
(2017) 02 MAD CK 0054
In the Madras High Court
Case No : S.A. No. 264 of 1998

Periyannan (Died)

APPELLANT

Vs

Palanisamy (Died)

RESPONDENT

Date of Decision : 27-02-2017

Acts Referred:

Citation : (2017) 3 MLJ 685

Hon'ble Judges : Dr. G. Jayachandran, J.

Bench : Single Bench

Advocate : Mrs. P.T. Asha, Advocate for Sarvabhauman Asso, for the Appellant in S.A. Nos. 264 and 265 of 1998; Mr. M. Ravi, Advocates, for the Appellant in S.A. No. 1458 of 1998; Mr. M. Ravi, Advocate, for the Respondents No. 2 to 5 in S.A. No. 264 of 1998 and Respondent Nos. 1, 3 to 5 in S.A. No. 265 of 1998; Mr. D. Jajendra Saraswathi, Advocate, for the Respondent No. 2 in S.A. No. 1458 of 1998

Final Decision : Disposed Off

Judgement

Dr. G. Jayachandran, J.—The subject matter of these two second appeals is in respect of 4.30 acres of land out of 17.59 acre in R.S.No. 46 of Puthupettai Village, Namagiri Pettai, Salem District. Two suits for specific performance, one in O.S.No. 139 of 1983 by Periyannan and another suit in O.S.No. 140 of 1983 by Ponnan @ Ramasamy Gounder were filed against the vendor Natesa Pandaram pleading that the said Natesa Pandaran executed two sale agreements dated 29.04.1982 one in favour of Periyannan, the plaintiff in O.S.No. 139 of 1983 in respect of 2.15 acres and another in favour of Ponnan @ Ramasamy Gounder, the plaintiff in O.S.No. 140 of 1983 in respect of another 2.15 acres of land.

2. In respect of the very same property a counter claim was laid by one Palanisamy and Ramasamy based on the specific performance decree passed in O.S.No. 322 of 1985 on the file of the Sub court, Namakkal.

3. The litigation over title and possession between the parties began with filing of specific performance suit in O.S.No. 139 of 1983 by Periyannan and O.S.No. 140

of 1983 by Ponnan @ Ramasamy Gounder against Natesa Pandaram on the averments that the suit property which was originally of larger extent consisting of 17.59 acres was divided into 2 portions among the father and son namely Natesa Pandaram and Suyamprakasham. The said Natesa Pandaram was allotted to the western portion and his son Syuamprakasham was allotted in the eastern portion as per the partition deed 30.06.1966. From out of his share, the said Natesa Pandaram agreed to sell 2.15 acres of land to Periyannan on 29.04.1982 and another 2.15 acres of land to Ponnan @ Ramasamy Gounder on the very same day. Both the agreements were registered. Under the said agreements, the time for completion of contract was fixed as six months for the sale consideration of Rs.31,500/- out of which advance of Rs. 2,500/- was received by Natesa Pandaram. In both sale agreements the terms and conditions are identical.

4. However, it is the case of the purchasers that by the end of six months, the contract could not be completed. Hence a fresh agreement was executed by Natesa Pandaram in favour of Periyannan and Ponnan @ Ramasamy Gounder separately on 29.10.1982. As per the second agreement, towards sale consideration of Rs.31,500/-, the said Natesa Pandaram has received Rs.15,000/- as advance, and time for completion for contract was fixed as one year.

5. After notice, two suits were filed one by Periyannan and another by Ponnan @ Ramasamy Gounder for specific performance and both the suits were decreed ex parte on 04.11.1988. Thereafter, third suit was filed jointly by Periyannan and Ponnan @ Ramasamy Gounder for injunction in O.S.No. 208 of 1988 on the file of the District Munsif Court, Rasipuram and re-numbered as O.S.No. 472 of 1994 on the file of Sub Court, Namakkal against Palanisamy and Ramasamy, those who are claiming rival title over the suit property based on the decree obtained by them in the specific performance suit filed by them in O.S.No. 322 of 1985.

6. Essential facts relating to the title dispute of the suit property are as under :-

(i) The suit property is part of larger extent of property admittedly owned by Natesa Pandaram family. On 30.06.1966 a partition has been effected between Natesa Pandaram and his son Suyamprakasham and the land covering the property in dispute was admittedly allotted to Natesa Pandaram.

