

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **RFA No.96/2002**

% **Reserved on: 28th September, 2011
Pronounced on: 5th October, 2011**

COL. A.B.SINGH(THROUGH L.RS) Appellants
Through: Mr. Sanjeev Kumar Saxena, and Mr.
Mukesh Kumar, Advocates

VERSUS

SHRI CHUNNILAL SAWHNEY & OTHERS Respondents
Through: Ms. Mala Goel, and Mr. Yashpal
Singh, Advocates

**CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA**

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? **Yes**
3. Whether the judgment should be reported in the Digest? **Yes**

VALMIKI J. MEHTA, J

1. The challenge by means of this Regular First Appeal, is to the impugned judgment of the trial court dated 9.1.2002, and by which judgment, the court below has decreed the suit for specific performance of the plaintiffs, and who are now represented by the respondents no.1 to 9 - the legal heirs of the original plaintiffs.

2. The reference in this judgment to the appellants will include and mean reference to the defendant no.1-seller. The reference to the respondents

would mean reference to the plaintiffs. This is for the sake of convenience inasmuch as not only both the original plaintiffs (the original respondents no.1 and 2 in this appeal) have expired during the pendency of the present appeal, even the original appellant, and who was the defendant no.1 in the trial court, has also expired during the pendency of the appeal. The legal heirs of the original appellant/defendant no.1 and the original respondent nos. 1 and 2/plaintiffs are on record. For completeness on this aspect, it may be stated that in the present appeal Delhi Development Authority (DDA) in the original memo of parties in this appeal was the respondent no.3, and which was sued as the defendant no.2 in the suit. DDA was made a party in the suit because the subject plot was a leasehold plot given on lease by the DDA. This respondent in the present judgment is referred to as DDA.

3. The facts of the case are that the plaintiffs/respondents as proposed buyers, entered into an Agreement to Sell dated 13.7.1977 (Ex.P-3) with the defendant no.1, as proposed seller, for the subject/suit plot admeasuring 209.032 sq. mts. having municipal number D-211, Malviya Nagar Extension, now known as Saket, New Delhi for a total sale consideration of Rs.1,60,000/-. The plaintiffs/respondents paid to the defendant no.1 a sum of Rs.90,000/- by way of four cheques as part sale consideration at the time of entering into the Agreement to Sell. The Agreement to Sell was got registered before the Sub-Registrar two days later on 15.7.1977, and on which date the possession of the suit property was delivered to the

plaintiffs/respondents by the defendant no.1. The balance price of Rs.70,000/- was to be paid by the plaintiffs at the time of execution and registration of the sale deed before the Sub-Registrar, Delhi. The defendant no.1 as per the agreement had undertaken the responsibility to obtain all the necessary permissions from the concerned authorities including the DDA for conveying the suit property to the respondents. As per the Clause 6 of the Agreement to Sell, after obtaining the necessary permissions for execution of the sale deed from the Income Tax Authority and the Local Authority i.e. the DDA, the defendant no.1 was to intimate the respondents of having obtained such permissions. Thereafter within a period of 30 days of receipt of such intimation by registered post AD, the respondents/plaintiffs were to get the sale deed executed and registered in the office of the Sub-Registrar, New Delhi and make payment of the balance sale consideration. It was the case of the respondents/plaintiffs that the defendant no.1 applied to the DDA for obtaining the permission, but the defendant no.1 failed to get the necessary permission, and hence the sale deed could not be executed and registered. It was the case of the plaintiffs that they were always ready and willing and continued to be ready and willing to perform their part of contract for making of payment of balance consideration of Rs.70,000/-. Ultimately, on the failure of the defendant no.1 to execute the sale deed, a legal notice dated 18.2.1985 was served, which proved futile, and hence the subject suit for specific performance was filed.

4. The defendant no.1 contested the suit by contending that the Agreement to Sell was violative of Section 23 of the Indian Contract Act, 1872 inasmuch as, as per the perpetual lease deed executed by the DDA in favour of the defendant no.1, the property could only have been transferred after 10 years of 20.1.1972 and therefore, the Agreement to sell entered into on 13.7.1977 was against public policy being against the terms of the perpetual lease. It was also pleaded that no notice was served upon the DDA prior to filing of the suit and consequently the suit was barred under Section 53-B of the Delhi Development Act, 1957. It was further pleaded that the suit was barred by limitation. It was also pleaded that the plaintiffs were not ready and willing to perform their part of the contract and they were guilty of breach of contract. Finally, it was pleaded that the relief of specific performance should be denied because the same is a discretionary relief and on account of delay, the defendant no.1 has lost out on receiving of the balance consideration which ought to have been received in the year 1977 itself thereby making it unjust and inequitable to grant specific performance.

5. After the pleadings were complete, the trial court framed the following issues:-

ISSUES:

- “1. Whether the suit of the plaintiff is within time?
2. Whether the agreement date: 13.7.77 is illegal, void and unenforceable?OPD

3. Whether the defendant had applied to the DDA seeking permission to transfer the property in question in terms of the agreement dated : 13.7.1977?OPD.
4. Whether the defendant/DDA had refused to grant the permission as stated in para 1 of the preliminary objections of defendant no.1 and the plaintiff was duly informed?
5. Whether the plaintiff had been willing to perform his part of the contract? OPP.
6. Whether the plaintiff is entitled to a decree of specific performance?
7. Relief.”

ADDITIONAL ISSUES:

- “1. Whether the agreement to sell was contrary to the terms of perpetual lease deed and is hit by Section 23/24 of the Indian Contract Act?OPD
2. Whether the suit is barred by Section 53 B of D.D.Act?OPD
3. Whether the suit is barred under Article 54 of Limitation Act?OPD”

6. The main issues which were argued before this court, and also before the trial court were issues pertaining to the suit being barred by limitation, that the relief should not be granted because DDA had been impleaded only after filing of the suit, the Agreement to Sell was void as it was violative of Section 23 of the Contract Act, 1872, the suit being barred on account of failure to give requisite notice to the DDA under Section 53-B of the Delhi Development Act, 1957 and finally that the discretionary relief for specific performance ought not to be granted in the facts of the present case.

