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

Reserved on :1st February, 2018

Date of decision :15th May, 2018

+ **RFA 370/2017, CM APPL. 14108/2017 (Ex-Parte Stay) &
CM APPL. 32820/2017 (Delay)**

NAVEEN GUPTA

..... Appellant

Through: Mr. Uday Gupta, Ms. Shivani Lal,
Mr. Hiren Dasan, Mr. M.K. Tripathi
and Mr. Chand Qureshi, Advocates.
(M-9560541151)

versus

BHARAT LAL MEENA & ANR.

..... Respondents

Through: Mr. Satya Bhushan, Advocate.
(M-9810631754)

CORAM:

JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. The Plaintiff/Appellant- Mr. Naveen Gupta (*hereinafter*, 'Plaintiff') is a professional serving in the Merchant Navy. He entered into an Agreement to Sell with the Defendants/Respondents - Mr. Bharat Lal Meena and Mr. Hans Raj Meena (*hereinafter* 'Defendants') in respect of property bearing No.419, 7th Floor, Block-B, Type S, Category III, Sector-18B, Dwarka, New Delhi-75 (*hereinafter*, 'the flat'). The flat was allotted by the DDA on 7th October, 2008 to the Defendants. The consideration agreed to in the Agreement to Sell dated 20th July, 2007 was as under:

- i) Rs.2 lakhs over and above the demand raised by the DDA of Rs.31,82,310/-;
- ii) Stamp duty charge of Rs.2,57,545/-;
- iii) Rs.5 lakhs in cash.

2. The Plaintiff paid the DDA by way of a pay order No.349888 dated 18th July, 2007, the entire consideration of Rs.31,82,310/- as also the sum of Rs.2 lakhs to the Defendants. The Plaintiff also got prepared a cheque for Rs.2,57,545/- in favour of the Collector of Stamps. Thus, the Defendants were to be paid a total of Rs.5 lakhs over and above the amount payable to the DDA, and stamp duty out of which Rs.4 lakhs stood paid. A balance consideration of only Rs.1 lakh was remaining. The allotment letter issued by the DDA and other documents in original were handed over to the Plaintiff at the time when the agreement to sell was executed by the Defendants. The Plaintiff approached the Defendants several times for execution of the final sale deed etc., after the conveyance deed was executed by the DDA, but the Defendants did not response. Accordingly, it is averred that the Plaintiff personally visited Rajasthan in January, 2008 in order to meet with the Defendants, but they continued to avoid the Plaintiff. This led to issuance of legal notice dated 10th March, 2008 calling upon the Defendants to comply with the agreement to sell and complete the necessary formalities as also handing over of possession.

3. Since no response was elicited from the Defendants, a suit for specific performance, possession and permanent injunction came to be filed seeking the following reliefs:

It is therefore most respectfully prayed that this Hon'ble Court may be pleased to :

(A) Pass a Decree of Specific Performance of Contract, directing the Defendants to complete all the necessary formalities with DDA and take the possession of the flat No. 419, 7th floor, Block -B, Type -S, Category-3, Sector 18-B, Dwarka, New Delhi-75 from DDA and thereafter to execute the title documents

In favour of the Plaintiff and handover the possession of the said flat to the Plaintiff . In case the Defendants do not perform their part of the contract then in that eventuality the entire formalities with DDA be got done by some official appointed by this Hon'ble Court and thereafter the flat be transferred in the name of the Plaintiff by means of Sale-Deed and possession of the flat in question be handed over to the Plaintiff by the said court official. Alternatively, in case the Specific Performance of the Agreement to Sell dated 20.07.2007 is not possible in any manner whatsoever , then the Defendants be directed to pay the double the amount of the sale- consideration along with interest @ 18% p.a. back to the Plaintiff.

