

IN THE JUDICATE OF MADRAS HIGH COURT

RESERVED ON : 01.08.2017

DELIVERED ON : 31.08.2017

CORUM

THE HON'BLE MR.JUSTICE R.SUBBIAH  
and  
THE HON'BLE MR.JUSTICE A.D.JAGADISH CHANDIRA

A.S.No.487 of 2011  
and  
C.M.P.Nos.18473 & 14042 of 2016

1.Tmt.R.Selvam  
2.R.Rajendran ..Appellants/Defendants 1&2

Vs.

1.A.Jenix Dev Singh ..1st Respondent/Plaintiff  
2.The Sub-Registrar, Konnur ...2nd Respondent/3rd defendant

Appeal has been filed under Section 96 of CPC r/w Order 41 Rule 1 & 2 of CPC, against the judgment and decree dated 09.06.2011 in O.S.No.144 of 2008 passed by the learned Additional District Judge (FTC-II), Poonamallee.

For Appellants : Mr.V.Manohar  
For Respondents : Mr.V.Raghavachari for  
Mr. I.Davidsingh (For R1)  
For 2nd Respondent: No. Appearance

JUDGMENT

R.SUBBIAH, J.,

The appellants herein are the defendants 1 & 2 and the 1st respondent herein is the plaintiff and the 2nd respondent herein is the 3rd defendant in the suit in O.S.No.144 of 2008 on the file of the learned Additional District Judge (FTC-II), Poonamallee. The said suit was filed by the 1st respondent herein/plaintiff for specific performance, directing the appellants herein/defendants 1 & 2 to execute the Sale Deed in favour of him in respect of the suit property, after receiving the balance sale consideration of Rs.13,58,000/- from the plaintiff or in alternative, the Court shall execute the sale deed. The Trial Court has decreed the suit vide the judgment and decree dated 09.06.2011, against which the defendants 1 & 2 have come forward with the present appeal.

2.For the sake of convenience, the parties shall be referred to as per rankings in the suit, as plaintiff and the defendants.

3.The facts of the case of the plaintiff are as follows:-

The 2<sup>nd</sup> defendant is the husband of the 1<sup>st</sup> defendant. The suit schedule property originally belonged to the defendants 1 & 2. The plaintiff and the 2nd defendant entered into an Agreement of Sale on 22.01.2005, under which the plaintiff agreed to purchase the suit property for a sum of Rs.28,58,000/-. The sale agreement was executed by the 2nd defendant, with the consultation and consent of the 1st defendant, who was at abroad at the time of execution of the sale agreement. On the date of sale agreement ie., on 22.01.2005, the 2nd defendant received a sum of Rs.5,00,000/- from the plaintiff as advance. Time fixed under the Sale agreement is not the essence of the contract. On 24.11.2005, the 2nd defendant received another sum of Rs.10 lakhs from the plaintiff towards a portion of the sale consideration and made an endorsement on the rear side of the Sale Agreement as instructed by the 1st defendant from U.S.A. Thereafter, inspite of requests and reminders of the plaintiff, in person and over phone, both the defendants not only evaded to receive the balance sale consideration of Rs.13,58,000/- from the plaintiff, but also to execute the sale deed in his favour as agreed on 22.01.2005 and 24.11.2005 respectively and they were postponing the execution of the sale deed on one pretext or the other. The plaintiff was always ready and willing to pay the balance sale consideration and to obtain sale deed from the defendants. On 31.05.2008, the plaintiff tendered the balance sale consideration, but the defendants bluntly refused to receive the same. The plaintiff came to know that the defendants 1 & 2 are making secret arrangements to sell the suit property to third parties, without the consent and knowledge of the plaintiff. Hence, the plaintiff left with no other option has filed the suit for the following reliefs:-

"(a) for Specific Performance of the Contract of the Sale Agreement dated 22.01.2005, directing the defendants 1 & 2 to execute the Sale Deed in respect of the suit property, after receiving the balance sale consideration of Rs.13,58,000/- from the plaintiff. In default, this Court may execute and register the sale deed in respect of the suit property, on deposit of the balance sale price of Rs.13,58,000/-.

(b) granting permanent injunction restraining the defendants 1 & 2, their men, agents and nominees from alienating or encumbering the sit property to any 3rd party;

(c) granting permanent injunction restraining the 3rd defendant, his sub-ordinates and successors-in-office from entertaining or registering any sort/kind of documents in respect of the suit property submitted by anyone.

(d) directing the defendants to pay the cost of the suit and pass such further or other reliefs"

4. Resisting the case of the plaintiff, the defendants 1 & 2 have filed separate written statements, by engaging separate counsel.

5. The 1st defendant in her written statement has contended that the allegation of the plaintiff that the suit property belongs to her and her husband is not correct. She has also denied the statement of the plaintiff that she agreed, along with the 2<sup>nd</sup> defendant, to sell the suit property to the plaintiff. She had not received any amount from the plaintiff. It is equally false to allege that she had consented for the sale of the suit property to the plaintiff. The 1st defendant is not the exclusive owner of the suit property. The suit property belongs to the partnership firm of the 1st defendant and three other partners. Therefore, it was impossible to give any consent for sale of the suit property to the plaintiff. The 1st defendant had never transacted with the plaintiff at any point of time either in person or over phone. The 1st defendant is not aware of the transactions between the plaintiff and the 2nd defendant. There is no privity of contract between the 1st defendant and the plaintiff. There is no cause of action for filing the suit as against the 1st defendant and as such, the plaint has to be rejected under Order 7 Rule 11 of CPC. Thus, the 1st defendant sought for dismissal of the suit.

