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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 07.12.2021

Judgment Pronounced on : 12.01.2022

CORAM :

THE HON'BLE MR. JUSTICE T.RAJA

AND

THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

A.S.No.498 of 2015

M.Vairamudi ... Appellant/Defendant

Versus

K.U.Janakiraman (died)

1.J.Jayalakshmi

2.K.J.Jayapal

3.K.J.Gopal

4.K.J.Shankarlal

5.K.J.Gopinath ... Respondents/Plaintiffs

Prayer : First Appeal filed under Section 96 read with Order XLI Rule 1 of C.P.C to allow the above appeal and set aside the judgment and decree dated 18.04.2015 of the learned II Additional Judge, District Court, Salem in O.S.No.177 of 2011 with costs.

For Appellant : Mr.V.Raghavachari
for Mr.M.A.R.Pragash

For Respondents : Mr.T.S.Vijaya Raghavan

JUDGMENT

(The Judgment was made by Mr.Justice.D.Bharatha Chakravarthy)

A. The Appeal:

This appeal is filed by Mr. M. Vairamudi, the defendant in O.S. No. 177 of 2011 on the file of the II Additional District Judge, Salem aggrieved by the Judgment and Decree dated



18/04/2015, thereby decreeing the suit originally filed by one Mr. K.V. Janakiraman, the first plaintiff who died pending the suit and his legal representatives coming on record as plaintiffs 2 to 6 and pursuing the suit for specific performance of a sale agreement dated 17/04/2011 of a house property consisting of an RCC Building of Ground, First and Second Floors, in an extent of 784 sq.ft. of land in No.16, Vela Street, Shevapet, Salem, more fully described in the suit schedule.

2. For the sake of convenience, in this judgement the parties are referred to as per their array in the original suit.

B.The case of the plaintiffs:

3. The defendant is the owner of the suit scheduled property he having purchased the same by a sale deed dated 16/05/2007 from one Parimala Venkatesan. The defendant intended to sell the property and the plaintiff agreed to purchase the property for a total sale consideration of Rs. 43,00,000/- (Rupees Forty Three Lakhs only). The defendant had mortgaged the property with M/s. Syndicate Bank and he promised to settle the dues and get back the original documents and convey the property in favour of the plaintiff. Hence four months time was fixed for completion of the transaction. On 17/04/2011, the plaintiff paid an advance of Rs. 16,00,000/- (Rupees Sixteen Lakhs Only) and in the presence of witnesses, the deceased first plaintiff and the defendant executed the suit agreement for sale. On 21/04/2011, another sum of Rs. 10,00,000/- (Rupees Ten Lakhs only) was paid and due endorsement was made on the reverse of the agreement in the presence of witnesses.

4. Even though the plaintiff was ready with the balance consideration of Rs. 17,00,000/- (Rupees Seventeen Lakhs only) and willing to complete the transaction, the defendant did not clear the bank dues and come forward to complete the transaction. Since the original time limit of four months was coming to close, on 07/06/2011, the plaintiff issued a legal notice to the defendant. The plaintiff also waited at the Sub-Registrar's office with balance sale consideration on 10/06/2011 as mentioned in the notice. The defendant did not turn up. In the envelope used for sending the legal notice, the name of the defendant was wrongly typed as 'Vairamani' instead of 'Vairamudi' and hence the notice returned unserved. Therefore once again the plaintiff caused another notice on 19/06/2011 with the correct name. The defendant received the notice and issued a reply on 06/07/2011 admitting the agreement and promised that he would settle the dues of M/s. Syndicate Bank and complete the transaction.



5. At request of the defendant again the plaintiff paid a sum of Rs.10,00,000/- (Rupees Ten Lakhs only) on 05/09/2011 and again an endorsement was made on the reverse of the agreement in the presence of the witnesses. The defendant also handed over the keys of the house to the plaintiff and directed the tenant to pay rent to the defendant. However, suddenly on 05/10/2011, the defendant issued a letter addressed to the plaintiff invoking the default clause, terminating the agreement and forfeiting the advance amount. The plaintiff issued a reply notice. The defendant also broke open the locks and the matter was reported to the police, however, they advised the plaintiff to approach the civil court. Since the OTS offered by the bank is about to expire, it was averred in the plaint that the plaintiff is making the payment to the bank and hence the suit was filed for specific performance and for possession of the suit property.

