



A.S.(MD)No.6 of 2011

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON: 26.09.2023

PRONOUNCED ON: 22.02.2024

CORAM:

THE HONOURABLE DR.JUSTICE ANITA SUMANTH
AND
THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

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B.T.Kumar

...Appellant

/Vs./

1.K.Subramanian

2.M/s.AR.K.N. Thenammai Achi Educational Trust,
Chennai.

Rep. by its Managing Trustee

K.Rajaram

(R2 impleaded as a party respondent vide
order of this Court dated 02.12.2013 in

M.P.(MD) No.3 of 2011)

...Respondents

PRAYER:- Appeal Suit - filed under Section 96 with Order 41 Rule 1 of
CPC, to set aside the judgement and decree dated 30.08.2010 made in
O.S.No.53 of 2009 on the file of the Additional District Judge (Fast



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Track Court), Dindigul and allow this first appeal.

For Appellant : M/s.N.Krishnaveni
Senior Counsel
for Mr.P.Thiagarajan

For Respondent : Mr.Shangar Murali (R2)
R1-Died

JUDGMENT

(Judgment of the Court was delivered by DR.ANITA SUMANTH, J.)

The appellant is the unsuccessful plaintiff and has challenged judgment and decree dated 30.08.2010 passed in O.S.No.53 of 2009 by the Additional District Court (Fast Track Court), Dindigul. The submissions of Mrs.N.Krishnaveni, learned Senior Counsel on behalf of Mr.P.Thiagarajan, learned counsel on record on behalf of the appellant are set out below.

2. The parties had entered into an agreement for sale of the property at திண்டுகல் பதிவு மாவட்டம், திண்டுகல் இணை- II, சார்பதிவகம், திண்டுகல் வட்டம், செட்டிநாயக்கன்பட்டி கிராமம்



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சர்வே எண்.92ல் செற.4.11.0ல் வடமேல்பக்கம் (suit property). The suit property ad-measured 1.12.0 acres 2.75 cent and housed a building thereupon. Possession of the suit property had earlier been with the Appellant as he had been running a Teacher's Training Institute therein.

3. The parties had executed an agreement of sale on 21.06.2006 (marked as Ex.A1 by the Appellant) agreeing upon sale consideration of Rs.50 lakhs towards the sale. Rs.10 lakhs had been paid upfront as advance and the balance consideration of a sum of Rs.40 lakhs was to be paid within six months and the sale registered thereafter without demur.

4. The sale agreement records that there were no encumbrances over the suit property and if there were to be any such encumbrances, the vendor would clear the same at his cost and responsibility. The parties agreed to be legally bound by the clauses in the agreement which includes the timelines set out as well.

5. On 27.01.2007, the parties had entered into an agreement for extension of time and enhancement of consideration, marked as



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Ex.A2 by the appellant, and the relevant clauses provide as follows:

1வது மற்றும் 2வது இரு பார்ட்டிகளின் சம்மதத்தின் பேரில் கடந்த 2006 ஜூன் மாதம் 21வது தேதியில் போடப்பட்ட கிரைய ஒப்பந்த பத்திரம் கடந்த டிசம்பர் 22ம் தேதியுடன் (22.12.2006) முடிவடைவதால் இந்த கிரைய ஒப்பந்த பத்திரத்தின் காலக்கெடுவை மேலும் இன்றைய தேதியிலிருந்து 6 மாதங்கள் நீடித்து அதாவது வரும் ஜூன் மாதம் 30ம் தேதிக்குள் (30.06.2007) பத்திரப்பதிவை செய்துகொள்வதென சம்மதித்து நாளது தேதியில் ஏற்கனவே நிர்ணயித்த மொத்தத் தொகை ரூ.50 லட்சத்துடன் இன்றைய தேதியில் ரூ.15 லட்சம் (சாமான்கள் உட்பட) சேர்த்து ஆகமொத்த கிரைய தொகையாக ரூ.65 லட்சம் முடிவு செய்யப்பட்டு, ஏற்கனவே முன்தொகையாக 21.06.2006 அன்று ரொக்கமாக கொடுக்கப்பட்ட ரூ.10,50,000 (ரூபாய் பத்து லட்சத்து ஐம்பதாயிரம்) மற்றும் இன்றைய தேதியில் கொடுக்கப்பட்ட ஐசிஐசிஐ வங்கி காசோலை எண். 867497, ரூ.4,50,000 (ரூபாய் நான்கு லட்சத்து ஐம்பதாயிரம்), ஐசிஐசிஐ வங்கி காசோலை எண்.867498, ரூ.5,00,000 (ரூபாய் ஐந்து லட்சம்) ஆகமொத்த முன்தொகை ரூபாய் 20 லட்சம் போக மீதி ரூபாய் 45 லட்சத்தில் வருகின்ற ஏப்ரல் மாதம் 10ந் தேதி அன்று ரூ.15 லட்சம் 1வது பார்ட்டி 2வது பார்ட்டியிடம் கொடுத்து வரவு வைத்துக் கொள்வதெனவும் மீதிதொகை ரூ.30 லட்சத்தை வருகின்ற ஜூன் மாதம் 30ந் தேதிக்குள் 1வது பார்ட்டி 2வது பார்ட்டியிடம் கொடுத்து கிரையம் செய்து கொள்ள வேண்டியது. 2வது பார்ட்டி சொத்தின் பேரில் ஏதேனும் வங்கி கடன், தனி நபர் கடன், அரசு கடன் ஏதேனும் இருப்பின் அதனை 2வது பார்ட்டி தன் சொந்த செலவில் தீர்த்து தர வேண்டியது.



