

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

+ **RSA No.50/2013**

% **7th March, 2014**

G.P. SHARMA

.....Appellant

Through: Mr. Peeyoosh Kalra, Advocate with
Mr. Ashok Nagrath, Advocate.

VERSUS

HARI SHANKAR SHARMA

..... Respondent

Through: Mr. Sandeep Sharma, Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? Yes

VALMIKI J. MEHTA, J (ORAL)

1. This Second Appeal is filed against the concurrent judgments of the courts below; of the trial court dated 8.2.2011 and the first appellate court dated 30.10.2012; by which the suit for possession filed by the appellant/plaintiff has been dismissed.

2. The facts of the case as pleaded by the appellant/plaintiff in the plaint were that the appellant/plaintiff and the respondent/defendant are real brothers. Respondent/defendant was an employee of Railways and therefore was a member of the Railway Board House Building Co-operative Society.

It was further the case of the appellant/plaintiff that the

respondent/defendant did not have enough funds to become member of the co-operative society and for making payment for land to be conveyed by the society and consequently the appellant/plaintiff also contributed equally in making payments to the cooperative society for membership and transfer of the plot by the society to the respondent/defendant. It was further pleaded by the appellant/plaintiff that the respondent/defendant agreed that he will take steps to get the appellant/plaintiff admitted as a joint member of the cooperative society alongwith the respondent/defendant. The appellant/plaintiff claims to have paid various amounts either directly to the respondent/defendant or to the society towards allotment of the plot. In all the appellant/plaintiff claims that a sum of Rs.5,340/- was paid to the respondent/defendant towards cost of the land of the suit property bearing no.230, Anand Vihar, New Delhi. The case of the appellant/plaintiff further was that the respondent/defendant executed in his favour for half ownership rights in the suit property an agreement to sell dated 3.4.1980. A separate receipt acknowledging receiving of a sum of Rs.9,570/- was also executed by the respondent/defendant as PW1/C. The appellant/plaintiff claims that by virtue of this agreement to sell he got benefit of the doctrine of part performance under Section 53A of the Transfer of Property Act, 1882 for half ownership interest in the suit property. The appellant/plaintiff claims

that he received the possession from the respondent/defendant, but when on 1.2.1983 the appellant/plaintiff went with his labourers to make estimates and measurements for raising a boundary wall to protect his possession, the respondent/defendant threatened the appellant/plaintiff to desist from raising any construction. The appellant/plaintiff in the plaint also refers to earlier legal proceedings in a suit titled as *Hari Shankar Vs. G.P.Sharma*, suit No.94/1987 wherein the respondent/defendant as plaintiff had challenged the agreement to sell dated 3.4.1980 executed by him in favour of the appellant/plaintiff as having been got fraudulently executed, but that suit No.94/1987 was dismissed by the judgment of the court dated 3.3.1990, and since that judgment has become final, consequentially all rights which the appellant/plaintiff has as per agreement to sell stands finalized in his favour.

3. The respondent/defendant before the trial court contended that the suit for possession filed by the appellant/plaintiff was not maintainable because the same was based upon the null and void agreement to sell dated 3.4.1980. Suit was also pleaded to be barred by limitation. Suit was also said to be barred by the provision of Section 23 of the Contract Act, 1872 as also by Section 4 of the Benami Transactions (Prohibition) Act, 1988. It was contended by the respondent/defendant that the respondent/defendant

himself received possession from the housing society in the year 1981 and therefore there did not arise any question of handing over possession to the appellant/plaintiff earlier to that and much less in the year 1978 (or even 1980) when the agreement to sell was entered into and as was the case of the appellant/plaintiff. Respondent/defendant also denied that he had ever received the half price of the suit plot or that he assured the appellant/plaintiff that he would assist in making the appellant/plaintiff as member of the cooperative society.

4. The following issues were framed in the suit:-

- “1. Whether plaintiff is entitled for possession as prayed? OPP
2. Whether plaintiff has right, title or interest in the suit property? OPP
3. Whether plaintiff has locus standi to file the present suit? OPP
4. Whether suit is within limitation? OPP
5. Whether suit is not maintainable in view of Section 23 of the Contract Act? OPD
6. Whether suit is barred U/S of Benami Transaction Act, 1988? OPD
7. Relief.”

5. The suit was dismissed by the trial court by its judgment dated 8.2.2011. Issue nos.1 to 3 were dealt with together and trial court held that the appellant/plaintiff failed to prove the existence of any joint hindu family and that the appellant/plaintiff failed to prove that the possession of the suit property was handed over to him because there were contradictions in the case of the appellant/plaintiff of possession being handed over in the year

1978/1980 at one place and in the year 1983 at another place. The issue of possession having been given to the appellant/plaintiff has been disbelieved by the trial court because the appellant/plaintiff failed to prove the date of dispossession. Other reasons have also been given and it has been held that the appellant/plaintiff failed to prove these issues and which were thus held against the appellant/plaintiff. Issue no.4 of limitation was held in favour of the appellant/plaintiff. Issue no.5 was held in favour of the respondent/defendant and it was held that the suit was not maintainable in view of Section 23 of the Contract Act, 1872. Issue no.6 of the Benami Act was held not to apply to the facts of the present case and which was therefore held against the respondent/defendant.

6. The first appellate court by its impugned judgment has upheld the judgment of the trial court. The first appellate court has held that the appellant/plaintiff cannot get benefit of Section 53A of the Transfer of Property Act because the appellant/plaintiff was not put in possession by the respondent/defendant and confirmed the finding of the trial court that the appellant/plaintiff was not handed over possession. The first appellate court however held in favour of the appellant/plaintiff with regard to finality of the agreement to sell dated 3.4.1980, Ex.PW1/B, on the ground that the judgment in the earlier suit No.94/1987 was binding upon the

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respondent/defendant and consequently it cannot be held that the agreement to sell was got fraudulently executed by the appellant/plaintiff from the respondent/defendant. The findings of the issue nos.1 to 3 of the trial court have been upheld by the first appellate court. Finding on issue no.5 of the suit not being maintainable under Section 23 of the Contract Act, 1872 has also been upheld in favour of the respondent/plaintiff by virtue of Clause II sub-Clause 6(a) and 6(b) of the perpetual lease deed dated 29.8.1978, Ex.DW1/1, executed by the cooperative society in favour of the respondent/defendant. It is held by the first appellate court that there was a bar to the transfer of the residential plot and consequently the agreement to sell cannot be enforced and possession as prayed therefore cannot be granted.

