

IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF
ANDHRA PRADESH

* * * *

A.S.NO.318 OF 2008

AND

A.S.M.P.NO.2618 OF 2017 IN A.S.NO.318 OF 2008

A.S.No.318 of 2008:

Sri Challapalli Venkateswara Rao and others

.. Appellants

Vs.

Sri Meka Gangadhara Rao

.. Respondent

DATE OF THE JUDGMENT PRONOUNCED: 24.11.2017

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE MS. JUSTICE J. UMA DEVI

1. Whether Reporters of Local newspapers may be allowed to see the judgment? Yes/No
2. Whether the copies of judgment may be marked to Law Reporters/Journals Yes/No
3. Whether Their Lordships wish to see the fair copy of the judgment? Yes/No

SANJAY KUMAR, J

J. UMA DEVI, J

* THE HON'BLE SRI JUSTICE SANJAY KUMAR
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% DATED 24th NOVEMBER, 2017

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Sri Challapalli Venkateswara Rao and others .. Appellants

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< Gist:

> Head Note:

! Counsel for the Appellants : Sri Srinivasa Rao Velivela and
Sri Kambhampati Ramesh Babu

^ Counsel for Respondent : Sri K.Chidambaram

? CASES REFERRED:

1. 2007 (3) ALD 617 (DB)
2. (1993) 1 SCC 519
3. (1997) 3 SCC 1
4. 2005 (5) ALD 767 (DB)
5. (2011) 12 SCC 18
6. (2011) 1 SCC 429
7. (2004) 6 SCC 649
8. (2015) 1 SCC 597
9. (1759) 1 Eden 177 : 28 ER 652
10. 2007 (2) ALD 496 (DB)
11. (2015) 8 SCC 695
12. (2013) 15 SCC 27
13. 2016(4) Mh.L.J. 289
14. (1996) 5 SCC 589
15. (2015) 1 SCC 705
16. 1998 (5) ALT 69 (D.B.)
17. 1997 (3) ALT 661 (D.B.)

THE HON'BLE SRI JUSTICE SANJAY KUMAR
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J U D G M E N T

(Per Hon'ble Sri Justice Sanjay Kumar)

This first appeal under Section 96 CPC arises out of the judgment and decree dated 14.03.2008 of the learned Principal District Judge, West Godavari District at Eluru, in O.S.No.16 of 2007. The appellants are the defendants in the said suit which was filed for specific performance of the agreement of sale dated 26.07.2006 (Ex.A1); for execution of a registered sale deed in respect of the suit property upon receiving the balance sale consideration; and for delivery of possession. By the judgment under appeal, the trial Court decreed the suit directing the plaintiff to deposit the balance sale consideration to the credit of the suit with interest thereon at 12% per annum; permitting the defendants to receive the said amount and directing them to execute a registered sale deed in favour of the plaintiff at his expense within two months from the date of deposit; and also to deliver possession of the suit schedule property, failing which the plaintiff was granted liberty to get the regular sale deed through process of law; and if the plaintiff failed to deposit the balance sale consideration within the stipulated time, directing the defendants to refund the amount paid by the plaintiff to the tune of Rs.21,25,000/- with interest thereon at 12% per annum; and to pay a sum of Rs.1,88,638/- to the plaintiff towards costs.

By order dated 21.04.2008 passed in A.S.M.P.No.763 of 2008 filed in this appeal, this Court granted interim stay of execution of the judgment and decree under appeal subject to deposit of the suit costs by the appellants/defendants within a time frame. The respondent/plaintiff was permitted to withdraw the same without furnishing security.

Parties shall hereinafter be referred to as arrayed in the suit.

The suit schedule property in O.S.No.16 of 2007 is an extent of Ac.8.78 cents in R.S.Nos.93/2A and 93/2B of Kothapalli Village, Goppannapalem Panchayat, Denduluru Mandal, Eluru Sub-Registry, West Godavari District. It was the case of the plaintiff that this property belonged to the second and third defendants, the son and daughter of the first defendant, and they all jointly offered to sell it to him at the rate of Rs.6,00,000/- per acre. Ex.A1 suit

agreement of sale was executed by them on 26.07.2006 incorporating the terms and conditions of the transaction. A sum of Rs.10,00,000/- was paid towards part of the sale consideration on that day out of the total sale consideration of Rs.52,68,000/-. The defendants acknowledged receipt of this amount. As per the suit agreement of sale, which was executed in the presence of Valasapalli Satyanarayana (P.W.2) and Veeranki Satyanarayana, a further sum of Rs.10,00,000/- out of the balance sale consideration of Rs.42,68,000/- was to be paid by him within one month from the date of the agreement and the balance Rs.32,68,000/- was to be paid within four months, i.e., by 25.11.2006. The plaintiff claimed that he paid Rs.5,00,000/- on 02.09.2006 to the first defendant and an endorsement to that effect (Ex.A2) was made on Ex.A1 agreement of sale. He paid a further sum of Rs.6,25,000/- to the defendants on 10.11.2006 and an endorsement to that effect (Ex.A3) was made by them on Ex.A1 agreement of sale. The plaintiff claimed that though he was always ready and willing to pay the balance sale consideration and get the registered sale deed at his cost, the defendants postponed on one pretext or the other representing that the original title deeds were not available. While so, to his surprise, the plaintiff received Ex.A4 telegram dated 25.11.2006 through Sri Ch.V.Ramana Rao, the defendants' Advocate, with false allegations to the effect that the defendants waited at the Sub-Registrar's Office (SRO) at Eluru on 25.11.2006 till 4.30 PM to perform their part of the contract but the plaintiff failed to pay the sale consideration and perform his part of the contract and that the defendants terminated Ex.A1 agreement of sale. The plaintiff asserted that the allegations in Ex.A4 telegram were utterly false and that it was the defendants who failed to perform their part of the contract within the time stipulated. He further stated that time was not made the essence of the contract. According to the plaintiff, the defendants did not go to the Registrar's Office on 25.11.2006 and they never informed him about their readiness. The plaintiff further stated that he waited for some days after receiving the telegram under the impression that the defendants' Advocate would send a detailed notice as they had no right to revoke or terminate the contract of sale unilaterally. He reiterated that he was ready and willing to pay the balance sale consideration and get the registered sale deed at his cost. After receiving Ex.A4 telegram, the plaintiff got issued registered notice dated 25.01.2007 (Ex.A5) demanding that the defendants execute the registered sale deed in his favour. He claimed that the defendants got issued reply notice dated 07.02.2007 (Ex.A6) with false and untenable allegations. Hence, his suit for specific performance.