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(Translation of the operative portion is as follows:)

'Whereas, with the consent of parties 1 and 2, the expiration of this deed of sale agreement, entered into on 21st June 2006, since this set to expire by 22nd December (22.12.2006), having been extended for 6 months further from this day, on an agreement to get the document registered by 30th June (30.06.2007), the total sale consideration amount having been fixed at Rs.65 Lakhs, which is inclusive of Rs.50 Lakhs, being the total amount already arrived at, and Rs.15 Lakhs (including the articles), on this day, out of this balance amount of Rs.45 Lakhs, by taking into account, the total advance amount of Rs.20 Lakhs, which included Rs.10,50,000/- (Ten Lakhs and Fifty Thousand), already paid in cash on 21.06.2006 as an advance and Rs.4,50,000/- (Four Lakhs and Fifty Thousand) paid through ICICI Bank Cheque No.67497 and Rs.5,00,000/- (Five Lakhs) paid through ICICI Bank Cheque No.867498, a sum of Rs.15 Lakhs, are covenanted to be paid by the 1st party to the 2nd party to be kept in credit and the 1st party shall get the sale executed by and within 13th June forthcoming on payment of the balance amount of Rs.30 Lakhs to the 2nd party. The 2nd party covenants to make good and discharge any bank loan, personal loan or Government loan, chargeable to the property, if there is any, at his own costs. The consideration thus stood enhanced by a sum of Rs.65 lakhs.

6. Before the lower Court as well as in the preliminary stages of hearing of the appeal suit, the Appellant had contended that the amounts stipulated as advance had been paid to the respondent by way



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of cash and two cheques that had not been presented by the respondent.

The respondent had countered, for his part, that the cheques had been presented, but dishonored. At the hearing on 22.09.2022, the respondent had been directed to produce the dishonored cheques along with the return slips from the bank.

7. Learned counsel for the Respondent/R2, Mr.Shangar Murali confirms today that the cheques are not available. As regards the component of the consideration stated to have been paid in cash, no receipt of acknowledgement has also been produced by the Appellant, though specifically directed.

8. Mr.Murali adds that the submission to the effect that the cheques were dishonoured had, in fact, been made in error. There was no question of the respondent even presenting the cheques as the receiving bank had been well aware of the poor financial position of the Appellant, and had thus simply handed the cheques back to the respondent upon their presentation. The respondent would maintain that it was public knowledge that the Appellant had been at the answering end of litigation



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initiated by various persons for impropriety in his financial dealings.

9. As regards the alleged cash payment, the respondent would point out that the chief examination does not contain any reference to the same and it is only in the cross examination that, for the first time, the appellant makes reference to the alleged cash payment. This is factually correct and thus, this Court does not, on a consideration of the pleadings and the evidence find any justification to accept the position that the appellant has made a cash payment of Rs.9.5 lakhs or any amount at all towards the sale consideration.

10. In light of the inability of the both parties to produce evidences to establish the payment of consideration by cash (appellant) and the cheques and return slips (respondent), the question of whether at all there has been compliance with the terms of the document dated 27.01.2007 is fraught with doubt and learned counsel would agree that there is a stalemate in this regard.

11. The suit property had been mortgaged by the defendant with the Tamil Nadu Mercantile Bank and the dues had been settled and



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the mortgage lifted in 2009. This is an admitted position. While so, the appellant had issued a legal notice on 01.07.2007, in response to which the respondent had filed O.S.No.428 of 2007 seeking a bare injunction as against the appellant from interfering with the respondent's ownership and possession of the suit property.

12. The injunction suit had come to be dismissed on 04.07.2007, as against which, Appeal Suit in A.S.No.71 of 2012 had been filed. The appeal had been allowed exparte on 23.10.2013. The appellant has chosen not to pursue the matter further and thus the litigation with respect to the injunction sought for by the respondent has attained finality as on 23.10.2013. Learned counsel concur on the position that as on date, possession of the suit property is with the respondent.

13. The pleadings make reference to the owner of the suit property being a Trust. However, the respondent draws attention to the relevant claims in the Trust Deed that vest the power to transfer, sell or buy property in the trustees. There appears to be no dispute that the Trust was fully empowered to deal with the suit property as were the trustees



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(Article 10 clause 6(e) of the Trust Deed). There is thus, no necessity to deal with this aspect of the matter any further. The grounds of appeal that have been raised by the appellant qua the suit property being a trust property are thus not pursued by either party.

14. The issues framed by the trial Court are as follows:

1. 21.6.2006 ம் தேதியிட்ட கிரைய உடன்படிக்கைப்படி வாதி கோரும் ஏற்றதை ஆற்றுக பரிகாரம் கிடைக்கத்தக்கதா?
2. 27.1.2007 ம் தேதியிட்ட கால நீட்டிப்பு உடன்படிக்கைப்படி கிரைய பாக்கித் தொகை என்பது ரூ.54,50,000/- என்பது சரியா?
3. 27.1.2007 ம் தேதிய ஒப்பந்தப்படி சொத்தின் சுவாதீனம் வாதியிடம் ஒப்படைக்கப்படவில்லை என்பதும், இன்று வரை சுவாதீனம் பிரதிவாதியிடமே உள்ளது என்பதும் உண்மையா?
4. 2.7.2007 ம் தேதிய பிரதிவாதியின் அறிவிப்புக்குப் பின்னரே வாதி தாவாச்சொத்தை அத்துமீறி ஆக்கிரமித்துக்கொண்டார் என்பது உண்மையா?
5. வாதி வழக்கிற்கு வழக்கு மூலம் உள்ளதா?
6. வாதிக்கு கிடைக்கக் கூடிய வேறு பரிகாரம் என்ன?



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15. The third issue framed relates to possession of the property which admittedly is now with the respondent. The fourth and fifth are general in nature, in relation to the relief that the appellant are entitled to. The first and second issues relate to the agreements that had been executed between the parties, being the original agreement as well as the agreement for increase of consideration and extension of time for remittance of the same.

