SUPREME COURT OF INDIA

J.P. Builders

Vs.

A. Ramadas Rao

C.A.Nos. 9821-9822 of 2010

(P. Sathasivam and Anil R. Dave JJ.)

22.11.2010

JUDGMENT

P. SATHASIVAM, J.

1) Leave granted in all the Special Leave Petitions.

2) These appeals seek to challenge the common judgment and order dated 23.02.2010 passed by the Division Bench of the High Court of Judicature at Madras in A.S. Nos. 708 of 2008 and 946 of 2009 and W.P. No. 23405 of 2009 whereby the High Court partly allowed A.S. No. 708 of 2008 confirming the decree for specific performance granted by the Principal District Court, Chengalpet in O.S. No. 336 of 2008 and dismissed A.S. No. 946 of 2009 preferred by the appellants herein. By the same order, the High Court disposed of W.P. No. 23405 of 2009 with certain directions. By a subsequent order dated 29.04.2010, the High Court dismissed the Review Application No. 37 of 2010 in A.S. No. 708 of 2008 and Review Application No. 47 of 2010 in W.P. No. 23405 of 2009 preferred by the appellants herein. Brief facts:-

3) (a) The subject matter of the suit is a total extent of 30 acres 86 cents of land in Senthamangalam Village, Sriperumbadur Taluk, Kancheepuram District comprised in 38 items. M/s J.P. Builders-Appellant No. 1 and Shri J.P. Paramanandam-Appellant No. 2 herein are the owners of the suit property which they acquired under various sale deeds. The sister concern of M/s J.P. Builders viz., M/s Anand Agency has availed certain financial assistance from the Indian Bank, (hereinafter referred to as `the Bank') and for the said assistance Appellant Nos. 1 and 2 herein offered their various properties including the suit property as security for the principal as well as interest amount payable by M/s Anand Agency of which Appellant No. 2 is the sole proprietor.

(b) On 15.08.2005, the appellants entered into a Memorandum of Understanding (MoU) (Ex. A-2) with Respondent No. 1 herein for sale of the suit property at a sale consideration of Rs. 14 lakhs per acre and a sum of Rs. 1 lakh was paid as advance by way of cheque on the same day. Balance sale consideration was to be paid within three months from the date of obtaining confirmation letter from the Bank.

(c) On 10.10.2005, M/s J.P. Builders, by a letter addressed to the AGM, Indian Bank, Asset Recovery Management Branch II, offered a sum of Rs. 100 lakhs as full and final settlement of the dues of its sister concern, M/s Anand Agency, which was declined by the Bank by letter dated

15.10.2005 advising them to revise the offer with substantial improvement. By letter dated 23.01.2006, the Bank stated that Appellant No. 2 herein had not made any improvement in his One Time Settlement (in short `OTS') proposal of Rs. 100 lakhs and hence the Bank is proceeding to enforce its rights under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interests Act, 2002 (hereinafter referred to as `the Act'). By letter dated 01.02.2006, Appellant No. 2 offered a sum of Rs. 148 lakhs as one time settlement of the loans availed by M/s Anand Agency.

(d) On 03.02.2006, Respondent No. 1 entered into a Sale Agreement with the appellants for purchase of the suit property. The sale price of Rs. 14 lakhs per acre was enhanced to Rs. 18 lakhs per acre and the total sale consideration was fixed at Rs. 5,55,48,000/-. On the same day, Respondent No. 1 had paid a sum of Rs. 24 lakhs by way of cheque as further advance to Appellant No.2 in addition to Rs. 1 lakh already paid. On 18.04.2006, a further payment of Rs. 50 lakhs was made by Respondent No. 1.

(e) On 26.04.2006, the Bank rejected the OTS offer of Rs. 148 lakhs stating that since the amount offered is very low, the Bank has decided to pursue the recovery application filed before the Debts Recovery Tribunal, (hereinafter referred to as `DRT') Chennai for the recovery of the dues of the Bank. Again, by letter dated 15.05.2006, the Bank stated that out of court settlement can be done if an offer of Rs. 629.60 lakhs by working out interest at PLR i.e. 11% compound on the principal outstanding as on 31.03.1993 be made. However, since the settlement amount was more than the sale consideration for the suit property, the Appellant No. 2 could not agree to pay the same.

(f) On 26.07.2006, Respondent No. 1 issued a legal notice to the appellants calling upon them to liquidate the loans out of the amounts received from him and retrieve the original documents from the Bank in order to execute the sale deed. By letter dated 27.07.2006, the Appellant No. 1 replied to the notice stating that the first respondent had not paid the balance sale consideration in spite of repeated requests and raised doubt that the first respondent is no longer interested to buy the suit property, therefore, a legal notice was sent calling upon Respondent No. 1 to pay a sum of Rs. 1 crore as liquidated damages.

(g) On 07.08.2006, Respondent No. 1 filed O.S. No. 336 of 2006 before the Principal District Judge, Chengalpet against the appellants and the Bank. By judgment and decree dated 30.04.2008, the Principal District Judge, Chengalpet decreed the suit partly, granting the relief of specific performance directing appellant Nos. 1 & 2 herein to specifically perform their part of the obligations arising out of the agreement for sale (Ex. A-3) dated 03.02.2006 by executing the sale deed in favour of Respondent No. 1 on receipt of the balance sale consideration of Rs. 4,80,48,000/- subject to the mortgage of the Bank. Further the relief in respect of permanent injunction restraining the appellants from alienating or encumbering or dealing with the subject property was granted. The prayer for mandatory injunction for directing the appellants to discharge the loan in respect of DRT proceedings pending on the file of DRT-I, Chennai, thereby retrieve the documents and deliver the same to Respondent No. 1 at the time of execution and registration of sale deed was refused. Challenging the rejection of the prayer of mandatory injunction and failure to award costs, Respondent No. 1 filed A.S. No. 708 of 2009 before the High Court of Madras along with interim applications being M.P. Nos. 1 and 2 of 2008. On 01.02.2009, Respondent No. 1 filed another interim application in M.P. No. 1 of 2009 in A.S. No. 708 of 2008. By order dated 18.04.2009, the Division Bench of the High Court passed an order of injunction in M.P. No. 1 of 2008 and M.P. No. 1 of 2009 restraining the appellants herein from alienating, encumbering or dealing with the suit

property pending appeal.

(h) On 06.10.2006, the Bank filed OA No. 491 of 1999 withdrawing its OTS offer of Rs. 629.60 lakhs and called upon the appellants to pay the total amount due along with future interest, costs and charges. By order dated 15.05.2009, the Presiding Officer, DRT-I, Chennai, disposed of O.A. No. 491 holding that the Bank is entitled to recover a sum of Rs. 11,08,51,875/- from M/s Anand Agency. Pursuant to the order, the Recovery Officer issued the recovery certificate being D.R.C. No. 102 of 2009 and also issued the 1st sale notification dated 23.10.2009 bringing to sale the suit property. The upset price was fixed at Rs. 27 crores and the date of sale was fixed as 25.11.2009.