7. Ordinarily, I would have referred to in detail the submissions made by the counsel for the appellants in this court with regard to each of these issues and the response thereto by the counsel for the respondents, however, since the impugned judgment exhaustively deals with each of these issues, arguments of the parties, giving thereafter the appropriate findings thereon, I would thus seek to reproduce the relevant paras of the impugned judgment, inasmuch as, I agree with the reasoning as contained in these paras. Wherever the additional reasoning is required to be given, I am adding such additional reasoning in the relevant portions of this judgment. Before reproducing the paras I note that there are some errors of grammar and syntax in certain portions of the impugned judgment and which be overlooked.

8. With respect to the issue of limitation, the court below has observed as under:-

"10. Issue no.1 and Addl. Issue no.3: In the written statement, it is alleged that suit of the plaintiff is barred by time and merits dismissal on this ground alone. According to Article 54 of Limitation Act, the suit requires to be filed within the period of 3 years. Learned Counsel for the defendant has contended that the defendant was always ready and willing to perform his part of contract and in support of this contention he cited various letters issued by defendant no.1 to the office of DDA and other higher authorities. Letter Ex.D1W1/P-1 to Ex.D1W1/P-5 dated:9.8.77, 1.5.78, 26.9.78, 23.8.79 and 25.5.82 respectively were issued by Col. A.B.Singh requesting the office of DDA to grant permission to execute the sale deed. When no positive response was received, he wrote letters Ex.D1W1/P-6 dated: 31.8.81 to the Prime Minister

of India, Ex.D1W1/P-8 dated: 14.2.84 to the Vice-Chairman of DDA. Some of the letters of Col. A.P.Singh were replied by DDA. The record was summoned from the office of DDA by issuing notice Ex.D1W1/3 dated: 16.9.2001 through postal receipts and AD cards Ex.D1W1/4 to D1W1/7. Some of the letters were produced and the same are Ex.D1/2 dated 4.4.78 Ex.D1W1/2 dated: 14.9.78 Ex.D1W1/1 dated 7.11.78 and Ex.D1W4/4 dated : 19.8.81. These letters were issued by DDA to Col. A.B.Singh and in all these 4 letters permission to sell was rejected by the DDA on the ground that 10 years have not passed since the execution of lease deed as per conditions of lease. Therefore, ld. counsel contended that the date of refusal are 4.4.78, 4.11.78 and 19.8.81, as above mentioned, the period of limitation of 3 years will commence from the last letter of refusal dated: 19.8.81. The present suit was filed much beyond the period of 3 years i.e. on 12.3.85 hence the suit of the plaintiff is liable to be dismissed on this ground alone. On the other hand, ld. counsel for the plaintiff has refused the above contention. He is relying upon para 14 of the written statement of DDA, in which DDA has submitted that defendant no.1 has never been refused the grant of sale permission. DDA still can allow the execution of conveyance lease only after the required formalities are completed and 50% of unearned increase in the value of plot is deposited. Besides the above pleadings in the written statement, ld. counsel has further gone to the extent that at the most, the time will commence from the letter dated: 16.1.85 written by Col. A.B.Singh in which he asked to vacate the premises. In reply of this, a letter dated: 18.2.85 was written by the plaintiffs asking the defendant no.1 to perform his part of agreement. Immediately, thereafter, the suit was filed on 18.2.85. Thus, it has been contended that suit is within the time.

11. From perusal of the agreement, that time is not the essence of the contract. Clause 6 of the agreement Ex.P-3 dated: 13.7.77 is reproduced as below:

“That all the legal requirements relating to the execution of the Sale Deed such as taking permission to sell, income-tax clearance Certificate, from the local authorities shall be the obligation of the Vendor of the First Part at this

own cost. After obtaining the sale permission he shall intimate the same to the Vendees of the Second Part and within a period of 30 days from the date of the Receipt of such intimation by Registered Post under A.D. the vendees of the second part shall get the Sale Deed executed and registered in the office of the Sub Registrar, New Delhi.

12. The above Clause states about the completion of formalities from the government department such as taking the permission to sell, income tax clearance certificate by the vendor and after obtaining the same he shall inform the vendee within 30 days by registered AD post for registration of sale deed. It further shows that as and when the permission is received, he shall inform to the vendee. Thus, the information of refusal to grant permission is not included in the agreement. In the first para of agreement it is stated that it is the vendor who has to act and the role of vendee comes later on. It appears from the correspondence Ex.P4,P5 & Ex.D1/5 to Ex.D1/22 from the side of plaintiff and Ex.D1W1/P1 to Ex.D1W1/P8 from the side of defendant, that both were eager to get the sale deed executed. But the main hurdle coming in the way was the completion of 10 years from the lease deed dated: 20.1.72 Ex.D2/1, Clause 4(a) of conditions of lease is reproduced as below:

“The Lessee shall not sell, transfer, assign or otherwise part with the possession of the whole or any part of the Residential plot except with the previous consent in writing of the lessor which he shall be entitled to refuse in his absolute discretion.

Provided that such consent shall not be given for a period of ten years from the commencement of this Lease unless, in the opinion of the Lessor, exceptional circumstances exist for the grant of such consent.”

13. Accordingly to the above clause, the parties are bound by the condition of completion of 10 years from the date of lease. No permission could be given before 10

years, provided there are exceptional circumstances. There was no exceptional circumstances accrued to the parties as per replies received by parties from the DDA. However, from reading of all the letters mentioned above, both the parties, without any exception, tried their utmost to get the sale permission from the DDA. It also appears from the letters of the defendant that he was in need of money during the initial period of this agreement and he was desperately interested to execute the sale deed prior to completion of 10 years from the date of lease. Similarly, the plaintiffs were also interested to get the sale permission from the DDA and that is why he mentioned in several letters to the plaintiffs to exert his influence for getting the work done. There are sequence of letters from both the parties conveying their intentions for the execution of sale deed. The defendant happens to be in active service in Army and most of the time he remained out of Delhi. Correspondence entered into between them about the progress of obtaining the permission of sale from the DDA. The plaintiffs being stationed in visited the office at Delhi on several occasions and apprised the position from time to time to the defendant, wherever he remained posted in the Army. The letters posted by the plaintiffs to the defendant are Ex.P4,P5, D1/5 to D1/22 and the same were filed by the defendant on record and admitted by the plaintiffs during the stage of admission denial of documents. The letters have been posted in the span of period from 29.9.77 to 1.4.84. Similarly, letters Ex.D1W1/P-1 to D1W/P-8 were written by Col. A.B.Singh to various concerned authorities relating to grant to sale permission and those authorities included income tax office, Vice-chairman of DDA, Lt. Governor of Delhi, Commissioner Land DDA, Prime Minister of India, President of India etc. These letters were posted in the above authorities with the request to expedite the sale permission and for waiving the payment of unearned increase. Although these letters were denied by the defendant during the stage of admission/denial of documents but the defendant could not escape from denying his signatures on all the letters. In fact these letters were written by the defendant no.1 and have been denied with ulterior motive. These letters are admitted in evidence. Despite, the aforesaid correspondence in between the parties and also with the govt. authorities, no

