

M/S Citadel Fine Pharmaceuticals vs M/S Ramaniyam Real Estates P.Ltd.& Anr on 8 August, 2011

Equivalent citations: AIR 2011 SUPREME COURT 3351, 2011 AIR SCW 5209, AIR 2011 SC (CIVIL) 2360, (2012) 1 ANDHLD 70, (2011) 5 CAL HN 200, (2011) 4 ICC 131, (2012) 1 LANDLR 256, (2011) 5 MAD LW 30, 2011 (9) SCC 147, (2011) 2 CLR 462 (SC), (2011) 5 ALL WC 4367, (2011) 4 RECCIVR 894, (2012) 1 CIVILCOURTC 244, (2012) 1 MAD LJ 476, (2011) 8 SCALE 301, (2012) 1 CIVLJ 813

Bench: Asok Kumar Ganguly, G.S. Singhvi

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 6437 OF 2011

(Arising out of Special Leave Petition (C)

No.28251/2008)

M/s Citadel Fine Pharmaceuticals ...

Appellant(s)

- Versus -

M/s Ramaniyam Real Estates P. Ltd. & Anr.

...Respondent(s)

WITH

CIVIL APPEAL NO. 6438 OF 2011

(Arising out of Special Leave Petition (C)

No.31269/2008)

M/s Ramaniyam Real Estates P. Ltd.

...

Appellant(s)

- Versus -

M/s Citadel Fine Pharmaceuticals & Anr.

...Respondent(s)

J U D G M E N T

GANGULY, J.

1. Leave is granted in both the special leave petitions.

2. These appeals have been preferred from the judgment and final order dated 2nd September, 2008 passed in O.S.A. No.332/2007 and C.M.P. No.1/2007 by the Division Bench of the Madras High Court.

3. The controversy arose out of a suit of specific performance. M/s. Citadel Fine Pharmaceuticals (defendant No.1), a partnership firm, owned 66 cents of agricultural land (hereinafter `the suit property'), forming a part of total of 2.87 acres of agricultural land in survey nos. 363, 364, 366/1 of Velachery village, Mamblam, Guindy Taluk, Registration District of Madras, and entered into an agreement for sale of the suit property (hereinafter `the agreement') for a consideration of Rs.1,00,00,000/- with M/s. Ramaniyam Real Estates Private Limited (plaintiff), which was a company incorporated under the Companies Act, 1956 and engaged in the business of constructing buildings.

4. The agreement dated 7th July, 1995 was the subject matter of suit between the above parties. As per the agreement, Rs.10,00,000/- of the sale consideration was to be paid upfront as earnest money, and the remainder of Rs.90,00,000/- was to be paid at the time of the registration of the sale deed. At the time of agreement, the suit property was encumbered by way of security with M/s. State Bank of India, Guindy Branch (defendant No.2) and therefore one of the conditions of the agreement was that defendant No. 1 would get the suit property released from such encumbrance before the final payment of Rs.90,00,000/- was to be made. Apart from this encumbrance, it was stated in the agreement, the suit property was to be without any other encumbrance; vide clauses 2 and 6 of the agreement.

5. Of the said 66 cents, however, 19 cents were considered excess urban vacant land under the Tamil Nadu Urban Land (Ceiling and Regulations) Act (24 of 1978), (hereinafter `the Tamil Nadu Act'). As per clause 7 of the agreement, it was for the plaintiff to have the land cleared for sale from the urban land ceiling authorities. Under clauses 8, 10 and 11 of the agreement, the sale was made time bound. Clause 10 stated that time was the essence of this contract. Clause 8 mandated that under all circumstances, the sale had to materialize within a year from the date of the agreement. In terms of clause 9, if the sale failed on account of lapses on plaintiff's part, the sale was to stand completely cancelled, and the earnest money of Rs.10,00,000/- was to be returned. As per clause 11, however, if the sale failed because of defendant No. 1, the plaintiff was at liberty to sue for specific performance of the contract.

6. In pursuance to the agreement, the earnest money was paid by the plaintiff and received by defendant No. 1. The plaintiff then preferred an application in Form 37-I prescribed under Rule 48-L of the Income Tax Rules, 1962, before the Appropriate Authority for the clearance of the suit property for sale vide section 269UC in Chapter XX of the Income Tax Act, 1961.

