

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 14.11.2019

Judgment Pronounced on : 11.06.2020

CORAM: THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

A.S.No.196 of 2009

M.Chinnaiyan

... Appellant / Plaintiff

Vs

1.Kasthuri Radhakrishnan
2.R.Murali
3.R.Saravanan
4.R.Kanchana

5.Tamil Nadu Housing Board
Erode Housing Unit
Rep. by its Executive Engineer cum
Administrative Officer,
Erode.

... Respondents Defendants

Prayer :- First Appeal filed under Section 96 of C.P.C., against the judgment and decree of the learned Additional District Judge cum Fast Track Court No.I, Erode in O.S.No.3 of 2006 dated 11.11.2008.

For Appellant : Mr.V.Raghavachari, Senior Counsel
for Mr.V.P.K.Goutham

For Respondents : Mr.M.K.Kabir, Senior Counsel
Assisted by Mr.V.P.Sengottuvel
[R1 to R4]
Mr.R.Jayaseelan
Standing Counsel for R5

JUDGMENT

Preliminary statement

1.1 The plaintiff in O.S.No.3 of 2006 on the file of Additional District Judge (Fast Track Court-I), Erode, is the appellant herein. He laid the suit for specific performance of an agreement of sale dated 30.07.1987 with an alternate prayer

for return of the advance amount paid under the agreement of sale. The trial court rejected both.

1.2 Challenging the decree, the plaintiff has appealed to this Court. The parties would be referred to by their rank before the trial court.

2.1 The suit property is a residential house, and it was constructed on a site allotted to a certain Radhakrishnan by the 5th defendant, the Tamil Nadu Housing Board (henceforth would be referred to as Housing Board). The defendants 1 to 4 claim under Radhakrishnan.

2.2 The allottee of the site Radhakrishnan had executed Ext.A-1 sale agreement, dated 30.07.1987, in favour of one Pongiannan, who is not a party to the suit. On 08.5.1988, Pongiannan had made over this agreement to the plaintiff for a consideration. On the strength of this assignment, the plaintiff has laid the suit for specific performance. In the meantime, Radhakrishnan, the allottee of the site, and the owner of the suit property died. Hence, the suit was laid against his legal representatives.

3. The facts may appear very straight forward. However, what it camouflages is a set of litigations that the parties hereto have mutually instituted against each other, with the present suit forming the last in the series. The other litigations came to be laid between the date of ExtA-1 agreement and prior to the filing of the present suit for specific performance in 2006, to which necessary reference would be made later.

Pleadings

4.1 A narrative of the material facts in the plaint along with the details concerning the earlier litigations is now stated in greater detail:

- The suit property is described as a plot measuring 4,400 sq.ft. in a Housing Board layout with a residential building. As referred to earlier, this property was allotted by the Housing Board, the 5th defendant in the suit, to Radhakrishnan. He had constructed a house therein, and had inducted one Kalidas as the tenant of the suit property.
- On 30.07.1987, Radhakrishnan, along with 2nd and 3rd defendants, his sons, executed a sale agreement for the sale of the suit property to a certain Pongiannan. It is recited in the agreement:

- That the entire dues payable to the Housing Board had been paid by Radhakrishnan; and
- That a case seeking enhancement of compensation for the lands acquired for the Housing Board for its project of forming the layout is pending at the instance of the landowners before the Court.
- The material terms of the agreement are:
 - The total consideration payable is Rs.5.40 lakhs, out of which a sum of Rs.1.0 lakh was paid as advance by Pongiannan.
 - The tenant (Kalidas) must be vacated by Radhakrishnan within three months, and vacant possession of the property must be handed over to Pongiannan. On delivery of the possession, Pongiannan was to pay another Rs.50,000/- towards the balance sale consideration to Radhakrishnan.
 - If however, the tenant could not be vacated, then a sum of Rs.1.0 lakh is to be deducted by Pongiannan from the sale consideration for vacating the tenant. (This would mean that the total sale consideration then would stand reduced to Rs.4.40 lakhs instead of Rs.5.40 lakhs)
 - Pongiannan was to pay all the additional liability such as payment of any amount that might arise on the demands of the Housing Board in terms of any award to be passed by the Court in connection with the land-acquisition claim.
 - Radhakrishnan was to execute the sale deed within 30 days from the date on which Housing Board executes the sale deed in his favour.
- Subsequently, on 22.12.1987 Radhakrishnan executed a Power of Attorney appointing one Dhanapal as his Power Holder. Dhanapal is Pongiannan's son.
- On 08.5.1988, Pongiannan, had assigned his right under the sale agreement to the plaintiff.
- Thereafter, on 12.02.1989, Dhanapal, (the Power of Attorney holder of Radhakrishnan) had executed a lease deed in favour of the plaintiff and inducted the latter in the suit property as a tenant. According to the plaintiff, Kalidas, the tenant of the suit property had surrendered possession to Dhanapal on 04.02.1988.

4.2 This is now followed by four litigations :

- a) The plaintiff had laid O.S.87 of 1989 on the file of Sub Court, Erode, for a decree of bare injunction against

Radhakrishnan, his wife and children, and Kalidas seeking a decree that the plaintiff should not be force-evicted from the property. The suit was laid within about a week of plaintiff entering possession of the suit property as a lessee of the suit property. This suit came to be decreed as the defendants submitted to the passing of the decree, indicating thereby that they were not interested in evicting the plaintiff, except by due process of law. (Ext.B-1 is the copy of the plaint in O.S.87/1989, and Ext.B-4 is the copy of the judgement and Ext.B-5 is the copy of the decree).

- c) The second suit was by the wife and children of Radhakrishnan. This suit is critical and has considerable relevance in the context of the present suit. This suit was originally laid as O.S.No.53 of 1989 before District Munsif Court, Erode, and later came to be transferred to the Sub Court, Erode, where it was taken on file as O.S.No.549 of 1989. The defendants in the suit are Radhakrishnan, his agreement holder Pongiannan, the tenant Kalidas, the present plaintiff (assignee of the sale agreement) and Dhanapal (Pongiannan's son and the Power of Attorney of Radhakrishnan). The primary prayer is for a declaration that the sale agreement dated 30.07.1987 executed by Radhakrishnan in favour of Pongiannan is not binding on the plaintiffs. According to the plaintiffs in that suit, the consideration paid to the Housing Board was not entirely paid by Radhakrishnan, and that his wife (the first plaintiff in the suit), and his father-in-law too had contributed to the same. Ext.A-2 = Ext.B-6 is the copy of the plaint. The suit was contested by both Pongiannan and the present plaintiff. The copies of their written statements are Exts.A-3=Ext.B-8 and Ext.A-4=Ext.B-9. In the suit, the plaintiffs had moved I.A.No.36 of 1989, seeking an order of interim injunction that Radhakrishnan should not execute any sale deed in favour of Pongiannan pursuant to Ext.A-1 agreement dated 30.07.1987. The District Munsif Court, Erode, had passed an order of interim injunction, and this order continued to be in force even after the transfer of the suit to the Sub Court. Ext.B-2 is the copy of this order. Subsequently, on 05.01.1999, the suit in O.S.No.549 of 1989 came to be dismissed as withdrawn, based on an endorsement made by the counsel for the plaintiffs (present defendants 1 to 3) which reads "not pressing the suit, since the agreement is time barred". The certified copy of this endorsement is marked Ext.B-7.

