



A.S.(MD).Nos.70 and 71 of 2011

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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Reserved on : 16.12.2022

Pronounced on : 23.12.2022

CORAM

**THE HONOURABLE DR. JUSTICE G.JAYACHANDRAN
AND
THE HONOURABLE MR. JUSTICE SUNDER MOHAN**

A.S.(MD).Nos.70 and 71 of 2011

A.S.(MD).No.70 of 2011

C.Shanmugam

....Appellant/Plaintiff

Vs.

C.Pooman (died)

1.Murugesan

2.Palani

3.G.Sriram

....Respondents / Defendants 2 to 4

Prayer : Appeal filed under Section 96, Order 41 Rule 1 of C.P.C against the Judgment and Decree passed in O.S.No.26 of 2008 dated 22.02.2011 on the file of the I Additional District Judge, Madurai.

For Appellant : Mr.M.P.Senthil
for Mr.C.Sundaravadivel



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For R-1 and R-2 : Mr.R.Parthiban
for Mr.M.Rajaraman

For R-3 : No appearance

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C.Shanmugam

....Appellant/Defendant

Vs.

C.Pooman (died)

1.M.Murugesan

2.M.Palani

....Respondents / Plaintiffs 2 & 3

Prayer : Appeal filed under Section 96, Order 41 Rule 1 of C.P.C against the Judgment and Decree passed in O.S.No.50 of 2008 dated 22.02.2011 on the file of the I Additional District Judge, Madurai.

For Appellant : Mr.M.P.Senthil
for M/s.C.Sundaravadivel

For R-1 and R-2 : Mr.R.Parthiban
for Mr.M.Rajaraman



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COMMON JUDGMENT

WEB CO **SUNDER MOHAN, J.**

The plaintiff in O.S.No.26 of 2008 and the defendant in O.S.No.50 of 2008 has filed the above appeals. O.S.No.26 of 2008 is a suit for specific performance of sale agreement dated 08.06.2005 entered into between the appellant, the third respondent herein on the one side and the deceased first defendant along with the respondents 1 and 2 on the other side and alternate prayer in the said suit is for a direction to the deceased first defendant and the respondents 1 and 2 to pay Rs.18,00,650/- (Rupees Eighteen Lakhs Six Hundred and Fifty only) with accrued interest. O.S.No.50 of 2008 was filed by the deceased first defendant along with the respondents 1 and 2 against the appellant herein for permanent injunction restraining the appellant from interfering with their possession in the suit schedule property. For the sake of convenience, the parties are referred as per their rank in A.S.(MD).No.70 of 2011.

2. The case of the appellant/plaintiff in O.S.No.26 of 2008 is that he along with the third respondent herein entered into a sale agreement with the deceased first defendant and the respondents 1 and 2 on 08.06.2005 for



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purchase of the suit schedule property measuring an extent of 1 Acre and 98 cents in V.Karisalkulam Village, Vilangudi Bit, Madurai North Taluk, Madurai District for a total sale consideration of Rs.41,58,000/-. Prior to the said sale agreement, they entered into an understanding on 06.04.2005. As per the sale agreement, the appellant and the third respondent paid Rs.10,00,000/- towards part of the sale consideration. The balance sale consideration was to be paid within a period of six months. As per the terms, the appellant and the third respondent were permitted to divide the land into layouts and sell the land to third parties and pay the balance sale consideration within the stipulated time. The original title deeds were also handed over to the appellant and the third respondent. The appellant based on the said agreement spent nearly about Rs.50,000/- for levelling the lands. Though the appellant and the third respondent were ready and willing to perform their part of the contract by paying the balance sale consideration and getting the sale deed executed, the deceased first defendant and the respondents 1 and 2 were not performing their part of the contract. On 30.01.2008, the appellant sent a lawyer's notice to the deceased first defendant and the respondents 1 and 2. However, they did not respond to the said notice. The appellant also made an averment stating that he



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reserved his right to proceed against the third respondent for his share of contribution in enforcing the original contract in a separate proceedings.

