G.T. Girish vs Y Subba Raju (D) By Lrs on 18 January, 2022

Author: K.M. Joseph

Bench: Pamidighantam Sri Narasimha, K.M. Joseph

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 380 OF 2022
[@ SPECIAL LEAVE PETITION [C] NO. 6857/2017]

G.T. GIRISH … APPELLANT(S)

VERSUS

Y. SUBBA RAJU (D) BY LRs AND ANOTHER … RESPONDENT(S)

WITH

CIVIL APPEAL NO. 381 OF 2022
[@ SPECIAL LEAVE PETITION [C] NO. 6858/2017]

JUDGMENT

K.M. JOSEPH, J.

1. Leave granted.

2. The appellants are defendant 1(a), defendant 1(b) and second defendant in a Suit filed for specific performance. Defendant 1(a) and Defendant 1(b) have filed SLP(C)No.6858/2017 while defendant No.2 has filed SLP(C)No.6857/2017. The Trial Court while refusing specific performance, directed the return of the amount paid by the plaintiff under the contract. By the Reason:

> impugned judgment, the High Court allowed the plaintiffs appeal and directed the appellants to execute the sale deed relating to the plaint schedule property in favour of the plaintiffs (legal representatives of original plaintiff). The parties will be hereinafter referred to by their status in the Trial Court.
>
> A BRIEF OVERVIEW OF FACTS

3. On 04.04.1979, the plaint schedule property, which consisted of a site, was allotted to the first defendant (since deceased), by the Bangalore Development Authority (hereinafter referred to as,

'the BDA'). Based on the allotment, a lease-cum-sale agreement was entered into between the BDA and the first defendant on 04.04.1979. The first defendant was put in possession on 14.05.1979. On 17.11.1982, the first defendant entered into the agreement with the plaintiff agreeing to execute the sale deed of the site within three months from the date on which, the plaintiff obtained the sale deed from the BDA. On 01.03.1983 and 26.04.1984, the plaintiff issued letters to the first defendant, calling upon her to execute the sale deed. The first defendant issued letter dated 08.05.1984, intimating that the plaintiff was in breach. The agreement itself had lapsed and the advance amount by the plaintiff was forfeited. After issuing Notice on 14.02.1985, the plaintiff instituted the Suit in question, seeking specific performance. The first defendant, after filing Written Statement on 14.08.1986, died pending the Suit, on 18.07.1994. The plaintiff impleaded the husband of the defendant as Defendant-1(a). A sale deed came to be executed by the BDA in favour of the son of defendant no.1 and defendant-1(a), on 19.06.1996. Thereafter, the son executed sale deed of the plaint schedule property in favour of the second defendant. It is further not in dispute that the son of the first defendant and defendant-1(a) was impleaded as defendant-1(b) in the Suit in the year 1997. The second defendant came to be impleaded as second defendant in the Suit in the year 1997. Both the defendant-1(b) and second defendant filed Written Statements.

4. The Trial Court did not decree the suit for specific performance but directed return of Rs.50,000/- with 9 per cent interest. The High Court found that the Suit is maintainable. It was further found that the second defendant is not a bonafide purchaser for value without notice of the Agreement to Sell dated 17.11.1982. It was further found by the High Court that, the alienation made in favour of the second defendant, was hit by the provisions of Section 52 of the Transfer of Property Act, 1882. Answering the point, whether the plaintiff was entitled to the relief of specific performance, it was found that, in the facts, when the entire sale consideration was paid by the plaintiff to the first defendant, nothing more remained to be done by the plaintiff, and having found that the second defendant was not a bonafide purchaser for value without notice, and taking the view that Section 23 of the Specific Relief Act, 1963 did not apply at all and there being no reason to not exercise discretion in favour of the plaintiff, the Suit was decreed by directing defendant-1(a), defendant-1(b) and the second defendant to jointly convey the plaint schedule property to the plaintiff.

5. We heard Smt. Kiran Suri, learned Senior Counsel on behalf of the second defendant and Shri R. Basant, learned Senior Counsel on behalf of the plaintiff. Mrs. Kirti Renu Mishra, AOR, appears in the Appeal filed by defendant-1(a) and defendant 1(b). THE CONTENTIONS OF THE APPELLANTS

6. Smt. Kiran Suri, learned senior counsel appearing on behalf of second defendant contended that the finding that the Suit was maintainable, was unsustainable. She contended that an agreement must be lawful, in order that a court may grant specific relief. It's her contention that the agreement is unlawful, being opposed to public policy, and also as it was a bargain, which would defeat the provisions of the law in question, within the meaning of Section 23 of the Indian Contract Act, 1872. She invited our attention to the terms of the lease-cum-sale agreement entered into between the first defendant and the BDA. She pointed out that there was clear prohibition against the alienation of the site or the plaint schedule property for a period of ten years. She drew support from the Bangalore Rules of Allotment, 1972 (hereinafter referred to as, 'the Rules'). She pointed out that the

court has erred in not noticing that Rule 18(2) proclaims an embargo against alienation for a period of ten years. The very agreement relied upon by the plaintiff was unlawful, and therefore, the court could not have granted specific performance. She drew support from Judgment of this Court in Kedar Nath Motani and others v. Prahlad Rai and others1 and Narayanamma and another v. Govindappa and others2. She further contended that the Suit itself, besides being not maintainable, was premature. She elaborated and contended that, what the agreement between the plaintiff and the first defendant contemplated, was that, the first defendant would execute the sale deed in favour of the plaintiff upon the expiry of three months from the date of conveyance of sale deed executed by the BDA. The agreement of lease-cum-sale 1 AIR 1960 SC 213 2 (2019) 19 SCC 42 contemplated such a conveyance in favour of the first defendant only after the expiry of ten years from the date of allotment and the date of the lease-cum-sale agreement dated 04.04.1979. The Suit is filed a good four years prior to even the expiry of ten years. She attacked the finding of the High Court that the second defendant was not a bonafide purchaser for value. She pointed out that as far as knowledge of pendency of Suit is concerned, the evidence pointed to the second defendant not being aware of the Suit, defendant-1(b) has admitted to not disclosing about the pendency of the Suit to the second defendant. The second defendant inspected the site and found it to be a vacant land except for a small shed. Regarding the finding of the High Court that the original document, evidencing delivery of possession of the plaint schedule property by the BDA to the first defendant, was not given to the second defendant and that only a photocopy was given, it is contended that second defendant was informed that the original was lost. There was already an assignment in favour of defendant-1(b). There was no need for the second defendant to make any further inquiry. All possible inquiry was conducted by the second defendant. There is no justification for the High Court to conclude that second defendant was not a bonafide purchaser for value. As far as finding of the High Court that the second defendant, a 20-years old, at the time of the sale, did not have the wherewithal to purchase the property, it could not be justified, having regard to the evidence which established that the second defendant was the owner of 10 acres of land. He was into the business of selling milk and he had the necessary funds and there is no occasion for the High Court to interfere with the findings of the Trial Court in this regard.

7. Per contra, Shri R. Basant, learned Senior Counsel for the plaintiff, reminded us that matter is appreciated by the two courts. The finding that there was a valid contract by the Trial Court was not challenged by the appellants. There is no pleading to justify the argument that the agreement in question was not lawful. He would point out that neither the lease- cum-sale agreement nor the Rules, prohibited the allotee entering into an agreement to sell the site. He pointed out that the Rule, which is relevant to the fact, is Rule 17. Even Rule 18, relied upon by the appellants, did not stand in the way of the agreement to sell or the sale in favour of the plaintiff. He also emphasised that it does not lie in the mouth of the appellants to invoke the proposition that agreement in question was unlawful. He pointed to the findings of the High Court that by his conduct there was complete absence of bonafides in the claim. He pointed out that as correctly found by the High Court, Doctrine of Lis Pendens, applies. He further submitted that, at any rate, if the court found that Lis Pendens did not apply, the fact that the second defendant has not been found to be a bonafide purchaser for value, was sufficient for this Court to decline to interfere, particularly, in a jurisdiction, which originates from the grant of Special Leave under Article 136 of the Constitution of India. He would refute the contention that the suit was not maintainable and further that it was

premature. He would point out that confronted with the definite stand of the first defendant, who he points out was the wife of an MLA and also a Minister, and having regard to Article 54 of the Limitation Act, 1963, had no choice, except to rush to the civil court and institute the Suit. He would rely upon large body of case law, including judgments of the High Court of Karnataka, to contend that an agreement to sell, in circumstances, such as obtaining in the present case, was valid and lawful. He would command for our acceptance, the findings of the High Court regarding the fact that second defendant was not a bonafide purchaser for value. He did not have the necessary capacity and he was fully aware of the pendency of the Suit. THE LAW IN QUESTION

8. The City of Bangalore Improvement Act, 1945, going by the Preamble, was enacted for the improvement of the city of Bangalore and to provide space for its future expansion. It contemplated the appointment of a Board of Trustees, which was to consist of eleven Trustees with the Chairman and six Trustees being appointed by the Government. The Act clothed the Board with the power to undertake improvement schemes. What is of relevance to the present case are the following provisions:

9. Section 24 read as follows:

> "24. Board not to sell or otherwise dispose of sites in certain cases.—The Board' shall not sell or otherwise dispose of any sites for the purpose of constructing buildings thereon for the accommodation of person until all the improvements specified in Section 23 [have been substantially provided for the estimates."

