HIGH COURT OF MADHYA PRADESH
BENCH AT INDORE

First Appeal No. 647 of 2008

Satish Kumar Khandelwal

Vs.

Rajendra Jain and others

Shri A.K.Sethi, Sr. Advocate assisted by Shri Harish Joshi, Advocate for the appellant.

Shri S.C.Bagadia, Sr. Advocate assisted by S/Shri Nitin Phadke & D.K.Chabra, Advocates for the respondents No.1 and 2.

Shri Sunil Jain, Sr. Advocate assisted by Shri Kushagra Jain, Advocate for the respondents No.4 and 5.

Shri Brajesh Kumar Pandya, Advocate for the respondent No.8

WHETHER APPROVED FOR REPORTING;YES

Law laid down:

SPECIFIC PERFORMANCE OF AN AGREEMENT TO SELL

(1) **An agreement to sell - vague, uncertain and not capable of execution.**

It is settled law that terms of an agreement for specific performance have to be read and understood as it is. The entire agreement to be read as a whole to ascertain the intention of parties and working out provisions thereof to ascertain fulfillment of the requisite conditions so that the agreement could be enforced by law. Moreover, the contents of written agreement cannot be proved otherwise than by writing itself. Section 91 of the Evidence Act prohibits proving of contents of a document, otherwise subject of course to exception provided thereunder.

The clauses of the agreement neither can be supplemented, supplanted or substituted by extensive description in the plaint or in the oral testimony**.** The specific performance of a contract is the actual execution of the contract according to its stipulations and terms, Courts direct the party in default to do the very thing which he contracted to do. Therefore, unless; the stipulations and terms of the contract are certain and parties must have been *consensus ad idem,* the specific performance cannot be ordered. The burden that the stipulations and terms of contract and the minds of parties *ad idem* is always on the plaintiff. If such burden is not

discharged, stipulations / terms are uncertain, and the parties are not ad idem, there can be no specific performance, for there was no contract at all.

Such an agreement to sell is vague, uncertain and cannot be capable for execution under law.

(2) **Benami transaction:**

True, in modern days, most of the properties are purchased on loan taken from various financial institutions, corporations, banks, societies, etc., and those institutions make payment to the seller. Therefore, the real intention of the parties needs to be looked into before declaring any transaction as benami transaction.

The transfer of property may take place not only 'in present' but, also 'in future' as the the word 'in present' or 'in future' qualify the word 'conveys. An agreement to sell though does not confer title on the proposed vendee in the suit property but, definitely, creates an enforceable right.

If an agreement to sale suffers from the vice of benami transaction within the meaning of section 2(a) of the Act, the same falls in the category of contracts forbidden by law as contemplated under section 23 of the Indian Contract Act, the object whereof is unlawful. An agreement to sale is in the realm of transaction for sale of immovable property. The word 'transaction' used in section 2(a) of the Act is in fact a generic term. Therefore, *benami* transaction defined in section 2(a) of the Act shall not only include transaction in which property is transferred to one person but, also agreement to transfer the property to one person as the intendment of the legislature is to prohibit *benami* transaction. Hence, inexecutable in an action for specific performance.

In **Pawan Kumar Gupta Vs. Rochiram Nagdeo, 1999 AIR SCW 1420,** the Hon'ble Supreme Court has ruled while interpreting section 2(a) of the Act that the word “paid” and the word “provided” used in the section must be understood disjunctively. To be precise, the correct interpretation shall be “consideration paid” or “consideration provided”. If consideration was paid to the transferor then the word provided has no

application for the said sale. If the consideration was not paid in regard to a sale transaction, a question of proving consideration would arise. In some cases of sale transaction ready payment of consideration might not have been effected then provision would be made for consideration. Therefore, the word “provided” as used in section 2(a) of the Act has to be read in that context. Any other interpretation shall harm the interest of persons involved in genuine transaction, i.e., if a purchaser availed himself of loan facility from bank to make up purchase money, such sale cannot be said to be a *benami* transaction as the bank has provided the consideration.

The aforesaid proposition of law in the context of the word “provided” used in section 2(a) of the Act is certainly beyond cavil of doubt. Nevertheless; its applicability shall depend upon the nature of transaction and facts and circumstances of each case to ascertain **the genuineness of the transaction.** Otherwise, the very purpose of the enactment shall frustrate and provision thereof *otiose.*

The Hon'ble Supreme Court in the case of **Meenakshi Mills, Madurai Vs. Commissioner of Income-tax, Madras, AIR 1957 SC 49** relying upon the judgment of Federal Court in the case of **Gangadara Ayyar Vs. Subramania Sastrigal, AIR 1949 FC 88**, it has been ruled that in a case where it is asserted that an assignment in the name of one person is in reality for the benefit of another, the real test is the source wherefrom the consideration came. It is also necessary to examine in such cases actually who has enjoyed the benefit of the transfer.

(3) **Readiness and willingness:**

Law is well settled that the plaintiff has to plead and prove each and every condition of the agreement right from the date of the agreement upto the date of decree.

Law is also well settled that the plaintiff has to show bona fide readiness and willingness to perform his part of the agreement with adherence of each and every terms of the agreement to sell, particularly schedule of payment. If particular dates are stipulated for payment of amount under the agreement then time would be essence even the agreement is related to sale of immovable property. The default in the schedule of payment

shall certainly attract the clause of automatic termination of the agreement.

The conduct and subsequent conduct of the party are also looked into.

In the instant case, the plaintiff found to have not made the payment of consideration as scheduled in the agreement, on the contrary, he has made a factual incorrect statement regarding offer of cash payment of Rs.35.00 lakhs before 05/11/2005.

Appeal dismissed.

Significant paragraphs: 1 to 14

Reserved on: 05/12/2019

O R D E R
(16/03/2020)

Rohit Arya, J.,

This first appeal by plaintiff under section 96 CPC is directed against the judgment and decree dated 28/08/2008 passed in civil suit No.1A/2006 by the District Judge, Indore.

Plaintiff's suit for specific performance of an agreement dated 27/04/2005 (exhibit P/9) has been dismissed.

2. Plaintiff; Satish Kumar Khandelwal son of Shankarlal Khandelwal, resident of 78A Parshanand Nagar, R.T.O.Road, Indore as described in the plaint *inter alia* contended that the defendants No.1 and 2 agreed to sell 08 acres of land out of the remaining area after sale to other persons falling in survey Nos.208/12, 208/9, 213/1, 213/238, 214, 216/4, 219/2, 220, 221/1 and 221/2 situated in village Talavali Chanda tehsil and district Indore. In addition, it was also agreed that the defendants No.1 and 2 shall purchase 04 acres of land from its owners falling in survey Nos.213/1, 216/4 & 213/238; Surendra Dilliwal and Sudha Dilliwal (defendants No.4 and 5) and in turn shall sell the same to the plaintiff fulfilling his requirement of 12 acres of land.

Total consideration amount was Rs.1,68,50,000/- at the rate of Rs.14.00 lakhs per acre.

Consideration amount was payable in installments and the last installment was payable on or before 27/03/2006. Thereafter,

the sale deed to be executed in favour of plaintiff or any other person, plaintiff would suggest. Schedule of payment agreed to was as under:

(a) 27/04/2005 : Rs.18.00 lakhs : Cash

(b) 16/05/2005 : Rs.30.00 lakhs : Cash

(c) 27/10/2005 : Rs.50.00 lakhs : Cash

(d)Remaining amount of Rs.14.00 lakhs to be paid prior to 27/03/2006 in cash.

A public notice was to be issued by defendants, two months prior to the date of sale but, in any case not before 27/01/2006 with the permission of plaintiff.

However, total amount of Rs.66.00 lakhs only was paid by the plaintiff to the defendants No.1 and 2; breakup is as under:

Sl.No.	Amount (Rs.)	Date	Details
(a)	18.00 lakhs	27/04/2005	Cash
(b)	03.00 lakhs	29/04/2005	Cash
(c)	09.00 lakhs	07/05/05	Cash
(d)	07.50 lakhs	16/05/2005	Pay Order No.26001 of U.T.I. Bank
(e)	07.50 lakhs	16/05/2005	Pay Order No.26002 of U.T.I.Bank
(f)	06.00 lakhs	16/05/2005	Cash
(g)	15,.00 lakhs	31/10/2005	Cash

Besides, on 26/10/2005 three pay orders, viz., 594016, 594017 & 594019; each of an amount of Rs.7.00 lakhs; total **Rs.21.00 lakhs** in favour of Rajendra Jain (defendant No.1) and two pay orders, viz., 594020 and 594021; each Rs.7.00 lakhs; **total 15.00 lakhs** in the name of defendant No.2 Rachna Jain (defendant No.2) were prepared from Bank of Rajasthan Limited, Branch Palasiya. On 27/10/2005, pay orders of Rs.35.00 lakhs and cash of Rs.15.00 lakhs were tendered to defendant No.1, however, he accepted cash of Rs.15.00 lakhs but, declined to take pay orders of Rs.35.00 lakhs with a request to pay in cash as per agreement. The date for payment of amount was extended upto 05/11/2005.