During the pendency of the suit, the first defendant died and since he had no children, his brother's sons, namely, the first and second respondents herein, who are already parties to the suit, continued the suit as legal heirs of the first defendant as well. The appellant therefore prayed for specific performance as against the respondents 1 and 2 and the deceased first defendant and in respect of the third respondent as well, who is a co-promisee. The appellant further prayed alternatively a direction to the deceased first defendant and the respondents 1 and 2 to pay Rs.18,00,650/- with interest.

3. The first respondent herein filed a written statement on behalf of the deceased first defendant and the second respondent as well. In the said written statement, he denied the averments made in the plaint. The appellant did not adhere to the terms of the agreement and failed to pay the balance sale consideration within six months as agreed between the parties. The plaintiff/appellant had not established his readiness and willingness. The advance payment of Rs.10,00,000/- was made from the account of



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DAN-AM Engineering Constructions, which was a partnership firm in which the appellant and the third respondent were partners. They represented that they were jointly doing the business of real estate and construction of Villas. Since the appellant and the third respondent were not ready and willing to perform their part of the contract and on the request of the third respondent, the deceased first defendant and the respondents 1 and 2 returned the advance by issuing two cheques for Rs.4,00,000/- and Rs.5,00,000/- on 08.03.2007 in favour of DAN-AM Engineering Constructions and paying a sum of Rs.1,00,000/- by cash and got the agreement cancelled by the third respondent. They also got the return of their original title deeds and obtained possession of the suit schedule property. The cheques were encashed by DAN-AM Engineering Constructions. The appellant was aware of these transactions and has filed the suit in collusion with the third respondent. The appellant's averment that he spent nearly Rs.50,000/- for levelling the lands is false. The suit filed by the appellant was unsustainable in law, since he had not produced the original sale agreement, which stood cancelled. A suit for specific performance is a discretionary relief and the appellant was not entitled to the relief in view of his conduct in acting in collusion with the third



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respondent. The respondents 1 and 2 further stated that they had filed a suit

in O.S.No.50 of 2008 against the appellant for a permanent injunction.

4. The third respondent filed a written statement stating that he had received Rs.10,00,000/- as stated by the respondents 1 and 2 and handed over the sale agreement by cancelling it along with the original title deeds to the deceased first defendant and the respondents 1 and 2. However, he would add that the sum of Rs.10,00,000/- received by him was towards his share of contribution made for entering into the agreement. He had contributed Rs.5,00,000/- and the deceased first defendant and the respondents 1 and 2 agreed to pay another sum of Rs.5,00,000/-. The third respondent further stated that the appellant spent Rs.50,000/- for demarcating the plots and that the receipt of money and cancellation of the agreement would not bind the co-promisee, namely, the appellant herein. The third respondent also stated that DAN-AM Engineering Constructions was a proprietorship concern and was not a partnership concern.

5. The appellant filed a reply statement stating that the averments of the respondents 1 and 2 and the deceased first defendant that



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DAN-AM Engineering Constructions is a partnership concern is false. The appellant had purchased another plot in Survey No.81/8A for having ingress and egress to the suit schedule property. This would show that the appellant had performed his part of the contract.

6. The deceased first defendant and the respondents 1 and 2 as stated earlier had filed O.S.No.50 of 2008 for permanent injunction restraining the appellant from interfering in their possession. The appellant filed a written statement and broadly the submissions made in O.S.No.26 of 2008 were reiterated in this suit as well by both the parties. Both the suits were tried together and evidence was recorded in common.

7. Before the Trial Court, the appellant examined himself and one A.Beer Masthan as P.W.1 and P.W.2 and marked Exhibits A1 to A14. The respondents examined the first respondent herein as D.W.1 and marked Exhibits B1 to B6.

8. The Trial Court framed six issues in O.S.No.26 of 2008 and two issues in O.S.No.50 of 2008. In all the issues, the Trial Court held in favour



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of the deceased first defendant and the respondents 1 and 2 and dismissed

O.S.No.26 of 2008 and allowed O.S.No.50 of 2008.

