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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 04.04.2019

PRONOUNCED ON : 10.04.2019

C O R A M

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

S.A.No.596 of 2010

1. Kannammal
2. M.Sakthivel
3. M.Mahalingam (Deceased)
4. M.Thirumoorthi
5. M.Thangavelu
6. P.Chinnasamy
7. S.Kuppusamy
8. Sethupathi
9. Gomathi
- 10.M.Suganthan

..Appellants/Respondents/Plaintiffs

(Appellants 9 and 10 brought on record as
LR's of the deceased 3rd appellant
vide order of Court dated 13.07.2018
made in C.M.P.No.6006 to 6008 of 2018
in S.A.No.596/2010 (RSMJ)

Vs.

Palaniammal

.. Respondent/Appellant/Defendant

Prayer: Second Appeal has been filed under Section 100 of C.P.C., against the judgment and decree dated 30.04.2010 in A.S.No.87 of 2009 dated 30.04.2010 in A.S.No. 87 of 2009 on the file of the Court of the Principal District Judge, Erode, reversing the judgment and decree dated 29.04.2009 in O.S.No.312 of 2007 on the file of the Court of the I Additional Subordinate Judge, Erode.

For Appellants : Mr.T.R.Rajagopalan
Senior Counsel for Mr.D.Ravichander

For Respondent : Mr.N.Manoharan

JUDGMENT

Aggrieved over the decree and judgment of the First Appellate Court allowing the appeal, thereby, setting aside the



decree and judgment of the trial Court granting specific performance, the present second appeal is filed.

2. The parties are arrayed as per their ranking before the trial Court.

3. The brief facts of the pleading to file this second appeal is as follows:

(i). Originally, the suit properties were the ancestral properties of one Kaliappa Gounder and his sons namely K.Athappan, K.Kolandasamy and N.K.Ramasamy. The said Athappan died leaving behind his son Raju and 2 daughters namely T.Sagunthala and A.Krishnaveni. As the properties are ancestral properties of the aforesaid Kaliappa Gounder and his sons, they are entitled to 1/4th share each. As they failed to divide the suit properties by an amicable manner, the said Kaliappa Gounder filed a suit in O.S.No.327 of 1986 on the file of Sub Court, Erode for partition and separate possession of his ¼th share in the properties.

(ii). Meanwhile, the said Kaliappa Gounder entered into a sale agreement with the plaintiffs 5 to 8 and one Mariappan with regard to his 1/4th share in the suit properties under a sale agreement dated 12.10.1986. Under the sale agreement, the said Kaliappa Gounder agreed to sell his 1/4th share for a total sale consideration of Rs.2,00,000/- and received a sum of Rs.1,50,000/- as advance on the date of agreement itself from the plaintiffs 5 to 8 and one Mariappan. The time fixed for the performance of contract was within three months after the disposal of the original suit in O.S.No.327 of 1986.

(iii). The suit in O.S.No.327 of 1986 was decreed by the Sub Court, Erode on 15.09.1992 under which, 1/4th share in the suit properties declared to the said Kaliappa Gounder in preliminary decree. When the suit was pending before the said Court, the said Kaliappa Gounder died on 22.02.1989. Before his death, the Kaliappa Gounder, out of his free will and volition, with a disposing state of mind, executed a Will, under which, he nominated his daughter namely, the respondent/defendant, to conduct the case. In the event of his death, during the pendency of the suit, the said Kaliappa Gounder has directed the defendant to performance his part of sale agreement entered by him with the plaintiffs 5 to 8 and the aforesaid Mariappan, after getting the share and after receiving the remaining balance amount of Rs.50,000/-. The said Will is the last testament of the testator and after the death of the Kaliappa Gounder, the said Will come into force. Hence, the respondent/defendant was arrayed as 2nd plaintiff in the aforesaid suit in O.S.No.327/1986 on the file of the Sub Court, Erode. A preliminary decree was passed in the above suit on



15.09.1992, under which, the respondent/defendant, who is the nominee of the said Kaliappa Gounder was entitled with 1/4th share in the suit properties.

