



A.S. (MD) No.73 of 2011

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED :14.07.2022

CORAM

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

A.S(MD)No.73 of 2011

and

M.P(MD)No.1 of 2011

Jayilani

:Appellant

Vs.

Padmavathy

: Respondent

PRAYER: Appeal Suit filed under Section 96 of the Civil Procedure Code, 1908 against the judgment and decree made in O.S.No.19of 2008, dated 27.09.2010, on the file of the Additional District Judge, Fast Track Court No.II, Pattukkottai.

For Appellant :Mr.VR.Shanmuganathan

For Respondent :Mr.T.Thiageswaran
for Mr.M.P.Senthil



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JUDGMENT

The Appeal Suit is directed against the judgment and decree made in O.S.No.19 of 2008, dated 27.09.2010, on the file of the Additional District Judge, Fast Track Court No.II, Pattukkottai.

2.The appellant is the plaintiff and the defendant is the respondent herein and the appellant has filed the suit in O.S.No.19 of 2008, on the file of Additional District Judge, Fast Track Court No.II, Pattukkottai for the relief of specific performance and in alternative, to get refund of a sum of Rs.3,39,000/- with interest at the rate of 18% per annum with cost. The trial Court, after trial, dismissed the suit in respect of the relief of specific performance and decreed the suit with respect to the alternative relief of refund of a sum of Rs.3,39,000/- paid by the plaintiff to the defendant with interest at 12% pa., from 28.01.2007 till the date of payment. Challenging the said judgment and decree passed by the trial Court, the appellant has filed the present appeal suit.



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3.The brief facts of the plaint reads as follows:

The suit property belongs to the plaintiff, having purchased the same through sale deed, dated 17.08.1982 from one Kannan. The plaintiff and the defendant have entered into an agreement of sale in respect of the suit property on 26.12.2006 and the sale price was fixed at the rate of Rs. 18,600/- per Kuzhi and a sum of Rs.2 lakhs was paid towards advance by the Plaintiff and three months time was fixed for the execution of the sale deed by paying the balance sale consideration. Thereafter, another sum of Rs.1 lakh and Rs.39,000/- are paid by the plaintiff to the defendant on 22.1.2007 and 28.1.2007 respectively and the same were duly endorsed in the agreement of sale. The Plaintiff was always ready and willing to perform his part of contract by paying the balance sale consideration and get the sale deed executed in his favour. Despite repeated requests, the defendant was evasive in performing his part of contract and hence the plaintiff sent a legal notice on 3.3.2008, for which, the defendant sent a reply on 2.4.2008 with false averments. It is falsely stated therein that the time is the essence



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of contract, wherein, it is stated that the plaintiff was not ready and willing to get the sale deed executed and that in the panchayat held in this regard, he had admitted his inability to pay the balance sale consideration and express the fact that he is ready to get back the advance amount. But there was no panchayat held as alleged by the defendant and prays for the relief of specific performance of the sale agreement, dated 26.12.2006 or in the alternative to get refund of a sum of Rs.3,39,000/- with interest at the rate of 18% per annum.

4.The defendant has filed a written statement and the brief facts of the same reads as under:

The averments contained in the plaint are all false. The defendant was always ready and willing to perform his part of contract of sale and he had surveyed the suit property in the month of May 2007 and the plaintiff has given a false statement that the defendant has not surveyed the suit property. There was a panchayat on 1.3.2008, in which, the plaintiff had



