
(2015) 11 BOM CK 0018

In the Bombay High Court

Case No : First Appeal No. 1010 of 2012 and Cross Objection No. 63 of 2013

Gold Touch Real Estate Private Limited and Others

APPELLANT

Vs

Suresh and Others

RESPONDENT

Date of Decision : 21-11-2015

Acts Referred:

Contract Act, 1872 — Section 17, 29, 49, 50, 61
Land Acquisition Act, 1894 — Section 4
Maharashtra Co-operative Societies Act, 1960 — Section 164
Maharashtra Regional and Town Planning Act, 1966 — Section 127, 37, 49
Registration Act, 1908 — Section 17(1)(b), 17(1)(c), 49, 50
Specific Relief Act, 1963 — Section 16(c)
State Financial Corporations Act, 1951 — Section 29

Citation : (2016) 1 ABR 232

Hon'ble Judges : B.P. Dharmadhikari and P.N. Deshmukh, JJ.

Bench : Division Bench

Advocate : M. Anilkumar, Advocate, for the Appellant; Harish Dangre, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

B.P. Dharmadhikari, J.—This First appeal by plaintiff assailing the dismissal of its suit for specific performance came to be admitted on 03.04.2013 and at that stage while passing orders on Civil Application No. 2507 of 2012, the appellant was directed to deposit an amount of Rs. 15 crore with the registry of this Court by 31.05.2013. Subject to such deposit interim direction to maintain status quo was continued. The said direction was questioned before the Hon"ble Apex Court and the Hon"ble Apex Court has on 07.07.2014 directed expeditious disposal of appeal. The deposit of Rs. 4 crore made by the appellant with the Registry of the Hon"ble Apex Court was directed to be transferred to this Court. The amount of Rs. 15 crore was thus substituted by the amount of Rs. 4 crore. In the meanwhile, on 13.12.2013, Cross Objection filed by Respondent Nos. 1, 4 & 5 also came to be admitted for final hearing.

2. As per orders of the Hon"ble Apex Court dated 07.07.2014, the Appeal and Cross Objection have been taken up for final hearing. The original plaintiff questions dismissal of his Special Civil Suit No. 82 of 2006. Said suit for specific performance, for possession, declaration and for permanent injunction is dismissed vide judgment dated 17.09.2012 delivered by the 5th Joint Civil Judge, Senior Division, Nagpur. While dismissing that suit, defendant Nos. 1, 4 & 5 were directed to repay sums paid to them by the plaintiff with 10% interest from the date of receipt of that amount till its repayment. This direction is questioned in Cross Objection by defendant Nos. 1, 4 & 5.

3. We have heard Shri Dangre, learned counsel for the appellant/plaintiff, Shri Anilkumar, learned counsel for defendant/respondent Nos. 1, 4 & 5, Shri Chauhan, Advocate for defendant/respondent No. 3 and Shri Dhore, learned counsel for defendant/respondent No. 6 - Co-operative Society, in First Appeal. We prefer to refer to the parties as per their mention in impugned judgment.

4. The description of suit properties is not in dispute. The title of defendant Nos. 1 to 5 to their respective lands is also not in dispute. During the pendency of said suit defendant Nos. 2 & 3 entered into compromise with the plaintiff and have sold their respective portions to it. These sale deeds are also not in dispute. The plaintiff approached Civil Court with a story stating that defendant Nos. 1 to 5, who are members of same family, executed an agreement to sell (Art. A) in favour of defendant No. 6 - Society, on 26.06.2000. On 09.08.2002 they executed six separate agreements at Exs. 136 to 141 in favour of plaintiff and defendant No. 6 consented to it. On 04.10.2003, defendant Nos. 1 to 5 executed a supplementary agreement Ex. 156 in favour of the plaintiff and it was confirmed by defendant No. 6.

5. The plaintiff is a company which deals in Real Estate development and construction. Defendant No. 6 is a cooperative housing society duly registered under & governed by the Maharashtra Cooperative Societies Act, It had agreed to pay rate of 10 lakh per acre i.e. total consideration of Rs. 6,87,50,000/- to defendant Nos. 1 to 5 and had paid earnest money of Rs. One lakh. It had also agreed to obtain all certificates, no objections and other documents required for execution of sale deed. Defendant Nos. 1 to 5 agreed to entrust the work of development of suit property to a Developer of choice of defendant No. 6 - society and to execute necessary document for said purpose. Defendants pointed out to the plaintiff that their property was brought under town planning reservation in the Development Plan and hence agreement dated 26.06.2000 could not have been implemented. After discussion, on 09.08.2000, six different agreements were entered into by defendant Nos. 1 to 5 while defendant No. 6-society consented to it. The sale consideration was agreed at Rs. 17,07,000/- per acre. The total consideration thus worked out to Rs. 11,73,56,250/-. The obligation to fulfill agreements entered into by defendant No. 6 with various persons was placed upon the plaintiff and the plaintiff was authorized to receive balance consideration from them. After payment of 50% or more amount out of

total sale consideration to defendant Nos. 1 to 5, plaintiff was given right to execute the sale deed or mortgaged deed etc. Defendant Nos. 1 to 5 on 09.08.2002 executed an irrevocable power of attorney at Ex. 100 in favour of Shri Nandkumar Khatumal Harchandani, a nominee of the plaintiff, which was duly registered.

6. The plaintiff alleges that these agreements were mutually modified and parties agreed to reduce consideration amount payable per acre by Rs. 1,25,000/-. A supplementary agreement at Ex. 156 for this purpose was entered into on 04.10.2003. The total sale consideration thus worked out to Rs. 10,87,62,500/-. The plaintiff paid Rs. 4,17,20,952/- out of it. An amount of Rs. 10,70,00,702/- (10,70,702?) only was credited towards consideration after deducting interest as also brokerage charges payable to Zaver Company & Aspee Bapuna. Defendants also accepted receipt of consideration of Rs. 4,06,00,250/-. Accordingly, the plaintiff states that it had taken requisite steps to get suit lands de-reserved. On 04.07.2005, defendant Nos. 1 to 5 forwarded notice containing false allegations, terminating registered agreements, irrevocable power of attorney dated 09.08.2002 when the agreement dated 09.08.2002 does not contain any such stipulation. Because of pains taken by the plaintiff, on 04.01.2010 during joint meeting of Principal Secretary, UDD, Government of Maharashtra, the plaintiff as also the Chairman and the Superintending Engineer of Planning Authority-Nagpur Improvement Trust, an option to permit land owners to develop suit properties was considered.

7. After receipt of notice dated 04.07.2005, the plaintiff presented Special Civil Suit No. 82 of 2006 on 24.01.2006. Certain events have taken place during the pendency of suit and we find it convenient to refer to the same a little later in the body of this judgment. However, briefly stated, according to the plaintiff, defendant Nos. 2 & 3 executed sale deeds of their respective portions in its favour. Similarly, Planning Authority principally agreed to allow land owners to develop the reserved properties in 2010 i.e. after institution of suit. Plaintiff filed a suit & due to interim orders passed therein, the plaintiff could take appropriate steps resulting in this permission to develop. These developments, according to the plaintiff, show its readiness and willingness to perform the contract at all material times.

8. Defendant Nos. 1, 4 & 5, who are respondent Nos. 1, 4 & 5 in First Appeal, filed their written statement at Exh. 73 in the Trial Court. Defendant No. 6 - society filed consent written statement at Exh. 71 praying for a decree in favour of the plaintiff. Defendant Nos. 2 & 3 filed appearance but did not file any written statement. The contesting defendants filed application at Exh. 45 on 29.07.2006 for a direction to the plaintiff to deposit the entire balance amount of sale consideration. They contended that as that amount was not deposited at any point of time, hollowness in the claim of the plaintiff that it was always ready and willing, became apparent. On 02.09.2006, they filed one more application seeking direction of the trial Court to the plaintiff to deposit an amount of Rs.

