

IN THE JUDICATE OF MADRAS HIGH COURT

Orders Reserved on : 05.07.2018

Delivered on :26.09.2018

CORUM

THE HON'BLE MR.JUSTICE R.SUBBIAH

and

THE HON'BLE MR.JUSTICE C.SARAVANAN

A.S.No.1251 of 2015

and

C.M.P.No.8895 of 2016 and C.M.P.No.11093 of 2016

and

M.P.No.1 of 2015

Thirugnanasambandam

... Appellant

Vs.

1.Kannan

2.Veerammal

3.Panchavarnam

4.Arumugam

5.Elumalai

6.Sakthivel

7.Raman

8.Lakshmanan

... Respondents

Appeal Suit has been filed under Section 96 r/w Order 41 Rule 1 of the Code of Civil Procedure, 1908, against the judgment and decree dated 18.08.2015 in O.S.No.6 of 2012 passed by the Principal District Judge, Villupuram.

For Appellant

:Mr.N.Suresh

For Respondents

: Mr.R.Karunakaran (For R1)

Mr.J.Bharathi Raja (For R2 to R5, R7 & R8)

(For R6) - No appearance

JUDGMENT

(R.SUBBIAH, J.,)

This appeal has been filed challenging the judgment and decree dated 18.08.2015 made in O.S.No.6 of 2012, wherein and whereby the learned Principal District Judge, Villupuram, has denied the relief of specific performance to the appellant/plaintiff and granted the alternative relief of refund

of Rs.21,49,425/- and further, directed the appellant/plaintiff to hand over the possession of the suit properties to the respondents/defendants.

2.The appellant herein is the plaintiff and the respondents herein are the defendants before the Trial Court. For the sake of convenience, hereinafter the parties will be referred to as per their rankings in the suit as plaintiff and the defendants.

3.Originally, the plaintiff filed the suit only as against the 1st defendant, who is the owner of the suit schedule property. The defendants 2 & 3 are the two wives of the 1st defendant. The defendants 4 to 8 are the sons of the 1st defendant born through the defendants 2 & 3. The defendants 2 to 8 got themselves impleaded in the suit by filing an impleading application before the Trial Court.

4.Due to subsequent developments, the plaintiff by filing an amendment application amended the plaint. The sum and substance of the amended plaint are as follows:-

The suit schedule property is a self-acquired property of the 1st defendant. The 1st defendant agreed to sell the suit schedule property to the plaintiff for a total sale consideration of Rs.17,50,000/-. Hence, the plaintiff and the 1st defendant had entered into an agreement of sale on 22.10.2009 and on the date of sale agreement, the 1st defendant had received a sum of Rs.7 lakhs from the plaintiff towards a part of the sale consideration. Under the sale agreement, it was agreed between the plaintiff and the 1st defendant that the plaintiff must pay the balance sale consideration of Rs.10,50,000/- within a period three months and the 1st defendant had also agreed to execute the sale deed after receiving the balance sale consideration of Rs.10,50,000/-, and out of the balance sale consideration, the loan amount borrowed by the 1st defendant from the Indian Bank at Kandachipuram has to be discharged. Subsequently, on 24.10.2009 itself, the 1st defendant had received a sum of Rs.1,00,000/- from the plaintiff in the presence of one Krishnasabapathy. According to the plaintiff, by possessing the balance sale consideration of Rs.9,50,000/-, he had approached the 1st defendant in person on several occasions and requested the 1st defendant to come along with him to Indian Bank at Kandachipuram, where the 1st defendant had borrowed agricultural & tractor loan by pledging the suit property, to discharge the loan and to get the document released, for the purpose of executing the sale deed in favour of the plaintiff. But, the 1st defendant was evading to go along with the plaintiff to the Bank to release the document and to execute the sale deed in favour of the plaintiff. However, on 29.12.2009 in the presence of the 1st defendant, the plaintiff had deposited a sum of Rs.83,981/- in the Bank towards the loan

account of the 1st defendant. Again the plaintiff had deposited another sum of Rs.2,48,708/- with the bank towards the tractor loan account borrowed by the 1st defendant. Even thereafter, the 1st defendant did not come forward to execute the sale deed in favour of the plaintiff, after receiving the balance sale consideration. In the meantime, the Bank made attempts to initiate action on the suit property mortgaged by the 1st defendant with the bank. Hence, on 21.06.2011 the plaintiff paid another sum of Rs.1 lakh towards the loan account to stop the bank from initiating action for bringing the suit property for auction. Even thereafter, the 1st defendant has purposely not come forward to receive the balance sale consideration from the plaintiff and to execute the sale deed in favour of the plaintiff. Hence, the plaintiff issued the legal notice on 19.12.2011, but the same was returned as unclaimed. Hence, the plaintiff filed the suit for specific performance of the sale agreement and by abundant caution, he has also made alternative prayer for refund of sale consideration.

5. Since the 1st defendant had evaded the service of notice, the Trial Court had ordered substituted service of notice to the 1st defendant through paper publication. The paper publication was effected on 12.07.2012. Thereafter, the defendants 2 to 8, who are the two wives and sons of the 1st defendant, filed I.A.No.66 of 2012 on 19.07.2012 and got impleaded in the suit as defendants 2 to 8. After their impleadment in the suit, the 4th defendant filed a written statement, which was adopted by the other defendants except the 1st defendant. The sum and substance of the written statement are as follows:-

The alleged sale agreement dated 22.10.2009 said to have been executed by the 1st defendant is false and frivolous document. The 1st defendant had left the village in and around 01.09.2009 and his whereabouts are not known to the family members. The defendants 2 to 8 searched for him but they could not trace him. While so, on 12.07.2012 when the 4th defendant was sitting in a tea shop, he happened to see the substituted service of notice to the 1st defendant effected through the Dinamalar news paper. Immediately, the defendants approached their advocate and instructed him to appear on behalf of them and take necessary steps to implead them in the suit and to save their property from the unlawful and illegal claim of the plaintiff. A complaint was also given by the defendants before the Station House Officer, Kandachipuram Police Station and an FIR was also registered in Crime No.381/2012. Thereafter, the defendants 2 to 8 filed I.A.No.66 of 2012 and got impleaded themselves in the suit. Thereafter, the defendants had filed a memo to inspect the suit agreement and on perusing the suit agreement, they came to know that the suit agreement is a forged one. On seeing the document, the

