

IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON : 17-12-2015

JUDGMENT PRONOUNCED ON : 18-01-2016

CORAM

THE HONOURABLE MR.JUSTICE M.SATHYANARAYANAN

CIVIL SUIT Nos.933 of 2009 and 1027 of 2010

C.S.No.933 of 2009:

1.A.G.Sampath
2.G.Anbalagan ... Plaintiffs

vs

1.C.Sabesan (deceased)
2.C.T.Saraswathi Achi
3.Rathna Sabesan
4.Dr.Parameswaran Sabesan
5.Dr.Priyadarshini Sabesan
(Defendants 2 to 5 are brought on
record as legal representatives of
the 1st defendant as per order
dated 3.2.2015, in A.No.6565/2010) ... Defendants

C.S.No.1027 of 2010:

1.C.T.Saraswathi Achi
2.Rathna Sabesan
3.Dr.S.Parameswaran @ Aiappan Sabesan
4.Dr.S.Priyadharshini ... Plaintiffs

vs

1.B.Thilagavathy
2.A.G.Sambath
3.A.Malliga
4.G.Anbalagan
5.Dr.G.Elangovan
6.P.Ganapathi ... Defendants

C.S.No.933 of 2009 filed under Order IV Rule 1 of

Original Side Rules read with Order VII Rule 1 of Code of
<https://hcservices.ecourts.gov.in/hcservices/>

Civil Procedure praying for a judgment and decree directing

the defendants to pay a sum of Rs.150 lakhs towards loss, damages and mental agony sustained by the plaintiffs due to non-cooperation on the part of the original defendant in fulfilling his part of obligations under sale agreements dated 3.10.2007 and 6.10.2007, and for costs.

C.S.No.1027 of 2010 filed under Order IV Rule 1 of Original Side Rules read with Order VII Rule 1 of Code of Civil Procedure praying for a judgment and decree directing the defendants 1 to 6 to jointly and severally pay the plaintiffs Rs.97,00,000/- together with interest thereon at the rate of 18% per annum from the date of suit till the date of realisation and for costs.

Mr.B.Harikrishnan : For Plaintiffs in C.S.1027/2010
and for Defendants 2 to 5 in
C.S.933/2009 (D1 died)

Mr.V.Srinivasa Babu : For Plaintiffs in C.S.933/2009
and for Defendants 1, 2, 4 and 5
in C.S.1027/2010

Mr.K.Udayakumar : For 3rd Defendant in
C.S.1027/2010

M/s.Gupta and Ravi : For 6th Defendant in
C.S.1027/2010

COMMON JUDGMENT

The averments stated in the plaint in C.S.No.933/2009, are as follows:-

<https://hcservices.ecourts.gov.in/hcservice61>) The plaintiffs are the sons of Late

Govindasamy and they along with their

sisters viz. Tmt.Thilagavathi and Mallika, and their brother Dr.G.Elangovan, are the co-owners of the land and building of a residential property bearing Plot No.3529, Door No.J.23/18, 1st Main Road, Anna Nagar East, Chennai 600 102, comprised in T.S./R.S.No.8 Part, 9 Part and 10 Part of Mullam Village, admeasuring to an extent of 2 grounds and 1650 square feet (hereinafter referred to as suit schedule property).

(ii) The suit schedule property was owned absolutely by the plaintiffs' deceased mother A.G.Padmavathy and since she died intestate, the plaintiffs along with their two sisters and one brother, had succeeded to the estate and inherited the above said property and each of them are entitled to get undivided 1/5th share.

(iii) The plaintiffs are in exclusive possession and enjoyment of the suit schedule property and carried out

necessary improvements in the property by spending huge amount and are residing there for more than 32 years and it was offered as a security with the Indian Bank for the credit facility availed by the second plaintiff, which culminated in the proceedings in T.A.No.28/2001 before the Debt Recovery Tribunal (DRT) at Chennai. The Indian Bank has also initiated legal proceedings by issuing A notice under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short, SARFAESI Act) against the legal heirs of Late A.G.Padmavathy, i.e., the plaintiffs, their two sisters and one brother, on 28.2.2003, followed by another notice under Section 13(4) of the SARFAESI Act dated 23.9.2005. The proceedings initiated under the SARFAESI Act, were put to challenge before the DRT - II, Chennai, in S.A.No.66/2005 and the claim of the Indian Bank was Rs.15 crores at that point of time.

(iv) The entire claim of the Indian Bank was referred for settlement through Lok Adalat and a consent Award came to be passed on 28.8.2004, directing the plaintiffs to pay a sum of Rs.100 lakhs as One Time Settlement (OTS), to Indian Bank within a stipulated time and since the time schedule was not adhered to, action was initiated under the SARFAESI Act and the plaintiffs also prayed for extension of time for making some payments and the DRT - II, Chennai, vide order dated 7.11.2005, granted conditional order of stay by directing the plaintiffs to deposit a sum of Rs.23,50,000/- and it was also deposited in "No Lien Account".

(v) The original defendant viz. Thiru C.Sabesan (since deceased), had approached the plaintiffs with an offer to purchase the suit schedule property for a total sale consideration of Rs.715 lakhs and also offered to

discharge the entire claim made by the Indian Bank in T.A.No.28/2001 and S.A.No.66/2005, by means of OTS, with an assurance to release the original documents in the custody of the said Bank. The plaintiffs along with their two sisters and one brother, believing the representation made by Thiru C.Sabesan, had entered into an agreement of sale on 3.10.2007, for the sale of the suit schedule property and as per the terms of the said agreement, the parties had agreed that a tentative sum of Rs.1 crore along with interest and other charges shall be paid towards the settlement of the entire loan amount of the Indian Bank under OTS, by the original defendant in order to avoid auction sale of the property. The sale consideration was fixed at Rs.5 crores, free from all encumbrances and the original defendant in terms of the above said agreement, had agreed to pay a sum of Rs.77 lakhs towards part settlement of the claim of the Indian Bank in the above said legal

proceedings. The original defendant has also entered into a supplementary agreement dated 6.10.2007, with the plaintiffs to pay the additional sale consideration of Rs.215 lakhs for the improvement made in the suit schedule property by the plaintiffs, and thus, the total sale consideration was fixed for a sum of Rs.715 lakhs and it was also re-confirmed by the original defendant vide letter dated 15.10.2007.

(vi) The original defendant as per the agreement, has paid a sum of Rs.77 lakhs directly to the Indian Bank towards part settlement of it's claim, and however, totally failed and neglected to pay another sum of Rs.73 lakhs on or before 25.10.2007, as per Clause - 3 of the above said agreement though very many requests have been made by the plaintiffs in this regard, and that apart, the original defendant has failed to pay the balance sale consideration of Rs.350 lakhs to the plaintiffs on or before 21.1.2008.

(vii) As per the terms of agreement of sale, time is the essence of contract and at no point of time, the original defendant viz. Thiru C.Sabesan, was ready and willing to perform his part of obligation under the agreement of sale. Had the original defendant fulfilled his promise, the entire amount due and payable to Indian Bank under OTS, would have been wiped out.

(viii) The DRT - II, Chennai, has passed final orders on 6.6.2008, in the above said legal proceedings, directing the plaintiffs and their sisters and brother to pay simple interest on Rs.100 lakhs, at 15% per annum from 28.8.2004 to 10.10.2007, directly to the Indian Bank within six weeks from the date of the order and on such payment, the Bank was directed to accept the same and treat the matter as closed. It has been further stated in the order, that if the plaintiffs fail to comply with the same, the Indian

Bank is at liberty to proceed with the final order dated 3.10.2005, for auctioning the suit schedule property.

(ix) Though the said order was communicated to the original defendant for the release of further payment, he has not chosen to respond and therefore, the plaintiffs had moved the DRT - II, Chennai for extension of further period and it was extended for a further period of five days and in spite of it, the original defendant did not fulfill his obligation, thereby leaving the plaintiffs no other option except to approach the Indian Bank and yield to its demand and taking advantage of the same, the Bank has demanded a further amount of Rs.2 lakhs towards the settlement of entire loan vide letter dated 3.11.2008.

(x) On account of the pressure exerted on the original defendant viz. Thiru C.Sabesaan, he has disbursed a part payment of Rs.20 lakhs towards OTS

amount of Rs.200 lakhs, and since the time limit given by the Indian Bank, would expire on 30.3.2009, the plaintiffs were left with no other option than to look for an alternate buyer to safeguard their property from being auctioned and accordingly, they have identified one Thiru P.Ganapathy, who had come forward to purchase the property and also discharge the loan amount, and the sale consideration was fixed at Rs.185 lakhs, which, according to the plaintiffs, was a distressed sale.

(xi) Thiru P.Ganapathy in compliance of his promise, has paid Rs.180 lakhs directly to the Indian Bank towards discharge of it's dues, on 27.5.2009, and paid the plaintiffs and their two sisters and one brother at the rate of Rs.1 lakh each (balance amount of Rs.5 lakhs), and also got a registered sale deed executed in his favour on 28.5.2009.

(xii) Since the original defendant viz. Thiru C.Sabesan, has failed to perform his obligation under the agreement of sale dated 3.10.2007, in a wanton and deliberate manner, the plaintiffs were constrained to approach Thiru P.Ganapathy and sell the property to him at a rock-bottom price of Rs.185 lakhs, to clear the dues of the Indian Bank and thereby, they had sustained damages to the tune of Rs.530 lakhs. The second plaintiff has also suffered cardiac arrest due to the above said attitude of the original defendant, and had undergone a surgery and the marriage of the first plaintiff was also not solemnized in the manner expected, due to financial constraint at the relevant point of time.

(xiii) The plaintiffs sent a legal notice dated 14.9.2009, to Thiru C.Sabesan cancelling the two agreements dated 3.10.2007 and 6.10.2007, and also informed that Rs.97 lakhs paid by him, has been adjusted towards the loss

sustained by them, and called upon him to pay a sum of Rs.483 lakhs towards loss, damages and mental agony, and for the purpose of Court Fee, restricted their claim to Rs.150 lakhs.

(xiv) Hence, the plaintiffs, for the above said reasons, came forward to claim a sum of Rs.150 lakhs towards loss, damages and mental agony sustained by them, due to the non-cooperative attitude of the original defendant in not fulfilling his part of obligation under the agreements dated 3.10.2007 and 6.10.2007, with costs of the suit.

2.The original defendant in C.S.No.933 of 2009, viz. Thiru C.Sabesan, has filed a written statement denying all the averments made in the plaint, and contended that the suit as framed, is not maintainable and is liable to be dismissed in limini and it is only an attempt to cover up the fraudulent acts of the plaintiffs and they have also indulged in unjust enrichment by causing wrongful loss to him. He would state that due to false promises and representations made by the plaintiffs, he was lured to

enter into an agreement of sale and part with his money to save the property in question, from being brought to auction by the Indian Bank and however, the plaintiffs had chosen to sell the property to a third party without his consent or knowledge.

3.The original defendant would further state that the claim of the plaintiffs that the property in question, was sold only for Rs.185 lakhs cannot be believed at all, for the reason that they have received not less than Rs.7 crores from the buyer. It is further contended by him that since the suit schedule property was at the verge of being sold in public auction, the plaintiffs approached him through a retired High Court staff and pressurized him to purchase the property and that is why the agreement of sale came into being on 3.10.2007, and subsequently, a supplementary agreement was entered into between the plaintiffs and the original defendant on 6.10.2007, with regard to the improvements said to have been made by the plaintiffs to the property, and immediately after signing the agreement, the original defendant parted with a sum of Rs.77 lakhs directly to the Indian Bank and avoided the auction and once the auction was stalled, the plaintiffs began to act indifferently and did not choose to cooperate with the original defendant in concluding the sale, and instead, they are pestering him to pay Rs.215 lakhs covered

under the supplementary agreement dated 6.10.2007, by citing the reason of the first plaintiff's daughter's marriage and other circumstances, but did not bother about the DRT proceedings.

4.It is also averred by the original defendant that the plaintiffs had also represented to him to wait for a little more time to pay up the entire OTS amount as they are negotiating a secret deal with the bank officials to have the OTS amount reduced further and the original defendant having developed suspicion over the plaintiffs' conduct and genuineness, did not part with a sum of Rs.215 lakhs as requested by them. He would further state that the plaintiffs only wanted him to defer the payment of second instalment of Rs.73 lakhs to Indian bank as they were negotiating a secret deal and also prevented him from directly negotiating with the bank.

5.It is the stand of the original defendant that he was always ready and willing to perform his part of the contract in not only settling the Indian Bank's claim, but also paying the balance sale consideration and the said amount is to be paid only upon the culmination of the DRT proceedings and the claim of the Indian Bank being satisfied fully and in any event, due to the conduct of the

the result of the shady dealings by the plaintiffs.

6.The original defendant would further contend that he was not put on notice about the order passed by the DRT, at the first instance and the extension of time, and pendency of the legal proceedings before the Debt Recovery Appellate Tribunal (DRAT), he made a further payment of Rs.20 lakhs and to his shock and surprise, he became aware that the plaintiffs had sold the suit schedule property during the pendency of the DRAT appeal, and they did not care to inform him about the fate of the appeal filed by the Indian Bank.

7.According to the original defendant, the plaintiffs would not have sold the property for Rs.185 lakhs and would have received not less than Rs.700 lakhs and the sale in favour of the third party itself, is sham and brought about by collusion and was intended to defeat the rights of the original defendant under the above said two agreements, and he cannot be put to blame for the reason that the plaintiffs have not put him on notice, about the alleged delay in settling the bank's claim and the payment of balance sale consideration, and the original defendant was always ready and willing to perform his part of obligation by settling the dues in favour of the Indian Bank, as early as in October, 2007/January, 2009.

