

(2009) 12 CAL CK 0042

In the Calcutta High Court

Case No : APO No. 354 of 2008, G.A. No. 2817 of 2008, APOT No. 325 of 2005
and C.S. No. 486 of 2002

Express Publication (Madurai) Ltd.

APPELLANT

Vs

India Media Services Pvt. Ltd. and Others

RESPONDENT

Date of Decision : 17-12-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11, 38, 39(4)

Negotiable Instruments Act, 1881 (NI) — Section 138

Specific Relief Act, 1963 — Section 22(1), 28, 28(1), 28(3)

Citation : (2011) 1 CHN 142

Hon'ble Judges : Sankar Prasad Mitra, J; Pinaki Chandra Ghose, J

Bench : Division Bench

Advocate : S.K. Kapoor, A.K. Chatterjee, Tapas Banerjee, Ravi Kapur and A.P. Agarwala, for the Appellant; Anindya Kumar Mitra, I.P. Mukherjee, Ritzu Ghosal and Pradeep Sanchati, for the Respondent

Judgement

Pinaki Chandra Ghose, J.—This appeal is directed against an order and judgment dated 30th July, 2008 passed by the Hon'ble First Court dismissing the application filed by the Appellant u/s 28 of the Specific Relief Act, 1963 (hereinafter referred to as the said "Act"). In the said application, the Appellant prayed for the following orders:

(a) Agreements dated 7th September, 2000 and 12th June, 2002 being Schedules "A" and "B" to the decree dated 17th March, 2004 be rescinded and/or annulled and the Petitioner be discharged from all its obligations thereunder;

(b) Declaration that decree dated 17th March, 2004 passed in C.S. No. 486 of 2002 (India Media Services Put. Ltd. v. Newsprint Trading & Sales Corporation and Ors.) is inexecutable and not binding upon Express Publication (Madurai) Ltd. the Petitioner/Defendant No. 3 herein;

(c) Decree dated 17th March, 2004 be rescinded and set aside;

(d) Directions in terms of prayers above;

(e) Plaintiff be directed to pay to the Petitioner costs of and incidentals to this application;

2. The facts of the case briefly are as follows:

3. The Appellant purchased newsprint from Respondent No. 2 and 3. An agreement was entered into on 7th September, 2000 between the Appellant and the Respondent No. 1, Respondent No. 2 and Respondent No. 3, whereby it was agreed between the parties that the Respondent No. 1 will pay the price of the newsprint, being Rs. 21.10 crores, to the Respondent Nos. 2 and 3 and the Respondent Nos. 2 and 3 agreed to withdraw the criminal proceedings filed by them against the Appellant and the Respondent No. 4 pending before the Additional Chief Metropolitan Magistrate, Mazagaon, Mumbai. It was further agreed that the Appellant would sale its Hyderabad property for a consideration of Rs. 21.10 crores to the Respondent No. 1 and on such consideration the Respondent No. 1 agreed to discharge the liability of the Appellant by such payment. In the agreement it was further recorded that the possession of 3960 sq. metres of the property was under the control of the trespassers against whom the eviction suit was filed at Hyderabad by the Appellant. Pursuant to and in terms of the said agreement dated 9th February, 2001 the Income Tax Clearance Certificate was obtained u/s 230A from the authority on the basis of the draft conveyance attached thereto.

4. On 12th June, 2002 second agreement was entered into between the Appellant, Respondent Nos. 1, 2 & 3 whereby the debt due from the Appellant was agreed to be assigned by Respondent Nos. 2 & 3 in favour of Respondent No. 1. Under the said agreement it was necessary for having permission from Reserve Bank of India for payment to the Respondent Nos. 2 & 3, being the sellers of the said newsprint and further it was necessary to obtain sanction from State Bank of India for settlement of outstanding invoices by way of set-off.

5. On 10th October, 2002 a suit was instituted by the Respondent No. 1 for a money decree for Rs. 21.10 crores on the ground that the Appellant was unable to convey the said property to Respondent No. 1. Therefore, the agreement had failed. However, no relief was claimed against the Respondent Nos. 2 & 3.

6. On 10th March, 2004 the said suit was dismissed against the sellers being Respondent Nos. 2 & 3.

7. On 12th March, 2004 settlement was arrived at between the Appellant and the Respondent No. 1.

8. On 17th March, 2004 at the suggestion of the parties a decree was passed directing the Appellant to transfer its Hyderabad property to Respondent No. 1 and under the decree it was directed that:

(I) To make the sale deed ready on stamp paper at its own costs and complete

all legal formalities within a period of 8 (eight) weeks from date of decree.

(II) Express was directed to execute and register the said sale deed with the appropriate registration office at Hyderabad within a fortnight thereafter.

(III) Respondent No. 1 undertook to pay and bear the registration fees and expenses incidental to the registration.

9. It is the case of the Appellant that instead of preparing the deed of conveyance on stamp paper in terms of the decree, Respondent No. 1 started investigation of the title of the Appellant (Express). The correspondences were exchanged between the parties and by a letter dated 22nd April, 2004 the India Media Services Pvt. Ltd. disputed the title of the "Express" to the property and demanded that Indian Express Newspapers (Bombay) Ltd., should be made a confirming party in the deed of conveyance. It is further to be noted that the said Bombay company was a separate company and was not a party to the suit or in the decree. However, the Appellant by its letter dated 26th April, 2004 indicated that there would be no difficulty in that behalf.

10. In the meantime, the suit which was filed against the trespassers by the Appellant at Hyderabad was dismissed by the City Civil Court at Hyderabad on 31st March, 2004 holding that the trespassers had acquired title by adverse possession.

11. An application was filed thereafter, on 9th August, 2004 by the Appellant for a direction upon Respondent No. 1 to deposit the amount of stamp duties, registration fees and expenses for completion of conveyance.

12. In these circumstances, on 27th January, 2005 an Execution Case No. 8 of 2005 was initiated by the Respondent No. 1 against the Appellant claiming the following reliefs:

(a) Receiver be appointed to take actual physical possession of Hyderabad property and sell the same by auction or private treaty.

(b) Receiver to pay the sale proceeds to the decree holder in protanto satisfaction.

(c) Enquiry into loss and damages suffered by the decree holder and award of compensation for not completing the sale.

13. On 21st November, 2005 the said Execution Case was dismissed and the application which was filed on 9th August, 2004 by the Appellant for depositing the amount of stamp duties, Registration fees and expenses was also disposed of by the Court without any order.

14. On 15th December, 2005 an application was also filed for modification of the said order dated 17th March, 2004 to the following effect:

(i) Injunction prohibiting Express from dealing with Hyderabad property be vacated;

(ii) The Judgment Debtor be absolved of obligation to transfer Hyderabad property in terms of the order dated 17.3.2004 and agreements dated 7.9.2004 and 12.6.2002;

(iii) Decree holder be directed to accept Rs. 21.10 crores in full and final settlement of principal claim;

(iv) In the event of refusal of the decree holder to accept Rs. 21.10 crores leave be granted to the Judgment Debtor to deposit the said sum to the credit of C.S. No. 486 of 2002 with the Registrar;

(v) Decree holder be directed to return the title deeds of Hyderabad property;

(b) The judgment-debtor be relieved of obligation to transfer Hyderabad property to the decree holder under the agreements dated 07.09.2000 and 12.06.2002.

