

THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.02.2015

CORAM:

THE HONOURABLE MR.JUSTICE S.NAGAMUTHU

Second Appeal No.642 of 2014

and

M.P.No.1 of 2014

The Tamil Nadu Small Industries Development Corporation Ltd.,

Rep by its Chairman and Managing Director,

Having office at No.5,

Greens Road, Chennai - 600 006.

.. Appellant/Defendant

- Vs -

P.Kalavathy Sukumar

.. Respondent/Plaintiff

Prayer:- Second Appeal filed under Section 100 of C.P.C., against the Judgment and Decree dated 09.11.2010, made in A.S.No.66 of 2009 on the file of the learned Subordinate Judge, Poonamallee confirming the Judgment and Decree dated 13.04.2009, made in O.S.No.95 of 2004 on the file of the learned District Munsif, Ambattur.

For Appellants : Mr.N.R.Chandran
SC for Mr.S.Yashwanth

For Respondent : Mr.R.Subramaniam
for Mr.B.Vijay.

J U D G M E N T

The defendant in O.S.No.295 of 1996 on the file of the learned District Munsif, Ambattur is the appellant herein. This suit was originally filed before the Subordinate Court, Poonamallee on 22.04.1996 and numbered as O.S.No.295 of 1996. Then, after the change in the pecuniary jurisdiction, the suit was transferred to the learned District Munsif, Ambattur and accordingly the same was renumbered as O.S.No.95 of 2004. The respondent herein is the sole plaintiff in the said suit. The said suit was filed for specific performance of contract seeking a direction to the defendant to execute a sale deed relating to the Shed bearing No.L-16 at Ambattur Industrial Estate, Ambattur in the name of the plaintiff. The suit was resisted by the appellant herein (defendant in the suit). The learned District Munsif, Ambattur by decree and judgment dated 13.04.2009, decreed the suit as prayed for. As against the same, the appellant herein filed an appeal in A.S.No.66 of 2009 and by decree and judgment dated 09.11.2010, the lower

appellate Court dismissed the appeal thereby confirming the decree and judgment of the trial Court. As against the same the appellant is before this Court with this second appeal.

2. This second appeal was presented on 13.12.2012, with a delay of 660 days. Seeking to condone the said delay, the appellant herein filed M.P.No.1 of 2013 in S.A.(SR)No.106476 of 2012 and notice was ordered in the said petition to the respondent and accordingly the respondent made appearance. The delay was condoned by an order dated 05.06.2014, and thereafter the second appeal came up for admission. The learned counsel for the respondent continued to appear in the second appeal. The matter was listed for admission on 23.06.2014, 30.06.2014, 02.07.2014, 04.07.2014, 08.07.2014, 16.07.2014, 21.07.2014, 22.07.2014, 07.08.2014, 13.08.2014, 27.08.2014, 03.09.2014, 10.09.2014, 15.09.2014, 17.09.2014, 19.09.2014, 23.09.2014, 13.10.2014, 30.10.2014, 11.11.2014, 25.11.2014, 05.12.2014, 06.01.2015, 20.01.2015, 22.01.2015, 29.01.2015, 30.01.2015, 03.02.2015. The matter stood adjourned at the request of the counsel. When it lastly came up for hearing on 05.02.2015, the learned counsel on either side submitted that records be called for and the appeal be heard finally. The records have been now received by this Court.

3. Today the matter has come up for admission and for final hearing. I have heard the learned senior counsel appearing for the appellant and the learned counsel appearing for the respondent and also perused the records carefully.

