S.Palanivel vs P.Natesan

Author: R.Subbiah

Bench: R.Subbiah

IN THE JUDICATE OF MADRAS HIGH COURT

RESERVED ON : 30.08.2017

DELIVERED ON : 26.10.2017

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THE HON'BLE MR.JUSTICE R.SUBBIAH
and
THE HON'BLE MR.JUSTICE A.D.JAGADISH CHANDIRA

A.S.Nos.484 & 485 of 2008
and
M.P.No.2 of 2012 in A.S.No.484 of 2008
and
C.M.P.No.8749 of 2017 in A.S.No.485 of 2008

A.S.No.484/2008
1.S.Palanivel
2.K.R.Selvaraj ... Appellants

vs.

1.P.Natesan
2.Thamarai Nayaki
3.Pallavi Natesan
4.Tharakai Natesan
5.Senthil Rajan ... Respondents
(R5 was declared as major and
R2 was discharged from her guardianship
vide order of Court dt 13.09.2012
made in M.P.1/2012 in A.S.No.484/2008)

A.S.No.485/2008
1.S.Palanivel
2.K.R.Selvaraj ... Appellants

Vs.

1.Thamari Nayaki
2.Pallavi Natesan
3.P.M.Ponnagounder
4.P.Natesan
5.Tharakai Natesan
6.Senthil Rajan
7.K.Chandrasekaran
8.Muthayee ... Respondents

(R6 was decleared as Major and
his guardian Kalavathi was discharged
from her guardianship vide order of Court
dt 13.9.2012 made in M.P.1/2012 in A.S.485/2008)

Appeals have been filed under Section 96 of CPC of CPC, against the common judgment and

Appearance of the counsel
Mr.P.Wilson, Senior Counsel for Mr.Pari Ramaiah,
for appellants in both the appeals

Mr.T.V.Ramanujam, Senior Counsel,
for M.P.Valliappan for R1 in A.S.No.484/2008 & R4 in A.S.No.485 of 2008

Mr.AR.L.Sundaresan, Senior Counsel
for Mr.C.Prabakaran for R2 to R5 in A.S.No.484/2008
and RR1, 2, 5 & 6 in A.S.No.485/2008

* * * * *

COMMON JUDGMENT

(Judgment of the Court was made by R.SUBBIAH, J., In the present appeals challenge is made to the common judgment and decree dated 20.03.2008 made in O.S.No.228 of 2004 & O.S.No.131 of 2006 respectively, passed by the learned First Additional District (Fast Track Court No.1), Salem.

2.The appellants herein are the plaintiffs in O.S.No.228 of 2004. Originally, the appellants herein/plaintiffs had filed the suit in O.S.No.193 of 2002 before the Sub-Court at Salem, as against the 1st defendant P.Natesan, for specific performance of the sale agreement dated 05.07.1998. Subsequently, the said suit was transferred to the file of Additional District Court (FTC-I), Salem and renumbered as O.S.No.228 of 2004 (A.S.No.484/2008). Later in the said suit, the daughters and son of the 1st defendant P.Natesan got themselves impleaded as defendants 2 to 5 and opposed the prayer of the plaintiffs for specific performance.

3.That apart, unmarried daughters of the 1st defendant P.Natesan, who are defendants 2 & 3 in O.S.No.228/2004, viz., Thamarai Nayaghi & Pallavi Natesan had also filed a separate suit in O.S.No.160 of 2004 before the Sub-Court at Namakkal, for partition of the suit schedule properties into 10 equal shares, as against their father Natesan and others and also impleading the plaintiffs in O.S.No.228 of 2004, as defendants 5 & 6. Later the said suit in O.S.No.160 of 2004 was transferred to the Additional District Court at Salem and renumbered as O.S.No.131 of 2006 and tried along

with O.S.No.228 of 2004.

4.The Trial Court, by judgment dated 20.03.2008, dismissed the suit filed by the appellants herein/plaintiffs in O.S.No.228 of 2004 filed for specific performance, holding that the Sale Agreement dated 05.07.1998 (Ex.A.1) is not a valid one, and decreed the suit in O.S.No.131 of 2006 filed by the two unmarried daughters of the said Natesan for partition of the suit schedule properties and passed a preliminary decree.

5.Since the issue involved in both the appeals are interconnected with each other, both these appeals are disposed of by way of this common judgment.

6.For easy reference, the parties will be referred to as per their rankings in O.S.No.228 of 2004, which was filed by the appellants herein for specific performance, as plaintiffs and the defendants. The respondents 7 & 8 viz., Chandrasekan and Muthayee in A.S.No.485 of 2008 will be referred to as D7 & D8.

7.The case of the plaintiffs in O.S.No.228 of 2004 filed for specific performance are as follows_
7-1.The 1st defendant P.Natesan is the absolute owner of the suit schedule property. The plaintiffs 1 & 2 entered into an agreement of sale on 05.07.1998, whereunder the 1st defendant agreed to sell the suit schedule property in favour of the plaintiffs for a sum of Rs.22 lakhs and on the same day, the 1st defendant received a sum of Rs.20 lakhs from the plaintiffs towards a portion of the sale consideration and as advance amount.

The balance sale consideration was agreed to be paid on or before 05.04.2002 and the 1st defendant has to execute the sale deed in favour of the plaintiff by receiving the balance sale consideration. Pursuant to the said sale agreement, the 1st defendant had also handed over the parental documents like Sale Deed dated 07.07.1983, copy of the final decree dated 21.1.1991 passed in a partition suit in O.S.No.963 of 1991 filed by the 1st defendant Natesan as against his father and grand-father, copy of compromise petition, order passed by Tahsildar dated 28.05.1991 and a kist receipt, to the plaintiffs as part performance.

7-2.From the date of sale agreement, the plaintiffs are ready and willing to perform their part of the agreement. In fact, the plaintiffs requested the 1st defendant, at many times, to receive the balance sale consideration of Rs.2 lakhs and to execute the sale deed in favour of them as per the terms and conditions of the sale agreement and to deliver the possession of the suit property to the plaintiffs. In spite of repeated personal requests, the 1st defendant wilfully defaulted in performing his part of the sale agreement. Hence, the plaintiffs sent a lawyer's Notice dated 26.03.2002 calling upon the 1st defendant to execute the sale deed as per the terms and conditions of the sale agreement, within one week from the date of receipt of the notice. After receiving the said legal notice from the plaintiffs, the 1st defendant issued a reply notice dated 30.03.2002 through his advocate with false and vexatious averments. Hence, the plaintiffs left with no other alternative have filed the suit seeking for the following reliefs_

(a)for specific performance of the sale agreement deed dated 05.07.1998 directing the defendant to execute the sale deed for Rs.22,00,000/- in respect of the suit properties in favour of the plaintiffs on receipt of the balance of the sale price of Rs.2,00,000/- without any encumbrance and have the sale deed registered and put the plaintiffs in possession of the suit properties.

(b)in case of failure by the defendant to do so, the Court may be pleased to execute the sale deed for Rs.22,00,000/- and get it registered according to the law and put the plaintiffs in possession of the suit properties through the process of the Court;

or in the alternative

(c)direct the defendant to pay the advance amount Rs.20,00,000/- plus Rs.2,00,000/- towards damages, with interest at the rate of 18% from the date of suit till the date of realization.

