

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 23.02.2015
Delivered on : 06.03.2015

CORAM

THE HONOURABLE MR. JUSTICE P.R.SHIVAKUMAR

S.A.No.441 of 2007
and
M.P.No.1 of 2007

Andrew Tennyson Abraham ... Appellant/Defendant

-Vs-

J.Daniel Sam ... Respondent/Plaintiff

Prayer:- Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree of the Principal District Judge, Chenalpattu dated 10.08.2006 made in A.S.No.93 of 2004 confirming the judgment and decree of the Subordinate Judge, Poonamallee dated 31.03.2004 made in O.S.No.393 of 1989.

For Appellant : Mr.D.Rajagopal

For Respondent : R.Ramanlaal

JUDGMENT

This second appeal has been preferred under Section 100 of the Code of Civil Procedure against the decree of the lower appellate court dated 10.08.2006 made in A.S.No.93 of 2004 on the file of the lower appellate court confirming the decree of the trial court dated 31.03.2004 made in O.S.No.393 of 1989 on the file of the trial court.

2. The defendant in the original suit, who suffered a decree for specific performance in the hands of the trial court and suffered a decree confirming the decree of the trial court in the hands of the lower appellate court, is the appellant in the present second appeal. The sole plaintiff, who emerged successful in both the courts below, is the respondent herein.

3. The respondent herein/plaintiff filed O.S.No.393/1989 on the file of Sub Court, Poonamallee (trial court) for the relief of specific performance directing the appellant herein/defendant to

execute a sale deed in respect of the suit house site after receiving the balance sale consideration of Rs.20,000/- from the respondent and for the relief of a declaration that the respondent herein is the owner of the building constructed in the suit site bearing plot No.1237 Arignar Anna Nagar Western Extension, Mogappair, Chennai. The said suit came to be filed for the above said reliefs based on the suit agreement for sale dated 09.05.1987.

4. The case of the respondent herein as revealed from the plaint averments can briefly be stated thus:-

The appellant herein, being the allottee of the suit house site bearing Plot No.1237 Arignar Anna Nagar Western Extension, Mogappair, Chennai, offered to sell the same and the respondent herein/plaintiff came forward to purchase the same. After negotiation, the sale price was fixed at Rs.2,23,000/- which amount was agreed to be paid in the following manner: (1) Rs.1,23,000/- as advance and part payment of consideration at the time of execution of the sale agreement; (2) Rs.80,000/- to be paid within a month from the date of agreement as further advance and (3) the balance amount of Rs.20,000/- to be paid at the time of execution and registration of the sale deed in favour of the respondent herein or his nominee. Accordingly, the suit sale agreement dated 09.05.1987 came to be executed between the appellant herein and the respondent herein and on the date of agreement itself, the appellant received a sum of Rs.1,23,000/-. The agreement also contemplated the execution of a Deed of irrevocable general Power of Attorney in favour of the respondent, so as to enable him to apply for planning permission and put up a construction as per the requirements of the Tamil Nadu Housing Board at the cost of the respondent, to get electricity, drainage and water supply service connections, to get the sale deed executed by the Tamil Nadu Housing Board in favour of the appellant herein, to receive the sale deed from the Registering Authority and to get a sale deed executed in his favour in accordance with the terms of the suit agreement for sale. Accordingly, an irrevocable deed of General Power of Attorney was executed and registered as document No.5617/1987 in the office of the Joint Sub Registrar, Anna Nagar on 11.05.1987. Though the respondent was ready with the money for the payment of further advance within a month from the date of execution of the agreement for sale, the appellant, who was on tour chose to send a letter dated 10.07.1987 as if the respondent committed default in payment of the further advance in accordance with the terms of the agreement. On receipt of the said letter, the respondent sent a telegram to the appellant informing him that the respondent was ready with the money from 06.06.1987 onwards and asking the appellant to come and take it. Despite the sending of the letter dated 10.07.1987, the appellant, who came back to Chennai, received the said amount of Rs.80,000/- on 28.07.1987 and issued a receipt acknowledging the receipt of the said amount. In pursuance of the agreement for sale and in part performance of the agreement, the

respondent was put in possession of the suit house site, with permission to put up a construction to satisfy the requirements of the Tamil Nadu Housing Board after obtaining necessary planning permission. The respondent put up construction at his own cost and got electricity, drainage and water service connections. Pursuant to the completion of the construction which satisfied the requirements of the Tamil Nadu Housing Board, it executed a sale deed on 16.08.1988 in favour of the appellant herein/defendant and the same was registered as Document No.5617/1988 in the office of the Sub Registrar, Ambattur. The appellant, who agreed to execute the sale deed in favour of the respondent herein or his nominees within a few days thereafter, started evading the execution of the sale deed under one pretext or other, even though the respondent was ready and willing to pay Rs.20,000/- being the balance amount of sale consideration and get the sale deed executed and registered in his favour. Instead of executing a sale deed in favour of the respondent in terms of the agreement for sale, the appellant tried to wriggle out of the commitment by issuing a notice dated 03.01.1989 through his advocate containing false and untenable allegations. The said notice was suitably replied by a reply notice dated 23.01.1989 and the appellant was called upon to come and execute the sale deed in accordance with the terms of the agreement for sale. The construction put up by the respondent gave a face lift to the property and the same made the appellant become avarice to make more money by selling the suit property for a higher price to third parties. Hence the respondent was constrained to approach the trial court with the suit for the above said reliefs of specific performance regarding the house site and declaration regarding the building.

5. The appellant herein who contested the suit, admitted the plaint averments regarding the execution of the suit sale agreement dated 09.05.1987, receipt of Rs.1,23,000/- as advance on the date of agreement and execution of a registered Deed of General Power of Attorney dated 11.05.1987 in favour of the respondent. The other terms and conditions regarding the payment of further advance of Rs.80,000/-, payment of the balance sale consideration of Rs.20,000/- respectively within one month from the date of sale agreement and at the time of execution and registration of sale deed in accordance with the agreement for sale, were also admitted by the appellant in his written statement. At the end of the period of one month from the date of the agreement for sale, the appellant chose to issue a notice as if the respondent was not ready to perform his obligations under the agreement. Pursuant to the reply sent by the respondent by telegram, the appellant received a sum of Rs.80,000/- as further advance contemplated under the agreement, leaving a balance of Rs.20,000/- alone to be paid by the respondent towards the sale consideration. The said fact was not denied by the appellant in his written statement and on the other hand he admitted the same by stating that a sum of Rs.20,000/-

alone was due to be paid by the respondent towards the balance sale consideration. However, the appellant resisted the prayers made in the suit, making further contentions, which are as follows:

At the time of execution of the suit agreement for sale, the appellant had not got the sale deed from the Tamil Nadu Housing Board and hence the agreement cannot be enforced. Apart from the suit sale agreement in writing, there was an understanding between the appellant and the respondent that the respondent should construct flats in the property and hand over 1000 sq.ft. of constructed area in the ground floor facing the Housing Board road to the appellant, but the respondent failed to do so. Having failed to honour the commitment made by him as per the supplemental oral agreement, the respondent shall not be entitled to seek specific performance. Pursuant to the misunderstanding that arose between the parties in the last week of June 1988, the respondent agreed to receive a sum of Rs.3,40,000/- for giving up his rights under the agreement and confirming the right and title of the appellant over the plot and superstructure along with the compound wall. Believing the said representation of the respondent, the appellant raised funds by pledging jewels and paid the amount due to the Housing Board. Only thereafter the Tamil Nadu Housing Board registered a sale deed in respect of the suit house site in favour of the appellant on 16.08.1988. As the respondent agreed to receive Rs.3,40,000/- in full quit of his claim, the appellant and respondent mutually agreed for an arrangement that the original document should be kept in a locker with a double lock system so that the appellant and respondent could operate it jointly. Since the respondent acted against the said commitment, notice, reply notice and rejoinder notice came to be exchanged. The respondent failed to honour the commitment to construct a flat measuring 1000 sq.ft. in the ground floor adjoining the Housing Board Road and hand it over to the appellant. Thereafter he agreed to get Rs.3,40,000/- in full quit of his claim. Going back from his commitment to receive Rs.3,40,000/- from the appellant in full quit of his claim, the respondent chose to file the suit for specific performance and declaration, with false and untenable allegations. The conduct of the respondent shows that he was never ready and willing to perform his part of the contract and hence the suit filed for specific performance regarding the house site and for declaration regarding the building should be dismissed with cost.

