
(2012) 02 MAD CK 0301

In the Madras High Court

Case No : Second Appeal No. 1811 of 1998 and C.M.P. No. 1316 of 1999

P. Kandaram (deceased), Devaki, K.C. Karuppannan and
Manikandan

APPELLANT

Vs

N.A. Chinnadurai

RESPONDENT

Date of Decision : 29-02-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, Order 2 Rule 2(3), Order 7 Rule 11, Order 7 Rule 7, 100
Contract Act, 1872 — Section 16
Criminal Procedure Code, 1973 (CrPC) — Section 145
Limitation Act, 1963 — Article 54, 15, 15(1), 3
Provincial Insolvency Act, 1920 — Section 29
Specific Relief Act, 1963 — Section 16
Transfer of Property Act, 1882 — Section 52

Citation : (2012) 02 MAD CK 0301

Hon'ble Judges : M. Venugopal, J

Bench : Single Bench

Advocate : Sathiya Bama for M/s. T.R. Rajaraman, for the Appellant; N. Damodaran, for the Respondent

Final Decision : Dismissed

Judgement

Honourable Mr. Justice M. Venugopal

1. The Appellants/Defendants have filed the present Second Appeal as against the Judgment and Decree dated 28.08.1998 in A.S. No. 34 of 1997 passed by the Learned I Additional District Court, Erode, in reversing the Judgment and Decree dated 11.10.1996 in O.S. No. 69 of 1996 passed by the Subordinate Judge, Bhavani, Erode District. The First Appellate Court, viz., the Learned First Additional District Judge cum Chief Judicial Magistrate, Erode, while passing the Judgment in A.S. No. 34 of 1997 and the Cross-Objection filed by the Respondent/Plaintiff (as an Appellant) on 28.08.1998, has among things observed that the Suit in O.S. No. 69 of 1996 has been filed on 13.12.1993, within three years from the date of dismissal of the Suit in O.S. No. 249 of 1989

on 19.11.1993 and as such, the Suit in O.S. No. 69 of 1996 is not barred by limitation and further opined that the trial Court, after deeper scrutiny in paragraph 13 of its Judgment in the main Suit, has mentioned that the cancellation of Sale Agreement based on the reason that as per Ex.B5, there is no amount of Rs. 5,000/- is only a sham one, which is a proper decision and also in the present Suit, there is no delay on the part of the Respondent/Plaintiff and that when the Suit filed by Bagyam has been dismissed within one month, the present Suit has been filed by the Respondent/Plaintiff and has come to a categorical conclusion that the direction issued by the trial Court to return the advance received without granting the relief of Specific Performance cannot be accepted and resultantly, allowed the Appeal and also the Cross-Objection with costs.

2. Also, the First Appellate Court has directed the Appellants/Defendants to receive the balance sale consideration of Rs. 1,30,000/- from the Respondent/Plaintiff in O.S. No. 69 of 1996 and in respect of the Suit property, the Appellants/Defendants will have to execute the Sale Deed and register the same in favour of the Respondent/Plaintiff and also hand over vacant possession to him. The balance sale consideration of Rs. 30,000/- will have to be deposited by the Respondent/Plaintiff after issuing notice either on 15.10.1998 or before that date and from the date of deposit within two months, the Appellants/Defendants have been directed to execute the Sale Deed and to register the same in respect of the Suit property in favour of the Respondent/Plaintiff and also to receive the amount deposited into the Court failing which the Respondent/Plaintiff can initiate Court proceedings for registration of Sale Deed and to obtain the possession.

3. Before the trial Court in the main Suit, 1 to 5 issues have been framed for determination. On behalf of the Respondent/Plaintiff, witness P.W.1 has been examined and Exs.A1 to A12 have been marked. On the side of the Appellants/Defendants, witnesses D.Ws.1 and 2 have been examined and Exs.B1 to B15 have been marked.

4. The trial Court, after analysing the oral and documentary evidence available on record, has come to a consequent conclusion that presently, on the basis of Ex.A12, Suit Extract details in O.S. No. 249 of 1989, party has been added after three years and on the basis of Ex.A6-Lawyer's notice dated 17.11.1989, when the Respondent/Plaintiff has stated that he is ready to fulfill his part of the contract and has issued a notice to the Defendants, after Ex.A7-Reply Notice dated 20.11.1989, the Respondent/Plaintiff has not taken steps to set aside the interim stay in O.S. No. 249 of 1989 for three years, which shows that he is not interested to purchase the property and further opined that the Respondent/Plaintiff through Interlocutory Application during December 1992, in O.S. No. 249 of 1989 has been arrayed as a party by filing a Petition and during the interregnum, he is not ready to complete the sale and that the sale Agreement is not affected by the injunction order in force and moreover held that the present

Suit ought to have been filed by the Respondent/Plaintiff after issuance of Ex.A7-Reply notice dated 20.11.1989 and before the issuance of Reply Notice-Ex.A8, dated 14.11.1992 within a period of three years, and when it is not established that during this in between period from Ex.A7-Notice and Ex.A8-Reply notice, the Respondent/Plaintiff has been ready and willing to perform his part of the contract viz., to purchase the property and granted only alternate relief of return of advance of Rs. 1,00,000/- to him to be paid by the Appellants/Defendants together with interest at 18% per annum from the date of Judgment till the date of realization along with costs and dismissed the Suit for Specific Performance with costs.