e) During the pendency of O.S.No.549 of 1989 , the present appellant had filed RCOP.No.2 of 1991 before the Rent Controller, Erode against Radhakrishnan and Dhanapal, to permit him to deposit rent in the Court under Section 8 (5) of the Tamil Nadu Buildings (Lease and Rent Control) Act. In the context of the present case, this petition is not of any significance.

d) The next proceeding is for eviction of the plaintiff. Though no documents pertaining to these proceedings are produced, the proceeding per se is not in dispute. Admitting that the plaintiff was a tenant of the suit property, the contesting defendants herein had laid RCOP.No.26/1998 before the Rent Controller, Erode against him and sought his eviction. On 31.10.2000, this came to be allowed, and challenging this order, the plaintiff herein had preferred RCA.No.5 of 2001, which too came to be decided against him. With an unfailing hope, the plaintiff had moved this Court in CRP No.337/2002 and it came to be dismissed on 19.12.2003. The plaintiff would not give up, and would now file a Review Petition in 91/2004 in CRP.337/2002. The review was allowed, and CRP itself came to be allowed on 11.07.2007. Aggrieved by the same, the landlord (defendants herein) moved the Hon'ble Supreme Court in C.A.5158/2009. On 28.01.2016, this was allowed Vide the judgment of the Hon'ble Supreme Court reported in (2016) 3 SCC 296. It was during the pendency of the review petition, the present suit for specific performance came to be laid.

4.3 The plaintiff further pleads:

- That he has been in possession of the suit property both as a tenant and also in part performance of the sale agreement. That he has always been ready and willing to perform his part of the contract. He has been paying all taxes to the local body and also paying maintenance charges to the Tamil Nadu Housing Board. He is also ready and willing to pay such enhanced land value as might be demanded by the Housing Board (required to be paid pursuant to the enhancement of compensation ordered by the court concerned).
- That on 14.10.1998, he has issued a suit notice (Ext.A7) requiring the defendants 1 to 4, the heirs of Radhakrishnan to perform their part of the agreement of sale that Radhakrishnan had entered into. This was

responded to by the aforesaid defendants in their reply dated 22.10.1998 (Ext.A8) refusing to perform the contract on the identical ground on which they had earlier laid O.S.549/1989. In the context of the reply notice, it is alleged that none of the children of Radhakrishnan have any interest in the suit property, and that one among them has been only formally included as a party to the sale agreement.

- Since Radhakrishnan had not vacated his tenant Kalidas, in terms of Ext.A-1 agreement, the total consideration payable to the suit property would stand reduced to Rs.4.40 lakhs plus the additional cost payable to the Housing Board. After adjusting the advance amount of Rs.1.0 lakh paid under Ext.A-1, the balance sale consideration payable is Rs.3.40 lakhs. However, the plaintiff does not insist on it, and ignores the term providing for reduction of sale consideration, and is now willing to pay the balance sale consideration of Rs.4.40 lakhs.
- The suit is within time since the time for execution of the sale deed itself commences only from the date on which the Housing Board executes the sale deed in favour of the defendants.

5.1 Resisting the suit, and primarily impugning the validity of the sale agreement, the defendants 2 and 3 in their written statement (which was adopted by the 1st defendant) have contended :

- The suit property was not the self-acquired property of Radhakrishnan. The father of the 1st defendant Aathikesavan had a textile business at Salem. The suit property was purchased with the finance provided by the 1st defendant's father Aathikesavan, and also by utilising the sale proceeds of the jewels of the 1st defendant. Even the construction of the property was made with the funds of the 1st defendant, and all the monthly instalments payable to the Housing Board also were paid only by these defendants.
- Radhakrishnan had no title to enter into a sale agreement with Pongiannan. It is hence the defendants 1 to 3 herein had laid a suit in O.S.No.549 of 1989 before the Sub-Court, Erode against Pongiannan, the present plaintiff and others. Even in that suit, these defendants had pleaded in their plaint in O.S.549 of 1989 that the said sale agreement which Radhakrishnan had entered into with Pongiannan was invalid. Curiously enough in the sale agreement, Radhakrishnan had induced his two children (Defendants 2

and 3), both of who were minors at the relevant time, and not competent to enter into a contract, to join him in executing the sale agreement without even informing them about the nature of the document that they were executing. There was no impending family necessity for entering into a sale agreement.

- To the extent these defendants learn, Radhakrishnan had some loan transaction with Pongiannan, and that the sale agreement was obtained by Pongiannan to secure the loan transaction. Necessarily, Pongiannan is a necessary party to the suit. Hence, the suit is bad for non-joinder of necessary parties.
- The sale agreement is also vitiated for its uncertainty since the time for performance is to be reckoned only from the date on which Housing Board executes the sale deed, and the date on which the said sale deed was to be executed by the Housing Board could never be ascertained. In Ext.A-7 suit notice dated 14.10.1998, it is mentioned that even as early as on 16.09.1995, the Housing Board had fixed the additional market price to be paid by the land owners pursuant to the enhancement of compensation awarded by the concerned Court at Rs.2,09,345/-, but the plaintiff had not taken any efforts to remit this additional demand of the Housing Board. It requires to be mentioned here that in the assignment deed which Pongiannan had executed in favour of the plaintiff, there is hardly any reference regarding the payment of enhanced value of the property which the Housing Board might determine.
- So far as the alleged assignment of the sale agreement by Pongiannan in favour of the plaintiff goes, it is a fraudulent document, since at no time prior to the suit, the plaintiff had informed about it to the defendants. Even in O.S.No.549 of 1989, where the present plaintiff was arrayed as 4th defendant, he had not chosen to mention about this assignment in his written statement, nor had he taken up a plea that he was in part performance under the sale agreement in that suit. Even in O.S.No.87 of 1989, which the plaintiff had laid for prohibitory injunction, he had not disclosed the assignment deed he claimed to have obtained from Pongiannan. Here, it may be relevant to mention that the plaintiff himself had approached the Rent Controller for depositing the rent under Section 8(5) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960, and even in that he had not taken a plea of part performance.

- Even if the plaintiff had any right to seek specific performance, the suit is terribly barred by limitation. In response to the suit notice that the plaintiff had issued, the defendants, in their reply notice dated 22.10.1998, had informed the plaintiff of their intention not to execute the sale deed in terms of the sale agreement. However, the suit was laid more than five years thereafter, and consequently, the bar of limitation invites itself to deny the plaintiff the remedy he seeks.
- Alternatively till such time the Housing Board executes a sale deed in favour of these defendants, no right accrues to the plaintiff to insist that the contract be performed now. In that sense, the suit is premature.
- The suit property would fetch not less than Rs.10,00,000/- even on the date of sale agreement in 1987, and present value of the property at the time of filing the suit would be more than Rs.30,00,000/-. Hence, the suit is liable to be dismissed.

5.2 In the written statement filed by the 5th defendant, it is alleged: (a) That the sale agreement between Radhakrishnan and Pongiannan would not bind the Housing Board; and (b) that at any rate the sale agreement executed is contrary to the terms and conditions of the allotment of the plot to Radhakrishnan, hence his allotment is liable to be cancelled.

