Deccan Paper Mills Co. Ltd. vs Regency Mahavir Properties . on 19 August, 2020

Equivalent citations: AIR 2020 SUPREME COURT 4047, AIRONLINE 2020 SC 701

Author: R.F. Nariman

Bench: Indira Banerjee, Navin Sinha, R. F. Nariman

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. 5147 OF 2016

DECCAN PAPER MILLS CO. LTD. …APPELLANT

VERSUS

REGENCY MAHAVIR PROPERTIES & ORS. …RESPONDENTS

JUDGMENT

R.F. Nariman, J.

1. The hearing in this appeal followed in the wake of the hearing in Civil Appeal Nos. 5145 of 2016, 5158 of 2016, and 9820 of 2016. The brief facts necessary to appreciate the controversy in this appeal are as follows:

> i. By an agreement dated 22.07.2004 between the Appellant, Deccan Paper Mills Co. Ltd. [hereinafter referred to as "Deccan"] and the Respondent No. 2 company, M/s Ashray Premises Pvt.
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> Ltd. [hereinafter referred to as "Ashray"], Deccan, being the owner of approximately 80,200 sq. meters of land bearing Survey Nos. 96B, 96C, and 96D at village Mundhwa, District Pune, decided to develop a portion of the said land, i.e., 32,659 sq. meters. It is not necessary to enter into the nitty-gritty of the said agreement. However, it is enough to note that this agreement contained clause 7(m), in which it is stated :
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> "7. The Owner and the Developer hereto covenant that upon the execution of these presents:

xxx xxx xxx m. The Owner shall have no objection if at any stage during the continuance of this agreement the Developer assigns, delegates the rights, under this agreement or the Power of Attorney/writings executed in furtherance hereof to any other person, firm or party without violating or disturbing any of the terms and conditions of this agreement." ii. This agreement did not contain any arbitration clause. Pursuant to clause 7(m), on 20.05.2006, an agreement was entered into between Respondent No. 2 – Ashray, and Respondent No.1 – Regency Mahavir Properties, a partnership firm [hereinafter referred to as "Regency"], by which Ashray assigned the execution of the agreement dated 22.07.2004 to Regency. The aforesaid agreement contained an arbitration clause, which is set out as follows:

"14. If during the continuance of the said Agreement/these presents or at any time afterwards any difference shall arise between the parties herein and the heirs, executors or administrators of the other of them or between their respective heirs, executors or administrators in regard to the construction of any of the articles herein contained or to any division (..illegible) thing to be made or done in pursuance hereto or to any other matter or thing relating to the said Agreement/these presents the same shall be forthwith referred to one arbitrator if the parties agree or otherwise to two arbitrators, one to be appointed by each party to the reference or to an Umpire to be chosen by the Arbiters before entering upon the reference and every such reference shall be deemed to be an Arbitration in accordance with and subject to the provisions of The Arbitration & Conciliation Act, 1996 or any statutory modification or re-enactment thereof for the time being in force." iii. A deed of confirmation dated 13.07.2006 followed, by which it was stated that this deed was to be treated as part of the 20.05.2006 agreement, in which the assignment by Ashray to Regency was reaffirmed. According to Deccan, a fraud had been played by one Mr. Atul Chordia, Respondent No.3 herein (Defendant No. 3 in the suit filed by Deccan), which is pleaded in Special Civil Suit No. 1400 of 2010, which was filed on 13.07.2010, as follows:

"6. In the year 2006 or thereabout, the Defendant No.3 approached directors of the Plaintiff Company and represented to them that for diverse reasons, he intends to develop the said property through a partnership firm by name Regency Mahavir Properties. The Defendant No.3 further assured Plaintiff Company that he will be one of the leading partners of the said M/s Regency Mahavir Properties i.e. the Defendant No.1 and the development of the said property and the same shall be carried out as quickly as possible. The directors of Plaintiff Company, relying on the strength of assurance given by Mr. Atul Chordia agreed to be joined a Consenting Party to a formal agreement of assignment to be executed between Defendant No.1 and Defendant No.2. It is pertinent to note that Defendant No.3 holding out to be an authorized partner of Defendant No.1 has signed the said agreement. The directors of Plaintiff Company under a bonafide belief that the said agreement of assignment was formal and Defendant No.3 will be responsible for development of the said property. Now directors of Plaintiff Company realize that Defendant No. 3 had different

> intentions." xxx xxx xxx "8. Recently, the director of Plaintiff Company approached Mr. Dilip R. Jain, one of the partners of Defendant No. 1. Directors of Plaintiff Company inquired with Mr. Jain about the delay in progress of construction and informed Mr. Jain that they will hold Defendant No.3 responsible for the deal. Mr. Jain, to the shock and surprise of directors of Plaintiff Company informed them that Mr. Chordia was no more responsible for development of the said property, since he has assigned development rights in respect thereof, way back in the year 2006 itself. Directors of Plaintiff Company took the said shock and approached Defendant No.3 and inquired with him about the aforesaid state of affairs. The Defendant No.3 avoided giving any explanation. The Directors of Plaintiff Company, took a search in the office of Registrar of Firms and for the first time came to know that the Defendant No.3 had opted to retire from business of Defendant No.1 with effect from 30.05.2006. It is pertinent to note that the Defendant No. 3 representing himself to be authorized partner of Defendant No.1 has signed deed of Confirmation dated 13.07.2006, confirming the terms and conditions of agreement dated 20.05.2006, executed between Defendant No.1 and 2 in respect of development of the suit property.
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> 9. As stated earlier, Directors of Plaintiff Company have granted development rights in respect of the said property to Defendant No.2, only because Defendant No.3 was its leading Director. The Plaintiff Company has joined the agreement of assignment dated 20.05.2006 and Deed of Confirmation dated 13.07.2006 executed by Defendant No.2 in favour of Defendant No.1 with understanding that Defendant No.3 was its partner. Directors of Plaintiff Company therefore say that Defendant No.1 in collusion with Defendant No.2 and in active concealment of material fact, by misrepresenting Plaintiff Company and by practicing fraud upon the Plaintiff Company have obtained consent of Plaintiff Company on the agreement of assignment and Deed of Confirmation.

Directors of Plaintiff Company therefore say that said agreement of assignment and Deed of Confirmation being tainted with fraud are ab initio null and void and not binding on Plaintiff Company. Since the Plaintiff Company has recently come to know the aforesaid fraud, they have decided to inform the Defendant that the agreement dated 20.05.2006 and the Deed of Confirmation dated 13.07.2006 in respect of the said property are not binding upon the Plaintiff Company and hence Defendant No.1 has no legal right to continue with further development of the said property.

