

CASE NO.:
Appeal (civil) 2583 of 2005

PETITIONER:
Umabai & Anr.

RESPONDENT:
Nilkanth Dhondiba Chavan (Dead) by Lrs. & Anr.

DATE OF JUDGMENT: 13/04/2005

BENCH:
H.K. Sema & S.B. Sinha

JUDGMENT:
J U D G M E N T

[Arising out of S.L.P. (Civil) No. 23864 of 2004]

S.B. SINHA, J :

Leave granted.

This appeal is directed against a judgment and order dated 3.9.2004 passed by the Bombay High Court in Letters Patent Appeal No.102 of 1990 whereby and whereunder the Appeal preferred against a judgment and order dated 30.1.1990 passed by a learned Single Judge of the said Court in First Appeal No.120 of 1984 affirming the judgment and decree dated 5.9.1983 passed by the Civil Judge, Sr. Division, Kolhapur in Special Suit No. 1 of 1979; was allowed.

The basic fact of the matter is not in dispute. The suit premises measure about 346 sq. yds. of land. Structures consisting of ground and first floor were built thereupon. The Appellant No.2 was a tenant in the ground floor of the said building.

A decree at the instance of his creditor was said to have been passed against the plaintiff-Respondents herein. The First Respondent with a view to repay the said loan entered into an agreement of sale with the Appellants on or about 30.12.1970. In terms of the said agreement, the plaintiff-Respondents agreed to sell the said property for a consideration of Rs.45,000/-, out of which a sum of Rs.3,434/- was paid by way of earnest money and the rest being sum of Rs. 40,076/- was to be disbursed to the creditors. Pursuant to or in furtherance of the said agreement, the plaintiff-Respondents executed a deed of sale in favour of the First Appellant herein. An agreement of sale was also entered into by and between the parties on the same day, in terms whereof the First Appellant agreed to reconvey the said property in favour of the First Respondent on receipt of the said sum of Rs.45,000/- between a period of seven years and nine years from the said date. The Respondents treating the said transaction to be one of mortgage filed an application purported to be under Sections 4(e) and 7(f) before the competent authority under the Maharashtra Debt Relief Act, inter alia, for a declaration that he is a 'debtor' thereunder and his debt should be discharged. While the said application was pending, a notice was sent by the plaintiff-Respondents to the Appellants herein wherein the aforementioned transaction was said to be a mortgage. A plea was raised therein that the said debt stood discharged under the provisions of the Maharashtra Debt Relief Act. It was contended that the First Appellant herein had already received more than Rs.50,000/- out of the income from the said property by way of rent. Despite the same, the Appellants asked for specific performance of the said agreement of re-conveyance. In her reply, the First Appellant offered to reconvey the property on receipt of a further sum of Rs.4,646/-, which allegedly was spent by her towards repairs of the house.

Thereafter, the suit was filed by the Respondents herein in the Court of Civil Judge, Senior Division at Kolhapur on 30.12.1978 which was marked as Civil Suit No.1 of 1979. The Respondents in their plaint raised a plea that the value of the suit property was about Rs.2 lacs but despite the same with a view to discharge their dues they requested the Appellants to advance a loan of Rs.50,000/- and to which the Appellants agreed for a sum of Rs.45,000/-; whereupon the suit property was agreed to be mortgaged. It was further contended that as the Appellants did not possess a money lenders' licence and the period of repayment was large, the parties agreed that the Respondents would execute a deed of mortgage by way of conditional sale; but the said document was termed as a deed of sale wherein a clause of re-conveyance was to be incorporated. However, such condition having mistakenly been not mentioned in the deed of sale and which having been noticed, the First Appellant entered into an agreement of re-conveyance of the suit property in the name of the Respondents on the same day. Both the deeds were said to be part of the same transaction and in fact, it was categorically averred that the "sale deed transaction" is a "mortgage transaction". As regard readiness and willingness on the part of the Respondents, it was averred in the plaint:

"Accordingly to the conditions in the agreement Plaintiff was and is ready to pay the amount to defendant. And also the Plaintiff is and was ready to bear the cost of reconveyance deed. According to the agreement Plaintiff is and was ready to prepare the reconveyance deed\005"

In the said suit, the plaintiff-Respondents prayed for the following reliefs :

"(a) The defendant no.1 be ordered to prepare the sale deed of the suit property and get it registered as per the agreement. The Plaintiff will pay the amount when the order is passed.