permission to sell was received. Further, the letters were received from the DDA regarding the reply from DDA Ex.D1/2 dated : 4.4.78, Ex.D1W1/2 dated: 14.9.78, Ex.D1W1 dt: 7.11.78 and Ex.D1W4/A dated 19.8.81. From these letters it has been interpreted by learned counsel for the defendant that the refusal for grant of permission to sell was sent by DDA and has contended that the period of limitation will commence from these dates. In this respect learned counsel for the defendant is relied upon 1997 IV A.D. S.C. 380 IN VENKAPPA VS. KASAWWA and the relevant extract is reproduced as below:

“Thus, it could be seen that the suit document itself was denied as early as in 1971. As a consequence mere issuance of notice dated: August 22, 1972 does not stop the running of limitation period. Once the same has began to run it runs its full course. Therefore, the suit having been filed after the expiry of 3 years from the date of the knowledge, of denial, by operation of Article 54 of this Schedule to the Limitation Act, 1963, the suit is hopelessly barred by limitation.”

14. In the above case, the denial was from the side of vendor whereas in the instant case, the denial of grant of permission was from the DDA and that too, due to non completion of period of 10 years from the date of execution of perpetual lease. The aforesaid letters issued by the DDA are not denial for obtaining permission to sell but these letters referred to the compliance of the provisions of terms and conditions of lease deed. The terms and conditions are that the period of 10 years must have expired after the issuance of perpetual lease deed and 50% of the unearned increase must be paid. The parties were initially interested to seek the said permission but because of aforesaid two conditions the matter was delayed. Otherwise any number of times the letters were written to DDA either by the plaintiffs or by the defendant, prior to completion of 10 years from the execution of perpetual lease, for the purpose of grant of permission to sell, the reply would have been always in negative. Therefore, the 4 aforesaid letters dated: 4.4.78 Ex.D1/2, dt:4.9.78 Ex.D1W1/2, dated: 7.11.78 Ex.D1W1/1 and dated: 19.8.81 Ex.D1W4/A cited by Id. counsel for the defendant no.1 would not be the dates from which the

period of limitation would begin to run. Besides this, the agreement to sell does not provide any time limit for execution of sale deed as the time was not the essence of contract. Both were unable to get through with the conditions to sell i.e. 10 years were not completed by that time according to clause 4A of perpetual lease deed. Thus, the time passed and the circumstances changed with the passage of time. Nobody knows when the mind of a person may change. Defendant admittedly wrote the letter dated : 16.1.85 for taking back the possession of the premises in question. This is the time to be considered as the final words from the defendant that he did not want to continue with the agreement to sell and from this time the period of limitation will begin to run for the filing of suit within the period of 3 years under Article 54 of Limitation act. The present suit was filed on 12.3.85 immediately after the receipt of final letter dated: 16.1.85. Thus, the suit of the plaintiff is within the period of limitation under Article 54 of Limitation Act. (underlining added)

9. A reference to the aforesaid paras read with Article 54 of the Limitation Act, 1963 shows that the following conclusions have rightly been drawn by the court below:-

(i) Time of performance was not the essence of the contract inasmuch as the sale deed was to be executed after uncertain events/dates of the permissions to sell being obtained by the defendant no.1 from DDA and the Income Tax Authority. After obtaining of the permissions such intimation was to be given to the plaintiffs by registered post AD and then within 30 days after receipt of this intimation by the plaintiffs that they were liable to get the sale deed executed and registered by payment of balance sale consideration. Accordingly in the facts of the case since a fixed/specified

date for performance was not there, limitation hence would only commence when the plaintiffs had notice of refusal on part of the defendant no.1 to perform the contract.

(ii) The defendant no.1 only on 16.1.1985 for the first time wrote a letter for taking back possession of the premises and the suit was thereafter immediately filed on 12.3.1985. The suit having been filed on 12.3.1989 was thus within limitation period of three years of refusal to perform the Agreement to Sell- the refusal coming into existence for the first time on the defendant no.1 writing the letter dated 16.1.1985. During the entire period from 1977 to 1985, no letter was ever written by the defendant no.1 terminating the contract or refusing to perform the contract and on the contrary repeated efforts were made to get the permission from the DDA for selling of the property. The contract was very much kept alive not only on behalf of the defendant no.1 but also by the plaintiffs.

I therefore hold applying Article 54 of the Limitation Act that since there was no specified date for performing of the contract; and since the time of performance was not the essence of the contract on account of the fact that it was the duty of the defendant no.1 to obtain the necessary permissions and thereafter intimate by registered post AD to the plaintiffs; the cause of action to file the suit for specific performance could only have arisen on 16.1.1985 when the plaintiffs were put to notice that the defendant no.1 had refused to perform the Agreement to Sell. I do not agree with the

argument as raised on behalf of the learned counsel for the appellant that since the DDA refused permission on 4.4.1978, on this date the limitation to file the suit for specific performance had arisen. The fact of the matter is that even after 4.4.1978, the defendant no.1 kept on trying to get the permission from DDA. A refusal by a third person, namely the DDA, to grant permission cannot be equated to a refusal by the defendant no.1 to perform the contract. As already stated, in fact the defendant no.1 himself had kept the contract alive for the entire period from 1977 to 1985. I therefore hold that the trial court has rightly held the suit not to be barred by limitation.