The first defendant filed a written statement. Therein, he admitted execution of Ex.A1 agreement of sale and receipt of the initial part payment of Rs.10,00,000/- on 26.07.2006. He however stated that this agreement was executed as the plaintiff expressed his inability to pay the entire sale consideration in lump sum directly. He stated that the sale consideration was to be appropriated by the defendants towards purchase of lands in Nalgonda District for doing real estate business. He claimed that the plaintiff was informed of the purpose for which the land was being sold and that two months time was agreed upon for payment of the entire sale consideration so as to avoid future problems. The plaintiff agreed and promised to pay the entire consideration within two months. However, the sale agreement was drawn up stipulating four months time, contrary to the agreed terms and conditions. At that stage, the mediators, Vasantha Rao, a Real Estate Broker, Veeranki Satyanarayana, a Surveyor, Vemuri Satyanarayana and another person, by name Satyanarayana, who had settled the transaction, prevailed upon him and made him believe that the plaintiff would pay the entire sale consideration within two months. Believing their words, he agreed to execution of the agreement of sale in its existing form. However, the plaintiff did not pay the further sum of Rs.10,00,000/- within one month from the date of execution of the agreement as promised by him. Further, the plaintiff never informed him of his readiness to get the property registered in his name by paying the balance sale consideration. Having waited till 26.09.2006, he tried to secure the presence of the plaintiff to inform him that the balance sale consideration was urgently required to pay the sale price to his vendors at Nalgonda so as to avoid forfeiture of the amount of advance already paid by him. He claimed that the plaintiff was not traceable despite his best efforts. He further claimed that he contacted the mediators who had settled the suit transaction and requested them to bring the plaintiff to perform his part of the contract. Though they promised to do so, neither the plaintiff nor the mediators made good their promise. He gave details of the time stipulated by the mediators and the failure of the plaintiff and the mediators to turn up in accordance therewith. He claimed that on 24.11.2006, he informed the mediators that he would wait at Registrar's Office on 25.11.2006 and asked them to bring the plaintiff and to see that he performed his part of the contract. According to him, he and his children, the second and third defendants, went to the Sub-Registrar's Office, Eluru, at 10.00 AM on 25.11.2006 and again, the mediators were informed that they were waiting for the plaintiff and that if he failed to turn up, the suit agreement of sale

would stand cancelled. However, neither the plaintiff nor the mediators came to the Sub-Registrar's Office at Eluru till the evening of 25.11.2006. The first defendant stated that he then got issued Ex.A4 telegram to the plaintiff informing him that the suit agreement of sale stood cancelled and terminated. He stated that as the plaintiff failed to perform his part of the contract, they were not liable to pay the advance or register the property in his favour. He said that the plaintiff issued reply telegram dated 05.12.2006 saying that he was unable to come to Eluru because of his health and requesting extension of the agreement time, promising that he would pay interest on the balance. He further stated that when he approached the vendors at Nalgonda on 26.11.2006 and explained his predicament, he had to forfeit the advance amount of Rs.25,00,000/- paid by him. He claimed that he sustained loss as he failed to purchase lands at Nalgonda and the value of such lands increased abnormally. He claimed that he had lost a golden opportunity to capitalize on the boom in the land values at Nalgonda.

No rejoinder was filed by the plaintiff.

The trial Court settled the following issues for trial:

1. Whether the plaintiff is entitled to specific performance of contract as prayed for?
2. Whether the plaintiff failed to perform his part of contract, the defendant is neither liable to pay the advance nor register the regular sale deed as it is time barred as contended by the defendants in their Written Statement?
3. Whether the sale agreement dated 25.7.2006 in view of the telegraphic notice got issued by the defendants dated 25.11.2006 stands cancelled?
4. To what relief?

The plaintiff examined himself as P.W.1 and Valasapalli Satyanarayana, one of the mediators and an attester of Ex.A1 agreement of sale, as P.W.2. The plaintiff marked in evidence Ex.A1 agreement of sale dated 26.07.2006; Ex.A2 part-payment endorsement dated 02.09.2006 on Ex.A1; Ex.A3 part-payment endorsement dated 10.11.2006 on Ex.A.1; Ex.A4 telegram dated 25.11.2006 sent by the first defendant; Ex.A5 registered notice dated 25.01.2007 got issued by the plaintiff to the defendants; and Ex.A6 reply notice dated 07.02.2007 got issued by the defendants.

The first defendant examined himself as D.W.1. Nekkanti Narasimha Rao, a third party, was examined as D.W.2 and he spoke of the first defendant's transaction at Nalgonda and his loss of the advance of Rs.25,00,000/-. He also claimed that he was present at the Sub-Registrar's Office, Eluru, on 25.11.2006 with the first defendant from 10.00 AM onwards. The defendants also examined the Mandal Surveyor, Denduluru Mandal, as

D.W.3 and their relation as D.W.4. They marked in evidence Exs.B1 to B6. Ex.B1 is the reply telegram dated 05.12.2006 issued by the plaintiff to the first defendant; Ex.B2 is the reply telegram dated 05.12.2006 issued by the plaintiff to the third defendant; Ex.B3 is the paper publication dated 19.12.2006 issued by the first defendant; Ex.B4 is the bill; Ex.B5 is the certificate dated 12.11.2007 issued by the Mandal Surveyor, Denduluru; and Ex.B6 is the cash bill, with arrival date 05.10.2006 and departure date 06.10.2006, issued by Siddhartha Hotel, Nalgonda.

Upon consideration of the pleadings and evidence, oral and documentary, the trial Court opined that as time is normally not the essence of the contract in transactions relating to immovable property and as the defendants had failed to get the suit schedule property measured by the Surveyor in the presence of the plaintiff and neighbours, they had failed to perform their part of the contract. The trial Court further held that receipt of the part-payments of the sale consideration beyond the stipulated period of one month from the date of execution of Ex.A1 agreement of sale clearly showed that time was not the essence of the contract. As the defendants never called upon the plaintiff to pay the balance sale consideration after getting the land measured by a Surveyor in his presence and the presence of neighbours, the trial Court opined that it was not open to them to unilaterally cancel the agreement of sale. Further, as it was not the case of the defendants that the plaintiff had no financial capacity to pay the balance sale consideration even as per their written statement; and as the plaintiff averred in the plaint that he was always ready and willing to perform his part of the contract, the trial Court held in favour of the plaintiff on this aspect also. The trial Court accordingly held in favour of the plaintiff on all the issues and granted relief, leading to the filing of this appeal.

Heard Sri Srinivasa Rao Velivela, learned counsel representing Sri Kambhampati Ramesh Babu, learned counsel for the appellants/defendants, and Sri K.Chidambaram, learned counsel for the respondent/plaintiff.

