Reserved On : 24/02/2025
Pronounced On : 15/04/2025

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/APPEAL FROM ORDER NO. 61 of 2024
With
CIVIL APPLICATION (FOR STAY) NO. 1 of 2024
In R/APPEAL FROM ORDER NO. 61 of 2024
With
R/APPEAL FROM ORDER NO. 63 of 2024
With
CIVIL APPLICATION (FOR STAY) NO. 1 of 2024
In R/APPEAL FROM ORDER NO. 63 of 2024
With
R/APPEAL FROM ORDER NO. 64 of 2024
With
CIVIL APPLICATION (FOR STAY) NO. 1 of 2024
In R/APPEAL FROM ORDER NO. 64 of 2024

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE MAULIK J.SHELAT Sd/-

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Approved for Reporting	Yes	No
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MOHAMMADALI MOHAMMADHUSEN GANDHI
Versus
HURBANU WD/O DECD. GULAMMOHIYUDDIN MOHAMMADHUSEN AFINWALA & ORS.

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Appearance:
MR NV GANDHI(1693) for the Appellant(s) No. 1
MR ARSHAD SHAIKH(11761) for the Respondent(s) No. 10,11,12,9
MR VISHAL C MEHTA(6152) for the Respondent(s) No. 1,2,3,4,5,6,7
NOTICE SERVED BY DS for the Respondent(s) No. 8

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CORAM:**HONOURABLE MR. JUSTICE MAULIK J.SHELAT**

COMMON CAV JUDGMENT

1. Admit. Learned advocates Mr. Vishal C. Mehta and Mr. Arshad Shaikh waives service of notice of admission of appeals on behalf of respective respondents. Respondent No.8 though served chosen not to appear, otherwise his presence would not requires for adjudication of these appeals. With the consent of learned advocates appearing for respective parties, appeals were heard finally.

2. The present appeals are filed under Order XLIII Rule (1) (r) of the Code of Civil Procedure, 1908 (hereinafter referred to as "the CPC"), challenging the common order passed below Exh.5, 15 and 59 dated 19.03.2024 by the 5th Additional Senior Civil Judge, Ahmedabad (Rural) in Special Civil Suit No.181 of 2021, which were filed for temporary injunction against defendant nos.1 to 7, mandatory injunction (restoration of possession) and temporary injunction against the defendant nos.9 to 12 respectively.

2.1 As far as possible, the parties will be referred to as per their original position before the Trial Court.

3. The short facts of the case, which are necessary to resolve the controversy involved in the present appeals, need to be mentioned, which are as under:

3.1 The appellant herein is the original plaintiff, who has filed Special Civil Suit No.181 of 2021 against the respondents - defendants before the Court of 5th Additional Senior Civil Judge, Ahmedabad (Rural).

3.2 The disputed suit property is situated at Block/Survey No.726+729 paiki Hissa No. 1/G/3, F.P. 76/1 paiki, admeasuring 2778 sq. Mtrs. land (Non-Agricultural) at Mouje Village: Vejalpur, District: Ahmedabad (hereinafter referred to as **"Suit Property"**).

3.3 The plaintiff entered into a Notarized Samjuti Karar/Banakhat (hereinafter referred as **"Agreement for sale"**) with Gulammohiyuddin M. Afinwala, Iqbalhussain M. Afinwala (defendant no.4) and Mukhtiyarhussain M. Afinwala (defendant

no.6) (herein after referred as **"executors"**) in relation to suit property on 06.02.2018 for the total consideration of Rs.12 Crore relying upon their representation in relation to their exclusive ownership and rights over the suit property. The aforesaid persons are real brothers.

3.4 It is worth to note that wives of aforesaid persons are also co-owners of the suit property. Gulammohiyuddin M. Afinwala, who died prior to filing of suit is being represented through his wife and two daughters, who joined as defendant nos.1, 2 and 3 respectively. Whereas wives of Iqbalhussain M. Afinwala (defendant no.4) and Mukhtiyarhussain M. Afinwala (defendant no.6) are joined as defendant nos.5 and 7 respectively. Thus, the defendant Nos.1 to 7 are original owners of suit property.

3.5 According to the terms & conditions, before executing the aforesaid agreement for sale, the Plaintiff has handed over Rs.15 Lakhs by cheque no.866427 dated 06.01.2018 drawn on SBI, Ambawadi Branch, Ahmedabad and further paid Rs. 5 Lakhs by cash in installments and thus, he has paid total

amount of Rs.20 Lakhs at the time of executing the aforesaid agreement for sale. The said cheque was duly credited in the Defendant's bank account.

3.6 That, at the time of executing the said agreement for sale, the Defendants have provided the copy of 7/12 village form of the suit property to the plaintiff, wherein names of Defendant Nos.1, 5 & 7 have been mentioned along with the names of executors (Gulammohiyuddin Mohammadhusen Afinwala (Deceased), Defendant Nos.4 and 6) in the capacity of co-owners. Thereafter, it has been alleged that the executors had handed over the possession of the suit property and after receipt of physical possession of the said suit property, the plaintiff deployed his security guard and also constructed small room for the purpose of his stay during day time and he had also constructed compound wall situated towards main highway i.e. on the southern side of the suit property, which was earlier demolished by the Ahmedabad Municipal Corporation (hereinafter referred to as **"AMC"**).

3.7 As per the terms and conditions of the said agreement for sale, it was for the defendant Nos.1 to 7 who were required to determine and acquire proportionate area of final plot from the competent authority and to obtain revised plan after de-marking the area of suit property as the suit property had been shown as parking and common plot as per the sanctioned plan of the Amenakhatun Hospital.

3.8 Thereafter, on 02.04.2018, an application along with the documents submitted for opinion of the City Planning and T.P. Department made by the plaintiff on behalf of the Defendants and Mohammed Charity Trust and further paid an amount of Rs. 40 lakhs in favour of executors [defendant nos.4, 6 and deceased - Gulammohiyuddin Mohammandhusen Afinwala (husband of the defendant no.1 and father of defendant nos.2 and 3]. It is also the case of the plaintiff that to expedite the process, he has appointed Consultant – Shri Asip Raiwala and on 02.04.2018, commenced the process of revised development permission.

3.9 On 19.02.2019, after receipt of part sale consideration of Rs.60 lakhs, a notarized Supplementary agreement (hereinafter as **"Supplementary agreement"**) in pursuant to the aforementioned agreement dated 06.02.2018, was executed between the plaintiff and executors [Late Gulammohiyuddin M. Afinwala, Iqbalhussain M. Afinwala (defendant no.4) and Mukhtiyarhussain M. Afinwala (defendant no.6)].

3.10 It is the case of the plaintiff that when he requested the defendants to give their signatures and authority letter for the purpose of undertaking further process of revised development plan but instead of giving their signatures and getting authority letter from the office bearers of the Hospital, the executors - signatory to the agreement for sale had given proposal to carry out development over the suit property under their partnership.

3.11 Thereafter, as the executors are backing out from their obligation, on 14.12.2020, the plaintiff has forwarded a letter to the Signatory to the agreement for sale to discharge their

obligations i.e., demarcating and acquiring proportionate area of final plot from competent authority, getting consent of office bearers of the Hospital and revised construction plan to the corporation etc. and executors had sent their reply on 30.12.2020, thereby, cancelled the agreement for sale and inclined to refund the amount of Rs.60,00,000/- with reasonable profit i.e., as per bank rate and so requested the plaintiff to give his bank details. The plaintiff has also served a rejoinder letter dated 05.01.2021 issued from U.S.A. thereby, rebutting all the allegations made in the aforesaid letter dated 30.12.2020 issued by executors.

3.12 It is the case of plaintiff that the defendants – original owners have published a Notice for title clearance certificate in Divya Bhaskar on 24.04.2021 and Gujarati Daily Gujarat Samachar on 27.01.2021 through M/s Lakhani-Gandhi & Solicitor, Advocate and Notary i.e., a public notice with an intention to transfer the same in favour of defendant no.8.

3.13 Thereafter, the plaintiff has submitted his strong objections

against the said public notice and upon notice of the said objections, the defendants have orally given assurance to the plaintiff that they will not transfer and alienate the suit property in favour of defendant no.8 and the defendants are ready and willing to execute the registered sale deed in relation to the suit property to the plaintiff but no action has been taken by the defendants in regard to execution of registered sale deed.

3.14 The plaintiff has also served a legal notice upon Signatory to the agreement for sale on 19.01.2021 and after about 6 months, on 03.07.2021, the executors have taken a contradictory stand.

3.15 Under the aforesaid circumstances, the plaintiff was compelled to file the Special Civil Suit in the Court of Learned Principal Senior Civil Judge, Ahmedabad (Rural) against the respondent nos. 1 to 8 seeking decree of specific performance of sale contract and permanent injunction. The Plaintiff has also filed 2 applications (first) at Exh.5 under Order XXXIX

Rule 1(2) of C.P.C seeking temporary injunction pending the suit and another application at Exh. 18 under Order XXVI Rule 9 of C.P.C for local investigation.

3.16 It is the case of the plaintiff that some unknown persons demolished the said room and driven out the security deployed by the plaintiff from the suit property and threatened him, thereby, illegally taken away the physical possession from the custody of the plaintiff. Under such circumstances, the plaintiff has filed an application below Exh.15 for mandatory injunctions (restoration of possession).

3.17 During the pendency of the aforesaid suit, the defendant nos.1 to 7 had entered into development agreement on 21.09.2022, in favour of defendant nos.9 to 12 and thus, the defendant no.9, a partnership firm and their partners i.e., defendant nos.10 to 12 have been impleaded as party and moreover, the plaintiff has also filed an application for temporary injunction below 59 against the defendant nos.9 to 12 respectively.

3.18 The Defendants have filed an application under Order VII Rule 11 of CPC, which was dismissed by the Trial Court vide its order dated 22.08.2023.

3.19 Furthermore, it is the case of the plaintiff that defendants have also filed a Civil Revision Application no. 13 of 2024 before this Court, which had been dismissed by this Court vide its order dated 08.02.2024.

3.20 It is also the case of the plaintiff that initially, AMC demanded Rs.67,62,900/- as betterment charges and Rs.1,81,66,500/- for development permission vide its communication letter dated 01.04.2019. Whereas, AMC issued letter dated 20.05.2021 demanded payment of Rs.2,49,29,400/- as betterment charges, Rs.2,79,04,800/- towards chargeable FSI, which was paid by the defendant Nos.9 to 12 on 13.07.2021 and in year 2022 respectively but the plaintiff has not been informed about these letters by the defendants. Likewise, during pendency and till disposal of injunction

application, defendant No. 9 to 12 has already incurred expenses of Rs.2,19,51,580/- towards construction expenses and Rs.2,63,49,455 towards other construction expenses thereby around spent Rs. 10,11,35,2235/ on the project.

3.21 After hearing the parties, the Trial Court vide its order dated 19.03.2024 has rejected the said applications filed below Exh.5, 15 and 59.

4. Being aggrieved and dissatisfied with the common order below Exh.5, 15 and 59 dated 19.03.2024 passed by 5th Additional Senior Civil Judge, Ahmedabad (Rural) in Special Civil Suit No.181 of 2021, which were filed for temporary injunction against defendant nos.1 to 7, Mandatory injunction (restoration of possession) and Temporary injunction against the defendant nos.9 to 12 respectively and hence, the present Appeal from Orders are filed.

5. Heard learned Senior Counsel Mr. Percy Kavina with learned advocate Mr. N. V. Gandhi for the appellant – original

plaintiff, learned Senior Counsel Mr. Mehul S. Shah with learned advocate Mr. Vishal C. Mehta for the respondent Nos.1 to 7 – original defendant Nos. 1 to 7 and learned advocate Ms. Megha Jani with Mr.Arshad Shaikh for the respondent Nos. 9 to 12 - original defendant Nos. 9 to 12.

6. SUBMISSION OF APPELLANT - PLAINTIFF

6.1 Learned Senior Counsel Mr. Percy Kavina with learned advocate Mr. N.V.Gandhi, would submit that once the Trial Court has held that there is a prima-facie case in favour of the plaintiff, it ought to have granted ad-interim injunction in favor of Plaintiffs.

6.2 Learned Senior Counsel Mr. Kavina would further submit that the reliance placed by the Trial Court on the judgment in case of ***Dalpatkumar versus Prahlad Singh*** reported in ***(1992) 1 SCC 719*** while denying the temporary injunction is misplaced, as the ratio of the said judgment is not applicable to the facts of the present case.

6.3 Learned Senior Counsel Mr. Kavina would further submit that plaintiff was always ready and willing to perform his part of contract, which is confirmed from various letters issued by plaintiff to the executors, who have failed to perform their part of agreement. Once, the Trial Court having found prima facie case in favour of the plaintiff and is ready and willing to perform his part of contract, balance of convenience and irreparable loss ought to have been observed in favour of plaintiff rather than defendants.

6.4 Learned Senior Counsel Mr. Kavina would further submit that the executors, knowing fully well that they are not only owners of suit property despite that the plaintiff was made to believe that they are the only owners, whereby, the plaintiff has entered into agreement for sale with them. In such a case, defendants (executors) who are signatory to agreement for sale, who acted dishonestly, not entitled to get any relief / protection from Court of law.

6.5 Learned Senior Counsel Mr. Kavina would further submit

that considering correspondence between the plaintiff and signatory to agreement for sale, all other co-owners of suit property were aware about such agreement, thereby, balance of convenience and irreparable loss, in fact, was in favour of plaintiff rather than defendants.

6.6 Learned Senior Counsel Mr. Kavina would further submit that by filing common written statement, defendant nos. 1 to 7 cannot disown their obligation to perform their part of obligation as per agreement for sale.

6.7 Learned Senior Counsel Mr. Kavina would further submit that there is nothing on record to show that at the given point of time, the defendants nos.1 to 7 have ever informed to the plaintiff about the letter dated 01.04.2019 issued by the AMC, thereby, not put the same to the notice of the plaintiff to pay betterment charges. As such, plaintiff was and is ready and willing to perform his part of agreement and having sufficient money to pay the amount, which had been demanded by AMC.

