

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

Reserved on: 28.03.2016
Pronounced on: 29.04.2016

+ **RFA (OS) 51/2015**

PREM KUMAR BANSAL

.....Appellant

Through: Sh. Sanjeev Sindhvani, Sr. Advocate
with Sh. Rajiv. K. Garg and Sh. Ashish Garg,
Advocates.

Versus

AMBRISH GARG

.....Respondent

Through: Sh. Rahul Gupta and Sh. Shekhar Gupta,
Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

MR. JUSTICE S. RAVINDRA BHAT

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1. An unsuccessful plaintiff appeals the decision of a learned Single Judge, dismissing his suit for specific performance of an agreement to sell dated 18.02.2005 ("Agreement" hereafter) in respect of property bearing No. E-23, Kalindi Colony, New Delhi (hereinafter referred to as the "suit property"). The plaintiff had also claimed a mandatory and permanent injunction.

2. The facts found- and undisputed in the appeal are that on 18.02.2005, the plaintiff and the defendant (Ambrish Garg) executed the Agreement by which the latter (i.e. the defendant) agreed to sell the entire ground floor of the suit property with a right to construct the basement for which a sale deed

was to be executed at a later date. The agreed terms stipulated that parties would jointly demolish the property and reconstruct upon it within a period not exceeding five years. The basement and ground floor then were to fall to the plaintiff's share and the first and second floor, to the defendant's share. The garage, drive-way, passage and the terrace floor were to be common to both parties. The consideration of the agreement was ₹ 27 lakhs paid by the plaintiff to the defendant on the same date. On 22.02.2005, the defendant executed the sale deed in favour of the plaintiff in respect of the suit property. It was reiterated that a sum of ₹ 27 lakhs had been received by the defendant from the plaintiff and he became owner of the ground floor; he had a right to realize the rent from the ground floor which was tenanted then. The plaintiff got the suit property vacated. The property was also mutated in his name on 22.08.2007. The mutation documents specify that the plaintiff is the owner of the ground floor with 50% terrace rights.

3. The suit was premised on the ground that despite lapse of the five year period under the Agreement, the defendant did not comply with the terms in enabling demolition and reconstruction, despite legal notice. The suit sought specific performance of para 15 of the Agreement followed by mandatory and permanent injunction. In the Written Statement the defendant's primary objection was that clause 15 of the Agreement to sell dated 18.02.2005 stood superseded by the registered sale deed dated 22.02.2005 and that the agreement to sell was no longer in existence. Clause 15 of the agreement to sell was not reiterated in the sale deed dated 22.02.2005 and this subsequent document superseded the agreement dated 18.02.2005 rendering it inoperative and unenforceable. The other objection was that the sale deed was dated 22.02.2005; the agreement to sell was dated 18.02.2005; the

plaintiff had to express his grievance within three years from the date of the agreement which period expired in 2008. Legal notice dated 20.05.2010 would not enlarge the period of limitation. The suit filed in May 2010 was time-barred. On merits, the averments in the plaint were denied; it was alleged that the plaintiff was disentitled to seek the relief of specific performance of the Agreement which stood superseded by the sale deed dated 22.02.2005. The plaintiff's claim that it could get the suit property sold and to share the proceeds equally was also denied.

4. Nine issues, with the additional question of any entitlement to relief, were framed in the suit; these *inter alia*, included the issue of enforceability of conditions of the Agreement, given that the registered Sale Deed had been executed. In the impugned judgment, these were discussed, and common findings rendered, in respect of Issues Nos. (i) to (iv) and (vi) to (viii). Since the Agreement Ex. P-1 was marked as an undisputed document, it was urged by the plaintiff that under it, Para 15 (i) an outer limit of five years for the reconstruction of the property after demolition was fixed; this period expired on 17.02.2010. The plaintiff urged that the defendant did not come forward to demolish and reconstruct the property even though he (the plaintiff) had kept his portion vacant to enable its demolition and reconstruction. He argued that the defendant's failure led to losses. The plaintiff proved the legal notice and the postal receipts (Ex. PW-1/2 and PW-1/3). The plaintiff also examined himself. In cross examination, he denied that the omission of the condition which was relied on – in the Sale Deed- was for the reason that Clause 15 stood superseded by the subsequent agreement dated 22.02.2005. He reiterated that he had called upon the defendant several times in the preceding five years to demolish and reconstruct the property but to no avail.

