



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on: 05.09.2017

Delivered on : 13.09.2017

CORAM:

THE HONOURABLE MR.JUSTICE M.M.SUNDRESH

and

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

A.S.(MD)No.157 of 2014

and

M.P.(MD)No.2 of 2014

Kottaisamy (died),

1.Parvatham

2.Gomathiammal

3.Selvalakshmi

4.Saraswathi

5.Om Kumaran

6.Om Sakthi

7.Gopalakrishnan

... Appellants/Defendants 2 to 8

Vs.

P.S.Chandrasekara Raja

... Respondent/Plaintiff

Prayer: Appeal Suit filed under Section 96 of Civil Procedure Code, against the judgment and decree passed in O.S.No.15 of 2007, dated 20.03.2014, on the file of the 1st Additional District and Sessions Court, Tirunelveli.

For Appellants : Mr.H.Arumugam

For Respondent : Mr.F.X.Eugene

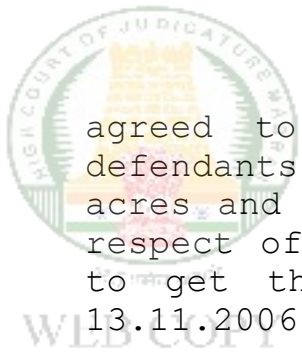
J U D G M E N T

[Judgment of the Court was delivered by **N.SATHISH KUMAR , J.**]

Aggrieved over the judgment and decree passed by the trial Court granting specific performance in favour of the plaintiff, the present appeal suit came to be filed by the defendants.

2.The brief facts of the plaintiff case is as follows:

By an agreement, dated 14.08.2006 defendants 1 & 2, who are the father and daughter agreed to sell the suit properties to the plaintiff at the rate of Rs.75,000/- per acre and had received a sum of Rs.1,00,000/- as advance. It is also agreed that the remaining sale consideration shall be paid on or before 13.11.2006. It is also agreed by the defendants 1 & 2 to make a marketable title and also indemnify as against any encroachment over the suit property. The defendants 1 & 2 also agreed to clear the notification issued by the CBCID at Bombay. The total land



agreed to be sold is 43 acres and 93 cents. However, the defendants 1 and 2 have executed the sale deed in respect of 18 acres and 90 cents. However, they have not executed sale deed in respect of the suit properties and they also not taken any steps to get the clearance from the CBCID at Mumbai on or before 13.11.2006.

3.The plaintiff has also filed a writ petition to register the documents by getting clearance from the CBCID and issued a legal notice to the defendants on 24.03.2007 to perform their part of contract. However, the same was not received by them. The plaintiff is always ready and willing to perform his part of contract. Hence, the suit has been filed.

4.The defendants 1 and 2 admitting the execution of agreement, submitted that despite repeated request for remaining sale consideration, the plaintiff has delayed the same. The plaintiff has never informed them about the writ petition allegedly filed by him as against the CBCID at Mumbai in respect of the suit properties. The plaintiff having failed to honour the commitment earlier, get the value of the suit properties has been increased and delayed his performance of contract and hence, prayed for dismissal of the suit.

5.1.Based on the above pleadings, the following issues are framed by the trial Court.

(i)Whether the plaintiff was responsible for non-completion of sale?

(ii)Is plaintiff is ready and willing to perform his part of contract?

(iii) To what relief?

5.2.At the time of pronouncing the judgment, the trial Court recasted the above issues as follows:-

1)Whether the Plaintiff was ready and willing to perform his part of contract?

2)Whether the plaintiff is entitled for the relief of specific performance?

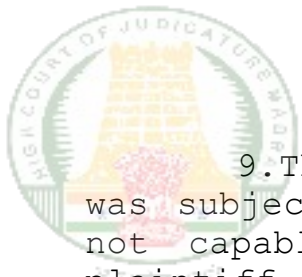
3)What other relief the plaintiff is entitled to?

6.On the side of the plaintiff, two witnesses were examined as P.Ws.1 and 2 and 39 documents were marked as Ex.A1 to Ex.A39.

On the side of the defendant, one witness was examined as D.W.1 and marked 5 documents as Ex.B1 to Ex.B5.

7.On the basis of the evidence and materials available on record, the trial Court decreed the suit in favour of the plaintiff granting specific performance. Aggrieved over the same, the present appeal came to be filed.

