

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE T.R.RAMACHANDRAN NAIR

&

THE HONOURABLE MR. JUSTICE K.P.JYOTHINDRANATH

THURSDAY, THE 30TH DAY OF JULY 2015/8TH SRAVANA, 1937

RFA.No. 586 of 2010 ()

AGAINST THE ORDER/JUDGMENT IN OS 206/2007 of PRINCIPAL SUB
COURT,ATTINGAL DATED 17-03-2009
APPELLANT(S)/DEFENDANT:

E.JALALUDEEN
'JAS VILLA', PUTHIYAKAVIL, EDAPPAZHANADU
KILIMANOOR VILLAGE, CHIRAYINKEEZH TALUK
THIRUVANANTHAPURAM DISTRICT.

BY ADVS.SRI.K.S.VINOD
SRI.M.R.RAJESH

RESPONDENT(S)/PLAINTIFF:

G.SOMAN
PALLICKAL, MYLOM VILLAGE, KOTTARAKKARA TALUK
KOLLAM DISTRICT.
ADDL.R2: GEEVARGHESE YOHANNAN, S/O. VARGHESE,
KUZHIVILAPUTHEN VEEDU, NELLIKUNNAM, KOTTARAKKARA (VIA) KOLLAM.
ADDL.R3: THOMAS @ KUNJUMON, PARAKAM VEETIL,
PULAMAN JUNCTION, KOTTARAKKARA, KOLLAM.
(ADDL.R2 IMPEADED AS PER ORDER IN IA 1295/2011 DT.29.8.2013
ADDL.R3 IMPEADED AS PER ORDER IN IA 1408/2013 DT.29.8.2013)

R, BY ADV. SRI.N.DHARMADAN (SR.)
R, BY ADV. SMT.D.P.RENU
R-R3 BY ADV. SRI.MOHAN JACOB GEORGE
R-R3 BY ADV. SMT.P.V.PARVATHI
R-R3 BY ADV. SMT.REENA THOMAS

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON 6-07-2015,
ALONG WITH CO. 24/2011, THE COURT ON 30/7/2015 DELIVERED THE
FOLLOWING:

**T.R. RAMACHANDRAN NAIR &
K.P. JYOTHINDRANATH, JJ.**

R.F.A.No.586/2010 & C.O.No.24/2011

Dated this the 30th day of July, 2015

JUDGMENT

Ramachandran Nair, J.

R.F.A. No.586 is filed by the appellant/defendant and the Cross Objection is filed by the plaintiff. The suit was one filed by the plaintiff/first respondent in the appeal for specific performance of a contract for sale of immovable property. The trial court, after refusing specific performance of the contract, granted a decree for realisation of Rs.60 Lakhs from the defendant. A claim for another sum of Rs.12 Lakhs was rejected as barred by limitation. Additional respondents 2 and 3 are persons to whom the defendant has transferred the property subsequently.

2. In the Cross Objection, the plaintiff/cross objector is seeking a decree for specific performance of the contract itself. The rejection of the claim for realisation of Rs.12 Lakh is also under challenge. The maintainability of the cross objection is disputed by the defendant - the

appellant in the appeal and by additional respondents 2 and 3. It is their contention that the plaintiff has acquiesced with the decree, as he had already filed execution petition for realising an amount of Rs.60 Lakhs from the defendant and the defendant had deposited the undisputed portion of the same, viz. Rs.39 Lakhs which was withdrawn by the plaintiff and thereafter only the defendant transferred the property in favour of additional respondents 2 and 3. It is in this background learned counsel contended that the cross objection is not maintainable.

3. We heard Shri M.R. Rajesh, learned counsel for the appellant/defendant, Shri N. Dharmadan, learned Senior Counsel and Smt. Renu D.P. for the plaintiff and Shri Mohan Jacob George, learned counsel for additional respondents 2 and 3 in the appeal as well as in the cross objection.

4. At the outset, Shri M.R.Rajesh submitted that in the appeal filed by the defendant, the challenge is only with regard to that part of the decree whereby the trial court has treated Rs.21 Lakhs as part of

the sale consideration relating to the total amount of Rs.60 Lakhs. According to the learned counsel, the same was not paid by way of advance for purchase of the property and hence it will not form part of the sale consideration and therefore the charge under Section 55(6)(b) of the Transfer of Property Act will not be there for the said amount. If there is no charge, then the claim as regards the said amount is barred by limitation also.

5. The relevant facts leading to the filing of the suit by the plaintiff are the following: Between the plaintiff and the defendant two agreements have been executed which have been marked as Exts.A1 and A2. Ext.A1 is dated 6.2.2001 and Ext.A2 is dated 1.8.2001. The suit is filed based on Ext.A2 agreement.

6. As per Ext.A1 agreement the defendant agreed to sell 3 acres and 33 cents of property along with the building situated in the property included in Sy. Nos.1455/34, 1431/2, 1431/1 of Pulimath village and 8 cents each in Sy. No.1430/2 and 1435/5 to the plaintiff for a total price of Rs.85 Lakhs. The agreement will show that an

establishment by the name of 'Motel Sanam' was already functioning there which had the approval of Kerala Tourism Department. Thus, the properties along with the buildings and the electrical fittings have been agreed to be sold. The period fixed for completing the transaction is six months and the advance paid by the purchaser is Rs.2 Lakhs. It is also agreed by the parties that for the purpose of the purchaser the seller will get approval orders from the ITDC for conducting a classified restaurant and the seller will make suitable construction of buildings in tune with the specifications of the ITDC, at the expenses of the purchaser. As initial expenses, the purchaser paid another amount of Rs.2 Lakhs. It is also agreed that the purchaser will pay amounts to the seller during the course of the construction from time to time in tune with the progress of the work. It is also agreed between the parties that if any liabilities are there in banks, then the purchaser will advance amounts to the seller for clearing the same from the total sale consideration of balance amount of Rs.83 Lakhs which will be suitably accounted at the time of execution of the sale deed.

7. On the reverse side of the first page of Ext.A1 agreement there are four endorsements showing receipt of Rs.15 Lakhs, Rs.4 Lakhs, Rs.1,10,000/- and Rs.90,000/- by the defendant which according to the plaintiff, are the amounts further paid to the defendant for making the construction.

8. Ext.A2 is dated 1.8.2001. Therein also the agreement is to transfer the same properties along with the establishment by name 'Motel Sanam, the buildings, the furniture, kitchen equipments and other movable items, for a total amount of Rs.85 Lakhs. The said agreement details certain other conditions. The first one is to the effect that apart from the purchase price of Rs.85 Lakhs the purchaser has paid an amount of Rs.12 Lakhs to the seller for the purpose of obtaining approval of ITDC for the classification, and as cost of furniture equipments, etc. for the restaurant. The period of agreement is 3 months and clause 3 states that out of the total purchase price of Rs.85 Lakhs, the defendant has already received Rs.20 Lakhs. The defendant has agreed that the employees and labourers employed by

him in Motel Sanam will be discharged after paying their dues. He also agreed to remit the dues if any towards labour department, the Government, financial institutions, KSEB, etc. and to entrust with the plaintiff the original documents and receipts as well as encumbrance certificate. In clause 6 it is stated that extra construction works attached to the classified restaurant for enabling the purchaser to get bar licence and classification are going on. Under clause 7 it is stated that the defendant will transfer whatever licence obtained in favour of the purchaser and the purchaser will pay the balance purchase price of Rs.65 Lakhs for executing the sale deed.

9. The plaintiff filed the suit on 15.12.2007 before the Sub Court, Attingal as O.S. No.207/2007. Relief (a) sought in the suit is to allow a decree directing the defendant to execute the sale deed in favour of the plaintiff in respect of the plaint schedule property. Relief (c) asked for is that the plaintiff may be allowed to adjust the amount of Rs.12 Lakhs and interest at 12% from 1.8.2001 in the balance sale consideration due to the defendant. It is pointed out by the learned counsel for the

appellant that as regards Rs.21 Lakhs there is no prayer for realisation of the same, or to adjust it in the sale consideration.

