IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 01.12.2016

PRONOUNCED ON : 03.02.2017

CORAM:

THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

C.S.No.139 of 2009

M/s.Asera Shelters and Investments Ltd.,
Represented by Managing Director,
K.Brij Mohan Asera
30, Thiruvengadam Street,
West Mambalam,
Chennai – 600 033. ... Plaintiff

Vs.

Mr.Harishankar ... Defendant

PRAYER : Plaint filed Under Order IV Rule 1 of the O.S. Rules R/w Order VII Rule 1 of Civil Procedure Code

For Plaintiff	:	Mr.Kuberan, for M/s.Rank Associates
For Defendant	:	Mr.N.R.Elango Senior Counsel for M/s.R.Vivekanath and Mr.R.Thilakaraj

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J U D G M E N T

The suit has been filed for the following reliefs :-

a directing the defendant to execute and register necessary Sale Deed, for the Property being land and building, land of a total extent of

2217 sq. ft. (2186 sq. ft as per Patta), comprised in Survey No.797/3, bearing Door No.9, Gengu Reddy Road, Egmore, Chennai – 600 008 more clearly described in the Schedule hereunder, in favour of the plaintiff, after receiving the balance Sale consideration of Rs.1,15,00,000/- within the time frame to be fixed by this Hon'ble Court and failing which direct execution of such Sale Deed by an officer of this Hon'ble Court, nominated for the said purpose;

b. for a Permanent Injunction, restraining the defendant, his men, agents, servants or any one acting under him from in any manner, dealing, alienating, encumbering the property being an extent of 2217 sq. ft. (2186 sq. ft as per Patta), comprised in Survey No.797/3, bearing Door No.9, Gengu Reddy Road, Egmore, Chennai – 600 008, more clearly described in the Schedule hereunder, except in favour of the plaintiff, in terms of the Sale Agreement dated 01.10.2007;

c. for costs of the Suit

Suit filed for specific performance of an agreement of a sale dated 01.10.2007 entered into between the plaintiff and the father of the defendant for a total consideration of Rs.1,45,00,000/- and also for a permanent injunction restraining the defendant from dealing with or in any manner encumbering the suit property. The suit property is land and building to an extent of 2,217 square feet bearing Door No.9, Gengu Reddy Road, Egmore, Chennai.

Plaint :

2. The plaintiff is a company incorporated under the provisions of the Companies Act 1956 and its objective are building and developing properties in Chennai. It had been stated that the plaintiff entered into an agreement for purchase of the property bearing Door No.9, Gengu Reddy Road, Egmore, Chennai from one R.Nandakumar, who was the father of the defendant. It had been stated that the said Nandakumar wanted to sell the property and consequently, the plaintiff entered into an agreement of sale on 01.10.2007 for a total consideration of Rs.1,45,00,000/-. At the time of agreement a sum of Rs.30,00,000/- had been paid as an advance. It had been further stated that there was a tenant, running TASMAC liquor shop in the premises and the said Nandakumar agreed to vacate the tenant. It had been stated that time was not the essence of the agreement. It had been further stated that the said Nandakumar was not able to vacate the tenant. He kept postponing to perform his part of the agreement.

3. In February 2008, the plaintiff was informed that the wife of said Nandakumar was suffering from Cancer and therefore the plaintiff did not persuade the said Nandakumar to immediately perform his part of the agreement. Subsequently, the said Nandakumar passed away in June 2008. It was stated that one Sethuraman, the Uncle of the defendant also knew about the agreement. The mother of the plaintiff also died because of Cancer. The defendant was asked to perform the agreement entered into by his father and a letter dated 13.08.2008 was sent. There was no reply from the defendant. A notice was issued on 10.12.2008 to both the defendant and the said Sethuraman. The notice was returned with the endorsement "Intimation Delivered". It had been stated that the plaintiff was always ready and willing to pay the balance sale consideration. It had been further stated that the defendant did not come forward to execute the sale deed and at the same time was making arrangement to sell the property. The suit was consequently filed for specific performance and for a permanent injunction.

