**AFR**

**HIGH COURT OF CHHATTISGARH, BILASPUR**

**FA No.33 of 2016**

1. Smt. Gulab Devi Singh W/o Late Keshav Kumar, Aged About 66 Years R/o Purani Basti, Tehsil Akaltara, District Janjgir Champa Chhattisgarh.......Defendant No. 01, Chhattisgarh

2. Alok Singh S/o Late Keshav Kumar, Aged About 41 Years R/o Purani Basti, Tehsil Akaltara, District Janjgir Champa Chhattisgarh.......Defendant No. 02, District : Janjgir-Champa, Chhattisgarh

3. Dhanraj Singh S/o Late Jainandan Singh, Aged About 44 Years R/o Near Sabji Market, Tehsil Akaltara, District Janjgir Champa Chhattisgarh.......Defendant No. 03, District : Janjgir-Champa, Chhattisgarh

**---- Appellants**

**Versus**

1. Ritesh Singh S/o Ramkhelawan Singh, Aged About 37 Years R/o Village Pounsara, P. S. Koni, District Bilaspur Chhattisgarh.......Plaintiff, Chhattisgarh

2. Government Of Chhattisgarh Through Collector, District Janjgir Champa Chhattisgarh..........Defendant No. 04, District : Janjgir-Champa, Chhattisgarh

**---- Respondents**

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| For Appellant | : | Shri Kshitiz Sharma, Advocate |
| For Respondent No.1 | : | Shri Sushobhit Singh, Advocate |
| For Respondent No.2 | : | Shri Amrito Das, Additional AG |

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**D.B.: Hon'ble Shri Justice Manindra Mohan Shrivastava**
**Hon'ble Smt. Justice Vimla Singh Kapoor**

**CAV Order**

**Per Manindra Mohan Shrivastava, J.**

**06/03/2020**

1. This appeal is directed against the impugned judgment and decree dated 04-01-2016 passed by the First Additional District Judge, Janjgir, District Janjgir-Champa in Civil Suit No.26-A/2015, by which, suit filed by the respondent No.1-plaintiff for specific performance of contract has been decreed against the appellants/defendants.

2. Respondent No.1-plaintiff-Ritesh Singh filed a suit praying for declaration,

permanent injunction and also for specific performance of contract on the pleadings, inter alia, that the defendant-Gulab Devi entered into an agreement of sale of disputed property with plaintiff on 13-08-2012, under which, defendant No.1-Gulab Devi agreed to sell the property in dispute for a consideration of Rs.8,90,000/-. Further pleading was that in execution of the said agreement, entire sale consideration was paid by the plaintiff to Gulab Devi, defendant No.1 and possession was also delivered to the plaintiff. Defendant No.1-Gulab Devi had agreed that the plaintiff may get the sale deed executed according to his own convenience and since then, the plaintiff is continuously holding the possession of the disputed property. Further pleading was that after execution of the agreement, though, the plaintiff requested the defendant No.1 to execute and get sale deed registered in his favour, the defendant No.1 kept on avoiding the same, whereas the plaintiff was always ready and willing to execute the sale deed. On 19-04-2013, the plaintiff came to know that the defendant No.1-Gulab Devi has sold the disputed property in favour of the defendant No.3-Dhanraj Singh, vide sale deed dated 28-03-2013. It was, thus, pleaded that the defendant No.1-Gulab Devi illegally sold the land in dispute to defendant No.3 and the said sale deed is null, void and inoperative. The plaintiff thus sought relief that the sale deed dated 28-03-2013 be declared null and void ; decree of specific performance of contract as per agreement dated 13-08-2012 be granted in favour of the plaintiff and the defendants be restrained from interfering with the peaceful possession of the plaintiff over the disputed property. Other ancillary relief were also sought.

3. The plaintiff's case was contested by the defendants by filing common written statement. According to the defendants, no agreement of sale, as pleaded by the plaintiff, was ever entered into between the parties nor any amount was received nor possession was handed over. It was pleaded that the

plaintiff is a relative of defendant No.1, who is engaged in sale and purchase of property and signatures of defendant No.1 were obtained by stating that the power of attorney has to be prepared, so that the plaintiff may negotiate with others for sale of the property in dispute. According to the defendants, agreement was a forged and fabricated document. Defendant No.1 executed general power of attorney in favour of her son-defendant No.2 on 25-03-2013 and in exercise of that authority, defendant No.2 sold the property in dispute to defendant No.3 for a consideration of Rs.15 Lakhs, vide registered sale deed dated 28-03-2013 and also handed over possession of the property to the defendant No.3. It was also pleaded that the said agreement, containing clause of delivery of possession, is required to be registered, therefore, the agreement does not confer any title in favour of the plaintiff, so as to protect possession on the strength of said agreement of sale by invoking Section 53-A of the Transfer of Property Act.

4. On the basis of pleadings made by the parties, the learned trial Court framed as many as seven issues, which are as below:-

| `क्रमांक | वाद प्रश्न | निष्कर्ष |
|---|---|---|
| 01. | क्या प्रतिवादी क्रमांक 01 के द्वारा ग्राम अकलतरा प.ह.न. 10 रा0नि0म0 व तहसील अकलतरा जिला जांजगीर चाम्पा छत्तीसगढ मे स्थित खसरा नंबर 2153/1 रकबा 3.77 एकड. वादभूमि को वादी के पास विक्रय करने का सौदा कर दिनांक 13.08.2012 को वादी के पक्ष में इकरारनामा (अनुबंध) निष्पादित किया गया था ? | "हां प्रमाणित" |
| 02. | क्या दिनांक 13.08.2012 को प्रतिवादी क्रमांक 01 द्वारा वादी के पक्ष में निष्पादित इकरारनामा फर्जी एवं झूठा है ? | "प्रमाणित नही" |
| 03. | क्या प्रतिवादी क्रमांक 01 के आम मुख्तयार प्रतिवादी क्रमांक 02 के `द्वारा वादभूमि विक्रय बाबत दिनांक 23.08.2013 को प्रतिवादी क्रमांक 03 के पक्ष में निष्पादित विक्रयपत्र अवैध एवं शून्य है ? | "हां अवैध एवं शून्य है" |

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| 04. | क्या वादी का दावा कब्जा के संबध मे वाद संस्थित किये बिना पोषणीय है ? | "पोषणीय है" |
| 05. | क्या वादी द्वारा वाद का उचित रूप से मूल्यांकन कर समुचित न्याय शुल्क अदा किया गया है ? | "हां प्रमाणित" |
| 06. | क्या वादी, प्रतिवादीगण के विरूद्ध वांछित अनुतोष प्राप्त करने का अधिकारी है ? | "हां प्रमाणित" |
| 07. | सहायता एवं वाद–व्यय ? | "कंडिका 27 अनुसार" |

5. In order to prove its case, the plaintiff examined three witnesses, which included the plaintiff himself as PW-1, Sourabh Singh, PW-2 and Shailendra Singh, PW-3. Shailendra Singh has been examined as witness of execution of agreement of sale dated 13-08-2012.

6. The defendants in support of their case, examined sole defence witness-Dhanraj Singh Chouhan, defendant No.3, the purchaser of the property in dispute, vide sale deed dated 23-08-2013.

7. The learned trial Court, relying upon the evidence of execution of agreement led by the plaintiff, came to the conclusion that the defendant No.1 entered into an agreement of the disputed property with the plaintiff on 13-08-2012 and sale deed dated 28-03-2013 is illegal and void. Accordingly, decree of specific performance of contract was granted in favour of the plaintiff. The learned trial Court also granted decree of permanent injunction in favour of the plaintiff restraining the defendants from interfering with the peaceful possession over the disputed property.

8. Assailing legality and validity of the impugned judgment and decree passed by the learned trial Court, learned counsel for the appellant contended that in view of the provisions contained in Section 35, read with Article 23 of the Indian Stamp Act, 1899, ("the Act of 1899"), as amended in the State of Madhya

Pradesh and State of Chhattisgarh, containing clause of delivery of possession, is deemed to be 'conveyance' and therefore, exigible to proper stamp duty. As proper stamp duty has not been paid, therefore, document is inadmissible in evidence. It is also submitted that the document contains recital regarding delivery of possession, it is also required to be registered under the Registration Act, 1908 (“the Act of 1908”). Reliance has been placed on the decision of the Supreme Court in the case of ***Omprakash vs. Laxminarayan and others***[1] and ***Avinash Kumar Chouhan vs. Vijay Krishna Mishra***[2] and also decisions of this Court in the case of ***Sushila Tripathi(appellant now died and deleted) through L.R.s vs. Anurag Singh and others*** and ***Mahadev Singh vs. Bihari Lal Sanadaya***[3] as also judgment passed by the Madras High Court in the case of ***S. Thirumalai vs. S. Govindarajan (Died) and others***[4]***.***

Next submission of learned counsel for the appellant is that in view of the provision contained under Section 61 of the Act of 1899, even if no objection to the admissibility of agreement of sale on such grounds was taken during trial, such objection could be raised at the appellate stage, in view of the dictum of this Court in the case of ***Bhiku Bhai and another vs. Manilal Meerani Died Through Lrs***[5]***.*** Next submission of learned counsel for the appellant is that the plaintiff has failed to plead and prove that he was ready and willing to perform his part of contract or that and he has actually performed his part of contract. Pleading and evidence led by the plaintiff did not discharge the burden of proof of readiness and willingness, as required under Section 16(c) of the Specific Relief Act, 1963 (“the Act of 1963”). It is also submitted that the learned trial Court did not frame any issue with regard to readiness and willingness, and therefore, only on this ground, the impugned judgment and decree is liable to be

1 (2014) 1 SCC 618
2 (2009) 2 SCC 532
3 FANo.87 of 2012, decided on 22-02-2019
4 2015-5-L.W.-834
5 F.A.No.418 of 1997, decided on 03/08/2018

set aside. In support of his submission, learned counsel for the appellant placed reliance on the decision of this Court in the case of ***Bhagirathi Devangan vs. Jhaduram & Others***[6]***.*** Learned counsel for the appellant submitted that the agreement of sale is fictitious and forged document. The defendant has clearly come out with the case that the defendant No.1 was asked to put signatures on the document by stating that it was power of attorney so that the plaintiff may negotiate with the parties for sale and purchase of the property of defendant No.1. It has come in the evidence that the plaintiff is a relative of the defendant No.1 and also engaged in sale and purchase of the property. Further submission is that the plaintiff's evidence with regard to execution of agreement of sale is not coherent and the plaintiff himself and two witnesses have narrated different version in their evidence with regard to mode and manner of execution, payment details and other material aspects. It is further submitted that the plaintiff's witnesses had admitted that after Gulab Devi signed the document, blank spaces have been filled up. There are serious discrepancies in the evidence of execution as to when, how and to whom, amount was paid from time to time. Different version of witnesses as to who purchased stamp document and that the plaintiff has not disclosed the source wherefrom he has managed huge fund of Rs.8,90,000/-, he being only a Teacher in a School, therefore, entire transaction has become doubtful.

Learned counsel for the appellant further argued that the finding of the learned trial Court that the sale deed executed in favour of defendant No.3 on 28-03-2013 is null and void, is perverse, because execution of the same is proved by the purchaser-Dhanraj Singh Chouhan, the sole defence witness, DW-1, who has clearly stated regarding payment of consideration and execution and registration of sale deed and also delivery of possession in favour of

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6 2013(1) CGLJ 442

defendant No.3. The evidence of Dhanraj Singh Chouhan, DW-1, the purchaser, with regard to payment of consideration to defendant No.1 could not be disputed by the plaintiff, as the plaintiff is not a party to the agreement nor witness thereof.

