IN THE COURT OF THE SUBORDINATE JUDGE OF VADAKARA

Present:- Sri.Anil K. Bhaskar, LL.M., Sub Judge

Tuesday, the 30th day of July, 2013

ORIGINAL SUIT No. 72 OF 2011

Between:

1. Nedumprath Basheer, S/o. Pocker Haji, Aged 43 years, Business, Veloor amsom Chalapram desom Vatakara Taluk, Kozhikode District.
2. Brother Nedumprath Ashraf, S/o.Pocker Haji, Aged 38 years, Business, do.do.

Plaintiffs

And:

1. Veeraliyambath Andru Haji @ Abdurahiman S/o. Mammad Haji, Aged 54 years, Business, Kummankode amsom Nadapuram desom, Vatakara Taluk, Kozhikode District.
2. Sister Veeralilyambath Mariyam, D/o. Mammad Haji, Aged 58 years, Mathath House, Iyyamgode amsom desom, Vatakara Taluk.
3. Pottantepunathil Afsal, S/o. Andru Haji, Aged 23 years, Business, Veloor amsom Chalapuram desom, Nadapuram(PO), Vatakara Talulk.
4. Sister Pottantepunathil Asma, D/o. Andru Haji, Aged 25 years, House wife, Veloor amsom Chapauram desom, Nadapuram(PO), Vatakara Taluk.
5. Mullarikandi Noorjahan, W/o. Abdul Nazar, Aged 32 years, House wife, Vanimel amsom Mambilakkool desom, Vanimel(PO), Vatakara Taluk.

Defendants

This suit is coming on 9th day of July 2013 for final hearing before me in the presence of S/Sri. N.K. Parameswaran and C.O. Ranjith kumar, advocates for the plaintiff and S/sri. K.B. Sahasranaman, T.K. Mithran, K. Ramesh and K.K. Abhilash Babu advocates for defendants 1 and 2 and S/Sri. P. Balagopalan and T.K. Arun kumar advocates for defendants 3 to 5 and having stood over to this day for consideration the court delivered the following:

JUDGMENT

1. Suit is one for specific performance.

2. Plaint averments briefly stated are as follows:- The plaint schedule property inclusive of the house therein belongs to defendants No.1 and 2 with Jenmam right and is in their actual possession. On 19.11.08, the defendants No.1 and 2 agreed to sell, and the plaintiffs agreed to purchase, the scheduled property therein for a consideration of ₹.6,60,000/- per cent. On the same day the plaintiffs paid an amount of ₹.25,00,000/- to the defendants 1 and 2 in cash towards consideration. As per the agreement a further amount of ₹.25,00,000/- has to be paid on

or before 5.12.08 towards consideration. There upon the defendants 1 and 2 were to hand over all the documents relating to the plaint schedule property to the plaintiff. It was further agreed to measure the property and to convince the plaintiffs regarding the actual extent and thereafter the balance consideration has to be paid by the plaintiffs within the period of 6 months from 19.11.08, where upon the defendants should execute and register the sale deed either in the name of the plaintiff or in the names of their nominees and also deliver possession of the property to the transferees. At the time of agreement the plaintiffs were lead to believe by defendants No.1 and 2 that the plaint schedule property is free from encumbrances or any cloud on title and they are in the absolute ownership and exclusive possession with full right of alienation. It was only on the basis of this representation, the plaintiffs agreed and entered into this contract for sale. The plaintiffs were always ready to perform their part within the stipulated time. But subsequent to the agreement, the plaintiffs came to know that a suit as OS.159/07 was instituted by one Menakkoth Ayisha and others before the Munsiff's Court, Nadapuram claiming themselves to be co-owners along with defendants No.1 and 2, and seeking partition and separate possession of their share in the property. This fact was suppressed by defendants No.1 and 2. After the trial the suit was dismissed on 31.3.08. The plaintiffs in that suit preferred an appeal as AS.32/08 before this court. In view of the information received regarding the pendency of the appeal, the plaintiffs could not pay the further amount of consideration of ₹25,00,000/- agreed to be paid on or before 5.12.08. In such circumstance, to prove the willingness and readiness of the plaintiffs, they issued a cheque for ₹.25,00,000/- drawn on the Federal Bank, Nadapuram branch in favour of the defendants No.1 and 2 by way of assurance and security. It was agreed that the cheque has to be returned to the plaintiffs on payment of equivalent amount in cash by the plaintiffs to defendants 1 and 2, as and when the agreement could be proceeded with.

3. The plaintiffs have information that appeal AS.32/08 referred above stands dismissed on 7.8.10. The plaintiffs were always and ever ready to pay the entire balance sale consideration on the basis of the actual extent of the property to be ascertained on measurement. This

was informed to defendants No.1 and 2 and they were requested several times to perform their part of the contract but they got it postponed by stating lame excuses. The defendants No.1 and 2 have deliberately committed breach of the agreement. On 2.9.10 the plaintiffs caused to issue a registered notice to the defendants No.1 and 2 requiring them to perform their part of the agreement and complete the sale. To the said notice the defendants No.1 and 2 sent a reply on 24.9.10. They had admitted the agreement and also the receipt of ₹.25,00,000/- as advance sale consideration and also receipt of the cheque for ₹.25,00,000/-. The pendency of the earlier litigation was also admitted. But they would say that the plaintiffs entered into the agreement, with the full knowledge about the earlier litigation and the sale agreement was entered into after the plaintiffs were convinced that there was no interim order in force preventing transfer/alienation of property. This allegation is not at all true. In the reply notice it is also stated that, as requested by the plaintiffs, a portion of the plaint schedule property has been transferred by the defendants No.1 and 2 to the defendants 3 to 5 herein as the persons nominated by the plaintiffs. This is absolute falsehood and they are not the nominees of the plaintiffs. There was no agreement or understanding between the plaintiffs and defendants No.3 to 5. There is also no truth in the allegation in the reply notice that the plaintiffs had committed breach and they were not having sufficient money to get the sale deed executed in their name. The assignment deeds executed in favour of defendants No.3 to 5 are not at all binding upon the plaintiffs and it is neither bona fide nor supported by consideration. Infact, this assignment deed was created in collusion between the defendants as an attempt to defeat the rights of the plaintiffs and it is only to be ignored.

4. The plaintiffs are in no way responsible for not fulfilling the terms of the agreement and completing the sale. The breach was committed by the defendants 1 and 2. The plaintiffs are convinced that they have to resort to this suit to have the agreement specifically enforced. Moreover the time was never understood by the parties to be the essence of the agreement. With these pleadings the plaintiffs filed the above suit for specific performance subject to deposit of balance consideration by the plaintiffs.

5. The defendants entered appearance and filed written statements. The defendants No.1 and 2 in their joint written statement raised the following contentions:- The execution of the agreement for sale as well as the receipt of advance consideration of ₹.25,00,000/- and also receipt of a cheque for ₹.25,00,000/- are all admitted. At the same time they would contend that the suit is misconceived in law and unsustainable on facts and the same is liable to be dismissed. These defendants never made any false representation to the plaintiffs prior to the execution of the sale deed. At the time of the execution of sale agreement, OS.159/07 stood dismissed by the trial court. The plaintiffs were fully aware of the pendency of AS.32/08 before this court when they bargained for the plaint schedule property. The copy of the judgment in OS.159/07 was made available to the plaintiffs. In fact, the sale agreement was entered into after the plaintiffs were convinced that there was no interim order in force preventing transfer/alienation of property. That being so it is idle for the plaintiffs to contend that these defendants had suppressed the details of the litigation from the plaintiffs. Since there was no injunction order in force, there was absolutely no