Written Statement :

4. In the written statement, filed on behalf of the defendant, it had been stated that his residential address was No.9/3, Gengu Reddy Road, Egmore, Chennai. In the written statement, it was specifically denied that his father Nandakumar executed an agreement of sale and it was further denied that he received a sum of Rs.30,00,000/- as

advance. It had been stated that the agreement was not supported by any document. It had been further stated that the signatures of the defendant's father differed in every page and alterations were also made, which were not counter signed by either the defendant's father or by the plaintiff. It had been further stated that there was a clause relating to executing of power of attorney, which naturally meant that the plaintiff was not interested in purchasing the property. It was also stated that the plaintiff had not filed any document to show that the Managing Director was authorised by the company to enter into an agreement of sale. It had been stated that after the death of his father on 28.05.2008, and after the death of his mother, the sister of the defendant executed a release deed in favour of the defendant. It was also denied that there was an agreement to vacate the tenant. Further the averment in the plaint that the defendant met the plaintiff and sought time to perform the agreement was also denied.

5. On the basis of the above pleadings, this Court framed the following issues for trial :

1. Whether the plaintiff is entitled to a decree directing the defendant to execute and register necessary sale deed for the property described in the Schedule to the Plaint after receiving the balance sale consideration of Rs.1,15,00,000/- within the

time fixed by this Court, failing which direct execution of such sale deed by an officer of this Court nominated for the said purpose?

2. Whether the plaintiff is entitled for the relief of permanent injunction restraining the defendant, his men, agents, servants or any one acting under him from in any manner, dealing, alienating, encumbering the property described in the Schedule to the plaint in terms of the sale agreement dated 01.10.2007?
3. Whether the Company entered into the alleged Agreement of Sale dated 01.10.2007 with the defendant's father in respect of the suit property?
4. Whether there is any consensus ad idem between the plaintiff and the defendant's father?
5. Whether the plaintiff can enforce the alleged Contract i.e., Agreement of Sale dated 01.10.2007 against the defendant?
6. Whether there is any Privity of Contract between the parties?
7. Whether the plaintiff is entitled to the costs of the suit?
8. To what other reliefs, the parties are entitled to?

6. The parties went to trial to substantiate their respective stands. The plaintiff examined K.Brij Mohan Asera, the Managing Director of the plaintiff company, who had also signed the Plaint as PW1. He marked

Exs.P1 to P5. Ex.P1 is the resolution dated 02.01.2009 authorising PW1 to institute the suit and to adduce the evidence on behalf of the plaintiff company. Ex.P2 is the agreement of sale entered into between the plaintiff and the father of the defendant dated 01.10.2007. Ex.P3 is the office copy of the letter dated 13.08.2008 signed to the defendant. Ex.P4 is the office copy of the advocate notice dated 10.12.2008 and the return cover; Ex.P5 is the statement of accounts of the plaintiff company in Indian Overseas Bank, West Mambalam Branch, Chennai. The defendant was examined as DW1 and he marked Exs.D1 to D4. Ex.D1 is the copy of the death certificate of the father of the defendant Nandakumar. Ex.D2 is the death certificate of the mother of the defendant. Ex.D3 is the legal heirship certificate showing the defendant and his sister as the legal heirs of their parents. Ex.D4 is the copy of the ration card showing the names of the father, mother, sister of the defendant and also the defendant.

7. Heard the arguments of Mr.Kuberan, representing M/s.Rank Associates, learned counsel appearing for the plaintiff and Mr.N.R.Elango, learned Senior Advocate appearing for the defendant.

The facts in brief :-

8. The plaintiff has come to Court on the basis of an agreement of a sale dated 01.10.2007. This agreement of sale, according to the

plaintiff, was entered into by K.Brij Mohan Asera, the Managing Director of the plaintiff company and R.Nandakumar, the father of the defendant. The defendant disputed that his father entered into this agreement of sale. It is the further case of the plaintiff that the total sale consideration of the property bearing Door No.9, Gengu Reddy Road, Egmore, Chennai was fixed at Rs.1,45,00,000/- and the plaintiff had paid an advance of Rs.30,00,000/-.