(ii) When all the three suits in O.S.Nos. 139 and 140 of 1983 and 472 of 1994 were taken up for joint trial, the trial Court examined witnesses in O.S.No. 139 of 1983 filed by Periyannan and parties were described as per the ranking in that suit. The exhibits are common to all the suits and the facts are also interconnected. For the sake of convenience, instead of referring the cases separately, unless it is warranted, the parties and documents are referred as found in O.S.No.139 of 1983 where-ever required.

(iii) Based on the partition deed, Natesa Pandaram has initially entered into an agreement of sale in respect of 2.15 acres of land each to Periyannan and Ponnan @ Ramasamy Gounder on 29.04.1982. On 29.10.1982, surprisingly, the

second agreement has been entered by Natesa Pandaram after receiving the advance amount of Rs.15,000/-. After causing notice dated 18.05.1983 and receiving the reply from Natesa Pandaram on 06.06.1983 for execution of agreement specific performance suits in O.S.Nos. 139 and 140 of 1983 have been filed. Meanwhile Natesa Pandaram has entered into sale agreement with one Periyanna Gounder for the entire extend of 6.30 acres for Rs.62,000/- and had received advance of Rs.35,000/-

(iv) While these two specific performance suits were pending, in respect of 2.15 acres of land each, one Periyannan Gounder, who had the unregistered written agreement with Natesa Pandaram for a sale of 6.30 acre of land in survey No.46, has made over the agreement in favour of one Palanisamy and Ramasamy on 15.03.1985, after receiving of Rs.30,000/- which he advanced to Natesa Pandaram. On the strength of the made over, Palanisamy and Ramasamy has filed a specific performance suit in O.S.No. 322 of 1985.

(v) While so, on 04.07.1983, Natesa Pandaram and his son Suyamprakasham have cancelled the earlier partition deed effected on 30.06.1966.

(vi) O.S.No. 322 of 1985 was filed by Palanisamy and Ramasamy for specific performance in respect of 6.30 acres, out of half share in 17.59 acre allotted to Natesa Pandaram and the Court decreed the suit and also executed sale deed in favour of them on 28.04.1989.

(vii) Likewise the specific performance suit filed by Periyannan and Ponnann in O.S.No. 139 and 140 of 1983 was also allowed as ex parte. When Palanisamy and Ramasamy trying to get the possession against Periyannan and Ponnann @ Ramasamy Gounder on the strength of the decree obtained by them through Court, Periyannan and Ponnann @ Ramasamy Gounder jointly together filed a suit for injunction in O.S.No. 208 of 1988 which was re-numbered as O.S.NO.472 of 1994.

(vii) Pending suit Ponnann @ Ramasamy Gounder died and one Srinivasan was arrayed as legal representative of deceased Ponnann @ Ramasamy Gounder based on the Will dated 21.11.1989 executed by Ponnann @ Ramasamy Gounder.

7. The trial Court, after considering all the above facts, in its common judgment allowed all the three suits. Thereby, decree for specific performance in respect of sale agreement Exs.A.3 and 33 was granted and the injunction restraining Palanisamy and others was also granted. Aggrieved by that, Suyamprakasham and others filed A.S.No. 75 of 1996 against the decree passed in O.S.No. 139 of 1983 and A.S.76 of 1996 against the decree passed in O.S. 140 of 1983. Palanisamy and others filed A.S.No. 77 of 1996 against the decree passed in O.S.No. 472 of 1994.

8. The lower appellate Court formulated the following points for determination.

1. Whether the plaintiffs are entitled for specific performance relief sought in O.S.Nos. 139 and 140 of 1983?

2. Whether the plaintiffs are entitled relief for permanent injunction sought in O.S.No. 474 of 1992.

9. The lower appellate Court on re-appreciating all the evidence dismissed A.S.No. 75 of 1996 and confirming the decree of specific performance granted in favour of Periyannan and reversed the findings of trial Court in O.S.No. 140 of 1983 and allowed A.S.No. 76 of 1996, on the ground that Ponnan @ Ramasamy Gounder, who is plaintiff in O.S.No. 140 of 1983 is father in law of Periyannan, who is the plaintiff in O.S.No. 139 of 1983. Pending suit Ponnan @ Ramasamy Gounder died and Srinivasan, who is the son of Periyannan, based on the Will executed by Ponnan @ Ramasamy Gounder got himself impleaded as legal representative of deceased Ponnan @ Ramasamy Gounder and has given evidence in support of agreement entered by Ponnan @ Ramasamy Gounder. The said Srinivasan is not a competent witness to speak about the suit transaction.