9. Mr.M.P.Senthil, learned counsel for the appellant submitted that the appellant was always ready and willing to perform his part of the contract. The agreement entered into between the appellant and the third respondent as vendees and the deceased first defendant along with the respondents 1 and 2 as vendors would show that the appellant and the third respondent were co-promisees. The alleged cancellation of the agreement on 08.03.2007 was unilaterally done by the third respondent and the deceased first defendant along with the respondents 1 and 2, which is a collusive act. The appellant had contributed Rs.5,00,000/- for making the advance sale consideration. The cancellation therefore is not binding on the appellant. The appellant was always ready and willing and in fact purchased a land for pathway besides spending nearly Rs.50,000/- for demarcating the plots and for laying stones for making the layout. Having spent money for developing the land, the Trial Court ought not to have accepted the respondents' version that he was not ready and willing to perform his part of the contract. The appellant had entered into an



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agreement on 12.07.2005 with the third respondent herein, which would show that he had contributed Rs.5,00,000/- for entering into sale agreement and it was agreed between them that the original sale deed shall be with the third respondent herein. This document, which was marked as Ex.A12, would further show that the appellant and the third respondent were not partners in DAN-AM Engineering Constructions. The learned counsel further submitted that admittedly, the appellant was in possession of the suit schedule property and prayed for allowing of the appeals.

10. Mr.R.Parthiban, learned counsel for the respondents 1 and 2 submitted that the suit filed by the appellant was a collusive suit along with the third respondent. The third respondent had falsely stated in his written statement that the sum of Rs.10,00,000/- received by him was towards his share of contribution. Ex.B5 is the document executed by the third respondent evidencing cancellation of sale agreement by receiving the entire advance amount of Rs.10,00,000/-. In the said document, there is no averment to show that the sum of Rs.10,00,000/- was towards his share. The appellant, when specifically asked as to whether he had established his capacity to pay the balance sale consideration, had stated that it was not



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11. The points for determination in the above appeals are as follows:

(I) Whether the appellant is entitled to the discretionary relief of specific performance of the agreement?

(II) Whether the appellant is entitled to the alternative relief of claim for money from the respondents 1 and 2?

(III) Whether the respondents 1 and 2 are entitled to permanent injunction restraining the appellant from interfering with their possession of the suit schedule property?

12. **Point No.(I):**

a) It is well settled that a suit for specific performance is a discretionary relief. The appellant seeking specific performance has to come up with a clear case. Even if the time is not the essence of contract in the agreement, the appellant/plaintiff should approach the Court immediately on coming to know of the defendants' refusal to perform their part of the contract. Further, the appellant also should plead and establish his readiness and willingness throughout. Though the appellant need not be always ready with the funds, but he must be able to show that he had the capacity to pay the balance sale consideration.



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b) These principles have been reiterated by the Hon'ble Supreme Court in several cases and in a recent judgment in the case of ***P.Daivasigamani Vs. S.Sambandan*** reported in **2022 SCC OnLine SC 1391**, the Hon'ble Supreme Court had held as follows:

“19. Section 20 of the Specific Relief Act (Pre-amendment), which confers discretion on the court to exercise jurisdiction to decree of specific performance, states that this exercise should not be arbitrary, but guided by sound and reasonable judicial principles. Interpreting and elucidating on Section 20 of the Specific Relief Act (Pre-amendment) and factors to be considered, this Court in Kamal Kumar v. Premlata Joshi has also referred to Sections 16(c), 22, 23 and 24 of the Specific Relief Act and forms 47/48 of Appendix A to C of the Civil Procedure Code, 1908, to summarise:

“7. It is a settled principle of law that the grant of relief of specific performance is a discretionary and equitable relief. The material questions, which are required to be gone into for grant of the relief of specific performance are:

7.1 First, whether there exists a valid and concluded contract between the parties for sale/purchase of the suit property;