6. Based on the pleadings made by the parties, the trial court framed three issues which are as follows:

- "1. Whether the plaintiff was never ready and willing to perform his part of the agreement?
2. Whether the plaintiff is entitled for specific performance relief as prayed?
3. To what relief, plaintiff is entitled?"

7. The parties went for trial on the basis of the issues

framed by the trial court. Three witnesses were examined as PWs.1 to 3 and seven documents were marked as Exs.A1 to A7 on the side of the respondent herein (plaintiff), whereas one witness was examined as DW1 and four documents were marked as Exs.B1 to B4 on the side of the appellant herein/defendant.

8. The learned trial judge, on appreciation of evidence (both oral and documentary), held that the respondent/plaintiff was ready and willing to perform his part of the obligations under the suit agreement for sale and that the contention made otherwise by the appellant (defendant) could not be sustained. Based on the said findings, the learned trial judge held the respondent (plaintiff) to be entitled to the relief of specific performance in respect of the suit house site and declaration in respect of the building thereon. Accordingly, the trial court decreed the suit as prayed for with cost by judgment and decree dated 31.03.2004, directing the appellant herein (defendant) to execute and register a sale deed in favour of the respondent herein (plaintiff) in respect of the house site after receiving Rs.20,000/-, being the balance amount of sale consideration, within three months from the date of decree and also granting a declaration as prayed for by the respondent/plaintiff in respect of the building.

9. Aggrieved by and challenging the decree of the trial court dated 31.03.2004, the appellant herein/defendant filed an appeal before the lower appellate court (court of the Principal District Judge, Chengalpattu) in A.S.No.93 of 2004. The learned lower appellate judge concurred with the findings of the trial court in all respects and dismissed the appeal with cost by judgment and decree dated 10.08.2006 and thereby confirmed the decree of the trial court dated 31.03.2004. As against the said decree of the lower appellate court confirming the decree of the trial court, the present second appeal has been filed on various grounds set out in the memorandum of grounds of second appeal.

10. At the time of admission of the second appeal on 21.04.2007, this court formulated the following question as the substantial question of law involved in the second appeal:

"Whether the findings of the courts below that no reliance can be placed in Ex.B1-agreement is erroneous, in the light of material evidence available on record and liable to be set aside?

After preliminary hearing, the court altered the question with some refinement and numbered it as question No.1, besides formulating three more questions as substantial questions of law Nos.2 to 4. The substantial questions of law, thus reframed and recast are as follows:-

"1. Whether the findings of the courts below that no reliance can be placed on Ex.B1-Agreement is

liable to be set aside as being erroneous in the light of material evidence available on record?

2. Whether the plaintiff, after making an offer to get refund of the money accepting the breach allegedly committed by the defendant, is entitled to seek specific performance?

3. Whether the courts below have erred in holding that the agreement for sale relating to the property to be acquired in future can be specifically enforced?

4. Whether the courts below erroneously granted the relief of specific performance without properly considering the question as to the readiness and willingness on the part of the plaintiff in compliance with the requirements of Section 16(c) of the Specific Relief Act?"

11. Pending disposal of the appeal, the appellant and the respondent filed M.P.No.2/2012 and M.P.No.1/2014 respectively, both under Order XLI Rule 27 of CPC, seeking permission to adduce additional documentary evidence. The arguments advanced by Mr.D.Rajagopal, learned counsel for the appellant and by Mr.R.Ramanlal, learned counsel for the respondent on the merits of the second appeal and also regarding their respective prayers made in miscellaneous petitions filed by them under Order XLI Rule 27 CPC, were heard. During the course of the arguments, the learned counsel for the appellant submitted that his party had no objection for allowing M.P.No.1/2014 filed by the respondent. Similarly, the learned counsel for the respondent submitted that his party did not have any objection for allowing M.P.No.2/2012 filed by the appellant. In the light of the said representations and on the basis of the consideration of the materials available on record in the light of the arguments advanced by the counsel for both parties regarding the merits of the case, this court, by order dated 02.04.2014, allowed both the miscellaneous petitions. Since it was agreed on behalf of both parties that no further oral evidence need be adduced and the documents produced along with the above said miscellaneous petitions could be marked by consent, Exs.B5 to B8 were marked by consent on the side of the appellant herein/defendant. Similarly, the additional documents produced by the respondent/plaintiff were marked by consent as Exs.A8, A9 (series) and A10 to A19.

12. In view of the recording of the additional evidence under Order XLI Rule 28 CPC, further arguments advanced on behalf of both parties were heard and this court paid its anxious consideration to such arguments advanced. The additional evidence produced as Exs.A8 to A19 and B5 to B8 were also taken into consideration.

13. The House site bearing Plot No.1237, Arignar Anna Nagar Western Extension, Mogappair, Chennai 600 101 was allotted by the Tamil Nadu Housing Board to the appellant herein/defendant. The appellant/defendant who got the allotment wanted to sell the property and the respondent/plaintiff came forward to purchase the same. The negotiation resulted in an agreement between the parties for the sale of the said house site to the respondent/plaintiff for a sum of Rs.2,23,000/-. The agreement was reduced to writing and signed by the parties on 09.05.1987. A sum of Rs.1,23,000/- was paid by the respondent/plaintiff as advance on the date of agreement itself and the receipt of the said advance was acknowledged by the appellant/defendant in the agreement itself. The said agreement contains a stipulation that a second advance of Rs.80,000/- would be paid within one month from the date of agreement and the balance amount of Rs.20,000/- was payable on registration of the sale deed in favour of the respondent or his assignee, nominee or representative. The original agreement for sale has been produced and marked as Ex.A1. So far as the execution of the Ex.A1-Agreement and its contents are concerned, there is no controversy.

14. It is the clear averment made by the respondent/plaintiff in the plaint that the second advance of Rs.80,000/- was paid on 28.07.1987 and the same was acknowledged by the appellant/defendant by issuing a receipt. The said receipt issued by the appellant/defendant on 28.07.1987 has been produced and marked as Ex.A3. In Ex.A3 itself, the total sale consideration as per the sale agreement, the first advance, the second advance and the total advance paid as on 28.07.1987 have been noted. The balance amount payable on registration of the sale deed has been noted as Rs.20,000/- only. The receipt of Rs.80,000/- as second advance and execution of Ex.A3-receipt are not disputed and on the other hand, admitted by the appellant/defendant. However, the appellant/defendant in the written statement, without either admitting or specifically denying the payment of Rs.80,000/- as second advance on 28.07.1987, had taken a nebulous plea that he had raised funds to the tune of Rs.75,000/- by pledging his jewels and paid the amount due to the Tamil Nadu Housing Board.