6.1(a) The dispute went to trial, in which the 5th defendant Housing Board did not participate to substantiate how its contention that Ext.A-1 sale agreement was contrary to the terms and conditions of allotment of plot to Radhakrishnan. Turning to plaintiff, he examined himself as P.W.1 and has produced Exts.A1 to Ext.A-10. He then examined Pongiannan as P.W.2, followed by Dhanapal, the son of Pongiannan (who was also the Power of Attorney of Radhakrishnan) as P.W.3 and another Kathirvel as P.W.4.

6.1(b) For the defendants, the 3rd defendant Saravanan was examined as D.W.1. They also examined their former tenant Kalidas as D.W.2. and have produced Exts.B-1 to B-15, most of which have already been referred to in the facts-narration above.

6.2 During trial, defendants 1 to 4 appeared to have dropped their primary line of defence on Radhakrishnan's want of title to execute Ext.A-1 agreement by the wayside, and pinned their

defence chiefly on their allegation that Ext.A-1 was only a security-document obtained by Pongiannan for a loan advanced to Radhakrishnan. Noting the inconsistency that springs from a wobbling defence of the defendants, the trial Court in its judgement has held that Ext.A-1 was a genuine agreement.

6.3 The trial Court still dismissed the suit primarily on the ground that the suit was barred by limitation. It reckoned that, in terms of Ext.A-7 suit notice, the terminus quo for filing the present suit has commenced on 16-09-1995, the date on which the Housing Board had determined the enhanced sale consideration to be paid for the site at Rs.2,09,345/-, and that neither P.W.2 Pongiannan, nor his assignee, the plaintiff, had attempted to comply with this condition. Having failed to comply with the condition stipulated, they chose not to institute the suit within three years from 1995, and hence the suit is barred by limitation.

6.4 Aggrieved by this decree, the plaintiff has approached this Court with this appeal. The defendants did not file any cross objection against the finding that Ext.A-1 was genuine.

7. Following points are raised for consideration:

- 1.Is the assignment of Ext.A-1 sale agreement in favour of the plaintiff is suspicious?
- 2.Whether the suit is barred by limitation?
- 3.Is the plaintiff entitled to have a decree for specific enforcement of Ext.A-1 agreement;
- 4.What is the nature of decree to be passed?

8. A suit for specific performance of a contract involving sale of an immovable property invariably is laid on a set of straight-forward facts, almost along predictable lines, and the nature of defence normally offered are also reasonably templated. The core facts of this case does little harm to this general pattern, except that the parties herein appeared to have made it a chess-board, with their moves and counter moves, which may even shame the best in the game. These layered-facts necessarily have to be separated for an accurate understanding.

9. There are essentially two aspects: (a) Is the assignment of Ext.A-1 contract by Pongiannan (P.W.2) in favour of the plaintiff is false, in the sense that it was not made on the date on which it was purported to have been made? (b) The point on bar of limitation in instituting the suit. An adjunct aspect raised is that if the plaintiff is entitled to the discretionary relief of specific enforcement of Ext.A-1 agreement.

The Arguments:

10.1 Mr. V.Raghavachari, the learned counsel for the plaintiff/appellant submitted:

- The primary contention of the defendants is that Radhakrishnan did not have title to execute Ext.A-1. In a suit for specific performance, defendants cannot plead defect in the title to perform the contract. In this case, defendants are impleaded essentially as the heirs of Radhakrishnan, and consequently they cannot plead that Radhakrishnan had no title to enter into Ext.A-1. Reliance was placed on Vadivelu Mudaliyar (died) & another Vs Kanni Ammal (died) & Four Others [1998-3-L.W.343]. Secondly, these defendants had withdrawn O.S.549/1989 which they had laid on the very ground on which they now defend the present suit, and with their withdrawal of their earlier suit, they cannot re-agitate the same ground in this suit.
- Ext.A-1 stipulates that any enhanced value for the site in terms of the Award passed in Land Acquisition proceedings has to be paid by the purchaser of the suit property. Consistent with the same, when the plaintiff came to know that the Housing Board had already raised a demand for Rs. 2,09,345/- from the allottee of the site (the defendants, they being the heirs of the allottee Radhakrishnan) on 16-09-1995, he issued a suit notice (Ext.A7) dated 14-10-1998, but in Ext.A-8 reply dated 22.10.1998, the defendants claimed that there was no necessity to share that information. This, in other words, would mean that the defendants have, by their calculated act hamstrung the plaintiff from performing his part of the contractual obligations. Given the setting, it is not given to the defendants to repudiate the contract, and if at all any, only the plaintiff can avoid contract. Ref: The State of Maharashtra Vs M/s S.N.Chawhan [1984 SCC OnLine Bom 86 : (1985) 1 Bom CR 579]. A party in fault has no right in law to take advantage of his own fault. Reliance was placed on the authorities in Puliyadi Navanna Ellarayan Vs Kuttuva China Kuna Muni Nagendra Iyen & another [VI (1917) L.W 233].
- The agreement has created reciprocal promises, whereby the time for performance on the part of the plaintiff commences only after the defendants have obtained the sale deed from the Housing Board. Here, the D.W.1, the third defendant had deposed (between April and August 2008), that the Housing Board had not executed the sale deed. The plaintiff's obligation to perform his part of the contract

is deferred till the defendants performed their reciprocal promise, since the former is dependent on the latter. Reliance was placed on the authority in: Nathulal Vs Phoolchand [AIR 1970 SC 546].

- Turning to Limitation, the point on which the trial Court had non-suited the plaintiff:
 - First, when in October, 1998 (Ref: Ext.A-7 suit notice) wherein the plaintiff had indicated for the first time his knowledge about the Housing Board's demand for additional payment made on 16-09-1995, the Order of interim injunction passed in O.S.549/1989 (Ext.B-2) was still in force. Therefore, there is no way that the plaintiff could have maintained a suit. Necessarily, the terminus quo for reckoning limitation cannot be reckoned from 16-09-1995.
 - Secondly, the denial of the defendants to perform their part of the contract Vide Ext.A-8 reply notice dated 22-10-1998 also does not have any consequence in law, since at that point of time, the title to the site has not been vested in the defendants. There cannot be any in presenti breach of an executory contract which Ext.A-1 is. In other words, what was attempted through Ext.A-8 reply notice was a premature-repudiation of the contract, and it would not affect the limitation for instituting the suit. Reliance was placed on the ratio in V.K.Kumaraswami Chettiar & Others Vs P.A.S.V.Karuppaswami Mooppanar [AIR 1953 Madras 380], Bhagwan Singh Vs Teja Singh alias Teja Ram [AIR 1995 P & H 64], and time for instituting the suit will start only when there is a refusal to perform after the due time for performance has arisen. Reliance was to P. Cecili Vs Devathal & Others [Manu/TN/3514/2016 = 2016 SCC Online Mad 10448]. Their deliberate tactics to defeat the contractual right of the plaintiff has substantially cost him monetarily. In terms of ExtA-1, after adjusting the advance amount of Rs.1.0 lakh, the plaintiff is strictly bound to pay a balance sale consideration of Rs.4.40 lakhs (since he had given up Rs.1.0 earmarked for vacating Kalidas by Radhakrishnan) plus the additional amount payable to the Housing Board. In other words, plaintiff was liable to pay only (Rs. 4,40,000 + Rs. 2,09,345) Rs.6,49,345/- whereas he has now deposited Rs.11.40

lakhs in the Court. This is in addition to Rs.1.0 lakh initially paid as advance.