7. SUBMISSION OF THE RESPONDENTS No.1 to 7-DEFENDANTS No. 1 to 7

7.1 Learned Senior Counsel Mr. Mehul S. Shah with learned advocate Mr.Vishal C. Mehta would submit that executors - signatories to agreement for sale never suppressed the fact that there are no other co-owners of suit property as alleged. As a matter of course, the plain reading of para-2 of plaint, suit notice as well as agreement for sale itself would indicate that it was within the knowledge of plaintiff that there were other co-owners of suit property.

7.2 Learned Senior Counsel Mr. Shah would submit that plaintiff was required to spend around Rs.4 crore as per agreement for sale and as per the plaint and the documents submitted by plaintiff, nowhere it has been shown that plaintiff was/is having the capacity to incur such expenses.

7.3 Learned Senior Counsel Mr. Shah would further submit that plaintiff has not prayed for appointment of court commissioner

at the first instance while filing suit, but after some passage of time, requested for appointment of court commissioner, wherein in Panchnama drawn on 04.11.2021, a possession of defendant no.6 has been clearly established. Furthermore, at no point of time, plaintiff was put in possession as alleged. Thus, relief as prayed for at Exh.15 and part relief of Exh.59 would not survive and correctly rejected by Trial Court.

7.4 Learned Senior Counsel Mr. Shah would further submit that agreement for sale was signed by only three co-owners of suit property and consent of other co-owners i.e., defendant nos.1, 5 and 7 were required for its performance, who having not agreed to sell the suit property in favour of plaintiff, such an agreement for sale cannot be put to performance by plaintiff being contingent contract.

7.5 Learned Senior Counsel Mr. Shah would submit that in the facts of the present case, agreement for sale is required to be considered as a contingent contract and as its conditions are not fulfilled, it is not enforceable. He would rely upon the

provisions of sections 31 and 32 of Contract Act.

7.6 Learned Senior Counsel Mr. Shah would further submit that when there is no conflict of interest between defendants nos.1 to 7, thereby, they have filed common written statement, which would not prejudice the rights of all the owners to defend the suit. Merely filing the common written statement would not, ipso facto, give the plaintiff the right to seek the performance of the agreement for sale, which is otherwise a contingent contract, if not observed it then, provisions of contract act, would become otiose and nugatory.

7.7 Learned Senior Counsel Mr. Shah would further submit that when all owners of suit property are not signatory to agreement for sale, it would be a void contract at the instance of non-signatory to the agreement for sale and it cannot be enforceable in law in view of Section 17 of Specific Relief Act.

7.8 Learned Senior Counsel Mr. Shah would further submit that plaintiff is asking for performance of entire suit property and

not even alternatively prayed for 50% of suit property as undisputedly, only three co-owners of suit property were signatories to agreement for sale and in view of such fact, no relief can be granted in favour of plaintiff.

7.9 Learned Senior Counsel Mr. Shah would further submit that plaintiff has not asked for any refund or damages in the prayer clause of the suit, question of refund of earnest money would not arise, especially, when agreement for sale is already cancelled.

7.10 Learned Senior Counsel Mr. Shah would further submit that plaintiff has not amended its prayer, thereby, not challenge the development agreement, which entered between defendants nos.1 to 7 with defendant nos.9 to 12 and so also, not seeking any possession of suit property from defendant nos. 9 to 12 in the plaint, then in absence of such prayers made in the plaint, injunction, as sought for, cannot be granted, which is correctly refused by Trial Court.

7.11 Learned Senior Counsel Mr. Shah would further submit that without amending prayer in the plaint, despite subsequent event taken place, during the pendency of the suit, entertaining injunction application is nothing but an exercise in futility.

7.12 Learned Senior Counsel Mr. Shah would further submit that there was an inordinate delay on the part of plaintiff to perform his part of contract, which was a ground of cancelling the agreement for sale by signatories to agreement for sale.

7.13 Learned Senior Counsel Mr.Shah would further submit that when the agreement for sale was already canceled vide letter dated 30.12.2020, and the present suit was filed only on 20th July 2021, it amounts to a delay in filing the suit. Even if the suit is filed within the period of limitation, no injunction as prayed for can be granted in favor of the plaintiff.

7.14 Learned Senior Counsel Mr. Shah would further submit that plaintiff failed to deposit the betterment charges, stipulated

by AMC vide its letter dated 01.04.2019, which was well within the knowledge of plaintiff as the consultant was appointed by plaintiff himself, which can be easily confirmed by reading the letter dated 14.12.2020, issued by plaintiff. Thus, plaintiff had never fulfilled his part of obligation stipulated in agreement for sale.

7.15 Learned Senior Counsel Mr. Shah would further submit that during the pendency of the suit, no injunction was granted in favour of plaintiff and having entered into development agreement with defendant nos. 9 to 12, substantial amount has been invested in the project and substantial portion of construction has already been completed so far, then, balance of convenience and irreparable loss was/is not in favour of plaintiff, thereby, Trial Court has correctly rejected injunction application.

8. To buttress his arguments, he is relying upon following decisions:

(1) Vitrang Holidays pvt. Limt Vitrang Holdings Pvt. Ltd. Vs. Gujarat State Textile Corporation Limited reported in 1996 (3) GLR 436 (para 8).

(2) Peemmada Prabhakar vs. Young Men's VYSYA Association, reported in 2015 5 SCC 355 (para 28 to 30).

(3) M.P. Housing Board vs. Anil Kumar Khiwani, reported in 2005 10 SCC 796 (para 19).

(4) ECE Industries Limited vs. S.P. Real State Developers Pvt. Ltd. Reported in 2009 12 SCC 776 (para 18 and 19).

9. SUBMISSIONS OF RESPONDENT NOS.9 TO 12 - DEFENDANT NOS.9 TO 12.

9.1 Learned advocate Ms. Megha Jani appearing would submit that the suit filed by plaintiff seeking for specific performance is not maintainable as the agreement, against which specific performance sought, is already cancelled by executors vide their reply dated 30.12.2020 and such cancellation has not

been challenged in the instant suit.

9.2 Learned advocate Ms. Megha Jani would submit that in absence of declaratory relief to declare the termination of the agreement of sale as bad in law, the suit for decree of specific performance is not maintainable in law. She would strenuously submit that despite such issue was neither pleaded in written statements of defendants nor pressed into service before trial Court but it is a jurisdictional issue, it can be raised by defendants before this Court in present appeals and as per settled legal position of law, this Court is requires to consider and decide it.

9.3 Learned advocate Ms. Megha Jani would submit that the agreement for sell, though pertaining to the entire suit land, was allegedly executed by only 3 out of 6 co-owners. Since inception, plaintiff was aware of the said fact that the suit land was owned by six co-owners, even before execution of the agreement for sale. Learned advocate Ms. Megha Jani would submit that an agreement executed by only 50% of the

co-owners cannot be specifically enforced with respect to the whole part of the suit land against all owners.

9.4 Learned advocate Ms. Megha Jani would submit that the plaintiff has failed to establish that the plaintiff was ready and willing to perform its part of contract throughout. Learned advocate Ms. Megha Jani would submit that in the present case, an important condition of the agreement was that the plaintiff would pay all dues and demands raised by AMC. Though AMC raised demand of Rs.67,62,900/- as betterment charges and Rs.1,81,66,500/- for development permission vide its communication letter dated 01.04.2019, the plaintiff failed and neglected to pay the said amount.

9.5 Learned advocate Ms. Megha Jani would submit that the plaintiff has also failed to plead that it had sufficient funds or was in a position to raise funds to discharge his obligation in terms of the contract. Learned advocate Ms. Megha Jani would submit that the conduct of the plaintiffs prior to and subsequent to the filing of the suit and the surrounding

circumstances, establish that the plaintiff was and is not ready and willing to perform his part of the contract.

9.6 Learned advocate Ms. Megha Jani appearing for the respondents would submit that the plaintiff has been guilty of delay in filing the suit. Learned advocate Ms.Megha Jani would also submit that though the AMC demanded said amount on 01.04.2019, the plaintiff took no step to pay such amount till filing of suit. Furthermore, the fact that the demand was raised pursuant to application dated 02.04.2018 filed by the agent of the plaintiff, who was liaison with AMC is established on record. So, it was well within knowledge of plaintiff about said demand raised by AMC and having not fulfilled his part of obligation as per terms of agreement for sale, plaintiff would not entitled to get any injunction.

9.7 Learned advocate Ms. Megha Jani would further submit that it was only when the original owners filed an application dated 05.12.2020 in AMC for extension and installments of the amount demanded by AMC then after, plaintiff issued notice

dated 14.12.2020, making a show of willing to pay the demand of AMC but in fact not paid. Learned advocate Ms. Megha Jani appearing for the respondents would submit that the executors in no time responded with their reply dated 30.12.2020 and cancelled the agreement for sale. The plaintiff still neither filed any suit at that time nor deposited any amount to AMC. It was only when betterment charges were paid on behalf of the original owners on 13.07.2021 by defendant No. 9 to 12, then the suit was filed on 20.07.2021. Learned advocate Ms. Megha Jani appearing for the respondents would submit that no prima case is made out by plaintiff and a such having no case made out for grant of any interim orders on account of delay and conduct of the plaintiff.

9.8 Learned advocate Ms.Megha Jani would submit that in view of aforesaid submissions, the observation of the learned judge in the impugned order in para 9.3, 10 & 17 to the effect that the plaintiff has made out a *prima facie* case is erroneous. Learned advocate Ms.Megha Jani appearing for the respondents

would submit that it is open for the respondents to challenge the said adverse finding in the present appeals from order, which is permissible in law. Learned advocate Ms. Megha Jani appearing for the respondents would place reliance under Order XLIII Rule 2 read with Order XLI Rule 22 of CPC.

9.9 Learned advocate Ms. Megha Jani appearing for the respondents would submit that the balance of convenience is in favour of the defendants and the defendants would suffer irreparable loss if any injunction is granted to the plaintiff. Learned advocate Ms. Megha Jani would further submit that the defendants No.9 to 12 have entered into development agreement of the suit land after verifying that the agreement for sale has been cancelled and that such cancellation has not been challenged by the plaintiff in his suit and furthermore, the plaintiff having not made any payment to AMC for a period of almost 4 and ½ years since the signing of the agreement for sale and so far, the defendants Nos.9 to 12 have paid Rs.2,49,29,400/- as betterment charges, Rs.2,79,04,800/-

towards chargeable FSI, Rs.2,19,51,580/- towards construction expenses and Rs.2,63,49,455/- towards other construction expenses thereby, roughly spent around more than Rs.10.0 crore and the construction as on date is going on at suit property, by now, the defendant nos.9 to 12 have incurred much more amount.

9.10 Learned advocate Ms. Megha Jani would further submit that the construction, which is proposed, is of two basements, ground floor + 12 floors. Learned advocate Ms. Megha Jani would further submit that the construction is almost over and third-party rights are created. She would further submit that against the investment made by Defendant Nos.9 to 12, the plaintiff has only paid a sum of only Rs.60 lakhs. Moreover, the conduct of the plaintiff shows that the plaintiff just wanted to block the land, which is worth in crores without any further investment and having no financial capacity to pay agreed amount as per agreement for sale.

9.11 Learned advocate Ms. Megha Jani would submit that the

possession of the suit land is with the defendants. The possession of the suit land was never handed over to the plaintiff as claimed by the plaintiff. Learned advocate Ms. Megha Jani would further submit that the supplementary agreement does not, in any manner, record that the possession was handed over to plaintiff. She would further point out that the plaintiff did not even apply for appointment of a court commissioner while filing the suit on 20.07.2021 and after almost 3 months on 14.10.2021, an application for appointment of court commission was made. Learned advocate Ms.Megha Jani would submit that considering the fact that the defendants have been in possession of the suit land all throughout and have put up a construction of 12 floors, therefore, no ground is made out for granting injunction in favour of the plaintiff on the lame plea of it being in possession.

9.12 Learned advocate Ms. Megha Jani appearing for the respondents would submit that the agreement in question is

dated 06.02.2018 then amendment which came into effect from 01.10.2018 in Specific Relief Act having held to be prospective thereby, it cannot apply to those transactions that took place prior to its coming into force. Resultantly, the suit is governed by the unamended Specific Relief Act giving full discretion to the court to refuse/grant of specific performance of an agreement.

9.13 Learned advocate Ms. Megha Jani would lastly submit that this Court while exercising its power under Order XLIII Rule 1 (r) of CPC would not substitute its own view and interfere with the impugned order as order impugned is neither perverse, erroneous, capricious nor arbitrary in nature nor against any settled legal position of law. So, assuming without admitting that merely some another view is possible, it would not be ground to interfere with discretionary order passed by trial court.

9.14 To buttress her arguments, she has relied upon the following decisions.

(i) I.S. Sikandar vs. K. Subramani reported in (2013) 15 SCC 27 (para 37 and 38);

(ii) Mohinder Kaur vs. Sant Paul Singh reported in (2019) 9 SCC 358;

(iii). R. Kandasamy (Since Dead) & Ors. vs. T.R.K. Sarawathy & Anr. reported in 2024 SCC OnLine SC 3377; (para 18.7, 22-25, 38, 39, 40-47);

(iv) Janardhan Das and others 2024 SCC online SC 2937 (para 2.4, 2.5, 2.7, 5.3, 7, 17, 18, 23);

(v) Saurav Jain and others reported in (2022)18 SCC 633 (Para 24–29);

(vi) Saurav Jain vs. A.B.P. Design reported in 2022 18 SCC 633; (para 24 to 29).

(vii) Ramakant Ambalal Choksi vs. Harish Ambalal Choksi & Ors. reported in 2024 SCC OnLine SC 3538; (para – 20 to 37)

(viii) Katta Sujatha Reddy & Anr. vs. Siddamsetty Infra Projects Pvt. Ltd. & Ors. reported in (2023) 1 SCC 355 (48 to 57).

(ix) R. Kandasamy (Since dead) & Ors. versus. T.R.K Sarawathy & Anr. reported in 2024 SCC Online SC 3377 : 2025 (0) AIR (SC) 44 (para 8, 22 to 24, 38 to 47).

