

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28.03.2018

CORAM

THE HONOURABLE MR.JUSTICE M.DHANDAPANI

S.A.No.1415 of 1998

And

C.M.P.No.1252 of 2010

- 1.Natarajan
- 2.Nagappan (Died)
- 3.Batmavady
- 4.Anourada Selvam
- 5.Barathan
- 6.Thiagarajan

(Appellants 3 to 6 brought on record as LR's of the deceased 2nd appellant vide order of Court dated 04.01.2013 made in C.M.P.Nos.846 to 848 of 2012 in S.A.No.1415 of 1998)

... Appellants

Vs.

- 1.Manjini
- 2.Saraswati (Deceased)
- 3.Kesavan
- 4.Purushothaman
- 5.Rangaswamy
- 6.Lakshmi

... Respondents

(Appellants 1 and 3 to 6 and Respondents R3 to R6 recorded as LR's of the deceased second respondent vide order of Court dated 30.06.2015 made in Memo USSR No.(4574) in S.A.No.1415 of 1998)

Prayer:

Second Appeal filed under Section 100 of C.P.C. against the judgment and decree dated 30.04.1998 in A.S.No.26 of 1990 on the file of the III Additional District Judge, Pondicherry affirming the judgment and decree dated 28.02.1989 in O.S.No.1699 of 1987 on the file of the II Additional District Munsif, Pondicherry.

For Appellants : Mrs.Chitra Sampath
Senior Counsel
for Mr.R.Sunil Kumar

For Respondents: Mr.R.Subramanian for R1
for M/s.T.R.Rajaraman

J U D G M E N T

The first respondent/ plaintiff filed the suit for specific performance directing the defendants 1 to 3 to execute the sale of the suit property in favour of the plaintiff and give possession by receiving the balance sale consideration of Rs.8000/- and in case of failure by the defendants the Court may be pleased to execute the sale deed in favour of the plaintiff on behalf of the defendants 1 to 3 and order delivery of the suit property from defendants 1 to 3 to the plaintiff with a consequential prayer for setting aside the donation deeds dated 08.12.1983 executed by the first defendant in favour of the defendants 2 and 3 and for permanent injunction restraining the defendants 1 to 3 from alienating any interest in the suit property by way of sale, mortgage, gift, donation, Will or otherwise.

2.The suit was decreed by the lower Court. Aggrieved by the same, the defendants filed appeal before the lower Appellate Court. The lower Appellate Court dismissed the appeal and confirmed the decree of the lower Court. Hence, the defendants 2 and 3 who lost the case before the lower Appellate Court has filed this second appeal.

3.The appellants 1 and 2 herein are the defendants 2 and 3 in the suit. Appellants 3 to 6 being the legal heirs of the deceased second appellant are impleaded in this second appeal. The first respondent herein is the plaintiff in the suit. Since the first defendant in the suit died during the pendency of the first appeal, his legal heirs were impleaded as appellants 4 to 8 in the first appeal and they are the respondents 2 to 6 herein. For the sake of convenience, the parties will be hereinafter referred to as per their rank in the suit.

4.The factual matrix of the plaint are as follows: The suit schedule property originally belonged to the first defendant. The first defendant entered into an agreement with the plaintiff to sell the suit property for a sum of Rs.10,000/- on 22.09.1982 and received an advance of Rs.2,000/-. The first defendant had also handed over the certified copy of the original title deed, photo copy of the measurement report of the suit property, field map for the said land etc. As per the terms of agreement, the first defendant should produce the nil encumbrance certificate for 30 years and also obtain permission from the Government for selling the property and inform the plaintiff and then the plaintiff should purchase the suit property within 3 months from the date of communication of the information regarding permission from the Government.

5.In the plaint, the plaintiff would further aver that the

first defendant had not taken any steps either for getting permission from the Government or for production of the nil encumbrance certificate and also for the title deeds. Therefore, the plaintiff issued a legal notice dated 11.04.1983 calling upon the defendant to get necessary permission from the Government, produce nil encumbrance certificate and other title deeds, to receive the balance amount and to execute the sale deed. He had also expressed his willingness to pay the balance amount and purchase the property as per the terms of the agreement. After receipt of the legal notice, the first defendant gave a reply after a lapse of 3 months with false and frivolous allegations denying the very execution of the agreement. However, he had personally approached the plaintiff and promised to settle the matter. However, the defendant was dragging on the matter for nearly 1-1/2 years. Hence, the plaintiff filed the suit.

6. In the plaint, the plaintiff would further aver that when the suit came for written statement, the first defendant filed a statement stating that on 08.12.1983, he had effected two settlement deeds one in favour of the second defendant and another in favour of the third defendant and handed over the suit property to them. The two settlement deeds were effected subsequent to the agreement between the plaintiff and the first defendant and subsequent to the issue of the legal notice by the plaintiff. In order to defraud the plaintiff, the first defendant effected these settlement deeds in favour of the defendants 2 and 3 and hence, they are not valid.

7. The sum and substance of the written statement filed by the third defendant and adopted by defendants 1 and 2 are as follows: The defendants denied the allegations contained in the plaint and according to them, they are frivolous and concocted one. Defendants 2 and 3 were possessing and enjoying the suit property by virtue of the settlement deed dated 08.12.1983 and the first defendant has no necessity to sell the suit property to the plaintiff at any point of time since he has no commitment in life and his sons were in well of position.

