

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 28.02.2020

DELIVERED ON: 02.06.2020

CORAM:

THE HON'BLE MR.JUSTICE V.PARTHIBAN

S.A.No.1523 of 2011

S.Sundari ...Appellant/Respondent/Defendant

Vs.

Vadivel Naicker ...Respondent/Appellant/Plaintiff

Prayer: Second Appeal filed against the judgment and decree dated 04.08.2011 passed by the District Judge, District Court-II, Kanchipuram, in A.S.No.28 of 2010, reversing the judgment and decree, dated 22.11.2007, passed by the Subordinate Judge, Kanchipuram, in O.S.No.225 of 2002.

For Appellant : Mr.K.Sukumaran

For Respondent : Mr.T.P.Manokaran, Sr.Counsel for

Mr.Y.Jyothish Chander

JUDGMENT

This Second Appeal is filed by the defendant as against the judgment and decree, dated 04.08.2011, passed by the District Judge, District Court-II, Kanchipuram, in A.S.No.28 of 2010, reversing the judgment and decree, dated 22.11.2007, passed by the Subordinate Judge, Kanchipuram, in O.S.No.225 of 2002, which was one for specific performance of the agreement to sell, delivery of possession and permanent injunction.

2.The appellant is the defendant and the respondent is the plaintiff in the suit proceedings. The parties, for the sake of convenience, are referred to hereunder according to their litigative status and ranking before the trial Court.

3.The respondent herein, as plaintiff, has approached the Subordinate Judge, Kancheepuram, by filing O.S.No.225 of 2002, seeking for specific performance of the agreement to sell, entered into between the respondent/plaintiff and appellant/defendant, on 02.06.2000; delivery of possession and permanent injunction in respect of the suit schedule properties or alternatively seeking for refund of the amount paid under the sale agreement, with damages.

4.The plaint averments in brief would run thus:

(a)According to the respondent/plaintiff, he and the defendant had entered into an agreement of sale on 02.06.2000, whereby the defendant agreed to sell the suit schedule properties for a price fixed in the agreement. On the date of agreement, according to the plaintiff, the defendant had received a sum of Rs.10,000/- towards advance and thereafter, on 20.06.2000, Rs.50,000/- had been paid and received by the defendant and subsequently, another sum of Rs.1,15,000/- was paid on 09.08.2000. In all, the defendant had received a sum of Rs.1,75,000/-.

(b)According to the plaintiff, even though he was ready and willing to perform his part of the contract under the agreement dated 02.06.2000, the defendant evaded and failed to execute sale deed in respect of the property covered under the sale agreement and hence the suit was laid by the plaintiff.

5.The defendant resisted the suit by filing a detailed written statement denying the execution of sale agreement dated 02.06.2000, contenting inter alia as under:

(i)There was no concluded contract at all between the plaintiff and her, as could be seen from the sale agreement itself, relied on by the plaintiff dated 02.06.2000. According to the defendant, no final sale price had been fixed, no measurement and boundaries were indicated in the sale agreement and there was no concluded contract at all for the plaintiff to enforce the so called sale agreement dated 02.06.2000.

(ii)The plaintiff was not entitled to enforce the relief of specific performance, since he did not have the financial capacity to complete the sale, even assuming there was any valid agreement as such. The defendant further averred that the plaintiff, who expressed his inability to make further payments, apart from the payments already paid to the tune of Rs.1,75,000/-, had infact agreed to buy another smaller property for the amount he had already paid and in view of his request, some other property had been settled in favour of the plaintiff's wife, by way of a sale, in 2002. Moreover, the defendant averred that the plaintiff was not entitled to the relief of specific performance, as he had not approached the Court with clean hands. The defendant also pleaded that in the suit notice issued on behalf of the plaintiff, no final price was indicated. Further, the defendant contended that there was an interpolation in the so called sale agreement dated 02.06.2000 for the purpose of obtaining the relief of specific performance against the defendant and such act, on the part of the plaintiff, amounted to playing fraud upon the Court. Therefore, the defendant prayed for dismissal of the suit.

6.The Trial Court, which framed the issues on the basis of the pleadings of the parties, eventually dismissed the suit against the plaintiff, vide its judgment and decree dated 22.11.2007. According to the Trial Court, the plaintiff had not come forward with clean hands, as there was suppression of material evidence, particularly Ex.B.1 document, filed on behalf of the defendant. According to the Trial Court, the equitable relief of specific performance cannot be granted to a person who had approached the Court with unclean hands. Moreover, the Trial Court had also held that there appeared to be an interpolation in the sale agreement, which was marked as Ex.A.1 and two endorsements were made in the same document, which were marked as Exs.A.2 and A.3, viz., the receipt of advance of Rs.50,000/- and Rs.1,15,000/- respectively on two dates, i.e. one on 20.06.2000 and another on 09.08.2000.

7.The Trial Court had also found that the plaintiff did not have the financial capacity. The Trial Court further found that there were no proper ingredients for consideration of the relief of specific performance in favour of the plaintiff, as the document relied on by the plaintiff itself, viz., the so called sale agreement, which was marked as Ex.A.1, was itself unstamped and unregistered and therefore, the same was inadmissible in evidence. The Trial Court had further found that there was no indication of readiness and willingness on the part of the plaintiff to perform his part of the contract under the sale agreement and the Trial Court discountenanced the documents viz., Exs.A.6 to A.16, relied on by the plaintiff. According to the Trial Court, these documents did not show that the plaintiff had sufficient wherewithal to complete the sale transaction. Even otherwise, the Trial Court held that there were several lacunae in the case of the plaintiff and therefore, the equitable relief of specific performance was not to be granted and hence, ultimately dismissed the suit. As against the said judgment and decree of the trial Court, the plaintiff preferred an Appeal in A.S.No.28 of 2010 before the District Judge, District Court No.II, Kancheepuram.

8.The Appellate Court, vide its judgment and decree, dated 04.08.2011, allowed the appeal filed by the plaintiff and thereby set aside the judgment and decree of the Trial Court in O.S.No.225 of 2002. According to the Appellate Court, there was a clear admission on the part of the defendant about the receipt of money under Exs.A.1, A.2 & A.3 and also in the reply notice to the suit notice, which was marked as Ex.A.5. The Appellate Court has also held that even though there was no mention about the boundaries of the property to be sold, the same in no way affected the plaintiff's case. The Appellate Court further reversed the findings of the Trial Court stating that the

plaintiff's assertion of his readiness and willingness to perform his part of the contract was established through Exs.A.6 to A.16. The Appellate Court held that the plaintiff was owning lot of agriculture properties and machineries worth more than Rs.15,00,000/-, as evidenced from Exs.A.6 to A.16. Further, the Appellate Court has also disbelieved that the defendant had sold some other property to the plaintiff's wife, as the defendant had not produced any document either before the Trial Court or before the Appellate Court to establish the said fact. Therefore, the Appellate Court accepted the case of the plaintiff and allowed the appeal. Challenging the said judgment and decree of the appellate Court, the defendant is before this Court by way of Second Appeal, raising the following substantial questions of law:

a) Whether or not the finding of the first appellate Court below is perverse based on no evidence, irrelevant materials and on presumption.

b) Whether or not the first appellate Court is correct in disposing the first appeal without framing of any issues as contemplated under Order 41 Rule 25 of CPC?

c) Whether or not the first appellate Court is correct in holding that the respondent has been ready and willing to perform his part of the contract on the basis of the Exhibit A6 to A16 and admittedly most of the documents have been brought into existence subsequent to the suit?

d) Whether or not the first appellate Court is correct in holding that the respondent has been ready and willing to perform his part of the contract on the basis of the assets held by the respondent, in the absence of any materials to show that the respondent has always been keeping the sale consideration ready so as to perform his part of the contract.

e) Whether or not the first appellate Court is correct in not drawing adverse inference over the non production of the document namely the agreement of sale pertaining to 2 acre 69 cents, when the said document has been pleaded and deposed in his chief examination.

f)whether or not the first appellate Court is correct in reversing the judgment and decree of the trial Court without any discussion or reasons.

g)Whether the discretionary relief has been granted by the first appellate Court in utter violation of judicial principles laid down by the Apex Court.

h)Whether or not the first appellate Court is correct in holding the Exhibit A1 as admissible in evidence, when admittedly it was totally unstamped.

i)Whether or not the first appellate Court is correct in decreeing the suit on the basis of Exhibit A1, when, in the absence of manipulation at the hands of respondent, is not a concluded contract.

j)Whether or not the first appellate Court is correct in relying upon Exhibit A1, when the evidence and proof of Exhibit A1, sale agreement is not absolutely clear and certain."

