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

Reserved on: 19th December, 2025
Pronounced on:17th April, 2026.

\+ RFA 70/2019, CM APPL. 3892/2019, CM APPL. 34117/2019 & CM APPL. 46747/2023

SUNITA SINHA .....Appellant

Through: Mr. Anirudh Bakhru, Mr. Ayush Puri, Mr. Kanav Madnani, Ms. Urvija Sharma, Ms. Aayomi Sharma, Mr. Sultan Jafri, Mr. Mohd. Umar and Mr. Abhigyan Pandey, Advs.
M: 9958029634

versus

M/S LEELA BUILDERS PVT. LTD.& ORS. .....Respondents

Through: Mr. Samar Singh Kachwaha, Ms. Aakanksha Kaul, Ms. Kavita Vinayak and Mr. Gaurav Vashisth, Advs. for R-1 to 8
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Mr. Lakshay Dhamija, Adv for R-9
Mr. Arpit Bhargava, Mr. Sarthak Sharma, Mr. Abhishek Gaind, Mr. Ajay Singh Gosain, Ms. Astha Sharma and Ms. Nitasha Gupta, Advs. for R-10
M: 9871316969
Mr. Manoj Pant, Advocate for R-11
(M:9971560508)

CORAM:
HON'BLE MS. JUSTICE MINI PUSHKARNA

JUDGMENT

MINI PUSHKARNA, J.

I. INTRODUCTION

1. The present Regular First Appeal **("RFA")** has been filed under Section 96 of the Code of Civil Procedure, 1908 **("CPC")**, thereby, challenging the judgment dated 10th January, 2019 **("impugned judgment")**, passed by the Additional District Judge - 07, Saket Courts, New Delhi **("ADJ")**, in the suit bearing *CS No. 2162/2008* (renumbered as *CS No. 1180/2017*), titled as *"Sunita Sinha and Anr. Versus M/s. Leela Builders Pvt. Ltd. & Ors."*, whereby, the Trial Court dismissed the suit of the appellant.

2. The aforesaid suit was filed by the plaintiffs, seeking mandatory injunction to restrain defendant nos. 1 to 8 from using the property bearing *No. 48, Block No. 171, Sunder Nagar, New Delhi*, admeasuring 966.33 sq. yards **("suit property")**, and to deliver the vacant and peaceful possession of the same to the plaintiffs. The suit, in the alternative, prayed for grant of decree of possession with respect to the suit property in favour of the plaintiffs, along with recovery of *mesne* profits and for permanent injunction, in respect of the same.

3. Before delving into the facts of the present case, it is pertinent to note that this Court *vide* order dated 28th January, 2019, directed the parties to maintain *status quo* with respect to the title and possession of the suit

property. Subsequently, an application being *C.M. APPL. 34117/2019* came to be filed by respondent nos. 1 to 8 seeking modification of the order dated 28th January, 2019 in order for them to seek mutation of the suit property in their name with the undertaking that they shall not part with the possession of the suit property. However, by way the order dated 29th August, 2024, the said application was directed to be dealt with directly at the time of hearing of the main appeal.

4. This Court *vide* order dated 05th May, 2022 has recorded that respondent nos. 1 to 8 are the only contesting parties in the present appeal. Further, this Court dealt with the application, i.e., *C.M. APPL. 7668/2021*, filed jointly by the four applicants, namely, Shri Sanjeev Sinha (husband of the deceased appellant), Shri Gaurav Sinha (son of the deceased appellant), Shri Mahesh Kapoor and Smt. Usha Kapoor, thereby, seeking their substitution in the appeal in place of the deceased appellant, i.e., Smt. Sunita Sinha, who died on 07th September, 2020.

5. By way of the aforesaid order, this Court impleaded Shri Sanjeev Sinha (husband of the deceased appellant) and Shri Gaurav Sinha (son of the deceased appellant) as the legal heirs of the deceased appellant. However, the other applicants, being Shri Mahesh Kapoor and Smt. Usha Kapoor, were not impleaded, since they were third parties who claimed interest in the suit property on the basis of an Agreement to Sell dated 05th December, 2005, executed by the appellant in their favour. The said applicants, however, were granted liberty to take appropriate steps for their intervention in the appeal separately. However, no steps were taken in this regard.

II. BRIEF FACTS OF THE CASE

a. Pre-Filing of the Suit

6. The brief facts, relevant for adjudication of the appeal, as culled out from the impugned judgment and the pleadings on record, are as follows:

6.1. The suit property was initially allotted by the President of India **("lessor")** to one Shri R.N. Luthra by way of a perpetual lease deed dated 30th November, 1961. He, thereof, constructed a two and half storeyed super-structure/bungalow, along with servant quarters and garage block over the suit property.

6.2. Shri R.N. Luthra died on 16th December, 1972, leaving behind a Will dated 10th September, 1971, as per which, the suit property was divided in 1/3rd equal shares between his two daughters, namely, Smt. Santosh Sethi and Smt. Nirmal Krishan,and his grandson, namely, Shri Rajiv Luthra. By order dated 26th November, 1975, in *Probate Case No. 1/1974*, the suit property was probated in favour of the said legal heirs.

6.3. Smt. Santosh Sethi died on 29th June, 1984, and by way of her Will dated 20th February, 1983, her 1/3rd share in the suit property devolved in favour of her son, Shri. Sanjeev Sethi.

6.4. Smt. Nirmal Krishan, along with Shri Sanjeev Sethi and Shri Rajeev Luthra **("sellers")**, entered into an Agreement to Sell dated 24th January, 1989, whereby, the said co-owners agreed to sell their respective shares in the suit property to respondent nos. 1 to 8 **("purchasers")** for a total agreed sale consideration of Rs. 80.70 Lacs.

6.5. Clause 2 of the Agreement to Sell recorded that respondent nos. 1 to 8 had paid an amount of Rs. 10.50 Lacs as part payment to the sellers.

6.6. Additionally, as per Clause 4 of the Agreement to Sell, the purchasers were required to pay a further sum of Rs. 62.40 Lacs upon clearance under Section 269UC of the Income Tax Act, 1961 **("Income Tax Act")** or within six months, whichever date is later. Further, the sellers shall deliver the vacant physical possession of the self-occupied portion and symbolic possession of the rented portion in the suit property to the purchasers, as part performance of the Agreement to Sell against the said payment, and call upon the tenants to attorn to the purchasers.

6.7. Further, as per Clause 6 of the Agreement to Sell, the balance sale consideration of Rs. 7.80 Lacs was to be paid within 30 days of the sellers having obtained permission under Section 230-A of the Income Tax Act.

6.8. Subsequently, a sum of Rs. 12 Lacs was paid by the purchasers to the sellers, and the said payment was acknowledged by the sellers by way of the receipt dated 01st August, 1989.

6.9. Thereafter, the purchasers also paid a sum of Rs. 15 Lacs to the sellers and a receipt dated 03rd August, 1989 was also issued by the sellers in this regard, whereby, the vacant physical possession of the self-occupied portion and the symbolic possession of the tenanted portion of the suit property, was handed over to the purchasers. By way of the said receipt dated 03rd August, 1989, the sellers also stated that the purchasers would be entitled to receive and claim the rent. Accordingly, the Agreement to Sell dated 24th January, 1989, stood modified to that extent. The receipt also records that the sellers executed a General Power of Attorney **("GPA")** in favor of respondent no. 7, i.e., Shri U.S. Sitani, which is irrevocable.

6.10. The aforesaid GPA dated 03rd August, 1989, as executed by the sellers authorizes the purchasers to demolish, reconstruct, sell, create lease or deal with the suit property, in any manner, whatsoever.

6.11. As per the purchasers, at the time of handing over of the possession of the suit property by the sellers on 03rd August, 1989 and execution of GPA on the same day, the parties arrived at an oral understanding that the purchasers shall take steps to recover possession of the tenanted portion of the suit property from the tenants, and any payments made by the purchasers to the tenants in this regard, shall be adjusted towards payment of balance sale consideration. Thus, the purchasers paid a sum of Rs. 45 Lacs in total, i.e., Rs. 25 Lacs and 20 Lacs to the tenants of the ground and first floors of the suit property, respectively, on 24th February, 1990. Receipts with regard thereto, have been placed on record.

6.12. The sellers have further acknowledged that the purchasers paid a sum of Rs. 8,23,646.72/- on 25thApril, 1990, as recorded in *Ex. DW-1/13*, and the same was paid by the sellers to the L&DO for revocation of re-entry proceedings.

6.13. One of the co-sellers, Smt. Nirmal Krishan passed away. She was survived by her husband, Shri G.D. Krishan and her two children, i.e., plaintiff no. 1/appellant and plaintiff no. 2/respondent no. 11.

6.14. By way of a letter dated 14th March 1991, Shri Rajeev Luthra, one of the sellers, informed the purchasers that certain *challans* had been received from the Municipal Corporation of Delhi **("MCD")** for payment of property taxes, and stated that there seems to be some mistake in the calculations done by the MCD.In the said letter, Shri Rajiv Luthra requested to the sellers

that *"you may like to take up the matter with the MCD and have their records corrected."*

6.15. The purchasers paid the lease rent in respect of the suit property for the 10 years' period from 1989 to 1998 on 05th September, 1997.

6.16. Mr. G.D. Krishan, husband of Ms. Nirmal Krishan passed away on 19th September, 1998.

6.17. The suit in question came to be filed on 13th August, 1999 by the children of Late Smt. Nirmal Krishan and Late Shri G.D. Krishan, approximately 11 years after the execution of the Agreement to Sell, GPA and the possession of the suit property being handed over to the purchasers.

6.18. It is the case of the plaintiffs that the remaining sale consideration under the Agreement to Sell, has not been paid by the purchasers, and therefore, the Agreement to Sell, stands cancelled.

b. Post-Filing of the Suit

6.19. By way of the order dated 07th January, 2000, Shri Sanjeev Sethi, who was defendant no. 10, was transposed as plaintiff in the suit on the ground that he is the owner of 1/3rd share of the suit property, by virtue of the Will of his mother, i.e., Smt. Santosh Sethi.

6.20. On 18th April, 2000, this Court restrained the L&DO from transferring or converting the leasehold rights of the suit property into freehold or transferring the same to any other person, till the next date of hearing.

6.21. Further, *vide* order dated 25th February, 2002, this Court granted temporary injunction in favour of the plaintiffs, restraining the L&DO from transferring or converting the leasehold rights of the suit property, or in any manner, selling or alienating the propertyto any other person, till the disposal

of the suit. However, it was further directed that the plaintiffs shall not disturb the peaceful possession of the defendants in the suit property.

6.22. Subsequently, in an appeal being *FAO(OS) 152/2002* against the order dated 25th February, 2002 of the Single Judge, the Division Bench of this Court *vide* order dated 26th March, 2003, vacated the aforesaid *status quo* order on the basis of a consent order. The Division Bench passed directions to the parties to move appropriate applications to the L&DO for conversion of the suit property from leasehold to freehold and that the same shall be done in the name of the recorded owners, i.e., Smt. Sunita Sinha, Shri Arvind Krishna Malhotra, Shri Sanjeev Sethi and Shri Rajiv Luthra.

6.23. The suit was subsequently transferred to the District Court *vide* order dated 17th November, 2003 in view of change in pecuniary jurisdiction of the Court.

6.24. Subsequently, by way of order dated 26th October, 2006, the plaint was allowed to be amended. The amended suit fell within the pecuniary jurisdiction of this Court, and consequently, the proceedings were then again continued before the High Court in *CS(OS) 2162/2008*.

6.25. This Court *vide* 08th November, 2011 dismissed the application filed by the plaintiffs under Order 12 Rule 6 of the CPC, while noting that no clear admission had been made by the defendants to the extent that the entire sale consideration had not been paid to the sellers. The Court further observed that *prima facie* reading of the GPA would show thatthe entire sale consideration has been paid or else no ordinary prudent man would execute a GPA with such sweeping powers or put the defendants in possession of the suit property.

6.26. The aforesaid decision was further upheld *vide* judgment dated 20th July, 2012 in *FAO(OS) 139/2012*, wherein, the Division Bench noted that the plaintiffs will have to explain the conduct of their mother, along with the other two co-owners, of handing over the possession to the purchasers and permitting the purchasers to pay money to the tenants for vacation of the tenanted portions. Pursuant thereto, the *SLP (C) 32200/2012*, against the judgment of the Division Bench was also dismissed by the Supreme Court *vide* order dated 23rd November, 2012.

6.27. Issues in the suit were framed by this Court by order dated 06th March, 2012, and the same are reproduced as under:

> *"(i) Whether the plaintiffs are entitled to a decree of mandatory injunction or in the alternative a decree for possession? OPP*
>
> *(ii) Whether the plaintiffs are entitled to a decree of mesne profits and if so, at what rate and for what period? OPP*
>
> *(iii) Whether the plaintiffs are entitled to a decree of Injunction as prayed for? OPP*
>
> *(iv) Whether the plaintiffs have no locus standi to file the present case? OPD*
>
> *(v) Whether the Agreement to Sell dated 24.01.1989 stood cancelled, as alleged in para 14 of the plaint? OPP*
>
> *(vi) Whether the suit is barred by limitation? OPD*
>
> *(vii) Whether the suit has not been properly valued for the purposes of court fees? OPD*
>
> *(viii)Whether the answering defendants have discharged their obligation under the Agreement to Sell dated 24.01.1989? OPD*
>
> *(ix) Whether defendant nos.1 to 8 were given possession of the suit property after receipt of the full consideration? OPD*
>
> *(x) Whether the predecessors-in-interest of the plaintiffs and defendant no.10 ceased to have any right, title or interest in the suit property, after execution of the duly registered, irrevocable General Power of Attorney dated 03.08.1989, in favour of the nominee (defendant no.7) of Defendant No.1- 6? OPD*
>
> *(xi) Relief."*

6.28. Subsequent to the change in the pecuniary jurisdiction, the suit was transferred from the Delhi High Court to the Patiala House Courts, in the year 2016. Considering the territorial jurisdiction, the suit was transferred to South East District, Saket Courts, in the year 2017.

6.29. Thereafter, the impugned judgment was pronounced by the Trial Court, whereby, the suit of the plaintiffs was dismissed. Hence, the present appeal has been filed.

6.30. In addition to the aforesaid, it is also to be noted that respondent no. 7, namely, Shri U.S. Sitani had filed a criminal complaint against the appellant/plaintiff no. 1 as well as respondent nos. 9 and 10, for committing offences under Sections 420, 467, 468, 471 and 120-B of the Indian Penal Code, 1860 **("IPC")**. Subsequently, an *FIR* bearing *No. 401/2002* was registered. Pursuant thereto, in *Cr. Case No. 40650/2016*, *vide* order dated 22nd November, 2021, the proceedings *qua* Smt. Sunita Sinha were abated due to her demise. The case is to be revived as and when the accused persons, namely, Shri Arvind and Shri Sanjeev Sethi, both of whom were declared as proclaimed offenders, are apprehended or arrested.

III. SUBMISSIONS OF THE APPELLANT

7. Before this Court, the appellant has raised the following contentions for seeking setting aside of the impugned judgment:

7.1. The appellant acquired 1/3rd share in the suit property from her father, Late Shri G.D. Krishan, who died intestate on 19th September, 1998.

7.2. The sellers under the Agreement to Sell dated 24th January, 1989 only received 56.7% of the entire sale consideration, i.e., Rs. 45,73,646.72/- out of the total sale consideration of Rs. 80,70,000/-. Since the entire payment

was never made by the purchasers, they failed to fulfill their contractual obligation and the Agreement to Sell, stood automatically cancelled in terms of Clause 1, read with Clause 4 therein.

7.3. The impugned judgment has erred in holding that there existed any oral understanding between the sellers and the purchasers, and the alleged payment of Rs. 45 Lacs made to the tenants, stood adjusted against the balance sale consideration.

7.4. The Agreement to Sell dated 24th January, 1989, did not provide for any obligation on the sellers to get the tenanted portion of the suit premises vacated and handover possession of the same to the purchasers. Further, there is no mention of any Clause, whereby, payments made to the tenants could be construed as fulfillment of the obligations of the respondent nos. 1 to 8 under the Agreement to Sell.

7.5. The receipt dated 01st August, 1989 also records that the balance sale consideration had to be paid at the time of registration of sale deed. The GPA dated 03th August, 1989, also never recorded any fact about any oral understanding between the sellers and the purchasers. Further, on the same date, the receipt issued by the sellers for a sum of Rs. 15 Lacs categorically stated that the balance sale consideration shall be paid at the time of registration of sale deed. Additionally, the receipt noted that the vacant physical possession of the self-occupied portion and the symbolic possession of the tenanted portion of the suit property, has been handed over to the purchasers, and the Agreement to Sell dated 24th January, 1989 was modified to that extent only. The said receipt does not record any oral understanding between the purchasers and the sellers.

7.6. Had the parties to the Agreement to Sell, agreed that the payment to the tenant would be adjusted towards the sale consideration, there would have been no question for providing payment of balance sale consideration at the time of registration of sale deed.

7.7. The findings in the impugned judgment are contradictory to the bare terms of the receipt dated 03rd August, 1989, which clearly records that the balance sale consideration was to be paid at the time of registration of the sale deed. Further, the said receipt only records that physical and symbolic possession of the vacant and the tenanted portions of the suit property, respectively, was handed over to respondent nos. 1 to 8. Thus, the impugned judgment failed to note that the Agreement to Sell dated 24th January, 1989, was modified only to this extent.

7.8. As per the case of the respondent nos. 1 to 8, the alleged oral understanding occurred prior to the execution of the GPA and the receipt dated 03rd August, 1989. Therefore, the said are subsequent documents to the alleged oral understanding, however, they do not record anything about the oral understanding or about the payment to tenants to secure relinquishment of tenancy. Hence, this alleged oral understanding being contrary to the admitted terms of the Agreement to Sell, GPA and the receipts is hit by Sections 91 and 92 of the Indian Evidence Act, 1872 **("Evidence Act")**.

7.9. Even otherwise, the alleged payments made by the purchasers to the tenants for relinquishment of tenancy, could not have been adjusted against the balance sale consideration under the Agreement to Sell, as such payments were unlawful under Section 5(3) of the Delhi Rent Control Act, 1958 **("DRC Act")**. Hence, the said alleged payments cannot be regarded as valid consideration in terms of Sections 23 and 24 of the Indian Contract

Act, 1872 **("Contract Act")**. Thus, the alleged oral understanding is also void under the DRC Act.

7.10. The alleged payment of Rs. 45 Lacs and the receipts thereto dated 24th February, 1990, were never proved as the tenants were never called as witnesses before the Trial Court.

7.11. By way of the letter dated 23rd November, 1993, Shri G.D. Krishan called upon Shri U.S. Sitani to pay the balance sale consideration or otherwise, the Agreement to Sell dated 24th January, 1989, will stand cancelled. Since the balance sale consideration was never paid to the sellers, the Agreement to Sell stood cancelled. Therefore, no sale deed was ever executed pursuant to the Agreement to Sell and the GPA.

7.12. As per the Clause 7 of the Agreement to Sell, the respondent nos. 1 to 8 were empowered to file a suit for specific performance if they were ready and willing to pay the sale consideration. However, since the respondents never made the requisite payments, no suit for specific performance was filed by them.

7.13. It is settled law that an Agreement to Sell or a GPA is not a document of title or a deed of transfer of property by sale, and as such, does not confer absolute title upon the buyer over the suit property in view of Section 54 of the Transfer of Property Act, 1882 **("TP Act")**.

7.14. The Trial Court by way of the impugned judgment erroneously held that the dictum in ***Suraj Lamp and Industries Private Limited Versus State of Haryana and Another***[1], would not apply to the present case, as the said decision is prospective in nature. This Court in the case of ***Chander Dutt***

[1](2012) 1 SCC 656.

Sharma Versus Prem Chand and Others[2], has held that the judgment passed by the Supreme Court in ***Suraj Lamp (Supra)*** only puts down the settled law that there can be no transfer of title without a registered conveyance deed, and documents such as an Agreement to Sell or GPA can only give a right to file a suit for specific performance. In that regard, further reliance has been placed upon the judgment of ***Shakeel Ahmed Versus Syed Akhlaq Hussain***[3].

7.15. Further, the receipt dated 03rd August, 1989 categorically mandates entering into a deed of sale, therefore, it cannot be said that the GPA is as good as a sale deed, as payments were yet to be made on the date when the GPA had been executed.

7.16. The respondent nos. 1 to 8 are estopped from seeking possession under Section 53-A of the TP Act on the basis of part-performance as the same is inherently contradictory to the case of the contesting respondents that they are the owners of the suit property *vide* the GPA.

7.17. The benefit under Section 53-A of the TP Act is not available to the purchasers, since they kept quiet, remained passive, and took no effective steps, even when the suit for specific performance was barred by time. Thus, the respondent nos. 1 to 8 cannot be said to be willing to perform their obligations under the Agreement to Sell. Further, if the argument of the respondent nos. 1 to 8 is to be accepted, a part performer would take control over the property till eternity without ever performing the contract.

7.18. The benefit under Section 53-A of the TP Act is only with respect to a contract in writing and therefore, the respondents could not rely on this provision on the basis of an alleged oral understanding.

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[2]2018 SCC OnLine Del 9903.
[3](2023) 20 SCC 655.

7.19. The GPA is not irrevocable, and lapsed after the death of the principal, Smt. Nirmal Krishan on 03rd August, 1990. An Agreement to Sell coupled with a GPA, even where both documents are contemporaneous, executed in favour of the same person and described as 'irrevocable', is neither irrevocable nor does it create title or ownership in favour of the GPA holder or create any 'interest' in the subject-matter, so as to attract the protection of Section 202 of the Contract Act.

7.20. The GPA, in the present case, does not satisfy the mandatory requirements of Section 202 of the Contract Act, since no proprietary or protectable interest whatsoever was created in favour of respondent nos. 1 to 8.

7.21. The suit in question is maintainable being one based on title and is well within the limitation period. The law stands settled that when title is directly in issue and adjudication on title is necessary for deciding possession, a suit for possession or injunction is perfectly maintainable without a separate declaratory relief. Where the question of title is directly and substantially in issue, and where the Court must determine title in order to grant the relief sought, no independent declaratory relief is necessary.

7.22. Once the Trial Court framed and decided the issue of ownership, the appellant's suit for possession, being a suit based on title, did not require a separate prayer for cancellation of the underlying documents. Thus, the suit is fundamentally one which is based on title and was filed within the limitation period of 12 years under Article 65 of the Limitation Act, 1963 **("Limitation Act")**.

7.23. A co-owner is entitled to protect the joint property and may sue for possession or injunction without impleading every other co-owner, so long as there is no conflict of interest between them.

IV. **SUBMISSIONS MADE BY RESPONDENT NOS. 1 TO 8**

8. Rebutting the contentions of the appellant, the respondent nos. 1 to 8 have raised the following arguments before this Court:

8.1. The suit filed before the Trial Court was completely frivolous and vexatious, wherein, a sale transaction in relation to an immovable property, was sought to be challenged after approximately 11 years, and that too, not by the sellers, but by the children of one of the sellers, who has passed away. The original surviving sellers were also approached by the plaintiffs at the time of filing of suit, however, they refused to join them in the same, showcasing that the suit was baseless and dishonest.

8.2. The contentions of the appellant that the Agreement to Sell stood cancelled cannot be accepted, given the conduct of the parties to the Agreement to Sell.

8.3. Even though the time limit to pay the amount of Rs. 62.4 Lacs expired on 20th June, 1989 as per Clause 4 of the Agreement to Sell, the sellers did not forfeit the sum of Rs. 10.5 Lacs. Rather, the sellers acquiesced and continued with the transaction as they accepted a further sum of Rs. 12 Lacs on 01st August, 1989 and a sum of Rs. 15 Lacs on 03rd August, 1989, from the purchasers, and handed over the possession of the suit property to the purchasers. On the same date, the sellers also executed an irrevocable GPA, whereby, the purchasers were given rights akin to an owner.

