

## **P.Retnaswamy vs A.Raja on 28 February, 2008**

**Author: M.Venugopal**

**Bench: S.J.Mukhopadhaya, M.Venugopal**

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:28.02.2008

CORAM:

THE HONOURABLE MR.JUSTICE S.J.MUKHOPADHAYA  
AND  
THE HONOURABLE MR.JUSTICE M.VENUGOPAL

O.S.A.No.90 of 2002

P.Retnaswamy ... Appellant

Vs.

1.A.Raja

2.Venкатasubramaniam ... Respondents

Prayer: Appeal filed under Order XXXVI Rule 11 of the O.S. Rules and Clause 15 of the Le

For Appellant : Mr.V.Selvaraj

For 1st Respondent : Mr.G.Ethirajulu  
Mr.D.Kulasekaran

For 2nd Respondent : Mr.R.Krishnasamy, S.C.  
For Mr.C.Ramesh

JUDGMENT

M.VENUGOPAL,J.

O.S.A.NO.90 of 2002 is preferred by the appellant/ plaintiff as against the Judgment and Decree passed by the learned Single Judge in dismissing the suit for specific performance in C.S.No.80 of 1997 dated 04.09.2001.

2.The appellant/plaintiff has filed the suit C.S.No.80 of 1997 praying for the relief of directing the respondents/ defendants to execute the sale deed in respect of the suit property in favour of appellant/plaintiff in terms of sale agreement dated 10.07.1996.

3.The first respondent/defendant has not appeared in person or through his counsel. The second respondent/second defendant contested the matter. After contest, the learned Single Judge has come to the conclusion in the suit that the appellant/plaintiff has not proved Ex.P.1-Agreement dated 10.07.1996 as a true, genuine and valid document etc. and resultantly, held that the appellant/plaintiff is not entitled to the relief of specific performance as per Ex.P.1-Agreement dated 10.07.1996 and also held that the second respondent/second defendant is a bona fide purchaser for value without notice and dismissed the suit without costs.

4.The learned counsel for the appellant/plaintiff urges that the learned Single Judge is not correct in coming to the conclusion that Ex.P.1-Agreement for sale dated 10.07.1996 has not been proved and when the first respondent/first defendant has not filed the written statement and contested the matter and when the signature of the first respondent/first defendant has not been disputed, the finding arrived at by the learned Single Judge that Ex.P.1-Agreement for sale dated 10.07.1996 is not proved, is unsustainable in law and that the view taken by the learned Single Judge that the plaintiff/appellant should have examined atleast one contesting witness to prove Ex.P.1 is not correct, in view of the fact that there is no need for the appellant/plaintiff to examine the attesor to establish Ex.P.1-Agreement for sale.

5.The further plea of the appellant/plaintiff is that the learned Single Judge ought to have held that Ex.D.4-sale deed dated 30.01.1997 is not a genuine sale deed and that the recitals of the said sale deed will only prove the case of the appellant/plaintiff that the sale deed is a sham and nominal one.

6.According to the learned counsel for the appellant/ plaintiff, the first respondent/first defendant issued many cheques on 15.06.1998, including a post dated cheque and when the first respondent/first defendant has not disputed the claim made in the plaint, it is not open to the second respondent/second defendant to dispute the same.

7.It is significant to point out that when the appellant/plaintiff has filed the suit for specific performance originally, the first respondent alone has been arrayed as a defendant. The second respondent/second defendant has been impleaded as party in the suit as per order in Application No.848 of 1998 dated 24.08.1998 and as per order in Application No.3434 of 1998 dated 08.10.1998.

8.The case of the appellant/plaintiff is that the first respondent/first defendant has proposed to sell the plaint schedule property to him for a consideration of Rs.10,05,000/- (Rupees Ten lakhs and five thousand only) and the appellant/plaintiff has accepted and agreed to purchase the same and that the appellant/plaintiff and first respondent/first defendant executed a sale agreement on 10.07.1996 and pursuant to the agreement, the appellant/ plaintiff paid Rs.8,05,000/- to the first respondent/first defendant as part of sale consideration and the balance of Rs.2,00,000/- to be paid within nine months from 10.07.1996 by the appellant/plaintiff to the first respondent/first

defendant and to get the sale deed executed.