(B) Pass a decree of Permanent Injunction in favour of the Plaintiff and against the Defendants thereby restraining the Defendants , their associates , nominees and legal representatives etc. from alienating , transferring or parting with possession or creating third party interest in the property (flat) in question. ”

4. In the written statement, the case of the Defendants is that this was merely a loan transaction and blank papers were gotten signed from the Defendants by the Plaintiff. In addition, the Defendants contended that prior to the execution of the conveyance deed by the DDA, no sales/transfer of the flat could have taken place as per the scheme of the DDA and hence the agreement to sell itself was contrary to the scheme of the DDA and hence unenforceable. Apart from merely relying on the clauses of the DDA scheme, the Defendants hardly put up any defence and most of the facts and documents are admitted.

5. On 23rd January, 2009, an interim order was passed in the suit restraining the Defendants from parting with possession or creating any third party interest in the suit property. Thereafter, the following issues were

framed on 4th May, 2011:

“(i) Whether the parties had not entered into an agreement to sell dated 20th July, 2007 in respect of the property Flat no.419, 7th floor, Block-B, Type-S, Category-3, Sector 18-B, Dwarka? OPD

(ii) Whether the defendants had obtained the loan from the plaintiff as alleged in para 1 and 2 of the preliminary objections of written statement? OPD

(iii) Whether the plaint has been signed and verified and the suit is instituted by a duly authorised person? OPD

(iv) Whether the plaintiff is entitled to the relief of specific performance of the agreement dated 20th July, 2007? OPD

(v) In case issue no. (iv) is decided against the plaintiff, whether the plaintiff is entitled to damages to the tune of double the amount of sale consideration with interest @ 18%per annum? OPD

(vi) Whether the plaintiff is entitled to interest on the amounts, if not awarded to it and if so on what amount, at what rate and for what period? OPD

(vii) Relief.”

6. The Trial Court held that the agreement to sell stands proved and hence decided issues 1 and 2 in favour of the Plaintiff and also held that the Defendants had not obtained any loan from the Plaintiff. On the question of specific performance, the Trial Court, relying upon the clauses in the Scheme, held that the contract is void under Section 23 of the Indian Contract Act as no sale could be made. The Trial Court therefore directed that the amount paid by the Plaintiff is liable to be returned along with 6% interest. The decree dated 9th February, 2017 passed by the Trial Court was in the following terms:

“In view of my above findings on issue nos. (i) to (vi), I

am of the view that the plaintiff is not entitled to the decree of specific performance of the agreement dated 20.07.2007 Ex. P-1 against the defendants. However the plaintiff is entitled to the decree for recovery of an amount Rs.38,82,310/- (Thirty Eight Lakhs Eighty Two Thousand Three Hundred and Ten only) from the defendants, with interest thereon @6%per annum only. No order as to the cost of suit in the facts and circumstances of the present case. Decree sheet be prepared accordingly. File be consigned to record room."

7. The Plaintiff has contended that the judgment of the Trial Court is completely unjust and inequitable inasmuch as except a sum of Rs.1 lakhs, which was to be paid at the time of the execution of the final documents, the entire consideration stood paid. If the Plaintiff had not paid the consideration to the DDA, the allotment may have itself lapsed. The Plaintiff having bonafidely paid the entire amount to the Defendants ought to be granted the relief of specific performance. The Plaintiff relied upon ***Mrs. Chandnee Widya Vati Madden v. Dr. C.L. Katial and Ors. (1964) 2 SCR 495*** in support of his case.

8. On the other hand, the Defendants contended that the Trial Court's judgment is as per law. Since the DDA had merely given an allotment, but the conveyance deed was yet to be executed, no title in the property could have been transferred. The Defendants relied on Section 54 of the Transfer of Property Act to contend that for any transaction to constitute sale, a registered document needs to be executed. Ld. Counsel also contends that the contract is hit by Section 23 and Section 27 of the Indian Contract Act, as it is forbidden by law. The object of the contract is unlawful. The Defendants rely upon ***Satish Kurma v. Taran Singh (2016) 4 SCC 352***.