10. Section 29 dealt with the power of the Board to acquire, hold and dispose of the property and it reads as follows:

> "29. Power of Board to acquire, hold and dispose of property.—(1) The Board shall, for the purposes of this Act, have power to acquire and hold movable and immovable property, whether within or outside the City.
>
> (2) Subject to such restrictions, conditions and limitations as may be prescribed by rules made by the Government, the Board shall have power or lease, sell or otherwise transfer any movable or immovable property which belongs to it, and to appropriate or apply any land vested in or acquire by it for the formation of open spaces or for building purposes or in any other' manner for the purpose of any improvement scheme.
>
> (3) The restrictions, conditions and limitations contained in any grant or other transfer of any immovable property of any interest therein made by the Board shall notwithstanding anything contained in the Transfer of Property Act, 1882 (Central Act 4 of 1882) or any other law have effect according to their tenor.]"

11. Section 42 conferred power to make Rules. Following provisions are relevant for the purpose of this case:

> "42. Power of Government to make rules.—The Government may, from time to time; make rules, not inconsistent with this Act. — xxx xxx xxx (aa) regulating the allotment or sale by auction of sites by Board;
>
> (ab)specifying the conditions, restrictions and limitations subject to which the Board may sell, lease or otherwise transfer movable or immovable property;" xxx xxx xxx

12. Initially, bylaws regulating the allotment of sites were published on 08.01.1954. These bylaws came to be cancelled upon enactment of City of Bangalore Allotment of Site Rules, 1964. Thereafter, the City of Bangalore Improvement Disposal of Site Rules, 1971 came to be enacted. The said Rules came to be repealed with the making of the City of Bangalore Improvement Allotment of Site Rules, 1972. These Rules came into force on the 1st Day of September, 1972. These Rules are the Rules, which would govern the fate of this case.

13. Rule 2(b) defines the word 'allottee' as meaning the person to whom the site is allotted under these Rules. The Rules define backward class. It also, inter alia, defines stray site.

14. Rule 3 reads as follows:

> "3. Offer of sites for allotment.—(1) Whenever the Board has formed an extension or layout in pursuance of any scheme, the Board may, subject to the general or special orders of the Government, offer any or all the sites in such extension or layout for allotment to persons eligible for allotment of sites under these rules.
>
> (2) Due publicity shall be given in respect of the sites for allotment specifying their location, number, the amount payable as earnest money, the last date for submission of applications and , such other particulars as the Chairman may consider necessary; by affixing a notice to the notice board of the office of the Board, and any other office as the Chairman may decide from time to time and by publication in not less than three daily .newspapers published in the City of Bangalore in English and Kannada having a wide circulation in the city."

15. Rule 5 dealt with the allotment of stray sites. Rules 6 contemplated disposal of sites for heritable purposes.

16. Rule 7 proclaimed that the allottee was to be lessee and it reads as follows:

> "7. Allottee to be a lessee. —The site allotted under Rule 3 or Rule 5shall be deemed to have been leased to the allottee until the lease is determined or the site is conveyed in the name of the allottee in accordance with these rules. During the period of the lease, the allottee shall pay to the Board rent at the rate of rupees three per annum where the area of the site does not exceed two hundred square meters, rupees six per annum where the area of the site exceeds two hundred square meters but does not exceed five hundred square meters and rupees twelve per annum where the area of

the site exceeds five hundred square meters before the commencement of each year."

17. Rule 8 dealt with applications. It contemplated that the applications for allotment of site was to be in Form I. Several details are to be furnished. It included the annual income of the applicant, whether the applicant already owned a house or house site in the city, outside the city and whether he had any share in such property and the value of the share. It further included the query as to whether the applicant's wife/husband/minor child, owned a house or house site inside or outside the city. Since, it may be relevant to the decision at hand, we may advert to the Form.

"FORM I [See sub-rule (1) of Rule 8] Form of Application for Purchase of Site To The Chairman, City Improvement Trust Board, Bangalore 20 Sir, I wish to purchase a building site measuring ..... in .....Extension, Bangalore. I agree to abide by the conditions of allotment and sale of the site contained in Rule 17 of the City of Bangalore Improvement (Allotment of Sites) Rules, 1972, and the terms of the lease-cum- sale agreement; copies of which are enclosed in duplicate. I also enclose the duplicate copies of the conditions of allotment and sale and lease-cum-sale agreement duly signed in token of having accepted the conditions therein.

Particulars about me are given below. — 1 . Namë (in Block letters)

2. Father's/Husband's name

3. Age

4. Whether the applicant belongs to Scheduled Caste or Scheduled Tribe, Nomadic Tribes, Semi-Nomadic Tribes, Backward Classes, Denotified Tribes.

5. Whether married or single

6. (a) Residential address: Permanent (House No., Name of street, locality and Town):

(b) Present address: (if different from above) for correspondence with the Board.

7. (i) Occupation or post.

(ii) Address

(iii) Place of employment or business.

8. (a) Annual income of the applicant (both from profession and from properties if any)

(b) Any other means indicating the capacity of the applicant to purchase the site applied for and to building a house thereon.

9. Whether the applicant is ordinarily a resident in Bangalore City or in the area under the jurisdiction of the Board and the period of such residence.

10. Whether any member of the family of which the applicant is a member owns or has been allotted site or a house by the Board or any other authority, within the area under the jurisdiction of the Board. (Furnish details).

11. (1) Whether the applicant already owns a house or a house-site:

(a) in the City (with details)

(b) outside the city (with details) (2) Whether he/she has any share in such property and the value of the share thereof.

12. (1) Whether the applicant's wife/ husband /minor child owns a house or a house-site:

(a) in the City (with details)

(b) outside the city (with details) (2)Whether the applicant's wife/husband/minor child has any share in such property and the value 01 the share thereof.

13. Whether the applicant has transferred the ownership or rights in the house or house- site already allotted to him/her in any of the schemes of the Board or any other authority to somebody else (if so, himish details).

14. Whether the applicant or any members or his/her family has already availed of any housing or loan scheme of Government local body or Co-operative Society, if so, give details.

15. Whether the applicants applied for allotment of a site or a site with a building, in any of the scheme of the Board or and other authority and whether his/her deposit was refund (if so, furnish details).

16. Amount of earnest money deposited now (with Challan No. and date).

I hereby solemnly declare that all the above information given by me is true. I shall furnish any additional information in my possession which you may require. If there is any delay on my part to furnish the necessary information required by the Board, it will be within the discretion of the Board to reject my application.

If, at any time it is found that the information given by me above is incorrect, the Board can cancel the allotment, resume possession of the site and forfeit part or whole of the amount paid by me till then towards cost of the site or deposit.

I am aware that under the Rules, I have to build the house myself with my own resources.

Signature of Applicant Station ..... Date ..... Attested Magistrate of the First Class Date....."

18. Rule 10 dealt with the issue of eligibility for allotment and it reads as follows:

> "10. Eligibility for allotment. —No person.
>
> (1)Nho.is not ordinarily resident (living independently or with his family members).in the area within the jurisdiction of the Board for not less than five years immediately before the last date fixed for making applications:
>
> Provided that the persons who are domiciled in the State of Karnataka but serving in the Armed Forces of the Union outside the State of Karnataka shall be eligible for allotment of Sites under these rules.
>
> (2) Who or any member of whose family owns or is a lessee entitled to demand conveyance eventually or has been allotted a site or a house by the Board or any other authority, within the area under the jurisdiction of the Board; or of the Corporation of the City of Bangalore, shall be eligible to apply for allotment of a site:
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> Provided that the Board may relax the restriction in c1ause (1) regarding residence in the case of persons. —
>
> (i) who are domiciled in the State of Mysore and who bona fide intend to reside within the area under the jurisdiction o/ the Board; or,
>
> (ii) who are domiciled.in the State of Mysore but have gone outside the State on business, employment, study or training and who bona fide intend to reside within the area under the jurisdiction of the board;
>
> or
>
> (iii) who though not domiciled in the State of Mysore bona fide intend to reside within the area under the jurisdiction of the Board."