9.Mr.K.Sukumaran, the learned counsel appearing for the appellant/defendant, would submit that the agreement dated 02.06.2000, which was marked as Ex.A.1, was unstamped and unregistered and therefore, not admissible in evidence. He would further submit that the document did not mention the measurement of land or description of the property. Further, the document did not mention anything about the final price of the land to be sold under the agreement.

10.The learned counsel would submit that Ex.B.1, which was marked in the suit proceedings, was a copy of Ex.A.1, which was intentionally suppressed by the plaintiff. According to the learned counsel, the Survey Numbers were not mentioned in Ex.B.1; whereas in Ex.A.1 the Survey Numbers were found, which means that the plaintiff had interpolated the Survey Numbers to gain unfair advantage of enforcing specific performance relief against the appellant/defendant. According to the learned counsel, even when the amount of Rs.1,15,000/- was received on 09.08.2000 and an endorsement was made by the defendant, which was marked as Ex.A.3, there was no mention of the total sale consideration. Boundaries were also not fixed and only when the plaint was filed in August, 2002, for the first time the boundaries were shown, i.e. after a period of two years from the date of the sale agreement Ex.A1, dated 02.06.2000.

11. According to the learned counsel, when a suit notice was issued on 06.07.2002, which was marked as Ex.A.4, the contents of the notice were contradictory and the same were suitably replied on behalf of the defendant on 16.07.2002, as could be seen from Ex.A.5. Even otherwise, Ex.A.1 is not an agreement of sale, as there was no concluded contract. Ex.A.1 was signed by the defendant and Ex.B.1 was signed by the plaintiff.

12. The learned counsel would further submit that the final price, which was mentioned in the plaint i.e., Rs.4,17,000/-, was neither mentioned in the suit notice, which was marked as Ex.A.4, nor was it found anywhere in the documents prior to the suit proceedings. The learned counsel would emphasize that the plaintiff has deliberately suppressed the material document Ex.B.1 and also caused interpolation in Ex.A.1 and therefore, he was not entitled for grant of any relief much less the equitable relief of specific performance. The learned counsel would also submit that the suit for specific performance has to be filed in terms of Forms 47 & 48 of Appendix-A of C.P.C. The averments in the plaint do not conform to these Forms and therefore, on this ground alone the suit is liable to be rejected.

13. The learned counsel would contend that in the face of the reply notice Ex.A.5, even assuming that the sale agreement dated 02.06.2000 was valid, the same stood canceled. The learned counsel would also point out that in the written statement it was clearly contended by the defendant that the plaintiff expressed his inability to perform his part of the contract, which has not been denied by the plaintiff and therefore, it amounted to admission. The learned counsel would, in fact, submit that the plaintiff himself had admitted his inability to make payments, in his evidence. The plaintiff was examined as P.W.1, who deposed without any ambiguity that he was unable to pay the balance amount of sale consideration under Ex.A.1 and demanded the return of money from the defendant and since the defendant was not willing to return the money, she agreed to sell a smaller portion of the property for the money already paid. Therefore, the learned counsel for the appellant/defendant would submit that in the face of such categorical admission by the plaintiff himself, the question of granting him the relief of specific performance did not arise at all.

14. The learned counsel would further submit that the defendant was examined as D.W.1 and her evidence was contrary to the plaint, as D.W.1 had clearly deposed about the inability of the plaintiff to pay the balance sale consideration and also about the sale of another property to the plaintiff's wife for the amount received. Since the evidence of D.W.1 was not

rebutted, the evidence of D.W.1 is to be accepted as true and correct.

15.The learned counsel would also emphasize that even otherwise factually the plaintiff did not establish that he was always ready and willing to perform his part of the contract under the sale agreement Ex.A1. The plaintiff did not choose to establish that he had sufficient money to pay the balance sale consideration. Even according to the plaintiff, Exs.A6 to A16 were all fixed assets and they did not really establish the fact of the plaintiff having sufficient liquid cash with him to pay the balance sale consideration. The plaintiff had also failed to file bank pass book or statement of accounts to support his claim that he was ready and willing to perform his part of the contract. On the other hand, it was established that the plaintiff had borrowed huge loan for buying Tractor and other allied machineries. The learned counsel, therefore, would submit that in all fours, the plaintiff was not entitled to enforce the relief of specific performance.

16.The learned counsel for the appellant/defendant would, thus, submit that the trial Court, which went into the issues, had correctly appreciated the stand of the defendant and dismissed the suit. In fact, the trial Court had accepted the plea of the defendant about the suppression of material fact by the plaintiff and also the validity of Ex.A1 in law and also as to the lack of capacity of the plaintiff to perform his part of the contract. The trial Court's finding on each aspect was well founded and the trial Court's finding was entirely in consonance with the pleadings of the parties and the evidence made available.

17.The learned counsel for the appellant/defendant would submit that on the other hand, the first appellate Court has completely misdirected itself by overturning the findings of the trial Court without adverting to any pleadings in depth or the evidence which were made available before the trial Court. He would submit that the substantial portion of the judgment of the first appellate Court is only a reproduction of the written submissions submitted by the parties and only in the last few paragraphs of the judgment, the findings of the appellate Court are found. Even those findings are without any reasons and no reference is drawn to the evidence and the pleadings of the parties before the trial Court. The entire judgment of the first appellate Court is bereft of material consideration and reasons and there appears to be a complete non-application of mind on the part of the first appellate Court. The learned counsel would also submit that the first appellate Court has also not framed any points for consideration and that by itself would vitiate the judgment of the first appellate Court.

18.The learned counsel for the appellant/defendant, in support of his various contentions, as stated supra, has relied on the following decisions:

(i) Sarwan Singh vs. State of Punjab - (2003) 1 SCC 240, certain extracts from paragraph No.9 of the judgment would run thus:

"9.It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross-examination it must follow that the evidence tendered on that issue ought to be accepted."

The learned counsel would submit that the plaintiff has not rebutted the evidence of D.W.1 and thus, the evidence of the defendant construed to be established.

(2) 1.S.Deivanai and others vs. V.M.Kothandaraman - 2017(4) CTC 734, certain extracts from paragraph No.39 would run thus:

"39.From a perusal of the materials on record, we are of the opinion that the defendants have not denied the case of the plaintiff by putting suggestion in the cross-examination of P.W.1. Failure to cross-examine on this aspect has resulted in establishment of the fact by the plaintiff that the plaintiff has proved that he was ready and willing to perform his part of the contract."

The learned counsel would submit that the above extract from the Division Bench judgment of this Court would also support the contention raised as above.

19.The learned counsel for the appellant/defendant would submit that in regard to a person approaching the Court with unclean hands, such cases can be thrown out summarily. He would rely on the following decisions, in support of his contention.

(i) S.P.Chengalvaraya Naidu (dead) by LRs. Vs. Jagannath (Dead) by LRs and Others - (1994) 1 Supreme Court Cases 1, paragraph No.5 of the judgment would run thus:

"5.The High Court, in our view, fell into patent error. The short question before the High Court was whether in the facts and circumstances of this case, Jagannath obtained the preliminary decree by playing fraud on the court. The High Court, however, went haywire and made observations which are wholly perverse. We do not agree with the High Court that "there is no legal

duty cast upon the plaintiff to come to court with a true case and prove it by true evidence". The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean-hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court - process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation."