9.15 Making the above submissions, she would request that the impugned order does not call for any interference at the instance of the original plaintiff and all these appeals from order deserve to be dismissed.

10. REJOINDER SUBMISSIONS OF APPELLANT - PLAINTIFF

10.1 Learned Senior Counsel Mr. Kavina would further submit that on the facts at hand, from the documents produced before the Trial Court by the rival parties, it clearly emerges that, the defendant nos.9 to 12 are not the *bona fide* purchasers of the value without notice. As per their own statements made in their written statement and after going through the development agreement, the defendant nos.9 to 12 have categorically stated that they are aware of the said agreements for sale in favour of Plaintiff. Thus, Defendant Nos.9 to 12 could not be said to be a *bona fide* purchasers of the value without notice. They are merely a partners of the development project with defendant nos.1 to 7. The said development agreement was executed by the defendant nos.1 to 7, pending

the suit having their financial interest, amounts to overreaching the process of the court.

10.2 Learned Senior Counsel Mr. Kavina would further submit that the balance of convenience cannot be said to be in favour of Defendants merely because they spend more amount as held by the learned Trial Court while answering issue nos. 2 and 3 of the impugned order.

10.3 Learned Senior Counsel Mr. Kavina would further submit that, in a suit for specific performance of contract, temporary injunction could not be denied to the plaintiff on the ground that, the plaintiff can be compensated in terms of money. Learned Senior Counsel Mr. Kavina would further submit that the Hon'ble Apex Court in the matter of ***Maharwal Khewaji Trust (Regd) Faridkot v. Baldev Dass reported in (2004) 8 SCC at Pg. 488*** has held that, until and unless a case of irreparable loss or damage is made out by a party to the suit, the court should not permit the nature of the property being changed which also includes alienation or transfer of the property

which may cause loss or damage to the party who may ultimately succeed in the suit and may further lead to multiplicity of proceedings.

10.4 Learned Senior Counsel Mr. Kavina would further submit that the principal contentions on behalf of the defendants that, as the defendant nos. 1, 5 & 7 are non-signatories to the agreement for sale dated 06.02.2018 and supplementary agreement dated 19.02.2019 and it is a contingent contract within the meaning of Section 32 of the Contract Act, 1872 and so the suit of the plaintiff is not maintainable seeking performance of agreement for sale is thoroughly misconceived notion of defendants. Learned Senior Counsel Mr. Kavina would submit that as per S. 44 of Transfer of Property Act and settled legal position of law, co-owner can always sell his interest/share from property and performance of such agreement for sale can always be sought by beneficiary of agreement i.e. purchaser as per section 13 of Specific Relief Act, 1963.

10.5 Learned Senior Counsel Mr. Kavina would further submit that in view of the provisions of Section 13 (1) (b) of the Specific Relief Act, 1963 read with recitals of the said agreements dated 06.02.2018 and 19.02.2019 respectively read with Section 17 of the Specific Relief Act, 1963, the judgment in case of ***I.S Sikandar (D) by LRs. v. Subramaniam*** *reported in* ***(2013) 15 SCC 27*** would not be applicable in the facts of present case. Learned Senior Counsel Mr.Kavina would further submit that the non-signatories to the agreement were bound to concur at the instance of their husbands who were signatories to the agreements and who had represented themselves to be the exclusive owners of the suit property.

10.6 Learned Senior Counsel Mr. Kavina would further submit that law laid down in the judgments cited by the respondents does not apply to the facts of the present case i.e., ***I.S Sikandar (D) by LRs. (supra)*** has been clarified in the subsequent judgments in the matters of ***A. Kantamani v. Nasreen Ahmed*** *reported in* ***2017 (4) SCC 654*** and having not

raised issue of none challenge of cancellation of agreement for sale before trial Court either in pleading of defendants or arguments, such issue can not be permitted to raise for first time in present appeals.

10.7 Learned Senior Counsel Mr. Kavina would further submit that the observations made in the judgment of ***R. Kandasamy (Since dead) & Ors, (supra)***, that the Trial Court is required to decide maintainability of suit under Section 9 of CPC, along with the contentions taken on behalf of defendants would not help the defendants as it is yet to be decided that at whose fault agreement for sale could not be performed.

10.8 Learned Senior Counsel Mr. Kavina would further submit that the defendant nos.1 to 7 have failed to assail the plaint in their application preferred under Order VII Rule 11 of CPC by taking similar contentions as has been taken in the present case. It is pertinent to note here that, the said order of Trial Court dismissing the application under Order VII Rule 11 of CPC has been upheld by this Hon'ble Court by a detailed order

dated 08.02.2024 passed in Civil Revision Application No.13 of 2024 and the same was confirmed by the Hon'ble Apex Court vide order dated 09.04.2024 and the Special Leave to Appeal (C) no.7870/2024 was also dismissed. Even otherwise also, the said judgment deals with the case related to post-trial.

10.9 Learned Senior Counsel Mr. Kavina would further submit that the objection regarding the maintainability of the suit was never raised by the defendants in their written statement. Learned Senior Counsel Mr.Kavina would further submit the Hon'ble Apex Court in the matter of ***A. Kanthamani (supra)*** was pleased to hold that, it is a well-settled principle of law that the plea regarding the maintainability of the suit is required to be raised in the first instance in the pleading (i.e. written statement). In other words, if maintainability was not an issue before the Trial Court, a suit cannot be dismissed as not maintainable. However, the Defendants have raised this plea for the very first time before this Hon'ble Court. Even otherwise also, once the defendant nos. 1 to 7 have failed in

assailing the plaint under Order VII Rule 11 of CPC, it is not open for the defendant nos.1 to 7 to object the grant of temporary injunction pending the suit by contending that the suit of the plaintiff is not maintainable under Section 9 of CPC and thus, they are not entitled to temporary injunction pending the suit.

10.10 Learned Senior Counsel Mr.Kavina would further submit that another principal contention that, the plaintiff is not ready and willing to perform his part of contract as he has not deposited the amount of betterment charges, is also misconceived since the plaintiff was never called upon to deposit such betterment charges with corporation. There is nothing on record to substantiate the said contention of the defendants. Learned Senior Counsel Mr. Kavina would further submit that there is nothing on record to suggest that, the defendant nos. 1 to 7 have ever called upon the Plaintiff to deposit the amount with Corporation. Though, under the contract, it was on the part of vendor to carryout appropriate

procedure before corporation to amalgamate the plot of the Hospital, with a view to expedite the procedure, the Plaintiff-Vendee at his own cost appointed consultant which can be seen from the letters produced vide Exh. 79. However, when the Plaintiff was not handed over the letter received from the corporation to enable him to deposit betterment charges, he wrote letter dated 14.12.2020.

10.11 Learned Senior Counsel Mr. Kavina would further submit that when the Plaintiff has received false reply to the said letter on 30.12.2020, he has given response on 04.01.2021 followed by legal notice dated 19.01.2021, which was responded by the Defendant nos.1 to 7 after long time on 03.07.2021.

10.12 Learned Senior Counsel Mr. Kavina would further submit that on the same day i.e., on 03.07.2021, the Defendant Nos.9 to 12 have claimed to deposit the money with Corporation i.e., AMC. Before that, the Defendant nos.1 to 7 has made an attempt to transfer the suit property to defendant no.8.

However, in view of the objections of the plaintiff, title clearance certificate was not issued.

10.13 Learned Senior Counsel Mr. Kavina would further submit that the materials on record reads with averments made in application at Exh.15, it could not be disputed that, the plaintiff was put into physical possession of the suit property, moreover, watchmen deployed by the Plaintiff was illegally dispossessed after filling of the suit. Thus, the Plaintiff is entitled to mandatory injunction, as prayed for, vide application at Exh. 15.

10.14 Learned Senior Counsel Mr. Kavina would further submit that no sound reasoning was assigned to refuse the temporary injunction pending the suit by the Trial Court.

10.15 To buttress his arguments, Learned Senior Counsel Mr.Kavina would rely upon the following decisions:-

> ***(1) Natwarlal Ranchhoddas Patel and ors. vs. Harendrabhai Somjibhai Patel, reported in 2021 (4) GLR 2936 (relied upon 3, 8 and 8.7);***

(2) Maharwal Khewaji Trust (Regd) Faridkot v. Baldev Dass reported in 2004 (8) SCC 488, (relied upon para 10).

(3) Julien Education Trust vs. Sourendar Kumar Roy and Ors. reported in (2010) 1 SCC 379 ***(relied upon para 25)***

(4) L/H Abdulhak Abdulmajid Munshi vs. Habibunisa reported in 2019 SCConline Guj 6174 (relied upon para 14)

(5) A Kanthamani vs. Nasreen Ahmed reported in 2017 4 SCC 654 (relied upon para 7, 13, 16 and 30)

(6) Kushal Infraproject Industries Ltd. v. Dalel Singh and Anr. reported in **2019 SCC Online Del 8832** ***(relied upon para 1, 4, 5, 9, and 8 to 11 & 14***;

(7) Manisha v. Madanlal reported in **2023 SCC OnlineBom 1581** ***(relied upon para 8, 22 and 26).***

10.16 Making the above submission, he would request to allow the present appeal from order.

11. At this stage, it is required to be observed that this Court after hearing learned advocates appearing for respective parties at length has reserved matters for judgement on **24.02.2024.** Nonetheless, learned advocate appearing for defendants have

orally mentioned on 08-04-2025 in the open Court by informing in advance to learned advocate appearing for plaintiff that recently on 04-04-2025, Honorable Apex Court in a case of Sangita Sinha *Versus* Bhawana Bhardwaj and Others in Civil Appeal No. 4972/2025 reported in 2025 SCC Online SC 723 again reiterated principle so laid down by it in a case of ***I S Sikandar (supra)*** and ***R. Kandasamy (Since dead) & Ors, (supra)***.

11.1 To observe principles of natural justice, audience given to the learned advocate appearing for plaintiff to address his point or concern against cited judgement. Learned advocate for plaintiff has without any reservation address on citing recent decision of Honourable Apex Court by learned advocate of defendant would submit that above cited recent judgement is not at all applicable to the facts of the present as in the case before Honourable Apex Court, demand draft was enchased by vendee (purchaser) thereby, Court hold that agreement to sell stood cancelled and concluded that what has been argued on behalf of plaintiff in course of oral submission may be taken note by this Court.

No other and further submission are made by any respective learned advocates appearing for respective parties.

Points for determination

(1) Whether in the facts and circumstances of the case, in absence of any challenge of cancellation of agreement for sale by executors, plaintiff can maintain suit seeking performance of non-existent agreement?

(2) Whether in the facts and circumstances of the case, defendants are able to substantiate that no prima facie case is made out by plaintiff and plaintiff was not ready and willing to perform part of his contract?

(3) Whether in the facts and circumstances of the case, plaintiff would able to prove that order impugned in appeal is erroneous, perverse, and or arbitrary having not observed that balance of convenience and irreparable loss was in favour of plaintiff than defendants?

(4) Whether in the facts and circumstances of the case, the impugned order requires to be interfered on any of issues so raised by plaintiff in these appeals?

12. Analysis:

12.1 Before adverting to the issues so germen in these appeals, it is required to be kept in mind that the present Appeal from Order is filed under the provisions of Order XLIII Rule 1 (r) of the Code and challenge in this appeal is a discretionary order

passed by the learned trial Judge under the provisions of Order XXXIX Rules 1 and 2 of the CPC.

12.2 In the case of ***Wonder Ltd. and another V/s. Antox India Pvt. Ltd., (1990) Supp 1 SCC 727,*** the Hon'ble Apex Court in para 9 of the said decision, after considering the scope of Order XLIII Rule 1(r) of the CPC in an appeal wherein, the discretionary order passed by the learned trial Court is under challenge, observed as under:-

> "9. Usually, the prayer for grant of an interlocutory injunction is at a stage when the existence of the legal right asserted by the plaintiff and its alleged violation are both contested and uncertain and remain uncertain till they are established at the trial on evidence. The court, at this stage, acts on certain well settled principles of administration of this form of interlocutory remedy which is both temporary and discretionary. The object of the interlocutory injunction, it is stated
>
> > "...is to protect the plaintiff against injury by violation of his rights for which he could not adequately be compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The court must weigh one need

against another and determine where the "balance of convenience lies".

The interlocutory remedy is intended to preserve in status quo, the rights of parties which may appear on a prima facie. The court also, in restraining a defendant from exercising what he considers his legal right but what the plaintiff would like to be prevented, puts into the scales, as a relevant consideration whether the defendant has yet to commence his enterprise or whether he has already been doing so in which latter case considerations somewhat different from those that apply to a case where the defendant is yet to commence his enterprise, are attracted."

(emphasis supplied)

12.3 Recently, in a case of ***Ramakant Ambalal Choksi V/s Harish Ambalal Choksi reported in 2024 SCC Online SC 3538*** also reiterated aforesaid principle, albeit with explaining what amounts to perversity in order having so observed as under:-

"27. The principles of law explained by this Court in Wander's (supra) have been reiterated in a number of subsequent decisions of this Court. However, over a period of time the test laid down by this Court as regards the scope of interference has been made more stringent. The emphasis is now more on perversity rather than a mere error of fact or law in the order granting injunction pending the final adjudication of the suit.

28. In *Neon Laboratories Ltd.* v. *Medical Technologies Ltd.*, (2016) 2 SCC 672 this Court held that the Appellate Court should not flimsily, whimsically or lightly interfere in the exercise of discretion by a subordinate court unless such exercise is palpably perverse. Perversity can pertain to the understanding of law or the appreciation of pleadings or

evidence. In other words, the Court took the view that to interfere against an order granting or declining to grant a temporary injunction, perversity has to be demonstrated in the finding of the trial court.