15. On 3rd January, 2006 an appeal was filed by the Respondent No. I against the judgment and order dated 21st November, 2005.

16. On 5th January, 2006 an Execution Case No. I of 2006 was filed by the Respondent No. I claiming the following relief:

(a) Direction be given for service of notice of the application upon Indian Express Newspapers (Bombay) Ltd.

(b) Express be directed to join Indian Express Newspapers (Bombay) Ltd. for conveying ownership of the Hyderabad property in terms of the said compromise decree dated March 17, 2004 jointly with Indian Express Newspapers (Bombay) Ltd. and to execute and register a deed of conveyance in a new format with new term as per draft marked "I" or for settling the deed of conveyance in accordance with the compromise Decree dated March 17, 2004;

(c) Delivery of vacant and peaceful, possession of the said Hyderabad property upon execution and registration of the deed of conveyance and if necessary a Receiver be appointed, for taking over possession and handing over vacant peaceful possession of the Hyderabad property.

(d) In default of Express executing and registering the deed of conveyance jointly with Indian Express Newspaper (Bombay) Ltd. as vendor the registrar of original side of this Hon'ble Court be empowered and directed to execute and register the deed of conveyance on behalf of and in the name of the Express and the said Indian Express Newspaper (Bombay) Ltd.

(e) In the event of failure of Express in delivering the vacant and peaceful possession of an area of 3960 square meters or any portion of the said Hyderabad property and/or conveying the title of the said Hyderabad property in its entirety, an order be passed for attachment of other properties of Express being No. 6, 6/1, 6/2, 6/3 and 6/4 Brunton Road, Bangalore-1, 1 Queens Road, Civil Station, Bangalore and 4 Vidhana Veedhi. Bangalore belonging to the Express, and if the Express does not arrange for delivery of vacant possession of

the said portion of the said property within six months the said attached property be sold through the receiver appointed by this Hon''ble Court and out of the sale proceeds, the amount of compensation of Rs. 4.26 crores or such other amount as this Hon''ble Court may think fit and proper, be paid to Respondent No. 1

17. On 18th May, 2007 the Execution Case No. 1 of 2006 and the application filed by the Appellant was disposed of. The Court was pleased to pass the following order:

This application succeeds. The Defendant No. 3 is directed to execute, and register deed of conveyance having joined Indian Express Newspapers (Bombay) Limited, Narimanpoint, Mumbai 400 021, in favour of the Applicant - Plaintiff in terms of decree and order dated 17th March, 2004 as per draft being Annexure-1 to this application upon the Plaintiffs paying all costs and expenses therefore within six weeks from the date of receipt of signed copy of the minutes of this order, failing which liberty is given to mention. The Defendant No. 3 is directed to deliver vacant and peaceful possession of the property in question in terms of prayer (c) of Column 10 of Tabular Statement within fortnight from date of execution and registration of conveyance. In default thereof, liberty to mention. Costs of this application is assessed at 600 GMs to be paid by the third Defendant. In view of this order subsequent application fails.

18. On 16th October, 2007 the appeal preferred against the judgment and/or order dated 21st November, 2005 which was dismissed by the Division Bench. The Division Bench was pleased to pass the following order:

It appears to us that the suit as it was filed after obtaining leave under clause 12 of the Letters Patent and, therefore, it cannot be said that the Court was lacking jurisdiction or authority either territorial or in this subject-matter. The decree was passed upon recording the satisfaction of the claim of the Plaintiff and in the said decree on the basis of the undertaking given by the Appellant it was agreed that the property should be transferred in favour of the Plaintiff/Respondent. Therefore, at this stage we do not find that there is any reason to accept the plea of inherent jurisdiction as sought to be raised by the Appellant before us. All through the Court acted including the acceptance of the suggestion put forward before the Court and the Court passed an order thereon at the instance of the parties. The effect of the decree has also been enjoyed by the Appellant/Defendant No. 3 and, thereafter, in our considered opinion, it is too late in the day to turn around and to challenge the decree on the ground of nullity or on the ground of territorial jurisdiction and not only that the Defendant No. 3 made an application before the Court when the Plaintiff pointed out and/or complained in respect of the title of the property at the instance of the Defendant No. 3 the Court was persuaded to dismiss such application of the Plaintiff and accepted the contention of the Defendant No. 3. After enjoying the fruits of the order passed at the instance of the Defendant No. 3, we must point out that the Appellant tried to find out a way to bypass such decree which obviously was passed also at their instance. In our considered opinion, it is only a way which is being tried to

find out by the Appellant to bypass the said decree in such a tricky manner. Therefore, in our opinion, the Defendant No. 3 took the burden on its shoulder to satisfy the claim of the Plaintiff by transferring the Hyderabad property in lieu of money claim and at this stage they cannot take such a plea that decree is a nullity or the properties are outside the jurisdiction of this Court. Since we are also of the considered opinion after analyzing the facts and the decisions cited by the panics that this Court has jurisdiction to execute the decree in respect of the property which is situated outside the territorial jurisdiction of this Hon''ble High Court.

19. Subsequent thereto on 20th November, 2007 an application was filed by the Respondent No. 1 (being G.A. No. 3390 of 2007) praying for the following reliefs:

(a) A fit and proper person be appointed as receiver with the direction upon him to execute and register the Deed of Conveyance in favour of the Applicant/ Plaintiff in terms of the decree and-order dated 17th March, 2004 for and on behalf of Indian Express Newspapers (Bombay) Ltd.

(b) An order directing the Defendant No. 3 (Express) to deliver vacant and peaceful possession of the property in favour of the Applicant/ Plaintiff.

20. On 7th April, 2008 SLP was filed by the Appellant against the Appeal Court's order dated 16th October, 2007 which was dismissed by the Supreme Court. The Supreme Court while dismissing the SLP was pleased to pass the following the order:

We are not inclined to interfere in this matter. The special leave petitions are, accordingly, dismissed.

It is stated that there is an attempt for execution beyond the terms of the decree. It is open to the Petitioner to highlight this aspect before the appropriate Court. We express no opinion in that regard.

21. Thereafter, an application was taken out by the Appellant u/s 28 of the said Act for rescission of the contract which was also dismissed by the Court on 30th July, 2008.

Being aggrieved the Appellant has filed this appeal.

22. Further an application was also filed by the Respondent No. 1 praying for the following reliefs:

(a) Time and date be fixed for the Defendant No. 3 to execute and register the deed of conveyance in respect of the subject Hyderabad property by joining Indian Express Newspapers (Bombay) Ltd., Nariman Point, Mumbai-400 021 as a party in the deed of conveyance as assured by the Defendant No. 3 in favour of the Petitioner in terms of the Judgment and Order dated 18th May, 2007 of His Lordship the Hon''ble Mr. Justice Kalyan Jyoti Sengupta and in accordance with the draft conveyance being Annexure "I" of the Execution Case No. 1 of 2006.

(b) Appropriate direction be given for implementation of the order dated 18th May, 2007 by execution and registration of the conveyance in accordance with the draft conveyance being Annexure "I" to the Execution Case No. I of 2006 on the date fixed by this Hon"ble Court in terms of prayer (a) hereof.

