

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 11.12.2020

PRONOUNCED ON : 18.01.2021

CORAM

THE HONOURABLE MS. JUSTICE R.N.MANJULA

C.S.No. 642 of 2012

T.S. Aswin

... Plaintiff

Versus

P.K. Iyer

... Defendant

Plaint filed under Order VII Rule 1 C.P.C. read with Order IV Rule 1 of the High Court Original Side Rules praying for:-

(i) To direct the defendant to execute and register a sale deed in favour of the plaintiff regarding the suit schedule property;

(ii) To direct the Registrar of this Court to execute and register the sale deed on behalf of the defendant;

(iii) To direct the defendant to refund Rs.4.50 crores with interest at the rate of 18% creating a charge on the suit property in case this Court declares that the plaintiff is not entitled to the main relief of specific performance of agreement dated 17.12.2009.

(Amended as per order dated 09.10.2018 in Application No.6410 of 2018 in C.S.No.642 of 2012).

For Plaintiff : Mr.S.R.Rajagopalan

for Mr.K.P.Sanjeevkumar,
M/s.Ojas Law Firm

For Defendant : Mr.V.C.Janardhan
for Mr.G.R.M.Palaniappan

JUDGEMENT

1. Brief facts set out in the plaint are as follows:-

The defendant is the owner of the suit property by virtue of a sale deed dated 27.08.2004. The defendant entered into an agreement of sale in respect of the suit property on 17.12.2009 with the plaintiff and agreed to sell the suit property for a sale consideration of Rs.4 crores and 50 lakhs. The plaintiff issued a cheque dated 17.12.2009 for the aforesaid sum in favour of the defendant. The statement of accounts of the plaintiff would show that the cheque was encashed. The defendant agreed to execute the sale deed as and when requested by the plaintiff without making any further demand. At the time of agreement itself he handed over the original sale deed dated 27.08.2004 and copies of other parent documents to the plaintiff. Despite the sale agreement was an unregistered one, the plaintiff was put in possession of the suit property for the purpose of protecting and maintaining the same. The plaintiff has been demanding the defendant to execute the sale deed but the defendant was protracting to execute the sale deed on some pretext or other. The defendant

avoided the phones and evaded to meet the plaintiff. So, the plaintiff issued a legal notice on 03.08.2012 and the same was received by the defendant on 06.08.2012. Even after the receipt of the legal notice the defendant did not come forward to execute the sale deed. He did not send a reply also. Hence, the plaintiff has filed the suit for specific performance. The plaintiff is ready and willing to pay stamp duty and registration expenses. The plaintiff has deployed the security persons to take care of the property and he has paid the property tax for 4 ½ years to the tune of Rs.8,936/- and electricity charges of Rs.3,724/-. He has spent a sum of Rs.72,000/- towards security charges. The plaintiff prays to pass a judgment and decree for specific performance or in the alternate a decree for recovery of a sum of Rs.4.50 crores with interest at the rate 18% by creating a charge on the suit property.

2. Brief facts set out in the written statement are as follows:-

The alleged agreement of sale deed dated 17.12.2009 was not executed as stated by the plaintiff. The said agreement is an unregistered and under stamped one and hence it should not be relied on for any purpose. The plaintiff has filed this frivolous suit just in order to deceive the defendant without paying the balance sale consideration. The plaintiff is in illegal possession of the suit property and the defendant reserves his right to pursue other remedies

in order to vacate him from the suit property. The plaintiff never approached the defendant for executing the sale deed. It is false to state that the plaintiff was paying the property tax and other charges for the suit property. The defendant is not bound to refund any amount to the plaintiff. Hence, the suit should be dismissed.

3. Brief facts set out in the Additional Written are as follows:-

The sale agreement dated 17.12.2009 was never acted upon. Since the plaintiff suffered heavy loss and the defendant helped him by lending money. The same would reflect in the income tax returns filed by both the plaintiff and the defendant. It is the defendant who had transferred money to the tune of Rs.7 crores to the plaintiff as hand loan. If the plaintiff paid the full sale consideration, there is no need to enter into an agreement of sale. The plaintiff has suppressed the material facts. There is no cause of action for the suit. The suit is abuse of process of law. Hence it has to be dismissed.

4. Brief facts set out in the Reply Statement are as follows:-

The defendant has introduced a new plea in his additional statement. The defendant had no wherewithal to pay Rs.7 crores to the plaintiff. The plaintiff has no necessity to borrow any money from the defendant. In fact, the

defendant requested the plaintiff to postpone the execution of sale deed to the next financial year as he was having a lot of financial problem. Hence the suit is decreed as prayed for.

5. Issues: On perusal of the records, it is seen that the issues have been framed on 05.12.2013 and 31.01.2014 on the basis of the pleadings made by both the plaintiff and the defendant. Since certain issues are repetitive, the issues are consolidated, reframed as under for the purpose of convenience:

- (1) Whether the alleged sale agreement dated 17.12.2009 is true?
- (2) Whether the amount of Rs.4,50,00,000/- paid by the plaintiff to the defendant is the sale consideration for the suit property ?
- (3) Whether the sale agreement is valid and enforceable?
- (4) Whether the plaintiff is entitled to the relief of specific performance as prayed for?
- (5) To what other relief the plaintiff is entitled to?