10. The averments in the plaint are as follows: Paragraph 2 states that the total sale consideration is Rs.85 Lakhs out of which Rs.2 Lakhs was given as advance amount at the time of execution of the agreement dated 6.2.2001. There was a promise that the defendant will arrange approval of Tourism Department for conducting a classified restaurant in the plaint schedule property and that the necessary building will be constructed under the supervision of the defendant with the funds provided by the plaintiff.

11. Paragraph 3 states that the defendant collected the amount of Rs.15 Lakhs for the purpose of construction of building in the plaint schedule property, upto 1.5.2001. Then the defendant had collected an amount of Rs.4 Lakhs on 30.6.2001, another amount of Rs.1,10,000/- and a further amount of Rs.90,000/-. Thus, an amount of Rs.21 Lakhs was collected by the defendant for the purpose of building construction and accordingly he had constructed a two storied building in the

schedule property. These payments have been acknowledged in the agreement dated 6.2.2001. It is stated in paragraph 4 that as the defendant could not fulfil the obligations under the agreement dated 6.2.2001, (Ext.A1), a renewed agreement for sale was executed between the plaintiff and defendant on 1.8.2001. As per the said agreement, he had collected Rs.12 Lakhs for arranging necessary furniture and equipments and for arranging feasibility certificate from the Tourism Department for the purpose of starting classified restaurant in the plaint schedule property. It is further averred that the defendant had further accepted an additional amount of Rs.18 Lakhs as additional advance amount, totalling the advance amount to Rs.20 Lakhs upto 1.8.2001. The defendant had agreed to clear all the liabilities outstanding with State, financial institutions, etc. It is also averred that the possession of the property was handed over to the plaintiff as part performance of the agreement for sale.

12. In paragraph 5 it is averred that the defendant had further collected an amount of Rs.5 Lakhs from the plaintiff on 26.10.2001

adjusting it in the balance sale consideration and another amount of Rs.5 Lakhs on 1.1.2005. A further amount of Rs.9 Lakhs was collected between 27.10.2001 and 19.3.2005 adjusting it in the balance sale consideration. Thus, the defendant had collected Rs.39 Lakhs from the plaintiff for adjusting it in the total sale consideration of Rs.85 Lakhs. It is stated that the plaintiff was ready and willing to execute the sale deed by paying the balance sale consideration due to the defendant and contacted the defendant on several occasions, but the defendant failed to fulfil the conditions prescribed in the agreement. In paragraph 9, the cause of action for the suit is stated to have arisen on 6.2.2001 and from 1.8.2001, the date of second agreement and then from 22.8.2001, 25.10.2001, 1.1.2005 and 19.3.2005, the respective dates of acknowledgement of receipt of further amounts and from 7.12.2007.

13. In the written statement the defendant contended that the amount paid to him for construction of the building is only Rs.19 Lakhs upto 30.6.2001 and Rs.1,10,000/- and Rs.90,000/- were borrowed by the defendant for personal purposes. He also disputed

the payment of the total amount as contended by the defendant and stated that upto 1.8.2001 an amount of Rs.32 Lakhs alone has been received and that before renewing the agreement on 1.8.2001 the amounts were settled between the plaintiff and defendant and it was agreed between the parties that Rs.20 Lakhs is by way of advance and Rs.12 Lakhs is for the purpose of construction. In paragraph 6 it was contended that Rs.5 Lakhs was also received as advance and thereafter no payments have been made before 1.1.2005. It is also pointed out that in the meanwhile the plaintiff formed a Trust by name "Rohini Educational Trust" for starting educational institutions and the Central Government had changed its policy with regard to the recognition of classified restaurant and the practice was stopped. Plaintiff therefore thought of alternatives like starting of educational institutions. He admits that a total amount of Rs.39 Lakhs has been received as advance sale consideration, out of which, Rs.14 Lakhs was paid between 1.1.2005 and 19.3.2005.

14. The defendant has raised a question of limitation in

paragraph 8 of the written statement by pointing out that the renewed agreement is dated 1.8.2001 and the period of agreement expired on 1.11.2001 and that the suit for enforcing the said agreement should be filed within three years from 1.11.2001, i.e. before 1.11.2004. It is therefore contended that the suit is barred by limitation. It is also contended that the plaintiff, virtually abandoned the agreement and wanted to get back the maximum possible money, had authorised the defendant on 10.5.2007 to sell the property. Accordingly, a sale agreement was executed with one Nasaruddeen on 22.9.2007 for sale of the plaint schedule property, the defendant's daughter's property and the property owned by Rohini Educational Trust and some amounts have been received. It is also stated that the defendant has discharged the liability towards bank and the Income Tax Department.

15. To the above written statement, the plaintiff filed a replication. He reiterated the payment of Rs.21 Lakhs for construction. It is contended in para 3 that he has got statutory charge in the three storied building constructed in the plaint schedule property. In

paragraph 4, by relying upon a kurippu account the plaintiff has averred that the defendant had collected amounts on different dates from 6.8.2003 upto 25.5.2004. According to the plaintiff, those are amounts paid towards advance. It is contended that the defendant did not clear the encumbrance touching the property and therefore the execution of sale deed prolonged and lastly the defendant conceded to execute the sale deed in favour of the plaintiff on 1.1.2005. He arranged an amount of Rs.5 Lakhs to the defendant for clearing the liability before the bank. It is contended that the sale deed was drafted in stamp paper on 1.1.2005 and the defendant had also put his signature but it could not be registered since there was attachment in the plaint schedule property when it was produced for registration. The draft sale deed signed by the defendant on 1.1.2005 was produced along with the replication. In the draft sale deed the total consideration shown is Rs.20 Lakhs. It is stated in paragraph 5 that the plaintiff had purchased 1 hectare 62 ares and 28 sq. metres of property located adjacent to the plaint schedule property based on three sale deeds in

2003 in favour of Rohini Educational Trust of which the plaintiff is the Chairman. It was purchased for starting educational institutions. For the purpose of moving application for starting educational institution, an existing building is to be shown in the application and a registered rent deed was executed by the defendant on 6.12.2003 in favour of Rohini Educational Trust based on mutual adjustment. There was no monetary transaction based on it. As the application for starting educational institution was not allowed, a release deed was also executed.

16. As regards the plea of limitation, it is contended in paragraph 6 that payments have been effected towards further advance money from 6.8.2003 to 19.3.2005. Hence, the suit is not barred by limitation. The plaintiff also disputes the contention that he had abandoned the agreement and that an express authority was given to the defendant to sell the property, by a document dated 10.5.2007. It is contended that the said document was fraudulently created.

17. In the replication, the plaintiff also prayed that in case there is

any hindrance in allowing the specific performance of agreement, the statutory charge created in the plaint schedule property by acceptance of Rs.72 Lakhs by the defendant from the plaintiff, may be upheld and a decree may be passed allowing the plaintiff to realise the said amount along with interest at 12% from the date of respective acceptance of amounts, charging upon the plaint schedule property and all other assets of the defendant.

18. In the additional written statement, the defendant denied the averment in the replication concerning the receipt of amounts between 6.8.2003 and 25.5.2004 and about the genuineness of the kurippu account. It is also contended that the plaintiff has abandoned the agreement, as the Government has changed its policy to issue bar licence to classified restaurants. Thereafter the plaintiff formed a Trust and wanted to start educational institutions. Attempts were made to start B.Ed. College, Ayurveda Medical College, Dental College, etc. in turn and has even started an international English Medium School in the name and style of “Sun Rose International School”. For the purpose

of this venture, the defendant had also purchased 5 acres of land in his name and in the name of his son. The plaintiff has also purchased some lands. All these transactions were entered into on the verbal understanding that the defendant also will be given due share in this project and all accounts will be settled. But the plaintiff could not obtain permission to start any of the institutions. In the meanwhile, the value of the land became double. The defendant did not go back from the offer for sale and was ready to execute the sale deed for 50% hike above the agreed date which was finalised. He also signed the sale deed since the plaintiff undertook to bring the cash by evening. The defendant waited till evening. The cash was not brought and finally the deed was not registered. The plaintiff did not even care to come to the Sub Registry Office. He had entrusted a sum of Rs.5 Lakhs through his Manager enabling the defendant to clear off a liability with the bank. The plaintiff advanced a further sum of Rs.9 Lakhs between 1.1.2005 and 19.3.2005. The defendant has co-operated with the plaintiff in getting refund of stamp duty also. Later, it was agreed that

the whole property can be sold as one block and the accounts can be settled. Finally, the plaintiff has given a written authority on 10.5.2007 enabling the defendant to negotiate and sell his lands also. Consequently, a sale agreement has been entered into on 22.9.2007. Finally, the defendant contended that there are no payments between 26.10.2001 and 1.5.2005 and even if payments are there, they will not save limitation or will cause renewal of the agreement. It is also contended that the value of the land has become more than four times during the period between 2001 and 2008. The schedule property is situated by the side of State Highway No.1 which has been renovated, widened and declared as a highway, which also contributed to the hike in price. It is further contended that the defendant will be put to irreparable loss and injury if the property is ordered to be sold on the basis of the agreement of the year 2001.