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admitted his inability to pay the balance sale consideration and agreed to get refund of the advance amount of Rs.3,39,000/- paid by him. Subsequently, the plaintiff refused the same and hence the same was deposited by the defendant in Syndicate Bank and City Union Bank. Further the plaintiff was not having the required balance sale consideration to get the sale deed executed. Further, as no document came into existence at the time of panchayat, signatures of the parties were not obtained. Had the plaintiff had the sufficient amount, he would have paid the entire amount and get the sale deed executed in his favour within the time stipulated in the sale agreement. Therefore he made piecemeal payments of Rs.1,39,000/- subsequent to the date of sale agreement. In fact, the defendant had entered into a sale agreement with the plaintiff only for the purchase of another property by him, for which, he entered into a sale agreement fixing the time as four months and because of the failure on the part of the plaintiff to perform his part of contract, the sale agreement entered by the plaintiff has been cancelled. The time is the essence of contract. The sale agreement was entered between the defendant and plaintiff is on 26.12.2006, whereas, the



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suit was filed on 9.4.2008 and even the suit notice was sent only after 16 months from the date of sale agreement and that would substantiate the contention of the defendant that the plaintiff has no sufficient funds to pay the balance sale consideration to the defendant. Because of this, the sale price of the land is increased by Rs.30,000/- per kuzhi. If the decree for specific performance is passed, the defendant would be put to irreparable loss and hardship due to the escalation in the price of land per kuzhi and the plaintiff would not incur any loss, if the relief of specific performance is not granted. The plaintiff and the attesor one Thiagarajan are the persons doing real estate business who have no real intention to purchase the property for their own but they look after some other persons to sell the said land for higher price. Therefore the said agreement of sale could not be materialized because of the lapses on the part of the plaintiff only. The suit is also barred by the period of limitation. Therefore the suit is liable to be dismissed with costs.

5.On the above said pleadings, the trial Court has framed the



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following issues:

1. Whether time is the essence of contract entered between the plaintiff and defendant?

2. Whether the plaintiff has expressed his readiness and willingness to perform his part of contract?

3. Whether the plaintiff is entitled to the relief of specific performance as prayed for?

4. To what relief, if any, is the plaintiff entitled to?

6. In order to substantiate the case of the parties, during trial on the side of the plaintiff, two witnesses were examined as P.W.1 and P.W.2 and Ex.A1 to A5 were marked. On the side of the defendant, two witnesses were examined as D.W.1 and D.W.2 and Ex.B1 to Ex.B3 were marked. After trial, and upon hearing the arguments advanced on either side, the suit is decreed in respect of the alternative relief of refund of advance amount and dismissed in respect of the relief of specific performance.



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7.The learned counsel for the appellant would submit that though in this case, three months time has been stipulated in the agreement of sale to perform the part of contract, it is settled proposition of law that in respect of sale of immovable property, normally time is not the essence of contract. The appellant is always ready and willing to perform his part of contract by paying the balance sale consideration and get the sale deed executed in his favour. However, the respondent was not ready and willing to execute the sale deed by surveying and demarcating the suit property within the time stipulated in the agreement and further the defendant/respondent had demanded more money towards the sale price which was already fixed. The learned counsel would further submit that the appellant has already paid a sum of Rs.2 lakhs as advance and subsequently on 22.1.2007 and 28.1.2007, he has paid Rs.1lakh and Rs.39,000/- respectively to the defendant. In this case, the respondent did not enter into the witness box and subjected himself for cross-examination, instead, her husband was examined as D.W.1. Though he has stated that in the month of May 2007, his wife had surveyed the suit property, which is only after the stipulated



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time mentioned in the agreement, which clearly would show that time was not the essence of the contract and so within the time the respondent was not ready and willing to perform her part of contract. However, the appellant repeatedly approached the respondent but she failed to execute the sale deed and also demanded more money and therefore the appellant issued a legal notice to the respondent on 31.3.2008. The respondent received the notice and sent a reply and has also stated that she has cancelled the agreement and if the appellant wants to purchase the suit property, he can fix fresh price towards sale consideration and can pay the entire sale consideration and get the property and also the defendant tried to encumber the suit property and therefore, the appellant has filed a suit and the appellant was always ready and willing to perform his part of contract and to prove the same and after arguments and before judgement was delivered, he deposited the entire sale consideration. Further he would submit that even the respondent admitted that in the month of May 2007 only, she measured the property. Therefore without measuring the property, the sale deed could not be executed. Therefore it is a failure on the part of the respondent and not a breach of



