

***HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO**
+ CCCAMP Nos.643 and 644 of 2015 in C.C.C.A.No. 112 of 2009
and
C.C.C.A.Nos. 111 and 112 of 2009

-
% **Dated 22.04.2016**

C.C.C.A.No. 111 of 2009

Between:

-
T.Pattabhi Rama Rao, _____
...Appellant/Plaintiff _____

-
And

\$ Y.Yadava Rao and others _____
....Respondents/defendants _____

C.C.C.A.No. 112 of 2009

-
Between:

-
T.Krishna Murthy _____
...Appellant/Plaintiff _____

-
And

\$ Y.Yadava Rao and others _____
....Respondents/defendants _____

-
! Counsel for the Appellant in both
the appeals : Sri S.Agastya Sharma,

^ Counsel for respondents in both
the appeals : Sri G.Madhusudhan Reddy,
Sri C.V.Bhasker Reddy,
Sri C.V.Mahesh Raje

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? Cases referred: _____

[1] 2008(5) ALD 200

2 AIR 1989 SC 193

3 AIR 1987 SC 1242

4 AIR 1966 SC 735,

5 AIR 1954 SC 458
6 AIR 1953 SC 235
7 (2008)17 SCC 491
8 AIR 1995 SC 167
9 AIR 1988 SC 719(B)
10 1991 (3) SCC 331
11 AIR 1999 SC 1441
12 AIR 2005 SC 439 = (2005)2 SCC 217
13 AIR 2009 SC 422
14 (2010)10 SCC 512
15 AIR 1995 SC 945
16 2006(7) Supreme 388
17 (1996)4 SCC 593
18 AIR 2005 SC 5303
19 2005(2) ALD 631
20 (2000)6 SCC 420
21 AIR 1971 SC 1238
22 (1999)6 SCC 337
23 (2008)5 SCC 676
24 Civil Appeal No.4841 of 2012, dt.03.07.2012
25 (2012)1 SCC 656
26 (2008)7 SCC 310
27 (2008)1 SCC 45
28 (1996)5 SCC 589
29 2015 Law Suit (SC) 636
30 (2005)7 SCC 534
31 AIR 2008 SC 1786
32 (2005)6 SCC 243
33 AIR 2009 SC 2157
34 (2011)1 SCC 429
35 (2004)6 SCC 649
36 (2002)5 SCC 481
37 (1995)5 SCC 115
38 AIR 1997 SC 1751
39 (1993)1 SCC 519
40 AIR 1968 SC 1413
41 Laws (APH)-1970-3-33
42 (2010) 11 SCC 441
43 (2016) 2 SCC 569
44 (2012) 1 SCC 656.
45 (2004)2 SCC-297
46 2008(1)ALT 10(SC)
47 AIR 2000 SC 573(1)
48 2010(1) ALD 470
49 (1864) 10 HIC 672
50 (1812) 3 Camp. 258

⁵¹ AIR 1941 Lah.407(FB)

⁵² AIR 1937 Madras 714

⁵³ AIR 1917 Madras 880

HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

CCCAMP No.643 and 644 of 2015 in C.C.C.A.No. 112 of 2009
and
C.C.C.A.Nos. 111 AND 112 of 2009

COMMON JUDGMENT :

The respective two plaintiffs no other than own brothers by names T.Pattabhi Rama Rao (for short, 'TPR') in O.S.No.1689 of 2003 and Sri T.Krishna Murthy (for short, 'TKM') in O.S.No.1690 of 2003 on the file of the VIII Additional Senior Civil Judge(FTC), City Civil Court, Hyderabad, maintained the two suits supra against the 7 self-same defendants by names Y.Yadava Rao, 2. Dr. D.Satyanarayana Rao, 3. Sri D.Suryanarayana Rao, 4. Dr.D.Lakshmi Narayana Rao, 5. Sri D.Venkat Narayana Rao, 6. Sri D.K.Narayana Rao and 7 Sri D.Ram Narayana Rao, of whom the defendant Nos.2 to 7 are no other than the legal heirs of the original owner of the property by name late Smt. D.L.Kanthamma, w/o late Sri D.B.Narayana, for specific performance of the contract for sale with alternative prayer for refund of the amounts with interest and for suit costs and such other reliefs. On contest by D.1-Developer as well as D.2 to D.7 supra, the learned Judge vide two separate judgments dated 26.03.2009 decreed both the suits in part with costs only against the D.1-Developer supra, for the alternative relief of refund of the amount holding as Rs.40,000/- in O.S.No.1689 of 2003 and Rs.5,00,000/- in O.S.No.1690 of 2003, together with interest at 12% p.a. from date of demand on 10.06.2002 till date of decree and with subsequent interest from date of decree till realization at 6% p.a. while dismissing the respective suit claims including for refund against D.2 to D.7.

2. It is now impugning the respective two judgments and decrees

of the trial Court, the two independent appeals supra i.e. CCCA No.111 of 2009 against O.S.No.1689 of 2003 and CCCA No.112 of 2009 against O.S.No.1690 of 2009 are maintained by the self-same plaintiffs/appellants against the self-same defendants/respondents. It is during pending of the appeals, the 3rd respondent by name Sri D.Suryanarayana Rao died and his wife and sons as his legal representatives are brought on record as R.8 to R.10 by names Smt.D.Jyothsna Kumari, Sri D.Muralidhar Rao and Sri D.Bhadri Narayana as per orders in CCCAMP No.458 of 2012 in CCCA No.111 of 2009 and as per the orders, dated 21.11.2012 in CCCAMP No.516 of 2012 in CCCA No.112 of 2009.

3. It is during pendency of the two appeals, ad interim injunction sought by the appellants against the respondents supra from alienating the plaint/decreed schedule property, in CCCAMP No.369 of 2009 and CCCAMP No.370 of 2009 respectively in the two respective appeals and the interim injunctions respectively were granted. So far as CCCAMP No.369 of 2009 in C.C.C.A.No.111 of 2009 is concerned, there is a separate application to vacate the stay/interim injunction supra. Opposing the interim injunction orders supra, counter affidavit of the R.2 to R.7(D.2 to D.7) were filed. The interim injunction applications as on date with the orders supra are in force and the applications are still pending. The applications are not dealt with separately herein, but for to dispose of subject to the result of the two appeals.

4. At the request of both the sides and for sake of convenience from the issues involved in both the matters since identical against self-same respondents/defendants, both the appeals are taken up together for common disposal.

5. It is during the course of common hearing of the appeals referred supra, on behalf of the plaintiffs/appellants Sri T.Krishna Murthy filed two applications vide CCCAMP No.643 and 644 of 2015 to mark the

copy of the Development Agreement (for short, 'the DA') dated 03.12.1998 by receiving as additional evidence and as exhibit in both the appeals and said applications are opposed by counter affidavit of R.4 and common counter affidavit of R.2,3, 5 to 7 through R.6(R.2 to R.7 of the appeal). These two petitions are taken up with the appeals for hearing and disposal.

6. From this background, the common contentions but for one or two grounds in relation to the respective amounts and payments, in the grounds of both the appeals are that the trial Court ought to have seen, appreciated and relied upon the pleadings and evidence of respective plaintiffs in the respective suits and ought to have held that each of the plaintiffs proved his case respectively by adducing cogent and acceptable evidence, in support of the respective pleadings and consequently ought to have decreed the respective suits, as prayed for. The trial Court was not justified in ignoring to take cognizance of the specific pleading of the respective plaintiffs/appellants herein, in paragraph 7 of the respective plaints to the effect that the respective plaintiffs performed their part of contract by paying the sale consideration (Rs.5,40,000/- out of Rs.5,50,000/- in O.S.No.1689 of 2003 and Rs.6,20,000/- in O.S.No.1690 of 2003) to the D.1-Developer herein under the Agreements of Sale dt.20-10-2000 and informed the D.1-Developer that respective plaintiffs are ready with balance amount of Rs.10,000/- in O.S.No.1689 of 2003 and of registration charges and of registration charges in O.S.No.1690 of 2003 for registering the sale deeds respectively in their favour, however, the D.1-Developer and other defendants failed to perform his part of contract under said two agreements and the respective plaintiffs are thus entitled to seek specific performance of the contracts for sale in respect of the respective plaint schedule properties. The plaintiff in O.S.1689 of 2003 is ready to pay the megre balance amount of Rs.10,000/- and met registration charges and also ready to meet registration charges

by the plaintiffs in O.S.No.1690 of 2003, having paid entire consideration to obtain their respective deeds of conveyance. The trial Court ought not to have answered Issue No.1 against the respective plaintiffs/appellants and in favour of the respondents/defendants. The trial Court ought to have seen and appreciated the specific pleadings of the respective appellants/plaintiffs, such as a) the D.1 herein shall construct a building as per the sanction accorded by the MCH with his own money and develop the building in terms of the said agreement, b) the D.2 to D.7 herein who are the sons of Smt D.L.Kantamma have also authorized the D.1-Developer to enter into an agreement of sale with purchasers of the above said property and in pursuance of the above said respective agreements, the D.1-Developer is entitled to seek the entire cellar, ground and the entire first floor consisting of commercial spaces units along with proportionate area of land on which the building is constructed, c) for purchase of office space bearing No.106 and 105 in the first floor admeasuring 1000 sq.ft. and 1050 sq.ft. respectively of super plinth areas together with an undivided share of land of 25 sq. yards each in the building constructed in the above mentioned property, more fully described in the schedule annexed hereto for a total sale consideration of Rs.5,50,000/- and Rs.6,20,000/- respectively, d) the respective plaintiffs herein have paid entire sale consideration to the D.1 herein but for Rs.10,000/- by plaintiff in O.S.1689 of 2003. e) however, the said D.L.Kantamma shall be joined in execution of Sale deed along with her sons to convey a better title to the respective plaintiffs herein and also undertake to get the execution and registration of the sale deed done in favour of the respective plaintiffs herein and to convey a better and effective title. f) as per said agreements, the D.1-Developer has to complete the construction on or before 31-03-2001 and execute respective registered sale deeds and deliver possession of the respective property on receipt of full consideration of Rs.10,000/- in

one of the suit claim detailed supra. In spite of it, the defendants were postponing from time to time under one or the other pretext to perform their part and g) the respective plaintiffs have performed their part of contracts and are ready and willing to perform if anything due to obtain registered deeds of conveyance in their favour, hence the trial Court ought to have decreed the respective two suits for specific performance as prayed for. The trial Court ought to have seen and appreciated that the pleadings and documentary evidence relied upon by the respective plaintiffs were specifically stated and solemnly affirmed on oath in the evidence affidavits and the same is neither rebutted nor shattered in the cross-examination of PW-1 respectively and as such the trial court ought to have taken consideration of the same for answering the respective issue No.1 in favour of the respective plaintiffs. The trial Court ought to have seen and appreciated that the respective plaintiffs/appellants adduced cogent and acceptable evidence by marking several documents and by examining themselves as PW.1 and proved their respective claim to decree the suit claims. The trial Court was thus not justified in observing at the end of paragraph 12 of the respective Judgments to the effect that "the said agreement of sale is signed by vendor No.2 described as duly authorized and neither the plaintiff nor vendor No.1 signed on the agreements of the sale and two witnesses were signed which itself falsifies the contention of the respective plaintiffs that he entered into agreement of sale with D-1 to the knowledge of D-2 to D-7, in respect of the suit schedule property" while answering issue No.1; since D-1 is duly authorized to enter into an agreement with prospective purchases in respect of the constructed area that had fallen to his share, as per the very Development Agreement. The trial Court ought to have seen and appreciated that the documents marked prima-facie substantiate payment of sale consideration and should have decreed the suit, as prayed for, in answering the respective issue No.2 in favour of the respective plaintiffs/appellants, even in respect of

alternative relief against all with a charge on the respective suit schedule property. The trial Court ought to have seen and appreciated that Ex.A.2,5 and A-7 in O.S.No.1689 of 2003 and Ex.A.2,5,7 and 9 in O.S.No.1690 of 2003 can be addressed only to D-1, since payment was made by respective plaintiff only to D-1, based on Development Agreement entered into by him with owners which authority is enough to bind them and had it been the absence of any such authority conferred upon the Developer by owners, the respective plaintiffs/appellants would not have entered into the agreements for sale with D-1 nor paid any amount to him, towards part payment of sale consideration respectively. In any event, the trial Court failed to take cognizance of this particular aspect, which is having a strong bearing on the scope and purview of both the suits for specific performance of agreement of sale. The trial Court was not justified in observing at paragraph 13 at page 11 to the effect that the contention of plaintiff is not supported by either oral evidence or documentary evidence that D.L.Kanthamma and/or her sons D-2 to D-7 are parties to Ex.A-1, in view of the subsistence of the Development Agreement between owner and developer. The trial Court having taken cognizance of the clear admission made by D-1-Developer in his written statement that he entered into agreements for sale with respective plaintiffs and ought to have appreciated that the admitted facts need not be proved and accordingly ought to have decreed the respective suits. The trial Court was not justified in observing at the end of paragraph 13 that the respective plaintiffs can rely on the sale agreements to get the relief against D-1 alone, in view of the admitted fact that D-1 is duly authorized agent to enter into agreement of sale with respective purchases in respect of built up area that had fallen to the share of D-1, as per Development Agreement that was subsisting and existing between D-1 and the owner, represented by D-2 to D-7, as on the date of agreement of sale in question and as such, the

learned trial judge ought to have answered the respective issue No.1 in favour the respective plaintiffs/appellants. The trial Court thus was not justified in answering the issue No.1 against the respective plaintiffs, with observation in paragraph 14 that it finds that issue relating to the relief of specific performance is confined only against D-1. The Learned Judge was not justified in observing in paragraph 15 in both the judgments that “a perusal of the documents filed on behalf of plaintiffs do not disclose that the respective plaintiff has expressed readiness and willingness to perform his part of the obligation for getting the registered sale deeds from D-1 within the time stipulated in Ex.A-1”, though there is proof on record that followed by legal notice and specific pleadings in plaint and evidence in support of it in the respective two suits, as stated supra. The trial Court was not justified in observing further in para-15.(b) that the respective plaintiffs themselves opted for refund of the sale reconsideration paid by them and demanding the D.1 to that effect by addressing letters in the year 2002 basing on which holding that the respective plaintiffs failed to establish that they are ready and willing to perform their part of the contract and to get registered sale deeds in their favour as per provisions of Sec.16 of the Specific Relief Act. The trial Court was not justified in observing that the plaintiff failed to produce any document to show that D.2 to D.7 have got knowledge about the agreements of sale etc, since D.2 to D.7 have knowledge regarding purchase of flat by respective plaintiffs, both by personal interaction and also through letters that were addressed to D.1, while marking a copy to D.7 (in O.S.No.1689 of 2003) to D.5 (in O.S.No.1690 of 2003), representing D.2 to D.7. The trial Court was not justified in giving a finding that the respective plaintiffs are entitled for refund of amounts stated to be paid by them to D.1 as they failed to establish that they paid to D.1 though material available on record. The trial Court was not justified in giving a finding that the plaintiff in O.S.No.1689 of 2003 is entitled for refund of Rs.40,000/- only and in O.S.No.1690 of 2003 is entitled for

Rs.5,00,000/- only instead of as prayed for, hence to set aside the respective judgments and decrees by allowing the appeals as prayed for.