He admitted that no written request, demand or notice was served upon the defendant during this period of five years. He admitted that all the work including sanction of building plans, engagement of contractors, architects and engineers were to be done jointly by both the parties. He had told the defendant to engage an architect but he did not do so. On 31.08.2009, he again made a request to the defendant for demolition of the suit property but excuses were made by the defendant. He denied the suggestion that he was not ready and willing to perform his part of the agreement.

5. The defendant also deposed in the proceedings; and deposed that the sale deed dated 22.02.2005 had superseded the agreement to sell dated 18.02.2005. He said that Clause 15 of the Agreement (dated 18.02.2005) was not included in the Sale Deed, because it was superseded and was no longer operational. In his cross-examination, he admitted that he had taken loan of ₹ 70 lakhs from Small Industries Development Bank of India (SIDBI) in 1999 and he arrived at a one time settlement by which he was given financial assistance. The defendant said that the plaintiff was known to him since 1997. He deposed that the sum of ₹103 lacs required by him for payment to SIDBI was arranged by the plaintiff. He admitted that the transaction between himself and the plaintiff was described as a collaboration agreement. He reiterated that the Ex.P-1 was superseded on the execution of the sale deed dated 22.02.2005 as the clause for demolition and reconstruction in the sale deed was omitted. The plaintiff, said DW-1, never came forward for the reconstruction of the property. The defendant stated that he had performed his part of the performance by executing the sale deed. On a specific query put to DW-1 as to whether the plaintiff was ready and willing to perform his obligation, the answer was that the plaintiff had never

come forward to perform his part of the contract.

6. The defendant relied upon *Her Highness Maharani Shantidevi P. Gaikwad Vs. Savjibhai Haribhai Patel & Others* 2001 (5) SCC 101 and *Vinod Seth Vs. Devinder Bajaj & Anr* 2010 (8) SCC 101 and argued that a collaboration agreement is not specifically enforceable; as it is neither practical and nor possible for the Court to enforce. According to the defendant Section 14 (1) (b) of the Specific Relief Act, 1963 (“the Act”), such an agreement is unenforceable. The defendant also cited *Arun Khanna & Anr. Vs. Rajeev Gupta and Others* 129 (2006) DLT 14 (DB) and *M/s Dadri Cement Co. and Anr. Vs. M/s Bird & Co. Pvt. Ltd.* AIR 1974 Delhi 223 to say that the sale deed dated 22.02.2005 superseded the Agreement Ex. P-1 and clause 15 on which the foundation of the plaintiff’s case rested.

7. The plaintiff relied on the circumstances of the case and the conduct of the parties and pointed out that Ex.P-1 dated 18.02.2005 is an admitted document by which the defendant had agreed to sell the ground floor along with lawn, courtyard, back verandah, garage and drive way as also the terrace on the second floor for joint common use with all right, title and interest to the plaintiff with a further right to construct its basement for a consideration of ₹ 27 lakhs. The covenants attached to the parties were contained in Clause 3 of Ex. P-1 which stipulated that there was no encumbrance over the suit property and was so certified by the defendant. The plaintiff (purchaser) was entitled to realize the rent of the property which was at that point of time was under tenancy. It was also pointed out that Clause 11 stipulated that the sale deed would be executed in favour of the plaintiff within a period of one month and time was the essence of the contract. Clause 14 stipulated the reconstruction plan which was that after

the sale of this property i.e. ground floor by the defendant to the plaintiff, a new building would be constructed by demolition of the existing structure. The new building would comprise a basement, ground floor, garage block, first floor and second floor. The entire basement and ground floor including garage block up to the height ground floor would fall to the share of the plaintiff. The first and the second floors and area on the garage block beyond the height of the ground floor would fall to the share of the defendant. The front courtyard, lawn, verandah would be owned by the plaintiff. The terrace of the second floor as also the drive way would be common. The costs of construction including the wood work would be shared by both the parties. On the completion of the new building, the provisions contained in the following clause i.e. Clause 15 would become null and void.

8. It was argued that in terms of Clause 15, the period of demolition and reconstruction was specified as not exceeding five years w.e.f. 18.02.2005. After the reconstruction is completed, the parties would be permitted to sell their own respective shares i.e. 50% of the entire property. Clause (iv) of para 15 was especially relied upon by the plaintiff; it read as follows:

“(iv) In case of re-construction of the "THE ENTIRE PROPERTY" is not feasible for any reason whatsoever, the parties hereto agree to sell, unless otherwise agreed mutually in writing. "THE ENTIRE PROPERTY" in the open market at the best price available and share the proceeds equally i.e. 50% each of the "THE ENTIRE PROPERTY". In case of any difference of opinion on the best market price of "THE ENTIRE PROPERTY" and/or any other matters related thereto the decision of Mr.Arinder Dhingra s/o Late Sh. A.S. Dhingra, who is also the sole arbitrator, shall be final and binding on both the parties.

