



A.S.(MD).No.157 of 2016

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

WEB COPY

Dated: 25.03.2024

CORAM:

THE HON'BLE MR.JUSTICE **P. DHANABAL**

A.S(MD) No.157 of 2016

and

C.M.P(MD) Nos.10161 of 2016 & 2649 of 2022

1. V.Kamatchi

2.S.Rasammal

3.Vembayee

4.V.Rajendran

5.R.Selvaraj

... Appellants/Defendants

(5th Appellant is impleaded vide Court order dated 23.08.2018 made in CMP(MD)No.5413 of 2018 in AS.(MD)No.157 of 2016 by PSNJ & TKJ))

Vs.

1.K.Rajendran

2.C.Devaraj

3.P.Subramani

4.C.Saravanan

... Respondents

(4th respondent is impleaded vide Court order dated 15.11.2022 made in C.M.P.(MD).No.2650 of 2022 in A.S.(MD).No.157 of 2016)

Prayer : This Appeal Suit has been filed under Section 96 of C.P.C., to set aside the judgment and decree made in O.S.No.43 of 2010 on the file of the District Judge, Karur, dated 07.12.2011.



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For Appellants : Mr.Suresh
for Mr.E.K.Kumaresan for A1 to A4

Mr.M.P.Senthil for A5

For R1 to R3 : Mr.S.Meenakshi Sundaram,
Senior Advocate
for Mr.P.Athimoolapandian

For R4 : No Appearance

JUDGMENT

This appeal has been preferred as against the Judgment and decree passed by the District Judge, Karur, in O.S.No.43 of 2010, dated 07.12.2011, wherein, the respondents/plaintiffs herein have filed a suit for specific performance of contract and the suit was decreed in favour of them. Aggrieved against the same, the present appeal has been preferred by the appellants/defendants.

2.During the pendency of this appeal, the respondents/plaintiffs have also filed a petition to produce the additional document in CMP(MD)No.2649 of 2022.

3. For the sake of convenience and brevity, the parties herein after will be referred to as per their status/ranking before the trial Court.



4.The gist of averments made in the plaint are as follows:

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The suit property is the self acquired property of one Rasagounder through two sale deeds dated 07.04.1952 and 20.03.1956. The said Rasagounder died interstate leaving behind his only son by name, Venkatachalam and the said Venkatachalam also died leaving behind the defendants as legal heirs to succeed his estate. The defendants offered to sell the suit property to the plaintiffs. Thereby, the plaintiffs and the defendants entered into a sale agreement on 04.07.2007 in respect of the suit property. The sale price was fixed as Rs.3950/- per cent and on the date of agreement itself, the defendants have jointly received a sum of Rs.7 lakhs towards advance for the sale consideration. The time was fixed as 3 months for completion of sale. The defendants assured the plaintiffs that before executing the sale deed, they will measure the property and convey the same. The plaintiffs are always ready and willing to perform their part of the contract by paying balance sale consideration. The plaintiffs so many occasions approached the defendants in person and expressed their readiness and willingness to perform their part of contract. But, the defendants failed to perform their part of contract. Therefore, the plaintiffs got doubt over the exclusive



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title of the document and demanded the legal heir certificate of the deceased Rasagounder and his son Venkatachalam. But, the defendants have not produced any legal heir certificate. Therefore, on 04.10.2008, the plaintiffs made enquiry in the village and came to know that the said Rasagounder have a daughter namely, Chinnammal, who is the sister of Venkatachalam. The said Chinnammal is also having $\frac{1}{2}$ share over the suit property. Thereafter, the plaintiffs requested the defendants to execute a sale deed in favour of the plaintiffs and insisted them that the said Chinnammal also should be a co-executor of the sale deed. The defendants also orally conceded and assured the plaintiffs that they will get the consent of the said Chinnammal and she will also joint with the defendants for the execution of sale deed. On 06.10.2008, the plaintiffs were presented at Sub Registrar Office. But, the defendants have not come and failed to perform their part of contract. The defendants attempted to alienate the suit property to the third parties and if any document is created, the same is not binding the plaintiffs' right over the property. On 10.10.2008, the plaintiffs in person approached the defendants to perform their part of contract. But, the defendants along with Chinnammal openly proclaimed that they were not ready and



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willing to perform their part of contract. Hence, the plaintiffs issued a legal notice dated 10.10.2008 and the same was served upon the defendants. Subsequently, the said Chinnammal filed a suit against the defendants in O.S.No.612 of 2008 before the District Munsif Court, Karur for the relief of permanent injunction restraining the defendants from alienating the suit property. The extent of the suit property is acres 9.95 $\frac{3}{4}$ cents in S.Nos.3 & 4 of Kakkavadi Village, Karur District. The defendants have entered into an agreement with the plaintiffs northern side half share i.e., 5 acres (out of acres 9.95 $\frac{3}{4}$ cents). Therefore, the plaintiffs have filed a suit for specific performance.