7. The additional evidence application affidavit petition averments relevant in this context to refer are the following:

It is submitted that the Development Agreement dated 03.12.1998 was not marked as Ex.B.1, despite D.5 filed in his evidence affidavit on behalf of D.2 to D.7 as D.W.1 at the end of evidence affidavit in O.S.No.1689 of 2003 to the effect that the documents i.e. Development Agreement dated 03.12.1998 between D.L.Kanthamma and the D.1 as Ex.B.1 and certified copy of MCH sanctioned Plan dated 03.12.1998 as Ex.B.2. The counsel for D.2 to D.7 in trial Court served copy of list of documents together with copies of Development Agreement dated 03.12.1998 and sanctioned plan dated 03.12.1998 on his counsel and the same were filed in paper book in the above Appeal at page Nos.65 to 75. He was under bona fide belief and impression that copies of Development Agreement dated 03.12.1998 and sanction plan dated 03.12.1998 were marked as Ex.B.1 and B.2 on behalf of D.Nos.2 to 7. But only sanctioned plan was marked as Ex.B.1 for the reasons better known to D.Nos. 2 to 7. Since parties to the original suit and above appeal relied upon Development Agreement dated 03.12.1998, in support of their pleadings and oral evidence, including from the cross-examination of P.W.1 & D.W.1, it would be in the interest of justice to receive and mark Development Agreement dated 03.12.1998 as Ex.B.1 in the above appeal. Even the D.1-Developer in O.S.No.1690 of 2003 in whose favour the Development Agreement dated 03.12.1998 was executed by the original owner, was cross-examined has D.W.1, based on the Development Agreement. Despite due diligence before the trial Court, plaintiff could not get the Development Agreement marked as Exhibit in the suit O.S.No.1689 of 2003. It is further submitted that original of said Development Agreement dated

03.12.1998 was apparently filed by D.2 to 7 along with evidence affidavit of D.W.1 for marking as Ex.B.1. Hence, may be permitted to submit that the D.W.1 having filed the original of copy of said Development Agreement ought to have ensured that the same was marked as an exhibit on their behalf. Since the same is not marked as an exhibit and the parties to the above appeal relied upon said Development Agreement in their pleadings and cross-examination; marking of said Development Agreement as an exhibit is just and essential. Hence, to receive the copy of Development Agreement as additional evidence and mark the same as an exhibit.

8. In reply to it, heard the learned counsel for the respondents which are discussed further.

9. So far as the R.1 is concerned, as per the orders in C.C.C.A.M.P.No.345 and 344 of 2012 respectively could not be served through courier, registered post and telegram and SMS, Substitute service by paper publication in Eenadu, Secunderabad Edition was ordered and complied with, thereby service is held sufficient to R.1. But he did not appear and contest. Thus it is taken up to decide on merits on behalf of R.1 from R.2 to R.7 are mainly contesting.

10. The contentions of the learned counsel for the respondents-defendants 2 to 7 supra in opposing the respective two appeals is by supporting the trial Court's partly decreeing the two suits only against the respondent No.1/D.1, while dismissing against the R.2 to R.10. It is the submission that D.1 failed to construct as per the Development Agreement and the same was later cancelled and thereby the R.2 to R.10 are not bound by the sale agreement with D.1 entered by the two plaintiffs and once the trial Court having fresh in mind of facts from recorded the evidence arrived a just conclusion in deciding the lis in partly decreeing for alternative relief only against D.1 for refund of what is only proved paid, there is nothing to interfere for this Court while sitting against in the appeals and that too for no personal liability even

on R.2 to R.10 and thus sought for dismissal of the two appeals as well as the additional evidence document receiving and exhibiting petitions.

11. From above rival contentions in deciding both the appeals by common disposal, the common points that arise for consideration are :-

1. Whether the respective plaintiffs are entitled to the decree for main relief of specific performance of the contract for sale and if so, with what observations?

2. Whether the trial Court's respective decrees and judgment in granting alternative relief for refund of amounts with interest respectively, that too, against the D.1 and not against D.2 to D.7 (R.1 to R.7 of whom R.3 since died represented by R.8 to R.10 as legal heirs) is unsustainable including on the quantum of the amounts paid by the respective plaintiffs arrived at by the trial Court, and if so to what amount? If so, the relief granted supra only against D.1 is unsustainable and all the defendants/respondents are equally and jointly liable to submit the suit reliefs for specific performance of the contract for sale respectively in favour of the two plaintiffs or at least for the alternative relief with common liability against all for refund of the amount with interest and with any charge over the property for its recovery? If so, the trial Court's decree and judgment respectively are liable to be set aside and if so to what extent and with what observations?

3. Whether there are any grounds to permit respectively the copy of the Agreement of Development dated 03.12.1998 to be marked as Exhibit by receiving as additional evidence on behalf of plaintiffs/appellants respectively and if so with what observations?

4. To what result in both the appeals respectively?

POINTS 1 to 3:

12. As per the averments of the respective two complaints Sri

D.B.Narayana, no other than the husband of Smt.D.L.Kanthamma and father of D.2 to D.7/R.2 to R.7, was the owner of the premises bearing No.1-9-628/3 forming part of S.No.59 situated at Zamisthanpur consisting of plot No.85 admeasuring 990 sq.yards which he purchased under registered sale deed (D.No.286), dated 20th Aradabhist, for fasili 1358 from one Mir Ahmed Ali S/o Late Nawab Mir Asab Ali and later said D.B.Narayana, constructed a residential house therein and that reached to dilapidated stage. While so, said D.B.Narayana breathed last and his wife Smt. D.L.Kanthamma claimed succeeded the property and during her lifetime she applied to the MCH for sanction of construction of building therein consisting of cellar for parking, ground floor for shops, first floor for banks and three more floors upto 4th floor for residential purpose and the MCH approved and sanctioned the plan dated 03.02.1998 covered by Ex.B.1. It was while so, there was a Development Agreement with the D.1-Developer by Smt.D.L.Kanthamma who was authorized by D.2 to D.7 to demolish the old building and to construct the multi-storeyed building proposed under the approved plan in the premises. The said Development Agreement, though not specifically exhibited, covered by part of the pleadings and evidence as the very written statement of D.5 adopted by D.2 to D.4, D.6 and D.7 respectively they admitted the same, however, by saying pursuant to the Development Agreement dated 03.12.1998, D.1-Developer was permitted to enter into agreement of sale with respect to the built up area which fallen to his share and D.1-Developer raised framed structure of cellar, ground, and four floors as per the MCH sanctioned plan dated 03.02.1998 vide No.77/91/98(Ex.B.1) and however D.1-Developer failed to complete the work having abandoned the same at that stage with no further progress and thus he surrendered entire built up area at that stage which comes to his share under the Development Agreement and also the balance sale consideration amount received from purchasers, vide

MOU dated 15.09.2004 with D.2 to D.7 however, in saying the alleged sale consideration between the plaintiff and D.1 not mentioned in the MOU dated 15.09.2004 in disputing the suit sale agreement equally of the plaint averments of any tripartite agreement between the D.1-Developer and respective plaintiffs and D.L.Kanthamma(Mother of D.2 to D.7) dated 20.10.2000 which is the suit sale agreement respectively. It is the suit claim that the D.1-Developer, having constructed, building as per the Municipal approved plan pursuant to the Development Agreement supra, cellar, ground and four floors in part entered into tripartite agreements with the respective plaintiffs along with Smt. D.L.Kanthamma for the office space with the plaintiff-T.P.Rama Rao, in O.S.No.1689 of 2003 of the office space bearing No.106 in First floor Flat measuring 1000 sq.feet of super plinth area together with undivided share of land of 25 sq.yards for consideration of Rs.5,50,000/- and also with the plaintiff in O.S.No.1690 of 2003 by name T.Krishna Murthy for the office space bearing No.105 in first floor admeasuring 1050sq.feet of super plinth area together with the undivided share of land of 25sq.yards for consideration of Rs.6,20,250/- and with undertaking to join Smt.D.L.Kanthamma and her sons also for execution of the sale deeds and for registration in favour of the two respective plaintiffs and the D.1-Developer has to complete the constructions on or before 31.03.2001 and execute sale deed and deliver possession of the respective flats on receiving balance sale consideration, however having received entire sale consideration but for Rs.10,000/- in one month, D.1-Developer has been postponing for execution of the sale deeds and to deliver possession. Plaintiffs demanded many a time by legal notices, dated 10.06.2002, 18.07.2002 and 01.08.2002, however, the D.1-Developer, having failed to execute the sale deeds in favour of the respective plaintiffs but for given possession to some of the purchasers, was postponing which made the plaintiffs ultimately to issue final notice dated 25.08.2002 demanding to hand over possession of the plaint

schedule property respectively and even for that D.1 failed to hand over possession of the suit property and execute registered sale deed respectively failed to perform his part of contract having received amounts pursuant to the two sale agreements executed in favour of the respective two plaintiffs, which made the two plaintiffs respectively to file the two suits for specific performance of the respective two contracts for sale or in the alternative for refund of the respective sale considerations paid under the agreements, together interest at 18%p.a. and for costs.

13. It is necessary to mention that the D.1 filed written statement by admitting that the property originally belong to the parents of the D.2 to D.7 by names Sri D.L.Narayana and Smt. D.L.Kanthamma and after death of Sri D.L.Narayana, said Smt.D.L.Kanthamma applied for MCH approved plan to construct the cellar, ground and 4 floors and having obtained the approved plan entered Development Agreement with the D.1 for construction of the said multi-storeyed building proposed under the Development Agreement dated 03.12.1998 and he invested huge amounts in construction of the multi-storeyed building and in the course of construction, several changes and modifications were made even at the instance of the D.2 to 7 and the D.1 was allotted the portions of the property entitled by D.2 to D.7 towards their share (owners' share) and D.1 was authorized and empowered to enter into sale transactions for his share as such the D.1-Developer is entitled to enter agreements for sale with prospective purchasers and accordingly entered into various sale agreements having received advance of sale consideration as per the agreement for sale and from out of the share of the D.1-Developer, entered into two sale agreements, dated 20.10.2000 with the respective two plaintiffs, to sell office space bearing No.106 admeasuring 1000sq.feet on the first floor with TPR Rao(plaintiff in O.S.No.1689 of 2003) for total consideration of Rs.5,50,000/- and for office space bearing No.105 of first floor

admeasuring 1050sq.ft of super plinth area together with undivided share of land of 25 sq.yards for total consideration of Rs.6,20,250/- to T.Krishna Murthy(plaintiff in O.S.No.1690 of 2003); however, the D.2 to D.7 having knowledge about the agreements and receiving of advance sale consideration, started harassing the D.1 in one or the other way and it is their non-cooperation with D.1 due to which he could not execute the sale deeds, however in saying the D.1 in his own right entered the sale agreements with respective two plaintiffs of the two suits while denying receiving of entire sale consideration and entitlement of the specific performance of the contract for sale respectively with the contest that he received from the two respective plaintiffs each Rs.40,000/- on the date of the respective two sale agreements and the respective plaintiffs each paid Rs.1,00,000/- by way of cheque on 15.12.2000 and failed to pay the balance consideration and they are postponing in collusion with the D.2 to D.7 to defeat the interest of the D.1 by alleging as if the plaintiffs paid entire sale consideration to the D.1 under the agreements. He contended however, that he has no objections to execute registered sale deeds in favour of the two respective plaintiffs by saying D.2 to D.7 are also bound by said agreements for sale in favour of the respective plaintiffs to execute registered sale deed with no right of refusal or avoidance.

14. It is from respective pleadings including the written statement further contest of D.2 to D.7 of they are not aware of sale agreements and alleged payments and it is the plaintiff and the D.1 respectively to have wrongful gain without knowledge of the D.2 to D.7, brought into existence the sale agreements and the payments as if made for which there is no consent of D.2 to D.7 or their mother in her lifetime and there is no office space in the first floor bearing Nos.105 and 106 of the suit property in existence and the claim is imaginary and D.1 has no right to deal with the property and if at all any liability to the respective plaintiffs it is the D.1 who has to refund the amounts received from the

plaintiffs and nothing beyond and D.L.Kanthamma is not a party to the respective sale agreements entered by the D.1 with the respective two plaintiffs and sought for dismissal of the two suit claims.