defendants further came to know that the plaintiff has initially fabricated the sale agreement and subsequently, altered the same according to his wishes, by inserting the words "சொத்துக்களை இன்றே ஒப்படைத்துவிட்டேன்" (possession was handed over today itself) just above the schedule column of the property. Therefore, according to the defendants 2 to 8, the averment made in the plaint that the plaintiff was put in possession of the suit property is a variance from the truth; hence, the plaintiff is not entitled for the relief of specific performance. Further, the defendants 2-8 had stated that in the third page of the alleged sale agreement, it is seen that last six lines were written with small letters to complete the same before the signatures. This alternation creates a doubt about the genuineness of the sale agreement. As per the alleged sale agreement, three months' time was fixed for the purpose of completion of the contract. The period prescribed in the alleged sale agreement i.e., three month period ends on 22.01.2010. But, the plaintiff had issued notice to the 1st defendant only on 19.12.2011. The plaintiff has not given any explanation for the long delay in issuing the notice. Further more, the plaintiff has not stated either in the notice or in the plaint that he is always ready and willing to perform his part of the contract. Though the plaintiff had stated in his plaint that out of the balance sale consideration of Rs.10,50,000/-, a sum of Rs.1 lakh was paid to the 1st defendant on 24.10.2009 in the presence of one Krishnasabapathi, no endorsement to that effect was made in the alleged sale agreement. Similarly, though the plaintiff had stated in the plaint that on 29.1.2009 he had deposited a sum of Rs.83,981/- with the bank towards the loan account of the 1st defendant, in the alleged sale agreement there is no recital to that effect to discharge the 1st defendant's loan by the plaintiff. When there is no recital in the sale agreement to discharge the loan of the 1st defendant, the plaintiff has no authority to discharge the same on behalf of the 1st defendant. In fact, whereabouts of the 1st defendant were not known to the defendants 2 - 8 from 01.09.2009. The plaintiff, knowing fully well that the whereabouts of the 1st defendant was not known, had planned to grab the properties of the defendants and fabricated the suit agreement and subsequently, altered the same to his convenience. Therefore, the suit agreement is hit by material alteration. Further more, the alleged sale agreement dated 22.10.2009 was not registered under Section 17(1-A) of the Registration Act, 1908 and as per Amended Act 2001 [i.e., the Registration and Other Related Laws (Amendment) Act 2001], it has no evidentiary value in the eye of law. Further, the defendants were in possession and enjoyment of the suit properties till August 2012. After the defendants 2-8 entered appearance in the suit, they went to Bangalore for their livelihood. Taking advantage of the absence of the defendants, the plaintiff trespassed into the suit property and as such, he has been in unlawful possession

and enjoyment of the suit properties from August 2012. The plaintiff is only a trespasser and he is bound to surrender possession to the defendants. Thus, the defendants 2-8 sought for dismissal of the suit.

6. Thereafter, the plaintiff filed a reply statement to the written statement filed by the defendants 2 to 8. The 4th defendant has also filed an additional written statement.

7. On the above pleadings, the Trial Court has framed the following issues

- 1) Whether the plaintiff is entitled to a decree for specific performance as prayed for?
- 2) Whether the suit as framed is not maintainable?
- 3) Whether the father of the defendant 4-8 left the village on 1.9.2009 and his whereabouts not known?
- 4) Whether the suit agreement is a fabricated document as alleged by the defendants?
- 5) Whether the suit agreement is invalid for want of registration?
- 6) Whether the suit is in time?
- 7) Whether the alleged trespass is true?
- 8) Whether the defendant is entitled to the relief as per the counter claim?
- 9) To what relief of any the plaintiff is entitled?

8. Before the Trial Court, in order to prove the case, on the side of the plaintiff, he examined himself as P.W.1, besides examining two other witnesses as P.W.2 & P.W.3 and marked sixteen documents as Ex.A.1 to Ex.A.16. On the side of the defendants, the 4th defendant examined himself as D.W.1 and marked two documents as Ex.B.1 & Ex.B2.

9. The Tribunal, after analysing the entire evidence both oral and documentary, has come to the conclusion that the sale agreement was proved by documentary and oral evidence by the plaintiff and that pursuant to the sale agreement, the plaintiff had taken the possession of the suit property and he has been in enjoyment of the same till date. However, the Trial Court held that since the 1st defendant is not available for several years, the plaintiff is entitled to get only the alternative remedy of refund of Rs.21,49,426/- with subsequent interest. Thus, the Trial Court denied the prayer of the plaintiff for specific performance and granted the relief of alternative remedy of refund of the sale consideration with subsequent interest. Aggrieved over the rejection of the prayer for specific

performance, the appellant/plaintiff has filed the present appeal.

10. Pending the appeal, the plaintiff has filed a petition in C.M.P.No.8895 of 2016 praying to permit him to produce additional evidence viz., the certified copy of the sale deed dated 14.03.2016 bearing Doc.No.1114/2016 registered in the office of SRO, Arakandanallur. Similarly, the plaintiff has filed another petition in C.M.P.no.11093 of 2016 seeking permission to produce additional evidence viz., the certified copy of the sale deed dated 30.12.2015 bearing Doc.No.5437/2015 registered in the office of SRO, Arakandanallur.

11. The learned counsel for the appellant/plaintiff submitted that the 1st defendant is the owner of the suit property. On 22.10.2009, the 1st defendant entered into a sale agreement with the plaintiff under Ex.A.1 to sell the suit property for a valuable sale consideration of Rs.17,50,000/-. On the date of sale agreement itself, the 1st defendant received a sum of Rs.7 lakhs from the plaintiff towards a part of the sale consideration. The time fixed for the purpose of execution of the contract was three months. Subsequently, on 24.10.2009, again another sum of Rs.1 lakh was paid by the plaintiff to the 1st defendant. Thereafter, by possessing the balance sale consideration of Rs.9,50,000/-, the plaintiff approached the 1st defendant on several occasions and asked him to come along with him to the Bank, where the 1st defendant had mortgaged the suit property, to repay the loan amount and to release the document. But, the 1st defendant was purposely evading to perform his part of the contract. Finally, the plaintiff has filed the suit after issuing legal notice under Ex.A.7, dated 19.12.2011. But, the 1st defendant did not appear before the Court below, as such he was set exparte. However, the legal heirs of the 1st defendant viz., the defendants 2 to 8 got impleaded themselves in the suit and contested the suit. It is the case of the defendants that the 1st defendant was missing from 01.09.2009 from the village, and hence they got themselves impleaded in the suit in order to defend the case. They also lodged a complaint with the police and FIR in Crime No.381 of 2012 was also registered. In this regard, the learned counsel for the appellant/plaintiff submitted that the defendants 2 to 4 are not the parties to the sale agreement and they have no locus standi to contest the suit. Under such circumstances, the Trial Court ought not to have allowed the impleading application itself. To fortify his contention, the learned counsel for the appellant/plaintiff has also relied upon the decision reported in 2008(6) SCALE 355 [Bharat Karsondas Thakkar Vs. Kiran Construction Co. and others] and contended that in a suit for

specific performance, the persons other than the parties to the agreement are not necessary parties and they are not entitled to contest the case.

