

) The Property Of Late A. Muthiah Namely ... vs Deputy Director Of Consolidation And ... on 10 February, 2009

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Bench: V.Ramasubramanian

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10-02-2009

CORAM

THE HON'BLE MR. JUSTICE V.RAMASUBRAMANIAN

A.No.4386 of 2007

in

C.S.No. 701 of 2006

ORDER

This is an application taken out by the first defendant in the suit seeking rejection of the plaint under Order VII, Rule 11, C.P.C.

2. I have heard Mr.T.V.Ramanujun, learned Senior Counsel for the applicant and Mr.V.T.Gopalan, learned Senior Counsel for the respondents/plaintiffs.

3. One Mr.A.Muthiah, purchased a property bearing Door No.10, old No.16, Singaram Street, T.Nagar, Chennai-17, by a sale deed dated 9-11-1933. He died intestate on 24-2-1961 leaving behind him surviving, (1) his wife Mrs.Parvatham Muthiah (2) 2 sons by name M.Gnanasambandam and M.Raja Appar and (3) 2 daughters by name Mrs.Uma Devi and Mrs. Madhuras Lakshman.

4. Mrs.Parvatham Muthiah executed a Will on 8-5-1997 registered as Document No.63/1997, in the office of the Sub-Registrar, T.Nagar, bequeathing the said property in entirety, to her 2 sons M.Gnanasambandam and M.Raja Appar. Mrs.Parvatham subsequently died on 6-12-2003. One of the daughters namely Uma Devi also died on 4-4-2005 leaving behind her surviving, her husband and 2 daughters.

5. After the death of Mrs.Parvatham, a Memorandum of Understanding was allegedly entered into between her 2 sons, her daughter Madhuras Lakshman and the legal heirs of the pre deceased daughter Uma Devi. Under the said Memorandum of Understanding dated 24-9-2005, the parties are said to have agreed to give the aforesaid property to a builder for joint development and take the constructed area that would fall to the share of the owners, in the ratio of < share each to the 2 sons and the surviving daughter of Mrs.Parvatham and < share to the legal heirs of Mrs.Uma Devi.

6. In pursuance of the Memorandum of Understanding, the parties claim to have identified a buyer and formally settled the terms of the joint development agreement on principle. But one of the 2 sons by name M.Gnanasambandam did not agree to the joint development agreement. Therefore, the other son M.Raja Appar, the surviving daughter Madhuras Lakshman and the legal heirs of the deceased daughter Uma Devi, joined together and have come up with the present suit seeking specific enforcement of the Memorandum of Understanding dated 24-9-2005. Thus, one son, one daughter and the legal heirs of the deceased daughter are the plaintiffs herein and the other son is the sole defendant herein.

7. The prayer of the plaintiffs in the suit is as follows:-

"directing the defendant to execute the sale deed to convey < undivided share of land in the suit schedule property in favour of the plaintiffs or their nominee or nominees in accordance with the memorandum of understanding dated 24-9-2005 failing which direct the officer of this court to execute and register the sale deed in favour of the plaintiffs"

8. While the plaintiffs instituted the present suit on 21-8-2006, the sole defendant herein instituted an independent suit in C.S.No.729 of 2006 within a few days in September 2006, praying for partition and separate possession of his 3/10 share in the suit property. His claim for 3/10 share is on the basis that after the death of the father A.Muthiah and Muthiah's mother, the property devolved upon the mother Mrs.Parvatham and 2 sons and 2 daughters in the share of 1/5 each and that the mother executed a Will dated 8-5-1997 bequeathing her 1/5 share in the suit property upon the 2 sons namely, M.Gnanasambandam (the defendant in the present suit) and M.Raja Appar (the first plaintiff in the present suit) and that therefore he was entitled to his own 1/5 share together with the 1/10 share inherited under the Will of the mother, totalling to 3/10 share. In view of such a claim based on a Will, M.Gnanasambandam has also filed O.P.No.85 of 2007 seeking Letters of Administration.

9. Thus, there are now 2 suits, one in C.S.No.701 of 2006 filed by all the other sharers against M.Gnanasambandam seeking enforcement of the Memorandum of Understanding dated 24-9-2005 and the other filed by M.Gnanasambandam against all the other sharers for partition. There is also one O.P for Letters of Administration.

10. In the above background of facts, the defendant in the present suit has come up with the present application seeking rejection of plaint on the short ground that there is no cause of action for the suit and that the suit is barred by law in view of the provisions of the Specific Relief Act, 1963.