9. The plaintiff said that there was no dispute that after four days of this agreement, the sale deed was executed, on 22.02.2005. By the registered sale deed, the defendant had sold the ground floor of the suit property to the plaintiff along with indivisible 50% ownership interest in the land with right to construct the basement. The consideration was ₹ 27 lakhs. It was reiterated that the first and the second floors would fall to the share of the defendant. The terrace rights would be common. The covenants between the parties were contained in para 3 of the sale deed. The plaintiff was to pay all municipal taxes w.e.f. 22.02.2005. Clause 10 of this sale deed is by and large a reproduction of clause 14 of Ex. P-1; it reproduced the time plan for the reconstruction or demolition of the existing structure. It was agreed that the new building would consist of basement, ground floor, garage block, first floor and second floor. The garage block up to the height of ground floor would fall to the share of the plaintiff and the garage block beyond the height of ground floor would fall to the share of the defendant. The front courtyard, lawn and verandah would be owned by the plaintiff. The terrace of the second floor would be common. The drive way would also be common. Cost of constructions would be borne by both the parties.

10. The learned Single Judge, on a plain construction of the language of the Sale Deed noticed that the condition in Clause 15 Ex.P-1 was omitted. There was also no mention in the sale deed that this document was in continuation of Ex. P-1 nor was there mention of Ex. P-1 in the sale deed dated 22.02.2005. The construction plan had been outlined in Para 10 and details of the manner in which the property would devolve upon the plaintiff and the defendant was delineated. There was however no specification that the parties would complete the construction in a period of five years and in

case this property could not be reconstructed within this period for any feasible reason, the property would be sold and the sale proceeds would be divided 50% each between the parties. It was held that the sale deed dated 22.02.2005 was also acted upon.

11. The impugned judgment noticed that the plaintiff had got the property mutated in the year 2007, in respect of the ground floor as also the common passage, drive way and 50% roof rights. It was held that from their conduct it appeared that the parties, while executing the document dated 22.02.2005 had agreed that the suit property would be demolished and reconstructed; the share of the property was detailed in Clause 10. However, the conspicuous absence of sub-para (iv) of clause 15 of Ex. P-1 by which the parties had earlier agreed that in case the construction of the property is not completed within a period of five years, it would be sold and the sale proceeds would be jointly divided between the two parties was absent and omitted. The court therefore held that the parties had given up this part of the agreement. This is also for the reason that although in the agreement to sell, there was an outer limit of five years for the reconstruction plan but in the sale deed although the demolition and reconstruction of the building had to be carried out but there was also no time limit within which this plan was to be effected. This was a conscious agreement arrived at between the parties. By entering into this new arrangement, the parties had substituted the original agreement to sell by the subsequent sale deed; there was novation of the original contract and thus the Court is of the view that the agreement to sell dated 18.02.2005 had become inoperative and unenforceable. The court relied on Section 62 of the Contract Act and held that the conscious decision of the parties not to include a stipulation akin to Clause 15 of Ex. P-1, in the sale deed while at

the same time incorporating the condition for demolition and reconstruction meant that the sale deed substituted the original agreement to sell by reason of novation of the agreement to sell. It was held that even otherwise, the plaintiff and the defendant both in their respective pleadings and evidence had admitted that this was a collaboration agreement which had been entered into between the parties.

12. The learned Single Judge also relied on Section 14 (1)(d) of the Specific Act which reads as under:-

“14. Contracts not specifically enforceable- (1) The following contracts cannot be specifically enforced, namely:-

(a)

(b)

(c)

(d) a contract the performance of which involved the performance of a continuous duty which the court cannot supervise.”