15. It is pursuant to which from the respective pleadings and on hearing, the trial Court in each of the two suits framed the following issues:-

O.S.No.1689 of 2003:

- 1. Whether the plaintiff paid entire sale consideration to the D.1 under the agreement and entitled for the relief of specific performance of contract to execute the registered sale deed in respect of the suit schedule property and delivery of possession of the same?**
- 2. Whether the plaintiff is entitled for alternative relief of recovery of Rs.5,50,000/- with interest?**
- 3. To what relief?**

O.S.No.1690 of 2003:

- 1. Whether the plaintiff paid entire sale consideration to the D.1 under the agreement and entitled for the relief of specific performance of contract to execute the registered sale deed in respect of the suit schedule property and delivery of possession of the same?**
- 2. Whether the plaintiff is entitled for alternative relief of recovery of Rs.6,20,250/- with interest?**
- 3. To what relief?**

16. In answering the above issues and during the course of trial in O.S.No.1689 of 2003 (CCCA No.111 of 2009) on behalf of the plaintiff, the plaintiff T.Pattabi Rama Rao was examined as P.W.1 and placed reliance upon Exs. A.1 to A.14 viz. Agreement of Sale, dated 20.10.2000, letter addressed by the plaintiff to D.1, dated 10.06.2002, representations of plaintiff to D.1 dated 08.07.2002, copy of legal notice issued by the plaintiff to D.1, dated 27.08.2002 with postal receipt, acknowledgment of D.1, dated 31.08.2012, GPA executed by

plaintiff, letter issued by the S.B.I. for the payments made by the plaintiffs to defendants, statement of account issued by the SBI, receipt, acknowledgments and original bank passbook. On behalf of the defendants 2 to 7, D.5 D.Venkat Narayana Rao was examined as D.W.1 and certified copy of MCH sanctioned plan dated 03.02.1998 was exhibited as Ex.B.1. It is referred about the development agreement to be marked as filed. Similarly in O.S.No.1690 of 2003(CCCA No.112 of 2009) the plaintiff TKR was examined as P.W.1 and placed reliance upon Exs.A.1 to A.14 viz; agreement of sale, dated 20.10.2000, letter of plaintiff to D.1 dated 10.06.2002, postal receipt, acknowledgment dated 15.06.2002, letter of plaintiff to D.1, dated 08.07.2002 with acknowledgment of D.1, representation of Plaintiff to D.1, dated 18.07.2002 with acknowledgment of D.1, dated 23.07.2002, another representation of plaintiff to D.1, dated 01.08.2002 with postal receipt, office copy of notice of plaintiff to D.1 dated 27.08.2002 with postal receipt and acknowledgment dated 31.08.2002 and original bank passbook. On behalf of the defendants 2 to 7, D.5 D.Venkata Narayana Rao, was examined as D.W.1 but no documents were exhibited. It is from said evidence of the separate trial of both suits and after hearing covered by the separate judgments on even date by the trial Court, both the suits were decreed in part against only D.1 as referred supra.

17. a) So far as the **O.S.1689 of 2003**, it was observed by the trial Court that the pleadings and the evidence on behalf of the plaintiff, do not disclose the readiness and willingness to perform his part of contract to get the sale deed from D.1 within the time stipulated under the sale agreement (Ex.A.1) and a perusal of schedule of payments show the plaintiff paid in all of Rs.5,50,000/- in the year 2000 and alternative relief is sought for refund of the amount and even the letters of plaintiff covered by Ex.A.2, 5 and 7 of the year 2002 also to that effect, that in **Baddam Pratap Reddy Vs. Chennadi Jalapathi**

Reddy^[1], it was held that *in a suit for specific performance, the plaintiff has to comply the requirements of Section 16© of S.R.Act, and also Form Nos. 47/48 of appendix-A of CPC and the averments should be proved.* In the present suit, P.W.1 in his cross-examination admits for refund of amounts as his flat was not completed and he has not verified whether his plot was completed or not till date which falsifies the pleadings of readiness and willingness to say could not establish the same for entitlement to the main relief and the Advocate-Commissioner appointed filed his report after inspection saying the construction was not completed and for the premises bearing No.1-9-628/3 on three sides boundaries are not tallied for no numbers given, there is nothing to show by any documentary evidence of D.2 to D.7 got knowledge about the Ex.A.1 sale agreement and even D.L.Kanthamma was shown as one of the vendors in the agreement, there is no signature of her as admitted by the P.W.1 and the letters of demands addressed by the respective plaintiffs except legal notice to all the defendants, were alone to D.1 and thereby not entitled to the main relief of specific performance of the contract for sale against the D.1 but for refund of the amount shown paid of Rs.5,40,000/- by date of Ex.A.2 notice wherein there is demand for refund, that in the cross-examination of P.W.1 what he claimed of Rs.5,00,000/- paid other than Rs.40,000/- on 20.10.2000 (date of sale agreement), for that not produced any documentary evidence that too, when D.1 in his written statement and in the cross-examination of P.W.1 suggested of only Rs.40,000/- paid that amount alone is entitled to be refunded in partly decreeing for the alternative relief while rejecting the main relief that too, only against the D.1 for Rs.40,000/- with interest.

17(b). Coming to the O.S.No.1690/2003 from the evidence on record supra and after hearing, the trial Court in answering issues observed that even the plaintiff claims having received sale consideration entirely, the D.1 did not execute sale deed; the D.1

denied the same and burden is on the plaintiff and Ex.A.2 letter of plaintiff to D.1 mentions payment made totally of Rs.6,20,250/- in demanding to refund the same by 31.07.2002 and there is no mention in Ex.A.2 dated 10.06.2002 of readiness and willingness to obtain sale deed having paid entire consideration, so also by subsequent letters dated 08.07.2002 and 18.07.2002 in asking to refund, but for under Ex.A.9 dated 01.08.2002 in demanding to hand over possession of the plot and in the legal notice Ex.A.11 dated 27.08.2002 to execute sale deed and deliver possession. It is after lapse of 1½ year from the agreement from the pleadings and evidence though what he paid of Rs.6,20,000/- in the year 2000 from the letters addressed to refund the amount and from the expression in **B. Pratap Reddy** supra of plaintiff has to comply the requirements of Section 16© of S.R.Act and Form Nos. 47/48 appendix–A and the averments should be proved and once asked for refund there is no such compliance of always ready and willing to perform to get register sale deed from D.1 and in the cross-examination of D.2 to 7, P.W.1 also admitted about giving notice for refund to say compliance of Section 16© of the S.R.Act, is not made out, and the Advocate Commissioner visited the property and submitted report saying construction was not completed and three sides boundaries not tallied for no particulars given for the premises bearing No.1-9-628/3 and plaintiff failed to produce any documentary evidence of D.2 to D.7 got knowledge about the sale agreement and even D.L.Kanthamma was referred as one of the executants along with D.1 she did not sign the Ex.A.1 agreement, and but for the legal notice issued to all the defendants, the letters addressed were only to D.1, thereby the plaintiff is not entitled to the relief of specific performance of the contract of sale but for alternative relief of refund of Rs.6,20,000/- claimed however from the evidence on record by dated 08.09.2000 date of Ex.A.1 sale agreement, paid Rs.40,000/- by cheque bearing No.446071, Rs.30,000/- by cheque bearing No.690421 dated

18.09.2000, Rs.50,000/- by cheque bearing No.690422 dated 18.09.2000, Rs.4,00,000/- by cheque bearing No.648631, dated 03.10.2000 Rs.30,000/- by cheque bearing No.690423 dated 02.10.2000 and Rs.1,00,000/- by cheque bearing No.648637 dated 14.02.2000 drawn on State Bank of Hyderabad. On the other hand, D.1 in his written statement contested as if Rs.40,000/- only paid from the payments, what all the plaintiff could prove is Rs.5,00,000/- and not of Rs.6,20,000/- as claimed. Thereby, plaintiff is entitled to refund only from D.1 for the alternative relief of Rs.5,00,000/- with interest by refusing main relief against all and even the alternative relief against D.2 to D.7.

18. Before discussing the facts further, it is important to discuss in relation to the contract for sale and entitlement to the main or alternative relief, as the case may be, and the requirements of ready and willing to perform his part of contract and plaintiff has to succeed on strength of own case and has to come to the Court with clean hands for the equitable relief and on duty of the appellate Court in appreciation of evidence, which is as follows:-

18(i). Under Order 41 Rule 33 CPC, it is the duty of the appellate Court to consider the entire material on record for re-appreciation of the same on facts and law and come to an independent conclusion even to support the decision of the trial court and in particular if to differ, where it is unsustainable including on any finding and to what extent. It is apt to refer the legal position on the specific performance of the contract for sale that plaintiff has to win or lose his case on own strength with pleading of ready and willing to perform his part of contract and it is not only readiness but also willingness to aver that is required to be established not only by plea but also by evidence right from entering into the contract for sale till the suit filed and even thereafter till delivery of judgment. Further Court has to consider the

hardship and also increase in the land values by taking judicial notice more particularly of the urbanized properties in grant or refusal of the main relief for specific performance, leave about alternative relief for refund of amount without prayer cannot be granted.

18(ii). It is the well-settled proposition of law in general appreciation of all civil cases, (though not in a suit for specific performance) from **S.B. Noronal V. Prem Kundi**^[2] that, pleadings are not statutes and legalism is not verbatim. Common sense should not be kept in cold storage, when pleadings are construed. In **Ram Sarup Gupta Vs. Bishur Narain Inter College**^[3] referring to the constitution Bench expression in **Bhagwati Prasad V.Chandramaul**^[4] **Sheodhari Rai V. Suraj Prasad Singh**^[5] and **Trojan & Company V. R M N N Nagappa Chettiar**^[6] it was held that the pleadings should receive a liberal and not pedantic approach as meant to ascertain the substance and not form. In **Bachhaj Nahar V. Nilima Mandal**^[7] at para No.12, it was held in a suit for injunction based on easementary right, that object and purpose of pleadings and issues is to ensure that litigants come to trial on clearly defined issues to prevent cases being expanded on grounds being shifted during trial. Though generally no plea, no evidence can be looked into and for no issue no finding can be given; it is not always the static principle from the fact that even a plea not made specifically from deficiency in pleadings, but if covered by implication and evidence let in and parties know the case, it can be looked into and even to give finding no issue framed is of no bar to formulate a point and decide. Burden of proof in such matters, pales significance as what is necessary is party shall aware of the plea and let in evidence for the Court to give finding from the hearing covering the lis but not outside the scope. It was also held therein that even alternative remedy not pleaded if entitled, Court can grant it where it is appropriate to do so, like where there is no legal bar. In **Balasankar**

Vs. Charity Commissioner, Gujarat^[8] at para-19-it was held that, burden of proof pales significance when both parties adduced evidence and it is the duty of the court to appreciate the entire evidence adduced by both sides in deciding the lis. Further the party proved in possession of best evidence is bound to produce the same to throw light on the lis and to unfold any truth and thereby cannot take shelter on the abstract doctrine of burden of proof saying burden not on him to prove by filing the same, as laid down in ***NIC vs. Jugal Kishore***^[9], and in ***Lakhan Sao Vs. Dharam Chowdhary***^[10].

18(iii). It was also laid down regarding appreciation of evidence in some of the expressions vividly that, appreciation of evidence is no doubt from experience and knowledge of human affairs depending upon facts and circumstances of each case and regard had to the credibility of the witness, probative value of the documents, lapse of time if any in proof of the events and occurrence for drawing inferences, from consistency to the material on record to draw wherever required necessary inferences and conclusions from the broad probabilities and preponderance and from the over all view of entire case to judge as to any fact is proved or not proved or disproved. In this context in ***Vidhyadhar V. Manikrao***^[11] it was held where defendants alleged sale deed executed by another defendant in favour of plaintiff was fictitious and bogus but not supported the plea by entering into witness box on oath and having avoided for no reason and plaintiff's case when proved in the suit for possession held such a contention of defendant with no proof can be rejected also by drawing inference from not entering witness box for no reason. The principle therein is where it warrants Court can draw adverse inference, no doubt depends on facts and circumstances as part of appreciation of evidence as to any fact is proved or not proved or disproved. Further, as part of appreciation, in ***Janaki Vashdeo Bhojwani V. Indusind***

Bank Ltd.^[12] on the scope of power of attorney competence to depose in the place of principal held though it empowers to act on behalf of principal, confines only to the acts done by the power of attorney holder in exercise of the power of attorney and would not include to depose in place and instead of principal in respect of such acts done by the principal and not by power of attorney holder and principal can have a personal knowledge over and in respect of which, in appreciation of deposition of such power of attorney holder with reference to facts and his acts in contra distinction to acts of principal within his personal knowledge which power of attorney cannot depose and same proposition is later relied upon in several subsequent expressions including **M/s.Shankar Finance & Investments V. State of A.P.**^[13], **Mankaur V. Hartar Singh Sangha**^[14].