(i) Challenging the decree for specific performance granted by the Principal Judge, Chengalpet, the appellants filed A.S. No. 946 of 2009 before the High Court which was admitted by the Division Bench on 20.10.2009. On 16.11.2009, Respondent No. 1 filed a writ petition being W.P. No. 23405 of 2009 before the High Court praying for a writ of mandamus for bringing the suit property in O.S. No. 336 of 2006 on the file of the Principal District Judge, Chengalpat in his favour and also filed Miscellaneous Petition in the aforesaid writ petition being M.P. No. 1 of 2009 praying to stay the auction sale of the property covered by the decree dated 30.04.2008 made in O.S. No. 336 of 2006. On the same day, the interim applications bearing M.P. Nos. 2 & 3 of 2009 in A.S. 708 of 2008 were also listed and the same were dismissed by the Division Bench.

(j) Questioning the auction sale proposed to be conducted by the DRT, on 19.11.2009, Respondent No. 1 filed I.A. Nos. 1 to 3 in D.R.C. No. 102 of 2009 in O.A. No. 491 of 1991 before the Recovery Officer, DRT-I, Chennai praying for release of the scheduled property and stay of auction sale. On 23.11.2009, the Recovery Officer, DRT-I, Chennai dismissed the said applications. On 24.11.2009, Respondent No. 1 filed SLP (C) No. 31358 of 2009 before this Court challenging the order dated 16.11.2009 passed by the Division Bench of the High Court in M.P. No. 1 of 2009 in W.P. No. 23405 of 2009. Respondent No. 1 also filed another SLP (C) Nos. 19154-55 of 2009 challenging the order dated 18.04.2009 passed by the Division Bench of the High Court in M.P. No. 1 of 2008 and M.P. No. 1 of 2009 in A.S. No. 708 of 2008 and order dated 16.11.2009 in M.P. Nos. 2 & 3 of 2009 in A.S. No. 708 of 2008. On the very same day, i.e. on 24.11.2009, this Court passed an order to continue auction but not to declare the result. 1

On 11.12.2009, this Court dismissed the SLPs filed by Respondent No. 1.

(k) On 23.02.2010, the Division Bench, by impugned judgment, partly allowed A.S. No. 708 of 2008 filed by Respondent No. 1 herein directing him to deposit the balance sale consideration of Rs.4,80,48,000/- with 18% interest from the date of filing of the suit and also directed the appellants herein to execute the sale deed conveying the subject property to Respondent No. 1 and the Bank was directed to proceed against the various other properties of the appellants being the subject matter of O.A. No. 491 of 1999 for recovering the balance amount. The appellants preferred Review Petition No. 37 of 2010 before the High Court which was dismissed on 29.04.2010. Being aggrieved by the impugned judgment dated 23.02.2010 and order dated 29.04.2010, the appellants have preferred these appeals by way of special leave petitions before this Court.

4) Heard Mr. L. Nageswara Rao and Mrs. Nalini Chidambaram, learned senior counsel for the appellants and Mr. R.F. Nariman, learned senior counsel for respondent No.1 and Mr. Himanshu Munshi, learned counsel for respondent No.2-Bank.

5) Mr. L.N. Rao and Mrs. Nalini Chidambaram appearing for the appellants after taking us through the pleadings, judgment of the trial Court as well as the impugned judgment of the High Court raised the following contentions:

i) The plaintiff has not established "readiness and willingness" in terms of Section 16(c) of the Specific Relief Act, 1963, hence the Courts below ought not to have granted discretionary relief of decree for specific performance.

ii) Inasmuch as the agreement being a contingent contract, which is impossible to fulfil and cannot be implemented, in such circumstance, whether the Courts below are justified in granting the relief in favour of the plaintiffs.

iii) Whether the right of marshaling by subsequent purchaser as provided in Section 56 of the Transfer of Property Act, 1882 (hereinafter referred to as `the T.P. Act') is available to a decree holder in a suit for specific performance and whether the High Court is justified in granting such a relief in the absence of any pleading and issue before the trial Court.

iv) Whether the High Court is justified in hearing a writ petition filed under Art. 226 of the Constitution of India along with the regular first appeal filed under Section 96 C.P.C.

v) Whether the High Court is justified in issuing certain directions to the Bank which are contrary to the orders passed by the competent forum, namely, Debts Recovery Tribunal.

vi) Whether the High Court is justified in granting cost in favour of the plaintiff when the same was rightly disallowed by the trial Court.

6) On the other hand, Mr. R.F. Nariman, learned senior counsel for the first respondent, by drawing our attention to all the relevant materials relied on by the trial Court and the appellate Court supported the ultimate decision of the High Court. He submitted that -

i) The plaintiff has established his readiness and willingness all along and the same was rightly accepted by the trial Court and confirmed by the High Court.

ii) The contract in question is not a contingent contract in terms of Sections 31 and 32 of the Indian Contract Act, 1872.

iii) In view of the fact that the plaintiff has prayed for larger relief and the trial Court has confined to lesser relief of decree for specific performance, the plea of marshaling being a question of law and taking note of equity and justice, the High Court rightly applied the said principle and there is no error warranting interference on this ground.

iv) The subject matter of the appeals and the relief prayed for in the writ petition were interconnected, hence the High Court is justified in disposing of the writ petition along with the appeals.

v) Inasmuch as the plaintiff has succeeded partial relief at the hands of the trial Court after paying substantial court fee, the High Court is justified in awarding cost which was omitted by the trial court. vi) In any event, in view of the materials placed and the ultimate decision by both the Courts

below, interference by this Court exercising jurisdiction under Art. 136 is not warranted. Even after grant of leave, this Court has ample power to dismiss the appeal without going into all the issues.

7) We have considered the rival contentions and perused all the relevant materials in the form of oral and documentary evidence.

Readiness and Willingness

8) Section 16(c) of the Specific Relief Act, 1963 provides for personal bars to relief. This provision states that specific performance of a contract cannot be enforced in favour of a person,

a) who would not be entitled to recover compensation for its breach; or

b) who has become incapable of performing, or violates any essential term of, the contract that on his part remains to be performed, or acts in fraud of the contract, or wilfully acts at variance with, or in subversion of, the relation intended to be established by the contract; or

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

Explanation.- For the purposes of clause (c),- (i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court; (ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction."

Among the three sub-sections, we are more concerned about sub-section(c). "Readiness and willingness" is enshrined in clause (c) which was not present in the old Act of 1877. However, it was later inserted with the recommendations of the 9th Law Commission's report. This clause provides that the person seeking specific performance must prove that he has performed or has been ready and willing to perform the essential terms of the contract which are to be performed by him.

9) The words "ready" and "willing" imply that the person was prepared to carry out the terms of the contact. The distinction between "readiness" and "willingness" is that the former refers to financial capacity and the latter to the conduct of the plaintiff wanting performance. Generally, readiness is backed by willingness.

10) In N.P. Thirugnanam vs. Dr. R. Jagan Mohan Rao & Ors., (1995) 5 SCC 115 at para 5, this Court held: ".....Section 16(c) of the Act envisages that plaintiff must plead and prove that he had performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than those terms the performance of which has been prevented or waived by the defendant. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit alongwith other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity

be proved to be available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was always ready and willing to perform his part of the contract."

11) In P.D'Souza vs. Shondrilo Naidu, (2004) 6 SCC 649 paras 19 and 21, this Court observed:

"It is indisputable that in a suit for specific performance of contract the plaintiff must establish his readiness and willingness to perform his part of contract. The question as to whether the onus was discharged by the plaintiff or not will depend upon the facts and circumstance of each case. No strait-jacket formula can be laid down in this behalf.... The readiness and willingness on the part of the plaintiff to perform his part of contract would also depend upon the question as to whether the defendant did everything which was required of him to be done in terms of the agreement for sale."

