

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 30.09.2019

Judgment Delivered on : 12.11.2019

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBBIAH
and
THE HONOURABLE MRS. JUSTICE T.KRISHNAVALLI

O.S.A.No.89 of 2018

and

C.M.P.Nos.5542, 12366 and 12367 of 2018

1. S.Ravichandran
2. S.Veeraraghavan
3. R.Jagadeesan

.. Appellants

Vs.

Himayam Engineers & Builders,
Represented by its Proprietor,
P.Ramana Reddy,
having office at
New No.150, Old No.60, Ramanaicker Street,
Nungambakkam,
Chennai-600034.

... Respondent

Original Side Appeal (OSA) filed under Clause 15 of the Letters Patent read with Order XXXVI Rule 1 of the Madras High Court Original Side Rules, against the judgment dated 07.09.2017 and decree dated 12.12.2017 in C.S.No.460 of 2005 on the file of this Court.

Prayer in CS.No.460 of 2005:

a) granting specific performance of the "development agreement" dated 10.09.2003 entered into between the plaintiff and defendants 1 and 2 represented by their power of Attorney Agent 3rd defendant

b) for permanent injunction restraining the defendants from in any manner preventing or interfering with the plaintiff from proceeding with construction in the suit schedule property in accordance with the approved plan hereafter to be obtained from the CMDA and

c) to direct defendants 1 & 2 to pay plaintiff jointly and severally a sum of Rs.71,00,000/- (Seventy One Lakhs) towards damages for breach of suit agreement and Rs.20,00,000/- (Twenty Lakhs being the return of advance amount in all a total sum of Rs.91,00,000/- (Ninety One Lakhs)

d) for costs of the suit.

For appellants : Mr.E.J.Ayyappan
For respondent : Mr.R.Thiyagarajan

JUDGMENT

R.SUBBIAH, J

This Original Side Appeal is filed against the judgment and decree dated 07.09.2017 passed by the learned Single Judge of this Court in C.S.No.460 of 2005, granting the relief of specific performance to the respondent/plaintiff in respect of the Development Agreement entered into between the respondent/plaintiff and the appellants 1 and 2/defendants 1 and 2 being the owners of the suit properties, represented by their Power of Attorney Agent, the third defendant (third appellant).

2. The appellants herein are the defendants and the respondent herein is the plaintiff in the suit. For the purpose of convenience, the parties herein are referred to as they are ranked in the suit as plaintiff and defendants.

3. The case of the plaintiff before the learned Single Judge in C.S.No.460 of 2005 is as follows:

(a) The plaintiff - P. Ramana Reddy is carrying on business in the name and style of M/s.Himayam Engineers and Builders. The defendants 1 and 2 are the owners of four plots of land in Survey No.415 in Mogappair Village, then Saidapet Taluk in then Chengalpet District. The two plots in item Nos.1(a) and 1(b) in the schedule to the plaint, belong to the first defendant and the remaining two plots in Item Nos.2(a) and 2(b) in the schedule to the plaint, belong to the second defendant. The third defendant is the Power of Attorney of the defendants 1 and 2.

(b) The defendants 1 and 2 represented by the said Power of Attorney, the third defendant, entered into a Development Agreement with the plaintiff at Chennai on 10.09.2003 to develop the said four plots. Pursuant to the said suit agreement, the defendants put the plaintiff in possession of the suit schedule properties as per Clause 19 of the suit agreement. As per Clause

1 of the suit agreement, the plaintiff agreed to put up construction in the plaint schedule property(ies) exclusively at his own costs - a multi-storied complex as per building plan, as may be permitted by the authorities concerned. Under Clause 3 of the suit agreement, the plaintiff agreed to commence the construction of the building within 30 days of obtaining sanction for the building plan and complete the construction within 18 months, with a grace period of 3 months from the date of plan sanction. The plaintiff and the defendants agreed to share the constructed area in the ratio of 56% for the plaintiff (developer) and 44% for the owners/defendants 1 and 2.

(c) At the time of entering into the suit agreement, the defendants were not in possession of Patta in respect of the lands. The Patta being the necessary document to be submitted for plan sanction before the Chennai Metropolitan Development Authority (CMDA), the plaintiff called upon the defendants to obtain Patta in respect of the lands. As soon as the Patta had been made available by the defendants, the plaintiff prepared the plan and submitted the application to CMDA on 23.01.2004 for approval.

(d) After scrutinising the application, the CMDA informed the plaintiff that the lands come under the land acquisition proceedings pertaining to the Tamil Nadu Housing Board (TNHB), and as such, the plaintiff was directed to produce the No Objection Certificate (NOC) from the TNHB. This fact with regard to the land acquisition proceedings, was not disclosed by the defendants at the time of entering into the suit agreement. After the defendants were informed about the said fact, they agreed to apply to the TNHB and get the NOC, which was also obtained from the TNHB, and the same was handed over to the plaintiff on 25.06.2004. The plaintiff immediately submitted the NOC to the CMDA for approval of the plan. The readiness and willingness need not be proved by the plaintiff to show that he is ready to pay for the contract and money is available with him.

(e) The NOC obtained by the defendants from the TNHB was not accepted by the CMDA, as it was vague and not clear. Hence, the CMDA called upon the plaintiff to submit a clear and fresh NOC from the TNHB. The plaintiff took pains and finally obtained a fresh NOC on 31.10.2004, which was submitted to CMDA. By the time, a delay of 13 months had occasioned, which is entirely due to the defendants' failure to produce the NOC from the TNHB.

(f) The plaintiff cleared the bushes and demarcated the boundaries of the suit lands as directed by the CMDA and also dug a Well for construction purpose. As per Clause 6(a) of the suit agreement, the plaintiff had paid a sum of Rs.10 lakhs to the defendants 1 and 2 as refundable advance on the date of the suit agreement. Though as per Clause 6(b) of the suit agreement, the plaintiff was not obliged to make any further advance till

the commencement of the construction after obtaining plan sanction from the CMDA, on the request of the defendants 1 and 2, the plaintiff had paid a sum of Rs.4 lakhs on 14.01.2004, Rs.1 lakh on 23.03.2004 and a sum of Rs.5 lakhs on 21.11.2004, and on the date of agreement, i.e. on 10.09.2003, the plaintiff paid a sum of Rs.10 lakhs, thus, totally, he paid a sum of Rs.20 lakhs as refundable advance to the defendants towards the suit agreement. The plaintiff was taking all possible steps to obtain plan sanction from the CMDA and to start the main work from 15.01.2005.

(g) While so, the plaintiff received a letter dated 15.12.2004 from the third defendant containing false allegations, purporting to terminate the suit agreement, dated 10.09.2003. The defendants 1 and 2 also sent a similar letter dated 25.12.2004 to the plaintiff, confirming the alleged termination of the suit agreement by their Power of Attorney Agent, the third defendant. The plaintiff disputed/denied the claim of the defendants and gave a detailed reply on 27.12.2004 to the third defendant, setting out true facts and informing the third defendant that the plaintiff proposes to start the main work between January 15th and February 15th of 2005. To the said reply letter of the plaintiff, dated 27.12.2004, the third defendant sent a further letter, dated 02.01.2005, confirming his earlier letter dated 15.12.2004, and hence, the plaintiff caused a notice to the defendants through his Advocate on 05.01.2005, informing the defendants that the proposed termination of the suit agreement by the defendants is illegal and called upon the defendants not to interfere with or prevent the plaintiff from proceeding with the construction as per the terms of the suit agreement.