18(iv). Coming to suit for specific performance of the contract for sale, it was held by the Apex Court in **Jugraj Singh Vs. Lab Singh**^[15] and later even in **Fakheer Chand Vs. Sudesh Kumar**^[16], that the compliance with readiness and willingness has to be in spirit and substance and not from mere pleadings and the continuous readiness and willingness that to be established has to be seen from the conduct of the plaintiff throughout not only from the pleadings but also from the evidence on facts and circumstances of the case on hand. It was held therein that from raising prices after agreement and delay in seeking relief by plaintiff is attributable to him are no doubt the grounds to deny equitable relief for specific performance but for to suitably compensate the plaintiff. **Fakheer Chand** supra relied upon **Kanshi Ram Vs. Om Prakash**^[17]. Also in **Aniglance Vs. Ram Latha**^[18], it was held that the basic principles behind Section 16 of the S.R.Act to consider for person seeking relief are that the plaintiff must manifest that his conduct has been blemishless throughout. No doubt mere pleading about the plaintiff's ready and willingness is not

sufficient to show that he prepared to perform his part of contract as laid down in 1999 (2) L.S.(A.P) 186. In **Gomibai V. Uma Rastogi**^[19] it was held at para No.80 of merely because agreement of sale is proved, it is not necessary to pass decree for specific performance being a discretionary relief to exercise judiciously by referring to **Jugraj Singh** and **Vidhyadhar** among other expressions supra. In **Motilal Jain V. Ramdasi Devi**^[20], it was held on sufficiency of pleading to comply Section 16(c) of the Act that the averment as to readiness and willingness in plaint is sufficient if the plaint on reading as a whole clearly indicates that plaintiff was always and is still ready and willing to fulfill his part of the obligation as such averment is not a mathematical formula. On facts held plaintiff paid not only 2/3rds of the consideration but also sent three notices after the agreement expressing readiness and willingness to say same is apparent therefrom, since delay in filing the suit arisen from third parties acquiring rights in the subject matter of the suit. It referred forms 47 and 48 of I schedule of C.P.C that were relied in **R.C. Chandiok V. Chunnilal**^[21] and a subsequent three Judge bench expression in **Sayyed Dastagir V. T.R.Gopalakrishna Shetty**^[22]. In the subsequent expression of the apex Court in **Ramesh Rameshwar Prasad V. Basutilal**^[23], it was held that where plaint contained statement of readiness and willingness, rejection of plaint on that ground or dismissal of appeal as if pleaded of not ready and willing won't sustain. In **Church of Christ Charitable Trust and Educational Charitable Society, rep. by its Chairman V. Ponniamman Educational Trust rep. by its Chairperson**^[24] it was held from para 10 to 14 referring to Forms 47 and 48 of Appendix-A of C.P.C and Order VII Rule 11 C.P.C. that it is mandatory for the plaintiff to seek the relief to aver all material facts and in the suit for specific performance not only show cause of action but also the date of

agreement and same not barred by time and if there is no pleading of readiness and willingness, plaint is even liable to be rejected. It also discussed further that a power of attorney unless coupled with interest saved by Section 202 of the Contract Act, is revocable referring to **Suraj Lamp and Industries Pvt. Ltd. V. State of Haryana**^[25] and in further saying from Para No.6 of the relief for specific performance is a discretionary one under Section 20 of the Act as also held referring to the first decision of 1937 Madras in **Sirigineedi Subbarayudu** among others in **Mohammadia Cooperative Building Society Ltd. V. Lakshmi Srinivasa Cooperative Building Society Ltd.**^[26] In **Silvey V. Arun Varghese**^[27] it was held referring to Sections 16(c) and 20 of the Act in para Nos.8 to 14 also referring to **Lourdu Mari David V. Louis Chinnaya Arogiaswamy**^[28] that the conduct of the defendant in specific performance suit of plaintiff cannot even be ignored, while weighing the question of exercise of discretion for decreeing specific performance or not. In **Nandkishore Lalbhai Mehta V. New Era Fabrics**^[29] that even in a suit for specific performance, pleading is a pleading which does not construe as evidence but that is required to be let in. In **Aniglase Yohannan V. Ramlatha**^[30] it was held that indication in the plaint that plaintiff's conduct had been blemishless throughout is entitling him to seek for specific performance. Where the essential facts contained in the plaint let to an inference of plaintiff's readiness and willingness, same can be construed as compliance of Section 16(c) of the Act and for that referred **Motilal Jain** supra among other expressions. In **Bal Krishna V. Bhagwan Das**^[31] it was held that it is mandatory for the plaintiff to plead readiness and willingness to perform the contract while seeking specific performance, which no doubt depends on judicial discretion to satisfy from facts and circumstances to grant or not of the equitable relief and any unfair advantage to plaintiff and where it involves hardship to defendant also

sought in the factors for consideration in exercise of the judicial discretion and referred **Motilal Jain** supra and **Umabhai V. Nilkant D Chawan**^[32] of conduct of parties as per settled law necessary to appreciate to arrive at a finding whether plaintiff is all along and still ready and willing to perform his part of the contract as is mandatorily required under Section 16(c) of the Act to determine not from bare averment in the plaint or statement or in examination in chief but from entire facts and attending circumstances in the evidence brought on record with reference to pleadings. No doubt, as held in **Azhar Sulthana V. D.Rajamani**^[33] it is not necessary that entire amount of consideration payable should be kept ready by plaintiff but for able to secure in support of plea of readiness and willingness. On facts held plaintiff failed to establish readiness and willingness all along to perform her part of contract and it would be unnecessary then to go into bonafides of the defendants, where plaintiff could not prove his case by preponderance of probabilities. In **J.P.Builders V. A.Ramdas Rao**^[34] on the test to determine readiness and willingness, it is held that there cannot be a straight jacket formula but for to determine from entirety of facts and circumstances relevant showing intention and conduct of plaintiff as a condition precedent for grant of relief with plea and proof and in the absence of such plea plaintiff is liable to be rejected and even pleaded for absence of such proof not entitled to the relief and also referred **Chandiok** supra among other expressions. In **P.D'Souza V. Shondrilo Nadi**^[35] it was held referring to **Nirmala Anand**^[36] that agreement providing liquidated damages be attracted only where defendant commits breach of terms of the contract for plaintiff in the option to invoke and that no way bars entitlement or not to reside specific performance and escalation of prices no doubt not a sole ground to grant or refuse but for one of the factors with reference to it of unforeseen situation and hardship to the defendant etc., in

refusing the relief. In **N.P.Thirugnanam V. R.Jaganmohana Rao** ^[37]

it was held referring to Section 16(c) and 20 of the Act of continuous readiness and willingness on the part of the plaintiff to plead and prove the condition precedents to consider for grant of the relief for specific performance and for that availability of consideration amounts conduct of plaintiff and attending circumstances with reference to plea of readiness and willingness always be looked into from evidence also and on facts held failed to make out a case for disentitlement to the relief of specific performance. The Apex Court in

K.S.Vydyanadhan V. Vairavan ^[38] held that though time stipulated in the agreement even not made essence of the contract, it must not lose significance and attention of the Court. It was held that, it is high time to consider the time stipulated has some meaning, not for nothing, could such time limit would have been prescribed; the Court should bear in mind in deciding what is the time stipulated and what are the steps to be taken by the one or the other party and what was the part performance done pursuant to it. The stipulations in the agreement should be read in combination with subsequent events and conduct of the parties including in deciding as to really the party is ready and willing in granting or refusing the relief and for entitlement or not of the relief from otherwise. On facts, it was held total inaction of the plaintiff seeking specific performance relief, for 2 ½ years in violation of the agreement stipulating time limit though not essence of the contract, it would be inequitable to give relief of specific performance to such purchaser and to that conclusion referred the constitution bench

expression in **Chandrani V. Kamalrani** ^[39] and with reference to it of time essence of the contract is not with any presumption. However, the Court may infer that it is to be performed in a reasonable time from the terms of the contract, nature of the property and surrounding circumstances relevant including the time limit specified in the agreement and from conduct of parties besides urban properties prices

have been going up shortly over the last few decades particularly after 1973 in taking notice of the same as a relevant circumstance.

18(v). Thus, it is the settled law from above expressions placed reliance by one or other of both sides that in a suit for specific performance, plaintiff has to win or lose his case on his own strength and not on the weak case of the defendant and in seeking the equitable relief, he has to come with clean hands to do equity, thereby court has to look into the case of the plaintiff first and if able to show from his very case entitlement, then to consider the defence, if at all still disentitled, even to exercise the discretion only there from no doubt conduct of the parties and any false plea of the parties can also be weighed against in arriving to grant or not relief, where even from plaintiff's making out the case. It is further to say that, the limitation prescribed of three years or the suit claim made within that time itself does not entitle to the equitable relief. It is because, mean time there is possibility of value of lands go up made change and even may several other factors inference. Besides that the increase in prices and the hardship of the defendants is also the weighing factors even though plaintiff otherwise entitled to the relief to refuse the judicial discretionary relief.

19. From the above propositions coming to further scope of law on facts in relation of pleadings and proof, it is also necessary to mention scope of Order VIII Rules 3 to 5 of C.P.C. and Section 58 of the Evidence Act and also Section 55(6) of the T.P.Act, which reads as follows:-

R.3. Denial to be specific.

It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages.

R.4. Evasive denial.

Where a defendant denies an allegation of fact in the plaint, he must not do so

evasively, but answer the point of substance. Thus, if it is alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And if an allegation is made with diverse circumstances, it shall not be sufficient to deny it along with those circumstances.

R.5. Specific denial.

[(1)] Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability :

Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission.

[(2)] Where the defendant has not filed a pleading, it shall be lawful for the Court to pronounce judgment on the basis of the facts contained in the plaint, except as against a person under a disability, but the Court may, in its discretion, require any such fact to be proved.

(3) In exercising its discretion under the proviso to sub-rule (1) or under sub-rule (2), the Court shall have due regard to the fact whether the defendant could have, or has, engaged a pleader.

(4) Whenever a judgment is pronounced under this rule, a decree shall be drawn up in accordance with such judgment and such decree shall bear the date on which the judgment was pronounced.

Section 58 of the Indian Evidence Act:

Facts admitted need not be proved. —No fact need to be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings: Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.

Section 55(6) in The Transfer of Property Act, 1882

(6) The buyer is entitled—

[\(a\)](#) where the ownership of the property has passed to him, to the benefit of any improvement in, or increase in value of, the property, and to the rents and profits thereof;

[\(b\)](#) unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him, 2[* * *] to the extent of the seller's interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount; and, when he properly declines to accept the delivery, also for the

earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission.

An omission to make such disclosures as are mentioned in this section, paragraph (1), clause (a), and paragraph (5), clause (a), is fraudulent.

20. From the above facts and law, coming to decide the controversy of the appeal lies from the pleadings, proof, provisions and the propositions of law on the scope of the S.R.Act, the written statement of D.1 as referred supra is while admitting execution of the sale agreement by saying the plaintiff is not entitled to the specific performance unless ready and willing to pay entire balance consideration and perform his obligation and that paid only part payment and failed to pay the entire amount. Whereas, the written statement of D.2 to D.7 who adopted the written statement of D.5(D.W.1) speaks that all the property belongs to their father who died leaving behind him themselves and their mother D.L.Kanthamma, who all succeeded and their mother applied for municipal permission from MCH and obtained permission No.77/91 of 1998, dated 03.02.1998 and they entered into Development Agreement with D.1 on 03.12.1998 for construction of multi-storeyed building as per MCH sanctioned plan and D.1 also was permitted by them to enter into agreements for sale with respect to the plinth area which has given to the share of D.1 under the Development Agreement.

21. Once these facts are clear from the pleadings, the same tantamounts to admission under Section 58 r/w Sections 17 to 23 of the Indian Evidence Act and the admitted facts need not be proved so also from the scope of Order VIII Rules 3 to 5 of CPC with reference to Order XVIII Rules 3 of CPC and Sections 101 to 103 of the Indian Evidence Act. The very pleading of the defendants is clear that pursuant to the Development Agreement dated 03.12.1998, there a multi-storeyed building to be constructed in their property by D.1-Developer as per the M.C.H. approved plan, dated 03.02.1998, which

is exhibited by D.5 as D.W.1 in O.S.No.1689 of 2003. The Development Agreement is definitely with them and D.5 as D.W.1 also referred the same as filed to exhibit for who are the custodians of the Development Agreement is the crux to the lis. They when withheld the same from exhibiting, even referred in evidence and what is the scope of the Development Agreement they have categorically stated in the written statements referred supra, once such is the case, non-filing of the Development Agreement leads to adverse interference against them for they have no right of withholding irrespective of no burden on them if at all for such a contest is not available from the Constitution Bench expressions of the Apex Court in **Gopalakrishnaji ketkar Vs Mahammad Haji Lathief**^[40]. The non-filing of the Development Agreement even referred in the evidence affidavit as filed to exhibit as Ex.B.1 and only the approved MCH plan filed and the GHMC plan marked in O.S.No.1689 of 2003 as Ex.B.1 equally to file those at least a copy of it in O.S.No.1690 of 2003, that also gives adverse inference against them from non-filing of the Development Agreement with them being the material document. Once such is the case, therefrom and also from the pleading admissions of as per the approved municipal plan covered by Ex.B.1, it is the admitted document to read in both the suit claims from the legal position supra and as per which according to that D.1 entered the Development Agreement with them on 03.12.1998 and same not seen the light of the day for their non-production and withholding, even in the evidence of D.W.1(D.5) in chief examination itself in both the suits what he deposed was the sale deed No.286, dated 20th Aradabhist (1358 fasili) 1948 AD obtained over the extent of 990 sq.yards as plot No.85 in Sy.No.59 bearing D.No.1-9-628/3 part of which covered by both the suit schedules under the sale agreement and the same is covered by Development Agreement, that sale deed was obtained from Mir Ahmed Ali, in the name of his mother D.L.Kanthamma. It is suffice to say the property was not purchased in

the name of their father but in the name of their mother. In the absence of showing benami, it is to say their mother's property. It is also suffice to say it is their mother that obtained Ex.B.1 municipal approved plan referred supra dated 03.02.1998 of MCH approved plan No.77/91 of 1998 and the Development Agreement they entered or their mother entered, it is as per the written statement they entered or if not at least they got knowledge of entering by their mother with D.1, was dated 03.12.1998, as their father died on 03.11.1983 itself and not alive by the time of Ex.B.1 approved plan was obtained by their mother as owner pursuant to the sale in her favour, what he deposed in further chief-examination as D.W.1 is their mother entered the Development Agreement with D.1 dated 31.02.1998. Even that is the case since their mother is admitted as owner of the property from the chief examination, it is she that obtained the approved plan as owner and that it is she that entered into the Development Agreement with D.1 and it is their written statement plea of they got knowledge about the same for nothing to their surprise of the said Development Agreement dated 31.02.1998 to construct by D.1-Developer in that property pursuant to the approved plan Ex.B.1 multi-storeyed building. It is also as referred supra pleaded by them that as per the Development Agreement the builder is entitled to enter into contract for sale so far as his share of the property under the Development Agreement concerned with prospective buyers pursuant to which and according to them the builder constructed cellar, ground and four floors but failed to complete further work like finishing and completion but for structures raised as a frame. In this background coming to the further chief-examination of D.W.1(D.5) pursuant to the written statement of him adopted by others, from their mother admittedly died on 29.01.2010 intestate, that D.1 did not make further completion by left the work of the construction of what constructed was unfinished after raising the skeleton upto roofs of the floors and even insisted to complete the left over work, the D.1-Developer expressed his inability saying due to his

financial incapacity. It was in saying so, they entered into memorandum of undertaking with D.1-Developer dated 15.09.2004. The two sale agreements by D.1 in favour of the respective two plaintiffs marked as Ex.A.1 in the two suits not even disputed by the D.2 to 7 in their written statement about their genuineness but for saying simply got no knowledge that too, when written statement of D.1 already filed, were dated 20.10.2000. At the cost of repetition what they stated in their written statement is there is no tripartite agreement covered by the sale agreements along with D.1 and plaintiff respectively for the sale agreements entered as their mother was not a party. P.W.1 in the cross-examination, no doubt admitted that, Smt. D.L.Kanthamma was not a signatory but for party to the sole agreements for the undertaking of D.1 to cause execute and register sale deed also by joining them. There is no difficulty to that as very written statement of D.2 to D.7 categorically speaks that after the Development Agreement between the D.1 and their mother D.L.Kanthamma dated 03.12.1998 to their knowledge, D.1 was permitted to enter into contract for sale with respect to the built up area to which he is entitled to towards his share, with third party-prospective purchasers. Once such is the case, before their entering into the MOU dated 15.09.2014 with D.1 to surrender the entire build up area including giving up his existing right if not as on that date as to did he enter into any sale agreement with any third party prior to the MOU dated 15.09.2004 as by virtue of the Development Agreement dated 03.12.1998 to what the share as a Developer in the Development Agreement, he is entitled that is by D.1-Developer to third parties that what they clearly pleaded in their written statement i.e. of D.5(D.W.1) adopted by all others and the admitted pleading need not be proved and the same is when not explained away, the admission is binding.

