

(2010) 02 MAD CK 0012

In the Madras High Court

Case No : A.S. No's. 708 of 2008 and 946 of 2009 and W.P. No. 23405 of 2009 and M.P. No's. 1 and 2 of 2008 and M.P. No's. 1 of 2009

A. Ramadas Rao

APPELLANT

Vs

J.P. Builders

RESPONDENT

Date of Decision : 23-02-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 35
Contract Act, 1872 — Section 10
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 3
Specific Relief Act, 1963 — Section 16
Transfer of Property Act, 1882 — Section 56

Citation : (2010) 2 LW 368

Hon'ble Judges : R. Banumathi, J;M.M. Sundresh, J

Bench : Division Bench

Advocate : R. Thiagarajan, in A.S. No. 708 of 2008, Nalini Chidambaram for C. Uma, in A.S. No. 946 of 2009, for the Appellant; R. Thiagarajan in W.P. No. 23405 of 2009 and in A.S. No. 946 of 2009 for Respondent No. 1, Nalini Chidambaram for C. Uma in A.S. No. 708 of 2008 and R4 and R5 in W.P. No. 23405 of 2009 for Respondents No. 1 and 2 Jayesh B. Dolia for Aiyar and Dolia, in A.S. No. 708 of 2008, in A.S. No. 946 of 2009 and in W.P. No. 2340-5 of 2009 for Respondent No. 2 and 3, for the Respondent

Judgement

1. Being aggrieved by the declining of mandatory injunction and also declining cost of Rs. 47,31,931.50ps, the Plaintiff in O.S. No. 336 of 2006

has preferred A.S. No. 708 of 2008.

2. Alleging that agreement of sale is a contingent contract and being aggrieved by grant of decree for specific performance and directing them to

execute the sale deed subject to mortgage, Defendants in O.S. No. 336 of 2006 have filed A.S. No. 946 of 2009 seeking a direction forbearing

the Bank from bringing the schedule property, subject matter of the decree in

O.S. No. 336 of 2006 from bringing it in public auction by Indian Bank - 3rd Defendant in O.S. No. 336 of 2006.

3. The Plaintiff has filed W.P. No. 23405 of 2009 for issuance of writ of mandamus forbearing the Respondents from bringing the petition scheduled property and forming the subject matter of the decree in O.S. No. 336 of 2006 on the file of the Principal District Judge, Chenglepet to auction and for a direction to the 2nd Respondent to accept the payment of Rs. 4,80,48,000 being the remaining sale consideration as per the decree made in O.S. No. 336 of 2005 dated 30.04.2008 and for other reliefs.

4. Since both the Appeals arise out a common judgment and the points raised in the Writ Petition are also connected with the Appeals, the Writ Petition was heard along with the Appeals and the Appeals and Writ Petition stand disposed of by this common judgment.

5. For convenience, the parties are referred to as arrayed in the suit. The facts are not in dispute. The subject matter of the suit is a total extent of

30 acres 86 cents in Senthamangalam village, Sriperumbudur Taluk, Kancheepuram District comprised in 38 items. Defendant Nos. 1 and 2 are

the owners of the suit property, which they acquired under various sale deeds. The sister concern of Defendant No. 1 viz., M/s. Anand Agency

has availed certain financial assistance from 3rd Defendant - Indian Bank and for the facility so extended to M/s. Anand Agency, Defendant Nos.

1 and 2 have offered their various properties including the suit property as security for due repayment of the principal as well as interest payable by

M/s. Anand Agency of which Defendant No. 2 - Paramanandam is the sole proprietor. After negotiations, Ex.A.2 - Memorandum of

Understanding (MOU) was entered into at Chennai on 15.8.2005 for sale of suit property by Defendant Nos. 1 and 2 in favour of Plaintiff for a

consideration of Rs. 14,00,000/- per acre and a sum of Rs. 1,00,000/- was paid as advance by way of Cheque dated 15.8.2005 drawn in favour

of 1st Defendant for sale of suit property by Defendant Nos. 1 and 2 in favour of Plaintiff for a consideration of Rs. 14,00,000/-. Balance sale

consideration was to be paid within three months from the date of obtaining confirmation letter from the Indian Bank, Chennai. Subsequently,

Ex.A.3 agreement of sale was entered into at Chennai on 3.2.2006 between the Plaintiff and Defendant Nos. 1 and 2 incorporating the terms and

conditions governing rights and obligations of the parties. The sale price of Rs. 14,00,000/- per acre was enhanced to Rs. 18,00,000/- per acre

and the Plaintiff had paid a sum of Rs. 24,00,000/- as further advance by Cheque bearing No. 513479 dated 3.2.2006 drawn on Indian Overseas

Bank, Sowcarpet Branch, Chennai and a sum of Rs. 25,00,000/- was paid as advance. The Plaintiff has made further payment of Rs. 50,00,000/-

by cash on 18.4.2006.

6. The case of Plaintiff is that Defendants agreed to retrieve the original documents relating to suit property and agreed to complete the transaction

within six months from the date of production of the original documents by Defendant Nos. 1 and 2. Further case of Plaintiff is that even though he

has paid Rs. 75,00,000/- and ready to pay the balance sale consideration, Defendant Nos. 1 and 2 committed breach of contract and that they

have not discharged the mortgage in favour of the Bank and they have failed to perform their part of the obligations arising out of Ex.A.3 -

agreement of sale. According to Plaintiff, he has deposited Rs. 2,45,00,000/- with Indian Overseas Bank, Sowcarpet Branch and expressed his

readiness and willingness"" to pay the balance sale consideration. Plaintiff sent Ex.A.4 legal notice to the Defendants and the Defendants sent Ex.

A.7 reply making false allegations against the Plaintiff. Alleging that despite issuance of legal notice Defendant Nos. 1 and 2 have failed to perform

their part of the obligations arising out of Ex.A.3 Agreement of sale, Plaintiff has filed suit in O.S. No. 336 of 2006 for specific performance of the

agreement of sale and other reliefs.

7. Admitting the execution of Ex.A.2 - MOU and Ex.A.3-agreement of sale dated 3.2.2006 and also receipt of sale consideration of Rs.

75,00,000/-, Defendant Nos. 1 and 2 have filed written statement contending that the Plaintiff has not offered the balance sale consideration within

the stipulated period on account of which Defendant Nos. 1 and 2 could not negotiate with the Bank for one time settlement (OTS). According to

Defendant Nos. 1 and 2, the suit properties are mortgaged to the Bank and the Bank is now claiming more than Rs. 23 Crores and even if the

decree for specific performance is granted, the 3rd Defendant Bank would not release the documents and as such the relief claimed by the Plaintiff

for specific performance cannot be granted. Defendant Nos. 1 and 2 have also

averred that since the Plaintiff has not come forward in making the payment now there are no chances of OTS. According to Defendant Nos. 1 and 2, having failed to perform his part of contract, the Plaintiff has no right or authority to call upon them to execute the sale deed as per the agreement of sale.

8. The 3rd Defendant - Indian Bank filed written statement setting out in detail about the proceedings initiated as against Defendant No. 1 - J.P.

Builders in O.A. No. 491 of 1999 for recovery of a sum of Rs. 5,51,39,473.88ps. with contractual rate of interest. According to the 3rd

Defendant, a recovery certificate was issued by D.R.T.-I as per which Defendant Nos. 1 and 2 are liable to pay to the Bank a sum of Rs. 1108.52

lakhs. The 3rd Defendant Bank further averred that the Bank has to recover a sum of Rs. 23,19,16,346/- from Defendant Nos. 1 and 2 and Bank

has initiated proceedings to bring the property in auction. The 3rd Defendant Bank further averred that even as per the terms of agreement, it is

subject to the mortgage created in favour of Indian Bank and that the property can be purchased free of encumbrance only after discharging dues

of the Bank.

9. On the above pleadings, trial Court framed five issues. Plaintiff examined himself as P.W.1 and Exs.A.1 to A.13 were marked on the Plaintiff's

side. No oral evidence was adduced by Defendant Nos. 1 and 2. Manager of 3rd Defendant Bank was summoned to appear, who was examined

as D.W.1. Exs.B.1 to B.6 were marked on Defendants' side.

