

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 28.10.2005

Coram:

The Hon'ble Mr. Justice P.K.MISRA  
and  
The Hon'ble Mr. Justice N.KANNADASAN

O.S.A.No.150 of 1989

1.Samrathmal Jain (died)  
2.Lalitha Devi  
3.Anil Kumar  
4.Anitha  
(Appellants 2 to 4 brought on record  
as L.Rs. of the deceased sole  
appellant as per order of Court dated  
27.1.2004 made in CMP.No.5606/98) .. Appellants/Plaintiff

vs.

1.Nainshukdas Baldeodas  
a Partnership Firm rep.,  
by defendants 2 and 3 having  
registered office at No.1/422,  
Mint Street, Madras 1.  
2.Surajnarian Daga (deceased)  
3.Premnarain Daga (deceased)  
4.Lakshminarain Daga  
5.Shrinarain Daga  
6.Sathyanarain Daga  
7.Gawara Devi Daga  
8.Praveen kumar Daga  
9.Praful kumar Daga  
10.Rajashree Rathi .. Respondents/ Defendants

RR4 to 6 brought on record as L.Rs of deceased 2nd Respondent and added as Respondents 4 to 6 vide order of court dated 27.6.2005 and made in CMP.Nos.8803 to 8805/98 RR7 to 10 brought on record as LR's of the deceased 3rd respondent and added as respondents 7 to 10 vide order of Court, dated 27.6.2005 and made in CMP.Nos.1337 to 1339/2004.

Appeal filed as against the judgment and decree of this Court dated 2.2.1989 in C.S.No.74 of 1983.

For Appellants : Mr.R.Thiagarajan

For Respondents-1,4  
to 10 : Mr.R.Krishnaswamy,  
Senior Counsel for  
Mr.H.Kishore

Respondents-2&3: Died

#### JUDGMENT

N.KANNADASAN, J.

The above appeal is filed as against the judgment and decree dated 2.2.1989 in C.S.No74 of 1983.

2. The first appellant is the plaintiff in the suit and the appellants 2 to 4 are the legal representatives of the first appellant. The respondents herein are the defendants in the suit.

3. The plaintiff filed the suit seeking a relief of specific performance, in default directing the execution of the sale deed and delivery of possession of the property and as well as claiming a sum of Rs.1 lakh towards damages. The suit is filed contending that the first defendant firm on 25.7.1980 agreed to sell the suit property for a sum of Rs.4,80,000/- to the plaintiff, for which the plaintiff issued a cheque for a sum of Rs.21,000/- towards advance, which was acknowledged by the first defendant by way of a receipt. As per the agreement, the defendants should obtain necessary Income Tax Clearance Certificate, Wealth Tax Certificate for the early execution of the sale deed and the time for performance of the contract was not specified. The title deeds relating to the property was handed over to the plaintiff's lawyer Mr.T.Chopda, who has passed on the title to the suit property. Subsequently, the defendants made available further documents and instructed the plaintiff's lawyer by name Purushothaman to prepare the draft sale deed for the purpose of execution. Since the plaintiff's lawyer advised that it would not be possible to get the registration of the sale deed done unless certain other documents such as Income Tax Clearance Certificate, Wealth Tax Certificate and Blue print of the property showing the exact measurement and an encumbrance Certificate for a period of 50 years were made available, which was agreed to by the defendants. Subsequently, all of a sudden the defendants caused a notice dated 24.10.1980 addressed to the plaintiff's lawyer Purushothaman to the effect that the defendants handed over the documents only for the purpose of scrutiny and return and as such, the said documents should be returned. When the said notice

was brought to the knowledge of the plaintiff, by letter dated 6.11.1980 he had informed the defendants that the contract was subsisting and out of the sale consideration of the property of Rs.4,80,000/-, a sum of Rs.21,000/- was already paid as advance and the plaintiff was ready and willing to pay the balance sale consideration. The defendants issued a reply notice dated 11.11.1980, wherein it is mentioned that the documents were entrusted to the plaintiff's lawyer only for scrutiny and return. Subsequently, the plaintiff has sent a lawyer's notice dated 14.11.1980 reiterating the earlier stand and directed the defendants to perform their part of the contract and also claimed a sum of Rs.1 lakh towards damages. Under the said circumstances, the suit is filed seeking the relief as stated above.