4. The case of the plaintiff in brief is as follows:
The plaintiff is one Mrs.P.Kalavathy Sukumar, describing herself as the Proprietrix of a proprietary concern known as "M/s Gitkara Products". The subject matter of the suit is a shed bearing No.L-16 at the Industrial Estate, Ambattur. The said shed was originally allotted by the appellant, the "Tamil Nadu Small Industries Development Corporation Limited", to one Mr.Dikshitalu, the proprietor of M/s Gitkara Products in the year 1972 on a rental scheme. Mr.Dikshitalu, due to loss in the business, took one Mr.Elumalai as a partner under the same name and style and conducted the business. The said partnership was later on dissolved on 18.10.1982, as Mr.Elumalai retired from the partnership. Thereafter, Mr.Dikshitalu took Mrs.P.Kalavathi Sukumar-the respondent herein and one Mr.P.Vijayaraghavalu Chetty as partners under a partnership deed dated 27.10.1982. The business was continued in the subject shed in the same name and style. While so, the defendant issued a letter dated 20.09.1982, offering the land and building on lease cum sale basis. The provisional cost of the land and building was fixed at Rs.46,817/- and the plaintiff was asked to pay a sum of Rs.9,364/- being 20% of the above cost. The partnership firm accepted the terms and conditions and paid the amount. Thereafter, the defendant was informed about the above change in the Constitution by letter dated 01.12.1982. A reply was sent by the defendant on 10.01.1983 (Ex.A12) requiring the partnership firm to furnish certain particulars, individual declaration, certificates etc., The

partnership firm complied with the same under letter dated 22.01.1983. Later on, the defendant issued yet another letter bearing No.47367/M3/82, dated 30.06.1983 again reiterating the same terms and conditions for the lease cum sale. Until this stage, there was no dispute between the parties.

5. Thereafter, the defendant sent a letter under reference No.5977/M3/85, dated 30.07.1985 (Ex.A24) informing the plaintiff that the cost of the land and building had been fixed at Rs.1,42,815/- including interest up to 30.09.1985 and further declaring that the balance of amount, after adjusting the sums already paid, should be paid in one lump sum on or before 30.09.1985, to consider the approval of change in constitution and to revoke the cancellation of allotment already issued and if the amount was not paid before 30.09.1985 further action would be taken to resume the shed. The plaintiff's partnership firm was aggrieved over the same and therefore a suit was filed in O.S.No.8195 of 1985 before the learned VIII Assistant Judge, City Civil Court, Chennai by M/s Gitkara Products represented by its partner Mrs.P.Kalavathy Sukumar. In that suit, the authority of the appellant herein to demand such a huge amount for the purpose of recognizing the re-constitution of the partnership firm was challenged. The prayer in the suit was for a declaration that the defendant (appellant herein) has no manner of right to increase the cost of the shed L-16 in Industrial Estate, Ambattur and make a demand on the plaintiff contrary to the terms of the allotment letter No.5977/M3/85, dated 30.07.1985 and for subsequent relief of injunction restraining the defendant from dispossessing the plaintiff. But unfortunately the appellant herein remained ex parte in the suit. Finally the learned Judge passed an ex parte decree dated 23.06.1986, and thus decreed the suit as prayed for.

6. Subsequently, the plaintiff herein filed I.A.No.12875 of 1990 in O.S.No.8195 of 1985 seeking to amend the decree in O.S.No.8195 of 1985 to correct the letter number as letter No.5977/M3/85, dated 30.07.1985 instead of letter No.47367/M3/82 dated 30.06.1983. Even in the said I.A. the respondent herein remained ex parte. Therefore, I.A.No.12875 of 1990 was allowed and the decree was accordingly amended by an order dated 08.10.1990.

7. Subsequently, the plaintiff herein filed the present suit for specific performance on 22.04.1996. In this suit it is contended that though the entire amount as demanded as per original agreement of lease cum sale was paid even in the year 1985 itself, sale deed was not executed by the appellant herein for one reason or the other. The appellant was evasive in executing the sale deed in favour of the plaintiff. It was also contended that the appellant, for no valid reason, has been evasive in performing his part of the contract.