impediment for sale of the property. There is no truth in the statement that the 2nd installment of the advance amount of ₹.25,00,000/- was not paid in cash due to the pendency of litigation. The cheque referred to in the plaint was given only because the plaintiffs were not having the requisite funds to pay the amount of ₹.25,00,000/-. Handing over of the cheque was definitely not on account of the pendency of AS.32/08. It was the plaintiffs who had committed breach of contract being not at all ready and willing to perform his part of the contract. Because of the lack of funds the plaintiffs delayed the matter indefinitely. These defendants had executed an assignment deed, registered as document No.1064/09 of S.R.O, Nadapuram, in favour of the nominees of plaintiffs the defendants No.3 to 5 herein, assigning to them an undivided 1 out of 4 share in the plaint schedule property. The aforementioned document was executed on 16.5.09 by these defendants as required by the plaintiffs. The value of the undivided 1 out of 4 share at the rate fixed under the agreement for sale would work out to ₹.49,50,000/-. A yet another sale deed was prepared at the instance of the plaintiffs on 18.5.09 by virtue of which another undivided 1 out of 4 share in the property was to be transferred by these defendants to Kundancheri Andru Haji and wife Rukhiya. The defendants 3 to 5 and the above mentioned Andru Haji are known to be relatives and close friends of the plaintiffs. The plaintiffs themselves had made all arrangements to prepare the sale deeds bearing all expenses. It was agreed and understood between the plaintiffs and these defendants that the entire sale consideration for the half share in the property amounting to ₹.99,00,000/- would be paid by them at the time of execution of second sale deed after deducting the amount of ₹.25,00,000/- already paid. It was further agreed by the plaintiffs and these defendants in the presence of mediators, that the cheque handed over by the plaintiffs for ₹.25,00,000/- would be returned on receipt of balance sale consideration in cash. But, after preparing the sale deed in stamp paper worth ₹.56,000/-, the plaintiffs were not able to pay the sale consideration required to be paid at that point of time. Then the plaintiffs agreed to raise the requisite amount, but they failed to raise the same. It was only because of the inability on the part of the plaintiffs to raise the required consideration amount the transaction failed. These defendants are always ready and willing to perform their part of the contract and they were always ready to transfer the property even during the pendency of the appeal period. It is submitted that the plaintiffs have derived improper and unreasonable gain by getting an undivided 1 out of 4 shares in the plaint schedule property transferred to their nominees without paying the proportionate sale consideration. It is submitted that there is absolutely no bonafides in filing this suit after nearly 2½ years from the sale agreement. Even the legal notice was issued after 2 years. The plaintiffs want the transaction to be completed leisurely as and when they are liable to pay enough money to pay the balance sale consideration. The plaintiffs herein are real estate businessmen. As expected, they were not able to identify willing purchasers to pool money for completing transaction. The conduct of the plaintiffs reveals that they had dispensed with the performance of the contract by their own default and latches. There is absolutely no truth in the contention of the plaintiffs that the defendants 3 to 5 are strangers to them.

6. It is submitted that the property prices have faced substantial increase all over Kerala and the market value of the plaint schedule

property has gone up several times during the past 3 years. The plaintiffs are trying to take advantage of the phenomenal increase in the land value and to grab the property for the consideration fixed nearly 3 years back. Therefore if a decree of specific performance is granted these defendants will be put to great hardship, injury and irreparable loss. On all these grounds these defendants pray for dismissal of the suit with costs.

7. The defendants 3 to 5 in the written statement raised the following contentions:- It is submitted that on 2.4.09 the plaintiffs as A party and these defendants father Pottanpunathil Andru along with Kundancheri Andru as B party, had entered into an agreement for sale with regard to the very same plaint schedule property. This agreement for sale was executed in continuation of the agreement for sale referred in the plaint. The second agreement dated 2.4.09 is fully binding upon the plaintiffs and they are bound to perform their part of the agreement. As per this agreement dated 2.4.09, an amount of ₹.65,00,000/- was paid by B party to the plaintiff as advance sale consideration and they had accepted the same. The original agreement dated 2.4.09, handed over

by these defendants father, has been produced along with this written statement. As per this agreement the plaintiffs had agreed to construct a multi storied commercial building in the plaint schedule property and after fixing the total consideration amount for the landed property as well as the building to be constructed as ₹.4,30,00,000/-, it was agreed upon to assign half right in the property to B party for a total consideration of ₹.2,15,00,000/- and it was towards this sale consideration the B party had paid ₹.65,00,000/- as advance. The plaintiffs have agreed to purchase the half right in the plaint schedule property from the defendants No.1 and 2 in the name of the B party or their nominees. Later acting in accordance with the terms of this agreement, as nominated by the B party to the agreement, ¼th right in the plaint schedule property was assigned in the name of defendants 3 to 5 by the defendants 1 and 2. This document was registered as document No.1064/09 before the S.R.O, Nadapuram. The defendants 3 to 5 are none other than the children of Pottanpunathil Andru, one among the B party, and moreover these defendants are really the relatives of the plaintiffs. There is absolutely no truth in the allegation that the sale deed was executed without their knowledge or consent. Infact the plaintiffs had also agreed to get a sale deed executed with regard to 1/4th right in the plaint schedule property by the defendants No.1 and 2 in favour of Kundancheri Andru but so far it has not been executed. This being the true facts, the plaintiffs have instituted the suit suppressing the material facts and without impleading the two Andru's who are the B party to the agreement for sale dated 2.4.09. Without their juncture the suit itself is bad for non-joinder of necessary parties. On all these facts these defendants also pray for the dismissal of the suit with costs.

8. The issues that arise for consideration are:-

1. Whether the non-performance of agreement for sale dated 19.11.08 was due to the default of the plaintiffs ?
2. Whether the sale deed No.1064/09 of SRO, Nadapuram was executed as per the direction of plaintiffs ?
3. Whether the plaintiff is entitled to a decree of specific performance as per the agreement for sale dated 19.11.08 ?
4. Reliefs and costs.

9. The evidence in this case consists of the oral testimony of PW1 the 2nd plaintiff as well as Exts.A1 to A12 documents marked on the side of the plaintiffs, Ext.B1 marked on the side of the defendants No.3 to 5 through PW1 in cross-examination. No oral evidence was adduced by the defendants. Heard both sides.

10. Issue No.1 :- First of all I will advert to certain basic facts which stands admitted and proved, and then advert to the disputed facts. The plaint schedule property having an extent of 30 cents, which also takes into a residential house, belonged to the defendants No.1 and 2 who are brother and sister. The plaintiffs are brothers. On 19.11.08, the plaintiffs and defendants 1 and 2 had entered into a written agreement for sale and thereby defendants No.1 and 2 agreed to sell and the plaintiffs agreed to purchase,the plaint schedule property for a consideration of ₹.6,60,000/- per cent. On the same day itself the plaintiffs paid ₹.25,00,000/- in cash as advance amount towards sale consideration. Ext.A1 is the said agreement for sale. The major stipulations contained in the agreement for sale are th e following;

1) That the plaintiffs shall pay to the defendants 1 and 2 ₹.25,00,000/- towards the sale consideration on or before 5.12.08.

2)Upon receipt of the said amount which is to be endorsed on the agreement, the plaintiff shall hand over all the required title documents with regard to the plaint schedule property to the satisfaction of the legal consultant.

3) Thereafter the defendants 1 and 2 have to get the plaint schedule property measured on the basis of F.M.B with the assistance of the local village officer, in the presence of the plaintiffs and thereby to convince the plaintiffs regarding the actual extent covered by the plaint schedule property.

4) Thereafter the plaintiffs have to pay the balance sale consideration for the actual extent ascertained by measurement, to the defendants 1 and 2. This payment has be made within 6 months from the date of agreement (ie. on or before 19.5.12).

5)Upon receipt of the balance sale consideration, the defendants 1 and 2 have to execute and register sale deed either in the name of the plaintiffs or in the name of their nominees.

6) Both the parties are bound to perform their part of the contract. If anybody commits breach in performing their part, the other party will have the right to take legal action against the defaulter and also entitled to get compensation for the loss sustained.