7. However, the Income Tax Authority refused such clearance on the ground that as per section 6 of the Tamil Nadu Act, agreement to sell a piece of urban land declared excess vacant land, or a piece of land, part of which had been declared excess vacant urban land, was deemed as null and void.

8. From the Statement and Objects and Reasons of the Tamil Nadu Act it appears that it was enacted to impose a ceiling on the quantum of land that could be held or owned within an urban agglomeration. The object of the Act was to prevent concentration of ownership of urban land in the hands of a few, and to regulate the construction of buildings on such lands, speculative trading of urban land and illegal profiteering. Under the Act, the ceiling limit had been fixed by Section 5.

Section 6 of the Act prevented transfer of such excess vacant urban land by its owner to any other person. Section 6 is set out:

6. Transfer of vacant land. - No person holding in excess of the ceiling limit immediately before the commencement of this Act, vacant land, shall transfer any such land or part thereof by way of sale, mortgage, gift, lease or otherwise until he has furnished a statement under section 7 and a notification regarding the excess vacant land held by him has been published under sub section (1) of section 11;

and any such transfer made in contravention of this provision shall be deemed to be null and void.

9. The section thus enjoined that landowners holding excess vacant land are to furnish a statement under Section 7. In this case, 19 cents were considered excess urban vacant land vide case no. R.C.6160/86 and defendant No. 1 filed its statement under Section 7.

10. Section 9 provided for preparation of a draft statement as regards the excess vacant land. Under clause (5) of Section 9, the Competent Authority, so designated under the Tamil Nadu Act, was to consider objections preferred by a land owner, and then pass orders with respect to the question of excess land. Defendant no. 1 preferred its objections before the Competent Authority. The objections however were dismissed. The defendant no.

1 then preferred an appeal before the Special Commissioner (Land Reforms), Madras and the appeal was kept pending.

11. In accordance with Section 11 (1), a notification regarding the 19 cents being excess vacant land was published and any transfer made in contravention of this provision was deemed to be null and void.

Section 11 provided for acquisition of such vacant urban land by the State Government.

12. Defendant no. 1 also preferred an application for exemption of that 19 cents of land under the provisions of Section

21. Section 21 empowered the State Government to exempt a piece of vacant excess land from acquisition mentioned above.

13. That application was also dismissed.

Defendant no. 1 then preferred Writ Petition No. 13906/2008 before the High Court challenging the declaration in R. C. 6160/86. In the writ petition, defendant no. 1 prayed for a stay of the proceedings and which was allowed. However, during the pendency of this writ petition the Tamil Nadu Act was repealed on 16th June, 1999 by the Tamil Nadu Urban Land (Ceiling and Regulation) Repeal Act, 1999 (20 of 1999) (hereinafter `the Repealing Act'). Under Section 4 of the repealing Act, all proceedings relating to any order made or purported to be made under the Principal Act,

that is the Tamil Nadu Act, shall abate. Section 4 of the Repealing Act is as follows:-

"4. Abatement of legal proceedings. - All proceedings relating to any order made or purported to be made under the Principal Act pending immediately before the commencement of this Act before any court, tribunal or any authority shall abate.

Provided that this section shall not apply to the proceedings relating to Sections 12, 13, 14, 15, 15-B and 16 of the Principal Act in so far as such proceedings are relatable to the land, possession of which has been taken over by the State Government of any person duly authorised by the State Government in this behalf or by the competent authority."

14. Admittedly, possession of 19 cents of land, in respect of which proceeding was pending, was not taken over by the Government. So the pending proceeding in respect of that land under the Principal Act, that is the Tamil Nadu Act, shall abate in view of Section 4 of the Repealing Act.

15. However, Income Tax authorities, as noted above, had refused to process Form 37-I in view of the proceedings initiated under the Tamil Nadu Act. Having referred to section 6 of the Act, the appropriate authority, while rejecting form 37-I stated:

"...In column 8, it has been mentioned that an extent of 19 cents has been declared as excess vacant land under section 9 (5) of Tamil Nadu Urban Land (Ceiling and Regulations) Act, 1978 that an appeal is pending before the Special Commissioner (Land Reforms), Madras and that the transferor has also applied to the State Government for exemption under Section 21 of the said Act but the same has been rejected and the matter is pending in W. P. No. 13906/1988, before the High Court, Madras.

