
(2010) 05 DEL CK 0203

In the Delhi High Court

Case No : C.S. (OS) 2011 of 1984 and I.A. No. 12274 of 1996

Shri Sant Singh

APPELLANT

Vs

Shri K.G. Ringshia

RESPONDENT

Date of Decision : 24-05-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 15, 16, 17, 18, 19
Specific Relief Act, 1877 — Section 42
Specific Relief Act, 1963 — Section 34

Citation : (2010) 6 ILR Delhi 203

Hon'ble Judges : S. Ravindra Bhat, J

Bench : Single Bench

Advocate : Purnima Sethi, for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

S. Ravindra Bhat, J.—The plaintiff claims a declaration in this suit, that the letter dated 20th November, 1984, by the defendant (hereafter "the impugned letter"; intimating about cancellation of a previous agreement between the parties, in respect of sale of a flat in Bombay now Mumbai) is illegal and void, and that the agreement between the parties, dated 10th November, 1979 subsists and binds them.

2. Briefly, the facts are that the plaintiff had entered into an agreement on 10.11.1979 with the defendant whereby a flat in the multi-storeyed building "ADITYA" to be constructed at Chakla Village, Andheri (East), Bombay by the defendant was agreed to be delivered to him on construction, for which he had paid a sum of Rs. 5,499/- to the latter. The plaintiff contends that though a number of years elapsed, and he came to know that construction of the building had started, nothing was heard from the defendant. The plaintiff alleges that he changed his residence, and intimated this to the defendant on 13.01.1982; the letter also queried about when the building work was to commence.

3. In August, 1984 by means of registered letter sent to the defendant the

plaintiff complained about the delay caused in the construction and inquired when the flat was likely to be completed and handed over to him and he offered to make further payments, immediately on demand. This was followed by reminder letter dated 27.10.1984 sent by Registered A.D; the letter again reiterated about the plaintiff's change of address. Receiving no response, the plaintiff sent a telegram on 05.12.1984, about the issue, mentioning about the previous letter and reminder, and asking about progress of the project. The plaintiff states having received a reply dated 20.11.1984, whereby he was informed that the amount of Rs. 5499/- paid by him at the time of signing of the agreement had been refunded through Shri Harnam Singh (described in the suit at some places as his son, and at other, as his brother-in-law) who had collected the amount under his (the plaintiff's) instructions in the presence of his broker Mr. Anjani Mishra; and now there was no agreement subsisting between the parties. The letter also alleged that the agreement dated 10.11.1979 had been mutually cancelled. It is alleged that though dated 20th, the letter had been despatched from Bombay on 28th November, 1984.

4. The plaintiff contends that the defendant's allegations in the letter are entirely baseless, and that he turned dishonest since the building had been constructed upto second floor level. It is contended that the defendant was to, according to the agreement of the parties, dated 10th November, 1979, give possession of the flat duly completed in all respects on or before 30th September, 1980.

5. The plaintiff denied that Harnam Singh had received the refund of Rs. 5499/- from the defendant or he was authorised by him to do so. These allegations are false and baseless. In fact the defendant had commenced the construction belatedly and now when the value of the flat had increased he has become dishonest and wants to avoid the agreement on one pretext or the other. The conduct of the defendant, alleges the plaintiff, is dishonest and he wanted to cheat and defraud him. It is alleged that the said Harnam Singh, a highly placed bank official, used to inquire about the progress of construction, periodically, but the defendant, falsely and dishonestly denied existence of the agreement, setting up a cancellation, and alleged refund, which never took place. It is alleged that if there were some truth in that plea, the defendant would have mentioned some details and specific facts about when the refund took place, and more importantly, produced some receipt, as would be expected in the normal course of human conduct. The plaintiff also says that Harnam Singh was, in any case, never authorized to seek refund of the amount deposited, or have the agreement cancelled.

6. The defendant, in the written statement, does not deny that the parties entered into an agreement, as alleged in the suit; he however, contends that by mutual agreement, it was cancelled on 14th August, 1981. The defendant further alleges that by another agreement, dated 07.02.1984, he contracted to assign or transfer the flat to one S.R. Karwa, resident of Bandra (East) Bombay. In terms of the agreement, the consideration payable was Rs. 20,000/-, of which the

intending purchaser paid Rs. 7000/-. The intending purchaser applied for a housing loan. The defendant submits that the said Karwa is a necessary party, whose absence, and the absence of the Income Tax department (his employer) renders the suit liable to be dismissed for non-joinder of necessary parties.

7. The defendant denies receiving any letters from the plaintiff, enquiring about the status of construction or about intimation of address change or about intimation of address change, or any query as to when the flat was being constructed and handed over to him. It is submitted that the allotment (to the plaintiff) was finalized by one Harnam Singh, a Bank Manager, and the plaintiff's son. The defendant alleges that he secured partial permission under the Urban Land Ceiling and Regulation Act, 1976 (ULCR Act) only in June, 1981 and further permission in January, 1983, and, later the commencement certificate under the Maharashtra Regional Town Planning Act, on 1st March, 1984; the first slab of the building was cast in June, 1984; the second was cast in September, 1984. He alleges that the plaintiff neglected to make payments at all those stages of construction, at least from June, 1984. It is crucially contended that the agreement of 10th November, 1979 (in respect of which the plaintiff seeks the decree of declaration) was mutually cancelled, by agreement of parties, on 14th of August, 1984.

