

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 28.06.2018	Delivered on 04.07.2018
---------------------------	----------------------------

CORAM:

The Honourable Mr. Justice M.M.SUNDRESH
and
The Honourable Mr. Justice N.ANAND VENKATESH

Original Side Appeal No.247 of 2015
and
MP.No.1/2015 & CMP No.2816/2016

J.Vincent ... Appellan/Plaintiff

Vs.

1.S.Srinivasan ... Respondent/Defendant

Original Side Appeal is filed under Order XXXVI Rule 1 of the O.S. Rules read with Clause 15 of the Letters Patent against the judgment and decree dated 01.10.2015 made in C.S.No.413 of 2011.

Prayer in C.S. 413 of 2011:

a) To direct the defendant to perform the contract on his part on receipt of the balance sale consideration sum of Rs.20,00,000/- from the plaintiff and to execute the sale deed in favour of plaintiff.

i) On receipt of the balance sale consideration if the defendant fail to perform on his part pursuance to the sale agreement dated 17/05/2009 permit the plaintiff to deposit the balance sale consideration in court deposit and execute sale deed by this office of this Hon'ble Court.

ii) To grant permanent Injunction restrain the defendant and his their men, agent any one claiming through them not to disturb the peace full posession and enjoyment of the day today business activities of the suit schedule mentioned property.

iii) To grant permanent injunction restraining the defendant and his men, agent or any one claiming through them not to make any encumbrance over the suit schedule mentioned property and

iv) To pa the costs of the suit.

For Appellant : Mr.R.Natarajan
for Mr.M.Kemp raj

For Respondent : Mr.S.Sethuraman

JUDGMENT

N.ANAND VENKATESH., J.

The plaintiff in the suit has filed the present Original Side Appeal aggrieved by the judgment and decree dated 01.10.2015, passed by the learned Single Judge, dismissing the suit.

2.The appellant will be referred to as the plaintiff and the respondent will be referred to as the defendant for the sake of convenience.

3.The case of the plaintiff in brief:

3.1.The plaintiff entered into an agreement of sale dated 17.05.2009 with the defendant and out of the total sale consideration which was fixed at Rs.50,000,00/- [Rupees Fifty Lakhs Only], an advance of Rs.10,00,000/- [Rupees Ten Lakhs Only] was paid out of which, Rs.2,50,000/- [Rupees Two Lakhs Fifty Thousand Only] was paid by way of cash and Rs.7,50,000/- [Rupees Seven Lakhs Fifty Thousand Only] paid by way of cheque. Pursuant to the agreement, the defendant handed over the physical possession of the suit property. At the time when the defendant entered into an agreement, he only had an allotment given in his favour by CMDA. Since the defendant was not in a position to pay the sale consideration instalments due and payable to CMDA, the plaintiff helped him financially to pay the instalments and ultimately the plaintiff rendered financial help to the defendant to pay the balance sale consideration also to CMDA. After the payment of the entire sale consideration, the CMDA executed a Sale Deed in favour of the defendant on 13.10.2009.

3.2.The plaintiff in all paid a sum of Rs.30,000,00/- [Rupees Thirty Lakhs Only] towards the Sale Agreement and only a balance sale consideration of Rs.20,00,000/- [Rupees Twenty Lakhs Only] remained to be paid by the plaintiff to the defendant. When the plaintiff requested the defendant to receive the balance sale consideration and execute the Sale Deed, the defendant instead of fulfilling his obligation under the Agreement of Sale, started giving false complaints before the Police and also filed Criminal Original Petition before this Court for registration of FIR. An FIR was registered against the plaintiff by the Central Crime Branch in Cr.No.565/2010 and during investigation, the plaintiff produced all the documents and also the proof for payment of Rs.30,00,000/- [Rupees Thirty Lakhs Only] to the defendant. After investigation, a Final Report was filed wherein the case was closed as mistake of fact.

3.3.The defendant resorted to filing a criminal complaint only as a ruse to avoid fulfilling his obligation under the Agreement of Sale. The plaintiff left with no option filed the present suit claiming for the relief of Specific Performance and other consequential reliefs.

4.The Case of the defendant in brief:

4.1.The defendant is engaged in the business of flower vending for more than fifty years. The CMDA allotted the suit property at Koyambedu in favour of the defendant by proceedings dated 25.10.1993. Thereafter in the year 2007, the defendant entered into a lease-cum-sale agreement with the CMDA and was running the business in the suit property in the name and style of "Thirumalai Thiru Annamalai". The defendant paid the entire sale consideration and CMDA executed a Sale Deed dated 13.10.2009 in favour of the defendant and thus the defendant is the absolute owner of the suit property.

4.2.The defendant knows the plaintiff from the year 1990 onwards when the plaintiff was eight years old and the plaintiff was working in the shop of the defendant and was financially supported by the defendant. At the time of the final payment becoming due and payable to CMDA, the defendant had some financial problem and the plaintiff volunteered to give a hand loan of Rs.2.5 lakhs and the defendant having known the plaintiff for a long time, accepted the money and utilised it for paying to the CMDA towards the sale consideration.