12) Section 16(c) of the Specific Relief Act, 1963 mandates "readiness and willingness" on the part of the plaintiff and it is a condition precedent for obtaining relief of grant of specific performance. It is also clear that in a suit for specific performance, the plaintiff must allege and prove a continuous "readiness and willingness" to perform the contract on his part from the date of the contract. The onus is on the plaintiff. It has been rightly considered by this Court in R.C. Chandiok & Anr. vs. Chuni Lal Sabharwal & Ors., (1970) 3 SCC 140 that "readiness and willingness" cannot be treated as a straight jacket formula. This has to be determined from the entirety of the facts and circumstances relevant to the intention and conduct of the party concerned. It is settled law that even in the absence of specific plea by the opposite party, it is the mandate of the statute that plaintiff has to comply with Section 16(c) of the Specific Relief Act and when there is non- compliance with this statutory mandate, the Court is not bound to grant specific performance and is left with no other alternative but to dismiss the suit. It is also clear that readiness to perform must be established throughout the relevant points of time. "Readiness and willingness" to perform the part of the contract has to be determined/ascertained from the conduct of the parties.

13) In the light of the above principles, let us consider whether the plaintiff has established his case for decree for specific performance.

14) Mr. L.N. Rao and Mrs. Nalini Chidambaram vehemently contended that the plaintiff has miserably failed to prove that he has fulfilled his obligation both under Ex. A-2 (MoU) and Ex. A-3 - Agreement for Sale and in those circumstances, defendants 1 & 2 are not bound to convey the suit property in favour of the plaintiff. It is not in dispute that on 15.08.2005, the defendants entered into a MoU with respondent No.1 for sale of the suit property at a sale consideration of Rs. 14 lakhs per acre and a sum of Rs. 1 lakh was paid as advance. Balance sale consideration was to be paid within three months from the date of obtaining confirmation letter from the second respondent-Bank. It is seen from the materials that on 10.10.2005, M/s J.P. Builders, by a letter addressed to the AGM, Indian Bank Assets Recovery Management Branch II, offered a sum of Rs. 100 lakhs as full and final settlement of the dues of its sister concern which was declined by the Bank advising to revise the offer with substantial improvement. By a letter dated 23.01.2006, the Bank stated that defendant No.2 herein had not made any improvement in his one time settlement proposal of Rs. 100 lakhs and hence the Bank is proceeding to enforce its rights under the Act. It is further seen that on 01.02.2006, the appellant No.2 offered a sum of Rs. 148 lakhs as one time settlement. Within two

days of the said offer i.e. 03.02.2006 the plaintiff entered into a Sale Agreement with the defendants for purchase of the suit property. The sale price of Rs. 14 lakhs per acre was enhanced to Rs. 18 lakhs per acre and the respondent No.1 had paid a sum of Rs. 24 lakhs as further advance to defendant No.2. It is further seen that on 18.04.2006, a further payment of Rs. 50 lakhs was made by the plaintiff. It is also seen that on 15.05.2006, the Bank rejected the one time settlement offer of Rs. 148 lakhs stating that out of court settlement can be done if an offer of Rs. 629.60 lakhs by working out interest at PLR i.e. 11% compound on the principal outstanding as on 31.3.1993 be made. For this, defendant No.2 could not agree to pay the same.

15) A perusal of the recitals in the Agreement for Sale (Ex.A- 3) are to the effect that to discharge the bank loan and for the business purpose of the vendors, the appellants have decided to sell the properties and offered the same for sale and the Respondent No. 1 has agreed to purchase the said property. In Ex. A-3, it is stated that defendant Nos. 1 & 2/vendors have undertaken to discharge the loans and hand over the original title deeds of the said property to the plaintiff within three months from the date of the agreement for scrutiny of title. It is relevant to mention here that Ex. A-3, was executed on 03.02.2006. The recital also shows that the plaintiff has to pay further advance, if any, required by the vendors to release the documents from the Bank. It is the definite case of the plaintiff that defendant Nos. 1 & 2 had agreed to liquidate the property and hand over the original title deeds for which the plaintiff had paid further advance of Rs. 24 lakhs and on 18.04.2006, he had paid Rs.50 lakhs.

16) We have already adverted to the initial OTS proposal dated 01.02.2006 expressing second defendant's willingness to pay for Rs. 148 lakhs since the bank has expressed its inability to consider, by letter dated 15.05.2006, the bank has conveyed that OTS will be accepted if the offer is given for Rs. 629.60 lakhs by working out compound interest at 11%. In the plaint, there is a specific averment that the plaintiff even on 18.4.2006 has paid a further advance of Rs. 50 lakhs. 17) In his oral evidence before the Court, the plaintiff - PW-1 had reiterated and in fact asserted that he was always ready with the money and duly pursuing the OTS along with Defendant Nos. 1 & 2. Insofar as readiness and willingness on the part of the plaintiff is concerned, apart from the specific plea in the plaint about the payment and advance of substantial amount, he also placed the relevant materials in the form of letters to show that he was corresponding with the Bank for early settlement of the dues. In other words, the assertion in the form of specific plea in the plaint and correspondence in the form of letter, his assertion in the witness box at the time of trial, the Courts below are right in arriving at a conclusion that the plaintiff has proved and complied with the mandates provided under Section 16 (c) of the Specific Relief Act.

18) Mrs. Nalini Chidambaram before the High Court as well as before us by basing reliance on clause 4 of the MoU (Ex. A- 2) contended that the balance sale consideration has to be paid within one week of the receipt of Confirmation Letter from the Bank and absolutely there is no material to show that the plaintiff was ready with the money within the prescribed period of one week. It is also pointed out that in addition to the same, plaintiff has to pay the amount to clear the bank loan and without paying the amount within the prescribed period, the plaintiff has committed breach of his obligations, hence, the plaintiff is not permitted to blame the defendant which would arise only after the performance of the plaintiff's obligation. In order to prove her stand, learned senior counsel for the appellants heavily placed reliance on Clauses 4, 6 and 7 of Ex. A-2. In the light of the said claim, we perused various clauses in Ex. A-2 as well the subsequent agreement for sale dated 03.02.2006, Ex. A-3. As rightly pointed out by the Division Bench, defendant Nos. 1 & 2 had entered into an agreement to sell the suit property to discharge loans and handover the original title

