GANESH SHET

v.

DR. C.S.G.K. SETTY AND ORS.

MAY 15, 1998

[S.B. MAJMUDAR AND M. JAGANNADHA RAO. JJ.]

Specific Relief Act—1963—Section 20—Relief in a suit for specific Performance—Discretionary—To be based on the pleadings and the proof adduced—Special principles govern the grant of specified relief—When there is a variation between the agreement alleged and that which is proved, and there is conflict in the proof creating uncertainty, then relief not to be granted—Court may grant relief in exceptional cases where possession is taken or where there is part performance / uncertainty about the terms of the contract or the variation between the pleading and the proof is either immaterial or insignificant—Relief of Specific Performance cannot be claimed only on the basis of evidence without pleadings in support thereof.

Civil Procedure Code—Order 7 Rule 7—Specific Performance / Grant of relief—The principle that even if evidence has been led on a point, though not pleaded, relief can be granted on the strength of that evidence does not apply to suits for specific performance.—

The appellant filed a suit for specific performance alleging that an agreement was entered into by him with the defendants, for the sale of a property in Shimoga on 25-1-84, at Delhi and the defendants went back on it and did not execute the sale. It was also stated that, that the defendant had come to Bangalore on 28-4-84 and there was further meeting of the parties wherein the defendant asked the appellant to be ready with the money. While the defendants agreed that there was some negotiation for the sale of the said property with the appellant, no sale price was fixed and there was no final agreement of sale. The trial court held in favour of the appellant based on its finding that there was a concluded agreement at Delhi on 25-1-84 for sale which was not materially altered subsequently and that the appellant was ready and willing to perform his part of the contract. On appeal, the High Court however, reversed the decision having come to the finding, after examining the evidence and the pleadings, that there was no concluded contract between the parties on 25-1-84 at Delhi; that the defendant had

A written to the appellant and waited for his confirmation which did not come; that the price of Rs. 5 lakhs was not agreed to at any time; that the appellant did not meet the defendant when he visited Bangalore, and that the appellant did not come to the court with clean hands. The High Court however gave the appellant an opportunity to amend the plaint by changing the date of the agreement for sale to 28-4-84 instead of 25-1-84 which the appellant refused and had approached this Court.

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Dismissing the Appeal, this Court

HELD : 1. It cannot be said that the discretion exercised by the High Court in the instant case in refusing specific performance is contrary to established principles. It cannot also be said that discretion has been exercised in a perverse manner. Finally this is not a fit case for exercising jurisdiction under Article 136 of the Constitution of India. [496-D]

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Ganesh Ram v *Ganpat Rai*, AIR (1924) Cal 461 and *Md Ziaul Haque* v. *Calcutta Vyapar* Pratishtan—AIR (1966) Cal 605, relied on.

D

Halsbury's Laws of England, Fry on Specific Performance, Corpus Juris Secundum, referred to.

2. Even assuming that a contract dated 28.4.1984 concluded at Bangalore is proved, which however is not proved—this case does not fit into the exceptions inasmuch as this is not a case where there has been part performance by delivery of possession. Nor can it be said that the variation between pleading and proof is immaterial or insignificant. Plaintiff has also refused to amend the plaint to seek relief on the basis of an agreement dated 28.4.84, keeping the plaint as it is. Nor can this case be brought with the principles applicable to "general relief" because the plaint specifically says that there is a *concluded contract* on 25.1.1984 at Delhi which is belied by the oral and documentary evidence. However liberally the plaint is construed, all that it says is that the defendant came to Bangalore and asked the plaintiff to be ready. It does not speak of any fresh agreement entered into at Bangalore on 28.4.1984. This Court is unable to spell out any such agreement concluded on 28.4.1984. The grant of any *general relief* on the basis of an agreement of sale dated 28.4.1984—even if proved—will be doing violence to the language in the plaint to the effect that the parties concluded an agreement on 25.1.1984.

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[495-E-G]

H *Fry on specific Performance*, referred to.

3. On the point as to whether there is a concluded agreement at Delhi on 25.1.1984, there is abundant evidence to say that there is no such concluded agreement. When an opportunity for amendment of plaint was given by the High Court to the plaintiff the same was spurned and not accepted by the plaintiffs counsel. That being the attitude of the appellant in the High Court, he cannot be given any relief for specific performance of any such agreement allegedly concluded at Bangalore on 28.4.1984. [485-E; 486-C] A B

4. The relief for specific performance is discretionary and is not given merely because it is legal but is governed by sound judicial principles. It is again well settled that, in a suit for specific performance, the evidence and proof of the agreement must be absolutely clear and certain. [487-C-D] C

5. While normally it is permissible to grant relief on the basis of what emerges from the evidence—even if not pleaded, provided there is no prejudice to the opposite party, such a principle is not applied in suits relating to specific performance. [488-A] D

Ganesh Ram v *Ganpat Rai*, AIR (1924) Cal 461, *Md. Ziaul Haque* v. *Calcutta Vyapar Pratisthan*, AIR (1966) Cal 605, relied on.