4.3.The defendant did not enter into any agreement of sale with the plaintiff. The plaintiff took the signature of the defendant in blank papers. By misusing these signed blank papers, the plaintiff started claiming in the market that he has an Agreement of Sale in his favour and he has paid huge amount as an advance. The Agreement of Sale is a fabricated document which was never agreed upon or signed by the defendant. Except borrowing Rs.2,50,000/-[Rupees Two Lakhs Fifty Thousand Only] as hand loan from the plaintiff, the plaintiff did not make any other payment to the defendant or to the CMDA as claimed by the plaintiff.

4.4.The plaintiff taking advantage of his relationship with the defendant, took forcible possession of the suit property from the defendant. Aggrieved by the criminal acts committed by the plaintiff, the Police Complaint was given against the plaintiff. The defendant is an old man and taking advantage of his age and relationship, the plaintiff with the help of one of the son-in-law of the defendant, has manipulated and created documents. The plaintiff is not entitled for the relief of Specific Performance since an agreement relied upon by

him is non-est in the eye of law.

5.The learned Single Judge framed the following issues based on the pleadings:

(a)Whether the alleged Agreement of Sale dated 17.05.2009 is true and valid document as pleaded by the plaintiff or it is fabricated document as contended by the defendant?

(b)Whether the plaintiff has been ready and willing to perform the contract from the date of agreement till the date of plaint?

(c)Whether it is true that the defendant has received a sum of Rs.30,00,000/- towards the sale consideration?

(d)Whether the plaintiff is in possession of the suit property in pursuance of the agreement?

(e)Whether the plaintiff is entitled to specific relief? And

(f)To what other relief the plaintiff is entitled to?

6.The plaintiff examined himself as PW-1 and examined the Bank Manager from Syndicate Bank, Koyambedu Branch as PW-2 and the Bank Manager of Bank of India, Koyambedu Branch as PW-3. In order to prove the payments made by him to the defendant the plaintiff also examined the witness in the Agreement of Sale as PW-4. The plaintiff marked documents Exs.P-1 to P-14 to substantiate his defence. On the side of the defendant, the defendant examined himself as DW-1 and his wife was examined as DW-2 and marked documents Exs.D-1 to D-21 to substantiate his defence. Exs.C-1 to C-3 was marked as the Court documents which are the Statement of Current Account, Savings Bank Account of the plaintiff and defendant.

7.The learned Single Judge on appreciation of the pleadings, oral and documentary evidence and the arguments put forth on either side has given a finding that the Sale Agreement is a legally valid document. But, however the plaintiff was not ready and willing to perform his part of the contract and was never in possession of the suit property, and therefore, the plaintiff is not entitled to the discretionary relief of Specific Performance. The suit thus came to be dismissed.

SUBMISSIONS ON BEHALF OF THE PLAINTIFF:

8.The learned counsel for the appellant would submit that the main defence that was taken by the defendant was that he never entered into any Sale Agreement with the plaintiff and if at all there is a Sale Agreement , it is a fabricated document. Further defence that was taken by the defendant was that he never intended to sell the suit property to the plaintiff and the plaintiff taking advantage of his proximity with the defendant, has manipulated documents and financial transactions. The further defence that was taken by the defendant was that the plaintiff took forcible possession of the Shop. The learned counsel for the appellant would further contend that all this defence that was taken by the plaintiff goes contrary to the evidence available on record. The learned counsel submitted that Exs.P-2, P-3, P-4, P-5 and Ex.C-3 will clearly establish the fact that the defendant has received a sum of Rs.30,00,000/- [Rupees Thirty Lakhs Only] from the plaintiff pursuant to the Agreement of Sale. The learned counsel would further submit that all these payments were made much prior to the CMDA executing the Sale Deed in favour of the defendant on 13.10.2009 [Ex.D-12]. The learned counsel for the petitioner submits that the attitude of the defendant completely changed only after he got the Sale Deed executed in his favour from CMDA. The Bank entries that are found in Ex.C-3 will clearly show that after the receipt of an amount of Rs.14,00,000/- [Rupees Fourteen Lakhs Only] on 17.08.2009, the defendant has proceeded to take two Fixed Deposits on the very same day in favour of his grand children for a sum of Rs,10,00,000/- [Rupees Ten Lakhs Only]. Therefore, the defendant was also utilising the amount paid by the plaintiff towards part sale consideration.