10. Directors of Plaintiff Company, from reliable sources, have come to know that Defendant No.1 has no intention to develop the said property, further and hence Defendant No.1, again in collusion with Defendant No.3 is negotiating to transfer/assign development rights in respect of the said property to third person. Since the agreement of assignment dated 20.05.2006 and Deed of Confirmation dated 13.07.2006 are illegal and void, Defendant No.1 has no right to deal with the suit property. Inspite of such position, if Defendant No.1 attempts to transfer such rights, the same shall be illegal and in any case shall not be binding upon Plaintiff Company." As a result of the fraud

played, it was then stated:

> "12. The cause of action for this suit first arose on or about 22.07.2004 when the Defendant No.1 obtained agreement for development of the suit property, it further arose when the Defendant No.1 and 2 obtained agreement of assignment dated 20.05.2006 and Deed of Confirmation dated 17.07.2006. It further arose, in the month of April/May 2010, when the Plaintiff for the first time came to know that the Defendant No.3 is no more partner of the Defendant No.1 and that the Defendants have committed fraud upon the Plaintiff. The cause of action also arose, when the Defendants failed to comply with the demands made in notice dated 10.07.2010.
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> 13. The present suit, being suit for declaration and cancellation, is properly valued as per the provisions of Section 6(4)(h-a) of Bombay Court Fee Act, 1959 and maximum court fee of Rs.3,00,000/- is paid.
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> 14. The suit property is situated at Pune. The cause of action for the present suit has arisen at Pune and therefore this Honourable Court has got jurisdiction to entertain, try and decide this suit.
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> 15. It is therefore prayed that:
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> A. It be declared that the Agreement dated 22.07.2004 and Agreement dated 20.05.2006 and Deed of Confirmation dated 13.07.2006 are obtained by fraud and hence they are ab initio null, void and not binding upon the Plaintiff.
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> ☐ It be declared that the Agreement dated 22.07.2004 and Agreement dated 20.05.2006 and Deed of Confirmation dated 13.07.2006 are illegal.

C. The Defendants, by order of mandatory injunction directed to execute and register Deed of Cancellation of Agreement dated 22.07.2004 and Agreement dated 20.05.2006 and Deed of Confirmation dated 13.07.2006. D. The Defendants may be restrained by an order of perpetual injunction from carrying out any further development activity in the said property or to enter the same or remain therein, either by themselves or through any person claiming through it, or to create any third party interests therein or to deal with the same in any manner whatsoever.

E. Interim orders in terms of Clause C above may be passed.

F. Costs of the suit may be awarded to the Plaintiff from the Defendants.

G. Any other just and other equitable orders in the interest of justice may be pleased to be passed." It is important to note that Defendant No. 3 did not file any written statement in the said suit.

iv. Almost immediately thereafter, by an application dated 19.07.2010 under section 8 of the Arbitration and Conciliation Act, 1996 [hereinafter referred to as the "1996 Act"] on behalf of

Regency, the arbitration clause in the agreement dated 20.05.2006 was set out and the Civil Judge (Senior Division), Pune was asked to refer the parties to arbitration. The reply to the said application on behalf of the plaintiff, Deccan, stated:

> "2. The averments in para 1 of the application to the extent of reproduction of clause No.14 of agreement dated 20.05.2006, being matter of record are not disputed for the purpose of this reply. The plaintiff shall rely upon and explain the true effect and interpretation of the said clause at the proper time. It is pertinent to note Defendant Nos.1 and 2 have avoided to make any comment with regard to merits of their defense.
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> 3. It is submitted that while considering the application u/s 8 of Arbitration and Conciliation Act, 1996, the court has to consider an issue that whether there exists any Arbitration Agreement between the parties. Such right is certainly vested in Civil Court. The Plaintiff is challenging the legality of agreement dated 20.05.2006 on the ground that the same is obtained by fraud and is therefore seeking further declaration that the said agreement is null and ab initio void. As such, the very Arbitration clause as contained in the said agreement is not enforceable. In spite of the fact that Section 16 of the said Act empowers the Arbitral Tribunal to decide its own jurisdiction in view of particular circumstances narrated in the plaint, the present application deserves to be rejected." v. By a judgment dated 19.07.2011, the Additional Judge, Small Causes Court, Pune, after hearing both sides, held as follows:
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> "11. After perusing the above mentioned cited cases, it shows that when there is a clause of arbitration it is mandated on the Civil Court to refer the dispute and parties for arbitration as per agreement. In present case the plaintiffs have materially contention about playing fraud by Defendant No.3 but there is no any contents in agreement as alleged by plaintiff in plaint about keeping faith on Defendant No.3. It shows about signing by Defendant No.3 for agreement dated 20.05.2006 and he was also party to said agreement.

The plaintiff alleged about playing fraud after resigning by Defendant No.3 from partnership firm of Defendant No.1 and signing the confirmation deed dated 13.07.2006 but as per Partnership Act remedy is provided. Moreover, from the documents, it shows that the confirmation deed dated 13.07.2007 was executed by Defendant No.3 as Authorized Partner of M/s Regency Mahavir Properties and another partner Dilip Jain. The fraud alleged by the plaintiff is in respect of the documents for which the remedy is also provided. After considering the arbitration clause I find that the application is to be allowed and the disputes have to be referred for arbitration. Hence, I pass the following order:

> 1) Application is allowed.
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> 2) The plaintiff is directed to get the alleged dispute resolved through the process of arbitration by referring the plaintiff to invoke the process of arbitration as per the

arbitration clause 14 mentioned in the agreement dated 20.05.2006." Finding thus, the learned Judge referred the parties to arbitration.

vi. A writ petition filed by Deccan in the Bombay High Court was then disposed of by the impugned judgment dated 18.03.2015, in which it was held, following the judgment of the Single Judge in Swiss Timing Ltd. v. Commonwealth Games 2010 Organising Committee, (2014) 6 SCC 677 [hereinafter referred to as "Swiss Timing"] that the decision in N. Radhakrishnan v. Maestro Engineers, (2010) 1 SCC 72 [hereinafter referred to as "N. Radhakrishnan"] being per incuriam, it would not be possible to follow the same, as a result of which the "fraud exception" was rejected. It was then held that there is no conflict between the Division Bench judgment in Avitel Post Studioz Limited & Ors. v. HSBC PI Holding (Mauritius) Ltd., Appeal No. 196 of 2014 in Arbitration Petition No. 1062 of 2012 (which is the judgment under appeal in Civil Appeal Nos. 5145 and 5158 of 2016) and another judgment in Satish Sood v. Gujarat Tele Links Pvt. Ltd., 2014 (1) AIR Bom R 27 [hereinafter referred to as "Satish Sood"]. The Court felt that it would not be possible to follow the decision of the Division Bench in the case of Satish Sood (supra) as it was rendered prior to the judgment of the learned Single Judge of the Supreme Court in Swiss Timing (supra). This being so, the writ petition was then dismissed, with the result that the parties stood referred to arbitration.