6. The 2nd defendant had filed a separate written statement. In his written statement, the 2nd defendant denied the case of the plaintiff that he and his wife (1st defendant) are owning the suit property. He also denied that he and his wife have entered into an agreement of sale with the plaintiff to sell the suit property to the plaintiff. Only the 2nd defendant has entered into the agreement of sale with the plaintiff. The plaintiff had approached the 2nd defendant and expressed that he had invested huge money for construction of apartments and he required additional space to widen the existing road as per the norms of the Chennai Metropolitan Development Authority Rule and therefore, he wanted the 2nd defendant to sell the suit property. The plaintiff represented and assured that the 2nd defendant can also use the suit property as a road for ingress and egress to the property in Survey Nos. 71/2, 220 and 221. In fact, the 2nd defendant wanted breathing time to consult with his wife and three others, who are the partners representing M/s. Pushpa Brick Works. The plaintiff by his alluring words cajoled the 2nd defendant to sign the suit agreement and as a matter of fact, the plaintiff had agreed to take a fulfilled and regular agreement of sale from the owners later on. Thus, according to the 2<sup>nd</sup> defendant, under the above said compelling circumstances, he had signed the suit agreement and received a sum of Rs.5 lakhs on 22.01.2005 and another sum of Rs.10 lakhs on 24.1.2005. An endorsement with regard to payment of Rs.10 lakhs was written by the plaintiff with his pen. The 2nd defendant had signed the endorsement only on 24.1.2005 and not on 24.11.2005. But, it appears that the plaintiff had interpolated the endorsement, by adding No.1 by the side of the existing No.1 in the date of the said endorsement and thus, there are material alterations in the Agreement of Sale.

Therefore, the plaintiff is not entitled to the discretionary relief of specific performance and he can only seek for the return of the advance amount. It is further case of the 2nd defendant that he made it clear to the plaintiff that the suit properties belonged to a partnership firm and also gave xerox copies of the Sale Deeds in the name of the partners and also the partnership deed even prior to the date of the agreement. The 2nd defendant was under the bone fide impression that he could convince his wife (1st defendant) and other partners to honour the agreement of sale. In spite of his genuine efforts, he could not comply with the obligations. However, the performance of the contract of the sale has become impossible for the aforesaid reasons. Therefore, the contract of sale is void and unenforceable in law under Section 56 of the Indian Contract Act. The 2nd defendant himself had executed the Agreement of Sale and not under the instructions of the 1st defendant. It is totally false to say that the plaintiff has made personal requests and reminders to the 1st defendant over phone to execute the Sale Deed. The 1st defendant has no occasion to transact with the plaintiff regarding the above matter at any point of time. In fact, the 1st defendant has no exclusive title over the suit property. The 2nd defendant denied the allegation that the plaintiff tendered the balance of sale consideration on 31.05.2008 and it was refused by the defendants 1 & 2. In any event, the suit is barred by the limitation under Article 54 of the Limitation Act. The plaintiff should have filed the suit on or before 15.03.2008 according to law. The plaint is liable to be rejected under Order 7 Rule 11 of CPC. Thus, the 2nd defendant sought for dismissal of the suit.

7. On the above pleadings, originally the Trial Court has framed the follows issues -

- (1) whether the plaintiff is entitled for specific performance of sale of contract as per sale agreement dated 24.11.2005?
- (2) Whether the 2nd defendant is having exclusive right to sell the suit property?
- (3) Whether the suit property belongs to the partnership firm?
- (4) Whether the suit is barred by limitation?
- (5) To what relief?

Subsequently, the Trial Court recast the issues as follows -

- (1) Whether the suit property belongs to the partnership firm?
- (2) Whether the 2nd defendant is having exclusive right to sell the suit property?
- (3) Whether the plaintiff is entitled for Specific Performance of sale of contract as per sale agreement dated 24.11.2005?
- (4) Whether the suit is barred by limitation?
- (5) To what relief?

Before the Trial Court, in order to prove his case, the plaintiff examined himself as P.W.1, besides examining one Ramachandran as P.W.2 and marked nine documents as Ex.A.1 to Ex.A.9. On the side of the defendants, the 2nd defendant examined himself as D.W.1 and marked two documents as Ex.B.1 & Ex.B.2.

8.The Trial Court, after analysing the entire evidence both oral and documentary, has decreed the suit, by rendering the findings that the owner of the suit property is not the partnership firm and the defendants 1 & 2 alone are the owners of the suit property and that the 2nd defendant, having acted as an agent to the 1st defendant, is having exclusive right to sell the suit property. Aggrieved over the same, the present appeal has been filed by the defendants 1 & 2.

9.In the present appeal, the defendants have taken out two Miscellaneous Petitions in C.M.P.Nos.14042 & 18473 of 2016, under Order 41 Rule 27 of CPC, seeking to receive and mark the following documents as additional documents in support their case:-

C.M.P.No.14042 of 2016

- 1.Partnership Deed, dated 06.01.1975
- 2.Sale Deed No.700/1975, dated 03.02.1975
- 3.Sale Deed No.701/1975, dated 03.02.1975
- 4.Rectification Deed No.498/1977, dated 16.11.1977
- 5.Rectification Deed No.499/1977, dated 16.11.1977

C.M.P.No.18473 of 2016

- (1)Day Book for M/sPushpa Brick Works, of the year 1997
- (2)Ledger maintained in M/s.Pushpa Brick Works, of the year 1977
- (3)Ledger maintained in M/s.Pushpa Brick Works, of the year 1975
- (4)Sale Deed executed by Varadhan & others in favour of Mrs.Selvam, dated 09.09.1977.

