IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 24TH DAY OF APRIL 2026

PRESENT

THE HON'BLE MR. JUSTICE D K SINGH

AND

THE HON'BLE MS. JUSTICE TARA VITASTA GANJU

REGULAR FIRST APPEAL NO. 1138 OF 2015 (SP)

BETWEEN:

1. SRI RAJU SHETTIGAR
S/O D. DASAPPA,
AGED ABOUT 54 YEARS,
1ST MAIN, 1ST CROSS,
BVKS LAYOUT,
CHANDRAVALLY NAGAR,
BHEEMASAMUDRA ROAD,
CHITRADURGA-577 520.

2. SRI RAMACHANDRA D. SHETTIGAR
S/O D. DASAPPA,
AGED AROUND 52 YEARS,
1ST MAIN, 1ST CROSS,
BVKS LAYOUT,
CHANDRAVALLY NAGAR,
BHEEMASAMUDRA ROAD,
CHITRADURGA-577 520.

...APPELLANTS

(BY SRI NANDA KISHORE, ADVOCATE)

AND:

1. SRI S SHIVAPRAKASH
S/O C.B. SHANTHAVEERAPPA,
AGED ABOUT 49 YEARS,
PROPRIETOR,
M/S. SHANTHI AGENCIES,

NEW SANTHE MAIDANA,
CHITRADURGA-577 501.

...RESPONDENT

(BY SRI G. KRISHNA MURTHY, SENIOR COUNSEL A/W
SRI GANAPATHI BHAT VAJRALLI, ADVOCATE)

THIS RFA IS FILED UNDER SECTION 96 OF CPC AGAINST THE JUDGMENT AND DECREE DATED 25.04.2015 PASSED IN O.S.NO.51/2011 ON THE FILE OF THE I ADDITIONAL SENIOR CIVIL JUDGE, CHITRADURGA, DECREEING THE SUIT FOR SPECIFIC PERFORMANCE.

THIS APPEAL HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 13.02.2026, COMING ON FOR PRONOUNCEMENT THIS DAY, ***HON'BLE MR. JUSTICE D K SINGH*** PRONOUNCED THE FOLLOWING:

CORAM: HON'BLE MR. JUSTICE D K SINGH
and
HON'BLE MS. JUSTICE TARA VITASTA GANJU

CAV JUDGMENT
(PER: HON'BLE MR. JUSTICE D K SINGH)

I PREFACE:-

1. The present Regular First Appeal under Section 96 read with Order XLI Rule 1 of the Code of Civil Procedure, 1908 (CPC) has been filed against the judgment and decree passed by the learned I Additional Senior Civil Judge at Chitradurga in O.S.No.51/2011 dated 25.04.2015.

2. The parties are referred to as per their ranking before the Trial Court, for the sake of convenience.

II BACKGROUND:-

3. The plaintiff has filed the aforesaid suit for specific performance of the contract directing the defendants to execute the registered sale deed in terms of the agreement of sale dated 18.03.2011 and for permanent injunction restraining the defendants, their agents etc., from selling, mortgaging or parting with the possession of the suit schedule property in favour of third party.

III THE CASE OF THE PLAINTIFF/RESPONDENT:-

4. The case of the plaintiff, as stated in the plaint, was that the plaintiff was the proprietor of M/s. Shanthi Agencies situated at New Santhe Maidana, Chitradurga and carrying on the business of selling two wheeler TVS bikes and mopeds. The plaintiff wanted to establish a big showroom for which, he was in search of a suitable property and he came to know that the defendants' property was available for sale. The plaintiff approached the defendants for sale of their property. However, the defendants informed him that they had taken housing loan against the said property from the State Bank of India, Chitradurga Branch and that the loan had become due. It was further stated that the Bank had offered the defendants One

Time Settlement (OTS) scheme for closing the loan account on payment of Rs.20,00,000/- within the month of March 2011.

5. According to the plaintiff, the defendants had also disclosed to him that another agreement of sale was executed by them in favour of Sri Nagaraja s/o late Chittanna and Smt. S.P. Bhagyamma w/o Vasantha Kumar on 24.08.2009 and had taken Rs.3,55,000/- from them. The said persons had filed a suit against the defendants in O.S.No.7/2010 before the Civil Court at Chitradurga. The said case was settled amicably for Rs.5,50,000/-.

6. The defendants made it known to the plaintiff that they did not have the money to repay the OTS amount of Rs.20,00,000/- to the State Bank of India within the month of March 2011 to get the property released from mortgage and they did not even have the money to pay Rs.5,50,000/- in pursuance to the settlement in O.S.No.7/2010. Under the aforesaid precarious financial conditions of the defendants, they had decided to dispose off the property in question. Both the plaintiff and the defendants negotiated the sale price in presence of Sri Gurusiddanagouda and others and finally, the

defendants agreed to sell the suit schedule property for an amount of Rs.58,00,000/-.

7. An agreement of sale dated 18.03.2011 was entered into by and between the plaintiff and the defendants. On the date of execution of the agreement, the plaintiff had paid Rs.5,50,000/- by way of Cheque drawn on the Corporation Bank, Chitradurga and had also paid Rs.10,000/- in cash. Thus, a total amount of Rs. 5,60,000/- was paid on the date of execution of the agreement of sale dated 18.03.2011. The plaintiff had agreed to clear the entire outstanding loan in the name of the defendants in the State Bank of India, Chitradurga Branch on or before 31.03.2011, for which the defendants agreed to execute the Authorization Letter dated 29.03.2011 in the name of the plaintiff to clear the said outstanding loan on their behalf and to secure the entire original documents of the suit schedule property. The plaintiff had paid Rs.19,90,000/- to the said Bank through the Cheque dated 29.03.2011 towards the housing loan standing in the name of the defendants and had received the original title deeds of the suit schedule property from the Bank. The plaintiff had also paid Rs.10,000/- by way of cash to the defendants. Thus, in total, the plaintiff had paid a sum of Rs.25,60,000/- as on 29.03.2011.