29. In *Mohd. Mehtab Khan* v. *Khushnuma Ibrahim Khan*, (2013) 9 SCC 221 this Court emphasised on the principles laid down in *Wander* (supra) and observed that while the view taken by the appellate court may be an equally possible view, the mere possibility of taking such a view must not form the basis for setting aside the decision arrived at by the trial court in exercise of its discretion under Order 39 of the CPC. The basis for substituting the view of the trial court should be malafides, capriciousness, arbitrariness or perversity in the order of the trial court. The relevant observations are extracted below:

> *"20. In a situation where the learned trial court on a consideration of the respective cases of the parties and the documents laid before it was of the view that the entitlement of the plaintiffs to an order of interim mandatory injunction was in serious doubt, the Appellate Court could not have interfered with the exercise of discretion by the learned Trial Judge unless such exercise was found to be palpably incorrect or untenable. The reasons that weighed with the learned Trial Judge, as already noticed, according to us, do not indicate that the view taken is not a possible view. The Appellate Court, therefore, should not have substituted its views in the matter merely on the ground that in its opinion the facts of the case call for a different conclusion. Such an exercise is not the correct parameter for exercise of jurisdiction while hearing an appeal against a discretionary order. While we must not be understood to have said that the Appellate Court was wrong in its conclusions what is sought to be emphasized is that as long as the view of the trial court was a possible view the Appellate Court should not have interfered with the same*

> *following the virtually settled principles of law in this regard as laid down by this Court in* Wander Ltd. *v.* Antox India (P) Ltd.**"**
>
> (emphasis supplied)

32. The appellate court in an appeal from an interlocutory order granting or declining to grant interim injunction is only required to adjudicate the validity of such order applying the well settled principles governing the scope of jurisdiction of appellate court under Order **43** of the CPC which have been reiterated in various other decisions of this Court. The appellate court should not assume unlimited jurisdiction and should guide its powers within the contours laid down in the *Wander* (supra) case.

34. The burden is on the plaintiff, by evidence aliunde by affidavit or otherwise, to prove that there is **"**a *prima facie* case**"** in his favour which needs adjudication at the trial. The existence of the *prima facie* right and infraction of the enjoyment of his property or the right is a condition precedent for the grant of temporary injunction. *Prima facie* case is not to be confused with *prima facie* title which has to be established on evidence at the trial. Only *prima facie* case is a substantial question raised, *bona fide*, which needs investigation and a decision on merits. Satisfaction that there is a *prima facie* case by itself is not sufficient to grant injunction. The Court further has to satisfy that non-interference by the court would result in **"**irreparable injury**"** to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury, but means only that the injury must be a material one, namely one that cannot be adequately compensated by way of damages. The third condition also is that **"**the balance of convenience**"** must be in favour of granting injunction. The Court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is

> likely to be caused to the parties, if the injunction is refused and compare it with that which is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury and if the Court considers that pending the suit, the subject matter should be maintained in *status quo*, an injunction would be issued. Thus, the Court has to exercise its sound judicial discretion in granting or refusing the relief of *ad interim* injunction pending the suit. (See : *Dalpat Kumar* v. *Prahlad Singh*, (1992) 1 SCC 719.)
>
> 35. Any order made in conscious violation of pleading and law is a perverse order. In *Moffett* v. *Gough*, (1878) 1 LR 1r 331, the Court observed that a perverse verdict may probably be defined as one that is not only against the weight of evidence but is altogether against the evidence. In *Godfrey* v. *Godfrey*, 106 NW 814, the Court defined "perverse" as "turned the wrong way"; not right; distorted from the right; turned away or deviating from what is right, proper, correct, etc.
>
> 37. The wrong finding should stem out on a complete misreading of evidence or it should be based only on conjectures and surmises. Safest approach on perversity is the classic approach on the reasonable man's inference on the facts. To him, if the conclusion on the facts in evidence made by the court below is possible, there is no perversity. If not, the finding is perverse. Inadequacy of evidence or a different reading of evidence is not perversity. (See : *Damodar Lal* v. *Sohan Devi*, (2016) 3 SCC 78)."
>
> (emphasis supplied)

12.4 So, in light of the limited powers of this Court, the Appellate Court can interfere with the discretionary order passed by the trial Court only in exceptional circumstances and

the Appellate Court cannot interfere with the exercise of discretion of the Court of first instance and substitute its own discretion except, where the discretion has been shown to have been exercised arbitrarily, capriciously or perversely or where the Court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. In nutshell, an appeal against exercise of discretion is said to be an appeal on principle. To put it differently, the Appellate Court cannot reassess the entire evidence so as to come to its own conclusion substituting the conclusion arrived at by the trial Court, if two views are possible.

13. Prima facie case and Effect of Non-Challenge of cancellation of agreement for sale by plaintiff in suit: -

13.1 The trial court, in its impugned order, has observed that plaintiff has made out a *prima facie* case. Learned advocate appearing for the defendants has strongly objected to such observations and findings recorded by the trial court, thereby disputing issue No.1 framed by the trial court— i.e. whether

plaintiff has a prima facie case?

13.2 The defendants have not filed an independent appeals questioning the aforesaid findings of the trial court but have disputed such findings by making their factual and legal submissions, which are recorded hereinabove. Such recourse is permissible in law as per Order XLI, Rule 22 of the CPC, and it has also been clarified by the Honorable Apex Court in the case of ***Saurav Jain & Anr. (supra)*** as under:

> *"**[21]** Apart from the above findings which negate the basis and foundation of the suit, the appellant-defendant has also raised an objection to the jurisdiction of the Trial Court to entertain the present suit, given the bar on jurisdiction under the ULCRA. The appellant has submitted that the first respondent, through an artful drafting of the plaint in the course of the pleadings in the suit placed in issue the entire gamut of proceedings under the ULCRA, without impleading either the State of Uttar Pradesh or the Competent Authority under the ULCRA. At the outset, we note that the ground of lack of jurisdiction of the Trial Court over the suit was raised in the proceedings before the court of first instance. The Trial Court rejected the objection raised by the appellant-defendant on the exercise of its jurisdiction, holding that the suit for declaratory relief against the auction sale and for an injunction could be entertained. In the appeal against the judgment of the Trial Court filed by the first respondent before the High*

Court, the appellant did not file a cross-objection against this finding of the Trial Court on the exercise of its jurisdiction. The appellant has urged before this Court that the jurisdiction of the civil court is impliedly excluded under the provisions of the ULCRA. Reliance has been placed by the appellant on Order XLI Rule 22 of the CPC to argue that a party, in whose favour the civil court has decreed a suit, can raise arguments against findings without having to file a cross- objection, in the appeal.

[22] *Order XLI Rule 22(1) reads in the following terms:*

> *"(1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree [but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross-objection] to the decree which he could have taken by way of appeal provided he has filed such objection in the Appellant Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.*
>
> *[Explanation. - A respondent aggrieved by a finding of the Court in the judgment on which the decree appealed against is based may, under this rule, file cross-objection in respect of the decree in so far as it is based on that finding, notwithstanding that by reason of the decision of the Court on any other finding which is sufficient for the decision of the suit, the decree, is, wholly or in part, in favour of that respondent.]"*
>
> *Order XLI Rule 22 CPC was amended by the CPC Amendment (Act 104 of 1976), with effect from 1*

February 1977. The text of the pre-amendment and post-amendment provision is reproduced below:
Order XLI Rule 22 prior to its amendment Order XLI Rule 22 as amended by Act 104 of 1976

Order XLI Rule 22 prior to its amendment	***Order XLI Rule 22 as amended by Act 104 of1976***
R.22. Upon hearing, respondent may object to decree as if he had preferred a separate appeal- *(1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree on any of the grounds decided against him in the Court below, but take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.*	*R.22. Upon hearing, respondent way object to decree as If he had preferred a separate appeal-* *(1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree* ***[but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and*** *may also take any cross- objection] to the decree which he could have taken by way of appeal provided he has filed such objection in the Appellant Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.* *[Explanation. – A respondent aggrieved by a finding of the Court in the judgment on*

	which the decree appealed against is based may, under this rule, file cross-objection in respect of the decree in so far as it is based on that finding, notwithstanding that by reason of the decision of the Court on any other finding which is sufficient for the decision of the suit, the decree, is, wholly or in part, in favour of that respondent.] ***(emphasis supplied)***

[23] *The effect of the amendment was considered in* ***Banarsi & Ors. v. Ram Phal****, 2003 9 SCC 606. , where this Court held that after the 1976 amendment, the respondent could file cross-objections against the 'findings' of the lower court, while previously cross-objections could only be filed when the decree of the lower court was partly against the respondent. Justice R.C Lahoti (as the learned Chief Justice then was), speaking for the two judge bench observed:*

> *"10-. [ ] There may be three situations:*
> *(i) The impugned decree is partly in favour of the appellant and partly in favour of the respondent.*
> *(ii) The decree is entirely in favour of the respondent though an issue has been decided against the respondent.*
> *(iii) The decree is entirely in favour of the respondent and all the issues have also been answered in favour of the respondent but there is a finding in the judgment which goes against the respondent.*
> *11. In the type of case (i) it was necessary for the respondent to file an appeal or take cross-objection against that part of the decree which is against him if he seeks to get rid of the same though that part of the decree which is in his favour he is entitled to support without taking any cross-objection. The*

law remains so post-amendment too. In the type of cases (ii) and (iii) pre-amendment CPC did not entitle nor permit the respondent to take any cross-objection as he was not the person aggrieved by the decree. ***Under the amended CPC, read in the light of the explanation, though it is still not necessary for the respondent to take any cross-objection laying challenge to any finding adverse to him as the decree is entirely in his favour and he may support the decree without cross-objection; the amendment made in the text of sub-rule (1), read with the explanation newly inserted, gives him a right to take cross-objection to a finding recorded against him either while answering an issue or while dealing with an issue.*** *The advantage of preferring such cross-objection is spelled out by sub-rule (4). In spite of the original appeal having been withdrawn or dismissed for default the cross-objection taken to any finding by the respondent shall still be available to be adjudicated upon on merits which remedy was not available to the respondent under the unamended CPC. In the pre-amendment era, the withdrawal or dismissal for default of the original appeal disabled the respondent to question the correctness or otherwise of any finding recorded against the respondent."*

(emphasis supplied)

[24] *Order XLI Rule 22(2) of the CPC states that a "cross-objection shall be filed in the form of a memorandum, and the provisions of Rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto." This Court in* ***S. Nazeer Ahmed v. State Bank of Mysore****, 2007 11 SCC 75. elaborated on the form of objections made under Order XLI Rule 22 CPC. In* ***Nazeer Ahmed (supra)****, the respondent had filed a suit for enforcement of an equitable mortgage. In deciding the suit, the Trial Court rejected the argument of the appellant-defendant and held that the suit was not barred by Order II Rule 2 of the CPC. However, the court dismissed the suit on grounds of limitation. On an appeal filed by the respondent before the High Court, the High Court observed that although the suit was barred by Order II Rule 2 of the CPC, the appellant had not challenged this finding of the Trial Court by filing a memorandum of cross-objection. Thus, the High Court granted the respondent a decree against the appellant. When*

this finding of the High Court was assailed before this Court, Justice P.K Balasubramanyam held that a memorandum of cross-objection needs to be filed while taking recourse to Order XLI Rule 22 only when the respondent claims a relief that had been rejected by the trial court or seeks an additional relief apart from that provided by the trial court. The court held that a memorandum of objection need not be filed when the appellant only assailed a 'finding' of the lower court:

> *"7. The High Court, in our view, was clearly in error in holding that the appellant not having filed a memorandum of cross-objections in terms of Order 41 Rule 22 of the Code, could not challenge the finding of the trial court that the suit was not barred by Order 2 Rule 2 of the Code.* ***The respondent in an appeal is entitled to support the decree of the trial court even by challenging any of the findings that might have been rendered by the trial court against himself. For supporting the decree passed by the trial court, it is not necessary for a respondent in the appeal, to file a memorandum of cross-objections challenging a particular finding that is rendered by the trial court against him when the ultimate decree itself is in his favour. A memorandum of cross-objections is needed only if the respondent claims any relief which had been negatived to him by the trial court and in addition to what he has already been given by the decree under challenge. We have therefore no hesitation in accepting the submission of the learned counsel for the appellant that the High Court was in error in proceeding on the basis that the appellant not having filed a memorandum of cross-objections, was not entitled to canvas the correctness of the finding on the bar of Order 2 Rule 2 rendered by the trial court.****"***
>
> ***(emphasis supplied)***

[25] *It is apparent from the amended provisions of Order XLI Rule 22 CPC and the above authorities that there are two changes that were brought by the 1976 amendment. First, the scope of filing of a cross-objection was enhanced substantively to include objections against 'findings' of the lower court; second, different forms of*

raising cross-objections were recognised. The amendment sought to introduce different forms of cross-objection for assailing the findings and decrees since the amendment separates the phrase "but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour" from "may also take any cross-objection to the decree" with a semi colon. Therefore, the two parts of the sentence must be read disjunctively. Only when a part of the decree has been assailed by the respondent, should a memorandum of cross-objection be filed. Otherwise, it is sufficient to raise a challenge to an adverse finding of the court of first instance before the appellate court without a cross objection.