6. Immediately after filing of the suit, as mentioned in the plaint, the plaintiff had also paid a sum of Rs. 6,00,000/- (Rupees Six Lakhs only) to M/s. Syndicate Bank on 23/11/2011 and the balance of Rs. 1,00,000/- (Rupees One Lakh only) was deposited into court on 18/02/2014. Hence the plaintiff seeks specific performance.

C. The case of the defendant :

7. The defendant and his family members are partners of the firm M/s.SS Tech. For a loan amount of Rs. 9,60,000/- (Rupees Nine Lakhs Sixty Thousands only) sanctioned to the firm by M/s. Syndicate Bank, the suit schedule property was hypothecated to the Bank in the year 2007. The defendant while making construction in suit property, had encroached about 20 sq.ft. of his father's adjacent property without his consent, when he was on long tour to North India. The plaintiff inspected the property including the encroached portion. The plaintiff knew that the defendant is liable to pay to the tune of Rs. 17,00,000/- (Rupees Seventeen Lakhs only) to M/s. Syndicate Bank. The contract entered into was contingent on the defendant clearing dues with the bank.

8. Even though the market value of the suit property was Rupees Fifty Five Lakhs, the defendant agreed to sell the same for Rupees Forty Three lakhs to the plaintiff as the plaintiff agreed to pay the consideration in one installment or two immediately.

9. The defendant entered into the agreement dated 17/04/2011 with the plaintiff. The plaintiff did not furnish him a copy of the agreement. The property includes the encroached portion and



therefore, cannot be legally alienated by the defendant. Time is the essence of the agreement. Even though the plaintiff paid the advance of Rs. 16 Lakhs and another sum of Rs. 10 Lakhs, thereafter, the plaintiff never paid the balance of Rs. 17 Lakhs. The plaintiff willfully issued the first legal notice with wrong name. The reply given to the second legal notice on 06/07/2011 by Advocate Manivannan was not on the instructions of the defendant. Further a copy of the agreement was not there to be placed before the advocate.

10. The time limit to complete the transaction was only upto 10/06/2011 and not four months as alleged in the plaint. The reply notice of the defendant dated 06/07/2011 was not on instructions and the plaintiff did not pay the balance and complete the transaction and the amount paid stood forfeited as per the agreement clause. The contract gets terminated on 10/06/2011 and time is the essence of the contract.

11. The defendant was not aware of the endorsement dated 05/09/2011 or the payment of Rs. 10 lakhs on that date. The plaintiff never paid any of the balance of 17 Lakhs of sale consideration. The plaintiff was pestering the defendant to pay the balance dues to M/s. Syndicate Bank and therefore the defendant gave Rs. 5 Lakhs to the plaintiff and the plaintiff remitted to the account on 06/09/2011.

12. Again on 23/11/2011, the plaintiff stormed the defendant's office premises with henchmen and forcing the defendant to pay another sum of Rs. 6,00,000/- to the plaintiff which was remitted by the plaintiff towards the dues of M/s. Syndicate Bank. The defendant does not admit the endorsement dated 05/09/2011 or the receipt of Rs. 10 Lakhs and the plaintiff made false complaint in Shevapet police station in a preplanned manner in the month of November, 2011 who tortured the defendant and forced to make signatures and the plaintiff forged the endorsement using the signature obtained by duress. The endorsement is obtained by co-ercion, fraud and undue influence.

13. There is no adequate consideration for the contract. Since the property is mortgaged, the contract is void. Since it included the property of the defendant's father, both parties were under mistake of identity. The contract becomes impossible in the event of not getting no objection from the bank. The agreement is void on account of impossible events.

14. The plaintiff was not ready and willing to perform the contract within the stipulated time and the defendant has a right to forfeit the advance. Apart from the mortgage, the defendant has also stood guarantee for his brother's educational



loan and unless the said loan is also cleared, original documents cannot be obtained. The plaintiff attempted to swallow the defendant's property by approaching the police. Since huge balance of Rs. 17 Lakhs is not paid, the plaintiff cannot pray for specific performance and there is no cause of action for the suit and hence the defendant prayed for dismissal of the suit.

D. The Trial and Evidence:

15. On the basis of the above pleadings, the trial court framed the following 8 issues and then recasted the same as 4 issues for convenience:

"1) Whether the sale agreement is unenforceable because of the subsisting mortgage loan with the bank and no objection certificate was obtained from the bank?