8. According to the defendant, the amounts payable by the plaintiff, in terms of the original Agreement or allotment letter, in June, and September, 1984 were to the extent of Rs. 8,248, each, aggregating Rs. 16, 497/-;. Time, says the defendant, was of the essence of the contract in respect of payment of the amounts, and since the plaintiff defaulted in his obligations, the defendant had to cancel the contract. It is stated that at the time of cancellation of the contract, one Mr. Anjali Misra, a broker who had facilitated the original agreement, or allotment, was present, and the amount originally paid on behalf of the plaintiff was refunded to Mr. Harnam Singh. The defendant claimed that at the time of allotment, in 1979, the said Mr. Harnam Singh was present, acting on the plaintiff's behalf, and that he continued to act for him, and received the refund amount, when the allotment was cancelled.

9. The suit is objected to on the ground of non-joinder of a necessary party, i.e. S.R. Karwa, who have to be impleaded as co-defendant and who would be vitally affected by the outcome of the present proceeding. It is alleged that the said Karwa is the subsequent allottee, who paid valuable consideration, and whose existence and interest was made known to the plaintiff. The defendant denies that the suit is based on any valid cause of action, or that the plaintiff is entitled to relief.

10. On the basis of the pleadings and documents, the Court framed the following issues:

(1) Whether this Court has no territorial jurisdiction to entertain and try the present suit; OPD

(2) Whether the suit for declaration simplicitor in the facts and circumstances of the present case is not maintainable? OPD

(3) Whether the suit is barred by time? OPD

(4) Whether the suit is bad for non-joinder of necessary parties? OPD

(5) Whether the present suit is maintainable in view of the non-registration of the agreement under the Maharashtra Ownership of Flats Act, 1962? If not to what effect? OPD

(6) Whether Shri Harnam Singh, the brother-in-law of the plaintiff was acting as the representative of the plaintiff and whether his actions do not bind the plaintiff? OPD

(7) Whether Shri. Harnam Singh cancelled the Agreement on 14.08.1981 and received the refund of the earnest money paid by the plaintiff under the agreement? If so to what effect? OPD

(8) Whether the agreement dated 10.11.1979 came to an end due to the non-payment of the instalments by the plaintiff? OPD

(9) Whether the plaintiff is entitled to the relief claimed in the suit? OPP

(10) Relief

Issue No. 1

11. The plaintiff urges that this Court has jurisdiction, as he has not sought any relief in regard to the properties and that rather it is only for a declaration in respect of the cancellation of the allotment, (which the defendant has resiled from). Thus, the relief relates only to the personal obligation of the defendants and has nothing to do with the properties. According to the plaintiff, Section 16 of the CPC (hereafter "CPC") does not come into picture; instead, it is submitted, the residual provision, in Section 20, CPC, applies since the defendant's reply, intimating about cancellation of allotment, was received in Delhi. The plaintiff says that this Court has territorial jurisdiction to try the suit as the relief sought is such that can be obtained through personal obedience of the defendants. It is urged that the letters intimating about the impugned cancellation were received in Delhi, and therefore the Court has territorial jurisdiction in the matter.

12. The defendant resists the plaintiffs' submission about jurisdiction and submits that the cause of action arose entirely in Bombay, where the property was to be handed over, and where the allotment took place. It is pointed out that the defendant also does not reside or work for gain, within jurisdiction of the Court. The declaration sought for is in respect of immovable property, and the suit has to be filed where the property is located.

13. Counsel for both parties relied on the Supreme Court judgment reported as Harshad Chiman Lal Modi Vs. DLF Universal and Another, where it was observed as under:

26. ...As we have already indicated, the suit relates to specific performance of an agreement of immovable property and for possession of plot. It is, therefore, covered by the main part of Section 16. Neither proviso to Section 16 would get attracted nor Section 20 (residuary provision) would apply and hence Delhi Court lacks inherent jurisdiction to entertain, deal with and decide the cause....

36. ...The registered office of the Company was in Bombay and the agreement was finally concluded in Bombay. It was, therefore, contended that Dhulia Court had no jurisdiction to try the suit. It was, however, held by the High Court that the case was covered by Clause (d) of Section 16 of the Code, the Proviso had no application and since the property was situated at Dhulia, Subordinate Judge, Dhulia had jurisdiction to entertain and try the suit. (See also Ananda Bazar Patrika Ltd. and Others Vs. Biswanath Prasad Maitin,

14. It is evident from the above discussion that the lis between the parties is whether the the cancellation of allotment, of the plaintiff clothes this Court with jurisdiction to try and decide the suit. There is no dispute that the property, in respect of which the declaratory relief is claimed, is situated at Mumbai; the allotment took place in Mumbai, and the alleged cancellation letter was issued by the defendant at Mumbai. The plaintiff, of course, received the letter in Delhi. The defendant disputes the Court's jurisdiction, contending that the residuary provision in the Code, i.e. Section 20 is inapplicable, since Section 16, which specifically deals with the question of disputes pertaining to immovable properties, would be attracted. The plaintiffs case, on the other hand, is that the relief is not ipso facto relatable to immovable property, but the obligations arising out of the allotment/Agreement dated 10.11.1979, and that the defendant's personal obedience to comply with this Court's orders can be secured here.