19. The parties led evidence. The plaintiff examined P.Ws.1 and 2 and marked Exts.A1 to A8 documents. Defendant examined D.Ws.1 to 4 and marked Exts.B1 to B41 documents. The third party exhibits are

Exts.X1 to X4.

20. The trial court found that the plaintiff has failed to prove readiness and willingness to pay balance amount of consideration as on 1.1.2005, when the defendant signed the original of the sale deed. Due to escalation of price in the locality, sale, if ordered, will result in unfair advantage to the plaintiff and loss to the defendant. The trial court further held on the basis of Ext.B28, that plaintiff had authorised the defendant to sell the property which disentitles him to get a decree for specific performance of such an agreement. The trial court also treated Rs.39 Lakhs given as advance by way of part sale consideration and the payment of Rs.21 Lakhs was for the construction of the building in the plaint schedule property together and held that a statutory charge is available for it also. Therefore, a decree for realisation of Rs.60 Lakhs was granted. It was held that as regards Rs.12 Lakhs paid by the plaintiff for purchase of furniture and for utilising it for obtaining licence, the claim is barred by limitation.

21.Learned counsel appearing for the defendant, Sri M.R. Rajesh

submitted that as far as relief of specific performance of the agreement is concerned, it is hopelessly barred by limitation. Ext.A2 is dated 1.8.2001 and the period provided for execution of the sale deed is three months which expired on 1.11.2001. Three years from the said date is the period provided under Article 54 of the Limitation Act for a suit for decree for specific performance. The payments made after 1.1.2005 to 19.3.2005 are clearly beyond the period of limitation. He referred to the pleadings of the plaintiff himself in the plaint and in the replication and submitted that even going by the averments and even if the kuripu Ext.A6 is considered, the suit will be barred by limitation. It is submitted that Ext.A6 was not accepted by the trial court also.

22. It is submitted by the learned counsel that the decree granted for realisation of Rs.21 Lakhs is clearly unsupportable and the said claim is further barred by limitation. It is submitted that the said payment is covered by Ext.A1 and no reference is made with regard to the said amount in Ext.A2. No relief has been claimed in the suit also. In the replication the plaintiff sought for realisation of Rs.72 Lakhs.

The plaint was not amended. It is submitted that Ext.A2 does not contain any clause with regard to the construction cost and Rs.20 Lakhs alone is shown as advance sale consideration. Rs.21 Lakhs cannot be treated as any advance amount out of the total purchase price of Rs.85 Lakhs . Therefore, the statutory charge under Section 55(6)(b) will not be available for the amount of Rs.21 Lakhs and the finding otherwise made by the court below is not correct. Hence, the decree can be sustained only as regards Rs.39 Lakhs which alone gets the protection under Section 55(6)(b) of the Transfer of Property Act. Since the amount of Rs.21 Lakhs is covered by Ext.A1 agreement dated 1.6.2001, any suit for realising the amount should have been filed within three years and therefore the suit filed in 2007 is clearly much beyond the period of limitation and hence the decree cannot be sustained to that extent.

23. It is submittd that Ext.A6 kuripu was produced by the plaintiff to get over the bar of limitation. It only contains certain dates and amounts against them and there is no written acknowledgment and

it is not at all signed by the defendant also. The trial court rejected the same rightly, the learned counsel submitted. It is further submitted that going by para 6 of the plaint, the cause of action is described as having arisen between different dates including 1.1.2005 and 19.3.2005 which dates are after the period of limitation. In the plaint as originally filed, the date 1.1.2005 contained in paragraph 5 is the date on which the defendant collected a sum of Rs.5 Lakhs from the plaintiff. In the plaint in paragraph 5 while stating that Rs.9 Lakhs was collected by the defendant between 1.1.2005 and 19.3.2005, the first date 1.1.2005 was amended as per order dated 16.10.2008, as 27.10.2001. But the suit is not filed within three years of that date also. It is submitted that Ext.A6 does not amount to acknowledgment of any amount, in writing. For attracting Section 18 of the Limitation Act, any acknowledgment should be in writing, that too before the expiry of the period of limitation. Learned counsel further submitted that Section 19 of the Limitation Act also will not apply, as the payment, if any, is not on account of any debt or of interest on a legacy and therefore, the prayer

for specific performance is also barred by limitation. In this context, learned counsel referred to the oral evidence of the parties also.

24. It is submitted that Ext.A2 alone remained in the field and the suit was filed only to enforce Ext.A2 and any payment made as consideration in Exts.A1 and A2 is different and distinct and the payment of Rs.21 Lakhs was for construction. The plaintiff has treated the payment of Rs.21 Lakhs as for construction alone and had never treated it as part of the sale consideration. To sustain the above argument, learned counsel referred to the pleadings of the plaintiff himself in the plaint as well as in the proof affidavit.

25. As regards the relief of specific performance sought by the cross objector, it is submitted that the same is not maintainable. Learned counsel elaborated the contention by stating that after the decree was passed, the plaintiff filed an execution petition. The defendant filed the appeal only for disputing that part of the decree allowing realisation of Rs.21 Lakhs and in the execution court Rs.39 Lakhs was deposited along with interest, (Rs.44,85,000/- in total) on

31.5.2010. As far as the balance amount of Rs.21 Lakhs is concerned, as per the interim order of this Court dated 17.9.2010 in this appeal, security was given by way of Fixed Deposit receipts for the said amount and the execution of that part of the decree was stayed by this Court. Thereafter, the execution court closed the execution petition. As the major amount covered by the decree has been accepted, he is estopped from challenging the refusal to grant specific performance of the agreement, in the cross objection. In this connection, learned counsel for the appellant relied upon the following decisions:

“M/s. Govindji Jevat and Co. v. Shree Saraswati Mills Ltd.
(AIR 1982 Bombay 76).

Krishnan Nair Sreedharan Nair v. Oommoommen Abraham
(AIR 1984 Kerala 164)

The plaintiff filed a cheque application on 23.7.2010 and as the amount was paid by cheque through court, the undisputed portion of the decree stood satisfied.

26. Learned counsel further submitted that even the relief of specific performance sought for in a cross objection cannot be

sustained as the plaintiff himself had committed breach of the contract. It is submitted that after the initial proposal for having a hotel and restaurant with bar licence could not be proceeded with because of the change of policy by the Government, the plaintiff created an educational trust as Rohini Educational Trust and different applications were filed for starting a B.Ed. College, Ayurveda Hospital, Dental Hospital, etc. and all the documents have been produced by the defendant before the trial court. As none of the proposals could get Government sanction, finally by Ext.B28 the defendant was authorised to sell the property.

27. It is also submitted that as the price of the property increased by several folds and the plaintiff also agreed to sell the property for getting maximum price, the defendant had demanded to pay an amount of Rs.1.25 crores and on that basis he agreed to execute the sale deed on 1.1.2005. He had put his signature on the said sale deed prepared in the stamp paper on 1.1.2005 and went to the Sub Registry Office, but the plaintiff did not pay the balance purchase

money and failed to be present in the Sub Registry Office. This clearly shows the bonafides of the defendant and the absence of bonafides on the part of the plaintiff. The plaintiff was never ready and willing to proceed with the sale of the property and therefore the discretionary relief of specific performance is not liable to be granted and he prayed for dismissing the cross objection and for allowing the appeal.

