

(2009) 09 MAD CK 0285

In the Madras High Court

Case No : A.S. No. 6 of 2001 and C.M.P. No. 897 of 2001

P. Velumani

APPELLANT

Vs

K.A. Noorjahan and M.M. Ahmed Hussain

RESPONDENT

Date of Decision : 30-09-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11
Constitution of India, 1950 — Article 227
Contract Act, 1872 — Section 51
Evidence Act, 1872 — Section 91
Limitation Act, 1963 — Section 5
Specific Relief Act, 1963 — Section 16

Citation : (2009) 8 MLJ 161

Hon'ble Judges : M. Venugopal, J

Bench : Single Bench

Advocate : T.V. Ramanujan for Star, Associates, for the Appellant; A. Aravindan for C.T. Subbiah, for the Respondent

Final Decision : Dismissed

Judgement

M. Venugopal, J.—The appellant/defendant has preferred this appeal as against the Judgment and Decree dated 25.09.2000 in O.S. No. 980 of 1995 on the file of Learned IV Additional Sub-Court, Coimbatore.

2. The necessary germane facts of the respondents/plaintiff's case are as follows:

The plaint schedule properties absolutely belongs to the appellant/defendant by virtue of registered settlement deed dated 04.02.1959 bearing document No. 165 of 1959. The 5 acres and 39 cents, being the extent of properties is situated in Kuniamuthur village, Coimbatore South Taluk in Coimbatore District which runs as follows:

1. S.F. No. 212/2 : Dry AC 1.01 2. S.F. No. 212/1 : Dry AC 0.50 3. S.F. No. 213/1 : Dry AC 0.30 4. S.F. No. 213/3 : Dry AC 1.34 5. S.F. No. 215/3 : Dry AC 0.45 6. S.F. No. 693/2 : Dry AC 1.79 7. S.F. No. 214 : 0.90 in this Southern half

3. As the agricultural operations of the defendant was not successful he was proposing to sell the properties which are situated on the periphery of the Coimbatore City and hence potential for laying the respondents/plaintiffs" on 05.02.1992 had entered into an agreement of sale with the appellant/defendant towards the purchase of the total 5 acres and 26 cents of land belonging to the appellant/defendant one in favour of the second respondent/second plaintiff in respect of an extent of 4 acres and 3 cents and another to an extent of 1.26 acres in favour of the first respondent/first plaintiff. An extent of 4 acres and 3 cents by means of an agreement dated 05.02.1992 in favour of the second respondent/second plaintiff is in respect of agricultural lands in entirety. An extent of 1 acre 26 cents in S.F. No. 212/2 comprises of a bungalow, wall, motor pumpset, service connection, 7 anganams of crusher shed, cow shed, farm shed, coconut trees and all other rights and appurtenances. The dominant intention of the parties was that the entire transactions of the sale agreement is only for the purpose of laying out the entire properties into house sites and resale. Therefore, it was never intended or perceived nor it could ever be intended that the time was the essence of contract.

4. It was further agreed that the second respondent/second plaintiff who initially performed his contract of sale as per first agreement by purchasing the 4.03 acres of lands and after completion of the entire sale only, the first respondent/first plaintiff had the right to claim the execution of the sale of the portion of the property under agreement in respect of S.F. No. 212.2 including the bungalow bearing D. No. 375-A, Well, Kalam bearing D. No. 375 Farm Shed, Crusher Shed, Cow Shed etc., and all other appurtenances with an option to purchase the rest of the agreed properties situated in S.F. No. 212 /2 (Western portion, S.F. No. 212/1 and 213/1). Hence a Varthamanam agreement was executed on 05.02.1992 itself. The second respondent/second plaintiff was put in possession of the properties proposed to be purchased by him as per his agreement and he had developed the same into house sites by spending considerable amount. The appellant/defendant during the negotiation and execution of the agreement had not diverged the hut dwellers on the western sides who were actually an illegal encroachers of the road margin pertaining to the highways department. The respondents/plaintiffs" believed that they were occupying portions of the property under the defendant and the property would be conveyed only after vacating them by the appellant/defendant himself. When the respondents/plaintiffs" commenced development portions in 4 acres and 3 cents, it was understood that the hut dwellers were really encroachers and they could not be evacuated easily exerting strenuous efforts. The second respondent/plaintiff was constrained to spend a sum of Rs. 3,50,000/- for evacuating the 15 hut dwellers on the western side border of the properties mentioned in the agreement. In fact, the second respondent/second plaintiff purchased an alternate land near Kovaipudar and the encroachers were shifted to that place and depending upon the size of the hut a compensation of Rs. 10,000 - Rs. 25,000/- was given to

them.

5. Even though the agreements satisfied the time as 18 months, it was never agreed upon that, time was the essence of contract. The respondents/plaintiff"s were always ready and willing to perform their part of the contract as per agreements but the appellant/defendant all of a sudden issued a notice dated 29.07.1993 to them individually purporting to cancel the agreements of sale as if they had failed to fulfill their part of the contract. The respondents/plaintiffs" issued replies dated 03.08.1993 and also send a telegram explaining the facts and the evidence that transpired between the parties inter-alia bringing to the notice of the appellant/defendant that an extent of 1 acre and 89 cents of agricultural land under the agreement had been purchased as per six separate sale deeds and the readiness and willingness to purchase the balance on 05.08.1993. The second respondent/second plaintiff made it clear that he was always ready and willing to perform his part of the contract. The first respondent/first plaintiff also send a reply and issued a telegram expressing her readiness and willingness to perform her part of the contract which was depending upon the completion and performance of the sale agreement between the second respondent/second plaintiff and the appellant/defendant.

6. By means of a telegram the respondents/plaintiffs" had apprised the appellant/defendant that they would be ready with the balance of purchase money payable to the appellant/defendant as per the two agreements fully prepared for obtaining the sales in the Joint Registrar No. 2, Raja Street, Coimbatore - 1 from morning 10 am. onwards among other things requesting the appellant/defendant to come to the registrars office to receive the balance of purchase money and to execute the sale deeds and both of them in fact were waiting in the said office on 05.08.1993 from 10 am. to 5.30 pm. in the evening. Further, the appellant/defendant was aware that by some means that the respondent/plaintiff were waiting in the registrars office had not appeared before the plaintiffs", but issued a rejoinder dated 07.08.1993 mentioning that the respondents/plaintiffs" were not possessing requisite funds to complete the transactions and that he was waiting at the Sub-Registrars office on 4th and 5th August, 1993 and that the respondents/plaintiffs" had not turned up. The said allegation of the appellant/defendant was a frivolous and concocted. The respondents/plaintiffs" do have ample proof that they were waiting in the Registrars office for the appellant/defendant on 05.03.1993 and they could not be blamed since there was no intimation from appellant/defendant that they should come to Registrars office on 04.03.1993.

7. The respondents/plaintiffs" issued a reply to the rejoinder dated 07.08.1993 repudiating the contentions of appellant/defendant and also denied his right to cancel the agreement which was partly performed. Thereafter, at the mediation of one Babu (being a close relative of appellant), the appellant came forward to execute the remainder of the properties as per agreement dated 05.02.1993 in favour of the second respondent/second plaintiff first, and thus, the agreement

in favour of the second respondent/second plaintiff was completed.

8. The second respondent/second plaintiff had purchased the agricultural lands bearing the entire extent of 4 acres and 3 cents by virtue of the agreement and also by means of payment of the entire sale consideration of Rs. 22,97,100/- to the appellant/defendant under various sale deeds. However, the appellant/defendant was delaying the execution of the sale deeds pertaining to an extent of 7 cents alone in favour of the second respondent/second plaintiff.

9. Till the performance of sale agreement in favour of second respondent/second plaintiff was completed the first respondent/first plaintiff could not make any demand in regard to the execution of the sale deed of the entire suit property inspite of her readiness and willingness to perform her part of the contract. Inasmuch as the agreement the performance in favour of the second respondent/second plaintiff is completed in full the first respondent/first plaintiff had no right to demand for the execution of the sale deed of the properties in her favour by the appellant/defendant.

10. The respondent/plaintiffs" had made clear that they were always ready and willing to perform their part of the contract by purchasing the properties as per agreement in favour of the first respondent/plaintiff but the appellant/defendant was endeavoring to wriggle out of the contract and fail to respond whenever demanded and therefore a legal notice dated 04.02.1995 was issued to the appellant/defendant by the first respondent/plaintiff wherein she expressed her readiness and willingness and the balance of sale consideration was kept ready but the appellant/defendant send a reply dated 13.02.1995 stating that he was not willing to execute the sale deed for the present. The appellant/defendant was attempting to retain 1 acre and 23 cents of lands together with the house and other appurtenances which form part of the total sale consideration of Rs. 22,97,100/- for the 4 acres 3 cents vacant agricultural lands which were agreed to between the parties.

11. The Varthamanam agreement dated 05.02.1992 was therefore operative from 14.12.1994 itself when the second respondent/second plaintiff paid the entire sale consideration to the appellant. Therefore, the appellant/defendant was duty bound to execute the sale of the suit properties in favour of the first respondent/plaintiff upon receiving the remaining sale consideration of Rs. 7,18,200/- with her and whenever she was called upon to deposit the said amount into Court she would deposit it.

12. The second respondent/second plaintiff was only a formal party and no relief was claimed separately or jointly in his favour inasmuch as the suit agreement was partially dependent on the completion of an agreement dated 05.02.1992 in his favour. The suit was filed within 3 years from the date of refusal of the appellant/defendant to execute the sale deed. Hence the suit was filed praying for the relief of directing the appellant/defendant to execute the sale deed in respect of the suit properties and register the same in favour of the first

respondent/plaintiff and in default the Court was to execute the sale deed and register it.

13. In the written statement filed by the appellant/defendant averments have been made to the effect that at no point of time during the negotiation or at the time of entering into an agreement it has been suggested by the respondents/plaintiffs" or anyone on behalf of them that the properties have been intended to be divided into house sites and further, the time has been the essence of contract and in this regard a legal notice dated 29.07.1993 has been issued by the appellant/defendant to the second respondent/second plaintiff and since he has not been ready and willing to perform his part of the contract by paying the remaining sale consideration he has committed a breach of the agreement and moreover, it is not correct to state that the second respondent/second plaintiff who has performed his part of the contract of sale under his agreement firstly by purchasing 4 acres and 3 cents and only after the completion of the entire sale has the right to claim execution of the sale of the property under the agreement pertaining to S.F. No. 212/2 including the bungalow bearing D. No. 375-A, Well, Kalam bearing D. No. 375 Farm Shed, Crusher Shed, Cow Shed etc., and all the appurtenance.

14. The further pleas of the appellant/defendant have been that the Varthamanam letter dated 05.02.1992 stated that the sale deed in respect of the D. No. 375-A, Well, Kalam bearing D. No. 375 Farm Shed, Crusher Shed, Cow Shed, coconut trees and other appurtenance would be executed after the completion of the sale of the rest of the property including the property covered by the agreement with the first respondent/first plaintiff and the two agreements are separate and they are not connected in anyway except that the house and the appurtenance thereof should be sold last and both the agreements stipulated the period for performance i.e., before 05.08.1993 and based on the Varthamanam letter. The plaintiffs" trying to take umbrage for the defaults and their inability to form their part of contract and moreover, the appellant/defendant has never parted with the possession of the property and that the properties have never been divided into house sites and it continued to be an agricultural property and also that the properties have been agreed to be sold as is where is condition and only after the inspection of the property made by the second respondent/second plaintiff the property has been agreed to be purchased and the second plaintiff never spent even a single pie for vacating the encroachers and in fact the appellant/defendant issued a legal notice on 29.07.1993 calling upon the respondents/plaintiffs to complete the transaction within the stipulated time reminding that time has been the essence of contract and the respondents/plaintiffs" have not been ready with cash to pay the remaining sale consideration and as a matter of fact the appellant/defendant has been to Sub-Registrar office on 05.08.1993 at Raja Street, Chennai, at 09.30 am. and waiting till 5 pm, but the respondents plaintiffs" never turned up till 5 pm.

15. Apart from the above, the stand of the appellant/defendant is that after the issuance of legal notice on 29.07.1993 the agreement has never been extended and no conveyance has been made in favour of the plaintiffs or their nominees and also that the appellant/defendant has sold the properties to third parties after the expiry of the time in regard to the performance of the agreement and the said sales have been effected with the knowledge of the respondents/plaintiffs" and also that the second respondent/second plaintiff has adduced all the sale deeds besides the plaintiffs" son himself has purchased 32 cents of vacant land from the appellant/defendant and there is absolutely no cause of action for the suit.

16. On the basis of the pleadings mentioned supra the trial Court altogether framed three issues on the side of respondents/plaintiffs" witnesses P.W. 1 to 4 were examined and Exs. A1 to A30 were marked and on the side of appellant/defendant witness D.W.1 was examined and Exs. B1 to B32 were marked.

17. On an appreciation of oral and documentary evidence and upon perusing the available material evidence on record the trial Court resultantly directed the first respondent/first plaintiff to deposit the balance sale consideration into Court and upon such deposit being made in favour of the first respondent/first plaintiff the appellant/defendant is to execute the sale deed within a month from the date of passing of the judgment and in default the plaintiffs have been directed to approach the Court in regard to the execution of sale deed by the Court on behalf of the appellant/defendant.

18. The points that arises for determination in this appeal are:

1. Whether eighteen months time specified in Ex.A2 agreement dater 05.02.1992 entered into between the appellant/defendant and the first respondent/plaintiff is the essence of contract?

2. Whether possession has been handed over by the appellant/defendant to the second respondent/second plaintiff in pursuance Ex.A1 agreement dated 05.02.1992?

3. Whether the appellant/plaintiff is to execute the sale deed of the suit properties in favour of the first respondent/first plaintiff?

19. Contentions, Discussions and Findings of point Nos. 1 to 3:

According to the learned Counsel for the appellant/defendant the appellant has entered into different agreement on the same date 05.02.1992 and Ex.A1 agreement dated 05.02.1992 has been entered into with the second respondent/second plaintiff in regard to an extent of 4 acres and 3 cents as mentioned in the schedule and present suit has nothing to do with Ex.A1 agreement dated 05.02.1992 and the other agreement Ex.A2 dated 05.02.1992 has been entered into between the appellant/defendant and the first respondent/first plaintiff in respect of an extent of 1 acre and 26 cents being the subject matter of the suit property and the buildings thereon and the stand of the respondents/plaintiff"s is

that as per Ex.A3 muchilika dated 05.02.1992 the suit agreement can be executed only after fulfillment of the obligations as per Ex.A1 agreement dated 05.02.1992 entered into between the appellant and the second respondent/second plaintiff and this plea is contrary to the averments made in Ex.A3 muchilika and there is no evidence at all in the case in regard to the purported readiness and willingness on the part of the first respondent/first plaintiff (wife of the second respondent/second plaintiff) who has not been examined and as a matter of fact the second respondent/second plaintiff as PW.1 before the trial Court in his evidence has not deposed that the first respondent/first plaintiff has been ready and willing to perform her part of the contract and that she has been possessing the money ready for completing the transactions and in this aspect the acceptance of evidence of PW.1 by the trial Court in favour of the first respondent/first plaintiff (wife) is clearly unsustainable and further the respondents/plaintiffs" have not come to Court with clean hands and therefore the grant of relief of specific performance as prayed for in the suit by the trial Court is not correct because of the fact that the relief of specific performance is undoubtedly an equitable and discretionary remedy in law and moreover, Ex.A2 agreement dated 05.02.1992 relates to the first respondent/first plaintiff and Ex.A1 agreement dated 05.02.1992 in favour of the second respondent/second plaintiff is not the subject matter of the suit and that the second respondent/second plaintiff has falsely contended that as if the huts are on the suit property and also that when the first respondent/first plaintiff has come out with the specific plea with the right to issue in respect of Ex.A2 agreement dated 05.02.1992 will arise only after the second respondent/second plaintiff perform his contract in respect of 4 acres and 3 cents covered under Ex.A1 agreement dated 05.02.1992 and on completion of the entire sale of the said extent of 4 acres and 3 cents etc. The present suit filed by the respondent/plaintiff is an unsustainable one even as per the respondents/plaintiffs" own case.

