

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 20.04.2016

Delivered on : 11.05.2016

CORAM

THE HONOURABLE MR. JUSTICE P.R.SHIVAKUMAR

S.A.Nos.125 and 126 of 2006

and C.M.P.Nos.2051 and 2052 of 2016

S.A.No.125 of 2006

A. Madurai gramani (died)

1. Pappathy Ammal
2. M.Neelakandan
3. M.Thirugnana Moorthy
4. P.Devadha
5. G.Parvathi
6. M.Veeramoorthy
7. M.Shanmugam ... Appellants/Plaintiff
(cause title accepted vide order of
Court dated 09.11.2005 made in
C.M.P.No.17533 of 2005 and 17534 of 2005)

-vs-

1. P.C.Venkatesan (Deceased)
2. Baby Ammal
3. Vijayalakshmi
4. Meena
5. Kamalakannan
6. Logaian
7. Rajaram .. Respondents/Defendants

(Respondents 2 to 7 brought on record as Lrs of
deceased R1 vide order of Court 10.06.2015 in
C.M.P.No.867 of 2013 in S.A.No.125 of 2006

S.A.No.126 of 2006

A. Madurai gramani (died)

1. Pappathy Ammal
2. M.Neelakandan
3. M.Thirugnana Moorthy
4. P.Devadha
5. G.Parvathi

6. M.Veeramoorthy
7. M.Shanmugam .. Appellants/Plaintiffs
(cause title accepted vide order of
Court dated 09.11.2005 made in
C.M.P.No.17533 of 2005 and 17534 of 2005)

-vs-

1. P.C. Venkatesan (Deceased)
2. Rajagopal
3. Venugopal
4. Loganathan
5. Baby Ammal
6. Vijayalakshmi
7. Meena
8. Kamalakannan
9. Logaian
10. Rajaram ... Respondents

(Respondents 5 to 10 brought on record as Lrs of
deceased R1 vide order of Court 10.06.2015 in
C.M.P.No.867 of 2013 in S.A.No.126 of 2006)

Prayer in S.A.Nos.125 and 126 of 2006:- Second Appeals filed
under Section 100 of the Civil Procedure Code against the
judgment and decree of the learned Subordinate Judge,
Poonamallee made in A.S.Nos.12 and 13 of 2003 respectively
dated 29.03.2005 confirming the judgment and decree of the
learned District Munsif, Poonamallee made in O.S.Nos.1434 and
1436 of 1986 dated 17.04.2003.

For Appellants : Mr.S.Parthasarathy, Senior Counsel
for Mr.J.Ramakrishnan

For Respondent : Mr.D.Veerasekaran

सत्यमेव जयते
COMMON JUDGMENT

These second appeals have been preferred by the legal
representatives of the unsuccessful plaintiff in
O.S.No.1434/1986 and O.S.No.1436/1986 on the file of the
District Munsif, Poonamallee challenging the decree of the
lower appellate court (Sub Court, Poonamallee) dated
29.03.2005 made in A.S.Nos.12/2003 and 13/2003 respectively,
confirming the decrees of the trial court dated 17.03.2003
dismissing the said suits. Both the suits were filed for the
relief of specific performance of two different agreements for
sale dated 04.04.1977 in respect of 78 cents comprised in
S.No.80/5 and Acres 1.52 cents comprised in S.No.79/2 in
Perumal Agaram Village, Saidapet Sub-Registration District,
respectively.

2. The first suit O.S.No.1434/1986 was filed by Madurai Gramani on the file of the District Munsif Court, Poonamallee against P.C.Venkatesan, the sole defendant in the said suit for the relief of specific performance, based on an agreement for sale allegedly executed by the said P.C.Venkatesan on 04.04.1977 agreeing to sell 78 cents of land comprised in S.No.80/5 in Perumal Agaram village for a sale consideration of Rs.2,808/-. It was contended by the plaintiff Madurai Gramani in his plaint that on the date of agreement itself, a sum of Rs.1,400/- was paid as advance and it was agreed between the parties that the sale transaction should be completed within four months and that the possession of the said property, which was agreed to be sold, was also handed over to him in part performance of the agreement for sale. It was his further contention that though a time of four months had been stipulated in the agreement, a further sum of Rs.1,250/- was paid on 10.08.1977 as further advance and part payment of the balance sale consideration, leaving a balance of Rs.158/- alone; that P.C.Venkatesan, the sole defendant in O.S.No.1434/1986 made an endorsement on 10.08.1977 acknowledging the receipt of Rs.1,250/- as further advance and part payment of the balance sale consideration and promising to execute the sale deed as and when the plaintiff (Madurai Gramani) would require him to do so. He contended further that Rajagopal, Venugopal and Loganathan (defendants 2 to 4 in O.S.No.1436/1986) filed a suit in O.S.No.37/1978 on the file of the District Munsif, Poonamallee for the reliefs of declaration and injunction based on their contention that they were the legal representatives of late Muthukrishnan Naidu; that in view of the pendency of the said suit P.C.Venkatesan, the sole defendant in O.S.No.1434/1986, was postponing the execution of the sale deed in accordance with the agreement for sale and was promising to execute the sale deed after the disposal of the above mentioned suit in O.S.No.37/1978 filed by Rajagopal, Venugopal and Loganathan; that even after the disposal of the said suit, the defendant P.C.Venkatesan evaded execution of the sale deed in accordance with the agreement for sale stating that an appeal had been preferred against the decree passed in O.S.No.37/1978 and that though the plaintiff Madurai Gramani had been always ready and willing to perform his part of the obligations under the agreement for sale, it was the defendant Venkatesan, who committed breach of contract. Contending further that besides refusing to execute a sale deed in terms of the agreement for sale, the defendant P.C.Venkatesan made attempts to evict the plaintiff from the suit property on 06.08.1986 and 10.10.1986, pursuant to which, he lodged a complaint with the police, the plaintiff Madurai Gramani filed the suit O.S.No.1434/1986 seeking the relief of specific performance against P.C.Venkatesan, the sole defendant therein.

3. The suit was resisted by P.C.Venkatesan, the sole defendant therein, denying the execution of the suit sale agreement and other plaint averments. It was also contended in his written statement that the cause of action alleged in the plaint was imaginary; that the suit was hopelessly barred by limitation; that the plaintiff was not ready to pay the balance amount of sale consideration and spend for the stamp duty and registration charges; that the alleged attempts made to evict the plaintiff on 06.08.1986 and 10.10.1986 were false and imaginary; that it was so alleged in an attempt to show a cause of action for the filing of the suit; that the plaintiff himself was not ready and willing to complete the transaction and that hence the suit should be dismissed with cost.

