Delhi High Court Kuldip Singh Suri vs Surinder Singh Kalra on 29 May, 1998 Equivalent citations: 1998 IVAD Delhi 469, 76 (1998) DLT 232, 1999 (48) DRJ 463, 1999 RLR 20 Author: A D Singh Bench: A D Singh ORDER Anil Dev Singh, J. 1. This is a suit for specific performance and possession. The dispute between the parties relates to property No.B-1/16, Vasant Vihar, New Delhi. The property is built upon plot measuring 600 sq. yards. The land belongs to the President of India. According to the plaintiff, the lease of this land along with some other plots of land were granted by the President of India in favour of the Government Servants Co-operative House Building Society Ltd (hereinafter referred to as the society). The plaintiff is a member of this society. By a tri-partite agreement (hereinafter called the sub-lease agreement) dated April 1, 1969, executed between the President of India (the lessor), the society (the lessee) and the plaintiff, the sub-lease of the above said plot was granted in favour of the plaintiff for a period of 99 years. As per clause 6 of the sub-lease agreement, the sub-lessee was not to sell, transfer, assign or otherwise part with the possession of the whole or any part of the residential plot without the prior consent in writing of the lessor. That apart, the sub-lease agreement required the sub-lessee to construct a residential premises on the subject plot within two years from April 1, 1969, which is the date of the execution of the said sub-lease agreement. It is the case of the plaintiff that due to exigencies of his service and paucity of funds he was not in a position to undertake the construction of a residential building on the said plot of land & owing to these circumstances he entered into a Building Construction Agreement (hereinafter referred to as the construction agreement) with the defendants on March 6, 1978. It required the defendants to construct a residential building at the cost of Rs.5 lakhs in accordance with the sanctioned plan, which was to be got prepared by the defendants. It also required the defendants to pay a sum of Rs.1,82,500/- to the plaintiff as security deposit for carrying out their contractual obligations. As against this, the plaintiff was required to pay to the defendants a sum of Rs.6.25 lakhs, Rs.5 lakhs as the cost of construction and Rs.1.25 lakhs as the profit of the defendants, after the defendants obtain a completion certificate of the building from the concerned authority and notify the acquisition thereof to the plaintiff as per clause 13 of the construction agreement. Besides the above said amount of Rs.6.25 lakhs, the plaintiff was also required to return the security deposit of Rs.1,82,500/- to the defendants. In the event of failure of the plaintiff to make the above said payments to the defendants within one month from the receipt of notice, in terms of clause 13 of the agreement, the plaintiff would cease to have any claim or interest in the building. 2. The defendants constructed a two and a half storeyed residential building on the said plot of land. They, without obtaining a completion certificate, occupied the ground floor of the building. They also let out the first floor thereof. The plaintiff claims that by a letter dated 12th May, 1981 he remonstrated to the defendants for their failure to furnish the completion certificate of the building. He also called upon them to hand over the possession of the property to him. But the defendants did not accede to his demand. The plaintiff further claims that he issued another letter dated 21st

July, 1981 to the defendants repeating its earlier demand and also asking them to render accounts so that he could pay the expenses incurred by them on the construction of the building. Not receiving any favourable response from the defendants, the plaintiff on April 26, 1984 filed the instant suit seeking a decree for specific performance of the aforesaid agreement and for a direction to the defendants to deliver the actual physical vacant possession of the suit property. 3. The defendants on the other hand by their written statement and counter claim, filed on January 24, 1985, set up the following case: 4. The plaintiff approached the defendants in early 1978 for the sale of the suit plot. Since the plaintiff under the sub-lease agreement was debarred from executing a regular sale deed, he suggested execution of usual documents namely, power of attorney, construction agreement, agreement to sell etc. for the transfer of title of the property to the defendants. The intention of the plaintiff was to sell the plot and the intention of the defendants was to purchase the same. With this objective in view a number of documents were executed by the plaintiff namely, construction agreement; agreement to sell; general power of attorney in favour of Sardar Saran Singh Kochar, father of defendant No.2 and father-in-law of defendant No.1; an undated letter of the plaintiff addressed to the defendants stating inter-alia that he was not in a position to pay Rs.8,07,500/- to the defendants and he would have no objection if the defendants got the property registered in their name; a will and last testament of the plaintiff bequeathing the suit property to the defendants; affidavit of Smt.Gurbux Kaur, wife of the plaintiff; and affidavits of Shri Kulvinder Singh, Shri Davinder Singh and Shri Ravinder Singh, sons of the plaintiff affirming that after the demise of the plaintiff they will not have any right or claim in respect of the suit property. The agreement to sell however got mixed up with the papers of the plaintiff and the same remained with him. This happened after the execution of the documents and delivery of possession of the plot to them against full payment of Rs.1,82,500/-. Even before the execution of the documents the parties had entered into an oral agreement on January 25, 1978, whereby the plaintiff agreed to sell the suit property for a total consideration of Rs.1,82,500/-. A sum of Rs.10,000/- was paid to the plaintiff vide cheque dated January 25, 1978, as an advance. In token of having received the cheque the plaintiff executed a receipt. The remaining amount of Rs.1,72,500/- was paid by the defendants to the plaintiff by means of a cheque dated March 6, 1978, on which date some of the above said documents were executed and possession of the plot was delivered to the defendants. 5. In the written statement-cum-counter claim the defendants have sought dismissal of the suit and a decree for pecific performance of the agree-ment to sell in favour of the defendants. On July 29, 1987 the following issues were framed by Mahesh Chandra, J. “1. Whether the plaintiff has entered into an agreement with the defendant on March 6, 1978 for nstruction of his house on plot No.B1/16, Vasant Vihar, New Delhi and what are the terms thereof? OPP. 2. Whether the plaintiff had agreed to sell plot No.B1/16, Vasant Vihar, New Delhi to the defendant vide agreement ted 6th March 1978 as alleged, if so what are the terms of said agreement of sale? 3. Whether the defendants have been prepared to perform their part