(d)to create a charge over the suit property for the due payment of amount

(e)awarding costs of the suit."

8-1.The said suit filed by the plaintiffs was resisted by the 1st defendant by filing a written statement, inter alia, stating that it is incorrect to state that the 1st defendant is the absolute owner of the suit schedule property. The 1st defendant was having an ancestral property at Tiruchengode Taluk and out of the joint family property income, the suit schedule property was purchased and thereafter, it was divided between the 1st defendant and his father. Now, the suit property is the joint family property belonging to the 1st defendant, his son and three unmarried daughters (defendants 2 to 5). The allegations that the plaintiffs and the 1st defendant had entered into a sale agreement on 05.07.1998, whereby the 1st defendant is alleged to have agreed to sell the suit schedule property in favour of the plaintiffs for a sum of Rs.22 lakhs and on the same day, the 1st defendant received a sum of Rs.20 lakhs towards a part of sale consideration and as advance amount, are all false and untenable. The alleged sale agreement had been fabricated. In fact, the plaintiffs sent a lawyer notice to the 1st defendant on 26.03.2002 calling upon the 1st defendant to perform his part of the alleged sale agreement, but, it was suitably replied by the 1st defendant by sending reply notice dated 30.03.2002 denying the execution of the sale agreement and clearly stating that if there is any sale agreement as stated in the notice sent by the plaintiff, it must be forged one. Further, in the reply notice, the 1st defendant had requested the plaintiffs' advocate to send the copy of the sale agreement, if there is any sale agreement as alleged in his notice. The 1st defendant had further stated in the reply notice that a xerox copy of such alleged sale agreement should be sent to him within 24 hours of the receipt of the reply notice and it is further stated that if the xerox copy of the alleged sale agreement is not sent within 24 hours, it must be presumed that it is a forged agreement and it is yet to be prepared. After receiving the reply notice, neither the plaintiffs' advocate nor the plaintiffs sent the xerox copy of the alleged sale agreement dated 05.07.1998. Therefore, it is presumed that the plaintiffs even without preparing the forged sale agreement, had issued the notice and only after the issuance of the notice and reply notice, the plaintiffs took herculean efforts and created a forged sale agreement with the help of the henchmen. Further, in the reply notice dated 30.03.2002, the 1st defendant had clearly stated that he has

borrowed a loan from the 2nd plaintiff to the tune of Rs.4,50,000/- and at that time, the 2nd plaintiff obtained the signatures of the 1st defendant on four blank stamped pro-notes, for the security of the loan amount and in addition, he requested the 1st defendant to handover the title deeds of his property concerned for the security of the loan. Thus, according to the 1st defendant, there is a money transaction between the defendant and the 2nd plaintiff and there is no agreement of sale of the 1st defendant's valuable property. Further, there is no connection between the 1st plaintiff and the 1st defendant. The 1st plaintiff is the father-in-law of the 2nd plaintiff.

8-2.Further, it is stated by the 1st defendant in his written statement that the market value of the suit property during the year 1998 was R.3000/- per square feet and the guide line value (Government Value) itself cost Rs.200/- per square feet. Apart from the pathway right, the saleable land would be measuring about 44908 square feet and if it is sold for market value, it would fetch Rs.1,34,72,400/- as per the guide line value in the year 1998. Even as per the Government guide line, the suit property was worth Rs.89,81,600/- . Hence, no ordinary prudent man would agree and enter into sale agreement to sell the suit property for a paltry sum of Rs.22 lakhs. Hence, on the face of it, the alleged sale agreement can be presumed that it is a forged one and not executed by the 1st defendant. According to the 1st defendant, he did not execute the sale agreement to the plaintiffs and he did not receive Rs.20 lakhs as advance on 05.07.1998 and hence, the question of returning the advance amount with the damage of Rs.2 lakhs would not arise at all. The real facts are that the 1st defendant was doing rig operator work and during the year 1997, for the said purpose, the 1st defendant borrowed a sum of Rs.4,50,000/- from the 2nd plaintiff and at that time, the 1st defendant signed the blank pro-notes for the security of loan amount and further, he handed over the title deeds with the 2nd plaintiff for the security of the loan. Further, even though the interest was usurious, the 1st defendant was paying interest regularly to the 2nd plaintiff and he did not repay the principal on demand by the 2nd plaintiff due to the loss in the business. Therefore, the 2nd plaintiff came with a gang of rowdy men to the residence of the 1st defendant and threatened him and his family members with dire consequences and hence, the 1st defendant reported the matter to the Sooramangalam Police Station on 16.12.2001 and he got the FIR report No.316/2001. Aggrieved over the same, the 2nd plaintiff and his father-in-law (1st plaintiff) colluded among themselves and created a forged sale agreement in order to knock away the valuable property of the 1st defendant.

8-3.It is further stated by the 1st defendant that he inspected the alleged sale agreement before the Court with the court permission on 17.02.2003 and it is a great shock and surprise to him that the stamp papers were purchased at Kodumudi on 16.04.1998, ie., three months prior to the alleged agreement. The 1st defendant never purchased any stamp paper at Kodumudi and in fact, the 1st defendant never went to Kodumudi so far and if it is necessary to the 1st defendant, he would have purchased the stamp papers at Salem City itself as there are number of stamp vendors in and around Salem City and he need not go to Kudumudi. This fact is sufficient to prove that the sale agreement is a forged one. Thus, the 1st defendant sought for dismissal of the suit.

9.The defendants 2 to 5, who are the daughters and son of the 1st defendant, filed a separate written statement stating that the suit property fell to the share of the 1st defendant in the partition suit in O.S.No.963/1990 filed by the 1st defendant against his father P.M.Ponna Gounder and grand-father

Muthu Gounder. Hence, the suit property is the ancestral property of the defendants. The defendants 1 to 5 are entitled to 1/5th share each in the suit property. In such a case, the 1st defendant himself cannot enter into a sale agreement with the plaintiffs to sell the whole suit property. The defendants 2 to 4 are the unmarried daughters till today and 5th defendant is the son of the 1st defendant. According to the Hindu Successions Amended Act 1 of 1980, the defendants 2 to 4 are also entitled to claim equal share with the 1st defendant in the joint family property. The alleged sale agreement dated 05.07.1998 said to have been executed between the plaintiffs and the 1st defendant will not bind the defendants 2 to 5. Thus, they sought for dismissal of the suit.

10.That apart, as stated supra, the defendants 2 & 3 have also filed a separate suit for partition in O.S.No.160 of 2004 before the Sub-Court, Nammakkal, which was subsequently transferred and renumbered as O.S.No.131 of 2006 on the file of the First Additional District Judge (FTC-I), Salem. It is the case of the defendants 2 & 3 herein in the said suit filed by them that the suit properties are the joint family property and they are entitled a share in the suit property. The suit properties belong to the ancestral joint family property of the defendants herein. Some of the properties were acquired from and out of the income from the joint family properties inherited by the 1st defendant and his father. The entire properties acquired by the 1st defendant and his father as stated above were thrown in the joint family hotch pot and treated and enjoyed as joint family property. At no point of time the acquired properties were enjoyed as their separate property by the 1st defendant and his father. Hence, the defendants 2 & 3 herein (plaintiffs in O.S.No.131 of 2006) are entitled to their share in the suit properties. Thus, in O.S.No.131 of 2006, they sought for passing of a preliminary decree for partition of the suit properties into 10 equal shares.