deeds has been reiterated both in Ex. A-2 and Ex. A-3. However, it is to be noted that after execution of Ex. A-3, i.e. agreement for sale dated 03.02.2006, defendant Nos. 1 & 2 have undertaken to discharge the loans and handover the original title deeds to the plaintiff. No doubt, as per Ex. A-3, plaintiff has to pay further advance, if required by the vendors to release the documents from the Bank. The plaintiff has demonstrated by placing oral and documentary evidence that on the date of execution of Ex. A-3, he has paid further advance of Rs. 24 lakhs and Rs. 50 lakhs on 18.04.2006. It was pointed out that the plaintiff has settled Rs. 75 lakhs out of the sale consideration and for the balance sale price he has deposited a sum of Rs. 2,45,00,000/- in Indian Overseas Bank, Sowcarpet Branch, Chennai. The deposit receipt of the said amount is produced as Ex. A-13. In order to prove that he had sufficient means of finance, the plaintiff has produced documents under Ex. A-12 and Ex. A- 13. In his evidence as PW-1, the plaintiff has asserted that he was having ready cash and also produced Ex. A-11, Fixed Deposit Receipt (FDR dated 19.04.2006 in his name) in Indian Overseas Bank for Rs. 2,45,00,000 with date of maturity as 18.07.2006. Ex. A-12 is the certificate issued by the Indian Bank, Alwarpet Branch, Chennai stating that the plaintiff is maintaining Savings Bank Account No.726244658 in their bank and the balance as on 20.04.2007 is Rs. 1,50,00,444/- Ex. A-13 is the Certificate issued by Indian Overseas Bank stating that credit balance of plaintiff's savings bank account No. 6874 is Rs. 304,12,574.08 as on 21.04.2007. If we analyse Ex. A-11 to Ex.A-13 coupled with assertion made in the oral evidence of PW-1, it would amply show that plaintiff was having sufficient cash and financial capacity to complete the transaction. Further the plaintiff is required to pay the balance amount of consideration only on the event of a demand made for payment of further amount by the defendants on the basis of the confirmation letter to be obtained from the bank as per the agreement for sale under Ex. A-3. Absolutely, there is no evidence as to any demand made by defendant Nos. 1 & 2 from the plaintiff for further payment of sale price. Inasmuch as under Ex. A-4, he had intimated that he is prepared to get the sale executed while perusing the aforesaid bank deposit receipts, it is clearly revealed that the plaintiff was endowed with the means to pay the sale consideration and had ever been prepared to do the same. On the other hand, it is not the case of Defendant Nos. 1 & 2 that they have asked for further advance and that the plaintiff did not respond for their request. As rightly pointed out by the trial Court and commended by the High Court, it is not clear that why Defendant Nos. 1 & 2 fail to led oral evidence in support of their claim. It is also not clear why they have avoided the witness box, though it is stated that the plaintiff had admitted the stand of Defendant Nos. 1 & 2 which is factually incorrect and unacceptable. The only objection pointed out was that for effective OTS, even though, the plaintiff has deposited Rs.10,01,000/- in the "No lien account" of second defendant, the plaintiff has surreptitiously withdrawn the said amount which had upset the settlement talks between defendant Nos. 1 & 2 and the 3rd defendant- Bank on the other side. It is true that as per clause 4 of Ex. A-2 MoU, the plaintiff has agreed to pay further advance to defendant Nos. 1 & 2 to enable them to pay and clear the bank loan obtained by their sister concern namely, M/s Anand Agency, wherein defendant No.1 - J.P. Builders have stood as guarantors to the said loan. It is equally true that in the letter (Ex. B-1), addressed to the Assistant General Manager of the Bank, the plaintiff has stated that he has deposited Rs.10,01,000/- in a "No-lien account" towards M/s. Anand Agency and that he has proposed to purchase the property from them which was mortgaged to the Bank and after acceptance of the compromise settlement, the amount can be appropriated towards the compromise arrived. In the same letter, the plaintiff has also informed that if the compromise settlement is not materialized, the said deposit may be released to him. However, as pointed out earlier, one time settlement offer of Rs. 148 lakhs was not acceptable by the Bank and because of the same, the plaintiff withdrew the said deposit and the bank by a letter (Ex. B-2), informed the second defendant about the same. As rightly pointed out by the High Court, mere withdrawal of Rs. 10,01,000/- deposited in "No- lien account" by the plaintiff has no significance

since subsequent to the same both parties have entered into Ex. A- 3, Agreement for sale on 03.02.2006 and on which date the plaintiff has also paid a further advance of Rs. 25 lakhs. These facts have been clearly explained by PW-1 in his evidence and he also asserted that the same fact was orally informed to Defendant Nos. 1 & 2. We have already pointed out that there is no reason to disbelieve the assertion of PW-1. As rightly pointed out by Mr. R.F. Nariman, learned senior counsel for the first respondent-plaintiff that after receipt of Ex. B-2 Defendant Nos. 1 & 2 have not raised any protest but on the other hand they proceeded to further advance of Rs. 50 lakhs from the plaintiff on 18.04.2006 and made endorsement in Ex. A-3 agreement for sale. In those circumstances, as rightly pointed out and correctly appreciated by the High Court, withdrawal of Rs. 10,01,000 from "No-lien account" of M/s Anand Agency by the plaintiff would not lead to the conclusion that the plaintiff had committed breach and was not ready to perform his part of the contract.

19) With the materials placed, specific assertion in the plaint, oral and documentary evidence as to execution of agreement, part-payment of sale consideration, having sufficient cash and financial capacity to execute the sale deed, bank statements as to the moneys in fixed deposits and saving accounts, we are of the view that the plaintiff has proved his "readiness" and "willingness" to perform his part of obligation under the contract. The concurrent findings of the trial court as well the High Court as to readiness and willingness to perform plaintiff's part of the obligations under the contract, in the absence of any acceptable contra evidence is to be confirmed. We agree with the conclusion arrived at by the trial Court as well as by the High Court on the readiness and willingness on the part of the plaintiff and reject the argument of the learned senior counsel for the appellants.

Contingent Contracts

20) By pointing out various clauses in the MoU (Ex. A-2), Ms. Nalini Chidambaram, learned senior counsel for the appellants heavily contended that inasmuch as the contract was depending upon uncertain events of the Indian Bank, agreeing for OTS, the contract entered is contingent depending on the move of the Indian Bank. According to her, inasmuch as various clauses insists certain impossible conditions at the hands of the Indian Bank, the contract entered into between the plaintiff and defendants become impossible and void. Though such an argument was advanced before us, there was no such specific plea in their written statement and the Trial Court has not framed separate issue and considered the same. Irrespective of the above position, in view of the assertion made by learned senior counsel, we intend to discuss and give our answer.

21) Chapter III of the Indian Contract Act, 1872 deals with Contingent Contracts. Contingent contract has been defined in Section 31 and method of enforcement is stated in Section 32 which reads as under:

"31. "Contingent contract" defined.-- A "contingent contract" is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen.

32. Enforcement of contracts contingent on an event happening.-- Contingent contracts to do or not to do anything if an uncertain future event happens, cannot be enforced by law unless and until that event has happened. If the event becomes impossible, such contracts become void."

It is clear that if the condition prescribed or even described in the contract is impossible,