of the contract all along as alleged? 4. Whether the documents mentioned in para 32, 34 and 35 of the written statement were executed by the laintiff as part of agreement to construct a house on Plot No.B1/16, Vasant Vihar, New Delhi? 5. Whether the plaintiff is entitled to possession of the suit property? 6. Whether the defendant is entitled to specific performance of agreement to sell? 7. What is the effect of alleged part performance of the suit? 8. Whether the defendants are estopped from alleging the agree-ment to sell? 9. Relief." 6. Subsequently on July 11, 1998 the following additional issue relating to limitation was raised: "Whether the counter-claim is within limitation?" 7. I have heard the learned counsel for the parties. The learned counsel apart from the oral submissions, have filed their written submissions. Both the parties are at one in submitting that the main question for the deci-sion is whether the transaction between the parties was one of sale or a contract for construction of a house. The plaintiff has made the said submission in para 15 of his written sub-missions, which reads as follows: "The only question which arises to be determined by this Hon'ble Court is as to whether the transaction in question is a construc-tion agreement or sale agreement?" 8. Similarly the defendants in para 16 of their written submissions have stated as follows:- "This being the case put forward, sole question for consideration in the above suit, in my respectful submission, can be formulated as under: Was it only a contract for construction of house, and, Not a 'Power-of-Attorney Sale' of the plot?" p> For the determination of the main question, it will be important to note that certain facts and documents are admitted on both sides. These are:- 1. A sum of Rs.10,000/- was paid by the defendants to the plaintiff by way of a cheque dated January 25, 1978 drawn on Grindlays Bank Ltd., Parliament Street, New Delhi, Ext.D-1. In the receipt executed by the plaintiff, Ext.D-5, the plaintiff admits to have received the amount as token advance for plot No.B-1/16, Vasant ihar. It also recites that the balance payment will be made on or before March 7, 1978. 2. An agreement dated March 6, 1978, Ext.D-6 captioned as agreement of building contract, was executed between the plain-tiff as owner of the plot and the defendants as contractors. 3. An irrevocable registered power of attorney dated March 6, 1978 Ex.D-7 was executed by the plaintiff in favour of Sardar Saran Singh Kochar, father of defendant No.2 and father-in-law of defendant No.1 whereby the latter was constituted as an attorney of the plaintiff for representing him at all levels in the office of the DDA and other connected offices to secure the lease deed, conveyance deed or any other document to be required in connec-tion with the plot from the DDA; to apply for permission to sell under section 27(2) of the Urban Land (Ceiling and Regulation) Act; to sell or transfer the plot on receipt of the permission to sell; to ecute the sale deed and to present the same for regis-tration at the office of the competent sub-registrar. 4. An undated letter Ext.D-8 (for short 'letter of repudia-tion') was authored and addressed by the plaintiff to the defend-ants whereby the plaintiff acknowledged the information given by the defendants that the house on the plot in question was ready for occupation. The letter also stated that the plaintiff was not in a position to make the payment of Rs.8,07,500/- and as such he shall have no objection if the property was registered in the name

of the defendants after securing the requisite permission for the sale of the property from the DDA. The letter also per-mitted the defendants to sell or rent out the premises. The plaintiff also admitted that he will have no lien or concern whatsoever on the said property. 5. A registered Will was executed on March 6, 1978 Ex.D-9 by the plaintiff whereby he devised and bequeathed the said property to the defendants. 6. Affidavits of sons of the plaintiff, namely, Shri Kulvinder Singh dated March 27, 1978, Shri Davinder Singh dated March 26, 1978 and Shri Ravinder Singh dated March 22, 1978, Ex.D-10, Ex.D-11 & Ex.D-12 respectively, stating, inter-alia, that after the demise of their father they would not have any right or claim in the property in question. A specific reference in the affidavits was made to the above said Will executed by their father in favour of the defendants. 7. Affidavit of Smt.Gurbux Kaur, wife of the plaintiff, Ex.D-13, stating that after the demise of her husband, she will have no claim in the said property. 8. The defendants claim that apart from the above said docu-ments, the plaintiff had executed an agreement to sell but by mistake the agreement remained with the plaintiff. 9. The plaintiff appearing as his own witness reiterated that the parties had entered into an agreement for construction of the building only. Explaining the reason for entering into such an agreement he stated that according to the terms of the perpetual sub lease, he was to construct a house on the plot within two years, but due to exigencies of service he was not in a position to construct the house. Since the defendants wanted to secure the money to be spent by them on construction of the property as well as their profit thereon and the security amount aggregating to Rs.8,07,500/-, he executed the above said documents, namely, general power of attorney, repudiation letter, Will and the affidavits. 10. It seems to me that the plea of the plaintiff that the above said documents were executed merely to secure the payment of Rs.8,07,500/- to the defendants is not correct. It is important to note that the possession of the plot was undisputedly delivered by the plaintiff to the defendants on March 6, 1978. On March 6, 1978 itself the title deed namely, perpetual sub lease, Ex.D-3, of the property was also handed over to the defendants. The plaintiff seeks to explain the handing over of the title deed to the defendants by stating that the document was given merely for the perusal of the defendants and it was to be returned by them which they failed to do. It is also stated that the defendants were asked to return the document in 1979 but they did not return the same and on their refusal to return the same, he could do nothing. The explanation of the plaintiff does not carry conviction. In case the title deed was given to the defendants merely for their perusal, in that event the plaintiff apart from his oral entreaties and requests to the defendants, could have given them notice for return of the same. No such notice has been pleaded in the plaint or placed on re- cord. In case the plaintiff was unable to get back the title deed from the defendants, he could have taken recourse to legal proceedings against them for recovery of the title deed. Right from 1978 till 1984 the plaintiff took no legal action whatsoever for securing the return of the title deed from the defendants. Even in the letters dated May 12, 1981 and July 21, 1981, alleged to have been written by the plaintiff to the defendants, in regard to the latters' failure to abide by the terms