19. Rule 11 provided for the principles for selection of applicants for allotment of sites. The following principles have been set out in Rule 11(1):

> "11. Principles for selection of applicants for allotment of sites. —(1) The Board shall consider the case of each applicant on its merits and shall have regard to the following principles in making selection. —
>
> (i) the status of the applicant, that is whether he is married or single and has dependent children;

(ii) the income of the applicant and his capacity to purchase a site and build a house thereon for his residence:

Provided that this condition shall not be considered in case of applicants belonging to Scheduled Castes, Scheduled Tribes, Wandering Tribes, Nomadic Tribes and other Backward Classes.

(iii) the number of years the applicant has been waiting for allotment of a site and the fact that he did not secure a site earlier though he is eligible and had applied for a site;

(iv) persons who are ex-servicemen or members of the family of the deceased servicemen killed in action, during the last ten years."

20. The sites were to be allotted among different classes of persons which included wandering tribes, scheduled tribes, scheduled castes, ex-servicemen, persons domiciled in Karnataka but serving in the Armed Forces of the Union outside the State, State Government servants, Central Government servants and servants of Corporation. 51 per cent was reserved, in other words, in specific percentage terms for these categories. 49 per cent was made available for the general public. Non-availability of applicants was also dealt with.

21. Rule 13 provided for selection of an applicant. The Board was empowered to reject any application without assigning any reason.

22. Rule 17 provides for conditions of allotment. Since, much turns on the impact of this Rule, we would refer to the same.

"17. Conditions of allotment and sale of site.

- The allotment of a site under these rules shall be subject to the following conditions. — (1) The allottee shall within a period of fifteen days from the date of receipt of the notice of allotment, pay to the Board twelve and a half per cent of the price of the site and if no such payment is made the allottee shall be deemed to have declined the allotment.

(2) The balance of the value of the site (less than a sum of rupees thirty where the area of the site does not exceed two hundred square meters, rupees sixty where the area exceeds two hundred square meters and does not exceed five hundred square meters and rupees one hundred and twenty where the area exceeds five hundred square meters) shall be paid within ninety days from the date of receipt of the notice of allotment, or such extended period not exceeding one year as the Chairman may specify. Interest at [fifteen per cent]] shall be paid on the said amount for the extended period. If the said amount is not paid within the period of ninety days or the extended period the earnest money paid by the allottee shall be liable to forfeiture and the allotment may be cancelled:

[Provided that where an allottee is a person. —

(i) whose annual income does not exceed [three thousand and six hundred rupees], he may choose to pay the balance value of the site in quarterly, half yearly or annual installments and the rate of interest on the said amount for the extended period for quarterly payment will be two per cent for half yearly payments will be three per cent and annual payments four per cent;

(ii) whose annual income exceeds [three thousand and six hundred rupees] but does not exceed seven thousand and two hundred rupees interest at twelve per cent per annum shall be paid on the said amount for de extended period:

Provided further that where an allottee is a person belonging to a Scheduled Caste or Scheduled Tribe or other Backward Classes or a nomadic tribe or a wandering tribe, or a denotified tribe or a family of Defence personnel killed or disabled during the recent war and whose annual income from all sources does not exceed rupees five thousand, the balance of the value of the site required to be paid under this sub-rule shall be paid by him without interest within a period of six years from the date of receipt of the notice of allotment.] (3) Until the site is conveyed to the allottee the amount paid by the allottee for the purchase of the site shall be held by the Board as security deposit for the due performance of the terms and conditions of the allotment and the lease-cum-sale agreement entered into between the Board and the allottee.

(4) After payment under sub-rule (2) is made the Board shall intimate the allottee the actual measurements of the site and the particulars thereof and a lease-cum-sale agreement in Form II shall thereafter be executed by the allottee and the Board and registered by the allottee. If the agreement is not executed within forty-five days after the Board has intimated the actual measurements and particulars of the site to the allottee, the earnest money paid by the allottee may be forfeited, the allotment of the site may be cancelled, and the amount paid by the allottee after deducting the earnest money refunded to him. Every allottee shall construct a building on the site in accordance with the plans and designs approved by the Board. If in any case it is considered necessary to add any additional conditions in the agreement the Board may make such additions.

Approval of the City of Bangalore Municipal Corporation for the plans and designs shall be necessary when the layout in which the site is situated is transferred to the control of the said Corporation.

(5) The allottee shall comply with the conditions of the agreement executed by him and the buildings and other bye-

laws of the Board or the Corporation, as the case may be, for the time being in force.

(6) The allottee shall construct a building within a period of two years from the date of execution of the agreement or such extended period '[as the Chairman may] in any specified case by written order permit. If the building is not constructed within the said period the allotment may, after reasonable notice to the allottee, be cancelled, the agreement revoked, the lease determined and the allottee evicted from the site by the Board, and after forfeiting twelve and a half per cent of the value of the site paid by the allottee, the Board shall refund the balance to the allottee.

(7) (a) On the expiry of the period of ten years and if the allotment has not been cancelled or the lease has not been determined in accordance with these brutes or the terms of the agreement in the meanwhile the Board shall by notice call upon the allottee to get the sale deed of tire site executed at his own cost within the time specified in the said notice.

(b) If the allottee fails to get the sale deed executed within the time so specified the Board shall itself execute the same and recover the cost and other charges, if any, incidental thereto from the allottee as if the same are amount due to the Board.] (8) The allottee shall ordinarily reside or himself make use of the building constructed on the site allotted to him.

(9) With effect from the date of taking possession of the site the allottee or his heirs and successors shall be liable to pay the taxes, fees and cesses payable in respect of the site and any building erected thereon.

If the particulars furnished by the applicant in the prescribed app1icaüon form for allotment of site are found incorrect or false subsequently, twelve and half per cent of the site value, shall be forfeited after the site is resumed by the Board and the balance amount of site value refunded to the applicant."

23. Rule 18, likewise, speaks about restrictions, conditions and limitations on sale of sites and we refer to the same:

> "18. Restrictions, conditions and limitation on sales of sites.—(1) Notwithstanding' anything contained in. —
>
> (i) these rules or any other rules, bye-

laws or orders governing the allotment, grant or sale of sites by the Board for construction of buildings; or

(ii) any instrument executed in respect of any site allotted, granted or sold by the Board for construction of buildings, the Chairman may at the request of the allottee grantee or purchaser of a site, execute a deed of conveyance subject to the restrictions, conditions and limitations specified in sub-rule (2). (2) The conveyance by the Chairman of a site in favour of an allottee, grantee or purchaser of a site (hereinafter referred to as "the purchaser") shall be subject to the following restrictions, conditions and limitations, namely.—

(a).in the case of a site on which a building has not been constructed. —

(i) the purchaser shall construct a building on the site within such period as may be specified by the Board, as per plans, designs and conditions to be approved by the Board or in conformity with the provisions of the City of Bangalore Municipal Corporation Act, 1949 and the Bye-laws made thereunder;

(ii) the purchaser shall not without the approval of the Board, construct on the site any building other than a building for the construction of which the site was allotted, granted or sold;

(iii) the purchaser shall not alienate the site within a period of ten years from the date of allotment except by mortgage in favour of the Government of India, the Government of Mysore, the Life Insurance Corporation of India or the Mysore Housing Board, or any [any company or Co-operative Society approved by the Board] or any Corporation set up, owned or controlled by the State Government or the Central Government to secure moneys advanced by such Government, 2[Corporation, Board, CompanyJ, Society or Corporations, as the case may be, for the construction of the building on the site;

(b) in the case of a site on which a building has been constructed, the purchaser shall not alienate the site and the building constructed thereon within a period of ten years from the date of allotment, except.

—

(i) by mortgage in favour of the Government of India, the Government of Mysore, the Life Insurance Corporation of India or the Mysore Housing Board or any Co-operative Society approved by the Board to secure moneys advanced by such Government, [Corporation, Board, Company] or Society for the construction of the building on the site; or

(ii) with the previous approval of the Board;

(c) in the event of the purchaser committing breach of any of the conditions in clause (a) or clause

(b), the Board may at any time, after giving the purchaser reasonable notice, resume the site free from all encumbrances. The purchaser may remove all things which he has attached to the earth:

> 'Provided he leaves the site in the state in which he received it. All transaction entered into in contravention of the conditions specified in clauses (a) and
>
> (b) shall be null and void ab initio.

‘Explanation. — In this rule, references to the Board shall be deemed to include the Chairman when authorised by the Board by a general resolution to exercise any power vested in the Board.