20. Continuing further, the learned Counsel for the appellant submits that the second respondent/second plaintiff has only been permitted to measure the lands and prepare the lay out plan etc., by entering into the property, and the possession always continued with the appellant/defendant who has been admittedly cultivating the suit property by raising sugar cane and other crops and that he was also supplying sugar cane to Bannariamman Sugar Company and other adangals also prove that the appellant/defendant has been alone in the possession of the property and this has been considered by PW.1 (second plaintiff) and in commercial transactions of the suit nature it must be construed that time is the essence of contract and in any evidence even whether time is not the essence of the contract it is open to the parties while issuing the notice to make time as the essence and thereafter any plea that time is not the essence of contract cannot be raised and it is not open to the parties to adduce any oral evidence in regard to the construction of a document as per Section 91 of the Indian Evidence Act, and there have been no hut dwellers in the property as per Ex.A1 agreement dated 05.02.1992 and as a matter of fact the hut dwellers have

been only on the highways and the amount alleged to have been spend by the second respondent/second plaintiffs" for displacing them cannot be construed as discharging any obligation in respect of the suit agreement Ex.A2 or Ex.A1 agreement dated 05.02.1992 and moreover, in both the agreement Exs.A1 and A2 dated 05.02.1992 there is no reference to the hut dwellers and if really the removal of hut dwellers has been a part of the obligation under the contract then the same might have been made mention of in the agreement itself and in the absence of the same the respondents/plaintiffs have been precluded from advancing any contention so as to seek an equity and the reading of the Ex.A3 Varthamanam agreement dated 05.02.1992 shows that the execution of the sale deed and delivery of possession was postponed only in regard to the constructed portion till the completion of the obligation under Ex.A1 as per agreement dated 05.02.1992 and indeed this suit filed by the respondents/plaintiffs" is unsustainable because of the reasons that obligations as per Ex.A1 dated 05.02.1992 have not been completed.

21. Besides the above, expatiating his arguments, the learned Counsel for the appellant contends that it is not open to the trial Court to render a finding that a period of 18 months will be available to the first respondent/first plaintiff were 14.12.1994, contrary to the case of the respondents/plaintiffs" and per contra a reading of the plaint will go to show that all the obligations in respect of the suit property as per Ex.A2 agreement dated 05.02.1992 has to be performed on or before 05.08.1993 and that the first respondent/first plaintiff has been ready and willing to purchase the suit property on 05.08.1993 and moreover, a telegram has been send by the first respondent/first plaintiff that the respondents/plaintiffs" have been ready with the balance of purchase sum payable to the appellant/defendant as per the two agreements dated 05.08.1993, and also the fact remains that the second respondent/second plaintiff has purchased only an extent of 1 acres and 89 cents till 01.02.1993 in regard to the properties covered under Ex.A1 agreement and he has failed to purchase the remaining extent of property and there is no explanation for not completing the transactions pertaining to the 7 cents of lands and as a matter of fact, there is no pleading that an extent of 44 cents has been covered by road and as such no sale has taken place and the evidence of appellant/DW.1 is to the effect that the sales have been executed subsequent to 01.02.1983 not in pursuance of Ex.A1 agreement dated 05.02.1992 and they are independent transactions and if the two agreements dated 05.02.1992 are inter-connected really and the respindent/plaintiffs are ready and willing to fulfill their obligations then, they have to prove that they have been possessing a sum of Rs. 6,18,000/- available with them on that date inasmuch as only an extent of 1 acre and 89 cents has been sold from and out of the extent covered under Ex.A1 agreement dated 05.02.1992, till 05.08.1993.

22. Added further, the learned Counsel for the appellant/defendant submits that the non-examination of the first respondent/first plaintiff as a witness is a fatal one to the case of the respondents/plaintiffs" and as a matter of fact the first

respondent/first plaintiff has been present on 05.08.1993 before the authorities of the Registration Department and the non-production of accounts by the respondent/plaintiffs" to substantiate their case that entire consideration has been paid in regard to Ex.A1 agreement dated 05.02.1992 transactions, and that cash has been ready to complete the transaction under Ex.A2 agreement will result in drawing of an adverse inference against them and that the agreement has been revoked, then there exists no subsisting right on the date of filing of the suit by the respondents/plaintiffs" and indeed the respondents/plaintiffs" have assigned erroneous reasons in the affidavit extending time for payment of Court fee and the evidence of the stamp vendor will show that stamp have been available and the non-production of receipts by the respondents/plaintiffs in regard to the payments received is very much fatal to their case.

23. The learned Counsel for the appellant/defendant submits that the respondents/plaintiffs" have to claim their relief's on the basis of their own conduct and if on account of their own conduct they are not entitled to any reliefs, then they cannot rely on the misconduct of the appellant/defendant and to lend support of this contention, he relies on the decision of this Court, Bhagwandas Fatechand Daswani and 4 Ors. v. H.P.A. International, a partnership firm carrying on its business at No. 8C, Old No. 15/16, Casa Major Road, Egmore, Madras 8 rep. By its Managing Partner H.A. Md. Aleemuddin and 2 Ors. 2001 (3) CTC 86 at page 123, wherein it is inter-alia held as follows:

Learned Counsel for the plaintiff respondent laid great emphasis on the misconduct on the part of the appellant in the course of the trial, in denying his identity as Bob Daswani, and his conduct in proceeding with the construction despite the interim injunction, and submitted that the lack of candour and dishonesty in his pleadings and affidavits, disentitles him to any relief in equity, as one who plays foul with equity cannot use it as a shield. This submission though relevant to the grant or withholding of discretionary relief, where the plaintiff is otherwise not disentitled in law or equity to such relief, cannot be regarded as relevant for the purpose of deciding the existence or otherwise of a legally enforceable contract at the time the trial Court granted the decree for specific performance. What does not exist in the eye of law cannot be deemed to exist, because of the acts of omission or commission of the defendant during the course of the trial. If the plaintiff having regard to it's own conduct is not entitled to the relief, the misconduct of the defendants cannot result in plaintiff becoming entitled to such relief.

24. Also the learned Counsel for the appellant contends that mere existence of a valid agreement of sale is no reason for the Court to grant an equitable relief of specific performance and the continuous readiness and willingness on the part of respondents/plaintiffs" is a condition pertinent to the grant of relief and moreover, Court of law has to look into the conduct of the respondents/plaintiff"s before and subsequent to the filing of the suit besides taking note of the other surrounding circumstances of the case.

25. He seeks in aid of the decision of the Hon''ble Supreme Court Ajaib Singh and Ors. v. Smt. Tulsi Devi (2000) 3 MLJ 159 (S.C) whereby and whereunder it is observed that,

plaintiff making averments which are convenient to her without regard for truth and not performing her part of the contract could not get specific performance.

26. He presses into surveys the decision of Hon''ble Supreme Court, N.P. Tirugnanam (Died) by Lrs. v. Dr. R. Jagan Mohan Rao and Ors. 1995 2 MLJ 118 at page 119 wherein it is laid down as follows;

It is settled law that remedy for specific performance is an equitable remedy and is in the discretion of the Court which discretion requires to be exercised according to settled principles of law and not arbitrarily as adumbrated u/s 20, of the Specific Relief Act, 1963. u/s 20 the court is not bound to grant the relief just because there was valid agreement of sale. Section 16(c) of the Act envisages that plaintiff must plead and prove that he had performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than those terms the performance of which has been prevented or waived by the defendant. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstances is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the plaintiff fails either to aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration, the conduct of the plaintiff prior and subsequent to filing of the suit along with other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available. Right from the date of the execution till date of the decree, he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his 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 always ready and willing to perform his part of contract.

27. He cites the decision of this Court in K. Jayakumar Vs. Robert, John Peter, Jamuna, Santhi, Amalraj, Geetha and Nedila, wherein it is observed as follows,

It is apparent from the materials on record that during the relevant time the plaintiff did not express her readiness and willingness to perform her part of the contract and call upon the appellant to complete the sale.

Notice was issued more than one year after the date fixed for executing the sale deed and after receipt of the reply notice stating that time was the essence of the contract and that the contract stood terminated, she waited for nearly a year to file the suit. She also did not take up the challenge by the defendant in his pleadings calling upon her to deposit the amount into Court.

28. Reliance is placed on the side of appellant to the decision of Hon''ble Supreme Court, Faquir Chand and Anr. v. Sudesh Kumari (2007) 7 MLJ 871 at page 872 whereby and whereunder it is observed that,

According to the provisions contained in Section 16(c) of Specific Relief Act 1963, readiness and willingness to perform the essential terms of contract are must for insistence of specific performance in a suit under the said Act.

29. Further, the learned Counsel for the appellant draws the attention of this Court to the decision Seeni Ammal Vs. Veerayee Ammal, wherein it is held that

Parties to the suit specifically agreeing to complete contract within stipulated date and time is the essence of contract and that the general principle that time is not the essence of contract relating to immovable property is not applicable.

30. The learned Counsel for the appellant cites the decision of Hon''ble Supreme Court P.R. Deb and Associates v. Sunanda Roy 1997 2 MLJ 3 wherein it is held thus,

If the contract relates sale of immovable property it would normally be presumed that time was not of the essence of the contract. But, even if it is not of the essence of the contract, the Court may infer that it is to be performed in a reasonable time if the conditions of the contract so warrant. That can be inferred (1) from the express terms of the contract, (2) from the nature of the property, and (3) from the surrounding circumstances.

31. Continuing further, on the side of the appellant the decision G. Ramalingam Vs. T. Vijayarangam, at page 593 is cited before this Court to the following effect that,

When the sale agreement does not contain any clause to the effect that time is the essence of the contract and the surrounding circumstances also prove that the parties never intended time to be the essence of the contract, the lower Courts are not correct in holding that time is the essence of the contract.

Even if for a single day, the plaintiff-agreement holder is not ready to take the sale deed, the equitable remedy of specific performance should not be granted. Readiness and willingness must be there continuously from the date of agreement up to the date of hearing.

When the findings of the lower Courts, that the plaintiff has not proved his continuous readiness and willingness at all stages, is based upon the evidence on record and when the findings are not perverse, the High Court will not interfere with such findings, by exercising power u/s 100 of the Code of Civil Procedure.

32. Moreover, the learned Counsel for the appellant/defendant relies on the decision of this Court Vasantha and Others Vs. M. Senguttuvan, wherein it is laid down as follows,

Even if for a single day, plaintiff-agreement holder is not ready to take the sale

deed, the equitable remedy should not be granted. Readiness and willingness must be there continuously from the date of agreement upto the date of hearing. Even if the finding of the lower court that the appellant has sufficient funds is accepted, that will not show his willingness. "Willingness" must be to implement the contract in accordance with the terms within the stipulated period or within a reasonable time thereafter. If he had the necessary funds, he has to explain why he did not offer or tender the balance sale consideration and got the sale deed. It is well-settled that even if the appellant proved all the ingredients of the section, he cannot claim specific performance as of right. It is only a discretion and that discretion will have to be exercised on well-established judicial principles.

33. In support of the contention that time limit prescribed by the parties in the agreement has relevance, the learned Counsel for the appellant brings to the notice of this Court to the decision *Ranganatha Gounder v. Sahadeva Gounder and Ors.* (2004) 4 MLJ 112 at page 113 wherein it is among other things held thus,

It is settled that a person cannot claim the relief of specific performance unless he proves his readiness and willingness to perform his part of the contract.

In the case of agreement of sale relating to immovable property, time is not of the essence of the contract. At the same time, it cannot be stated that the time-limits prescribed by the parties in the agreement have no significance or value and that they mean nothing.

34. Even if time is not the essence of contract the contract has to be performed within a reasonable time, on the side of appellant/defendant, reliance is placed on the decision *Subbanna Gounder (deceased), Lakshmiammal and Palaniammal Vs. Subbayammal, Duraiswamy, Palaniswamy, Sundaram (deceased), Swarnam, Sri Udayakumar and Gnanasekaran*, at page 232, wherein it is held that,

In the suit for specific performance which is a discreatory relief, the plaintiff must come to the Court with clean hands.

35. To say when time is the essence of contract the learned Counsel for the appellant relies on the decision *S.S. Chokkalingam v. R.B.S. Mani and 5 Ors.* 1994 1 LW 321 at page 322 wherein it is held thus,

No doubt, ordinarily in contracts relating to immovable property, time is not the essence of the contract. But, in the facts and circumstances of each case, the court can come to a conclusion that in a particular case, time has been made the essence of the contract. In the present case, we hold that though initially the respondents were willing to extend the time as requested by the appellant, they have made it clear to him unequivocally that he should complete the transaction before a particular date. In fact, the appellant himself has assured the respondents that in case of default, they were free to seek other purchasers. Hence, in this case we hold that the appellant is not entitled to claim the relief of specific performance as he has not come to Court within the time. We have also

pointed out that the suit has been filed long after the appellant was informed of the sale in favour of respondent 3 and 4. There is absolutely no explanation on record as to why the appellant was keeping quiet for such a long time.

36. He also relies on the decision *Indravathi Vs. Kamala*, wherein it is observed that,

Normally time is the essence of contract relating to sale of immovable property and condition regarding time being essence of contract as a matter of consensus between parties to such contract and time is the essence of contract where time limit has been stipulated for performance of certain obligations and any disregard to such stipulation would amount to ignoring understanding between parties.

37. As a matter of fact, the learned Counsel for the appellant places reliance on the decision of Hon"ble Supreme Court *Gomathinayagam Pillai and Others Vs. Pallaniswami Nadar*, wherein it is among other things observed that,

Time is of essence of contract if parties intend it to be so and intention may be evidenced either by express stipulations or by circumstances which are sufficiently strong to displace ordinary presumption that in contract for sale of land stipulation as to time is not of essence and if time is not of essence originally, it can be made of essence even subsequently by serving notice on other party.

38. He also cites the decision of Hon"ble Supreme Court *Smt. Chand Rani (dead) by LRs. Vs. Smt. Kamal Rani (dead) by LRs.*, wherein it is observed thus;

In the case of sale of immovable property there is no presumption as to time being the essence of the contract. Even if it is not of the essence of the contract the Court may infer that it is to be performed in a reasonable time if the conditions are: (1) from the express terms of the contract; (2) from the nature of the property; and (3) from the surrounding circumstances, for example: the object of making the contract.

39. The learned Counsel for the appellant contends that the first respondent/first plaintiff has not been examined as a witness on the side of respondents/plaintiff's before the trial Court and the said non-examination enables the Court to draw an adverse inference against her and in support of the said contention he draws the attention of this Court to the decision *S.K.M. Mohammed Amanullah represented by his S.K.M. Mohammed Amanullah represented by his Power Agent A. Ali Akbar Aziz Vs. T.C.S. Ramasangu Pandian and Others*, wherein it is held as under;

In the absence of any valid explanation for the plaintiff's non-examination of himself as a witness, the Court is entitled to draw an adverse inference against him.

40. He also cites the decision of Hon"ble Supreme Court *K.S. Vidyanadam and Others Vs. Vairavan*, wherein it is inter-alia observed that,

if property is a house located in an urban area, continuing steep rise in price thereof would be a relevant factor for the court to decide whether the delay or laches on the part of the plaintiff to perform his part of the contract would disentitle him the relief of specific performance and where agreement specifying period of 6 months within which plaintiff had to purchase the stamp papers, tender the balance amount of consideration and require the defendants to execute the sale deed, total inaction for 2 = years after initial payment of a small amount as earnest money by the plaintiff would be a circumstance which would weigh against exercise of discretion for grant of specific performance of the agreement in favour of the plaintiff.