8. It was the further case of the plaintiff that on the date of agreement of sale, the suit schedule property was not vacant since two tenants viz., Rahamatulla and G.Pathimunissa had occupied some portion of the suit schedule property on lease basis. The defendants told the plaintiff that they had executed lease agreements in favour of the two tenants for Rs.2,75,000/- and Rs.1,80,000/- respectively. The defendants had agreed to get the premises vacated from the tenants before execution of the sale deed in the name of the plaintiff. The plaintiff had agreed to pay the balance sale consideration of Rs.32,40,000/- within three months from the date of the agreement of sale and to get the suit schedule property registered in his name or in the names of the nominees provided the defendants would get the tenants vacated and also upon fulfillment of other terms and conditions of agreement of sale.

9. The defendants had approached the plaintiff again to pay some more amount for their personal reasons and on the request of the defendants, the plaintiff had paid a sum of Rs.1,50,000/- by way of Cheque bearing No.001346 dated 11.04.2011 drawn on ICICI Bank and Rs.10,000/- by way of

cash. Further on 04.06.2011, the plaintiff had paid Rs.70,000/- and further sum of Rs.50,000/- on 17.06.2011 by way of cash. After receipt of the aforesaid amounts, the defendants had made endorsement and put their signatures on the agreement of sale itself.

10. It was further stated that on the request of the defendants, the plaintiff had once again made payment of Rs.3,70,000/- by way of cash on 30.06.2011 for making payment to the tenants in order to get the premises vacated from them and an endorsement was made by the defendants in the agreement of sale itself. It was further stated that despite making the payment of almost 50% of the total sale consideration, the plaintiff's repeated requests to execute the sale deed in pursuance to the agreement of sale was not positively responded to by the defendants.

11. It was further stated that all of a sudden, the defendants had sent a legal notice dated 04.10.2011 stating that the plaintiff had failed to get the suit schedule property registered in his name within three months as per the agreement of sale dated 18.03.2011 and therefore, the defendants were not ready to execute the sale deed in pursuance to the agreement

of sale and they were ready to return the amount after 10% deduction of the amount paid by the plaintiff. The plaintiff had replied to the said legal notice through his counsel on 10.10.2011 and demanded the defendants to execute the sale deed in his favour. According to the plaintiff, he was always ready and willing to pay the balance sale consideration and bear the registration expenses and stamp duty for execution of the sale deed in pursuance to the agreement of sale dated 18.03.2011, however, the defendants failed to perform their obligation under the agreement of sale.

12. It was further stated that the plaintiff had, on 17.10.2011, gone to the Sub-Registrar's Office, Chitradurga, along with the witness with the balance amount of consideration. However, the defendants did not turn up before the Sub-Registrar's Office to register the sale deed in favour of the plaintiff in respect of the suit schedule property. The plaintiff, therefore, filed the aforesaid suit seeking a decree for specific performance of the agreement of sale dated 18.03.2011.

IV <u>THE CASE OF THE DEFENDANTS/APPELLANTS</u>:-

13. The defendants filed their written statement. They admitted the agreement of sale dated 18.03.2011, but said that the plaintiff had breached the terms of the agreement of sale. The plaintiff was required to pay the balance consideration of Rs.32,40,000/- within a period of three months after clearing the outstanding loan in the State Bank of India against the suit schedule property, but the plaintiff did not make the payment of the balance consideration of Rs.32,40,000/- within the stipulated period of three months. In fact, the plaintiff had paid only an amount of Rs.6,50,000/- before the three months' period could get expired i.e., on 30.06.2011 as against the amount of Rs.32,40,000/-. It was further said that the time was the essence of the contract and when the plaintiff had failed to make payment of the balance consideration within the period of three months, the legal notice dated 04.10.2011 was issued to the plaintiff stating that as he had failed to make payment of the balance consideration of Rs.32,40,000/- within the period of three months, the defendants were not ready to execute the sale deed in favour of the plaintiff in pursuance to the agreement of sale and they were ready to return the amount after deducting 10% of the amount paid by the

plaintiff. There was a clear stipulation in the agreement of sale dated 18.03.2011 that the plaintiff was required to make the balance payment of Rs.32,40,000/- within the period of three months and the plaintiff had failed to make the payment thereof. It was stated that the plaintiff himself was in default of the agreement and therefore, he could not have asked for specific performance of the agreement as he was not ready and willing to perform his part of the contract.