10. The second main issue which was argued before this court was the issue with respect to denial of relief of specific performance as the DDA ought to have been made a party since inception but it was made a party only much after filing of the suit. This aspect has been dealt with by the trial court in paras 15 and 16 of the impugned judgment and which read as under:-

"15. The defendant has also raised preliminary objection in his written statement that the suit is barred by limitation by virtue of Article 21 of Limitation Act, 1963. It has been submitted that the plaintiff had move I.A. No.3644/85 in the suit before the Hon'ble High Court of Delhi for impleading DDA in the suit. The Hon'ble High Court vide its order dated 27.1.86 impleaded DDA as defendant no.2 in the suit. Therefore, order 1 Rule 10 (5) CPC steps into the matter. The suit becomes time barred because the alleged agreement of sale is dated 13.7.77 and the impleadment is made on 21.1.86. In replication the plaintiff has submitted that the defendant no.1 or defendant no.2 DDA never challenged the order dated

21.1.86 before any court of law and as such the said order has become final in all respects and as such it cannot be said that the suit has become time barred. According to order 1 Rule 10(2) CPC, the court may either upon or without the application by either party may join plaintiff or defendant as a party to the suit in order to enable the court effectually and completely adjudicate upon and settle all the questions involved in the suit. But that provision is subject to Section 22 of Limitation Act, 1877 (now Section 21). Section 21 of Limitation Act provides that after institution of the suit if new defendant is added the suit shall, as regards with him, will be deemed to have been instituted when he was made a party but this provision is subject to the proviso that omission to implead, if bonafide, the period of limitation may be any period. On this point, learned counsel for the defendant is relied upon 2001 SAR page 327 and the relevant extract is reproduced as below:

“Adding or substituting the new plaintiff or defendant after institution of suit – suit shall as regards such newly added or substituted party be deemed to have been instituted when he was so made a party – application for impleadment of such a party allowed when time prescribed for institution of the suit has already expired – suit would stand barred – proviso to the substantive provision of Section 21 can be of any avail to the plaintiff only if the court is satisfied and direct that the suit has regards newly added or substituted party shall be deemed to have been instituted on an earlier date.”

16. Thus it has to be seen as to whether the plaintiff has not added DDA by mistake or in good faith. The ground cited by learned counsel for the plaintiff is that there is no objection raised by the DDA in his written statement on this point but this is no ground of exception on this point. However, from perusal of the record it appears that at the time of filing of the suit before the Hon’ble High Court at the initial stage no relief was claimed by the plaintiff against the DDA, therefore, the plaintiff did not make DDA as a party to the suit. The subsequent act of inclusion of DDA as party is merely a source to achieve the desired objective and it appears that it is the mistake in good faith by the plaintiff for non-inclusion of DDA as a party to the

suit and it will be deemed that the suit has been filed on the earlier date as per Section 21 of Limitation Act. The plaintiff has satisfied on both the legal objections for filing the suit within the period of limitation under Article 21 and Article 54 of Limitation Act. The issues are, accordingly decided in favour of the plaintiffs and against the defendant no.1.” (underlining added)

I completely agree with the aforesaid findings of the trial court on this aspect because there was no need to make the DDA as a party originally because no relief was claimed initially against the DDA. There were therefore no malafides for not adding the DDA as a party from the beginning.

11. At this stage I may add that this entire argument is actually without any substance because the suit for specific performance could have been decreed even if the DDA would not have been made a party to the suit. When a suit for specific performance is decreed qua a lease hold property, and where permission of the superior lessor has to be obtained for transferring the property, a decree which is passed includes therein a direction to the defendant/proposed seller to execute the sale deed after obtaining the necessary permissions of the appropriate authorities and which appropriate authorities do not have to be made parties to the suit. As per Order 21 Rule 32 sub-Rule 5 CPC, if the defendant does not take the necessary permissions, the court in execution proceedings can appoint a Local Commissioner at the cost of the defendant/judgment debtor to take the necessary permissions. In fact a contract of specific performance of the type

in question is a contingent contract and such a contingent contract is enforceable without making the authority which has to give the permission as party to the suit. It is only if for some valid reason that the concerned authority denies permission, then the decree for specific performance cannot be enforced, otherwise, the decree for specific performance will be enforced by either the defendant no.1 getting the necessary permissions or on behalf of the defendant no.1 appointment of a person by the court who will take the necessary permissions and thereafter get the sale deed executed and registered. The Supreme Court in the case of ***Chandnee Vidyawati Vs. C.L. Katiyal AIR 1964 SC 978*** has held that such type of contracts/Agreements to Sell are contingent contracts and in terms of the decree in such suits the proposed seller will have to take the necessary permissions from the appropriate authorities after passing of the decree for specific performance.

12. I therefore, hold that not only there is no bar for granting of the relief of specific performance merely because the DDA was added as a party only subsequently, and on the contrary DDA actually need not at all have been added as a party as stated above. Further, the trial court has rightly held that the DDA was added as a party for bonafide reasons and it should therefore be treated as a defendant since the date of filing of the suit. I therefore, reject the argument urged on behalf of the appellant that a suit for specific performance could not have been decreed as the DDA was only

subsequently added as a party and that DDA ought to have been made a party since the inception.

13. The next issue which was argued on behalf of the appellant was that the Agreement to Sell in question was in violation of the terms of the perpetual lease deed, which provided that there could not be a transfer of the property for a period of 10 years from the date of the execution of the lease deed, and thus such agreement would be violative of Section 23 of the Contract Act, 1872 being against public policy and hence void and unenforceable. In order to appreciate this contention, firstly, it is necessary to refer to the relevant clause of the lease deed executed by the DDA in favour of the defendant no.1 and which reads as under:-

Clause 4(a)

“The Lessee shall not sell, transfer, assign, or otherwise part with the possession of the whole or any part of the Residential plot except with the previous consent in writing of the Lessor which he shall be entitled to refuse in his absolute discretion.

Provided that such consent shall not be given for a period of ten years from the commencement of this Lease unless, in the opinion of the Lessor, exceptional circumstances exist for the grant of such consent.”