(b) The sale deed be prepared in the plaintiff's name through the Honourable Court if the defendant no.1 denies the same.

(c) According to the mortgage document at sr. no.7 dated 2.11.1971, the suit property be mortgaged Relief and be given in the possession of the Plaintiff.

(d) The declaration be passed under the provision of Mumbai Debt Relief Act that the Plaintiff has been debt released and the possession of the debt released suit property be given to the plaintiff.

(e) If not done as mentioned above, then the accounting of mortgage be done and whatever amount remains be given to the Plaintiff or else Plaintiff be ordered to pay the amount to defendant no.1 and the reconveyance deed for the mortgage relief be made in the name of the plaintiff by the defendant on denial it should be done through the court and possession of suit property be given to the plaintiff.

(f) The Plaintiff be allowed to amend or alter the plaint, if necessary."

The Appellants, however, in their written statement denied and disputed the contentions raised in the Plaint. It was averred that the

transaction was for a sale with an agreement of reconveyance. The Appellants denied and disputed that the First Respondent was 'ready to act as per the agreement'. It was contended that he never offered any amount to the Appellants. It was further contended :

"\005But plaintiff did not take any steps to reconvey the sale deed as per the notice of the plaintiff. But the plaintiff did nothing. So the Plaintiff has committed a breach of agreement and on that count suit may kindly be dismissed. On the contrary Plaintiff had taken a stand that the suit transaction is mortgaged and from rent received the amount has been satisfied such a wrong and false stand was taken by the Plaintiff. Also before the Tahsildar proceeding was initiated saying that the property is redeemed (Property is released from the debt) from the total behaviour of plaintiff it cannot be said that Plaintiff was ready to fulfill the terms of agreement."

The Trial Court dismissed the said suit holding (i) the suit property was not undervalued; (ii) consideration of Rs.45,000/- mentioned in the document was not inadequate; (iii) the transaction was one of sale and not of mortgage; (iv) the suit property was not self-redeemed under the Maharashtra Debt Relief Act; (v) the plaintiffs were not ready and willing to perform their part of contract; and (vi) the defendants had spent a sum of Rs.4,646/- over the repairs of the suit property.

Before the High Court, the First Respondent herein gave up the plea that he was a debtor in terms of the Maharashtra Debt Relief Act. The learned Single Judge of the High Court while holding that the transaction was that of sale and not mortgage proceeded also to consider as to whether the transaction was a mortgage or not. As regard the plea of purported readiness and willingness on the part of the Respondents, it was opined :

"\005It will not be open to the plaintiff to put his own construction on the terms but he would be bound by the terms as determined by the Court. It will not be open to the plaintiff to vary the terms according to his interpretation and yet claim specific performance. In the present case the plaintiffs set up a plea under the Maharashtra Debt Relief Act. In other words, the plaintiffs sought to contend that their debt under the suit transaction was discharged under the Maharashtra Debt Relief Act. They were, therefore, not liable to pay and yet claim reconveyance. This is not the conduct of a party who is expected to perform his part of the terms and conditions of the contract of repayment of Rs.45,000/-. The first plaintiff had applied under the aforesaid Act to the Mamlatdar for a declaration that he was a debtor and that the debt had been discharged. He had engaged an Advocate in those proceedings. When the present suit was filed, the plea about the aforesaid proceedings was set up in the forefront and a conditional offer to pay was made subject to the result of those proceedings. In the alternative, the plaintiffs set up a case of a mortgage which case I have found as not proved both on facts as also in law. The plaintiffs averred that the entire mortgage debt had been paid up from out of the income of the property. They offered to pay if any amount was found due on taking accounts. In my judgment, the aforesaid rival pleas set up by the plaintiffs disentitle them to a decree for specific performance. By setting up these rival pleas they have exhibited their unwillingness to make an unconditional offer to pay which was a pre-requisite condition in the agreement of

reconveyance where it was provided that, if after the period of 7 years and within the period of 9 years, the plaintiff paid the amount of Rs.45,000/- along with incidental charges of the sale deed, the defendants would reconvey the property\005"

The Division Bench of the High Court, however, by reason of the impugned judgment reversed the said findings holding that although evidences were led to show that the amount of Rs.45,000/- paid by the Appellants to the Respondents was a loan but having regard to Section 58(c) of the Transfer of Property Act, the document could not be construed to be a deed of mortgage.