15. Section 16 of the Code reads as follows:

Suits to be instituted where subject-matter situate.- Subject to the pecuniary or other limitations prescribed by any law, suits,

- (a) for the recovery of immovable property with or without rent or profits,
- (b) for the partition of immovable property,
- (c) for foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property,
- (d) for the determination of any other right to or interest in immovable property,
- (e) for compensation for wrong to immovable property,
- (f) for the recovery of movable property actually under distraint or attachment,

shall be instituted in the Court within the local limits of whose jurisdiction the property is situate:

Provided that a suit to obtain relief respecting, or compensation for wrong to, immovable property held by or on behalf of the defendant may, where the relief

sought can be entirely obtained through his personal obedience, be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain.

16. The question is whether the suit is covered u/s 16(d) of the Code as opposed to the plaintiffs claim that the suit falls under the proviso to Section 16. Clause (d) covers such suits in which the determination of any right to or interest in immovable property is not prescribed under either Clause (a), (b) or (c). The proviso to Section 16 is based on the maxim equity acts in personam and encompasses cases where a suit can be instituted in a Court within the local limits of whose jurisdiction the defendant actually or voluntarily resides or carries on business or works for gain although the property in respect of which it is filed may be situated outside the territorial jurisdiction of that Court.

17. The Calcutta High Court, in Trustees for Improvement of Calcutta Vs. Bahadur Khan and Others, held that where the plaintiff wanted a determination as to his right and status in regard to the immovable property, the forum should be determined u/s 16 of the Code of Civil Procedure. In Pantaloon Retail India Ltd. v. DLF Limited and Ors. 2008 (155) DLT 642 the plaintiff had moved this Court in appeal against the order of the learned Single Judge returning plaint seeking mandatory injunction against the defendants therein on the ground that Delhi Courts lacked territorial jurisdiction to entertain the suit as the suit property is situated in Gurgaon, Haryana. The contention regarding lack of territorial jurisdiction was affirmed. In Vipul Infrastructure Developers Ltd. v. Rohit Kochhar and Anr. FAO (OS) 196-197/2005 decided on 11.03.2008 the following discussion by the Division Bench is worth noting:

17. The interpretation that is sought to be given by the respondents herein, if accepted, would in view of the aforesaid decision, lead to an incongruous situation, as a person who is located in Delhi and buys a property in Gurgaon or in Mumbai, would seek for declaration at Delhi and at the execution stage, get the decree transferred to Gurgaon or Mumbai for its execution.

18. In the present case, it is an admitted position that the appellant had entered into the aforesaid alleged contract at its Corporate office at Delhi. It is the specific stand of the appellant that they were initially residents of Delhi and that they had moved to Gurgaon and their corporate office is now also located at Gurgaon. It is the contention of the counsel appearing for the respondents that the proviso to Section 16 of CPC is applicable which is sought to be invoked, for, the relief which is sought for could be entirely enforced through the personal obedience of the defendants in Delhi. There is however not only a prayer in the plaint for declaration of the right and title, but also to transfer the right, title and interest in the suit premises situate at Gurgaon. As, in our opinion, the suit can be decreed in favor of the plaintiff only when the Court can get the sale deed executed and registered in favor of the plaintiff which would confer the title of

the suit premises on the plaintiff, and the execution and the registration of the sale document would have to take place at Gurgaon and, for this the Court will also have to pass a decree directing the defendant to get the sale deed executed and registered at Gurgaon, implication of the same will be that a direction will have to be given to the defendant that he shall have to move out of Delhi and go to Gurgaon and get the same registered. No sale deed is sought to be registered at Delhi and, therefore, in our considered opinion such a relief cannot be entirely obtained through the personal obedience of the defendant, who in this case has to go to the jurisdiction of another court to get the decree executed and the sale deed registered....

18. In the judgment reported as Harshad Chiman Lal Modi Vs. DLF Universal and Another, , the Supreme Court observed that:

In the prayer clause, the plaintiff stated;

Therefore, it is most respectfully prayed that in the facts and circumstances stated above, this Hon"ble Court may graciously be pleased to:

- a) pass a decree of declaration to the effect that there is a valid and existing contract with regard to plot No. L-31/4, DLF Qutab Enclave Complex, Gurgaon, Haryana, between the plaintiff and the Defendant No. 1;
- b) pass a decree to the effect that the Defendant No. 1 is bound to abide by the contract, i.e. plot buyer agreement dated 14.8.85 and the unilateral rescinding/ canceling/withdrawing of the contract by the Defendant No. 1 is bad and illegal;

....