(h) That being so, on 06.01.2005, when the workers of the plaintiff started clearing the bushes, the third defendant came along with his henchmen and assaulted one Murugesan, who was working at the construction site and threatened him with dire consequences, if any work is proceeded with, in the suit site. Subsequently, the third defendant also threatened one Masthan, a real estate broker, who was instrumental in bringing about the suit agreement, dated 10.09.2003. The third defendant, unlawfully and high-handedly removed the sign-board erected by the plaintiff in the construction site. Hence, the plaintiff and the said Masthan gave a Police Complaint on 06.01.2005 in respect of the above incidents to the Inspector of Police, J.J.Nagar Police Station, Chennai.

(i) Apprehending further interference and threats from the defendants in proceeding with the work, the plaintiff filed O.S.No.30 of 2005 before the District Munsif Court, Ambattur, for declaration that the alleged termination of the suit agreement, dated 10.09.2003 by the defendants is illegal and

invalid and also for permanent injunction restraining the defendants from preventing the plaintiff in any manner with the construction and development of the plaint schedule property (ies) or engaging any one else for construction or development of the plaint schedule property(ies). Pending the said suit in O.S.No.30 of 2005, the plaintiff also filed I.A.No.144 of 2005 for temporary injunction, in which, on 08.02.2005, notice was ordered to the defendants, which was thereafter directed to be listed on 23.06.2005.

(j) In the meantime, the defendants were trying to develop the suit schedule property(ies) by engaging some other property-developer. Hence, the present suit for specific performance is filed by the plaintiff.

(k) The plaintiff was always ready and willing to perform the obligations under the suit agreement in accordance with its terms and conditions. While so, the third defendant had written to the CMDA withdrawing his application for plan sanction, due to which, the plaintiff was unable to proceed with the construction work. As per Clause 8 of the suit agreement, the plaintiff is entitled to enter into agreements and negotiate for sale, or otherwise, deal with or alienate for consideration in respect of 56% of the constructed area falling to the plaintiff's share as developer, without any restriction or hindrance from the defendants. Pursuant to this Clause, the plaintiff had entered into agreements with third parties and committed himself to fulfil the obligations arising out of such agreements. The defendants are bound to honour the same and cannot unilaterally terminate the suit agreement. The suit agreement in Clause 18 entitles the parties to specifically enforce the suit agreement under Section 14(3)(c) of the Specific Relief Act and that the conditions mentioned in Section 14(3)(c)(i)(ii)(iii) are satisfied in the case on hand and hence, according to the plaintiff, he is entitled for the relief of specific performance.

(l) As an alternative relief, the plaintiff is entitled to claim damages for breach of the suit agreement and for return of Rs.20 lakhs paid as refundable advance from the defendants. In such circumstance, the plaintiff has filed the suit in C.S.No.460 of 2005 with the following prayers:

(i) granting specific performance of the Development Agreement dated 10.09.2003 entered into between the plaintiff and defendants 1 and 2 represented by their Power of Attorney Agent/third defendant;

(ii) for permanent injunction restraining the defendants from in any manner preventing or interfering with the plaintiff from proceeding with the construction in the

suit schedule property(ies) in accordance with the approved plan hereafter to be obtained from the CMDA;

or in the alternative

(iii) to direct the defendants 1 and 2 to pay the plaintiff jointly and severally a sum of Rs.71 lakhs towards damages for breach of the suit agreement and Rs.20 lakhs being the return of the advance amount, in all a total sum of Rs.91 lakhs, and

(iv) for costs of the suit.

4. The defendants have filed written statement with the following averments:

(a) The third defendant, as Power Agent of the first and second defendants, entered into a Development Agreement on 10.09.2003 with the plaintiff in respect of the suit land(s), which belonged to the defendants 1 and 2. The said Development Agreement is only a Joint Venture Agreement (Joint Development Agreement-JDA). There is no dispute about receipt of Rs.20 lakhs from the plaintiff as refundable advance without interest. As per the said agreement, the plaintiff should construct 24 flats in the land measuring 14,400 Sq.ft., morefully set out in the plaint schedule, at his cost. Further, the plaintiff shall have a share of 56% of the flats and the defendants 1 and 2 shall have 44% of the flats. As per the terms of the agreement, the plaintiff should apply for plan sanction forthwith to the CMDA at his costs.

(b) As per the terms of the agreement, the plaintiff has to commence construction of the building within 30 days of obtaining sanction for the building plan and complete the construction within 18 months, with a grace period of three months from the date of plan sanction. The Development Agreement, dated 10.09.2003 was not an agreement for specific performance by the defendants, but it was only an executory agreement. The plaintiff has to perform his part of contract under the executory agreement to claim anything under the Development Agreement, dated 10.09.2003, but the plaintiff has not performed his part of the Development Agreement, and the Development Agreement is frustrated by the "inaction" on the part of the plaintiff, coupled with "fraud".

(c) It is only the plaintiff who approached the third defendant and persuaded the third defendant for constructing flats in the suit land(s) under a "Joint Venture" called "Development Agreement". The plaintiff hoodwinked the third

defendant to enter into the said Development Agreement. The plaintiff promised that he would start construction of flats within six months from the date of the Development Agreement and to complete and hand over 44% of the flats to the defendants 1 and 2. The plaintiff informed the third defendant that he would get the CMDA approval of the plan within 90 days. It is incorrect to state that under the Development Agreement, dated 10.09.2003, the suit lands were given in possession of the plaintiff. The possession of the suit lands remained with the defendants 1 and 2. The plaintiff was given only licence to enter the suit lands and start construction work. Clause 19 of the Development Agreement meant only that the plaintiff was given permission as a licensee to enter into the suit lands for the limited purpose of putting up construction, which had not taken place. The suit land(s) remained for ever within the absolute possession of the defendants 1 and 2.

(d) At any rate, the plaintiff had seen all the documents relating to the suit schedule property(ies) and he promised to get Patta, if required, in no time, at his cost. Contrary to the promise, the plaintiff informed the third defendant on 22.09.2003 that the Patta was necessary for CMDA's approval. Therefore, the defendants 1 and 2 obtained Patta of their land (s) on 29.09.2003, i.e. within a week's time by spending heavily and the Patta dated 29.09.2003 was delivered to the plaintiff on 30.09.2003. Thereafter, the plaintiff took nearly 4 months to file an application for plan approval to the CMDA purposely. The plaintiff applied for plan approval to the CMDA only on 23.01.2004. The reason may be that the plaintiff only intended to hold up the suit land(s) and to injure the rights of the defendants.

(e) The CMDA was aware of the fact that the suit land(s) were not under any acquisition proceedings of the TNHB and the CMDA had not asked for the production of any NOC from the TNHB. The CMDA itself in its Notice Board, displayed the lands which remain under the acquisition of the TNHB or any other authority. The plaintiff, unnecessarily, with an intention to delay the matter, had asked the defendants to produce NOC from the TNHB. But however, the defendants approached the TNHB and obtained NOC from TNHB, which was also delivered to the plaintiff. The plaintiff again insisted that another Certificate should be obtained and produced with more particulars, and hence, the defendants again approached the TNHB and obtained another NOC from the TNHB, which was also delivered to the plaintiff. The plaintiff had not produced any Certificate from the TNHB to CMDA and it is only a hoax played by the plaintiff, with a motive to defraud the defendants. It was later ascertained from the CMDA

that no NOC from the TNHB was insisted to be produced by the plaintiff. Thus, neither the CMDA asked for any such NOC, nor was it produced by the plaintiff to the CMDA. The plaintiff has neither demarcated the boundaries of the lands, nor cleared any bushes.