8.The original defendant would further state that the sale in favour of the third party, was brought by collusion and is not a genuine one and he aggrieved by the deception played by the plaintiffs, has also lodged a police complaint, based on which, a case in FIR No.525 of 2009 was registered by the Central Crime Branch - II, Egmore, Chennai. He has also stated that the cancellation of the sale agreement by the plaintiffs is illegal and not in accordance with law and in any event, the plaintiffs before making an attempt to sell the property in favour of the third party, ought to have put the original defendant on notice, to rectify the breach and/or perform his part of the contract; but, they did not do so and in respect of the legal notice sent by the plaintiffs, a suitable reply was also sent on 3.10.2009, and the plaintiffs did not suffer any damage and they have also not spelt out the real damages suffered by them. He also took a stand that the suit has not been properly valued and it lacks merit and prays for it's dismissal with costs.

9.The original defendant in C.S.No.933/2009 viz. Thiru C.Sabesan, died and vide order dated 3.2.2015, his legal representatives were brought on record as defendants 2 to 5 in C.S.No.933/2009.

10.The legal heirs of the original defendant in C.S.No.933/2009 - Late C.Sabesan, filed C.S.No.1027 of 2010 praying for a judgment and decree directing the defendants

1 to 5 as well as the subsequent purchaser of the suit schedule property viz. Thiru P.Ganapathi - 6th defendant, to jointly and severally pay a sum of Rs.97 lakhs together with interest and costs.

11.In the plaint in C.S.No.1027/2010, apart from pleading the facts as per the written statement of Late C.Sabesan filed in C.S.No.933/2009, it is averred that the sixth defendant had purchased the suit schedule property being fully aware of the subsisting sale agreement between C.Sabesan and the defendants 1 to 5 as well as the payment made by C.Sabesan to the tune of Rs.97 lakhs and the purported sale in his favour, was intended to defeat the lawful and just claim of the deceased C.Sabesan. It is further averred that the sixth defendant has also colluded with the defendants 1 to 5 in bringing about such a sale and therefore, the sale in his favour, is to be declared as null and void.

12.It is averred by the plaintiffs that there is a charge upon the suit schedule property inasmuch as the deceased original defendant C.Sabesan has paid a total sum of Rs.97 lakhs as advance amount under the sale agreement dated 3.10.2007, and out of the said amount, a sum of Rs.86 lakhs was paid directly by C.Sabesan to Indian Bank during the pendency of the proceedings before the DRT - II, Chennai and therefore, the right of C.Sabesan got abrogated to the extent of Rs.97 lakhs and thereby, charge upon the

suit schedule property has been created.

13. In sum and substance, it is the case of the plaintiffs that the defendants 1 to 6 had colluded with each other and played fraud and deception and therefore, they are entitled to get back the sum of Rs.97 lakhs paid by C.Sabesan to stall the auction proceedings initiated by the Indian Bank against the defendants, and they prayed for decreeing the suit with costs.

14. The defendants 1, 2, 4 and 5 viz. B.Thilagavathy, A.G.Sampath, G.Anbalagan and Dr.G.Elangovan respectively, had filed a written statement reiterating the stand taken in the plaint in C.S.No.933/2009, and would contend that since C.Sabesan did not fulfill his obligation in a willful and deliberate manner, they were constrained to approach the sixth defendant to have the sale of the property at a very low price of Rs.185 lakhs and the sixth defendant has directly paid a sum of Rs.180 lakhs to the Indian Bank and paid a sum of Rs.1 lakh each to the defendants 1 to 5 in respect of the balance amount of Rs.5 lakhs, and denied the averment that there was a collusion between them and the sixth defendant and hence, prayed for dismissal of the suit with costs.

15. The third defendant has independently filed a written statement stating that she was not aware of any transaction as alleged in paragraph No.7 of the plaint, and the supplementary agreement, which came into being without

her knowledge, and in fact, C.Sabesan has also colluded with the defendants 2 and 4 in cheating her. She would further state that she was under the impression that the amount of Rs.97 lakhs said to have been paid by C.Sabesan, is to be repaid to him by the defendants 2 and 4 towards the sale of the property, and she was surprised to note that the defendants 2 and 4 did not repay the same, but kept her in total darkness about the shady transaction that took place between them, and since she is not a party to the transaction, she is not liable for any claim and she is not a proper or necessary party.

16.The sixth defendant has also filed his written statement stating among other things, that he is a bonafide purchaser of the suit schedule property for a valuable consideration and cannot be held liable under the operation of statutory law and was informed about the legal proceedings initiated by the Indian Bank, and paid a sum of Rs.180 lakhs directly to Indian Bank on 27.5.2009, to discharge the loans and thereafter, the title deeds were also handed over to him and he has also paid a sum of Rs.1 lakh each to the defendants 1 to 5 and a sale deed dated 28.5.2009, was executed in his favour and thereby, he became the absolute owner of the suit schedule property.

17.The sixth defendant would further contend that the price paid by him, was fair considering the fact that it was utilized to discharge the mortgage liabilities of

the defendants 1 to 5 and the plaintiffs have to bear in mind, that in a case of demand and supply, it is not always practically possible to obtain the prevalent market price for a piece of property when the seller is financially in dire straits, and even otherwise, the Registering Authority found that the price for the property purchased by him, was in accordance with law and found no defects at the time of registration.

18. It is further contended by the sixth defendant that the question of obtaining consent from C.Sabesan towards the purchase, does not arise for consideration for the reason that he is only an agreement holder. He denied the fact that he was aware of the payment of Rs.97 lakhs made by C.Sabesan directly to Indian Bank, and has colluded with the other defendants. He prayed for dismissal of the suit.

19. In C.S.No.933/2009, the following issues were framed for trial and adjudication:-

- WEB COPY
- (1) Whether the defendants are liable to pay a sum of Rs.150 lakhs towards the loss, damages and mental agony sustained by the plaintiffs due to the non-cooperation of the defendants in fulfilling their part of obligation under sale agreement dated 3.10.2007

and 6.10.2007?

(2) Whether the plaintiffs are entitled to claim any relief for loss and damages sustained by them, as per Clause - 8 of the Sale Agreement dated 3.10.2007, and Clause - 10 of the Agreement dated 6.10.2007, as against the defendants?

(3) Whether the defendant are ready and willing to fulfill the conditions stipulated in the Sale Agreement dated 3.10.2007 and 6.10.2007, during the contract period?

(4) Whether the defendants committed any default in paying the balance sale consideration during the time stipulated in the contract period of the Sale Agreement dated 3.10.2007 and 6.10.2007?

(5) Whether the time is the essence of the contract to fulfill the obligations between the plaintiff and the defendants, as per the Sale Agreement dated 3.10.2007 and 6.10.2007?

(6) Whether the suit can be decreed as prayed for?

20. In C.S.No.1027/2010, the following issues were framed for trial and adjudication:-

(1) Whether the plaintiffs are entitled to claim refund of Rs.97 lakhs together with 18% interest per annum from the date of the suit till realization on the basis of the sale agreement dated 3.10.2007 and 6.10.2007?

(2) Whether the plaintiffs have fulfilled their obligation to honour their commitment as per Sale Agreement dated 3.10.2007 and 6.10.2007?

(3) Whether the defendants had committed any breach in honouring their commitment as per Sale Agreement dated 3.10.2007 and 6.10.2007?

(4) Whether the plaintiffs are entitled for any relief for the suit claim in the event of their failure to fulfill the terms and conditions stipulated under Sale Agreement dated 3.10.2007 and 6.10.2007?

(5) Whether any specific relief can be claimed by the plaintiffs for their

failure to pay balance sale consideration during the contract period based on the sale agreement dated 3.10.2007 and 6.10.2007?

21.This Court on 22.9.2015 and 15.12.2015, framed the following additional issues in C.S.No.1027/2010, respectively:-

- (1) Whether the 6th defendant is liable to pay the amount as claimed in the plaint?
- (2) Whether the statutory charge has been created under Section 55(6) (b) of Transfer of Property Act, 1882?

22.This Court vide order dated 18.3.2015, has ordered joint trial of both suits as the issues raised in both the suits, are substantial and one and the same. This Court taking into consideration the submission made by the learned Counsel appearing for the plaintiffs in C.S.No.1027/2010, that the first plaintiff in C.S.No.1027/2010 viz. B.Thilagavathy, is aged about 85 years, appointed Prof.Dr.S.D.Purushothaman, Advocate, as Advocate Commissioner to record evidence and accordingly, the learned Advocate Commissioner has recorded the evidence

of the witnesses and also marked exhibits and submitted the same to this Court.

23.The second plaintiff in C.S.No.933/2009 viz. Thiru G.Anbalagan, has filed the proof affidavit in lieu of chief-examination, and marked Exs.A1 to A12 and B1 to B4. The fourth defendant in C.S.No.933/2009 viz. Dr.Parameswaran Sabesan, has filed his proof affidavit in lieu of chief-examination, and marked Exs.B5 to B22 and was cross-examined by the learned Counsel appearing for the defendants 3 and 6 in C.S.No.1027/2010. Though the said defendants 3 and 6 had filed their written statements, they did not enter the witness box.

24.Since the issues involved in both the suits, are substantial and one and the same and a joint trial was conducted, this Court is passing this common judgment.

25.For the sake of convenience, the parties will be referred in this judgment, as per the array of parties in C.S.No.933/2009, and since the sixth defendant in C.S.No.1027/2010, is not a party in C.S.No.933/2009, he will be referred as sixth defendant.

26.The written arguments have also been filed on behalf of both parties in the suits.

27.The learned Counsel appearing for the plaintiffs in C.S.No.933/2009 and the defendants 2 and 4 in C.S.No.1027/2010, has made the following submissions:-

(a) The deceased original defendant viz. Thiru C.Sabesan, at the time of entering into the agreement under Exs.A1 and A2/B8 and B9 respectively, was very well aware of the difficulties and predicaments faced by the plaintiffs and their family members, on account of the action initiated by Indian Bank, especially under the provisions of SARFAESI Act and has parted with a total sum of Rs.97 lakhs, but deliberately failed and neglected to pay the balance sum of Rs.73 lakhs on or before 25.10.2007, in terms of Clause No.3 of Ex.A1/B8 and also failed to adhere to Clause No.4 of the said document and in spite of repeated requests and pleas made, Late C.Sabesan for reasons best known to him, has failed to adhere to his commitments and since the dues as agreed, have not been settled, Indian Bank took further action in S.A.No.66/2005, and the DRT - II, Chennai has passed an order dated 6.6.2008, in I.A.No.655/2005 in

T.A.No.28/2001 directing the applicants therein to pay simple interest on Rs.1 lakh at the rate of 15% per annum from 28.8.2004 to 10.10.2007, directly to the Bank within six weeks from the date of the order and in the event of such a payment, the Bank was directed to accept the said amount of interest and treat the matter as closed and in the event of failure on the part of the applicants therein to comply with the above said order, liberty was granted to the Indian Bank to proceed further in terms of the final order dated 3.10.2005, and the said order was also communicated to Late C.Sabesan with a request to release the second instalment and however, it was not acceded to and had he released the second instalment, at least during the period between 6.6.2008 and 18.7.2008, the entire loan due and payable to Indian Bank, would have been wiped out and the documents of the suit schedule property given as security, would have been relelased.

(b) The second plaintiff thereafter, submitted a proposal on 18.7.2008, under Ex.A4, and it was considered and the Indian Bank made an offer dated 3.11.2008, in and by which, a sum of Rs.200 lakhs was demanded towards the settlement of entire claim and it was also communicated to the plaintiffs that the acceptance of the said offer should be given within seven days from the date of receipt of the offer/communication dated 3.11.2008, marked as Ex.A5, and the payment should be made within 30 days and if the time schedule is adhered to, the legal proceedings initiated, should be withdrawn unconditionally and the said letter was also shown to Late C.Sabesan and the plaintiffs requested him to release the fund of Rs.200 lakhs in lieu of the time limit fixed, and however, he has disbursed only 10% of the OTS amount i.e., Rs.20 lakhs, on 2.12.2008, under Ex.B13 demand draft dated 1.12.2008, and taking advantage of the tight situation, also got an endorsement dated 2.12.2008, in Ex.A1/B8

sale agreement, and thereby, the time to perform the obligation was extended for a further period of six months from 2.12.2008, and even at that time also, Late C.Sabesan was very much aware that the balance Rs.180 lakhs is to be released within 30 days - the time limit prescribed; but, he has deliberately violated and neglected to adhere to his undertaking/promise.

(c) The plaintiffs under Exs.B3 and B4, made a prayer to the Indian Bank to grant further extension and no orders have been passed and under Ex.A6, it has informed the plaintiffs that they have to make the balance amount of Rs.180 lakhs under OTS Scheme, before 30.3.2009, with 12.5% compounding interest quarterly from 3.11.2008, and it was also brought to the knowledge of Late C.Sabesan; but, once again, he has kept quiet and since the time limit was running, the plaintiffs were left with no other option except to contact the sixth defendant viz. Thiru P.Ganapathi,

who gave an offer of Rs.185 lakhs to purchase the suit schedule property and also agreed to pay the balance sum of Rs.180 lakhs directly to Indian Bank, and accordingly, under Ex.A7, he has paid a sum of Rs.180 lakhs directly to Indian Bank and on the same day, a registered sale deed was executed in his favour for a sum of Rs.185 lakhs under Ex.A8/B15, and in respect of the remaining sum of Rs.5 lakhs, five demand drafts each for a sum of Rs.1 lakh were taken and given to the plaintiffs, their two sisters and one brother respectively. The Indian Bank, on fulfillment of the obligation under OTS, has also issued a letter under Ex.A9 dated 15.6.2009, stating that their entire claim has been settled. Thus, it is contended that on account of the deliberate inaction and non-performance of obligation on the part of Late C.Sabesan, who in spite of very many requests made, did not adhere to his obligations, the plaintiffs were made to run from pillar to post to make good,

the balance OTS amount of Rs.180 lakhs before 30.3.2009, and left with no other option only, approached the sixth defendant, who had not only settled Rs.180 lakhs, but also paid a sum of Rs.1 lakh each to the plaintiffs and their two sisters and one brother and thereby, the valuable property, which is located in a prime area of Chennai City, has been sold to him and as a consequence, the plaintiffs have suffered huge monetary loss and grave hardship and difficulties.