V <u>ISSUES BEFORE THE TRIAL COURT</u>:-

14. On the basis of the pleadings between the parties, the Trial Court, vide order dated 31.07.2012, framed the following issues:

> *"(1) Whether plaintiff proves that defendants have executed an agreement of sale on 18.03.2011 agreeing to sell the suit property in his favour?*
>
> *(2) Whether plaintiff proves that the payment towards sale consideration made on various dates in favour of defendants as pleaded?*
>
> *(3) Whether plaintiff proves that he is ever ready and willing to perform his*

> *part of agreement and defendants fails to perform?*
>
> *(4) Whether plaintiff is entitled for specific performance of agreement as sought?*
>
> *(5) Whether plaintiff is entitled for damages as claimed?*
>
> *(6) What order or decree?"*

VI <u>FINDINGS OF THE TRIAL COURT</u>:-

15. The Trial Court has decided issue Nos.1 and 2 together and answered them in the affirmative. So far as the issue of plaintiff's readiness and willingness to perform his part of the agreement is concerned, the Trial Court has held that if the pleadings, the conduct of the parties and other provisions of the agreement are read together, the same would disclose that neither the terms of the agreement nor the intention of the parties would indicate that the time was the essence of the contract. The defendants had received Rs.3,70,000/- on 30.06.2011 by way of cash to make payment to the tenants after completion of the time fixed for performance of the contract. Therefore, issue No.3 was decided in favour of the plaintiff. Issue Nos.4 and 5 have been decided together and

issue No.4 was answered in the affirmative whereas, issue No.5 was answered in the negative. Thus, the Trial Court has decreed the suit and directed the defendants to execute the registered sale deed in favour of the plaintiff in respect of the suit schedule property in terms of the agreement of sale dated 18.03.2011 and deliver vacant physical possession of the same in favour of the plaintiff within a period of three months from the date of the order. The plaintiff was also directed to deposit the balance sale consideration before the Court immediately and if the defendants fail to do so, the plaintiff would be at liberty to get the execution through the process of Court.

VII QUESTIONS FOR CONSIDERATION:-

16. Two questions arise for consideration in this appeal. They are:-

(1) Whether the time was the essence of the contract in the Agreement of Sale dated 18.03.2011?

(2) Whether the plaintiff has been able to prove his readiness and willingness throughout to perform his part of the contract?

VIII SUBMISSIONS:-

17. The learned counsel for the appellants/defendants would submit that the respondent/plaintiff had cleared the loan of the

State Bank of India and also the decretal amount in O.S.No.7/2010 and had paid further sums totalling Rs.32,10,000/-. However, the sum of Rs.25,90,000/- was still due to be paid within a period of three months i.e., by 18.06.2011. The plaintiff had failed to perform his part of the contract by not tendering the remainder of the sale consideration within a period of three months from the date of the agreement i.e., by 18.06.2011. In fact, even by 04.10.2011 i.e., more than six months from the date of the agreement of sale, the plaintiff had failed to tender and pay the balance amount of sale consideration. There is nothing on record to suggest that the plaintiff had ever tendered the balance consideration to the defendants from 18.03.2011 to 04.10.2011. The agreement specifically would suggest that the entire consideration as agreed in the agreement of sale dated 18.03.2011 was to be paid within a period of three months, which would include the plaintiff clearing the outstanding loan in the State Bank of India as also the amounts taken from the tenants viz., Sri Nagaraja and Smt. S.P. Bhagyamma. Therefore, the time period of three months for making payment of the entire consideration as agreed in the agreement of sale dated 18.03.2011 was the essence of the contract.

18. The defendants were in need of money being poor persons whereas, the plaintiff was a wealthy person having business. After entering into the agreement of sale, the plaintiff started exploiting the situation and never came forward to tender the balance consideration. Finally, the defendants were constrained to issue the legal notice dated 04.10.2011 (Ex.P.4) pointing out that the time specified in the contract had lapsed and offered refund of the consideration paid thus far. To this notice, the plaintiff replied through the notices dated 07.10.2011 and 10.10.2011 (Ex.P.6 and Ex.P.5) falsely stating that he was ready and willing to pay the balance consideration before the Sub-Registrar Office on 17.10.2011. By that time, it was evident that the plaintiff had already committed breach of the agreement by failing to tender the balance consideration within the time stipulated in the agreement of sale dated 18.03.2011.

19. The learned counsel for the appellants has drawn the attention of this Court to the testimony of P.W.3-S.B.Rudrappa. He submitted that the plaintiff never went to the Sub-Registrar's Office even on 17.10.2011 and thus, the plaintiff was neither ready nor willing to perform his part of the

contract. It is further submitted that the Trial Court has erroneously decreed the suit and allowed the prayer of the plaintiff for specific performance of the contract and has also granted permanent injunction restraining alienation of the suit schedule property by the defendants.

20. The learned counsel for the appellants has placed reliance on the following judgments in support of his submissions:-

(1) CHAND RANI (SMT) (DEAD) BY LRS. vs KAMAL RANI (SMT)(DEAD) BY LRS. ([1993] 1 SCC 519);
(2) K.S. VIDYANADAM AND OTHERS vs VAIRAVAN ([1997] 3 SCC 1);
(3) PADMAKUMARI AND OTHERS vs DASAYYAN AND OTHERS ([2015] 8 SCC 695);
(4) RAMESH CHAND (DEAD) THROUGH LEGAL REPRESENTATIVES vs ASRUDDIN (DEAD) THOUGH LEGAL REPRESENTATIVES AND ANOTHER ([2016] 1 SCC 653); and
(5) K. NARENDRA vs RIVIERA APARTMENTS (P) LTD. ([1999] 5 SCC 77);

21. Sri G. Krishna Murthy, the learned Senior Counsel appearing along with Sri Ganapathi Bhat Vajralli, learned

counsel for the respondent/plaintiff would submit that in terms of the agreement of sale dated 18.03.2011 (Ex.P.1), the period of three months expired on 17.06.2011. The defendants had received further amount of Rs.3,70,000/- on 30.06.2011, which is after the expiry of three months' period as prescribed under the agreement of sale and thereby, the said three months' period had been renewed. Therefore, the stipulation of three months' period for performance of the contract would no longer remain relevant.