15. It is the case of neither party that the respondent/plaintiff undertook to pay any part of the amount due to the Tamil Nadu Housing Board. On the other hand, it is an admitted fact that the obligation cast on the respondent/plaintiff was to put up a construction with his own funds, so as to satisfy the requirements of the Tamil Nadu Housing Board which would lead to the execution of the sale deed in favour of the allottee, namely the appellant/defendant. As per the allotment order produced by the respondent/plaintiff and marked as Ex.A8, a sum of Rs.500/- had been paid towards EMD, a sum of Rs.6,075/- had been paid towards

1/4th cost of the plot and a sum of Rs.18,225/- was noted as the balance cost of the plot, which was permitted to be paid in monthly installments of Rs.632/- with an interest at the rate of 12% per annum within a period of three years. Such allotment came to be made as per Ex.A8-allotment order dated 11.10.1983. Ex.A9 (series) are the receipts evidencing payment of installments. Up to 15.03.1986, a total sum of Rs.19,048/- came to be paid which shall be more or less equal to 30 installments. The balance installments and the interest due was intimated under Ex.A11 dated 10.02.1986. The amount shown to be due up to February 1986 was Rs.7,580/-. Only after the issuance of Ex.A11-notice, a sum of Rs.8,300/- came to be paid on 15.03.1986 as evidenced by the last of the receipts found in Ex.A9 (series). The difference between the amounts mentioned in Ex.A11 and the above said receipt dated 15.03.1986 shall be the interest for the belated payment. There is no document to show that any other payment was made by the appellant/defendant after the payment of Rs.8,300/- was made on 15.03.1986. It is the contention of the appellant/defendant that subsequent to the date of agreement and on the assurance of the respondent/plaintiff to put up a multi-storied building and hand over a portion in the ground floor with the plinth area of 1000 sq.ft. abutting the road to the appellant/defendant, he pledged jewels, raised funds and paid further sum of Rs.75,000/- to the Tamil Nadu Housing Board. Receipt for payment of the said amount has not been produced. However, Ex.A4-sale deed recites a sum of Rs.64,800/- towards the total amount of cost of the plot and development charges paid by the appellant/defendant as consideration for the same. As pointed out supra, the amounts covered by Ex.A8 and A9 would show that the cost of the plot was Rs.24,300/-. Even that amount is deducted from Rs.64,800/- the balance amount that could have been paid subsequent to the period covered by Ex.A9 series would be only Rs.40,500/-. When the sale consideration was revised has not been spelt out in the pleadings of the appellant/defendant. If at all any interest was paid towards belated payment it would be due to the delay caused by the appellant/defendant. The contention of the appellant/defendant that he paid a sum of Rs.75,000/- to the Tamil Nadu Housing Board after the execution of Ex.A1-Sale agreement and A3-Receipt is not supported by any evidence except Ex.A4-Sale deed which accounts for a sum of Rs.64,800/- alone. The same will show that the appellant/defendant has not come out with full truth.

16. On the other hand, under Ex.A12 dated 19.11.1986, the Tamil Nadu Housing Board issued a "No Objection Certificate" to the allottee (appellant/defendant) to put up a residential building with a minimum plinth area of 350 sq.ft. or 25% of the plot area whichever shall be less. The No Objection Certificate also contains a stipulation that the building regulations of the local body and development control rules of Madras Metropolitan Development Authority should be complied with. The suit sale agreement, namely Ex.A1 came to be executed on 09.05.1987. The respondent/plaintiff

would have chosen to produce a certificate of balance issued by his banker to the effect that on 30.05.1987 itself, he was having a credit balance of Rs.64,001/- in his Savings Bank account, in order to show that he had the wherewithals to arrange the fund for the payment of the second advance contemplated in the agreement for sale. His capacity to pay the second advance of Rs.80,000/- could not have been challenged and it could not be set up as a plea of defence in the light of the specific admission made under Ex.A3-receipt and also in the written statement to the effect that a sum of Rs.20,000/- alone remained payable and that the same was agreed to be paid on registration of the sale deed in favour of the respondent/plaintiff. The same is the reason why the appellant/defendant took a plea of supplemental oral agreement, novation by a subsequent mutual agreement in writing and want of readiness and willingness on the part of the respondent/plaintiff to resist the prayers made in the plaint.

17. The plea of defence made by the appellant/defendant proceeds on the following grounds:

1) Though by Ex.A1-Agreement the appellant/defendant agreed to sell the suit house site to the respondent/plaintiff for a sum of Rs.2,23,000/-, handed over possession of the house site to the respondent/plaintiff and executed a registered Deed of General Power of Attorney dated 11.05.1987 marked as Ex.A2, there was an oral understanding between the appellant/defendant and the respondent/plaintiff that the respondent/plaintiff should put up an apartment consisting of a number of flats at his own cost and hand over a flat in the ground floor with a plinth area of 1000 sq.ft. abutting the Housing Board Road. The respondent/plaintiff failed to honour the said commitment.

(2) The suit sale agreement (Ex.A1) was superseded and novated by a subsequent agreement dated 04.10.1988 whereby the respondent/plaintiff agreed to receive a sum of Rs.3,40,000/- in full quit of his claim, for giving up his right under the agreement and for handing over the suit house site with the construction put up thereon;

(3) The respondent/plaintiff was not ready and willing to perform his part of the contract under the suit agreement for sale.

18. So far as the question of readiness and willingness on the part of the respondent/plaintiff is concerned, there could be no controversy over the proposition that the same should be specifically pleaded and proved by the respondent/plaintiff in accordance with Section 16(c) of the Specific Relief Act, 1963. In

this regard, three witnesses were examined on the side of the respondent/plaintiff. PW1 is none other than the plaintiff's sister's husband. PW2 is the father of the plaintiff and PW3 is the brother of the plaintiff. All of them, without giving any room for questioning their veracity, have stated in clear terms that they were personally aware of the transaction between the appellant and the respondent; that the respondent/plaintiff was ever ready and willing to perform his part of the contract under the suit agreement for sale and that on the other hand, it was the appellant/defendant, who evaded performance of his part of the obligations under the agreement for sale. In fact PW3 has stated in categorical terms that the appellant/defendant had given an advertisement in Dina Thanthi to the effect that the suit property was available for sale; that at that point of time, the appellant/defendant was working as a Divisional Engineer in Tamil Nadu Electricity Board at Nagercoil; that the respondent/plaintiff, who came across the advertisement, asked PW3 to meet the appellant/defendant and find out his address, pursuant to which he went to the office of the Tamil Nadu Electricity Board at Nagercoil, met the appellant/defendant and ascertained his preparedness to sell the suit house site, provided he would get a reasonable price and informed the same to the respondent/plaintiff and that it was he who arranged for the meeting of the appellant and respondent which resulted in the execution of the suit sale agreement in the office of the respondent/plaintiff in Anna Nagar, Chennai. He also made a clear assertion that there was no oral agreement or understanding to the effect that the respondent/plaintiff should put up a multi-storeyed building in the suit site and hand over a portion measuring 1000 sq.ft. in the ground floor abutting the road to the appellant/defendant.

19. Similar is the evidence of the other two witnesses, namely PWs1 and 2. The testimony of PW2 is to the effect that during the period when the suit sale agreement was entered into, he was residing with his son, namely the respondent/plaintiff at 12th Main Road, Anna Nagar. The said aspect of his evidence remains unchallenged and uncontradicted either by cross-examination or by adducing contrary evidence on the side of the appellant/defendant. He also asserted in clear terms that, apart from the terms and conditions incorporated in Ex.A1-Agreement, there was no oral agreement or understanding as sought to be projected by the appellant/defendant. PW1, who is also a resident of Chennai, has stated in categorical terms that he was present along with the plaintiff at the time of execution of Ex.A1-Agreement for sale and the subsequent events and that hence he personally knew what transpired. Though he was cross-examined by the counsel for the appellant/defendant with a suggestion that the respondent/plaintiff agreed to construct a building with a plinth area of 1000 sq.ft. for the appellant/defendant, the said suggestion was stoutly denied by PW1. It was also his assertion that there was no such oral

agreement apart from Ex.A1-agreement. In the light of the said oral evidence, coupled with the fact that nothing has been stated in Ex.A1-Agreement or Ex.A3-receipt regarding the alleged oral agreement/understanding as projected by the appellant/defendant, the burden of proving such an agreement shall be heavily cast upon the appellant/defendant.