It is further contended that the plaintiff surrendered the pay orders with the bank and thereafter, though tendered cash to defendants No.1 and 2 but, they refused to accept the same.

Land falling in survey Nos.208/9, 214, 219/2, 220, 221/1, 213/1 & 208/12 is of the joint ownership of defendants No.1 & 2.

Land falling in survey No.219/2 is of the ownership of Smt. Rachna Jain (defendant No.2), Palak and Subham (daughter and son of defendant No.1).

Likewise land falling in survey Nos.213/238 & 216/4 is of the joint ownership of Rajendra Jain (defendant No.1), Rachna Jain (defendant No.2), Surendra Dilliwal & Sudha Dilliwal (defendants No.4 & 5).

Out of total area from survey Nos.213/238 & 216/4 after reducing the land sold earlier, the remaining land available for sale is 04.03 acres. In survey Nos.208/9, 214, 219/2 & 221/1 after reducing the area sold out of total area; 8.00 acres of land is available for sale. Likewise, after reducing the land sold earlier, the remaining land available is 1.31 acres out of survey No.213/1. The land falling in survey Nos.221/2 and 208/12 is of the joint ownership of defendants No.1 and 2.

The defendants No.1 and 2 have half share of the land falling in survey Nos.213/1, 213/238 and 216/4. However, they have agreed to purchase the remaining half share from Surendra Dilliwal & Sudha Dilliwal (defendants No.4 & 5). In turn, shall sell four acres of land to the plaintiff.

However, defendants No.4 and 5 are not party to the agreement.

Since beginning of March, 2006 the plaintiff was willing and ready to pay the remaining amount of consideration. On 25/03/2006, the plaintiff got prepared bank drafts in the names of following persons :

(i) Rachna Jain : Rs.11.00 lakhs;

(ii) Subham Jain : Rs.02.50 lakhs;

(iii) Rajendra Jain : Rs.43.00 lakhs

(Rs.2.50 + 17.50 + 12.50 + 10.50 lakhs each)
total; Rs.65.50 lakhs

(iv) Besides; cash of Rs.37,22,500/- was available in his savings bank account.

The defendants were bound to execute the sale deed on or before the cut off date, 27/03/2006. Therefore, the plaintiff sent a telegram on 26/03/2006 to the defendants to remain present at the office of Registrar for registration of sale deed but, they failed

to appear. On 27/03/2006, again the plaintiff sent a telegram to receive the remaining amount and execute the sale deed.

Thereafter, the plaintiff sent a notice on 31/03/2006 and also published a notice in daily news papers Dainik Bhaskar & Nai Duniya on 17/04/2006. In response to public notice, one Nandkumar Dalal replied that he has purchased land falling in survey No.216. One Smt. Rajashree w/o Ajay Chaudhary has also replied that she has purchased land falling in survey Nos.213/1 & 213/238.

Defendants denied agreement to sell in their reply on 24/06/2006.

The details of sale deeds executed by defendants No.1 and 2 in favour of various persons are detailed in paragraphs 11 and 12 of the impugned judgment.

In the backdrop of the aforesaid facts pleaded, the plaintiff prayed for following reliefs:

> (a) defendants No.1 and 2 be called upon to execute the sale deed for 08 acres of land. Besides, after obtaining lease / NOC or sale of land from the defendants No.4 and 5, execute the sale deed in favour of plaintiff for additional 04 acres of land, as agreed to;
>
> (b) possession of land be delivered to the plaintiff of 08 acres of the ownership of defendants No.1 and 2. And possession of 04 acres of land after purchase or obtaining NOC from the defendants No.4 and 5 be also delivered to the plaintiff.
>
> (c) in default, let the sale deed be executed through the Court.

3. Defendants No.1 and 2 have filed written statement *inter alia* contending that some time back discussion took place between broker Babusingh Sisodiya and the defendant No.1, Rajendra Jain for sale of land. Thereafter, he placed an agreement to sell dated 27/04/2005 (Annexure P/9) already signed by plaintiff in relation to available remaining land of 08 acres in the aforesaid survey numbers. Besides, another

stipulation thereunder was to make available additional 04 acres of land of the ownership and in possession of Surendra Dhilliwal and Sudha Dhilliwal after purchase from them by defendants No.1 and 2. However, condition of payment of Rs.35.00 lakhs by plaintiff to defendants No.1 and 2 was precedent thereto.

Defendants No.1 and 2 never met Satish Khandelwal. The broker Babusingh Sisodiya had never organized meetings with Satish Khandelwal. Even the agreement was not signed by Satish Khandelwal in front of defendants No.1 and 2.

Defendants though admitted receipt of two pay orders of Rs.7.50 lakhs each; total Rs.15.00 lakhs but, denied receipt of cash. On enquiry, broker Sisodiya told them that the plaintiff's name is imaginary (fictitious) and not real person (benami). The sale deed shall be executed in the name of different person on strength of terms of the said agreement. It is also pleaded that upon further enquiry after 26/05/2006, it has come to knowledge of defendants that though Satish Kumar Khandelwal is a fictitious person but, the agreement was actually signed by one Satish Kumar Sharma who was an employee of A.R. Infrastructure.

That apart, the aforesaid suspicion also got precipitated as later on, it has come to the knowledge of defendants No.1 and 2 that pay orders handed over to them were not prepared from the account of plaintiff, Satish Kumar Khandelwal (fictitious person) but from the accounts of different persons/institutions indicating A.R.Infrastrcutre. Therefore, the instant suit is not maintainable and deserves to be dismissed for the reason that the agreement was entered in the name of a fictitious person and is sought to be enforced through judicial intervention.

It is denied that the agreement for sale of 8 acres of land and that of 04 acres of land was entered into with the plaintiff, Satish Kumar Khandelwal. In fact, it is Satish Sharma resident of 78-A, Parasnath Nagar, R.T.O. Road, Indore. Hence, the plaintiff is not same person signing the plaint and alleged to have executed the agreement to sell with the defendants No.1 and 2. Defendants also denied receipt of Rs.21.00 lakhs on 16/05/2005. There was no agreement that an additional amount of Rs.30.00 lakhs shall be paid before sale or release of land admeasuring 04 acres of land first in favour of defendants No.1 and 2 by defendants No.4 and 5 and thereafter in favour of plaintiff. The

said amount was never advanced by plaintiff. Therefore, it was denied to have entered into an agreement for 04 acres of land. Even otherwise, there was no description of boundaries and specification of area defined either for 08 acres of land or for that of 04 acres of land in the alleged agreement.

The amendment incorporated in the plaint related to description of land has been denied. The amendment runs contrary to or inconsistent with the averments in the plaint (paragraph 17 of the judgment)

Besides, defendants No.1 and 2 submitted that there is no description of 08 acres of land in the alleged agreement to sell except mentioning survey numbers and no map attached thereto as well to make it specific how much land of each survey number was included to make total 8 acres of land with description of boundaries. Hence, the agreement to sell (document) is ambiguous or defective on its face. There was no explanation in the plaint averments for substituting the contents of agreement. As such, in the light of provisions of section 93 of the Evidence Act which contemplates that when the language used in the agreement on its face, ambiguous, defective and vague, no amount of evidence can be given on facts which would show its meaning or cure its defects**.** Therefore, no such amendment in the plaint can either substitute, explain or cure the defect of vagueness and non-description of land in the agreement. Hence, the agreement is not enforceable under section 29 of the Specific Relief Act. The plaintiff also did not abide by the schedule and mode of payment of consideration under the agreement.

It is also submitted that even assuming cash payment alleged to have been made by plaintiff on 30/10/2005 to the tune of Rs.15.00 lakhs but, he failed to pay Rs.35.00 lakhs upto the extended period of 05/11/2005. Therefore, the agreement stands repudiated by itself due to non-compliance of clauses thereof.

Besides, it is also contended that the plaintiff did not have financial capacity to purchase the suit land. The alleged pay orders and bank drafts were not prepared from the account of the plaintiff. The plaintiff was called upon by defendants to produce details of preparation of pay orders and name of bank and surrender thereof as well as the income tax returns to reflect the said amount. No such details have been furnished.

In Bank of Rajasthan, an account was opened in the name of plaintiff Satish Kumar Khanelwal on 27/03/2006. In fact, Satish Kuamr Sharma is an ordinary employee and has no financial resources to enter into an agreement to purchase the suit land by payment of consideration of more than 01.00 crore.

None of the pay orders or bank drafts were prepared from the account of Satish Sharma / Satish Khandelwal.