22. It is submitted that on 17.10.2011, the plaintiff had prepared a draft and also brought an amount of Rs.25,90,000/- to be paid to the defendants, but the defendants had not turned up to the Sub-Registrar's Office. The plaintiff had issued a notice to the defendants on 07.10.2011 calling upon them to register the property by receiving the balance sale consideration. It is further submitted that the plaintiff was always ready and willing to perform his part of the contract, which would be evident from Ex.P.2 and Ex.P.3, the bank statements of the plaintiff of the relevant time.

23. It is further submitted on behalf of the respondent that a specific pleading was taken in paragraph 21 of the suit that on

17.10.2011, the plaintiff, along with the witness, had waited before the Sub-Registrar's Office at Chitradurga with the balance consideration, however, the defendants purposefully did not turn up to register the sale deed in favour of the plaintiff. The defendants had admitted in the written statement regarding the execution of the agreement of sale as well as the amount received from the plaintiff.

24. The learned Senior Counsel appearing for the respondent has placed reliance on the following authorities in support of his submissions:-

(1) A. KANTHAMANI vs NASREEN AHMED ([2017] 4 SCC 654; and

(2) MOTILAL JAIN vs RAMDASI DEVI (SMT) AND OTHERS ([2000] 6 SCC 420).

IX <u>APPLICATIONS UNDER ORDER XLI RULE 1 CPC</u>:-

25. Both the parties have filed applications in the present appeal. I.A.No.1/2025 has been filed by the respondent/plaintiff seeking to produce the bank statement of the proprietary concern of the respondent and I.A.No.1/2026 has been filed by the appellants/defendants seeking to produce additional documents viz., valuation report with respect to the

suit schedule property as in 2025, the photographs of the suit schedule property and the residence of the appellants and their family in the suit schedule property and also the copies of the electricity bills of the suit schedule property.

X <u>RELEVANT PROVISION OF CPC & DISPOSAL OF THE APPLICATIONS</u>:-

26. Order XLI Rule 27 of the CPC makes provision for producing and accepting the additional documents. It reads as under:

> *"**27. Production of additional evidence in Appellate Court.**- (1) The parties to an appeal shall not be entitled to produce additional evidence, whether* oral or documentary, *in the Appellate Court. But if-*
>
> *(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or*
>
> *(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the*

exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission."

27. Thus, on consideration of the aforesaid provision, it is evident that the following conditions are provided for accepting additional documents under Order XLI Rule 27 of CPC by the Appellate Court;-

(i) The Trial Court has refused to admit evidence which ought to have been admitted and this is one of the express triggers allowing the Appellate Court to admit additional evidence as held in the case of ***UNION OF INDIA vs IBRAHIM UDDIN AND ANOTHER ([2012] 8 SCC 148)***.

(ii) The party seeking to adduce additional evidence establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not be produced by him at the time when the decree appealed against was passed. This is a Code carved out for allowing production of evidence where diligence could not have been revealed earlier as held in the case of ***BASAYYA I. MATHAD vs RUDRAYYA S. MATHAD AND OTHERS ([2008] 3 SCC 120)***. Thus, additional evidence can be admitted by the Appellate Court where due diligence was exercised and the evidence was not in possession previously.

(iii) The Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce the judgment or for any other substantial cause of similar nature as held in the case of ***SHYAM GOPAL BINDAL AND OTHERS vs LAND ACQUISITION OFFICER AND ANOTHER ([2010] 2 SCC 316).*** Thus, the Appellate Court may admit additional evidence only if it is necessary to pronounce a judgment or for a substantial cause.

28. The Appellate Court is required to give reasons for admitting such evidence. The Appellate Court should admit additional evidence only if it is necessary to pronounce the judgment based on the materials available. If the judgment can be pronounced satisfactorily from the existing records, the Appellate Court should refrain from admitting new evidence. This has been articulated in ***IBRAHIM UDDIN*** (*supra*) and ***SURJIT SINGH AND OTHERS vs GURWANT KAUR AND OTHERS ([2015] 1 SCC 665)***. The evidence admitted under Rule XLI Rule 27 of CPC should be for a genuine, justified purpose and not to patch up weak points. The Court should be sure that the evidence falls within the enumerated grounds and does not amount to a fresh trial on factual merits.

29. Paragraph 2 of the application-I.A.No.1/2025 filed by the respondent/plaintiff would state: "I have supplied the Statement of Account of my proprietary concern-M/s. Shanthi Agencies of both accounts i.e., in the State Bank of India as well as in the Corporation Bank, however, inadvertently, my advocate has produced only Corporation Bank Statement. My proprietary concern was having sufficient balance, and therefore, I may be permitted to produce Account Statement

for the year 2011 which would show sufficient balance". The relevant pleading in paragraph 3 of the said application is "the abovesaid statement of account is very crucial document to determine the controversy between the parties. That apart, I have paid substantial sale consideration to the appellants herein and by virtue of the payment made by me, property has been saved through Bank auction and the suit in O.S.No.7/2011 has been settled. That apart, I have paid the amount for refund of the security deposit and therefore, there is a need to consider the equity which lies in my favour. However, non-production of the abovesaid vital documents is *bona fide* mistake and the same is unintentional. Hence, I may be permitted to produce the statement of account which stands in the name of my proprietary concern. Hence this application."