12.As a next fold of submission, the learned counsel for the appellant/plaintiff submitted that the conduct of the defendants is also relevant factor to be taken into consideration while granting the relief of specific performance. In this case, the 1st defendant had purposely been hiding himself from appearing before the Trial Court to receive the summons. Only after effecting the substituted service on 12.07.2012 through news paper, pursuant to the direction of the Court below, the defendants 2 to 8 who are the wives and sons of the 1st defendant came forward and got themselves impleaded in the suit, claiming that the 1st defendant was missing from 01.09.2009. It is pertinent to note that the defendants 2-8 have chosen to give complaint before the Police with regard to the missing of the 1st defendant only after they entered appearance in the suit. Further, in the present appeal, the 1st defendant entered appearance to contest the appeal by engaging a separate counsel. Absolutely no explanation was given as to how he suddenly appeared before this Court. It is also submitted by the learned counsel for the appellant/plaintiff that after the disposal of the suit, the 1st defendant had executed two documents of sale, one on 30.12.2015 and another on 14.03.2016. The sale deed dated 14.03.2016 was executed by the 1st defendant in favour of his own son Ramu, who is arrayed as 7th defendant in this case and in the said sale deed 8th defendant Lakshmanan is the attesor. The address of the 1st defendant that was given in the said sale deed is that of the address given in the plaint. The sale deed dated 30.12.2015 is in respect of the entire suit property executed by 1st defendant in favour of one Sivakumar, in which 4th defendant (D.W.1) is the attesor. The said sale deed was executed for a sale consideration of Rs.20,00,947/-. If really the 1st defendant was missing since 2009, there is no possibility for him to execute two sale deeds in the year 2016. Further, more there is no explanation from the defendants as to how the 1st defendant executed the above said documents from the very same address, from where he is said to have gone missing since the year 2009. There is also no explanation from the defendants before this Court as to how the 1st defendant had suddenly appeared before this Court. Hence, the conduct of the defendants are nothing but misleading the Court. By misleading the Court below, the defendants had illegally denied the relief of specific performance to the plaintiff. Therefore, the conduct of the defendants has to be taken into consideration for decreeing the suit for specific performance in favour of the plaintiff. In this regard, the learned counsel for the appellant/plaintiff has also relied upon the decision reported in 2015(1) SCC 705 [Zarina Siddiqui Vs. A.Ramalingam @

R.Amarnathan], wherein it has been held that the equitable discretion to grant or not to grant a relief for specific performance also depends upon the conduct of the parties.

13.Further, the learned counsel for the appellant/plaintiff submitted that the 1st defendant has not chosen to appear before the Court below and did not file any written statement denying the allegations in the plaint. The 1st defendant is a party to the agreement and he is the person who executed the sale agreement. The 1st defendant had purposely evaded the service of notice and he was also not available even for receiving the balance sale consideration as he was hiding. The 1st defendant has not denied the allegations in the plaint and he has not chosen to appear and made himself available for cross-examination. As per Order VIII Rule 5 of CPC, every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability. In the instant case, the 1st defendant had not appeared before the trial Court and filed his written statement denying the allegation made in the plaint. Under such circumstances, the provisions of Order VIII Rule 5 of CPC would be attracted and the allegations in the plaint shall be taken as admitted. In this regard, the learned counsel for the appellant/plaintiff has also relied upon the decision reported in 2017(4) CTC 734 [S.Deivanai Vs. V.M.Kothandaraman].

14.The learned counsel for the appellant/plaintiff would further submit that the possession of the property was handed over to the plaintiff by the 1st defendant on the date of sale agreement itself. Though it is the defence of the defendants that the plaintiff by forging the document and altering the same by inserting the words "brhj;Jf;fis ,d;nw xg;gilj;Jtpl;nld;", (possession was handed over today itself), just above the schedule column to the sale agreement marked as Ex.A.1, but absolutely no suggestion was put to that effect when the scribe of the document himself was examined as P.W.2. Moreover, one of the attestors to the sale agreement viz., one Subramanian is samandhi to the 1st defendant and another attestor to the sale agreement is the 2nd defendant Veerammal. But, both of them were not examined on the side of the defendants before the Trial Court to speak about the execution of the sale agreement. Hence, it is clear that the suit agreement is not materially altered and the same is genuine and deserves to be enforced.

15.With regard to the contention of the defendants that the sale agreement is inadmissible in law, since it was not registered as required under Section 17(1-A) of the Registration Act, it is contended by the learned counsel for the appellant/plaintiff that as per Section 53-A of the Transfer of

Property Act, the document has to be registered under Section 17 (1-A) of the Indian Registration Act, in order to make claim for transfer of property under Section 53-A of the Transfer of Property Act. Thus, only if the document is registered, the defendants can claim benefit under Section 53-A of the Transfer of Property Act. However, the non-registration will not be a bar for claiming relief for specific performance by the plaintiff.

16. Further, the learned counsel for the appellant/plaintiff has also submitted that it is a well settled principle that so far as the immovable properties are concerned, time is not the essence of the contract. Moreover, in the instant case, the plaintiff has already paid around 65% of the sale consideration within three months and thereafter, paid the amount of Rs.4 lakhs over and above the sale consideration. Therefore, the plaintiff is entitled for the relief of specific performance. In this regard, the learned counsel for the appellant/plaintiff has also relied upon the decision reported in 2011(4) CTC 640 [Saradamani Kandappan Vs. S.Rajalakshmi], wherein it has been held that the three years period is intended to assist purchasers in special cases, as for example, where the major part of the consideration has been paid to the vendor and possession has been delivered in part performance, where equity shifts in favour of the purchaser.

17. Further, the learned counsel for the appellant/plaintiff would submit that the plaintiff has also proved that he was always ready and willing to perform his part of the contract. The plaintiff has produced cogent evidence to show that he was continuously ready and willing to perform his part of the contract, by paying 65% of the amount and following it up by contacting and calling upon the 1st defendant on various occasions to come along with him to the bank in order to get the document released by repaying the loan amount. The learned counsel for the appellant/plaintiff submitted that though the Trial Court has come to the conclusion that the sale agreement has been proved by the plaintiff by producing evidence, it has ordered only for refund of the sale consideration on the ground that the 1st defendant is not available for execution of the sale deed, which finding is not legally sustainable. Thus, the learned counsel for the appellant/plaintiff sought for allowing the appeal by decreeing the suit for specific performance.