9. On the other hand, learned counsel appearing for the respondent No.1-plaintiff would argue that the finding of the learned trial Court, with regard to execution of agreement dated 13-08-2012, is based not only on the evidence of Ritesh Singh, PW-1, but also on the coherent and reliable evidence of other two witnesses i.e. Sourabh Singh, PW-2 and Shailendra Singh, PW-3, who have proved execution of agreement by clearly stating that the amount of sale consideration of Rs.8,90,000/- was paid by the plaintiff to the defendant No.1 and the defendant No.1 has signed the agreement and delivered possession of the property. Learned counsel for respondent No.1 submitted that the defendants having not raised any objection to the admissibility of the agreement dated 13-08-2012 at the time, when the document was tendered in evidence, in view of the provisions contained under Section 36 of the Act of 1899, admissibility of the document could not be questioned at the appellate stage on the ground that it was insufficiently stamped. The decisions cited by the appellant in this regard are therefore, distinguishable. It is also submitted that Section 61 of the Act of 1899 confers power of revision in a case, where the trial Court has decided regarding amount of stamp duty and penalty under Section 35 and the provision reserves the jurisdiction to examine the validity and legality of any such decision of the lower Court in the matter of payment of stamp duty and penalty. The agreement of sale does not create any right in the property. Therefore, for this reason, the agreement of sale is not required to be registered. Relief sought in the suit is that for specific performance of contract, the agreement of sale, even if it is coupled with the delivery of possession, is

not required registration. Learned counsel for the respondent No.1 next submitted that merely because, issue was not framed, in every case, the judgment and decree is not liable to be set aside only on this ground, once it is found that the parties were alive to the issue and led their evidence in this regard.

Learned counsel for the respondent No.1 further argued that the entire case of the defendant is liable to be rejected, because neither the defendant No.1 nor her son-defendant No.2 had entered into the agreement and once, in the present case, the plaintiff led specific evidence that the defendant No.1 had executed the agreement, the same could be denied only by the concerned party to the agreement. The payment of amount of consideration could not be denied nor disputed by any witness, who is not party to the said transaction. Defendant No.1, who is party to the transaction and who executed the agreement and received consideration, having not entered into the witness box, adverse inference is liable to be drawn. All other discrepancies, as have been pointed out, are only towards execution of agreement of sale and payment of consideration and delivery of possession. All these could be disputed only by the defendant No.1, who did not even enter into the witness box. Even her son, defendant No.2-Alok Singh did not enter into the witness box. Learned counsel for the respondent No.1 lastly submitted that the finding of the learned trial Court that the sale deed dated 28-03-2013 is a sham and bogus transaction, is based on minute scrutiny of the evidence of Dhanraj Singh, DW-1, who has failed to clearly state regarding details of payment of sale consideration. In support of his submission, learned counsel for the respondent No.1 placed reliance upon the decision of the Supreme Court in the case of ***Vidhyadhar vs. Mankikrao and another***[7]***, M. Mohammed Ismail (Died) by Lrs. vs. K. P.***

7 AIR 1999 SC 1441

***Subbiah (died) by Lrs.*[8]*, Balkrishna vs. Board of Revenue, M.P. and Ors.*[9]*and Babulal S/o Damodarji Agrawal vs. Mohammad Sharif S/o Kaji Mohammad Yusuf and others*[10]*.***

10. In the present case, as arguments were advanced on the aspect of power of revision conferred under Section 61 of the Act of 1899, on this legal aspect, arguments were advanced by the learned Additional Advocate General, who submitted that Section 61(2) of the Act of 1899 only protects the interest of the revenue, but does not affect the admissibility of the document at the appellate stage. Reliance has been placed on the provision of Section 67 of the Indian Evidence Act and the decision in the case of ***Babulal*** (supra) and ***S. Thirumalai*** (supra) to submit that though, in view of Section 36 of the Act of 1899, the appellant may not assail the finding on the ground of admissibility of the document at the appellate stage, nevertheless, the Court may suo moto pass order under Section 61 of the Act of 1899.

11. We have heard learned counsel for the parties and perused records of the case containing pleadings as well as oral and documentary evidence led by respective parties.

12. The following issues arise for determination in this appeal:-

(i) Whether the agreement dated 13-08-2012, containing recital of delivery of possession is inadmissible being inadequately stamped?

(ii) Whether the agreement is compulsorily registrable being an agreement of sale coupled with delivery of possession?

(iii) Whether suit for specific performance of contract could be decreed without framing an issue with regard to readiness and willingness of plaintiff to perform his part of contract, as required under Section 16(c) of the Act of 1963?

(iv) Whether the learned trial Court erred in law and on facts in holding that the plaintiff succeeded in proving agreement ?

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8 2015 STPL 7801 Madras

9 1969 MPLJ 827

10 1996 MPLJ 461

(v) Whether the finding regarding sale deed dated 28-03-2013 of it being a sham and bogus document, suffers from error of law and fact?

13. One of the foremost contention raised by learned counsel for the appellant is that the agreement dated 13-08-2012 and agreement to sell the disputed property contained recital with regard to delivery of possession also and therefore, this document was deemed to be 'conveyance' by virtue of explanation appended to Article 23 of Schedule 1-A of the Act of 1899 as substituted by Madhya Pradesh Act No.19 of 1989. This contention has been responded to by learned counsel for the respondent-plaintiff by submitting that whether or not possession was actually transferred would be decisive and not mere recital in the agreement to decide as to whether it would be covered by explanation appended to Article 23 of the relevant schedule.

The legal position as to whether the nature of the document is to be construed on the basis of recitals or on the basis of evidence that may be led during the course of trial, is very well settled. In the case of ***Omprakash*** (supra), the Supreme Court authoritatively pronounced that at the time of considering the question of admissibility of document, it is the recital therein, which shall govern the issue, though, such recital in the document is not conclusive, but for the purpose of admissibility of the document. It was held, as below:-

> **11. "**As stated earlier, the plaintiffs filed a suit for specific performance of contract and their case is founded on the agreement to sell executed on 27th December, 2000. The agreement to sell acknowledges payment of the part of consideration money and further giving actual physical possession to the purchaser by the seller. Though the defendants dispute that, but in our opinion, for determination of the question of admissibility of a document, it is the recital therein which shall be decisive. Whether the possession in fact was given or not in terms of the agreement to sell is a question of fact which requires adjudication. But, at the time of considering the question of admissibility of document, it is the recital therein which shall govern the issue. It does not mean that the recital in the document shall be conclusive but for the purpose of admissibility it is the terms and conditions incorporated therein which shall hold the field. Having said that, we proceed to consider as to whether the document in question is "conveyance" within the meaning of Section 2(10) of the Act."

Their Lordships in the Supreme Court quoted with approval the long standing legal position adumbrated by the High Court of Madhya Pradesh in the case of ***Mansingh (deceased) through legal representatives Smt. Sumranbai and others vs. Rameshwar and another***[11], **as below:-**

> 18. To put the record straight, the correctness of the impugned judgment (Laxminarayan & Ors. v. Omprakash & Ors., 2008 (2) MPLJ 416) came up for consideration before a Division Bench of the High Court itself in Writ Petition No. 6464 of 2008 (Man Singh (deceased) through Legal Representatives Smt. Sumranbai & Ors. v. Rameshwar) and same has been overruled by judgment dated January 22, 2010. The High Court observed as follows:
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> "8. A document would be admissible on basis of the recitals made in the document and not on basis of the pleadings raised by the parties. In the matter of Laxminarayan (supra), the learned Single Judge with due respect to his authority we don't think that he did look into the legal position but it appears that he was simply swayed away by the argument that as the defendant was denying the delivery of possession, the endorsement/recital in the document lost all its effect and efficacy.
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> 9. It would be trite to say that if in a document certain recitals are made then the Court would decide the admissibility of the document on the strength of such recitals and not otherwise. In a given case, if there is an absolute unregistered sale deed and the parties say that the same is not required to be registered then we don't think that the Court would be entitled to admit the document because simply the parties say so. The jurisdiction of the Court flows from Sections 33, 35 and 38 of the Indian Stamp Act and the Court has to decide the question of admissibility. With all humility at our command we over-rule the judgment in the matter of Laxminarayan (supra)." We respectfully agree with the conclusion of the High Court in this regard.

14. In the present case, apparently an agreement to sell dated 13-08-2012, relied upon by the plaintiff, clearly contains recital with regard to delivery of possession. Therefore, the admissibility of the document is required to be judged by such recitals applying the provisions contained in the Act of 1899 as amended and applicable in the State of Madhya Pradesh (now Chhattisgarh). In the case of **Avinash** (supra)**,** the Supreme Court examined the legal position taking into consideration the recitals regarding delivery of possession in the light of explanation appended to Article 23 of the Schedule 1-A of the Act of 1899 substituted by Madhya Pradesh Act No.19 of 1989 and it was held that by virtue

11 (2010) 2 MPLJ 140

of said explanation, a document containing recital in a agreement to sell the immovable property, coupled with recital that the possession of immovable property is transferred to the purchaser, would, by legal friction, be deemed to be 'conveyance' and thus, exigible to stamp duty according to law. It was stated thus:-

> 19. ”Indisputably an instrument was executed. By reason of such an instrument not only the entire amount of consideration was paid but possession of the property had also been transferred.
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> 20. Explanation appended to Article 23 of Schedule IA of the Stamp Act as substituted by M.P. Act No. 19 of 1989 reads as under :-
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> "Explanation.- For the purpose of this Article, where in the case of agreement to sell immovable property, the possession of any immovable property is transferred to the purchaser before execution after execution of such agreement without executing the conveyance in respect thereof, then such agreement to sell shall be deemed to be a conveyance and stamp duty thereon shall be leviable accordingly:
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> Provided that the provisions of section 47A shall apply mutatis mutandis to such agreement which is deemed to be a conveyance as aforesaid, as they apply to a conveyance under that section:
>
> Provided further that where subsequently a conveyance is effected in pursuance of such agreement of sale, the stamp duty, if any, already paid and recovered on the agreement of sale, which is deemed to be a conveyance shall be adjusted towards the total duty leviable on the conveyance subject to a minimum of Rs.10."
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> The said explanation has been inserted by M.P. Act 19 of 1989 with effect from 15th November, 1989. By reason of the said provision, thus, a legal fiction has been created. Although ordinarily an agreement to sell would not be subject to payment of stamp duty which is payable on a sale deed, but having regard to the purpose and object it seeks to achieve the legislature thought it necessary to levy stamp duty on an instrument whereby possession has been transferred. The validity of the said provision is not in question.”

15. The aforesaid legal position was reiterated in the case of **Om Prakash** (supra), as below:-

> **12.** Section 2(10) of the Act. Section 2(10) of the Act reads as follows:
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> 2. Definitions. -In this Act, unless there is something repugnant

in the subject or context, -

(10)"Conveyance" includes a conveyance on sale and every instrument by which property, whether movable or immovable, is transferred inter vivos and which is not otherwise specifically provided for by Schedule I;

**13.** From a plain reading of the aforesaid provision, it is evident that an instrument by which movable or immovable property is transferred, comes within the expression "conveyance". In the present case, an immovable property is transferred on payment of part of the consideration and handing over the possession of the property.