8.1.The learned counsel for the appellant submitted that after the Sale Deed came to be executed in favour of the defendant on 13.10.2009 by CMDA, the defendant wanted to somehow wriggle out of his commitment and therefore started giving false complaints before the Police and started giving a criminal colour to the entire transaction. The learned counsel pointed out the averments made in the complaint [Ex.P-7 and Ex.D-13] by the defendant wherein the defendant apart from stating that the Sale Agreement and the extension letter [Ex.P-5] are concocted documents has further stated that he permitted the plaintiff to run the Shop for which the plaintiff has to pay a commission of Rs.10,000/- [Rupees Ten Thousand Only] which he stopped paying from December 2009 and when the defendant insisted for payment of the license amount, the plaintiff threatened the defendant with dire consequences. The learned counsel for the appellant further brought to our notice the averments contained in the criminal original petition filed by the defendant before this Court where in with regard to possession, the defendant has

stated that the plaintiff took forcible possession of the suit property and on 24.06.2010 when the defendant's son went to the Shop, all the belongings and the name board were thrown out in the dustbin and the defendant's son was prevented from entering into the Shop by the henchmen of the plaintiff. The learned counsel thereafter proceeded to point out the averment made in the Written Statement wherein the defendant had stated that the plaintiff took forcible possession of the Shop. By pointing out to all these statements made by the defendant, the learned counsel would submit that the defendant was improving his case at every stage with regard to the manner in which the plaintiff came in possession of the suit property. The learned counsel further submits that the defendant even went to the extent making derogatory allegations against the learned counsel who was conducting the case and also the learned Judge who passed the interim order in C.S.No.413 of 2011. For this purpose, the learned Counsel brought to our notice the complaint given by the defendant to the Deputy Commissioner of Police and which was marked as Ex.P-11.

8.2.The learned counsel for the appellant pointing out to all the above said documents and the statements made by the defendant, would contend that the conduct of the defendant throughout was not above board and the learned Single failed to take notice of this conduct of the defendant.

8.3.The learned counsel for the appellant further contended that the plaintiff was always ready and willing to perform his part of the contract and the fact that he had paid Rs.30,00,000/- [Rupees Thirty Lakhs Only] out of the total sale consideration of Rs.50,00,000/- [Rupees Fifty Lakhs Only] within three months from the date of agreement would go to show that he had the financial wherewithal to fulfil his commitment under the Agreement of Sale. The learned counsel would further contend that the criminal case that was given by the defendant ultimately came to be closed as mistake of fact and the same will be evident from the order passed by the Chief Metropolitan Magistrate, Egmore on 18.07.2011. which was marked as Ex.P-9.

9.The learned counsel for the appellant further contended that the learned Single Judge having found that the Sale Agreement is a legally valid document, went wrong in finding that the plaintiff was not ready and willing to perform his part of the contract. Th learned counsel further contended that the finding of the learned Single Judge that the plaintiff is not in possession and enjoyment of the suit property is contrary to the evidence available on record. Therefore, the learned counsel would contend that the judgment of the learned Single Judge is liable to be set aside and the plaintiff is entitled to the relief sought for in the suit.

SUBMISSIONS ON BEHANF OF THE RESPONDENT:

10.The learned counsel for the respondent reiterated the stand that was taken in the Written Statement to the effect that the defendant never entered into any Sale Agreement with the plaintiff and the plaintiff has misused the blank papers signed by the defendant and created Ex.P-5 and the plaintiff taking advantage of his proximity with the defendant, has taken forcible possession of the suit property. The learned counsel for the respondent would further submit that the fact that the signature of the defendant alone is found in the Sale Agreement [Ex.P-1] would go to show that the plaintiff has unilaterally concocted and created an Agreement of Sale. The learned counsel further contended that the defendant is an illiterate person and the plaintiff in connivance with the son-in-law of the defendant has taken all steps to grab the suit property from the defendant.

10.1.The learned counsel for the respondent would further contend that even though the Agreement of Sale [Ex.P-1] mentions about the cheque dated 18.05.2009 for a sum of Rs.7,50,000/-, [Rupees Seven Lakhs Fifty Thousand Only] this cheque was never paid to the defendant. For the purpose of substantiating the said argument, the learned counsel brought to our notice Ex.P-6 which is the Statement of Account wherein there was no proof or entry for the encashment of the said cheque. Therefore, the claim of the plaintiff that he paid a sum of Rs.10,00,000/- [Rupees Ten Lakhs Only] at the time of Agreement of Sale is totally false. The learned counsel further contends that the plaintiff was working as an Assistant with the defendant in his flower Shop for a long period of time and had gained his confidence. When the defendant had difficulty in mobilising funds to make the final payment to CMDA, the plaintiff volunteered to give a hand loan of Rs.2.5 lakhs and the defendant believing it to be a genuine help, accepted the money. This relationship was taken advantage of by the plaintiff and the Agreement of Sale Ex.P-1 and the extension letter Ex.P-5 were concocted and fabricated by the plaintiff with the sole intention of grabbing the suit property.

11.The learned counsel for the respondent would further submit that since the Agreement of Sale was a fabricated document and since the plaintiff took forcible possession of the suit property, the defendant was completely justified in initiating Criminal Proceedings against the plaintiff.