2. It transpires, therefore, that the transferor intends to transfer the entire extent of 66 cents, inclusive of the 19 cents of land which is declared as excess vacant land by the Competent Authority under the Urban Land Ceiling Act, which is prohibited by section 6 of the Tamil Nadu Urban Land (Ceiling and Regulations) Act, 1978.

In view of the prohibition contained in section 6, quoted above, the agreement entered into between the parties on 7.7.95 to transfer the entire land, including the excess vacant land of 19 cents, shall be deemed to be null and void. In view of this legal prohibition, we are unable to process the 37-I statement filed by you and therefore, the same is lodged in this office. If you are so advised, you may file a fresh 37-I statement for transfer of the balance land only."

16. As per clause (7) of the agreement, it was the plaintiff's responsibility to have the suit property cleared for sale by the urban land ceiling authorities. Since Form 37-I was not cleared, the plaintiff sent two letters dated 10th June, 1996 and 3rd July, 1996 to the defendant requesting that the sale be split up and two separate agreements be entered into. The first for the unencumbered 47 cents

and the second for 19 cents termed as the excess land by the urban land ceiling authority. This proposal was rejected by the defendant no.

1 on the grounds that the agreement is not divisible. According to defendant No.1, the splitting up of the agreement into two in effect meant the writing of an entirely new contract. The bar under section 6 of the Tamil Nadu Act, as pointed out by the Appropriate Authority was applicable not only in respect of the 19 cents of land termed as excess, but in fact the entire 66 cents for the reason that the said 19 cents could not be severed from the 66 cents. The defendant No.1 urged that the contract was hit by illegality and was thus frustrated.

17. The plaintiff, the proposed purchaser, under these circumstances instituted on 9th September, 1998 the suit for specific performance of the contract, viz. C. S. 589/1996 for the entire 66 cents of land.

18. The plaint case is that at the time the agreement for sale was entered into, it was known to both the parties that 19 cents of the suit property had been declared excess land under the Tamil Nadu Act, and that an appeal to the Special Commissioner (Land Reforms), Madras was pending. It also submitted that the parties knew that a writ petition challenging the State Government's refusal to exempt the property under section 21 of the Tamil Nadu Act was also pending. With knowledge the parties entered into the agreement to sell. The plaintiff submitted that this meeting of minds was reflected in clause 7 of the agreement. There was thus no new and unforeseen development leading to the frustration of contract as such the relief for specific performance of the contract was prayed or in the alternative, it was prayed the plaintiff be allowed a refund of the earnest money with an interest of 25% per annum and liquidated damages to the tune of Rs.75,00,000/- along with costs.

19. The defendant, the proposed vendor, resisted the suit by submitting that the agreement to sell was with respect to the entire suit property, i.e. 66 cents, and thus could not have been split into separate agreements to sell for 47 cents and 19 cents. It submitted that in view of the bar placed because of section 6 of the Tamil Nadu Act and the consequential refusal by the appropriate authority under the income tax department to allow the execution of the sale, the contract itself had become frustrated and thus unenforceable in law.

20. It was further urged that time was the essence of the contract and it was for the plaintiff purchaser to seek exemption for the said 19 cents land from the urban land ceiling department, which however it failed to do. As a result of this failure, the sale could not be affected within a year's time. This clearly rendered the contract void in terms of clauses 8 and 10 insofar as the contract was not performed within a year's time. Hence, clause 9 was attracted and the contract stood cancelled for default of the plaintiff. It submitted that in terms of clause 9, the proposed vendor (defendant no.1) refunded the earnest money to the plaintiff-purchaser.

However the cheque sent under registered post came back to the defendant no. 1 'refused'. It appears that the same refused by the plaintiff-purchaser either by 6th or 7th September, 1996.

21. As such the defendant no. 1 prayed for dismissal of the suit in view of impossibility of performance of the contract and non-performance by the plaintiff of its obligation under the contract within the stipulated time.