4. The suit was resisted by the defendants by contending that an agreement of sale was not finalised and the terms and conditions were not arrived at and the contract was not concluded and only the sale price was finalised and the defendants never agreed to handover all the Certificates such as Income Tax Clearance Certificate, Wealth Tax Certificate and Blue print as claimed by the plaintiff, but however, made available the title deeds to the plaintiff's lawyer Mr.T.Chopda. Since the plaintiff did not take any steps to proceed further and the value of the property has gone up in the meanwhile, the defendants have issued a notice dated 24.10.1980 directing the plaintiff's lawyer to return all the documents immediately.

5. In the light of the above pleadings, the learned single Judge has framed as many as four issues as set out hereunder:-

1. Whether there was a concluded contract for the sale of property between the plaintiff and the defendants?
2. What are the terms of the agreement of sale?
3. Whether the plaintiff was ready and willing to perform his part of the contract?
4. Whether it will be unjust and inequitable to order specific performance for the reasons stated by the defendants 1 and 3?

6. The learned single Judge, by judgment and decree dated 2.2.1989 in C.S.No.74 of 1983, held that there was no concluded contract, but however, directed refund of the amount of Rs.21,000/- with interest at the rate of 12% from 11.11.1980, on which date the forfeiture of advance was referred to, and awarded a sum of Rs.9,600/- as a nominal damages. Aggrieved against the said judgment and decree, the present appeal is filed.

7. Learned counsel appearing for the appellants contended that the learned single Judge has taken inconsistent stand inasmuch as a findings rendered in paragraph-13 of the judgment to the effect that though there was no concluded contract, but there existed a contract of sale in respect of the suit property for a specified price agreed between the parties. Learned counsel further contended that inasmuch as a finding is rendered by the learned single Judge that the plaintiff was ready and willing to perform his part of contract, and there was breach only on the part of the defendants and passed a decree to refund the amount of Rs.21,000/- with interest apart from payment of a nominal damages of Rs.9,600/-, the discretion ought to have been exercised in favour of the plaintiff by decreeing the suit as prayed for.

8. Learned counsel also placed reliance upon the various documentary evidences as well as oral evidence adduced by the parties in support of his contention. Learned counsel also placed reliance upon the provisions viz., Sections 9 and 55 of the Indian Contract Act as well as Sections 16(c) and 20 of the Specific Relief Act in support of his contention.

9. Per contra, learned senior counsel for the respondents contended that as per the materials available on record, at no stretch of imagination, a decision can be arrived at that there was a concluded contract between the parties. In this connection, learned senior counsel has placed reliance upon the oral evidence as well as the documentary evidence. Learned senior counsel also placed reliance upon the various citations in support of his contention.

10. We have considered the rival contentions of the leaned counsels appearing on either side.

11. The point for determination that arises in this appeal is:

"Whether the judgment and decree of the learned single Judge is sustainable in law or not?"

12. It is not in dispute that on 25.7.1980, the plaintiff has paid a sum of Rs.21,000/- towards advance, for which a receipt was issued by the first defendant firm, evidencing the said payment for the purchase of the property in question. Though there is no dispute that the parties have agreed to for the sale and the sale consideration is also arrived at, it is to be seen as to whether there was a concluded contract or not. In a suit for specific performance, one of the essential feature is that there should be consensus ad idem between the parties. In order to



ascertain as to whether there was a mutuality of minds and the contract was concluded or not, we have to necessarily see the relevant evidence adduced by the parties in the light of the oral and documentary evidences.

13. Ex.P.1 dated 25.7.1980 indicates that a sum of Rs.21,000/- is received towards advance from the plaintiff against the sale of the suit property and the total sale consideration is indicated as Rs.4,80,000/-. The plaintiff while tendering evidence as PW.1 has admitted that there were no other terms and conditions of the agreement, apart from the amounts indicated in Ex.P.1. He has also deposed that there was no oral agreement of sale except on certain aspects such as stamp charges, advocate's fee and registration fee. He has also admitted in his evidence that there was no specific pleading in respect of the exact terms and conditions relating to such matters. Initially the plaintiff has sought the opinion of his lawyer by name one T.Chopda who was not examined. The subsequent lawyer of the plaintiff's viz., Purushothaman gave evidence as PW.2. He has deposed that when the defendants handed over the documents to him, he handed over the receipt viz., Ex.D.16. In Ex.D.16, he has only indicated that he has received the said documents in connection with the "Proposal to Sell" of the suit property. In his evidence, he has admitted that he did not know about any proposal for agreement and he was not aware of the terms and conditions of the sale. If really, the documents were handed over to him for the execution of the sale deed, one cannot expect him to plead ignorance about all these vital details. Under the said circumstances, we are of the opinion that there was no consensus ad idem between the parties and there was no concluded contract and as such, the plaintiff cannot enforce the specific performance as pleaded by him. Since we have to come to the conclusion that there was no concluded contract, the other details as to whether the defendants agreed to produce the other Certificates such as Income Tax Clearance Certificate, Wealth Tax Certificate etc., have no relevance.