(f) With reference to Rs.20 lakhs alleged to have been paid by the plaintiff, the defendants are willing to refund the same, though it would remain forfeited on the ground of non-performance of the executory agreement by the plaintiff. Ultimately, the defendants were made to suffer heavy loss. The defendants had patiently waited from 10.09.2003 to 15.12.2004 expecting the plaintiff to perform his part of the executory contract, which was not done. The third defendant informed the plaintiff that the Development Agreement dated 10.09.2003 was terminated on 15.12.2004 and even as on 15.12.2004 and also as on 15.01.2005, the plan was not approved by the CMDA. The plan was returned by the CMDA to the third defendant on 17.02.2005.

(g) According to the defendants, there is no question of construction, when there was no plan approved by the CMDA. The Development Agreement, dated 10.09.2003 is not a registered instrument. After filing of the suit in O.S.No.30 of 2005 as stated by the plaintiff, in the District Munsif Court, Ambattur, there is no jurisdiction for this Court to entertain the present suit and the same had to be dismissed summarily on that ground alone. Further, the instant suit is hit by Order 2 Rule 2 of the Civil Procedure Code (CPC). The cause of action is same in both the suits. The cause of action arose out of the termination of the Development Agreement on 15.12.2004. The instant suit therefore is hit by Order 11 Rule 2 CPC as well. As the Development Agreement is not an agreement for sale, the defendants are not liable for any specific performance.

(h) The delay defeated the Development Agreement, dated 10.09.2003 and the amount of Rs.20 lakhs will be refunded to the plaintiff. The suit mentioned land(s) were "even" lands and there are definite boundaries for the suit schedule mentioned lands. The Well dug up was without water and as water is available, the plaintiff should not have dug the Well without the approval of the plan by the CMDA. The third defendant approached the CMDA to ascertain the stage of the approval plan and came to know that the signature of the third defendant was forged by the plaintiff. The plaintiff had no money to construct the flats and therefore also the plaintiff delayed the execution of the work.

(i) The defendants 1 and 2 are very poor and their family was affected due to the delay caused by the plaintiff and he had no right to hold up the suit lands indefinitely under the executory agreement called the Development Agreement, dated 10.09.2003, not only affecting the lives of the defendants 1 and 2, but also their co-sharers. The plaintiff had no right to negotiate with third parties in respect of the sale of the flats without constructing the same and it would arise only on issuance of Completion Certificate from the CMDA. Till the flats are constructed, either party cannot invoke Clause 18 of the Development Agreement. Further, the question of application of specific performance under Section 14(3)(c) of the Specific Relief Act, does not arise. Even otherwise, the plaintiff is not entitled for any discretionary remedy and it could be invoked only by the land owner. The plaintiff without investing any money on the construction of flats, is indulging in notional profits as an unjust enrichment.

(j) The sale price of a well-constructed flat, with all requirements, does not go beyond Rs.1,400/- per square feet as on 30.06.2005 and the sale price quoted by the plaintiff is on the higher side. The claim of the plaintiff for Rs.71 lakhs is almost the cost of half of the suit lands. The plaintiff is not entitled for the specific relief or for grant of any damages as claimed by him.

(k) No cause of action had arisen within the Original Jurisdiction of this Court, as the defendants are not residing within the territorial Original jurisdiction of this Court. The defendants are residing in Tiruvallur District. Even the suit properties do not remain within the Original territorial jurisdiction of this Court. Further, the Development Agreement dated 10.09.2003 was not executed within the jurisdiction of this Court and it was entered into at the place of the third defendant at Tiruvallur District, which is out of the jurisdiction of this Court.

(l) The plaintiff forged the signature of the third defendant in the Deed of Reconstruction, dated 25.01.2004 and got it attested by a Notary Public clandestinely and produced it before the CMDA for sanction and approval of the plan and this came to the notice of the defendants during the pendency of the application with the CMDA. Fraud vitiates every solemn act and it is an antithesis of Justice. The plaintiff has not approached the Court with clean hands. The plaintiff had not done any development work. The third defendant gave a notice to the plaintiff about the fraud committed by him on 01.03.2005, for which, there was no reply from the plaintiff. The third

defendant filed a complaint in the Office of the Commissioner of Police, Greater Chennai on 28.03.2005. After the petition-enquiry, the Central Crime Branch (CCB) in the Office of the Commissioner of Police laid an FIR in Crime No.359 of 2005 on 20.05.2005 against the plaintiff for the offences under Sections 406, 465 and 420 IPC.

(m) The original title deed of Plot No. 2-a of the suit schedule land, which was delivered to the plaintiff on 10.09.2003, after entering into the Development Agreement, dated 10.09.2003, had been used by the plaintiff for raising loan clandestinely. The plaintiff is liable to pay damages of Rs.5,000/- per month for each ground of the suit lands since 10.09.2003 being the date of Development Agreement. The CMDA had not inspected the suit lands at all and the bushes were not removed by the plaintiff. For all the above reasons, the defendants prayed for dismissal of the suit.

5. The plaintiff has filed reply statement stating as follows:

(a) The Development Agreement, dated 10.09.2003 is a bilateral agreement creating rights and liabilities on either side and intended to be performed according to its terms by both the parties. In Clause 18 of the suit agreement itself it is clearly stated that the parties are entitled to specifically enforce the suit agreement. The defendants failed to provide necessary documents for obtaining plan approval from the CMDA, which resulted in delay. Neither any "inaction" nor "fraud", was on the part of the plaintiff. The suit agreement could not be performed by the plaintiff by reason of the breach committed by the defendants by unilaterally and unlawfully terminating the agreement, thereby preventing the plaintiff from performing the same. The plaintiff was put in possession of the suit properties as expressly stated in the suit agreement.

(b) The delay had occasioned only by reason of the non-production of Patta and the NOC from the TNHB by the defendants as required by CMDA authorities. Further, O.S.No.30 of 2005, filed by the plaintiff before the District Munsif Court, Ambattur, was a suit for declaration and permanent injunction to protect the plaintiff's possession which was threatened by the defendants. The present suit is one for specific performance, which is entirely different from the one filed by the plaintiff in O.S.No.30 of 2005. Since the cause of action for both the suits, i.e. O.S.No.30 of 2005 and the present suit in C.S.No.460 of 2005, and the relief are entirely different, Order II Rule 2 CPC has no application.

(c) The alleged forgery of the signature of the third defendant, is denied by the plaintiff. The plaintiff is an established construction firm executing many projects and is in the outskirts of Chennai and is financially very sound. The calculation made by the plaintiff in the plaint regarding the costs of construction and probable net profit, is correct. The suit is not one 'for land' and hence, it is maintainable before this Court.

(d) The Development Agreement dated 10.09.2003 was executed only within the Ordinary Civil Jurisdiction of this Court, wherein the plaintiff's office is situated and the suit agreement is not signed at the place of the third defendant. All the documents filed with the CMDA, were filed by the third defendant under his signature only and the plaintiff did not file any document as alleged. The plaintiff was only interested in processing the application for plan approval. The plaintiff is not aware of any complaint alleged to have been filed by the third defendant or any enquiry or any FIR, as alleged, had been registered against the plaintiff and the plaintiff has not received any notice from any authority till date. The plaintiff denies the allegation that he has used the title deed in respect of Plot No.2(a) mentioned in the plaint schedule for raising loan clandestinely. No loan was raised by the plaintiff at any time using the document. The plaintiff prays for a decree as stated in the plaint.