13. In this regard, the impugned judgment records as follows:

“28 This provision provides that a contract the performance of which involved the performance of a continuous duty which the Court cannot supervise is not specifically unenforceable. Being a collaboration agreement, there was obligations and counter obligations on both the parties. The building plans had to be sanctioned; the architect and the contractors had to be engaged. This had to be done jointly by both the parties. The agreement was ever otherwise vague and incomplete as there was no detail mentioning the manner in which the parties were to execute this agreement. The performance and obligation of the respective parties under this collaboration agreement would be impractical to enforce. Even if the Court was to decree the suit for the plaintiff, it would not be practical or possible for the Court to ensure that the plaintiff will perform his part of the obligations

and the counter obligations will be performed by the defendant. What would happen if the construction plan is not sanctioned; who would decide upon the common name of an architect or a contractor; who would ensure that the quality of the construction, fitting and fixtures agreed to be put up in the building would be as per specification of the respective parties?

*29. This would be specially keeping in view the acrimony which has developed between the parties since the filing of this litigation. Every effort for reconciliation was also made by this Court but to no avail. In this hostile environment which is now prevailing inter-se the parties, it would in fact be impossible to execute this joint venture. *

30. The Supreme Court in Vinod Seth (supra) had an occasion to consider such a collaboration agreement in a suit for specific performance. In this context, the observation of the Apex Court are relevant and they read herein as under:-

“12. It is doubtful whether the collaboration agreement, as alleged by the appellant, is specifically enforceable, having regard to the prohibition contained in [Sections 14\(1\)\(b\) and \(d\) of the Specific Relief Act, 1963](#). The agreement propounded by the appellant is not an usual agreement for sale/transfer, where the contract is enforceable and if the defendant fails to comply with the decree for specific performance, the court can have the contract performed by appointing a person to execute the deed of sale/transfer under order 21 Rule 32(5) of the code of Civil Procedure ("the Code", for short).

13. The agreement alleged by the appellant is termed by him as a commercial collaboration agreement for development of a residential property of the respondents. Under the alleged agreement, the obligation of the respondents are limited, that is, to apply to DDA for conversion of the property from

leasehold to freehold, to submit the construction plan to the authority concerned for sanction, and to deliver vacant possession of the suit property to the appellant for development. But the appellant-plaintiff has several obligations to perform when the property is delivered, that is, to demolish the existing building, to construct a three-storeyed building within one year in accordance with the agreed plan, deliver the first and second floors to the respondents and also pay a token cash consideration of Rs.3,71,000/-. The performance of these obligations by the appellant is dependent upon his personal qualifications and volition.” 31 Thus, on this ground also, the plaintiff is not entitled to this equitable relief. The agreement besides being vague and not containing the details which have to be followed up by the respective parties, it would even otherwise involve performance of a continuous duty which the Court would not be able to supervise and in view of the provision of [Section 14 \(1\)\(d\)](#) of the said Act, this not being a usual agreement for sale, it would neither be practical and nor possible for the Court to allow specific performance of this contract.”

32 Thus clause (iv) of para 15 of the agreement to sell dated 18.02.2005 having superseded by the sale deed dated 22.02.2005, the agreement to sell had become inoperative and unenforceable. Further this agreement being a collaboration agreement, in view of [Section 14 \(1\)\(d\)](#) of the said Act, it would also be impossible to enforce such an agreement.”

14. The issue of limitation was decided in favor of the plaintiff. As to the other issues, the learned Single Judge held as follows:

“47 In the instant case, it has clearly come on record that it was agreed between the plaintiff and the defendant that the demolition and reconstruction of the building would be carried out by the parties jointly. PW-1 has candidly admitted that it was a joint venture. He however did not approach any contractor or

architect in this intervening period or contact any competent authority including any municipal body to find out as to how the demolition and reconstruction was to be carried out. He also did not give any notice to the defendant on this count. He actually lay in slumber. His averment is that he was waiting for the defendant to carry out the work. However since, the agreement provided that it was a joint venture and the expenses were to be borne jointly by both the parties; the non-performance and unwillingness on the part of the plaintiff become evident in view of the aforementioned categorical admissions made by him. The averment in para 9 of the plaint are contrary to the evidence. PW-1's testimony establishes that the readiness and willingness on the part of the plaintiff was missing; the suit of the plaintiff on this count also must fail.

52 The plaint clearly discloses that the plaintiff has not made any claim for compensation for the breach of the agreement to sell or in substitution non-performance of the agreement. He has not asked for compensation. [Section 21](#) (5) emphatically provides that no compensation shall be awarded unless the relief for compensation has been claimed either in the plaint or included later by amending the plaint by any application. No such application has been filed.