16. This aspect of the matter assumes importance for the reason that the payments are under a severe cloud and thus the contracts itself become unenforceable in light of the fact that the parties have not adhered to the timelines under the contract. The parties have admitted that they are bound by the terms agreed upon, including the timelines stipulated, which thus form the essence of the contract. In such circumstances, the non-adherence to the terms, and the timelines stipulated, would itself render the contract unenforceable.

17. In the case of *Mrs. Saradamani Kannappan V. S.Rajalakshmi & ors.*¹ wherein reference is made to earlier judgements of

¹ [2011 (4) CTC 640]



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the Supreme Courts including the judgement in *K.S.Vaidyanadam* and others *V. Vairavan*² the Supreme Court considered the impact of the parties to a contract not adhering to the terms stipulated therein, specifically relating to the timelines contained. In the latter case, the Hon'ble Supreme Court had stated as follows:

It has been consistently held by the courts in India, following certain early English decisions, that in the case of agreement of sale relating to immovable property, time is not of the essence of the contract unless specifically provided to that effect. In the case of urban properties in India, it is well-known that their prices have been going up sharply over the last few decades - particularly after 1973. We cannot be oblivious to the reality and the reality is constant and continuous rise in the values of urban properties - fueled by large scale migration of people from rural areas to urban centres and by inflation. Indeed, we are inclined to think that the rigor of the rule evolved by courts that time is not of the essence of the contract in the case of immovable properties - evolved in times when prices and values were stable and inflation was unknown - requires to be relaxed, if not modified, particularly in the case of urban immovable properties. It is high time, we do so.

18. The following principles were laid down, awaiting a fuller

² [1997 (1) CTC 628 (SC)]



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adjudication of the issue of how the principle of time being the essence, is to be understood, construed and applied:

- (i) Courts, while exercising discretion in suits for specific performance, should bear in mind that when the parties prescribe a time/period, for taking certain steps or for completion of the transaction, that must have some significance and therefore time/period prescribed cannot be ignored.*
- (ii) Courts will apply greater scrutiny and strictness when considering whether the purchaser was 'ready and willing' to perform his part of the contract.*
- (iii) Every suit for specific performance need not be decreed merely because it is filed within the period of limitation by ignoring the time-limits stipulated in the agreement. Courts will also 'frown' upon suits which are not filed immediately after the breach/refusal. The fact that limitation is three years does not mean a purchaser can wait for 1 or 2 years to file a suit and obtain specific performance. The three year period is intended to assist purchasers in special cases, as for example, where the major part of the consideration has been paid to the vendor and possession has been delivered in part performance, where equity shifts in favour of the purchaser.*

19. In *Desh Raj and others v. Rohtash Singh*³, the Court reiterated the social and economic considerations that arose in cases

³ [2023 (1) MWN 403]



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involving the plea of specific performance. The earlier premise, that time was not of the essence in contracts relating to immovable properties, had been relevant in an era when the market value of immovable property was stable over several years and did not undergo frequent market fluctuations. No prejudice would be caused to the vendor financially in such circumstances.

20. However, over the last half century there has been a steady increase in prices of real estate and in *K.S.Vaidyanadam* and *others* (supra), there was a shift in judicial perception such that time should be taken to be the essence of the contract in view of the steep increase in the prices of real estate over the years (also see judgment in *M/s.Citadel Fine Pharmaceuticals v. M/s.Ramaniyan Real Estates P. Ltd. & Another*⁴).

21. In this case as well, there is no doubt that time is the essence of the contract. The argument advanced on behalf of the respondent is thus that the Appellant had not performed, and had never

⁴ [2011 (9) SCC 147]



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been ready to perform, his part of the contract. In such circumstances, the plea of specific performance fails.

22. Faced with this position, the appellant, while reiterating that he was ready at all points in time to perform his part of the contract, raises a preliminary objection to the effect that there is no issue that has been framed with regard to readiness and willingness and hence it cannot be raised at this distance of time.

23. The Respondent would argue that the issues framed, especially Issue 1, are broad enough to encompass the aspect of readiness and willingness. Moreover, there has been sufficient reference in the pleadings, including in his written statement, as well as in the evidence and the impugned order, for the Appeal Court to take note of this aspect of the matter and render a finding.

24. Going a step beyond, Respondent challenges the maintainability of the suit itself stating that O.S.53 of 2009 was not maintainable in light of the bar under Order 2, Rule 2 of the Code of Civil Procedure (CPC). Order 2 Rule 2 reads as follows:



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**'ORDER II
FRAME OF SUIT**

1.....

2.Suit to include the whole claim. – (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2)Relinquishment of part of claim. – Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs. – A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs, but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.'

25. According to him, the first suit, O.S.428 of 2007 ought to have included the prayer for specific performance as well. He argues that the suit filed in 2009 was belated as the cause of action for the prayer of specific performance had arisen in 2007 itself. In any event, once the Sale agreement itself stood cancelled by virtue of non-compliance of the conditions for payment, it is not enough that specific performance be sought without challenging the cancellation itself.



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26. The two issues that have thus to be addressed are as to whether the bar under Order 2 Rule 2 will stand attracted and whether, in fact, the Appellant has satisfied the requirement of readiness and willingness.

27. We advert to the legal issue first. In *Rathnavathi and anr. V. Kavita Ganashamdas*⁵ the Court was concerned with the challenge to the maintainability of the suit on the bar contained in Order II, Rule 2 of the Civil Procedure Code (CPC). Very similar to the present case, the allegation in that case as well, was that the plaintiff had sought permanent injunction against the defendants, consciously omitting to seek the relief of specific performance in that suit itself.