Sri Srinivasa Rao Velivela, learned counsel, would assert that a plain reading of Ex.A1 agreement of sale dated 26.07.2006 would demonstrate that time was very much the essence of the contract. He would point out that the agreement stipulated that the entire sale consideration had to be paid by 25.11.2006 and even when the plaintiff made the belated payment after the expiry of the stipulated one month period from the date of execution of the suit agreement of sale, the endorsement under Ex.A3 categorically required the plaintiff to make the payment of the balance sale consideration by

25.11.2006, the date initially fixed. Learned counsel would assert that the suit property was sold by the first defendant and his children, the second and third defendants, for the purpose of investment in lands at Nalgonda as a real estate venture and the failure on the part of the plaintiff to come through caused them irreparable loss. He would further state that though the agreement stated to the effect that time for payment was four months, the understanding between the parties was that the plaintiff would pay the balance consideration within two months and that was the reason why the first defendant, speaking as D.W.1, gave details of the various demands made by him for payment of the balance sale consideration long before 25.11.2006. He would assert that the first defendant waited at the Sub-Registrar's Office, Eluru, on the stipulated date, 25.11.2006, and as the plaintiff failed to turn up, a telegram was gotten issued at 5.10 PM on the said day canceling the suit agreement of sale and terminating the transaction thereunder. The said telegram was received and the plaintiff got issued Exs.B1 and B2 telegrams on 05.12.2006 seeking extension of the agreement due date on the ground of ill-health. The first defendant thereafter got Ex.B3 public notice published through his Advocate in Eenadu Telugu newspaper dated 19.12.2006, West Godavari District Edition, informing the general public that the suit agreement of sale dated 25.11.2006 was cancelled. It was long thereafter that the plaintiff got issued Ex.A5 notice on 25.01.2007, wherein he claimed that he was always ready and willing to pay the balance sale consideration but the defendants were postponing on one pretext or the other by representing that the original title deeds were not available. He however admitted receipt of Ex.A4 telegram and the intimation thereunder that the defendants had cancelled and terminated the agreement of sale. He asserted through his Advocate that the defendants had not gone to the Sub-Registrar's Office on 25.11.2006 and never informed him about their readiness. He claimed that the defendants had no right to revoke or terminate the contract of sale unilaterally and called upon the defendants to receive the balance sale consideration and execute a registered sale deed in his favour. In reply, the defendants issued Ex.A6 legal notice dated 07.02.2007, wherein they reiterated that their main interest in selling the suit schedule land was to develop their real estate business at Nalgonda and as the plaintiff had failed to fulfill the contract in terms of the time stipulations, the defendants had cancelled the suit agreement of sale. They adverted to the fact that a caveat petition had been lodged before the Senior Civil Judge, Eluru, and cautioned the plaintiff not to initiate any vexatious litigation.

Sri Srinivasa Rao Velivela, learned counsel, would assert that neither in Ex.A5 legal notice nor in the plaint did the plaintiff ever allege or assert that the defendants had failed to perform their part of the contract in getting the suit land measured in his presence. Even in his own deposition as P.W.1, the plaintiff never raised this issue. Learned counsel would point out that it was only in the cross-examination of the first defendant, speaking as D.W.1, that this aspect was raised for the first time. He would point out that all along the claim of the plaintiff was that the defendants were putting off execution of a registered sale deed on the pretext that the original title documents were not available. He would contend that the finding of the trial Court that the defendants had failed to perform their part of the contract by getting the suit land measured in the presence of the plaintiff and neighbours was wholly unsustainable as this was never the plea put forth by the plaintiff, either in his pleadings or in his own evidence. Learned counsel would further point out that though the plaintiff never claimed either in his pleadings or in his examination-in-chief that he had gone to the Sub-Registrar's Office on 25.11.2006, he surprisingly claimed in his cross-examination that he was present at the Sub-Registrar's Office on 25.11.2006 for complying with the conditions under Ex.A1, but the defendants did not turn up and he further claimed that he had complained about the absence of the defendants to the mediators. Learned counsel would point out that Ex.A5 legal notice never mentioned the fact that the plaintiff had gone to the Sub-Registrar's Office on 25.11.2006. He would therefore argue that as specific performance is not only a discretionary relief but also an equitable one, the conduct on the part of the plaintiff in changing his stands time and again and building up his case as he went along clearly disentitled him to claim such relief. Learned counsel would point out that though Section 22 of the Specific Relief Act, 1963 (for brevity, 'the Act of 1963') provides that refund of the earnest money or deposit made by the plaintiff, in case his claim for specific performance is refused, should not be granted unless it has been specifically claimed, the trial Court directed so though the plaint prayer did not advert to any such refund claim. He would also contend that perusal of the judgment under appeal reflects that the trial Court completely lost sight of the requirement of Section 16(c) of the Act of 1963 and that the entire burden was cast upon the defendants as if the onus was upon them to prove that the plaintiff was not entitled to specific performance. He would rely upon MOHAMMED IBRAHIM V/ s. MOHAMMED ABDUL RAZZAK¹, wherein a Division Bench of this Court

¹ 2007 (3) ALD 617 (DB)

affirmed the settled proposition that the burden of proof is generally on the plaintiff who must succeed on the strength of his own case and he cannot be assisted by weaknesses, real or apparent, in the case of the defendant and that a defect in the evidence of the party on whom the burden of proof lies cannot be cured by criticism of the evidence of the other side. Learned counsel would also contend that once Ex.A1 agreement of sale stood cancelled under Ex.A4 telegram, to the knowledge of the plaintiff, he necessarily had to seek declaratory relief with regard to the validity of such cancellation and without doing so, the plaintiff could not ask for specific performance of the cancelled agreement of sale.

Countering these arguments, Sri K.Chidambaram, learned counsel, would state that Ex.A1 agreement of sale mentioned the requirement of the land being measured in the presence of the plaintiff and therefore, the failure on the part of the defendants to comply with the same disentitled them to claim that it was the plaintiff who was not ready and willing to perform his part of the contract. He would submit that time is not the essence of the contract in transactions relating to immovable property and would point out that the action of the defendants in receiving part-payments of the sale consideration beyond the stipulated period of one month from the date of execution of the agreement of sale clearly demonstrated that they did not treat the time stipulations thereunder as being of essence. Learned counsel would further assert that the demands made by the first defendant to pay the balance sale consideration even before the stipulated date 25.11.2006 clearly demonstrated his anxiety and eagerness to cancel the agreement on one pretext or the other. He would further argue that as Ex.A1 agreement of sale never contemplated cancellation of the suit transaction, the unilateral act on the part of the first defendant in doing so under Ex.A4 telegram is a nullity and as such cancellation is non-est in the eye of law, there was no need for his client to seek any declaratory relief as to its validity. He would state that by way of abundant caution his client filed A.S.M.P.No.2618 of 2017 in this appeal seeking amendment of the plaint by including a prayer for a declaration that cancellation of Ex.A1 suit agreement of sale under Ex.A4 telegram dated 25.11.2006, forfeiting the advance sale consideration, was illegal and void and to set aside the same. Learned counsel would further contend that once the trial Court exercised its discretion and granted the equitable relief of specific performance to the plaintiff, the appellate Court should be slow to interfere therewith. He would assert that the judgment under appeal is fully justified on facts and in law and pray that the appeal be

dismissed. In the alternative, he would submit that if given more time, his client would seek the relief of refund of the sale consideration already paid by seeking further amendment of the plaint.

