

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 20.11.2016

PRONOUNCED ON: 03.02.2017

CORAM:

THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

CS.Nos.247 and 593 of 2010

CS.No.247/2010:-

V.Kimis

Plaintiff

Vs

1. Johnsy Pappa
2. D.Ramraj
3. R.Vijayraghavan
4. V.Malathy

Defendants

CS.No.593/2010:-

Johnsy Pappa

Plaintiff

Vs.

1. V.Kimis
2. K.Simpson
3. Senthil Kumar

Defendants

Prayer:- These Civil Suit are filed under Order IV Rule 1 of the Original Side Rules and Order VII Rule 1 of CPC.

For Plaintiff : Mr.S.R.Rajagopal-CS.247/2010
Mr.R.Thiagarajan-DD1&2-CS.593/2010

For Defendant : Mr.R.Thiagarajan-CS.247/2010
Mr.S.R.Rajagopal-DD1&2-CS.593/2010
Mr.R.Parthasarathy-DD3&4-CS.247/2010

JUDGEMENT

CS.No.247 of 2010 has been filed to pass a judgement and decree,

against the Defendants:-

- (a) declaring that the sale deed dated 31.12.2009, executed by the 3rd Defendant in favour of the 1st Defendant by the 2nd Defendant as Power of Attorney of the 3rd Defendant and registered as Document No.4118 of 2009, on the file of the Sub Registrar of Assurances, Kodambakkam, is null and void and consequently, granting mandatory injunction, directing the 3rd Defendant to execute a sale deed in favour of the Plaintiff and hand over vacant possession in respect of the suit property, including the parent title deeds in original.

or

directing the 1st Defendant to execute a deed of re-conveyance in favour of the Plaintiff and handover vacant possession in respect of the suit property to the Plaintiff including the parent tile deeds in original.

- (b) directing the Defendants to repay a sum of Rs.11,40,000/- (Rupees eleven lakhs and forty thousand only) with interest at 12% p.a. from the date of the plaint till the date of realisation.
- (c) directing the Defendants 1 and 2 to repay the sum of Rs.34,00,000/- (Rupees thirty four lakhs only).
- (d) Directing the Defendants 1 and 2 to pay mesne profits to the Plaintiff at Rs.1,00,000/- (Rupees one lakh only) per month from the date of the plaint till the date of handing over of possession.
- (e) directing the Defendants to pay the costs of the suit.

2. CS.No.593 of 2010 has been filed to pass a judgement and decree, against the Defendants:-

- (a) declaring that the Power of Attorney dated 5.2.2010 executed by the Plaintiff in favour of the 2nd Defendant for the property bearing Door No.41B, Pasumarathi Street, Rangarajapuram, Chennai-44, more fully described in the schedule, has been executed under threat and coercion and therefore, the same is void and not binding on the Plaintiff.
- (b) declaring that the sale agreement dated 5.2.2010 executed

by the Plaintiff in favour of the 1st Defendant for the property bearing Door No.41B, Pasumarathi Street, Rangarajapuram, Chennai-44, more fully described in the schedule, has been executed under threat and coercion and therefore, the same is void and not binding on the Plaintiff.

- (c) granting mandatory injunction directing the 1st Defendant to return the original title deed, namely, Document No.4118 of 2009, on the file of the Sub Registrar, Kodambakkam, for the property bearing Door No.41B, Pasumarathi Street, Rangarajapuram, Chennai-44, more fully described in the schedule.
- (d) granting permanent prohibitory injunction, restraining the 1st Defendant from alienating or encumbering or otherwise dealing with the property, namely, house property bearing Door No.41B, Pasumarathi Street, Rangarajapuram, Chennai-44, more fully described in the schedule.

3. Complaint in CS.No.247 of 2010:-

a. The Plaintiff is a Malaysian National and a person of Indian origin, involved in various business activities in Malaysia, owning various companies, of which some are, WARIS, BUMI, GAJAH Sdn-Bhd and Asia Communication and Electronics Sdn-Bhd. The 2nd Defendant is the Plaintiff's sister's son. The 1st Defendant is the wife of the 2nd Defendant. The Plaintiff had incorporated a Company in Malaysia in 1994 called Phoenix Technology Corporation Private Limited. This was also incorporated in India at Bangalore. The brother of the 2nd Defendant was appointed as Director of the said Company. The 2nd Defendant was appointed as Branch In charge for the Branch Office, which was opened at Chennai. The suit property being house, ground and premises, bearing Door No.41/B, Pasumarthy Street, Rangarajapuram, Kodambakkam, Chennai, measuring about one ground and 21 sq.ft. with building erected to an extent of 1700 sq.ft. consisting of ground floor of 800 sq.ft. and first floor of

about 900 sq.ft. was stated by the Plaintiff to have been taken on lease by M/s.Phoenix Technology Corporation Private Limited to be used as a guest house.

b. The Plaintiff had retained a room in the first floor and also the entire second floor. The family members of the 2nd Defendant were permitted to stay in the ground floor and in a portion of the first floor. The Company was incurring losses and it was the Plaintiff, who continued to infuse funds for running of the Company. Subsequently, the Plaintiff was informed that the said property described above was for sale and the Plaintiff had authorised the 2nd Defendant to negotiate purchase of the said property for and on behalf of the Plaintiff. In March 2007, the 2nd Defendant had visited Malaysia and collected an amount of 2,64,500 Malaysian Ringgits, amounting to Indian Rupees 34 lakhs on 2.3.2007. This amount was handed over by the Plaintiff as advance for the purchase of the suit property for the benefit of the Plaintiff. It was informed that the sale transaction will be completed within a year and the total sale consideration was Rs.98 lakhs. The balance of Rs.64 lakhs was to be paid within that period of one year. The Plaintiff, under the instructions of the 2nd Defendant, had purchased a demand draft for Rs.64 lakhs, in favour of the 4th Defendant and handed over it to the 2nd Defendant. The 4th Defendant had encashed the demand draft through ICICI Bank, Nariman Point Branch, Mumbai. This was in April 2008. In addition to the above, the 2nd Defendant had informed that he was in deep financial trouble and accordingly, the Plaintiff had raised a loan of Rs.9.5 lakhs from his friends in India and paid the same to the 1st and 2nd Defendants for redeeming the pledged jewels in the presence of

the Plaintiff's sister and brother in law. The Plaintiff, taking into consideration the close family relationship with the 2nd Defendant, had no reason to doubt the representations and answers of the 2nd Defendant. On 14.1.2010, the Plaintiff received an unsigned letter dated 8.1.2010 from the 2nd Defendant, setting up an agreement of sale in his favour in respect of the suit property. Immediately, on the very same day, the Plaintiff left for India and was shocked to learn that the 2nd Defendant had actually obtained a sale deed in favour of the 1st Defendant in respect of the suit property, which was registered as Document No.4118 of 2009, dated 31.12.2009.

c. The sale consideration in the said documents was shown as Rs.52.6 lakhs. This had been executed by the 2nd Defendant as Power of Attorney Agent of the 3rd Defendant. The Power of Attorney document was dated 2.5.2008 and registered as Document No.860 of 2008. Immediately on coming to know these facts, on 20.1.2010, the Plaintiff had registered a police complaint in Cr.No.51 of 2010 with the Central Crime Branch, Egmore, Chennai. The 2nd Defendant coming to know about the complaint had pleaded with the Plaintiff not to pursue the complaint and also undertook to re-convey the suit property in favour of the Plaintiff. The Defendants 1 and 2 had handed over the original sale deeds dated 31.12.2009 executed by the 3rd Defendant in favour of the 1st Defendant. The Defendants 1 and 2 prepared an agreement of sale in respect of the suit property. The Plaintiff was not given much time and on subsequent legal advise, came to know that the Power of Attorney cannot be acted upon since it should have been compulsorily registered and further the recitals in the agreement of sale in respect of consideration did not

reflect the actual transaction.

d. It had been further stated that the 2nd Defendant was only an employee and acted as an Agent and acted in breach of it. Criminal investigation revealed that a sum of Rs.2 lakhs was withdrawn as cash on 5.2.2007 just before the alleged agreement of sale dated 9.2.2007. A sum of Rs.20 lakhs transferred to the Company had been transferred by the 2nd Defendant to his personal account and he had paid the said amount to the 3rd Defendant. In such circumstances, claiming that the 2nd Defendant had breached his trust, this civil suit had been filed, claiming the reliefs as mentioned above.