22. However, the learned Single Judge held that the suit property was in respect of agricultural land and not about an urban land as contemplated under the Tamil Nadu Act. It was further noted by the learned Judge that as the Tamil Nadu Act had been repealed in 1999, its application itself would be limited to only those instances where possession of the excess vacant land had been taken over by the State Government.

23. The learned Judge noted that the suit property in the instant case did not attract any of the provisions mentioned in Section 3 of the Repealing Act. According to the learned Judge, there were two reasons for which the provisions of Tamil Nadu Act would not apply to the instant agreement: firstly, the suit property was agricultural in nature and thus the same was outside the purview of the Act.

Secondly, after the repeal of the Tamil Nadu Act in 1999, none of its provisions affected the agreement. The Judge held that clause (7) in itself, however, was not a condition precedent to the contract.

It merely stated that clearance of the said 19 cents from the urban land ceiling authorities was upon the plaintiff, and that in the event the plaintiff was unable to have it cleared, the defendant no. 1 shall not be provided with any alternative piece of land or any compensation. Thus, the learned Judge held that the plaintiff was entitled to specific performance of the contract and decreed the suit.

24. Aggrieved, the defendant no. 1 preferred an appeal. The learned Division Bench partly allowed it holding that the respondents could be given the relief of specific performance only to the extent of 47 cents of the lands that were not part of the proceedings under the Tamil Nadu Act.

25. Apart from upholding the judgment of the learned Judge with respect to the agricultural nature of the suit property, the Division Bench noted that in none of the letters exchanged between the parties it had come on record that the agreement had become illegal in view of the provisions of Section 6 of the Tamil Nadu Act. On the contrary, in all these communications, the only position that the defendant no. 1 had insisted upon was the satisfaction of the conditions mentioned in clause (7) of the agreement, viz., permission for the sale of 19 cents by the urban land ceiling authorities. The learned Division Bench noted that if this was the stance of the defendant no. 1, it could not be allowed to resist the suit on the grounds of illegality of contract.

26. However, it disagreed with the decision of the learned Judge to the extent the repeal of the Tamil Nadu Act did not in itself released 19 cents of the excess vacant land from the proceedings initiated under that Act. It held that Section 3 of the Repeal Act provided that repealing of the Tamil Nadu Act would not affect the vesting of any vacant land under sub section (3) of Section 11 of the Tamil Nadu Act in cases where the possession of such vacant land had been taken over by the State

Government. Relying upon and following decision of a Full Bench of the High Court in P. Gopirathnam and 4 Others v. Ferrodous Estate (Private) Limited, represented by its Power of Attorney Holder Sri G. John Arthur, 1999 (2) Current Tamil Nadu Cases 181, the learned Bench held that the proceedings with respect to the said 19 cents had been initiated and that the same were pending.

The Division Bench held that decree for specific performance as given by the learned Judge had to be modified to the extent that the same was possible only to the extent of the unencumbered portion of the land.

27. One of the main questions which arise for consideration in the facts of this Court is whether in the said agreement time is of the essence of the contract. In order to appreciate this question, the Court has to consider several clauses in the said agreement. The relevant clauses are clauses 7, 8, 9 & 10, which are set out below:

"7. The vendor states that an extent of 770 sq.mts. in S.No.363/1B & 363/1C forming part of the property described below and agreed to be sold has been declared as excess vacant land under Sec 9(5) of the Tamil Nadu Urban Land Ceiling (C&R) Act, 1978. An appeal is pending before the Special Commissioner (Land Reforms), Madras. The Vendor also applied to the State Government for exemption under Sec 21 of the Act but the same has been rejected and the matter is pending in W.P.13906/1988 before the High Court, Madras. It shall be the sole responsibility of the Purchaser to get clearance from the Urban Land Ceiling Authorities by negotiation or getting exemption under the Act or permission to sell, at his own cost and the Vendor shall not be responsible for the same. But, the Vendor shall sign all applications or petitions necessary for this purpose. While, getting permission to sell or exemption under the Act in respect of the property agreed to be sold, the Purchaser shall ensure that no compensatory claim or alternate land is claimed by the Urban Land Ceiling authorities in the rest of the land to be retained by the Vendor.