8. The third defendant would further aver that the plaintiff making use of the old age and illiteracy of the first defendant has manipulated and created the suit document in French. However, patta stands in the name of defendants 2 and 3. The first defendant had never executed any sale deed at any point of time and he has also not received any amount towards the said document from the plaintiff and the said agreement is a fraudulent and manipulated document. The first defendant has no right or title to sell the property to anybody including the

plaintiff and no notice was issued by the plaintiff to the defendants 2 and 3 in connection with the said agreement.

9. During trial, on the side of the plaintiff, the plaintiff examined himself as P.W.1 and also examined one another person who was a witness to the agreement as P.W.2 and exhibits Ex.A1 to Ex.A7 were marked. On the side of the defendants, four witnesses were examined as D.W.1 to D.W.4 and exhibits Ex.B1 to Ex.B4 were marked. The first defendant was examined by the Advocate Commissioner as D.W.1, the second defendant examined himself as D.W.2. D.W.3 and D.W.4 are the tenants of D.W.1.

10. On the above pleadings, the learned II Additional District Munsif, Pondicherry, framed the following issues for trial:

'1. Whether the suit was properly valued and correct court fee was paid? If not, whether this court is having jurisdiction to try this case?

2. Whether D1 executed the sale agreement dated 22.9.82 and received a sum of Rs.2,000/- from the plaintiff towards advance?

3. Whether D1 delayed the execution of sale deed despite plaintiff's readiness to pay the remaining balance?

4. Whether the settlement deed dated 8.12.83 in favour of D2 and D3 are invalid?

5. Whether the plaintiff is entitled for specific performance as prayed by him?

6. Whether the plaintiff is entitled for injunction as prayed by him?

7. To what relief the plaintiff is entitled?'

After elaborate discussions, the learned II Additional District Munsif, Pondicherry, decreed the suit.

11. Aggrieved by the same, the defendants filed appeal before the learned III Additional District Judge, Pondicherry. The learned III

Additional District Judge, Pondicherry, formulated the following points for consideration:

'1. Whether the Sale Agreement dated 22.9.1982 is true?

2. Whether Exs.B2 and B3 Settlement Deeds are liable to be set aside?'

Upon consideration of the evidence, records and pleadings, the learned III Additional District Judge, Pondicherry, arrived at a conclusion that the plaintiff is entitled to the relief prayed

and dismissed the appeal. As against the findings of the lower Appellate Court, the present second appeal has been filed.

12.At the time of admission of the second appeal, this Court framed the following substantial question of law:

"Whether under the above legal premises the plaintiff's suit was not barred by limitation under Article 54 of the Limitation Act, the starting point of limitation being the date of refusal of agreement under Ex.A.4 dated 20.7.1983?"

13.I have heard Mrs.Chitra Sampath, learned Senior Counsel appearing for the appellants and Mr.R.Subramanian, learned counsel appearing for the first respondent.

14.The learned Senior Counsel appearing for the appellants would submit that the alleged sale agreement Ex.A1 is an un-registered document dated 22.09.1982. The total sale consideration as agreed was Rs.10,000/-. The advance amount of Rs.2,000/- was paid on the date of its execution and the remaining sale consideration of Rs.8,000/- has to be paid after complying with the conditions imposed in the sale agreement, namely, the first defendant/ father of appellants 1 and 2, has to approach the State Government for permission to sell the land to the plaintiff and he has to produce the nil encumbrance certificate for 30 years. Though the sale agreement was executed on 22.09.1982, till 11.04.1983 the first defendant had not taken any steps to either execute sale deed or to return the sale consideration. Hence, the plaintiff issued a legal notice to the first defendant. The first defendant/ father of appellants 1 and 2 sent a reply notice on 27.07.1983.

15.Apart from arguing the above substantial question of law, Mrs.Chitra Sampath, the learned Senior Counsel appearing for the appellants raised the issue relating to readiness and willingness on the part of the plaintiff in terms of Section 16 (c) of the Specific Relief Act. Mr.R.Subramanian, learned counsel appearing for the first respondent fairly conceded that this Court while disposing of a second appeal has the power to frame additional question of law. Hence the following additional substantial question of law is framed for consideration:

'Whether the plaintiff is entitled for the relief of specific performance in the absence of compliance of the provisions of Section 16 (c) of the Specific Relief Act?'

Mr.R.Subramanian, learned counsel appearing for the first respondent was heard on the additional substantial question of law framed.

16. In order to answer the substantial question of law, the learned counsel appearing for the first respondent would submit that in either way, the plaintiff filed the suit within the limitation period of three years.

17. In view of the consent of the learned counsel on either side, the substantial question of law is answered in favour of the plaintiff/ first respondent and the suit has been filed well within the period of limitation.

18. With regard to the additional substantial question of law, admittedly, the alleged sale agreement was executed by the first defendant in favour of the plaintiff on 22.09.1982 on the specific

condition that the first defendant should get clearance certificate from the State Government for selling the suit property to the plaintiff and he has to produce nil encumbrance certificate for 30 years. However, neither in the pleadings nor in the evidence, the plaintiff has properly explained the delay in issuing the legal notice though the sale agreement says that within 6 months, the first defendant should clear the entire dues to the Government and obtain no objection certificate from the Government. After compliance of the said condition by the first defendant, balance sale consideration will be paid by the plaintiff in favour of the first defendant within 3 months thereafter and the first defendant has to execute the sale deed in favour of the plaintiff with nil encumbrance certificate for 30 years.