(ii) The Kancheepuram Kamakshi Amman Silk Handloom Weavers' Co-operative Production and Sale Society Limited vs. Yamuna Bai and Others - 1993 MLJ 618, certain extracts from Paragraph No.10 of the judgment would run thus:

"10. (1) the plaintiff had given false testimony in the witness box and (2) granting specific performance would be doing injustice to the respondent. In the present case, it is clear from a reading of the evidence of P.Ws.1 and 2 that they are not willing to speak the truth before the Court. It is obvious that they are concealing the facts from the court and their evidence is false. Even that is sufficient to refuse the relief to the plaintiff. . . . "

20. The learned counsel for the appellant/defendant would rely on the following decisions in regard to his specific contention that there was no consensus ad idem and hence, the relief of specific performance cannot be given to the plaintiff.

(i) Mayawanti vs. Kaushalya Devi - (1990) 3 Supreme Court Cases 1. The learned counsel would rely on the following observations from Paragraph Nos.11, 18 and 22 of the judgment::

"11. It is settled law that if a contract is to be made, the intention of the offeree to accept the offer must be expressed without leaving room for doubt as to the fact of acceptance or to the coincidence of the terms of acceptance with those of the offer. The rule is that the acceptance must be absolute, and must co-

respond with the terms of the offer. If the two minds were not ad idem in respect of the property to be sold, there cannot be said to have been a contract for specific performance. If the parties themselves were not ad idem as to the subject matter of the contract the court cannot order specific performance."

"18. The burden of showing the stipulations and terms of the contract and that the minds were ad idem, is, of course, on the plaintiff. If the stipulations and terms are uncertain, and the parties are not ad idem, there can be no specific performance, for there was no contract at all. Where there are negotiations, the court has to determine at what point, if at all, the parties have reached agreement. Negotiations thereafter would also be material if the agreement is rescinded."

"22. Section 9 of the Specific Relief Act says that except as otherwise provided in that Act where any relief is claimed under Chapter II of the Act in respect of a contract, the person against whom the relief is claimed may plead by way of defence any ground which is available to him under any law relating to contracts. In the instant case the defence of there having not been a contract for lack of consensus ad idem was available to the defendant."

(ii) *Nahar Singh vs. Harnak Singh and Others* - (1996) 6 Supreme Court Cases 699, certain extracts from paragraph No.6 of the judgment would run thus:

"6. It is well settled that unless the property in question for which the relief has been sought for is identifiable, no decree can be granted in respect of the same."

21. The learned counsel for the appellant/defendant would also rely on the following decisions in respect of his contention that the plaintiff must also demonstrate his readiness and willingness to perform his part of the contract.

(i) *Mrs. Sandhya Rani Sarkar vs. Smt. Sudha Rani Debi and others* - AIR 1978 Supreme Court 537, certain extracts from Paragraph Nos.16 and 17 would run thus:

"16. This would show that at the material point of time she did not have the necessary wherewithal to

pay the balance of consideration and to take the conveyance and this would provide tell-tale evidence to explain her conduct in putting forth one or the other impediment in the path of performance of the contract. If in the background of the evidence, the High Court reached the conclusion that she did not have the necessary wherewithal with her to pay the balance of consideration and take the deed of conveyance, one cannot take any exception to it. But, in this connection Mr.Chatterjee contended that the plaintiff seeking specific performance of the contract is not required to show that she has at all material time necessary cash with her to perform her part of the contract. It is enough if the plaintiff can show that she was in a position to raise the money required at or about the time when the contract was to be performed and she discharges the obligation of proving readiness and willingness so far as the financial aspect is concerned. "

17. In fact, it prominently appears that the plaintiff put off performing her part of the contract presumably because she had not the necessary wherewithal to take the conveyance when she would be obliged to pay the balance of consideration and having obtained possession stuck on to it without meeting her obligation. If in this background the High Court interfered with the decree of the trial Court, we see nothing objectionable in it. The decree for specific performance in this case has been rightly refused and this appeal is liable to be dismissed."

(ii)Jugraj Singh and another vs. Labh Singh and Others - AIR 1995 Supreme Court 945, certain extracts from Paragraph No.3 of the judgment would run thus:

"3.The continuous readiness and willingness at all stages from the date of the agreement till the date of the hearing of the suit need to be proved. The substance of the matter and surrounding circumstances and the conduct of the plaintiff must be taken into consideration in adjudging readiness and willingness to perform the plaintiff's part of the contract."

(iii)Ritu Saxena vs. J.S.Grover and another - (2019) 9 Supreme Court Cases 132, certain extracts from Paragraph No.15 would run thus:

"15. . . . Independent of such loan, there is mere statement that the appellant and her husband have income of Rs.80 lakhs per annum unsupported by any documentary evidence. Such statement will be in the nature of ipse dixit of the appellant and/or her husband and is without any corroborating evidence. Such self-serving statements without any proof of financial resources cannot be relied upon to return a finding that the appellant was ready and willing to perform her part of the contract. The appellant has not produced any income tax record or the bank statement in support of her plea of financial capacity so as to be ready and willing to perform the contract."

(iv)Manjunath Anandappa Urf Shivappa Hansi vs. Tammanasa and others - AIR 2003 Supreme Court 1391, paragraph No.27 of the judgment would run thus:

"27.The decisions of this Court, therefore, leave no manner of doubt that a Plaintiff in a suit for specific performance of contract not only must raise a plea that he had all along been and even on the date of filing of suit was ready and willing to perform his part of contract, but also prove the same. Only in certain exceptional situation where although in letter and spirit, the exact words had not been used but readiness and willingness can be culled out from reading all the averments made in the plaint as a whole coupled with the materials brought on record at the trial of the suit, to the said effect, the statutory requirement of S.16(c) of the Specific Relief Act may be held to have been complied with."

(v)Soundarrajan vs. Vettobai (deceased) and four others - 2017(4) CTC 225, paragraph Nos.27 and 31 of the judgment would run thus:

"27.It is pertinent to point out at this juncture, that readiness and willingness is the continuous process. It should be present from the date of the Agreement till the document is completed. At every stage, the plaintiff should show his readiness and willingness. The act of paying the amount of Rs.9,00,000/- by the Plaintiff after three years from the date of the Agreement itself would prove that he has not shown his readiness and willingness continuously. The

conduct of the Plaintiff could be seen from his admission in the cross-examination, wherein he has stated that he received a sum of Rs.11,00,000 towards Sale consideration under Exs.B1 & B2 but he has paid only Rs.9,00,000/- to the 1st defendant on 18.09.2002. This would clearly probabilise the fact that the plaintiff is not at all ready and willing to perform his part of the contract. The plaintiff, all along, has been cautious in getting endorsement from the first defendant and also getting receipt for the paltry amount said to have been paid by him to the son-in-law and grandson of the 1st defendant. He has failed to prove the balance Sale consideration of Rs.2,40,000/- said to have been paid by him to one Kesavan, Watchman and another person, who is a Land Broker."

"31.Even assuming that there was a litigation pending with regard to the suit property as per Ex.A1, it is clear that in the year 2002 itself, the same came to an end, which is evident from Exs.B2 and B3. Even thereafter, the plaintiff has not tendered the balance Sale consideration to get the Sale Deed registered in his favour. This fact clearly shows that the essential term as agreed between the parties in the Agreement has been breached by the plaintiff and readiness has also not been established. The conduct of the plaintiff in paying the balance Sale consideration in a piecemeal manner with huge delay, would clearly show that readiness is totally lacking on his part and his mental attitude to purchase the property for himself, is also absent from the very beginning. Only when the readiness and willingness on the part of the Plaintiff has been proved together, he can seek equitable relief of Specific Performance."

(vi) S.A.Kothandaraman vs. Crystal Residency India Private Limited - 2017(4) CTC 313, paragraph Nos.16 and 21 of the judgment would run thus:

"16.P.W.1, in his chief-examination has stated that the Sale consideration was finalized in his office and a sum of Rs.6,500/- per cent has been finalized. If really, Rs.6,500 is finalized,

there was no need whatsoever to write Rs.5,000 per cent, as Sale consideration of the Agreement. Further, his evidence also shows that he is not aware of the other Witness who signed in EX.A2. Therefore, if really P.W.1 had intended to purchase the property, he could have entered into an Agreement in a proper manner. Ex.A1 has been written even without giving description of the properties. Except mentioning the Survey Number, the description and boundaries of the property are not at all mentioned. Therefore, the very execution of the document is itself doubtful in this case."