Section 16 enacts that the suits for recovery of immovable property, or for partition of immovable property, or for foreclosure, sale or redemption of mortgage property, or for determination of any other right or interest in immovable property, or for compensation for wrong to immovable property shall be instituted in the court within the local limits of whose jurisdiction the property is situate. Proviso to Section 16 declares that where the relief sought can be obtained through the personal obedience of the defendant, the suit can be instituted either in the court within whose jurisdiction the property is situate or in the court where the defendant actually or voluntarily resides, or carries on business, or personally works for gain. Section 17 supplements Section 16 and is virtually another proviso to that section. It deals with those cases where immovable property is situate within the jurisdiction of different courts. Section 18 applies where local limits of jurisdiction of different courts is uncertain. Section 19 is a special provision and applies to suits for compensation for wrongs to a person or to movable property. Section 20 is a residuary section and covers all those cases not dealt with or covered by Sections 15 - 19.

Section 16 thus recognizes a well established principle that actions against res or property should be brought in the forum where such res is situate. A court within whose territorial jurisdiction the property is not situate has no power to deal with

and decide the rights or interests in such property. In other words, a court has no jurisdiction over a dispute in which it cannot give an effective judgment. Proviso to Section 16, no doubt, states that though the court cannot, in case of immovable property situate beyond jurisdiction, grant a relief in rem still it can entertain a suit where relief sought can be obtained through the personal obedience of the defendant. The proviso is based on well known maxim "equity acts in personam, recognized by Chancery Courts in England. Equity Courts had jurisdiction to entertain certain suits respecting immovable properties situated abroad through personal obedience of the defendant. The principle on which the maxim was based was that courts could grant relief in suits respecting immovable property situate abroad by enforcing their judgments by process in personam, i.e. by arrest of defendant or by attachment of his property.

....

In the instant case, Delhi Court has no jurisdiction since the property is not situate within the jurisdiction of that court. The trial court was, therefore, right in passing an order returning the plaint to the plaintiff for presentation to the proper court. Hence, even though the plaintiff is right in submitting that the defendants had agreed to the jurisdiction of Delhi Court and in the original written statement, they had admitted that Delhi Court had jurisdiction and even after the amendment in the written statement, the paragraph relating to jurisdiction had remained as it was, i.e. Delhi Court had jurisdiction, it cannot take away the right of the defendants to challenge the jurisdiction of the court nor it can confer jurisdiction on Delhi Court, which it did not possess. Since the suit was for specific performance of agreement and possession of immovable property situated outside the jurisdiction of Delhi Court, the trial court was right in holding that it had no jurisdiction.

19. The plaintiff had relied on a Division Bench ruling in *Prakash Kaur v. K.G. Ringshia* FOA (OS) Nos. 213 of 1990 and 4 of 1998 (decided on: 20.07.2007), contending that in identical set of circumstances, this Court had upheld its jurisdiction. In this case, the plaintiff does not anywhere assert that the defendant resides within the jurisdiction of this Court, to enable exercise of personal jurisdiction, so that obedience to the decree can be secured, in terms of Explanation to Section 16. No doubt the relief claimed is declaratory; yet the Court is not unmindful of the circumstance that the declaration is in respect of right or interest in immovable property. The extract in *Harshad Chimanlal Mehta*'s case clearly reveals that such suits can be maintained only if the Court can exercise jurisdiction to enable personal obedience of its orders by the defendant. The suit reveals that the defendant is not subject to the jurisdiction of this Court

The Division Bench ruling in *Prakash Kaur* does not reflect if the plaintiff had alleged and proved such conditions. In any event, the ruling in *Harshad Chimanlal* (supra) also concerned with a claim for declaration in respect of immovable property; the Supreme Court rejected the plea about this Court's

jurisdiction. The subsequent rulings in Pantaloon (supra) and Vipul Infrastructure also suggest that in such cases, this Court cannot assume jurisdiction, due to the substantive provisions in Section 16, CPC. In these circumstances, the Court is of opinion that the suit falls within the mischief of the main provision of Section 16; therefore, this Court does not possess jurisdiction to entertain and try the suit.

Issue No. 2

20. This issue can be conveniently discussed along with Issue No 9, as it is intrinsically connected with, and arises from it; therefore, the finding would be rendered in the section dealing with Issue No. 9.

Issue No. 3:

21. The present issue, about limitation was framed at the behest of the defendant, who alleged that the suit was time-barred. The material on record discloses that the defendant undeniably issued a letter dated 20.11.1984, which mentions about cancellation of the Allotment Letter and the agreement in respect of the flat, dated 10.11.1979. That letter is marked as Ex. P-3. That document nowhere mentions any date as to when the cancellation took place and was communicated. It alleges that the plaintiff's son Sh. Harnam Singh had acted on his behalf and instructions, and received refund of Rs. 5499/- (paid at the time of entering into the agreement in 1979). In the oral evidence, the defendant, deposing as DW-1, mentioned for the first time about the cancellation and refund of Rs. 5499/- (to Sh. Harnam Singh on 14.08.1981). This fact is alleged in para 4 of the written statement.

