



A.S.NO.272 OF 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON : 16 / 04 / 2024

JUDGMENT DELIVERED ON: 13 / 06 / 2024

CORAM:

THE HONOURABLE MR. JUSTICE R.SUBRAMANIAN

AND

THE HONOURABLE MR. JUSTICE R.SAKTHIVEL

A.S.NO.272 OF 2017

AND CMP NO.10461 OF 2017

1.A.L.Deivanathan

2.K.Dhanapal

... Appellants /
Plaintiffs 1 and 2

Vs.

1.R.Saravanan

2.S.Narashiman

3.S.Mathivanan

... Respondents
Defendants 1 to 3

PRAYER: First Appeal filed under Section 96 read with Order XLI Rule 1 of Code of Civil Procedure, 1908, praying to set aside the judgment and decree dated 18.01.2017 passed in O.S.No.190 of 2011 by the learned III Additional District Judge, Salem.

For Appellants /

Plaintiffs 1 and 2 : Mr.C.P.Sivamohan

For Respondents 1 to 3 : No appearance

Defendants 1 to 3



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J U D G M E N T

WEB CO **R.SAKTHIVEL, J.**

The appellants herein are the plaintiffs in *O.S.No.190 of 2011* on the file of 'III Additional District Judge, Salem' (henceforth 'Trial Court' for the sake of brevity).

2.For the sake of convenience, henceforth, the parties will be referred to as per their array in the suit *i.e.*, the appellants herein and the respondents herein will be referred to as plaintiffs and defendants respectively.

3.Felling aggrieved with the judgment and decree dated *January 18, 2017*, passed by the Trial Court in *O.S.No.190 of 2011*, the plaintiffs have preferred this Appeal under Section 96 read with Order XLI Rule 1 of 'Code of Civil Procedure, 1908' (henceforth 'CPC'), praying to set aside the aforementioned judgment and decree.



Plaintiffs' case

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4.The case of the plaintiffs is that, the 1st defendant is the father of the 2nd and 3rd defendants. Defendants acquired the Suit Property measuring an extent of 46 Cents under a registered Partition Deed dated *June 13, 1985*.

4.1.On *April 24, 2008*, the defendants entered into an agreement of sale with the plaintiffs to sell the Suit Property. As per the agreement, the sale price was fixed at Rs.230/- per Sq.ft., which totally comes to the tune of Rs.46,12,880/- (Rupees Forty Six Lakh Twelve Thousand Eight Hundred and Eighty only), and the sale shall be completed on or before *September 30, 2008*. While executing the sale agreement on *April 24, 2008*, the plaintiffs paid a sum of Rs.2,00,000/- (Rupees Two Lakh only) as advance and subsequently on *May 28, 2008*, another sum of Rs.13,00,000/- (Rupees Thirteen Lakh only) was paid as advance. Subsequently, on *October 7, 2008*, a sum of Rs.1,00,000/- (Rupees One Lakh only) was paid. Thus, in total, a sum of Rs.16,00,000/- (Rupees



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Sixteen Lakh Only) had been paid to the defendants by the plaintiffs

towards purchase of the Suit Property. The defendants duly acknowledged

the receipt of the said total sum in the presence of one Thiru.V.Pal

Arumugam and Thiru.M.Mohan. Further, the defendants had received the

sale consideration even after the deadline for performance of the contract

i.e., September 30, 2008, which reflects unequivocally that time is not the

essence of the contract.

4.2.After receipt of the huge amount as advance, the defendants handed over possession of the property to the plaintiffs for its development. The plaintiffs spent nearly Rs.10,00,000/- (Rupees Ten Lakh only) towards development of the Suit Property. The plaintiffs also purchased right on a pathway as additional approach road to the Suit Property from third party by paying consideration. All these things were done with the knowledge of the defendants. Major part of the sale consideration has been paid to the vendors and possession has been delivered in part performance.



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4.3.The plaintiffs are always ready and willing to perform

their part of the agreement. The Sale Agreement dated *April 24, 2008*

requires that the vendors should satisfy the purchaser on title of vendors

and clear encumbrances, if any. It is a condition precedent for payment of

the balance sale consideration to the vendors. Contrary to the same, when

the plaintiffs asked for production of the original Partition Deed and

execution of the sale deed after receiving the balance sale consideration,

the defendants did not come forward and began evading execution of the

sale deed under one pretext or other.