6. Evidence on Record:- On the side of the plaintiff, the plaintiff examined himself as PW1 and Ex.P1 to Ex.P8 have been marked. On the side of the defendant, the defendant examined himself as DW1 and Ex.D1 and Ex.D2 have been marked.

7. Arguments on the side of the Plaintiff:-

The submission of the plaintiff in his pleadings formed part of the argument of

the plaintiff. And it is further submitted that the plaintiff has admitted the execution of the sale agreement and receipt of the amount as found in the agreement. The sale agreement is true and valid and it is enforceable. The defendant did not prove that he had lent money to the plaintiff and he has not produced any accounts also to show the same. On the side of the Plaintiff the following judgement have been cited.

Citations submitted on the side of the plaintiff

- | | | |
|---|--------------------------|---|
| 1 | 2019 (8) SCC 575 | Surinder Kaur V.Bahadur Singh |
| 2 | 2020 (3) SCC 280 | C.S.Venkatesh V. A.S.C.Murthy |
| 3 | 2014 (6) CTC 773 | R.Munusamy V. G.Krishttappillai & Ors |
| 4 | 2014 (3) MWN (Civil) 578 | Minor Ravi Bharathi V. P.Balasubramani
& Anr |

8. Arguments on the side of the defendant:-

The submission of the defendant in his pleadings formed part of the argument of the defendant. And it is further submitted that the agreement Ex.P2 itself is not admissible for the reason that it is not registered and it is insufficiently stamped. And the court ought to have decided on the point of admissibility at the time when the same was marked in evidence. The suit property has been subsequently attached by the Enforcement Wing and hence it got frustrated. Since the sale agreement is an unregistered one the interest if any created in pursuance of the alleged sale agreement can not be saved as per sec.

64(2) C.P.C.

Citations submitted on the side of the defendant:-

1	1978 (3) SCC 236	Ram Rattan vs. Bajrang Lal
2	2019 (3) LW 30	K.Kanagasabai and others Vs. R.Sankar
3	2020 (3) LW 932	Thamizhselvi Vs. Gurunathan and others
4	2020 (2) LW 49	Kamal Kumar Vs. Premlatha Joshi
5	2020 (4) LW 157	M/s.Z.Engineers Construction Vs.Bipin
6	2004 (4) MAH L.J 919	Sumikin Bussan International Vs. Manharlal T.Mody

9. Issue Nos. 1&2 :-

The facts that the plaintiff and the defendant are known to each other and that they had business connections were not denied. The plaintiff claims that the defendant has executed a sale agreement Ex.P2 in favour of the plaintiff on 17.12.2009 and agreed to sell the suit property for a sale price of 4.5 crores. The plaintiff has further submitted that the total sale consideration of rupees 4.5 crores was transferred to the defendant's bank account on the same day of the agreement. The defendant did not deny the receipt of rupees 4.5 crores from the plaintiff through bank transaction and Ex.P3 bank statement also proves the same. But he contended that it was a part repayment made towards the loan amount of 7 crores advanced by him to the plaintiff. Admittedly no document

or account details showing the alleged loan transaction for 7 crores has been produced. In the absence of any evidence to substantiate the claim of the defendant that he had advanced rupees 7 crores, it can not be accepted that the amount paid by the plaintiff on the date of the sale agreement is towards the part repayment of any loan.

10. The plaintiff examined himself as PW1 and the defendant has also examined himself as DW1. During the cross examination of DW1, he has stated that the recitals in the agreement Ex.P2 are true and admitted that the sale consideration as found in Ex.P2 was received by him. He has further stated that the possession of the suit property was also given to the plaintiff. This would show that despite the defendant denied the execution of Ex.P2 and pleaded that it was not acted upon in his evidence he could not confirm it during the course of his evidence, but on the contrary he admitted the execution of Ex.P2 and the receipt of sale consideration also. With regard to the possession the defendant has given an indirect but affirmative answer in his cross examination that he accepted the terms and conditions and therefore, he signed it. However, he retracted once again that the sale agreement was not acted up on.

11. Had the sale agreement was a nominal one and the parties to the agreement did not intend to act upon it, there is no need to pay the sale consideration as

stated in the agreement by the plaintiff to the defendant. After paying the said sum of Rs.4.5 crores on the same day of the agreement, the plaintiff was said to put in possession of the suit property. The relevant portion of DW1's evidence is extracted as below.

“Q: Did you make any endeavour to correct the recitals of handing over the possession in the agreement?”

A: I agreed to the terms of the agreement. Therefore, I signed it.

Q: Have you paid the property tax for the building?

A: Yes, I have paid the property tax. The receipts are with me.

Q: The possession of the property found in Ex.P2 was not modified subsequently in any writing between you and the plaintiff. Do you agree?