4. O.S.No.1436/1986 came to be filed on the file of the District Munsif, Poonamallee, by Madurai Gramani himself against P.C.Venkatesan, Rajagopal, Venugopal and Loganathan arraying them as defendants 1 to 4 and praying for the relief of specific performance directing either P.C.Venkatesan, the first defendant therein or Rajagopal, Venugopal and Loganathan, the defendants 2 to 4 therein to execute a sale deed in accordance with an agreement for sale dated 04.04.1977 allegedly executed by one Muthukrishnan Naidu, agreeing to sell Acres 1.52 Cents comprised in S.No.79/2 of Perumal Agaram village for a sum of Rs.5,472/-. The plaintiff Madurai Gramani contended in his plaint in O.S.No.1436/1986 that on the date of agreement itself a sum of Rs.100/- was paid as advance and he got possession of the said property agreed to be sold in part performance of the agreement on the date of agreement itself; that the vendor under the agreement, namely Muthukrishnan Naidu died within three months after the execution of the agreement for sale and that he was not in a position to ascertain the particulars of the legal representatives of Muthukrishnan Naidu to file the suit earlier. It was also contended in his plaint in O.S.No.1436/1986 that after the agreement for sale, he effected improvements in the suit property by spending a sum of Rs.4,000/-; that meanwhile Rajagopal, Venugopal and Loganathan (defendants 2 to 4 in O.S.No.1436/1986) filed a suit in O.S.No.37/1978 for declaration and permanent injunction and the same was dismissed on 30.03.1984; that P.C.Venkatesan, who figured as the first defendant in the said suit, who contended that he had become the owner of the above said property by virtue of a will of Muthukrishnan Naidu dated 19.05.1977, did not come forward to execute a sale deed in accordance with the sale agreement executed by Muthukrishnan Naidu even after the dismissal of O.S.No.37/1978; that on the other hand, he was making promise to execute the sale deed after the disposal of the appeal allegedly filed by Rajagopal, Venugopal and Loganathan (defendants 2 to 4 in O.S.No.1436/1986); that P.C.Venkatesan, the first defendant,

later on failed to honour his promise and on the other hand, he made attempts to trespass into the property, which was the subject matter of the agreement between Muthukrishnan Naidu and the plaintiff Madurai Gramani; that such attempts were made on 06.08.1986 and 10.10.1986 and that the same forced the plaintiff Madurai Gramani to lodge a complaint with the police and file a suit for specific performance.

5. The said suit O.S.No.1436/1986 was resisted by P.C.Venkatesan, who figured as the first defendant therein, denying the execution of the agreement for sale dated 04.04.1977 by late Muthukrishnan Naidu agreeing to sell 1.52 Acres comprised in S.No.79/2 to the plaintiff Madurai Gramani and the receipt of a sum of Rs.100/- as advance. He had also denied the plaint averment regarding delivery of possession of the property to the plaintiff Madurai Gramani in part performance of the agreement for sale. All other averments found in the plaint, including the one that the plaintiff made improvements by spending a sum of Rs.4,000/-, were also denied by him as false. It was also contended by P.C.Venkatesan, the first defendant therein that he did not make any promise to execute sale deed after the disposal of O.S.No.37/1978 filed by Rajagopal and others (defendants 2 to 4) on the file of the District Munsif, Poonamalle. The first defendant P.C.Venkatesan, relying on the will executed by Muthukrishnan Naidu, contended that Rajagopal, Venugopal, Loganathan (defendants 2 to 4) did not have any right or title in respect of the property described in the plaint schedule in O.S.No.1436/1986. P.C.Venkatesan, the first defendant in O.S.No.1436/1986, also contended that the plaintiff Madurai Gramani, who chose to file an earlier suit O.S.No.137/1986 on the file of District Munsif, Poonamallee for bare injunction did not seek and get the leave of the court to file a separate suit for specific performance and that hence the suit was barred by Order II Rule 2 CPC. It was his further contention that the plaintiff Madurai Gramani was not having the possession of the suit property and on the other hand, he (first defendant P.C.Venkatesan) entered into an agreement for sale with one Punniyakotisamy, Vallikullanadu village and put him in possession and that hence the plaintiff Madurai Gramani could not seek protection under Section 53-A of the Transfer of Property Act also.

Based on the above said pleadings, the first defendant P.C.Venkatesan, prayed for the dismissal of the suit with cost.

6. The second defendant Rajagopal did not enter appearance. Though Venugopal and Loganathan, the third and fourth defendants initially entered appearance through counsel and filed a written statement, later on they also remained absent and were set ex-parte. Thus, the only contesting defendant before the trial court was the first defendant

P.C.Venkatesan.

7. After framing of necessary issues in both the suits, the learned trial Judge tried both the suits together and by a common judgment and separate decrees in the suits dated 17.03.2003 dismissed both the suits without cost. Challenging the decrees of the trial court dismissing O.S.No.1434/1986 and O.S.No.1436/1986, Madurai Gramani, the plaintiff therein, filed two appeals in A.S.Nos.12/2003 and 13/2003 respectively on the file of the Subordinate Court, Poonamallee. The learned lower appellate Judge (Subordinate Judge, Poonamallee), after hearing, dismissed both the appeals by a common judgment dated 29.03.2005 and the decrees drawn based on such common judgment.

8. After the first appellate court dismissed the first appeals and before the filing of the second appeals, the sole plaintiff Madurai Gramani died and his legal representatives have filed the second appeal Nos.125/2006 and 126/2006 against the decrees of the lower appellate court made in A.S.No.12/2003 and 13/2003 respectively.

9. Both the second appeals came to be admitted on 13.02.2006 identifying and formulating the following questions to be the common substantial questions of law involved in the second appeals:

i) When it has been established that Madurai Gramani husband of the first appellant and father of the appellants 2 to 7 was always ready and willing to perform his part of the contract by paying a meagre balance of sale consideration, whether the Courts below right in dismissing his claim of specific performance of the agreement of sale?

(ii) When it has been established before the Courts below that the respondent was postponing the performance of the agreement of sale by stating that suit and the appeal that have been filed by third parties against him and the said Madurai Gramani, whether the Courts below are correct in not granting relief for specific performance of the agreement of sale?