6,68,99,750/- which, according to the plaintiff's case itself, was payable to the defendants. This application was opposed by the plaintiff. The defendants pointed out that they attempted to amicably settle the matter after institution of suit but plaintiff offered only an amount of Rs. 50 lakh towards damages and interest to all of them. The amount was too meager and the plaintiff had failed to maintain the schedule of payment. No notice under Section 164 of the Maharashtra Co-operative Societies Act, 1960, was served upon defendant No. 6 - society and, therefore, suit was not maintainable. These defendants pointed out that at the behest of plaintiff, an antedated agreement came to be executed with defendant No. 6 - society. Date 26.06.2000 was put upon it and defendants never received the amount of Rs. One lakh as stated in that agreement. They also denied supplementary agreement dated 04.10.2003 and alleged that it was the outcome of fraud and misrepresentation. That agreement was never registered as required by law and hence it cannot supersede six agreements executed by them in favour of the plaintiff on 09.08.2002. The Power of Attorney is rightly revoked by legal notice as there could not have been any irrevocable power of attorney. They point out that on 09.08.2002, they were in dire need of money as their industrial unit was about to be auctioned by State Bank of India after obtaining orders from Debts Recovery Tribunal in O.A. No. 459 of 2002, as such, they executed the agreements. In those agreements it was stipulated that if the plaintiff failed to get the land de-reserved, the agreement would come to an end and the defendants would refund the amount received by them. Nagpur Improvement Trust, the Planning Authority pointed out that suit lands were to be utilized only for development of a park by it and also took steps to acquire it. As such, the agreements could not have been specifically enforced, thereafter. Therefore, a legal notice was issued on 04.07.2005. Again there are certain other defences but the same can be more conveniently looked into at appropriate place in this judgment.

9. In the backdrop of these pleadings, the trial Court has framed following issues and answered the same as below :

Issues 1 to 4 supra revolve round the document at Art. A. Issues 5 to 10 are regarding Exs. 136 to 141, Ex. 156 & Ex. 100. It is in this background that we have heard the respective counsel.

10. Shri Dangre, learned counsel submits that the material on record clearly shows that the agreement dated 26.06.2000 entered into between defendant Nos. 1, 4 & 5 as also defendant No. 6 is properly proved and omission of trial Court to mark it as exhibit & its act of only mentioning article No. "A" upon it, is unsustainable. He contends that no specific defence denying its due execution or contents was raised by the defendants. He further points out that as per terms and conditions of this document, sale could have been executed till March 2002 or even during extended period. There was to be deemed extension till defendant No. 6- society obtained necessary no objection certificates and permissions. The parties were to make joint efforts for the said purpose and clause 4 authorizes

defendant No. 6- society to entrust the work of development to any developer of its choice. The defendants had agreed to execute necessary documents in favour of such developer. In terms of this basic document and power, on 09.08.2002, these agreements i.e. Exhs. 136 to 141 were entered into between the parties. The agreements are for development and executed by all the defendants in favour of the plaintiff. Defendant No. 6 - society has signed these agreements as consenting party. Even these later documents did not make time an essence of contract. The plaintiff was given necessary power to get the land de-reserved and make it available for development. Accordingly, the land owners agreed to execute a power of attorney in its favour. Clause 11 of this agreement envisaged situation which would arise only if its de-reservation could not take place & owners could not have developed it. Total sale consideration of Rs. 11,73,56,250/- was to be paid as per these agreements. The power of attorney at Exh. 100 came into existence because of these six agreements. The said power of attorney authorized the nominee of the plaintiff to start work also. Learned counsel submits that circumstances then necessitated third agreement i.e. Exh. 156 dated 04.10.2003. It is executed by defendant Nos. 1 to 5 in favour of the plaintiff and defendant No. 6 - society has signed it as a consenting party. The reduction in per acre rate as stipulated therein was accepted and acted upon. The new rate worked out to Rs. 10,87,62,500/-. He then points out the correspondence done by power of attorney on behalf of defendant Nos. 1 to 5 with State Government and Planning Authority (Nagpur Improvement Trust i.e. NIT for short) on various dates after these agreements. He submits that the Government Resolution dated 07.04.1994 at Exh. 132 allows land owners to develop the land for reserved/earmarked purpose. After the land was shown as reserved on 15.03.2000, land owners objected to draft plan vide Exh. 229 and thereafter entered into an agreement at Art. A dated 26.06.2000 with defendant No. 6 - society. The learned counsel submits that after later agreements dated 09.08.2002, the plaintiff started acting and issued notice under Section 49 of the Maharashtra Regional Town Planning Act, on 05.04.2003. These notices at Exhs. 114/115 were found technically deficient and hence, after reply from the Nagpur Municipal Corporation, fresh notice was issued on 30.07.2003 vide Exh. 118. On 05.08.2003, Nagpur Improvement Trust (NIT) published an advertisement in the Newspaper vide Exh. 198 inviting interested developers to submit their willingness to develop the land for earmarked purpose of park, botanical and zoological garden, bird sanctuary, amusement park, forestry/nursery. He then points out further developments with reference to various annexures on record and a communication dated 24.01.2005 (Exh. 201) sent by the Superintending Engineer of NIT to the office of the Collector for initiating land acquisition proceedings. On 03.05.2005, vide Exh. 127, the plaintiff placed its protest and objected to acquisition. The plaintiff offered to develop the entire specified area as a park as earmarked in Development Plan and offered to pay compensation for balance land needed to be acquired to facilitate the said purpose. Shri Dangre, learned counsel submits that it is after this stage that defendants parted their ways with the plaintiff and issued legal notice dated 04.07.2005.

11. Inviting attention to events which took place after service of legal notice and during the pendency of suit, the learned counsel submits that ultimately on 04.01.2010, in a joint meeting, it was noted that total 52.63 H. of land was earmarked as park in Town Planning Scheme. Agent of defendants used the power of attorney and served a purchase notice covering 27.43 H. of land out of it. This constituted more than 50% of total land earmarked for the development. The reservation could have been developed by NIT after acquiring entire land or then through private developers in consonance with the purpose of reservation by suitable method. The land owners could have been permitted to develop the land as park. The further course of action which was chalked out in that meeting expected Nagpur Improvement Trust to find out whether it was interested in acquiring and developing the land itself or then through a private developer. The meeting also noted that the land owners could have been permitted to develop the entire land on participatory all inclusive basis. He has argued that there was no need & scope for acquiring the land as land owners could develop it.

12. To point out the benefit gained by defendant Nos. 1 to 5 or their families, he has invited attention to documents at Exhs. 233 to 239. He submits that industrial unit of defendants was being proceeded against by secured creditors like State Bank of India, SICOM and MSFC etc. The said loan liability was met with through funds provided to defendants by plaintiff, therefore, the defendants have consented to and executed all documents including document at Exh. 156. Oral evidence led on behalf of the plaintiff is also read over to point out how the agreement dated 26.06.2000 at article "A" has been duly proved on record. He states that though PW-1 - Nandkumar Khatumal Harchandani has given necessary details about these agreements and also proved payments, there is no serious challenge to his deposition by the defendants. The Cross Objection does not bring on record any dispute either about article "A" or Exh. 156, on the contrary the agreements at Exhs. 136 to 141 have been accepted by the defendants during cross examination. He submits that the fact of decision at State Government level in 2010 in favour of land owners is also not in dispute. Defendant Nos. 1 to 5 unnecessarily issued a legal notice on 04.07.2005 and thereby created obstacles in the steps taken by the plaintiff. Filing of suit by plaintiff, steps taken by its nominee for getting the lands de-reserved, 2010 decision of State, filing of a writ petition by plaintiff in this Court in 2011, all show readiness and willingness. Most of the amount was already paid to the defendants and the amount in deposit with the Registry of this Court is more than sufficient to meet the outstanding liability. Shri Dangre submits that the Trial Court has erroneously observed that the plaintiff was not ready and willing to perform its part of contract.

13. Inviting attention to evidence of PW-2 - Sunil Dhole, the plaintiff states that three sale deeds executed by defendant Nos. 2 & 3 are duly proved through this witness. Thus, sale deeds and its execution by two defendants show that the other defendants were deliberately refusing to co-operate with the plaintiff. He submits that without raising any express challenge to those sale deeds, other

defence attempted to impugn the same on trivial grounds. Counsel for plaintiff relies upon those sale deeds at Exhs. 151 to 153 to buttress his submissions.

14. The evidence of PW-3 - Vedprakash is also pressed into service by him to show that said witness proves supplementary agreement dated 04.10.2003 at Exh. 156. He further contends that his cross examination fails to bring on record any material sufficient to discard it.

15. Inviting attention to evidence of witness examined by the defendants, the learned counsel states that DW-1 has been examined only to cast a shadow on Exhs. 161 to 163. DW-2 - Nandkumar Suke, Land Acquisition Officer was examined only to bring on record the report in respect of acquisition prepared on 15.03.2010. That report is at Exh. 188. He points out that said L.A.O. in cross examination accepted that though NIT deposited only Rs. 5,03,00,000/- & though was asked to deposit further amount of Rs. 11,38,00,000/-, did not deposit it. As NIT did not deposit the entire amount, notification under Section 4 of Land Acquisition Act could not be issued. He points out that this witness accepts that though the land was under reservation, its acquisition had not started.

16. DW-3 - Siddharth Mankar working with NIT was examined to prove documents at Sr. Nos. 1 to 12 filed with Exh. 170. Those documents were exhibited as Exhs. 195 to 206, however, this witness was not aware of contents of those documents and he was not aware of developments after 23.06.2009.