In reply, Sri Srinivasa Rao Velivela, learned counsel, would again point out that no mention was made of the requirement of survey of the suit land as a condition precedent by the plaintiff in either his demand notice or his pleadings. Further, the plaintiff did not even mention this aspect during his examination-in-chief. It was only in the cross-examination of the first defendant, speaking as D.W.1, that this aspect was raised for the first time. He would point out that had that been the issue, the plaintiff would have demanded that the defendants undertake measurement of the land but there was never any such move on his part. He would further point out that the urgency on the part of his clients was clear from the averments made in paras 39 and 40 of the written statement and that, in spite of the same, they waited till the last day, 25.11.2006, and only thereafter cancelled the suit agreement of sale. Learned counsel would point out that even if it was to be accepted that such measurement had to be undertaken and his clients failed to do so, it was wholly unconnected to the issue of payment of the sale consideration in terms of the suit agreement of sale. He would argue that both the issues could not be clubbed together so as to hold in favour of the plaintiff in the manner that the trial Court did. Learned counsel would again assert that in the absence of a claim for refund, the trial Court ought not to have granted such relief to the plaintiff and that it would be equally unsustainable in law for this Court to entertain such a request without an actual claim from the plaintiff. As regards the amendment presently sought, the learned counsel would point out that such amendment was sought by the plaintiff only at the fag end, after his arguments were over. He cited case law in support of his contention that a suit for specific performance based on a cancelled agreement of sale could not be entertained.

Upon consideration of the record and the arguments advanced by the learned counsel, the following points arise for determination in this appeal:

1. Whether time was the essence of the contract under Ex.A1 suit agreement of sale?
2. Whether the plaintiff averred and proved his readiness and willingness to perform his part of the contract under Ex.A1 suit agreement of sale in accordance with law?
3. Whether the respective parties performed their part of the contract under Ex.A1 suit agreement of sale and if not, the effect thereof?

4. Whether the defendants' cancellation of Ex.A1 suit agreement of sale under Ex.A4 telegram dated 25.11.2006 is lawful and valid and what is its effect in law?
5. Whether the plaintiff would be entitled to refund of the sale consideration already paid by him in the event his prayer for specific performance is refused?
6. Whether the judgment and decree under appeal are sustainable in law?

POINT 1:

Ex.A1 agreement of sale dated 26.07.2006 reads to the following effect: The second and third defendants inherited Ac.8.78 cents along with other extents from their grand father, late Challapalli Kotaiah, under registered Will dated 26.04.1984. The said land was agreed to be sold by the defendants to the plaintiff to enable them to meet their family expenses, sundry debts and to appropriate the remaining amount for their improvement and development. The defendants acknowledged receipt of Rs.10,00,000/- out of the total sale consideration of Rs.52,68,000/-. A further sum of Rs.10,00,000/- was to be paid within one month from the date of the agreement and the balance sale consideration of Rs.32,68,000/- was to be paid within four months, i.e., by 25.11.2006. The defendants declared that they did not create any third party interest over the land sold and undertook to get it measured in the presence of the plaintiff and neighbours by 25.11.2006 so that the exact extent of Ac.8.78 cents could be delivered to them. They stated that as per measurements, the account could be settled in terms of the agreed rate of Rs.6,00,000/- per acre.

Notably, the aforestated agreement of sale did not mention the pressing need for the sale consideration to enable the defendants to make payment for the land proposed to be purchased by them at Nalgonda. On the other hand, the agreement reads to the effect that the sale consideration was to be spent towards their family expenses and sundry debts and only the balance left thereafter was to be utilized for family improvement and development. That being said, it cannot be construed that merely because the defendants did not state this, it would mean that the agreement could be acted upon at any time that the plaintiff chose. Be it noted that there was a clear stipulation that both the parties to the agreement contemplated that the transaction should be concluded by 25.11.2006. The agreement reads to the effect that payments were to be made by the plaintiff within the time stipulated and the obligation cast on the defendants was that they would get the land measured in the presence of the plaintiff and neighbours by 25.11.2006 so that the exact extent sold thereunder could be delivered to the

plaintiff. This was necessary as the agreement itself recorded that the second and third defendants inherited a larger extent of property from their grand father and settlement of the account was left open till the actual measurement was done so that it could be finalized thereafter, at the rate of Rs.6,00,000/- per acre. It is an admitted fact that the plaintiff failed to adhere to the first stipulation that he would pay Rs.10,00,000/- within one month from the date of execution of the agreement. As per this condition, he had to pay the said sum by 26.08.2006. It is however an admitted fact that he paid Rs.5,00,000/- on 02.09.2006 under Ex.A2 endorsement signed by the first defendant and Rs.6,25,000/- on 10.11.2006 under Ex.A3 endorsement by all the defendants. Significantly, Ex.A3 endorsement stipulated that the balance sale consideration of Rs.31,43,000/- had to be paid by the plaintiff in terms of the agreement date, i.e., 25.11.2006, and it was for the plaintiff to get the registration at his own expense.

The question that would arise is whether Ex.A1 agreement of sale made time the essence of the contract. No doubt, mention was not made in the said agreement of any urgency for money on the part of the defendants in relation to their proposed purchase of land at Nalgonda. However, specific mention was made of 25.11.2006 being the outer temporal limit for completion of the transaction. This date found mention not only in the body of the agreement of sale but was again reiterated under Ex.A3 endorsement, when the plaintiff made belated part-payment of the sale consideration beyond the stipulated one month from the date of the agreement, but within the final date, 25.11.2006. It may be noted that no provision was made in the agreement that in the event the sale consideration was not paid by the said date, it would carry interest. In cases where a stipulation is made as to the interest that would have to be paid in the event the date stipulated is not adhered to, it can clearly be inferred that time is not the essence of the contract. That is however not the case in so far as the suit agreement of sale is concerned. The intention of the parties was therefore explicit that the sale transaction should be concluded by that date.

The leading judgment on the issue as to whether time is the essence of the contract is that of a Constitution Bench in CHAND RANI V/ s. KAMAL RANI². Both the learned counsel relied upon this decision. The Supreme Court observed therein that it is a well accepted principle that in the case of sale of immovable property, time is never regarded as the essence of the contract and there is a presumption against time being the essence of the

² (1993) 1 SCC 519

contract. However, under the law of equity which governs the rights of the parties in the case of specific performance of contract to sell real estate, law looks not at the letter but at the substance of the agreement and it has to be ascertained whether under the terms of the contract, the parties named a specific time within which completion was to take place, really and in substance it was intended that it should be completed within a reasonable time. The Supreme Court held that an intention to make time the essence of the contract must be expressed in unequivocal language. Upon analysis of case law, it was observed that even if time is not the essence of the contract, the Court may infer that it is to be performed in a reasonable time if the conditions are evident: (1) from the express terms of the contract; (2) from the nature of the property; and (3) from the surrounding circumstances; for example: the object of making the contract. On facts, it was found that once there was a stipulation as to payment of the amount within a time frame, the parties intended to make time the essence of the contract. The clause in the agreement of sale in that case required the sum of Rs.98,000/- to be paid within ten days and the balance at the time of registration of the sale deed. As the said sum of Rs.98,000/- was not paid within the ten day period stipulated, the Supreme Court opined that the plaintiff was never willing to make the payment and accordingly held him disentitled to specific performance.