8.4. The parties had arrived at an oral understanding that the purchasers shall take all the steps required to recover possession from the tenants and

any payments made in this regard to the tenants shall be adjusted against the balance sale consideration.

8.5. In line with this oral understanding, the receipt dated 03rd August, 1989 stated the balance sale consideration shall be paid at the time of registration of the sale deed, as the amounts which the purchasers may have to pay to the tenants were not known at this stage. The receipt does not, by any stretch, bar the respondent nos. 1 to 8 from asserting that there existed any oral understanding with the sellers.

8.6. The oral understanding arrived between the parties is not hit by Sections 91 and 92 of the Evidence Act, since the purpose of the said provisions is to only exclude oral evidence that varies or contradicts a written agreement or instrument. The payment receipt dated 03rd August, 1989 acknowledges that subsequent to handing of possession of the suit property to the contesting respondents and execution of irrevocable GPA, the Agreement to Sell dated 24th January, 1989 has been 'modified' to that extent. Therefore, to prove said oral understanding, the contesting respondents can certainly lead appropriate oral evidence.

8.7. The plaintiffs had, in fact, sought a decree on admission in the underlying suit, by heavily relying on Sections 91 and 92 of the Evidence Act, to contend that no oral evidence to prove payment of full consideration is permissible in this case. Their application, in this regard, was dismissed by this Court and subsequently, the said decision was upheld by the Division Bench of this Court, which categorically held that the matter required leading of evidence and the *onus* was upon the plaintiffs therein to explain the conduct of their mother and other co-sellers. The said decision of the

Division Bench was further upheld by the Supreme Court *vide* order dated 23rd November, 2012.

8.8. However, the plaintiffs have failed to explain the conduct of the sellers and the evidence led by the contesting respondents regarding the oral understanding remains un-rebutted.

8.9. Since the sellers handed over the possession to the purchasers and also irrevocably conveyed all rights akin to an owner through the GPA, it is clear that they had received what they considered as adequate sale consideration.

8.10. Had the sellers not been satisfied with the aforesaid understanding, there would have been no occasion for them to hand over the possession and execute the GPA.

8.11. It is in line with this understanding, that the purchasers paid a sum of Rs. 45 Lacs to the tenants on 24th February, 1990. Further, the sellers on 25th April, 1990 also accepted Demand Drafts for a sum of Rs. 8,23,646.72/- from the purchasers, and submitted the same to the L&DO to revoke re-entry proceedings. Thus, the purchasers have paid a total sum of Rs. 90,73,646.67/- for the suit property, which is more than the sale consideration under the Agreement to Sell. Since no balance sale consideration remained to be paid, none was ever demanded by the sellers and the sale transaction had been concluded.

8.12. Thereafter, on 14th March, 1991, the sellers informed the purchasers about certain *challans* received from the MCD for payment of property taxes, and that there were certain mistakes in the calculations therein. Therefore, the purchasers could take up the matter with the MCD. This conduct of the sellers is consistent with the parties, who have no remaining

rights, interests or obligations in relation to the said property, including payment of statutory dues.

8.13. The appellant has further alleged that the understanding with respect to paying tenants to vacate the suit property is prohibited under the provisions of DRC Act. The said objection was never taken by the appellant in her pleadings.

8.14. The intention of the legislature behind Section 5(3) of the DRC Act was to protect a statutory tenant and not assist a third-party, who has no *locus*, to setup a dishonest challenge to a different contract. The challenge under this provision could have only been raised by a tenant and the same is not applicable where the tenant raises no grievance and willingly relinquishes the tenancy.

8.15. The reliance placed by the appellants on the alleged letter dated 23rd November, 1993, allegedly written by Shri. G.D. Krishan to respondent no. 7 is devoid of any merits, as the said letter is forged or fabricated and no such letter was ever sent to the contesting respondents.

8.16. The plaintiffs have placed reliance on the photocopy of the Acknowledgement Due Card **("AD Card")** bearing a stamp of a money order. However, the purchasers have led evidence of witnesses from the postal department, who confirmed that the postal department does not use any such stamp.

8.17. The fact that respondent nos. 1 to 8 have paid a lease rent for the suit property for a period of ten years from the year 1989 to 1998 shows that the sale transaction has been concluded and the Agreement to Sell has not been cancelled.

8.18. The suit in question came to be filed only after 11 years of the execution of the Agreement to Sell, GPA and the possession being handed over to the purchasers, and pursuant to the death of Shri G.D. Krishan. This is because the plaintiffs could not have filed the suit during the lifetime of their parents, who were satisfied with the receipt of the full sale consideration and treated the transaction as a concluded one. This is also substantiated by the statement of the appellant during her cross-examination that the other co-sellers refused to join her in the underlying suit.

8.19. Plaintiff, being a purported successors-in-interest to one of the original sellers, has no *locus* to contend that the Agreement to Sell stood cancelled, when her predecessor-in-interest clearly acted in a manner contrary to such assertions.

8.20. Since the plaintiffs have admitted to the execution of the Agreement to Sell, GPA and the fact of possession, the relief claimed with respect to the possession and mandatory injunction in the plaint is untenable, as no cancellation of the Agreement to Sell and GPA, has been sought. Since the appellant in her cross-examination has confirmed that the possession of the suit property has not been taken forcibly by the purchasers, she has admitted that possession was handed over in terms of Agreement to Sell and GPA. Therefore, no relief as to recovery of possession can be sought without seeking the principal relief of cancellation in relation to such documents.

8.21. The purchasers have all rights akin to ownership on the basis of the irrevocable GPA, since the GPA remains unchallenged. Further, the rights under the said GPA do not lapse with the death of the executors and the rights of the purchasers stand protected under Section 200 of the Contract Act.

8.22. Even if it assumed that the transaction was not concluded, the possession of the respondent over the suit property is protected under the principle of part-performance as per Section 53-A of the TP Act.

8.23. The contesting respondents have been in uninterrupted and continuous possession of the suit property since at least August, 1989 and the same has never been challenged or disputed by the sellers. Therefore, without prejudice, even if the appellant's contention was to be accepted, the only legal remedy of the plaintiffs was to file a suit for payment of the balance sale consideration.

8.24. In order to enjoy the protection under Section 53-A of the TP Act, the purchasers in possession need not file a suit for specific performance for execution of a sale deed.

8.25. In order to sustain the relief sought in the plaint, a challenge to the GPA and the Agreement to Sell was mandatory. Further, the period of limitation to such a challenge is 3 years as per Article 58 of the Limitation Act. Since said period expired on 03rd August, 1992 and 24th January, 1992, respectively, thus, the suit is barred by limitation.

V. ANALYSIS AND FINDINGS

9. This Court has heard the arguments of the parties, and perused the documents and evidence on record.

a. Subsistence of the Agreement to Sell dated 24th January, 1989

10. The first question for consideration before this Court is, as to whether the Agreement to Sell dated 24th January, 1989, executed by the sellers in favour of respondent nos. 1 to 8, i.e., the purchasers, stood cancelled or continued to subsist.

11. The undisputed facts that emerge from the pleadings and evidence on record is that an Agreement to Sell dated 24th January, 1989, *Ex. PW-1/2*, was executed by three individual co-owners, namely, Shri Sanjeev Sethi/respondent no. 10, Shri Rajeev Luthra/respondent no. 9 and Late Smt. Nirmal Krishan, mother of appellant and respondent no. 11, in favour of respondent nos. 1 to 8 herein.

12. The plaintiff no. 1/appellant, passed away during the proceedings before this Court. She was substituted by her LRs. The LRs of the deceased plaintiff no.1/appellant, have vehemently argued that since the entire payment as per the Agreement to Sell dated 24th January, 1989 was never made by the respondent nos. 1 to 8, the Agreement to Sell stood automatically cancelled in terms of Clause 1, read with Clause 4 therein, for failure in performing their contractual obligation.

13. In this regard, it is to be noted that under the Agreement to Sell, a total consideration of Rs. 80.70 Lacs was payable. Clause 2 of the Agreement to Sell records the receipt of a sum of Rs. 10.50 Lacs by the sellers, as part-consideration. As per Clause 4 of the Agreement to Sell, another amount of Rs. 62.40 Lacs was to be paid after obtaining Clearance Certificate under Section 269UC of the Income Tax Act or within 6 months, whichever date was later, failing which, the transaction would stand cancelled and part payment of Rs. 10.50 Lacs, shall stand forfeited.

14. Further, Clause 5 provides that the sellers shall take steps for cancellation of re-entry proceedings, and compromise with the lessors/L&DO. Any amount demanded by the lessors shall be borne by the purchasers, and the same would be adjusted in the consideration payable.

15. Clause 6 of the Agreement to Sell further provides that upon delivery of the possession, the sellers shall obtain income tax clearance under Section 238 of the Income Tax Act, and the purchasers shall pay the balance sale consideration of Rs. 7.80 Lacs.

16. The Clearance Certificate for sale under Section 269UC of the Income Tax Act was received on 07th March, 1989. The stipulated period of 6 months, as agreed under Clause 4 of the Agreement to Sell, lapsed on 20th June, 1989. However, the said amount of Rs. 62.40 Lacs was not paid by the purchasers till said date.

17. This Court notes that despite the lapse of the time period provided under the Agreement to Sell, the sellers did not forfeit the sum of Rs. 10.50 Lacs already paid by the purchasers. Rather, even after the expiry of the time period under Clause 4 of the Agreement to Sell, a sum of Rs. 12 Lacs was received and accepted by the sellers from the purchasers towards sale consideration on 01st August, 1989, by way of two Demand Drafts for Rs. 6 Lacs each, marked as *Ex. DW-1/5 (A)-(B).* The said payment of Rs. 12 Lacs was also acknowledged by the sellers *vide* a receipt dated 01st August, 1989, marked as *Ex. DW-1/6*, in this regard.

18. The sellers subsequently accepted a sum of Rs. 15 Lacs from the purchasers on 03rd August, 1989, by way of three Demand Drafts, for sum of Rs. 5 Lacs each, marked as *Ex. DW-1/7-(a)-(b)-(c).*The payment of Rs. 15 Lacs was acknowledged by the sellers by issuing the receipt dated 03rd August, 1989, marked as *Ex. DW-1/8*.

19. The aforesaid receipt dated 03rd August, 1989 also records that the sellers handed over the vacant physical possession of the self-occupied portion and symbolic possession of the tenanted portion of the suit property

to the purchasers. It also states that the purchasers shall be entitled to claim the rent amount and the Agreement to Sell, stands modified to this extent. Further, the said receipt also mentions the fact of execution of the irrevocable GPA. The said GPA dated 03rd August, 1989, marked as *Ex. DW-1/10*, was executed by the sellers in favour of respondent no. 7 herein. The receipt dated 03rd August, 1989, modifying the terms of the Agreement to Sell dated 24th January, 1989, is reproduced as under:

"*xxx xxx xxx*

RECEIPT

RECEIVED a sum of Rs. 15,00,000/- (Rupees fifteen lacs only) as further part sale-proceed from M/s Leela Builders Pvt. Ltd., M/s Swadeshi Construction Private Limited, M/s Meghdoot Overseas Private Ltd., M/s Priya Electricfals Industries Private Limited, M/s Pawansut Plastics Private Ltd. and M/s Dan Traders Private Ltd by means of Banker Cheque No's 258986, 258988, 258985 all dated 1.8.89 drawn on Bank of Madura, Nehru Place, New Delhi-110019 for Rs. 5,00,000/- (Rupees five lacs only) each favouring each of us towards the sale consideration in respect of 48, Sunder Nagar, New Delhi. The balance sale consideration shall be paid at the time of registration of the deed of sale.

We have, also handed over the vacant physical possession of the self occupied portion and symbolic possession of the tenanted portion of the aforesaid 48, Sunder Nagar, New Delhi to the aforesaid six co-buyers who shall also be entitled to receive and claim the rent and accordingly the agreement to sell dt. 24.1.89 stands modified to that extent. We have executed General Power of Attorney in favour of the nominee of the purchasers Shri U.S. Sitani which is irrecoverable.

Delhi :

Dated : 3/8/89

1. Smt. Nirmal Krishan

2. Shri Sanjiv Sethi

3. Shri Rajiv Luthra

TRUE COPY
ATTESTED

6 JAN 2018

xxx xxx xxx"

20. Thereafter, the sellers approached the L&DO for revocation of re-entry proceedings with respect to the suit property. In terms of Clause 5 of the Agreement to Sell, the purchasers paid an amount of Rs. 8,23,646.72/- on 25th April, 1990 to the sellers by way of a Demand Draft. The said payment was acknowledged by way of a receipt by Shri Rajeev Luthra, i.e., one of the sellers. Thereafter, the sellers paid the requisite amount to the L&DO for revocation of the re-entry proceedings.

21. Further, by way of the letter dated 14th March, 1991, marked as *Ex. DW-1/17*, Shri Rajeev Luthra wrote to Shri U.S. Sitani, respondent no. 7

herein, that he received two *challans* from the MCD for payment of property tax, and that there seemed to be some mistake in the calculations done by the MCD. He, thus, requested respondent no. 7 herein to take up the matter with the MCD and have the records corrected.

22. It bears consideration as to why Shri Rajiv Luthra would address the said letter calling upon Shri U.S. Sitani, to take up the matter of property tax with the MCD, if he treated the Agreement to Sell as having been cancelled, for any alleged non-payment of balance sale consideration. Rather, said letter is consistent with the conduct of a person who no longer had any interest in the statutory obligations that came with the suit property, and who did not treat the Agreement to Sell as having been cancelled.

23. It is also to be noted that the purchasers, respondent nos. 1 to 8 herein, have been paying statutory dues towards payment of the lease rent to the L&DO, as well as property tax to the MCD with respect to the suit property since 1989. The documents with regard thereto are before this Court, and marked as *Ex. DW-1/16 (a)-(i)*.

24. Thus, from the aforesaid sequence of conduct of the original sellers, it is manifest that the sellers never treated the Agreement to Sell as cancelled, at any point of time. The subsequent payments, after lapse of the time period under Clause 4 of the Agreement to Sell, have been established during the course of evidence. Rather than cancelling the Agreement to Sell, all the signatories thereto, i.e., the sellers, executed the GPA dated 03rd August, 1989 in favour of respondent no. 7, thereby handing over possession of the suit property to the purchasers.

25. Moreover, it is undisputed that the original sellers never demanded any alleged balance amount from the purchasers due under the Agreement to

Sell, executed between the parties. None of the original owners/ sellers initiated any legal action against the purchasers, respondent nos. 1 to 8.

26. The appellant has also admitted that her mother did not take any action against the respondents while she was alive. It is imperative to note that it is not the case of the appellant that her mother was constrained or compelled by any circumstances in not filing the suit or taking any legal action while she was alive. Not even a single letter or correspondence has been shown by the appellant to prove that her mother, or the other two sellers, ever demanded any balance sale consideration from the purchasers.

27. Although the appellant alleges that the Agreement to Sell was cancelled, the exact date as to when it was cancelled, has not been mentioned. No pleading has been made in the plaint to the effect that any legal notice was sent to the purchasers/ respondent nos. 1 to 8, that the Agreement to Sell, stood cancelled.

28. This Court finds it incomprehensible that the sellers not only parted with the possession of the suit property even though they allegedly did not receive almost half of the sale consideration, but took no further steps whatsoever, for 11 years to secure the alleged balance sale consideration. The said inaction of the original sellers, coupled with the lack of any justification/explanation as to the said conduct, makes the case put forth by the appellant highly improbable.

29. The aforesaid narration is a clear pointer to the fact that the sellers have consistently acted upon the Agreement to Sell by accepting payments repeatedly from the purchasers, and handing over the possession of the suit property to the purchasers. From the evidence on record, it is manifest that

the appellant failed to prove that sellers treated the Agreement to Sell, as having been cancelled.

30. The conduct of the sellers clearly establishes that they acquiesced and ratified the Agreement to Sell, and hence it cannot be contended that the Agreement to Sell stood cancelled. Further, the appellant has nowhere pleaded that the sale consideration admitted to have been received by the sellers, was ever returned to the purchasers. Therefore, the appellant cannot be allowed to contend that the Agreement to Sell, stood cancelled.

31. In this regard, it would be apposite to refer to the decision in the case of ***Union of India and Others Versus N. Murugesan and Others***[4], wherein, the Supreme Court held that acquiescence, whether by words or conduct, is an exception to termination of contract. Additionally, where one knowingly accepts benefits of a contract, he is estopped from denying the validity/binding effect of such contract, as the law does not permit a person to both approbate and reprobate or blow hot and cold. The relevant paragraphs of the said decision are reproduced as under:

> *"xxx xxx xxx*
>
> ***19. Section 39 deals with the effect of the refusal of the party to perform a promise wholly. Though we are not concerned with this provision, this provision is the only one that speaks of the concept of acquiescence, which could be signified by words or conduct, being an exception for terminating the contract. Under this provision, a promisee may put an end to the contract unless there exists an element of acquiescence that could be seen and exhibited through his words or conduct.*** *Obviously, such a contract which would also involve words or conduct, is to be seen on the facts of each case.*
>
> *xxx xxx xxx*
>
> ***25. Acquiescence would mean a tacit or passive acceptance. It is implied and reluctant consent to an act. In other words, such an action would qualify a passive assent. Thus, when acquiescence***

[4](2022) 2 SCC 25.

takes place, it presupposes knowledge against a particular act. From the knowledge comes passive acceptance, therefore instead of taking any action against any alleged refusal to perform the original contract, despite adequate knowledge of its terms, and instead being allowed to continue by consciously ignoring it and thereafter proceeding further, acquiescence does take place. As a consequence, it reintroduces a new implied agreement between the parties. Once such a situation arises, it is not open to the party that acquiesced itself to insist upon the compliance of the original terms. Hence, what is essential, is the conduct of the parties. *We only dealt with the distinction involving a mere acquiescence. When acquiescence is followed by delay, it may become laches. Here again, we are inclined to hold that the concept of acquiescence is to be seen on a case-to-case basis.*

Approbate and reprobate

26. These phrases are borrowed from the Scots law. They would only mean that no party can be allowed to accept and reject the same thing, and thus one cannot blow hot and cold. The principle behind the doctrine of election is inbuilt in the concept of approbate and reprobate. Once again, it is a principle of equity coming under the contours of common law. Therefore, he who knows that if he objects to an instrument, he will not get the benefit he wants cannot be allowed to do so while enjoying the fruits. One cannot take advantage of one part while rejecting the rest. A person cannot be allowed to have the benefit of an instrument while questioning the same. Such a party either has to affirm or disaffirm the transaction. This principle has to be applied with more vigour as a common law principle, if such a party actually enjoys the one part fully and on near completion of the said enjoyment, thereafter questions the other part. An element of fair play is inbuilt in this principle. It is also a species of estoppel dealing with the conduct of a party*. We have already dealt with the provisions of the Contract Act concerning the conduct of a party, and his presumption of knowledge while confirming an offer through his acceptance unconditionally.*

27. *We would like to quote the following judgments for better appreciation and understanding of the said principle:*

27.1. *Nagubai Ammal* v. *B. Shama Rao* [*Nagubai Ammal* v. *B. Shama Rao,* 1956 SCR 451: AIR 1956 SC 593]: (AIR pp. 601-02, para 23)

> "*23. But it is argued by Sri Krishnaswami Ayyangar that as the proceedings in OS. No. 92 of 1938-39 are relied on as barring the plea that the decree and sale in OS. No. 100 of 1919-20 are not collusive, not on the ground of res judicata or estoppel but on the*

principle that a person cannot both approbate and reprobate. It is immaterial that the present appellants were not parties thereto, and the decision in Verschures Creameries Ltd. v. Hull & Netherlands Steamship Co. Ltd. [Verschures Creameries Ltd. v. Hull & Netherlands Steamship Co. Ltd., (1921) 2 KB 608 (CA)], and in particular, the observations of Scrutton, LJ., at p. 611 were quoted in support of this position. There, the facts were that an agent delivered goods to the customer contrary to the instructions of the principal, who thereafter filed a suit against the purchaser for price of goods and obtained a decree.

Not having obtained satisfaction, the principal next filed a suit against the agent for damages on the ground of negligence and breach of duty. It was held that such an action was barred. The ground of the decision is that when on the same facts, a person has the right to claim one of two reliefs and with full knowledge he elects to claim one and obtains it, it is not open to him thereafter to go back on his election and claim the alternative relief. The principle was thus stated by Bankes, L.J.: (Verschures Creameries Ltd. case [Verschures Creameries Ltd. v. Hull & Netherlands Steamship Co. Ltd., (1921) 2 KB 608 (CA)], KB p. 611)

*'... **Having elected to treat the delivery to him as an authorised delivery they cannot treat the same act as a misdelivery. To do so would be to approbate and reprobate the same act**.'*

The observations of Scrutton, L.J. on which the appellants rely are as follows: (Verschures Creameries Ltd. case [Verschures Creameries Ltd. v. Hull & Netherlands Steamship Co. Ltd., (1921) 2 KB 608 (CA)], KB pp. 611-12)

'... A plaintiff is not permitted to "approbate and reprobate". The phrase is apparently borrowed from the Scotch law, where it is used to express the principle embodied in our doctrine of election — namely, that no party can accept and reject the same instrument : Ker v. Wauchope [Ker v. Wauchope, (1819) 1 Bligh PC 1 at p. 21 : 4 ER 1 at p. 8] : Douglas-Menzies v. Umphelby [Douglas-Menzies v. Umphelby, 1908 AC 224 at p. 232 (PC)] . The doctrine of election is not however confined to instruments. A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage. That is to approbate and reprobate the transaction.'

It is clear from the above observations that the maxim that a person cannot "approbate and reprobate" is only one application

of the doctrine of election, and that its operation must be confined to reliefs claimed in respect of the same transaction and to the persons who are parties thereto*. The law is thus stated in Halsbury's Laws of England, Vol. XIII, p. 464, para 512:*

*'**On the principle that a person may not approbate and reprobate, a species of estoppel has arisen which seems to be intermediate between estoppel by record and estoppel in pais, and may conveniently be referred to here. Thus a party cannot, after taking advantage under an order (e.g. payment of costs), be heard to say that it is invalid and ask to set it aside, or to set up to the prejudice of persons who have relied upon it a case inconsistent with that upon which it was founded; nor will he be allowed to go behind an order made in ignorance of the true facts to the prejudice of third parties who have acted on it**.'*

27.2.*State of Punjab v. Dhanjit Singh Sandhu [State of Punjab v. Dhanjit Singh Sandhu, (2014) 15 SCC 144]: (SCC pp. 153-54, paras 22-23 & 25-26)*

"22. The doctrine of "approbate and reprobate" is only a species of estoppel, it implies only to the conduct of parties. As in the case of estoppel it cannot operate against the provisions of a statute. (Vide CIT v. MR. P. Firm Muar [CIT v. MR. P. Firm Muar, AIR 1965 SC 1216].)

23. It is settled proposition of law that once an order has been passed, it is complied with, accepted by the other party and derived the benefit out of it, he cannot challenge it on any ground. (Vide Maharashtra SRTC v. Balwant Regular Motor Service [Maharashtra SRTC v. Balwant Regular Motor Service, AIR 1969 SC 329].) In R.N. Gosain v. Yashpal Dhir [R.N. Gosain v. Yashpal Dhir, (1992) 4 SCC 683] this Court has observed as under: (R.N. Gosain case [R.N. Gosain v. Yashpal Dhir, (1992) 4 SCC 683], SCC pp. 687-88, para 10)

*'10. **Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that 'a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage'.**'*

* * *

*25. **The Supreme Court in Rajasthan State Industrial Development & Investment Corpn. v. Diamond & Gem Development Corpn. Ltd. [Rajasthan State Industrial***

Development & Investment Corpn. v. Diamond & Gem Development Corpn. Ltd., (2013) 5 SCC 470: (2013) 3 SCC (Civ) 153], made an observation that a party cannot be permitted to "blow hot and cold", "fast and loose" or "approbate and reprobate". Where one knowingly accepts the benefits of a contract or conveyance or an order, is estopped to deny the validity or binding effect on him of such contract or conveyance or order. This rule is applied to do equity, however, it must not be applied in a manner as to violate the principles of right and good conscience.