18. The 1st respondent/1st defendant, who remained exparte before the Trial Court, has entered appearance in this appeal and contested the appeal by engaging a separate counsel. Countering the submissions made by the learned counsel for the appellant/plaintiff, it is replied by the learned counsel for the 1st respondent/1st defendant that irrespective of the defence

taken by the defendants, the duty is cast upon the plaintiff to show that he was always ready and willing to perform his part of the contract. In the instant case, as per the sale agreement, the entire sale consideration has to be paid within a period of three months. But, the plaintiff has not paid the balance sale consideration within the period of three months. There is a forfeiture clause in the sale agreement to the effect that if the plaintiff fails to pay the sale consideration within the period of three months, the advance amount paid by the plaintiff will be forfeited. But, the 1st defendant has not pressed for the forfeiture of the advance amount. Unless it was established by the plaintiff that he was always ready and willing to perform his part of the contract, he is not entitled for the specific performance relief. In the instant case, the plaintiff has chosen to give legal notice only on 19.12.2011 ie., after a period of two years from the date of expiry of time mentioned in the sale agreement. Therefore, it is clear that the plaintiff was not ready and willing to perform his part of the contract. Under such circumstances, the judgment and decree passed by the Trial Court needs no interference from this court.

19. The respondents 2 to 8/Defendants 2 to 8, who contested the suit before the Trial court, have engaged a separate counsel and contested this appeal. The learned counsel for the respondents 2 to 8/D2-D8 would submit that the plaintiff has failed to pay the sale consideration within a period of three months as stipulated under the Sale agreement, to get the sale deed executed in his favour. The plaintiff was not continuously ready and willing to perform his part of the contract and he has issued legal notice to the 1st defendant only on 19.12.2011 ie., nearly after two years from the date of expiry of time mentioned in the sale agreement; therefore, he is not entitled for the discretionary/equity relief of specific performance of the contract. The conduct of the plaintiff in seeking the alternate relief of refund of the advance amount itself shows that he was unsure of getting the decree for specific performance because he did not strictly adhere to the terms and conditions stipulated under the sale agreement, on both counts ie., payment of balance sale consideration and coming with his readiness and willingness. Since the plaintiff has been in possession and cultivating the suit properties, which is measuring nearly about 7 acres, and getting income from the same for the past several years, the defendants 2 to 8 have made a counter claim in the suit for delivery of possession and also for mesne profits in the suit. The Trial Court after full-fledged trial has granted the decree for refund of the advance amount with interest, and allowed the counter claim made by the defendants 2 - 8 partly by ordering the delivery of possession alone to the defendants. In fact, the learned counsel for the appellant/plaintiff placed most of his arguments about the conduct of the 1st defendant, but

he has not placed any argument regarding the conduct of the plaintiff. The learned counsel for the respondents 2 to 8 submitted that the sale agreement was entered into on 22.10.2009 and it was agreed to between the 1st defendant and the plaintiff that the time is the essence of the contract and failure on the part of the plaintiff to pay the balance of sale consideration within three months' time would make his advance amount to be forfeited. Nevertheless, the plaintiff failed to pay the balance of sale consideration as agreed under the sale agreement and he did not even issue the legal notice to the 1st defendant expressing his readiness and willingness to perform his part of the contract, within the prescribed time limit. The Trial court has failed to discuss this issue in detail and also gave no finding with regard to the readiness and willingness of the plaintiff. The Trial Court, without proper appreciation of the evidence, has granted the alternative relief of refund of the amount with interest. Even in his cross-examination, the plaintiff (P.W.1) admitted that the time is the essence of the contract and he has further said that recital regarding the time for performance of the contract was written only on his advice. Therefore, having admitted that the time is the essence of the contract, the plaintiff miserably failed to perform his part of contract within agreed time. Therefore, the conduct of plaintiff assumes more significance in this case, in the absence of any explanation or pleadings as to the delay on the part of the plaintiff in adhering to the terms of contract.

20. With regard to the submission made by the learned counsel for the appellant/plaintiff that the defendants 2 to 8 have no locus standi to contest the suit, it is replied by the learned counsel for the respondents 2 to 8/D2-D8 that the defendants 2 to 8 are none other than the family members of the 1st defendant and they came to know about the filing of the suit by the plaintiff as against the 1st defendant, only through paper publication and thereafter, they decided to contest the suit. Hence, they filed a petition to implead themselves as party defendants to the suit and the same was allowed by the Trial Court and the plaintiff has not filed any revision challenging the same and hence, the order of impleadment has become final. Hence, these defendants had every right to contest the suit. Moreover, they are not strangers to the suit property or purchasers of the property. Having allowed the order passed in the impleading petition to become final, the plaintiff cannot now argue that these respondents have no locus standi to contest the suit.

21. With regard to the submission made by the learned counsel for the appellant/plaintiff that the 2nd defendant, who is one of the attestors to the sale agreement, was not examined to prove the plea of interpolation in the sale agreement, handing over of

the possession of the property and the payment of the balance sale consideration in the bank, it is replied by the learned counsel for the defendants 2 to 8 that even assuming without admitting that there was no interpolation in the sale agreement, handing over of the possession of the property on the same day of the agreement will not make the case of the plaintiff strong, since as per the terms recited in the sale agreement, the payment of balance of sale consideration and completion of the sale transaction must have been made within three months, which the plaintiff miserably failed to do. Therefore, before considering the conduct of the defendants, conduct of the plaintiff has to be taken into consideration for decreeing the suit for specific performance.

22. With regard to the other arguments made by the learned counsel for the plaintiff that the 1st defendants remained exparte before the trial Court; that he has not filed any written statement specifically denying the averments made in the plaint, hence, whatever averments that have been made in the plaint shall be deemed to have been admitted as per Order VIII Rule 5 of CPC, it is replied by the learned counsel for the respondents 2 to 8 that the said provision cannot be applied to the present facts of the case, for the reason that if the Court comes to the conclusion that the averments made in the plaint shall be taken to be admitted, it will go against the documentary evidence particularly Ex.A.1(Sale agreement) and Ex.A.7(legal notice) filed by the plaintiff himself, in view of the undisputed fact that the time is the essence of the contract and the balance sale consideration has to be paid within the period of three months. Therefore, in the facts and circumstances of this case, the said provision of law cannot be applied here to draw an adverse inference. More particularly, no adverse inference can be drawn against the defendants when the documentary evidence are available, which were marked before the Trial Court.