10. During the course of arguments, it was pointed out that the substantial questions of law needed to be refined and reformulated, and hence they were reformulated and recast as follows:

Substantial Questions of Law:

1. Whether the courts below have rendered a perverse finding that Madurai Gramani, the husband of the first appellant/father of the

appellants 2 to 7 did not prove that he was always ready and willing to perform his part of the contract, even though only a meager amount had been left as balance of sale consideration in O.S.No.1434/1986?

2. Whether the courts below are correct in not granting the relief of specific performance in O.S.No.1434/1986 when sufficient evidence had been adduced to show that the first defendant P.C.Venkatesan was postponing the completion of the sale transaction under Ex.A16 initially on the premise that O.S.No.37/1978 filed by defendants 2 to 4 was pending and subsequently on the pretext that an appeal filed against the decree passed in O.S.No.37/1978 was pending?

3. Whether the courts below were right in not granting the relief of specific performance of Ex.A15-agreement for sale executed by late Muthukrishnan Naidu in O.S.No.1436/1986?

11. During the pendency of the second appeals P.C.Venkatesan, the sole respondent in S.A.No.125/2006 died and his legal representatives were impleaded as respondents 2 to 4 in the said second appeal. Similarly, on the death of P.C.Venkatesan, who figured as the first respondent in S.A.No.126/2006, his legal representatives were impleaded as respondents 5 to 7 in the second appeal.

12. Since the original suits were tried together and evidence came to be recorded in common for both the suits, leading to the disposal of the suits by a common judgment and since the first appeals preferred against the decrees passed in the original suits were also jointly heard and disposed of by a common judgment, both the second appeals were heard jointly and they are being disposed of by this common judgment.

13. Since all the parties in S.A.No.125/2006 are also parties in S.A.No.126/2006 and in addition there are three more persons as parties (respondents 2 to 4) in S.A.No.126/2006, which arose from O.S.No.1436/1986, the parties are referred to in accordance with their respective ranks in O.S.No.1436/1986 for the sake of convenience. The term plaintiff shall mean deceased Madurai Gramani, the plaintiff in both the suits. The term first defendant shall refer to the deceased P.C.Venkatesan, who was the first defendant in O.S.No.1436/1986 and the sole defendant in O.S.No.1434/1986. The term defendants 2 to 4 shall mean the defendants 2 to 4 in O.S.No.1436/1986. In addition to the ranks of the parties in the trial court, their ranks in the

second appeal will also be furnished in this judgment at appropriate places, if necessity arises.

14. The arguments advanced by Mr.S.Parthasarathy, learned Senior Counsel appearing for Mr.J.Ramakrishnan, learned counsel on record for the appellants in both the second appeals and by Mr.D.Veerasekaran, learned counsel for the contesting respondents in both the second appeals were heard. The materials available on record were also perused and taken into consideration.

15. The first suit O.S.No.1434/1986 came to be filed by the plaintiff Madurai Gramani for the relief of specific performance based on an agreement for sale dated 04.04.1977, allegedly executed by the first defendant P.C.Venkatesan, agreeing to sell the property described in the plaint schedule in the said suit, namely 78 cents of land comprised in S.No.80/5 in Perumal Agaram village. O.S.No.1436/1986 came to be filed for the relief of specific performance based on an even dated (04.04.1977) agreement for sale allegedly executed by Muthukrishnan Naidu in respect of 1 Acre 52 cents comprised in S.No.79/2 in Perumal Agaram village, which has been described in the plaint schedule in O.S.No.1436/1986. Let us first take up the question of sustainability of the claim of the deceased plaintiff Madurai Gramani in respect of 78 cents of land comprised in S.No.80/5 in Perumal Agaram village, the subject matter of O.S.No.1434/1986. The same can be conveniently referred to as the first item of the suit properties.

16. It is not in dispute that the first item of the suit properties, namely 78 cents of the land comprised in S.No.80/5, as described in the plaint schedule in O.S.No.1434/1986, belonged to the first defendant P.C.Venkatesan. According to the plaintiff Madurai Gramani, the first defendant P.C.Venkatesan agreed to sell the same to him for a sum of Rs.2,808/-, received a sum of Rs.1,400/- as advance and executed an agreement for sale on 04.04.1977. The original agreement had been filed in another suit, a certified copy of the same was obtained and such certified copy came to be produced and marked as Ex.A1. However, at a later point of time, the original agreement itself was produced and marked as Ex.A16. Ex.A16 contains an endorsement dated 10.08.1977 and the said endorsement has been marked separately as Ex.A24. The said agreement contains a stipulation that the balance sale consideration should be paid within four months and the sale transaction should be completed within four months. The parties had not disputed the incorporation of such a clause in Ex.A16-Agreement for sale. Then the necessary question that may arise will be, "whether the time stipulated therein was agreed by the parties to be the essence of the contract?" A plain reading of Ex.A16-Agreement may suggest that the intention of the parties to treat the time as the essence of the contract has been reflected in such a clause. However, the

subsequent conduct of the parties also should be taken into account to decide whether the time stipulated in the agreement was agreed to be the essence of the contract. The four months period stipulated in Ex.A16-Agreement for sale expired on 03.08.1977. If at all the parties intended that time should be the essence of the contract, the purchaser under the agreement would not have received further payment towards further advance and part payment of the balance sale consideration after the expiry of the said time stipulated in the agreement. Ex.A24-endorsement shows that on 10.08.1977, namely six days after the expiry of the time stipulated in Ex.A16-agreement, the first defendant accepted payment of a sum of Rs.1,250/- towards further advance and part payment of the sale consideration.

17. In this regard, the plea made by the first defendant P.C.Venkatesan is that he did not execute the agreement for sale and he did not make the above said endorsement. Since he had denied the execution of the agreement and the making of the endorsement, the plaintiff chose to lead evidence in proof of execution of the agreement for sale and also the making of the endorsement, marked as Exs.A16 and A24 respectively. In this regard, the evidence of PW1, the plaintiff himself, is lacking in material particulars and clarity. He would state that the sale price was fixed at the rate of Rs.36/- per cent. However, he could not state as to what was the total amount of sale consideration as per the agreement. Apart from the above said lacuna in the evidence of PW1 in respect of the execution of Ex.A16-agreement for sale, it is also his testimony that the further payment of Rs.1,250/- was paid within the period of four months stipulated in the agreement and not after the expiry of the four months period stipulated in the agreement. The same casts a grave suspicion as to whether the agreement could have been executed and whether the endorsement could have been made on the respective dates as claimed by the plaintiff.