26. ***It is evident that the doctrine of election is based on the rule of estoppel, the principle that one cannot approbate and reprobate is inherent in it. The doctrine of estoppel by election is one among the species of estoppel in pais (or equitable estoppel), which is a rule of equity. By this law, a person may be precluded, by way of his actions, or conduct, or silence when he has to speak, from asserting a right which he would have otherwise had."***

27.3.*Rajasthan State Industrial Development & Investment Corpn. v. Diamond & Gem Development Corpn. Ltd. [Rajasthan State Industrial Development & Investment Corpn. v. Diamond & Gem Development Corpn. Ltd., (2013) 5 SCC 47: (2013) 3 SCC (Civ) 153]: (SCC pp. 480-81, paras 15-16)*

*"**I. Approbate and reprobate***

15. ***A party cannot be permitted to "blow hot-blow cold", "fast and loose" or "approbate and reprobate". Where one knowingly accepts the benefits of a contract, or conveyance, or of an order, he is estopped from denying the validity of, or the binding effect of such contract, or conveyance, or order upon himself.*** *This rule is applied to ensure equity, however, it must not be applied in such a manner so as to violate the principles of what is right and of good conscience. [Vide Nagubai Ammal v. B. Shama Rao [Nagubai Ammal v. B. Shama Rao, 1956 SCR 451: AIR 1956 SC 593], CIT v. V. MR. P. Firm Muar [CIT v. MR. P. Firm Muar, AIR 1965 SC 1216], Ramesh Chandra Sankla v. Vikram Cement [Ramesh Chandra Sankla v. Vikram Cement, (2008) 14 SCC 58: (2009) 1 SCC (L&S) 706], Pradeep Oil Corpn. v. MCD [Pradeep Oil Corpn. v. MCD, (2011) 5 SCC 270: (2011) 2 SCC (Civ) 712], Cauvery Coffee Traders v. Hornor Resources (International) Co. Ltd. [Cauvery Coffee Traders v. Hornor Resources (International) Co. Ltd., (2011) 10 SCC 420: (2012) 3 SCC (Civ) 685] and V. Chandrasekaran v. AdministrativeOfficer [V. Chandrasekaran v. Administrative Officer, (2012) 12 SCC 133: (2013) 2 SCC (Civ) 136 : (2013) 4 SCC (Cri) 587: (2013) 3 SCC (L&S) 416].]*

> *16.* ***Thus, it is evident that the doctrine of election is based on the rule of estoppel—the principle that one cannot approbate and reprobate is inherent in it. The doctrine of estoppel by election is one among the species of estoppel in pais (or equitable estoppel), which is a rule of equity. By this law, a person may be precluded, by way of his actions, or conduct, or silence when it is his duty to speak, from asserting a right which he would have otherwise had****."*
>
> *xxx xxx xxx"*
>
> *(Emphasis Supplied)*

32. Likewise, holding that an agreement to extend the time period for performance of a contract need not necessarily be reduced to writing, and may be proved by oral evidence or conduct of parties, including forbearance, the Supreme Court in the case of ***S. Brahmanand and Others Versus K. R. Muthugopal (Dead) and Others***[5], has held as follows:

> *"xxx xxx xxx*
>
> ***34. Thus, this was a situation where the original agreement of 10-3-1989 had a "fixed date" for performance, but by the subsequent letter of 18-6-1992 the defendants made a request for postponing the performance to a future date without fixing any further date for performance. This was accepted by the plaintiffs by their act of forbearance and not insisting on performance forthwith. There is nothing strange in time for performance being extended, even though originally the agreement had a fixed date. Section 63 of the Contract Act, 1872 provides that every promisee may extend time for the performance of the contract. Such an agreement to extend time need not necessarily be reduced to writing, but may be proved by oral evidence or, in some cases, even by evidence of conduct including forbearance on the part of the other party****. [See in this connection the observations of this Court in Keshavlal Lallubhai Patel v. Lalbhai Trikumlal Mills Ltd., 1959 SCR 213 : AIR 1958 SC 512, para 8. See also in this connection Saraswathamma v. H. Sharad Shrikhande, AIR 2005 Kant 292 and K. Venkoji Rao v. M. Abdul Khuddur Kureshi, AIR 1991 Kant 119, following the judgment in Keshavlal Lallubhai Patel (supra).]* ***Thus, in this case there was a variation in the date of performance by express representation by the defendants, agreed to by the act of forbearance on the part of the plaintiffs. What was originally covered by the first part of Article 54, now fell within the***

[5](2005) 12 SCC 764.

purview of the second part of the article. Pazhaniappa Chettiyar v. South Indian Planting and Industrial Co. Ltd. [AIR 1953 Trav Co 161] was a similar instance where the contract when initially made had a date fixed for the performance of the contract but the Court was of the view that "in the events that happened in this case, the agreement in question though started with fixation of a period for the completion of the transaction became one without such period on account of the peculiar facts and circumstances already explained and the contract, therefore, became one in which no time was fixed for its performance" and held that what was originally covered by the first part of Article 113 of the Limitation Act, 1908 would fall under the second part of the said article because of the supervening circumstances of the case.

xxx xxx xxx"

(Emphasis Supplied)

33. Hence, the sequence of events that have transpired in the present case is a clear pointer to the fact that the sellers never considered the Agreement to Sell, as having been cancelled. Rather, the sellers affirmed and continued with the transaction, by accepting payments even beyond the last date envisaged under the Agreement to Sell, i.e., 20th June, 1989, and handing over possession of the suit property to the purchasers.

34. The contention of the appellant that an alleged letter dated 23rd November, 1993, had purportedly been sent by Shri G.D. Krishan to respondent no. 7 herein, seeking payment of balance sale consideration, has to be rejected. The evidence on record clearly points that the receipt of said letter was never proved by the appellant, nor was the said letter acted upon, by the alleged sender.

35. The plaintiffs in the suit failed to furnish the original AD Card and only produced a photocopy of the same, bearing a stamp of a *'money order'*. However, the contesting defendants led evidence of several witnesses from the postal department, who confirmed that the postal department did not use

a money stamp, and only used a date stamp. No evidence to counter this position, or to otherwise prove delivery, was led by the plaintiffs.

36. In this regard, reference may be made to the deposition of *DW-2*, i.e., Shri Jai Bhagwan, retired Sub-Post Master, who has categorically stated in his Evidence Affidavit that the postal AD Card bears a *'money order'* stamp which is not used on such cards and lacks proper postal stamping as there is no date stamp on it. Thus, the said deposition clearly points out that the postal AD Card with respect to the letter dated 23rd November, 1993, was not genuine.

37. Further, *DW-3*, i.e., Shri Lalit Kumar, Postal Assistant, Passport Seva Kendra, has deposed in his Evidence Affidavit that the *'money order'* stamp on the AD card is not used on such cards, as only date stamps are applied. He further denied that the money stamp can be affixed by postal authorities by an error.

38. To similar effect, *DW-4*, i.e., Shri Surender Saha, Post Master, Kalkaji Head Office, has deposed that the AD Card was not proper, as it bears an incorrect pin-code. Further, he deposed categorically that a *'money order'* stamp is not used on AD cards. He clarified that only metal date stamps are used in post offices and not rubber stamps.

39. Likewise, *DW-5*, i.e., Shri Rajender Bahadur Singh, Post Master, Naraina, Head Office has stated that the postal AD Card in support of letter dated 23rd November, 1993, has a rubber stamp, whereas, only iron stamps are used by the post office. He further deposed that a 'REGD' stamp is put in AD Cards, which is missing in the AD card in question. Instead of a 'REGD' stamp, a *'money order'* stamp has been put, which is not normally used on AD Cards.

40. Thus, the depositions of *DW-2* to *DW-5*, clearly establishes that the AD Card with regard to letter dated 23rd November,1993, was defective and contained a *'money order'* stamp, which is inconsistent with standard postal practice of using a date stamp. Accordingly, the Trial Court rightly held that the acknowledgment of the letter dated 23rd November, 1993, has not been proved.

41. Even otherwise, it was admitted by the appellant that Shri G.D. Krishan never took any steps on the basis of the alleged letter dated 23rd November, 1993, though he remained alive for almost six years post the purported letter. Thus, the reliance by the appellant on the said letter becomes immaterial.

42. It is also undisputed that none of the sellers ever took any action, be it by sending a letter or notice or filing a suit against the purchasers, respondent nos. 1 to 8. Pertinently, in this regard, in her cross-examination, the appellant has categorically deposed as follows:

IN THE HIGH COURT OF DELHI AT NEW DELHI

C.S.(SO) NO. 2162 OF 2008

IN THE MATTER OF:

SMT. SUNITA SINHA AND ANR. ... PLAINTIFFS

VERSUS

M/S LEELA BUILDERS P. LTD.
AND OTHERS ... DEFENDANTS

20.05.2014

PW-1 SMT SUNITA SINHA, AGED ABOUT 54 YEARS, WIFE OF MR. S. SINHA, RESIDENT OF 139, POCKET E, MAYUR VIHAR, PHASE-II, DELHI-110091 RECALLED FOR FURTHER CROSS EXAMINATION IN CONTINUATION OF CROSS EXAMINATION RECORDED ON 27.04.2013

ON S.A.

XXXXX by Samar Singh Kachwaha, Advocate, counsel for the Defendant.

Q. Is it correct that your mother in her life time never wrote to the Defendants No. 1 to 8 asking for payment of any balance consideration or for recovery of possession of the suit property?

A. She died within one year of signing the agreement and I do not think there was enough time.

It is correct that my mother passed away on 3rd October, 1990. It is also correct that as per the agreement to sell dated 24.01.1989, the balance sale consideration was to be paid within six months i.e. by 24th July, 1989. It is correct that my mother was alive for one year and three months after 24th July, 1989. I am not aware whether my mother addressed any communication during this period to Defendants No 1 to 8.

Q. Is it correct that Defendants 9 and 10 being the co-sellers of the property never wrote to Defendants 1 to 8 regarding payment of any balance sale consideration of recovery of possession of the suit property?

A. I am not aware.

Q. Is it correct, that when you asked Defendants 9 and 10 to join you in filing the present suit, they refused?

A. Yes, I asked them and they did not join.

Q. Did you or your brother, being the Plaintiffs herein, before filing the present suit ever write to Defendants 1 to 8 asking for recovery of any balance sale consideration, or recovery of possession?

A. I am not aware.

Q. In your affidavit, you have mentioned a letter dated 23rd November, 1993. Can you tell, who wrote that letter?

A. My father wrote that letter.

Q. As per the above letter dated 23rd November, 1993 (Exhibit PW-1/5), seven days were granted to Defendants 1 to 8 to pay the purported balance sale consideration or else appropriate action would be initiated. Was any payment made by Defendants 1 to 8 within the next seven days pursuant to the above letter?

A. No.

Q. Nonetheless, your father in his life time never initiated any action against Defendants 1 to 8 pursuant to the alleged letter dated 23rd November, 1993. Is that correct?

A. No, he did not take any legal action.

43. Perusal of the aforesaid deposition of the appellant clearly brings to the fore that the sellers never initiated any action against the purchasers, with respect to either recovery of any balance amount or possession of the suit property. Further, when the appellant asked the other two original sellers, i.e., respondent nos. 9 and 10 herein, to join in filing the suit, they refused to join the appellant in the present suit.

44. The evidence on record points out that the transaction in question for sale of the suit property was executed and validly concluded by the original sellers. The sellers conducted themselves in a manner from which only one conclusion can be drawn, i.e., that full sale consideration was received to their satisfaction, in a mode and manner acceptable to them. Therefore, it is

apparent that the sellers clearly considered the transaction as a concluded one.

45. When the sellers and purchasers under the Agreement to Sell never treated the same as being cancelled, and where the sellers, including the mother of the appellant herein, have not asserted that any sale consideration remained due, the appellant cannot contend that the Agreement to Sell stood cancelled. In the garb of stepping into the shoes of her mother, who was one of the original sellers, the appellant cannot seek to turn the clock back and challenge a transaction which to the understanding of all the signatories to the Agreement to Sell and GPA, had duly concluded/affirmed, and further been reaffirmed by the conduct of all the parties.

46. Thus, the bare contention of the appellant, unsupported by any evidence, after a passage of 11 years, that the Agreement to Sell stood cancelled, has to be necessarily rejected.

b. <u>Plea regarding payment of balance sale consideration raised by appellant viz.-a-viz. plea of oral understanding raised by respondent nos. 1 to 8/purchasers</u>

47. The next question which arises for consideration before this Court is as to whether it has been established that the balance amount towards the sale consideration under the Agreement to Sell, has not been paid by the purchasers, thereby, entitling the appellant to any relief.

48. With regard to the present issue, it is the stand of the purchasers, that the parties had arrived at an oral understanding that the purchasers shall take all steps required to recover the possession of the tenanted portion of the suit property from the tenants, and any payments made by the purchasers to the

tenants in this regard, shall be adjusted towards the payment of balance sale consideration.

49. In contrast, the appellant has contended that there was no oral understanding between the sellers and the purchasers, and the receipts dated 01st August, 1989 and 03rd August, 1989 categorically record that the balance sale consideration was payable at the time of registration of Sale Deed.

50. Rebutting the same, respondent nos. 1 to 8 have asserted that the oral understanding could not be recorded under the Agreement to Sell, the GPA or the payment receipts, since the exact amount required to be paid to the tenants for vacating the suit property could not have been contemplated by the parties at the time of execution of these documents.

51. In essence, the issue before this Court is whether there existed an oral understanding between the sellers and the purchasers, with respect to adjusting the payments made to the tenants against the balance sale consideration.

52. In this regard, law is settled that whether there existed an oral understanding or not is a question of fact, and has to be determined in the facts and circumstances of each individual case. Thus, in the case of ***Brij Mohan and Others Versus Sugra Begum and Others***[6], it has been held as follows:

> *"xxx xxx xxx*
>
> ***20.*** *We have given our careful consideration to the arguments advanced by learned counsel for the parties and have thoroughly perused the record. We agree with the contention of the learned counsel for the appellants to the extent that there is no requirement of law that an agreement or contract of sale of immovable property should only be in writing.* ***<u>However, in a case where the plaintiffs come forward to seek a</u>***

[6](1990) 4 SCC 147.

decree for specific performance of contract of sale of immovable property on the basis of an oral agreement alone, heavy burden lies on the plaintiffs to prove that there was consensus ad idem between the parties for a concluded oral agreement for sale of immovable property. Whether there was such a concluded oral contract or not would be a question of fact to be determined in the facts and circumstances of each individual case. It has to be established by the plaintiffs that vital and fundamental terms for sale of immovable property were concluded between the parties orally and a written agreement if any to be executed subsequently would only be a formal agreement incorporating such terms which had already been settled and concluded in the oral agreement.

xxx xxx xxx"

(Emphasis Supplied)

53. In order to prove the existence of the oral understanding between the sellers and the purchasers, *DW-1*, i.e., Shri U.S. Sitani in his Evidence Affidavit, has deposed as under:

"xxx xxx xxx

10. The receipt dated 03.08.1989 further states that the balance sale consideration shall be paid at the time of registration of sale deed, and that an irrevocable power of attorney in favour of the Deponent stands executed. Vide the Agreement to Sell, it was agreed between the parties that the purchaser i.e. the Defendants would pay another sum of Rs. 62,40,000/-and vacant physical possession was to be delivered subsequent to payment of the said sum. ***However, at the stage of issuance of the receipt dated 03.08.1989, the new understanding that was arrived at between the parties was that any payments made by the purchasers to the tenants, for having the property vacated, and/ or other payments made by the purchasers, for or on behalf of the sellers, to statutory authorities such as L&DO etc., would be adjusted against the final sale consideration payable to the sellers. That is the reason why, although the said sum of Rs. 62.40 lakhs was not as yet received by the sellers, vide the receipt dated 03.08.1989, the possession was officially transferred on the said date.As on 03.08.1989, the clear understanding between the parties was that any further consideration was payable to the sellers, only subject to, and after adjusting payments made towards the tenant and/ or other payments made on behalf of the sellers to statutory authorities such as L&DO****. In view of the fact that* ***the exact amounts which the purchasers may be required to pay on behalf of the sellers was not***

> ***known on 03.08.1989, the balance sale consideration remaining payable was not specified****. It is for this reason that the receipt also notices that the Agreement to sell dated 24.01.1989 stands modified, to the extent that possession stands transferred. This understanding is also clear from a reading of the General Power of Attorney executed on the same date (03.08.1989) which virtually transferred all the rights qua the property to the Defendant Nos. 1-8.*
>
> *xxx xxx xxx*
>
> *13. That* ***thereafter, the Defendants no. 1 to 8, on 24.02.1990 got the physical vacant possession of the tenanted portion of the suit property from M/s. Bhardwaj Bhardwaj and Associates (i.e. the tenants) against a payment of Rs. 25,00,000 and Rs. 20,00,000 for the ground and first floor of the suit property respectively. That the said possession w/ taken from the tenants under two separate receipts, both dt. 24.02.1990. The said receipts are Exhibited as DW-1/11 and DW-1/12 respectively****.*
>
> *xxx xxx xxx"*
>
> *(Emphasis Supplied)*

54. As per the aforesaid deposition, the oral understanding was arrived at the time of the receipt dated 03rd August, 1989, whereby, any payments made by the purchasers to the tenants for having the suit property vacated, would be adjusted against the final sale consideration payable to the sellers. Thus, as per the case put forth by the purchasers, there was a clear understanding that any further consideration would be payable to the sellers, only after adjusting the payments made by the purchasers to the tenants and to statutory authorities such as L&DO. Since the exact amount which the purchasers would have been required to pay in this regard was not known, the exact amount of sale consideration remaining payable, was not specified in the receipt dated 03rd August, 1989.

55. Further, the statement of *DW-1* during his cross-examination dated 10th September, 2018, is reproduced as under:

"xxx xxx xxx

Q Who proposed the new understanding as mentioned in para no. 10 of your affidavit?

Ans. All the parties jointly proposed the same.

Q Why did the need for arriving at such understanding arise?

Ans. After entering into agreement to sell, it was becoming difficult to get the property vacated from the tenant and at that juncture the vendors had given me the powers by executing a GPA for removing the tenant and all the payments made to the tenants were agreed to be adjusted in the amount to be paid to the vendors.

It is wrong to suggest that I am deposing falsely in respect of the aforesaid answer or that vendors had never agreed to adjust any payment made to the tenants against the sale consideration amount.

No new documents or permission was executed or asked by me to give in writing permission with respect to new understanding apart from what is mentioned in the GPA which declared me the owner of the property.

xxx xxx xxx"

56. Perusal of the cross-examination clearly shows that the testimony of the *DW-1* remained unshaken during his cross-examination. This Court

further notes that none of the sellers who were alive at that time, i.e., Shri Rajiv Luthra and Shri Sanjeev Sethi entered the witness box to controvert the testimony of *DW-1*, i.e., Shri U.S. Sitani with respect to the oral understanding.

57. Further, it is to be noted that Clause 4 of the Agreement to Sell states that the sellers had to deliver possession of the suit property to the purchasers against the payment of Rs. 62.40 Lacs and call upon the tenants to attorn to the purchasers. This Court finds force in the contention of the respondent nos. 1 to 8 that although the entire sum of Rs. 62.40 Lacs had not been received by the sellers as on 03rd August, 1989, the sellers executed the receipt dated 03rd August, 1989, and transferred the vacant physical possession of the self-occupied portion and the symbolic possession of the tenanted portion of the suit property to the purchasers, in *lieu* of the oral understanding between the parties, as aforesaid.

58. Had there been no such oral understanding, there would have been no occasion for the sellers to transfer the possession of the suit property to the purchasers, and modify the Agreement to sell to such extent.

59. This Court also notes that the sellers executed the GPA on 03rd August, 1989 in favor of the respondent no. 7. The appellant in her Evidence Affidavit has categorically admitted that the GPA, marked as *Ex. PW-1/4*, had been executed to facilitate the handing over of the possession of the suit property to the purchasers, respondent nos. 1 to 8 herein, in terms of Clause 4 of the Agreement to Sell. The relevant portion of the Evidence Affidavit of the appellant herein, is reproduced as under:

"xxx xxx xxx

12. I say that the ground and first floor portions of the said property were in possession of tenants at the relevant time. As per the agreement to sell dated 24.10.1989 executed between the parties the sellers were to deliver possession of self occupied portion and symbolic possession of the rented portion to the purchaser. To facilitate handing over possession of the property to the Defendant no. 1 to 6 in terms of the clause 4 of the agreement to sell, I say that the joint owners of the property gave a power of attorney in favour of the representatives of Defendant No. 1 to 6 to take appropriate action for getting back possession of the said premises. The said attorney was not given in furtherance of any understanding as alleged by Defendants 1-8 in their written statement. The GPA is exhibited herewith and marked as **Exhibit PW 1/4.** I say that on the strength of the said power of attorney the representatives of Defendant no. 1 to 6 got the premises vacated from the said tenants and as agents of the then owners have occupied the said premises. I say that the second floor of the property was in possession of the joint owners of the property and none of the joint owners were residing therein. I say that the Defendants 1 to 7 have also started using the said portion of the premises without any authorization from the then joint owners.

xxx xxx xxx"

60. A perusal of the GPA shows that wide sweeping powers were conferred by the sellers in favor of the respondent no. 7, such as to carry construction, to create lease, execute sale agreements, to deal with statutory authorities with respect to the suit property, etc. Had there been no oral understanding between the sellers and the purchasers, there would have been no occasion for the sellers to grant such wide sweeping powers to respondent no. 7 under the GPA, especially, when allegedly, almost half of the sale consideration remained pending. In this regard, some important authorizations given under the GPA dated 03rd August, 1989, as taken note of by the learned Trial Court in paragraph 27 of the impugned judgment, are reproduced as under:

"xxx xxx xxx

27. Alongwith this receipt, an irrevocable registered GPA was also executed on same date. Some important authorizations which were given in the GPA are as under:-

28. *"2. To carry out construction, reconstruction, additions, alterations either after demolition or otherwise over the said plot, engage any contractors, architects, labour sub-contractor, workmen, electricians, plumber, sanitary engineers, structural engineer, draftsman and any other person(s) for completion of the construction over the said property.*

3. To apply and obtain any extension for period of construction before the Municipal Authority and for revalidation of plans, to sign and submit any plans for additions, alterations or revised plans, to apply and obtain form 'C' from 'D' severage connection, completion, to pay any composition compounding fee, betterment charges, to get any unauthorised construction regularised, to furnish any indemnity, guarantees, security bond, security.

7. To create leases, transferable, heritable licences, to receive consideration, premium, rents, licence fee, issue receipts, give discharge thereof, to sign and execute any rent note, to induct or reject tenants, and to appear before any concerned authority for such eviction;

8. To sell to sign and execute any agreement to sell, flat-buyer agreement, deed of sale, receive earnest money, part payment, consideration, advance amount, appear and act before the Registrar of Assurances or any other Registrar which may be appointed under the Delhi Apartment Ownership Act, to admit execution and receipt of consideration and get the said documents registered, for the said purpose to obtain any requisite permission or sanction, income-tax clearance, to engage any Chartered Accountant and to apply for permission to sell from the President of India/Lessor of land/L&D.O., Competent Authority;

xxx xxx xxx"

61. It is in line with the oral understanding that the purchasers paid a sum of Rs. 45 Lacs to the tenants on 24th February, 1990, by way of multiple Demand Drafts as recorded in the two receipts dated 24th February, 1990, acknowledging payments of Rs. 25 Lacs and Rs. 20 Lacs, and marked as *Ex.DW-1/11* and *Ex.DW-1/12*, respectively.