23. It is other contention of the learned counsel for the respondents 2 to 8 that since the major portion of the sale consideration was paid and possession was handed over, time for performance of the contract prescribed under the sale agreement will not get automatically extended. In the instant case, since there is no evidence to show that the plaintiff was ready and willing to perform his part of the contract within the period of three months as stipulated under the sale agreement, the submission made by the learned counsel for the appellant/plaintiff in this regard has to be rejected. Thus, the learned counsel for the respondents 2 to 8/defendants 2 to 8 sought for dismissal of the appeal.

24. We have carefully heard the submissions made on either side and perused the materials available on record.

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

1) When the defendants 2 to 8 are not parties to the sale agreement, whether they have any locus standi to contest the suit for specific performance, especially when it is admitted that the 1st defendant alone is the owner of the suit property?

2) Whether the non-filing of the written statement by the 1st defendant will attract the provisions of Order VIII Rule 5 of CPC?

3) Whether the defendants have established their defence that the suit agreement dated 22.10.2009 is materially altered?

4) Whether the conduct of the defendants would make the plaintiff to get the relief of specific performance?

5) Whether the suit agreement is legally inadmissible in evidence since it was not registered, in view of the amendment to the Registration Act?

6) Whether the time fixed under the sale agreement is essence of the contract?

7) Whether the plaintiff was always ready and willing to perform his part of the contract?

26. As we have dealt with the factual matrix of the case in detail, We refrain from dealing with the same any further. However, certain facts which are absolutely germane and necessary are dealt with by us for disposal of this appeal.

Point No.1:-

27. With regard to the first point, it could be seen from the materials available on record that the 1st defendant alone is the absolute owner of the property. The suit agreement was executed by the 1st defendant in favour of the plaintiff on 22.10.2009. Since the first defendant has not come forward to execute the sale deed, in spite of the fact that the plaintiff had paid more than 65% of the total sale consideration and expressed his readiness and willingness to pay the balance sale consideration, the plaintiff after issuing the legal notice has filed the suit as against the 1st defendant only. Since the 1st defendant was evading the service of summons, the lower Court had ordered substituted service through paper publication. On seeing the paper publication, the 4th defendant, who is one of the sons of

first defendant, approached and instructed their advocate to appear on behalf of D2 to D8 who are the two wives and sons born through the first defendant respectively, and to take necessary steps to implead them in the suit. Accordingly, I.A.No.66 of 2012 was filed to implead by them and thereafter, they were impleaded and they contested the suit before the Court below. Before the trial Court, it was contended by the defendants 2 to 8 that the 1st defendant was missing from 01.09.2009 and his whereabouts were not known to them and in this regard, they have also lodged a complaint with the police, which was registered as Cr.No.381/2012. Thus, according to the learned counsel for the defendants 2 to 8, since the 1st defendant was missing, they got themselves impleaded and contested the suit.

28. But, it is a well settled legal principal that in a suit for specific performance of the sale agreement, the persons other than the parties to the agreement are not necessary parties. But, it is the reply of the learned counsel for the defendants 2 - 8 that they are not strangers to the suit property or purchasers of the property; that they are none other than the family members of the 1st defendant; therefore, they are having every right to contest the suit. But, this submission of the learned counsel for the defendants 2 - 8 cannot be countenanced. When the 1st defendant is alive, no right over the suit property has accrued on the defendants 2 - 8. When no legal right was accrued on them and when they are not parties to the sale agreement, they have no locus standi to defend the suit for specific performance, especially when the 1st defendant alone is the owner of the suit property. In this regard, a useful reference could be placed in the decision reported in 2008(6) SCALE 355 [Bharat Karsondas Thakkar Vs. Kiran Construction Co. and others], wherein the Hon'ble Supreme Court has held as follows_

" 21..... This aspect of the matter has been dealt with in detail in Kasturi's case (MANU/SC/0319/2005). While holding that the scope of a suit for specific performance could not be enlarged to convert the same into a suit for title and possession, their Lordships observed that a third party or a stranger to the contract could not be added so as to convert a suit of one character into a suit of a different character.

23..... this Court held that since the plaintiff in the said matter was merely seeking the specific performance of an agreement of sale, any attempt to implead a third party to the contract in the suit would be hit by the provisions of Section 15(a) of the Specific Relief Act, 1963. In fact, in

Anil Kumar Singh's case (MANU/SC/0652/1995) in a suit for specific performance, the respondent, who was not a party to the contract but wanted to be impleaded as a defendant on the ground that he had acquired subsequent interest as a co-owner by virtue of a decree obtained from the Court, was held not entitled to be joined as defendant either under Order 1 Rule 3 or under Order 1 Rule 10(ii) of the Code having regard to the provisions of Sections 15 and 16 of the Specific Relief Act, 1963."

In the light of the dictum laid down in the above judgment, it is clear that in a suit for specific performance, the person who was not a party to the contract, is not entitled to be joined as a defendant either under Order 1 Rule 3 or under Order 1 Rule 10(ii) of the Civil Procedure Code having regard to the provisions of Sections 15 and 16 of the Specific Relief Act, 1963.

29.As a matter of fact, Section 15 of the Specific Relief Act clearly stipulates that specific performance of the contract could be obtained by any party thereto. Hence, it is very clear that so far as specific performance is concerned, it is only between the parties thereto. The defendants 2 to 8 admittedly are not parties to the suit sale agreement. It is also an admitted fact that the 1st defendant is very much alive and as such, the defendants 2 to 8 are not legally entitled to claim any right over the suit property, especially when the 1st defendant alone is the owner of the property. Hence, the Court below is not correct even in allowing the impleading application in I.A.No.66 of 2012 filed by the defendants 2 - 8. As a consequence to the above, the defendants 2 to 8, who are not parties to the sale agreement, have no locus standi to contest the case, as 1st defendant is very much alive.

Point No.2:-

30.With regard to the second point, it could be seen from the materials available on record that the 1st defendant has not chosen to appear before the trial Court and file written statement denying the allegations made in the plaint by the plaintiff. The 1st defendant is the person, who had executed the sale agreement, but, he purposely evaded the service of notice and was not available for receiving the balance sale consideration as he was hiding himself. The non-filing of the written statement would go a long way to establish that the contents of the plaint are deemed to have been admitted by the 1st defendant. In this regard, the learned counsel for the plaintiff has also relied upon Order VII Rule 5 of CPC, wherein it has been clearly stipulated that every allegation of fact if

not denied specifically or by necessary implication or stated to be not admitted in the pleading of the defendant shall be taken to be admitted except as against the person under disability. In this regard, it would be appropriate to extract Order VIII Rule 5 of CPC, as under_

"5.Special denial._ (1)Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person a person under disability.

Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission.

(2)Where the defendant has not filed a pleading, it shall be lawful for the Court to pronounce judgment on the basis of facts contained in the plaint, except as against a person under a disability, but the Court may, in its discretion, require any such fact to be proved.