18. However, the first defendant who deposed as DW1, during his cross examination, filled up the lacuna caused in the evidence of the witnesses examined on the side of the plaintiff and rectified the defects found therein, by making a clear admission that he executed Ex.A16-Agreement for sale on 04.04.1977 agreeing to sell the first item of the suit properties for a sum of Rs.2,808/-and received a sum of Rs.1,400/- as advance on the date of agreement. He has also admitted that he received a further advance of Rs.1,250/- on 10.04.1977 and made Ex.A24-endorsement. Since the first defendant has admitted the execution of Ex.A16-agreement for sale and making of Ex.A24-endorsement, there shall be no room for considering whether Ex.A16-agreement and Ex.A24-endorsement are genuine or not. In fact both the courts below, based on the above said admission of DW1, have rendered a concurrent finding that the suit agreement for sale marked as Ex.A16 and the endorsement marked as Ex.A24 are genuine. Even

in the second appeal, the contesting respondents have not chosen to raise a contention that the findings of the courts below regarding the genuineness of Ex.A16-Agreement and A24-endorsement was wrong and the courts below ought to have held them to be not genuine. It is quite obvious that the respondents in the appeal cannot take such a plea in the light of the clear and categorical admission made by DW1, the sole witness examined on the side of the defendants. Hence the question of genuineness or otherwise of Ex.A16-agreement and Ex.A24-endorsement does not arise for consideration in the second appeal.

19. The grounds on which the first defendant resisted the prayer of the plaintiff for the relief of specific performance are : (a) the suit is barred by limitation; (b) the suit is barred by Order II Rule 2 CPC and (c) the plaintiff did not prove his readiness and willingness. It is the contention raised on behalf of the legal representatives of the first defendant/respondents 2 to 7 in S.A.No.125/2006 that the acceptance of further advance on 10.08.1977, namely after the expiry of the four months time stipulated in the agreement did not cause any alteration in the date from which limitation started running; that hence the suit O.S.No.1434/1986 ought to have been filed on or before 03.08.1980 and that since the suit was not filed on or before the said date, it was hopelessly barred by limitation.

20. On the other hand, it is the contention of Mr.S.Parthasarathy, learned senior counsel for the appellants that once further payment made after the expiry of the date fixed in the agreement for sale is accepted without stipulating a further date within which the transaction is to be completed, the same will take the agreement from the first part of Article 54 of the Limitation Act, 1963 to the second part of the said article, whereupon the limitation will start running from the date on which the plaintiff would get notice of refusal by the defendants to perform. In support of his contention, the learned senior counsel for the appellants relied on the judgment of the Hon'ble Supreme Court in S.Brahamanand and others v. K.R.Muthugopal (dead) and others reported in (2005) 12 SCC 764. In the said case, the Hon'ble Supreme Court relied on the observations made by the Supreme Court in Keshavlal Lallubhai Patel v. Lalbhai Trikumlal Mills Ltd., reported in AIR 1958 SC 512 and also referred to the judgment of the Kerala High Court in Pazhaniappa Chettiar v.South Indian Planting and Industrial Co. Ltd. reported in AIR 1953 Trav Co 161 : Laws(Ker)-1952-6-14 and held that an agreement which prescribed a fixed date for performance may be varied making it an agreement without a date fixed for performance. The relevant passage in the said judgment of the Supreme Court in S.Brahamanand's case is found in paragraph 34 and the same reads as follows:

"34. Thus, this was a situation where the original agreement of 10.3.1989 had a "fixed date" for performance, but by the subsequent letter of 18.6.1992 the Defendants made a request for postponing the performance to a future date without fixing any further date for performance. This was accepted by the Plaintiffs by their act of forbearance and not insisting on performance forthwith. There is nothing strange in time for performance being extended, even though originally the agreement had a fixed date. Section 63 of the Indian Contract Act, 1872 provides that every promisee may extend time for the performance of the contract. Such an agreement to extend time need not necessarily be reduced to writing, but may be proved by oral evidence or in some cases, even by evidence of conduct including forbearance on the part of the other party. Thus, in this case there was a variation in the date of performance by express representation by the Defendants, agreed to by the act of forbearance on the part of the Plaintiffs. What was originally covered by the first part of Article 54, now fell within the purview of the second part of the Article. Pazhaniappa Chettiyar v. South Indian Planting and Industrial Co. Ltd. and Anr. was a similar instance where the contract when initially made had a date fixed for the performance of the contract but the Court was of the view that "in the events that happened in this case, the agreement in question though started with fixation of a period for the completion of the transaction became one without such period on account of the peculiar facts and circumstances already explained and the contract, therefore, became one in which no time fixed for its performance." and held that was originally covered by the first part of Article 113 of the Limitation Act, 1908 would fall under the second part of the said Article because of the supervening circumstances of the case.

The above said ratio squarely applies to the present suit in O.S.No.1434/1986 filed by the plaintiff against the first defendant in view of the fact that he made Ex.A24-endorsement on 10.08.1977 i.e. after the expiry of the period stipulated in Ex.A16-Agreement, wherein no further date or period has been mentioned as the date on or before which or the period within which the sale transaction should be completed. Hence, as rightly contended by the learned senior counsel for the appellants, though initially Ex.A16-Agreement stipulated a fixed period for completion of the transaction, it was converted by Ex.A24-endorsement into an agreement in which no date or period has been fixed for the completion of the sale transaction. Accordingly, the second part and not the first part of Article 54 of the Limitation Act, 1963 stands

attracted. As per the second part of Article 54 of the Limitation Act, 1963, limitation shall be counted from the date on which the plaintiff got notice of refusal by the first defendant to perform.

21. According to the plaintiff, since the defendants 2 to 4 filed a suit in O.S.No.37/1978 on the file of the Principal District Munsif, Poonamallee seeking declaration of their title in respect 1.52 acres comprised in S.No.79/2 (the subject matter of O.S.No.1436/1986) and also for injunction, in which suit the first defendant P.C.Venkatesan and the plaintiff Madurai Gramani figured as 1st and 10th defendants respectively, the first defendant asked the plaintiff to wait till the disposal of the said suit filed by the defendants 2 to 4 promising to execute the sale deed after the disposal of O.S.No.37/1978. The further contention of the plaintiff is that even after the disposal of O.S.No.37/1978, the first defendant P.C.Venkatesan postponed the execution of the sale deed in accordance with Ex.A16-Agreement for sale stating that an appeal against the decree passed in O.S.No.37/1978 had been filed and that he would execute the sale deed after the disposal of such appeal.