7. For the purpose of disposal of this Regular Second Appeal, the following substantial questions of law are framed:-

“(i) Whether the courts below have committed gross illegality and perversity in denying the benefit to the appellant/plaintiff of Section 53A of the Transfer of Property Act, 1882 once the judgment dated 3.3.1990 in suit No.94/1987 had become final and it was held that the agreement to sell dated 3.4.1980 was not got fraudulently executed by the appellant/plaintiff from the respondent/defendant?

(ii) Whether the courts below have committed clear cut illegality and perversity in holding that the appellant/plaintiff is not entitled to benefit of Section 53A of the Transfer of Property Act, 1882 arising under the agreement to sell dated 3.4.1980 on the ground that physical possession of the suit property was not proved to have been delivered to the appellant/plaintiff?

(iii) Whether the courts below have committed a gross illegality and perversity in holding that the rights to the appellant/plaintiff under the agreement to sell dated 3.4.1980 are barred by virtue of Section 23 of the Contract Act, 1872 read with Clause II sub-Clauses 6(a) and 6(b) of the perpetual lease deed executed by the cooperative society in favour of the respondent/defendant?”

The aforesaid substantial questions of law are framed in exercise of powers of this Court under Section 100(5) of the Code of Civil Procedure, 1908 (CPC) and as per the issues which have been urged before me.

8. Before me, learned counsel for the appellant/plaintiff has argued as under:-

(i) Appellant/plaintiff cannot be denied benefits of the agreement to sell dated 3.4.1980 inasmuch as contradictions relied upon by the courts below

of the appellant coming into possession were not such contradictions to hold against the appellant/plaintiff that the constructive possession was not with the appellant/plaintiff, so that the appellant/plaintiff should be denied the benefit of Section 53A of the Transfer of Property Act, 1882 and it should be held that the appellant/plaintiff was in constructive possession.

(ii) The contention of the respondent/defendant that the appellant/plaintiff is disentitled to benefit of the agreement to sell dated 3.4.1980 and half joint ownership rights on the ground that there would be sub-division and change of lay out in the suit plot is misconceived because these aspects are held against the respondent/defendant by the judgments of the two learned Single Judges of this Court reported as *Inderjit Singh etc Vs. Tarlochan Singh etc. 1991 Rajdhani Law Reporter 239* and *Chiranjilal and Anr. Vs. Bhagwan Das and Ors. AIR 1991 Delhi 325*. Relying upon the judgments, it is argued that the appellant/plaintiff is neither challenging the lay out and nor is sub-dividing the plot and therefore the Clause II sub-Clauses 6(a) and 6(b) of the perpetual lease deed relied upon by the respondent/defendant would have no application, much less for application of Section 23 of the Contract Act, 1872 to be invoked as a bar to the suit. It is also argued that by virtue of clauses the other paras of para II of the perpetual lease, transfer of rights in the suit property are very much permissible, of course subject to the *RSA No.50/2013*

permission being taken from the superior lessor, and thus in such a case the contract being the agreement to sell is not illegal or null and void, but is only a contingent contract depending upon the permission to be granted by the superior lessor subject to the terms including of payment of unearned increase as held by the Supreme Court in the case of ***Mrs. Chandnee Widya Vati Madden Vs. Dr. C.L. Katial and Ors. AIR 1964 SC 978.***

(iii) It is argued that for the purpose of giving benefit of Section 53A of the Transfer of Property Act, 1882, even constructive possession is enough and appellant/plaintiff would be in constructive possession because the respondent/defendant/brother when he received possession from the society would have received not only for himself but also on behalf of the appellant/plaintiff and the possession of the respondent/defendant of half the suit plot belonging to the appellant/plaintiff was as a trustee and in a fiduciary capacity for the appellant/plaintiff. Appellant/plaintiff therefore, it is argued, cannot be denied the benefit of Section 53A of the Transfer of Property Act, 1882 once in the judgment dated 3.3.1990 in the suit No.94/1987, the issue of bindingness of the agreement to sell dated 3.4.1980 stood concluded in favour of the appellant/plaintiff.

(iv) Learned counsel for the appellant/plaintiff finally relies upon the judgment of the Supreme Court in the case of ***B.O.I. Finance Ltd, etc. Vs. RSA No.50/2013***

The Custodian and Ors., etc., AIR 1997 SC 1952 to argue that even for some reason the agreement to sell is held to be illegal, the same is not illegal to the extent/obligations under the same which have already been performed by creating rights in favour of the appellant/plaintiff and constructive possession being handed over to him, and the said rights already having come into existence in favour of the appellant/plaintiff the same cannot be denied by a defence placing reliance upon Section 23 of the Contract Act, 1872.

9. On behalf of the respondent/defendant, the case as set up before me on behalf of the appellant/plaintiff has been contested on the following grounds:-

(i) The suit as framed being a suit for possession on the ground that the appellant/plaintiff claimed to have been dispossessed by the respondent/defendant, but since the appellant/plaintiff has failed to prove his dispossession, the suit fails and the relief for possession should be declined. With this aspect it is also urged that the suit which is filed is a suit only under Section 6 of the Specific Relief Act, 1963 and since prior possession is not proved, hence the suit for possession cannot succeed. To further buttress this argument, it is contended that the suit could not have been a suit for possession but ought to have been a suit for specific performance.

(ii) The appellant/plaintiff has argued aspects before this Court by setting up a totally new case which does not exist in the records of the courts below and consequently the arguments urged on behalf of the appellant merit rejection.

(iii) It is argued that the courts below have rightly relied upon and dismissed the suit by invoking Section 23 of the Contract Act, 1872 read with Clause II sub-Clauses 6(a) and (b) of the perpetual lease deed dated 29.8.1978, Ex.DW1/1.