"21.A person, who seeks equitable relief must also come to the Court with clean hands. The manner in which the Demand Draft was taken only shows as if he is ready and willing to perform his part of the contract show that the same has been done only for the purpose of the case. Further from the date of the Agreement, the plaintiff was never ready and willing to perform his part of the Contract. The Plaintiff has also not produced any document to show that at the relevant point of time he has the capacity to mobilize the funds. Further, if the Plaintiff is really intended to purchase the property, a normal conduct of a human being is to verify the Title Deeds immediately then and there and demarcate the property or at least identify the property. But the evidence of the Plaintiff does not show that he has taken any such steps."

22.The learned counsel for the appellant/defendant would also submit that the person who claims a particular fact has to prove the same, as the burden of proof is entirely on him. In this case, the plaintiff claimed that there was a sale agreement in respect of another property purchased in his wife's name, sold by the defendant. But the said stand was the defence taken by the appellant/defendant to resist the claim of specific performance. Therefore, the learned counsel would submit that the plaintiff has not discharged his burden and in support of his contention, the learned counsel relies on the following decision:-

(i)Anil Rishi v. Gurbaksh Singh - (2006) 5 Supreme Court Cases 558, the learned counsel would draw specific reference to Paragraph Nos.10 and 11 of the judgment, which would run thus:

"10.Pleading is not evidence, far less proof. Issues are raised on the basis of the pleadings. The defendant-appellant having not

admitted or acknowledged the fiduciary relationship between the parties, indisputably, the relationship between the parties itself would be an issue. The suit will fail if both the parties do not adduce any evidence, in view of Section 102 of the Evidence Act. Thus, ordinarily, the burden of proof would be on the party who asserts the affirmative of the issue and it rests, after evidence has gone in, upon the party against whom, at the time the question arises, judgment would be given, if no further evidence were to be adduced by either side."

"11.The fact that the defendant was in a dominant position must, thus, be proved by the plaintiff at the first instance."

23.In respect of the contention regarding construction of agreement-Ex.A1, read with readiness and willingness to perform, the learned counsel for the appellant/defendant would rely on the judgment of the Andhra Pradesh High Court in G.Rosaiah vs. C.Balarami Reddy and another - AIR 1989 Andhra Pradesh 179. He would rely on a particular observation in Paragraph No.11 of the judgment, which would run thus:

"11.S.16 of the Specific Relief Act (Act 47 of 1963), for short, "the Act", provides bar to relief, Specific performance of a contract cannot be enforced in favour of a person:

(a) & (b)

©. . . .

Explanation (ii) to S.16(c) provides:

"For the purposes of Cl.(c)-the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction.

Therefore, the plaintiff must aver and prove that he has performed or has always been ready and willing to perform his part of the essential terms of the contract or prevented to be performed or waived by the defendant.. . . . "

The learned counsel for the appellant/defendant would also in this regard refer to a Division Bench decision of this Court in S.Deivanai and others vs. V.M.Kothandaraman and others [2017 (4) CTC 734], more particularly Paragraph No.35, which reads as follows:

"35. But, we are not inclined to accept the said submission made by the learned Senior Counsel for the appellants/defendants, because the Sale Agreement Ex.A1 is a Contract, by means of a document in writing, and the said document is binding on the parties to the Contract, so long as it is not opposed to Public Policy as provided in Section 23 of the Indian Contract Act. Further, Ex.A1-Sale Agreement has to be read as it is and no interpretation is permissible and in other words, on the well laid down principles in the matter of construction of deeds and documents, the documents are to be read as it is, including the full-stop and comma mentioned in the said document."

The learned counsel for the appellant/defendant would sum up, on the basis of his arguments, contentions and the case laws, that in all fours, the plaintiff was not entitled for the grant of equitable relief of specific performance and rightly the trial Court had dismissed the suit, but unfortunately, the first appellate Court reversed the findings of the trial Court on lack of appreciation of either pleadings or the evidence let in before the trial Court. In the said circumstances, the learned counsel would submit that the second appeal is liable to be allowed.

24. Per contra, Mr.T.P.Manoharan, the learned Senior counsel appearing for the respondent/plaintiff would make the following submissions:-

The contention of the appellant/defendant that there was an active suppression of material evidence, viz., Ex.B1, in the plaint, was in fact factually incorrect, since the document Ex.B1 was with the defendant and therefore, the question of suppression did not arise at all. Although there was a denial of execution of Ex.A1-Sale Agreement by the appellant/defendant in more than one place in the written statement, yet, in the evidence of D.W.1 and in other documents, there was a clear admission of execution of the said document Ex.A1. In fact, the scribe of the documents Exs.B1 and A1 was the defendant's own son Jeyakumar, who was examined as one of the plaintiff witnesses. In fact, the defendant had admitted the endorsements made in Ex.A1, which were marked as Exs.A2 and A3. Therefore, the denial of execution of Ex.A1 was contrary to fact and the arguments advanced on the said document are to be rejected as being out rightly false and contrary to records.

25. The learned Senior counsel would also submit that in respect of identification of property, it was clearly understood by the defendant and she had also deposed to the said effect in

her evidence before the trial Court. The learned Senior counsel would submit that in fact, in the reply notice itself (Ex.A5), there was a clear admission by the defendant about the receipt of payments etc., under Ex.A1. In fact, the suit notice was issued before expiry of the limitation period and in regard to the contention of the defendant that there was a sale of another property, the burden of proving such transaction, was on the defendant and the same was not discharged at all. In regard to the contention that there were no proper boundaries fixed, the learned Senior counsel would submit that the schedule properties given in the plaint, in fact, were not disputed by the defendant. The scribe of Exs.A1 and B1, who was none other than the son of defendant, was examined as P.W.3 and in his examination, he had admitted everything what the plaintiff had averred. As regards the financial capacity of the plaintiff, several exhibits were marked, viz., Exs.A6 to A16, to demonstrate that the plaintiff had the wherewithal to buy the property. In fact, the learned Senior counsel would refer to the evidence of P.W.1, in which, he clearly deposed that he has lot of agricultural land, which yields good crops for three seasons in a year and he is also getting yields through the cattle and paddy business and also having tractor and other agricultural machineries and his yearly income is more than Rs.2 lakhs. Unfortunately, these facts were ignored by the trial Court and the trial Court had wrongly held that the plaintiff did not have the capacity to perform his part of the contract.

26.The learned Senior counsel would submit that the trial Court had dismissed the suit on a wrong premise that Ex.A1 was unstamped when the fact of the matter was that the agreement was accepted and admitted by the parties concerned and the so called contention of interpolation by the plaintiff was not proved at all. The learned Senior counsel would submit that there was no attempt by the plaintiff to play fraud upon the Court, as alleged by the defendant and in fact, the defendant had come up with the false story of completely denying the execution of Ex.A1. Therefore, the learned Senior counsel would submit that it does not lie in the mouth of the defendant to allege fraud or suppression of material fact against the plaintiff.

27.The learned Senior counsel would further submit that the first appellate Court, while dealing with the appeal, has rightly appreciated the case of the plaintiff and reversed the findings of the trial Court. The first appellate Court has rightly held that the plaintiff had the necessary wherewithal to pay the balance amount of sale consideration and has also held in respect of other aspects of the intra dispute in favour of the plaintiff. The appellate Court has analysed several judgments cited in respect of the respective contentions and has come to the right conclusion by reversing the findings and judgment of the trial Court.

28.The learned Senior counsel for the respondent/plaintiff would rely on the following decisions in support of his contentions:

(i)Boramma vs. Krishna Gowda and Others - (2000)9 Supreme Court Cases 214, certain extracts from paragraph Nos.9 and 10 of the judgment would run thus:

"9.A perusal of the extract of the plaint found in the judgment of the High Court clearly indicates readiness and willingness of the respondents to perform their part of the contract. No exception can be taken to the findings recorded by the High Court that there has been compliance with Section 16(c) of the Specific Relief Act.