2. Smt. Meena Doshi, learned advocate appearing on behalf of the Appellant, has taken us through the record and argued on the basis of N. Radhakrishnan (supra) that when it comes to serious allegations of fraud, an arbitrator's jurisdiction gets ousted and reading the pleadings in the Special Civil Suit, it is obvious that serious allegations of fraud being raised in the present case, the dispute is thus rendered non-arbitrable. She then referred to section 8 of the 1996 Act, as amended by the Arbitration and Conciliation (Amendment) Act, 2015 [hereinafter referred to as the "2015 Amendment Act"] to further argue that both the District Judge as well as the High Court did not look into the requirements of the amended section 8, and that the aforesaid judgments are infirm on this count alone. She also argued, basing herself on the seven-Judge Bench judgment in S.B.P. & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618 that the correct application of section 8 is not a mere mechanical incantation of the section, the Court having to apply its mind as to whether there exists an arbitration agreement at all, which would include whether the subject matter of the proceeding is at all arbitrable. She also argued that the original agreement between Deccan and Ashray did not contain an arbitration clause, and since the suit was to set aside that agreement as well, the dispute could not be decided piecemeal, and on this ground also, ought not to have been referred to arbitration. She then relied heavily upon section 31 of the Specific Relief Act, 1963 and stated that a reading of the plaint and the prayers in the suit would show that the suit is one for cancellation of three "written instruments". This being so, and the proceeding under section 31 being a proceeding in rem, would fall within one of the exceptions made out in Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532 [hereinafter referred to as "Booz Allen"]. For this purpose, she relied heavily upon a judgment of the High Court of Judicature at Hyderabad for Telangana and Andhra Pradesh in Aliens Developers Pvt. Ltd. v. M. Janardhan Reddy, (2016) 1 ALT 194 (DB) [hereinafter referred to as "Aliens Developers"]. On all these grounds, therefore, the cryptic judgment of the Bombay High Court ought to be set aside and the suit should be set down for hearing, to be disposed of within a short timeframe.

3. Shri Vinay Navre, learned Senior Advocate appearing on behalf of Respondent No.1, referred us to the case law on the "fraud exception" and stated that after the judgment in Rashid Raza v. Sadaf Akhtar, (2019) 8 SCC 710 (see paragraph 4), this exception would only apply if it can be stated that the agreement itself was never executed, in which case the arbitration clause itself would fall, but not otherwise. Also, since there are no public ramifications in the present proceeding, and in particular, no ramifications of a criminal nature, neither of the conditions precedent for the application of the "fraud exception" being present in this case, it is clear that the judgments of the Courts below were correct in law. When it came to section 31 of the Specific Relief Act, Shri Navre stated that a correct reading of the section would show that the Court's jurisdiction, being discretionary and for the benefit of the party interested in setting aside a written instrument, the proceeding would have to be considered to be one in personam. According to him, the judgment in Aliens Developers (supra) does not lay down the law correctly and should be overruled by us. In answer to the argument that the agreement dated 22.07.2004, which did not contain an arbitration clause, was also sought to be cancelled in the suit, he argued that this was inserted only in the prayer clause in order to camouflage the suit so as to get out of arbitration. If the body of the suit were to be seen, it is clear that what was sought to be impugned was only the latter two agreements, the first being of historical significance only. This being the case, it is clear that the dispute is arbitrable. Further, all that is to be seen under section 8 of the 1996 Act after its amendment is that prima facie, a valid arbitration agreement exists. Here, as a matter of fact, it was admitted, according to Shri Navre, in the affidavit filed in reply to the section 8 application that the agreement between the parties did exist, but was vitiated on account of fraud, which only made it voidable.

4. We have, in our judgment in Avitel Post Studioz Limited & Ors. v.

HSBC PI Holding (Mauritius) Ltd., Civil Appeal No. 5145 of 2016, laid down the law on invocation of the "fraud exception" in some detail, which reasoning we adopt and follow. The said judgment indicates that given the case law since N. Radhakrishnan (supra), it is clear that N. Radhakrishnan (supra), as a precedent, has no legs to stand on. If the subject matter of an agreement between parties falls within section 17 of the Indian Contract Act, 1872, or involves fraud in the performance of the contract, as has been held in the aforesaid judgment, which would amount to deceit, being a civil wrong, the subject matter of such agreement would certainly be arbitrable. Further, we have also held that merely because a particular transaction may have criminal overtones as well, does not mean that its subject matter becomes non-arbitrable. We have no doubt that Shri Navre is right in his submission that there is no averment that the agreement dated 20.05.2006 and the deed of confirmation dated 13.07.2006 were not entered into at all, as a result of which the arbitration clause would be non-existent. Further, it is equally clear that the suit is one that is inter parties with no "public overtones", as has been understood in paragraph 14 of Avitel (supra), as a result of which this exception would clearly not apply to the facts of this case.

5. Smt. Doshi then cited State of A.P. & Anr. v. T. Suryachandra Rao, (2005) 6 SCC 149 and read paragraphs 8 to 16 of the judgment to impress upon us that fraud vitiates every solemn act and that a conspiracy with a view to deprive the rights of others in relation to a property would render the transaction void ab initio. This case arose out of an order of the Land Reforms Tribunal which held against the respondent, stating that they had fraudulently taken advantage of the ceiling limit under

the Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act, 1973 by suppression of facts. In this case, the Tribunal reopened the matter when it found that the land which was surrendered had already been acquired in proceedings under the Land Acquisition Act, 1898. The question was whether the Tribunal was justified in modifying the earlier order and leaving out such land. It was held, by a concurrent finding of fact, that the Tribunal was capable of so varying the order. It was in this backdrop that the general observations on fraud were made. This case has no relevance to the exact issue before this Court.

6. We are also inclined to accept Shri Navre's argument on section 8 of the 1996 Act, in view of some of the recent judgments on section 8 after the 2015 Amendment Act. (See Ameet Lalchand Shah v. Rishabh Enterprises, (2018) 15 SCC 678 at pp. 698-700, Mayavati Trading Pvt. Ltd. v. Pradyut Deb Burman, (2019) 8 SCC 714 at pp. 724-725, and Emaar MGF Land Ltd. v. Aftab Singh, (2019) 12 SCC 751 at pp. 779-783). It is enough to state that there is a sea change between section 8 of the 1996 Act and section 20 of the Arbitration Act, 1940, as has been held in paragraph 9 of Avitel Post Studioz Limited & Ors. v. HSBC PI Holding (Mauritius) Ltd., Civil Appeal No. 5145 of 2016. Post amendment, it is clear that the judicial authority before which an action is brought shall, if the other conditions of section 8 are met, refer the parties to arbitration unless it finds that prima facie, no valid arbitration agreement exists. As has been held hereinabove, in the present case, the finding that is returned is correct – a valid arbitration agreement certainly exists as the agreements that are sought to be cancelled are not stated not to have ever been entered into.