8. The time for completion of the purchase shall be one year from the date of this agreement.

9. If the purchaser fails to complete the transaction within the time stipulated, this agreement shall stand cancelled and a sum of Rs.10,00,000/- (Rupees Ten Lakhs only) paid as earnest money will be returned without interest to the Purchaser and the Vendor shall be at liberty to sell the property to whomsoever he likes.

10. Time shall be the essence of the contract."

28. Admittedly, the agreement was entered into on 7th July, 1995 and the period of one year expired by 6th July, 1996. Within that period the plaintiff-purchaser could not get clearance from the Urban Land Ceiling Authorities nor could they obtain the exemption under the Act for permission to sell a

part of the property in respect of which the suit for specific performance was filed.

29. It is not the case of the plaintiff-

purchaser that the vendor in any way delayed the signing of application or petition necessary for getting such permission for clearance. From some correspondence exchanged between the parties it is clear that purchaser took a few steps but could not get the clearance within the time agreed by it. The Vendor, however, by a letter dated 4th September, 1996 cancelled the agreement in terms of clause 9 of the agreement and returned the advance money of Rs.10,00,000/- vide a cheque in terms of clause 9. The said letter written by the vendor is set out below:-

"CITADEL FINE PHARMACEUTICALS Ref: 3852/96 4th September 1996 M/s. Ramaniyam Real Estates Pvt. Ltd., Rep. by Mr. V. Jagannathan, Managing Director, 'Sruthi'. No.11, 2nd Main Raod, Gandhi Nagar, Madras 600 020.

Dear Sir, Re: 1. Our letter dated 11.7.96

2. Your letter dated 19.7.96.

As would be appreciated by you, at the meeting had with you, by ourself through our Mr. Rajiv and further by telephone on 30.8.1996 as you have expressed your reluctance in accepting our terms put to you on the sale of the property, we are returning the advance money of Rs.10,00,000/- vide SBI, Guindy, Cheque No.904014 dt.4.9.1996 in terms of Clause 9 of the Agreement dated 7th July, 1995. Kindly acknowledge the receipt of this. Thanking you, Yours faithfully, For CITADEL FINE PHARMACEUTICALS Sd/-

Partner Encl: as above"

30. Under these circumstances, the question is whether from the facts of this case vendor can raise a defence to the suit for specific performance of the contract that time being of the essence of this contract, the Court cannot order its specific performance when plaintiff failed to discharge its part of the contract within time and when after expiry of time, the contract was cancelled by the vendor in terms of clause 9 of the Contract.

31. The settled law seems to be that in a case for specific performance of contract relating to immovable property time is not normally of the essence. However, this is not an absolute proposition and it has several exceptions.

32. Reference in this connection may be made to the decision of Privy Council in Jamshed Khodaram Irani v. Burjorji Dhunjibhai reported in (1915-16) 43 I.A.

26. Viscount Haldane delivering the judgment for the Judicial Committee of the Privy Council held that the law applicable to this question is contained in Section 55 of the Indian Contract Act and the

learned Law Lord was of the opinion that Section 55 of the Indian Contract Act does not lay down any principle which is different from those which obtain under the law of England with regard to contracts for sale of land. It was further held that in cases relating to specific performance, equity, which governs the rights of the parties, does not look always at the express term of the agreement but at the substance of it in order to ascertain whether the parties named a specific time within which completion was to take place and whether the parties in substance intended that the completion should take place within a reasonable time. The legal position was as follows:-

"...A Court of Equity will indeed relieve against and enforce specific performance, notwithstanding a failure to keep the dates assigned by the contract; either for completion or for the steps towards completion, if it can do justice between the parties, and if (as Lord Justice Turner said in *Roberts v. Berry* [3 D.M.& G. 284 at 289] there is nothing in the 'express stipulation between the parties, the nature of the property, or the surrounding circumstances', which would make it inequitable to interfere with and modify the legal right...." (page 32 of the report)

33. The learned Law Lord made it clear that equity can operate in the construction of a contract "unless excluded by any clearly expressed stipulation". However, it was made clear that equity will not assist where there has been undue delay on the part of one party to the contract and one party has given notice to the other party that the defaulting party must complete the contract within a definite time. A further caution was added by saying that equity will not assist when other circumstances will result in injustice on application of equitable principle. In the words of Lord Haldane the principles have been formulated as follows:-

"...Nor will it (equity) exercise its jurisdiction when the character of the property or other circumstances would render such exercise likely to result in injustice. In such cases the circumstances themselves, apart from any question of expressed intention, exclude the jurisdiction. Equity will further infer an intention that time should be of the essence from what has passed between the parties prior to the signing of the contract...." (Page 33 of the report)

34. In this case, prior to the signing of the agreement, the terms were discussed between the parties and the plaintiff purchaser willingly took upon itself the burden of obtaining the clearance within the time stipulated in the agreement.