6. In the first round of litigation, before the learned Single Judge, the plaintiff was examined as P.W.1, besides examining one Raghavendra Rao, a consultant who inspected the suit property, as P.W.2, and Exs.P-1 to P-46 were marked on the side of the plaintiff. On the side of defendants, the third defendant was examined as D.W.1 and Exs.D-1 to D-13 were marked. Earlier, when the present suit in C.S.No.460 of 2005 was taken up for hearing, this Court, by judgment and decree dated 30.03.2012, decreed the present suit in part, holding as follows:

"Issue No.8:

59. While rejecting the claim of the plaintiff for specific performance and the claim for damages, the prayer as to refund of advance amount is ordered with a default clause, as answered in Issue Nos.II and VI. In view of my findings as to the conduct of the plaintiff, particularly for Bench hunting and for filing false affidavits, the plaintiff shall pay exemplary cost of Rs.1,00,000/- (Rupees One Lakh only) to the defendants.

60. In the result, the suit is decreed in part so far as the claim for refund of advance amount is concerned and the defendants 1 and 2 are directed to refund the advance amount, within a period of three months from today, failing which, the defendants 1 and 2 shall pay interest at the rate of 9% per annum from the date of this order till actual payment is made. In all other aspects, the suit is dismissed with a direction to the plaintiff to pay a cost of Rs.1,00,000/- (Rupees One Lakh Only) to the defendants."

7. Challenging the above findings of the learned Single Judge in C.S.No.460 of 2005, dated 30.03.2012, the plaintiff had preferred appeal in O.S.A.No.141 of 2012, and a Division Bench of this Court, by judgment dated 08.08.2014, allowed the said O.S.A., setting aside the judgment and decree of the learned Single Judge and remitted the suit for fresh consideration, subsequent to which, the learned Single Judge took the matter for fresh consideration by way of second round of litigation, and by the impugned judgment and decree dated 07.09.2017, had decreed the present suit in C.S.No.460 of 2005. Considering the pleadings, the learned Single Judge has framed the following issues afresh for consideration in the present suit in C.S.No.460 of 2005:

(i) Whether the suit is liable to be dismissed, in view of the earlier suit filed by the plaintiff, on the same cause of action, in view of Order II Rule 2 CPC ?

(ii) Whether the plaintiff is entitled to get a decree for specific performance of contract on the basis of Development Agreement dated 10.09.2003 and to get a consequential order of permanent injunction as prayed for ?

(iii) Whether the plaintiff is entitled to the alternative relief of Rs.71,00,000/- towards damages for breach of suit agreement and Rs.20,00,000/- being the return of advance amount ?

(iv) Whether the suit land was subjected to any land acquisition proceedings of the TNHB ?

(v) Whether the plaintiff has failed to perform his part of the contract ?

(vi) Whether Clause 18 of the Development Agreement dated 10.09.2003 will be applicable ?

(vii) Whether the plaintiff is entitled to claim any damages inspite of his inordinate delay in executing the contract ?

(viii) Whether the plaintiff has any cause of action to file the suit ?, and

(ix) To what relief the plaintiff is entitled to ?

8. While analysing the oral and documentary evidence, the learned single Judge held as follows:

(i) The defendants are not entitled to re-agitate the already settled issue in the same proceedings and therefore, there is no bar in view of Order 2 Rule 2 CPC to maintain the present suit.

(ii) The suit at the instance of the developer, is maintainable.

(iii) The plaintiff has cause of action for filing the suit.

(iv) The suit lands were subjected to land acquisition proceedings of the TNHB, which were subsequently dropped.

(v) The delay in obtaining the plan sanction from the CMDA is for want of NOC from the TNHB. After issuance of the NOC on 21.10.2004, the plaintiff and defendants also entered into a Memorandum of Understanding, dated 21.11.2014 in continuation of the original Development Agreement and the defendants also got further Rs.5 lakhs. The application was also returned by the CMDA to rectify certain defects mentioned therein by the CMDA as per its letter-Ex.P-40 dated 30.11.2004. While so, on 15.12.2004, the defendants terminated the contract. After issuance of NOC from the TNHB and receipt of Rs.5 lakhs towards refundable advance on 21.11.2004, the defendants, within a month, turned around and terminated the contract. It was further observed by the learned Single Judge that the Court has no doubt that the defendants attempted to wriggle out of the contract due to escalation in the price of real estate properties. Therefore, the plaintiff is entitled to get a decree for specific performance of contract on the basis of the Development Agreement, dated 10.09.2003 and also to get a consequential order of permanent injunction. Since the main relief of specific performance was granted by the learned Single Judge, the issue relating to the alternative relief was not answered. In fine, the suit was decreed by the impugned judgment and decree dated 07.09.2017 for specific performance of the Development Agreement, dated 10.09.2003 and also for permanent injunction as prayed for and the parties were directed to bear their own costs.

9. The learned counsel for the appellants/defendants submitted that the defendants 1 and 2 are the absolute owners of the suit schedule properties, which consists of item Nos.1(a), 1 (b), 2(a) and 2(b). The third defendant is the Power of Attorney Agent of the defendants 1 and 2. The plaintiff, who is a builder, approached the defendants 1 and 2 and offered to construct the residential complex in respect of the suit schedule properties at his own cost, with 44% of the built-up area to the defendants 1 and 2 and to take 56% share in the built-up area for himself. For this purpose, a Development Agreement, dated 10.09.2003 was entered into between the plaintiff and defendants 1 and 2. As per Clause 1 of the Development Agreement, the plaintiff-developer shall construct on the lands exclusively at his own costs, a multi-storied complex as per building plan, as may be permitted by the authorities concerned. As per Clause 2 of the suit agreement, the developer, may at his own costs, apply to the local body or the CMDA for sanction of the building plan. As per Clause 3 of the suit agreement, the builder shall commence the building construction within 30 days of obtaining the sanction for the building plan and complete the construction within 18 months, with a grace period of three months from the date of sanction of plan. Therefore, the entire agreement will come into operation only when the building plan as permitted by the authorities concerned, is obtained by the plaintiff.

10. The learned counsel for the appellants/defendants further contended that the plaintiff/builder submitted the application for plan approval to the CMDA on 22.06.2004 by paying the scrutiny charges of Rs.3,200/- on 23.01.2004 (Ex.P-10). It is further submitted by the learned counsel for the appellants/defendants that the plaintiff-builder was not prompt and diligent in obtaining the approved plan and hence, the third defendant served a letter dated 01.06.2004 (Ex.D-2) on the plaintiff granting time up to 15.07.2004 to commence the work. The said letter was received by the plaintiff, who had acknowledged the receipt of the same by signing at the bottom of the copy of the said letter, and hence, he has submitted himself to the time limit fixed by the third defendant on that date, which was determined as 15.07.2004. But the plaintiff failed to obtain sanctioned plan before 15.07.2004 and failed to commence the work by 15.07.2004. After another four months, on 30.11.2004, though the CMDA sent a letter (Ex.P-40) bearing the name of the third defendant, but the same was sent to the plaintiff's address, specifically calling for submission of a revised plan after rectifying the eight defects mentioned therein by paying a scrutiny fee of Rs.0.75/Sq.Mt of the total built-up area within seven days, failing which the papers will

be returned unapproved. The plaintiff-builder completely suppressed this letter to the defendants and further he failed to rectify the defects within the stipulated time and hence, the plaintiff's application stood rejected after the time limit given by the CMDA. Further, according to the learned counsel for the appellants/defendants, there is no evidence available or produced by the plaintiff to show that he had taken efforts to rectify the defects in his plan approval application within the time limit of seven days on or before 07.12.2004.