10(i) Let me first deal with the issue as to whether the appellant/plaintiff should succeed in the relief claimed of possession of his half portion of the suit property. While dealing with this aspect, additional aspects will also be dealt with as to the effect of plaintiff failing to allegedly prove that he was given possession by the respondent/defendant and that the suit therefore fails by virtue of Section 6 of the Specific Relief Act, 1963 and also that the suit should have been framed as a suit for specific performance of the agreement to sell dated 3.4.1980 and not for possession.

(ii) In my opinion, the arguments urged on behalf of the appellant/plaintiff merits acceptance by this Court and the counter arguments urged on behalf of the respondent/defendant have to be rejected.

(iii) Firstly, the issues which have been framed in the suit do not show that the suit was treated only as a suit for possession falling under Section 6 of the Specific Relief Act, 1963. The appellant/plaintiff in the suit had quite clearly relied upon the rights under the agreement to sell dated 3.4.1980 alongwith Section 53A of the Transfer of Property Act, 1882 i.e effectively rights equivalent to ownership rights were claimed in the suit property and consequently to the relief of possession. Both the courts below have also examined the merits of the case of the appellant/plaintiff by reference to validity of those rights as per Section 53A, and therefore I do not think it is valid argument for the respondent/defendant to urge that the suit has been filed and treated by the courts below as a suit under Section 6 of the Specific Relief Act, 1963. I also take note of the fact that counsel for the appellant/plaintiff has drawn the attention of this Court to the order dated 1.2.1993 in Civil Revision No.562/1992 between the parties in which it is observed that none of the parties will take any objection of the suit being a suit for possession only under Section 6 of the Specific Relief Act, 1963. Also, once if rights would exist under Section 53A of the Transfer of Property Act, 1882, such rights can be enforced, and it is not necessary that a suit for specific performance only ought to be filed because if there are valid rights under Section 53A of the Transfer of Property Act, 1882, such rights

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are choate rights and not inchoate rights. Such rights of Section 53A have always been enforced by the Courts. Accordingly, I reject the argument of the respondent/defendant that the appellant/plaintiff is setting up a new case although such a case is not taken up in the courts below. Suffice to reiterate that both the judgments of the courts below proceed on the claim of entitlement of the appellant/plaintiff to half ownership interest in the suit property pursuant to the agreement to sell dated 3.4.1980 as per right arising under Section 53A of the Transfer of Property Act, 1882 and such suit/claim for possession was dismissed on account of the defence of the respondent/defendant of such an agreement to sell being illegal/null and void either by virtue of Section 23 of the Contract Act, 1872 or allegedly because of the fact that appellant/plaintiff had in fact never received possession and which aspect the appellant/plaintiff as per the courts below failed to prove.

11. I also, at this stage, reject the argument urged on behalf of the respondent/defendant that if the appellant/plaintiff has failed to prove that he was dispossessed then the suit must fail because in the facts of this case the entitlement to the relief of possession is not on the ground of prior possession but is on the basis of rights under Section 53A of the Transfer of Property Act, 1882 and that the appellant/plaintiff, in the facts as have emerged on record, is to be taken as in constructive possession because

respondent/defendant/brother stood in the position of a trustee or in fiduciary relationship so that when he took possession from the cooperative society it was taken jointly for himself as well as the appellant/plaintiff in view of the fact that there was a concluded agreement to sell dated 3.4.1980 (as also a receipt dated 3.4.1980) duly mentioning the giving of possession by the respondent/defendant to the appellant/plaintiff. Accordingly, in my opinion, the suit cannot be dismissed on the defence/ground as urged on behalf of the respondent/defendant that since the appellant/plaintiff has failed to prove prior possession and dispossession, the suit for possession must fail.

12. That takes me to the next argument as to whether the appellant/plaintiff has rights under the agreement to sell dated 3.4.1980 read with Section 53A of the Transfer of Property Act, 1882. In this regard, before proceeding further, it demands reiteration that finality stands achieved to the rights under the agreement to sell dated 3.4.1980 in favour of the appellant/plaintiff in view of the judgment dated 3.3.1990 in suit No.94/1987 between the parties which has become final and which held in favour of the appellant/plaintiff that the agreement to sell was not fraudulently got executed in favour of the appellant/plaintiff from the respondent/defendant, and as was the case argued on behalf of the respondent/defendant in the suit No.94/1987. Once the agreement to sell

dated 3.4.1980 is final and binding between the parties, the only thing which has to be seen is the effect thereof and the legality thereof. If the agreement to sell is valid, effective rights thereunder should flow to the appellant/plaintiff unless for reasons in law the rights as claimed under the agreement to sell are to be denied to the appellant/plaintiff.

13. Let us therefore turn to the issue as to whether the respondent/defendant is justified in contending that the appellant/plaintiff cannot rely upon Section 53A of the Transfer of Property Act, 1882 because the agreement to sell is illegal/null and void in view of Clause II sub-Clauses 6(a) and (b) of the perpetual lease deed Ex.DW1/1 read with Section 23 of the Contract Act, 1872. In order to consider this aspect, let me reproduce the entire Clause II, with all its sub-clauses including Clauses 6(a) and (b) relied upon by the respondent/defendant. This Clause II of the perpetual sub-lease reads as under:-

“ II. The Sub-Lessee for himself, his heirs, executors, administrators and assigns covenants with the Lessee and the Lessor in the manner following, that is to say:-

(1) The Sub-Lessee shall pay to the Lessee with such time such additional sum or sums towards premium in respect of the residential plot as may be decided upon and fixed by the Lessor on account of the compensation awarded by the Land Acquisition Collector being chanced on reference or in appeal or both as mentioned in sub-clauses (1) and (5)(a) of Clause II of the Lease and the decisions of the Lessor in this behalf shall be final and binding on the Sub-Lessee and the Lessee.

The yearly rent of two and a half per cent of the premium hereby reserved shall be calculated on the sum received towards premium by the Lessee

before the execution of these presents and on such additional sum or sums payable premium as provided herein from 5th day of May one thousand nine hundred and seventy seven.