Firstly, it cannot be said by reading of the aforesaid clause that there was an absolute bar against transferring the property during the period of 10 years because for exceptional circumstances the permission could have been granted. Therefore, it cannot be said that the Agreement to Sell entered into within a period of 10 years of execution of the perpetual lease

deed would be violative of the terms of the lease deed. Secondly, what is barred is an execution of a sale deed and not entering into of an Agreement to Sell. It therefore cannot be said that execution of Agreement to Sell itself would be violative of the terms of the lease deed. One can also in the facts of the case press into application the principle/spirit of Section 43 of the Transfer of Property Act, 1882 which provides that if a person at the time of the transfer of the property is found not to have title and he subsequently acquires the title, the agreement entered into at the time when the transferor had no title can be enforced on account of the subsequent event of the transferor having acquired title in the property. The said Section 43 of the Transfer of Property Act, 1882 reads as under:-

“Section 43: Transfer by unauthorised person who subsequently acquires interest in property transferred— Where a person erroneously represents that he is authorised to transfer certain immoveable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists.

Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option.”

Accordingly, for the aforesaid reasons, it is not possible to hold that the Agreement to Sell in question was in violation of Section 23 of the Contract Act, 1872.

14. This aspect has been rightly dealt with by the trial court, inter alia, in the following words:

“20. Issue no.2 & Addl. Issue no.1: In the preliminary objections of written statement of defendant no.1 it has been alleged that the sale agreement dated 13.7.1977 is in violation of terms of perpetual lease dated 20.1.1972 as the agreement has been arrived at in between the parties prior to the completion of 10 years from the date of perpetual lease. It has also been alleged that the said agreement is contrary to the terms of perpetual lease deed and being against public policy and is covered under section 23/24 of India Contract Act. These provisions have to be read jointly with Section 6(h) of the Transfer of Property Act. In reply the plaintiff in his replication has denied the agreement to sell was in violation of terms of perpetual lease dated 20.1.1972. It has been submitted that as per clause 4 of said lease deed it is the discretionary power of the Lessor/DDA to grant permission for sale and accordingly the DDA i.e. defendant no.2 granted permission to sell the property in dispute in favour of the plaintiffs provided the defendant no.1 to do/complete certain formalities, which the defendant never completed with malafide and with ulterior motives to harass the plaintiffs. Section 23 of Indian Contract Act provides that the agreement is lawful if its is not forbidden by law. It is not opposed to the public policy and it is not inequitable. If the object or consideration of the agreement is unlawful then the said agreement is void. Therefore, learned counsel for the defendant no.1 has contended that the agreement to sell is against the public policy, and it in violation of terms and conditions of lease and is causing hardship to defendant no.1. Under such circumstances, he pleaded that the said agreement is void and not enforceable in law. With these contentions of the defendant no.1, he will have to prove that the agreement executed in between the parties is contrary to law or opposed to public policy or the agreement is void etc.

21. First of all, it is necessary to state as to what type of agreement the parties has entered into in regard to provisions of Section 23 and 24 of the Indian Contract Act. the defendant agreed to sell his plot of land and plaintiff accepted to purchase for consideration mutually settled in between them. The agreement to sell was registered before

the Sub-Registrar, the major part of the consideration was paid, the delivery of possession of house in question was handed over to the plaintiff and the defendant agreed to executed the sale deed after obtaining the necessary permission from the local authorities. According to the terms and conditions of perpetual lease, the sale deed could be executed after a period of 10 years from the date of lease.

25. Here, in the instant case, parties entered into agreement knowing well that the permission to sell could not be granted up to period of 10 years, therefore, it is alleged by Id. counsel that the agreement is in violation of 10 years condition and is forbidden by law under section 23 of Contract Act. Definitely, the parties can enter into an agreement to sell but the agreement is not executable prior to 10 years and the entering into such agreement is not against any statute. In certain cases, the condition of 10 years could be relaxed under exceptional circumstances as provided under clause 4(a) of the perpetual lease. As such, it could not be said that the agreement is forbidden by law. On similar grounds, the case law cited in AIR 1975 SUPREME COURT 1223 AND AIR 1969 S.C. 504 are not applicable to the instant case.” (underlining added)

The trial court has therefore, rightly held that the Agreement to Sell was not in violation of the Section 23 of the Contract Act, 1872.

15. The next issue which was argued on behalf of the appellant was that the suit against the DDA was barred under Section 53-B of the Delhi Development Act, 1957 inasmuch as the requisite notice was not given prior to filing of the suit. The trial court has correctly held that there was no bar to the suit for lack of notice under Section 53-B of the Delhi Development Act, 1957 by observing as under:-

“17. Addl. Issue no. 2: In the amended written statement of defendant no.1, a preliminary legal objection has been raised

that the suit is barred under section 53B of D.D.Act as no notice has been issued to the DDA and as such the entire suit must fail. In reply to this objection, the plaintiff has submitted in the replication that the DDA was impleaded as defendant no.2 under the orders of Hon'ble High Court when the plaintiffs moved an application. It has been further submitted that the defendant no.2 DDA has not taken any objection as such defendant no.1 cannot be permitted to take the said objection. However, it is mandatory if the suit is against the DDA, a notice must be issued prior to the filing of the suit. Admittedly, in this case no notice has been issued by the plaintiff before filing of this suit. As such, Id. counsel for the defendant no.1 is relied upon 59 (1995) DLT 625 (DCM Limited Vs. DDA) and the relevant extract is reproduced as belows:

“A notice which is required to be served on the defendant as is contemplated under section 53H of the Act is similar to the notice, which is required to be served under section 80 of the Code of Civil Procedure, in case a suit is to be filed against the government or public authority. Section 53B of Delhi Development Act like section 80 of Code of Civil Procedure is mandatory and its compliance is imperative. The suit not complying with such like procedures cannot be entertained by any court and if instituted must be rejected under order 7 Rule 11 CPC.”

18. Similar view has been held in various cases decided by the courts, i.e. 1996 RLR 400, 61 (1996) DLT 757, 2001 RLR 100, AIR 1927 PREVY COUNSEL 176, AIR 1938 PATNA 127, AIR (37) 1950 ORISSA 257, AIR 1931 MADRAS 175, AIR 1936 PATANA 339, AIR 1931 CALCUTTA 503, 63 1996 DLT 676, 1950 ORISSA 257 AND 1972 RLR 38. The construction of Section 53B of DD Act is on the analogy of Section 80 of Code of Civil Procedure. It is mandatory on the part of party suing to issue notice under section 80 of CPC before filing of the suit if the case has been filed against government authorities. But in the case where the parties are in correspondence with DDA for the sake of grant of permission to sell for the last many years and several letters have been cited, as mentioned above, and agitated before the DDA, these correspondence and representations are sufficient notice to

the DDA. The main purpose of this provision of Section 53 B of the DD Act is that the government authorities are not surprised by filing of the case against them without their information. Through these letters the DDA was informed and apprised of the problem existing in between the DDA and the parties, therefore, the purpose of Section 53B of DD Act or Section 80 of CPC is fully served by way of previous representations and correspondence with the DDA by the plaintiffs or by defendant no.1. This view has been supported from the case laws reported in 1994 RLR 71 (Moonlight Electronics Industry vs. DDA) in which the following observations have been made by our own High Court and the extract is reproduced as below:

“The purpose of Section 53(H) of the Delhi Development Act is to give notice to the deft. of the facts on which the plaintiff wishes to rely for purposes of seeking relief from this court.