5. At the time of admission of the Second Appeal, this Court has formulated the following Substantial Questions of Law for determination:

- (i) Is not the Suit barred by limitation under Article 54 of the Limitation Act?
- (ii) Whether the readiness pleaded in the Plaint is sufficient in compliance of Section 16(c) of the Specific Relief Act?

The Contentions, Discussions and Findings on Substantial Questions of Law Nos. 1 and 2:

6. The Learned Counsel for the Appellants/Defendants submits that the Learned First Additional District Judge cum Chief Judicial Magistrate, Erode in A.S. No. 34 of 1997, in reversing the findings has committed an error that the Respondent/Plaintiff has not been ready and willing to perform his part of the contract without assigning any reasons and without adverting into the material facts. It is the further contention of the Learned Counsel for the Appellants/Defendants that the First Appellate Court has failed to appreciate that time for performance of the contract of sale has been extended till 15.10.1989 and that parties to the Agreement have not agreed for further extension either on account of pendency of litigation or for any other reasons.

7. Expatiating her submissions, the Learned Counsel for the Appellants/Defendants urges before this Court that the First Appellate Court has erred in holding that the Defendants 1 and 2 refused to execute the Sale Deed because of pendency of another Suit for Partition, as if it is admitted by filtering the fact conveniently.

8. The Learned Counsel for the Appellants/Defendants projects a legal plea that the First Appellate Court has wrongly held that the Suit is not barred by limitation without adverting to the ingredients of Article 54 of the Indian Limitation Act, 1963, which specifies that the limitation starts from the date fixed in the Agreement for performance. Furthermore, Ex.A1-Sale Agreement and the endorsement made to that effect for extension of time go to exhibit that the time for performance of the contract has been given only till 15.10.1989 and that the First Appellate Authority should have held that the present Suit in O.S. No. 69 of 1996 (on the file of the Learned Sub Judge, Bhavani) filed only on 13.12.1993 is

clearly time-barred.

9. That apart, the Learned Counsel for the Appellants/Defendants contends that the Learned First Appellate Authority has failed to take into account of the fact that a mere pendency of litigation or an interim order of injunction will not stop the limitation being run for the institution of Suit for Specific Performance and that the Respondent/Plaintiff has not been prevented or prohibited by any law from instituting a Suit for Specific Performance within time.

10. The Learned Counsel for the Appellants/Defendants submits that O.S. No. 249 of 1989 has been abated on the death of Rukmani Ammal on 15.10.1990 and till the disposal of the Suit in O.S. No. 249 of 1989, the first Defendant and the heirs of Rukmani Ammal have been prevented from executing the Sale Deed. But, these vital facts have not been looked into by the First Appellate Court in a proper and real perspective.

11. The Appellants/Defendants take a plea that the First Appellate court has failed to take into consideration that the Respondent/Plaintiff has not even pleaded his readiness and willingness as per Section 16(c) of the Specific Relief Act, which is mandatory before granting the relief of Specific Performance.

12. The Learned Counsel for the Appellants/Defendants contends that the First Appellate Court has committed an error in observing that the recitals in Ex.B5 relating to the means of the Respondent/Plaintiff are unacceptable and that they are sham and indeed the recitals of written documents are binding on the parties and that the parties are estopped from adducing oral and other evidence contrary to the tenor of the documents.

13. The Learned Counsel for the Appellants/Defendants strenuously contends that the First Appellate Court has come to a wrong conclusion that Ex.A2-Sale Deed, dated 05.08.1993 in favour of the 3rd Defendant is a sham transaction without adverting to the various attendant circumstances and probabilities of the case.

14(i). The Learned Counsel for the Appellants/Defendants cites a decision of the Honourable Supreme Court reported in (1996) 4 SCC 526 (His Holiness Acharya Swami Ganesh Dassji vs. Sita Ram Thapar), wherein, it is held as under:

There is a distinction between readiness to perform the contract and willingness to perform the contract. By readiness may be meant the capacity of the plaintiff to perform the contract which includes his financial position to pay the purchase price. For determining his willingness to perform his part of the contract, the conduct has to be properly scrutinised. The factum of readiness and willingness to perform plaintiff's part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of the contract. The facts of this case would amply demonstrate that the petitioner/plaintiff was not ready nor had the

capacity to perform his part of the contract as he had no financial capacity to pay the consideration in cash as contracted and intended to bid for the time which disentitles him as time was of the essence of the contract. The essential term of the contract was executing the sale deed within the stipulated period. He did not perform his part of the contract within the stipulated period. The High Court was right in refusing to enforce the contract. It being a discretionary remedy, the High Court has exercised sound judicial discretion to negate the relief of Specific Performance of the contract.

14(ii). She also cites a decision of this Court reported in 1998 (I) CTC 186 (Vasanth and others vs. M.Senguttuvan), wherein it is held that the Agreement Holder should prove readiness and willingness continuously from the date of agreement upto the date of hearing and that equitable remedy should not be granted if the agreement holder is not ready to take sale deed even it is a single day.