22. Significantly, the defendant's contention about mutual agreement for cancellation of the allotment, on 14.08.1981 is unsupported by any documentary evidence or objective material. He mentions about the presence of one Anjali Mishra on an averment made in the written statement and also deposed to in evidence. However, no attempt was made by the defendant to substantiate this aspect. If indeed the said Anjali Mishra had been present at the time of original allotment in 1979 as well as on 14.08.1981, he would have been the best person to depose about those facts. The defendant's failure to take any steps for presenting him or secure his evidence compels the Court to conclude that the cancellation as alleged on 14.08.1981 did not take place and that notice of such alleged cancellation was intimated for the first time in Ex. P-3, through letter dated 20.11.1984. The plaintiff has approached this Court immediately after receipt of such letter, within the prescribed three-year period. Accordingly, the issue is answered against the defendant and in favour of the plaintiff.

Issue No. 4:

23. This issue with regard to non-joinder of a necessary party was framed at the behest of the defendant. It was contended that after cancellation of the plaintiff's allotment in 1984, an agreement was entered into with Sh. S.R. Karwa, on 07.03.1984. Although a copy of that agreement was placed on record,

the plaintiff denied it. The defendant did not produce any material in support of such contention; yet he reiterated about the agreement with Sh. S.R. Karwa and stated that after construction was completed, Sh. S.R. Karwa secured allotment for a bigger flat and the flat given to him was allotted to Smt. Maliti Devi Singh in 1989.

24. As the onus of proving that the suit had to fail on account of non-joinder of necessary parties was upon the defendant, the easiest course available would have been to produce documentary evidence of allotment of the flat and if required, the subsequent allottee. In addition, the defendant also had to establish that the subsequent allotment was made known to the plaintiff at or around the time of filing of the suit and that the allottee was aware of the cancellation. The Court is of the opinion that in the absence of this evidence, the objection as to the maintainability cannot be sustained as the defendant has not established that in the event of the plaintiff succeeding in his claim, a third-party's rights are likely to be affected. This issue is accordingly answered against the defendant and in favour of the plaintiff.

Issue No. 5:

25. The defendant alleges that since the agreement (of 1979 with the plaintiff) was not registered in terms of the Maharashtra Ownership of Flats Act, 1962, ("the Maharastra Act") the suit is not maintainable. During an earlier stage of the proceeding, a copy of the enactment had been produced. It reveals that originally the Act was brought into force with effect from 10.02.1964 in the area of Greater Bombay. Section 1(4) stated that the enactment was temporary and was to remain in force till 31.03.1978. In 1977, the enactment was extended for a period upto 1979; subsequently, by Act No. 1 of 1979, it was made effective till 1981, and thereafter again it was extended annually by separate amendments and was made effective till 1985. Sections 4 and 13 of the Act read as follows:

XXXXXX XXXXXX XXXXXX

4. Promoter before accepting advance payment or deposit to enter into agreement and agreement to be registered. Notwithstanding anything contained in any other law, a promoter who intends to construct or constructs a block or building of flats, all or some of which are to be taken or are taken on ownership basis, shall, before he accepts any sum of money as advance payment or deposit, which shall not be more than 20 per cent of the sale price enter into a written agreement for sale with each of such persons who are to take or have taken such flats, and the agreement shall be registered under the Indian Registration Act, 1908 and such agreement shall contain the prescribed particulars; and to such agreement there shall be attached, such documents or copies thereof, in respect of such matters, as may be prescribed.

XXXXXX XXXXXX

XXXXXX

13. Offences by promoter Any promoter who, without reasonable excuse, fails to comply with or contravenes any provision of this Act or of any rule made thereunder shall [where no other penalty is expressly provided for,] on conviction, be punished with imprisonment for a term which may extend to one year or with fine which may extent to two hundred rupees, or with both; and a promoter who commits criminal breach of trust of any amount advanced or deposited with him for the purposes mentioned in section 5 shall, on conviction, be punished with imprisonment for a term which may extend to four years, or with both.

XXXXXX XXXXXX XXXXXX

26. The defendant's contention here appears to be since the Agreement of 1979 was unregistered, the plaintiff is not entitled to relief. At the outset, it may be noticed here that the obligation to secure registration, in terms of the Maharashtra Act is squarely upon the promoter. The defendant here is clearly a promoter. Although Section 4 obliges such agreements to be registered and also imposes a condition that the initial deposit for entering into a flat purchase agreement would not be more than 20%, the consequence spelt-out is not as if the builder or promoter can take advantage of non-compliance of such provision.