14. Learned counsel for the appellants further contended that even though the defendants agreed to perform the implied promise, they did not do so, but however, chose to send a legal notice dated 24.10.1980 under Ex.P.2 for return of the documents with a view to avoid execution of the sale deed. It is seen from the records that even though an amount of Rs.21,000/- was paid by way of advance as early as on 25.7.1980 and immediately thereafter, all the title deeds pertaining to the property were handed over to the previous counsel for the plaintiffs viz., T.Chopda and when the said counsel returned the title deeds, the same were handed over once again to the subsequent counsel viz., T.A.M.Purushothaman. While receiving the said title deeds, the subsequent counsel Purushothaman in Ex.D.16 has merely

acknowledged the receipt of the said documents wherein it is specifically mentioned that the said documents were received for inspection and proposal to sell. In the said receipt, it is not indicated that the defendants are required to produce further documents such as Income Tax Clearance Certificate etc., for the purpose of preparation of sale deed. Neither the plaintiffs nor their counsel have chosen to send any communication thereafter, directing the defendants to make available such certificates/documents. Under the said circumstances, the defendants have chosen to send lawyer's notice under Ex.P.2. It is only on receipt of the said notice, the plaintiffs have sent a letter dated 6.11.1980 in Ex.P.3, wherein for the first time, it is indicated that the defendants are required to produce certificates such as Income Tax Clearance Certificate etc. That apart, the abovesaid Purushothaman, while giving evidence, as PW.2, has admitted that he went through the documents immediately within two hours of such production. If that is so, there is no proper explanation on the part of the plaintiffs as to why the plaintiffs were keeping quite for such a long period without sending any communication to the defendants requesting them to make available such documents for the purpose of the preparation of the sale deed. Assuming that the documents were handed over for the preparation of sale deed and the same could not be done for want of production of certain documents such as Income Tax Clearance Certificate, it is to be seen that PW.2 has not even prepared the draft sale deed which is essential for the purpose of obtaining Income Tax Clearance Certificate. PW.2, while deposing evidence, has admitted the said fact.

15. Even though the learned senior counsel appearing for the defendants contended that the findings of the learned Judge in respect of other issues viz., readiness and willingness on the part of the plaintiffs and there was a breach on the part of the defendants are not based on the materials available on record, we do not propose to deal with the said contentions in view of the conclusions arrived at by us to the effect that there was no concluded contract between the parties.

16. Learned counsel for the appellants placed reliance upon the decision of a Division Bench of this Court in PALANICHAMI vs. G.PILLAI (AIR 1966 Madras 46) to substantiate that in the absence of any express provision with regard to the completion of transaction within the specified time, the Courts have to render decision based on equity. He has also placed reliance upon the judgment of the Apex Court rendered in RAMESH CHANDRA vs. CHUNILAL (AIR 1971 SC 1238) to substantiate that the discretionary relief should be exercised in accordance with sound and reasonable principles. Similarly, he has placed reliance upon the decision in PRAKASH CHANDRA vs. ANGADLAL (AIR 1979 SC 1241) and contended that

ordinarily specific performance should be granted and it can be denied only when equitable considerations point to its refusal and the circumstances show that damages would constitute an adequate relief. He has also placed reliance up the other decisions viz., SMT.INDIRA KAUR AND OTHERS vs. SHEO LAL KAPOOR (1988 (2) SCC 488), ABDUL KHADER ROWTHER vs. P.K.SARA BAI AND OTHERS (1989 (4) SCC 313), REDDY C.V. vs. THE INDIAN BANK ETC. (1991 (2) Law Weekly 42, MUNISWAMY, R. AND 6 OTHERS vs. P.PANDIARAJAN AND 3 OTHERS (1993 (1) Law Weekly 186), RAM NIWAS vs. BANO (2000 (6) SCC 685) and SURJIT KAUR vs. NAURATA SINGH (2000 (7) SCC 379) in support of his contention.