The Division Bench differed from the learned Single Judge and the learned Trial Judge on their finding as regard valuation of the property holding that the Respondents had proved that the sale-deed was under-valued, observing :

"\005From the fact that the agreement for reconveyance provided for the payment of Rs.45,000/- after 7 years and before nine years by itself would indicate that the transaction was much more than a mere deed of conveyance. No interest was provided for. It is in these circumstances that the court must consider whether the discretion should be exercised in favour of the Plaintiff."

As regard readiness and willingness on the part of the Respondents to perform their part of contract in terms of the said agreement of reconveyance dated 1.1.1971, the Division Bench came to the conclusion that the plaintiff-Respondents had pleaded and proved the said fact.

Mr. Ajit S. Bhasme, learned counsel appearing on behalf of the Appellants, in support of the appeal would urge that the Division Bench of the High Court clearly erred in holding that the Respondents were ready and willing to perform their part of contract. According to the learned counsel, the plea taken by the Respondents that the amount of debt stood satisfied from the income therefrom by way of rent and, thus, the debt stood discharged was wholly inconsistent with a plea of readiness and willingness. Totality of circumstances, the learned counsel would contend, vis-à-vis the conduct of the parties would be relevant for determining as to whether the plaintiff-Respondents have been able to satisfy the court as regard fulfillment of the conditions laid down under Section 16(c) of the Specific Relief Act, 1963.

Mr. Bhasme would submit that a manifest error had been committed by the Division Bench of the High Court in arriving at the finding that the plaintiff-Respondents pleaded and proved that they had all along been ready and willing to perform their part of contract; without taking into consideration that they initiated proceedings before the competent authority under the Maharashtra Debt Relief Act and raised insufficient plea in that behalf in the notice dated 9.6.1978 and furthermore made clear averments in the plaint that they were debtors and their debt stood discharged.

The learned counsel would contend that from a perusal of the plaint, it would appear that the plaintiffs made a conditional offer which does not satisfy the requirement of Section 16(c) of the Specific Relief Act. In support of the said contention, the learned counsel would rely upon Prem Raj vs. D.L.F. Housing & Construction Pvt. Ltd. & Another [(1968) 3 SCR 648], Mahabir Prasad Jain vs. Ganga Singh [(1999) 8 SCC 274], Pushparani S. Sundaram and Others vs. Pauline Manomani James (Deceased) and Others [(2002) 9 SCC 582], Manjunath Anandappa Urf Shivappa Hanasi vs. Tammanasa and Others [(2003) 10 SCC 390] and Pukhraj D. Jain and Others vs. G. Gopalakrishna [(2004) 7 SCC 251].

Mr. Bhasme would submit that the Division Bench had wrongly interfered with the concurrent findings of fact arrived at by the two courts.

Mr. A.V. Sawant, the learned Senior Counsel appearing on behalf of the Respondents, on the other hand, would contend that there is no limitation as regard exercise of jurisdiction by a Division Bench of the High Court while entertaining a Letters Patent Appeal as in such an appeal, the Court is entitled to consider the questions of both fact and law. Reliance, in this behalf, has been placed on Smt. Asha Devi vs. Dukhi Sao and Another [(1974) 2 SCC 492].

Mr. Sawant would submit that the plea that a transaction is a mortgage vis-à-vis an ostensible sale cannot be said to be fraudulent nor dishonest which would debar the court from granting an equitable relief for specific performance of contract.

The learned counsel would argue that the Trial Judge as also the learned Single Judge of the High Court overlooked the pleadings of Respondents in the plaint as also the evidence adduced in this behalf as regard readiness and willingness on their part of contract and, thus, the Division Bench of the High Court cannot be said to have committed any error in interfering therewith. Readiness and willingness to perform one's part of contract must be judged, Mr. Sawant would submit, upon taking into consideration all the attending circumstances as also the conduct of both the parties and, therefore, it is not necessary to deposit the amount in court or to be possessed of the requisite amount at all times. Strong reliance, in this behalf, has been placed on The Bank of India Ltd. and Others vs. Jamsetji A.H. Chinoy and Messrs. Chinoy and Co. [AIR (37) 1950 PC 90], Nathulal vs. Phoolchand [(1969) 3 SCC 120], Smt. Indira Kaur and Others vs. Sheo Lal Kapoor [(1988) 2 SCC 488], Tamboli Ramanlal Motilal (Dead) by Lrs. vs. Ghanchi Chimanlal Keshavlal (Dead) by Lrs. And Another [(1993) Supp. (1) SCC 295]; and Mushir Mohammed Khan (Dead) by Lrs. Vs. Sajeda Bano (Smt.) and Others [(2000) 3 SCC 536].