I have seen the order which has been passed by D.B. of B.N.Kirpal and Sunanda Bhandare, JJ. in CWP No. 2716/88, D/25.01.91 which is Annexure-A to the plaint.

It is not disputed that in the writ both the parties in the suit were parties & order of 25.1.1991 was passed. The writ was disposed of for the reasons that the D.B. would not go into the rate which was to be charged as market rate as on 8.1.81. The amount payable has already been deposited by the plaintiff in the instant suit, and the petitioner in the W.P. with the DDA.

In my view, filing of the W.P. is sufficient notice. It is also sufficient notice, in my view, that this suit has been filed. Counsel for the petitioner also refers to and relies upon 1991 Rajdhani LR 389. Same view has been taken by P.K.Bahri, J.

I decide the preliminary issue in favour of the plaintiff by holding that the suit is maintainable.”
(underlining added)

16. To the aforesaid finding of the trial court, I may add that in fact, the appellants/defendant no.1 had no locus standi to raise this issue as it is only

the DDA which can raise this issue, and which is not raising this issue. In any case, this issue is no longer res integra inasmuch as, it has been held by a Division Bench judgment of this court in the case of ***Yashoda Kumari Vs. MCD AIR 2004 Del 225*** that once there is a contest to the suit, the suit cannot be held to be barred for not giving of the notice under Section 53-B inasmuch as the basic object of Section 53-B, like Section 80 CPC is to prevent the matters from coming to court and once the matter reach the court and are contested, the suit should not be dismissed on such technical grounds. The relevant observations of the Division Bench of this court in the decision of the case ***Yashoda Kumari (supra)*** are as under:-

7. Section 80, CPC affords two options to the plaintiff. He may either file a suit against the Government or the public officer after serving two months notice under Sub-section 1 or he may file it without serving the notice and for this seek the leave of the Court under Sub-section 2 on satisfying it that an immediate and urgent relief was required in the facts and circumstances of the case. He can do this by filing an accompanying application to show the urgency which is to be considered and disposed of by the Court. In the event it is rejected, the Court has to return the plaint to the plaintiff who could refile it after service of two months notice under the proviso of Section 80.

8. The object of Section 80 notice is to afford the Government or the public officer an opportunity to examine the nature of the claim to settle it, if so advised and to avoid any futile litigation and to save the public money and time which would be otherwise wasted on unnecessary litigation.

9. The Supreme Court in Raghunath Das v. [Union of India and Anr., MANU/SC/0406/1968](#) : [1969]1SCR450 , holding this:

"The object of the notice contemplated by Section [80](#), CPC is to give to the concerned Government and public officers opportunity to reconsider the legal position and to make amends or settle the claim, if so advised without litigation. The legislative intention behind that section is that public money and time should not be wasted on unnecessary litigation and the Government and the public officers should be given a reasonable opportunity to examine the claim made against them lest they should be drawn into avoidable litigation. The purpose of law is advancement of justice. The provisions in Section [80](#) are not intended to be used as booby trap against ignorant and illiterate persons."

11. Apart from this, we find that the appellant's suit was already registered by the Court first and ex parte interim order was also passed in this. It was thereafter transferred to District Court along with the application for grant of leave. From this it could also be easily presumed that the Court had impliedly granted the leave to institute the suit or that the notice stood waived in the facts and circumstances of the case. This aspect seems to have gone totally unnoticed with Trial Court proceedings mechanically; in the matter to dismiss the suit for want of notice under Section [80](#), CPC.

14. But this apart, taking in regard that this Court had registered the suit and granted the stay order and that respondents had contested it all through, even notice under Section [53-B](#) should be deemed waived in the facts and circumstances of the case. After all the purpose of notice under Section [53-B](#) of DDA Act is the same as that of Section [80](#), CPC i.e. to bring the claim to the authority's notice so that it may concede or contest it. Once the authority had contested it on merits even at preliminary stage, it could not complain of non-service of notice under Section [53-B](#) now. Nor could it be held fatal to justify the dismissal of the suit.

15. Viewed this, we allow this appeal and set aside the impugned dismissal order. Technically this would revive appellant's suit for consideration of appellant's application for grant or refusal of leave but we feel that much water had flowed down since and doing so would be an exercise in futility because parties have already contested the suit on merit all through and all these years. It would be ridiculous and hyper-technical to take them back to square one for a fresh debate on service of two months' notice under Section 80, CPC or Section 53-B of DDA Act. Both notices shall, Therefore, be deemed waived in the facts and circumstances of the case and appellant's suit No. 316 shall be revived and disposed of under law on merit. (emphasis supplied)

17. The final issue which has been urged on behalf of the appellant is that the relief for specific performance is a discretionary relief and in the facts of the present case, the discretionary relief for specific performance ought not to be granted. This argument seeking denial of the relief of specific performance is based upon Section 20 of the Specific Relief Act, 1963 and which provides that the court is not bound to grant specific performance merely because it is lawful to do so. Sub-Section-2 of Section 20 gives certain examples where specific performance may be denied. We are concerned in the facts of the present case with Section 20(2)(b) of the Specific Relief Act, 1963, which states that specific performance can be denied where performance of the contract would involve of hardship on the defendant which he did not foresee and non performance would not involve hardship on the plaintiff. Explanation-1 of Section 20 adds a caveat that mere inadequacy of consideration or that the contract is more onerous to the defendant or improvident in nature will not be deemed to be considered as a

hardship within the meaning of Section 20 (2)(b). Keeping in view the aforesaid position of law, in my opinion, specific performance in the facts of the present case cannot be denied because of the reasons which are stated below, although, the amount which would be awarded to the appellants would have to be modulated. The factors for granting specific performance and not denying the same are:-

(i) The defendant no.1 entered into a contract with open eyes knowing that it is possible that permission to sell the property may not be granted since 10 years had not expired from the date of the execution of the lease deed with the DDA. It is not a case that the defendant no.1 was misled into entering of the contract, because the subject clause is a clause in the lease deed of the defendant no.1 himself with the DDA. It is the defendant no.1 who expected to get the necessary permission from the DDA by showing exceptional hardship, and merely because, permission was not granted, cannot mean that the plaintiffs are to blame.

