(1986) 10 MAD CK 0018

In the Madras High Court

Case No : L.P.A. 18 of 1981

Kalianna Gounder (died) and Others — APPELLANT

Vs

Kalianna Gounder and other — RESPONDENT

Date of Decision : 15-10-1986

Acts Referred:

Constitution of India, 1950 — Article 134A
Evidence Act, 1872 — Section 114(g), 52, 68, 71, 92
Specific Relief Act, 1963 — Section 16(b), 16(c)
Transfer of Property Act, 1882 — Section 105, 107, 31

Citation : (1986) 10 MAD CK 0018

Hon'ble Judges : V. Ramaswami, J;Ratnam, J

Bench : Division Bench

Advocate : R. Kesava Iyyengar for Sri K.S. Rajavelu, for the Appellant; S.V. Jayaramau, for the Respondent

Judgement

Ratnam, J.—This appeal at the instant of the defendants 6 to 8 in O.S. 277 of 1968, Sub Court, Salem, is directed against the judgment in A.S. 79 of 1873, dismissing their appeal preferred against the decree in favour of the first respondent herein granting the relief of specific performance in respect of an agreement for sale Ex.A1 dated 27-7-1964, executed by the second respondent herein and his father deceased Chinna Gounder. The properties in question admittedly belonged to Chinna Gounder and the second respondent therein. Under the agreement Ex.A1 which was also registered on 13-11-1964, the second respondent and his father agreed to sell certain properties to the first respondent for a consideration of Rs. 14000 and received Rs. 1500 byway of advance. The first respondent had agreed to discharge certain mortgage and pronote debts due by the second respondent and his father to one Kandaswami Gounder, amounting to Rs. 11272 within one year. The balance of Rs. 1228 was agreed to be paid and received at the time of the execution of the said deed. According to the case of the first respondent, at the instance of an instigation of the appellants, in November 1964, the second respondent and his father approached the first respondent and asked him to discharge the debts immediately and pay the balance of Rs. 1228 and take the sale deed and gave out that they would sell the properties to third parties, if the respondent did not do so. The first respondent declined to accede to the request of the second respondent and his father. The second respondent and his father entered into another agreement under Ex.B1 dated 27-7-1964, for the salt; of the same properties in favour of the appellants herein for a consideration of Rs. 15000. That agreement recited that a sum of Rs. 2000 had been received as advance by the second respondent and his father and that the balance amount was to be paid some time before the middle of March 1965 and the sale completed. It was also further provided therein that there was to be a mortgage for Rs. 4000 in favour of the vendors of the suit properties and the balance of Rs. 9000 would be paid by the purchasers for the purpose of discharging the debts. On the strength of Ex.B1, the appellants herein instituted O.S. 76 of 1965 on 13-3-1965 praying for the relief of specific performance, against the second respondent, his father and some others. The first respondent herein was impleaded as the sixth respondent in that suit. The further case of the first respondent was that the second respondent and his father filed a written statement in O.S. 76 of 1965 admitting that Ex.A1, had been executed in favour of the first respondent earlier than Ex.B1, in favour of the appellants. The suit however was not tried, but on 14-6-1968, the appellants filed a memo exonerating the first respondent herein on the ground that a sale deed had been executed on 9 5 1968 in their favour by respondents 2 to 5 and therefore, the first respondent was no longer a necessary party. In view of that, the suit O.S. 76 of 1965 was dismissed as withdrawn. In the course of the plaint in O.S. 277 of 1968, the first respondent averred that he had always been ready and willing to perform his part of the contract and that owing to the pendency of O.S. 76 of 1965, the second respondent and his father represented that the execution of the sale deed could be postponed till the disposal of that suit and believing those representations the first respondent did not insist upon the execution of the sale deed within one year as stipulated under the terms of Ex.A1. The first respondent therefore instituted the suit for specific performance of Ex.A1, impleading the appellants herein as defendants 6 to 8, contending that the sale deed in their favour executed on 9-5-1968 was not valid and supported by consideration and that Ex.A1 was the only true and valid agreement of sale and further that the agreement under Ex.B1, comes into existence long subsequently and had been ante-dated. The appellants, who were the main contesting defendants, resisted the suit contending that there was already a sale deed in their favour pursuant to an earlier agreement under Ex.B1 and that they had been put in possession of the properties sold to them and further that the first respondent was not entitled to the equitable relief of specific performance on the strength of Ex.A1. It was also the case of the appellants that the agreement under Ex.A1 had not been entered into on 27-7-1964.