It may be true that level of a document is not decisive. A true nature of transaction must be determined having regard to the intention of the parties as well as the circumstances attributing thereto as also the wordings used in the document in question.

In this case, admittedly, two documents were executed on the same day. In view of the express provisions contained in Section 58(c) of the Transfer of Property Act, indisputably the transaction in question was not a mortgage by way of conditional sale.

There exists a distinction between mortgage by conditional sale and a sale with a condition of repurchase. In a mortgage, the debt subsists and a right to redeem remains with the debtor; but a sale with a condition of repurchase is not a lending and borrowing arrangement. There does not exist any debt and no right to redeem is reserved thereby. An agreement to sell confers merely a personal right which can be enforced strictly according to the terms of the deed and at the time agreed upon. Proviso appended to Section 58(c), however, states that if the condition for re-transfer is not embodied in the document which effects or purports to effect a sale, the transaction will not be regarded as a mortgage. [See Pandit Chunchun Jha vs. Sheikh Ebadat Ali and Another (1955) 1 SCR 174, Shri Bhaskar Waman Joshi and Others vs. Shri Narayan Rambilas Agarwal (deceased) and Others (1960) 2 SCR 117], K. Simrathmull vs. Nanjalingiah Gowder, AIR 1963 SC 1182; Mushir Mohammed Khan (supra); and Tamboli Ramanlal Motilal (supra)],

The plaintiff in a suit for specific performance of contract may raise an alternative plea that the transaction is a mortgage by way of conditional sale but he must be ready and willing either to repay the debt or pay the amount of consideration as agreed upon. In the instant case, the First

Respondent herein, however, raised a specific plea that he was a debtor and that the deed of mortgage was executed only because the Appellants were not licensed money lenders. He not only approached the competent authority under the Maharashtra Debt Relief Act for a declaration that he was a debtor and stood discharged from his debt, but also in the plaint he sought for a decree for possession of the suit land on the premise that the provisions of the Maharashtra Debt Relief Act were attracted. He even asked for a decree of accounting.

It may be true that the plaintiff had made alternative prayers of specific performance of the agreement of reconveyance and redemption of mortgage but it appears that the plaint starts with the description of the mortgage property.

In the plaint, the plaintiffs averred :

"2\005The sale deed and the agreement are two documents of the same transaction. They are written in same meeting and registered on same day. Sale deed transaction is a mortgage transaction\005\005"

"3. The Plaintiff as agreed wrote a sale deed in the name of defendant no.1 on 1.1.1971 as a security to the loan\005"

After reciting the relevant stipulations contained in the registered deed of agreement of sale to the effect that the First Appellant would reconvey the suit property in his name and got a document registered, it was averred :

"Accordingly to the conditions in the agreement Plaintiff was and is ready to pay the amount to defendant. And also the Plaintiff is and was ready to bear the cost of reconveyance deed. According to the agreement Plaintiff is and was ready to prepare the reconveyance deed\005"

However, from paragraph 6 onwards, a plea as regard creation of a mortgage was raised specifically contending :

"(7). Plaintiff is a debtor under Mumbai Debt Relief Act. According to the Plaintiff the mortgage amount in the said document has been shunked. Therefore Plaintiff prays that accordingly it be decided.

(8) If not decided as above then the accounting of the mortgage property shall be done under the provisions of Mumbai Money Lending Act. The defendant has earned a large amount by giving the mortgage property on rental basis. After the accounting whatever amount remains for paying or taking accordingly the Plaintiff is ready to give and take."

It was further averred :

"The Plaintiff prays that if it is not done as mentioned above then the amount of Rs.45,000/- which the Plaintiff is ready to pay to the defendants be given to the defendant and the Plaintiff be given the possession of mortgage relief suit property with necessary documents."