(ii) The record shows that permission was denied by the DDA on account of the faults not of the plaintiffs but of the defendant no.1. The first default was that the necessary documentation was not completed by the defendant no.1. Secondly, the defendant no.1 though was bound to pay 50% of the unearned increase for getting the permission, failed to pay the same. There is nothing which has emerged on record that the DDA refused to grant the permission except for the reason of non-compliance of the requirements of

giving the necessary documentation and paying of the unearned increase by the defendant no.1

(iii) The defendant no.1 very much in spite of a bar for selling of the property for 10 years except on showing undue hardship, not only entered into the contract but also received more than 50% of the consideration i.e. Rs.90,000/- out of Rs.1,60,000/-. In fact, the possession of the property was also delivered on 15.7.1977 when the Agreement to Sell was registered. No seller transfers possession unless he has received the entire sale consideration except the balance stated sale consideration. In terms of Section 20(3) of the Specific Relief Act in the facts of the present case, the court would exercise discretion to decree specific performance because the plaintiff has done substantial acts in furtherance of the Agreement to Sell. The trial court has by extensive discussion held that the plaintiffs were ready and willing to perform their part of the contract and that the contract could not be performed by execution and registration of the sale deed (and only when the balance sale consideration was payable) on account of failure of the defendant no.1 to complete the necessary documentation required by the DDA including by making payment of 50% of the unearned increase.

(iv) The facts of this case are such that specific performance cannot be denied because of the alleged hardship to the appellant because in terms of Section 20(2)(b) there is a hardship on the plaintiff who has paid substantial

part of the price of over 50%, received possession and can claim the prejudice of denial of the relief of specific performance.

(v) The facts of the present case show that the plaintiffs had a complete right to the property in terms of the doctrine of *part performance* under Section 53A of the Transfer of Property Act, 1882 inasmuch as there is a written agreement to sell (duly registered) containing the necessary terms and under the agreement the plaintiffs had received possession after paying part sale consideration and they were always ready and willing to perform their part of the contract which part was awaiting the permission from DDA. The defendant No.1 and his successors thus can claim no right in the property except on payment of the balance sale consideration.

18. The counsel for the appellants argued that prices of the property have risen and balance sale consideration if now received would not be sufficient to cover the actual price of the property causing hardship to the appellants. Besides the fact that I am in the subsequent part of this judgment modulating the amount which the appellants will receive, this argument raised in my opinion is wholly fallacious because it was defendant No.1 who was guilty of breach as he failed to complete the required formalities as asked for by DDA and the plaintiffs were not guilty of breach and the plaintiffs thus also cannot be prejudiced on account of rise in the prices of property, more so when they are in possession since 1977 and that too as per the doctrine of part performance contained in Section 53A of Transfer of

Property Act, 1882. The plaintiffs would have no advantage in retaining the balance payment of sale price, and they were entitled to retain the same by making its payment only after necessary permissions were obtained so that the plaintiffs had the complete title to the property by execution and registration of the sale deed in their favour.

19. While on this aspect of the appellants being prejudiced by not receiving today's price of the property, I would like to bring on record the argument of the counsel for the plaintiffs that the defendant no.1 had in spite of the subject contract with the plaintiffs, entered into two further Agreements to sell with certain persons and from which persons the defendant no.1 has received lacs of rupees. The earlier counsel Sh. Saurabh Tiwary who appeared for the appellants tried to wriggle away from the situation, however, no effective reply was forthcoming , more so because at least with respect to one other such person/prospective buyer of the property, litigation is said to be pending in a civil court. The conduct of the appellants/defendant no.1 is therefore such that it is not open to claim the defence of denying the plaintiffs the discretionary relief of specific performance.

Added to the above conduct of the appellants/defendant no.1, is their conduct during the arguments of the present appeal. The case was taken up first time in the 'Regulars' in around the last week of July this year. The earlier counsel, who appeared in the case after discussion of the broad

parameters sought to take time to take instructions from his clients. The need for instructions arose because the Agreement to Sell was admitted and it was also admitted that it was the defendant no.1 who was responsible for not getting the necessary permissions from the DDA for selling of the property which he did not obtain. The need for taking instructions was to balance the equities because specific performance was argued to be a discretionary relief. The earlier counsel Mr. Saurabh Tiwari, after seeking adjournment for two weeks again sought adjournment on 17.8.2011 for settlement. On 17.8.2011 though the matter was adjourned at request, it was however made clear that appeal would have to be argued on the adjourned date if there was no settlement by the next date i.e 9.9.2011. The case was then called out on 20.9.2011 when it was found that the appellants mid course the arguments had changed their advocate on record and who was led by a senior counsel to argue the case. Once again repeated requests for adjournment were made on 20.9.2011 which were declined, and the arguments thus again commenced. Once again, during the course of arguments, adjournment was prayed on behalf of the appellant, which was first declined and thereafter granted because the new counsels were not aware as to what had transpired in the court when the earlier counsel Sh. Saurabh Tiwari had appeared for the appellants/defendant no.1 and the new counsel wanted to discuss the modalities of adjusting equities with the appellants and which were already discussed in the Court with the earlier

counsel. On 28.9.2011-the adjourned date, the matter was shown in the 'Admission List' because certain applications to bring on record the legal heirs were filed on behalf of the appellants besides filing of an application for adjournment. The matter was called out three times in the morning but no one appeared on behalf of the appellants although the applications which had come up were filed on behalf of the appellants and this specific date of 28.9.2011 was fixed for further final arguments in the matter. The matter was then kept after lunch when one counsel appeared and sought a passover that the senior counsel would just come. In view of the aforesaid conduct, the matter was passed over making it clear on the next call, the matter would have to be argued. Once again, on the next call, a pass-over was prayed which was declined because the same had been granted for four times since morning. It is at this stage it transpired that the son of the original defendant no.1 was all the time from the morning sitting in the court and quietly observing the court proceedings without causing an appearance to be made on the first three calls when no one appeared for the appellants. The matter was then ultimately argued on behalf of the appellants when this court refused to grant any further accommodation. Thus, on behalf of the appellants, the case was argued in bits and pieces on three dates of hearings and finally on 28.9.2011 and during which period the strategy was to try and avoid the conclusion of the arguments.