7. This brings us to the interesting argument on behalf of Smt. Doshi as to the applicability of section 31 of the Specific Relief Act and the High Court's judgment in Aliens Developers (supra) relied upon by her. section 31 of the Specific Relief Act states as follows:

> "31. When cancellation may be ordered.
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> (1) Any person against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable; and the court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.
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> (2) If the instrument has been registered under the Indian Registration Act, 1908 (16 of 1908), the court shall also send a copy of its decree to the officer in whose office the instrument has been so registered;

and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation." Referring to section 31, a Division Bench of the High Court in Aliens Developers (supra) held:

> "14. ... Under Section 31(2) of the Specific Relief Act, Legislature conferred the power on Courts to send a copy of the cancellation decree to the officer in whose office the instrument has been so registered and such officer shall note on the copy of the instrument contained in his books, the fact of its cancellation. It is evident from the

provision under Section 31(2) that the power of nullifying the effect of registration is conferred only on the Court. In the judgment in Booz Allens case (supra), the Hon'ble Supreme Court has held that a right in rem is a right exercisable against the world at large, as contrasted from a right in personam which is an interest protected solely against specific individuals and actions in personam refer to actions determining the rights and interests of the parties themselves in the subject matter of the case, whereas, actions in rem refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property. In the said judgment, it is clearly held that if the adjudicatory effect of the Court is a judgment in rem, only public fora i.e. Courts and Tribunals have to adjudicate such disputes, but not the Arbitral Tribunals as agreed by the parties. As much as the Development Agreement-cum-Irrevocable Power of Attorney is a registered one and is relating to title of the property, any cancellation will affect the removal of rights accrued to the parties, such cancellation is to be communicated to the officer who has registered the document, in view of the provision under Section 31(2) of the Specific Relief Act. Therefore, we are of the considered view that such adjudicatory function in cases like this will operate in rem. In any event, having regard to the power conferred on Courts by virtue of the provision under Section 31(2) of the Specific Relief Act, only a competent Court is empowered to send the cancellation decree, to the officer concerned, to effect such cancellation and note in his books to that effect. When such Statutory power is conferred on Courts, such power cannot be exercised by the Arbitrator, in spite of the fact that there is an arbitration clause in the agreement entered between the parties..."

8. It is now for us to examine whether a further exception can be carved out based upon Booz Allen (supra) on the footing of the High Court's judgment in Aliens Developers (supra). In order to examine the correctness of Aliens Developers (supra), it is necessary to set out certain sections of the Specific Relief Act. The relevant sections are set out hereinbelow:

"4. Specific relief to be granted only for enforcing individual civil rights and not for enforcing penal laws.—Specific relief can be granted only for the purpose of enforcing individual civil rights and not for the mere purpose of enforcing a penal law." xxx xxx xxx "26. When instrument may be rectified.—(1) When, through fraud or a mutual mistake of the parties, a contract or other instrument in writing [not being the articles of association of a company to which the Companies Act, 1956 (1 of 1956), applies] does not express their real intention, then

(a) either party or his representative in interest may institute a suit to have the instrument rectified; or

(b) the plaintiff may, in any suit in which any right arising under the instrument is in issue, claim in his pleading that the instrument be rectified; or

(c) a defendant in any such suit as is referred to in clause (b), may, in addition to any other defence open to him, ask for rectification of the instrument.

(2) If, in any suit in which a contract or other instrument is sought to be rectified under sub-section (1), the court finds that the instrument, through fraud or mistake, does not express the real intention of the parties, the court may, in its discretion, direct rectification of the instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value.

(3) A contract in writing may first be rectified, and then if the party claiming rectification has so prayed in his pleading and the court thinks fit, may be specifically enforced.

(4) No relief for the rectification of an instrument shall be granted to any party under this section unless it has been specifically claimed: Provided that where a party has not claimed any such relief in his pleading, the court shall, at any stage of the proceeding, allow him to amend the pleading on such terms as may be just for including such claim.

27. When rescission may be adjudged or refused. —(1) Any person interested in a contract may sue to have it rescinded, and such rescission may be adjudged by the court in any of the following cases, namely:

(a) where the contract is voidable or terminable by the plaintiff;

(b) where the contract is unlawful for causes not apparent on its face and the defendant is more to blame than the plaintiff.

(2) Notwithstanding anything contained in sub-

section (1), the court may refuse to rescind the contract

(a) where the plaintiff has expressly or impliedly ratified the contract; or

(b) where, owing to the change of circumstances which has taken place since the making of the contract (not being due to any act of the defendant himself), the parties cannot be substantially restored to the position in which they stood when the contract was made; or

(c) where third parties have, during the subsistence of the contract, acquired rights in good faith without notice and for value; or

(d) where only a part of the contract is sought to be rescinded and such part is not severable from the rest of the contract.

Explanation.—In this section "contract" in relation to the territories to which the Transfer of Property Act, 1882 (4 of 1882), does not extend, means a contract in writing." xxx xxx xxx "29. Alternative prayer for rescission in suit for specific performance.—A plaintiff instituting a suit for the specific performance of a contract in writing may pray in the alternative that, if the contract cannot be specifically enforced, it may be rescinded and delivered up to be cancelled; and the court, if it refuses to enforce the contract specifically, may direct it to be rescinded and delivered up accordingly.

30. Court may require parties rescinding to do equity.—On adjudging the rescission of a contract, the court may require the party to whom such relief is granted to restore, so far as may be, any benefit which he may have received from the other party and to make any compensation to him which justice may require." xxx xxx xxx "32. What instruments may be partially cancelled. —Where an instrument is evidence of different rights or different obligations, the court may, in a proper case, cancel it in part and allow it to stand for the residue.

33. Power to require benefit to be restored or compensation to be made when instrument is cancelled or is successfully resisted as being void or voidable.— (1) On adjudging the cancellation of an instrument, the court may require the party to whom such relief is granted, to restore, so far as may be any benefit which he may have received from the other party and to make any compensation to him which justice may require.

(2) Where a defendant successfully resists any suit on the ground—

(a) that the instrument sought to be enforced against him in the suit is voidable, the court may if the defendant has received any benefit under the instrument from the other party, require him to restore, so far as may be, such benefit to that party or to make compensation for it;

(b) that the agreement sought to be enforced against him in the suit is void by reason of his not having been competent to contract under section 11 of the Indian Contract Act, 1872 (9 of 1872), the court may, if the defendant has received any benefit under the agreement from the other party, require him to restore, so far as may be, such benefit to that party, to the extent to which he or his estate has benefited thereby.

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

> Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.
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> Explanation.—A trustee of property is a "person interested to deny" a title adverse to the title of someone who is not inexistence, and for whom, if in existence, he would be

a trustee.

35. Effect of declaration.—A declaration made under this Chapter is binding only on the parties to the suit, persons claiming through them respectively, and, where any of the parties are trustees, on the persons for whom, if in existence at the date of the declaration, such parties would be trustees." The very sheet anchor of Smt. Doshi's case, namely, the judgment in Booz Allen (supra), refers to the judgment of this Court in Olympus Superstructures v. Meena Vijay Khetan, (1999) 5 SCC 651 [hereinafter referred to as "Olympus"], in which it was held that an arbitrator has the power and jurisdiction to grant specific performance of contracts relating to immovable property (see paragraphs 43 and 44).