11. It is the further submission of the learned counsel for the appellants/ defendants that the defendants were not at all aware of the said letter dated 30.11.2004 and yet on 15.12.2004, after realising that the plaintiff is totally incapable of carrying out any development activity as per the Development Agreement, dated 10.09.2003, the third defendant terminated the Development Agreement, dated 10.09.2003 by sending a letter of termination, dated 15.12.2004 (Ex.P-15). The plaintiff sent a reply notice, dated 27.12.2004 (Ex.P-18) claiming that he was diligent in getting planning approval from the CMDA and that the delay in commencing the construction was only on account of the time taken to obtain NOC from the TNHB. According to the defendants, this statement of the plaintiff is totally false. On 09.01.2005, the third defendant sent a letter requesting the CMDA to return the planning permission application submitted in his name by the plaintiff (Ex.D-9). Thus, the plaintiff has not taken any effort to rectify the defects as observed above. Therefore, inspite of sufficient time given to the plaintiff, he could not even obtain the plan approval from the CMDA and hence, the defendants 1 and 2 have lost hope and faith in the capabilities of the plaintiff to fulfil the contract. Therefore, the defendants cancelled the agreement, promising to refund the advance amount received by them.

12. The learned counsel for the appellants/defendants further submitted that the time is the essence of the contract, which is evident from the letter dated 01.06.2004 sent by the defendants, which was received by the plaintiff. As per the said letter dated 01.06.2004, the time limit was fixed as 15.07.2004 for performance of the contract. That apart, after getting back the unapproved plan application through letter dated 08.02.2005, the third defendant realised that the plaintiff had forged the third defendant's signature in the Deed of Re-constitution, dated 25.01.2004. When the approval of the CMDA is the most vital condition of the Development Agreement, without which the contract itself cannot be executed, then it is classified as a 'contingent contract' and hence, it necessarily follows that when the approval is refused by the

CMDA, the contingency has not been fulfilled and consequently, the contract cannot be executed and it falls to the ground. Therefore, on this ground, a decree of specific performance has to be refused. The learned Single Judge has come to an erroneous conclusion that the plaintiff was ready and willing to perform his part of the contract, without realising that the readiness will be established only if the planning approval is obtained. On these grounds, the impugned judgment and decree passed by the learned Single Judge are liable to be set aside.

13. The learned counsel for the appellants/defendants further contended that on 25.01.2005, the plaintiff filed a suit in O.S.No.30 of 2005 for declaration that the notice dated 15.12.2004 terminating the agreement dated 10.09.2003 is illegal and invalid and also for permanent injunction before the District Munsif Court, Ambattur in O.S.No.30 of 2005. The said suit in O.S.No.30 of 2005 was withdrawn and subsequently the present suit is filed in C.S.No.460 of 2005 before this Court for specific performance. The cause of action in both these suits is one and the same, and therefore, the present suit in C.S.No.460 of 2005 is liable to be dismissed on the principle of "res-judicata". The learned Single Judge failed to consider the fact that the cause of action for both these suits is same and both these suits are filed based on the suit agreement (Development Agreement, dated 10.09.2003). Therefore, on this short ground also, the present suit is liable to be dismissed as per Order 2 Rule 2 CPC.

14. Countering the above submissions, the learned counsel appearing for the respondent/plaintiff submitted that though the Development Agreement was entered into between the parties, as per Clause 3 of the suit agreement, the construction work will have to be commenced within 30 days from the date of obtaining the sanctioned plan and thereafter the entire construction has to be completed within a period of 18 months, with a grace period of 3 months from the date of obtaining the sanctioned plan. The plaintiff submitted the application for planning permission on 23.01.2004 and remitted the scrutiny fee under Ex.P-10. The third defendant, who has been acting on behalf of the defendants 1 and 2, received a communication from the CMDA informing him that as per available Map, the lands in S.Nos.414 and 415 of Mogappair Village lie in TNHB acquisition boundary and the said Survey Numbers lie in general industrial use zone. On 25.06.2004 (Ex.P-12), the TNHB informed the defendants that the suit schedule mentioned properties were originally included in the Notification under Section 4(1) of the Land Acquisition Act for the purpose of acquisition on behalf of the TNHB and subsequently withdrawn at the time of draft Declaration, vide

CMDA letter dated 10.01.1992. Under Ex.P-13, dated 21.10.2004, TNHB sent a communication to the defendants, which was received on 31.10.2004 stating that the suit lands were not proposed for further acquisition by the TNHB, but however, the defendants were directed to contact the CMDA for planning permission approval with relevant documents and particulars. The plaintiff was not aware of the said land acquisition proceedings in respect of the suit lands at the time of entering into the Development Agreement.

15. It is further contended by the learned counsel appearing for the respondent/plaintiff that the respondent/plaintiff, with his own efforts, secured a letter dated 21.10.2004 from the TNHB around 31.10.2004. Similarly, the Patta, NOC and drawings were submitted to the CMDA for processing the planning permission application submitted by the plaintiff in the name of the third defendant. The plaintiff was required to pay a sum of Rs.10 lakhs at the inception of the contract, i.e. 10.09.2003 and a further sum of Rs.19 lakhs on obtaining the plan approval from the CMDA. Further, the plaintiff had effected payments on various dates amounting to Rs.5 lakhs and made further payment of Rs.5 lakhs and in all, amounting to Rs.10 lakhs on 21.11.2004 as per Ex.P-14. Even though the JDA contemplates the second payment of Rs.10 lakhs only on obtaining the planning approval, as requested by the third defendant, the respondent/plaintiff disbursed the further amount with a letter of endorsement in the original of the Development Agreement, Ex.P-46. After having received the payment, the building approval application with all required documents had been re-submitted for consideration and grant of building permission by the building controlling authority. But to the shock and dismay of the plaintiff, the third defendant sent a communication (Ex.P-15), dated 15.12.2004 terminating the JDA, dated 10.09.2003, without any valid reasons. This was followed by two communications sent by the first and second defendants, in Exs.P-16 and P-17, dated 25.12.2004, terminating the contract. In response to that letter, the respondent/plaintiff, on 15.02.2005 sent a communication which is self-explanatory, wherein reasons have been stated by the plaintiff and attempted to impress upon the defendants that it is the appellants/defendants who had committed breach of the essential terms of the JDA, on account of their inaction and omission to produce the NOC from the TNHB and also the Patta for the property. According to the plaintiff, the defendants 1 and 2 are the owners of the suit properties and the third defendant being the Power of Attorney Agent of the defendants land 2, ought to have disclosed these factual aspects of the matter prior to the execution of the JDA (Ex.P-9) and failure to disclose those aspects, was the main

cause for the delay in re-submission of the planning permit application.