5. The averments of the written statement filed by the third defendant are as follows:

The allegations stated in the plaint are all false and the suit is not maintainable either in law or on facts. The plaintiffs have made alterations in the suit agreement so as to get unlawful gain. The agreement dated 04.07.2007 is true and the defendants are the absolute owners of the suit property. They received only for a sum of Rs.6 lakhs towards earnest money. Subsequently, the plaintiffs have manipulated



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the agreement and inserted the typing lines in Page No.3 by altering the amount from Rs.6 lakhs to Rs.7 lakhs and thereby, made fabrication in the suit agreement. Only after the receipt of the summon, they entered into appearance and inspected the documents and came to know about the aforesaid alterations. The time has been fixed as 3 months and the time is essence of contract and this was the sole intention of the parties in the agreement. Since, the defendants have need of money at the relevant point of time, they agreed to execute a sale if the balance amount is paid within a specific period of 3 months. In order to express the intention, a clause has been provided under the agreement, that if the balance amount is not paid within a period of 3 months, the advance amount will be forfeited. The defendants have approached the plaintiffs within the stipulated period of 3 months on several occasions for payment of sale consideration and expressed their readiness and willingness to execute the sale deed in favour of the plaintiffs. But, they postponed the same by saying that they were in the process of arranging funds. As this being the fact, the alleged readiness and willingness pleaded by the plaintiffs is denied as false and incorrect. The plaintiffs never ready and willing to pay the balance sale consideration within the stipulated time. It is falsely



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stated that the Chinnammal having $\frac{1}{2}$ share over the suit property. It is also false to state that the plaintiffs insisted the Chinnammal should also be a co-executor of a sale deed. In the mean while, the plaintiffs have induced the said Chinnammal and dictated her to file a suit. Accordingly, the suit has been filed by her for permanent injunction. The plaintiffs are not entitled to any relief as prayed for by them. The suit is filed by the plaintiffs only to get unlawful gain from the defendants. Hence, the suit is liable to be dismissed.

6. Based on the above said pleadings, the trial Court has framed the following issues:-

1. Whether the suit filed by the plaintiffs is maintainable in view of the joint possession of the suit property by one Chinnammal, who is the co-sharer and has not entered into any sale agreement with the plaintiffs?

2. Whether the plaintiffs are entitled to the relief of specific performance?

3. To what relief the plaintiffs are entitled to?



7. Recasted Issues:-

1. Whether the plaintiffs were all along ready and willing to complete terms of sale agreement entered between the plaintiff and the defendant on 04.07.2007?

2. Whether the plaintiff paid Rs.7 lakh as advance or Rs.6 lakh alone as advance as claimed by the defendants?

3. Whether time was fixed as essence of the agreement?

4. Whether the plaintiffs are entitled to the relief of specific performance as prayed for?

5. To what relief the plaintiffs are entitled to?

8. Before the trial Court on the side of the plaintiffs P.W.1 & P.W.2 were examined and Exs.A1 to A7 were marked. On the side of the defendants D.W.1 was examined and Ex.B1 was marked.

9. After analyzing the evidence adduced on both sides, the trial Court has decreed the suit in favour of the plaintiffs.

10. Aggrieved over the said decree and judgment, the present appeal has been preferred by the defendants on the following grounds:-



i) *The Judgment and Decree of the trial Court is contrary to propositions of law weights and probabilities of the case.*

ii) *The trial Court has failed to consider that the plaintiffs manipulated the suit sale agreement and such manipulation disentitle them from claiming the discretionary relief of specific performance.*

iii) *The trial Court has failed to consider that though P.W.1 deposed about the alteration done by the typist, they failed to examine the typist. Thereby, it is fatal to the case of the respondents/plaintiffs.*

iv) *The trial Court has placed much weightage to the fact of non-issuance of reply on the part of appellants/defendants.*

v) *The trial Court has failed to consider that the plaintiffs have not established the material alteration have been done only with the consent of the appellants/defendants.*

vi) *The trial Court has failed to consider that the time is essence of contract and there is no specific averments in the plaint or in the evidence of the respondents/plaintiffs that the time is not essence of contract.*

vii) *The trial Court failed to consider that the respondents/plaintiffs have not taken any steps to perform their part of the contract within a period of 3 months*



stipulated in the agreement and have not issued any notice expressing their readiness and willingness.

viii) The trial Court has failed to consider that the admission made by P.W.1 that within the stipulated time, the plaintiffs have not ready to get sale deed and there is no explanation by the trial Court in this aspects.

ix) The trial Court has failed to consider that though according to the plaintiffs refusal on behalf of the defendants as early as on 04.10.2008, they have filed a suit only after a lapse of 2 years from the date of refusal. Therefore, the plaintiffs failed to prove their readiness and willingness.

x)The trial Court has failed to consider that though the plaintiffs have pleaded the said Chinnammal got share over the suit property, they have not impleaded the said Chinnammal in the present suit, which is the fatel to the case of the respondents/plaintiffs.

xi)The trail Court has framed the issue in respect of maintainability of the suit in view of the joint possession by Chinnammal who is the co-sharer and had not entered into any sale agreement with the plaintiffs. But, the said issues were recasted and removed. There is no opportunity was given to the parties in respect of issue.



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- Therefore, the judgment and decree of the trial Court is liable to be set aside by allowing this appeal.