17. Shri Dangre, learned counsel points out that defendant No. 1 has been examined as DW-4. This witness has accepted his signature on all documents and stated that he signed the same acting in good faith. This witness denied any discussion held on 04.10.2003 when Exh. 156 was executed though he stated that the plaintiff got it executed. This witness also pointed out financial difficulties and claimed that he was not knowing Vedprakash Wadhwani. This witness also came up with stand that after NIT refused proposal of the plaintiff to develop park on 31.03.2008 vide Exh. 130, the question of de-reservation came to an end. According to him, the entire examination-in-chief of this witness shows readiness and willingness on the part of the plaintiff.

18. His cross examination is heavily relied upon to show that this witness understands English and he signed all the documents after reading contents thereof after understanding it. He also accepted correctness of portion marked "A" in his written statement at Exh. 73. This witness also accepted that the amount of Rs. 50,00,000/- offered by the plaintiff was not acceptable to them and they were asking for more amount. They were asking plaintiff to better (improve) its proposal. He also gave issuance & service of purchase notice on their behalf as one of the reasons for cancellation of agreements.

19. Shri Dangre, learned counsel submits that all this material clearly shows that the trial Court was wrong in not accepting the agreement at Exh. 156, in not exhibiting article "A" and in holding that notice under Section 164 of the

Maharashtra Co-operative Societies Act, ought to have been served upon defendant No. 6. The plaintiff was ready and willing to complete its part of agreement, had paid amount as per modified schedule in Exh. 156 and, therefore, its suit could not have been dismissed. He further contends that frustration of contract was not the issue framed by the trial Court. He has relied upon the provisions of Section 17(1)(c) read with Section 49 of the Registration Act to demonstrate admissibility of Ex. 156.

20. On readiness and willingness, Shri Dangre, learned counsel, invites attention to the explanation at end of Section 16(c) of Specific Relief Act, and points out that the trial Court had never ordered the plaintiff to deposit the balance amount. Hence, mere filing of Exhs. 47 or 45 by the defendants was not sufficient to infer that the plaintiff was not ready and willing to deposit the balance amount. He contends that the material on record clearly shows that the plaintiff was always ready and willing even during the pendency of the suit to perform its part of agreement. He further submits that clause 11 in the agreements at Exhs. 136 to 141 only speak of procedure to be followed for refunding the advance paid to defendants, and it does not derogate from other substantive portions and arrangements in the agreements. The Development Regulations (D.C.) particularly Regulation No. 28 of D.C. Rules which enable the land owner to develop, have been overlooked. Here, as de-reservation took place, the owners and, therefore, the plaintiff is free to develop the land. He further points out that Writ Petition No. 1629 of 2011 filed by the plaintiff is admitted by this Court for final hearing on 12.04.2013 and in it a declaration of de-reservation has been sought.

21. Inviting attention to provisions of Section 29 of the Contract Act, he submits that the agreement which has been acted upon cannot be labeled as uncertain. The defendants have not led any evidence of any price rise or any prejudice or hardship caused to them. The time was never the essence, land was otherwise not available for sale and the plaintiff converted it into a commercial asset. In the process the plaintiff invested huge amounts and also helped defendants in time of their need. Because of wrong acts of defendants, the plaintiff has been made to face litigation unnecessarily. The suit, therefore, ought to have been decreed. He has relied upon certain judgments and we find it proper to refer to the same at appropriate place. However, at the end, he made a statement, upon instructions, that the plaintiff is ready and willing to pay amount of Rs. One crore more over the sum agreed upon & in deposit to put an end to litigation.

22. Shri Chauhan, learned counsel appearing for respondent No. 3 supported the arguments of Shri Dangre, learned counsel and accepted that defendant No. 3 has executed a sale deed in favour of the plaintiff.

23. Shri Dhore, learned counsel for defendant No. 6 - Cooperative Society also supported the arguments of Shri Dangre, learned counsel.

24. Shri Anilkumar, learned counsel, appearing on behalf of the contesting

respondent (defendants) Nos. 1, 4 & 5 submits that the arguments about demand for more amount over and above the agreed amount by the defendants is not supported by any pleading and there was no such plea taken while filing the suit. After State Government accepted purchase notice and NIT moved for acquisition, there was no scope left for de-reservation. Section 127 of the M.R.T.P. Act, was not available as period of 10 years was then to expire. He points out that Exh. 156 is to be acted upon, stage to demand specific performance has not come even today. He further points out that it is plaintiff who came up with a case that as de-reservation was under progress, the contract could not have been seen as frustrated. Under power of attorney, the plaintiff which has got means and methods to get the work done, was given necessary powers and hence defendants were not expected to take any steps. The plaintiff never called upon them to sign or execute any document and never complained that any particular step or work could not be accomplished as the defendants refused to co-operate. He invites attention to prayer clauses (1) & (2) in the plaint to submit that the plaintiff wants specific performance in the light of all documents and more particularly last document at Exh. 156. The purpose of entering into agreement with the plaintiff was to develop the lands of defendants into a township and not as a park or garden. When the fact that NIT was ready and willing to develop it as park or garden and there was no scope for locating a township on it became clear, the agreement between the parties did not survive. Even otherwise time was essence and as the plaintiff did not stick to time schedule or pay the amount as specified therein, denial of specific performance is just and proper. The steps taken by the plaintiff and its offer to develop suit lands as park or garden is not in consonance with the purpose with which the agreement was entered into between the parties. Filing of suit, obtaining orders of status quo therein and not depositing the balance amount though its attention was specifically invited towards the same, are stated to be the indications of unreadiness or unwillingness on the part of the plaintiff. Exh. 45 and Exh. 47 filed before the trial Court and pendency of Exh. 47 for a period of over six years are relied upon by Shri Anilkumar to state that the plaintiff was not ready and willing to deposit even the balance amount. It was given liberty to deposit the undisputed amount ie as found due and payable by it, but that amount was also not deposited.

25. Events during the pendency of suit have got no bearing on readiness and willingness of the plaintiff. The defendants wanted fruits in return of their property immediately and hence after waiting for three years and after finding that no township can be developed on their land, they put the arrangement to an end. The plaintiff unnecessarily filed suit and protracted the matter. As NIT moved for acquisition within the stipulated time of one year, de-reservation issue lapsed on 14.01.2005. Hence, the offers made by the plaintiff through its nominee to develop suit land as a park or garden are not the steps taken in pursuance of agreements between the parties. The said nominee while acting as Power of Attorney could not have agreed to undertake such development. If the

defendants had time of several years and could have waited, they would not have asked the plaintiff to intervene. It is pointed out that 10.10.2002 was the last date for payment and plaintiff failed to keep it.

26. He submits that the person examined as PW-1 by the plaintiff is not signatory to any document and none of the witnesses had any personal knowledge about the situation in which signatures of defendants were obtained on Article "A" or other agreements. The defendants specifically pleaded that they had not received the amount of Rs. One Lakh while signing article "A" and this has not been disproved by examining any officer of Co-operative Society or by producing any receipt. He further states that though the signatures on Exh. 156 are not in dispute, its contents and purpose is very much disputed. The said document has no existence in the eyes of law. He adds that in reply notice sent on 27.07.2005, the plaintiff did not assert any readiness or willingness. In written statement, defendants had agreed to refund the amount as per clause 11 of Exhs. 136 to 141 to the plaintiff.

27. In the alternative and without prejudice, Shri Anilkumar, learned counsel submits that even if de-reservation is presumed, the plaintiff did not offer to pay as per schedule contained in Exh. 156. The learned counsel submits that not only land of the defendants but lands of others are also to be developed as park and the plaintiff is not owner of the all those lands. The plaintiff has not taken any steps to obtain consent of others and it cannot expect the defendants to wait indefinitely to enjoy the fruits of their own property.

28. Inviting attention to deposition of PW-1, it is pointed out that PW-1 has no personal knowledge of any document or of any transaction. It is pointed out that the plaintiff itself had no funds and, therefore, borrowed money and paid it to the defendants. However, interest on such borrowed amount was paid through the amount payable to the defendants. It is stated that even today the land continues to be reserved for park. Shri Anilkumar submits that the plaintiff deliberately chose to produce as witnesses persons who had no knowledge on material aspects of the transaction. He further submits that the demand for better proposal by the defendants is after filing of suit i.e. after putting an end to earlier agreements. He has also invited our attention to various exhibits on record to point out the loan facility availed by the defendants from the State Bank of India, one time settlement with it, action under Section 29 of State Financial Corporation Act by Maharashtra State Financial Corporation, adverse order of Debts Recovery Tribunal, etc. The document at Exh. 126 is also pressed into service to show interest paid through pocket of defendants by the plaintiff to M/s. Zaver and Aspee Bapuna on sum paid to defendants 1 to 5.