2) Whether there is mistake in identifying the property?

3) Whether the time is essence of contract?

4) Whether the plaintiff created forged documents and endorsements with the help of others?

5) Whether there were valid termination of the agreement by the defendant?

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

7) Whether the plaintiff is entitled for the relief of specific performance prayed for?

8) To what relief, is the plaintiff is entitled to ?"

The said issues were re-casted as follows for convenience:-

"1) Whether the suit sale agreement is a forged one?

2) Whether the plaintiff is entitled for the relief of specific performance?

3) Whether the plaintiff is always ready and willing to perform his part of contract?

4) To what relief, the plaintiff is entitled?"



16. On behalf of the plaintiffs, the deceased Original plaintiff Mr. K.U. Janakiraman, was examined as PW-1 and one of the attesting witness to the agreement and endorsements, namely, V.K. Venugopal was examined as PW-2. On behalf of the plaintiffs, the suit agreement for sale dated 17/04/2021 was marked as Ex- A1, the endorsement dated 21/04/2011 was marked as Ex-A2, the endorsement dated 05/09/2011 was marked as Ex. A3, the legal notices issued by the plaintiff on 07/06/2011 and 19/06/2011 were marked as Ex-A4 & Ex. A5. The reply notices issued by the defendant on 06/07/2011 and 05/10/2011 were marked as Ex- A6 and Ex-A7. The rejoinder notice issued by the plaintiff and the postal acknowledgement card were marked as Ex-A8 and Ex-A9. The challan for payment of Rs. 6 Lakhs to M/s. Syndicate Bank dated 23/11/2021 is marked as Ex-A10 and the copy of the statement of defendant's bank account along with endorsement was marked as Ex-A11.

17. The defendant examined himself as DW-1. On behalf of the defendant, the sale deed dated 05/02/1973 in favour of Palaniammal in respect of the adjacent property was marked as Ex-B1, the will executed by Palaniammal in favour of defendant's father was marked as Ex-B2, the telegrams issued to higher police officials complaining illegal custody and torture dated 14/11/2011 and 15/11/2011 were marked as Ex-B3 to Ex-B-6. The notice issued by the defendant to plaintiff on 25/11/2011 is marked as Ex- B-7 and the postal receipt as Ex-B-8 and the acknowledgment card as Ex-B-9 and the encumbrance certificate of the property as Ex- B-10 and the letter from the bank to the defendant's brother Tamilarasan complaining non payment of loan arrears dated 22/09/2014 as Ex- B11.

E. The findings and conclusions of the Trial Court :

18. Upon consideration of the submissions made on either side and the material evidence on record, the Trial Court found that the contract is about sale of immovable property and time is not the essence of contract. After the expiry of original time, the defendant has obtained another 10 lakhs under Ex-A3 endorsement. In the first reply notice issued by the defendant, he has admitted the contract and payment of the first to installments of the advances and promised to complete the transaction. Even in the second reply notice dated 05/10/2021, the defendant contended that the plaintiff is not willing to pay the balance of Rs. 17 lakhs, no whisper is made about any forgery or fraud played. The defendant did not make any complaint to the police about the alleged forgery even though several telegrams are issued. The plaintiff duly sent a rejoinder notice stating that Rs. 37 Lakhs is paid and only Rs. 7 Lakhs is due. Further the receipt for payment of Rs. 6 lakhs



to M/s. Syndicate Bank is produced and therefore, except Rs. 1 Lakh, the entire sale consideration was paid.

19. The defendant even though pleaded that the endorsement dated 05/09/2011 is forgery, the plaintiff had examined one attesting witness, but the defendant did not make any attempt to prove the forgery by examining the attesting witnesses. The contention that the plaintiff was not ready and willing is incorrect and it is only the defendant who did not pay any amount to M/s. Syndicate Bank inspite of receiving Rs. 16 Lakhs as advance.

20. From the cross examination of PW-1, it is clear that the plaintiff paid Rs. 10 lakhs on 05/09/2011 of which the plaintiff paid only Rs. 5 Lakhs to the Bank and with the deposit of Rs. 1 lakh into court, the entire consideration stood paid. It is the case of the defendant that fraud was played and Ex-A3 endorsement was forged and therefore the onus is the defendant to prove the same and the defendant has not taken any steps to prove his case. The defendant did not come forward with a clear case of forgery of signature and did not even examine his sister. Thus in the absence of any proof, regarding forgery, the plaintiff having paid the entire sale consideration, trial court answered the issue No.1 and 2 in favour of the plaintiff.