10. The first appellate Court considering the relationship between the plaintiffs in O.S.Nos. 139 and 140 of 1983 and the relationship of Srinivasan with plaintiff in O.S.No. 139 of 1983, has arrived at the conclusion that the plaintiff in O.S.No. 139 of 1983 - Periyannan alone was the agreement holder. In the Will of Ponnan @ Ramasamy Gounder, he has bequeathed the property to Srinivasan. He is not the legal heir of Ponnan but son of Periyannan, who is the plaintiff in O.S.No. 139 of 1983. So based on this relationship he inferred that Ponnan @ Ramasamy Gounder was only the name lender for the agreement. Therefore, the name lender cannot seek any civil remedy.

11. As per the appellate Court judgment, the readiness to perform the contract can be spoken only by the agreement holder. Since the agreement holder Ponnan @ Ramasamy Gounder is the plaintiff in O.S.No. 140 of 1983 and the plaintiff in O.S.No. 139 of 1983 ie., Periyannan cannot spoke on behalf of Ponnan @ Ramasamy Gounder to substantiate the case filed by the Ponnan @ Ramasamy Gounder. On this ground, the lower appellate Court while allowing the specific performance suit filed by the Periyannan, dismissed the suit laid by late Ponnan @ Ramasamy Gounder, which was pursued by his legal heir Srinivasan.

12. Regarding A.S.No. 77 of 1996 arising out of O.S.No. 472 of 1994, the lower appellate Court held that the prayer in the said suit is to restrain the defendants from forcibly trespassing into the suit schedule property and disturbing the peaceful enjoyment, based on the decree passed in O.S.No. 322 of 1985, which was obtained by collusion. Since the specific performance suit in O.S.No. 322 of 1985 was decreed by the learned Sub Court, Namakkal, the order restraining the execution of the decree passed by the Sub Court cannot be granted by the Munsif Court, Ranipet District, which is lower in hierarchy. For the said reason the lower appellate Court has held that the decree and injunction passed in O.S.No. 472 of 1994 are wrong and not sustainable.

13. As a result, the lower appellate Court allowed the specific performance suit filed by Periyannan and dismissed the specific performance suit filed by Ponnan

@ Ramasamy Gounder and also dismissed the suit for injunction filed by Periyannan and Ponnar @ Ramasamy Gounder filed together against Palanisamy and Ramasamy.

14. With these backgrounds, three second appeals are filed. S.A.No. 264 of 1998 is filed by Periyannan and Srinivasan against Palanisamy aggrieved by the dismissal of injunction suit. S.A.No. 265 of 1998 is filed by Srinivasan, the legal representatives of the deceased Ponnar @ Ramasamy Gounder, plaintiff in O.S.No. 140 of 1983 aggrieved by the dismissal of the specific performance suit, S.A.No. 1458 of 1998 is filed by Suyamprakasam and others who are the defendants in O.S.No. 139 of 1983 against Periyannan.

15. At the time of admission, this Court has formulated common substantial question of law in S.A.Nos. 264 and 265 of 1998 as follows :-

1. "When two identical suits for specific performance in respect of two sale agreements were tried together against the common defendants and when both suits were decreed based on common evidence. Whether the Lower Appellate Court is right in law in confirming the common judgment in one suit and in reversing the other suit on mere surmises and conjectures?

2. When there is neither a plea nor any evidence and when no issue as framed as to whether the plaintiff in O.S.No. 140 of 1983 was a name lender for the plaintiff in O.S.No. 139 of 1983 on the file of Subordinate Judge's Court, Namakkal, whether the lower appellate Court is right in law in holding that the plaintiff in O.S.No. 140 of 1983 was only a name lender and hence not entitled to the relief for specific performance that too on mere surmises and conjectures?