It is denied that defendants were not ready and willing to perform their part of agreement / contract. In fact, the funds were not available with the plaintiff at any time, muchless; on 27/03/2006. Parties had never agreed that the remaining amount of sale consideration shall be paid to defendants No.1 and 2 at the office of Registrar during the time of registration of sale deed on 27/03/2006. Plaintiff did not purchase stamp papers on 27/03/2006. He also did not handover the draft sale deed on or before 27/03/2006 to defendants No.1 and 2. Hence, the story coined by plaintiff is hypothetical. It is a frivolous litigation. Hence, the suit deserves to be dismissed.

4. Defendants No.4 and 5 have filed separate written statement. It is stated that they are not party to the agreement dated 27/04/2005. They neither have knowledge of the said agreement nor the same was entered by defendants No.1 and 2 with their consent. They have never permitted defendants No.1 and 2 to sell the land of their ownership falling in survey Nos.213/1, 213/238, 216/4 to the plaintiff. As such, there is no privity of contract between the plaintiff and the defendants No.4 and 5. They have been wrongly added as party by way of amendment after two years of filing the suit for no justification. The sale deed executed in favour of defendant No.8 on 28/03/2007 registered on 31/03/2007 was legal and valid. The amended paragraphs 4 and 5 of the plaint have been specifically denied. Therefore, they prayed for dismissal of the suit against them with cost of Rs.50,000/-.

5. Defendants No.6 and 7 have filed joint written statement. Defendant No.6 is company and defendant No.7 is director of the company *inter alia* pleaded that 2.50 acres of land falling in survey No.208/12 has been transferred vide registered sale deed

dated 06/03/2007 by defendant No.1 in favour of defendants No.6 & 7.

Likewise, defendant No.2 has transferred 1.790 acre of land falling in survey No.208/9 vide registered sale deed dated 06/03/2007.

Answering defendants were appraised of rejection of injunction by the trial Court vide order dated 05/07/2006. There was no restriction on the sale of land. Besides, the land falling in survey No.208/9 was not included in the agreement to sell. Instead, interpolation was done including the said survey numbers. The figures were forged in agreement by interpolation and fabricated the agreement.

The land admeasuring 2.5 acres is not part of the land falling in survey No.208/12 indicated in the agreement and the same is conceded by the plaintiff himself. Hence, no relief whatsoever can be granted to the plaintiff against the land transferred in favour of defendants No.6 and 7 falling in survey No.208/12.

6. Defendant No.8 had also filed separate written statement and denied plaint averments. It is contended that the land admeasuring 0.405 hectare falling in survey No.216/4 has been transferred in her name by defendants No.1 and 2 & defendants No.4 and 5 by registered sale deed for a consideration of Rs.4,80,000/-. Defendant No.8 had no knowledge or notice of such agreement dated 27/04/2005. Besides, the land purchased by her is not part of the agreement to sell. She is a *bona fide* purchaser. There was no agreement between the plaintiff and the defendants No.4 & 5 for sale of the land. The alleged agreement was without consent and knowledge of defendants No.4 and 5. The suit deserves to be dismissed.

7. On the aforesaid pleadings, trial Court framed as many as 20 issues and allowed parties to lead evidence. Upon critical evaluation of the entire evidence on record returned the following findings:

(i) agreement to sale dated 27/04/2005 (exhibit P/9) was entered between the plaintiff and defendants No.1 and 2 in

respect of 08 acres of suit land for an amount of Rs.1.120 crores. The entire consideration was to be paid in cash;

(ii)the plaintiff is a fictitious person;

(iii) plaintiff failed to prove and explain the source of cash flow of Rs.50.00 lakhs allegedly paid to defendants No.1 and 2;

(iv) admittedly, he was an employee of A.R. Infrastructure and part-time employee in M/s. Aditya Marcon Company Pvt. Ltd., who has acted as a front man / name lender with meager earning of Rs.3.00 to Rs.5.00 lakhs per annum;

(v) the pay orders and bank drafts were found to be prepared directly in the name of defendants No.1 and 2 from the accounts of Arun Dagaria, A.R. Infrastructure and M/s Ansal Housing and Construction Ltd., whereas there was no stipulation in the agreement to sale in that behalf. Hence, the transaction in question fell within four corners of benami transaction as defined under section 2(a) of the Act and, therefore, it was a prohibitory transaction under section 3(1) of the said Act ;

(vi)there is no agreement between the plaintiff and such companies related to cash transaction of such huge amount as to purpose and on what terms and conditions such amount was advanced to him;

(vii) plaintiff has failed to adhere to the schedule of payment as per agreement. He has paid only Rs.66.00 lakhs upto 16/05/2005 whereas Rs.98.00 laks remained to be paid. Therefore, in terms of clause under the agreement related to automatic rescinding of the agreement, the agreement automatically came to an end;

(viii) the plaintiff claimed to have tendered

Rs.35.00 lakhs cash on 30/10/2005 after surrendering and encashment of pay orders prepared earlier prior to 05/11/2005 but, the defendants No.1 and 2 avoided to accept the same. The aforesaid statement stands falsified in the wake of paragraph 3 of the statement of P.W.6 Satya Kumar Kasliwal, Assistant Branch Manager of Bank of Rajasthan, New Palasiya Indore wherein he has stated that pay orders (exhibits P/63, P/65, P/69 and P/71) prepared from the account holder A.R. Infrastructure were submitted for cancellation on 26/11/2005 and after cancellation the amount was deposited in that account. Hence, there was no cash amount available on 05/11/2005 with the plaintiff to tender Rs.35.00 lakhs to defendants No.1 and 2 though the plaintiff tried to explain that the aforesaid amount was advanced for consultancy service he had rendered with A.R. Infrastructure and M/s Ansal Housing and Construction Limited. But, there was no documentary evidence that such consultancy service was rendered by the plaintiff;

(ix) the bank drafts were prepared by U.T.I.Bank from account of Ansal Housing and Construction Limited as per request received on 23/03/2006 for preparation of 09 demand drafts against a cheque for total amount of Rs.71.00 lakhs as is evident from the statement of P.W.7 Sumit Sani; Bank manager (exhibit P/83). Accordingly, the bank had prepared and released drafts on 25/03/2006. Besides, on 02/05/2006, the aforesaid company had filed an application for cancellation of 09 drafts prepared on 23/03/2006 (exhibit P/84).

The demand drafts were cancelled and

credited in the account of Ansal Housing and Construction Limited. The certified copies of originals filed as exhibits P/85 to P/93. As such, the entire amount of Rs.65.50 lakhs in the form of demand drafts were not prepared from the account of the plaintiff. That apart, Ansal Housing and Construction Limited is not party to the agreement.

Ansal Housing and Construction Limited did not transfer the funds to the plaintiff for purchase of land instead, prepared the demand drafts through bank in the names of defendants No.1 and 2. Hence, the transaction is apparently benami transaction;

(x) plaintiff admitted in paragraph 61 of his statement that he had not prepared the draft sale deed and in paragraph 62 that he had not purchased the stamp papers;

(xi) as the agreement (exhibit P/9) was not signed by defendants No.4 and 5, there was no privity of contract between the plaintiff and defendants No.4 and 5. Besides, the agreement does not specify the description of 4 acres of land of the ownership and in possession of defendants No.4 and 5 to be sold to the plaintiff by defendants No.1 and 2 after obtaining release of the same by defendants No.4 and 5;

(xii) neither there was any consent nor knowledge of defendants No.4 and 5. That apart, the plaintiff has not adhered to payment of Rs.30.00 lakhs as condition precedent for purchase of 4 acres of land;

(xiii) as regards the sale deeds executed by defendants No.1, 2 in favour defendants No.6 & 7 on 06/03/2007 (exhibits P/47 & P/48) and sale deed executed by defendants No.4 & 5 in favour of defendant No.8 on 28/03/2007 (exhibit P/49), it has been held

> that after rejection of injunction on 05/07/2006; the same have been executed; For want of details of survey numbers, area, dimensions, locations and map of 08 acres of land and 04 acres of land in the agreement to sell, the said sale deeds were legal and valid as a result no interference is warranted.

With the aforesaid dismissed the suit of the plaintiff with a direction to the defendants No.1 and 2 to refund an amount of Rs.66.00 lakhs to the plaintiff.

8. In the backdrop of aforesaid factual matrix and findings of the trial Court, following questions are framed for disposal of this appeal:

(i) **Whether the plaintiff is a fictitious person?;**

(ii) **Whether, the agreement to sell dated 27/04/2005 is vague, uncertain and not capable of execution?**

(iii) **Whether the agreement to sell is hit by the prohibition under section 3 of the Benami Transactions (Prohibition) Act, 1988 and, therefore, not enforceable under law? and**

(iv)**Whether the plaintiff was ready and willing to perform his part of the agreement?**

(v) **Whether defendants No.4 and 4 are entitled for cost?**

9. **Question (I)** :

(i) **Whether the plaintiff is a fictitious person?**

(a) In the agreement to sell dated 27/04/2005 (exhibit P/9), the second party is described as under:

> Shri Satish Kumar Khandelwal
> Son of Shri Shankarlal Ji Khandelwal
> Resident: 216, Banshi Trade Centre,
> Indore (M.P.)