53 The observation of the Apex Court in (2004) 8 SCC 569 *Shamsu Suhara Beevi Vs. G. Alex and Another* are relevant. This was a case where the High Court while decreeing the suit had granted compensation under [Section 21](#) of the said Act. The observations of the Apex Court in this context had noted as under:-

"In our view, the High Court has clearly erred in granting the compensation under [Section 21](#) in addition to the relief of specific performance in the absence of prayer made to that effect either in the plaint or amending the same at any later stage of the proceedings to include the relief of compensation in addition to the relief of specific performance. Grant of

such a relief in the teeth of express provisions of the statute to the contrary is not permissible. On equitable consideration court cannot ignore or overlook the provisions of the statute. Equity must yield to law"

On the basis of the above findings, the learned Single Judge dismissed the suit.

Contentions of parties

15. The plaintiff argues that the learned Single Judge overlooked that Para 15 of Ex. P-1 is in two parts (1) concerning the development/re-constructions of the building after its demolition and its division after development and (2) in the event (1) is not achieved, the parties to buy each other's share or the property to be sold and proceeds to be divided equally. The learned Single Judge only proceeded in respect of the first part and completely ignored the second part of the agreement thus, erred in not granting relief as claimed by the plaintiff. It is secondly argued that the Sale Deed culminated only with respect to the passing of title of the portion of the suit property i.e. ground floor with basement to be constructed to the appellant. It was not satisfied with regard to the question of the stipulation of construction and its incumbent consequences in para 15 of Ex. P-1. The effect, of these was that though the appellant was entitled to the basement, however, neither had he got the basement nor the sale proceeds of the property as provided in the agreement Ex. P-1 whereas, the defendant continued to enjoy at the cost of the appellant.

16. Mr. Sanjeev Sindhwani, learned senior counsel, argued that the learned Single Judge also fell into error in holding that there was novation of contract, by reason of Section 62. According to the plaintiff, this was not

applicable. Furthermore, the finding that the plaintiff was not ready and willing to perform his part of the bargain too was in error of law, because the impugned judgment held that the appellant had filed the suit in time.

17. Mr. Sindhwani argued that the defendant conveyed and transferred a right in the suit property upon payment of full consideration, to build and construct a basement in the suit property and own 50% ownership rights therein or its sale proceeds, shows the scheme designated by the parties at the time of negotiation and execution of the agreement, the defendant now cannot, after taking advantage thereof, wriggle out of it. He argued that the learned Single Judge failed to appreciate that the defendant did not prove that Para 15 of Ex. P-1 stood performed and had fully culminated into Ex. P-2 (the Sale Deed) or that it was no longer in existence or unenforceable and/or that was superseded or replaced or stood novated by Ex. P-2 and was rendered incapable of performance.

18. It was submitted that the learned Single Judge overemphasized the importance of Section 14 (1) (d), which in effect overcame equity. Having secured a valuable advantage against a pledge to co-operate in the construction of basement, for which concededly full consideration was paid, the defendant sought shelter under technical and procedural rules. Learned counsel submitted that the condition in Section 14 (1) (d) has to be seen on a case to case basis; the court has to balance that stipulation with the fact that the plaintiff had admittedly paid valuable consideration for the entire property, including the right to construct a basement after demolition and reconstruction of the suit property.

19. Learned counsel for the defendant submitted that this court should not interfere with the findings and judgment of the learned Single Judge. It was

submitted that merely because Ex P-1 and Ex P-2 were four days apart, there could be no inference that the stipulations from the former, left out in the latter were unintended and that they had a separate existence, capable of independent enforcement. It was argued here that the parties knew what was to be conveyed; the stipulations in the Sale Deed (Ex. P-2) did not incorporate the condition in question, i.e. Clause 15 of Ex. P-1. It was also submitted that *Vinod Seth (supra)* was an appropriate decision, relied on by the learned Single Judge to hold that Clause 15 as claimed was unenforceable, not merely because it was part of a collaboration agreement, but it was premised on further unspelt terms, which required detailed supervision which the court could not get involved in.

Analysis and Findings

20. Ex P-1, to the extent relevant, is as follows:

"14. It is further mutually agreed between 'THE SELLER' and the PURCHASER for the re-construction of a new building by demolishing the existing one as under:-

(i) The New building shall consist of Basement Ground Floor, Garage Block, First Floor and Second Floor

(ii) The PURCHASER shall be entitled to get the Entire Basement and the entire floor including Garage Block up to the height of ground Floor.