11.In the suit in O.S.No.131 of 2006, the plaintiffs herein who are Defendants 5 & 6 in the said suit, filed their written statement contending that the defendants 1 to 5 have colluded together and filed the suit in O.S.No.131 of 2006 on vexatious allegations, only in order to defeat the valuable right of the plaintiffs for specific performance.

12.The Trial Court conducted a joint trial and on the above pleading framed the following issues_ In O.S.No.228/2004:-

> (1)Whether the sale agreement dated 05.07.1998 is valid under law and true? (2)Whether the plaintiffs are entitled to specific performance on the basis of the sale agreement dated 05.07.1998? (3)Whether the plaintiffs are entitled to get back the advance amount of Rs.22 lakhs with 18% interest from the 1st defendant as alternative remedy? (4)Whether the plaintiffs are entitled for attachment of the suit properties? (5)To what other reliefs the plaintiffs are entitled to?
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> In O.S.No.131 of 2006:-
>
> (1)Whether the plaintiffs (Defendants 2 & 3 in O.S.No.228/2004) are entitled to the relief of partition as prayed for?

(2)whether the sale agreement between the 2nd defendant (1st defendant herein) and the defendants 5 & 6 (the plaintiffs herein) is true?

(3)Will the sale agreement entered between the 2nd defendant (1st defendant herein) and the defendants 5 & 6 (the plaintiffs) bind the plaintiffs (defendants 2 & 3 herein)
(4)to what relief the plaintiffs are entitled to?

13.Before the Trial Court, on the side of the plaintiffs, the 2nd plaintiff Selvaraj examined himself as P.W.1, besides examining five others as P.W.2 to P.W.6 and marked 23 documents as Ex.P.1 to Ex.P.23. On the side of the defendants, the 1st defendant examined himself as D.W.1 and 2nd defendant examined herself as D.W.2 and marked 7 documents as Ex.R.1 to Ex.R.7.

14.The Trial Court, after analysing the entire evidence adduced on either side both oral and documentary, has dismissed the suit for specific performance (O.S.228 of 2004) filed by the plaintiffs, holding that the sale agreement dated 05.07.1998 is not a valid document and the said document will not bind the defendants 2 to 5 and consequently, decreed the suit for partition (O.S.No.131 of 2006) filed by the defendants 2 & 3 and passed a preliminary decree. Aggrieved over the same, the present appeals have been filed by the plaintiffs.

15.The learned counsel for the appellants/plaintiffs submitted that the total extent of the suit schedule property is 1.97 1/2 acres. The suit property is a self-acquired properties of the father of the 1st defendant viz., Ponna Gounder. The 1st defendant-Natesan had filed a suit in O.S.No.963 of 1990 as against his father Ponna Gounder and grand-father Muthu Gounder in the year 1990 and in the said suit, a compromise decree was passed on 21.01.1991, in and by which 1.03 acres of land out of 1.97 1/2 acres was allotted to the 1st defendant Natesan and the balance 74 cents of land was retained by his father Ponna Gounder and the balance 0.20 1/2 acre land was left for common passage. Therefore, the suit property is the absolute property of the 1st defendant Natesan. On 05.07.1998, the 1st defendant- Natesan entered into a sale agreement (Ex.A.1) with the plaintiffs, whereby the 1st defendant agreed to sell the suit property, having 1.03 acres along with the land of 0.20 1/2 acres of common passage. The sale consideration was fixed as Rs.22 lakhs. On the very same day, the 1st defendant received a sum of Rs.20 lakhs as advance from the plaintiffs. The period for completion of sale was fixed till 05.04.2002, subjectively for a period of 45 months running from 05.07.1998 to 05.04.2002. The sale agreement is unregistered one and having a waiver of consideration clause and covenant of performing the part of execution of sale on receipt of remaining consideration. The sale agreement is having the thumb impression of the 1st defendant and his signature. The sale agreement was attested by two witnesses viz., 1) Kesavan S/o.Arthanari (P.W.3) and (2)Rajamanickam S/o.Pachiannan (P.W.2). P.W.2 & P.W.3 have deposed in their evidence, corroborating the lines of execution of sale agreement. On the date of execution of the sale agreement itself, the original Sale Deed dated 07.07.1983 (Ex.A.3), the final compromise decree dated 21.01.1991 (Ex.A.4), a copy of compromise petition (Ex.A.5), the order of patta transfer and sub-division passed by the Tahsildar dated 28.05.1991 (Ex.A.6) and a kist receipt dated 21.06.1992 (Ex.A.7) were handed over by the 1st defendant/seller to the plaintiffs/purchasers. The nature of the suit property is independent and self-acquired in character as purchased by Mr.Ponna Gounder, father of 1st defendant-Natesan. In fact, the said Ponna Gounder had executed a sale deed in favour

of one Chandrasekar in respect of the remaining land of 74 cents retained by him, which would show that it is only a self-acquired property and not as ancestral property as claimed by the defendants. Therefore, it is clear that the 1st defendant-Natesan knowing fully well that it is his absolute property agreed to sell the same to the plaintiffs. After entering into the sale agreement, the 1st defendant evaded to execute the sale deed. The plaintiffs expressed their readiness and willingness to get the sale deed executed in their favour and on several times, requested the 1st defendant to receive the balance sale consideration and to hand over the possession of the property by executing the sale deed; but, the 1st defendant went on evading the execution of the sale deed. On 16.12.2001, the 2nd plaintiff went to the residence of the 1st defendant/vendor and demanded for part performance, but enraged over the same, a false complaint was lodged against the plaintiffs by the 1st defendant's wife on 16.12.2001 alleging that the plaintiffs attempted to abduct the 1st defendant-Natesan. In the said complaint dated 16.12.2001, an admission was made with respect to the receipt of part sale consideration to the tune of Rs.16,50,000/-. The said Police Complaint was marked as Ex.A.15. In fact, the receipt for the said complaint was received by the 1st defendant, which is evident from CSR receipt dated 16.12.2011 (Ex.B.3). In response to the said police complaint, on the very next day of the said complaint ie, on 17.12.2001 itself, the 2nd plaintiff appeared before the Police and gave a reply-Ex.A.20, which contains clear paraphrase about a sale agreement, consideration, date of sale agreement. Then, the plaintiffs caused the lawyer notice on 26.03.2002 (Ex.A.2), calling upon the 1st defendant to execute the sale deed, for which the 1st defendant sent a reply notice dated 30.03.2002 (Ex.A.9) denying the sale agreement, as if the 1st defendant has borrowed a loan of Rs.4,50,000/- from the 2nd plaintiff and at that time of borrowal of loan, the 2nd plaintiff had obtained signature of the 1st defendant in four blank stamp pro-notes for the security of the loan amount.

16.In this regard, the learned senior counsel appearing for the appellants/plaintiffs submitted that for the first time in the reply notice (Ex.A.9), the 1st defendant has come forward with a case as if the transaction between the plaintiffs and the 1st defendant is only a loan transaction to the tune of Rs.4,50,000/-. Whereas in Ex.A.15-police complaint given by the wife of the 1st defendant, it was stated that the 1st defendant received a part of sale consideration to the extent of Rs.16,50,000/-. Further, in the sale agreement (Ex.A.1), the receipt of Rs.20 lakhs was acknowledged by the 1st defendant. This inconsistent statement made by the 1st defendant would itself clearly falsify the case of the 1st defendant that the sale agreement is not a valid one.