28. It was only in the second suit filed was there was a prayer for specific performance, which, according to that respondent, was hit by the rigour of Order II Rule 2. Other points were also raised, with which we are not concerned. In the context of the bar under Order II, Rule 2, the Court took note of the judgment in *Gurbux Singh V. Bhooralal*⁶ wherein parameters had been laid down as to how such a plea was to be

⁵ [2015 5 SCC 223]

⁶ (AIR 1964 SC 1810)



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invoked.

29. The Court held that in order that a plea of bar under Order II Rule 2 succeed, the defendant who raises the plea must satisfy three positions. The first is that the later suit be in respect of the same cause of action as that on which the previous suit was placed, the second was that in respect of that cause of action the plaintiff be entitled to grant of relief and the third that, being entitled to multiple reliefs and seeking only one such relief, leave ought to have been obtained from the Court to sue at a later stage for the relief for which the second suit had been filed.

30. Reference was made to the judgment in *Virgo Industries (Eng.) Private Limited V. Venturetech Solutions Private Limited*⁷ on this aspect, elaborating on what would constitute cause of action in order to determine the first test. The definition of 'cause of action' in Halsbury's Laws of England, (4th Edition) is as follows:-

'Cause of Action' has been defined as meaning simply a factual situation existence of which entitles one person to obtain from the Court a remedy against another person. The phrase has been held from the earliest time to include every fact which is material to be proved to entitle the

⁷ ([2013] 1 SCC 625)



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Plaintiff to succeed, and every fact which a Defendant would have a right to traverse. 'Cause of action' has also been taken to mean that particular action on the part of the Defendant which gives the Plaintiff his cause of complaint, or the subject-matter of grievance founding the action, not merely the technical cause of action.

31. The Court found that the bar contained in Order II, Rule 2 was not attracted as a distinction was found in the cause of action for filing the two suits. They state that as far as the suit for permanent injunction was concerned, it was based on a threat to dispossess the plaintiff from the suit property, whereas, the cause of action for filing the suit for specific performance was based on non-performance of the agreements between the parties.

32. As the cause of action was different in the two cases, they could well have been filed simultaneously. In the case of an injunction suit, the ingredients to determine the suit would be the existence of a prima facie case, balance of convenience and irreparable loss likely to be suffered by the plaintiff as provided under Section 38 of the Specific Relief Act, 1963 read with Order 39 Rules 1 and 2 of CPC.



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33. In the case of the specific performance suit, the plaintiff would be required to plead and prove continuous readiness and willingness to perform his part of the contract and further to prove that the defendant had failed to perform their part of the agreement, both stipulations contained under Section 16 of the Specific Relief Act.

34. In *State Bank of India V. Gracure Pharmaceuticals Ltd.*⁸, the specific issue that arose was the applicability of Order II, Rule 2 of the CPC. The suit had been filed by respondents claiming damages with costs and interest.

35. An application had been filed by the appellant, the defendant in suit, for rejection of plaint under Order VII, Rule 11 of the CPC. The District Court allowed the application noticing that the plaintiff had filed a suit before the Delhi High Court on the same cause of action and hence, the subsequent suit was barred under Order II Rule 2.

36. That Order was set-aside in appeal by the High Court, challenging which the defendant in suit, that is, the *State Bank of India*

⁸ (2013 (6) CTC 789)



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filed appeals before the Hon'ble Supreme Court. The Court dealt with the several cases on that point, commencing from *Naba Kumar Hazra V. Radhashyam Mahish*⁹ wherein it had been held that plaintiff cannot be permitted to draw the defendant to court twice for the same cause of action.

37. At paragraph 11 and 12, the Bench observes as follows:-

11. The above-mentioned decisions categorically lay down the law that if a plaintiff is entitled to seek reliefs against the defendant in respect of the same cause of action, the plaintiff cannot split up the claim so as to omit one part to the claim and sue for the other. If the cause of action is same, the plaintiff has to place all his claims before the Court in one suit, as Order 2 Rule 2, CPC is based on the cardinal principle that defendant should not be vexed twice for the same cause.

12. Order 2 Rule 2, CPC, therefore, requires the unity of all claims based on the same cause of action in one suit, it does not contemplate unity of distinct and separate cause of action. On the above- mentioned legal principle, let us examine whether the High Court has correctly applied the legal principle in the instant case.

38. After comparing the cause of action that arose in both the suits, the Court concluded that when the first suit for recovery of dues

⁹ (AIR 1931 PC 229)



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was filed on 15.03.2003, the plaintiff could well have sought for damages at that very time. Citing Order II, Rule 2 which provided that every suit shall include the basis of the claim which the plaintiff was entitled to make in respect of the same cause of action, the Court held that the plaintiff was not entitled to split that cause of action into two parts and file separate suits.

39. The object of Order II Rule 2 was to avoid multiplicity of proceedings and not to vex the parties over and again in a litigative process and such larger public interest must be achieved, they said, while allowing the appeal. The test would therefore be to examine the specifics of the cause of action espoused by the plaintiff in the two suits and come to a decision as to whether it would be appropriate to split the same into two separate suits.

40. Three Judges of the Hon'ble Supreme Court in *Sri Gangai Vinayagar Temple and Another v. Meenakshi Ammal and Others*¹⁰ dealt with the ambit and sweep of the principles of res judicata and Order 2 Rule 2 of CPC (on the question of cost) and had this to state:

¹⁰ [(2015) 3 SCC 624]



15.As has already been reflected and commented upon, the tenants had filed an appeal only in respect of OS No.6 of 1978, although common conclusions had been arrived at in all three suits, except for some inconsequential differences. It is trite that the obligation and duty to frame issues is cast solely on the court which may, nevertheless, elicit suggestions from the litigating adversaries before it. Issues settled by the court under Order 14 CPC constitute the crystallisation of the conflict or the distillation of the dispute between the parties to the lis, and are in the nature of disputed questions of fact and/or law. While discharging this primary function, the court is expected to peruse the pleadings of the parties in order to extract their essence, analyse the allegations of the parties and the contents of the documents produced by them, and, thereafter, proceed to frame the issues.