35. The aforesaid principles in *Jamshed Khodaram (supra)* were accepted by a three-Judge Bench of this Court in the case of *Gomathinayagam Pillai and others v.*

Palaniswami Nadar reported in AIR 1967 SC

868.

36. From the terms of agreement in this case which have been set out in the earlier part of the judgment it is clear that the time is of the essence and this is clearly stipulated and understood by the parties having regard to the previous correspondence and also having regard to the laid down terms of the contract and especially when the consequence of non-

completion of the terms by purchaser within the stipulated time was spelt out in clause 9.

37. In a case where time is of the essence of the contract, the consequence of non-

performance of such term has been very succinctly explained by Chitty on Contracts, (Volume 1, Thirteenth Edition, Sweet & Maxwell in paragraph 21-015) and the same is set out:

"Consequences of time being "of the essence". In determining the consequences of a stipulation that time is to be "of the essence"

of an obligation, it is vital to distinguish between the case where both parties agree that time is to be of the essence of the obligation and the case where, following a breach of a non-

essential term of the contract, the innocent party serves a notice on the other stating that time is to be of the essence. In the former case the effect of declaring time to be of the essence is to elevate the term to the status of a "condition" with the consequences that a failure to perform by the stipulated time will entitle the innocent party to: (a) terminate performance of the contract and thereby put an end to all the primary obligations of both parties remaining unperformed; and (b) claim damages from the contract-breaker on the basis that he has committed a fundamental breach of the contract ("a breach going to the root of the contract") depriving the innocent party of the benefit of the contract ("damages for loss of the whole transaction". (page 1410)

38. Fry in his Treatise on the Specific Performance of Contracts (Sixth Edition) has dealt with this aspect in paragraph 1075:-

"Time is originally of the essence of the contract, in the view of a Court of Equity, whenever it appears to have been part of the real intention of the parties that it should be so, and not to have been inserted as a merely formal part of the contract. As this intention may either be separately expressed, or may be implied from the nature or structure of the contract, it follows that time may be originally of the essence of a contract, as to any one or more of its terms, either by virtue of an express condition in the contract itself making it so, or by reason of its being implied.... " (page 502)

39. In paragraph 1079, the learned author has explained the position further by saying the time may be implied as essential in a contract from the nature of the subject matter with which the parties are

dealing.

The learned author explained this by saying:-

"1079. Time may be implied as essential in a contract, from the nature of the subject-matter with which the parties are dealing. "If, therefore," said Alderson B., "the thing sold be of greater or less value according to the effluxion of time, it is manifest that time is of the essence of the contract: and a stipulation as to time must then be literally complied with in Equity as well as in Law...."

(page 504)

40. At paragraph 1081 page 505, the learned author made it very clear that in a contract relating to commercial enterprise the Court is strongly inclined to hold time to be essential, whether the contract is for the purchase of land or for such purposes or more `directly for the prosecution of trade'. The elaboration of this point by the learned author is as follows:-

"1081. And so, again, where the object of the contract is a commercial enterprise, the Court is strongly inclined to hold time to be essential, whether the contract be for the purchaser of land for such purposes, or more directly for the prosecution of trade. This principle has been acted on in the matter of a contract respecting land which had been purchased for the erection of mills, also in relation to a sale of pasture lands, required by the purchaser, as the vendor new, for stocking, and in several cases of contracts for the sale of public-houses as going concerns...." (page 505)

41. The aforesaid principles squarely apply to the facts of the present case. Here the purchaser is admittedly in the business of building construction and is entering with agreement for purchasing the plot on commercial basis.

