IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON : 15.12.2017

JUDGMENT PRONOUNCED ON : 03.01.2018

CORAM

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

C.S.No.329 of 2013

1.M/s.Farida Shoes Pvt. Ltd
Rep. by its Authorised Signatory,
Mr.D.C.Ravi,
1st Floor, 151/4, Mount Poonamallee Road,
Ramapuram, Chennai – 600 089.

2.M/s.Farida Classic Shoes Pvt. Ltd
Mr.D.C.Ravi,
1st Floor, 151/4, Mount Poonamalee Road,
Ramapuram, Chennai – 600 089.

3.M/s.Kenmore Shoes Pvt. Ltd,
Mr.D.C.Ravi,
No.40, Poonamallee Bye Pass,
Seenerkuppam,
Chennai – 600 056. ... Plaintiffs

-Vs-

M/s.Southern Roofings Pvt Ltd,
Rep. by its Director,
Karim Mansion,
No.787, Mount Road,
Chennai – 600 002. ... Defendant

Plaint filed under Order IV Rule 1 of Original Side Rules read with Order VII Rule 1 of Civil Procedure Code, praying to pass a judgment and decree in favour of the plaintiff:-

a) to direct the defendant to execute the sale deed, in respect of suit property in favour of the plaintiffs failing which this Honourable Court may be pleased to execute the same in favour of the plaintiffs.

b) to grant permanent injunction restraining defendant from alienating, encumbering, creating third party interest in manner in respect of the suit schedule property.

c) such other reliefs

d) cost of the suit

For Plaintiffs : Mr.Zaffarullah Khan

For Defendant : Mr.PL.Narayanan

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<u>J U D G M E N T</u>

The suit in C.S.No.329 of 2013 is one for specific performance. The gist of the plaint is as follows:-

The plaintiffs, which are Companies registered under the Companies Act, 1956, have come forward with the above suit seeking specific performance of the agreement dated 27.02.2012, allegedly entered into with the defendant company for purchase of land measuring an extent of 11 grounds comprised in survey numbers 59/1B, 59/2B, 59/3, 59/5 and 59/6 in Mudichur Village, Tambaram Taluk, Kancheepuram District for total consideration of Rs.2,75,00,000/-.

2. According to the plaintiffs, the defendant company had authorised its then Managing Director Mr.Shoukath to negotiate and sell some of its lands by a resolution dated 01.03.1995.

3. It is further claimed by the plaintiffs that the defendant company had entered into a sale agreement with the plaintiffs on 27.02.2012, and had received an advance of Rs.15,00,000/- (Rs.5,00,000/- from each of the plaintiffs). It is also averred that since the defendant company was not in a position to operate its bank accounts, the then Managing Director of the defendant had requested the plaintiffs to issue cheques towards advance in his personal name and he had assured that the payment so made would be accepted as payment made to the Company. As per the terms and conditions of the agreement, the transaction is to be completed within a period of nine months. Though the plaintiffs expressed their readiness and willingness to complete the sale transaction, the defendant evaded completion. Therefore, the plaintiffs caused a notice to be issued to Mr.Shoukath as Managing Director of the defendant company on 19.11.2012. The said Mr.Shoukath by his letter dated 12.12.2012 had informed the plaintiffs that one of the shareholders of the defendant had obtained a restraint order against the defendant company from alienating its assets towards any claim before the Company Law Board. The said share holder is none other than the sister of the then

Managing Director of the defendant company.

4. The plaintiffs would further claim that Mr.Shoukath, who is the Managing Director had resigned with effect from 13.09.2012. On 12.12.2012, it is stated that, the said Shoukath had written to the plaintiffs stating that he is no longer the Managing Director and also expressed that there is no possibility for execution of sale deed in favour of the plaintiffs pursuant to the agreement dated 27.02.2012. Thereafter, the plaintiffs had issued legal notice dated 27.02.2013 to the defendant company seeking execution of the sale deed. Though the defendant received the notice, did not choose to send a reply. They also did not come forward to execute the sale deed as per the agreement. Hence, the plaintiffs have come forward with the above suit for specific performance of the agreement dated 27.02.2012.