2. On the aforesaid pleadings of the parties, the two issues, which were tried by the trial court were (i) whether the agreement Ex.A1 in favour of the first

respondent was prior to the agreement Ex.B1 in favour of the appellants? and (2) whether the first respondent was entitled to the relief of specific performance on the strength of Ex.A1? On a consideration of the oral as well as the documentary evidence, the learned subordinate judge, Salem came to the conclusion that Ex.A1 in favour of the first respondent herein was the earlier agreement and that Ex.B1 in favour of the appellants came to be executed subsequently and was ante-dated. It was also further found that the sale deed Ex.A12 dated 9-5-1968 was not valid in view of Ex.A1 and that therefore the appellants did not derive any right to the properties sold thereunder. On those findings, the learned Subordinate judge, Salem, granted a decree in favour of the first respondent herein directing the appellants and respondents 2 to 6 to execute a sale deed in respect of the suit properties and deliver possession within two months on deposit of a sum of Rs. 1228 by the first respondent within one month. Against that the appellants herein preferred A.S. 79 of 1973 before this court. Sethuraman, J. who heard the appeal, was of the view that Ex.A1 was executed prior to Ex.B1, that time was not of the essence of the contract and that the first respondent was entitled to a decree for specific performance. On those conclusions, the appeal was dismissed, the correctness of which is challenged in this Letters Patent appeal. During the pendency of the Letters patent appeal the first appellant died and his legal representatives have been brought on record as appellants 4 to 7.

3. In support of this appeal, Sri R. Kesava Iyengar, learned counsel for the appellants raised two principal contentions. The first was that the first respondent had not established by best evidence that Ex.A1 was executed earlier to Ex.B1 and that Ex.B1 was ante dated, while, the appellants had proved by best evidence, the execution of the agreement under Ex.B1 as well as the sale under Ex.12. The second contention urged was that as the first respondent had committed breach of the terms of the agreement, Ex.A1 and there was no continuous readiness and willingness on his part, he should be non-suited as per the provisions of the Specific Relief Act. To make good these submissions, learned counsel referred in extenso to the pleadings, the evidence and also drew our attention to certain circumstances as well as several decisions, which we shall refer in due course of this judgment. On the other hand, Mr. S.V. Jayaraman, strenuously contended by drawing attention to certain other circumstances that Ex.A1 is earlier in point of time and that had been established to be so by the first respondent and that the appellants had not made available to the court the best evidence and therefore, they cannot be heard to contend that the relief of specific performance cannot be granted to the first respondent. It was also pointed out that the first respondent had averred in the plaint about his readiness and willingness to perform his part of the contract and had also examined himself and that would suffice and to enable the court to grant the relief of specific performance in favour of the first respondent. It was also contended that there was a waiver of a strict adherence to the terms of the agreement Ex.A1. In support of these contentions, reliance was also placed by

the learned counsel on some decisions.

4. The first question is whether the first respondent had established that Ex.A1 was executed earlier in point of time. Issue No. 2 framed in the suit also reflects this aspect. There is no dispute that the properties agreed to be sold both under Ex.A1 and Ex.B1 belonged to the second respondent and his father. The father of the second respondent Chinna Gounder, died on 2-4-1968 as could be seen from Ex. A9. The second respondent is one of the executants of Ex. A1 as well as Ex. B1. Respondents 3 to 6 are the wife and daughters of Chinna Gounder, respectively. It is seen from para 4 of the plaintiff, that according to the case of the first respondent, the father of the second respondent and the second respondent made it clear that the agreement they were executing in favour of the appellant herein had to come into effect only it the suit agreement Ex. A1 is cancelled and given up by the first respondent. That would mean trot even according to the first respondent, there were two agreements executed by the second respondent and his father, one in favour of the first respondent and other in favour of the appellants. The question whether Ex.A1 or Ex.B1 was earlier in point of time has to be decided by taking into account the evidence and the other circumstances appearing therefrom.

5. We may first refer to the intrinsic evidence afforded by the terms of Ex.A1 to ascertain whether it could have been executed on 27-7-1964. There is one recital therein which is very significant and it runs thus:- This means that the first respondent had not till that date made any payment towards the discharge of the debts. Such a recital is wholly inconsistent with the direction for the discharge of the debts under the document Ex.A1. This would also establish that there was some other agreement or that recital was put in at a point of time later than 27-7-1964, making reference to an earlier default committed by the first respondent. Further Ex.A1, bearing date 27-7-1964 had been registered on 13-11-1964. In para 8 of the plaint, the first respondent had attempted an ingenious explanation for the registration of Ex.A1 on 13-11-1964. According to dim, in November 1964, the appellants persuaded the second respondent and his father to approach the first respondent to discharge the debts mentioned in Ex.A1 and to pay the balance of Rs. 1228 immediately and take the sale deed. The first respondent is stated to have said that he had eight months time to complete the sale and with a view to settle the dispute, a panchayat was held, wherein the second respondent and his father agreed to abide by the terms of Ex. A1 and that, as a matter of caution and with a view to safeguard his rights, the first respondent got Ex.A1 registered on 13-11-1964. We may point out that none of the Panchayatdars have been examined to establish that the panchayat was so held and that registration was resorted to later. P.W.1 in the course of his cross examination stated that the Panchayat took place in the month of Ippasi and that he had given the details of the panchayat in the notice. The notice referred to is Ex.A4 dated 10-12-1964, sent by the counsel on behalf of the first respondent and in para 4 thereof, it is stated that on or about 19-11-1964 the second respondent and his father pressed for immediate execution of the sale