Before getting into details, it is relevant to note that the sole defendant in the suit namely, M.Gnanasambandam died and his legal heirs have been brought on record as the defendants in the suit as well as the applicants in the present application.

11. As seen from the prayer in the suit (extracted in paragraph-7 above), the suit is one for specific performance of a Memorandum of Understanding dated 24-9-2005. It is not a suit for partition, but is one for a direction to the defendant to sell his < share in the suit property. The suit is also valued as a suit for specific performance only and court fee is paid accordingly. Therefore it is necessary to see if the suit is maintainable in law, in view of the objections raised.

12. Before we get into the law on the point, it is necessary to look into the operative portion of the Memorandum of Understanding. Hence it extracted as follows:-

"Now THIS Memorandum of Understanding WITNESSETH:

1) The property of late A. Muthiah namely the house, ground and premises bearing old No.16, New No.10, Singaram Street, T. Nagar, Chennai-17 shall be shared as follows:

i) 1/4th undivided share to Mr.M.Gnanasambandam

ii) 1/4th undivided share to Mr.M. Raja Appar

iii) 1/4th undivided share to Mrs.Sujata Tamta, Mrs.Malti Venkatraman and Mr.R.S.Subramaniam together

iv) 1/4th undivided share to Mrs.Maduram Lakshmanan and

2) It is further agreed between the parties that they will not go back on the understanding with reference to allotment of the shares above mentioned.

3) It is further agreed that preference will be given for joint development of the property through a good builder and share the built up area as per the understanding to be reached. Sincere efforts will be made to bargain with the builder based on the present market value of the property to get reasonable share in the built up area.

4) The deal will be transparent and the parties will be taken into confidence and the discussions with the builder will be minuted and copies will be sent to the Advocate for the parties of the third and fourth part herein namely, Mrs.C.R.Rukmani. A rough plan will also be obtained from the builder and sent to her and once all the parties agreed the property will be entrusted to the builder by entering into an Agreement for Development.

5) Meanwhile, it is open to any party or parties to opt for money consideration relating to their share of the property and inform the same in writing to the parties of the first and second part so that arrangements can be made to collect the sale proceeds of their respective shares in terms of monetary consideration by means of Demand Drafts and forwarded to the respective parties."

13. A careful scrutiny of the Memorandum of Understanding extracted above, would show that the parties agreed upon three things namely, (i) that the first plaintiff will be entitled to < share, the second plaintiff will be entitled to < share, the plaintiffs 3 to 6 will together be entitled to < share and the defendant will be entitled to < share in the suit schedule property; (ii) that the property will be given for joint development to a builder and the built up area will be shared as per the understanding to be reached, by bargaining with the builder based on the present market value of the property to get reasonable share in the built up area; and (iii) that it will be open to any one of the parties to opt for money consideration in lieu of their share in the built up area.

14. Thus the only point in respect of which, there was certainty in the Memorandum of Understanding, was the undivided share to which each party was entitled. In contrast, there was total uncertainty in respect of (i) the method of choosing the builder (ii) the bargain to be had with the builder (iii) the nature of the deal or joint development agreement to be entered into with the builder (iv) the share of constructed area that each of the parties will get and (v) the consideration to be paid to the party who opts to take money in lieu of the constructed area.

15. Since the suit is one for specific performance of the aforesaid Memorandum of Understanding, we have to see if the same can be specifically enforced, in the light of so many uncertainties inherent in the Memorandum of Understanding. This has to be done both with reference to the provisions of the Specific Relief Act, 1963 and with reference to Section 29 of the Indian Contract Act, 1872.

16. Mr.V.T.Gopalan, learned Senior Counsel appearing for the respondents/plaintiffs contended that a family arrangement is always enforceable in law and that there are "special equities" which govern a family arrangement. It is his contention that a plaint can never be rejected on the ground that a family arrangement is unenforceable in law. In support of the said contentions, the learned Senior Counsel relied upon several decisions of the Supreme Court, which I shall take up one after another.

17. The first decision relied upon by the learned Senior Counsel for the plaintiffs is Kale and others Vs. Deputy Director of Consolidation and others {1976 (3) SCC 119}. It was held in the said decision as follows:-

"By virtue of a family settlement or arrangement members of a family descending from a common ancestor or a near relation seek to sink their differences and disputes, settle and resolve their conflicting claims or disputed titles once for all in order to buy peace of mind and bring about complete harmony and goodwill in the family. The family arrangements are governed by a special equity peculiar to themselves and would be enforced if honestly made."