3. When the question of readiness and willingness on the part of the plaintiff was never disputed by the defendants and the same was not in issue between the parties and when plaintiff has specifically averred in pleading and filed a suit within the stipulated time of one year as contemplated under Ex.A.33 suit sale agreement whether the lower appellate Court is right in law in holding that the plaintiff has not established his readiness and willingness solely on the assumption that plaintiff in O.S.No.140 of 1983 was a name lender for the plaintiff in O.S.No.139 of 1983 on the file of the Subordinate Judge's Court, Namakkal?

4. When plaintiffs are found to be in lawful possession of the suit property, whether the lower appellate Court is right in law in not granting the relief of permanent injunction on an erroneous application of Section 41 of the Specific Relief Act and without considering the actual relief sought for in O.S.No. 472 of 1994 on the file of Subordinate Judge's Court, Namakkal?"

16. In respect of S.A.No. 1458 of 1998, the following substantial question of law has been formulated.

"(a) Whether in law have not the Courts below failed to see that Section 16C of Specific Relief Act is mandatory and a duty is cast on the Court to find out

whether the plaintiff is ready and willing?

(b) whether in law have not the Courts below omitted to see that the agreements exhibits A.30, 31, 32 were not executed by the defendants and once they deny execution, the onus is on the plaintiff to prove the same in a manner known to law? And

(c) Whether in law the decree and judgment of the lower appellate Court are not vitiated as no proper points for determination have been framed as registered under Order 41, Rule 31 , CPC (1997(1) LW 704 DB)"

17. The learned counsel for the appellants in S.A.Nos. 264 and 265 of 1998 submitted that the conduct of the vendor and the conduct of the purchaser are crucial in the suit for specific performance to ascertain whether the prospective buyer satisfies the basic ingredient for granting relief of specific performance, which is an equitable relief. The lower appellate Court having rightly held that the plaintiff in O.S.No. 139 of 1983 is entitled for specific performance, should have applied the same logic for the plaintiff in O.S.No. 140 of 1983 also. The lower appellate Court instead of appreciating the evidence of Srinivasan who is the legal representative of the deceased Ponnan @ Ramasamy Gounder, just because the said Srinivasan happened to be a son of Periyasamy who is the plaintiff in the other suit O.S.No. 139 of 1983. It has unnecessarily gone adverse inference and wrongly concluded that Ponnan @ Ramasamy Gounder is only a name lender of Periyannan. The lower appellate Court failed to note that initially the suit was filed by Ponnan @ Ramasamy Gounder and on his demise, Srinivasan was impleaded as legal representative based on the Will duly executed by Ponnan @ Ramasamy Gounder. When the Will is not questioned and contested, where the status of Ponnan as Benami not pleaded, it is not known as to why and for what reason, the lower appellate Court has disbelieved the Will of Ponnan and arrived at a conclusion that Ponnan was only a name lender for dismissing the suit.

18. Insofar as the dismissal of the injunction suit, the learned Counsel for the appellant submitted that the lower appellate Court has erroneously gone on the hierarchy of the Court. Instead of piercing the veil and look at the fraud committed by the defendants 10 and 11 along with one Periyanna Gounder, who has been declared as insolvent at the time of sale agreement and alleged made-over in favour of Palanisamy and Ramasamy; and the fraud committed by the vendor Natesa Pandaram and his son Suyamprakasham by creating a partition deed on 30.06.1966 and after making others to act upon it; and later revoked it in order to defeat the alienation of the property. For conveniences, has cancelled the said partition deed on 04.07.1983, only to create another partition deed immediately on 15.07.1983 just to cheat the appellants.

19. In S.A.No. 264 of 1998, the learned counsel for the appellant submitted that the sale deed Ex.B.7 dated 14.04.1982 executed by Natesa Pandaram in favour of Periyannan S/o. Kulantha Gounder itself the product of fraud, because at the time of entering the agreement the said Periyannan was declared insolvent in the

insolvency petition filed by the debtors itself. He has been discharged from insolvency only in the year 1992. While so, it is highly unbelievable that a declared insolvent paid Rs.35,000/- as advance to Natesa Pandaram to purchase the property worth of Rs.62,000/-. Further as per the terms of the agreement, Periyannan was supposed to complete the contract within a period of one year i.e., by 13.07.1983. There was no wishphering about this agreement for about 3? years from the date of execution of this agreement. After 3-? years, it appears as if Periyannan has made-over the agreement in favour of Palanisamy and Ramasamy. The manner in which the specific performance suit conducted to obtain a decree brishiles with fraud and mis representation not to cheat the parties but also the Court.