5. The defendant has filed a written statement setting out its defence. The summary of the written statement of the defendant is as follows:-

The defendant would claim that the agreement dated

27.02.2012 is a fradulant one, brought about in collusion between the plaintiffs company and the then Managing Director of the defendant. It is also claimed that the 3rd plaintiff's Director, Mr.Irshad Ahmed, being the son-in-law of the then Managing Director of defendant company Mr.Shoukath he had colluded with the said Shoukath in brining about the agreement of sale.

6. It is also claimed that the authority given to Mr.Shoukath under the resolution dated 01.03.1995 does not extend to the suit property in as much as the said resolution only authorises Mr.Shoukath to take steps for sale of the residential plots and not industrial plots. The very existence of the agreement dated 27.02.2012 is denied and it is claimed that the agreement has been concocted and fabricated by the plaintiffs in collusion with the then Managing Director Mr.Shoukath. It is also contended that when the suit is for specific performance, the land, which is the subject matter of the suit having been situated outside territorial jurisdiction of this Court, this court will not have jurisdiction to entertain the present suit.

7. It is also claimed that taking advantage of the resolution dated 01.03.1995, then Managing Director Mr.Shoukath had gone abut indiscriminately, alienating the property of the defendant company. The claim that the defendant company was not in a position to operate its bank accounts and hence the advance amount was received by Mr.Shoukath in his individual capacity is totally denied. The accounts of the defendant company would not reveal the realisation of the monies paid to Mr.Shoukath.

8. The defendant would also point out certain contradictions in the pleadings as well as the proceedings in C.P.No.63 of 2012 before the Company Law Board to show that the claim of the plaintiffs that there was an agreement on 27.02.2012 cannot be true. It is also claimed that the very agreement amounts to breach of trust on the part of Mr.Shoukath, then Managing Director of the defendant. On the above contentions, the defendant sought for dismissal of the suit.

9. Upon consideration of the pleadings, the following issues were framed by this Court on 12.06.2015:-

1. ***Whether the agreement of sale, dated 27.02.2012 in respect of the suit property is a genuine bona fide agreement?***
2. ***Whether there is collusion between the plaintiffs and the first defendant company's erstwhile Managing Director, Mohammed-Shoukath in bringing about the agreement of sale, dated 27.02.2012?***
3. ***Whether the advance money of Rupees Fifteen Lakhs was received on behalf of the defendant Company or was it a different transaction between the defendant company's erstwhile Managing Director, Mohammed – Shoukath and the plaintiffs, unconnected with the agreement to sell the suit property?***
4. ***Whether the plaintiffs were always ready and willing to perform their part of the contract?***
5. ***Are the plaintiffs are entitled to specific performance of the agreement of sale, dated 27.02.2012?***
6. ***Are the plaintiffs entitled to any other relief?***

10. At Trial, one D.C.Ravi, authorised signatory of the plaintiffs was examined as P.W.1. and Mr.S.Srithar, Corporate Manager, Accounts and Finance of the Farida Group Company, was examined as P.W.2. Ex.P1 to Ex.P22 were marked on the side of the plaintiffs. One

Mr.Suhaan Sherif, Manager (Legal Affairs) of the defendant company was examined as D.W.1. Ex.D1, the letter of authorisation, authorising the said witness to depose on behalf of the defendant was marked.

11. I have heard Mr.Zaffarullah Khan, learned counsel appearing for the plaintiffs and Mr.PL.Narayanan, learned counsel appearing for the defendant.

12. ***Issue Nos.1 to 3:-***

These issues are taken up together as decision on any one of them will have a bearing on the other. It is the specific case of the plaintiffs in the plaint that then Managing Director of the defendant Mr.Shoukath entered into an agreement of sale on 27.02.2012 and pursuant to the same, each of the plaintiffs had paid a sum of Rs.5,00,000/-, in all Rs.15,00,000/- to the defendant. Even in the plaint, it is admitted that the cheques for a sum of Rs.5,00,000/- were issued in the name of Shoukath, the then Managing Director of the defendant. It is brought out in the evidence that the said sum of Rs.15,00,000/- was not reflected in the account books of the defendant.