8.The learned counsel for the appellants submitted that the plaintiff/respondent being a Real estate promoter taking advantage of the sale deed executed by the defendants 1 and 2, failed to pay the remaining balance sale consideration within a period of three months, as agreed in the agreement.



9. The contention of the plaintiff that since the property was subject matter of the proceeding of the CBCID at Mumbai and not capable of registration. It is a story invented by the plaintiff. The respondent/plaintiff was aware of the notice issued by the CBCID at the time of the agreement itself and subsequent to agreement, he also got registered certain properties, which was covered under CBCID notification. Therefore, now, the contention of the plaintiff that since the notification issued by the CBCID was not cleared by the defendants, he could not pay the remaining consideration, cannot be accepted at all. Besides, the power of attorney also executed in favour of the respondent in respect of certain item of the properties, even then he has not registered the property, whereas the legal notice was issued on 24.03.2007 and suit was filed on 03.04.2007 with inordinate delay. It is the further contention that absolutely there is no bar for registration of the properties. In fact, the plaintiff himself has registered the property in similar nature, even prior to the agreement, though, those documents are kept pending. If really, the plaintiffs are ready and willing, he could have paid the remaining sale consideration and got the document registered in his name. The payment of remaining sale consideration within three months is the vital term of contract, which has not been complied by the respondent. Therefore, ready and willingness cannot be inferred merely because during the pendency of the suit, the plaintiff has deposited the remaining sale consideration.

10. As per Ex.A5, a notification issued by the CBCID the property to an extent of 8.8 acres alone covered under Ex.A5. Therefore, there was no bar in registering the remaining properties by the respondent. But the respondent being the real estate promoter, taking advantage of the same, waiting till increase of the price, without paying the sale consideration. Hence, there is no ready and willingness on the part of the respondent. That apart, his capable and ready cash to pay the remaining sale consideration has also not been established. The stipulation contained in the contract has also make it clear. Such stipulation has to be only on the respondent, who has already aware of the nature of the properties. Taking advantage of the same, he delayed the contract. He further submitted that absolutely there is no ready and willingness on the part of the respondent besides vital terms of the contract is also not complied with. That apart, the contract itself was executed. Under these circumstances, when some item of the properties were subject matter of proceedings under Ex.A5. He further submitted that the trial Court has not considered all these aspects and simply decreed the suit.

11. In support of his arguments, the learned counsel for the plaintiff relied upon the judgment reported in **2011(2) Supreme Court Cases 18 Saradamani Kandappan vs. S.Rajalakshmi and others.**



12. The learned counsel for the appellants also relied upon the judgment reported in **(2010) 1 Supreme Court Cases 287, A.K. Lakshmipathy (dead) and others vs. Rai Saheb Pannalal H. Lahoti Charitable Trust and others**, wherein the relevant passage reads as under:-

"29. In view of our discussions made hereinabove and in order not to execute the agreement for sale on the part of the appellants, it is evident from Exts. P-3, P-5 and P-7 which would show that the appellants sought clarifications regarding the joining of all trustees in execution of the sale deed, asking the second respondent to enter into another agreement by way of indemnifying the appellants for any loss due to defect in the title, etc. We do not find any justification to say in the facts and circumstances of the case that the demands of the appellants were justified and reasonable. On the other hand, this demand on the part of the appellants, in our view, was not only unjustified and unreasonable but it was in fact imaginary as rightly pointed out by the trial court in its judgment. In order to show that the appellants were all ready and willing to perform their part of the obligation to complete the agreement was to bear the remaining amount of the contract and then agitate the matter for specific performance before the court.

30. This was also the view expressed by this Court in *Chand Rani V. Kamal Rani* wherein this Court held that if the final ultimatum by the seller has been given for payment of balance amount then the best thing for the purchasers is to pay the amount and then take appropriate steps. Therefore, in our view, the appellants having failed to do so, they cannot be allowed to take advantage of their own mistake and conveniently pass on the blame to the respondents.

and (2016) 4 Supreme Court Cases 352, Satish Kumar vs. Karan Singh and another

"8. It is well settled that the jurisdiction to order specific performance of contract is based on the existence of a valid and enforceable contract. Where a valid and enforceable contract has not been made, the court will not make a contract for them. Specific performance will not be ordered if the contract itself suffers from some defect which makes the contract invalid or



unenforceable. The discretion of the court will not be there even though the contract is otherwise valid and enforceable."