A: No. I do not agree. It was not modified.

12. Though DW1 asserted during the cross examination that he would submit the income tax returns to show the alleged loan transaction between himself and the defendant he did not produce the same. So it is proved that the defendant signed the agreement only after accepting to its terms and he received the amount of 4.5 crores from the plaintiff only as per its terms and only as a sale price.

13. Even if it is assumed for the sake of argument that the intention of the

parties was different or got changed subsequent to the agreement, that should have been reduced into writing and Ex.P2 should have been cancelled. Even after receiving the legal notice from the plaintiff the defendant did not choose to send any reply or call upon the plaintiff to cancel the agreement. So the conduct of the defendant and the evidence on record would give one and only inference that Ex.P2 sale agreement was entered into between parties only for the purpose of executing the sale transaction. Since the evidence on record proves that the sale agreement is true and the plaintiff has paid the sale consideration of Rs.4.5 crores to the defendant, **Issues 1 and 2 are answered in favour of the plaintiff.**

14. Issue No.3:

The defendant pleaded that the possession was not given to the plaintiff. However he took an inconsistent defence during the course of arguments. The learned counsel for the defendant submitted that since the plaintiff was put in possession of the suit property, the sale agreement ought to have been registered. It is claimed by the learned counsel for the defendant that Ex.P2 is inadmissible in evidence since it is unregistered and insufficiently stamped one. The plaintiff has stated that he assumed the role of care taker of the suit property and he has deployed security persons to protect the suit property. In

the legal notice Ex.P7 also the plaintiff has alleged that subsequent to the sale agreement he had taken the constructive possession of the suit property and he employed securities for the property. However the defendant submitted that he continues to pay the property tax for the suit property. Ex.P6 Town Survey Extract also stands in the name of the defendant. These documents would show that the actual possession of the suit property was not given to the plaintiff despite the plaintiff was given with the purposive possession to safeguard the same. The plaintiff himself did not claim that he has taken the actual possession of the suit property and he has been consistently stating that he has appointed securities in order to safeguard the property.

15. The learned counsel for the defendant submitted that whenever the validity of the document is objected on the ground that it is insufficiently stamped and inadmissible, it is the duty of the Court to decide on the said objection before receiving the document. He relied on the judgements in the cases of **M/s.Z.Engineers Construction Pvt.Ltd & another V. Bipin Bihari Behera & others (2020 (4) LW 157)** and **Ram Rattan V. Bajrang Lal & Ors (1978) 3 SCC 240** in support of his above contention.

M/s.Z.Engineers Construction Pvt.Ltd & another V. Bipin Bihari Behera & others (2020 (4) LW 157)

11. We find that the trial court as well as the High Court

returned the findings on the bare reading of the power of attorney and observed that since it is a registered document, therefore, it is properly stamped. But the question as to whether in terms of the explanation inserted by the Orissa Act, such power of attorney is liable to be stamped as conveyance, on account of the delivery of possession at the time of execution of power of attorney or thereafter has not been examined.

12. We find that the question whether possession was transferred at the time or after execution of such power of attorney is a question of fact which is required to be decided by the Court at the time of final decision being adjudicated, after evidence is led by the parties and not merely on the basis of recitals in the power of attorney. Such process would be fair and reasonable keeping in view the provisions of Orissa Act.

13. We find that in the facts of the present case, the objection related to deficiency in stamp duty on a power of attorney which the appellant claims to be conveyance, depends upon the finding regarding delivery of possession in terms of the power of attorney. Generally speaking, such objection is required to be decided before proceeding further. However in case where evidence is determine the nature of the document, it is reasonable to defer the admissibility of a document for insufficient stamp duty at the time of final decision in the suit.

Ram Rattan V. Bajrang Lal & Ors

(1978) 3 SCC 240

Mr. Desai then contended that where an instrument not duly stamped or insufficiently stamped is tendered in evidence, the Court has impound it as obligated by Section 33 and then proceed as required by Section 35, viz., to recover the deficit stamp duty along with penalty. Undoubtedly, if a person having by law authority to receive evidence and the civil court is one such person before whom any instrument chargeable with duty is produced and it is found that such instrument is not duly

stamped, the same has to be impounded. The duty and penalty has to be recovered according to law. Section, 35, however, prohibits its admission in evidence till such duty and penalty is paid. The plaintiff has neither paid the duty nor penalty till today. Therefore, stricto, sensu the instrument is not admissible in evidence. Mr. Desai, however, wanted us to refer the instrument to the authority competent to adjudicate the requisite stamp duty payable on the instrument and then recover the duty and penalty which the party who tenders the instrument in evidence is in any event bound to pay and, therefore, on this account it was said that the document should not be excluded from evidence. The duty and the penalty has to be paid when the document is tendered in evidence and an objection is raised. The difficulty in this case arises from the fact that the learned trial judge declined to decide the objection on merits and then sought refuge under Section. 36. The plaintiff was, therefore, unable to pay the deficit duty and penalty which when paid subject to all just exceptions, the document has, to be admitted in evidence. In this background while holding that the document Ext. I would be inadmissible in evidence as it is not duly stamped, we would not decline to take it into consideration because the trial Court is bound to impound the document and deal with it according to law.