14(iii). She also invites the attention of this Court to yet another decision of this Court reported in 2010 (6) CTC 95 (S.Gananatha Perumal vs. S.Valliappan), wherein, it is held thus :

In order to find out the element of readiness and willingness on his part, there shall be some materials which show that he was conscious enough about his part and whether he was acting to get the Sale Deed executed positively. If there had been absence of convincing explanation on his part for the delay, he has to be non-suited for the relief of Specific Performance and he has to face legal consequences for his laches. Even though the delay in filing the Suit has been specifically pleaded in the additional Written Statement of the Appellant, the Respondent has not rendered any satisfactory explanations for the undue delay. The pendency of the other Suit will in no way put an embargo for Respondent to file the Suit for Specific Performance of contract, subject to the provisions of Order 2, Rule 2, CPC.

14(iv). The Learned Counsel for the Appellants/Defendants would seek the aid of a Division Bench decision of this Court reported in 1993 (2) LW 411 (K.Krishnan Nair & three others vs. K.Parameswaran Pillai and 23 others), wherein, in paragraphs 9 and 15, it is held thus :

There is no difficulty in holding that the sale deed had to be executed within one month from the date of the final order. The contention of the appellants that "final order" means the final determination of all the proceedings which may arise out of the final order passed in M.C. No. 7 of 1964 cannot be accepted, as the agreement referred only to the final order passed in M.C. No. 7 of 1964 and not to any order which may be made in the subsequent proceedings. It was admitted that the first respondent (B) was a vakils clerk and he wrote the document. Obviously, he was aware of the fact that in proceedings under S.145 Cr.P.C., there will be a preliminary order in the first instance and a final order at the end. Thus, he used the expression "final order" in the document in order to

indicate the final order which will be passed in the said proceedings in continuation of the preliminary order already passed... In the circumstances of the case, the only conclusion that is possible is that the parties intended to fix the time for performance of the contract as one month from the date of the final order in M.C. No. 7 of 1964.

Article 54 of the Limitation Act, 1963 prescribes a period of three years for a suit for Specific Performance of a contract from the date fixed for the performance or, if no such date is fixed, when the plaintiff has noticed that performance is refused. In the present case, the date is fixed by the parties. Though actual date is not fixed, the parties have clearly mentioned the time within which the contract should be performed. It has been held in 1956 II MLJ 163 that the words "date fixed" are comprehensive to include a date which can be ascertained with reference to an event certain to happen. The suit having been filed only on 18.07.1979 is clearly barred by limitation.

14(v). Again, she has placed reliance on a decision of this Court reported in 2011 (4) L.W. 264 (Sathiyamurthy vs. R.Pavunambal and another), wherein, it is held that the Appellant ought to have obtained leave under Order 2 Rule 2 C.P.C. to file a fresh suit for Specific Performance and that the real test for entertaining Order 7 Rule 11 C.P.C. is whether cause of action for filing the present suit was available even on the date when the earlier suit was filed and under Order 2 Rule 11(d) C.P.C., the subsequent suit filed by the Appellant is barred by the principle of res judicata.

15. Per contra, it is the contention of the Learned Counsel for the Respondent/Plaintiff that in I.A.No.383 of 1989 in O.S. No. 249 of 1999 (filed by one Bagyam as Plaintiff) against one A.V.Karumanda Gounder and four others, status quo order has been passed from 01.06.1989 till 18.10.1989 and later, it has not been extended for some time. But, the Partition Suit has been pending and again on 18.10.1989, the status quo order has been extended and further, on 27.11.1989 also, the status quo order has been extended and that on 22.02.1990, the Petition enquiry has been adjourned to 20.03.1990 and injunction has been extended and that the injunction order has been extended every now and then till 20.02.1995 and subsequently, the same has not been extended and finally, on 14.08.1992, the injunction order has been made absolute and the Petition has been allowed and in view of the injunction order in force, the 1st Appellant/1st Defendant (since deceased) and Rukmani Ammal or the heirs of Rukmani Ammal cannot sell the property to the Respondent/Plaintiff and finally, the Suit in O.S. No. 249 of 1989 has been dismissed on 19.12.1992 and as such the Respondent/Plaintiff is prevented from filing a Suit for Specific Performance during the period of injunction and indeed, the First Appellate Court has elaborately dealt with the subject matter in issue in detail and has come to a right conclusion that the Respondent/Plaintiff is entitled to get the relief of Specific Performance and allowed the Appeal, which may not be interfered with by this Court sitting in Second Appeal.

16(i). The Learned Counsel for the Respondent/Plaintiff relies on a decision of the Honourable Supreme Court reported in AIR 1964 SC 1810(1) (Gurbux Singh vs. Bhooralal), wherein it is held that in respect of a plea of bar under Order 2 Rule 2(3) of the Code of Civil Procedure, the same has to be established satisfactorily by the Defendant and cannot be presumed on the basis of inferential reasoning and that the Defendant has to file in evidence pleading in previous Suit.

16(ii). He also cites a Division Bench Judgment of this Court reported in 2011 (6) CTC 141 (R.Radhakrishnan and another vs. G.Ekambaram and others), wherein in paragraph 43, it is held as follows:

In the present case, though the Respondents had pleaded that the present Suit is barred under Order 2, Rule 2, C.P.C., they have not placed the pleadings of the former Suit. They have also not raised an issue before the Trial Court and the Trial Court has also not gone into this issue. It is well settled that Order 2, C.P.C. can be made applicable only if the earlier Suit was disposed of and thereafter a fresh Suit is being filed with the same cause of action for fresh relief. When the present Suit has been filed during the pendency of the earlier Suit, the provision of Order 2, Rule 2, CPC is not attracted. It is also the fact that the present relief of Specific Performance was not within the jurisdiction of the Court in which earlier Suit was pending. Moreover, the Respondents have also not produced the Plaint filed in the earlier Suit for permanent injunction. Therefore, we are of the considered view that the present Suit is not barred under Order 2, Rule 2, C.P.C.