13. A perusal of the agreement dated 27.02.2012 shows that it is in the letter pad of the defendant. The same is not stamped in accordance with law. It is stated to be a receipt for advance payment of Rs.15,00,000/- (Rs.5,00,000/- by each of the plaintiffs) in favour of the defendant. The cheques are dated 22.11.2011. All cheques have been issued even prior to the date of the agreement as alleged in the plaint.

14. A perusal of the plaint, as it is, discloses that the plaintiffs have come to the Court with the specific case that there was an agreement of sale on 27.02.2012 and the suit is laid on the basis of the said agreement of sale. The document that has been produced as Ex.P4 does not refer to any oral agreement of sale prior to the said date. It is useful to reproduce the contents of the document:-

> ***"Received from 1) Farida Shoes Pvt. Ltd. 2) Farida Classic Shoes Pvt. Ltd. both having Registered Office at No.151/4, Mount Poonamallee High Road, Ramapuram, Chennai - 600 089 and 3) Kenmore Shoes Pvt. Ltd, having***

Registered Office at Govindapuram Main Road, Nagawara, Bangalore – 560 072, a sum of Rs.5,00,000/- (Rupees Five Lakhs only) Each, by Cheques No.067340 (issued from Axis bank), No.027908 (issued from Citi bank) and No.670773 (issued from SBI) all dated 22.11.2011 respectively, totaling to Rs.15,00,000/- (Rupees Fifteen Lakhs only) as advance through their representative Mr.D.C.Ravi S/o D.Chengaih residing at Plot No.15, Door No.18, Sanjay Gandhi Nagar, Adambakkam, Chennai – 600 088, who is authorized and empowered by their respective Board resolutions dated 23.02.2012 to complete the sale transaction for 11 grounds of land at Nawab Habibullah Nagar, No.168, Mudichur road with the above company. The total sale consideration of the property is Rs.2,75,00,000/- (Rupees Two Crores Seventy Five Lakhs only). The balance sale consideration of Rs.2,60,00,000/- (Rupees Two Crores Sixty Lakhs only) shall be paid before the sale registration with a period of nine (9) months from today. Default in payment on or before the due date shall attract of forfeiture of advance amount paid.

<u>Schedule of Property</u>

11 grounds of land shown as Light Industrial in the plan attached in Survey Nos. Part Nos.59/1B, 59/2B, 59/3, 59/5, 59/6 bound on the:

North By	-	*A Shop, Plot No.3 and Plot No.4*
South By	-	*Plot No.21 and part of park area*
East By	-	*Mudichur Road*

West By - Plot No.20 and part of park area forming part of larger extent of layout sanctioned and approved from MMDA in PPA No.349 dated 16.07.1993.

SELLER"

15. Only a xerox copy of the document dated 27.02.2012 has been marked as Ex.P4. The original has not been produced. If Ex.P4 is to be treated as an agreement by itself, the same would be invalid for want of proper stamp duty. Realising the said difficulty, P.W.1, who had claimed in his proof affidavit that there was an agreement of sale on 27.02.2012 entered into between the plaintiffs and the defendant, wherein, then Managing Director of the defendant agreed to sell an extent of 11 grounds of the land, which is the subject matter of the suit, for total consideration of Rs.2,75,00,000/- has in his cross examination stated that there was an oral agreement of sale between plaintiffs and the defendant company in November, 2011. He would also state that the defendant's Managing Director has power to sell the property. He would also depose that before 2011, the bargain was struck by the parties for purchase and sale of the property.