11. Infact there was an earlier litigation with regard to the plaint schedule property, in between the defendants 1 and 2 and their relatives, as OS.159/07. It was instituted by one Menakkoth Ayisha and others before the Munsiff's Court, Nadapuram claiming themselves to be co-owners along with defendant 1 and 2, seeking partition and separate possession of their share over the same property. After trial, the suit was dismissed on 31.3.08 i.e., before the date of agreement. Against this judgment and decree, the plaintiffs therein had preferred appeal as AS.32/08 before this court. This appeal was pending as on the date of Ext.A1 agreement. But the agreement, does not make any mention about this litigation.

12. The plaintiffs would say that this fact has been suppressed by the defendants 1 and 2 whereas defendants 1 and 2 would say that all those facts were revealed to the plaintiffs before the execution of the agreement itself.

13. Anyway it is admitted by Pw1 in evidence that within 5 days the facts regarding this litigation has been made known to the plaintiffs. Before the next due date for payment itself, the litigation details has been recorded by an express endorsement on the reverse side of the first page of Ext.A1 agreement. Even though this endorsement speaks only about the suit OS.159/07, it has admitted in evidence that the factum of the pendency of appeal was also disclosed at that time.

14. The plaintiffs have not paid ₹.25,00,000/- in cash to the defendants 1 and 2 on or before 5.12.08 as per the terms of Ext.A1 agreement. In stead of that the plaintiffs handed over a cheque for ₹.25,00,000/- to the defendants 1 and 2 as security upon a condition that the defendants 1 and 2 have to return the cheque as and when the plaintiffs pay the same in cash. This fact is recorded in the second part of

the endorsement found on the reverse side of the first page of Ext.A1 agreement. Thereafter nothing perceptible happened up to 2.4.09. As noticed earlier, the time limit fixed for the performance of the contract was to expire on 19.5.09. On 2.4.09 the plaintiffs entered into an agreement for sale with 2 Andru Hajis, one Pottanpunathil Andru Haji and other one Kundancheri Andru Haji. As per this agreement it was decided to construct a multi storied commercial complex in the plaint schedule property by the plaintiffs and to sell half right in plaint schedule property as well as in the building to be constructed, to these 2 Andru Hajis. The total market value of the plaint schedule property and the building to be constructed was fixed as ₹.4,30,00,000/- and the consideration to be paid by 2 Andru Hajis was fixed as ₹.2,15,00,000/-. Towards this sale consideration, the 2 Andru Hajis together paid ₹.65,00,000/- to the plaintiffs as advance consideration. As per this agreement dated 02.04.09, Firstly the plaint schedule property has to be purchased and then the proposed building is to be constructed. What has been specifically stated in the said agreement is that the plaintiffs have decided to purchase the plaint schedule property from the defendants

1 and 2 on 10.4.09 and while purchasing the said property the half of the property will be purchased in the name of 2 Andru Hajis. It was further agreed that after the purchase of the plaint schedule landed property the parties will execute a separate detailed agreement with regard to the construction of the commercial complex. The said agreement also contains a clause that both parties are bound to perform their part of the contract without fail and if anybody defaulted, the other party have the right to take legal action and to obtain compensation from the defaulted party. The said agreement is marked as Ext.B1.

15. But nothing had taken place on 10.4.10, but at the same time on 16.5.10 i.e., 3 days before the time-period mentioned in Ext.A1 agreement got expired, the defendants 1 and 2 executed a sale deed assigning 1/4th portion of the plaint schedule property to the 3 children of one of the B party to Ext.B1 agreement i.e., Pottanpunathil Andru Haji. Ext.A6 is the said document. Thereafter in furtherance of both the agreements, nothing noticeable took place.

16. The appeal AS.32/08 which was pending before this court

was disposed only on 7.8.10. It ended in dismissal. On 2.9.10 plaintiffs caused to issue a registered notice to the defendants No.1 and 2 requiring them to perform their part of the agreement and complete the sale. Ext.A3 is the copy of the lawyer's notice. In the lawyer's notice, the plaintiffs have not mentioned anything about Ext.B1 agreement. To that notice the defendants No.1 and 2 sent a reply on 24.9.10. The said reply is marked as Ext.A5.

17. Later after an expiry of about 6 months the plaintiffs instituted the above suit also impleading the assignees under Ext.A6 sale deed and contending that Ext.A6 sale deed is not binding upon them and those assignees were not the assignees of the plaintiffs and therefore it is to be ignored and they are entitled to get relief for specific performance.

18. Now I come to the disputed facts. The sequence of events right from the date of execution ofExt.A1 agreement till the filing of the suit, as described in the plaint is as follows. At the time of Ext.A1 agreement executed on 19.11.08 the appeal AS.32/08 was pending but

this fact was not revealed out by the defendants 1 and 2. On the other hand the plaintiffs were lead to believe by defendants 1 and 2 that the plaint schedule property is free from encumbrances or cloud on title and they are free to transfer the same. It is because of this assurance the plaintiffs agreed to purchase the property. It is pointed out that no prudent man would be prepared to purchase a property involved in a litigation the result of which is unpredictable and nobody would ordinarily willing to undertake the risk. The plaintiffs were always ready and willing to perform their part of the contract. Even after the plaintiffs came to know about the pendency of the earlier litigation they don't want to pull out from the contract on the other hand, still, they were willing to purchase the property but they were not ready to take the risk of paying ₹.25,00,000/- in cash before it is seen that the earlier litigation ends in favour of the defendants. To show their bonafides and to prove their willingness they handed over the cheque for ₹.25,00,000/- within the time for payment fixed in Ext.A1 agreement. As and when the earlier litigation come to an end by dismissal of AS.32/08 on 7.8.10, the plaintiffs had taken steps for performance of the agreement. Since oral demands made by the plaintiffs does not get good response, without any further delay the plaintiffs issued demand notice to the defendants 1 and 2. since defendants 1 and 2, instead of coming forward to perform their part of the agreement, they had sent a reply stating untrue facts and also informing that they had sold a portion of the plaint schedule property to third parties, after collecting the required details, the plaintiffs have instituted the above suit against defendants 1 and 2 as well as the assignees who are defendants 3 to 5. It is submitted that the plaintiffs were always ready and willing to perform their part of the contract and there is absolutely no latches on their side and that the subsequent assignees being not the nominees of the plaintiffs having any connection with them, the plaintiffs are entitled to get a decree for specific performance of the plaint schedule property ignoring Ext.A6. It is submitted that as far as this agreement is concerned the time was not the essence of the contract and the plaintiffs were always and even now ready and willing to perform their part of the contract.