16. The evidence in this case does not show that Ex.P2 has been marked despite the objection raised by the defendant with regard to its admissibility. It is seen that Ex.P2 has been marked without any objection. It is probably because the defendant has pleaded in his written statement that the sale agreement was not acted upon and that the possession was not given to the plaintiff. Since the citations relied upon the learned counsel for the defendant lay down the

position of law, this point is also taken up for discussion in order to find out whether the said legal position is applicable to the situation of this case.

17. To counter the above point, the learned counsel for the plaintiff cited the decision reported in ***Munusamy v. Krishnasamy Pillai and Others (2014 (6) CTC 373)*** and claimed that the unregistered document can be received in evidence in the suit for specific performance.

Munusamy v. Krishnasamy Pillai and Others
(2014 (6) CTC 373)

7. The Court below rejected the said application only on the reason that the said document was not registered. In order to answer the issue on hand, it is better to refer to the relevant provision, namely Section 49 of the Registration Act, 1908, which reads as follows:-

"Section 49: Effect of non-registration of documents required to be registered: No document required by section 17 or by any provision of the Transfer of Property Act, 1882, to be registered shall--

(a) affect any immovable property comprised therein, or

(b) confer any power to adopt, or

(c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered:

Provided that an unregistered document affecting immovable property and required by this Act, or the Transfer of Property Act, 1882, to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific

Relief Act, 1877, or as evidence of any collateral transaction not required to be effected by registered instrument."

8. A careful perusal of the abovesaid provision of law would indicate that a document required to be registered under Section 17 of the Registration Act, 1908, if not registered, it shall not be received as evidence of any transaction affecting such property or conferring such power. Though such an embargo is put under Section 49(c) of the said Act, the proviso made to the said Section however contemplates that such unregistered document affecting immovable property may be received as evidence either in a suit for specific performance or as evidence of any collateral transaction not required to be effected by registered instrument. Thus, it is evident that the proviso to Section 49 permits receipt of such unregistered document as evidence of any collateral transaction.

18. The above case been cited and followed in the subsequent judgement of the Madras High Court in **Minor Ravi Bharathi V. P.Balasubramani and another** and reported in **2014(3) MWN (Civil) 578.**

9. The very same provision of law was considered by this Court in a recent decision reported in *R.Munusamy V.G.Krishttapillai*, 2014(7) MLJ 861 ; 2014(5) LW 59, wherein this Court followed the decision of the Honourable Supreme Court reported in *Bondar Singh and others v. Nihal Singh*, 2003 (2) CTC 635 (SC) : 2003(2) MLJ 122 : AIR 2003 SC 1905 : 2004(1) LW 706 (SC). This Court observed in Paragraphs 8 & 9 of this said decision as follows :

“8.A careful perusal of the abovesaid provision

of law would indicate that a document required to be registered under Section 17 of the Registration Act 1908, if not registered, it shall not be received as evidence of any transaction affecting such property or conferring such power. Though such an embargo is put under Section 49(c) of the said Act, the Proviso made to the said Section however contemplates that such unregistered document affecting immovable property may be received as evidence either in a Suit for Specific Performance or as evidence of any collateral transaction not required to be effected by registered instrument. Thus, it is evident that the Proviso to Section 49, permits receipt of such unregistered document as evidence of any collateral transaction.

9. Keeping the above provision of law in mind, if the facts and circumstances of this case are considered, it would only show that the order passed by the Court below cannot be sustained. The contention of the learned counsel for the respondents, confining his submissions based on Section 49(c), alone, cannot be accepted, especially when the Proviso, as discussed supra, permits marking of such document for collateral purpose. The other contention of the learned counsel for the respondents, namely the Proviso to Section 49 of the said Act is applicable only to the suits for Specific Performance, is also liable to be rejected, since a careful reading of the said Proviso would show that the same is applicable not only in respect of the suit for Specific Performance, but also in respect of the other suits where such document is intended to be marked as evidence for any collateral transaction.”

10. In view of the specific provision made under the

Proviso to Section 49 of the Registration Act, 1980, allowing the unregistered document affecting immovable property to be received as evidence of a contract in a suit for Specific Performance, the contentions raised by the learned counsel for the petitioner cannot be sustained and the same is liable to be rejected. The Trial Court has rightly rejected the application filed by the petitioner seeking to discard the unregistered agreement of sale, dated 31.08.2005, with which I find no infirmity or illegality.