21. The trial court found that the plaintiff was always ready and willing and as such answered the issue No.3 in favour of the plaintiff by taking into account the conduct of the defendant and that of the plaintiff. The Trial court finally granted the relief of specific performance and answered the issue No. 4 in favour of the plaintiff and hence decreed the suit.

F. The Grounds of Appeal :

22. Aggrieved, the present appeal suit is filed by raising the grounds that (i) time is the essence of the contract; (ii) the factum of illegal custody of the father and younger brother of the defendant was not considered by the trial court; (iii) Equitable remedy of specific performance was granted without taking into account the bad conduct of the plaintiff; (iv) Preponderance of probabilities points towards obtaining of the endorsement by force; (v) the attesting witness is a close relative of the plaintiff; (vi) the agreement contains forfeiture clause and the amount stood forfeited; (vii) the defendant need not settle the bank dues on the receipt of the first installment of advance itself; (viii) the contract is a contingent contract and when the defendant has avoided payment within time, the agreement cannot be enforced; (ix) the defendant never handed over possession of the suit property;



G. The Submissions :

26. In support of his contentions, he relied upon the following judgments :

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Maneckji Pestonji Barucha And .. -Vs- Wadilal Sarabhai And Company And.. (1926) 51 MLJ 1	If a party is unable to perform his contract within the time, time being essence, the other party cannot claim benefit (para 13)
M/s. Shining India Developers .. Vs Lt. Col. P.S. Bhatnagar - Delhi High Court dated 15.07.2011	Conduct of parties to be considered while grant or refusal of relief
S.S.Chokkalingam Vs. R.B.S.Mani and Ors. - Madras High Court dated 23.09.1993	Party projecting a false case is not entitled for specific performance

27. Mr. T. S. Vijaya Raghavan, the Learned Counsel appearing on behalf of the plaintiffs, would submit that the execution of agreement, payment of first installment of Rs. 16 Lakhs, second installment of Rs. 10 Lakhs are admitted. The defendant first issued a reply notice that he will clear the dues and complete the transaction as per his reply notice dated 06/07/2011, which was beyond the prescribed time and pursuant thereto, another sum of Rs. 10 Lakhs was paid on 05/09/2011. The stand of the defendant is dubious regarding this payment. While signatures are admitted, it is mentioned that the endorsement are obtained by co-ercion. On the other hand, Ex-All, statement of accounts would conclusively prove the payment of money on behalf of the plaintiff. The defendant's case that he gave the money to the plaintiff to pay to the bank is absolutely unbelievable.

28. He would submit further that his case was specific performance simpliciter and not based on part performance of handing over possession. Unable to muster evidence for handing over keys, even before the trial court, it is clearly pleaded that the defendant had taken back possession of the property by breaking open the locks and relief of possession is prayed for in the plaint. As a matter of fact, the episode is mentioned only justifying the conduct of the plaintiff in approaching the police station.

29. He would submit that the defendant had pleaded a bouquet of all possible defenses and have attempted to unjustly enrich himself and wriggle out of the lawful contract and the trial court has rightly decreed the suit.

H. The Points for Consideration :

30. Upon consideration of the pleadings of parties, the issues framed, the findings of the trial court, the grounds of appeal and the submissions made before us, the following questions arise for our consideration :



J. Question No.2:-

36. In this case, even though original time stipulated by the parties stood expired on 10/06/2011, subsequently, on 13/07/2011, the defendant issued a reply notice stating that he is still trying to close the mortgage with the M/s. Syndicate Bank and that he will comply with the contract thereafter. It can also be seen and inferred from the evidence that the object of the defendant in selling the property is for settling the bank dues also and that he has been simultaneously negotiating with M/s. Syndicate Bank for one time settlement and once the bank gives that one time settlement, then within that period amounts were deposited and for that purpose, on 05/09/2011 also, the plaintiff had paid a sum of Rs.10,00,000/-, which is accepted by the defendant, which would be of categorical proof that in this case, the time is not the essence of the contract and we answer the question accordingly.