9.It is the further case of the appellant/plaintiff that when he approached the first respondent/first defendant on 03.02.1997 for production of the original documents pertaining to the suit property for the purpose of obtaining legal opinion and informing that he is ready with the balance amount of Rs.2,00,000/- for registration of sale deed, the first respondent/first defendant has not handed over the original title deeds and that the appellant/ plaintiff as information from reliable sources that the first respondent/first defendant is actively negotiating with the third parties to sell the suit property, in violation of the agreement of sale dated 10.07.1996.

10.The appellant/plaintiff's counsel contends that the appellant/plaintiff made enquiry in the District Registrar's Office South and that he came to know that the suit property was sold in favour of second respondent/second defendant for a consideration of Rs.4,60,000/-, as per sale deed dated 31.01.1997 (document No.326) and that the encumbrance certificate dated 18.02.1997 indicated that the first respondent/first defendant was the owner till 17.02.1997.

11.According to the learned counsel for the appellant, the real value of the property is more than Rs.10 lakhs and that the property was sold for a paltry sum of Rs.4,60,000/- and in fact, no such sum was paid by the second respondent/ second defendant to the first respondent/first defendant and that the second respondent/second defendant is only a name lender and as such, no right has accrued in favour of the second respondent/second defendant and that the sale deed dated 31.01.1997 executed by the first respondent/first defendant in favour of the second respondent/second defendant is void and non est in law.

12.The stand of the second respondent/second defendant is that the appellant/plaintiff filed Application No.95 of 1997 praying for the relief of interim injunction restraining the first respondent/first defendant from alienating the suit property pending suit and the first respondent/first defendant filed a counter stating that he has not entered into an agreement with the appellant/ plaintiff for sale of the suit property and that a sum of Rs.8,05,000/- received from the appellant/plaintiff was only towards loan, since they were employees in the same organisation and therefore, it is clear that the so-called agreement is sham and that the said application was dismissed by the Court on 03.04.1997.

13.The learned counsel for the second respondent/second defendant submits that the second respondent/second defendant purchased the suit property for value by a registered sale deed dated 30.01.1997, prior to the date of filing of the suit and that the appellant/plaintiff and the first respondent were of the same department and that the appellant/plaintiff has fabricated the sale agreement dated 10.07.1996 and that it is the contention of the first respondent/first defendant that he used to take loans from the appellant/plaintiff and in this regard, the first respondent/first defendant has handed over to the appellant/plaintiff stamp papers and white papers affixed with revenue stamps duly signed and these papers were utilised for creating the sale agreement and therefore, the said agreement is fabricated, sham and void.

14.Expatiating his contentions, the learned counsel for the second respondent/second defendant contends that the suit property was purchased by the second respondent/second defendant by means of a registered sale deed dated 31.01.1997 and that the second respondent/second defendant had no notice of prior agreement and that he is a bona fide purchaser for value and that the second respondent/second defendant has obtained an encumbrance certificate for the period from 01.01.1961 to 31.12.1993 on 06.12.1996 and another encumbrance certificate has been obtained by the second respondent/second defendant in regard to the period from 01.07.1974 to 09.07.1996 on 15.07.1996 and another encumbrance certificate has been obtained for the period from 01.01.1994 to 04.12.1996 on 24.12.1996 and for the period from 01.12.1996 to 30.04.1998, the second respondent/second defendant has obtained the encumbrance certificate after registration of the sale deed on 20.05.1998.