10.In the affidavits filed in support of the said petitions for reception of additional documents, it has been contended by the appellants/defendants 1 & 2, inter alia, as follows\_

The suit property belongs to a partnership firm by name M/s.Pushpa Brick Works. The said part of the property was purchased in the year 1975 in the name of Rathna Brick Industry Partnership Company and thereafter, by way of registered rectification deed dated 16.11.1977, the said property was entrusted to M/s.Pushpa Brick Works formed as early as on 06.01.1975 itself. Apart from the 1st defendant, there are three other partners, who owned equal shares along with the 1st defendant in the said partnership firm. When that being so, the claim of the plaintiff with regard to the alleged agreement with the 2nd defendant stating that he has the authority on behalf of the 1st defendant, being the wife, cannot have any legal implication. In fact, all the documents were produced before the Trial Court by filing an Interlocutory Application No.1289 of 2009, but the same were not introduced as documents in the

suit due to the scope of the suit which depended on plaintiff's claim. However, the said documents were made available on records of the Court and the trial Court had adverted about the same. Since the ownership of the property became the core issue to construe the validity of the agreement, the said documents are sought to be marked in the appeal for the purpose of appreciation of the true facts and circumstances.

11. Opposing the prayer of the defendants for receiving additional documents, the plaintiff has filed counter affidavits inter alia contending that all the documents now sought to be marked are relating to the years 1975 & 1977, i.e., well before the filing of the present suit. But, the defendants have not given sufficient reason for not marking the said documents at the time of trial. Further, based on the said documents, oral evidence has to be let in by the parties and the veracity of the said documents has to be tested. The appellants/defendants cannot introduce new facts in the appeal. Thus, the 1st respondent/plaintiff sought for dismissal of the said petitions for receiving additional documents.

12. The learned counsel appearing for the appellants/defendants 1 & 2 submitted that the suit property is measuring an extent of 3176 sq.ft in S.Nos.71/2, 220 & 221 situated in Nolambur Village, Amabthur Taluk, Thiruvallur District. The plaintiff is a real estate agent, who invested huge money for construction of apartments. Since he required the suit property, he approached the 2nd defendant to purchase the suit property. Since the suit property belongs to the partnership firm viz., M/s. Pushpa Brick Works, in which the 1st defendant is one of the partners, the 2nd defendant wanted some breathing time to consult with the 1st defendant (his wife), who was abroad at that time, as well as with other partners of the said partnership firm. But, the plaintiff by his alluring words cajoled the 2nd defendant. Under compelling circumstance, the 2nd defendant entered into a Sale Agreement (Ex.A.2) with the plaintiff on 22.1.2005 and he had signed the Sale Agreement (Ex.A.2), by receiving Rs.5 lakhs as advance. Again on 24.1.2005, the 2nd defendant has also received another sum of Rs.10 lakhs and to that effect, he has made an endorsement on the rear side of the Sale Agreement (Ex.A.2) and the said endorsement of the 2nd defendant was marked as Ex.A.3. It is the contention of the learned counsel for the appellants/defendants that the 2nd defendant has made an endorsement (Ex.A.3) in the Sale Agreement (Ex.A.2) on 24.1.2005 and not on 24.11.2005 as claimed by the plaintiff. In the said endorsement (Ex.A.3) made by the 2nd defendant, by interpolating the 1st month, by adding No.1 by the side of existing No.1, the plaintiff made it to appear as 11th month, as if the advance amount of Rs.10 lakhs was paid by him on 24.11.2005 and not on 24.1.2005. It is further case of the appellants/defendants that since the balance amount of Rs.10 lakhs was paid on 24.1.2005, the plaintiff ought to have filed the suit within a period of three years from 24.1.2005. Whereas, the suit was filed only on 04.06.2008 i.e., after the expiry of three years limitation period. But, by way of manipulation in

the month mentioned in the endorsement (Ex.A.3) of the 2nd defendant, by adding No.1 by the side of the existing No.1, the plaintiff claimed that the balance advance amount of Rs.10 lakhs was paid only on 24.11.2005 and as such, the suit is not hit by limitation as it was filed within period of limitation of three years. The Trial Court has failed to go into the plea of manipulation in the date mentioned in the endorsement (Ex.A.3) made by the 2nd defendant in the Sale Agreement (Ex.A.2). When the document produced by the plaintiff differs from the copy given to the defendants, which discloses the actual date of 24.1.2005 in variation to the endorsement found in Ex.A.3, it was not properly addressed by the trial Court.

13.The learned counsel for the appellants/defendants would further submit that after the payment of Rs.10 lakhs on 24.1.2005, even as per the case of the plaintiff in the plaint, he tendered the balance sale consideration only on 31.05.2008 and the defendants refused to receive the same, which would show that even as per the case of the plaintiff, after the payment of Rs.10 lakhs, he was not ready and willing to pay the balance sale consideration for a period of more than 2 years. Therefore, on the ground of delay also, the plaintiff is not entitled to get the relief of specific performance. Moreover, without issuing any notice to the defendants, the plaintiff has straight-away filed the suit.