[(3) Notwithstanding anything in sub-rule (2), but without prejudice to the provisions of Rule 17 where the lessee applies that for reasons beyond his control he is unable to reside in the City of Bangalore or by reasons of his insolvency or impecuniosity it is necessary for him to sell the site or site and the building, if any, he may have put up thereon, the Bangalore Development Authority may, with the previous approval of the State Government, either. —

(a) require him to surrender the site, where there is no building, in its favour; or

(b) where there is a building put up, permit him to sell the vacant site and building:

> Provided that. —
>
> (i) in case covered by clause (a), the Bangalore Development Authority shall pay to the lessee the allotted value of the site and an, additional sum equal to the amount of interest at twelve per cent per annum thereon; and in case covered by clause (b), the lessee shall pay to the Bangalore Development Authority a sum equal to the amount of interest at twelve per cent per annum on the allotted value of the site.]"

24. Rule 19 dealt with voluntary surrender and it read as follows:

> "19. Voluntary surrender. — An allottee may at any time after allotment, surrender the site allotted to him to the Board. On such surrender the Board shall refund all amounts paid by the allottee to the Board in respect of the said site."

25. The Rules did not apply to disposal of corner sites and commercial sites.

26. We may notice in fact that the City of Bangalore Improvement Act, 1945 came to be repealed by the Bangalore Development Authority Act, 1976. There were certain amendments carried out to the 1972 Rules which need not detain us.

THE PURPORT OF THE ABOVE LAW

27. It is clear that what is involved is the allotment of public property. The allottee was to be a lessee. The allottee, during the period of lease, was to pay rent, as provided in Rule 7. Allotment was premised on selection being carried out based on principles for selection, as provided in Rule 11 and to be carried by the Allotment Committee under Rule 12. The value of the site is fixed. This is clear from Rule 17(1). The allottee was to pay 12 ½ per cent of the price of the site within 15 days of the receipt of notice of allotment. Within 90 days from the date of receipt of notice of allotment or extended period not exceeding one year, which may be fixed by the Chairman, the balance had to be paid. Non-payment attracted interest for the extended period. If the amount was not paid within 90 days or the extended period, earnest money was liable to be forfeited and the allotment may be cancelled. The two provisos of Rule 17 provided for certain concessions to certain categories. The amount, which was paid by the allottee, formed the security deposit for the due performance of the obligation, under the lease-cum-sale agreement between the Board and the allottee. This was to be

so till the conveyance was executed regarding the site to the allottee. A lease-cum-sale agreement in Form 2 was to be entered into by the allottee. Every allottee was mandated to construct a building, which, we may clarify was to be a residential building, on the site in accordance with plan approved by the Board. The allottee was to comply with the conditions in the agreement. Rule 17(6) fixed the period of two years from the date of execution of the lease-cum-sale agreement or such extended period, within which the building had to be put up. Till 29.05.1980, the power to extend the period was vested with the Board. After 29.05.1980 the power to extend by a written Order was vested with the Chairman. If the building was not constructed within the period of two years or extended period, the allotment could be cancelled and the agreement revoked, the lease determined and the allottee evicted from the site by the Board. Such action was to be preceded by according a reasonable notice to the allottee against the proposed action. In the event of such action being taken, the allottee was entitled to the refund of the amount after forfeiting 12 ½ per cent of the value. It is under Rule 17(7)(a) that on expiry of 10 years of the allotment, the time arrived for conveying the rights over the site. When 10 years expired, if the allotment had not been cancelled or lease determined, in accordance with the Rules or in terms of the agreement, the Board, after issuing a notice to the allottee, calls upon the allottee to execute the sale deed at his cost. If the allottee failed to get the sale deed executed, the Board was to execute the sale deed and recover the cost.

28. Now, the time is ripe to advert to the statutory lease-cum-sale agreement referred to in Rule 17(4). It is in Form II and much turns on its terms and we advert to the same, which has been, admittedly, entered into by the first defendant with the BDA.

"FORM II [See Rule 17(4)] Lease-cum-sale agreement An agreement made this . . . . . day of ..... 197.. , between the City of Bangalore Improvement Trust Board, Bangalore, (hereinafter called the "Lessor/Vendor") which term shall wherever the context so permits, mean and include its successors in interest and assigns of the ONE PART and .....hereinafter called Lessee/Purchaser (which term shall wherever the context so permits mean and include his/her heirs, executors; administrators and legal representatives) of the OTHER PART; . Whereas, the City of Bangalore Improvement Trust Board advertised for sale building sites in Extension; And, whereas, one of such building site in Site No:..... more fully described in the Schedule hereunder and referred to as property;

And, whereas, there were negotiation between the Lessee/Purchaser on the one hand and the Lessor/Vendor on the other for allowing the Lessee/purchaser to occupy the property as Lessee until the payment in full of the price of the aforesaid site as might be fixed by the Lessor/Vendor as hereinafter provided; And, whereas, the Lessor/Vendor agreed to do so subject to the terms and conditions specified in the City of Bangalore Improvement (Allotment of Sites) Rules, 1972, and the terms and conditions hereinafter contained; And, whereas, thus the Lessor/Vendor has agreed to lease the property and the Lessee/Purchaser has agreed to take it on lease subject to the terms and conditions specified in the said rules and the terms and conditions specified hereunder:

Now this Indenture Witnesseth

1. ..... The Lessee/Purchaser is hereby put in possession of the property and the Lessee/Purchaser shall occupy the property as a tenant thereof for a period of ten years from (here enter the date of giving possession) or in the event of the lease being determined earlier till the date of such termination. The amount deposited by the Lessee/Purchaser towards the value of the property shall, during the period of tenancy, he held by the Lessor/Vendor as security deposit for the due performance of the terms and conditions of these presents.

2. ..... The lessee/ purchaser shall pay a sum of rupees ... per years as rent on or before ..... commencing from.....

3. The Lessee/Purchaser shall construct a building in the property as per plans, designs and conditions to be approved by the Lessee/Vendor and in conformity with the provisions of the City of Bangalore Municipal Corporations Act, 1949, and the bye-laws made thereunder within two years from the date of this agreement:

Provided that where the Lessor/Vendor for sufficient reasons extends in any particular case the time for construction of such building, the Lessee/Purchaser shall construct the building within such extended period.

4. The Lessee/Purchaser shall not sub-divide the property or construct more than one dwelling house on it.

The expression “dwelling house” means a building constructed to be used wholly for human habitation and shall not include any apartments to the building whether attached thereto or not, used as a shop or a building of ware-house or building in which manufactory operations are conducted by mechanical power or otherwise.

5. The Lessee/Purchaser shall not alienate the site or the building that may be constructed thereon during the period to the tenancy. The Lessor/Vendor may, however permit the mortgage of the right, title and interest of the Lessee/Purchaser in favour of the Government of Mysore, the Central Government or bodies corporate like the Mysore Housing Board or the Life Insurance Corporation of India, Housing Co-operative Societies or Banks to secure moneys advanced by such Governments or bodies for the construction of the building.

6. The Lessee/Purchaser agrees that the Lessor/Vendor may take over possession of the property with the structure thereon if there is any misrepresentation in the application for allotment of site.

7.The property shall not be put to any use except as a residential building without the consent in writing of Lessor/Vendor.

8. The Lessee/Purchaser shall be liable to pay all outgoings with reference to the property including taxes due to the Government and the Municipal Corporation of Bangalore.

9. On matters not specifically stipulated in these presents the Lessor/Vendor shall be entitled to give directions to the Lessee/Purchaser which the Lessee/Purchaser shall carry out and default in carrying out such directions will be a breach of conditions of these presents.

10.. In the event of the Lessee/Purchaser committing default in the payment of rent or committing breach of any of the conditions of this agreement or the provisions of the City of Bangalore Improvement (Allotment of Sites) Rules, 1972, the Lessor/Vendor may determine the tenancy at any time after giving the Lessee/Purchaser fifteen days' notice ending with the month of the tenancy, and take possession of the property. The Lessor/Vendor may also forfeit twelve and a half per cent of the amount treated as security deposit under Clause 1 of these presents.

11. At the end of ten years referred to in Clause 1 the total amount of rent paid by the lessee/purchaser for the period of the tenancy shall be adjusted towards the balance of the value of the property.

12. If the Lessee/Purchaser has performed all the conditions mentioned herein and committed no breach thereof the Lessor/Vendor shall at the end of ten years referred to in Clause 1, sell the property, to the Lessee/Purchaser and all attendant expenses in connection with such sale such as stamp duty, registration charges, etc., shall be borne by the Lessee/Purchaser.

13. The Lessee/Purchaser hereby also confirms that this agreement shall be subject to the terms and conditions specified in the City of Bangalore Improvement (Allotment of Sites) Rules, 1972, and agreed to by the Lessee/Purchaser in his/her application for allotment of the site.

14. In case the Lessee/Purchaser is evicted under Clause 9 he shall not be entitled to claim from the Lessor/Vendor and compensation towards the value of the improvements or the superstructure erected by him on the scheduled property by virtue of and in pursuance of these presents.