4.4.Therefore, the plaintiffs issued a legal notice to the

defendants on *February 14, 2010* calling upon them to execute sale deed

by enforcing the agreement of sale dated *April 24, 2008* after showing the

original Partition Deed dated *June 13, 1985*. On *March 9, 2010*, the

defendants gave a reply stating that no such sale agreement was entered

into with the plaintiffs, and they denied the very receipt of Rs.16,00,000/-

as advance. The defendants colluded together and played fraud on the



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plaintiffs. The plaintiffs came to know that the defendants were negotiating with a real estate baron to sell the Suit Property at a higher rate when the written contract with the plaintiffs is very much alive. When the plaintiffs questioned the same, the defendants threatened them with dire consequences.

4.5. Therefore, the plaintiffs filed the suit in *O.S.No.190 of 2011* for a direction to the defendants to execute sale deed in favour of the plaintiffs with respect to the Suit Property after receiving the balance sale consideration. The plaintiffs also made an alternate prayer for return of advance amount.

Defendants' case

5. The 1st defendant filed a written statement refuting the allegations levelled against him by the plaintiffs, which the 2nd and 3rd defendants adopted. The defendants admitted the execution of sale agreement that was entered into on *April 24, 2008*. They further admitted the receipt of payment of Rs.2,00,000/- on *April 24, 2008* and



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Rs.13,00,000/- on *May 28, 2008* and stated that the same was endorsed on

the back of the suit agreement and signed by all the parties. However, the

defendants refuted the receipt of payment of Rs.1,00,000/- on *October 7,*

2008. It is further denied that the defendants received sale consideration

even after *September 30, 2008* and that time is not the essence of the

contract. It was agreed between the parties that time is the essence of the

contract.

5.1.The first defendant further stated that he never handed over physical possession of the Suit Property to the plaintiffs for development and the defendants alone are still in possession of the Suit Property. In the sale agreement, it has been not mentioned that possession was handed over. The first defendant denied that the plaintiffs spent Rs.10,00,000/- for development of the property. Further, the suit property is situated near main road and there is direct access from the main road to the suit property and the plaintiffs did not purchase any right of pathway as additional approach to the suit property from third party. It is also denied



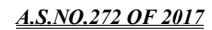
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that possession was delivered in part performance. Further, there cannot be

any valid delivery of possession except when the agreement is a registered one.

5.2.The first defendant further stated that at the time of execution of the sale agreement, the original Partition Deed dated *June 13, 1985* was shown to the plaintiffs and they had perused and also taken a photo copy of the same. The plaintiffs gave a legal notice on *February 14, 2010* and a reply notice was sent on *March 9, 2010*. However, the defendant finds that the said reply notice was not drafted by the advocate as per the instruction given by the third defendant.

5.3.Further, the plaintiffs never demanded execution of the sale deed any time within the time period fixed in the sale agreement. In fact, when the first defendant approached the plaintiffs on the eve of end of the time fixed in the sale agreement asking them to pay the balance sale consideration and take a sale deed, the plaintiffs expressed their inability to pay the balance sale consideration and also informed the defendants that



committed breach of the agreement.

O.S.No.868 of 2010. The plaintiffs are not entitled also to the relief of



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5.5.The defendants wanted to sell the suit property to discharge their liabilities and for purchasing some other property. Since the plaintiffs failed to perform their part of the agreement, the defendants are forced to pay high interest for their liabilities and are unable to purchase any other property. The defendants are entitled to adjust the loss from and out of the advance amount paid by the plaintiffs. Further, the value of the properties has shot up over the years and hence, if the defendants sell the Suit property now for the agreement price, then they would be put to heavy loss. Accordingly, the defendants prayed to dismiss the Suit.

6.Upon considering the plaint and other materials, the Trial Court framed the following issues:

- “1.Whether the alleged sale agreement dated 24.04.2008 is true, valid and enforceable?*
- 2.Whether the time is essence of the contract?*
- 3.Whether the suit is barred under Or.2 R.2 C.P.C.?*
- 4.To what other relief?”*



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6.1. Before the Trial Court, on the side of the plaintiffs, the second plaintiff was examined as P.W.1 and the first plaintiff was examined as P.W.2 and Ex-P.1 to Ex-P.11 were marked. Neither any witnesses were examined nor any documents were marked on the side of the defendants.