(b) whereas the plaintiff in the plaint is described as under:

> Satish Kumar Khandelwal
> S/o Shri Shankarlal Khandelwal
> Aged about 42 years
> Occupation: Businessman
> Resident of 78A Parshanand Nagar,

RTO Road, Indore M.P.

As such, there is mark difference in the description of the second party.

10. Shri A.K.Sethi, learned senior counsel contends that Satish Kumar Khandelwal and Satish Kumar Sharma are one and the same person. 'Khandelwal' surname is also used by 'Brahmins'. Hence, no exception thereto can be taken with the description of 'Khadelwal' in the agreement to sell and plaint, nevertheless; no motive can be attributed thereto. Moreover, the plaintiff and the second party in the agreement are found to be same person by the Court itself while ordering for refund of an amount of Rs.66.00 lakhs to the plaintiff granting alternate relief.

11. *Per contra,* Shri Bagadiya, learned senior counsel for the contesting respondents contends that there is no explanation forthcoming for different address in the agreement to sell and in the plaint. There is no evidence on record that the second party is residing at 216, Banshi Trade Centre, Indore (M.P.) instead it is a commercial place of M/s Baldev Chadda.

The address in the plaint with evidence on record unequivocally suggests that Satish Sharma resides at 78A Parshanand Nagar, RTO Road, Indore M.P but not Satish Khandelwal. The wrong description of second party in the agreement is with ulterior motive to hide identity of plaintiff. In fact, the plaintiff is an employee of A.R. Infrastructure and to achieve collateral purpose entered into the agreement to sell in fictitious name for the benefit and gain of the company. Therefore, it is a benami transaction. As the plaintiff has not come with clean hands before the Court, equitable relief cannot be granted.

The plaintiff is a fictitious person: for following reasons:

(a) the address shown in the agreement (exhibit P/9) is one of Balwant Singh Chadda; a commercial establishment. Therefore, the second party cannot be said to be residing there;

(b) Satish Sharma resident of 78A

Parshanand Nagar, RTO Road, Indore and his wife, Meena Sharma are known to the defendant No.1 whereas the agreement to sell and the plaint is In the name of Satish Kumar Khandelwal;

(c) plaintiff has admitted in his cross-examination that his father's surname is 'Sharma' and his wife's name is Meena Sharma.

In every document, viz., bank account (exhibit P/127), insurance premium receipts, bank loan statement, etc., (exhibits P/128, P/134, P/139, P/141, P/149 & P/152) appears the name of Satish Sharma & also bank account statement (exhibit P/50);

Likewise, In the power of attorney (exhibit P/116) executed between Rajendra Kumar & others and Atul Surana, the plaintiff signed as a witness with name of Satish Sharma s/o Shankarlal R/o 78A Parashnand Nagar, Indore.

In the sale deed dated 12/12/2005 (exhibit P/122) between Rajendra Kumar & others and A.R.Infrastructure Pvt., Ltd., the plaintiff signed as a witness with name of Satish Sharma s/o Shankarlal R/o 78A Parashnand Nagar, Indore.

(d) during trial in response to the application filed under Order 12 rule 3 CPC dated 09/08/2007, the plaintiff filed reply on 16/08/2007 and admitted his signature thereon as Satish Sharma;

(e) in his affidavit under Order 18 rule 4 CPC his name is written as Satish Kumar;

(f) however, in the bank account opened on 27/03/2006 (exhibit P/30) with the Bank of Rajasthan Limited, his name mentioned as Satish Shankarlal Khandelwal which is the

only document;

(g) besides, the plaintiff admitted his signature as Statish Sharma mentioning his address as 79 Parshanand Nagar in exhibit D/1 sale deed dated 03/09/2005 executed by A.R. Infrastructure; exhbit D/2 sale deed and map attached therewith dated 23/04/1999 executed by Panchwati Sahkari Grih Nirman Sanstha in favour of Satish Sharma, exhibit D/3, a power of attorney executed by Satish Sharma on 03/05/2006 in favour of Manoharlal Dixit mentioning his address as 70 Lodhi Mohalla, Halmukam 78-A Parshanand Colony;

(h) exhibit D/4, motorcycle bearing registration No.MP09 LL 2484 dated 27.10.2005 is also in the name of Satish Sharma;

(i) further, during trial the plaintiff was given a notice on 29/05/2006 calling upon to produce the income tax return, PAN card, driving licence and Voter ID. But, he chose not to produce the aforesaid documents except Voter ID without disclosing his surname mentioning the address as Lodhi Mohalla, Indore;

(j) besides, for the first time, the plaintiff used the name Satish Shankarlal Khandelwal R/o 78A Parasnath Colony, Indore while he opened the account in Bank of Rajasthan Limited on 27/03/2006 (exhibit P/30). However, in the statement of account issued by the Bank on 02/08/2007 (exhibit P/50), he was described as Satish Sharma (Khandelwal) after institution of the instant suit.

These documents were discussed in paragraphs 39 and 40 of the judgment by the trial Court.

Finding:

There is no explanation, muchless; plausible explanation forthcoming from the record as to why the plaintiff described himself differently.

Address in agreement:	Address in plaint:
Shri Satish Kumar Khandelwal S/o Shankarlal Ji Khandelwal Resident: 216 Banshi Trade Centre Indore (M.P.)	Satish Kumar Khandelwal S/o Shri Shankarlal Khandelwal Aged about 42 years Occupation: Businessman Resident of 78A Parshanand Nagar, RTO Road, Indore M.P

The address of Banwant Singh Chadda, a commercial place and not a place of residence whereas the 78A Parshanand Nagar, R.T.O.Road, Indore is a residential place of Satish Sharma.

There is no document, muchless; official document on record to indicate that plaintiff Satish Kumar Khandelwal is resident of 78A Parshanand Nagar, R.T.O.Road, Indore. For the first time, opened bank account in the Bank of Rajasthan Limited on 27/03/2006 (exhibit P/30) in the name of Satish Shankarlal Khandelwal. Besides, in his affidavit dated 24/04/2007, he has used the surname Satish Sharma (Khandelwal). Non-production of PAN card, school record or marks sheet, driving licence despite notice issued under Order 12 rule 3 CPC upon the plaintiff certainly shall lead to adverse inference against him in view of section 114(g) of the Evidence Act.

The aforesaid unnatural conduct of the plaintiff points needle of suspicion towards him and his *bona fides* are questionable. For want of explanation of genesis of cash flow, preparation of pay orders and bank drafts from the accounts of persons / companies, i.e., Arun Dagariya, A.R. Infrastructure & Ansal Housing and Construction Ltd., with whom there was no agreement by the plaintiff to provide consideration amount. Further, those persons were not examined in the Court. Such sequence of facts suggest that the plaintiff with ulterior motive described himself differently to act as a front man / name lender for the collateral purpose to benefit them.

In view of the aforesaid, the finding of the trial Court that only for the purpose of agreement to sell (exhibit P/9), the plaintiff

used the name of Satish Kumar Khandelwal, resident of 216, Banshi Trade Centre, Indore as prior thereto the documents placed on record admitted by plaintiff himself describe him as Satish Sharma resident of 78A Parshanand Nagar, RTO Road, Indore M.P., cannot be faulted.

12. **Question (ii)**:

Whether, the agreement to sell dated 27/04/2005 is vague, uncertain and not capable of execution?

Shri Sethi, learned senior counsel for the appellant would contend that the defendant No.1 in his deposition has clearly admitted that out of the above referred survey numbers, 08 acres of land was available. Hence, even if the details of survey numbers, details of sale deeds, location, dimensions and map of 08 acres of land are not attached thereto, that by itself; shall not render the agreement as uncertain and not capable of execution. In any case, the amendment application allowed by the trial Court contains all such details as regards the ownership of different survey numbers, area, location, dimensions etc., Besides, the defendant No.1 (D.W.1) in paragraphs 23 and 27 of his cross-examination has admitted that 8 acres of land was left in various survey numbers mentioned in the agreement (exhibit P/9) after transfer of remaining land to different persons and the same was available. The defect, if any in the agreement stands cured. Hence, incomplete details in the agreement, shall not enure any benefit to defendants.

Per contra, Shri Bagadia, learned counsel for the defendants No.1 and 2 controverts the same with the submission that in a suit for specific performance of an agreement to sell, unless; the agreement spelt out a specific area of survey numbers, its exact dimensions / location with map attached, such agreement is not capable of enforcement for specific performance of the contract. As such, non-description of aforesaid details alongwith map hit by the provisions of Order 7 rule 3 CPC. He placed reliance on judgments in cases of S**mt. Mayawanti Vs. Smt. Kaushlyadevi, 1990 (3) SCC 1, Roopkumar Vs. Mohan,**

AIR 2003 SC 2418, **Vimlesh Kumari Kulshretha Vs. Sambhajirao and another (2008) 5 SCC 58, Kanhaiyalal Vs. Bhura 1978 (1) MPWN 135, Sambhajirao Vs.Vimlesh, AIR 2004 MP 74 and Kasihram Vs. Mitthulal, 2013(1) MPHT 388** to bolster his submissions.