9. A perusal of the judgment in Olympus (supra) would show that this Court was faced with differing views taken by the High Courts as to whether specific performance of a contract relating to immovable property is at all arbitrable. The Delhi High Court in Sulochana Uppal v. Surinder Sheel Bhakri, AIR 1991 Del 138 [hereinafter referred to as "Sulochana Uppal"] had held that specific performance of an agreement could not be granted by an arbitrator for the reason that:

> "15. An agreement to refer a dispute to arbitration, the effect of which would be to have an award directing specific performance of an agreement to sell, would have for its object to defeat the provisions of the Specific Relief Act, especially sections 10 and 20 thereof. It is clearly intended by the aforesaid provisions that it is only courts, and courts alone who would have jurisdiction to grant or refuse specific performance." The learned Single Judge thus disagreed with the contrary view of the Bombay High Court and the Punjab High Court. 1

10. It is important to note that this Court referred to all the aforesaid three judgments, including a judgment of the Calcutta High Court. In arriving at the conclusion that the Punjab, Bombay, and Calcutta High Courts' view is the correct one and that the Delhi High Court's view, being incorrect, is overruled, this Court referred to an important passage in Halsbury's Laws of England as follows :

> "35. It is stated in Halsbury's Laws of England, 4th Edn., (Arbitration, Vol. 2, para 503) as follows:
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> "503. Nature of the dispute or difference.— The dispute or difference which the parties to an arbitration agreement agree to refer must consist of a justiciable issue triable civilly. A fair test of this is whether the difference can be compromised lawfully by way of accord and satisfaction (Cf. Bac Abr Arbitrament and Award A)."
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> 36. Further, as pointed out in the Calcutta case [Apo 498 of 1997 & Apo 449 of (401) dated 27-1-1998 (Cal)] merely because there is need for exercise of discretion in case of specific performance, it cannot be said that only the civil court can exercise such a discretion. In the above case, Ms Ruma Pal, J. observed:

> "... merely because the sections of the Specific Relief Act confer discretion on courts to grant specific performance of a contract does not mean that parties cannot agree that the discretion will be exercised by a forum of their choice. If the converse were true, then 1 This Court in Olympus Superstructures v. Meena Vijay Khetan, (1999) 5 SCC 651 wrongly refers to the Delhi High Court's judgment as being the judgment in "P.N.B. Finance Ltd. v. Shital Prasad Jain, AIR 1991 Del 13" (see paragraph 33).

whenever a relief is dependent upon the exercise of discretion of a court by statute e.g. the grant of interest or costs, parties could be precluded from referring the dispute to arbitration." We agree with this reasoning. We hold on Point 3 that disputes relating to specific performance of a contract can be referred to arbitration and Section 34(2)(b)(i) is not attracted. We overrule the view of the Delhi High Court. Point 3 is decided in favour of the respondents."

11. A perusal of section 26(1) of the Specific Relief Act, 1963 would show that when, through fraud or mutual mistake of parties, a contract or other instrument in writing does not express the real intent of the parties, then either party or his representative in interest may either institute a suit to have the instrument rectified or as defendant, may, in addition to any defence open to him, ask for rectification of the instrument. Importantly, under section 26(3), a party may pray in a rectification suit for specific performance – and if the Court thinks fit, may after rectifying the contract, grant specific performance of the contract. Thus, what is made clear by this section is that the rectification of a contract can be the subject matter of a suit for specific performance, which, as we have already seen, can be the subject matter of an arbitral proceeding.

12. Under section 27(1) of the Specific Relief Act, 1963, "any party interested" in a contract may sue to have it rescinded and such rescission may be adjudged by the Court in the cases mentioned in clauses (a) and (b) of sub-section (1). Sub-section (2) of section 27 refers to four exceptions to this rule. In Shravan Goba Mahajan v. Kashiram Devji, ILR (1927) 51 Bom 133, a Division Bench of the Bombay High Court, with regard to section 35 of the Specific Relief Act, 1877 (which is the pari materia provision to section 27 of the 1963 Act) held that an heir is a person interested in the contract which is sought to be set aside, thus, making it clear that the expression "any person interested" would include not just a party to the contract, but persons who may be heirs of one of the parties to the contract. A reading of this section would also show that all such actions in which a contract or instrument may be rectified or rescinded, no judgment in rem follows, as what is sought to be rectified or rescinded is by the parties to the contract or persons who may be their heirs or legal representatives. Third parties to the contract are not persons who can be said to be "any person interested", particularly when section 27(2)(c), which refers to third parties, is seen and contrasted with the expression "any person interested" in section 27(1) – under section 27(2)(c), third parties come in as an exception to the rule only when they have acquired rights in good faith, without notice and for value, during the subsistence of the contract between the parties to that contract.

13. Sections 29 and 30 are also important, in that a plaintiff instituting a suit for specific performance may pray in the alternative that if the contract cannot be specifically enforced, it may be rescinded and be delivered up to be cancelled. In addition, on adjudging the rescission of the contract, the Court may require the party to whom such relief is granted to restore, so far as may be,

any benefit which he may have received from the other party and to make any compensation to him which justice may require. These two sections would also show that following rescission of a contract, it has to be delivered up to the plaintiff to be cancelled – and all of this can be done in a suit for specific performance. Thus far, therefore, it is clear that an action for rescission of a contract and delivering up of that contract to be cancelled is an action in personam which can be the subject matter of a suit for specific performance, making such rescission and delivering up the contract to be cancelled, the subject matter of arbitration.

14. When it comes to section 31(1), the important expression used by the legislature is "any person against whom a written instrument is void or voidable…". An instructive judgment of the Full Bench of the Madras High Court reported as Muppudathi Pillai v. Krishnaswami Pillai, AIR 1960 Mad 1 involved the determination of the scope of section 41 of the Specific Relief Act, 1877 (section 33(1) of the 1963 Act is the pari materia provision). This judgment, after referring to section 41, then referred to section 39 of the Specific Relief Act, 1877 (which is the pari materia provision to section 31 of the 1963 Act). The Court then went on to notice the distinction between section 35 (which is the pari materia provision to section 27 of the 1963 Act) and section 39 of the Specific Relief Act, 1877 as follows:

> "11. … It may be noticed that the above section applies not merely to the case of an instrument which is voidable but also one that is void. S. 35 provides for the case of rescission of voidable contracts. It is evident that S. 39 covers not only a case contemplated under S. 35, but also a wider field, that is, a case of a void document, which under the law need not be set aside."