11.1.The learned counsel for the respondent further submitted that the defendant also took independent steps to take action against the plaintiff who was illegally running business in the suit property without a valid license and more particularly when the license was standing in the name of the defendant. W.P.No.15063 of 2013 was filed by the defendant for a direction to the Chief Executive Officer of Koyambedu Whole

Sale Market to take action against the plaintiff and this Court gave a direction to consider the representation of the plaintiff and since the order was not complied with, Cont.P.No.2850 of 2014 was also filed and the same is pending. Therefore, the defendant has been taking all steps in order to restore his right over the suit property.

11.2.The learned counsel for the respondent further submitted that the finding of the learned Single Judge that the Agreement of Sale Ex.P-1 is a valid document is not correct since the learned Single Judge failed to take note of the fact that the agreement was not signed only by the defendant and the factors surrounding the entire transaction clearly points out to the fact that the document itself was unilaterally prepared by the plaintiff. The learned counsel further contended that even though a separate Appeal has not been filed by the defendant challenging the finding of the learned Single Judge, the defendant is entitled to question the findings in the present appeal itself by virtue of Order 41 Rule 22 CPC.

12.The learned counsel for the respondent further contended that the finding of the learned Single Judge to the effect that the plaintiff was not ready and willing to perform his part of the contract does not require any interference by this Court since sufficient reasons have been given to arrive at this finding. The learned Counsel therefore would contend that the judgment and decree passed by the learned Single Judge does not require any interference and the present appeal is liable to be dismissed with costs.

13.We have heard the learned Counsel appearing on either side and also carefully considered the evidence available on record.

The following points arises for consideration in the present appeal:

- i)Whether the Agreement of Sale [Ex.P-1] is a genuine document which binds the defendant?
- ii)Whether the plaintiff was ready and willing to perform his part of the contract?
- iii)Whether in the facts and circumstances of the case this Court has to exercise its discretion under Section 20 of the Specific Relief Act and grant the relief of Specific Performance in favour of the plaintiff or the plaintiff is entitled for the alternative relief of the refund of the amount paid by him to the defendant?

14. From the materials available on record it is clearly seen that the plaintiff and defendant are known to each other for a long time. It is also seen that the plaintiff was engaged in the flower business along with the defendant for a long time. A perusal of the Agreement of Sale clearly shows that it is the defendant who has subscribed his signature in the Agreement of Sale and the plaintiff has not signed this document. It is true that even if the Agreement of Sale is signed by only one of the party, the same can be enforced. Useful reference can be made to the judgment of the Hon'ble Supreme Court in *Aloka Bose Vs. Parmatama Devi and Others* reported in [2009] 2 SCC P 582. The relevant paragraphs are extracted hereunder:

"13. The defendant submitted that a contract for sale, like any other contract, is bilateral in nature under which both vendor and the purchaser have rights and obligations. It is submitted that an agreement for sale being a contract for sale, creating a right in the purchaser to obtain a deed of conveyance in terms of the agreement under which, the vendor agrees to convey to the purchaser, and the purchaser agrees to purchase, the subject-matter of the agreement for an agreed consideration, subject to the terms and conditions stipulated in the said agreement, it is bilateral. It is therefore contended that an agreement of sale is neither complete nor enforceable unless it is signed by both parties.

14. Certain amount of confusion is created on account of two divergent views expressed by two High Courts. In *S. M. Gopal Chetty vs. Raman* [AIR 1998 Madras 169], a learned Single Judge held that where the agreement of sale was not signed by the purchaser, but only by the vendor, it cannot be said that there was a contract between the vendor and the purchaser; and as there was no contract, the question of specific performance of an agreement signed only by the vendor did not arise. On the other hand, in *Md. Mohar Ali vs. Md. Mamud Ali* [AIR 1998 Gauhati 92], a learned Single Judge held that an agreement of sale was an unilateral contract (under which the vendor agreed to sell the immovable property to the purchaser in accordance with the terms contained in the said agreement), that such an agreement for sale did not require the signatures of both

parties, and that therefore an agreement for sale signed only by the vendor was enforceable by the purchaser.

15. We find that neither of the two decisions have addressed the real issue and cannot be said to be laying down the correct law. The observation in Md. Mohar Ali (supra) stating that an agreement of sale is an unilateral contract is not correct. An unilateral contract refers to a gratuitous promise where only party makes a promise without a return promise. Unilateral contract is explained thus by John D. Calamari & Joseph M. Perillo in The Law of Contracts (4th Edition Para 2-10(a) at pages 64-65):

"If A says to B, 'If you walk across the Brooklyn Bridge I will pay you \$ 100,' A has made a promise but has not asked B for a return promise. A has asked B to perform, not a commitment to perform. A has thus made an offer looking to a unilateral contract. B cannot accept this offer by promising to walk the bridge. B must accept, if at all, by performing the act. Because no return promise is requested, at no point is B bound to perform. If B does perform, a contract involving two parties is created, but the contract is classified as unilateral because only one party is ever under an obligation."