19. Now I will come to the defence put forward by the

defendants. Defendants 1 and 2 had raised the following contentions. The plaintiffs were fully aware of the pendency of AS.32/08 before this court when they bargained for the plaint schedule property. The sale agreement was entered into after the plaintiffs were convinced that there was no interim order in force preventing transfer/alienation of property. They never suppressed the details of litigation from the plaintiffs. There was absolutely no impediment for sale of the plaint schedule property on account of the pendency of appeal. The non-payment of the second installment of consideration within the prescribed time itself will prove that the plaintiffs breached the contract. The contention of the plaintiffs that they were not in a position to pay the amount of ₹.25,00,000/- on account of the pendency of the appeal is absolutely false. The cheque referred to in the plaint was given by the plaintiffs because they did not have the requisite money to pay that much amount. It was only on account of lack of funds the plaintiffs issued cheque for ₹.25,00,000/-. It is false to allege that the plaintiffs were continuously ready and willing to perform their part of the contract. The transaction could not be completed only on account of the default, neglect and latches on the part of the plaintiffs. It is pointed out that the plaintiffs are persons indulging in large scale real estate business and the situations had gone against their expectation and they were not able to identify willing purchasers to shell out money for completing the transaction. The failure and inability of the plaintiffs to raise the requisite balance consideration is the reason for non-completion of the transaction. On 16.5.09 these defendants had executed an assignment deed in favour of the nominees of the plaintiffs who are the defendants 3 to 5 herein thereby assigning 1 out of 4 shares in the plaint schedule property. The value of this 1/4th share, at the rate fixed under the sale agreement, worked out to ₹.49,50,000/-. Another sale deed was also prepared at the instance of the plaintiffs on 18.5.09 by virtue of which another 1/4th share in the property was to be transferred by these defendants to Kundancheri Andru Haji and wife Rukhiya. The plaintiffs themselves have made all arrangements to prepare the sale deed at their expense. It was agreed and understood between these plaintiffs and defendants that the entire sale consideration for the half share in the property amounting to ₹.99,00,000/-would be paid by them at the time of execution of the second sale deed after deducting ₹.25,00,000/- already paid in advance. It was also agreed that after the execution of the second sale deed the cheque will be returned, but after preparing the sale deed in stamp paper worth ₹.56,000/- the plaintiffs were not able to raise the consideration amount and complete the transaction. At last it is submitted that even otherwise the plaintiffs are not entitled to get a decree for specific performance for the reason that the property prices have faced substantial increase all over Kerala and the market value of the plaint schedule property has gone up several times during the past 3 years. The plaintiffs are trying to take advantage of the phenomenal increase in the land value and grabbing the property for the consideration fixed nearly 3 years back. If the relief of specific performance is to be granted these defendants would be put to great hardship, injury and loss. It is also submitted that the defendants had already assigned property worth ₹.49,50,000/- to the nominees of the plaintiffs on receipt of ₹.25,00,000/-.

20. The defendants 3 to 5 raised the following contentions. As

per Ext.B1 agreement the plaintiffs are bound to get a sale deed executed by the defendants 1 and 2 with regard to 1/4th of the plaint schedule property in the name of Pottanpunathil Andru Haji or his representatives. The consideration for this amount has already been paid to the plaintiffs by the B party to Ext.B1 agreement. It is in accordance with the terms of Ext.B1 agreement that the defendants 1 and 2, on the request of the plaintiffs, had executed Ext.A6 assignment deed with regard to 1/4th of the plaint schedule property in the name of the representatives of Pottanpunathil Andru Haji the defendants 3 to 5 herein who are none other than the children of Pottanpunathil Andru Haji. As per Ext.B1 the plaintiffs are also bound to get a sale deed executed by defendants 1 and 2 in the name of Kundancheri Andru Haji or his representatives with regard to another 1/4th of the plaint schedule property but that has not been done so far even though preparations were made to execute the sale deed. Now the attempt of the plaintiffs has to make unjust enrichment which cannot be permitted at all. It is submitted that Ext.A6 is binding upon the plaintiffs.

21. Now I will make a reference to the oral as well as the documentary evidence available before the court. The oral evidence available herein is that of the sole oral testimony of PW1 the 2nd plaintiff. In evidence he admitted the execution of Ext.B1 agreement with 2 Andru Hajis on 2.4.09. He also admitted that as on the date of execution of Ext.B1 the plaintiffs were aware about AS.32/08 pending before this court. He also conceded that the plaintiffs are persons indulged in real estate business in Kozhikode district. He deposed that the plaintiffs got knowledge about the earlier litigation within 5 days from the date of Ext.A1 and on knowing about it the plaintiffs never want to withdrawn from the agreement. He further deposed that the father of defendants 3 to 5 is a distant relative of the plaintiffs. He admitted that the receipt of ₹.65,00,000/- from the 2 Andru Hajis as advance to the sale consideration mentioned in Ext.B1. He admitted that the 2 Andru Hajis are bound to get sale deeds executed by the defendants 1 and 2 regarding the half share of the plaint schedule property. He further deposed that the plaintiffs had not done anything to carry out the proposed construction in the plaint schedule property. He would further say that after Ext.B1 and

receipt of ₹.65,00,000/- as advance sale consideration, no discussions had taken place in between the plaintiffs and 2 Andru Hajis regarding the further steps to be taken as per Ext.B1 agreement. In evidence he denied the suggestion made by the other side that the plaintiffs were having no sufficient amount in their hand to pay the balance sale consideration as fixed in Ext.A1 agreement. He deposed that his bank passbooks will prove this fact and subsequently he produced the extract of the Bank accounts .

22. The documentary evidence consists of Exts.A1 to A12 marked on the side of the plaintiffs and Ext.B1 marked in cross. I had already made reference to Ext.A1 agreement, Ext.A2 lawyer's notice, Exts.A5 and A6 assignment deeds. Exts.A3 and A4 are the acknowledgement cards to prove receipt of notice by the defendants 1 and 2. I had also referred to Ext.B1 agreement. Now what remains are Exts.A7 to A12. Ext.A7 is the copy of the computer statement of accounts of 1st plaintiff regarding his S.B.account in State Bank of India bank road, Calicut for the period from 19.7.07 to 12.12.07. Ext.A8 is the copy of

statement of S.B account of the 1st plaintiff in Canara Bank, Nadapuram branch for the period from 16.12.08 to 8.1.09. Ext.A9 is the copy of the statement of the very same account for the period from 30.5.08 to 26.3.09. Ext.A10 is the statement of bank account of the 1st plaintiff with State Bank of Travancore, Kallachi branch for the period from 1.4.09 to 31.3.10. Ext.A11 is the statement of the bank account of the 1st plaintiff with Canara Bank, Parakkadavu branch for the period from 1.1.08 to 13.5.10 and Ext.A12 is the copy of statement of bank account of 1st plaintiff with Federal Bank, Nadapuram branch for the period from 1.3.12 to 25.3.13. These are all mere Photostat copies not authenticated by any bank officials. These documents were produced after the examination of Pw1 and marked subject to proof. But no further proof has been adduced to substantiate its authenticity. Therefore, strictly speaking, these documents are not admissible in evidence. Since both parties argued much upon its contents, I will consider it on merits assuming that they are all admissible documents. These documents were produced to prove the availability of funds to make the payment of ₹.25,00,000/- in the month of December 2008 and an amount of ₹.11,70,000/- after the said period. Ext.A7 is for the period from 19.7.07 to 12.12.07. So Ext.A7 is not of much relevance as far as this case is concerned. Ext.A8 will only prove that the plaintiffs were having an amount of ₹.20,00,000/- in his credit on 7.1.09. This document does not prove that the plaintiffs were having sufficient money in their account either to pay ₹.25,00,000/- in December 2008 or to pay more than ₹.10,00,000/- during the subsequent periods. Ext.A9 also will not help the plaintiffs. It would show that either at the time of execution of Ext.A1 sale deed or subsequently, the plaintiffs were having more than ₹.1,30,000/- in their hand. Ext.A10 will show that on 15.6.09 ₹.10,00,000/- was credited but on the same day ₹.5,00,000/- was withdrawn and later on 16.6.09 ₹.20,00,000/- was credited and on the same day ₹.25,00,000/- were withdrawn and further on 15.7.09 ₹.10,00,000/- was credited and on the same day ₹.10,00,000/- was withdrawn and on 20.7.09 ₹.7,50,000/- was deposited and on the same day it was withdrawn. It is a N.R.I account. Ext.A11 is also not helpful for the plaintiffs. It will only prove that ₹.30,00,000/- was deposited on 1.2.10 and on the same day it was withdrawn. Ext.A12 is of the recent period. It will show that the amount in credit never had gone more than ₹.5,50,000/-. Therefore it can be seen that Exts.A7 to A12, to the most, will only prove that the maximum amount came into the account of the plaintiffs was only ₹.30,00,000/- and that is in the year 2010.