(iv). The respondent/defendant has filed a final decree application in pursuance of the preliminary decree passed in O.S.No.327/1986 to divide the properties by metes and bounds with reference to good and bad soil and an Advocate/Commissioner was appointed as Commissioner to divide the properties according to the preliminary decree. The Commissioner measured the properties and divided the properties as per the terms of the preliminary decree and filed his report and plan before the Court. Because of the stay order of the High Court, Madras, passing of the final decree alone was stayed. Hence, the specific portion was not allotted to Kaliappa Gounder and his legal heirs. Hence, the common 1/4th share has been described as suit property in the present suit.

(v). As per the Will dated 03.02.1998 (Ex.A2), the defendant/respondent had a right to execute the sale deed in favour of the plaintiffs 5 to 8 and late Mariapan after receipt of the balance sale consideration of Rs.50,000/- within three months after the disposal of the civil suit. She has not given any more right except the said one. The appeal filed by the sons of Kaliappa Gounder in A.S.No.923 of 1992 is also dismissed by confirming the lower Court judgment passed in O.S.No.327/1986.

(vi). The plaintiffs were entitled to get a sale deed as per the sale agreement dated 12.10.1986 and the defendant bound to execute the same as per the Will executed by the aforesaid Kaliappa Gounder on 03.02.1988. The said Kaliappa Gounder died on 22.02.1989 and the said Will is the last testament of the testator. The plaintiffs are always ready and willing to perform their part of contract from the date of execution of sale agreement and they are ready to perform their part of the contract. On 03.07.2007, the plaintiffs issued a legal notice to the defendant for execution of the sale deed in favour of plaintiffs or their nominees, after receipt of the balance sale consideration of Rs.50,000/- However, the said notice was received by the defendant and issued a reply notice on 09.07.2007 with false allegations. Hence, the plaintiffs have come forward with the present suit for specific performance of contract, directing the defendant to perform the part of the sale agreement of Late. Kaliappa Gounder, who entered into a sale agreement with the plaintiffs on 12.10.1986.

4. Denying the sale agreement, it is the contention of the defendants that the suit was filed without necessary parties, whereas, son of the defendant is necessary party to the proceedings. The suit properties should shown as if, it is a



vacant land and houses. In fact, the entire properties are residential houses. The description of the properties in the plaint itself is not correct and the suit is barred by limitation. It also denied that the Kaliappa Gounder has executed a Will while in disposing state of mind. The readiness and willingness on the part of the plaintiffs was denied and the suit was barred by limitation. The plaintiffs were not entitled to relief as prayed for in the suit properties are not identical and the same is uncertain. The suit was also barred by res judicata. The plaintiffs has also not approached the Court with clean hand, hence prays for dismissal of the suit.

5. The trial Court has framed the following issues:

1. Whether the suit is bad for non-joinder of the son of the defendant?
2. Whether the suit is hit by the principles of res judicata?
3. Whether the suit is barred by limitation?
4. Whether the suit agreement is not genuine, valid and true?
5. Whether is there no cause of action for the suit?
6. Whether the plaintiff are entitled to the relief of specific performance of contract as prayed?
7. Whether the plaintiff are entitled to the relief of permanent injunction as prayed?

6. On the side of the plaintiffs, two witnesses were examined as P.W.1 and P.W.2 and 13 documents were marked as Ex.A.1 to Ex.A.13. On the side of Defendants, two witnesses were examined as D.W.1 and D.W.2 and 9 documents were marked. On the side of the Court, Exs.C.1 and C.2 were marked.

7. Considering the oral and documentary evidence, the trial Court decreed the suit, against which, the appeal was filed by the defendant. The Appellate Court has allowed the appeal. The Appellate Court has dismissed the suit for specific performance on three grounds. The plaintiffs were not ready and willing to perform their part of obligations; the suit filed for specific performance was barred under Order 2 Rule 2 of CPC and the suit is barred by limitation, against which, the present second appeal is filed.

8. The second appeal has been admitted on the following substantial questions of law:

1. Is the learned District Judge correct in holding that the suit is barred under Order II Rule 2 C.P.C. When there is no specific pleading taken in this regard in the written statement or issue framed by the Trial Court, providing an opportunity to the appellants to



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rebut the same?