deed and that led to a panchayat wherein the second respondent and his father agreed to abide by the terms of Ex.A1 and the first respondent insisted upon the registration of the document at once, as he entertained serious doubts about the second respondent and his father abiding by the terms of the agreement. Thus, while, according to Ex.A4, the panchayat had been held of 19-11-1964, the registration of Ex.A1 had been done on 13-11-1964, viz., six days earlier to the panchayat. The reason given by the first respondent for the registration of Ex. A1, on 13-11-1964, is thus not acceptable, especially when Ex. A1 is not compulsorily registerable. Serious doubts are thus thrown upon the holding of panchayat, as having led to the registration of Ex.A1 on 13-11-1964. We are, therefore, unable to hold that there was a panchayat and thereafter Ex.A1 was registered. To make it appear as if Ex.A1 had been executed on 27-7-1964, registration had been resorted to on 13-11-1964, when probably it was executed and registered, as would be seen later. The trial court, while referring to this in para 9 of its judgment, has stated that this is a trivial contradiction. We are however not inclined to dismiss this as a trivial or inconsequential circumstance, as could be seen from the other circumstances, which we shall presently refer.

6. Under Ex.A1, the first respondent had been given a year''s time to discharge the debts of the second respondent and his father totaling to Rs. 11272. While so, it is not probable and indeed it is also not supported by any acceptable evidence that the second responded and his father demanded the payment of the debts by the first respondent contrary to the terms of Ex.A-1, and that led to the registration of Ex. A-1, on 13-11-1964. In other words, the reason given for the Panchayat does not appear to be true. Likewise, the registration of the document on 13-11-1964, as subsequent to the panchayat, is also unacceptable. P.W.1 in the course of his cross examination admitted that Ex. A-1 was written in the Sub-Registrar''s office. Ex.A-1 had been attested by one Sengoda Nadar and one Perianna Gounder, belonging to Arasampalayam and Kandangipalayam. They participated in the registration of Ex. A-1 as identifying witnesses also. The evidence of D.W. 2 shows that the Sub Registrar Office at Mallasamudram is at a distance of five miles from Arasampalayam, where the parties reside. P.W.1 would give contradictory answers in his evidence that be went to the Sub-Registrar''s office only once and that Ex.A-1 was not registered earlier, but three months later, as he was informed that registration was not necessary. The definite admission of PW 1 in his evidence that Ex. A-1 was written in the Sub-Registrar office and the absence of other satisfactory evidence regarding the circumstances under which the same set of persons had participated in the attestation as well as identification, clearly establish that Ex. A-1 was executed and registered at Mullasamudram Sub Registrar Office only on 13-11-1964, with the help of two persons, who had acted as attesting as well as identifying witnesses. It is in this context that the non-examination of the attestors and the scribe assumes considerable significance, P.W.1 in his evidence stated that he was not going to examine the attestors to Ex.A-1. The further suggestion to P.W. 1 is to the effect that the attesting witnesses are respectable people and that