**14.** It is relevant here to state that by the Indian Stamp (Madhya Pradesh Second Amendment) Act, 1990 (Act No.22 of 1990) few Articles including Article 23 of Schedule 1-A have been substituted and Explanation has been added to Article 23. The Explanation appended to Article 23 of Schedule 1- A of the Stamp Act as substituted by Section (6) of Act 22 of 1990 reads as follows:

"Explanation.—For the purpose of this article, where in the case of agreement to sell immovable property, the possession of any immovable property is transferred to the purchaser before execution or after execution of, such agreement without executing the conveyance in respect thereof then such agreement to sell shall be deemed to be a conveyance and stamp duty thereon shall be leviable accordingly:

Provided that, the provisions of Section 47-A shall apply mutatis mutandis to such agreement which is deemed to be a conveyance as aforesaid, as they apply to a conveyance under that section:

Provided further that where subsequently a conveyance is effected in pursuance of such agreement of sale the stamp duty, if any, already paid and recovered on the agreement of sale which is deemed to be a conveyance shall be adjusted towards the total duty leviable on the conveyance, subject to a minimum of Rs. 10."

The aforesaid Explanation has come into effect with effect from 26th September, 1990. The Explanation, therefore, creates a legal fiction. The agreement to sell shall be deemed to be a conveyance and stamp duty is leviable on an instrument whereby possession has been transferred. Thus the agreement to sell in question is a conveyance within the meaning of Section 2(10) of the Act and is to be duly stamped."

In both the decisions cited hereinabove holding that in a agreement to sell containing recital regarding delivery of possession, it was held that such agreement required to be duly stamped under the Stamp Act and according to legal requirement of Section 35 of the Stamp Act.

In the case of **Om Prakash** (supra), it was held thus:-

> **15.** **Section 35** of the Act makes instruments not duly stamped inadmissible in evidence, the relevant portion whereof reads as follows:
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> > "**35. Instruments not duly stamped inadmissible in evidence, etc**.- No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped:
> >
> > Provided that-
> >
> > (a)any such instrument shall be admitted in evidence on payment of the duty with which the same is chargeable or, in the case of an instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of five rupees, or, when ten times the amount of the proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion;
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> **16.** From a plain reading of the aforesaid provision, it is evident that an authority to receive evidence shall not admit any instrument unless it is duly stamped. An instrument not duly stamped shall be admitted in evidence on payment of the duty with which the same is chargeable or in the case of an instrument insufficiently stamped, of the amount required to make up such duty together with penalty. As we have observed earlier, the deed of agreement having been insufficiently stamped, the same was inadmissible in evidence. The court being an authority to receive a document in evidence to give effect thereto, the agreement to sell with possession is an instrument which requires payment of the stamp duty applicable to a deed of conveyance. Duty as required, has not been paid and, hence, the trial court rightly held the same to be inadmissible in evidence."

16. It is relevant to note that in the aforesaid two decisions in the case of **Avinash (**supra) **and Om Prakash** (supra), on facts, it was a case where during stage of trial itself, the agreement was not admitted in evidence, held to be inadmissible for want of proper stamp duty.

In the case of **Avinash** (supra), factual aspect were noticed as below:-

> 3. "The undisputed fact of the matter is that the respondent herein, who is said to be a member of the Scheduled Tribe intended to transfer a house and land admeasuring 10150 sq. ft. situated at Village Gariyaband, District Raipur. A sum of Rs.2,70,000/- fixed by way of consideration towards the aforementioned transfer was paid to the respondent by the appellant. Possession of the said property had also been delivered.

4. Indisputably for the purpose of effecting transfer of the said land, permission of the Collector was required to be obtained in terms of Section 165 (6) of the C.G. Land Revenue Code, 1959, which was applied for but rejected.

5. The appellant herein filed a suit for recovery of Rs.2,70,000/-. In support of his case, the agreement dated 4th August, 2003 which was sought to be registered as a sale-deed has been relied upon. The same was directed to be impounded by an order dated 9th January, 2007, stating :-

> "Under Section 35(a) of the Stamp Act there is a provision that for any such instrument or bill of exchange or promissory note, subject to all just exceptions, will
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> 'be admitted in evidence on payment of the duty with which the same is chargeable or, in the case of an instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of five rupees, or, when ten times the amount of the proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion.'
>
> In this matter the agreement of sell produced is valued Rs.2,70,000/- which as per Article 23 of Indian Stamp Act and as per Schedule 5, on the said amount stamp duty of 5.6% is leviable and the 7.5% of Rs.2,70,000/- comes to Rs.20,250/-. In the agreement to sell Rs.60/- is mentioned as stamp which means reducing the Rs.20,250 - Rs.60 = Rs.20,190 is less stamp duty paid, 10 times penalty of which will be leviable as per Section 35 of the Stamp Act means Rs.201900/- stamp duty will be leviable. In this regard relevant case law is `Kapur Constructions vs. Lita Nagraj and Ors.,' AIR 2005 Karnataka 032. The plaintiff has paid Rs.20,850/- in the C.C.D. so the rest of the amount of Rs.181050 be deposited within the next date of hearing and the Opposite Party shall also file its counter reply by the next date of hearing."

Further in the case of ***Omprakash*** (supra), factual background was noticed as under:-

> **3.**"The defendants in the written statement, however, denied the assertion of the plaintiffs and stated that no agreement to sell was ever executed and possession given. On the basis of the pleading and the written statement, the trial court framed several issues. During the course of the trial the agreement to sell was sought to be proved and admitted in evidence by the plaintiffs' witness Shankarlal. This was objected to by defendant no. 1. Its admissibility was questioned on the ground that the agreement to sell in question contains a recital that possession has been handed over to the purchaser and, therefore, it is a conveyance over which the stamp duty as indicated in Schedule 1A of the Indian Stamp Act, 1899 as substituted by M.P. Act 22 of 1990 is required to be affixed. It is pointed out that the agreement to sell in question is on a stamp paper of Rs. 50 only."

17. However, in the present case, what is required to be decided is as to whether, an objection to the admissibility of the agreement to sell could be

raised as a ground to challenge the legality and validity of the finding with regard to proof of agreement and grant of decree of specific performance in favour of the respondent-plaintiff, when no such objection to the admissibility of the agreement on the ground that it was either not stamped or inadequately stamped, was taken in trial when such document was being tendered in evidence and admitted in evidence by the learned trial Court.

18. The answer to the question lies in the provision contained in Section 36 of the Act of 1899, which reads as below:-

> 36. **Admission of instrument where not to be questioned**.--- "Where an instrument has been admitted in evidence, such admission shall not, except as provided in section 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not duly stamped."

In order to give full effect and meaning to the aforesaid provisions as enacted by the legislature, the provision has to be construed in the manner that once an instrument is admitted in evidence, the objection to the admissibility on the ground that the instrument was not duly stamped, could not be taken and such admissibility could not be called in question at any stage of the same suit or proceedings, which includes appellate proceedings as well. Thus, even if the appellate Court comes to the conclusion that an agreement to sell was not adequately stamped, in view of the bar created under Section 36, which has to be applied with full force, would come in the way of raising any such objection at the appellate proceedings. The finding recorded by the trial Court on the basis of said document could not be assailed on the ground that though, the document was inadequately stamped, it was wrongly admitted in evidence. This objection to admission, however, is confined only on the aspect that the instrument has not been duly stamped and not on other ground, because that would be beyond the rigour of Section 36 of the Act of 1899. The legal implications of bar created under Section 36 of the Act of 1899 were considered by the Supreme Court in the case of ***Jhaver Chand vs. Pukhraj Surana***[12]***,*** wherein it was held:-

> **4.** On those pleadings, a number of issues were joined between the parties, but the only relevant issue was issue No. 2 in these terms:-
>
> "Whether the two hundis, the basis of the suit, being unstamped, were inadmissible in evidence? (OD*)"
>
> (*which perhaps are meant to indicate that the onus was on the defendant in respect of this issue).
>
> It appears that the defendant led evidence first, in view of the fact that the onus lay on him. He was examined as D.W.5, and in his examination-in-chief he stated,
>
> "I did not receive any gold towards, these hundis I asked them to return the hundis, but 'they did not return them., I had' drawn the two hundis marked Ex. P.' I and Ex. P. 2. They are written in Roopchand's hand. I did not receive any notice to honour these hundis."
>
> His other witnesses, D.Ws.1, 2 and 4 were examined and cross-examined with reference to the terms of the hundis and as to who the author of the hundis was. All along during the course of the recording of the evidence on behalf of the parties, these hundis have been referred to as Ex. P. I. and Ex. P.2. The conclusion of the learned Trial Judge on issue No. 2 was in these terms:-
>
> "Therefore, in this case the plaintiff having paid the penalty, the two documents in suit having been exhibited and numbered under the signatures of the presiding officer of court and the same having thus been introduced in evidence and also referred to and read in evidence by the defendant's learned counsel, the provisions of sec. 36 of the Stamp Act, which are mandatory, at once come into play and the disputed documents cannot be rejected and excluded from evidence and they shall accordingly properly form part of evidence on record. Issue No. 2 is thus decided against the defendant."
>
> The suit was accordingly decreed with costs, as stated above. On appeal by the defendant to the High Court, the High Court also found that the hundis were marked as Exs. P. 1 and P. 2, with the endorsement "Admitted in evidence" and signed by the Judge. The High Court also noticed the fact that when the hundis were executed in December, 1946, the Marwar Stamp Act of 1914 was in force and ss. 9 and 11 of the Marwar Stamp Act, 1914, authorised the Court to realise the full stamp duty and penalty in case of unstamped instruments produced in evidence. Section 9 further provi- ded that on the payment of proper stamp duty, and the required penalty, if any, the document shall be admissible in evidence. It was also noticed that when the suit was filed in January, 1949, stamp duty and penalty were paid in respect of the hundis, acting upon the law, namely, the Marwar Stamp Act, 1914. The High Court also pointed out that the' documents appear to have been Admitted in evidence because the Trial court lost sight of the fact that in 1947 a new Stamp Act had come into force in the former State of

12 AIR 1961 SC 1655

Marwar, amending the Marwar Stamp Act of 1914. The "new law was, in terms, similar to the Indian Stamp Act. The High Court further pointed out that after the coming into effect of the Marwar Stamp Act, 1947 the hundis in this case could not be admitted in evidence, in view of the provisions of s. 35, proviso (a) of the Act, even on payment of duty and penalty. With reference to the provisions of s. 36 of the Stamp Act., the High Court held that the plaintiffs could not take advantage of the provisions of that section because, in its opinion, the admission of the two hundis 'was a pure mistake'. Relying upon a previous decision of the Rajasthan High Court in Ratan Lal v. Dan Das (1), the High Court held that as the admission of the documents was pure mistake, the High Court, on appeal, could go behind the orders of the Trial Court and correct the mistake made by that Court. In our opinion, the High Court misdirected itself, in its view of the provisions of s. 36 of the Stamp Act. Section 36 is in these terms:-

"Where an instrument has been admitted in evidence, such admission shall not, except as provided in section 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped."