6.2. The Trial Court, after hearing both sides, on observing that the execution of Ex-A.1 and the receipt of sum of Rs.15,00,000/- have been admitted; that the receipt of a further sum of Rs.1,00,000/- on *October 7, 2008*, has been refuted; that the 1st and 2nd defendants have not signed in the receipt for the payment of further sum of Rs.1,00,000/- dated *October 7, 2008*; and that the plaintiffs failed to prove the said receipt dated *October 7, 2008*, concluded that a sum of Rs.15,00,000/- alone was paid as advance under Ex.A.1 – Sale Agreement.

6.3. Further, since the plaintiffs claim that they have been put in possession, Ex-A.1 ought to have been registered and stamped duly. Since Ex.A-1 – Sale Agreement is not registered duly as per Registration



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Act, 1908 and not duly stamped as per the Indian Stamp Act, 1899, it is a

legally invalid and unenforceable document. Accordingly, the Trial Court answered Issue No.1 in favour of the defendants.

6.4.Further, the Trial Court held that time is essence of the agreement and accordingly, answered Issue No.2 in favour of the defendants and against the plaintiffs.

6.5.Further held that, the cause of action urged for the suit was available to the plaintiffs at the time of filing the earlier suit in *O.S.No.868 of 2010* on the file of 1st Additional District Munsif, Salem itself. Accordingly, held that the suit is barred under Order II Rule 2 (3) of CPC and thus, answered Issue No.3 in favour of the defendants.

6.6.Furthermore, in view of the decision for Issue Nos.1, 2 and 3, held that, the plaintiffs are not entitled to any other reliefs. Accordingly, Issue No.4 was answered in favour of the defendants.

6.7.In light of these findings, the Trial Court dismissed the Suit.



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7. Feeling aggrieved with the judgment and decree, the plaintiffs have preferred this appeal.

Argument

8. This Court has heard Mr.C.P.Sivamohan, learned counsel for the appellants/plaintiffs. Though respondents were duly served, none appeared on behalf of them.

9. Learned Counsel for the appellants / plaintiffs submitted that, the Trial Court failed to consider the fact that, as there was a threat of alienation, the plaintiffs filed a suit for permanent injunction in *O.S.No.868 of 2010* on the file of 1st Additional District Munsif, Salem along with a petition under Order II Rule 2 (3) seeking permission to file a separate suit under the Specific Relief Act on the same cause of action in *I.A.No.1262 of 2010* in *O.S.No.868 of 2010*. While the said petition was in enquiry stage, the said suit was not pressed and the present suit was filed seeking the relief of specific performance and the alternate relief of return



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of advance money, on different cause of action, which is not barred under

Order II Rule 2 of CPC. Further submitted that, the Trial Court failed to frame issues regarding the payment of advance money by the plaintiffs and that the Trial Court failed to note the conduct of the defendants in denying the execution of agreement of sale in their reply notice. The Trial Court did not consider the evidence properly and failed to apply the law in the right perspective. Accordingly, he prayed to allow the appeal.

Points for consideration

10. Heard the learned counsel for the appellants. Perused the records. The points that arise for consideration in this appeal are as follows.

- i) Whether Ex-A.1 – Sale Agreement is a valid, admissible, and enforceable agreement?
- ii) Whether the plaintiffs have proved the receipt dated *October 7, 2008* for the payment of sum of Rs.1,00,000/-?



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the defendants. Defendants deny the alleged handing over of possession of the Suit Property.

12.This Court deems fit to note here that, for the purpose of admissibility of a document, it shall be the recital therein which shall hold the field and be decisive. However, the same shall not be conclusive. In Ex-A.1, there is no recital about handing over of physical possession to the plaintiffs. Moreover, there is nothing on record to show that possession has been handed over to the plaintiffs. Though the plaintiffs have pleaded that physical possession has been handed over to them, no relief / prayer has been sought to protect the alleged physical possession. Bare reading of Ex-A.1 would show that possession remains with the defendants.

13.Stamp Duty

13.1.Ex-A.1 – Sale Agreement has been written on a Twenty Rupees Non-Judicial Stamp Paper. It is apposite to mention here that, ‘the



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Registration and the Other Related Laws Amendment Act (Act No.48 of

2001)' (henceforth 'the said amendment Act') inserted Serial No.23-A in

Schedule 1 of the Indian Stamp Act, 1899. Notably, Tamil Nadu State

Legislature has not brought in any amendment similar to that of Serial

No.23-A. Hence, as far as Tamil Nadu is concerned, sale agreement is

covered under Article 5 (j) of Schedule 1 of the Stamp Act, which

prescribes Twenty Rupees as proper stamp duty for sale agreements.