(d) Attention of this Court was drawn to Ex.A1/B8 agreement, and it is further contended that the obligation on the part of the plaintiffs would commence upon receipt of the entire sale consideration and even as per their own admission, Late C.Sabesan did not make the entire payment, but pleaded that pursuant to the oral request and plea made by the plaintiffs, he did not make payment and the same is not substantiated by any tenable evidence.

Mr.C.Sabesan was also very well aware of the extreme difficulties and hardships undergone by the plaintiffs, and the reason for which Exs.A1 and A2 came into existence and under Ex.B10 dated 10.10.2007, the plaintiffs submitted another letter to the Indian Bank, wherein, they have authorised Mr.C.Sabesan's Advocates viz. Tvl. M.Muthu Kumar and B.Harikrishnan, to jointly receive the original title deeds relating to the suit schedule property and also expressed their no objection in handing over the title deeds to them in the event of the claim being fully settled and it is also one of the factors, which would substantiate and probablise the case of the plaintiffs as to the immediate and urgent requirements to make the payment directly to Indian Bank to have it's claim settled.

(e) The fourth defendant viz. Dr.Parameswaran Sabesan, who has entered the witness box as D.W.1, has not been personally acquainted with the facts of

the case, and most of his answers were of denial and his oral testimony is of no help to probablise the defence taken by the defendants. Though P.W.1 was cross-examined on behalf of the defendants 3 and 6 in C.S.No.1027/2010, they did not enter the witness box and therefore, their defence in the form of written statements, has not been substantiated and virtually, they have no contra evidence as against the testimony of P.W.1.

(f) The sale in favour of the sixth defendant, has been accepted and acknowledged by the defendants and in paragraph Nos.6 and 11 of the written statement filed by C.Sabesan, it has been averred among other things, that the plaintiffs should have received not less than Rs.7 crores from the buyer and are now shedding crocodile tears as if to suggest that the property was sold only for Rs.185 lakhs, and the said pleading also substantiates the case of the plaintiffs that the property has

been sold for the said sum in favour of the sixth defendant in view of the emergent requirements, and it was nothing but a distressed sale.

(g) As per Exs.A1 and A2/B8 and B9, the total consideration was fixed at Rs.715 lakhs and after making the advance payment of Rs.97 lakhs by C.Sabesan, nothing has been paid by him thereafter as agreed, and on account of the time limit fixed by the Indian Bank to settle the balance amount of Rs.180 lakhs, they were constrained to approach the sixth defendant, who has directly made the payment of Rs.180 lakhs to the Indian bank and gave five demand drafts each for Rs.1 lakh, in favour of the plaintiffs and their two sisters and one brother, and as a consequence, they suffered a loss of Rs.530 lakhs and after deducting the advance amount, the net loss suffered by them, is Rs.433 lakhs and for the purpose of Court Fee, they restricted their claim to Rs.150 lakhs towards loss, damages and mental

agony sustained by them on account of the conduct of Late C.Sabesan.

28.On a legal plea, it is the submission of the learned Counsel appearing for the plaintiffs, that Section 55 of the Transfer of Property Act has no application to the case on hand for the reason that the said provision is applicable only in the absence of contract; but, Exs.A1 and A2/B8 and B9 agreements, contain very many conditions.

29.The learned Counsel appearing for the plaintiffs, in support of his submissions, has placed reliance upon the following judgments:-

(i) (2011) 4 SCC 741 (PRAMOD BUILDINGS AND DEVELOPERS PRIVATE LIMITED V. SHANTA CHOPRA) ;

(ii) (2013) 1 SCC 345 (SATISH BATRA V. SUDHIR RAWAL) ;

(iii) (2010) 1 SCC 287 (A.K.LAKSHMIPATHY AND OTHERS V. RAI SAHEB PANNALAL H.LAHOTI CHARITABLE TRUST AND OTHERS) ;

(iv) (2004) 3 SCC 711 (VIDEOCON PROPERTIES LTD. V. BHALCHANDRA LABORATORIES) and

(v) (1969) 3 SCC 522 (SHREE HANUMAN COTTON MILLS AND OTHERS V. TATA AIR

CRAFT LIMITED) .

30.Per contra, the learned Counsel appearing for the defendants 2 to 5 in C.S.No.933/2009/plaintiffs in C.S.No.1027/2010, made the following submissions:-

(a) The execution of Exs.A1 and A2/B8 and B9 is admitted; but, having got the partial relief in lieu of payment of Rs.77 lakhs made by Late C.Sabesan directly to Indian Bank, the plaintiffs in C.S.No.933/2009, began to backtrack and they were not keen to settle the amount due and payable to Indian Bank and told C.Sabesan to defer the further payments to Indian Bank, since they are secretly negotiating with the bank officials for further reduction of the OTS amount; but, at the same time, were insisting C.Sabesan to perform his part of obligation under Ex.A2/B9 agreement, as they are to be personally benefited though their two sisters and one brother have not joined while executing the said agreement and due to the said reason only, C.Sabesan did not make the balance

payment and since the fault lies on the part of the plaintiffs, he cannot be put to any blame.

(b) The plaintiffs in C.S.No.933/2009, have subsequently approached the Indian Bank, who has given another offer under Ex.A5 dated 3.11.2008, calling upon them to pay a sum of Rs.200 lakhs in full and final settlement prescribing the time limit and immediately, they approached Late C.Sabesan, who has paid a sum of Rs.20 lakhs directly to Indian Bank vide demand draft under Ex.B13 dated 1.12.2008, and also got an endorsement in Ex.A1 marked as Ex.B22 dated 2.12.2008, and further time of six months was granted to fulfill his obligations and during the subsistence of Exs.A1 and A2/B8 and B9 agreements, and without even informing Late C.Sabesan, the plaintiffs managed to have a tacit understanding with the sixth defendant and sold the suit schedule property in his favour under Ex.A8/B15 document and in the light of the above said conduct of the

plaintiffs, Late C.Sabesan cannot be put to blame as a person who has failed to perform his part of obligation under Ex.A1/B8 agreement.

(c) The plaintiffs have not marked any exhibits to show that they have made repeated requests to Late C.Sabesan to make good the balance amount and admittedly, there was no such communication between December, 2008 and September, 2009, to substantiate the plea of the plaintiffs in that regard.

(d) Attention of this Court was also drawn to the testimony of P.W.1. It is an admitted fact that Late C.Sabesan has parted with a sum of Rs.97 lakhs towards advance under Exs.B2 series, B11 and B13 and only on account of the request made by the plaintiffs that they are secretly negotiating with the Indian Bank for further reduction of OTS amount, he did not make good the payment and even by applying common sense, Mr.C.Sabesan would not have kept quiet after nearly

parting with a sum of Rs.97 lakhs, to have his part of obligation under the above said agreements fulfilled.

(e) Admittedly, two agreements under Exs.A1 and A2/B8 and B9 as well as the endorsement made in Ex.A1 vide Ex.B4, have not been cancelled and there is no communication from the plaintiffs except the pre-suit notice as to the non-performance of obligation on the part of C.Sabesan and in collusion with the sixth defendant, they have cheated Late C.Sabesan and in this regard, a police complaint was also lodged, based on which, a FIR under Ex.B18 dated 24.10.2009, came to be registered against the plaintiffs and their sisters and brother and even in the sale deed under Ex.A8/B15, executed in favour of the sixth defendant, nothing has been stated about the subsistence of the agreement between C.Sabesan and the plaintiffs in C.S.No.933/2009. Thus, it would clearly substantiate the case of the defendants 2 to 5 that a fraud has

been played upon and the sixth defendant in collusion with the plaintiffs, managed to get the possession of the suit schedule property in lieu of the sale deed executed in his favour, and the sale consideration reflected in the said sale deed, is not a true figure for the reason that the plaintiffs would have got much more than that amount and in any event, no person with common sense would have sold the property, which is located in a prime area of Chennai City, for a sum of Rs.185 lakhs, though the very same plaintiffs had entered into agreements under Exs.A1 and A2/B8 and B9 with C.Sabesan to sell the property and also got the compensation for the improvements made, aggregating to a sum of Rs.715 lakhs.

(f) The sixth defendant was very well aware of the above said agreements and with open eyes as to the subsisting encumbrance, he voluntarily offered to pay a sum of Rs.180 lakhs directly to Indian Bank and the balance amount of

Rs.5 lakhs to the plaintiffs and their two sisters and one brother and therefore, he cannot claim to be a bonafide purchaser for value and consideration without prior notice of any encumbrance and since the legal heirs of Late C.Sabesan had colluded and connived with the sixth defendant in depriving the plaintiffs the valuable sale consideration, the suit schedule property sold in favour of the sixth defendant, is also a subject matter of charge and in the event of the legal representatives of Late C.Sabesan/defendants 2 to 5 in C.S.No.933/2009, making good the decretal amount if the suit is decreed, liberty may be granted to the plaintiffs to proceed against the suit schedule property at the hands of the sixth defendant.

31.The learned Counsel appearing for the defendants 2 to 5 in C.S.No.933/2009/plaintiffs in C.S.No.1027/2010, also raised a legal plea by inviting the attention of this Court to Sections 69 and 70 of the Indian

Contract Act and would submit that in order to rest the claim under Section 70 of the Act, there need not be a pre-existing legal obligation on the part of the plaintiff to supply or to serve and if the plaintiff substantiates his case that he has acted with the genuine intention of doing the work and it was not intended to be a free or gratuitous act, then he is bound to be compensated by the other party for such an overt, but a sincere act and in the case on hand, Section 70 of the Indian Contract Act is having full application and also supports the case of the defendants 2 to 5 in C.S.No.933/2009/plaintiffs in C.S.No.1027/2010, and even otherwise by virtue of Section 69 of the Indian Contract Act, they are entitled to get back the sum of Rs.97 lakhs paid by Late C.Sabesan, with interest and hence, prayed for decreeing the suit with exemplary costs.

32.The learned Counsel appearing for the defendants 2 to 5 in C.S.No.933/2009/plaintiffs in C.S.No.1027/2010, in support of his submissions, has placed reliance on the following decisions:-

(i) **AIR 1961 MADRAS 170 (THIRUMALASUBBU**

CHETTIAR V. RAJAMMAL);

(ii) **(1985) II MLJ 179 (APPAVOO NADAR V.**

CHELLIAN NADAR AND OTHERS);

(iii) **(1999) 6 SCC 104**

(K.S.SATYANARAYANA V. V.R.NARAYANA RAO)

and

(iv) (2004) 12 SCC 754 (KRISHNA PILLAI
RAJASEKHARAN NAIR V. PADAMANABHA PILLAI
AND OTHERS) .

33.The learned Counsel appearing for the sixth defendant in C.S.No.1027/2010, would contend that no statutory charge has been created and even for the sake of argument, a statutory charge under Section 56 of the Transfer of Property Act has been created, still the sixth defendant cannot be made personally liable for the claim made by the plaintiffs and in the event of the plaintiffs in C.S.No.933/2009 are to succeed, they are entitled to proceed against the property only and not personally against the sixth defendant and the plaint in C.S.No.933/2009 is also not properly framed and is in violation of Order XXXVII of Original Side Rules read with Form No.84. It is his further submission that Section 65 of the Transfer of Property Act has no application as there are several terms and conditions under Exs.A1 and A2 agreements, to be performed.

34.Insofar as the submission made as to the collusion between the sixth defendant and the defendants 2 to 5 in C.S.No.933/2009/plaintiffs in C.S.No.1027/2010 is concerned, the learned Counsel appearing for the sixth defendant, would contend that though the sixth defendant

was aware of the recovery action initiated by the Indian Bank against the plaintiffs, he was not aware of Exs.A1 and A2 agreements, between the parties and having found that a sum of Rs.180 lakhs have to be paid before a particular time, he obliged them by directly making the payment of Rs.180 lakhs to the Indian Bank before the expiry of the time limit given, and also paid a sum of Rs.1 lakh each to them by way of demand drafts and in the absence of any evidence to show that the suit schedule property is worth much more than the sale consideration as shown in Ex.A8/B15, it is not open to either parties to contend that the property has been sold for a lesser amount and it was a distress sale and even otherwise, the Registration Authorities have accepted the value given in the sale deed, and registered the document.

35.It is also contended on behalf of the sixth defendant, that there is no time limit prescribed for completion of Ex.A1 with regard to the immovable property in question; but, the time limit is only for making the payment and not in respect of the completion of the transaction and hence, it cannot be contended that time is the essence of the contract under Ex.A1. It is the further submission of the learned Counsel appearing for the sixth defendant, that though the plaintiffs in C.S.Nos.933/2009 and 1027/2010 would contend that there were repeated communications calling upon Mr.C.Sabesan to perform his

part of obligation, admittedly, no exhibits to that effect, have been marked and hence, it is not open to the plaintiffs in C.S.No.1027/2010 to contend that the sixth defendant after becoming aware of Exs.A1 and A2, voluntarily expressed his willingness to purchase the suit schedule property and admittedly, no pre-suit notice has been issued to him so as to enable him to indicate his stand at the earliest point of time.