13. On the other hand, the learned counsel appearing for the respondent would submit that there is no dispute with regard to the agreement. The agreement itself shows that it is the duty of the vendor to clear the notification issued by the CBCID under Ex.A5. Further, since the lands are covered under the Land Ceiling Act, there is an obligation on the part of the respondent to make out a marketable title. whereas, the appellants have not taken any steps in this regard to clear the land from the CBCID notification. Whereas, the respondent alone filed a writ petition under Ex.A9, which is also ordered on 28.09.2007. All these facts clearly shows that the respondent all along ready and willing to perform the contract. The trial Court rightly taking into consideration all the facts. Hence, the judgment and decree of the trial court does not require any interference.

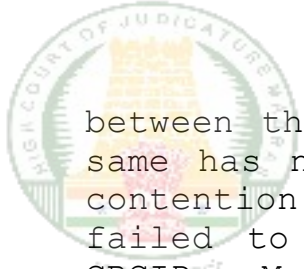
14. In the light of the above submission, the only point that arose for consideration is i) whether the respondent is ready and willing to perform his part of the contract. ii) Whether the respondent is entitled to specific performance.

15. Points 1 & 2:-

The agreement Ex.A1, dated 14.08.2006 is not in dispute.

Ex.A1 entered between the parties for sale of a total extent of 43.93 acres in various survey number of the Karanthaneri Village. It is also agreed between the parties that sale consideration shall be a sum of Rs.75,000/- per acre and advance of Rs.1,00,000/- was paid on the date of agreement. It is also specifically agreed between the parties that remaining sale consideration shall be paid by the respondent on or before 13.11.2006 i.e., three months from the date of agreement. Though the other conditions have been put in the agreement to make a marketable title, now the respondent has pleaded in his plaint that one of the main condition in the agreement is that suit properties were subjected to the proceedings initiated by CBCID, Mumbai in respect of the case relating to the some other third party. Therefore, there was an embargo on the Registration Authorities to register the properties and the appellant agreed to clear the said embargo in the agreement itself. As they failed to clear the said embargo, the respondent himself has filed a writ petition and got an order in his favour. Therefore, it is the case of the respondent that he is always ready and willing to perform his contract, hence filed the suit.

16. On a careful perusal of the entire agreement, it is specifically agreed by the parties that the remaining sale consideration for entire 43.43 acres, has agreed to be paid on or before 13.11.2006. This condition, infact, is a vital terms of the contract. Admittedly, in this case within three months agreed

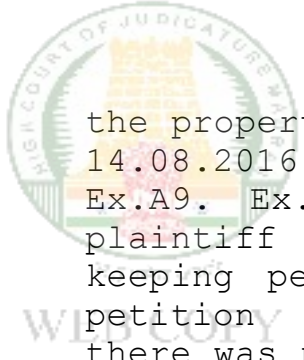


between the parties to pay the remaining sale consideration, the same has not been complied by the respondent. Though, it is the contention of the respondent that it is only the appellants have failed to clear the encumbrance by getting clearance from the CBCID, Mumbai in respect of the suit properties, we are constrained to hold that such contention cannot be accepted for various reasons. It is to be noted that EX.A5 the xerox copy of the notification issued by the CBCID, Mumbai to the registering authorities.

17. In the above communication, the Inspector of Police Economic Offences Wing, Crime Branch addressed the communication to the Sub-Registrar, Nanguneri, Tirunelveli District informing that one M/s. Indica Organic Foods & Plantations Ltd., dealt with in the despite of various peoples which resulted in filing the criminal case and requested the Sub Registrar not to register the sale deed in respect of the survey field mentioned in the communication without permission from the EOW, CBCID, Mumbai. Ex.A5 is also related to the Karanthanery survey number. On a careful perusal of Ex.A5 and suit agreement, we are of the view that the contention of the appellants that the entire suit properties are covered under the notification, cannot be true at all.