[26] *The applicability of the principle in Order XLI Rule 22 CPC to proceedings before this Court under Article 136 of the Constitution was considered by a Constitution Bench in the decision in* ***Ramanbhai Ashabhai Patel v. Dabhi Ajitkumar Fulsinji****, 1965 AIR(SC) 669. . Justice JR Mudholkar overruled the judgment of the three judge bench in* ***Vashist Narain Sharma v. Dev Chandra****, 1955 1 SCR 509 which had rejected the argument of the respondent that a party could raise arguments on the 'findings' that were against him, while supporting the judgment. It was held that Order XLI Rule 22 of the CPC does not have application to an appeal under Article 136. In* ***Ramanbhai Ashabhai Patel (supra)****, this Court held that the provisions of Order XLI Rule 22 of the CPC are not applicable to the Supreme Court and the rules of the Supreme Court do not provide for any analogous provisions. However, it was held that this deficiency must be supplemented by drawing from CPC:*

> *"18. [ ] Apart from that we think that while dealing with the appeal before it this Court has the power to decide all the points arising from the judgment appealed against and even in the absence of an express provision like Order [4]1 Rule 22 of the Code of Civil Procedure it can devise the appropriate procedure to be adopted at the hearing.* ***There could be no better way of supplying the deficiency than by drawing upon the provisions of a general law like the Code of Civil Procedure and adopting such of those provisions as are suitable. We cannot lose sight of the fact that normally a party in whose favour the judgment appealed***

from has been given will not be granted special leave to appeal from it. Considerations of justice, therefore, require that this Court should in appropriate cases permit a party placed in such a position to support the judgment in his favour even upon grounds which were negatived in that judgment. *[ ]"*

(emphasis supplied)

Expanding on this further, a two judge Bench (Justice R.C Lahoti speaking for himself and Justice Brijesh Kumar) of this Court in ***Jamshed Hormusji Wadia v. Port of Mumbai****, 2004 3 SCC 214. observed:*

*"35. A few decisions were brought to the notice of this Court by the learned Additional Solicitor General wherein this Court has made a reference to Order 41 Rule 22 CPC and permitted the respondent to support the decree or decision under appeal by laying challenge to a finding recorded or issue decided against him though the order, judgment or decree was in the end in his favour. Illustratively, see Ramanbhai Ashabhai Patel [****Ramanbhai Ashabhai Patel v. Dabhi Ajitkumar Fulsinji****, 1965 AIR(SC) 669] , Northern Railway Coop. Credit Society Ltd. [****Northern Railway Coop. Credit Society Ltd. v. Industrial Tribunal****, 1967 AIR(SC) 1182] and Bharat Kala Bhandar (P) Ltd. [****Bharat Kala Bhandar (P) Ltd. v. Municipal Committee, Dhamangaon****, 1966 AIR(SC) 249] The learned Additional Solicitor General is right. But we would like to clarify that this is done not because Order 41 Rule 22 CPC is applicable to appeals preferred under Article 136 of the Constitution; it is because of a basic principle of justice applicable to courts of superior jurisdiction. A person who has entirely succeeded before a court or tribunal below cannot file an appeal solely for the sake of clearing himself from the effect of an adverse finding or an adverse decision on one of the issues as he would not be a person falling within the meaning of the words 'person aggrieved'. In an appeal or revision, as a matter of general principle, the party who has an order in his favour, is entitled to show that even if the order was liable to be set aside on the grounds decided in his favour, yet the order could be sustained by reversing the finding on some other ground which was decided against him in the court below. This*

position of law is supportable on general principles without having recourse to Order 41 Rule 22 of the Code of Civil Procedure. Reference may be had to a recent decision of this Court in ***Nalakath Sainuddin v. Koorikadan Sulaiman****, 2002 6 SCC 1 and also* ***Banarsi v. Ram Phal****, 2003 9 SCC 606 . This Court being a court of plenary jurisdiction, once the matter has come to it in appeal, shall have power to pass any decree and make any order which ought to have been passed or made as the facts of the case and law applicable thereto call for.* ***Such a power is exercised by this Court by virtue of its own jurisdiction and not by having recourse to Order 41 Rule 33 CPC though in some of the cases observations are available to the effect that this Court can act on the principles deducible from Order 41 Rule 33 CPC. It may be added that this Court has jurisdiction to pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it. Such jurisdiction is conferred on this Court by Article 142 of the Constitution and this Court is not required to have recourse to any provision of the Code of Civil Procedure or any principle deducible therefrom****. However, still, in spite of the wide jurisdiction being available, this Court would not ordinarily make an order, direction or decree placing the party appealing to it in a position more disadvantageous than in what it would have been had it not appealed."*

(emphasis supplied)

[27] *On a perusal of the above authorities, it is evident that the principle stipulated in Order XLI Rule 22 of CPC can be applied to petitions under Article 136 of the Constitution because of this Court's wide powers to do justice under Article 142 of the Constitution.* ***Since the principle in Order XLI Rule 22 of the CPC furthers the cause of justice by providing the party other than the 'aggrieved party' to raise any adverse findings against them, this Court can draw colour from Order XLI Rule 22 CPC and permit objections to findings****.*

[28] From the above it has been established that it not necessary that a challenge to the adverse findings of the

> ***lower court needs to be made in the form of a memorandum of cross-objection.*** *In the present case, we note that the appellant had raised an objection to the jurisdiction of the Trial Court for entertaining the suit on the ground that an injunction and declaratory relief could not have been given. Although the Trial Court passed a decree in favour of the appellant, it had decided against the appellant on the question of jurisdiction. This finding was not challenged by the appellant before the High Court in the form of a memorandum of cross-objection. The judgment of the High Court makes no mention that a plea of lack of jurisdiction was taken by either the appellant or the MDA. Before this Court, the appellant has not filed the counter-affidavit it had filed before the High Court.* ***Thus, the conclusion that emanates from the record before us is that the ground of jurisdiction was only raised by the appellant before the Trial Court and not before the High Court. In effect then, this Court would have to adjudicate on a plea, which did not form a part of the decision of the High Court in challenge before us****."*
>
> ***(emphasis supplied)***

13.3 So, this point is now required to be examined first to determine whether plaintiff has made out a prima facie case or not**?**

13.4 It is an undisputed fact that vide communication dated **30.12.2020,** executors of agreement for sale had cancelled the agreement dated **06.02.2018.** It is undisputed before the trial court and before this court that the plaintiff has not challenged

such cancellation of the agreement for sale by the executors in the suit having not amended its plaint and or prayers made in the plaint.

13.5 In view of the above factual scenario, learned Senior Counsel Mr. Shah and learned Counsel Ms. Jani have heavily relied upon the decision of the Honorable Apex Court in the case of ***I S Sikandar (supra)*** and ***Mohinder Kaur (supra)***, thereby contended that the suit itself is not maintainable.

13.6 Whereas, learned Senior Counsel Mr. Kavina, in his rejoinder arguments, has placed heavy reliance upon the decision of the Honorable Apex Court in the case of ***A. Kanthamani (supra)***, whereby he has emphasized that the points/issues raised by the defendants in the present appeals were neither part of their written statement nor pressed into service before the trial court while defending the injunction application. Thus, learned Senior Counsel Mr. Kavina would submit that defendants cannot be allowed to raise such issues

at this stage and in the present appeals.

13.7 Learned Counsel Mr. Kavina has also further placed reliance upon the decision of the Delhi High Court in the case of ***Kushal Infraproject (supra)*** and the Bombay High Court in the case of ***Manisha (supra***), thereby contended that the issue regarding the cancellation of the agreement for sell in question requires adjudication by the trial court, and at this stage, this Court is not required to accept the arguments of the defendants.

13.8 Per Contra, Learned advocate Ms. Jani has placed reliance upon the decision of the Honorable Apex Court in the case of ***R. Kandasamy (supra),*** whereby she has contended that the Honorable Apex Court, after considering the decisions in the case of ***I S Sikandar (supra)*** and ***A. Kanthamani (supra)***, has held that when the question of jurisdiction arises in the matter, it can be decided at any stage, including before the Honorable Apex Court.

13.9 Learned Counsel Ms. Jani would submit that the issue regarding the non-challenge of the cancellation of the agreement for sale / MoU by the plaintiff in the suit, requires consideration by this Court in the present appeals.

14. It would be appropriate to refer to relevant observations made by the Honorable Apex Court in the case of ***I S Sikandar (supra)***, followed in ***Mohinder Kaur (supra)***, which makes it very clear that the plaintiff is supposed to challenge the cancellation of the agreement for sale by the defendant, failing which the suit itself is held to be not maintainable in law. The relevant observation of Hon'ble Apex Court made in ***Mohinder Kaur (supra)***, needs to be reproduced herein below as under,

> *"[7] The agreement was cancelled by the appellant on 01.09.1989 and the consideration already paid confiscated under intimation to the respondent.* ***The respondent never challenged the communication of cancellation. In Sikandar (supra) it was observed as follows:***
>
> *"37.* ***As could be seen from the prayer sought for in the original suit, the Plaintiff has not sought for declaratory relief to declare the termination of Agreement of Sale as bad in law. In the absence of such prayer by the Plaintiff the original suit filed by him before the trial court for grant of decree for specific performance in respect of the suit schedule***

> ***property on the basis of Agreement of Sale and consequential relief of decree for permanent injunction is not maintainable in law.***
>
> *38. **Therefore, we have to hold that the relief sought for by the Plaintiff for grant of decree for specific performance of execution of sale deed in respect of the suit schedule property in his favour on the basis of non existing Agreement of Sale is wholly unsustainable in law....**"*
> **(emphasis supplied)**

14.1 Furthermore, close reading of ***I S Sikandar (supra)***, would indicate that despite not framing such an issue of maintainability of suit either by the trial court or before the High Court, the Honorable Apex Court framed such an issue and answered it accordingly.

14.2 It is true that ***I S Sikandar (supra)***, was considered by Hon'ble Apex Court in a case of ***A. Kanthamani (supra)***, wherein observed as under,

> *"30. Coming first to the submission of the learned counsel for the appellant about the maintainability of suit, in our considered view, it has no merit for more than one reason.*
> *30.1 First, as rightly argued by learned counsel for the respondent, the objection regarding the maintainability of the Suit was neither raised by the defendant in the written*

statement nor in first appeal before the High Court and nor in grounds of appeal in this Court.

30.2 Second, since no plea was raised in the written statement, a fortiori, no issue was framed and, in consequence, neither the Trial Court nor the High Court could render any finding on the plea.

30.3 Third, it is a well-settled principle of law that the plea regarding the maintainability of suit is required to be raised in the first instance in the pleading (written statement) then only such plea can be adjudicated by the Trial Court on its merits as a preliminary issue under Order 14 Rule 2 of the CPC. Once a finding is rendered on the plea, the same can then be examined by the first or/and second appellate Court.

30.4 It is only in appropriate cases, where the Court prima facie finds by mere perusal of plaint allegations that the suit is barred by any express provision of law or is not legally maintainable due to any legal provision; a judicial notice can be taken to avoid abuse of judicial process in prosecuting such suit. Such is, however, not the case here.

30.5 Fourth, the decision relied on by the learned counsel for the appellant in the case of I.S. Sikander turns on the facts involved therein and is thus distinguishable.

30.6 Lastly, the suit filed by the respondent seeking specific performance of the agreement dated 05.03.1989 was maintainable for the reason that the cause of action to file the suit arose on the expiry of period mentioned in the agreement (31.12.1989) for its performance as provided in Article 54 of the Limitation Act and it was rightly filed immediately within 10 days on 10.01.1990.”

(emphasis supplied)

14.3 So, what was held in ***A. Kanthamani (supra)***, that if the objection regarding the maintainability of the suit was neither

raised by the defendant in their written statement, nor in the first appeal before the High Court, nor even as a ground agitated in the appeal filed before the Honorable Apex Court, and if no such issue was framed regarding the non-challenge of the cancellation of the agreement for sale, then such a plea was not allowed to be raised by the defendant before the Honorable Apex Court.

14.4 To better understand the issue in detail and its applicability to the facts of the present case, it would be profitable to refer and to rely upon the decision of the Honorable Apex Court in the case of ***R. Kandasamy (supra)***, wherein Hon'ble Apex Court after considering both these decisions i.e. ***I S Sikandar (supra)*** and ***A. Kanthamani (supra)***, held as under:

> *"[40] Having held thus, allowing the appeal is the inevitable result.* ***However, before we part, there seems to be a discordant note struck by the decision in A. Kanthamani (supra) while distinguishing I.S. Sikandar (supra), which could create uncertainty and confusion. It is, therefore, considered worthwhile to attempt and clear the same.***
>
> *[41] A comprehensive reading of the two decisions reveals that in a fact scenario where the vendor unliterally cancels an*

agreement for sale, the vendee who is seeking specific performance of such agreement ought to seek declaratory relief to the effect that the cancellation is bad and not binding on the vendee. This is because ***an agreement, which has been cancelled, would be rendered non-existent in the eyes of law and such a non-existent agreement could not possibly be enforced before a court of law. Both the decisions cited above are unanimous in their approval of such legal principle.*** *However, as clarified in Kanthamani (supra), it is imperative that an issue be framed with respect to maintainability of the suit on such ground, before the court of first instance, as it is only when a finding on the issue of maintainability is rendered by trial court that the same can be examined by the first or/and second appellate court. In other words, if maintainability were not an issue before the trial court or the appellate court, a suit cannot be dismissed as not maintainable. This is what Kanthamani (supra) holds.*

[42] The aforesaid two views of this Court, expressed by coordinate benches, demand deference. ***However, it is noticed that this Court in Kanthamani (supra) had not been addressed on the effect of non-existence of a jurisdictional fact (the existence whereof would clothe the trial court with jurisdiction to try a suit and consider granting relief), i.e., what would be its effect on the right to relief claimed by the plaintiff in a suit for specific performance of contract.***

[43] In Shrisht Dhawan (Smt) v. Shaw Bros., 1992 1 SCC 534 an interesting discussion on 'jurisdictional fact' is found in the concurring opinion of Hon'ble R. M. Sahai, J. (as His Lordship then was). It reads:

*"19. *** What, then, is an error in respect of jurisdictional fact? A jurisdictional fact is one on existence or non-existence of which depends assumption or refusal to assume jurisdiction by a court, tribunal or an authority. In Black's Legal Dictionary it is explained as a fact which must exist before a court can properly assume jurisdiction of a particular case.*

*Mistake of fact in relation to jurisdiction is an error of jurisdictional fact. No statutory authority or tribunal can assume jurisdiction in respect of subject matter which the statute does not confer on it and if by deciding erroneously the fact on which jurisdiction depends the court or tribunal exercises the jurisdiction then the order is vitiated. Error of jurisdictional fact renders the order ultra vires and bad (Wade, Administrative Law. In Raza Textiles [(1973) 1 SCC 633] it was held that a court or tribunal cannot confer jurisdiction on itself by deciding a jurisdictional fact wrongly. ***"*

(emphasis supplied)

[44] Borrowing wisdom from the aforesaid passage, our deduction is this. An issue of maintainability of a suit strikes at the root of the proceedings initiated by filing of the plaint as per requirements of Order VII Rule 1, CPC. If a suit is barred by law, the trial court has absolutely no jurisdiction to entertain and try it. However, even though a given case might not attract the bar envisaged by section 9, CPC, it is obligatory for a trial court seized of a suit to inquire and ascertain whether the jurisdictional fact does, in fact, exist to enable it (the trial court) to proceed to trial and consider granting relief to the plaintiff as claimed. No higher court, much less the Supreme Court, should feel constrained to interfere with a decree granting relief on the specious ground that the parties were not put specifically on notice in respect of a particular line of attack/defence on which success/failure of the suit depends, more particularly an issue touching the authority of the trial court to grant relief if the 'jurisdictional fact' imperative for granting relief had not been satisfied. It is fundamental, as held in Shrisht Dhawan (supra), that assumption of jurisdiction/refusal to assume jurisdiction would depend on existence of the jurisdictional fact. Irrespective of whether the parties have raised the contention, it is for the trial court to satisfy itself that adequate evidence has been led and all facts including the jurisdictional fact stand proved for relief to be granted and the suit to succeed. This is a duty the

trial court has to discharge in its pursuit for rendering substantive justice to the parties, irrespective of whether any party to the lis has raised or not. If the jurisdictional fact does not exist, at the time of settling the issues, notice of the parties must be invited to the trial court's prima facie opinion of non-existent jurisdictional fact touching its jurisdiction. However, failure to determine the jurisdictional fact, or erroneously determining it leading to conferment of jurisdiction, would amount to wrongful assumption of jurisdiction and the resultant order liable to be branded as ultra vires and bad.