they would not come forward to depose falsely. No doubt P.W.1 has stated that he does not know whether it is so. Though according to P.W.1 in chief examination, the attesting witnesses Perianna Gounder is the son of the aunt of the second respondent and Sengoda Nadar is working in the lands of the first appellant, in his cross examination, he stated that Sengoda Nadar is the adjoining land owner and that he had not brought him to court on the last hearing date. He would also state that prior to the registration of Ex.A1, the witnesses had attended the Sub-Registrar Office twice, though in the earlier part of his evidence, P.W. 1 stated that he went only once to the Sub Registrar Office. It is thus clear from, the evidence of P.W.1, that both the attestors to Ex.A1, are available, but for some reason, he had not examined them. It would not be unreasonable having regard to the evidence of P.W. 1 referred to above, to invoke the presumption under S. 114(g) of the Indian Evidence Act, and hold that if the attestors had been examined, their evidence would have been unfavorable to P.W.1, and that was the reason why their evidence had been withheld from court. The evidence of P.W.1 shows that Chinna Gounder and the second respondent brought the attesting witnesses and those witnesses are still available. The explanation for the non examination of the attestors was that they were obliged to the appellants. This was accepted by the trial court as well as the learned Judge, as exonerating the firs; respondent from his duty to examine the attesting witnesses. We regret our inability to share this view. The two witnesses had gone to the Sub-Registrar Office at Mallasamudram at the time of the registration of Ex.A1, on 13-11-1964, and if they had participated in the attestation as well as the registration of Ex.A1, despite their being obliged to the appellants, we really do not see any reason why they would not tome to speak to the execution of Ex. A1, if as a matter of fact Ex. A1 was executed on 27-7-1964. We are also unable to subscribe to the view of the learned Judge that the conviction of D.W.1 in a murder case or the conviction of the second appellant in a case for assault, would enable the first appellant to establish the execution of Ex.A1 without the best evidence. We are also unable to appreciate the reasoning of the learned Judge that by reason of the association of the attestors with the appellants, they would not have, been in a position to enter the witness box on behalf of the first respondent. Having regard to the participation of the attesting witnesses in the execution of Ex.A1 as well as its registration it was the duty of the first respondent to have made available to court their evidence and if their evidence was not sufficient to prove the execution of Ex.A1, it was open to the first respondent to establish me same by other evidence as per S.71 of the Indian Evidence Act. Further, we may point oat that the conviction of D.W.1 or the second appellant for offences is not very relevant in civil cases under S.52 of the Indian Evidence Act. There is no acceptable evidence of the existence of any impediment in the examination of the two attesting witnesses by the first respondent. In the circumstances of this case, there is absolutely no justification whatever for the non examination of the scribe and attestors of Ex.A1, and the first respondent has therefore not placed before the court the best evidence in support of the execution of Ex.A1 on 27-7-1964.

7. We may now refer in this connection to the decision of AIR 1937 152 (Privy Council) relied on by the counsel for appellants. It was pointed out by the Privy Council that a failure to place, the evidence, which would disclose the manner in which the consignment was dealt with, entitled the court to presume terms of S. 114(g) of the Indian Evidence Act, that evidence, if produced, would be unfavourable. We may also usefully refer in this connection to the observations of the Supreme Court in Gopal Krishnaji Ketkar Vs. Mahomed Haji Latif and Others, The Supreme Court pointed out that even if he with holds important documents in his possession, which throw light on the facts at issue and it is not a sound practice for those desiring to rely upon a certain state of facts to withhold from the court the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof. Viewed in the light of the principles laid down in the decision referred to by the learned counsel for the appellants, we are inclined to take the view that the scribe and attestors to Ex.A1 though available, were not examined and their evidence, if made available, to court, would throw light upon the issues in controversy between the parties and that evidence had been with hold by the first respondent. Considered in the light of evidence of P.W.1 that Ex.A1 was written in the Sub Registrar Office and taking into account the participation by the same set of persons as attestors as well as identifying witnesses before the Sub Registrar, Mallasamudram, five miles away from the village of the parties, and the non-examination of the scribe and attestors and the other aspects set out above, the case of the appellants that Ex.A1, was executed and registered at Mallasamudram on 13-11-1964 is rendered probable and acceptable.

8. Reliance was placed by the learned counsel for the first respondent upon Ex. A-2, a notice dated 1-8-1964 issued on behalf of Muthu Gounder and others to three persons viz., Chinna Gounder, Palaniappa and Kalianna Gounder (first respondent herein). From this notice it was attempted to be established that the agreement under Ex.A1, had come into existence even prior to the date of issue of that notice, viz., 1-8-1964. In that notice sent on behalf of Muthu Gounder and others, they claimed that Chinna Gounder, father of the second respondent, was entitled only to a half share in an extent of 9 acres and 73 cents and that Palaniappa Gounder and Kalianna Gounder (first respondent herein) cannot purchase anything more than a half. There is no reference therein to any prior agreement of sale having been executed by Chinna Gounder or the second respondent in favour of the first respondent. It is further stated that Chinna Gounder intends to sell and not that he bad already agreed to sell. Thus, the contents of Ex.A2 cannot be pressed into service to establish the existence of Ex. A-1 on 27-7-1964 itself. Apart from this, the evidence of P.W.2, one of the persons, on whose behalf Ex.A2 had been issued, is to the effect that on coming to know of the registration of Ex. A1 the notice Ex.A-2 was given and that it was issued on the assumption that Palaniappa also might have purchased lands We have earlier noticed that the registration of Ex. A-1 was on 13-11-1964. It is, therefore, difficult to believe that the notice under Ex. A2 had been issued even

on 1-8-1964, three months and more before the actual registration, knowing about the registration of the agreement for sale. Further, the parties to Ex. A1 and A2 are not the same. We are therefore of the view that no reliance can be placed on Ex.A2.