23. Now I will evaluate the above referred evidence in the factual and legal background and find out whose case is more probable and believable, who committed the breach of contract and also whether the plaintiffs are entitled to get the discretionary relief of specific performance ignoring Ext.A6 sale deed . To ascertain the legal background I will make a reference to the decisions cited by the parties. The plaintiffs have cited the following decisions to substantiate their contentions. The decision of Hon'ble Supreme Court in Dr.Jiwan Lal and others V. Briji Mohan Mehra and another (AIR 1973 SC 559) was cited for the proposition that where the plaintiffs have been pursuing their claim under an agreement and the specific performance of the agreement on the date of the institution of the suit was not likely to cause any prejudice to the other party, the suit could not be dismissed on account of delay. That was a case wherein suit was not filed immediately after the breach

but filed after 2 years. But if we go into the facts it can be seen that, that was a peculiar case wherein due to the delay no disadvantages has been caused to the defendant. The court had noted that the prices of the property started depreciating in or about October 1962 when there was Chines aggression on India. The suit was instituted after the Chinese aggression. Taking those facts into consideration the court held that granting the relief of specific performance by the court will not cause any prejudice to the defendants.

24. The second decision cited is that of the Hon'ble Supreme Court in Prakash Chandra V. Angadlal and others (AIR 1979 SC 1241). There the Hon'ble Supreme Court held that the ordinary rule is that specific performance should be granted and it ought to be denied only when equitable considerations point to its refusal and the circumstances show that damages would not constitute an adequate relief.

25. In Ramakrishna Pillai & Anr. V. Muhammed Kunju & Ors. (2008 SAR (Civil) 311) the Hon'ble Supreme Court held that there was no plea either in the written statement or in the cross objections filed in the appeal

before the High Court, that the plaintiffs were not ready and willing to fulfill their part of the obligation.

26. In Silvey and Ors. V. Arun Varghese and Anr. (2008 SAR (Civil) 308) the Hon'ble Supreme Court held that the conduct of the defendant cannot be ignored while weighing the question of exercise of discretion decreeing or denying a decree for specific performance. There, it has brought out in evidence that the defendants failed to furnish to the plaintiff with all documents which resulted in the delay of execution of the sale deed.

27. In M/s.J.P.Builders & Anr. V. A.Ramadas Rao & Anr. (2011 SAR (Civil) 69) the Hon'ble Supreme Court held that the words "ready" and "willing" implied that the person was prepared to carry out the terms of the contract. The distinction between "readiness" and "willingness" is that the former refers to financial capacity and the latter to the conduct of the plaintiff wanting performance. Generally readiness is backed by willingness. In that decision the Hon'ble Supreme Court quoted a paragraph from its earlier judgment in N.P.Thirugnanam V. Dr.R.Jagan

Mohan Rao & Others ((1995) 5 SCC 115 at para 5) which reads as follows." ….Sec.16(c) of the Act envisages that plaintiff must plead and prove that he had performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than those terms the performance of which has been prevented or waived by the defendant. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was always ready and willing to perform his part of the contract."

28. As far as the facts of the case reported in 2011 SAR (Civil) 69, the Hon'ble Supreme court confirmed the finding of the Hon'ble High Court that the plaintiffs therein are entitled to get the relief of specific performance. The factual conclusion as stated in para 17 is as follows. "In his oral evidence before the court, the plaintiff – PW1 had reiterated and in fact asserted that he was always ready with the money and duly pursuing the OTS along with defendant 1 and 2. Insofar as readiness and willingness on the part of the plaintiff is concerned, apart from the specific plea in the plaint about the payment and advance of substantial amount, he also placed the relevant materials in the form of letters to show that he was corresponding with the Bank for early settlement of the dues. In other words, the assertion in the form of specific plea in the plaint and correspondence in the form of letter, his assertion in the witness box

at the time of trial, the courts below are right in arriving at a conclusion that the plaintiff has proved and complied with the mandates provided u/s.16(c) of the Specific Relief Act."

29. In Radhamani V. Babu (2012 (4) KLT SN 92 (C.No.81)) our Hon'ble High Court held that it is for the subsequent transferee to show that he purchased the property in ignorance of the previous contract and in good faith and in this regard 3 essentials to be proved are the payment of full consideration, establishment of good faith and ignorance of the original contract at the time the sale was effected.

30. In Prakash Chandra V. Narayan reported in 2012 SAR (Civil) 481) Hon'ble Supreme Court held that in a case of specific performance, hardship is a good defence provided such defence is taken by the defendant and evidence in support of such defence is brought on record. Considering the facts of that case, the Hon'ble Supreme Court found that no such defence was taken by the respondent and no evidence was brought on record in its support, but the Hon'ble High Court failed to take notice of that and therefore the refusal to grant the relief of

specific performance by the Hon'ble High Court is to be reversed.

31. In Narinderjith Sing V. North Star Estate Promoters Ltd. (2012 (SAR (Civil) 544) Hon'ble Supreme Court held that escalation in the price of the land cannot be a ground for denying relief of specific performance and further mere fact that the contract is onerous to the defendant is not sufficient to deny the relief. That was a case wherein the court found that the defendant had neither pleaded hardship nor produced any evidence to show that it will be inequitable to order specific performance of the agreement. Rather, the important plea taken by the defendant was that the agreement was fictitious and fabricated and his father had neither executed the same nor received the earnest money and this contention was found to be whole untenable by the courts. In this given circumstance the Hon'ble Supreme Court refused to interfere with the judgment of the Hon'ble High Court granting the relief of specific performance.

32. In Satya Jain (D) Thr.Lrs. And Others V. Anis Ahmed Rushdie (D) Thr.Lrs. & Ors. (2013 SAR (Civil) 120) the Hon'ble Supreme Court held

that no strait jacket formula can be laid down with regard to the exercise of the discretion to direct specific performance. The ultimate guiding test would be the principles of fairness and reasonableness as may be dictated by the peculiar facts of any given case, which features the experienced judicial mind can perceive without any real difficulty. It must however be emphasized that efflux of time and escalation of price of property, by itself, cannot be a valid ground to deny the relief of specific performance. That was a case wherein there occurred long efflux of time over 40 years and in the meanwhile there caused galloping of value of real estate. It was proved in that case that this delay occurred not because of the fault of the plaintiffs and the plaintiffs were keenly participating in the proceedings till date showing the live interest on their part to have the agreement enforced in law. The defendant in that case was a British citizen and since he was away from the country the plaintiff has to wait for 7 years to file the suit. Considering all these fact the Hon'ble Supreme Court granted the relief of specific performance, but to meet the ends of justice, with a direction to pay the present prevailing market price of the property.

33. In Vidhyadhar V. Mankikrao and another (AIR 1999 SC 1441) the Hon'ble Supreme Court held that "where a party to the suit does not appear into the witness box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct."

34. The defendants cited the ruling of Hon'ble Supreme Court in Saradamani Kandappan V. S.Rajalakshmi & Ors. (2011 SAR (Civil) 630). In that case the Hon'ble Supreme Court had taken into consideration the historical background behind the principles laid down by the court "normally the time was not an essence in performance of contracts relating to immovable property and an urgent need to revisit the principles in view of the changed circumstances arising from inflation and steep increase in prices. The court held that the purchaser can no longer take shelter under the principle that time is not of essence in performance of contracts relating to immovable property to cover his delays, latches, breaches and non-readiness. It is very much beneficial to extract paragraph 25 of the said judgment which reads as follows. "The reality

arising from this economic change cannot continue to be ignored in deciding cases relating to specific performance. The steep increase in prices is a circumstance which makes it inequitable to grant the relief of specific performance where the purchaser does not take steps to complete the sale within the agreed period, and the vendor has not been responsible for any delay or non-performance. A purchaser can no longer take shelter under the principle that time is not of essence in performance of contracts relating to immovable property to cover his delays, latches, breaches and 'non-readiness.' The precedents from an era, when high inflation was unknown, holding that time is not of the essence of the contract in regard to immovable properties, may no longer apply, not because the principle laid down there is unsound or erroneous, but the circumstances that existed when the said principle was evolved, no longer exist. In these days of galloping increases in prices of immovable properties, to hold that a vendor who took an earnest money of say about 10% of the sale price and agreed for three months or four months as the period for performance, did not intend that time should be the essence, will be a cruel joke on him and will result in injustice. Adding to the misery is the delay in disposal of cases relating to specific performance as suits and appeals therefrom routinely take two to three decades to attain finality. As a result, an owner agreeing to sell a property for Rs. One lakh and received Rupees Ten Thousand as advance may be required to execute a sale deed a quarter century later by receiving the remaining Rupees Ninety Thousand, when the property value has risen to a crore of rupees."