Once there is admittedly the Development Agreement of 1998, they could have been made a *bona fide* enquiry in this regard and their

entering with D.1 of MOU dated 15.09.2004 that no way takes away the existing rights of third parties who are *bona fide* prospective vendees as *bona fide* purchasers and suffice to say the said agreements even D.L.Kanthamma was not a party though alive by the date of the agreements dated 20.10.2000 for not a signatory for the name referred of her is binding on the said D.L. Kanthamma and equally of D.2 to D.7 from their written statement plea of the Development Agreement enables the builder to enter into sale transactions with 3rd parties to that extent of the share of the builder to bind the owners even. In this background, coming to the cross-examination of D.W.1, what all he stated is that the MOU dated 15.09.2004 between the D.1 and D.2 to D.7 inter se no way referred the sale agreements in favour of the two respective plaintiffs in the list of purchasers. That MOU is not even seen the light of the day at least to demonstrate to that effect by its filing. In the absence of which, a stray oral sentence no way helpful much less to discharge their burden much less to avoid their liability pursuant to the Ex.A.1 respective two agreements of sale in favour of the two plaintiffs, entered by the D.1-Developer equally binding on them and it is out of the Developer's share pursuant to the admitted existing Development Agreement dated 03.12.1998 executed. It is not their case of the original Development Agreement dated 03.12.1998 is not with them so also of subsequent MOU dated 15.09.2004 and no filing leads adverse inference against them as discussed supra. It is there that has to explain though these are the two material documents the burden lies on them without any right to withhold as held in the three judge Bench expression of the apex Court in **Khetkar** supra.

22. Having regard to the above, their contest of D.1 has no right to deal with the property or it might be a collusive outcome between the D.1 and plaintiff respectively subsequent to the MOU dated 15.09.2004 is unsustainable, as they could not show any of the

material to say the Ex.A.1 two agreements in both the suits dated 20.10.2003 are subsequent to MOU dated 15.08.2004, or the sale agreements as collusive and not supported by consideration. In the absence of which, they being bound by the Ex.A.1 sale agreements, dated 20.01.2000, the MOU dated 15.08.2004 can at best be called collusive one and even genuine that no way thereby defeat the rights of the respective plaintiffs and the binding nature of the same on the property to enforce against D.1 including against D.2 to D.7 though not personally for the property in their hands is liable being succeeded the property of their mother D.L.Kanthamma as her legal heirs to account for the suit reliefs from the property in their hands that is binding to satisfy the suit claim of the plaintiff from entitlement to the main relief or the alternative relief, as the case may be, in the respective two suits for specific performance of the contract or for refund of the amount, as the case may be. It is in this context to say prima facie there are payments made reflected from the bank account even prior to the MOU there are exchange of legal notices between the plaintiff and D.1 respectively referring to the sale agreements which are even long prior to the MOU dated 15.09.2004 to say the MOU no way takes away any existing right of the respective plaintiff against the D.1 and also on the estate of the owner who is the mother of D.2 to D.7 in the hands of D.2 to D.7 as they succeed in so far as the share of the D.1 as developer therein to that extent to make them liable to recover the refund of the amount if not for the main relief of specific performance with charge on the property if at all to grant though not they are personally liable but for to say that cannot under the guise of the MOU, dated 15.09.2004 be given go by to the third party rights created under the Development Agreement dated 03.12.1998 in before the MOU entered cancelling the Development Agreement.

23. From the discussion supra, coming to further facts even the Advocate Commissioner's report speaks he could not identify for door

numbers of the flats and boundaries not mentioned. Once the plan covered by Ex.B.1 and the Development Agreement and the subsequent MOU cancelling Development Agreement no way different much less demonstrate from any evidence of defendants of the sale agreement Ex.A.1 covered two items of the property of the two suits are not part of it, in the absence of which and its showing as forming part of it more particularly in Ex.B.1 marked in one case that demonstrates the trial Court, it can clearly be said went wrong in saying the Commissioner's report is no way helpful but for to say construction was left unfinished, instead of concluding from the record it demonstrates the respective two sale agreements property is part of the property covered by Ex.B.1 plan and the Development Agreement as discussed supra. The non-filing of the Development Agreement of 1998 and the non-filing of MOU, the subsequent cancellation of the Development Agreement, dated 15.09.2004 as discussed supra from above also leads to adverse inference to the defence of the defendants that was not properly appreciated by the trial Court in appreciating of whom the burden lies and how a party in possession of the property, based on evidence has no right to withhold but for to produce before the Court so as to arrive truth by the Court apart from their pleading not in dispute about the property description no way part of the Ex.B.1 plan and Development Agreement property, that too when categorically pleaded in the written statement of D.1-Developer is entitled for his share of property under construction to enter into contract for sale pursuant to the Development Agreement of 03.12.1998 which is admitted as per the approved plan dated 03.02.1998 which is the plan obtained by their mother for which their mother is the owner of the property as per the evidence, though parties claimed initially of it is that of their father, it is clarified by the chief examination of D.5(D.W.1) of the property stands in the name of their mother is suffice so to hold as discussed supra. It is because what the proof required is not only from positive evidence of plaintiff but also from the admissions in the

pleadings and evidence of defendants to rely by plaintiff. It is also because appreciation of evidence is not only from the evidence covered by respective deposition but also with reference to surrounding facts and circumstances to draw inference as the whole process of the pleadings and the controversies is to find out and the evidence itself adduced to the extent of controversies resolved therefrom is as part of voyage by the process of trial to arrive the truth which is the quest and appreciation of evidence is thereby to arrive where truth lies from the overall evidence irrespective of who let in what evidence. As once evidence is brought before the Court, it is helpful for giving appreciation either in favour or against any of the contesting parties, that too when burden of proof pales of significance when both the parties are on the issue from leading of evidence. Apart from even no issues specifically found once covered by plea it is immaterial, as the whole process is to arrive a truth and the conclusion from the judgment as a final process is to find out where truth lies with reference to which to decide rights or liabilities and obligations of the parties.

24. In fact it is important to say in the cross-examination of D.5(D.W.1) by plaintiff particularly in O.S.No.1690 of 2003 equally in the other suit on 05.01.2009 it is brought on record that as per the Development Agreement dated 03.12.1998 between D.L.Kanthamma, mother of the D.2 to D.7 and the D.1-the Developer out of cellar, ground and 4 floors the share of the D.L.Kanthamma, represented by their sons D.2 to D.7 is for 6 cars and 6 scooters parking in the cellar and 6 mulgies in the ground floor, entire second floor and entire 3rd and part of 4th floor and remaining is that of the D.1-Developer. Once such is the case, the flats of the plaintiffs respectively covered by the two suits are in first floor viz; flat Nos. 105 and 106 with undivided part of 25 sq.yards site respectively for the built up area of 1000 sq.ft. in one

case and 1050sq.ft in another case respective sq.ft. of built up area besides of common area. It is not the case of the defendant either in the written statement or in the evidence of D.W.1 of first floor by any exchange falls to them before entering into the sale agreements by D.1 with respective two plaintiffs covered by Ex.A.1 in two suits dated 20.10.2000. It is admitted that some of the prospective vendees filed before the some District Consumer Forums claims against the D.2 to D.7 and D.1 and the State Commission directed to execute sale deeds in favour of the said claimants for their respective sale agreement portions. It is subsequently suggested to D.W.1 that in the list supplied by D.1 while entering the MOU dated 15.05.2004, it is also referred the two plaintiffs respective agreements extents. Though the D.W.1 is denying the same, he failed to produce despite the specific suggestion of plaintiff to demonstrate the said MOU dated 15.09.2004, that is the reason why as concluded supra, the non-filing of which leads adverse inference from the withholding, that too, despite the specific suggestion that too having been in custody of the document to the extent to draw the inference that had it been produced, it could reflect the names of the plaintiffs covered by the suits sale agreement extents in the MOU to bind them. It is therefrom suggested by the respective plaintiffs to D.W.1 that the defendants all are also liable to execute sale deeds pursuant to the two sale agreements in favour of the two plaintiffs in both the suits covered by Ex.A.1 agreements respectively. In fact, in the further cross-examination, D.W.1 stated that after the MOU for saying the plaintiffs' extents not mentioned in the list given by D.1, they did not initiate any action against the D.1 by police complaint or the like even after they came to know about the two sale agreements transactions between the plaintiffs and D.1. It is suggested that entire sale consideration received by the D.1 under the two respective agreements from the respective plaintiffs, for which D.W.1 answered as not aware and not even denial of the agreements though in the further cross-examination disown their liability also to submit specific

performance by execution of sale deeds of the suit relief as claimed to bind them along with D.1. A perusal of the Ex.A.1 sale agreements clearly show the respective extents in the first floor (super plinth area) of 1050 sq.ft. as plot 105 and 1000sq.ft. as plot No.106 respectively with undivided land of 25sq.yards of the multi-storeyed building under construction. It is referred as building constructed under the land forming part of the premises of the land bearing D.No.1-9-628/3 in the boundary descriptions besides the road, corridor and other appurtenant door numbers of the first floor given with open space to say the description is clear to the understanding with all clarity with no any ambiguity even in the commission report so to say, leave about the Commissioner's report is with no value to say contra from what is discussed supra. It is important in this context to further say that the respective two sale agreements were dated 20.10.2010. The sale agreement terms also speak that D.L. Kanthamma is one of the parties, no doubt there is no signature of her, but for the signature of D.1-Developer as vendor No.2 as duly authorized. It is because written statement of D.2 to D.7 that is of D.5 adopted by them as referred supra is very clear of as per the Development Agreement dated 03.12.1998, D.1-Developer is entitled to sell out of his share of the flats to 3rd parties to bind the parties to the Development Agreement and what are the properties fallen to D.1 and what are the properties fallen to them as legal representatives of their mother's property under the Development Agreement is categorically deposed in the cross-examination of D.W.1, that also discussed supra that the two sale agreement extents of the first floor therefore proved fallen to the share of D.1 and from the written statement plea, D.1-Developer is entitled to enter contract for sale with third parties to bind not only D.1-Developer but also for execution of sale deeds by the other party to the Development Agreement that is owner of the premises Smt. D.L.Kanthamma, no other than the late mother of D.2 to D.7 as she

died in 2001 after the said Development Agreement of October, 2000 to bind them as succeeded to the estate to submit the suit reliefs either for specific performance or for the alternative relief. The estate of Kanthamma representing by them, though not but for if Kanthamma alive to make her personally liable, since the estate in their hands is made liable that is the property covered by the Development Agreement and once such is the case even there is any cancellation of Development Agreement inter se that no way takes away the third parties rights in between accrued including that of the two plaintiffs under the two sale agreements dated 20.10.2000 in execution of the agreement by D.1 also representing Smt.D.L.Kanthamma as duly authorized in his signing on behalf of both of them pursuant to the Development Agreement terms supra. It is to say even for specific performance, the D.2 to D.7 cannot avoid that is also why even in the Consumer State Commission prospective vendee claims for specific performance is ordered in directing all to execute sale deeds for the agreements entered by the D.1-Developer with the prospective vendees to bind D.2 to D.7 also.

25. From this background, in the agreements when there is reference of Rs.40,000/- part payment respectively out of the sale consideration and the subsequent installments for balance of sale consideration fixed time and also for execution of sale deeds after 31.03.2001 for the payments in between. From this background from the legal position already discussed supra as to entitlement of the equitable relief of the specific performance of contract for sale by the receptive two plaintiffs that is negated by the trial Court and its correctness concerned, though under Section 16© of the S.R.Act what is required is the plea of readiness and willingness, both the components, for very maintainability of the suit that is there and so far as proof concerned from the law, right from date of agreement till date of decree plaintiff who seeks for specific performance of the contract for

sale supposed to show always ready and willing to perform his part of the contract. Even the suit has to be filed whether on notice of refusal with no lapse of time and not at the fag end of limitation contemplated by Article 54 of the Indian Limitation Act, 1963. The law is very clearly from the several of the expressions referred supra as to Court has to consider various factors including the hardship on other side and increase in the value of property by taking judicial notice that too in case of urbanate property like the present one, from the delay in seeking performance. Apart from it, it is not the mere plea but also the proof of always ready and willing to perform, that is required Exs.A.1 to A.14 and Ex.B.1 in O.S.No.1689 of 2003 of which the Ex.A.1 and Ex.B.1 already discussed supra, at the cost of repetition the sale agreement was dated 20.10.2000 and at the cost of repetition as per the terms of the sale agreement the payments stipulated for balance excluding Rs.40,000/- paid as advance out of the sale consideration amount of Rs.5,50,000/- for the flat No. 106 of first floor 1000 sq.feet with undivided share of land of 25 sq.yards, that to be paid in three instalments, 1st instalment of Rs.2,50,000/- on or before dated 20.11.2000(within one month from 20.10.2000 date of Ex.A.1 sale agreement), 2nd instalment of Rs.1,50,000/- on or before dated 20.01.2001(within two months) and the 3rd instalment of Rs.1,10,000/- on or before dated 31.03.2001(within three months) and to obtain sale deed therefrom.