4. Written Statement of the 1st and 2nd Defendants in CS.No.247 of 2010:-

(a) In the written statement filed in CS.No.247 of 2010 by the Defendants 1 and 2, it had been stated that it was the 2nd Defendant, who actually developed the business of the Plaintiff at Chennai and since he was winning his confidence, the brother in law of the Plaintiff and others became jealous and spread false stories and rumours about the Defendants 1 and 2. The Plaintiff had started behaving indifferently from September 2009 and the 2nd Defendant dissociated himself from the Plaintiff. The 2nd Defendant had started his own business in the same field. The Plaintiff came to India and filed a false case. The Plaintiff, in collusion with the police forcibly took possession of the original document of the suit property. It had been further stated that the 1st Defendant is the absolute owner of the suit property having purchased the same from the 3rd Defendant from and out of the income earned by the 2nd

Defendant and by selling her jewels and by raising loans from close relatives and friends and from gifts from his parents, brothers and sisters. It had been further stated that the 2nd Defendant had also contributed to the said purchase by getting financial assistance from her parents, close relatives and friends. It had been further stated that the suit property was taken on lease by the Company and actually, it was only taken on lease for the residence of the Defendants 1 and 2. They denied that the Plaintiff retained a room in the first floor and the entire second floor during his stay.

(b) The 2nd Defendant denied having informed the Plaintiff that the suit property was for sale. The 2nd Defendant wanted to purchase the property in the name of his wife and paid an advance on various dates amounting to Rs.21 lakhs. Due to financial crisis, the 2nd Defendant could not pay the balance sale consideration to the 3rd and 4th Defendants who got annoyed and filed eviction petition against the 2nd Defendant. The 1st and 2nd Defendants were able to raise finance and managed to pay the entire sale consideration of Rs.110 lakhs. On receiving the entire sale consideration, the 3rd Defendant executed a Power of Attorney in favour of the 2nd Defendant after declaring that he received the entire sale consideration. Based on the said Power of Attorney, the 2nd Defendant executed the sale deed in favour of the 1st Defendant. The 2nd Defendant admitted having visited Malaysia in March 2007, but denied having collected 2,64,500 Malaysian Ringgits from the Plaintiff. He denied knowledge of payment of Rs.64 lakhs by the Plaintiff to the 4th Defendant. The 1st and 2nd Defendants stated that it is not correct to say that the Plaintiff sent Rs.64 lakhs to the 4th Defendant for the purpose of

purchasing the suit schedule property and put the Plaintiff to strict proof of the same. The 2nd Defendant denied having sent the unsigned letter dated 08.01.2010 to the Plaintiff. Though the sale consideration shown in the sale deed was Rs.52.6 lakhs, a sum of Rs.110 lakhs was paid by the 1st and 2nd Defendants to the 3rd Defendant towards the entire sale consideration. The suit property was purchased by the 1st and 2nd Defendants out of their own funds. They, therefore, claimed that the suit should be dismissed with costs.

5. Written Statement of the 3rd and 4th Defendants in CS.No.247 of 2010:-

(a) In the common written statement filed in CS.No.247 of 2010 by the Defendants 3 and 4, it had been stated that the suit property was originally owned by the 3rd Defendant and he was living in Singapore and the property had been let out on lease to M/s.Phoenix Technology Corporation Private Limited as a Company guest house. The 2nd Defendant used to transact on behalf of the Company and the 3rd Defendant was under the impression that the Company was owned by the 2nd Defendant. However, the 3rd Defendant requested the 2nd Defendant and the Company to vacate the premises as there were some disputes regarding rent. Subsequently, rent control proceedings were also initiated by the 3rd Defendant.

(b) In view of the fact that the 2nd Defendant was claiming to be the representative of the M/s.Phoenix Technology Corporation Private Limited, he informed the 3rd Defendant that he would be willing to purchase the property and further held out that if this offer was not accepted, the rent control proceedings would be dragged on endlessly. The 3rd Defendant then came

down from Singapore to Chennai to execute the sale deed. However, the 2nd Defendant postponed the registration of the sale and instead, asked the 3rd Defendant to execute a Power of Attorney since the 2nd Defendant had paid the entire consideration of Rs.1.10 crores and he need not come back for executing the sale deed and the Power of Attorney could do it. Consequently, without any other option, the 3rd Defendant executed the Power of Attorney in favour of the 2nd Defendant and he also received the payment towards sale consideration. These Defendants denied any knowledge about the plaintiff. They further stated that they are neither necessary nor proper parties in the issues between the Plaintiff and the Defendants 1 and 2. These Defendants, therefore, prayed that the suit should be dismissed against them.

6. Plaint in CS.No.593 of 2010:-

a. This suit had been filed on the ground that since the 1st Defendant wanted to develop his business in India and since the 1st Defendant was the maternal uncle of the husband of the Plaintiff, he requested for opening of an Office at Chennai. The 1st Defendant started a Company in Chennai in the name of M/s.Phoenix Technology Corporation Private Limited. The Plaintiff's husband actively engaged himself in the development of the above Company and his close affiliation to the 1st Defendant drew the ire of the relatives of the 1st Defendant. Subsequently, the 1st Defendant started to behave indifferently and thereafter, after the entire books of account up to May 2009 were inspected by the Auditors, the husband of the Plaintiff and the 1st Defendant decided to part ways. The Plaintiff had further stated that her husband decided to start his own business and the 1st Defendant became panic and came down to India

and foisted a false case against them in Cr.No.51 of 2010 under the active cooperation of the 3rd Defendant, who is the Inspector of Police, Central Crime Branch, Egmore, Chennai. It had been further stated that on 5.2.2010 at 7.30 a.m. at the instigation of the 1st Defendant and with the active cooperation and collusion of the 3rd Defendant, ten policemen came to their house and forcibly took the plaintiff, her husband and also their two years old child and produced them before the 3rd Defendant. The 3rd Defendant informed them that a criminal case has been registered under Sections 408 and 420 of IPC and held out that if the Plaintiff does not produce the original title deeds of the house property, which she had purchased under the sale deed dated 31.12.2009 and registered as Document No.4118 of 2009 in the Office of the Sub Registrar, Kodambakkam, she would be taken into custody thereby leaving the two year old child unattended. Fearing for this, the 3rd Defendant signed an agreement of sale and a Power of Attorney and also handed over the title deeds of the house. Then she sent registered letters to the higher police officials, CM Cell, Chief Justice of Tamil Nadu, the Governor and also the Sub Registrar, Kodambakkam. The 3rd Defendant was then transferred.

b. The Plaintiff and her husband obtained anticipatory bail in Cr.No.51 of 2010. She then sent a notice dated 12.3.2010 to the Defendants, calling upon them to return the original title deeds of the house property and also to return the original Power of Attorney and the original agreement of sale both dated 5.2.2010, to resist from making any alienation or encumbrance over the suit property and to pay compensation of Rs.50 lakhs. The 1st Defendant had sent a reply notice, denying all the allegations. The Plaintiff had further

stated that both the Power of Attorney and the agreement of sale had been prepared in a hurried manner and she had been forced and coerced to sign them. In fact, the 1st Defendant had also signed pages 1 to 3 of the Power of Attorney even though he was not entitled to do so and the agreement of sale reflected that the sale consideration of Rs.64 lakhs had to be paid and out of the same, Rs.53,50,000/- had been paid on the date of the agreement. The Plaintiff had denied both these facts. The Plaintiff therefore had filed the suit for the reliefs as stated above.

7. **Written Statement of the 1st Defendant in CS.No.593/of 2010:-** In the written statement filed in CS.No.593 of 2010 by the 1st Defendant, the 1st Defendant had denied all the allegations in the plaint. In fact, the written statement is the replica of the plaint in CS.No.247 of 2010. However, with a view to complete the pleadings, the written statement of the 1st Defendant is also extracted below.

a. The 1st Defendant had stated that he is a Malaysian National and a person of Indian Origin, having several companies in Malaysia and in 1994, incorporated a Company called M/s.Phoenix Technology Corporation Private Limited at Bangalore. The Plaintiff's husband Ramaraj, who is the 1st Defendant's sister's son was appointed as Branch Incharge of the said Company with monthly remuneration and allowances. The said Company took on rent the suit property and thereafter, the Plaintiff's husband informed that she had opted for sale of the suit property. This Defendant therefore wanted to purchase the same and consideration towards this was given in the following manner:-

- (1) The husband of the Plaintiff Ramaraj visited Malaysia in March 2007, particularly on 2.3.2007 and collected a sum of 2,64,500 Ringgits amounting to Indian rupees 34 lakhs. It was stated that the entire sale consideration was Rs.98 lakhs and the balance Rs.64 lakhs was to be paid within a year.
- (2) In addition to the above, the husband of the Plaintiff stated that he was in deep financial trouble and consequently, this Defendant also advanced a sum of Rs.9.5 lakhs arranged from his various friends.

b. On 14.01.2010, this Defendant received an unsigned letter dated 8.1.2010 from the husband of the Plaintiff. The 1st Defendant was shocked to see the contents of the notice as if the husband of the Plaintiff had purchased the suit property. On the very same day, this Defendant left for India and learnt that the husband of the Plaintiff had obtained the sale deed in favour of his wife the Plaintiff herein. This Defendant was not even permitted to enter into the suit property. He therefore filed a police complaint and the First Information Report in Cr.No.51 of 2010 was registered against the Plaintiff and her husband. Thereafter, the Plaintiff and her husband handed over the original documents to him. They also signed a Power of Attorney and an agreement of sale dated 5.2.2010. However, this Defendant was not acting on the said Power of Attorney or on the sale deed since they had been actually prepared by the Plaintiff and her husband with a view to defraud this Defendant. This Defendant therefore is entitled for re-conveyance of the suit property back to this Defendant and also to refund the excess amount of Rs.45.64 lakhs paid by this Defendant. This Defendant further denied each and every allegation in the plaint and finally stated that the suit should be dismissed as against this

Defendant.