undoubtedly, such contracts become void and not enforceable in terms of Section 32. The events enumerated in the contract, according to Ms. Nalini Chidambaram are (a) a letter specifying the balance due to the bank (b) an undertaking later from the Bank that it will receive the said balance amount (c) they will handover the original documents directly to the plaintiff. While elaborating the said points, learned senior counsel highlighted that for executing the sale deed, getting confirmation or clearance letter from the Indian Bank on payment of the dues to the Bank and getting original documents have been emphasized in various clauses in the MoU (Ex. A-2). Among various clauses, she highlighted Clauses 4, 6, 7 in the MoU (Ex. A-2). No doubt, those conditions have been enumerated in the above referred clauses. She also brought to our notice that the Indian Bank not only declined the OTS offer of Rs 148 lakhs but got a decree for Rs. 8,51,825.29 from the DRT. The very same contentions were raised before the High Court. Mr. R. F. Nariman, by drawing our attention to Ex. A-3 contended that Agreement for Sale dated 03.02.2006 is a fresh agreement hence clause 4, 6 and 7 of the MoU (Ex. A-2) would not govern the parties. We have once again perused various clauses in Ex. A-2 as well as subsequent agreement for sale Ex. A-3. It is relevant to note that in the plaint, in paragraph 7, this aspect has been specifically pleaded wherein it was highlighted that the plaintiff sought for performance of contract strictly in accordance with the original Memorandum of Understanding (MoU) dated 15.08.2005 as emerged with the agreement for sale dated 03.02.2006 entered into between the plaintiff and the defendant Nos. 1 and 2 in Chennai for sale and purchase of the suit property. In fact, this was specifically mentioned by the plaintiff in his rejoinder notice dated 31.07.2006 addressed to defendant Nos. 1 and 2 and even after receipt of the same, they have not chosen to send any reply disputing the same. In those circumstances, we agree with the conclusion arrived at by the High Court, namely, after the parties entered into Ex. A-3 agreement for sale, Clauses 4, 6 and 7 of the MoU (Ex A-2) would not govern the parties. On the other hand, as per Clause 3, 4 and 6 in Ex. A-3, the vendor and defendant Nos. 1 and 2 have undertaken to discharge their loans and hand over title deeds. The relevant clauses, namely, 3, 4 and 6 of Ex. A-3 are as follows. "......3. The balance of sale consideration shall be paid by the PURCHASER TO THE VENDORS on or before the Registration of the Deed of Sale.

4. The Vendor undertake to discharge the Loans and hand over the ORIGINAL TITLE DEEDS relating to Schedule mentioned properties to the PURCHASER, within three months from this date for scrutiny of title. HOWEVER, the purchaser has to pay further advance if any required by the VENDORS, to release the documents from Bank.

6. The sale shall be completed within six months from the date of production of ORIGINAL DOCUMENTS by the VENDORS to the Purchaser....."

22) If we accept the above stand and conduct of the parties and fresh terms as mentioned above in Ex. A-3, the conditions incorporated in Ex. A-2 need not be complied with and it cannot be contended that the contract was a contingent contract and unless and until a letter of confirmation issued by the Indian Bank, the same is not enforceable. As rightly pointed out by Mr R. F Nariman, the vendors have agreed to sell the property but agreed to execute the sale deed after discharge of the mortgage in favour of the defendants. In other words, it was only the execution of the sale deed which was postponed to a future date. The clauses referred above in Ex A-3 do not insist the sale deed is to be executed only after the acceptance of OTS proposal by the Bank. It is true that the first OTS offered by defendant Nos. 1 and 2 was not acceptable by the Bank. When the Bank offered OTS for Rs. 629.60 lakhs, it was not acceptable by the defendant Nos 1 and 2. Clause 4 of Ex. A-3, makes it clear that to discharge the loans of the Bank, the vendors are free to make a request to the purchaser, namely, the plaintiff, to make further advance and after getting the amount from the

plaintiff, defendant Nos. 1 and 2 have to secure documents from the Bank. The trial Court as well as the High Court held that there is no material to show that the defendant Nos. 1 and 2 made any attempt to comply with Clause 4 in Ex. A-3 by requiring the plaintiff to make further advance. In the earlier paragraphs, we have also highlighted the conduct of the plaintiff in keeping the required money, no doubt, in their SB account for the purpose of meeting the demand of the defendant Nos. 1 and 2. Even otherwise, the agreement to discharge the loans of the Bank and handover the original title deeds to the plaintiff cannot be construed as impossible event and it would affect the terms of contract to become void, more particularly, when the plaintiff deposited substantial amount facilitating the defendant Nos. 1 and 2 to meet their requirement for fulfilling the contract. As rightly observed by the High Court, in the light of various clauses in the agreement agreed to by both the parties, the same cannot be termed as a contingent contract.

23) As stated earlier, merely because the contract insist settlement of a loan of the bank and handover the title deeds to the plaintiff from the bank are not impossible events in the light of the performance made by the plaintiff, the contract in question did not come to an end on this ground and such contract is not a contingent contract and undoubtedly, the Court has jurisdiction to grant relief in terms of the contract. Obtaining No Objection Certificate (NOC) from the authority concerned, clearance of NOC from Income Tax Department or any other State/Central authority, securing title deeds after clearing certain loans are incidental and implied covenant on the part of the vendors to do the needful to give effect to the agreement.

24) It is also relevant to point out that though defendant Nos. 1 and 2, at the first instance offered OTS for Rs. 148 lakhs, the Bank, after taking note of various aspects claimed Rs. 629.60 lakhs as their proposal. As rightly pointed out by Mr. R.F. Nariman, it was not an impossible performance considering the amount borrowed by the sister agency of the Ist defendant and various properties possessed by defendant Nos. 1 and 2 in prime localities of Chennai and in and around the sub-urban areas of Chennai.

25) We are satisfied that the contract in question is capable of performance and the contention of the learned senior counsel for the appellants that it is a contingent contract and is incapable of performance cannot be accepted. We have already pointed out that this was not an issue before the trial Court and such plea was not raised in the written statement. We have also pointed out that defendant Nos. 1 and 2 did not bother to explain all salient features by entering the witness box in support of their claim. We have already highlighted that the plaintiff has established that he has partially performed his part of obligations by paying the advance amount of Rs. 25 lakhs and another Rs. 50 lakhs in addition to the initial deposit of Rs. 1 Lakh. We also hold that plaintiff has proved his readiness and willingness and financial ability to complete the sale transaction. Accordingly, we reject the second contention also.

Marshalling

26) It is the claim of the plaintiff before the High Court that having secured a decree for specific performance as per Section 56 of the T.P. Act, 1882, by applying the principles of Marshalling, directions may be issued to the Bank to exhaust its remedy from other items of property which are located in the prime places in Chennai before bringing the properties covered in the agreement of sale.

27) In order to understand the claim of the plaintiff and the stand taken by the defendant Nos. 1 and

2, it is useful to refer Section 56 of the T. P. Act.

"56. Marshalling by subsequent purchaser.--If the owner of two or more properties mortgages them to one person and then sells one or more of the properties to another person, the buyer is, in the absence of a contract to the contrary, entitled to have the mortgaged-debt satisfied out of the property or properties not sold to him, so far as the same will extend, but not so as to prejudice the rights of the mortgagee or persons claiming under him or of any other person who has for consideration acquired an interest in any of the properties."

Similar to this is Section 81 of the T.P. Act which speaks about marshalling securities. The High Court after noting that the plaintiff had paid substantial amount as advance and secured decree for specific performance, came to the conclusion that the right of marshalling is available to the plaintiff. Section 56 deals with the right of subsequent purchaser to claim marshalling. It should be contrasted with Section 81 which refers to marshalling by a subsequent mortgage. The concept as in Section 56 applies to sales in a manner similar to Section 81 which applies to mortgages alone.

28) The concept of marshalling by subsequent purchaser can be explained by the following illustration. Suppose A owns properties X and Y. Both these properties are mortgaged to C. Later, A sells property X to B. Now, B will be entitled to insist that his vendor A, shall satisfy his mortgage debt out of property Y (unsold) in the first instance as far as possible. If after property Y is exhausted there still remains balance of debt, only then property X will be drawn upon. As stated earlier, Section 56 deals with the concept of marshalling in a transaction involved in subsequent sale, on the other hand, Section 81 is applicable only to mortgages. The doctrine of marshalling rests upon the principle that a creditor who has the means of satisfying his debt out of several funds shall not, by the exercise of his right, prejudice another creditor whose security comprises only one of the funds.