22. It is a fact admitted by both parties that the suit O.S.No.37/1978 filed by the defendants 2 to 4 had nothing to do with the first item of the suit properties measuring an extent of 78 cents comprised in S.No.80/5 in Perumal Agaram village, which is the subject matter of Ex.A16-agreement and O.S.No.1434/1986. The suit O.S.No.37/1978 filed by the defendants 2 to 4 was in respect of 1.52 Acres comprised in S.No.79/2. Hence it is quite improbable that the first defendant Venkatesan would have cited the pendency of O.S.No.37/1978 as an impediment for his executing a sale deed in respect of the first item, namely 78 cents comprised in S.No.80/5, which had been agreed to be sold to the plaintiff as per Ex.A16-agreement. On the other hand, the plaintiff having paid more than 95% of the sale consideration, could have very well insisted upon and persuaded the first defendant to execute a sale deed in accordance with Ex.A16-agreement for sale.

23. Ex.A4 is the notice dated 11.02.1982 sent by the first defendant P.C.Venkatesan through his lawyer to the plaintiff Madurai Gramani. In the said notice he had accused the plaintiff of having trespassed into 1.52 Acres comprised in S.No.79/2 (concerned in O.S.No.1436/1986) and called upon him to pay mesne profits. Ex.A5 is the copy of the reply notice dated 17.02.1982 sent on behalf of the plaintiff. In the said reply it was contended that the erstwhile owner of the said property, namely Muthukrishnan Naidu executed an agreement for sale on 04.04.1977 and placed the plaintiff in possession and enjoyment of the said property; that after the death of Muthukrishnan Naidu, the plaintiff was not able to get the correct particulars of his legal heirs and that,

however, he was ready and willing to perform his part of the obligations under the said agreement and get the property conveyed to him. Subsequently O.S.No.37/1978 filed by the defendants 2 to 4 came to be dismissed on 30.03.1984. After such dismissal also the first defendant P.C.Venkatesan, caused issuance of a notice dated 09.10.1984 marked as Ex.A18 for which a reply was sent on 21.10.1984, the office copy of which has been marked as Ex.A19. The exchange of notices indicate that the contention of the plaintiff that the first defendant, at the first instance promised to execute a sale deed in respect of 78 cents of land comprised in S.No.80/5, which is the subject matter of O.S.No.1434/1986, after the disposal of O.S.No.37/1978 filed by the defendants 2 to 4 and thereafter promised to execute the sale deed after the disposal of the appeal filed against the decree passed in O.S.No.37/1978 shall not be probable. The relationship between the plaintiff and the first defendant came to be strained at least from 11.02.1982, the date on which Ex.A4-Notice was issued.

24. In addition, it is pertinent to note that no notice was issued by plaintiff expressing his readiness and willingness to complete the transaction under Ex.A16-agreement for sale till Ex.A4-notice. Even thereafter no such notice came to be issued by the plaintiff. In O.S.No.37/1978 filed by the defendants 2 to 4, the plaintiff Madurai Gramani came to be impleaded as 10th defendant on 28.04.1983. On his impleadment, the first defendant Venkatesan took a plea in his additional written statement that the plaintiff Madurai Gramani was a person set up by the defendants 2 to 4 to defeat the claim of the first defendant. Even before the filing of such additional written statement in O.S.No.37/1978, the dispute between the plaintiff and the first defendant did arise as revealed by the exchange of notices under Exs.A4 and A5. Hence, by preponderance of probabilities the contention of the first defendant that the plaintiff, who was bent upon purchasing both the properties together, kept quiet and postponed the completion of the transaction under Ex.A16-agreement for sale till the disposal of O.S.No.37/1978 stands substantiated. It is quite obvious that the plaintiff was not ready and willing to complete the transaction under Ex.A16-agreement for sale during the pendency of O.S.No.37/1978. The strained relationship revealed by the exchange of notices under Exs.A4 and A5 shows that the plaintiff should have notice of refusal to perform at least on the date of receipt of Ex.A4-notice dated 11.02.1982. Ex.A5-reply notice came to be issued on 17.02.1982. Hence the plaintiff' ought to have had notice of refusal by the first defendant to perform between 11.02.1982 and 17.02.1982. The suit O.S.No.1434/1986 has not been filed within three years thereafter and on the other hand, it came to be filed on 15.10.1986. Hence the suit is barred by limitation as contended by the first defendant.

25. Moreover there is a clear admission made by the plaintiff as PW1 that he did not issue any notice either during the pendency of O.S.No.37/1978 or after its disposal, calling upon the first defendant to execute a sale deed in terms of Ex.A16-agreement for sale. In fact the first notice came to be issued by the first defendant under Ex.A4 on 11.02.1982 for which the reply under Ex.A5 came to be issued on 17.02.1982. Even thereafter it was the first defendant, who issued a notice calling upon the plaintiff to pay damages under Ex.A18-Notice dated 09.10.1984 for which the plaintiff chose to issue a reply on 21.10.1984 under Ex.A19. It should be noticed that the said notice and the reply notice pertain to the land measuring 1.52 acres comprised in S.No.79/2 and there is no reference to S.No.80/5 and the agreement in respect of the same. Till the filing of the suit, no notice calling upon the first defendant to execute a sale deed in respect of the first item of the suit property, namely 78 cents comprised in S.No.80/5 came to be issued by the plaintiff. As pointed out supra, the relationship between the plaintiff and the first defendant got strained long back in February 1982 itself. The plaintiff has not furnished clear particulars as to the date on which he made a demand and the date on which the first defendant refused to perform. In this regard, the evidence of PW1 is bereft of particulars regarding the date on which the first defendant refused to perform. However he made an attempt to contend that only when the first defendant made attempts to evict him from the suit property by force on 06.08.1986 and 10.10.1986 he got notice of the refusal by the first defendant to perform. However during cross examination he admitted that he came to the court with the suit after a lapse of nine years from the date of expiry of the time for performance as per the agreement.

26. In addition, there is a vital admission made by E.V.Ramasamy, who was examined as PW2. He made a clear admission that he along with the plaintiff approached the first defendant P.C.Venkatesan in 1979 and asked him to execute a sale deed and that at that point of time, the first defendant replied that he could not execute a sale deed. The relevant portion of his testimony in vernacular reads as follows:

“1979ல் வெங்கடேசலு நாயுடு கிரயம் செய்து தர வாதியும் நானும் கேட்டோம். அவர் தற்போது கிரயம் செய்து தர இயலாது என்றார். அதன் பிறகு நான் எப்போதும் வாதியுடன் சென்று பிரதிவாதியைக் கேட்கவில்லை.”