9. That takes us on to a consideration of the so-called admission by the second respondent and his father as regards Ex. A1, in the course of this and the prior proceedings in O.S. 76 of 1965 referred to already. In Para 3 of the written statement in O.S. 277 of 1568, out of which this Letters Patent appeal has arisen, the appellants have stated as follows-

The plaintiff is not entitled to the relief of specific performance of the agreement dated 27-7-1964. I he said document is ante-dated agreement executed by the plaintiff and first defendant and his father Chinna Gounder to nullify the effect of an agreement dated 27-7-1964, executed between these defendants and the family of the first defendant.

We fail to see how this could be construed as an admission. The use of the expression ''dated 27-7-1964'' can only mean ''bearing the date 27-7-1964'' and cannot amount loan admission of the truth and validity of Ex.A1, Even otherwise, the stand taken by the appellants is indicative of a specific case that the agreement dated 27-7-1964, on the basis of which the suit is filed, is an ante-dated one. We are unable to subscribe to the view that this stand taken by the appellants in the written statement would amount to an admission. Even assuming that the statement, referred to above, can be considered as an admission, we must consider the whole of it or reject the whole of it and not accept it in part or reject it in part. That this should be the proper approach has been laid down by the Supreme Court in Hanumant Vs. The State of Madhya Pradesh, and Sridhara Valia Raja v. Kunhunni 41 M.L.J. 525 at 528. The stand taken by the appellants in the course of the present suit is one of specific denial and can not at all be termed as an admission. We then proceed to consider whether the stand taken by the second respondent and his father in O.S. 76 of 1965. Supreme Court, Salem under Ex.A6 dated 26-7-1965, can be construed as an admission of the truth as well as the genuineness of the agreement Ex.A1. That suit was instituted by the present appellants against respondents 2 to 5 herein, who were impleaded as defendants 1 to 5 and the first respondent, who was impleaded as the 6th defendant. The relief prayed for was for specific performance of the agreement under Ex.B1. In the written statement filed by the second respondent and his father, in para 3, in Ex. A6, they have stated as under--

These defendants have entered into an agreement of sale with the 6th defendant first respondent herein; on 27-7-1964, to sell their properties to him for Rs. 14000. The agreement of sale in favour of the plaintiffs was executed by the defendants subsequent to the agreement in favour of the 6th defendant.

The statement so made has been construed by the learned Judge to be a specific admission by the second respondent and his father and there was therefore no need also to call any of the attesting witnesses for the purpose of proving the execution of Ex.A1, which was also registered. In our opinion, Ex.A6 also cannot be relied upon as an admission either for the purpose of establishing the execution of Ex.A1 by relying upon it or for purpose of dispensing with the examination of the attestors thereto. Ex.A10, the judgment in O.S. 76 of 1965, does not indicate that Ex.A1 was marked or used in evidence in those proceedings. Further, there was no controversy between the defendants in that suit regarding Ex.A1. There was also no denial of the execution of Ex.A1 by the second respondent, though the first respondent in his written statement, Ex.A1, disputed Ex. B1. Even in the present suit, there is no denial by the second respondent regarding Ex.A1 as he had not even filed a written statement; but the appellants have denied its execution on 27-7-1964. Under those circumstances, there was no question of the applicability of the proviso to S. 68 of the Indian Evidence Act. We are, therefore, of the opinion that the learned Judge was clearly in error in applying the proviso to S. 68 of the Indian Evidence Act and stating that it was unnecessary to examine the attesting witnesses for the purpose of proving Ex.A1. Ex.A6 can at best be relied upon as a piece of evidence and not as an admission, as understood by the learned Judge, Even assuming that para 3 of Ex. A6 can be regarded as an admission that cannot be taken in isolation, for, it is seen from Ex.A12, that the circumstances under which the stand was so taken in Ex.A6 have been explained by the second respondent, who is the beat person, who can explain the stand taken earlier. In Ex. A12 it has been stated by the second respondent that the appellants had instituted O.S. 76 of 1965, and that lie and others had filed a wrong written statement at the instance of the first respondent herein and realising that the defence so raised would not be accepted, they had agreed to withdraw the defence. It is also further stated that Ex. B1, dated 17-7-1964, is true and that in pursuance thereof, the sale deed had been executed. Thus, the second respondent has not only explained, but repudiated the stand taken earlier under Ex.A6, clearly setting out the circumstances under which it was to taken. Unfortunately, there is no reference by the learned Judge to Ex.A12 at all. We are of the view that there is nothing to discredit the explanation given in Ex. A12 as regards Ex. A6. In any event, in view of the statement made in Ex. A12, Ex. A6 cannot be put against the appellants. Ex. A6 and Ex. A12, when considered as two pieces of evidence, Ex. A12 explaining the circumstances under which the statement in Ex. A6 was made, if certainly rendered more acceptable in the light of the other circumstances adverted to already.