30. The aforesaid two grounds taken for producing the additional document in the year 2025, though the appeal was filed in the year 2015, would not fall in any of the three grounds as enumerated under Order XLI Rule 27 of CPC. The documents were admittedly with the plaintiff's reach and the reason stated that he had given it to the advocate representing him, who inadvertently did not file it, would not come within the three grounds as enumerated in Order XLI Rule 27 of CPC.

The Appellate Court is not required to conduct re-trial. The plaintiff had this document and did not produce it. Therefore, there is no reason for this Court to allow I.A.No.1/2025 and accordingly, the same is dismissed.

31. So far as I.A.No.1/2026 filed by the appellants/defendants is concerned, the documents sought to be produced by them are the valuation report as in 2025 of the suit schedule property, the photographs of the suit schedule property and the residence of the appellants and their family in the suit schedule property besides copies of the electricity bills of the suit schedule property.

32. For deciding the present appeal, the valuation report of 2025 is of no relevance and there is no dispute that the appellants/defendants are in possession of the suit schedule property even today. They are staying and consuming electricity, they would be paying the electricity bill and therefore, their application also does not fall in any of the three grounds as enumerated under Order XLI Rule 27 of CPC. Therefore, the application-I.A.No.1/2026 also stands dismissed.

XI <u>ANALYSIS & CONCLUSION</u>:-

33. It would be apt to take note of the important clauses of the agreement of sale dated 18.03.2011 (Ex.P.1). Under Clause 1, the total consideration of the suit schedule property was fixed as Rs.58,00,000/- (Rupees fifty eight lakhs only). Clauses 15 and 16 read as under:-

> *"15. If the SELLERS makes default in completing the sale within the stipulated period, the PURCHASER shall have the right to make time is essence of the contract and to cancel this agreement thereafter by giving at least fifteen days notice to the SELLERS to that effect and on the cancellation of the agreement, the PURCHASER shall be entitled to claim and recover from the SELLERS not only the said amount of earnest money along with the interest as mentioned above but also all costs, charges and expenses incurred by the PURCHASER of and incidental to this agreement and the damages suffered by him. This is without prejudice to the right of the PURCHASER to seek specific performance of this agreement or any other modes which is prescribed by law which is time being in force."*

> *"16. If the PURCHASER makes default in completing the sale within the stipulated period, the SELLERS shall have the right to make time is essence of the contract and to cancel this agreement thereafter by giving at least fifteen days notice to the PURCHASER to that effect and on the cancellation of the agreement, the SELLERS shall deduct 10% of the earnest money paid by the PURCHASER and shall return the balance amount immediately."*

34. The cumulative reading of Clauses 15 and 16 of the agreement of sale would clearly make it clear that the time was the essence of the contract. It is also not in dispute that the plaintiff never gave a notice or tendered the balance amount to the defendants asking them to execute the sale deed within three months from the date of execution of the agreement. The question whether some part payment made by the plaintiff on 30.06.2011 to the defendants would take away the effect of Clauses 15 and 16 of the agreement of sale and, the time no longer would be the essence of the contract, is required to be considered.

35. The defendants had issued the notice only on 04.10.2011 and the plaintiff had failed to show that he ever tendered the

balance consideration to the defendants from 18.03.2011 to 04.10.2011, except for making payment of Rs.3,70,000/- on 30.06.2011. As the time specified in the contract had lapsed, the defendants had issued the notice dated 04.10.2011 (Ex.P.4) and offered refund of the consideration amount paid by the plaintiff thus far.

36. Even if it is accepted that in the reply notices dated 07.10.2011 and 10.10.2011 (Ex.P.6 and Ex.P.5) the plaintiff had shown his readiness and willingness to pay the balance consideration before the Sub-Registrar's Office on 17.10.2011, by that time, he had already committed breach of the agreement by failing to tender the balance sale consideration within the stipulated time.

37. Whether the time was the essence of the contract has to be ascertained from the express terms of the contract, from the nature of the property and from the surrounding circumstances and there can be no presumption as to the time being the essence of the contract?

38. A Constitution Bench of the Supreme Court, in the case of ***CHAND RANI*** (*supra*), has held that under the agreement of sale of immovable property, whether the time is the essence of

contract or not has to be ascertained under the terms of the contract. The parties named a specific time within which the completion was to take place. An intention to make the time the essence of the contact must be expressed in unequivocal language. As we have taken note of the relevant clauses of the agreement of sale, it can be said that the parties had intended under the agreement that the time was the essence of the contract. The intention to make time the essence of the contract was expressed in writing in unmistakable language. Mere making payment of Rs.3,70,000/- on 30.06.2001 after the expiry of three months' period would not obliterate the clear and unambiguous language and intention employed in the agreement of sale that the time was the essence of the contract. The acceptance of Rs.3,70,000/- would not result in exoneration of the plaintiff to fulfil his obligation under the contract of making the balance payment within the stipulated period of three months. Nothing has been brought on record by leading any credible evidence to suggest that the plaintiff had ever offered to make payment of the balance consideration before 04.10.2011 i.e., the date of issuance of notice by the defendants (Ex.P.4). Therefore, to say that the time was not the essence of the contract would go against the express language employed in the agreement itself. The defendants had never agreed that the part payment of Rs.3,70,000/- on 30.06.2011 would obliterate the obligation under Clauses 15 and 16 of the agreement of sale.