8. In the present suit, the defendant/appellant herein made appearance and filed a written statement. In the written statement it is admitted that the original allotment order on lease basis was issued to Mr.Dikshitalu who was the sole proprietor of M/s.Gitkara

Products in the year 1972. It is also admitted that subsequently it was converted as a lease cum sale and accordingly a new contract was entered into. It is further contended that Mr.Dikshitalu failed to pay the balance of dues and therefore the contract between Mr.Dikshitalu and the defendant came to an end. It is also contended that the present plaintiff Mrs.P.Kalavathy Sukumar was not a party to the contract and therefore she is not entitled to enforce the agreement between Mr.Dikshitalu and the defendant. So far as the change in the Constitution of the partnership firm is concerned, the appellant disowns knowledge. It is further stated in paragraph 5 of the written statement that the plaintiff has to pay a sum of Rs.1,42,815/- with subsequent interest from 01.10.1985 or the present cost of land and building whichever is higher and enter into a fresh agreement with the defendant and in such an event, the defendant will execute the sale deed as per the Corporation Rules and Regulations. So far as the suit in O.S.No.8195 of 1985 is concerned, it is stated that opinion was given by their counsel that there is no need to file a petition to set aside the ex parte decree, and so no such steps were taken. Thus, according to the defendant the suit is liable to be dismissed.

9. Based on the above pleadings, the trial Court framed appropriate issues. On the side of the plaintiff one witness namely the plaintiff's husband Mr.B.Sukumar was examined as P.W.1 and on the side of the defendant one Mr.N.Mani, the superintendent of TANSIDCO was examined as D.W.1. As many as 25 documents were marked on the side of the plaintiff and no document was marked on the side of the defendant. Having considered all the above, the trial Court decreed the suit which was confirmed by the lower appellate Court and that is how the appellant is before this Court with this second appeal.

10. I have heard the learned counsel appearing on either side and also perused the records carefully.

11. The learned senior counsel appearing for the appellant would submit that among other grounds, four grounds, according to him, constitute substantial questions of law. According to him, the suit is barred by limitation, since it was not filed within three years from the date of letter dated 30.07.1985 in Ex.A24 by which, the defendant had refused to perform his part of contract. The second legal argument advanced by the learned senior counsel appearing for the appellant is that the suit is barred by Order 2 Rule 2 of the Code of Civil Procedure, since the plaintiff had cause of action for filing a suit for specific performance even in the year 1985 itself when he filed the earlier suit in O.S.No.8195 of 1985. The third legal argument advanced by the learned senior counsel appearing for the appellant is that the Courts below have proceeded on the wrong footing that in a suit for specific performance granting a decree for specific performance is automatic. He would further submit that the price of the land has escalated many fold and therefore at this length of time the decree for specific performance ought not to have been granted. The

learned senior counsel further submitted that the present suit has been filed by Mrs.P.Kalavathy Sukumar as the proprietor of M/s Gitkara Products with whom there was no privity of contract at all. The learned senior counsel further submitted that it is not true that the full amount representing the cost of the property was paid by the plaintiff. According to him, the full cost would denote the enhanced amount as demanded in Ex.A24 dated 30.07.1985. Since the enhanced amount has not been paid as per Ex.A24, it cannot be stated that the full amount of the property has been paid by the plaintiff and thus the plaintiff has not performed her part of the contract.

12. Having considered the above submissions and having gone through the records, I find that the following substantial questions of law have arisen for consideration in this second appeal viz.,

- (i) Whether the suit is barred by limitation ?
- (ii) Whether the suit is barred by Order 2 Rule 2 of the Code of Civil Procedure ?
- (iii) Whether the Courts below were right in decreeing the suit as if granting decree for specific performance (as contended by the appellant) is automatic ?

13. The learned senior counsel appearing for the appellant advanced arguments elaborately by taking me through evidence both oral and documentary.

14. Countering the above contentions, the learned counsel appearing for the respondent would submit that the suit is not barred by limitation at all. According to him, as per Article 54 of the Limitation Act, the period of limitation for institution of a suit for specific performance is three years from the date of notice of refusal. In this case, the letter under Ex.A24 does not indicate any refusal on the part of the appellant. He would further submit that there was no pleading at all made in the written statement to the fact that the suit is barred by limitation. According to him, the commencement of the period of limitation is a question of fact depending upon the intention of the parties. He would further submit that the intention is a matter to be pleaded and gathered from evidence. In this case, whether there was any refusal, either impliedly or expressly, is primarily a question of fact and unless there is a specific pleading on the same, according to the learned counsel for the respondent, it cannot be contended that the suit is barred by limitation. At any rate, according to the learned counsel for the respondent, since the plea of limitation has not been taken in the written statement, it is not open for the appellant to take such a plea for the very first time before this Court. He would also point out that the plea of limitation was not even argued before the Courts below.