28. Learned Senior Counsel, Shri N. Dharmadan appearing for the plaintiff submitted that the plaintiff was always ready and willing to execute the sale deed. Learned Senior Counsel relied upon the various clauses in Exts.A1 and A2 agreements. It is submitted that the defendant had to clear off the debts and dues towards various financial institutions and banks as well as to the Income Tax Department. Learned Senior Counsel attacked the finding of the trial court that the plaintiff was not ready and willing to perform his part of the contract. It is submitted that Ext.A4 is the communication from the Village Officer which will show that in respect of the plaint schedule property,

there was an attachment order in O.S. No.440/2005, as well as liabilities to a Bank and attachment by the Income Tax Department. Therefore, the same is the reason for not registering the document on 1.1.2005. The plaintiff is an abkari contractor owning bar hotels and he was ready with the funds also for payment. The defendant is not entitled for purchase price more than that is fixed in Ext.A2.

29. It is submitted that the effect of Ext.A4 has not been properly considered by the trial court. The plaintiff has never authorised the defendant to sell the property as per Ext.B28 and challenging the genuineness of Ext.B28, a fresh suit has been filed by the plaintiff and a copy of the plaint has been produced along with the cross objection as Annexure 1. Learned Senior Counsel relied upon various decisions of the Apex Court and this Court to contend that specific performance being an equitable relief, as the plaintiff was blemishless throughout, he is entitled for a decree as such. The property has been fraudulently found transferred to additional respondents 2 and 3, obviously for better price and the transfer is hit by

lis pendens and additional respondents 2 and 3 will not get any right.

30. Learned Senior Counsel, Shri N. Dharmadan submitted that the relief of specific performance is not barred by limitation and the details of amounts paid on various dates will show that there is clear acknowledgment of amounts towards balance sale consideration which will save the period of limitation. In this context, learned Senior Counsel refuted the contentions of the learned counsel for the appellant/defendant.

31. It is submitted vehemently that Rs.21 Lakhs paid for construction of the building and Rs.12 Lakhs paid for obtaining approval for classification, etc. will have to be treated as part of the sale consideration itself. These payments were made based on the agreement between the parties and therefore as the parties had in contemplation, the transaction by way of sale of the property, the same will have the effect of the payments made by the plaintiff as part of the sale consideration itself. If that be so, for the entire amount of Rs.72 Lakhs there will be a statutory charge under Section 55(6)(b) of the

Transfer of Property Act. Learned Senior Counsel also submitted that in the light of Section 55(6)(a) of the Act, the plaintiff is entitled for the benefit of any improvement in the property and the said provision also applies here. Learned Senior Counsel further contended that in a situation of this nature, this Court will have to consider the equitable principles and protect the plaintiff who has spent money for such a transaction. Therefore, none of the reliefs have been barred by limitation, it is contended. Learned Senior Counsel invited our attention to the various parts of the evidence of the plaintiff in that context.

32. It is further submitted that merely because Rs.39 Lakhs was remitted by the defendant before the trial court in execution and that a cheque application was filed, the cross objection cannot be said to be not maintainable. It is submitted that the execution petition happened to be filed without reference to the plaintiff and he is prepared to remit back the amount of Rs.39 Lakhs with interest received. It is actually a case of wrong legal advice. The said circumstance cannot therefore be

taken against the plaintiff. Therefore, learned Senior Counsel submitted that additional respondents 2 and 3 who have purchased the property later from the defendant cannot get any right at all. The following judgments have been relied upon by the learned Senior Counsel to support the arguments:

“Krishnaji Pandharinath v. Anusayabai and another (AIR 1959 Bom. 475), **G.M.V. Krishnamachari v. M.D. Dhanalakshmi Ammal and others** (AIR 1968 Mad. 142) **Augusti v. Ramakrishna Panicker** (1969 KLT 326) and **Indian Financial Association of Seventh Day Adventists v. Unneerikutty** (2006 (4) KLT 520 - SC)”

33. Shri Mohan Jacob George, learned counsel appearing for additional respondents 2 and 3 submitted that they are bonafide purchasers for value. They purchased the property after the plaintiff filed the execution petition and after the defendant deposited the undisputed amount of Rs.39 Lakhs along with interest. The sale deed in their favour was executed on 17.11.2011 whereas the amounts were deposited as per Annexure R3(b) chalan dated 31.5.2010 before the execution court, by the defendant. The cross objector filed the cheque

application as early as on 23.7.2010 for release of the amount and additional respondents 2 and 3 have produced copy of the cheque application along with the affidavit filed as Annexure R3(c). Therefore, after the receipt of the amount the decree stood satisfied and the charge, if any, created stood discharged by the aforesaid conduct of the plaintiff and the plaintiff has acquiesced to the same, and therefore there is no commission of fraud in the matter. Additional respondents 2 and 3 have constructed school buildings and have purchased furnitures, fixtures and vehicles and more than 500 students are studying in the school and there are about 25 staff members there. Now M.G. International school is functioning there and from kindergarten to Standard VI classes are being conducted. Learned counsel relied upon the following judgments to contend that there will not be any statutory charge after the decree has been satisfied.

“Kumud Kumar v. Central Bank of India and another {(2000) 9 SCC 244}, Gokul Prasad v. State of Bihar (2009 KHC 8033) and Litty v. Vasu (2013 (1) KLT 669)”

34. The following points, therefore, arise for consideration: (i)

Whether the relief of specific performance of the agreement sought for by the plaintiff is barred by limitation; (ii) Whether the amount of Rs.21 Lakhs received by the defendant for construction purposes could be treated as part of the sale consideration and if so, the statutory charge under Section 55(6)(b) is attracted to the said amount and if not, whether the claim for realisation of Rs.21 Lakhs is barred by limitation; (iii) Whether the plaintiff has established by evidence his readiness and willingness under Section 16(c) of the Specific Relief Act for enabling him to get a decree for specific performance of the agreement; and (iv) Whether the cross objection as such is maintainable.

35. Point No.(i): Ext.A2 agreement is dated 1.8.2001 and the period provided for execution of the sale deed is three months which expired on 1.11.2001. Under Article 54 of the Limitation Act three years period from the said date is available for filing a suit of the nature herein. Therefore, the period expired on 1.11.2004 and the suit herein was filed on 15.12.2007. As far as the stipulations contained in Ext.A2 are concerned, clause 3 is to the effect that Rs.20 Lakhs was already

advanced and the balance amount as sale consideration is Rs.65 Lakhs. On the reverse side of the first page of Ext.A2 there are certain endorsements for receipt of amounts by the defendant. They are the following:

26.10.2001 - Rs.5 Lakhs

upto 19.3.2005 - Rs.14 Lakhs

The description regarding the second endorsement is that apart from Rs.25 Lakhs already received, Rs.5 Lakhs was given on 1.1.2005 to remit in the bank and adding Rs.9 Lakhs received on different dates, the total amount as on 19.3.2005 is Rs.39 Lakhs and the balance will be Rs.46 Lakhs. The payment of Rs.5 Lakhs on 1.1.2005 is beyond the three year period of limitation. When we come to the averments in the plaint, the initial payment of Rs.2 Lakhs is as advance which is based on the agreement dated 6.2.2001. Regarding the total amount paid towards balance sale consideration, subsequent payments have been described as Rs.18 Lakhs upto 1.8.2001, Rs.5 Lakhs on 26.10.2001 and another Rs.5 Lakhs on 1.1.2005. The further averment in paragraph 5

is that between 1.1.2005 and 19.3.2005 Rs.9 Lakhs have been collected from the plaintiff towards sale consideration. The date 1.1.2005 in that sentence was amended as 27.10.2001 by order dated 16.10.2008 in I.A.No.1625/2008.

36. The replication filed by the plaintiff in paragraph 4 refers to certain alleged payments and we extract hereinbelow the following portion in paragraph 4:

“4. The averments in para 6 of the written statement are also not fully correct. The averment that the plaintiff did not pay any additional advance amount in between 26.10.2001 and 1.1.2005 is against the facts and said claim is denied by the plaintiff. The truth of the matter is that the defendant had collected an amount of rupees fifty thousand on 6.8.2003, amount of fifty thousand on 19.8.2003, amount of rupees thirty thousand on 6.9.2003, an amount of Rs.24,331/- on 2.10.2003, an amount of Rs.10,000/- on 2.11.2003, an amount of Rs.15,000/- on 22.11.2003, an amount of Rs.15,000/- on 21.1.2004, an amount of Rs.10,000/- on 2.2.2004, an amount of Rs.25,000/- on 1.3.2004, an amount of Rs.15,000/- on 27.3.2004, and another amount of Rs.50,000/- on 25.5.2004 in the account of advance earnest money before 1.1.2005 based on

the agreement for sale. In respect to the above said collections of advance money, the defendant had issued kurippu account and the same is produced herewith.....”