18. In fact, only few item of the property measuring about 8.87 acres alone in various survey fields covered under the above notification. It is further curious to note that under EX.A15, dated 20.11.2006 and EX.A16, dated 23.11.2006, an extent of six acres was sold at the instructions of the respondent. In fact EX.A15, the respondent has executed the sale deed as a power agent of the defendants in survey field No.772/2A1 for an extent of 3 acres. The above survey field No.772 is also covered under EX.A5. These documents are executed on 20.11.2006 and 30.11.2006. Similarly an extent of 18 acres and 90 cents also registered at the instruction of respondent in various sale deeds. The above sale is in respect of items 6,7,16 and 17, 18,19,20,21,23,24,27,38,36 of the suit agreement. Some of the properties are also covered under Ex.A5, the communication sent by the CBCID. Having purchased 18 acres and 19 cents within the agreement period for remaining 25 acres 3 cents alone the suit has been filed. Therefore, very conduct of the respondent itself clearly shows that the property is capable of registration at the relevant point of time. Despite having registered the properties though covered under Ex.A5, now it cannot be canvassed by the respondent that because the suit properties are covered under EX.A15, there was a delay on his part and the defendants have not taken any steps in this regard.

19. The evidence of the plaintiff would carefully scanned <https://hcservices.echips.gov.in/hcservices> clearly indicates that he has not come to the Court with clean hands. The definite evidence of the plaintiff, in his cross examination that the factum of EX.A5 and registration under



the properties were known to him only after EX.A1 agreement, dated 14.08.2016. His very evidence itself falsified by his own document Ex.A9. Ex.A9 is a writ petition filed by the plaintiff. The plaintiff has challenged the orders of the Sub-Registrar for keeping pending the document, dated 27.06.2006. The above writ petition was allowed taking into consideration of the fact that there was no attachment whatsoever in respect of the properties is the subject matter of the sale deed, dated 26.11.2006.

20.Ex.A9 is relevant for assessing the conduct of the respondent herein. The writ petition itself clearly show that sale deed, dated 26.11.2006. He was aware that there was some communication under Ex.A5. Therefore, he challenged it. Ex.A9 relates to the return of the document dated 26.11.2006 executed in his favour by some other third party. Whereas now it is contended by the plaintiff that he only took steps under Ex.A9 to get the Clearance in respect of the suit properties. On perusal of the above documents his contention found to be false. From the above, we are constrained to hold that the plaintiff has come before the Court for law, for equitable relief, has infact made a false plea and not come to the Court with clean hands. Yet another fact taken note of is that, admittedly he was aware of the Ex.A5 even prior to the agreement. Further, his evidence also clearly shows that he was also aware that the restriction under Land Ceiling Act has already expired in the year 2001. Despite knowing of this fact incorporating such a condition in the agreement at the instance of the purchaser, who is a Real Estate Promoter makes it evident that such conditions were insisted on the vendors, only to gain un-due advantage over the agreement and its stipulation.

21.Therefore, when a person seeks equitable relief before the Court of law, should come with clean hands, on the face of the above documents referred to above and pleading of the plaintiff that he only filed the writ petition to clear the suit lands from the CBCID restriction which is found to be false, that itself gives an inference that he has made a false plea and not come to the Court with clean hands. It is to be noted that has already discussed several properties already registered at the instance of the agreement holder namely, respondent including those properties were covered under Ex.A5. Therefore, the contention of the respondent that because of such restriction, he could not pay remaining sale consideration in time, cannot be countenanced. Agreeing specific covenant in agreement to pay the balance sale consideration within a specified time, such covenant make vital terms of contract. When the person comes for equitable relief has violated such vital part of contract, has no right to equitable relief of specific performance in his favour.

<https://hcservices.ecourts.gov.in/hcservices/> 20. It is further to be noted that despite Ex.A.39 power of attorney given by the agreement holder in respect of certain item of properties, even then, he has not completed the sale in



respect of those items of properties. When a specific terms is agreed between the parties, unless and until such performance is complied, party cannot insist the performance of subsequent terms of contract. In this regard, the judgment reported in **(2011)12 SCC Supreme Court Cases 18 Saradamani Kandappan vs. S.Rajalakshmi and others)**, paragraphs 54 and 56 reads as follows:

"54.Effect of default as that promise which should be first performed in contract consisting of reciprocal promises. When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, such and the promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract."

The agreement in this case provides a good illustration for this section. The purchaser cannot claim that the vendors should produce the original title deeds and satisfy her regarding their title, or claim execution of the sale deed, unless and until she paid the entire consideration within the time stipulated in Clause 4 of the agreement, which would enable the vendors to repay the loans and obtain release of the original title deeds.