15. So far as the argument on Order 2 Rule 2 is concerned, the learned counsel for the respondent would submit that in the instant case, in the letter dated 30.07.1985 (Ex.A24) there is no indication at all that the defendant had either expressly or impliedly refused to perform his part of contract. Thus, according to him, in the year 1985, after receipt of the letter dated 30.07.1985, there was no cause of action for the plaintiff to file a suit for specific performance. The cause of action which arose in letter dated 30.07.1985, was only in respect of re-fixation of the land cost and therefore according to him, the plea that the present suit is barred by Order 2 Rule 2 of the Code of Civil Procedure is not all tenable. Further, according to him, there is no pleading that the suit is barred by Order 2 Rule 2 C.P.C.

16. The learned counsel for the respondent would further submit that so far as the third substantial question of law is concerned, in the instant case, the Courts below have not granted the decree for specific performance in a mechanical fashion or automatically. The Courts below have taken into consideration the fact that the land was allotted as early as in the year 1972. Lease cum sale agreement was entered into in the year 1983 and the entire cost was paid in the year 1985 itself. Admittedly, it was only thereafter, Ex.A24 was issued on 30.07.1985, demanding more money and that was set aside by the Court in the earlier suit and even thereafter, it was only the defendant who has not come forward to perform his part of contract. It is not as though the plaintiff was in any manner responsible for the delay caused. The learned counsel would further submit that it is not as though only a meager part of the sale consideration was paid and therefore at this length of time, going by the escalation of price, the specific performance decree cannot be granted. Since the entire amount was paid in the year 1985 itself and that delay was caused only by the defendant, it is not open for the defendant to now contend that the decree for specific performance cannot be granted.

17. So far as the amount due from the plaintiff is concerned, the learned counsel would contend that as per the original lease cum sale agreement, whatever was the amount which was fixed was paid in its entirety which is not disputed. The learned counsel would further submit that the enhanced amount under letter dated 30.07.1985 has been set aside by the Court. Therefore, according to the learned counsel appearing for the respondent, the contention of the appellant that some more amount is due from the plaintiff is not correct.

18. Regarding the last contention of the learned senior counsel appearing for the appellant that there is no privity of contract between the appellant herein and the respondent, the learned counsel appearing for the respondent would submit that the partnership between the Mr.Dikshitalu and the plaintiff was dissolved. Thereafter, as per the provisions of the Partnership Act, the plaintiff herein has become the absolute owner and the same has not been denied by the appellant at any point of time before the Courts below. The learned counsel for the respondent

would further point out that the earlier suit in O.S.No.8195 of 1985 was filed by the partnership firm and now it is filed by the plaintiff herein in her independent capacity because of the dissolution of the partnership firm. Having not denied the dissolution of the partnership firm, according to the learned counsel, it is not open for the appellant to raise such a new plea during the course of arguments in this second appeal.

19. The learned counsel for the respondent would submit that all the other questions are only on facts which have been duly considered by two Courts below and therefore they do not warrant any interference at the hands of this Court. In crux, the contention of the learned counsel for the respondent is that the decree and judgment of the Courts below does not require any interference at the hands of this Court.