15.For the proposition that the second respondent/ second defendant is a bona fide purchaser for value, the learned counsel for the second respondent/second defendant cited the decision 2007(1) CTC 449 Jayalakshmi Ammal and 8 others V. Chinnasamy Gounder, whereby it is held as follows:

"Evidence Act, 1872 (1 of 1872) Sections 3, 101 to 103   Appreciation of Evidence and Burden of Proof   Defendant who was owner of property in Suit for specific performance pleaded that he was pressurized to sign in blank papers by plaintiff and plaintiff had created agreement by using such papers   Burden of proving existence of agreement is primarily on plaintiff   When defendants admitted signature but pleaded coercion, burden to prove same shifts on defendants   Uncorroborated testimony of defendant is not enough to come to conclusion that agreement had been entered into because of coercion   Discrepancy in evidence regarding place of execution of agreement is not very much relevant when signature is admitted by defendant who disputes such agreement.

Specific Relief Act, 1963 (47 of 1963), Section 19 and 20   Plaintiff sought specific performance of agreement and arrayed vendor and subsequent purchaser of such property and sought alternative relief of damages against vendor   Subsequent purchaser had purchased property without notice of prior agreement and plaintiff could recover amounts paid to vendor and specific performance could not be granted".

16.He also placed reliance on (2000) 2 SCC 428 Ram Awadh (Dead) by Lrs. And others V. Achhaibar Dubey and another, wherein it is observed as follows:

"Specific Relief Act, 1963   S.16(c)   Suit for specific performance of agreement to sell property   Plea that plaintiff was never ready and willing to perform his part of the agreement   Held, can be raised also by subsequent purchaser of the property or his LRs who were defendants in the suit".

17.The learned counsel for the second respondent/second defendant cited 2000(I) CTC 484 Nalluswamy Reddiar V. Marammal and 5 others, whereunder it is laid down as follows:

"Specific Relief Act, 1963 Specific Performance of Agreement of Sale Enforceability as against subsequent Transferee without notice in good faith for consideration Specific Performance of Agreement of Sale cannot be enforced against subsequent Transferee unless he had Notice of prior Agreement Plaintiff did not plead that Transferee had knowledge of alleged Sale Agreement reached between Plaintiff and Vendor No actual notice or constructive Notice about Agreement Transfer was made for valuable consideration Evidence regarding notice knowledge of Agreement on part of Transferee no cannot be looked into for want of plea Specific performance of Agreement cannot be enforced against such Transferee in good faith for consideration without notice of earlier Agreement.

Law of Pleadings Absence of Plea Permissibility of evidence in absence of any pleading regarding prior notice of Sale Agreement to Purchaser Evidence cannot be let in to prove knowledge of earlier agreement to Transferee in absence of plea regarding notice".

18.Further, he pressed into service the decision 2000-2-L.W. Page 15 and 16 M.M.S.Investments through its Managing Director and 4 others V. V.Veerappan and 8 others, wherein it is held thus:

"Specific Performance, Specific Relief Act (1963), Ss.16 (b) and ) and 20, T.P.Act, Ss.52, 54, and C.P.C., O.1, R.10, and O.22, R.10(1) Right of Subsequent Purchaser of the property without notice of earlier agreement, to contest the suit No legal bar to raise issues other than that he is a bona fide purchaser without notice.

Plea of collusion on the part of the vendor Impleading of such person as party in the suit Permissibility Bar of lis pendens -Applicability of the plea to cases where sale of property takes place prior to suit and cases where the sale takes place subsequent to the suit.

Mere agreement of sale does not create any rights over property under S.54, T.P. Act Distinction between Indian Law and English Law powers of Equity court in its discretion Plea of readiness and willingness on the part of purchaser, as agreement holder being personal to him, considerations as regards subsequent purchaser raising other issues.

Order impleading subsequent purchaser as party, upheld Impleading under O.1, R.10 (not under O.22, R.10, whether affects the circumstances as regards raising of pleas.