20. In this regard, excepting the interested testimony of the appellant/defendant as DW1, no other independent witness was examined on his side to prove the alleged oral agreement/understanding. The appellant/defendant also failed to examine any one of the witnesses, who attested Ex.A1-Agreement, to show that there was a parallel oral agreement/understanding. It is pertinent to note that the appellant/defendant had not taken such a plea in any of the notices or reply notices or rejoinder notice sent by him through his lawyer to the respondent/plaintiff or his lawyer. No notice containing an averment that there was an oral agreement as projected by the appellant/defendant for the construction of a flat of 1000 sq.ft. in the ground floor by the respondent/plaintiff for the use of the appellant/defendant has been produced by the appellant/defendant as an exhibit. In none of the notices, reply notices and rejoinder notice sent on behalf of the appellant/defendant by his lawyer, such oral agreement has been referred to. There is also absence of clear plea or evidence as to the date on which such oral agreement came to be made and the persons in whose presence such oral agreement came to be made. In addition, it is an admitted fact that the suit house site was handed over to the respondent/plaintiff on the date of agreement itself as part performance of the agreement for sale and by virtue of the authorisation given to him under Ex.A2, the respondent/plaintiff applied for and got planning permission from Ambattur Municipality. There is also absence of plea and evidence to the effect that the building was not constructed in accordance with the planning permission. It is not the case of the appellant/defendant that the construction put up in the suit house site is a multi-storeyed building consisting of a number of flats. All these aspects would go to show that the plea of the appellant/defendant that there was an oral agreement by which the respondent/plaintiff undertook to construct a multi-storeyed building at his cost and hand over a flat measuring 1000 sq.ft. in the ground floor facing the Housing Board road to the appellant/defendant is only the result of an afterthought. Both the courts below, on proper appreciation of evidence, came to a correct conclusion and rendered a finding of fact, which finding cannot be termed perverse. Even in the light of the additional documentary evidence produced in the second appeal, the above said plea of the appellant/defendant as if there was an oral agreement as indicated supra does not stand substantiated. Therefore, the first ground on which the appellant/defendant resisted the prayer of the respondent/plaintiff seeking the relief of specific performance

deserves rejection as not substantiated.

21. The second contention, namely Ex.-A1-Agreement was superseded by a subsequent agreement and the third contention that the respondent/plaintiff had not complied with the requirements of Section 16(c) of the Specific Relief Act, 1963 have to be taken up together for discussion. It is obvious from the records that Tamil Nadu Housing Board came forward to execute the sale deed in favour of the allottee (appellant/defendant) on satisfying that the cost of the plot had been paid and a building had been constructed to the satisfaction of the Housing Board as per the lease-cum-sale agreement. At that point of time the appellant/defendant chose to publish a notice addressed to the respondent/plaintiff in the Tamil daily "Malai Murasu" on 06.01.1988, to the effect that the power granted to him under 11.05.1987 document (Ex.A2) was revoked by the appellant/defendant on 23.12.1987. The notice published in the newspaper was produced as Ex.B5 and its contents are reproduced hereunder:

"To
Mr.J.Daniel Sam,
Plot No.1652-H
2nd Avenue, Anna Nagar,
Madras-40

Sir,

Ref: Plot No.1237, Anna Nagar Western Extension,
Madras

On instructions from my client Mr.A.T.Abraham, I state that any act of yours regarding the property cited above will not bind my client, since the power granted to you on 11-5-1987 by my client was revoked by him from 23-12-1987. On violation if any necessary action will be taken against you.

(P.Kothandaraman)

Advocate.

182, Linghi Chetty Street
Madras- 600 001."

It transpires, the sale deed executed by the Executive Engineer and Administrative Officer of Tamil Nadu Housing Board, Sub Division - I, Anna Nagar Western Extension, Madras 600 101 on behalf of the Tamil Nadu Housing Board, in favour of the appellant/defendant came to be executed on 16.08.1988 and registered as Document No.5617/1988 in the office of the Sub Registrar, Ambattur. The said sale deed was also signed by the purchaser, namely the appellant/defendant and the execution of the document was admitted by him before the registering authority. The registering authority also made an endorsement that the executant of the document

(Executive Engineer, Tamil Nadu Housing Board) was exempted from personal appearance under Section 88(1) of the Registration Act. It is also pertinent to note that the identifying witnesses before the Registering Authority were one Thomas Fernando and J.Daniel Sam, the respondent herein/plaintiff. By virtue of the authorisation given to him, the respondent/plaintiff got the registered document (sale deed dated 16.08.1988) from the office of the Sub Registrar and that is how he was able to produce the same as Ex.A4 on his side.

22. The case of the appellant/defendant is that though Ex.A1-Agreement was executed, subsequently due to the inability of the respondent/plaintiff to fulfill his obligations under the Agreement for sale, he came forward to give up his right under the agreement for sale for a sum of Rs.3,40,000/- to be paid by the appellant/defendant. In support of the said contention, the appellant/defendant relied on Ex.B3-copy of notice dated 26.11.1997 issued by Mr.Calvin Jacob, Advocate on behalf of the respondent/plaintiff to the appellant/defendant and Ex.B1-xerox copy of an agreement dated 04.10.1988. Relying on those two documents, the appellant/defendant contended that the original agreement was given a go by and the respondent/plaintiff agreed to receive a sum of Rs.3,40,000/- in full quit of his claim under Ex.A1-Agreement for sale. In this regard, it is the case of the respondent/plaintiff that the appellant/defendant, using his influence with the police, lodged a complaint and made the police officials take the respondent/plaintiff into custody; that the police officer, using threat and coercion, got an agreement for letting him out and that thereafter, based on the complaint given by the plaintiff to the Superintendent of Police, further action in the complaint of the appellant/defendant came to be dropped. It is the further contention of the respondent/plaintiff that the same was the reason why the said agreement in original was not available with the defendant and he chose to produce only a xerox copy of the same as Ex.B1. As rightly contended by the learned counsel for the plaintiff, Ex.B1 has not been proved to be true copy of the alleged mutual agreement dated 04.10.1988. In addition, the defendant has not let in evidence in compliance with Section 66 of the Indian Evidence Act, 1872 for adducing secondary evidence in proof of the said agreement. It is quite obvious from Ex.A7, copy of the closure report and the order of the Judicial Magistrate accepting the same in Crime No.15/1988 registered on the file of District Crime Branch, St. Thomas Mount, Chennai that further proceedings in the said case was dropped holding that the dispute was civil in nature.