Coming to the case on hand, this Court is of the view that, in the absence

of any recital about handing over of possession and in the absence of any

claim under Section 53-A of Transfer of Property Act, 1882 as stated *supra*

in paragraph no.12, Twenty Rupees is the proper Stamp Duty for Ex-A.1 –

Sale Agreement. Since Ex-A.1 is written on a Twenty Rupees Non-Judicial

Stamp Paper, it is duly stamped.

14.Registration

14.1.The said amendment Act also inserted Section 17 (1-A)

in the Registration Act, 1908; and further, amended Section 49 of the



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Registration Act, 1908 and Section 53-A of the Transfer of Property Act,

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1882. In view of these amendments, if a person desires to protect his possession under Section 53-A of the Transfer of Property Act, the agreement must be registered as per Section 17 (1-A) of the Registration Act. However, as stated *supra* in paragraph no.12, Ex-A.1 has no recital about the defendants handing over physical possession of the Suit Property. Hence, Section 17 (1-A) of the Registration Act and Section 53-A of the Transfer of Property Act, 1882 would not govern this case. In other words, they do not come into picture in view of the reasons stated *supra* in paragraph no.12.

14.2.Further, the Tamil Nadu State Legislature brought in an amendment to substitute Section 17 (g) of the Registration Act with effect from *December 1, 2012*, as a result of which, agreements relating to sale of immovable property of the value of Rs.100 and upwards need to be registered compulsorily. However, Section 49 of the Registration Act has



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not been amended to align with the changes brought in by the newly

substituted Section 17 (g). Coming to the case on hand, the Suit Agreement

was executed on *April 24, 2008*. The Suit was filed on *October 10, 2011*.

Both are well before the newly substituted Section 17 (g) came into force.

Moreover, even after the newly substituted Section 17 (g) came into force,

as per the proviso under Section 49 of the Registration Act, an unregistered

document affecting the immovable property and required by the

Registration Act to be registered, may be received as evidence of a contract

in a suit for specific performance under Chapter II of Specific Relief Act,

1963 [*vide R.Hemalatha Vs. Kasthuri* reported in **2023 (10) SCC 725**]. In

short, there is no legal bar to enforce specific performance of contract

based on unregistered sale agreement.

14.3. Hence, in view of the discussion in paragraph nos.14.1

and 14.2 herein, this Court is of the view that Ex-A.1 need not be

registered for the purpose of the present suit filed for the relief of specific

performance.



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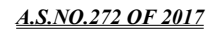
15.To sum up, in view of the reasons stated *supra* in

paragraph no. 13 and 14, Ex-A.1 is duly stamped as per Stamp Act and does not require registration for the purpose of this Suit filed for the relief of specific performance. Hence, Ex-A.1 is a legally valid, enforceable, and admissible document subject to other provisions of the Specific Relief Act, 1963. Point No.(i) is answered accordingly in favour of the plaintiffs.

Point No.(ii) – *Whether the plaintiffs have proved the receipt dated*

October 7, 2008 for the payment of sum of Rs.1,00,000/-?

16.The plaintiffs have pleaded that, while executing the sale agreement on *April 24, 2008*, the plaintiffs paid a sum of Rs.2,00,000/- (Rupees Two Lakhs only) as advance and subsequently on *May 28, 2008*, another sum of Rs.13,00,000/- (Rupees Thirteen Lakhs only) was paid as advance. The defendants have admitted the receipt of payment of Rs.2,00,000/- on *April 24, 2008* and Rs.13,00,000/- on *May 28, 2008* in their written statement. The only point of contradiction between the plaintiffs and the defendants is the alleged further payment of a sum of



October 7, 2008 therefor. Defendants have specifically denied the receipt

Point No.(iii) – *Whether time is essence of Ex-A.1 – Sale Agreement dated April 24, 2008?*