[45] Should the trial court not satisfy itself that the jurisdictional fact for grant of relief does exist, nothing prevents the court higher in the hierarchy from so satisfying itself. It is true that the point of maintainability of a suit has to looked only through the prism of section 9, CPC, and the court can rule on such point either upon framing of an issue or even prior thereto if Order VII Rule 11 (d) thereof is applicable. ***In a fit and proper case, notwithstanding omission of the trial court to frame an issue touching jurisdictional fact, the higher court would be justified in pronouncing its verdict upon application of the test laid down in Shrisht Dhawan (supra).***

[46] In this case, even though no issue as to maintainability of the suit had been framed in course of proceedings before the Trial Court, there was an issue as to whether the Agreement is true, valid and enforceable which was answered against the sellers. Obviously, owing to dismissal of the suit, the sellers did not appeal. Nevertheless, having regard to our findings on the point as to whether the buyer was 'ready and willing', we do not see the necessity of proceeding with any further discussion on the point of jurisdictional fact here.

[47] ***However, we clarify that any failure or omission on the part of the trial Court to frame an issue on maintainability of a suit touching jurisdictional fact by itself cannot trim the***

> ***powers of the higher court to examine whether the jurisdictional fact did exist for grant of relief as claimed, provided no new facts were required to be pleased and no new evidence led.***"
>
> (emphasis supplied)

14.5 As stated and referred herein above, this Court though reserved the matters for judgement, after due observance of principles of natural justice, has considered the recent decision of Honorable Apex Court passed in a case of ***Sangita Sinha (supra)*** wherein it has been observed and held as under,

> **"ABSENT A PRAYER FOR DECLARATORY RELIEF THAT CANCELLATION OF THE AGREEMENT IS BAD IN LAW, A SUIT FOR SPECIFIC PERFORMANCE IS NOT MAINTAINABLE**
>
> **24.** ***This Court further finds*** that the seller had admittedly issued a letter dated 7th February 2008 cancelling the Agreement to Sell dated 25th January 2008, prior to the filing of the subject suit on 5th May 2008. Even though the demand drafts enclosed with the letter dated 07th February, 2008 were subsequently encashed in July, 2008, yet this Court is of the view that it was incumbent upon the Respondent No. 1-buyer to seek a declaratory relief that the said cancellation is bad in law and not binding on parties for the reason that existence of a valid agreement is sine qua non for the grant of relief of specific performance.
>
> **25.** This Court in I.S. Sikandar (Dead) By LRs. v. K. Subramani, (2013) 15 SCC 27 has held that in absence of a prayer for a declaratory relief that the termination of the agreement is bad in law, the suit for specific performance of that agreement is not maintainable. Though subsequently, this Court in A. Kanthamani v. Nasreen Ahmed, (2017) 4 SCC 654 has held that the

declaration of law in I.S. Sikander (Dead) By LRs. v. K. Subramani (supra) regarding non-maintainability of the suit in the absence of a challenge to letter of termination is confined to the facts of the said case, yet the aforesaid issue has been recently considered in R. Kandasamy (Since Dead) v. T.R.K. Sarawathy (supra) authored by brother Justice Dipankar Datta and the conflict between the judgment of I.S. Sikander (Dead) By LRs. v. K. Subramani (supra) and A. Kanthamani v. Nasreen Ahmed (supra) has been deliberated upon. In R. Kandasamy (Since Dead) v. T.R.K. Sarawathy (supra), it has been clarified that the appellate court would not be precluded from examining whether the jurisdictional fact exists for grant of relief of specific performance, notwithstanding the fact that the trial Court omitted or failed to frame an issue on maintainability of the suit…….

26. **Since in the present case, the seller had issued a letter dated 07th February, 2008 cancelling the agreement to sell prior to the institution of the suit, the same constitutes a jurisdictional fact as till the said cancellation is set aside, the respondent is not entitled to the relief of specific performance.**

27. **Consequently, this Court is of the opinion that absent a prayer for declaratory relief that termination/cancellation of the agreement is bad in law, a suit for specific performance is not maintainable.”**

(emphasis supplied)

14.6 Thus, in view of the clear pronouncement of law by the Honorable Apex Court, it would be very much clear like a day that if vendor has cancelled agreement for sale prior to filing of suit by vendee and such cancellation is not challenged by vendee in the suit, the same constitutes a jurisdictional fact and in absence of any a prayer for declaratory relief that

termination/cancellation of the agreement is bad in law, suit for specific performance is not maintainable. So, in view of said position of law stood as on date, this Court is required to examine the issue regarding the non-challenge of the cancellation of the agreement for sale by the plaintiff in the suit having so raised by defendants in these appeals.

14.7 Having observed earlier that undisputedly, despite knowing that executors (defendant Nos. 4 & 6 and Late Gulammohiyuddin M. Afinwala) has cancelled the agreement for sale vide communication dated 30th December, 2020, the plaintiff chosen not to challenge such cancellation of the agreement for sale in the suit. In such a situation, prima facie, in view of the ratio laid down in the case of ***I S Sikandar (supra)***, followed in ***Mohinder Kaur (supra)*** which has been elaborately discussed in ***R. Kandasamy (supra)*** again reiterated in ***Sangita Sinha (supra),*** the suit itself is held to be not maintainable. Once the foundation of the suit itself is weak, it cannot be said that plaintiff has made out a prima facie case.

15. So far as the decisions of the Delhi High Court in the case of ***Kushal Infraproject (supra)*** and the Bombay High Court in the case of ***Manisha (supra)*** are concerned, they are neither applicable to the facts of the present case nor carry the case of the appellant further apart from said, its settled position that both are having persuasive value and not binding to this Court.

15.1 Nonetheless, in the case of ***Kushal Infraproject (supra),*** the observations of the Delhi High Court in paragraph 13 and 14 held as under:

> *"13. In fact, subsequently in A. Kanthamani, the Supreme Court, in a case where the Defendant had cancelled the agreement to sell, held that firstly time was not the essence of the contract and the judgement of I.S. Sikandar turned on the facts involved therein. The relevant observations of the Supreme Court are set out below:*
>
> > *"34. Coming first to the submission of the learned Counsel for the Appellant about the maintainability of suit, in our considered view, it has no merit for more than one reason.*
> >
> > *39. Fourth, the decision relied on by the learned Counsel for the Appellant in the case of I.S. Sikander (supra) turns on the facts involved therein and is thus distinguishable."*

> *14. Both I.S. Sikandar and A. Kanthamani were cases which were finally adjudicated after evidence was led by the parties and thus until evidence is led, it cannot be held at the initial stage, that the suits are not maintainable."*
> (emphasis supplied)

15.2 The aforesaid view, with respectful disagreement, would not be a correct reading of the ratio of the decisions in the case of ***I S Sikandar (supra)***, followed in ***Mohinder Kaur (supra)***, and clarified in ***A Kandasamy (supra)*** again recently followed in ***Sangita Sinha (supra)***. When the Honorable Apex Court in clear terms, held that an issue as regards the maintainability of the suit touching jurisdictional facts can be examined for grant of relief at any stage, it would not be correct to say that maintainability of suit can be examined later on but not at initial stage of suit. This Court is not in a position to subscribe said view of Delhi High Court which according to me not a correct view but would rather like to consider such a jurisdictional issue when it is raised before it in these appeals.

15.3 Likewise, the observations made by the Bombay High Court in the case of ***Manisha (supra),*** wherein it has been so held that the ratio of ***I S Sikandar (supra)*** would not be relied upon in that case as the termination of the agreement will have to be proved in the trial. It appears that in ***Mainsha (supra),*** letter of termination of agreement for sale was not served upon plaintiff which was one of factor, as well as it observed that cancellation of agreement for sale can not be raised as defence in a suit for specific performance thereby held that its premature to rely upon ratio of ***I S Sikandar (supra)***, thus it was not followed.

15.4 In the present case, such controversy was never raised by the plaintiff, as in response to the communication dated 30.12.2020, plaintiff had issued his reply dated 04.01.2021 to the aforesaid parties. So, plaintiff did received letter of cancellation of agreement for sale. So far as raising of defence by defendant in a suit for specific performance as regards to cancellation of agreement for sale is concern, prima facie, I am

not in agreement with a view taken by Bombay High Court. When Hon'ble Apex Court in a case of ***I S Sikandar (supra)***, allowed such defence to be raised for first time before it and after framing such issue answered against vendee as well as same is clarified recently in a case of ***A Kandasamy (supra)*** followed in ***Sangita Sinha (supra)*** as regards to examination of jurisdictional aspect at any stage of suit proceeding including at appellate or final stage before Hon'ble Apex Court, it would not be appropriate to suggest that such an issue can not be set up as defence especially when it touches jurisdictional fact and maintainability of suit.

15.5 In view of the above, the decisions of Delhi High Court and Bombay High Court as such not applicable to facts of case and not followed for aforesaid reasons.

15.6 Thus, after going through the aforementioned decisions of the Honorable Apex Court, it can be held that plaintiff has not sought declaratory relief against the termination of the

agreement to sell as bad in law, then in the absence of such a prayer in the suit filed by the plaintiff before the trial court for grant of decree for specific performance in respect of the suit schedule property on the basis of Agreement of Sale and consequential relief of decree for permanent injunction is not maintainable in law. Therefore, at this stage, in absence of such declaratory relief prayed in the suit, no relief can be granted of specific performance in respect of the suit property on the basis of non-existing the agreement for sale.

Effect of Non-Execution of Agreement for sale by all owners.

16. Learned advocates appearing for the defendants have vehemently submitted that the agreement for sale in question has been entered into by three co-owners of the suit property and not by all, whereby no performance of such an agreement can be sought by the plaintiffs. Learned senior counsel Mr. Mehul Shah has placed heavy reliance upon a decision in case of ***Peemmada Prabhakar (supra)***, and thereby learned senior counsel Mr. Shah would submit that undisputedly,

Gulammohiyuddin M. Afinwala – deceased and defendant Nos. 1 (wife of Gulammohiyuddin M. Afinwala) and defendant nos. 4 to 7 are joint owners of the property, and all of them were not signatories to the agreement. As per the provisions of Section 17 of the Specific Relief Act, such an agreement is not enforceable in law.

16.1 To support of his submission, he has heavily relied upon the decision of Honourable Apex Court in the case of ***Peemmada Prabhakar (supra),*** which reads as under:

> *"[29] It is an undisputed fact that the suit schedule property is self acquired property by late Pemmada Venkateswara Rao as he had purchased the said property vide Sale-Deed Document No.5174 of 1970 dated 24.11.1970 from his vendors. It is also an undisputed fact that the said property is intestate property. He is survived by his wife, 3 sons and 3 daughters. The said property devolved upon them in view of Section 8 of Chapter 2 of the Hindu Succession Act as the defendants are class I legal heirs in the suit schedule property.* ***Undisputedly, the Agreement of Sale- Ex.-A1 is executed only by defendant Nos. 1 and 2. The 3rd son, mother and 3 sisters who have got equal shares in the property have not executed the Agreement of Sale. In view of the matter, the Agreement of Sale executed by defendant Nos. 1 and 2 who have no absolute right to property in question cannot confer any right whatsoever upon the plaintiffs for grant of decree of specific performance of***

Agreement of Sale in their favour. The said agreement is not enforceable in law in view of Section 17 of the Specific Relief Act *in view of right accrued in favour of defendant Nos. 3 to 6 under Section 8 of the Hindu Succession Act. The provisions of Section 17 of the Specific Relief Act in categorical term expressly state that a Contract to sell or let any immovable property cannot be specifically enforced in favour of a vendor or lessor who does not have absolute title and right upon the party. It is worthwhile to extract Section 17 of the Specific Relief Act,1963 here :-*

"17.-Contract to sell or let property by one who has no title, not specifically enforceable.- A contract to sell or let any immovable property cannot be specifically enforced in favour of a vendor or lessor;

(a) who, knowing not to have any title to the property, has contracted to sell or let the property

(b) who, though he entered into the contract believing that he had a good title to the property, cannot at the time fixed by the parties or by the court for the completion of the sale or letting, give the purchaser or lessee a title free from reasonable doubt."