23. Mr. S.K. Kapoor, learned Senior Counsel, appearing on behalf of the Appellant submitted that the Trial Court declined to go into any of the factual issues on the ground of res judicata and even declined to go into the issue of nullity and essentially rejected the application on the ground of res judicata. He submitted that it is obvious that in any suit the Court looks at the same facts over and over again on several times. The facts can be gone into for different interlocutory applications. Just because the Court has seen the facts in one application it does not debar the Court from looking at them in a subsequent application. The application, which was filed before the Trial Court by the Appellant was for rescission of the decree u/s 28 of the said Act. The said application was not an execution application. Such application was filed under a substantive provision of law which had nothing to do with execution. Therefore, it was necessary for the Court to look into the facts for deciding the application from the perspective of section 28 of the said Act and the real question to be decided was whether the facts after the date of the decree showed overall, that the Plaintiff had been continuously or otherwise unready and unwilling to perform the compromise decree on its true construction and according to its terms as claimed by the Appellant.

24. Mr. Kapoor, further submitted that if in the period of four years that had elapsed between the passing of the decree on 17th March, 2004, and the making of the application u/s 28 of the said Act which was in 22nd March, 2008, the Trial Court had considered the same facts for any other purpose in execution proceedings, it did not follow that the same facts could not be seen to decide the section 28 of the said Act. The decree was obviously for specific performance and it is necessary to remember that at no prior point of time had the Plaintiff applied for rescission of the decree of the two contracts between the parties and this was the very first application for the purpose. He also submitted that all the four applications heard by Sengupta, J. were execution proceedings. In the first round of litigation one of the applications for execution had been filed by the Appellant; and the Plaintiff (Respondent No. I) by a separate petition had then applied for having the properties sold and for payment of the sate proceeds to him. In the second round of litigation, Mr. Kapoor submitted that the Plaintiff/Respondent No. I had applied for execution and suggested that it would take the conveyance in the form proposed by it being Annexure-I to its execution application and the Appellant had made an application for a direction upon the Plaintiff to accept Rs. 21.10 crores in full and final settlement of its claims. Thus, the two applications decided on 18th May, 2007 also related to execution. No other matter was in issue. No relief to rescind the decree was claimed. The Plaintiff had applied by tabular statement for execution of Annexure-1 the Appellant had asked for an order that since the Plaintiff/Respondent No. I was unwilling to go through with

the sale it should be allowed to pay the decretal sum to satisfy the decree.

25. He further submitted that before it could be said that because of the order of 18th May, 2007 passed by Sengupta, J, the principle of res judicata applied to the facts it would be necessary for the Plaintiff to show that section 11 of the CPC was applicable to the application u/s 28 of the said Act. Mr. Kapoor contented that no application was filed u/s 28 of the said Act. There had been four applications for execution which were referred to as pieces of evidence to show the total unwillingness of the Plaintiff to execute the decree in its terms.

26. It is submitted that in the present case, the issue of section 28 had never come up before the Trial Court and, therefore, the said facts were never considered. Therefore, he submitted that the Trial Court was completely misdirected itself by holding that the rule of res judicata would apply. In fact, the test of res judicata is the identity of issues in the two different litigations and not the identity of the actual property that may be involved in the two different applications. In support of his contention he relied on the following decisions:

1. Ramnandan Prasad Narayan Singh Vs. Mahanth Kapildeo Ram Jee and Another,
2. Raj Lakshmi Dasi and Others Vs. Banamali Sen and Others,
3. Bejoy Gopal Mukherji Vs. Pratul Chandra Ghose,
4. Sri Venkataramana Devaru and Others Vs. The State of Mysore and Others,

27. He further contended that the Trial Court ignored the factual situation before Sengupta, J. and the matter in issue before His Lordship. He drew our attention to section 11 of the Code and submitted that if it is seen that the two proceedings are operating in different spheres and if the subject-matter of the two proceedings is entirely distinct and different, in other words if the cause of action of the two proceedings is distinct and different then there can be no question of res judicata. He submitted that the Trial Court failed to appreciate that hardly any facts were in issue before Sengupta, J. in giving his judgment on 18th May, 2007 His Lordship made it clear that His Lordship was only deciding four questions which His Lordship settled and framed and which were actually questions of law. According to Mr. Kapoor, Sengupta, J., hardly discussed any facts. He submitted that in this background the question is whether the decree was a nullity because the Court has no territorial jurisdiction over the Hyderabad property? According to him, before Sengupta, J. there was nothing else. No other aspects were being considered. He contended that the Trial Court also did not appreciate that section 11 of the Code applies where a particular relief has been previously claimed by raising a particular issue. Moreover, it has to be shown that the Court had the competence to grant the relief claimed in the second proceeding. It is settled law that the Executing Court cannot modify the decree. Section 28 of the said Act relates to modification of the decree. So, Sengupta, J, in execution proceedings could not modify the decree because His Lordship was sitting as the Executing Court and not as the Trial Court. Moreover, in the

proceeding before His Lordship no relief u/s 28 of the said Act had been asked. This was an additional reason for holding that the res judicata rule could not apply.

28. He further submitted that the Supreme Court in the case of Sajjadanashin Sayed Md. B.E.Edr. (D) By Lrs. Vs. Musa Dadabhai Ummer and Others, , has said that "...the fundamental rule is that a judgment is not conclusive if any matter came collaterally in question. A collateral or incidental issue is one that is ancillary to a direct and substantive issue; the former is an auxiliary issue and the later is the principal issue". So in rejecting any consideration whatsoever of the facts before 18th May. 2007 the Trial Court was wrong.

29. Similarly, Mr. Kapoor contended that with regard to the facts after 18th May, 2007 the Trial Court simply said that there is "nothing to show" or question the Plaintiffs readiness or willingness subsequent, to 7th April, 2008. Mr. Kapoor drew our attention to the prayers of the petition in G.A. No. 3390 of 2007, G.A. No. 1311 of 2008 and the Execution Case No. 126 of 2008 and submitted that in these three pending applications would show that the Plaintiff/Respondent No. I had not changed his stand following the compromise decree in any manner whatsoever.

30. Mr. Kapoor submitted that from the said three pending applications, the Plaintiff did not alter his stand to abandon the decree as originally passed and still wants that the Bombay party to be joined as a vendor. He asked for vacant possession of the property including the portion occupied by the encroachers and, further, the conveyance to be executed as directed by the Court, being Annexure-1 to the order. The conduct of the Plaintiff would show that they were not ready to accept the compromise decree of 7th March, 2004 in terms thereof. From the facts, it would show that the Plaintiff was all along and still is not ready and willing to accept the conveyance except on the terms Court settled the same, being Annexure-1. Even before this Court the Plaintiff did not change his stand and wanted to add the Bombay party.