35. That was a case wherein the terms of contract makes it clear that payment of sale price did not depend upon the execution of sale deed. The purchaser had to fulfill her obligations with regard to payment of price as provided in the agreement and thereafter vendors were required to perform their reciprocal promise of executing sale deed either in her name or in the names of her nominees. The Hon'ble Supreme court while considering the effect of Sec.55 of the Contract Act, observed that the question when time is the essence of the contract with reference to the performance of a contract, what generally may arise for consideration either with reference to the contract as a whole or with

reference to a particular term or condition of the contract which is breached. In a contract relating to sale of immovable property if time is specified for payment of price but not in regard to the execution of sale deed, time will become the essence only with reference to payment of sale prices but not in regard to execution of sale deed. In that case the Hon'ble Supreme Court denied the relief of specific performance and ordered return of the advance amount with interest.

36. That was a case wherein the agreement of sale stipulates specific dates for the payment of the consideration amount and these dates were not the dates fixed for the execution of sale deed. There the agreement of sale was executed on 17.1.1981. The consideration amount has to be paid in instalments and the last instalment has to be paid on or before 30.5.1981. It was made clear in the agreement that the payments on dates is the essence of this contract and in case of default the other party can cancel the agreement. It is further stipulated that after the receipt of sale consideration the vendor has to convince the vendee about the title deed of property if the vendee finds that the title of the

property to be unsatisfactory or unexpected he can cancel the contract and claims the advance amount. On the other hand if he satisfied with the title the vendor has to execute the sale deed at the convenience of the vendee. In that case all the instalments except the last one was paid by the vendee within time. Infact a part payment was also made as far as the last instalment but the balance he failed to pay. Later the vendor cancelled the contract on the ground of default. Then vendee came up with the suit for specific performance contenting that the vendor failed to hand over the original title deeds and that is the reason why he failed to make the payment. It is pointed out that he was always ready and willing and that is why he made part payment towards the last instalment.

37. The Hon'ble Supreme Court found that the payments on due dates is the essence of the contract and the question of satisfying the title to the property cannot be combined with the obligation on the part of the vendee in paying the consideration amount. In other words the court found that the contract contains reciprocal promises and the payment of consideration is a pre-condition for entering into the next stage regarding

the question of satisfying the title to the property. On final analysis the Honorable supreme court found that since the vendee failed to make payment within the stipulated time he is not entitled to get the relief of specific performance.

38. A close evaluation of all the above decisions will re-emphasise and reinforce the most fundamental rule that what is more important is the facts involved and the law will follow the facts and not otherwise. Generally speaking, the legal proposition that emerges from the discussions made above, can be summarized as follows;- In these days of universal day to day escalation of the prices of immovable properties- steeply, by leaps and bounds and the galloping inflation, if there is delay in filing the suit the plaintiff has to explain the delay, otherwise he cannot get the relief of specific performance. At the same time mere escalation of price and inflation cannot be a ground for denying the relief of specific performance if it is proved before the court that there is absolutely no latches on the side of the plaintiff and the delay occurred cannot be attributed to the acts and deeds of the

plaintiff and further there is clear evidence to prove that he was continuously and consciously pursuing the agreement for sale. In such cases the suit could not be dismissed on account of delay alone, if it doesn't cause any prejudice to the other party. In this context the conduct of the defendant cannot be ignored. It is for the defendant to plead and prove hardship to avoid a decree of specific performance. The question whether time is the essence of the contract is purely a question of fact and it depends upon the real intention of the parties, which is to be gathered from the terms of the contract. In a contract relating to sale of immovable property if time is specified for payment of price but not in regard to the execution of sale deed, time will become the essence only with reference to payment of sale prices. If it is found that the contract contains reciprocal promises and the payment of consideration is a pre-condition for entering into the next stage regarding the question of satisfying the title to the property, the non-payment of consideration amount within the stipulated time will disentitle the plaintiff from getting the relief of specific performance. The ultimate guiding test would be the principles of fairness and reasonableness as may be dictated by the peculiar facts of any given case.

39. Now I will come back to the facts of the case. I had already referred to the terms and conditions enumerated in Ext.A1 agreement. The total consideration amount comes to nearly ₹.1,73,00,000/-. On the date of the agreement ₹.25,00,000/- was paid. The payment of ₹.25,00,000/- is only a nominal payment as far as the total consideration is concerned. In the agreement it has been clearly stipulated that the plaintiffs have to pay ₹.25,00,000/- more within 1½ months. The date fixed for payment was 5.12.08. If we take into account the second payment also, then it will come to 30% of the consideration amount. Upon payment of this 30% of the consideration amount, then the defendants 1 and 2 have to produce the title deeds of the plaint schedule property to convince the plaintiffs with regard to the title of the plaint schedule property that too to the satisfaction of their legal consultant. If the title issue is satisfactorily dealt with, then the defendants 1 and 2 have to convince the plaintiffs about the actual extent of the plaint schedule property by measuring the same in the presence of the plaintiffs.

Thereafter it is for the plaintiffs to pay the sale consideration for the actual extent of the property after deducting the advance amount already paid. Upon payment in full, the defendants 1 and 2 have to execute a sale deed, assigning the plaint schedule property, either in the name of the plaintiffs or in the name of their nominees.

40. All these terms will prove that Ext.A1 agreement of sale contains reciprocal promises arranged in the sequence as stated by me above. Especially the first promise to pay 30% of the sale consideration is really a pre-condition for performing the remaining promises. In other words the purchasers cannot claim that the vendors should convince them about the title to the property before they pay the second instalment of the consideration amount within the time stipulated in Ext.A1 agreement. In this case admittedly the plaintiffs failed to pay the second instalment of ₹.25,00,000/- on or before 5.12.09. The said payment was not even made at the time of issuing lawyer's notice.

41. The defendants would say that the plaintiffs were not having sufficient money with them to pay the second installment as well

as the remaining balance sale consideration and that was the main reason for the non-performance of the agreement for sale. It is pointed out that the plaintiffs are persons involved in real estate business and they were not able to get prospective buyers to purchase the entire property and thereby to raise the required funds to pay the balance sale consideration. It is also pointed out that the demand notice was issued to the plaintiffs after 2 years from the date of agreement even though the period fixed for performance of the contract was only 6 months and moreover the suit was filed after 2½ years from the date of agreement and all these facts will show that the plaintiffs were not ready and willing to perform their part of the contract.

42. On the other hand the plaintiffs would say that they were always ready with the balance sale consideration and willing to perform their part of the contract and to purchase the plaint schedule property and even now they are ready and willing to pay the balance sale consideration and to purchase the property. It is submitted that they failed to pay ₹.25,00,000/- on 5.12.10 only because of the litigation filed by

third party with regard to the plaint schedule property which was then pending before the appellate court. In fact the defendants 1&2 had suppressed the details regarding the litigation at the time of the execution of the agreement, Still the defendants had not withdrawn from the same and to show their willingness they had handed over a cheque for ₹.25,00,000/- to the defendant 1 and 2. In view of the pendency of the litigation, it was agreed upon by the parties that further proceedings has to be taken up only after the disposal of the litigation pending before the court and that is why they waited till the disposal of the appeal and immediately after its dismissal they sent the lawyer's notice and filed the suit. It is submitted that there is absolutely no latches on their part and they are continuously pursuing the contract.