Again, in *K.S.VIDYANADAM V/ s. VAI RAVAN*³, the Supreme Court observed that though a time-limit fixed in the agreement of sale may not amount to making time the essence of the contract, it must yet have some meaning, as such time-limit would not have been prescribed for nothing, and it could not be stated as a rule of law or a rule of prudence that where time is not made the essence of the contract, all stipulations of time provided in the contract have no significance or meaning or that they are as good as non-existent. The Supreme Court held that this would only mean that while exercising its discretion, the Court should also bear in mind that when the parties prescribe certain time-limits for taking steps by one or the other party, it must have some significance and that the said time-limits cannot be ignored altogether on the ground that time has not been made the essence of contracts relating to immovable properties.

In *NALAMATHU VENKAIYA (DIED) BY L.R. V/ s. B.S. NEELKANTA*⁴, a Division Bench of this Court observed that though there may

³ (1997) 3 SCC 1

⁴ 2005 (5) ALD 767 (DB)

be no express term in the agreement, the conditions stipulated for payment would go to show that time is the essence of the contract.

In *SARADAMANI KANDAPPAN V/ s. S.RAJALAKSHMI*⁵, referring to *CHAND RANI*², the Supreme Court considered the terms of the agreement of sale in that case to find out whether time was the essence as there was a conscious effort to delink the term relating to payment of price from the term relating to execution of the sale deed and making time the essence only in regard to payment of the balance sale consideration. The Supreme Court held that time was of the essence to that extent. Adverting to the fact that the principle that time was not of essence in contracts relating to immovable properties took shape in an era when market values of immovable properties were stable and did not undergo any marked change over a period of time, the Supreme Court observed as under:

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

In the present case, when the parties specifically put it in writing that the sale transaction between them should be completed by a particular date and there is no implied agreement between them that any extension of such date is contemplated, be it by way of interest payment or otherwise, it is not for the Court to examine as to what was the urgency on the part of either party to stipulate that time is of essence. The mention of the date by which

⁵ (2011) 12 SCC 18

the transaction should be concluded, with nothing further to dilute its stipulation, is sufficient indication of *consensus ad idem* between the parties that the said date carries sanctity. The normal rule that time would not be of essence in a contract relating to immovable property has no inflexible application. Each case would have to turn upon its own individual facts. In this regard, the trial Court only went by the fact that the defendants accepted the belated payment made by the plaintiff under Exs.A2 and A3 endorsements, losing sight of the fact that by such payment the defendants did not enlarge the time for completion of the contract and it was once again reiterated under Ex.A3 endorsement in explicit terms. Time was therefore of the essence of contract under Ex.A1 agreement of sale. This point is therefore answered in favour of the defendants.

POINT 2:

As to the issue of the plaintiff averring and proving his readiness and willingness to perform his part of the contract, it may be noticed that Section 16(c) of the Act of 1963 stipulates in no uncertain terms that such burden is wholly cast upon the plaintiff in a suit for specific performance. This provision reads as under:

'16. Personal bars to relief.— Specific performance of a contract cannot be enforced in favour of a person—

(a)

(b)

(c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.

Explanation.—For the purpose of clause (c),—

(i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court;

(ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction.'

In this regard, it may be noticed that the case of the defendants, in terms of Ex.A4 telegram, was that the plaintiff had agreed to pay the entire sale consideration on or before 25.11.2006 and seek registration, but in spite of their demand, he had failed to pay the sale consideration and perform his part of the contract. The telegram further recorded that the defendants had waited at the SRO, Eluru, till 4.30 PM to perform their part of the contract by registering the land in his favour and they therefore terminated the terms and conditions of the said agreement. In response to this, according to the

defendants, the plaintiff addressed Exs.B1 and B2 telegrams dated 05.12.2006 seeking extension of the agreement due date. However, in his deposition, the plaintiff denied having sent these telegrams. In their reply notice dated 07.02.2007 (Ex.A6), the defendants specifically referred to the fact that they had received Exs.B1 and B2 telegrams dated 05.12.2006 whereunder the plaintiff sought extension of the agreement due date. However, the plaintiff did not choose to respond thereto and disclaim issuance of these telegrams. Even in his plaint, the plaintiff, though he was well aware by then of the fact that the defendants claimed that they had received telegrams from him under Exs.B1 and B2 dated 05.12.2006 seeking extension of the agreement due date, did not deny it or advert to any failure on their part in performing their part of the contract. In his legal notice (Ex.A5), the plaintiff merely stated that he was always ready and willing to pay the balance sale consideration but did not offer any explanation as to why he failed to turn up on 25.11.2006 with the balance sale consideration. Significantly, no mention was made by him of the defendants having failed to perform their promise of getting the land measured in his presence. He however admitted receipt of Ex.A4 telegram, whereby the defendants cancelled the suit agreement of sale. Further, this legal notice did not mention anything about the plaintiff having gone to the Registrar's Office on 25.11.2006. All through, his only claim was that the defendants were postponing execution of the registered sale deed representing that the original title deeds were not available. It may also be noticed that Ex.A1 agreement of sale did not stipulate anything at all about the presentation of original documents as a condition precedent for payment of the balance sale consideration or even for registration of the sale deed.

Speaking as P.W.1, the plaintiff again harped upon the alleged representation of the defendants that the original title deeds were not available as an excuse to postpone execution of the sale deed. He merely stated that he was always ready and willing to pay the balance sale consideration but did not offer any proof of this claim. As is clear from the Explanation to Section 16(c) of the Act of 1963, it is not necessary for the plaintiff in a suit for specific performance to tender the money to the defendant or deposit it in court but he must at least prove his capacity, apart from his readiness and willingness, to perform his part of the contract. Significantly, the plaintiff did nothing whatsoever to prove that he had either the capacity to pay the balance sale consideration on the stipulated date, 25.11.2006, or that it was the defendants' own inaction which led to the failure of the transaction.

In J.P.BUILDERS V/ s. A.RAMADAS RAO⁶, the Supreme Court relied on its earlier decision in P. D'SOUZA V/ s. SHONDRILO NAIDU⁷ and affirmed that readiness and willingness on the part of the plaintiff to perform his part of the contract would depend upon the question as to whether the defendant did everything which was required of him to be done in terms of the agreement for sale. In that case, the balance sale consideration was to be paid within three months from the date the defendants obtained a no-objection certificate from the authority concerned and secured the title deeds after clearing a mortgage loan. Further, the plaintiff, in proof of his readiness and willingness to perform his part of the contract, not only took a specific plea in that regard in the plaint but also placed relevant materials in the form of letters to show that he was corresponding with the bank for early settlement of the dues. He also produced documentary proof of sufficient financial means. The conclusion arrived at by the Courts below that the plaintiff proved and complied with the mandate of Section 16(c) of the Act of 1963 was therefore upheld.