19. Admittedly the plaintiff has not filed this suit for any relief basing on the possession and this is a clear case for specific performance. So the unregistered sale agreement Ex.P2 can be received in evidence by applying the exception provided under the proviso to sec.49 (c) of the Registration Act. The proviso makes it more clear that even if the document happened to be an unregistered conveyance, that can be received in evidence for any collateral purposes like possession. Under such circumstances, Ex.P2 sale agreement cannot be rejected as inadmissible on the ground that it is not registered or that it is insufficiently stamped. Hence I hold that **Ex.P2 sale agreement is valid and enforceable and Issue No.3 is answered accordingly.**

20. Issue No. 4:-

It has already been held that the sale agreement is true and valid and that the sale consideration of Rs.4,50,00,000/- as stipulated in the sale agreement had been passed to the defendant through bank and it is accepted by the defendant

also. It is seen from the recitals of Ex.P2 that the parties have agreed between themselves that the sale deed should be executed in favour of the plaintiff as and when it is requested by the plaintiff without any further claim or demand. No time limit has been prescribed in the sale agreement for the purpose of executing the sale deed. It is the contention of the plaintiff that he has been trying to contact the defendant through phone, but the defendant was not responsive. It is further submitted that the plaintiff could not even meet the defendant as he was evasive. The plaintiff has chosen to issue the legal notice Ex.P7 on 03.08.2012 and that was received by the defendant. The acknowledgement Ex.P8 is produced to show the same. The date of the sale agreement is 07.12.2009 and the legal notice Ex.P7 has been sent on 03.08.2012. It shows that the legal notice has been issued by the plaintiff at the verge of the completion of three years from the date of the sale agreement. It is submitted by the defendant that the plaintiff was not serious about the agreement and only because of that he chose to take legal action to enforce the contract at the verge of 3 years. So it is submitted by the defendant that the plaintiff was not ready and willing to complete the transaction.

21. In support of his contention, the learned counsel for the defendant cited the judgement of this court rendered in *Thamizhselvi v. Gurunathan and Ors* and

reported in **2020-3-L.W. 932**. In the said judgement the single judge of this court has recorded as under:

9.Given the ordinary course of human conduct, no man will demonstrate his excellence in patience especially when he had paid the entire consideration for obtaining a sale deed. Ext.A-1 Sale Agreement, the manner of its alleged execution, does not inspire confidence. Therefore, even dehors the plea of the second defendant that he is a bonafide purchaser for value without notice of Ext.A-1, the plaintiff still does not qualify for this Court to consider the exercise of its discretion in her favour.

22. The above opinion was rendered by the court in view of the facts involved in that case. Though it is true that the plaintiff of this case has paid the entire sale consideration on the date of the sale agreement itself, a sale agreement was entered into. And the plaintiff waited to get a response from the defendant for nearly three years and then filed the suit. But, still no fact or circumstance which might cause cloud on the agreement is pleaded or established by the defendant. It was neither pleaded by the defendant that the sale agreement was in fact a security arrangement for a loan availed by him from the plaintiff. On the other hand, he claimed that the amount of Rs.4.5 crores received by him through bank and as mentioned in the sale agreement, was only towards the part repayment of a loan lent by him to the plaintiff. It is already held that the defendant did not substantiate the said fact.

23. Sometimes the parties might change their intentions subsequent to the agreement. But that should also be reduced into writing in order to nullify the earlier written contract. Until then the earlier contract holds good and the parties can not evade to perform their respective part of contract. Just because the plaintiff has chosen to resort to legal action at the edge of the limitation period that alone will not disqualify him from getting the relief. Especially when it is not proved that the plaintiff had any *malafide* intention for executing the sale agreement, despite paying the sale consideration in full. The defendant who has received the entire sale consideration from the plaintiff is at a better position than the plaintiff who has paid the entire sale consideration and waited for the defendant to respond to his calls. It is also within the knowledge of the defendant that the plaintiff is entitled to take legal action anytime within 3 years and get the terms of the contract fulfilled. If the intention for the sale agreement is to put the defendant in any disadvantageous situation, then the defendant should have had the urgency to safeguard his interest by taking steps to cancel the agreement by stating the other intentions if any. He can not keep silent and allow the plaintiff to file a case and then tell that the agreement was for a purpose other than what has been stated therein. So in the absence of any *malafide* intention on the part of the plaintiff, the sale agreement can not be

seen with suspicion, just because the plaintiff was under the wire while taking legal action. To deny relief to the plaintiff for the sole reason that he came to court at the edge of 3 years limitation will render the statutory time limit of 3 years itself meaningless.

24. It is submitted by the learned counsel for the plaintiff that the plaintiff was ready and willing to perform his part of contract and hence he is entitled to the relief of specific performance. He cited the decision reported in **(2020) 3 SCC 280 (C.S.Venkatesh V. A.S.C.Murthy)** in support of his contention. In the said judgement it is held:

15. The words 'ready and willing' imply that the plaintiff was prepared to carry out those parts of the contract to their logical end so far as they depend upon his performance. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of performance. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of contract, the court must take into consideration the conduct of the plaintiff prior, and subsequent to the filing of the suit along with other attending circumstances. The amount which he has to pay the defendant must be of necessity to be proved to be available. Right from the date of the execution of the contract till the date of decree, he must prove that he is ready and willing to perform his part of the contract. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready to perform his contract.