9. The following documents are exhibited:
- i) Agreement to Sell dated 20th July, 2007- Ex.P1;
 - ii) Receipts of payment of Rs.4 lakhs in cash – EX.P2;
 - iii) Certificates issued by HSBC and proof of payment to the DDA- EX.PW1/3 and EX.PW1/4;
 - iv) Challan dated 18th July, 2007 issued by Central Bank of India showing payment of Rs.31,82,310/- to the DDA - EX.PW1/5;
 - v) Copy of demand draft showing payment of Rs.2 lakhs to the Defendants along with certificates from ICICI Bank confirming the said payment – EX.P3 and Ex.PW1/2;
 - vi) Letter dated 19th January, 2007 issued by the DDA showing that the Defendants have been successful for allotment of a flat with the flat number and the amount to be paid – EX.P4;
 - vii) Original cheque in favour of Collector of Stamps dated 19th July, 2007 for Rs.2,57,545/- EX.PW1/11;
 - viii) Challan issued by the Treasury showing payment of Stamp Duty and the demand draft issued by ICICI Bank – EX.PW1/12 and EX.P1/13;
 - ix) Legal notice dated 10th March, 2008- EX.PW1/15, along with postal receipt and ID Cards – EX.P1/16 to PW.1/20;
 - x) Original brochure of the DDA Housing Scheme, 2006 dated 22nd August, 2006 to 12th October, 2006 for allotment of 3500 ready for occupation flats in Sarita Vihar, Dwarka and Rohini and other areas in Delhi - DW.1/1;
 - xi) Original allotment letter dated 7th October, 2008 and other supporting letters under the financial scheme issued by DDA to the

Defendants –EX.D1, D2, D3, D4, D5, D6, D7, D8.

10. The Court has considered the rival contentions, pleadings, evidence and judgment of the Trial Court. Insofar as issues no. 1, 2 and 3 are concerned, there is no serious dispute between the parties qua these issues. The only question, that remains to be adjudicated which has been argued and raised by the parties, is as to whether in the light of the clauses contained in the DDA Housing Scheme, 2006, the relief of Specific Performance can be granted in favour of the Plaintiff.

11. The relevant clauses of the DDA Housing Scheme, 2006 are set out herein below:

“5 (B) II. FOR POSSESSION OF FLAT

- a. Payment proof of Allotment money deposited.*
- b. Conveyance deeds duly stamped from the office of collector of stamps. Blank Conveyance deeds would be sent to allottees alongwith the demand letter.*
- c. Affidavit as per proforma given in Annexure-C, D & E.*
- d. Undertakings as per proforma given in Annexure-F & G.*
- e. Duly filled possession letter In quadruplicate given in Annexure-H.*
- f. Photograph and three signatures of self and wife. If any, duly attested as per proforma given in Annexure-1.*
- g. Identity proof and address proof.*

7. RESULT OF ALLOTMENT

I. The results of the draw shall be displayed on the Notice Board of DDA at Vikas Sadan, D-Block, INA, New Delhi-23. In addition the result shall be displayed on the website of DDA with the address <http://www.dda.org.in>. The result will also be published in the leading National Newspapers.

II. The allotment-cum-demand letters will be dispatched through Speed Post/Courier/Registered Post but it shall be the sole responsibility of the applicant to check the result of the draw if he/she does not get information despite the aforementioned means. In case applicant has given address of a place/office, where entry (of courier) is restricted, all communication including dispatch of refund cheque/demand letter on failure of courier would be through available mode. Applicant is advised to contact nodal officer of the bank as given in Annexure B In such cases. DDA/Banks in such cases would not be responsible for delay/ non receipt of communication by applicant/allottee.

III. A separate waiting list of 200 applicants will also be declared in order of priority. The waiting list will be valid only for 9 months from the date of issue of demand letters. The registration money of the wait listed registrants shall be refunded along with unsuccessful registrants. However, before going for the draw in case the same takes place for filling up the vacancies, all such eligible waitlisted shall be asked to deposit the registration money. 15 days time shall be given to them to do so and only those names shall be included who would be depositing their registration money prior to the draw. A draw will be held only once after six months, from date of issue of demand letters, for allotment of the surrendered flats to the wait listed registrants as per the priority decided initially. Only those flats which are surrendered within six months from date of issue of demand letters would be included for allotment to waitlisted registrants. The waiting list is created just to ensure that the surrendered flats (if any) are allotted to same registrants rather than keeping them vacant and the list will be valid only for 9 months, hence it doesn't create any right of the wait listed registrants if they fail to get a flat from the surrendered ones. If successful, the cost would be the

cost of the flat on the date of the demand-cum-allotment letter is issued.

