

Judgment Reserved on: 21.03.2017
Judgment Pronounced on : 24.03.1017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Coram:

The Hon'ble Mr.Justice N.SATHISHKUMAR

Appeal Suit No. 392 of 2010
and
M.P.No.1 of 2010

R.Irusappan	..	Appellant
Versus		
M.Gerard Morassin rep. By Power Agent M.Kamalorbhavan.	..	Respondent

Appeal Suit filed under Section 96 of Civil Procedure Code,
against the Judgment and decree passed in O.S.No.50 of 2006 by the
learned Principal District Judge, Puducherry dated 23.03.2010.

For Appellants .. Ms.G.Sumitra
For Respondent .. Mrs.Hema Sampath, S.C., for
M/s. R.Meenal.

JUDGMENT

Aggrieved over the judgment and decree of the learned trial Judge, in a
suit for specific performance, the present appeal came to be filed by the
Defendant. The parties are arrayed as per their own ranking before the
trial Court.

2. Brief facts of the plaintiff's case is as follows:- The plaintiff through his power agent entered into an agreement for sale on 16.11.2004 for purchase of the suit property for a total sale consideration of Rs.5,10,000/- from the defendant and the defendant has agreed to sell the property and received Rs.1,70,000/- as advance on the date of the agreement and he has also further received Rs.1.00 lakh on 16.12.2004 and Rs.10,000/- on 8.2.2005. The plaintiff was always ready and willing to perform his part of contract. But the defendant was evading to execute the sale deed in favour of the plaintiff under the pretext or other. Hence, a legal notice was issued by the plaintiff on 12.4.2005. The plaintiff was allays ready and willing to perform his part of contract. Hence the suit.

3. It is the case of the defendant that the agreement cannot be enforced in law. It is further contention of the defendant that the plaintiff was not ready and willing to perform his part of sale agreement is in the nature of the Benami transaction. The plaintiff's power agent M.Kamalorbhavan alias Murugan expressed his inability to complete the sale on several occasions and agreed to receive back the advance amount in front of the witnesses. The promise given by the said M.Kamalorbhavan amounts to cancelling the agreement. It is also denied the

receipt of further sum of Rs.10,000/- towards sale consideration. In fact the said M.Kamalorbhavan expressed his inability to complete the sale. Therefore, the agreement to sell stood cancelled. Hence, prayed for dismissal of the suit.

4. On the basis of the above pleadings, the following issues are framed:-

1. Whether the defendant agreed to sell the suit property to the plaintiff for Rs.5,10,000/- under the sale agreement dated 16.11.2004?
2. Whether the defendant has received advance amount of Rs.1,70,000/- on 16.11.2004 and Rs.1,00,000/- on 16.12.2004 and Rs.10,000/- on 06.02.2005?
3. Whether the plaintiff was ready and willing to perform his part of contract?
4. Whether the plaintiff has waived his right to enforce the contract?
5. Whether the suit contract is not legally enforceable in view of Benami Transaction (Protection) Act?
6. Whether the plaintiff is entitled to the relief of specific performance?
7. To what relief, the plaintiff is entitled?

5. On the side of the plaintiff two witnesses were examined as P.W.1 and P.W.2 and marked Exhibit A1 to A7. Ex.A1 is the power of Attorney Deed dated 30.05.2005 in French language executed by Gerard Morassin (Plaintiff) in favour of Kamalorbhavan; Ex.A2 is the English translation of Ex.A1; Ex.A3 is the Sale Agreement dated

16.11.2004 executed between the power agent of the plaintiff and the defendant; Ex.A4 is the endorsement dated 16.12.2004 on the back side of Ex.A3 Sale Agreement; Ex.A5 is the copy of Lawyer's notice dated 12.04.2005 issued by the plaintiff to the defendant; Ex.A6 is the Postal Acknowledgment Card signed by the defendant; Ex.A7 is the Reply notice dated 20.04.2005 issued by the defendant. On the side of the defendant two witnesses were examined as D.W.1 and D.W.2 and no document has been marked.

6. Based on the oral and documentary evidence and materials, the learned trial Judge has decreed the suit for specific performance. Aggrieved over the same, the present appeal came to be filed.

7. The only contention of the learned counsel for the appellant before this Court is that though the agreement said to have been executed through the power agent, on the date of agreement power was not in existence and only subsequently the power was executed by Gerard Morassin in favour of the plaintiff/power agent. Hence, it is the contention of the learned counsel for the appellant that the agreement cannot be enforced in law. It is further contention of the appellant that the plaintiff has not proved the subsequent payment and ready and willingness to complete the contract on his part.