20. I have considered the above submissions.

21. So far as the question of limitation is concerned, it is the contention of the learned senior counsel appearing for the appellant that the suit was not filed within three years from the date of notice of refusal. As per Article 54 of the Limitation Act, for filing a suit for specific performance of a contract, the period of limitation is three years which shall commence from the date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused. The learned senior counsel appearing for the appellant would submit that such refusal need not be express as it can be even implied. In other words, according to him, such refusal may be either in writing or oral or by the conduct of the defendant. But the fact remains that as required under Article 54 of the Limitation Act, such refusal, whether implied or express, should be brought to the notice of the other party viz., the plaintiff. In the instant case, whether there was any such refusal on the part of the appellant and whether such refusal was brought to the notice of the plaintiff need to be examined. The contention of the learned senior counsel appearing for the appellant is that the letter dated 30.07.1985 would clearly go to show that there was refusal. He would further submit that a perusal of the plaint in O.S.No.8195 of 1985 would also go to show the same. I have carefully gone through these two documents. Absolutely, I find no material, even remotely, to infer that there was such refusal on the part of the appellant to perform his part of contract.

22. As rightly contended by the learned counsel for the respondent, the plea of limitation was never taken in the written statement. I am conscious of the legal position that the question of limitation, being a legal question, can be raised at any stage even though the same has not been raised specifically in the written statement. But, at the same time, in the instant case, the starting point of period of limitation has to be proved only by the defendant. It is essentially a question of fact as the starting point of period of limitation is a matter of inference based on the intention of the parties. The intention of the parties in turn,

can be gathered only from the evidence under Section 5 of the Evidence Act, evidence can be admitted only in respect of a fact in issue or a relevant fact. Thus, first of all, the fact regarding the commencement of period of limitation and that the suit is barred by limitation are to be put at issue by the defendant by necessary pleading. In other words, in this case, the question of limitation is not a pure question of law, but it is a mixed question of law and fact. So, in the instant case, in my considered opinion, in order to come to the right conclusion as to when did the period of limitation commence, since the same being a question of fact, there should have been a specific pleading in the written statement. In a case where there is no dispute regarding the date of commencement of the period of limitation, even in the absence of any plea of limitation, it can be canvassed at any stage as it is a pure question of law. But here in this case, as I have already pointed out that there is a dispute regarding the actual date of commencement of the period of limitation which is based on the date of refusal and notice of the same to the plaintiff. I have already held that it is a mixed question of facts and law which should have been pleaded and therefore, I hold that it is not open for the defendant for the first time to canvass bar on the ground of period of limitation before this Court at the second appeal stage. That apart, there is no evidence that there was refusal on 30.07.1985 and so, I have to hold that the period of limitation did not commence on 30.07.1985. Therefore, the first substantial question of law that the suit is barred by limitation is rejected.

23. Next, the learned senior counsel would contend that the suit is barred by Order 2 Rule 2 of the Code of Civil Procedure. In order to apply Order 2 Rule 2 of the Code of Civil Procedure, it is settled law that when the earlier suit was filed by the plaintiff, there should have been the cause of action for filing the suit for specific performance as well. If there was such a cause of action for specific performance, if plaintiff, for his own reasons, had failed to file the suit for specific performance at the earliest opportunity and instead, if he had chosen to file a different suit for a different relief, then as pointed out by the learned senior counsel, the plaintiff will be barred from filing a suit for specific performance. This legal bar emanates from Order 2 Rule 2 of the Code of Civil Procedure. In order to apply this Rule, it is to be seen as to whether in the first instance, the plaintiff had cause of action in the year 1985 to file a suit for specific performance. The contention of the learned senior counsel for the appellant is that a reading of Ex.A24 and plaint in O.S.No.8195 of 1985 would go to show that there was cause of action. As I have already pointed out, these two documents do not indicate any refusal on the part of the appellant to perform his part of the contract. Instead, all that was stated in the said notice dated 30.07.1985 was a demand to pay additional amount towards the cost. Thus, the cause of action arising out of the letter was only relating to additional amount. There is no indication that there was refusal on the part of the defendant. Even after the decree in O.S.No.8195 of 1985, there was no other correspondence indicating, either expressly or impliedly, to the

plaintiff that the defendant had refused to perform his part of the contract. Thus, I do not find that there was any cause of action for the plaintiff to file a suit for specific performance in the year 1985. Above all, this plea was also not taken in the written statement. Since for the first time, such a plea is taken, I have no doubt in my mind that such a plea is not available for the appellant to raise at this stage. In this context, it would be relevant to refer to the Constitution Bench judgment of the Hon'ble Supreme Court in Gurbux Singh Vs. Bhooralal reported in AIR 1964 SC 1810 where in paragraph 6 it has been held as follows:

"6. In order that a plea of a bar under O. 2. r. 2(3), Civil Procedure Code should succeed the defendant who raises the plea must make out (1) that the second suit was in respect of the same cause of action as that on which the previous suit was based, (2) that in respect of that cause of action the plaintiff was entitled to more than one relief, (3) that being thus entitled to more than one relief the plaintiff, without leave obtained from the Court, omitted to sue for the relief for which the second suit had been filed. From this analysis it would be seen that the defendant would have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed, for unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the later suit is based there would be no scope for the application of the bar. No doubt, a relief which is sought in a plaint could ordinarily be traceable to a particular cause of action but this might, by no means, be the universal rule. As the plea is a technical bar it has to be established satisfactorily and cannot be presumed merely on basis of inferential reasoning. It is for this reason that we consider that a plea of a bar under O. 2. r. 2, Civil Procedure Code can be established only if the defendant files in evidence the pleadings in the previous suit and thereby proves to the Court the identity of the cause of action in the two suits."

24. From the above judgment, it is crystal clear that the bar under Order 2 Rule 2 should be specifically pleaded and that it should be proved that the plaintiff had cause of action to file a suit for specific performance at the time when she filed the earlier suit. In this case, admittedly, the appellant has not made any such plea in his written statement and so, such a plea which is taken for the first time is liable to be rejected.

25. Assuming that such plea can be taken at this stage, in the instant case, as I have already held, the bar under Order 2 Rule 2 is not applicable to the facts of the present case because in the

year 1985 when the plaintiff filed the suit in O.S.No.8195 of 1985, there was no cause of action to file a suit for specific performance. Therefore, the second question of law is also answered against the appellant.

26. The third question of law framed is as to whether the Courts below were right in decreeing the suit thereby granting the decree for specific performance without regard to the change of circumstances. Regarding the legal position, I agree that in a suit for specific performance, granting of decree for specific performance is not automatic is well settled. But, at the same time, it is also the law that not in every case where there is escalation of price that a decree for specific performance should be denied. It all depends upon the facts and circumstances of each case. As rightly contended by the learned counsel, there are cases where a meager amount would have been paid towards the sale consideration and due to long lapse of time, there may be escalation of price, in such a case, the Court would decline to grant a decree for specific performance. There are also cases where for the delay, if the plaintiff is held responsible, either in full or in part, the Courts have declined to grant a decree for specific performance. But, in the instant case, for the delay of nearly about 30 years, the plaintiff is not at all responsible. As rightly pointed out by the learned counsel for the respondent the entire sale consideration was paid even in the year 1985 itself. What was demanded in the year 1985 was additional amount to recognize the reconstitution of the partnership firm. That was set aside by the Court in O.S.No.8195 of 1985. It cannot be concluded that the full amount was not paid, therefore, when there is a delay of more than two decades and when the plaintiff is in no way responsible for the delay, though there is escalation of price manifold, that cannot be a ground to deny a decree for specific performance. I find that the Courts below have not granted the decree in a mechanical fashion or in an automatic fashion as contended by the appellant. After having considered all the factual aspects and after considering the evidence scrupulously, the Courts below have rightly come to the conclusion that the decree for specific performance should be granted and accordingly they have granted, in which, I do not find any infirmity. Thus, the third substantial question of law is also answered against the appellant.