(3)In exercising its discretion under the proviso to sub-rule (1) or under sub-rule (2), the Court shall have due regard to the fact whether the defendant could have, or has, engaged a pleader,

(4)Whenever a judgment is pronounced under this rule, a decree shall be drawn up in accordance with such judgment and such decree shall bear the date on which the judgment was pronounced."

Further, in this regard, it would be appropriate make reference in some of the decisions. In 1997-2-LW. 589 (R.Singaperumal Vs. Vellikkannu and another), this Court has observed as follows_

"15.Under Order 8, Rule 5, CPC, every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability: Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission. Along with this, the Court can also take note of Section 58 of the Evidence Act. It says that 'No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings: Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such

admissions. So long as the defendant has not denied that he is not the murderer of Ramasami Konar, this is a matter which does not require evidence. Under Order 8, Rule 5, CPC read with Section 58 of the Evidence Act, this fact need not be further proved. It must be deemed to have been admitted."

In AIR 2009 SC 2463 (Seth Ramdaya Jat Vs. Laxmi Prasad), it has been observed as follows—

"24. Having regard to the fact that the averments contained in paragraph 3 of the plaint were not traversed, the same would be deemed to have been admitted by him in terms of Order VIII, Rule 5 of the Code of Civil Procedure.

In Gautam Sarup Vs. Leela Jetly (2008) 7 SCC 85, this Court held:

14. An admission made in a pleading is not to be treated in the same manner as an admission in a document. And admission made by a party to the list is admissible against him proprio vigore."

In (1999) 8 SCC 396 (Balraj Taneja Vs. Sunil Madan) it has been held by the Hon'ble Supreme Court as follows—

"9. The scheme of this rule is largely dependent upon the filing or non-filing of the pleading by the defendant. Sub-Rule (1) of Rule 5 provides that any fact stated in the plaint, if not denied specifically or by necessary implication or stated to be not admitted in the pleading of the defendant, shall be treated as admitted. Under Rule 3 of Order 8, it is provided that the denial by the defendant in his written statement must be specific with reference to each allegation of fact made in the plaint. A general denial or an evasive denial is not treated as sufficient denial and, therefore, the denial, if it is not definite, positive and unambiguous, the allegations of facts made in the plaint shall be treated as admitted under this Rule."

In the light of the above dictum, in the case on hand, it could be safely concluded that since the 1st defendant has not denied the pleadings in the plaint by filing a written statement, it would attract the provisions under Order VIII Rule 5 of CPC and the allegations in the plaint shall be taken into as admitted.

Point No.3:-

31. It is the submission of the learned counsel for the defendants that the plaintiff has initially fabricated the sale

agreement and thereafter, material alteration was made in the sale agreement by adding the words "சொத்துக்களை இன்றே ஒப்படைத்துவிட்டேன்" (properties were handed over today itself). Thus, according to the defendants, the averments in the plaint that the plaintiff had been put in possession of the suit property is at variance from the truth; hence, on that ground also the plaintiff is not entitled to the specific performance. It has been further submitted by the learned counsel for the defendants that in the sale agreement at page 3, last six lines were written with small words to complete the same, above the signatures. The said fact will create a doubt about the genuineness of the agreement.

32. But, We find that the 1st defendant has not denied the allegations in the plaint by appearing before the Court and he has not made himself available for the cross-examination. The two attesting witnesses to the sale agreement are the 2nd defendant (one of the wives of the 1st defendant) and one Subaramanian, who is samandhi to the 1st defendant. Though the said two attesting witnesses were very much available, the defendants have not chosen to examine them to speak about the alleged material alteration made in the sale agreement. The persons who can speak about the alleged material alteration in the sale agreement are the said two attesting witnesses, but unfortunately those two attesting witnesses were not examined. However, on the side of the plaintiff, the scribe of the document viz., one Kanthasamy was examined as P.W.2 and he had clearly stated in his cross-examination that insertion of those words was made only just ten minutes after writing the document and that all the corrections and alteration were made in the presence of both the parties and the witnesses. The relevant portion in the deposition of P.W.2 reads as follows_

"வா.ச.ஆ.1 எழுதி முடிக்கப்பட்ட பிறகு விடுபட்ட வாசகம் எழுதப்பட்டது. வா.சா.ஆ.1ல் பக்கம் 2ல் சொத்துக்களை இன்றே ஒப்படைத்துவிட்டேன் என்று எழுதப்பட்டிருப்பது, ஆவணம் எழுதிய பிறகு விடுபட்ட வாசகமாக எழுதப்பட்டது. அதை நானே என் கைப்பட எழுதினேன். பக்கம் 3ல் பாக்கி கிரய தொகையில் கண்டாச்சியரம் இந்தியன் வங்கி கடன் தொகையை அடைக்கவும் என்று எழுதப்பட்டுள்ளதும் ஆவணத்தை எழுதிய பிறகு சேர்த்த வாசகமாகும். வா.சா.ஆ.1 எழுதி 10 நிமிடம் கழித்து விடுபட்ட மேற்சொன்ன இரண்டு வாசகமும் எழுதப்பட்டது "

From the above extract of the deposition of P.W.2, it is seen that P.W.2 has clearly stated about the insertion of the words and reason for insertion of the same. But, there is no cross-examination on the side of the defendants suggesting that P.W.2 had not done so. Therefore, the defendants have miserably failed to establish their defence that the document was materially altered.

33.Further, it is also pertinent to note that the defendants had admitted that the suit property is in possession and enjoyment of the plaintiff. Though the defendants in their written statement stated that the plaintiff trespassed into the suit property during August 2012, they have not proved the same by adducing substantial evidence. On the other hand, in the cross-examination of the plaintiff, by putting a suggestion to the plaintiff, the defendants have admitted that the plaintiff is in possession and enjoyment of the suit property. The relevant suggestion put to the plaintiff during his cross-examination by the defendants reads as follows:-

"நான் கண்ணனுக்கு சொந்தமான நிலத்தை பயிர்ட்டு அதில் லாபம்
அடைந்து வங்கி கடனை செலுத்திவந்தாலும் நான் மாற்று பரிகாரம் கோர
தகுதியற்றவர் என்றாலும் சரியல்ல".

Therefore, the theory of trespass alleged by the defendants also falls to the ground. The possession of the suit property has also been established by the plaintiff. It is also clear that the possession was also handed over to the plaintiff on the date of agreement itself. The defendants have miserably failed to establish their defence that the sale agreement was materially altered. Hence, this point is also liable to be decided in favour of the plaintiff.