(2) The Sub-Lessee shall pay unto the Lessee the yearly rent hereby reserved on the days and in the manner herein before appointed.

(3) The Sub-Lessee shall not deviate in any manner from the layout plan not alter the size of the residential plot whether by sub-division, amalgamation or otherwise.

(4) The Sub-Lessee shall at all times duly perform and observe all the covenants and conditions which are contained in the Lease on the part of the Lessee or Sub-Lessee thereunder to be performed and observed in so far as the same may be applicable to affect and relate to the residential plot sub-leased to him.

(5) The Sub-Lessee shall, within a period of two years from the Twenty Ninth day of August one thousand nine hundred (and the time so specified shall be of the essence of the contracts) after obtaining sanction to the building plan, with the necessary plans and specifications from the proper municipal or other authority, at his own expense, erect upon the residential plot and complete in a substantial and workmanlike manner a residential building for private dwelling with the requisite and proper walls, sewers and drains and other convenience in accordance with the sanctioned building plan and to the satisfaction of such municipal or other authority.

(6)(a) The Sub-Lessee shall not sell, transfer, assign or otherwise part with the possession of the whole or any part of the residential plot in any form or manner benami or otherwise, to a person who is not a member of the Lessee.

(b) The Sub-Lessee shall not sell, transfer, assign or otherwise part with the possession of the whole or any part of the residential plot to any other member of the Lessee except with the previous consent in writing of the Lessor which he shall be entitled to refuse in his absolute discretion;

PROVIDED that in the event of the consent being given, the Lessor may impose such terms and conditions as he thinks fit and the Lessor shall be entitled to claim and recover a portion of the unearned increase in the value (i.e the difference between the premium paid and the market value) of the residential plot at the time of sale, transfer, assignment or parting with the possession, the amount to be recovered being fifty per cent of the unearned increase and the decision of the Lessor in respect of the market value shall be final and binding.

PROVIDED that the Lt. Governor reserves the right to resume any Plot or part thereof on payment of reasonable compensation, which may be required for the development of the area like laying of Sewerage, Trunk

Services, Electric and Telephone Wires and Water Supply Lines etc. or such other purposes which may be deemed of public and general utility.

PROVIDED that, in the event of the sale or fore-closure of the mortgaged or charged property, the Lessor shall be entitled to claim and recover the fifty per cent of the unearned increase in the value of the residential plot as aforesaid, and the amount of the Lessor's share of the said unearned increase shall be a first charge having priority over the said mortgage or charge. The decision of the Lessor in respect of the market value of the said residential plot shall be final and binding on all parties concerned;

PROVIDED FURTHER that the Lessor shall have the pre-emptive right to purchase the mortgaged or charged property after deducting fifty per cent of the unearned increase as aforesaid.” (underlining added)

14(i) Clauses such as the above are/were found almost in all the lease deeds which were executed either by the Government of Delhi or by the Delhi Development Authority or other local bodies in Delhi, subject to variation as per the circumstances of the case. The two basic objects of the clause were that firstly there should not be any sub-division of the plot and secondly that since the perpetual lease is granted on concessional terms, the lessee should not transfer the property to a third person except with permission of the superior lessor and which permission was granted on payment of what is known as “unearned increase”. Putting it differently, there was no complete ban on transfer of title of the property and all that was required was a permission being obtained from the superior lessor on payment of unearned increase. In fact, the history of the conveyance documentation in the city of Delhi shows that the governmental authorities themselves have now more or less made these clauses redundant because

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now the lessees have been allowed to convert their properties into free hold properties by paying certain charges to the superior lessor. Once the property becomes free hold, in future thereafter, no permission is required for transfer or re-transfer of the property. That a clause which is reproduced above does not cause a legal bar for creating rights, much less a bar under Section 23 of the Contract Act, 1872 is settled law right from the judgment of the Supreme Court in the case of *Mrs. Chandnee Widya Vati Madden (supra)*. Supreme Court in this judgment, in similar facts, has held that where a suit is filed for specific performance of an agreement to sell in which there is a clause in the perpetual lease deed by which the sale deed cannot be executed in favour of the transferee without prior permission of the superior lessor, then, such a clause of the perpetual lease deed only makes the agreement to sell a contingent contract and while decreeing the suit for specific performance it has to be directed that the defendant will obtain the necessary permission to transfer the property. Whatever are the charges payable to the superior lessor will be paid in terms of whose liability the same is under the agreement to sell. I may also note that as per Order 21 Rule 32 CPC if a defendant does not comply with the decree for specific performance, Courts appoint a Local Commissioner to perform the obligations for and on behalf of the defendant/judgment debtor in the suit

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and which Local Commissioner not only applies for permission to the competent authority but he also executes and registers the sale deed in favour of the successful plaintiff. Paras 4 and 5 of the judgment in the case of *Mrs. Chandnee Widya Vati Madden (supra)* are relevant and the same read as under:-

“4. The main ground of attack on this appeal is that the contract is not enforceable being of a contingent nature and the contingency not having been fulfilled. In our opinion, there is no substance in this contention. So far as the parties to the contract are concerned, they had agreed to bind themselves by the terms of the document executed between them. Under that document it was for the defendant-vendor to make the necessary application for the permission to the Chief Commissioner. She had as a matter of fact made such an application but for reasons of her own decided to withdraw the same. On the findings that the plaintiffs have always been ready and willing to perform their part of the contract, and that it was the defendant who wilfully refused to perform her part of the contract, and that the time was not of the essence of the contract, the Court has got to enforce the terms of the contract and to enjoin upon the defendant-appellant to make the necessary application to the Chief Commissioner. It will be for the Chief Commissioner to decide whether or not to grant the necessary sanction.