of the construction agreement, no mention is made of the defendants' failure to return the title deed. The plea of the plaintiff that the title deed was given to the defendants only for their perusal and the same was not returned by them appears to be an after thought. Besides there was hardly any reason for the plaintiff to have handed over the title deed of the property to a contrac-tor employed by him. Even where an agreement to sell is executed, normally the title deed of the property is not handed over to the intending buyer. 11. As pointed out earlier, an irrevocable registered power of attorney dated March 6, 1978, Ex.D-6, was executed by the plaintiff in favour of Sardar Saran Singh Kochar. The power of attorney empowers Sardar Saran Singh Kochar to sell and dispose of the property. It is significant to note that the general power of attorney was executed by the plaintiff in favour of a person who was the father of the defendant No.2 and was not related in any manner to the plaintiff. In case the transaction between the plaintiff and the defendants was only in the nature of a construction agreement, there was no necessity for the plaintiff to confer the power of sale of the property on a close relative of the defendants. Why the plaintiff appointed Mr.Kochar as his agent, is a question which itself suggests an answer. The appointment of Mr.Kochar as the plaintiff's attorney was obviously made in order to facilitate the execution of a sale deed in favour of the defend- ants without any difficulty as he would be interested in his daughter and son-in-law rather than the plaintiff. The plaintiff admits that it was sugg that since Mr.Kochar bore a close relationship with the defend-ants, he should, therefore, be appointed as an attorney and he agreed to that suggestion. 12. In the construction agreement, there is no mention of any specifica-tions. It also does not mention the nature and extent of the construction to be carried out. The kind of the material to be used in the construction, the dimensions of the rooms and the number of rooms on each floor to be constructed, have not been detailed in the construction greement. All that it says in this regard is that the building will be constructed in accordance with the plan to be approved by the Delhi Municipal Corporation. The agreement further inter-alia states that the contractors will get the plans prepared. It is surprising that a person who intends to get a building constructed for himself would leave the above said details and the choice of the material to the building contractor. No owner of a building would leave such details to a contractor. The plaintiff in the cross-examination categorically stated that he can not answer the question as to why no specifications were mentioned in the agreement, Ext.D-6. 13. It appears to me that in case the parties had actually entered into an agreement for construction of a building, which on completion was to be used by the plaintiff, he would have ensured that the agreement incorporat-ed the details like the extent and specifications of the construction including the kind of material to be used by the contractor in constructing the building. Besides, the satisfaction regarding the quality of work could only be that of the plaintiff and not of a third person wholly unconnected with him. As per clause 8 of the Agreement, the approval of general attor- ney, Sardar Saran Singh Kochar father of the defendant No.2, regarding the workmanship of the building and the quality of the material used therein has been made final. The plaintiff

has not given any convincing reason as to why such a power was given to Mr.Kochar. The plaintiff justifies this by saying that he was not residing and working at Delhi and therefore, he had appointed Mr.Kochar as the attorney. The explanation is puerile and sup-ports the case of the defendants that actually, the parties were entering into an agreement to sell the property as otherwise the plaintiff, firstly, would not have appointed a close relative of the defendants as his attor-ney; secondly, he would not have empowered him to sell the property, and thirdly, would not have made his opinion about the quality of the material used in the building and the workmanship thereof as final. 14. In the construction agreement one would have expected provisions for: inspection of the building by the owner; guarantee of workmanship; time frame within which the work would be completed; damages for delay in completing the work; termination of the contract due to delay in execution of the same and consequent appointment of another contractor for completing the work at the risks and cost of the defendants etc. but all these condi-tions are missing. The plaintiff has also failed to point out what equip-ment or machinery was deployed by the defendants during the construction of the house. 15. The plaintiff has admitted that after the completion of the building, he did not visit the site. He was also not able to identify the photographs of the building. From the cross-examination of the plaintiff it is clear that he does not even know the name of the Architect employed to design the building. He has also exhibited his ignorance with regard to the contrac-tors engaged for the purpose of masonary and electrical works. In this regard, the plaintiff stated as under:- "I do not know if one Surinder Sarin was an architect in the Vasant Vihar house. I also do not know if S/Shri Charan Dass and Makhan Singh were the contractors for masonary work and Shri Sant Lal was the contractor for electric work for the Vasant Vihar house. I only know the defendants who were my contractors. I used to visit the Vasant Vihar house during the course of its con-struction but I never visited it after its completion. Q. I am showing 13 photographs of the Vasant Vihar house. Kindly look at them and state if you identify the house? Ans. I cannot identify these photographs since I have not seen the completed house because I was abroad. 16. That shows an absolute lack of interest on the part of the plaintiff in the construction of the building in question. 17. In case the plaintiff was interested in getting the construction effected through a contractor, he would have made some sort of a market survey and for this purpose would have approached other contractors before entering into an agreement with the defendants for construction of the building so that he would be in a position to know the standing of the defendants as contractors and the market rate for similar constructions. The plaintiff in his cross-examination has admitted that except for ap-preaching the defendants through Bagga Property Dealers, he did not ap-proach any other contractor. He also admits that he did not consider it necessary to enquire as to what documents are required to be executed between an owner who wants his house constructed and a building contractor who undertakes construction. He also did not find out as to what was the standing of the defendants in the field of construction. In cross-examina-tion he admitted this position but