16. In N.P. Thirugnanam (Dead) by LRs. v. Dr. R. Jagan Mohan Rao and Others¹, it was held that continuous readiness and willingness on the part of the plaintiff is a

condition precedent to grant of the relief of specific performance. This circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior to and subsequent to the filing of the suit along with other attending circumstances. The amount of consideration which he has to pay to the defendant must necessarily be proved to be available.

25. According to the above judgement it is imperative on the part of the plaintiff to prove that he always had the wherewithal to pay the sale amount to the defendant. Only if he could prove so, that will ensure his readiness and willingness in all practical terms. But in this case the plaintiff has paid the entire sale consideration and hence to prove the financial strength of the plaintiff to pay the sale price does not arise. The only contention of the plaintiff was that the defendant did not come forward to execute the sale deed. A reasonable question would arise with regard to the necessity to enter into a sale agreement when the entire sale consideration was paid in one and the same day. In that context of usual practice the parties will directly go for the execution of the sale deed once the entire sale consideration is paid and there will not be any necessity to pre-arrange a written sale agreement. When the plaintiff was confronted on this point during his cross examination he replied that it was executed at the request of the defendant and to help him to avoid the tax impact

on the capital gain arising out of the sale transaction during the said financial year. The learned counsel for the defendant submitted that the plaintiff did not state this reasons in his plaint. It is not something which plaintiff tried to prove without pleading. It was the answer given by the plaintiff when the defendant asked him about the reason for the execution of the sale agreement. And in fact he has stated the same in his reply statement and that will also form part of the plaintiff's pleading. Hence its acceptability can be tested even though it is not pleaded in the plaint itself. The tax reason stated by the plaintiff during his cross examination is not something uncommon or unacceptable in the context of tax savings plans adopted by the assesseees.

26. It is further submitted by the learned counsel for the defendant that the relief of specific performance is a discretionary relief and the court is not bound to grant the same. He cited the decision of the Division bench of this court reported in **K.Kanagasabai and Others V.R.Sankar** (2019 (3) LW 30) and the recent judgement of the Supreme Court in **Kamal Kumar V.Premlata Joshi & Others** LW 30) (2020 (2) LW 749) in support of his above said contention.

K.Kanagasabai and Others V.R.Sankar
2019 (3) LW 30)

It is well settled legal principle that under Section 20(1) of the

*Specific Relief Act, the jurisdiction to decree specific performance is discretionary and the Court is not bound to grant such relief merely because it is lawful to do so. The discretion to be exercised by the Court should not be arbitrary, but based on sound reasoning guided by judicial principles and capable of correction by a Court of appeal. In this regard, learned counsel for the appellants/defendants relied on a decision of the Supreme Court reported in **2017-3-L.W.895 = 2017(5) SCC 178 = 2017 SCC online SC 157 (Jayakantham and others Vs.Abaykumar)**, wherein the Apex Court held as follows :*

"7.While evaluating whether specific performance ought to have been decreed in the present case, it would be necessary to bear in mind the fundamental principles of law. The court is not bound to grant the relief of specific performance merely because it is lawful to do so. Section 20(1) of the Specific Relief Act, 1963 indicates that the jurisdiction to decree specific performance is discretionary. Yet, the discretion of the court is not arbitrary but is "sound and reasonable" to be "guided by judicial principles". The exercise of discretion is capable of being corrected by a court of appeal in the hierarchy of appellate courts. Sub-section (2) of Section 20 contains a stipulation of those cases where the court may exercise its discretion not to grant specific performance. Sub-section (2) of Section 20 is in the following terms :

"Section 20(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'. 8. However, Explanation 1 stipulates that the mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendants or improvident in its nature, will not constitute an unfair advantage within the meaning of clause (a) or hardship within the meaning of clause (b). Moreover, Explanation 2 requires that the issue as to whether the performance of a contract involves hardship on the defendant has to be determined with reference to the circumstances existing at the time of the contract, except where the hardship has been caused from an act of the plaintiff subsequent to the contract.

(Kamal Kumar V.Premlata Joshi & Others)

2020 (2) LW 749

10. It is a settled principle of law that the grant of relief of specific performance is a discretionary and equitable relief. The material questions, which are required to be gone into for grant of the relief of specific performance, are First, whether there exists a valid and concluded contract between the parties for sale/purchase of the suit property; Second, whether the plaintiff has been ready and willing to perform his part of contract and whether he is still ready and willing to perform his part as mentioned in the contract; Third, whether the plaintiff has, in fact, performed his part of the contract and, if so, how and to what extent and in what manner he has performed and whether such performance was in conformity with the terms of the contract; Fourth, whether it will be equitable to grant the relief of specific performance to the plaintiff against the defendant in relation to suit property or it will cause any kind of hardship to the defendant and, if so, how and in what manner and the extent if such relief is eventually granted to the plaintiff; and lastly, whether the plaintiff is entitled for grant of any other alternative relief, namely, refund of earnest money etc. And, if so, on what grounds.