16. He would admit that he does not have any documentary evidence to show such bargain. The relationship between Mr.Shoukath and Mr.Irshad Ahmed, one of the Directors and son of the Chairman of all the three plaintiffs is admitted by P.W.1. He would also depose as follows with reference to the acknowledgment obtained for the said cheques “It is true that after encashment of the cheques we obtained acknowledgment after three months of the encashment. The period of sale agreed upon the parties is 9 months from the date of receipt on 27.02.2012”. P.W.2 would in his cross examination admit that the resolution dated 01.03.1995 of the defendant company marked as Ex.P2 does not specifically refer to the suit property. The very existence of the agreement is totally denied by the defendant. Therefore, the burden to prove the agreement is on the plaintiffs. The plaint does not disclose the existence of any oral agreement of sale prior to 27.02.2012. Even the proof affidavit of P.W.1 does not refer to any oral agreement, it is only in cross examination, it is stated that the cheques were issued sometime in November, 2011 that too in favour of Mr.Shoukath, then Managing Director of the defendant company. P.W.1 comes forward with the claim that there was a

bargain that was struck between the parties with reference to the suit properties, sometime prior to 2011.

17. The evidence of P.W.1 in this regard is as follows "There is no agreement of sale between the plaintiffs and the defendant company. The defendant's Director has offered to sell the suit property". "The plaintiff Company agreed to purchase the property for Rs.2.75 Crores". According to him, before 2011, the bargain was struck between the parties for purchase and sale of the suit property. They do not have documentary evidence to show when, before 2011, such bargain was struck between the parties. This theory of oral bargain during the 2011 was introduced by P.W.1 only during his cross examination. Though P.W.2 would claim that the cheques were encashed and the fact that the cheques were encashed would be reflected in the accounts of the plaintiffs, he has not chosen to produce any document to show that the cheques were in fact encashed by the payee.

18. As regards non-production of the original of Ex.P4, it should

be pointed out that there is no explanation in the plaint. The suit being one for specific performance, it is mandatory for the plaintiffs to produce original agreement of sale or satisfactorily explain the absence of the original. In order to overcome the said difficulty, the plaintiffs had produced three documents, which have been marked as Ex.P20 to Ex.P22. Ex.P20 is an affidavit of Mr.Shoukath dated 21.12.2016, wherein, he had sworn to the fact that the original receipt dated 27.02.2012 acknowledging the receipt of advance of a sum of Rs.15,00,000/- executed by him on behalf of M/s.Southern Roofings Private Limited namely, defendant was in his custody and the same has been misplaced and is presently not traceable. This affidavit has been obtained on 21.01.2016 during the pendency of the suit before trial began. However, there is no reference to the said document in the proof affidavit filed by the plaintiff. The plaintiffs have also produced Ex.P21, which is a notice addressed to the counsel for the defendant seeking production of certain documents to which reply has been sent by the said counsel on 27.10.2015. It has been stated that those documents are not available with the defendant. The notice refers three other letters dated 18.11.2011, 28.11.2011, and 12.12.2012, none of which are found referred to in the plaint.

19. Therefore, as rightly contended by Mr.PL.Narayanan, Ex.P20 affidavit has been obtained by the plaintiffs from Mr.Shoukath only to escape the consequences of non-production of the original of Ex.P4. Mr.PL.Narayanan, also pointed out that the Board resolution of the defendant company, which has been marked as Ex.P2 dated 01.03.1995 does not authorise Mr.Shoukath to sell the suit property. He would point out that Shoukath has been authorised only to deal with the land of the company situated at Mudichur plotted into sites for housing, shops, etc; as per the plan approved by MMDA vide PPA No.349/93, to be sold at the best price with a view to discharge the liabilities of the company. It is in evidence that the suit property, being Industrial land, was not the subject matter of the approved plan namely, PPA No.349/93.

20. P.W.1 in his evidence particularly in cross examination would admit that the suit property is an industrial land in which old factory building of the defendant company is situated. P.W.2 would

also depose that the suit property is not a residential property and it is an industrial land, wherein factory premises of the defendant is situated. The evidence of P.W.2, in his cross examination with reference to the resolution dated 01.03.1995 is as follows "The resolution in favour of Managing Director Mr.Shoukath dated 01.03.1995 there is no specific mentioning of the suit property empowering him to sell the suit property. It is not mention in the resolution for the sale of industrial land of 11 grounds in Ex.P2".