29. Shri Anilkumar, learned counsel submits that all this material is rightly looked into by the trial Court. The contents or truth of contents of the document at article "A" is not proved by the plaintiff. Similarly, assertion that it is antedated has remained unchallenged as nobody on behalf of defendant No. 6-society entered the witness box. By consenting to Exhs. 136 to 141, defendant No. 6 -

society transferred & cast its obligations upon the plaintiff. Defendant No. 6 being a registered Co-operative Society, its actions needed to be viewed in the light of its object, business and management. Therefore, notice under Section 164 in the Maharashtra Co-operative Societies Act (MCS Act) to the District Deputy Registrar was essential. As that notice has not been issued, no suit could have been filed against defendant No. 6 and the Court could not have looked into either Article "A" or other documents to which defendant No. 6 consented. He further states that agreement at Exh. 156 is nothing but novation of contract in terms of Section 61 of the Contract Act. The rate of land was altered and time schedule for payment was also substituted. Thus, rights of parties were redefined, curtailed and limited, as such the document needed registration under Section 17. Sections 49 and 50 do not save that document. The purpose for which it is sought to be used by the plaintiff cannot be seen collateral purpose. Exh. 156, therefore, has been rightly discarded by the trial Court. As Exh. 156 is legally not available, the other documents at Exhs. 136 to 141 are also legally not enforceable and the plaintiff is not entitled to any relief. Shri Anilkumar, therefore, states that the defendants are not at fault and when they have shown readiness and willingness to refund the amount received in terms of clause 11 of Exhs. 136 to 141, a direction to refund that amount with 10% interest is unsustainable. He states that as and when the defendants receive the amount of compensation, they are duty bound to refund the amount received by them through it to the plaintiff.

30. Shri Dangre, learned counsel, in his reply, submitted that nature of suit land as prevailing on the date of institution of the suit and stand of NIT in relation thereto as in 2010 remain & continue to be the same even today. The readiness and willingness which was prevailing on the date of institution of suit and evidenced through conduct of plaintiff thereafter, lasts throughout during the pendency of the suit. The act of plaintiff in filing present appeal and in prosecuting it by depositing amount of Rs. Four crore, brings on record that readiness and willingness only. He submits that the provisions of Section 62 of the Contract Act are not relevant as Exh. 156 does not create any new right and is only diluting mutually, the condition in registered agreements i.e. Exhs. 136 to 141. Therefore, Exh. 156 does not require registration. In any case, it can be looked into for collateral purposes as per proviso to Section 49 of the Registration Act. He further states that development of suit land as a park is in consonance with the object of providing a township on it. A park may consist of not only residential colony but also provide other facilities. He, therefore, prays for decree in terms of prayer clauses in the suit.

31. The following points, therefore, arise for determination before us:--

"1] Whether the appellant/plaintiff is entitled to relief of specific performance as prayed for?

2] What is the effect of not serving upon the Deputy Registrar, Co-operative Societies, a notice under Section 164 of the Maharashtra Co-operative Societies

Act, 1960?

3] Whether the plaintiff has proved its readiness and willingness to perform the contracts?

4] Whether the contracts between the plaintiff and the defendants survive after the Nagpur Improvement Trust decided to acquire the land?

5] Is plaintiff appellant entitled to any relief?

6] Are the defendants liable to refund amount received by them to the plaintiff with interest?

7] Whether the judgment and decree of trial Court calls for any interference?"

As to point No. 1:--

32. Perusal of prayer clause (i) reveals that the effort of the plaintiff is to obtain a decree of declaration that agreement to sell dated 26.06.2000 (Article-A), registered agreements, six in numbers, and all dated 09.08.2002 (Exhibit Nos. 136 to 141), registered Power of Attorney dated 09.08.2002 at Exhibit-100 and supplementary agreement dated 10.04.2003 at Exhibit-156 are all subsisting and enforceable with further relief that the acts and omissions disclosed by defendant Nos. 1 to 5 in their legal notice dated 04.07.2005 at Exhibit-101 and cancellation of irrevocable Power of Attorney (Ex. 100) is bad in law. By prayer clause (ii), all above mentioned agreements are sought to be specifically enforced.

33. The trial Court has not exhibited agreement to sell dated 26.06.2000 and it has been given an article number. That document i.e. Article-A is entered into between defendant Nos. 1 to 5 on one hand, and defendant No. 6/Co-operative Society, on the other hand. The defendants have alleged that it is antedated and they did not receive any consideration as mentioned therein. The consideration reflected therein is of Rs. 1 lakh.

34. Nandkumar Khattumal Harchandani has been examined by the plaintiff as its witness No. 1. In relation to this document, Nandkumar has deposed that it bears signatures of Suresh, Jagmohan, Shantidevi, Smt. Shashi and Smt. Kamlesh i.e. defendant Nos. 1 to 5. He has further stated that all of them have put signatures in his presence. He also states that this agreement bears signature of his deceased brother Jagdish Harchandani which he has identified. He then states that the contents of agreement are correct and then it has been given article number. Cross examination of Nandkumar by defendants Nos. 1, 4 and 5 shows that the defendants did not cross examine him in relation to his assertions about Article-A. The said witness only points out the making of signature in his presence. He does not speak of any agreement between defendant Nos. 1 to 5 on one hand, and defendant No. 6, on the other hand. He also does not state that an amount of Rs. 1 lakh was paid or was agreed as received in his presence.

35. The defendants, on the other hand, examined one of them i.e. Shri Suresh

Suri as witness. This Suresh is defendant No. 1 and he has deposed that agreement dated 26.06.2000 (Article-A) was never executed in favour of defendant No. 6. He alleges that the plaintiff made mis-representation to the effect that it would help the plaintiff in getting the land released from the Urban Land Ceiling proceedings and to get it regularized under the Gunthewari Act. He has further deposed that the plaintiff informed that the cut-off date for regularization was 01.01.2001 and therefore there was need for antedating the agreement. The plaintiff agreed to abide by subsequent agreements dated 09.08.2002. He has deposed that the land was never demarcated and there was no layout on it. He also deposed that defendant No. 6 is sister concern/associate of family members and friends of the plaintiff and he or any other defendants never received any consideration on 26.06.2000. This witness has been cross examined by the plaintiff at length. However, there is no cross examination on Article-A or the alleged disclosure by the plaintiff of reason to antedate it or about non-receipt of consideration by the defendants.

36. Above evidence, therefore, shows that the plaintiff only proved the signatures of the defendants on Article-A. The defendants did not dispute their signatures but came up with a specific plea that they never received the consideration as mentioned in that document. Defendant No. 6 Society could have produced the audited books of accounts to show that an amount of Rs. 1 lakh was paid by it to the defendants before 26.06.2000. The suit is filed by the plaintiff through its Director/Anilkumar Harchandani. This Director has not entered the witness box. The plaintiff also did not make any efforts to bring on record the payment of consideration of Rs. 1 lakh to defendants in lieu of Article-A. The details of bookings done by defendant No. 6 between 26.6.2000 to 9.8.2002 are also not furnished to rebut the antedating theory. The best possible & unimpeachable evidence to throw more light was & must be with the defendant No. 6. In present matter, due to relationship between the plaintiff & the defendant No. 6, omission to get in record warrants drawing of an adverse inference against the said defendant as also against the plaintiffs. It is, therefore, obvious that the trial Court is justified in not accepting that document.

37. This brings us to the consideration of later agreements between the parties vide Exhibit Nos. 136 to 141. These documents are dated 09.08.2002. Agreement to sell at Article-A is signed on behalf of defendant No. 6 by its President Jagdishkumar S/o. Khatumal Harchandani. it is notarized and the Notary has mentioned that one advocate identified the parties before him.

38. Later agreements at Exhibit Nos. 136 to 141 are signed by respective owner defendant, Shri Anilkumar Harchandani on behalf of the plaintiff and one Nandkishore Adhau on behalf of defendant No. 6. Agreement at Exhibit-136 is signed by Smt. Shashi Sahani and Smt. Kamlesh Choudhary and it is in relation to their lands ad measuring total 17.74 acres. It records that there is a schedule of payments appended to it. This schedule specifies dates 05.08.2002, March 2003, December 2003, October 2003 and July 2005 as the dates of the payment.

Two separate schedules are appended showing the amounts to be paid to Smt. Shashi and Smt. Kamlesh each. This document is registered with Sub-Registrar on 09.08.2002 itself.