62. It is undisputed that the tenants handed over possession of the suit premises under their possession to the purchasers as far back as the year 1989. The purchasers have continued with the possession of the entire suit property even at the time of filing of the suit in the present case in the year 1999, and till date. There is nothing on record that there was any protest by the sellers as to why the tenants had handed over possession to the purchasers. Moreover, even the appellant has admitted that the purchasers/respondent nos. 1 to 8, have not taken the possession forcibly. Further, the purchasers had been paying the statutory dues with respect to the suit property.

63. This Court also notes that the sellers accepted Demand Draft on 25th April, 1990 for a sum of Rs. 8,23,646.72/- from the purchasers, and submitted the same to the L&DO for revocation of re-entry proceedings. This conduct of the sellers in accepting the money from the purchasers for the purpose of depositing the same with the L&DO, is again in line with the case put forward by the purchasers as regards an oral understanding between the parties regarding payments to be made to the tenants and statutory authorities, as set off against the balance sale consideration. The conduct of the sellers in transferring possession, allowing the tenants to hand over the vacant possession of the part of the premises occupied by them to the purchasers, taking steps for revocation of the re-entry proceedings, and not

raising any dispute or demand for any pending amount, makes it evident that they were satisfied with the consideration they received and accepted it as full payment with respect to the suit property.

64. Reference may also be made to the judgment in the case of ***S.V. Narayanaswamy Versus Smt. Savitharamma, since deceased by her LRs. and Others***[7], wherein, it has been held that the oral agreement stood proved on the basis of the possession of the property in question by the appellant therein and documents regarding payment of statutory dues, etc. Thus, it was held as follows:

> *"xxx xxx xxx*
>
> ***92.*** *There is no merit in the contention that the appellant has not pleaded oral sale agreement. The appellant has pleaded all the ingredients of the oral sale agreement i.e., the date of sale agreement, the property agreed to be sold, the consideration, the amount paid, the mode of payment, delivery of possession, putting up of construction, demand to execute the sale deed, readiness and willingness to perform his part of the contract. Therefore, there is no merit in the contention that oral sale agreement is not pleaded. The pleadings conform to form No. 47 and 48 of 1st schedule to CPC and Section 16 of the Specific Relief Act.*
>
> ***93. The respondents contend that they are in possession and enjoyment of the suit schedule property. They have produced Ex. P1 khatha certificate, Ex. P2 assessment register extract, Ex. P3 death certificate of Venkatanarasimhaiah, Ex. P4 certified copy of the lease cum sale agreement, Ex. P5 certified copy of the sale deed, Ex.P6 copy of legal notice, exhibits P7 to P13, P15 and P16 tax paid receipts, Ex. P14 copy of the order in disciplinary proceedings against the appellant and others. Ex. P17 is the certified copy of the order passed on issue No. 4. Ex. P18 is the certified copy of the decree in O.S. No. 1920/1989****.*
>
> ***94. The appellant contends that he was put in possession of the suit schedule property pursuant to the sale agreement dated 17.12.79 and the documents were handed over to him. The appellant has produced possession certificate and the documents which were handed over to***

[7] 2013 SCC OnLine Kar 7650.

him. PW.1 has deposed that the original possession certificate, lease cum sale agreement and other documents pertaining to the suit schedule property were given to the appellant as he was a GPA holder. DW.1 and DW.2 have deposed that the documents were handed over to the appellant on the date of sale agreement i.e., on 17.12.1979. There is no mention in the power of attorney Ex. D1 that the documents were handed over to the appellant at the time of executing Ex. D1 power of attorney. Therefore, it is clear, the documents were handed over pursuant to the sale agreement dated 17.12.1979*.*

95. *Thereafter, the appellant has obtained sanctioned plan as per Ex. D.9. The documents produced by the appellant i.e., exhibits D.36 to D.67 clearly show that the appellant has purchased construction material and spent considerable amount to put up construction. Exhibits D.36 to D.67 are receipts and cash bills for having purchased cement, steel, boulders, stones, sand, jelly, bricks, tiles, borewell and labour charges. The respondents have pleaded that the construction was put up by late Venkatanarasimhaiah. PW. 1 has deposed that they have put up construction in the suit property at their cost. The respondents have not produced anything to show that the respondents or late Venkatanarasimhaiah had put up construction or spent money to put up construction or participated in the construction work. Therefore, it is clear, the construction was put up by the appellant and he has spent money. The claim of the respondents that they have put up construction is baseless and cannot be accepted.* ***The documents produced by the appellant and the oral evidence on record clearly show that the appellant was put in possession of the property by virtue of the oral sale agreement dated 17.12.79 and he has put up construction by spending considerable amount. The contention that the respondents are in possession of the suit schedule property cannot be accepted****.*

96. *It is contended that Ex. D1 GPA dated 3.2.1982 was executed by A. Venkatanarasimhaiah in favour of the appellant only for the purpose of putting up construction. The appellant has acted only as an agent. The GPA is not coupled with interest. It is determined by death. Reliance was placed on the decision reported in 1993 (3) Kar. LJ page 331.*

97. ***In Mohammed alias Podiya Beary v. AC, Puttur [1993 (3) Kar. LJ page 331], this Court has held, a power of attorney is an authority whereby one is authorised to act for another. Where all the rights and liabilities under a contract were made over by a power of attorney, such power is an agency coupled with interest. An authority***

coupled with interest is not determined by death, insanity or bankruptcy of the principal. Power of attorney is ordinarily construed strictly and general powers are interpreted in the light of the special powers.

xxx xxx xxx

99. It is clear from the terms of GPA, the appellant has been authorised to put up construction, to obtain license, to pay tax, to apply for necessary permits, to get cement, steel etc., to enter into an agreement or agreements to lease out, to realise rent, to manage, supervise and direct construction, to pay after construction house tax, light and water charges, to attend repairs or alteration, and to defend all actions. Clause No. 15 of the GPA provides that the executant i.e., Venkatanarasimhaiah shall not revoke the GPA until such time that his attorney voluntarily seeks for such revocation. It is clear, the GPA cannot be revoked until such time the appellant seeks for its revocation. Therefore, it cannot be said that the GPA was given only for the purpose of putting up construction. The GPA authorises the appellant to enter into agreement, to lease out the property, to attend to repairs and alteration, to pay tax and other charges after construction. The GPA cannot be revoked until such time the appellant voluntarily seeks for its revocation. Therefore, the contention of the respondents that the GPA was given only for the purpose of construction cannot be accepted and accordingly, it is rejected*.***

100. The appellant is not claiming possession based on the GPA. The appellant claims possession based on the oral sale agreement dated 17.12.1979. According to the appellant, he was put in possession on 17.12.1979 and documents were handed over. The appellant has produced the documents handed over to him. DWs. 1 to 3 have deposed regarding the oral sale agreement. The evidence of DWs. 1 to 3 coupled with admission of PW-1 clearly show that there was oral sale agreement dated 17.12.1979 between the appellant and Venkatanarasimhaiah and the entire sale consideration amount of Rs. 16,000/- has been paid. The respondents contend that they are in possession of the suit schedule property. But, the documents produced by the appellant clearly show that he is in possession of the suit schedule property and he has put up construction by spending considerable amount.

101. *Ex. D2 is the copy of the letter dated 22.4.1986 written by the 2nd respondent to the Spl. D.C., Urban Ceiling Bangalore requesting to permit to sell the site. Ex.D2(a) is the signature of the 2nd respondent. Ex.D3 is the xerox of the notice under Section 26 of the Urban Ceiling Regulation Act, 1976. Ex. D4 is the copy of the affidavit*

of A. Venkatanarasimhaiah in support of Ex. D3. Ex. D5 is the endorsement. PW-1, in his evidence has denied his signature in Ex. D2. DW-1 has deposed that Ex. D2 was handed over to him by the 2nd respondent and he has identified the signature of the 2nd respondent in Ex. D2 as Ex. D2(a). Ex. D3 and Ex. D4 are not authenticated documents. Ex. D5 is the endorsement dated 25.4.1986 stating that notice issued under ULC(2) SR.607/85-86 dated 27.2.1986 is cancelled. Ex. D2 is the copy of the letter sent to the Urban Ceiling Authority. It bears the signature of the 2nd respondent. The 2nd respondent i.e., PW.1 has denied his signature in Ex.D2 evasively stating that Ex. D2(a) is not his signature because in Ex. D2 the appellant is shown as his uncle, but, actually the appellant is not his uncle. He has stated, he does not know whether his father had filed application seeking permission to sell the property. He does not remember whether the document shown to him is the endorsement received by him from the Spl. D.C. ULC, Bangalore. Ex. D2 shows that request was made to the ULC, Authority, Bangalore to sell the property.

102. *Exhibits D21, D22, D23, D25, D26 and D27 are copies of the statements of assets and liabilities for the years 1983, 1984, 1985, 1988 and 1989 submitted by the appellant to the concerned authority. In the said statements, the appellant has shown that the suit schedule property belongs to him. However, exhibits D21, D22, D23, D25, D26 and D27 are not authenticated documents. Therefore, they cannot be relied upon.*

103. *Exhibits D33, D34 and D35 are the letters addressed to the appellant. In exhibits D33 and D34 the address shown is No. 106, Koramangala, Bangalore, i.e., the suit schedule property.*

104. *Ex. D9 is the sanctioned plan obtained by the appellant. Ex. D11 is the cement allotment card. It is in the name of the appellant. Ex. D19 is cash memo for having purchased cement. Exhibits D36 to D67 are the receipts and cash bills. They show that the appellant has purchased the building material like cement, steel, boulders, stones, sand, jelly, bricks, tiles and dug borewell and paid labour charges.*

105. From the evidence on record, it is clear, that there was an oral sale agreement between the appellant and A. Venkatanarasimhaiah on 17.12.1979. Thereafter, Ex. D1 GPA has been executed on 3.2.1982. The appellant has put up construction after obtaining sanctioned plan. The amount is spent by the appellant. The sale consideration amount except Rs. 1,500/- has been paid through cheque. A sum of Rs. 1,500/- has been paid in cash. Thus, the entire sale consideration amount has been paid. The appellant has proved

oral sale agreement dated 17.12.1979. Point No. 1 answered accordingly holding that the appellant has proved oral sale agreement dated 17.12.1979.

xxx xxx xxx"

(Emphasis Supplied)

65. It is also pertinent to note that while rejecting the application filed by the appellant herein, seeking a judgment under Order XII Rule 6 of the CPC, this Court *vide* judgment dated 08th November, 2011, had observed as under:

"xxx xxx xxx

15. ***It is not in dispute that payments have been made to the tenants by cheque. It is also not in dispute that tenants handed over possession to the defendants as far back from the year 1989 till the date of filing of the present suit i.e. in the year 2008. There was no protest on the part of the plaintiffs as to why tenants had handed over possession to the defendants nor any steps were taken by the plaintiffs to safeguard their rights****.*

16. ***I have also carefully perused the General Power of Attorney, which has been placed on record, which would prima facie show that wide and extensive powers have been given to the defendants and plaintiffs had for all intents and purposes severed all their rights with respect to the suit property. The powers include the right to reconstruct and right to sell. Prima facie reading of the General Power of Attorney would show that the entire sale consideration has been paid or else no ordinary prudent man would execute such a Power of Attorney. This is also to be considered in the light of the fact that plaintiffs considered it appropriate to hand over possession of the suit property to the defendants and in case less than 50% of the amount has been received by them there would have been no occasion either to have executed such a Power of Attorney with such sweeping powers or to put the defendants in possession of the suit property. There is also no explanation much less a reasonable explanation as to why the plaintiffs allowed the defendants to take possession of the property from the tenants in case the sale consideration was not paid. It has also not been explained as to why during the life time of the original sellers no action was initiated by them or the plaintiffs as according to the plaintiffs more than 50% of the sale consideration was not paid to them.*** *Applying the law laid down by the Apex Court to the facts of this case and having regard to the stand taken by the defendants in the written statement it cannot be said that defendants have admitted that they have not paid the entire*

sale consideration to the plaintiffs. ***It is also not in dispute that besides payments to the tenants, all of which fortunately have been paid by means of cheques, the defendants have also paid a sum of Rs.8.23 lakhs to L&DO to enable L&DO to withdraw the notice of re-entry.*** *The judgment, sought to be relied upon by learned senior counsel for the plaintiffs in the case of* ***FGP Limited*** *(supra), is not applicable to the facts of the present case as in the present matter as per the defendants the entire sale consideration stands paid by them. The question, whether the defendants were authorized to make the payments or not, can only be decided on the basis of evidence.*

xxx xxx xxx"

(Emphasis Supplied)

66. In concurrence with the aforesaid findings of the learned Single Judge, the Division Bench of this Court *vide* judgment dated 30th July, 2012 in *FAO(OS) 139/2012*, upheld the judgment dated 08th November, 2011 in the following manner:

"xxx xxx xxx

2. The agreement to sell records that the six companies who were acting through their Directors U.S.Sitani and Leela Sitani, impleaded as defendants No.7 and 8 in the suit, would pay ₹80,70,000/- as sale consideration for sale of the house. It records Nirmal Krishan, Rajiv Luthra and Sanjiv Sethi having received ₹10,50,000/- and envisages that upon clearance being obtained under the Income Tax Act within six months the six companies would pay another sum of ₹62,40,000/- and the balance sum of ₹7,80,000/- would be paid when sale deed would be executed. It stands further recorded that simultaneously upon receipt of ₹62,40,000/- the sellers shall deliver vacant physical possession of such portion of the house which was self-occupied and symbolic possession of the rented portion to the buyers. The document records that the property had been re-entered by the lessor and envisages the purchasers to have the re-entry cancelled and such amount as was payable to the lessor would be paid by the purchasers, but the samewould be adjustable from the amount payable to the sellers.

3. ***On August 03, 1989 Nirmal Krishan, Sanjiv Sethi and Rajiv Luthra executed a General Power of Attorney in favour of U.S.Sitani, describing him as the nominee of the six purchaser companies; and under the General Power of Attorney empowered him to deal with the property and do acts, which an owner could***

perform i.e. demolish the existing construction and reconstruct a building, let out the property and even sell the same. And on the same day handed over possession of such portions of the property as were with Nirmal Krishan, Sanjiv Sethi and Rajiv Luthra and wrote to the tenant to attorn to the purchasers. Thereafter the six companies paid money to the tenant to vacate such portions of the property as were tenanted, and in all paid ₹45,00,000/- to the tenant.

4. ***Since August 03, 1989 possession of the entire property remained with the purchasers, who paid ₹8,23,646.72 to the lessor for the re-entry to be revoked.***

5. ***Noting that the agreed sale consideration was ₹80,70,000/- and out of which as per the agreement to sell ₹10,50,000/- was received by the sellers, the stage for paying further sum of ₹62,40,000/- was within six months of the execution of the agreement to sell on January 24, 1989 and that left balance sale consideration in sum of ₹7,80,000/-, to be paid, but from which amount such sum which the purchasers had to pay to the lessor for revocation of the re-entry notice had to be deducted, suffice would it be to state that if the purchasers would have paid ₹62,40,000/-, no further amount was payable to the sellers; rather it was the sellers who would have to make a refund to the buyers inasmuch as the buyers paid ₹8,23,646.72 to the lessor****.*

6. ***Everything remained quiet till the appellants, Sunita Sinha and her brother Arvind Krishan filed a suit on September 04, 2002 to restrain defendants No.1 to 8 from using the property and for the decree of possession.***

7. In the written statement filed by defendants No.1 to 8, who we note are the six purchasers companies and their two directors who represented the companies, it was pleaded that the six companies are the owners of the property having paid full sale consideration for the same. It was pleaded that the suit filed in the year 2002 was highly belated and was barred by limitation.

8. Now, as per the agreement to sell, the sale consideration in sum of ₹80,70,000/- had to be paid at three stages. Firstly when the agreement to sell was executed. At this stage, ₹10,50,000/- was to be paid; and was paid. The second stage was to pay ₹62,40,000/- within six months. That left ₹7,80,000/- to be paid when sale deed was to be executed, but from which such amount as was paid by the buyers to the lessor for re-entry to be revoked had to be deducted. In the written statement filed it was pleaded that the entire sale consideration was paid, and suffice would it be to state that since ₹8,23,646.72 was admittedly paid by the buyers to the lessor and further since admittedly ₹10,50,000/- was paid to the sellers when the agreement to

sell was executed, the defence would succeed if the buyers could prove having paid ₹62,40,000/- to the sellers, in respect whereof it has been pleaded in the written statement that entire sale consideration was paid.

9. It may be true that there is no specific plea in the written statement as to when ₹62,40,000/- was paid; the general plea taken is that the entire sale consideration was paid, and it is equally true that no documentary evidence by means of a receipt, acknowledgement or payment by a mode under which there would be proof that ₹62,40,000/- flowed from the coffers of the buyers to those of the sellers has been filed, ***but one fact of importance needs to be noted i.e. the agreement to sell dated January 24, 1989 recording that ₹62,40,000/- would be paid within six months and simultaneously therewith vacant possession of such portion of the property as was with the sellers would be parted with to the buyers and symbolic possession of the rest would be given, and that just at the expiry of six months of January 24, 1989 i.e. on August 03, 1989 possession of such portions as were with the sellers was handed over to the buyers as also symbolic possession of the tenanted portion was handed over.***

10. The appellants i.e. the plaintiffs filed IA No.3759/2010 under Order XII Rule 6 CPC praying for a decree on admission in which it was pleaded that the defendants have admitted the agreement to sell in question; have admitted having paid ₹10,50,000/- out of the agreed sale consideration in sum of ₹80,70,000/- and that in the absence of a specific pleading and further in the absence of any proof that the defendants paid ₹62,40,000/-, it is apparent that the purchasers have not acquired any title to the property and thus a decree should follow.

11. Dismissing the application the learned Single Judge has held that a suit can be decreed under Order XII Rule 6 CPC if there is a clear admission, and none has been found.

12. Suffice would it be for us to note that an admission by a party may be relied upon by the opposite party through the medium of a pleading or even otherwise. But the law is clear, the admission must be clear and unequivocal.

13. We do not find any admission made by the defendants which warrants a decree to follow. It may be true that the defendants have not pleaded the date when they paid ₹62,40,000/- to the sellers and further have no documentary proof to sustain said fact. ***But conduct of a party is also relevant and admissible evidence. The plaintiffs will have to explain the conduct of their mother along with the other two co-owners handing over vacant possession of such portions of the suit property as were with them to the buyers as also they giving symbolic possession of the tenanted portion and permitting the***

> ***purchasers to pay money to the tenant for the tenant to vacate the tenanted portion of the property. The plaintiffs would also have to explain the conduct of their mother and the other two co-owners executing a General Power of Attorney in favour of a director of the six purchaser companies and authorizing him thereunder to sell the property. The power of attorney has been executed just after six months of the date when the agreement to sell was executed, and relevant would it be to state that it is the case of the defendants that when the power of attorney was executed on August 03, 1989 physical possession of the vacant portion and symbolic possession of the tenanted portion was delivered. This is a matter of trial and surely a matter of a good argument that from the fact that the agreement to sell envisages ₹62,40,000/- to be further paid and simultaneously possession handed over; from the fact that possession was handed over would be proof that ₹62,40,000/- was paid.The ominous silence for over 10 years has also to be explained, and who says that silence has no sound****, we remind ourselves of the famous song : 'The Sound of Silence' by Simon & Garfunkel.*
>
> *14.* ***On the subject of possession, notwithstanding there being no sale deed executed in favour of the buyers, Section 53A of the Transfer of Property Act needs to be noted. Possession by a purchaser can be successfully defended against even the title holder of a property upon proof that the possession is under an agreement to sell and sale consideration has been paid.***
>
> *xxx xxx xxx"*
>
> *(Emphasis Supplied)*

67. From the evidence and documents on record, the conclusion is inescapable that the appellant has been unable to explain the conduct of her mother and the other two sellers in handing over possession of the suit property, and authorizing respondent no. 7 under the GPA to sell the suit property, and the silence and inaction of the sellers in raising any dispute, whatsoever.

68. Accordingly, this Court is of the considered opinion that the fact of oral understanding as pleaded by the purchasers/respondent nos. 1 to 8, stands proved by the evidence on record and the conduct of the parties. The appellant has been unable to rebut the said plea of the purchasers.

Pertinently, though, the purchasers set up the defence of oral understanding, the same was not rebutted by the sellers by entering into the witness box and deposing to the contrary, when two of the sellers, were defendants and party to the suit.

69. It is a settled legal proposition that the Courts in a civil trial apply a standard of proof governed by *preponderance of probabilities*. Proof of a fact depends on the probability of its existence. The Court would balance the conflicting probabilities concerning a fact situation. Upon weighing the various probabilities, the Court would come to a conclusion as regards preponderance in favour of existence of a particular fact. In this regard, reference may be made to the judgment in the case of ***M. Siddiq (Ram Janmabhumi Temple Case) Versus Mahant Suresh Das and Others***[8], wherein, while delving on the aspect of *preponderance of probabilities*, it was held as follows:

> *"xxx xxx xxx*
>
> ***The standard of proof***
>
> ***720. <u>The court in a civil trial applies a standard of proof governed by a preponderance of probabilities. This standard is also described sometimes as a balance of probability or the preponderance of the evidence.</u>*** *Phipson on Evidence formulates the standard succinctly :* ***<u>If therefore, the evidence is such that the court can say "we think it more probable than not", the burden is discharged, but if the probabilities are equal, it is not.</u>*** *[Phipson on Evidence.] In Miller v. Minister of Pensions [Miller v. Minister of Pensions, (1947) 2 All ER 372],* ***<u>Lord Denning, J.</u>*** *(as the Master of Rolls then was)* ***<u>defined the doctrine of the balance or preponderance of probabilities in the following terms</u>*** *: (All ER p. 373 H)*
>
> > *"(1) ...* ***<u>It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect</u>***

[8](2020) 1 SCC 1.

the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence, "of course it is possible, but not in the least probable" the case is proved beyond reasonable doubt, but nothing short of that will suffice*."*

(emphasis supplied)

721. ***The law recognises that within the standard of preponderance of probabilities, there could be different degrees of probability.*** *This was succinctly summarised by Denning, L.J. in Bater v. Bater [Bater v. Bater, 1951 P 35 (CA)], where he formulated the principle thus: (p. 37)*

*"... **So also in civil cases, the case must be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter**."*

(emphasis supplied)

722. *The definition of the expression "proved" in Section 3 of the Evidence Act is in the following terms:*

*"**3. … "Proved".—A fact is said to be proved when, after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists**."*

723. ***Proof of a fact depends upon the probability of its existence. The finding of the court must be based on****:*

723.1. ***The test of a prudent person, who acts under the supposition that a fact exists.***

723.2. *In the context and circumstances of a particular case.*

724. *Analysing this, Y.V. Chandrachud, J. (as the learned Chief Justice then was) in N.G. Dastane v. S. Dastane [N.G. Dastane v. S. Dastane, (1975) 2 SCC 326] held : (SCC pp. 335-36, para 24)*

*"**The belief regarding the existence of a fact may thus be founded on a balance of probabilities. A prudent man faced with conflicting probabilities concerning a fact situation will act on the supposition that the fact exists, if on weighing the various probabilities he finds that the preponderance is in favour of the existence of the particular fact. As a prudent***

> ***man, so the court applies this test for finding whether a fact in issue can be said to be proved. The first step in this process is to fix the probabilities, the second to weigh them, though the two may often intermingle. The impossible is weeded out at the first stage, the improbable at the second****. Within the wide range of probabilities the court has often a difficult choice to make but it is this choice which ultimately determines where the preponderance of probabilities lies. Important issues like those which affect the status of parties demand a closer scrutiny than those like the loan on a promissory note:* ***'the nature and gravity of an issue necessarily determines the manner of attaining reasonable satisfaction of the truth of the issue*** *[Per Dixon, J. in Wright v. Wright, (1948) 77 CLR 191 (Aust).] , CLR at p. 210'; or as said by Lord Denning,* ***'the degree of probability depends on the subject-matter'****. In proportion as the offence is grave, so ought the proof to be clear [Blyth v. Blyth, 1966 AC 643 : (1966) 2 WLR 634 : (1966) 1 All ER 524 (HL)], All ER at p. 536'.* ***But whether the issue is one of cruelty or of a loan on a pronote, the test to apply is whether on a preponderance of probabilities the relevant fact is proved. In civil cases this, normally, is the standard of proof to apply for finding whether the burden of proof is discharged****."*
>
> *(emphasis supplied)*
>
> ***725. The Court recognised that within the standard of preponderance of probabilities, the degree of probability is based on the subject-matter involved.***
>
> *xxx xxx xxx"*
>
> *(Emphasis Supplied)*

70. As noted hereinabove, the case set up by the purchasers regarding oral agreement has not been controverted by the original sellers, i.e., respondent nos. 9 and 10 herein, and they never entered into the witness box before the Trial Court to dispute the assertions regarding oral agreement by the purchasers. In this regard, it would be fruitful to refer to the judgment in the case of ***Chowdamma (D) by LR and Another Versus Venkatappa (D) by LRs and Another***[9],wherein it has been held as follows:

[9]2025 SCC OnLine SC 1814.