27. The Act nowhere states that non-registration of a document or default in compliance with any of the conditions of the Act would deprive a flat buyer from the benefits of his agreement. On the contrary, Section 13 prescribes that non-compliance by a promoter with the terms of the enactment would be an offence, punishable with a prison sentence, extendable up to one year, with fine. The enactment nowhere states that non-registration of the agreement would render it void. Similarly, there is no provision which overrides the Registration Act, 1908 or the Evidence Act, 1872. Section 16 only states that the Maharashtra Act would be in addition to the Transfer of Property Act and would override contracts to the contrary. On an overall consideration of the material provisions of the Maharashtra Act, this Court is of the opinion that its terms were enacted to safeguard flat buyers' rights and protect them from exploitation by promoters and builders. Therefore, the provisions which spell-out a cap in terms of the what can be secured at the time of agreement; the need to register agreements (Section 4); the need to maintain accounts by the promoter (Section 5); non-alteration of the area agreed upon by the promoter (Section 7), option to refund the amount with interest in the event of failure to give possession within the time specified (Section 8) are all beneficial and catered to the aid of flat buyers. Their contravention or non-compliance cannot be under any circumstance said to visit the flat buyer with adverse circumstances, as is urged by the defendant in this case. In view of these findings, the fifth issue is answered against the defendant and in favour of the plaintiff.

Issue Nos. 6 to 8:

28. As these issues are interconnected, it would be appropriate to consider them

together and render common findings. The defendant had alleged that Sh. Harnam Singh acted as representative on his behalf, was party to the cancellation of agreement dated 14.08.1981 and further that he received the refund of the initial earnest money of Rs. 5499/-. The only documentary evidence in support of the defendant's arguments on these issues is Ex. P-3, i.e. the letter dated 20.11.1984, acknowledging the plaintiff's registered letter. In Ex. P-3, the defendant alleges that Sh. Harnam Singh had received the said refund in the presence of Sh. Anjani Mishra. That letter also states that Sh. Harnam Singh represented that immediately upon reaching Delhi, he would obtain a receipt from the plaintiff and send it and also send back the signed agreement dated 10.11.1979. Besides these, the other evidence on record is the agreement, Ex. DW-1/1 which bears the signatures of the plaintiff and defendant. That agreement does not reflect anywhere that Sh. Harnam Singh had been nominated as the plaintiff's representative to act on his behalf in respect of the allotment arising out of the said document, Ex. D-1.

29. In all, three witnesses were examined by the parties; the plaintiff examined himself as PW-1 and examined Sh. Harnam Singh as PW-2. The defendant examined himself as DW-1. The plaintiff's evidence is about his having executed the agreement on 10.11.1979 and paying Rs. 5499/-, as on that date. He also marked the other documents being copies of registered letters issued to the defendant from time to time, enquiring about the status of construction and also further reminding through telegrams. He denied the suggestion of having received refund of Rs. 5499/- and also stated that after the receipt of Ex. P-3, upon enquiry, Sh. Harnam Singh had categorically stated about not receiving such amount. No suggestion was made to PW-1 that Sh. Harnam Singh was his authorized representative, and entitled to cancel the document exhibited, D-1, as alleged by the defendant.

30. Sh. Harnam Singh deposed as PW-2, stating about his having worked as Senior Manager with the Punjab and Sind Bank and having been in Mumbai at the relevant time, i.e. till 1982, after which he was posted in Delhi. He mentions about agreements between the plaintiff and the defendant, for allotment of flat and another agreement between his mother, Smt. Prakash Kaur and the defendant at the same time. He denied having participated in any negotiations in respect of those transactions. Upon a specific query, he mentioned that the transaction on behalf of the mother was finalized by Sh. Jawahar Singh, a family friend. He stated having visited the complex where the defendant's building activity used to be carried-on sometimes, and expressed no knowledge about a clearance under the ULCR Act. To a query, DW-1 denied that the agreement was cancelled either on 04.08.1981 or any date prior to that date or being a party to it. He also expressed lack of knowledge about agreement with the owner of the land, Sh. K.D. Nair. He denied having received the amounts towards refund from the defendant.

31. DW-1's evidence, so far as execution of D-1 and the agreement with Smt.

Prakash Kaur are concerned, corresponds with the version of PW-1. However, he states that Sh. Harnam Singh met him (the defendant) about 20 times after 1979 and that he started asking for refund of money, on behalf of the plaintiff. He also states that on 14.08.1981, he had kept two cheques, one favouring the plaintiff and the other favouring Smt. Prakash Kaur and that on 14.08.1981, when Sh. Harnam Singh refused to accept the cheques, he paid Rs. 9500/- approximately to him (Sh. Harnam Singh), for refund of amount in favour of Smt. Prakash Kaur and approximately Rs. 5500/- in respect of cancellation of agreement with the plaintiff. He also deposes about the presence of Sh. Anjani Mishra, who is said to have assured him (the defendant) that PW-2 was authorized to act on behalf of PW-1, at the time of the Agreement, Ex.D-1, and later, when it was allegedly cancelled on 14.08.1981.