Halsury's Laws of England, Fry on Specific Performance, referred to.

6. Yet another aspect of the matter is whether in a suit for specific performance the plaintiff can be given relief under the *general prayer*, "such other relief as this Hon'ble Court may deem fit to grant in the circumstances of the case." Other relief to be granted must be consistent with both pleading and proof, in suits for specific performance. If there was no concluded contract at Delhi on 25-1-1984, then the averments in the plaint do not show that there was an independent concluded agreement at Bangalore. The plaint proceeds on the basis that the concluded agreement, if any, was the one dated 25-1-1984 at Delhi. Therefore there is no specific allegation of any fresh agreement of sale dated 28-4-1984 in the plaint. Further, the relief asked for is only with regard to the 'concluded' agreement of 25-1-1984. The main difficulty for the plaintiff in this case is that he has thrown away the opportunity granted by the High Court to amend the plaint for proof of an agreement of sale dated 28-4-1984 and for specific performance of such an agreement of sale dated 28.4.1984. [491-A-H; 492-F-G; 493-C] E F G

Mulla : CPC Vol 2(15th Ed. P. 1224), Corpus Juris Secundum (Vol 81 A, Specific Performance) (para 189), referred to. H

A CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1347 of 1988.

From the Judgment and Order and dated 24-25/8/87 and 1.9.87 of the Karnataka High Court in R. F.A. No. 210 of 1987.

R.F. Nariman, Girish Ananthamurthy, G.V. Chandrasekhar and B.Y. Kulami,
B for the Appellant.

M. Rama Jois and P. Mahale for the Respondent No. 1.

G.L. Sanghi and T.V. Ratnam for the Respondent Nos. 2-3.

C The Judgment of the Court was delivered by

M. JAGANNADHA RAO, J. The appellant is the plaintiff. He filed the suit O.S No. 50 of 1985 for specific performance of an agreement of sale of house property located at Shimoga, Karnataka State executed in his favour. He succeeded in the trial court but on appeal by the Vendors-defendants, the
D Judgment of the trial court was set aside by the High Court and the suit was dismissed. Against the said Judgment of the High Court, this appeal was preferred.

The case of the appellant in the suit filed on the file of the Civil Judge, Shimoga was as follows : The defendants 1 to 3 are three brothers and are
E joint owners of the house at Shimoga. The Ist defendant who was a Professor was working at Delhi (now retired); the 2nd defendant was at Madras and the third defendant was at Bangalore. The defendants 2 and 3 gave powers-of-attorney to the Ist defendant. There were consultations between plaintiff and the Ist defendant which started in 1983 by way telephone calls and letters
F and 'after the negotiations reached a *final stage'* the Ist defendant wanted the plaintiff to come to Delhi *"for finalising"* the proposals. The plaintiff took along with him, one Mr. R.K. Kalyankar (PW 2) to help him in the negotiations. They took two Bank drafts for Rs. 50,000 and Rs. 10,000 respectively and reached Delhi in January 1984. On 25.1.1984, at the residence of the Ist defendant, a draft agreement of sale was *'approved'* by the Ist defendant with
G small changes made in his own handwriting and the Ist defendant told the plaintiff 'that he has approved the draft and *"the contract was concluded"*. (The photocopy of the agreement was filed and its original was marked as Ex. P3). The *agreed* consideration was Rs. 5 lakhs and the purchaser agreed to bear the stamps and registration charges. It was also *agreed* that the sale
H deed was to be executed on or before 30.6.1984 or within a reasonable time

and that thereafter the plaintiff would be put in possession. The Ist defendant did not accept the Bank drafts but said he would accept the entire consideration in one lump sum at the time of registration. The plaintiff returned to Shimoga and the further correspondence *'only confirmed* that the defendants would execute the sale deed'. The plaintiff received a telegram (Ex. P7 dated 4.4.84) addressed to PW 2 that the terms of the agreement were acceptable. Further, the 3rd defendant also *"confirmed"* the terms of the agreement by letter dated 11.4.84 (Ex .P6). The plaintiff received another letter dated 18.4.1984 (Ex.P4) which stated that 1st defendant would be coming over to Bangalore on 28.4.1984. They met at Bangalore and it was agreed that plaintiff was to be ready with the entire sale consideration by about 3rd week of June 1984. The plaintiff raised finances by selling some of his properties. The plaintiff was ready and willing to perform the contract. The Ist defendant came to Shimoga on or about 17.6.1984 but surprisingly he did not meet the plaintiff. On the other hand defendants gave a paper advertisement on 26.6.84 for sale of the house. Plaintiff then got a regd. notice dated 2.7.84 (Ex.P12) issued and defendants 2 and 3 give a reply dated 31.7.84 (Ex . P16). The suit was laid for specific performance of the agreement of sale said to be dated *25.1.84* entered into at Delhi and for posession and also for permanent injunction restraining alienation by defendants.