5. In this view of the matter, the High Court was entirely correct in decreeing the suit for specific performance of the contract. The High Court should have further directed the defendant to make the necessary application for permission to the Chief Commissioner, which was implied in the contract between the parties. As the defendant-vendor, without any sufficient reasons, withdrew the application already made to the Chief Commissioner the decree to be prepared by this Court will add the clause that the defendant, within one month from to-day, shall make the necessary application to the Chief Commissioner or to such other competent authority as

may have been empowered to grant the necessary sanction to transfers like the one in question, and further that within one month of the receipt of that sanction she shall convey to the plaintiffs the property in suit. In the event of the sanction being refused, the plaintiffs shall be entitled to the damages as decreed by the High Court. The appellant sought to raise certain other pleas which had not been raised in the High Court, for example, that this was not a fit case in which specific performance of contract should be enforced by the Court. This plea was not specifically raised in the High Court and the necessary facts were not pleaded in the pleadings. It is manifest that this Court should not allow such a plea to be raised here for the first time.”

15. Now let us examine the aspect that the subject suit is not a suit for specific performance and is a suit for possession by claiming rights as per Section 53A in view of the agreement to sell dated 3.4.1980. It also be noted that the above discussion referring to the ratio of *Mrs. Chandnee Widya Vati Madden (supra)* case is to emphasize that the agreement to sell is not a null and void document in view of Clause II sub-Clauses 6(a) & (b) of the perpetual lease. Taking the same logic/reason further that the agreement to sell is not illegal/null and void, if the same can be a basis for filing a suit for specific performance, then, the very same agreement to sell can also entitle the transferee to claim rights under the same as per Section 53A. This issue now stands concluded in favour of the appellant/plaintiff by the recent judgment of the Supreme Court in the case of *Suraj Lamps & Industries Pvt. Ltd. Vs. State of Haryana and Anr. (183) 2011 DLT 1 (SC)* RSA No.50/2013

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and which holds that rights under Section 53A even if the agreement to sell is unregistered are protected, provided of course the documentation is prior to 25.9.2001 when by Act 48 of 2001 the provision of Section 53A (and other related provisions) were amended to require compulsory registration and stamping. I have had an occasion to examine this issue in the judgment delivered in the case of *Ramesh Chand Vs. Suresh Chand* in RFA No.358/2000 decided on 9.4.2012. Paras 1 to 3 of this judgment are relevant and the same read as under:-

“1. This Regular First Appeal was dismissed by a detailed judgment on 28.2.2011. A Special Leave Petition was filed in the Supreme Court against the judgment dated 28.2.2011 and the Supreme Court has remanded the matter back for a fresh decision by its order dated 31.10.2011. The order of the Supreme Court dated 31.10.2011 is based on the issue of the Supreme Court passing the judgment in the case of *Suraj Lamps & Industries Pvt. Ltd. Vs. State of Haryana and Anr. 183 (2011) DLT 1 (SC)*, and as per which judgment the Supreme Court overruled the Division Bench judgment of this Court in the case of *Asha M. Jain Vs. Canara Bank 94 (2001) DLT 841*. Since the judgment of this Court dated 28.2.2011 had relied upon the Division Bench judgment in the case of *Asha M. Jain (supra)*, and which judgment was over ruled the Supreme Court in the case of *Suraj Lamps & Industries Pvt. Ltd. (supra)*, the matter was therefore remanded back to this Court.

2. Before I proceed to dispose of the appeal, and which would turn substantially on the judgment in the case of *Suraj Lamps & Industries Pvt. Ltd. (supra)*, it is necessary to reproduce certain paras of this judgment of the Supreme Court, and which paras are paras 12, 13, 14 and 16, and which read as under:-

“12. Any contract of sale (agreement to sell) which is not a registered deed of conveyance (deed of sale) would fall short of the requirements of Sections 54 and 55 of Transfer of Property Act and will not confer any title nor transfer any interest in an immovable property (**except to the limited right granted under Section 53A of Transfer of Property Act**).

According to Transfer of Property Act, an agreement of sale, whether with

possession or without possession, is not a conveyance. Section 54 of Transfer of Property Act enacts that sale of immoveable property can be made only by a registered instrument and an agreement of sale does not create any interest or charge on its subject matter.

Scope of Power of Attorney

13. A power of attorney is not an instrument of transfer in regard to any right, title or interest in an immovable property. The power of attorney is creation of an agency whereby the grantor authorizes the grantee to do the acts specified therein, on behalf of grantor, which when executed will be binding on the grantor as if done by him (see Section 1A and Section 2 of the Powers of Attorney Act, 1882). It is revocable or terminable at any time **unless it is made irrevocable in a manner known to law**. Even an irrevocable attorney does not have the effect of transferring title to the grantee. In State of Rajasthan v. Basant Nehata : 2005 (12) SCC 77 this Court held:

“A grant of power of attorney is essentially governed by Chapter X of the Contract Act. By reason of a deed of power of attorney, an agent is formally appointed to act for the principal in one transaction or a series of transactions or to manage the affairs of the principal generally conferring necessary authority upon another person. A deed of power of attorney is executed by the principal in favor of the agent. The agent derives a right to use his name and all acts, deeds and things done by him and subject to the limitations contained in the said deed, the same shall be read as if done by the donor. A power of attorney is, as is well known, a document of convenience.

Execution of a power of attorney in terms of the provisions of the Contract Act as also the Powers-of-Attorney Act is valid. A power of attorney, we have noticed hereinbefore, is executed by the donor so as to enable the donee to act on his behalf. **Except in cases where power of attorney is coupled with interest**, it is revocable. The donee in exercise of his power under such power of attorney only acts in place of the donor subject of course to the powers granted to him by reason thereof. He cannot use the power of attorney for his own benefit. He acts in a fiduciary capacity. Any act of infidelity or breach of trust is a matter between the donor and the donee.”

An attorney holder may however execute a deed of conveyance in exercise of the power granted under the power of attorney and convey title on behalf of the grantor.

Scope of Will

14. A will is the testament of the testator. It is a posthumous disposition of the estate of the testator directing distribution of his estate upon his death. It

is not a transfer inter vivos. The two essential characteristics of a will are that it is intended to come into effect only after the death of the testator and is revocable at any time during the life time of the testator. It is said that so long as the testator is alive, a will is not worth the paper on which it is written, as the testator can at any time revoke it. If the testator, who is not married, marries after making the will, by operation of law, the will stands revoked. (see Sections 69 and 70 of Indian Succession Act, 1925). Registration of a will does not make it any more effective.