36.The learned Counsel appearing for the sixth defendant, in support of his submissions, has placed reliance upon the decisions reported in **(2000) 10 SCC 130 (DELHI DEVELOPMENT AUTHORITY V. SKIPPER CONSTRUCTION CO. (P) LTD. AND OTHERS)** and **(2011) 12 SCC 18 (SARADAMANI KANDAPPAN V. S.RAJALAKSHMI AND OTHERS)**.

37.Though the third defendant in C.S.No.933/2009 had filed a written statement and cross-examined P.W.1, did not choose to examine herself as a witness and so also the sixth defendant.

38.This Court has carefully considered the rival submissions and also perused the pleadings as well as the oral and documentary evidence.

C.S.No.933/2009:

39.ISSUE Nos.(1) to (3):-

39(i) It is not in dispute that the suit schedule property of the plaintiffs in C.S.No.933/2009 and the defendants 1 to 5 in C.S.No.1027/2010, was owned by their

mother A.G.Padmavathi, who died intestate leaving behind them as her legal heirs, and hence all of them are entitled to undivided 1/5th share in the suit schedule property. The suit schedule property was also offered as a security with the Indian Bank for the credit facility availed by the second plaintiff in C.S.No.933/2009 viz. Thiru G.Anbalagan, and in view of the defaults committed, recovery proceedings were initiated in T.A.No.28 of 2001 before the DRT, Chennai, purportedly under the provisions of Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDDBFI) and subsequently, proceedings were also initiated under the SARFAESI Act against the above said persons. A challenge was also made to the notices issued under Sections 13(2) and 13(4) of SARFAESI Act marked as Exs.B5 and B6 respectively, before the DRT II, Chennai in S.A.No.66/2005 and at that point of time, the dues were to the tune of Rs.15 crores. The matter was referred to Lok Adalat and by consent of both parties, Lok Adalat has passed an Award dated 28.8.2004, by directing them to pay the sum of Rs.100 lakhs as OTS to Indian bank within the period stipulated in the said Award, and extension of time was also sought and it was declined and in this regard, legal proceedings were initiated and the DRT - II has granted conditional stay on deposit of Rs.23,50,000/- and it was also deposited under No Lien Account. The above said parties at that juncture, had approached one

C.Sabesan, who has offered to purchase the suit schedule property for a consideration of Rs.5 crores and an agreement came into being under Ex.A1/B8 between the defendants 1 to 5 in C.S.No.1027/2010 and C.Sabesan.

39(ii) A perusal of Ex.A1/B8 would disclose that the vendors had proceeded to sell the suit schedule property to pay up the amounts due and payable to Indian Bank as per the terms and conditions of OTS, to avoid auction sale and other unforeseen situation and also apportion the remaining sale proceeds among themselves and as per Clause No.2, C.Sabesan has agreed to pay the sum of Rs.77 lakhs on behalf of the defendants 1 to 5 in C.S.No.1027/2010 and it was also paid. Mr.C.Sabesan has also agreed to pay the further sum of Rs.73 lakhs on or before 25.10.2007, and further agreed to pay the balance consideration of Rs.350 lakhs on or before 21.1.2008, and in that regard, the parties had agreed that time is the essence of the contract. The vendors on receipt of the entire sale consideration of Rs.5 crores, agreed to pay up and settle the Indian Bank's claim in T.A.No.28 of 2001 and S.A.No.66 of 2005 fully and finally and redeem the suit schedule property from Indian Bank and thereafter, convey the same in favour of C.Sabesan in the form of sale deed. As per Clause No.8 of Ex.A1/B8 agreement, in the event of breach committed by either of the parties or any of the terms contained therein, the party not in breach, shall be

entitled to the relief of specific performance against the party committing such a breach and the said party shall also be liable to reimburse the aggrieved party all expenses, loss and damages suffered by the aggrieved party by reason of such a breach. The supplementary agreement Ex.A2 came into being between the plaintiffs in C.S.No.933/2009 and C.Sabesan with regard to the improvements made to the suit schedule property, and the consideration was fixed at Rs.215 lakhs in the form of reimbursement and it is in addition to the sale consideration fixed under Ex.A1/B8 agreement. As per Clause 4 of Ex.B12 confirmation letter, the plaintiffs in C.S.No.933/2009, on receipt of the agreed sale consideration of Rs.5 crores and the sum of Rs.215 lakhs, agreed to pay up and settle the dues of the Indian Bank and redeem the suit schedule property and execute the sale deed on or before 21.1.2008, in favour of C.Sabesan and deliver free hold vacant possession. Subsequently, the consolidation of Exs.A1 and A2 agreements, in the form of Ex.B9 came into existence in the form of Memorandum of Understanding (MOU), wherein, the plaintiffs in C.S.No.933/2009, have agreed to sell the suit schedule property in favour of C.Sabesan for a sum of Rs.715 lakhs free of all encumbrances. It is relevant to extract Clause Nos.9 and 10 of the said MOU as under:-

"9. On receipt of the entire sale consideration, the First Party and the other legal heirs of deceased A.G. Padmavathy shall:

a.. execute a full fledged Power of Attorney to and in favour of the Second Party and/or his nominee inter alia to deal with the Schedule property in all respects; and

b.. deliver free hold vacant possession of the Schedule property to the Second Party and/or his nominee not later than January 27, 2008.

10. In the event of breach of all or any of the terms and conditions set out herein the aggrieved party shall be entitled to the relief of specific performance. In addition to and not in derogation to the relief of specific performance, the aggrieved party shall be entitled for reimbursement of losses and expenses incurred by reason of such breach from the Party committing the breach."

second plaintiff in C.S.No.933/2009/4th defendant in C.S.No.1027/2010, would admit that C.Sabesan has remitted a sum of Rs.97 lakhs to Indian Bank and would further admit that "I have not mentioned the dates either in the plaint or in the proof affidavit, the dates on which they have made repeated requests to Mr.Sabesan. I have not stated in the plaint and proof affidavit whether our repeated requests are in writing or oral. I deny the suggestion that since I have not made any repeated requests to Mr.Sabesan, I have not made such repeated requests either in plaint or in proof affidavit..... I have not sent any letter or notice after Exhibit B-3 to Mr.Sabesan requesting for payment of the balance OTS amount but was repeatedly requesting him orally.... I have not mentioned either in plaint or proof affidavit that after 3.1.2009, I made repeated requests to Mr.C.Sabesan to pay the balance OTS amount of Rs.180 lakhs.... I have not issued any notice to Mr.Sabesan prior to sale of the suit property stating that since he has not paid the balance OTS amount, the Agreement Exhibit - A1 stands cancelled and that the property will be sold to the third party. In Exhibit A-8 there is no mention about DRT proceedings.... We have claimed total damages of Rs.483 lakhs in Exhibit - A12 notice, but we have not quantified the damages sustained by us under various heads.... There is no agreement with Mr.Ganapathy (Defendant No.6) prior to Exhibit A-9. We sold the suit

property to Mr.Ganapathy (D6) under Exhibit A-8 for Rs.1.85 crores. In Exhibit A-8 sale deed, it is stated that the suit property is free of all encumbrances, charges, lien and litigation etc.... Only because of compelling situation, I was forced to sell the property under Exhibit A-8 to Mr.Ganapathy without prior notice to Mr.Sabesan. I have not stated in page 9 of Exhibit A-8 the reason for selling the property to Mr.Ganapathy.... The time granted under OTS in Exhibit A-5 is 30.03.2009. We sold the property on 28.05.2009. Thereafter, we made further request to Indian Bank for extension of time. I have not mentioned either in my notice Exhibit A-12 or in the plaint or in the Proof affidavit that after 31.03.2009 I approached Indian Bank seeking further extension of time to pay up the OTS amount. I have also not made any written request to Indian Bank after 31.03.2009 seeking further extension of time to pay the OTS amount.... After seeking extension of six months time from Indian Bank by my letter dated vide Exhibit B-3, I sold the suit property to Mr.Ganapathy (D6) on 28.05.2009 without prior intimation to Mr.Sabesan.... I deny the suggestion that after having retrieved the property from the clutches from Indian Bank out of the money provided by Mr.Sabesan I stealthily sold the property to Mr.Ganapathy.... I deny the suggestion that we have not sustained any damages and we have made

false claim for damages in the suit."

39(iv) Under Ex.A3/B14, the DRT - II has passed an order dated 6.6.2008, in I.A.No.655/2005 in T.A.No.28/2001 and S.A.No.66/2005, and has recorded the fact that the applicants in I.A.No.655/2005 viz. the defendants 2 to 5 in C.S.No.1027/2010, have paid the entire Lok Adalath Award of Rs.100 lakhs by various instalments, the last being 10.10.2007, and directed them to pay simple interest on Rs.100 lakhs at the rate of 15% per annum from 28.8.2004 to 10.10.2007 directly to the respondent/bank therein within six weeks from the date of receipt of the order and in the event of receipt of the same, the bank was directed to treat the matter as closed and in the event of default, the Indian Bank is entitled to proceed further in terms of final order dated 3.10.2005. The second plaintiff in C.S.No.933/2009/4th defendant in C.S.No.1027/2010 under Ex.A4 compromise proposal, dated 18.7.2008, has drawn the attention of the Indian Bank to the order under Ex.A3/B14, and would state that the interest for the delayed period works out to Rs.47 lakhs and after discussion, they were willing to pay a sum of Rs.110 lakhs towards full and final settlement and prayed for accepting the compromise proposal. The Indian Bank in response to Ex.A4 dated 18.7.2008, sent a communication under Ex.A5 dated 3.11.2008, stating that the Bank is prepared to receive Rs.200 lakhs in full and final settlement subject to four

conditions and two of them are that acceptance is to be given within 7 days from the date of receipt of the said letter and payment should be made within 30 days and in the event of not accepting or not adhering to any of the terms and conditions, the Bank will proceed with the recovery proceedings before the DRT for recovery of it's dues and also proceed for effecting recovery under the law relating to enforcement of security. Thereafter, C.Sabesan has paid a sum of Rs.20 lakhs directly to Indian Bank under Ex.B3 demand draft dated 1.12.2008, and the endorsement to that effect was also made in Exs.A1/B8 under Ex.B22 and the period of agreement was also extended by six months from the date of endorsement dated 2.12.2008, and it was signed by the plaintiffs in C.S.No.933/2009. Under Exs.B3 and B4, the plaintiffs in C.S.No.933/2009 made a request to the Indian Bank to grant extension of time to pay the balance sum of Rs.180 lakhs and the Indian Bank vide response under Ex.A6 dated 2.3.2009, has acknowledged the receipt of Rs.20 lakhs towards OTS sanction amount of Rs.200 lakhs, and permitted them to pay the balance amount of Rs.180 lakhs on or before 30.3.2009, along with interest at BPLR (presently 12.5%) compounded quarterly from 3.11.2008.

39(v) It is the case of the plaintiffs in C.S.No.933/2009 that C.Sabesan was not at all willing to perform his part of obligation under Exs.A1 and A2 agreements, and in this regard, repeated requests have been

made to fulfill his part of obligation and since he did not fulfill his promise, the interest amount could not be paid on time, which resulted in further liability, and thereafter, a request was made for reduction of OTS amount and it was also agreed by the Indian Bank, wherein, it directed them to pay a sum of Rs.200 lakhs in full quits under Ex.A5 dated 3.11.2008, and in view of the time limit prescribed, they once again, approached C.Sabesan, who taking advantage of the situation, paid Rs.20 lakhs under Ex.B13 in the form of demand draft and also managed to get endorsement in Ex.A1 under Ex.B22 and thereafter, had gone back on his words once again and since the time limit prescribed under Ex.A6 dated 2.3.2009, was expiring on 30.3.2009, they were left with no other option except to approach the sixth defendant, who has paid a sum of Rs.180 lakhs by means of a demand draft dated 27.5.2009, directly to Indian Bank, and thereby, settled the entire claim of the Indian Bank and in this regard, they have also sent a communication under Ex.A7 dated 28.5.2009, to the Indian Bank and subsequently, executed a sale deed under Ex.A8/B15 dated 28.5.2009, in favour of the sixth defendant. A perusal of Ex.A8/B15 would disclose that nothing has been stated about the subsistence of Exs.A1 and A2 agreements, and there is also a recital in the above said sale deed that the vendors declare and covenant with the purchaser that there are no encumbrances, charges, trusts, lien,

attachments, claims or demands whatsoever now subsisting on the said property and it is not the subject matter of any suit or litigation or proceedings and has not been offered as security or charged otherwise to any Court or revenue authority. For the first time, the plaintiffs put Mr.C.Sabesan on notice under Ex.A12/B16 dated 14.9.2009, and that too, after the sale in favour of the sixth defendant under Ex.A8/B15 dated 28.5.2009. Mr.C.Sabesan in response to the said notice, has sent a reply under Ex.B1 denying the allegations and in paragraph No.5, it is stated that they have represented to C.Sabesan to wait for a little more time to pay up the entire OTS amount as they are negotiating a secret deal with the Bank Officials to reduce the OTS amount further and since it was suspected, Mr.C.Sabesan did not part with Rs.215 lakhs as demanded and in any event, he cannot be blamed for the delay and the delay has occurred only on account of their surreptitious and shady dealings and the alleged non-performance of the sale agreement has occurred only due to their fraudulent and clandestine conduct in negotiating a secret deal with the bank officials to have the OTS amount reduced further and thereby, prevented Mr.C.Sabesan from paying up the OTS amount in full as early as in October, 2007/January, 2008.