8. Written Statement of the 2nd Defendant in CS.No.593 of 2010:-

The 2nd Defendant in his written statement filed in CS.No.593 of 2010 had also denied the allegations made in the plaint and filed a memo, adopting the written statement of the 1st Defendant.

9. Written Statement of the 3rd Defendant in CS.No.593 of 2010:-

The 3rd Defendant in his written statement filed in CS.No.593 of 2010, had also denied all the allegations in the plaint. The 3rd Defendant claimed that he was Inspector of Police in Central Crime Branch, Egmore, Chennai and in the course of his official duty, registered the First Information Report in Cr.No.51 of 2010 as against the Plaintiff and her husband under Section 420 of IPC on the complaint given by the 1st Defendant. This Defendant was the Investigating Officer and had discharged his duties in his official capacity. The 3rd Defendant had denied each and every allegations in the plaint and claimed that the suit should be dismissed.

10. Issues in CS.No.247 of 2010:- In CS.No.247 of 2010, on perusal of the pleadings of the parties and other materials on record, the following issues were framed for determination:-

1. Whether the present suit is maintainable?
2. Whether the suit has been properly valued and correct court fee has been paid by the Plaintiff?
3. Whether the consideration paid by the Plaintiff was used for purchase of the suit schedule mentioned property?
4. Whether the sale deed dated 31.12.2009 registered as document no.4118 of 2009 is liable to be declared as null and void?

5. Whether the Plaintiff is entitled to mandatory injunction directing the 3rd Defendant to execute the sale deed in respect of the suit schedule mentioned property in his favour?
6. Whether the Plaintiff is entitled to vacant possession of the suit property?
7. Whether the Plaintiff is entitled to consequential relief directing the 1st Defendant to execute deed of re-conveyance of the suit property in his favour?
8. Whether the Defendants are liable to pay Rs.11,40,000/- to the Plaintiff?
9. Whether the Defendants 1 and 2 are liable to pay Rs.34,00,000/- to the Plaintiff?
10. Whether the Defendants 1 and 2 are liable to pay Rs.1,00,000/- per month towards mesne profits to the Plaintiff?
11. Whether the Defendants 3 and 4 are necessary parties?
12. Whether there is any privity of contract between the Plaintiff on the one hand and the Defendants 3 and 4 on the other hand and whether the Plaintiff is entitled to any reliefs against the Defendants 3 and 4?
13. Whether the Plaintiff is entitled to interest? If so at what rate and for what period?
14. Whether the Plaintiff is entitled to costs?
15. To what reliefs the Plaintiff is entitled to?

11. **Issues in CS.No.593 of 2010:-** In CS.No.593 of 2010, on perusal of the pleadings of the parties and other materials on record, the following issues were framed for determination:-

1. Whether the Defendants 2 and 3 are a proper and necessary party to the suit?

2. Whether the 1st Defendant forced the Plaintiff and her husband to produce the original sale deed dated 21.12.2009 registered as Doc.No.4118 of 2009 on the file of SRO, Kodambakkam, with the active collusion and connivance of the 3rd Defendant?
3. Whether the 1st Defendant is not liable to return the original title deed dated 31.12.2009 registered as Document No.4118 of 2009 on the file of SRO, Kodambakkam to the Plaintiff?
4. Whether the Plaintiff is entitled to get a prohibitory injunction decree against the 1st Defendant as prayed for?
5. Whether the 1st Defendant forced the Plaintiff to sign the Power of Attorney dated 5.2.2010 in favour of the 2nd Defendant for the suit property with the active collusion and connivance of the 3rd Defendant?
6. Whether the Power of Attorney dated 5.2.2010 is void or not?
7. Whether the 1st Defendant forced the Plaintiff to execute the sale agreement dated 5.2.2010 in favour of the 1st Defendant for the suit schedule property?
8. Whether the sale agreement dated 5.2.2010 is void or not?
9. Whether the Plaintiff is entitled to get a mandatory injunction against the 1st Defendant to return the sale deed dated 31.12.2009 registered as Document No.4118 of 2009 on the file of SRO, Kodambakkam?
10. Whether the Plaintiff is entitled to cost?
11. To what other reliefs, the Plaintiff is entitled?

12. **The Trial:-** During the trial, this court had directed that joint trial of both the suits may be conducted. Accordingly, the Plaintiff in CS.No.247 of 2010 led evidence as PW.1. The 2nd Defendant in CS.No.247 of 2010 led evidence as DW.1. The other parties in both the suits did not lead evidence. The Plaintiff had marked Exs.P1 to P11 documents and DW.1 had marked

Exs.D1 to D40 documents. This court heard the learned counsel on either side and considered their submissions and also perused the materials placed on record.

13. Issues in CS.No.247 of 2010:- Issue (1):- This issue had arisen because in the written statement in CS.No.247 of 2010, the 2nd Defendant had stated that the Plaintiff had instituted the suit in his individual name, whereas in the pleadings, he had stated that he was running several companies at Malaysia, including a Company called Asia Communication and Electronics Sdn-Bhd and another Company incorporated at Bangalore and having branch office at Chennai by name M/s.Phoenix Technology Corporation Private Limited. It had been further stated in the plaint that this Company took on lease the suit property as a guest house. It had been the further averment in the plaint that a sum of Rs.64 lakhs had been paid to the 4th Defendant by demand draft. The documents had been filed as Ex.P3, Ex.P4 and Ex.P5, which indicate that the said amount of Rs.64 lakhs stated by the Plaintiff to be towards the sale consideration for purchase of the suit property had been drawn from the said Asia Communication and Electronics Sdn-Bhd. It had been, therefore, stated by the learned counsel for the 2nd Defendant that since the said Company is not a party to the suit and since the Plaintiff had instituted the suit in his individual name, the suit is not maintainable.

14. It had also been pointed out that there was no resolution of Asia Communication and Electronics Sdn-Bhd, authorising the Plaintiff either to withdraw Rs.64 lakhs and pay the same to the 4th Defendant or even to purchase the property in India. In this connection, PW.1, who is the Plaintiff,

was cross examined in detail by the learned counsel for the Defendants 1 and 2. PW.1 was very categorical for all the questions put at different junctures during the cross examination that he alone authorised the 2nd Defendant to purchase the suit property for and on his individual behalf. He had further stated during the cross examination that since he was running the Company Asia Communication and Electronics Sdn-Bhd, he was authorised to withdraw the money from the said account and use it for purchase of the suit property. He had specifically stated during the cross examination on 27.9.2013, "I am entitled for drawing funds from the Company and I can send funds through the Company" and again stated, "I have sent the money under Ex.P3 for the purchase of house for myself". Further, he had also stated during the cross examination on 3.10.2013 to the specific questions as follows:-

"Q: Whether any of your companies controlled by you from whom you have drawn funds on your account has authorised you to file any suit or proceeding in India as well as criminal on behalf of the various disclosed companies as against the Defendants 1 to 4 herein, Is there any such resolutions passed by the companies?

A: In this suit my companies have nothing to do. I am drawing money from my company as per the conditions of Registrar of Companies Malaysia and I am buying the property for me.

Q: If your companies audited statement are furnished before this court, it would indicate about the payment made to Malathy for the purchase of the suit property?

A: The funds are sent by me for purchase of property in my name.

Q: May I take it that you had funded your personal funds for the purchase of the property?

A: The money sent through the bank is through my Company but it is my money drawn by me? "

It is, therefore, clear that the Plaintiff had an intention to purchase the suit property in his name alone and therefore, he had instituted the suit in his individual capacity. I, therefore, hold issue (1) in favour of the Plaintiff and accordingly, hold that the suit is maintainable as framed.