16. The learned counsel appearing for the respondent/plaintiff further contended that Section 55 of the Transfer of Property Act deals with seller as well as the purchaser's obligations. It is the duty of the defendants to disclose the non-availability of Patta and also the earlier land acquisition proceedings and Notifications issued thereunder. However, it came to light only when the application was being processed by the building controlling authority. Further, the respondent/plaintiff had been acting according to the instructions of the third defendant and as such, after having received the payment on 21.11.2004 under Ex.P-14, it is unjust on the part of the third defendant to terminate the contract and also to write to the statutory authorities, viz., the CMDA, on 15.01.2005 and 27.01.2005, requesting the building controlling authority, viz., CMDA, Chennai, to return the unapproved planning permission as withdrawn, along with the PPA, plans, documents, etc. Further, Ex.P-15 letter, dated 15.12.2004 would manifest that the defendants are ready and willing to refund the money received with interest and also reimburse the amount that had been spent for the development in furtherance of the JDA, but till date, no pie had been paid by the defendants.

17. The learned counsel appearing for the respondent/plaintiff further states that not contented with the termination of the contract, the third defendant, under Ex.D-9, dated 09.01.2005, sent a communication to the Member Secretary of CMDA, marking a copy of Ex.D-10, dated 18.01.2005, to the Chief Planner, CMDA about the alleged termination of the contract. Adding fuel to the fire and insult to the injury, the third defendant also lodged a private complaint before the Chief Metropolitan Magistrate, Egmore, Chennai in X.Cr.No.359 of 2005, alleging as if the respondent/plaintiff had committed forgery and fraud and sought for investigation and for report from the Forensic Sciences Laboratory. The investigating officer, on the basis of the report of the Forensic Sciences Department, closed the complaint. Aggrieved by the same, the third defendant filed a Protest Petition in CrI.M.P. No. 423 of 2007 and the learned Metropolitan Magistrate by order dated 11.01.2008 allowed the protest petition and directed to conduct a fresh investigation. Further, the learned counsel appearing for the respondent/plaintiff submitted that the conduct of the parties, i.e. the plaintiff and the defendants, should be free from any blemish and the plaintiff had never misconducted himself in relation to the JDA. On the contrary, he has been acting within the ambit of law and fulfilled and accomplished all the

requirements expected from a promoter/builder. The defendants are not in a position to satisfy the requirements of the building control laws, which had caused delay in obtaining the planning permission and building permit. The appellants/defendants have not only intervened with the planning permission and building permit application, but have also contributed for the delay in obtaining the permission from the statutory authorities.

18. It is further stated by the learned counsel appearing for the respondent/ plaintiff that the learned Single Judge analysed both the oral and documentary evidence and came to an irresistible conclusion that it is the appellants/defendants who have committed breach of the contract. The learned Single Judge gave a categorical finding that it is the appellants who are to be attributed for the delay in obtaining planning permission and insofar as the respondent/plaintiff is concerned, he has been ready and willing to perform his part of the contract at all material points of time ever-since the date of the JDA till date. Accordingly, the suit was decreed by the learned Single Judge. The learned Single Judge has rendered such a well-considered judgment and granted decree for specific performance directing the defendants to perform their part of the obligations, as enjoined in the JDA/Ex.P-9.

19. With regard to the contentions made by the learned counsel for the appellants/defendants touching upon Order 2 Rule 2 CPC read with Order 7 Rule 11 CPC, the learned counsel appearing for the respondent/plaintiff submitted that the cause of action in both the suits are totally different. The suit in O.S.No.30 of 2005 cannot operate as res-judicata for the present suit in C.S.No.460 of 2005. When there was a threat of wrongful interference and invasion into the possessory rights of the respondent/plaintiff by the hooligans arranged by the defendants, it necessitated the respondent/plaintiff to file a suit for declaration and injunction in O.S.No.30 of 2005 on the file of the District Munsif Court, Ambattur. In fact, the defendants filed an application under Order 7 Rule 11 CPC to reject the present plaint (in C.S.No.460 of 2005) on the ground that the plaintiff has not obtained leave of this Court, but subsequently, in the application to revoke the plaint, this Court has given categorical finding that the cause of action in both the above suits is distinct and different. As against such findings rendered by this Court, the defendants have not filed any appeal, and therefore, the said finding has become final. However, once again, the defendants raked up the same issue, which cannot be countenanced.

20. According to the learned counsel appearing for the respondent/plaintiff, pursuant to the contract, the appellants/defendants had committed for sale of the proposed flats in favour of the customers and that the respondent/plaintiff had satisfied the ingredients of Section 14 (3)(c)(i), (ii) and (iii) of the Specific Relief Act. Hence, the respondent/plaintiff is entitled for decree of specific performance, as also for damages. Thus, the learned counsel appearing for the respondents/plaintiff prayed for dismissal of the appeal.

21. Keeping in mind the above submissions of the learned counsel on both sides, we have perused the materials available on record. Upon considering the submissions and perusing the oral and documentary evidence, the following points emerge for consideration in the present appeal :

(i) Whether the delay in commencing the construction work is attributed on the part of the plaintiff ?

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

(iii) Whether time is the essence of the contract in this case ? and

(iv) Whether the present suit is hit by Order 2 Rule 2 CPC ?

22. As we have dealt with the factual aspects of the matter in detail, we refrain from reiterating the same any further in this appeal, but the facts which are germane alone are discussed hereunder. As the points (i) to (iii) are inter-linked and inter-related to each other, we are dealing with the same together.

23. Admittedly, there was a Development Agreement dated 10.09.2003 entered into between the plaintiff and the third defendant, being represented as Power of Attorney Agent of the defendants 1 and 2. As per Clause 3 of the Development Agreement, the plaintiff agreed to commence the construction of the building within 30 days of obtaining the sanction of the building plan and complete the construction within 18 months, with a grace period of three months from the date of plan sanction. However, by citing delay on the part of the plaintiff in fulfilling his part of the obligations under the Development Agreement dated 10.09.2003, the defendants terminated the agreement by letter dated 15.12.2003 sent by the third defendant, who is the Power of Attorney Agent of the defendants 1 and 2. In such circumstances, the plaintiff has come forward with the present suit for specific performance of the agreement dated 10.09.2003.

24. It is not in dispute that soon after the agreement dated 10.09.2003, the plaintiff, in order to perform his obligations, has intended to submit a building planning permission, but for want of Patta in respect of the property(ies), he could not submit the same. Therefore, the plaintiff requested the defendants to furnish the Patta and when it was handed over to the plaintiff, he immediately submitted a building planning approval form to the Chennai Metropolitan Development Authority on 23.01.2004. On 23.01.2004 itself, the plaintiff has paid a sum of Rs.3,200/- towards scrutiny charges. The planning authority, on scrutiny of the building planning approval, called upon the plaintiff to obtain NOC from the TNHB, inasmuch as it was made to appear that the property in question is under acquisition proceedings. When this was informed, the defendants have obtained a NOC on 25.06.2004 and thereafter, the plaintiff re-submitted the building plan. Once again, the planning authority called upon the plaintiff to submit a fresh NOC by pointing out certain defects and therefore, the plaintiff once again requested the defendants to obtain such NOC. Such NOC was also obtained on 31.10.2004 and handed over to the plaintiff, who in turn re-submitted the building planning permission with the fresh NOC obtained from the Tamil Nadu Housing Board. In this process, there was some delay in obtaining the building planning permission as per the terms and conditions of the Development Agreement dated 10.09.2003. From the above narration of sequence of events, which led to the delay, it is evident that neither the plaintiff nor the defendants could be blamed for such delay. At the same blush, it is clear that there is no slackness on the part of the plaintiff in submitting the building planning permission application soon after the Development Agreement dated 10.09.2003 and if at all had there been any delay, the plaintiff could not be blamed, since he was made to wait for getting the NOC from the TNHB. Further, the planning authority could not process the building planning permission application for want of the NOC from the TNHB. When the fresh NOC itself was obtained by the defendants on 31.10.2004, it is not known as to how the defendants could issue the termination notice on 15.12.2004 by citing the alleged delay or non-performance of the obligation by the plaintiff. In fact, on receipt of the letter dated 15.12.2004 from the third defendant, followed by a letter dated 25.12.2004 of the defendants 1 and 2, terminating the Development Agreement dated 10.09.2003, the plaintiff sent a reply dated 27.12.2004 informing the steps he had taken to fulfil his part of the obligations under the contract and that the delay had occasioned only due to the defects pointed out by the planning authority in obtaining Patta as well as a Fresh NOC from the Tamil Nadu Housing Board. When that be so, it is futile on the part of the