39(vi) Pendency of the suit in C.S.No.933/2009,

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Mr.C.Sabesan died and his legal representatives were

brought on record and one of the defendants viz. Dr.Paremeswaran Sabesan @ Aiyappan Sabesan, was examined as D.W.1 and he filed his proof affidavit and marked Exs.B5 to B22. D.W.1 was cross-examined by the learned Counsel appearing for the plaintiffs in C.S.No.933/2009 and defendants 2 and 4 in C.S.No.1027/2010, as well as by the respective learned Counsel appearing for the third defendant and sixth defendant and it is relevant to consider and discuss his oral testimony.

39(vii) D.W.1/third plaintiff in C.S.No.1027/2010, has given evidence on behalf of the other defendants, and in the cross-examination, would state that he is not a party to the sale agreements marked as Exs.A1 and A2, and also not a witness to the above said agreements and was not physically present at the time of signing of the above said agreements and only on being apprised by his father and perusal of the documents, he came to know about the sale agreements under Exs.A1 and A2. D.W.1 would further depose that it is true that as per the agreement, the date of completion/conclusion, is mentioned as 21.1.2008, and his father did not disburse the second instalment of Rs.73 lakhs to the Indian Bank before 24.10.2007, and it was not disbursed on the instructions of the plaintiffs in C.S.No.933/2009, and it was on the basis of the oral instructions given by the said persons. D.W.1

denied the suggestion and would state that there is no secret deal with regard to the payment of Rs.2.15 crores between his father and the plaintiffs in C.S.No.933/2009 and there is no written communication from his father to the said persons by stating that he is ready and willing to clear the bank dues and pay the balance sale consideration to the plaintiffs and denied the suggestion that the said persons were insisting his father to honour the commitment as per Ex.A1 and also for clearance of bank dues at the first instance. D.W.1 has once again, reiterated that his father C.Sabesan did not release Rs.180 lakhs being the remaining OTS amount to Indian Bank and it was not paid only at the instance of the plaintiffs in C.S.No.933/2009 and as agreed, the time limit prescribed in Ex.A1, has been extended for a further period of six months from 2.12.2008, and it got expired on 1.6.2009. D.W.1 has also stated that he has no personal knowledge about how many times the plaintiffs approached his father for the settlement of Indian Bank dues and denied the suggestion that if the OTS amount is not paid, the plaintiffs in C.S.No.933/2009 have to pay Rs.33.69 crores as on 3.11.2008.

39(viii) In the cross-examination done on behalf of the sixth defendant, D.W.1 would state that he was not personally aware of the transaction between his father and the defendants 1 to 5 in C.S.No.1027/2010, and there is no

correspondence between 3.10.2007 and 1.12.2008, to show that his father was ready and willing to perform his part of the contract in terms of Ex.A1 and there is nothing in writing to show that his father was ready and willing to perform his part of obligation after 2.12.2008 and would further admit that he was not personally aware whether the sixth defendant was aware of the agreement of sale under Ex.B8 prior to the filing of C.S.No.1027/2010, and the plaintiffs in the said suit did not issue any legal notice to the sixth defendant; but, he was aware that the sixth defendant made the payment of balance dues to the Indian Bank and thereafter, purchased the suit schedule property. D.W.1 denied the suggestion that the sixth defendant is a bonafide purchaser and he was not aware of the agreement of sale under Ex.B8 and further that the sixth defendant is not liable for the claim made by him.

39(ix) In the cross-examination done on behalf of the third defendant, D.W.1 would state that he is aware of the plaint averments and was not aware whether his father had direct contact with Tmt.Mallika, the third defendant in C.S.No.1027/2010 and other than Ex.B8, the said person is not a party to any other agreement. D.W.1 would further state that the third defendant did not receive any amount directly from his father and payments in cash, were made only to the plaintiffs in C.S.No.933/2009, for which,

receipts have been marked as Ex.B2 series and denied the suggestion that she is not liable for the suit claim in C.S.No.1027/2010.

39(x) In the re-examination done, D.W.1 would state that Mallika has also joined as a party in Ex.B15 registered sale deed, dated 28.5.2009, executed in favour of the sixth defendant viz. Thiru P.Ganapathy.

39(xi) A careful scrutiny and analysis of the evidence of P.W.1 and D.W.1 would clearly reveal that with regard to the alleged breach of agreements marked as Exs.A1 and A2, except the pre-suit notice marked as Ex.A12/B16, there was no written communication between the plaintiffs in C.S.No.933/2009 and Late C.Sabesan - the original defendant in the said suit. It is the case of the plaintiffs in C.S.No.933/2009, that they have repeatedly approached Late C.Sabesan very many times and made a request to settle the dues as promised by him, in entirety to Indian Bank and he has not acceded to the said request and deliberately delayed the payment and after much persuasion, made the payment of Rs.20 lakhs and got the endorsement under Ex.B22 in Ex.A1 agreement. Similarly, it is the stand taken on behalf of the defendants 2 to 5 in C.S.No.933/2009 and the plaintiffs in C.S.No.1027/2010, that the balance payment agreed, has not been paid for the reason that the plaintiffs in C.S.No.933/2009, represented to them that they are making secret negotiation/deal with

the Indian Bank to reduce the OTS amount and that is why the balance due and payable to the Indian Bank has not been paid. As already pointed out, unfortunately, it is the admitted case of the plaintiffs in C.S.No.933/2009 and in C.S.No.1027/2010, that there were no written communications between them as to the stand taken by them in their pleadings. The second plaintiff in C.S.No.933/2009, who was examined as P.W.1, has also made admissions to that effect in his oral testimony. Mr.C.Sabesan, who was a party to Ex.A1 and A2 agreements, could not be examined for the reason that he died pendency of C.S.No.933/2009 and his legal representatives were brought on record as other defendants and his son, who is arrayed as defendant No.4 in C.S.No.933/2009, and the third plaintiff in C.S.No.1027/2010, chose to examine himself as D.W.1 on behalf of the defendants and he has made crucial admission that he was not directly aware of the transactions in the form of Exs.A1 and A2 between his father and the plaintiffs in C.S.No.933/2009 and his testimony is based on the information given by his father and the contents of the documents.

39(xii) It is a well settled position of law that the plaintiff has to succeed or perish on his pleadings and evidence and in this case, crucial and important evidence as to the non-performance of the respective obligations on behalf of the plaintiffs in both the suits, is absolutely

lacking. The judgment relied on by the learned Counsel appearing for the plaintiffs in C.S.No.933/2009, and reported in **(2010) 1 SCC 287 (A.K.LAKSHMIPATHY AND OTHERS V. RAI SAHEB PANNALAL H.LAHOTI CHARITABLE TRUST AND OTHERS)**, has laid down the proposition that Clause (c) of Section 55(1) of the Transfer of Property Act has no application for the reason that the contract for sale, admittedly, lays down certain terms and conditions to govern the sale transaction. A perusal of Ex.A1 agreement, would also disclose that the performance is subject to many conditions and hence, this Court is of the view that the said provision has no application to the case on hand. The plaintiffs in C.S.No.933/2009, while calculating the quantum of damages, have deducted a sum of Rs.97 lakhs paid by Late C.Sabesan in instalments, for the reason that he has failed to perform his part of the contract and therefore, the advance amount paid by him, has been forfeited.

39(xiii) In **(2013) 1 SCC 345 (SATISH BATRA V. SUDHIR RAWAL)**, relied on by the learned Counsel appearing for the plaintiffs in C.S.No.933/2009, the question that arose for consideration before the Hon'ble Supreme Court, was whether the seller is entitled to retain the entire amount of Rs.7 lakhs received towards earnest money or not.

The Hon'ble Supreme Court of India has placed reliance upon the decision reported in **(1926) 23 LW 172 : AIR 1926 PC 1**

(**CHIRANJIT SINGH V. HAR SWARUP**), wherein, it has been held that the earnest money is part of the purchase price when the transaction goes forward and it is forfeited when the transaction falls through, by reason of fault or failure of the purchaser. The Hon'ble Supreme Court of India has also taken into consideration the decision reported in **(1969) 3 SCC 522 (SHREE HANUMAN COTTON MILLS AND OTHERS V. TATA AIR CRAFT LIMITED)**, wherein, the principle regarding "earnest", has been considered and it has been held that unless there is anything to the contrary in the terms of the contract, on default committed by the buyer, the seller is entitled to forfeit the earnest. There cannot be any difficulty in accepting the said proposition. But, the law laid down in the decisions, will have application depending upon the facts and circumstances of each case. In the case on hand, there is absolutely no evidence with regard to the stand of the plaintiffs in C.S.No.933/2009 as to the deliberate inaction or non-performance of obligation on the part of Late C.Sabesan - the original defendant in C.S.No.933/2009, and it was also admitted by the second plaintiff in C.S.No.933/2009, who was examined as P.W.1, as extracted above. Only in the pre-suit notice marked as Ex.A12/B16, such a stand was taken and the defendants had given a reply under Ex.B1 dated 3.10.2009, denying all the allegations. Hence, the plaintiffs in C.S.No.933/2009 are not entitled to forfeit/adjust the advance amount paid by Late C.Sabesan

towards damages.

39(xiv) As regards the primary claim for damages by the plaintiffs in C.S.No.933/2009, it is contended that there were compelling situations, which made them to sell the property in favour of the sixth defendant in C.S.No.1027/2010. P.W.1 in the cross-examination, made a crucial admission that he has not stated in page No.9 of Ex.A8, the reasons for selling the property and the time granted under OTS under Ex.A5, was till 30.3.2009 and the suit schedule property was sold in favour of the sixth defendant on 28.5.2009, and thereafter, made further request to Indian Bank for extension of time and would further depose that he has not mentioned either in his notice under Ex.A12, or in the plaint, or in the proof affidavit that after 31.3.2009, he has approached the Indian Bank seeking further extension of time to pay up the OTS amount and also not made any written request to Indian Bank after 31.3.2009, seeking further extension of time to pay up the OTS amount and after seeking extension of six months' time from Indian Bank, vide letter under Ex.B3 dated 3.1.2009, he sold the property in favour of the sixth defendant on 28.5.2009, without prior intimation to Late C.Sabesan - the original defendant in C.S.No.933/2009.

39(xv) The plaintiffs in C.S.No.933/2009 in order to sustain the said stand, did not implead the Indian Bank as a formal party in their suit. Admittedly, the time

limit granted under OTS in the form of Ex.A5, expired on 30.3.2009, and the property was sold in favour of the sixth defendant on 28.5.2009, after he has directly paid a sum of Rs.180 lakhs to Indian Bank. It is not clear either from the pleadings or from the evidence, whether the Indian Bank directly or impliedly granted extension of time to settle the OTS amount and none from Indian Bank has been examined as a witness in the suit in C.S.No.933/2009 and de hors whether it was made as a party or not, it was open to the plaintiffs in C.S.No.933/2009, to summon the concerned official from Indian Bank and examine him as a witness; but, for the reasons best known to them, they did not do so.

39(xvi) It is also admitted by P.W.1 that the agreements under Exs.A1 and A2 have not been cancelled and Late C.Sabesan - the original defendant in C.S.No.933/2009, was also not informed with regard to their dealings with the sixth defendant. It is very pertinent to point out at this juncture, that only under the legal notice marked as Ex.A12/B16, dated 14.9.2009, nearly four months after Ex.A8/B15, whereby, the plaintiffs sold the property in favour of the sixth defendant, the agreements A1 and A2 came to be cancelled and the advance money paid by Late C.Sabesan, has been adjusted towards the alleged loss sustained by them. This Court in para 39(xiii), held that the plaintiffs in C.S.No.933/2009 cannot do so.

39(xvii) In **AIR 1962 SC (V 49 C 57) (MURLIDHAR CHIRANJILAL V. HARISHCHANDRA DWARKADAS AND ANOTHER)**, the scope of Section 73 of the Indian Contract Act came up for consideration. It is relevant to extract paragraph No.9 of the judgment as under:-

“(9) The two principles on which damages in such cases are calculated are well-settled. The first is that as far as possible, he who has proved a breach of bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed, but this principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps : (British Wetsinghouse Electric and Manufacturing Company Limited v. Underground Electric Ry. Co. of London, (1912) AC 673 at p. 689.

These two principles also follow from the law as laid down in S. 73 read with

the Explanation thereof. If therefore the contract was to be performed at Kanpur it was the respondent's duty to buy the goods in Kanpur and rail them to Calcutta on the date of the breach and if it suffered any damage thereby because of the rise in price on the date of the breach as compared to the contract price, it would be entitled to be reimbursed for the loss. Even if the respondent did not actually buy them in the market at Kanpur on the date of breach it would be entitled to damages on proof of the rate for similar canvas prevalent in Kanpur on the date of breach, if that rate was above the contracted rate resulting in loss to it. But the respondent did not make any attempt to prove the rate for similar canvas prevalent in Kanpur on the date of breach. Therefore it would obviously be not entitled to any damages at all, for on this state of the evidence it could not be said that any damage naturally arose in the usual course of things."