11. The learned counsel appearing for the appellants would contend that the plaintiffs and the defendants have entered into an agreement to sell the property on 04.07.2007. The sale amount was fixed as Rs.3,950/- per cent. On the date of sale agreement itself, they received a sum of Rs.6 lakhs. But, in the agreement, they manipulated the said amount as Rs.7 lakhs and there was no initial in the said erased portion of the agreement. The said alteration has not been made with the consent of the appellants/defendants. Therefore, there is a material alteration in the agreement. The agreement was only half share of the property i.e., northern side 5 acres (out of 9.95 acres $\frac{3}{4}$ cents). The Chinnammal is not entitled to any share over the properties and the respondents herein alone induced the said Chinnammal to file a suit for the purpose of purchasing a property for very low rate against the agreed rate. The plaintiffs have not ready and willing to purchase the property within the stipulated time. Therefore, they are not entitled to the relief of specific performance and the earnest money is also forfeited. Therefore, the suit is liable to be



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dismissed. But, the trial Court decreed the suit in favour of the plaintiffs.

Before the trial Court, the defendants have categorically pleaded and they adduced evidence in respect of the material alteration and the trial Court has also accepted the same as alteration but failed to take as material alteration since the amount is only a meagre amount and the aforesaid finding is erroneous.

11.1. According to the appellants/defendants, the time is essence of contract that's why the specific time of 3 months was fixed and there is a clause for forfeit the advance amount. Therefore, the time is essence of contract. When the appellants/defendants approached the respondents/plaintiffs within the time of 3 months for execution of sale deed and payment of money, the respondents/plaintiffs evaded from payment of money and for getting sale deed in their favour. The respondents/plaintiffs only issued notice on 10.10.2008, i.e., after a lapse of 1 year time. Therefore, they are not entitled to specific performance of contract since they have not ready and willing to perform their part of contract. In order to prove their readiness and willingness, they have not examined any witnesses and not produced any documents. Though, the



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respondents/plaintiffs have taken plea that the Chinnammal is also has half share over the suit property, they have not impleaded her as a party to the suit. The respondents/plaintiffs have not approached this Court with clean hands and they suppressed the material alteration. However, the trial Court has not considered the above said aspects and simply decreed the suit in favour of the respondents/plaintiffs.

11.2. The learned counsel for the appellants has relied upon the following Judgments of the Honourable Supreme Court of India as well as this Court:-

i) Seth Loonkaran Sethiya and Others Vs. Mr.Ivan E.John and Others reported in 1977 1 SCC 379.

ii) Panchaksharam Mudaliar(died) S.K. Vs. T.V.Kanniah Naidu reported in 98-Lw Page 674.

iii) Harbans Singh Vs. Didar Singh reported in 2009 SCC OnLine P&H 10009.

iv) Chamela Ram Vs. Balwant Singh & Others reported in 1999-2-ILR P&H Page 254.

v) K.S.Vidyanadam and Others Vs. Vairavan reported in (1997) 3 SCC.

vi) Saradamani Kaandappan Vs. S.Rajalakshmi and Others reported in (2011) 12 SCC 18.



vii) ***Padmakumari and Others Vs. Dasayyan and Others*** reported in (2015) 8 SCC 695.

viii) ***Sankaran Vs. Kuppa Gounder*** reported in 2001 – 1 – L.W. 137.

ix) ***G.Ramalingam Vs. T.Vijayarangam*** reported in 2007 (1) CTC 243.

x) ***M.Sankar Nadar and Another Vs. Deva Krishnan*** reported in (2017) 1 CTC 561.

xi) ***M.Johnson Vs. E.Pushpavalli*** reported in 2016 - 3 - L.W. 527.

xii) ***Kadupugotla Varalakshmi Vs. Vudagiri Venkata Rao & Others*** reported in 2021 (2) CTC 596.

xiii) ***J.Dhanapal Vs. V.Manimala*** reported in 2023 (1) CTC 298.

xiv) ***Moreskar Yadaorao Mahajan Vs. Vyankatesh Sitaram Bhed(d) THR. LRS., and others*** reported in 2022 Live Law (SC) 802.

12. The learned counsel appearing for the respondents/plaintiffs would contend that the appellants/defendants and the respondents/plaintiffs have entered into an agreement for sale of properties belongs to the appellants/defendants to an extent of 5 acres through agreement dated 04.07.2007. On the date of agreement itself, the



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appellants/defendants have received the sale advance of Rs.7 lakhs. In the agreement, since there was typographical error, it was corrected by the typist himself. At the time of signing by the appellants/defendants itself, the said correction was made and at the time, the appellants/defendants have not raised any objection. After knowing the correction of the error only, they signed in the agreement. Therefore, there is no alteration as alleged by the appellants/defendants. Further, the appellants/defendants suppressed the entitlement of half share of the sister of Venkatachalam, the Chinnammal is having half of the share in the suit property. The respondents/plaintiffs have approached the appellants/defendants to get sale deed along with Chinnammal and appellants/defendants also accepted the same. Thereafter, they refused to execute a sale deed. The respondents/plaintiffs were always ready and willing to perform their part of the contract by paying the balance sale consideration. But, the appellants/defendants only evading from executing the sale deed. The appellants/defendants have received Rs.7 lakhs as advance and in this regard, P.W.1 and P.W.2 have categorically deposed about the said error found in the sale agreement.