9. STATUS OF ALLOTTEE

I. All allotments shall be made on free hold basis. However, the title shall be transferred only when conveyance deed is executed in favour of the allottee and is registered in the office of Sub-Registrar.

13. DISPOSAL COST OF THE FLATS

a) The tentative cost of the flats is given in annexure 'A'. The above cost includes land premium and cost of construction and 20% surcharge on land premium and cost of construction in case of flats situated in South Delhi. Cost of construction includes departmental charges and Interest during construction period. The land premium is normally revised every year on first April while cost of construction is revised twice during the year on every 1st Oct. and 1st April. The variation in cost within category is due to variation in plinth area of the flats. There may be some more flats added or deleted (at the discretion of DDA). If the area changes, the cost of newly added flats will change accordingly.

b) In addition to above, allottee is liable to pay Free hold charges. Present provisional, free hold charges are given in Annexure 'A', if these rates are revised upward, difference will be claimed from the allottee.

15. PERIOD FOR PAYMENT

Allottee is liable to make the payment within 90 days from the date of issue of demand letter without interest. Thereafter, the allottee is liable to deposit the amount in not more than next 90 days along with interest @ 15% p.a. compounded as on 31st March. If the payment is not made within 180 days, including interest, from the date of demand letter, allotment of the flat will be automatically cancelled. No show cause

notice/intimation will be given by the DDA for cancellation. No time extension for payment beyond the date of automatic cancellation would be given in this scheme. Also no restoration is allowed once the flat is automatically cancelled due to non payment. If the allottee fails to deposit the demanded amount within 180 days i.e. date of automatic cancellation, the amount deposited will be refunded without interest and after deduction of cancellation charges as mentioned in para 12.

18. POSSESSION OF FLATS

- i. The allottees shall be entitled to take delivery of possession only after he/she has completed all the formalities, paid all dues and furnished/executed all the documents as required in the demand cum allotment letter or the Delhi Development Authority (Management & Disposal of Housing Estate) Regulations, 1968.*
- ii. If the allottee does not take possession of the flat within 3 months from the date of issue of possession letter shall be liable to pay watch and ward charges at the prescribed rates beyond a period of 3 months from the date of issue of possession letter up to a maximum period of one year from the date of issue of possession letter. At present watch & ward charges are Rs 1250/- per month for three bed room flats and Rs 1000/- per month for two bed room flats & expendable houses.*
- iii. If the physical possession is still not taken over then the allotment shall be automatically cancelled. No show cause notice shall be served before cancellation. However, in exceptional cases the physical possession can be given beyond 12 months and up to 24 months on payment of said charges in addition to prescribed restoration/ cancellation charges provided prior permission of DDA is obtained. Any amount deposited towards the cost of the flat shall be refundable without interest in such a case of cancellation after deduction*

of penalties.

iv. The property is being offered on "as is where is basis. The DDA will not entertain any request for additions or alterations or any complaints, whatsoever regarding Property Circumstances except as defined in para 19 of the Regulation referred to above or about cost of flats, its design, the quality of material used, workmanship or any other defect.

19. EXECUTION OF CONVEYANCE DEED

Conveyance deed (Free Hold Deed) paper will be issued by the DDA along with the demand cum allotment letter. These are required to be stamped from the Collector of stamps, Govt. of NCT of Delhi and submitted to DDA before the possession letter is issued. Stamp duty and other expenses in this regard shall be borne by the allottees. Allottee shall not be entitled to transfer or otherwise part with the possession of the whole or any part of the flat without execution of conveyance deed, such sale/transfer shall not be recognized by the Authority and it shall be open to the Authority to cancel the allotment and resume the flat."