2. Is the learned District Judge correct in holding that Order II Rule 2 C.P.C is applicable to the suit when the cause of action for the present suit arose only on the disposal of A.S.No.923 of 1992 on the file of the Hon'ble High Court, Madras and after receipt of Exhibit A.10 from the defendant refusing to perform her part of contract?
3. When the suit is filed within 3 years from the date of refusal as contemplated under Article 54 of Limitation Act, is the learned District Judge correct in dismissing the suit as barred by Limitation?
4. When the defendant's claim on the basis of the Will, dated 03.02.1988 is upheld granting her a share based on the said Will, is it open to the defendant to act against the term in the Will and is the Court below right in dismissing the suit for specific performance?
5. When the plaintiff was always ready and willing to perform, is the Court below right in holding otherwise, ignoring the proceedings in O.S.No.326 of 1986 on the file of the Subordinate Court, Erode, and A.S.No.923 of 1992 on the file of the High Court, Chennai."

9. The learned senior counsel appearing for the appellants has vehemently contended that the agreement was executed by one Kaliappa Gounder in respect of his 1/4th share in the suit properties and he has filed a suit in O.S.No.327 of 1986 for partition of his share. The suit has been filed against his sons and during the pendency of the suit, he has executed a Will nominating his only daughter to continue the suit and also to execute the agreement in respect of his 1/4th share in favour of the appellants. The earlier suit was already decreed and preliminary decree was passed. The appeal filed against the preliminary decree also dismissed. Thereafter, he has filed the present suit to enforce the agreement.

10. It is the further contention of the learned senior counsel that though three months time is fixed in the agreement after disposal of the suit namely O.S.No.327 of 1986, the appeal was admittedly filed against the preliminary decree. Therefore, the appeal is the continuation of the suit. The limitation starts only after the dismissal of the above appeal. Accordingly, the plaintiffs have filed a suit for enforcement of the contract. Therefore, the question of limitation does not arise at all. The suit has been filed after the first appeal is dismissed. Now, the proceedings are pending for final decree.



The First Appellate Court has non suited the plaintiff's case on the ground of limitation.

11. Further, it is his contention that the plaintiffs as all along ready and willing to purchase the property. Substantially, the sale consideration was paid on the date of agreement i.e., on 12.10.1986. The plaintiffs also impleaded themselves in the appeal. All these facts clearly indicates that they were always ready and willing to perform their part of contract. The remaining sale consideration of Rs.50,000/- was also deposited in the Court. All these facts are not taken into consideration by the First Appellate Court.

12. The learned senior counsel further contended that merely because he has filed a suit for permanent injunction against the defendant not to alienate the suit property, the suit filed for specific performance cannot be non suited on the ground of bar under Order 2 Rule 2 of C.P.C., such plea was never raised in the written statement. Therefore, question of deciding the plea under Order 2 Rule 2 of C.P.C did not arise at all.

13. The First Appellate Court has held that the suit is barred under Order 2 Rule 2. According to the learned counsel, the cause of action for filing injunction suit on specific performance is totally different. The suit was filed for bare injunction on different cause of action, whereas, the specific performance suit was filed based on the rights under the agreement. Right to enforce the contract depending upon the result of the suit filed by the preliminary decree in O.S.No.327 of 1986, the above suit has reached finality only in the year 1992. Hence, bar under Order 2 Rule 2 will not apply to the present case. Further, the suit in O.S.No.312 of 2007 for specific performance filed on 07.08.2007 after issuing the pre suit notice. The suit was filed within a period of three months limitation. Hence, the First Appellate Court ought not have dismissed the suit on the ground of limitation. The plaintiffs were always ready and willing and also participated in the appeal in A.S.No.923 of 1992 and the remaining sale consideration also deposited, wherein, the plaintiffs has established their readiness and willingness. The First Appellate Court has not considered these aspects properly. Hence, prayed for allowing the appeal.