7.2 Second, whether the plaintiff has been ready and willing to perform his part of contract and whether he is still ready and willing to perform his part as mentioned in the contract;

7.3 Third, whether the plaintiff has, in fact, performed his part of the contract and, if so, how and to what extent and in what manner he has performed and whether such performance was in conformity with the terms of the contract;

7.4 Fourth, whether it will be equitable to grant the relief of specific performance to the plaintiff against the defendant in relation to suit property or it will cause any kind of hardship to the defendant and, if so, how and in what manner and the extent if such relief is eventually granted to the plaintiff;

7.5 Lastly, whether the plaintiff is entitled for grant of any other alternative relief, namely, refund of earnest money etc. and, if so, on what grounds.

8. In our opinion, the aforementioned questions are part of the statutory requirements [See Sections 16(c), 20, 21, 22, 23 of the Specific Relief Act, 1963 and the Forms 47/48 of Appendix A to C of the Code of Civil Procedure]. These requirements have to be properly pleaded by the parties in their respective pleadings and proved with the aid of evidence in accordance



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with law. It is only then the Court is entitled to exercise its discretion and accordingly grant or refuse the relief of specific performance depending upon the case made out by the parties on facts.”

20. Sub-section (2) to Section 20 of the Specific Relief Act (Pre-amendment) lists some of the principles that the court should take into consideration while exercising discretion. The factors to be considered while exercising discretion include hardship to the defendant/seller which he did not foresee, hardship to the plaintiff/purchaser in case of non-performance, or whether the contract, even when not void, was entered under the circumstances that make the enforcement of specific performance inequitable, or whether the plaintiff has done substantial acts or suffered losses as a consequence of the contract, and the conduct of the parties, including that of the defendant/seller and other circumstances under which the contract was entered are such that they give an unfair advantage over the defendant/seller. The court should examine whether the plaintiff/purchaser had, in fact, performed his part of the contract, and if so, how and to what extent, and in what manner he has performed, and whether such performance was in conformity with the terms of the contract. The status of the parties, and whether the plaintiff/purchaser is a speculator in the property, who buys and sells properties, and whether his



conduct reflects an attempt to gain on account of the rise in the price of the property, hoping that the delay in payment of full consideration would go to his advantage, will be a relevant consideration. Incapacity of the defendant/seller and whether the plaintiff/purchaser is operating in property trade, or as a financier or middleman and the defendant/seller is a typical property owner, may also affect the exercise of discretion. In cases where the defendant/seller claims that he was gullible and nescient, who got caught by entering into the agreement to sell, facts like whether the sale consideration is lower than the market price and the terms and conditions settled are unfavourable, should be given due weightage. Sometimes the defendant/seller, post the agreement to sell, in consultation with elders or family members, wishes to back out because the decision to sell was a folly, unwise, or a result of trickery. In such cases, the conduct of the defendant/seller would be of consequence. The defendant/seller would be well advised to immediately and without delay write to the plaintiff/purchaser reneging the agreement to sell and enclose a cheque for the amount received. His offer to pay or payment of interest or damages would be an added factor as the intending purchaser would then be entitled to look for another property.

21. Time, it is stated, is not the essence of the contract in the case of immovable properties, unless there are grounds to



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hold to the contrary. This doctrine is applied, without being unfair and inequitable to the defendant/seller, as the court should not ignore that a person sells the property when he needs money, and, therefore, expects the money in the stipulated or reasonable time, which would meet the purpose of the sale. The purpose of sale can vary from the need for liquid cash to be invested to earn interest, medical, educational, child's marriage or purchasing another property. To save capital gains, the seller has to purchase another immovable property, unless the proceeds are exempt. There has been a steep rise in the prices of land in the last quarter of the 20th Century in India. With the rise in property value, the value of money has fallen. At times, delay in payment would defeat the defendant/seller's purpose. Therefore, the offer of the plaintiff/purchaser in writing and the time and occasion when the offer to pay the balance amount to the defendant/seller is an important factor which would matter when the court examines the question of discretion, that is, whether or not to grant a decree of specific performance. While examining these aspects, the quantum of money paid by the plaintiff/seller to the defendant/purchaser may become a relevant fact that merits due consideration. There is a distinction between limitation and delay and laches. Limitation is a ground for dismissing a suit even if the plaintiff is otherwise entitled to specific performance, while delay operates to determine the discretion