15. **Issue (2):-** CS.No.247 of 2010 had been filed as stated above for the reliefs mentioned at the beginning of this judgement. The Plaintiff, for the purposes of court fee and jurisdiction, had valued the relief in prayer (a) at Rs.52,60,000/- and had paid the court fees under Section 25(a) of the Tamil Nadu Court Fees and Suit Valuation Act 1955 read with Appendix 1A of the High Court Fee Rules. This has been challenged by the learned counsel for the 2nd Defendant. It has to be pointed out that Section 25 actually relates to suits for declaration, deals with relief sought for declaration and for possession, which is the specific relief the Plaintiff has sought. I find no infirmity on this aspect. The learned counsel for the 2nd Defendant stated that the relief for declaration can be sought only when there is a cloud over the title. He argued that the Plaintiff did not have any title at all and consequently, the suit is not maintainable. In so far as the valuation of the court fee is concerned, the reliefs sought by the Plaintiff are the reliefs he seeks and for the reliefs which the Plaintiff seeks, necessary court fee had been paid. Even if the court feels that adequate court fee has not been paid, Order 7 Rule 11(b) and (c) does not apply to the Original Side of the High Court, in view of the Order 49 of CPC and under Order 3 Rule 11 of the Original Side Rules, if this courts comes to a conclusion that the court fee paid is not sufficient, then the matter has to be

remitted back to the Taxing Officer to determine the actual court fees payable and opportunity must be granted to the Plaintiff to pay necessary court fee. That step is not necessary in this case. Here, the Plaintiff had valued the suit in accordance with the reliefs which he has sought and had paid the court fee in accordance with the Tamil Nadu Court Fees and Suit Valuation Act 1955 and I find no infirmity or reason to non suit the Plaintiff. Consequently, issue (2) is also answered in favour of the Plaintiff.

16. Issue (3):- This issue, as to whether the consideration paid by the Plaintiff to the 2nd Defendant in trust was used by the 2nd Defendant for purchase of the suit property in the name of the 1st Defendant, is the primary issue around which the entire suit revolves.

17. It is the case of the Plaintiff that he wanted to purchase the suit property when he was informed by the 2nd Defendant that the landlord wanted vacant possession and consequently, they were to vacate the premises. The Plaintiff had authorised the 2nd Defendant to negotiate for the purchase of the suit property. It must be kept in mind that the Plaintiff is an Malaysian Citizen of Indian origin. He had put full faith on the 2nd Defendant, who was the Manager, residing at the suit premises. It was the 2nd Defendant, who was interacting with the Defendants 3 and 4. As between the Defendants 3 and 4, they being husband and wife, it was not to the direct knowledge of the Plaintiff as to who was the actual owner. This predicament of the Plaintiff is understandable. The Plaintiff had not seen the title deeds of the property to know the actual owner of the property. There is no evidence and it is also not the case of the 2nd Defendant that he had handed over the title deeds to the

Plaintiff and had clarified as to who was the exact owner. The 2nd Defendant had only stated that the property was for sale. It must also be kept in mind that the Defendants 3 and 4 had also initiated rent control proceedings in RCOP.No.1355 of 2007 on the file of the 12th Judge, Court of Small Causes, Chennai. In fact, the order in the said RCOP dated 10.3.2008 had been filed as Ex.D20 and the decreetal order had been filed as Ex.D21. A perusal of Ex.D20 and Ex.D21 revealed that the rent control proceedings had been initiated by Vijayaraghavan Malathy, as the Power of Attorney Agent of R.Vijayaraghavan. This naturally means that the 4th Defendant, V.Malathy was acting as the Power of Attorney Agent of the 3rd Defendant, who is her husband. The order and the decreetal order is dated 10.3.2008. The proceedings had been initiated much earlier and it is seen from the cause title that the proceedings were initiated in the year 2007 itself. Therefore, to the limited knowledge of the Plaintiff, it had been projected to him that the 4th Defendant was the owner of the suit property. This apart, the Plaintiff had stated that he had sent money for the specific purpose of purchase of the suit property and in this regard, he had stated that he was originally informed that the total sale consideration was Rs.98 lakhs. This sum of Rs.98 lakhs, according to the Plaintiff, was also paid by him. Initially, he had stated in his plaint that in March 2007, the 2nd Defendant visited Malaysia and collected Malaysian Ringgits 2,64,500, equivalent to Rs.34 lakhs in cash. The balance of Rs.64 lakhs, according to the Plaintiff, was paid by demand draft in April 2008 favouring the 4th Defendant. In paragraph 21 of the written statement of the Defendants 1 and 2, the 2nd Defendant had admitted that he had visited Malaysia in March 2007,

but denied that he collected a sum of 2,64,500 Malaysian Ringgits on 2.3.2007. This transaction, in entirety, has been challenged by the learned counsel for the 2nd Defendant, who in very strong terms stated that this plea of the Plaintiff itself is illegal and should not be upheld by the court. In fact, the learned counsel further stated that this amounted to illegal handing over of money in a foreign country for purchase of property in India and the Plaintiff had not obtained any permission either from the Reserve Bank of India or under the Rules of the Malaysian Government to purchase the property in India.

18. With respect to the consideration, according to the learned counsel for the Plaintiff, this payment by the Plaintiff to the 2nd Defendant was towards payment of advance sale consideration for the suit property. However the learned counsel for the 2nd Defendant had, as pointed out above, very strongly contested the said claim. According to him, this payment had been made at Malaysia and it is a clear case of hawala transaction since the said amount had been paid without obtaining necessary permission from the Reserve Bank of India either for payment of such amount or for purchase of property by a Malaysian Citizen of Indian origin. Even before going into further details regarding the said payment, the learned counsel for the 2nd Defendant had very strenuously and consistently relied on the decision of the Division Bench of this court reported in **1996 1 CTC 620 (Shoba Viswanathan Vs. D.P.Kingsley)**.

19. In the said decision, in an Original Side Appeal, the Division Bench of this court, while considering a suit for specific performance, had observed that in an agreement of sale entered into with a non citizen and when

it is transpired that permission had not been obtained from the Reserve Bank of India for sale, the relief for specific performance was discretionary and further since the purpose of the Foreign Exchange Regulations Act, which was prevalent at that point of time, was to ensure economic health of the Nation, the Court has to take into consideration the statutory rights of the Reserve Bank of India and national interest and finally held that enforcement of a contract against the provisions of law will amount to enforcement of illegal contract. On those grounds, the Division Bench of this court had negated the claim seeking specific performance of the said agreement.

20. The learned counsel for the 2nd Defendant, relying on the said decision, had stated that in this case also, the Plaintiff is a Malaysian Citizen of Indian origin, who wanted to purchase a property in his name and for that purpose, had claimed to have given an amount in Malaysian Ringgits of 2,64,500 equivalent to Rs.34 lakhs in Indian currency at Malaysia to the 2nd Defendant. The learned counsel had stated that the said payment cannot be recognized as a legal tender by the Court and consequently, urged this court to follow the principles laid down by the Division Bench of this court cited supra, which held that consideration is in pursuance of a illegal contract.

21. The learned counsel for the Plaintiff in his reply argument countered this stand on the ground that the Foreign Exchange Regulation Act, which was prevalent in 1996, had been repealed and a new legislation Foreign Exchange Management (Acquisition and transfer of immovable property outside India) Regulations, 2000 had been brought into force. The learned counsel had stated that in the said Regulation, a person of Indian origin, residing outside

India, under Section 4 can acquire any immovable property other than agricultural land/farm house/plantation property in India by purchase from and out of the funds in non resident account maintained in accordance with the provisions of the Act and the Regulation made by the Reserve Bank of India under the Act.

22. Before going into the legality or otherwise of the advance amount as claimed by the Plaintiff in Malaysian Ringgits to the 2nd Defendant, this court should again revisit the pleadings on this aspect. In the plaint, it had been stated by the Plaintiff that in March 2007, the 2nd Defendant visited Malaysia and collected a sum of 2,64,500 Ringgits amounting to Rs.34 lakhs on 2.3.2007, which was to be paid as advance for purchase of the suit property in the name and for the benefit of the Plaintiff. With respect to this specific averment, the 2nd Defendant in his written statement had denied them as absolutely false. While admitting that the 2nd Defendant visited Malaysia in March 2007, he categorically denied that he collected a sum of 2,64,500 Ringgits on 2.3.2007 as wrongly alleged in the plaint and therefore, the Plaintiff in strict proof of the same.

23. It is seen from the above that the only fact, which emerges, is the visit of the 2nd Defendant to Malaysia in March 2007. With respect to the payment in Malaysian Ringgits, PW.1, who was cross examined very extensively by the learned counsel for the Defendants, was cross examined as follows:-

“Q: Did you by any chance gave money to your nephew for the purchase of the property?

A: I have given him cash. He collected money equivalent to Rs.34 lakhs from me and I have sent money to the Company and I also sent money for the purchase of property at the instruction of the 2nd Defendant to Madam Malathy the 4th Defendant.”