23. The report of the Deputy Superintendent of Police, District Crime Branch is to the effect that the plaintiff was not willing to return either the sale deed or to enter into an agreement and that the agreement dated 04.10.1988 was not voluntarily given. The report and its annexures show the following

sequence of events:

After respondent/plaintiff got the sale deed executed by the Tamil Nadu Housing Board in favour of the defendant from the office of the Sub Registrar, Ambattur on the basis of the authorisation given by the appellant/defendant, the appellant/defendant gave a complaint on 03.10.1988 as if the sale deed had been taken away by the respondent/plaintiff from the office of the Sub Registrar, Ambattur with the connivance of the staff working there. Based on the said complaint, a case came to be registered in Crime No.15/1988 on the file of the District Crime Branch. The respondent/plaintiff was taken by the police to the District Crime Branch, St. Thomas Mount and one Mr.Michael, Inspector of Police took up the investigation. On the information received from the wife of the plaintiff over phone, Mr.Calvin Jacob, advocate of the plaintiff, went to the District Crime Branch police station, St. Thomas Mount, where he saw the Inspector Michael enquiring the plaintiff. His efforts to get him released on bail from the police station proved futile. The said Advocate, who earlier held the office of the City Public Prosecutor, was also sought to be humiliated by Mr.Michael, Inspector of Police. When Mr.Michael, Inspector of Police had to go out with the instruction that he would come back at about 9.00 p.m, the request made by Mr.Calvin Jacob to allow him to take the respondent/plaintiff with him and bring him back to the police station at 9.00 p.m was stoutly rejected by the Inspector stating that the respondent/plaintiff was an accused and he would not be allowed to go out. Thereafter, Mr.Calvin Jacob came out and he requested one Mr.Rajakumar Robert, Advocate to go to the police station and see whether the respondent/plaintiff could be taken on bail. By the time Mr.Michael, Inspector of police, returned to the police station, Justin Selvamumar, PW1-Duraiaraj, who is none other than the brother-in-law of the plaintiff and Edison had gone there. Shortly after the arrival of Mr.Michael, Inspector of Police, Mr.Rajakumar Robert, Advocate also arrived. In the presence of all of them, Mr.Michael, Inspector of Police, was acting on the instructions of the appellant herein/defendant and Mr.Thomas Fernando, Advocate who was helping him. After ascertaining the fact that the sale deed had been handed over to Mr.Calvin Jacob by the respondent/plaintiff for proceeding against the appellant/defendant, the Inspector of Police was holding out that the respondent/plaintiff would not be released unless he would agree for signing an agreement for the return of the title deed. Mr.Rajakumar Robert, Advocate, who was given to understand that in the event of the respondent's/plaintiff's refusal to sign the agreement, he would be implicated in a criminal case of serious nature, advised the plaintiff to sign the agreement with the sole aim of getting him out of the police station. The Inspector of police caused a draft agreement to be prepared to the dictation of Mr.Thomas Fernando and the appellant/defendant and made Mr.Rajakumar Robert, Advocate to write the agreement. The respondent/plaintiff showed reluctance and unwillingness to sign

the agreement even at the time of writing the agreement. However, on the advice of Mr.Rajakumar Robert, Advocate, he signed the agreement and only thereafter he was let out by the Inspector of Police. On the very next day itself, the respondent herein/plaintiff gave a complaint to the Superintendent of Police and then preferred a private complaint before the Sub Divisional Juudicial Magistrate, Poonamallee. The same was forwarded to the Superintendent of Police, District Crime Branch, St. Thomas Mount under Section 156(3) of Cr.P.C. to cause an enquiry to be conducted and submit a report. As per the direction of the Superintendent of Police, the Deputy Superintendent of Police, District Crime Branch, St. Thomas Mount conducted an enquiry and submitted a report to the effect that the agreement dated 04.10.1988 was not executed voluntarily by the respondent herein/plaintiff and it was obtained by duress and coercion exercised by Mr.Michael, Inspector of Police at the instigation of the appellant/defendant and his advocate Mr.Thomas Fernando. The said facts can be ascertained from Ex.A6-copy of the report and Ex.A7-copy of the order of the Magistrate.

24. In the light of the said facts, the further evidence adduced through PW1 would show that the complaint was made against the Inspector of Police by the respondent/plaintiff the very next day after his release. During the course of enquiry by the Deputy Superintendent of Police, the agreement dated 04.10.1988 was torn and destroyed in the presence of and with the consent of both parties. If we correlate the same with the fact that the defendant has produced only a xerox copy, the same will probablise the case of the respondent/plaintiff regarding the execution of the agreement dated 04.10.1988. When such is the tenor of evidence adduced on the side of the respondent/plaintiff, there are a lot of contradictions and improbabilities in the pleadings and evidence of the appellant/defendant.

25. Though the appellant/defendant might have stated in his written statement that the plaintiff, in the last week of June 1988, agreed to receive Rs.3,40,000/- for the cancellation of the suit sale agreement, he has not stated whether such an agreement was oral or was reduced to writing. It was also stated in the written statement that there was a further arrangement that the original sale deed should be kept in a locker with double lock system and the appellant herein/defendant was asking the respondent herein/plaintiff to perform his part of the said agreement. But, he has not stated what was the date of agreement and whether it was a written agreement or only an oral agreement. The written statement was filed in the month of December 2001 and he has not stated anything about the original of Ex.B1-Agreement dated 04.10.1988. However, during the course of his evidence as DW1, the appellant/defendant produced Ex.B1 as the xerox copy of the agreement dated 04.10.1988. In his proof affidavit, DW1 referred to the circumstances leading to the execution of the said agreement.

The English translation of relevant portion in vernacular is as follows:

"Plaintiff had given a complaint on the file of the Judicial Magistrate, Ambattur. While proceedings in the complaint was pending, one Selvin negotiated for a settlement, as a result of which, it was decided that the plaintiff should get a sum of Rs.3,25,000/- from the defendant and should not claim any right in respect of the suit property. The plaintiff also agreed for the same. However during the proceedings before the Judicial Magistrate, Ambattur a negotiation was held in the court itself and an oral agreement was entered into for payment of Rs.3,40,000/- to the plaintiff in full quit of his claim in respect of the suit property. Again the plaintiff showed reluctance. In the meanwhile, with ulterior motive, the plaintiff had taken the sale deed from the office of the Sub Registrar, Ambattur without the authority of the defendant. Hence the defendant gave a complaint to the police. After such complaint was given, the plaintiff and the defendant negotiated and executed a written agreement to the effect indicated above. In the said agreement the parties and their advocates did sign."

26. It is pertinent to note that the dates on which the oral agreement for payment of Rs.3,25,000/- was entered into and the further agreement, as a result of negotiation made in the court of Judicial Magistrate, Ambattur for payment of Rs.3,40,000/- was entered into have not been furnished by the appellant/defendant. During cross examination, DW1 stated that the original of Ex.B1-Agreement was not executed in the police station and that on the other hand, it was written at the residence of Mr.Thomas Fernando, Advocate. However, he would admit that he did not state in his written statement that the agreement was written at the residence of his advocate Mr.Thomas Fernando. It is also his further evidence in cross examination that he gave a notice on 24.11.1988 to the respondent/plaintiff asking him to return the sale deed and the compromise deed (rkur xg;ge;jk;) referring to the agreement dated 04.10.1988. It is pertinent to note that no notice dated 24.11.1988 has been produced. On the other hand, the first lawyer's notice issued by the appellant/defendant was one sent on 24.12.1988 and the same is Ex.A17. A copy of the same has also been produced as Ex.B6. In Ex.A17, it has not been averred that the agreement dated 04.10.1988 was available with the respondent/plaintiff and that he was called upon to produce the sale deed and the said agreement dated 04.10.1988. The alleged initial oral agreement for payment of Rs.3,25,000/- in full quit was not at all referred to in the said notice. On the other hand, it was stated in Ex.A17-notice that an oral agreement for the first time was entered into in the last week of June 1988 in the presence of common persons including one

Mr.K.C.Ramakrishnan, an advocate practising in the Poonamallee Court, by which the parties agreed that on receipt of a sum of Rs.3,40,000/- the respondent/plaintiff should give up all his rights in respect of the suit property. In the second paragraph of the notice, without referring to the place wherein the agreement was entered into and in whose presence the agreement was entered into, a bald averment was made to the effect that in order to give effect to the above said oral agreement, a mutual agreement in writing was entered into on 04.10.1988, whereby the respondent/plaintiff agreed to keep the original sale deed in the safety locker with a double lock system in a nationalised bank on or before 07.10.1988. Nowhere in the said notice, the appellant/defendant stated that the agreement dated 04.10.1988 was with the plaintiff and he was called upon to produce the said agreement. Besides furnishing a wrong date of notice, the evidence of DW1 is obviously quite contrary to what is found in Ex.A17. Copy of the reply sent to the said notice has been marked as Ex.A19. In the said reply notice, it was clearly averred that the mutual agreement referred to in the notice under reply was one extorted from the plaintiff by the Inspector of Police and the appellant/defendant in the District Crime Branch police station. Relevant portion in the reply notice is extracted.