Point No.4:-

34.With regard to the conduct of the parties, it is submitted by the learned counsel for the appellant/plaintiff that pursuant to the sale agreement dated 22.10.2009, a sum of Rs.7 lakhs was paid by the plaintiff towards a part of sale consideration on the date of sale agreement itself. Thereafter, he paid another sum of Rs.1 lakh on 24.10.2009 to the 1st defendant. It is further case of the plaintiff that since the suit property was mortgaged by the 1st defendant with the bank, he called the 1st defendant to come along with him to the bank to discharge the loan amount and get the document released from the Bank. Since the 1st defendant did not come forward, the plaintiff deposited a sum of Rs.83,981/- on 29.12.2009 (which is evidence from Ex.A.2) and another sum of Rs.2,48,708/- on 29.12.2009 (which is evidence from Ex.A.3) with the bank in the loan account of the 1st defendant. According to the plaintiff, the 1st defendant was not available for payment. Even before receiving the balance sale consideration, he was willfully hiding himself in order to avoid the execution of the sale deed in favour of the plaintiff and he had not chosen to appear before the Trial Court.

35.Hence, the Trial Court has ordered substituted notice through paper publication and the paper publication was effected

on 12.07.2012. On seeing the paper publication, the defendants 2 to 8 got themselves impleaded in the suit and contested the suit. Even according to the defendants 2 to 8, the 1st defendant was missing from 01.09.2009. But, they have chosen to give police complaint only on 08.11.2012 about the missing of the 1st defendant, ie., only after seeing the paper publication effected on 12.07.2012. If really the 1st defendant was missing from 01.09.2009, there should be an explanation from the defendants as to what prevented them from giving police complaint immediately. Therefore, the above said dates viz., filing of the application on 19.07.2012 and giving police complaint on 08.11.2012 stating that the 1st defendant was missing from 01.09.2009 are all crucial, which would clearly establish that the defendants 2 to 8 purposely screened and hid the 1st defendant and as an afterthought, they have given the false complaint with the police. Considering all these facts, the trial Court has clearly held that it cannot be concluded that the 1st defendant left the village on 01.09.2009. Furthermore, it is also pertinent to note that though the 1st defendant has not appeared before the trial Court, he has appeared before this Court in this appeal by engaging a counsel. Absolutely, there is no explanation from him as to how he suddenly appeared before this Court. Therefore, it is clear that the defendants have not approached the Court with clean hands. The purpose of evading the service of summon by the first defendant and the case that 1st defendant was missing from 01.09.2009 are all false and only to mislead the Court below by playing fraud on the Court, the defendants have introduced the said false story. From these facts, it is clear that the conduct of the defendants is not fair, which could be taken as one of the contingent circumstances to decree the suit for specific performance and to grant equitable relief. In this regard, a useful reference could be placed in the judgment delivered by the Hon'ble Supreme Court reported in (2015) 1 SCC 705 [Zarina Siddiqui Vs. A.Ramalingam], wherein it has been held as follows—

"33.The equitable discretion to grant or not to grant a relief for specific performance also depends upon the conduct of the parties. The necessary ingredient has to be proved and established by the plaintiff so that discretion would be exercised judiciously in favour of the plaintiff. At the same time, if the defendant does not come with clean hands and suppresses material facts and evidence and misled the Court then such discretion should not be exercised by refusing to grant specific performance.

34. In the instant case, as noticed above, although defendant No.2 held a registered power of attorney on behalf of

defendant No.1 to sell and dispose of the property, but the defendants not only made a false statement on affidavit that the power of attorney had authorized the second defendant only to look after and manage the property but also withheld the said power of attorney from the Court in order to misguide the Court from truth of the facts. Further, by registered agreement the defendants agreed to sell the suit premises after receiving advance consideration but they denied the existence of the agreement in their pleading. Such conduct of the defendants in our opinion, disentitle them to ask the Court for exercising discretion in their favour by refusing to grant a decree for specific performance. Further, if a party to a lis does not disclose all material facts truly and fairly but states them in distorted manner and mislead the Court, the Court has inherent power to exercise its discretionary jurisdiction in order to prevent abuse of the process of law."

The above said dictum is squarely applicable to the present facts of the case. The conduct of the defendants in suppressing the materials facts would make the Court to exercise its discretionary power to grant the relief of specific performance in favour of the plaintiff.

Point No.5:-

36.It is the contention of the learned counsel for the defendants that the sale agreement provides that the property was handed over pursuant to the agreement and as such, in view of the amendment to Section 17(1-A) of the Registration Act, the document is inadmissible in evidence. In view of the said contention of the learned counsel for the defendants, it would be appropriate to extract Section 17(1-A) of the Registration Act, which reads as follows:-

"17.Documents of which registration compulsory:-

(1).....

(1-A) The documents containing contracts to transfer for consideration, any immovable property for the purpose of section 53-A of the Transfer of Property Act, 1882, shall be registered if they have been executed on or after the commencement of the Registration and Other Related Laws (Amendment) Act, 2001, and if such documents are not registered on or after such commencement then, they shall

have no effect for the purposes of the said Section 53-A."

It is significant to note that the above Section clearly provides that the contracts to transfer for consideration any immovable property for the purpose of Section 53-A of the Transfer of Property Act shall be registered and if they have not been registered, then they shall have no effect for the purpose of Section 53-A of the Transfer of Property Act. The amendment to the Section 53-A of the Transfer of Property Act was made by way of Act 40 of 2001, under which the words "the contract, though required to be registered, has not been registered, or," have been omitted. Therefore, the amendment is very clear that if the document is not registered, no relief under Section 53-A of the Transfer of Property Act can be claimed.

37. Section 53-A of the Transfer of Property Act clearly provides that if an agreement holder was put in possession of the property and he was having an instrument of transfer that has not been completed in the manner known to law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee in respect of the property of which the transferee has taken or continued in possession other than a right expressly proved by the terms of the contract. Therefore, it is clear that Section 53-A of the Transfer of Property Act is a defending provision under which a transferee can defend his possession against the transferor who wanted to claim possession from the transferee and for defending such action against the transferor the contract is required to be registered. Hence, the claim benefit under Section 53-A of the Transfer of Property Act, the contract has to be registered.

38. So far as Section 49 of the Registration Act is concerned, the Proviso to Section 49 reads as follows_

"Provided that an unregistered document affecting immovable property and required by this Act, or the Transfer of Property act, 1882, to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877, [***] or as evidence of any collateral transaction not required to be effected by registered instrument."

The words 'or as evidence of part performance of a contract for the purpose of section 53-A of the Transfer of Property Act, 1882' were omitted by Act 48 of 2001.