C.P.C., O.1, R.10, and O.22, R.10-Order Impleading subsequent purchaser as party, upheld Impleading under O.1, R.10 (not under O.22, R.10, whether affects the circumstances as regards raising of pleas See Specific Performance, Specific Relief Act, Ss.16(b), (c),20 etc. C.P.C., O.22, R.10 See O.1, R.10, Specific Performance, Specific Relief Act, Ss.16(b)(c), 20 etc. Transfer of Property Act, Ss.52,54,40-Lis

Pendens See Specific Performance, Specific Relief Act, Ss.16(b)(c)20 etc. T.P.Act, S.54-Rights of agreement holder over property See Ss.52,40, and Specific Performance, Specific Relief Act, Ss.16(b)(c), 20 etc.,".

19.P.W.1 the appellant/plaintiff in his evidence has deposed that the first respondent/first defendant informed him that he will sell the suit property viz., flat which belongs to him for a sum of Rs.12,00,000/- and the first respondent/first defendant after discussions, has agreed to sell for a sum of Rs.10,05,000/- and that in January 1996 he made the first payment of Rs.2,00,000/- and a further sum of Rs.2,00,000/- each was paid in March and May 1998 and that he paid Rs.2,05,000/- in July 1996 and that the first respondent/first defendant informed him that he will execute an agreement and the said agreement Ex.P.1 was executed on 10.07.1996, granting nine months time and that the balance of sale consideration will have to be paid within the specified time.

20.It is the further evidence of P.W.1, (appellant/ plaintiff) that after the dismissal of injunction application and also after coming to know from the counter that the first respondent/first defendant has sold the suit property on 31.01.1997, he has come to know from the Registrar's Office that the suit property has been sold for Rs.4,60,000/- by the first respondent/first defendant which is far below the market value of Rs.10,50,000/- and that the guideline value of the property has been more than Rs.10,00,000/-, which he has come to know from the Registrar's Office and that the suit property as on today continues to be with the first respondent/first defendant and that the first respondent/first defendant has sold the property for a meagre consideration and he has not actually sold the same and that the second respondent/second defendant has known Ex.P.1 sale agreement dated 10.07.1996 entered into between him and the first respondent/first defendant and since the first respondent/first defendant has sold the property to the second respondent/second defendant during the pendency of Ex.P.1-Agreement and inasmuch as the the second respondent/second defendant has purchased the property with the knowledge of subsisting agreement, he is entitled to the relief of specific performance decree.

21.D.W.1-G.Vaidayanathan, (uncle of the second respondent/second defendant) has deposed that he is a Chartered Accountant by profession and he has been authorised to tender evidence on behalf of the second respondent/second defendant and that he has negotiated the sale transaction between the first respondent and second respondent/defendants from the beginning till the end in respect of the suit property, on behalf of the second defendant and Ex.D.1 is the Special Power of Attorney given by the second respondent/second defendant to him and that he has met the first respondent/first defendant in connection with the negotiation in regard to the suit property two days after the advertisement in "The Hindu" daily at the place of suit property itself and the second respondent/second defendant at no point of time has personally met the first respondent/first defendant in connection with the negotiation pertaining to the suit transaction and on behalf of the second respondent/second defendant, he concluded the transaction.

22.The further evidence of D.W.2-Vaidayanathan is to the effect that a sum of Rs.4.94 lakhs (approximately) has been agreed towards sale price, and the same has been paid by means of two bank demand drafts and that the said sum is the market price and since the guideline value of the property has been found to be at Rs.10,00,000/- the stamp duty has been paid, as per the guideline

value, notwithstanding the actual sale price and that the second respondent/second defendant is a bona fide purchaser of the suit property as per Ex.D.4 sale deed and that he has not known the first respondent/first defendant prior to the said transaction.

23.It is not in dispute that the appellant/plaintiff and the first respondent/first defendant are employed in the State Express Transport Corporation and that the first respondent/first defendant is the Superior Officer of the appellant/plaintiff as Deputy Manager.