"xxx xxx xxx

54. *This principle is neither novel nor uncertain. This Court in Vidhyadhar v. Manikrao [1999 3 SCC 573] held thus:*

> *"**17. <u>Where a party to the suit does not appear in 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</u>** ...."*

55. *The present case is a compelling invocation of the above principle. Defendant No. 1, though physically present in the Court during the trial, abstained from stepping into the witness box to rebut the plaintiffs' assertions — assertions that strike at the very core of the dispute. In the absence of cogent medical evidence to support her alleged incapacity, her abstention from the witness box constitutes deliberate circumvention of the evidentiary burden resting upon her.*

56. *In the present factual matrix, the adverse presumption under Section 114(g) of the Evidence Act is inevitable.*

57. *This Court cannot overlook that defendant No. 1, while central to the controversy, chose not only to abstain from entering the witness box but also wilfully bypassed the statutory remedy available to those pleading physical incapacity.*

58. <u>Order XXVI, Rule 1 of the Civil Procedure Code, 1908, permits the recording of evidence through a commission in cases of age or infirmity. Yet, no application was filed invoking the said provision, nor was any explanation tendered for its non-invocation. In a dispute where the foundational facts lie squarely within her exclusive knowledge, such omission assumes critical significance. Her refusal to depose, despite the existence of a procedural safeguard specifically tailored to her alleged condition, cannot be dismissed as inadvertent</u>. <u>Rather, it reflects a conscious evasion from the evidentiary process, compounded by her unexplained failure to avail an accessible legal alternative, is not a neutral act. It constitutes wilful shielding from judicial scrutiny.</u>

59. <u>A Court of law cannot offer refuge to studied silence where a duty to disclose exists.</u> *The plaintiffs anchored their claim in measured and unwavering testimony of P.W.2 (Hanumanthappa), an account rooted in personal knowledge and long-standing familiarity, which withstood the rigours of cross-examination. His evidence, unshaken and consistent, found further corroboration in the genealogical chart presented by the plaintiffs. It, therefore, stands established that the plaintiffs have discharged the evidentiary burden imposed upon them by law. In contrast, the defendants, bereft of probative material or candour, resorted solely to denials. When*

measured against the touchstone of preponderance of probabilities, the scales unambiguously tilt in favour of the plaintiffs.

xxx xxx xxx"

(Emphasis Supplied)

71. Reference may also be made to the case of ***Heinz India Private Limited and Another Versus State of Uttar Pradesh and Others***[10], wherein, the Supreme Court dealt with the standard of proof in civil action and elucidated on the concept of standard of proof governed by *preponderance of probabilities*. Thus, it was held as follows:

"xxx xxx xxx

43. In England, the civil standard of proof is defined by Lord Denning in Miller v. Minister of Pensions *[(1947) 2 All ER 372]* ***thus****: (All ER p. 373 H)*

"(1) ... ***It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable,' the case is proved beyond reasonable doubt, but nothing short of that will suffice****."*

44. Three years later came Bater v. Bater *[1951 P 35 at p. 37 : (1950) 2 All ER 458 (CA)]* ***in which the civil standard of proof was to an extent modified, was seen by some jurists as somewhat confusing the concept so clearly stated in Miller case*** *[(1947) 2 All ER 372].* ***In Bater*** *[1951 P 35 at p. 37 : (1950) 2 All ER 458 (CA)]* ***the Court declared that neither civil nor criminal standard of proof was an absolute standard. A "civil case" may be proved by a preponderance of probability****, explained Denning, J.: (Bater case [1951 P 35 at p. 37: (1950) 2 All ER 458 (CA)], All ER p. 459)*

"... ***but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if***

[10](2012) 5 SCC 443.

> ***considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion."***
>
> ***45.*** *Then came Hornal v. Neuberger Products Ltd. [(1957) 1 QB 247 : (1956) 3 WLR 1034 : (1956) 3 All ER 970 (CA)] where the Court held that: (QB p. 247)*
>
> *"**In a civil action where fraud or other matter which is or may be a crime is alleged against a party or against persons not parties to the action, the standard of proof to be applied is that applicable in civil actions generally, namely, proof on the balance of probability, and not the higher standard of proof beyond all reasonable doubt required in criminal matters; but there is no absolute standard of proof, and no great gulf between proof in criminal and civil matters; for in all cases the degree of probability must be commensurate with the occasion and proportionate to the subject-matter. The elements of gravity of an issue are part of the range of circumstances which have to be weighed when deciding as to the balance of probabilities**."*
>
> *xxx xxx xxx"*
>
> *(Emphasis Supplied)*

72. It is also pertinent to refer to the definition of 'proved' as given in Section 3 of the Evidence Act, which deals with the interpretation clause. Thus, 'proved', has been defined in the following manner:

> *"**"Proved".**—**A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists**."*
>
> *(Emphasis Supplied)*

73. Thus, considering the oral and documentary evidence on record and by applying the standard of *preponderance of probabilities*, this Court is of the opinion that the purchasers have 'proved' that there existed an oral understanding between the sellers and the purchasers.

74. The contention of the appellant that the alleged payments by the purchasers/respondent nos. 1 to 8, to the tenants is hit by Sections 91 and 92 of Evidence Act, since the GPA as well as the receipt, although being subsequent documents to the alleged oral understanding, do not record anything about the oral understanding or about the payment to tenants to secure relinquishment of tenancy, is misplaced.

75. Section 92 of the Evidence Act provides that where the terms of the contract have been proved according to Section 91, no evidence of any oral agreement or statement shall be admitted for the purposes of contradicting, varying, adding to, or subtracting from its terms. The question that arises in the present appeal is whether the respondent nos. 1 to 8 were barred from proving the existence of an oral understanding between the sellers and purchasers under Section 92 of the Evidence Act.

76. In this regard, it would be apposite to refer to the provision of Section 92 of the Evidence Act and Provisos 2 and 6 to Section 92, which are relevant for the present case. The same are reproduced as under:

> *"92.* ***Exclusion of evidence of oral agreement****.—**When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms**:*
>
> *xxx xxx xxx*
>
> *Proviso (2) —**The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.***

xxx xxx xxx

*Proviso (6).—**Any fact may be proved which shows in what manner the language of a document is related to existing facts.***

xxx xxx xxx

(Emphasis Supplied)

77. Section 92 of Evidence Act provides that where the terms of a (i) contract, (ii) grant, (iii) or, other disposition of property, or (iv) a matter required to be reduced in the form of a document, are proved in accordance with Section 91 of Evidence Act, then evidence of any oral agreement to contradict, vary, add or subtract from the said terms, is barred.

78. Further, Proviso 2 of Section 92 carves an exception from the main principle under Section 92 of the Evidence Act. Proviso 2 provides that existence of any separate oral agreement can be proved, provided the document is silent on that matter, and there is no inconsistency with the terms of the document. In this regard, reference is made to the judgment in the case of ***K. Manoharan Versus T. Janaki Ammal***[11], wherein, it has been held as follows:

"xxx xxx xxx

*27. **When the terms of transaction which reduced into writing, it is not possible to lead evidence to contradict its terms in view of Section 91 of Indian Evidence Act. As per Section 92 of Indian Evidence Act, extrinsic parol evidence contradicting, varying adding to or subtracting from the terms of a solemn written instrument is inadmissible. This is because the parties have reduced into writing their agreement, it must be presumed that they have put into writing all that they considered necessary to give full expression to their meaning yard intention. As between parties to an instrument oral of intention is not admissible for the purpose either of construing deeds or of proving the intention of the parties.***

[11]2012 SCC OnLine Mad 1261.

28. ***Even though no extrinsic evidence is admissible in substitution for the written document, there are exceptions to the Rule in Section 92 of Indian, Evidence Act****. Proviso (2) to Section 92 of Indian Evidence Act reads as under:*

> *"Proviso (2).—* ***The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this Proviso applies, the Court shall have regard to the degree of formality of the document****."*

Thus as per Proviso (2) to Section 92 of Indian Evidence Act, if there is contemporaneous nor prior separate oral agreement as to any matter which is not inconsistent with its terms may be proved. The separate-agreement should be on a distinct collateral matter although it may form part of the same transactions, the test being that it should not vary or contradict the terms of the written contract*.*

29. In the light of the above principles, we need to analyse the evidence of DWs.1 & 2 and consider whether they would fall within the Proviso (2) to Section 92 of Indian Evidence Act. As pointed out earlier, DWs.1 & 2 have stated that at the time of entering into an Agreement of Sale (Ex.A1), parties have agreed that Plaintiff has to allot six plots and on that understanding; the price was reduced to Rs. 13,500/- per cent. On such agreement between the parties, it was agreed at the time of entering into Ex.A1-Agreement of Sale. Evidence adduced as to the oral agreement between the parties for allotting six plots to the Defendants 1 to 3 is no way contradicting, varying the terms of Ex.A1-Agreement of Sale. Therefore, the evidence adduced to establish the oral agreement between the parties to allot six plots to the Defendants 1 to 3 by the Plaintiff is admissible in evidence and not hit under Sections 91 & 92 of Indian Evidence Act.
xxx xxx xxx"

(Emphasis Supplied)

79. Thus, the ingredients for the applicability of Proviso 2 of Section 92 of Evidence Act, can be summed up as follows:

i. The separate oral agreement envisaged under Proviso 2 refers to a contemporaneous separate oral agreement.

ii. The separate oral agreement should relate to any matter on which the document is silent.

iii. The separate oral agreement should be on a distinct collateral matter, although it may form part of the same transaction.

iv. Oral agreement should not contradict or vary the terms of the written agreement.

v. The Court would have due regard to the degree of formality of the document in writing.

80. Thus, where the document in writing is of a lower degree of formality, i.e., it does not contain the entire agreement between the parties, but embodies only some of the conditions, then oral evidence to prove contemporaneous oral agreement is clearly admissible in evidence, provided it is not inconsistent with the written document.

81. If the document is a formal one, the presumption is that it incorporates the entire agreement between the parties, and therefore, oral evidence is excluded. If the document is informal, it need not contain all the terms agreed to between the parties, because by its very nature it is not supposed to be a document complete in all respects. Oral evidence can be led in such cases. Thus, spelling out the principles for proving oral agreement with regard to a written document, the Division Bench of the Patna High Court in the case of ***Rajendra Prasad Versus Gaya Prasad Sah***[12], has held as follows:

> *"xxx xxx xxx*
>
> ***17. <u>It is therefore obvious that where the document is silent the existence of any separate oral agreement in respect thereof, if not inconsistent with its term, may be given. It must be noted that in</u>***

[12]1975 SCC OnLine Pat 90.

considering the question of application of this proviso, the court has to keep regard to the degree of formality of the document itself. It is well settled that where the document is formal and if the matter in respect of which the evidence is sought to be adduced was a matter which necessarily would have been mentioned in the document, evidence in that regard shall not be allowed. If however the document is not formal and it need not have contained all the matters relating thereto and when the document is silent, in such cases it is open to the party to lead evidence in respect of the matter on which it is silent.

xxx xxx xxx

19. The principle underlying the law is that when a transaction has been reduced to writing that must be regarded as the appropriate and the only evidence of the terms of agreement. The question therefore as to what is the nature of the document becomes a very important one because upon its nature will depend the answer to the question as to whether the document can be treated to be one which is supposed to incorporate all the terms of agreement. If the document is a formal one, obviously the presumption is that it incorporates the entire agreement between, the parties. That is the reason why oral evidence is excluded. If the document is of an informal nature it need not contain within itself all the terms agreed to between the parties because by its very nature it is not supposed to be a document complete in all respect. It is therefore well settled that where the document is a formal one no oral evidence relating to any contemporaneous agreement inconsistent with the terms of the document would be permitted. The same cannot however be said in respect of an informal document*. In the present case the chitha being an informal document the law laid down in the cases aforesaid has no application.*

xxx xxx xxx"

(Emphasis Supplied)

82. The aforesaid position of law is also supported by illustrations (f), (g) and (h) to Section 92 of the Evidence Act, which read as under:

"xxx xxx xxx

(f) A orders goods of B by a letter in which nothing is said as to the time of payment, and accepts the goods on delivery. B sues A for the price. A may show that the goods were supplied on credit for a term still unexpired.

(g) A sells B a horse and verbally warrants him sound. A gives B a paper in these words: "Bought of A a horse of Rs. 500". B may prove the verbal warranty.

(h) ***A hires lodgings of B, and gives B a card on which is written — "Rooms, Rs. 200 a month." A may prove a verbal agreement that these terms were to include partial board****.*

A hires lodgings of B for a year, and a regularly stamped agreement, drawn up by an attorney, is made between them. It is silent on the subject of board. A may not prove that board was included in the terms verbally.

xxx xxx xxx"

(Emphasis Supplied)

83. The two scenarios in illustration (h) show that the Courts would have due regard to the formality of the document while deciding whether to allow oral evidence with respect to existence of any separate oral agreement.

84. In the light of the above principles, when analyzing the evidence on record, the oral understanding as pleaded by the purchasers, is not barred by Section 92 of the Evidence Act. In the present case, the formal Agreement to Sell dated 24th January, 1989 was subsequently modified by way of the covenant as contained in the receipt dated 03rd August, 1989, which records that the sellers have handed over the vacant physical possession of the self-occupied portion and symbolic possession of the tenanted portion of the suit property. It also states that the purchasers shall be entitled to claim the rent.

85. Additionally, the receipt dated 03rd August, 1989 further states that the balance sale consideration shall be paid at the time of registration of the sale deed. The receipt is a writing of an 'informal nature', as it does not include all the terms between the parties. The receipt only mentions the time/event when the balance sale consideration was payable. However, the receipt is silent on the manner and mode in which the balance sale consideration has to be paid. The purchasers, i.e., respondent nos. 1 to 8 herein, seek to prove the

oral understanding that payments made to tenants stand adjusted against the balance sale consideration. Thus, the oral understanding pleaded is on a matter of distinct collateral nature, forming part of the same transaction. It is not contradictory to any terms of the receipt dated 03rd August, 1989. Therefore, the purchasers could lead oral evidence to prove the terms of oral agreement between the parties.

86. Further, Proviso 6 to Section 92 of the Evidence Act provides also an exception to the general rule under Section 92, and states that any fact may be proved which shows in what manner the language of a document is related to existing facts.

87. Further, Section 95 of the Evidence Act provides that where the language used in the document is plain in itself, but is unmeaning in reference to its existing facts, evidence may be given to show that it was used in a peculiar sense. Section 95 of the Evidence Act, reads as under:

> *"xxx xxx xxx*
>
> *95.* ***Evidence as to document in unmeaning reference to existing facts.—<u>When language used in a document is plain in itself, but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense</u>.***
> *xxx xxx xxx"*
>
> *(Emphasis Supplied)*

88. In this regard, it would be apposite to place reliance on the judgment passed in ***Anglo American Metallurgical Coal Pty. Limited Versus MMTC Ltd.***[13], wherein the Supreme Court noted that a latent ambiguity arises when the words of the instrument are clear, but their application to the circumstances is doubtful, and such an ambiguity, being raised solely by

[13](2021) 3 SCC 308.

extrinsic evidence, is allowed to be removed by the same means. The Supreme Court further held that under Section 95 of the Evidence Act, which deals with latent ambiguity, read with Proviso (6) and Illustration (f) to Section 92 of the Evidence Act, evidence may be led to show the peculiar sense in which the language was used, when the plain language of the document is otherwise unmeaning in reference. The relevant paragraphs of the said decision are reproduced as under:

> *"xxx xxx xxx*
>
> *30. Importantly, Section 92 of the Evidence Act refers to the terms of a "contract, grant or other disposition of property or any matter required by law to be reduced to the form of a document".* ***In all these cases, under Proviso (6) read with Illustration (f), any fact may be proven which shows in what manner the language of a document is related to existing facts. Illustration (f) of Section 92 of the Evidence Act indicates that facts, which may on the face of it, be ambiguous and vague, can be made certain in the contextual setting of the contract, grant or other disposition of property. Section 94 of the Evidence Act, then speaks of language being used in a document being "plain in itself". It is only when such document "applies accurately to existing facts", that evidence may not be given to show that it was not meant to apply to such facts. Likewise, the obverse situation is contained in Section 95 of the Evidence Act, which then states that when the language used in a document is plain in itself, but is "unmeaning in reference to existing facts", only then may evidence be given to show that it was used in a peculiar sense.***
>
> *31.* ***When Sections 92, 94 and 95 of the Evidence Act are applied to a string of correspondence between parties, it is important to remember that each document must be taken to be part of a coherent whole, which happens only when the "plain" language of the document is first applied accurately to existing facts.***
>
> *32. In Woodroffe and Ali's Law of Evidence [Woodroffe, J. and Ali, A., Law of Evidence, [19th Edn. (Vol. 3), Butterworths, Wadhwa, Nagpur, 2013].], the learned authors opine that whereas Sections 93 and 94 of the Evidence Act deal with cases of patent ambiguity, Sections 95 to 97*

of the Evidence Act deal with cases of latent ambiguity (see pp. 3119-20). A "patent ambiguity" is explained in the following terms in Starkie on Evidence [Starkie, T., A Treatise on the Law of Evidence, (7th Edn., William Benning, London, 1829)]:

> *"By patent ambiguity must be understood an ambiguity inherent in the words, and incapable of being dispelled, either by any legal rules of construction applied to the instrument itself, or by evidence showing that terms in themselves unmeaning or unintelligible are capable of receiving a known conventional meaning, the great principle on which the rule is founded is that the intention of parties, should be construed, not by vague evidence of their intentions independently of the expressions which they have thought fit to use, but by the expression themselves. Now, those expressions which are incapable of any legal construction and interpretation by the rules of art are either so because they are in themselves unintelligible, or because, being intelligible, they exhibit a plain and obvious uncertainty. In the first instance, the case admits of two varieties; the terms though at first sight unintelligible, may yet be capable of having a meaning annexed to them by extrinsic evidence, just as if they were written in a foreign language, as when mercantile terms are used which amongst mercantile men bear a distinct and definite meaning, although others do not comprehend them; the terms used may, on the other hand, be capable of no distinct and definite interpretation. Now, it is evident that to give effect to an instrument, the terms of which, though apparently ambiguous are capable of having a distinct and definite meaning annexed to them is no violation of the general principle, for, in such a case, effect is given, not to any loose conjecture as to the intent and meaning of the party, but to the expressed meaning and that, on the other hand, where either the terms used are incapable of any certain and definite meaning, or, being in themselves intelligible, exhibit plain and obvious uncertainty, and are equally capable of different applications, to give an effect to them by extrinsic evidence as to the intention of the party would be to make the supposed intention operate independently of any definite expression of such intention. By patent ambiguity, therefore, must be*

understood an inherent ambiguity, which cannot be removed, either by the ordinary rules of legal construction or by the application of extrinsic and explanatory evidence, showing that expressions, prima facie, unintelligible, are yet capable of conveying a certain and definite meaning."

(emphasis supplied)

33. ***On the other hand, a "latent ambiguity"*** *is described in Woodroffe and Ali's Law of Evidence, as follows:*

> ***"Latent ambiguity, in the more ordinary application, arises from the existence of facts external to the instrument, and the creation by these facts of a question not solved by the document itself. A latent ambiguity arises when the words of the instrument are clear, but their application to the circumstances is doubtful; here the ambiguity, being raised solely by extrinsic evidence, is allowed to be removed by the same means.*** *In strictness of definition, such cases, as those in which peculiar usage may afford a construction to a term different from its natural one as can be seen in Section 98, would be instances of latent ambiguity, since the double use of the term would leave it open to the doubt in which of its two senses it was to be taken. It is not, however, to this class of cases that reference is now made, but to those in which the ambiguity is rather that of description, either equivocal itself from the existence of two subject-matter, or two persons, both falling within its terms as can be seen in Section 96, or imperfect when brought to bear on any given person or thing as per Sections 95 and 97."*

xxx xxx xxx

36. ***However, Section 95 of the Evidence Act, dealing with latent ambiguity, when read with Proviso (6) and Illustration (f) to Section 92 of the Evidence Act, could apply to the facts of the present case, as when the plain language of a document is otherwise unmeaning in reference to how particular words are used in a particular sense, given the entirety of the correspondence, evidence may be led to show the peculiar sense of such language.*** *Thus, if this provision is applied, the majority award cannot be faulted as it has accepted the evidence given by Mr Wilcox, wherein he explained that the three emails would only be meaningful if they were taken to refer to*

"mixed" supplies of coal, and not supplies of coal at the contractual price.

xxx xxx xxx

38. The approach of the Singapore Court of Appeal has our broad approval, being in line with the modern contextual approach to the interpretation of contracts. ***When Proviso (6) and Illustration (f) to Section 92, Section 94 and Section 95 of the Evidence Act are read together, the picture that emerges is that when there are a number of documents exchanged between the parties in the performance of a contract, all of them must be read as a connected whole, relating each particular document to "existing facts", which include how particular words are used in a particular sense, given the entirety of correspondence between the parties. Thus, after the application of Proviso (6) to Section 92 of the Evidence Act, the adjudicating authority must be very careful when it applies provisions dealing with patent ambiguity, as it must first ascertain whether the plain language of a particular document applies accurately to existing facts. If, however, it is ambiguous or unmeaning in reference to existing facts, evidence may then be given to show that the words used in a particular document were used in a sense that would make the aforesaid words meaningful in the context of the entirety of the correspondence between the parties.***

xxx xxx xxx"

(Emphasis Supplied)

89. Likewise, in the case of ***West Bengal State Electricity Distribution Co. Ltd. Versus Adhunik Power & Natural Resource Ltd. and Others***[14], the Supreme Court held that the rule that the terms of a contract must be determined from the document itself does not bar the Court from looking into attending circumstances and impart meaning to a term, which may otherwise be meaningless or unworkable, in the following manner:

[14]2026 SCC OnLine SC 328.