"The Courts have, therefore, leaned in favour of upholding a family arrangement instead of disturbing the same on technical or trivial grounds. Where the Courts find that the family arrangement suffers from a legal lacuna or a formal defect the rule of estoppel is pressed into service and is applied to shut out plea of the person who being a party to family arrangement seeks to unsettle a settled dispute and claims to revoke the family arrangement under which he has himself enjoyed some material benefits."

18. The next decision relied upon by the learned Senior Counsel is the one in *The Commissioner of Wealth Tax, Mysore Vs. Her Highness Vijayaba* {1979 (2) SCC 213}. In the said case, there was a dispute between 2 sons of the Maharaja of Gondal, in respect of the assets left behind by the Maharaja. The wife of the Maharaja intervened and the dispute was resolved. However, on the question relating to a payment made by the wife of the Maharaja, proceedings for assessment of wealth tax were initiated, which ended in favour of the Rani. When the department filed an appeal before the Supreme Court, it was contended on behalf of the Revenue that the compromise reached between the 2 sons at the instance of their mother, cannot be taken to be a contract, as there was no consideration for the same and that therefore the contract was void under Section 25. But such a contention was repelled by the Supreme Court on the ground that it was a family settlement or family arrangement and that therefore Section 25 of the Contract Act would not hit it.

19. The next decision relied upon by the learned Senior Counsel is the one in *Vigneswara Cooperative Housing Society Ltd Vs. K.Balachandramouli* {2005 (13) SCC 506}. This decision arose out of a suit for specific performance. The rejection of the plaint was sought for, on the ground that the land was notified to be acquired and that no relief for refund or damages was made. But the Supreme Court held that they may be grounds for dismissing the suit ultimately, but they may not be grounds for rejecting the plaint.

20. In the next decision *Hari Shankar Singhania and others Vs. Gaur Hari Singhania and others* {2006 (2) CTC 597}, an arbitration suit was dismissed on the ground of limitation by a single Judge of the Bombay High Court and the same was confirmed by the Division Bench. When the matter was taken up on appeal to the Supreme Court, the Supreme Court held in paragraphs-18 and 27 as follows:-

"Further in *Krishna Biharilal Vs. Gulabchand*, 1971 (1) SCC 837, this Court reiterated the approach of Courts to lean strongly in favour of family arrangements to bring about harmony in a family and do justice to its various members and avoid in anticipation future disputes which might ruin them all. This approach was again re-emphasised in *S. Shanmugam Pillai Vs. K. Shanmugam Pillai*, 1973 (2) SCC 312, where it was declared that this Court will be reluctant to disturb a family arrangement. In *Kale and others Vs. Deputy Director of Consolidation and others*, 1976 (3) SCC 119 (V.R. Krishna Iyer, R.S.Sarkaria and S.Murtaza Fazal Ali, JJ.) this Court examined the effect and value of family arrangements entered into between the parties with a view to resolving disputes for all."

"27. Better late than never we have already referred to the concept of family arrangement and settlement. Parties are members of three different groups and are leading business people. We, therefore, advise the parties instead of litigating in Court they may as well concentrate on their business and, at the same time, settle the disputes amicably which, in our opinion, is essential for maintaining peace and harmony in the family. Even though the parties with a good intention have entered into the Deed of Dissolution and to divide the properties in equal measure in 1987, the attitude and conduct of the parties have changed, unfortunately in a different direction."

21. In the next decision in K.K.Modi Vs. K.N.Modi and others {1998 (3) SCC 573}, the Supreme Court held as follows:-

"Such a family settlement which settles disputes within the family should not be lightly interfered with especially when the settlement has been already acted upon by some members of the family. In the present case, from 1989 to 1995 the Memorandum of Understanding has been substantially acted upon and hence the parties must be held to the settlement which is in the interest of the family and which avoids disputes between the members of the family. Such settlements have to be viewed a little differently from ordinary contracts and their internal mechanism for working out the settlement should not be lightly disturbed."