32. The above discussion would show that barring the averments in the written statement, and an allegation in Ex. P-3, the defendant has no material to support his claim that Sh. Harnam Singh, acted as the plaintiffs representative and about his having cancelled the agreement Ex. D-1, on 14.08.1981, and received back the refund. The documentary evidence which does exist on record reveals that the plaintiff had executed the document, Ex. D-1 himself, the same bears no mention about any authorized representative. In the ordinary course of business, having regard to the circumstance that the defendant was a builder/promoter, it can be reasonably presumed that if indeed, the plaintiff had authorized anyone to act on his behalf, at least a letter of authority or some written form of such authorization would have been on record with the defendant. In the present case, the transaction involved sale and purchase of immovable property, which meant that if Sh. Harnam Singh were to bind the plaintiff, the least expected of the defendant was to establish that the said individual (i.e. PW-2 Sh. Harnam Singh) held a duly executed deed of Power of Attorney. No such document is forthcoming. The plaintiff and Sh. Harnam Singh have categorically denied that the latter was the former's representative or that he had entered into a transaction for cancelling Ex D-1 on 04.08.1981 or any other date and further they deny that any amount as alleged by the defendant was received back as refund.

33. The matter can be looked at from another perspective. The defendant avers in the written statement and also alleged in his deposition - and even suggested to the plaintiffs witnesses that Sh. Anjani Mishra, a broker was present on 14.08.1981. As observed earlier, the defendant did not secure presence of the said Sh. Anjani Mishra in support of his allegation. In the absence of any documentary evidence, if it were to be established that Sh. Harnam Singh was the plaintiffs authorized representative, that he cancelled the allotment dated 10.11.1979 (Ex.D-1)(and having regard, further to the absence of any receipt, or even an acknowledgment of having received such amount, by the plaintiff), the least expected, of the defendant, was to have the deposition of Sh. Anjani Mishra in support of his case. His testimony would have been an important piece of evidence to unravel the truth. The defendant's inability and lack of any initiative

in this regard, leads this Court to conclude that a material witness who could have thrown light on this issue, was intentionally not produced. As a consequence, the Court has to draw a diverse inference against the defendant for his not taking any steps to summon Sh. Anjani Mishra, for deposing in the present case.

34. On a conspectus of the evidence available on the record, and the totality of the circumstances, this Court is of the opinion that the defendant has not been able to prove that Sh. Harnam Singh was authorized to act on behalf of the plaintiff; similarly the defendant has been unable to prove that Sh. Harnam Singh cancelled the Ex. D-1 on 14.08.1981 and received a refund, as alleged in the written statement. Issue Nos. 6, 7 and 8 are answered as against defendant and in favour of the plaintiff.

Issue Nos. 2 & 9

35. The plaintiff here seeks a decree for declaration that the cancellation, alleged by the defendant is void, and the contract with the latter subsists. The defendant alleges that the suit is not maintainable, as framed.

36. Section 34 of the Specific Relief Act, 1963, which enables courts to grant declarations, reads as follows:

34 Discretion of Court as to declaration of Status or right.

Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled and the plaintiff need not in such suit ask for any further relief:

Provided that no court shall make any such declaration where the plaintiff being able to seek further relief than a mere declaration of title, omits to do so.

Explanation : A trustee of property is a "person interested to deny" a title adverse to the title of some-one who is not in existence and for whom, if in existence, he would be a trustee.

37. In K.P. Ramakrishna Pattar Vs. K.P. Narayana Pattar and Another, a declaration was sought that a contract subsisted; it related to some tax. Accepting that such declaration of contractual rights could not be claimed under the then Section 42 of the Specific Relief Act, as such declarations could not be held to relate to any person's legal character, it was held:

We think that the contention must be upheld, to this extent, namely, that Section 42 of the Specific Relief Act does not contemplate a suit like the present. We take it that a man's "legal character" is the same thing as a man's status. "A man's status or "legal character" is constituted by the attributes which the law attaches to him in his individual and personal capacity, the distinctive mark or dress, as it were, with which the law clothes him apart from the attributes which may be said

to belong to normal humanity in general.

38. In *Tian Sahu Vs. Mulchand Sahu and others* the plaintiff sought declaration that he was entitled to contribution from the defendant if and when occasion arose; the Court held that such a suit was not maintainable, as it did not claim a legal right, or status. An identical view was taken in *Sripatrao Sadashiv Upre Vs. Shankarrao Sarnaik*, . Following these two later cases it was held, by the Lahore High Court, in *Nathu Ram v. Mula* AIR 1937 Lah 25 that:

A suit for a declaration that the defendant would be liable to contribute to the plaintiff all moneys which the plaintiff as the defendant's surety would be liable to pay does not come u/s 42 as it affects only the pecuniary relationship between the parties to the contract.

This view was again followed in *Firm Gopal Das Parmanand v. Mul Raj* AIR 1937 Lah 389 where a declaration that certain sum deposited by the plaintiff with the defendant (as margin money) was accountable by the defendant to the plaintiff was refused. The Court held that such a declaration could not be granted u/s 42 of the Specific Relief Act as it affected only the pecuniary relationship between the parties to the contract. In *Madanlal v. State of Madhya Bharat (S)* AIR 1955 MP 111 a declaration had been sought that under a contract the plaintiff was not responsible for payment of any amount due on account of the sale and distribution of food-grains; the Court held that as the declaration did not relate to any legal character or right to property it could not be claimed u/s 42 of the Specific Relief Act. These views were affirmed and applied by the Allahabad High Court, in *Mahabir Jute Mills Vs. Firm Kedar Nath Ram Bharose*, and also by the Bombay High Court, in *Major General Shanta Shamsheer Jung Bahadur Rana Vs. Kamani Brothers Private Ltd. and Ors*,

39. In the present case, the plaintiff wishes the Court to deal with a plea about cancellation of a contract; the suit does claim a legal right or legal status of either party. The document Ex. P-3 cancels a previous agreement, Ex. D-1, which outline the parties' duties and obligations. The plaintiff does not say that the contract spells out the legal status of parties. It is also not that the contract is sought to be declared as void, so that the plaintiff's right to some property is at stake. On this score, a declaration as sought cannot be granted.