All agreements of sale are bilateral contracts as promises are made by both - the vendor agreeing to sell and the purchaser agreeing to purchase.

16. On the other hand, the observation in S.M. Gopal Chetty (supra) that unless agreement is signed both by the vendor and purchaser, it is not a valid contract is also not sound. An agreement of sale comes into existence when the vendor agrees to sell and the purchaser agrees to purchase, for an agreed consideration on agreed terms. It can be oral. It can be by exchange of communications which may or may not be signed. It may be by a single document signed by both parties. It can also be by a document in two parts, each party signing one copy and then

exchanging the signed copy as a consequence of which the purchaser has the copy signed by the vendor and a vendor has a copy signed by the purchaser. Or it can be by the vendor executing the document and delivering it to the purchaser who accepts it.

17. Section 10 of the Act provides all agreements are contracts if they are made by the free consent by the parties competent to contract, for a lawful consideration and with a lawful object, and are not expressly declared to be void under the provisions of the Contract Act. The proviso to section 10 of the Act makes it clear that the section will not apply to contracts which are required to be made in writing or in the presence of witnesses or any law relating to registration of documents. Our attention has not been drawn to any law applicable in Bihar at the relevant time, which requires an agreement of sale to be made in writing or in the presence of witnesses or to be registered. Therefore, even an oral agreement to sell is valid. If so, a written agreement signed by one of the parties, if it evidences such an oral agreement will also be valid.

18. In any agreement of sale, the terms are always negotiated and thereafter reduced in the form of an agreement of sale and signed by both parties or the vendor alone (unless it is by a series of offers and counter-offers by letters or other modes of recognized communication). In India, an agreement of sale signed by the vendor alone and delivered to the purchaser, and accepted by the purchaser, has always been considered to be a valid contract. In the event of breach by the vendor, it can be specifically enforced by the purchaser. There is, however, no practice of purchaser alone signing an agreement of sale.

19. The defendant next contended that the agreement of sale in this case (Ex.2) was clearly in a form which required signatures of both vendor and purchaser. It is pointed out that the agreement begins as : "Agreement for sale between Kanika Bose and Parmatma Devi" and not an "Agreement of sale executed by Kanika Bose in favour of Parmatma Devi". Our attention is also drawn to the testimonium

clause (the provision at the end of the instrument stating when and by whom it was signed) of the agreement, which reads thus :

"In witnesses whereof, the parties hereto have hereunto set and subscribed their respective hands and seals on these presents." It is therefore contended that the agreement specifically contemplated execution by both parties; and as it was not so executed, it was incomplete and unenforceable.

20. We have carefully examined the agreement (Ex.2), a photocopy of which is produced. The testimonium portion in the agreement is in an archaic form which has lost its meaning. Parties no longer 'subscribe their respective hands and seals'. It is true that the format obviously contemplates signature by both parties. But it is clear that the intention of the parties was that it should be complete on signature by only the vendor. This is evident from the fact that the document is signed by the vendor and duly witnessed by four witnesses and was delivered to the purchaser. Apart from a separate endorsement made on the date of the agreement itself (7.9.1979) by the vendor acknowledging the receipt of Rs.2001 as advance, it also contains a second endorsement (which is also duly witnessed) made on 10.10.1979 by the vendor, acknowledging the receipt of a further sum of Rs.2000 and confirming that the total earnest money received was Rs.4001. This shows that the purchaser accepted and acted in terms of the agreement which was signed, witnessed and delivered to her as a complete instrument and that she then obtained an endorsement thereon by the vendor, in regard to second payment. If the agreement was not complete, the vendor would not have received a further amount and endorsed an acknowledgement thereon on 10.10.1979.

21. Apart from the above, the evidence of the witnesses also shows that there was a concluded contract. Therefore, even though the draftsman who prepared the agreement might have used a format intended for execution by both vendor and purchaser, the manner in which the parties had proceeded, clearly

demonstrated that it was intended to be executed only by the vendor alone.

22. Thus we hold that the agreement of sale (Ext. 2) signed only by the vendor was valid and enforceable by the purchaser.

15. This judgment has subsequently been followed by our High Court in *Siluvai Rajan @ M.S. Rajan .Vs. Glory Stella Bai and Another* reported in [2014 (1) CTC 467] and *Muthukrishna Gounder .Vs. Gowri Others* reported in [2014 (1) CTC 603]

16. From the above judgments it is clear that even if an Agreement of Sale is signed only by one party, the same can be enforced. The real test is whether the parties had consensus-ad-idem in entering into an agreement to deal with the suit property. Therefore, we cannot come to a conclusion that since the Agreement of Sale is signed only by the defendant, the same cannot be enforced. This necessarily takes us to the next step of seeing whether in the facts and circumstances of the case, the defendant had any intention to enter into contract of Agreement of Sale with the plaintiff.