31. Mr. Kapoor contended that all these matters are beyond the decree and further pointed out that the order dated 7th April, 2008 passed by the Supreme Court when the Apex Court made it clear that beyond doubt it would be open to the Appellant to highlight this aspect before the Appropriate Court. He submitted that the conduct of the Plaintiff/Respondent No. I herein, which resulted in rescission of the decree, is illustrated by the cases which had been cited before this Court. He also submitted that the decree originally passed has to be taken note of. On 17th March, 2004 the compromise decree was passed in the suit wherein the two agreements dated 7th September, 2000 and 12th June, 2002 formed part of the decree and whereby Defendant No. 3 was to transfer its Hyderabad property subject to encumbrances to the Plaintiff against payment of Rs. 21.10 crores by the Plaintiff as per the draft conveyance which had been approved by the Income Tax department. The decree was contained reciprocal obligations to be performed by the Plaintiff and the Appellant as under:

- (i) To make the sale deed ready between the Plaintiff and the Appellant, on stamp-paper and complete all legal formalities within a period of 8 (eight) weeks from date of decree;
- (ii) To pay and bear the registration fees and expenses incidental to the registration;
- (iii) In default of the Appellant executing or registering the conveyance the Registrar, Original Side to do so in the name and steady of the Appellant;
- (iv) Two separate criminal complaint cases pending before 14th Court of SEMM at Mazagaon, Mumbai filed by the Defendant No. 2 against the Appellant to be withdrawn;
- (v) To make payment to the Defendant No. 3's creditors (Defendant Nos. 1 and 2) of a sum of Rs. 21.10 crores through the Defendant No. 3's banker, the State Bank of India, where the documents were lying and the exchange risk to be on account of the Plaintiff;
- (vi) The payment to be made in the specially designated way after getting all necessary permissions and sanctions from the RBI and the State Bank.

32. Mr. Kapoor submitted that to execute and register the sale deed, the Plaintiff/ Respondent No. 1 had to take with the appropriate steps within a fortnight from the expiry of 8 (eight) weeks from the date of decree. He further submitted that possession of Hyderabad property to be made by the Appellant to the Plaintiff excepting 3920 square meters areas which are in possession of the trespassers as held by Sengupta, J, in his first judgment.

33. Mr. Kapoor further contended that a mere reading of this summary of the reciprocal obligations contained in the decree, clearly shows that right up to this date, the Plaintiff had never performed its obligations. He submitted that the Plaintiff had throughout insisted upon handing over of vacant possession of the entire property. The Plaintiff never appointed a time or place for execution of the conveyance. The Plaintiff never paid nor indicated its willingness to pay the stamp duty and registration fees and expenses within the prescribed time. The Plaintiff had done nothing about withdrawing the criminal complaints. He contended that the Plaintiff has not lifted a finger to remit the payment to the creditors of the Appellant, in terms of the agreements or the decree. On the contrary, the Plaintiff has insisted and is still insisting for adding the Bombay party as a vendor. The Plaintiff was insisting on a conveyance as per Annexure "I". Significantly, Annexure "1" prescribes that the Bombay party must be the first vendor and the names of all other parties have been deleted. Annexure "I" also provides that payment would be made to the vendors of the newsprint to the Appellant. Annexure "I" also provides that there was some Board Meeting of the Bombay party which is also not a fact. He further submitted that Annexure "I" recites covenants to be performed by the vendors of newsprint who are not even added as parties to the document and is, therefore, ex facie meaningless in

this behalf. Annexure "I" also provides that if the title to the property is found to be defective the debt due to the Defendant Nos, 1 and 2 would stand revived. All these clauses and matters travel miles beyond the original consent compromise decree.

34. Mr. Kapoor further submitted that these matters are still being pressed by the Plaintiff. In other words, the Plaintiff pressed this case before 18.05.2007 and after that right up to the time when the Supreme Court made its order on 7.04.2008 and even thereafter till the judgment was delivered by the Trial Court on 30.07.2008.

Mr. Kapoor further submitted that the Hon"ble First Court has failed to appreciate these facts and, in fact, ignored these facts by saying that "there was nothing to question" the Plaintiffs readiness and willingness. He submitted that the Trial Court was bound to see the facts from the point of view of section 28 of the said Act. It is submitted that there was no question of res judicata here. The whole bundle of facts showed that the Plaintiff was never ready and willing to perform its obligations under the decree and the Trial Court's findings on the factual part of the case is wrong.

35. Mr. Kapoor further submitted that the Trial Court ignored these facts in one line by saying that "there was nothing to question" the Plaintiffs readiness and willingness.

36. On the scope of section 28 of the said Act Mr. Kapoor relied upon the following decisions:

- (i) Anandilal Poddar Vs. Gunendra Kr. Roy and Another,
- (ii) Md. Ziaul Haque Vs. Calcutta Vyaper Pratisthan,
- (iii) M. Sakuntala Devi Vs. V. Sakuntala and Others,
- (iv) Sunity Chandra v. Nil Ratan, reported in AIR 1985;
- (v) V.S. Palanichamy Chettiar Firm Vs. C. Alagappan and Another,
- (vi) Kumar Dhirendra v. Tivoli Park, reported in 2005 (9) SCC 261.

37. He submitted that the core question before the Trial Court was whether the Appellant was entitled to get any relief by way of rescission of the contracts and the decree for specific performance made on the basis of those contracts. The question resolved itself before the Trial Court into two aspects, Firstly, there is no decision from the Trial Court on such facts. Secondly, the proposition of law laid down in the Tivoli Park decision (supra) has no application in the facts of the present case.

38. He further submitted that it is settled law, "that the doctrine of readiness and willingness has to be applied not only prior to the decree but also subsequent to the decree". In Anandilal's case (supra) it was a duty on the Plaintiff to tender the conveyance and on refusal to have it executed by the other party it should

registered by the Registrar.

39. He further submitted that the true character of a decree for specific performance is that it is in the nature of a preliminary decree and the Original Court keeps control over the action and has full power to make any just and necessary orders therein.

40. Mr. Kapur further submitted that in Tivoli Park case (supra) the entire law on the subject was again summarized by the Supreme Court. The Supreme Court in that case approvingly pronounced that if there was a refusal to complete the execution then the decree would be set aside and said that the Court retains control over the entire matter even after the decree and it is also open to the Court to order rescission of the agreement where it is found that the decree holder is not ready and willing to abide by his obligations under the decree.

41. Mr. Kapoor further contended that Kapadia, J. In Tivoli Park case (supra) further observed that in such a situation the Court does not become functus officio but has power to see all the circumstances including the conduct of the parties and would apply the tests to the facts of the particular case.

42. He further submitted that in the present case, the Trial Court ignored these principles and brushed them aside on the ground of res judicata. Section 28 of the said Act was never a matter in issue previously and, therefore, the rule of res judicata could not be applied by the Trial Court, The Trial Court was wrong in not appreciating the facts and also ignored the settled principles of law.

43. Mr. Kapoor further contended that the debt due and owing from the Appellant had arisen mainly in favour of a Singapore party who was the Defendant No. 2 and the Defendant No. 1 was its Indian agent. The debt was for Rs. 21.10 crores and the agreement, as well as the decree, provided that the foreign vendor would ultimately be paid by the Plaintiff. The foreign vendor through its Indian agent instituted a criminal proceeding u/s 138 of the Negotiable Instruments Act, 1881 in Mumbai relying on dishonoured cheques of the Appellant. Therefore, the payment had to be made through the Appellant's bank. It is also provided in the compromise decree that the criminal complaints filed at Mumbai should be withdrawn after the payment had been made.