10 In our view it will not be a sound rule of appreciation of evidence to pick up an answer from the cross-examination of a witness and draw inference taking it in isolation. The court must see as to how consistent the testimony of the witness is and as to how that answer fits in with the rest of the evidence and probabilities of the case. From this sentence stated in the cross-examination where the question is also not recorded, we are unable to infer inability of the respondents in performing their part of the contract after filing of the suit nor can we say that the findings recorded by the trial Court, the first appellate Court and the High Court that the plaintiffs have been ready and willing to perform their part of the contract have been erroneously arrived at."

The above observations of the Hon'ble Supreme Court of India, according to the learned Senior counsel for the plaintiff, would support the case of the plaintiff that there should be overall appreciation of materials and records and one should not pick and choose a particular answer in the deposition, particularly, in regard to the capacity of the plaintiff to perform his part of the contract.

(ii)Zarina Siddiqui vs. A.Ramalingam alias R.Amarnathan - (2015) 1 Supreme Court Cases 705, paragraph Nos.33 and 34 of the judgment would run thus:

"33.The equitable discretion to grant or not to grant a relief for specific performance also depends upon the conduct of the parties. The necessary ingredient has to be proved and established by the plaintiff so that

discretion would be exercised judiciously in favour of the plaintiff. At the same time, if the defendant does not come with clean hands and suppresses material facts and evidence and misled the Court then such discretion should not be exercised by refusing to grant specific performance.

34. In the instant case, as noticed above, although defendant no.2 held a registered power of attorney on behalf of defendant no.1 to sell and dispose of the property, but the defendants not only made a false statement on affidavit that the power of attorney had authorized the second defendant only to look after and manage the property but also withheld the said power of attorney from the Court in order to misguide the Court from truth of the facts. Further, by registered agreement the defendants agreed to sell the suit premises after receiving advance consideration but they denied the existence of the agreement in their pleading. Such conduct of the defendants in our opinion, disentitle them to ask the Court for exercising discretion in their favour by refusing to grant a decree for specific performance. Further, if a party to a lis does not disclose all material facts truly and fairly but states them in distorted manner and mislead the Court, the Court has inherent power to exercise its discretionary jurisdiction in order to prevent abuse of the process of law."

The learned Senior Counsel would submit that the above decision of the Hon'ble Supreme Court would be applicable to the facts and circumstances of the present case with reference to a contradictory stand taken by the defendant in regard to the execution of Ex.A1-Sale Agreement and also in regard to the contradictory averments in the written statement.

(iii) Ramesh Kumar and another vs. Furu Ram and another - (2011) 8 Supreme Court Cases 613, paragraph No.33 of the judgment would run thus:

"33. It is well settled that no amount of evidence contrary to the pleading can be relied on or accepted. In this case, there is variance and divergence between the pleading and documentary evidence, pleading and oral evidence and between the oral and documentary evidence. It

is thus clear that the entire case of the respondents is liable to be rejected. The different versions clearly demonstration fraud and misrepresentation on the part of the respondents."

The learned Senior counsel would submit that the above observation of the Hon'ble Supreme Court would also strengthen the case of the plaintiff as against the defendant because of the defendant's contradictory conduct and assertion.

(iv) Ram Khilona and Others vs. Sardar and Others - (2002) 6 Supreme Court Cases 375. In this case, the learned counsel would rely on the observation of the Hon'ble Supreme Court of India in paragraph No.13, on the basis of a decision of the English Court, which are extracted hereunder:

"13. In Halsbury's Laws of England, 4th Edition at page 552 para 1378 it is observed :

"A material alteration is one which varies the rights, liabilities, or legal position of the parties as ascertained by the deed in its original state, or otherwise varies the legal effect of the instrument as originally expressed, or reduces to certainty some provision which was originally unascertained and as such void, or which may otherwise prejudice the party bound by the deed as originally executed.

The effect of making such an alteration without the consent of the party bound is exactly the same as that of canceling the deed."

In paragraph 1383 at page 555 it is observed :

"An alteration made in a deed, after its execution, in some particular which is not material does not in any way affect the validity of the deed; and this is equally the case whether the alteration was made by a stranger or by a party to the deed.

.
Further, as discussed earlier, the view taken by the High Court that the interpolation said to have been made by the covenantees in the agreement of sale does not stand scrutiny under law. As observed earlier such alteration, assuming that it was made subsequently, did not bring about any change in the validity and enforceability of the agreement of sale. We are constrained to observe that the finding recorded by the High Court

appears to be based on surmise. Therefore, the judgment is clearly unsustainable."

According to the learned Senior counsel, even assuming that there was an interpolation in Ex.A1, that interpolation by itself is immaterial to the claim of the plaintiff and hence, the plaintiff cannot be non-suited on that ground.

(v) Kalianna Gounder vs. Palani Gounder and another - 1970(1) Supreme Court Cases pg 56, paragraph Nos.14 and 15 of the judgment would run thus:

"14. Even if it be assumed that the sentence regarding encumbrance was written after the deed was executed it will not invalidate the deed. The second defendant and his witnesses have admitted that there was no discussion at the time of the writing and execution of the agreement about the encumbrances upon the land. There is not even evidence that there were any encumbrances subsisting on the land. Ordinarily when property is agreed to be sold for a price, it would be the duty of the vendor to clear it of all the encumbrances before executing the sale deed. The alteration, if any, cannot therefore be regarded as material. As observed in Halsbury's Laws of England, Vol. 11, 3rd Edn., Art. 599 at 368:

"A material alteration is one which varies the rights, liabilities, or legal position of the parties as ascertained by the deed in its original state, or otherwise varies the legal effect of the instrument as originally expressed, or reduces to certainty some provision which was originally unascertained and as such void, or may otherwise prejudice the party bound by the deed as originally executed.

The effect of making such an alteration, without the consent of the party bound, is exactly the same as that of canceling the deed."

It is also stated in Art. 604 at pp. 370 and 371:

"An alteration made in a deed, after its execution, in some particular which is not material does not in any way affect the validity of the deed; an alteration is not material which does not vary the legal effect of the deed in its original state, but merely expresses that which was implied by law in the deed as originally written, or which carries out the intention of the parties already apparent on

the face of the deed, provided that the alteration does not otherwise prejudice the party liable thereunder."

This rule has been applied by the Privy Council in Nathu Lal and Ors. v. Mussamat Gombi Kuar and Others(1). The Judicial Committee observed in that case at p. 331:

"A deed is nothing more than an instrument or agreement under seal; and the principle of those cases is that any alteration in a material part of any instrument or agreement avoids it, because it thereby ceases to be the same instrument."

The Judicial Committee observed at p. 333:

"A material alteration has been defined in the rule as one which varies the rights, liabilities or legal position of the parties ascertained by the deed, etc.",

and after applying that test they held that the alteration in that case was not material in the sense of altering the rights, liabilities or legal position of the parties or the legal effect of the document.

15. Since the defendants were liable to clear the encumbrances, if any, subsisting on the land before executing the sale deed, assuming that the covenant was incorporated after the execution of the deed, it cannot be regarded as a material alteration on that account, for it does not alter the rights or liabilities of the parties or the legal effect of the instrument."

According to the learned Senior counsel, in this case also the Hon'ble Supreme Court has held that the immaterial changes in the document may not affect the claim of the plaintiff.

(vi) Union of India vs. Ibrahim Uddin and Another - (2012) 8 Supreme Court Cases 148, paragraph No.24 of the judgment would run thus:

"24. Thus, in view of the above, the law on the issue can be summarised to the effect that, issue of drawing adverse inference is required to be decided by the court taking into consideration the pleadings of the parties and by deciding whether any document/evidence, withheld, has any relevance at all or omission of its production would

directly establish the case of the other side. The court cannot lose sight of the fact that burden of proof is on the party which makes a factual averment. The court has to consider further as to whether the other side could file interrogatories or apply for inspection and production of the documents etc. as is required under Order XI CPC. Conduct and diligence of the other party is also of paramount importance. Presumption or adverse inference for non-production of evidence is always optional and a relevant factor to be considered in the background of facts involved in the case. Existence of some other circumstances may justify non-production of such documents on some reasonable grounds. In case one party has asked the court to direct the other side to produce the document and other side failed to comply with the court's order, the court may be justified in drawing the adverse inference. All the pros and cons must be examined before the adverse inference is drawn. Such presumption is permissible, if other larger evidence is shown to the contrary."