In K.PRAKASH V/ s. B.R.SAMPATH KUMAR⁸, the Supreme Court reiterated that the remedy of specific performance is an equitable remedy and the Court while granting such relief exercises discretionary jurisdiction. Referring to the decision of the Court of Chancery in ATTORNEY GENERAL V/ s. WHEATE⁹, the Supreme Court observed that the principle that can be enunciated therefrom is that where the plaintiff brings a suit for specific performance of contract for sale, the law insists upon a condition precedent to the grant of decree that the plaintiff must show his continued readiness and willingness to perform his part of the contract in accordance with its terms from the date of contract to the date of hearing and normally, when the trial Court exercises its discretion in one way or the other after appreciation of entire evidence and materials on record, the appellate Court should not interfere unless it is established that the discretion has been exercised perversely, arbitrarily or against judicial principles. It was further observed that subsequent rise in the price would not be treated as a hardship entailing refusal of the decree for specific performance. Rise in price is a normal change of circumstances and, therefore, on that ground a decree for specific performance cannot be reversed.

⁶ (2011) 1 SCC 429

⁷ (2004) 6 SCC 649

⁸ (2015) 1 SCC 597

⁹ (1759) 1 Eden 177 : 28 ER 652

In C.MANO HAR REDDY V/ s. ALOPI SHANKER¹⁰, a Division Bench of this Court observed that when the self-serving evidence adduced by the plaintiffs is not supported by any independent evidence and is also not in accordance with the probabilities of the case, it could not be believed that the plaintiffs were ready and willing to perform their part of the contract. That was also a case where the plaintiffs failed to make payments in terms of the agreement, which required them to do so within a time schedule.

Mere averment in the plaint coupled with reiteration in his deposition by the plaintiff in the present case is not sufficient in itself to prove the readiness and willingness of the plaintiff. The trial Court seems to have misguided itself in this regard by casting the burden upon the defendants to show that the plaintiff was not capable of making the payment. As it was their case all along that the plaintiff failed to turn up and pay the balance sale consideration, the burden was fully upon the plaintiff to prove his readiness and willingness to pay the balance sale consideration. All the more so, as he admittedly made belated payments earlier, beyond the time stipulation in Ex.A1 agreement of sale, clearly casting a doubt on his capacity to make the final payment within the stipulated date. It is therefore manifest that he dismally failed in discharging the burden cast upon him in this regard. This point is therefore answered in favour of the defendants.

POINT 3:

Though much ado was made about the failure on the part of the defendants in getting the land measured by 25.11.2006 in the presence of the plaintiff, it was never the case of the plaintiff that he made ready the balance sale consideration to be paid and despite the same, the defendants failed to get the land measured in his presence and he therefore could not pay the sale consideration.

In this regard, it may be noted that Chapter IV of the Indian Contract Act, 1872 (for brevity, 'the Act of 1872') deals with performance of contracts and performance of reciprocal promises is covered by Sections 51 to 58 thereunder. Section 51 states that when a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise. Illustrations (a) and (b) thereunder are of significance and are extracted hereunder:

¹⁰ 2007 (2) ALD 496 (DB)

‘(a) *A* and *B* contract that *A* shall deliver goods to *B* to be paid for by *B* on delivery. *A* need not deliver the goods, unless *B* is ready and willing to pay for the goods on delivery.

B need not pay for the goods, unless *A* is ready and willing to deliver them on payment.

(b) *A* and *B* contract that *A* shall deliver goods to *B* at a price to be paid by installments, the first installment to be paid on delivery.

A need not deliver, unless *B* is ready and willing to pay the first installment on delivery.

B need not pay the first installment, unless *A* is ready and willing to deliver the goods on payment of the first installment.’

Section 52 deals with the order of performance of reciprocal promises and provides that where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order; and where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.

Illustration (a) to this provision reads as under:

‘(a) *A* and *B* contract that *A* shall build a house for *B* at a fixed price. *A*’s promise to build the house must be performed before *B*’s promise to pay for it.’

Section 55 states to the effect that failure of the promisor to perform a contract in which time is essential would entail the contract becoming voidable at the option of the promisee.

Significantly, not only did the plaintiff fail to issue any notice to the defendants with regard to measurement of the land but he did not even choose to advert to this aspect either in his legal notice or in his pleadings or even in his own evidence as P.W.1. It is therefore clear that this ground was struck upon only at a later stage during the course of the suit proceedings, while the first defendant was being cross-examined as D.W.1. It may be noticed that D.W.1, in his cross-examination, specifically asserted that he got the land measured with the help of the Denduluru Mandal Surveyor. It was only at this stage that a suggestion was put to him that he and the other defendants intentionally delayed by not getting the land measured by informing the plaintiff and thereby failed to perform their part of the contract. D.W.3 is the Mandal Surveyor at Denduluru Mandal. According to him, the first defendant made an application to his office to measure the suit property and he got issued notices to the plaintiff and surrounding land owners. He then visited the suit property and got it measured and issued Ex.B5 certificate. He produced the office register before the trial Court in proof of his claim. In his cross-examination, he admitted that no particulars of the measurement were noted in Ex.B5, but denied the suggestion that he got issued Ex.B5 certificate to accommodate the defendants. D.W.1 marked Ex.B5 certificate issued by

the Mandal Surveyor which reads to the effect that the suit agreement land admeasuring Ac.8.78 cents in Survey No.93/2 was surveyed by him on 20.10.2006 and boundaries were fixed. According to D.W.1, the plaintiff did not attend at the time of the measurement though he was informed about undertaking of such measurement through the surveyor.

In SARADAMANI KANDAPPAN⁵, dealing with the aspect of performance of reciprocal promise, the Supreme Court observed that the contract in that case contained two different streams of provisions for performance and one related to payment of the balance consideration in the manner provided, which was not dependent upon any performance of any obligation by the vendors. There was no provision that payment of sale consideration would depend upon satisfaction of the plaintiff regarding title and nil encumbrance. Therefore, linking of the payment to such satisfaction was held to be unsustainable.

In PADMAKUMARI V/s. DASAYYAN¹¹, a plea similar to the one taken by the plaintiff in this case was advanced to the effect that the land had to be measured and therefore, there was a failure on the part of the defendants in performing their part of the contract. However, the Supreme Court found that the question of taking measurement did not arise before the plaintiff performed his part of the contract regarding payment of the balance consideration. The decree of specific performance granted by the Courts below was accordingly set aside.