24. Thereafter, after several further cross examinations of PW.1, the following questions and answers had been recorded in the cross examination of PW.1:-

“Q: How did you make the payment of Rs.34 lakhs and when did the 2nd Defendant meet you in Malaysia?

A: Some time in March or April 2007. The 2nd Defendant collected cash from me in Malaysia.

Q: Did you give it to him in Indian currency or Ringgets?

A: I gave it in Ringgets.

Q: Is it permissible in your country to send money of that country's currency through carrier or a person?

A: There is no such prohibition for making such payments in currency in Malaysia.

Q: I put it to you that transfer of funds without the permission of Public Bank in Malaysia is prohibited by Law?

A: I deny the suggestion.

Q: I suggest to you that if you had transferred funds illegally violating the laws which are prevalent in Malaysia as well as laws prevalent in India, no suit shall lie for recovery of such amounts since the same are opposed to public policy and forbidden by law?

A: I deny the suggestion.

25. From the above, even though the 2nd Defendant had widened the scope of the suit, inviting the court to give a finding with respect to the

legality of the payment in Malaysian Ringgits, it is to be primarily determined whether the said payment was actually part of the sale consideration of the sale deed, which is challenged by the Plaintiff. The sale deed had been marked as Ex.P7 and it is seen that it had been registered for a value of Rs.52,60,000/- on 31.12.2009. Payment in Malaysian Ringgits was in March 2007 and even if this court were to give any finding on the legality or otherwise of the said payment, the said finding would have no direct impact on the sale consideration since the Plaintiff has further strengthened his case by giving the details of further payments made towards the sale consideration. According to the Plaintiff, he had further paid a sum of Rs.64 lakhs by demand draft, which is Ex.P3, on 16.4.2008 in favour of the 4th Defendant, who is the wife and Power of Attorney of the 3rd Defendant. The said demand draft had been encashed by the 4th Defendant and the Bank Account had been filed as Ex.P4. It had been further brought on evidence that on 5.2.2007 a sum of Rs.2 lakhs had been withdrawn by the 2nd Defendant and this is shown in Ex.P1. This is important because the 2nd Defendant had claimed to have paid an advance of Rs.1 lakh to the 4th Defendant on 9.2.2007. In this regard, during the cross examination of DW.1, this aspect was questioned and answered as follows:-

Q: Do you agree that on 5.2.2007, you had withdrawn Rs.2 lakhs from M/s.Phoenix Technology Corporation Private Limited 4 days prior to the alleged agreement (Ex.D18) with Malathy?

A: I have not withdrawn the amount, but only M/s.Phoenix Technology Corporation Private Limited has withdrawn the amount. I countersigned in the cheque for that withdrawal.

26. It is, however, seen and it is a fact that from the money

transferred by the Plaintiff to M/s.Phoenix Technology Corporation Private Limited account, which is given at Ex.P1 on 6.6.2007, a sum of Rs.20 lakhs had been transferred by the 2nd Defendant to his personal account and from his personal account, he had paid Rs.15 lakhs to the 4th Defendant through cheque no.174682 on 8.6.2007 and a further sum of Rs.5 lakhs through cheque no.174683 on 11.6.2007 which reflected in Ex.P2 and in Ex.D38 (Series). With respect to these transactions, DW.1 during his cross examination, had stated as follows:-

Q: In Ex.D38 (series) the entry on 6.6.2007 is a transfer of Rs.20 lakhs from M/s.Pheonix Technology Corporation Private Limited account to my account. Do you agree?

A: Yes, but it is only reimbursement from M/s.Phoenix Technology Corporation Private Limited.

Q: I put it to you that subsequent to the transfer of Rs.20 lakhs by cheque no.174682 a sum of Rs.15 lakhs and by cheque no.174683 a sum of Rs.5 lakhs has been paid to Mrs.V.Malathy?

A: I have paid to Malathy. The said amount belongs to me.

Q: Do you agree that Rs.20 lakhs cheque was signed by you on behalf of M/s.Phoenix Technology Corporation Private Limited payable to yourself which was encashed in your account on 6.6.2007?

A: After getting approval from A.P.Jayaseelan, I countersigned the cheque along with the local Director.

27. The 2nd Defendant has given as source for payment of sale consideration that he made a payment of Rs.10 lakhs by cash on 9.2.2007 to the 4th Defendant and a further payment of Rs.5 lakhs on 9.2.2007. It is these payments which are reflected in Ex.P2 by cheque no.174682 dated 8.6.2007

and cheque no.174683 dated 11.6.2007. I hold that the claim of passage of consideration points to the probability that the Plaintiff had transferred sums of money with an intention to purchase the property and instead of purchasing the property in the name of the Plaintiff, the 2nd Defendant had purchased the suit property in the name of his wife, the 1st Defendant. The claim of the 2nd Defendant that he had independent source of income has not been established to the satisfaction of the court. The learned counsel for the 2nd Defendant had challenged the payment by demand draft of Rs.64 lakhs and stated that the purpose for which it had been paid was for purchase of goods and not for capital transaction. This court cannot come to any conclusion in the absence of evidence as to whether Rs.64 lakhs was paid for purchase of any goods. It is a fact that demand draft for Rs.64 lakhs was sent to the 4th Defendant, who also encashed the same. The application for remitting the said Rs.64 lakhs had been filed as Ex.P3 and the said document had been filed along with the plaint. It is further seen that the Defendants have no claim of benami transaction as a defence in their written statement. To substantiate the payments, the Plaintiff had filed Ex.P1 being a certified copy of the statement of account of M/s.Phoenix Technology Corporation Private Limited maintained with the Catholic Syrian Bank for the period from 1.1.2005 to 31.12.2010. A careful perusal of the same reveals that there is reflection of payment of various sums of money to the 4th Defendant and also withdrawal of Rs.2 lakhs and this correspond to Ex.D38 (Series)

28. A reappraisal of the discussion, particularly with respect to the handing over of Malaysian Ringgits, reveals that there are two aspects in this

regard. The first aspect is handing over of the Malaysian Ringgits amounting to Rs.34 lakhs to the 2nd Defendant at Malaysia. There being no proof or admissible proof for the same, apart from the statement of the Plaintiff and denial of the 2nd Defendant, this court on the basis of such weak oral evidence, cannot come to any conclusion in favour of the Plaintiff. The second aspect is that the learned counsel for the 2nd Defendant had stated that handing over of this money at Malaysia for purchase of the property in India would amount to an illegal transaction. Here, I would like to differ from the views expressed by the learned counsel for the 2nd Defendant. To invite a finding that the handing over of cash in the form of Malaysian Ringgits is illegal, would imply that he would have to admit primarily, handing over and receipt of money and only then can the transaction be claimed to be illegal.

29. Probing a little deeper, it is seen that on the one hand, the 2nd Defendant has denied that he received Rs.34 lakhs in Malaysian Ringgits on 2.3.2007 at Malaysia from the Plaintiff. On the other hand, he had stated that handing over of the said sum is an illegal transaction. This naturally means that he has to admit receipt and then claim that the court cannot enforce any agreement based on such receipt, since the handing over is an illegal act. The 2nd Defendant cannot vacillate between two stands. It is for that reason, I hold that legality or illegality will arise only when a transaction happens. In the absence of any transaction, the court need not go into the legality or illegality of a non event. It is to be further seen that the object of the handing over the said money was for purchase of a property by the Plaintiff from the Defendants 3 and 4. Ultimately, the vendors are the Defendants 3 and 4 and the purchaser

should have been the Plaintiff. The 2nd Defendant had come into the picture only because the Plaintiff put full faith in him and authorised him to negotiate the sale on his behalf with the Defendants 3 and 4. Instead of negotiating the purchase of the property in the name of the Plaintiff, according to the Plaintiff, the 2nd Defendant managed to obtain a Power of Attorney from the 3rd Defendant in his name and thereafter, executed a sale deed not in favour of the Plaintiff, but in favour of his wife, the 1st Defendant. A further analysis of the sequence of events reveals the follows:-

- i. The Defendants 3/4 are the owners of the suit property.
- ii. The 3rd Defendant was stated to be the actual owner.
- iii. The 4th Defendant was the Power of Attorney of the 3rd Defendant.
- iv. The 2nd Defendant is said to have received a sum of Rs.34 lakhs in Malaysian Ringgits on 2.3.2007.
- v. The Plaintiff had purchased a demand draft in the name of the 4th Defendant for Rs.64 lakhs.
- vi. There has been transfer of funds from the account of M/s.Phoenix Technology Corporation Privated Limited to the account of the 2nd Defendant and then payments have been made to the 4th Defendant.