39(xviii) It is the case of the plaintiffs in C.S.No.933/2009, that the original sale consideration fixed under Ex.A1, was Rs.5 crores and under Ex.A2, Late C.Sabesan has also agreed to make a further payment of Rs.2.15 crores for the improvements made and therefore, the entire consideration is Rs.7.15 crores and because of the deliberate default committed by him, they could not honour the original OTS and subsequently, another OTS came into being and since the time limit was expiring shortly, they were constrained to approach the sixth defendant, who has agreed to purchase the suit schedule property, for a sale consideration of Rs.185 lakhs and honouring his commitment, had made direct payment of Rs.1.80 crores in favour of Indian Bank. In the written statement filed in C.S.No.933/2009, as well as the plaint in C.S.No.1027/2010, it is averred that the plaintiffs in C.S.No.933/2009, had fraudulently sold the suit schedule property for a lesser sale consideration of Rs.185 lakhs and admittedly, the suit property will fetch a better price in the market. It is to be noted at this juncture, that it is the stand of the plaintiffs in C.S.No.933/2009, that in view of the deliberate inaction and failure on the part of Late C.Sabesan, one of the plaintiffs viz. Thiru G.Anbalagan, suffered heart failure and underwent Coronary Angiography on 10.8.2009, and the marriage of the first plaintiff's

daughter could not be performed in a grand manner due to financial setback during the relevant point of time. P.W.1 has made a crucial admission that the time limit prescribed under the OTS, expired on 30.3.2009, and the property was sold in favour of the sixth defendant on 28.5.2009. No exhibits have been marked to show about the grant of extension of time by the Indian Bank and none of the officials of the Indian Bank has been examined to prove that fact. A perusal of Ex.A11 the discharge summary, would disclose that the second plaintiff in C.S.No.933/2009 is a known hypertensive with coronary artery disease and there is a family history of CAD and diabetes and hence, it cannot be presumed that on account of the non-performance of obligation on the part of Late C.Sabesan under Ex.A1, the second plaintiff in C.S.No.933/2009, suffered heart ailment. It is also to be noted at this juncture, no evidence has been let in as to market value leave alone the guideline value of the suit schedule property so as to quantify the damages on account of alleged distress sale.

39(xix) Insofar as the averments with regard to the non-performance of the first plaintiff's daughter's marriage in a grand scale manner, on account of the financial constraints, the evidence in that regard, is absolutely lacking.

39(xx) In **AIR 1956 CALCUTTA 41 (DIVISION BENCH)**

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(PRAVUDAYAL AGARWALA V. RAMKUMAR AGARWALA), the Calcutta

High Court after considering the general principles laid down in **HADLEY V. BAZENDALE** reported in **(1854) 9 Ex. 341 (D)**, has held that where the plaintiff has suffered damages as a direct consequence of the breach of contract by the defendant and it is difficult to calculate the same with mathematical accuracy by instituting enquiries, the plaintiff is to be presumed to have sustained damages, which may be liquidated damages or in some cases, nominal damages, and what is to be the amount of nominal damages depends upon the facts of each particular case.

39(xxi) In the light of the discussion made above, this Court is of the considered view that in the absence of any exhibits/non-marking of exhibits as to the prompt action taken by the plaintiffs in C.S.No.933/2009, in the form of written communication calling upon Late C.Sabesan to perform his part of obligation coupled with the fact that there is no evidence let in as to loss sustained due to alleged distress sale, they are not entitled to damages. The laws assist those who are vigilant, and not those, who sleep over their rights (*vigilantibus, non dormientibus, jura subveniunt*). If an action be brought in a Court, which has jurisdiction, upon insufficient grounds or against the wrong party, no injury is thereby done for which an action can be maintained (*is qui jure publico utitur non videtur injuriae faciende cause hoc facere, juris enim executio non habet injuriam*). In a

original proceedings like the suit, the pleadings and evidence are absolutely essential to sustain and probablise the case of the plaintiffs and in the case on hand, the oral as well as documentary evidence are absolutely lacking as to the prompt and effective steps taken by the plaintiffs in C.S.No.933/2009 with regard to the deliberate inaction and non-performance on the part of Late C.Sabesan under Ex.A1, and other material facts. No doubt, Clause 8 of Ex.A1 dated 3.10.2007, and Clause 10 of Ex.A2 dated 6.10.2007, speak about the consequences of breach of contract. However, due to lack of documentary evidence with regard to the readiness and willingness on the part of the parties, especially of Late C.Sabesan, this Court is not expected to presume and assume things to sustain the case of the plaintiffs. Therefore, issue Nos.(1) to (3) are answered in negative and against the plaintiffs in C.S.No.933/2009.

40. ISSUE No. (4) :-

40(i) As per Clause 3 of A1 agreement, the purchaser viz. Late C.Sabesan, agreed to pay the vendors viz. B.Thilagavathi, A.G.Sampath, A.Malliga, G.Anbalagan and G.Elangovan, a further sum of Rs.73 lakhs on or before 25.10.2007, and as per Clause 4, further agreed to pay the balance sale consideration of Rs.3.50 crores and conclude the sale in all respects on or before 21.1.2008, and the parties had agreed that time is the essence of the

contract. As already pointed out, as per Clause 8, in the event of breach committed by either of the parties of all or any of the terms contained, the party not in breach (aggrieved party) shall be entitled to the relief of specific performance against the party committing such a breach and the party committing such a breach, shall also be liable to reimburse the aggrieved party all expenses, loss and damages suffered by the aggrieved party by reason of such breach. This Court in the earlier paragraphs, while answering issue Nos.(1) to (3), has pointed out that the plaintiffs in C.S.No.933/2009, did not send any written communication as to the alleged non-performance of obligation on the part of C.Sabesan under Exs.A1 and A2, and did not file any suit for specific performance, but after selling the suit schedule property in favour of sixth defendant in C.S.No.1027/2010, under Ex.A8/B15 dated 28.5.2009, sent a legal notice under Ex.A12 on 14.9.2009, terminating the agreements and forfeited the sum of Rs.93 lakhs paid by C.Sabesan towards part of sale consideration. This Court has also considered the effect of absence of evidence regarding damages. It is to be pointed out at this juncture, that after the expiry of time stipulated, Late C.Sabesan has directly paid a sum of Rs.20 lakhs to Indian Bank and an endorsement to that effect, was made in Ex.A1 agreement, on 2.12.2008, under Ex.B22 and the time limit was also extended by six months from that date.

40(ii) In **(2010) 1 SCC 287 (A.K.LAKSHMIPATHY AND OTHERS V. RAI SAHEB PANNALAL H.LAHOTI CHARITABLE TRUST AND OTHERS)**, the issue regarding whether time will be the essence of contract, arose for consideration and the Hon'ble Supreme Court of India by placing reliance upon the judgments rendered by the Constitution Bench reported in **(1993) 1 SCC 519 : AIR 1993 SC 1742 (CHAND RANI V. KAMAL RANI)**, held that in the case of sale of immovable property, there is no presumption as to the time being the essence of the contract. It has been further held in the said decision, that it is well settled that in a suit for specific performance of a contract for sale, it has to be proved that the plaintiff, who is seeking for a decree for specific performance of the contract for sale, is always ready and willing to complete/perform the terms of the agreement for sale and that he has not abandoned the contract and his intention is to keep the contract subsisting till it is executed. Similar view has been taken in the case in **K.S.VIDYANANDAM V. VAIRAVAN [(1997) 3 SCC 1]**.

40(iii) A perusal of Ex.A1 would disclose that the time limit has been prescribed for payment of sale consideration and it is an admitted fact that Late C.Sabesan has paid a sum of Rs.97 lakhs in instalments directly to the Indian Bank. The grievance expressed by

the plaintiffs in C.S.No.933/2009, is that C.Sabesan did not make the balance payment as promised by him and deliberately has gone back on his promise and obligations, which resulted in increase in liability in the form of another OTS and since the time limit prescribed to settle the OTS amount, was going to expire shortly, they were constrained to approach the sixth defendant, who agreed to purchase the suit schedule property for a sale consideration of Rs.185 lakhs and also promptly made the payment, and immediately thereafter, Ex.A8/B15 sale deed, dated 28.5.2009, came to be executed. This Court keeping in mind the ratio laid down in the above cited decisions, is of the view that in the case on hand, time is not the essence of the contract to fulfill the obligations for the reason that after the expiry of time limit prescribed, Late C.Sabesan has made the payment of Rs.20 lakhs and under Ex.B22, endorsement has been made in Ex.A1 and the further extension of time for 6 months from 2.12.2008 was granted. Though it is the case of the plaintiffs that even after the expiry of such a time limit, Late C.Sabesan did not fulfill his obligation, admittedly, no notice or written communication has been sent to him calling upon him to perform his obligation or pointing out breach of terms and conditions of Exs.A1 and A2, and it is also admitted by P.W.1 that prior to entering into the negotiation with the sixth defendant, Mr.C.Sabesan was not informed about the

said development and only after the sale in favour of sixth defendant, the said fact was informed to C.Sabesan in the form of legal notice dated 14.9.2009 under Ex.A12/B16.

40(iv) Therefore, in the light of the above facts and circumstances, this Court holds that time is not the essence of the contract and issue No.(4) is answered in negative and against the plaintiffs in C.S.No.933/2009.

41. **ISSUE No. (5) :-** This Court while answering issue Nos.(1) to (3), has given a finding that in the absence of any written communication reminding Late C.Sabesan to perform his part of obligation under Exs.A1 and A2, it cannot be said that the plaintiffs had suffered loss and mental agony and as a consequence, are entitled to get damages. Even otherwise, apart from the testimony of the second plaintiff in C.S.No.933/2009/P.W.1, there is no other evidence to probablise the case of the plaintiffs that they repeatedly approached C.Sabesan and made oral requests reminding him to perform his part of contract. Late C.Sabesan has paid a sum of Rs.20 lakhs and got extension of time under Ex.B22 for a period of six months from 2.12.2008, and even afterwards, the plaintiffs in C.S.No.933/2009, did not approach him in the form of any written communication and remind him of his responsibilities and in the absence of such a vital and crucial evidence, it cannot be said that the defendants had committed default in paying the balance sale consideration

under Exs.A1 and A2. Therefore, the said issue is answered in negative and against the plaintiffs in C.S.No.933/2009.

42.**ISSUE No. (6):-** In the light of what is held above, the plaintiffs are not entitled to get any relief as they failed to probablise their case.

C.S.No.1027/2010:

43.**ADDITIONAL ISSUE Nos. (1) and (2):-**

43(i) P.W.1/second plaintiff in C.S.No.933/2009 made a crucial admission that before entering into an arrangement with the sixth defendant with regard to the sale of the property, he did not put Late C.Sabesan on notice, about the said fact. It is the case of the plaintiffs in C.S.No.1027/2010, that the plaintiffs in C.S.No.933/2009 in active connivance and collusion with the sixth defendant, have sold the property in favour of the sixth defendant and the sixth defendant was also aware of the subsisting agreements under Exs.A1 and A2 and hence, he is also liable to pay damages. The sixth defendant though filed his written statement and cross-examined P.W.1, did not examine himself as a witness. It is the submission of the learned Counsel appearing for the sixth defendant, that even for the sake of arguments, the claim of the plaintiffs is sustainable, in any event, they cannot get a personal decree against the sixth defendant and the remedy of the plaintiffs in C.S.No.1027/2010 if any, is to proceed against the property in the hands of the sixth defendant

and in support of his submission, the learned Counsel placed reliance upon the decisions reported in **(2000) 10 SCC 130 (DELHI DEVELOPMENT AUTHORITY V. SKIPPER CONSTRUCTION CO. (P) LTD. AND OTHERS)** and **(2011) 12 SCC 18 (SARADAMANI KANDAPPAN V. S. RAJALAKSHMI AND OTHERS)**.

43(ii) The Hon'ble Supreme Court of India in the decision reported in **(2000) 10 SCC 130** (cited supra), has considered the scope of Section 55(6) (b) of the Transfer of Property Act and in paragraph Nos.29 to 31, held as follows:-

"29. These points depend upon the effect of the provisions in sub-section (6) of Section 55 of the Transfer of Property Act. That section starts with the words: "In the absence of a contract to the contrary", and reads thus (insofar as it is material for our purpose):

"55. (6) (b) The buyer is entitled -

(a) * * *

(b) unless he has improperly declined to accept delivery of the property to a charge on the property, as against the

seller and all persons claiming under him, to the extent of the seller's interest in the property, for the amount of any purchase-money property paid by the buyer in anticipation of the delivery and for interest on such amount; and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission." (emphasis supplied)

It is plain from the above provision that, in the absence of a contract to the contrary, the buyer will have a charge on the seller's interest in the property which is the subject-matter of the sale agreement insofar as the purchase money and interest on such amount are concerned, unless the buyer

has improperly declined to accept delivery. The charge is available against the seller and all persons claiming under him. This charge in favour of the buyer is the converse of the seller's charge under Section 55(4) (b). The buyer's charge under this section is a statutory charge and differs from a contractual charge which a buyer may be entitled to claim under a separate contract - *M.M.R.M. Chettiar Firm v. S.R.M.S.L. Chettiar Firm* (AIR 1941 PC 47 : 46 CWN 57). No charge is available unless the agreement is genuine - *Trimbak Narayan Hardas v. Babulal Motaji* [(1973) 2 SCC 154 : AIR 1973 SC 1363]. As pointed out in *Mulla's Commentary on Transfer of Property Act*, 8th Edn. (p.411), the charge on the property under Section 55 (6) (b) is enforceable not only against the seller but against all persons claiming under him. Before the amending Act of 1929, the words "with notice of payment" occurred after the words "all the persons claiming under him". These

words were omitted as they allowed a transferee without notice to escape. After the amendment of 1929, notice to the purchaser has now become irrelevant.

30. When the property upon which the charge is created gets converted into another form, the buyer will be entitled to proceed against the substituted security. This is a general principle of law and Section 73 of the Transfer of Property Act is only an example of the said principle. The above principle has been applied to enforce mortgage on substituted securities (see *Barhamdeo Prasad v. Tara Chand* - (1913) 41 IA 45 : ITR (1914) 41 CAL 654 (PC) and *Surapudi Muniappa v. Nookala Seshayya Gari Subbaiah* - AIR 1917 MAD 880). The same

principle which is applicable to mortgages applies to cases of statutory charge under Section 55(6)(b). If immovable property is charged and is converted into another property or money, then the charge will fasten on the property or money into which the subject-matter of the agreement is

converted.