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contract committed by the appellant. Though the respondent pleaded that there was a panchayat, in her written statement, she has not stated that P.W. 2 also participated in the panchayat and only during the evidence, she has stated that P.W.2 has participated in the panchayat. Without pleadings, no amount of evidence can be allowed and that the Court need not look into the same. Though the trial Court has found that there is no need to demarcate the property, Ex.A1 does not clearly mention about the demarcation of the property. But however, in Ex.A1, it is not clearly mentioned as 18 feet pathway and the same indicate the plaintiff to wait for the defendant to demarcate the same and without demarcating and fixing the boundaries, it is difficult to get the sale deed executed and therefore, the trial Court failed to take into consideration the said facts and lastly the appellant met the respondent and at the time, the respondent refused to execute the sale deed and demanded more money and wait for one year for sending the notice and filed the suit. Therefore they came to the conclusion that the appellant was not ready and willing to perform his part of contract. The said finding of the trial Court is erroneous on the ground that even if



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the measurement is mentioned, only after the said period, as admitted by the respondent in his written statement as well as in his evidence. It is settled proposition of law that the appellant need not having the money always in his hand and if the appellant is able to mobilize the fund, even then he can show his readiness and willingness and the same can be established by showing his capacity. Therefore the finding of the trial Court that the appellant was not ready and willing is erroneous and further he would submit that trial Court also erroneously held that conduct of the party clearly show that the appellant was not ready and willing. The trial Court failed to appreciate the conduct of the respondent also. The respondent never come to the witness box and only the husband of the respondent come to the witness box and depose and further as admitted by them, the measurement is done only in the month of May, 2007. Therefore, the trial Court failed to look into the conduct of the respondent. Further, the trial Court failed to take note of the fact that after the sale agreement and before delivery of judgment, the appellant deposited the balance sale consideration to show his readiness and willingness and therefore, the



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judgment and decree passed by the trial Court is liable to be set aside.

8.The learned counsel for the respondent would submit that the period of three months stipulated in the agreement of sale marked under Ex.A1 for completion of the sale is the essence of the contract. The appellant was not ready and willing to perform his part of contract though the sale price was fixed and a sum of Rs.2 lakhs was paid as advance and that subsequently, even within the stipulated time, the appellant has paid a sum of Rs.3 lakhs and another sum of Rs.39,000/- alone and the appellant has not shown that he has necessary fund with him to pay the balance sale consideration and he is not an income-tax assessee. Though the appellant has pleaded that he has sufficient funds in the bank account, he has not produced any proof for the same. Even in two occasions, he had deposited only a sum of Rs.3,45,144/-, whereas, the balance sale consideration is Rs. 10 lakhs. Three months time stipulated in the agreement expired on 26.3.2007. However, the appellant had approached the respondent on 20.3.2007 and at that time, the respondent refused to execute the sale deed



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as per the agreement and also he raised the price of the land, which increased the balance sale consideration, but whereas, he sent the notice on 31.03.2008 after one year. Even though he has clearly stated that on 20.3.2007 itself, the respondent has refused and demanded more money and he has not taken steps to deposit the entire money immediately after notice but he had filed the suit and at the time of filing of the suit also, he has not deposited the entire money, whereas, he has sent the notice on 31.3.2008 and filed the suit only on 9.4.2008 and in the one year period, the appellant has not proved that even during the said period, he was ready and willing to perform his part of contract. He is not having the money always with him in his hand and able to mobilise the same and readiness and willingness is proved only from the conduct of the parties. Therefore, from 20.3.2007 till 31.3.2008, the appellant has not shown his readiness to get the sale deed executed in his favour. Therefore, though the trial Court has held that time is not the essence of the contract and further found that the appellant was not ready and willing to perform his part of contract and that he is not entitled to the discretionary relief of specific performance and also in order to