10. Upon consideration of oral and documentary evidence, the learned District Judge negatived the defence plea that the Plaintiff failed to perform

his obligations and thereby committed breach of contract holding that the Plaintiff was ready and willing to perform his part of the contract. Trial

Court partly decreed the suit directing Defendants 1 and 2 to specifically perform their part of the obligations arising out of Ex.A.3 agreement of

sale on receipt of balance sale consideration of Rs. 4,80,48,000/- subject to the mortgage in favour of 3rd Defendant. The trial Court also granted

permanent injunction restraining the Defendants from in any manner alienating or encumbering or dealing with the property either by way of sale,

mortgage, joint development or otherwise. Insofar as the relief claimed in respect of mandatory injunction directing Defendant Nos. 1 and 2 to

discharge the liability payable to the 3rd Defendant in respect of D.R.T.proceedings, the trial Court negated the relief of mandatory injunction.

Being aggrieved, the appeals are preferred by both Plaintiff as well as Defendant Nos. 1 and 2.

11. We have heard Mr. R. Thiagarajan, learned Counsel for Plaintiff and Ms. Nalini Chidambaram, learned Counsel appearing for Defendant Nos.

1 and 2 and Mr. Jayesh Dolia, learned Counsel appearing for the 3rd Defendant Bank.

12. It is not in dispute that under Ex.A.2 MOU, the Plaintiff and Defendant Nos. 1 and 2 have entered into Ex.A.2 MOU dated 15.8.2005 under

which Defendant Nos. 1 and 2 agreed to sell the suit property at Rs. 14,00,000/- per acre and that a sum of Rs. 1,00,000/- was paid as advance.

Equally, there is no dispute that Defendant Nos. 1 and 2 have entered into Ex.A.3 Agreement of sale on 3.2.2006 and that the Plaintiff has paid

further advance of Rs. 24,00,000/- by way of Cheque dated 3.2.2006. Further payment of Rs. 50,00,000/- made by cash on 18.4.2006 is also

not disputed by Defendant Nos. 1 and 2. That would have been a simple suit for specific performance has become complex because of subsisting

loan and proceedings initiated by the 3rd Defendant Bank for recovery of borrowed amount. 3rd Defendant Bank has filed O.A. No. 491 of 1999

for recovery of a sum of Rs. 5,51,39,000/- in which final orders were passed by Debt Recovery Tribunal and Recovery Certificate was issued for

a sum of Rs. 1108.52 lakhs. The 3rd Defendant Bank has taken steps to bring the mortgaged property including the suit property for sale.

13. According to the Plaintiff, Defendant Nos. 1 and 2 did not fulfil their contractual obligations and thereby committed breach of contract. Per

contra, Defendant Nos. 1 and 2 alleged that the Plaintiff has to pay the balance sale consideration of Rs. 4,80,48,000/-and that the Plaintiff was

responsible for breach of contract and the trial Court failed to appreciate the conduct of the Plaintiff in committing breach of contract.

14. Learned Senior Counsel Ms. Nalini Chidambaram appearing for Defendant Nos. 1 and 2 contended that contract depends on uncertain event

i.e., Banker giving confirmation letter and the performance of contract is depending upon the uncertain event and therefore the contract is a

contingent contract impossible of performance. It was further contended that the trial Court granted decree for specific performance subject to

mortgage, which remains unchallenged and while so the prayer directing Defendant Nos. 1 and 2 to discharge the loan amount to the Bank is highly misconceived.

15. Drawing our attention to evidence and judgment of trial Court, learned Counsel for Plaintiff Mr. Thiagarajan submitted that the Plaintiff has been duly pursuing performance of his obligations and was always having ready cash to complete the sale. It was further contended that amount deposited in the Bank for payment towards sale consideration is still lying in the Bank and Court below has rightly granted a decree for specific performance. Insofar as declining relief of mandatory injunction it was contended that when Defendant Nos. 1 and 2 have agreed to liquidate their liability, the trial Court ought to have granted mandatory injunction directing the Defendants 1 and 2 to discharge the loan from out of the balance consideration. Insofar as declining of costs, placing reliance upon number of decisions, the learned Counsel submitted that costs shall follow the event and the successful party is entitled to costs and while so the Court below erred in not awarding costs to the successful Plaintiff.

16. Upon analysis of evidence and rival contentions, the following points arise for consideration:

(i) Whether the trial Court is right in passing the decree for specific performance subject to mortgage in favour of 3rd Defendant Bank?

(ii) Whether the contract is a contingent contract and whether it cannot be implemented?

(iii) Whether Plaintiff is right in insisting upon grant of mandatory injunction to direct Defendants No. 1 and 2 to discharge the liability proportionately?

(iv) Whether the right of marshalling is available to a decree holder in a suit for specific performance?

(v) Whether the trial Court was justified in deviating from the normal rule "costs shall follow the event"?

(vi) To what relief the Plaintiff is entitled to?

17. "Readiness and willingness":

We have given anxious consideration to the rival contentions. Section 16(c) of the Specific Relief Act postulates "readiness and willingness" on the part of the Plaintiff. It is a condition precedent for obtaining relief of grant of

specific performance. 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 to the time of hearing. The onus is on the Plaintiff although in the absence of any evidence to the contrary it may be easily discharged. The requirement of law is two fold. (i) that the Plaintiff must aver in the plaint and (ii) that he must prove by evidence that he has always been ready and willing to perform his part of the contract.

18. In 2002 3 L.W.5 (Manjunath Anandappa Urf.shivappa Hanasi v. Tammanasa and Ors.), the Supreme Court held that "readiness and willingness" cannot be treated as a straight jacket formula by observing thus:

13. It was held in the case of R.C. Chandiok and Another Vs. Chuni Lal Sabharwal and Others, 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. Finally, we have no hesitation to hold that the pleading as made by the Plaintiff not only shows his "readiness and willingness" to perform his part of the obligation under the contract but by tendering the total amount shows he has performed his part of the obligation. We also construe such a plea to be a plea of "readiness and willingness" as required u/s 16(c)....

19. In 99 L.W. 239 (V.Y. Rethinasabapathi Pillai v. T.R. Sriramulu Chettiar), Division Bench of this Court held as follows:

The requirement u/s 16(c) of the Specific Relief Act has got a legal ethic behind it and that is, in a suit for specific performance, the Plaintiff must have treated and is required by Court to treat the contract as still subsisting and it is only to bring out the stand of the Plaintiff, he is enjoined to make the requisite averments that he is ready and willing to perform the essential part of the contract.

Compliance with Section 16(c) of the Specific Performance Act is not an empty formality. It is a mandate of the statute. Irrespective of whether the opposite party raises a contention or not with regard to compliance with S. 16(c), it is the duty of the court to advert to this aspect to find out compliance or otherwise, and when there is non-compliance with this statutory mandate, to decline to grant specific performance. Lack of plea by

the other side and lack of formulating an issue over the same shall not absolve the Court from its duty to advert to this statutory mandate to find out

compliance or non-compliance with it, and in the latter case, the Court is left with no other alternative but to dismiss the suit.

Readiness to perform, must be established throughout the relevant points of time.

20. It is well settled that pleading and proof of ""readiness and willingness"" is a mandatory requirement to obtain decree for specific performance.

The words ""readiness and willingness"" to perform the part of the contract has to be determined from the conduct of the parties. The acts of

performance of which or the readiness to perform must be shown by the Plaintiff.

21. Keeping the above principles in the mind, we have analysed the evidence and the findings of the trial Court. Learned Senior Counsel Ms.

Nalini Chidambaram appearing for Defendant Nos. 1 and 2 submitted that the lower Court failed to appreciate the two cardinal principles viz.,

willingness and readiness, which are mandatory in a suit for specific performance and which is required to be fulfilled by the Defendants and the

Plaintiff miserably failed to prove that he had fulfilled his obligations both under Ex.A.2 MOU and Ex.A.3 -agreement of sale.