15. In an extremely important paragraph, the Full Bench then set out the principle behind section 39(1) of the Specific Relief Act, 1877 as follows:

> "12. The principle is that such document though not necessary to be set aside may, if left outstanding, be a source of potential mischief. The jurisdiction under S. 39 is, therefore, a protective or a preventive one. It is not confined to a case of fraud, mistake, undue influence etc. and as it has been stated it was to prevent a document to remain as a menace and danger to the party against whom under different circumstances it might have operated. A party against whom a claim under a document might be made is not bound to wait till the document is used against him. If that were so he might be in a disadvantageous position if the impugned document is sought to be used after the evidence attending its execution has disappeared. Section 39 embodies the principle by which he is allowed to anticipate the danger and institute a suit to cancel the document and to deliver it up to him. The principle of the relief is the same as in quia timet actions." (emphasis added) The Court then continued its discussion as follows:

> "13. … The provisions of Section 39 make it clear that three conditions are requisite for the exercise of the jurisdiction to cancel an instrument : (1) the instrument is void or voidable against the plaintiff; (2) plaintiff may reasonably apprehend serious

> injury by the instrument being left outstanding; (3) in the circumstances of the case the court considers it proper to grant this relief of preventive justice. On the third aspect of the question the English and American authorities hold that where the document is void on its face the court would not exercise its jurisdiction while it would if it were not so apparent. In India it is a matter entirely for the discretion of the court.
>
> 14. The question that has to be considered depends on the first and second conditions set out above. As the principle is one of potential mischief, by the document remaining outstanding, it stands to reason the executant of the document should be either the plaintiff or a person who can in certain circumstances bind him. It is only then it could be said that the instrument is voidable by or void against him. The second aspect of the matter emphasises that principle.

For there can be no apprehension if a mere third party asserting a hostile title creates a document. Thus relief under S. 39 would be granted only in respect of an instrument likely to affect the title of the plaintiff and not of an instrument executed by a stranger to that title.

15. Let us take an example of a trespasser purporting to convey the property in his own right and not in the right of the owner. In such a case a mere cancellation of the document would not remove the cloud occasioned by the assertion of a hostile title, as such a document even if cancelled would not remove the assertion of the hostile title. In that case it would be the title that has got to be judicially adjudicated and declared, and a mere cancellation of an instrument would not achieve the object. S. 42 of the Specific Relief Act would apply to such a case. The remedy under S. 39 is to remove a cloud upon the title, by removing a potential danger but it does not envisage an adjudication between competing titles. That can relate only to instruments executed or purported to be executed by a party or by any person who can bind him in certain circumstances. It is only in such cases that it can be said there is a cloud on his title and an apprehension that if the instrument is left outstanding it may be a source of danger. Such cases may arise in the following circumstances: A party executing the document, or a principal in respect of a document executed by his agent, or a minor in respect of a document executed by his guardian de jure or de facto, a reversioner in respect of a document executed by the holder of the anterior limited estate, a real owner in respect of a document executed by the benamidar, etc. This right has also been recognised in respect of forged instruments which could be cancelled by a party on whose behalf it is purported to be executed. In all these cases there is no question of a document by a stranger to the title. The title is the same. But in the case of a person asserting hostile title, the source or claim of title is different. It cannot be said to be void against the plaintiff as the term void or voidable implies that but for the vitiating factor it would be binding on him, that is, he was a party to the contract.

16. There is one other reason for this conclusion. Section 39 empowers the court after adjudicating the instrument to be void to order the instrument to be delivered up and cancelled. If the sale deed is or purported to have been executed by a party, the instrument on cancellation could be directed to be delivered over to the plaintiff. If on the other hand such an instrument is executed by a trespasser or a person claiming adversely to the plaintiff it is not possible to conceive the instrument being

delivered over not to the executant but his rival, the plaintiff." The Court then concluded:

> "18. In our opinion, Sec. 39 will not apply to a case like the present where the sale was executed by a person claiming title adverse to that of Vinayagam Pillai, and therefore, the court would have no jurisdiction under S. 41 to direct payment of compensation by the plaintiff to the appellant before obtaining relief as to possession.

To hold otherwise would mean that a mere volunteer who paid the debt of the plaintiff would be able to recover the same."2

16. A reading of the aforesaid judgment of the Full Bench would make the position in law crystal clear. The expression "any person" does not include a third party, but is restricted to a party to the written instrument or any person who can bind such party. Importantly, relief under section 39 of the Specific Relief Act, 1877 would be granted only in respect of an instrument likely to affect the title of 2 A Full Bench of the Andhra Pradesh High Court in Yanala Malleshwari v. Ananthula Sayamma, AIR 2007 AP 57 followed this judgment and then stated the law thus:

> "33. The law, therefore, may be taken as well settled that in all cases of void or voidable transactions, a suit for cancellation of a deed is not maintainable. In a case where immovable property is transferred by a person without authority to a third person, it is no answer to say that the true owner who has authority and entitlement to transfer can file a suit under Section 31 of the Specific Relief Act for the simple reason that such a suit is not maintainable. Further, in case of an instrument, which is void or voidable against executant, a suit would be maintainable for cancellation of such instrument and can be decreed only when it is adjudicated by the competent Court that such instrument is void or voidable and that if such instrument is left to exist, it would cause serious injury to the true owner." the plaintiff, and not of an instrument executed by a stranger to that title. The expression "any person" in this section has been held by this Court to include a person seeking derivative title from his seller (see Mohd. Noorul Hoda v. Bibi Raifunnisa (1996) 7 SCC 767, at p. 771). The principle behind the section is to protect a party or a person having a derivative title to property from such party from a prospective misuse of an instrument against him. A reading of section 31(1) then shows that when a written instrument is adjudged void or voidable, the Court may then order it to be delivered up to the plaintiff and cancelled – in exactly the same way as a suit for rescission of a contract under section 29. Thus far, it is clear that the action under section 31(1) is strictly an action inter parties or by persons who obtained derivative title from the parties, and is thus in personam.
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> 17. Let us see whether section 31(2) makes any difference to this position in law. According to the judgment in Aliens Developers (supra), the moment a registered instrument is cancelled, the effect being to remove it from a public register, the adjudicatory effect of the Court would make it a judgment in rem. Further, only a competent court is empowered to send the cancellation decree to the officer

concerned, to effect such cancellation and "note on the copy of the instrument contained in his books the fact of its cancellation". Both reasons are incorrect. An action that is started under section 31(1) cannot be said to be in personam when an unregistered instrument is cancelled and in rem when a registered instrument is cancelled. The suit that is filed for cancellation cannot be in personam only for unregistered instruments by virtue of the fact that the decree for cancellation does not involve its being sent to the registration office – a ministerial action which is subsequent to the decree being passed. In fact, in Gopal Das v. Sri Thakurji, AIR 1943 PC 83, a certified copy of a registered instrument, being a receipt dated 29.03.1881 signed by the owner, was held not to be a public record of a private document under section 74(2) of the Indian Evidence Act, 1872 for the reason that the original has to be returned to the party under section 61(2) of the Registration Act, 1908 (see p. 87). This judgment has been followed in Rekha v.