14. In support of his contentions, the learned senior counsel appearing for the appellants has relied upon the following judgments of the Hon'ble Apex Court viz.,

1. Coffee Board vs. Ramesh Exports Private Limited reported in (2014) 6 Supreme Court Cases 424;
2. Rikabdas A.Oswal vs. Deepak Jewellers and others reported



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- in (1996) 6 Supreme Court Cases 40;
3. Bapusaheb Chimasahab Naik-Nimbalkar and another vs. Mahesh Vijaysinha Rajebhosale and others reported in (2017) 7 Supreme Court Cases 769;
 4. Inbasagaran and another vs. S.Natrarajan (Dead) through Legal Representatives reported in (2015) 11 Supreme Court Cases 12;
 5. Rathinavathi and another vs. Kavitha Ganashamdas reported in (2015) 5 Supreme Court Cases 223;
 6. Alka Gupta vs. Narender Kumar Gupta reported in (2010) 10 Supreme Court Cases 141;
 7. Dalip Singh vs. Mehar Singh Rathee and others reported in (2004) 7 Supreme Court Cases 650;
 8. Kunjan Nair Sivaraman Nair vs. Narayanan Nair and others reported in (2004) 3 Supreme Court Cases 277;
 9. Union of India vs. H.K.Dhruv reported in (2005) 10 Supreme Court Cases 218;
 10. Deva Ram and another vs. Ishwar Chand and another reported in AIR 1996 Supreme Court Cases 378 and
 11. Sucha Singh Sodhi (Dead) through legal representatives vs. Baldev Raj Walia and another reported in (2018) 6 Supreme Court Cases 733.

15. Whereas, the learned counsel appearing for the respondent submitted that the plaintiffs have suppressed the material facts in the plaint. He has filed a suit in O.S.No.652 of 2006 for permanent injunction on the same cause of action. The above suit has been suppressed in the specific performance suit. Therefore, question of raising the plea under Order 2 Rule 2 of C.P.C did not arise at all. Both the complaints, the allegations are one and the same. The cause of action for filing specific performance was available to the plaintiff even when they filed a suit for permanent injunction. Therefore, the present suit is certainly barred under Order 2 Rule 2 of C.P.C.

16. It is further contention of the learned counsel that the preliminary decree was passed on 15.09.1992 in O.S.No.327 of 1986. The agreement itself clearly stipulates that three months time for completion of sale from the date of the judgment in O.S.No.327 of 1986. Having entered the contract for undivided the share, the plaintiffs cannot wait till the appeals and the final decree proceedings are concluded. They ought to have filed a suit within a period of three months from the date of judgment i.e., preliminary decree was passed in the year 1992. Even after appeal was dismissed in the year 2006, the suit was not filed immediately within a period of three months. The suit (O.S.No.312 of 2007) has been filed only on 07.08.2007. These facts clearly indicates that the plaintiff was not ready and willing to perform their part of contract. The First Appellate Court has thoroughly analysed the readiness and



17. In support of the above submissions, he has also relied upon the following judgments viz.,

(ii). S.P.Chengalvaraya Naidu (Dead) by Legal Representatives vs. Jagannath (Dead) by Legal Representatives and others reported in (1994) 1 Supreme Court Cases 1;

15. Furthermore, according to the plaintiff, which fact is also stated in the plaints filed in C.S. Nos. 831 and 833, on the date when the aforesaid two suits were filed the relief of specific performance was premature inasmuch as the time for execution of the sale documents by the defendant in terms of the agreements dated 27.7.2005 had not elapsed. According to the plaintiff, it is only after the expiry of the aforesaid period of time and upon failure of the defendant to execute the sale deeds despite the legal notice dated 24.2.2006 that the cause of action to claim the relief of specific performance had accrued. The above stand of the plaintiff found favour with the High Court. We disagree. A suit claiming a relief to which the plaintiff may become entitled at a subsequent point of time, though may be termed as premature, yet, can not per se be dismissed to be presented on a future date. There is no universal rule to the above effect inasmuch as "the question of a suit being premature does not go to the root of the jurisdiction of the Court" as held by this Court in *Vithalbhai (P) Ltd. v. Union Bank of India.*"

" 15. When we go through the above quoted paragraph it is clear that the facts on the basis of which subsequent suit was filed, existed on the date on which the earlier suit was filed. The earlier suit was filed on 15.03.2003 and