39. The plaintiff has lead evidence to prove his readiness by producing the Bank Statements (Ex.P.2 and Ex.P3). Ex.P.2 is the bank statement of M/s. Shanthi Agencies, a proprietary of the plaintiff, from 01.03.2011 to 31.03.2011 which would suggest the balance amount of Rs.35,335/- on 31.03.2011. Ex.P.3 is the statement of account maintained in the Bank of India by the plaintiff himself and this statement is from 29.03.2011 to 03.11.2011. On 29.03.2011, the plaintiff had balance amount of Rs.7,31,339/-; on 22.06.2011, he had Rs.2,479/-; on 14.07.2011, he had Rs.22,279/-; and on 14.09.2011, the balance amount in his account was only Rs.17,846/-.

40. From the evidence lead by the plaintiff, it is evident that the plaintiff did not prove that he was ready to perform his part of the contract i.e., to make payment of the balance consideration inasmuch as Ex.P.2 and Ex.P.3 would clearly suggest that he had only meagre amount in his bank accounts

on the relevant date. The relief of specific performance is a discretionary relief of Court. The Court is required to consider the circumstances in exercising the discretion. The readiness and willingness to perform his part of the contract has to be proved by the plaintiff and if the time is the essence of the contract, he must prove that he was ever ready and willing to perform his part of the contract within the stipulated time. Even where the time is not the essence of the contract, the Court has said that it should be performed within a reasonable time having regard to the terms of the contract prescribing a time limit and the nature of the property.

41. If the property is a house located in an urban area as in the present case, the continuing steep rise in price thereafter would be a relevant factor for the Court to decide the issue. It is to be seen whether the delay and laches on the part of the plaintiff in performing the contract would disentitle him from the relief of specific performance.

42. The Supreme Court, in the case of ***K.S. VIDYANADAM*** *(supra)* at paragraphs 10, 11 and 14 of the judgment, has held as under:-

"10. It has been consistently held by the courts in India, following certain early English decisions, that in the case of agreement of sale relating to immovable property, time is not of the essence of the contract unless specifically provided to that effect. The period of limitation prescribed by the Limitation Act for filing a suit is three years. From these two circumstances, it does not follow that any and every suit for specific performance of the agreement (which does not provide specifically that time is of the essence of the contract) should be decreed provided it is filed within the period of limitation notwithstanding the time-limits stipulated in the agreement for doing one or the other thing by one or the other party. That would amount to saying that the time-limits prescribed by the parties in the agreement have no significance or value and that they mean nothing. Would it be reasonable to say that because time is not made the essence of the contract, the time-limit(s) specified in the agreement have no relevance and can be ignored with impunity? It would also mean denying the discretion vested in the court by both Sections 10 and 20. As held by a

Constitution Bench of this Court in Chand Rani v. Kamal Rani [(1993) 1 SCC 519] : (SCC p. 528, para 25)

"… it is clear that in the case of sale of immovable property there is no presumption as to time being the essence of the contract. Even if it is not of 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."

In other words, the court should look at all the relevant circumstances including the time-limit(s) specified in the agreement and determine whether its discretion to grant specific performance should be exercised…"

11. Shri Sivasubramaniam cited the decision of the Madras High Court in S.V. Sankaralinga Nadar v. P.T.S. Ratnaswami Nadar [AIR 1952 Mad 389 : (1952) 1 MLJ 44] holding that mere rise in prices is no ground for denying the specific performance. With great respect, we are *unable to agree if the said decision is understood as saying that the said factor is not at all to be taken into account while exercising the discretion vested in the court by law. We cannot be oblivious to the reality — and the reality is constant and continuous rise in the values of urban properties — fuelled by large-scale migration of people from rural areas to urban centres and by inflation. Take this very case. The plaintiff had agreed to pay the balance consideration, purchase the stamp papers and ask for the execution of sale deed and delivery of possession within six months. He did nothing of the sort. The agreement expressly provides that if the plaintiff fails in performing his part of the contract, the defendants are entitled to forfeit the earnest money of Rs 5000 and that if the defendants fail to perform their part of the contract, they are liable to pay double the said amount. Except paying the small amount of Rs.5000 (as against the total consideration of Rs 60,000) the plaintiff did nothing until he issued the suit notice 2 1/2 years after the agreement. Indeed, we are inclined to think that the rigor of the rule evolved by courts that time is not* *of the essence of the contract in the case of immovable properties — evolved in times when prices and values were stable and inflation was unknown — requires to be relaxed, if not modified, particularly in the case of urban immovable properties. It is high time, we do so. The learned counsel for the plaintiff says that when the parties entered into the contract, they knew that prices are rising; hence, he says, rise in prices cannot be a ground for denying specific performance. May be, the parties knew of the said circumstance but they have also specified six months as the period within which the transaction should be completed. The said time-limit may not amount to making time the essence of the contract but it must yet have some meaning. Not for nothing could such time-limit would have been prescribed. Can it be stated as a rule of law or 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? All this only means that while exercising its discretion, the court should also bear in mind that when the parties prescribe certain time-limit(s)* *for taking steps by one or the other party, it must have some significance and that the said time-limit(s) cannot be ignored altogether on the ground that time has not been made the essence of the contract (relating to immovable properties).*

14. Shri Sivasubramaniam then relied upon the decision in Jiwan Lal (Dr) v. Brij Mohan Mehra [(1972) 2 SCC 757 : (1973) 2 SCR 230] to show that the delay of two years is not a ground to deny specific performance. But a perusal of the judgment shows that there were good reasons for the plaintiff to wait in that case because of the pendency of an appeal against the order of requisition of the suit property. We may reiterate that the true principle is the one stated by the Constitution Bench in Chand Rani [(1993) 1 SCC 519]. Even where time is not of the essence of the contract, the plaintiffs must perform his part of the contract within a reasonable time and reasonable time should be determined by looking at all the surrounding circumstances including the express terms of the contract and the nature of the property."