Reading the plaint as a whole, it becomes evident that the First Respondent principally raised a contention that the transaction was of

mortgage and the sale stood redeemed and he was discharged from the debt. He moreover prayed for a decree for accounting, but contended that only in the event, such prayer is not granted, he was ready to pay the defendants the said sum of Rs.45,000/- The averments made in the pleadings must be construed reasonably and so read the statement made as regard purported readiness and willingness to pay the stipulated amount to the defendants according to the conditions mentioned in the agreement cannot be read in isolation.

In his examination-in-chief although he stated :

"\005I am and I was ready to pay the consideration as per the agreement. I am ready to pay the consideration amount of Rs.45,000/-. I was also ready to pay the said sum. I am also ready to pay the costs of the registration of the sale deed".

but in his cross-examination, he admitted :

"I am not doing any business or work, since last 10 years. I have no source of income. I have no bank account. I am not to receive any amounts from any one. I have no amount with me. I am money less since last 10 years. At the time of giving notice (9.6.1978) I have no my own accounts. It is not true to say that I was never ready and willing to pay the sums of the defendants, for the reconveyance of the suit house."

The learned trial Judge further noticed the following statement of the plaintiffs in paragraph 18 of the cross-examination :

"It is my prayer in the suit that the suit property is to be redeemed without any amount being given, as the said sum is already satisfied out of the income of rent, received by the Defendant. It is also my prayer that account of dues be taken and if necessary, I would pay if any dues remained unsatisfied. It is also my say that the suit transaction is of mortgage nature."

(Emphasis supplied)

It is now well-settled that the conduct of the parties, with a view to arrive at a finding as to whether the plaintiff-Respondents were all along and still are ready and willing to perform their part of contract as is mandatorily required under Section 16(c) of the Specific Relief Act must be determined having regard to the entire attending circumstances. A bare averment in the plaint or a statement made in the examination-in-chief would not suffice. The conduct of the plaintiff-Respondents must be judged having regard to the entirety of the pleadings as also the evidences brought on records.

In terms of Form Nos. 47 and 48 appended to Appendix A of the Code of Civil Procedure, 'the plaintiff must plead that he has been and still is ready and willing specifically to perform the agreement on his part of which the defendant has had notice' or 'the plaintiff is still ready and willing to pay the purchase-money of the said property to the defendant'. The offer of the plaintiff in the instant case is a conditional one and, thus, does not fulfill the requirements of law.

In Bank of India (supra), it was held :

"\005It is true that plaintiff 1 stated that he was buying for

himself, that he had not sufficient ready money to meet the price and that no definite arrangements had been made for finding it at the time of repudiation. But in order to prove himself ready and willing a purchaser has not necessarily to produce the money or to vouch a concluded scheme for financing the transaction. The question is one of fact and in the present case the appellate Court had ample material on which to found the view it reached\005"

The said decision was, thus, rendered on its own fact. Such a conclusion was arrived at having regard to the fact that ample material had been brought on records. There must, thus, be some evidence to show that the plaintiff could arrange for the amount stipulated for payment to the vendor as and when called upon to do so. In this case no such evidence was disclosed.

In Nathulal (supra), the contract was required to be performed in certain sequence. Therein it was found that certain arrangements had been made by the Respondent therein for paying the amount due. It was held that so long as Nathulal did not carry out his part of contract, Phoolchand could not be called upon to pay the balance of the price and it was in that situation held that latter at all relevant time was ready to perform his part of contract.

The said decision also has no application in the instant case.

In Smt. Indira Kaur (supra), this Court merely held that for determining the question as regard readiness and willingness on the part of the plaintiff to perform his part of contract, the Court must examine the position of both the parties. This Court did not say, as was submitted by Mr. Sawant, that the conduct of both the parties must be taken into consideration. In that case, the defendant's contention that he had not received the notice of the plaintiff was held to be incorrect, as despite his alleged receipt of notice, he admitted to have visited the Sub-Registrar's office on 16.8.1977. In that situation it was held that the defendant was not ready and willing to perform his part of contract. It was held that as of fact that the plaintiff had done what he could do. He went to the Sub-Registrar's Office, he filed an application for recording his presence. The said decision, therefore, has no application in the instant case.

On the other hand in Mahabir Prasad Jain (supra), it has been held :

"22. The way in which the respondent has been instituting different proceedings in different fora within a short time making inconsistent allegations shows that the respondent has been abusing the process of court and not come to court with clean hands. He is not entitled to get any equitable relief under the Specific Relief Act."