16(iii). He also places reliance on a decision of the Honourable Supreme Court reported in AIR 2006 SC 40 (S.Brahmanand and others vs. K.R.Muthugopal (D) and others), wherein in paragraph 37, it is held thus:

In the present case, it was only on 31.08.1995/01.09.1995 that the plaintiffs realised that there was a refusal to performance, when they were forcibly evicted from the godown. It is only then that the Plaintiffs had notice of refusal of performance. Counted from this date, the suit was filed within 15 days, and, therefore, was perfectly within the period of limitation. We, therefore, disagree with the High Court on the issue of limitation and hold that the suit filed by the Plaintiffs was within the period of limitation and was not liable to be dismissed u/s 3 of the Limitation Act. All other issues concurrently have been held in favour of the Plaintiffs. Hence, there is no impediment to the Plaintiffs succeeding in the suit.

17. For a complete and better appreciation of the merits of the case, this Court makes a useful reference to the evidence of witnesses, P.W.1, D.W.1 and D.W.2.

18. P.W.1 (Respondent/Plaintiff), in his evidence has deposed that the Suit property originally belonged to the 1st Defendant and 2nd Defendant's mother. On 27.04.1989, the Sale Consideration has been determined for Rs. 2,30,000/- and that an advance of Rs. 1,00,000/- has been received and the balance amount will have to be paid in Tamil Sukla year "Aani" month and to execute the Sale Deed at his expenses and on the date of execution of the Sale Agreement,

the possession of the Suit property has been handed over and the Sale Agreement is marked as Ex.A1 and that the original Sale Agreement has been filed in O.S. No. 511 of 1990 and the said suit is pending and further, when he is ready to execute the Sale Deed, but, they informed that there is an encumbrance and that one Bagyam has filed a Suit on the file of the Sub-Court, Erode and therefore, time has been extended, which is mentioned in the Agreement and that the Appellants/Defendants have not set aside the order of stay and as such, they have not executed the Sale Deed.

19. P.W.1 goes on to add in his evidence, since an admission has been made to interfere with his possession, he filed a Suit on the file of the District Munsif Court and obtained an order of stay. Later, such stay has been cancelled and the Appellants/Defendants have again taken possession of the Suit property and when the Suit has been pending on the file of the Sub Court, Erode, at that time, the property has been sold to the 3rd Defendant as per Ex.A2-Sale Deed, dated 05.08.1993 and that the 3rd Defendant has known about the Sale Agreement that has been entered into in his favour and subsequently, on 19.11.1993, the Suit on the file of Sub-Court, Erode has been dismissed for not taking further steps/proceedings and time is not the essence of contract and Ex.A3 is the certified copy of the Decree dated 19.11.1993 in O.S. No. 249 of 1989 and Ex.A4 is the Plaint copy in O.S. No. 249 of 1989 and Ex.A5 is the Petition in I.A.No.1539 of 1989 and the orders passed therein and on 14.08.1992, the stay granted already has been made absolute and that the Sale in favour of the 3rd Defendant will not bind him and that he is ready to purchase the property.

20. P.W.1, in his cross-examination has deposed that it is correct to state that he has filed O.S. No. 583 of 1993 on 13.12.1993 and he does not remember, on 27.10.1988, he has sold a portion of the property to the 1st Defendant and he does not remember that he has paid Rs. 25,000/- after entering into an Agreement and that since 1 1/2 years time have been shown, he has entered into a honest sale transaction and Ex. B4 is the Sale Deed dated 27.10.1998 and on 26.04.1989, he has cancelled Ex.B3-Agreement and Ex. B5 is the Cancellation of Agreement.

21. P.W.1 proceeds to state in his evidence that Rukmani Ammal died approximately in the year 1991 and he does not remember that in Ex.A8-Reply, dated 14.11.1992, whether he has stated that the Plaintiff therein has no right in the property. He does not know whether any time limit has been specified in Ex.A8, dated 14.11.1992 and he does not remember who has extended the time, in Ex.A1 on 10.07.1989 and it is wrong to state that after 15.10.1990, all rights have been annulled.

22. P.W.1 (in his cross-examination) has stated, that on 15.10.1990 Rukmani Ammal died, in the Suit on the file of Sub Court, Erode and he has taken action to implead the legal heirs of Rukmani Ammal. Continuing further, it is the evidence of P.W.1 that Petition number has been given on 16.03.1996 for impleading him as a party in the Suit filed by Bagyammal on the file of the Sub

Court, Erode during the year 1993.

23. D.W.1, in his evidence has deposed that the 2nd Defendant is his wife and his wife's mother is Rukmani Ammal and she died on 15.10.1990 and for Rukmani, his wife/2nd Defendant is the legal heir and on 27.04.1999, a Sale Agreement has been entered into by them and the sale consideration is Rs. 2,30,000/- and that he has received a sum of Rs. 1,00,000/- and the balance amount is Rs. 1,30,000/- and the time limit is three months and subsequently, the time limited has been extended for another three months and neither the Plaintiff nor others, after the expiry of the Sale Agreement, have filed a Suit for Specific Performance and that the Respondent/Plaintiff has filed a Suit on 13.12.1993 and that the Suit is barred by limitation and further, the Respondent/Plaintiff has filed O.S. No. 511 of 1990 on the file of the Sub Court, Bhavani and the I.A. filed for injunction has been dismissed and the Civil Miscellaneous Appeal filed by the Respondent/Plaintiff has been dismissed.