29) As rightly pointed out, in view of the sale agreement which results into decree for specific performance, the plaintiff is entitled to insist upon defendant Nos. 1 to 3 to have the mortgage debt satisfied out of the properties not sold to the plaintiff and in any case if the sale proceeds are not sufficient then to proceed against the said suit properties. Learned senior counsel for the appellants strongly objected the application of the principle of marshalling by subsequent purchaser by the High Court when the plea of marshalling was not taken by the plaintiff in the trial Court. In other words, according to them, without taking such plea before the trial court, the same cannot be taken for the first time before the Appellate Court. It is not in dispute that the plea of marshalling and applicability of Section 56 of the T.P. Act was not raised before the trial Court. However, if we consider the entire plaint, which is available in the appeal paper-book, the plaintiff has claimed a larger relief. In para 12 of the plaint, the plaintiff has prayed for the following reliefs.

(i) "directing the Defendant Nos. 1 and 2 to specifically perform the Agreement for Sale Deed dated 03.02.2006 in respect of the suit schedule mentioned property which is more fully described in the schedule hereunder, by executing a Deed of Sale or Deeds of Sale and register a valid conveyance in favour of the Plaintiff or his nominee or nominees on a date to be fixed by this Court and/or in default, direct the officer of this Court to convey the suit schedule mentioned property on behalf of the Ist and 2nd Defendants herein in favour of the plaintiff or his nominee or nominees on a date to be fixed by this Court on receipt of the balance sale consideration of Rs. 4,80,48,000/- payable by the Plaintiff to them.

(ii) For a mandatory injunction directing the 1st and 2nd Defendants to discharge the loan payable to the 3rd Defendant Bank in respect of DRT proceedings pending on the file of DRT, Chennai as per the terms of the contract dated 03.02.2006 thereby retrieve the documents and deliver the same to the plaintiff at time of execution and registration of Sale Deed or Sale Deeds in favour of the plaintiff or his nominee or nominees either in one lot or in pieces as the case may be. (iii) Not pressed, deleted.

(iv) For a permanent injunction restraining the Defendants 1 and 2, their men, servants, agents, or any one claiming through them or authorized by them in any manner alienating, encumbering or dealing with the suit schedule mentioned property either by way of sale, mortgage, lease, joint-development, or otherwise, or putting up any construction thereon except in accordance with law. (v) To grant such further or other reliefs; and (vi) To award the costs of this suit."

30) As observed by the High Court, the plaintiff was under an impression that the trial Court would grant the entire relief as claimed and he did not anticipate that he could get a part of relief sought for by him. In this circumstance, learned senior counsel appearing for the plaintiff was right in highlighting that there was no occasion for the plaintiff to raise the plea of marshalling at the time of filing of the suit. Even otherwise, as rightly observed by the High Court, the plea of marshalling being pure question of law based upon the decree obtained for specific performance, cannot simply be thrown out merely because the same was not specifically pleaded.

31) Mrs. Nalini Chidambaram strongly contended that in the absence of any plea the claim of marshalling cannot be applied to the plaintiff. In support of her stand she relied on Anathula Sudhakar vs P. Buchi Reddy (Dead) By Lrs. And Ors. (2008) 4 SCC 594 wherein this Court held "no amount of evidence or arguments can be looked into or considered in the absence of pleadings and issues, is a proposition that is too well settled." Absolutely, there is no dispute about the said proposition. In the said decision, the High Court in a Second Appeal arising from a suit for bare injunction while reversing the decision of the first Appellate Court, examined various aspects relating to title and recorded findings and proceeded to discuss and grant relief in the absence of pleadings and issues regarding title. Similar view has been expressed in Bachhaj Nahar vs. Nilima Mandal and Anr (2008) 17 SCC 491. It is relevant to extract the principles enunciated in para 23 of the judgment which are as follows.

"23. It is fundamental that in a civil suit, relief to be granted can be only with reference to the prayers made in the pleadings. That apart, in civil suits, grant of relief is circumscribed by various factors like court fee, limitation, parties to the suits, as also grounds barring relief, like res judicata, estoppel, acquiescence, non-joinder of causes of action or parties, etc., which require pleading and proof. Therefore, it would be hazardous to hold that in a civil suit whatever be the relief that is prayed, the court can on examination of facts grant any relief as it thinks fit. In a suit for recovery of rupees one lakh, the court cannot grant a decree for rupees ten lakhs. In a suit for recovery possession of property `A', court cannot grant possession of property `B'. In a suit praying for permanent injunction, court cannot grant a relief of declaration or possession. The jurisdiction to grant relief in a civil suit necessarily depends on the pleadings, prayer, court fee paid, evidence let in, etc." In those circumstances, while reiterating the principles laid down above, we hold that the same are not applicable to the case on hand.

32) We have already demonstrated the relief prayed in the plaint by paying substantial court fee of Rs. 41,66,326.50. In such circumstance, when a party is able to secure substantial relief, namely,

decree for specific performance with clearance of mortgage amount, it is the duty of the Court to mould the relief so as to render substantial justice between the parties. In this regard, we accept the course adopted by the High Court in granting relief to the plaintiff.

33) We are also satisfied that merely because for recovery of the loan secured by banks, a special Act, namely, Recovery of Debts due to Banks and Financial Institutions Act, 1993 has been enacted which is not a bar for the civil Court to apply to other relief such as Section 56 of the T.P. Act. We are also satisfied that by issuing such direction on the application of Section 56 of the T.P. Act, the Division Bench has not modified or eroded the order passed by the DRT. On the other hand, it is an admitted fact that the Bank has accepted the impugned verdict of the High Court and did not challenge the same before this Court by filing an appeal. We are also satisfied that by granting such a relief, the Bank is not prejudiced in any way by bringing other properties for sale first to satisfy the mortgage debt payable by defendant Nos. 1 and 2. In fact, the High Court was conscious and also observed that if sale proceeds of other items of properties are not sufficient to satisfy the debt payable to the Bank by defendant Nos. 1 and 2, in that event, Bank can proceed against the suit properties.

34) We are also conscious of the fact that the said doctrine cannot be permitted to become a device for destructing the sanctity of contract. The court will also not apply the doctrine of impossibility to assist a party which does not want to fulfill its obligations under the contract.

About Writ Petition:

35) It is relevant to note that during the pendency of the appeals before the High Court, the very same plaintiff filed Writ Petition No. 23405 of 2009, impleading defendant Nos. 1 and 2, M/s Anand Agency which is a sister concern of defendant No. 1 and 3rd defendant-Bank apart from Union of India, praying for issuance of a writ of Mandamus forbearing the respondents from bringing the scheduled property forming the subject matter of the decree in his favour in O.S. No 336 of 2006 on the file of the Principal District Judge, Chengalpet by way of auction. He also prayed for certain other directions. Objections were raised by the appellants about the hearing of the writ petition along with the appeals. We have already adverted to the facts leading to the filing of two regular First Appeals before the High Court. It is not in dispute that the parties in those appeals as well as in the writ petition are one and the same except Union of India against whom the writ petitioner has not sought any relief. It is also not in dispute that the subject matter of the lis and properties are one and the same in both the appeals and the writ petition. There is no bar for the Division Bench which has jurisdiction to hear appeal, to hear writ petition when the same is connected with the main issue. In fact, no serious objection was raised before the High Court for hearing the writ petition along with the appeal. On the other hand, on the earlier occasion, when the parties have filed special leave petitions against certain interim orders, this Court requested the High Court to dispose of all the matters together. It is relevant to point out that no clarification or direction was sought in respect of the said order passed by this Court.