39. The other documents at Exhibit Nos. 137 to 141 are almost identical but refer to other defendants/land owners and their respective lands. Similar schedules showing the amounts to be paid on dates or in months mentioned supra are also annexed with these exhibits. These agreements show that Anilkumar S/o. Nandkumar Harchandani i.e. the son of PW-1 is the Director of plaintiff Company. All these documents are signed by defendant No. 6 Cooperative Society through its Secretary Nandkishore Tikaram Adhau & society has been referred to as confirming party.

40. These agreements stipulate that there is an agreement for sale between the land owners and the confirming party i.e. applicant/defendant No. 6. Conspicuously, the date of said agreement is not mentioned in it. It adds that in furtherance of that agreement party No. 3/Co-operative Society has entered into an arrangement with various persons and also accepted the booking amount from them. It also incurred various expenses but later on the property was brought under reservation and hence defendant No. 6 Society found itself not capable of getting over it. The land owners and party No. 3 Society record that they made all possible efforts to perform the agreement but because of difficulties and lack of necessary infrastructure, they found it proper to enter into an agreement with party No. (ii) developer i.e. the plaintiff. It is also mentioned that the parties desire that the subject property should be developed in an ideal township to cater to the needy persons at reasonable cost in the interest of all of them and the purpose for which party No. 3/Co-operative Society was formed. Accordingly, by the said agreement at Exhibit Nos. 136 to 141, the plaintiff has been appointed and nominated as developer. This agreement mentions rate of Rs. 17,7000/- per acre as also the total consideration to be paid to the respective owners. It also records that the list of persons with whom defendant No. 6/Co-operative Housing Society has entered into various arrangements, has been separately provided to the plaintiff/developer. It also mentions that the Society has received the booking amount from them. The plaintiff/developer has accepted the liability to fulfill and honour all such commitments of defendant No. 6 society towards them. The plaintiff has been authorized to receive the balance consideration from them. The plaintiff/developer agreed to pay an amount of Rs. 1/- per square feet of constructed space and/or plotable area to defendant No. 6 Society.

41. Thus, these agreements at Exhibit Nos. 136 to 141 do not speak of any earlier consideration paid by defendant No. 6 to the plaintiff. It does not mention any members or then, name the members of defendant No. 6 Society to whom the plots were allotted or agreed to be allotted in the proposed township. Defendant No. 6 being the Co-operative Society was duty bound to issue shares to its members and to issue them the allotment letter indicating the plot number

etc. All those details are conspicuously missing in these agreements.

42. We have already noted supra that defendant No. 6 has given its no objection to decree the suit as filed. However, the facts show that the agreements at Exhibit Nos. 136 to 141 cannot stand independent of Article-A. Article-A is the foundation of Exhibit Nos. 136 to 141. When Article-A itself has not been satisfactorily proved on record, it is clear that these agreements also cannot be relied upon.

43. Exhibit-100 on record is the irrevocable Power of Attorney jointly executed by all the defendants in favour of PW-1 Nandkumar S/o. Khattumal Harchandani. This document records that he has been nominated by the plaintiff Company for the said purpose. Ex. 100, in its preamble refers to the agreement between the land owners and defendant No. 6/Co-operative Society and thereafter to subsequent agreements at Exhibit Nos. 136 to 141. The Power of Attorney, therefore, cannot be used independently. The purpose for which the Power of Attorney has been entered into is to develop an ideal township on the lands forming suit property.

44. The last document which needs to be looked into is Exhibit-156. This document neither registered nor notarized. It is executed by defendant Nos. 1 to 5 and the plaintiff as also defendant No. 6 are the parties to it. The narration therein commences from agreement dated 09.08.2002 and the rates stipulated therein. It then mentions that after execution of said document the Nagpur Improvement Trust has regularized 1900 unauthorized lay outs and the Gunthewari Law also came into existence, with the result ample space became available and the rates came down. The plaintiff/developer, therefore, was likely to face problems as it had already invested huge amount over the project. The parties, therefore, had a joint meeting and the land owners agreed to reduce the land rate mentioned in registered agreement dated 09.08.2002. It mentions that till then the developer had paid an amount of Rs. 2,61,00,250/- to the defendants. The rate per acre was reduced of Rs. 1,25,000/- and new rate agreed was Rs. 15,82,000/- per acre. It also mentions that after said reduction, the developer/plaintiff paid an amount of Rs. 1,15,00,000/- to the defendants. The time bound schedule of payments with registered agreements dated 09.08.2002 was re-framed and as per re-framed schedule, the amount due and payable in March, 2003 as per the old/original schedule is agreed to be paid within six months from the date of clearance of Park reservation. Second installment is agreed to be paid ten months after such payment and third or last installment was agreed to be paid nine months after the second payment. This agreement described to be supplementary agreement executed on 04.10.2003 expressly mentions that except the changes mentioned supra, all other conditions of registered agreement dated 09.08.2002 would remain unchanged and supplementary agreement would form part and parcel of registered agreement dated 09.08.2002.

45. There is factual dispute about the execution of this supplementary

agreement. According to the defendants, their signatures were obtained by misleading them under the pretext that it would facilitate obtaining the orders of de-reservation or clearance. This document is not registered and the trial Court has refused to read it into evidence. Considering the legal challenges to this document, we are not inclined to delve into niceties of factual aspects. Witness on behalf of land owners namely Suresh (DW-1) has accepted that he understands English and he did all signatures after reading and understanding the document.

46. Exhibit-156 mentions name of Nandkishore T. Adhau as confirming party. Shri Adhau appears to have placed his signature on behalf of defendant No. 6/Co-operative Society. Insofar as registered documents dated 09.08.2002 at Exhibit Nos. 136 to 141 are concerned, those documents carry photograph and signature of Shri N.T. Adhau. That signature is different even to a naked eye from both the signatures of this person which appear on last page of Exhibit-156.

47. Section 17(1)(b) of the Registration Act, 1908, stipulates that such non-testamentary instrument which purports to limit or extinguish any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property must be compulsorily registered. Exhibit-156 limits the right of land owners to claim consideration at Rs. 17,7000/- per acre. It brings down or reduces that rate by Rs. 1,25,000/- per acre and new selling rate as agreed therein is Rs. 15,82,000/- only per acre. Thus, the entitlement of the land owners to receive the larger amount of sale consideration has been curtailed or brought down substantially. Not only this but as per the registered agreements dated 09.08.2002, all the payments were also to be completed by July, 2005. Exhibit-156 shows that payment due to the land owners in March, 2003 as per Exhibit Nos. 136 to 141 itself was not released till date of its purported execution i.e. till 04-10-2003. As per Exhibit Nos. 136 to 141, the next payment was due in December, 2003, thereafter in October, 2004 and lastly in July, 2005. Vide Exhibit-156 the amount which should have been received by defendant Nos. 1 to 5 in March 2003 is made payable within six months after clearance from Park reservation granted by the Competent Authority. Thus, till the event of de-reservation or deletion of reservation, this period of six months could not have & can not begun to run. The next installment was made payable 10 months after the expiry of above mentioned period of six months. Third installment was to be paid after nine months from the second installment. Thus, specific time on which the defendants were guaranteed payment in Exhibit Nos. 136 to 141 was deleted. The quantum of installments was varied, payment thereof was rescheduled & also made contingent upon the event of clearance from Park reservation. This event or clearance from Park reservation could not have been controlled by any of the parties or even by any Government agency. The plaintiff has pointed out that Writ Petition No. 1629 of 2011 filed by it for seeking declaration of de-reservation has been admitted by this Court on 12-04-2013 for final hearing and it is still pending.

48. This discussion on effect of Exhibit-156 shows that it is a document which required compulsory registration under Section 17 (1)(b) of the Registration Act.

49. The plaintiff has relied upon the proviso to Section 49 of the Registration Act, to urge that Ex. 156 can be taken into consideration for collateral purposes. In this suit, when the plaintiff seeks specific enforcement of Exhibit-156, it is apparent, that the said contention is misconceived. The defendants/land owners have invited our attention to the provisions of Section 50 of the Registration Act, to urge that in such situation, registered documents like Exhibit Nos. 136 to 141 only take effect and must be given primacy as against unregistered document at Exhibit-156. We do not find it necessary, to delve on that aspect while considering this issue. The impact of Section 50 of the Registration Act is being considered while resolving point No. 4, mentioned supra. However, the original time schedule as envisaged in paragraph No. 2 of registered agreement dated 09-08-2002 revealed that the payment at Annexure-B thereto was not contingent upon any such de-reservation or clearance by the Planning Authority. It obliged the plaintiff to strictly abide by the time schedule. If the plaintiff delayed the payment by more than three months, it had to pay interest at 15% on that amount. In case of habitual defaults, the land owners were given liberty to terminate their respective agreements with three months prior notice. Ex. 156 eclipses this scheme in registered documents totally.