24. It is the further evidence of D.W.1 that Bagyam has filed a Suit in O.S.No.249 of 1989 against him and his mother-in-law and obtained an order of injunction and after the death of his mother-in-law, no steps have been taken to implead her legal heirs in that Suit and therefore, in that Original Suit, the Respondent/Plaintiff seeks the relief against them.

25. D.W.1 in his cross-examination has deposed that it is wrong to state that Ex.B5 has come into existence in a sham manner to cancel the Agreement and it is wrong to state that the Respondent/Plaintiff after the Agreement has been ready to perform his part of the contract and the Respondent/Plaintiff has filed a Suit through Bagyam and an interim stay has been obtained that he and his mother-in-law should not sell the Suit property and he does not know about the Respondent/Plaintiff filing I.A. No. 34 of 1993 to implead him in the Suit before the Sub Court, Erode and after the said I.A. has been filed and allowed since the Plaintiff Bagyam has not taken further steps, the said Suit has been dismissed, and he does not know about the same and it is correct to state that as per Ex. A1, he has received a sum of Rs. 1,00,000/- as advance.

26. D.W.2 (3rd Defendant), in his evidence has deposed that he has purchased the Suit property from Defendants 1 and 2 as per Ex. B6-Sale Deed dated 05.08.1993 and that he has seen the encumbrance in respect of the Suit property and that there is no encumbrance and it is wrong to state that he has known about the present Suit in O.S. No. 69 of 1996 and the earlier Suit prior to his benami/sham purchase and that the Defendants 1 and 2 have not informed him about the case.

27. The Learned Counsel for the Appellants/Defendants submits that the Suit filed in O.S. No. 69 of 1996 on the file of the trial Court by the Respondent/Plaintiff (earlier before the Sub Judge, Erode as O.S. No. 580 of 1994) is barred by limitation as per Article 54 of the Indian Limitation Act, which prescribes that the limitation starts from the date of determination in the Agreement for

performance and in the instant case on hand, in Ex.A1-Agreement, dated 15.07.1989 and the endorsement of extension of time made to the effect clearly points out that the time for performance of contract has been given only up to 15.10.1989 and therefore, O.S.No.69 of 1996 viz., O.S. No. 580 of 1994 on the file of the Sub-Court, Erode should have been filed well before 15.10.1992. But, in the present case, the Suit has been filed only on 13.02.1993, which is hopelessly barred by limitation.

28. Also that a mere pendency of litigation in an earlier Suit or an interim order of injunction will not prevent the limitation being run for filing of a Suit for Specific Performance, since the Respondent/Plaintiff is not prohibited to file a Suit in law.

29. At this juncture, it is to be pointed out by this Court that in a Suit for Specific Performance, contract is founded on a contract and the grant of Specific Performance is an equitable remedy, which is special and extraordinary in character, notwithstanding the fact that a Court of Law has a discretion either to grant the relief or to allow the parties to work out their remedies as per law.

30. In a case of Suit for Specific Performance, the Respondent/Plaintiff has to establish his readiness and willingness in substance and not in form, in the considered opinion of this Court. Moreover, it cannot be gainsaid that the Respondent/Plaintiff can pray for Specific Performance for contract of sale even against the transferee, if he has purchased the property with notice on earlier contract of the Plaintiff for sale.

31. Coming to the aspect of commencement point of limitation, it is to be borne in mind that a reading of third column of Article 54 of Limitation Act, 1963 makes it crystal clear that wherever a time is determined for the Specific Performance, the first part would apply and in other cases, the second part would apply. No doubt, the limitation is three years in regard to a Suit for Specific Performance, but, under the first part, the said limitation commences from the date determined for the purpose. The refusal to perform the contract need not be in express term, it may be inferred or gathered from attending surrounding circumstances.

32. When a "Lis" in respect of the Suit property is pending before the Court of Law and if there is any agreement that the seller has unambiguously agreed to sell the property within a particular period of the disposal of the lis, then, it is a matter when the date is fixed for the performance of the contract. Therefore, the said case is clearly covered by the first part of third column of Article 54 of the Limitation Act.

33. It is a settled principle of law that the ingredients of Order 7 Rule 7 will not enable the Court of Law to ignore or override the limitation enshrined in Section 16 of the Specific Performance of Contract Act and Article 54 of the Limitation Act, which prevents the Court to award the relief for Specific Performance of contract except within the period of limitation circumscribed by Article 54 of the

Limitation Act.

34. The aim of Section 15(1) of the Limitation Act is to protect the litigant who is prevented by an order of injunction from exercising the right of suit or execution of a Decree in his favour against he being injured. A litigant seeking to gain advantage of Section 15(1) of the Limitation Act should show that he has been restrained earlier by an order from making the request now seeking from the Court. For exclusion of time prescribed as per Section 15(1) of the Limitation Act, a person should show that for filing of a Suit in issue has been stayed by an injunction order, if the order of injunction in favour of the party is filed, then the ingredients of Section 15(1) of the Limitation Act are fully complied with, as opined by this Court. If a litigant files a Suit for Specific Performance of a contract or sale in respect of a particular property, then he is entitled to avail the benefit of Section 15 of the Limitation Act, because of the simple fact that the filing of the Suit has been stayed either by an order of injunction or by necessary implication in an earlier litigation, as opined by this Court.