12. Under the above Housing Scheme of 2006, the DDA had allotted the property on 19th January, 2007 to the Defendants. A perusal of the allotment letter shows that the allottees had the option of paying the initial deposit in the following manner:

*"12. Initial deposit payable by (**) 31-Mar-07*

<i>Initial deposit if paid by</i>		<i>payable including interest</i>
<i>20-JAN-07</i>	<i>31-MAR-07</i>	<i>3068806.00</i>
<i>01-APR-07</i>	<i>19-APR-07</i>	<i>3068806.00</i>
<i>20-APR-07</i>	<i>19-MAY-07</i>	<i>3106641.00</i>
<i>20-MAY-07</i>	<i>18-JUN-07</i>	<i>3144475.00</i>
<i>19-JUN-07</i>	<i>18-JUN-07</i>	<i>3182310.00</i>

13. Automatic cancellation, if initial deposit is not paid, by 18-JUL-07”

13. Thus, despite the allotment having been made on 19th January, 2007, the Defendants had not been able to arrange for the necessary funds to make the deposit with the DDA almost until the last date i.e., 18th July, 2007. As stated by the Plaintiff, it was finally when the Plaintiff met the Defendants through a local property dealer and the transaction was agreed upon, in principle, the Plaintiff paid the amount to the DDA and not the Defendants. If the amount had not been paid on 18th July, 2007, the allotment was liable for “*automatic cancellation*” as per the Housing Scheme of 2006. Thus, the Plaintiff has invested a huge amount and has not merely paid the DDA the initial deposit for allotment of the flat, but also arranged for the stamp duty amount, and over and above that, paid a sum of Rs.4 lakhs to the Defendants. This shows that the Defendants took complete advantage of the Plaintiff and his funds which became available to them. The agreement to sell was entered into on 20th July, 2007, after almost the entire payment was made by the Plaintiff. The salient clauses of the agreement to sell are as under:

“1. that the First Party has agreed to sell and the Second Party has agreed to purchase the aforesaid flat in the manner as abovementioned and that the Second Party has paid to the First Party a consideration of Rs. 200,000/- (Rupees two lakhs only) vide Pay order No. 123676 dated 18-07-2007 drawn on ICICI Bank, Mayur Vihar, Delhi -91 and the receipt whereof the First Party doth hereby also confirms and acknowledges and discharges the Second Party in respect thereof.

2. that the Second Party has paid on behalf of the

First Party the entire cost of flat as demanded from the First Party by the D.D.A. vide its letter No. 65240 dated 19-01-2007. As such, the Second Party has paid Rs.31,82,310/- (Rupees Thirty one lakhs eighty two thousand three hundred ten only) vide Pay Order No. 349888 dated 18-7-2007 drawn on HSBC Ltd. New Delhi Main Office, New Delhi-1 favouring "D.D.A. Housing" and the First Party hereby confirms the receipt thereof.

3. that the Second Party has also paid to the First Party stamp duty charges of Two lakh fifty seven thousand five hundred forty five thirty only (Rs. 2,57,545/-) as required by the D.D.A. vide cheque No. 816198 dated 19-07-2007 drawn on ICICI Bank, Mayur Vihar, Delhi-91 favouring "Collector of Stamps, SBI A/C Vikas Sadan" and the First Party hereby confirms the receipt thereof.

4. that now the First Party confirms to have deposited the instruments abovementioned in paras 2 & 3 with the D.D.A and Collector of Stamps respectively in order to complete the documentation formalities with the D.D.A. etc. and undertakes to collect the original documents related thereto and to take the peaceful vacant physical possession of the aforesaid flat from the D.D.A soon as possible.

5. that the First Party undertakes to immediately inform the Second Party on completion-collection of the documents and/or of taking peaceful vacant physical possession from the D.D.A. and hand over the same to the Second Party at mutually agreed upon time.