43. Though the presumption is that the time is not of the essence of the contract in case of sale of immovable property, however, from the express terms of the contract, the time would be treated to be the essence of the contract.

44. The Supreme Court, in the case of ***A.K. LAKSHMIPATHY (DEAD) AND OTHERS vs RAI SAHEB PANNALAL H. LAHOTI CHARITABLE TRUST AND OTHERS ([2010] 1 SCC 287)*** at paragraphs 20 to 27 of the judgment, has held as under:-

> *"20. We are in agreement with the views expressed by the High Court in the impugned judgment holding that since the Head Office of the Trust is registered at Kolkata which would be enough to show that the relevant law applicable to a charitable trust would be that of the State in which the head office of the trust is registered. (See State of Bihar v. Charusila Dasi [AIR 1959 SC 1002] and Anant Prasad Lakshminiwas Ganeriwal v. State of A.P. [AIR 1963 SC 853]) In addition to this, the respondents had fulfilled their part of the obligation when Respondent 2 sent a reply dated 6-6-1979*

intimating the appellants that there was no need to obtain any permission from the Endowment Department for the purpose of transferring the title in respect of the property in question as the laws of West Bengal applicable in this case were not required to take such permission for alienation of trust property. In view of the above, we are, therefore, of the view that there was no obligation on the part of the respondents to get clearance or permission or exemption from the Endowment Department of the State for the purpose of transferring the title of the property in question.

21. It was next contended by Mr Venugopal, learned Senior Counsel appearing for the appellants, that the High Court was in error in not giving any due regard to all the clauses of the contract for sale, especially Clause 11 of the agreement for sale. We do not find any merit in this contention of the learned Senior Counsel for the appellants. From a mere glance through the judgment of the High Court, it would be evident that the entire agreement was reproduced *verbatim and the High Court in the impugned order truly went in depth into the discussion of the terms and conditions embodied in the contract for sale. We are in agreement with the High Court that its analysis was impregnable. This submission of Mr Venugopal, learned Senior Counsel for the appellants, cannot be said to have any merit and is accordingly rejected.*

22. It was next contended by Mr Venugopal that although there is a specific clause in the agreement, namely, Clause 10 where one of the conditions has been embodied that "time is of the essence of the contract" even then it is well settled that in many instances, a mere clause in the agreement to be insufficient as a sole reason to lead one to the conclusion that "time was to be of essence of the contract". This submission of Mr Venugopal was hotly contested by Mr P.S. Patwalia, learned Senior Counsel appearing for the respondents. In order to decide this question, it would be relevant for us to look into the clauses in the agreement entered into by the *parties because they are of utmost importance.*

23. In our view, the High Court has rightly pointed out that there are many instances in the said contract where the fact that time is to be of essence of the contract has been specifically mentioned. Clause 10 of the agreement for sale which reads "Time will be of the essence of the contract", therefore, has been clearly mentioned in the agreement for sale. However, it is a well-settled proposition of law by now that time is not to be of the essence in case of sale of immovable property. In Chand Rani v. Kamal Rani [(1993) 1 SCC 519 : AIR 1993 SC 1742] this Court clearly held that in the case of sale of immovable property, there is no presumption as to time being the essence of the contract.

24. Keeping this principle in mind, we now turn to the clauses of the contract for sale entered into by the parties. Clauses 3 and 5, in our view, of the contract for sale are of no inconsiderable importance. So far as Clause 10 of the agreement for sale is *concerned, we have already referred to the same earlier. At this juncture, we now reproduce Clause 3 of the agreement for sale which reads:*

"Payment of the balance amount of Rs 5,00,000 (Rupees 5 lakhs only) on or before 6-6-1979 is the essence of the agreement. If the vendees fail to pay the balance amount in time as aforesaid for whatsoever reason, the advance earnest amount paid today shall stand forfeited and the vendees shall have no right whatsoever in the scheduled property and they shall not in any case be entitled to ask for refund of the earnest money which by his non-payment of the balance amount as aforesaid shall irrevocably stand forfeited."

A reading of this clause, namely, Clause 3 of the agreement for sale would clearly show that what was the intention of the parties to make time to be of the essence of the contract. If we read Clause 3 and Clause 10 of the agreement for sale conjointly, it would not be unsafe for us to conclude that the intention of the parties to enter *into the agreement for sale incorporating Clauses 3 and 10 in the same for the purpose of making the time being of the essence of the contract.*

25. Mr Venugopal, however, in support of his contention that "time was not of the essence of the contract" strongly relied on a decision of this Court in Swarnam Ramachandran v. Aravacode Chakungal Jayapalan [(2004) 8 SCC 689] and argued that even if Clause 10 clearly stipulates that time was of the essence of the contract, then also, in the surrounding circumstances, it can always be held that the agreement must be performed within a reasonable time and time was not of the essence of the contract.