By reckoning three years from 1.11.2001 the last payment within the period of limitation, going by the said averment, is on 25.5.2004. If three years from that date is reckoned, the suit ought to have been filed on or before 25.5.2007. While refuting the averment in paragraph 8 of the written statement that the suit is barred by limitation, in paragraph 6 of the replication it is stated as follows:

“.....In fact there was renewal of agreement on the respective dates acceptance of further advance earnest money. On the above mentioned dates on 6.8.2003, 19.8.2003, 6.9.2003, 2.10.2003, 2.11.2003, 24.11.2003, 21.1.2004, 2.2.2004, 1.3.2004, 27.3.04, 25.5.04, 1.1.2005 and 19.3.2005.”

The same is in tune with the averment in paragraph 4 quoted above. It will also show that the alleged payments on 1.1.2005 and 19.3.2005 claimed by the plaintiff are beyond the period of limitation.

37. The document produced as Ext.A6 is stated to be a kurippu account. The amounts are shown against the dates 6.8.2003 onwards

upto 22.5.2004. It is not signed by the defendant and not proved to be in his handwriting and apart from the figures, there are no descriptions therein. The above was not relied upon by the trial court. Ext.A6 cannot advance the case of the plaintiff for want of authenticity and for the shortcomings already stated above. The document has not been subjected to any expert examination also.

38. When we come to the evidence of P.W.1, the plaintiff, in the proof affidavit what is stated in paragraph 3 is that after execution of Ext.A2, further payments have been made, of Rs.5 Lakhs on 26.10.2001 and Rs.14 Lakhs between 27.10.2001 and 19.3.2005. It is also averred that upto 19.3.2005, Rs.39 Lakhs has been paid and there is mention of different dates from 6.8.2003 to 1.1.2005. It is stated in paragraph 5 that as the advance amounts have been received on 21.1.2004, 2.2.2004, 1.3.2004, 27.3.2004 and 25.5.2004, the suit is not barred by limitation and there are payments upto 19.3.2005.

39. Section 18 of the of the Limitation Act insists for an acknowledgment of liability in writing and signed by the party before

the expiration of the prescribed period for a suit in respect of any property. Sub-section (1) states as follows:

“18 Effect of acknowledgment in writing.--(1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.”

The main part of Section 19 also states as follows:

“19. Effect of payment on account of debt or of interest on legacy.-- Where payment on account of a debt or of interest on a legacy is made before the expiration of the prescribed period by the person liable to pay the debt or legacy or by his agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made.

Provided that, save in the case of payment of interest made before the 1st day of January, 1928, an acknowledgment of the payment appears in the handwriting of, or in a writing signed by, the person making the payment.”

Ext.A6, as rightly pointed out by the learned counsel for the appellant, Shri Rajesh, cannot be termed as an acknowledgment in writing and also signed by the defendant. Only figures are shown in Ext.A6 as against the dates mentioned and there is no acknowledgment in writing of any liability under his signature. Therefore, Ext.A6 loses its value as evidence in this case. In the light of Section 18(1) of the Limitation Act, only if there is an acknowledgment in writing signed by the party before the expiration of the prescribed period for a suit, a fresh period will have to be computed from the time when the acknowledgment was so signed. The outer date, being 1.11.2004, going by the date of Ext.A2, the only payment made within the period of limitation is on 26.10.2001. The next payment is on 1.1.2005 and the payment of Rs.9 Lakhs is between 1.1.2005 and 19.3.2005. Therefore, if three years are reckoned from 26.10.2001, the period for filing of the suit expires on 26.10.2004. The payments made from 1.1.2005 will not save the period of limitation. It is a well settled proposition of law that acknowledgment of liability merely extends the period of limitation

and does not create a new right of action or a new contract. The view taken by the court below that the time was not the essence of the contract, is not correct. Therefore, the suit filed on 15.12.2007 seeking specific performance of Ext.A2 agreement is clearly barred by limitation and we uphold the contention of the defendant/appellant in that regard. Therefore, the plaintiff is clearly disentitled from seeking a decree for directing the appellant to execute the sale deed in his favour in respect of the plaint schedule property. The court below, on this point held that the cause of action for reckoning the period of limitation starts running from 19.3.2005 and hence the suit filed on 15.12.2007 is not barred by limitation, which we cannot agree.

40. Now we will come to the second point, as regards the statutory charge claimed in respect of Rs.21 Lakhs paid for construction of building by the plaintiff. The reliefs claimed by the plaintiff in the cross objection are two fold, viz. one regarding the denial of relief of specific performance and the other regarding the refusal to include Rs.12 Lakhs which also should be treated, according

to the plaintiff, as part of the sale consideration.

41. When we come to the payments made by the plaintiff, they are three in nature. Rs.21 Lakhs was paid for construction of a building which is mentioned in Ext.A1 agreement and not in Ext.A2 agreement. The next one is payment of Rs. 12 Lakhs as mentioned in Ext.A2 agreement to meet the expenses for getting ITDC classification and for purchase of furniture and equipments for the restaurant which is stated in clause (1) of Ext.A2. The third payment is towards part of sale consideration. As far as the amount paid towards part of sale consideration is concerned, evidently it is covered by the statutory charge under Section 55(6)(b) of the Transfer of Property Act. Unless the payment of Rs.21 Lakhs as well as Rs.12 Lakhs get the said protection the suit filed for realising these amounts is clearly barred by limitation, as the payment of Rs.21 Lakhs is before 1.8.2001 and the payment of Rs.12 Lakhs is stated in Ext.A2 dated 1.8.2001. The trial court treated Rs.21 Lakhs as amount spent in the property scheduled and therefore it will get statutory charge also. As far as Rs.12 Lakhs is

concerned, the claim is found as barred by limitation.

42. As already noticed, as per the original plaint only two main reliefs were sought; (i) for specific performance of the agreement for executing the sale deed; and (ii) for adjusting Rs.12 Lakhs towards part of the sale consideration. (Reliefs A and C). The last relief sought is relief 'F', viz. to grant such other relief as the court may find fit and proper in the nature and circumstances of the suit. In the light of Section 22 of the Specific Relief Act, an alternate relief should be specifically sought for, viz. for return of the advance money. The plaintiff, through the replication, in paragraph 9 has sought for an alternate relief of decree to realise Rs.72 Lakhs with interest at 12% from the respective dates of payments.

43. As we have already noticed, the agreement Ext.A1 alone is concerned with payment of amount towards construction of building for getting ITDC classification for conducting a classified restaurant. It was agreed between the parties that the defendant will make the construction and the payment will be made by the plaintiff. As on the

date of Ext.A1, viz. 6.2.2001, the initial payment is R.2 Lakhs which is recorded therein, for meeting preliminary expenses. There are three endorsements on the reverse side of the first page of Ext.A1 which will show that upto 1.5.2001 an amount of Rs.15 Lakhs was paid and a further payment of Rs.4 Lakhs has been made on 30.6.2001. The further payments are Rs.1,10,000/- and Rs.90,000/-. Obviously, they are before 1.8.2001, the date of Ext.A2. Going by the averments in the plaint, the amount of Rs.21 Lakhs has been paid as expenditure for construction which is clear from paragraph 3 of the plaint itself wherein it is clearly averred that the defendant had collected a total amount of Rs.21 Lakhs for the purpose of building construction and accordingly constructed a two storied building in the plaint schedule property. It is also stated that in respect of collection of the above amount, the defendant had written acknowledgments in the agreement dated 6.2.2001. In the replication also, in paragraph 3 it is stated that the defendant collected Rs.21 Lakhs for the purpose of construction of a three stored building in the plaint schedule property after collecting

various amounts from the plaintiff periodically, totalling Rs.21 Lakhs. The further averment is that Rs.15 Lakhs was collected as on 1.5.2001, Rs.4 Lakhs was collected on 30.6.2001 and Rs.1,10,000/- and Rs.90,000/- were collected between 30.6.2001 and 1.8.2001. But it is claimed that the plaintiff has got statutory charge in the three storied building constructed in the plaint schedule property. The proof affidavit also states so in paragraph 1. If statutory charge is available under Section 55(6)(b) of the Transfer of Property Act, the period of limitation is 12 years. Only if the same is allowable as regards Rs.21 Lakhs, the suit will be within the time. Under Section 55(6)(b), the charge on the property is created “for the amount of any purchase money properly paid by the buyer in anticipation of a the delivery and for interest on such amount.” Admittedly, in this case the advance amount paid towards purchase money is to the tune of Rs.39 Lakhs in total. There cannot be any iota of doubt that as far as the amount of Rs.21 Lakhs is concerned, it is paid for construction of the building. Therefore, that will not form part of any advance to be treated as part of

purchase money.