stated that if the defendants were not competent enough, they would have engaged a civil engineer. 18. It seems to me that since the real and actual nature of the transac-tion was not what is being made out by the plaintiff and actually the transaction was in the nature of an agreement to sell, the plaintiff did not take the trouble of finding out the details which a prudent owner of a plot of land would have normally checked up before entering into a con-struction agreement. The conduct of the plaintiff shows his total lack of interest in the construction of the building. It appears to me that as the building was being built for the defendants, the plaintiff was not interested in the quality and specifications of the work. 19. Besides, in case the defendants were merely employed as contractors to execute the construction work, there is no worth while reason why the plaintiff executed the Will dated March 6, 1978 (Ext.D-9) and the repudia-tion letter (Ext.D-8). There is also no cogent explanation as to why the wife and sons of the plaintiff executed affidavits giving up their rights in the property in question if the parties were entering into a construc-tion agreement for the purposes of raising the building on the subject plot. 20. The plaintiff has also not offered any plausible reason why he did not execute the deeds for cancellation of the power of attorney dated March 6, 1978 (Ext.D-7) in favour of Sardar Saran Singh Kochar and Will dated March 6, 1978 (Ext.D-9), bequeathing the plot to the defendants, till June 4, 1982 on which date both the documents were cancelled by means of registered documents. This shows that right from March 6, 1978 to June 4, 1982 i.e. for almost more than four years, the plaintiff did not take any action, even though as per his own version the defendants had breached the 'con- struction agreement'. Learned counsel for the plaintiff submitted that the plaintiff had sent registered letters dated May 12, 1981 Ext.P-1 and July 21, 1981 Ext.P-2 to Sardar Saran Singh & the defendants informing them about the cancellation of the Will, Ext.D-9, cancellation of power of attorney Ext.D-7 and the withdrawal of the undated"letter of repudiation" Ext.D-8. The plaintiff has not placed on record the postal receipts or registered A.D. cards in proof of having despatched these letters to the defendants. It is important to note that ostensibly a copy of the letter dated May 12, 1981, Ex.P1, was forwarded to the Sub-Registrar, Asaf Ali Road, New Delhi with the request that the Will dated March 6, 1978 be considered as cancelled. Similarly ostensibly copies of the letter dated July 21, 1981 addressed to the defendants were forwarded to Sub-Registrar, Asaf Ali Road in continuation of the letter dated May 12, 1981 & Delhi Development Authority, Vikas Minar, Indraprastha Estate and the Land & Development Officer, Nirman Bhawan in continuation of plaintiff's letter dated June 4, 1981. No effort, however, was made by the plaintiff to show that the copies were in fact despatched to the above said authorities. The plaintiff also failed to summon the copies of the alleged letters from the offices of the Sub-Registrar, Asaf Ali Road, Delhi Development Authority and the Land & Development Officer. These letters do not find any mention either in Ext.P3, which is the registered deed of cancellation of the power of attorney dated March 6, 1978, or in Ext.P-4, which is the fresh Will executed by the plaintiff repudiating and cancelling the earlier Will dated March 6, 1978 in favour of the

defendants. The plaintiff has not furnished any explanation for not mentioning the letters dated May 12, 1981 and July 21, 1981 in Ext.P3 and Ext.P4 which were executed on June 4, 1982, long after the despatch of the alleged letters to the defendants. The existence and authenticity of these letters is of a doubtful character. In case these letters had been written to the defendants & Sardar Saran Singh, the plain-tiff would have produced the postal receipts or registered A.D. cards. The explanation of the plaintiff that the A.D.cards were in possession of Shri Sardari Lal Bhatia,Advocate, and the same could not be retrieved from his office after his death, does not carry conviction. In the plaint the plain-tiff has not given this explanation at all. Even if A.D.cards were not available the plaintiff could have applied to the postal authorities for furnishing a certificate of delivery of letters to the defendants and to the officers of the DDA, L&DO,etc.,to whom the copies were allegedly sent. No attempt was made to secure the certificate or to summon the copies of the letters from the office of the DDA & L&DO. For all these reasons the said letters appear to have been fabricated. 21. Before closing the discussion on this aspect of the matter it needs to be noticed that the plaintiff was not legally competent to revoke the registered irrevocable power of attorney in favour of Sardar Saran Singh as the defendants had paid the entire sale consideration to the plaintiff and the plaintiff had in turn handed over possession of the property to the defendants. The power of attorney was executed in favour of Sardar Saran Singh, father of efendant No.2, only to facilitate the execution of the sale deed in favour of the defendants. Since Sardar Saran Singh is the father of defendant No.2, he is, therefore, interested in the subject-matter of agency, namely, the plot number B-1/16, Vasant Vihar, New Delhi. Section 202 of the Contract Act interdicts termination of agency where an agent has an interest in the subject-matter of the agency. The power of attorney executed by the plaintiff in favour of Sardar Saran Singh express-ly stated that it could not be revoked by the plaintiff. In the absence of an express contract permitting termination of the agency, section 202 of he Contract Act barred such termination. A similar question came up for consideration before a Division Bench of this Court in Harbans Singh Vs. Shanti Devi, 1977 R.L.R. 487, where this court held as follows :- “The next question is whether this interest was only that of respondent or that of Shri Gulati also. Paragraph 3 of the agree-ment of sale executed by the appellant itself describes Shri Gulati as”a nominee and husband" of the respondent. It also says that the appointment of Shri Gulati as the appellant’s attorney was made “in order to facilitate the transaction” of sale by the appellant to respondent. Why had the appellant to appoint as his agent Shri Gulati who was really the nominee and the husband of the respondent? The reason obviously was that Shri Gulati was regarded really interested in his wife, namely, the respondent, rather than in the appellant whose interests were opposed to those of the respondent. By his relationship with the respondent and also by the nomination by the respondent Shri Gulati was in the position of a representative or an agent of the respondent in fact. It is only in law that he became an agent of the apellant. But this agency was only with a view to serve the purpose of the respondent.This is why the last sentence in