A written statement was filed by the Ist defendant contending mainly that there was correspondence between parties, the negotiations did not reach any '*final*' stage and that there was '*no concluded contract*'. There were only proposals and counter proposals. Sale consideration was not Rs 5 lakhs. The Ist defendant had an obligation to consult his brothers. They were not willing for a consideration of Rs.5 lakhs. The Ist defendant did not state, as contended, in any telegram dated 4.4.84 nor any letter dated 11.4.84. PW 2 *sent* another draft agreement(Ex. D11) alongwith his letter dated 29.3.1984 (Ex .P8) and the Ist defendant made corrections therein, especially regarding consideration, correcting the figure Rs .5 lakhs as Rs.6.50 lakhs - apart from other corrections. The Ist defendant did not ask the plaintiff to be ready by June 1984 for registration as alleged by plaintiff. The agreement produced alongwith plaint was only a proposal. Plaintiff was, in the meantime, negotiating for another property at Davangere. Plaintiff was not ready and willing. The plaintiff did not produce the letter of PW 2 dated 11.4.84 addressed to Ist defendant. The suit was liable to be dismissed. These were the allegations in the said written statement of the 1st Defendant. Defendants 2 and 3 adopted the written statement of Ist defendant.

The trial court after considering the oral and documentary evidence

held on issues 1,3 & 4 that a contract was *concluded* at Delhi between Plaintiff and defendants on 25.1.1984 for Rs .5 lakhs as per Ex .P3 draft, that the said agreement dated 25.1.84 was not materially altered later and the sale deed was agreed to be executed by 30.6.84. On issue 2, it held that plaintiff was ready and willing and that plaintiff was entitled to specific performance of the agreement dated 25.1.1984 and for permanent injuction against defendants not to alienate the property to others.

The defendants 1 to 3 appealed to the High Court. The High Court reversed the decree and dismissed the suit. It held that there was *no concluded contract* on 25.1.1984 at Delhi and this was clear from the subsequent correspondence. So far as the subsequent correspondence was concerned, it was clear from Ex.P5 dated 10.4.84 written by Ist defendant that the Ist defendant was ready to execute the agreement as per the "talks" that took place at Delhi on 25.1.1984 and he had written to the plaintiff to go over to Delhi or he would come to Bangalore. He requested the plaintiff to inform him about the plaintiff's decision in regard to the matter. Ex.P23 letter addressed to plaintiff also said the same thing. As per Ex .P6 letter dated 11.4.84 of defendants the *ball was left in the court of the plaintiff* 'awaiting his confirmation', but the plaintiff did not send any reply. Ex .P4 letter dated 18.4.84 of Ist defendant showed that he had sent the agreement sent by the plaintiff with certain alterations and that he would be reaching Bangalore on 28th. But after Ist defendant arrived at Bangalore on 27.4.84 , *plaintiff did not meet him*. It was *not* possible to say that *parties had agreed for Rs. 5 lakhs at any stage*. The draft sent to the Ist defendant alongwith Ex.P4 letter was of course, Ex P3 as contended by plaintiff and not the other draft Ex. D11, as contended by the 1st defendant. But it was *not* possible to accept that plaintiff agreed to pay Rs.5 lakhs. Inasmuch as the relief was for specific performance of an agreement of sale dated 25.1.1984 and no such agreement was proved, it must be held that plaintiff did not come to Court with clean hands and discretion could not be exercised in his favour. It was also stated that plaintiff, when he was asked if he wanted to rely on any agreement of April 1984 and if he would amend the plaint, the plaintiff's counsel was not willing to amend the plaint. Hence the suit was liable to be dismissed. The appeal was allowed accordingly.

In this appeal elaborate arguments were advanced by learned senior counsel Sri R.F. Nariman for the plaintiff-appellant, learned senior counsel by Sri Rama Jois for the Ist defendant and senior counsel Sri G.L. Sanghi for defendants 2 and 3.

Four points arise for consideration : A

(1) Whether there was a *concluded contract* between the parties on 25.1.1984 at Delhi when plaintiff and PW 2 (Mr. Kalyankar) met the Ist defendant at his Delhi residence?