41. In regard to the contention that if purchaser who has not given true facts with reference to deposit of balance sale consideration is not entitled to get the relief of specific performance, the learned Counsel for the appellant/defendant relies on the decision of this Court, Pankajam Parthasarathy and five Ors. v. Kasturi Guna Singh 2001 (1) CTC 200 at page 220 in para 48 it is held as follows.

In so far as encumbrance certificate is concerned, the vendor was required to produce encumbrance certificate for a period of one year from September, 1976 on the date of execution of sale and that period also expired in September, 1977. I am of the view, the plaintiff has kept quiet, because she was in possession of the suit property by paying rent for some time. After the death of Chengammal in 1978, the plaintiff fall in arrears in payment of rent from January, 1980. Taking into account the overall view of the matter, I hold that the plaintiff was not ready and willing to perform her part of the contract after the payment of Rs. 20,000 in January, 1978. Though the said payment has indicated that she was ready at that time, her subsequent conduct shows that she was not ready and willing to perform her part of the contract. Further, she has also come forward with conflicting versions both in the affidavit (Ex.B-4) and in the evidence regarding the availability of money of Rs. 26,000/-. It is well settled by various decisions of this Court that where the plaintiff has set up a false case, she is not entitled to the relief of specific performance. I hold that on the vital and important aspect with reference to the deposit of balance of sale consideration, the plaintiff has not given true facts which disentitle the plaintiff from claiming the relief of specific performance. The various decisions relied upon by the learned Counsel for the appellants on this aspect do support the case of the appellants.

42. As to the legal principle that a plaintiff ought to stand or fall on the strength of his own case and not to bang upon the weakness of the defendant's case on the side of appellant reliance is placed on the decision V. Manakkan and Ors. v. Veera Perumal 1998 3 MLJ 557 at page 580 wherein it is held that,

It is settled law that a plaintiff should stand or fail on the strength of his own case and not rely on the alleged weakness of the defendant's case.

43. In another decision of this Court Ayyakannu Gounder Vs. Virudhambal Ammal, it is observed that,

it is well settled that the plaintiff cannot pick holes in the defendant's case to establish his case.

44. In the decision of Parakunnnan Veetill Joseph's Vs. Nedumbara Kuruvila's and Ors, , it is held that,

Section 20 preserves judicial discretion to Courts as to decreeing specific performance. The Court should meticulously consider all facts and circumstances of the case. The Court is bound to grant specific performance merely because it is lawful to do so. The motive behind the litigation should also enter into the judicial verdict. The court should take care to see that it is not used as an instrument of oppression to have an unfair advantage to the plaintiff.

45. Again in P.R. Gopal v. M. Rajeswari (2008) 7 MLJ 164 it is observed that,

Relief of specific performance is an equitable relief and the Court has to see all the circumstances attendant. Any person seeking the benefit of specific performance of contract must manifest that his conduct has been blemishless throughout entitling him to the specific relief. Therefore, when the plaintiff has not shown any blemishless conduct to entitle her for the specific relief as prayed for, the suit for specific performance by the plaintiff ought to be declined.

46. That apart, the learned Counsel for the appellant refers to the order of this Court dated 04.02.1997 in Notice of Motion No. 347 of 1995 in Suit No. 4715 of 1994 between Mina Fusade v. Parasrampur Estate Developers, wherein it is observed as follows;

...relying on the aforesaid Division Bench judgment the learned Judge has further held:

I am supported in my view to the effect that the suit for specific performance of development agreement is not maintainable by an unreported judgment of the Division Bench of this Court in Appeal No. 285 of 1988 in Notice of Motion No. 76 of 1987 in Suit No. 3419 of 1986 being the judgment of Lentin and Sujata Manohar, JJ. Dated 7th March, 1988.

In view of what has been held above it is obvious that defendant No. 1 could not claim any relief in the present suit etc.

47. Also on the side of the appellant order dated 29.03.2005 passed by this Court in Orl. Application No. 684 of 2004 and Application Nos. 3233 & 3234 of 2004 in C.S. No. 202 of 2004, Jain Housing & Constructions Ltd., rep. By its Executive Director, Mr. Sandeep Mehta, No. 7, Lakshmi Narasimhan Street, T. Nagar, Chennai v. Raptakos Brett and Co. Ltd. No. 142 (Old No. 66), Velacherry Road, Guindy, Chennai is relied on to the observations made which run as follows;

The Bombay High Court in an unreported case of Panchami Mooloor v. Namedo and Ors. in Suit No. 2607 of 1983 has held that if an agreement under which both the parties have agreed to collaborate for the development of the suit land, and is purely commercial in nature, any breach of the agreement is capable of

being compensated in terms of money. The plaintiff therein would not ordinarily be entitled to a specific performance of agreement and held that the case was of a fit case of granting interim relief of injunction. There is no reason for me to take a different view than the one taken by the Bombay High Court in the above said case, is the present case is also one for commercial venture.

In Gajanan Narayan Malik and another Vs. Kolte Patil Developers Ltd. and others, , the Bombay High Court heard as follows:

This Court has consistently taken a view that the Development Agreement cannot be specifically enforced and that damages are an answer except where the Developer has invested substantial money and altered his position by creating third party rights.

In view of the above, I am of the view that the applicant has not made out a prima facie case and the balance of conveyance is also not in favour of the applicant, rather more in favour of the respondent in rejecting prayer. Hence, interim injunction as sought for has to be rejected and the same is rejected and the application is dismissed.

48. In response, the learned Counsel for the respondent/plaintiffs submits that the subject matter of the suit is Ex.A2 agreement dated 05.02.1992 and that the said agreement is not an independent agreement and it depends on Ex.A1 agreement dated 05.02.1992 through Ex.A3 Varthamanam agreement dated 05.02.1992 entered into between appellant/defendant and first respondent/first defendant and by execution of Ex.A3 Varthamanam agreement dated 05.02.1992, the parties have altered Ex.A2 agreement dated 05.02.1992 in respect of the time factor of 18 months alone as agreed to earlier and in other aspects Ex.A2 agreement dated 05.02.1992 remains as it is and really speaking till the completion of Ex.A1 agreement dated 05.02.1992 Ex.A2 has nothing to do and as a matter of fact Ex.A2 agreement dated 05.02.1992 will take effect after the completion of Ex.A1 agreement and moreover, in Ex.A1 agreement dated 05.02.1992 there is no mention of the factum of encroachment but the encroachment has been admitted in Ex.A9, lawyer's reply notice dated 07.08.1993 issued on behalf of the appellant/defendant to the effect that the property has been agreed to be purchased along with the advance, knowing full well of the pros and cons of the deal and without removing the encroachments the properties cannot be sold and in Ex.A2 agreement dated 05.02.1992, Clause-V refers to nil-encumbrance and the existence of huts have been suppressed in the said agreement and though Ex.A7, lawyer's reply notice dated 03.08.1993 issued on behalf of the second respondent/plaintiff and addressed to the appellant/defendants lawyer refers to the second respondent/plaintiff purchasing an alternate side to the hut dwellers to shift their huts and the payment of the compensation from Rs. 10,000/- to Rs. 25,000/- depending upon the size of hut and thereby spend a sum of Rs. 3,50,000/- so far for the eviction of 15 hut dwellers, the same has not been paid by the appellant/defendant notwithstanding the fact that as per Ex.A2 agreement dated 05.02.1992 the first

respondent/first plaintiff is entitled to deduct the said expenditure from and out of the sale consideration amount and when the suit is filed within three years, as per Article 54 of Limitation Act, there cannot be any abandonment and the first sale deed has been executed on 18.02.1992 and six sale deeds have been executed on 01.02.1993 and last sale deeds dated 14.12.1994 are Exs.A20 and 23 and that all the seven sale deeds have been executed in respect of various nominees nominated by the plaintiff and the Ex.A20 sale deed dated 14.12.1994 is in pursuance of Ex.A1 agreement dated 05.02.1992 and as a matter of fact the plaintiff's son nominee of the plaintiff has himself purchased 32 cents of vacant land and the denial of seven sale deeds is not admitted and 05.08.1993 is not the dead line for Ex.A1 agreement dated 05.02.1992 and as per Section 62 of the Indian Contract Act, new contract viz., Ex.A3 Varthamanam agreement when it has come into force then, 05.08.1993 date is not the dead line and even on 05.08.1993 the first respondent/first plaintiff and her husband namely the second respondent/second plaintiff have gone to the Sub-Registrar's office and waited there and there is no evidence that the plaintiffs have gone with insufficient funds and that the balance sale consideration has been kept ready and has been deposited into Court within two days from the passing of the decree and that time is not the essence of contract and the parties have extended the time as per Ex.A3 Varthamanam agreement there is no abandonment of any right at all and Section 52 of the Indian Contract Act, refers to the order of preference in case of reciprocal promise and in short the trial Court has taken into account all the relevant facts and circumstances of the case in a right perspective and as decreed the suit is prayed for by the plaintiff in the plaint.

49. The learned Counsel for the respondents/plaintiffs" cites the decision of Hon"ble Supreme Court Surya Narain Upadhyaya Vs. Ram Roop Pandey and others, wherein it is held as follows;

Though the decree for specific performance is a discretionary power, yet the court is not bound to grant such a relief merely because it is lawful to do so. The discretion of the court is not arbitrary, but sound and reasonable, guided by judicial principles of law and capable of correction by a court of appeal. Therefore, the discretion should be properly exercised keeping in view the settled principles of law as envisaged in Section 20 of the Act. In this case, the High Court took irrelevant consideration into account to refuse to grant the decree for specific performance. It also committed manifest illegality in reversing the concurrent finding of facts recorded by the trial court as well as the first appellant court, namely the appellant has always been ready and willing to perform his part of the contract.

50. He also relies on the decision of Hon"ble Supreme Court Balasaheb Dayandeo Naik (Dead) through LRs. and Others Vs. Appasaheb Dattatraya Pawar, , wherein it is held that;

... purchaser is entitled to enforce specific performance and the plea of seller has

been rejected that time has been the essence, as he sold land under dire need to construct his house but purchaser evaded to complete sale within six months and the seller has not proved his plea on oath and on the contrary the purchaser has been found ready and willing to perform his part of the deal and therefore, the purchaser has been directed to deposit the balance amount and the seller has been directed to execute the sale deed.

51. Another decision of Hon''ble Supreme Court *Bibi Jaibunisha v. Jagdish Pandit and Ors.* 1997 MLJ (Sc) 54 is relied on the side of the respondents to the effect that,

It is now well-settled legal position that in the matter of enforcement of the agreement or agreement of reconveyance, time is not always the essence of the contract unless the agreement specifically stipulated and there are special facts and circumstances in support thereof. It must be specifically pleaded and issue raised so that the other party has a right to lead evidence.

52. The learned Counsel for the respondents presses into surveys the decision of the Hon''ble Supreme Court *Jai Durga Finvest Pvt. Ltd. Vs. State of Haryana and Others*, at page 382 wherein it is held thus,

The question, thus, which was required to be posed and answered was as to whether Clause 18-A of the agreement would remain enforceable despite the fact that the appellant allegedly could not extract any sand by reasons of omission and commission on the part of the respondents concerned. Therefore, in this regard the first question that arises is whether the respondents complied with their statutory obligations when the request was made by the appellant. If not, the second question would be the effect of non-compliance with the statutory obligation of the respondents which formed part of the contract insofar as they did not comply with the appellant's request as aforementioned which had a direct bearing on the right of the appellant to raise sand.

53. Further, he brings it to the notice of this Court, the decision of Hon''ble Supreme Court *P. D'Souza Vs. Shondriilo Naidu*, at page 951 wherein it is laid down as follows;

The contention raised on behalf of the appellant to the effect that the plaintiff had failed to show her readiness and willingness to perform her part of contract by 5.12.1978 i.e. Time stipulated for performance of contract is rejected inasmuch as the defendant himself had revived the contract at a later stage. He, as would appear from the findings recorded by the High Court, even sought for extension of time for registering the sale deed till 31.12.1981. It is, therefore, too late in the day for the defendant now to contend that it was obligatory on the part of the plaintiff to show readiness and willingness as far back as 5.12.1978.

Time, having regard to the fact situation obtaining herein, cannot, thus, be said to be of the essence of the contract. In any event, the defendant consciously waived his right. He, therefore, now cannot turn around and contend that the

time was of the essence of the contract and the plaintiff was not ready and willing to perform her part of contract in December 1978.

54. Also it is held that "it is indisputable that the plaintiff must establish his readiness and willingness to perform his part of the contract and however the readiness and willingness on his part to perform his part of the contract will also depend on whether the defendant has done everything which has been required of him to do the same in terms of the agreement".

55. Besides the above, the learned Counsel for the respondents places reliance on the decision Rathinam Chettiar Vs. Embar Naidu and another, wherein it is held that,

plaintiff (purchaser) establishing that he was always ready and willing to pay balance consideration and get sale deed executed, he need not produce documents to show that he is having money with him to pay the sale consideration.

56. It is the contention on the side of respondents/plaintiff's that the conduct of parties will have to be looked into by the Court of law when a false plea is taken that the purchaser have abandoned the agreement. In this regard the decision of Hon"ble Supreme Court Silvey and Others Vs. Arun Varghese and Another, is relied on the side of respondents to the effect that,

Conduct of defendants in taking a false plea has to be taken into account while decreeing or denying a decree for specific performance.

57. In the decision of Hon"ble Supreme Court Motilal Jain Vs. Smt. Ramdasi Devi and Others, it is held that,

Where appellant-plaintiff had paid about two-thirds of the consideration settled at the time of execution of agreement for sale of suit property and had sent three notices to the defendant-respondent, all of which was set out in the plaint, held, High Court erred in setting aside the decree of specific performance and substituted one for compensation.

58. At this juncture, the learned Counsel for the respondent/plaintiff submits that the suit cannot be dismissed on the basis that no plea has been raised in regard to the readiness and willingness of a party to perform as per Section 20 of The Specific Relief Act, 1963.

59. Moreover, he cites the decision of Hon"ble Supreme Court Ramakrishna Pillai and Another Vs. Muhammed Kunju and Others, and page 213 wherein it is held that,

It was categorically stated in the plaint in both the suits that the plaintiffs are always ready and willing to fulfill their part of the obligations and that the defendants were evading the execution for one reason or the other and the respondents directed to execute the sale deed after receiving the balance of the consideration.

60. Another decision of Hon''ble Supreme Court Aniglase Yohannan Vs. Ramlatha and Others, is relied on the side of respondents/plaintiffs'' to the effect that,

Where in a suit for specific performance agreement for sale, the essential facts contained in the plaint led to an inference of the plaintiff's readiness and willingness, the High Court rightly held that the requirement of Section 16(c) of the Specific Relief Act, 1963 stood complied with.