44. He further pointed out that there was a further set of conditions precedent in the matter of remitting payment. The agreement prescribed that necessary permissions from the Reserve Bank of India and the State Bank of India would be obtained by the Plaintiff. The decree was passed on 17th March, 2004. The conveyance was to be executed in eight weeks. Therefore, it follows that the necessary conditions precedent for (a) obtaining permission from the banks and (b) making remittance abroad and (c) then having the criminal complaint withdrawn were obligations on the Plaintiff to be completed before the conveyance could be required to be executed.

45. Mr. Kapoor further contended that there is not a scrap of evidence to show

that there was any permission obtained from the Reserve Bank and the State Bank. It is also an admitted fact that no remittance was made through the Appellant's bank or any other bank. It is also an admitted fact that the criminal complaints filed against the Plaintiff had not been withdrawn.

46. It is submitted that the Plaintiffs stated that payments have been made. According to Mr. Kapoor nothing could be paid because the decree expressly made it a condition that payments would be through the Appellant's bank. In any way without the permission of Reserve Bank of India, such payments would be a violation of foreign exchange laws. He submitted that the provisions of the decree were not considered rather ignored by the Trial Court. The finding of the Trial Court, according to Mr. Kapoor, avoids the main issue of the payment altogether. On the one hand the Trial Court has said that Annexure I itself provides that the payment was to be paid on behalf of the Appellant by the Plaintiff to the Singapore party namely Price & Pierce (Asia-Pacific) Pvt. Ltd. In this background he submitted that the Trial Court did not even notice that there is a collateral obligation on the part of the Respondent No. 1/Plaintiff to withdraw the criminal complaints after the payments is made.

47. Mr. Kapoor also drew our attention to the application which was filed by the Plaintiff/Respondent pending for hearing being GA No. 3390 of 2007. In that petition the Plaintiff has asked that a Receiver should be appointed to execute and register the deed of conveyance in accordance with and in terms of the decree dated 17th March, 2004 for and on behalf of the Indian Express Newspapers (Bombay) Ltd.

48. Mr. Kapoor submitted that the decree did not contemplate execution of any conveyance by the Bombay party who was not a party to the suit or to the agreements.

49. On the contrary, the Plaintiff/Respondent pressed on Annexure-I and submitted that conveyance should be as per Annexure-I. The Plaintiff/Respondent also took a ground that the reliefs which the Appellants are claiming are barred by res judicata and/or constructive res judicata.

50. He submitted that the order directing the execution of conveyance as per Annexure-I is without jurisdiction.

51. He also relied upon a decision reported in Jai Narain Ram Lundia Vs. Kedar Nath Khetan and Others, , and submitted that the Executing Court has no jurisdiction to vary the decree or can go beyond the decree. The said position was not considered by His Lordship.

52. Mr. Kapoor further submitted that it is well-settled that a void decree or order can be challenged at any stage even in execution or collateral proceedings.

53. Mr. Kapoor further submitted that a compromise decree cannot be varied except by consent in the case of M. Sakuntala Devi Vs. V. Sakuntala and Others, .

54. He also relied upon the following decisions of (1) Manish Mohan Sharma and Others Vs. Ram Bahadur Thakur Ltd. and Others, (2) N.R. Dongre and Others Vs. Whirlpool Corpn. and Another, ; (3) Maxafoy v. United Africa Company Limited, reported in 1961 (3) All ER 1169, where the Supreme Court held that an Executing Court cannot go behind the decree under the decree is a nullity for a lack of jurisdiction. (See N.R. Dongre v. Whirlpool Corporation (supra) and Maxafoy v. United Africa Company Limited (supra).

55. Mr. Kapoor further submitted that a void order or decree can be challenged at any stage even in execution or collateral proceedings and relied upon a decision in the case of Balvant N. Viswamitra and Others Vs. Yadav Sadashiv Mule (dead) through Lrs. and Others,

56. He also relied upon the following decisions in support of his contention:

- a) Sushil Kumar Mehta Vs. Gobind Ram Bohra (Dead) through his Lrs.,
- b) Dwarka Prasad Agarwal (D) by LRs. and Another Vs. B.D. Agarwal and Others,
- c) Sri Ramnik Vallabhdas Madhvani and Others Vs. Taraben Pravinlal Madhvani,
- d) A. Jitendra Nath v. Jubilee Hills, reported in 2006 (10) SCC 96;
- e) V.C., Banaras Hindu University and Others Vs. Shrikant,
- f) Hasham Abbas Sayyad Vs. Usman Abbas Sayyad and Others,
- g) T. Vijendradas and Another Vs. M. Subramanian and Others, .

57. He submitted that all the abovementioned judgments are illustrations of the principles that (a) a nullity cannot be ignored (b) challenged can be thrown even in any collateral proceeding and (c) the rule of res judicata, which is a rule of procedure is not applicable where the impugned order is a nullity and has been made by a Court which inherently lacking in jurisdiction.

58. Mr. Kapoor further submitted that the principle of res judicata is a procedural provision and the same has no application where there is an inherent lack of jurisdiction.

59. He also relied upon the decision in Hasham's case (supra), where the Supreme Court held that the principle of estoppel, waiver and acquiescence or even res judicata which are procedural in nature would have no application to a case where an order has been passed by the Tribunal/Court which has no authority in that behalf.

60. Mr. Kapoor further submitted that the Trial Court ignored the point of nullity without giving any reason by simply saying that it was "a vain effort".

61. In these circumstances, he submitted that the order and/or judgment of Sengupta, J. cannot attract the rule of res judicata.

62. Mr. Kapoor further contended that the judgment dated 18th May, 2007

specifically directed that the Appellant to deliver vacant and peaceful possession of the property in question in terms of prayer (c) of the tabular statement. The said order challenged u/s 39(4) of the CPC and in the light of the decision of the Supreme Court in the case of Mohit Bhargava Vs. Bharat Bhushan Bhargava and Others, .

63. Mr. Kapoor relied upon the decision in the case of Prem Chand v. Mokhada, reported in ILR Cal 699, a Full Bench of this Court held that the principle had been laid down that a Court has no jurisdiction in execution of a decree to sell property over which it has no territorial jurisdiction at the time of execution.

64. In these circumstances, he submitted that the Court has no jurisdiction to direct that the conveyance in terms of Annexure-I to be executed. It is submitted that the Court has no power even to direct for delivery of possession of property at Hyderabad outside jurisdiction, Therefore, it is submitted that at that point of time when the order so passed by the Court suffers from inherent lack of jurisdiction. Hence, he submitted that the directions were therefore inherently bad and a nullity. That order can be challenged at any subsequent stage and even in collateral proceedings such as in this present application u/s 28 of the Act.

65. Mr. Kapoor further submitted that in the earlier proceedings when the order was challenged before the Division Bench, section 39(4) was not even referred to in arguments nor was the Mohit Bhargava's case (supra) was placed before the Division Bench. Therefore, the decision was per incuriam because the parties did not show the law or the relevant case to this Hon"ble Court.

66. Therefore, the order so passed by the Hon"ble Court at that point of time cannot be said to have discussed or discarded the section 39(4) in its judgment dated 16th October, 2007. It is submitted that the point to which the attention of this Division Bench at that point of time is drawn earlier was only limited to the issue that the compromise decree dated 17.3.2004 was a nullity.