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and exercise under Section 20 of the Specific Relief Act, even if the suit is not dismissed on account of limitation. However, not one but several aspects have to be considered when the court, in terms of Section 20 of the Specific Relief Act, exercises discretion, guided by judicial principles, sound and reasonable.”

c) In the instant case on hand, from the pleadings and evidence on record, the following facts emerge:

(i) The appellant and the third respondent entered into a sale agreement on 08.06.2005 with the deceased first defendant and the respondents 1 and 2 for purchase of 1 Acre and 98 cents of land for a total sale consideration of Rs.41,58,000/-.

(ii) The appellant and the third respondent paid Rs.10,00,000/- as advance for entering into the sale agreement. The said amount was paid by way of two cheques for Rs.4,00,000/- and Rs.5,00,000/- respectively from the account of DAN-AM Engineering Constructions and Rs.1,00,000/- was paid by cash.

(iii) As per the terms, the appellant and the third respondent were to divide the land into plots and make sales to third parties and pay the balance



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sale consideration to the deceased first defendant and the respondents 1 and 2 within a period of six months from the date of agreement.

(iv) As per the agreement, the possession and the original title deeds were handed over to the appellant and the third respondent.

(v) After the agreement, neither the appellant nor the third respondent paid the balance sale consideration within the time stipulated in the agreement. On 08.03.2007, the third respondent had cancelled the agreement by receiving Rs.10,00,000/- from the first respondent herein. Besides handing over the original cancelled sale agreement to the deceased first defendant and the respondents 1 and 2, the third respondent also handed over the original title deeds of the suit schedule property to the deceased first defendant and the respondents 1 and 2. He had cited health reasons for not complying with the terms of the agreement.

(vi) The appellant issued lawyer's notice on 30.01.2008 marked as Ex.A7 to the deceased first defendant and the respondents 1 and 2 asking them to execute the sale deed by receiving the balance sale consideration.

d) The above facts are admitted by both the parties. The appellant's case is that the unilateral cancellation by one of the co-promisees to the sale



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agreement is not binding on him. The appellant and the third respondent did not enter into the sale agreement as partners of DAN-AM Engineering Constructions. The third respondent is the proprietor of DAN-AM Engineering Constructions. The appellant had contributed Rs.5,00,000/- for entering into the sale agreement. The first and second respondents, on the other hand, would contend that the advance amount of Rs.9,00,000/- were paid by cheques by the appellant and the third respondent, which came from the account of DAN-AM Engineering Constructions. The balance was paid by cash. The agreement would not indicate as to how much the appellant had contributed for paying the advance amount, since the entire advance was paid from the account of DAN-AM Engineering Constructions. On the request of the third respondent, the deceased first defendant and the respondents 1 and 2 returned the advance amount on 08.03.2007, since the appellant and the third respondent were unable to perform their part of the contract. As per the terms of the agreement, the balance sale consideration ought to have been paid before December 2005. The deceased first defendant and the respondents 1 and 2 waited patiently till March 2007. Further, we find that in the cancellation document executed by the third respondent marked as Ex.B5, the third respondent had received the entire



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amount paid as advance. Therefore, his version that the sum of Rs.10,00,000/- paid to him was towards Rs.5,00,000/- paid by him as his share and the balance Rs.5,00,000/- was towards the gain derived by the deceased first defendant and the respondents 1 and 2 cannot be accepted. The appellant though pleads ignorance of the unilateral cancellation by the third respondent has not explained the delay in pursuing the terms of the sale agreement. He would also admit in the cross-examination that he was aware of the fact that the third respondent had cancelled the agreement by receiving the advance amount.