The said admission will make it clear that the first defendant communicated his refusal to perform in the year 1979 itself. The plaint averments also are to the effect that the plaintiff approached the first defendant with a demand to execute a sale deed in accordance with Ex.A16-agreement for sale, but he evaded execution of sale deed citing the pendency of

O.S.No.37/1978. The same will show that in 1979 itself the plaintiff had got knowledge of the refusal by the first defendant to perform his obligations under Ex.A16-agreement for sale. Therefore, this court comes to the conclusion that the courts below have not committed any error or mistake in holding that the suit O.S.No.1434/1986 filed by the plaintiff was barred by the law of limitation.

27. Even if it is assumed that there was no express refusal on the part of the first defendant to perform his part of the obligations under the agreement for sale, the plaintiff shall not be entitled to the relief of specific performance unless he pleads and proves his readiness and willingness to perform his part of the obligations under the agreement right from the date of filing of the suit, in accordance with Section 16(c) of the Specific Relief Act, 1963. No doubt the plaintiff has made an averment in the plaint that he was always ready and willing and on the other hand, the first defendant was postponing the completion of the transaction citing the pendency of O.S.No.37/1978 filed by the defendants 2 to 4. As pointed out supra, the said suit had no connection with the first item of the suit properties, namely 78 cents of land comprised in S.No.80/5 which is the subject matter of Ex.A16-sale agreement and O.S.No.1434/1986. It has also been pointed out supra that it was the plaintiff who was not ready and prepared to complete the transaction showing the pendency of O.S.No.37/1978 with the intention of purchasing the first item of the suit property along with the second item of the suit properties at one and the same time. Hence it is quite obvious that the plaintiff was not ready and willing to complete the sale transaction under Ex.A16-agreement for sale during the pendency of O.S.No.37/1978. However, the learned senior counsel for the appellants contended that the conduct of the first defendant in taking a plea denying execution of Ex.A16 agreement and Ex.A24 - endorsement and his admission, during trial, of execution of the agreement and endorsement should be taken into account to make an inference that the first defendant would have been postponing the execution of the sale deed citing the pendency of the suit in O.S.No.37/1978 even though the plaintiff was ready and willing. Of course it is true that the same will show the dilatory tactics and the unpreparedness on the part of the first defendant to execute a sale deed in accordance with the terms of Ex.A16-agreement for sale. But the plaintiff cannot succeed by pointing out the weakness or defect in the defence case of the defendant. Unless the plaintiff complies with the requirement of Section 16(c) of the Specific Relief Act, 1963 relating to pleading and proof of readiness and willingness, he shall not be entitled to the relief of specific performance.

28. A meek attempt was made by the learned senior counsel for the appellants that since admittedly the plaintiff had paid more than 95% of the sale consideration, readiness and willingness to complete the transaction on his part could be readily presumed and that the burden of showing the absence of readiness and willingness on the part of the plaintiff stood heavily cast on the first defendant. In support of his contention, learned senior counsel for the appellants relied on the judgment of the Supreme Court in Motilal Jain vs. Ramdasi Devi (Smt) and others reported in (2000) 6 SCC 420. Of course in the said case, the Supreme Court held that since the purchaser had paid 2/3rd of the sale consideration at the time of execution of the agreement, his willingness to pay the remaining amount of sale consideration was apparent and it should be presumed. In the said case, though the Supreme Court held that the readiness and willingness on the part of the plaintiff therein was to be presumed, the said proposition cannot be applied in all cases invariably without any exception. In the case on hand, though the plaintiff had paid more than 95% of the sale consideration as evidenced by Ex.A16-agreement for sale and Ex.A24-endorsement, which will give rise to a strong presumption that the plaintiff was ready and willing to perform his part of the obligation under the agreement, such a presumption is only rebuttable. The first defendant, by meticulous cross examination of PWs.1 and 2 and through his evidence as DW1 has substantiated his contention that it was the plaintiff, who was postponing the completion of transaction with the intention of having sale deeds executed in respect of the first item of the suit property along with the second item of the suit properties regarding which a suit was pending in O.S.No.37/1978. The admission made by PW1 that he did not issue any notice during the pendency of O.S.No.37/1978 calling upon the first defendant to execute a sale deed in respect of the first item of the suit properties, namely 78 cents comprised in S.No.80/5 and the further admission of PW2 that when they approached the first defendant in 1979 with a demand for execution of the sale deed, he replied that he could not do so and that thereafter, no demand was made by the plaintiff by issuing a notice, will probablise the case of the first defendant that it was the plaintiff, who was not prepared to complete the transaction during the pendency of the suit O.S.No.39/1978.

29. It is quite obvious from the pleadings and evidence that the plaintiff, who wanted to have the dispute resolved regarding the second item of the suit properties, namely 1.52 acres comprised in S.No.79/2, which was the larger property, was postponing the completion of the sale transaction as per Ex.A16-agreement for sale. The presumption contemplated in the said judgment of the Supreme Court can be only under Section 114 of the Evidence Act. Such a presumption is discretionary and the same has to be made taking into account the

surrounding facts and circumstances of the case and also the evidence adduced on both sides. Of course the fact that more than 95% of the sale consideration was paid is a strong ground for drawing such a presumption, but the same cannot be the sole factor on which a decision as to whether a presumption can be drawn or not can be made. The attending facts and circumstances also should be taken into consideration. The attending facts and circumstances of this case is the pendency of the suit filed by the defendants 2 to 4 in O.S.No.37/1978 regarding the second item of the suit properties, namely 1.52 acres comprised in S.No.79/2, the failure of the plaintiff to issue any notice calling upon the first defendant to execute a sale deed in accordance with Ex.A16-agreement for sale during the pendency of the said suit O.S.No.37/1978 and also the admission made by PW2 that when they approached the first defendant in 1979 he declined execution of sale deed will show that it is not a fit case in which the presumption can be drawn in favour of the plaintiff. Hence this court comes to the conclusion that by preponderance of probabilities, the plaintiff failed to prove his readiness and willingness, right from the date of agreement till the date of filing of the suit, to complete the transaction and on the other hand, the first defendant has substantiated his contention that it was the plaintiff who was not ready and willing to complete the transaction and chose to await the result of the suit O.S.No.37/1978. The courts below have not committed any error in law in arriving at a conclusion that the plaintiff failed to prove his readiness and willingness in accordance with Section 16(c) of the Specific Relief Act, 1963.