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12.1. The appellants/defendants also failed to reply to the notice issued by the respondents/plaintiffs. In the legal notice itself they mentioned about the receipt of Rs.7 lakhs and thereby, the appellants/defendants were not in a position to plead about the alleged mistake of typographical error. The respondents/plaintiffs have examined the attestors of the sale agreement. They categorically deposed about the alleged typographical mistake. Therefore, the mistake is not a material alteration. The trial Court also in this regard correctly came to a fair conclusion that the alteration is not material alteration and also the time is not essence of contract. The respondents/plaintiffs have insisting the defendants to execute a sale deed on several occasions. But, the defendants have failed to do so and the same was categorically pleaded before the trial Court. As per the agreement, the defendants assured that before executing the sale deed, they would measure the properties which sought to be conveyed. But, they have not ready for the measurement of the property and to execute the registered sale deed. The defendants have not measured the property and also they have not submitted the legal heir certificate within the stipulated time of 3 months. Thereafter, they suspected the exclusive title over the property and came to know about



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the Chinnammal is also one of the legal heir of Rasa Gounder. That's why the plaintiffs insisted the defendants to get sale deed from Chinnammal also.

12.2. The plaintiffs had been always ready and willing to get the sale deed. But, the defendants constantly refused to execute the sale deed. The defendants came to know about the existence of Chinnammal on 04.10.2008 and insisted the appellants to get the sale deed along with the said Chinnammal and they informed that the Chinnammal orally released her share. Hence, there is sufficient reasons for the respondents, who are unable to complete the sale within the stipulated period of 3 months and after expiry of that stipulated period till the date of issuance of the legal notice. The plaintiffs are having financial capacity to purchase the property and the same was also admitted by D.W.1 in his cross-examination. The Chinnammal has filed a suit in O.S.No.612 of 2008 for the relief of permanent injunction as against the appellants/defendants restraining the appellants from alienating the suit property and thereafter, it was withdrawn since they settled the matter between themselves. Therefore, the above said act shows the



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collusiveness between the said Chinnammal and the appellants. Since the execution of the sale agreement was admitted by the appellants/defendants, the burden of proof is shifted on them to rebut the evidence of the respondents/plaintiffs that the alteration was made at the time of execution of sale agreement itself. The trial Court after considering all these aspects, decreed the suit in favour of the plaintiffs. Therefore, there is no ground to allow this appeal and the appeal is liable to be dismissed.

12.3. The learned counsel for the respondents has relied upon the following Judgments of the Honourable Supreme Court of India as well as the judgments of this Court:-

i) P.Swaminathan Vs. M.Chidhambaram reported in 2014 6 MLJ 397.

ii) Padmanaban Vs. Chinnakannu and Others reported in 2002 (2) CTC 203.

iii) Deivam Vs. Samy and others reported in 2023 SAR (Civil) 1.

iv) A.Abdul Rashid Khan (Dead) and others Vs. P.A.K.A.Shahul Hamid and Others reported in 2000 (6) SCC 575.

v) Basavaraj Vs. Padmavathi and Another



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reported in 2023 Live Law (SC) 17.

vi) *B.B.Patel and Others Vs. DCF Universal Limited* reported in 2022 (6) SCC 742.

13. Heard the learned counsel appearing for the appellants and the learned counsel appearing for the respondents.

14. Points for determination in this appeal are,

i) *Whether the C.M.P.(MD)No.2649 of 2022 is to be allowed or not?*

ii) *Whether the error crypt in the agreement is the material alteration or not?*

iii) *Whether the time is essence of contract or not?*

iv) *Whether the appellants/defendants received advance amount of Rs.7 lakh?*

v) *Whether the respondents/plaintiffs are always ready and willing to perform his part of contract?*

vi) *Whether the Chinnammal who is the share holder of the suit property is proper and necessary party to the suit?*

vii) *Whether the respondents/plaintiffs are entitled to relief of specific performance of contract?*



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viii) *Whether the appeal has to be allowed or not?*

ix) *To what relief the parties are entitled to?*

15. Point No.1 : *i) Whether the C.M.P.(MD)No.2649 of 2022 is to be allowed or not?*

During the pendency of the appeal, the respondents have filed a petition to receive the additional document in CMP.(MD)No.2649 of 2022 in A.S.No.157 of 2016. According to the petitioners, subsequent to the judgment of the suit, it appears that the respondents 1 to 4 in the Civil Miscellaneous Petition have executed a sale deed dated 16.05.2003 in favour of the fifth respondent with respect to an extent of 5 acres in the southern side of S.Nos.3/4 and 4/1. On the same day, the respondents 1 to 4 have also executed a registered mortgage deed with respect to an extent of 4.95 $\frac{3}{4}$ acres in the northern side of S.Nos.3/4 and 4/1. On the same day, the respondents 1 to 4 herein have also executed a registered general power of attorney empowering one R.Thiyagarajan to further encumber or alienation the extent of 4.95 $\frac{3}{4}$ acres. On the same day, the respondents 1 to 4 herein have also executed a registered general power of attorney empowering one R.Thiagarajan to further encumber or



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alienate the extent of 4.95 $\frac{3}{4}$ acres and subsequently, the mortgage executed in favour of the fifth respondent was discharged on 10.09.2015 by the respondents 1 to 4 and they have sold the northern portion of 4.95 $\frac{3}{4}$ acres in favour of the fifth respondent and another person Balamurugan on the same day. The sixth respondent was also impleaded in the appeal and the sixth respondent sold the entire property to Balamurugan. All the transaction being done collusively between the respondents to defeat the rights of the petitioners/defendants. Therefore, the above said documents are necessary to decide the case and those documents produced have to be received and marked as respondent/plaintiff side documents.