That section is categorical in its terms that when a document has once been admitted in evidence, such admission cannot be called in question at any stage of the suit or the proceeding on the ground that the instrument had not been duly stamped. The only exception recognised by the section is the class of cases contemplated by s. 61, which is not material to the present controversy. Section 36 does not admit of other exceptions. Where a question as to the admissibility of a document is raised on the ground that it has not been stamped, or has not been properly stamped, it has to be decided then and there when the {(1) I.L.R. [1953] Raj. 833.}document is tendered in evidence. Once the Court, rightly or wrongly, decides to admit the document in evidence, so far as the parties are concerned, the matter is closed. Section 35 is in the nature of a penal provision and has far-reaching effects. Parties to a litigation, where such a controversy is raised, have to be circumspect and the party challenging the admissibility of the document has to be alert to see that the document is not admitted in evidence by the Court. The Court has to judicially determine the matter as soon as the document is tendered in evidence and before it is marked as an exhibit in the case. The record in this case discloses the fact that the hundis were marked as Exs. P. 1 and P. 2 and bore the endorsement 'admitted in evidence' under the signature of the Court. It is not, therefore, one of those cases where a document has been inadvertently admitted, without the Court applying its mind to the question of its admissibility. Once a document has been marked as an exhibit in the case and the trial has proceeded all along on the footing that the document was an exhibit in the case and has been used by the parties in examination and cross-examination of their witnesses, s. 36 of the Stamp Act comes into operation. Once a document has been admitted in evidence, as aforesaid, it is not open either to the Trial Court itself or to a Court of Appeal or revision to go behind that order. Such an order is not one of those judicial orders which are liable to be reviewed or revised by the same Court or a Court of superior jurisdiction."

19. Relying upon the aforesaid decisions, High Court of Bombay in the case of ***D. J. Belekar vs. Rambhau Bhagwanji Gorale***[13]**,** also held that it is not open to raise question about the admissibility of the instrument at revisional stage.

13 AIR 1981 Bom 45

20. In another decision in the case ***Balkrishna*** (supra), the issue was examined on the factual premise when no objection was taken to admission of the document at the time when it was tendered in evidence and marked as exhibit, it was held:-

> 9. "We shall now advert to the first question. Having perused the record of the civil suit and the proceedings of the Court recorded in the order sheet, we have no doubt that the document was admitted in evidence. When Balkrishna was examined and cross-examined as P.W. 1, no objection was taken, either by the defendant or by the Court. Exhibit number was put on the document over the signature of the Presiding Officer of the Court. Objection was taken, for the first time, when Hiralal (P.W. 2) was being examined and the document was put to him in examination-in-chief. But, by virtue of Section 36 of the Stamp Act, admission of an instrument cannot be called in question on the ground that the instrument was not duly stamped.
>
> 10. It was an argument that there was no conscious admission of the document by the Court. It was mechanically produced when Balkrishna was in the witness-box and it was mechanically marked as an exhibit. The learned Judge of trial Court also wrote a remark to that effect when objection was taken to the admissibility of the document during the course of recording of Hiralal's evidence. But the law is quite clear on the point. When a document is tendered in evidence and before it is marked as exhibit in a case, the trial Court has to "judicially determine whether it is properly stamped or not. Once it has been marked as exhibit in a case and has been used by the parties in examination-in-chief or cross-examination of a witness. Section 36 steps in. See Javer Chand v. Pukhraj Surana, AIR 1961 SC 1655."

21. The legal position and the course of action permissible under the law was also examined, as below:-

> 11. "The scheme of the Act is abundantly clear.
>
> (i) Once an instrument chargeable with duty is tendered in a civil court, it shall impound it, if, after examining it, the Court is of the opinion that it is not duly stamped: Section 33 of the Act. The Court has, however, power under Section 35 of the Act to admit it (barring certain instruments) in evidence on payment of duty with which the instrument is chargeable, or the amount required to make up the deficiency, together with a penalty, limits of which are prescribed in the section. There is no third course open to the Court, once it finds that an instrument tendered in evidence is not duly stamped. The next step, which the Court has then to take, is provided in Section 38. If the Court has admitted in evidence an instrument upon payment of penalty and/or duty, it shall send to the Collector an authentic copy of such instrument together with a certificate stating the amount of duty and penalty levied in respect of that instrument and shall send such amount to the Collector. This is provided in Sub-section (1) of Section 38.

(ii) Then Sub-section (2) of Section 38 enacts thus:--

"In every other case, the person so impounding an instrument shall send it in original to the Collector."

This sub-section, therefore, clearly refers to a case where an instrument has been impounded under Section 33 of the Act but has not been admitted in evidence on payment of penalty and/or duty. The Collector has then to follow the procedure as specified in Sections 39 and 40 of the Act, according as the instrument is sent to him by the Civil Court under sub-section (1) or Sub-section (2) respectively of Section 38.

(iii) But when the Civil Court is of the opinion that an instrument is duly stamped, it does not impound it under Section 33 of the Act but admits it in evidence.

(iv) In a case where an instrument is tendered and the Civil Court just admits it in evidence, without its being questioned on the ground that it is not duly stamped, such validity cannot, by virtue of Section 36 of the Act, be subsequently questioned at any stage of the same suit or proceeding on the ground that it is not duly stamped. The only course then open is the one provided in Section 61 of the Act. Under that section, it is the Court, to which appeals lie from, or references are made by, the Court which admitted the instrument in evidence, which may, on its own motion or on the application of the Collector, take into consideration the order of the subordinate Court admitting the instrument in evidence. And, if such (appeal or reference) Court is of the opinion that such instrument should not have been admitted in evidence without payment of duty and penalty under Section 35, or that higher duty and penalty should have been paid, such Court may order the instrument to be produced and may impound it when produced. Such Court shall then send the instrument, along with its declaration, to the Collector."

22. Similar view has been taken in yet another decision in the case of **Babulal** (supra)**,** in that case, the trial Court while admitting the document, directed to pay necessary amount of stamp duty and the documents were admitted by the trial Court while pronouncing judgment and decree in consequence thereof.

23. Learned counsel for the appellant has relied upon two Division Bench decisions of the High Court of Chhattisgarh in the case of ***Sushila Tripathi(appellant now died and deleted) through L.R.s*** (supra) and **Mahadev Singh** (supra). The aforesaid two decisions have been rendered, relying upon the decisions of the Supreme Court in the case of **Om Prakash** (supra) **and Avinash** (supra). It has already been considered hereinabove that

the aforesaid two decisions of the Supreme Court did not deal with the situation as to whether objection to the admissibility of the instrument could be taken at the appellate stage, in view of the bar created under Section 36 of the Act of 1899. No such objection was taken before the trial Court, when the document was admitted in evidence. On facts, the aforesaid two decisions of the Supreme Court were tested on the factual backdrop that the trial Court, at the time when the instrument was sought to be tendered in evidence, upheld objection to the admissibility of the document, in view of the provision contained under Section 33 & 35 of the Act of 1899 and such decision was upheld by the Supreme Court.

24. In the two decisions of the Division Bench of this Court in the case of ***Sushila Tripathi(appellant now died and deleted) through L.R.s*** *and* **Mahadev Singh** (supra), it was neither argued nor decided as to what would be the legal implications flowing from the bar engrafted under Section 35 of the Act of 1899, when objection to the admissibility of the document has not been raised in the trial Court and document has been admitted in evidence. The aforesaid two decisions of Division Bench of this Court were rendered in the light of the judicial pronouncement of the Supreme Court in the case of **Omprakash** (supra) **and Avinash** (supra), wherein legal implications flowing from the bar engrafted under Section 36 of the Act of 1899 were not considered, obviously because in those cases, the document was not admitted by the trial Court and these were not the cases, where documents were not admitted by the trial Court and these are not cases where occasion arose for the Supreme Court to deal with an issue of peculiar factual premise, as obtaining in the present case, to which, the provision of Section 36 directly apply as also interpretation thereof by the Supreme Court in the case of ***Jhaver Chand (***supra).

25. Reliance has also been placed on the decision of the learned Single

Judge of Chhattisgarh High Court rendered in the case of ***Shashank Shekhar and others vs. Jagdish Prasad Saraf and others***[14]. The question of law, which fell for consideration and answered in the aforesaid decisions were noted by the learned Single Judge, as below:-

> 6. "The short question that has cropped up for consideration is whether the trial Court is justified in not permitting the petitioners/plaintiffs to exhibit two Ikrarnamas dated 02.09.1987 for want of registration and requisite stamp duty.
>
> 17. The next question for consideration would be if the Ikrarnamas are unregistered documents, which are not duly/insufficiently stamped, then what is the course available to the trial Court?

In the aforesaid case also, the learned Single Judge had no occasion to examine the scope and ambit of legal bar created under Section 36 of the Act of 1899 on the factual premise that when the document was tendered in evidence, no objection was taken and it was admitted in evidence and then, later on, judgment and decree founded upon the said document was challenged in the appellate Court, calling in question the admissibility of the document so admitted. The learned Single Judge had no occasion to examine that legal position. Thus, the decisions of the Supreme Court in the case of ***Omprakash*** (supra) ***and Avinash*** (supra) as also Division Bench decisions of this Court in the case of ***Sushila Tripathi(appellant now died and deleted) through L.R.s*** (supra) ***and Mahadev Singh*** (supra) and the learned Single Judge in the case of ***Shashank Shekhar*** (supra) are not proposition for the authority that despite legal bar created under Section 36 of the Act of 1899, an instrument once admitted during trial, may be held inadmissible in evidence so as to assail the finding and conclusion of the trial Court and the decree ultimately passed based on such instrument.

Rather, the legal position on the factual premise, where the document has

14 WP (227)No.558/2015, decided on 20-02-2017

been admitted by the trial Court, later on, in appellate proceedings, when objection to the admissibility is raised on the ground that the document was either not stamped or inadequately stamped, would be one as laid down by the Supreme Court in the case of **Jhaver Chand** (supra), the legal position as unequivocally stated on Section 36 of the Act of 1899, followed by the High Court of Bombay in the case of **D. J. Belekar** (supra), the decision of High Court of Madhya Pradesh in the case of ***Balakrishna*** (supra) and ***Babulal*** (supra).

26. In view of the aforesaid analysis of legal position, we have to hold that objection to the admissibility of the agreement to sell dated 13-08-2012 on the ground that it is inadmissible or inadequately stamped as barred under Section 36 of the Act of 1899, is accordingly liable to be rejected.

27. An argument has been advanced by relying again on the decision of Division Bench of this Court in the cases of ***Sushila Tripathi(appellant now died and deleted) through L.R.s*** (supra) **and Mahadev Singh** *(supra)* that the agreement to sell containing recital delivery of possession, being instrument of transfer of right, would be compulsorily registrable under Section 17 of the Act of 1908.

28. To begin with, there is no provision under Section 17 or any other provision of the Act of 1908, which requires a document to be registered merely because the document is exigible to stamp duty in the Act of 1899. Whether or not, document is required to be registered has to be decided on the basis of provisions contained in Section 17 of the Act of 1908, which reads thus:-

> **17. Documents of which registration is compulsory.**—(l) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely:—
> (a) instruments of gift of immovable property;

(b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property;
(c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; and
(d) leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent;
[(e) non-testamentary instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property:]
Provided that the [State Government] may, by order published in the [26] [Official Gazette], exempt from the operation of this sub-section any lease executed in any district, or part of a district, the terms granted by which do not exceed five years and the annual rents reserved by which do not exceed fifty rupees.
[(1A) The documents containing contracts to transfer for consideration, any immovable property for the purpose of section 53A of the Transfer of Property Act, 1882 (4 of 1882) shall be registered if they have been executed on or after the commencement of the Registration and Other Related laws (Amendment) Act, 2001 and if such documents are not registered on or after such commencement, then, they shall have no effect for the purposes of the said section 53A.]