FINDING:

Agreement to sell (exhibit P/9) indicates the agreement between defendants No.1 & 2 and plaintiff for sale of 8 acres of land.

A bare perusal of relevant clauses of the agreement suggest that:

> **(a)** there is no description of details of land *qua* each survey number, its location, dimensions and area to make the clauses capable of enforcement as the then survey numbers indicate total area 17.110 acres and out of it, major portion of the land had already been sold prior to execution of the agreement to sell;
>
> **(b)** likewise, under clause (ii) there is no description of survey numbers with the area of land or bhumi swami rights of defendants No.4 and 5, out of which 4 acres of land allegedly agreed by defendants No.1 and 2 to be purchased by them and transfer the same to the plaintiff;
>
> **(c)** agreement is not signed by defendants No.4 and 5;
>
> **(d)** there is nothing on record to suggest that agreement was with the consent and knowledge of defendants No.4 and 5;
>
> **(e)** there is no mention of the details of the person in whose favour the sale deeds have already been executed with specific areas, dimensions and boundaries;
>
> **(f)** there is no map attached with the agreement indicating either 8 acres or 4

acres of land in terms of clauses (i) and (ii) of the agreement;

(g) in the legal notice dated 31/03/2006 (exhibit P/34), Jahir Suchana dated 17/04/2006 (exhibits P/44 and P/45) and in the plaint as originally filed, the plaintiff had claimed to have entered into an agreement for purchase of 08 acres of land plus 04 acres of land falling in aforesaid 10 survey numbers.

the details of sale deeds have been left blank and even the area, dimension and location of individual survey numbers have not been mentioned in the agreement. However, in the amendment application dated 19/05/2007, the plaintiff sought to improve upon clauses of the agreement to contend that 08 acres of land compraised in survey Nos.208/9, 214, 219/2, 220 and 221/1 as evident from paragraph 79 of the statement of plaintiff (P.W.1).

(h) the aforesaid objections were specifically raised in the written statement dated 08/08/2006 by the defendants No.1 and 2;

(i) the trial Judge while rejecting the prayer for injunction vide order dated 5/07/2006 has also made an observation that the contract was void being uncertain.

The land falling in survey no.219/2 total area 1.40 acres of land has been jointly recorded in the names of Rajendra Jain, Rachna Jain, Palak and Subham Jain (exhibit P/94). Land falling in survey Nos.221/2 & 208/12 are recorded in the name of Shantilal (exhibit P/96 & P/99). Land falling in survey no.213/1 is recorded in the name of Surendra Dilliwal and Rajendra Jain (exhibit P/98) Land falling in survey No.216/4 is recorded in the name of Surendra Dilliwal, Sudha Dilliwal, Rajendra Jain &

Rachna Jain (exhibit P/101). Therefore, the same lands were in the names of the aforesaid persons. There is no evidence that at any point of time, partition has taken place for apportionment of shares of defendants No.1, 2 and their heirs and rights conferred upon the defendants No.1 and 2 to deal with the lands of joint ownership.

Under such circumstances, the finding of the trial Court cannot be faulted that the agreement was uncertain and not enforceable.

Besides, the handwritten insertion under clause (2) in exhibit P/9 indicates that only on a condition of payment of Rs.30.00 lakhs on 16/05/2005, the defendant No.1 shall purchase 4 acres of land recorded in the names of defendants No.4 and 5 and transfer the same to the plaintiff. For ready reference, clause (1) and handwritten portion of clause (2) quoted below:

Clause(1):

> " प्रथमपक्ष के एकमात्र स्वामित्व अधिकारी एवं आधिपत्य की कुल 8 एकड़ भूमि ग्राम तलावली चांदा तहसील एवं जिला इंदौर के पटवारी हल्का क्रमांक 18 पर स्थित सर्वे क्रमांक निम्नानुसार हैः–
>
> | क्र. | सर्वेनम्बर | | |
> |---|---|---|---|
> | 1. | 208/12 | 2. 208/9 | 3. 213/1 |
> | 4. | 213/238 | 5. 214 | 6. 216 |
> | 7. | 219/2 | 8. 220/ | 9. 221/1 |
> | 10. | 221/2 | पेकि आठ एकड | |
>
> यह संपत्ति प्रथमपक्ष में..... से पंजीकृत विक्रय लेख 1अ/ग्रंथ...../पृष्ट...../क्रमांक...../दिनांक..... के अनुसार विधिवत रूप से क्रय की है। इस प्रकार प्रथमपक्ष उपरोक्त वैधानिक आधारों पर कुल भू–भाग पर एकमात्र मालिक एवं कब्जेधारी नाते काबिज है। सदर भूमि भू–राजस्व अभिलेखों में ऋण पुस्तिका क्रमांक..... के अनुसार प्रथमपक्ष के नाम दर्ज है। प्रथमपक्ष को उपरोक्त वर्णित कृषि भूमि में से पैकी 8 एकड़ को विक्रय कर रहे है के विक्रय अनुबंध लेख के निष्पादन का पूर्ण वैधानिक अधिकार प्राप्त है।
>
> अनुबंधित कृषि भूमि को लेख में आगे सुविधा की दृष्टि से **सदर संपत्ति** से संबोधित किया गया है। "

handwritten portion of clause (2):

> ".....

यह कि विक्रित कृर्षी भूमि 8 एकड विक्रेता गण कि है व एवमं 4 चार एकड भूमि अन्य नाम कि है सुरेन्द्र दिल्लीवाल व सुधा दिल्लीवाल के नाम कि है। चार एकड भूमि खरीदने की जवाबदारी विक्रेता पक्ष की रहेगी। 16/5/2005 को 3000000 (तीस लाख) प्राप्त होने पर ही चार एकड भूमि खरीदकर देने की शर्त लागू होगी नहीं तो आठ एकड की रजिस्ट्री विक्रता पक्ष इन खसरो में से करेगा।

आज दिनांक को 27/4/05 1800000(अठारह लाख) कृषी भूमि का सोदा चोदह लाख प्रति एकड के मान से हुआ। आज दिनांक 16–05–2005 का पे आर्डर यु.टी.आई बैक न. 26001 रचना जैन के नाम से सात लाख पचास हजार 750000/– एवं पे आर्डर यू.टी.आई बैक न 26002 राजेन्द्र जैन 750000/– अक्षरी सात लाख पचास हजार प्राप्त हुए। इसीदीन नगद छः लाख 600000/– प्राप्त हुए। इस प्रकार आज दिनांक 16–5–05 को दोनों मिलाकर टोटल इक्कीस लाख प्राप्त हुआ है। चार एकड क्रय करने की जवाबदारी मेरी रहेगी। तथा प्रथम पक्ष उसकी मालकीन एवम कब्जे की उपरोक्त खसरा इन्ट्री की जमीन अन्य व्यक्तियों को विक्रय कर चुका है यह अनूबंध शेष बची जमीन बाबद है। ''

However, 8 acres of land is part of land spread over in 10 survey numbers in village Talwali Chand tehsil and district Indore with total area of 17.110 acres of the ownership of defendant No.1 Rajendra Jain, defendant No.2 Rachna Jain and Palak & Subham (daughter & son of defendant No.1), Surendra Dilliwal and Sudha Dilliwal as well as father of defendant No.1 Shantilal Jain as well discussed in paragraphs 74 and 76 of the judgment.

The Hon'ble Supreme Court in the case of **Vimlesh Kumari Kulshrestha Vs. Sambhajirao and another (2008) 5 SCC 58.** In paragraph 25 has held as under:

> "An agreement of sale must be construed having regard to the circumstances attending thereto. The relationship between the parties was that of the landlord and tenant. Appellant was only a tenant in respect of a part of the premises. It may be that the boundaries of the house have been described but a plan was to be a part thereof. We have indicated hereinbefore that the parties intended to annex a plan with the agreement only because the description of the properties was inadequate. It is with a view to make the description of the subject matter of sale definite, the plan was to be attached. The plan was not even prepared. It has not been found that the sketch of map annexed to the plaint conformed to

> the plan which was to be made a part of the agreement for sale. The agreement for sale, therefore, being uncertain could not be given effect to.

This Court in the case of **Laxman Singh s/o Meharban Singh Vs. Jagannath s/o Mansaram, 2000(1) MPLJ 79,** it has been held as under:

> "10. The purpose of Order 7 Rule 3 of the Code, is that unless the plaintiff indicates the identity of the property claimed by him either by means of boundaries or by means of map as required by Order 7, Rule 3 of the Code, it would be difficult for the Court to find whether the plaintiff has title to the property claimed and whether any encroachment or dispossession has been made by the defendant. Thus the duty of the party is to give description sufficient to identify the property in dispute. If such decree is passed, it shall be unworkable. The Court can only pass a decree which can be executed under Order 21 of the Code.