16. We therefore reiterate that immovable property can be legally and lawfully transferred/conveyed only by a registered deed of conveyance. Transactions of the nature of 'GPA sales' or 'SA/GPA/WILL transfers' do not convey title and do not amount to transfer, nor can they be recognized or valid mode of transfer of immoveable property. The courts will not treat such transactions as completed or concluded transfers or as conveyances as they neither convey title nor create any interest in an immovable property. They cannot be recognized as deeds of title, except to the limited extent of Section 53A of the Transfer of Property Act. Such transactions cannot be relied upon or made the basis for mutations in Municipal or Revenue Records. What is stated above will apply not only to deeds of conveyance in regard to freehold property but also to transfer of leasehold property. A lease can be validly transferred only under a registered Assignment of Lease. It is time that an end is put to the pernicious practice of SA/GPA/WILL transactions known as GPA sales.” (emphasis added)

3. A reference to the aforesaid paras shows that unless there is a proper registered sale deed, title of an immovable property does not pass. The Supreme Court has however reiterated that rights which are created pursuant to Section 53A of the Transfer of Property Act, 1882 dealing with the doctrine of *part performance* (para 12), an irrevocable right of a person holding a power of attorney given for consideration coupled with interest as per Section 202 of the Contract Act, 1872 (para 13) and devolution of interest pursuant to a Will (para 14). Therefore, no doubt, a person strictly may not have complete ownership rights unless there is a duly registered sale deed, however, certain rights can exist in an immovable property pursuant to the provisions of Section 53A of the Transfer of Property Act, 1882, Section 202 of the Contract Act, 1872. There also takes place devolution of interest after the death of the testator in terms of a Will.”

16. I may at this stage state that the first appellate court has rightly held that the benefit of Section 53A of the Transfer of Property Act, 1882 cannot be denied to the appellant/plaintiff in this case because the agreement to sell in this case is prior to amendment of Section 53A of the Transfer of Property Act, 1882 w.e.f 25.9.2001 by Act 48 of 2001. This is mentioned by the first appellate court in para 26 of its judgment.

17(i) In the present case, on account of creation of ownership rights to the extent of 50% in favour of the appellant/plaintiff by the subject agreement to sell dated 3.4.1980, there would neither be change of lay out plan or any sub-division of the plot and this issue is also no longer res integra in view of the judgment of learned Single Judge of this Court in the case of *Inderjit Singh etc* which is relied upon by the appellant/plaintiff. The relevant paras of this judgment are paras 8 to 18 and which read as under:-

“8. What was required to be considered is whether what was being proposed by this compromise was lawful, in other words in accordance with the terms of the perpetual lease which has been executed. For this purpose, it is necessary to look at the provisions of Clause 2 & 4(a) of the perpetual lease. These read:

“2. The Lessee shall not deviate in any manner from the lay-out plan or alter the size of the plot whether by sub-division, amalgamation or otherwise, unless specifically permitted to do so by the Lessor.

4(a). The Lessee shall not sell, transfer, assign or otherwise part with possession of the whole or any part of the commercial plot except with

the previous consent in writing of the Lesser which he shall be entitled to refuse in his absolute discretion.....”

9. Clause 2 of the perpetual lease refers to the lay-out plan. Mr. Bansal points out that the perpetual lease refers to lay-out in its other parts also, and a reference to the same makes it clear that the "lay-out" is referred to in the context of lay-out plan of Community Centre, Mayapuri Industrial Area, Phase-I". This is so stated in the 3rd recital of the perpetual lease; also in the schedule of the perpetual lease.

10. The question is whether there is any deviation in the lay-out plan, as postulated by the perpetual lease deed by what is proposed in the application under Order 23 Rule 3 Civil Procedure Code The lay-out plan in the context of the perpetual lease being the lay-out plan of the Community Centre, Mayapuri Industrial Area, Phase-1, it must necessarily mean the entire lay-out plan of the said Community Centre. Inasmuch as plot No. 16 as laid out in the Community Centre, Mayapuri Industrial Area plan, is not to be altered by what is proposed in this application under Order 23 Rule 3, the provision of clause 2 in the perpetual lease does not appear to be impinged upon or violated by the parties to the suit, and. Therefore, no "permission" is required from the Lessor under the said provision.

11. LAY-out means an arrangement, an arrangement by which various components are placed with reference to each other. In this way the word "lay-out" is defined under Section 313 of the Delhi Municipal Corporation Act, 1957. That provision reads as under :-

“313(1) Before utilising, selling or otherwise dealing with any land under Section 312, the owner thereof shall send to the Commissioner a written application with a lay-out plan of the land showing the following particulars, namely :- (a) the plots into which the land is proposed to be divided for the erection of buildings thereon and the purpose or purposes for which such buildings are to be used ; (b) the reservation or allotment of any site for any street, open apace, park. recreation ground, school, market or any other public purpose (c) the inteoded level, direction and width of street or streets; (d) the regular line or street or streets; (e) the arrangements to be made for levelling, paving, metalling, flagging, channelling, sewerage, draining, conserving and lighting street or streets. (2) The provisions of this Act and the bye-laws made there under as to which of the public streets and the height of buildings abutting thereon, shall apply in the case of streets referred to in sub-section (1) and all the

particulars referred to in that sub-section shall be subject to the section of the Standing Committee. (3) Within sixty days after the receipt of any application under Sub-section (1) the Standing Committee shall either accord sanction to the lay-out plan on such conditions as it may think fit or disallow it or ask for further information with respect to it. (4) Such sanction shall be refused- (a) if the particulars shown in the lay-out plan would conflict with any arrangements which have been made or which are in the opinion of the Standing Committee likely to be made for carrying out any general scheme of development of Delhi whether contained in the master plan or a zonal development plan prepared for Delhi or not; or (b) if the said lay-out plan does not conform to the provisions of this Act and bye-laws made there under; or (c) if any street proposed in the plan is not designed so as to connect at one end with a street which is already open (5) No person shall utilise, sell or otherwise deal with any land or layout or make any new street without or otherwise than in conformity with the orders of the Standing Committee and if further information is asked for. no step shall be taken to utilise, sell or otherwise deal with the land or to lay-out or make the street until orders have been passed upon receipt of such information : Provided that the passing of such orders shall not be in any case delayed for more than sixty days after the Standing Committee has received the information which it considers necessary to enable it to deal with the said application. (6) The lay-out plan referred to earlier in this section shall, if so required by the Standing Committee, be prepared by a licensed town planner.”