22. I have carefully considered the above decisions. There is no dispute about the fact that Courts have always placed family arrangements on a higher pedestal than the normal contracts. While contracts of the regular variety are generally commercial in nature, family arrangements would not normally have a commercial undercurrent. The objects of both are different and hence the rigours of the law of contracts may not apply to family arrangements. This is why Courts have always leaned in favour of enforcing family arrangements, with a view to preserve the family unity and honour, since family is the nucleus of the society. In "Leading Cases in Equity" by White and Tudor, the learned authors have remarked that "The expression 'family arrangement' covers a multitude of agreements made between relatives and designed to preserve the harmony, to protect the property and to save the honour of the family".

23. But unfortunately, the anxiety to preserve family arrangements cannot throw over board, the essential requirements of an agreement enforceable by law. The basic requirements of consensus ad idem, the absence of fraud, misrepresentation, undue influence or coercion etc., are not to be dispensed with, even in a family arrangement. In Cheshire and Fifoot's "Law of Contract" by M.P.Furmston, (10th edition), the learned author says (page 271) as follows:-

"Equity, though always anxious to sustain family arrangements, insists that there should be the fullest disclosure of all material facts known to each party, even though no inquiry about them may have been made. The parties must be on an equal footing."

Thus, in *Gordon Vs. Gordon* {(1821) 3 Swan 400}, a division of property, based upon the probability that the elder son was illegitimate, was set aside, nineteen years afterwards upon proof that the younger son had concealed his knowledge of a private ceremony of marriage solemnised between his parents before the birth of his brother; and in *Greenwood Vs. Greenwood* {(1863) 2 De GJ and Sm 28} an agreement to divide the property of a deceased relative was avoided on the ground that one of the parties failed to disclose information which he alone possessed concerning the amount of the estate."

24. Keeping the above fundamental principles in mind, if we scrutinise the decisions of the Supreme Court relied upon by the learned Senior Counsel for the respondent/plaintiff, it could be seen that in *Kale's case* {1976 (3) SCC 119}, the Supreme Court was concerned primarily with the question as to whether the non registration of a family arrangement would make it unenforceable. The Court was also concerned with the question of estoppel against persons who derived a benefit under the family arrangement but attempted to go back on the same, afterwards. Thus two essential features in the family arrangement entered into between the parties, were noted by the Supreme Court in the said decision viz., (i) that what the parties agreed upon could be deciphered from their conduct and (ii) that the parties had also acted upon the terms of the family arrangement. But in the case on hand, the parties had agreed only upon one thing viz., that each of them would be entitled to a defined share (viz., <)in the suit schedule property. The other part of the agreement, viz., to have the property developed through a builder, had so many loose ends, devoid of any material particulars, essential for its specific enforcement. Therefore, what is to be enforced under the family arrangement, in the present case, is left to the imagination of this Court or to a further agreement to be reached by the parties with an unknown builder. This is not the kind of family arrangement, which the Supreme Court was dealing with, in *Kale's case*.

25. In *The Commissioner of Wealth Tax, Mysore case* {1979 (2) SCC 213}, the parties to the family settlement were not questioning the validity of the same. It was the Revenue which was assailing the family settlement as void in terms of the provisions of the Contract Act. Therefore the Supreme Court held that such settlements cannot be upset. This is on the fundamental principle that a third party cannot assail a contract between two persons as hit by Section 25 of the Contract Act and on the principle that natural love and affection could be a valid consideration for a family arrangement between the members of a family.

26. In *Singhania's case* {2006 (2) CTC 597}, a partnership firm comprising of 3 brothers as partners was dissolved in 1987 and the deed of dissolution contained an arbitration clause. In February 1988, the parties nominated their representatives to work out an arrangement. Several letters were exchanged between the parties, the last of which was dated 29.9.1989. But a petition under Section 20 of the Arbitration Act, 1940 was filed only on 8.5.1992. A single Judge of the Bombay High Court dismissed the arbitration suit, on the ground that it was filed beyond 3 years and hence barred by limitation. The Division Bench confirmed the view and the parties went before the Supreme Court. The Supreme Court found on facts that the last of the letters was written only on 29.9.1989 and that limitation started running only from the said date and that therefore the suit filed on 8.5.1992 was within time. Therefore the decision of the Supreme Court cannot be taken to mean that the law of

limitation does not apply to the enforcement of family settlements. In any case, we are not concerned in the present case, with any technical objection such as limitation or jurisdiction, to the enforcement of the Memorandum of Understanding. We are primarily concerned here about what is to be actually enforced and what the parties are to be compelled to perform in terms of the Memorandum of Understanding.