14.The learned counsel for the appellants/defendants would also submit that absolutely, there is no explanation from the plaintiff to state that after the payment of advance amount of Rs.10 lakhs, he was continuously ready and willing to pay the balance sale consideration and to perform his part of the contract. Since it was not established by the plaintiff that he was continuously ready and willing to perform his part of the contract, he is not entitled to the relief of specific performance. But, the Trial Court has not taken it seriously, but concluded that the plaintiff is entitled to the relief of specific performance. सत्यमेव जयते

15.Further, the learned counsel for the appellants/defendants submitted that the basic question of finding the ownership of the property is essential. It is the specific case of the defendants that the suit property belongs to the partnership firm M/s.Pushpa Brick Works, in which the 1st defendant is one of the partners. In fact, before the Trial Court, the documents, now sought to be marked as additional documents to show that the suit property belongs to the partnership firm, were filed along with I.A.No.1289 of 2009, which was filed for rejection of the plaint; but the said documents were not introduced as documents in the suit due to the scope of the suit which depends on plaintiff's claim. However, the said documents were made available on records of the Court and the trial Court had adverted about the same. Since the ownership of the property became the core issue to constitute the validity of the agreement, the said documents have to be accepted as additional documents to decide the issue involved in the appeal. Thus, the learned counsel for the

appellants/defendants sought for setting aside the judgment and decree of the trial Court.

16. Countering the submissions made by the learned counsel for the appellants/defendants, it is replied by the learned counsel appearing for the 1st respondent/plaintiff that on 22.01.2005 when the sale agreement (Ex.A.2) was entered into between the plaintiff and the 2nd defendant to purchase the suit property for a sale consideration of Rs.28,58,000/-, before signing the sale agreement, the 1st defendant obtained the consent of the 2nd defendant over phone as 1st defendant was abroad at that time. This fact was spoken to by P.W.2, who stood as a witness to the sale agreement (Ex.A.2). In fact, the 2nd defendant, who examined himself as D.W.1, has admitted in his cross-examination that only after going through the contents of the sale agreement (Ex.A.2), he signed it. Both the defendants 1 & 2 did not choose to file any document before the Trial Court to show that the suit property belongs to M/s.Pushpa Brick Works. Having signed the Sale Agreement, the 2nd defendant, being an Advocate, now cannot state that the suit property does not belong to them and it belongs to the partnership firm. Further, in the suit, the plaintiff had also filed an application in I.A.No.555/2008 for interim injunction and in the said IA, the defendants filed their counter and in the counter, they have clearly admitted that the suit property belongs to them and they have agreed to sell the suit property for a total sale consideration of Rs.28,58,000/-. So, once the defendants 1 & 2 have admitted the ownership and execution of the sale agreement, they cannot deny it or call the plaintiff to prove it.

17. Further, the learned counsel for the 1st respondent/plaintiff would submit that in order to prove that the defendants 1 & 2 are the owners of the suit property, before the trial Court on the side of the plaintiff, the plaint in O.S.No.290 of 2006, which was filed the 1st defendant herein before the District Munsif Court at Ambattur against one Krishnan and others, was marked as Ex.A.4. In the said plaint in O.S.No.290 of 2006, the 1st defendant herein had categorically stated that she is the absolute owner of the subject property. Even in the cause title of the said suit, the 1st defendant herein had stated that she is the Proprietor of M/s.Puspha Brick Works. That apart, in the said suit in O.S.No.290 of 2006, the 2nd defendant herein was examined as P.W.1. Certified copy of his proof affidavit and cross-examination were marked as Ex.A.5 & Ex.A.6 in the present suit and in the said documents, the 2nd defendant herein had admitted that the defendants 1 & 2 herein are the owners of the subject property.

18. The learned counsel for the 1st respondent/plaintiff would further submit that in fact, there was an another suit in O.S.No.337 of 2007 on the file of the District Munsif Court at Ambattur, which was filed by the Villagers of Nolambur against the defendants 1 & 2 herein and in the said suit also, there was an admission made by the defendants 1 & 2 herein to the effect

that they are the owners of the suit subject property. A police complaint was also lodged by the 2nd defendant against the plaintiff before the Nolambur Police Station, in which also the defendants 1 & 2 had stated that the subject property belongs to them. Only for the first time in the written statements filed by the defendants 1 & 2 in the present suit, they have taken a stand that the subject property belongs to the partnership firm M/s.Pushpha Brick Works, in which the 1st defendant is also one of the partners; but, the defendants 1 & 2 have not produced any document to show that the suit property is owned by the partnership firm M/s.Pushpha Brick Works. Further, though the 1st defendant has filed a separate written statement by engaging a separate counsel, she did not choose to enter into the witness box, to mark the documents to show that the property belongs to the partnership firm.

19. With regard to the submission made by the learned counsel for the appellants/defendants that there was an interpolation in the endorsement (Ex.A.3) by adding No.1 by side of existing No.1 to make it appear as 11th month instead of 1st month, it is replied by the learned counsel for the 1st respondent/plaintiff that a witness to Ex.A.3 was examined as P.W.2 and he had categorically stated in his evidence that the 2nd defendant received the amount only on 24.11.2005. In fact, no proof was produced on the side of the defendants to show that the 2nd defendant received the amount only on 24.1.2005. The xerox copies of the a sale agreement said to have been available with the defendants were marked as Ex.B.1 & Ex.B.2. The said documents have been created by the 2nd defendant for the purpose of this case. In fact, D.W.1 himself has admitted in his evidence that the plaintiff gave xerox copies of the Sale Agreement before signing it on 22.01.2005. So, it is clear that the defendants would have used the same at later point of time by giving the date as 24.1.2005, as if further sum of Rs.10 lakhs was received on 24.1.2005. Therefore, the trial Court has correctly rejected the said document.