In Pushparani S. Sundaram (supra), it was opined :

"\005Inference of readiness and willingness could be drawn by the conduct of the plaintiff, the circumstances in a particular case in other words to be gathered from the totality of circumstances."

It was further held

"\005So far these being a plea that they were ready and willing to perform their part of the contract is there in the pleading, we have no hesitation to conclude, that this by itself is not sufficient to hold that the appellants were ready and willing in terms of Section 16(c) of the

Specific Relief Act. This requires not only such plea but also proof of the same. Now examining the first of the two circumstances, how could mere filing of this suit, after exemption was granted be a circumstance about willingness or readiness of the plaintiff. This at the most could be the desire of the plaintiff to have this property. It may be for such a desire this suit was filed raising such a plea. But Section 16(c) of the said Act makes it clear that mere plea is not sufficient, it has to be proved."

In N.P. Thirugnanam (Dead) by Lrs. vs. Dr. R. Jagan Mohan Rao and Others [(1995) 5 SCC 115], this Court held :

"\005The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available..."

Yet again in Manjunath Anandappa (supra), this Court held :

"27. The decisions of this Court, therefore, leave no manner of doubt that a plaintiff in a suit for specific performance of contract not only must raise a plea that he had all along been and even on the date of filing of suit was ready and willing to perform his part of contract, but also prove the same. Only in certain exceptional situation where although in letter and spirit, the exact words had not been used but readiness and willingness can be culled out from reading all the averments made by the plaintiff as a whole coupled with the materials brought on record at the trial of the suit, to the said effect, the statutory requirement of Section 16(c) of the Specific Relief Act may be held to have been complied with."

In Pukhraj D. Jain (supra), it was held :

"6. Section 16(c) of the Specific Relief Act lays down that specific performance of a contract cannot be enforced in favour of a person who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant. Explanation (ii) to this sub-section provides that the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction. The requirement of this provision is that the plaintiff must aver that he has always been ready and willing to perform the essential terms of the contract. Therefore, not only should there be such an averment in the plaint but the surrounding circumstances must also indicate that the readiness and willingness continue from the date of the contract till the hearing of the suit. It is well settled that equitable remedy of specific performance cannot be had on the basis of pleadings which do not contain averments of readiness and

willingness of the plaintiff to perform his contract in terms of Forms 47 and 48 CPC. Here Respondent 1 himself sent a legal notice rescinding the contract and thereafter filed OS No. 801 of 1977 on 7-11-1977 claiming refund of the advance paid by him. In fact the suit for recovery of the amount was decreed by the trial court on 24-7-1985 but he himself preferred a revision against the decree wherein an order of rejection of the plaint was passed by the High Court. In such circumstances, it is absolutely apparent that Respondent 1 was not ready and willing to perform his part of the contract and in view of the mandate of Section 16 of the Specific Relief Act, no decree for specific performance could be passed in his favour. The trial court, therefore, rightly held that the suit filed by Respondent 1 was not maintainable."

Furthermore, the First Respondents had raised inconsistent plea in the sense that he had categorically taken a standing that the debt stood discharged. Such a plea was irreconcilable with the plea that he had all along been ready and willing to perform his part of contract. It is in that situation, the decision of this Court in Prem Raj (supra) is attracted wherein it was held that although inconsistent reliefs by a party to the suit is maintainable but it must be shown that each of such pleas is maintainable.

The plea of automatic redemption of mortgage and discharge from debt raised on the part of the Respondents herein cannot stand with a plea of readiness and willingness on his part to perform their part of contract.

The Division Bench of the High Court, thus, posed a wrong question unto itself. It also failed to take into consideration the statement of the plaintiff in his cross-examination and in particular paragraphs 12 and 19 thereof in their proper perspective. The statements made by the plaintiff before the court, if read as a whole would clearly show that he was neither in a position to raise any fund. He proceeded on the basis that he was not required to pay any amount. The Division Bench furthermore misdirected itself in holding :

"The test would be whether the Plaintiff was in a position to pay the money on direction by the court and not whether he had the money. No such question was ever put to him to suggest that if he was called upon by the Court to deposit the money, he had no means to deposit the money or make it available for deposit.