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subsequent suit was filed on 21.05.2003. No fresh cause of action arose in between the first suit and the second suit. The closure of account, as already indicated, was intimated on 20.03.2002 due to the alleged fault of the respondent in not regularizing their accounts i.e. after non-receipt of payment of LC, the account became irregular. When the first suit for recovery of dues was filed i.e. on 15.03.2001 for alleged relief, damages sought for in the subsequent suit could have also been sought for. Order 2 Rule 2 provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the same cause of action. Respondent is not entitled to split the cause of action into parts by filing separate suits. We find, as such, that respondent had omitted certain reliefs which were available to it at the time of filing of the first suit and after having relinquished the same, it cannot file a separate suit in view of the provisions of sub-rule (2) of Order 2 Rule 2, CPC. The object of Order 2 Rule 2 is to avoid multiplicity of proceedings and not to vex the parties over and again in a litigative process. The object enunciated in Order 2 Rule 2, CPC is laudable and it has a larger public purpose to achieve by not burdening the court with repeated suits."

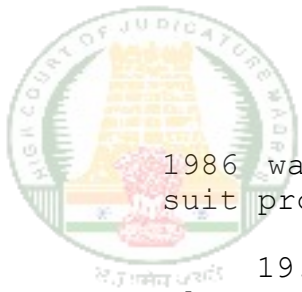
(v). Jaswinder Kaur (Now Deceased) through her legal representatives and others vs. Gurmeet Singh and others reported in (2017) 12 Supreme Court Cases 810;

(vi) J.P.Builders and another vs. A.Ramada Rao and another reported in (2011) Supreme Court Cases 429;

(vii) R.Shanmugam vs. P.Govindaraju (deceased) and others reported in 2017 (2) MWN (Civil) 446;

(viii) Jayakantham and others vs. Abaykumar reported in (2017) 5 Supreme Court Cases 178.

18. The following are the admitted facts under Ex.A.1 that one Kaliappa Gounder has executed a agreement to sell his undivided share of 1/4th share for total sale consideration of Rs.2,00,000/- in favour of the plaintiff on 05.01.2008 and received a sum of Rs.1,50,000/- as advance. It is also specifically agreed in the agreement that the time for completion of sale is three months from the date of judgment in O.S.No.326 of 1986. It is also admitted case that O.S.No.327 of



1986 was filed by the said Kaliappa Gounder for dividing the suit properties and allot 1/4th share to him.

19. During the pendency of the suit, Kaliappa Gounder has also executed the Will in favour of the defendant/respondent herein namely, the only daughter nominating her to continue the suit. In the event of his death she should execute sale deed after receiving the balance sale consideration of Rs.50,000/- in favour of the plaintiffs 5 to 8, the above suit was decreed and preliminary decree was passed on 15.09.1992. Ex.A3 is filed in this regard. The appeal filed against the above decree and judgment in A.S.No.923 of 1992 was dismissed on 31.10.2006. The plaintiffs were also impleaded in the above A.S.No.923 of 1992 on 30.12.2003. Thereafter, first time on 03.07.2007, pre suit notice was issued by the plaintiffs in the suit which was replied by the defendant on 09.07.2007 under Ex.A.10. Thereafter, the suit was filed on 07.08.2007.

20. From the above factual background it could be seen that there is no dispute in the pending suit. The vendor has nominated his daughter to continue the suit and also to execute a sale deed in respect of his 1/4th share to enforce the agreement dated 12.10.1986, hence, the present suit is filed.

21. It is to be noted that in the agreement, there is a specific clause in the agreement to the effect that the sale shall be completed within a period of three months from the date of judgment or knowledge of the judgment in O.S.No.327 of 1996.

22. The agreement was executed in the year 1986 in respect of the 1/4th share including the 1/4th share in the houses. Now the suit has been filed to include the area shown by the Commissioner in his Report.