Ratnashree, (2006) 1 MP LJ 103 by a Division Bench of the Madhya Pradesh High Court, in which it was held:

"8. A deed of sale is a conveyance. A deed of conveyance or other document executed by any person is not an act nor record of an act of any sovereign authority or of any official body or tribunal, or of any public officer, legislative, judicial and executive. Nor is it a public record kept in a State of any private documents. A sale-deed (or any other deed of conveyance) when presented for registration under the Registration Act, is not retained or kept in any public office of a State after registration, but is returned to the person who presented such document for registration, on completion of the process of registration. An original registered document is not therefore a public record kept by a State of a private document. Consequently, a deed of sale or other registered document will not fall under either of the two classes of documents described in section 74, as 'public documents'. Any document which is not a public document is a private document. We therefore have no hesitation in holding that a registered sale-deed (or any other registered document) is not a public document but a private document.

9. This position is made abundantly clear in Gopal Das v. Shri Thakurji, AIR 1943 Privy Council 83, wherein the Privy Council considering the question whether a registered receipt is a public document observed thus:

"It was contended by Sir Thomas Strangman for the respondents that the receipt comes within para 2 of section 74, Evidence Act, and was a "public document"; hence under section 65(e) no such foundation is required as in cases coming within clauses (a), (b) and (c) of that section. Their Lordships cannot accept this argument since the original receipt of 1881 is not "a public record of a private document". The original has to be returned to the party. A similar argument would appear at one time to have had some acceptance in India but it involves a misconstruction of the Evidence Act and Registration Act and later decisions have abandoned it." (emphasis supplied) We

may also refer to the following passage from Ratanlal's Law of Evidence (19th Edition-Page 237):

"Public document [Clause (e)] — This clause is intended to protect the originals of public records from the danger to which they would be exposed by constant production in evidence. Secondary evidence is admissible in the case of public documents mentioned in section 74. What section 74 provides is that public records kept in any state of private documents are public documents, but private documents of which public records are kept are not in themselves public documents. A registered document, therefore, does not fall under either clause (e) or (f). The entry in the register book is a public document, but the original is a private document." (emphasis in original) Thus, the factum of registration of what is otherwise a private document inter parties does not clothe the document with any higher legal status by virtue of its registration.

18. Also, it must be remembered that the Delhi High Court's reasoning in Sulochana Uppal (supra) that it is the Court alone that can, under the Specific Relief Act, enforce specific performance of an agreement, is contra to the reasoning in Olympus (supra) which overruled it, stating that "the dispute or difference which parties to an arbitration agreement agree to refer must consist of justiciable issues triable civilly". Since specific performance is a justiciable issue triable civilly, obviously, the expression "court" occurring throughout the Specific Relief Act will have to be substituted by "arbitrator" or "arbitral tribunal". This part of the reasoning in Aliens Developers (supra), in following the same reasoning as an overruled Delhi High Court judgment, would fly in the face of Olympus (supra) and would, therefore, not be good law. We, therefore, overrule the same.

19. P. Ramanatha Aiyar's Advanced Law Lexicon (3rd Edn., Wadhwa Nagpur) describes an in rem proceeding as follows:

"In rem. adj. [Latin "against a thing"] Involving or determining the status of a thing, and therefore the rights of persons generally with respect to that thing.- Also termed (archaically) impersonal. (Black 7th Edn., 1999) "An action in rem is one in which the judgment of the Court determines the title to property and the rights of the parties, not merely as between themselves, but also as against all persons at any time dealing with them or with the property upon which the Court had adjudicated." R.H. GRAVESON, Conflict of Laws 98 (7th ed. 1974).

Against the king; against the property, not against a person.

This term is derived from the Roman law, but is not used in English law in precisely the same sense as in that law. Indeed, Bracton, limits proceedings in rem to actions to obtain possession of res by which he understood real actions; (Bigelow on Estoppel 42, 43.) A proceeding in rem is a proceeding instituted against a thing, and not against a person.

A proceeding in rem, in a strict sense, is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants but in a larger and more general sense the term 'proceeding in rem' is applied to actions between parties where the direct object is to reach and dispose of property owned by them, or of some interest therein.

A judgement in rem is generally said to be a judgment declaratory of the status of some subject matter, whether this be a person, or a thing. Thus the probate of a will fixes the status of the document as a will; so a decree establishing or dissolving a marriage is a judgment in rem, because it fixes the status of the person. A judgment or forfeiture against specified articles of goods for violation of the revenue laws is a judgment in rem. In such case the judgment is conclusive against all the world, and, if the expression 'strictly in rem' may be applied to any class of cases, it should be confined to such as these. Chief Justice Marshall says: 'I have always understood that where a process is to be served on the thing itself, and where the mere possession of the thing itself, by the service of a process and making proclamation, authorizes the Court to decide upon it without notice to any individual whatever, it is a proceeding in rem, to which all the world are parties. The claimant if a party, whether he speaks or is silent, whether he asserts his claim or abandons it. But usage has distinguished as proceedings in rem a class of cases in which, while the seizure of the thing will be in aid of jurisdiction, yet it is essential that some form of notice be given to the particular person or persons. The proceeding thus assumes a phase of actions in personam, and a judgment will not be binding upon any one who was not before the Court.

An act or proceeding is in rem when it is done or directed with reference to no specific person and consequently against or with reference to all whom it might concern, or 'all the world'.

Lawsuits brought against property as compared with those against a person; the Court's jurisdiction does not depend on notice to the property owner."

20. In R. Viswanathan v. Rukn-ul-Mulk Syed Abdul Wajid, (1963) 3 SCR 22, this Court set out the Roman law concept of jus in rem as follows:

> "Roman lawyers recognised a right either as a jus in rem or a jus in personam. According to its literal meaning "jus in rem" is a right in respect of a thing, a "jus in personam" is a right against or in respect of a person. In modern legal terminology a right in rem, postulates a duty to recognise the right imposed upon all persons generally, a right in personam postulates a duty imposed upon a determinate person or class of persons. A right in rem is therefore protected against the world at large; a right in personam against determinate individuals or persons. An action to enforce a jus in personam was originally regarded as an action in personam and an action to enforce a jus in rem was regarded as an action in rem. But in course of time, actions in rem and actions in personam acquired different content. When in an action the rights and interest of the parties themselves in the subject- matter are sought to be determined, the action is in personam. The effect of such an action is therefore merely to bind the parties thereto. Where the intervention of the Court is sought for the adjudication of a right or title to property, not merely as between the parties but