44. Sub-section 6(a) of Section 55 of the T.P Act provides as follows:

“(6) The buyer is entitled--

(a) where the ownership of the property has passed to him, to the benefit of any improvement in, or increase in value of, the property, and to the rents and profits thereof.”

Therefore, once the ownership is passed on in respect of the property, the buyer will be entitled to the benefit of any improvement or increase in value of the property and the rents and profits. Sub-sections (a) and (b) are distinct. Obviously, the plaintiff herein will not get the benefit of sub-section (a) to contend that since the building has been constructed even in the absence of a decree for specific performance he will be entitled for the benefit of improvement and automatically a statutory charge on the amount spent for the said building. Herein, the suit is filed based on Ext.A2 agreement and evidently, the payment of Rs.21 Lakhs has not been described anywhere in Ext.A2 agreement, as it is part of Ext.A1 alone. In that view of the matter, we are definitely

of the view that the plaintiff will not get the benefit, viz. of treating the same as part of the purchase money for getting the statutory charge to save the period of limitation. Even going by the averment of the plaintiff, the last of the payments, viz. Rs.90,000/- towards construction, is prior to 1.8.2001. The period of limitation for any such relief is clearly three years from the said date. In the suit filed on 15.12.2007 there was no prayer to adjust Rs.21 Lakhs as part of the purchase money and in the replication filed on 29.9.2008 such a relief was sought. Whatever that be, as the statutory charge under Section 55 (6)(b) is not available to the said amount, the claim for Rs.21 Lakhs is clearly barred by limitation.

45. The trial court, on issue No.4, held that since the Engineer of the plaintiff was supervising the construction work, it can be inferred that the plaintiff was put in possession of the property through his agent. In his evidence as P.W.1, the plaintiff did not set up a case that he was put in possession pursuant to the agreements. He has clearly deposed that his Engineer has done only the supervision. The

plaintiff's responsibility was only for paying the money. His plan and supervision by the Engineer alone were there. This will not prove that he was put in possession of the plaint schedule items.

46. In respect of Rs.12 Lakhs paid for meeting charges for obtaining ITDC classification and purchase of furniture and equipments etc. also the position will be the same. Ext.A2 is dated 1.8.2001 and the period provided in the agreement is three months which expired on 1.11.2001. The trial court was of the view that the same is not part of the sale consideration and therefore the claim for realising the said amount will be barred by limitation. The evidence of the defendant is that he has made payments for applying ITDC classification and also for purchase of furnitures for obtaining permit. The evidence of D.W.1 in this regard shows that Ext.B4 is the receipt for payment of Rs.2,000/- as application fee for obtaining ITDC classification and Exts.B5 to B7 are other documents in support of the sending of application. Therefore, it is clear that the amount of Rs.12 Lakhs will not get the character of amount paid towards part of sale

consideration and the parties never understood the same as such. Evidently, such payment cannot create a charge over the plaint schedule property.

47. The argument of the learned Senior Counsel for the plaintiff is that the amounts under the above two counts being paid pursuant to the agreement for sale of the property, they should form part of the sale consideration and in equity this Court will be justified in granting a decree by treating them as part of the sale consideration. Learned Senior Counsel submitted that Section 20 of the Specific Relief Act engrafts power for the court to grant discretionary relief in such matters and therefore equitable principles should come in the way of granting a decree in favour of the plaintiff. Learned Senior Counsel vehemently relied upon the principles stated in various decisions to contend that Section 20 is wide enough to grant discretion to the court after considering various aspects, and to grant relief to a party who has not committed any breach of the contract.

48. It is well settled that a relief can be granted on equitable

principles, only if it is not in conflict with any express statutory provision, legal principles, etc.. Herein, the payments to the tune of Rs.21 Lakhs and Rs.12 Lakhs will not get the statutory charge under Section 55(6)(b) of the T.P.Act, as they were not paid as part of the sale consideration. Therefore, the express terms of the said statutory provision will not come into play as regards these payments. Then, the bar of limitation under the Limitation Act is also there, to get a decree by enforcing such a claim and for realising the amount. Such being the case, a discretionary relief under Section 20 of the Specific Relief Act by the aid of equitable principles cannot help the plaintiff to realise these two items of amounts from the defendant. In the light of the finding by us that the suit for specific performance of the agreement is barred by limitation, the cross objection has only to be dismissed.

49. Learned Senior Counsel for the plaintiff, Shri Dharmadan had argued that the plaintiff is entitled for a decree, since he was always ready and willing. We will also address the said question in the light of the arguments raised. The plaintiff's case is that in the light of

Ext.A4 it can be seen that there is an attachment in O.S. No.440/2005 and another from the Income Tax Department. For that reason the document could not be registered on 1.1.2005. That parties prepared a document on 1.1.2005 and the defendant had signed it, is clear from the evidence and the photo copy of the document has been marked as Ext.A5. The original was produced along with the application of the plaintiff for refund of stamp duty. The evidence of P.W.1, the plaintiff is that he was ready to pay the sale consideration on that day, but registration could not be done because of the attachment. Ext.A4, according to the learned Senior Counsel, was not considered by the trial court. The same is dated 9.1.2008 and is a reply given to the plaintiff under the Right to Information Act on his application dated 26.12.2007. It is stated that there is an attachment in O.S. No.440/2005. It is also stated that the property is given as security in a bank in Madras and there is also attachment by Income Tax Department. With regard to these informations, the relevant dates have not been mentioned.

50. Shri Rajesh, learned counsel for the defendant pointed out that O.S. No.440/2005 and the attachment mentioned therein cannot be on 1.1.2005, the date of Ext.A5, even if the information is correct. It is also submitted that there is no proof that the Income Tax Department effected an attachment prior to 1.1.2005, in the absence of any evidence.

51. To show that there is an attachment by the Income Tax Department, the plaintiff has not summoned any relevant documents. As regards attachment in O.S. No.440/2005, it can only be after 1.1.2005. Therefore, the plea raised by the plaintiff that on 1.1.2005 the document could not be registered for the said reason, cannot at all be believed. To prove that the sale deed could not be registered for these reasons, the Sub Registrar has not been examined.

52. Admittedly, the plaintiff has not gone to the Sub Registry Office and there is no evidence to that effect. P.W.2 is the document writer who was examined to prove that the document could not be registered due to the attachment. His evidence is only to the effect that

he also went to the Sub Registry Office, but he has not stated that he has seen any attachment order.

53. The plaintiff has no case that he has given the money, viz. the balance sale consideration of Rs.46 Lakhs to the defendant on 1.1.2005. He has not proved anything to show that he has offered to pay such amount also and there is no independent or oral evidence to that effect. To show that he was ready with the money, he did not produce pass book of any bank or other details. What is stated is that he is the owner of two bars and therefore he has got the resources. To get a decree, he will have to prove that he was ready and willing and readiness is attributed to make available the funds. What is paid as on 1.1.2005, even going by the evidence of the plaintiff, is Rs.5 Lakhs alone. The evidence of the defendant will show that the said amount was remitted to Kilimanoor Agricultural and Rural Development Bank towards repayment of loan.