30. In addition to the absence of proof of readiness and willingness on the part of the plaintiff, it is apparent from the fact that even after the plaintiff came to know that the first defendant refused to perform his part of the obligations under Ex.A16-agreement for sale, the plaintiff failed to file the suit for specific performance at the first instance and seek an order of interim injunction to protect his possession by filing an interlocutory application in such suit. On the other hand, the plaintiff chose to file a suit in O.S.No.137/1986 for a permanent injunction against the first defendant P.C.Venkatesan not to interfere with his peaceful possession and enjoyment of the first and second items of the suit properties. It is quite obvious that the said suit came to be filed on 29.01.1986 on the basis of the alleged attempt made by the first defendant on 04.01.1986 to disturb plaintiff's possession and enjoyment of the first and second items of the suit properties. It is quite obvious that at the time of filing of the said suit, viz. O.S.No.137/1986, the cause of action for filing a suit for specific performance had also arisen. Still without seeking the leave of the court to file a separate suit for the relief of specific performance, the plaintiff chose to file the above said suit O.S.No.137/1986 for bare injunction. The cause of action for

the said suit and the cause of action for the suit for specific performance were one and the same, namely the alleged attempt made by the first defendant to disturb the possession and enjoyment of the plaintiff in respect of the suit properties exhibiting his refusal to perform. Still the plaintiff chose to file the said previous suit for bare injunction alone, without seeking the leave of the court to file a separate suit for specific performance. Hence the contention of the first defendant that the present suit O.S.No.1434/1986 filed for specific performance was barred by Order II Rule 2 CPC in view of the filing of the earlier suit O.S.No.137/1986 has got to be countenanced. Hence on the ground of the suit having been barred by Order II Rule 2 CPC also, the suit O.S.No.1434 of 1986 filed by the plaintiff for specific performance is liable to be dismissed. The courts below have not committed any error in law in non-suiting the plaintiff for the relief of specific performance on the grounds of the suit having been barred under Order II Rule 2 CPC, the plaintiff having failed to prove his readiness and willingness and the suit being one barred by limitation as it was filed after the expiry of the period of limitation. The first and second substantial questions of law are answered accordingly against the appellants and in favour of the contesting respondents.

31. So far as S.A.No.126/2006 is concerned, the suit O.S.No.1436/1986 came to be filed on the basis of Ex.A15-Agreement for sale dated 04.04.1977 alleged to have been executed by Muthukrishnan Naidu. Admittedly the property concerned in the said suit, namely 1.52 acres comprised in S.No.79/2 of Perumal Agaram village, belonged to the said Muthukrishnan Naidu. Though the execution of Ex.A15 - sale agreement was denied by the first defendant, in the latter part of his testimony during cross examination as DW1, he clearly admitted that the said agreement was executed by Muthukrishnan Naidu on 04.04.1977 in favour of the plaintiff. Unlike the case of the plaintiff in O.S.No.1434/1986 wherein there was an endorsement under Ex.A24 making the agreement into the one stipulating no specific date for completion of the transaction, there is no such endorsement on Ex.A15-agreement for sale. Ex.A15-agreement for sale stipulates a period of four months for completion of the sale transaction. The four months period expired on 03.08.1977. Even if the time stipulated there is not taken as the essential condition of the contract, as per Article 54 of the Limitation Act, 1963, limitation started running from the expiry of the period of four months from the date of Ex.A15 and the three years period of limitation expired on 03.08.1980. The suit O.S.No.1436/1986 came to be filed on 15.10.1986. Therefore it is quite obvious that the said suit is clearly barred by limitation.

Naidu, the vendor under Ex.A15 - agreement for sale, died within three months from the date of agreement and the plaintiff was not able to gather the particulars regarding the legal heirs of the said Muthukrishnan Naidu, he could not file the suit in time; that before the expiry of the period of limitation, the defendants 2 to 4 filed O.S.No.37/1978 against the first defendant and others in which the plaintiff came to be impleaded at a later point of time; that the said period of pendency of the suit should be excluded for the purpose of counting limitation for filing the suit for specific performance and that since the suit for specific performance came to be filed within three years after the disposal of O.S.No.37/1978, the suit O.S.No.1436/1986 is well within time and the suit is not barred by limitation. By no stretch of imagination such a contention can be countenanced. The very fact that there was a dispute between two sets of people claiming to be the legal heirs of Muthukrishnan Naidu, shall not be a justification for the plaintiff (purchaser under Ex.A15-agreement executed by Muthukrishnan Naidu) to wait for the disposal of the suit and claim exclusion of the period during which the said suit O.S.No.37/1978 was pending. The inability of the plaintiff to ascertain the particulars of the legal heirs of Muthukrishnan Naidu shall not prevent the running of limitation. Though it may be assumed, for the argument sake, that till the filing of the suit in O.S.No.37/1978 the plaintiff would not have got the particulars of the persons claiming to be the legal heirs of Muthukrishnan Naidu, admittedly he was aware of the pendency of the suit. Hence he ought to have got the particulars of persons making rival claims to be the legal heirs of deceased Muthukrishnan Naidu. Under the said circumstances, the plaintiff ought to have filed the suit for specific performance against the persons claiming to be the legal heirs of Muthukrishnan Naidu within the period of limitation.

33. It is an admitted fact that Muthukrishnan Naidu was married and got a child, but the child died within a few months after it was born and Saradhambal, the wife of Muthukrishnan Naidu died within 1½ years from the date of death of the child and that thereafter, he lived for a number of years and died. The defendants 2 to 4 claiming to be the pangalis of Muthukrishnan Naidu made an attempt by filing O.S.No.37/1978 to claim intestate succession to the properties of Muthukrishnan Naidu. On the other hand, the first defendant P.C.Venkatesan claimed to be the testamentary heir by the virtue of a Will dated 19.05.1977 allegedly executed by Muthukrishnan Naidu. Ultimately, the said suit O.S.No.37/1978 ended in favour of the first defendant on 30.03.1984 as evidenced by Ex.B1, copy of the judgment and the first appeal A.S.No.11 of 1986 and the second appeal S.A.No.546 of 1988 preferred there from were also dismissed. The same is evidenced by Ex.A26, copy of the judgment in the said second appeal. Even before the disposal of O.S.No.37/1978, the first