61. Countering the submissions of the learned Counsel for the respondents/plaintiffs the learned Counsel for the appellant contends that Ex.A3 Varthamanam agreement does not say that one can complete the performance of contract after 18 months period and in reality Ex.A3 Varthamanam agreement never speaks of eternal one and as a matter of fact even in Ex.A3 Varthamanam agreement the second respondent/second plaintiff can take sale deeds in respect of all other portions within 18 months period. Firstly, the Ex.A1 agreement and letter the Ex.A2 agreement or a portion of Ex.A2 dated 05.02.1992 agreement even before completion of Ex.A1 dated 05.02.1992 that option is given to the second respondent/second plaintiff and moreover, it is not correct to state that Ex.A3 Varthamanam agreement is a novation of Exs.A1 and A2 and the averments in page 2 of the Ex.A3 agreement dated 05.02.1992 to the effect that in respect of the property mentioned in the sale agreement entered into between the second respondent/second plaintiff and the appellant/defendant that only after the completion of entire sales being effected by the appellant/defendant in the name of the second respondent/plaintiff or his nominee or nominees the sale agreement entered into between the appellant/defendant and the first respondent/first plaintiff the appellant/defendant can hand over the possession and effect sale in respect of the portion of the said property mentioned in the agreement are only statements of fact and at best Ex.A3 says how Exs.A1 and A2 agreements will have to be performed and from 05.02.1992. On 05.08.1993 the period of 18 months is over and the date 05.08.1993 can be made by the parties as an essence of contract and the appellant/defendant has issued an Ex.A10 lawyer's notice dated 07.08.1993 addressed to the first respondents/first plaintiff's lawyer stating that the first respondent/first plaintiff is not having the requisite funds to complete the transactions and that the appellant has been waiting at the Sub-Registrars office on 4th and 5th August, 1993 and that the first respondent/first plaintiff has never turned up and no proof that there has been a panchayat and in panchayat there is no novation and in fact in paragraph 13 of the plaint the averment of payment of entire sale consideration of Rs. 22,97,100/- is a material fact of falsehood and the factum of the second respondent/second plaintiff having no money for payment of stamp duty and registration charges cannot be equated with deficit Court fee and that the second respondent/second plaintiff is a real estate owner and the relative hardship caused to the appellant/defendant can be taken into account by a Court of Law, since the grant of relief of specific performance is an equitable and discretionary remedy and therefore, prays for allowing the appeal in furtherance of substantial cause of justice.

62. In the present case, the evidence of PW.1/second plaintiff and DW.1/defendant are to be looked into by this Court. PW.1/second plaintiff in his evidence has deposed that the first plaintiff his wife and that he has entered into a sale agreement with the appellant/defendant and the appellant has agreed to sell 5 acres and 26 cents land at the rate of Rs. 5,70,000/- per acre and the 5 acre land are in two parts and in between there is a channel and one path consists of 4 acres and 3 cents and in another part of 1 acre and 39 cent consists of a bungalow, well, motor pump set, power line, farm house, coconut trees etc., and that he has paid a token advance of Rs. 25,000/- for which a receipt has been given by the appellant/defendant and two sale agreements have been entered into in respect of these properties and the sale agreement in his favour is Ex.A1 which refers to 4 acres land and the sale agreement for 1 acre 26 cents in his wife's name is Ex.A2 and even for the sale agreement in favour of his wife he has paid the money and his wife is not in the habit of coming to common place and the suit has been filed in respect of Ex.A2 agreement executed in favour of his wife and because of the fact that the properties in his wife's agreement is of high value and only after getting the sale deed executed as per the sale agreement in his favour, the sale deed can be executed in regard to the sale agreement of his wife and the sale agreements have been entered into for the purpose of plotting out the properties as house sites, as described in the agreements and that he has taken the possession of the properties from the appellant/defendant on the date of entering into an agreement itself and he has come to know that in 4 acres and 3 cents property a road has been laid and the road belongs to Highways Department on the western side and these roads are situated in the lands belonging to the appellant/defendant as informed by him and when he has measured the properties he has come to know that the roads have been formed after encroachment and because of the encroachment one cannot come to the road and the appellant/defendant has informed him that the encroachments will have to be cleared by himself in view of the fact that the said encroachments are in Poromboke and the necessary expenditure in this regard will have to be borne by himself and out of 20 encroachers he has vacated 15 of the by providing alternative place and also paying compensation and in this regard he has incurred an expenditure of Rs. 3,50,000/- and pending sale agreement he has sold out 1 acre 80 cents to six persons out of the properties mentioned in his sale agreement and in the said sale deed the appellant has out his signature and he has paid an advance of Rs. 1,75,000/- towards his sale agreement and apart from it he has paid Rs. 11,97,300/- and the appellant/defendant has not rendered in assistance in regard to the removal of the encroachment and he has issued separate notices Exs.A4 and A5 to himself and his wife and separate replies Ex.A6 and A7 have been issued by him and his wife and he has sent an reply stating that he is willing to perform his part of the contract and has called upon the appellant/defendant to come to the registrars office and the appellant/defendant has asked him to come to the registrars office on 05.08.1993 and he has gone along with his wife to the registrars office and has been waiting in the said office from morning 9am till 5pm in the evening and

that the appellant/defendant has not turned up and the appellant/defendant has send a telegram that he has been waiting in the registrar's office.

63. PW.1 has further deposed that the appellant has given a reply in these Ex.A9 dated 07.08.1993 and further he has issued reply notice Ex.A10 to his wife and rejoinder given by him is Ex.A11 dated 17.08.1993 and later on Babu alias Balasubramaniam has called him for settling the issue and hence in the house of the appellant/defendant panchayat talks have been held and on 10.09.1993 he has paid a sum of Rs. 4,50,000/- to the appellant/defendant and obtained sale deeds to an extent of 92 cents in favour of sons names and the appellant/defendant has compelled him to effect the purchase to prevent trouble Urban tax office and the appellant/defendant has executed a sale deed to an extent of 40 cents in Babu's name and another sale deed to an extent of 39 cents in the name of Balu and for these two sale deeds he has to pay the sale amount and in the name of appellant/defendant there is a land to an extent of 20 cents for which he has to pay the amount and in regard to 99 cents on 14.12.1994 he has paid the money and has obtained sale deeds in Gafoor and Mumtaz names and that till date he has paid a sum of Rs. 22,92,100/- to the appellant/defendant and as per the sale agreements he has paid the entire amount to the appellant/defendant and 48 cents land is of path way and that he has paid money including the said path way and as per the sale agreement A1 he has fulfilled his obligations and therefore he gets the right as per Ex.A2 agreement and the appellant/defendant has informed him that after cultivating sugar cane he will execute the sale deed and therefore he has issued Ex.A12 notice dated 04.05.1995 to the appellant/defendant for which a reply Ex.A13 dated 13.05.1995 has been given by the appellant/defendant for which he issued a rejoinder Ex.A15 dated 22.05.1995 and inspite of the same since the appellant/defendant has not executed the sale deed and that he has instituted the suit and in regard to the sale agreement dated 05.02.1992 in favour of his wife on the date of agreement itself and an advance of Rs. 1 lakh has been paid and as per Ex.A2 agreement the appellant/defendant has to be paid a sum of Rs. 6,18,000/- and that he has been ready with the money at all the time and from the date of Ex.A2 agreement till date is ready and willing to perform his part of the contract and is also presently ready to deposit the amount.

64. PW.1 in his cross-examination has categorically stated that Exs.A1 to A3 agreement are interrelated and the averment in the plaint to the effect that only after himself purchasing the properties mentioned in his Ex.A1 sale agreement right will accrue in the properties mentioned in his wife's agreement and during the period of 18 months he has purchased 1 acre and 30 cents and that he is not paying the Income Tax and that he has no bank accounts and also he is not keeping any accounts in respect of the sale agreement transaction and there is no direct relationship between the appellant/defendant and the six purchasers and further the appellant/defendant has effected the sales as per his directions and that he has paid the amount due to the appellant/defendant and even after the completion of 18 months the appellant/defendant has sold 1 acre and 55

cents land to five persons and that the appellant/defendant has not sold the lands individually and in regard to the sale or purchase of suit properties he has no connection with Balasundaram and Balasubramaniam and that in sale agreement as regards the balance 62 cents sale has taken place and 44 cents have been left out as common path way and that on 30.09.1993 they have executed sale deeds in favour of Fatima to an extent of 7 cents and in favour of Reddy executed the sale deed in respect of 4 cents and in the remaining 7 cents there are huts and there is no mention in the plaint that the appellant/defendant has not effected the sale in respect of 7 cents.

65. Added further, it is the evidence of PW.1 that he has not taken any steps to obtain the sale deed in respect of path way and that he has not deposited the money into Court or the bank pertaining to the suit property and that he has not filed any documents to show that he has kept the money readily and that he has filed the suit on the last working day on 28.04.1995 by paying a Court fee of one rupee and he has not filed any application to state that stamp papers have not been available and since many persons have purchased the stamp papers he has not got the same, and on 10.06.1995 the suit papers have been returned for directing him to affix the same the stamp papers and on 10.07.1995 the stamp papers have not been available and again he has represented the suit before the Court and later he has paid the Court fee and it is not correct to state that towards purchase of stamp papers for four months he has no money and that he has not given any application before the treasury requesting for the supply of stamp papers and on 05.08.1993 he has been waiting in the Sub-Registrars office with an amount of Rs. 6,18,000/- in cash and that he has not purchased the stamp papers in anybody's name and that on 05.08.1993 he has come to know that appellant/defendant will not act as agreed and immediately on the next day he has not taken any steps for filing of the suit and he thought that the appellant/defendant after completion of sale of properties in the first agreement the sale can be effected in respect of the other land and therefore he has instituted the suit 1 = years later and in the first agreement the last sale deed is effected on 19.12.1994 and that the time of filing of the suit in the suit properties seven hut dwellers have been resided and he is not aware of their names and that the appellant/defendant has not stated in the agreement that he will evict the huts in the highways and he has evidence to show that he has spend Rs. 3,50,000/- in regard to the removal of huts and the sale incurred thereto.

66. It is quite relevant to state that PW.1 in his evidence has stated that the stamp vendor M. Pratapan in his sworn affidavit has stated that stamp papers have not been available and further that on 05.08.1993 his wife has brought a sum of Rs. 6,18,000/- and since the appellant/defendant has not turned up his wife has taken the money to the house but the same has not been deposited in a bank and she has kept the same in the house and out of Rs. 6,18,000/- on certain occasions for urgent need relatives have borrowed the amount and returned the same and they have obtained pro-note for such borrowal from some

of the relatives and he cannot say the year and month of the pronotes.

67. PW.2 in his evidence has stated that previously he and his family resided in the National Highways for 42 years and behind his house there has been a garden of the appellant/defendant and that has been given in sale by the appellant/defendant and since the purchaser has no way, in order to provide a path way since he has been assured of the place and money he has vacated the said place along with 20 others and in the present place where he is staying at Sunambu Kalvai there are 13 persons residing and that particular place has been given by the second plaintiff's son for which PW.1/second plaintiff has given money and no sum has been paid by the appellant/defendant.

68. The evidence of PW.3 is to the effect that he has purchased a property on 14.12.1994 from the second plaintiff and has paid him the money and at the time when the sale deed has been executed the second plaintiff has brought three persons and asked them to sign in the sale deed and he has come to know of them at that point of time and that he has not spoken to them in regard to the sale dated 14.12.1994 and that he has not paid the sale amount to the said three persons.

69. PW.3 in his cross-examination has specifically stated that plaintiff has shown him the sale agreement in his name and that he has not seen the date of sale in the agreement and that he has seen the Ex.A1 sale agreement and that he has purchased within six months period and at the time of purchase property has not been divided as plots and that he has not known what are the rights of appellant/defendant and the second plaintiff.

70. The appellant as DW.1 in his evidence has deposed that he has entered into an Ex.A2 agreement with the first respondent/first plaintiff (wife of second plaintiff) and the suit property relates to 1 acre and 26 cents and in respect of the properties other than the suit properties he has entered into an agreement with the second respondent/second plaintiff in respect of 4 acres and 3 cents and the time limit for performance of both the agreement is 18 months and Ex.A2 agreement dated 05.02.1992 is for a commercial purpose and time limit specified in Ex.A2 agreement is an important condition and Ex.A3 muchilika agreement relates to the possession being give in respect of house and well pertaining to 1 acre and 26 cents and as per Ex.A1 agreement only after sale is completed in respect of 4 acres and 3 cents the possession of house and well agreement has been written and in the sale agreement property as per Ex.A1 the second plaintiff has purchased 1 acre 89 cents and he has not purchased the remaining portion and that the plaintiff have not come forward to purchase the suit property of 1 cent and he has not agreed at any point of time to extend the time limit in regard to the suit agreement and the second respondent/second plaintiff has purchased by means of six sale deeds an extent of 1 acre and 89 cents and that after the sale agreement date he has executed 7 sale deeds and these sale deeds have not been effected as directed by the second plaintiff and an extent of 1 acre 63 cents as covered under the 7 sale deeds and out of 7 sale

deeds he has filed the certificate copy marked as Exs.B1 to B5 and he has received the money in respect of 1 acre and 63 cents which has been sold by him and that he has not handed over possession of the suit property to the plaintiffs" and in the suit property there are plantains and apart from them he has raised maize and sugarcane and the sugarcanes have been delivered to the Sugar Factory and adangal Exs.B6 to B8 are in respect of suit property for the faslis 1400-1402 and the payment of tax receipts in respect of suit property are Exs.B9 to B11 and that he has issued Ex.A4 notice mentioning that the time mentioned in the sale agreement is an important condition and the two telegrams he has issued to the plaintiff's are Exs.B26 and B27 and on 04.08.1993 and on 05.08.1993, he has been waiting in the registrars office and on 05.08.1993, in the registration office he has signed as witness in the settlement deed namely Ex.B28 and as per the sale agreement in favour of the second plaintiff leaving 1 acre and 89 cents the balance of 2 acre and 9 cents remained to be sold and in regard to the two sale agreements within the time limit of 18 months there has been a balance of 3 acres for which the sale has not been effected and at the time of the conclusion of 18 months period in respect of the two agreements the balance sale consideration to be paid remained as Rs. 19 lakhs and odd and the plaintiff's have no capacity to pay a sum of Rs. 19 lakhs and it is not correct on the part of the plaintiff's to say that they have paid the amount in respect of unsold 51 cents of land and it is not correct to state on part of the plaintiff that after his issuance of notice there has been a panchayat and in the said panchayat the time has been extended.

71. DW.1 in his cross-examination has stated that in the Kuniyamuthur property of 1 acre and 23 cents there is a bungalow and land and out of 1 acre 36 cents the sale agreement has been entered in respect of 1 acre and 26 cents in respect of which there is no encroachment and in the 4 acre 3 cents of land abutting the highways there have been huts and for entering into this land of 4 acre and 3 cents a way has been their and in Ex.A1 property there is no well and the value of properties in 2 agreements will be more than Rs. 30 lakhs and in between the plaintiffs" and himself one C.Palanivel has acted as a spokesmen, in respect of two sale agreements and he has spoken with the second plaintiff in respect of the two sale agreement and only after reading the two agreements and after coming to know that it is correct, he has signed the same. Also it is the further evidence of DW.1 that in Ex.A1 sale agreement property 7 cents remains to be sold and before issuance of notice by the second plaintiff through his counsel he has not issued any notice in regard to the expiry of time specified in the agreement and in Exs.A1 and A2 sale agreements it is written that time is the essence of contract and he has issued receipts to the amounts paid by the plaintiff's and that as described in Ex.25 the roads are not linked and in the sale deed the path way is mentioned as 10 feet in breadth and about 600 feet in length.