17. In the light of the findings rendered by us, all the above referred decisions are not applicable to the facts of the present case, since the oral and documentary evidence amply demonstrate that there was no mutuality between the parties and the contract was not a concluded one.

18. With regard to the contention urged by the learned counsel for the appellants on the basis of provisions in Section 16(c) and Section 20 of the Specific Relief Act, and Sections 9 and 55 of the Indian Contract Act, it is to be seen that the plaintiff cannot seek any indulgence on the facts of the present case. In this connection, it is useful to refer to the decision of the Apex Court in K.S.VIDYANADAM AND OTHERS vs. VAIRAVAN (1997 III SCC 1), wherein it is observed that the party is not entitled for a discretionary relief on the payment of a small amount as earnest money considering the fact that the house property located in the urban area and continuing steep rise in price thereof, which is also one of the relevant factor for the Court to decide. The facts of the said decision is squarely applies to the facts of the present case also. Similarly, the principles laid down by the Division Bench of this Court in Kumarasamy and Others vs. S.K.John (died) and Others (1993 II MLJ 144) proceeds to the effect that if there is a lack of mutuality between the parties, it is a valid ground for refusing specific performance. Further, Section 7 of the Contract Act proceeds as follows:-

"In order to convert a proposal into a promise, the acceptance must (1) be absolute and unqualified."

In the light of the above provision, considering the fact that the parties herein are only at the stage of negotiations on which date the advance amount was paid, it cannot be construed that the contract was a concluded contract. The above view is supported by the principles laid down by a Division Bench of this Court in Board of Control for Cricket in India vs. Zee Telefilms Ltd (2005 (2) CTC 609).



19. As regards the next contention urged by the learned counsel for the appellants to the effect that the learned single Judge is not consistent while rendering the judgment in the light of what is stated in paragraph-13 of the judgment is concerned, it is to be seen that the learned single Judge has merely referred therein that even though there is no concluded contract, the contract of sale of the suit property existed as pleaded by the plaintiff. Learned single Judge, while referring as above, has further qualified that the parties have agreed for a fixed price as evident from Ex.P.1 and as such, in the absence of necessary terms and conditions, the stand taken by the plaintiff to the effect that there was a contract of sale of the suit property, cannot be rejected. Even though there existed a contract of sale, in a suit for specific performance, what is required is that there should be a concluded contract between the parties. Learned single Judge in the very same paragraph has observed that there is no concluded contract embodying all necessary terms and conditions. Hence, we cannot accept the contention of the learned counsel that the learned single Judge has adopted an inconsistent stand.

20. Similarly, on the contention urged by the learned counsel for the appellants that the readiness and willingness on the part of the plaintiff was accepted by the learned single Judge, but however, denied the relief, it is to be seen that the learned Judge came to the said conclusion on the basis that when the lawyer's notice dated 24.10.1980 in Ex.P.2 was sent to the plaintiff's counsel, seeking for the return of the documents, there was no reference about any default on the part of the plaintiff in performing his part of the contract or about the forfeiture of the advance amount. Learned single Judge has also adverted to the fact that the defendants for the first time took the stand only on 11.11.1980 in Ex.P.4 that the amount paid by way of advance would be forfeited. It is only under the said circumstances, learned single Judge has directed for return of the said sum of Rs.21,000/- along with interest at the rate of 12% from 11.11.1980 and also ordered nominal damage of Rs.9,600/-. Hence, the contention in this regard urged by the learned counsel for the appellants has no merit.

21. The Supreme Court in its judgment reported in 1990 4 SCC 147 (Brij Mohan vs. Sugra Begum) has clearly held that whenever the plaintiff has come forward to seek a decree for specific performance of contract of sale of immovable property on the basis of an oral agreement alone, heavy burden lies on him to prove that there was consensus ad idem between the parties for a concluded oral agreement of sale of immovable property. In the instant case, the plaintiff has not discharged the said burden in proving that there was consensus ad idem. In this regard, the



Supreme Court in its judgment reported in 1999 (1) SCC 1 (RICKMERS VERWALTUNG GMBH vs. INDIAN OIL CORPORATION LTD) has laid down the law as set out here-under:-