35. Speaking generally, the ingredients of Section 15(1) of the Limitation Act will come into operation when the filing of the Suit has been stayed by means of an order of injunction and in such an event, the entire period during which the injunction has remained in force has to be excluded in calculating the period of limitation for such Suit or Interlocutory Application. The period of injunction will be the period of time which has to be excluded while computing the period of limitation. If there is no injunction order or stay order barring a person to file a Suit, then Section 15(1) of the Limitation Act is not to be attracted. As a matter of fact, to invoke Section 15(1) of the Limitation Act, the injunction order or stay order should be made absolute. Undoubtedly, when the injunction order or stay order has been made absolute, the fact that a person in law has the remedy or power to annul or vary or modify the said order, will not in any way change the position.

36. The purport of Section 15 of the Limitation Act is that law does not compel a HOMO SAPIEN to perform what he cannot possibly perform and it is an axiomatic principle in law that an Act or Code shall not injure or prejudice anyone. In construing the provisions of the Limitation Act, the strict grammatical words or the meaning employed will have to be taken note of and equitable considerations are not germane to be taken into account by the Court of Law, as opined by this Court.

37. The Limitation Act is a procedural law and it has to be strictly construed. In excluding the period of interim stay or injunction, it must be proved that the filing of a Suit in issue has been stayed by an order of injunction. The injunction or stay order imposed to be "express". The exclusion of time as per Section 15 of the Limitation Act can only be embarked upon by inter parties and it has no reference to the portion of a Judgment in "rem".

38. It is to be noted that in the decision Kannappa Chettiar V. Kandaswami Pillai

in AIR 1955 MADRAS 547, it is held as follows:

When once there is an order of a Court which absolutely on its terms prohibits a party from executing the decree, the mere fact that the Court has the power to modify such an order does not make it any the less an order staying the execution of a decree. Hence, it cannot be held that as it was open to the decree-holder to have applied to have the order of stay under S. 29, Provincial Insolvency Act modified or vacated it is not such an order of absolute stay as is contemplated by S. 15, AIR 1929 Pat 597, Dist.

39. Also, one cannot forget that the period of limitation prescribed for a suit for specific performance is three years, which runs from the date of accrual of a cause of action.

40. An order, even though, interim in nature, is binding till it is set aside by the Competent Court and it cannot be ignored on the ground that the Court, which passed the order has no jurisdiction to pass the same.

41. Section 52 of the Transfer of Property Act secures the right of parties of a suit from a voluntary transfer or otherwise dealing with a particular property.

42. It is the duty of a vendor to inform the intending purchaser about the pendency of the suit. No wonder, transfer made during the pendency of suit is nullity, as opined by this Court. Moreover, Section 52 of the Transfer of Property Act creates a legal fiction and proceeding commences from the date on which a suit is filed. "Lis Pendens" is applicable to a case of specific performance of contract. It is well settled principle in law that "Lis" commences on the date of plaint and not on the date of decree.

43. The term "Lis" is defined as suit, action, dispute or controversy. "Res" is the subject matter of thing involved in a suit. A Lis Pendens transferee is bound by the decree, whether on contest, ex parte or on compromise and a party is under no obligation to implead such transferee as a party in a pending proceedings.

44. This Court aptly points out the decision Gulam Nasirud-din V. Mardeo Prasad in ILR (1912) A.436 wherein it is held that where "a portion of a decree" is stayed by an injunction, an exclusion operates in favour of entire decree.

45. At this stage, this Court worth recalls the decision Nriyamoni V. Lakhan in 30 MLJ 529(PC) wherein it is observed that "limitation would without doubt remain in suspense whilst the plaintiffs were bona fide litigating for their rights in a Court of justice.

46. It is to be borne in mind that a limitation to file a suit for specific performance of contract will commence from the date when such sale deed has been executed in favour of a third party as per decision Srikrishna V. Balaji in AIR 1976 Bom 342.

47. In the decision Suresh Bhatt V. S. Brahmanand in AIR 2004 Ker 101 (DB), the property has been under litigation and interim order has been passed by the

Court against its alienation. The agreement for sale provides that the sale deed shall be executed on vacation of interim order. So date fixed by the agreement for sale is ascertainable. Consequently, the suit for specific performance of contract has to be filed within three years of the vacation of the interim order and therefore, it is held that the suit filed beyond three years of the vacation of the interim order is clearly barred by limitation.

48. Only if the suit for specific performance of contract is filed within the period of limitation mentioned in the third column of the Article 54 of the Limitation Act, 1963, the same is maintainable. If the same is not filed, then a Court of Law has no right in invoking its discretionary power as per Order VII Rule 7 of the CPC to grant such relief to a Defendant.