paragraph 3 of the said agreement states that the appellant shall not be liable for negligence of Shri Gulati "who is the nominee" of his own wife. Since Indian ladies traditionally do not transact business activities, it is well known that their husbands figure as their representatives or agent in these activities. This is why Shri Gulati has acted for the respondent in these transactions. His interest in the transaction was the same as that of his wife. It was, therefore, the interest of Shri Gulati that the property which was the subject matter of the agency should be conveyed by the appellant to the respondent. The interest in such onveyance was not only of the respondent but also of Shri Gulati. The powers of attorney in favour of Shri Gulati were executed by the appellant on the same date on which he executed the agreement of sale in favour of the respondent. Since Shri Gulati acted for his wife, all these documents, therefore, constitute one transaction. The power of attorney are granted to Shri Gulati only because an agreement of sale is entered in favour of his wife. Shri Gulati no less than his wife is, therefore, interested in the subject-matter of the agency, namely, the shop. If the agency were to be terminated, prejudice would have been caused to the interest not only of the respondent but also of Shri Gulati. Section 202 of the Contract Act, therefore, prohibited the appellant from terminating the agency of Shri Gulati before the shop was duly conveyed by the appellant to the respondent." 22. Therefore, I hold that the registered deed (Ext.P-3) cancelling the power of attorney dated March 6, 1978 (Ext.D-7) is of no consequence and the power of attorney Ext.D-7 in favour of Sardar Saran Singh still sub- sists. The receipt Ex.D-5 executed by the plaintiff recites that Rs.10,000/- paid by the defendants by way of a cheque dated January 25, 1978 (Ext. D-4) was received by him as token advance for the plot. The intention of the parties to the transaction can also be gathered from the language used in the receipt which states as follows: "Received with thanks a sum of Rs.10,000/- vide cheque No.73H 090103 dated January 25, 1978 ..... from Surinder Singh Kalra and Smt. Ramandeep Kaur.....a token advance of my plot..... and balance payment will be made on or before March 7, 1978. Sd/- Kuldip Singh Suri." 23. Thus it is clear that in January 1978, before the execution of the construction agreement(Ext.D-6), Irrevocable registered Power of Attorney (Ext.D-7), registered Will Ext.D-9, affidavits Ext.D-10 to Ext.D-13, the plaintiff had received the token advance for the plot. This is also indica-tive of the transaction being one of agreement to sell. The receipt clearly shows that the plaintiff had received a sum of Rs.10,000/- from the defend-ants as advance for the plot and not as advance on account of security deposit for due performance of the terms of the construction agreement. Normally in cases where a contractor is employed for the purposes of con-struction of a building, it is the owner which makes the advance payment to the contractor towards the cost of the construction of the same. In the instant case, according to the plaintiff, the contractor not only paid the so called security deposit of Rs.1,82,500/- but was also required to spend a sum of Rs.5 lakhs from his own pocket without expecting any amount from the owner till the receipt of the completion certificate for the building from the appropriate authority. Thus the entire investment for the con- struction had to

be made by the contractor and not by the owner. It is a well known practice in Delhi that in respect of a building collaboration agreement, the contractor offers to develop the vacant land by making flats thereon & offers some money and a specified percentage of the built up area or a share of profits derived from the sale of the flats. In a building collaboration agreement normally the owner is not to spend any amount on the development and construction of flats and it is the contractor who invests the money. But the qualitative difference between a building collaboration agreement and the so called construction agreement, if its express purpose is to be accepted, is that in the former case the contrac-tor spends the entire money as he gets predominant share in the constructed area, while in the latter case the contractor does not get any interest in the property and yet constructs the same at his own cost for the owner who is to pay the money at a later stage on completion thereof. The explicit purpose of the construction agreement runs contrary to human probabilities. 24. As per the agreement, Ext.D-6, the defendants were to pay the taxes to Delhi Municipal Corporation and the ground rent to DDA. In case the plain-tiff was entering into a construction agreement, he being the owner of the property would have been liable to pay the taxes to the Delhi Municipal Corporation and the ground rent to DDA and not the defendants. This feature is also not compatible with the case set up by the plaintiff. 25. Clause 18 of the construction agreement talks of execution of a sale deed and makes the defendants liable for the payment of the stamp duty on the sale deed and registration charges. This condition is in keeping with the practice that it is the vendee who pays such expenses. This also lends support to the theory that construction agreement was nothing but a device to hide the true nature of the transaction so as to get over the restric-tion on transfer of the land. 26. Learned counsel for the defendants pointed out that the plaintiff did not have the financial capacity to built the house on the plot in question and was in need of money. He had to pay a sum of Rs.50,000/- to his brother as owlets in respect of the entire ground floor of C-426, defense Colony, New Delhi which was owned by his father during his life time. Besides his son was constructing a house at Chandigarh in the year 1978. The plaintiff in his statement has admitted that after the death of his father, the entire ground floor of the defense Colony house came to his share on partition between him and his brother for which he had to pay a sum of Rs.50,000/- to his brother as owlets. He also admitted having renovated the ground floor of the defense Colony house. The plaintiff however, has denied that he had withdrawn any money from United Commercial Bank, where he had deposited Rs.1,82,500/- after taking the same from the defendants, for the purposes of construction of the house of his son in Chandigarh. From the statement of the current account of the plaintiff Ex.D-2, it is manifest that from March 1978 till the end of December 1978 the entire sum of Rs.1,82,500/- had been utilised by him. This indicates that in case the transaction between the plaintiff and the defendants was in the nature of a construction agreement, the plaintiff in the ordinary course of human conduct would not have utilised the above said amount received from them by the defendants as the same along with the construction cost and profit of the defendants had to be returned to