6. that the First Party hereby understands and admits that with the receipt of the full and final consideration / sums above mentioned herein from the Second Party

and with the signing of this Agreement to Sell, they are left with no right, title, interest and concern of any nature whatsoever in the aforesaid property and that the Second Party is the sole and absolute owner of the aforesaid flat for all intents and purposes.

7. that the First Party assures the Second Party that the aforesaid property is free from all sorts of encumbrances, such as prior sale, gifts, mortgages, litigation, disputes, stay orders, attachments, modifications, acquisitions, charges, liens, court injunctions, sureties, securities, HUF, benami ownership or any other registered or unregistered encumbrances etc nor have they entered into any other agreement/settlement/MoU etc in respect thereof with any other person(s) whomsoever in any manner whatsoever, and if this fact is ever found otherwise the First Party shall be liable and responsible for the same and shall indemnify the Second Party against all actions, claims, demands, costs, charges, expenses, losses which may be raised, suffered, incurred, undergone and/or sustained by the Second Party as a result thereof, directly or indirectly by any person or party in connection with the title or right of possession of the Second Party and/or resulting from anything done or omitted to be done by the First Party, including any claim or demand or action, including minor's interest etc.

8. that the First Party undertakes to execute the requisite Sale deed in respect of the aforesaid property in the office of Sub-Registrar, Delhi in favour of the Second Party or his nominee and shall sign, verify, and present herself for registration in the abovesaid office to admit its execution, to give statements and to do all other acts, deeds and things which are necessary for the same.

9. that all the expenses on the transfer of the said flat as may be determined by the relevant authorities shall be borne and paid by the Second Party.

10. that if the First Party infringes the terms and conditions of this Agreement to Sell in whatsoever manner, the Second Party shall be at liberty to enforce this contract through appropriate proceedings for Specific Performance etc. in the court of appropriate jurisdiction at Delhi at the costs and risks of the First Party who shall be liable and responsible for making good the losses which may be suffered, incurred, undergone and/or sustained by the Second Party as a result thereof.”

14. The above agreement records the transaction as it took place in its chronology except the payment of Rs.4 lakhs in cash which is evidenced by Receipts - EX.P2. Clause 5 makes it clear that the possession was not handed over at the time of the agreement to sell. Thus the transaction was not a sale as contemplated under clause 19 of the DDA Housing Scheme, 2006. It was merely an agreement by which the parties had agreed upon the terms for the conveyance deed to be executed by the DDA. The Defendants were to execute the requisite deed and hand over vacant and peaceful possession of the flat.

15. The Plaintiff who appeared as PW-1 categorically stated in his cross-examination:

“It is correct that till the time the amount of Rs.31,82,310/- was paid to DDA, there was no agreement to sell between the plaintiff and the defendants. It is correct that when the said amount was paid to the DDA, till then DDA had not handed over the possession to the defendants and there was no transfer of title in favour of defendants by the DDA. I

did not take any permission from the DDA to enter into any transaction with the defendants in respect of the suit property. It is correct that stamp duty and convergence charges were paid to the DDA before execution of agreement to sell.”

16. PW-3 who appeared as a witness confirmed the payment of Rs.4 lakhs in cash. DW-1, Mr. Bharat Lal Meena admitted the signatures in the documents including the agreement to sell, receipts etc. Though, he made a statement that he tried to repay the loan amount, he was not able to produce any evidence to support the statement that he went to deliver the repayment of loan to the property dealer. He admitted that he had not written any letter to the Plaintiff to enquire and pay the instalments of the loan. He admitted to having not replied to the legal notice issued by the Plaintiffs. He further admitted that he had taken the possession of the property from the DDA. He further stated that DDA had not executed any conveyance deed in favour of the Defendants till 2nd February, 2015 i.e., the date of his cross-examination.