22. Learned Senior Counsel Ms. Nalini Chidambaram further contended that the agreement of sale dated 3.2.2006 entered by the Defendants

with Plaintiff consists of reciprocal promises and the reciprocal promise of Plaintiff is that he has to advance necessary monies towards the sale

consideration to the Defendants 1 and 2 to enable them to settle the loan amount with the Bank and only then the 3rd Defendant Bank would

release the original title deeds pertaining to the suit property. The learned Senior Counsel would further submit that the Plaintiff having failed to fulfil

his set of obligations under the sale agreement, Defendant Nos. 1 and 2 are not bound to convey the suit property in favour of the Plaintiff.

23. As held in 99 L.W. 239 (V.Y. Rethinasabapathi Pillai v. T.R. Sriramulu Chettiar), the principle is well-settled that in considering whether a

person is willing to perform his part of the contract, the sequence in which the obligations under the contract are to be performed must be taken

into account and if under the terms of the contract the obligations of the parties have to be performed in a certain sequence, one of the parties to

the contract cannot require compliance with the obligations by the other party without in the first instance performing his own part of the contract

which, in the sequence of obligations, is per-formable by him earlier.

24. In Ex.A.3 agreement, recitals are to the effect that to discharge the bank loan and for business purpose of the vendors, the vendors have

decided to sell the properties and offered the same to the Plaintiff and the Plaintiff has agreed to purchase the property. In the recitals in Ex.A.3, it

is further stated that Defendant Nos. 1 and 2/ vendors have undertaken to discharge the loan and hand over the original title deeds relating to the

suit property to the Plaintiff within three months from the date of agreement (3.2.2006) for scrutiny of title. Further covenant was that the Plaintiff

has to pay further advance, if any, required by the vendors to release the documents from the Bank. According to the Plaintiff, Defendants No. 1

and 2 have agreed to liquidate the liability and hand over the original title deeds and for liquidating the Bank liability, the Plaintiff has paid Rs.

50,00,000/- on 18.4.2006.

25. From Ex.B.2 letter from 3rd Defendant Bank, it is seen that the 2nd Defendant had given OTS proposal on 1.2.2006 expressing his

willingness to go for OTS for Rs. 148 lakhs. It is also seen from Exs.B.3 and B.4 that the 2nd Defendant has also given OTS offer letters dated

26.4.2006 and 15.4.2006. In Ex.B.3 (26.4.2006), the 3rd Defendant Bank has expressed its inability to consider OTS offer for Rs. 148 lakhs

under Bank compromise settlement scheme stating that the amount offered is well below the minimum recoverable amount and declined to accept

OTS proposal. It is seen from Ex.B.4 (15.5.2006) that the Bank has stated that the OTS will be accepted if the offer is given for Rs. 629.60 lakhs

by working out compound interest at 11 percent.

26. As we have pointed out earlier that on 18.4.2006 the Plaintiff has paid further advance of Rs. 50,00,000/-. In his oral evidence, P.W. 1/

Plaintiff has stated that he was always ready with the money and that he has also been pursuing the OTS proposal. The Plaintiff has been duly

pursuing the OTS along with Defendant Nos. 1 and 2, as seen from Ex.B.4, which contains reference as ""CC/ARMB/RAO/06/2006"". The

evidence of Plaintiff that he was always ready and willing to perform his part of the contract and that he was also corresponding with the Bank

remains unchallenged. Defendant Nos. 1 and 2 have not gone into the witness box and no evidence was adduced to contradict the version of Plaintiff.

27. Contending that the Plaintiff was not ready and willing to perform his part of obligations, Ms. Nalini Chidambaram learned Senior Counsel

submitted that as per Clause 4 in Ex.A.2 MOU, the balance sale consideration has to be paid within one week and absolutely there is no material

to show that the Plaintiff was ready with money within one week after MOU (15.8.2005). It was further contended that as per the terms of MOU,

Plaintiff has to pay the amount to clear the Bank loan and without paying the amount within the stipulated period, the Plaintiff has committed breach

of obligations and while so the Plaintiff cannot insist upon performance of set of obligations by the Defendants, which would arise only after

performance of Plaintiff's obligations. The learned Senior Counsel laid emphasis to contend that the Plaintiff has committed breach of his

obligations by placing reliance on Clauses 4, 6 and 7 of Ex.A.2 MOU.

28. The contention of learned Senior Counsel cannot be countenanced. It is for the reason that Ex.A.2 MOU was superseded by Ex.A.3

agreement of sale (3.2.2006). Of course, Defendant Nos. 1 and 2 have entered into agreement to sell the suit property to discharge the Bank

debts and for the business purpose of the vendors. The undertaking of Defendant Nos. 1 and 2 to discharge loans and hand over the original title

deeds has been reiterated both in Exs.A.2 and A3. As discussed infra, in Clause (4) of Ex.A.3, Defendant Nos. 1 and 2 have undertaken to

discharge the loans and hand over the original title deeds. In the sequence of obligations, the first obligation is upon Defendant Nos. 1 and 2 to

discharge the loans and hand over the original title deeds. Then only the obligation cast upon the Plaintiff comes to the fore. In Ex.A.3, the

covenant upon the Plaintiff was that he has to pay further advance, if any, required by the vendors to release the documents from the Bank. On the

date of Ex.A3, the Plaintiff has paid further advance of Rs. 24,00,000/- and on 18.4.2006, he has paid Rs. 50,00,000/-. It is not the case of

Defendant Nos. 1 and 2 that they demanded money and that the Plaintiff has not responded. The evidence of P.W.1 with regard to the terms of

the contract and his readiness with money and willingness to perform the

contract remains unchallenged.

29. In his evidence, P.W.1 has stated that he was having ready cash. The Plaintiff has also produced Ex.A.11 Fixed Deposit Receipt (F.D.R)

dated 19.4.2006 in his name in Indian Overseas Bank, Sowcarpet Branch, Chennai for Rs. 2,45,00,000/- with date of maturity as 18.7.2006.

Ex.A.12 is the Certificate issued by Indian Bank, Alwarpet Branch, Chennai stating that the Plaintiff is maintaining SB account No. 726244658 in

their bank and the balance as on 20.4.2007 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 21.4.2007. Exs.A.11 to A. 13 coupled with oral evidence of

P.W.1 would amply show that the Plaintiff was having cash and financial capacity to complete the transaction. In the sequence of obligations it

cannot be said that the Plaintiff was not ready with the cash.

30. By careful reading of recitals in Ex.A.3, in our considered view, in the sequence of obligations, the first obligation is upon Defendant Nos. 1

and 2 to discharge the loan, of course from out of the money paid by the Plaintiff. On the date of Ex.A.3, the Plaintiff has paid Rs. 24,00,000/-

apart from Rs. 1,00,000/- already paid under Ex.A.2 MOU. On 18.4.2006, Plaintiff has paid further advance of Rs. 50,00,000/-. As we have

pointed out earlier it is not the case of Defendants No. 1 and 2 that they have asked for further advance and that the Plaintiff did not respond.

31. It was mainly contended that for effecting OTS, even though the Plaintiff has deposited a sum of Rs. 10,01,000/- in the ""no lien account"" of the

2nd Defendant, the Plaintiff has surreptitiously withdrawn the said amount, which has upset the settlement talks between Defendant Nos. 1 and 2

and the 3rd Defendant Bank. As per Clause 4 of Ex.A.2 - MOU, the Plaintiff has agreed to pay further advance to Defendant Nos. 1 and 2 to

enable them to pay and clear the Bank loan obtained by M/s. Anand Agency, wherein Defendant No. 1 - J.P. Builders have stood as guarantors

to the said loan. In Ex.B.1 letter addressed to the Assistant General Manager of 3rd Defendant Bank, Plaintiff has stated that he has deposited Rs.

10,01,000/- in a ""no lien account"" towards M/s. Ananda Agency and that he has proposed to purchase the property from them which was

mortgaged to the Bank and on acceptance of the compromise settlement, the

amount can be appropriated towards the compromise settlement. In

Ex.B.1, the Plaintiff has further stated that if the compromise settlement is not reached the deposit may be released to him.

32. In the meanwhile, Defendant Nos. 1 and 2 have submitted their proposal for OTS offering Rs. 148.00 lakhs as one time settlement of their

dues. In Ex.B.2 letter dated 14.4.2006 addressed to Defendant No. 2, the Bank has clearly stated that the proposal at Rs. 148.00 lakhs as one

time settlement is not acceptable to them. In Ex.B.2 letter addressed to the 2nd Defendant, the Bank has also stated that the amount of Rs.