54. Learned Senior Counsel for the plaintiff submitted that the defendant had to clear all the dues, loans, etc. and to satisfy the plaintiff

about the same and he failed to do so. Going by Ext.A1, the provision therein is that the plaintiff will have to clear various dues out of the sale consideration of Rs.85 Lakhs. Ext.B3 is a consent letter executed by the defendant on 1.1.2005 enabling the plaintiff to obtain the original title deeds from Kilimanoor Agricultural and Rural Development Bank, after remitting the loan amounts and clearing the dues. The case of the defendant as D.W.1 is that the same was given to P.W.2, the document writer for handing over to the plaintiff. The document was marked when P.W.1 was cross examined and he also admitted that such a consent letter was given by the defendant. The admitted loan transaction is with the said bank and the case of the defendant is that he could not clear the debt for not transferring much funds by the plaintiff.

55. In the light of the above evidence, it can be seen that as on 1.1.2005, the defendant had signed the original document of sale deed prepared on the stamp paper produced by the plaintiff and was present in the Sub Registry Office. As rightly contended by the learned

counsel for the defendant, it shows the bonafides on the part of the defendant. The plaintiff failed to turn up to the Sub Registry Office with the required funds, which is clear from the evidence of P.W.2 and his evidence will also show that the plaintiff was not present with the money there, on that date. In the cross examination he stated that the plaintiff has not handed over any amount to him and the document was prepared in original in his office itself. As instructed by the plaintiff and defendant, Ext.B3 was also written in his handwriting in Motel Sanam on 1.1.2005. It was stated that the same had to be submitted to the Bank. As the document could not be executed, he returned back by 3 p.m. According to him, the plaintiff has given the amount to be remitted in the Bank on 1.1.2005. The said evidence will not show that the plaintiff was ready with the entire balance amount fixed as sale consideration in Ext.A2. The defendant, in his evidence has marked the receipt given by the bank for payment of Rs.5 Lakhs, Ext.B26. We cannot, therefore, obviously accept that it was due to the fault of the defendant that the document could not be registered and there is a

breach of contract on his part. The trial court was of the view in paragraph 25 that the plaintiff failed to prove that he was ready and willing to perform his part of the contract which is a necessary requisite for granting a decree for specific performance.

56. The defendant had also got a case that after the change of policy by the Government for giving classification for restaurant, the plaintiff did not give any importance for the said purpose and he thereafter formed a trust along with some of his relatives. Several documents have been produced by the defendant to show that for different purposes applications were being filed before the Government. Initially it was for starting a B.Ed. College and the true copy of the reply given by the Government that the application cannot be considered, has been produced as Ext.B8. Ext.B9 is the registered rent deed executed by the plaintiff for showing the building in the plaint schedule property for starting B.Ed. College. The said fact is also admitted by the plaintiff. It is the case of the defendant that for the purpose of B.Ed. College an international school was started in the

property and Ext.B10 series are the admission slips and counterfoils showing the admission slips relating to the students. Ext.B11 is a consent letter given by the Headmistress of RRVHS, Kilimanoor stating that the said school is prepared to provide facility for starting B.Ed. College. Ext.B12 is the copy of the letter issued from the Collegiate Education Department. It is the case of the defendant that later the plaintiff did not proceed with the matter as the sanction was not granted by the concerned authorities and Ext.B13 is produced to show that the fees paid by the students were returned back. Ext.B14 is the photo copy of the application for starting an Ayurveda College. It is stated that the original is with the plaintiff. Ext.B15 is the copy of the application for starting Dental College and Ext.B16 is the consent letter obtained from Karete Medical Centre. The subsequent communications have been produced as Ext.B17. Exts.B18 and B19 are produced to show that the defendant had obtained licence for starting beer parlour. Ext.B20 series are produced to show that steps were taken by the defendant to sell the property by giving newspaper

advertisements . Exts.B21 to B25 are sale deeds for purchase of nearby properties which according to the defendant, have been purchased for the purpose of starting educational institutions.

57. In the light of our finding that the plaintiff has failed to prove that he was ready with the money even as on 1.1.2005 for payment of balance amount to the defendant and as there is evidence to show that the defendant had executed the document on 1.1.2005, it cannot be said that there is breach on the part of the defendant. What is submitted by learned Senior Counsel Shri Dharmadan is that the defendant had to make available all the funds for clearing the dues. But evidently, going by the evidence of the parties, there was an agreement that the plaintiff will make available the funds for clearance of dues. This is clear from clause 8 of Ext.A2. It is provided therein that in case of any failure on the part of the defendant to fulfil various conditions for clearing liabilities, the plaintiff shall clear them by adjusting in the sale consideration and deposit the balance sale consideration in court and seek specific performance of the contract. If any excess amount is

paid, clause 9 allows him to realise it from the other assets of the defendant. The attachment referred to in Ext.A4, in the suit or any prohibitory order issued by the Income Tax Department, have not been proved to be there as on 1.1.2005. Ext.A4 will not prove that they were in force as on 1.1.2005. Ext.X1 will show that the plaintiff had claimed refund of the amount paid as stamp duty for purchase of stamp papers and the defendant had consented for the same also.

58. The further case of the defendant is that there was an agreement between the parties that the plaintiff will offer more amount in view of the escalation of price in the locality after the widening of National Highway. Of course, it is not covered by any written agreement between the parties. The time lag from the date of Ext.A2 till the date of suit is six years. Obviously, there will be an escalation of price in the locality.

59. We do not therefore find any reason to vary the finding of the trial court that the plaintiff has not proved that he was ready and

willing to proceed with the transaction.

60. Ext.B28 agreement was also accepted by the trial court in the light of the evidence of D.W.4. It authorised the defendant to sell the property. D.W.4's evidence is that plaintiff signed it before him. The plaintiff denied it but did not take steps to send the document for examination by an expert. The documentary evidence further produced will show that the initial purpose to have the classification from ITDC did not work out, and later the attempt was to have educational institutions which also could not materialise for want of sanction. These two were relied upon by the trial court to find against the plaintiff. In that view of the matter also, the plaintiff will not be entitled for specific performance of the agreement.

61. Two more points have been argued. The first one is relating to the maintainability of the cross objection and the next one is regarding the transfer in favour of additional respondents 2 and 3 and whether it is affected by the doctrine of lis pendens.

62. The argument raised by learned counsel for the appellant,

Shri M.R. Rajesh with regard to the maintainability of the cross objection is that in execution of the decree passed in the case the plaintiff has withdrawn the amount of Rs.39 Lakhs plus interest from the court below. As regards the balance amount covered by the decree, this Court had granted a stay on condition of furnishing security in tune with the direction issued by this Court. It is long thereafter that the cross objection has been filed. According to the learned counsel, a party who has availed the benefit of the decree, cannot then turn round and file a cross objection, on the principle that he cannot approbate and reprobate at the same time and also on the further principle that the plaintiff has acquiesced with the decree which is revealed from the filing of cheque application for getting the benefit of the decree and got released the amount of Rs.44,85,000/-.

63. It is submitted by learned Senior Counsel Shri Dharmadan that the cross objection was filed with a petition to condone the delay of 188 days and the delay has been condoned also as per the order in C.M.Appl. No.620/2011 dated 3.8.2011. It is further pointed out that

to the objection filed by the appellant as regards the maintainability of the cross objection, a reply has been filed by the cross objector. It is explained in the said affidavit that the withdrawal of amount deposited was based on wrong legal advice and if at all the amount is withdrawn, it will not affect the maintainability of the cross objection.

64. We find from the records that R.F.A. No.586/2010 was filed on 5.10.2009. When it came up for admission on 17.9.2010, an interim order of stay of execution was passed. After noticing the submission that Rs.39 Lakhs with interest was deposited before the court below, this Court granted an interim order as regards the disputed balance amount of Rs.21 Lakhs, on condition that the appellant will furnish security for a sum of Rs.25 Lakhs by way of Fixed Deposit with a nationalised bank. A certified copy of 'B' diary in E.P.No.67/2009 was made available by the learned Senior Counsel which will show that in the execution petition notice was ordered on 25.7.2009. On 6.7.2010 it was reported that the judgment debtor has deposited an amount of Rs.44,85,000/-. The copy of the execution

petition has been produced as Annexure R3(a) along with the counter affidavit filed by additional third respondent. Annexure R3(c) is the copy of the cheque application filed by the cross objector for withdrawing the amount of Rs.44,85,000/-. It is stated in the counter affidavit in paragraph 4 that the property was purchased by the additional third respondent only thereafter, viz. on 17.1.2011.