Hence, prayed for allowing the appeal.

8. Whereas it is the contention of the learned Senior Counsel appearing for the respondent that the plaintiff through his power agent entered into an agreement to purchase the suit property and paid substantial amount. The defendant having admitted the execution of agreement in the reply notice, he has taken a different stand in the written statement. That apart his conduct also clearly show that he has not come to the Court with clean hands. Whereas the plaintiff exhibited his readiness and willingness to perform his part of contract from the inception and he made all efforts to complete the transaction within three months to as agreed between the parties. But the defendant taking advantage of the fact that the plaintiff was residing in France, had delayed the performance. The plaintiff has also deposited the balance sale consideration before the Court. Hence, submitted that the judgment and decree of the learned trial Judge is well balanced and it does not require any interference.

9. In the light of the above submissions now, the points that arise for consideration are:

1. Whether there was an agreement of sale between the plaintiff and defendant?

2. Whether the plaintiff was ready and willing to perform his part of contract?

3. To what relief?

10. Points: 1 to 3:-It is the case of the plaintiff that he has entered into an agreement to purchase the property on 16.11.2004 through his Power Agent M.Kamalorbhavan for a total sale consideration of Rs.5,10,000/- and on the date of agreement he has paid Rs.1,70,000/- further sum of Rs.1.00 lakh also paid on 16.12.2004 and further sum of Rs.10,000/- was paid on 8.2.2005. The defendant in his written statement having denied the agreement with the plaintiff in general, he has taken a specific stand that the agreement in question is the nature of Benami transaction. However, in para 8 of the written statement in fact he has admitted the execution of the agreement with one M.Kamalorbhavan alias Murugan, wherein he has clearly pleaded that the said M.Kamalorbhavan expressed his inability to complete the sale and agreed to receive back the advance amount. Hence it is the contention of the defendant that the said agreement stood cancelled in view of the inability expressed by the said M.Kamalorbhavan to complete the sale. Whereas it is the contention of the plaintiff that he was always ready with sale consideration and willing to perform his part of contract.

11. Ex.A1 is the Power of Attorney executed in French language, appointing one M.Kamalorbhavan as Power Agent of the plaintiff. Ex.A2 is the English version of Ex.A1. Ex.A3 is the agreement entered into between the

parties on 16.11.2004. The agreement was entered into between the plaintiff through his Power Agent and the defendant. Though on the date of agreement power of attorney was not in existence as could be seen from Ex.A2 the power of attorney was executed on 30.5.2005 subsequent to the agreement and general power of attorney was given in the name of M.Kamalorbhavan by the plaintiff. The subsequent appointment of power agent in fact clearly ratified the acts done by his agent. Therefore, even though there was no power of attorney on the date of agreement, the subsequent appointment of power agent clearly ratified all the acts done by the agent on behalf of the principal. Therefore, the defendant cannot take such a defence that there was no power of attorney on the date of agreement. Any act done by the agent prior to the execution of power of attorney has been subsequently ratified by the principal, the agreement is a valid one. That cannot be questioned by the third parties. Therefore, merely because the power of attorney was not existence at the relevant time when the agreement was executed on 16.11.2004, it cannot be said that there is no valid agreement executed between the parties. In fact the recitals in the agreement itself clearly show that the defendant agreed to sell the property only to the plaintiff through his power agent M.Kamalorbhavan. The recitals on the agreement further indicate that the defendant has agreed to sell the property for Rs.5,10,000/- and also received Rs.1,10,000/- as advance towards sale consideration on the date of agreement. Ex.A4 is the endorsement dated 16.11.2004 on the reverse of agreement clearly shows the defendant has

also received another sum of Rs. 1.00 lakh towards sale consideration. The parties specifically agreed to complete the sale within three months. It is also specifically agreed by the defendant that he would clear the Co-operative Housing Society loan and also produce all the relevant documents after vacating the person who is in possession of the property on the usufructuary mortgage. Having agreed to clear the Co-operative Housing Society loan and also produce all the relevant documents after vacating the person who is in possession of the property, nothing has been done by the defendant. Though it can be said that only the plaintiff has to show his readiness and willingness, the same will not expel the defendant from performing his part of contract. Ex.A3 clearly show that in fact the defendant has executed an agreement and received substantial payment of consideration. The power agent of the plaintiff examined as P.W.1 in his evidence has clearly stated that he was aware of the factum of transaction. He has entered into contract on behalf of the principal name the plaintiff herein and he has paid Rs.1,70,000/- on the date of the agreement and another sum of Rs.1.00 lakh on 16.11.2004 and another sum of Rs.10,000/- on 08.02.2005.