10,01,000/- as 10 percent of offer of Rs. 100,00,000/- was withdrawn by the depositor (Plaintiff) during November 2005 itself. The contention of

Defendant Nos. 1 and 2 is that the Plaintiff has withdrawn surreptitiously a sum of Rs. 10,01,000/- which has upset the settlement talks between

the Plaintiff and the Banker. In our considered view, withdrawal of Rs. 10,01,000/- deposited for the ""no lien account"" by the Plaintiff in

November 2005 has no significance, since subsequently the parties have entered into Ex.A.3 Agreement of sale on 3.2.2006 and on which date

the Plaintiff has also paid further advance of Rs. 25,00,000/-. In his evidence, the Plaintiff/P.W.1 has also stated that since the proposal for OTS

did not fructify, he has withdrawn deposit of Rs. 10,01,000/- and that he has also orally informed the same to Defendant Nos. 1 and 2.

Absolutely, there is no rebuttal evidence on this aspect.

33. As we pointed out earlier, in Ex.B.2 letter dated 14.02.2006, the Banker has informed the 2nd Defendant that the Plaintiff has already

withdrawn the amount of Rs. 10,01,000/-. After receipt of Ex.B.2, Defendant Nos. 1 and 2 have not raised any protest but only proceeded to

receive further advance of Rs. 50,00,000/- from the Plaintiff on 18.4.2006 and made endorsement in Ex.A.3 agreement. In our considered view,

withdrawal of Rs. 10,01,000/- from ""no lien account"" of Anand Agency by the Plaintiff would not lead to the conclusion that the Plaintiff was not

ready to perform his part of the contract.

34. The Plaintiff having proved execution of agreement and payment of part of sale consideration and having cash and financial ability to get the

sale deed executed, we have no hesitation in holding that the Plaintiff has proved his readiness and willingness to perform his part of the obligations

under the contract. The finding of trial Court as to readiness and willingness of the Plaintiff to perform his obligation is to be confirmed.

35. Of course, the Plaintiff has kept the money in fixed deposit in his own name and also in his Savings Bank Account and he has not deposited in

Court. While granting decree for specific performance, trial Court has also not directed the Plaintiff to deposit the balance sale consideration. Law

does not enjoin the party seeking specific performance of contract to deposit the amount in the Court unless directed by the Court. No adverse

inference can be drawn against the Plaintiff for not depositing the amount in the Court, whereas the Court did not give any direction to deposit the

amount. However, we have kept in view the non-deposit of the amount in the Court and deprivation of interest payable to Defendant Nos. 1 and 2

for issuing suitable directions, which we would elaborate shortly.

36. Re. Contention - Contingent contract:

Contending that the contract was depending upon uncertain future event of the Indian Bank agreeing for OTS, learned Senior Counsel Ms. Nalini

Chidambaram submitted that the contract is contingent on the Indian Bank giving a letter specifying the balance due to the Bank and an undertaking

letter from the Bank that it will receive the said balance amount and they will hand over the original documents directly to the Plaintiff. It was further

argued 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 is the pre-requisite envisaged as per Clauses 4, 6 and 7 of Ex.A.2 MOU, which read as under:

...4. The Party of the Second Part hereby further agree that he will pay the further advance to the Parties of the First Part, so as to enable them to

Pay And Clear The Bank Loan obtained by the sister concern of the Parties of The First Part namely M/s.Anand Agency, wherein the

J.P.BUILDERS have stood guarantors to the said loan after the PARTIES OF THE FIRST PART produce a Letter from the said INDIAN

BANK, Chennai, in respect of the Loan and balance amount payable to them, with regard to the said Loan and further undertaking letter by the

BANK to the effect that they will, after receiving the said balance of amount to be mentioned in the said letter, they will hand over all the

ORIGINAL DOCUMENTS OF TITLE, directly to the PARTY OF THE SECOND PART.

Further, the party of the second part undertake to

pay the said amount to be mentioned/arrived by the Bank within a week from the receipt of such letter from the Bank. (CONFIRMATION

LETTER FROM INDIAN BANK, CHENNAI) FROM AND OUT OF THE SALE CONSIDERATION.

5...

6. THE SALE SHALL BE COMPLETED within 3 months from the date of obtaining CONFIRMATION LETTER FROM THE INDIAN

BANK, CHENNAI and produce the same to the party of the second part.

7. THE PARTIES OF THE FIRST PART undertake to produce the CONFIRMATION LETTER as stated supra within 45 days FROM THIS

DATE and on receipt of the said letter, the PARTIES herein have agreed to enter into a REGULAR SALE AGREEMENT, incorporating all the

terms and conditions.

37. Learned Senior Counsel submitted that not only the Indian bank refused to give letter of undertaking accepting OTS offer of Rs. 148 lakhs, but

also pursued D.R.T. Proceedings and got a decree for Rs. 11,08,51,825.29, which is more than the sale consideration. It was further argued that

the contract became void since it was depending on the letter of undertaking to be given by the Indian Bank on the amount due and release of

original documents and the said event of getting letter of undertaking and release of original documents became impossible on account of dispute

with reference to the amount payable on compromise settlement.

38. The contention that the contract is unenforceable because of Clauses 4, 6 and 7 is unacceptable. After the parties entered into Ex.A.3 fresh

agreement of sale, Clauses 4, 6 and 7 of Ex.A.2 - MOU would not govern the parties. As per Clause 4 of Ex.A.3, the vendors have undertaken

to discharge the loans and hand over the title deeds. Clauses 3, 4 and 6 in Ex.A.3 read as under:

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...

The parties are governed by the above terms and conditions in Ex.A.3 agreement of sale. Defendant Nos. 1 and 2 cannot fall back upon terms of

Ex.A.2 - MOU. Nowhere in Ex.A.3, it is stated that the terms and conditions incorporated in Ex.A.2 would form part of Ex.A.3. Based upon

Clauses 4, 6 and 7 of Ex.A.2 MOU, it cannot be contended that the contract was a contingent contract depending upon the letter of confirmation

to be issued by the Indian Bank.

39. There is a clear difference between a contract creating a personal obligation but postponing its performance to a future date and a contract

creating no personal obligation at all, but arising by reason of some condition being complied with or some contingency occurring in future. In the

instant case, the vendors have agreed to sell the suit property, but agreed to execute the sale deed after discharge of the mortgage in favour of the

3rd Defendant. The contract of sale was not contingent; it was only the execution of sale deed which was postponed to a future date. Terms of

Ex.A.3 do not indicate that the execution of the sale deed is a dependant upon acceptance of OTS proposal by the 3rd Defendant Bank. In our

considered view, the differences between the Bank and Defendant Nos. 1 and 2 as to the OTS proposal did not make the contract contingent. It

was always open to Defendants Nos. 1 and 2 to accept the OTS proposal for Rs. 629.60 lakhs. While so, the obligations under Exs.A2 and A3

cannot be frustrated by vendors' own wrong.

40. In Ex.A.3 agreement, Defendant Nos. 1 and 2 had agreed to do certain acts and things i.e., to discharge the loans and hand over original title

deeds to the Plaintiff. That is always an implied covenant on the part of the vendor to do all things and also to hand over the original title deeds

necessary to transfer the property. The terms agreed upon between the Plaintiff and Defendant Nos. 1 and 2 do not show that it is a contingent

contract.

41. In Raghunath Rai and Another Vs. Jageshwar Prashad Sharma and Another, , a decision before the Delhi High Court, the seller was required

to obtain No objection Certificate and income tax Clearance. Seller had intimated to purchaser his inability to sell on ground that he could not get

no objection certificate"" and title deeds from the Bank where the property was mortgaged. In those circumstances, the Delhi High Court held that

the contract did not come to end on that ground, such contract is not a contingent contract and the Court has jurisdiction to order the vendor to

apply to such authority within specified period by observing as follows:

...14. Section 37 of the Contract Act casts an obligation on the parties to the contract to perform or to offer to perform their respective promises.

Section 10 of the Contract Act provides what agreements are contracts and enforceable in law.

15. it is not the case of the Defendant that the contract was void or voidable at the time of execution of the agreement to sell at the instance of the

Defendant No. 1 for any of the grounds enumerated in the Contract Act.