15. It is also agreed between the parties hereto that R s .....(Rupees.....) in the hands of the Lessor/Vendor received by them from the Lessee/Purchaser shall be held by them as security for any loss or expense that the Lessor/Vendor may be put to in connection with any legal proceedings including eviction proceedings that may be, taken against the Lessee/Purchaser and ,all such expenses shall be appropriated by the Lessor/Vendor from and out of the moneys of the Lessee/Purchaser held in their hands.

THE SCHEDULE Site No..... formed by the City of Bangalore Improvement Trust Board in Block No. . . . . in the. ..... Extension. Site bound on.— East by:

West by:

North by:

South by:

and measuring east to west .....:...north to south ..... in all measuring ... . square feet. In witness whereof the parties have affixed their signatures to this agreement. Chairman.

The City of Bangalore Improvement Trust Board. Witnesses:

1.

2. Witnesses:

1.

2.

Lessee/Purchaser."

29. The question then arises, as to what is the purport of Rule 18. Rule 18, in our view, produces the following effects and is intended to apply as follows:

> It begins with a non obstante clause as far as Rule 18(1) is concerned. Rule 18(1) is to apply despite anything which is contained in the Rules itself. That apart, it would operate, notwithstanding any other Rules, bylaws and orders, which may occupy the field. Even an instrument executed in respect of any site allotted, rented or sold by the Board for the construction of buildings, will not detract from the exercise of power. The power, under Rule 18, is vested with the Chairman. The scope of the power is to execute a deed of conveyance. This is premised on the request being made by the allottee grantee or purchaser of the site. Rule 18(1) further contemplates that when the power is invoked by the Chairman under Rule 18(1), the restrictions, conditions and limitations mentioned in Rule 18(2) will ipso facto apply. Rule 18(2) divides the categories into two. Rule 18(2)(a) deals with the situation where no building has been constructed on the site. Rule 18 (2)(b) deals with the situation where a building has been constructed on the site. Since, we are, in this case, concerned with the case of a site on which the building has not been constructed, within the meaning of the Rules, we may indicate that the condition that is imposed, includes the obligation on the part of the purchaser to construct the building on the site, within the period as may be specified by the Board. The purchaser is visited with the restriction that he shall not, without the approval of the Board, construct on the site, any building other than the building for which the site was allotted, rented or sold. The purchaser, who is the beneficiary of deed of conveyance in his favour under Rule 18(1), is bound by the further limitation or condition that the purchaser shall not alienate the site within a period of 10 years from the date of allotment. The restriction against alienation, however, could not operate against a mortgage, as provided in Rule 18(2)(iii). The mortgage is, however, to be one effected for the purpose of construction of the building on the site. Rule 18(2)(c) visits the purchaser,

> committing breach of any of the conditions in clause (a), inter alia, with the resumption of the site, no doubt, after a reasonable notice. Rule 18(2)(c) further declares that all transactions entered into in contravention of the conditions in Clause (a) and (b) are to be null and void ab initio. The transactions, which are referred to in Rule 18(2)(c), are the transactions which are referred to in Rule 18(2)(a)(iii) or Rule 18(2)(b).

30. Now, the question would arise as to the effect of the interplay of Rule 17, the lease-cum-sale agreement and the provisions of Rule 18(1) and Rule 18(2). An allottee begins his innings as a lessee. The terms of the lease are set out in the Rules itself, which we have adverted to. The entire value of the site is to be paid at the very beginning, as already noticed, or within the extended period. However, the allottee continues as a lessee. He is obliged to observe the conditions of the lease-cum-sale agreement. He is obliged to pay rent, as provided in the Rules and also the lease-cum-sale agreement. Under Clause (5) of the lease-cum-sale agreement, the allottee, who is also described as the lessee/purchaser, is forbidden from alienating the site or the building that may be constructed during the period of the tenancy. The period of tenancy is fixed as a period of 10 years from the date of giving possession to the allottee. In other words, an allottee, who is obliged to enter into a lease-cum-sale agreement is prohibited from alienating the site or the building, which may be put up for the period of 10 years. This period of 10 years is adverted to in Rule 17(7). In other words, for a period of 10 years, the allottee, who is also described as the lessee and purchaser, cannot alienate the site or the building. It is to be understood that by virtue of Rule 7 of the Rules, the allottee is treated as a lessee. What the Rules and agreement contemplate is, though the entire amount of the value of the site is payable within a period of 90 days or extended period under Rule 17(2), the allottee/lessee becomes the purchaser of the site, only when the conveyance deed is executed in his favour under Rule 17(7). During this period, the Rules and the agreement contemplate clearly that the allottee puts up the building for his residence but he cannot alienate the property during the period of 10 years, which is the period of tenancy, and this period of 10 years begins, from the time he is put into possession, based on the agreement. Rule 18(1) and Rule 18(2), in a manner of speaking, fast tracks the conveyance. In other words, Rule 18(1) enables the Chairman, on the request of an allottee, within the meaning of Rule 17, to execute a deed of conveyance, even before the expiry of 10 years, contemplated in Rule 17(7). However, when an allottee is the beneficiary of the exercise of power under Rule 18(1) and a conveyance deed is executed to him, the Rule-maker, has still incorporated the condition against alienation for a period of 10 years, which is not to operate from the date of the conveyance. The embargo against alienation in the case of the conveyance deed being executed in favour of the allottee during the currency of the lease-cum-sale agreement in Form II will operate for a period of 10 years from the date of allotment.

31. Thus, in a case of allotment under Rule 17, the condition against alienation is to exist for a period of 10 years from the date of allotment. In the case of conveyance deed, which is executed in favour of the allottee, the condition against alienation will again operate for the period of ten years from the date of allotment. This is apart from the other conditions, viz., construction of the building on the site. In short, the allottee becomes the owner of the site before the expiry of 10 years upon power being invoked under Rule 18(1) but the assignment of the rights, which would have been otherwise absolute, is subjected to the conditions, as mentioned in Rule 18(2)(a), which includes the

prohibition against the alienation. We must remind ourselves that under Section 29(3) of the Act of 1945, the Transfer of Property Act is eclipsed by the terms of any grant or transfer. The condition against alienation is not to be counted from the date of the execution of the conveyance deed but for the unexpired period, in the case of the lease-cum-sale agreement executed.

32. The impact of Rule 18(3) is to be noticed. This Rule was substituted w.e.f. from 21.12.1976. The Rule contemplates two conditions for its operation. Firstly, it operates without prejudice to the provisions of Rule

17. Secondly, Rule 18(3) applies, notwithstanding anything contained in Rule 18(2). Now, coming to the exact scope of Rule 18(3), it contemplates the existence of either of the conditions mentioned therein. They are – (1) the lessee applies pointing out that for reason beyond his control, he is unable to reside in the city of Bangalore; (2) by reason of his insolvency or impecuniosity, it has become necessary for him to sell the site and or site and the building, if any, he may have put up thereon.

33. We have already explained the scope of Rule 18 and the interplay between Rule 17 and Rule 18. Rule 18(3) must be read along with Rule 17. The argument to the contrary by the plaintiff is untenable. In fact, it would involve denying relief intended for persons falling under Rule 17, as will be clear hereinafter. A perusal of Rule 18(3) would reveal the following:

> While a person is a lessee (which means while he is an allottee), the course open to an allottee/lessee, is to follow the Rules and lease-
>
> cum-sale agreement and put up a residential building on the site. He may be disabled by the financial condition from fulfilling his promise under the lease-cum-sale agreement and the Rules to put up the building. In either case, i.e., when because of the dire financial straits, he finds himself in, he can apply to the Authority to permit him to sell the site, if no building has been put up or if he has put up a building on the site, the site along with the building. The courses of action open to the BDA would be as follows:
>
> It may with the previous approval of the State Government, call upon the applicant, when he has not put up the building, to surrender the site.
>
> Thus, in a case where a lessee/allottee wishes to sell the site, the Rules contemplate that site would have to be surrendered in favour of the Authority. The rationale appears to be, instead of permitting the site being sold to any third party, the site would go back to the Authority, which in turn, will enable it to allot it to the eligible persons waiting in the queue. Where a building has been put up, again, Rule 18(3)(b) contemplates that the lessee can be permitted to sell the vacant site and the building. When the lessee, on the basis of his request that he may be permitted to sell the site, has surrendered the site to the BDA, the further consequence contemplated is that the lessee will get back the value of the allotted site, which he has deposited under

Rule 17(1) and (2). Over the above the same, the lessee is to be paid an additional sum equal to the amount of interest at the rate of 12 per cent per annum. We must, at this juncture, also do justice to the words in Rule 18(3) "but without provisions of Rule 17". The import of this part of Rule 18(3) is as follows – under Rule 17, it is open to the Authority to cancel allotment and revoke the agreement and determine the lease. The allottee can be evicted from the site. The amount of 12 ½ per cent of the value paid, under Rule 17(1) can be forfeited. No doubt, the Board will refund the balance to the allottee. This is a consequence which is contemplated in Rule 17(6). This power with the Board is kept preserved when an allottee does not put up the building. Thus, Rule 18(3) must be understood as a power with the Board to be exercised with the previous approval of the State Government. Thus, an allottee, as a Rule, is expected to hold up to the promise he has made about his financial capacity to construct the building. Consequences in Rule 17 would remain alive. The power under Rule 18(3) appears to us to encompass situations of insolvency or impecuniosity, which overtake an allottee after the allotment takes place. In other words, the unplanned and uncontemplated vicissitudes of life may visit him inter alia with insolvency or impecuniosity, leaving with him no other choice but to sell the site or even the site with the building. The fact that power under Rule 18(3) is not meant to be a mechanical exercise of power, can be discerned from the requirement that 'previous' approval of the State Government is the sine qua non for the BDA exercising its power.