● In this suit, the defendants have all along been the party at fault. They invented every possible technique to defeat the performance of their contractual obligations. Even in this suit, they have pleaded that the suit property did not belong to Radhakrishnan with a self negating inconsistent plea that Radhakrishnan might have executed Ext.A-1 to secure a loan that he might have obtained from Pongiannan. And, during trial they gave up the former, and failed to establish the probability of the latter. In a suit for specific performance, the conduct of the defendants is as much relevant as that of the plaintiff, and any attempt of the defendants to defeat the performance of the contract need to be factored while exercising the judicial discretion to grant a relief in equity. Reliance was placed on the ratio in *Silvey & Others Vs Arun Varghese & another* [(2008)11 SCC 45], *Zarina Siddiqui Vs A.Ramalingam alias R.Amarnathan* [(2015) 1 SCC 705], and *A.N.Arunachalam Vs. T.Sivaparakasam & another* [2011(1) MWN (Civil) 819].

10.2 So far as the Housing Board is concerned, Radhakrishnan was its employee till he died, and after his demise, his son has now become an employee. The Housing Board has filed its written statement impugning Ext.A-1 but it did not prove it. It has taken a principled position to shield the non-existing interest of either of its former employee or its current employee. This apart even if the plea of the Housing Board were to be considered on its face value, it has not produced the agreement that it had entered into with Radhakrishnan on which it founded its defence.

11. Per contra, arguing for the defendants 1 to 4/respondents 1 to 4, Mr. M.K.Kabir, the learned senior counsel, contended:

- That Ext.A-1 was fraudulently made could be known from the fact that it was not just executed exclusively by Radhakrishnan, but also by the 2nd and 3rd defendants, who are his sons, of who the third defendant was a minor at the relevant time.
- That the assignment of the right under the sale agreement by Pongiannan to the plaintiff is a concoction, hurriedly made to create a title in the plaintiff to institute the suit. This assignment was said to have been made on 08-05-1988 as per the endorsement in Ext.A-1, but it was never

pleaded at any time before. These defendants had laid O.S.549/1989 in which the present plaintiff was arrayed as the 4th defendant, whereas his assignor Pongiannan was the second defendant. Neither of them disclosed the assignment of Ext.A-1 to the plaintiff in their respective (Ext.A3 = Ext.B8 and ExtA4 = Ext.B-9) written statements. Secondly, the plaintiff himself had first laid O.S.87/1989, and even in the plaint (Ext.B-1), there is no reference to it. Thirdly, these defendants initiated eviction proceedings against the plaintiff under the provisions of Rent Control Act, and even here he did not plead about the assignment of the sale agreement. Inasmuch as the plaintiff had chosen to plead only his tenancy both in his suit O.S.87/1989 and also in his written statement in O.S.549/1989, it is evident that the assignment of Ext.A-1 has not taken place on 08-05-1988. The conduct of the plaintiff hides a material fact, which sources the cause of action for the present suit, is contrary to ordinary course of human conduct. Hence, it is more probable that the alleged assignment of Ext.A-1 could only be a later creation, and that it could not have been made on the date on which it was purported to have been made. Necessarily the conduct of the plaintiff comes under a shadow of suspicion and consequently, he is not entitled to a remedy in equity as he has approached the Court with unclean hands. Reliance was made to *Lourdu Mari David & Others Vs Louis Chinnaya Arogiaswamy & Others* [(1996) 5 SCC 589] and *Ravindran Vs Danton Shanmugham & Others* [(2017) 3 CTC 344 : (2017) 3 Mad LJ 265].

- This apart, when the defendants have denied and impugned the assignment of Ext.A-1 in favour of the plaintiff, the latter ought to have prayed for a declaration that the assignment was valid before proceeding to seek specific enforcement of Ext.A-1.
- Alternatively, having taken a position that he is only a tenant of the suit property consistently, it is impermissible for the plaintiff to put forth a case that he is an assignee of Ext.A-1 sale agreement, and hence he is estopped by his own pleadings in the earlier proceedings. Reliance was placed on the dictum in *R.N. Gosain Vs Yashpal Dhir* [(1992) 4 SCC 683], *Ranganayakamma & another Vs K.S.Prakash (dead) by Lrs. and Others* [(2008) 15 SCC 673], *In re Govinda Rao, Magal* [AIR 1947 Madras 5], and *Sukumabai Vs Chandgonda Kalgonda Patil* [AIR 2003 Bombay 131].

- The suit is barred by limitation. The plaintiff issued Ext.A-7 notice dated 14-10-1998 requiring the defendants 1 to 4 to execute the sale deed. To this, these defendants issued their reply Vide Ext.A-8 dated 22-10-1998, in which they had conveyed their unwillingness to execute the sale deed. This in effect is the notice of refusal to perform the contract, and hence the terminus quo would run from the date of Ext.A-8 reply notice. In all cases where time is not stipulated for performance of the contract, under Article 54 of the Limitation Act, time for filing a suit would run from the date of refusal. Authorities relied on are: Thankamma Mathew Vs M.AzamathullaKhan & Others [1993 Supp (4) SCC 492], Van Vibhag Karamchari Griha Nirman Sahkari Sanstha Maryadit Vs Ramesh Chander & Others [(2010)14 SCC 596] and I.S. Sikandar (Dead) by LRs., Vs K. Subramani & Others [(2013)15 SCC 27]. At any rate a suit for specific performance must be laid within a reasonable time. Reliance was placed on the authorities in K.S.Vidyanadam & Others Vs Vairavan [(1997)3 SCC 1], Pushparani S.Sundaram & Others Vs Pauline Manomani James & Others [(2002)9 SCC 582], Manjunath Anandappa urf Shivappa Vs Tammanasa & Others [(2003)10 SCC 390] and Saradamani Kandappan Vs S. Rajalakshmi & Others [(2011)12 SCC 18]

12. In reply, the learned counsel for the appellant submitted:

- That, if Ext.A-8 reply notice of the defendants had to serve as the commencing point of limitation, then they must admit Ext.A-1 agreement, before harping on the plaintiff's default to perform the contract in time. The defendants resist the suit not on the title of Radhakrishnan to execute Ext.A-1, but in resting title in themselves. And in O.S.549/1989, Radhakrishnan did not file a written statement till his death in 1994. Therefore, primarily O.S.549/1989 assumed a character of a title dispute between Radhakrishnan and rest of his family - his spouse and children over the suit property. Hence, if the suit for specific performance is laid, where the title of the vendor of the immovable property is not the criterion, unless the heirs of the vendor admit the latter's title, they are incompetent to repudiate the contract that is sought to be enforced.
- Alternatively, refusal to perform Vide Ext.A-8 reply gives the plaintiff an option either to accept the repudiation, or to keep alive the contract till the arrival of the time for performance. A unilateral repudiation before the time for performance of contract cannot be thrust on an

unwilling plaintiff.

The Discussion

13. The core issues are: If Ext.A-1 agreement must be specifically enforced? And, if the plaintiff deserves a relief in equity? Before dealing with them, it is necessary to detail how the defendants have positioned themselves in resisting the suit: They admitted the execution of Ext.A-1 by Radhakrishnan at all points of time, but resisted the performance either by Radhakrishnan himself (when they laid O.S 549/1989), or by themselves in the present suit posthumously after Radhakrishnan's death with twin defenses: First they pleaded that the suit property was not exclusively Radhakrishnan's but theirs', and hence Radhakrishnan did not have any right to enter into a sale agreement. The second was, at the best Ext.A-1 was executed only to secure a loan which Radhakrishnan had obtained from Pongiannan. These aspects apart, they have pleaded that (a) the assignment of Ext.A-1 by Pongiannan (P.W.2) to the plaintiff on 08-05-1998 was not true; and (b) the suit was barred by limitation.