23. The evidence of P.W.1 makes it clear that they have knowledge not only about the suit, but also the judgment of the trial Court and preliminary decree passed, whereas, first time, they themselves impleaded in Appeal Suit No.923 of 1992 dated 31.10.2006. From these facts, it is easily come to the conclusion that the plaintiffs in the present suit were aware of the preliminary decree passed in the year 1992 for dividing the suit property into four equal shares. It is to be noted that the agreement is not for definite portion of the property. The agreement itself is in respect of undivided 1/4th share. The time limit is fixed for three months after passing the preliminary decree. When the agreement itself is entered for undivided 1/4th share, now, the contention of the plaintiffs that since the appeal is pending and final decree proceedings are pending, they are waiting to enforce the agreement till the proceedings were not reached finality cannot be countenanced for



the simple reason that the agreement itself for enforcement of contract in respect of the undivided interest. When the agreement stipulates specific time limit, the same cannot be ignored together, though, in general, the suit for specific performance, the time is not essence of contract when the parties have agreed to perform their obligations within a certain period and agreed in the agreement, such agreement makes the time as essence of contract. Therefore, the contention of the plaintiffs that the appeal is the continuation of the suit filed by them is in time cannot be countenanced.

24. The facts are also clearly indicates that even the First Appeal was dismissed on 31.10.2006, they have not taken any steps within a period of three months as stipulated in the agreement to enforce the contract, whereas, pre suit notice was issued only on 03.07.2007 and suit has been filed on 07.08.2007 with much delay. It is to be noted that the agreement is of the year 1986. It is specifically agreed in the agreement that immediately, after knowledge of the decree and judgment in O.S.No.327 of 1986 within three months, at any day, the plaintiffs has to pay the balance sale consideration and to enforce the agreement. But, the fact remains that they waited all along even after the appeal was dismissed and the present suit was filed only on 07.08.2007 with inordinate delay. In fact, the time agreed in the agreement makes it clear that the time is an essence of the contract. The plaintiffs had not chosen to file the suit as per the terms agreed in the agreement. The above conduct also makes it very clear that they are not ready and willing to purchase the property.

25. Despite the specific knowledge about the preliminary decree, they remains silent till the legal notice issued on 03.07.2007, it clearly exhibit that readiness and willingness is totally absent on their side. It is yet another aspect to be taken note that the plaintiffs have filed a suit in O.S.No.622 of 2006 on 14.09.2006 for permanent injunction for restraining the defendant from alienating the suit property, the plaint in the above suit was marked as Ex.B1. Ex.B1 clearly show the entire allegations made in the above suit on the basis of the agreement dated 12.10.1986 (Ex.A1). On the date of Exhibit B1, cause of action for filing suit for specific performance was very much available at the relevant time but they have not exercised their right in filing a suit for specific performance, and filed a simple suit for bare injunction. Further they have not obtained any leave from the Court or reserved any right to file the subsequent suit on the same cause of action. The above suit also dismissed for default on 03.10.2007 as evident by Ex.B7. As per Ex.A11, the application filed to restore the above suit is also not pursued.



26. Now, with the above background, it has to be analysed whether the subsequent suit filed by the plaintiffs for specific performance is barred under Order 2 Rule 2 of C.P.C.

27. In the light of the judgments of the Honorable Apex Court, the judgment reported in the case of Coffee Board's case (supra) it is held, without any objection as to the bar under Order 2 Rule 2, the suit cannot be dismissed under Order 2 Rule 2. It is to be noted that absolutely there is no dispute with regard to above judgment. The suit filed by the plaintiffs for permanent injunction in the year 2006. The entire allegation almost similar to that of the plaint in the suit for specific performance. When the allegation in the previous suit filed for injunction itself, show that the defendant was not willing to honour the agreement and started dealing with the properties independently in favour of the third parties. At that stage itself, the plaintiffs were aware of the fact that the defendant has refused to honour the agreement. Therefore, the cause of action in enforcing such agreement arose at that point of time. Without obtaining the leave to file suit for specific performance, certainly, subsequent suit is barred under law.

28. It is further to be noted that the suit filed for specific performance and absolutely there was no whisper what so ever with regard to earlier suit filed for injunction. If the plaintiffs have mentioned about the previous suit, question of raising the contention under Order 2 Rule 2 would arise, but, the plaintiffs had omitted to refer the earlier suit filed by them. The above conduct clearly indicates that the plaintiffs having omitted to mention the earlier suit filed by them cannot now contend that objection under Order 2 Rule 2 not taken by defendant. Omission to seek relief in earlier suit, same amounts to relinquishment of relief.