26. Coming to the payments and readiness and willingness, the Ex.A.2 letter of plaintiff to D.1-Developer dated 10.06.2002(in both the suits) showing the details of advance payment made by him totally in asking to refund the amount paid entirely of Rs.5,50,000/- by 31.07.2002. The contents of the letter of plaintiff TPR addressed to D.1 sent by registered post speaks that in relation to the flat No.106 at DLB Arcade,H.No.1-9-628/3,Vidyanagar,Hyderabad for refund of amounts pursuant to the sale agreement, dated 20.10.2000 for 1000

sq.feet super plinth area of the first floor with undivided share in the land admeasuring 25sq.yards in the building constructed on land forming part of the premises. As per the terms of the agreement, advance payment of Rs.5,40,000/- and from the meeting held at owners residence in the new building premises on 12.05.2002 and at the residence of the vendee TPR, Bagh Amberpet on 14.05.2002 and on 09.06.2002 from the advance payments made so far viz; before the agreement dated 20.10.2000, on 12.09.2000 through SBI cheque No.690415 of Rs.40,000/-, on 04.10.2000 through SBI cheque No.493026 of Rs.2,00,000/-, on the even date of agreement on 21.10.2000 through SBH, cheque No.648634 of Rs.2,00,000/- and later on 14.12.2000 through SBH cheque No.648636 of Rs.1,00,000/- since total of Rs.5,40,000/- out of Rs.5,50,000/- paid and on 12.05.2002 D.1-Developer and the authorized representative of the owner i.e. D.N.Rao (D.5) among others explained reasons for not progressing with construction of the building/flats as per the agreed schedule of completion and handing over of flats before 31.12.2000 from the unexpected problems cropped up consequent to the demise of the owner Smt.D.L.Kanthamma in completing the registration for the undivided share of land admeasuring of 25sq.yards of land and thereupon his authorized representative Sri TKR observed that the present suits is a sheer violation of the agreement terms dated 20.10.2000 executed by the D.1-Developer and the owner and for the uncertainty of the period in resolving the disputes between the owner and the D.1-Developer and keeping the pressing need of requirement to urgently seek alternative in view, for no alternative but to speak option of withdrawal from the agreement subject to refund of Rs.5,40,000/- already paid as referred supra together with interest at 18%p.a. immediately and copy is marked to D.5 D. Narayana Rao, owner of D.L.B. Arcade. Once the same is the case, there is an indication even of the letter Ex.A.2 dated 10.06.2002 and knowledge of

D.2 to 7 along with D.1 of the amount of Rs.5,40,000/- paid by the plaintiff to D.1 under the agreement (Ex.A.1) so far to be refunded with interest at 18%p.a. as alternative to withdraw from the agreement to enforce specific performance. It clearly speaks but for Rs.10,000/- entire sale consideration out of Rs.5,50,000/- is paid before December, 2000 pursuant to the agreement dated 20.10.2000 even the stipulation under the agreement to pay is by 31.03.2001. It is suffice to say the plaintiff paid the amounts in advance pursuant to the agreement and what he claims alternatively is from the problems between the D.1-Developer and owners (D.2 to D.7) and uncertainty in completion by D.1-Developer and to hand over to the plaintiff his premises under the agreement and for execution of sale deed, as an alternative to refund with interest at 18%p.a. of the amount paid of Rs.5,40,000/- to withdraw from the sale agreement transaction. It was not complied, as can be seen, D.1 in his pleading suppressed the same so also D.5. Once they got notice of it how they subsequently could enter into MOU dated 15.09.2004 much less to say they are ignorant of the sale transaction covered by Ex.A.1 with plaintiff TPR who is represented through the other plaintiff in O.S.No.1690 of 2003 by name TKR as referred supra in Ex.A.2. Even subsequently under Ex.A.3 another notice issued by the plaintiff in O.S.No.1689 of 2003 dated 08.07.2002 through TKR-P.W.1 in another suit as an authorized representative of plaintiff TPR in referring to the meeting and Ex.A.2 letter saying there is no positive response to the amount to be refunded with interest as agreed, despite Ex.A.2 notice. Hence to indicate the steps for refund along with interest supra before 31.07.2002, failing which, plaintiff is constrained to initiate legal recourse. The notice is given to D.1-Developer and copy marked to D.5. Another notice Ex.A.4 to D.1-Developer referring to Exs.A.3, A.2 and Ex.A.1 in relation to the refund saying despite two letters and cut off date of 31.07.2002, for no arrangements made to refund the amount of Rs.5,40,000/- with interest at 18% p.a. that comes to Rs.1,72,346.50 paise as on 31.07.2002 total

of Rs.7,12,346.50 paise to be refunded, once again advising to honestly comply with the obligation and settle the same. Ex.A.5 is another letter dated 01.08.2002 to D.1 by marked copy to D.5 referring to Exs. A.1 to A.4 supra saying despite cut off date 31.07.2002 as stipulated, committed default in refunding the amount as well as withdrawing the earlier offer for refund of advance and necessity for handing over all the flats as per the Ex.A.1 agreement dated 20.10.2000 on or before 18.08.2002 without prejudice to other remedies and rights. D.5 written statement adopted by others off D.2 to D.7 and D.5 deposed as D.W.1 on behalf of all and thus the notice issued to D.5 is clear of D.2 to D.7 got knowledge of the notice contents and later collusively setup MOU, that not ever seen light of the day. Ex.A.6 is ultimate legal notice to D.1 dated 27.08.2002 by reiterating all the facts about the advance paid and to refund with interest, failed to comply that tantamounts to the offence of cheating liable for legal recourse for the same, apart from directing the handing over possession of the flat as else to take criminal action and civil recourse. Ex.A.8 is the registered postal acknowledgment of D.1, Ex.A.9 General power of attorney executed by the P.W.1 TPR in favour of TKR, his brother and plaintiff in another suit O.S.No.1690 of 2003 to lay claim civil and criminal recourse authorizing him. Ex.A.10 is an important document in support of Exs.A.1 to A.8 supra and it clearly speaks from the S.B.I. account of plaintiff that as per the cheque referred supra in Exs.A.2 to A.8 bearing cheque No.648634 for Rs.2,00,000/- encashed by D.1 on 21.10.2000 and another cheque bearing No.648636 dated 14.12.2000 for Rs.1,00,000/- encashed by D.1 on 03.10.2000. Ex.A.10 payments and payment of 4,00,000/- reference to the suit claim in O.S.No.1689 of 2003 of TPR and pursuant to Ex.A.2 legal notice, it substantiates regarding payment reflected in Ex.A.10. There are no replies given by any of the defendants either D.5 on behalf of the D.2 to D.7 representing for any

of the Ex.A.2 to A.5 letters, leave about A.6 notice and A.8 acknowledgment of D.1. The trial Court totally ignored these important aspects and went wrong in directing payment of Rs.40,000/- only and as if there is no other payment proof filed. In fact, this Ex.A.10 not only reflects the two payments covered by the cheques encashed by the D.1 referred in Exs.A.2 to A.6 but also the plaintiff in other suit TKR, brother of TPR paid Rs.4,00,000/- and Rs.1,00,000/- by two cheques bearing Nos. 648631 dated 03.10.2000 of Rs.4,00,000/- and 648637 dated 14.12.2000 of Rs.1,00,000/-, out of the payments either in the name of D.1-Developer or his entity's name Sadguru Constructions of D.1 and D.1 cannot dispute for he did not even come to witness box much less with oath against oath against the plaintiffs said evidence to rebut said proof, even burden shifts and there is nothing even to disprove the documentary evidence for not a case of D.5 of these notices not served on him by any specific plea much less not with any specific suggestion even from P.W.1's cross-examination. It is apart Ex.A.10 speaks said Ex.A.10 items covered of Rs.3,00,000/- and add paid of the suit claim of TPR of Rs.3,00,000/- under the two cheques reflected in Ex.A.11 and also Rs.4,00,000/- and Rs.1,00,000/- =Rs.5,00,000/- referred in Ex.A.10 reflected from Ex.A.11 of appeal suit claim in CCCA No.112 of 2009 of Sri TKM-the plaintiff from the account when they are the two brothers and the payments made from the account of TKR on behalf of both covered by the two agreements and that is the notice issued and even from the settlement letters issued demanding to refund that was not refunded. It is unknown how the trial Court was justified in ignoring the above documentary evidence without proper appreciation, even in saying though justified to that extent of from the waiver of the main relief for specific performance pursuant to the letters Exs. A.2 to A.4, leave about A.5 and A.6, asked for refund of amount with interest and not with demand for specific performance. As the main endeavour from the letters reflected served on D.5 and D.1 is for refund with interest, of the

amounts claimed paid since proved as referred supra, the trial Court could not here ignored, without even drawing of necessary adverse inference for non-giving of reply. It is for the reason, though non-giving of reply does not amount to admission of contents of the notice, adverse inference can be drawn to the extent that but for truth they could not have been kept quiet with no reply as no ordinary prudent person would keep quiet without reply by denying the averments but for truth as laid down in Chapala **Hanumaiah Vs. Kavuri Venkateshwarlu**^[41] and also the three Judge Bench expression in **N.Rangappa Vs. Mohan**^[42] in para 15 in discussing the reverse onus clause burden lies and adding strength to the same from non-giving of reply to draw adverse inference for had there been any truth, it could have been replied by denial as the only inference from any prudent conduct of a human being to deny by giving reply but for truth is to draw.

27. Exs.A.12 and A.14 are the postal receipt and acknowledgment of original bank passbook of T.Krishnamurthy. In this back ground coming to the cross-examination of P.W.1 by defendants, though D.1 did not cross-examine since entitled to the benefit from the cross-examination done by the D.2 to D.7, the P.W.1 TPR, is the brother of the plaintiff TKR in other suit O.S.No.1690 of 2003. He, in his chief examination, specifically mentioned the total sale consideration of Rs.5,50,000/- and how Rs.5,40,000/- paid by 4 cheques including one for Rs.40,000/- referred in the sale agreement and the other three of two reflected by Exs. A.10 and A.11 supra also from Ex.A.14 and the one for Rs.2,00,000/- dated 04.10.2000 cheque bearing No.493026 drawn on S.B.I. and that is reflected from Exs.A.2 to A.6 referred supra and the circumstances of the meeting to address a letter and why withdrawn in demanding to deliver possession that is what is discussed supra from contents of Exs.A.2 to A.6. In the cross-

examination, learned counsel for D.2 to 7 having taken time from 29.09.2006/17.11.2006 to 13.3.2008 for failure to do the cross-examination in between including on 17.04.2007 and P.W.1 as reflected in the certified copy of deposition, on closure permitted for recall as per the order in I.A.No.80 of 2008 dated 24.04.2008 and P.W.1 was cross-examined only on 01.05.2008, where he deposed that he verified the Development Agreement dated 03.12.1998 between the D.1 and Smt D.L.Kanthamma-the owner and therefrom entered the agreement Ex.A.1 for the commercial flat and in the Ex.A.1 agreement D.L.Kanthamma referred as first vendor however she did not sign, but for D.1 as second vendor as authorized signatory thereby there is no earmarked column for signature of first vendor and on the question whether he informed Smt D.L.Kanthamma about Ex.A.1 agreement, he categorically deposed that he informed to the sons of late D.L.Kanthamma about the Ex.A.1 agreement and also sent Ex.A.2 notice not only to D.1-Developer but also to D.5 on behalf of D.2 to D.7 though he stated that he did not file any proof about the service of notice, in denying the suggestion of no such notice sent. He himself categorically stated as copy of the notice sent to D.5, though he could not file any proof regarding service of the notice covered by Exs.A.3,A.4 and A.5 also to any of the legal representatives of D.L.Kanthamma. He also deposed that Ex.A.6 legal notice got sent to legal heirs of D.L.Kanthamma i.e. D.6 and denied the suggestion of no such notice sent or Ex.A.7 receipt is not pertaining to Ex.A.6. In fact, the trial Court reflecting the service of the proof regarding Ex.A.6 notice sent to one among D.2 to D.7 by the plaintiff under Ex.A.7 in saying but for that there is no proof of sending the letters Exs.A.2 to A.5. In fact, Ex.A.2 contents clearly speak the sittings with the owners and also the D.1-Developer pursuant to the Ex.A.1 agreement, from the talks to take refund of the amount paid with interest at 18% p.a. the contents of the notice not even disputed in the cross-examination of P.W.1 by the defendants dated 01.05.2008. It is brought on record in the cross-

examination that as per the Development Agreement dated 03.12.1998, there was an obligation to execute registered sale deed by the D.2 to D.7 on behalf of the D.L.Kanthamma as owners, in favour of the vendees of the D.1-Developer, subject to completion of the built up area allotted to the owners under the agreement. That agreement not seen the light of the day as discussed supra by clearly speaks Development Agreement is available with D. 2 to 7 who withheld from its filing in Court. He deposed that the facts mentioned in Ex.A.2 are aware and as the construction not completed by D.1, thereby in asking for refund under Ex.A.1. Once the same is brought on record, the contents of A.2 are substantiating from the cross-examination of P.W.1 by the defendants without denying the contents as to the payments made by the plaintiff and also the meetings with the owners and the dispute between the D.1-Developer and owners and the understanding to refund with interest to plaintiff in asking to refund as agreed from the sitting with the owners and the D.1-Developer at the premises of the owners apart from at the premises of the plaintiff. The trial Court totally ignoring the same in appreciation though this is one of the vital aspects suffice to show knowledge of D.2 to D.7 of the agreement which is prior to the MOU from the contents of Ex.A.2 notice that are substantiated by the cross-examination supra of plaintiff by defendants. P.W.1 deposed that he does not know about MOU between the D.1 and D.2 to D.7 dated 15.09.2004 and any of the built up area surrendered by the D.1-Developer to the owners and denied the suggestion of Ex.A.1 is not binding on the D. 2 to 7 for not parties to Ex.A.1. Once they or their mother through whom they are claiming are parties to the Development Agreement dated 03.12.1998 and once the same is reflected in the written statement as referred supra of the Development Agreement authorized the D.1-Developer to alienate his share of the properties (flats) to the 3rd party vendees for the owners also to join and execute the sale deeds, that is enough and defendants

cannot deny much less to say Ex.A.1 sale agreement is not binding, much less even not referred in the MOU dated 15.09.2004 much less same is nothing but collusive outcome from the very say with reference to the contents of Ex.A.2 deposed in the cross-examination of P.W.1 by not disputing the same, even by any suggestion; leave about Exs.A.3 to A.6, reiterating the same, so also the amount due and payable from the understanding to refund by all. The contention of open space bearing No.106 is not in existence as per the sanctioned plan is untenable without even filing the Development Agreement, dated 3.12.1998, and also the cancellation agreement, dated 15.09.2004, as to what flats as to what space left further without completion since already constructed structure undisputedly. The trial Court thereby should have even taken the waiver of the right by plaintiff under Exs.A.2 to A.4 of enforcement for specific performance in asking for refund while ordering for refund of Rs.5,40,000/- with interest at 18%p.a. as claimed in Ex.A.2 notice content of which and not even in dispute in the cross-examination of P.W.1 as discussed supra.