43. The first question to be answered is that whether the pendency of appeal filed by the third party claiming right in the plaint schedule property created any obstacles in the performance of the agreement of sale. OS.159/07 was filed by third party claiming right in the plaint schedule property as co-owners. It was filed in the year 2007. It was

dismissed on 31.3.08, i.e., before the execution of the agreement. The plaintiffs in that case does not stopped there and they preferred an appeal before this court as AS.32/08. At the time of execution of Ext.A1 agreement that appeal was pending, but nothing has been mentioned about this appeal in the agreement of sale. The plaintiffs would say that the defendants 1 and 2 had not disclosed the pendency of this appeal at the time of agreement. On the other hand the defendants 1 and 2 would say that it was disclosed and even a copy of the judgment was handed over to the plaintiffs and fully knowing about the pendency of the appeal they bargained for the purchase of the plaint schedule property. There is no convincing evidence to prove that the defendants 1 and 2 had disclosed about the pendency of the appeal to the plaintiffs at the time of execution of Ext.A1 agreement. Defendants 1&2 failed to enter the box also. All these will probabilise the case of the plaintiffs. Therefore it is to be held that the defendants 1 and 2 had not disclosed about AS.32/08 to the plaintiffs at time of execution of Ext.A1 agreement.

44. Anyway without much delay the factum of this earlier

litigation has been disclosed to the plaintiffs. PW1 himself admitted that he came to know about this within 5 days from the date of execution of agreement. Subsequently this fact has been endorsed on the reverse side of the first page of Ext.A1 agreement. A perusal of this endorsement will reveal that what has been mentioned therein is only with regard to the suit and not appeal, but it is admitted in evidence that the pendency of the appeal was also made known to the plaintiffs at the time of this endorsement. The endorsement made in Ext.A1 is undated, but a reading of the whole endorsement will reveal that it was made much before 5.12.10 the date fixed for payment of second installment. It is endorsed therein that the plaintiffs are only handing over a cheque for ₹.25,00,000/- and this cheque is to be returned as and when the plaintiffs pay the amount in cash. The plaintiffs would say that they handed over the cheque to safeguard their interest just because of the pendency of AS.32/08. It is pointed out that normally no one will agree to purchase the property which is the subject matter of a litigation. The counsel for the plaintiffs argued that the handing over of the cheque itself will prove the willingness of the plaintiffs to purchase the property. The plaintiffs would say that it was mutually agreed by the parties that the second instalment need to be paid only after the disposal of the appeal in favour of defendants 1 and 2.

45. At first blush this reasoning appears to be convincing, but if we analyze the subsequent acts of the plaintiffs will reveal out that the plaintiffs never took the pendency of Appeal a serious impediment in the execution of the sale deed. It is now being used by the plaintiffs to generate a cause of action for this delayed suit. This will be clear from the following discussions. After knowing about the pendency of this litigation the plaintiffs had entered into an agreement for sale regarding the very same plaint schedule property, with 2 other persons both named Andru Haji. As I stated above the time period fixed for performance of Ext.A1 agreement was 19.5.09. On 2.4.09 the plaintiffs entered into an agreement for sale with Andru Hajis'. The said agreement is Ext.B1. As per this agreement the plaintiffs agreed to assign half right in the plaint schedule landed property and also half right in the multi storied building to be constructed in the plaint schedule property to these Andru Hajis for

a total consideration of ₹.2,15,00,000/-. In Ext.B1 the plaintiffs made a specific statement that they are going to purchase the plaint schedule property from the defendants 1 and 2 by 10.4.09 and while doing so they will get a sale deed executed by defendants 1 and 2 with regard to half right in the plaint schedule property in the name of 2 Andru Hajis. This statement in Ext.B1 fully disprove the case now put forward by the plaintiffs that there was a subsequent agreement in between the plaintiffs and defendants 1 and 2 that the second instalment of the sale consideration need to be paid only after the disposal of the appeal and all further steps in this regard is to be taken only after the disposal of the appeal. If there was such a subsequent agreement in between the parties deviating from the terms of the earlier agreement, definitely it would have find a place in the subsequent endorsement made in Ext A1 agreement, but that is not there. All these will probabilise the case of the defendants 1&2 that since there was no injunction order passed by the court restraining the defendants 1 and 2 from alienating the property the plaintiffs had agreed to move on and to purchase the property in-spite of the pendency of Appeal.

46. Since it is found that the plaintiffs never took the pendency of Appeal as a serious impediment in the execution of the sale deed,next thing to be looked into is that whether the plaintiffs were having sufficient funds with them to pay the second instalment. Exts.A8 to A12 are the statements of the bank accounts produced by the plaintiffs to prove their financial capacity. I had already referred to these account statements. These documents will never prove that the plaintiffs were having ₹.25,00,000/- with them on 5.12.08.

47. If we together consider the two factual findings made above, it is very much clear that the pendency of AS.32/08 has not caused any obstacle in performance of the agreement, on the other hand it was because of the insufficiency of funds, the plaintiffs failed to pay the second installment towards the consideration and instead of that issued a security cheque. In this given factual circumstance, it can well be presumed that the plaintiffs issued the cheque only to gain the confidence of defendants 1 and 2 so as to get some more time to arrange the money for the second instalment. All these will show that the

breach was committed by the plaintiffs themselves. I had already found that the payment of the second instalment of sale consideration is a pre-condition for performing the remaining promises made in the agreement. Therefore the plaintiffs cannot cover up their breach by pointing out any latches on the side of the defendants 1&2 in performing their part.

48. Leave apart the failure on the side of the plaintiffs to pay the second instalment of sale consideration, there is absolutely no evidence to prove that till the date of the institution of the suit the plaintiffs were,and subsequently till this date the plaintiffs are, having funds to pay the balance sale consideration which will come to nearly ₹.1,50,00,000/-. It is true that the plaintiffs are NRIs and they are doing real estate business in Kozhikode. But when question was put to PW1 regarding the evidence available to prove that they were having funds to pay the balance sale consideration, PW1 deposed that the bank accounts will prove the same. Later the plaintiffs themselves voluntarily produced the bank statements which were marked as Exts.A8 to A12 stating that these

documents are sufficient to prove the financial capacity of the plaintiffs. I had already gone to these documents. These documents really go against the plaintiffs. There is nothing on record to prove that the plaintiffs had earlier carried out such big deals and they are capable to pool such huge amounts. To sum up, it is to be held that the evidence available on the side of the plaintiffs itself will show that the plaintiffs were not ready with required funds to purchase the plaint schedule property. As observed earlier, Willingness is a factor that follows readiness. Therefore it can safely be concluded that the plaintiffs were not ready and willing to perform their part of the contract and the breach was committed by them and resultantly the non-performance of agreement for sale dated 19.11.08 was due to the default of the plaintiffs. The above issue is answered accordingly.

49. Issue No.2 :-Next issue posed for consideration is that Whether Ext.A6 sale deed, regarding ¼ th right in the plaint schedule property, was executed by the defendants1&2 in favour of defendants 3&4 as per the directions of plaintiffs. The case of the defendants is that

as per Ext.B1 the plaintiffs had agreed to get a sale deed executed by defendants 1 and 2 in the name of 2 Andru Hajis mentioned as B party to Ext.B1 agreement or in the name of their nominees, as far as the half right in the plaint schedule property is concerned. As per Ext.B1, the proposed date for the execution of the sale deed was 10.4.09. The sale consideration for half share of the plaint schedule property, computed in terms of Ext.A1 will come to nearly ₹.1,00,00,000/-. Towards that ₹.65,00,000/- was already paid by 2 Andru Hajis to the plaintiffs. If bifurcated, one Andru Haji is entitled to get 1/4th of the plaint schedule property. Later as the representatives of Pottanpunathil Andru Haji, the plaintiffs nominated the additional defendants as their representative and accordingly 1/4th share in the plaint schedule property was assigned by defendants 1 and 2 in the name of defendants 3 to 5 on 16. 05.2009. The defendants would further say that a sale deed was also prepared in stamp paper at the expense of the plaintiffs to assign 1/4th share in the plaint schedule property in the name of Kundancheri Andru Haji and his wife, but subsequently the plaintiffs failed to pay the sale consideration to the defendants 1 and 2 and that is why it has not been executed and registered. The defendants 1 and 2 would say that by way of Ext.A6 they had infact assigned to the nominees of the plaintiffs, property worth more than the value of ₹.25,00,000/- received by them.