20. The issue therefore is how the relief with respect to the balance payment should be modulated so as to balance the equities and not to cause any injustice to either of the parties. This has to be done keeping in mind on the one hand that the defendant no.1 was himself responsible for not getting the permission due to his own faults, and on the other hand it has also to be kept in mind that the appellants should still be compensated because of rise in the value of the prices of the properties and the balance price continuing to remain with the plaintiffs/respondents. I may at this stage add that when the earlier counsel Mr. Saurabh Tiwari, Advocate had appeared, there was an offer from the side of the plaintiffs to increase the sale price to five times its original price or pay on the balance price due with a high rate of interest of 14% per annum to 18% per annum, and at one stage to ensure complete equities are done, the counsel for the plaintiffs even raised the rate of interest to 24% per annum simple. These alternatives were also given to the new counsels who had appeared on 20.9.2011. On 28.9.2011, there was only a wishy-washy response on such offers of the plaintiffs by the appellants/defendant no.1, and in effect it was said that compromise was not possible.

21. Though, it has not been argued on behalf of the appellants/defendant no.1 for a claim of a higher price or other adjustments to the balance price payable, however, considering the offer of the plaintiffs, and more so keeping in mind the judgment of the Supreme court in the case of **Nirmala**

Anand Vs. Advert Corporation(P) Ltd. 2002 (8) SCC 146 I have thought it fit not only to increase the sale price of the property but also grant a substantially high rate of interest to alleviate the alleged loss to the defendant No.1, although as stated above the situation which has emerged today was mostly on account of the defendant No.1 himself. The Supreme Court in the aforesaid case of **Nirmala Anand (supra)** has held that the courts have power to increase the price of the property and balance the equities keeping in view the facts of each individual case. Increase in price of the property or other adjustments which are made have to be so done keeping in view various factors as to who is the person responsible for bringing the parties to the present stage, for what period should compensation/increase in price be granted, what should be the rate of interest or as to how else should the equities be balanced.

22. On this aspect, firstly, I must note that the maximum advantage at best which the appellants/defendant no.1 can take is for increase of the prices from 1977 to 1985 when the litigation commenced in court. After 1985, it is only because of the unjustified defence of the defendant no.1/appellants that the case was contested otherwise the defendant no.1/appellants would have definitely received the balance price in 1985 itself. In my opinion, taking any parameters, the price of the property would have increased at best only by about three times from 1977 to 1985, and therefore, the appellants/defendant no.1 would be entitled to a sum of

Rs.2,10,000/- (Rs.70,000/- multiplied by three) on the date of filing of the suit in 1985. This also is being liberal towards the appellants because it was not the fault of the plaintiffs that the case had come to the stage of filing of the litigation and the suit had to be filed because the defendant no.1 turned dishonest in 1985 by refusing to perform the contract by asking back the possession of the suit property. On this amount of Rs.2,10,000/- the appellants/defendant no.1 should be granted a rate of interest from the date of filing of the suit till the date of payment by the plaintiffs, and period is a huge period from 1985 till today i.e. approximately over 26 years. In my opinion considering all aspects, 18% per annum simple interest can surely be considered to be reasonable rate of return on the amount of Rs.2,10,000/-.

There were two options offered by the plaintiffs for compensating the appellants/defendant no.1. One was to grant interest of 14% per annum simple wrenched up to 24% per annum simple on the balance price payable from the date of filing of the suit till the date of payment and the second was to grant interest at 14% and simultaneously increasing the balance price which is payable.

Considering the facts and circumstances of the case, I deem it fit that the appellant would be entitled to a sum of Rs.2,10,000/- as on the date when the suit was filed for specific performance i.e. 13.3.1985 and thereafter on such amount pendente lite and future interest till payment at 18% per annum simple. I may note that the rate of interest of 18% being granted by

this court is very high considering the interest regime on the fixed deposits as at present and in the past one decade or so. There has been a consistent fall in the rates of interest over the last decade and a half. Also, it has to be kept in mind that it was not necessary that the appellants if they would have received the amount of Rs.2,10,000/- in 1985 then they would have had consistent benefit of high rate of return on investment of Rs.2,10,000/- over each and every year, because not only the rates of interest have varied, but also there was a possibility that if the investment of Rs.2,10,000/- was not wisely made by defendant no.1/appellants, they in fact besides earning a much lesser rate of interest, may have suffered other consequences also.

23. In view of the above, I hold that the appeal is liable to be dismissed modulating the price as stated in para 22 above. The impugned judgment and decree stands sustained except that the appellants shall be granted a money decree for a sum of Rs.2,10,000/- along with interest @ 18% per annum simple from the date of filing of the suit till the date of payment. Let the plaintiffs deposit this amount as directed by today's judgment in this court within a period of three months from today and whereupon the appellants are directed to get the necessary permissions for sale of the property including from the DDA and thereafter to execute and register the necessary sale deed with respect to the suit property bearing no.D-211, Malviya Nagar Extension, now known as Saket, New Delhi situated on a plot admeasuring 209.032 sq. mts. in favour of the plaintiffs/respondents no.1

and 2. I also clarify that as per the policy of the DDA if the property can be converted to freehold on payment of conversion charges, and if the plaintiffs are ready to pay these charges, the DDA will on payment of such charges execute a Conveyance Deed instead of a Lease Deed in favour of the plaintiffs/respondents no.1 and 2. The conversion charges will be paid directly by the plaintiffs/respondents no.1 and 2 to the DDA on such intimation of the amount being given to them. Appeal is accordingly disposed of accordingly. Parties are left to bear their own costs.

OCTOBER 05, 2011
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VALMIKI J. MEHTA, J.