20. The learned counsel for the appellant contented that the lower appellate Court allowing the suits in O.S.No. 140 of 1983 and O.S.No. 472 of 1994 has to be set aside the trial Court order must be restored. Since fraud vitiates all other consequences, the trial Court has rightly granted decree of injunction in O.S.No.472 of 1994. The alleged contract entered between Periyannan Gounder for purchase of property during his insolvency is without leave of the Court and without informing the Official Assignee.

21. Per contra the learned counsel appearing for the appellants in S.A.No. 1458 of 1983 and respondents in the other two second appeals contented that it is wrong to say that the decree passed in O.S.No. 322 of 1985 is obtained by fraud and collusion. Periyannan Gounder was discharged from insolvency as on date of declaration and therefore there is no fraud or collusion in the said suit. Whereas the respondent in S.A.No. 1458 of 1983 Periyannan and the plaintiff in O.S.No. 140 of 1983 have not proved their readiness and willingness to perform their part of contract, which could be clearly found from the evidence of P.W.2, who has categorically stated that only after entering into the agreement dated 29.03.1983, they started mobilisation of fund and only after 10 months from the date of the agreement they were able to mobilise the fund. The very ingredient of readiness has not been established by the plaintiff in the suit for specific performance and therefore they are not entitled for the relief. The lower appellate Court ought to have dismissed the suit in O.S.No. 139 of 1983 also. He wrongly allowed the suit in O.S.No. 472 of 1994 in favour of Periyannan without examining the ingredients required for specific performance suit.

22. This Court, after hearing the contentions of the rival parties intends to discuss the matter on the following three heads.

1. Specific Performance - Readiness and willingness
2. Insolvency
3. Validity of a decree obtained by fraudulent.

Readiness and willingness :-

23. The appellant herein, in his written statement never questioned the ready

and willingness of the purchaser. He only questioned the competency of his father Natesa Pandaram to enter into the sale agreement. He has denied the execution of agreements and had alleged that Periyannan and his junior father-in-law in collusion trying to grab his family property. His case is that the partition deed dated 30.06.1966 was never acted upon. It was created only to avail more loan. If that is true then his father Natesa Pandaram would not have filed suit for injunction in O.S.No. 497 of 1979 against this appellant based on the partition deed. He would not have executed mortgage deeds Ex.P.28 and Ex.P.29, in favour of Land Development Banks at Rasipuram and Gopichettipalam, referring the partition deed and its recitals. Wherein he had given an undertaking to discharge the loans, releasing his son Suyamprakash, from liability, in terms of the partition deed. He should not have entered into an agreement to sell the property neither with Periyannan and Ponnann nor with Perriyanna Gounder, S/o.Kolinji Gounder.

24. For the said reason, and through the conduct of the parties, by issuing pre suit notice, the readiness and willingness is manifested. Neither in the reply notice nor in the written statement the defendant has raised doubt over the readiness and willingness of the purchaser. Therefore, the necessity to decide the issue of readiness and willingness never warranted before the Court.

Fraud :-

25. When we look at the suit for specific performance, the decree passed in O.S.No. 322 of 1985, obviously based on a made over by a declared insolvent and subsequent to the suit for specific performance filed in O.S.No. 139 of 1983 and 140 of 1983. While the appellant contesting the validity of the agreement disowning their own partition deed of the year 1966, has quietly conceded to the subsequent suit for specific performance entered by his father based on very same partition deed.

26. In "Ram Chandra Sigh v. Savithri Devi (2003) 8 SCC 327", the Hon"ble Supreme Court says as follows :-

"15. Commission of fraud on Court and suppression of material facts are the core issues involved in thses matters. Fraud as is well known vitiates every solemn act. Fraud and justice never dwell together.

17. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentation may also given reason to claim relief against fraud".

27. When the decree is obtained by fraud or misrepresentation, it is not necessary for the person aggrieved by such decree to file a suit to set aside the decree. Any decree obtained by fraud rendered a nullity. In this case an agreement with an insolvent is made over to a third party, after lapse of 3 years from the date of alleged agreement. The said made over was during pendence of litigation and beyond the period prescribed in the agreement for completion of contract. The inconsistent stand of the second defendant in this suit and the

subsequent suit, papably exposes the collusion and fraud.