42. Gareth Jones and William Goodhart in their Treaties on Specific Performance (Second Edition, Butterworths) expressed similar views by saying:

"If the parties have expressly agreed that time is to be of the essence, the courts will generally if not always give effect to that stipulation. An intention that a stipulation as to time should be of the essence may be implied from the circumstances. In the absence of agreement to the contrary, time will generally be considered of the essence in mercantile contracts and in contracts for the sale of a business or of property which has a fluctuating or speculative value...." (page 74)

43. The instant case obviously relates to a contract in commercial transaction and the Court can take judicial notice of the fact that in the city of Chennai the price of real estate is constantly escalating and the clear intention of the parties, as it appears from the stipulations of the agreement, was to treat time as the essence of the contract.

44. Having regard to the aforesaid principles the court cannot attribute a different intention to the parties and cannot specifically enforce the contract at the instance of the plaintiff-purchaser who has failed to perform his part of the obligation within the time stipulated.

45. In *K.S. Vidyanadam and others v. Vairavan* reported in (1997) 3 SCC 1 this Court explained how discretion is to be exercised by the Court before granting specific performance. This Court held that in cases of urban properties in India it is well known that prices are going up sharply over the last few decades particularly after 1973. In *Vidyanadam (supra)* the court was dealing with a property in Madurai in the State of Tamil Nadu and it was argued before this Court by referring to the Madras High Court judgment in *S.V. Sankaralinga Nadar v.*

P.T.S. Ratnaswami Nadar (AIR 1952 Mad 389) that mere rise in price is no ground for denying the specific performance. This Court did not agree with the decision of the Madras High Court and held that the Court cannot be oblivious of the reality of constant and continuous rise in the value of urban properties. In that context the time limit set in the contract has to be strictly construed. In the case of *Vidyanadam (supra)* there is no such strict stipulation as time being of the essence of the contract as is in the instant case even then the Court refused to grant the relief of specific performance.

46. In *Vidyanadam (supra)* reference was made to a Constitution Bench judgment of this Court in *Chand Rani (Smt.) (Dead) by LRs.*

v. Kamal Rani (Smt.) (Dead) by LRs.

reported in (1993) 1 SCC 519. The same question, whether time was of essence of the contract was discussed in *Chand Rani (supra)*. The Constitution Bench of this Court while dealing with this question referred to another decision of this Court in the case of *M/s. Hind Construction Contractors* by its sole proprietor *Bhikamchand Mulchand Jain (Dead) by LRs.*

v. State of Maharashtra reported in (1979) 2 SCC 70. By referring to various judgments, the Constitution Bench in *Chand Rani (supra)* formulated the proposition that even where parties have expressly provided time to be of the essence of the contract, such a stipulation will have to be read along with other terms of the contract. Such other terms, on a proper construction, may exclude the inference that the completion of work by a particular date was meant to be fundamental. The learned Judges indicated the following circumstances which may indicate a contrary inference; (a) if a contract includes clauses providing for extension of time in certain contingencies, or (b) if there are clauses for payment of fine or penalty for every day or week the work undertaken remains unfinished after the expiry of time. The Constitution Bench held that such clauses would be construed as rendering ineffective the express provision relating to time being of the essence of contract (see para 22 at page 528 of the report).

47. In the instant case, in the said agreement no such clause, as aforesaid, exists.

Rather the stipulation as time being of the essence of the contract was specifically mentioned in clause 10 and the consequences of non-completion are mentioned in clause 9. So from the express

terms of the contract and the commercial nature of the transaction and the surrounding circumstances make it clear that the parties intended time in this case was intended to be of the essence of the contract.

48. Keeping the above principle if we look at the portion of Law in India, it is clear that under Section 9 of the Specific Relief Act, 1963 it is provided as follows:-

"9. Defences respecting suits for relief based on contract.- Except as otherwise provided herein, where any relief is claimed under this Chapter in respect of a contract, the person against whom the relief is claimed may plead by way of defence any ground which is available to him under any law relating to contracts."

49. It is clear from Section 9 of the Specific Relief Act, 1963 that Section 55 of The Indian Contract Act, 1872 enables a defendant against whom suit for the specific performance has been filed to raise the defence under Section 55 of the Indian Contract Act.