(iii) 'THE SELLER' shall be entitled to entire first and second Floor and the Area on the Garage Block beyond the height of the ground floor.

(iv) The front-court yard/lawn and the rear court yard/verandah shall be exclusively owned and possessed by the PURCHASER.

(v) The terrace of the second floor shall be common and shall house the water tanks and the servant quarter etc.

(vi) The driveway shall be common and both the parties shall have right to park equal number of car

each.

(vii) The cost of construction of the structure and finishing and façade of the building shall be shared in proportion to the built up area whereas flooring finishing, sanitary fitting, wood work etc. shall be paid by the respective party for a the areas.

(viii) On completion of the new Building each party shall be free to possess, sell, dispose off and deal with his portions/areas. The provisions contained in Clause 15 below shall become null and void on completion of the re-construction

15. It is further mutually agreed between "THE SELLER" and the PURCHASER as under

(i) That the parties shall demolish the existing building and rebuild a new building within a period not exceeding 5 years from the date of this agreement, unless agreed to otherwise by the parties in writing.

(ii) That within the said period, before the re-construction is completed, none of the parties shall be entitled to sell any rights in "THE ENTIRE PROPERTY" to a third party. The party desirous of selling his part of "THE ENTIRE PROPERTY" shall offer it to the other party to purchase his entire share/areas at a price equivalent to 50% of the prevailing market price of "THE ENTIRE PROPERTY". In case of any difference of opinion on the prevailing market price of "THE ENTIRE PROPERTY" and/or any other matters related thereto, the decision of Mr. Arvinder Dhingra S/o Late SH. A.S. Dhingra, who is also the sole arbitrator, shall be final and binding on both the parties.

(iii) In case none of the party is able to purchase the share of the other party, the parties shall join together and sell "THE ENTIRE PROPERTY" in the market at the best price available and share the proceeds equally i.e. 50% each, of "THE ENTIRE

PROEPRTY". In case of any difference of opinion on the best market price of 'THE ENTIRE PROPETY' and/or any other matters related thereto the decision of Mr. Arvinder Dhingra S/o Late Sh. A.S. Dhingra, who is also the sole arbitrator, shall be final and binding on both the parties.

(iv) In case the re-construction of the "THE ENTIRE PROPERTY" is not feasible for any reason whatsoever, the parties hereto agree to sell, unless otherwise agreed mutually in writing "THE ENTIRE PROPERTY' in the open market at the best price available and share the proceeds equally i.e. 50% each of 'THE ENTIRE PROPERTY". In case of any difference of opinion on the best market price of "THE ENTIRE PROPERTY" and/or any other matters related thereto the decision of Mr. Arvinder Dhingra S/o Late Sh. A.S. Dhingra, who is also the sole arbitrator, shall be final and binding on both the parties.."

The sale deed (Ex. P-2), *inter alia*, stipulated as follows:

"..That in pursuance of the above agreement between "THE SELLER" and "THE PRUCHASER", "THE SELLER" doth hereby grant, transfer, release and convey and assure unto "THE PURCHASER" the entire ground floor together with the sheds, structures, hereditaments, premises & building presently existing on the ground floor, along with indivisible 50% ownership interest in the land of the plot no. E 23, Kalindi, New Delhi-110065, along with the exclusive right to the entire front Lawn/ Courtyard and Back Verandah/Courtyard and Garage, and with right to construct and own the entire basement, with the Drive way. Main staircase and the Terrace/roof over 2nd floor held for joint common use with "THE SELLER" and all rights, title and interest so far held and enjoyed by "THE SELLER" in respect thereof (hereinafter referred to as "THE SUBJECT PROPERTY") for a total consideration of RS.27,00,000/- (RS TWENTY SEVEN LACS) free from all encumbrances, charges, legal disputes, acquisition/requisitions, sales, prior sale,

mortgages etc unto "THE PURCHASER" absolutely and forever, TO HAVE AND TO HOLD the premises hereby granted, released and assured or intended so to be with it and every part of the rights, members and appurtenances UNTO AND TO THE USE OF AND ON BEHALF OF "THE PURCHASER", forever and absolutely..."

Clause 10 of Ex. 2 Sale Deed reads as follows:

"10. It is further mutually agreed between "THE SELLER" and "THE PURCHASER", for the re- construction of a new building by demolishing the existing one, as under.