27. In K.K. Modi's case {1998 (3) SCC 573}, disputes arose between the younger brother of one Seth Gujjar Mal Modi on the one hand and the sons of Seth Gujjar Mal Modi on the other hand. After negotiations were held with the assistance of Financial Institutions, a Memorandum of Understanding was reached between both the warring groups. Under the Memorandum of Understanding, the shares and assets of various companies were directed to be valued in the manner specified in the MOU by one M/s.S.B.Billimoria and Co. Three companies were also to be divided between two groups in accordance with a scheme to be prepared by one Banssi S. Mehta and Co. Clause-9 of the MOU contained an arbitration clause. After the valuation of shares by S.B.Billimoria and Co., and submission of reports by Banssi S. Mehta and Co., the parties became dissatisfied and hence arbitration was initiated. The Arbitrator formed a Committee of experts who found that the MOU had already been implemented to a great extent. Therefore one group was directed to pay money to the other group. Thereafter one group filed a petition under Section 33 of the Arbitration Act, challenging the decision of the Arbitrator, prepared in the form of a report, though it was not filed into Court for passing a decree in terms thereof. The same group simultaneously filed a suit, challenging the decision of the Arbitrator. The High Court held the decision of the Arbitrator to be not an award. At the same time, the suit was also dismissed on the ground that it was a replica of the arbitration petition and hence an abuse of the process of law. It is in this context that the Supreme Court remarked (in paragraph-52) that a family settlement should not be lightly interfered with, especially when the settlement had already been acted upon by some members of the family. Therefore the said decision does not take the respondent/plaintiff anywhere.

28. Coming to the case on hand, it is seen from the Memorandum of Understanding extracted above, that the only issue on which there was certainty, was that each of the parties will be entitled to < share in the suit schedule property. Beyond this, the MOU just contained several indeterminate factors such as (i) identification of a builder who would provide the best bargain for the parties, (ii) negotiation with such a builder, (iii) the execution of agreements with him and (iv) the sharing of the constructed area on mutually acceptable terms. The MOU also contained an option for any of the parties to take money value in lieu of constructed area. Thus everything else other than the shares to which each of the parties is entitled, was left open to be discussed, sorted out and determined. Such a MOU, in my considered view, is incapable of specific enforcement.

29. An agreement, which is bereft of material details indicating the consent terms between the parties, cannot be enforced by the Court, as the Court is not competent to investigate and supply material details as to how the contract could be specifically enforced. Suppose this Court were to pass a decree as prayed for in the suit, is the Court going to find a builder for the parties to have negotiations? Will the decree contain a clause determining the constructed area that could be allotted to the builder and to the parties? Can the decree specify the constructed area to be allotted to the parties? Can the decree also contain the method of valuation of the share of constructed area,

allotted to each party, so as to facilitate the payment of money value in lieu of constructed area, to a party who opts for the same in terms of the MOU?

30. If the Court is competent to do the above, then the MOU can be specifically enforced. But if the Court is not competent to do any of the above things, except declaring the undivided shares of each of the parties, then there cannot be a decree for specific performance. The stage upto which this Court can go in the present suit, is merely to pass a preliminary decree for partition declaring that each of the parties is entitled to < share in the suit schedule property. Since all issues to be sorted out between the parties, beyond this allotment, are to be sorted out only by mutual consent, there cannot be a decree in the suit beyond the point of allotment of shares. But such allotment of shares can always be done in the suit for partition C.S.No.729 of 2006 filed by the applicant herein. Therefore, the present is actually redundant.

31. As a matter of fact, the parties are at loggerheads, in the matter of identification of a builder and the terms and conditions of joint development. The respondents/plaintiffs are alleged to have already entered into a joint development agreement with a builder of their choice. But the applicant/defendant has not agreed to the choice or to the terms and conditions. The applicant/defendant is not a party to the alleged joint development agreement. Therefore, unilaterally, the respondents/plaintiffs have valued the money equivalent of the constructed area that could be allotted to the applicant/defendant and the respondents/plaintiffs have actually come up with a prayer for directing the applicant/defendant to take the money equivalent of the constructed area. They have valued the suit for specific performance in this fashion, since there is no clue in the MOU about the total constructed area permissible in the suit land and the ratio at which the builder and the parties would share the constructed area. Under such circumstances, the MOU cannot be specifically enforced.

32. Section 12 (1) of the Specific Relief Act, 1963, places an embargo upon the right of parties to seek specific performance of a part of a contract. Section 12 of the Specific Relief Act, 1963, reads as follows:-

"12. Specific performance of part of contract.--(1) Except as otherwise hereinafter provided in this Section, the Court shall not direct the specific performance of a part of a contract.