50. The plaintiffs have taken a stand that the additional defendants were not their nominees/representatives nor there was any agreement in between them to sell the property and hence Ext A6 is only to be ignored.

51. The learned Counsel for the plaintiffs would submit that the burden to prove that ExtA6 was executed in favour of defendants 3 to5 as directed by the plaintiffs, is upon the defendants and the defendants had completely failed to discharge the said burden. It is pointed out that none of the defendants had cared to enter the witness box and moreover, they failed to examine the Andru Hajis even though they were cited as witnesses on the side of defendants 3 to 5. It is also pointed out that the alleged sale deed said to have been prepared in the name of Andru Haji and his wife has not been produced and this fact also go against the defendants. Moreover, if the case of the defendants is true then the

defendants would out at least insisted the plaintiffs to subscribe the signature as a testing witnesses to the sale deed but that is not the case herein.

52. An enquiry into the question whether the defendants 3 to 5 are the nominees of the plaintiffs will definitely lead to an enquiry regarding the performance of Ext B1 agreement for sale entered in between the plaintiffs and the two Andru Hajis. To give a clear finding on this issue,the two Andru Hajis are to be definitely in the party array. The defendants 3 to 5 had taken a specific contention regarding non-joinder but the plaintiffs have not taken any steps in this direction. Therefore , a detailed enquiry in this regard is not possible. Further, to dispose the present suit a detailed enquiry in this regard is not at all required. To the most only a collateral finding is sufficient. Taking all these aspects into consideration and also the fact this is not a suit on the basis of Ext.B1 agreement I do not find that any burden is cast upon the additional defendants to prove anything from their side except to bring out the circumstances to point out that the plaintiffs are not entitled to get the

discretionary relief of specific performance. I am of the considered view that the defendants have succeeded in discharging the limited burden cast upon them even without examining any witnesses from the side. This will be clear from the following discussions.

53. It is to be noted that even though in the reply notice the defendants 1 and 2 had given the names of the additional defendants to whom they had executed Ext.A6 document and specifically stated that these additional defendants were the nominees of the plaintiffs. If there was any bonafides on the side of the plaintiffs they would have definitely made a reference to Ext.B1 agreement in the plaint. Even after the filing of the written statement by the defendants 3 to 5, plaintiffs, doest not filed any better statement either denying or admitting Ext.B1 agreement. On the other hand they pretended that the defendants 3 to 5 are total strangers. It is in that circumstance the additional defendants had cited their father Andru Haji as a witness. But later in evidence PW1 admitted that this Andru Haji is a distant relative of the plaintiffs and with two Andru Hajis they had executed Ext.B1 agreement and received ₹ 65,00,000/- as

advance. In view of this admission the additional defendants have not examined Andru Haji as a witness. It is true that exhibit A6 doesn't make any mention about exhibit A1 agreement and that the plaintiffs were not even made as witnesses to the sale deed. These factors even though relevant will not give any upper hand to the plaintiffs. It cannot be believed that the B party to the agreement kept mum after paying ₹.65,00,000/- to the plaintiffs. What Pw1 deposed is that after paying the said amount the Andrew Hajis never contacted the plaintiffs. It is very difficult to swallow this statement. The preponderance of probabilities are definitely in favour of the defendants. Another thing pointed out is the non-production of the sale deed prepared in stamp paper. Here, it is to be noted that the defendants never said that it is in their custody. What they have said is that it was prepared by the plaintiffs at their expense. Therefore its non production will not cast any doubt regarding the contention put forward by the defendants. The favourable circumstances brought out by producing and marking Ext.B1 and from the admissions in the cross-examination of PW1 is sufficient to have an inference that what has been stated by the plaintiffs is not true and there are strong circumstances to have an inference that Ext.A6 is an assignment executed in part performance of Ext.A1 agreement and the assignees therein who are the defendants 3 t0 5 herein, appears to be the nominees of the plaintiffs being the representative of Pottanpunathil Andru Haji one among the B party. To that extent I answer the said issue against the plaintiffs.

54. Issue No.3:- In the light of the findings rendered by me regarding the readiness and willingness it is found that the plaintiffs have committed breach of contract and they were not ready to perform their part of the contract. Therefore there arise no question of granting the relief of specific performance which is the one and the only relief sought by the plaintiffs. Even otherwise, I am of the firm view that the plaintiffs are not entitled to get the discretionary relief of specific performance. It is true that the terms of Ext A1 agreement doesn't disclose that the parties had treated time as the essence of the contract, still, the plaintiffs by their own conduct of causing unexplained delay in filing the suit had made themselves dis entitled to get the relief of specific performance. Granting

the relief of specific performance at this belated stage, will definitely cause undue hardship to the defendants 1&2 as pleaded by them in the written statement. The above issue is answered accordingly.

55. Issue No.4:-The one and only relief sought by the plaintiffs is for specific performance. I had already found that the plaintiffs are not entitled to get the same. The plaintiffs have not sought for the return of the advance amount. I had already found that the available evidence and the factual circumstances give a strong indication to infer that Ext.A6 sale deed was executed by defendants 1 and 2 in favour of defendants 3 to 5 as nominees of the plaintiffs and the sale price of the extent of property assigned by way of Ext.A6, computed as per the price per cent mentioned in Ext.A1, will be more than the advance amount paid by the plaintiffs. Further Pw1 had admitted in evidence that the plaintiffs had received ₹.65,00,000/- under Ext.B1 agreement with regard to the very same property. That means in effect they gained ₹.40,00,000/- in the transaction. In this given factual situation, I am of the view that there is no need for granting any relief for the return of the advance amount , on

equitable grounds, without a prayer for the same. The end result is that the plaintiffs are not entitled to get any of the reliefs against the defendants. Since it is proved that the plaintiffs have themselves committed default and they suppressed the execution of Ext.B1 agreement, the plaintiffs are also to be the burdened with a direction to pay the costs of the defendants.

In the result,

suit is hereby dismissed with costs.

(Dictated to the Confidential Assistant, transcribed by him, corrected and pronounced by me in open Court, this the 30th day of July, 2013)

Sd/-

Sub Judge

<u>Plaintiffs Witnesses:</u>

PW1. 25-06-2013. Ashraf, S/o. Pocker.

<u>Plaintiffs Exhibits:</u>

Ext.A1. 19-11-2008. Agreement entered into between defendant 1 and 2 and plaintiffs.

Ext.A2. 31-08-2010. Copy of lawyer notice issued by Adv. N.K. Parameswaran to the defendants 1 and 2.

Ext.A3. 08-09-2010. Postal acknowledgement card.

Ext.A4. 14-09-2010. -do-

Ext.A5. 20-09-2010. Copy of reply notice issued by Adv.K.B. Sahasranaman to the Adv. N.K. Parameswaran.

Ext.A6. 16-05-2009. Carbon copy of assignment deed executed by Abdurahiman and others in favour of Afsal and others.

Ext.A7. 12-12-2007. Statement of account submitted by plaintiff.

Ext.A8. 09-01-2009. Copy of statement of S.B.Account submitted by plaintiff.

Ext.A9. 26-03-2009. Copy of statement of S.B. Account submitted by plaintiff.

Ext.A10. 12-05-2010 Statement of Bank Account submitted by plaintiff.

Ext.A11. 13-05-2010. Statement of Bank Account submitted by plaintiff.

Ext.A12. 25-03-2013. Statement of Bank Account submitted by plalintiff.

<u>Defendants Witnesses:</u> Nil.

<u>Defendants Exhlibits</u>:

Ext.B1. 02-04-2009. Agreement entered into between plaintiff and Pottante Punathil Andru and others.

Sd/-
Sub Judge.