12. In my view in the context of the perpetual lease in which the word "lay-out" occurs, what is to be seen is whether there is any alteration in the arrangement of plots in the Community Centre, Mayapuri Industrial Area, by the parties to the suit. To this, the answer must obvious be in an emphatic "NO". The parties to this suit do not, in any way, control any plot other than plot No 16. and, Therefore, cannot alter the lay-out of plot No t6. Layout of community centre can be altered in juxtaposition to each other. As that is not what is contemplated by the parties, the lay-out of plot No. 16 cannot be said to be deviated from.

13. There is yet another meaning which can be given to the word 'lay-out' in clause 2 of the perpetual lease deed. That is the lay-out of building which has been built upon the said plot. The arrangement of its various component parts, that is to say the open areas, respective rooms and their sizes, on various floors.

14. By what is contemplated between the parties, no part of the layout of the building and the plan according to which the same has been built, is proposed to be deviated from,

15. In these circumstances, I do not think that there is any deviation from the lay-out with respect to either plot No. 16, Community Centre, or the building which has been built thereon.

16. Mr. Jayant Bhushan relying upon the word "transfer" in clause 4 of the perpetual lease deed, says that the arrangement postulated between the parties by this application would amount to transfer. I do not agree. I do not agree for the reason that in two judgments of the Supreme Court, i.e. AIR 1965 Supreme Court 866 C.I.T., Gujarat Vs. Keswamlal and (1966) 1 S.C.R. 349 (V.N. Sarin Vs. Major Ajit Kumar), the Supreme Court has said that when joint property is transferred to one of the persons who were earlier joint owners upon partition, there is no transfer. In the facts and circumstances of the case, what will be happening in this case, is that four joint perpetual lessees would be becoming owners of specific areas of a property, which has been built on plot No. 16. This is no different from what takes place on partition between coparceners owning co-parcenary property.

17. In my view, in view of facts and circumstances of this case, what is being done by the parties to the suit, would not amount to transfer within the meaning of clause 4 of the perpetual lease.

18. Mr. Jayant Bhushan urges that what is to be proposed between the parties in this suit, is sub-dividing the plot within the meaning of clause 2 of the perpetual lease-deed. I do not agree. The parties are specifically stating that they would be undivided owners of the plot. By the act of the parties postulated by this application, the plot is not, in fact, being subdivided.”
(underlining added)

(ii) Accordingly, I hold that by benefit being given to the appellant/plaintiff of the agreement to sell dated 3.4.1980, there would be no sub-division of the plot nor any change of lay out plan and as so held in the case of *Inderjit Singh etc (supra)* inasmuch as the clause of transfer is valid

and only upon permission being denied by the superior lessor can rights
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under the agreement to sell be denied to the appellant/plaintiff. In fact, the superior lessor is being a State under Article 12 of the Constitution of India has a policy to routinely give permission for transfer on payment of unearned increase. Further, an important aspect to be noted is that it is not that the superior lessor has cancelled the perpetual lease on account of the parties having entered into the agreement to sell dated 3.4.1980. Only the superior lessor had a right to cancel the perpetual lease on account of the agreement to sell dated 3.4.1980 having been entered into without its permission because a breach of contract makes the same only voidable (not void) on the option of the superior lessor and till the same is voided both the perpetual lease and the agreement to sell will exist and bind all the concerned parties. As already otherwise commented upon in this judgment that not only perpetual leases are not cancelled and permission for transfer on payment of unearned increase is given but also that now there is a policy of making the plots/lands free hold from lease hold once the prescribed charges are paid and whereupon a conveyance deed is executed by the superior lessor.

(iii) I may note that the judgment in the case of *Inderjit Singh etc (supra)* was followed by another learned Single Judge in the case of *Chiranjilal and another (supra)*, relied upon by the appellant/plaintiff, and
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which holds that there is no sub-division of the plot because it is actually the constructed portion over the plot which would be sub-divided and the persons will remain joint undivided owners of the plot in question. Para 21 of the judgment in the case of *Chiranjilal and another (supra)* is relevant and the same reads as under:-

“21. Issue No. 5

A contention was raised that as there exists a joint lease in respect of the plot in question from the Government and the plot cannot be divided in view of the terms of the lease deed, thus the property in question cannot be partitioned by metes and bounds. Similar question arose for decision in *Inderjit Singh v. Tarlochan Singh* 1991 Raj LR 239 and it was held that the super structure built on a plot can be partitioned by metes and bounds according to the respective shares of the parties while keeping the plot underneath the structure as joint and no permission of the Lesser is needed for effecting the partition of the building by metes and bounds. I respectively agree with the ratio expressed in this judgment and hold that no permission is liable to be obtained from the Delhi Development Authority for partitioning the building in question according to the shares of the parties. Now the question whether physically the building could be partitioned by metes and bounds according to the shares of the parties mentioned above, could be decided only by the Local Commissioner who is to be appointed for suggesting mode of partition.”

18. At this stage, I take note of and reject the argument urged on behalf of the respondent/defendant that the judgments in the cases of *Inderjit Singh (supra)* and *Chiranjilal (supra)* will not apply because these judgments were passed in partition suits. I reject the argument because the issue is not whether the judgments were passed in partition suits but what

was the ratio which was laid down in the judgments, ratio being laid down is that there is no sub-division of plot when there are co-owners and there is also no change of lay out plan. It is only the constructed portion which is divided and there is no bar to divide the constructed portion by any of the clauses of the perpetual lease deed.