72. Ex.A1 is the sale agreement in respect of agricultural land dated 05.02.1992 entered into between the appellant/defendant and the second respondent/second

plaintiff in respect of property 4 acres and 3 cents out of 5 acres and 39 cents more particularly described in schedule thereto and the sale consideration per acre has been fixed at Rs. 5,70,000/- as per the said agreement and an advance of Rs. 2 lakhs have been paid by the second respondent/second plaintiff to the appellant/defendant subject to certain conditions mentioned in the Ex.A1 agreement. As a matter of fact in Ex.A1 agreement dated 05.02.1992 the time for completion of performance has been mentioned as 18 English months, from 05.02.1992. Also there is a clause in the said agreement that the balance of sale consideration other than the advance of Rs. 2 lakhs will have to be paid by the second respondent/second plaintiff to the appellant/defendant before 05.08.1993 and he has to get the sale deed executed at his expense either in his name or in portion thereof as an agricultural land. Further, the 3rd clause of the agreement specifically refers to the second respondent/second plaintiff forfeiting the advance amount if he refuses or fails to perform his part of the contract within the time specified. Significantly, the 4th clause in the agreement speaks of the second respondent/second plaintiff to deposit the sale consideration into Court other than the advance amount paid and to get compulsory registration of the documents in case if the appellant/defendant refuses or fails to perform his part of the contract. The Clause six in Ex.A1 agreement refers to the permission being given by appellant/defendant to the second respondent/second plaintiff in measuring, cleaning, fixing stones, to lay roads, to complete the transaction by fixing a higher price, to do agricultural operations, to enter into agreements and to receive advance and to facilitate in this regard the appellant/defendant has given possession of the land to the second respondent/second plaintiff.

73. Ex.A2 is the sale agreement in respect of an agricultural land dated 05.02.1992 entered into between the appellant/defendant and the first respondent/first plaintiff (wife of second respondent/second plaintiff) in respect of a land of 1 acre 26 cents which more fully and particularly described in the schedule thereto. In Ex.A2 agreement the sale price per acre has been fixed at Rs. 5,70,000/- as agreed to by the parties and an advance of Rs. 1 lakh has been paid by the first respondent/first plaintiff to the appellant/defendant who had received the same. The time limit for the agreement has been specified as 18 English months from 05.02.1992. Like Ex.A1 agreement dated 05.02.1992 Ex.A2 agreement dated 05.02.1992 contains a clause that the balance sale consideration (other than advance of Rs. 1lakh) has to be remitted by the first respondent/first plaintiff to the appellant/defendant before 05.08.1993 and the first respondent/first plaintiff has to get the sale deed either in his name or in others name either in part or in entirety as an agricultural land. Ex.A2 agreement speaks of the first respondent/first plaintiff, forfeiting the advance if she fails to perform her part of the contract and the appellant/defendant when he refuses to execute the sale deed to the first respondent/first plaintiff, then the first respondent/first plaintiff has to approach the court and get the documents registered compulsorily by depositing the balance amount etc. Further, the Clause six of the Ex.A2 agreement refers to the permission being granted to the

first respondent/first plaintiff by the appellant/defendant to measure the land, cleaning the same to fix stones, to lay roads, and to negotiate with sale for others for a higher price or to do agriculture and enter into agreement and to receive advance, and to facilitate the same and that appellant/defendant has handed over possession of the property to the first respondent/first plaintiff.

74. Interestingly the two sale agreements Exs.A1 and A2 dated 05.02.1992 speak of the right of the appellant/defendant to sell the remaining portion not purchased by the respondents/plaintiffs within the time adumbrated. Also it contains a condition that in case the respondents/plaintiff's have not sold the land to any person as per agreement the same will not bind the appellant/defendant.

75. Ex.A3 is the Varthamanam agreement dated 05.02.1992 entered into between the appellant/defendant and the first respondent/first plaintiff (wife of the second respondent/second plaintiff) it is pertinent to point out that Ex.A3 Varthamanam agreement is dated 05.02.1992 like that of Exs.A1 and A2 sale agreements.

76. In Ex.A3 Varthamanam agreement dated 05.02.1992 there is a recital to the effect that the appellant/defendant and the second respondent/second plaintiff has entered into a sale agreement in respect of the property in Government Survey No. 214, 693/2, 215/3, 213/3 in Kuniamuthur village and only after the second respondent/second plaintiff obtaining the entire sale deed from the appellant/defendant either in his name or in the names of persons mentioned by him. The portion of the property mentioned in their sale agreement in Government Survey No. 212/2, in which the bungalow in door No. 375-A, well, mango trees, kalam, coconut trees and other adjoining portions and their sale will be effected by the appellant/defendant to and in favour of the second respondent/second plaintiff.

77. The appellant/defendant has issued Ex.A4 lawyer's notice dated 29.07.1993 addressed to the second respondent/second plaintiff inter-alia stating that the second respondent/second plaintiff has entered into an agreement with him on 05.02.1992 towards the purchase of agricultural lands measuring 4.03 acres for a sum of Rs. 5,70,000/- per acre and has paid an advance of Rs. 2lakhs and has agreed to complete the sale within 18 months viz., before 05.08.1993 and that he has purchased 1.89 acres only in various persons names and that the period is coming to an end on 05.08.1993 and that time is the essence of the contract and that he is ready and willing to perform his part of the contract if the transaction is completed by means of payment of balance of amount before 05.08.1993 and since the second respondent/second plaintiff is not willing to purchase the balance extent, the time will not be extended under any circumstances beyond 05.08.1993 and if the balance amount is not paid and transaction is not completed, the agreement dated 05.02.1992 entered into by the parties stand canceled and that advance amount will be forfeited. In effect Ex.A4 appellant/defendants lawyer's notice dated 29.07.1993 calls upon the

second respondent/second plaintiff to pay the entire balance amount before 05.08.1993 and to complete the transaction before that date failing which the time will not be extended under any circumstances etc.

78. In Ex.A5 appellant/defendants lawyer's notice dated 29.07.1993 addressed to the first respondent/first plaintiff (wife of second plaintiff) it is mentioned that the first respondent/first plaintiff has entered into an agreement with appellant/defendant on 05.02.1992 to purchase an extent of 1.26 acres agricultural lands together with a house and other appurtenances therein for a sum of Rs. 5,70,000/- per acre and that an advance of One Lakh rupees has been paid and further that the first respondent/first plaintiff has agreed to purchase the property by paying the balance amount within 18 months from 05.02.1992 i.e., before 05.08.1993, and moreover, her husband namely the second respondent/second plaintiff has also entered into an another agreement with the appellant on 05.02.1992 in regard to the purchase of 4.03 acres of land and on 05.02.1992 itself a Varthamanam agreement has been entered into between the appellant and the first respondent/first plaintiff in and by which the first respondent/first plaintiff has agreed that only after purchasing the entire extent covered in the agreement between appellant/defendant and the second respondent/second plaintiff the first respondent/first plaintiff will purchase the house i.e., D. No. 375-A and Kalam No. 375, coconut trees and the area surrounding the house and the Kalam and that her husband, second respondent/second plaintiff has failed to perform his part of the contract by paying the balance amount and that the agreement of sale entered into between the first respondent/first plaintiff and the appellant/defendant, dated 05.02.1992 cannot be extended under any circumstance beyond 05.08.1993 and if the first respondent/first plaintiff failed to complete the transaction before 05.08.1993 the agreement stands canceled and added further the first respondent/first plaintiff had been directed to comply with the terms of the agreement and the Vathamnam Oppantham dated 05.02.1992 and that time is the essence of contract and that the agreement stands canceled if there is failure on the part of the first respondent/first plaintiff and on her part of the contract before 05.08.1993 and that the advance paid by her will stand forfeited.

79. Ex.A6 is the reply lawyer's notice dated 03.08.1993 issued by the first respondent/first plaintiff addressed to the appellant/respondents advocate stating that the first respondent/first plaintiff has entered into an agreement with the appellant/defendant for the purchase of the properties described in the agreement dated 05.02.1992 at the value of Rs. 5,70,000/- and that an amount of Rs. 1lakh has been paid as an advance being the part amount of sale consideration on the date of agreement itself and that the said agreement can be performed subject to and being dependent on an earlier agreement entered into between the appellant/defendant and the first respondent/first plaintiff's husband namely the second respondent/second plaintiff and in the Varthamanam agreement it is mentioned specifically that the appellant/defendant will be able to sell and transfer the bungalow, well, farm shed and crusher shed, cow shed,

coconut trees and all other appurtenances only after the performance in full of the earlier agreement mentioned supra, but an option is given in favour of the first respondent/first plaintiff that she can purchase the property in S.F. No. 212/2 western portion, 212/1 & 213/1 and that the first respondent/first plaintiff has always been ready and willing to perform her part of the contract as per the agreement referred to and repeated demands have been made to with effect and it is now declared that the first respondent/first plaintiff is willing to purchase the property under the agreement on 04.08.1993 itself by which date this reply might have been received and also a request is made to inform the first respondent/first plaintiff telegraphically of the readiness and willingness of appellant/defendant to execute the sale deed by receiving the balance sale consideration and first respondent/first plaintiff in possession of the properties and therefore the first respondent/first plaintiff is looking forward to a positive reply and the balance of sale consideration is kept ready with her.

80. Ex.A7 is the second respondent/second plaintiff's lawyer's reply notice dated 03.08.1993 addressed to the appellant/defendants lawyer stating inter-alia that the appellant/defendant has not been successful in agricultural operations and for quite a long time has been proposing to sell the properties, since the lands are situated on the periphery of Coimbatore City, the agricultural lands in and around are being converted into house sites or industrial sites and the second respondent/second plaintiff has inspected the property proposed to purchase the same for the sole purpose of laying out the same as house sites and that after negotiation between the parties the property has been agreed to be sold out to the second respondent/second plaintiff's and an agreement has also been entered into between the parties and their dominant intention being that the property can be converted into house sites and sold to various parties and it has never been intended nor it can be never be intended that time is the essence of contract and that the appellant/defendant has suppressed the fact that there have been/are numerous huts in which people from all walks of life have been residing by encroaching the road strips of the Coimbatore Palghat National Highways land as well as the land belonging to him, which is the subject matter of the agreement and the second respondent/second plaintiff after talks has agreed to vacate the hutment dwellers by spending his own money and clear the western border of the property and the appellant/defendant has agreed to deduct the value of 50 cents out of the total sale consideration and in pursuance to the agreement the second respondent/second plaintiff has been put into possession of the property more fully for the reasons mentioned under Clause-6 of the agreement and in pursuant of the possession the second respondent/second plaintiff has convened a meeting of the hutment dwellers but only a few of them attended and the protracted negotiations have been successful in vacating 15 huts and purchased alternative sites and made them to shift their hut to the said place and also gave a compensation from Rs. 10,000-Rs.25,000/- depending upon the size of the hut and also spent a sum of Rs. 3,50,000/- for eviction of the 15 hutment dwellers and the second respondent/second plaintiff

has thereby partly performed the agreement and moreover, he has cleared and leveled the land after planting survey stones, laid road at cost of Rs. 50,000/- and there are more than 20 huts and negotiations are still being carried on and in the meanwhile the second respondent/second plaintiff has purchased land under six separate slae deeds varying extent of land on different dates totaling and entent of 1 acre and 89 cents etc.

81. Indeed, a reading of Ex.A7 second respondent/second plaintiffs lawyer's notice dated 03.08.93 contain averments to the effect that the second respondent/second plaintiff has been and is always willing to purchase the property agreed upon and he has never conceived any idea of either protracting or unlawfully enriching at the cost of appellant/defendant etc., and if the matter is precipitated the same will entail in utter chaos and loss due to proceedings by Urban Land Ceiling and Urban Land Tax Authorities.

82. In Ex.A8 telegram issued by the appellant/defendnant addressed to first respondent/first plaintiff the following recitals are seen; "...Received your telegram willing to execute sale of entire property on fifth August come with balance money, I shall wait at Sub Registrars Office from ten a.m. onwards on fifth August yesterday you did not turn up". Further in the Ex.A9 lawyer's rejoinder issued on behalf of the appellant/defendant addressed to the second respondent/second plaintiff's lawyer, it is stated that possession continues with the appellant/defendant and that the second respondent/second plaintiff has never been willing and ready to purchase the property and that he never had a required fund to complete the sale etc.

83. In Ex.A10 appellants lawyer's rejoinder dated 07.08.1993 addressed to the lawyer of the first respondent/first plaintiff it is mentioned that the first respondent/first plaintiff is not having the requisite funds to complete the transaction and that the appellant/defendant has been waiting at the Sub Registrars office on 4th and 5th August, 1993 but, the first respondent/first plaintiff has never turned up and hence the contract between the first respondent/first plaintiff and the appellant dated 05.02.1992 stands canceled.

84. In Ex.A11 lawyer's reply notice dated 07.08.1993 issued on behalf of the first respondent/first plaintiff addressed to the appellant/defendant's lawyer that it is inter-alia mentioned that the first respondent/first plaintiff has already intimated and has been waiting at Sub Registrars Office on 4th and 5th of August and it is personally known to the appellant/defendant and that the first respondent's/first plaintiff's husband namely the second respondent/second plaintiff has gone to the house of appellant/defendant on 06.08.1993 and further talks have been held in the presence of one Babu a close relative of the appellant who is the mediator in the matter and further a request has been made that the appellant/defendant must see the entire matter in a proper perspective and complete the sale consideration without any loss to both the parties.

85. In Ex.A12 lawyer's notice dated 04.02.1995 issued on behalf of the

respondent's/plaintiff's addressed to the appellant/defendant among other things mention that the agreement in favour of the second respondent/second plaintiff is dependent on the performance of agreement with the second respondent/second plaintiff and the first respondent/first plaintiff is entitled to get the sale deed as per agreement in her favour only after the purchase of 4.03 acres lands purchased by the second respondent/second plaintiff.

86. Ex.A13 is the reply notice of appellant's lawyer addressed to the respondents/plaintiffs lawyer inter-alia stating that both the agreements are independent and there is no connection between the two agreements and further that both the agreements should be performed within the stipulated period and after the expiry of period there is no question of the appellant/defendant executing the sale in favour of the respondent/plaintiff and that the respondents/plaintiffs do not have the required funds to purchase the properties and that the appellant is not willing to execute the sale deed at present. Ex.A14 is the rejoinder notice dated 22.02.1995 issued by the respondents/plaintiffs lawyer addressed to the appellants/defendants lawyer stating that the appellant/defendant will have to perform his part of the agreement by executing the sale deed in favour of the respondent/plaintiff or his nominees etc., and the respondents/plaintiffs are ready and willing to perform their part of the agreement and get the sale executed as per the agreement by paying the balance of purchase money and they are prepared to wait for another seven days beyond which it will be put to the dire necessity of seeking appropriate reliefs before the Civil Forum.

87. It is to be borne in mind that the specific performance of a contract is the actual execution of contract as per the terms and conditions and a Court of law directs a party in default to perform the very thing which is he is contracted to do. As such, the terms of the conditions contract will have to be certain and the parties should have consenses ad idem. In short, the acceptance must be absolute and ought to correspond with terms of offer. The minds were ad idem is to be established by a plaintiff in a given case. However, terms and conditions are uncertain and parties are not ad idem there can be no specific performance, for there has been no contract at all.

88. It is to be noted that in a suit for specific performance, the evidence and the proof of agreement must be absolutely clear and certain. Furthermore, explanation-I appended to Section 20 of the Specific Relief Act clearly enjoins that mere fact that a contract is onerous to the defendant or improvident in its nature will not construe and unfair advantage within the meaning of Section 20(2) of the Act. Moreover, a mere incorporation in the written agreement of clause imposing penalty in case of default it is not by itself an evidence on intention to make time is the essence of contract.

89. Even if time is not the essence of contract a Court of Law may interfere that it is to be performed in a reasonable time for which the conditions are:

1. From the express terms of contract.

2. From the nature of property.

3. From surrounding circumstances. For e.g., aim of making the contract while granting relief, reasonable time has to be ascertained from all the facts and circumstances of the case. Also as per Section 20 of the Specific Relief Act 1963, a Court of Law while exercising its discretion must see that it is not used as an instrument of oppression and to have an unfair advantage to the plaintiff.

90. As a matter of fact the motive behind the litigation must also enter into the judicial verdict because Section 20 of the Specific Relief Act (47 of 1963) preserves the judicial discretion to a Court of Law in decreeing the Reliefs of Specific Performance.