THE UNDISPUTED FACTS

34. The BDA made an allotment of the plot on 04.04.1979 to the first defendant. The lease-cum-sale agreement was also executed on the same date. It is while so that on 17.11.1982, the plaintiff entered into the agreement with the first defendant. Under the allotment, the first defendant was put in possession of the site. A perusal of the agreement would reveal the following:

"NOW THIS DEED WITNESSETH AS FOLLOWS :

1. The vendor does hereby agrees to sell the schedule site to the purchaser for a price of Rs. 50,000/- (Rs. Fifty thousand only).

2. The purchaser has hereby agreed with the vendor to purchase the schedule site for the said price of Rs.50,000 (Fifty thousand only).

3. The purchaser has paid a sum of Rs.30,000/- (Rs.Thirty thousand only) as advance and part of the purchase money by cheque No. 81/YA. 709838 dated 17 .11.198 2, drawn on Indian Bank, Malleswaram, Bangalore to the vendor, who hereby acknowledges the receipt of the said amount from the purchaser.

4. The vendor does hereby agree with the purchaser to obtain the absolute sale deed from the Bangalore Development Authority and then complete the sale transaction

with the purchaser. It is agreed that the sale has to be completed on or before the expiry period of three months from the day the vendor obtains the absolute sale deed from the Bangalore Development Authority and intimates the purchaser in writing.

5. The vendor has handed over the original possession certificate to the purchaser.

6. The vendor has agreed to deliver the following documents to the purchaser :

(a) Absolute sale deed after obtaining from the Bangalore Development Authority, Bangalore.

(b) Katha certificate issued by the Bangalore Development Authority in favour of the vendor.

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(c)    N I L Encumbrance Certificate.
(d)     Uptodate tax paid receipt.
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7. The vendor hereby aggress with the purchaser to make necessary applications to the competent authority under the Urban Land Regulations) Act, 1976 and obtain permission to transfer the schedule (Ceiling and necessary site to the purchaser. The purchaser has agreed to render necessary assistance to the vendor in this regard.

8. The vendor has put the purchaser in possession of the schedule site this day as part performance of this contract of sale. The vendor covenants with the purchaser that the purchaser is entitled to put up temporary structure on the schedule site."

35. Clause 5 shows that the first defendant has handed over the original possession certificate to the plaintiff. Clause 8 recites that the first defendant has put the plaintiff in possession of the site on the date of the agreement as part performance of the contract of sale. The first defendant further covenanted with the plaintiff that he is entitled to construct a temporary structure on the site. THE CORRESPONDENCE BEFORE THE SUIT

36. The plaintiff, on 01.03.1983, i.e., within four months of agreement dated 17.11.1982, wrote to the first defendant as follows:

"Y. SUBBARAJU ENGINEERING CONTRACTORS 24, 2nd CROSS, KODANDARAMAPURAM, MALLESWARAM, ' BANGALORE - 560003 Date : 1.3.1983 REGISTERED POST ACK. DUE To, Smt. Jayalakshmamma, W /o K.T. Krishnappa, Ex. M.L.A., TB Extn., Nagamangala, Mandya District Madam, Sub: Agreement for the sale of Site No. 1588, Block II at Banashankari I Stage Extension - Regarding.

You have agreed for the sale of the above site, for which an agreement was made on 17.11.1982 on the condition that you will register the sale deed within 3 months from

the date of obtaining all the necessary documents required in this connection from BOA. So far you. have not informed about obtaining the documents from BDA. You had promised that all the documents will be handed over to me within 2 weeks time to facilitate me for registering the property.

Since 3 months are over, I am proposing to sell to my nominee for the agreed amount of Rs.50,000/- (Rupees Fifty Thousand only), as you have failed to produce the clear documents. I am forced to transfer the property to my nominee at the agreed amount of Rs.50,00,0/- with you. This is for your kind information and early necessary action.

Thanking you, Yours faithfully Sd/-

(Y. Subbaraju)" (Emphasis supplied) There is no reference to any threat by the first defendant to sell to others.

37. The plaintiff did not rest content with the first letter and in the very next month, on 26.04.1984, complains to the first defendant, by pointing to the letter dated 01.03.1983 and pointing out that the first defendant has not replied to his letter, notifying her readiness to comply with the agreement. Thereafter, it is stated that by the letter dated 26.04.1984, he was finally calling upon the first defendant to act in terms of the agreement, execute the sale deed in favour of the plaintiff or his nominee within one week from the date of receipt of the letter, failing which, litigation would be launched. This letter provoked the first defendant to reply through a lawyer on 08.05.1984. The first defendant admitted the agreement dated 19.11.1982. She, however, pointed out that it was not as per the terms and conditions of letters sent by the plaintiff. The plaintiff, it was pointed out, was enjoined upon to complete the sale within three months from the date of the agreement. It was pointed out that time was of the essence of the contract and the contract has lapsed and the advance was forfeited. All documents of title relating to the site, it was stated, were handed over to the plaintiff at the time of the agreement itself. In view of the breach on the part of the plaintiff to pay the balance of the consideration, there was no legally enforceable contract. It was stated that the first defendant was always willing and ready to perform her part of the contract and to execute the sale deed and convey the site. She further set up the case that she had agreed to sell the site for Rs.1,50,000/-.

38. On 03.07.1984, the plaintiff sent a lawyer notice. Clause 4, which we have extracted, in the agreement, was invoked. The plaintiff pointed out that in terms of the said Clause, the first defendant was obliged, in the first place, to obtain the sale deed from the BDA and to inform the plaintiff in writing about having obtained the sale deed. The plaintiff was also to obtain the Khata Certificate. Period of three months would begin to run only from the said date. The claim of the first defendant that he had handed over the documents of title, was denied. The further payments, which were made, after having paid Rs.30,000/- on the date of the agreement, was stated to be unnecessary but it was pointed out that the total sum of Rs.50,000/- stood paid. It was reiterated that on the date of the sale agreement itself, the plaintiff was put in possession. The claim that the sale consideration was Rs.1,50,000/- was denied. The first defendant, it was pointed out, had

committed default in not complying with the terms of the agreement, by obtaining absolute sale deed from the BDA. Legal action was spoken of by the plaintiff. Lastly, on 14.02.1985, a legal notice was sent by the plaintiff to the first defendant. Thereinafter, referring to the agreement, it was complained that though it was then more than two years that the first defendant had entered into the agreement. First defendant had given a reply on 08.05.1984, pleading excuses for execution of the sale deed. Thereafter, the first defendant was called upon to act in terms of the sale agreement and execute the sale deed within fifteen days of the receipt of the notice. It was held out that failure on the part of the first defendant would constrain the plaintiff to seek relief from the court. That the plaintiff meant business, is proved by the fact the Suit, out of which this Appeal arises, was filed on 16.11.1985. THE PLEADINGS

39. In the plaint, the plaintiff, inter alia, again reiterated that he was put in possession of the site at the time of executing the agreement. After referring to the correspondence, which we have referred to, it is averred that the first defendant was not willing to perform her part of the contract. It was complained that the first defendant could not unilaterally treat the contract as cancelled and that he had unjustly repudiated her obligation. It was pleaded that he is likely to execute a sale deed in favour of some other person. To prevent the same, the Suit for Specific Performance of the agreement and for injunction, it was stated, was filed. It was further stated that the first defendant is bound and liable to obtain the absolute sale deed from the BDA and deliver the same to the plaintiff to execute the sale deed. In the amended pleadings, there is reference to the husband and the son being brought on the party array on the death of the first defendant. There is also reference to the subsequent sale by the son to the appellant. The prayer sought was a direction to execute the sale deed and to convey the title and deliver the documents of title including the sale deed, after obtaining the same from the BDA and injunction was sought against interfering with the plaintiff's lawful possession. Such relief of injunction was also sought against the appellant also.