40. The matter does not rest there; even if it were assumed that the plaintiff can secure a declaration, as is claimed, he is obliged to secure further (or consequential) relief -injunctive, either perpetual, or mandatory, or any direction in the nature of specific performance, if that course is available. If he omits to do so, the proviso to Section 34 bars the suit. This aspect was highlighted in *Maharaji Educational Trust and Another Vs. Punjab and Sind Bank and Another*, by this Court, when it was observed that:

On a perusal of the prayer contained in the plaint, it may be immediately noticed that the only relief claimed by the appellants is a declaration from the Court to the effect that the communication dated 22.8.2005 sent by the respondents to

them repudiating the settlement that took place between the parties vide letter dated 23.7.2005 is illegal and void and of no consequence. It is the first principle of law that the Court is to pronounce its verdict on the prayer made by a party to the case and by no stretch of imagination, the Court can compel any party to include relief which he is not interested for. In our view the plaintiff is dominus litus and is free to choose his remedy he wants in the suit. It is not open to the Court to import into the plaint or to read into it any relief which has not been asked for by the plaintiff only in order to levy higher Court fee. We derive support for our said view from a Full Bench judgment of Punjab High Court in *Jai Krishna Das and Others Vs. Babu Ram and Others*, Learned Counsel for the respondents could not show any contrary judgment to us.

41. In a similar vein, the Supreme Court, in *Rajasthan State Road Transport Corporation and Others Vs. Shyam Bihari Lal Gupta*, held that:

4. In an almost identical case, this Court in *Rajasthan S.R.T.C. and Another Vs. Ladulal Mali*, held that the decree does not contain payment of back wages. Only declaratory relief of the nature granted in the present case was granted. Further, in *A.P.S.R.T.C. and Another Vs. S. Narsagoud*, , in paragraph-9, this Court held as follows:

9. We find merit in the submission so made. There is a difference between an order of reinstatement accompanied by a simple direction for continuity of service and a direction where reinstatement is accompanied by a specific direction that the employee shall be entitled to all the consequential benefits, which necessarily flow from reinstatement or accompanied by a specific direction that the employee shall be entitled to the benefit of the increments earning during the period of absence. In our opinion, the employee after having been held guilty of unauthorised absence from duty cannot claim the benefit of increments notionally earned during the period of unauthorised absence in the absence of a specific direction in that regard and merely because he has been directed to be reinstated with the benefit of continuity in service.

42. In the *R.K. Aneja v. Delhi Development Authority* 47 (1992) DLT 649, this Court, dealing with a somewhat similar proposition, emphasized the need to seek proper relief, along with the claim for declaration and also articulated the consequence of absence or failure of the plaintiff:

29. It is crystal clear from the prayer clauses reproduced above that the plaintiff through the institution of the present suits wants this Court to declare Clauses 19 and 30 of the conditions of contract as un-enforceable, null and void and action taken by the defendants under Clause 2 of the agreement also as null and void. The sum and substance of the relief"s sought is that the defendants may not withhold the amount and the same be paid to him. Similarly, no penalty be imposed on him by the defendants and he be got paid the amount which has fallen due to him into. Thus, this Court feels that the applicant could have sought further relief after seeking the impugned declaration, i.e., the recovery of the

amounts which have fallen due to him. The applicant for the best reasons known to him confined himself to seeking a mere declaration without seeking the further relief which he was entitled to. Such a suit I feel is clearly barred by Section 34 of the Specific Relief Act. The learned Counsel for the applicant has failed to show anything to the contrary.

In an earlier decision, of the Supreme Court, M.K. Rappai and Others Vs. John and Others, it was held that:

a bare declaration of right will be within the mischief of Section 42 of the Specific Relief Act, 1877 and Section 34 of the Specific Relief Act, 1963.

43. In this case, keeping aside the circumstance that the main relief of declaration cannot be granted, even on an assumption of its being available, the suit is nevertheless barred, because the plaintiff has omitted to sue for the appropriate consequential relief, at the appropriate stage, i.e. an appropriate injunction, or a decree for specific performance. The suit reliefs cannot therefore, be granted. In view of the previous discussion, Issue Nos. 2 and 9 are held against the plaintiff.

Issue No. 10.

44. In view of the findings on Issue Nos. 1, 2 and 9, it is held that the suit has to fail. It is accordingly dismissed. In the circumstances of the case, the parties are left to bear their costs.