"Your client exerted pressure on police and gave a police complaint before the District Crime Branch, Chengalpattu and succeeded in wrongfully confining my client at Dist. Crime Branch, Chengalpattu and obtained an agreement signed by my client at about 12 midnight on 4/5-10-1988. My client was constrained to give a petition to the Supdt. of Police, Chengalpattu stating the circumstances under which the agreement was extorted from my client by the Inspector of Police and your client at the District Police office. On my client's complaint, the documents obtained by extortion were seized by the police. The agreement was one obtained by extortion and it is illegal and invalid. It was obtained on threat of arrest. My client was confined wrongfully from the afternoon of 4-10-1988 till midnight of 4/5-10-1988. My client thereafter filed complaint before the Sub divisional Judicial Magistrate in C C No 2895/1988 and the matter has been forwarded under Section 156(3) Cr.P.C. for investigation and the matter is still pending."

27. For the said reply notice, a rejoinder came to be issued by the appellant/defendant through his counsel on 28.01.1989. A copy of the same is marked as Ex.B7. A bald denial of the said averment found in the reply notice was made in Ex.B7. Even in Ex.B7, the appellant/defendant had not stated that the original agreement was taken by the police and it was then handed over to

the respondent/plaintiff and the respondent/plaintiff was being called upon to produce the same. The place of execution of the agreement dated 04.10.1988 was also not mentioned in Ex.B7. A copy of the reply to the rejoinder sent by the respondent/plaintiff on 07.02.1989 has been produced and marked as Ex.A18. In the same, referring to the notice dated 26.11.1987 (Ex.B3 has been produced as a copy of the same), it was stated that the offer made therein was that the respondent/plaintiff was willing to give up his right provided the appellant/defendant would pay a sum of Rs.2,83,000/- which would take care of the amount paid by him and also damages excluding the cost of the building (but inclusive of the well and compound wall) and that since the offer was not accepted within the time stipulated therein, the respondent/plaintiff proceeded with the construction and completed the construction. There is also clear evidence adduced on the side of the respondent/plaintiff to the effect that after completing the construction, the respondent/plaintiff moved to the suit property and he was residing there. It was also reiterated that the agreement dated 04.10.1988 was one extorted by the appellant/defendant; that the District Crime Branch, St. Thomas Mount and the plaintiff was pursuing further action against such extortion and that no right would flow from the said document.

28. It is the contention of the appellant/defendant that the respondent/plaintiff had agreed for receiving a sum of Rs.3,25,000/- for giving up his rights under the agreement for sale. Such an agreement was projected by the appellant/defendant to be oral. It is his further assertion that despite having agreed for the same, the respondent/plaintiff took Ex.A4-sale deed from the office of the Sub Registrar, Ambattur without the consent and knowledge of the appellant/defendant. The said contention is ex-facie untenable. If at all stained relationship led to such an oral agreement, the appellant/defendant would not have taken the respondent/plaintiff as one of the attestors of the sale deed executed by the Tamil Nadu Housing Board in his favour. The offer contained in Ex.B3 was conditional and it did not result in a concluded agreement, as the offer was not accepted by the appellant/defendant within the time stipulated therein. The subsequent developments will show that both the parties proceeded on the understanding that despite the insuance of such a notice, the suit sale agreement was very much in force and the transaction would be concluded in accordance with the suit sale agreement. The same was the reason why the appellant/defendant did make the respondent/plaintiff to be an attestor of Ex.A4-sale deed executed by the Tamil Nadu Housing Board in favour of the appellant/defendant. It has also been proved that by virtue of the authorisation given by the appellant/defendant to the respondent/plaintiff for receiving the registered sale deed from the office of the Sub Registrar, Ambattur, the respondent/plaintiff got it from the said office. Only thereafter the

appellant/defendant made attempts by lodging a complaint on the file of the DCB as if the respondent/plaintiff had stealthily removed the original sale deed from the office of the Sub Registrar, Ambattur and committed theft.

29. It shall be obvious from evidence that the appellant/defendant exerted pressure on the respondent/plaintiff through Mr. Michael, Inspector of Police, DCB, St. Thomas Mount, to hand over the sale deed to the appellant/defendant and that when he was informed that the sale deed had already been handed over to the advocate for institution of proceedings in a court of Law, using threat and coercion, he obtained an agreement as if the respondent/plaintiff consented for giving up his rights under Ex.A1- agreement for sale for a sum of Rs.3,40,000/- to be paid by the appellant/defendant. There is no evidence to show that the said amount was paid by the appellant/defendant to the respondent/plaintiff. It is not the case of the appellant/defendant that he did not have the intention to sell the land. On the other hand, it is his contention that he would find out a prospective purchaser or a joint developer, from whom he would get the said amount and settle the same to the respondent/plaintiff. All the above aspects and the fact that immediately after his release from the clutches of the police, the respondent/plaintiff lodged a complaint with the Superintendent of Police leading to further probe made by the Deputy Superintendent of Police, DCB, St. Thomas Mount on the directions of the Superintendent of Police and filing of a report in the court to the effect that the agreement dated 04.10.1988 was not voluntary and that it was obtained by using intimidation and coercion, will make it quite obvious that all along the respondent/plaintiff was ready and willing to perform his part of the obligations under the Agreement for Sale, whereas the appellant/defendant, after sale deed came to be executed by the Tamil Nadu Housing Board in his favour, changed his mind and wanted to wriggle out of the commitment and that the same resulted in the extraction of an agreement by exercising threat and coercion. It should also be noticed that only after the construction was put up by the respondent/plaintiff at his own cost to satisfy the requirements of the Housing Board, the Tamil Nadu Housing Board executed the sale deed in favour of the appellant/defendant. The first Substantial Questions of Law is answered accordingly against the appellant/defendant.

30. The next contention raised on behalf of the appellant/defendant is that since sale deed had not been obtained from the Housing Board, agreement for sale regarding a property over which the appellant/defendant did not have alienable title as on the date of agreement cannot be specifically enforced. Admittedly, the house site was allotted to the appellant/defendant by the Tamil Nadu Housing Board and possession was handed over under a lease-cum-sale agreement. The arrangement was that the sale

consideration should be paid in installments and the allottee should also put up a construction which would answer the minimum requirements of the Housing Board. In case of the allottee making payment as per the lease-cum-agreement for sale and putting up a construction to the minimum extent, the allottee was cocksure of getting the property conveyed to him. Section 6 of the Transfer of Property Act, 1882 states that property of any kind may be transferred, except otherwise provided by the Transfer of Property Act or any other law for the time being in force. Clauses (a) to (i) in the said section enumerates what are the rights that cannot be transferred. The case of the appellant/defendant does not come under any one of those sub-clauses. The allottee did have a vested right to get the property conveyed to him by the Tamil Nadu Housing Board on his fulfillment of all the conditions, namely conditions regarding payment of the sale consideration and the condition regarding putting up of a construction to the minimum specifications. Nothing has been produced on the side of the appellant/defendant to show that there was any condition in the allotment order or in the lease-cum-sale agreement between the allottee and the Tamil Nadu Housing Board restraining or prohibiting transfer. The right of the allottee cannot be said to be a mere chance of acquiring title to the property. Hence the contention of the appellant/defendant that Ex.A1-suit sale agreement, being one for the sale of the property regarding which the appellant/defendant himself had to get sale deed from the Tamil Nadu Housing Board, cannot be specifically enforced is quite untenable and liable to be rejected. Substantial Question of Law No.3 is answered accordingly against the appellant/defendant.