37. In this case, the plaintiff, after paying an advance of Rs.17,00,000/- on the date of agreement i.e., on 17/04/2011, within four days i.e., on 21/04/2011 itself, has paid another sum of Rs.10,00,000/-. Then, when the date stipulated was nearing, the plaintiff had issued the first legal notice on 07/06/2011 and thereafter, when the notice returned unserved, without any delay, the second notice was issued on 17/06/2011. When the defendant could get an OTS offer, on 05/10/2011, the plaintiff had paid Rs.10,00,000/- and of the said amount, the defendant kept Rs.5,00,000/- to himself. He did not clear the dues and even though suit was filed on 21/11/2011. When the plaintiff came to know that the OTS period expiring, he immediately paid the sum of Rs.6,00,000/- to the bank on

2 2021 SCC online SC 1053)



23/11/2011, so that the entire dues of the M/s. Syndicate Bank was wiped off and the property became free from mortgage and he deposited the further sum of Rs.1,00,000/- also, upon the defendant been set exparte by the Trial Court.

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38. Therefore, we find that this is a case where the plaintiff has clearly pleaded his readiness and willingness in paragraph Nos.IV to VI of the plaint and has proved by letting in ample evidence and also by his conduct and therefore, we have no hesitation in holding that the plaintiff was always ready and willing to perform his part of contract and it is only the defendant, who, on the other hand, has exhibited the following conduct:-

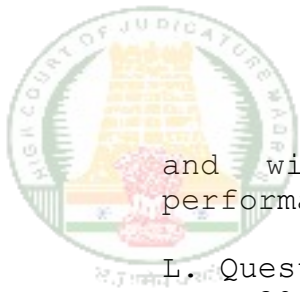
(i) he had issued a reply notice on 06/07/2011 and had taken a dubious stand in the written statement that he did not instruct the Advocate and he did not have the copy of the sale agreement to place before the Advocate for issuing proper notice. The pleading in the written statement speaks for itself;

(ii) to overcome the payment made to the bank on 06/09/2011, he pleads that since the plaintiff was pestering to pay the OTS amount to the bank, it is he, who gave the amount of Rs.5,00,000/- to the plaintiff to pay to the bank, which again on the face of it, is unbelievable as his further case is that Ex.A3 endorsement is a fraudulent one and was made in the month of November, after taking him to the Police Station. When, according to the defendant, when there is no further transaction, his pleading that he would give a sum of Rs.5,00,000/- to the plaintiff, is on the face of it unbelievable;

(iii) his further pleading that the plaintiff has planned to take the defendant to the Police Station in the month of November and being sure that they will get a signature on a blank paper and that he can manipulate such endorsement over such blank paper, in a pre-planned manner mentioned about the endorsement in the rejoinder notice issued on 05/10/2011 itself, is again absurd.

(iv) Finally, as extracted as above, it may be seen that the defendant had only attempted to take every imaginable and possible defense in a suit for specific performance, but, however, absolutely not able to substantiate any of his defences, which are far from truth.

Therefore, by his own conduct, the defendant's defence fails and without reference to this conduct of the defendant, the plaintiff's case stands on its own merits as plaintiff proved the agreement, the payment of sale consideration, his readiness



and willingness and therefore, is entitled for specific performance.

L. Question No.4:-

39. Mr.V.Raghavachari, learned Counsel appearing on behalf of the appellate would rely on Section 16(b) of the Specific Relief Act, 1963 and submits that there is no clause in the agreement so as to enable the plaintiff to pay the part sale consideration of Rs.6,00,000/- directly to M/s. Syndicate Bank and therefore, his action is at variance the original contract and therefore, the relief of specific purpose is payment, as per Section 16(b) of the Act.

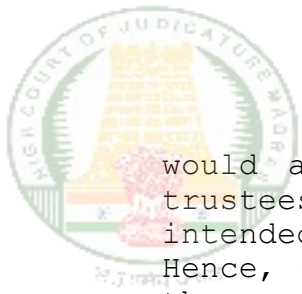
40. We reject the submission for two reasons. Firstly, we do not see the conduct of the plaintiff as a variance from the contract. Reading of the contract and the subsequent communication of the parties, it is very much clear that the payment of dues to the M/s. Syndicate Bank is very much part and purpose of the contract and therefore, when the deadline for payment of OTS amount granted by the bank was nearing and when the defendant having obtained the first installment of Rs.17,00,000/-, second installment of Rs.10,00,000/-, did not pay the amount and paid only a sum of Rs.5,00,000/- from the third installment, the plaintiff had no other option to deposit the amount with the bank. The action is not at variance to the contract, but towards the fulfillment of the purpose of the contract. The defendant is only attempting to take advantage of his own failure.