50. Section 55 of the Indian Contract Act which deals with a contract, in which time is of essence is as follows:-

"Section 55 - Effect of failure to perform at a fixed time, in contract in which time is essential. - When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract."

51. On a combined reading of Section 9 of the Specific Relief Act and Section 55 of The Indian Contracts Act it is clear that in this case the vendor as a promisee, was within its right to terminate the contract by sending the letter dated 4th September, 1996 in terms of Clause 9 of the Contract while returning the advance money of Rs.10,00,000/-. It is clear that the plaintiff has not discharged its burden within the time specified and is not entitled to a specific performance of the contract.

52. Therefore, the approach of the High Court both by the Single Judge and the Appellate Bench cannot be sustained.

53. There is another aspect of the matter also. In the instant case by asking for specific performance of the contract, the plaintiff-purchaser is praying for a discretionary remedy. It is axiomatic that when discretionary remedy is prayed for by a party, such party must come to court on proper disclosure of facts. The plaint which it filed before the Court in such cases must state all facts with sufficient candour and clarity. In the instant case the plaintiff-purchaser made an averment in the plaint that the defendant-vendor be directed to return the advance amount of Rs.10,00,000/- at the rate of 24% interest from the date of payment of the said amount till the realization and an alternative prayer to that effect was also made in the prayer clause (c).

54. However, the fact remains that prior to the filing of the suit the defendant-

vendor returned the said amount of Rs.10,00,000/- by its letter dated 4th September, 1996 by an account payee cheque in favour of the plaintiff and the same was sent to the plaintiff under registered post which was refused by the plaintiff on 6.9.1996. The plaintiff suppressed this fact in the plaint and filed the suit on 9.9.1996 with a totally contrary representation before the court as if the amount has not been returned to it by the vendor. This is suppression of a material fact, and disentitles the plaintiff-

purchaser from getting any discretionary relief of specific performance by Court.

55. In this connection we may refer to the Principle of Equitable Remedies by I.C.F. SPRY, Fourth Edition (Sweet & Maxwell, 1990). Dealing with the question of 'Clean Hands' the learned author opined that where the plaintiff is shown to have materially misled the court or to have abused its process, or to have attempted to do so, the discretionary relief of specific performance can be denied to him.

In laying down this principle, the learned author relied on a decision of the English Court in the case of *Armstrong v. Sheppard & Short Ltd.* (1959) 2 Q.B. 384 at page

397. (See SPRY Equitable Remedies page

243).

56. This Court has also taken the same view in the case of *Arunima Baruah v. Union of India* and others reported in (2007) 6 SCC

120. At paragraph 12, page 125 of the report, this Court held that it is trite law that to enable the court to refuse to exercise its discretionary jurisdiction suppression must be of a material fact.

This Court, of course, held what is a material fact, suppression whereof would disentitle the suitor to obtain a discretionary relief, would depend upon the facts and circumstances of each case.

However, by way of guidance this Court held that material fact would mean that fact which is material for the purpose of determination of the lis.

57. Following the aforesaid tests, this Court is of the opinion that the suppression of the fact that the plaintiff refused to accept the cheque of Rs.10 lac sent to it by the defendant under registered post with A.D. in terms of Clause 9 of the Contract is a material fact. So on that ground the plaintiff-purchaser is not entitled to any relief in its suit of specific performance.

58. For the reasons aforesaid, this Court allows the appeal filed by M/s. Citadel Fine Pharmaceuticals [SLP(C) No.28251/2008] and dismisses the appeal filed by the M/s Ramaniyam Real Estates P. Ltd., [SLP(C) No.31269/2008].

59. The Court directs M/s. Citadel Fine Pharmaceuticals to return the amount of Rs.10,00,000/- by an account payee cheque to M/s. Ramaniyam Real Estates P. Ltd., if not already returned, within 4 weeks from date. In default M/s. Citadel Fine Pharmaceuticals will have to pay interest at the rate of 12% per annum on the same from the expiry of the period of 4 weeks from date till actual payment.

60. Having regard to the facts and circumstances of this case there will be no order as to costs.

.....J.

(G.S. SINGHVI)

.....J.

New Delhi

(ASOK KUMAR GANGULY)

August 08, 2011