36) Mr. R.F. Nariman, learned senior counsel has pointed out that the writ petitioner has highlighted the applicability of the principle of marshalling. He pointed out that in grounds (j) and (k), the factual aspects about applicability of marshalling have been highlighted. Since the appellants have seriously objected that in the absence of any material, the High Court ought not to have considered the same, we reproduce the said grounds hereunder:

(j) "When there are other properties belonging to the Judgment Debtors are available for auction sale for realization of the D.R.C. issued the suit properties are brought to auction sale, leaving out the other valuable properties of the Respondent Nos. 1 & 2 at Chennai and the property covered by the decree situate at Senthamangalam village are brought to sale and the said action of the respondents would defeat and frustrate the decree for specific performance granted in favour of the petitioner herein. (k) When there are more than one property belonging to the borrowers are available leaving out all the properties including the 3 valuable properties at Chennai are left from auction sale and the property situate at Senthamangalam village (forming the decree property) would demonstrate that the respondent bank with tacit understanding with the borrowers is attempting to destroy the rights of the Decree Holder who is holding a decree for specific performance which has not been stayed by the High Court, Madras and the respondent bank is not willing to receive the monies offered by the petitioner on behalf of the Respondents 4, 5 and 6 ever since the inception of the suit in August 2006 till date which would demonstrate the motive of the bank in indulging in dilatory tactics, the Respondents 2 and 3 in collusion and connivance of the respondents 4, 5 and 6 are bringing the property covered by the decree solely with a view to frustrate the decree secured by the petitioner herein."

Though the plea of `marshalling' has not been specifically mentioned but all the required details have been referred to. It is not clear whether any objection/counter has been filed by the respondent Nos. 4 to 6 therein (respondent Nos. 1 & 2 herein) about those factual details. Irrespective of the same, we have already concurred with the High Court in applying the said principle considering the larger relief prayed for in the suit and the plaintiff was having a decree for specific performance subject to clearance of mortgage loan with the Bank.

37) In Sain Ditta Mal vs. Bulagi Mal & Sons and others, AIR (34) 1947 Lahore 230, the High Court after adverting to Section 56 of the Transfer of Property Act has held that this equitable doctrine exists for the benefit of the buyer alone. Following the said decision of the Lahore High Court, Karam Singh Sobti vs. Smt Shukla Bedi, AIR 1962 Punjab High Court at Delhi 477 reiterated the same principle.

38) The principle laid down in Brahm Parkash vs. Manbir Singh & Ors., [1964] 2 SCR 324 at 335 is also relevant to quote:.

"The other submission of learned counsel was that the learned Judges failed to give effect to the last portion of Section 56 under which marshalling is not to be permitted so as to prejudice the rights inter alia of the mortgagees or other persons claiming under him i.e. under the original mortgagor. Learned counsel pointed out that the appellant having proved his mortgage and the fact that it was subsisting, the learned Judges of the High Court ought to have held that any direction as to marshalling must necessarily prejudice him. We are unable to agree that this follows as any matter of law. The question of prejudice is purely one of fact which has to be pleaded and the necessary facts and circumstances established. It is obvious that the question of prejudice would be intimately connected with the value of the property against which the mortgagee is directed to proceed in the first instance. If even after paying off such a mortgage there is enough left for payment over to the subsequent encumbrancer referred to in the last portion of Section 56 it would be manifest that there would be no question of prejudice. If therefore the appellant desired to invoke the benefit of the last portion of Section 56 he should have made some plea as to the value of the property and shown how it would prejudice his rights as a subsequent encumbrancer. He however made no such plea and no evidence was led as to the value of the property. Even at the stage of the appeal in the High Court

the contention that to allow marshalling in favour of the subsequent purchaser -- Mukhamal would result in prejudice to him was admittedly never put forward before the learned Judges. As the point is one not of pure law but springs from the factual inadequacy of the property mortgaged to him to discharge his debt it is too late for the appellant to raise such a plea in this Court." It is clear that the application of the principle of marshalling may cause prejudice to the other party, but their Lordships have held that the said prejudice is a pure question of fact and depends upon various factors.

39) In the light of the details and materials highlighted in the earlier paragraphs and as discussed by the High Court, we are satisfied that the High Court is right in applying the principle of marshalling in favour of the plaintiff that too by safeguarding the interest of the 3rd defendant-Bank. In fact, the Bank did not challenge the impugned judgment of the High Court. Accordingly, we reject the contrary arguments made in respect of applying the principle of marshalling at the appellate stage.

Cost

40) Though no serious argument was advanced about the award of cost, in the grounds raised in the appeal, the appellants have agitated the award of cost by the High Court in favour of the plaintiff. Section 35 of the CPC speaks about Cost. Inasmuch as the plaintiff after valuing the suit paid a substantial court fee of Rs. 41,66,326.50 and ultimately he secured a decree for specific performance though he could not secure a relief in its entirety, the plaintiff is entitled for his cost. It is not in dispute that the court has granted the major relief, namely, decree for specific performance subject to clearance of the mortgage debt. In those circumstances, the High Court having noticed the payment of substantial court fee ordered cost payable by the contesting defendant Nos. 1 and 2 to the plaintiff. We agree with the said direction. Direction to the Recovery Officer/Tribunal

41) Learned senior counsel for the appellants contended that the jurisdiction of Recovery officer/Tribunal is exclusive and no other Court can go into their order for which they relied on Allahabad Bank vs. Canara Bank & Anr., (2000) 4 SCC 406, State Bank of India vs. Allied Chemical Laboratories & Anr., (2006) 9 SCC 252, India Household and Healthcare Ltd. vs. LG Houshold and Healthcare Ltd., (2007) 5 SCC 510. We are conscious of the principles enunciated in these decisions. However, in our case, the High Court taking note of the fact that it had considered various connected issues in respect of the same properties in which both the Civil Court and the DRT passed several orders and the fact that defendant Nos. 1 and 2 are having sufficient other properties in prime locations at Chennai and other places nearby Chennai and also of the fact that the Bank was also party to both these proceedings and accepted the impugned order of the High Court and not filed any appeal before this Court, we feel that the direction/clarification issued by the High Court does not run counter to the orders of DRT/Recovery Officers, on the other hand, it safeguards the interest of all parties. Only because of the delay on the part of the defendant Nos. 1 and 2 in not settling the dues of the Bank at the appropriate time, in the recent times, property value has risen to some extent. On this ground, we cannot interfere with the direction of the High Court about the sale of the said properties.

Interference under Article 136 of the Constitution of India

42) Though we have exhaustively dealt with the merits of the appeals, Mr. R.F. Nariman, learned senior counsel for Respondent No. 1 highlighted that even after grant of leave, there is no obligation on the part of this Court to go into all aspects and decide after giving reasons. According to him, in

view of the concurrent findings by the Trial Court and the High Court about the decree for specific performance and other relief by the High Court based on the question of law and equity, this Court has ample power to dismiss all the appeals even without assigning any reason.