17.It is further submitted by the learned senior counsel appearing for the appellants/plaintiffs that P.W.2 & P.W.3, who stood as attesting witnesses to the sale agreement, clearly stated in their evidence with regard to the payment of Rs.20 lakhs towards sale consideration to the 1st defendant on the date of sale agreement. Though it is the case of the defendants that the sale agreement is a forged one, but, according to the plaintiffs, the sale agreement-Ex.A.1 stands proved by cogent and convincing evidence of P.W.1 to P.W.3. Further, the signature of the 1st defendant appeared in Ex.A.1 is identical to the exhibits of sale conveyances and agreements admitted by the 1st defendant. Since the case of such fabrication of document is alleged, the 1st defendant himself has taken the burden to prove the same. In order to prove the same, the 1st defendant had filed applications on three occasions to refer the document to the forensic expert. The 1st defendant filed I.A.No.6 of 2003 on 15.09.2003 for taking photos of thumb impression in the sale agreement to send the same

to an forensic expert for opinion; but, subsequently, the 1st defendant withdrew the said application. Thereafter, he filed I.A.No.1281 of 2004 seeking the same relief. But, even in the said application also, he made an endorsement of 'not pressed' and as such, the said application was als dismissed on 28.02.2005. On the third occasion, the 1st defendant filed I.A.No.486 of 2006 and the lower Court allowed the said application on 07.04.2006 on condition that the 1st defendant shall deposit a sum of Rs.10,000/- for paying the fee for hand-writting expert. Later, since the 1st defendant did not pay the said amount, the Court below dismissed the said application on 30.06.2006.

18.The learned senior counsel for the appellants/plaintiffs submitted that the appeal is a continuation of the suit and the appellants have a right to exercise their venues to test the signatures and thumb impressions in Ex.A.1 and the same may be compared with the admitted documents of the 1st defendant in Ex.A.10 - A.14 & A18. There is no embargo to test the same in appeal. Therefore, the additional evidence could be pleaded in appeal and the said pleas were set up by the appellants in M.P.No.2 of 2012 in A.S.484 of 2008, for sending Ex.A.1, along with the admitted documents, for getting opinion of the hand-writing expert.

19.The learned senior counsel for the appellants/plaintiffs has also relied upon the decision reported in AIR 1967 SCC 778 (The State of Gujarat Vs. Vinay Chandra Chotta Lal Pathi), in support of his contention that even though an opinion of handwriting expert is not conclusive, the Court is competent to compare the disputed writing of the person with others which are admitted or proved to be his writing.

20.The learned senior counsel has also relied upon the decision reported in 2004 (5) CTC 617 (Kalaimani and another Vs. Chinnapayan @ Perumal Gounder), in support of his contention that Section 73 of the Indian Evidence Act enables the Court to use its own eyes to compare the disputed signature with the admitted signature. The Court is competent to compare the disputed signature with the admitted signature for proper assessment of total evidence to arrive at a correct conclusion.

21.Thus, the learned senior counsel appearing for the appellants/plaintiffs submitted that by the cogent and convincing evidence, the appellants/plaintiffs have proved that it is only a sale transaction with regard to the sale of the suit schedule property. The evidence of P.W.2 & P.W.3 has proved that the 1st defendant has agreed to sell the suit schedule property to the plaintiffs for a sale consideration of Rs.22 lakhs and received a sum of Rs.20 laksh as advance and later, he failed to execute the sale deed. Further, only on the instructions of the 1st defendant, his daughters and son themselves got impleaded in the suit for specific performance only to frustrate the suit filed by the plaintiffs.

22.With regard to the partition suit in O.S.No.131 of 2006 filed by the defendants 2 & 3, it is submitted by the learned senior counsel for the appellants/plaintiffs that it is the case of the defendants 2 & 3 in the suit filed by them in O.S.No.131 of 2006 that the compromise in the suit in O.S.No.963 of 1990 that was entered into between the 1st defendant, his father and grand-father has to be valued as a 'Family Arrangement' and if such connotation is applied, the share allotted to the 1st defendant-Natesan, should be read as joint family property in the hands of father, as the daughters were already born at the time of partition.

23.In this regard, the learned senior counsel for the appellants/plaintiffs submitted that once the compromise decree is passed by dividing the property and by allocating the particular property with possession, the said partition decree becomes effective and acted upon. If there is any challenge against such partition decree or the shares or the properties allotted to the parties, they can only prefer an appeal as a separate suit is barred under Order 22 Rule 3A of CPC; otherwise, if any 3rd party is aggrieved, they can prefer independent suit or 3rd party appeal. In the present case, the pleadings of the daughters/defendants 2 & 3 in the suit filed by them in O.S.No.131 of 2006 are that "the compromise decree in O.S.No.963/1990 is not binding on them (defendants 2 & 3 herein) and they are ignoring the same and filing the suit for partition". When such a specific averment is there, they would have challenged the partition decree in the partition suit itself as an added prayer. Since they failed to do so, the partition decree becomes final. Further, there is no explanation from the daughters/defendants 2 & 3 for not challenging the said partition decree. Thus, the learned senior counsel for the appellants/submitted that only to frustrate the suit filed by the plaintiffs, the daughters/defendants 2 & 3 have filed the partition suit in O.S.No.131 of 2006.

24.The learned senior counsel for the appellants/plaintiffs submitted that the execution of the sale agreement-Ex.A.1 was proved by the plaintiffs by examining the attestors to the documents as P.W.2 & P.W.3; but, the trial Court has rendered a finding as if P.W.2-attestor was not examined, which would show that the trial Court without application of mind has dismissed the suit filed by the plaintiffs/appellants herein.

25.Thus, it is the submission of the learned senior counsel for the appellants/plaintiffs that without considering all these aspects, the Trial Court has decreed the suit filed by the daughters and dismissed the suit filed by the appellants herein/plaintiffs. He prayed for remanding the matter to the trial Court, by setting aside the judgment and decree passed by the trial Court.

26.Countering the submissions made by the learned senior counsel for the appellants/plaintiffs, it is replied by the learned senior counsel appearing for the 1st defendant that the plaintiffs have not established before the Trial Court that the signature & thumb impression in the alleged sale agreement (Ex.A.1) are that of the 1st defendant-Natesan. The attesting witnesses to the sale agreement Ex.A.1 are the relatives of the 2nd plaintiff and their testimony is not trustworthy. The failure on the part of the 1st plaintiff to enter the witness box is fatal to their case and the period of nearly 3 1/2 years for paying a small balance sale consideration amount of Rs.2 lakhs creates a serious doubt about the genuineness of the alleged sale agreement Ex.A.1. According to the 1st defendant, it is not a sale agreement at all. Even from the evidence of P.W.1 to 5, it can be concluded that Ex.A.1 is a fraudulent document. Ex.A.1 was written on Rs.10/- stamp paper, which clearly shows that the said document is a fraudulent document. For paying a paltry sum of Rs.2 lakhs, a period of nearly four years would not have been fixed. There is no proof to show that Rs.20 lakhs had been paid to the 1st defendant. The plaintiffs are not entitled to seek either the relief of specific performance or the alternative relief of refund of alleged advance amount.