"xxx xxx xxx

22. ***Mr. Sibal's argument that a written contract between parties cannot be qualified with reference to any prior or subsequent statements/conduct is unfounded. The law in this regard is crystal clear. Ordinarily, when a contract is reduced to writing, its terms must be determined from the document itself. However, this rule does not put an embargo on looking into such facts which (i) establish a link between terms of the contract and existing facts i.e. attending circumstances, or (ii) impart meaning to a term which may otherwise be meaningless or unworkable.*** *These principles have been eloquently summarized in Anglo American Metallurgical Coal Pty. Limited v. MMTC Limited wherein this Court observed:…*

23. In the present context, we note that Article 2.5 of the PPA/PSA refers to a 'captive source' for coal supply for generation & supply of power and indemnifies WBSEDCL against any additional cost arising from procurement of coal from alternate sources. Though the captive source is not expressly identified in Article 2.5, its identity is clearly discernible from the surrounding circumstances, in particular, the Minutes of Meeting dated 03.01.2011 recording the salient features underlying the PPA/PSA, which specifically note that APNRL had a captive coal block at Ganeshpur. Further, the letter dated 30.04.2012 issued by WBSEDCL enquiring about the status of work relating to lifting of coal from Ganeshpur captive coal block and its transportation to the coal handling plant, reinforces this position. WBSEDCL was a party to these correspondences and has never disputed their contents. In these circumstances, it does not lie in the mouth of WBSEDCL to contend that the PPA/PSA did not prescribe Ganeshpur Coal Block as the captive coal source for generation and supply of electricity.

xxx xxx xxx"

(Emphasis Supplied)

90. Adverting to the present facts, the receipts dated 01st August, 1989 and 03rd August, 1989 record that the balance sale consideration is payable at the time of registration of the sale deed. However, any specific amount as due balance sale consideration is not expressly identified or recorded in the said

receipts. The sellers transferred the possession of the suit property to the purchasers, and raised no dispute as to the sale consideration, and only after a passage of approximately 11 years, the successor-in-interest of one of the sellers has raised a dispute as to the sale consideration not having been satisfied.

91. In view of these attending circumstances, the plain meaning of the words used in the said receipt have become doubtful, ambiguous or unmeaning in reference to existing facts. Thus, the purchasers/respondent nos. 1 to 8, can lead oral evidence to contend that the balance sale consideration as mentioned in the said receipt, referred to the amount due after the payments made to the tenants were adjusted.

92. The appellant has also argued that the alleged payments made by the purchasers/respondent nos. 1 to 8 to the tenants in the suit property, could not have been adjusted against the balance sale consideration, since the said payments were unlawful under Section 5(3) of the DRC Act, and were not valid consideration under Sections 23 and 24 of the Contract Act.

93. However, it is to be noted that these objections with respect to the legal validity of payments made to the tenants were never taken by the appellant in the pleadings before the Trial Court, and no such issue was framed with regard thereto.

94. In this regard, decision of the Supreme Court in the case of ***Bachhaj Nahar Versus Nilima Mandal and Another***[15], may be referred to, wherein, the Supreme Court has held that:

[15](2008) 17 SCC 491.

"xxx xxx xxx

10. *The High Court, in this case, in its obvious zeal to cut delay and hardship that may ensue by relegating the plaintiffs to one more round of litigation, has rendered a judgment which violates several fundamental rules of civil procedure. The rules breached are:*

(i) ***No amount of evidence can be looked into, upon a plea which was never put forward in the pleadings. A question which did arise from the pleadings and which was not the subject-matter of an issue, cannot be decided by the court.***

(ii) A court cannot make out a case not pleaded. The court should confine its decision to the question raised in pleadings. Nor can it grant a relief which is not claimed and which does not flow from the facts and the cause of action alleged in the plaint.

(iii) A factual issue cannot be raised or considered for the first time in a second appeal.

11. *The Civil Procedure Code is an elaborate codification of the principles of natural justice to be applied to civil litigation. The provisions are so elaborate that many a time, fulfilment of the procedural requirements of the Code may itself contribute to delay. But any anxiety to cut the delay or further litigation should not be a ground to flout the settled fundamental rules of civil procedure. Be that as it may. We will briefly set out the reasons for the aforesaid conclusions.*

12.The object and purpose of pleadings and issues is to ensure that the litigants come to trial with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. Its object is also to ensure that each side is fully alive to the questions that are likely to be raised or considered so that they may have an opportunity of placing the relevant evidence appropriate to the issues before the court for its consideration. This Court has repeatedly held that the pleadings are meant to give to each side intimation of the case of the other so that it may be met, to enable courts to determine what is really at issue between the parties, and to prevent any deviation from the course which litigation on particular causes must take.

13. The object of issues is to identify from the pleadings the questions or points required to be decided by the courts so as to enable parties to let in evidence thereon. When the facts necessary to make out a particular claim, or to seek a particular relief, are not found in the plaint, the court cannot focus the attention of the parties, or its own attention on that claim or relief, by framing an appropriate issue. *As a result the defendant does not get an opportunity to place the facts and contentions necessary to repudiate or challenge such a claim or relief. Therefore, the court cannot, on finding that the plaintiff has not made out the case put forth by him, grant some other relief. The question before a court is not whether there is some material on the basis of which some relief can be granted.* ***The question is whether any relief can be granted, when the defendant had no opportunity to show that the relief proposed by the court could not be granted. When there is no prayer for a particular relief and no pleadings to support such a relief, and when the defendant has no opportunity to resist or oppose such a relief, if the court considers and grants such a relief, it will lead to miscarriage of justice.****Thus it is said that no amount of evidence, on a plea that is not put forward in the pleadings, can be looked into to grant any relief.*

xxx xxx xxx

17.It is thus clear that a case not specifically pleaded can be considered by the court only where the pleadings in substance, though not in specific terms, contain the necessary averments to make out a particular case and the issues framed also generally cover the question involved and the parties proceed on the basis that such case was at issue and had led evidence thereon. As the very requirements indicate, this should be only in exceptional cases where the court is fully satisfied that the pleadings and issues generally cover the case subsequently put forward and that the parties being conscious of the issue, had led evidence on such issue. But where the court is not satisfied that such case was at issue, the question of resorting to the exception to the general rule does not arise. *The principles laid down in Bhagwati Prasad [AIR 1966 SC 735] and Ram Sarup Gupta [(1987) 2 SCC 555 : AIR 1987 SC 1242] referred to above and several other decisions of this Court following the same cannot be construed as diluting* ***the well-settled principle that without pleadings and issues, evidence cannot be considered to make out a new case which is not pleaded. Another aspect to be***

noticed, is that the court can consider such a case not specifically pleaded, only when one of the parties raises the same at the stage of arguments by contending that the pleadings and issues are sufficient to make out a particular case and that the parties proceeded on that basis and had led evidence on that case. Where neither party puts forth such a contention, the court cannot obviously make out such a case not pleaded, suo motu.

xxx xxx xxx

23.*It is fundamental that in a civil suit, relief to be granted can be only with reference to the prayers made in the pleadings. That apart, in civil suits, grant of relief is circumscribed by various factors like court fee, limitation, parties to the suits, as also grounds barring relief, like res judicata, estoppel, acquiescence, non-joinder of causes of action or parties, etc., which require pleading and proof. Therefore, it would be hazardous to hold that in a civil suit whatever be the relief that is prayed, the court can on examination of facts grant any relief as it thinks fit.* ***In a suit for recovery of rupees one lakh, the court cannot grant a decree for rupees ten lakhs. In a suit for recovery possession of property 'A', court cannot grant possession of property 'B'. In a suit praying for permanent injunction, court cannot grant a relief of declaration or possession. The jurisdiction to grant relief in a civil suit necessarily depends on the pleadings, prayer, court fee paid, evidence let in, etc.***

24. *In the absence of a claim by the plaintiffs based on an easementary right, the first defendant did not have an opportunity to demonstrate that the plaintiffs had no easementary right.* ***In the absence of pleadings and an opportunity to the first defendant to deny such claim, the High Court could not have converted a suit for title into a suit for enforcement of an easementary right.*** *The first appellate court had recorded a finding of fact that the plaintiffs had not made out title. The High Court in second appeal did not disturb the said finding. As no question of law arose for consideration, the High Court ought to have dismissed the second appeal. Even if the High Court felt that a case for easement was made out, at best liberty could have been reserved to the plaintiffs to file a separate suit for easement. But the High Court could not, in a second appeal, while rejecting the plea of the plaintiffs that they were owners of the suit property, grant the*

relief of injunction in regard to an easementary right by assuming that they had an easementary right to use the schedule property as a passage.
xxx xxx xxx"

(Emphasis Supplied)

95. The appellant has neither asserted nor established the applicability of the DRC Act to the tenancy in question, by proving the monthly rent amount of the suit property. Since the appellant did not do so, the contesting respondents had no occasion to deal with the same in their pleadings and evidence. Therefore, in the absence of any evidence in regard to applicability of the DRC Act, this Court would not presume that the suit premises were covered under the DRC Act.

96. In this regard, it would be apposite to refer to the case of ***M/s Sentinel Consultants Pvt. Ltd. Versus Shri Sudhir Malhotra***[16], wherein, it was held that if the premises were not covered under the DRC Act, payment of compensation to a tenant for surrendering the tenancy rights, cannot be considered as unlawful, in the following manner:

"xxx xxx xxx

17. One of the objections taken in the Written Statement is that since the agreement to sell provided for payment of Rs. 10 lac to the plaintiff for surrender of the tenancy rights in the ground floor portion and adjustment of that amount towards payment of sale consideration of the basement floor, the consideration being unlawful in terms of Section 23 of the Indian Contract Act, the agreement is void and unenforceable in law. Section 23 of the Indian Contract Act, 1872, to the extent it is relevant, provides that the consideration or object of an agreement is lawful, unless it is forbidden by law or is of such a nature, if permitted, it would defeat the provisions of any law. Section 24 of the Indian Contract Act, to the extent it is relevant, provides that if any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object is unlawful, the agreement is void. When questioned in this regard, the

[16]2011 SCC OnLine Del 4485.

learned Counsel for the plaintiff stated that the rent of the ground floor premises which defendant No. 1 had let out to the plaintiff and which it had vacated pursuant to the agreement to sell dated 27th March, 1997 was Rs. 6,000/- p.m. Section 5(3) of Delhi Rent Control Act provides that it shall not be lawful for the tenant to receive any payment in consideration of the relinquishment of tenancy of any premises. Therefore, if the provisions of Delhi Rent Control Act apply to the Ground Floor which was let out to the plaintiff and was vacated by it pursuant to the agreement to sell dated 27th March, 1997, the part of the consideration may be held unlawful and consequently the agreement may be void. ***Section 3 (c) of Delhi Rent Control Act, to the extent it is relevant provides, that nothing in the Act shall apply to any premises whether residential or not, whose monthly rent exceeds Rs. 3500/-. Hence, the provisions of Delhi Rent Control Act including Section 5 thereof do not apply to the ground floor premises which defendant No. 1 had let out to the plaintiff and which was surrendered by the plaintiff company pursuant to the agreement to sell dated 27th March, 1997. No other provision of law, prohibiting payment of compensation to a tenant for surrendering the tenancy rights has been brought to my notice. I, therefore hold that the consideration or object of the agreement to sell dated 27th March, 1997 cannot be said to be unlawful.***

xxx xxx xxx"

(Emphasis Supplied)

97. Thus, the appellant has failed to establish that full payment has not been received by the sellers, in terms of the Agreement to Sell between the sellers and the purchasers.

c. Validity of the GPA dated 03rd August, 1989

98. The appellant has contended that the GPA dated 03rd August, 1989 was revocable under Section 201 of the Contract Act as it did not create any interest in favor of the respondent no. 7 in the subject matter, and therefore, the GPA stood terminated upon the demise of Smt. Nirmal Krishan. On the other hand, it is the case of respondent nos. 1 to 8 that the said GPA was irrevocable in nature, and did not lapse upon the death of the executant.

99. At the outset, it is to be noted that no challenge was raised by the appellant herein to the validity of the said GPA before the Trial Court. Further, it is not the case of the appellant that the said GPA was obtained by fraud or undue influence. In contrast, the GPA has duly been admitted into evidence during the trial.

100. The law with regard to the nature of a GPA being revocable or irrevocable has been recently discussed by the Supreme Court in the case of ***M.S. Ananthamurthy and Another Versus J. Manjula and Others***[17], in the following manner:

> *"xxx xxx xxx*
>
> ***(i)Relationship between the executant and holder of general power of attorney***
>
> *27. A power of attorney derives its basic principles from Chapter X of the Contract Act which provides for "Agency" along with Sections 1-A and 2, respectively, of the Powers of Attorney Act, 1882.* ***Agency is a fiduciary relationship between two persons, where one explicitly or implicitly agrees that the other will act on their behalf to influence their legal relations with third parties, and the other similarly agrees to act in this capacity or does so based on an agreement. The relationship between the executant of a general power of attorney and the holder of the power is one of principal and agent. A principal is bound by the acts done by an agent or the contracts made by him on behalf of the principal. Likewise, power of attorney in the nature of contract of agency authorises the holder to do acts specified by the executant, or represent the executant in dealings with third persons.***
>
> *xxx xxx xxx*
>
> *33. Section 201 of the Contract Act prescribes various ways of revocation of authority given by the principal to his agent. A principal can terminate the contract of agency unless such revocation is precluded by Section 202 of the Contract Act.* ***Section 202 of the Contract Act, as an exception to the general rule under Section 201, prescribes that where an agent has himself an interest in the property which forms the subject-matter of the agency, the agency***

[17](2025) 10 SCC 596.

cannot be terminated to the prejudice of such interest unless there is an express stipulation to the contrary.

34. Illustration (a) to Section 202 of the Contract Act states that A (principal) has given authority to B (agent) to sell A's land, and to pay himself i.e. the agent, from the proceeds the debt which is due to him from A. Illustration (b) states that A (principal) has consigned 1000 bales of cotton to B (agent), who has given an advance on the bales of cotton. Now, A wishes B to sell the cotton and recover his advance from the sale proceeds. ***In both the cases, A can neither revoke the authority nor agency will be terminated by his insanity or death. It is important to take a note that in both the cases, the agent has an interest vested in the subject-matter of the agency. The factum of interest or security of the agent, in both cases, does not imply that the agent's right to remuneration constitutes an interest in the subject-matter of the agency; rather, it extends beyond the mere advancement of remuneration or commission. Where PoA is coupled with an interest, it metamorphosises to an irrevocable agency unless expressly stated otherwise. There an agent's right to remuneration is not an interest in the subject-matter of the agency.***

35. ***Therefore, the essentials of Section 202 of the Contract Act are, first, there shall be a relationship in the capacity of "principal and agent" between the parties and secondly, there shall be agent's interest in the subject-matter of the agency. If both the conditions are fulfilled the agency becomes irrevocable and cannot be terminated unilaterally at the behest of the principal.*** *As the first condition is satisfied in the present case, we shall now proceed to examine whether from the reading of the GPA, the holder of PoA had an interest in the subject-matter of the agency, namely, the suit property.*

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38. In Palani Vannan v. Krishnaswami Konar [Palani Vannan v. Krishnaswami Konar, 1945 SCC OnLine Mad 119], the decree-holder had executed a PoAauthorising the holder to execute the decree. Later, the executant revoked the PoA through a notice. The question before the Court was whether the notice revoking the authority was valid in law or not. The Court held that the PoA was not coupled with interest as the object of the PoA was not securing any interest of the agent. It held that the primary object of the PoA was to recover the fruits of the decree on behalf of the principal despite the fact that the agent's remuneration was fixed to be drawn from the proceeds of the decree. The relevant observations are reproduced hereinbelow: (SCC OnLine Mad)

"It is only necessary to refer to one further decision, Reginald Charles Frith v. Josiah Alexander Frith [Reginald Charles Frith v. Josiah Alexander Frith, 1906 AC 254 (PC)], in which the Judicial Committee discuss the general position relating to these matters. Their Lordships point out that in what is known as Carmichael case [Hannan's Empress Gold Mining & Development Co., In re, (1896) 2 Ch 643 (CA)]: (Josiah Alexander Frith case [Reginald Charles Frith v. Josiah Alexander Frith, 1906 AC 254 (PC)], AC p. 260)

> *'... the donor of the power, for valuable consideration, conferred upon the donee, authority to do a particular thing in which the latter had an interest, namely, to apply for the shares of the company which the donee was promoting for the purpose of purchasing his own property from him, and the donor sought to revoke that authority before the benefit was reaped.'*

The effect of all these cases appears to be stated accurately in Bowstead on the Law of Agency, 8th Edn., p. 456. It is stated (Article 138):

> ***'Where the authority of an agent is given … for the purpose of effectuating any security, or of protecting or securing any interest of the agent, it is irrevocable during the subsistence of such security or interest.'***

* * *

My view of this document is as follows: I think its primary object was to recover on behalf of the principal the fruits of his decree. It contained incidentally a provision for the employment of the agent, Vedavyasachar, in order to realise that decree. It provides that his remuneration is to be one-half of the proceeds. It contains an indemnity clause against any out-of-pocket expenses which he is entitled also to recover from the amount of the decree. But the object of the power of attorney is not for the purpose of protecting or securing any interest of the agent. I think that part of the agreement is purely incidental. There is, however, another feature of this document which seems to me to be conclusive against the appellants. The last words,

'I shall not for any reason whatever, cancel without your permission this authority which I have given to you, without paying the amount expended by you and without giving the aforesaid relief for your trouble',

seem to me to make express provision for the revocation of the above power. It can be done in two ways: (a) by consent, for that is what I understand "your permission" to mean, and (b) if that permission is withheld, on payment by the principal of all out-of-pocket expenses and also remuneration for his services. With regard to remuneration, the wording is vague, "without giving the aforesaid relief for your trouble"."

(emphasis supplied)

39. To the same effect is the decision of the High Court of Delhi in ***Harbans Singh v. Shanti Devi [Harbans Singh v. Shanti Devi, 1977 SCC OnLine Del 102]. The High Court while dealing with the question of whether the powers of attorney executed by the appellant were cancelled validly, laid down the conditions of irrevocability of a contract of agency as: (i) authority to agent given for valuable consideration; (ii) such valuable consideration was given for the purpose of effectuating a security or protecting or securing the interest of the agent; (iii) agency not being irrevocable merely because the agent has some interest in carrying it out or holds a special right, such as a lien or advance, over its subject-matter. Thus, the agency has to be specifically meant to secure the agent's benefit or interest. It further observed that the interest of the agent can be inferred from the language of the document or from the course of business between the principal and agent.*** *The observations are reproduced hereinbelow: (SCC OnLine Del)*

"All the conditions of irrevocability are satisfied in the present case. The authority to the agent was given for valuable consideration which proceeded from the respondent. It was given for the purpose of effectuating a security or protecting or securing the interest of the agent. For, the only purpose of the agency was to ensure and secure the performance of the contract by the appellant in favour of the respondent for whom Shri Gulati was acting as the husband and the nominee and, therefore, a representative or an agent. Where the performance of the agency is not to secure the interest or the benefit of the agent then the agency is not irrevocable merely because the agent has an interest in the exercise of it or has a special property in or lien for advances upon the subject-matter of it."

(emphasis supplied)

xxx xxx xxx

45. ***Further, a mere use of the word "irrevocable" in a PoA does not make the PoA irrevocable. If the PoA is not coupled with interest, no extraneous expression can make it irrevocable. At the same time, even if there is no expression to the effect that the PoA is irrevocable***

but the reading of the document indicates that it is a PoA coupled with interest, it would be irrevocable.The principles of construction of a PoA termed as "irrevocable" was explained in Manubhai Prabhudas Patel v. Jayantilal Vadilal Shah [Manubhai Prabhudas Patel v. Jayantilal Vadilal Shah, 2011 SCC OnLine Guj 7028]*. The relevant observations are reproduced below: (SCC OnLine Guj para 12)*

> *"12.* ***I am of the view that while construing a document, it is necessary to determine the real intention of the parties. The mere form in which document is couched is immaterial. The intention of the parties has to be gathered from the terms of the documents themselves and from such of the surrounding circumstances, as later required to show in what manner the language of the document is related to the existing fact****. It is very difficult task to know the intention of the parties on the basis of the recital of the document. But, the Court can rely safely on the language of the document, the language, which has been used by the parties to manifest the intention of the parties. If the Court goes on extraneous evidence, that may lead to more difficulty and confusion. But, there are certain principles to be borne in mind. The first principle is, the mere saying that the power of attorney is an irrevocable power of attorney coupled with interest is not the end of the matter. The Court, can clearly say that the document, though, is styled as an irrevocable power of attorney is not in substance a power coupled with interest so as to make it an irrevocable power of attorney. At the same time, even if there is no title to show that the power is an irrevocable power, but, the substance of the entire document would suggest that the same is an irrevocable power coupled with interest. Therefore, a document has to be construed as a whole. A stray sentence here and there cannot be picked out to construe a document. To understand the tenor of the document and the intention of the parties, it has to be read as a whole. The real intention of the parties has to be covered not merely from what ex facie is stated in the document, but, from the totality of the recitals in the document. At this stage, I may quote with profit a very lucid judgment rendered by learned Single Judge of the Madras High Court explaining the general principles regarding the construction of power of attorney. In Anantha Pillai v. Rathnasabapathy Mudaliar [Anantha Pillai v. Rathnasabapathy Mudaliar, 1968 SCC OnLine Mad 79], Ismail, J. (as he then was), held thus: (SCC OnLine Mad)*
>
> *'The general principles regarding the construction of power of attorney are well settled. Powers of attorney must be strictly*

construed as giving only such authority as they confer expressly or by necessary implication. Where an act purporting to be done under the power of attorney is challenged as being in excess of the power, it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument either by express terms or by necessary implication. Some of the principles governing the construction of a power of attorney are: (1) the operative part of the deed is controlled by the recitals; (2) where an authority is given to do particular acts, followed by general words, the general words are restricted to what is necessary for the performance of the particular acts; (3) the general words do not confer general powers but are limited to the purpose for which the authority is given and are construed as enlarging the special powers only when necessary for that purpose; (4) a power of attorney is construed so as to include all medium powers necessary for its effective execution. Bearing these general principles in mind the question for consideration is whether the power of attorney in this case authorised the first defendant to enter into an agreement to sell or authorised him to execute a sale deed.' "

xxx xxx xxx

(Emphasis Supplied)

101. A perusal of the aforesaid judgment shows that the essential ingredients under Section 202 of the Contract Act are first, there shall be a relationship in the capacity of 'principal and agent' between the parties and second, the agent must have interest in the subject matter of the agency. If both the conditions are fulfilled, the agency becomes irrevocable, and cannot be terminated unilaterally at the behest of the principal. Thus, where a power of attorney is coupled with an interest, it metamorphoses into an irrevocable agency, unless expressly stated otherwise.

102. For a power of attorney to be irrevocable, it must have been given to the agent for the purpose of effectuating a security, or protecting/securing the interest of the agent. Thus, the agency has to be specifically meant to secure the agent's benefit or interest, which can be inferred from the language of the

document or from the course of business between the principal and agent. The intention of the parties has to be gathered from the terms of the documents themselves and from the surrounding circumstances, which are required to show in what manner the language of the document is related to the existing facts.

103. In the present case, the sellers and the purchasers had executed the Agreement to Sell, and were clearly in talks of sale/purchase of the suit property. In this course of business and dealings between them, when a part of the sale consideration stood paid, the sellers executed the GPA dated 03rd August, 1989, against valuable consideration.

104. The purpose for executing the GPA, as is clear from the admission of the appellant in her Evidence Affidavit, was to facilitate the handing over of the possession of the suit property to the purchasers/respondent nos. 1 to 8 in terms of Clause 4 of the Agreement to Sell. Thus, it is evident that the purpose of the said GPA was meant to secure the interest of possession of the purchasers in the suit property. The GPA is clearly coupled with the interest, and is irrevocable in nature. Hence, the contention of the appellant that the GPA lapsed upon the death of Smt. Nirmal Krishan is devoid of any merit, and has to be rejected.