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17.In Ex-A.1 – Sale Agreement, date fixed for performance has been specifically mentioned as on or before *September 30, 2008*. The consequences of non-performance within the specified time period have also been stipulated therein. As decided in Point No.(ii), the plaintiffs have not proved the receipt dated *October 7, 2008* for the payment of sum of Rs.1,00,000/- and hence, the contention of the plaintiffs that the act of the defendants receiving sale consideration even after the time period of performance *i.e., September 30, 2008*, reflects unequivocally that time is not the essence of the contract, does not hold water. Even in the said receipt, there is nothing about extension of time. Hence, this Court is of the view that time is essence of Ex-A.1 – Sale Agreement dated *April 24, 2008*. It is apposite to cite here the judgment of the Hon'ble Supreme Court ***Saradamani Kandappan Vs. S.Rajalakshmi and others*** reported in **(2011) 12 SCC 18**. The relevant paragraph nos are 42 and 43. They are extracted hereunder:-



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“....

42. Therefore there is an urgent need to revisit the principle that time is not of the essence in contracts relating to immovable properties and also explain the current position of law with regard to contracts relating to immovable property made after 1975, in view of the changed circumstances arising from inflation and steep increase in prices. We do not propose to undertake that exercise in this case, nor referring the matter to larger bench as we have held on facts in this case that time is the essence of the contract, even with reference to the principles in Chand Rani and other cases. Be that as it may.

43. Till the issue is considered in an appropriate case, we can only reiterate what has been suggested in [K.S. Vidyanadam](#):

(i) The Courts, while exercising discretion in suits for specific performance, should bear in mind that when the parties prescribe a time/period, for taking certain steps or for completion of the transaction, that must have some significance and therefore time/period prescribed cannot be ignored.

(ii) Courts will apply greater scrutiny and strictness when considering whether the purchaser was “ready and willing” to perform his part of the contract.



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(iii) Every suit for specific performance need not be decreed merely because it is filed within the period of limitation by ignoring the time-limits stipulated in the agreement. Courts will also “frown” upon suits which are not filed immediately after the breach/refusal. The fact that limitation is three years does not mean a purchaser can wait for 1 or 2 years to file a suit and obtain specific performance. The three year period is intended to assist purchasers in special cases, as for example, where the major part of the consideration has been paid to the vendor and possession has been delivered in part performance, where equity shifts in favour of the purchaser.

.....”

Hence, point No.(iii) is answered accordingly in favour of the defendants.

Point No.(iv) – *Whether the plaintiffs are entitled to the relief of specific performance of the agreement dated April 24, 2008?*

18.As per Ex-A.1 – Sale Agreement, total sale consideration is Rs.46,12,880/-. As stated *supra*, the plaintiffs paid a sum of Rs.15,00,000/- as advance. The balance sale price is Rs.31,12,880/-



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(Rupees Thirty One Lakh Twelve Thousand Eight Hundred and Eighty

only).

18.1.As per Ex-A.1, date fixed for performance is on or before *September 30, 2008*. As decided in Point No.(iii), time is essence of Ex-A.1 – Sale Agreement. According to the defendants, the plaintiffs were not ready to pay the balance sale consideration of Rs.31,12,880/- and take a sale deed. The plaintiffs filed Ex-A.9 to Ex-A.11, bank certificates issued by the manager of the Swarnapuri Branch of Bank of India, to show their readiness to perform their part of the agreement. This court is of the view that Ex-A.9 to Ex-A.11, which sets out the bank balances of various accounts of the plaintiffs and people/companies connected with the plaintiffs, alone are not sufficient to prove their readiness and willingness to perform their part of the agreement within the stipulated time period.

18.2.Further, the plaintiffs issued Ex-A.3 – Notice dated *February 14, 2010* calling upon the defendants to produce the original



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Partition Deed and measure the boundaries of the property and execute

sale deed after receipt of balance sale consideration. The Partition Deed

dated *June 13, 1985* being a registered one, the plaintiffs need not call

upon the defendants to produce the same. The defendants issued Ex-A.5 -

Reply to Ex-A.3, denying the execution of contract, calling the agreement

a fabricated and forged one. But, in the written statement the defendants

have stated that, Ex-A.5 reply notice was not issued by the advocate as per

their instructions.

18.3.Be that as it may, the plaintiff had not sent any notice within the time fixed for performance mentioned in Ex-A.1 showing his readiness and willingness to perform his part of the agreement. Further, the plaintiff did not examine any independent witness to prove his readiness and willingness to perform the contract. On the other hand, the defendants have specifically pleaded that the 1st defendant approached the plaintiffs on the eve of end of the time fixed for performance mentioned the agreement and the plaintiffs expressed their inability to honour their commitment.