19. Though the said sale agreement is 22.09.1982, till 11.04.1983, the first defendant has not taken any steps to neither comply with the condition or to return the received sale consideration and has also not given any convincing reply to the plaintiff. Accordingly, the plaintiff sent a legal notice. However, perusal of Ex.A4, legal notice sent by the plaintiff discloses that there is a specific averment in Ex.A1 that 'as per the said agreement you have agreed to comply and get permission from the Government and also to produce

total deeds of the said property and have not taken steps to comply the sale agreement' and requested the first defendant to execute the sale deed in favour of the plaintiff. On perusal of the above legal notice, there is no proper explanation given for sending the legal notice after seven months. However on receipt of the legal notice, the first defendant sent a reply denying the very execution of the sale agreement itself.

20. The learned counsel appearing for the first respondent

would submit that the sale agreement is dated 22.09.1982. However, the plaintiff sent a legal notice on 11.04.1983. On 27.07.1983, the first defendant sent a reply notice to the plaintiff and denied the execution of the sale agreement itself. Hence, the suit was presented before the Sub-Court on 21.02.1985 and the Sub-Court assigned O.S.No.114 of 1985. Thereafter, the Sub-Court returned the plaint on 09.12.1986 with liberty to the plaintiff to bring a fresh suit on the same cause of action after incorporating the necessary and proper reliefs. Thereafter, the suit was re-numbered as O.S.No.1699 of 1987 on the file of the II Additional District Munsif, Pondicherry.

21.The learned Senior Counsel appearing for the appellants

would submit that there is no proper explanation for the delay in filing the suit though the reply was given by the first defendant on 27.07.1983. Hence, the learned Senior Counsel submits that the case is squarely covered by Section 16 (c) of the Specific Relief Act. The plaintiff fails to aver and prove that he is ready and willing to perform essential terms of the contract which are performed to by him and there is no pleadings that the plaintiff is ready to perform the essential terms of agreement. In the present case, the first defendant denied the sale agreement itself, however, the plaintiff took 1-1/2 years for filing the suit. That conduct itself shows that the plaintiff is not interested in performing the contract since there is no contract inbetween the plaintiff and the first defendant.

22.Per contra, the learned counsel appearing for the first respondent would submit that the legal notice Ex.A3 is clear that the plaintiff was ready and willing to purchase the suit property and he is having sufficient funds to perform his part of the contract. The said legal notice reveals that the agreement contains penalty clause. Since the first defendant did not comply the penalty clause, the plaintiff was not able to perform the contract before the lawyer notice.

23.The learned counsel appearing for the first respondent further submitted that the Court has to take note of the conduct of the first defendant that in one hand the defendant executed sale agreement to the plaintiff and on the other hand, he executed settlement deeds in favour of the defendants 2 and 3. The very conduct of the defendant itself is suspicious. Accordingly, the lower Court as well as the lower Appellate Court elaborately discussed on the issue and decreed the suit. The well considered order of the Courts below need not be interfered with in the second appeal and this Court has no power

to re-appreciate the findings of the lower Court and the same is barred.

24.The learned counsel appearing for the first respondent further submitted that the first defendant sent a reply notice denying the sale agreement. However, he was examined as D.W.1 through Advocate Commissioner. In the cross-examination, the first defendant admitted that he received a sum of Rs.2,000/- as advance and sale agreement. Based on the first defendant's admission, the Courts below granted decree in favour of the plaintiff.

25.In support of his arguments, the learned counsel appearing

for the first respondent relied upon the following decisions:

(i) The decision of the Hon'ble Apex Court reported in (1972) 2 SCC 757 (Dr.Jiwan Lal and others vs. Brij Mohan Mehra and another), the relevant portion of which reads as follows:

"12.The agreement was made on December 9, 1959. The premises were requisitioned by an order dated January 23, 1960. Brij Mohan Mehra filed an appeal against the order of requisition. It was dismissed on August 1, 1960. The suit was instituted on November 5, 1962. As the appeal was pending, the plaintiffs could reasonably wait until August 1, 1960 in the hope that the order of requisition might be set aside in 'appeal. So no legitimate objection can be taken on the score of delay until August 1, 1960. The suit was instituted within two years, three months and four days of the dismissal of appeal on August 1, 1960. It is now to be seen whether this delay is such as would disentitle the plaintiffs to the relief of specific performance of the contract. In Lindsay Petroleum Co. v. Hurd(4), Lord Selborne said :

"The doctrine of laches in courts of equity is not an arbitrary or technical doctrine. Where it would be practically unjust to give a remedy either because the party has by his conduct done that which might fairly be regarded as an equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy put the other party in a situation in which it would not be reasonable to

place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material."