(2) Having not agreed in the High Court to amend the plaint and plead B that there was a concluded contract at Bangalore on 28.4.84 and having thus refused to seek for a relief for specific performance of an agreement dated 28.4.84, whether the plaintiff could contend that there was an agreement of sale dated 28.4.84 at Bangalore?

(3) What are the legal principles applicable to suits for specific C performance under section 20 of the Specific Relief Act, 1963 where there is variation between pleadings and evidence in regard to the date or other terms of the contract? To what extent can relief be given under the heading 'general relief' in suits for specific performance under Order 7 Rule 7 CPC?

(4) Alternatively, whether, on the plaint as it stands, and the prayer D made therein without seeking amendment, the plaintiff can get a decree for specific performance of an agreement dated 28.4.84 said to have been concluded at Bangalore?

Point 1: E

On this point, as to whether there is a concluded agreement at Delhi on 25.1.1984, there is abundant evidence to say that there is no such concluded agreement. This is clear from the suit-notice Ex.P12 dated 2.7.84 wherein plaintiff has stated clearly that at the Delhi meeting the Ist defendant said that he is yet to consult his two brothers. The correspondance between the parties F and PW2 subsequent to 25.1.84 has been read to us by the learned senior counsel for the appellant-plaintiff and on reading the same, we are clear that the finding of the High Court that there is no concluded agreement on 25.1.1984 at Delhi is unassailable and is absolutely correct. The tenor of several letters from PW2 to 1st defendant after 25.1.1984 shows that consideration for sale was not finalised at Delhi. Learned senior counsel for G the appellant, after elaborate submissions has more or less accepted this position and has concentrated on the question which we have set out under the third and fourth points. Hence there can be no decree for specific performance of any agreement dated 25.1.84 as none has been concluded on that day. We hold on Point 1 accordingly. H

A *Point 2:*

The learned senior counsel for the appellant has argued before us that plaintiff must be given relief in respect of the agreement which, according to him, has been concluded at Bangalore on 28.4.1984 and specific performance can be granted in respect of such an agreement.

B

We have already stated that, in the High Court, when an opportunity for amendment of plaint was given by the High Court to the plaintiff the same was spurned and not accepted by the plaintiff's counsel. That being the attitude of the appellant in the High Court, we are of the view that the plaintiff cannot be given any relief for specific performance of any such agreement
C allegedly concluded at Bangalore on 28.4.1984. Point 2 is also held against the appellant.

Point 3 and 4 :

These are the points upon which the appellants counsel made elaborate
D submissions citing several rulings of this Court and the High Courts under Order 6 and Order 7 CPC. It has been argued that, without amendment of plaint, plaintiff can ask the Court to construe the pleadings liberally. Inasmuch as both sides have adduced evidence on the question whether there has been an agreement at Bangalore on 28.4.1984 or not, the plaintiff can still be given
E relief of specific performance on the basis of the original plaint as it stands, even assuming there is no specific reference to a contract being concluded at Bangalore on 28.4.84. Several rulings have been cited before us to the effect that if parties have led evidence on a point which has not been pleaded, no prejudice will be caused if relief is granted on the basis of what emerges from the evidence. We do not propose to refer to these rulings as the said
F propositions are not in dispute.

(A) Point 3:

(a) We shall first refer to certain special principles of law applicable to suits for specific performance in regard to the discretion which is to be
G exercised under section 20 of the Specific Relief Act, 1963, when there is a conflict between the pleading and the evidence.

Section 20 of the Act reads as follows :

"S .20: *Discretion as to decreeing specific performance*:(1) The
H jurisdiction to decree specific performance is discretionary, and the

Court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.

(2) .....

(3) .....

(4) ....."

It is well settled that the circumstances referred to in sub-clauses (2) to (4) in regard to exercise of discretion for granting a decree for specific performance are not exhaustive. The relief for specific performance is discretionary and is not given merely because it is legal but it is governed by sound judicial principles. *See Madamsetty Satyanarayana* v. *G. Yellogi Rao & Two Others,* [1965] 2 SCR 221 and *Sardar Singh* v. *Smt. Krishna Devi & Another,* [1994] 4 SCC 18.

It is again well settled that, in a suit for specific performance, the evidence and proof of the agreement must be absolutely clear and certain.

In Pomeroy on 'Specific Performance of Contracts' (3rd Edn) (para 159) it is stated clearly, that a "*greater amount or degree of certainly is required* in the terms of an agreement, which is to be specifically executed in equity, than is necessary in a contract which is to be the basis of an action at law for damages. An action at law is founded upon the mere non-performance by the defendant, and this negative conclusion can often be established without determining all the terms of the agreement with exactness. The suit in equity is wholly an affirmative proceeding. The mere fact of non performance is not enough; its object is to procure a performance by the defendant, and this demands a clear, definite, and precise understanding of all the terms; they must be exactly ascertained before their performance can be enforced. This quality of certainty can best be illustrated by examples selected from the decided cases....."