17. Admittedly in this case the defendant was the person who was running the flower Shop for a long period of time. After the business from Parrys Corner got shifted to Keyambedu, the CMDA allotted the suit property in favour of the defendant by proceedings dated 25.10.1993. Thereafter by letter dated 28.11.2006, CMDA informed the defendant to pay the balance initial deposit in order to enter into Lease cum Sale Agreement. This document has been marked as Ex.D-11. Subsequently by registered Sale deed dated 13.10.2009 marked as Ex.D-12, CMDA conveyed the suit property in favour of the defendant and thereby the defendant became the absolute owner of the suit property. It is seen from the records that at the time when the alleged Agreement of Sale was entered into by the defendant with the plaintiff, the defendant was not even the owner of the suit property. One more important factor that has to be taken into consideration is regarding the payment of cheque for a sum of Rs.7,50,000/- [Rupees Seven Lakhs Fifty Thousand Only] that is mentioned in the Agreement of Sale. There is no proof that this cheque was given in the name of the defendant. When the plaintiff was questioned regarding the same during the course of cross examination, he accepts that there is no proof or entry in Ex.P-6 for the encashment of the said cheque. A perusal of Ex.C-2 which is the Statement of Account in the name of the plaintiff in Bank of India, it is seen that this cheque has been issued in the name of E.Murugan who is the son-in-law of the defendant with whom the defendant is not in

good terms. There is no explanation from the plaintiff as to why the cheque was not given in favour of the defendant more particularly when the plaintiff claims that he entered into an Agreement of Sale with the defendant. The Agreement of Sale Ex.P-1 reads as if the said cheque was given in favour of the defendant.

18.The other documents which requires our close scrutiny is Ex.P-5 which has been heavily relied upon by the plaintiff to substantiate his case. The defendant has accepted that the signature found in Ex.P-5 is his signature but however the contents of the document was not written by him since he does not know to read or write in Tamil.

19.Taking into consideration Exs.P-2, P-3 and P-4 it can be seen that payments have been made by the plaintiff to the Chief Executive Officer of CMDA. Similarly, Ex.C-3 also clearly shows that a sum of Rs.14,00,000/- [Rupees Fourteen lakhs Only] has been paid by the plaintiff to the defendant and in fact the defendant has utilised this money and taken two Fixed Deposits in favour of his grand children for a sum of Rs.10,00,000/- [Rupees Ten lakhs Only]. Therefore, the stand of the defendant that he received only a sum of Rs.2.5 lakhs as hand loan and nothing more is totally falsified by the evidence that is available on record to show that the plaintiff has made sufficient

payments to the defendant or on behalf of the defendant to the Chief Executive Officer, CMDA. In the entire cross examination, the defendant has merely denied all suggestions regarding the payment of money without any explanation even when confronted by overwhelming evidence.

20.The next question is whether this money was given by the plaintiff to the defendant towards the agreement of sale is the mute question to be decided in order to answer the points for determination. The entire dispute in this case started only after the Sale Deed got executed in favour of the defendant by the CMDA on 13.10.2009. Till that time whatever amount was paid by the plaintiff to the defendant, the same was received without any demur by the defendant. After the Sale Deed was executed in favour of the defendant, a series of criminal proceedings started emanating from the side of the defendant wherein the defendant started alleging that the plaintiff has concocted and fabricated documents as if the defendant has entered into an Agreement of Sale and also there were allegations in the manner in which the suit property was taken over by the plaintiff.

21.On the side of the plaintiff, in order to prove existence of Agreement of Sale, Exs.P-1 and P-5 has been marked and the plaintiff has examined himself as PW-1 and spoken about the same

and he has also examined PW-4 who is one of the witnesses in the Agreement of Sale. If the defendant has not entered into an Agreement of Sale with the plaintiff, there is no occasion for the plaintiff to make such substantial payments to the defendant. The conduct of the defendant where he denies receiving any amount apart from 2.50 lakhs, in spite of overwhelming evidence, speaks volumes about the genuineness of the claim made by the defendant. If really there was no Agreement of Sale and the defendant is a genuine person, he would have refused to receive the money from the plaintiff. From the point of view of plaintiff, there was no need for the plaintiff to make such substantial payments to the defendant without there being any Agreement of Sale with the defendant. The circumstances under which Exs.P-1 and P-5 was signed by the defendant has not been properly explained by the defendant except saying that the blank papers that were signed by him have been misused in creating these documents. A Look at these documents viz., Exs.P-1 to P-5, does not indicate that pre-signed papers have been utilised to create those documents.

22.For all the reasons stated above, we proceed to answer the first issue in the points for determination and we hold that Ex.P-1 Sale Agreement is a genuine document and the same binds the defendant. We therefore concur with the finding of the learned Single Judge on this issue.