In view of the aforesaid provisions of the Specific Relief Act, the Agreement of Sale entered between the plaintiffs and some of the co-sharers who do not have the absolute title to the suit schedule property is not enforceable in law. *This aspect of the matter has not been properly appreciated and considered by both the First Appellate Court and the Second Appellate Court. Therefore, the impugned judgment is vitiated in law.*

[30] Even assuming for the sake of argument that the agreement is valid, the names of three sons are mentioned in Agreement of Sale, out of whom the agreement is executed by defendant Nos. 1 and 2 and they assured that they would get the signatures of the 3rd brother namely, Srinivasa Rao and also the remaining 3 sisters. At the time of execution of this

agreement signatures were not obtained. Therefore, ***the agreement is not executed by all the co-sharers of the property which fact is evident from the recitals of the document itself. Hence, the plaintiffs are not entitled for specific performance decree.*** *This vital factual and legal aspect has been ignored by both the First Appellate Court and the Second Appellate Court. Therefore, the impugned judgment is vitiated both on facts and law. Accordingly, the point No. 1 is answered in favour of the defendants."*

(emphasis supplied)

16.2 Even in a case of ***Janardhan Das (supra),*** also it has been held as under,

"[17] The plaintiffs were cognizant of the fact that Defendant Nos. 6 to 8 were not parties to the agreement and that their willingness and participation were necessary for a valid sale. This is further corroborated by the plaintiffs' own admissions that they were assured by Defendant No. 1 and late Soumendra that the sisters would be brought to execute the sale deed. Thus, the plaintiffs cannot claim that they believed Defendant No. 1 had the authority to bind the sisters without their explicit consent. The appellants have rightly pointed out that an agent's authority must be explicit, and any limitations or revocations thereof must be given due consideration. In the absence of a valid and subsisting power of attorney authorizing Defendant No. 1 to sell the property on behalf of Defendant Nos. 6 to 8, the agreement cannot be enforced against them.

[18] In view of the above, we hold that Defendant No. 1 lacked the authority to bind Defendant Nos. 6 to 8 in the agreement to sell dated 06.06.1993. The General Power of Attorney did not confer upon him the power to sell the property on behalf of his sisters at the time of the agreement, having been impliedly revoked

by the partition deed. The agreement was, therefore, incomplete and unenforceable against Defendant Nos. 6 to 8, who collectively held a majority share in the property. **The plaintiffs' knowledge of the necessity of obtaining the sisters' consent, coupled with their failure to secure such consent, renders the agreement ineffective against Defendant Nos. 6 to 8. Consequently, the agreement cannot be specifically enforced against them, and the plaintiffs cannot claim any right over their shares in the property based on the said agreement.**

[19] The relief of specific performance under the Specific Relief Act, 1963, is discretionary in nature. Section 20 of the Act (applicable to this case as it predates the 2018 amendment) explicitly stated that the court is not bound to grant such relief merely because it is lawful to do so. The discretion must be exercised judiciously and based on sound principles, ensuring that granting specific performance is just and equitable in the circumstances of the case.

[20] **In the present case, several factors weigh against granting specific performance. The agreement to sell was incomplete and unenforceable against Defendant Nos. 6 to 8, who held a majority share in the property; enforcing such an agreement would be inequitable.** The plaintiffs failed to demonstrate readiness and willingness to perform their obligations and did not take necessary steps to secure the consent of all co-owners. Granting specific performance would unfairly prejudice the defendants, especially Defendant Nos. 6 to 8, who never consented to the sale to the plaintiffs. Furthermore, the plaintiffs can be adequately compensated by a refund of the earnest money with interest; there is no evidence to suggest that monetary compensation would not suffice.

[21] Section 20 of the Specific Relief Act, 1963 prior to amendment by Act No. 18 of 2018 which was brought into effect w.e.f. 1.10.2018 categorically provided that the relief of specific

> performance is discretionary in nature and the court is not bound to grant such relief merely because it is lawful to do so. But the discretion Page 24 of 26 of the court has to be on sound and reasonable principles.”
> emphasis supplied)

16.3 Opposing the aforesaid arguments, learned senior counsel Mr. Kavina, in his eloquent style, responded that Section 17 of the Specific Relief Act is not applicable to the facts of the present case as the plaintiff is neither a vendor nor a lessor. Learned Senior Counsel Mr. Kavina respectfully submitted that the observations made by the Honourable Apex Court and answers given to point no. 1 in the case of ***Peemmada Prabhakar (supra)*** by considering Section 17 of the Specific Relief Act is complete misreading of such provision and could not have been applied against plaintiff who was vendee/lessee. Thus, learned Senior Counsel Mr. Kavina would submit that the decision of the Honourable Apex Court in the case of ***Peemmada Prabhakar (supra)*** should not be considered by this Court as it would not be correct position of law.

16.4 Learned senior counsel Mr. Kavina, tried to distinguished

the decision of ***Janardhan Das (supra),*** would contend that it is not absolute proposition that in a case where all co-owners are not signatory to agreement for sale, such agreement is non-executable against those are signatory. He would emphasis upon S. 44 of Transfer of Property Act read with S. 13 of Specific Relief Act. According to him, at least Court can grant partial relief of performance qua signatory to agreement.

17. At first glance, the arguments, canvassed by learned Senior Counsel Mr. Kavina, appear attractive, but they require rejection due to the following reasons.

17.1 In ***Peemmada Prabhakar (supra)***, after referring to Section 17 of the Specific Relief Act, it is clearly held by Honourable Apex Court that as per Section 17 of the Specific Relief Act, the agreement of sale entered into between the plaintiffs and some of the co-sharers, who do not have absolute title over the property, is not enforceable in law. At the time of execution of the agreement, the signatures of all co-sharers

were not obtained; therefore, the agreement was not executed by all co-sharers of the property. Hence, it was held in that case that the plaintiffs are not entitled to a decree of specific performance.

17.2 When there is a clear pronouncement of law by the Honourable Apex Court, this Court cannot take a contrary view. As an obedient soldier, it is required to follow the decision of the Apex Court in its true letter and spirit which is mandate of Article **141** of Constitution of India.

17.3 The relief claimed in present suit is for seeking performance of agreement for sale of entire land which was subject matter of the agreement and no alternative relief has been prayed by plaintiff seeking specific performance of agreement qua share of executors in suit land then, in absence of such prayer and having not relinquishing right to claim performance qua non-signatory to agreement, it would not be appropriate for the Court to grant reliefs as stand today.

17.4 Thus, in view of aforesaid, in the present case also, where, undisputedly, there are six co-owners of the suit property and the agreement for sale was executed and signed by only three co-sharers, applying the ratio in the case of ***Peemmada Prabhakar (supra)*** and ***Janardhan Das (supra)*** to facts of present case, the plaintiff is not entitled to a decree of specific performance as the agreement to sell was incomplete and unenforceable against Defendant Nos. 1, 5 & 7 who held a equal share in the property, enforcing such an agreement would be inequitable.

17.5 This would be another ground whereby it can be held that the plaintiff has no prima facie case.

Readiness and Willingness

18. Learned senior counsel Mr. Kavina would submit that the plaintiff was always ready and willing to perform his part of the contract, but the defendants, executors have never acted and fulfilled their obligations as per the terms of the agreement. Learned senior counsel Mr. Kavina would further

submit that the plaintiff was not made aware that there were other three co-sharers/co-owners of the suit property. The signatories to the agreement assured the plaintiff that whatever consent of other persons was required to perform the agreement would be undertaken by them.

18.1 Learned senior counsel Mr. Kavina would further submit that the plaintiff was not informed about the communication dated 01.04.2019 of AMC and was never informed by the defendants to deposit betterment charges and other charges as demanded by AMC. Learned senior counsel Mr. Kavina would further submit that, vide letter dated 14.12.2020, the plaintiff explicitly requested executors to obtain an appropriate authority letter from Mohammadiya Charitable Trust and complete the necessary formalities. Thereafter, the plaintiff could proceed with his obligations and perform his part of the contract.

18.2 Learned senior counsel Mr. Kavina would submit that instead of accepting the request made by the plaintiff, the executors replied on 30.12.2020, thereby canceling the agreement of sale and alleging that the plaintiff was not financially capable of fulfilling his part of the contract. Thus, learned senior counsel Mr. Kavina would submit that the plaintiff was always ready and willing to perform his part of the contract throughout.

18.3 However, learned counsel appearing for the defendants vehemently objected to these submissions and tried to show that the conduct of the plaintiff, even after execution of the agreement for sale and the supplementary agreement dated 19.02.2019, indicates that he never fulfilled his obligations. According to learned counsel appearing for the defendants, the plaintiff was never ready and willing to perform his part of the contract, thereby making him ineligible for a decree of specific performance.

18.4 Learned counsel appearing for the defendants would draw the attention of this Court to the fact that, as per the agreement of sale, the plaintiff was required to deposit betterment charges and bear all related expenses. The plaintiff appointed an engineer consultant who undertook the process of obtaining necessary permissions from AMC. However, when AMC issued a communication dated 01.04.2019 demanding betterment charges and other costs to be paid within 15 days, the plaintiff's failure to pay such amounts itself shows that he was not in a financial position to comply with the agreement at the relevant time.

18.5 Prima facie, after reviewing the exchange of letters between the plaintiff and the signatories of the agreement, it appears that the plaintiff was required to obtain necessary permission from AMC before developing the suit property and bear all the required charges. When the plaintiff had already engaged an engineer consultant for obtaining AMC's permission, it is difficult to believe that he was unaware of the

communication dated 01.04.2019 issued by AMC to the trust. In fact, plaintiff's own communication dated 14.12.2020 address to executors wherein he admitted that he has appointed civil engineer and received details/amount of betterment charges from AMC. So, the consultant engaged by the plaintiff must have apprised him of the said communication of AMC (01.04.2019), but surprisingly till 14.12.2020, nothing has been done by plaintiff.

18.6 It remains undisputed that as per the terms of the agreement, the plaintiff was required to deposit the charges stipulated by the AMC. It has not come on record what steps have been taken by the plaintiff between 01.04.2019 till 05.12.2020. This would suggests that the plaintiff was not ready and willing to perform his part of the contract. Therefore, the defendants are well within their rights to contend that the plaintiff was not ready and willing to perform his part of the contract.

18.7 At this stage, it is also necessary to observe that, subsequent to the cancellation of the agreement for sale, the plaintiff responded with a letter dated 05.01.2021 sent from the USA, followed by a legal notice dated 19.01.2021. It appears that the plaintiff was well aware of the other co-sharers of the suit property since inception. Thus, in absence of any further evidence, this Court is not inclined to accept the plaintiff's argument that the signatories to the agreement for sale had concealed information regarding the right, title, and interest of other co-sharers.

18.8 It remains undisputed that the betterment charges and other costs were deposited by the defendants with AMC on 13.07.2021, and a reply was issued to the plaintiff on 14.07.2021. It appears that due to passage of time, AMC has demanded more charges which is in fact deposited by defendants. At that stage, the plaintiff rushed to the court by filing the suit on 20.07.2021.

18.9 At this stage, it is apt to refer and to rely upon the decision of the Honourable Apex Court in the case of R. Shama Naik *Versus* G. Srinivasiah reported in 2024 SCC Online SC 3586 wherein it is held as under,

> "**10.** The law is well settled. The plaintiff is obliged not only to make specific statement and averments in the plaint but is also obliged to adduce necessary oral and documentary evidence to show the availability of funds to make payment in terms of the contract in time.
> **11.** There is a fine distinction between readiness and willingness to perform the contract. Both the ingredients are necessary for the relief of specific performance.
>
> **12. <u>While readiness means the capacity of the plaintiff to perform the contract which would include his financial position, willingness relates to the conduct of the plaintiff.</u>**"
>
> (emphasis supplied)

18.10 So, considering the facts of the present case and the ratio of R. Shama Naik (supra), it can be observed that the plaintiff was not ready and willing to perform his part of the agreement. In view of the above, when the plaintiff has prima facie failed to show that he was ready and willing to perform his part of the contract, the question of granting an injunction, which is an equitable relief, is out of place.

Balance of Convenience and Irreparable Loss

19. As far as the balance of convenience and irreparable loss are concerned, when the plaintiff has not been able to show a *prima facie* case, the question of entering into these two issues is academic. Nonetheless, as there are several submissions made by both sides on this aspect, this Court would like to deal them.

19.1 Learned senior counsel Mr. Kavina would submit that when three co-sharers out of six have entered into the agreement, at least for half of suit properties, the plaintiff would be entitled to specific performance. Learned senior counsel Mr. Kavina would further submit that considering Sections 43 and 44 of the Transfer of Property Act, the plaintiff can ask for performance of the agreement thereby balance of convenience is in favour of plaintiff.

19.2 Such arguments is already dealt with and answered by me

in preceding paras. As such, considering entire set of facts and event, conduct of plaintiff after execution of agreement for sale till filing of suit would not remotely indicate that plaintiff was in fact serious to perform his part of contract and in fact rush to Court after charges/expenses deposited by defendants in AMC thereby, balance of convenience was never on side of plaintiff.

19.3 Prima facie, the plaintiff would not be able to bind other co-owners or co-sharers of the suit property, who were not signatories to the agreement for sale, and consequently, the agreement for sale cannot be specifically enforced against them. As observed in the aforesaid decisions, it is well settled that granting a decree of specific performance is a discretionary relief especially when the agreement for sale in question was executed prior to the amendment in the Specific Relief Act, 1963. Ultimately, the plaintiff must satisfy the trial court by leading appropriate evidence, making his case made out for grant of specific performance of the decree qua

signatories to the agreement. In that situation, it would be for the trial court to pass an appropriate discretionary relief, be it granting performance of the decree qua the signatories of the agreement for sale or compensating the plaintiff in terms of money.

19.4 It is true that the plaintiff has not asked for any alternative relief, either returning the money with interest and/ or damages, and has not even prayed for specific performance of the decree qua the signatories of the agreement for sale in question. However, as the suit is at its initial stage, issues are yet to be framed, and evidence is yet to be laid by the parties, it would be for the plaintiff to make the necessary amendments in the plaint if he so desires and is advised thereby, ask for appropriate reliefs as per provisions of Specific Relief Act, 1963.

19.5 Be that as it may, considering the totality of the facts and circumstances of the case and keeping in mind the ratio laid

down by the Honourable Apex Court in above referred decisions, since granting a decree of specific performance is a discretionary relief, I am of the view that the balance of convenience is not tilted in favour of the plaintiff.

20. So for as irreparable loss, it is a matter of record that the defendant Nos.9 to 12 have not only paid betterment charges and other charges to AMC but have also made substantial investments. Necessary development and construction activities have been carried out despite objections raised by the plaintiff before AMC and RERA which were turn down and authorities have granted development permission and RERA approval in favour of the defendants. The construction activity is going on since long and during pendency of injunction application, there was no prohibitory order so far passed by trial Court.