defendants to terminate the Development Agreement dated 10.09.2003 by citing non-performance/poor performance of the obligations on the part of the plaintiff. Thus, we conclude that there is no delay on the part of the plaintiff in performing his part of the contract under the Development Agreement dated 10.09.2003. The plaintiff was totally depending upon the planning permission to be issued by the statutory authority (CMDA), but, according to the learned counsel appearing for the respondent/plaintiff, due to the act of the defendants, the plaintiff could not obtain the building planning approval. Therefore, we hold that there is no delay on the part of the plaintiff either in obtaining the building planning permission from the planning authority, as has been stated in the Development Agreement, or in commencing the construction activity. The plaintiff was always diligent in taking efforts on his part to commence the construction. But for the termination notice(s) sent by the defendants, we are certain that the plaintiff would have completed the construction, as per the contract.

25. As per the agreement dated 10.09.2003, the plaintiff-builder has to complete the construction within eighteen months from the date on which building planning permission is issued by the planning authority, of course, with a grace period of three months to tide over any act of "Vis Major" or any other natural calamities. Obviously, the project was a total non-starter due to the reasons mentioned above. We have already held that the delay is not due to the act of the plaintiff. We also hold that the plaintiff was always ready and willing to perform his part of the contract. As far as financial capability of the plaintiff is concerned, as per the contract, the plaintiff paid a sum of Rs.10 lakhs on the date of entering into the Development Agreement dated 10.09.2003. Subsequently, at the instance of the defendants 1 and 2, a further sum of Rs.4 lakhs was paid 14.01.2004, Rs.1 lakh on 23.03.2004 and Rs.5 lakhs on 21.11.2004. Having received a sum of Rs.5 lakhs on 21.11.2004, within 25 days, on 15.12.2004, the defendants have terminated the contract on the ground of delay on the part of the plaintiff. In fact, as per Clause 6 (b) of the Development Agreement, the plaintiff need not make any further advance amount to the defendants till the commencement of the construction. In other words, except the sum of Rs.10 lakhs, which the plaintiff paid on the date of entering into Development Agreement on 10.09.2003 to the defendants, he need not make any further amount. However, contrary to the contract, at the instance of the defendants, the plaintiff paid further sum of Rs.10 lakhs as mentioned above. This only shows the financial resourcefulness and the wherewithal of the plaintiff to commence the construction of the building as per

specifications. With regard to the financial capability of the plaintiff, it is disputed by the defendants in the written statement by stating that, "the plaintiff had no money to construct the flats and without any money, how could the plaintiff perform his part of the contract", for which the Plaintiff, in his reply affidavit filed before the learned Single Judge, in Para No.7, has stated that, "It is also not true that the plaintiff have no money to construct the flats. The plaintiff is an established construction firm in executing many projects and in the outskirts of Chennai and is financially very sound." Therefore, it is clear that the plaintiff is financially capable and sound to undertake the construction in question. This statement of the plaintiff has not been subsequently and specifically denied or disproved by the defendants in any other manner. The Plaintiff also filed Income Tax Returns for the assessment years 2005-2006, 2006-2007 and 2007-2008 under Exs. P35 to P37. The Plaintiff also filed Ex.P38, balance sheet for the year ending on 31.03.2004 and Ex.P39 being the Bank Statement of Accounts for the period from 01.12.2004 to 10.03.2007, with Lakshmi Vilas Bank, Nungambakkam, Chennai. Above all, the plaintiff also filed Exs. P27 to P34, Agreements entered into between various third party purchasers in respect of various properties which the plaintiffs firm developed. This, in our view, would adequately prove that the plaintiff is monetarily sound enough to commence the construction and to complete the building. It is well settled that to prove the financial soundness, the plaintiff need not show the actual physical balance in his bank account, but it is suffice to show some evidence to substantiate that he is capable of undertaking the contract. If this ratio is applied to this case, in the light of the above evidence, we are of the view that the plaintiff is capable of undertaking the project and he is always ready and willing to commence and complete the contract.

26. Though the plaintiff was always ready and willing to perform his part of the contract, but it was the defendants, who were reluctant to continue the contractual transaction any further. This is explicit from Ex.P-15 letter, dated 15.12.2004 sent by the defendants wherein it was stated that the defendants are ready and willing to refund the money received with interest and also reimburse the amount that had been spent for the development in furtherance of the JDA. The reason for saying so is also explicit, as the defendants have stated in the letter dated 15.12.2004 that, "now the land value has been increased by 50% after the agreement and when I requested you to increase the share percentage of the land owner's you had simply refused." The defendants have alleged that due to delay, the land costs

had sky-rocketed and therefore, they are not in a position to accede to the amount indicated in the Development Agreement any longer. This is not a valid reason for rescinding the contract by the defendants. The defendants, having caused delay in obtaining the NOC from the TNHB enabling the plaintiff to get the planning permission sanction, ought not to have terminated the agreement and therefore, we hold that the delay cannot be attributed on the part of the plaintiff.

27. The next question that falls for our consideration is as to whether time was the essence of the contract entered into between the plaintiff and third defendant. As per Clause 3 of the Development Agreement dated 10.09.2003, the plaintiff, as a builder, is required to commence the construction of the building within thirty days of obtaining sanction for the building plan and complete the construction within 18 months with a grace period of three months from the date of plan sanction. In the present case, the time limit will be a factor for consideration only if the building plan is approved. Further, in the present case, when the planning authority is ceased of the building planning approval application submitted by the plaintiff, the defendants wrote letters on 15.01.2005 and 27.01.2005, requesting the Building Controlling Authority, viz., CMDA, Chennai, to return the unapproved planning permission as withdrawn, along with the PPA, plans, documents, etc. Therefore, till the filing of the present suit, the building planning permission has not been obtained at all from the competent planning authority.

28. Though in the JDA, dated 10.09.2003, the time was not fixed for completion of the project, it is the contention of the defendants that by Ex.D-2 letter, dated 01.06.2004, the defendants have fixed the time limit to commence the work on or before 15.07.2004. But the plaintiff has not commenced the work. It has to be stated that unless the statutory authority grants planning permission, the plaintiff cannot commence the work, and hence, the delay in commencing the work on or before 15.07.2004 cannot be attributed on the part of the plaintiff. Therefore, the plea of the learned counsel appearing for the defendants that the time is the essence of the contract, cannot be countenanced. Since the defendants have also subsequently received the amount(s) inspite of the time having been fixed for commencement of the work, no significance could be attached to the time mentioned in the letter, dated 01.06.2004 (Ex.D-2). In such circumstances, the question of time being the essence of the contract is insignificant for our consideration.