(2) Nothing in clauses (b) and (c) of sub-section (l) applies to—
(i) any composition deed; or
(ii) any instrument relating to shares in a joint stock Company, notwithstanding that the assets of such Company consist in whole or in part of immovable property; or
(iii) any debenture issued by any such Company and not creating, declaring, assigning, limiting or extinguishing any right, title or interest, to or in immovable property except in so far as it entitles the holder to the security afforded by a registered instrument whereby the Company has mortgaged, conveyed or otherwise transferred the whole or part of its immovable property or any interest therein to trustees upon trust for the benefit of the holders of such debentures; or
(iv) any endorsement upon or transfer of any debenture issued by any such Company; or
(v) [28] [any document other than the documents specified in sub-section (1A)] not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of one hundred rupees and upwards to or in immovable property, but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest; or
(vi) any decree or order of a Court [29] [except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of the suit or proceeding]; or
(vii) any grant of immovable property by [30] [Government]; or
(viii) any instrument of partition made by a Revenue-Officer; or
(ix) any order granting a loan or instrument of collateral security granted under the Land Improvement Act, 1871, or the Land Improvement Loans Act, 1883; or
(x) any order granting a loan under the Agriculturists, Loans Act, 1884, or

instrument for securing the repayment of a loan made under that Act; or

[(xa) any order made under the Charitable Endowments Act, 1890, (6 of 1890) vesting any property in a Treasurer of Charitable Endowments or divesting any such Treasurer of any property; or]
(xi) any endorsement on a mortgage-deed acknowledging the payment of the whole or any part of the mortgage-money, and any other receipt for payment of money due under a mortgage when the receipt does not purport to extinguish the mortgage; or
(xii) any certificate of sale granted to the purchaser of any property sold by public auction by a Civil or Revenue-Officer.[Explanation.—A document purporting or operating to effect a contract for the sale of immovable property shall not be deemed to require or ever to have required registration by reason only of the fact that such document contains a recital of the payment of any earnest money or of the whole or any part of the purchase money.]
(3) Authorities to adopt a son, executed after the 1st day of January, 1872, and not conferred by a will, shall also be registered."

An agreement to sell the property, apparently is not an instrument of the nature specified any of the clause (a) to (e) of sub section (1) of Section 17. On the contrary, Section 2(v) clarifies, as below:-

(v) [any document other than the documents specified in sub-section (1A)] not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of one hundred rupees and upwards to or in immovable property, but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest; or

----- xx ----

An agreement to sell dated 13-08-2012 in the present case, is not a document, which by itself, creates, declares, assigns, limits or extinguishes any right, title or interest of the value of the hundred rupees and upwards to or in immovable property. This merely creates a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest. This is clear from the explanation appended to sub section(2) of Section 17 of the Registration Act, as below:-

[Explanation.—A document purporting or operating to effect a contract for the sale of immovable property shall not be deemed to require or ever to have required registration by reason only of the fact that such document contains a recital of the payment of any earnest money or of the whole or any part of the purchase money."

29. If an agreement to sell immovable property contains recital of delivery of possession, then such document containing contract to transfer for consideration, any immovable property for the purpose of Section 53-A of the Transfer of Property Act, 1882 (In short "the Act of 1882"), shall be required to be registered, if it has been executed on or after commencement of the Registration Act and other laws (Amendment) Act, 2000, and if such document is not registered on or after such commencement, then it shall have no effect for the purpose of Section 53-A, in view of the insertion of new sub section 1(A) after sub section (1) of the Act of 1908. The said provision reads as under:-

> [(1A) "The documents containing contracts to transfer for consideration, any immovable property for the purpose of section 53A of the Transfer of Property Act, 1882 (4 of 1882) shall be registered if they have been executed on or after the commencement of the Registration and Other Related laws (Amendment) Act, 2001 and if such documents are not registered on or after such commencement, then, they shall have no effect for the purposes of the said section 53A."

Therefore, when a suit for specific performance is founded on agreement to sell, even though, it may be containing recital of delivery of possession, that would not be decisive whether the document is compulsorily registrable.

30. Indeed, provision contained in Section 49 of the Act of 1908, provides that an unregistered document, affecting immovable property and required by the Act or the Act of 1882, to be registered, may be received as evidence of a contract in a suit for specific performance under Chapter II of the Act of 1963

31. Present is not a case where right under Section 53-A of the Act of 1882 is being invoked by the defendant to protect his possession. The plaintiff has sought substantial relief of decree of specific performance of contract.

32. New sub section 1(A) of Section 17 of the Act of 1908 was inserted vide

Registration and other related laws (Amendment) Act, 2000. The expression "for the purpose of Section 53-A of the Act of 1882", contained in the newly inserted provision has to be understood, interpreted and assigned meaning in the context, in which, it has been used. Applying one of the cardinal principles of statutory interpretation that every word in a statute is to be given full meaning and rejection of words has to be avoided, this general principle being only subject to exceptions, the aforesaid expression, given full meaning and import has, therefore, to be interpreted as limiting and restricting legal requirement of registration of document under sub section 1-A of Section 17 of the Act of 1908. Rationally so construed, the legal requirement of registration of the document containing contract to transfer for considering any immovable property shall be applicable when such document is used for the purpose of Section 53-A of the Act of 1882, but not otherwise in all circumstances.

Section 53-A of the Act of 1882 incorporates doctrine of part performance. Upon fulfillment of the terms and conditions of Section 53-A, protection under Section 53 available to the parties, which has been put in possession. But such protection is available as a shield only against the transferrer. It disentitles the transferrer from disturbing the possession of proposed transferee, who has been put in possession in part performance of contract. (***Please see:- Rambhau Namdeo Gajre vs. Narayan Bapuji Dhotra (dead) through Lrs., AIR 2004 SC 4342)*. The provision is only meant to create bar against enforcement of right in respect of transferee, but does not give any right to the transferee to claim any possession or any other right on the basis of unregistered document. (***Please See***:- ***Delhi Motor Company and others vs. U. A. Basrurkar (Dead) by his Legal Representative and others, AIR 1968 SC 794***)

33. What, therefore, legislature intended by inserting sub section 1-A was to

require compulsorily registration of the document containing contracts to transfer for registration of any immovable property, when such document is intended to be used to protect rights flowing from part performance as protected under Section 53-A of the Act of 1882. Newly added provision, cannot be interpreted to mean that even when a suit for specific performance was brought on the basis of agreement to sell, which contains recital of transfer of possession, when such document is not being used to protect possession as defendant, to require registration. Such interpretation would essentially require rejection of words “for the purpose of Section 53-A of the Transfer of Property Act, 1882” and rendering it otiose.

34. It is worth noticing that even though, vide amending Act of 2000, new sub section 1-A was inserted, at the same time, the Explanation existing in sub section(2) was neither omitted nor amended and it is stood as it is. It is also worthwhile to mention that there was no explanation to sub section 2 of Section 17 of the Registration Act, as originally enacted, but was inserted vide amending Act No.2 of 1927.

The explanation was added to sub section 2 only to clarify exclusionary clause (v) thereof, which excluded right from the beginning agreement to sell, because an agreement to sell did not create any right to or in any property but only right to obtain another document.

35. In the aforesaid background, allowing explanation appended to sub section(2) of Section 17 to remain in the statute book, despite insertion of Section1-A vide amending Act of 2000, there is ample light on the legislative intention that agreement to sell remained excluded from the purview of category of document, which are made compulsorily registrable under Section 17. At the same time, a document containing contracts for transfer of consideration any immovable property under Section 53-A of the Act of 1882 was made

compulsorily registrable, if it was executed on or after the commencement of Amendment Act of 2000, declaring that if such document was not registered on or after such commencement, they shall have no effect for the purpose of Section 53-A.

36. It is also extremely relevant that despite various amendments made, part of the proviso to Section 49, which provided that unregistered document affecting immovable property and required by the Registration Act or the Transfer of Property Act to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877, was not omitted and continued to remain in the Statute book.

34. A harmonious interpretation of all the provisions referred to hereinabove, lead to the conclusion that despite various amendments made in Section 17 of the Act of 1908, agreement to sell immovable property is not compulsorily registrable by virtue of explanation appended to sub section (2) of Section 17 of the Act of 1908 and only when such document is used for the purpose of Section 53-A, i.e. as a shield by the defendant against the action of enforcement of right by the transferrer that such document, if executed, after coming into force of the Amendment Act of 2000, would require registration and without that it would not be admissible in evidence, but where such document being agreement to sell, is led as evidence of contract in a suit for specific performance of contract under Chapter II of the Specific Relief Act, it would not require registration. In the absence of there being any express stipulation either in the explanation to sub section (2) of Section 17 on anywhere in Section 49 of the Act of 1908, it can be safely concluded that irrespective of whether in agreement to sell contains recital of transfer of possession, it will not be compulsorily registrable under Section 17 of the Act of 1908, because it continues to remain excluded. If the legislature had any intention to exclude

agreement to sell, from the purview of Section 17 so as to require compulsorily registration, nothing prevented legislature from amending Explanation to sub section(2) of Section 17 as also Section 49 of the Registration Act while inserting sub Section 1-A to Section 17. Therefore, Explanation to sub section (2) of Section 17 and Section 49, all have to be interpreted, applying rule of harmonious construction. An interpretation which results in conflict between Section 1-A on one hand and explanation to sub section(2) of Section 17 and Section 49 on the other, has to be avoided. Interpretation, which allows all the provisions referred to hereinabove taking full effect, without making the other redundant or meaning less alone would be consistent with the well settled principles of harmonious considerations of statute. Interpretation otherwise would not only result in rejection of words occurring in sub section 1-A, but also render explanation under sub section (2) of Section 17 meaning less and at the same time also rendering meaningless, part of proviso to Section 49 of the Act of 1908.

38. An argument that as agreement to sell coupled with transfer of possession is deemed to be 'conveyance' under explanation appended to Article 23 Schedule 1A of the Stamp Act, therefore, that be treated as document compulsorily registrable for the purpose of Section 17, cannot be accepted. An agreement to sell, containing recital of delivery of possession and followed by delivery of possession, does not result in creation of title in favour of the transferee. However, by deeming fiction, it has to be deemed to be 'conveyance' for the purpose of leviability of stamp duty, as applicable to 'conveyance' defined under sub section(2) of Section 2 of the Stamp Act. That deeming fiction cannot be stretched beyond the provision of Stamp Act, unless there is specific provision to that effect, either in the Stamp Act or in the Registration Act. We do no find any such provision in either of the two legislation. The object and

purpose of giving deeming fiction as 'conveyance' to an agreement to sell coupled with transfer of possession was examined by the Supreme Court in the case of ***Veena Hasmukh Jain and another vs. State of Maharashtra and others***[15]**,** wherein, examining similar explanation contained in Article 25 of Schedule 1 of the Stamp Act, it was held:-

> **8.** **"**The duty in respect of an agreement covered by the Explanation is leviable as if it is a conveyance. The conditions to be fulfilled are if there is an agreement to sell immovable property and possession of such property is transferred to the purchaser before the execution or at the time of execution or subsequently without executing any conveyance in respect thereof such, an agreement to sell is deemed to be a "conveyance". In the event a conveyance is executed in pursuance of such agreement subsequently, the stamp duty already paid and recovered on the agreement of sale which is deemed to be a conveyance shall be adjusted towards the total duty leviable on the conveyance. Now, in the present case, the agreement entered into clearly provides for sale of an immoveable property and there is also a specific time within which possession has to be delivered. There- fore, the document in question clearly falls within the scope of the Explanation I. It is open to the Legislature to levy duty on different kinds of agreement in different rates. If the Legislature thought that it would be appropriate to collect duty at the stage of agreement itself if it fulfills certain conditions instead of postponing the collection of such duty till the completion of the transaction by execution of a conveyance deed inasmuch as all substantial conditions of a conveyance have already been fulfilled such as by passing of a consideration and delivery of possession of the property and what remained to be done is a mere formality of execution of a sale deed; it would be necessary to collect duty at a later stage itself though right, title and interest may not have passed as such. Still by reason of the fact that under the terms of the agreement there is an intention of sale and possession of the property has also been delivered, it is certainly open to the State to charge such instruments at a particular rate which is akin to a conveyance and that is exactly what has been done in the present case."
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Once the aforesaid legislative intention behind classifying agreement to sell, coupled with the delivery of possession as conveyance by deeming fiction under explanation to Article 23 of Schedule-1A of the Stamp Act, as amended Act vide Madhya Pradesh Amendment Act is fulfilled, said legal fiction cannot be extended any further by incorporating it under Section 17 of the Act of 1908 to make such document compulsorily registrable also.