13. In his written statement Brij Mohan Mehra pleaded only waiver and not also that he would be prejudiced by specific performance. There was considerable correspondence between the parties between February 11, and April 27, 1960. In their letters the prospective vendees repeatedly asked Brij Mohan Mehra to execute a sale deed in accordance with the agreement. They also said that they were ready and willing to pay the sale consideration stipulated in the agreement. But Brij Mohan Mehra persisted in his refusal to execute the sale deed. Eventually on April 17, 1960 one Sardari Lal Sachdev, Advocate, gave notice on behalf of the prospective vendees to Shri Hans Raj Mittal, Advocate, for Brij Mohan Mehra. It is said in that notice that the prospective vendees would attend the office of the Sub-Registrar, Amritsar on April 30, 1960 between 10 A.M. and 12 noon and that Brij Mohan Mehra should reach there to get the sale deed registered. As April 30, 1960 was a holiday, the prospective vendees later sent a telegram to Brij Mohan Mehra to appear before the Sub-Registrar and produced before him a sum of Rs. 1,12,500/-. The money was counted by the clerk of the Sub-Registrar. Brij Mohan Mehra did not appear before the Sub-Registrar on that date. The Sub-Registrar has supported this version of the plaintiffs. Dr. Jiwan Lal, one of the plaintiffs, has deposed that even after April 29, 1960, he had been asking Brij Mohan Mehra to execute a registered sale deed but he had been evading. One Mr. Ranbir Mehta went along with him to Brij Mohan Mehra for the same purpose. But Brij Mohan Mehra told him that as the premises had been attached by the Rani of Kashmir he should wait for some time. Dr. Jiwan Lal then added : "Thereafter I went and asked him to complete the same but he continued to evade." There appears to be no cross-examination on this part of his statement on behalf of Brij Mohan Mehra. Dr. Jiwan Lal denied in his

cross-examination that the plaintiffs had abandoned their claim. It is not possible to believe that the plaintiffs, who were so insistent on the execution of the sale deed in their favour and who had actually appeared before the Sub-Registrar with the requisite amount of money for payment to the vendor, would abandon their claim after April 29 or August 1, 1960. There is no reason to disbelieve Dr. Jiwan Lal's statement that even after April 29, 1960, he had been pressing upon Brij Mohan Mehra to execute a registered sale deed. In our opinion the plaintiffs did not abandon their rights under the agreement. The institution of the suit after two years does not appear to have caused any disadvantage to Brij Mohan Mehra. As already stated earlier, there is no such allegation in his written statement nor is there any evidence to that effect. Brij Mohan Mehra has admitted in his cross-examination that the prices of properties started depreciating in or about October 1962 when there was Chinese aggression on India. The suit was instituted after the Chinese aggression. So it cannot be said that the specific performance of the agreement was likely to cause any prejudice to Brij Mohan Mehra on the date of the institution of the suit. The suit cannot accordingly be dismissed on account of delay. In view of our earlier findings, it is not necessary to decide whether the requisitioning of the premises was a manoeuvre of Brij Mohan Mehra to slide back from the agreement."

(ii) The decision of the Hon'ble Apex Court reported in AIR 2018 Supreme Court 340 (Ramathal v. Maruthathal and others), the relevant portion of which reads as follows:

"9. The preliminary objection raised by the Ld. Counsel for buyer is that the High Court has exceeded its appellate jurisdiction in the second appeal under Section 100 of CPC, when it came to a different set of conclusion on facts, in utter disregard to the reasoning of the courts below. It is to be noted that the trial court and the lower appellate court concurrently found that the buyer was ready and willing to perform the contract which was apparent from both

pleadings as well as oral and documentary evidence available on record.

13. The factual aspect which was supposed to be considered was whether the survey was conducted by the seller or not. It is on record that DW1 and DW2 have stated that the survey was conducted subsequent to the execution of the agreement, but no documents were marked on behalf of the seller evidencing the fact that survey was undertaken. When both the courts below took a view that evidence of the witness was not believable on detailed consideration of their cross examination and non availability of documentary evidence to prove that survey was conducted, then the High Court should not have interfered with such factual findings by taking into consideration the oral evidence of witnesses without there being any documentary evidence. The crucial fact that the survey was not conducted had attained finality by the earlier judgment of the High Court in CRP No. 2195 of 1989. Therefore, once trial court and first appellate court which are the fact finding courts have come to the specific conclusion that the plaintiff is entitled for specific performance of the agreement of sale, the High Court on re-appreciation of evidence could not have upset the factual findings in second appeal.

14. It was not appropriate for the high court to embark upon the task of re appreciation of evidence in the second appeal and disturb the concurrent findings of fact of the court below which are the fact finding courts. At this juncture for better appreciation we deem it appropriate to extract section 100 and 103 of CPC which reads as follows:
Section 100:

(1) Same as otherwise provided in the body of this court or by any other law for the time being in force, an appeal shall lie to high court from every decree passed in appeal by any court subordinate to the high court. If the high court is satisfied that the case involves a substantial question of law.

(2) An appeal may lie under this section from an appellate decree passed ex-parte.

(3) In an appeal under this section the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

(4) Where the high court is satisfied that the substantial question of law is involved in any case it shall formulate that question.

(5) The appeal shall be heard on the question so formulated and the respondent shall at the hearing of the appeal be allowed to argue that the case does not involve such question.

Section 103:

"Power of High Court to determine issues of fact" In any second appeal the high court may, if the evidence on record is sufficient, determine any issue necessary for the disposal of the appeal.

(a) Which has not been determined by the lower appellate court or both by the court of first instance and the lower appellate court

Or

(b) Which has been wrongly determined by such court by reason for decision on such question of law as referred in section 100.

15. A clear reading of section 100 and 103 of the CPC envisages that a burden is placed upon the appellant to state in the memorandum of grounds of appeal the substantial question of law that is involved in the appeal, then the high court being satisfied that such a substantial question of law arises for its consideration has to formulate the questions of law and decide the appeal. Hence a prerequisite for entertaining a Second appeal is a substantial question of law involved in the case which has to be adjudicated by the high court. It is the intention of the Legislature to limit the scope of second appeal only when a substantial question of law is involved and the amendment made to section 100 makes the legislative intent more clear that it never wanted the High Court to be a fact finding court. However it is not an absolute rule that high court cannot interfere in a second

appeal on a question of fact, Section 103 of the CPC enables the High Court to consider the evidence when the same has been wrongly determined by the courts below on which a substantial question of law arises as referred to in Section 100. When appreciation of evidence suffers from material irregularities and when there is perversity in the findings of the court which are not based on any material, court is empowered to interfere on a question of fact as well. Unless and until there is absolute perversity, it would not be appropriate for the High Courts to interfere in a question of fact just because two views are possible, in such circumstances the High Courts should restrain itself from exercising the jurisdiction on a question of fact.