28. In so far as O.S.No.1690 of 2003 is concerned among the Exs.A.1 to A.4 and the evidence of P.W.1 TKR, D.W.1(D.5) Sri D.Narayana pursuant to Ex.A.1 sale agreement, the terms and contents and executants as referred supra since in detail discussed in O.S.No.1689 of 2003 in the previous paras no way requires repetition but for the other documents of which Ex.A.2 is similar, to Ex.A.2 letter on O.S.No.1689 of 2003 dated 10.06.2002, in O.S.No.1690 of 2003 with self-same terms and contents in asking to refund the amount of Rs.6,20,000/- so far paid interest at 18% p.a. It is necessary to refer the contents of Ex.A.2 letter addressed to D.1-Developer by marked copy to D.5/D.6 D.Narayana Rao, by plaintiff Sri TKR in relation to office space bearing No.105 of DOB Arcade 1050sq.ft. in the first floor of the (super plinth) area with undivided share in the land of 25 sq.yards with the building constructed on the land forming part of the items 1-9-628/3

of Zamisthanpur for Rs.6,20,000/- and after several discussions on the subject handing over of the plot very significantly meetings held at the owners residence (D.2 to D.7) at the above referred new building on 12.05.2002 at the residence of the plaintiff at Bagh Amberpet on 14.05.2002 again on 09.06.2002 from the detailed of advance payments made of Rs.6,20,000/- viz; Rs.40,000/- under cheque No.446071 dated 8.9.2000 referred in the sale agreement Ex.A.1 dated 20.01.2000, other payments of Rs.30,000/- and Rs.20,000/- under two cheques bearing Nos. 690421 and 22 of later even date 18.09.2000 drawn on S.B.I.,

Rs.4,00,000/-by cheque bearing No.648631 dated 03.10.2000 and Rs.1,00,000/- by cheque No.648637 dated 14.12.2000 drawn on SBH they reflected in Ex.A.10 and Ex.A.11 of O.S.No.1689 of 2009 discussed supra also with reference to Ex.A.14 passbook which are the self-same documents also filed herein and marked said Ex.A.14 self-same document as Ex.A.14 herein showing all the other payments covered by the transactions from the account of T.Krushmamrthy (brother of TPR, besides cheque No.690423 of Rs.30,000/- dated 03.10.2000 drawn on SBI. The Ex.A.2 correlated to Ex.A.14 besides Ex.A.10 and A.11 of O.S.No.1689 of 2003 reflected the Rs.4,00,000/- and Rs.1,00,000/- herein of the suit and Rs.2,00,000/- and Rs.1,00,000/- of the suit transactions in O.S.No.1689 of 2003 as discussed supra, the Ex.A.2 referred cheque of Rs.40,000/- dated 08.09.2000 i.e. reflected in the sale agreement as advance received undisputedly, coming to other payment out of Rs.6,20,000/- including Rs.4,00,000/- and Rs.1,00,000/- supra also reflected under Exs.A.10 and A.11 of the other suit exhibited documents from the account copy of bank letter discussed supra, the cheque No.690421 for Rs.30,000/- and 690422 of Rs.20,000/- on 18.09.2000 are reflected from Ex.A.14 bank passbook in this suit O.S.No.1690 of 2003 at last but one page of the transactions in the last two lines with cheque numbers and as encashed and even the cheque No.690423 dated 03.10.2000 for

Rs.30,000/- also reflected in the list as transaction No.2 as encashed.

Thus correlation of Ex.A.2 with Ex.A.14 and with reference to Ex.A.10 and Ex.A.11 of O.S.No.1689 of 2003 clearly proves the payment of Rs.5,40,000/- by TPR plaintiff in O.S.No.1689 of 2003 and the another payment of Rs.6,20,000/- by plaintiff T.Krishnam Murthy in O.S.No.1690 of 2003 and the trial Court did not properly advert to it. Apart from the above, Ex.A.2 letter further contents speak for the reasons of not progressing the construction and at the meeting dated 12.05.2002 with D.1 and D.5/D.6 D.Narayana Rao on behalf of the owners D.2 to D.7 among other matters explained as the flat as per the agreed schedule to be completed by 31.12.2000 and from the unexpected problems cropped up in after demise of the Smt. D.L.Kanthamma (mother of D.2 to D.7) in completing the registration for undivided share of the land to an extent of 25sq.yards in the building constructed in favour of the plaintiff and from the owners of the property D.2 to D.7 for allotment of the office space bearing No.105 already agreed to be sold to the plaintiff among the other flats to few others and from the present status is sheer violation of the sale agreement dated 20.11.2000 executed by the D.1-Developer and the owner but mindful of the time already spent and the investment already made on the venture and from the uncertainty of the period involved in resolving the issue between the owner and the D.1-Developer and keeping the pressing need to urgently seek an alternative view and having no other alternative, cause to seek option of withdrawal from the sale agreement subject to the refund of Rs.6,20,000/- with interest at 18% p.a. as per the rate stipulated in the Ex.A.1 agreement for the delayed payments and at the meeting held later on 09.06.2002 reiterated the obligation and responsibility to refund of what was undertaken in the earlier meetings supra, including in subsequent meetings of 15th and 16th June, 2002, to settle the dues to refund the amount by 31.07.2002. It is similar to Ex.A.2 of O.S.No.1689 of 2003

discussed supra. Ex.A.3 is the postal receipt of the notice sent to D.5/D.6 in EX.A.4 and Ex.A.5 another letter dated 08.09.2002 similar to the contents of Ex.A.3 to A.5 representations of plaintiff in O.S.No.1689 of 2003, Ex.A.6 is acknowledgment of D.1 to Ex.A.5 letter, Ex.A.7 representation of plaintiff again dated 18.07.2002 and acknowledgment of D.1 to it dated 23.07.2002 is Ex.A.8; another representation of plaintiff dated 01.08.2002, is covered by Ex.A.10 postal receipt to D.5/D.6 dated Ex.A.11 office copy of legal notice, dated 27.08.2002, with postal receipt of D.5/D.6, acknowledgment of D.1 similar to Ex.A.6 to EX.A.8 in O.S.No.1689 of 2003, leave about Ex.A.14 herein is the original bank passbook as referred supra.

29. In this regard coming to the cross-examination of P.W.1 in O.S.No.1690 of 2003 equally on 01.05.2008 though chief-examination taken on 31.01.2005, the cross-examination of P.W.1 in O.S.No.1690 of 2003 went on several sitting on 20.11.2006, 22.11.2006, again by recall from the docket order dated 17.04.2007 treated no further cross-examination for the counsel for the D.2 to D.7 did not turn up to do cross-examination, on 13.03.2008 and on 01.05.2008 as per the orders in the petition I.A.No.79 of 2008 recall allowed and further cross-examined. A reading of the same shows from the cross-examination, P.W.1 deposed that at the time of execution of Ex.A.1 sale agreement, dated 20.10.2000 he personally met Smt. D.L.Kanthamma and by then the building was under construction and not completed and under the agreement he agreed to purchase the commercial space in first floor bearing No.105 for a consideration of Rs.6,20,000/- and paid advance Rs.40,000/- the date of agreement and another sum of Rs.4,80,000/- paid by then, apart from Rs.40,000/- and the D.1-Developer promised to hand over possession and postponing and meantime Smt. D.L.Kanthamma expired and even by 12.05.2002, the property agreed to be sold was semi-constructed and even before filing of the suit he addressed letters including to D.6

besides D.1. It is suggested that he opted for cancellation of the agreement subject to refund of the amount with interest at 18% p.a. He further deposed that he also requested the owners of the property D.2 to D.7 to arrange the refund of the amount along with the interest. He denied the suggestion of the payments from 18.09.2000 to 14.01.2000 stated in Ex.A.11 are not true. In fact, the Ex.A.11 is the legal notice. He denied the suggestion of entries reflected in Ex.A.14 did not pertain to the payments made to D.1. He deposed that he does not know the subsequent agreement between the D.1 and other defendants from the *inter se* disputes between them and that is the reason the sale deed could not be executed by them. He denied the suggestion of balance sale consideration not paid and thereby sale deed could not be executed or he is not entitled to the suit reliefs. The P.W.1 is also cross-examined by the D.2 to 7 as referred supra by cause admitting, plaintiff also requested the D.2 to D.7 to arrange the refund of said amount of Rs.6,20,000/- with interest at 18%p.a. when such is the case, it is unknown how they can pretend lack of knowledge of the transactions even they were demanded by plaintiff before giving of the legal notice and that too Ex.A.2 contents not even in dispute by them but for a stray suggestion of but for Rs.40,000/- referred in Ex.A.1 other payments not made, even the record clearly speaks the payments made to D.1 and proved and then the burden is on the defendants particularly D.1 who did not even come to witness box, much less cross-examined P.W.1 disputing the same about the amounts received. Once the respective plaintiffs could prove and the onus shifts on the defendants and they could not discharge, the trial Court could not ignore these aspects proved for the entitlement to refund that too when the agreement itself speaks, for delayed payments interest at 18% p.a. is payable. In the further cross-examination of P.W.1 by the defendants dated 01.05.2008 on recall, it is brought on record that the plaintiff verified the Development Agreement between the D.L.Kanthamma and D.1-Developer dated 03.05.1998 before entering

into the Ex.A.1 agreement for the commercial building of open space of 105 of first floor as D.L.Kanthamma as original owner and except the Development Agreement he did not verify any other documents and he does not know whether there was any power of attorney executed by D.L.Kanthamma to D.1-Developer. It is also deposed that D.L.Kanthamma did not sign and the plaintiff also did not sign and there is no column for the first vendor D.L.Kanthamma in the Ex.A.1 to sign and he informed about the Ex.A.1 to the sons of D.L.Kanthamma i.e. D.2 to D.7 and he sent Ex.A.2 letter to them as he sent Ex.A.2 notice to D.1 by marking copy to D.K.Rama Rao (D.6) though there is no proof about serving of Exs. A.2 on D.6, he denied the suggestion of Ex.A.2 copy not sent to D.6, but for made endorsement as if sent, for no proof filed in this regard, equally for Ex.A.6, 7 and 9 sending copies to legal heirs of D.L.Kanthamma for no notice sent to her during lifetime of D.L.Kanthamma. He deposed that the open space bearing No.105 was not completed by D.1-Developer and he did not know whether D.1 not completed the other flats allotted to the owner towards their share under the Development Agreement dated 03.12.1998. He deposed that plot No.105 comes to the share of the D.1-Developer and clause No.10 of the Development Agreement speaks to execute the agreement in favour of the buyers by the D.1-Developer, subject to completion of the build up area allotted to the share of the owners under Development Agreement dated 03.12.1998 to execute sale deeds and he is aware of the facts. He deposed that he asked, for refund of amounts, the D.1-Developer as his flat was not completed and he is not aware of the memorandum of undertaking between D.1 to D.7 dated 15.09.2004 regarding surrender of the built up area to the land owner by D.1. He denied the suggestion of Ex.A.1 was not binding on D.2 to D.7 but for on D.1 and he denied that Ex.A.1 is a created one to defeat the rights of the land owners or there is no authority given to D.1-Developer by land owners to enter Ex.A.1

agreement or open space bearing No.105 is not in existence or he is not entitled to enforce Ex.A.1 agreement.

30. In fact, at the cost of repetition in the written statement of D.5 adopted by D.2 to D.7, it is categorically deposed that pursuant to the Development Agreement, the flats to be taken by the D.1-Developer can be alienated by him to third party vendees for which the flat owners also to execute sale deeds and it is also in the cross-examination by P.W.1 in few lines above referred supra brought on record in the clause-10 of the said Development Agreement dated 03.12.1998, the owners to execute the sale deeds in favour of the vendees of the D.1-Developer of the flats fell to the share of D.1-Developer, provided there is completion of construction. Even therefrom, only to execute sale deed, the construction to be completed and not for entering into the agreement for sale and also same from the written statement admission supra. When such is the case and when refund of amount by the D.1-Developer, the entire property can be made liable, if not entitled for specific performance from the waiver of such right by the plaintiff, by notices from what is discussed supra, that too having paid the entire amount for the construction not completed and there is inter se dispute between the (D.1Developer and owners-D.2 to D.7), that no way takes away plaintiffs rights to get refund of amounts with interest.

31. Having regard to the above, the trial Court went wrong, while ordering alternative relief, in saying as if what is proved the payment made of only Rs.5,00,000/- though it clearly proved of Rs.6,20,000/- paid already and entitled to it with 18% p.a interest pursuant to the terms of the Ex.A.1 agreement for any late payment with such rate to refund; for ordered at 12% p.a till date of decree and at 6%p.a. later till realization that too only of Rs.5,00,000/- so also even D.2 to D.7 bound to submit the reliefs with D.1 for refund of entire amount else to recover though not personally liable being the legal representatives of

the owner their late mother to make the estate liable which what they succeeded. In this regard it is also necessary to mention from the latest expression of the Apex Court in **Unitech Ltd. v. Union of India** ^[43] under Sections 269-UA(2)(f)(ii) & 269-UD of the Income Tax Act 1961 that in case of undervaluation of compulsory purchase of immovable property in case of transfer by way of an agreement or arrangement which has the effect of transferring or enabling enjoyment of immovable property, to evade tax, valuation, to arrive at inference of undervaluation, has to be proportionate to value of rights transferred. Expression “transfer” is wide enough to include within its scope, agreements or arrangements which have the effect of transferring all important rights in land for future considerations such as part acquisition of shares in buildings to be constructed, even though the transfer does not sale, lease exchange.