105. The reliance by the appellant on the case of ***M.S. Ananthamurthy (Supra)***, to contend that the GPA in the present case is revocable, is misplaced. In the facts and circumstances of the said decision, the Supreme Court held that the GPA therein was revocable as it did not create any interest in favor of the agent in the subject matter thereto. Furthermore, the agent under the said GPA was not in possession of the property in question.

106. Pertinently, with regard to GPAs and agreements to sell, the Supreme Court in the celebrated judgment in the case of ***Suraj Lamp and Industries Private Limited (Supra)***, itself has held that the agreement to sell and the GPA can be used to obtain specific performance or to defend possession under Section 53-A of the TP Act and that nothing prevents the affected parties from getting registered deeds of conveyance to complete their title.

d. <u>Possession of the purchasers is protected even in the absence of a Sale Deed</u>

107. The appellant has contended that the purchasers/respondent nos. 1 to 8 are estopped from setting up a case under Section 53-A of the TP Act, as the same is contradictory to the case setup by them before the Trial Court, wherein, they claimed ownership of the suit property by way of the GPA. Additionally, the appellant contends that no recourse can be sought under Section 53-A of the TP Act as the oral understanding was not in writing, and the respondent nos. 1 to 8 were not ready and willing to perform their part of the contract.

108. Rebutting the aforesaid, respondent nos. 1 to 8 have argued that the purchasers have been duly put in possession of the suit property against the payment of full sale consideration, and have been in uninterrupted possession of the suit property since August, 1989. Hence, their possession of the suit property, as purchasers, is protected under Section 53-A of the TP Act.

109. At the outset, this Court notes that the unregistered Agreement to Sell, in favour of the purchasers was executed on 24th January, 1989. The Registration and Other Related Laws (Amendment) Act, 2001, which

introduced the requirement of the registration of documents for the purposes of Section 53-A of the TP Act, is prospective in nature, and came into force with effect from 24th September, 2001. Since the Agreement to Sell in favour of the purchasers is of the year 1989, the requirement of registration would not apply to it.

110. In this regard, reliance is placed on the case of ***Gurmeet Kaur Versus Harbhajan Singh and Another***[18], relevant paragraph of which, is reproduced as under:

> *"xxx xxx xxx*
>
> ***9. <u>It is an undisputed fact that the appellant/plaintiff proved the documents being the agreement to sell, general power of attorney and the receipt as Ex. P.W. ½ to Ex. P.W. ¼. These documents have been executed prior to amendment of section 53-A of the Transfer of Property Act, 1882 by Act 48 of 2001 and which came into effect from 24.9.2001. These documents therefore need not have been stamped or registered so as to create rights in terms of doctrine of part performance under the then existing section 53-A of the Transfer of Property Act. It is only by the subsequent amendment of section 53-A of the Transfer of Property Act w.e.f 24.9.2001, that an agreement to sell would not confer any rights in terms of the doctrine of part performance if such an agreement to sell is not registered. Since the amendment is prospective in nature, therefore, the documents executed prior to 24.9.2001 being the documents Ex. P.W. ½ to Ex. P.W. ¼ dated 19.4.1995 did not require registration and stamping</u>**. This aspect has been dealt by this Court in detail in the judgment in the case of Shri Ramesh Chand v. Suresh Chand,[(2012) 188 DLT 538.] and in which judgment this Court has referred to the judgment of the Supreme Court in the case of Suraj Lamps and Industries Pvt. Ltd. v. State of Haryana [(2011) 107 AIC 1 (SC) : (2011) 183 DLT 1 (SC) : (2011) 89 ALR 445 (SC).], and as per which Supreme Court judgment agreements to sell, general power of attorneys and Wills which are validly executed are protected and such documents will have rights flowing under the same in terms of section*

[18]2017 SCC OnLine Del 12863.

53-A of the Transfer of Property Act, section 202 of the Indian Contract Act and the relevant provisions of the Indian Succession Act pertaining to devolution of properties by a Will le only such documents executed post 24.9.2001 will not have validity if they are not stamped and registered.
xxx xxx xxx"

(Emphasis Supplied)

111. Accordingly, this Court will proceed by referring to the un-amended Section 53-A of the TP Act, which deals with part-performance, as the Agreement to Sell in favour of the respondent nos. 1 to 8, is of the year 1989, i.e., prior to the amendment of the year 2001. The said provision reads as under:

"xxx xxx xxx

53A. Part performance. —

Where any person contracts to transfer for consideration any immoveable property ***by writing*** *signed by him or on his behalf from which* ***the terms necessary to constitute the transfer can be ascertained with reasonable certainty****, and* ***the transferee has, in part performance of the contract, taken possession of the property or any part thereof,*** *or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,*

and the transferee ***has performed*** *or* ***is willing to perform*** *his part of the contract, then,* ***notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefore by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:***

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

xxx xxx xxx"

(Emphasis Supplied)

112. Perusal of the aforesaid provision shows that Section 53-A of the TP Act requires that there must be a contract in writing, for transfer of any immovable property for consideration, and the terms necessary to constitute the transfer must be ascertained with reasonable certainty therefrom. Further, it is required that the transferee has in part-performance of the contract taken possession of the property or any part thereof, and has performed or is willing to perform his part of the contract.

113. Where these essential conditions under Section 53-A of the TP Act are satisfied, the transferor and any person claiming under him, shall be debarred from enforcing any right in respect of the property against the transferee and persons claiming under him, other than a right expressly provided by the terms of the contract. The transferor and person claiming under him would stand debarred to this extent, notwithstanding, that the contract was not registered or that the transfer has not been completed in the manner prescribed by the law for the time being in force.

114. In the facts and circumstances of the present case, there exists a written Agreement to Sell in favor of the purchasers/respondent nos. 1 to 8 for the transfer of the suit property for consideration. Additionally, there also exists a GPA in favor of respondent no. 7.

115. Furthermore, the purchasers have been duly put in possession of the suit property pursuant to the Agreement to Sell and GPA in their favour and have been in uninterrupted continuous possession of the suit property since at least August, 1989. The sellers have never disputed or challenged the rights of the contesting respondents in this regard, and have not sought to assert any right of ownership over the suit property.

116. It is essential to take into account the admitted position of the appellant that the respondent nos. 1 to 8 have not taken possession of the suit property forcibly. The testimony of the appellant, i.e., *PW-1*, in this regard, as recorded in her cross-examination dated 16th December, 2017, is reproduced as under:

> *"xxx xxx xxx*
>
> *Q Is it your testimony that possession of the property was forcibly taken by the purchasers ?*
>
> *A* ***No , it was not forcibly taken****.*
>
> *xxx xxx xxx"*
>
> *(Emphasis Supplied)*

117. The contention of the appellant that the purchasers/respondent nos. 1 to 8 are in unauthorized possession of the second floor of the suit property is also not tenable. This is in view of the fact that the receipt dated 03rd August, 1989 categorically records that the sellers have handed over the vacant physical possession of the self-occupied portion and the symbolic possession of the tenanted portion of the suit property to the purchasers. In addition, the argument of the appellant that the second floor of the suit property was in possession of the sellers, and since none of the sellers were residing therein, the purchasers started using the said portion without any authorization, cannot sustain, since, the second floor, being in the vacant physical possession of the sellers has clearly been handed over to the purchasers.

118. In furtherance of the purchasers occupying the suit property, they have also paid the lease rent to the L&DO from the year 1989 to 1998, along with other statutory dues with respect to the suit property.

119. Therefore, it is manifest that the purchasers have been in uninterrupted and continuous possession of the suit property since the year 1989. Further,

considering the ensuing facts and circumstances of the present case, this Court has already recorded in the preceding paragraphs that the entire sale consideration had been satisfied by the purchasers, and the purchasers have fulfilled their obligations under the Agreement to Sell entered into with the sellers. Thus, all the prerequisites of Section 53-A of the TP Act have been complied with.

120. At this stage, it would be apposite to refer to the judgment passed in the case of ***Ghanshyam Versus Yogendra Rathi***[19], wherein, the Supreme Court held that where the entire sale consideration had been paid, and possession of the property has been transferred, even if in view of an agreement to sell, and not a sale deed, the transferee would be said to have acquired *"de-facto possessory right"* over the property, and the same cannot be disturbed. The relevant paragraphs of the said judgment are reproduced as under:

> *"xxx xxx xxx*
>
> ***9. No doubt, agreement to sell is not a document of title or a deed of transfer of property by sale and as such, may not confer absolute title upon the respondent-plaintiff over the suit property in view of Section 54 of the Transfer of Property Act, 1882, nonetheless, the agreement to sell, the payment of entire sale consideration as mentioned in the agreement itself and corroborated by the receipt of its payment and the fact that the respondent-plaintiff was put in possession of the suit property in accordance with law as is also established by the possession memo on record, goes to prove that the respondent-plaintiff is de facto having possessory rights over the suit property in part-performance of the agreement to sell. This possessory right of the respondent-plaintiff is not liable to be disturbed by the transferer i.e. the appellant-defendant.*** *The entry of the appellant-defendant over part of the suit property subsequently is simply as a licensee of the respondent-plaintiff. He does not continue to occupy it in capacity of the owner.*

[19](2023) 7 SCC 361.

10. <u>In the wake of the finding that the abovementioned documents have not been fraudulently obtained or have not been manipulated, treating the said documents to be duly executed and as genuine, one thing is clear that the respondent-plaintiff is in a settled possession of the suit property at least in part-performance of the agreement which cannot be disturbed or disputed by the transferer i.e. the appellant-defendant</u>.

xxx xxx xxx

***16. <u>Legally an agreement to sell may not be regarded as a transaction of sale or a document transferring the proprietary rights</u>** in an immovable property but the prospective purchaser having performed his part of the contract and lawfully in possession acquires possessory title which is liable to be protected in view of Section 53-A of the Transfer of Property Act, 1882. The said possessory rights of the prospective purchaser cannot be invaded by the transferor or any person claiming under him.*

***17.** Notwithstanding the above as the respondent-plaintiff admittedly was settled with possessory title in part-performance of the agreement to sell dated 10-4-2002 and that the appellant-defendant has lost his possession over it and had acquired the right of possession under a licence simpliciter, exhausted his right to continue in possession after the licence has been determined. **<u>Thus, the appellant-defendant parted with the possession of the suit property by putting the respondent-plaintiff in possession of it under an agreement to sell. The respondent-plaintiff in this way came to acquire possessory title over the same. The appellant-defendant, as such, ceased to be in possession of it as an owner rather occupied it as a licensee for a fixed period which stood determined by valid notice, leaving the appellant-defendant with no subsisting right to remain in possession of the suit premises</u>**.*

xxx xxx xxx"

(Emphasis Supplied)

121. It would also be fruitful to refer to the judgment of the Supreme Court in the case of ***Suraj Lamp (Supra)*** wherein, the Supreme Court held that the GPA would be considered a relevant document for protecting possession in a property under Section 53-A of the TP Act. Thus, it was held as follows:

"xxx xxx xxx

24. ***<u>We therefore reiterate that immovable property can be legally and lawfully transferred/conveyed only by a registered deed of conveyance. Transactions of the nature of "GPA sales" or "SA/GPA/will transfers" do not convey title and do not amount to transfer, nor can they be recognised or valid mode of transfer of immovable property. The courts will not treat such transactions as completed or concluded transfers or as conveyances as they neither convey title nor create any interest in an immovable property. They cannot be recognised as deeds of title, except to the limited extent of Section 53-A of the TP Act</u>***. *Such transactions cannot be relied upon or made the basis for mutations in municipal or revenue records. What is stated above will apply not only to deeds of conveyance in regard to freehold property but also to transfer of leasehold property. A lease can be validly transferred only under a registered assignment of lease. It is time that an end is put to the pernicious practice of SA/GPA/will transactions known as GPA sales.*

xxx xxx xxx

26. *We have merely drawn attention to and reiterated the well-settled legal position that SA/GPA/will transactions are not "transfers" or "sales" and that such transactions cannot be treated as completed transfers or conveyances.* ***<u>They can continue to be treated as existing agreements of sale. Nothing prevents the affected parties from getting registered deeds of conveyance to complete their title. The said "SA/GPA/will transactions" may also be used to obtain specific performance or to defend possession under Section 53-A of the TP Act.</u>*** *If they are entered before this day, they may be relied upon to apply for regularisation of allotments/leases by development authorities. We make it clear that if the documents relating to "SA/GPA/will transactions" have been accepted/acted upon by DDA or other developmental authorities or by the municipal or Revenue Authorities to effect mutation, they need not be disturbed, merely on account of this decision.*

27. *We make it clear that our observations are not intended to in any way affect the validity of sale agreements and powers of attorney executed in genuine transactions. For example, a person may give a power of attorney to his spouse, son, daughter, brother, sister or a relative to manage his affairs or to execute a deed of conveyance. A person may enter into a development agreement with a land developer or builder for developing the land either by forming plots or by constructing apartment buildings and in that behalf execute an agreement of sale and grant a power of attorney empowering the developer to execute agreements of sale or conveyances in regard to*

individual plots of land or undivided shares in the land relating to apartments in favour of prospective purchasers. In several States, the execution of such development agreements and powers of attorney are already regulated by law and subjected to specific stamp duty. Our observations regarding "SA/GPA/will transactions" are not intended to apply to such bona fide/genuine transactions.

xxx xxx xxx"

(Emphasis Supplied)

122. In regard to Section 53-A of the TP Act, the Supreme Court in the case of ***Ramesh Chand (D) Thr. Lrs. Versus Suresh Chand and Another***[20]**,** has held that the main ingredient for taking shelter under Section 53-A of the TP Act is the factum of possession. Further, the Supreme Court reiterated that if the conditions of Section 53-A of TP Act are fulfilled, then notwithstanding that the transfer has not been completed in the manner prescribed by law, the transferor will be debarred from taking the possession of the property. The relevant extract from the aforesaid judgment is reproduced as under:

"xxx xxx xxx

***30. <u>According to Section 53A of the TP Act, where there is a contract to transfer any immovable property in writing and the transferee has in part performance of the contract taken the possession of the property or part thereof, then notwithstanding that the transfer has not been completed in the manner prescribed by law, the transferor will be debarred from taking the possession of the property</u>**. The essential conditions for invoking the doctrine of part-performance as envisaged u/s 53A of TP Act have been enunciated by this Court in the case of Nathulal v. Phoolchand [(1969) 3 SCC 120] thus:*

*"**9.** The conditions necessary for making out the defence of part performance to an action in ejectment by the owner are:*

(1) that the transferor has contracted to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty;

[20]2025 SCC OnLine SC 1879.

(2) that the transferee, has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession continues in possession in part performance of the contract;

(3) that the transferee has done some act in furtherance of the contract; and

(4) that the transferee has performed or is willing to perform his part of the contract.

If these conditions are fulfilled then notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him is debarred from enforcing against the transferee any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract*."*

31. A perusal of Section 53A of TP Act, as well as the case law on point, it is forthcoming that one of the main ingredients for taking shelter under Section 53A is the factum of possession. Unless the transferee in the instrument of agreement to sale is able to prove that he has been in possession of the suit property, no benefit u/s 53A will be given*. In the instant matter, the very fact that plaintiff has filed the present suit for possession, along with other reliefs, shows that on the date of filing of the suit, plaintiff was not in possession of the entire suit property. Since there was no possession with the plaintiff, he cannot derive any benefit under the doctrine of part-possession.*

xxx xxx xxx"

(Emphasis Supplied)

123. This Court has come to a considered finding that on the basis of the evidence on record and considering the *preponderance of probabilities*, the purchasers have been able to establish the payment of due amounts to the sellers, fulfillment of their part of the contract and their possession of the suit property. Whereas, the appellant had been unable to prove that any amounts were due and payable by the purchasers to the sellers, in any manner whatsoever.

124. Thus, the purchasers are entitled to the benefit under Section 53-A of the TP Act. Resultantly, the appellant, claiming her right under the original sellers, is barred from seeking to enforce any purported right in relation to the suit property against the purchasers, by virtue of Section 53-A of the TP Act.

125. The contention of the appellant that the respondent nos. 1 to 8 cannot take recourse under Section 53-A of the TP Act as the relief of seeking specific performance of the Agreement to Sell stands time barred, has to be necessarily rejected. It is no longer *res integra* that the legal bar placed by Section 53-A of the TP Act and the protection afforded thereunder to the purchaser in question, would be available even if the time period for filing a suit for specific performance, has elapsed.

126. The Supreme Court in the case of ***Shrimant Shamrao Suryavanshi and Another Versus Pralhad Bhairoba Suryavanshi and Others***[21], has held that the relief under Section 53-A of the TP Act is available even if specific performance of agreement to sell is barred by limitation, in the following manner:

> *"xxx xxx xxx*
>
> ***7. A perusal of Section 53-A shows that it does not forbid a defendant transferee from taking a plea in his defence to protect his possession over the suit property obtained in part-performance of a contract even though the period of limitation for bringing a suit for specific performance has expired. It also does not expressly provide that a defendant transferee is not entitled to protect his possession over the suit property taken in part-performance of the contract if the period of limitation to bring a suit for specific performance has expired. In absence of such a provision, we have to interpret the provisions of Section 53-A in a scientific manner. It means to look into the legislative history and structure of the provisions of Section 53-A of the Act.***

[21](2002) 3 SCC 676.

xxx xxx xxx

15. <u>The Special Committee's report which is reflected in the aims and objects of the amending Act, 1929 shows that one of the purposes of enacting Section 53-A was to provide protection to a transferee who in part-performance of the contract had taken possession of the property even if the limitation to bring a suit for specific performance has expired. In that view of the matter, Section 53-A is required to be interpreted in the light of the recommendation of the Special Committee's report and aims, objects contained in the amending Act, 1929 of the Act and specially when Section 53-A itself does not put any restriction to plea taken in defence by a transferee to protect his possession under Section 53-A even if the period of limitation to bring a suit for specific performance has expired</u>.

16. *But there are certain conditions which are required to be fulfilled if a transferee wants to defend or protect his possession under Section 53-A of the Act. The necessary conditions are:*

(1) there must be a contract to transfer for consideration of any immovable property;

(2) the contract must be in writing, signed by the transferor, or by someone on his behalf;

(3) the writing must be in such words from which the terms necessary to construe the transfer can be ascertained;

(4) the transferee must in part-performance of the contract take possession of the property, or of any part thereof;

(5) the transferee must have done some act in furtherance of the contract; and

(6) the transferee must have performed or be willing to perform his part of the contract.

xxx xxx xxx

20. <u>It is, therefore, manifest that the Limitation Act does not extinguish a defence, but only bars the remedy. Since the period of limitation bars a suit for specific performance of a contract, if brought after the period of limitation, it is open to a defendant in a suit for recovery of possession brought by a transferor to take a plea in defence of part-performance of the contract to protect his possession, though he may not be able to enforce that right through a suit or action</u>.

xxx xxx xxx"

(Emphasis Supplied)

127. In view of the detailed discussion hereinabove, the appellant stands debarred from enforcing any right in the suit property, and is not entitled to seek any reliefs, as prayed for in the suit in question.

128. Further, the reliance put by the appellant on the case of ***Suraj Lamp (Supra)*** is misplaced. The only proposition laid down in the said case is that title cannot be transferred without valid sale deed. The decision in the said case does not seek to take away the subsisting rights of a GPA holder, and cannot be used to negate the specific rights conveyed under a GPA. In the present case, especially, with the Agreement to Sell and GPA being valid, the rights of the purchasers, i.e., respondent nos. 1 to 8 herein, under the said documents, remain in force.

129. Similarly, the reliance by the appellant on the case of ***M.S. Ananthamurthy (Supra)***, is totally misplaced as the said judgment does not apply to the facts and circumstances of the present case. In the said case, though a GPA had been executed, possession of the property in the said case was never given to the GPA holder. Subsequently, the LRs of the actual owner sold the property in question therein to a third party, by way of a registered sale deed. There were subsequent transfers of the property in the said case by way of registered sale deed/gift deed. It is in these factual circumstances that the Supreme Court held that no interest was transferred to the GPA holder merely on the basis of the unregistered agreement to sell and GPA.

130. However, in the present case, undisputedly possession of the suit property already stands transferred to the purchasers, who have been in possession of the same since the year 1989. This is coupled with the fact that the original sellers never challenged either the possession of the purchasers

or their right under the Agreement to Sell and GPA, in any manner whatsoever. Thus, the aforesaid case of ***M.S. Ananthamurthy (Supra)***, is clearly distinguishable and not applicable to the present case.

e. <u>Suit of the appellant for mere possession and mesne profits is not maintainable in view of validity of the Agreement to Sell and GPA, and is also barred by limitation</u>

131. In the present case, as per the amended plaint, suit was filed seeking mandatory injunction, for restraining the respondent nos. 1 to 8 from using the suit property and for delivery of vacant and peaceful possession of the suit property to the appellant herein. In the alternative, appellant has prayed for possession of the suit property, *mesne* profits, and decree of injunction for restraining the respondent nos. 1 to 8 from creating any third-party rights in the suit property. In this factual scenario, the Trial Court held that the suit filed by the appellant was barred by limitation.

132. The contention of the appellant herein is that the suit would be governed by Article 65 of the Schedule to Limitation Act, and therefore, the present suit is maintainable, having been filed within the period of 12 years.

133. *Per contra*, the argument raised by the respondent nos. 1 to 8 is that since the substantive relief in the suit would have been of declaration/cancellation, therefore, Article 58 of the Schedule to Limitation Act would be applicable, which prescribes a limitation period of three years. The said period of limitation for challenging the Agreement to Sell, and the GPA, expired on 24th January, 1992 and 03rd August, 1992, respectively, rendering the suit filed by the appellant, grossly barred by limitation.

134. In this regard, it is to be noted that the plaint admits and acknowledges execution of the Agreement to Sell and GPA, in favour of the purchasers, as

well as the fact that possession of the suit property was handed over to the purchasers, pursuant to the said documents.

135. It is an admitted fact that Smt. Nirmal Krishan, along with Shri Sanjeev Sethi and Shri Rajeev Luthra, had executed the Agreement to Sell dated 24th January, 1989 in favour of respondent nos. 1 to 8 herein. Further, the contention of the appellant that the Agreement to Sell stood automatically cancelled, has already been rejected by this Court.

136. Furthermore, it is also an admitted position that the sellers executed the GPA in favour of respondent no. 7 herein, i.e., Shri U.S. Sitani, to facilitate handing over of the possession of the suit property to the purchasers/respondent nos. 1 to 8. It is on the strength of this GPA, that the suit property was got vacated by the purchasers from the tenants occupying portions of the suit property. Besides, the plaint raises absolutely no challenge to the GPA. Pertinently, this Court has already held in the preceding paragraphs that the said GPA was irrevocable, and did not lapse on the demise of Smt. Nirmal Krishan.

137. It is to be noted that the purchasers, as defendant nos. 1 to 8 in the suit, have stated in their written statement that they have been in continuous possession since the year 1989, and no dispute as to the title had been raised in the last 11 years by the original sellers.

138. Additionally, the appellant has placed reliance on the alleged letter dated 23rd November, 1993 purportedly sent by Shri G.D. Krishan, asking the purchasers to pay the balance sale consideration, failing which the Agreement to Sell, shall stand cancelled. However, as noted herein above, the acknowledgement card with respect to the said letter is of a dubious nature, and the appellant has been unable to prove the same. Even otherwise,

said alleged letter becomes immaterial on account of the fact that Shri G.D. Krishan never took any steps in furtherance of the alleged letter.

139. Thus, the possession of the purchasers is undisputed and has been established during the course of evidence. It is also undisputed that the purchasers are in possession of the suit property on the basis of the Agreement to Sell, and GPA in their favour.