16. When the intention of the legislature is so clear the courts have no power to enlarge the scope of Section 100 for whatsoever reasons. Justice has to be administered in accordance with law. In the case on hand the High Court has exceeded its jurisdiction by reversing the well considered judgment of the courts below which is based on cogent reasoning. The learned judge ought not to have entered the arena of re appreciation of the evidence, hence the whole exercise done by the High Court is beyond the scope and jurisdiction conferred under section 100 of CPC.

19. As per the law laid down by this Court in respect of sale of immovable property there is no presumption as to time being the essence of the contract. Even when there is no stipulation courts may infer that it has to be performed within a reasonable time taking into consideration the terms of the contract, the nature of the property and other surrounding circumstances. We feel that this proposition needs to be revisited in an appropriate case, as the value of an immovable property rate is fluctuating in recent times.

23. The buyer has taken prompt steps to file a suit for specific performance as soon

as the execution of the sale was stalled by the seller. From this discussion, it is clear that the buyer has always been ready and willing to perform his part of the contract at all stages. Moreover it is the seller who had always been trying to wriggle out of the contract. Now the seller cannot take advantage of their own wrong and then plead that the grant of decree of specific performance would be inequitable. Escalation of prices cannot be a ground for denying the relief of specific performance. Specific performance is an equitable relief and granting the relief is the discretion of the court. The discretion has to be exercised by the court judicially and within the settled principles of law. Absolutely there is no illegality or infirmity in the judgments of the courts below which has judicially exercised its discretion and the High Court ought not to have interfered with the same."

(Emphasis Supplied)

(iii) The decision of this Court reported in 2017 (4) CTC 734 (S.Deivanai and others vs. V.M.Kothandaraman and others), the relevant portion of which reads as follows:

"17. The learned senior counsel for the appellants/defendants would also submit that the plaintiff has kept quite for more than two-years and filed the suit only on 13.04.2009 ie., after two years and two months from the expiry of the date fixed under the sale agreement. Therefore, on the ground of delay also, the plaintiff is not entitled to the relief of specific performance. In this regard, the learned senior counsel for the appellants/defendants relied upon the decision of the Hon'ble Supreme Court reported in K.S.Vidyanadam and others Vs. Vairavan, 1997 (1) CTC 628 (SC) : 1997 (3) SCC 1, and submitted that the delay has brought about a situation where it would be inequitable to give the relief of specific performance to the plaintiff. The learned senior counsel for the appellants/defendants submitted that though the plaintiff had projected a case that after receipt of the reply notice from the defendants, he had taken efforts through the panchayattars to perform their part of the contract and

thereafter filed the suit, the plaintiff has not chosen to examine any witness to prove his case that there was an panchayat and since nothing fructified in the panchayat, he filed the suit, as such there was a delay of 2 years and 2 months from the date of sale agreement in filing the suit. The learned senior counsel for the appellants/ defendants submitted that without considering all these legal aspects and without properly appreciating the evidence, the Trial Court has decreed the suit. Thus, the learned senior counsel for the appellants/ defendants sought for setting aside the judgment and decree of the Trial Court."

26. Repudiating the submissions made by the learned counsel appearing for the first respondent, the learned Senior Counsel appearing for the appellants would submit that though it has not been pleaded before both the Courts below it is relevant to note here that the stamp papers have been purchased in the name of one Venkatachalam, Pondy, however, the sale agreement stands in the name of the plaintiff. The stamp paper has been purchased in the name of a third party and this itself clearly shows that the defendant did not execute any sale agreement in favour of the plaintiff.

27. The learned Senior Counsel appearing for the appellants further submitted that there is no proper explanation for the delay in filing the suit. Though the plaintiff has the right to file a suit within three years, however, each and every day delay in filing the suit has to be explained. In the present case, the plaintiff has not complied with the requirements of Section 16 (c) of the Specific Relief Act and filed suit after 1-1/2 years. This particular issue has not been properly discussed by the Courts below. Accordingly, on the sole ground, the order of the Courts below are liable to be interfered with in the second appeal.

28. In support of his arguments, the learned Senior Counsel appearing for the appellants relied upon the following decisions:

(i) The decision of the Hon'ble Apex Court reported in 2011 (4) CTC 640 (Saradamani kandappan Vs. S. Rajalakshmi and others), the relevant portion of which reads as follows:

"25. The reality arising from this economic change cannot continue to be ignored in deciding cases relating to specific performance. The steep increase in prices is a circumstance which makes it inequitable to grant the relief of specific performance

where the purchaser does not take steps to complete the sale within the agreed period, and the vendor has not been responsible for any delay or non-performance. A purchaser can no longer take shelter under the principle that time is not of essence in performance of contracts relating to immovable property, to cover his delays, laches, breaches and 'non-readiness'. The precedents from an era, when high inflation was unknown, holding that time is not of the essence of the contract in regard to immovable properties, may no longer apply, not because the principle laid down therein is unsound or erroneous, but the circumstances that existed when the said principle was evolved, no longer exist. In these days of galloping increases in prices of immovable properties, to hold that a vendor who took an earnest money of say about 10% of the sale price and agreed for three months or four months as the period for performance, did not intend that time should be the essence, will be a cruel joke on him, and will result in injustice. Adding to the misery is the delay in disposal of cases relating to specific performance, as suits and appeals therefrom routinely take two to three decades to attain finality. As a result, an owner agreeing to sell a property for Rs.One lakh and received Rs.Ten Thousand as advance may be required to execute a sale deed a quarter century later by receiving the remaining Rs.Ninety Thousand, when the property value has risen to a crore of rupees.