The Hon'ble Supreme Court in the case of **Hemanta Mondal & Ors vs Sri Ganesh Chandra Naskar (2016) 1 SCC 567,** it has been held in paragraphs 8 and 16 as under**:**

> 8. The description of the schedule property for which advance is taken, gives following details at the end of the terms mentioned in the agreement (Annexure P-8) :-
>
> "Description Of Schedule Property For Which Advances Taken
>
> Under District-Howrah, District Registrar Office-Howrah, Sub-Registry Office- Domjur, P.S. Domjur and within Mouza-Pakura mentioned in old 'Parcha' (record) in Khatian No. 177 (one hundred seventy seven) in Dag No. 271 (Two hundred seventy one), high land measuring 33 (thirty three) shataks under permanent tenancy right, half portion from the western side which is according to Revisional Settlement's 'Parcha' (record) in Khatian No. 746 (seven hundred forty six), Dag No. 271 (two hundred seventy one) and in Parcha (Record) of present Revisional Settlement it is recorded in Khatian No. 602 (six hundred two), Dag No. 273 (two hundred seventy three) under permanent tenancy right as high land measuring 16 (sixteen) shataks".
>
> 16. In the present case, it appears that possession was not given to the plaintiff at the time of execution of the agreement, nor the area of land agreed to be sold was clear, as such, it cannot be said that the plaintiff has done substantial acts or

> suffered losses due to the expenditure in constructions, etc., in consequence of a contract capable of specific performance. The direction given by the High Court in the impugned order shows that the measurements of land actually agreed to be sold, are not final.

It is settled law that terms of an agreement for specific performance have to be read and understood as it is and the entire agreement to be read as a whole to ascertain the intention of the parties and working out its conclusions thereof so that upon fulfillment of the requisite conditions, the agreement could be enforced under law. No external aid can be allowed for appreciating the provisions of the agreement. Therefore, no amendment in the pleadings can be either permitted or read in conjunction with various clauses of the agreement. Moreover, the contents of written agreement cannot be proved otherwise than by writing itself. Section 91 of the Evidence Act prohibits proving of contents of a document.

The Hon'ble Supreme Court in the case of **Roop Kumar Vs. Mohan Thedani, AIR 2003 SC 2418**, it has been held as under:

> "It is likewise a general and most inflexible rule that wherever written instruments are appointment, either by the requirement of law or by the contract of the parties, to be the repositories and memorials of truth, any other evidence is excluded form being used either as a substitute for such instruments, or to contradict or alter them. This is a matter of both of principle and policy. It is of principle because such instruments are in their own nature and origin, entitled to a much higher degree of credit than parol evidence. It is of policy because it would be attended with great mischief if those instruments, upon which men's rights depended, were liable to be impeached by loose collateral evidence."

The Hon'ble Supreme Court in the case of Manawanti Vs. Kaushalya Devi (1990) 3 SCC 1, it has been held as under:

> "19. The specific performance of a contract is the actual execution of the contract according to its stipulations and terms, and the courts direct the party in default to do the very thing which he contracted to do. The stipulations and terms of the contract have, therefore, to be certain and the parties must have been *consensus ad idem*. The burden of showing the stipulations and terms of the contract and that the minds were ad idem is, of course, on the plaintiff. If the stipulations and

> terms are uncertain, and the parties are not *ad idem*, there can be no specific performance, for there was no contract act all."

Besides, the clauses of the agreement neither can be supplemented, supplanted or substituted by extensive description in the plaint or in the oral testimony **(Roop Kumar Vs. Mohan Thendani, AIR 2003 SC 2418, referred to).**

The specific performance of a contract is the actual execution of the contract according to its stipulations and terms, the Courts direct the party in default to do the very thing which he contracted to do. Therefore, unless; the stipulations and terms of the contract are certain and parties must have been *consensus ad idem,* the specific performance cannot be ordered. The burden that the stipulations and terms of contract and the minds of parties *ad idem* is always on the plaintiff. If such burden is not discharged and the stipulations and terms are uncertain, and the parties are not ad idem, there can be no specific performance, for there was no contract at all. **[Smt. Mayawanti Vs. Smt. Kaushlyadevi, 1990 (3) SCC 1** referred to].

Therefore, this Court is of the view that the agreement to sale (exhibit P/9) is vague, uncertain and is not capable for execution under law.

13. **Question (iii):**

> **Whether the agreement to sell hit by the prohibition under section 3 of the Benami Transactions (Prohibition) Act, 1988 and, therefore, not enforceable by law?**

Shri Sethi, learned senior counsel contends that the plaintiff/appellant has arranged amount from different companies and none of these companies or persons claimed any right over the suit property.

In modern days, most of the properties are purchased on loan taken from various financial institutions, corporations, banks, societies, etc., and those institutions directly make payment to the seller. If the understanding and reasoning of the trial Court is accepted, all such transactions where funds have been mobilized from different sources shall be rendered *benami* transactions.

Therefore, the real intention of the parties needs to be looked into before declaring any transaction as benami transaction.

Learned senior counsel relying upon the judgment of Hon'ble Supreme Court in the case of **Pawan Kumar Gupta Vs. Rochiram Nagdeo, 1999 AIR SCW 1420** (paragraphs 29 & 30) contends that the word “provided” in section 2(a) of the Act cannot be construed in relation to the source or sources which the real transferee made funds available for paying the sale consideration. The words “paid”or “provided”are disjunctively employed in the clause and each has to be understood with the word consideration. Therefore, if the sale consideration has been provided by different sources, the same shall not render the transaction of sale under the agreement to sell as *benami* transaction within the meaning of section 2(a) of the Act.

Per contra, Shri Bagadia, learned senior counsel for the contesting defendants referred to paragraphs 48 and 49 of the judgment of the trial Court to contend that the plaintiff was an employee of A.R. Infrastructure & M/s Aditya Marcon Pvt. Limited with a meager monthly salary with an aggregate amount of Rs.3.00 lakh to Rs.5.00 lakhs per annum. The plaintiff had no capacity to enter into an agreement to purchase property worth Rs.1.12 crore.

He has not disclosed the source of cash flow of Rs.51.00 lakhs. Besides, the pay orders and bank drafts were from the accounts of Arun Dagaria, A.R. Infrastructure and Ansal Housing and Construction Limited, New Delhi directly in the names of defendants No.1 and 2.

He used the fictitious name for entering into an agreement (exhibit P/9). The passbook of Bank of Rajasthan (exhibit D/11) coupled with the statement of P.W.1 in paragraph 59 reflects that the cash amount of Rs.28.45 lakhs was deposited on 27/03/2006 in his account by A.R. Infrastructure but, he does not remember three entries of deposit in his account. Besides, cash deposited on 19/04/2007 (exhibit D/10) does not reflect the source of deposit. Later on, he stated that the the said amount was transferred from M/s Ansal Housing and Construction Limited and the amount was automatically deposited in the form of fixed deposit account. He, however, claimed that the said amount was

advanced to him but, no where, he has disclosed this income. Hence, the entire details of flow of money suggests that it was a benami transaction. There is no agreement or terms and conditions in writing between the plaintiff and these companies for transfer of lakhs of rupees for purchase of the suit land.

All these factors cumulatively indicate that the plaintiff has acted as a front man for purchase of the suit land for the benefit and gain of companies, A.R. Infrastructure and Ansal Housing and Construction Ltd.,

Learned senior counsel placed reliance on the judgment of Hon'ble Supreme Court in the case of **Union of India Vs. Moksh Builders and Financiers Ltd., and others, [(1977) 1 SCC 60**. **paras 13, 15 and 18].**

FINDING:

Before adverting to rival contentions, it is expedient to discuss ratio of the judgment of Hon'ble Supreme Court in the case of **Pawan Kumar Gupta (supra)**, while interpreting section 2(a) of the Act has ruled that the word “paid” and the word “provided” used in the section must be understood disjunctively. To be precise, the correct interpretation shall be “consideration paid” or “consideration provided”. If consideration was paid to the transferor then the word provided has no application for the said sale. If the consideration was not paid in regard to a sale transaction, a question of proving consideration would arise. In some cases of sale transaction ready payment of consideration might not have been effected then provision would be made for consideration. Therefore, the word “provided” as used in section 2(a) of the Act has to be read in that context. Any other interpretation shall harm the interest of persons involved in genuine transaction, i.e., if a purchaser availed himself of loan facility from bank to make up purchase money, such sale cannot be said to be a *benami* transaction as the bank has provided the consideration.