28. In "(2012) 1 SCC 476 Union of India and others v. Ramesh Gandhi" case the Hon"ble Supreme Court held as follows :-

"27. If a judgment obtained by playing fraud on the Court is a nullity and is to be treated as non est by every Court, superior or inferior....."

Insolvency :-

29. Learned counsel for the respondent in S.A.No. 264 and 265 of 1998 contented that once the adjudicating proceeding in an insolvency petition, gets annulled by order of discharge, the effect of the insolvency is totally wiped out and therefore made over of the agreement by Periyannan Gounder in favour of the defendants 10 & 11, who are the appellant in S.A.No.1458 of 1998 is perfectly valid and no element of fraud or misrepresentation or illegality could be seen from the transaction. He also cited the Hon"ble Supreme Court judgment rendered in "(1997) 5 SCC 366 - Arora Exterprises Ltd and others v. Indubhushan Obhan and others" as follows:-

"10. Though the arguments addressed before us covered a wide range, we are of the view that it is unnecessary to pronounce in detail on the various aspects involved in the matter at this stage. Suffice it to say that the preponderance of judicial opinion is in favour of the view that the effect of annulling the adjudication in insolvency proceedings, is to wipe out the effect of insolvency and to vest the property retrospectively in the insolvent. The consequence of annulling an order of adjudicating is to wipe out altogether the insolvency and its effect. The property will revert in the insolvent retrospectively from the date of the vesting order. We hold that the law is fairly clear to the above extent. But, this does not solve the problem arising in this case. The effect of the suit (independently) filed by the appellants and the orders passed therein have to be considered. That is a distinct and different matter, which has its own existence and legal impact, unimpaired by the annulment of the insolvency. In other words, by the annulment of the insolvency and wiping out its effect retroactively, in law, the suit and the judicial orders passed thereon are not wiped out, or rendered void or a nullity, automatically. The order passed in the suit is not non est of ineffective....."

30. This Court has no second opinion in the proposition laid down by the Hon"ble Supreme Court. In fact, that is the only logical conclusion could be in case of annulment or discharge of an insolvent. In this case whether property remains should be re-vested to the discharged insolvent is not the question before this Court. Here is a case, where a person pending insolvency proceedings had entered into a contract and paid Rs.35,000/- as advance, later he had made over the agreement to a third party on receiving Rs.35,000/-. These transactions were admittedly without the knowledge of the Official Liquidator with whom the properties of the insolvent was vested and managed. There is no evidence to show whether the part sale consideration of Rs.35,000/- was made from him

income acquired after insolvency or before declaring him as insolvent. If it was before insolvency, then it should have been disclosed as part of his assets in his debtor's petition. If not disclosed, it amounts to fraud. If it is after insolvency, he should have disclosed the source of the money.

Absence of these material facts amounts to "suppresso veri". In case of an insolvent, any interest accrued upon the property vests with Official Assignee as per Section 28(4) of the Provincial Insolvency Act 1920.

31. In "Nadiminti Satyanarayanamurthi v. Malluri Papayya and another - (28) A.I.R. (1941) Madras 713 : (1941) 2 MLJ 834" case, it is held that as follows :-

"All property acquired by an insolvent subsequent to the date of adjudication and before his discharge vests in the official receiver the moment the acquisition is made. The word "forthwith" in the section leaves no room for any other interpretation. Actual intervention by the official receiver is not necessary"

32. The Courts below, regarding the readiness and willingness held in favour of plaintiff in O.S.No. 139 of 1983 holding that by causing notice to the vendor on 18.05.1983 vide Exs.A.3 and A34 calling upon Natesa Pandaram to perform the specific performance of the agreement dated 29.03.1983 by receiving the balance sale consideration and execute the sale deed. While believing the case of the plaintiff in O.S.No. 139 of 1983 the lower appellate Court giving a very strange reasons, has held that the plaintiff in O.S.No. 140 of 1983 was not ready to perform the contract because by the time the suit came up for trial the original plaintiff Ponnan in that case died and Srinivasan get himself impleaded and given evidence.