15.1. The respondents in the CMP.(MD)No.2649 of 2022 have vehemently opposed to receive the said document as they are not essential to decide the case. The said documents are after suits. Already both the parties examined witnesses on their sides and also marked documents. Therefore, the said available documents are sufficient to decide the case effectively. More over, the plaintiffs have not satisfied the conditions of Order 41 Rule 27 CPC., to receive those documents.



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15.2. This is the case of suit for relief of specific performance and according to the petitioners/respondents/plaintiffs, after the suit, the respondent/appellants/defendants sold the property to the fifth respondent and in turn, he sold the property to the sixth respondent. Thereby, the documents in respect of those transaction are essential to decide the case. According to the respondent those documents are not essential to decide the case. This Court perused the available records and the same are sufficient to decide the case and these documents are created during pendency of appeal. The parties have adduced oral and documentary evidences on either side and the same are sufficient to decide the case and the documents sought to be received no way helpful to decide the case. Hence, without receiving those documents, this Court can dispose the case effectively. The documents sought to be produced are not necessary to decide the suit. The parties are bound by the verdict of this Court since the transactions are hit by *lis pendens*. Therefore, the documents need not be received as the available evidences are sufficient to dispose the case. Therefore, the petition is liable to be dismissed. Thus, the point is answered.



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16. Point No.2: *Whether the error crypt in the agreement is the material alteration or not?*

In this case, it is admitted by both the parties that the agreement was executed on 04.07.2007 between the parties in respect of suit properties. According to the appellants, they agreed to sell the property but only received Rs.6 lakhs towards advance of sale consideration and not Rs.7 lakhs. Thereafter, the plaintiffs altered the amount from Rs.6 lakhs to Rs.7 lakhs. Therefore, it is a material alteration. The said contention of the appellants/defendants was not denied by the respondents/plaintiffs and they also admitted that there was a typographical error in the agreement. But, according to the respondents/plaintiffs, the typographical error was occurred at the time of execution of agreement itself and before signing by the parties they knew about the error and after knowing the above said error only, the parties have signed in the agreement. The plaintiffs examined P.W.1 and P.W.2 and they also categorically stated about the above said typographical error.



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16.1. But, the appellants/defendants denied the said error crypt in the agreement. The defendants have not examined any witnesses in respect of the transactions of amount through sale agreement. In general, at the time of execution of agreement, a copy of agreement also would be given to other side. In this case, the appellants/defendants have not produced the copy of the agreement. Already, the plaintiffs have also issued a notice to the defendants. In the notice also, they stated about the advance amount received by the defendants and the defendants have not issued any reply. It is true, in the agreement there is an alteration but no initial was made by the parties. Normally, while writing in the agreement, if any alteration, then it would be mentioned in the document itself. In this case, there is no any such mentioning about the alleged typographical error. However, only because of that the typographical error, it cannot be said that it is a material alteration. Though the defendants have also stated in the written statement, subsequently, they stated that they only received a sum of Rs.6 lakhs and in the agreement, the words altered as Rs.7 lakhs. But, the defendants once pleaded that there is a material alteration, then it is their duty to establish that they only received Rs.6 lakhs and not received Rs.7 lakhs by examining any



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of the attesting witnesses. However, on the side of the plaintiffs, they examined P.W.2, who is the attester of the document and he categorically stated that there was typographical error and the same was occurred before signing in the agreement and the defendants also after knowing the said typographical error only signed in the document. Therefore, the plaintiffs discharged their burdens and the defendants have not rebutted the evidence of the plaintiffs in this regard. Therefore, the plaintiffs have proved that there was typographical error crypt in the agreement before signed by the parties, there by it is not a material alteration.

16.2. The learned counsel appearing for the appellants has relied upon the following judgments:-

i) Seth Loonkovan Setiyan and Others Vs. Mr.Ivan E.Sohn and Others reported in 1977 1 SCC 379.

ii) Panchaksaram Mudalier (Died) ... Vs. T.V.Kanniah Naidu reported in 1998 Law Weekly 674.

iii) Harbans Singh Vs. Dider Singh and Others reported in 2009 SCC Online Punjab & Haryana 10009.

iv) Chandra Ram Vs. Balvant Singh and Others reported in 1999-2-ILR Punjab & Haryana 254.



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16.3. On a careful perusal of the above judgments, it is clear that the effect of making such an alteration without the consent of the party bound is exactly the same as that of cancelling the deed and interpolation is a material alteration acting to the prejudice of other party and therefore, the plaintiffs cannot enforced their right on the suit agreement. In the case on hand, the typographical error was corrected and the plaintiffs have amply proved that before signing the document the said typographical error was occurred and after knowing that only, the parties have signed in the document. Therefore, the above said judgments will not be applicable to the present facts of the case.

16.4. The learned counsel appearing for the respondents has relied a judgment in the case of **Padmanapan Vs. Chinnakallu and others** reported in **2002 2 CTC 203**.

16.5. On a careful perusal of the above judgment, it will not applicable to the present facts of the case. Because, in that case, there was no specific plea in the written statement in respect of material alterations. In the case on hand, the defendants categorically pleaded



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about the alleged material alterations. Hence, the said case will not apply to the case in hand.

16.6. In view of the above said discussions, this Court is of the opinion that there is no material alteration in the agreement. Thus, the point is answered.