- (i) The new building shall consist of Basement Floor, Ground Floor, Garage Block, First Floor and Second Floor.*
- (ii) The Basement Floor shall be constructed at maximum permissible height from the Road as may be permissible under the MCD Bye-laws.*
- (iii) "THE PURCHASER" shall be entitled to get the Entire Basement and, the entire ground Floor including Garage Block up to the height of ground Floor.*
- (iv) "THE SELLER" shall be entitled to the Entire First and Second Floor and the Area on the Garage Block beyond the height of the ground floor,*
- (v) The front court yard /lawn and the rear court yard /verandah shall be exclusively owned and possessed by "THE PURCHASER",*
- (vi) The terrace of the second floor shall be common and shall house the water tanks and the servant quarter etc.*
- (vii) The driveway shall be common and both parties shall have the right to park equal number of cars each.*
- (viii) The cost of construction of the structure and finishing and facade of the building including the furnishings, sanitary fittings, wood-work etc shall be paid by the respective parties for their areas.*
- (ix) On completion of the new Building each party shall be free to possess, sell, dispose off and deal with his*

portion/areas.”

21. A comparison between the stipulations in the two documents would immediately show that whereas the pattern with respect to ownership of the reconstructed areas is more or less the same (on a juxtaposition of Clause 14 of the Agreement to Sell, Ex P-1 and clause 10 of the Sale Deed, Ex. P-2) the parties do not agree that in event of no possibility of reconstruction, the property would be sold. In other words, the Conveyance is silent as to the right to claim sale in if “*re-construction of the "THE ENTIRE PROPERTY" is not feasible for any reason whatsoever, the parties hereto agree to sell, unless otherwise agreed mutually in writing "THE ENTIRE PROPERTY" in the open market at the best price available and share the proceeds equally i.e. 50% each..*” That stipulation is a salient feature of Clause 15 (iv) of Ex. P-1.

22. The plaintiff can, in our opinion succeed only if he establishes that the obligation under Clause 15 (iv) or any other condition in Ex. P-1 could be viewed as an independent covenant despite the execution of the Sale Deed, Ex. P-2. Now, that is a plausible argument, provided the conditions in the two deeds, particularly the Sale Deed, is forthright on this feature. The Sale Deed has, for instance, incorporated *what kind of property* the parties, (to the conveyance of title documents itself) can construct. This was necessary because in the absence of iteration of Clause 14 of the Agreement Ex. P-1 (which transformed into Clause 10 of the Sale Deed Ex. P-2) there could have been litigation and there would have been ambiguity about the plaintiff's right to construct a basement. However, Clause 15 (iv) was, at best a contingent condition in the sense that it envisioned a possibility of the

parties failing to reach an agreement about reconstruction, in which event the obligation to mutually sell the property and realize amounts was spelt out. However, whatever be the reason, this condition was omitted.

23. In *Sarupuri Narayanamma & Ors v Kadiyala Venkatasubbaiah* AIR 1973 SC 2114 it was held by the Supreme Court, as follows:

“It is a principle settled beyond dispute that each document has to be interpreted on the words of that document itself and the other documents interpreted in earlier decisions cannot provide a binding precedent in interpreting a document.”

There is no indication in Ex. P-2- akin to Clause 15 (iv) of Ex P-1. This omission, in the opinion of the court is significant. Firstly, because the parties spelt out the rights clearly when they sought to incorporate an existing condition in Ex. P-1 into Ex. P-2. The most striking part to prove this is that Clause 14 of Ex.P-1 was reproduced as Clause 10 in Ex. P-2. However, the same did not apply in the case of Clause 15. The imperative “shall” that the parties had to demolish the property, to effectuate the condition in Ex P-1 was omitted in the Sale Deed. Necessarily, therefore, the inference had to be that the parties were clear that whereas the plaintiff had basement rights, yet the question of joint demolition of the entire structure and joint construction failing which sale and joint sharing of the proceeds, was not consciously incorporated in the final sale deed. Secondly, the modality or steps to secure the requisite permission, the responsibilities for securing clearances, the expenses and who would bear them, the time line thereof, etc had not been spelt out. These omissions, in the opinion of the court, attest to the soundness of the learned Single Judge’s conclusions.

24. The second important aspect is that there is no indication how the

condition, i.e reconstruction is to be effected; if so, what ought to be the budget, who would take charge of the construction, its quality, etc. Without these details, the concerned stipulation, Clause 10 is *per se* unenforceable. It only amounts to an agreement that *in the event the parties reconstruct the building, what would their rights be*. This necessarily meant a further *consensus ad idem* on the un-spelt specifics. The hazy nature of this arrangement meant that one party could not unilaterally proceed to exercise its rights.