31. If the question whether Ex.A1-suit agreement for sale was superseded and novated by an agreement dated 04.10.1988 is considered in the light of the above said aspects, the conclusion that can be arrived at shall be that the appellant/defendant miserably failed to prove the supersession/novation of Ex.A1-Agreement by an agreement dated 04.10.1988 even on preponderance of probabilities. Hence the findings of the courts below that no reliance can be made on Ex.B1 cannot be said to be either defective or erroneous, much less perverse, warranting any interference by this court. However, the learned counsel for the appellant/defendant was vehement in putting forward an argument that even assuming that Ex.A1-Agreement was not superseded by an agreement dated 04.10.1988 as claimed by the appellant/defendant, unless the respondent/plaintiff would be found to have complied with the requirements of Section 16(c) of the Specific Relief Act, 1963, he could not have been granted relief of specific performance as prayed for.

32. In this regard, it is the contention of the learned counsel for the appellant/defendant that the question of readiness and willingness on the part of the respondent/plaintiff shall be uniquely within the knowledge of the respondent/plaintiff and that

the non-examination of the respondent/plaintiff on his side was fatal to the case of the respondent/plaintiff. It was also contended by the learned counsel for the appellant/defendant that at one point of time the respondent/plaintiff expressed his readiness to give up his right on payment of a particular amount and that the same would show absence of readiness and willingness at least at that point of time on the part of the respondent/plaintiff to perform his part of the contract under the suit agreement for sale. In support of this contention that the authority given under the General Power of Attorney was only to conduct the case on behalf of the party and not for giving evidence on behalf his principal, the learned counsel for the appellant/defendant has relied on the judgment of the Hon'ble Supreme Court in Janki Vashdeo Bhojwani and another vs. Indusind Bank Ltd. and others reported in 2005(3) CTC 128 . The said judgment shall not be of much help to the appellant/defendant. The view expressed therein was that the Power of Attorney holder could appear, plead and act on behalf of the party, but the said power would not extend to deposing for the principal in respect of acts not done by the Power of Attorney holder in exercise of such power or regarding the facts which were within the personal knowledge of the principal alone. In short, the view expressed therein is that there cannot be a proxy witness to speak about what is not known to him personally.

33. The scope of the Power of Attorney holder to lead evidence has been summarised by the Supreme Court in Man Kaur (dead) by LRs. vs. Hartar Singh Sangha reported in (2010) 10 SCC 512. For better appreciation, the relevant part is extracted here under:

"(a) An attorney holder who has signed the plaint and instituted the suit, but has no personal knowledge of the transaction can only give formal evidence about the validity of the power of attorney and the filing of the suit.

(b) If the attorney holder has done any act or handled any transactions, in pursuance of the power of attorney granted by the principal, he may be examined as a witness to prove those acts or transactions. If the attorney holder alone has personal knowledge of such acts and transactions and not the principal, the attorney holder shall be examined, if those acts and transactions have to be proved.

(c) The attorney holder cannot depose or give evidence in place of his principal for the acts done by the principal or transactions or dealings of the principal, of which principal alone has personal knowledge.

(d) Where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction, and where the entire transaction has been handled by an attorney holder, necessarily the attorney holder alone can give evidence in regard to the transaction. This frequently happens in case of principals carrying on business through authorized managers/attorney holders or persons residing abroad managing their affairs through their attorney holders.

(e) Where the entire transaction has been conducted through a particular attorney holder, the principal has to examine that attorney holder to prove the transaction, and not a different or subsequent attorney holder.

(f) Where different attorney holders had dealt with the matter at different stages of the transaction, if evidence has to be led as to what transpired at those different stages, all the attorney holders will have to be examined.

(g) Where the law requires or contemplated the plaintiff or other party to a proceeding, to establish or prove something with reference to his 'state of mind' or 'conduct', normally the person concerned alone has to give evidence and not an attorney holder. A landlord who seeks eviction of his tenant, on the ground of his 'bona fide' need and a purchaser seeking specific performance who has to show his 'readiness and willingness' fall under this category. There is however a recognized exception to this requirement. Where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bona fides or 'readiness and willingness'. Examples of such attorney holders are a husband/wife exclusively managing the affairs of his/her spouse, a son/daughter exclusively managing the affairs of an old and infirm parent, a father/mother exclusively managing the affairs of a son/daughter living abroad."

34. Here is a case in which PW1 is the holder of Power of Attorney under Ex.A2 executed by the respondent/plaintiff. PW1 gave evidence not in respect of the facts which were not known to him personally. On the other hand, he gave evidence regarding his personal knowledge of the execution of the agreement for sale, the

araisal of dispute and the happenings in the office of the District Crime Branch. In a civil case, it is not necessary for a party to appear as a witness and he can prove his case by examining witnesses of his choice. The opposite party cannot compel him or dictate him as to who are all to be examined as witnesses on his side. It is the prerogative of the party to decide the number of witnesses and the persons who are all to be examined as witnesses on his side. If at all the party wishes to appear as a witness after the examination of the non-party witnesses, then he should take the permission of the court under Order 18 Rule 17 of the Code of Civil Procedure. When there are overwhelming evidence in support of a case of a party to the suit, he cannot be non-suited for the relief sought on the sole ground that he did not figure as a witness on his side.

35. The evidence discussed above will make it clear that all along the respondent/plaintiff was holding out that he was entitled to the execution of the sale deed in accordance with the suit agreement for sale. It is contended on behalf of the appellant/defendant that at least on one occasion that is when he issued a notice dated 26.11.1987, the respondent/plaintiff was not ready and willing. The said notice has not been produced. Ex.B3 has been produced as xerox copy of the said notice. But it does not contain any signature. There is no authentication of the same. Assuming that Ex.b3 is the copy of the notice, at the outset, it may appear as if the plaintiff was not ready and willing to proceed with the transaction at that point of time. However, a thorough reading of the same would show that no unequivocal claim for damages and refund of advance amount was made under the said notice. On the other hand, even though the respondent/plaintiff was ready and willing to perform his part of the contract under the agreement for sale, in view of the reluctance on the part of the appellant/defendant, an offer was made by the respondent/plaintiff. Had the appellant/defendant accepted that offer, the contention of the appellant/defendant that the respondent/plaintiff would not be entitled to specific performance would have some substance in it. In Ex.A18 it has been clarified that the figure noted in the notice did not include the cost of the building. It is an admitted fact that the appellant/defendant had not accepted the offer. The sequence of events indicate that the respondent/plaintiff even thereafter proceeded with the construction and completed the construction. The said fact coupled with the concluding part of the said notice dated 26.11.1987 that the respondent/plaintiff would be constrained to initiate appropriate proceedings, will make it clear that the respondent/plaintiff meant that he would be even forced to file a suit for specific performance. The subsequent episode will also show the readiness and willingness on the part of the respondent/plaintiff and the various attempts made by the appellant/defendant to wriggle out of the commitment.

36. It shall be pertinent to note that initially the appellant/defendant remained ex-parte leading to the passing of an ex-parte decree, pursuant to which the balance amount of sale consideration was deposited and a sale deed came to be executed by the court. Only thereafter, the defendant filed an application and got the ex-parte decree set aside. The appellant/defendant, who was aware of the dispute and various criminal proceedings also admitted exchange of notices. But he would simply contend that he was not aware of the pendency of the suit earlier. The veracity of the testimony of DW1 stands affected by his statement that when he filed a suit in O.S.No.7780/1993 for injunction in the City Civil Court, Chennai, he was not aware of the suit for specific performance filed against him. There is a clear admission by DW1 that the suit came to be filed in the City Civil Court, knowing fully well that it could not be filed in the City Civil Court. There is also an admission that the said suit was dismissed for his non-appearance. DW1 has also admitted the fact that the filing of the present suit for specific performance against him came to his knowledge in 1989. Immediately thereafter, he changed his version and stated that he got knowledge of the same in 1990 and thereafter he filed the application to set aside the ex-parte decree.