the defendants. The plaintiff has failed to show that in or about the time when the defendants had construct-ed the house the plaintiff had the means to pay a sum of Rs.8,07,500/- to the defendants. According to the own showing of the plaintiff (as reflected from the disputed letter dated May 12, 1981) he was aware of the fact that house was ready in the year 1981. The plaintiff ought to have adduced evidence to show that he had set apart a sum of Rs.8,07,500/- which was available to him in the year 1981 for being paid to the defendants. The utilisation of the said sum of Rs.1,82,500/- by the plaintiff and his failure to show that he had the availability of Rs.8,07,500/- is yet anoth-er factor indicating that actually the transaction was not in the nature of a construction agreement as otherwise he would not have acted in the manner in which he did. 27. Harish Chand Bagga (DW-2) was examined by the defendants. He stated that the plot in question was sold by the plaintiff to the defendants for a sum of Rs.1,82,500/- and he was paid his commission of Rs.3650/- by the plaintiff. The plaintiff has not denied the factum, of payment of the commission to Harish Chand Bagga by means of a cheque Ext.D-1. The payment of 2% commission to the property agent also supports the theory that the parties had entered into an agreement for the sale of the property. 28. The transaction in question because of its peculiar features does not appear to be a construction agreement at all. The construction agreement (Ext.D-6) is merely a cloak to conceal the real nature of the transaction. The mist shrouding the transaction by and between the parties is lifted once the construction agreement is examined along with the receipt Ext.D-1, letter of repudiation Ext.D-8, registered Will Ext.D-9, affidavits Ext.D-1 to D-13, the above mentioned facts and circumstances and conduct of the parties. They expose the real intention of the parties and the nature of the agreement entered into by them. 29. The above mentioned facts and circumstances overwhelmingly show that the subject transaction was a power of attorney sale. The construction agreement cannot be read in isolation. In order to judge the nature of the transaction it must be viewed in the light of the circumstances existing before and after the transaction, ordinary cause of human affairs, and human probabilities. In a case where the court is to choose between two conflicting versions the court in order to unravel the truth must find out which one of the two is in tandem with ordinary course of human affairs. These principles haloed by time have found ample judicial recognition. 30. In Meer Usd Oollah vs. Mussumat Beeby Imaman, 1 Moore's Indian Ap-peals, 19, it has been held that in order to arrive at the truth, there is no better criterion of the truth, no safer rule for investigating cases of conflicting evidence than to examine which of the two cases best accords with those facts according to the ordinary course of human affairs and usual habits of life. 31. In Ramchandra Rambux vs. Champabai and others, href="javascript:fnOpenGlobalPopUp('/citation/crosscitations.asp','','1');">, the Supreme Court laid down that in order to judge the credibility of the witnesses, the Court is not confined only to the way in which the witnesses have deposed or to the demeanour of witnesses, but it is open to the Court to look into the surrounding circumstances as well as the probabilities, so that it may be able to form a correct idea of the rustworthiness of the witnesses. 32. Again

in S. Chattanatha Karayalar Vs. The Central Bank of India and others, AIR 1965 S.C. 1856 and Smt.Indira Kapur and others Vs. Shri Sheo Lal Kapoor, , it has been held that to arrive at the real nature of the transaction, it is open to the Court to look into the attend-ant and surrounding circumstances and contemporary documents. 33. Therefore, having regard to the preponderance of probabilities as well as all the documents contemporaneously executed along with the construction agreement and the attendent and surrounding circumstances and keeping in view the ordinary course of human affairs and human behaviour, it seems to me that the parties had actually entered into a power of attorney sale, which is nothing more than an agreement to sell, and the defendants paid the full consideration of Rs.1,82,500/- to the plaintiff who in turn accepted the same and handed over the possession of the land to the defend-ants. Thus, there was not only an agreement to sell by and between the parties but there was part performance of the same which was signified by delivery of possession of land. The failure of the defendants to produce the formal agreement to sell does not alter the above situation. Therefore, it is also not necessary to go into the question as to why the formal agreement to sell could not be produced by the defendants and whether it remained in the possession of the plaintiff or the parties did not execute the same at all. 34. The instant case is not an isolated case of power of attorney sale. The power of attorney sales are a reality which cannot be wished away. The practice of disposal of plots by executing various documents short of sale deeds is clearly reflected by the decision of the this Court in Usha Malho-tra vs. G.S. Uppal, 1991 Rajdhani Law Reporter 223, wherein this Court noticed the practice of entering into construction agreement to use it as a camouflage for an agreement to sell. This was a case where alongwith a construction agreement the sub-lessee of the plot, executed inter-alia the following documents in favour of the purchaser: 1. Two Wills, one by himself and the other by his wife bequeath-ing the property to the purchaser. 2. General power of attorney appointing husband of the purchaser as the lawful attorney of the sub-lessee. 3.Agreement to sell stating that since the sub-lessee was not able to construct a building on the plot therefore she agreed to sell the same to the purchaser. 35. Besides the above documents and several others including a letter of repudiation of the kind executed in the instant case, the parties also executed a construction agreement similar to the one which is the subject matter of the case in hand. While the purchaser brought a suit for specific performance, the sub lessee, plot owner, filed an application under Section 20 of the Arbitration Act to enforce the arbitration clause occurring in the construction agreement. In the suit filed by the purchaser the sub lessee filed an application under Section 41 of the Arbitration Act. This court while dismissing the application under section 20 and 41 of the Arbitration Act observed as follows: “It is a matter of common knowledge that in Delhi due to various restrictions imposed on the owners of plots held by them on perpetual leasehold basis, they devise/methods to dispose of their plots by entering into various documents like in the present case. The construction agreement is not to be read in isolation. I find, when the Uppals filed the present petition u/S. 20 of the Act,

they withheld material nformation from the Court. They said nothing except the construction agreement. After written statement was filed, they in their replication, admitted execution of various documents mentioned above. They said that agreement to sell was no doubt executed by the parties on 1.8.1978 itself, but said that the parties immediately thereafter discussed the matter the same day and in view of the fact that such a contract was forbidden by law, decided to execute the construction agreement superseding the agreement to sell. This cannot be true. They have been then unable to explain the execution; of the wills and the general power of attorney which was presented for registration on 2.8.1978. They have woefully failed to explain their letter dated 15.7.1981. If the stand that the agreement to sell was superseded with the construction agreement is to be believed, they have no answer to the execution; of other documents. Prima facie, it does appear to me that the parties agreed to the sale of the plot in question by Uppals to Usha. Otherwise, it is difficult for Uppals to explain the delay as to why for five years after the construction agreement dated 1.8.1978 till April 1983 they kept quiet, and particularly when Usha was not in construction business." 36. Same dispute at a subsequent stage again found its way to this Court, when it was observed as follows:- "It may be mentioned that in the suit, the plea of the plaintiff is that it was a sale by irrevocable power of attorney, which was executed for valuable consideration and an agreement to sell was also executed and full price was realised. However, in view of the restrictions on the transfer contained in the lease, the property could not be conveyed by formal sale deed at the time when the agreement to sell was entered into and a power of attor- ney was granted by the defendant in favour of the plaintiff against payment of full consideration for the property. Counsel for the defendant states that the power of attorney has since been revoked. I am unable to understand as to how any irrevocable power of attorney for valuable considertion, could be revoked simply by a notice under law. Counsel for the defendant states that the said grant of power of attorney was accompanied by an agreement for construction. This argument is absolutely fallacious because in fact the transaction appears to be one of a sale by power of attorney notwithstanding the lack of formality of the execution of the formal sale deed, which could not be executed in view of certain restrictions contained in the sale deed. Under the scheme whereby DDA has given the liberty to the plot holders to obtain free hold title, the position of purchases by sale on power of attorney has been recognised nothwithstanding the fact that such a sale could not be considered to be a sale of the property in the eye of law under Transfer of Property Act." 37. Learned counsel for the plaintiff next submitted that assuming the transaction was one of agreement to sell, the same is illegal in view of clause 6 of the perpetual sub lease. Clause 6 of the construction agreement in so far as it is relevant to the case in hand, reads as follows:- "6(a) The Sub-Lessee shall not sell, transfer, assign or other wise part with the possession of whole or any part of the residential plot in any form or manner, benami or otherwise, to a person who is not a member of the Lessee. (b) The Sub-Lessee shall not sell, transfer, assign or otherwise part with the possession of the whole or any part of the residen- tial plot to any other member