17. Point No.3 : *Whether the time is essence of contract or not?*

It is admitted by both the parties that the time was fixed for completion of sale is 3 months. There is a condition in the agreement that if the purchaser failed to get the sale deed within the time stipulated, the advance amount would be forfeited. According to the appellant/defendants, the time is essence of contract that's why the said condition has been stipulated in the agreement. In this context, D.W.1 also in his evidence categorically deposed that the time is essence of contract and the respondents/plaintiffs have not get sale deed within a stipulated time and thereby, forfeited the advance amount. According to the respondents/plaintiffs, though the time is mentioned as 3 months, there is no intention to complete the contract within that 3 months and



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the time is only to confirm the contract and the time is not essence of contract. In general, with regard to immovable property, the time is not essence of contract unless the special reasons granted about time is specifically mentioned in the agreement. In this case, there is a clause in the agreement that, if the sale is not completed within the time, the plaintiffs have to forfeit the advance amount and there is no specific reasons mentioned to make time is essence of contract.

17.1. In this context, the learned counsel appearing for the appellants/defendants has relied the following judgments:-

i) K.S.Vidyanadam and Others Vs. Vairavan reported in (1997) 3 SCC 1.

ii) Saradamani Kandappan Vs/ S.Rajalakshmi and Others reported in 2011 12 SCC 18.

17.2. On a careful perusal of the above judgment, it is clear that even where the time is not essence of the contract, the plaintiffs must perform their part of contract within reasonable time and the reasonable time should be determined by looking at all the surrounding circumstances including the prescribed terms of contract and the nature



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of the property. In this case on hand also, the time was fixed as 3 months.

But, there is no specific reasons stated to hold that the time is essence of contract. Therefore, the time is not essence of contract, unless the specific reasons made in respect of time in the sale agreement. In the absence of specific condition in the agreement, it cannot be construed that the time is essence of contract. In this case on hand, there is no any specific reasons mention about the essence of time.

17.3. The learned counsel appearing for the respondents has further relied the judgment in **B.B.Patel and Other Vs. DCF Universal Limited** reported in (2022) 6 SCC 742.

17.4. On careful perusal of the said judgment, it is clear that the said case law will not be applicable to this case, because the said case is related to construction of building. Therefore, time is not essence of contract. Thus, the point is answered.

18. Point No.4: *Whether the appellants/defendants received advance amount of Rs.7 lakh?*



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According to the plaintiffs they paid a sum of Rs.7 lakhs towards advance amount and the defendants denied the same and their defence is they only received Rs.6 lakhs as advance and the said amount Rs.6 lakhs was corrected as Rs.7 lakhs and the plaintiffs have altered the amount. This Court in the pervious point, decided that there is no material alteration and the defendants have also failed to examine any witnesses to prove their contention that they received only Rs.6 lakhs. Once the defendants admitted the execution of the agreement, they have to prove that they only received a sum of Rs.6 lakhs and not received Rs.7 lakhs as alleged in the agreement. But, they have not examined any witnesses and also not elicited anything from the attesting witness during cross examination about the receipt of advance. The defendants cannot take advantage of the typographical error crypt in the agreement. The plaintiff side witnesses, P.W.1 and P.W.2 also categorically deposed about the payment of advance amount and the typographical error crypt in the agreement. As stated above, the plaintiffs have proved that the defendants received advance of Rs.7 lakhs. Therefore, the defendants received a sum of Rs.7 lakhs as mentioned in the agreement. Thus, this point is answered.



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notice. Even assuming that there is a delay due to the negotiation between the defendants and plaintiffs in respect of share of Chinnammal.

According to the plaint averments, they came to know about the availability of Chinnammal on 04.10.2008. Immediately on 06.10.2008, they approached the defendants and then, issued notice on 10.10.2008 till 04.10.2007, the plaintiffs have not taken any steps to perform their part of contract. In this context, P.W.1 in his cross examination admitted that “சின்னம்மாள் மூலம் சொத்தில் உள்ள வில்லங்கத்தை குறிப்பிட்டு 04.10.2008 தெரியவந்தது, அதற்கு முன்னர் தெரியாது.”. Therefore, P.W.1 admitted that they have no knowledge about the Chinnammal has right over the suit property prior to the date of 04.10.2008 and they have not taken any steps for getting sale deed by paying balance of sale consideration. Even assuming that the plaintiffs delayed only for the reasons that the Chinnammal is one of the share holder, then, how they filed the suit without impleading her has to be explained. In this case, the said Chinnammal was not impleaded as a party. Therefore, the reasons stated by the plaintiffs that they waited for getting sale deed from the said Chinnammal is not acceptable one. Therefore, the plaintiffs have not explained for the delay in taking steps to get sale deed in their favour.