37. It is obvious that the injunction suit in O.S.No.7780/1993 came to be filed in the City Civil Court, knowing fully well that the said court had no jurisdiction and that the same was also allowed to be dismissed for default. The admission of DW1 that in 1989 or 1990 itself, he came to know that the present suit for specific performance had been filed against him, will go to show that he deliberately let the suit to be decreed ex-parte (by an ex-parte decree dated 18.04.1991) and thereafter filed the petition on 01.02.1994 for setting aside the ex-parte decree along with an application to condone the delay under Section 5 of the Limitation Act. Thus it will be obvious from the same that even after coming to know that the suit had been decreed ex-parte against him, he chose to file another suit in O.S.No.7780/1993 on the file of the City Civil Court and left it to be dismissed for default in 1993 itself and only in 1994 he chose to file the petition for setting aside the ex-parte decree. All the above said aspects will go to show that it was the appellant/defendant who was not ready and willing and he made almost all attempts to see that the plaintiff's claim was defeated.

38. In Motilal Jain vs. Ramdasi Devi (Smt) and Others reported in (2000) 6 SCC 420, when the plaintiff had paid about 2/3rd of the total consideration at the time of execution of the agreement for sale, the High Court held that the readiness and willingness would not be inferred from the averments from the plaint and that even if it were otherwise, there was no evidence of such readiness and willingness. On appeal to the Supreme Court, the Supreme Court allowed the appeal and it observed as follows:

"It is thus clear that an averment of readiness and willingness in the plaint is not a mathematical formula which should only be in specific words. If the averments in the plaint as a whole do clearly indicate the readiness and willingness of the plaintiff to fulfil his part of the obligations under the contract which is subject-matter of the suit, the fact that they are differently worded will not militate against the readiness and willingness of the plaintiff in a suit of specific performance of contract for sale.

10. In the instant case a perusal of paras 6 to 11 of the plaint do clearly indicate the readiness and willingness of the plaintiff. The only obligation which he had to comply with was payment of balance of consideration. It was stated that he demanded the defendant to receive the balance of consideration of Rs.8000/- and execute the sale deed. The defendant was in Patna (Bihar) at the time of notices and when he came back to his place the plaintiff filed the suit against him. In support of his case, he adduced the evidence of PW 1 and PW 2. The plaintiff had parted with two-third of the consideration at the time of execution of Ext.2. There is no reason why he would not pay the balance of one-third consideration of Rs.8,000/- to have the property conveyed in his favour.

11. We are not persuaded to accept the contention that the conduct of the plaintiff disentitles him to the relief of specific performance.

12. The last contention of Mr.Choudhary that because the plaintiff has claimed compensation in lieu of specific performance so he is disentitled to claim the specific performance of the contract, is to be noted to be rejected. The plaintiff's claim was in accord with the provisions of Section 21 of the Specific Relief Act, 1963. Merely because the plaintiff claims damages in a suit for specific performance of contract as alternative relief, it cannot be said that he is not entitled to the main relief of specific performance of contract itself.

39. The said judgment shall get squarely attracted to the facts of the case on hand. It can be even stated that the respondent/plaintiff in the case on hand has got a better case than the plaintiff in the case that went before the Supreme Court. The respondent/plaintiff paid an advance of Rs.1,23,000/- out of the sale consideration of Rs.2,23,000/- as advance on the date of agreement itself and a further advance of Rs.80,000/- was also paid as contemplated in the agreement. In all, he had paid a sum of Rs.2,03,000/- leaving a small sum of Rs.20,000/- as balance amount of sale consideration. 10/11th of the sale consideration had been paid. In part performance of the contract of the agreement for sale, possession of suit house site was also delivered to the respondent/plaintiff. The respondent/plaintiff also obtained planning permission from the local authority and put up the construction at his own cost. A power of attorney was also executed by the defendant in favour of the plaintiff. The sale deed executed by the Housing Board in favour of the respondent/plaintiff was obtained by the respondent/plaintiff from the office of the Sub Registrar based on the authorisation given by the appellant/defendant. The exchange of notices also show that the respondent/plaintiff was ready and willing and on the other hand, the appellant/defendant was not prepared to complete the transaction, keeping in mind the escalation of the price. There is a clear plea made in the plaint that the respondent/plaintiff was always ready and willing to perform his part of the contract by making payment of the balance sale consideration and getting the sale deed executed and registered in his name. Evidence, both oral and documentary, has also been adduced to the said effect. As against the overwhelming evidence adduced on the side of the respondent/plaintiff, there is no contra evidence on the side of the defendant to show that he was ready and willing but the respondent/plaintiff was not ready and willing. Under such circumstances, the concurrent findings of the courts below that the respondent/plaintiff pleaded and proved his readiness and willingness in consonance with the requirements of Section 16(c) of the Specific Relief Act, 1963 does not require any interference. The substantial question of law deserves to be answered accordingly holding that the plaintiff complied with the conditions of Section 16(c) of the Specific Relief Act, 1963 and that the discretion was also properly exercised by the courts below in granting the relief of specific performance in favour of the respondent/plaintiff. Accordingly the 2nd and 4th substantial questions of law are answered against the appellant/defendant and in favour of the respondent/plaintiff.

40. In view of the answers given to the substantial question of law, additional substantial questions of law and the discussions appearing above, this court comes to the conclusion that there is no merit in the second appeal and the same deserves to be dismissed

confirming the decree of the lower appellate court, which in turn has confirmed the decree of the trial court.

In the result, the second appeal is dismissed with cost confirming the decree of the lower appellate court which in turn has confirmed the decree of the trial court. Consequently, the connected miscellaneous petition is closed.

List of additional documents marked on the side of the respondent/ plaintiff in S.A.No.441 of 2007

1	11.10.1983	Order of allotment	A8
2	09.11.1983	Series of Receipts towards payments made to TNHB	A9 Series
3	05.12.1983	Documents evidencing handing over of the plot allotted to the appellant	A10
4	10.02.1986	Communication sent by TNHB to the appellant informing arrears of payment	A11
5	19.11.1986	Letter granting permission to the appellant to put up construction	A12
6	30.05.1987	Certificate of Balance issued by Indian Bank, Anna Nagar in favour of the respondent	A13
7	25.11.1987	Planning permission from the Executive Officer, Ambattur Municipality	A14
8	18.02.1988	Lawyer's Notice sent to Sub-Registrar, Anna Nagar, Chennai (with acknowledgement) and Sub-Registrar, Ambattur	A15
9	18.02.1988	Office copy of the Lawyer's Notice sent to Sub-Registrar, Anna Nagar, Chennai and Sub-Registrar, Ambattur (with acknowledgement)	A16
10	24.12.1998	Lawyer's Notice issued by the appellant to the respondent	A17
11	07.02.1989	Office copy of the Reply Notice sent by the respondent	A18
12	03.01.1989	Reply Notice issued by the Respondent's lawyer	A19

List of additional documents marked on the side of the appellant/ defendant in S.A.No.441 of 2007

1	06.01.1988	Paper Publication informing the cancellation of Power of Attorney	B5
2	24.12.1988	Notice by the appellant to the respondent	B6
3	28.01.1989	Rejoinder issued to the reply notice of the appellant	B7
4	08.01.1991	Affidavit of the Respondent before the Sub-Court, Poonamallee	B8
5	22.11.1991	Order of the Judicial Magistrate, Ambattur	B9

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

- 1) The Principal District Judge,
Chengalpattu
- 2) The Subordinate Judge,
Poonamallee
- 3) The Section Officer,
VR Section,
High Court, Madras

S.A.No.441 of 2007

TEJ(CO)
CA(20/04/2015)

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