against all persons generally, the action is in rem. Such an action is one brought in the Admiralty Division of the High Court possessing Admiralty jurisdiction by service of process against a ship or cargo within jurisdiction. There is another sense in which an action in rem is understood. A proceeding in relation to personal status is also treated as a proceeding in rem, for the judgment of the proper court within the jurisdiction of which the parties are domiciled is by comity of nations admitted to recognition by other courts. As observed by Cheshire in his "Private International Law", Sixth Edition at page 109, "In Roman law an action in rem was one brought in order to vindicate a jus in rem, i.e., a right such as ownership available against all persons, but the only action in rem known to English law is that which lies in an Admiralty court against a particular res, namely, a ship or some other res, such as cargo, associated with the ship." Dealing with judgments in rem and judgments in personam. Cheshire observed at page 653, "It (judgment in rem) has been defined as a judgment of a court of competent jurisdiction determining the status of a person or thing (as distinct from the particular interest in it of a party to the litigation); and such a judgment is conclusive evidence for and against all persons whether parties, privies or strangers of the matter actually decided. ..... A judgment in rem settles the destiny of the res itself 'and binds all persons claiming an interest in the property inconsistent with the judgment even though pronounced in their absence'; a judgment in personam, although it may concern a res, merely determines the rights of the litigants inter se to the res." (at pp. 43-44) Also, a judgment in rem has been described in Satrucharla Vijaya Rama Raju v. Nimmaka Jaya Raju, (2006) 1 SCC 212 as follows:

"10. ... A judgment in rem is defined in English law as "an adjudication pronounced (as its name indeed denotes) by the status, some particular subject-matter by a tribunal having competent authority for that purpose". Spencer Bower on Res Judicata defines the term as one which "declares, defines or otherwise determines the status of a person or of a thing, that is to say, the jural relation of the person or thing to the world generally"..." Judged by these authorities, it is clear that the proceeding under section 31 is with reference to specific persons and not with reference to all who may be concerned with the property underlying the instrument, or "all the world". Clearly, the cancellation of the instrument under section 31 is as between the parties to the action and their privies and not against all persons generally, as the instrument that is cancelled is to be delivered to the plaintiff in the cancellation suit. A judgment delivered under section 31 does not bind all persons claiming an interest in the property inconsistent with the judgment, even though pronounced in their absence.

21. A reading of sections 32 and 33 of the Specific Relief Act, 1963 would also show that the reasoning of the High Court in Aliens Developers (supra) is flawed. Where, for example, under section 32, an instrument is cancelled in part, the instrument which is otherwise only an instrument inter parties, cannot be said to be an instrument which remains inter parties, the cancelled portion being a cancellation to the world at large, i.e., in rem. Equally, under section 33, when compensation

is required to be paid or restoration of benefit which has been received from the other party is required to be made, it is exactly the same as that which is required to be done under a contract which is rescinded and cancelled (see section 30): and it is clear that both sections 30 and 33 would apply only to contracts or instruments which are rescinded/cancelled in personam.

22. When sections 34 and 35 are seen, the position becomes even clearer. Unlike section 31, under section 34, any person entitled to any legal character may institute a suit for a declaration that he is so entitled. Considering that it is possible to argue on a reading of this provision that the legal character so declared may be against the entire world, section 35 follows, making it clear that such declaration is binding only on the parties to the suit and persons claiming through them, respectively. This is for the reason that under section 4 of the Specific Relief Act, specific relief is granted only for the purpose of enforcing individual civil rights. The principle contained in section 4 permeates the entire Act, and it would be most incongruous to say that every other provision of the Specific Relief Act refers to in personam actions, section 31 alone being out of step, i.e., referring to in rem actions.

23. As a matter of fact, this Court in Razia Begum v. Sahebzadi Anwar Begum, 1959 SCR 1111 clarified that the predecessor to section 35 of the 1963 Act, namely, section 43 of the Specific Relief Act, 1877, made it clear that both sections 42 and 43 of the Specific Relief Act, 1877 go together and refer only to an action that is in personam. This was felicitously stated by this Court as follows:

> " ... Sections 42 and 43, as indicated above, go together, and are meant to be coextensive in their operation. That being so, a declaratory judgment in respect of a disputed status, will be binding not only upon the parties actually before the court, but also upon persons claiming through them respectively. The use of the word "only" in Section 43, as rightly contended on behalf of the appellant, was meant to emphasize that a declaration in Chapter VI of the Specific Relief Act, is not a judgment in rem. But even though such a declaration operates only in personam, the section proceeds further to provide that it binds not only the parties to the suit, but also persons claiming through them, respectively. The word "respectively" has been used with a view to showing that the parties arrayed on either side, are really claiming adversely to one another, so far as the declaration is concerned. This is another indication of the sound rule that the court, in a particular case where it has reasons to believe that there is no real conflict, may, in exercise of a judicial discretion, refuse to grant the declaration asked for oblique reasons." (at p. 1131)

24. Also, in an instructive judgment of this Court in Suhrid Singh v.

Randhir Singh, (2010) 12 SCC 112, in the context of the Court Fees Act, 1870 this Court held:

> "7. Where the executant of a deed wants it to be annulled, he has to seek cancellation of the deed. But if a non-executant seeks annulment of a deed, he has to seek a declaration that the deed is invalid, or non est, or illegal or that it is not binding on him. The difference between a prayer for cancellation and declaration in regard to a

> deed of transfer/conveyance, can be brought out by the following illustration relating to A and B, two brothers. A executes a sale deed in favour of C. Subsequently A wants to avoid the sale. A has to sue for cancellation of the deed. On the other hand, if B, who is not the executant of the deed, wants to avoid it, he has to sue for a declaration that the deed executed by A is invalid/void and non est/illegal and he is not bound by it. In essence both may be suing to have the deed set aside or declared as non-binding. But the form is different and court fee is also different. If A, the executant of the deed, seeks cancellation of the deed, he has to pay ad valorem court fee on the consideration stated in the sale deed. If B, who is a non-executant, is in possession and sues for a declaration that the deed is null or void and does not bind him or his share, he has to merely pay a fixed court fee of Rs. 19.50 under Article 17(iii) of the Second Schedule of the Act. But if B, a non-executant, is not in possession, and he seeks not only a declaration that the sale deed is invalid, but also the consequential relief of possession, he has to pay an ad valorem court fee as provided under Section 7(iv)(c) of the Act."

25. The reasoning in the aforesaid judgment would again expose the incongruous result of section 31 of the Specific Relief Act being held to be an in rem provision. When it comes to cancellation of a deed by an executant to the document, such person can approach the Court under section 31, but when it comes to cancellation of a deed by a non-executant, the non-executant must approach the Court under section 34 of the Specific Relief Act, 1963. Cancellation of the very same deed, therefore, by a non-executant would be an action in personam since a suit has to be filed under section 34. However, cancellation of the same deed by an executant of the deed, being under section 31, would somehow convert the suit into a suit being in rem. All these anomalies only highlight the impossibility of holding that an action instituted under section 31 of the Specific Relief Act, 1963 is an action in rem.

26. Given this finding of law, it is clear that the judgments of the District Court and the High Court in this case need no interference. This appeal, therefore, stands dismissed.

……J. (R. F. Nariman) ……J. (Navin Sinha) .....J. (Indira Banerjee) New Delhi August 19, 2020.