15 (1999) 5 SCC 725

In interpreting a legal fiction, the Court is to ascertain for what purpose, the fiction is created. But in so construing the fiction, it is not to be extended beyond the purpose for which it is created. In the case of **Raj Kumar Khurana vs. State of (NCT of Delhi) and another[16],** it was held as below:-

**10.** ---- do ---

"A legal fiction, as is well known, although is required to be given full effect, has its own limitations. It cannot be taken recourse to for any purpose other than the one mentioned in the statute itself.

In State of A.P. and Anr. v. A.P. Pensioners Association and Ors. [(2005) 13 SCC 161], this Court held:

"30 ...In other words, all the consequences ordinarily flowing from a rule would be given effect to if the rule otherwise does not limit the operation thereof. If the rule itself provides a limitation on its operation, the consequences flowing from the legal fiction have to be understood in the light of the limitations prescribed. Thus, it is not possible to construe the legal fiction as simply as suggested by Mr. Lalit."

39. Therefore, it is well settled that a legal fiction is normally restricted to that Act, under which, it is created for the purpose of the said Act and cannot be extended to cover another Act. In the case of ***State of Karnataka vs. K. Gopalkrishna Shenoy and another[17]*****,** following legal position was enunciated:-

**10. "**The next factor for consideration is whether the impact of Section 38 of the Motor Vehicles Act on Section 22 of the said Act will have its ramifications on Section 3(1) and the Explanation of the Taxation Act. Section 22 deals with the necessity for registration of motor vehicles and mandates that no person shall drive a motor vehicle and no owner shall cause or permit his motor vehicle to be driven in any public place or in any other place for the purpose of carrying passengers or goods unless the vehicle is registered in accordance with Chapter 3 of the Act and the Certificate of Registration granted has not been suspended or cancelled. Section 38 on the other hand deals with the Certificate of Fitness for transport vehicles. This section lays down that a transport vehicles shall not be deemed to be validly registered for the purposes of Section 22, unless it carries a Certificate of Fitness in the prescribed form issued by the Prescribed Authority. The very terms of Section 38 limit the deeming effect caused by the absence of a Certificate of Fitness to the rights conferred under Section 22 pursuant to the registration of a vehicle. There is therefore, no scope for extending the deeming provision in Section 38 to Section 3(1) and the Explanation thereto of the Taxation Act. In fact the Explanation to Section 3(1) clearly sets out that the deeming effect

16 (2009) 6 SCC 72

17 (1987) 3 SCC 655

> conferred by it will have overriding force on Section 3(1). This is made clear by the words "for the purposes of this Act" contained in the Explanation. The operative force of the deeming provision contained in Sec- tion 38 being restricted to Section 22 of the Motor Vehicles Act has been correctly noticed by the Karnataka High Court in Naraina Reddy's case and the High Court has held at page 322 as follows:-
> "The legal fiction created by Section 38 of the Motor Vehicles Act is only for the purpose of section 22 of that Act and cannot be extended to the Taxation Act."

40. A Division Bench of High Court of Rajasthan in the case of ***Sampatraj and others vs. Pokar and others***[18], upon examination of the statutory scheme of provisions of Registration Act as also the provisions of Transfer of Property Act, arrived at the conclusion that a contract for sale where Transfer of Property Act is in force, would merely amount to a document creating right to create another document and would not require registration, according to Section 53(2)(v), it was held:-

> "If a document on the face of it purports to create an interest in immovable property then it cannot be used in evidence for the purpose of showing that it affected such interest, nor even for the purpose of showing any transaction affecting such interest. We do not think that their Lordships meant to lay down that even where a document does not purport to create an interest in immovable property it falls under sec. 17 and is therefore altogether inadmissible under sec. 49 for either purpose. Nor do we think their Lordships have laid down in their judgment that a mere contract for sale of immovable property purports to; create interest in such property and falls within sec. 17, Registration Act, so as to be compulsorily registrable. We think that the view of the Court that a mere contract for the sale of an immovable property and require registration has not been overruled by this pronouncement of their Lordships".

Similar view has been taken by the Delhi High Court in the case of **S. Niranjan Singh vs. Prakash Wati**[19]**,** Wherein it has been held as below:-

> **13.** Mr. Sharma, Council for the defendant contended that the receipt/agreement dated 17/03/1980 could not have been exhibited nor relied upon because it is not a registered document. According to him this documents hit by the provisions of Section 17(1)(b) & (e) of the Registration Act (In short the Act). By this document the parties created right, title and interest and passed on the consideration regarding an immovable property, value of which was more than Rs. 100.00. Therefore it required compulsory registration. I am afraid this argument has no force. It is a settled law that a writing which confers upon a person a right which comes into existence after such conditions are fulfillled byhim. Such a document does not require registration. An agreement for sale of an immovable property will not fall

18 AIR 1955 Raj 70
19 58 (1995) DLT 215

> under the definition under Section 17(1)(b)as it does not itself create, declare, assign, limit or extinguish any, right title or interest whether vested or contingent in immovable property.
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41. Therefore, in view of above analysis, argument that since the agreement to sell containing recital of transfer of possession is deemed to be 'conveyance' and leviable to stamp duty as per the Stamp Act, therefore, it would also be compulsorily registrable, even if it is otherwise not included for the said purpose under Section 17 of the Registration Act, has to be rejected.

41. Having considered the first two submissions regarding admissibility of document for want of adequate stamp duty and registration, the next submission, which requires consideration is as to whether finding recorded by the learned trial Court and decree granted in favour of the respondent-plaintiff is liable to be set aside only on the ground that the trial Court has failed to frame any specific issue as to whether the plaintiff proved that he was ready and willing to perform his part of contract. No doubt, no decree of specific performance of contract can be granted unless legal requirement in Section 16 (c) of the Specific Relief Act that the plaintiff was and is at all times ready and willing to perform his part of contract is proved. Normally, the trial Court is required to frame specific issue in this regard and then record specific finding. It is only when the finding recorded is in affirmative that the plaintiff was and is ready and willing to perform its part of contract, or has performed his part of contract, a decree of specific performance of contract can be granted. But, it is not invariable rule that in every case, in the absence of any specific issue in this regard, no decree could be granted or if granted, liable to be set aside with no exception.

42. In one of its earliest decision in the case of ***Nedunuri Kameswaramma vs. Sampati Subba Rao***[20]**,** the Supreme Court held that even if, no specific

20 AIR 1963 SC 884

issue was framed and one which was framed could be more elaborate and since parties in the trial are alive to the issue and led all the evidence not only in support of their contention, but in refutation of those from the others side, absence of any issue, cannot be said to be fatal to the case.

43. In the case of **Swamy Atmananda and others vs. Sri Ramakrishna Tapovanam and others**[21]**,** it was held:-

> **39.** If the parties went to the trial knowing fully well the real issues involved and adduced evidence in such a case without establishing prejudice, it would not be open to a party to raise the question of non-framing of particular issue.
>
> **40**. In Nedunuri Kameswaramma vs. Sampati Subba Rao [AIR 1963 SC 884], it was observed :
>
> "No doubt, no issue was framed, and the one, which was framed, could have been more elaborate; but since the parties went to trial fully knowing the rival case and led all the evidence not only in support of their contentions but in refutation of those of the other side, it cannot be said that the absence of an issue was fatal to the case, or that there was that mis-trial which vitiates proceedings. We are, therefore, of opinion that the suit could not be dismissed on this narrow ground, and also that there is no need for a remit, as the evidence which has been led in the case is sufficient to reach the right conclusion. Neither party claimed before us that it had any further evidence to offer."

44. The aforesaid two decisions were relied upon by the Madras High Court in the case of ***M. Mohammed Ismail (Died) by Lrs.*** (supra)***,*** in which, it was held:-

> 18. Referring to the judgment of the Supreme Court in Nedunuri Kameswaramma vs. Sampati Subba Rao reported in AIR 1963 SC 884 and Swamy Atmananda & Ors. Vs. Sri Ramakrishna Tapovanam & Ors. reported in (2005) 10 SCC 51, this court approved the above said proposition in Sridhandappa @ Rajappa vs. Muniamma reported in (2014) 3 MLJ 684. The relevant portions from the said judgment are extracted hereunder:
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> "....mere failure to frame an issue alone shall not be the ground for remanding the case back to the trial Court and that such omission would be an irregularity capable of being cured by the appellate Court or the second appellate Court if the parties were very much aware of their respective pleas and conscious of the respective pleas, they lead evidence in full regarding such controversy also. In this regard, reliance can be made to the judgment of the Hon'ble Supreme Court in Nedunuri Kameswaramma vs. Sampati Subba Rao reported in AIR 1963 SC 884 and Swamy Atmananda & Ors. Vs. Sri Ramakrishna Tapovanam & Ors.

21 (2005) 10 SCC 51

reported in (2005) 10 SCC 51. In the first of the judgment cited above, namely Nedunuri Kameswaramma's case, a Larger Bench of the Supreme Court consisting of three Hon'ble Judges made the following observations:

'No doubt, no issue was framed, and the one, which was framed, could have been more elaborate; but since the parties went to trial knowing the rival case and led all the evidence not only in support of their contentions but in refutation of those of the other side, it cannot be said that the absence of an issue was fatal to the case, or that there was that mix-trial which vitiates proceedings. We are, therefore, of opinion that the suit could not be dismissed on this narrow ground, and also that there is no need for a remit, as the evidence which has been led in the case is sufficient to reach the right conclusion. Neither party claimed before us that it had any further evidence to offer.'

In the second of the judgment cited above, namely Swamy Atmananda's case, the Hon'ble Apex court referring to the above cited observation of the Larger Bench of the Supreme Court in Nedunuri Kameswaramma's case cited supra and following the same, has made the following observation:

' If the parties went to the trial knowing fully well the real issues involved and adduced evidence in such a case without establishing prejudice, it would not be open to a party to raise the question of non-framing of particular issue."

The aforesaid was a case relating to grant of decree of specific performance of contract and it was held that mere non framing of specific issue with regard to readiness and willingness would not be fatal to the case of the plaintiff.

45. In the present case, even though, specific issue with regard to readiness and willingness was not framed, on facts, taking into consideration the nature of pleadings and the evidence, which has been led by the parties, it is found that the parties were fully alive to the issue and controversy raised and have specifically pleaded and led their evidence on the aspect of readiness and willingness to prove as well as to refute, therefore, even though, the normal rule of framing and requirement of specific issue with regard to readiness and willingness not complied with, as held by the learned Single Judge of this Court in the case of ***Bhagirathi Dewangan vs. Jhaduram and others***[22]***,*** the impugned judgment and decree of specific performance of contract is not liable

22 2013 (1) CGLJ 442

to be set aside on the ground of mere non framing of issue regarding readiness and willingness, it being exceptional case, as considered in the decisions referred to hereinabove. This case, on facts, is that plaintiff claims that he has paid entire sale consideration at the time of execution of agreement.