"13. In this connection the cardinal principle to remember is that it is the duty of the court to construe correspondence with a view to arrive at a conclusion whether there was any meeting of mind between the parties, which could create a binding contract between them but the court is not empowered to create a contract for the parties by going outside the clear language used in the correspondence, except insofar as there are some appropriate implications of law to be drawn. Unless from the correspondence, it can unequivocally and clearly emerge that the parties were ad idem to the terms, it cannot be said that an agreement had come into existence between them through correspondence. The court is required to review what the parties wrote and how they acted and from that material to infer whether the intention as expressed in the correspondence was to bring into existence a mutually binding contract. The intention of the parties is to be gathered only from the expressions used in the correspondence and the meaning it conveys and in case it shows that there had been meeting of mind between the parties and they had actually reached an agreement upon all material terms, then and then alone can it be said that a binding contract was capable of being spelt out from the correspondence"

22. Similarly, the Supreme Court in its decision reported in 1990 (3) SCC 1 (MAYAWANTI vs. KAUSHALYA DEVI) has observed as follows:-

"8. In a case of specific performance it is settled law, and indeed it cannot be doubted, that the jurisdiction to order specific performance of a contract is based on the existence of a valid and enforceable contract. The Law of Contract is based on the ideal of freedom of contract and it provides the limiting principles within which the parties are free to make their own contracts. Where a valid and enforceable contract has not been made, the court will not make a contract for them. Specific performance will not be ordered if the contract itself suffers from some defect which makes the contract invalid or enforceable. The discretion of

the court will be there even though the contract is otherwise valid and enforceable and it can pass a decree of specific performance even before there has been any breach of the contract. It is, therefore, necessary first to see whether there has been a valid and enforceable contract and then to see the nature and obligation arising out of it. The contract being the foundation of the obligation the order of specific performance is to enforce that obligation."

23. Similarly, the Supreme Court in its judgment reported in AIR 1989 SC 839 (I.T.C. Ltd. vs. G.J.Fernandes) has held that where the parties make mutual mistake in understanding each other and are at cross purposes, there is no real correspondence of offer and acceptance, there is no consensus ad idem existing. It is further held therein that there is no agreement at all; and the contract is also void.

24. Similar view is expressed by the Apex Court in its decision in 1996 (2) SCC 667 (U.P.RAJKIYA NIRMAN NIGAM LTD vs. INDURE PVT. LTD). The relevant paragraph is extracted here-under:

"17. In Ramji Dayawala & Sons (P) Ltd vs. Invest Import, a two-Judge Bench of this Court considered the existence of the contract and arbitration clause thereunder. This Court had held that in the facts of a given case acceptance of a suggestion may be sub silentio reinforced by the subsequent conduct. Where there is a mistake as to terms of a document, amendment to the draft was suggested and a counter-offer was made, the signatory to the original contract is not estopped by his signature from denying that he intended to make an offer in the terms set out in the document. Where the contract is in a number of parts it is essential to the validity of the contract that the contracting party should either have assented to or taken to have assented to the same thing in the same sense or as it is sometimes put, there should be consensus ad idem. In that case a sub-contract was signed and executed by the Managing Director of the appellant-Company but part of the contract was altered subsequently since counter-proposal was given by the respondent. This Court had held that one such case is where a part of the offer was disputed at the negotiation stage and the

original offeree communicated that fact to the offeror saying that he understood the offer in a particular sense; this communication probably amounts to a counter-offer in which case it may be that mere silence of the original offeror will constitute his acceptance. Where there is a mistake as to the terms of the documents as in that case, amendment to the draft was suggested and a counter-offer was made, the signatory to the original contract is not estopped by his signature from denying that he intended to make an offer in the terms set out in the document; to wit, the letter and the cable. It can, therefore, be stated that where the contract is in a number of parts it is essential to the validity of the contract that the contracting party should either have assented to or taken to have assented to the same thing in the same sense or as it is sometimes put, there should be consensus ad idem. It was held that there was no consensus ad idem to the original contract. It was open to the party contending novatio to prove that he had not accepted a party of the original agreement though it had signed the agreement containing that part."

25. Under the abovesaid circumstances and by applying the principles of law as narrated supra, we do not see any reason to interfere with the order of the learned single Judge and accordingly, the above appeal is dismissed. No costs.

Svn

Sd/

Asst.Registrar

/true copy/

Sub Asst.Registrar

TO

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

+ 1 cc to Mr.H. Kishore, Advocate SR No.43674

+ 1 cc to Mr.R. Thiagarajan, Advocate SR no.44010

NG(CO)

SR/11.11.2005

Judgment in

O.S.A. 150 of 1989