The question is whether, when parties have led evidence in regard to a contract not pleaded in the evidence, relief can be granted on the basis of the evidence and whether the plaintiff can be allowed to give a go-bye to the specific plea in the plaint. Is there any difference between suits for specific performance and other suits?

A It appears to us that while normally it is permissible to grant relief on the basis of what emerges from the evidence - even if not pleaded, provided there is no prejudice to the opposite party, such a principle is not applied in suits relating to specific performance. In *Gonesh Ram* v. *Ganpat Rai,* AIR (1924) Cal 461, the Calcutta High Court has considered the same question. There the agreement pleaded was not proved but plaintiff wanted to prove B an antecedent agreement based on correspondence. It was held that the plaintiff, in a suit for specific performance, could not be permitted to abandon the case made out in the plaint and to invite the Court to examine whether a completed agreement may or may not be spelt out of the antecedent correspondence. In that connection Sir Asutosh Mookerjee observed:

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> "The Court would not in a *case of this description* permit the plaintiffs to depart from the case made in the plaint as the Court discourages, as a rule, variance between pleading and proof. The test to be applied in such cases is whether if the variance were permitted in favour of the plaintiffs, defendants would be taken by surprise and be *prejudiced* D thereby .....*This rule is applied with special strictness* in cases of specific performance of contracts. In *Hawkins* v. *Maltby,* (1868) 3 Ch.A. 188, one contract was alleged and another was proved, with the result that the bill was dismissed. No doubt where there has been *part performance*, the Court may struggle with apparently conflicting E evidence rather than dismiss the suit. This appears to have been the view adopted by Lord Cottenham in *Mundy* v. *Jolliffe,* 5 Myl 8 C167: (1939) 9 LJ ch. 95. In the case before us there is no question of part performance".

A.N. Ray (as he then was) in *Md. Ziaul Haque* v. *Calcutta Vyapar* F *Pratisthan,* AIR (1966) Cal 605, referred to the special rule applicable to suits for specific performance and also relied upon *Hawkins* v. *Maltby,* (1867) 3 Ch. A. 188. The learned judge observed;

> "In Nil Kanta's case 19 C.W.N. 933 = AIR (1916) Cal 774, it was said that when a plaintiff alleged a contract of which he sought specific G performance and failed to establish in the court would not make a decree for specific performance of a different four specific performance of a different contract. Reliance was placed on *Hawkins* v. *Maltby,* reported in (1867) 3 Ch.A. 188.
>
> .....Emphasis was rightly placed on the aspect of the plaintiff's case H pleaded that there was an *agreement in the month of August* and that

the plaintiff failed to prove that case and the plaintiff having completely abandoned that case of *agreement in the month of August*, any attempt on behalf of the plaintiff to make recourse to *May agreement* would be to have a decree for specific performance of an agreement which was *not* the agreement of the parties according to the plaintiff". A

The above special principles applicable to cases of specific performance can be also gathered from standard works under the English Law, where the above English cases have been cited. B

Halsbury's Law of England (Vol 44, 4th Edn.1984) (Specific Performance, para 443) (f .n.1) states, after referring to *Pillage* v. *Armitage,* (1805) 12 Ves 78, that the plaintiff having failed to prove an agreement which he had set up, was refused specific performance of a different agreement admitted by the defendant of. *Legal* v. *Miller,* (1750) 2 Ves. Sen. 299. C

Fry on 'Specific Performance' (6th Ed) (PP. 298-302) deals with the exact point in issue before us. The author refers to four types of cases: (1) Where the defendant admits the contract alleged; (2) Where the defendant denies the contract as alleged and the plaintiff supports his case by one witness only; (3) Where the defendant denies the contract as alleged and the evidence proves a contract, but different from that alleged by the plaintiff; and (4) where the defendant denies the contract as alleged and admits another contract. D

On the assumption that plaintiff has proved an agreement at Bangalore on 28.4.84 (which question we shall deal with under Point 4), it is obvious that we are here concerned with category (3) mentioned by Fry. In regard to that category, Fry says (p. 299) (paras 634 to 638) as follows: E

"(3): In considering the case in which a Variation has arisen between the contract alleged and that proved, it must be borne in mind that the burthen of providing his case rests, of course on the plaintiff, and therefore, if there by any such conflict of evidence as leaves any uncertainty in the mind of the court as to what the terms of the parole contract were its interference will be refused *Lindsay* v. *Lynch* 2, Sch. & Lef. 1; cf *Price* v. *Salusbury* 2 Beav, 446" F G