10. We are unable to attach any importance to the circumstance relied on by the learned counsel for the first respondent that the stamp papers used for writing Ex.A1 bear serial numbers earlier to the serial numbers found in the stamp papers used for writing Ex.B1. From the mere circumstances that the stamp papers had been purchased earlier, it cannot be concluded that the agreement written with the stamp paper purchased earlier had been written prior to the

agreement with the stamp paper purchased, later. These cannot be any assumption regarding the purchase of the stamp papers and the writing up of the documents. We have already referred to some of the circumstances militating against the execution of Ex.A1 on the date it bears, viz., 27-7-1964, and under those circumstances, we are unable to attach any importance to the serial number of the stamp paper found in Ex.A1.

11. We have already referred to the stand taken by the second respondent in Ex.A6 and the explanation for taking that stand in Ex.A12 and held that explanation is acceptable and therefore, the truth and validity of Ex.A1 cannot be upheld on the basis of Ex.A6. The argument of the learned counsel for the first respondent that the second respondents should have been examined by the appellants and that the appellants have not let in the best evidence does not merit acceptance P.W.1, in the course of his chief examination has stated that the second respondent was in Kasipuram and there was enmity between him and the first respondent. A suggestion was also made to P.W.1 that the second respondent was friendly to him, but that had been denied. D.W.1 deposed that there were no disputes between Chinna Gounder and the appellants after Ex.B1. He would also say that he was not on talking terms with Chinna Gounder. He would further say that the second respondent executed the sale deed. From the evidence above referred it is difficult to accept the contention of the learned counsel for the first respondent that the second respondent should have been made available for examination by the appellants. Apparently, the second respondent had been sitting on the fence, as it were, attempting to take sides either with the appellant or the first respondent, depending upon the occasion. Even if that were so, the first respondent, while basing his claim for specific performance on the strength of Ex.A1, stated to be earlier to Ex.B1, should make out his case and entitlement to that relief by establishing that Ex.A1 had been executed by the second respondent and his father on 27-7-1984, and that agreement was earlier to Ex.B-1. That could have been done by the first respondent even by other evidence without the examination of the second respondent. We are therefore of the view that the non-examination of the second respondent is not fatal to the case of either party. Though the learned counsel for the first respondent attempted to explain the non examination of the scribe, or the attestors to Ex.A-1, on the ground of some relationship of one of the attestors to one of the appellants, we are not at all impressed by that argument. There is no evidence to show that the scribe was not available. Equally, there is no evidence regarding any impediment for the examination of the attestors. We therefore hold the first respondent has not established that Ex.A-1 was executed on 27-7-1964, and that too earlier to Ex.B-1.

12. From the foregoing discussions, it follows that the one and the only agreement for the sale of the properties in question, which had been executed on 27-7-1964, by the second respondent and his father was under Ex.B1, in favour of the appellants herein. The execution of Ex.B1, has been established by the evidence of the attestors D.Ws. 2 and 3. The agreement under Ex.B1 also

ripened into a sale deed under the original of Ex.A12 on 9-5-1968. Under those circumstances on the strength of Ex.A1, the first respondent cannot seek to have a sale deed executed and secure title over the properties in question.

13. We now proceed to consider the contention that the first respondent had committed breach of the terms of Ex.A1, and that he had also not established that he had been ready and willing to perform the obligations under Ex. A1, and therefore not entitled to claim the relief of specific performance under S. 16(b) and (c) of the Specific relief Act. Under the terms of Ex.A1, the first respondent had to discharge the debts totaling to Rs. 11272 payable by the second respondent and his father within one year from the date of Ex. A1. The further provision in Ex.A1 is to the effect that the transaction should be completed by 26-7-1968, and that in the event of default, the second respondent and his father would not be bound by the terms of the agreement. A further provision has also been made that if the second respondent and his lather, within the aforesaid period declined to execute the sale deed, then, the first respondent was at liberty to secure the execution of the conveyance through court and also recover the loss and damage from the second respondent and his father. Even in paras 3 and 5 of the plaint, the aforesaid terms of the agreement under Ex. A1, and the obligation to perform within one year nave been accepted by the first respondent. Even according to the stand taken in Ex. A1 issued or behalf of the first respondent, he has accepted that the sale should be completed on or before 26-7-1965. P.W.1 in the course of his chief examination stated that he informed the second respondent and his father that the transaction could be completed within stipulated period. However, in para 10 of the plaint, the first respondent stated that owing to the pendency of O.S. 76 of 1965 the second respondent and his father represented that the sale deed need not be written within the time but can await the disposal of the the suit and believing those representations, the first respondent did not insist upon the execution of the sale deed immediately. P.W.1 deposed in his chief examination that he was ready to make the payments within the period of one year and that owing to the pendency of O.S. 76 of 1965, the amount was agreed to be received after its disposal However, in the course of his cross examination. P.W. 1 was force to admit that at the time of Ex. A-1, he had only Rs. 2000 and that at the time of its registration, he had only Rs. 500. It is his further evidence that he was of the view that the debts due to the creditors could be discharged later and that was the reason why the amounts were not paid and the execution of the sale deed obtained. P.W. 1 also stated that money could be raised quickly. This evidence of P.W.1 clearly shows that he did not have the amounts to discharge the debts and pay the balance and he was not ready and willing to adhere to the terms of the contract in the matter of performance. The evidence of P.W.1 referred to above does not at all support the stand taken by the first respondent in para 10 of the plaint that be had always been ready and willing to perform his part of the agreement and had also gathered the funds for discharging the debts of the second respondent and his father and to pay the balance. On a consideration of the terms of Ex. A1, we are inclined to take the