26. In our view, the decision of this Court in Swarnam Ramachandran case [(2004) 8 SCC 689] would not be applicable in the facts and circumstances of the present case. It is true that it was conclusively held in the aforesaid decision of this Court on facts that time was not to be of the essence of the contract except in a *reconveyance or renewal of lease, the facts and circumstances of that case were totally different from the one at hand. In the said case, there was a specific proviso to one of the clauses in the contract for sale which clearly stipulates that if payment was not made in time, the appellants who were the vendors could extend such date. Hence, in that decision, this Court in the facts of that case held that time was not to be of the essence of the contract which was determined by this Court in the said decision on the intention of the parties as well as the written terms of the agreement.*

27. Clauses 3 and 10 of the contract for sale in this case clearly indicate that time was always meant to be of prime importance in the contract. In fact PW 1, V.A. Gupta who was examined as a witness for the appellants admitted in his deposition (Annexure P-9) that time was always of the essence of the contract and the appellants were aware of this even before entering into the contract. From the contract for sale also, we can very well see that time

> *was repeatedly mentioned to be of prime importance and it was stated quite clearly that under all circumstances, the appellants would have to definitely deposit the balance amount of Rs 5 lakhs by the date stipulated in the contract for sale. Hence, this submission advanced by Mr Venugopal, that time was not of the essence of the contract cannot at all be accepted and, therefore, we reject the same."*

45. Further, in the case of ***PADMAKUMARI*** (*supra*), after considering the terms of the agreement, the Supreme Court has held that the time was the essence of the contract and as the plaintiff failed to make payment of the balance sale consideration within the stipulated time, the plaintiff would not be entitled for the decree of specific performance. Paragraphs 19 and 20 of the said judgment are extracted hereunder:-

> *"19. The said legal contention urged on behalf of Defendants 12 to 15 has been strongly rebutted by learned counsel on behalf of the plaintiff contending that the question of payment of balance consideration amount of Rs.63,000 within*

nine months would have arisen after the terms and conditions of the contract agreed upon by Defendants 1 to 11 if they had measured the suit schedule property. They have not discharged their part of the contract stipulated in the agreement to sell, therefore, it is urged by him that time was not the essence of the contract as Defendants 1 to 11 themselves have failed to perform their part of the agreement.

20. The said contention urged on behalf of the plaintiff is unacceptable to us that the question of taking measurement would not arise before the plaintiff performed his part of the contract regarding the balance consideration within the period stipulated in the agreement. Undisputedly, that had not been done by the plaintiff in the instant case within the stipulated time and the notice was issued by the plaintiff only after one year, therefore, the plaintiff has not adhered to the time which is stipulated to pay the balance consideration amount to Defendants 1 to 11 which is a very important legal aspect which was required to be considered by

> *the courts below at the time of determining rights of the parties and passing the impugned judgment. The courts below have ignored this important aspect of the matter while answering the contentious Issues (i) and (ii) in favour of the plaintiff and granted decree of specific performance in respect of the suit schedule property. The said finding of fact is contrary to the terms and conditions of the agreement, pleadings and the evidence on record. Accordingly, we answer the said issues in favour of Defendants 12 to 15 after setting aside the concurrent finding of fact recorded by the High Court."*

46. Thus, we hold that the time was the essence of the contract in view of the express terms in Clauses 15 and 16 of the agreement of sale dated 18.03.2011 (Ex.P.1) and the plaintiff had not proved that he had made offer to make payment of the balance consideration, except for making payment of Rs.3,70,000/- on 30.06.2011 up to 04.10.2011. As the plaintiff failed to perform his part of the contract, the defendants were entitled to terminate the contract.

47. We also hold that the plaintiff had failed to prove that he was ready and willing to perform his part of the contract inasmuch as Ex.P.2 and Ex.P.3, the bank account statements of the plaintiff for the relevant period, would suggest that he had only meagre amount in his bank accounts at the relevant time.

48. We also need to consider the comparative hardship of the plaintiff and the defendants. The defendants have only one house where their family is residing. They do not have any other shelter whereas, the plaintiff is a businessman and he wanted to buy the house of the defendants for the purpose of establishing a showroom for selling two wheeler TVS bikes and mopeds. Therefore, on comparison, the defendants are hard-pressed as, except for this house, they do not have any shelter for their family. Considering the comparative hardship of the parties, we are of the view that when the plaintiff did not tender the full amount within the stipulated period of three months from the date of the agreement and even after 04.10.2011 and he did not have the fund in his bank accounts to perform his part of the contract, the decree of specific performance should not have been granted. The Trial Court has erred in not considering the aforesaid facts and the evidence

while granting the decree of specific performance in favour of the plaintiff.

49. We, therefore, allow this appeal and set aside the impugned judgment and decree dated 25.04.2015 passed by the Trial Court in O.S.No.51/2011. However, as the relief of specific performance is an equitable and discretionary relief, we direct the appellants/defendants to refund the amount of Rs.32,10,000/- to the plaintiff along with interest @6% p.a. from 30.06.2011 till the date of payment.

50. We also direct the plaintiff to refund the stamp duty of Rs.3,24,840/- along with the registration charges of Rs.58,385/- with a period of three months from today as the sale deed has been executed by the Court Commissioner, Chitradurga, in favour of the plaintiff on 23.02.2016 which now stands cancelled in view of the judgment and decree passed by us. The plaintiff would also be entitled for the amount deposited in this Court along with the accrued interest thereon.

51. Draw the judgment and decree accordingly.

52. In view of disposal of the appeal, pending IAs, if any, do not survive for consideration and accordingly, they stand disposed of.

Sd/-
(D K SINGH)
JUDGE

Sd/-
(TARA VITASTA GANJU)
JUDGE

BKV