46. The next issue, which arises for determination as to whether the plaintiff has succeeded in proving the agreement to sell the disputed property in his favour said to be executed by Gulab Devi, so as to entitle him to get decree of specific performance of contract. For this purpose, the pleadings as well as oral and documentary evidence led by both the parties needs to be examined in the light of extensive submission made by learned counsel for the appellant-defendant and learned counsel for the respondent-plaintiff.

47. We shall now examine as to whether the trial Court erred in law and on facts, in holding that the plaintiff succeeded in proving agreement to sell dated 13-08-2012.

48. The plaintiff has pleaded in para 2 of the plaint that the defendant-Gulab Devi Singh, recorded sole owner of the property in dispute, was in need of money to meet domestic expenditure and therefore, entered into an agreement with the plaintiff for sale of disputed property for a consideration of Rs.8,90,000/-. Further pleading is that the defendant-Gulab Devi Singh and her son-Alok Singh received the sale consideration and also delivered possession to the plaintiff and agreement to sell was executed by the defendant-Gulab Devi Singh on 13-08-2012 in the presence of her son-Alok Singh and another witness-Shailendra Singh, after getting the agreement prepared by Shri S. K. Dongre, Advocate. The defendant-Gulab Devi Singh, however, in her written statement, denied execution of the agreement. In para 2 of her written submission, filed jointly with other defendants, it was pleaded that neither any agreement to sell was executed nor possession was handed over. Further

pleading was that the plaintiff is a property broker and relative of defendant No.1. Her signatures were obtained on the document by stating that the power of attorney document is to be prepared. Neither any agreement to sell was entered into for sale of the disputed property or part of the property nor defendant-Gulab Devi Singh agreed to sell or executed any agreement in favour of the plaintiff nor handed over possession. The defendant also denied having received any consideration and denied agreement stating that it is fabricated and fictitious document.

49. Specific issue No.1 was framed by the learned trial Court whether the defendant had entered into the agreement with the plaintiff on 13-08-2012. Learned trial Court relied upon the evidence of Ritesh Singh, PW-1 and other two plaintiff witnesses namely Sourabh Singh, PW-2 and Shailendra Singh, PW-3.

50. Plaintiff-Ritesh Singh, PW-1 in his affidavit under Order 18 Rule 4 CPC has stated that Gulab Devi Singh was in need of money, therefore, for a consideration of Rs.8,90,000/-, she had agreed to sell the disputed property in favour of the plaintiff and at that time, Sourabh Singh was present and in his presence, a deal was struck. He has further stated that after the said agreement, Alok Singh and Gulab Devi Singh received the entire amount of consideration in installments. It is further stated that in August, 2012, an agreement was prepared by Advocate, Shri Dongre and it was notarized before the Notary Shri Jaiswal and it was executed by putting signatures of Gulab Devi Singh before the Notary and the contents of the agreement was read over to Gulab Devi Singh, to which, she was agreed. It was also stated that possession was also handed over to the plaintiff. It was also stated that at the time of execution of agreement, Alok Singh was also present. In his cross-examination, it has been elicited that before Mr. Dongre got agreement typed, the entire

details including description and area of the property as also the amount of sale consideration was disclosed. He further states that the column relating to area of the land and sale consideration were not filled up as B-1 of the land was not available at that time and all other recitals were contained in the agreement. He then again states that khasra number of the land was recorded, but then again changes the statement that the spaces requiring mention of khasra number and sale consideration was left blank, though, space for area was not left blank. He also states that he does not know much about the area of the land. He further deposed that the blank spaces have not been filled up by him with his pen, but it is filled up by Shri Dongre, Advocate. He admits that after document was signed by all the persons, blank spaces were filled up. He does no know the person as to who purchased the stamp. He further admits that on the date of execution of agreement, Ex.P-1, he had not given the entire consideration of Rs.8,90,000/- at a time, but this amount was given to Gulab Devi Singh and Alok Singh on different dates. He has deposed that on 27-07-2012, Rs.5 Lakh was paid and before execution of agreement, Rs.3,90,000/- was paid. He then states that he had entered into an agreement in June, 2012. He has denied relationship with Gulab Devi Singh and has stated that relationship as stated in para 3 of the plaint is by virtue of being member of the same community. Suggestion that he got signed the document by keeping Gulab Devi Singh in dark and falsely stating that he would got sold her property on good price as he is a property broker, has been denied.

51. In the plaint, the plaintiff has not specifically stated that he had paid sale consideration to defendant-Gulab Devi Singh in installments, though, it has been stated that entire consideration was paid to her. Therefore, it is also borne out from the evidence that agreement contained certain blank spaces and this witness has given different statements with regard to details relating to those

blank spaces in the agreement. It has also been admitted in evidence that the blank spaces were filled up after the documents were signed by signatories.

52. As far as second witness of the plaintiff, Sourabh Singh is concerned, according to the plaintiff-Ritesh Singh, PW-1, Sourabh Singh was present at the time of striking deal with the defendant-Gulab Devi Singh and according to him, Gulab Devi Singh's son, Alok Singh was also present.

Sourabh Singh, PW-2 has deposed that Gulab Devi Singh and Alok Kumar Singh were in need of money and as Gulab Devi Singh, Alok Singh and the plaintiff-Ritesh Singh are his relatives, the discussion had taken place in his presence and he informed Ritesh Singh regarding sale of land and Ritesh Singh had agreed to purchase the property in dispute. He has further deposed that in his presence, Gulab Devi Singh and Alok Singh agreed to sell the property in favour of Ritesh Singh for a total consideration of Rs.8,90,000/- and amount was also paid in cash in his presence by the plaintiff-Ritesh Singh to Gulab Devi and Alok Kumar Singh. Shri Dongre Advocate, in presence of plaintiff-Ritesh Singh and defendants-Gulab Devi and Alok Singh as also this witness, prepared agreement as per the instructions of Alok Singh and Gulab Devi Sing. Thereafter, the agreement was read over to Gulab Devi Singh before the Notary, to which, Gulab Devi agreed and all of them have signed the agreement and thereafter, Alok Singh and Shailendra Singh signed the document as a witness. He has also deposed that the possession was handed over to the plaintiff. In his cross-examination, he admits that he had discussed with Gulab Devi Singh and Alok Singh regarding sale of the property and not with Ritesh. He has deposed that he had informed Ritesh regarding the proposed sale at Akaltara. Suggestion which has been admitted by this witness is that when he talked to Ritesh, Ritesh purchased the property. He stated that he did not give any money to Gulab Devi Singh or Alok Singh. According to him, a deal was struck in August, 2012, and at that time itself, Rs.5 Lakh was paid to Gulab Devi Singh in the presence of Alok Singh and remaining amount of Rs.3,90,000/- was paid at the time of execution of agreement dated 13-08-2012. He then states that the deal was struck on 27-07-2012. However, this fact was not stated in the agreement. He further states that Dhanraj Singh had brough stamp paper from the stamp vender and does not know, who has typed it. He further states that after it was typed, he read over the same. He then also states that at the time of typing the document, khasra number and area of the land as also the remaining amount of Rs.3,90,000/- were mentioned by typing. He further states that the aforesaid details were written by pen by the Notary. However, this witness now states that the details were written through pen by Dhanraj Singh Chouhan. In his cross-examination, he clarifies by stating that the plaintiff-Ritesh is not a relative of Gulab Devi Singh and her son-Alok Singh, but they belong to the same community. The entire amount of sale consideration of Rs.8,90,000/- was not given in his presence. He further admits that he is also engaged in sale and purchase of the property.

53. Third witness-Shailendra Singh, PW-3, is a witness of the execution of agreement. In his affidavit under Order 18 Rule 4 CPC, he has deposed that Gulab Devi Singh had entered into an agreement to sell the property for a consideration of Rs.8,90,000/- and after the deal was struck, an agreement was got prepared by Shri Dongre, Advocate, in the presence of Gulab Devi Singh, her son-Alok Singh and this witness. He has further deposed that for execution of the said document, this witness along with Alok Singh, plaintiff-Ritesh Singh accompanied by Shri Jaiswal, Notary, had gone to the house of Gulab Devi Singh and contents of the document was read over by Shri Jaiswal, Notary, before Gulab Devi, to which, she has accepted and signed the said document and after that, her son-Alok Singh and Shailendra Singh had signed the

document as witness. Thereafter, the Notary notarized the document and handed over the document to the plaintiff-Ritesh Singh. He has further stated in the affidavit that the receipt of sale consideration was mentioned in the document and was admitted by Gulab Devi Singh. This witness has been subjected to detailed cross-examination. In his cross-examination, he has admitted that Dhanraj is his maternal uncle, but denies that he has strained relations with him. He reiterates that the agreement, Ex.P-1 was got typed by Shri Shrawan Kumar Dongre, though he does know who has typed it. He denied the suggestion that at the time of preparation of the document, no transaction had taken place. He states that at the time of preparation of document, Rs.8,90,000/- was not given, but Rs.3,90,000/- was given and Rs.5 Lakh was stated to be paid earlier. He has further stated that stamped document was purchased by him and at that time, Alok Singh was along with him. He further stated that at the time of preparation of document, Ex.P-1, Gulab Devi Singh was not present, but she was present before the Notary at the time of notarizing the document. He denies that Alok Singh was not present at the time of preparation of document. Discrepancy in the name of person, who has purchased the document has also elicited that in the agreement, Ex.P-1, the name of purchaser is shown as B. Singh and the name of this witness Shailendra Bahadur Singh. This witness does not know as to why the stamp vendor did not mention the name. This witness has stated that at the time of preparation of document, Alok Singh, Ritesh Singh, Sourabh Singh, Shrawan Dongre and he were present. At the time of preparation of document, money was paid by Ritesh Singh to Alok Singh. At that time, Gulab Devi Singh was not present. He admits that in his presence, no money was paid by Ritesh Singh to Gulab Devi Singh.

54. Looking to the evidence of the aforesaid three witnesses including the

plaintiff, one of the witnesses of execution, Shailendra Singh and one Sourabh Singh, who has stated to be present at the time of deal, it is proved that an agreement was executed. There are certain discrepancies in the evidence. It is worth mentioning that the defendant-Gulab Devi Singh had not denied her signature on the document, but her defence is that the plaintiff had obtained her signature on the document by falsely stating that power of attorney has to be prepared towards striking deal of sale of the property on her behalf.

55. Once the defendant-Gulab Devi Singh admitted her signature in the document, the pleading that her signatures were obtained in a fraudulent manner by stating that power of attorney is to be prepared, could be proved only by leading proper evidence. In the present case, it is extremely relevant to mention that neither Gulab Devi Singh nor her son Alok Singh entered into the witness box.

56. The argument of learned counsel for the appellant that the evidence of the plaintiff's witnesses, including witness of execution, are at variance and contradiction with each other with regard to manner, in which, the agreement was prepared, signed and payment of sale consideration, does not have any force. The plaintiff-Ritesh has stated regarding the time, when deal was struck as also the time when the document was prepared and that Rs.5 Lakh was earlier paid and at the time of execution of document, Rs.3,90,000/- was also paid. Thus, entire sale consideration was paid to Gulab Devi Singh. On this aspect, the evidence of witness of execution, Shailendra Singh, PW-3, is coherent and an attempt was made to discredit her testimony by suggesting that the money was not paid by Ritesh Singh to Gulab Devi Singh. However, this witness in his cross-examination itself, has stated that balance of Rs.3,90,000/- was paid in his presence by Ritesh Singh to Alok, because at the time, when the document was prepared, Gulab Devi Singh was not present.