30. It is seen on analysis of the evidence that even if the payment of Rs.34 lakhs in Malaysian Ringgits is left out, since there is inadequate proof of the same, the Plaintiff had produced Ex.P3, P4 and P5 for purchase of the demand draft for Rs.64 lakhs. This again has been very seriously challenged by the 2nd Defendant. Ex.P3 is an application for remittance in the name of May Bank for Rs.64 lakhs in Indian Rupees and the name of the agent is ICICI

Bank Limited and the name of the Branch is Prestige Heridian. The name of the debit is to the account No.000405075280 with the account of Nariman Point Branch of the 4th Defendant V.Malathy. It has been purchased by Asia Communication and Electronics Sdn-Bhd in the name of the Company. As stated above, in issue (1), the Plaintiff has very categorically stated that it is his money which is in the Company account which he has withdrawn for the purchase of the demand demand for Rs.64 lakhs. The primary aspect on which this transaction has been challenged is the purpose for which the draft has been taken. In Ex.P3, there are five different purposes given, viz. (1) goods, (2) services, (3) capital transactions, (4) special transactions and (5) current transfer. It has been pointed out by the learned counsel for the 2nd Defendant that in Ex.P3 the purpose for payment has been given as goods and not capital transactions. It had been further stated by the learned counsel for the 2nd Defendant that the 3rd Defendant had business interest in Indonesia and therefore, this is a transaction for purchase of goods by the 3rd Defendant and it is not for purchase of suit property. The name in which the draft has been taken is the 4th Defendant. If the purpose for which it has been taken is to be disputed, it is the 4th Defendant or at most the 3rd Defendant who has to dispute the payment. It does not lie in the mouth of the 2nd Defendant to point out mistakes in a transaction as between the Plaintiff and the 4th Defendant. Rigour and vigour of the submissions of the learned counsel for the 2nd Defendant itself shows that he was very apprehensive on this aspect.

31. As stated above, the Plaintiff during the cross examination has very clearly stated that the said money was actually only for the purpose of

purchase of the suit property. There are no evidence on record regarding any business transactions as between the 3rd Defendant and the Plaintiff. There is only evidence to show that the Plaintiff had necessity to purchase a demand draft for a huge sum of Rs.64 lakhs in the name of the 4th Defendant for the purpose of purchasing the suit property. In this connection, the rent control proceedings evidenced by Ex.D20 and D21 have to be recalled to memory and a perusal of the cause title shows that the 4th Defendant in her capacity as Power of Attorney of the 3rd Defendant had initiated the rent control proceedings. Consequently, it is only natural that in the eyes of the Plaintiff, the 4th Defendant had a controlling interest over the property and I hold that for purchase of the suit property, he had taken a demand draft in her name. Moreover, from Ex.P4 it is clear that the 4th Defendant had negotiated the demand draft and had utilised the same and has brought the amount to her account. It is totally inconceivable that any ordinary man much less a business man will part with a huge amount of Rs.64 lakhs without any specific purpose. In this case, the Plaintiff has been very categorical that it was towards purchase of the suit property. When there are two versions given, namely, "towards purchase of property" and "towards purchase of goods" and when the property, namely, suit property, is shown as the subject matter of the entire litigation and when by contrast there are no "goods" at all mentioned in any of the pleadings by any of the parties, this court has to come to the only conclusion that this amount was for purchase of the suit property alone.

32. It had been further stated by the Plaintiff that he had also given further amounts to the 2nd Defendant towards the purchase of the suit property.

In this connection, Ex.P1 and Ex.P2 are very relevant. It is the contention of the Plaintiff that on 5.2.2007, a sum of Rs.2 lakhs had been withdrawn in cash from the account of M/s.Phoenix Technology Corporation Private Limited in A/c.No.000116 with Catholic Syrian Bank, Kodambakkam, Chennai. Again on 6.6.2007, a sum of Rs.20 lakhs had been transferred to the account of the 2nd Defendant, which is reflected in Ex.P2 and thereafter, there had been payment made on 8.6.2007 for Rs.15 lakhs and again on 11.6.2007 for Rs.5 lakhs to the 4th Defendant. In fact, when the 2nd Defendant challenged the purchase of demand draft for Rs.64 lakhs in the name of the 4th Defendant, it is seen that he had himself transferred a sum of Rs.20 lakhs only to the 4th Defendant. If the 4th Defendant had no manner of title or interest over the suit property, there was no necessity for the 2nd Defendant to transfer money to her. I again hold that the transfer was for the purchase of the suit property and the consideration had flowed from the Plaintiff.

33. Ex.D18 is a sale agreement dated 9.2.2007 entered into between the 4th Defendant and the 2nd Defendant. In the said agreement, the 3rd Defendant is represented by the 4th Defendant in her capacity as Power of Attorney. There are endorsements with respect to payment of advance amounts by the 2nd Defendant. These endorsements have been challenged by the learned counsel for the Plaintiff by pointing out that there is no date in any of the endorsements Ex.D18(a) or Ex.D18(b). This has to be contrasted with the pleadings in the written statement that a sum of Rs.21 lakhs was paid as advance on various dates. However, in the proof affidavit, the 2nd Defendant had improved his version by stating that a sum of Rs.1 lakh was paid on

9.1.2007 and a sum of Rs.10 lakhs and Rs.5 lakhs were paid by cash pursuant to the endorsement on 9.2.2007. However, a careful perusal of Ex.P1 and Ex.P2 reveals that on 5.2.2007 just four days prior to the agreement of sale dated 9.2.2007, the 2nd Defendant had withdrawn Rs.2 lakhs from the Company's account. Again on 8.6.2007 and on 11.6.2007, he had transferred Rs.15 lakhs and Rs.5 lakhs to the 4th Defendant. A sum of Rs.20 lakhs had actually been transferred by him from Ex.P1 to Ex.P2 a few days prior on 6.6.2007. Consequently, it is very evident that the entire amount of advance of Rs.1 lakh at the time of Ex.D18 and further advance of Rs.20 lakhs had flown only from the account of M/s.Phoenix Technology Corporation Private Limited, in effect from the Plaintiff. In this connection, a further perusal of Ex.P2, the account of the 2nd Defendant, reveals that the 2nd Defendant was not possessed of Rs.52 lakhs at any point of time.

34. According to the 2nd Defendant, the consideration was paid by him (1) out of income earned by the 2nd Defendant, (2) by selling jewels of the 1st Defendant, (3) by raising loans from close relatives and friends, (4) by getting gifts from the parents, brothers and sisters of the 1st Defendant and (5) by getting financial assistance from the parents, close relatives and friends of the 2nd Defendant. I hold that there is absolutely no admissible or legally acceptable evidence on any of these aspects. The Defendant had produced only Ex.D37 in which it has been stated that the property has been purchased out of jewels given to the 1st Defendant of 325 sovereigns at the time of marriage in 2003 and there was agricultural income of Rs.10 lakhs given by the mother. I reject the contention that this assessment should invite a finding that

the 2nd Defendant had purchased the property from his own funds. In fact in Ex.D37, the nature of business of the 2nd Defendant is shown as travel agent. There is no evidence produced before this court with respect to the possession or sale of jewels of 325 sovereigns. There is no evidence of agricultural holding, much less, income of Rs.10 lakhs allegedly given by the mother. The assessment order conveys no meaning. Before this court, the 2nd Defendant has to establish that he and the 1st Defendant also had paid the entire sale consideration. There is a very strong obligation on his part to prove the same before this court. The assessment order by an Income Tax Officer cannot be used for this purpose without any documents to substantiate the same. I hold that the 2nd Defendant had not produced any iota of proof to show that he had financed or was in possession of necessary finance to purchase the suit property. For all these reasons, I hold that the entire consideration had flowed from the Plaintiff towards the purchase of the suit property. Issue (3) is answered accordingly.

35. Issue (4):- This issue relates to whether the sale deed dated 31.12.2009 registered as Doc.No.4118 of 2009 is liable to be declared as null and void. To determine this issue, the facts will have to be re-analysed. The Plaintiff in CS.No.247 of 2010 is a Malaysian National and a person of Indian Origin. He owns various businesses in Malaysia and had incorporated a Company in 1994 called M/s.Phoenix Technology Corporation Private Limited in India at Bangalore. The Plaintiff had also various other companies at Bangalore, called WARIS, BUMI, GAJAH Sdn-Bhd and Asia Communication and Electronics Sdn-Bhd. The 2nd Defendant, who had been examined as

DW.1 in the case and who is primarily challenging the case of the Plaintiff is his sister's son. This Company at Bangalore was run by D.Kamaraj, who was appointed as a Director and the 2nd Defendant is the brother of said D.Kamaraj. The said Company was engaged in the business of manufacturing and selling of wireless telephones as well as railway signalling tracks. The said Company had opened a branch Office at Chennai and the property, which is the subject matter of this suit, bearing Door No.41/B, Pasumarathi Street, Rangarajapuram, Chennai, measuring about one ground and 21 sq.ft was taken on lease by the said Company. The 2nd Defendant was placed as incharge of the branch and the Plaintiff is said to have retained a room in the first floor and also the entire second floor. The Defendants 1 and 2 were permitted to stay in the ground floor and in a portion of the first floor. The owner of the said property was the 3rd Defendant. The 4th Defendant is the wife of the 3rd Defendant.