20.1 Learned counsel appearing for the defendants have also submitted that, in fact, by now more than Rs.10,00,00,000/- have been spent by the defendants for the development of the

suit property. Whereas, except for making a payment of Rs.60,00,000/-, the plaintiff has not paid any charges to AMC or demonstrated his capacity to bear other expenses.

20.2 Thus, in view of the above facts and circumstances of the case, I am of the view that there would not be any irreparable loss to the plaintiff rather granting an injunction in favour of the plaintiff would definitely cause great hardship and loss to the defendants.

20.3 The few judgments referred to by the learned counsel appearing for the defendants clearly hold field that when there is a substantive investment and ongoing construction activities and delay in approaching Court by way of filing suit for specific performance, ordinarily, the Court should not stop such construction, as it would cause great hardship to the party making such construction and thereby, not to grant any injunction. I would like to accept submissions of defendants to that effect and accordingly applied to the facts of the present

case.

20.4 At the same time, the plaintiff, having already instituted a suit and registered his *lis pendens*, if ultimately he succeeds in the suit, may be compensated in terms of money. Thus, there would not be any irreparable loss caused to plaintiff.

Contingent Contract

21. Learned senior counsel Mehul Shah has vehemently argued that the agreement for sale in question is a contingent contract. Considering Sections 31 and 32 of the Contract Act, 1872 when signatories of the agreement for sale are not in a position to obtain consent of other co-sharers, such an agreement is not executable.

21.1 Learned senior counsel Mr. Kavina has rebutted such submissions by contending that the agreement cannot be said to be a contingent contract and not enforceable in a case where signatories of the agreement were not able to get

consent of other co-sharers.

21.2 Prima facie, argument so canvassed by learned Senior Counsel Mr. Shah need not acceptance as it is fairly well settled that in a case of agreement for sale, ordinarily obligation cast upon vendor to fulfill his obligation by obtaining permission and having failed to do so, it would not itself deny right of vendee to seek performance of it. It is profitable to refer and to rely upon recent decision of the division bench of this Court in a case of Sentinel Properties Private Limited v/s Legal Heir of Deceased Atul Dhirajlal Amin Viral Atulbhai Amin s/o Late Autlbhai Amin reported in 2024 GUJHC 50071 wherein observed as under,

> *"[71] **On the question as to whether the agreements were contingent contract or contract creating absolute liabilities between the parties without contemplating any contingency**, it is clear that the agreements clearly contemplated that the sale deeds were to be executed after the requisite permission was obtained from the Collector for transfer of the lands in question to a non-agriculturist and that without permission, the land was not to be sold. **The question is whether the Court or the arbitrator has jurisdiction to pass a contingent or conditional decree of specific performance directing the vendor to seek necessary permission and execute sale deed.***

[72] In Rojasara Ramjibhai Dahyabhai vs Jani Narottamdas Lallubhai, 1986 3 SCC 300, the appellant had entered into an agreement to purchase plots recorded as Girasdar agricultural land of which he was a tenant from Girasdari. The agreement stipulated that the appellant was to apply for permission from the Collector to convert the agricultural land into village site, i.e., for non-agricultural use. The sale deed was executed by the appellant after he had obtained the requisite permission from the Collector within one month from the agreement with the Girasdar, by a contract covenanted to sell the property to another person. The agreement provided that the appellant as a vendor was to get the land converted into village site at his own expenses. The appellant applied to the Collector for grant of permission to convert the land into village site, but his application was rejected. In the meantime, the Saurashtra Land Reforms Act, 1951 came into force with effect from 01.09.1951 and the appellant was recognised to be an occupant thereof under the provisions of the Bombay Land Revenue Code, 1898. The appellant thereafter, obtained permission for converting the land both as plots for non-agricultural use. The respondent then called upon the appellant to execute the conveyance of the property in accordance with the agreement to sell between the parties and on his failure to comply, the suit for specific performance was instituted.

[73] The appellant therein contested the suit on two grounds, firstly that he had an imperfect title and secondly that the contract with the respondent was contingent contract dependent on appellant's vendor (Girasdar) obtaining permission for conversion of land. The civil judge dismissed the suit holding that the same was barred by limitation and further that the contract between the parties being a contingent contract, the agreement in view of the events that had happened made it unenforceable. On an appeal, the High Court reversed the decree and held that the agreement between the parties had not been cancelled by mutual consent. On the question whether the agreement was a contingent contract, it

was held by the Apex Court that there is always in such a contract implied covenant on the part of the vendor to do all things necessary to give effect to the agreement including obtaining of the permission for the transfer of the property.

[74] The decision of the Privy Council in Motilal v. Nanhelal Ghasiram, 1930 AIR (PC) 287. was relied therein to observe that it is an authority for the proposition that if the vendor agrees to sell the property which can be transferred only with the sanction of some Government authority, the Court has jurisdiction to order the vendor to apply to the authority within a specified period, and if the sanction is forthcoming to convey to the purchaser within a certain time. The law is well settled in this regard. Ref: Motilal v. Nanhelal Ghasiram, 1930 AIR(PC) 287, Chandnee Widya Vati Madden Vs C.L.Katial & Others, 1964 AIR(SC) 978, Rojasara Ramjibhai Dahyabhai Vs Jani Narottamdas Lallubhai (dead) by L.Rs., & others, 1986 3 SCC 300. and R. C. Chandiok & Anr vs Chuni Lal Sabharwal, 1971 AIR(SC) 1238.

*[75] **It is settled that in the agreement to sell, when the vendor had agreed to do certain acts and things, there is an implied covenant on the part of the vendor to do all things necessary to give effect to the agreement, including the obtaining of permission or clearance for the transfer of the property.***

[76] In Govindbhai Gordhanbhai Patel & Ors vs Gulam Abbas Mulla Allibhai, 1977 3 SCC 179 [1977], while dealing with Section 63 of the Bombay Tenancy Act, the Apex Court had considered the question as to whether the performance of the contract therein became impossible, rather it became impracticable on the refusal of the Prant Officer to grant the permission under Section 63 of the Act. It was argued before the Apex Court that the contract was contingent upon the grant of permission by the Prant Officer and on refusal thereof, the parties would be governed by Section 56 of the Contract Act, according to which, a contract becomes void if something supervenes after its execution which renders it

impracticable. While answering the question whether the order of the Prant Officer rendered the contract impracticable, it was noted by the Apex Court that the said order was not of such a catastrophic character as can be said to have struck at the very root of the whole object and purpose for which the parties had entered into the bargain in question or to have rendered the contract impracticable or impossible of performance.

[77] It was held therein that a careful perusal of the order of the Prant Officer indicated that it was not conclusive nor was based on the merits of the application seeking permission, rather refusal was on technical ground which do not prohibit the appellant from making a fresh application to the Collector in view of Section 63 of the Tenancy Act. It was, thus, concluded that since the order of the Prant Officer therein did not put any fetter on the appellant to apply to the Collector or the Additional Collector for grant of the requisite permission for sale and purchase of the land after obtaining the aforesaid certificate, no untoward event or change of circumstances supervened to make the agreement factually or legally impossible of performance so as to attract Section 56 of the Contract Act.

[78] In Mrs. Chandnee Widya Vati Madden (supra), the Apex Court had discussed Section 12 and Section 21 of the Specific Relief Act, 1877. In the said case, one of the terms of the contract of sale of a house on the plot granted by the Government was that the vendor shall obtain necessary permission of the Government for sale within two months of the agreement and if the permission was not forthcoming within that time, it was open to the vendor to extend the date or to treat the agreement as cancelled. The vendor made an application, but for the reasons of her own withdrew the same. In the suit filed by the vendees for specific performance of the contract or in the alternative for damages, it was found that the vendees were always ready and willing to perform their part of the contract and that it was the vendor who willfully refused to perform her part of contract and that the time was not of the

essence of the contract. The Supreme Court, thus, has held that the High Court was correct in decreeing the suit for specific performance of the contract and has held that the main ground of attack in the appeal was that the contract was not enforceable being of a contingent nature and the contingency having not been fulfilled, was without substance.

[79] It was observed therein that so far as the parties to the contract are concerned, they have agreed to bind themselves by the terms of the documents executed between them. Under that document, it was for the defendant vendor to make necessary application for the permission to the Chief Commissioner. For the reason best known to the defendant vendor, though such an application was made, but the vendor decided to withdraw the same. On the finding that the plaintiffs have always been ready and willing to perform their part of the contract and that it was the defendant who willfully refused to perform her part of the contract and that the time was not of the essence of the contract, the Court has directed to enforce the terms of the contract and to enjoin upon the defendant-appellant to make the necessary application to the Chief Commissioner or such other competent authority as may have been empowered to grant the necessary sanction to transfer within the time prescribed therein. It was further held that the High Court was entirely correct in decreeing the suit for specific performance of contract with the above direction and further that in the event of the sanction being refused, the plaintiff shall be entitled to the damages as decreed by the High Court.

[80] <u>The general principle is that if a condition is laid down that the transferor is bound to do everything to give effect to the contract, specific performance can be obtained with a direction to the transferor to obtain the requisite consent or permission. The principle is that unless and until the transaction itself is unlawful, it may be enforced directing the defendant/transferor to take such steps as are necessary for affecting the contract. The principle is</u>

that if the vendor has agreed to sell the property, which can be transferred only with the sanction of some Government authority, the Court has jurisdiction to order the vendor to apply to the authority and if the sanction is not forthcoming, to convey to the purchaser the same, but on the ground that the sanction is not available, decree for specific performance cannot be refused. It is settled that when permission from some authority is required to be obtained, prior obtaining of the same is not a condition precedent for grant of decree for specific performance, if after grant of the decree permission can be obtained. The conditional decree for specific performance can be granted making it subject to obtaining permission or exemption, as contemplated in the Statute. The relief can be moulded to such an extent that the vendor is required to obtain permission or consent. It has been the consistent view that on the ground of non-availability of consent or permission, the vendor cannot avoid such an agreement. There are series of judgments of various High Courts, following the principles laid down in Mrs. Chandnee Widya Vati Madden (supra). Reference may be made to Khan Bhadur C.B. Taraporwala vs. Kazim Ali Pasha, 1966 AIR(AP) 361, Indra Prasad Saxena vs. Chaman Lal Malik, 1994 AIR(ALL) 105, Shri Rajesh Aggarwal vs. Shri Balbir Singh, 1994 AIR(Del) 345, Rameshwarlal vs. Dattatraya, 2010 AIR(MP) 187."

(emphasis supplied)

21.3 As such, at this stage, this Court would not like to finally opine on this issue raised by the defendants, as evidence is yet to be led by the parties. So without much deliberation on it, such issue is kept open to be decided by trial Court on completion of the trial and be decided as per the evidence comes on record albeit, in accordance with law.

Reliefs prayed in Exhibit 15 & 59.

22. Lastly, the plaintiff has not been able to show that he was put in possession by the signatories of the agreement. As such, the *Panchnama* drawn during the course of the injunction application does not indicate the possession of the plaintiff. Therefore, granting any relief, as prayed for in his application filed below Exhibit 15, is out of place.

22.1 Likewise, having no prima facie case found in favour of the plaintiff and possession in his favour, granting of any relief, as prayed for in his other application filed below Exhibit 59, thereby stopping defendant nos.9 to 12 from making construction, is also not required to be granted in light of the above observations and discussions.

Conclusion.

23. The upshot of the aforesaid discussions, observations and reasons leads to only one conclusion that the plaintiff has

miserably failed to prove any *prima facie* case as he has not challenged the cancellation of the agreement of sale by the executors of the agreement for sale vide their letter dated 14.12.2020 and the agreement for sale is not executed by all co-sharers/co-owners of suit property.

23.1 Having so observed herein above and forgoing reasons, as on date in absence of challenge of cancellation of agreement for sale by plaintiff, suit itself is held to be not maintainable as no relief can be granted of specific performance in respect of the suit property on the basis of non-existing the agreement for sale.

23.2 As observed hereinabove and forgoing reasons, *prima facie*, the defendants are able to show that plaintiff was and is, not ready and willing to perform his part of the contract.

23.3 After examining the totality of the facts and circumstances

of the case, as well as the law laid down by the Honourable Apex Court as referred hereinabove, the balance of convenience and irreparable loss are also not found in favour of the plaintiff.

23.4 Having not found any substance in the appeal filed against refusal of granting injunction below Ex.5, consequently for forgoing reasons, not found any substance in rest of impugned applications filed below Ex. 15 & 59.

23.5 At the end, this Court is of the opinion that considering the scope and ambit of Order XLIII Rule 1 of the Code of Civil Procedure, 1908 and keeping in mind the ratio laid down by ***Wander Ltd. v. Antox India Pvt. Ltd. and Rasiklal Choksi (supra)***, there is no need to interfere with the impugned common order passed by the trial court albeit, observing that trial Court has erroneously observed that plaintiff has made out prima facie case.

24. Before parting with the order, it is clarified that this Court has examined the impugned common order passed by the learned trial Court within the limited scope of interference as per Order XLIII Rule 1 (r) of the CPC as well as judging the issues as per prayers made in suit stand as on date. Whereas, the main controversy involved in the suit is pending at large before the trial Court to be adjudicated through full-fledged trial. Therefore, the learned trial Court shall not be influenced by any observations recorded in its common order impugned in these appeals and or by this Court in present judgement/order while deciding the suit at the end of trial.

25. The findings recorded either by the trial Court or by this Court at interlocutory stage of the suit are tentative in its nature and the learned trial Court shall decide the case on its merit and as per evidence that may be laid by parties during the course of trial and accordingly, decide the suit in accordance with law.

26. Thus, in view of the aforesaid reasons, the present appeals are found merit-less, require to be dismissed, and the same are hereby **DISMISSED.** There shall be no order as to costs.

27. All Civil Applications are disposed of accordingly.

Sd/-
(MAULIK J.SHELAT,J)

DRASHTI / MONIS

Original copy of this order has been signed by the Hon'ble Judge.
Digitally signed by: DRASHTI HIRENBHAI MER(HC00354), PRINCIPAL PRIVATE SECRETARY, at High Court of Gujarat on 15/04/2025 15:18:09