14.1 Once the defendants have chosen not to dispute the execution of Ext.A-1, but resist its performance with their pleas referred to above, then specific enforcement of the contract cannot be denied in the absence of proof of the defence offered. And, if the plaintiff displays a conduct that invites disgrace upon himself to deny him a remedy in equity, then non-suiting him becomes the natural consequence. This however, depends not on the ability of the defendants to resist performance of contract, but on the efforts of the plaintiff himself.

14.2 The burden of proving the plea taken in defence to refuse performance of the contract lies very obviously on the defendants. As referred to above, they took alternate pleas, one on the title of Radhakrishnan to execute Ext.A-1 and the other that Ext.A-1 might only be a security-document. Of them, they did not attempt to prove the first, and made only a half hearted attempt to prove the second, that fell well short of the requirements that the law on burden of proof mandates. The trial court therefore, has most appropriately held that Ext.A-1 was validly made.

15. That leaves the other two pleas of (a) denial of assignment of Ext.A-1 and (b) plea of limitation alive for consideration. In effect what this Court is now required to consider is to evaluate the quality of plaintiff's case, and the merit of defendants' effort to expose the weakness in it.

(a) Is the assignment of Ext.A-1 to plaintiff suspect?

16. This is an issue, if found against the plaintiff, has the ability to non-suit him single-handedly since his conduct will then become utterly discomfoting to the conscience of the court while contemplating to grant a remedy in equity. Is then the assignment of Ext.A-1 validly made on the date it bears? Here the insistence is on the date of assignment: 08-05-1988, and the allegation is that it could not have been made on that date. The reasons provided are that,

- In their written statements in O.S.549/1989, neither P.W.2, the agreement holder under Ext.A-1, nor the plaintiff herein, both of who are arrayed respectively as defendants 2 and 4, the factum of assignment of Ext.A-1 was pleaded;
- Second, neither in his suit for injunction in O.S.87/1989 nor in the eviction proceedings under the Rent Control Act, plaintiff pleaded about the assignment of Ext.A-1.

According to the defendants 1 to 4/respondents 1 to 4, if the ordinary course of human conduct is taken as an indicator, the non-disclosure of the alleged assignment of Ext.A-1 does not stand to reason. Hence the probability is that the assignment of Ext.A-1 in favour of the plaintiff should have come into existence at a later point of time. This in turn would imply that the plaintiff has approached this court with an untrue document and a false plea.

17.1 This Court is plainly not impressed with the arguments suspecting assignment of Ext.A-1 as contended by the defendants 1 to 4, and the reasons are:

- Contrary to their contention that the plaintiff had not disclosed the assignment at an earlier point of time, it could be ascertained from the evidence on record that this plaintiff as 4th defendant in O.S.549/1989 had in his written statement (marked Ext.A-4 = Ext.B-9) pleaded that he had adopted the written statement of Pongiannan, who was the second defendant in that suit. The copy of Pongiannan's written statement is Ext.A-3 = Ext.B-8. In paragraph 14 of this written statement, Pongiannan had disclosed the assignment of Ext.A-1 on 08-05-1988 in favour of the present plaintiff. This written statement was filed sometime in October, 1990. And, in his Ext.A-4 written statement, the present plaintiff had required that a sale deed in terms of the sale agreement be executed in his favour. Cumulatively they show that the assignment of Ext.A-1 in favour of the

plaintiff was disclosed even in 1990, and the contention of these defendants on this aspect does not fit in with the facts borne out by the record. Secondly, Ext.A-7 suit notice, dated 14-10-1998, which was issued by the plaintiff during the pendency of the eviction proceedings before the Rent Controller, also makes a reference to the assignment of Ext.A-1 in favour of the plaintiff.

- Turning to O.S.87/1989, it is a suit that the plaintiff has laid on his title as a tenant of the suit property. To revisit the basic facts (not exclusively those pleaded in O.S.87/1989), the plaintiff alleges that he was both an assignee of Ext.A-1 and that he was also the tenant of the suit property, in terms of the lease granted by Dhanapal (Pongiannan's son and Radhakrishnan's Power of Attorney). In O.S.87/1989, the plaintiff rests his title to the suit as a tenant of the property, and not as an agreement holder holding possession of the property in part performance of the contract of sale. And the remedy he sought in O.S.87/1989 was that his possession as a tenant should not be disturbed except by the due process of law. Does then the character of O.S.87/1989 require that the plaintiff disclosed the assignment of Ext.A-1 in his favour? This Court considers that in the negative. The fact that he could have indicated the assignment of Ext.A-1 in Ext.B-1 plaint was optional, and his failure to disclose it can never be considered fatal. And, in the very next year, Vide the written statements in O.S.549/1989, where the assignment of Ext.A-1 was material, the plaintiff indeed had disclosed it by adopting the written statement of Pongiannan.
- And, so far as the non disclosure of the assignment of Ext.A-1 in the proceedings before the Rent Controller is concerned, it is again a proceeding which the plaintiff had defended entirely as a tenant. Given the nature of the proceedings, there is no connect between the cause of action in the eviction proceedings before the Rent Controller, and the one that supplies a right of action for a suit for specific performance.

This Court therefore, holds that defendants 1 to 4 have failed to sustain their plea that the assignment of Ext.A-1 sale agreement in favour of the plaintiff was a false document.

17.2 Curiously enough the defendants have contended that inasmuch as they have denied the assignment of Ext.A-1, the plaintiff ought to have gone for a suit for declaration. This

appears to be a desperate plea. Is it their case that the agreement was assigned in favour of somebody else? For the defendants who had plainly denied Radhakrishnana's right to execute Ext.A-1, it would have been an amazing stance, if only they should come forward with a plea such as this, and unless something such as that is put forward, no cloud is cast on the assignment per se. See: Arulmigu Velukkai Sri Azhagiya Singaperumal Devasthanam, Rep. By its Trustees vs. G.K.Kannan (Deceased) & others [2020-2-L.W. 317].

(b) Is the suit barred by limitation:

18. This depends on the nature of the contractual obligations that Ext.A-1 has created. According to the plaintiff, Ext.A-1 is an executory contract with reciprocal contractual obligations to be performed in a certain sequence. And hence, the purported repudiation of contract in Ext.A-8 reply notice is not a repudiation that law would countenance, and hence terminus quo for reckoning limitation cannot start from 22-10-1998, the date on which Ext.A-8 was issued. The defendants assume a position contrary to this.

19. Before delving more on this, it is necessary to enter an immediate finding on the correctness of the approach of the trial court in reckoning the terminus quo in deciding on the period of limitation. According to the trial Court, the time for the purpose of limitation has commenced from 16-09-1995, the date on which the Housing Board has made its demand for the payment of the additional value for the site. This Court does not consider it the right approach since the trial Court has overlooked few material facts:

- a) As on 16-09-1995, the order of interim injunction (Ext.B-2) passed in O.S.549/1989 (originally passed in O.S.No.53/1989) was in force, by which Radhakrishnan was restrained from alienating the suit property. It is a situation where time is saved under Sec.15 of the Limitation Act.
- b) Ext.A-1 is not a tri-partite agreement involving the Housing Board, and where there is no privity of contract between the plaintiff and the Housing Board, and the former cannot perform his part of the contract unless the defendants play their part to enable him perform his part of the contract. This aspect will be detailed in the subsequent paragraphs.