20. The learned counsel for the 1st respondent/plaintiff would further submit that the plaintiff has proved that he was continuously ready and willing to perform his part of the contract. In the affidavit, the plaintiff has stated that he was continuously approaching the defendants, in person as well as over phone, but, the defendants refused to receive the balance sale consideration. Further, not even a suggestion was put forth to P.W.1 during his cross-examination that he was not ready and willing to perform his part of the contract. Thus, it is established by the plaintiff that he was ready and willing to perform his part of the contract.

21. With regard to receipt of additional documents, it is contended by the learned counsel for the 1st respondent/plaintiff that having lost the suit before the Trial Court, now the defendants 1 & 2 cannot be allowed to mark the same documents, which were already available with them during the time of trial. The learned counsel for the 1st respondent/plaintiff would further submit that in the appeal

additional documents can be accepted only to remove the lacuna in the case and not to fill up the lacuna in the case of a party. If there is no lacuna in the evidence, the question of removing the lacuna does not arise. In this regard, the learned counsel for the 1st respondent/plaintiff has also relied upon the decision reported in 2012 (8) SCC 148 (Union of India Vs. Ibrahim Uddin and another) and submitted that in the said case it has been held by the Hon'ble Supreme Court that the inherent power of the appellate Court to allow production of documents in expectational circumstances should be executed judicially and with circumspection. But, in the instant case, the defendants have not chosen to give any convincing reason and exceptional circumstances for not filing the documents at the time of trial.

22.The learned counsel for the 1st respondent/plaintiff has also relied upon the decision reported in 2014 (13) SCC 468 [State of Karnataka and another Vs. K.C.Subramanya and others], wherein it has been held by the Honourable Supreme Court that the documents can be allowed to be marked at the appellate stage only if the documents could not be produced at the stage of trial, inspite of exercise of due diligence and the evidence could not be produced as a matter of routine and as per the will and pleasure of the parties. The learned counsel for the 1st respondent/plaintiff has also relied upon the decision reported in 1997 LW 562 [Margachari V.K. Vs.M.R.Krishnaswami Mudaliar etc] and submitted that the parties cannot change their colour and at the same time approbate and reprobate. The defendants have not given sufficient reasons for reception of the additional documents and as such the petitions for reception of additional documents are also liable to be dismissed.

23.The learned counsel for the 1st respondent/plaintiff submitted that there is no infirmity in the judgment and decree passed by the trial Court and there is no compelling circumstances warranting this court to reverse the judgment and decree of the trial Court. Thus, the learned counsel for the 1st respondent/plaintiff sought for dismissal of the appeal.

24.We have given our anxious consideration to the submissions made on either side and carefully perused the materials available on record.

25.In view of the submissions made on either side, the following points arose for consideration in this appeal\_

1.Whether the plaintiff has established before the trial Court that the defendants 1 & 2 are the owners of the suit schedule property?

2.Whether the plaintiff has established that the sale agreement dated 22.1.2015 was signed by the 2nd defendant with the consent of the 1st defendant?

3.Whether the defendants have established their defence that there was an interpolation in the sale agreement by adding No.1 by the side of existing No.1, in order to show that the suit is

barred by limitation?

4. Whether plaintiff has failed to establish that he was ready and willing to perform his part of the contract?

5. Whether the defendants 1 & 2 have made out any case under Order 41 Rule 27 of CPC for reception of additional documents in the appeal?

Points 1 & 2:-

26. It is the case of the plaintiff that on 22.01.2005 the 2<sup>nd</sup> defendant entered into an agreement of sale with the plaintiff to sell the suit property for a sum of Rs.28,58,000/- and at that time, it was represented by the 2<sup>nd</sup> defendant that the suit schedule property belongs to his wife 1<sup>st</sup> defendant. Since the 1<sup>st</sup> defendant was abroad at the time of execution of the agreement, after consultation with the 1<sup>st</sup> defendant, the 2<sup>nd</sup> defendant had signed the sale agreement and he had also received a sum of Rs.5 lakhs as advance from the plaintiff; that the time fixed under the sale agreement is not the essence of the contract.

27. It is further case of the plaintiff that at the time of entering into the sale agreement, he was informed by the 1<sup>st</sup> defendant that the suit schedule property belongs to the 1<sup>st</sup> defendant. Now, only in the written statements filed by the defendants 1 & 2, they have taken a defence that the property belongs to the partnership concern viz., M/s. Pushpa Brick Works, in which the 1<sup>st</sup> defendant (wife of the 2<sup>nd</sup> defendant) is one of the partners. The 1<sup>st</sup> defendant has also filed a separate written statement by engaging a separate counsel. Though the 1<sup>st</sup> defendant has stated that the suit schedule property belongs to the partnership concern, she has not chosen to enter into the witness box to examine herself to prove that the property belongs to the partnership concern.