50. This, therefore, shows that the land owners who were to receive the last payment in July, 2005 had not received even second installment as per Annexure-B and, as per case of plaintiff, that second installment payable in March, 2003 is indefinitely postponed. The future payments were also postponed and everything was made contingent upon a contingent event of securing such de-reservation or clearance from Park reservation. Thus, Exhibit-156, in fact, materially substitutes the essential terms and conditions of registered agreements at Exhibit Nos. 136 to 141. Perusal of Annexure-B with registered agreements show that a small amount was received by the land owners at the time of registration or before registration. The major amount was to be received or recovered by them thereafter only. This portion to be recovered is about 10 times more than the amount already received by them. The change brought about by Exhibit-156, therefore, shows that it has material impact on rights of the parties and on modalities. This discussion, therefore, leaves no manner of doubt that Exhibit-156 is not sought to be used for any collateral purpose & the plaintiff company is praying for its specific performance. It ought to have been therefore duly registered.

51. At one stage, Advocate Shri Anilkumar attempted to demonstrate before us that it constituted novation of contract. He also pointed out the provisions of Section 62 of the Indian Contract Act, 1872, for said purpose. According to Advocate Shri Dangre, said section has no application in the present matter. Again, we do not find it necessary to examine this aspect due to the prayers as made by the plaintiff. The plaintiff seeks specific performance of agreement to

sell at Article-A, of six registered agreements at Exhibit Nos. 136 to 141 as also of Exhibit-156. The plaintiff has not prayed for ignoring Article-A or then unregistered agreement at Exhibit-156. The plaintiff seeks enforcement of a contract/s between parties as surfacing through all these documents including an unregistered agreement at Ex. 156 also. Looking to the contract between the parties, the participation of a Co-operative Society therein is essential. Exhibit Nos. 136 to 141, therefore, cannot be viewed independent of Article-A and the plaintiff does not want these registered agreements to be enforced independent of Exhibit-156. Plaintiff nowhere pleads or agrees to enforce contacts contained only in Exs. 136 to 141 by not taking note of or by not recognizing the modifications therein vide Ex. 156. Hence, even if we presume that Art. A is a duly proved document, this discussion does not entitle the plaintiff to a decree for specific performance. Our findings on other points below also lead us to the same result.

52. As the plaintiff has not filed the suit on the basis of oral agreement or any unregistered agreement but on all agreements together, we find that the judgment of learned Single Judge of this Court reported at Nirav Deepak Modi of Bombay, Indian Inhabitant, Vs. Najoo Behram Bhiwandiwalla of Bombay, Indian Inhabitant, Ami Merchandising Pvt. Ltd., , Surendra B. Agarwal and Anuj Agarwal, delivered at interlocutory stage can not assist the plaintiffs. Admission of their signatures by the defendants on Art. A does results in proving the correctness or truth of its contents is the proposition advanced by citing the judgment delivered by the Hon. Apex Court in Narbada Devi Gupta Vs. Birendra Kumar Jaiswal and Another, . This ruling shows that their as against plea of tenancy based upon the undisputed signed rent receipts issued by the plaintiff landlord, landlord claimed that he gave a blank signed paper to the defendant to conduct litigation. After specific averment of the tenant, plaint was not amended & no plea of fraud was raised. The document was admitted & given exhibit number. The plaintiff could not explain how the rent receipts having thumb impression & signatures went in custody of tenant. Here the defendants specifically urge that the defendant 6 cooperative housing society is the sister concern of plaintiff, an antedated document was entered into & they did not receive any amount. Defendant No. 6 cooperative housing society could not have paid the advance to the defendants in cash or without accounting for it. Hence, the above ruling can not govern the present controversy. Division Bench of this Court in Imageads and Communications Pvt. Ltd. Vs. Bajaj Leathers Private Limited and Mittal Chambers Owners Premises Co-operative Society Ltd., , in paragraph 9 found that having encashed the cheque received with undisputed covering letter mentioning the agreement & balance payment towards final consideration, effort to urge the agreement as sham & bogus in written statement & attempt to lead oral evidence on it but inconsistent with the documents, could not have been countenanced. Again the view is reached in peculiar facts which supported the case of that plaintiff. Here, as discussed supra, the emerging position is otherwise & discredits the appellants.

As to point No. 2:--

53. At this stage, it would be proper to understand the impact of absence of notice under Section 164 of the Maharashtra Cooperative Societies Act. The notice is necessary if the suit is filed against a Co-operative Society in connection with its business or management. The legislature has not prescribed service of notice upon a Co-operative Society but notice is required to be served upon an officer of the State Government namely the Registrar (District Deputy Registrar) of Co-operative Societies. This officer has been given power to supervise and monitor the working of a Co-operative Society to see that it functions democratically in accordance with the parent Act and its bye-laws. Notice, therefore, is not meant or issued for the benefit of Co-operative Society. The purpose of the provisions is to enable said officer of the State Government to maintain proper vigil on administration, business and management of such society. Contention that such notice can be waived by defendant No. 6 is, therefore, erroneous.

54. The defendant No. 6 Society, in the present matter, is duly registered under the Maharashtra Co-operative Societies Act. The agreement to sell dated 26.06.2000 (Article-A) was entered into by it through its President Jagdishkumar who appears to be real brother of PW-1 and uncle of the Director of the plaintiff company. While entering into registered agreements dated 09.08.2002 defendant No. 6 Society states that it has entered into various agreements with persons and received the booking amount from them. List of such persons is claimed to be handed over to the plaintiff/developer. The developer has agreed to shoulder the liability to fulfill and honour the commitment of the Society towards these persons. The plaintiff/developer is also authorized to receive the consideration from such persons. Thus, the nature of this arrangement between defendant No. 6 Society and the so-called persons from whom it has received the booking sums is important. Such persons ought to be the members of defendant No. 6/ Cooperative Society. If the Society has to abdicate its function in favour of the developer, there has to be proper resolution passed by its General Body authorizing this course of action. The agreement to sell at Article-A does not show any such resolution while entering into contract with defendant Nos. 1 to 5. The registered agreements at Exhibit Nos. 136 to 141 also do not mention such resolution to support transferring liability of these customers of defendant No. 6 to the plaintiff. We cannot and need not go into the validity of all these acts of defendant No. 6. We have seen some difference in signature of Shri Adhau who has signed registered agreements on behalf of the Society and who is also shown to have signed Exhibit-156. The responsible officer of the State Government like the District Deputy Registrar could have seen through all this and arrived at proper conclusion to safeguard the interest of the members of defendant No. 6 Society. He could have also summoned from defendant 6 the books of accounts, membership records & verified the exact nature of transaction. The purpose of serving suit notice upon that authority is to facilitate such enquiry. As the plaintiff did not issue that notice, this scrutiny is avoided. We, therefore, find that the

trial Court has rightly concluded that the service of notice under Section 164 of the Maharashtra Cooperative Societies Act upon defendant No. 6 Society was must. The defendant No. 6 Society has in the present matter merely acted as a puppet in the hands of the plaintiff. We can not forget that the defendant No. 1 has specifically deposed that the said Co-operative Society is the sister concern of the plaintiff. This statement is supported by the relationship between the parties who have come together against landowners.

55. There is no proof of its any other activity though the defendants 1 to 5 urge that it is a sister concern of the plaintiff. The circumstances here cast doubt on role of a registered cooperative housing society & lend credence to the stand of defendants. Precisely this may be one of the mischiefs sought to be remedied by the State Legislature through section 164 . The District Deputy Registrar may have called for records to find out propriety, legality etc. of the steps taken by the Society. 2007 (2) All MR 306 - Pimpri Refugee Industrial Cooperative Society v. Parmanand Bhimandas Talreja is the view of learned Single Judge of this Court in a writ petition filed by the defendant seeking return of plaint under O.VII R. 11 after its disposal. Observations in paragraph 5 of the judgment show that requirement of serving notice not upon the defendant cooperative society but upon the Registrar ie officer of the State Government was not brought to the notice of this court at all. The said judgment therefore is not an authority for the proposition that a cooperative society can dispense with or defeat the mandate of S. 164 of the MCS Act.