31.The above sub-section of Section 55 also makes it clear that the buyer is entitled to interest on the amount of purchase money paid. Interest is payable from the date of payment of the purchase money to the seller till the date of delivery of property to the purchaser or till the execution of the sale deed, whichever is earlier. Points 1 and 2 are decided accordingly in favour of the buyers."

43(iii) As per the ration laid down in the above cited decision, if an immovable property is charged and is converted into another property or money, then the charge will fasten on the property or money into which the subject matter of agreement is converted. The plaintiffs in the event of the suit in C.S.No.1027/2010 being decreed, are entitled to succeed against the sixth defendant; but, they can proceed only against the property in the hands of the sixth defendant, which is the suit schedule property, and cannot have any personal decree against him.

43(iv) In **(2011) 12 SCC 18** (*cited above*), it has been held that the encumbrance is a charge or burden created by transfer of any interest in a property and it is

a liability attached to the property that runs with the land and reliance has been placed upon the decisions in **NATIONAL TEXTILE CORPORATION V. STATE OF MAHARASHTRA** reported in (1977) 3 SCC 4 : AIR 1977 SC 1566 and in **STATE OF H.P. V. TARSEM SINGH** reported in (2001) 8 SCC 104. Therefore, the plaintiffs in C.S.No.1027/2010, are not entitled to get any personal decree against the sixth defendant. A perusal of recitals in Ex.A8/B15 would also disclose the fact of subsistence of Exs.A1 and A2 agreements, has not been disclosed except the recovery proceedings initiated by the Indian Bank. However, the fact remains that the sixth defendant did discharge the loan amount due and payable to Indian Bank, and before parting with the large sum of money in the form of sale consideration, is expected to make local enquiry and verify with the Indian Bank and in that event, payments made by the original defendant C.Sabesan to them, would have come to his knowledge. But, the sixth defendant failed to do so. The sixth defendant has not entered into the witness box to refute the allegations and nothing prevented him to cross-examine P.W.1 after obtaining the leave of the Court; but, he did not do so. Therefore, the additional issue Nos.(1) and (2) are answered in affirmative and in favour of the plaintiffs in C.S.No.1027/2010.

44. **ISSUE No.2:-**

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44(i) A perusal of Ex.A1/B8 would read that the

recovery proceedings initiated by the Indian Bank has been stated and so also the legal proceedings connected with it, and the reasons for entering into the sale transaction. The terms and conditions would read among other things, that the obligation has been cast upon the purchaser viz. C.Sabesan, to fulfill certain terms and conditions and the only obligation cast upon the vendors, is that they have assured and confirmed that they have a valid and subsisting marketable title to the suit schedule property and there are no claims/mortgage other than one referred to above viz. the recovery proceedings initiated by the Indian Bank, and the legal proceedings and the vendors have also agreed to indemnify the purchaser and/or his nominees, in the event of any damages, loss or expenses incurred or suffered by him. In Clause 8, the consequences of breach of contract on the part of either parties, have also been stated. Under Ex.A2 agreement, entered into between the plaintiffs in C.S.No.933/2009, and Late C.Sabesan, the second party viz. C.Sabesan, agreed to pay and reimburse the first party, a sum of Rs.2.15 crores towards the cost already incurred by the said first party in constructing building and other structures upon the schedule property, etc., and the second party viz. C.Sabesan, agreed to pay the said sum on or before 21.1.2008, and it is in addition to the sale consideration fixed under Ex.A1 agreement, and upon receipt of the sale consideration of Rs.5 crores and

Rs.2.15 crores, the plaintiffs in C.S.No.933/2009, pay up and settle the Indian Bank's claim in T.A.No.28 of 2001 and S.A.No.66 of 2005 and redeem the suit schedule property from the Indian Bank and execute the sale deed in his favour on or before 21.1.2008 and also deliver free hold vacant possession of the suit schedule property. P.W.1/second plaintiff in C.S.No.933/2009 has also sent a letter under Ex.B10 dated 10.10.2007, to the Indian Bank authorising the Advocates of Late C.Sabesan viz. Tvl. M.Muthukumaran and Hari Krishnan, to jointly receive the original sale deeds relating to the suit schedule property, and also expressed his no objection in handing over the said title deeds subject to the clearance of the entire claim and the said letter has been issued only to receive the documents. Initially, Late C.Sabesan has parted with a sum of Rs.77 lakhs and also made a further sum of Rs.20 lakhs in the form of demand draft under Ex.B13 dated 1.12.2008, and got an endorsement in Ex.A1 marked as Ex.B22, in and by which, six months' time was granted from that date to fulfill his obligation.

44(ii) On behalf of the plaintiffs in C.S.No.933/2009, legal notice under Exs.A12/B16 dated 14.9.2009, was issued, for which, a reply was sent under Ex.B1 dated 3.10.2009. In the reply, a stand has been taken that Ex.A2 supplementary agreement, is only a ploy to cheat the other co-owners to the tune of Rs.215 lakhs and

it has been further stated that since the plaintiffs in C.S.No.933/2009, represented to C.Sabesan to wait for a little more time to pay up the entire OTS amount as they are negotiating a secret deal with the bank officials to reduce the amount further, Late C.Sabesan suspected their conduct and genuineness and hence, did not part with the sum of Rs.215 lakhs as demanded and on account of the said fact, Late C.Sabesan was prevented from directly negotiating with the Indian Bank.

44(iii) This Court while answering issue Nos.(1) to (3) in C.S.No.933/2009, has pointed out that with regard to the plaintiffs in C.S.No.933/2009 approaching C.Sabesan very many times to prevail upon him to pay the balance sale consideration, the same is not bagged by any documentary evidence. Similarly, Mr.C.Sabesan while he was alive, did not send any written communication stating about the genuineness of A2 and the reasons for non-performance of his obligation under Ex.A1. Unfortunately, Mr.C.Sabesan died pendency of C.S.No.933/2009, and his legal representatives came on record as defendants 2 to 5 in the said suit and in turn, filed the present suit (C.S.No.1027/2010). The third plaintiff in C.S.No.1027/2010/fourth defendant in C.S.No.933/2009, filed his proof affidavit in lieu of chief-examination and in the cross-examination, has deposed that he (D.W.1) is deposing on behalf of the other defendants also. The details of

cross-examination has been extracted above and it would clearly indicate that D.W.1 is not aware of the events took place, which led to Exs.A1 and A2 and the subsequent events, and would categorically admit that he was not personally aware of the transaction between his father C.Sabesan and the defendants 1 to 5 in C.S.No.1027/2010, and his father informed him and he has also gone through the documents and would further admit that there is no correspondence from 3.10.2007 till 1.12.2008, to show that his father was ready and willing to perform his part of the contract in terms of the agreement dated 3.10.2007, and there is nothing in writing to show that his father was ready and willing to perform his part of the contract after 2.12.2008, and it was only oral communication with A.G.Sampath - first plaintiff in C.S.No.933/2009 and the second defendant in the present suit (C.S.No.1027/2010). He would further depose that he was not personally aware whether the sixth defendant was aware of the agreement of sale dated 3.10.2007 (Ex.B8) prior to the filing of C.S.No.1027/2010, and the plaintiffs therein did not issue any legal notice to the sixth defendant and he was aware that the sixth defendant made the payment of balance dues payable to Indian Bank and thereafter, purchased the suit schedule property and however, denied the suggestion that he is a bonafide purchaser.

44(iv) As already pointed out, primary obligation has been cast upon Late C.Sabesan under Exs.A1 and A2 and except the self-serving statement that the plaintiffs in C.S.No.933/2009 asked him to wait as they are secretly negotiating with the Indian Bank to reduce the OTS amount, there is nothing on record in the form of written communication to the effect that such was the intention or understanding between them. However, in the light of statutory and legal position and findings in respect of additional issue Nos.(1) and (2), the plaintiffs in C.S.No.1027/2010, are entitled to get relief. Albeit issue No.(2) is to be answered in negative, the plaintiffs in C.S.No.1027/2010, are entitled to succeed for the above said reasons.

45. ISSUE No. (3) :-

45(i) Admittedly, Mr.C.Sabesan - original defendant in C.S.No.933/2009, while he was alive, has paid a sum of Rs.97 lakhs and thereafter, did not pay the remaining amount. His son, who is the fourth defendant in C.S.No.933/2009 and the third plaintiff in C.S.No.1027/2010, was examined as D.W.1 and in his cross-examination as extracted in the earlier paragraphs, has admitted that he is not a party to Exs.A1 and A2 agreements, and was not physically present during the signing of the agreements, and only on being apprised by his father and on perusal of the documents, he came to know

about Exs.A1 and A2, and further admitted that it is true to say that as per the agreement, the date of conclusion is mentioned as 21.1.2008, and the balance amount was not paid on the basis of the oral instructions given by the plaintiffs in C.S.No.933/2009/defendants 2 and 4 in C.S.No.1027/2010. D.W.1 also conceded that there is no written communication from his father C.Sabesan to the plaintiffs in C.S.No.933/2009, stating that he is ready and willing to clear the Bank dues and pay the balance sale consideration to the plaintiffs and also answered in affirmative to the suggestion that the Indian Bank vide letter dated 3.11.2008, called upon the plaintiffs in C.S.No.933/2009/defendants 2 and 4 in C.S.No.1027/2010, to pay Rs.200 lakhs in full and final settlement, in Ex.A5, with a condition that it should be accepted within seven days and the payment should be made within 30 days and in the proof affidavit, it is stated that 10% of the OTS amount should be paid immediately. D.W.1 once again, reiterated that his father Late C.Sabesan has not released Rs.180 lakhs being the remaining OTS amount to Indian Bank proposal, and that the balance amount was not paid only at the instance of the plaintiffs in C.S.No.933/2009 and Ex.A1 was extended for a period of six months from 2.12.2008 and got expired on 1.6.2009. D.W.1 also made a crucial admission that there is no written communication from his father to state that he is ready and willing to clear the

bank dues of Rs.180 lakhs and to pay the balance sale consideration from 2.12.2008 to 1.6.2009 and also added that even though his father was ready to pay the balance OTS amount, the plaintiffs in C.S.No.933/2009 did not respond favourably to the phone calls made by his father, and plainly stated that they are still negotiating with the Indian Bank and further admitted that there is no written communication from his father (Late C.Sabesan) to the plaintiffs saying that he is ready and willing to pay the bank dues and the balance sale consideration from 1.6.2009 till termination notice dated 14.9.2009. D.W.1 denied the suggestion that his father failed to pay the balance OTS amount to Indian Bank as per time schedule and consequently, the plaintiffs were forced to sell the property to the sixth defendant for a sum of Rs.185 lakhs and thereby sustained huge loss.

45(ii) This Court has pointed out in the earlier paragraphs, that unfortunately, there is no written communication between the plaintiffs in C.S.No.933/2009, and C.Sabesan - original defendant, with regard to the approach made by them to prevail upon C.Sabesan to part with the balance amount, or attempts made by C.Sabesan to pay the balance sale consideration and get the sale deed executed in his favour in respect of the suit schedule property. In the absence of any written communication either between the plaintiffs and the original defendant

viz. C.Sabesan, or vice versa, in C.S.No.933/2009, with regard to the alleged breach of the terms of the agreements, or readiness and willingness on the part of the original defendant to perform his part of obligation, the case projected by the respective parties in that regard, cannot said to be probablised. Moreover, the acceptable evidence in this regard, is lacking as both the parties merely plead oral requests/understanding. This Court in C.S.No.933/2009, has found that during the subsistence of Ex.A1 agreement, the property has been conveyed in favour of the sixth defendant, without putting the original defendant viz. C.Sabesan, in the form of written notice or communication. Insofar as Ex.A2 is concerned, it is a separate agreement itself for the reason that the original defendant had agreed to pay the sum of Rs.215 lakhs with regard to the improvements made in the suit schedule property, and the primary agreement is only Ex.A1 - agreement of sale. In the absence of any acceptable evidence and proof, it cannot be stated that the defendants 1 to 5 in C.S.No.1027/2010 had committed breach in honouring their commitment and therefore, issue No.(3) is answered in negative and against the plaintiffs in C.S.No.1027/2010.

46. ISSUE Nos. (4) and (5) :-

46(i) In (1999) 6 SCC 104 (K.S.SATYANARAYANA V.

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V.R.NARAYANA RAO), there was an agreement of sale and it

did not go through and the plaintiff therein did not file a suit for specific performance, but prayed for return of the money paid by him. The facts of the case would disclose that the first defendant is the owner of the property and he authorised in writing, the second defendant to enter into any sale agreement of the property with anyone and accordingly, the second defendant has entered into an agreement of sale with the plaintiff to sell the property. The suit after contest, came to be decreed against the second defendant and the suit against the first defendant, was dismissed on the ground that there was no privity of contract. The appeal filed by the plaintiff before the High Court, has also ended in dismissal. The question as to the entitlement of the plaintiff to restitution in terms of Sections 70 and 72 of the Indian Contract Act, 1872, arose for consideration and it is relevant to extract the said provisions as under:-

"70. Obligation of person enjoying benefit of non-gratuitous act:- Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the

former in respect of, or to restore, the thing so done or delivered.

....

72. *Liability of person to whom money is paid, or thing delivered, by mistake or under coercion:-* A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it."