The aforesaid proposition of law in the context of the word “provided” used in section 2(a) of the Act is certainly beyond cavil of doubt. Nevertheless; its applicability shall depend upon the nature of transaction and facts and circumstances of each case to

ascertain the genuineness of the transaction. Otherwise, the very purpose of the enactment shall frustrate.

The facts in hand as discussed above unambiguously and unequivocally lead to a conclusion that the plaintiff was not a *bona fide* purchaser with no financial capacity whatsoever. Besides, the plaintiff also failed to prove genuineness of the transaction for preparation of pay orders and bank drafts from the accounts of such persons with whom plaintiff had no privity in terms of the agreement for providing the consideration and unexplained cash flow. None of the persons providing consideration amount were examined in the Court. Under such circumstances, the transaction in question in the considered opinion of this Court tantamount to *benami* transaction prohibited within the meaning of section 2(a) of the Act, the same cannot be termed genuine transaction as conceptualized by the Hon'ble Supreme Court in the judgments quoted above.

The Hon'ble Supreme Court in the case of **Meenakshi Mills, Madurai Vs. Commissioner of Income-tax, Madras, AIR 1957 SC 49** relying upon the judgment of Federal Court in the case of **Gangadara Ayyar Vs. Subramania Sastrigal, AIR 1949 FC 88**, it has been ruled that in a case where it is asserted that an assignment in the name of one person is in reality for the benefit of another, the real test is the source wherefrom the consideration came. It is also necessary to examine in such cases actually who has enjoyed the benefit of the transfer.

Plaintiff (P.W.1) has admitted in his cross-examination (paragraph 33) that he was an employee in A.R. Infrastructure and Aditya Marcon Company Private Limited wherefrom he had annual income of Rs.70,000/- & Rs.1,28,000/- respectively. Therefore, his total income was Rs.2,00,000/-. He has also admitted in his cross-examination that his income tax return reflects income ranging from Rs.3,00,000/- to Rs.5,00,000/-. Per annum. Besides, the plaintiff in paragraphs 23, 27 & 33 has stated that he rendered consultancy services to A.R. Infrastructure and Ansal Housing and Construction Limited. However, he has not submitted a single document either in respect of alleged consultancy services or income tax return to reflect income from consultancy services.

The plaintiff in paragraph 64 of his statement has stated that the witnesses list submitted by him include the names of A.R.Infrastructure, Arun Dagariya, Ansal Housing and Construction Limited, etc., Whereas, none of the aforesaid witnesses have been produced and examined. However, two pay orders (Rs.15.00 lakhs); each of Rs.7.50 lakhs dated 16/05/2005 vide Nos.26001 and 26002 of UTI Bank were prepared from the account of Arun Dagariya**.** 05 demand drafts of each Rs.5.00 lakhs (total Rs.35.00 lakhs) were prepared from the account of A.R. Infrastructure and handed over to the plaintiff by Arun Dagariya. It is to be noted that these pay orders and bank drafts were in the names of defendants No.1 and 2 and not in the name of plaintiff. There is no privity of contract between defendants No.1 & 2 either with Arun Dagariya or A. R. Infrastructure or Ansal Housing and Construction Limited, there is also no document on record that loan agreement was entered between the plaintiff and these persons. There is no provision under the agreement (exhibit P/9) contemplating payment of consideration to defendants No.1 and 2 by any person other than the plaintiff.

That apart, Rs.51.00 lakhs cash was already paid on different dates between 27/04/2005 to 31/10/2005 but not withdrawn from the account of plaintiff as there is no evidence on record. The plaintiff failed to establish the source of cash flow of Rs.51.00 lakhs.

Besides, 05 drafts for an amount of Rs.65.50 lakhs were prepared from the account of Ansal Housing and Construction Limited, Delhi in the names of defendants No.1 and 2.

The above discussed facts clearly suggests that the plaintiff with meager earning (Rs.3.00 to Rs.5.00 lakhs per annum) as an employee of A. R. Infrastructure was not a person of sufficient means to enter into an agreement for purchase of 8 acres of land for a consideration of Rs.1.120 crores. Using the name of Satish Kumar Khandelwal with address of 216, Banshi Trade Centre, Indore (M.P.); a fictitious name and address, the plaintiff entered into the agreement (exhibit P/9) as second party and acted as a front man / name lender to achieve collateral purpose for the benefit and gain of A.R. Infrastructure. Unexplained genesis or source of flow of Rs.51.00 lakhs (cash) allegedly paid to defendants No.1 and 2 coupled with preparation of pay orders

and bank drafts from the accounts of Arun Dagaria, A.R. Infrastructure and Ansal Housing and Construction Limited, Delhi in the names of defendants No.1 and 2 gives rise to important questions of law:

> "(i) Whether such transaction on the anvil of agreement (exhibit P/9) can be classified as *benami* transaction within the meaning of section 2(a) of the Act and, therefore, prohibited under section 3 (1) of the said Act?
>
> **If Yes**
>
> (ii) Whether *benami* transaction as defined under section 2(a) of the Act shall include 'an agreement to sell' regard being had to be clubbed definition of sale and contract for sale defined under section 54 of the Transfer of Property Act?"
>
> **If Yes**
>
> (iii) Whether such an agreement forbidden by law is hit by section 23 of the Contract Act as the object of the agreement is vulnerable rendering the agreement as *void?"*

Before adverting to questions, it is expedient to quote unamended sections 2(a); ***'benami* transaction'**, relevant for the present purpose:

> "(a) **"benami** transaction" means any transaction in which property is transferred to one person for a consideration paid or provided by another person."
>
> and
>
> Section 3. **Prohibition of benami transactions** :- (1) No person shall enter into any *benami* transaction."
>
> … … ..."

Transfer of Property Act, 1882:

Section 4, 5 and 54 are relevant and relevant part thereof quoted below:

> **"4. Enactments relating to contracts to be taken as part of Contract Act and**

> **supplemental to the Registration Act.-** The Chapters and sections of this Act which relate to contracts shall be taken as part of the Indian Contract Act, 1872 (9 of 1872).
>
> … … …"

> 5. **"Transfer of Property" defined**.- In the following sections "transfer of property" means an act by which a living person conveys property, in present or in future, to one or more other living persons; and "to transfer property" is to perform such act."
>
> **"54**. "**Sale" defined**.' "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.
>
> … … …
>
> **Contract for sale**.- A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.
>
> It does not, of itself, create any interest in or charge on such property."

The Indian Contract Act, 1872:

> "**Section 23**: **What consideration and objects are lawful, and what not**.- The consideration or object of an agreement is lawful, unless-
>
> **<u>it is forbidden by law</u>**; or
>
> is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or
>
> …. … ...; or
>
> the Court regards it as immoral, or opposed to public policy.
>
> In case of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is *void*.
>
> (Emphasis supplied)

Section 4:

Section 4 of the Transfer of Property Act provides for Chapters and sections of Transfer of Property Act which relates to contracts to be taken as part of the Indian Contract Act. Thus,

an 'agreement to sell' as occurs in section 54 of the Transfer of Property Act is to be understood in the same sense as in the Indian Contract Act.

Section 5:

The word “transfer” is defined with reference to the word “conveys”. The word 'conveys' in section 5 is used in wider sense. The transfer of property may take place not only 'in present' but, also 'in future' as the the word 'in present' or 'in future' qualify the word 'conveys. An agreement to sell though does not create interest in the proposed vendee in the suit property but, definitely, creates an enforceable right in the parties [**Namdeo Vs. Collector, East Meemar, Khandwa and others (1995) 5 SCC 598** and **Rambhau Mamdeo Gajre Vs. Narayan Bapuji Dhotra (dead) through LRs.,(2004) 8 SCC 614**, referred to].

Therefore, a person having an agreement to sell in his favour though does not get any right to the property but, has a right of litigation for title to the property on that basis.

Benami transaction involves transaction in relation to a property defined in section 2(c) of the Act. **“Property”** means property of any kind, whether movable or immovable, tangible or intangible, and includes any right or interest in such property.”

Black's Law dictionary defined 'transaction' as performance or discharge of contract; a business agreement. Something performed or carried out. The agreement to sell property creates an enforceable right upon a proposed vendee. Of course, upon fulfillment of conditions under the agreement/contract. Therefore, it is in the realm of transaction for sale of immovable property. The word 'transaction' used in section 2(a) of the Act is in fact a generic term. Therefore, benami transaction defined in section 2(a) of the Act shall not only include transaction in which property is transferred to one person but, also agreement to transfer the property to one person as the intendment of the legislature is to prohibit *benami* transaction.

Sale and agreement to sale defined under section 54 of the Transfer of Property Act being part of the Indian Contract Act, as contemplated under section 4 of the Transfer of Property Act are subject to prohibition contained thereunder.

If an agreement to sale suffers from the vice of benami transaction within the meaning of section 2(a) of the Act, the same falls in the category of contracts forbidden by law as contemplated under section 23 of the Indian Contract Act, the object whereof is unlawful. Hence, inexecutable in an action for specific performance.