As to point No. 3:--

56. The other question to be looked into is, whether the plaintiff has proved its readiness and willingness to perform its obligation as per the agreements between the parties. The arguments of the plaintiff in this respect show that the plaintiff insists for considering that readiness and willingness only in terms of unregistered agreement at Exhibit-156. The schedule of payment with respect to which the readiness and willingness could have been examined in law is Annexure-B with registered agreements at Exhibit Nos. 136 to 141. How the unregistered document has attempted to introduce a material alteration therein has been mentioned supra. Thus, after paying the land owners about 10% amount, the payment of balance amount has been indefinitely postponed by device of an unregistered agreement. The defendants correctly point out that the plaintiff could not & did not complete the payment as per the registered agreement while the plaintiff relies upon Exhibit-156. In the light of above discussion and the express provisions contained in Section 50 of the Registration Act, it is clear, that the terms and conditions appearing in Exhibit Nos. 136 to 141 prevail over Ex. 156 and must be implemented. The readiness and willingness of the plaintiff cannot be examined qua time schedule substituted by Exhibit-156. Exhibit-156 is reached between the parties just 14 months after registered agreements dated 09.08.2002. The plaintiffs claim that the defendants have accepted the payment in terms of the conditions mentioned in Exhibit-156.

They pointed out that amount of Rs. 1,15,000/- has been paid by the plaintiff to the respective land owners on 04.10.2003. However, the plaintiff has not sought specific performance mainly only in view of Exhibit-156. The purpose or object of development stipulated in registered agreements has not undergone any change but is reaffirmed by the Exhibit-156. We have already noted that the agreements between the parties cannot be enforced in absence of effective and legal representation of defendant No. 6 Society in the matter. All the arguments of the plaintiff proceed upon the subsequent developments. The plaintiff has attempted to urge that the law enables the land owners to develop the subject lands for earmarked purpose i.e. as Park also. It has taken support from communication (Exhibit-263) dated 04.01.2010 which is the proceeding of a meeting with Hon"ble Minister. In the meeting held on 04.01.2010, the fact, that the land owners can develop the subject land for the purpose for which it is earmarked in development plan, has been taken into consideration. We find that the purpose of agreement at Exhibit Nos. 136 to 141 is to develop the subject land into an ideal township. Township will not mean only Park or a zoological or botanical garden, it will necessarily consist of a residential colony. Even otherwise, the plaintiff has not taken any steps for developing the subject land for earmarked purpose. On the contrary, it has filed a Writ Petition No. 1629 of 2011, seeking declaration that the reservation has lapsed. We, therefore, do not find anything wrong with the conclusion of the trial Court that the plaintiff has failed to prove its readiness and willingness to develop the land for agreed purpose. Admittedly, the plaintiff does not complete the payments as per Annex. B with Exhs. 136 to 141 & wants to comply with modified schedule as per Exh. 156. Legally, this effort can not be countenanced & negates the stance of readiness & willingness.

Faquir Chand and Another Vs. Sudesh Kumari, is also pressed into service by Adv. Dangre to show that the readiness & willingness is apparent from plaintiffs steps like continuous correspondence with the State Government or NIT, filing of writ petitions, institution of a suit for specific performance or obtaining three sale deeds from the willing defendants 2 & 3. Even the deposit of money during pendency of this first appeal is cited as an indication thereof. Defendants 2 & 3 executed the sales during pendency of suit for specific performance in the process of compromise. Other defendants did not agree to the compromise & hence, the suit continued. In that suit the effort of plaintiff is to force the unregistered agreement at Ex. 156 on unwilling defendants 1, 4 & 5. Plaintiff did not abide by agreements at Ex. 136 to 141. We have already found that Ex. 156 is not enforceable against these defendants. The discussion reveals that the plaintiff was never ready & willing to follow agreements at Ex. 136 to 141.

Plaintiff has placed reliance upon the judgment of Hon. Apex Court reported at P. D'Souza Vs. Shondriilo Naidu, to buttress the stand that when at a later date, the landowners accept payment without protest, the time can not be construed as an essence of contract. Hon. Apex Court also holds that escalation in price of property can not be the ground to deny relief of specific performance. Here, the plaintiff itself has not accepted theory of novation of contract or has not relied

upon any oral agreement. The landowners no doubt accepted amount of Rs. 50 Lac but it is during pendency of suit while parties were attempting a compromise. Plaintiff itself argues that the defendants 1, 4 & 5 were asking him to better the terms. In present case, Art. A which constitutes very foundation of everything is not duly proved. Later agreements to develop at Exs. 136 to 141 are found not surviving after application by NIT for acquisition on 14.1.2005. This ruling therefore has no bearing. Division Bench judgment of this Court in Jeetmal Mangalchand Sakhlecha and Others Vs. Neelkanth Building Corporation and Others, judge view in Ambadas Khanderao Hagvane and Others Vs. Shaikh Razaq Shaikh Yakub and Others, - Preetam Kaur v. Prakash Jaiswal which follow the same line need no consideration. Also there can not be any debate about the proposition laid down in Shrikrishna Ganuji Sonone Vs. Vitthal Bajre, that unless there are strong equities against the plaintiff, ordinarily specific relief needs to be decreed. However, here our findings are otherwise & answer to various points framed constrain us to sustain the judgment & decree of the trial court.

Similarly the division bench judgment Nilkantha Dhondiba Chavan v. Unabai w/o Anant Desai -(2005) 2 Mah.L.J. 8 which lays down that an inference of unreadiness or unwillingness can be drawn against the plaintiff only if fails to deposit after the express court order to do so in terms of S. 16(c) of the Specific Relief Act may show that reliance upon long pendency of Ex. 45 or 47 before the trial court can not be viewed adversely and used against the plaintiff. But then if such a purchaser deposits the balance amount voluntarily, in appropriate case, it can be viewed a positive material in its favour. Learned Single Judge of this Court in Sau. Chandraprabha Prabhakar Ghorpade Vs. Maruti alias Marutrao Shivram Patil and Sadashiv Balvant Puranik, again taken the similar view with further observation that readiness & willingness can be ascertained from material on record. Narinderjit Singh Vs. North Star Estate Promoters Ltd., relied upon by the plaintiff/appellant itself shows that the readiness & willingness is required to be decided with reference to conduct of the parties. Though the trial court has not properly appreciated the significance in law of the positive direction in terms of S.16(c) , that by itself does not entitle the plaintiff to a decree in present matter.

As to point No. 4:--

57. The point, whether the contract between the parties survived after the Nagpur Improvement Trust decided to acquire the land now needs consideration. The fact that the land owners objected vide Exhibit-229 on 15.03.2000 to propose reservation in draft development plan is not in dispute. Article-A dated 26-06-2000 appears to be born thereafter. The registered agreements at Exhibit Nos. 136 to 141 are dated 09.08.2002. The unregistered agreement at Exhibit-156 is dated 03.10.2003. In terms of registered agreements dated 09.08.2002 the defendants executed a Power of Attorney in favour of PW-1/ Nandkumar. PW-1 issued notice at Exhibits-114 and 115 on 05.04.2003 & moved

for clearing the land of reservation. The Nagpur Municipal Corporation (other body) replied to this notice on 06.06.2003 and pointed out the defects therein. This Power of Attorney, thereafter, has issued fresh notice under Section 49 of the Maharashtra Regional & Town Planning Act vide Exhibit-118. Section 49 obliges the Planning Authority to acquire the land, if the procedure therein is complied with. Under said section, the unsatisfied land owners who are not in a position to beneficially use their lands or to sell it at a competitive price, are allowed to serve a purchase notice. The defendant Nos. 1 to 5, accordingly, served the purchase notice through the plaintiff and that purchase notice is confirmed by the State Government vide Exhibit-121 on 23.03.2004. The acquiring agency namely the Nagpur Improvement Trust had already issued earlier a public advertisement for development of a Park on subject land on 05.08.2003 vide Exhibit-198. The Nagpur Improvement Trust applied for acquisition on 14-01-2005. Under the scheme of Section 49, if within one year from the date of confirmation of the purchase notice, there is failure to make an application to acquire the reserved land, reservation is deemed to have lapsed. Here, that application has been moved well within time and the NIT also deposited an amount of Rs. 5,31,00,000/- for its acquisition on 26.09.2006. It is, therefore, apparent that the purchase notice issued by the land owners through the plaintiff became redundant after 14.01.2005.