67. The question of nullity on Annexure-I or direction to deliver possession was never raised at that stage. He further submitted that the litigant should not suffer on account of a direction of a Court leading to conferment of jurisdiction, he relied upon the decision of A.R. Antulay Vs. R.S. Nayak and Another,

68. He further pointed out that at the instance of the Plaintiff who after the compromise decree by a letter dated 22.4.2004 had first suggested that the Bombay party be made a confirming party to the proposed deed of conveyance.

69. He further submitted that the Appellant then believing it could accommodate the Plaintiff/Respondent by its letter dated 22.4.2004 by saying that "there is no difficulty in IENB (Bombay party) joining as a confirming party....

70. He further submitted that the Appellant instead of filing the Execution Case No. 8 of 2005 in which it is clearly said that the decree was in executable and it wanted that the property should be sold through a Receiver for the realization of

its money claims.

71. From the conduct of the parties, it would show that the Plaintiff never accepted the offer and it wanted to sale the property to realise its money claim and subsequently changed its stand and filed Execution Case No. 1 of 2006 in which it asked for execution of Annexure "I" and delivery of possession.

72. From the pleadings of the Appellant it would also evident that Bombay party never accepted the Annexure-I nor communicated nor accepted the said position nor indicated its willingness to submit to the jurisdiction of this Hon"ble Court for executing any conveyance or for any other purposes.

73. In this background Mr. Kapoor submitted in fact, Plaintiff/Respondent itself rejected the offer to bring the Bombay party to confirm the conveyance.

74. He pointed out that the decree directed the Plaintiff to prepare the stamped conveyance and tender it for execution within eight weeks. No steps were taken nor any stamp was ever purchased by the Plaintiff/ Respondent for execution.

75. In these circumstances, it is submitted that the judgment and/or order dated 30th July, 2008 has to be set aside and the appeal should be allowed. It was further pointed out that Rs. 21.10 crores had already been lying with the Registrar, Original Side.

76. Mr. Anindya Kumar Mitra, learned Senior Advocate, appearing on behalf of the Plaintiff/Respondent submitted that the suit was not for specific performance of the agreement dated 7th September, 2000 and 12th June. 2002. The suit was simply a money suit. Therefore, section 28 of the Specific Relief Act has no application. The entire amount of consideration payable for the purchase of the property has already been paid and there is no failure of payment on the part of the decree holder. The failure of payment of price is the only ground for rescission mentioned in section 28 of the Act, there is no default clause in the decree on the ground of absence of default clause the petition u/s 28 of the Act was dismissed by Supreme Court in Tivoli Park's case (supra). The contention regarding lack of readiness and willingness has already been dealt with and decided by the judgment and order in Execution Case No. 1 of 2006 dated 18th May, 2007 which was affirmed by the High Court and ultimately by the Supreme Court. The said question cannot be re-opened and/or re-agitated any further being barred by res judicata.

77. It is further submitted that it was not a suit for specific performance therefore, the question of readiness and willingness to perform the agreement did not arise. The decree records that as mentioned in Schedule "B" stand satisfied and adjusted in full, Hyderabad property being value of Rs. 21.10 crores, will be transferred to the Plaintiff and invoices mentioned in Schedule "B" will stand satisfied and adjusted in full. Further questions of readiness and willingness are barred by res judicata. In Tivoli Park case, (supra) application u/s 28 of the Act was dismissed by the Hon"ble Supreme Court although the amount

of consideration was not paid by the decree holder for a long period of seven years only because there was no default clause. Section 28 of the Act provides for only one ground for recession of the contract, namely, failure to pay the amount of consideration. In the instant case the amount of consideration has already been paid and nothing further is required to be paid by the decree holder.

78. The Appellant has already having enjoyed the fruits of the decree cannot now seek to resile or get the decree set aside by; making application u/s 28 of the Act. The Appellant cannot approbate and reprobate. In this contention he relied upon a decision in the case of Deewan Singh and Others Vs. Rajendra Pd. Ardevi and Others,

79. Mr. Mitra submitted that the additional grounds as taken by the Appellant which are not available at this stage since the matter is concluded between the parties up to the Supreme Court. There is no lack of inherent jurisdiction and the additional grounds are not available at this stage. The additional grounds u/s 39(4) of CPC and readiness and willingness are barred by res judicata. The Appellant failed to raise such objection in the earlier proceedings. The Appellant did not raise the plea of section 39(4) of the CPC in Execution Case No. 1 of 2006, in which the order for execution of the decree has been passed.

80. Mr. Mitra relied upon the decision in the case of Barkat Ali and Another Vs. Badri Narain (D) by LRs., , and in the case of Lagan Jute Machineries Co. Ltd. Vs. Candlewood Holdings Ltd. and Others, and in the case of State of West Bengal and Ors. v. Anil Chandra Chowdhury, reported in 2000 (1) CLJ, where the Division Bench of this Court says even wrong order operates as res judicata. He also relied upon the decision in the case of Kamlabai and Others Vs. Mangilal Dulichand Mantri, , where the Supreme Court duly dealt with the matter in question.

81. He also drew our attention to the order of the Division Bench and submitted that the Division Bench has clearly held that this Court has jurisdiction to execute the decree in respect of the property outside the territorial jurisdiction of this Court, which-will operate as res judicata. Therefore, u/s 38 of the CPC has the jurisdiction to execute the decree.

82. He also relied upon the decision in the case of Exide Industry v. Howrah Motors, reported in 2006 (4) CHN and submitted that the Division Bench of this Court held that the High Court Rules prevail over Code of Civil Procedure.

83. He further drew our attention in the case of Mohit Bhargava (supra), where it is clearly distinguishable and does not apply to the facts of this case. First, the decree was passed by the District Court of Gwalior and under the final decree, certain amounts of money were payable by the judgment-debtor. Secondly, the decree was not passed by any High Court. Thirdly, the decree did not provide for sale of any property, unlike this case. Fourthly, execution proceeding was started before the District Court. The first order is dated 19.3.2003 restraining transfer by the judgment-debtor, of the properties enumerated in the list. The second

order is dated 7.7.2003 by which the Execution Court directed some documents be kept in safe custody of Court. In the above two stages of execution, the judgment-debtor did not raise any objection of lack of territorial jurisdiction. On 26th July, 2003, the decree-holder applied for sale of property at Indore outside the territorial jurisdiction of the Executing Court, Immediately, the judgment-debtor took objection of lack of jurisdiction and filed an application objecting to the prayer for sale of the property at Indore. Thus, unlike the instant case, objection of lack of jurisdiction was raised before the Executing Court itself as soon as the application for sale of property outside jurisdiction was made by the decree-holder.

84. He further contended that the Executing Court held that it had territorial jurisdiction and directed sale of the property at indore. The High Court lacked territorial jurisdiction, specifically in respect of the indore properties and that order of sale of the property at Indore was outside its jurisdiction. He submitted that in the present case the decree itself provide for sale of Hyderabad property and also contended that the decree is a nullity has been rejected by the judgments int he Execution Case No. 1 of 2006, however, repelled the challenge of the judgment-debtor to the earlier orders of restraint dated 19.3.2003 and 7.7.2003 passed by the Executing Court. Felling aggrieved by non-cancellation of the orders of execution dated 19.3.2003 and 7.7.2003, the appeal was filed before the Hon"ble Supreme Court.