33. The lower appellate Court has considered Srinivasan as stranger to the transaction, completely ignoring the fact that Ponnan and Periyannan are related to each other by blood and Srinivasan is non other than son of Periyannan. In stead of drawing adverse inference to the evidence of Srinivasan, it ought to have presumed that being closely related to Ponnan he had the knowledge of the transaction, as one of the member of the family. In fact if any one go through the Will of Ponnan, will find, Ponnan has recorded that Srinivasan is like a son to him. That is the reason why, Ponnan gave the property under litigation to Srinivasan through his Will. This will not give any inference to conclude that the said transaction is a binami transaction.

34. None of the defendant has raised the pleading of Binami transaction, but strangely the first appellate Court in the suit in O.S.No. 140 of 1983 has relied upon certain portion of the deposition of P.W.2 and come to an erroneous conclusion that Ex.A.33 is only a Binami transaction. The said finding is contrary to law, more so when Srinivasan has mounted witnesses box and deposed in detail about the transaction between Natesa Pandaram and Ponnan. At the time of agreement itself the possession had been given to the appellant and P.W.2 has spoken about the possession and payment of Kist and taxes in respect of the suit property and marked those documents as Ex.A. 40 to Ex.A.42 and the electricity

consumption bills have been marked as Exs.A.43 to 48. It is also the evidence of P.W.2 that in the suit property purchased by Ponnann he had constructed a house and obtained electricity service connection and dig up well and fixed motor service which shows that Srinivasan not only by virtue of will, but even as independent person is competent to give evidence about the transaction.

35. Therefore, this Court finds that lower appellate Court failed to appreciate the evidence and has wrongly held that the transaction is a binami transaction when it was no body case. Similarly it is only the subsequent buyers, who are the respondents herein, seriously contest about the readiness and willingness of the plaintiff in O.S.Nos. 139 and 140 of 1983. It is not the case of the vendor who is competent to question or rise this plead. Even in the absence of such pleading the trial Court has testified the ready and willingness and had satisfied with the pleadings and from the conduct of the plaintiff that they were ready and willing to perform the contract.

36. In case where the possession is already given to the purchasers as a part performance and when the parties explicitly put to notice about the readiness to complete the contract, there is no reason to disbelieve and suspect the readiness and willingness. While considering the merits of the plaintiff, it is also pertinent to point out the demerits of the defendants who have dis-entitled themselves by conduct and law to contest the case. As pointed out earlier, Natesa Pandaram and Suyamprakasam who are the respondents herein divided the family property on 13.06.1966 and acted upon it by mortgaging and alienating the property till 1983. They have entered into several transactions referring the partition held in the year 1966. They also litigated before the Court based on the said partition. Thereafter for the best reason know to them, they have cancelled the partition deed in the year 1983 and again entered into the partition within two weeks.

37. If one look at Ex.B.7 the sale agreement and endorsement of made over, it is very clear that Natesa Pandaram has entered into an agreement with Periyannan Gounder S/o. Kulantha Gounder to sell 6.30 acre of land in survey No.44. On the date of this agreement, admittedly Periyannan Gounder, S/o. Kulantha Gounder was a declared insolvent in an application filed by Periyanna Gounder himself to declare him as insolvent. Ex.A.6, dated 01.09.1975 is admitted by Periyanna Gounder who was examined as D.W.2. He also admits that he did not get the permission of the Official Liquidator before advancing Rs.35,000/- for the purchase of the property. It is also not his case that before the made over of the sale agreement in favour of Palanisamy and Ramasamy, he informed the official Liquidator about the receipt of Rs.35,000/- from them.

38. So this Court comes to the conclusion that, on expiry of the time prescribed in the contract, Ex.B.7 lost its enforceability. However, such an agreement has been made-over to Palanaisamy and Ramasamy by Periyannan Gounder after 3? years on receiving Rs.35,000/-. Based on such a sham and nominal madeover, the suit for specific performance filed suppressing vital and material facts and decree has been obtained by fraud.

39. For the said reasons this Court held that the judgement of the first appellate Court dismissing the specific performance suit filed by Ponnann is against law and is liable to be set aside.

40. For the same reason, S.A.No. 1458 of 1998 is dismissed. S.A.No. 264 of 1998 and S.A.No. 265 of 1998 are allowed.

41. In the result, the judgment and decree of the lower appellate Court is set aside and trial Court judgment is restored. No order as to costs. Consequently, connected miscellaneous petition is closed.