46(ii) The Hon'ble Supreme Court of India in the above cited decision, has taken into consideration it's earlier decision reported in **AIR 1968 SC 1218 (MULAMCHAND V. STATE OF M.P.)**, wherein, it has been held that "in a case falling under Section 70 of the Indian Contract Act, the person doing something for another or delivering something to another cannot sue for specific performance of the contract, nor ask for damages for the breach of contract, for the reason that there is no contract between him and the other person for whom he does something or to whom he delivers something and where a claim for compensation is made by one person against another under Section 70, it is not on the basis of any subsisting contract between the parties, but on a different kind of obligation and the

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juris basis of the obligation in such a case is not founded upon any contract or tort, but upon a third category

of law viz. quasi-contract or restitution.” and the two decisions of the English Courts reported in **1943 AC 32 : (1942) 2 All ER 122 (FIBROSA V. FAIRBAIRN)** and **(1948) 1 KB 339 : (1947) 2 All ER 751 (NELSON V. LARHOLT)** have also been taken into consideration and the Supreme Court has set aside the judgments of the trial Court as well as of the High Court and decreed the suit with interest from the date of institution till realisation.

46(iii) In **(1985) II MLJ 179 (APPAVOO NADAR V. CHELLIAN NADAR AND OTHERS)**, the scope of Section 70 of the Indian Contract Act came up for consideration and it is relevant to extract paragraph Nos.20, 22 and 27 as under:-

“20. We are clear in our mind that the basis for the liability to pay back or to compensate under section 70 of the Act is not either a subsisting or an ineffective and unenforceable contract, but the absence of a contract and dehors it on voluntary acceptance and enjoyment of the thing done. The Supreme Court, in *State of West Bengal v. B.K.Mondal and Sons*, A.I.R. 1962 S.C. 779, while expounding the implication of the word 'lawfully' in section 70 of the Act, observed as

follows:

"...It is of course true that between the person claiming compensation and the person against whom it is claimed some lawful relationship must subsist, for that is the implication of the use of the word 'lawfully' in section 70; but the said lawful relationship arises not because the party claiming compensation has done something for the party against whom the compensation is claimed but because what has been done by the former has been accepted and enjoyed by the latter. It is only when the latter accepts and enjoys what is done by the former that a lawful relationship arises between the two and it is the existence of the said lawful relationship which gives rise

to the claim for compensation."

The doing of a thing or delivering of a thing lawfully by one to another need not necessarily have the origin in a contract, which may prove abortive; but also in other contingencies outside the sphere of contract. The terms of the section are indisputably wide, to clothe the Courts with the power and discretion to meet out substantial justice in those cases where there would be difficulties to demonstrate the existence of any relationship traceable to a contract. Our attention has not been drawn to any authority, which has countenanced a proposition that the operation of section 70 of the Act should be confined only to those cases where there was, in fact, a contract, but which could not be fulfilled or implemented for one reason or another. The principle is not to be confined to contracts which have proved ineffective, although as per the passage in Chitty on Contracts,

extracted above, most of the cases may be concerned with ineffective contracts.

.....

22. In our considered view, the principle under section 70 of the Act has no foundation in contract. It adumbrates the equitable principles inhibiting unjust enrichment and enabling the Court to order restitution. The principles may come into play even when there was a contract which proved abortive and ineffective. Even then relief could be asked for and granted not on the ground that there was a contract, but on the principle that no man should unjustly enrich himself without compensating for the same to the other, who gave the benefit and disgorging what he received, when what he received was not paid or delivered gratuitously. In order to maintain the action, it is not essential that the money sought to be recovered should have been received by the defendant under such circumstances

so as to create a privity between him and the plaintiff. The Court imposes an obligation to repay, on the defendant, on the ground that it is just and reasonable to do so. This obligation is independent of any consent or intention of parties or any privity of contract, and this obligation has got the foundation only in equity. It is only this equitable principle which has found expression in section 70 of the Act.

.....

27. In view of the above discussion of the legal position, we do not find any difficulty in according the relief of repayment of the money paid by the plaintiff when there is no factual impediment in the way. Once we do not accept the case of the first defendant that the payment of Rs.50,000/- was meant to serve different purposes and got discharged by the said purposes, and we are expressing the reasons therefor hereinafter, then it has got to be held that the defendant did

receive and enjoy the benefit of the payment made by the plaintiff. Merely because we have eschewed the case of the plaintiff that there was an oral agreement of sale on 18.5.1976 for want of substantiation of the same, we cannot shut our eyes to the factum of payment of Rs.50,000/-. Our inability to accept the plaintiff's case of oral agreement of sale will not provide a cover for the defendant with regard to his liability to refund this payment, in the absence of any convincing answer for the same both in law and on facts. As pointed out by the Supreme Court in *Hansraj Gupta and Company v. Union of India*, (1973)2 S.C.W.R. 509 = A.I.R. 1973 S.C. 2724, the remedy under section 70 of the Act could be accorded on equitable grounds, even though express agreement or a contract may not be proved. The words in the section 'such other person enjoys the benefit thereof' referable to the defendant in the suit, mean a conscious receipt of the benefit and utilising the same. It

would be a different matter if the payment was voluntary and was intended to be gratuitous. As observed by the Supreme Court in *State of West Bengal v. B.K.Mondal and Sons*, A.I.R. 1962 S.C. 779, lawful relationship arises not because the party claiming compensation has done something for the party against whom compensation is claimed, but because what has been done has been accepted and enjoyed by the latter. When the payment has been made by the plaintiff to the defendant without any gratuitous intention and the defendant receives it and enjoys it, though he would offer a discharge for the same, which is being found to be not tenable, the defendant must be deemed to have accepted and enjoyed that benefit and the principle inhibiting unjust enrichment would intervene and would enable the Court to direct restitution of that benefit to the plaintiff by the defendant. As we observed earlier, the principles do not present any difficulty for us for

countenancing the case of the plaintiff
for refund of the sum of Rs.50,000/-."

46(iv) This Court in the above cited decision, has also taken note of the decision in **AIR 1974 MADRAS 371 : (1974)2 MLJ 270 (KHADER KHAN SAHIB V. DORAISWAMI CHETTIAR)**, wherein, this Court has countenanced the invocation of Section 70 of the Indian Contract Act to a case where the plaintiff paid money which went in to discharge the mortgage decree, but for which payment the property would have been sold in Court auction.

46(v) In yet another decision reported in **AIR 1974 SC 602 : (1973)3 SCC 458 (THOMAS ABRAHAM V. NATIONAL TYRE AND RUBBER COMPANY)**, which was also referred to by this Court in the above cited decision, it was observed that "the principles to prevent unjust enrichment and order restitution could be clearly invoked even to the case of delivery of money".

46(vi) The decision reported in **AIR 1952 CALCUTTA 306 (RAM NAGINA SINGH V. GOVERNOR GENERAL IN COUNCIL)**, was also considered in the earlier judgment, wherein, it was observed that there was preponderance of authority in favour of the view that if the facts of a case could be fairly brought within the terms of Section 70 of the Act and the conditions expressly laid down therein were satisfied, the Section should be given effect to and

applied irrespective of the fact that there was in fact no contract between the parties.

46(vii) This Court keeping in mind, the principles laid down in the above cited decisions, has scanned the pleadings and evidence let in by the parties.

46(viii) P.W.1 would admit that the Indian Bank has already initiated auction proceedings under the SARFAESI Act and it was put to challenge in S.A.No.66/2005, wherein, vide order dated 7.11.2005, (Ex.B7), conditional stay was granted, and the plaintiffs in C.S.No.933/2009, deposited the amount under No Lien Account and at that juncture, the original defendant C.Sabesan voluntarily approached them to purchase the property and Exs.A1 and A2 agreements, came into being for a total consideration of Rs.715 lakhs and C.Sabesan has initially disbursed a sum of Rs.77 lakhs towards part settlement of Indian Bank's claim and later on, paid another sum of Rs.20 lakhs and got the agreement extended for a further period of six months under Ex.B22 and thereby, he has made a total payment of Rs.97 lakhs and in the light of the said payments made, further action was deferred and since the payments as ordered by the DRT, have not been made, the amount payable, comes to Rs.200 lakhs. According to P.W.1, since the time limit has been prescribed to clear the said sum, which was arrived at by way of OTS, they were constrained to approach the sixth defendant and sold the property to him by way of a

distressed sale for a sale consideration of Rs.185 lakhs under Ex.A8/B15. It was also conceded by P.W.1 that during the subsistence of Ex.A1 and without putting the original defendant on notice, the sale in favour of the sixth defendant, took place and the sale agreement under Ex.A1, came to be cancelled only by virtue of the legal notice dated 14.9.2009, under Ex.A12/B16. Thus, the plaintiffs in C.S.No.933/2009 got the benefit out of the payment of Rs.97 lakhs made by Late C.Sabesan. It was also conceded by P.W.1 that he did not send any written communication to the original defendant C.Sabesan calling upon him to perform his part of obligation under Exs.A1 and A2.

46(ix) In the light of the ratio laid down in **(1999) 6 SCC 104** and **(1985) II MLJ 179**, and also the various decisions relied on by this Court in the decision in **(1985) II MLJ 179 (DB)**, (*cited supra*), this Court is of the view that the plaintiffs in C.S.No.1027/2010/legal representatives of Late C.Sabesan - original defendant in C.S.No.933/2009, are entitled to get back the sum of Rs.97 lakhs. Therefore, issue Nos.(4) and (5) are answered accordingly.

47.**ISSUE No. (1) :-** In the light of the discussions made in respect of issue Nos.(4) and (5), the plaintiffs in C.S.No.1027/2010 are entitled to get refund of Rs.97 lakhs. Insofar as the interest claimed at the rate of 18% per annum, is concerned, as already observed,

Late C.Sabesan did not send any written communication as to his readiness and willingness to perform his part of the contract and only by way of reply under Ex.B1 to the legal notice under Ex.A12/B16, he has made his stand. Therefore, the plaintiffs in C.S.No.1027/2010 are not entitled to get interest at the rate claimed by them, but are entitled to get interest at the rate of 6% per annum. This issue is answered in the above terms.

48.In the result, C.S.No.933/2009 is dismissed and there shall be no order as to costs. C.S.No.1027/2010 is decreed with costs, as against the defendants 1 to 5 directing them to jointly and severally pay the plaintiffs Rs.97,00,000/- (Rupees ninety seven lakhs only) together with interest thereon at the rate of 6% per annum from the date of suit till realisation. There shall be a charge on the suit schedule property at the hands of the sixth defendant till the claim of the plaintiffs in C.S.No.1027/2010, is satisfied and there is no personal decree against the sixth defendant.

LIST OF WITNESSES AND EXHIBITS ON THE SIDE OF THE PLAINTIFFS IN C.S.No.933/2009:

P.W.1	G.Anbalagan	
Ex.A1	03.10.2007	Sale agreement
Ex.A2	06.10.2007	Sale agreement
Ex.A3	06.06.2008	Order in I.A.No.655/2005 on the file of the Debt Recovery Tribunal, Chennai

Ex.A4	18.7.2008	Compromise proposal
Ex.A5	03.11.2008	One Time Settlement offer by Indian Bank
Ex.A6	02.03.2009	Letter given by Indian Bank
Ex.A7	28.05.2009	Request letter given to Indian Bank with challan
Ex.A8	28.05.2009	Certified copy of sale deed
Ex.A9	15.06.2009	Full and final settlement by Indian Bank
Ex.A10	11.02.2008	Marriage invitation
Ex.A11	26.08.2009	Discharge summary
Ex.A12	14.09.2009	Legal notice to the defendants

LIST OF WITNESSES AND EXHIBITS ON THE SIDE OF THE DEFENDANTS IN C.S.No.933/2009:

D.W.1	Dr.Parameswaran Sabesan @ Aiyappan Sabesan	
Ex.B1	03.10.2009	Reply given by the defendants' Counsel
Ex.B2 series		Receipts (five numbers)
Ex.B3	03.01.2009	Letter by P.W.1 to the Chief Manager, Indian Bank
Ex.B4		Endorsement of Indian Bank in Ex.B3
Ex.B5	28.02.2003	Copy of Notice under Sec.13 (2) of the SARFAESI Act, 2002
Ex.B6	23.09.2005	Copy of notice of intended sale
Ex.B7		Copy of true extract of proceeding on 7.11.2005 and 6.12.2005 in S.A.No.66/2005
Ex.B8	03.10.2007	Sale agreement between the defendants 1 to 5 in C.S.No.1027 of 2010 and Late C.Sabesan
Ex.B9	06.10.2007	Memorandum of Understanding between defendants 2 and 4 in

C.S.No.1027/2010 and Late C.Sabesan

Ex.B10	10.10.2007	Copy of letter sent by G.Anbalagan to Indian Bank
Ex.B11	10.10.2007	Photocopy of Demand Draft for Rs.66 lakhs
Ex.B12	15.10.2007	Confirmation letter of the defendants 2 and 4 in C.S.1027/2010
Ex.B13	01.12.2008	Photocopy of Demand Draft for Rs.20 lakhs
Ex.B14	06.06.2008	Copy of Order in I.A.No.655/2005 in T.A.No.28/2001 by DRT II, Chennai
Ex.B15	28.05.2009	Certified copy of Sale deed in favour of the sixth defendant in C.S.1027/2010
Ex.B16	14.09.2009	Counsel's notice by the defendants 2 and 4 in C.S.1027/2010 to Late C.Sabesan
Ex.B17	25.09.2009	Encumbrance Certificate
Ex.B18	24.10.2009	Certified copy of the First Information Report
Ex.B19	16.08.2010	Death certificate of C.Sabesan
Ex.B20	19.08.2010	Copy of legal heirship certificate of C.Sabesan
Ex.B21	19.08.2010	Copy of power of attorney by Priyadharshini to Rathna Sabesan
Ex.B22	02.12.2008	Endorsement on the rear side of page 1 of Ex.B8 regarding renewal of agreement

sd/.M.S.N.J
18.01.2016

//Certified to be a true copy//
Dated this the day of 2016