49. In Ex.A6, the Respondent/Plaintiff's lawyer's notice dated 17.11.1989 addressed to Defendants 1 and 2, it is mentioned that ever since the date of agreement, the Respondent/Plaintiff has always been ready and willing to perform his part of the contract and in fact tendered the balance amount of sale consideration and on 10.07.1989, Defendants 1 and 2 because of the inability to execute the sale, extended the time of sale agreement for three months and even then, they have not been prepared to perform the agreement and that the stipulated period has expired on 09.10.1989. In Ex.A7-Reply lawyer's notice dated 20.11.1989, issued on behalf of Defendants 1 and 2 and addressed to the Respondent/Plaintiff's lawyer, it is mentioned that it is true that the Respondent/Plaintiff has received an advance of Rs. 1,00,000/- and the agreement also recites the usual default clause and that the said agreement has been further extended by another three months on 10.07.1989 and the same has been endorsed on the back of the Agreement and while extending the period, it has been clearly written that the Suit is pending regarding the property and that the Respondent/Plaintiff has requested for extension and further, since the Respondent/Plaintiff is willing to get the Sale in respect of the Suit pending, the Appellants/Defendants are ready to execute the Sale Deed in his favour at any time and therefore, intimate the date, time and place for execution of the Sale Deed.

50. In Ex. A8, Respondent/Plaintiff's Reply Lawyers' Notice dated 14.11.1992, addressed to the 1st Defendant, his wife and 3rd Defendant, wherein, among other things, it is mentioned that the Respondent/Plaintiff has filed a Suit against the 1st Appellant/1st Defendant (since deceased) and his mother-in-law for bare injunction in O.S. No. 511 of 1990 and got an interim order of injunction in I.A. No. 2011 of 1990 restraining them from inducting some third party into the property agreed to be sold on the file of the District Munsif Court, Bhavani and that after filing of the Suit, Rukmani Ammal died intestate leaving Smt.P.Kandaram, wife of the 1st Appellant/1st Defendant as her legal heir to succeed to the estate left by her.

51. Moreover, in Ex. A8, dated 14.11.1992, it is mentioned that no earnest efforts have been made to vacate the order of injunction obtained by Bagyam by

the Defendants 1 and 2 in I.A. No. 383 of 1989.

52. In Ex. A5, certified copy of the Petition in I.A. No. 383 of 1989 in O.S. No. 249 of 1989, it is seen that the Petitioner/Plaintiff therein, one Bagyam has filed a Suit against A.V.Karumanda Gounder and four others and in I.A. No. 1539 of 1989 in O.S. No. 230 of 1989 on the file of the Vacation Civil Judge, Periyar District, Erode, the relief of temporary injunction has been prayed for by Respondents/Defendants restraining the respondents 11 to 15 from in any way creating any encumbrances or alienation over the Suit property by way of Gift, Lease, Sale, Mortgage, Will, etc. pending disposal of the Suit.

53. It appears that on 01.06.1989, notice has been ordered returnable by 23.06.1989 and status quo order has been extended till then by the Vacation Judge. Later, after receipt of the Suit bundle from the Vacation Court, the status quo has been extended from time to time till 19.01.1990 and when the case has been posted to 19.01.1990, the Judge has been on Casual Leave and the matter has been re-posted to 22.02.1990. On 22.02.1990, the injunction has been extended till 20.03.1990 and the matter has been posted for enquiry. Again, the matter has been adjourned to 02.05.1990 on 20.03.1990 and the interim injunction has been extended till then. Thereafter, from 02.05.1990 till 08.01.1991, injunction has been extended and it has been adjourned to various dates from 20.02.1991 till 18.06.1992 and the injunction order has been made absolute on 14.08.1992 and the Petition has been allowed because of the reason that there has been no representation on the side of the Respondents. It has to be remembered that the Suit in O.S. No. 249 of 1989 has been dismissed on 19.11.1993 within a period of three years viz. on 13.12.1993, the present Suit O.S. No. 580 of 1994 on the file of the Sub-Court, Erode and re-numbered as O.S. No. 69 of 1996 on the file of the Sub-Court, Bhavani has been filed. Therefore, the Suit is not barred by the plea of limitation and as such, the said plea is answered against the Appellants/Defendants.

54. Dealing with the plea of Appellants/Defendants that O.S. No. 69 of 1996 on the file of the Learned Sub-Judge, Bhavani is barred by the principle of Order Rule 2 of the CPC in view of the factum of filing of O.S. No. 511 of 1990 by the Respondent/Plaintiff, praying for the relief of bare injunction, it is to be pointed out that the Suit filed by the Respondent/Plaintiff is one seeking for the relief of Specific Performance and the earlier Suit filed by him relates only to the relief of injunction which has been subsequently dismissed. The Suit filed by the Respondent/Plaintiff in O.S. No. 511 of 1990 is only on the basis that his peaceful possession of enjoying the property has been interfered with by the Defendants therein. But, one cannot brush aside an important fact that from 22.02.1990 till 08.01.1991 in the main Suit in O.S. No. 249 of 1989, there has been an order of interim injunction and also that the present Respondent/Plaintiff has been added as one of the parties as per the order dated 16.03.1993 in I.A. No. 34 of 1993. The Suit in O.S. No. 249 of 1989 has been dismissed originally for default on 12.11.1993. Later, it has been dismissed again on 13.03.1995. When the stay