24.It is useful to refer to the relevant portion of the recitals in Ex.P.1-Sale Agreement dated 10.07.1996 entered into between the first respondent/first defendant (first party) and the appellant/plaintiff (second party), which runs as follows:

"The first party is the absolute owner of the flat, described specifically in schedule hereunder, which he has purchased from his vendors, as per sale deed dated 13.05.1994 and Registered as document No.2071 of 94 in the District Registrar Office, Madras South.

The first party proposed to sell the flat, scheduled herein, for a price of Rs.10,05,000/- (Rs.Ten Lakhs and Five thousand only) and the second party accepted the said proposal and agreed to purchase the same for the said price.

The second party pays now a sum of Rs.8,05,000/- (Rupees Eight Lakhs and Five thousand only) by cash, as part payment of the above said sale consideration and the first party having received the said amount, acknowledges the same.

The second party agrees to pay the remaining balance of sale consideration ie Rs.2,00,000/- (Rupees Two Lakhs only) within a period of nine months from to-day and get the sale deed, in respect of the scheduled property, executed by the first party, in his favour.".....

25.When the Ex.P.1-Sale Agreement dated 10.07.1996 refers to a sum of Rs.8,05,000/- now being paid by the appellant/plaintiff, the oral evidence of appellant/ plaintiff viz., P.W.1 is that he has paid Rs.2,00,000/- in January 1996, another sum of Rs.2,00,000/- each paid in March and May 1996 and another sum of Rs.2,05,000/- paid in July 1996 is contrary to the recitals found in Ex.P.1-Sale Agreement dated 10.07.1996, in our considered opinion.

26.It is not out of place to make a mention that in para 5 of the paint, the appellant/plaintiff has averred that "in pursuance of this agreement, the plaintiff paid Rs.8,05,000/- (Rupees Eight Lakhs and Five thousand only) to the defendant as part of the above said sale transaction". Therefore, it is quite evident that the oral testimony of P.W.1 viz., appellant/plaintiff in regard to the payments made by him is clearly to the exclusion of the tenure of Ex.P.1-Agreement of sale dated 10.07.1996, as per Section 91 of the Indian Evidence Act.

27.As a matter of fact, the litigant when he approaches the Court not with clean hands, then he is certainly not entitled to claim the benefit of equitable relief of specific performance. Equally, there cannot be any dispute that in a suit for specific performance of agreement of sale, plaintiff is the Dominus litus. Normally, in our law it is the "Purchaser Beware" and prior to the entering of transaction, it is for the prospective purchaser to ensure that the property in issue is free from encumbrance, any cloud or shroud, etc. and it is his duty to check the parental and other antecedent documents so as to satisfy the rudimentary requirements of law. In fact, the appellant/ plaintiff has to establish his case before Court of law in a civil remedy notwithstanding the fact that the first respondent/first defendant has not filed the written statement and set exparte in the suit, in the case on hand. Moreover, the burden of proving the case rests on the appellant/plaintiff when the first respondent/ first defendant has filed a counter to the Application No.95 of 1997 to the effect that Ex.P.1-Agreement of Sale dated 10.07.1996 is a cooked up document by the appellant/ plaintiff by utilising the blank stamp papers, wherein the signature of the first respondent/first defendant finds a place.

28.As far as the present case is concerned, neither the second respondent/second defendant nor the first respondent /first defendant has appeared before Court and tendered evidence only D.W.1-Vaidayanathan (uncle of the defendant) has been examined, on the basis that he negotiated the sale transaction on behalf of second respondent/second defendant, between the first respondent/first defendant and second respondent/second defendant in regard to the suit property.

29.The learned counsel for the appellant/plaintiff has advanced an argument that D.W.1-Vaidayanathan is only the Power of Attorney of the second respondent/second defendant and when it is the specific case of the appellant/plaintiff that the first respondent/first defendant has executed Ex.P.1-Agreement dated 10.07.1996 it is upto the first respondent/first defendant to contest the case and when the first respondent/first defendant has remained exparte in the suit, it does not lie in the mouth of the second respondent/second defendant to raise a plea of validity of Ex.P.1-Agreement.