27.Further, the 2nd plaintiff, who was examined as P.W.1, in his cross-examination, admitted that the stamp paper of Rs.10/-, on which the alleged sale agreement was prepared, was purchased at Kodumudi. In fact, it is the contention of the leaned senior counsel for the appellants/plaintiffs that

the 1st defendant went to Kodumudi, which is 92 kms away from Salem where the 1st defendant is residing, to purchase Rs.10/- non-judicial stamp paper.

28.But, it is the reply of the learned senior counsel appearing for the 1st respondent/1st defendant that there is no need for the 1st defendant to travel to Kodumudi, which is 92 kms away from Salem, to purchase a Rs.10/- non-judicial stamp paper, especially when the stamp papers were readily available at Salem itself. Besides that, the plaintiffs/appellants have not established that they were continuously ready and willing to get the sale deed executed in their favour. Moreover, the plaintiffs/appellants were involved in police case. The sale agreement was created only at the time of institution of the suit by the plaintiffs and that is the reason why the plaintiffs did not handover a xerox copy of the alleged sale agreement to the 1st defendant, despite the receipt of reply notice dated 30.03.2002 sent by the 1st defendant to the plaintiffs requesting to handover a copy of the alleged sale agreement. The plaintiffs have miserably failed to prove the alleged payment of Rs.20 lakhs as advance, by producing any income tax return filed by them.

29.With regard to the submission made by the learned senior counsel for the appellants/plaintiffs that there is inconsistent statement in the evidence adduced on the side of the defendants, since the 1st defendant had stated that the transaction is only a loan transaction and he borrowed a sum of Rs.4,50,000/- as loan from the plaintiffs, whereas in the police complaint given by the wife of the 1st defendant, she has stated that a sum of Rs.16,50,000/- was borrowed from the plaintiffs, it is replied by the learned senior counsel appearing for the 1st defendant that if the plaintiffs want to rely upon the police complaint given by the wife of the 1st defendant, they have to rely upon the same as a whole document and they should also admit that they attempted to kidnap the 1st defendant. The plaintiffs cannot rely upon one portion of the document and contend that they will not rely upon the other parts of the document. The police complaint does not contain the seal. If the whole statement is taken into account, it is only the 1st defendant who came up with the claim of loan transaction and for the first time in the year 2001, the plaintiffs came up with the story of sale agreement. Therefore, the theory of execution of the sale agreement cannot be accepted.

30.With regard to the submission made by the learned senior counsel for the appellants/plaintiffs with regard to the non-payment of Rs.10,000/- as per the conditional order passed in the Interlocutory application for sending the document to get expert's opinion, it is replied by the learned senior counsel for the 1st respondent/1st defendant that even during the pendency of the suit and even after the dismissal of the application filed by the 1st respondent in the year 2006 and even at the time of filing the above appeals in the year 2008, the plaintiffs had not taken any step to seek expert's opinion.

31.The learned senior counsel for the 1st respondent/1st defendant would further submit that the plaintiffs have not proved the execution of sale agreement by cogent and convincing evidence. The plaintiffs have also not proved that they are always ready and willing to perform their part of the contract and that they paid a sum of Rs.20 lakhs towards the sale transaction; on the other hand, the plaintiffs are totally making an attempt to make use of the weakness in the defence put forth by the defendants. The learned senior counsel for the 1st defendant submitted that the plaintiffs failed to establish their case and the decree cannot be granted on the basis of any weakness in the case of the

defendants. The plaintiffs cannot rely upon the weakness in the case of the defendants and seek decree for specific performance. In support of this contention, the learned senior counsel appearing for the 1st defendant relied upon the following decisions_ (1)AIR 2014 SC 937 (Union of India Vs. Vasavi Co-op, Housing Society Ltd and others)

2)Volume 95 LW 708 (P.Thangavelu Vs R.Dhanalakshmi Ammal and others)

3)Volume 99 LW 239 (Rethinasabapathi Pillai Vs. Sriramulu Chettiar)

32.With regard to the submission made by the learned senior counsel appearing for the plaintiffs that the trial Court without looking into the evidence of P.W.2 & P.W.3 had dismissed the suit filed by the plaintiffs as if P.W.2 & P.W.3 were not examined, it is replied by the learned senior counsel appearing for the 1st defendant that merely because it is stated by the trial Court that P.W.2 & P.W.3 were not examined, there is no reason to remand the matter back to the trial Court by setting aside the judgment and decree of the trial Court, for fresh consideration. In this regard, the learned senior counsel for the 1st defendant has also relied upon the decision reported in AIR 1965 Madras 417 (Balasubramania Iyer Vs. Subbiah Thevar and anothers).

33.The learned senior counsel appearing for the respondents 2 & 3/Defendants 2 & 3 has also submitted that the plaintiffs have not established the execution of the sale agreement-Ex.A.1 and they are not entitled to question the rights of the defendants 2 & 3. Further more, the plaintiffs have no right to question the partition because they are totally strangers to the family. Ex.A.1, sale agreement itself, would establish that the suit property is a property of the Hindu undivided joint family. The plaintiffs cannot contend that the suit property is the separate property of the 1st defendant and knock away the property of the daughters and son of the 1st defendant. The defendants 1 to 5 are entitled to 1/5th share over the suit properties and the 1st defendant/father alone does not have any right to execute the alleged sale agreement. The trial Court, by appreciating the evidence in a proper perspective, has dismissed the suit filed by the plaintiffs and decreed the suit filed by the defendants 2 & 3. Thus, the learned senior counsel for the respondents 2 & 3/ Defendants 2 & 3, sought for dismissal of the appeals.

34.By way of reply, with regard to the submission made by the learned senior counsel for the 1st respondent/1st defendant that the stamp paper was purchased from the vendor at Kodumudi, which is far-away from Salem, it is replied by the learned senior counsel appearing for the appellants/plaintiffs that the entire instrument/sale agreement was prepared by the 1st defendant and he himself bought the witnesses to Tiruchengode. Further, the evidence of D.W.2-Thamarai Nayagi, the daughter of the 1st defendant, (1st plaintiff in O.S.No.131/2006) would reveal that the 1st defendant used to avail loan often from various sources by executing bonds and was also doing finance. As it appears, there is a material to believe that the 1st defendant might have used Kodumudi stamp paper, which was already in his custody, and might not have travelled to Kodumudi at all. Therefore, the submission made by the learned senior counsel for the 1st respondent/1st defendant that the stamp paper was purchased from a far-away place, has no significance to decide the issue involved this matter. Thus, the learned senior counsel appearing for the appellants/plaintiffs sought for setting aside the judgment and decree passed by the trial Court.

35.We have carefully heard the submissions made on either side and perused the materials available on record.

36.In view of the above submissions made on either side, the following points arose for consideration in these appeals_

1)Whether the plaintiffs have established their case that the transaction between the parties is only in respect of the sale of the suit schedule property?

2)Whether the plaintiffs are entitled for the relief of specific performance?

3)Whether the claim of the defendants 2 & 3 for partition of the suit is legally sustainable?