20.1 To appreciate the plaintiff's case on limitation, it is necessary to reiterate the salient aspects in Ext.A-1 that would have a bearing. It reads:

- The purchaser under Ext.A-1 agreement (meaning thereby P.W.2 or his nominee, the plaintiff) would have to pay any

demand of differential price of the plot which the Housing Board might make, based on any award to be passed by the Court (in the Land Acquisition proceedings);

- That the vendor under the agreement should execute the sale deed within 30 days of the Housing Board executing the sale deed in favour of the vendor. (As the vendor is now dead it would mean, the defendants)

20.2 It is evident that Ext.A-1 has created reciprocal contractual obligations. The order of performance may now be stated: First, the purchaser under Ext.A-1 had to pay the additional claim of the Housing Board (towards the enhanced price for the property allotted, based on the Court's Order in the related Land Acquisition matter), if any. This amount when paid, would set up the circumstance for the Housing Board to convey title to the suit property to the allottee. This is the second stage. And, once the Housing Board has executed the sale deed in favour of the allottee, the latter should execute the sale deed to the purchaser under Ext.A-1 sale agreement. This will be the third step.

21. The contract does not stipulate a specific time-line for its performance as in Sec.47 of the Contract Act, but has provided for the circumstance to evolve for the plaintiff to perform his part of the contract. The circumstance contemplated is the execution of a sale deed by the Housing Board in favour of the allottee, now his heirs, the defendants 1 to 4. This will set up the stage for parties to the contract to perform their respective contractual obligations. Contextually Sec.51 and 52 of the Indian Contract Act are relevant here:

Section	Content
Sec.51	Promisor not bound to perform, unless reciprocal promisee ready and willing to preform - When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

Section	Content
Sec.52	Order of performance of reciprocal promises - Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order, and where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.

The provision is straight forward, and as to its application see Nathulal Vs Phoolchand [AIR 1970 SC 546].

22. In the context of Ext.A1, as indicated above, the first step in performing the set of reciprocal promises is payment of the differential price as demanded by the Housing Board by the plaintiff. But, inasmuch as there is no privity of contract between the plaintiff and the Housing Board, the former could make the payment only when the defendants 1 to 4 co-operated. P.W.1 indeed has spoken about it in his cross examination when he deposed that he could not pay the Housing Board directly. This would imply, that beneath the written words of the contract, there is an underlying implied term that the defendants 1 to 4 would do everything that is required to be done for the plaintiff to comply with this condition. See Motilal & Others Vs Nanhelal & another [AIR 1930 PC 287].

23.1 The learned counsel for the appellant inter alia argued that, for the contesting defendants to repudiate the contract, they must first accept the contract before opting to repudiate it. As heirs of Radhakrishnan, the defences available to them are those defences by which a contract can be vitiated, or other defences available under Sec.16(c) of the Specific Relief Act, 1963, (as the provision stood then), or exposing plaintiff's conduct that would disentitle him to obtain a relief in equity in terms of Sec.20 of the Act. Having impugned Ext.A-1 not in terms of the relevant provisions of the Contract Act or the Specific Relief Act, but on the basis of title to the property, which is alien to the Contract, and beyond the scope of a suit for specific performance. Hence, refusal to perform Ext.A-1 contract Vide Ext.A-8 reply is incompetent.

23.2 This argument is not without merit. In addition to what the learned counsel has argued, there is yet another ground open to the defendants: They can plead that the purported agreement is not intended to be acted upon as one such. This plea, has been taken by them in their written statement (though was not taken in Ext.A-8 reply) where they have alleged (as an

alternate plea) that Ext.A-1 was intended to be only a security document for securing a loan which Radhkrishnan had obtained from Pongiannan. It can be instantly noticed that this plea does not spring from the terms of the contract, but outside of it, and its sustainability depends on its proof. Hence, it would not relate to performing or refusing to perform the contract on its terms. To expatiate it slightly, in the context of the present case, if the defendants 1 to 4 have proved their plea that the sale agreement on which the cause of action for the suit is found is only a security-document, then the plaintiff will be non-suited for want of a cause of action, and not for proving the justifications for refusing to perform this contract. The difference is subtle, still vital and critical. Secondly, this is an aspect which the Court may have to decide ultimately based on proof of the pleading, and hence it does not affect the institution of the suit. Limitation operates at the point of institution of the suit de hors the proof of any fact during trial.

24. Still, the fact remains that Ext.A-8 reply dated 22-10-1998 does convey a refusal to perform Ext.A-1 contract, the reason that it discloses for the refusal notwithstanding. In the context of understanding the bar of limitation for instituting the suit, it is not the refusal to perform that is material, but its timing is. Does Ext.A-8 reply notice dated 22-10-1998 constitute a valid repudiation within the meaning Article 54 of the Limitation Act? In this segment, this will be focused.

25. The sequence of performance of the contract indicates that the time for performance of reciprocal promise by the plaintiff can arise only after the defendant has performed his part of his contract in obtaining the sale deed from the Housing Board. The performance of reciprocal contractual obligations would and could commence only on the defendants 1 to 4 intimating to the other contracting party about the additional amount payable to the Housing Board. They did not intimate it. At least, have they paid it? They did not. The 3rd defendant as D.W.1 admits this. Necessarily, the Housing Board, the 5th defendant in this case, was not in a position to execute the sale deed in favour of the defendants 1 to 4.

26.1 In V.K.Kumaraswami Chettiar & Others Vs P.A.S.V. Karuppuswami Moopanar [AIR 1953 Madras 580], the First Bench of our High Court had stated the law as below:

"This argument is based on a misconception of the true scope of Section 39 of the Contract Act, and of the principles on which it is based. Where a contract is to be performed at a future date and

before the time for performance arrives one of the parties gives notice to the other party that he is not willing to perform his part of the agreement, then there is what has been called an "anticipatory breach" of the contract by him. This expression was characterised by Lord Wrenbury as unfortunate in 'Bradley v. Newsom' (1919) AC 16, because strictly speaking there can be no breach in praesenti of an obligation which is to be performed in future. The substance of the matter, however, is that when a party refuses to perform his part of the agreement before the due date, he in effect throws up the contract; and then the question is what the other party might then do. He might either accept the repudiation and treat the contract as broken then and there and proceed to claim damages or he might, notwithstanding the repudiation by the other party, get ready for performing his part of the contract in due course, offer performance when the time for it arrives and on the refusal by the other party claim damages for breach of the contract by him. In that case he keeps the contract alive for the benefit of both the parties. This was laid down by Cockburn, C.J., in the leading case on the subject Frost v. Knight [(1892) L.R. 7 Ex. III]. Vide also Hochster v. De la Tour [(1853) 2 E. and B. 678:118 E.R. 922], Avery v. Bowden [(1855) 5 E. and B. 714:119 E.R. 647], Johnstone v. Milling [(1886) 16 Q.B.D. 460] and Fan Heek and Co. [(1921) 2 Q.B.D. 369].