91. At this stage, this Court recalls observation of Hon''ble Supreme Court in the decision Ganesh Shet Vs. Dr. C.S.G.K. Setty and Others, wherein it is observed as follows:

While normally, it is permissible to grant relief on the basis of what emerges from the evidence, even if not pleaded, provided there is no prejudice to the opposite party, such a principle is not applied in suits relating to specific performance. Other relief i.e. General relief to be granted must be consistent with both pleading and proof, in suits for specific performance.

Also in the aforesaid decision at page 2216 it is observed thus;

Where in a suit for specific performance of contract, the contract on which relief was based was found to be not a concluded contract, the relief cannot be given on basis of another contract alleged by plaintiff to be concluded contract when it was not proved that it was a fresh or independent contract. In such a case the grant of any general relief on the basis of an agreement of sale for second time even if proved will be doing violence to the language in the plaint to the effect that the parties concluded an agreement on previous occasion as aforesaid which was found to be concluded contract.

92. In another decision Prakash Chandra Vs. Angadlal and Others, , the Hon''ble Supreme Court has observed as follows;

"The ordinary rule is that specific performance should be granted. It ought to be denied only when equitable considerations point to its refusal and the circumstances show that damages would constitute an adequate relief."

93. It is not out of place for this Court to make a pertinent mention that the Hon''ble Supreme Court in the decision The Union of India Vs. Kishorilal Gupta and Bros., at page 1368 as other things observed as follows:

We are concerned with the expressed intention of the parties and when the words are clear and unambiguous they are undoubtedly clear in this case there is no scope for drawing upon hypothetical considerations or supposed intentions of

the parties; nor are we attracted by the argument that the description of the properties intended to be hypothecated was not made clear and therefore the presumed intention was to sustain the rights under the new contract till a valid document in respect of a definite and specified property was executed. Apart from the fact that we are not satisfied with the argument that the description was indefinite, we do not think that such a flaw either invalidates a document or suspends its operation till the defect is rectified or the ambiguity clarified. The substituted agreement gave a new cause of action and obliterated the earlier ones and if there was a valid defence for the enforcement of the new contract in whole or in part, the party affected must take the consequences. We have, therefore, no doubt that the contract dated February 22, 1949, was for valid consideration and the common intention of the parties was that it should be in substitution of the earlier ones and the parties thereto should thereafter look to it alone for enforcement of their claims. As the document does not disclose any ambiguity, no scrutiny of the subsequent conduct of the parties is called for to ascertain their intention.

94. In the decision *Kabirdass Vs. Vinothambal, Ganapathy, Balasubramanian and Revathi*, this Court has held thus;

The vendor should be equally ready and willing to perform his part of the obligations from day one e.g., clearing the encumbrance if any on the property, procuring the encumbrance certificate, Income Tax clearance, steps to get the tenant, if any, in the occupation of the property out getting consent from other sharers, etc.; If time is not of essence originally, it can be made of essence even subsequently by serving notice on the party.

95. In the decision *Suryagandhi Vs. Lourduswamy*, this Court has held that;

Even if time is not the essence of the contract, the Court may infer that it has to be performed within a reasonable time. In the present case, the learned Counsel for the defendant strongly contended that time is the essence of the contract as a condition has been stipulated in Ex.A-2 sale agreement viz., the plaintiff has to forfeit the advance in case if there is a breach on his part and the defendant has to refund double the advance amount in case of his committing breach. However, this Court is not persuaded to sustain the contention that the time is the essence of the contract in the light of the law laid down by the Apex Court in the recent reported decision.

96. One cannot brush aside an important fact that as per Section 51 of the Indian Contract Act, 1872 if promises which reciprocals each one has always the option to perform his part of the contract but one party cannot insist on the other performing his promise without himself performing what he has agreed to do as per decision *Vairavan Chettiar and Others Vs. Kannappa Mudaliar*, , whereas suit for Specific Performance of Contract to sell an immovable property has been filed on the litigation that the plaintiff has paid the full consideration amount and the litigation has been found to be incorrect in that case it cannot be said that

plaintiff has not been willing to perform his part of the contract as per decision *Lachuram Nath v. Madharam Nath* AIR 1962 Assam 41 (D.B).

97. A party will be absolved from performing his part of the contract only if he accepts repudiation and acts upon it. But when he does choose to do so but treats the contract as subsisting, he has to prove the performance of the conditions precedent and readiness and willingness on his part if he desire to enforce the performance of the contract by the other side as per decision *Paudi Lazarus v. Rev. Johnson Edward* AIR 1976 AP 243. Continuing further it is to be mentioned that while seeking performance of the reciprocal promise by the opposite party, the plaintiff has to specifically plead and prove that he has performed or has been ready and willing to perform the promise he has made as per decision *Ushodaya Publications Private Ltd. Vs. Smt. M. Ramanamma and Others*, . Further, if the Court comes to the conclusion that time is not the essence of contract and for the purchase of immovable properties the failure of the party for the option of the purchase money required in the contract within the stipulated period will not ipso facto disentitle him to get a decree for Specific Performance as per decision *Debendra Nath Mandal Vs. Sakhilal Kar and Others*, .

98. Section 54 of the Indian Contract Act 1872, refers to a contract of reciprocal promises, such that one cannot be performed or its performance cannot be claimed different the other has been performed. Indeed, a validly entered into contract cannot rescinded without any cogent justification in the considered opinion of this Court. The law of accord and satisfaction is that a person entitled to the performance of a promise might accept instead of the original promise, something different; this different thing is agreed upon by an accord reached between the parties to the contract as per decision *Saraswat Trading Agency Vs. Union of India (UOI)*, .

99. It is significant to point out that as per the Contract Act, there is no legal presumption that time is the essence of the contract. Even where the parties have expressly provided that time is the essence of the contract such provisions have to be read along with other provisions of the contract and such other provisions may on the construction of the contract may exclude the completion of the contract by a particular date was intended to be fundamental. In short whether or not time must be regarded as an essential clause of the contract is purely a question of intention of the individuals to be gathered from the terms of the contract and the surrounding circumstances of the case. Apart from that, intention to make time of the essence, if expressed in writing, must be in an unmistakable language. However, the Specific Performance of the Contract will ordinarily be granted notwithstanding the default in carrying out the contract within the specified period, if having regard to express stipulation of the parties, nature of the property and surrounding circumstances, it is not inequitable to grant the relief. Also an intention to make time of the essence of contract may be inferred from what passed between the parties before the contract and not thereafter. Furthermore, equity which governs the right of the parties in the

cases of Specific Performance of contracts to sell real-estates looks at the substance of the agreement in order to find out whether the parties, notwithstanding that the named specific time within which completion was to take place really and in substance intended grant it should take place within a reasonable time. Generally speaking, Equity has never laid it down that a man who never be allowed to mean what he says, in the considered opinion of this Court.

100. As per Section 58 of the Indian Contract Act 1872, in the case of an alternative promise one branch of it which is legal and other illegal, the legal branch alone can be enforced. If a contract has separate clause some of which are legal and others illegal, the fact that some which are illegal will not make the legal ones unlawful and the Court of law can enforce the legal ones as opined by this Court.

101. Under the Indian Contract Act a novation is a new promise which is accepted in satisfaction of a previously existing claim while in accord and satisfaction itself is not a new promise but the performance of the new promise that is accepted as satisfaction. To put it differently, a novation is generally defined as a mutual agreement among concerned parties for the discharge of a valid existing obligation by the substitution of a valid existing obligation on the part of an individual or a debtor or a like agreement for the discharge of a debtor to its creditor for the substitution of a new creditor. In common law, novation is brought about by introduction of new parties or alteration between the same parties by an introduction of new covenant. The parties to a contract are competent by a mutual agreement, without any satisfaction, to discharge the obligation of a contract wholly or in part and this is otherwise, clear from the ingredients of Section 63 of the Contract Act, which speaks of a promisee who may dispense with or remit performance of promise. The abandonment/waiver may be in writing or in oral terms and can also be inferred from the conduct and circumstances of a given case. For novation, consideration is necessary, ordinarily the consideration mutually being the discharging of an old contract as per decision *Kedarnath Lal v. Sheonarain Ram* AIR 1957 Pat. 407 (D.B).

102. Undoubtedly, the requirement of an averment as to readiness and willingness to perform plaintiffs' part of the contract is a mandatory requirement and the same applies only to executory contracts. Where the plaintiff-buyer has paid the entire price and is put in possession and the only thing remains is only the execution of sale deed for which the suit is filed, there is no question of his having to plead his readiness and willingness to perform his part of the contract in the considered opinion of this Court. Also it is not necessary for a buyer to go about jingling money to demonstrate his capacity to pay the purchase price as per decision *Ganesh Prasad Vs. Saraswati Devi and Others*, (serving notice and bringing suit sufficient to prove readiness and willingness to pay). When a time is fixed for performance, a buyer need not show that he had command of ready money even before that date during the time of the contract and that will render

meaningless fixing of a date/time for performance in the considered opinion of this Court. Moreover, when the obligations under the contract are to be performed in a certain sequence, one individual cannot require compliance by the other party without first performing his own part of the contract. Added further, it is not necessary to produce money or to vouch a scheme for financing the transaction as per decision *Bank of India v. Jamsetji Chinoy* AIR 1950 P.C. 90 at page 96. It is not necessary to produce account books as per decision *Santlal v. Shyamdhawan* AIR 1986 Delhi 275 at page 282.

103. As far as the present case is concerned in Ex.A1 sale agreement dated 05.02.1992 (entered into between the appellant/defendant and the second respondent/second plaintiff, being the husband of the first respondent/first plaintiff) the time specified for the performance of contract is 18 English months from 05.02.1992 likewise, in Ex.A2 sale agreement dated 05.02.1992 (entered into between the appellant/defendant and first respondent/first plaintiff, being the wife of second respondent/second plaintiff) the time fixed for performance of the contract is 18 English months from 05.02.1992. In Ex.A2 sale agreement dated 05.02.1992 (entered into between the appellant/defendant and the first respondent/first plaintiff) it is clearly mentioned that apart from the advance amount of Rs. 1 lakh the balance sale consideration will have to be paid by the first respondent/first plaintiff to the appellant/defendant before 05.08.1993 (that is within 18 months time limit from 05.02.1992). However, in Ex.A1 sale agreement dated 05.02.1992 (entered into between the appellant/defendant and the second respondent/second plaintiff) it is mentioned that apart from an advance of Rs. 2 lakhs the balance sale consideration will have to be paid within 18 months from 05.02.1992 (i.e. before 05.08.1993 by the second respondent/second plaintiff to the appellant/defendant). Interestingly, in the Ex.A3, Varthamanam agreement dated 05.02.1992 entered into between the appellant/defendant and the first respondent/first plaintiff (wife of second respondent/second plaintiff) it is mentioned that "only after the performance of sale agreement in entirety either in favour of second respondent/second plaintiff or his nominees/assignees is completed then the appellant/defendant will be in a position to hand over possession and execute sale to and in favour of the first respondent/first plaintiff in respect of the property viz., bungalow, bearing house No. 375, well, kallam etc., in a portion of Government Survey No. 212/2 etc. Moreover, in Ex.A3 Varthamanam agreement in page 3, it is also mentioned that in regard to the other western portion in Government Survey No. 212, 212/2, 213/1 etc. described in the sale agreement if the first respondent/first plaintiff demands for the sale being effected the appellant/defendant agrees for the same. Therefore, it is candidly clear that only after the entire sale of the properties mentioned in Ex.A1 sale agreement dated 05.02.1992 (entered into between the appellant/defendant and the second respondent/second plaintiff) either in second respondent/second plaintiff or his nominees name is completed, the first respondent/first plaintiff gets the right of demanding the sale of properties mentioned in her sale agreement dated 05.02.1992 from the

appellant/defendant.

104. In this connection a reading of Clause-6 of Ex.A1 agreement dated 05.02.1992 entered into between the appellant/defendant and the second respondent/second plaintiff indicates that the appellant/defendant as permitted to the second respondent/second plaintiff to measure, clean and to lay stones and to form roads in the land and also to enter into negotiation with others by fixing higher price, to do agricultural operations to enter into agreements and to receive advance. Even though Exs.A1 to A2 sale agreements dated 05.02.1992 speak of 18 English months being the period of time for completion of performance of the contract (from 05.02.1992) in view of the fact that in Ex.A3 Varthamanam agreement dated 05.02.1992 (entered into between the appellant/defendant and the first respondent/first plaintiff) the parties have covenanted a clause to the effect that "only after selling the entire properties mentioned in the sale agreement in favour of the second respondent/second plaintiff the sale of a portion of a property in respect of the sale agreement in favour of the first respondent/first plaintiff can be given in sale shows unequivocal terms that 18 English months period is not the essence of contract as understood by the parties and it is also not the dead line for the performance of the contract in the matter in controversy, as opined by this Court. In fact, by means of subsequent arrangement/Ex.A3 Varthamanam agreement dated 05.02.1992 entered into between the appellant/defendant and the first respondent/first plaintiff altogether a new contract has been entered into between the appellant/defendant and the first respondent/first plaintiff which is nothing but a subsequent arrangement in novation of the earlier Exs.A1 and A2 agreement dated 05.02.1992 (entered into between appellant/defendant and the respondents/plaintiffs). Suffice it for this Court to point out that Ex.A3 Varthamanam agreement is a new mutual agreement/contract in substitution of Ex.A1 and A2 agreements dated 05.02.1992 entered into between the parties and as a matter of fact by all means Ex.A3 Varthamanam agreement dated 05.02.1992 is a valid and enforceable contract in the eye of law to be effective as a novation, since in the present case on hand the appellant/defendant and the first respondent/first plaintiff by means of agreement A3 Varthamanam agreement dated 05.02.1992 have agreed to substitute a new contract or to alter the previous Exs.A1 and A2 agreement dated 05.02.1992, this Court is of the considered view that the original contract namely Exs.A1 and A2 need not be performed. Moreover, in the present case on hand appellant/defendant has executed sale deeds even after 05.08.1993 and this act unhesitatingly points out that time is not the essence of contract as opined by this Court. In regard Ex.A1 sale agreement dated 05.02.1992 in favour of the second respondent/second plaintiff the appellant/defendant has executed the sale deeds even after 05.08.1993 and the second respondent/second plaintiff (husband) has signed as witness in those sale deeds and therefore, by no stretch of imagination it can be said that time is the essence of contract in the considered opinion of this Court and in fact by means of consenses ad idem between the parties on the terms

mentioned in Ex.A3 Varthamanam agreement dated 05.02.1992 the respondents/ plaintiffs can maintain an action of filing the present suit before the trial court and the same is valid in law and the point is answered accordingly.

105. The case of the respondents/plaintiffs (through evidence of PW.1/second plaintiff) is that as per Ex.A1 sale agreement dated 05.02.1992 on 14.12.1994 he has paid the entire sale consideration and therefore as per Ex.A2 agreement dated 05.02.1992 he derives right of demanding sale from the appellant/defendant but at that point of time the appellant/defendant in Ex.A2 sale agreement property dated 05.02.1992 (entered into between the appellant/ plaintiff and the first respondent/first plaintiff) has raised sugarcane, and he informed that he will execute the sale deed after harvesting sugarcane and since the appellant/defendant has not executed the sale deed he has issued Ex.A12 lawyer's notice dated 04.02.1995. At this juncture, it is apt for this Court to point out that from Exs.B12 to B25 it transpires that in the suit property the appellant/defendant has raised sugarcane.