12. The evidence of P.W.1 clearly show that from the date of agreement within three months he has made another sum of Rs.1.00 lakh and another sum of Rs.10,000/- towards the sale consideration. This evidence when carefully analyzed, except the denial of receipt of the amount in entirety, nothing can be elicited from his evidence. In fact defence was taken in the cross-examination of

P.W.1 to the effect that there was no consideration at all. Further in the cross-examination a suggestion was put to P.W.1 to the effect that P.W.1 paid money only from his pocket and the amount is not that of the plaintiff. The above suggestion to P.W.1 also clearly show that the defence of the defendant is unreliable. It is further fortified by Ex.A7 reply notice given by the defendant dated 20.04.2005 wherein he has categorically admitted execution of the agreement in favour of the plaintiff through his power agent and receipt of Rs.1.70,000/- on the date of agreement. He has also admitted in Ex.A7 that he has executed the agreement knowing very well that the plaintiff has appointed M.Kamalorbhavan as his agent.

13. The entire reading of Ex.A7 clearly establish the fact that the defendant was aware of the fact that he has executed the agreement only to the plaintiff through P.W.1. Ex.A4 endorsement also admitted by the defendant in the reply notice. Further, a sum of Rs.1.00 lakh received by him was also admitted. Except denying that he has not received Rs.10,000/- on 08.02.2005 all other aspects of agreement has been clearly admitted. The further case of the defendant in the reply notice that since P.W.1 was not ready and expressed his inability to complete the sale and pay the balance sale consideration the agreement could not be enforced. Whereas having pleaded under Ex.A7 admitting receipt of the advance of Rs.2,70,000/- in the defence, only in the written statement he has taken a contrary view of totally denying the receipt of

advance. In all aspects the defendant clearly exhibited his intention only to defeat the agreement. Whereas the evidence of P.W.1 clearly show that he has made efforts to pay the balance sale consideration within the period of three months. That itself sows that he was ready and willing to purchase the property from the beginning. Further as already stated above, the act done by P.W.1 is also ratified by his principal by executing the power of attorney Ex.A1 and translated copy Ex.A2. Therefore, it cannot be contended by the defendant that since there was no power of attorney at the relevant time the agreement cannot be enforced.

14. Though D.W.2 was examined to show that as if P.W.1 requested to get back the advance amount, his evidence cannot be given much importance for the simple reason that D.W.2 is a close friend of D.W.1. That apart having agreed specific terms in the contract, the defendant cannot take contrary view by leading oral evidence of D.W.2. Hence, once the plaintiff has expressed his readiness and willingness the defendant has set up false statement in the written statement which is contrary to the contentions made in Ex.A7. This Court is of the view that the entire defence is false and only in order to defeat the rights of the plaintiff. Ex.A3 agreement has been executed by him with the specific stipulation to clear Co-operative Society loan and also to vacate and hand over the possession at the time of registration of the document. Though three months time was fixed in the agreement the plaintiff has made efforts to

pay the balance consideration and he has paid additional balance sale consideration of Rs.1,10,000/- within the period of three months and immediately he has also sent legal notice and filed the suit on 29.6.2005 within four months from the date of expiry of the agreement. There was no factum of delay on the part of the plaintiff also. This fact clearly shows that the defendant alone protracted to perform his part of contract and in fact he has set up false plea in the written statement.

15. Therefore, having regard to the nature of the agreement entered into between the parties, I am of the view that the plaintiff has made out his case for granting specific performance. Though the grant of specific performance is equitable relief, the defendant has not made out any case for hardship or unfair advantage for declining the relief. This Court does not find any infirmities in the findings of the learned trial Judge in granting the decree in favour of the Respondent. All the points are answered against the appellant.

16. In the result, the appeal is dismissed. No costs. Consequently, M.P.No.1 of 2010 is closed.

24.03.2017

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N.SATHISHKUMAR, J

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**PRE DELIVERY JUDGMENTT IN
A.S.No.392 of 2010**

24.03.2017