16.In our opinion, so far as OS No.5 of 1978 is concerned, the question of the title of the property would ordinarily remain irrelevant to that litigation for two reasons:

16.1.Firstly, Section 116 of the Evidence Act bars the lessee/licensee from constructing if not concocting a challenge vis-a-vis the title of the lessor/licensor, if it is the latter who has put the former in possession of the demised/licensed premises. In the case in hand, the first lease was executed by Shri Sethurama Chettiar and the renewal or the succeeding lease was between the Trust through its President, Shri Sethurama Chettiar, on the one hand, and the tenants on the other. The tenants, therefore, stood legally impeded and foreclosed from assailing the title of the Trust, as has been correctly concluded by the trial court, even though a specific issue had not been struck in this context in OS No.5 of 1978. There is no gainsaying that where parties are aware of the rival cases the failure to



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formally formulate an issue fades into insignificance, especially when it is prominently present in connected matters and extensive evidence has been recorded on it without demur.'

41. O.S.No.428 of 2007 was initiated on 09.07.2007 and paragraph 10 setting out the cause of action therein reads as follows:-

“10. Cause of action:

The cause of action arose when the plaintiff and Defendant entered into an sale agreement on 21.06.2006 and on 27.01.2007 when the extension of sale agreement is made between them and on 21.6.2006 when possession delivered by the Defendant to Plaintiff, and on 23:12.2006 when the Plaintiff got recognition for running Educational Institution from NCTE and on 1.7.2007 when the Plaintiff sent legal notice to Defendant and when subsequently legal notice sent by the defendant to the Plaintiff and on 6.7.2007 when the Defendant and his men and agents unlawfully entered the suit premises and threatened the staffs, students to vacate the premises and it is lawfully prevented by the Plaintiff and on subsequent dates where the suit property situate in Chettinaickenpatti, Kallipatti Village, Dindigul Taluk within the jurisdiction of this Honourable Court.”

42. O.S.No.53 of 2009 was initiated on 24.06.2009 and paragraph 11 relating to the cause of action therein reads as follows:-



11. வாக்குமூலம் அது தாவா 21.06.2006ம் தேதியிட்ட கிரைய அக்ரிமெண்ட் அடிப்படையில் பின் அந்த 27.01.2007 கிரைய அக்ரிமெண்ட் நீட்டிப்பு அடிப்படையில் தாவா சொத்துக்களை இந்த வாதிக்கு பிரதிவாதி ரூ.65,00,000/- (ரூபாய் அறுபத்தைந்து லட்சம்) க்கு கிரையம் செய்து கொடுக்க ஒப்புக்கொண்ட அதன் அடிப்படையில் பிரதிவாதி இந்த வாதியிடம் இருந்து கிரைய அடவான்ஸ் தொகையாக ரூ.20,00,000/- பெற்றுக்கொண்டு 6 மாத காலத்திற்குள் உபயதரப்பினர்கள் சேர்ந்து தாவா ஏற்படுத்திக்கொண்ட கிரைய உடன்பாட்டின் தேதியிலும், அதன் நீட்டிப்பு உடன்பாட்டின் தேதியிலும் கிரைய நீட்டிப்பு எக்கிரிமெண்டின் சரத்துக்களின் படிக்கு ஒப்பந்த கெடுவுக்குள் கிரைய பாக்கி தொகையை பிரதிவாதிக்கு செலுத்தி இந்த வாதியின் பத்திர செலவில் தாவா சொத்துக்களை கிரையம் முடித்துக்கொள்ள இந்த வாதி எப்போதும் Ready and Willing ஆக இருந்து வந்துள்ள ஒவ்வொரு தேதிகளிலும், இந்த வாதி தாவா சொத்தில் தனது சுவாதீனத்தை இடையூறு செய்யக்கூடாது என தொடர்ந்து வழக்கின் கடந்த 28.04.2009ம் தேதி வாய்தாவின் போது துயர்ந்த தாவா கிரைய உடன்படிக்கை அடிப்படையில் இந்த வாதியிடமிருந்து கிரைய பாக்கித் தொகையைப் பெற்றுக்கொண்டு இந்த வாதியின் பத்திரசெலவில் தாவா சொத்துக்களை இந்த வாதிக்கு பிரதிவாதி கிரையம் செய்து கொடுக்க வீண் காலதாமதம் செய்து வரும் காலம் தொடரும், தாவா கிரைய உடன்படிக்கை சரத்துக்களின்படிக்கு செயல்படி இந்தப் பிரதிவாதி எப்போதும் தயாராக இருந்து வரும் ஒவ்வொரு தேதிகளிலும், தாவா சொத்துக்கள் இருக்கும் இடமான சமீகம் கோர்ட்டு சரகத்திற்குட்பட்ட திண்டுக்கல் தாலுகா, செட்டிநாயக்கன்பட்டியில் உற்பத்தி.



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43. Translated, paragraph 11 reads thus:

Statement: Based on the sale agreement dated 21.6.2006 and the extension of the sale agreement on 21.7.2007, the defendant having agreed to sell the suit property to this plaintiff for Rs.65,00,000/- (Rupees sixty Five lakhs only), and on the basis of it, the defendant having received an amount of Rs.20,00,000/- from the plaintiff as an advance for the sale, the beneficiaries together shall pay the balance amount to the defendant within the stipulated period of this agreement as per the terms of the agreement within a period of 6 months on the date during which the sale agreement of the suit was executed and on the date on which the agreement was extended; and on each date the plaintiff has always been ready and willing to execute the sale agreement of the suit property at his/her own cost based on the distressed suit sale agreement during the adjournment on 28.04.2009 of the suit which has been filed by the plaintiff for not disturbing his/her possession over the suit property, the period from which the defendant has been causing unnecessary delay in executing the sale of the suit property in favour of the plaintiff by the defendant at the cost of the plaintiff, after having received the balance sale amount from this plaintiff; and in each date during which this defendant is always ready and willing to act as per the terms and conditions of this suit sale agreement, the cause of action arose at the place, where the suit property is located in Chettinayakampatti, Dindigul Taluk, within the jurisdiction of this court.