25. The learned Single Judge held that the contract, of which specific performance is sought, cannot be enforced in the manner claimed, because it would require constant supervision (*“a contract the performance of which involves, the performance of a continuous duty which the Court cannot supervise”*) by virtue of Section 14 (1) (d) of the Specific Relief Act. Section 14 (3) provides an exception to this rule, by stating that a contract for *“enforcement of a contract for the construction of any building or the execution of any other work on land”* [Section 14 (3)(c)] can be given effect through specific performance, if three conditions are fulfilled, i.e. (a) the building or other work is described in the contract in terms of sufficiently precise to enable the Court to determine the exact nature of the building or work, (ii) the plaintiff has a substantial interest in the performance of the contract and the interest is of such a nature that compensation in money for non-performance of the contract is not an adequate relief, and (iii) the defendant has, in pursuance of the contract, obtained possession of the whole or any part of the land on which the building is to be constructed or other work is to be executed.

26. The law relating to specific performance of contracts is founded on the premise that damages or other such relief provide inadequate remedy and that in such eventuality, equitable relief – be it injunction (mandatory or perpetual) or a decree for specific performance is granted. This relief is conditioned upon fulfillments of several requirements; one of them is that constant supervision of the court should not be called for in the event a decree is issued. In the case of building contracts, further conditions for a decree of specific performance have been spelt out, in Section 14 (3) (c). Thus, in *J. C. Williamson Ltd. v Lukey & Mulholland* 1931 (45) CLR 282, it was held that “*specific performance is inapplicable when the continued supervision of the court is necessary to ensure the fulfillment of the contract*”. The House of Lords in the *Co-Operative Insurance Society Ltd - V- Argyll Stores* [1997] 3 All ER 297 stated that “constant supervision” meant rulings by the court rather than physical supervision undertaken by an officer of the court. Rather, it is the possibility of the court having to give an indefinite succession of rulings in order to ensure that the order is carried out, which would prove undesirable.

27. In *Vipin Bhimani v Sunanda Das* AIR 2006 Cal 209 the Calcutta High Court, observing the nature of mutual rights in a construction contract, stated as follows:

"11. From the provisions contained in Section 14 (3) (c) of the Act, it is clear that a suit for specific performance of a development agreement at the instance of a developer is clearly hit by the provisions contained therein. However, a suit for specific performance of such agreement at the instance of the owner of the building would be maintainable if possession is

already handed over to developer and clauses (i) and (ii) of Section 14 (3) (c) are complied with.

"16. We are not impressed by the submission of Mr. Roy Chowdhury that a so-called irrevocable Power-of-Attorney cannot be revoked in any circumstances. By virtue of such Power-of-Attorney if an owner of the building gives agency to a person to act on his behalf, the contract by itself is determinable at any point of time. The concept of irrevocable Power-of-Attorney thereby conferring agency for all time to come is unknown in jurisprudence unless such power is coupled with an interest, meaning thereby, the conferment of power to do some act conveyed to an agent along with an interest in the subject-matter of the power. When such power coupled with an interest is given, the holder of such power does not hold the same for the benefit of the principal but for his own benefit and for the above reason, such authority is not recognised as true "agency power" and is termed as "proprietary power". In the case before us, no such "propriety power" has been given to the developer. Section 202 of the Contract Act recognises such propriety power and as provided in Section 203 thereof, except in the cases covered by Section 202, all other agencies are revocable at the instance of the principal. After going through the Power-of-Attorney involved herein, we find that such agency was given only to give effect to the earlier agreement for development of the immoveable property which by itself does not create any interest over the property in view of the provisions contained in Section 54 of the Transfer of Property Act."

In the present case, the possession of the entire property was never handed over to the plaintiff. Apart from the basic fallacy in his claim, i.e in the absence of specific responsibilities and terms in respect of the construction, specific performance would have been heavily- if not entirely dependent upon oversight and a series of court orders, rendering it impracticable of

enforcement. The plaintiff did not seek other remedies, which clearly were available. The claim in the suit, therefore, had to fail.

28. For the above reasons, the appeal lacks in merit. It is accordingly dismissed without order as to costs.

**S. RAVINDRA BHAT
(JUDGE)**

**DEEPA SHARMA
(JUDGE)**

APRIL 29, 2016