36. Two factors are established, viz. (1) the 2nd Defendant was working under the Plaintiff as Branch Incharge of the Company called Phoenix Technology Corporation Private Limited and (2) the said Company was taken on lease the suit property as a guest house. To establish the fact that the 2nd Defendant was actually employed as the Branch Incharge under the Plaintiff herein, the Plaintiff had filed a series of documents, namely, salary slips paid to the 2nd Defendant. These documents were marked as Ex.P11. Ex.P11 are pay slips for payment to the Catholic Syrian Bank, Kodambakkam Branch, Chennai. These had been filed by the Plaintiff to establish the fact that the 2nd Defendant was working under him. This leads to a conclusion that the 2nd Defendant was

acting in a fiduciary capacity under the Plaintiff. He was also a relative of the Plaintiff in Chennai and had been permitted to stay in the suit property.

37. It is seen that by the sale deed dated 31.12.2009, registered as Doc.No.4118 of 2009, the 2nd Defendant had however sold the suit property to the 1st Defendant. This sale deed had been marked as Ex.P7 and also as Ex.D5. A perusal of the same shows that the 3rd Defendant represented by the 2nd Defendant as his Power of Attorney Agent had sold the property to the 1st Defendant, who is the wife of the 2nd Defendant. In effect, even though there is no specific bar and law recognizes separate status as between the husband and wife, the husband, namely, the 2nd Defendant had sold the property to his own wife, the 1st Defendant.

38. With respect to the consideration, it had been stated that the consideration was fixed at Rs.52,60,000/- and that the said consideration had been paid and on payment of the said consideration, the property had been sold. There is no mention about the manner in which the consideration had been paid. There is also no mention whether it was paid by cash or whether it was paid through a negotiable instrument. There is also no mention whether any advance was paid. On the other hand, the Defendants themselves produced Ex.D18, which is the agreement of sale entered into by the 4th Defendant in favour of the 2nd Defendant, dated 9.2.2007 for purchase of the very same property. The 2nd Defendant relies on the said agreement. It has been established that the said agreement is dated 9.2.2007 and on 5.2.2007, the 2nd Defendant had withdrawn a sum of Rs.2 lakhs as cash. An advance of Rs.1 lakhs was paid on 9.2.2007 by the 2nd Defendant to the 4th Defendant.

Similarly, though there is no date, on 8.6.2007, a further advance of Rs.15 lakhs was paid by the 2nd Defendant to the 4th Defendant and on 11.6.2007, another sum of Rs.5 lakhs was paid by the 2nd Defendant to the 4th Defendant. It is seen from Ex.P1 that on 6.6.2007 just a few days prior to these advances, the 2nd Defendant had transferred a sum of Rs.20 lakhs from the account of M/s.Phoenix Technology Corporation Private Limited, which Company is financed entirely by the Plaintiff. Thus, the source of money of advance by the Plaintiff is clearly determined. When the 2nd Defendant relies on the agreement of sale by which he had paid a sum of Rs.21 lakhs as advance, it is very strange that in Ex.P7/Ex.D5 sale deed, there is no mention about any advance. Moreover, Ex.P7/Ex.D5 had been executed by the 2nd Defendant in favour of the 1st Defendant in his capacity as Power of Attorney Agent of the 3rd Defendant. The said Power of Attorney had been produced as Ex.D39 (series). It is dated 2.5.2008. In the said Power of Attorney, there is again no mention about the consideration. Be that as it may, the sale deed is now challenged by the Plaintiff.

39. The Plaintiff ought to have been more prudent and vigilant. He cannot hide himself behind a shield of misplaced trust. That he has transferred money to the 2nd Defendant is evident. The dates are crucial. The relevant dates are 5.2.2007, 9.2.2007, 2.3.2007, 8.6.2007, 11.6.2007 and April 2008. The sale deed is dated 31.12.2009. The Plaintiff cannot stretch naivety for a period of more than 2 ½ years. There is no illegality surrounding the document on the face of it. The consideration has flowed from the Plaintiff. It is to be kept in mind that the Plaintiff has not taken a single step towards exercising his

rights as a prudent man should do when he has parted with consideration. He cannot claim that filing of a suit, nearly 1 ½ years after the date of the last payment, purchase of draft for Rs.64 lakhs must absolve his duties. I hold that the Plaintiff has to fall on his own shortcomings.

40. If the 2nd Defendant had committed fraud as against the Plaintiff, then the Plaintiff can be adequately compensated with the amount, which he claims to have been defrauded. On evidence, if we are to reject the payment of Rs.34 lakhs by Malaysian Ringgits, it is on evidence that the Plaintiff had paid a sum of Rs.21 lakhs and a further sum of Rs.64 lakhs to the 4th Defendant through the 2nd Defendant. But, the value in the sale deed is Rs.52,60,000/-. That alone can be taken as the consideration towards the purchase of the suit property by this court. I hold that the sale deed cannot be cancelled. This is also because of the extraordinary time gap between 2007 and 2009 and the naivety of the Plaintiff to be in a state of inertia right through the above period and then claim trust was betrayed. Subsequent balance of convenience must be considered by the court. In exercising power under Order 7 Rule 7 of CPC, I am emboldened by the following observation of the Honourable Supreme Court reported in 1975 AIR 1409 (Pasupuleti Venkateswarlu vs The Motor & General Traders):-

“ It is basic to our processual jurisprudence that the right to relief must be judged to exist as on the date a suitor institutes the legal proceeding. Equally clear is the principle that procedure is the handmaid and not the mistress of the judicial process. If a fact, arising after the lis has come to court and has a fundamental impact on the right to relief for the manner of moulding it, is brought diligently to the notice of the tribunal, it cannot blink at it or be blind to events which stultify or render inept the decretal remedy. Equity justifies bending the rules of

procedure, where no specific provision or fairplay is violated, with a view to promote substantial justice--subject, of course, to the absence of other disentitling (actors or just circumstances. Nor can we contemplate any limitation on this power to take note of updated facts to confine it to the trial Court. If the litigation pends, the power exists, absent other special circumstances repelling resort to that course in law or justice. Rulings on this point are legion, even as situations for applications of this equitable rule are myraid. We affirm the proposition that for making the right or remedy claimed by the party just and meaningful as also legally and factually in accord with the current realities, the court can, and in many cases must, take cautious cognisance of events and developments subsequent to the institution of the proceeding provided the rules of fairness to both sides are scrupulously obeyed."

But, in order to do substantial justice, I further hold, exercising power under Order 7 Rule 7 of CPC, that on the other hand, the 2nd Defendant is bound and liable to pay to the Plaintiff, the value in the sale deed, namely, Rs.52,60,000/- with interest at 18% per annum from the date of the plaint till the date of decree and thereafter at 6% per annum from the date of the decree till the date of realisation. In this case, dispensing substantial justice would justify repayment of the amount back to the Plaintiff and the court cannot cancel the sale deed. Therefore, this issue is answered to the effect that the sale deed dated 31.12.2009 registered as Document No.4118 of 2009, cannot be cancelled, but however, the 2nd Defendant is due and liable to pay the Plaintiff a sum of Rs.52,60,000/- with interest at 18% per annum from the date of the plaint till the date of decree and thereafter at 6% from the date of decree till the date of realisation.

41. Issues (5), (6) and (7):- Since this court had held that the sale deed dated 31.12.2009 registered as Doc.No.4118 of 2009 and produced as Ex.P7/D5 cannot be cancelled, the Plaintiff is not entitled to mandatory

injunction as sought for and also for vacant possession of the suit property and also for any consequential relief directing execution of reconveyance of the suit property in favour of the Plaintiff. These issues are answered against the Plaintiff.

42. **Issue (8):-** With respect to this issue, the learned counsel for the Plaintiff has made an endorsement that he was not pressing the issue as against the Defendants 3 and 4. Even other wise this issue arises from the difference in the sale consideration between Rs.64 lakhs sent by way of demand draft and the amount shown in the sale deed namely, Rs.52,60,000/- Again the amount of Rs.64 lakhs was sent directly to the Plaintiff to the 4th Defendant and therefore, the 1st and 2nd Defendants cannot be called upon to repay back the difference to the Plaintiff. This issue is answered against the Plaintiff.