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18.4.Further, the time period as per Ex-A.1, ended on *September 30, 2008*, which is well before the exchange of these notices.

Hence, if really the plaintiffs were ready and willing to perform their part of the contract, they would have filed a suit for specific performance of contract and deposited the balance sale price before the competent court as per the terms of Ex-A.1 - Sale Agreement. To be noted, after the exchange of Ex-A.3 and Ex-A.5 notices, the plaintiffs filed a suit for permanent injunction in *O.S.No.868 of 2010* on the file of 1st Additional District Munsif court Salem. Even in the said suit, the plaintiffs could have deposited the balance amount of Rs.31,12,880/-, which they failed to do. Further, the plaintiffs not pressed the said suit and filed the present suit. In the present suit also, the plaintiffs have not deposited the balance sale price in the Court. The conduct of the plaintiffs would show that the plaintiffs all along were not ready and willing to perform their part of the agreement within the time period fixed in Ex-A.1.



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18.5.The relief of specific performance is an equitable relief.

Considering the facts and circumstances of the case, and discussions so far and to be alluded to *infra*, this Court is of the view that the plaintiff is not entitled to the equitable relief of specific performance. Hence, Point No.(iv) is answered accordingly in favour of the defendants and against the plaintiffs.

Point No.(v) – Whether the suit is barred by limitation?

19.The date of execution of Ex-A.1 – Sale Agreement is *April 24, 2008*. Date fixed for performance is on or before *September 30, 2008*. This Court deems fit to extract Article 54 of the Limitation Act, 1963 hereunder.

Art. 54.	For specific performance of a contract.	Three years	The date fixed for the performance, or if no such date is fixed, when the plaintiff has notice that performance is refused.
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19.1.Hence, the plaintiffs ought to have filed this suit on or before *October 1, 2011*. However, the suit has been filed on *October 10,*



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2011. Hence, this Suit for specific performance of the agreement dated

April 24, 2008, is barred by limitation. Point No.(v) is answered

accordingly in favour of the defendants and against the plaintiffs.

Point No.(vi) - *Whether the suit is barred under Order II Rule 2 of CPC?*

20.As per Ex-A.1–Sale Agreement, the sale has to be completed on or before *September 30, 2008*. The cause of action for filing suit for specific performance arose on *1st October, 2008*. The plaintiffs instead of filing a suit for specific performance, filed a suit for permanent injunction on *August 27, 2010* in *O.S.No.868 of 2010* on the file of 1st Additional District Munsif Court Salem. Paragraph No. 10 of the plaint in the earlier suit and paragraph no.12 of the plaint in the present suit, both dealing with the causes of action, are identical and reads thus.

“The cause of action for the suit arose on 24/04/2008 when the defendant entered a sale agreement with the plaintiff and on 14/02/2010 the plaintiff issued legal notice to the defendant and on 15/02/2010 when paper publication was given



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and on 16/02/2010 when protest petition was filed and on 09/03/2010 when the defendants issued reply. All of them are arising within the jurisdiction of this Hon'ble Court.”

20.1. Notably, the plaintiff marked Ex-A.6 – Copy of the plaint in *O.S.No.868 of 2010* and Ex-A.8 – Copy of the Judgement and Decree passed in *O.S.No.868 of 2010*. Perusal of Ex-A.8 reveals that the said suit was dismissed as not pressed on *October 19, 2011*. The present suit was filed on *October 10, 2011*. On the date of not pressing the earlier suit, the present plaint was alive. The real test to check whether a suit is hit by Order II Rule 2 is whether the causes of action urged for the present suit seeking specific performance were available at the time of filing the earlier suit. As stated *supra*, in the present suit seeking specific performance and the earlier suit seeking permanent injunction, the causes of action urged are one and the same, which means they were available to the plaintiffs at the time of filing the earlier suit itself. Leave under Order II Rule 2 was not granted. Further, while not pressing the earlier suit in *O.S.No.868 of 2010*,



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permission was not obtained under Order XXIII Rule 1 (3) of CPC for

filing this present suit. Hence, the present suit for specific performance is

hit by Order II Rule 2 of CPC. Point No.(vi) is answered accordingly, in

favour of the defendants and against the plaintiffs.