Though no acceptable evidence has been let in by the defendants of any transaction at Nalgonda and the alleged loss of the advance amount of Rs.25,00,000/- paid by them, the same is of no real relevance in this appeal. Irrespective of whether they had really entered into such a transaction and suffered loss owing to the suit transaction falling through in terms of the time stipulation therein, once it is proved that the parties to Ex.A1 agreement of sale intended that the transaction thereunder should be concluded by the stipulated date, 25.11.2006, no more is required to be proved by the defendants. Once time is of essence to the contract, failure of the one party to deliver in terms of the promise made under the contract would be fatal to its claim for specific performance thereafter. In the present case, bare perusal of Ex.A1 agreement of sale reflects that payment of the balance sale consideration by the plaintiff was independent of and was a condition precedent to the measurement of land by the defendants. There is no reason to doubt the Mandal Surveyor (D.W.3) as he produced the office register in

¹¹ (2015) 8 SCC 695

proof of his claim that upon the application made by the first defendant, he undertook survey of the suit land after giving due notice to all parties concerned, including the plaintiff and the neighbouring land owners. Ex.B5 certificate therefore commends credibility and is worthy of acceptance. No doubt, the plaintiff was not present at the time of such survey and measurement, but according to the first defendant as well as the Mandal Surveyor (D.W.3), notice was given to the plaintiff but he did not choose to attend. This aspect of the matter therefore stands settled and it is not open to the plaintiff to now claim that the defendants failed to perform their part of the contract in getting the land measured in his presence in terms of the suit agreement of sale. The first defendant also did not state in his written statement or in his reply notice that he got the land measured but this fact was never put in issue until his cross-examination and he then got examined the Mandal Surveyor and marked Ex.B5 certificate issued by the said Mandal Surveyor. There is therefore no failure on the part of the defendants in performing their reciprocal promise of getting the land measured. This point also is therefore answered in favour of the defendants.

POINTS 4 & 5:

It is an admitted fact that the plaintiff received Ex.A4 telegram on 25.11.2006 intimating him of the termination of the suit agreement of sale by the defendants. Exs.B1 and B2 telegrams are pressed into service by the defendants, whereunder the plaintiff allegedly sought extension of the agreement due date, but the plaintiff denied having issued these telegrams at a later stage though he did not say so in his pleadings. In any event, he did nothing till 25.01.2007 when he got issued Ex.A5 notice. In the plaint, having adverted to cancellation of the suit agreement of sale under Ex.A4 telegram, the plaintiff surprisingly chose not to seek any declaratory relief in relation thereto. He neither asked for a declaration that the said cancellation was illegal nor did he claim that it was void *ab initio*.

In I.S.SIKANDAR V/ s. K.SUBRAMANI¹², the Supreme Court unequivocally held that a suit for specific performance cannot be based on a cancelled agreement of sale. The agreement in that case was terminated as the plaintiff therein failed to perform his part of the contract. However, in his prayer in the suit, while seeking specific performance of the said agreement of sale, the plaintiff did not seek a declaration that its termination was bad in law. In the absence of such prayer by the plaintiff, the Supreme Court held that grant of a decree for specific performance on the basis of a non-existent

¹² (2013) 15 SCC 27

agreement of sale was wholly unsustainable in law and that the suit itself was not maintainable. Reference was also made to CHAND RANI² and it was observed that if the parties agreed to a specified time in the agreement to perform their part of the agreement, then time is the essence of the contract and parties should adhere to the same.

The principle laid down by the Supreme Court in I.S.SI KANDAR¹² was followed and applied in C.PADMAWATI NAIDU V/s. FRIENDS CO-OPERATIVE HSG. SOCIETY LTD., NAGPUR¹³.

It was only after these judgments were cited by Sri Srinivasa Rao Velivela, learned counsel, that Sri K.Chidambaram, learned counsel, sought an adjournment to the next day to advance further arguments and then filed A.S.M.P.No.2618 of 2017 seeking to amend the plaint so as to include a prayer for declaratory relief that the cancellation of Ex.A1 agreement of sale dated 26.07.2006 under Ex.A4 telegram dated 25.11.2006 and forfeiture of the advance sale consideration was illegal and void and to set aside the same. In terms of the *proviso* to Order 6 Rule 17 CPC, liberty given to a litigant to amend his pleadings is severely curtailed if such prayer is made after commencement of the trial and it cannot be allowed except for valid and justified reasons. Presently, permitting the plaintiff to seek amendment of his prayer in the suit at this late stage, after case law is cited by the other side demolishing the very foundation of his suit, would be nothing short of permitting abuse of process of this Court, apart from causing irreparable loss to the defendants. A.S.M.P.No.2618 of 2017 is therefore wholly lacking in *bonafides* and is liable to be dismissed.

Though Sri K.Chidambaram, learned counsel, would contend that cancellation of the suit agreement of sale under Ex.A4 telegram is void in law and therefore need not be challenged, this Court is not persuaded to agree. Once time is treated to be of essence under Ex.A1 suit agreement of sale, the failure on the part of the plaintiff to adhere to the stipulation as to completion of the contract by 25.11.2006 would entitle the aggrieved defendants to cancel and terminate such agreement. As per the defendants' claim, having waited up to the evening on the said date, they issued Ex.A4 telegram at 5.10 PM. Further, even if time is not treated as of essence in a contract relating to immovable property, it does not mean that the party aggrieved by non-performance of his part of the contract by the other side has no right to terminate the contract, though in such cases it may be necessary for such party to call upon the defaulting party to make good the lapses on its part and

¹³ 2016(4) Mh.L.J. 289

comply with its part of the contract before resorting to termination, but when time is the essence of the contract, no such notice requires to be given and once the stipulated date for performance expires, the aggrieved party may straightaway resort to cancellation of the contract without further ado. That is exactly what the defendants did in the case on hand. It is therefore fallacious for the plaintiff to contend that he did not have to seek declaratory relief in relation to the cancellation of the suit agreement and that the same must automatically be treated as void and non-est in the eye of law.

It may be noted that even under A.S.M.P.No.2618 of 2017, the plaintiff did not choose to include a prayer for refund of the sale consideration already paid by him. It is well settled that a prayer under Section 22 of the Act of 1963 can be permitted even at the appellate stage but it must be *bonafide*. However, when the plaintiff did not seek such relief in his own wisdom right up to the stage of arguments and having filed an amendment petition at this late stage, he did not choose to include a prayer for such relief even therein, this Court is left with no alternative except to abide by the statutory mandate of the proviso to Section 22(2) of the Act of 1963. The provision is extracted hereunder:

‘22. Power to grant relief for possession, partition, refund of earnest money, etc.—(1) Notwithstanding anything to the contrary contained in the Code of Civil Procedure, 1908 (5 of 1908), any person suing for the specific performance of a contract for the transfer of immovable property may, in an appropriate case, ask for—

(a) possession, or partition and separate possession, of the property, in addition to such performance; or

(b) any other relief to which he may be entitled, including the refund of any earnest money or deposit paid or made by him, in case his claim for specific performance is refused.