19. Therefore, I reject the argument that the agreement to sell in question is illegal/null and void and hit by Section 23 of the Contract Act, 1872 and that appellant/plaintiff is not entitled to the benefits of the agreement to sell dated 3.4.1980.

20. I also reject the argument urged on behalf of the respondent/defendant that the suit ought to be dismissed because the suit had to be a suit for specific performance inasmuch as if there are vested and choate rights under Section 53A of the Transfer of Property Act, 1882, there is no need to file a suit for specific performance. In fact, Section 53A states that once rights under the same are created in favour of a person neither the seller nor any person claiming under the seller can claim any rights contrary to the interest which is created by means of the agreement to sell falling within the scope of Section 53A.

21(i). Now let me advert to the issue as to whether if the plaintiff did not have physical possession at any time. That possession is delivered is mentioned in the agreement to sell entered into on 3.4.1980 as also in the affidavit of the respondent/defendant dated 25.4.1980. The argument urged by the respondent/defendant is that as the co-operative society itself gave possession to the respondent/defendant only subsequently in the year 1983 and therefore appellant/plaintiff cannot have possession prior to the year 1983 and as written in the agreement to sell and affidavit of the year 1980. The related issue is would rights come into existence as envisaged under Section 53A of the Transfer of Property Act, 1882 if the appellant/plaintiff did not come into physical possession.

(ii) A reading of the Section 53A shows that the same does not bar entitlement thereunder if a person under the same gets constructive possession. In the facts of the case such as the present, and also because both the parties are brothers, hence actually the possession which was taken by the respondent/defendant from the co-operative society in 1983 would be not only for self but also as a trustee for and on behalf of the appellant/plaintiff because surely there is a fiduciary relationship between the appellant/plaintiff and respondent/defendant in view of an agreement to sell dated 3.4.1980 having been executed by the respondent/defendant in

favour of the appellant/plaintiff and in which giving of possession to the appellant/plaintiff is specifically stated. It is relevant to mention that not only the agreement to sell dated 3.4.1980 talks of possession being handed over to the appellant/plaintiff by the respondent/defendant but this is also confirmed by an affidavit, Ex.PW1/D, dated 25.4.1980 executed by the respondent/defendant in favour of the appellant/plaintiff. Therefore, in the facts of the present case possession which was received by the respondent/defendant from the co-operative society/superior lessor would be taken as joint possession with the appellant/plaintiff.

22. I would like to draw such a conclusion of joint possession in the facts of the present case otherwise it would amount to promoting injustice and inequity especially because the agreement to sell is held to be final by means of the judgment dated 3.3.1990 in suit No.94/1987. Hence, to deny rights under the agreement to sell to the appellant/plaintiff would be not only to negate the judgment dated 3.3.1990 but also to negate justice. It also bears note that as per Sections 91 and 92 of the Evidence Act, 1872 there is also finality to the terms of the agreement to sell including of respondent/defendant having received the necessary consideration for transfer of half ownership rights in the suit property to the appellant/plaintiff.

23. In view of my aforesaid discussion, I need not advert to the argument urged on behalf of the appellant/plaintiff which places reliance upon the judgment of the Supreme Court in the case of *B.O.I. Finance Ltd. (supra)*.

24. I may note that this case was argued on behalf of the appellant on 13.2.2014 when the respondent/defendant was also partly heard. In the middle of hearing there emerged a possibility of compromise, of course without prejudice to the respective rights, of division of the property by making new construction, but today I am informed that no compromise is possible and the case be decided on merits. I have therefore heard the counsel for the respondent with respect to his remaining arguments, and which have been dealt with in the present judgment.

25. I therefore hold that the appellant/plaintiff cannot be denied the benefit of Section 53A of the Transfer of Property Act, 1882 and that he would be and is entitled to possession of half of the property shown in red in plan Ex.PW1/A which he will hold as undivided owner alongwith the respondent/defendant. Appellant/plaintiff will also be entitled to, as per this judgment, get himself made a joint member in the records not only of the co-operative society but also in the records of the superior lessor. The appellant/plaintiff, if he wants, can on payment of necessary charges, in
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accordance with the policy of superior lessor also seek to make property from lease hold to free hold and execution of the conveyance deed of the suit plot jointly in favour of the appellant/plaintiff and the respondent/defendant noting that both of them would be equal co-owners in the suit plot. I may note that if any further rights are to be worked out inter se the appellant/plaintiff and the respondent/defendant pursuant to the present judgment, such further/additional rights can be enforced by appropriate legal proceedings.

26. In view of the above, the substantial questions of law are answered in favour of the appellant/plaintiff and the suit of the appellant/plaintiff for possession is decreed by directing that the appellant/plaintiff will be given possession of 50% of the suit plot bearing No.C-230, Anand Vihar, New Delhi as shown in red in the site plan Ex.PW1/A, and both the appellant/plaintiff and the respondent/defendant will be joint co-owners of the rights in the suit plot subject to any further decision inter se the parties in appropriate legal proceedings. Other directions as passed in para 25 above will also be applicable between the parties. While allowing the appeal, I am also inclined to grant costs to the appellant/plaintiff who in spite of finality achieved of the agreement to sell dated 3.4.1980 (which is now over 34 years old) in view of the judgment

dated 3.3.1990 (being over 20 years old), yet the respondent/defendant against all canons of justice, equity and good-conscience is keeping on unfortunately denying the rights of the appellant/plaintiff. Supreme Court has observed in the judgment in the case of *Ramrameshwari Devi & Ors. Vs Nirmala Devi & Ors. (2011) 8 SCC 249* that it is high time that in certain litigations, actual costs must be imposed. I am also empowered to impose actual costs in terms of *Volume V* of the *Punjab High Court Rules and Orders (as applicable to Delhi) Chapter VI Part I Rule 15*. Therefore, in the facts of the present case, the appeal is allowed with costs of Rs.1 lakh. Costs shall be paid within a period of six weeks from today.

MARCH 07, 2014
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VALMIKI J. MEHTA, J.