23.We now venture into the next question to find if the plaintiff was ready and willing to perform his part of the contract. A reading of the Agreement of Sale [Ex.P-1] clearly points out to the fact that three months period was fixed for the completion of the sale transaction. Thereafter by virtue of Ex.P-5 this term was extended for a further period of three months from 14.08.2009 which means the sale transaction should have been completed during November 2009. Whether time is the essence of the contract for an immovable property can be inferred by the Court from the express terms of the contract, from the nature of the suit property and from surrounding circumstances. As above stated, the period that was extended by Ex.P-5 came to an end in November 2009. In the meantime, the defendant also became the absolute owner of the suit property by virtue of the Sale Deed executed in his favour by CMDA on 13.10.2009. Even though the defendant was not the owner of the suit property at the time when the Agreement of Sale was entered into, by virtue of he becoming the owner of the suit property subsequently the same will enure to the benefit of the plaintiff by doctrine of feeding the grant by estoppel. There was no bar for the defendant to execute the Sale Deed in favour fo the plaintiff.

24.After the extended period came to an end in November 2009, there is absolutely nothing to show what steps the

plaintiff has taken to get the Sale Deed executed in his favour by paying the balance sale consideration. There was no pre-suit notice in this case by the plaintiff calling upon the defendant to execute the Sale Deed in his favour. Even in the plaint, except stating that he was ready and willing to pay the balance sale consideration, there is nothing more to show that the plaintiff took steps on his side to get the Sale Deed executed after paying the balance sale consideration. In fact the first reaction started from the side of the defendant on 17.06.2010 when he gave the complaint to the Commissioner of Police and started the criminal proceedings. At least this was a clear indication for the plaintiff to proceed further by filing a suit for Specific Performance since the mind of the defendant became clear that he is not willing to execute the Sale Deed in accordance with the Agreement of Sale.

25.The suit ultimately came to be filed only on 09.06.2011 which is nearly after a period of one year seven months from the date on which the period extended by Ex.P-5 came to an end. The only reason assigned by the plaintiff for this delay was the criminal proceedings that were initiated by the defendant. This reason given by the plaintiff is wholly unacceptable since the criminal proceedings did not in any way stop the plaintiff from pursuing further with the filing of a suit for Specific Performance. The plaintiff cannot take advantage of the conduct of the defendant to cover up his lapses more particularly in a suit for Specific Performance where the entire onus of proving the readiness and willingness falls on the plaintiff.

26.The plaintiff was not ready and willing to perform his part of the contract which is a mandatory requirement under Section 16 (c) of the Specific Relief Act, 1963. Readiness and willingness connotes independent meaning to each of those terms. Readiness signifies financial position of the purchaser and willingness signifies the frame of mind of the purchaser.

27.The law is now fairly well settled by means of a catena of decisions of the Hon'ble Supreme Court and this Court and also of various other High Court's that the Readiness and Willingness on the part of the agreement holder must be continuously shown at all stages right from the date of agreement, till the date of decree that is passed in the suit. The conduct of the agreement holder must be blemish less through out to entitle him for the equitable relief of Specific Performance.

28.This is a case where the time is the essence of the contract. Therefore, it is incumbent on the part of the plaintiff to show his readiness and willingness to pay the balance sale consideration and complete the sale transaction within the time stipulated or within a reasonable time. However, there is no explanation on the part of the plaintiff as

to why he did not proceed further to file a suit for Specific Performance at least immediately after the defendant gave the Police Complaint during June 2010 expressing his mind that he will not execute any Sale Deed in favour of the plaintiff. The plaintiff after this complaint has awaited for a further period of one year for which there is absolutely no explanation. This conduct of the plaintiff clearly shows that he was not ready and willing to perform his part of the contract. We accordingly answer the second issue in the points for determination.

29. Moving on to the third issue with regard to the exercise of discretion under Section 20 of the Specific Relief Act, we have already held here in above that the plaintiff is not ready and willing to perform his part of the contract. Therefore, there is no question of this Court exercising its discretion under Section 20 of the Specific Relief Act in favour of the plaintiff.

30. In a suit for Specific Performance, the Court has to keep in mind that the discretionary power vested in it is by virtue of Section 20 of the Specific Relief Act. It is now a well settled principle of law that the Court is not bound to grant Specific Performance merely because it is lawful to do so. The Court should meticulously consider all the facts and circumstances of the case and ensure that it is not used as an instrument of oppression to have an unfair advantage to the plaintiff. Since the relief of Specific Performance is given exercising the equity jurisdiction, the conduct of the plaintiff should be fair. The discretion that is exercised by the Court is not arbitrary but it is guided by sound and reasonable judicial principles.

31. Section 20 (2) of the Specific Relief Act contains a stipulation as to when the Court may exercise its discretion not to grant Specific Performance. Sub Section (2) of Section 20 of the Specific Relief Act reads as follows:

"(2) The following are cases in which the Court may properly exercise discretion not to decree specific performance-

(a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or

(b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas

its non-performance would involve no such hardship on the plaintiff;

(c) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.