56.As noticed above there is an unconditional promise to pay the balance consideration in three instalments and the said promise by the purchaser is not dependent upon performance of any obligation by the vendors. The contract specifically states that having paid the balance price, if the purchaser is not satisfied about the title and on being intimated about the same if the vendors fail to satisfy the purchaser about their title, all amounts paid towards the price should be refunded to the purchaser. This clearly demonstrates that the payment of balance of sale price in terms of the contract was not postponed nor made conditional upon the purchaser being satisfied about the title, but that payment of the balance price should be made to the vendors as agreed unconditionally. If fact if the intention of the parties was that only after the vendors satisfying the purchaser about their title, balance consideration had to be paid, Clause 12 would be redundant as the situation contemplated therein would not arise. Further, if that was the intention, the purchaser would not have paid Rs.1,00,000/- as



further advance on 28.01.1981 and Rs.25,000/- on 02.04.1981. It is therefore clear that the contract does not expressly (or even impliedly) specify the order of performance of reciprocal promises, as alleged by the appellant.

Similarly, **(2015) 8 Supreme Court Cases 695 (Padmakumari and others vs. Dasayyan and others)** wherein in paragraphs 19 and 20 are reads as follows:

"19.The said legal contention urged on behalf of Defendants 12 to 15 has been strongly rebutted by the learned counsel on behalf of the plaintiff contending that the question of payment of balance consideration amount of Rs.63,000/- within nine months would have arisen after the terms and conditions of the contract agreed upon by Defendants 1 to 11 if they had measured the suit scheduled property. They have not discharged their part of the contract stipulated in the agreement to sell, therefore, it is urged by him that time was not the essence of the contract as Defendants 1 to 11 themselves have failed to perform their part of the agreement.

20.The said contention urged on behalf of the plaintiff is unacceptable to us that the question of taking measurement would not arise before the plaintiff performed his part of the contract regarding the balance consideration within the period stipulated in the agreement. Undisputedly, that had not been done by the plaintiff in the instant case within the stipulated time and the notice was issued by the plaintiff only after one year, therefore, the plaintiff has not adhered to the time which is stipulated to pay the balance consideration amount to Defendants 1 to 11 which is a very important legal aspect which was required to be considered by the courts below at the time of determining the rights of the parties and passing the impugned judgment. The Courts below have ignored this important aspect of the matter while answering the contentious Issues (i) and (ii) in favour of the plaintiff and granted decree of specific performance in respect of the suit scheduled property. The said finding of fact is contrary to the terms and conditions of the agreement, pleadings and the evidence or record. Accordingly, we answer the said issues in favour of Defendants 12 to 15 after setting aside the concurrent finding of fact recorded by the High Court."



23. Having got the sale deeds in respect of more than 18 acres and failure to pay the remaining sale consideration for the remaining properties, makes it evident that the plaintiff is not ready and willing to perform the contract. It is to be noted that ready and willingness must be exhibited from the date of agreement till the completion of sale deed. Ready and willingness must be a continuous process. It should be in respect of the entire properties. Only when the plaintiff is able to show that he was ready and willing in performing the contract in its entirety, his readiness and willingness to remaining part of contract, can be inferred. Therefore ready and willingness for entire contract is a sine-qua-non for getting the equitable relief.

24. We also note that the suit has been laid to specific performance in respect of the part of contract and not in entirety. His evidence in the cross-examination shows that though 18 acres have been purchased by him he has produced only one document and the consideration for the above property shown as Rs.26,820/- and Rs.34,440/- for almost 10 acres. His evidence also shows that 1 acre has registered only for Rs.6,240/-. His evidence clearly indicates that as per the sale deeds, he has paid the amount to the vendors. It is to be noted that when a suit is laid for enforcing the part of contract, section 12 of the specific relief act comes into play.

25. Section 12 of the Specific Relief Act, 1963 reads as follows;

*"12. Specific performance of part of contract.____(1)
Except as otherwise hereinafter provided in this section, the Court shall not direct the specific performance of a part of a contract.*

(2) Where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed bears only a small proportion to the whole in value and admits of compensation in money, the Court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency.