58. Various events after 14.01.2005 pointed out to this Court are the efforts made by the Power of Attorney or the plaintiff thereafter to get the land de-reserved or then to seek authorization in favour of the land owners to develop it for the purpose for which it is earmarked in Development Plan. The lengthy correspondence in this respect shows that lastly, vide Exhibit-263, on 04.01.2010 the meeting took place in this respect. Perusal of this document shows that it is the proceedings of said meeting conducted in the chamber of the Chief Secretary of the State of Maharashtra on 04.01.2010. The meeting is attended by PW-1/ Nandkumar, Chairman of the Nagpur Improvement Trust and its Executive Engineer. It brings on record fact that the total reservation in development plan for park is fastened on 52.62 Hectares. PW-1 had Power of Attorney regarding only about 50% of that land while remaining land was/is owned by four to five other persons. These other owners have no contract with plaintiff & are strangers to this litigation. The purchase notice served by PW-1 was only in relation to 27.43 Hectares of land. It is also noticed that the Nagpur Improvement Trust has implemented the development proposal and has deposited 2/3rd amount of compensation payable to the land owners. The meeting concludes by observing that the Nagpur Improvement Trust can acquire the entire land and then develop it itself or, then get it developed through private developers. In alternate, it is also noted that the land owners can also participate as stake holders in work of Park development. At the end, the requirement of a minor modification in terms of Section 37 of the Maharashtra Regional & Town Planning Act has been taken note of. The proceedings also mention that if the Park reservation was to be developed on participatory basis, the necessary modification will be required to

be undertaken and hence the NIT was advised to submit the requisite proposal. The matter has not progressed thereafter and Writ Petition 1629 of 2011 filed by the plaintiff is still pending.

59. In the light of arguments and the contents of Exhibit Nos. 136 to 141, it is seen, that the subject land cannot be developed as a ideal township after the Nagpur Improvement Trust moved the application on 14.01.2005. Not only Ex. 198 but also Ex. 200 dated 6.1.2005 show the reservation as "Park" with allied permissible user as amusement park, forestry/nursery, botanical or zoological garden or the bird sanctuary. This reservation is on lands which fall in "green belt control scheme". Thus, the submission of plaintiff's that it can develop it as a residential scheme is unsustainable. In so far as the legal contracts it & contesting defendants are concerned, their design to establish an ideal town failed after NIT filed application to start the acquisition proceedings as per law. The sequence of events shows that after the plaintiff and the Power of Attorney made attempts to seek permission to develop the subject land as a Park in favour of the land owners by opposing acquisition and filed application at Exhibit-127 on 03.05.2005, the land owners distanced themselves and chose to serve the legal notice on 04.07.2005 upon the plaintiff.

60. We, therefore, find that the trial Court is justified in observing that the contract between the parties was frustrated on account of these developments. Advocate Shri Dangre has urged that the trial Court was not called upon to look into the aspect of frustration. However, in paragraph No. 19 of the plaint the plaintiff has urged that as the process of de-reservation is in progress the subject contracts are not yet frustrated as contemplated under Clause-11 of the agreement dated 09.08.2002. We find that the contracts, whether at Exhibit Nos. 136 to 141 or then at Exhibit-156 got frustrated on 14.01.2005. As such, there is no question of plaintiff being ready and willing to perform its part of agreement after said date. It can not force the defendant to participate in developing the park reservation on the subject lands.

61. In view of this finding, we need not delve in detail upon impact of application at Exhibit-47 moved by the land owners in the pending suit calling upon the plaintiff to deposit the balance amount of sale consideration. The application was opposed by the plaintiff and it remained pending for more than six years and was ultimately not pressed by the land owners. There was no order passed by the trial Court calling upon the plaintiff to deposit any amount. Hence, in the light of express provision in Section 16(c) of the Specific Relief Act, in absence of such order the non deposit of balance amount by the plaintiff cannot be taken as an indication of its unreadiness or unwillingness. However, these events have occurred after the Nagpur Improvement Trust moved for acquisition on 14.01.2005 and therefore, are not determinative. The contention that the plaintiff paid an amount of Rs. 50 lakhs during the pendency of suit or defendants accepted it, is also irrelevant for very same reasons. The argument that the defendants wanted to extort more amount from the plaintiff and

therefore they avoided the compromise during the pendency of the suit is hardly relevant. The fact that the defendant Nos. 2 and 3 have during the pendency of suit, executed sale-deeds of their respective portions in favour of the plaintiff by accepting such compromise, is again not decisive. The contracts between the parties came to an end and the subsequent sale by these defendants therefore do not improve the case or cause of the plaintiff against defendant Nos. 1, 4 and 5. The plaintiffs have also pointed out that the Nagpur Improvement Trust did not deposit the requisite amount of Rs. 11.38 Crores for paying compensation to the land owners. This failure on part of the Nagpur Improvement Trust cannot revive the contracts between the parties which have lapsed on 14.01.2005. Similar arguments on helping hand provided by the plaintiff to the defendants to repay their loans to the State Bank of India, SICOM, Maharashtra State Finance Corporation, etc. are not relevant.

As to point No. 5:--

62. We briefly refer here to the other judgments cited by Adv. Dangre. K. Prakash Vs. B.R. Sampath Kumar, is the judgment where primacy of discretion exercised by trial court in decreeing the suit & limited scope available to the appellate court to interfere with it has been pointed out by the Hon. Apex Court. It also found that mere escalation in prices could not have been the reason to unsettle that decree & substituted sale consideration of Rs. 25 Lac in place of Rs. 16 Lac. Niwas Builders Vs. Chanchalaben Gandhi (since deceased through legal heirs), is the division bench judgment of this Court which upholds rejection of a decree for specific performance. The material on record there has been considered & we need not dwell more upon the law in this respect. Chheda Housing Development Corporation Vs. Bibijan Shaikh Farid and Others, considers challenge at an interlocutory stage. Rajesh Deorao Meshram, Proprietor of Rajesh Vihar Developers Vs. Murlidhar Khangar, , Dashrath Bondade and Others Vs. Shyam Sunder Khandelwal, are the division bench judgment which essentially evaluate the conduct of parties. We have already appreciated said conduct & the law governing it supra. The cumulative effect of the discussion & the findings reached by us is that on account of each of such findings, the plaintiff can not be given any relief & its suit can not be decreed. Adv. Anil Kumar has also tendered a compilation of the precedents. Most of them figure in the impugned judgment of the Trial Court. As we are inclined to sustain & uphold that judgment to the extent it dismisses the prayer for specific performance, we do not find it necessary to evaluate those judgments.

As to point No. 6:--

63. Defendant Nos. 1, 4 and 5 have filed a cross objection. They rely upon Clause-11 in the registered agreements dated 09.08.2002 to urge that they have to refund the amount of Rs. 4,16,70,952/- (ie Rs. Four Crore Sixteen Lakh Seventy Thousand Nine Hundred & Fifty Two only) to the plaintiff only after receipt of compensation from the Nagpur Improvement Trust and that too without any interest. The trial Court, therefore, could not have called upon them

to pay that amount with 10% interest. We find that said amount is determined by the Trial Court in paragraph 53 of its judgment & the defendants do not assail it as incorrect. The agreements dated 09.08.2002 at Exhibit Nos. 136 to 141 envisaged the refund, if the efforts to get the lands deserved failed. Only then the land owners have to refund the amount of plaintiffs through the compensation received by them from the NIT and Clause-11 also does not stipulate any interest upon it. This Clause or the fact that does not undergo any change due to Ex. 156, is accepted by the plaintiffs. In this situation, it is apparent, that the plaintiff is entitled to be reimbursed but only through the amount of compensation paid to the land owners by the Nagpur Improvement Trust & that too, without any interest.

As to point No. 7:--

64. The judgment and decree of trial Court, therefore, calls for limited interference & needs modification. It is necessary to delete the decree & direction to the defendants 1, 4 & 5 to refund the amount received by them from plaintiff with 10% interest. Instead the defendants 1, 4 & 5 are directed to refund that amount of Rs. 4,16,70,952/- (ie Rs. Four Crore Sixteen Lakh Seventy Thousand Nine Hundred & Fifty Two only) after receipt of the compensation for the subject lands from the acquiring agency i.e. NIT. If the defendants do not repay said amount within four weeks of receipt of compensation from the NIT/State Government, they shall pay simple interest at 10% on it for the period beyond such four weeks. If the plaintiffs do not get the refund of Rs. 4,16,70,952/- within four weeks mentioned above, it will be open to them to recover that money with accrued interest by filing an execution or by taking recourse to other coercive measures as per law. It is also open to the plaintiff's to withdraw the amount of Rs. Four Crore in deposit with the registry of this Court with interest accrued upon it. However, parties shall bear the costs as incurred. A decree be drawn accordingly to that effect.

65. Appeal filed by the plaintiff is dismissed. Cross objection of the defendants 1, 4 & 5 is allowed by modifying the decree against them to the extent stipulated above. Special Civil Suit No. 82 of 2006 filed by the appellant or plaintiff shall stand decreed partly but without any costs.

66. At this stage, learned Advocate Shri Dangre for the appellant, seeks continuation of interim arrangement for a period of ten weeks" more. Learned Advocate Shri Anilkumar for respondent Nos. 1, 4 and 5 submits that instead of this Court issuing this direction, the respondent Nos. 1, 4 and 5 shall maintain the situation as it is for a period of 10 weeks". In view of the undertaking which we take on record, no orders are necessary.