9. It is the further case of the plaintiff that the father of the defendant agreed to vacate the tenant, who was running a TASMAC shop. Further, it also came to the knowledge of the plaintiff that the mother of the defendant was suffering from Cancer. It is the further case of the plaintiff that one Sethuraman, who is the Uncle of the defendant had negotiated the agreement of sale. The agreement holder namely Nandakumar died and the suit has been filed, because the defendant failed to honour the agreement entered into by his father.

10. The defence taken by the defendant is that the father had not entered into agreement of sale and he had not received any advance amount. To substantiate these, he relied on the agreement of sale and stated that the signatures of his father differed in each pages. Insertions were not counter signed either by the plaintiff or by the father of the defendant. Further, defendant also challenged the locus of the

signatory of the plaint to institute the suit and to adduce evidence. In the background of the above facts, the issues will now have to be re-examined. Issue Nos.1 and 2 relate to grant of the main relief in the plaint and will be taken up at the end of the discussion.

11. Issue No.3

This relates to whether the company M/s.Asera Shelters and Investments Ltd., had entered the agreement of sale as stated in the plaint. The seal of the company is not found in Ex.P2. This certainly affects the case of the plaintiff. The Board resolution authorising entering into an agreement to purchase property has not been produced. In this connection, PW1 during his cross examination on 21.11.2014 stated that Ex.P2 did not contain the seal of the plaintiff company since the agreement, was signed at his residence. It is seen from the Ex.P2 agreement that it was entered by "K.Brij Mohan Asera", in his private capacity alone. He might be the Managing Director of the plaintiff company. When there is no seal of the plaintiff company in Ex.P2, it must be held that the plaintiff company as such had not entered into the agreement of sale.

12. Issue Nos.4,5 and 6 :

The agreement of sale relied on by the plaintiff was marked as Ex.P.2 Ex.P2 is not registered. The schedule is given as No.9, Gengu

Reddy Road, Egmore, Chennai- 600 008. It is seen that the date originally typed had been struck off by a whitener and the date "1st" had been inserted in pen. Similarly, the month which was originally typed had been struck off by whitener and the month "October" had been written in Pen. Thereafter, the same date and month viz. "1st October 2007" was again written in ink. There are no counter signatures to these writings, particularly with respect to the striking off in whitener and writing over the same in Ink.

13. It is the contention of the learned Senior Counsel appearing for the defendant that this agreement has been prepared by the plaintiff. According to the learned Senior counsel, these are material alterations which render the agreement unenforceable. The learned Senior Counsel further argued that material particulars in the agreement have been inserted in Ink and have not been counter signed by both the alleged signatories to the agreement. To further substantiate this aspect, he also referred to page No.3 of Ex.P2 in which in Clause 1, the consideration "1,45,00,000/-" and "One Crore Forty Five lakh only" have been written in ink and again have not been counter signed even by the plaintiff, who stands by the agreement. Further in Clause 2, the payment of an advance through cheque had again been inserted and the following are the actual insertions, namely cheque bearing

No."204393", dated "01.10.2007" in "I.O.B." Bank, "W.Mambalam" Branch, Chennai "[20,00,000 + Cash 10,00,000]". Further in Clause 3 the purchaser agrees to pay the balance amount of Rs."11500000"/- (Rupees "One Crore Fifteen Lakh only") . The learned Senior Counsel further stated that in the very same Clause 3 at page No.3 in the second line from the bottom the writings had been erased in Whitener and the following had been written "120" days.

14. Pointing out of these, the learned senior Counsel was very emphatic in stating that the suit relief cannot be granted. On this aspect, he relied on Seth Loonkaran Sethiya and Others Vs. Mr.Ivan E.John and Others reported in 1977 (1) SCC 379.

15. In this regard, the learned counsel for the plaintiff had stated that the material particulars which are said to have been inserted are not alterations but only reduction in writing of the terms of agreement between the plaintiff and the father of the defendant.