30.It is significant to cite the decision AIR 2004 Madhya Pradesh 58 Smt.Shanti Devi Agarwal V. H.Lulla, whereby it is held as follows:

"Civil P.C. (5 of 1908), O.3, R.2;O.18, R.4 Evidence Act (1 of 1872), Ss.118, 3 M.P. Accommodation Control Act (41 of 1961), S.23-A(a) Eviction Ground of bona fide requirement Recording of evidence by recognised agent Plaintiff, being an elderly lady of 78 years and having health problem, appointed her son as power of attorney to contest case Old age and bad health of plaintiff would be good ground for her son, being power of attorney holder, to tender evidence on her behalf Affidavit of plaintiff's son is, therefore, to be treated as examination in chief of plaintiff That apart, bona fide requirement being with reference to family, can be proved by any member of family Plaintiff's son being power of attorney holder virtually steps into her shoes, to prove ground".

31.In AIR 1971 Rajesthan at 240 Gulab Devi V. Bhagwan Sahai, it is laid down as follows:



"Civil P.C. (1908), Order 18, Rule 1 Court cannot refuse the plaintiff to examine a person holding power of attorney for plaintiff and insist that plaintiff himself must record his own statement in support of his claim in the suit. (1866) 6 Suth WR 231 & (1910) 1 KB 327 & (1957) 2 All ER 155, Ref".

32.It is not out of place to refer to the decision AIR 2004 Andhra Pradesh 309 and 310 S.Padmavathamma V. S.Sudha Rani and others, wherein it is observed as follows:

"Civil P.C. (5 of 1908), O.16, R.1 Examining General Power of Attorney as a witness on behalf of Plaintiff Application for General Power of Attorney holder can appear as a witness only in his personal capacity He cannot appear as witness on behalf of plaintiff in capacity of plaintiff as he cannot speak about facts which are within personal knowledge of party".

33.In regard to the Power of Attorney holder of a party be examined as a witness, in AIR 1995 Gujarat 151 at 152 Divaliben V. Mavjibhai Vasanjibhai Ahir, it is held as follows:

"Civil P.C. (5 of 1908), O.18, Rr.2, 4 Examination of witnesses Power of attorney holder of a party Can be examined as witness No procedural defect in such examination Interference in revision not proper".

In view of the above, since D.W.1-Vaidayanathan (Power Holder) has negotiated the sale transaction between the first respondent/first defendant and second respondent/ second defendant from the beginning as spoken to by him, there is no bar in law for him to be examined as witness as far as the present case is concerned, in our considered opinion.

34.It cannot be lost sight of that the plea of the second respondent/second defendant is one of bona fide purchaser for value without notice or knowledge of the original contract. In fact, Section 19(b) of the Specific Relief Act, 1963 speaks of "Relief against parties and persons claiming under them by subsequent title". As a matter of fact, Section 19(b) protects the bona fide purchaser in good faith for value without notice or original contract, which is in the nature of exception to the general rule. Therefore, onus of proof of good faith is on the purchaser who takes the place that he is an innocent purchaser. Of course, good faith is a question of fact to be considered and decided on the facts on each case. In short, the initial burden of establishing the defence lies on the subsequent purchaser. Before that, it is to be noted that in the plaint the appellant/plaintiff has not whispered that the second respondent/second defendant had knowledge or notice of the prior sale agreement. To put it differently, there is absence of pleading to the above effect notwithstanding the fact that the appellant/plaintiff has known that the second respondent/second defendant has purchased the property.

35.It is significant to make a mention that the first respondent/first defendant in the counter (presented in Court on 31.3.1997) to Application No.95 of 1997 has admitted that the appellant/plaintiff and himself are working in the same department and that from the number of non-Judicial Stamp Papers and the Value of Stamp Papers in which the alleged sale agreement is

engrossed that the sale agreement is a cooked up one cooked up one, prepared by the appellant/plaintiff to deprive him of the property and that the alleged sale agreement has been executed on three stamp papers for the value of Rs.30/- each containing the value of Rs.10/- and as per Schedule 2(4) of the Indian Stamp Act, 1899, the Stamp duty fixed for unregistered agreement is Rs.10/- only, but in the said alleged sale agreement, the stamp papers worth Rs.30/- are used, which manipulation establishes that he has not executed any such sale agreement.