21. Mr.PL.Narayanan, learned counsel appearing for the defendant would submit that the totality of the circumstances and effect of evidence, with reference to the agreement would show that the plaintiffs have no definite case regarding the agreement dated 27.02.2012. He would further submit that the Court should not exercise its discretion in favour of the plaintiffs, who have not come to Court with a consistent case. He has characterised the agreement as a fraudulent one created by the plaintiffs in collusion with Mr.Shoukath, who is none other than father-in-law of one of the Director of all the plaintiffs.

22. Mr.Zaffarullah Khan, learned counsel appearing for the plaintiffs would point out that the present Director as well as the Managing Director of the defendant company are also related to Mr.Shoukath. Relationships apart, in a suit for specific performance, it is the bounden duty of the plaintiffs to prove the existence of a valid agreement of sale. As already pointed out, the plaintiffs have no consistent case with regard to agreement dated 27.02.2012. The plaint proceeds on the footing that the agreement was entered into on 27.02.2012 and the advance was paid on that date. Ex.P4 reveals a altogether different state of affairs. Ex.P4 acknowledges receipt of cheques sometime in November, 2011 by the Managing Director of the defendant. Ex.P4 is not stamped in accordance with law or there is no attesting witness to the said document. The case of the oral agreement in sometime in November, 2011 has been introduced in cross examination by P.W.1. Neither the plaint nor the proof affidavit of P.W.1 refer to existence of any oral agreement.

23. Apart from the above, original of Ex.P4 has not seen the

light of the day. The plaint does not aver that the original of Ex.P4 was handed over to Mr.Shoukath, the then Managing Director of the defendant. The proof affidavit also does not disclose such cause for non-production of the original of Ex.P4. It should be pointed out at this juncture that Ex.P20 has been obtained by the plaintiffs from Mr.Shoukath, in January, 2016. The proof affidavit of P.W.1 was filed on 1st September, 2016. At that time, the affidavit, which is now marked as Ex.P.20 was very much available with the plaintiffs. There is no reference to Ex.P20 in the proof affidavit filed by P.W.1. All these discrepancies and anomalies lead me to believe that the case of the plaintiffs is not true.

24. Mr.PL.Narayanan, learned counsel appearing for the defendant would invite my attention to the decision of the Hon'ble Supreme Court in ***Ganesh Shet Vs. DR.C.S.G.K.Setty and others*** reported in ***(1998) 5 SCC 381,*** wherein, the Hon'ble Supreme Court has dealt with the effect of variation between pleadings and evidence in regard to terms of the contract and difference in position between a suit for specific performance and other suits. The Hon'ble Supreme

Court after referring Section 20 of Specific Relief Act, 1963, has observed as follows:-

> *12. .... It is well settled that the circumstances referred to in sub-clauses (2) to (4) in regard to exercise of discretion for granting a decree for specific performance are not exhaustive. The relief for specific performance is discretionary and is not given merely because it is legal but it is governed by sound judicial principles. (See Mademsetty Satyanarayana v. G.Yelloji Rao and Sardar Singh v. Krishna Devi.)*
>
> *13. It is again well settled that in a suit for specific performance, the evidence and proof of the agreement must be absolutely clear and certain.*
>
> *15. The question is whether, when parties have led evidence in regard to a contract not pleaded in the 'evidence (Sic), relief can be granted on the basis of the evidence and whether the plaintiff can be allowed to give a go-by to the specific plea in the plaint. Is there any difference between suits for specific performance and other suits?*
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> *16. It appears to us that while normally it is permissible to grant relief on the basis of what*

emerges from the evidence - even if not pleaded, provided there is no prejudice to the opposite party, such a principle is not applied in suits relating to specific performance."

After referring to various decisions of the High Courts and Hon'ble Supreme Court had finally concluded as follows:-

"21. The above principles are, it is clear, special principles applicable to suits for specific performance. The case before us does not fall within the exceptions namely, part-performance or immaterial variations. Nor is it a case where the plaintiff has agreed to amend his plaint. On the other hand, as already stated, the plaintiff spurned the opportunity given to him by the High Court for amendment of plaint. The case is in no way dissimilar to the cases in Gonesh Ram v. Ganpat Rai and to Mohd. Ziaul Haque referred to above."