The above observation of the Hon'ble Supreme Court would lend support to the contention of the plaintiff that non-production of the evidence cannot ipso facto lead to adverse inference and the Court has to take into consideration the totality of circumstances. Therefore, the learned Senior counsel would submit that the adverse inference to be drawn against the plaintiff, as contended on behalf of the defendant, is misplaced, misconceived and unsustainable.

(vii) R. Lakshmikantham vs. Devaraji - (2019) 8 Supreme Court Cases 62, paragraph No.11 of the judgment would run thus:

"11. The High Court order is not correct in stating that readiness and willingness cannot be inferred because the letters dated 18.12.2002 and 19.12.2002 had not been sent to the defendant. The High Court also erred in holding that despite having the necessary funds, the plaintiff could not be said to be ready and willing. In the aforesaid circumstances, the High Court was also incorrect in putting a short delay in filing the Suit against the plaintiff to state that he was not ready and willing. In India, it is well settled that the rule of equity that exists in England, does not apply, and so long as a Suit for specific performance is filed within the period of limitation, delay cannot be put against the plaintiff - See Mademsetty Satyanarayana v. G.

Yelloji Rao and others AIR 1965 Supreme Court 1405 (paragraph 7) which reads as under:

"(7) Mr. Lakshmaiah cited a long catena of English decisions to define the scope of a Court's discretion. Before referring to them, it is necessary to know the fundamental difference between the two systems-English and Indian-qua the relief of specific performance. In England the relief of specific performance pertains to the domain of equity; in India, to that of statutory law. In England there is no period of limitation for instituting a suit for the said relief and, therefore, mere delay - the time lag depending upon circumstances - may itself be sufficient to refuse the relief; but, in India mere delay cannot be a ground for refusing the said relief, for the statute prescribes the period of limitation. If the suit is in time, delay is sanctioned by law; if it is beyond time, the suit will be dismissed as barred by time; in either case, no question of equity arises."

The above decision is relied on for the purpose of elucidating the legal principle prevailing in India regarding filing of specific performance suit. The Hon'ble Supreme Court of India has held that if the specific performance suit is filed within the limitation period, the delay cannot be put against the plaintiff.

(viii) Motilal Jain vs. Ramdasi Devi (Smt) and Others - (2006) 6 Supreme Court Cases 420, paragraph No.10 of the judgment would run thus:

"10. In the instant case, a perusal of paras 6 to 11 of the plaint do clearly indicate the readiness and willingness of the plaintiff. The only obligation which he had to comply with was payment of balance of consideration. It was stated that he demanded the defendant to receive the balance of consideration of Rs. 8000/- and execute the sale deed. The defendant was in Patna (Bihar) at the time of notices and when he came back to his place the plaintiff filed the suit against him. In support of his case, he adduced the evidence of PW 1 and PW 2. The plaintiff had parted with two-third of the consideration at the time of execution of Ext.2. There is no reason why he would not pay the balance of one-third consideration of Rs. 8,000/- to have the property conveyed in his favour."

The learned Senior counsel for the respondent/plaintiff would submit that the plaintiff was ready and willing to perform his part of the contract and well before the expiry date, a legal notice was issued on 06.07.2002, calling upon the defendant to execute the sale deed. However, the defendant had not responded to it positively and had come up with the false case.

(ix) Angamuthu Asari v. Periyar (Madras) - 2000 (3) MLJ 653. As regards the contention raised on behalf of the defendant that the appellate Court has not framed proper points for consideration, the learned Senior counsel would submit that it is not necessary to specifically frame points for consideration, if the judgment of the appellate Court is indicative of clear finding and reasoning on the issues framed by the trial Court, the same is sufficient, as held by the Hon'ble Supreme Court of India, followed by this Court in the above decision. The learned Senior counsel would particularly rely on Paragraph Nos.18 to 20 of the judgment, which are extracted hereunder:

"18.As indicated above, the lower appellate Court has given a decision by giving reasonings to confirm the judgment and decree passed by the trial Court. Under those circumstances, it cannot be contended that there is no substantial compliance of the Order 41 Rule 31 C.P.C.

19.In this context, the observation of Hon'ble Srinivasan, J.(as he then was) made in the judgment reported in 1992(1) Mad LW 22 (supra) is quite relevant, which is as follows:

"In this second appeal three questions are raised as stated in the beginning. The first point argued by learned counsel for the appellant is the judgment of the lower appellate Court is vitiated for want of framing of a point for consideration by the appellate Judge. After setting out the pleadings of both the parties and the conclusion of the trial Court, the appellate Judge proceeded to discuss the merits of the case and the evidence on record. Ultimately he gave a finding that the plaintiffs had title to the property and the judgment of the trial Court had to be affirmed. Learned counsel for the appellant contends that under Order 41, Rule 31, C.P.Code, it is the duty of the Court to frame the points for consideration and to give findings thereon with reason to support these findings. I am of the view that in the present case the judgment is not vitiated for want of framing of such a point. Though a point has not been framed

by the appellate Judge, he considered the entire evidence on record and discussed the same in detail and ultimately came to the conclusion. His findings are supported by his reasons. Hence there is substantial compliance with the provisions of Order 41, Rule 31 C.P.C. and judgment is not in any manner vitiated by the absence of a point."

20. In the instant case, the lower appellate Court, in the light of the issues framed by the trial Court which have been referred to in the judgment of the lower appellate Court, framed a point for determination as to whether the appeal is to be allowed and whether, the trial Court's judgment and decree are liable to be set aside. Under those circumstances, in my view, there is substantial compliance of the provision of Order 41 Rule 31 C.P.C."

29. The learned Senior counsel would, therefore, submit that the appellate Court has rightly appreciated the merits of the plaintiff's claim and the fallacious approach of the trial Court and has correctly overturned the wrongful finding of the trial Court. In fact, if one could see the judgment of the appellate Court, it could easily be discerned that it was based on a complete consideration of all the issues and the first appellate Court, after taking into consideration the written submissions addressing all aspects of the inter se claims, had come to a well founded conclusion and allowed the appeal. Therefore, the learned Senior counsel would submit that the judgment of the appellate Court warrants no interference and the same is liable to be confirmed.

30. Heard Mr.K.Sukumaran, the learned counsel for the appellant/defendant and Mr.T.P.Manoharan, the learned Senior counsel appearing for the respondent/plaintiff and perused the pleadings, citations and materials placed on record.

31. There are several rival contentions raised on behalf of both the plaintiff and the defendant. The Trial Court by and large accepted the contention of the defendant and dismissed the suit against the plaintiff, whereas the first Appellate Court contrarily accepted the contentions of the plaintiff and overturned the verdict of the Trial Court. In the said circumstances, this Court, while dealing with this appeal, primarily has to consider with reference to the Substantial Questions of Law framed and also the inter se contentions of the parties before both the Courts below.

32.As far as the contention of the appellant/defendant in regard to the validity of the most crucial document, which gave rise to the filing of the suit, viz., Ex.A.1, dated 02.06.2000 (sale agreement), this Court has to consider as to whether legally the document is valid, because it is not stamped or registered and also it appears to be an inchoate agreement not a concluded contract or the document is otherwise valid, in view of the admission of the defendant in executing the agreement.

33.The Trial Court has held that the document Ex.A.1 is inadmissible because it was unstamped. The counsel for the appellant/defendant strenuously argued that the contents of the document Ex.A.1 did not indicate that the contract was a concluded one, as no boundaries were mentioned nor any measurement indicated and also no price was fixed. In such event, the document in question cannot be construed as a valid document, which could be relied on by the plaintiff for enforcing the relief of specific performance. As far as the First Appellate Court is concerned, it is simply held that the document is valid even in the absence of any indication of the boundaries of the property. If the two judgments of both the Courts below are examined, the reasons set forth by the Trial Court are more sound and acceptable than the conclusion reached by the First Appellate Court on this aspect.

34.First of all, the First Appellate Court, which held that the document is valid, did not give any reasons at all nor it appreciated any evidence, which were made available before the Trial Court. Such conclusion reached the First Appellate Court is legally unacceptable and therefore, the same is liable to be rejected. On the other hand, the Trial Court has thoroughly examined the document Ex.A.1 and found that the same is invalid, which, in the opinion of this Court, is in order and does not call for any interference. Once the pivotal document is found to be inadmissible and not valid, the entire claim edified on that document by the plaintiff has to necessarily crumble.