27. The learned senior counsel appearing for the appellant would nextly contend that the full amount in this case would mean the amount demanded in Ex.A24 and not the amount fixed originally in the lease cum sale agreement. I find it very difficult to accept the said contention in view of the decree passed in O.S.No.8195 of 1985. As I have already pointed out, the said suit has been filed challenging the demand of enhanced cost in Ex.A24. The said suit was decreed ex parte. The learned senior counsel would submit that the decree was only not to demand any amount more than the amount as per the letter dated 30.06.1983. The learned senior counsel would submit that subsequently the decree was amended as per the order dated 08.10.1990, by which only, it was

amended as letter No.5977/M3/85, dated 30.07.1985. The learned senior counsel would submit that therefore, the said decree which was originally against the letter dated 30.06.1983, cannot be construed that the plaintiff is liable to pay only the original amount. The learned counsel for the respondent would submit that the amendment of the decree was also made after issuing notice to the defendant herein. He would further point out that subsequently a petition was also filed by the respondent before the lower Court seeking to set aside the ex parte decree. There was a delay in filing the said petition. The said petition was allowed on condition to pay a sum of Rs.75/- as cost, but the same was also not paid. Therefore, the I.A. was dismissed as cost was not paid. As against the same, the appellant took up the matter on appeal and filed a C.M.P. to condone the delay of 835 days in filing the appeal, but, the same was also dismissed. According to the learned counsel for the respondent, it is not open for the defendant, to plead that the full amount means the amount demanded in the letter dated 30.07.1985. I find every justification in the said contention of the learned counsel for the respondent.

28. I do not understand as to why, being a public organization, the defendant remained ex parte in the suit, remained ex parte in the petition filed to amend the plaint, and why the defendant failed to pay the cost when the Court passed the conditional order to allow the petition to set aside the ex parte decree. It is not explained as to why the defendant took more than 835 days to file the petition to set aside the ex parte decree. All these facts would go to show that the defendant was not vigilant in pursuing the matter at every stage. Even in the present appeal pleadings, no plea of limitation, no plea on Order 2 Rule 2 of C.P.C. or any other plea worth considering has been raised. All these points, I have dealt with herein were developed now during the course of arguments by the learned senior counsel for the appellant. This is really unfortunate.

29. The learned senior counsel would nextly contend that this suit has been filed by Mrs.P.Kalavathy Sukumar (the plaintiff) as the proprietrix of Gitkara Products with whom there is no privity of contract. The learned counsel for the respondent would submit that this argument is not available for the learned senior counsel appearing for the appellant in view of the decree in O.S.No.8195 of 1985 and the subsequent conduct of the appellant. Though it is true that originally the lease cum sale agreement was between Mr.Dikshitalu and the appellant/defendant, but subsequently when the partnership was sought to be introduced, the defendant also agreed with the same and demanded for production of certain documents like declaration etc., and such particulars were submitted, it is in evidence. Subsequently, the letter dated 30.07.1985, was sent demanding more amount for the purpose of recognizing the partnership. It is true that as of now there is no order recognizing the partnership, but the suit in O.S.No.8195 of 1985 was filed by the partnership firm and decree is in favour of the partnership firm. Further, subsequent communications would also go to show that the partnership has been recognized by the

defendant. Therefore, the contention of the learned senior counsel for the appellant that there was no privity of contract between the partnership and the defendant cannot be accepted. It is in evidence that the new partnership was dissolved between the present plaintiff and Mr.Dikshitalu. As per the Partnership Act, as rightly contended by the learned counsel for the respondent, the plaintiff has acquired all the rights of the partnership and therefore there is privity of contract between the plaintiff and the defendant and therefore the suit filed by her in the present form is certainly maintainable.

30. In view of all the above, I answer all the substantial questions of law against the appellant and I also hold that there is no merit at all in this appeal, even on facts.

31. In the result, the appeal fails and the same is accordingly dismissed. Consequently, the connected miscellaneous petition is closed. No costs.

Sd/-
Assistant Registrar

//True Copy//
Sub Assistant Registrar

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To

1. The Subordinate Judge,
Poonamallee.
2. The District Munsif,
Ambattur.
3. The Head Clerk,
V.R. Section,
High Court, Madras.

+ 3 ccs to Mr.B. Vijay, Advocate Sr.7531
+ 1 cc to Mr.S. Yashwanth, Advocate Sr.7485

S.A.No.642 of 2014
and M.P.No.1 of 2014

JSV(CO)
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