28. On the contrary, on the side of the plaintiff, Ex.A.4 to 9 were marked. Ex.A.4 is the plaint in O.S.No.290 of 2006 on the file of the District Munsif Court at Ambattur, which was filed by the 1<sup>st</sup> defendant herein as against one Krishnaveni and others, wherein in paragraph 3, she has stated as follows\_

"3. The plaintiff states that the property morefully described in the plaint schedule is the absolute property of the plaintiff, hereinafter called as suit property."

Even in the cause title of the said plaint, the 1<sup>st</sup> defendant herein had stated as if she is the proprietor of Pushpa Brick Works. For the benefit of clarity, the cause of the said suit is extracted hereunder\_

"IN THE COURT OF HONOURABLE DISTRICT  
MUNSIF AT AMBATTUR  
O.S.No. 290 of 2006

Mrs.R.Selvam  
Prop.Pushpa Brick Works                      ..Plaintiff

Vs.

1.Mrs.Krishnaveni

2.The President, Nolumbur Village.

3.The Block Development Officer,  
Villivakkam Panchayat Union                      ..Respondents."

The proof affidavit filed by the 2<sup>nd</sup> defendant herein and his cross-examination in the said suit, have been marked as Ex.P.5 & Ex.P.6 in the present suit. Even in the said documents also, the 2<sup>nd</sup> defendant herein has stated that his wife-1<sup>st</sup> defendant herein is the owner of the the suit schedule property.

29.That apart, Ex.A.7 is the written statement by filed by the defendants 1 & 2 herein in the suit in O.S.No.337 of 2007 which was filed by one M.Immanueal and another as against the defendants herein before the District Munsif Court at Ambattur, in respect of the same subject property. In Ex.A.7, the defendants 1 & 2 have stated that the suit schedule property belongs to them. The relevant portion in Ex.A.7 reads as follows\_

"6.... it is the patta land absolutely  
belonging to the defendants."

Similarly, in the police complaint given by the 2<sup>nd</sup> defendant herein as against the plaintiff, which was marked as Ex.P.8, the 2<sup>nd</sup> defendant has categorically stated that the 1<sup>st</sup> defendant is the owner of the suit property. Thus, by marking Ex.P.4 to Ex.P.8, the plaintiff has established that the defendants 1 & 2 are the owners of the suit subject property.

30.Though the defendants 1 & 2 had stated that the suit subject property belongs to the partnership concern, in which the 1<sup>st</sup> defendant is one of the partners, they have not chosen to mark any document before the trial court during the course of trial, inspite of their claim that documents are in their possession, which are now sought to be marked in the appeal as additional documents.

31.It is the specific case of the plaintiff that on 22.1.2005, the 2<sup>nd</sup> defendant had signed the sale agreement (Ex.A.2) with the consultation and consent of the 1<sup>st</sup> defendant, who was abroad at that time. But, though the 2<sup>nd</sup> defendant had admitted the signing of the sale agreement on 22.1.2005, he is denying that he had done so after getting the consent from his wife.

32. On the side of the plaintiff, the person who stood as a witness to the sale agreement, was examined as P.W.2, who had categorically stated in his evidence that at the time of execution of the sale agreement, he was present and the 2nd defendant signed the document and received Rs.5 lakhs. In the proof affidavit filed by P.W.2, he has stated that the 2nd defendant signed the sale agreement after consultation with his wife 1st defendant. Therefore, from the materials on records viz., Ex.A.1 to Ex.A.8 coupled with the evidence of P.W.2, it could be inferred that the 2<sup>nd</sup> defendant has always been dealing with the suit property on behalf of the 1<sup>st</sup> defendant and he has given evidence on behalf of the 1<sup>st</sup> defendant and he has also admitted in Ex.A.6 - cross examination recorded in O.S.No.290 of 2006 before the District Munsif Court at Ambattur that his wife has given power to him to deal with the suit property as her agent. Therefore, Ex.A.2-sale agreement is a valid document and it binds on the defendants 1 & 2.

33. Further, We are of the opinion that really if there is no consent from 1<sup>st</sup> defendant, she could have informed the plaintiff at least after her arrival from USA. The 2nd defendant, as D.W.1, has adduced evidence that he has intimated the 1<sup>st</sup> defendant about the execution of the sale agreement-Ex.A.2. But, the 1<sup>st</sup> defendant did not deny or send any thing in writing to the plaintiff about her unwillingness to stand by the sale agreement. Similarly, if really the suit property belongs to the partnership concern M/s.Pushpha Brick Works, the partners would have taken steps to stop the sale in favour of the plaintiff. It is not the case of the defendants that the partners were not aware of the sale agreement. Therefore, it has been clearly established by the plaintiff that the defendants 1 & 2 are the owners of the suit schedule property and the sale agreement was signed by the 2<sup>nd</sup> defendant only with the consent of the 1<sup>st</sup> defendant.

#### Point No.3

34. It is the case of the defendants that further advance amount of Rs.10 lakhs was paid by the plaintiff to the 2<sup>nd</sup> defendant on 24.1.2005 i.e., within two days from the execution of the sale agreement. Therefore, the plaintiff ought to have filed the suit within the period of three years from the date of 24.1.2005; but, the suit has been filed by the plaintiff only on 04.06.2008 i.e., after the expiry of three years limitation period. But, the plaintiff manipulated the endorsement (Ex.A.3) made in sale agreement, by adding No.1 by the side of existing No.1, to make it appear as if it is 24.11.2005 instead of 24.1.2005. Therefore, according to the learned counsel for the appellants/defendants, the suit is barred by limitation. In support of this submission, the learned counsel for the appellants/defendants has also relied upon Ex.B.1 & Ex.B.2, xerox copies of the sale agreement said to have been available with the defendants.