35.The connected issue, which is raised by the appellant/defendant in regard to the suppression of material fact by the plaintiff in regard to execution of Ex.B.1 document, which was a copy of Ex.A.1, the reply of the plaintiff was that the said document was in the possession of the defendant and therefore, non-production or non-mentioning of the same did not amount to suppression of any material. This Court finds that there appears to be no clear evidence on both sides to establish their respective pleas. In the absence of any clear evidence on this factual aspect, no definite finding could be rendered by both the Courts below. In any event, this Court finds that the said issue need not be dealt with to decide this Second Appeal.

36.As regards the interpolation allegation of the appellant/defendant against the plaintiff, viz., inserting Survey numbers in Ex.A.1, there was no investigation as to who caused and who was responsible for the interpolation. Ofcourse, Ex.B.1 document, which was a copy of Ex.A.1, contemporaneous document, did not contain any Survey numbers, but Ex.A.1 contains survey numbers, this Court finds that no enquiry was conducted on the said aspect. However, the Trial Court appears to have gone into that issue to some extent and held that there was a suppression of material. On the other hand the First Appellate Court is entirely silent on that aspect. But, ultimately it remains that in the absence of any cogent and acceptable evidence, this Court cannot come to any conclusion as to whether the plaintiff has committed any deliberate fraud or he has approached the Court with unclean hands, in view of suppression of Ex.B.1. Therefore, the arguments advanced on both sides and the judgments relied on the said aspect need not be considered, since factually these arguments were not established. In fact, there was accusation and counter accusation by both the parties that a fraud has been played on the Court. As far as the plaintiff is concerned, he would contend that the defendant suppressed about another sale of property to the wife of the plaintiff and as the defendant has not produced any document and thereby withheld information. As far as the defendant is concerned, the plaintiff has suppressed Ex.B.1 and also caused interpolation in Ex.A.1. In such view of the matter, unless there are clinching materials by way of evidence, no conclusion could be correctly arrived at. Therefore, this Court is not inclined to refer to the decisions relied on by both counsels appearing for the appellant/defendant and respondent/plaintiff.

37.The learned counsel for the appellant/defendant has also strenuously contended that even otherwise the contract was inconclusive, as no exact or final price was mentioned in Exs.A.1 or B.1. According to the learned counsel even in the suit notice (Ex.A.4) issued on behalf of the plaintiff, there was no mention about the final price. It was only in the plaint, for the first time the final price of the sale to take place under Ex.A.1 was mentioned. According to the learned counsel, in the absence of any final price fixed in the sale agreement, the document (Ex.A1) cannot give any right to the plaintiff to enforce the plea of specific performance.

38.On the contrary, the learned Senior Counsel appearing for the respondent/plaintiff would submit that the boundaries mentioned in the plaint were not disputed by the defendant nor the amount was denied.

39. With reference to these contentions, when the materials are perused, there is some force in the contentions raised on behalf of the appellant/defendant. Neither Ex.A.1 nor Ex.B.1 mention about any final price. As rightly contended by the learned counsel for the appellant/defendant even in the suit notice Ex.A.4, dated 06.07.2002, no final price was mentioned. It was only in the plaint the final price was mentioned. Therefore, as emphasized by the learned counsel for the appellant/defendant, there was no consensus ad idem between the parties and hence, the relief of specific performance cannot be granted. Infact, the learned counsel for the appellant/defendant relied on the decision of the Hon'ble Supreme Court of India in Mayawanti vs. Kaushalya Devi[(1990) 3 Supreme Court Cases 1], paragraph No.11 of the judgment was extracted supra, which would support the case of the appellant/defendant fully. In fact the learned counsel relied on paragraph Nos.18 and 22, which were also extracted supra, and the same would further strengthen the case of the appellant/defendant that there was no consensus ad idem between the parties and hence, Ex.A.1 is unenforceable and on this ground also the plaintiff is not entitled to the relief of specific performance.

40. One other contention of the counsels is in regard to construction of the document i.e., Ex.A.1 and also Ex.B.1. The learned counsel for the appellant/defendant relied on the Division Bench judgment of this Court in I.S.Deivanai and others vs. V.M.Kothandaraman[2017(4) CTC 734], particularly paragraph 35, which was extracted supra, which dealt with the principles of construction of deeds and documents. If we apply the said legal principle, it will once again support the case of the appellant/defendant that the documents Ex.A.1 and Ex.B.1 did not give any cause of action at all for the plaintiff to enforce his right for specific performance against the defendant.

41. Yet another contention by the learned counsel for the appellant/defendant is that the defendant, who examined himself as D.W.1, had clearly deposed about another sale transaction in favour of the plaintiff's wife and also about the inability of the plaintiff to complete the sale transaction in respect of the sale agreement Ex.A.1. According to the learned counsel, the plaintiff has not taken any efforts to rebut that evidence nor when an opportunity was given in cross examination, elicit any answer to his aid from D.W.1.

42. In fact, the learned counsel would rely on the decision of the Hon'ble Supreme Court on this aspect in Sarwan Singh vs. State of Punjab[(2003) 1 SCC 240]. The observation of the Hon'ble Supreme Court in paragraph No.9 of the judgment was also extracted supra. The learned counsel also relied on another decision in I.S.Deivanai and others vs. V.M.Kothandaraman [2017 (4) CTC 734], Paragraph 39 of the Division Bench observation of

this Court on the said aspect was also extracted supra. Both the above cases are fully applicable to the facts of this case, since the evidence of D.W.1 went un rebutted and therefore, the Trial Court has rightly held that the plaintiff had no means to complete his part of the transaction.

43.In regard to the important contention as to the readiness and willingness to be demonstrated by the plaintiff under the document, viz., sale agreement (Ex.A1), several contentions were raised on behalf of both the parties by the counsels concerned. On behalf of appellant/defendant, several decisions were cited and the relevant passages of those judgments were also extracted supra.

44.The legal principle on the issue of expressing readiness and willingness on the part of the person seeking enforcement of his right for specific performance is well settled. The judgments relied on by both the counsels are self-explanatory. All this Court has to take into consideration is as to whether the Courts below have applied these legal principles on the factual matrix of the present case.

45.The learned counsel for the appellant/defendant would draw the attention of this Court to the evidence tendered by the plaintiff himself, who was examined as P.W.1. The learned counsel for the defendant would argue that the plaintiff himself had clearly deposed in his evidence that he did not have the balance amount to complete the sale transaction and he wanted the money already paid to the defendant to be returned. This piece of evidence was relied on by the Trial Court along with the other supporting materials and evidence and ultimately, the Trial Court has held that the plaintiff was not ready and willing to perform his part of the contract. On the other hand the First Appellate Court reversed the said findings on the ground that the plaintiff has marked Exs.A6 to A.16 documents to show that he has lot of agricultural properties. In fact, the First Appellate Court has not examined the other oral and documentary evidence, but merely guided by those exhibits, which exhibits were actually discountenanced by the Trial Court and in the opinion of this Court rightly so.

46.As regards the contention of the learned counsel for the appellant/defendant that the specific performance suit was not filed in terms of Forms 47 and 48 of Appendix-A of Civil Code is concerned, this Court is not inclined to go into that issue for the reason that the said contention is too technical and superfluous and on that plea alone the plaintiff cannot be non-suited.

47.As far as the decisions relied on by the learned Senior counsel for the respondent/plaintiff are concerned, the decisions relating to readiness and willingness do not advance

the case of the plaintiff for the simple reason that on the factual matrix of the case, it is clearly established that the plaintiff had no wherewithal during the subsistence of the sale agreement to complete his part of the contract and therefore, he was not entitled to enforce his plea of specific performance. The learned Senior counsel in fact referred to the decision of the Hon'ble Supreme Court of India in Zarina Siddiqui vs. A.Ramalingam alias R.Amarnathan [(2015) 1 Supreme Court Cases 705], Paragraph Nos. 33 & 34 were extracted supra. But the said decision relates to suppression of material fact by the party. According to the learned Senior counsel, the defendant suffered from suppression of material fact and hence, not entitled to succeed. However, this Court has concluded earlier that the allegation of suppression by both the plaintiff and defendant as against each other is not sufficiently established and therefore, this Court did not deal with the said issue elaborately, as the same is also not required for disposing of the present appeal.