44. Upon a comparison of the cause of action put forth in the



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two suits we find that the plea of specific performance could well have been raised in 2007, even at the original instance. The sequence of events prior to the institution of the 2007 suit on 09.07.2007 reveals that legal notices had been exchanged between the parties on 01.07.2007 and thereafter, all relating to the rival claim for possession of the property.

45. A copy of legal notice dated 01.07.2007 has been marked through D.W.1 as Ex.B1 and reads thus:

‘எனவே சட்டப்படி நீங்கள் கொடுத்த அட்வான்ஸ் தொகையை இழந்துவிட்டிருக்கிறீர்கள் என்றும், அந்த சொத்தை பொறுத்து தங்களுக்கு எவ்வித உரிமையும், பின் தொடர்ச்சியோ இல்லை

என்றும், மேற்படி காலாவதியான ஒப்பந்தம் எனது கட்சிக்காரர்களை எந்த வகையிலும் கட்டுப்படுத்தாது என்றும், இனிமேல் அந்த சொத்தை எமது கட்சிக்காரர் தன் விருப்பம் போல் மற்றவர்களுக்கு விற்பனை செய்துகொள்ள உரியவராகிறார் என்பதை இந்த நோட்டீஸ் மூலம் அறியவும். ’

46. Moreover, the plaint filed in O.S.428 of 2007, at paragraph (8) states as follows:

8) Now, in the Plaintiff's K.V.K. Teacher Training Institute and K.V.K. B.Ed., Courses Several number of students were joined in the academic year and undergoing studies. In the meanwhile the Plaintiff sent

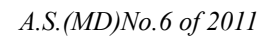


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legal notice on 1.7.2007 to Defendant to show that he is ready and willing to perform his remaining part of contract provided the Defendant should discharge all the liabilities attached to the suit property. Having received the notice, but concealing the receive of notice, the Defendant sent a legal notice on subsequent date accusing the Plaintiff stating that Plaintiff is failed to perform his part of contract and so the agreement is unenforceable and the agreement amount is forfeited etc. To that, the plaintiff sent reply notice through his counsel narrating the true facts, on 06.07.2007.

47. Thus, both parties were very much alive to the possibility of a plea for specific performance and there is discussion in both the legal notice dated 01.07.2007 and the plaint filed in O.S.428 of 2007 on this account. The mortgage on the suit property had been lifted by the Bank only in 2009. However, the prayer of specific performance could well have been made even then and subject to the respondent clearing the loan.

48. The case of the Appellant has been to the effect that he has complied with his part of the contract and remitted the sale consideration in time. In such circumstances, there was nothing that stood in the way of the Appellant raising the plea of specific performance even at the time



49. As regards the submission that no issue has been framed on this aspect, and thus, the aspect of readiness and willingness falls outside the purview of examination, we disagree. In *V.S. Ramakrishnan V. P.M.Muhammed Ali*¹¹ the challenge was to an order of the High Court that had non-suited the appellant by refusing to go into the aspect of readiness and willingness on his part.

50. The Trial Court had not framed a specific issue on the aspect of readiness and willingness and in the absence of the same, the Supreme Court was of the view that the High Court ought not to have non-suited the plaintiff. Ultimately, the matter was remanded for framing of an additional issue on the aspect of readiness and willingness and decision thereupon.

51. There are a slew of judgments to buttress the position that the question of readiness and willingness is one which goes to the root of the matter especially in a prayer relating to specific relief. Being

11 ([2022] Supreme (SC) 1144)



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discretionary in nature, the person seeking the relief would have to satisfy all ingredients of Section 16 including whether at all he was ready and willing to perform the contract.

52. In *P.Purushottam Reddy and Another v. Pratap Steels Ltd.*,¹² the Court dealt with the question of maintainability that was raised by the respondent for failure of the plaintiff to satisfy the requirement of Forms 47 and 48 of Appendix A of the CPC.

53. No issue had been framed for the simple reason that there was no plea that gave rise to such issue in the written statement. However, the Court held that the plea of readiness and willingness was covered by pleadings and despite such an issue not having been raised specifically by the parties, the Court were very much alive to the issue in regard to whether the ingredients of Section 16, specifically Clause (c) had been complied.

54. The Supreme Court held that the High Court was to examine whether the finding of the trial Court was sustainable or not both in law as well as on facts. Being an appellate Court all questions of

¹² [(2002) 2 SCC 686]



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fact and law were open before it. Thus, the High Court ought not to have remanded the matter in the absence of any material before it to warrant such remand but could have looked into the issue afresh itself.

55. In *Balraj Taneja and Another v. Sunil Madan and Another*¹³, an appeal had been filed by the defendant in suit, who argued that the High Court had not been justified in passing a decree against them for specific performance merely on the ground that written statement had not been filed on the date fixed.

56. The decreeing of the suit had been under Order 8 Rule 10 of the CPC which provides for written statement. Sub Rule 5 specifically states that every allegation of fact in the plaint shall be taken to be admitted if not specifically denied or denied by necessary implication. Sub Rule 10 stipulates that where a party from whom a written statement as sought fails to present the same within time, judgment shall be pronounced by the Court as it thinks fit and so decreed.