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19.2. According to the appellants/defendants, the plaintiffs intended to purchase the property because of proposal of bus stand near to the suit property. Thereafter, the proposal was dropped. Thereby, they left the matter without getting sale deed. In this regard P.W.1, in his cross examination admitted that “தாவாச் சொத்து அமைந்திருக்கும் பகுதி, தோரணக்கல்பட்டியிலிருந்து 1 கிலோ மீட்டர் தூரத்தில் உள்ளது. தோரணக்கல்பட்டியில் பேருந்து நிலையம் வரும் என பேசிக் கொண்டனர். வேறு இடத்திற்கு வருவதாகவும் பேசிக் கொண்டிருக்கின்றனர்”. Therefore, the defence of the appellants/defendants is clearly established through the evidence of P.W.1. The respondents/plaintiffs miserably failed to prove the readiness and willingness to get the sale deed in their favour. Though the defendants admitted that the plaintiffs have financial capacity to purchase the property, there is no sufficient evidence adduced to prove the readiness and willingness to purchase the property. Even according to the plaintiffs, they came to knowledge about the Chinnammal in the year 2008. But, admittedly, they have not filed any suit immediately and the suit was filed only on 01.07.2010. Therefore, it is crystal clear that the respondents/plaintiffs have not always ready and willing to perform their part of contract. More over, the notice was issued on 04.10.2008 and thereafter, the suit was filed only on 01.07.2010 i.e., at the verge of



expiry of limitation. Therefore, the conduct of the plaintiffs shows that they have not ready and willing to perform their part of contract. Thus, the point is answered.

19.3. The learned counsel appearing for the appellants has relied the following judgments:-

i) Padmakumari and Others Vs. Dasayyan and Others reported in 2015 8 SCC 695.

ii) Sankaran Vs. Kuppa Goundar reported in 2001 1 Law Weekly 137.

iii) G.Ramalingam Vs. T.Viyayarangan reported in 2007 1 CTC 243.

19.4. On a careful perusal of the above said judgment, it is clear that the plaintiff has to establish his continues readiness and willingness in all stages right from the date of agreement till the hearing of the suit in order to become entitle to decree for specific performance. In this case on hand, the plaintiffs have miserably failed to prove that they are always ready and willing to perform their part of contract. Therefore, the said case laws are squarely applicable to the facts of case on hand.



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19.5. Per contra, the learned counsel appearing for the respondents has relied upon the following judgments:-

- i) *Deivam Vs. Sampantham* reported in 2023 SAR Civ 1.
- ii) *Basavaraj Vs. Padmavathis and Another* reported in 2021 Live Law (SC) 17.

19.6. On a careful perusal of the above judgment, thus will not be applicable to the present facts of the case because, in this case, the plaintiffs miserably, failed to prove their readiness and willingness.

19.7. In view of the above discussions and the above said judgments relied on by the appellants' counsel, this Court is of the opinion that the plaintiffs failed to prove their readiness and willingness to perform their part of contract from the date of agreement till the hearing of the suit. Thus, the point is answered.

20. Point No.6 : *Whether the Chinnammal, who is the share holder of the suit property is proper and necessary party to the suit?*

According to the appellants/plaintiffs, Chinnammal has already relinquished her right orally to the defendants. According to the



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respondents/plaintiffs, Chinnammal is also having $\frac{1}{2}$ share of the property of her father. But, the plaintiffs have not impleaded the said Chinnammal as one of the party to the suit. The suit for specific performance and it is the admitted fact that, the suit property is only 5 acres (out of 9.95 acres $\frac{3}{4}$ cents). According to the respondents/plaintiffs, thought the Chinnammal has also having $\frac{1}{2}$ share in the property i.e., only 5 acres and thereby, the Chinnammal is not a proper and necessary party. Once, the defendants have taken plea that the said Chinnammal has relinquished her right, they cannot take the plea that she is also a proper and necessary party. Moreover, on perusal of records observed that already, the said Chinnammal filed a suit in O.S.No.612 of 2008 and thereafter, the said suit was withdrawn by her since the matter has been compromised between them. Therefore, the presence of the Chinnammal is not essential to decide the suit and she is not a proper and necessary party to the suit. Without her presence, the suit can be disposed of effectively. It is admitted fact that the total extent of the property is 9.95 acres and the agreement is only for 5 acres and not for the entire property. Therefore, the said Chinnammal is not a proper and necessary party to decide the suit.



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20.1. In this context, the learned counsel appearing for the respondents, relied the judgment of the Hon'ble Supreme Court in the case of **Abdul Razeed Khan Vs. Shagul Hameed** reported in **2010 SCC** and also relied the judgment of this Court in the case of **Narayanan Vs. Kuppan and Others** in **SA.No.1566 of 2010**.

20.2. On a careful perusal of the above judgment, it is clear that where any properties held jointly, and once any party to the contract has agreed to sell such joint property by agreement, then, even if the other co-sharer has not joint, atleast to the extent of his share, he is bound to execute the sale deed. In this case on hand also, though the Chinnammal is said to have right over the property, the agreement is not for the total extent and this is only for 5 acres. It is admitted fact that the defendants are having $\frac{1}{2}$ share over the entire property and the suit property is only part of the property and not for whole property. Therefore, the suit can be decided effectively for the share of the defendants. Therefore, the Chinnammal is not a proper and necessary party to the suit. Thus, the point is answered.



21. Point No.7 : *Whether the respondents/plaintiffs are entitled to relief of specific performance of contract?*

The plaintiffs have filed a suit for the relief of specific performance in order to get relief of specific performance of contract, the plaintiffs have to prove their readiness and willingness. This Court in the previous point decided that the plaintiffs have failed to prove their readiness and willingness.