48.The decision relied on by the learned Senior counsel in Ram Khilona and Others vs. Sardar and Others [2002 6 SCC 372], particularly paragraph No.13, relates to alteration of document. The learned Senior counsel strenuously contended that the interpolation, which crept in Ex.A.1, was in fact not material, which would change the course of the claim. However, this Court is not inclined to go into that issue either, since the allegation of interpolation is not clearly established and therefore, the rival contention on that aspect is not dealt with at all.

49.The learned Senior counsel for the respondent/plaintiff would rely on one other decision of the Hon'ble Supreme Court of India relating to the same aspect in Kalianna Gounder vs. Palani Gounder and another - 1970(1) Supreme Court Cases pg 56, and the same also will not help the case of the plaintiff.

50.As regards the decision relied on by the learned Senior counsel reported in Angamuthu Asari v. Periyar (Madras) [2000 (3) MLJ 653] is concerned, the learned judge in the said judgment has factually found that the lower Appellate Court has in fact dealt with all the issues, though no points were framed and therefore, concluded that the judgment of the Lower Appellate Court per se is not vitiated. But, as far as the present case on hand is concerned neither proper points for consideration were framed nor the disputes raised in the suit were considered threadbare as it required in law by the First Appellate Court. Therefore, the said judgment relied on by the learned Senior counsel for the plaintiff cannot be applied to the factual matrix of the present case.

51.Although Mr.T.P.Manoharan, learned Senior counsel appearing for the respondent/plaintiff, strenuously contended that Exs.A.6 to A.16 would establish the fact that the plaintiff had sufficient means to perform his part of the contract and relied on some decisions, yet, in the face of the deposition of the plaintiff himself, such contention is unacceptable. In fact, on behalf of the appellant/defendant a number of decisions were cited and there is no need to refer to those decisions specifically herein, though they were extracted supra. Therefore, from the materials and the pleadings made available, this Court is unable to come to a conclusion that the plaintiff had sufficient wherewithal to perform his part of the contract towards completion of the sale. When the plaintiff himself has made a categoric statement through his evidence that he was unable to pay the balance sale consideration, the question of contending otherwise was only for the purpose of the case and such contention is, therefore, liable to be rejected. Moreover, it is also established in evidence that the plaintiff borrowed huge money for buying a Tractor for the purpose of agricultural activities. Further, as rightly contended by the learned counsel for the appellant/defendant, the plaintiff has not chosen to file any Bank Statements before the Trial Court or before the First Appellate Court to establish that he had the sufficient liquidity to pay the balance sale consideration. Therefore, in the said circumstances, the decisions in regard to readiness and willingness, relied on by the learned Senior counsel for the respondent/plaintiff, would in no way advance the case of the plaintiff. In fact, most of the documents, viz., Exs.A.6 to A.16 appear to be post suit documents and hence, they were rightly rejected by the Trial Court, whereas the First Appellate Court has relied on the said documents, incorrectly.

52.The learned Senior counsel appearing for the respondent/plaintiff in fact submitted that the plaintiff had deposited the balance amount before the Appellate Court.

53.In any event, mere deposit of balance amount before the First Appellate Court would not fulfil the requirements for enforcing the equitable relief of specific performance. The decisions relied on by the learned counsel for the appellant/defendant, which were extracted supra, would clearly demonstrate the legal position that the readiness and willingness of the party concerned must be shown at all stages of the transaction and such readiness and willingness has to be culled out from the conduct of the parties and also the contents of the documents, which are the subject matter of transaction. In the case on hand, the Trial Court has correctly found that the plaintiff had not shown his readiness and willingness at all stages. As rightly contended by the learned counsel for the appellant/defendant, the appellate Court did not examine, analyze or refer to the evidence or the pleadings of the parties

and also the judgment of the Trial Court in detail. This Court finds that the approach of the Appellate Court is quite shallow, as the appellate Court did not delve deep into the issues more critically as it required. As correctly contended by the learned counsel for the appellate/defendant the First Appellate Court has simply incorporated the written arguments of the parties and chosen to render a finding in few paragraphs, without supportive reasons. From the entirety of the judgment of the First Appellate Court, it could be seen that the first appellate Court has come to the conclusion on its own presumption, divorced from the materials and the pleadings placed on record and the judgment of the Trial Court. In the said circumstances, the judgment and decree of the First Appellate Court is completely flawed, invalid and the same is liable to go lock, stock and barrel.

54. In the conspectus of the above discussion and narrative, this Court has no hesitation in coming to the conclusion that the judgment and decree of the Trial Court are liable to be upheld and the judgment of the First Appellate Court are liable to be set aside. Accordingly, the judgment and decree dated 04.08.2011, passed by the District Judge, District Court No.II, Kancheepuram, in A.S.No.28 of 2010 are hereby set aside and the judgment and decree dated 22.11.2007, passed by the subordinate Judge, Kanchipuram, in O.S.No.225 of 2002, are confirmed. The Second Appeal is, therefore, allowed and the Substantial Questions of Law are answered in favour of the appellant/defendant. No costs. Connected Miscellaneous Petition stands closed;

-s/d-

Assistant Registrar

True Copy

Sub-Assistent Registrar

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Msk

To

1.The Subordinate Judge, Kanchipuram

2.The District Judge,

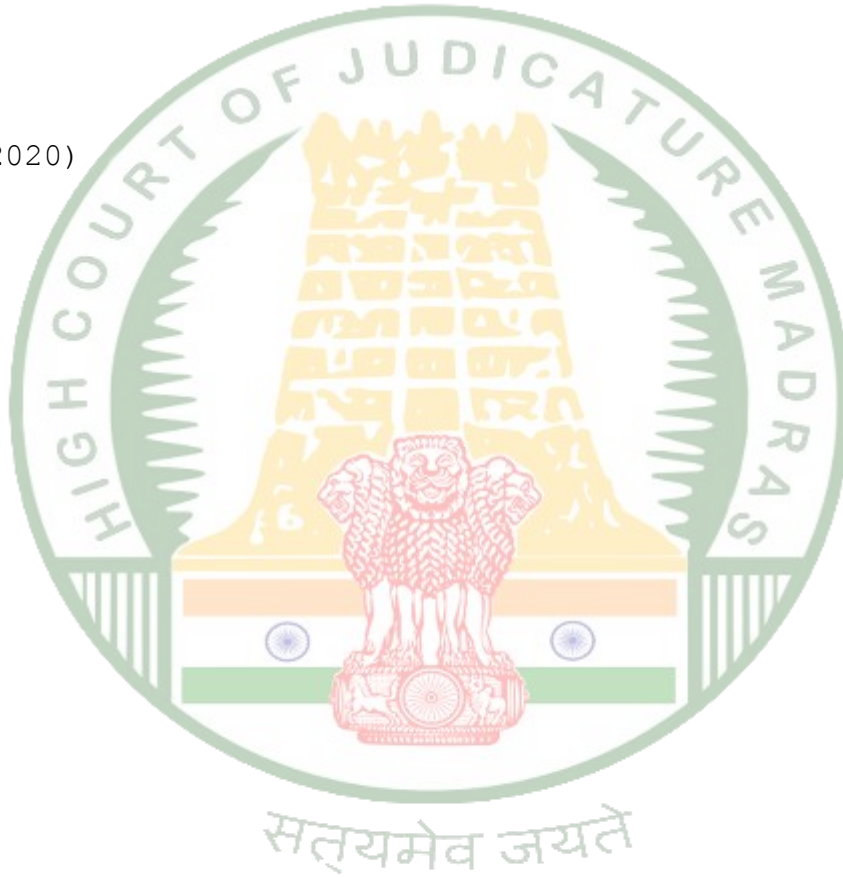
District Court No.II, Kancheepuram

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The Section Officer
VR Section
High Court, Madras 104.

S.A.No.1523 of 2011

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