Point No.1:-

37.It is the case of the plaintiffs that the 1st defendant-Natesan is the absolute owner of 1.03 acres of land with the common passage of 0.20 1/2 acres, having obtained the same by way of compromise decree passed in O.S.No.963 of 1990, which was filed by the 1st defendant as against his father and grand-father for partition of the property. On 05.07.1998 the 1st defendant entered into a sale agreement with the plaintiffs, whereby he agreed to sell the suit property for a sum of Rs.22 lakhs. On the date of sale agreement ie., on 05.07.1998 itself, the 1st defendant received a sum of Rs.20 lakhs as advance and for the payment of balance amount of Rs.2 lakhs, the time was fixed upto 05.04.2002.

38.Whereas, according to the 1st defendant, the sale agreement is a fraudulent and fabricated document. The 1st defendant in his reply notice dated 30.03.2002 (Ex.A.9) sent to the plaintiffs has categorically stated that the transaction between the parties is only a loan transaction and he had borrowed a sum of Rs.4,50,000/- from the 2nd plaintiff and at that time, the 2nd plaintiff had obtained signature of the 1st defendant in blank stamp papers for security of loan amount and the 1st defendant had handed over the parental documents in respect of the suit property as security and there is no other transaction between the plaintiffs and the 1st defendant.

39.But, in order to establish that the transaction was only a sale transaction, the learned senior counsel for the appellants/plaintiffs has relied upon Ex.P.15-Police complaint given by the wife of the 1st defendant as against the plaintiffs, in which she has stated to the Police as if the 1st defendant had received a sum of Rs.16,50,000/- from the plaintiffs as a loan; therefore, according to the learned senior counsel for the appellants/plaintiffs, in one place the 1st defendant has stated that he had obtained loan of Rs.4,50,000/- and another place, the wife of the 1st defendant stated that they borrowed a sum of Rs.16,50,000/-, which would show the falsity in the case of defendants. Further, it is the case of the plaintiffs that P.W.2 & P.W.3 had categorically stated in their evidence that on the date of sale agreement, a sum of Rs.20 laksh was received by the 1st defendant towards a part of sale consideration.

40.But, it is the reply of the learned senior counsel for the 1st defendant that the market value of the suit property on the date of alleged sale agreement is more than Rs.1.35 crores. There is no necessity for the 1st defendant to sell the suit property for a paltry sum of Rs.22 lakhs. The alleged advance sale consideration of Rs.20 lakhs was not received by the 1st defendant. On 16.12.2001, the 2nd plaintiff had come to the residence of the 1st defendant with rowdy elements and threatened the family members of the 1st defendant, due to which FIR was lodged against him before the Suramangalam Police Station. Aggrieved over the same, the plaintiffs had fabricated the sale agreement and even after that, the plaintiffs had attempted to kidnap the wife of the 1st defendant Natesan and his minor son, due to which reports were sent to the Director General of Police and other Police Officials. The alleged stamp paper obtained from the Registrar on 16.04.1998, seems to have been purchased at Kodumudi, three months prior to the date mentioned in the alleged sale agreement. The 1st defendant never went to Kodumudi for purchasing the stamp papers from there. There was no need to travel to Kodumudi, which is 92 kms away from salem to purchase a Rs.10/- non-judicial stamp paper especially when the stamp papers were readily available at Salem itself.

41.Keeping the above said submissions made on either side, We have carefully perused Ex.A.9 & Ex.A.15. From perusal of the said documents, We find that though there is a difference in mentioning the amount as Rs.4,50,000/- and 16,50,000/-, the consistent statement of the 1st defendant and his wife is that it is only a loan transaction. In Ex.P.15-Police Complaint, the wife of the 1st defendant has clearly stated that the transaction between the plaintiffs and the 1st defendant is only a loan transaction. In this regard, it would be appropriate to extract the relevant portion in Ex.A.15, which reads as follows_ "vd; fzth; v';fsJ epy gj;jpuj;ij <nuhl;il nrh;e;j Mh;/bry;guhR vd;gthplk; bfhLj;J 16.50.000-? U:gha; th';fpndhk;/ eh';fs; th';fp ehd;F tUlk; MfpwJ v';fshy; jw;rkak; gzk; fl;l Koahj epiyapy; fc;≶gLfpnwhk;/ ,d;W 16/12/2001?k; njjp khiy Rkhh; 6 kzpf;F bry;tuhRk; mtUld; te;j kJiuia nrh;e;jtUk; v';fpslk; te;J gzk; nfl;L jfuhW bra;J v';fsJ fhl;il fpiuak; gz;zr; brhy;ypa[k; vdJ fztiu ,Gj;Jr; bry;y te;jhh;fs;. gpwF gzj;ij th';ff;Toa tHpapy; th';fpf; bfhs;fpnwhk; vd;W brhy;yptpl;L brd;whh;fs;/ vdJ fztUf;F VjhtJ Mgj;J Vw;gl;lhy; ,th;fs;jhd; bghWg;g[/ vdnt ,th;fs; kPJ eltof;if vLf;f nfl;Lf;bfhs;fpnwd;/ Therefore, a reading of the above said complaint-Ex.A.15 would show that the transaction between the 1st defendant and the plaintiffs is only a loan transaction.

42.Further, it is the submission of the learned senior counsel for the appellants/plaintiffs that on three occasions, the 1st defendant had taken out application to send the document-Ex.A.1, to get the expert's opinion. Finally, on 07.04.2006 in I.A.No.486 of 2006, the Court below allowed the application to send the document to get the expert's opinion, on condition that the 1st defendant shall deposit a sum of Rs.10,000/- towards the fee for the expert. The 1st defendant failed to deposit the said amount, and thereby he allowed the said application to be dismissed on 30.06.2006, which would show that the signature in the document-Ex.A.1 belongs to the 1st defendant and only to prolong the case, he had taken out such applications.

43.Per contra, it is the reply of the learned senior counsel appearing for the 1st defendant that non-payment of the cost of Rs.10,000/- for sending the document to get the expert's opinion, will not be fatal to the case of the defendants.

44.On a careful consideration of the case of the plaintiffs, We find that the plaintiffs are only pointing out the discrepancies in the defence of the defendants. When it is the specific case of the 1st defendant that it is only a loan transaction, which is supported by Ex.A.15-Police Complaint and Ex.A.9-reply sent by the 1st defendant to the plaintiffs, the plaintiffs ought to have proved the passing of the sale consideration of Rs.20 lakhs on the date of sale agreement by producing the income tax returns. The plaintiffs have to stand or fall on their own legs and cannot pick up the holes in the defence put forth by the defendants, for getting the relief of specific performance. The 2nd plaintiff-P.W.1 had stated in his evidence that he paid Rs.15 lakhs and his father-in-law (the 1st plaintiff) paid Rs.5 lakhs, thus, totally, they paid Rs.20 lakhs to the 1st defendant-Natesan. P.W.1 admitted in his evidence that he is an income tax assessee and that he had bank account. P.W.1 neither produced the bank account statement nor his income tax returns to prove the payment of Rs.15 lakhs. It would be appropriate to extract the relevant portions in the evidence of P.W.1 (2nd plaintiff), which would read as follows_ "5/7/98?y; ,e;j ,uz;L t';fpffspYk; cs;s fzf;F K:ykhf 20 yl;rk; itj;jpUe;njd; vd;gJ fhl;lf;Toa fzf;F jhf;fy; bra;atpy;iy fhl;lKoahJ//////// //////////ehd; ,d;fk;nlf;;!; fl;Lfpnwd;/ Mol;lh; K:ykhf fl;lndd;/ ve;j mYtyfj;jpy; fl;odhh; vd;W mtUf;F jhd; bjhpa[k;//////// Under such circumstances, it is highly suspicious that such a huge amount of Rs.20 lakhs would have been paid in cash. It is for the plaintiffs to prove that the amount of Rs.20 lakhs has been paid to the 1st defendant. The plaintiffs cannot simply rely upon the recitals in the supposed agreement of Sale-Ex.A.1. The burden is on the plaintiffs to prove that the sale consideration has been paid, by producing the best evidence available, before the Court. The best evidence namely the bank accounts statement and the income tax returns of the plaintiffs have not been produced before the Court. If the plaintiffs had produced their bank statements and the income tax returns, the truth would have come out. Not having placed the best evidence before the Court, the plaintiffs cannot seek for any equitable or discretionary relief of specific performance. In this regard, a reference could be placed in the following decisions_