(3) Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed either

(a) forms a considerable part of the whole, though admitting of compensation in money; or

*(b) does not admit of compensation in money;
he is not entitled to obtain a decree for specific performance; but the Court may, at the suit of the other party, direct the party in default to perform specifically his part of the contract as he can perform, if the other party*



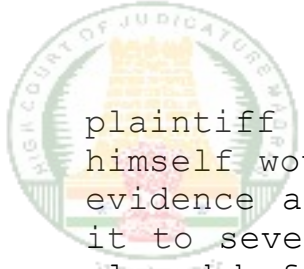
(i) in a case falling under clause (a), pays or has paid the agreed consideration for the whole of the contract reduced by the consideration for the part which must be left unperformed and in a case falling under clause (b), (pays or has paid) the consideration for the whole of the contract without any abatement; and

(ii) in either case, relinquishes all claims to the performance of the remaining part of the contract and all right to compensation, either for the deficiency or for the loss or damage sustained by him through the default of the defendant."

26. Where the clause 3 of Section 12 makes it clear that when the suit is laid for enforcing the part of contract, specific performance cannot be granted, unless party seeking such a relief has paid the agreed consideration for whole of the contract reduced by the consideration for the part which must left unformed and infact falling under clause 6 has paid the consideration for the whole of the contract without any abatement. Therefore, to enforce the part of contract, the payment of agreed consideration for the whole of the contract must be established. Though the defendants have also not disputed the execution of the sale deeds in respect of 18 acres, however, the plaintiff has not established the factum that he has paid whole consideration agreed in the agreement based on the sale deed, therefore, we are of the view that the plaintiff cannot succeed in specific performance in respect of the part of contract, unless he satisfied the ingredients of Section 12 of the Act.

27. It is further to be noted that ready and willingness has not been established in the case. Though the plaintiff has deposited the remaining sale consideration of Rs.17 lakhs during the pendency of the suit, that itself cannot be construed as ready and willingness. Ready and willingness must be established from very inception. Absolutely there is no evidence whatsoever available on record to show that from the date of agreement, he had a ready money in his hand and has also the capacity to mobilize those funds. In the absence of any evidence with regard to the financial status at the relevant point of time, readiness cannot be inferred from merely on the basis of the agreement. Further, despite the power of attorney executed in his favour he failed to register the document within the agreement period. That also clearly indicates that the willingness also is not there from very beginning. Readiness and willingness both are distinct act both should be established by the plaintiff.

28. The manner in which the conditions incorporated in the agreement with regard to the land ceiling act and CBCID notification clearly indicates that the plaintiff being a real estate dealer incorporated such conditions. Only thrusting such a conditions the agreement came into existence and such agreement, though valid is enforced, it gives an unfair advantage to the



plaintiff over the defendant. The evidence of the plaintiff himself would clearly show that he is a real estate promoter. His evidence also clearly shows that he has also made plots and sold it to several persons and obtained advance and further he has not placed before the Court, the actual transaction under various sale deeds to the third parties. All these facts clearly indicate that the agreement itself was executed under the circumstances taking advantage of the fact that some of the suit properties are covered under Ex.A5 issued by the CBCID. If such agreement is enforced, certainly will give unfair advantage of the plaintiff. Therefore, we are of the view that when the vital terms of the contract namely payment of the entire sale consideration within the time has not been paid, the plaintiff cannot take advantage of the subsequent clause which cause some obligation of the vendor and contend that suit is well within the time. Hence, considering the entire aspect we are of the view that the trial Court has not appreciated these facts hence, we are constrained to hold that the plaintiff is not entitled to the equitable relief, which is a discretionary relief and first defendant is already died during the pendency of the suit. Only his legal heirs brought on record. Taking into consideration of the above facts and also the circumstances surrounding the contract, the manner in which plaintiff is real estate promoters, taken the advantage of the one of the condition of the contract and prolonged the issue. We are of the view that plaintiff is not entitled to specific performance. Accordingly, these points are answered.

29. In the result, the appeal is allowed and the decree and judgement of the trial Court are set aside and the respondent is permitted to withdraw a sum of Rs.17,17,250/- with accrued interests, deposited by him, before the trial court which rightly kept under the investment in the Canara Bank, Tirunelveli by filing an appropriate application before the trial Court. No costs. Consequently, connected miscellaneous petition is also closed.

Sd/-

Assistant Registrar(RTI)

/True Copy/

Sub Assistant Registrar

To

1st Additional District and Sessions Judge, Tirunelveli.

+1cc to M/S.H.ARUMUGAM, Advocate SR.No.78728

+1cc to M/S.F.X.EUGENE, Advocate SR.No.78637

am/psd

MAS/JC/SAR2:11.10.2017:12P-4C

A.S. (MD) No.157 of 2014

and

M.P. (MD) No.2 of 2014

13.09.2017