16. The terms agreed upon also do not show that it was also a contingent contract giving the option to the seller to avoid the contract on the

happening or non-happening of any event. The conditions to be fulfilled by the Defendant/seller are also not impossible of performance. As such

the Defendant could not avoid the agreement on his own ipse dixit for nonperformance of the terms on his part as agreed for the alleged reasons.

17. In the agreement to sell Defendant had agreed to do certain acts and things. There is mostly always an implied covenant on the part of the

vendor to do all things necessary to give effect to the agreement, including the obtaining of the permission or clearance for the transfer of the

property-. The law is well settled that if the vendor agrees to sell the property which can be transferred only with the sanction of some Government

authority, the Court has jurisdiction to order the vendor to apply to such authority within a specified period, and if the sanction is forthcoming to

convey the property to the purchaser within a certain time. (See AIR 1930 287 (Privy Council); Mrs. Chandnee Widya Vati Madden Vs. Dr.

C.L. Katial and Others, ; and Rojasa Ramjibhai Dahyabhai v. Jani Narottamdas lallubhai (dead by L Rs.) AIR 1986 SC 1912.

42. Of course, in this case, Defendant Nos. 1 and 2 had offered OTS for Rs. 148 lakhs. In turn, the Bank responded saying that the OTS

proposal would be accepted if the offer is made for Rs. 629.60 lakhs. It was not

impossible of performance. Defendants 1 and 2 could have very well performed their part of obligations by accepting the offer of Rs. 629.60 lakhs or further negotiating with the Bank. Absolutely there is no evidence as to what was the subsequent conduct of the Defendant Nos. 1 and 2 after the offer by the Bank. In any event, merely because Defendant Nos. 1 and 2 could not get their OTS proposal accepted by the Bank, contract did not come to an end on that ground. In our considered view, the contract of sale having been partially performed by the parties and acted upon by both parties the contract is capable of performance. The contention of learned Senior Counsel that the contract is a contingent contract and is incapable of performance cannot be sustained.

43. Whether the Plaintiff is entitled to discretionary relief:

It is well settled principle that the ordinary rule is to grant specific performance. Grant of decree for specific performance is one of discretion of the Court. The Court has to see all the attendant circumstances. It could be denied only when equitable consideration points to its refusal and the circumstances show that damages would constitute adequate relief.

44. In the decision of Parakunnam Veetil Joseph's Vs. Nedumbara Kuruvila's and Ors, , it was held by the Supreme Court as under:

Section 20 preserves judicial discretion to Courts as to decreeing specific performance. The Court should meticulously consider all facts and circumstances of the case. The Court is not bound to grant specific performance merely because it is lawful to do so. The motive behind the litigation should also enter into the judicial verdict. The court should take care to see that it is not used as an instrument of oppression to have an unfair advantage to the Plaintiff

45. Again in P.R. Gopal v. M. Rajeswari (2008) 7 MLJ 164 it is observed by the Supreme Court as under:

Relief of specific performance is an equitable relief and the Court has to see all the circumstances attendant. Any person seeking the benefit of specific performance of contract must manifest that his conduct has been blemishless throughout entitling him to the specific relief. Therefore, when the Plaintiff has not shown any blemishless conduct to entitle her for the specific relief as prayed for, the suit for specific performance by the Plaintiff

ought to be declined

46. The Supreme Court in A.C. Arulappan Vs. Smt. Ahalya Naik, held thus:

In Gobind Ram Vs. Gian Chand, , it was observed in para 7 of the judgment that grant of a decree for specific performance of contract is not

automatic and is one of the discretions of the court and the court has to consider whether it would be fair, justice and equitable. The Court is

guided by the principles of justice, equity and good conscience.

47. Applying the ratio of the above decisions, when we consider the case on hand, there is nothing to suggest that the Plaintiff has acted unfairly

and that he was not willing to perform his part of the contract. The Plaintiff has proved that he has partially performed his part of the obligations by

paying advance amount of Rs. 25,00,000/-plus Rs. 50,00,000/-. The Plaintiff has also proved his ready cash and financial ability to complete the

sale transaction. The trial Court was right in granting the decree for specific performance, which of course, is subject to the mortgage to the Bank.

48. Tender of money/deposit of balance sale consideration:

At the time when the suit was filed in August 2006, the Plaintiff did not deposit the balance sale consideration of Rs. 4,80,48,000/- to the credit of

suit, though the Plaintiff had the money in his Savings Bank Account fixed deposit. Having held that the Plaintiff has been ready and willing to

perform his part of contract and he also had ready cash, when the suit was decreed by the trial Court, having granted decree for specific

performance, trial Court ought to have directed the Plaintiff to deposit the balance sale consideration of Rs. 4,80,48,000/-.

49. The Plaintiff had money and financial ability to pay the balance sale consideration, but he has not chosen to deposit the balance sale

consideration to the credit of the suit. Had the Plaintiff deposited the money in the Court, on investment, the balance sale consideration would have

fetches considerably good amount as interest, which would have accrued to the benefit of the Defendants and also the Bank. Had he deposited the

money, probably, Bank might have withdrawn the money adjusted towards the loan amount thereby the burden of interest on Defendant Nos. 1

and 2 might have been considerably reduced. Had the Plaintiff deposited the amount, the things might have taken a different turn.

50. Learned Counsel for the Plaintiff Mr. Thiagarajan submitted that the amount

deposited by the Plaintiff in Fixed Deposit in his name is now matured to more than Rs. 5 Crores and that the Plaintiff is ready to pay the said amount. In our considered view, the Defendant Nos. 1 and 2 have been deprived of benefit of accrued interest apart from being cast the burden of paying accrued interest to the Bank. In such facts and circumstances of the case, keeping in view escalation of prices of lands, in our considered view, the Plaintiff has to be directed to pay the balance sale consideration of Rs. 4,80,48,000./- with interest at 18 percent per annum from the date of filing of the suit i.e., 30.8.2006 till the date of deposit. The Plaintiff is directed to deposit the balance sale consideration along with interest within a period of eight weeks.

51. DRT Proceedings in O.A. No. 491 of 1999:

As pointed out earlier, the 3rd Defendant Bank filed O.A. No. 491 of 1999 for recovery of Rs. 5,51,39,000/- with contractual rate of interest from the date of application till the date of payment in full. The Debt Recovery Tribunal (DRT) passed final orders allowing the Original Application and issued a Recovery Certificate to the effect that the Defendant Nos. 1 and 2 are liable to pay the Bank a sum of Rs. 1108.52 lakhs. In the above D.R.C.102 of 2009, DRT brought the properties for sale fixing the date of auction on 25.11.2009 fixing upset price at Rs. 27.00 Crores. The Plaintiff moved W.P. No. 23405 of 2009 and by order dated 16.11.2009 the Court has passed interim order directing Recovery Officer to proceed with the sale fixed on 25.11.2009 giving liberty to the Plaintiff to participate in the auction. The Plaintiff/Appellant preferred SLP before the Supreme Court of India and the Honourable Supreme Court declined to interfere with the matter and issued direction to dispose of the Appeals and the connected Writ Petition expeditiously.

52. The Plaintiff filed application before the DRT, Chennai to defer the auction on the ground that the Bank is entitled to only a sum of Rs. 12 Crores and there was no necessity for the Bank to bring the entire property of 30 Acres for sale and to release the suit schedule property. On behalf of the Plaintiff, learned Counsel Mr. R. Thiagarajan contended that Defendant Nos. 1 and 2 have mortgaged other properties apart from the suit schedule property and it was alleged that Defendant Nos. 1 and 2 had colluded together to deprive the Plaintiff from enjoying the decree for

specific performance in his favour. It was further argued that instead of bringing other properties to auction sale to, deprive the Plaintiff from

enjoying the decree, Defendant Nos. 1 and 2 and the Bank, in collusion with each other, notified the suit property for sale. However, the sale to be

held on 25.11.2009 was postponed for want of bidders.

53. In D.R.C. No. 102 of 2009, DRT dismissed the Interlocutory Applications observing that the agreement of sale between the Plaintiff and

Defendant Nos. 1 and 2 is subsequent to the mortgage in favour of 3rd Defendant Bank and that Court has decreed the suit for specific

performance in favour of the Plaintiff only subject to the mortgage rights of the 3rd Defendant Bank and while so, Plaintiff cannot insist upon

releasing the suit property from sale.