(2) Where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed bears only a small proportion to the whole in value and admits of compensation in money, the Court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency.

(3) Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed either --

(a) forms a considerable part of the whole, though admitting of compensation in money; or

(b) does not admit of compensation in money;

he is not entitled to obtain a decree for specific performance; but the Court may, at the suit of the other party, direct the party, in default to perform specifically so much of his part of the contract as he can perform, if the other party --

(i) in a case falling under Clause (a), pays or has paid the agreed consideration for the whole of the contract reduced by the consideration for the part which must be left unperformed and in a case falling under Clause (b) pays or has paid the consideration for the whole of the contract without any abatement; and

(ii) in either case, relinquishes all claims to the performance of the remaining part of the contract and all right to compensation, either for the deficiency or for the loss or damage sustained him through the default of the defendant.

(4) When a part of a contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the Court may direct specific performance of the former part.

Explanation For the purpose of this Section, a party to a contract shall be deemed to be unable to perform the whole of his part of it if a portion of its subject matter existing at the date of the contract has ceased to exist at the time of its performance."

33. Thus the general rule under Section 12 is that the Court shall not direct specific performance of a part of a contract. The exception to the rule is of two kinds viz., (i) where the part left unperformed bears only a small proportion to the whole in value and admits of compensation in money and (ii) where the part left unperformed either forms a considerable portion of the whole or does not admit of compensation in money.

34. In the present case, the only part of the contract, which could be performed, is a declaration of the undivided shares of each of the parties. The part which cannot be directed to be specifically performed are (i) the identification of a builder (ii) settlement of terms with the builder with regard to the proportionate share of constructed area to be allotted to the builder on the one hand and to be allotted to the parties on the other hand (iii) the determination of the constructed area to be allotted to each of the parties after completion of construction and (iv) the fixation of monetary value in lieu of constructed area, if someone opts for the same. Thus the part of the contract to be left unperformed, forms a considerable portion of the whole of the contract and hence this MOU cannot be specifically enforced. Even if the case falls under Sub section (4) of Section 12, there can only be a preliminary decree for partition declaring the shares of each of the parties. But there is already a suit for partition pending between the same parties in respect of the same subject matter. Therefore,

there is no point in keeping two suits for the determination of the same question.

35. Moreover, Section 14 (1) (b) and (d) of the Act also declares the following contracts to be not specifically enforceable:-

(i) a contract which runs into such minute or numerous details or which is so dependent on the personal qualifications or volition of the parties or otherwise from its nature is such, that the Court cannot enforce specific performance of its material terms and

(ii) A contract the performance of which involves the performance of a continuous duty which the Court cannot supervise.

The MOU in the present case would certainly fall under either of the above two categories. As stated earlier, this Court will have to identify a builder on behalf of the parties, negotiate the best bargain for the parties, determine the constructed area to be allotted to each of the parties and find out the monetary value of the constructed area, before it could pass a decree for specific performance, in this case. Such an exercise is not contemplated under the Specific Relief Act. Therefore the suit is barred by law and the plaint is liable to be rejected under Order VII, Rule 11, CPC.

36. As stated earlier, the only relief that this Court is competent to give to the respondents/plaintiffs in the present suit, is to declare that the first plaintiff, the second plaintiff, the plaintiffs 3 to 5 and the defendant would be entitled to < share each in the suit schedule property. In other words, this Court has to pass a preliminary decree for partition, in a suit for specific performance. But it is actually unnecessary to do so, since a suit for partition in C.S.No.729 of 2006 is also pending between the same parties. In that suit, the applicant/defendant is seeking a decree for partition of his 3/10 share in the suit property. Therefore the respondents/plaintiffs can always file the MOU in the said suit for partition and contend that the applicant/defendant is entitled only to < share and not 3/10 share. Thus the only result possible in the present suit, can be achieved by the respondents/ plaintiffs in the other suit.

37. In view of the above, the application A.No.4386 of 2007 for rejection of plaint is allowed and the plaint in C.S.No.701 of 2006 is rejected. However, this will not preclude the respondents/plaintiffs from filing the MOU dated 24.9.2005 in the other suit C.S.No.729 of 2006 and plead estoppel against the applicant in so far as the share to which he is entitled to in the suit schedule property is concerned.

Svn