21.1. The learned counsel appearing for the appellants has relied upon the following judgments:-

i) ***M.Sankar Nadar and Another Vs. Deva Krishnan reported in 2017-1-CTC 561.***

ii) ***M.Johnson Vs. E.Pushva Valli reported in 2016-3-LW 527.***

iii) ***Kadupugotla Varalakshmi Vs. Vudagiri Venkata Rao and Others reported in 2021 (2) CTC 596.***

iv) ***J.Dhanapal Vs. V,Manimala and Others reported in 2023 CTC 298.***



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21.2. On careful perusal of the said judgment, it is clear that the discretionary relief of specific performance could be granted only if the plaintiff makes out case, that too strong case for exercising discretion by Courts and the Courts should meticulously consider all case and Court is not bound to grant specific performance. Merely because, it was lawful to do so, and further, it is clear that in the suit for specific performance, bounden duty of the plaintiff is to prove that he is ready and willing to perform his part of the contract and the plaintiff failed to give reasons for delay in issuing suit notice and further delay in filing suit, the plaintiff is not entitled to the discretionary relief of specific performance. In the case on hand also the plaintiffs issued suit notice with huge delay and the delay was not properly explained and even after the notice, the suit was filed with further delay and the plaintiffs have failed to prove their readiness of willingness. Therefore, the said case laws are squarely applicable to the present facts of the case.

21.3. The learned counsel appearing for the respondents/plaintiffs relied the judgment in **P.Swaminathan Vs. M.Chidhambaram** reported in **2014 (6) MLJ 397**.



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21.4. On careful perusal of the said judgment, it is clear that in a suit for specific performance, the defendants must also come to the Court with clean hands and they cannot find fault with the plaintiffs' case and get the dismissal order. The said case law will not be applicable to the present facts of the case because, in this case, no any pleading in respect of any fraud or other mistakes committed by the defendants. In view of the above said judgments and discussions, this Court is of the opinion that the plaintiffs are not entitled to the relief of special performance of contract. Thus, the point is answered.

22. Point No.8 : *Whether the appeal has to be allowed or not?*

The plaintiffs have filed a suit for specific permanence of contract and they have failed to prove their readiness and willingness to perform their part of contract. The trial Court has elaborately discussed about the entitlement of the plaintiffs upon the relief of specific permanence. However, failed to consider that the date of agreement is 04.07.2007 and 3 months time lapsed on 04.10.2007 and thereafter, they came to knowledge about the share of Chinnammal on 04.10.2008 and thereafter, they instituted the suit on 10.10.2010. Between the period of 04.10.2007



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to 04.10.2008, they have not taken any steps and not even issued any notice to the defendants by expressing their willingness to get sale deed in their favour by paying the balance of sale consideration. Therefore, the plaintiffs miserably failed to prove their readiness and willingness. But, the trial Court has failed to consider the above said aspect and wrongly hold that the plaintiffs were always ready and willing to perform their part of contract. The trial Court in respect of material alterations correctly held that there is no material alteration and the time is not essence of contract. Since the trial Court has failed to consider that the plaintiffs have not always ready and willing to perform their part of contract, erroneously granted the relief of specific performance. Therefore, the judgment and decree passed by the trial Court are unsustainable and the same are liable to be set aside. Thus, the point is answered.

23. Point No.9 : To what relief the parties are entitled to?

The appellant have filed this appeal as against the judgment and decree passed by the trial Court by challenging the relief of specific performance granted to the plaintiffs. This Court in the previous point decided that the trial Court judgment is not sustainable and the same is



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liable to be set aside. The plaintiffs have paid a sum of Rs.7 lakhs towards advance of sale consideration and the same has not been returned by the defendants so far. According to the defendants, they only received a sum of Rs.6 lakhs. But, this Court already in the previous point decided that the defendants have received a sum of Rs.7 lakhs. Thereby, the defendants are liable to pay the said amount of advance received from the plaintiffs. It is true that the plaintiffs have not sought for any relief in respect of return of advance. However, as per the admission made by the defendant under enquiry, it is appropriate to pass a money decree in favour of the plaintiffs and as against the defendants, to pay the advance amount of Rs.7,00,000/- to the plaintiffs with interest at the rate of 9% per annum from the date of argument till the date of realisation of the amount. Thus, the point is answered.

24. In the result, **CMP.No.2649 of 2022 in A.S.No.157 of 2016 is dismissed.**

25. **The Appeal Suit is allowed** and the judgment and decree passed by the District Judge, Karur in O.S.No.43 of 2010 dated



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07.12.2011 is hereby set aside. The suit in **O.S.No.43 of 2010** is **dismissed**. However, as per the admission made by the appellants/defendants, it is appropriate to pass a money decree in favour of the respondents/plaintiffs and as against the appellants/defendants. Hence, the appellants/defendants are directed to pay the advance amount of Rs.7 lakhs (Rupees Seven Lakhs Only) to the respondents/plaintiffs within a period of one month from the date of receipt of a copy of the judgment of this Court with interest at the rate of 9% per annum from the date of agreement till the realization of the amount. No costs. Consequently, the connected miscellaneous petitions are closed.

25.03.2024

NCC : Yes/No
Index : Yes/No
Internet: Yes/No
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P. DHANABAL,J.

dss

To:

1. The District Judge,
Karur.
2. The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.

A.S(MD) No.157 of 2016
and
C.M.P(MD) Nos.10161 of 2016 & 2649 of 2022

25.03.2024