106. That apart, a perusal of Ex.A1 agreement dated 05.02.1992 (entered into between the appellant/defendant and the second respondent/second plaintiff in respect of sale of 4.03 acres) the same is silent about the existence of huts and the encroachments. But it is evident from Ex.A7 second respondent/second plaintiffs lawyer's notice dated 03.08.1993 addressed to the appellant/defendant's lawyer that the second respondent/second plaintiff pursuant to the Ex.A1 agreement dated 05.02.1992 has been put into possession of the property as per Clause-6 for the purposes mentioned therein. However, there is a categorical averment that the PW.1/second respondent/second plaintiff after a protracted negotiation with the hut dwellers have vacated 15 of them and has purchased an alternate site, made them to shift their huts to that site and has also given a compensation ranging from Rs. 10,000 - Rs.25,000/- depending upon the size of the hut and thereby spent a sum of Rs. 3.5 lakhs for evicting them and still there are more than 20 huts and negotiation are still being carried on for the rest and to this effect the second respondent/second plaintiff has deposed in his evidence as PW.1. To put it precisely, even though Ex.A1 agreement dated 05.02.1992 has not expressly or impliedly refers to the existence of hut or the hut dwellers, Ex.A9 appellant's lawyer's rejoinder notice dated 07.08.1993 addressed to the second respondent/second plaintiff's lawyer mentions that the second respondent/second plaintiffs after inspection has agreed to purchase the property in "as is were is condition" and further has agreed to purchase the property along with hutments knowing fully well the pros and cons of the deal etc.

107. In as much as Clause-6 of the Ex.A1 agreement dated 05.02.1992 in favour of the second respondent/second plaintiff speaks of the possession being handed over by the appellant/defendant to the second respondent/second plaintiff and also the second respondent/second plaintiff has cleared and levelled the land after planting survey stones etc., and also vacated the 15 hut dwellers by

purchasing and providing an alternate site to them to shift their huts and has also paid compensation amount and thereby incurred an expense of Rs. 3.5 lakhs for vacating them and also in regard to the disbursement of compensation amount varying from Rs. 10,000-Rs.25,000/- depending upon the size of the hut, this Court accepts the evidence of PW.1 (second respondent/second plaintiff) since the same is worthy of credence based on the facts and circumstances of the case on hand, coupled with the evidence of PW.2 and has stated that the second plaintiff has given money to vacate the encroachers and has come to the inevitable conclusion that the possession has been handed over by the appellant/defendant to the second respondent/second plaintiff in pursuance of Ex.A1 agreement dated 05.02.1992 and the point is so answered.

108. The appellant/defendant has DW.1 in his evidence in cross-examination has deposed that he has not issued any notice to the respondents/plaintiffs demanding the money due in respect of the 51 cents and the reason for non-issuance of notice to respondents/plaintiffs is that the time has expired as per agreement. Moreover, he has also admitted in his evidence that the 51 cents are lying as separate portions without sale being effected there to. It is not out of place to pertinently point out that the appellant/defendant as DW.1 in his evidence has stated that he has given the path way measuring an extent of 44 cents to the purchasers but the evidence of PW.1/second respondent/second plaintiff is that 44 cents has been left as common path way and in the remaining 7 cents there are huts and that he has paid amount in respect of the said 7 cents but the appellant/defendant has not executed the sale deed in respect of the same. It is relevant to make a significant mention that the appellant/DW.1 in his evidence has categorically stated that the purchasers at the time of their purchase have not paid consideration in regard to the path way, and it is incorrect to state that purchasers have paid consideration towards the purchase of path way. However, a closer scrutiny of schedule of property of Ex.A1 agreement dated 05.02.1992 entered into between the appellant/defendant and the second respondent/second plaintiff without any iota of doubt refers to the sale of 4.03 acres including the trees, mamool path way right etc., and in view of the fact that the PW.1/second plaintiff has paid Rs. 22,92,100/- (as spoken to by him in his evidence) to the appellant/defendant as on 14.12.1994, being the entire sale consideration in respect of his sale agreement Ex.A1 dated 05.02.1992 though it is stoutly denied by the appellant/defendant side and a plea is put forward that the respondents/plaintiffs have falsely averred in para 13 of the plaint that the second plaintiff has paid a sum of Rs. 22,97,100/- to the appellant/defendant under various sale deeds, being the entire sale consideration, even in the absence of receipt, it is to be pointed out that no ordinary prudent man will remain quiet if the amount is not paid for a commercial venture of land transaction and as such the contra evidence of appellant/DW.1 to the effect that the purchasers have not given money to the property mentioned in the agreement including the path way is not accepted by this Court.

109. In regard to the averment in the written statement of appellant/defendant to the effect that second respondent/second plaintiff is not a necessary party for the suit and there is misjoinder of parties and misjoinder of cause of action it is to be pointed out that second respondent/second plaintiff in his evidence as PW.1 has deposed that he has only entered into an agreement with the appellant/defendant and that he conducts the case on behalf of his wife namely the second respondent/second plaintiff and that Exs.A1 and A2 agreements dated 05.02.1992 have been entered into by them that the appellant/defendant and Ex.A3 Varthamanam agreement dated 05.02.1992 has been entered into between the appellant/defendant and the first respondent/first plaintiff namely his wife. By means of Ex.A3 Varthamanam agreement dated 05.02.1992 entered into between the appellant/defendant and the first respondent/first plaintiff a new contract by mutual agreement has been entered into between the parties which is a valid and a legally enforceable contract in the eye of law as novation and since Exs.A1 and A2 agreements dated 05.02.1992 speak of 18 months period for completion of contract from 05.02.1992 in order to resolve all the disputes whether time is the essence of contract as understood by the parties and also because of the fact that Ex.A3 Varthamanam agreement refers to the averments that the first respondent/first plaintiff cannot make any demand for the execution of the sale deed till the performance of the sale agreement in favour of second respondent/second plaintiff is completed, this Court opines that the second respondent/second plaintiff (PW.1), being the husband of first respondent/first plaintiff is a proper/necessary party to the case for a complete and effectual determination of all controversies involved in the suit.

110. As regards the plea of the appellant/defendant that the respondents/plaintiffs have assigned erroneous reasons in the affidavit to extend time for payment of Court fee when the evidence of stamp vendor goes to show that stamps have been made available, the learned Counsel for the appellant/defendant submits that the respondents/plaintiffs have projected a false case in this regard and they have not approached the Court with clean hands when they have paid a Court fee of One rupee only on the date of filing of the suit on 28.04.1995, when in reality they have to pay a Court fee of Rs. 53,865.50/-.

111. The learned Counsel for the appellant/defendant cites the decision of this Court Ramiah and Anr. v. R. Palaniappan and Ors. (2007) 5 MLJ 559 at page 560 it is held as follows;

In the present case, the delay in re-presentation was huge. The reasons given for the delay even on the face of it do not merit acceptance. Yet, the delay was condoned. After three years of prosecution of plaint, the Court permitted the first respondent to pay the deficit Court fees, which was almost the entire Court fees payable, without notice to the other side, contrary to K. Natarajan Vs. P.K. Rajasekaran, . It is definitely open to the petitioners to complain to this Court that absolutely no justifiable reasons were made out and that there was a glaring infirmity and abuse of process of law, and this Court is bound to examine the

grievance of the petitioner.

The Court finds that the condonation of the delay of 1090 days in re-presenting the plaint by the learned Subordinate Judge is without application of mind. But more importantly, the learned Subordinate Judge had no authority nor the jurisdiction to decide that question. He knew that the jurisdiction was taken away from him in view of the Amendment Act. When the plaint was re-presented, all he had to do was direct the respondents to return it to the appropriate Court. The order without jurisdiction is totally void. It must be noted that even in the application for condonation of delay, the first respondent was aware that he had to pay deficit Court fees. He should have filed an application for reception of the deficit Court fees. He does not do so. He waits until the day when the Court will wake up to the fact and direct him to pay the Court fees, which it does on 22.04.2004. On this date, at least the Court should have considered u/s 149, C.P.C whether it should allow in its discretion, the plaintiff to make up the deficit Court fees since he had come to Court on paying only Rs. 300/- as against a sum of Rs. 17,96,693/-. This also, it does not do, but merely grants time for him to make good the deficit. This direction to pay the deficit Court fees on 22.04.2004 is also untenable and therefore, can be corrected under Article 227 of the Constitution of India.

He also relies on the decision *S.V. Arjunaraja v. P. Vasantha* (2005) 5 CTC 401 and 402 wherein it is among other things held that;

In the absence of specific application invoking Section 149 of CPC and in the absence of any order passed by the Court granting time for payment or enlargement, plaintiff is not protected and suit is liable to be rejected.

Furthermore, in the aforesaid decision it is also held that,

In a suit based on promissory note filed in time but proper Court fees not being paid, and the deficit made up after the period of limitation for the suit expires and when there is no order for payment of deficit Court fee made by the Court and no application filed by the plaintiff also then the plaintiff is liable to be rejected and the suit is held to be barred under law.

112. On the side of appellant/defendant the decision *P. Sakthivel v. Ponnusamy* (2007) 4 MLJ 433 is relied on and wherein it is held that,

Once there was a deficit Court fee found, and it was directed to be paid within the stipulated time, and if not done, the only procedure possible under the C.P.C is to seek extension of time for payment of the deficit Court fee as required u/s 149 of the Code.

Also it is laid down that,

So long as the application as contemplated u/s 149 of C.P.C has not been filed and that too within the stipulated time, no question of condoning the delay of 258 days in making the re-presentation of the plaint would arise and the

application which could be filed u/s 151 of C.P.C., should have been made in time.

113. He also draws the attention of this Court to the decision V.N. Subramaniam Vs. A. Nawab John and Others, wherein its inter-alia held that;

Court fee has to be paid within period of limitation and if there is delay in payment of Court fee application to extend time for payment of Court fee or to condone delay in payment of Court fee must be made and the applications filed for condoning delay in representation of Plaint will not amount condonation of delay in payment of Court fee and suit was liable to be rejected, and that Section 149 of C.P.C gives discretionary powers to Court to extend time for payment of deficit Court fee, if it is established that bonafide mistake have been occurred in valuing plaint under particular provision of Court Fees Act or if it is established that non-payment of Court fee was for reasons beyond his control, like where stamps meant for filing were stolen or stamps were not available at particular point of time, etc.

Also it is further held that;

The plaintiffs who filed suit by paying Court fee lesser than one to be paid sought to condone delay in representing plaint and did not file petition u/s 149 to extend time for paying deficit Court fee cannot get such relief u/s 151 of C.P.C.

114. A perusal of Section 149 of the CPC shows that the section is an enabling provision which empowers a Court of law to permit a party to make up the deficiency of Court fees payable on plaint, memorandum of appeals, application for review of judgment etc., even after the expiration of the limitation period prescribed. As a matter of fact, the power to make up the deficiency of Court fees is subject to the discretion of the Court and the same cannot be claimed as a matter of right by one party. When the extension and the exemption of the Court fees is a discretionary power of a Court of Law, bonafide of the ground must be established beyond all reasonable doubt in the considered opinion of this Court. Also an Order u/s 149 of the CPC can be made suo motu. In fact, the payment of deficit Court fee relates back to the date of lodgment of the plaint. Significantly, the words "at any stage" in Section 149 of the C.P.C contemplates that the deficiency can be ordered to be made good even after the period of limitation for filing of the suit or appeal has lapsed. Indeed, the discretion can be exercised even in the case of a plaint without any Court fees.

115. At this stage this Court recalls the observation of Hon"ble Supreme Court, in the decision Johri Singh Vs. Sukh Pal Singh and Others, where in it is held that,

When Subordinate Court makes an order in proper exercise of its jurisdiction u/s 148 and neither acts illegally nor commits any material error in the procedure which may affect the ultimate decision then, High Courts interference u/s 115 of C.P.C is not called for.

116. In the decision of Hon"ble Supreme Court Indian Statistical Institute Vs. Associated Builders and Others, it is laid down as follows;

The two defects pointed out were that the objections were not properly stamped and that the verification was not dated. So far as the deficiency in stamps is concerned u/s 149 C.P.C, the Court has ample jurisdiction to allow the person by whom the fee is payable to pay it at any stage. The defect in not affixing the date of verification is not a material one to be taken serious notice of. In the circumstances, it cannot be said that the objections were not filed within time or that because they were not properly stamped the objections could not be taken as having been filed at all. Therefore, there has not been any delay in preferring the objections. The delay, if any, was in complying with the directions of the Registrar to rectify the defects and re-filing the objections. Section 5 of the Limitation Act provides for extension of the prescribed period of limitation if the petitioner satisfies the Court that he had sufficient cause for not preferring the objections within the period of limitation. When there is no delay in presenting the objection petition, Section 5 has no application and the delay in re-presentation is not subject to rigorous tests which are usually applied in excusing the delay in a petition u/s 5. In the present case, the papers were obtained by the second advocate from the first on January 20, 1977 and the objections were promptly re-filed on the very next day. The High Court was, therefore, not justified in dismissing the petition.

117. In *Custodian of Evacuee Property, New Delhi Vs. Rameshwar Dayal and Others*, it is held thus;

The discretion conferred on the Court by Section 149 is normally expected to be exercised in favour of the litigant except in cases of contumacy or positive malafides or reasons of a similar kind. The question of bonafides has in this connection to be considered from the point of view of its definition as contained in the General Clauses Act and not as contained in the Limitation Act. A thing should be presumed to be done bonafide if it is done honestly, whether it is done negligently or not, for the purposes of judging whether the discretion u/s 149 should or should not be exercised in favour of the litigant.

When the deficient Court-fee stamp to be affixed on the copy of the order appealed from was actually attached with the application u/s 149, it would be a more appropriate and more satisfactory exercise of judicial discretion to allow the deficiency to be made good so that the controversy was heard on the merits rather than to throw out the appeal on this ground.

118. In the decision *Faizullah Khan and Anr. v. Mauladad Khan and Ors.* AIR 1929 Pc 147 it is observed as follows;

In a suit for accounts and the settlement of the sums due thereon in connection with a partnership of a firm of contractors the plaintiffs valued their suit at Rs. 3,000/- for the purpose of Court-fees and asked for rendering of accounts and a decree for Rs. 3,000/- with the settlement "if mere than Rs. 3,000/- is found due to the plaintiffs they will pay an additional Court-fee". The defendant asked for a decree in his own favour for Rs. 29,000/- and he challenged the shares as given

by the plaintiffs and asked for dismissal of the suit. The Subordinate Judge passed a final decree with costs and interest. Under that decree Rs. 19,991 was declared to be due to defendants by plaintiff. No sum was found due to the appellants under the claim for Rs. 3,000/-. The judgment was appealed from by both parties. The position of the plaintiff still remained the same viz., that they challenged the decree against them for over Rs. 19,000/- and maintained that sum in whole or in part should be disallowed and their own claim for Rs. 3,000/- or less or more should be granted in their favour. The appeal was valued for purposes of Court-fee at Rs. 19,991/- and the fee paid was Rs. 975/-.

And held that "the valuation applied to the appeal in its entirety, that is to say both for the purpose of reversing the decree against the appellants and for granting the decree in their favour and that it was a mistake to treat the payment of Rs. 975/- as a fee made only on the amount of the decree passed against the appellant".

And further it is laid down that "this was pre-eminently a case for the exercise by the judicial authority of the discretion u/s 149, C.P.C.

119. Generally, discretion is exercised in favour of a litigant except in cases of contumacy or positive malafide. In case of delayed payment of deficit Court fee, Court has ample power to receive at late stage to do justice but good faith has to be taken into account when delay is not due to his fault. In the decision Gobardhan Singh Vs. Barsati, it is held as follows;

Even in cases where an order is made by the Court for doing a thing within a particular time and the order further provides that the application, suit or appeal shall stand dismissed if the thing is not done within the time fixed, the Court has jurisdiction, if sufficient cause is made out, to extend the time even when the application for extension of time is made after the expiry of the time fixed. It is not the application for grant of further time, whether made before or after the expiry of the time granted, which confers jurisdiction on the Court. The Court possesses the jurisdiction u/s 148, CPC to enlarge the time and the application merely invokes that jurisdiction.