41. The second reason, being with the reliance on Section 16 (b) of the Act, is also inappropriate to the facts of this case. Section 16(a) and (b) of the Specific Relief Act, 1963 reads thus:-

"16. Personal bars to relief. — Specific performance of a contract cannot be enforced in favour of a person —
(a) who has obtained substituted performance of contract under section 20; or
(b) who has become incapable of performing, or violates any essential term of, the contract that on his part remains to be performed, or acts in fraud of the contract, or willfully acts at variance with, or in subversion of, the relation intended to be established by the contract; or"

(emphasis supplied)

A bar by the last limb of Section 16(b) of the Act is if a person willfully acts at variance with, or in subversion, of, the relation intended to be established by the contract. This



would apply, for instance, in matters of contract of agency, trusteeship etc., where the action is at variance with the intended fiduciary relation to be established by the contract. Hence, this has no application to the instant case. Therefore, the contention of the learned Counsel for the appellant, in this regard, is rejected and accordingly, we answer the question in favour of the plaintiff.

M. Question No.5:-

42. Final submission of the learned Counsel for the appellant is that the plaintiff has pleaded of handing over possession by way of part performance. He would submit that a reading of Section 53-A of Transfer of Property Act, 1882, would be clear that part performance of handing over the possession should always be in writing and in the absence of any such endorsement in the agreement, the same should be treated as false. The plaintiff is not able to establish that the possession was handed over to him and therefore, having made a false pleading of part performance, the said pleading alone is enough to non-suit the plaintiff. In support of his contention, the learned Counsel also relied upon the judgment reported in S.S.Chokkalingam Vs. R.B.S.Mani and Ors.³, and also the aforementioned judgment in Arunachala Mudaliar Vs. Jayalakshmi Ammal ⁴.

43. The learned Counsel for the respondent, on the other hand, would submit that the suit was not filed based on the part performance of handing over the possession. As a matter of fact, possession has been prayed as a relief in the suit. He would further submit that from the pleadings of the plaintiff, it would be clear that handing over of the keys and subsequent break open of the locks was never pleaded as part performance, but, such a pleading was made only to explain the fact as to why the plaintiff had to approach the Police. Reading of the prayer made in the plaint and also the manner, in which the pleading was made in para No.7, would support the submission of the learned Counsel for the plaintiff. We hold that the plaintiff had not projected any false case which would disentitle him from specific performance and we answer the question accordingly.

N. Findings on the issues framed:-

44. In view of our aforesaid findings, we affirm the finding of the Trial Court that the suit sale agreement and the endorsement are not forged ones. We affirm the finding of the Trial Court in respect of issue No.2 that the plaintiff is entitled for specific performance. We affirm the findings of the Trial Court in respect of issue No.3 that the plaintiff is

³ 1994(2) MLJ 78

⁴ (2003) 1 CTC 355



always ready and willing to perform his part of contract. As to the issue No.4, we answer that the plaintiff is entitled for specific performance as prayed for in the suit and as decreed by the Trial Court and hence we affirm the judgment and decree of the Trial Court.

O. Result:-

45. In the result, the appeal filed by the appellant/defendant in A.S.No.498 of 2015 is dismissed. The judgment and decree dated 18/04/2015 of the learned II Additional District Judge, Salem in O.S.No.177 of 2011 is confirmed. The appellant herein do bear the costs of the respondents in this appeal in addition to costs of the suit, as directed by the Trial Court. Consequently, connected miscellaneous petitions, if any, are closed.

Sd/-
Assistant Registrar

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Sub Assistant Registrar

grs

To

1. The II Additional District Judge,
Salem.
2. The Section Officer,
VR Section,
High Court, Madras.

+1cc to M/s.MAR.Pragash, Advocate, S.R.No.2667

+1cc to M/s.T.S.Vijayaraghavan, Advocate, S.R.No.2801

A.S.No.498 of 2015

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