16. The learned counsel stated that these alterations cannot affect the genuinity of the agreement of sale. He further stated that the defendant was liable to perform the agreement. Further to substantiate that advance amount as mentioned in the agreement of sale, Ex.P2 was

actually paid to the father of the defendant, the learned counsel for the plaintiff relied on Ex.P5 which is the statement of Indian Overseas Bank of the plaintiff company. The learned counsel relied on entries dated 05.10.2007 in which cheque No.204393 for Rs.20,00,000/- has been debited in the name of Nandakumar. The learned counsel further stated that for some reason, the said debit was cancelled on the same day and a perusal of the statement of accounts shows that there is a reversal of the entry. Further learned counsel for the plaintiff stated that the same cheque was reissued and there was an entry dated 09.10.2007 in favour of Nandakumar for Rs.20,00,000/-. According to the learned counsel, consequently, consideration had passed from the plaintiff to the father of the defendant. With much respect to the learned counsel, it must be pointed out that the stand of the plaintiff was that a total advance amount of Rs.30,00,000/- have been paid. The bank entries show a payment of Rs.20,00,000/-, cancellation of the same and thereafter reissue of the cheque on a subsequent date. The reissue of the cheque has not been entered or endorsed in the agreement of sale. Explanations have not been given in the pleadings with respect to cancellation and reissue of the cheque. But it is a fact that Rs.20,00,000/- had been transferred to Nandakumar from the account of the plaintiff. It is further seen from Ex.P2, the plaintiff has stated that he has made a payment of Rs.10,00,000/- in cash. Again, there is no evidence in the statement of accounts, Ex.P5 to show withdrawal of cash by the plaintiff company on 01.10.2007. In fact, there is no entry dated 01.10.2007. As a matter of fact, there is no entry for withdrawal right from August 2007 for an amount of Rs.10,00,000/-. It is for the plaintiff to establish payment of consideration. Even if he has established payment of Rs.20,00,000/- by way of cheque, the payment of Rs.10,00,000/- has not been substantiated in manner known to law. Further during cross examination on 24.11.2014, PW1 had admitted writings have been inserted. He further stated that the date of the agreement originally showed “29” and that has been erased and “1” has been inserted. He further admitted that the sale consideration and the advance amount have also been inserted. He further admitted that these insertions were not countersigned by both the parties.

17. In the judgment of Seth Loonkaran Sethiya and Others Vs. Mr.Ivan E.John and Others reported in 1977 (1) SCC 379, referred above, it had been held at paragraphs 23, 24, 25 are as follows :-

> *23. Question 5 : Before proceeding to determine this question, it would be well to advert to the legal position bearing on the matter. As aptly stated in paragraph 1378 of Volume 12 of Halsbury's Laws of England (Fourth Edition)*
> *if an alteration (by erasure, interlineation, or otherwise) is made in a material part of a deed, after its execution, by or with the consent of any party to or person entitled under it, but without the consent of the party or parties liable under it, the deed is rendered void from the time of the alteration so as to prevent the person who has made or*

authorised the alteration and those claiming under him, from putting the deed in the suit to enforce against any party bound by it, who did not consent to the alteration, any obligation, covenant, or promise thereby undertaken or made.

24. A material alteration, according to this authoritative work, is one which varies the rights, liabilities, or legal position of the parties as ascertained by the deed in its original state, or otherwise varies the legal effect of the instrument as originally expressed, or reduces to certainty some provision which was originally unascertained and as such void, or which may otherwise prejudice the party bound by the deed as originally executed.

25. The effect of making such an alteration without the consent of the party bound is exactly the same as that of cancelling the deed.

18. It is seen that the Hon'ble Supreme Court had also relied on AIR 1940 Privy Council in Nathu Lal V. Musammat Gomti, wherein also it had been held if alterations substantially vary the rights and liabilities as also the legal position of the parties, they cannot be held to be anything but material alterations and since they have been made without the consent of the defendants first set, they have the effect of cancelling the deed.

19. In this case also, I hold that there are material alterations in Ex.P2, which renders the agreement as cancelled and voidable on the part of the party who repudiates the agreement, in this case, the defendant. This naturally implies there is no consensus ad idem between the plaintiff and the defendant father.

20. A further perusal of Ex.P2 reveals that there are two witnesses to the agreement. It has been pointed out by the learned Senior Counsel for the defendant that the second witness Ashok Azera is actually the brother of the signatory to the plaint. This may or may not be factually correct. However, the plaintiff did not deem it fit to examine any one of the witnesses to speak about the agreement and its alterations. In fact, there has been a pleading that one Sethuraman, who is said to be the Uncle of the defendant was also present during the time of agreement. The plaintiff did not examine the said Sethuraman. The defendant also raised further issues that the signature of his father differed from page to page. In this connection both the learned Senior Counsel appearing for the plaintiff and the learned counsel for the plaintiff shifted the onus of proving the signature on the other side.