of the Lessee except with the previous consent in writing of the Lessor which he shall be entitled to refused in his absolute discretion." 38. It is a matter of common knowledge that in all sub leases executed on behalf of the President of India such like restrictive clauses have been incorporated. It is also a matter of common knowledge that due to such like restrictions the power of attorney sales in thousands have been effected. If the instant transaction is held to be illegal then in that eventuality thousands of such transactions on the same token would have to be declared as illegal. This would cause colossal loss and misery to the vendees. Though both the vendors and the vendees are in pari delicto, the vendors would be making capital out of their breach by getting back their proper-ties which over the years have appreciated astronomically. It would be wholly inequitable to declare such agreements being violative of perpetual sub leases. Learned counsel for the plaintiff contended that the fetter imposed by clause 6 of the perpetual sub lease Ext. D-3 is meant to protect public interest as the land in Delhi has become a scarce commodity and therefore, any violation of the same would not only give impetus to the illegal sales but would also be conflict with public policy. 39. Argument though attractive must be repelled. Public policy is not a immutable concept. It must change with the march of time. The Supreme Court in Central Inland Water Transport Corporation Limited and another Vs. Brojo Nath Ganguly and another, (1986) 3 S 156, has observed that public policy connotes some matter which concerns the public good and the public inter-est. The principles governing the doctrine of public policy must be and are capable, on proper occasion, of expansion or modification. 40. In Gherulal Parakh Vs. Mahadeodas Maiya and others, 1959 SC 781, the Supreme Court summarizing the doctrine of public policy observed as fol-lows:- The doctrine of public policy may be summarized thus: Public Policy or the policy of law is an illusive concept; it has been described as "untrustworthy guide", "variable quality", "uncerain one", "unruly horse", etc. 41. Thus it is clear that doctrine of public policy is a variable concept which must be fine tuned with demands of time and changing concerns for public good and public interest. Whether in the instant case the above said policy had achieved its desired goal is a question to be considered. The answer is not far to seek. Despite the incorporation of the restrictive clauses in the perpetual sub-leases executed by and between the DDA or L&DO on the one hand and the sub lessees on the other properties have been changing hands through, what are known as, power of attorney sales. This has deprived the state of the stamp duty and registration fee chargeable on the sale deeds. Restrictions have created a situation where there is no incentive for observing honesty. Rather the policy has given boost to dishonesty. If such restrictive clauses did not exit, the sellers and buyers would have entered into straight and regular sale transactions resulting in generation of revenue for the State in as much as the buyers would have been liable to pay the stamp duty and registration fee. In practice the restrictive clauses have worked to the detriment of the State. In order to get over the restrictions a method of sale of the property through execution of power of attorneys, Wills, affidavits and agreements to sell has been devised. It may be mentioned that Government of India on February 14,

1992 has introduced a Scheme whereby lease hold properties acquired from the Government can be converted into free hold. This decision also provides for regularisation of power of attorney sales on payment of penalty. The Scheme originally applied to the DDA and the L&DO plots measur-ing 500 sq. meters. However, by a subsequent office order No.V.11-6/92 dated June 2, 1994 the Notification dated February 14, 1992 has been made applicable to plots upto 505 sq. meters. Therefore, by virtue of the office order plots measuring upto 505 sq. meters are to be treated as falling under the Scheme dated February 14, 1992. This policy decision of the Government is an eloquent testimony of the fact that the requirements of public interest change with the times and are not static. A time had come where in keeping with the ground realities the Government had to introduce a Scheme for regularising the sales on the basis of the power of attorneys. Experience shows that unnecessary restrictions lead to deceitfulness in arranging ones affairs. The Government had rightly recognised the need for removal of such restrictions. 42. The argument of the learned counsel for the plaintiff that if the transaction is considered to be an agreement to sell, then in that event the same would be clearly void as no prior permission for entering into such a transaction was taken from the DDA for the transfer of the land, is devoid of force. An agreement to sell does not amount to sale or transfer of the immovable property. Therefore, under clause 6(a) and (b) of the perpetual sub lease, there is no bar for a sub lessee to enter into an agreement to sell. As per clause 6(a) if the sub lessee desires to sell or transfer an unbuilt plot to any person who is not a member of the lessee, he is required to take the consent in writing of the lessor. The Privy Council in Motilal v. Nanhelal , laid down that if the vendor had agreed to sell the property which can be transferred only with the sanction of some government authority, the court has jurisdiction to order the vendor to apply to the authority within a specified period, and if the sanction is forthcoming to convey to the purchaser within a certain time. This proposition of law was followed in Mrs. Chandnee Widya Wati Madden Vs. C.L. Katial, , and R.C. Chandiok Vs. Chuni Lal Sabharwal, . The Privy Council in Motilal v. Nanhelal (supra) also laid down that there is always an implied covenant on the part of the vendor to do all things necessary to effect transfer of the property regarding which he has agreed to sell the same to the vendee. In Ajit Prashad Jain Vs. N.K. Widhani and others, , this Court held that the permission from the Land & Development Officer is not a condition precedent for grant of decree for specific performance. While holding so this court relied upon the decision of the Supreme Court in Mrs. Chandnee Widya Vati Madden Vs. Dr. C.L. Katial (supra) and Maharo Saheb Shri Bhim Singhji v. Union of India, . At this stage it would be appropriate to reproduce the law laid down by this Court :- "The permission from Land and Development Office is not a condi- tion precedent for grant of decree for specific performance. In Mrs.Chandnee Widya Vati Madden Vs. Dr. C.L.Katial, : the Supreme Court confirmed the decision of the Punjab High Court holding that if the Chief Commissioner ultimately refused to grant the sanction to the sale the plain- tiff may not be able to enforce the decree for specific perform- ance of the contract but that was no bar to the court passing a decree for that relief.