43) In Balvantrai Chimanlal Trivedi, Manager Raipur Manfg. Co. Ltd., Ahmedabad vs. M.N. Nagrashna and Others, AIR 1960 SC 407, while considering the scope of Article 136 of the Constitution of India, a three-Judge Bench of this Court has concluded:

"5. The question then arises whether we should interfere in our jurisdiction under Article 136 of the Constitution, when we are satisfied that there was no failure of justice. In similar circumstances this court refused to interfere and did not go into the question of jurisdiction on the ground that this Court could refuse interference unless it was satisfied that the justice of the case required it: see A.M. Allison vs. B.L. Sen, (1957) SCR 359: ((S) AIR 1957 SC 227). On a parity of reasoning we are of opinion that as we are not satisfied that the justice of the case requires interference in the circumstances, we should refuse to interfere with the order of the High Court dismissing the writ petition of the appellant. We accordingly dismiss the appeal, but having regard to the peculiar circumstances of the case which we have referred to above we order that each party will bear its own costs of this appeal."

44) In Balvantrai Chimanlal Trivedi vs. M.N. Nagrashna and Others, AIR 1960 SC 1292, the Constitution Bench of this Court, while considering the jurisdiction of this Court under Article 136, has held:

"....It is necessary to remember that wide as are our powers under Article 136, their exercise is discretionary; and if it is conceded, as it was in the course of the arguments, that this Court could have dismissed the appellant's application for special leave summarily on the ground that the order under appeal had done substantial justice, it is difficult to appreciate the argument that because leave has been granted this Court must always and in every case deal with the merits even though it is satisfied that ends of justice do not justify its interference in a given case. In the circumstances we are of opinion that this Court was not bound to decide the question of jurisdiction on the facts and circumstances of this case when it had come to the conclusion in dealing with an appeal under Article 136 of the Constitution that there was no failure of justice. The review application therefore fails and is hereby dismissed with costs."

45) In Taherakhatoon (D) By Lrs. vs. Salambin Mohammad, (1999) 2 SCC 635, the following point arose for consideration.

"(2) Whether the discretionary power available to this Court at the time of grant of special leave continues with the Court even after grant of special leave and when the appeal is being heard on merits and whether, this Court could declare the law and yet not interfere or could mould the relief? Or whether, once the law is declared, this Court is bound to grant possession and the mandatory injunction? Their Lordships have held:

15. It is now well settled that though special leave is granted, the discretionary power which vested in the Court at the stage of the special leave petition continues to remain with the Court even at the stage when the appeal comes up for hearing and when both sides are heard on merits in the appeal. This principle is applicable to all kinds of appeals admitted by special leave under Article 136, irrespective of the nature of the subject - matter. It was so laid down by a Constitution Bench of five

learned Judges of this Court in Pritam Singh v. State. In that case, it was argued for the appellant that once special leave was granted and the matter was registered as an appeal, the case should be disposed of on merits on all points and that the discretionary power available at the stage of grant of special leave was not available when the appeal was being heard on merits.

20. In view of the above decisions, even though we are now dealing with the appeal after grant of special leave, we are not bound to go into merits and even if we do so and declare the law or point out the error -- still we may not interfere if the justice of the case on facts does not require interference or if we feel that the relief could be moulded in a different fashion. We have already referred to the various circumstances of the case which show that the plaintiff, on her own admission, had knowledge of the trespass in December 1967 and did not raise any objection to the construction of the two rooms though she was the adjacent neighbour. She gave notice only after 7 years in 1974 and she filed suit in 1975. These two rooms have been there for the last 30 years. In those circumstances, we declare the law by holding that the High Court while dealing with a second appeal under Section 100 CPC erred in not framing a substantial question of law and that it also erred in interfering with a pure question of fact relating to the genuineness of the agreement. We declare that this was not permissible in law. Even while so declaring, we hold that in the peculiar circumstances referred to above, this is not a fit case for interference and that in exercise of our discretion under Article 136, -- a discretion which continues with us even after the grant of special leave, -- the decree passed by the High Court dismissing the suit for possession need not be interfered with and the two rooms need not be demolished. The plaintiff could be adequately compensated by way of damages....."

46) In Chandra Singh and Ors. vs. State of Rajasthan and Anr. (2003) 6 SCC 545, a three-Judge Bench, after following the principle in Taherakhaton (supra), held:

"42. In any event, even assuming that there is some force in the contention of the appellants, this Court will be justified in following Taherakhatoon v. Salambin Mohd. wherein this Court declared that even if the appellants' contention is right in law having regard to the overall circumstances of the case, this Court would be justified in declining to grant relief under Article 136 while declaring the law in favour of the appellants.

43. Issuance of a writ of certiorari is a discretionary remedy. (See Champalal Binani v. CIT) The High Court and consequently this Court while exercising their extraordinary jurisdiction under Article 226 or 32 of the Constitution of India may not strike down an illegal order although it would be lawful to do so. In a given case, the High Court or this Court may refuse to extend the benefit of a discretionary relief to the applicant. Furthermore, this Court exercised its discretionary jurisdiction under Article 136 of the Constitution of India which need not be exercised in a case where the impugned judgment is found to be erroneous if by reason thereof substantial justice is being done. [See S.D.S. Shipping (P) Ltd. v. Jay Container Services Co. (P) Ltd.] Such a relief can be denied, inter alia, when it would be opposed to public policy or in a case where quashing of an illegal order would revive another illegal one. This Court also in exercise of its jurisdiction under Article 142 of the Constitution of India is entitled to pass such order which will do complete justice to the parties.

45. This Court said that this principle applies to all kinds of appeals admitted by special leave under Article 136, irrespective of the nature of the subject-matter. So even after the appeal is admitted and special leave is granted, the appellants must show that exceptional and special circumstances exist, and that, if there is no interference, substantial and grave injustice will result and that the case has

features of sufficient gravity to warrant a review of the decision appealed against on merits. So this Court may declare the law or point out the lower court's error, still it may not interfere if special circumstances are not shown to exist and the justice of the case on facts does not require interference or if it feels the relief could be moulded in a different fashion.

46. The observations made in paras 15-20 of Taherakhatoon can be usefully applied to the facts and circumstances of the case on hand."

It is clear from the above decisions, even after issuance of notice in the special leave petition and after grant of leave, irrespective of the nature of the subject matter, the appellants must show that exceptional and special circumstances exists and if there is no interference by this Court substantial and grave injustice will result and that the case has features of sufficient gravity to warrant a decision from this Court on merits.

Conclusion

47) In the light of the above discussion, more particularly, the factual findings rendered by the trial Court and the Appellate Court-High Court in respect of grant of decree for specific performance and application of principle of marshalling under Section 56 of the Transfer of Property Act, we are in entire agreement with the conclusion arrived by the High Court. We have also gone through the elaborate order of the High Court in review petitions filed by the appellants. As a matter of fact, after highlighting the jurisdiction under review, the Division Bench of the High Court had taken pains to discuss once again and rendered a finding on all aspects with which we fully agree. Inasmuch as we are confirming the impugned judgment of the High Court in toto, there is no need to refer the affidavit of undertaking filed by the first respondent herein and the objection raised by the appellants as to the contents of the same. Since we confirm the conclusion and ultimate decision of the High Court, we grant further time of three months from today for deposit of the balance amount as directed by the High Court in paragraph

85. In case defendant Nos. 1 and 2 fail to comply with the said directions in executing the sale deed, the trial Court is directed to execute the sale deed incorporating all the directions and observations made in the judgment of the High Court. Consequently, all the appeals are dismissed as devoid of any merit with no order as to costs.