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substantiate his case, he also examined D.W.2 and he has categorically stated that the respondent was not ready and willing to perform his part of contract. Though the agreement stood in the name of the wife, the respondent's husband has actively participated and he is having the personal knowledge of the entire agreement and the conduct of the parties. Therefore, he is competent to speak about the fact. Therefore the non-examination of the respondent is not fatal to the case of the respondent. Therefore, the trial Court has rightly dismissed the suit and therefore, no valid ground is made out to interfere with the said judgment. Therefore the appeal suit may be dismissed.

9.Heard the learned counsel appearing on either side and perused the materials placed before this Court.

10.The sale agreement, dated 26.12.2006 and ExA1 is not in dispute and the payment of sale consideration initially at Rs.2 lakhs and subsequently a sum of Rs.39,000/-, totally a sum of Rs.3,39,000/- are also



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not in dispute. Therefore, once the execution is admitted and the consideration is admitted, then as per Section 16(C) of the Specific Relief Act, the plaintiff/appellant must prove that he had performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him other than those terms, the performance of which has been prevented or waived by the defendant. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. In this case, though the time has been fixed for three months to execute the sale deed by paying the balance sale consideration and as per the agreement, the sale deed has not been executed. However, the respondent has taken one of the defense that the plaintiff has not come forward to perform his part of contract within the stipulated time and therefore he is not entitled to get the relief of specific performance and a specific issue has been framed regarding as to whether the time is the essence of contract. In this case, the trial Court has stated that the time is not ordinarily the essence of the contract as far as the immovable property is concerned. The defendant has not filed any appeal or



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cross-objection against that finding. Now against the disallowing of the main relief of specific performance, the plaintiff has filed the present appeal suit. Therefore, the point for consideration in this appeal is as to whether the appellant has proved that he was always ready and willing to perform his part of the contract from the date of the sale agreement till the date of the suit continuously? The continuous readiness and willingness on the part of the plaintiff was a condition precedent for grant of the relief of specific performance. This Court and the Honourable Apex Court, has time and again has laid down the law that the plaintiff must aver and prove about the readiness and willingness from the date of the sale agreement till the date of disposal of the suit. But in this case, the respondent has denied that the appellant was not ready and willing to perform his part of the contract within the stipulated time mentioned in the sale agreement. It is the bounden duty of the appellant that he was always ready and willing to perform his part of the contract from the date of the sale agreement. Though a reading of the evidence shows that the appellant himself had admitted that within the stipulated time, out of Rs.13,39,000/- total sale consideration, he



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has paid only a sum of Rs.3,39,000/- and he did not pay the balance sale consideration of remaining Rs.10 lakhs. He has admitted that on 20.3.2007, the appellant had approached the respondent, she refused to receive the balance sale consideration and execute the sale deed and also she demanded more money. Further, the appellant was not in a position to prove that on the date, he was having the entire balance sale consideration. Further he has admitted that he is not an income-tax assessee and he was having a bank account, but he could not prove that in his account, he was having the entire balance sale consideration on that day. Though it is not mandatory that the plaintiff is always have the ready cash in his hand or he can always show the deposit made in the bank. Further if the plaintiff is able to show his source to raise the fund within the stipulated time and he was ready and willing to perform his part of contract, then the defendant failed to execute his part, then the plaintiff can get the relief of specific performance from the Court. Though The above section specifically states that the plaintiff should aver and prove the readiness and willingness and also the obligation to pay the money. In terms of the contract, the plaintiff would have to make