29. The learned counsel appearing for the respondents relied on the decision reported in 1979 (4) SCC 393 (Prakash Chandra Vs. Angadlal and others), wherein the Supreme Court observed that the ordinary rule is that specific performance should be granted and that it ought to be denied only when equitable considerations point to its refusal and the circumstances show that damages would constitute an adequate relief. Even if a sum had been named in the contract for sale as the amount to be paid in case of breach, the plaintiff is entitled in law to the enforcement of the agreement. He also placed reliance on the decision in 1993 (1) SCC 519 (Chand Rani (dead) by LRs. Vs. Kamal Rani (dead) by LRs), wherein it was held that the specific performance of a contract will ordinarily be granted, notwithstanding default in carrying out the contract within the specified period, if having regard to the express stipulations of the parties, nature of the property and the surrounding circumstances, it is not inequitable to grant the relief. Similarly, in the decision reported in 1995 (4) SCC 15 (S.V.R.Mudaliar (dead) by LRs. and others Vs. Rajabu F.Buhari (dead) by LRs and others), it was held by the Apex Court that the relief of specific performance is said to be discretionary only in the sense that the Court may not act arbitrarily and nothing beyond this, and while exercising the discretion, judicial conscience and judicial statesmanship alone are the guiding facts. These decisions relied on by the counsel for the plaintiff strengthens our conclusion in this case. In this case, there is no default on the part of the plaintiff in fulfilling the obligations in the Development Agreement. All along, the plaintiff was cautious and diligent in fulfilling his part of the obligations under the contract and therefore, the relief of specific performance being a equitable remedy, it has to be granted in favour of the plaintiff.

30. Coming to the application of Order 2 Rule 2 CPC to the case on hand, we find that earlier, the defendants have filed an application to reject the plaint under Order 7 Rule 11 CPC in the present suit on the ground that the suit is hit by Order 2 Rule 2 CPC. The said application was dismissed by a learned Single Judge, along with the application seeking revocation of leave to sue, in A.Nos.5412 and 5413 of 2005. The order dated 21.01.2006 passed by the learned Judge as follows:

"8. After careful consideration of the rival submissions, this Court is of the opinion that both the applications require an order of dismissal by this Court. It is an admitted position that both the parties are residing outside the city of Chennai and from the reading of the development agreement

entered into between the parties, it is seen that the said agreement was entered into at Chennai. The Court is unable to notice anything contrary to what is found in the said agreement entered into between the parties. Therefore, this Court is of the opinion that this Court had jurisdiction to proceed with the case.

9. The second contention put forth by the learned counsel for the applicant that it is suit for land and hence, it should have been filed within the jurisdiction of the Court concerned, cannot also be countenanced for the simple reason that from the reading of the prayer column, it would clearly indicate that the plaintiff has asked for specific performance of the agreement entered into between the parties and also for permanent injunction restraining the defendants from interfering with the plaintiff from proceeding with the construction in the property or in the alternate for damages and thus, no delivery of possession is asked for. So far as such a relief is not asked for, it can be well stated that it is not a suit for land. Under such circumstances, the contention of the learned counsel for the applicant that it is a suit for land, cannot be countenanced. Hence, application No.5412 of 2005 deserves an order of dismissal and accordingly the same is dismissed.

10. In so far as Application No.5413/2005 seeking rejection of the plaint, the Court is able to see that the cause of action are distinct and different. In the suit filed before the District Munsif Court, Ambathur, the plaintiff has sought for possession pursuant to the agreement entered into between the parties. In so far as the instant suit is concerned, it is a comprehensive relief which is one for specific performance of the agreement along with consequential relief not to interfere with the plaintiff in proceeding with the construction. Thus, the cause of action shown is distinct and different from that of the suit filed before the District Munsif Court, Ambattur. Therefore, the Court is of the view

that it is not hit by the provisions enshrined in Order II of CPC and hence, the application to reject the plaint, has got to be dismissed. Accordingly, both the applications are dismissed."

(emphasis supplied)

31. The above said order passed in application seeking to reject the plaint, has not been taken on appeal and it has become final. Therefore, the question of dealing with the principle of Order 2 Rule 2 CPC does not arise. In fact, the learned Single Judge, in the order passed in the above applications, had dealt with the issues and rejected the contention regarding Order 2 Rule 2 CPC, and thus, it is clear that the suit is not hit by Order 2 Rule 2 CPC.

32. Thus, from the above decisions and taking note of the facts of the case on hand, we are of the opinion that by well-considered judgment, the learned Single Judge had granted the relief of specific performance to the respondent/plaintiff, which needs no interference by this Court in this appeal.

33. Therefore, for all the reasons stated supra, we do not find any valid reason to interfere with the judgment and decree of the learned Single Judge. Accordingly, the judgment and decree dated 07.09.2017 passed by the learned Single Judge in C.S.No.460 of 2005, are confirmed. Resultantly, the Original Side Appeal is dismissed. No costs. Consequently, C.M.Ps. are closed.

-s/d-

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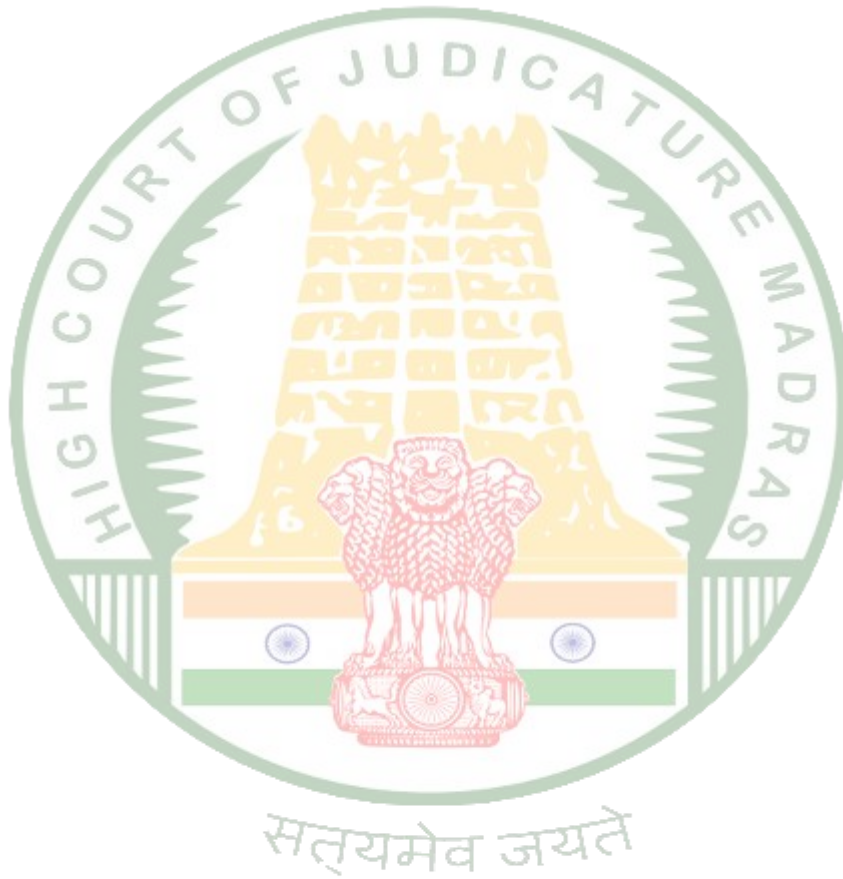
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