27. It is true that the relief of specific performance is an equitable relief and that

the court has to use its discretion by weighing the undue advantage that might result to one party at the hardship caused to the other while granting the same. The plaintiff in this case has already paid the full sale consideration as how it was agreed in the sale agreement. Though the defendant has stated that the sale agreement was a nominal one and executed for some other reason he has not proved the same. But he admitted that he affixed his signature in the sale agreement after fully understanding its content and agreeing it to be true. No doubtful or unreasonable conduct on the part of the plaintiff at the time of executing the sale agreement or subsequent to that has been pleaded or proved. The defendant did not opt to return the money and called upon the plaintiff to cancel the agreement for any reasons of unfairness or failure on the part of the plaintiff. The defendant neither claimed that the suit property was undervalued unfairly and he was defrauded by the plaintiff at the time of executing the agreement. He did not even prove any fact or circumstance that might put him in a hardship but put the plaintiff to gain unfair enrichment or advantage. In fact the defendant had enjoyed the sale consideration for many years without executing the sale deed. The object of the specific relief Act is to ensure performance of the contract and to contain the damages that might cause to the respective parties to the agreement. In fact the recent amendment to the Specific

Relief Act has made it more obligatory.

28. However, the change of circumstances that occurred subsequent to this suit deprives this relief to the plaintiff. It is submitted by the defendant that the suit property was attached by the Directorate of Enforcement, Hyderabad, by virtue of its order dated 28.03.2017. The copy of the said order is marked as Ex.D2. The learned counsel for the defendant submitted that only those interests in the property which have been safeguarded through registered instruments before attachment could be unaffected due to the attachment. In support of his above said contention he cited in the case of ***Sumikin Bussan International Hong Kong v. Manharlal T.Mody*** reported in **2009 (4) Mh.L.J. 919**. In the said judgment as held:

12. The Civil Procedure Code Amendment Act 2002 (22 of 2002) with effect from 1st July, 2002, has introduced basically Sub-section (2) of Section 64 to the Civil Procedure Code. The above referred amended provision has been inserted on the basis of 54th Law Commission. Specially, in view of the various conflicting issues relating to the transfers, which were entered into before or after order of attachment, and to avoid abuse and practice of entering into such antedated agreements or contracts and such other transactions. Sub-section (2) as referred above, now, contemplate that any private transfer or delivery of the property or of any interest therein, made in pursuance to such contract, and same if, registered before the attachment, then such transfer or

delivery will not be affected by the attachment order, as contemplated under the provisions of Section 64 of Civil Procedure Code. Therefore, any private alienation of the property through any contract, if, registered prior to the date of the attachment, such sale or delivery or transfer, would prevail over the order of attachment of such property. Now, therefore, registration of such document before attachment order is a must, to claim right over the property under the attachment.

13. Admittedly, the warrant of attachment is of dated 12th January, 2004. The memorandum of understanding, as relied by appellants, dated 6-6-2003 which was entered into between the applicants and Mr. Manharlal Mody and Mrs. Meena M. Mody. Applicants contended that it is agreement of sale, whereas Mr. Kadam, appearing on behalf of Judgment Debtor, opposed the same. In the commercial world, memorandum of understanding and agreement for sale are two different documents. The payment in reference to this transaction, was made on 29th April, 2002, of Rs. 2,50,000/- and on 6-6-2003 Rs. 25 lacs, were paid and received by the Judgment Debtor Mr. Manharlal Mody and Mrs. Meena M. Mody. Admittedly, there is no actual delivery of possession of the property in question to appellants till this date. There is no dispute that execution application No. 18 of 2004, whereby, the property in question has been attached by the judgment creditors, based on the judgment and decree or order dated 31st May, 2002. In view of this admitted position, unless there is registration of contract/document, prior to the attachment, such sale or transactions cannot be recognised. It shall not prevail over the order of attachment of the same property. In the present case, as document of transaction (M.O.U.) is not registered, and property not delivered or transferred actually to the applicants, there is no right as such, in favour of the applicants, which will prevail over the attachment order dated 12th January, 2004.

29. The learned counsel for the plaintiff submitted that Section 64 (2) of CPC

has no application for the agreements that have been entered into prior to the attachment. But the words found in the subsection 2 of sec.64 C.P.C unequivocally lay that those rights derived through registered documents alone can prevail over the attachment. Since Ex.P2 is an unregistered agreement it does not have the qualification to prevail over the attachment order Ex.D2 and stand unaffected. The amended provision of sec.64(2) has come into effect from 1st July 2002. On 17.12.2009 when the sale agreement Ex.P2 was executed sec.64(2) C.P.C was very much in force. So the right and interest of the plaintiff in the suit property which has been created through an unregistered sale agreement Ex.P2 will not prevail over Ex.D2 attachment. **And hence it is not possible to grant a relief of specific performance to the plaintiff. Thus Issue No.4 is answered.**