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a specific statement in the plaint and adduce evidence to show the availability of funds to make payment in terms of the contract, in time. In other words, the plaintiff would have to plead that he had sufficient funds or was in a position to raise funds in time to discharge his obligation under the contract. The plaintiff does not have sufficient fund with him to discharge his obligation in terms of the contract which requires payment of money and the plaintiff would have to specifically plead how the funds would be available to him. Therefore the plaintiff has to adduce evidence and arrangement with the Financier for disbursement of available funds for timely compliance in accordance with the terms and conditions of the contract involving payment of money. So in this case, though the appellant has averred that he was ready and willing to perform his part of the contract, whereas, he has not proved that within the time stipulated, he was having adequate fund or in other words, he was in a position to mobilise the fund. The reasons stated by the appellant that non-performing within the stipulated time is that he was ready and willing to perform his part of contract within the time and paid advance amount of Rs.3,39,000/-. But the



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respondent has not measured the property with the help of a Surveyor and ear-marked the property covered under the sale agreement and that is the reason why he could not perform his part of contract. A careful reading of the recital found in the agreement Ex.A1, it is not a condition precedent that the respondent should come and measure the suit property within the stipulated time and hand over the surveyed documents and thereafter, the appellant has to pay the balance sale consideration. Therefore, when there is no specific condition stipulated, the appellant cannot insist upon that and imposing of any specific or special condition which does not form part of the terms of the condition of the sale agreement. Further the appellant also admitted that on 20.3.2007 lastly he had approached the respondent and she refused to execute the sale deed and also demanded more money. Even according to the appellant, legal notice was sent on 31.3.2008. But the specific stand was that he had lastly approached the respondent on 20.3.2007 and she expressed her unwillingness to execute the sale deed. Then the appellant should either send a notice and approach the Court or deposit the said money into Court to show his bona-fideness and also



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readiness and willingness. The appellant has not approached the Court immediately thereafter and after one year on 20.3.2008, he sent a notice to the defendant and filed the suit on 09.04.2008 and even on the date of filing of the suit, in order to prove his readiness and willingness, he has not deposited the balance sale consideration. Though at the time of filing of the suit, deposit of balance sale consideration is not a condition precedent, however, in order to show his readiness and willingness, he should have deposited the same. Further when the respondent has clearly stated that there was a Panchayat, D.W.2 and P.W.2 were also present in the Panchayat and at that time, the appellant had stated that he had no fund with him to get the sale deed executed and therefore he does not want to proceed with the sale agreement. Even though the appellant denied the Panchayat, he has not shown that he was having the funds from the date of agreement till the filing of the suit, even otherwise, he has also not shown the source of fund. Further, the respondent has stated that the appellant and P.W.2 approached third party and to sell the property mentioned in the sale agreement after getting the sale price, for which, they are searching the purchaser, for a



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higher amount . Since they could not get the purchaser for a higher amount than the sale price fixed in the sale agreement, he could not pay and perform his part of contract with the respondent. As specifically stated by the respondent, the appellant has no money. Even in the Panchayat also, he has expressed unwillingness. It is the duty of the appellant to prove that he was having sufficient fund or he was having adequate source to mobilise the fund and execute the sale deed, whereas, in this case, a reading of the entire materials clearly shows that the appellant has not proved that he was always ready and willing to perform his part of contract.

11. There is a distinction between readiness and willingness to perform the contract and both the ingredients are necessary for the relief of specific performance. While readiness means capacity of the plaintiff to perform the part of contract which would include his financial position, willingness with regard to the conduct of the plaintiff. The same view was taken by the Honourable Supreme Court in the decision of ***Kalavathy .vs. Rakesh Kumar***. Therefore, the appellant has not established that within the



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time stipulated, he was having the sufficient fund to pay the balance sale consideration and get the sale deed executed and even otherwise, as far as the willingness is concerned, though he has expressly admitted that on 20.03.2007, when the respondent expressed her un-willingness to sell the property and demanded more money, the appellant should have approached the Court immediately or within a reasonable time to show his genuineness to purchase the property. So, as already stated, notice was sent only after one year and the suit was filed thereafter and even, the appellant has not shown that he has sufficient funds or able to mobilise the fund to purchase the property and he had filed the suit for specific performance immediately. Therefore, for 1 ½ years, the appellant has not taken any steps either to show that he was having the sufficient funds or able to mobilize the fund or he was ready and willing to perform his part of contract. Therefore the appellant has not proved his readiness and willingness.