has been made absolute in O.S. No. 249 of 1989, either the 1st Defendant or Rukmani Ammal or her heirs cannot sell the property and also that O.S. No. 249 of 1989 has been dismissed on 19.11.1993. When the order of injunction has been made absolute on 14.08.1992, as seen from Ex.A5, then the 1st Defendant and Rukmani Ammal have been restrained from selling the property. Therefore, the Respondent/Plaintiff cannot file a Suit for Specific Performance during the existence of injunction order, in the considered opinion of this Court. Just because, the status quo has not been extended in I.A. No. 383 of 1989 in O.S. No. 249 of 1989 for the period from 18.10.1989 till 22.11.1989, it cannot be said prudently that the Respondent/Plaintiff should have filed the suit praying for the relief of specific performance of contract against the concerned persons, during the interregnum. When already a litigation in O.S. No. 249 of 1989 is pending between the parties, admittedly, this Court opines that it is not necessary for the Respondent/Plaintiff to institute a futile litigation under peril of losing his valuable right. Therefore, the very fact the status quo order has not been extended in I.A. No. 383 of 1989 in O.S. No. 249 of 1989 for the period from 18.10.1989 till 22.11.1989 will not affect or alter the position of the Respondent/Plaintiff because of the simple fact that if the Respondent/Plaintiff files a suit during the pendency of litigation in O.S. No. 249 of 1989 praying for the relief of specific performance of contract, then clearly it will attract the ingredients of "Lis Pendens" as per Section 52 of the Transfer of Property Act and as such, inaction or no endeavour of the Respondent/Plaintiff to file a suit during the interregnum against the Appellants/Defendants praying for the relief of specific performance of contract is nothing but a vain or futile litigation and the said inaction will not alter his position in law in any manner because of the reason, subsequently, on 22.02.1990, the injunction application has been adjourned to 20.03.1990 and also injunction has been extended till then and more over, the injunction order has been extended till 20.02.1991 and later, the injunction order has not been extended and finally, on 14.08.1992, injunction order has been made absolute and the petition has since been allowed.

55. Also, it has to be pointed out that Ex. A1-Sale Deed is dated 27.04.1989 and as per Ex. B5, Ex. B4-Sale Agreement has been cancelled and as per Ex. A1, a new Agreement has been entered into. The trial Court has gone into the matter elaborately and has observed that in the main Suit Judgment, that Ex. A1, document is dated 27.04.1989 and the same has been written next day in Ex. B5 and as per Ex. B5, that the person has cancelled the Agreement on next day, and has paid a sum of Rs. 1,00,000/- and as per Ex. A1, in respect of Suit property, a plea that from 1st Defendant and 2nd Defendant's mother, an

Agreement has been entered into cannot be accepted and the mentioning of inability of Plaintiff (Respondent in Second Appeal) to raise an amount of Rs. 5,000/- in Cancellation of Sale Agreement document, Ex. B5 and to cancel the Sale Agreement, is only a sham one and the said finding of the fact of trial Court has also been proved by the first Appellate Court in its Appellate Judgment in paragraph 11.

56. The jurisdiction of the trial Court in Second Appeal is limited and the concurrent findings of pure question of fact arrived at by the Courts below cannot be so easily disturbed or interfered with in Second Appeal as per Section 100 of the Code of Civil Procedure, in the considered opinion of this Court. Only just because in the Suit filed by Bagyam, viz. O.S. No. 249 of 1989, there has been an order of stay, the Respondent/Plaintiff has been prevented from proceeding further. It is true that the relief of Specific Performance is an equitable remedy. Also, the Respondent/Plaintiff in respect of the Suit property has paid a sum of Rs. 1,00,000/- as advance for the total sale consideration of Rs. 2,30,000/- . He has to pay only the remaining sum of Rs. 1,30,000/- . The averment that the Respondent/Plaintiff is ready and willing to perform his part of the contract is sufficient compliance of Section 16(c) of the Specific Relief Act and it is not the essential requisite for him to further plead that he has made a demand upon the Defendant to execute the Sale Deed on a certain date. Moreover, it is also not necessary that the Respondent/Plaintiff should have averred his readiness and willingness in the notice, if he has sent one.

57. In the instant case on hand, the Respondent/Plaintiff has established his onus of readiness and willingness to perform his part of the contract from the date of the contract till the date of filing of the Suit and therefore, this Court comes to an irresistible conclusion that the Respondent/Plaintiff is entitled to get the relief of Specific Performance and in this regard, this Court holds that the first Appellate Court has rightly granted the relief of Specific Performance in favour of the Respondent/Plaintiff in its Appeal Judgment dated 28.08.1998 and the said Judgment does not suffer from any material irregularity or patent illegality in the eye of law. Furthermore, the suit in O.S. No. 249 of 1989 has been dismissed on 19.11.1993 and on 13.12.1993, within a span of three years, the suit in O.S. No. 580 of 1994 has been filed on the file of the Subordinate Court, Erode and later, renumbered as O.S. No. 69 of 1996 on the file of the Subordinate Court, Bhavani. As such, the suit is not barred as per Article 54 of the Limitation Act. In short, there is no perversity of approach made by the First Appellate Court while granting the relief of Specific Performance in favour of the Respondent/Plaintiff and against the Appellants/Defendants and accordingly, the substantial questions of law 1 and 2 are answered against the Appellants/Defendants. In the result, the Second Appeal is dismissed leaving the parties to bear their own costs. Resultantly, the Judgment and Decree of the First Appellate Court dated 28.08.1998 in A.S. No. 34 of 1997 on the file of the Learned First Additional District Judge cum Chief Judicial Magistrate, Erode are affirmed by this Court for the reasons assigned in this Appeal. Two months time is granted to the Appellants/Defendants to execute the Sale Deed in favour of the Respondent/Plaintiff from the date of receipt of copy of this Judgment. Consequently, the connected miscellaneous petition is closed.