Point No.(vii) – *Whether the plaintiffs are entitled to the alternate relief of return of advance money with interest?*

21.As decided in Point No.(ii), the plaintiffs have not proved the receipt dated *October 7, 2008* for the payment of sum of Rs.1,00,000/- and hence, this Court is of the view that they paid a sum of Rs.15,00,000/- (Rupees Fifteen Lakh only) alone to the defendants as advance. Perusal of pleadings would show that the defendants intended to sell the property with a view to discharge their liabilities and to purchase some other property. However, the plaintiffs failed to perform their part of the agreement. According to the defendants, due to the non-performance of contract, they were forced to pay high interests for their liabilities and not



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able to purchase any other property. However, the defendants have not produced any document or evidence in this regard.

21.1.From the plaint, it could only be ‘inferred’ that the plaintiffs are seeking return of advance money of a sum of Rs.16,00,000/- with interest. It is true that the plaintiffs ought to have also specifically valued the alternate relief under Section 22 of ‘the Tamil Nadu Court Fees and Suits Valuation Act, 1955’ (henceforth ‘the Court Fees Act’) for the purpose of court fees and jurisdiction. However, the plaintiffs have failed to do so. Be that as it may, the plaintiffs have valued the suit at Rs.46,12,880/- and accordingly, paid the court fees under Section 42 of the Court Fees Act. In other words, they have paid the highest court fees chargeable upon them. At this juncture, this Court deems fit to extract subsection 3 of Section 6 of the Court Fees Act hereunder.

“(3)Where a suit embraces two or more distinct and different causes of action and separate reliefs are sought based on them, either alternatively or cumulatively, the



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plaint shall be chargeable with the aggregate amount of the fees with which complaints would be chargeable under this Act if separate suits were instituted in respect of the several causes of action :

Provided that, where the causes of action in respect of reliefs claimed alternatively against the same person arise out of the same transaction, the complaint shall be chargeable only with the highest of the fees chargeable on them.”

21.2.Hence, in view of the proviso to sub-section 3 of Section 6 of the Court Fees Act, since the highest court fees chargeable upon the plaintiffs has been paid, separate court fees need not be paid for the alternate relief. Further, there is a statutory charge created under Section 55 (6) (b) of Transfer of Property Act, 1882 for the purchase money properly paid in the event the buyer is unable to get delivery of the property and as per Article 62 of the Limitation Act, 1963, 12 years limitation period has been prescribed to secure the money back [*vide Delhi Development Authority v. Skipper Construction Co. (P) Ltd. and others* reported in



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2000 (1) CTC 507 and *K.Shanmugam v. C. Samiappan* reported in 2013

WEB COPY (6) CTC 28]. Hence, purchase money properly paid or advance can be

claimed within 12 years from when the money sued for becomes due.

Since it is an independent cause of action separate from that for the relief of specific performance, it would not be hit by Order II Rule 2 of CPC.

This Court is of the view that, since the plaintiffs have failed to plead the specified quantum of advance money sought to be refunded and the interest, the plaintiffs are not entitled to pre-suit interest for the advance money. Considering the above facts and circumstances, this Court is of the view that the plaintiffs are entitled to the alternate relief of refund of advance amount of Rs.15,00,000/- along with interest at the rate of 9% per annum from the date of suit till the date of decree and post decree interest at the rate of 6% from the date of decree till the date of realisation.

Conclusion

22.Resultantly, this Appeal Suit is partly allowed in the following terms.



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- i) The plaintiffs are not entitled to the relief of specific performance of the agreement dated *April 24, 2008*; to this extent the Trial Court's decree is confirmed.
- ii) The defendants are directed to pay the plaintiffs a sum of Rs.15,00,000/- (Rupees Fifteen Lakh only) along with interest at the rate of 9% per annum from the date of suit till the date of decree and post decree interest at the rate of 6% per annum from the date of decree till the date of realisation; to this extent the Trial Court's decree is set aside.
- iii) Appellants shall bear their own costs.
- iv) The connected Civil Miscellaneous Petition is closed.

[R.S.M., J.]

[R.S.V., J.]

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Index : Yes
Internet : Yes
Neutral Citation : Yes
Speaking Order
TK/KRK

To
The III Additional District Judge
III Additional District Court, Salem.



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R.SUBRAMANIAN, J.

AND

R.SAKTHIVEL, J.

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PRE-DELIVERY JUDGMENT MADE IN

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