12.It is settled proposition of law that for the relief of specific performance, the plaintiff has to prove that all along till the final decision



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of the suit, he was ready and willing to perform his part of contract. It is the bounden duty of the plaintiff to prove his readiness and willingness or by adducing cogent and ample evidence. This crucial fact has to be determined by considering the circumstances including the availability of funds and a mere statement or averment in plaint about willingness and readiness would not suffice. In this case, the plaintiff has failed to discharge his duty to prove his readiness as well as the willingness to perform his part of contract by adducing cogent evidence. Acceptable evidence has not been placed on record to prove his readiness and willingness. Even the document i.e, the Bank Statement clearly shows that at the relevant point of time, there is only Rs.2 lakhs but the balance sale consideration is Rs.10 lakhs. Even otherwise, he has not stated that under what sources he is going to pay the remaining sale consideration. Therefore, as already stated, the plaintiff has to not only aver in the plaint regarding the readiness and willingness but also he has to prove the same with cogent and ample evidence. Therefore the main ground taken by the appellant is that the respondent has not measured the property and ear-marked and therefore, he



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could not get the sale deed executed. As already stated, there is no condition precedent in the sale agreement that the respondent has to measure and ear-mark the property. Therefore in the absence of the same, the appellant cannot state that that is the reason why he could not perform his part of contract within the stipulated time. Though the appellant/plaintiff cannot take advantage of the loop-holes left by the respondent/defendant, he has to prove his case on his own strength. In other words, it can be stated that the plaintiff has to first of all aver his readiness and willingness and then prove the same by showing that he was having sufficient funds for readiness to execute the sale deed and the steps taken for executing the contract to prove his willingness by producing material evidence before the Court. Therefore, the appellant is not entitled to get the discretionary relief of specific performance. In order to get the discretionary relief, the Honourable Supreme Court in the case referred to supra, has held that the Court has to look into the conduct of the parties and the terms of the sale agreement. Whether the plaintiff has shown his genuineness towards his conduct that he was ready and willing to perform his part of contract,



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whereas, in this case, as already stated, by his conduct, the appellant has not proved his readiness and willingness. Therefore, this Court finds that the appellant has failed to prove his readiness and willingness to perform his part of contract from the date of execution of sale agreement till the date of filing of the suit. Though the appellant has deposited the money after arguments and before the pronouncement of judgement, it is settled proposition that from the date of agreement till the date of judgement, he has to prove that he was always ready and willing to perform his part of contract. The evidence clearly shows that the appellant was not ready with the fund and he has possibly entered into an agreement and had negotiated with other person for profitable price and he could get the money from them and he could pay the respondent the balance sale consideration and get the sale deed executed. Unfortunately, he could not succeed in his attempt. Therefore this Court finds that the appellant has not proved his readiness and willingness and he is not entitled to get the discretionary relief of specific performance.



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13.As far as the order of refund of advance money, since the respondent has not filed any appeal or cross-appeal challenging the order of refund of advance amount, this Court does not say anything about the refund of the advance amount. Accordingly, this Court, on a perusal of the entire records, come to the conclusion that the appellant has not proved his readiness and willingness. Therefore he is not entitled to get the relief of specific performance and hence this Court finds no reason to interfere with the judgment and decree passed by the trial Court.

14.Accordingly, the first appeal stands dismissed and the judgment and decree of the Court below are hereby confirmed. No costs. Consequently, connected Miscellaneous Petition is dismissed.

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Internet: Yes/No

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To

1. The Additional District Judge,
Fast Track Court No.II,
Pattukkottai.
2. The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



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JUDGMENT MADE IN

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