It was for the plaintiff to prove his readiness and willingness to pay the stipulated amount and it was not for the Appellants to raise such question. The Division Bench furthermore considered irrelevant facts in holding that the plaintiff deposited the amount of Rs.60,000/- in the Court of Appeal to arrive at the conclusion that the plaintiff-Appellant was ready and willing to perform his part of contract. Deposit of any amount in court at the appellate stage by the plaintiffs by itself would not establish their readiness and willingness to perform their part of the contract within the meaning of Section 16(c) of the Specific Relief Act. It further erred in holding that the mere fact that he did not have money at the time of issuance of the notice, the day when plaint was filed or at the time of his evidence was of no consequence in total disregard of statutory mandate contained in Section 16(c) of the Specific Relief Act. Similarly, the finding of the Division Bench that the prayer for grant of specific performance of contract and in the alternative for redemption of mortgage or cancellation of debt cannot be said to be pleas which could not be raised or be a bar for the court to consider to grant the relief of specific performance, cannot be accepted, as pleas of specific performance of contract and cancellation of debt and/or a decree for accounting are inconsistent.

As regard the question as to whether the transaction was undervalued, the Appellate Court committed a manifest error in taking into consideration the fact that payment of Rs.45,000/- was to be made after 7 years and before 9 years without any interest is a circumstance to hold that discretion should be exercised in favour of the plaintiff-Respondents.

In *Sargunam (Dead) by Lr. Vs. Chidambram and Another* [(2005) 1 SCC 162], this Court observed :

"In the case of *Mademsetty Satyanarayana v. G. Yelloji Rao*, it has been held that the jurisdiction to decree specific performance is discretionary and the court is not bound to grant such relief merely because it is lawful to do so; that in cases where one of the three circumstances mentioned in Section 20(2) is established, no question of discretion arises\005"

[See also *M.V. Shankar Bhat and Another vs. Claude Pinto since (Deceased) by Lrs. And Others.* \026 (2003) 4 SCC 86].

It is furthermore trite that normally a court of appeal would not interfere with a concurrent finding of fact which is based on appreciation of oral evidence.

In *Bank of India (supra)* whereupon Mr. Sawant placed reliance, the Privy Council held :

"Their Lordships are not unmindful of the great weight to be attached to the findings of fact of a Judge of first instance who sees and hears the witnesses and is in a position to assess their credibility from his own observation. For this reason they would be reluctant to differ from the learned Judge in this instance if his conclusion on the issue under consideration had turned on the impression made by *Jamsetji* in the witness-box\005."

Yet in *Manjunath Anandappa (supra)*, it was held :

"It is now also well settled that a court of appeal should not ordinarily interfere with the discretion exercised by the courts below."

The question also came up for consideration in *Collector of Customs, Bombay vs. Swastic Woollens (P) Ltd. and Others* [(1988) Supp. SCC 796]

"\005An appeal has been provided to this Court to oversee that the subordinate tribunals act within the law. Merely because another view might be possible by a competent court of law is no ground for interference under Section 130-E of the Act though in relation to the rate of duty of customs or to the value of the goods for purposes of assessment, the amplitude of appeal is unlimited. But because the jurisdiction is unlimited, there is inherent limitation imposed in such appeals. The Tribunal has not deviated from the path of correct principle and has considered all the relevant factors. If the Tribunal has acted bona fide with the natural justice by a speaking order, in our opinion, even if superior court feels that another view is possible, that is no ground for substitution of that view in exercise of power under clause (b) of Section 130-E of the Act."

[See also *West Bengal Electricity Regulatory Commission vs. CESC Ltd.* (2002) 8 SCC 715 and *Commissioner of Customs, Chennai vs. Adani*

Exports Ltd. and another (2004) 4 SCC 367]

It may be, as has been held in Asha Devi (supra) that the power of the Appellate Court in intra court appeal is not exactly the same as contained in Section 100 of the Code of Civil Procedure but it is also well-known that entertainment of a Letters Patent Appeal is discretionary and normally the Division Bench would not, unless there exist cogent reasons, differ from a finding of fact arrived at by the learned Single Judge. Even as noticed hereinbefore, a court of first appeal which is the final court of appeal on fact may have to exercise some amount of restraint.

For the reasons aforementioned, the impugned judgment cannot be sustained which is set aside accordingly. The appeal is allowed. In the facts and circumstances of the case, however, there shall be no order as to costs.

JUDIS