27. A correct perspective relating to the question whether time is not of the essence of the contract in contracts relating to immovable property, is given by this court in K.S. Vidyanadam and Others vs. Vairavan - (1997) 3 SCC 1 (by Jeevan Reddy J. who incidentally was a member of the Constitution Bench in Chand Rani). This Court observed:

"It has been consistently held by the courts in India, following certain early English decisions, that in the case of agreement of sale relating to immovable property, time is not of the essence of the contract unless specifically provided

to that effect. In the case of urban properties in India, it is well-known that their prices have been going up sharply over the last few decades - particularly after 1973. We cannot be oblivious to the reality and the reality is constant and continuous rise in the values of urban properties - fuelled by large scale migration of people from rural areas to urban centres and by inflation. Indeed, we are inclined to think that the rigor of the rule evolved by courts that time is not of the essence of the contract in the case of immovable properties - evolved in times when prices and values were stable and inflation was unknown - requires to be relaxed, if not modified, particularly in the case of urban immovable properties. It is high time, we do so." (emphasis supplied)

Therefore there is an urgent need to revisit the principle that time is not of the essence in contracts relating to immovable properties and also explain the current position of law with regard to contracts relating to immovable property made after 1975, in view of the changed circumstances arising from inflation and steep increase in prices. We do not propose to undertake that exercise in this case, nor referring the matter to larger bench as we have held on facts in this case that time is the essence of the contract, even with reference to the principles in Chand Rani and other cases. Be that as it may.

28. Till the issue is considered in an appropriate case, we can only reiterate what has been suggested in K.S. Vidyanadam (supra) :

(i) Courts, while exercising discretion in suits for specific performance, should bear in mind that when the parties prescribe a time/period, for taking certain steps or for completion of the transaction, that must have some significance and therefore time/period prescribed cannot be ignored.

(ii) Courts will apply greater scrutiny

and strictness when considering whether the purchaser was 'ready and willing' to perform his part of the contract.

(iii) Every suit for specific performance need not be decreed merely because it is filed within the period of limitation by ignoring the time-limits stipulated in the agreement. Courts will also 'frown' upon suits which are not filed immediately after the breach/refusal. The fact that limitation is three years does not mean a purchaser can wait for 1 or 2 years to file a suit and obtain specific performance. The three year 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."

(ii) The decision of this Court reported in 2016 (6) CTC 58 (T.Basker Vs. S.Venkatammal and others), the relevant portion of which reads as follows:

"22. The plaintiff, in order to succeed in a suit for specific performance, has to plead and prove that he was always ready and willing to perform his part of the contract. In the case on hand, the agreement dated 12.11.2005, prescribes the period of one week for payment of balance of consideration and execution of sale deed. Of course, the said one week's time would commence from the date on which the copies of the documents are made available to the plaintiff. In the cross examination of PW-1, the plaintiff would admit that the xerox copies of patta and chitta were given to him on 11.12.2005. He would admit that patta, chitta and adangal were also given to him. That being the case, the period of one week had at least commenced from 11.12.2005. The plaintiff issues a notice on 25.01.2006, demanding execution of sale deed for 3 acres 50 cents. The said notice was replied by the defendants on 03.02.2006 wherein it is made clear that since the plaintiff had failed to perform his part of the contract within the time allowed, the contract cannot be enforced and he is not

entitled to execution of sale deed. After the receipt of the said reply, the plaintiff again sent three letters on 06.02.2006, 27.03.2006 and 19.08.2006 and ultimately, the suit was filed on 28.04.2008, that is clearly after 2 years and 3 months from the date of the 1st notice dated 25.01.2006. Neither in the evidence nor the proof of affidavit filed by the plaintiff, there is an explanation for his silence from 03.02.2006 to 28.04.2008.

23. The learned senior counsel for the appellant would contend that the plaintiff had sent messages on several occasions and requested for the execution of sale deed. Apart from the interested oral testimony, there is no other evidence to corroborate the statements made by him. The learned senior counsel appearing for the respondents would contend that the plaintiff, having kept quite from more than two years, after the issuance of the first notice, is not entitled to the relief of specific performance. He would also rely upon the judgment of the Hon'ble Supreme Court reported in *Saradamani Kandappan v. S.Rajalakshmi and others*, 2011 (4) CTC 640 (SC). In paragraph 28 of the said judgment, the Hon'ble Supreme Court has extracted the principles laid down in an earlier case in *K.S. Vidyanadam and Others v. Vairavan*, 1997 (1) CTC 628 (SC) : 1997 (3) SCC 1.

24. I am of the considered opinion that clause III of the above case, cited supra, would apply to the present case. The plaintiff had knowledge of the fact that the defendants had refused to execute the sale deed as early as on 03.02.2006, when he had received the reply notice. He also admits the receipt of the said reply notice in his subsequent letter dated 06.02.2006. Further, he is satisfied with the writing letters. From 19.08.2006 to the date of filing of the suit, i.e., 28.04.2008, the plaintiff has not even moved his little finger, to seek specific performance. This unexplained delay on the part of the plaintiff in seeking the relief of specific performance compels this Court to come to the conclusion that he has not always been ready and willing to perform

his part of the contract, as required under Section 16 of the Specific Relief Act.”