A repudiation before the due date is in the nature of an offer by a party to a concluded contract to vary the terms thereof. If accepted there comes into existence a new contract in supersession of the old one; if not accepted, the original contract continues to remain in force with the rights and obligations of either party unaffected. By its very nature this situation is possible only when the contract is executory and the time for performance has not arrived. The principle has also been applied to continuing contracts performance under which is in progress and has not been completed; the most familiar example being where the goods are to be delivered in instalments spread over several months. In such a case when a party refuses to deliver the future instalments,

the other party has the option either to accept the repudiation and put an end to the contract with reference to the future instalments and claim the damages or keep it alive and claim performance when the instalments actually fall due. But where the time for performance has arrived and one party has actually offered to perform his part, then the other party has to perform his portion of the contract; in default the contract is broken and comes to an end. It is a well recognised juristic concept that when a contract is broken it is discharged giving rise to a new obligation which the law imposes on the party in default to pay damages.

"A breach or default in performance discharges a contract wholly or in part in the sense that it converts into a right of action for damages or pecuniary compensation." (Vide Leake on Contracts, page 671, 8th Edn).

"Mr. Anson enumerates five modes by which a contract may be discharged and one of them is breach. "It may be broken; upon this a new obligation connects the parties, a right of action possessed by the one against the other" and "if one of two parties to a contract breaks the obligation which the contract imposes, a new obligation will in every case arise, a right of action conferred upon the party injured by the breach." (Vide Anson's Law of Contracts, 8th Edn. p.304 and P.318).

Therefore, the principle that it is open to one party to keep the contract alive can have application only when the contract is executory or where there is still something to be performed under the contract. It can have no application where time for performance has arrived and there has been a breach. When a contract has been broken it is dead and there is nothing which could thereafter be kept alive. Even if the parties subsequently come to an agreement in respect of the same subject-matter, it is in law a new contract. Thus there is a fundamental difference between a refusal to perform a contract before performance has become due and a failure to perform it after it has become due." (emphasis

supplied)

26.2 As candidly expounded in V.K.Kumaraswami Chettiar case, every contract possesses elements that might frustrate its performance. Where performance of contract is frustrated, it is a situation where the contract becomes incapable of being performed and that leaves not any opportunity to repudiate. The law as laid down only informs that any attempt to repudiate the contract before the time for its performance has arisen cannot be unilaterally imposed by the repudiating party on the other party to the contract. For similar views, the ratio in P.Cecil's case [MANU/TN/3514/2016] and Bhawan Singh Vs Teja Singh alias Teja Ram [AIR 1995 P & H 64] where the Courts have held that for the purposes of Article 54 of the Limitation Act, time starts running only after the cause of action has arisen, and that the cause of action cannot arise unless the defendant is in a position to perform his part of the contract.

26.3 To sum up this aspect, the intent to repudiate or refusal to perform Ext.A-1 by the defendants 1 to 4 cannot be countenanced before they are in a position to perform their part of the contract. Contextually, it must be stated that the purported repudiation of contract Vide Ext.A-8 reply notice is a pre-mature repudiation of a future contract, and the plaintiff can ignore it.

27. Turning to the defendants' plea and the list of authorities that they have relied on, it is premised on the fact that as on the date when the defendants issued Ext.A-8 reply notice on 22-10-1998, they were in a position to perform their part of the contract, which the facts as proved in this case negate with ease. When the basic premise of the defendants itself is faulty, any arguments built on it should necessarily fail.

28. To conclude, the suit is not barred by limitation, not because Ext.A-8 does not constitute a refusal but because it was made when the defendants were not even in a position to refuse performance.

(c) Should the Court exercise its discretion in favour of the plaintiff:

29. Even though the defendants could not sustain the major defences that they have taken in the written statement, and they having failed in their efforts to convince the Court also on the point of limitation, still this Court needs to weigh if the plaintiff is entitled to the discretionary relief

of specific performance. Here the conduct of the plaintiff comes into sharp focus, though the march of law has recognised the need to factor in the conduct of the defendant also while balancing the Court's discretion in granting a relief in equity. See: *Silvey & another Vs Arun Varghese & another* [(2008)11 SCC 45], *Zarina Siddiquio Vs A. Ramalingam alias R.Amarnathan* [(2015)1 SCC 705], and *A.N. Arunachalam Vs T. Sivaparakasam & another* [2011(1) MWN (Civil) 819].

30.1 When the points on conduct of the parties are pitted against each other, this court sees that the defendants 1 to 4 are shown to be the parties fundamentally in default. This can now be established:

- The conduct of the plaintiff which according to the defendants which might affect his right to obtain a remedy in equity are:

a) The assignment of Ext.A-1 was suspect, but this has already been found against them.

c) The other aspect is about how the plaintiff has conducted himself in the eviction proceedings under the Rent Control Act which he resisted as a tenant. It was even argued that notwithstanding the fact that the Hon'ble Supreme Court has directed eviction, the plaintiff as a tenant has not surrendered possession to defendants 1 to 4. It now needs to be stated here that the cause of action in an eviction proceedings and the right of defence available to the plaintiff as a statutory tenant under the Tamil Nadu Buildings (Lease & Rent Control) Act, 1961, and title of the plaintiff in the present suit are entirely different. And, the plaintiff, has been careful enough not to bring in Ext.A-1 agreement to defend the eviction proceedings. Hence, the conduct of the plaintiff in delaying his eviction as a tenant cannot be telescoped into the present suit.

e) Another aspect raised was that a minor son of Radhakrishnan was caused to be included in the sale agreement, and this indicates how nefarious Pongiannan had been when Ext.A-1 was executed. In Ext.A-1, the execution of which is not in dispute, the age of both the sons of Radhakrishnan as disclosed, reveals that they had attained majority then. Set in the context, if the allegation of the defendants is to be considered for its merit, it requires to be proved that:

- That one of the sons of Radhakrishnan was a minor when Ext.A-1 was executed. There is no documentary

proof for it;

- Secondly, Pongiannan should have known that the said boy was a minor and should have fraudulently made a statement that he was a major. Here, the defendants in their written statement only blame Radhakrishnan for including a minor in the contract. And, it is inconceivable that Pongiannan could have unilaterally granted majority to a minor boy in the presence of the latter's father. And, it also needs to be recalled that Radhakrishnan, was alive for about five years since the filing of O.S.549/1989 by his wife and children, and he chose not to file any written statement clarifying the facts to which he alone was privy.
- Thirdly, and most significantly, what is that subsisting right of the minor in the suit property which was sought to be divested by the execution of Ext.A-1? Even if the other two facts are presumed to be available, still mere inclusion of a minor son by itself is inadequate to prove that Pongiannan's conduct was doubtful unless it is shown that the minor had some interest in the subject matter of the contract, and that the other party to the contract had attempted to take a benefit to himself adverse to the interest of the minor. That then would border on fraud, which no court at no time would tolerate. However, as has been found, neither of the sons of Radhakrishnan were proved to have any interest in the suit property, a plea which the defendants themselves had given up during trial. (In fact they had given it up twice, earlier in withdrawing O.S.549/1989).