Plaintiff-Ritesh Singh in his evidence has stated that before execution of agreement, Rs.3,90,000/- was paid. All the witnesses of the plaintiff have stated that during the period, when the document was prepared and signed and money was paid, Alok Singh was present.

57. As far as filling up of blank spaces in the agreement Ex.P-1 is concerned, the plaintiff's witness has remained coherent and on the aspect that after the agreement was prepared, it was read over to Gulab Devi Singh and Gulab Devi Singh accepted the same. Merely because, some of the details were filled up with pen on the blank spaces, would not render the plaintiff's case doubtful, once payment of sale consideration and signing the document by Gulab Devi Singh is duly proved.

59. Gulab Devi Singh and Alok Singh did not enter into the witness box and therefore, Gulab Devi Singh having admitted in her written statement that she has signed the document, the plaintiff's version with regard to execution of agreement deserves to be accepted that an agreement was executed on 13-08-2012 by Gulab Devi Singh for sale of the disputed property for a consideration of Rs.8,90,000/-. It is relevant to note that the present is not a case where the plaintiff was required to pay anything more. According to the agreement, entire sale consideration was paid by the plaintiff. Initially, Rs.5 Lakh was paid and at the time of execution of agreement, Rs.3,90,000/- was also paid. Shailendra Singh, witness to the agreement, Ex.P-1, fully supported the case of the plaintiff. Other signatories to the document namely Alok Singh, though he was available, but was not examined by the defendant. The contents of the sale deed could be disputed only by the signatory of the document, but Gulab Devi Singh and her son Alok Singh, both of them have not entered into the witness box.

59. In the case of **Vidhyadhar vs. Mankikrao and another[23],** the consequence of defendants not entering into the witness box to prove that the sale deed was fictitious and transaction was bogus, was examined, as below:-

> **15.** It was defendant No. 1 who contended that the sale deed, executed by defendant No. 2 in favour of the plaintiff, was fictitious and the whole transaction was a bogus transaction as only Rs. 500 were paid as sale consideration to defendant No. 2. He further claimed that payment of Rs. 4,500 to defendant No. 2 at his home before the registration of the deed was wholly incorrect. This plea was not supported by defendant No. 1 as he did not enter into the witness box. He did not state the facts pleaded in the written statement on oath in the Trial Court and avoided the witness box so that he may not be cross examined. This, by itself, is enough to reject the claim that the transaction of sale between defendant No. 2 and the plaintiff was a bogus transaction.
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> **16.** Where a party to the suit does not appear into the witness box and states his own case on oath and does not offer himself to be cross examined by the other side, a presumption would arise that the case set up by him is not correct as has been held in a series of decisions passed by various High Courts and the Privy Council beginning from the decision in Sardar Gurbakhsh Singh v. Gurdial Singh and Anr. . This was followed by the Lahore High Court in Kirpa Singh v. Ajaipal Singh and Ors. AIR (1930) Lahore 1 and the Bombay High Court in Martand Pandharinath Chaudhari v. Radhabai Krishnarao Deshmukh AIR (1931) Bombay 97. The Madhya Pradesh High Court in Gulla Kharagjit Carpenter v. Narsingh Nandkishore Rawat also followed the Privy Council decision in Sardar Gurbakhsh Singh's case (supra). The Allahabad High Court in Arjun Singh v. Virender Nath and Anr. held that if a party abstains from entering the witness box, it would give rise to an inference adverse against him. Similarly, a Division Bench of the Punjab & Haryana High Court in Bhagwan Dass v. Bhishan Chand and Ors. , drew a presumption under Section 114 of the Evidence Act against a party who did not enter into the witness box.
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> 17. --- xxx ---
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> 18. --- xxx ---
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> 19. In Lal Achal Ram v. Raja Kazim Hussain Khan (1905) 32 Indian Appeals 113, the Privy Council laid down the principle that a stranger to a sale deed cannot dispute payment of consideration or its adequacy. This decision has since been considered by various High Courts and a distinction has been drawn between a deed which was intended to be real or operative between the parties and a deed which is fictitious in character and was never designed as a genuine document to effect transfer of title. In such a situation, it would be open even to a stranger to impeach the deed as void and invalid on all possible grounds. This was also laid down in Kamini Kumar Deb v. Durga Charan Nag and Ors. AIR (1923) Calcutta 521 and again in Saradindu Mukherjee v. S.M. Kunja Katnini Roy and Ors. . The Patna High Court in Jugal Kishore Tiwari and Anr. v. Umesh Chandra Tiwari and Ors. and the Orissa High Court in Sanatan Mohapatra and Ors. v. Hakim Mohammad Kazim Mohammad and Ors. have also taken the same view.

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> 20. The above decisions appear to be based on the principle that a person in his capacity as a defendant can raise any legitimate plea available to him under law to defeat the suit of the plaintiff. This would also include the plea that the sale deed by which title to the property was intended to be conveyed to plaintiff was void or fictitious or, for that matter, collusive and not intended to be acted upon. Thus, the whole question would depend upon the pleadings of the parties, the nature of the suit, the nature of the deed, the evidence led by the parties in the suit and other attending circumstances. For example, in a landlord-tenant matter where the landlord is possessed of many properties and cannot possibly seek eviction of his tenant for bona fide need from one of the properties, the landlord may ostensibly transfer that property to a person who is not possessed of any other property so that that person, namely, the transferee, may institute eviction proceedings on the ground of his genuine need and thus evict the tenant who could not have been otherwise evicted. In this situation, the deed by which the property was intended to be transferred, would be a collusive deed representing a sham transaction which was never intended to be acted upon. It would be open to the tenant in his capacity as defendant to assert, plead and prove that the deed was fictitious and collusive in nature. We, therefore, cannot subscribe to the view expressed by the Privy Council in the case of Lal Achal Ram (supra) in the broad terms in which it is expressed but do approve the law laid down by the Calcutta, Patna and Orissa High Courts as pointed out above."

60. Therefore, in view of above enunciation of law, the plaintiff's case relating to execution of agreement for sale of the property by the defendant-Gulab Devi Singh in the presence of Shailendra Singh and Alok Singh and upon receipt of total consideration of Rs.8,90,000/- deserves to be accepted and the defendant's case is liable to be rejected.

61. The plaintiff's case is also resisted on the ground that the plaintiff has not disclosed the source from which, he has managed the fund of Rs.8,90,000/- as he only being a teacher. The plaintiff has stated in his evidence that total sale consideration of Rs.8,90,000/- was paid on different dates in installments by him and the plaintiff's version is also supported by the evidence of Sourabh Singh, PW-2 and Shailendra Singh, PW-3, there being no denial of payment of consideration by the defendant's signatory to the agreement. At the appellate stage, the defendant is not entitled to challenge the receipt of consideration on the ground that the plaintiff has failed to prove the source of funds. The plaintiff's pleadings and evidence with regard to execution of document of having found

proved that the entire amount of consideration of Rs.8,90,000/- has also been found proved, nothing remained further to performed by the plaintiff under the terms of the agreement, Ex.P-1. It was only when defendant-Gulab Devi Singh, having entered into the agreement to sell the property in favour of the plaintiff, she executed a sale deed in favour of Dhanraj Singh on 28-03-2013 without any notice and knowledge of the plaintiff that suit was filed. Therefore, it is to be held that the plaintiff had performed his part of contract by fulfilling the legal requirement under Section 16(c) of the Specific Relief Act.

62. Lastly, the learned trial Court recorded a finding that the sale deed dated 28-03-2013 being sham and bogus transaction, does not suffer from any error of law and fact, because the learned trial Court has arrived at the conclusion taking into consideration the evidence of none other than Dhanraj Singh Chouhan, the sole defendant witness, who is not in a position to clearly state as to how and in what manner payment of sale consideration was made. Even otherwise, once it is found that the plaintiff was entitled to execution of sale deed in his favour by decree of specific performance by virtue of agreement dated 13-08-2012, subsequent sale deed dated 23-08-2013 executed by the defendant-Gulab Devi Singh in favour of Dhanraj Singh Chouhan is not binding on the plaintiff and the same is illegal and inoperative in law and cannot be made a basis to deny the decree of specific performance in favour of the plaintiff, once the plaintiff has succeeded in proving its case that the defendant-Gulab Devi Singh entered into an agreement with him on 13-08-2012 and the entire sale consideration of Rs.8,90,000/- was paid to her.

63. In the present case, during the course of argument, while hearing learned counsel for the parties, on the aspect of scope and ambit of Section 61 of the Act of 1899, it being a matter concerning interest of revenue, learned Additional

Advocate General was requested to assist the Court. Learned Additional Advocate General, referring to provision under Section 167 of the Evidence Act as also the judgment in the case of ***Babulal*** (supra) ***and S. Thirumalai*** (supra) submitted that once document is admitted during trial without there being any objection raised, Section 36 bars objection to the admissibility of the document on the ground that it is inadequately stamped. He is also correct in submitting that nevertheless that even though, the finding recorded by the learned lower appellate Court, based on the admission of the document, could not be challenged by raising objection to the admissibility at the appellate stage in view of the provision contained under Section 36 of the Stamp Act, the appellate Court is empowered to exercise revisional jurisdiction conferred under Section 61 of the Stamp Act.

64. In the case of ***Balakrishna*** (supra), High Court of Madhya Pradesh held that though the admissibility of the document, which was admitted in evidence during trial, could not be objected to on the ground that it was inadequately stamped, the Court, to which, appeals lie from or references are made by, the Court which admitted the instructed in evidence, may, on its own motion, take into consideration the order of the Subordinate Court admitting the instrument in evidence and if such Court is of the opinion that such instrument should not have been admitted in evidence without payment of duty and penalty under Section 35, such Court may order the instrument to be produced and may impound it when produced and then send the instrument, along with its declaration, to the Collector.

65. In the case of ***S. Thirumalai*** (supra) also, similar course of action has been found permissible in law.

The document i.e. agreement containing recital of delivery of possession, in view of the detailed finding of this Court in earlier paragraphs, is deemed to be conveyance by virtue of explanation appended to Article 23 of the Schedule-1A of the Stamp Act, as amended in the State of Madhya Pradesh (now Chhattisgarh). Therefore, the document i.e. agreement, Ex.P-1 dated 13-08-2012 was required to be stamped treating it to be a 'conveyance', which has not been done and it only bears stamp duty of Rs.50/-. Therefore, the document is not inadequately stamped. The plaintiff has filed the agreement in original as Ex.P-1. Therefore, in view of above consideration, the document is declared to be insufficiently stamped and is therefore, impounded. The original agreement, Ex.P-1 be sent to the Collector (Stamps), District Janjgir-Champa for drawing necessary proceedings under Stamp Act towards recovery of balance stamp duty from the plaintiff-Ritesh Singh. A copy of this judgment duly certified by the Registrar (Judicial) along with original agreement dated 13-08-2012, Ex.P-1 shall be sent along with aforesaid declaration accordingly. After drawing necessary proceedings and payment of stamp duty, the original agreement shall be returned to this Court and attached with the original records of the trial Court along with the order that may be passed by the Collector (Stamps).

66. In the result, the appeal of the appellants being devoid of merit, is therefore, dismissed. Let appellate decree be drawn accordingly.

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| SD/- | SD/- |
| **(Manindra Mohan Shrivastava)** | **(Vimla Singh Kapoor)** |
| **Judge** | **Judge** |

Tumane