43. **Issue (9):-** It has already been discussed and held that there is no direct proof that the Plaintiff had paid to the 2nd Defendant a sum of Rs.34 lakhs in Malaysian Ringgits at Malaysia. The 2nd Defendant had also denied receiving any such payment. It is for the Plaintiff to establish the source of money and the actual fact that he was possessed of that particular amount of money on a date in proximity close to 2.3.2007 on which date he had stated that he had paid the amount. In view of there being no evidence on the same, this issue is answered against the Plaintiff.

44. **Issue (10):-** It has already been held after extensive discussion that the sale deed dated 31.12.2009, registered as Document No.4118 of 2009 and marked as Ex.P7/D5, cannot be cancelled. Consequently, even though the

Plaintiff had paid amounts to the 2nd Defendant, the sale deed being valid, the Defendants are in possession as the owners of the suit property. Consequently, they cannot be called upon to pay any sum towards mesne profits to the Plaintiff. Accordingly, this issue is answered against the Plaintiff.

45. **Issues (11) and (12):-** As has been pointed out repeatedly, the 3rd Defendant was the owner of the suit property and in the rent control proceedings, the 3rd Defendant was represented by the 4th Defendant, who is his wife and the Plaintiff had sent a sum of Rs.64 lakhs through demand draft through Ex.P3, Ex.P4 and Ex.P5, which reflect that a sum of Rs.64 lakhs had been paid to the 4th Defendant. However, the 2nd Defendant had acted as Power of Attorney Agent of the 3rd Defendant and had conveyed the suit property to the 1st Defendant. The entire transaction involves the role of the Defendants 1, 2, 3 and 4 at some stage or the other. The Plaintiff being a Malaysian National who placed entire trust in the 2nd Defendant was not aware about the actual owner of the suit property prior to the execution of the sale deed by the 2nd Defendant in favour of the 1st Defendant. In such circumstances, it is only natural that the Plaintiff had impleaded all the necessary and proper parties to the suit and consequently, the Defendants 3 and 4 are necessary parties. Even though the Plaintiff had stated that he had never seen the 4th Defendant or had any direct contact even with the 3rd Defendant and even though there is no privity of contract directly between the Plaintiff on the one hand and the Defendants 3 and 4 on the other hand, the Plaintiff having parted with a huge sum of Rs.64 lakhs by way of demand draft, the Plaintiff had sought relief against the Defendants 3 and 4 for return of

Rs.11,40,000/- with interest at the rate of 12% p.a. from the date of the plaint till the date of realisation. This amount was determined by the Plaintiff as being difference in the sale consideration amount of Rs.52,60,000/- and the amount of Rs.64 lakhs being taken by him as demand draft in the name of the 4th Defendant. However, during the course of trial, the Plaintiff had given up the claim against the Defendants 3 and 4 and accordingly, with respect to issue (11), I hold that the Defendants 3 and 4 are necessary parties, but with respect to issue (12), I hold that the Plaintiff is not entitled to any relief against the Defendants 3 and 4.

46. **Issue (13):-** As already held above, the 2nd Defendant is due and liable to pay the Plaintiff a sum of Rs.52,60,000/-, which shall carry interest at 18% per annum from the date of the plaint till the date of decree and thereafter, at 6% from the date of decree till the date of realisation.

47. **Issue (14):-** With respect to this issue, it has to be mentioned that even though this court had held that the 2nd Defendant had benefited from the largesses of the Plaintiff and had purchased the property, still the Plaintiff also should have been vigilant. He had, according to him, paid a sum of 2,64,000 Malaysian Ringgits, amounting to Rs.34 lakhs. He had also known that Rs.20 lakhs was transferred from his account. However, a mere pleading that he trusted the 2nd Defendant is not sufficient. Trust cannot extend to being totally and deliberately ignorant about what the 2nd Defendant actually did with the amounts handed over to him. The Plaintiff as any prudent person should have questioned the 2nd Defendant at regular intervals. The Plaintiff had a duty towards himself and also to the Companies which he runs to take care that

the amounts had not been misused by the 2nd Defendant. Merely coming to court and stating that he had handed over the money in trust without doing any further act would not help the cause of the Plaintiff. It is for this reason that the sale deed is not being set aside. The Plaintiff is however entitled to return of the consideration mentioned in the sale deed. Though the plaintiff can claim interest, he is not entitled for costs since he has invited litigation primarily by his extreme naivety.

48. **Issue (15):-** As already held above, the Plaintiff is entitled for a money decree for a sum of Rs.52,60,000/- (Rupees fifty two lakhs sixty thousand only), which shall carry interest at 18% p.a. from the date of the plaint till the date of decree and thereafter, at 6% p.a. from the date of decree till the date of realisation.

49. **Issues in CS.593 of 2010:-** **Issue (1):-** The Plaintiff having alleged that the 2nd Defendant is the Power of Attorney Agent and the 3rd Defendant had been instrumental in the execution of Power of Attorney marked as Ex.P10/D8, I hold that the Defendants 2 and 3 are proper and necessary parties to the suit. Accordingly, issue (1) is answered.

50. **Issue (2):-** It is the case of the Plaintiff that the 1st Defendant had given a police complaint and the Plaintiff and her husband were forced to produce the sale deed dated 31.12.2009 with the active collusion of the 3rd Defendant. However, in this regard, apart from sending a letter Ex.D9, the Plaintiff had not taken any further steps till the institution of the suit and I consequently hold that this issue has to be answered against the Plaintiff.

51. **Issue (3) and (9):-** These issues relate to handing over of the

sale deed dated 31.12.2009, registered as Doc.No.4118 of 2009 by the 1st Defendant to the Plaintiff. The sale deed is not cancelled in answer to the specific issue as discussed in CS.247 of 2010. Consequently, the 1st Defendant is under obligation to return back the original sale deed. The 1st Defendant is directed to hand over the original sale deed to the Plaintiff within three months. These issues (3) and (9) are answered accordingly.

52. Issue (4):- This issue relates to prohibitory injunction as against the 1st Defendant from alienating or encumbering the suit property since he is in possession of the original sale deed. It is only natural that since the sale deed has not been cancelled and the 1st Defendant had been directed to hand over the original sale deed to the Plaintiff, there should be a prohibitory injunction against him from dealing with the suit property in any manner whatsoever till he hands over the said document. This issue (4) is answered accordingly.

53. Issues (5) and (7):- There is no evidence to show that the 1st Defendant forced the Plaintiff to sign the Power of Attorney in favour of the 2nd Defendant and to execute the sale agreement both dated 5.2.2010 in favour of the 1st Defendant. There is no admissible evidence in this regard. In fact, the Plaintiff did not even come forward to the witness box to give evidence in this regard. Consequently, these issues are answered against the Plaintiff.

54. Issues (6) and (8):- These issues relate to the Power of Attorney and sale agreement both dated 5.2.1020. The 1st Defendant has also admitted that consideration has not been passed in accordance with the sale agreement and consequently, the Power of Attorney and the agreement of sale are void

documents and are not binding on both the parties. These issues (6) and (8) are answered accordingly.

55. **Issue (10):-** It is seen that the Plaintiff had not filed the suit asserting title at the very first instance. The suit had been filed only as a counter blast to CS.No.247 of 2010. This naturally means that the Plaintiff had invited litigation on herself. Consequently, I hold that the Plaintiff is not entitled for any costs.

56. **Issue (11):-** The Plaintiff is entitled for a decree for handing over of the sale deed dated 31.12.2009, registered as Document No.4118 of 2009 and also for declaration that both the Power of Attorney and the sale agreement both dated 5.2.2010 are not binding on any of the parties to the suit.

57. In the result, these civil suits are partly decreed to the extent indicated below:-.

- i. The Defendants 1 and 2 in CS.No.247 of 2010 are due and liable to pay to the Plaintiff in CS.No.247 of 2010, a sum of Rs.52,60,000/- (Rupees fifty two lakhs sixty thousand only) which shall carry interest at 18% p.a. from the date of the plaint till the date of decree and thereafter, at 6% p.a. from the date of decree till the date of realisation. Time for payment is three months.
- ii. The Plaintiff in CS.No.247 of 2010 is directed to hand over the original sale deed dated 31.12.2009, registered as Document No.4118 of 2009, to the Plaintiff in CS.No.593 of 2010, within three months.
- iii. There shall be a prohibitory injunction restraining the

Plaintiff in CS.No.247 of 2010 from dealing with the suit property in any manner till he hands over the sale deed dated 31.12.2009, registered as Document No.4118 of 2009.

- iv. The sale agreement and the Power of Attorney both dated 5.2.2010 are not binding on any of the parties to both the litigations.
- v. There shall be no order as to costs in both the suits.

03.02.2017

Index:Yes/No
Web:Yes/No
Srcm

To:

The Record Keeper, VR Section, High Court, Madras

C.V.KARTHIKEYAN, J.

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Pre-Delivery Judgement in
CS.Nos.247 and 593 of 2010

03.02.2017

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