e) The unilateral cancellation of agreement by one promisee, (i.e.) the third respondent herein, may not be appropriate. However, the relief of specific performance is a discretionary relief. The appellant even otherwise has approached the Court with laches. He had not established his readiness and willingness throughout. After the sale agreement dated 08.06.2005, the appellant has not been able to show any correspondence or document to establish his readiness and willingness. Even after the appellant had admittedly come to know of the cancellation deed, he had approached the Court one year later. In any event, we find that the advance amount was



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paid from the account of DAN-AM Engineering Constructions and the deceased first defendant and the respondents 1 and 2 have returned the advance amount in favour of DAN-AM Engineering Constructions. There is admittedly no record to show the contribution made by the appellant towards the sale consideration. The appellant had admitted in his evidence that there was no necessity for him to establish that he had the financial capacity to pay the balance sale consideration.

f) Therefore, for all the above reasons, we are of the view that the appellant has not established his readiness and willingness besides approaching the Court with laches and not entitled to the discretionary relief of specific performance. Point No.(I) is answered accordingly.

12. Point No.(II):

As regards Issue No.(II), we find that the appellant has made an alternative prayer for directing the deceased first defendant and the respondents 1 and 2 herein to pay Rs.18,00,650/- along with accrued interest at the rate of 12% per annum from the date of plaint. The appellant has not stated anywhere in the plaint as to how he is entitled to



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Rs.18,00,650/-. Even according to him, he had paid Rs.5,00,000/- towards his share for making the advance payment. The plaint or the evidence do not substantiate the appellant's claim for Rs.18,00,650/-. Further the appellant has not established that he had contributed Rs.5,00,000/-. The appellant has produced Ex.A12, which is said to be an understanding between the appellant and the third respondent, wherein, it is stated that the appellant and the third respondent each paid Rs.5,00,000/- for making the advance payment. However, it is established that the payments were made from the account of DAN-AM Engineering Constructions. Further, Ex.B5, which is the cancellation executed by the third respondent, states that the third respondent had received two cheques to the total value of Rs.9,00,000/- and Rs.1,00,000 by cash towards return of the entire advance amount. The cheques were issued in the name of DAN-AM Engineering Constructions. There is nothing in the said cancellation letter marked as Ex.B5 to show that the sum of Rs.10,00,000/- was paid towards the share contributed by the third respondent alone. The appellant was aware of the receipt of advance amount by the third respondent and had specifically stated in his plaint as follows:

“The plaintiff reserves his right to proceed against the 4th



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defendant for his share of contribution in enforcing the original contract in a separate proceedings.”

When that was the specific stand of the appellant, he cannot make any claim as against the deceased first defendant and the respondents 1 and 2 for returning the advance amount. He ought to have made claim only as against the third respondent herein, if they had any dispute amongst themselves. That apart, the appellant has not pleaded and justified his claim for additional money and hence, he is not entitled to the alternative prayer. Point No.(II) is answered accordingly.

13. Point No.(III):

As regards Issue No.(III), we find that the original documents and the original sale agreement were returned by the third respondent to the deceased first defendant and the respondents 1 and 2. The first and second respondents claimed possession of the suit schedule properties and prayed for permanent injunction. The appellant in the absence of any right over the suit schedule properties cannot lawfully interfere in the possession of the respondents 1 and 2 herein and therefore, the relief of permanent injunction



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granted by the Trial Court in O.S.No.50 of 2008 is in accordance with law and cannot be interfered with. Point No.(III) is answered accordingly.

14. For the above reasons, we find that the appellant has not made out any ground for interference in the judgment of the Trial Court and for justifying his alternative prayer in the suit. Hence, the Appeal Suits in A.S.(MD).Nos.70 and 71 of 2011 are dismissed. There shall be no order as to costs.

[G.J.,J.] [S.M.,J]
23.12.2022

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To

The I Additional District Judge,
I Additional District Court,
Madurai.



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Dr.G.JAYACHANDRAN, J.
and
SUNDER MOHAN, J.

Lm

Pre-Delivery Judgment made in
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23.12.2022