30. Issue No.5:- However the plaintiff is entitled to get the alternative relief of getting a decree for recovery of money. The evidence on record and the defendant's own admission during the course of his evidence would prove that the plaintiff has paid the defendant the entire sale consideration of Rs.4.5 crores as agreed in Ex.P2 and it was received by him. The payment was made through bank transaction and hence it is borne by records. Though the defendant claimed that the said sum was paid by the plaintiff as part payment towards the

loan lent by him, it is not proved. The defendant has defaulted to execute the sale deed before attachment and the subsequent attachment had made it impossible to make it executed. Under such circumstances the only remedy available to the plaintiff is to get a decree for recovery of the sale consideration paid by him along with compensatory interest. Hence I hold that the plaintiff is entitled to a decree for recovery of a sum of rupees 4.5 crores from the defendant with a reasonable interest at the rate of 12% p.a from 17.12 2009 till this date and at the rate of 6% p.a from the date of decree till realisation and cost. **Thus Issue No.5 is answered.**

31. In the result the suit is allowed with regard to the alternative relief and decreed for recovery of a sum of rupees 4.5 crores from the defendant with interest at the rate of 12% p.a from 17.12 2009 till this date and at the rate of 6% p.a from the date of decree till realisation and cost and the suit is dismissed with regard to the relief of specific performance. Time for payment 1 month.

WEB COPY

**18.01.2021
(RNMJ)**

msm

Index : Yes/No

Internet : Yes/No

Speaking/Non Speaking Order : Yes/No

List of Witness examined on the side of the plaintiff

T.S.Aswin - PW1

List of documents marked on the side of the plaintiff

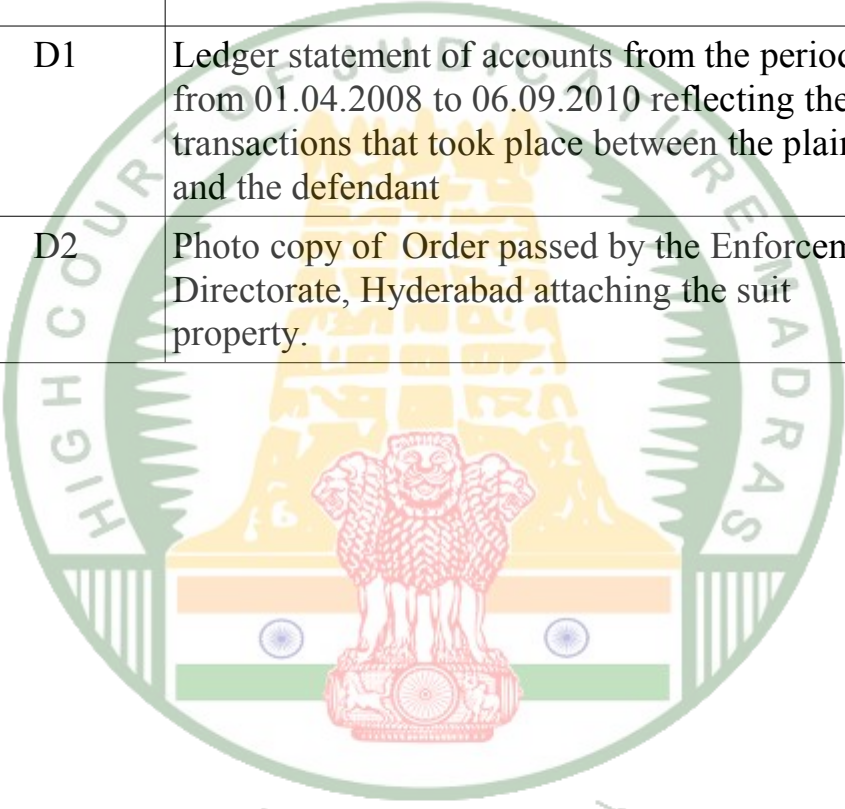
Sl.No	Exhibits	Description of documents	Date
1	P1	Certified copy of the Sale Deed	27.08.2004
2	P2	Original Agreement of sale	17.12.2009
3	P3	Statement of account issued by ICICI Bank	-
4	P4	Audited balance sheet upto 31.03.2010	-
5	P5	Audited balance sheet upto 31.03.2011	-
6	P6	Extract of Town Survey land register for the land issued by the concerned Tahsildar	-
7	P7	Office copy of the legal notice	03.08.2012
8	P8	Acknowledgment card	-

List of Witness examined on the side of the Defendant

P.K.Iyer - DW1

List of documents marked on the side of the Defendant

Sl. No	Exhibits	Description of documents
1	D1	Ledger statement of accounts from the period from 01.04.2008 to 06.09.2010 reflecting the transactions that took place between the plaintiff and the defendant
2	D2	Photo copy of Order passed by the Enforcement Directorate, Hyderabad attaching the suit property.

18.01.2021
(RNMJ)


सत्यमेव जयते

WEB COPY

R.N.MANJULA, J.



delivery Judgment in
C.S.No. 642 of 2012

18.01.2021

WEB COPY