39.Hence, the above said proviso to Section 49 provides that the suit for specific performance is maintainable and is not barred even though the contract is not registered. The said amendment will apply only to claim benefit under Section 53-A of the Transfer of Property Act and non-registration of the document will not affect the suit for specific performance. Under such circumstances, the contention of the learned counsel for the defendants that since the sale agreement was not registered, the plaintiff is not entitled to claim the relief of specific performance, cannot be accepted.

Point No.6:-

40.With regard to the point that the time is essence of the contract, it is contended by the learned counsel for the defendants that as per the sale agreement, three months time has been stipulated for completion of the sale transaction and that since the plaintiff failed to do his part of the contract, he is not entitled to the relief of specific performance.

41.But, it is well settled legal principal that insofar as the immovable properties are concerned, time is not essence of the contract. In this regard, a reference could be placed in the decision of the Hon'ble Supreme Court reported in (1977) 2 SCC 539 [Govind Prasad Chaturvedi Vs. Hari Dutt Shastri], wherein it has been held as follows_

".... It is settled law that the fixation of the period within which the contract has to be performed does not make the stipulation as to time the essence of the contract. When a contract relates to sale of immovable property it will normally be presumed that the time is not the essence of the contract. [Vide Gomathinayagam Pillai Vs. Pallaniswami Nadar (1967) 1 SCR 227 : AIR 1967 SC 868]. It may also be mentioned that the language used in the agreement is not such as to indicate in unmistakable terms that the time is of the essence of the contract. The intention to treat time as the essence of the contract may be evidenced by circumstances which are sufficiently strong to displace the normal presumption that in a contract of sale of land stipulation as to time is not the essence of the Contract."

In the decision reported in (1993) 1 SCC 519 [Chand Rani Vs. Kamal Rani], it has been held by the Hon'ble Supreme Court as follows_

"19.It is a well-accepted principle that in the case of sale of immovable property, time is

never regarded as the essence of the contract. In fact, there is a presumption against time being the essence of the contract. This principle is not in any way different from that obtainable in England. Under the law of equity which governs the rights of the parties in the case of the specific performance of contract to sell real estate, law looks not at the letter but at the substance of the agreement. It has to be ascertained whether under the terms of the contract the parties named a specific time within which completion was to take place, really and in substance it was intended that it should be completed within a reasonable time. An intention to make time the essence of the contract must be expressed in unequivocal language. "

The dictum laid down in the above said decisions would clearly be applicable to the present facts of the fact. In the instant case, it is seen that on the date of sale agreement itself ie., on 22.10.2009, the plaintiff has paid a sum of Rs.7 lakhs to the 1st defendant towards advance amount. Again on 29.10.2009, he has paid another sum of Rs.1 lakh to the 1st defendant. Further, on 29.12.2009, the plaintiff has deposited a sum of Rs.83,981/- under Ex.A.2 and a sum of Rs.2,48,708/- under Ex.A.3, with the bank towards the loan borrowed by the 1st defendant. Thus, the plaintiff has paid a major portion of the sale consideration within three months fixed under the sale agreement. In fact, the Hon'ble Supreme Court in the judgment reported in 2011(4) CTC 640 (Saradamani Kandappan Vs. S.Rajalakshmi) held in para 28 as follows-

"the 3 year period is intended to assist purchasers in special case as for example, where major part of the consideration has been paid to the vendor and possession has been delivered in part performance, where equity shifts in favour of the purchaser". सत्यमेव जयते

The said decision is squarely applicable to the present facts of the case. In the instant case, it is the 1st defendant who did not come forward to execute the sale and he was not available to receive the balance sale consideration. Under such circumstances, it cannot be said that the time is the essence of the contract.

Point No.7:-

42.With regard to readiness and willingness, it is contended by the learned counsel for the respondents/defendants that the plaintiff has miserably failed to establish that he was always ready and willing to perform his part of the contract. In this

regard, it is replied by the learned counsel for the appellant/plaintiff that the plaintiff has failed to pay the balance sale consideration within three months and did not even issue the notice at the earliest point of time and the notice was issued only after two years from the lapse of three months period stipulated under the sale agreement.

43. But, as held supra, evidence on record would show that the 1st defendant has not made himself available to receive the balance sale consideration and he was avoiding the execution of the sale deed. Further, the 1st defendant has not chosen to appear before the Trial Court and file written statement to deny the averments in the plaint that the plaintiff is ready and willing to perform his part of the contract. Explanation to Section 16(c) of the Specific Relief Act clearly provides that it is not essential for the plaintiff to actually tender to the defendant or to deposit into Court any money except when so directed by the Court. In the instant case, the plaintiff has deposited money in the bank accounts of the 1st defendant in order to prevent the property from being brought to public auction by the bank. He has also paid 65% of the sale consideration and was searching for the 1st defendant in order to pay the balance sale consideration. Hence, the plea readiness and willingness is fully proved by the plaintiff.

44. Further, as held supra, since the 1st defendant has not filed any written statement, the provisions of Order VII Rule 5 of CPC will attract and allegations in the plaint will stand unrefuted and will tantamount to have been admitted. Further, the 1st defendant has not gone into the box, hence, adverse inference has to be drawn against him. There is no explanation even before this Court from the 1st defendant for non-filing of the written statement in the suit. Under such circumstances, the submission made by the learned counsel for the defendants that the plaintiff miserably failed to prove that he was always ready and willing to perform his part of the contract, is not sustainable.

45. Therefore, We are of the opinion that the Trial Court ought to have granted the equity relief of specific performance, whereas by dismissing the prayer for specific performance, the Trial Court has granted only alternative relief of refund of sale consideration paid by the plaintiff, which is not correct. Hence, the plaintiff is entitled to the relief of specific performance as prayed for in the suit.

C.M.P.Nos.8895 & 11093 of 2016

46. Since We have come to the conclusion that from the conduct of the defendants, the plaintiff is entitled to the

relief of specific performance, there is no need to adduce additional evidence as sought for by the plaintiff. Hence, C.M.P.Nos.8895 & 11093 of 2016 are closed.

47.For the foregoing reasons, the appeal is allowed. The judgment and decree passed by the trial Court rejecting the prayer for specific relief and granting alternative relief of refund of sale consideration, are hereby set aside and the 1st defendant is directed to execute the sale deed in respect of the suit property in favour of the plaintiff. Connected Miscellaneous Petitions are closed. No costs.

Sd/-

Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

ssv

To,

The Principal District Judge,
Villupuram.

+1cc to Mr.N.Suresh, Advocate Sr.66880

+1cc to Mr.J.Bharatharaja, Advocate Sr.66748

A.S.No.1251 of 2015
and

C.M.P.No.8895 & 11093 of 2016
and

M.P.No.1 of 2015

rsi[co]
srg 09/01/2019

WEB COPY