57. In allowing the appeals and remanding the case for fresh decision by the High Court, the Bench held that the matter ought not to

¹³ [(1999) 8 SCC 396]



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have been decided solely on account of the failure to file written statement, but that the Clause ('to pass judgment as it thinks fit') places a responsibility on the Court to deal with the matter in a holistic perspective. Thus, the conduct of the defendants in not filing a written statement will have to be seen in the context of the conduct of the plaintiff over the years and other relevant factors as well. The bar under Order 2 Rule 2 is thus attracted in the facts and circumstances of this case.

58. On facts, the findings and conclusions of the trial Court at paragraph 29 are pertinent and read as follows:

29. மேலும் கிரைய பாக்கித் தொகையை செலுத்துவதற்கு தயாராகவும் விருப்பமாகவும் இருந்தார் என்று வாதி குறிப்பிட்ட போதும் அவருடைய குறுக்கு விசாரணையில் வா.சா.ஆ.1, 2 ஒப்பந்த தேதிகளில் ஒப்பந்தத்தில் கண்ட தொகைகள் தன்னுடைய வங்கிக் கணக்கில் உள்ளது என்று காட்டுவதற்கு ஆதாரம் உள்ளது என்றும், தனக்கு அறக்கட்டளை சார்பில் நன்கொடையாளர்களிடம் பணம் வாங்கி தயாராக வைத்திருந்தார் என்றும், அன்றைய தேதியில் தன்னுடைய வங்கிக் கணக்கில் பணம் இருந்தது என்பதற்கு ஆதரவு உள்ளதா என்றால் அதற்கு ஆவணம் இல்லை என்றும் ஒப்புக்கொண்டுள்ளார். எனவே வாதியின் சாட்சியத்தை இந்நீதிமன்றம் பரிசீலிக்கும் போது ஒப்பந்த தேதியிலும் அதற்கு



பின்னிட்ட தேதிகளிலும் வழக்கு தாக்கல் செய்யும் காலம் வரை ஒப்பந்தப்படி கிரைய பாக்கித் தொகையை செலுத்துவதற்கு அவரிடம் போதிய பணம் இல்லை என்பது தெளிவாகிறது. தன்னுடைய வங்கிக் கணக்கில் பணம் இருப்பதாக குறிப்பிட்ட போதும் அதனை நீதிமன்றத்தில் தாக்கல் செய்யவில்லை. மேலும் அறக்கட்டளை சார்பில் நன்கொடையாளரிடம் பணம் வாங்கி தயாராக வைத்திருந்தார் என்று குறிப்பிட்ட போதும் அதற்கான ஆதரவுகள் எதுவும் இல்லை என்பதையும் அவருடைய சாட்சியத்திலேயே ஒப்புக் கொண்டுள்ளார். எனவே தாவாச்சொத்தானது அரு.கன.தேனம்மை ஆச்சி அறக்கட்டளைக்கு பாத்தியப்பட்டது என்று தெரிந்திருந்தும் அந்தச் சொத்தை கிரையம் செய்வதாக பிரதிவாதி ஒப்புக்கொண்டார் என்று குறிப்பிட்டு வா.சா.ஆ.1, 2 கிரைய ஒப்பந்தங்கள் ஏற்படுத்திக்கொண்ட போதும் அந்த கிரைய ஒப்பந்த தேதியில் முன்பணம் செலுத்திய பின்னர் கிரைய தொகையை வாதியானவர் சில காரணங்களால் ஒப்பந்தத்தை நிறைவேற்ற முடியவில்லை என்று ஒப்புக்கொண்டு வா.சா.ஆ.2 கால நீட்டிப்பு செய்து எழுதப்பட்ட போதும் அதன் பின்வரும் பிரதிவாதிக்கு உரிய காலக்கெடுவிற்குள் தொகையை செலுத்தி ஒப்பந்தம் பதிவு செய்து கொள்வதற்கு வாதி விருப்பமாகவும் தயாராகவும் இருந்தார் என்பது வாதி தரப்பில் நிரூபிக்கப்படவில்லை.

59. Thus, the finding of the trial Court is to the effect that, there was no evidence that was produced at the time of trial to establish the submission that the appellant had procured the necessary funds to



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proceed with his part of the contract.

60. Order XIV deals with the settlement of issues and determination of suit on issues of Law or on issues agreed upon. In specific, Rule 5 states that at the first hearing of the suit the court shall, after reading of the plaint and the written statements, and after examination under Order X Rule 2 ascertain the material propositions of fact or of law, in respect of which parties are at variance.

61. The Court is to thereupon proceed to frame and record the issues on which right decision of the case appears to depend. In the present case, the issues framed are broad and the first issue could be read in a manner so as to bring within its ambit the issue of readiness and willingness of the appellant.

62. Admittedly there has been no specific issue framed on the aspect of readiness and willingness of the appellant. It is however too well settled a proposition that a determination on this issue would be fundamental to a decision in a suit for specific performance. It would have been entirely a different matter perhaps had the question of



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financial resources of the appellant not been called into question at the stage of trial.

63. However, in this matter, the financial resources, or the lack of it, have certainly caught the attention of the Court and in para 29 of the trial court judgment extracted elsewhere, the learned trial judge has also referred to evidence and rival submissions in the context of whether at all the appellant has necessary funds to carry forward his end of the bargain.

64. In this context, we may make useful reference to Order XLI which deals with appeals from original decree and Rules 24 and 25 read as follows:-

Order XLI
Appeals from Original Decrees

.....

24. Where evidence on record sufficient, Appellate Court may determine case finally.- *Where the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court after resettling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on*



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which the Appellate Court proceeds.