30.2 So far as the defendants' conduct goes, they first laid a suit in O.S.53/89 (later as O.S.549/1989) impugning Ext.A-1 agreement, but chose to withdraw it (Vide Ext.B7 endorsement, on their misconceived notion of law that the suit for specific-enforcement of the contract was time-barred as on 05-01-1999). What it spotlights is the real intent behind instituting the suit: That it was not laid to establish their alleged right over the suit property, but only developed as a gambit to frustrate the performance of Ext.A-1 by Radhakrishnan. What was their primary contention in the plaint in O.S.549/1989 (Ext.A-2), became their core defence in this suit. As stated earlier, they did not pursue this line of their case to its logical end. Have they not then ventured into a speculative

resistance/defence? This Court is conscious to the fact that a forensic process does permit a certain space to the litigants for contriving a strategy, but it requires to be underscored that its limit stops where it breaches the borders of fairness, and interferes with judicial process. Courts are not casinos, and no litigant can secure an undeserving advantage by its misuse.

31. There is yet another aspect. Should the Court exercise its discretion after about 33 years of the formation of Ext.A-1? To a very large extent, this was defendants' own making. A combined reading of Ext.A-7 notice, and the cross examination of D.W.1 shows that while the Housing Board had made a demand for Rs.2,09,345/- in September, 1995, but this amount was not paid by them even in 2008, when the 3rd defendant was examined. D.W.1 would say that they might have to pay the Housing Board around Rs.5 to 6 lakhs. The plaintiffs have now deposited about Rs. 11.40 lakhs in the Court, which taken along with the advance amount paid makes the value of the property at around Rs.12.50 lakhs when the total consideration ought have been around Rs.7.50 lakhs. To a large extent, the defendants' conduct appears to have contributed to this unnecessary loss of money for the plaintiff. Given this circumstance, loss of time cannot be accounted against the plaintiff to deny him the relief.

Nature of relief to be granted:

32.1 The foregoing discussion and the findings arrived make it certain that the plaintiff is entitled to a decree of specific performance of Ext.A-1 contract, but this decree in terms of the prayer, may have to be passed only against the defendants 1 to 4. Justly, the plaintiff did not seek a relief against the Housing Board as the latter is a third party to sale agreement.

32.2 Now, if the decree is to be meaningful and effective, then it must be drawn without leaving any opportunity to these defendants to frustrate and defeat the decree to be passed. This would necessarily require that the Housing Board executed a sale deed in favour defendants 1 to 4 to enable them to comply with the decree.

33. In Chandnee Widya Vati Madden Vs C.L.Katial & Others [AIR 1964 SC 978], the facts of the case involved an agreement of sale which stipulated that the permission for the transaction should be obtained from the Chief Commissioner within two months

from the date of the agreement, and the performance of the contract by the parties thereto was made contingent upon obtaining this permission. The permission of the Chief Commissioner however, was not so obtained. The point that came before the Hon'ble Supreme Court was that inasmuch as the contract was a contingent contract, if it was enforceable in the absence of permission by the Chief Commissioner. After relying on the ratio in Motilal Vs Nanhelal [AIR 1930 PC 287 : ILR (1930) IA 333], the Hon'ble Supreme Court proceeded to hold:

5. The main ground of attack on this appeal is that the contract is not enforceable being of a contingent nature and the contingency not have been fulfilled. In our opinion, there is no substance in this contention. So far as the parties to the contract are concerned, they had agreed to bind themselves by the terms of the document executed between them. Under the document it was for the defendant-vendor to make the necessary application for the permission to the Chief Commissioner. She had as a matter of fact made such an application but for reasons of her own decided to withdrew the same. On the findings that the plaintiffs have always been ready and willing to perform their part of the contract, and that the time was not of the essence of the contract, the Court has got to enforce the terms of the contract and to enjoin upon the defendant-appellant to make the necessary application to the Chief Commissioner. It will be for the Chief Commissioner to decide whether or not to grant necessary sanction.

6. In view of the matter, the High Court was entirely correct in decreeing the suit for specific performance of the contract. The High Court should have further directed the defendant to make the necessary application for the permission of the Chief Commissioner, which was implied in the contract between the parties. As the defendant-vendor without any sufficient reasons, withdrew the application already made to the Chief-Commissioner the decree to be prepared by this Court will add the clause that the defendant, within one month from today shall make the necessary application to the Chief Commissioner or to such other competent authority as may have been empowered to grant the necessary sanction to transfers like the one in question, and further that within one month of the receipt of that sanction she shall convey to the plaintiffs the property in the suit..."

Rojasara Ramjibhai Dahyabhai Vs Jani Narottamdas Lallubhai (dead) by L.Rs., & others [AIR 1986 SC 1912 : (1986)3 SCC 300] is another case where the facts are substantially similar, the Hon'ble Supreme Court has relied on Motilal's case [AIR 1930 PC 287] wherein the Privy Council had held that,

"..the appellate Court had jurisdiction under the provisions of the Specific Relief Act to make the decree against which the appeal is directed, and that the terms of O.21 R.32(4) are sufficient to provide for the decree being carried out."

and following it, the Hon'ble Supreme Court held :

"The decision of the Privy Council in Motilal Vs Nanehala Ghasiram, therefore is an authority for the proposition that if the vendor agrees to sell the property which can be transferred only with the sanction of some Government authority, the Court has jurisdiction to order the vendor to apply to the authority within a specified period, and if the sanction is forthcoming to convey to the purchaser within a certain time."

34. The facts of these cases, and the contract involved in the present case share a limited similarity in that, the nature of contingency created by the terms of the respective contracts require something to be done by a third party to the contract. In the cases before the Hon'ble Supreme Court, an act to be done by an authority was the contingency to which the performance of the contract was hinged, whereas here the requirement is that the Housing Board should execute the sale deed in favour of defendants 1 to 4. What is significant here is that, in the cases before the Hon'ble Supreme Court the non-performance of the contingency did not come in the way of the Court in granting a decree. On the other hand it enabled the Court to fashion its decree for specific performance, with such stipulations as to make it an effective and a workable decree.

35. To conclude, this Court allows this appeal on following terms:

- a) The defendants 1 to 4 either jointly, or anyone acting for all, are directed to apply to Tamil Nadu Housing Board, the 5th defendant within three months from the date of receiving the certified copies of the judgement, requiring it to appropriate the amount available before the trial Court and to execute a sale deed in their favour.
- b) As and when the fifth defendant applies to the trial Court for withdrawal of any portion of the sum available with it (which necessarily include the proportionate interest the

amount in deposit would have fetched in investment of the said sum by the Court), the plaintiff should not offer any objection.

- c) The balance amount left after payment to the fifth-defendant , which should be not less than the balance sale consideration of Rs. 4,40,000/- (exclusive of the interest it would have fetched in Court-investment) payable to defendants 1 to 4 should go to them. If the said amount is less than the balance the sale consideration of Rs.4,40,000/-, the plaintiff is hereby directed to deposit the difference amount before the trial Court within two months from the date on which the 5th defendant withdraws the amount due to it.
- d) Where the amount payable to the defendants in terms of clause (c) above is either available, or made available in the Court, the defendants 1 to 4 shall execute a sale deed in favour of the plaintiff.
- e) The defendants 1 to 4 shall execute the sale deed.
- f) Given the peculiar nature of the case, costs are not awarded.

Accordingly the judgement and decree dated 11.11.2008 in O.S.No.3 of 2006 on the file of Additional District cum Fast Track Court No.I, Erode, is set aside.

-s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

ds

To:

1.The Additional District Judge cum Fast Track Court No.I, Erode.

Copy to

The Section Officer, VR Section, High Court, Madras.

A.S.No.196 of 2009

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