40. First defendant, in her Written Statement, denied the case of the plaintiff that he was ready and willing. According to her, plaintiff had to pay the balance of Rs. 1,00,000/-, which remains after paying Rs.50,000/-. Time was pointed out to be essence of the contract. The first defendant was ready and willing to perform her part. It was further alleged that the plaintiff was not put in possession. The defendant No.1(b) son of the first defendant filed a Written Statement. He refers to the Clause prohibiting alienation for a period of ten years from the date of allotment, and that, absolute rights were not created by the BDA by the allotment. It was further contended that the first defendant, his mother, was only the lessee of the site and she did not have any right to convey ownership rights. She was not competent to convey the property. It was pointed out that the agreement was a void agreement and could not be enforced.

41. The second defendant, in his Written Statement, inter alia, pleaded no knowledge about the agreement dated 17.11.1982, providing that the first defendant must obtain an absolute sale deed from the BDA and it must be intimated in writing to the plaintiff. The allegation that the plaintiff was put in possession, was denied as false. Regarding putting the plaintiff in possession of the possession certificate, the appellant pleaded no knowledge. It was further pleaded that the first defendant was the absolute owner in possession of the site and, after her demise, in view of the death of the husband of the first defendant, the son became the owner of the property. It was

pleaded that the first defendant was a site-less and houseless person and permanent resident of Bangalore City. After having made due enquiries, property was purchased by sale deed dated 19.09.1996. An additional Written Statement was filed by the appellant to the amended plaint which was largely devoted to his case about him being a bonafide purchaser.

THE ORAL EVIDENCE

42. PW2, the son of the plaintiff (the plaintiff died on 05.01.2001) deposed, inter alia, that possession of the entire property was delivered to the plaintiff. Subsequently, his legal representatives are in possession. After the plaintiff was put in possession, he has allegedly constructed a temporary shed in it. The shed was demolished in the year 1991 during the Cauvery riots. He has never made any attempts to go to the BDA to know about the Suit property. He deposed that since he guessed that since 1960 his father commenced civil contract work he was doing so till his death. With reference to the question that the site was inalienable for a period of ten years, PW2 answered that it could have been sold to them. He confessed to ignorance of the BDA Rules regarding allotment. He did not know that the lease period was completed on the 13th Day of May, 1989. He did not know about the non- alienation clause in the allotment by the BDA. He did not know that in the year 1985, his father did not have the right to file the Suit. He was associated with his father in construction work. He refers to Exhibit-P14, which was a show cause notice received by the plaintiff from the BDA. He deposed that plaintiff intimated the BDA about the sale agreement.

43. The following evidence of PW2, the son of the plaintiff is very relevant. He has deposed interalia as follows:-

> ‘My father was contractor and real estate business since 30 years. It is not true that there are 70 to 80 cases pending in different courts. There are about 35 to 40 cases pending. My elder brother is doing construction.’ ‘I guess since 1960 my father commenced civil contract work. He was doing same business till his death.
>
> Simultaneously, he commenced real estate business and continued till his demise.’ ‘My father was getting monthly rental income of Rs.1,00,000/-.’ ‘In the name of our mother, there is commercial complex at Shehsdripuram. We presently get monthly rent of Rs.
>
> 4,50,000/-. The said commercial complex is joint family property.’ PW 2 has entered into an agreement to purchase 24 acres land at Tannishandra. He has negotiated to purchase the land at the rate of Rs.8,00,000/- per acre. At also Ulsoor, they have vacant site of 90,000/- sq. feet. It is quite expensive property PW2 deposes. They are staying at a rented house. At Cunningham Road, they have got a property which is in dispute. Cunningham property is 1,20,000/-
>
> sq. feet. It is vacant land. Most importantly PW2 deposes that if decree is denied they will have loss of money.

44. The appellant (second defendant) examined as DW1, inter alia, deposed that he owned both irrigated and non-irrigated lands to the extent of 12 acres. He did not own any site or building in Bangalore. He invested amount arrived from agriculture and milk-vending business to purchase this property. His father helped him. On the date of purchase, the possession was handed over to him. Apart from Bettanna, none acted as broker at the time of purchase. He, inter alia, further states that he went to the site. He found tin shed. He made inquiries with regard to ownership of the site and possession. He was told that one Sudershan was the owner of the site, who use to visit the site often. He, along with is elder brother, who was residing in Bangalore, went to the house of Sudershan. Sudershan wanted price of Rs.6,00,000/-. Finally, the parties agreed for Rs.4,50,000/-. Certain xerox copies of documents, including possession certificate, was handed over to him and he consulted an Advocate who said that the title was clear. On the date of sale, the possession was handed over to the appellant. Property was mutated. The broker was not aware of the pendency of the Suit. He will be put to great hardship if the Suit is decreed. The original of the Sale Deed is with the bank. In cross-examination, he, inter alia, deposed that he has studied up to PUC. His brothers were staying in Bangalore. His father owned 12 acres. Six acres were irrigated and six acres was dry land. His brothers were doing jewellery work in Bangalore. 12 acres was ancestral property. They used to get daily 20 litres of milk per day. They use to get Rs.195-196/- per day by selling milk. Father had not spent any money during marriage of elder brothers. Neither father, second defendant nor his brother Mukund were income-tax assessees. He has no record to show that he had the money to the extent of Rs.4,50,000/- with him. His brothers were staying in the rented house. He knew the broker since his childhood. He invested Rs.3,00,000/- of his own. The remaining was paid by his father. He earned Rs.3,00,000/- by selling milk and vegetables. He informed the broker for the first time in June, 1996 that he intended to purchase the site at Bangalore. After seeing the site on the next day itself, he approached the defendant 1(a) and defendant 1(b) for discussion. Defendant 1(a) was MLA of their Taluk and also former Minister. The negotiations were completed on the same day. The amount was paid by cash. His Advocate did not tell him that both defendant 1(a) and defendant 1(b) had acquired title and informed him to purchase from both. The entire process of seeing the site, sale talks, were done in the first week of June, 1996. Defendant 1(a) and defendant 1(b) did not disclose regarding the pendency of the Suit. He did not inquire with the BDA as to who is the owner of the site. He denied the suggestion that till day, the legal representatives of the original plaintiff were in possession of the property. The suggestion that the possession of the site was handed over to plaintiff, was denied. Defendant 1(b) furnished xerox copy of the possession certificate at the time of negotiations. After receipt of Suit Summons, he was not on talking terms with defendant 1(a) and defendant 1(b). Defendant 1(b) disclosed to him that the original possession certificate was lost and, therefore, he gave the duplicate certificate.

45. Defendant 1(b) was examined as DW2. He has deposed about the non-alienation clause and about the agreement in favour of the plaintiff for Rs.50,000/-. At the time of the agreement, there was a shed on the site. It was agreed to execute sale deed in favour of the plaintiff after getting the absolute sale from the BDA. The BDA was supposed to execute the sale deed after the 10-year lease period. The plaintiff had not taken any steps to waive-off the non-alienation clause for the period of 10 years. His father gave consent to the BDA to issue the sale deed only in his name. He knew the appellant from June, 1996. The name of the broker-Bettana, is spoken to by him. He speaks about handing over of xerox copies to DW1. The second defendant had met him twice in June, 1996.

Appellant when he met DW2 for the second time, showed his interest to purchase the property in September, 1996 for Rs.4,50,000/-. Appellant took time till September, 1996 to ascertain whether he was in possession and to mobilise funds. Entire amount of Rs.4,50,000/- was paid in cash. DW2 owned a residential house at Arti Nagar in Judges Colony. The said property was standing in the name of his father. He owned an industrial site. He did not own any residential property in Bangalore apart from the residential property. Since, plaintiff was not having any right, they did not inform the appellant regarding the pendency of the Suit. The plaintiff never asked his mother to alienate the suit property before expiry of the non-alienation period. He took duplicate Possession Certificate from BDA in June, 1996. He did not hand over the transfer agreement executed by the BDA at the time of sale in favour of the appellant. His father was present, when appellant met him twice. His mother has not given any application to the BDA to waive-off the non-alienation clause. He denied the suggestion that possession was handed over to the plaintiff on the date of agreement. There is no document to show that he has received Rs.4,50,000/- from the second defendant. There is reference to a site as Koramangala being allotted to him and it being cancelled by the High Court. He is confronted with the agreement to sell the said site in favour of another person (P-19).