The same is the position in the present case. If after grant of the decree of specific performance of the contract the Land and Development Office refuses to grant permis- sion for sale the decree-holder may not be in a position to enforce the decree but it cannot be held that such a permission is a condition precedent for passing a decree for specific per- formance of the contract. I may also notice that S.27(1) of the Urban Land (Ceiling and Regulation) Act, in so far as it imposes a restriction on transfer of any urban or unobtainable land with a building or a portion of such building, which is within the ceiling area, was declared invalid by Supreme Court in Maharo Saheb Shri Bhim Singhji Vs. Union of India , and as such it may not be necessary to obtain permission under the said Act but that is not a matter with which I am concerned at this stage. Assuming such a permission is required that would be a matter for consideration after passing of the decree and at the stage of execution. No fault can be found out with the plaintiff's anxiousness to take possession in terms of the agree- ment on payment of the amounts stipulated therein. 43. Therefore, having regard to the principle laid down in the above said decision of the Privy Council, which was subsequently reiterated by the Supreme Court and various High Courts, appropriate direction can be issued to the vendor to apply for permission of the appropriate authority as required under clauses 6(a) and (b) of the sub lease. 44. Learned counsel for the plaintiff submitted that the counter-claim of the defendants is barred by limitation. The submission is based on basical-ly the letters dated May 12, 1981 (Ext.P-1) and July 21, 1981 Ext.2. It was contended by the learned counsel for the plaintiff that under Article 54 of the Limitation Act, any suit for specific performance of a contract must be brought within three years from the date fixed for performance of the same, or if no such date is fixed, when the plaintiff had notice of the refusal of the performance by the defendant, otherwise the suit would be out of time. It was contended by the learned counsel for the plaintiff that in order to escape the bar of limitation the defendants should have filed the suit for specific performance of the agreement to sell within three years of the receipt of the letters Ext.P1 and Ext.P2. As already noticed, the plaintiff has failed to prove that the letters were despatched to the concerned persons. Since the existence and authenticity of these letters have not been established by the plaintiff he cannot draw any benefit therefrom. 45. The plaintiff illegally cancelled the General Power of Attorney and superseded the Will executed in favour of the defendants only on June 4, 1982. Since this was done by registered documents, a constructive notice thereof to the defendants can be assumed. While the deed of cancellation of General Power of Attorney and the fresh Will is dated June 4, 1982, the counter-claim was filed on January 25, 1985. 46. Therefore, the counter-claim is within three years from the date when for the first time the plaintiff indicated its refusal to perform the contract. Thus, the counter-claim is within time. Accordingly the submis-sion of the learned counsel for the plaintiff grounded on Article 54 of the Limitation Act is rejected. 47. In the light of the above discussion, my findings on each of the issues are as follows :- Issue No. 1: The plaintiff and the defendants had ostensibly entered into a construction agreement dated March 6, 1978, but the same was a camouflage to hide the

real nature of the transaction. The so called construction agreement was in reality a sham agreement and has no existence in the eye of law. Issue No. 2: The plaintiff had agreed to sell the subject plot to the defend- ants and the defendants had paid the sale consideration of Rs.1,82,500/- to the plaintiff. The plaintiff had in part per- formance of the agreement handed over possession of the suit plot to the defendants. Issue No. 3: Since the defendants had paid the entire sale consideration of Rs.1,82,500/- to the petitioner, no further obligation was cast on them which they were to discharge. Issue No. 4: Documents, namely, receipt-cum-agreement dated January 25, 1978 (Ext.D-5); irrevocable registered power of attorney dated March 6, 1978 (Ext.D-7) executed by the plaintiff in favour of Sardar Saran Singh Kochhar, father of defendant No.2; undated letter of repudiation executed by the plaintiff (Ext. D-8) and the registered Will dated March 6, 1978 (Ext. D-9) were executed by the plaintiff not as part of the agreement to construct, but were executed to nullify and explode the myth that the parties had entered into a construction agreement. These documents coupled with Ext. D-10, Ext.D-11, Ext.D-12 and Ext.D-13 and surrounding circumstances and human probabilities show that the parties had actually entered into an agreement to sell. Issue No. 5: Since the plaintiff has received the entire sale consideration from the defendants, he is not entitled to possession of the suit property. Issue No. 6: The defendants are entitled to specific performance of the agree- ment to sell as they were at all times ready and willing to perform their part of the obligation under the contract and they also discharged the obligation by paying the entire sale consideration to the plaintiff. Issue No. 7: The issue is covered by my findings in respect of the main ques- tion. Issue No. 8: The defendants are not estopped from alleging the agreement to sell. Additional Issue: The counter-claim is within limitation. Relief: In view of the foregoing findings and the con-collusions reached by me in respect of the various points raised by the parties, the suit of the plaintiff for possession of the suit premises is dismissed. The counter-claim of the defendants succeeds to the extent indicated below : A decree is hereby passed directing the plaintiff, or in the alternative Sardar Saran Singh Kochhar, to apply to the D.D.A. for permission to sell the suit land to the defendants, and on receipt of the permission execute conveyance deed in favour of the defendants. No costs.