defendant issued Ex.A4-Notice on 11.02.1982 which showed that the possession of the plaintiff in respect of the second item of the suit property in S.No.79/2 was that of a trespasser. Before the receipt of the said notice, the plaintiff did not issue any notice calling upon either the first defendant or defendants 2 to 4 to execute a sale deed in accordance with Ex.A15-Agreement for sale. Only in the reply dated 17.02.1982, office copy of which has been marked as Ex.A5, the plaintiff referred to the agreement dated 04.04.1977 executed by Muthukrishnan Naidu and expressed his readiness and willingness to perform his part of the contract under the agreement for sale. By then the limitation for filing a suit for specific performance had expired. Therefore, the attempt made to revisit the same and recount the limitation from the date of such notice cannot succeed. For all the reasons stated above, this court comes to the conclusion that the suit O.S.No.1436/1986 filed for specific performance based on Ex.A15-agreement for sale was hopelessly barred by limitation, as the limitation expired on 03.08.1980 itself. The concurrent finding of the court below in this regard cannot be said to be either defective or infirm warranting interference by this court.

34. However the learned senior counsel for the appellant made an attempt to contend that the plaintiff having got possession of the suit property, is entitled to protect his possession under Section 53-A of the Transfer of Property Act and that hence there will be no question of limitation so long as the possession remained with the plaintiff. Of course, though the first defendant had denied having entrusted the possession of the suit property in part performance of the agreement for sale to the plaintiff, during cross examination as DW1, he has admitted that possession had been delivered to the plaintiff pursuant to the agreement. But the mere fact that the plaintiff got possession of the suit property pursuant to the agreements for sale will not be enough to make the law of limitation inapplicable to the suit for specific performance. What Section 53-A of the Transfer of Property Act contemplates is the protection of the possession of the purchaser under an agreement for sale in case he has already performed the entire part of his obligations under the agreement for sale or has been ready and willing to perform his part of the obligations under the agreement for sale. It has nothing to do with the limitation for filing a suit for specific performance. A purchaser who remains passive for years together after getting the possession of the property under the agreement for sale cannot contend that the law of limitation shall not be applicable to him. In O.S.No.1436/1986 it is quite clear that the limitation expired on 03.08.1980 and the suit came to be filed after six years from the date of expiry of the period of limitation. The amount paid as advance is only Rs.100/-. The inaction on the part of the plaintiff would show that he was not ready and willing to perform his

part of the obligation under the agreement for sale. Hence this court comes to the conclusion that the plaintiff failed to prove his entitlement to get the relief of specific performance. A.S.No.13 of 2003 confirming the decree of the trial court in O.S.No.1436 of 1986 dismissing the said suit. The third substantial question of law is, accordingly, answered against the appellants and in favour of the contesting respondents.

35. In line with the answers, provided supra, to the first, second and third substantial questions of law, this court hereby holds that there is no scope for interference with the decrees of the lower appellate court dated 29.03.2005 made A.S.Nos.12 and 13 of 2003 confirming the decrees of the trial court dated 17.04.2003 made in O.S.Nos.1434/1986 and 1436/1986 dismissing those suits filed for specific performance. There is no merit in the second appeals and both the second appeals are bound to be dismissed. Since the plaintiffs had not prayed for refund of the advance amount and since it has been held that the suits are barred by limitation, there shall be no question of granting an alternative relief of refund of advance amount.

In the result, both the second appeals are dismissed, confirming the judgment and decrees passed by of the learned Subordinate Judge, Poonamallee dated 29.03.2005 made in A.S.Nos.12 and 13 of 2003. However, there shall be no order as to cost. Consequently, the connected miscellaneous petition is closed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1.The Subordinate Judge,
Poonamallee.

2.The District Munsif,
Poonamallee.

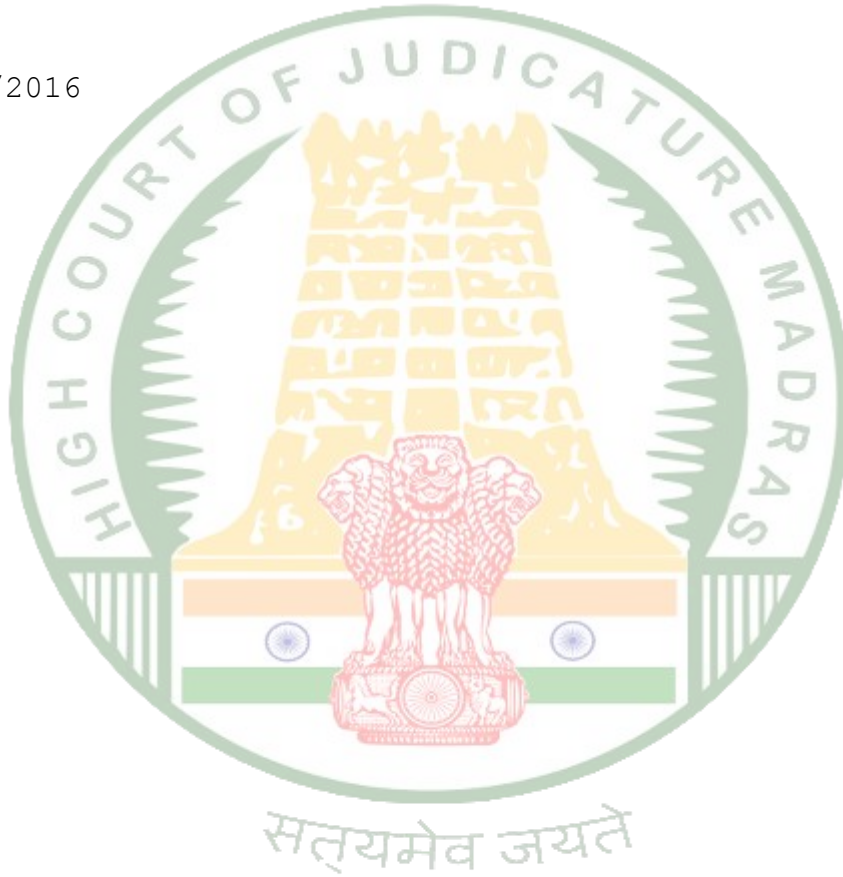
3.The Section Officer,
VR Section,
High Court, Madras.

+1cc to M/S.J.Ramakrishnan, Advocate sr.28267

+1cc to M/S.Veerasekaran, Advocate sr.28201

S.A.Nos.125 and 126 of 2006

MP[co]
srg 07/06/2016



WEB COPY