120. That apart, in the decision Durairangam Pillai Vs. Govindarajulu Naidu and Another, it is held as follows;

The next point for decision is whether the suit is barred by limitation. The facts relating to this point are as follows. The plaint was presented on 4th October 1928, the last day of the period of limitation, with a one rupee stamp thereon. It was returned with an endorsement on 5th October 1928 giving two weeks" time for payment of the deficit Court-fee. It was re-presented on 19th October, 1928 praying for a further two weeks time to comply with the requirements. It was granted on 20th October, 1928 and the plaint was re-presented on 3rd November, 1928 paying the required Court-fee. Full Court-fee having been paid only on 3rd November, 1928, it is argued that in the circumstances the suit is barred by limitation. Order 7, Rule 11(e), C.P.C., suggests that the Court may

admit a plaint though it is written on paper insufficiently stamped if the plaintiff on being required by the Court supplies the requisite stamp paper within the time allowed by it. That is what has been done in the case. Under the Code of 1882, there was a conflict of decisions on this point. This conflict has now been set at rest by the enactment in the new Code of Section 149, which runs as follows;

Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court-fee has not been paid, the Court, may in its discretion, at any stage, allow the person by whom such fee is payable, to pay the whole or part, as the case may be, of such court-fee; and upon such payment the document, in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance.

It follows from this section that when in circumstances like the present the deficient court fee was paid and accepted by the Court, the document should have the same effect as if the court-fee had been paid in the first instance, that is, on the date when the plaint was first presented. This date was before the expiry of the period of limitation though it was on the last day of the period. We must therefore hold that the suit is not barred by limitation. The whole point is very clearly considered in Mulla's Commentaries on the CPC in Point No. 3 under Clause (c) of Order 7, Rule 11, to which reference may be made in this connection. As in the circumstances of this case no question of limitation arises, the decision in 41 Mad 412 relied on by the appellants' learned Counsel does not apply. We may also draw attention to the decision in 24 CLJ 88 which says that discretion exercised by the Court below according permission for paying the deficient court-fee should not be interfered with by a Court of Appeal Reading Order 7, Rule 11 with Section 149, C.P.C., it is clear that the contention that the suit is barred by limitation should be overruled. For the above reasons, the appeal fails on both the points argued before us and is dismissed with costs.

121. PW.1/second plaintiff in his evidence has deposed that at the time of filing of the suit one rupee Court fee has been paid in the plaint and has filed the said suit on the last working day of the Court on 28.04.1995 and that he has not filed any application stating that he has not got the stamp papers and since many persons have purchased the stamp papers he has not got the same and the plaint has been returned on 10.06.1995 for payment of proper Court fee and again he has represented the plaint before Court on 10.07.1995 stating that he has not got the stamp papers and thereafter, he has paid Court fee and he has not filed any application in the treasury office requesting for the supply of stamp papers to him and it is incorrect to state that stamp papers have been easily available in large quantity and also that since he has no money he has not purchased the same.

122. It is useful to refer to the evidence of PW.4 (stamp vendor) to the effect that he is a stamp vendor selling stamp papers inside the Court compound and before 07.07.1995 there is no shortage of stamp papers and on 07.07.1995 he

has given requisition to the treasury office stating that he is in requirement of stamp papers and next date is on 11.06.1995 to enable him to give a requisition and like him there are 7 persons and like treasury office there is an Advocate Society, because of the Court summer vacation the stamp papers have been easily made available during last week of April 1995.

123. It transpires from the perusal of the plaint in O.S. No. 980 of 1995 filed by the respondent/plaintiff that the plaint has been presented on 28.04.1995 and on 10.06.1995 the plaint has been returned assigning one among other reasons that, "Deficit Court Fee to be affixed to the plaint" and the plaint has been re-presented on 10.07.1995 with an endorsement made by the respondents/plaintiffs counsel inter-alia stating that "still stamps are not available". Hence, application requesting extension by three days is filed". Thereafter, the plaint has been returned on 18.07.1995 citing other defects than the payment of Court fee and the same have been complied with by the respondents/plaintiffs advocate on 26.07.1995. Really speaking, the plaint has been taken cognisance of by the trial Court on 03.08.1995 and numbered as O.S. No. 980 of 1995 and summons has been ordered to be issued for the hearing on 19.10.1995. On top of the plaint an endorsement in red ink is seen to the effect "C.F.Rs.53865.50/- paid kept separately". It is pertinent to point out that, Pw.4 (stamp vendor) has been examined before the trial Court on 21.08.2000, nearly 5 years after the numbering of the plaint.

124. It is to be borne in mind that it is not always justifiable to draw an adverse inference against the plaintiffs' capacity when the plaint in specific performance suit is filed with a deficit Court fee and this approach may be a dangerous one too at times. Several factors may be there for not filing the plaint with full Court fee. This is not an invariable for the reason that a plaintiff has not arranged for meeting his obligation under the contract. Hence, in all these matters a Court of law is supposed to deal with caution and where a plausible explanation is brought forth, due credence must be given to it. Also a party may be equipped to perform the contract fully but if, for any reason, circumstance coupled him to seek recourse by way of filing of the suit, he may see himself in a predicament that he is unable to manage the additional expenses in connection with the litigation. To put it candidly, the capacity to perform the contract and the capacity to finance litigation are two distinct matters and the incapacity to spend for the litigation cannot lead to an irresistible conclusion that a party lacks money for performing his part of the contract in the considered opinion of this Court. Admittedly, as against the discretion exercised by the trial Court, in allowing an application filed by the respondents/plaintiffs praying for extension of time in regard to the payment of deficit Court fee if the appellant/defendant has not preferred any revision before the High Court questioning the same and therefore, this Court is of the considered view that the said discretion exercised by the trial Court cannot afterwards be impeached. However, in view of the categorical evidence of PW.4 (stamp vendor) to the effect that stamp papers have been available before 07.07.1995 and there has been no scarcity in this regard, at best it can very well

safely be said that second plaintiff/PW.1 has not assigned bonafide reasons in his affidavit praying for an extension of time in regard to the payment of deficit Court fee, and has not acted in good faith in the considered opinion of this Court.

125. In the instant case on hand, it is to be mentioned that the first respondent/first plaintiff (wife of the second respondent/second plaintiff) has not been examined as a witness before the trial Court on the side of respondents/plaintiffs. The learned Counsel for the appellant/defendant contents that there is no valid explanation offered on the side of respondents/plaintiffs in not examining the first respondent/first plaintiff (wife of the second respondent/second plaintiff) and therefore, this is not a favourable circumstance, in favour of the respondents/plaintiffs, when admittedly, the respondents/plaintiffs have sought the relief of execution of the sale deed in respect of the suit property and register them, in favour of the first respondent/first plaintiff by means of specific performance against the appellant/defendant. In this connection it is the evidence of PW.1/second plaintiff that first respondent/first plaintiff is his wife and he deposed for himself and also on behalf of his wife and further that he has entered into an agreement with the appellant/defendant in regard to the purchase of land at Kuniamuthur village and the sale agreements in his favour is Ex A1 dated 05.02.1992 and his wife sale agreement dated 05.02.1992 is Ex.A2 and that as per the covenants in Ex.A1 sale agreement he has performed all his acts pursuant to the contract and therefore he has acquired the right as per sale agreement Ex.A2 dated 05.02.1992 and therefore, he has demanded the appellant/defendant to act as per Ex.A2 sale agreement dated 05.02.1992. Further, as per Ex.A2 sale agreement the appellant/defendant is to be paid a sum of Rs. 6,18,100/- and as per Ex.A2 sale agreement in favour of his wife namely, the first respondent/first plaintiff an advance of Rs. 1 lakh has been paid to the appellant/defendant and that he is all the time ready with money and from the date of Ex.A2 sale agreement till date he is ready. In view of the fact that the appellant/defendant has raised sugarcane in the property of Ex A2 agreement dated 05.02.1992 it is crystal clear that the appellant/defendant has not been ready and willing to execute the sale deed in the considered opinion of this Court. Moreover, though PW.1/second plaintiff in his evidence has stated that he has paid a sum of Rs. 22,92,100/- till 14.12.1994 and has paid the full amount as per the agreement and this has been stoutly denied by the appellant/defendant to the effect that even if Exs.B1 to B5 sale deeds are put together then it will not come to Rs. 22,97,100/- and therefore PW.1 has uttered a falsehood upon a material fact and accordingly the plaintiffs must fail and at this juncture this Court opines that it is enough for the first respondent/first plaintiff to make a demand on the appellant/defendant to hand over possession and execute sale deed in respect of the properties mentioned in Ex.A2 agreement dated 05.02.1992 as opined by this Court in view of the specific recitals seen in the Ex.A3 Varthamanam agreement dated 05.02.1992 entered into between the appellant/defendant and the first respondent/first plaintiff and also agreed to by the parties, and by an incorrect or material false statement so made by the

plaintiffs in para 13 of the plaint in regard to the payment of consideration, the same is not a fatal one. Therefore, there is no question of first respondent/first plaintiff to prove her readiness and willingness to perform her part of the contract in the considered opinion of this Court.

126. When Ex.A3 Varthamanam agreement dated 05.02.1992 specifically refers to the averment that till the performance of sale agreement in favour of the second plaintiff is completed, the first plaintiff cannot make a demand for possession and execution of the sale deed from the appellant/defendant in respect of the entire suit property and when this has been agreed to, by meeting of minds then the first respondent/first plaintiff need not show that she has been in possession or in command of the ready money even before the time/date fixed for performance since delay may be otiose in determining of a date for performance as opined by this Court. Moreover, when Ex.A3 Varthamanam agreement specifies the obligations to be performed under the contract in a certain manner a party has to perform his or her own part of the contract before asking the other party to perform in compliance of the conditions agreed thereto.

127. However, the learned Counsel for the appellant/defendant cites the decision of Hon''ble Supreme Court K.S. Vidyanadam and Others Vs. Vairavan, at page 3 wherein it is held as follows;

In the present case, the case of the defendants is acceptable. In the agreement of sale there is no reference to the existence of any tenant in the building. No letter or notice was issued by the plaintiff to the defendants calling upon them to get the tenant vacated and get the sale deed executed until he issued the suit notice on 11.07.1981. From 15.12.1978 till 11.07.1981, i.e., for a period of more than 2 = years, the plaintiff was sitting quiet without taking any steps to perform his part of the contract under the agreement. It is thus not a case of mere delay. It is a case of total inaction on the part of the plaintiff for 2 = years in clear violation of the terms of agreement which required him to pay the balance, purchase the stamp papers and then ask for execution of sale deed within six months. Further, the delay is coupled with substantial rise in prices according to the defendants, three times between the date of agreement and the date of suit notice. The delay has brought about a situation where it would be inequitable to give the relief of specific performance to the plaintiff

and contends that in the present case before us, the circumstances are against the exercise of discretion for grant of specific performance relief in favour of the plaintiffs by the Court and therefore, the respondents/plaintiffs are dis-entitled to the reliefs prayed for by them because of the latches on their part.

128. In the decision V. Pechimuthu Vs. Gowrammal, it is held that "refusal of relief of the specific performance on the ground that price of land has arisen astronomically is not proper".

129. Be that as it may, when the PW.1/second plaintiff has paid the entire sale amount of Rs. 22,92,100/- till 14.12.1994 as per sale agreement as spoken to by

him, in his evidence and when the suit has been filed before the trial Court on 28.04.1995 by the respondents/plaintiffs because of the refusal of the appellant/defendant to execute the sale deed firstly on 07.08.1993 by means of a telegram and later by 13.02.1995 reply notice, the suit filed is within 3 years period from the date of refusal as per Article 54 of the Limitation Act and the same is not hit by limitation in the considered opinion of this Court. Just because money taken by the first respondent/first plaintiff has not been sufficient towards the purchase of stamp papers and for registration expenses it cannot be construed by any means that first respondent/first plaintiff is not ready to conclude her part of the contract. Even though the mediation said to have been done by close relative of the appellant is denied by the appellant and though Babu has not been examined before the trial Court the fact that appellant/defendant has executed sale deed in regard to the remainder of the properties as per agreement dated 05.02.1993 in favour of the second respondent/second plaintiff tacitly goes to show that there has been a Panchayat and added further, the non-examination of mediator Babu has not affected the case of the plaintiff in any manner in the considered opinion of this Court based on the overall assessment of the facts and circumstances of the case in an integral manner.

130. Merely because Ex.A3 Varthamanam agreement confers an unfair advantage to the first respondent/first plaintiff the refusal of specific performance relief is improper since in the instant case the minds were ad idem at the time of entering into Exs.A1 to A3 agreements between the parties have been proved beyond all reasonable doubt as opined by this Court. It is not out of place to point out that PW.1(second plaintiff) in his evidence (re-cross-examined) has specifically stated that on 05.08.1993 accidentally they have signed in the documents in the registration office and on 05.08.1993 his wife has brought Rs. 6,18,000/- in cash and since the appellant/defendant has not turned up she has taken back the money to the house and the same has not been deposited in the bank and kept it in the house and in Rs. 6,18,000/- some time the relatives have taken loan and returned the same and in regard to some loan pro-notes have been obtained and from some persons no pronotes have been taken and he cannot tell the year, date and month of the pronotes and he cannot say from how many named persons they have taken pronotes etc. At this stage, the learned Counsel for the appellant/defendant submits that the case of lending money by plaintiffs on pronotes show an abandonment of the right and by the next day the first respondent/first plaintiff should have rushed to

Court, but on the basis of lending money on pronotes by the respondents/plaintiffs it cannot be said by any means that they have abandoned or waived their right of claiming the relief of specific performance. It cannot be lost sight of, that the respondents/plaintiffs have deposited the balance sale consideration amount before the trial Court within two days from the date of passing of the decree. Also, the observations of the trial Court in its judgment in para 13 to the effect that "work of affixing stamp papers towards payment of Court fees and the act of purchasing stamp papers are not performed by the respondents/plaintiffs

directly and mostly these acts are performed by the assistant of an Advocate etc." are certainly based on assumptions or presumptions and as a matter of fact on conjectures in the considered opinion of this Court.

131. Therefore, on a careful consideration of respective contentions and in view of the qualitative and quantitative discussions mentioned supra and on assessment of the entire facts and circumstances of the case in a cumulative manner this Court comes to the inevitable conclusion that when Ex.A3 Varthamanam agreement dated 05.02.1992 clearly spells out that only after the sale of the properties mentioned in Ex.A1 sale agreement dated 05.02.1992 (entered into between the appellant/defendant and second respondent/second plaintiff either in second respondents/second plaintiffs name or his nominees is/are completed then the first respondent/first plaintiff gets the right of demanding the sale of properties mentioned in her Ex.A2 sale agreement dated 05.02.1992 from the appellant, the first respondent/first plaintiff need not exhibit that she had the command of ready money even before that time/date during the time of the contract and that will render nugatory or meaningless fixing of a time/date for performance (namely Ex.A3 Varthamanam agreement dated 05.02.1992) and moreover, it is not necessary to produce money or vouch a scheme for financing the transaction in that view of the matter the the first respondent/first plaintiff is entitled to the relief of specific performance as claimed in the suit and resultantly the appeal fails.

132. In the result for the foregoing reasons the appeal is dismissed leaving the parties to bear their own costs. Consequently the judgment and decree in O.S. No. 980 of 1995 on the file of trial Court are affirmed for the reasons assigned by this Court in this appeal. Having regard to the facts and circumstances of the case the parties are directed to bear their own costs. Connected C.M.P. No. 897 of 2001 is also closed.