35. But, the trial Court has rejected the said documents Ex.B.1 & Ex.B.2. In fact, the 2<sup>nd</sup> defendant admitted in his evidence that a xerox copy of the sale agreement was handed over

to him prior to signing it. Therefore, according to the plaintiff, the 2<sup>nd</sup> defendant made use of the said xerox copy, by making the date as 24.1.2005 in the endorsement. Further, P.W.2, who is a witness to the sale agreement, deposed that the 2<sup>nd</sup> defendant received the amount only on 24.11.2005.

36. Though the learned counsel for the appellants/defendants submitted that the further advance amount of Rs.10 lakhs was received by the 2<sup>nd</sup> defendant only on 24.1.2005, no proof has been produced on the side of the defendants to show that the 2<sup>nd</sup> defendant received the amount of Rs.10 lakhs only on 24.1.2005.

Moreover, if really interpolation was made in the endorsement-Ex.A.3, the defendants ought to have taken steps to send the document to get the opinion of the handwriting expert/forensic expert with regard to the alleged interpolation made in Ex.A.3. But, they have not done so. Considering the facts and circumstances of the case, We do not find any force in the submission made by the learned counsel for the appellants/defendants that there is an interpolation in Ex.A.3. In fact, the Trial Court by properly dealing with the said issue has rightly rejected the case projected by the defendants by assigning valid reason.

Point No.4:-

37. It is yet another submission of the learned counsel for the appellants/defendants that though the further advance amount of Rs.10 lakhs was paid by the plaintiff, thereafter, he had not contacted the defendants and he was not continuously ready and willing to perform his part of the contract. But, it is the specific case of the plaintiff that he was continuously approaching the defendants in person as well as over phone, to receive the balance sale consideration and to execute the sale deed, but they refused to receive the balance sale consideration. To that effect, the plaintiff has adduced evidence as P.W.1. But, in his cross-examination, not even a suggestion was put forth to P.W.1 on the side of the defendants that the plaintiff was not ready and willing to perform his part of the contract. Under such circumstance, We do not find any force in the submission made by the learned counsel for the appellants/defendants in this regard.

Point No.5:-

38. With regard to the petitions filed by the defendants 1 & 2 under Order 41 Rule 27 of CPC, it is the submission of the learned counsel for the appellants/defendants that the basic question of finding the ownership of the subject property is essential. According to the appellants/defendants, the documents pertaining to M/s.Pushpha Brick Works viz., ledgers were handed over to the counsel appearing for the appellants herein/defendants before the trial Court, but the said documents were omitted to be marked in the suit. In fact, the said documents were produced before the trial Court along with 1.A.No.1289 of 2009, which was filed for rejection of the plaint, but the same were not introduced as documents in the suit due to the scope of the suit which depended on plaintiff's

claim. However, the said documents were made available on records of the Court and the trial Court had adverted about the same. Since the ownership of the property became the core issue to construe the validity of the agreement, the said documents are sought to be marked in the appeal for the purpose of appreciation of the true facts and circumstances. Thus, the learned counsel for the appellants/defendants submitted that the said documents have to be received as additional documents in the appeal and consequently, the matter has to be remanded back to the trial Court for the purpose of adducing further evidence by marking the said documents.

39. But, it is the reply of the learned counsel for the 1<sup>st</sup> respondent/plaintiff that the defendants have not given sufficient reason for not filing the documents at the time of trial and the defendants cannot introduce the new facts at the time of appeal; as such, the petitions filed by the defendants to receive additional documents shall be rejected.

40. In our considered opinion, it has been seen whether the defendants have made out any case under Order 41 Rule 27 of CPC to receive the documents as additional evidence. In this regard, useful reference can be made to the decision of the Honourable Apex Court in the case of (Malayalam Plantations Limited vs. State of Kerala and another) reported in AIR 2011 Supreme Court 559 wherein it has been held by the Honourable Apex Court as follows:-

"11. If any petition is filed under Order 41 Rule 27 in an appeal, it is incumbent on the part of the appellate Court to consider at the time of hearing of the appeal on merits so as to find out whether the documents or evidence sought to be adduced have any relevance/bearing in the issues involved. Further, additional evidence could be adduced in one of the three situations namely (a) whether the trial court has illegally refused the evidence although it ought to have permitted (b) whether the evidence sought to be adduced by the party was not available despite the exercise of due diligence and (c) whether additional evidence was necessary in order to enable the Appellate Court to pronounce the judgment or any other substantial cause of similar nature. It is equally well settled that additional evidence cannot be permitted to be adduced so as to fill in the lacuna or to patch up the weak points in the case."