Fry also refers to a case where one contract has been alleged in the bill, another has been proved by the plaintiffs' one witness and a third contract has been admitted by the two defendants and where initially specific performance has been granted as per the contract set up by the answers. Fry H

says: "but Lord Rosslyn considered that in strictness the bill ought to have been dismissed. (*Mortimer* v. *Orchard*, 2 Ves,. Jun, 243; *London and Birmingham Rly. Co.* v. *Winter*: Cr. & Ph. 57). In a more recent case, where one contract was alleged and another proved, the bill was dismissed without prejudice to the filing of another bill (*Hawkins* v. *Maltby,* L.R. 3 Ch.A. 188; the fresh bill was filed (L.R. 6 Eq.505 and 4 Ch.200). The inclination of Lord Cottenham's mind seems to have been to struggle with apparently conflicting evidence rather than to dismiss the bill, *where there had been part performance* (*Mundy* v. *Jollife,* 5 Myl. Cr.p.167). In one case Turner L.J observed that there are cases in which the court will go to a great extent in order to do justice between the parties when *possession has been taken*, and there is an uncertainty about the terms of the contract *East India Co.* v. *Nuthumbadoo Veerasawmy Moodelly,* 7 Moo PCC p.482 at 497. In the case of *part performance*, it is said, similar views were expressed in the Privy Council by Sir William Erle (*Oxford* v. *Provand,* L.R. 2 P.C. 135) as follows:

> "With respect to the supposed vagueness of the memorandum of agreement, their Lordships propose to consider what is the true construction of that memorandum, having regard to the terms of the instrument and, and to the surrounding circumstances, and also in reference to this suit for specific performance, and, to the *conduct of the parties* in the interval between the making of the agreements and the commencement of the suit".

Fry also refers to *Hart* v. *Hart* (18 Ch.D.670 at 685) in that context. The author then refers to cases where the variation between the contract alleged and proved is an *immaterial variation* and says that in such cases, the bill is granted. He says (p. 301) that this is the position under the old practice of the Court of Chancery but the High Court can permit amendment to put that contract in issue; but "that if there was not (i.e.amendment), it will generally give judgment for the defendant, without reserving any right to the plaintiff to institute fresh proceedings. But the circumstances will govern the *discretion* of the Court in each case which may arise".

The above principles are, it is clear, special principles applicable to suits for specific performance. The case before us does not fall within the exceptions namely, -part performance or immaterial variations. Nor is it a case where the plaintiff has agreed to amend his plaint. On the other hand, as already stated, the plaintiff spurned the opportunity given to him by the High Court for amendment of plaint. The case is in no way dissimilar to the cases in *Gonesh Ram* v. *Ganpat Rai,* and to Mohd. Ziaul (Haque), referred to above.

(b) Yet another aspect of the matter is whether in a suit for specific performance the plaintiff can be given relief under the *general prayer* "such other relief as this Hon'ble Court may deem fit to grant in the circumstances of the case", in the light of Order 7 Rule 7 CPC. order 7 Rule 7 CPC reads as follows:

> *"Relief to be specifically stated:* Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for *general* or *other relief* which may always be given as the Court may think just to the same extent as if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement."

Mulla(CPC) Vol.2 (15th Ed.p.1224) says that such relief may always be given to the same extent as if it had been asked for, provided it is *not inconsistent* with *that specifically claimed,* and with the case raised in the pleading. *See Cargil* v. *Bower,* (1878 Ch. D.502, 508) and *Kidar Lall Seal & Another* v. *Hari Lall Seal* [1952] SCR 179.

It is stated in *Corpus Juris Secundum* (Vol. 81A, Specific Performance) (Para 189) as follows:

> "In accordance with general rules, the relief awarded in a suit for specific performance would be based on the issues raised by the pleadings and supported by the proof. More specifically, relief awarded for the plaintiff must be authorised by or be in conformity with his pleading *in respect of the contract to be enforced* and the parties thereto".

As to the 'general relief' in suits for specific performance it is stated:

> "In accordance with the general rules and its qualifications and limitations where the bill or complaint in a suit for specific performance contains a prayer for *general relief,* the court may grant relief *consistent* with the facts *pleaded and proved* and the court may in some cases grant or award partial relief."

In other words, other relief to be granted must be consistent with both pleading and proof, in suits for specific performance. The principles stated above under (a) and (b) appear to us to be the broad principles which are to be borne in mind while dealing with exercise of discretion in cases of specific performance. We decide Point 3 accordingly.

A *(B) Point 4:*

Strictly, this point does not arise in view of the principles stated under Point 3. But even so, as the counsel have made elaborate submissions we shall decide the same.