54. Learned Counsel for 3rd Defendant Bank Mr. Jayesh Dolia submitted that earlier Recovery Officer brought the property - 20 acres for sale

fixing the upset price at Rs. 14.70 Crores. Thereafter the borrowers/ Defendant Nos. 1 and 2 filed application before the Recovery Officer stating

that the demarcation of the property will cause loss to them and requested the Recovery Officer to bring the entire extent of land and also given

their consent to waive the statutory period of thirty days notice to put it in auction with regard to entire extent of land measuring 30 acres. On joint

proposal by Defendant Nos. 1 and 2, the Bank had no objection for the same. The Bank appears to have changed its earliest stand and appears

to be soft peddling towards the borrowers. Noting the volte-face of the bank, the DRT in its order dated 8.2.2010 observed as under:

The Respondent Bank which was stoutly opposing the Petitioner's (borrower) claim for cancellation of notified sale dated 9.2.2010 and

vehemently insisting for proceeding with the notified sale has now took a somersault to state in their letter dated 8.2.2010 in the following words:

... We tried out level best to demark the land in the above suggested way. But one way or other, it is obstructing the marketability and hence we

have filed out affidavit to bring the entire land extent of Ac.30 and 18 cents in one lot as prayed by the Certificate debtor and to avoid the conflict

of access or approach-way for the remaining land as opined by RO/DRT....

Upon consideration of such proposal, the DRT passed the order directing sale of 19.99 Acres, which has direct access from Bangalore-Chennai

National Highways.

55. The trial Court has granted the decree for specific performance subject to mortgage created in favour of Bank. The Plaintiff was unsuccessful

in his application before DRT that it was not necessary to bring all the properties for sale and defer the sale of entire extent of property, which was

declined by the DRT. While granting decree for specific performance subject to charge, trial Court observed that the 3rd Defendant (Bank) is

having a charge over the property and the sale could be only subject to the charge of the 3rd Defendant Bank. The trial Court further observed

that in the context of the amount payable to the Bank, which is higher than the sale price required to be payable to the Bank, Plaintiff's claim for

issuance of mandatory injunction requiring Defendant Nos. 1 and 2 to settle the loan was not accepted by the trial Court. Though the Trial Court

granted decree for specific performance, which is subject to mortgage in favour of the Bank, subsequent events and the stand of the parties even

with decree for specific performance, the chances of Plaintiff getting any relief appears to be very remote.

56. Two things are relevant to be noted:

Not only the suit properties were mortgaged to the 3rd Defendant Bank, but number of other properties including prime properties in Chennai city

were also mortgaged by Defendants No. 1 and 2. Schedule "A" comprises of flats in Nungambakkam High Road; Schedule "B" is 2 grounds and

100 sq.ft. in R.S. No. 3884/2 of Mylapore; Schedule "C" comprises of number of items of properties in Pappankuzhi village, Sriperumbudur

Taluk and also prime property at Np.7/2, J.P. Towers, 9th Floor admeasuring an extent of 3700 sq.ft., comprised in R.S. No. 146 situated within

the Registration District of Madras and Sub-District T. Nagar; Schedule "D" comprises of 44 items which include 38 items of suit properties apart

from other items of properties in Sendamangalam and Papankuzhi villages and the property situate at No. 7/2, J.P. Towers, Ground Floor,

Nungambakkam High road, Chennai - 34 measuring an extent of 5000 sq.ft. comprised in R.S. No. 146 situate within the Registration Sub-

District of T. Nagar and Registration District of Madras.

Even though prime properties in Chennai worth several crores have been mortgaged, those properties are not brought for sale. Apart from the suit

properties, the D - Schedule of mortgaged properties also comprises of Survey Nos. 31/1B, 32/6B, 31/1A1, 32/6B, 31/1E1 and 31/1A3 and

those properties are also not brought for sale.

57. Before the DRT, earlier 20.47 Acres leaving aside remaining lands of an extent of 9.99 acres in Sendamangalam village was notified for sale.

As we pointed out earlier, before the DRT, the borrowers/Defendant Nos. 1 and 2 filed petition stating that the entire land is situated in a prime

industrial locality viz., Sriperumbudur abutting the National High Way and therefore demarcation would result in blocking the entire remaining lands

and leaving no approach way to reach the remaining lands and that would cause loss and hardship to the borrower in getting marketability with

better price for the said remaining lands and Defendants No. 1 and 2 prayed to bring the entire extent of 30.18 Acres in "D" Schedule for sale.

58. Upon consideration of the applications filed by the borrowers, DRT found that Schedule "D" consists of 49 items of distinct lands with

different dimensions and even as per the valuation given by the Bank, it was around Rs. 27 Crores as against the debt of Rs. 11.08 Crores payable

by the borrowers. The DRT found that the entire extent would fetch huge amount and it is sufficient to notify sale of part of the property by

demarcating which would be sufficient to satisfy the Bank debt. On those findings, DRT has divided entire "D"- Schedule lands as 19.99 Acres

with the approach way on the Bangalore - Chennai Highway and 10.19 Acres with approach way on the Podavur Tar Road. Taking the valuation

given by 3rd Defendant bank, DRT observed that 19.99 Acres having access from Bangalore - Chennai High Way would fetch approximately Rs.

14 Crores and the latter would fetch the value of Rs. 7 Crores. Considering the debt payable under the Recovery Certificate, which is

approximately Rs. 12 Crores, DRT has ordered sale of 19.99 Acres which has approach way on the Bangalore - Chennai Highways. By perusal

of the plan, the said Rs. 19.99 Acres notified for sale includes S. Nos. 23/7A2, 23/7C1, 23/7C2 and 23/7D, which are Items 35 to 38 of the suit

property. By the order of the DRT ordering sale of 19.99 Acres having approach way from Bangalore - Chennai National High Ways, even if

Plaintiff gets sale deeds for the suit property, the Plaintiff would be deprived of any access to the National High Ways. We also find that in the said

Ac. 19.99 notified for sale by DRT, most of the items of the suit property have been included.

59. This Court is not oblivious of escalation of prices in Metropolitan cities like Madras and also in the industrial areas like Sriperumbudur abutting

Madras. Because Sriperumbudur has now become a prime industrial area in the State, prices of the lands had gone up. If 19.99 Acres are brought

for sale in public auction, due the escalation of prices in lands, in all probability, it would fetch very huge amount even higher than the value fixed by

the Bank i.e., Rs. 14 Crores, which would be more than sufficient to satisfy the Bank debt. However, if as per the order of DRT notifying sale of

19.99 acres, which includes most of the items of the suit property are sold, it would amount to denial of the relief of specific performance and the

decree in favour of the Plaintiff would only remain as a paper decree.

60. As we pointed out earlier, the prime properties in Chennai city in Mylapore and Nun-gambakkam High Road mortgaged to the Bank were not

brought for sale. Defendant Nos. 1 and 2 would stand benefited by saving their other properties in Chennai by bringing Sendamangalam properties

for sale. If the Bank is allowed to bring the Ac. 19.99 for sale it would amount to allowing Defendant Nos. 1 and 2 to unjustly enrich at the cost of

the Plaintiff, who entered into the agreement and now armed with decree of the Court for specific performance. Defendant Nos. 1 and 2 cannot be

allowed to take benefit of their own breach and omissions. Contracts solemnly entered into cannot be avoided on the ipse dixit of the parties

causing prejudice to the other side. In our considered view, suitable directions are to be issued to the DRT.

61. Right of Marshalling and Section 56 of Transfer of Property Act:

Learned Counsel for the Plaintiff Mr. R. Thiagarajan contended that only such extent of properties are required to be brought for sale and the

Bank has possibly colluded with the borrowers in bringing the entire properties for sale and now Ac. 19.99 Cents notified for sale by DRT would

virtually deprive the Plaintiff from getting any relief. It was further contended that the Bank could have requested DRT to bring only the requisite

extent of property for sale. It was further argued that if there are number of items of properties and the debt to be satisfied is only Rs. 11 Crores,

only such portion of the property, the proceeds of which would be sufficient to

satisfy the claim of the Bank ought to have been brought for sale. In support of his contention, the learned Counsel placed reliance upon the decisions of U.P. Financial Corporation and Others Vs. Naini Oxygen and Acetylene Gas Ltd. and Another, and Lal Chand Vs. VIIIth Addl. District Judge and others, .