(i)In AIR 2014 SC 937 (Union of India Vs. Vasavi Co-Op Housing Society Ltd), wherein it has been held as follows_ "The legal position, therefore, is clear that the plaintiff in a suit for declaration of title and possession could succeed only on the strength of its own title and that could be done only by adducing sufficient evidence to discharge the onus on it, irrespective of the question whether the defendants have proved their case or not. We are of the view that even if the title set up by the defendants is found against, in the absence of establishment of plaintiff's own title, plaintiff must be non-suited."

(ii)In the case of P.Thangavelu Vs. R.Dhanalakshmi Ammal and other, reported in Volume 95 LW 708, it has been held as follows_ "The plaintiff can succeed in the suit for declaration under the plaint as amended only on the basis of a valid title to the property. If he did not have any title to the property, then he cannot pick holes in the title of the defendants and try to succeed. That the plaintiff can succeed only on the basis of the proof of his own allegation in the plaint as regards his title and he cannot succeed by picking holes in the title of the defendants is too well established to need citation of any authority."

(iii)In the decision reported in Volume 99 LW 239 (Rethinasabapati Pillai Vs. Sriramulu Chettiar), a Division Bench of this Court has held that falsity of the defence story does not establish the truth of

the plaintiff's story.

(iv)In the decision reported in 2002 3 CT 462 (Kumari Anandan Vs. Dr.T.Balamukunda Rao), it has been held by a Division Bench of this Court as follows_ "In a suit for specific performance of the contract, the onus is on the plaintiff to prove the contract, unless its existence is admitted by the Opposite Party. When the plaintiff fails to prove the contract, the mere fact, that the defendant admits receipt of money but on altogether different account, does not shift the burden of proof to the defendant."

45.In the instant case, it seen that the plaintiffs have only picked the holes in the defence set up by the defendants, rather than proving that it is only a sale transaction and a sum of Rs.20 lakhs as mentioned in Ex.A.1-sale agreement was passed to the 1st defendant on 05.07.1998. Further, We find that a major portion of of the sale consideration viz., Rs.20 lakhs was alleged to have been paid on the date of sale agreement itself and only for the purpose of paying a meagre balance amount of Rs.2 lakhs, the long period of 3 1/2 years was fixed under the sale agreement, which would throw doubt on the conduct of the parties. Under such circumstances, We are of the opinion that the transaction between the parties cannot be one for sale.

46.In this regard, a reference could be placed in the decision reported in 2012-4-LW 435 (Pappamma Vs. P.ramasamy), wherein it has been held by this Court that the payment of a major portion of the sale consideration and fixing of a long period for performance of the contract would only imply that it is only a loan transaction and the person seeking specific performance is not entitled to the said relief.

47.In the decision reported in AIR 1997 SCC 2702 (Tejram Vs. patirambhau), it has been held by the Hon'ble Supreme Court that a payment of the major portion of the sale consideration and delay in seeking specific performance would throw doubt about the conduct of the parties and that the agreement cannot be one for sale.

48.In the light of the above decisions, We are of the opinion that in the instant case, since there is no proper explanation forthcoming from the plaintiffs for fixing 3 1/2 years for paying the remaining amount of Rs.2 lakhs, when they have paid a major portion of the sale consideration viz. Rs.20 lakhs, the transaction between the parties cannot be presumed to a sale transaction and it is only a loan transaction.

49.Further, according to the plaintiffs, the sale agreement was prepared only by the 1st defendant, in Rs.10/- stamp paper purchased from Kodumudi. But, when the 1st defendant is residing in Salem and already the stamp papers were available at Salem, it is not necessary for the 1st defendant to go to Kodumudi to purchase the stamp paper for Rs.10/-. This fact also creates a doubt in the case of the plaintiffs. Considering all these aspects, We are of the opinion that the plaintiffs have failed to establish before the Court that it is only a sale transaction.

Point No.2:-

50.As held supra, We have already found that the plaintiffs have failed to establish that the transaction between them and the 1st defendant is only in respect of the sale of the suit schedule property. Therefore, in the light of Section 20 of the Specific Relief Act, the granting of decree for specific performance is not automatic and if granting decree for specific performance would be inequitable and unjust, the same has to be refused. In this regard, a reference could be placed in the decision of the Hon'ble Supreme Court reported in AIR 1996 SC 2150 (Kanshi Ram Vs. Om Praksh Jawal and others), wherein it has been held by the Hon'ble Supreme Court as follows_ ".... But it is equally settled law that granting decree for specific performance of a contract of immovable property is not automatic. It is one of discretion to be exercised on sound principles. When the Court gets into equity jurisdiction, it would be guided by justice, equity good conscience and fairness to both the parties. Considered from this perspective, in view of the fact that the respondent himself had claimed alternative relief for damages, We think that the Courts would have been well justified in granting alternative decree for damages, instead of ordering specific performance which would be unrealistic and unfair. Under these circumstances, We hold that the decree for specific performance is inequitable and unjust to the appellant."

51.It is yet another submission of the learned senior counsel appearing for the appellants/plaintiffs that the Trial Court without looking into the evidence of P.W.2 & P.W.3 has stated as if they were not examined and thus, erroneously dismissed the suit filed by the plaintiffs for specific performance. But, We are of the opinion that merely because it is stated by the Trial Court in its judgment as if P.W.2 & P.W.3 were not examined, there is no need for remanding the matter to the trial Court for fresh consideration. Even if the evidence of P.W.2 & P.W.3 are taken into consideration, it will not support the case of the plaintiffs. Therefore, the question of remanding the matter to the trail Court does not arise in this case. In this regard, it would be useful to make a reference in the judgment reported in AIR 1965 MADRAS 417 (Balasubramania Iyer Vs. Subbiah Thevar and another), wherein it has been held by the Hon'ble Supreme Court as follows_ "If the trial Court has not disposed of the suit on a preliminary point but has delivered judgment on merits it is the duty of the appellate Court to deal with the appeal on its merits. It is only in exceptional cases where the judgment of the trial Court is wholly unintelligible or incomprehensible that the appellant Court can remand the suit for a fresh trial. The fact that there are some detects and infirmities in the reasoning of the trial Court is surely not a ground for the appellate Court not to do its duty of disposing of the appeal on merits. The appellate Court will be acting clearly without jurisdiction if it simply and mechanically remands a suit to the trial Court without applying its mind as to whether the judgment and the findings of the trial Court are correct and if not whether it should be reversed or set aside.