41. Applying the above decision of the Honourable Supreme Court to the case on hand, the claim of the defendants for reception of additional document will not fall in any of the parameters laid down by the Honourable Supreme Court. It is not the case of the defendants that they have filed the documents before the trial court but it was unlawfully rejected by the trial court. It is also not the case of the defendants that in spite of exercise of due diligence, they were prevented from filing the documents in their possession. The claim made by the defendants for not marking the documents before the trial court

is that due to the scope of the suit which depends on the plaintiff's claim, they did not mark the documents as exhibits during the course of trial. But, We are not in a position to accept the theory put forth by the defendants for not marking the documents before the trial court. Further, it is not open to the defendants to make fresh allegations and call upon the other side to admit or deny such allegations at the stage of appeal, which is contrary to the provisions contained under Order 41 Rule 27 of CPC. Therefore, we are of the view that the plea of the defendants to grant leave to mark the additional documents at the appellate stage cannot be countenanced and it has to be rejected. Under such circumstances, the plaintiff is entitled to the relief of specific performance; however, considering the fact that the sale agreement was entered into between the parties on 22.01.2005 and now, 11 years have lapsed, in the interest of justice, the plaintiffs could be directed to pay interest on the balance sale consideration at the rate of 6% per annum to the defendants. In this regard, a reference could be placed in the judgment of the Honourable Supreme Court in the case of (P. D'Souza vs. Shondrilo Naidu) reported in (2004) 6 SCC 649, wherein in Para No.43, it was observed as follows:-

"43. Bhan, J., however, while expressing his dissension in part observed; (SCC pp. 506 & 507, paras 38 & 40)

"38. It is well settled that in cases of contract for sale of immovable property the grant of relief of specific performance is a rule and its refusal an exception based on valid and cogent grounds. Further, the defendant cannot take advantage of his own wrong and then plead that decree for specific performance would be an unfair advantage to the plaintiff.

....

40. Escalation of price during the period may be a relevant consideration under certain circumstances for either refusing to grant the decree of specific performance or for decreeing the specific performance with a direction to the plaintiff to pay an additional amount to the defendant and compensate him. It would depend on the facts and circumstances of each case."

The above said decision is squarely applicable to the present facts of the case. In the instant case, since now 11 years have lapsed from the date of the sale agreement. Considering the escalation of prices, We are of the opinion that the plaintiff could be directed to pay 6% interest per annum on the sale consideration.

42. For the foregoing reasons, the appeal is dismissed. However, the plaintiff/1st respondent is directed to pay 6% interest per annum on the balance sale consideration, from the date of sale agreement till the date of deposit. The said amount has to be deposited by the plaintiff, after adjusting the amount that has already been deposited before the Court below, within a period of eight weeks from the date of receipt of a copy of this

Judgment. On such payment, the plaintiff is entitled to the relief of specific performance as ordered by the Trial Court. In the meantime, the appellants/defendants 1 & 2 are permitted to withdraw the amount already deposited by the plaintiffs from the Trial Court. Consequently, connected Miscellaneous Petitions are closed. No costs.

Sd/-  
Assistant Registrar(CS )

//True Copy//

Sub Assistant Registrar

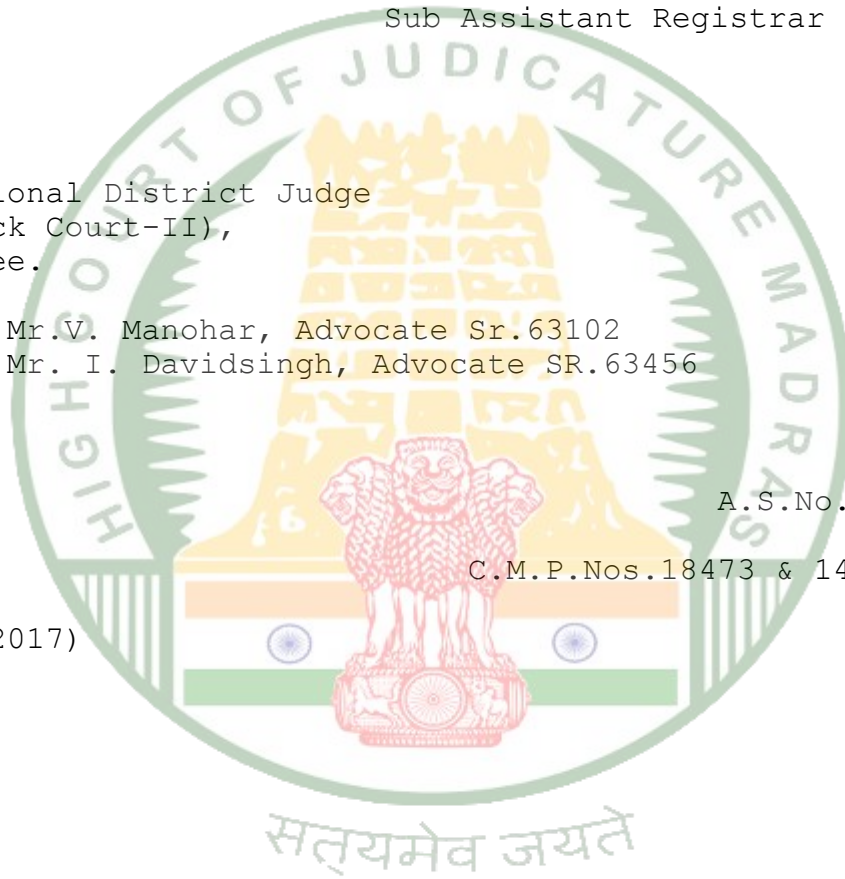
To,

The Additional District Judge  
(Fast Track Court-II),  
Poonamallee.

+ 1 cc to Mr.V. Manohar, Advocate Sr.63102  
+ 1 cc to Mr. I. Davidsingh, Advocate SR.63456

VD(CO)  
EU(09/10/2017)

A.S.No.487 of 2011  
and  
C.M.P.Nos.18473 & 14042 of 2016



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