17. The facts of the present case demonstrate that this is a case of dishonesty on the part of the Defendants. The Defendants, who had gotten the allotment of the flat from the DDA in January, 2007, had not been able to arrange for funds to make the initial deposit to the DDA. It was due to the intervention of the property dealer that the Defendants came in touch with the Plaintiff, who not only paid the entire amount due to the DDA, but also paid the amounts for the stamp duty as also the consideration of Rs.4 lakhs out of Rs.5 lakhs to the Defendants. Barring the payment of Rs.1 lakh which was to be paid at the time of the execution of the sale documents, the Plaintiff has paid the entire amount to the Defendant. However, the Defendants have been anything but scrupulous. They have enjoyed the entire

money for more than 11 years. They have also obtained possession of the flat from the DDA and also did not make any attempts to repay the amounts paid by the Plaintiff which they claimed to be a loan. They kept completely silent even when the legal notice was issued and hence the Plaintiff has been made to litigate for all these years for a decade to obtain what is due to him. The Plaintiff has spent a huge amount of money and has also not been able to enjoy the property.

18. The defences of the Defendant are twofold namely, that the transaction was a loan and that the transfer was barred under the DDA Housing Scheme, 2006. The Trial Court has already held that there was no loan paid by the Plaintiff to the Defendants and neither has a loan transaction been established in the written or oral evidence. Thus, the defence that the transaction is a loan transaction has been rightly rejected by the Trial Court.

19. Insofar as the bar under clause 19 of the DDA Housing Scheme, 2006 is concerned, the clause deals with “transfer or part with possession” of the property. The word transfer has been later used synonymously with sale. The agreement to sell dated 20th July, 2007 does not constitute sale as no possession was handed over and the agreement was also not registered. Thus, under the provisions of the Transfer of Property Act, the transaction did not constitute a sale/transfer.

20. Reliance by the Defendants on the judgment of the Supreme Court in ***Satish Kumar (Supra)*** is misplaced because in the said case the receipt cum agreement to sell did not mention the correct sale consideration. The payment made to the DDA was higher than the amounts settled in the agreement to sell and the suit was valued for a higher amount than what was

paid. Moreover, the property which was allotted to the Defendants therein by the DDA was on a leasehold basis with a condition that the plot would be non-transferable for the period of 10 years. In the present case, however, the status of the allottee is on a free hold basis and not on a leasehold basis. Thus, the allottee could not sell the property until possession was given and conveyance deed was executed. However, once the payments were made and the transaction with the DDA had fructified, the status of the allottee was that of an owner and not a lessee. Thus the judgment in **Satish Kumar (supra)** is clearly distinguishable. The status of the allottee being on a free hold basis, the allottee could have entered into any transaction which could constitute sale/transfer once the allotment was made. The clauses of the scheme were well within the knowledge of the Defendants who, therefore made a categorical assertion in the agreement to sell under clause 7 and gave an indemnity to the Plaintiff in respect of their title.

21. In fact two similar cases decided by the Delhi High Court, including the Division Bench's Judgment in **Yogesh Tyagi v. Kela Devi 2007 (107) DRJ 242 (DB)**, **Vinod Singh v. Phutori Devi 2006 (87) DRJ 567** (hereinafter, 'Vinod Singh') and **A.B. Singh v. Chunnilal Sawhney & Others 2011IX AD (Delhi) 235** (hereinafter, 'A.B. Singh' are relevant. In **Vinod Singh (supra)**, a Ld. Single Judge of this court following **Kuldip Singh Suri v. Surinder Singh Kalra (1999) 48 DRJ 463** where it was held categorically as under:

"The argument of learned counsel for the plaintiff that if the transaction is considered to be an agreement to sell, then in that event the same would be clearly void as no prior permission for entering into such a transaction was taken from the DDA for the transfer of

the land, is devoid of force. An agreement to sell does not amount to sale or transfer of the immovable property. Therefore, under clauses 6(a) and (b) of the perpetual sub lease, there is no bar for a sub lessee to enter into an agreement to sell.”