21. The learned Senior Counsel for the defendant relied on R.Chinnadurai Vs. S.Rajalakshmi reported in 2004 (4) Law Weekly 186, wherein at paragraph 19, it had been stated that when there is dispute in the execution of an agreement, atleast one witness to the agreement must be examined to establish the genuineness of the agreement. Here, even though one of the witnesses is said to be the brother of the plaintiff, he was not examined to prove the genuinity of the agreement. Both the learned Senior Counsel for the defendant and the learned

counsel for the plaintiff invited me to examine the agreement of sale and exercise the power under Section 73 of the Evidence Act to examine the signatures of the father of the defendant and given a finding whether it is the same or it differs in each page. This procedure has to be used very sparingly and only either one of the two sides claim denial of opportunities to refer the document for examination by a handwriting experts. Here the plaintiff must have examined one of the witnesses. Instead of adopting the procedure known to law, the plaintiff cannot seek the indulgence of this Court. In this case, the plaintiff stands by the agreement and had the primary duty to establish that the agreement is genuine. In this connection, in the wake of the denial by the defendant, examination of atleast one of the witnesses becomes necessary in view of Section 68 of the Indian Evidence Act. Section 68 of the Indian Evidence Act is as follows :

> *Even though the proviso exempts a document which is not a Will, in this case, the burden is on the plaintiff to prove the agreement and the best way would have been to examine the atleast one of the witnesses.*

22. In effect, I hold that Issue Nos.4,5 and 6 have to be answered against the plaintiff.

23. Issue No.1 : I hold that the plaintiff has not proved Ex.P2. In Ex.P5, there is a entry with respect to debit of Rs.20,00,000/- in the

name of Nandakumar. The said entry has been cancelled and there has been a reissue of the cheque on 07.10.2007. There has been no pleadings to this effect in the plaint. There is no explanation as to why the cheque was cancelled and then reissued on a subsequent date. There is no proof to show that cash of Rs.10,00,000/- was paid to the father of the defendant. The defendant had denied the very agreement itself. He had infact challenged it on the ground that his father's signature varies from page to page. Consequently, the claim of the plaintiff has to fail. However, it is a fact that the very same cheque has been reissued to the father of the defendant. Consequently though the plaintiff is denied the relief of specific performance, I hold that the plaintiff is entitled for return of the advance amount of Rs.20,00,000/- paid by cheque. However, I hold that the defendant shall be liable to return the same @ 6% interest p.a. alone. Issue No.1 is answered accordingly.

24. Issue No.2 : This issue relates to permanent injunction restraining the defendant from dealing with the property. When the agreement of sale fails and the defendant is the owner of the property, the defendant has every right to deal with in any manner, he deems fit. Consequently this issue also fails and is answered against the plaintiff.

25. Issue Nos. 7 and 8 :

I hold that the suit has to be dismissed with respect to the relief of seeking specific performance. However, as stated above there is a debit entry in the name of the father of the defendant for Rs.20,00,000/- in Ex.P.5. The defendant is liable to pay back the said amount to the plaintiff with interest at 6% p.a. The plaintiff is not entitled for costs as he has not proved the agreement. The issues are answered accordingly.

26. In the result, this Civil Suit is partly allowed to the extent mentioned above without costs, i.e. is so far as reliefs of specific performance and permanent injunction are concerned this Civil Suit is dismissed, but this Civil Suit is decreed for a sum of Rs.20,00,000/- (Rupees twenty lakhs only) with interest at 6% p.a. from the date of plaint till date of payment. The said decreetal amount shall be paid by defendant to the plaintiff within a period of three months. No costs.

03.02.2017

Index:yes/no
Internet:yes
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C.V.KARTHIKEYAN, J.

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To
The Sub Assistant Registrar,
Original Side,
High Court, Madras.

Judgement of
C.S.No.139 of 2009

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