The Hon"ble Supreme Court dismissing the appeal and held that here was submission to the Executing Court and further on the ground that the orders dated 19.3.2002 and 7.7.2003 were within the jurisdiction of the Executing Court which passed the decree and also on the ground that the judgment-debtor had no questioned those order as and when they were passed. He also submitted that in the present case, the judgment-debtor did not question the jurisdiction of the Executing Court. No objection was raised before the Hon"ble Justice Kalyan Jyoti Sengupta that His Lordship had no jurisdiction to entertain the Execution Case No. 1 of 2006 on the ground that the property was located outside the jurisdiction of the High Court. He also submitted that the appeal was filed and heard before the Division Bench being A.P.O. No. 308 of 2007 from the order dated 18th May, 2007 passed in the Execution Case No. 1 of 2006. In the appeal also, no objection was raised that this Court as the Executing Court had no territorial jurisdiction to entertain the execution case and to pass the order of execution. So, following the ratio of Mohit Bhargau's case (supra) he also submitted that the High Court has the jurisdiction at Calcutta to execute the decree as the Executing Court. It is more so in the present case because the judgment-debtor itself had earlier applied for execution of the very same decree and for same relief before the High Court in an application being GA No. 3035 of 2004.

84. He also submitted that the objection u/s 39(4) is a matter of territorial jurisdiction as held by the High Court of Midhya Pradesh in Mohit Bhargav's case

(supra) and this judgment of the High Court of Madhya Pradesh was fully confirmed and the appeal was dismissed by the Hon"ble Supreme Court and the objection regarding lack of territorial jurisdiction does not go to the root of the jurisdiction of any Court. He also contended, that it is not a case of lack of inherent jurisdiction. The objection as to territorial jurisdiction has to be taken at the first instance and if not taken, cannot be taken in subsequent proceedings.

85. He further submitted that it is not a case of lack of inherent jurisdiction. The question of lack of territorial jurisdiction of this Court cannot be raised" at this later stage. In view of the fact that the order of execution has been passed by a Chartered High Court and the order of execution already passed has not been Interfered with by the Supreme Court.

88. He further contended that the decree records an undertaking of the judgment-debtor to transfer the Hyderabad property. Undertaking given to this Hon"ble Court can be enforced by this Hon"ble Court and no other Court. The Appellant itself applied for execution of the very same decree which was dismissed on technical ground since no tabular statement was filed.

89. Mr. Mitra further submitted that several judgments have been cited for the proposition that res judicata does not apply if the order is nullity. It is not a case of nullity. Following judgments were cited by the Appellant in the cases of:

(i) Hasham Abbas Sayyad Vs. Usman Abbas Sayyad and Others, where the Supreme Court held that Residential houses was auctioned in execution proceeding before the final decree was passed. Only final decree can be executed. Therefore, there being no final decree, it was a case of lack of inherent jurisdiction. The auction sale was illegal because it was a residential house.

(ii) A. Jithendernath v. Jubilee Hills Coop. House Building Society and Anr., reported in 2006 (10) SCC 96, where the Supreme Court held that Award was held to be a nullity because award was passed in violation of principles of natural justice. No question of violation of natural justice is involved in this case. The Appellants were heard at length at every stage.

(iii) Sri Ramnik Vallabhdas Madhvani and Others Vs. Taraben Pravinlal Madhvani, , where the Supreme Court held that- The order of amendment of plaint was allowed without opportunity of hearing to the Defendant and decree was passed simultaneously. Decree was held to be nullity because of lack of inherent jurisdiction. Award of inherent at a rate higher than what was admissible in law was held to be illegal and decree to that extend was nullity. This has no application to the present case.

90. He further submitted that there is a substantial difference between illegality and nullity. Reference may be made in the case of Rafique Bibi (D) by Lrs. Vs. Sayed Waliuddin (D) by Lrs. and Others, , where the Court held that order not in terms of provisions of law may be illegal, which can only be cured by preferring an appeal from the order itself. The order is not a nullity. In this "case, the order

for execution passed in Execution Case No. 1 of 2006 has been taken up to the Supreme Court and held to be valid.

91. He further submitted that the order of execution dated 18.5.2007 passed by the Hon''ble Single Judge confirm''ed by the Hon''ble Division Bench on 16.10.2007 and by the Hon''ble Supreme Court on 07.04.2008 cannot be said to be nullity nor can such contention be entertained in any subsequent stage or the proceedings for execution.

92. Mr. Mitra further submitted that the question of readiness and willingness is irrelevant when it was not a suit for specific performance. The plea of not buying the stamp is of no substance. The amount of stamp-duty has been lying and deposited with a Bank in the name of the Plaintiffs advocate-on-record which has already been recorded in the order passed by the Hon''ble First Court.

93. He further pointed out that Express (Bombay) as a party has not been disputing that Express Madurai is the owner of this property. The only defect is that the consent decree was registered in Bombay and not in the State of Andhra Pradesh. This defect can be cured by joining Express Bombay in the Deed of Conveyance which would be evident from the letters and the correspondences exchanged between the parties. The draft conveyance Annexure I showed Express Bombay as a Co-vendor.

94. Mr. Mr. Mitra further pointed out that in the Memorandum of Appeal from the said order and judgment dated 18th May, 2007 no ground was taken that Express (Bombay) should not have been directed to be joined as a Co-vendor and it was not so argued even in course of hearing of the appeal, The Hon''ble Division Bench in Appeal No. 379 of 2007 confirmed the order of Hon''ble Justice Kalyan Jyoti Sengupta vide order dated 16.10.2007. He further submitted that the Appellants have clearly acquiescence in joining Express (Bombay) in the deed of conveyance and it is not open for them to raise this contention.

95. Mr. Mitra further pointed out that the Appellant has not mentioned in any affidavit and application need by them including the application u/s 28 of the Act that it is not possible for the Appellant to join Express (Bombay) as a Co-vendor in the deed of conveyance excepting making an oral statement before this Court.

96. Mr. Mitra further submitted that the decree-holder has agreed to take possession of the property without the litigated portion of 3960 sqm. which is occupied by trespassers. The notice of the application was also served on Express (Bombay) pursuant to the order of this Court but none appeared on their behalf. Therefore, they do not have any interests in the Hyderabad property. It is further submitted that the Appellant is abusing the process of the Court and the appeal should be dismissed.

97. It is further submitted that if the party fails to execute the documents the Registrar, Original Side shall execute and register the document on behalf of the defaulting party so to be directed by this Court.

98. He further submitted that the decisions cited on behalf of the Appellant have no application. The decision of Tivoli Park (supra) would not help the Appellant rather it supports the case of the Respondent.

99. He also submitted that in the case of Anandilal Poddar Vs. Gunendra Kr. Roy and Another, , in the facts and circumstances of this case the said citation has no application and it is nobody's case that after the order was passed by the Hon"ble Supreme Court on 7th April, 2008, the decree-holder has not been ready and willing to obtain the deed of conveyance in terms of the order of the Executing Court.

100. He relied upon the decision in the case of Md. Ziaul Haque Vs. Calcutta Vyaper Pratisthan, In the said decision the Plaintiff could not prove the agreement or readiness and willingness. The facts are completely different. Therefore, it has no application in the facts and circumstances of the case.