29. On a perusal of the materials and the findings of the Courts below discloses that the plaintiff/ agreement holder entered into an agreement with the first defendant on 22.09.1982 with some conditions namely, the first defendant should produce the nil encumbrance certificate for 30 years and also obtain permission from the Government for selling the property and inform about the same to the plaintiff and then the plaintiff should purchase the property within 3 months from the date of communication of the information regarding permission from the Government. However, on perusal of the pleadings and the findings of the Courts below, it is known that the first defendant has not attempted to obtain permission from the Government and has not produced the nil encumbrance certificate.

30. Thereafter, the plaintiff sent the legal notice which was marked as Ex.A4 stating that the plaintiff is willing to purchase the suit

property and he has sufficient funds to perform his part of contract. On receipt of the said notice, the first defendant sent a reply notice stating that he deny the very execution of agreement itself. The said reply notice dated 27.07.1983 is marked as Ex.A5. However, the plaintiff filed the suit before the Court only on 21.02.1985 after 19 months. Admittedly the three years period of limitation starts from 27.07.1983. However, there is no proper explanation for the delay in filing the suit.

31. Perusal of Ex.A1 Sale Agreement make two things clear. (i) the first defendant has to obtain No Objection Certificate from the State Government for alienating the property; (ii) Nil encumbrance certificate for 30 years has to be produced and thereafter within 3 months, the plaintiff has to purchase the property. The sale agreement also makes it clear that the plaintiff is willing to purchase the property without litigations from the State Government and the same intention is expressed in the legal notice which was marked as Ex.A4.

32. In the legal notice, the plaintiff requested the first defendant to obtain No Objection Certificate from the State Government and Nil

encumbrance certificate for 30 years. However, the plaintiff had no intention to purchase the property with litigation namely without No Objection Certificate and Nil encumbrance certificate. Admittedly, the sale agreement is dated 22.09.1982 and the legal notice is dated 11.04.1983. In the reply notice

dated 27.07.1983, the first defendant had clearly denied the execution of the sale agreement itself. However, for the reasons best known to the plaintiff, the plaintiff has not sent any further notice to the first defendant. Hence, the plaintiff is not intended to buy the property without No Objection Certificate and Nil encumbrance certificate.

33. Similarly, the conduct of the plaintiff from the alleged date of agreement is also relevant to assess the readiness and willingness. Even assuming Ex.A1 is proved in the manner known to law, in view of the oral evidence adduced on the side of the plaintiff, that itself is not sufficient to grant equitable relief of specific performance since the normal human conduct is that no person will be willing to purchase the property without No Objection Certificate from the Government. When the plaintiff has not expressly stated either in the legal notice or in the pleadings, that he is willing to purchase the property without No Objection Certificate and Nil encumbrance certificate, it is clear that he

is not willing and ready to purchase the property. This issue was not discussed by the Courts below.

34. On careful perusal of the deposition of D.W.1, chief as well as cross examination, this Court finds no cogent evidence and hence, this Court is unable to arrive at a conclusion that the first defendant has executed the sale agreement in favour of the plaintiff with stable mind. Admittedly, the first defendant was examined through Advocate Commissioner. The lower Court arrived at a conclusion based on the statement of D.W.1 who was examined through Advocate Commissioner for receiving a sum of Rs.2,000/- from the plaintiff. However the Advocate of the first defendant objected that he has not stated so and the same was recorded in Tamil in the decision of the lower Court. However, the lower Court arrived at a conclusion that the defendant received a sum of Rs.2,000/-.

35. Apart from the above, it is relevant to mention here that though the sale consideration is Rs.10,000/-, the advance amount of Rs.2,000/- which is approximately 20% of the sale consideration has only been paid and major portion of the sale consideration has not been paid. Hence, the present case is squarely covered by the principles laid down in the case of K.S. Vidyanadam and Others v. Vairavan (1997 (1) CTC 628 (SC)) more particularly,

'(III) Every Suit for specific performance need not be decreed merely because it is filed within the period of limitation by ignoring the time-limits stipulated in the agreement. Courts will also 'frown upon suits

which are not filed immediately after the breach/refusal. The fact that limitation is three years does not mean a purchaser can wait for 1 or 2 years to file a Suit and obtain specific performance. The three year 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.'

In the present case, only 20% of the sale consideration was paid to the first defendant and major portion was not paid.

36. Apart from the above, there is some force in the submissions made by the learned Senior Counsel appearing for the appellants. At the time of execution of the sale agreement the first defendant was more than 85 years old and there is no dispute that the first defendant was examined through Advocate Commissioner. Perusal of the chief

and cross examination of D.W.1 discloses that D.W.1 has deposed that he is not able to confirm the Ex.A1 sale agreement and he is not able to ascertain the signature contained in Ex.A1. However, the Courts believed the one word that he has received Rs.2,000/- from the plaintiff. Merely receiving Rs.2,000/- does not mean that the sale agreement is a genuine one. Both the Courts below without considering the Chief and Cross examination of D.W.1 and based on the admission of D.W.1 that he had received Rs.2,000/- has arrived at a conclusion that the sale agreement was executed by D.W.1.