B (a) We shall initially analyse the plaint averments and then examine the evidence limited to the agreement dated 28.4.1984.

In para 3 of the plaint it is stated, referring to 25.1.84 meeting of the parties at Delhi, that '*the contract was also concluded*', and that it was decided that the registration should take place in June 1984. The plaint states:

C

> 'further correspondance which only *confirmed* that the defendants would execute the registered sale deed. The plaintiff also received telegram addressed to Sri R.K. Kalyankar that the terms of the agreement are acceptable and this was received on 4.4.1984. Further, the 3rd defendant also *confirmed* the terms of the agreement and
> D wrote a letter to the plaintiff on 11.4.1984.'

Adverting to the Bangalore meeting the plaint merely stated as follows:

> "The defendants informed the plaintiff that the first defendant is purchasing a flat in University Compound, Delhi and that he requires
> E the amount and that he would receive the entire amount at the time of executing the sale deed. The defendant also said that the plaintiff is to be ready with the entire amount at the time of executing the sale deed. .....The defendant also told the plaintiff to be ready with the entire sale consideration by about the 3rd week of June 1984".

F If, as stated under Point 1, there was no concluded contract at Delhi on 25.1.1984, then the above averments in the plaint do not show that there was an independent concluded agreement at Bangalore. The plaint proceeds on the basis that the concluded agreement, if any, was the one dated 25.1.1984 at Delhi. The paragraph dealing with cause of action (paragraph 9) also, states
G thus:

> "When the defendants *concluded* the contract on 25.1.1984 and also on *subsequent dates* when the defendants further confirmed the agreement of sale....."

H Therefore, there is no specific allegation of any fresh agreement of sale

dated 28.4.1984 in the plaint. Further, the relief asked for in para 11 is only with regard to the 'concluded' agreement of 25.1.1984 and reads as follows:

> "(a) Specific performance of the agreement of sale *concluded* between the parties on *25.1.1984* and direct....."
>
> (b) Permanent injunction.....
>
> (c) Cost of this suit and *such other reliefs as this Hon'ble Court may deem fit to grant in the circumstances of the case*".

The main difficulty for the plaintiff in this case is that he was thrown away the opportunity granted by the High Court to amend the plaint for proof of an agreement of sale dated 28.4.1984 and for specific performance of such an agreement of sale dated 28.4.1984.

(b) We shall next deal with the evidence on this aspect. Learned senior counsel on both sides have referred us to the evidence adduced by the parties in relation to the agreement dated 28.4.1984. PW 2 the person who was corresponding and negotiating on behalf of plaintiff stated in his evidence-

> "We did not get agreement on 28.4.1984 from the first defendant."

He stated in regard to the concluded agreement of 25.1.1984 as follows:

> "It is not correct to say on 25.1.1984 no transaction (was settled) and sale price was not settled".

As already stated, this runs counter to the suit notice sent wherein it is admitted that on 25.1.1984, Ist defendant said at Delhi that he has still to consult his brothers. Subsequent correspondance after 25.1.1984 on this aspect, as already stated, is very clear that there is no concluded contract as on 25.1.1984.

So far as the plaintiff is concerned, as PW1 he says that the agreement is concluded at Delhi on 25.1.1984 for Rs.5 lakhs and Ist defendant "confirmed negotiation. I gave first defendant a rupee coin". This version of giving a rupee coin at Delhi also shows that, even at the stage of the evidence, PW 1 stuck to a case of a concluded contract on 25.1.1984 at Delhi which is totally contrary to the suit notice and the correspondance after 25.1.1984.

In respect of the 28.4.1984 meeting at Bangalore, PW1 stated that the Ist defendant was alone at Bangalore and they met him and he said he had

A to correct some question-papers from Andhra Pradesh and that he had to go to Delhi urgently and that he asked the plaintiff "to come again in the second week June 1984 and also he told that he would come to Shimoga to execute registered deed. He told us to keep entire amount ready and there shall not (be) give trouble". From the above evidence, it could not be said that parties negotiated afresh at Bangalore and concluded any fresh agreement on 28.4.1984.
B

Learned senior counsel for appellant relied upon a telegram dated 4.4.84 (Ex .P7) which reads as follows:

> "Agreement acceptable. You come to Delhi for agreement, if unable, inform"

C

Ex. P5 letter dated 10.4.84 of Ist defendant to plaintiff states that he has received the letter of PW2 on 6.4.84 and it further states:

> "I agree to make agreement in accordance with talks at Delhi by us. It may be done at Delhi if you come to Delhi.....Mainly, if mind satisfied regarding *money*, it may be done, if it is less or more. As it is said by Kalyankar, we must have due it seems".