...

Ends of justice require that a party litigant who had incurred expenses and undergone all the ordeal and trouble of a protracted trial in the trial Court should not be deprived of the benefit of the adjudication and be obliged to fight the case, over again for some defect or mistake in the form of expression of the trial Court."

In the light of the above decision, We are of the opinion that there is no need for remanding the matter to the trial Court.

52.In the instant case, as stated supra, the plaintiffs have failed to establish that there is valid sale agreement. Further, the plaintiffs have also failed to establish the passing of the sale consideration of Rs.20 lakhs by producing the income tax returns and bank accounts statements. Therefore, We are of the opinion that the plaintiffs are not entitled to get the relief of specific performance. In this regard, a reference could be placed in another decision of the Hon'ble Supreme Court reported in AIR 2001 SC 2783 (A.C.Arulappan vs. Smt.Ahalya Naik), wherein it has been held that merely because it is lawful to grant specific relief, the Court need not grant such an order, thereby allowing the plaintiff to take an unfair advantage over the defendants. In the case on hand also, the plaintiffs are not entitled to any such unfair advantage.

Point No.3:-

53.It is the case of the unmarried daughters of the 1st defendants, who are the plaintiffs in O.S.No.131 of 2006, that the compromise decree which was entered into between the 1st defendant, his father Ponna Gounder and Grand-father Muthu Gounder has to be valued as a family arrangement and the share allotted to the 1st defendant in the said partition suit/compromise decree should be treated as joint family property in the hands of the father, as the daughters were already born at the time of partition. In this regard, the learned senior counsel for the defendants 2 & 3 has also drawn the attention of this Court to the clauses incorporated in the compromise decree, wherein it has been stated that 'It is hereby agreed that it's a joint family property'. Hence, according to the unmarried daughters, the suit property is the joint family property, therefore, they are entitled to claim a share in the suit schedule property.

54.But, it is the submission of the learned senior counsel for the appellants/plaintiffs that the suit schedule property is the absolute property of the father of the 1st defendant viz., Ponna Gounder having purchased the same by way of sale deed dated 07.07.1983 from Thirumalai Ammal and others. By way of compromise decree dated 21.01.1991 in O.S.No.963/1999, the suit schedule property was allotted to the 1st defendant herein. Therefore, it is only the absolute property of the 1st defendant. In fact, the suit for specific performance was filed by the plaintiffs on 06.04.2002. After filing the suit for specific performance by the plaintiffs, admittedly after receipt of the summons in the suit for specific performance, the defendants 2 & 3 have filed the suit for partition at the instigation of the 1st defendant only on 05.08.2002, only in order to frustrate the suit filed by the plaintiffs for specific performance.

55.But, it is the submission of the learned senior counsel appearing for the defendants 2 & 3 that the suit property is Hindu undivided joint family property. Further, even as per Ex.A.1, alleged sale agreement, there is a recital stating that the 1st defendant Natesan was allotted the suit property in a compromise decree passed in a partition suit filed by him. As such, the alleged sale agreement itself would prove that the suit property is a Hindu undivided joint family property. Further, the compromise decree was passed on 21.01.1991 that is long before the execution of the alleged sale agreement on 05.07.1998. Therefore, the plaintiffs cannot contend that the suit property is the

separate property of the 1st defendant Natesan and knock away the property of the minors. Further, the defendants 2 & 3 were unmarried on 25.03.1989, when the Tamil Nadu Act, 1 of 1990 came into force, as such, they are eligible to equal share along with their father Natesan, other sister and brother. Therefore, the defendants 1 to 5 are each entitled to 1/5th share over the suit property and the 1st respondent/father alone does not have any right to execute the alleged sale agreement dated 05.07.1998. In support of his contention, the learned senior counsel for the defendants 2 & 3 has also relied upon the decision reported in AIR 1979 MADRAS 1 (The Additional Commissioner of Income-tax Vs. P.L.Karuppan Chettiar), wherein the Hon'ble Full Bench of this Court has observed as follows_ "5.This is a case where a person who had obtained the property under partition died. His name was Palaniappa. When he died, his sons Karuppan was alive. We are concerned with the property which Palaniappa had obtained in the partition. In that partition, Karuppan was also a party. We are concerned with the question of devolution of the property of Palaniappa which he obtained in the partition and which had devolved on some persons, after his death. Not only was Karuppan alive at the time of the death of Palaniappa, but at the time of his death Karuppan's son was also alive. In such circumstances, under the Hindu Law, the property will devolve on the son and the grandson will also have an interest in the property; and the two together will form a Hindu undivided family (we are of course assuming that there were no female).

In the decision reported in 2004 (2) CTC 145 (Chandrasekaran Vs. Palanisamy and thirteen others), it has been held by a Division Bench of this Court as follows_ "5..... Admittedly, in the deed of partition dated 10.08.1964 (Ex.A.1), joint family properties were allotted to the first defendant and the properties allotted to the first defendant continued to be the joint family properties and when the first defendant had two sons, namely, the plaintiff and the second defendant who had right by birth in the properties at the time of settlement, the deed of settlement dated 5.6.1974 executed by the first defendant in favour of his wife, third defendant would not bind the plaintiff as the plaintiff would be entitled to 1/3rd share on the basis of pre-existing right by his birth in 1/3rd share in the joint family properties. ... "

> 56.From a reading of the above decisions as well as from a perusal of the compromise decree(Ex.A.4), We find that it is understood between the parties to treat the suit property as joint family property. Further, the entire properties acquired by the 1st defendant and his father Ponna Gounder had been thrown into the common hotch pot and treated as joint family property. At no point of time the acquired properties were enjoyed as their separate properties. Therefore, the defendants 2 & 3 are entitled to claim partition in the suit schedule property. Moreover, the plaintiffs who are stranger to the family are not entitled to question the relief of partition sought for by the defendants 2 & 3. Further, the compromise decree was passed on 21.01.1991, much earlier to the date of alleged sale agreement dated 05.07.1998.
>
> 57.It is the main contention of the learned senior counsel for the appellants/plaintiffs that the partition suit was filed only to frustrate the suit for specific performance filed by7 the plaintiff. Since this Court has already come to the conclusion that the transaction between the plaintiffs and the 1st defendant is only a loan transaction and not the sale transaction, the plaintiffs are not entitled to question the relief of

partition sought for by the defendants 2 & 3, as it has to be treated as joint family property. Therefore, the decree passed in the partition suit filed by the daughters cannot be challenged by the plaintiffs/appellants herein.

In view of the foregoing reasons, both the appeals fail and the same are dismissed, confirming the impugned judgment and decree passed by the Trial Court. Consequently, connected Miscellaneous Petitions are closed. No costs.

(R.P.S.J.,) (A.D.J.C.J.,) 26.10.2017 Internet : Yes / No Index : Yes / No ssv To, The I Additional District (FTC-I), Salem.

R.SUBBIAH, J., and A.D.JAGADISH CHANDIRA, J., (ssv) Pre-delivery Common Judgment in A.S.Nos.484 & 485 of 2008 and connected MPs 26.10.2017