14. **Question (iv):**

Whether the plaintiff was ready and willing to perform his part of the agreement?

Shri Sethi, learned senior counsel contends that the plaintiff/appellant was always ready and willing to perform and has offered the entire consideration as per schedule of payment of agreement but, the defendants No.1 and 2 failed to adhere to the same as a result committed breach of agreement. Therefore, there is perversity of approach by the trial Court in recording the finding that plaintiff was not ready and willing to perform his part of agreement. Hence, the impugned judgment and decree be set aside by allowing the appeal.

Per contra, Shri Bagadia, learned senior counsel contends that the agreement contains schedule of payment, default clause and admission of the plaintiff in that behalf in paragraph 68 of his cross-examination. The plaintiff in his notice dated 31/03/2006 (exhibit P/34) and in the plaint originally filed has not pleaded that he tendered Rs.35.00 lakhs to defendants No.1 and 2. The plaintiff for the first time on 19/05/2007 pleaded that he had tendered demand drafts/pay orders for an amount of Rs.35.00 lakhs Moreover, the pay orders for an amount of Rs.35.00 lakhs were not prepared from the account of plaintiff but, from the account of A.R. Infrastructure. In paragraph 8 of examination-in-chief, the plaintiff pleaded that he has encashed the pay orders and offered cash prior to 05/11/2005 in presence of Atul Surana but, he was not examined though cited in the list of witnesses. The aforesaid statement falsified in the wake of statement of Satya Kumar Kasliwal (P.W.6) bank manager that the aforesaid pay orders were submitted for cancellation only on 26/11/2005 by A.R.Infrastructure and after cancellation, the amount has been credited in the account holder. The plaintiff has not tendered the

draft sale deed and straightaway sent a telegram on 27/03/2006 for registration of sale deed without complying terms and conditions of the agreement.

It is settled law that the plaintiff has to plead and prove his continuous readiness and willingness to perform each and every condition of the agreement right from the date of agreement upto the date of decree **(N.P.Thirugnanam Vs. Dr. R. Jagan, AIR 1996 SC 116,** referred to).

FINDING:

The agreement (exhibit P/9) specifically mentions the dates on which payments were to be made in respect of sale of 08 acres of land.

(a) 27/04/2005 : Rs.18.00 lakhs : Cash

(b) 16/05/2005 : Rs.30.00 lakhs : Cash

(c) 27/10/2005 : Rs.50.00 lakhs : Cash

(d)Remaining amount of Rs.14.00 lakhs to be paid prior to 27/03/2006 in cash.

Besides, the clause of handwritten recital stipulates the responsibility upon the defendants No.1 to 2 to purchase 04 acres of land from Dr. Surendra Dilliwal and Smt. Sudha Dilliwal subject to payment of Rs.30.00 lakhs by the plaintiff on or before 27/10/2005. The said amount was never paid.

By 27/10/2005 and / or the extended period, 16/05/2005, the plaintiff was required to make payment of Rs.98.00 lakhs in respect of 8 acres of land.

The plaintiff has failed to adhere to the aforesaid terms and conditions of payment. The details whereof are as under:

(i) 27/04/2005 : Rs.18.00 lakhs Cash

(ii) 29/04/2005 : Rs.03.00 lakhs Cash

(iii) 07/05/2005 : Rs.09.00 lakhs Cash

(iv) 16/05/2005 : Rs.06.00 lakhs Cash &
Rs.15.00 lakhs Pay Orders

(v) 30.10.2005 : Rs.15.00 lakhs Cash

Total :: Rs.66.00 lakhs

The payments made are not as per the schedule of payment agreed by the parties.

Besides, though upto 27/10/2005, Rs.98.00 lakhs was to be paid whereas upto 30/10/2005, Rs.66.00 lakhs was paid. In fact, on 27/10/2005, Rs.50.00 lakhs was to be paid but, only Rs.15.00 lakhs was paid. The period for payment was extended upto 05/11/2005. Though, it is alleged that Rs.35.00 lakhs was offered in the form of pay orders but, the same was not agreed to by defendants No.1 and 2 as in terms of the agreement, only cash was to be paid to which the plaintiff agreed to pay the entire remaining consideration amount in cash. However, neither in the notice dated 31/10/2006 (exhibit P/34) nor in the original plaint, averment was made that bank drafts for Rs.35.00 lakhs were tendered to defendants No.1 and 2 on 30/10/2005 but, the same were refused on the premise that they shall accept cash only. Be that as it may. At this stage, it is relevant to point out that the plaintiff though has deposed that he has encashed bank drafts from the bank and offered cash of Rs.35.00 lakhs prior to 05/11/2005 but the defendants No.1 and 2 avoided to accept the same in presence of Atul Surana (paragraph 8 of his deposition). However, Atul Surana has not been examined by the plaintiff. The aforesaid statement stands falsified in the wake of paragraph 3 of the statement of P.W.6 Vimalchand wherein he has deposed that the aforesaid demand drafts were submitted in the bank bA.R.Infrastructure on 26/11/2005 and credited its account. Therefore, Rs.35.00 lakhs cash was not available with the plaintiff on that date. Therefore, is a factual incorrect statement.

The default clause as admitted by the plaintiff in his examination in chief and paragraph 68 of his cross-examination are quoted below**:**

Clause in agreement:

> "अठारह लाख बयाने के पश्चात द्वितीय पक्ष द्वारा पेमेन्ट नहीं किये जाने पर यह अनुबंध स्वतः निरस्त माना जावेगाा।"

Court Statement of plaintiff:

> "साथ ही ऐसा तय किया था कि अठारह लाख रूपये बयाने के पश्चात यदि मेरे द्वारा भुगतान नहीं किया जाता है तो अनुबंध स्वतः निरस्त माना जावेगा।"

Under such circumstances, the reliance on the judgment of Hon'ble Supreme Court in the case of **A.K.Lakshmipathy (D) &**

Ors., Vs. Rai Saheb Pannalal H. Lahoti Charitable Trut & Ors., AIR 2010 SC 577 is found to have substantial bearing on the proposition that the plaintiff was not ready and willing to perform his part of the agreement in the matter of payment of consideration. It has been ruled in that case, if particular dates are stipulated for payment of amount under the agreement then time would be essence even if the agreement is related to sale of immovable property. The default in the schedule of payment shall certainly attract the clause of automatic termination of the agreement, quoted above.

Hence, the plaintiff could not be said to be ready and willing to perform his part of the contract. Due to default of payment schedule as agreed to, the agreement stands rescinded on its own.

The subsequent conduct of the plaintiff is also unnatural. He sent two telegraphs for taking the remaining amount and presence of defendants No.1 and 2 on 27/03/2006 for registration of sale deed whereas neither he had purchased the stamp paper nor handed over the draft sale deed to defendants No.1 and 2.

Therefore, the plaintiff found to have not made the payment of consideration as agreed to between the parties and on the contrary, has made a factual incorrect statement discussed above regarding cash payment of Rs.35.00 lakhs before 05/11/2005.

Law is well settled that the plaintiff has to plead and prove each and every condition of the agreement right from the date of the agreement upto the date of decree (**N.P.Thirugnanam Vs. Dr. R.Jagan, AIR 1996 SC 116**, referred to).

15. **Question (v):**

Whether the defendants No.4 and 5 are entitled for cost?

Originally the suit was filed in the year 2006 but, the defendants No.4 and 5 were not party to the suit. It was only by way of amendment allowed on 19/05/2007, they were made as party to the suit. Even otherwise, the agreement to sell dated 27/04/2005 (exibit P/9) itself suggest that the plaintiff shall pay an amount of Rs.35.00 lakhs to the defendants No.1 and 2 on or

before 16/05/2005 who in turn purchase 04 acres of land or obtain consent from defendants No.4 and 5 and thereafter, the same shall be made available for sale to the plaintiff. Undisputedly, Rs.35.00 lakhs was never paid by the plaintiff to the defendants No.1 and 2 for purchase of 04 acres of land from the defendants No.4 and 5 [Statements of P.W.1 Satish Khandelwal, D.W.1 Rajendra Jain and D.W.4 Dr. Surendra Dilliwal, referred to].

The trial Court has elaborately discussed the aforesaid facts in its judgment and discussed in preceding paragraphs of this judgment. As such, the defendants No.4 and 5 found to have been unjustifiably dragged into the instant litigation. Therefore, they are entitled for cost of Rs.50,000/- (Rupees fifty thousand only) payable by the plaintiff within four weeks from the date of pronouncement of this judgment.

For the above detailed discussion; the question Nos.(i), (ii), (iii) and (v) are answered affirmative and against the plaintiff / appellant & question No.(iv) is answered in the negative and against the plaintiff/appellant.

16. Appeal sans merit and is hereby dismissed. No order as to cost.

(Rohit Arya)
Judge
16-03-2020

b/-