D

On the next day 11.4.84, the 3rd defendant writes to PW1 Ex P6 dated 11.4.84 (produced by plaintiff PW1) as follows:

E

> "I understood from my brother, Dr. C.S.G.K. Setty at Delhi, that he has conveyed to you both by telephone and by letter, that you should meet him at Bangalore during the end of April 1984, when he will be visiting Bangalore for *finalising* the agreement as he had discussed with you earlier. he writes me that he is *awaiting* your *confirmation*"

F

Ex. D9 dated 6.4.84 by PW 2 to Ist defendant shows that plaintiff was in a dilemne whether to purchase this property or some other property and that plaintiff and Ist defendant should talk over the matter. This letter would be inconsistent with there being any concluded contract by 4.4.84 when telegram Ex.P7 was issued by Ist defendant. Further, Ex.P6 would throw a doubt as to whether there was any concluded contract by 10.4.84 when Ex. P5 was written by Ist defendant. In fact, the argument before us, on the contrary, was that there was a concluded agreement on 28.4.1984 when Ist defendant came to Bangalore. This proceeds on the basis that there was no concluded agreement before 28.4.1984.

G

H

No doubt the High Court has stated that plaintiff and Ist defendant

have not met at Bangalore on 28.4.1984. This finding is wrong as it does not take into account the other telegram of Ist defendant Ex. P8 dated 28.4.1984 about his arrival at Bangalore and the oral evidence. But from what all PW1, PW2 stated as to what happened on 28.4.84, it appears to us that there is no fresh agreement on 28.4.84 at Bangalore and that Ist defendant asked the plaintiff to come to Delhi.

Considerable argument has been advanced before us regarding Ex.P6 dated 11.4.84 which is an inland letter by the 3rd defendant to plaintiff that it is not genuine. It being an Inland letter bearing postal seals, we cannot accept the contention that the letter is not genuine. There is no such evidence on plaintiff's side nor any cross-examination of the 1st defendant.

Another argument was that in his evidence, 1st defendant admitted that he signed the draft agreement. Appellant's counsel has contended that this is with reference to Ex.P3 while Respondent's counsel has submitted that this evidence of the 1st defendant has reference to Ex.D11, the draft set up by Ist defendant for Rs.6.50 lakhs. It has also been contended for respondents that there is no signature of 1st defendant on Ex. P3.

Applying the legal principles referred under Point 3 to the above facts it will be noticed - even assuming that a contract dated 28.4.1984 at Bangalore is proved, which in our view, is not proved - that this case does not fit into the exceptions stated by Fry on Specific Performance inasmuch as this is not a case where there has been part performance by delivery of possession. Nor can it be said that the variation between pleading and proof is immaterial or insignificant. Plaintiff has also refused to amend the plaint to seek relief on the basis of an agreement dated 28.4.84, keeping the plaint as it is.

Nor can this case be brought with the principles applicable to *'general relief'* because the plaint specifically says that there is a *concluded contract* on 25.1.1984 at Delhi which is belied by the oral and documentary evidence. However liberally the plaint is construed, all that it says is that the 1st defendant came to Bangalore and asked the plaintiff to be ready. It does not speak of any fresh agreement entered into at Bangalore on 28.4.1984. Nor are we able spell out any such agreement concluded on 28.4.1984. The grant of any *general relief* on the basis of an agreement of sale dated 28.4.84 - even if proved - will be doing violence to the language in the plaint to the effect that the parties concluded an agreement on 25.1.1984.

The High Court on the basis of its findings has held in para 13 as

A follows: "If only the plaintiff was able to prove the agreement as pleaded by him there was no difficulty in granting a decree for specific performance, as the evidence on record does not disclose that the case falls within any of the exceptions mentioned either in Section 16 or Section 20 of the Specific Relief Act. No doubt specific relief is an equitable remedy and (it is the) *discretion* is required to be exercised judicially on the basis of establishment principles
B of equity, justice and fairplay". The High Court then stated:

> "The party has to approach the Court *with clean hands*. The contract sought to be enforced must be established. As the agreement pleaded by the plaintiff has not been established, on Point No. 3, it is held that the plaintiff is not entitled for a decree for specific performance."
C

Having regard to the principles laid down in *Gonesh Ram's* case AIR (1924) Cal 461, *Ziaul Haque's* case AIR (1966) Cal 605. Halsbury's Laws of England. Fry on Specific Performance and Corpus Juris Secundum as set out under Point 3, we are unable to say that the discretion exercised by the High
D Court in refusing specific performance is contrary to established principles. Nor can we say that discretion has been exercised in a perverse manner. Finally, we do not also think that this is a fit case for exercising our jurisdiction under Article 136 of the Constitution of India.

The appeal fails and is dismissed without costs.

E

I.M.A. Appeal dismissed.