65. Both sides relied upon various decisions. In **M/s. Govindji Jevat and Co. v. Shree Saraswati Mills Ltd.** (AIR 1982 Bombay 76) the principle of estoppel under Section 115 of the Evidence Act was considered. The view taken therein is that a party accepting payment under an Arbitration Award, is estopped from challenging the award.

61. The next decision is **Krishnan Nair Sreedharan Nair v. Oommoommen Abraham** (AIR 1984 Kerala 164). The principle that a party cannot approbate and reprobate was considered, while examining the principle of estoppel under Section 115 of the Evidence Act. That was a case in which in a suit for eviction the validity of the notice terminating the tenancy was the issue. It was contended that the

appellant is estopped from raising a contention with regard to the validity of the notice in view of his contention on the same issue in a former suit for eviction. While examining the question, this Court relied upon the decision of the Andhra Pradesh High Court in **Amritlal N. Shah v. Alla Annapurnamma** (AIR 1959 A.P.9) and that of this Court in **Devaki v. Rama Panicker** (1979 KLT 48 (SN) and **Ranga Pai v. Special Tahsildar (LR), Vypeen** (1983 KLN 9). In both these cases the doctrine of estoppel was relied upon in different circumstances. The learned Judge, in paragraph 7 held that “the tenant having obtained an advantage on the representation so made cannot now turn round and take up an inconsistent position or cannot blow hot and cold or play fast and loose stating that the termination should be on the 8th and that he can be asked to vacate only on the 9th of the month.” In **Devaki's case** (1979 KLT 48 (SN), the principle adopted by this Court is the following:

“....A party litigant cannot be permitted to assume inconsistent position in court, to play fast and loose, to blow hot and cold, to approbate and reprobate to the detriment of his opponent.

This doctrine applies not only to successive stages of the same suit but also another suit than the one in which the position was taken up provided that “the second suit grows out of the judgment in the first.”

Therein, the party claimed initially that she was a tenant under the Rent Control Act. In the later stage of the execution petition, she claimed tenancy of the whole property under the Land Reforms Act.

66. Shri Mohan Jacob George, learned counsel appearing for additional respondents 2 and 3 relied upon a decision of Patna High Court in **Gokul Prasad v. State of Bihar and others** (2008 KHC 8033). He also relied upon a decision of the Apex Court in **Kumud Kumar v. Central Bank of India and another** {(2000) 9 SCC 244}.

67. In the decision of the Apex Court quoted above, the facts show that the appellant filed a suit for possession, damages as well as mesne profits which was decreed. An appeal was filed by the tenant and during the hearing it was found that the landlady had not terminated the tenancy by giving notice under Section 106 of the Transfer of Property Act and the appeal was allowed, against which the landlady approached

the Apex Court. In fact, after the judgment of the High Court, the landlady terminated the tenancy by giving notice under Section 106 of the T.P. Act and a fresh suit for possession and mesne profits was filed which was decreed and the tenant thereafter handed over possession of the premises and deposited the mesne profits at the rate of Rs.5,000/- per month which was withdrawn by the landlady. The Apex Court considered the matter and held that it will be an abuse of the process of the court to prosecute the pending appeal. It was held in paragraph 3 as follows:

“If we permit the appellant to prosecute this appeal, it would amount to abuse of the process of the court. It is almost settled that a litigant cannot be allowed to prosecute two remedies simultaneously. Moreover we find that the appellant has acquiesced to the order of the High Court by giving notice under Section 106 of the Transfer of Property Act and thereafter filing a suit for ejectment of the tenant.”

Even though it was argued by the learned Senior Counsel for the plaintiff that it was on a wrong legal advice the execution petition was filed, we cannot readily accept the said plea. The execution petition

was filed and it was proceeded with also and after deposit of the amount of Rs.39 Lakhs with interest, the said amount was withdrawn by filing cheque application by the party. The cheque application and affidavit are filed by the cross objector himself, as evident from Annexure R3(c). Therefore, it cannot be said that he was not aware of the details of the execution steps. It is after all these, the cross objection has been filed on 7.4.2011. It is evident that he has acquiesced with the decree as he has withdrawn the amount. Now he is seeking a larger relief after withdrawing the amount also. It is evident that the party cannot approbate and reprobate at the same time.

68. As far as the question whether the transfer in favour of the third respondent is affected by the doctrine of lis pendens, Shri Mohan Jacob George, learned counsel for the third respondent relied upon a judgment of a learned Single Judge of this Court in **Litty v. Vasu** (2013 (1) KLT 669). From paragraph 18 onwards of the said judgment, the learned Judge has considered the legal issues. That was a case in which an appeal, even though was dismissed for default and a transfer of the

property was made after the time prescribed to apply for re-admission of the appeal, it was held in paragraph 35 that “when the time prescribed by the Act for filing an application for restoration of the suit/appeal dismissed for default or for preferring an appeal has expired, then during the time thereafter and until the suit/appeal is re-admitted or an appeal is admitted after condoning the delay, the *lis* cannot be said to be 'pending' so that any transaction entered into in the meantime is hit by S.52 of the Act.” Various authorities have been discussed by the learned Judge.

69. Shri Dharmadan, learned Senior Counsel relied upon the decision of a learned Single Judge of Bombay High Court in **Krishnaji Pandharinath v. Anusayabai** (AIR 1959 Bombay 475) wherein the view taken is that transfer after dismissal of suit under Order 9 Rule 2 and before its restoration is *pendente lite*. In fact, this Court in **Litty's case** (2013 (1)KLT 669) has referred to the said judgment in paragraph 26. It was noted by this Court that “if the transfer was made within the time plaintiff could have as of right brought an application for

restoration of the suit which was dismissed for non-payment of process fee, such transfer is hit by Section 52 of the T.P. Act since it could be said that the transfer was made during the pendency of the *lis*.”

70. As far as the position herein is concerned, the cross objection itself is filed with a petition to condone delay, on 7.4.2011. In execution the cheque application was filed on 23.7.2010. The property was purchased on 17.1.2011. Therefore, in the light of the principles stated by this Court in **Litty's case** (supra), the transfer will not be hit by the doctrine of *lis pendens*.

71. Learned Senior Counsel relied upon the following decisions to contend for the position that as far as the relief of specific performance is concerned, if it is found that the plaintiff was ready and willing he is entitled for a decree:

“Videocon Properties Ltd. v. Dr. Bhalchandra Laboratories and others {(2004) 3 SCC 711}, Silvey and others v. Arun Varghese and another (AIR 2008 SC 1568), Thomson Press (India) Ltd. v. Nanak Builders and Investors P. Ltd. (AIR 2013 SC 2389), Biswanath Ghosh (Dead) by Lrs. and others v. Gobinda Ghosh alias Gobindha Chandra Ghosh and

others (AIR 2014 SC 1582), **Zarina Siddiqui v. A. Ramalingam alias R. Amarnathan** (AIR 2015 SC 580), **K. Prakash v. B.R. Sampath Kumar** (AIR 2015 SC 9) and **Faizal Eroth v. Venkalath Raveendran** (2013 (3) KLT 1041).

The principles regarding grant of relief of specific performance have been settled in various decisions. We have examined various details in the light of the evidence in this case also and found that even as on 1.1.2005 when Ext.A5 was executed by the defendant, the plaintiff has not proved the necessary ingredients required under Section 16(c) of the Specific Relief Act, viz. readiness and willingness. We have also held that the relief of specific performance sought is barred by limitation. Therefore, we need not go elaborately into the said decisions.

Hence, R.F.A. No.586/2010 is allowed and the decree granted by the court below will stand modified and we hold that the plaintiff will be entitled to realise from the defendant an amount of Rs.39 Lakhs with interest at the rate of 6% per annum from the date of suit till realisation and from his assets and by charging the plaint schedule

property. The decree granted for a total sum of Rs.60 Lakhs is thus set aside. Cross Objection No.24/2011 is dismissed. The parties will suffer their costs in the appeal and Cross Objection.

(T.R. RAMACHANDRAN NAIR, JUDGE.)

(K.P. JYOTHINDRANATH, JUDGE.)

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