22. The Ld. Single Judge in **Vinod Singh (supra)** thereafter concluded that the agreement to sell is enforceable and is not contrary to public policy. In **A.B. Singh (supra)** also the Court followed **Vinod Singh (supra)** and held that an agreement to sell is not barred. The subsequent judgment of the Supreme Court in **Satish Kumar (supra)** may have however changed the landscape as far as lease hold property is concerned. However, in the present case, the allotment itself is on a freehold basis and as per clause 19, there is no sale or transfer of the property. This is a case where the Defendants were well aware of the clauses of the DDA Housing Scheme, 2006 but still entered into the agreement to sell. The Defendants have completely enjoyed the consideration amounts as paid by the Plaintiff. Only a balance of Rs.1 lakh is to be paid. In **Jayakantham & Ors. v. Abhaykumar (2017) 5 SCC 178** the Supreme Court has held as under:

“7. While evaluating whether specific performance ought to have been decreed in the present case, it would be necessary to bear in mind the fundamental principles of law. The court is not bound to grant the relief of specific performance merely because it is lawful to do so. Section 20(1) of the Specific Relief Act, 1963 indicates that the jurisdiction to decree specific performance is discretionary. Yet, the discretion of the court is not arbitrary but is “sound and reasonable”, to be “guided by judicial principles”. The exercise of discretion is capable of being corrected by a court of appeal in the hierarchy of appellate courts. Sub-section (2) of Section 20 contains a stipulation of those cases

where the court may exercise its discretion not to grant specific performance. Sub-Section (2) of Section 20 is in the following terms :

20 (2). The following are cases in which the court may properly exercise discretion not to decree specific performance-

(a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or

(b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff;

(c) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.

8. However, Explanation 1 stipulates that the mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, will not constitute an unfair advantage within the meaning of clause (a) or hardship within the meaning of clause (b). Moreover, explanation 2 requires that the issue as to whether the performance of a contract involves hardship on the defendant has to be determined with reference to the circumstances existing at the time of the contract, except where the hardship has been caused from an act of the plaintiff subsequent to the contract."

23. Applying the above ratio to the present case, it is held that the Plaintiff does not get any advantage over the Defendants who may have in fact lost the allotment itself if the Plaintiff had not made the payment to the DDA. There is no hardship to the Defendants but in fact the hardship would

be to the Plaintiff who has almost made the entire payment and has litigated for more than a decade. The grant of specific performance under these circumstances is in fact equitable. The Plaintiff has also prayed for an alternative relief of payment of double the amount of sale consideration. Considering the overall conspectus of the case and the current market value of the property, merely directing the refund of the entire amount, with interest, would not be equitable.

24. Though the Plaintiff is held entitled to the relief of specific performance, considering that the Plaintiff would have to undergo further formalities, etc., and there may be a serious issue of transferring of ownership in his name and also keeping in mind that more than 99 % of the sale consideration has already been paid, the Plaintiff is held entitled to enhanced compensation. The Plaintiff has prayed for grant of double the amount of the sale consideration as an alternative prayer to the decree of specific performance. The circle rates of the property are in the range of Rs.85,000 to Rs. 87,000/- per sq. metre. Thus the market value of the property would be much higher. It is the settled law that in a suit for specific performance, the Court can either grant specific performance of the contract or grant compensation/damages in lieu thereof.

25. Under the facts and circumstances of the present case, the suit is decreed for a sum of Rs.76 lakhs which is double the amount paid by the Plaintiff, along with simple interest @ 12% p.a. from 20th July, 2007 till the date of payment. In addition, the Plaintiff is also held entitled for a sum of Rs.50,000/- as costs of the litigation. The payments shall be made within a period of 8 weeks.

26. Until the payments are made in favour of the Plaintiff, it is directed

that the Defendants shall maintain status quo as to title and possession of the flat. The DDA is also directed not to execute the conveyance deed in favour of the Defendants until and unless a no objection is received in writing from the Plaintiff. A copy of this order be sent to the Vice-Chairman of DDA for compliance.

27. Appeal is allowed in the above terms. Decree sheet be drawn accordingly. All miscellaneous applications are also disposed of.

**PRATHIBA M. SINGH, J.
JUDGE**

MAY 15, 2018/Rahul