37. There is no quarrel over the decision of the Hon'ble Apex Court and this Court is well aware of its power in exercising the appeal jurisdiction under Section 100 of C.P.C. The power of this Court while exercising the appeal jurisdiction interfering with the findings of the Court below, is very very limited and it is not appropriate for High Court to embark upon the task of re-appreciation of evidence in the second appeal and disturb the concurrent findings of the Courts below which are fact finding Courts. Only when the High Court is satisfied that substantial question of law is involved as per Section 103 of C.P.C., the High Court has power to determine the issue of fact while exercising appeal jurisdiction based on the evidence and necessary to

determine any issue necessary for the disposal of the second appeal which was not determined by the Courts below.

38. Keeping in mind the above legal position, in the present

case except the legal notice, the plaintiff has not expressed his readiness and willingness to purchase the property. The readiness and willingness is not only to be pleaded but also to be proved by convincing evidence before the Court of law. In the present case, except lawyer notice, there is no other cogent and convincing reason to prove that the plaintiff is ready and willing to purchase the property. Readiness infact is the capacity to raise funds and willingness is the mental attitude to get the documents registered.

39.Hence, I am of the opinion that both the Courts below has not considered the veracity of the evidence adduced by D.W.1 and the delay in filing the suit and therefore, the present case is squarely covered by the principles laid down in the case of K.S. Vidyanadam and Others v. Vairavan (1997 (1) CTC 628 (SC)), particularly clause III.

40.Further, though the plaintiff had knowledge of the fact that the first defendant had refused to execute the sale deed as early as on 27.07.1983, when he had received the reply notice namely, Ex.A5, he filed the suit only in the year 1985 and there is no proper explanation for approaching the Court for the relief of specific performance. Accordingly, the plaintiff compelled this Court to come to the conclusion that he is not always been ready and willing to perform his part of contract as required under Section 16 (c) of the Specific Relief Act. Hence, the additional substantial question of law is answered against the plaintiff and in favour of the appellants.

41.In the light of the above discussions and the decisions cited supra, this Court feels that it is necessary to interfere with the decision of the Courts below. Accordingly, the additional substantial question of law is answered in favour of the appellants.

42.In the result, the second appeal is allowed. The judgment and decree dated 30.04.1998 made in A.S.No.26 of 1990 on the file of the learned III Additional District Judge, Pondicherry and the judgment and decree dated 28.02.1989 made in O.S.No.1699 of 1987 on the file of the learned II Additional District Munsif, Pondicherry, are hereby set aside. No costs. Consequently, the connected miscellaneous petition is also closed.

sd/-

Assistant Registrar(CCC)

//True copy//

Sub Assistant Registrar

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To

1.The III Additional District Judge, Pondicherry.

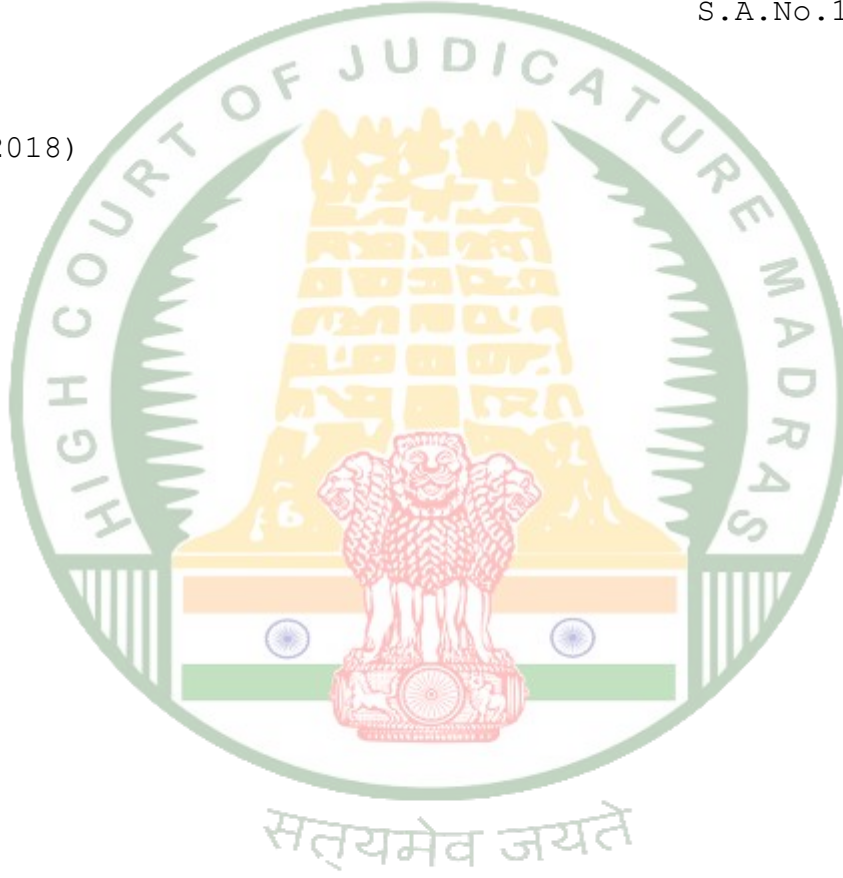
2.The II Additional District Munsif, Pondicherry.

+1cc to Mr.T.R.Rajaraman, Advocate SR.No.24152

+1cc to Mr.R.Sunil Kumar, Advocate SR.No.24222

S.A.No.1415 of 1998

GJ (CO)
GN(08/06/2018)



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