In view of the above dictum of the Hon'ble Supreme Court unless the plaintiffs' case that is pleaded is consistent with the evidence on record, the suit for specific performance cannot be decreed. As already pointed out, the case of the plaintiffs in the plaint as well as in the evidence is not consistent and there is variation between what is pleaded and what is sought to be proved.

25. On such consideration, I find the evidence available on record is insufficient to prove the existence of agreement of sale on 27.02.2012 as alleged by the plaintiffs. The fact that then Managing Director Mr.Shoukath had played in to the hands of the plaintiffs by swearing affidavit in 2016 to the effect that he had possession of the original document dated 27.02.2012 and he misplaced the same also raises a doubt as to the genuineness of the claim of the plaintiffs.

26. In view of the foregoing reasons, Issues 2 & 3 are answered against the plaintiffs to the effect that the plaintiffs have not established the existence of valid agreement of sale and that there was collusion between Mr.Shoukath and the plaintiffs in bringing the above document dated 27.02.2012.

27. In view of the above conclusion issue No.1 is also answered against the plaintiffs holding that the alleged agreement dated

27.02.2012 is not a genuine and *bona fide* agreement. I am also in agreement with the contention of Mr.PL.Narayanan, that the resolution dated 01.03.1995 marked as Ex.P.2 does not authorise the then Managing Director of the defendant to deal with the suit property.

28. ***Issue No. 4:-***

In view of my finding of one (1) to three (3) that there was no valid, *bona fide* agreement between the parties, the question, whether the plaintiffs were ready and willing to perform their part of the contract in the agreement does not arise for consideration.

29. In fine, the suit is dismissed with costs of the defendant.

03.01.2018

Internet: Yes
Speaking order

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List of the Witnesses examined on the side of the Plaintiffs :-

P.W.1 – D.C.Ravi

P.W.2 – S.Srithar

List of Exhibits marked on the side of the Plaintiffs :-

S.No.	***Exhibits***	***Description of documents***	***Date***
1	P-1 series	The original Board Resolution (3 Nos.)	09.04.2013
2	P-2	The original Board Resolution	01.03.1995
3	P-3 series	The photocopy of the Board Resolution	10.02.2012
4	P-4	The photocopy of the agreement for sale	27.02.2012
5	P-5 series	The photocopy of the letters (3 Nos.)	18.11.2011
6	P-6 series	The photocopy of the letters (3 Nos.)	28.11.2011
7	P-7	The photocopy of the legal notice	19.11.2012
8	P-8	The photocopy of the letter	12.12.2012
9	P-9	The office copy of the notice	27.02.2013
10	P-10	Print out copy of acknowledgment for the notice	--
11	P-11	The balance sheet of the first plaintiff	2012-2013
12	P-12	The certified true copy of the balance sheet of the 2nd plaintiff	2012-2013
13	P-13	The certified true copy of the balance sheet of the 3rd plaintiff	2012-2013
14	P-14 series	The original Board Resolution	16.07.2016
15	P-15	The original Board Resolution	23.02.2012
16	P-16	The copy of the statement filed before the Company Law Board	17.07.2012
17	P-17	The photocopy of the bank statement of 1st plaintiff	--
18	P-18	The photocopy of the bank statement of 2nd plaintiff	--

S.No.	*Exhibits*	*Description of documents*	*Date*
19	P-19	The photocopy of the bank statement of 3rd plaintiff	--
20	P-20	Affidavit from Mr.Shoukath	21.01.2016
21	P-21	Letter from plaintiff counsel	13.10.2015
22	P-22	Reply letter from defendant counsel	27.10.2015

List of the Witnesses examined on the side of the Defendant :-

D.W.1- Suhaan Sherif

List of Exhibits marked on the side of the Defendants :-

S.No.	*Exhibit*	*Description of document*	*Date*
1	D-1	Board Resolution	26.06.2015

R.SUBRAMANIAN, J.

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C.S.No.329 of 2013

03.01.2018