25. Where Appellate Court may frame issues and refer them for trial to Court whose decree appealed from.- *Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred and in such case shall direct such Court to take the additional evidence required; and such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor [within such time as may be fixed by the Appellate Court or extended by it from time to time]*

65. In the present case, we are of the considered view that the evidence available on record would more than enable us to decide the issue of readiness and willingness of the appellant. The respondent has also drawn attention to public notices issued intimating that the appellant had been before the Debt Recovery Tribunal on account of recovery action initiated by various banks for outstanding dues. In such circumstances, it was very evident that the appellant had no funds and



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thus the question of his being ready and willing to pay is nothing but a farce.

66. We also note that sufficient evidence has been recorded by the trial court based on the pleadings and evidence. We thus do not agree that Rule 25 would be attracted necessitating a remand of the matter to the file of the trial Judge.

67. Rule 25 provides for a reference to an issue which the trial court has omitted to consider an issue and where additional evidence is required to be collated. As stated earlier, the trial Court has not lost sight of statutory compliance with Section 16(c) and though an issue may not have been framed in as many words, the learned Judge has adverted to the aspect of readiness and willingness sufficiently in detail.

68. In *P.Daivasigamani V. S. Sambandan*¹⁴, readiness and willingness, it was reiterated, was not one but two separate elements of human behaviour. Readiness means the capacity of the party to perform the contract, including his financial position to pay the purchased price. Willingness refers to the intention of the party as a purchaser to perform

¹⁴ ([2022] AIR (SC) 5009)



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his part of the contract, such as scrutinizing the conduct of the other party as well as other attending circumstances.

69. Readiness and willingness must thus be seen to be continuous as condition precedents for the grant of relief of specific performance. The expression cannot be interpreted as a straight-jacket formula and reference is made by the Court to the judgment in *Syed Dastagir V. T.R.Gopalakrishna Setty*¹⁵, where three Judges of the Hon'ble Supreme Court held that compliance of readiness and willingness has to be established in spirit and substance and not merely in letter and form.

70. Furthermore, the Court held that it was not necessary that the parties deposit the requisite amount in the Court, but it must aver performance of or readiness to perform the contract according to its true construction. Thus, readiness and willingness will require not a mere pleading, but establishment of the same by way of credible evidence.

71. Appellant has submitted that he had annexed with the plaint a lodgement schedule for deposit of the sale consideration. However, though the matter had been heard in extenso by the Trial Court,

¹⁵ (1996 (6) SCC 337)



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the lodgement schedule was never acted upon and the Appellant was never called upon to deposit the sale consideration.

72. This cannot however lead to an adverse conclusion, as, with the filing of the lodgement schedule, he had established that he was ready and willing to perform the contract. We are of the considered view that the mere filing of a lodgement schedule cannot enure to his benefit as there must be something over and above, to indicate both readiness and willingness. Had the Appellant really been in possession of the funds, there was nothing standing in the way of him depositing the amount before the trial Court or even in Appeal. He has not chosen to do so and must suffer the consequences.

73. In *Ferrodous Estates (Pvt.) Ltd. V. P.Gopirathinam (Dead) & Ors.*¹⁶ it was held that it fell within the discretion of the Court to decide as to whether specific performance is to be granted. Though the relief is discretionary, such discretion has to be exercised soundly and reasonably, guided by judicial principles. Thus, the court must consider the conduct of the parties in a holistic fashion to come to the conclusion,

¹⁶ ([2020] AIR (SC) 5041)



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as to whether the plaintiff was ready and willing and so entitled to the grant of the discretionary remedy.

74. In *G.Sunil Panickar v. G.N.Gomathy and another*¹⁷ the factual findings were that the appellant had not established readiness and willingness to pay the balance sale consideration. To be noted incidentally that, the issues framed by the Trial Court have been extracted by the Division Bench and a specific issue is found to have been framed at that stage as to whether the plaintiff was ready and willing to perform his part of the contract.

75. In *S.Ravi and others v. P.Navaneetharaj & others*¹⁸, this Court has held that non-framing of an issue is fatal, referring to the judgment in *Shivaji Balaram Haibatti v. Avinash Maruthi Pawar*¹⁹. The Supreme Court has held therein that parties to the suit cannot travel beyond the pleadings and Court cannot record findings on issues that are not part of the pleadings.

76. In *Elango v. K.Kamalaveni (died) and 16 others*²⁰, the

¹⁷ [2023 (2) CTC 1]

¹⁸ [2021-5-L.W.1.]

¹⁹ [(2018) 11 SCC 652]

²⁰ [2023 (2) CTC 535]



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Division Bench of this Court reiterated the mandatory duty cast upon the plaintiff to lead credible evidence to establish readiness and willingness as the relief of specific performance was equitable, and discretionary relief cannot be mechanically granted. In that case as well, a specific issue had not been framed in regard to the readiness and willingness of the plaintiffs to perform their part of the contract.

77. On the facts set out before them, the Bench found that the plaintiffs had not established readiness and willingness to perform their part of the terms of sale. A specific observation was made noticing that no categorical issue had been framed on the aspect of readiness and willingness, similar to the present case. In *N.P.Thirugnanam (Dead) by LRS v. Dr.R.Jagan Mohan Rao and others*²¹, the principle of continuous readiness and willingness was reiterated.

78. Upon a detailed consideration of the matter and the ratio of the decisions relied upon, we are of the unambiguous view that the Appellant has not discharged the burden of proving that he was ready and willing to fulfil his part of the Agreement at any stage of the matter.

²¹ [(1995) 5 SCC 115]



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79. This appeal is dismissed. No costs.

[A.S.M.J.] & [R.V.J.]
22.02.2024

Index : Yes/No

Speaking order/Non-speaking order

Neutral Citation: Yes/No

vs

To

1. The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.

2. The Additional District Judge (Fast Track Court),
Dindigul.



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A.S.(MD)No.6 of 2011

DR.ANITA SUMANTH, J.
AND
R.VIJAYAKUMAR, J.

VS

Pre-delivery Judgment made in
A.S.(MD)No.6 of 2011

Dated:
22.02.2024