view that thereunder the payment of Rs. 11272 towards the discharge of the debts due by the second respondent and his father and the balance of Rs. 1228 within one year from the date of the agreement, was one year from the date of the agreement, was one of the vital conditions of the contract. The recital in Ex.A1 regarding the payment of Rs. 11272 runs as follows- (first respondent herein). The further recital, which throws considerable light upon the nature of the obligation imposed on the part of the first respondent is as follows--

Sethuraman, J. was inclined to lake the view that the present case is one similar to the decision in AIR 1936 24 (Privy Council) and that time was not of the essence of the contract. On the terms of Ex.A-1 referred to earlier, we are of the view that a time limit had been set and stipulated under the agreement Ex.A1 as one of its essential and vital conditions. Even in Gomathinayagam Pillai and Others Vs. Pallaniswami Nadar, referred to by that if it is intended by the parties that time is of the essence of the contract, such intention to make time of the essence, if expressed in writing, must be in language, which is clear and unmistakable, but that it may also be inferred from the nature of the property agreed to be sold, conduct of the parties and the surrounding circumstances at or before the contract. It was also further pointed out that intention to make time the essence of the contract may be evidenced by either express stipulation or by circumstances sufficiently strong to displace the ordinary presumption that in a contract of sale of land, stipulations as to the time, is not of the essence of the contract. In the case decided by the Supreme Court there was no express stipulation nor were there circumstances strong enough to indicate that it was the intention of the parties that time was of the essence. On the contrary, in this case, the terms of the agreement. Ex.A1 already extracted not only make it clear that the intention was to make time of the essence by express stipulation in clear language, but it had also been so understood by the parties as per the pleadings and evidence, so that even on the footing that time was not originally of the essence, the parties had agreed to take and execute the conveyance within the time fixed, in default of compliance of which, other consequences were to follow. On the terms of Ex.A1, we have no doubt that the parties had stipulated that time was of the essence of the contract and had also incorporated a clause to that effect and further had understood the transaction as a time bound one, as could be seen from the evidence, of P.W.1, Ex. A4, etc. already referred to. The principle of the decision in AIR 1936 24 (Privy Council) , relied on by the learned Judge to hold that time was not of the essence of the contract, is not applicable to the facts of this case. The decision arose under Sec. 31 of the Transfer of Property Act, with reference to a completed sale, whereunder the property had already passed, containing a provision for a subsequent divestiture, in the event of a failure to satisfy the dues of certain creditors by a particular time. That was thus not a case of an agreement for a sale of the properties, as we have here. We are therefore of the view that the principle of that decision cannot have any application at all in this case. We have earlier noticed how the first respondent had not made any attempt whatever to discharge the debts within the stipulated time as stated in Ex.A1. We have also referred to the stated taken by the first respondent in the plaint and his evidence, which did not in any manner establish his readiness and willingness. Under those circumstances, we are constrained to held that the first respondent had violated one of the essential terms of Ex.A1 and had also not made out his readiness and willingness to perform the essential terms of Ex.A1 and was therefore disentitled to claim the equitable relief of specific performance under S. 16(b) and (c) of Specific Relief Act.