32. Though the additional evidence application is filed to receive copy of the Development Agreement as additional evidence to exhibit in CCCA No.112 of 2009, the same, for the reasons better known, opposed by the respondents 2 to 7 (D.2 to D.7) from the counter affidavit of R.6/D.6 saying the said Development Agreement was between D.1 and mother of D.2 to D.7 and the Development Agreement along with the approved plan was filed and it was not exhibited in the reference in chief affidavit of D.W.1, and no attempt made from production of original before asking for exhibiting copy of the Development Agreement and thereby a copy cannot be permitted to exhibit. The separate counter affidavit of D.4/R.4 further that the Development Agreement apart from Development Agreement was cancelled by subsequent MOU between the D.1 and D.2 to D.7 dated 15.09.2004 and thereby same cannot be marked as additional evidence by receiving. In fact, they did not deny additional evidence affidavit contents of the chief-affidavit of D.W.1(D.5) in O.S.No.1689 of 2003 referred as Ex.B.1 for marking and thereby filed by

plaintiff/appellant in C.C.C.A.M.P.643 of 2015 to receive the copy to exhibit as additional evidence that was returned with objection to file original Development Agreement as it is only a Photostat copy since he is not in possession of the original but for photostat copy that was furnished by the D.1-Developer and the legal representatives of the original owner i.e. D.2 to D.7 in the Court below while filing the chief affidavit of D.W.1 for original Development Agreement is with the defendants, D.W.1 also cross-examined with reference of the Development Agreement executed between D.1-Developer and original owner D.L.Kanthamma (mother of D.2 to D.7) and even the plaintiff/appellant pending the appeal served notice to produce the original Development Agreement vide notice dated 23.11.1996 on counsel of defendants/ respondents for which having received the notice to produce they failed to produce thereby requirement for adducing secondary evidence is laid and thus it is just and necessary to receive the photostat copy of the Development Agreement and to exhibit as additional evidence as Ex.B.1 in CCCA No.112 of 2009 with notice to produce also enclosed and it is received and acknowledged and there is no reply filed. it also clearly speaks out the original was withheld despite notice to produce without production and not even with any endorsement of the original not with them and if so what happened to the original as discussed supra and once the Development Agreement and pursuant to which and also from the written statement of D.5 and cross-examination suggestions to P.W.1 by defendants, the defendants also liable under the agreement Ex.A.1 obtained by the plaintiffs that was even signed by D.1-Developer executed on behalf of the original owner D.L.Kanthamma also by then alive and signed as authorized signatory for the original owner and D.1-Developer. It is because even original owner not signed what the written statement of defendants referred supra speaks, the D.1-Developer is authorized to alienate the portion fallen to his share of the

flats under construction to third parties to execute sale deeds by them alone to the prospective vendees and that was also the suggestion referring to clause 10 of the Development Agreement by D.2 to D.7 to P.W.1 in both the suits as D.1 not completed the finishing work but for skeleton constructed for his selling to several vendees of the respective portions fallen to the owner D.L.Kanthamma represented by her sons D.2 to D.7 not handed over by finishing they did not execute the sale deeds as it is the condition precedent and it is also admitted the respective plaintiffs are also demanding D.2 to D.7 also to refund. The Development Agreement is for consideration. The D.1-Developer already invested and constructed as per the Development Agreement the flats and when no way prohibits from entering into the sale agreements but for clause 10 speaks at best for execution of sale deed subject to completion of owners' portion by the D.1-Developer. When such is the case, it is as held by the Apex Court in **Suraj Lamp & Industries(p) Ltd. Vs. State of Haryana**^[44] with reference to Section 202 of the Contract Act. It cannot unilaterally be cancelled of the Development Agreement dated 03.12.1998 by MOU dated 15.09.2004 that too in between the D.1 when entered sale agreements with the two respective plaintiffs under Ex.A.1 of the two suits dated 20.10.2000 and having received almost entire sale consideration failed to execute sale deeds despite notices failed to respond when bound even for the main relief waived by the plaintiffs from the understanding by the plaintiff with D.1 to 7 respectively and it is also brought on record of plaintiff was also demanding D.2 to 7 for refund of the amounts; they all being bound to refund at least for ordering refund by the Court in the alternative in favour of the plaintiff respectively with interest at 18%p.a. of the amount paid also from clause-10 in the Ex.A.1 agreement supra for late payment liability of 18% p.a. interest at least from Ex.A.2 notice of plaintiff till date of suit and the subsequent interest from date of suit as pendent-liti till date of decree and even from date of decree till

realization for not an agricultural transaction but in the business or commercial transaction for the commercial flat sold and amount received to be refunded under Section 34 of the C.P.C. and that too having demanded in Ex.A.2 notices by reiterating the understanding between them to refund with interest at 18% that is not disputed by any reply even by D.1-Developer the refund to be ordered is at 18%p.a. from Ex.A.2 notice till date of suit and thereafter even the Court got a discretion to reduce to 12%p.a. pending suit till date of decree and thereafter it is not 6% but 12% p.a. The appellate Court also got the discretionary power under Order LXI Rule 33 C.P.C to award reasonable rate of interest from the fall in bank lending rate of interest as laid down by the Apex Court in **DDA Vs. Joginder S. Monga**^[45].

33. In fact, though under Order XLI Rule 27(1)(b) the Court the power to receive the additional evidence for just decision of the case, from the objection raised and consent not given for marking though the Court can mark as a Court document for reference sake as Exhibit from the agreement contents not in dispute even from the pleadings and evidence on record supra, this is not even chosen to take the ordeal with reference to the provision as the material on record is sufficient to draw adverse inference against the defendants from their non-filing of the Development Agreement as per the three Judge Bench expression of the Apex Court in Ketkar supra that is discussed supra. Thereby the petition for additional evidence is **closed** for that no way necessary to arrive at a just decision of the case from what is discussed supra, even to invoke Order XLI Rule 27 (1)(b) C.P.C. from what is laid down in **KRM Reddy Vs M/s Net work inc.,**^[46].

Issue No.3:

34. Thus, the CCCAMP Nos.643 and 644 of 2015 are closed and both the appeals are held to be allowed in part and with costs, while confirming the trial Court's decree and judgment in refusing the relief of

specific performance of the contract for sale and in granting the alternative relief for the refund of the amounts with interest, by modifying the amount and by modifying from what is awarded against the D.1 to against the D.1 personally also and against D.2 to D.7(R.2 to R.10) on the property of the mother of D.2 to D.7 in the hands of D.2 to D.7(Now R.2 to R.10) for the following:-

The Apex Court in **Delhi Development Authority Vs. Skipper Construction Company Pvt.Ltd**^[47] and judgment of another Bench of this Court in **Mudureddipalle Sanjeeva Reddy Vs. Butturu Rama Mohan Reddy**^[48] and also from the expression with reference to the provision similar to it in **Rose Vs. Watson**^[49] following the earlier expression in **De Bernales Vs. Wood**^[50] of right to refund of the amount is safeguarded by giving the purchaser of lien on the property and interest to be allowed from the time of purchase on the amount paid. It is further the Full Bench of the Lahore High Court in **Shankri Vs. Milkhasingh**^[51] held that the power of giving charge over the property covered by the contract for sale is not just kept by any agreement, but by operation of law from the moment of payment of the purchase amount. It is also wayback held by the Madras High Court as a binding precedent on this Court in **Sura Reddy Vs. Ramanarsu**^[52] that lien given by virtue of clause 6(b) of Section 55 of the T.P.Act can be excluded only by a contract to the contrary and not otherwise to say the lien is statutorily created to enforce unless given up by specific clause of exclusion. In **Delhi Development Authority** Supra categorically observed that the charge specified under Section 55(6)(b) of the T.P.Act in favour of power is statutory charge against the vendor interest in the property to fasten the charge of such property to enforce and it is observed the interest payable to the buyer is from the date of payment of purchase money to the seller to the date of delivery of property or execution of sale deed or otherwise and the

period of limitation to enforce such charge for recovery on the substituted security is 12 years under Article 62 of the Limitation Act and not mere three years. In **Muniappa Vs. Subbaiah** ^[53] it is held on the scope of charge under Section 55(6)(b) of the T.P.Act as akin to the principle to apply to the enforcement of mortgage and substituted securities from the general principle of law in Section 73 of the T.P.Act.

35. Accordingly and in the result, while setting aside the trial Court's decree and judgment respectively in both the suits, the appeals are partly allowed and with costs as follows:

a) In CCCA No.111 of 2009 against O.S.No.1689 of 2003 it is now ordered for refund of amount paid under the Ex.A.1 sale agreement of Rs.5,40,000/-(Rupees five lakh forty thousand only) with interest at 18%p.a. from the Ex.A.2 letter dated 10.06.2002 till date of suit i.e.16.09.2003 and thereafter at 12%p.a. as per the discretion exercised by the trial Court in so arriving the rate of interest for the pendent-liti till date of decree on the entire amount of the principal sum adjudged of the advance amount of Rs.5,40,000/- with interest at 18% p.a. thereon as on the date of suit and from date of decree on such principal sum adjudged further that is the suit amount to be arrived of the amount to be refunded of Rs.5,40,000/- with interest at 18%p.a. from Ex.A.2 letter dated 10.06.2002 to the date of suit 16.09.2003 of Rs.1,22,796/- comes to Rs.6,62,796/- with subsequent interest at 9% p.a. from the date of decree till realization; which is to recover against the D.1-Developer personally also and also against the D.2 to D.7 with no personal liability but for on the estate of their mother D.L.Kanthamma which they succeeded, with charge over said property to realize the amount but for to say the executing Court if at all to invoke Section 52(2) C.P.C. for any personal liability against the D.2 to D.7 if requirements to that extent satisfied u/sec. 55(1)(d) r/w 55(b) of the T.P.Act.

b) In **CCCA No.112 of 2009** against O.S.No.1690 of 2003, it is now ordered for refund of the amount paid under the Ex.A.1 sale agreement of Rs.6,20,000/-(Rupees six lakh twenty thousand only) with interest at 18%p.a. from Ex.A.2 letter dated 10.06.2002 till date of suit i.e.16.09.2003 and thereafter at 12%p.a. as per the discretion exercised by the trial Court in so arriving the rate of interest for the pendent-liti till date of decree on the entire amount of the principal sum adjudged of the advance amount of Rs.6,20,000/- with interest at 18% p.a. as on the date of suit and from date of decree on such principal sum adjudged further that is the suit amount to be arrived of the amount to be refunded of Rs.6,20,000/- with interest at 18%p.a. from Ex.A.2 letter dated 10.06.2002 to the date of suit 16.09.2003 of Rs.1,45,080/- comes to Rs.7,65,080/-+ with subsequent interest at 9% p.a. from the date of decree till realization; which is to recover against the D.1-Developer personally also and also against the D.2 to D.7 with no personal liability but for on the estate of their mother D.L.Kanthamma which they succeeded, with charge over said property to realize the amount but for to say the executing Court if at all to invoke Section 52(2) C.P.C. for any personal liability against D.2 to D.7 if requirements to that extent satisfied) u/sec. 55(1)(d) r/w 55(b) of the T.P.Act.

c) Consequently, miscellaneous petitions, if any, pending in these appeals stand closed.

Dr. B. SIVA SANKARA RAO, J

Dated : 22-04-2016.

Note: L.R.copy to be marked.

B/o vvr.

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- [1] 2008(5) ALD 200
- [2] AIR 1989 SC 193
- [3] AIR 1987 SC 1242
- [4] AIR 1966 SC 735,
- [5] AIR 1954 SC 458
- [6] AIR 1953 SC 235
- [7] (2008)17 SCC 491
- [8] AIR 1995 SC 167
- [9] AIR 1988 SC 719(B)
- [10] 1991 (3) SCC 331
- [11] AIR 1999 SC 1441
- [12] AIR 2005 SC 439 = (2005)2 SCC 217
- [13] AIR 2009 SC 422
- [14] (2010)10 SCC 512
- [15] AIR 1995 SC 945
- [16] 2006(7) Supreme 388
- [17] (1996)4 SCC 593
- [18] AIR 2005 SC 5303
- [19] 2005(2) ALD 631
- [20] (2000)6 SCC 420
- [21] AIR 1971 SC 1238
- [22] (1999)6 SCC 337
- [23] (2008)5 SCC 676
- [24] Civil Appeal No.4841 of 2012, dt.03.07.2012
- [25] (2012)1 SCC 656
- [26] (2008)7 SCC 310
- [27] (2008)1 SCC 45
- [28] (1996)5 SCC 589
- [29] 2015 Law Suit (SC) 636
- [30] (2005)7 SCC 534
- [31] AIR 2008 SC 1786
- [32] (2005)6 SCC 243
- [33] AIR 2009 SC 2157
- [34] (2011)1 SCC 429
- [35] (2004)6 SCC 649
- [36] (2002)5 SCC 481
- [37] (1995)5 SCC 115
- [38] AIR 1997 SC 1751
- [39] (1993)1 SCC 519

- [\[40\]](#) AIR 1968 SC 1413
- [\[41\]](#) Laws (APH)-1970-3-33
- [\[42\]](#) (2010) 11 SCC 441
- [\[43\]](#) (2016) 2 SCC 569
- [\[44\]](#) (2012) 1 SCC 656.
- [\[45\]](#) (2004)2 SCC-297
- [\[46\]](#) 2008(1)ALT 10(SC)
- [\[47\]](#) AIR 2000 SC 573(1)
- [\[48\]](#) 2010(1) ALD 470
- [\[49\]](#) (1864) 10 HIC 672
- [\[50\]](#) (1812) 3 Camp. 258
- [\[51\]](#) AIR 1941 Lah.407(FB)
- [\[52\]](#) AIR 1937 Madras 714
- [\[53\]](#) AIR 1917 Madras 880