36.Moreover, the first respondent/first defendant in the said counter has also taken a categorical stand that it is true that he used to raise loans through the appellant/ plaintiff and repay the same through him, for which the appellant/plaintiff used to obtain his signatures on blank non-Judicial Stamp Papers and Revenue Stamps as well as white papers and believing him, he used to issue such blank papers affixing his signatures and that there is no evidence to prove that the appellant/plaintiff has paid a sum of Rs.8,05,000/- (Rupees Eight Lakhs and Five thousand only) by cash in lumpsum and that he has already disposed of his property in order to discharge his debts.

37.A perusal of Ex.P.1-Agreement dated 10.07.1996 indicates that there are three stamp papers of value Rs.10/- each. There are two witnesses mentioned in the last page of Ex.P.1-Sale Agreement. No one has been examined as witness on the side of appellant/plaintiff in the case. In fact, the recitals found in Ex.P.1-Sale Agreement are in typed form. No doubt, in Ex.P.1-Agreement dated 10.07.1996 the signature of the first respondent/first defendant finds a place. Even then, it is the burden of the appellant/plaintiff to prove that Ex.P.1-Agreement is a true and valid one in the eye of law. The fact that no one witness, as seen in Ex.P.1-Agreement is examined in the case is a circumstance which certainly goes against the appellant/plaintiff. In this connection, it is useful to refer to Ex.P.4, Lawyer Notice dated 06.07.1998 issued by the appellant/plaintiff's counsel addressed to the first respondent/defendant, wherein it is among other things stated that the first respondent/first defendant has approached the appellant/plaintiff for a compromise offering to return a sum of Rs.9,00,000/- (Rupees nine lakhs only) by issuing the nine cheques and out of these nine cheques, two cheques serial Nos.8 and 9 for Rs.2,00,000/- are dated 15.08.1998 and 30.08.1998 and that the appellant/plaintiff is not interested in getting back his amount given as part sale consideration in pursuance of the agreement dated 10.07.1996 and that the cheques were received in order to establish the appellant/plaintiff's case better in C.S.No.80 of 1997.

38.For Ex.P.4, the first respondent/first defendant has given a reply through his lawyer stating that he has not issued any cheques towards settlement of the case and that certain blank cheques having his signatures kept in his Office table drawer were suddenly missing and a police complaint was lodged and that the story of the missing cheque leaves has come to light and therefore, it is easy for the police to take appropriate action against the culprit to trace the missing cheques. In Ex.P.3(series) the cheque in serial No.7 bearing No.358043 is dated as 30.07.1998 but in Ex.P.4, notice the same is mentioned as dated 15.06.1998. Thus, there is a discrepancy in regard to the claim of appellant/plaintiff. At this juncture, one cannot brush aside the fact that Ex.P.4-Notice was issued by the appellant/plaintiff's counsel on 06.07.1998. Therefore, it is quite obvious that Ex.P.3(series) cheques would not have come into existence either for a compromise or in regard to the part sale consideration, has contended by the appellant/plaintiff.

39.As per Section 19(b) of the Specific Relief Act, 1963, a specific performance of contract can be enforced not only against either party thereto but also against any other person claiming under him by a title arising subsequently to the contract except a transferee for value who has paid his money in good faith and without notice of original contract. Notwithstanding the fact, the first respondent/first defendant has remained *exparte* in the suit, the second respondent/second defendant in law as subsequent purchaser is entitled to impeach the valid nature of Ex.P.1-Agreement dated 10.07.1996.