It will be useful to extract explanation 2 which reads as follows:

Explanation.2 - The question whether the performance of a contract would involve hardship on the defendant within the meaning of clause (b) shall, except in cases where the hardship has resulted from any act of the plaintiff subsequent to the contract, be determined with reference to the circumstances existing at the time of the contract.

32. In the facts of the present case it can be seen that the plaintiff was involved in the flower business along with the defendant for a long time and it is but natural that the defendant would have allowed him to do the business in his Shop. In fact the allegation made by the defendant in his first complaint before the Police on 17.06.2010, also proceeds on the same basis and only grievance was that he has not properly paying the license amount. The later version of the defendant that the plaintiff took forcible possession of the suit property is an exaggeration. Therefore, the possession of the plaintiff in this case is nothing but a permissive possession and it cannot even be said that it is a possession given pursuant to the Agreement of Sale in order to invoke the provisions of Section 53(A) of the Transfer of Property Act. The plaintiff and the defendant are not rank strangers and they are known to each other for a long time. Therefore, the defendant allowing the plaintiff to conduct the business in his Shop is but natural. This permissive possession cannot be taken advantage by the plaintiff and he cannot equate it to the level of part performance under Section 53(A) of the Transfer of Property Act. If the possession had been given pursuant to the Sale Agreement, it would have been reflected in the agreement itself or at least in Ex.P-5 letter. In the absence of the same, the possession of the plaintiff of the suit property can at the best be called only as a permissive possession. This nature of possession cannot be taken advantage of by the plaintiff in order to strengthen his case for Specific Performance.

33. In the present case, apart from the plaintiff not showing his readiness and willingness, will not also suffer from any hardship if the relief is not granted in his favour since he has enjoyed the suit property for a long time to the detriment of the defendant. On the other hand, the defendant will be put to

hardship if the relief of Specific Performance is granted in favour of the plaintiff since the act of the plaintiff subsequent to the contract, has placed the plaintiff in a advantageous position. Therefore, this Court in exercise of its discretion under sub Section (2) of Section 20 comes to a conclusion that the plaintiff is not entitled for a decree of Specific Performance. We accordingly confirm the findings of the learned Single Judge that the plaintiff was not ready and willing to perform his part of the contract and therefore he is not entitled to the relief of Specific Performance.

34.This takes us to the last question as to whether the plaintiff is entitled for the refund of amount paid by him to the defendant. In this case we find that the plaintiff has paid a sum of Rs.30,00,000/- [Rupees Three Lakhs Only] to the defendant and the same is borne out by documents which have been filed and marked on the side of the plaintiff. During the pendency of this appeal, the defendant himself has filed an affidavit on 20.12.2017 wherein he has agreed to pay the amount with interest. At para 5 of the affidavit, the defendant has stated as follows:

"5. I further submit neither the appellant nor his counsel objected to the suggestion made by his Honourable Court asking me to pay Rs.30 lakhs with interest. Therefore based on proceeding dated 25.11.2007 (when first hearing of the case took place) and 05.12.2017 I have mobilized the funds to the tune of 40 lakhs (Rs.30,00,000/- plus interest at the Rate of 6%) and was ready to pay it to the appellant upon handing over of possession of the suit property".

35.The plaintiff in his suit has not claimed for the alternative relief of refund of the advance money. However, with a view to render complete justice, this Court feels that it is empowered to mould the relief and issue appropriate direction to the defendant for refund of the advance amount. Useful reference in this regard can be made to the decision of the Division Bench in N. Sekaran and Another .Vs. C.Rajendran reported in [2017 (3) MWN (civil) 716].

36.In the result this Original Side Appeal is disposed of as follows:

i)The judgment and decree of the learned Single Judge in C.S.No.413 of 2011 dated 01.10.2015 is hereby confirmed and to that extent the OSA stands dismissed.

ii)The appellant is entitled to the refund of the money of a sum of Rs.30 lakhs paid by him to the respondent.

iii)The respondent is directed to repay back the sum of

Rs.30 lakhs with interest at the rate of 9% p.a. from May 2009 up to October 2015 and at the rate of 6% p.a. from November 2015 till the date of actual payment to the appellant and this payment must be made by the respondent to the appellant within a period of eight weeks from the date of receipt of a copy of this order.

iv) The parties shall bear their own costs.
Consequently, the connected miscellaneous petitions are closed.

s/d-
Assistant Registrar (CS VI)

True Copy

Sub-Assistant Registrar

Kp

Copy to:

The Sub. Asst. Registrar
Original Side,
High Court,
Madras.

+2 Ccs to Mr.S. Sethuraman, Advocate sr 43026.
+3 Ccs to Mr.M. Kempraj, Advocate sr 43057.

O.S.A.No.247 of 2015
& MP.No.1 & CMP.No.2816/2016

RSY (CO)
SP (23/07/2018)

सत्यमेव जयते

WEB COPY