101. In the case of Sunity Chandra Bose v. Nilratan Sinha, reported in AIR 1985 Cal and in the case of M. Sakuntala Devi Vs. V. Sakuntala and Others, the Court allowed modification of the donee regarding amount payable. But in the instant case the decree was never modified. The Court provided the machinery to execute the decree is held in 75 CWN 162 (B.M. Bhattacharjee v. Ajit K. Basu) and the Express (Bombay) was directed to be added as a party by consent of the parties for proper execution of the decree.

102. The decisions of V.S. Palanichamy Chettiar Firm Vs. C. Alagappan and Another, also has no application, Jai Narain Ram Lundia Vs. Kedar Nath Khetan and Others, and Rameshwar Das Gupta Vs. State of U.P. and Another, have no application in the facts and circumstances of this case.

103. In the case of Smt. Uma Kanoria Vs. Pradip Kumar Daga, is no longer good law in view of the decision in the case of Birla Corporation Ltd. Vs. Prasad Trading Company and Another, and also the decisions cited on behalf of the Appellant hereinbelow:

1. Sushil Kumar Mehta Vs. Gobind Ram Bohra (Dead) through his Lrs.,
2. Balvant N. Viswamitra and Others Vs. Yadav Sadashiv Mule (dead) through Lrs. and Others,
3. I.M.H. Press v. Addl. Industrial Tribunal, reported in 1961 (1) SCC 1169;
4. Dwarka Prasad Agarwal (D) by LRs. and Another Vs. B.D. Agarwal and Others,
5. T. Vijendradas and Another Vs. M. Subramanian and Others,
6. V.C., Banaras Hindu University and Others Vs. Shrikant,
7. Manish Mohan Sharma and Others Vs. Ram Bahadur Thakur Ltd. and Others,

104. He further submitted that all the above cases are on the point of voidness, nullity etc. It is also submitted that a proceeding or order is void or is a nullity

when the Court has no inherent jurisdiction to entertain the subject-matter of the dispute. Even wrong decisions are not void can be described as nullity. In the present case, he submitted that the order so passed by the Court cannot be said suffers from any infirmity. Furthermore, the order in execution has become final after dismissal of SLP and has become res judicata. This cannot be re-agitated any longer.

105. In these circumstances, Mr. Mitra submitted that the appeal should be dismissed.

106. After considering the facts and circumstances of this case and after analysing the decisions and submissions made before us, it appears that the Appellant has filed the application u/s 28 of the Act. The said section of the Specific Relief Act reads as follows:

28. Rescission in certain circumstances of contracts for the sale or lease of immovable property, the specific performance of which has been decreed--

(1) Where in any suit a decree for specific performance of a contract for the sale or lease of immovable property has been made and the purchaser or lessee does not, within the period allowed by the decree or such further period as the Court may allow, pay the purchase money or other sum which the Court has ordered him to pay, the vendor or lessor may apply in the same suit in which the decree is made, to have the contract rescinded and on such application the Court may, by order, rescind the contract either so far as regards the party in default or altogether as the justice of the case may require.

(2) Where a contract is rescinded under Sub-section (1), the Court--

(a) shall direct the purchaser or the lessee, if he has obtained possession of the property under the contract, to restore such possession to the vendor or lessor, and

(b) may direct payment to the vendor or lessor of all the rents and profits which have accrued in respect of the property from the date on which possession was so obtained by the purchaser or lessee until restoration of possession to the vendor or lessor, and, if the justice of the case so requires, the refund of any sum paid by the vendee or lessee as earnest money or deposit in connection with the contract.

(3) If the purchaser or lessee pays the purchase money or other sum which he is ordered to pay under the decree within the period referred to in Sub-section (1) the Court may, on application made in the same suit, award the purchaser or lessee such further relief as he may be entitled to including in appropriate cases all or any of the following reliefs, namely:

(a) the execution of a proper conveyance or lease by the vendor or lessor;

(b) the delivery of possession, or partition and separate possession, of the property on the execution of such conveyance or lease.

107. It appears to us that the Calcutta High Court in Anandilal's case (supra) held that for rescission of a contract after a decree for specific performance a suit will lie default in payment. Under the said section 28(3), legislators used the expression "further relief which is a clear pointer that reliefs by way of delivery of possession or partition and separate possession of property mentioned in section 22(l)(a) and in Clause (b) of Sub-section (3) of section 28 of the Act are ancillary or consequential to the passing of a decree for specific performance of a contract to transfer immovable property, (see Sm. Dhiraj Bala Karia Vs. Jethia Estate Pvt. Ltd.,).

108. In the instant case, it appears to us that the payment has already been made by the Plaintiff/Respondent No. I. It has also been accepted that the decision in mentioning section 28 of the Act, Mr. Kapoor contended that readiness and willingness on the part of the Respondent No. I have already been dealt with in Execution Case No. I of 2006 and furthermore, the order and/or judgment passed by the High Court has already been affirmed by the Supreme Court of India. Therefore, we agree with the contention of Mr. Anindya Mitra that the said question cannot be reopened at this stage any further.

109. It further appears that in Tivoli Park case (supra) the Supreme Court was pleased to dismiss the application u/s 28 of the Specific Relief Act, although the amount of consideration was not paid by the decree holder since there was no default clause in the decree. Section 28 of the said Act provides for recession of the contract only on the ground of consideration. In the facts and circumstances of this case, we do not find that the Appellant can have any benefit under the provisions of section 28 of the said Act. So far the question of lack of inherent jurisdiction is concerned, it appears to us that the Appellant did not raise any objection for a longtime on the contrary it would be evident from the correspondences exchanged between the parties. The Appellant agreed to bring Express (Bombay) and to add them as a confirming party. Execution application was also filed by the Appellant to give effect to the compromise decree. Therefore, it is nothing but a chance was tried to be taken by the Appellant by filing this application. It is also to be noted that payment has been made by the Plaintiff/Respondent. It is also cannot be brushed aside that the suit is for a money claim and not under Specific Relief Act. The Appellant failed to raise any objection in the earlier proceedings and the Appellant did not raise any plea before the Court even in Execution Case No. I of 2006 when the order for execution of the decree has been passed.

110. After perusing the facts and after analyzing the decisions cited before us, it appears to us that the Division Bench earlier held that this Court has its jurisdiction to execute the decree and, furthermore, the SLP has also been dismissed by the Supreme Court. Therefore, in our considered opinion, the said question has also been settled and the Appellant earlier did not raise any objection in respect thereof.

111. Therefore, we accept the contention of Mr. Anindya Mitra, learned Senior

Counsel that this Court has jurisdiction to deal with the matter. We further make it clear that in the facts and circumstances of this case, the Hon''ble First Court has correctly decided the question and we do not find that there is any illegality or irregularity in the said decision.

112. Before we part we direct that if the party fails to execute the documents the Registrar Original Side shall execute and register the documents on behalf of the defaulting party in respect of the said sale in question.

113. In these circumstances, we affirm the order so passed by the Hon''ble First Court and dismiss the appeal.

114. Urgent xerox certified copy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

Sankar Prasad Mitra, J.

I agree.