(2) No relief under clause (a) or clause (b) of sub-section (1) shall be granted by the court unless it has been specifically claimed:

Provided that where the plaintiff has not claimed any such relief in the plaint, the court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just for including a claim for such relief.’

Though Sri K.Chidambaram, learned counsel, would fervently plead that his client may be permitted to further amend his plaint and include a prayer seeking such relief, this Court is not impressed. A litigant who is not diligent about his rights and does not even choose to frame his prayers correctly, be it before the trial Court or at least before the appellate Court, has no one to blame but himself. It is too late in the day for the plaintiff to now wake up and resort to measures, which were available to him in law all along, for seeking alternative relief so as to make good the lapses on his part after

the hearing is practically over. The request of Sri K.Chidambaram, learned counsel, to permit such amendment of the prayer is rejected.

Pertinent to note, in SARADAMANI KANDAPPAN⁵, the contract provided that payments were to be made on due dates and in case of failure on the part of the purchaser, the vendors shall cancel the agreement. There was no clause in the contract with regard to forfeiture of the amounts already paid in the event of breach by the purchaser. As the amounts were not paid within the time stipulated, the defendants cancelled the sale agreement. Confirming the decision of the High Court that the plaintiff was not entitled to the relief of specific performance, the Supreme Court directed refund of the sale consideration already paid along with interest thereon. It may however be noted that the defendants therein, in their written statement, specifically agreed to refund all the amounts received by them from the plaintiff. Further, the Court did not consider the mandate of the proviso to Section 22(2) of the Act of 1963 though the plaintiff in that case did not seek refund of the sale consideration paid by him.

These points are therefore answered in favour of the defendants.

POINT 6:

On the above analysis, this Court finds that time was the essence of the contract in so far as the suit agreement of sale is concerned; the plaintiff failed to adequately aver and prove his readiness and willingness to perform his part of the contract under Ex.A1 suit agreement of sale dated 26.07.2006; that the plaintiff failed to perform his independent and foremost promise under the contract of paying the balance sale consideration within the stipulated time; that the defendants performed their part of the contract in getting the suit land measured before 25.11.2006 as stipulated in the suit agreement of sale; that cancellation of the suit agreement of sale under Ex.A4 telegram dated 25.11.2006 was lawful and valid; that the failure of the plaintiff to seek a declaration that such cancellation was illegal is fatal to his case; that the trial Court gravely erred in decreeing the suit for specific performance based on the cancelled agreement of sale; that the failure on the part of the plaintiff to seek the alternative relief of refund of the sale consideration already paid by him is fatal to such a plea being advanced at this late stage; and that the trial Court completely misguided itself in treating the defendants as the plaintiffs in the suit and in casting upon them the burden to disprove the plaintiff's claim.

Further, the manner in which the plaintiff conducted himself in the course of the suit proceedings leaves this Court in no doubt that he

completely lacked *bonafides*. The attempts on his part to change his version and build up his case from stage to stage are clear and manifest. He did not deny issuing Ex.B1 and Ex.B2 telegrams in his pleadings but did so only in his deposition. His story all along was that the defendants failed to perform their part of the contract representing that the original title documents were not available but for the first time, during the cross-examination of the first defendant (D.W.1), he came up with the new case that the defendants failed to get the land measured in his presence. Further, during his own cross-examination as P.W.1, he suddenly came up with the story that he was present at the Registrar's Office on 25.11.2006 to comply with the suit agreement of sale and get a regular registered sale deed and that it was the defendants who did not turn up. This was never his claim earlier.

Significantly, in *LOURDU MARI DAVID V/ s. LOUIS CHINNAYA AROGI ASWAMY*¹⁴, the Supreme Court affirmed that a person who comes to Court with a false plea is not entitled to the equitable relief of specific performance. Again, in *ZARINA SIDDIQUI V/ s. A.RAMALINGAM ALIAS R.AMARNATHAN*¹⁵, while reiterating that the remedy for specific performance is an equitable one, the Supreme Court observed that the equitable discretion to grant or not to grant a relief for specific performance would depend upon the conduct of the parties and the necessary ingredients have to be proved and established by the plaintiff so that discretion would be exercised judiciously in his favour. The Supreme Court however cautioned that if the defendant does not come with clean hands and suppresses material facts and evidence or misleads the Court, then such discretion should not be exercised by refusing to grant specific performance. In that case, the Supreme Court found that the second defendant held a registered power of attorney for the first defendant to sell and dispose of the property, but the defendants not only made a false statement on affidavit that the power of attorney authorized the second defendant only to look after and manage the property but also withheld the said power of attorney from the Court in order to misguide the Court from the truth.

*KROVIDI KAMESWARAMMA V/ s. KUDAPA BALARAMAYYA*¹⁶ was a case where a Division Bench of this Court observed that the plaintiff must come to Court with clean hands and more so, when he seeks the equitable relief of specific performance as it lies entirely within the discretion of the Court. It was held that it is absolutely necessary that the plaintiff should

¹⁴ (1996) 5 SCC 589

¹⁵ (2015) 1 SCC 705

¹⁶ 1998 (5) ALT 69 (D.B.)

come to the Court with clean hands and if he sets up a false case, he cannot expect the Court of equity to grant him relief.

On the same lines, in TATAVARTHI JAGANNADHAM (DIED) PER L.R. V/ s. AKKINENI RADHAKRISHNA¹⁷, a Division Bench of this Court affirmed that it is well settled that a party, who seeks to avail the equitable jurisdiction of a Court, and as specific performance is an equitable relief, must come to the Court with clean hands. It was further observed that if a party makes false allegations and does not come to Court with clean hands, he is not entitled to such equitable relief.

The plaintiff in the present case, with his ever-changing stands, therefore fall foul of the aforesaid standard and cannot, in any event, claim the equitable relief of specific performance.

The judgment and decree under appeal are therefore wholly unsustainable on facts and in law and are accordingly set aside. The appeal is allowed. A.S.M.P.No.2618 of 2017 filed by the plaintiff is dismissed. It is noticed that A.S.M.P.No.1708 of 2017 was filed by the appellants/defendants under Order 41 Rule 27 CPC seeking to place on record additional evidence but no arguments whatsoever were advanced on this petition or in the context of the documents sought to be placed on record thereunder. The said ASMP is also dismissed. As the judgment and decree under appeal are set aside in their entirety, award of the suit costs to the respondent/plaintiff by the trial Court is also set aside. As the suit costs have already been withdrawn by him, pursuant to the interim order passed in this appeal, the appellants/defendants would be entitled to restitution. The respondent/plaintiff shall refund the same to the appellants/defendants within four weeks from the date of receipt of this judgment and decree.

Other pending miscellaneous petitions, if any, shall also stand closed.

There shall be no order as to costs.

SANJAY KUMAR, J

J. UMA DEVI, J

24th NOVEMBER, 2017

Note: L.R.Copy to be marked.
(B/O) SVV

¹⁷ 1997 (3) ALT 661 (D.B.)