40.Ex.D.4 is the Xerox copy of Sale Deed dated 30.01.1997 executed by the first respondent/first defendant in favour of the second respondent/second defendant in respect of the suit property. In Ex.D.4 it is mentioned as follows: "Whereas the vendor has agreed to sell his one-eighth interest of undivided share in Schedule "A" property and the flat mentioned in the Schedule "B" for a consideration of Rs.4,60,000/- (Rupees Four Lakhs Sixty thousand only) and the Purchaser has agreed to purchase the aforesaid interest more fully described in Schedule "C" for the consideration of Rs.4,60,000.00 (Rupees Four Lakhs sixty thousand only) etc." The said sale deed refers to the Pay Order dated 27.11.1996 for Rs.1,00,000/- and another Pay Order dated 10.01.1997 for Rs.3,60,000/-, the receipt of which a sum of Rs.4,60,000/-, the vendor acknowledges and admit the same. In fact, Ex.D.4-Sale Deed dated 30.01.2007, Clause 9 enjoins that the purchaser has agreed to purchase the "aforesaid Schedule 'C' property" subject to his accepting the onerous responsibility to evict the said tenant and obtain a vacant possession of the said property. Therefore, it is clear that the second respondent/second defendant has purchased the property subject to the covenant of vacating the tenant from the property and inasmuch as Ex.D.4-Sale Deed dated 30.01.1997 is a registered one, by no stretch of imagination, it can be construed that the said document is a nominal and sham one, in our considered opinion.

41.It is significant to point out that as per Section 54 of the Transfer of Property Act to constitute a sale 1) a contract to transfer the ownership of property and 2)transfer of ownership followed by delivery of property are very much required. The very definition of the sale shows that "sale is a transfer of property for consideration". Merely because a property worth several thousands of rupees was sold away for a few hundred rupees by a person for his own reasons, the same cannot be challenged on the premise that the sale consideration is inadequate or on the ground of under valuation of property. As a matter of fact, if the sale consideration has been held to be low, it does not render the contract of sale as void or illegal. It is to be noted that the stamp duty of Rs.1.30 lakhs for registering Ex.D.4-Sale Deed dated 30.01.1997 was paid by the second respondent/second defendant. It is also the evidence of D.W.1-Vaidyanathan (Power of Attorney of second respondent) that the second respondent/second defendant paid Rs.3,00,000/- for evicting the tenant. Moreover, merely because the second respondent/second defendant has paid the stamp duty of Rs.1.30 lakhs for the purpose of registration of Ex.D.4-Sale Deed dated 30.01.1997, it cannot be held that the suit property has been sold for a song. After all in sale, the vendor or seller barter away his property movable or immovable for valuable consideration in cash or in kind paid or payable by the buyer.

42.In the instant case on hand, the appellant/plaintiff has not established that Ex.P.1-Agreement dated 10.07.1997 is a true and valid agreement. The second respondent/second defendant is only a bona fide purchaser for value, without notice of Ex.P.1-Agreement. It is well settled principle in law

that the grant of specific relief is an equitable remedy. As a matter of fact, there is no plea taken by the appellant/plaintiff in the plaint that the second respondent /second defendant had knowledge of the original agreement and in the absence of such pleading, no amount of evidence can be looked into by a Court of law, in our considered opinion.

43.In the backdrop of our detailed discussions mentioned supra and on examination and consideration of available material evidence on record and considering the entire facts and circumstances of the case in an integrated manner, viewing it from any angle, we come to the conclusion that the appellant/plaintiff is not entitled to the relief of specific performance as per Ex.P.1-Sale Agreement dated 10.07.1996 and in that view, the OSA fails and the same is hereby dismissed, in the interest of justice. Having regard to the facts and circumstances of the case, the parties are directed to bear their own costs.

(S.J.M.,J.) (M.V.,J.) 28.02.2008 Index : Yes Internet : Yes sgl S.J.MUKHOPADHAYA,J.

AND M.VENUGOPAL,J.

sgl Judgment in 28.02.2008