14. Whether the pendency of O.S. 76 of 1965 would nave any bearing upon the observance of the terms of Ex.A1, may now be considered I hat suit as referred to already was instituted by the appellants against respondents 2 to 5 and the first respondent, who were impleaded as defendants 1 to 6, praying for a decree for specific performance of the agreement Ex.B1 dated 27-7-1964. That suit was instituted on 13-8-1965 and was ultimately dismissed as withdrawn on 15-6-1968. Ex.A1 is a registered agreement. In evidence, P.W.1, stated that owing to the pendency of O.S. 76 of 1968, it was agreed to postpone the payment and the receipt of monies as stipulated under Ex.A1. This would amount to an arrangement or agreement contrary to the terms of the registered document Ex.A1, and oral agreement contrary to the terms of a written registered instrument cannot be pleaded, as it would be opposed to Proviso (4) to S.92 of the Indian Evidence Act. We may also refer in this connection to the decision in Ramachandra v. Raval & Co. 82 L.W. 479 (D.B.) = 989 II M.L.J. 8, where it was laid down that where a tenancy is evidence by a registered lease deed, it is not open to the tenant to plead variation of rent not evidenced by another registered instrument and Ss.105 and 107 of the Transfer of Property Act read with S.92 of the Indian Evidence Act bar the evidence of variation of the terms of the lease, whether the evidence be a course of conduct or correspondence. The Supreme Court in Raval & Co. v. Ramachadran AIR 1947 S.C. 818 at 824, laid down that the variation of rent reserved by a registered lease deed must be made by another registered instrument. We are therefore of the view that the pendency of O.S. 76 of 1965 and the consequent oral agreement or arrangement for postponement of the performance of the obligation under the terms of Ex.A1, varying the relevant clause in the registered agreement Ex.A1 cannot be countenanced.

15. We are also of the view that the pendency of O.S. 76 of 1965 cannot in any wanner affect either the terms of the contract or their performance and in any event, would have no impact upon the continuous readiness and willingness of the first respondent to perform his part of the contract under Ex. A1. We may also refer in this connection to the observations of the Privy Council in Ardeshir H Kamo v. Flora Seasoon LV M.L.J. 523 at 539 to the effect that in a suit for specific performance the plaintiff had to allege and if traversed, to establish that he had been continuously ready and willing from the date of the Contract to the time of hearing of the suit to perform the contract and that failure to make good that averment brought with it the inevitable dismissal of suit. In Sundaramayya v. Jagadeesan 1965 I M.L.J. 362 (D.B.), at was pointed out that a plaintiff in a suit

for specific performance has to prove his continuous readiness and willingness from the date of contract to the time of the hearing of the suit to perform his part of the contract and that it would not be open to a party, who elects to accept the breach, assuming there was a breach on the part of the other side, to cancel that and test the contract, as if it was subsisting. We have already pointed out that the non-performance of the conditions under Ex.A1 during the pendency O.S.76 of 1965 was not one of the terms of Ex.A1, and therefore, these proceedings would not affect the performance of the terms of Ex.A1, or even the readiness and willingness of the first respondent to perform his part from the date of the contract down to the date of hearing of the present suit. We also do not see any statutory impediment in the matter of readiness and willingness of the first respondent to adhere to the terms of Ex.A1 and perform the same or even a suspension of the terms of condition under Ex.A1. The mere pendency of O.S.76 of 1965 could not in our opinion be taken advantage of by the first respondent as an excuse for not adhering to the terms of Ex. A1 and also performing the conditions therein within the stipulated lime. We also do not see any basis for the plea of waiver urged by the learned counsel for the first respondent. In any event, having regard to the conclusion earlier arrived at by us that the first respondent has disabled himself from claiming the relief of specific performance in view of S.16(b) and (c) of the Specific Relief Act, to grant such a relief would be to fly in the lace of the statutory prohibitions contained therein. We may usefully refer in this connection to the decision in Krishna Reddi and Co. v. Thimmiah 1983 1 M.L.J. 167 (D.B.) where in Padmanabhan, J. has pointed out that S. 16(c) of the Specific Relief Act is prohibitory and a duty is cast on courts by statute that specific performance of a contract cannot be granted in favour of a person, unless he averts and proves his readiness and willingness to perform his part of the contract. We have already found that there has been a violation of S.16(b) and (c) of the Specific Relief Act, and if the decree for specific performance granted already is to be maintained, the court would be carrying out what has been prohibited by the provisions of the Specific Relief Act. Viewed in that light also, the first respondent cannot be granted the relief of specific performance.

16. For the foregoing reasons, the judgments and decrees of the trial court as well Sethuraman, J. cannot be sustained. Accordingly, we allow the Letters Patent Appeal and dismiss O.S. 277 of 1968. Sub-Court, Salem, with costs throughout. Under Art. 134A of the Constitution of India, the learned counsel for the first respondent seeks leave to appeal to the Supreme Court, against our judgment. Though we have discussed certain aspects with reference to the provisions of law, we have not laid down any new law. We have only followed earlier decisions of the Privy Council and some decision of the Supreme Court. The decision in this appeal purely rested on the facts of the case. In the circumstances, we are of the view that the proposed appeal to the Supreme Court does not involve any substantial question of law of general importance which need to be decided by the Supreme Court, nor are we satisfied that this is

a fit case for the grant of leave. We therefore reject the oral application for leave.