140. In the present case, the contesting respondents are admittedly not trespassers, nor persons who have taken forcible possession of the property. Rather, they are purchasers under an Agreement to Sell, and power of attorney holder under an irrevocable GPA.

141. These documents, i.e., the Agreement to Sell and the GPA, grant rights and interests, including *'de-facto possessory rights'* to the purchasers in the suit property. These documents would, thus, create a cloud or some apparent defect in the title of the original sellers, and the persons claiming under them, which also includes the appellant herein. Therefore, where the appellant is admittedly not in possession of the suit property, and has filed the suit seeking possession on the basis of title, she must necessarily remove the cloud over her title in the suit property by seeking necessary declaratory reliefs.

142. Accordingly, in view of the valid rights being conferred upon the purchasers in view of the Agreement to Sell and the GPA, followed by handing over possession to the purchasers, this Court rejects the contention of the appellant that the said documents did not create any right or interest in favour of the purchasers. Thus, the contention of the appellant, that there was no need to challenge the said documents, does not hold any water and is accordingly rejected.

143. In view of the aforesaid, the relief of declaration/cancellation that ought to have been sought by the plaintiffs in the suit would have been in the nature of *'substantive relief'*. Whereas, the relief of mandatory injunction and possession, as sought by the plaintiffs in the suit, is a *'consequential relief'*, which could have only been granted if the declaratory relief of title or cancellation of the Agreement to Sell and GPA, had been sought.

144. Without challenging the transaction documents, the consequential reliefs as claimed, are not maintainable. With the purchasers having been granted wide sweeping rights with respect to the suit property by way of the GPA, the consequential reliefs as sought in the suit, are not maintainable and are barred by law, since the GPA remains unchallenged.

145. Thus, a simpliciter suit for injunction/possession cannot lie against the contesting respondents. The reliefs, as sought in the plaint, i.e., the decree of mandatory injunction, possession, *mesne* profits and permanent injunction, are not maintainable, since principal declaratory reliefs challenging and seeking cancellation of the Agreement to Sell and GPA have not been sought.

146. The law is well settled in this regard that where the principal declaratory relief is barred by limitation, the consequential reliefs, which derive their very foundation and enforceability from the existence of the declaratory decree, would also collapse as being time barred. This Court is reminded of the adage that *'where the foundation falls, all actions flowing therefrom also collapse'*.

147. In the case of ***Padhiyar Prahladji Chenaji (Deceased) Through Legal Representatives Versus Maniben Jagmalbhai (Deceased) Through***

Legal Representatives and Others[22]*,* it was held that once the suit is held to be barred by limitation *qua* the declaratory relief and when the relief for permanent injunction was a consequential relief, the prayer for permanent injunction, which was a consequential relief can also be said to be barred by limitation. It has been held that under normal circumstances, the relief of permanent injunction sought is a substantive relief and the period of limitation would commence from the date on which the possession is sought to be disturbed, so long as the interference in possession is continuous. However, in the case of a consequential relief, when the substantive relief of declaration is held to be barred by limitation, the said principle shall not be applicable. Thus, it has been held as follows:

> *"xxx xxx xxx*
>
> ***17. Therefore, once the suit is held to be barred by limitation qua the declaratory relief and when the relief for permanent injunction was a consequential relief, the prayer for permanent injunction, which was a consequential relief can also be said to be barred by limitation. It is true that under normal circumstances, the relief of permanent injunction sought is a substantive relief and the period of limitation would commence from the date on which the possession is sought to be disturbed so long as the interference in possession continuous. However, in the case of a consequential relief, when the substantive relief of declaration is held to be barred by limitation, the said principle shall not be applicable.***
>
> *xxx xxx xxx"*
>
> *(Emphasis Supplied)*

148. Likewise, in the case of ***Raj Kumari Garg Versus S.M. Ezaz & Ors.***[23], it has been held that in a suit having been filed for seeking possession, without seeking declaration of cancellation of documents, when the prayer for declaration would be time barred under Article 58 of the Limitation Act,

[22]2022 SCC OnLine SC 258.
[23]2012 (132) DRJ 108 (DB).

mere suit for possession would also be barred by limitation. Thus, it was held as follows:

> *"xxx xxx xxx*
>
> ***19. <u>The learned single Judge has referred to the provisions of the Limitation Act, 1963 (hereinafter referred to as the 'Limitation Act'). It can really not be disputed that Article 58 of the Schedule to the Limitation Act prescribing period of limitation for suits relating to declaratory decrees would apply if the documents have to be cancelled. The period prescribed is three (3) years from the date the right to sue accrues. In fact, under Section 3 of the Limitation Act, suits, appeals and applications made after the prescribed period of limitation, subject to the provisions of Sections 4 to 24 of the Limitation Act, are liable to be dismissed even though limitation may not have been set up as a defence. If the appellant was to claim cancellation of the documents executed in favour of respondents 3 & 4 on 7.7.1998, execution of which is not denied nor receipt of full consideration with possession being parted, the period of limitation had expired long time back in July, 2001. The suit for possession was filed in the year 2009, i.e., after eleven (11) years from the date when the cause of action accrued.</u>***
>
> ***20.*** *The reason why the three issues have been dealt with together is because of the ingenious frame of the suit and the plea sought to be advanced on behalf of the appellant that she does not seek cancellation of documents but only seeks possession and, thus, the limitation should be treated as twelve (12) years.*
>
> ***21.*** *The aforesaid plea is only stated to be rejected as the issue is no more res integra in view of the judgement of the Division Bench of this Court in Jyotika Kumar v. Anil Soni156 (2009) DLT 685 (DB) : 2009 (108) DRJ 119 [DB].* ***<u>The factual matrix is quite similar where possession was sought without seeking cancellation of the documents and also from parties with whom there was no privity of contract. Thus, the judgement applies on all fours. It has been observed that there can be no valid cause of action on the date of filing of the suit when the prayer for declaration would be time barred under Article 58 of the Limitation Act. A mere suit for possession could not have been maintained.</u>***
>
> ***22. <u>It is quite obvious that the appellant has filed the mere suit for possession with an injunction without seeking declaration of cancellation of documents being conscious of the claim for cancellation being beyond time and, thus, would have faced a defence of the suit being barred by time. An illusion of cause of action is sought to be created to get over the period of limitation</u>.***

There has to be a meaningful reading of the plaint and not a mere formal reading as observed by the Supreme Court in T. Arivandandam v. T.V. Satyapal (1977) 4 SCC 467.

xxx xxx xxx

24. We are in complete agreement with the views expressed by the learned single Judge that the plaint as framed merely for possession cannot be maintained in law without the relief of declaration for cancellation of the documents executed by the appellant in favour of respondents 3 & 4 and the real issue cannot be obfuscated by seeking to raise a plea that only possession is being sought (and that too from respondents 1 & 2) as those respondents do not have any right to continue in possession even though there is no privity of contract between the appellant and respondents 1 & 2*.*

xxx xxx xxx

26. There can be no doubt that the parties have contracted to transfer the immovable property when they executed the agreement to sell & purchase and collateral documents. It is also coupled with possession being parted with by the appellant in favour of respondents 3 & 4 in part performance of the contract and full consideration stands paid by respondents 3 & 4 and appropriated by the appellant. Thus, the prohibition envisaged against the transferor in the absence of any instrument to transfer would come into play under the provisions of Section 53A of the TP Act*. In fact, the right to make further transfers has been specifically conferred under Clause 18 of the agreement to sell & purchase dated 7.7.1998 as observed by the learned single Judge. It is in exercise of such a right that respondents 3 & 4 executed the agreement to sell dated 1.5.2004 in favour of respondents 1 & 2.*

xxx xxx xxx

29. *Learned counsel for the appellant laid emphasis only on the views expressed by the Supreme Court in Rambhau Namdeo Gajre case (supra), which places reliance on State of U.P. v. District Judge case (supra). The similarity between the present case and the facts of that case rest only with there being an agreement to sell without there being a sale deed. There were no collateral documents executed. The party purchasing under the agreement to sell sold it further to a third party who in turn claimed the defence of Section 53A of the TP Act. One important fact in that case noticed is that the original agreement to sell was not proved and neither was it brought on record. It is in these circumstances that the subsequent purchaser was held not entitled to the defence of Section 53A of the TP Act.* ***In the facts of the present case, all the rights are transferred by the appellant to***

respondents 3 & 4 under the agreement to sell & purchase which is duly registered and is accompanied by other collateral documents like the GPA, SPA, Will, etc. and parting of notional possession as there was a licensee. Ultimately the physical possession also came to respondents 3 & 4. A specific clause 18 of the agreement to sell & purchase confers unfettered and uninterrupted rights and powers on Respondents 3 & 4 to further sell or otherwise transfer, in any manner, in whole or in part to anybody and that the appellant would have no claim or objection to the same. Therefore, the appellant gave the unfettered right of assignment of their rights under the agreement to sell dated 7.7.1998 to respondents 3 & 4*. There was no such authority in Rambhau Namdeo Gajre case (supra). In the present case both the first purchaser and the subsequent purchase have been made parties and respondents 1 & 2 are claiming under respondents 3 & 4. Respondents 3 & 4 have already sued for getting the property converted into freehold and for getting the conveyance deed executed in their favour as the intent of the appellant has become dishonest when the conversion was applied for conversion of leasehold rights into freehold.*

30. Section 53A of the T.P.A. debars the transferor or any person claiming under him" from enforcing against "the transferee and persons claims under him" any right in respect of the property of which the transferee has taken or continued in possession, other than the right expressly provided by the terms of the contract. The said provision, therefore, consciously protects the rights of not only the transferee, but also of persons claiming under the transferee, even though the rights of the transferee are not perfected as there is only an agreement to sell and not a registered sale deed/conveyance deed. Therefore, it cannot be argued that a person claiming under the transferee would not be entitled to protect his possession, merely because the title of the transferee was not perfected. The intention of the law clearly is to protect the rights of not only the transferee, but also of persons claiming under the transferee, even though the transferee does not have perfect title. If the transferee had a perfected title on the basis of a registered conveyance deed, the question of involving Section 53A of the TPA would not arise.

xxx xxx xxx

34. *Another aspect taken note of in the impugned order and which was canvassed before us arises from the judgement of the Supreme Court in Suraj Lamp & Industries Private Limited (2) Through Director v. State of Haryana(2012) 1 SCC 656. The execution of agreement to sell & purchase coupled with collateral documents like GPA, SPA, Will, etc. has been a common practice in Delhi. The validity of such a practice has been examined in the said judgement*

and it has been held that the bunch of such documents cannot be recognized as deeds of title, "except to the limited extent of Section 53A of the TP Act". ***In fact, it has been observed in paras 26 & 27 that the observations of the Supreme Court are not intended in any way to affect the validity and powers of attorney executed in genuine transactions and the bunch of documents can continue to be treated as existing agreements of sale which would not prevent the affected parties from getting the registered deeds of conveyance to complete their title. The said bunch of documents can also be used to obtain specific performance or to defend possession under Section 53A of the TP Act****. We reproduce para 26 of the said judgement as under:*

> *"26.* ***We have merely drawn attention to and reiterated the well-settled legal position that SA/GPA/WILL transactions are not 'transfers' or 'sales' and that such transactions cannot be treated as completed transfers or conveyances. They can continue to be treated as existing agreement of sale. Nothing prevents affected parties from getting registered Deeds of Conveyance to complete their title. The said 'SA/GPA/WILL transactions' may also be used to obtain specific performance or to defend possession under Section 53A of Transfer of Property Act.*** *If they are entered before this day, they may be relied upon to apply for regularization of allotments/leases by Development Authorities. We make it clear that if the documents relating to 'SA/GPA/WILL transactions' has been accepted acted upon by DDA or other developmental authorities or by the Municipal or revenue authorities to effect mutation, they need not be disturbed, merely on account of this decision."*

It is, thus, clear that the present case fits in with the legal principles laid down and the defence of Section 53A of the TP Act in such a case would be available to respondents 3 & 4 and since respondents 1 & 2 are claiming under them, similarly to them too.

xxx xxx xxx"

(Emphasis Supplied)

149. Similarly, in the case of ***Mallavva and Another Versus Kalsammanavara Kalamma and Others***[24], it was held that where the relief for possession is a consequential relief and the substantive relief is for declaration, the period of limitation is required to be considered with respect

[24]2024 SCC OnLine SC 3846.

to the substantive relief claimed and not the consequential relief. Thus, it was held as follows:

> *"xxx xxx xxx*
>
> ***35.*** *The decision in the case of Rajpal Singh v. Saroj (Deceased) through Legal Representatives &, (2022) 15 SCC 260, relied upon by the learned counsel appearing for the appellants is also of no avail. In the said case, this Court observed as under:*
>
> > *"**14. The submission on behalf of the original plaintiff (now represented through her heirs) that the prayer in the suit was also for recovery of the possession and therefore the said suit was filed within the period of twelve years and therefore the suit has been filed within the period of limitation, cannot be accepted. Relief for possession is a consequential prayer and the substantive prayer was of cancellation of the sale deed dated 19-4-1996 and therefore, the limitation period is required to be considered with respect to the substantive relief claimed and not the consequential relief. When a composite suit is filed for cancellation of the sale deed as well as for recovery of the possession, the limitation period is required to be considered with respect to the substantive relief of cancellation of the sale deed, which would be three years from the date of the knowledge of the sale deed sought to be cancelled. Therefore, the suit, which was filed by the original plaintiff for cancellation of the sale deed, can be said to be substantive therefore the same was clearly barred by limitation. Hence, the learned trial court ought to have dismissed the suit on the ground that the suit was barred by limitation. As such the learned first appellate court was justified and right in setting aside the judgment and decree passed by the learned trial court and consequently dismissing the suit. The High Court has committed a grave error in quashing and setting aside a well-reasoned and a detailed judgment and order passed by the first appellate court dismissing the suit and consequently restoring the judgment and decree passed by the trial court."***
>
> ***36.*** *Thus, it appears that two reliefs were prayed for. One for cancellation of the Sale Deed and the second for recovery of possession. The Court treated the relief for possession as consequential prayer and the relief for cancellation of Sale Deed as the substantive prayer.*
>
> ***37. In such circumstances referred to above, the Court held that if a composite suit is filed for cancellation of Sale Deed as well as for recovery of possession, the limitation period should be considered with respect to the substantive relief of cancellation of Sale Deed***

which would be three years from the date of knowledge of Sale Deed sought to be cancelled.

38. The dictum as laid in Rajpal Singh (supra) cannot be made applicable to the facts and circumstances of the case on hand. The reason is simple. Ordinarily when, a suit is filed for cancellation of Sale Deed and recovery of possession, the same would suggest that the title of the plaintiff has already been lost. By seeking to get the Sale Deed set aside on the grounds as may have been urged in the plaint, the plaintiff could be said to be trying to regain his title over the suit property and recover the possession. In such circumstances, the period of limitation would be three years and not twelve years.

39. *In view of the aforesaid discussion, this appeal fails and is hereby dismissed.*

xxx xxx xxx"

(Emphasis Supplied)

150. At this stage, it would also be fruitful to refer to the judgment passed by the Division Bench of this Court in the case of ***Inderjeet Singh Bindra Versus Ramesh Kumari and Others***[25], where in the facts of the said case, a sale deed had been executed on the basis of a registered GPA, and cancellation of only sale deed was sought in the plaint. Subsequent application for amendment for seeking prayer for cancellation of GPA was rejected by the Single Judge. The same was upheld by the Division Bench on the ground that seeking the relief of cancellation of GPA would be barred by limitation. Thus, the Division Bench, held as follows:

"xxx xxx xxx

16. ***The crux of the issue is whether it is Article 59 or Article 65, which would apply to the present facts in hand****. The aforesaid Articles are reproduced as under:*

59.	*To cancel or set aside an instrument or decree or for the rescission of a contract.*	*Three years.*	*When the facts entitling the plaintiff to have the instrument or decree cancelled or set aside or the*

[25]2025 SCC OnLine Del 7100.

			contract rescinded first become known to him.
65.	*For possession of immovable property or any interest therein based on title. Explanation.— For the purposes of this article— (a)where the suit is by a remainderman, a reversioner (other than a landlord) or a devisee, the possession of the defendant shall be deemed to become adverse only when the estate of the remainderman, reversioner or devisee, as the case may be, falls into possession; (b) where the suit is by a Hindu or Muslim entitled to the possession of immovable property on the death of a Hindu or Muslim female, the possession of the defendant shall be deemed to become adverse only when the female dies; (c)where the suit is by a purchaser at a sale in execution of a decree when the judgment-debtor was out of possession at the date of the sale, the purchaser shall be deemed to be a representative of the judgment debtor who was out of possession.*	*Twelve years.*	*When the possession of the defendant becomes adverse to the plaintiff*

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18. Before determining the applicability of the aforesaid Articles to the present case, a perusal of the difference between Sections 31 and 34 of the Specific Relief Act, 1963 [hereinafter referred to as 'SRA'] is required. Section 31 of the SRA empowers a person who is a party to the written instrument to seek cancellation of the instrument, which is void or voidable, to protect himself from the injury which such instrument may cause. On the other hand, Section 34 of the SRA provides that a person entitled to any legal character or to any right as to any property may seek a declaration of such legal character or right, when the same is denied or is likely to be denied by another

person. The distinction between the two provisions lies in the nature of relief sought- Section 31 of the SRA pertains to the annulment of a particular document, whereas Section 34 of the SRA pertains to the declaration and establishment of a legal right or status as against a claimant.

xxx xxx xxx

21. ***In the case in hand, the GPA is prima facie valid unless it is proved that there was a revocation of the same. On a perusal of the 13 Sale Deeds, it is evident that they were executed by Mr. Bhullar in the capacity of an agent of the Appellant, through the GPA executed by the Appellant. Further, the Appellant has stated in Para 7 of the plaint that he asked Mr. Bhullar to bring back the GPA, and thereafter, he revoked the GPA. However, no written document signifying the revocation of the GPA has been filed by the Appellant****.*

22. ***It is pertinent to note that a duly registered GPA can only be revoked by a registered Deed of Revocation. Thus, in the absence of a Deed of Revocation, this Court is prima facie of the view that the GPA has not been revoked in accordance with the law. Accordingly, Article 59 would be attracted as the fraud, which the Appellant asserts is required to be proved****.*

23. Further, learned counsel representing the Appellant has placed reliance on the judgment rendered by the Supreme Court in ***Shanti Devi*** *(supra), whereby in the absence of sale consideration being tendered, the sale deed was made. Thus, in the eyes of law, the sale deed cannot be said to be executed, and therefore, the plaintiff would not be required to seek the cancellation of the said instrument. However, in the case in hand, the instrument, i.e., the GPA prima facie is a valid document. Hence, the aforesaid judgment is distinguishable and not applicable to the present case.*

24. Further, reliance is placed upon the judgment rendered in ***Life Insurance Corporation of India*** *(supra), whereby an amendment of the plaint was sought, for the purpose of enhancing the amount towards damages in a suit for specific performance of an agreement. The issue, herein, was with regard to Sections 21(5) and 22(2) of the SRA i.e., specific provisos permitting amendment of a plaint for including a claim in cases where the plaintiff had not claimed compensation earlier. The Court, herein, allowed the amendment. However, the ratio of the aforesaid judgment is not applicable in the case in hand as the same is different from the peculiar facts of the present case.*

25. ***Therefore, this Court is of the considered view that Article 59 is attracted in the present case. Though the present suit is one for possession, but the substantive relief is for cancellation/annulment***

of the various Sale Deeds executed by the Appellant through his GPA. By the proposed amendment, the prayer that was sought to be introduced was for cancellation of the GPA after a period of eight years after the Appellant came to know of the Sale Deeds executed on the strength of GPA and after seven years of filing of the suit. Thus, the relief sought to be added by the Amendment Application is barred under Article 59*.*

xxx xxx xxx"

(Emphasis Supplied)

151. As a sequitur to the aforesaid, it is manifest that where the principal relief is barred by limitation, the consequential relief would also be time barred. In the present facts, the principal relief of declaration/cancellation of the Agreement to Sell and the GPA, would be governed under Article 58 of the Limitation Act, and the same stands expired on 24th January, 1992 and 03rd August, 1992, respectively. Since the suit was filed in the year 1999, this Court concurs with the finding of the Trial Court that the suit was barred by limitation.

152. Even otherwise, where challenge to the Agreement to Sell and GPA stands time barred, the appellant cannot be allowed to evade the laws of limitation and use clever drafting to portray the suit as being simpliciter suit for possession, injunction and *mesne* profit. What cannot be done directly, cannot be allowed to be done indirectly. Reliance is placed in this regard on the case of ***Basavraj Versus Indira and Others***[26], wherein, the Supreme Court held as follows:

"xxx xxx xxx

16. *In the case in hand, the compromise decree was passed on 14-10-2004 in which the plaintiffs were party. The application for amendment of the plaint was filed on 8-2-2010 i.e. 5 years and 03 months after passing of the compromise decree, which is sought to be challenged by way of amendment.* ***The limitation for challenging any***

[26](2024) 3 SCC 705.

> ***decree is three years (reference can be made to Article 59 in Part IV of the Schedule attached to the Limitation Act, 1963). A fresh suit to challenge the same may not be maintainable. Meaning thereby, the relief sought by way of amendment was time-barred. As with the passage of time, right had accrued in favour of the appellant with reference to challenge to the compromise decree, the same cannot be taken away. In case the amendment in the plaint is allowed, this will certainly cause prejudice to the appellant. What cannot be done directly, cannot be allowed to be done indirectly****.*
>
> *xxx xxx xxx"*
>
> *(Emphasis Supplied)*

153. In view of the detailed discussed hereinabove, this Court finds no infirmity with the finding of the Trial Court that the suit was barred by limitation.

f. Appellant has approached this Court with unclean hands on account of deliberate and intentional mis-statement before this Court

154. There is yet another aspect of the present matter which has to be considered by this Court with regard to statements made by the plaintiffs in the suit, i.e., the appellant and her brother, respondent no. 11 herein.

155. It is pertinent to note that when the issue of limitation was raised by the contesting respondents in their written statement, the plaintiffs made an assertion in the replication filed before the Trial Court that the plaintiffs, have been living abroad most of the time, and thereby, were not able to initiate any action with respect to the suit property earlier. However, during the cross-examination before the Trial Court, the appellant categorically stated that *"she has never resided in any country other than India"*.

156. Thus, clearly, the appellant made false statements on oath and approached the Court with unclean hands.

g. Present litigation being a proxy litigation

157. Furthermore, the present litigation is nothing but a proxy litigation, since the appellant is stated to have already sold her interest in the suit property in favour of third parties, being Shri Mahesh Kapoor and Smt. Usha Kapoor, for a sum of Rs. 77.50 Lacs, *vide* an Agreement to Sell dated 05th December, 2005. The appellant has admitted in her cross-examination that after she gets possession of the suit property, she will sell it to one Shri Mahesh Kapoor.

158. It is to be noted that upon the demise of the appellant on 07th September, 2020, an impleadment application was filed by the LRs of the deceased appellant, as well as third parties, namely, Shri Mahesh Kapoor and Smt. Usha Kapoor, seeking to assert their rights under the Agreement to Sell dated 05th December, 2005. However, the said application for impleadment *qua* the third parties, was dismissed by this Court *vide* order dated 05th May, 2022. Thus, it is manifest that the present proceedings are being pursued by a speculative litigant who has invested in a disputed property.

CONCLUSION

159. On the basis of the detailed discussion hereinabove, this Court does not find any error in the findings of the learned Trial Court. No merit is found in the present appeal. The same is accordingly dismissed.

160. The pending applications also stand disposed of.

MINI PUSHKARNA
(JUDGE)

APRIL 17, 2026
Kr/Au/Ak/Sk