62. The above decisions arise out of execution proceedings and the applicability of Order 21 Rule 64 Code of CPC The question falling for

consideration is, whether Order 21 Rule 64 Code of CPC could be invoked in respect of a proceedings pending before DRT. The DRT

constituted u/s 3 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (R.D.D.B.F.I. Act) is conferred with jurisdiction in

terms of Section 19 to entertain and decide applications of the Banks and the financial institutions. Section 22(1) of R.D.D.B.F.I. Act specifically

provides that it shall not be bound by the procedure laid down by the Code of Civil Procedure, but shall be guided by the principles of natural

justice and the Tribunal shall have the power to regulate its own procedure. The Statute contemplates the proceedings for recovery of debt at the

instance of the Banks and financial institutions. u/s 19 of the Act, a recovery proceeding is having summary character. The recovery proceeding

before DRT being summary in nature, the DRT-I Chennai declined the request of Plaintiff to defer the auction on the ground that the Bank is

entitled for a sum of Rs. 11.08 Crores and there was no necessity for the Bank to bring the entire property for auction.

63. In our considered view, even though the proceedings are pending before DRT, there is no abridgement of application of enforceability of

Transfer of Property Act and for assertion of right of foreclosure and redemption and also right of marshalling against the financial institutions, more

so when the concerned Bank is a party to the decree for specific performance. Of course, for those reliefs, the appropriate civil Courts may be

approached if there is a survival of vestige of claims of any third party to a proceedings against any party inclusive of a Bank or Financial Institution

before a competent Court of Civil Jurisdiction.

64. Learned Counsel for the Plaintiff Mr. Thiagarajan contended that now that the Plaintiff being armed with a decree for specific performance, as

per Section 56 of the Transfer of Property Act, which is available to a purchaser,

is now available to the Plaintiff and therefore the 3rd Defendant

Bank is to be directed to exhaust its remedy from other items of property before bringing the suit property for sale. The learned Counsel would

further contend that the trial Court ought to have granted relief of mandatory injunction directing Defendant Nos. 1 and 2 to discharge the loan

payable to the 3rd Defendant Bank in respect of DRT proceedings and ought to have directed delivery of documents to the Plaintiff at the time of

execution of sale deed in favour of the Plaintiff.

65. Insofar as the relief of mandatory injunction directing Defendants No. 1 and 2 to discharge the loan payable to the 3rd Defendant Bank and to

deliver the documents to the Plaintiff is not acceptable. Even at the time when the Plaintiff entered into MOU on 15.8.2006 and agreement on

3.2.2006 the Bank has already initiated proceedings by filing O.A. No. 491 of 2009 before the DRT and the same was pending. Section 128 of

Indian Contract Act contemplates that the liability of a surety is co-extensive with that of the principal debtor unless it is otherwise provided by the

contract. In the instant case, both Plaintiff and Defendant Nos. 1 and 2 have jointly entered into agreement with specific understanding that

Defendant Nos. 1 and 2 are to discharge the bank loan borrowed by sister concern M/s. Anand Agency for which Defendant Nos. 1 and 2 were

the guarantors. When Defendants No. 1 and 2 have stood as guarantors for M/s. Anand Agency, liability of Defendants No. 1 and 2 is co-

extensive with that of the principal borrower. Plaintiff entered into agreement knowing fully well the subsisting mortgage in favour of the Bank and

the Plaintiff cannot seek for delivery of documents and there cannot be unqualified direction for retrieval of the documents and delivery of the same

to the Plaintiff.

66. Placing reliance upon a decision of this Court reported in 2009(3) CTC 342 (The Motor & Ageneral Finance Limited, Rep.by Its General

Manager v. S. durailingam Also Known As S. duraisingam), Mr. Jayesh Dolia, the learned Counsel for the Bank contended that the liability of

surety is co-extensive with that of principal debtor and while so the mortgage in favour of the Bank cannot be considered to be severable.

Considering the liability-of surety vis-a-vis principal debtor with reference to the provisions of Contract Act, Division Bench of this Court has held

that Section 140 of the Indian Contract Act contemplates a right of the surety on payment of performance. As per the said Section, where a guaranteed debt has become due or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor. Section 141 of the said Act again contemplates that a surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship was entered into. Therefore, the decree relating to the mortgage cannot be considered to be severable, as the right of the principal debtor and the guarantor is co-extensive.

67. Since the liability of surety is co-extensive with that of the principal debtor, Plaintiff cannot contend that the suit properties are to be released from the mortgage. This is all the more so when the decree for specific performance is subject to the mortgage in favour of the Bank. Likewise, the Plaintiff also cannot insist that the suit properties are to be severed, the proportionate debt has to be collected from the Plaintiff and the suit property has to be released.

68. Insofar as the relief of marshalling, Section 56 of the Transfer of Property Act deals with the right of a subsequent purchaser to claim

marshalling. Section 56 of the Transfer of Property Act reads as follows:

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 mortgage-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.

69. Having paid substantial advance amount and armed with decree for specific performance, right of marshalling is available to the Plaintiff.

Considering the scope of marshalling, in Rama Shankar Prasad Vs. Ghulam Husain and Others, , it has been held as under:

This Section deals with the right of a subsequent purchaser to claim marshalling. It should be contrasted with Section 81 which refers to marshalling

by a subsequent mortgagee. Marshalling is a converse of contribution, for while marshalling requires that a mortgagee who has the means of satisfying his debt out of several properties shall exercise his right so as not to prejudice the purchaser of one of them, contribution requires that if several properties are liable to a mortgage and the mortgagee has been paid out of one, the others shall not escape. Marshalling arises under this section where property has been sold free from encumbrances, while contribution is applicable where the property has been sold subject to the mortgage.

70. The Plaintiff, having purchased the property by entering into agreement of property, which is subject to mortgage, he can only insist upon contribution i.e., the Plaintiff could only insist upon Defendants No. 1 to 3 to have the mortgage debt satisfied out of the properties not sold to the Plaintiff and if the sale proceeds are not sufficient then to proceed against the suit property.

71. Of course, the right of marshalling cannot be exercised to prejudice the mortgagee or persons claiming under him or any person having an interest in any of the properties. Of course, plea of marshalling was not taken by the Plaintiff in the trial Court. Learned Senior Counsel Ms. Nalini

Chidambaram contended that without taking such a plea in the trial Court, the plea of marshalling cannot be taken for the first time in the Appellate

Court. No doubt, plea of marshalling and invoking Section 56 was not raised before the trial Court. However, it is seen in the present case that the

Plaintiff had asked for a larger relief in his suit. It cannot be said that the Plaintiff would anticipate that the Trial Court would grant a part of the relief

sought for by him while rejecting the remaining part. Therefore, there was no occasion for the Plaintiff to raise the plea of marshalling at the time of

filing the suit. Further the said plea, being a pure question of law based upon the decree obtained for specific performance, the contention of the

learned Counsel for the Defendants 1 and 2 cannot be countenanced. It is a well settled principle of law that when a larger relief is sought for by a

party and a lesser relief is granted by the Civil Court, then suitable consequential relief can be granted by the Civil Court. But being a Court of

equity, the Court has to mould the relief so as to render substantial justice between the parties. We find that there is no impediment in considering

the right of marshalling pleaded by the Plaintiff in the appeal.

72. It is a well settled principle of law that while interpreting the provisions of two or three enactments, a harmonious construction has to be made

by the Courts. An interpretation made by the Court must lead to justice and reasoning. Therefore, this Court is of the opinion that a reading of the

provisions of the Specific Relief Act as well as the provisions of the Recovery of Debts due to Banks and Financial Act, 1993 would lead to the

conclusion that the right of marshalling available to the Plaintiff u/s 56 of the Transfer of Property Act cannot be taken away, when the Plaintiff is

armed with the decree for specific performance. Therefore we do not find any inconsistency between the Specific Relief Act and the Recovery of

Debts due to Banks and Financial Institutions Act, 1993 so as to prevent the Plaintiff from getting the relief by exercising the power u/s 56 of the

Specific Relief Act.