29. On seeing both the plaint, except the reliefs, the allegations are same, therefore, it cannot be said that in the earlier suit there was different cause of action available. The Judgments of the Hon'ble Apex Court relied on by the learned senior counsel based on the factual aspect in considering the facts and circumstances of the particular cases. Whereas, in this case, the appellants not only aware of the decree and judgment passed in the year 1992, they also aware that the suit reached finality in the year 2006. They filed the suit for permanent injunction based on the same agreement except stating that there is attempt to alienation, that day itself, the cause of action arose for filing the suit for specific performance. Similarly, suppressing to mention about the previous suit in the present suit, also one of the factor that cannot be ignored. The agreement of the year 1986 does not stipulate that only finality reached in the above suit, same could be enforced.



Whereas, parties have specifically agreed to enforce the agreement within the three months from the date of preliminary decree or its knowledge. The agreement was not for specific portion of the property, it was only for undivided share.

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30. Therefore, this Court is of the view that when there is time limit fixed in the agreement, the suit is not filed within three months from the date of decree and judgment which is passed on 15.09.1992, certainly, the suit is barred by limitation. The limitation starts immediately after the preliminary decree is passed on 30.11.1992 or from the date of knowledge of the decree. The plaintiffs aware of the preliminary decree immediately. Further in appeal in the year 2003, they also come on record. They ought to have filed a suit immediately after 30.11.1992 within a period of three months of the decree. At most, within three months from the date of decree, they remain silent all these years. The suit has been filed only in the year 2007 i.e., after 21 years of agreement. Therefore, considering these aspects, this Court is of the view that the suit is certainly not only barred by limitation but also barred under Order 2 Rule 2 of C.P.C. Non performance of contract and merely watching the proceedings to take advantage of the litigation, following the final outcome in the final decree proceedings and watching the escalation of the prices clearly indicates that the plaintiffs have not come with clean hands and in fact, waiting for undue advantage.

31. When the obligations has not been performed within the time agreed between the parties, they cannot seek discretionary relief of specific performance. It is further to be noted that the evidence of P.W.1 itself clearly indicates that the suit property is now totally changed and the structure of the building also changed and many of them in occupation of the buildings. When there were lot of improvements made in the suit properties after passage of time and the building was constructed. Merely on the basis of the agreement that it is inequitable to grant a specific performance in favour of the plaintiffs, in fact, such contract is enforced after several buildings were constructed by others. Thereby, it will be undue hardships to the defendant and in fact, it will give undue advantage to the plaintiffs. Certainly, it is also one of the reasons that the plaintiffs was not entitled to specific performance. Hence, the substantial question is answered against him and the appeal is dismissed. However, considering the fact that advance amount was also received by the first plaintiff and Will also executed in favour of the defendant, the suit has been filed only against the defendant and the defendant also derived benefit out of the share allotted by her father.



32. Considering the plaint, though there is no alternative relief prayed, this Court is of the view that to meet the ends of justice, advance amount of Rs.1,50,000/- is ordered to be refunded to the plaintiffs with interest at the rate of 6% from the date of agreement till the date of realisation, till such amount is paid, there will be charge over the 1/4th share of the said Kaliappa Gounder. The amount of Rs.50,000/- deposited by the appellants in Court shall be refunded to them.

33. Accordingly, the second appeal is partly allowed and the judgment and decree of the First Appellate Court dismissing suit for specific performance are confirmed. No cost.

Sd/-
Assistant Registrar (CS-VIII)

//True Copy//

Sub Assistant Registrar

msv
To

- 1) The Principal District Judge,
Erode.
- 2) The I Additional Subordinate Judge,
Erode.
- 3) The Section Officer,
VR Section, High Court, Madras.

+1 cc to Mr.N.Manokaran, Advocate, S.R.No.35579

+1 cc to M/s.P.Veena Suresh, Advocate, S.R.No.35568

Second Appeal No.596 of 2010

LN(CO)
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