73. In the judgment reported in Maru Ram and Others Vs. Union of India (UOI) and Others, the Hon''ble Apex Court distinguished between a

specific provision and a special law and held that a specific provision dealing with the particular situation would override even a special law which

is inconsistent therewith. The Hon''ble Apex Court in the judgment reported in (2009) 7 SCC 1 : 2009 3 L.W. 376 [K. Kannadasan v. Ajoy

Khose and Ors.] has held that an interpretation must lead to justice and reason. Applying the said principles laid down by the Hon''ble Supreme

Court in the above said judgments, we are of the view that there is no impediment in the present case to apply Section 56 of the Transfer of

Property Act in favour of the Plaintiff. Further in the present case, the decree granted by the Debt Recovery Tribunal is not interfered with by

exercising the power u/s 56 of the Transfer of Property Act.

74. Whether prejudice would be caused is a question of fact and it is for the person who invokes the clause to establish such facts. As we pointed

out earlier, there are other prime properties within the city and also other items of properties in Sendamangalam and Pa-pankuzhi villages. Prima

facie, we do not find any prejudice being caused to the mortgagee/ 3rd Defendant Bank in bringing other properties for sale first to satisfy the

mortgage debt.

75. We hold that being armed with a decree for specific performance, Plaintiff is

entitled to invoke the benefit of Section 56 of Transfer of

Property Act against the 3rd Defendant Bank. The 3rd Defendant Bank is directed to have its mortgage debt satisfied from out of the properties

other than the suit properties. We further direct that only if the sale proceeds of other items of properties are not sufficient to satisfy the debt

payable to the Bank by the Defendants 1 and 2 only then the Bank can proceed against the suit properties.

Costs shall follow the event - Section 35 Code of Civil Procedure:

76. The trial Court after having come to the conclusion that the Plaintiff/Appellant is entitled to a decree for specific performance, has ordered that

both parties shall bear their respective costs. Having granted decree for specific performance, without recording any reasons, the trial Court ought

not to have deprived the Plaintiff of the costs.

77. The Plaintiff/Appellant has paid Court fee on the sale consideration of Rs. 5,55,51,000/-and he has incurred to the tune of Rs.

47,42,931.50ps. towards costs for institution of suit i.e., by paying Rs. 41,66,326.50ps towards court fee and other expenses.

78. As per Section 35 CPC , costs shall follow the event. The awarding of costs is fully discretionary, but the discretion must be exercised on

judicial principles and not arbitrarily, as enunciated by the Supreme Court in Tirumalachetti Rajaram Vs. Tirumalachetti Radhakrishnayya Chetty,

and Hoshiam Shavaksha Dolikuka Vs. Thrity Hoshie Dolikuka, . The general rule is that successful parties are entitled to costs unless he is guilty of

misconduct, negligence or omission or unless there are some other reasons for not allowing the costs. Normally the costs should follow the event

and the successful party is entitled to costs unless there are good grounds for depriving him of that right as has been laid down in Thungabhadra

Industries Ltd. Vs. The Government of Andhra Pradesh, , Jugraj Singh and Another Vs. Jaswant Singh and Others, and Kali Prasad Singh Vs.

Ram Prasad Singh and Others, .

79. We are conscious that when the discretionary power as to costs is judicially exercised the same cannot be interfered in appeal. But when costs

is declined to a successful party, the trial Court ought to have recorded its reasons for declining the costs to the successful Plaintiff, who paid huge

Court fee of Rs. 41,66,326.50ps. In our considered view, in disallowing costs to

the Plaintiff, there is no proper exercise of discretion and disallowing of costs is arbitrary and unreasonable, which has resulted in serious prejudice to the Plaintiff. The Order of trial Court directing both the parties to bear their respective costs is set aside. Defendant Nos. 1 and 2 are directed to pay the suit costs to the Plaintiff.

80. Upon analysis of evidence and materials on record, in our considered view, the trial Court has rightly granted the decree for specific performance and the contentions raised by Defendants No. 1 and 2 are devoid of merits.

81. W.P. No. 23405 of 2009:

In the Writ Petition, the Plaintiff sought for writ of mandamus forbearing the Respondents from bringing the suit property to auction and other reliefs. In the Writ Petition, the grievance of the Plaintiff is that when other valuable properties belonging to judgment Debtors are available for auction sale, Bank is not justified in bringing the suit property for sale and the auction of the suit property would defeat and frustrate the decree for specific performance granted in favour of the Plaintiff. In the Writ Petition, learned Counsel for Plaintiff/Petitioner contended that with tacit understanding with the Bank, the borrowers are attempting to destroy the rights of the decree holder/Plaintiff. Further grievance of Plaintiff is that Respondent Bank is not willing to receive the moneys offered by the Plaintiff on behalf of the borrowers and therefore seeks writ of mandamus forbearing the Respondents from bringing the property to sale.

82. Learned Senior Counsel Ms. Nalini Chidambaram drawing our attention to various Interlocutory Applications both in Appeal as well as DRT proceedings contended that in view of efficacious alternative remedies available before the DRT, no relief could be granted in the Writ Petition.

83. As we pointed out earlier, before DRT, Plaintiff filed applications praying to adjudicate and determine his claim and release the suit property and also to stay the auction of the property. By order dated 23.11.2009, DRT dismissed the applications filed by the Plaintiff observing that the decree for specific performance in favour of the Plaintiff is subject to the mortgage rights of the Respondent Bank and that the Plaintiff cannot insist upon releasing the suit property.

84. We have held that the Plaintiff would be entitled to the right of marshalling

and in paragraph No. 73, we have directed the Bank to proceed against other properties. We have further directed that only in case the sale proceeds of other properties are not sufficient, the Bank could proceed against the suit property. The writ Petition has to be disposed of in terms of our findings in the Appeals.

85. Confirming the decree for specific performance granted by the Principal District Court, Chenglepet in O.S. No. 336 of 2008, A.S. No. 708 of 2008 is partly allowed with the following directions and observations:

Plaintiff/Appellant is directed to deposit the balance sale consideration of Rs. 4,80,48,000/- along with interest at 18% p.a. from the date of filing

of suit i.e., 30.8.2006 till the date of deposit. The Plaintiff is directed to deposit the balance amount along with interest within a period of eight

weeks from today into the credit of O.S. No. 336 of 2008. On such deposit, 3rd Defendant Bank is permitted to withdraw the amount and

appropriate the same towards the debt payable by Defendant Nos. 1 and 2. On such withdrawal of the amount by the Bank, Defendant Nos. 1

and 2 are directed to execute the sale deed in favour of the Plaintiff within four weeks from the date of withdrawal of the amount by the 3rd

Defendant Bank. In case of Defendants No. 1 and 2 fail to execute the sale deed, the trial Court is directed to execute sale deed incorporating all

the directions and observations:

For the balance amount payable, the 3rd Defendant Bank is directed to proceed against other items of mortgaged properties including the items of

properties in Nungambakkam, T. Nagar, Mylapore, etc.,. Only if the sale proceeds from other items of properties are not sufficient to satisfy the

debts payable by Defendant Nos. 1 and 2, 3rd Defendant could proceed against the suit property sold to the Plaintiff. On satisfaction of the entire

debt payable by Defendants 1 and 2, the Bank is directed to release the documents of title to the Plaintiff in respect of the suit property. This order

is passed subject to the decision to be rendered by the Debt Recovery Appellate Tribunal in the appeal filed by the 3rd Defendant seeking

enhanced amount as the debt payable by the Defendants 1 and 2. In the event of the appeal being allowed in favour of the 3rd Defendant, it is

always open to the 3rd Defendant to recover the said amount from the suit properties by following the same procedure mentioned above.

Defendants No. 1 and 2 are directed to pay to the Plaintiff the costs of the suit.

W.P. No. 23405 of 2009 is disposed of on the above lines.

A.S. No. 946 of 2009 preferred by Defendant Nos. 1 and 2 is dismissed. The parties are directed to bear their respective costs in these appeals

and writ petition. Consequently all the connected miscellaneous petitions are closed.