THE FINDINGS BY THE TRIAL COURT

46. Seven issues were struck by the Trial Court. Thereafter, two additional issues were also raised, of which, the first additional issue was whether the second defendant, second Legal Representative of deceased defendant, 'proved that the proved sale agreement' is void. The Trial Court found the agreement dated 17.11.1982 as proved. It further found that the plaintiff has not proved that plaintiff was put in possession. It was further found that till the year 1989, the first defendant was unable to take an absolute sale deed from the BDA and, therefore, unable to execute the sale deed in response to the communication sent by the plaintiff. It was further found that since the first defendant was not able to get the sale deed from the BDA, she could not cancel the agreement unilaterally. It was further found that the plaintiff ought to have waited till the expiry of the lease period. It was found, however, that the plaintiff was always ready and willing, however, at the same time, the first defendant was not in breach. It was further found that there was no iota of evidence to prove that the defendant had tried to sell the property in favour of the third party. It was further found that there was no oral agreement of sale for Rs.1,50,000/- and the plaintiff was not in breach. This aspect was found against the first defendant. It was found that the second defendant was a bonafide purchaser of the site for value without notice of the earlier agreement of sale as well as pendency of the Suit. It was further found that in view of the allotment and the lease-cum-sale agreement, the plaintiff had no right to file the Suit so as to enforce the agreement to sell during the year 1985. The plaintiff ought to have waited till year 1989. The first defendant died on 18.07.1994 without obtaining the absolute sale deed from the BDA. After her death, property stood transferred in favour of her son and the son sold it to the appellant. On 17.09.1996, when the sale took place, the predecessor in interest of the second defendant was not a party. The suit property was sold to the second defendant for a huge sale consideration of Rs. 4,50,000/-. There was no cause of action to institute the Suit. On these findings, inter alia, the Trial Court partly decreed the Suit by ordering return of Rs.50,000/- along with 9 per cent interest per annum by defendants 1(a) and 1(b). The relief of permanent injunction was rejected.

PARI DELICTO POTIOR EST CONDITIO DEFENDENTIS

47. The principle of in pari delicto potior est conditio defendentis is a maxim which we must bear in mind. We need only notice the following discussion by this Court. The decision of this Court in Kedar Nath Motani (supra) comes to mind:

> "9. ... Where both parties do not show that there was any conspiracy to defraud a third person ought to commit any other illegal act, the maxim, in pari delito etc., can hardly be made applicable. ..."

48. This Court in Kedar Nath Motani (supra) also referred to the following statement by Lord Mansfield in Holman v. Johnson3, wherein it was held as follows:

> "12. The law was stated as far back as 1775 by Lord Mansfield in Holman v. Johnson [(1775) 1 Cowp 341, 343 : 98 ER 1120, 1121] in the following words:
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> "The principle of public policy is this; ex dolo malo non oritur actio. No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, potior est conditio defendentis." There are, however, some exceptions or "supposed exceptions" to the rule of turpi causa. In Salmond and William on Contracts, four such exceptions have been mentioned, and the fourth of these exceptions is based on the right of restitutio in integrum, where the relationship of trustee and beneficiary is involved. Salmond stated the 3 [1775 1 COWP 341] law in these words at p. 352 of his Book (2nd Edn.):
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> "So if A employs B to commit a robbery, A cannot sue B for the proceeds. And the position would be the same if A were to vest property in B upon trust to carry out some fraudulent scheme: A could not sue B for an account of the profits. But if B, who is A's agent or trustee, receives on A's account money paid by C pursuant to an illegal contract between A and C the position is otherwise and A can recover the property from B, although he could not have claimed it from C. In such cases public policy requires that the rule of turpis causa shall be excluded by the more important and imperative rule that agents and trustees must faithfully perform the duties of their office." Williston in his Book on Contracts (Revised Edn.), Vol. VI, has discussed this matter at p. 5069, para 1785 and in paras 1771 to 1774, he has noted certain exceptional cases, and has observed as follows:

> "If recovery is to be allowed by either partner or principal in any case, it must be where the illegality is of so light or venial a character that it is deemed more opposed to public policy to allow the defendant to violate his fiduciary relation with the plaintiff than to allow the plaintiff to gain the benefit of an illegal transaction." Even in India, certain exceptions to the rule of turpi causa have been accepted. Examples of those cases are found in Palaniyappa Chettiar v. Chockalingam Chettiar [(1920) ILR 44 Mad 334] and Bhola Nath v. Mul Chand [(1903) ILR 25 All 639]."

49. We may also notice the following statement by this Court in Kedar Nath Motani (supra):

> "15. The correct position in law, in our opinion, is that what one has to see is whether the illegality goes so much to the root of the matter that the plaintiff cannot bring his action without relying upon the illegal transaction into which he had entered. If the illegality be trivial or venial, as stated by Williston and the plaintiff is not required to rest his case upon that illegality, then public policy demands that the defendant should not be allowed to take advantage of the position. A strict view, of course, must be taken of the plaintiff's conduct, and he should not be allowed to circumvent the illegality by resorting to some subterfuge or by mis- stating the facts. If, however, the matter is clear and the illegality is not required to be pleaded or proved as part of the cause of action and the plaintiff recanted before the illegal purpose was achieved, then, unless it be of such a gross nature as to outrage the conscience of the Court, the plea of the defendant should not prevail."

50. In Sita Ram v. Radhabai and others4, this Court observed as follows:

> "11. The principle that the Courts will refuse to enforce an illegal agreement at the instance of a person who is himself a party to an illegality or fraud is expressed in the maxim in pari deucto portior est conditio defendentis. But as stated in 4 AIR 1968 SC 534 Anson's Principles of the English Law of Contracts, 22nd Edn., p. 343: there are exceptional cases in which a man will be relieved of the consequences of an illegal contract into which he has entered — cases to which the maxim does not apply. They fall into three classes: (a) where the illegal purpose has not yet been substantially carried into effect before it is sought to recover money paid or goods delivered in furtherance of it; (b) where the plaintiff is not in pari delicto with the defendant;

(c) where the plaintiff does not have to rely on the illegality to make out his claim'.

51. In Narayanamma (supra), this Court was considering a Suit for specific performance, which was resisted on the ground that the agreement to sell was contrary to the provisions of the Statute. Section 61 of the Karnataka Land Reforms Act, 1961 provided that no land for which occupancy was granted, shall within 15 years of the order of the Tribunal, be transferred by sale, inter alia. A partition was permitted. Equally, a mortgage could be effected to secure a loan. Drawing support from Judgment of this Court in Kedar Nath (supra), this Court, inter alia, as follows:

> "15. The three-Judge Bench of this Court, after referring to the aforesaid judgments, speaking through M. Hidayatullah, J. (as his Lordship then was), observes thus: (Kedar Nath Motani case [Kedar Nath Motani v. Prahlad Rai, (1960) 1 SCR 861 : AIR 1960 SC 213] , AIR pp. 218-19, para 15) "15. The correct position in law, in our opinion, is that what one has to see is whether the illegality goes so much to the root of the matter that the plaintiff cannot bring his action without relying upon the illegal transaction into which he had entered. If the illegality be trivial or venial, as stated by Williston and the plaintiff is not required to rest his case upon that illegality, then public policy demands that the defendant should not be allowed to take advantage of the position. A strict view, of course, must be taken of the plaintiff's conduct, and he should not be allowed to circumvent the illegality by resorting to some subterfuge or by misstating the facts. If, however, the matter is clear and the illegality is not required to be pleaded or proved as part of the cause of action and the plaintiff recanted before the illegal purpose was achieved, then, unless it be of such a gross nature as to outrage the conscience of the Court, the plea of the defendant should not prevail."
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> 16. It could thus be seen, that this Court has held that the correct position of law is that, what one has to see is whether the illegality goes so much to the root of the matter that the plaintiff cannot bring his action without relying upon the illegal transaction into which he had entered. This Court further held, that if the illegality is trivial or venial and the plaintiff is not required to rest his case upon that illegality, then public policy demands that the defendant should not be allowed to take advantage of the position. It has further been held, that a strict view must be taken of the plaintiff's conduct and he should not be allowed to circumvent the illegality by resorting to some subterfuge or by misstating the facts.

However, if the matter is clear and the illegality is not required to be pleaded or proved as part of the cause of action and the plaintiff recanted before the illegal purpose is achieved, then, unless it be of such a gross nature as to outrage the conscience of the Court, the plea of the defendant should not prevail."

52. In Narayanamma (supra), this Court further held as follows:

> "24. The transaction between the late Bale Venkataramanappa and the plaintiff is not disputed. Initially the said Bale Venkataramanappa had executed a registered mortgage deed in favour of the plaintiff. Within a month, he entered into an agreement to sell wherein, the entire consideration for the transfer as well as handing over of the possession was acknowledged. It could thus be seen, that the transaction was nothing short of a transfer of property. Under Section 61 of the Reforms Act, there is a complete prohibition on such mortgage or transfer for a period of 15 years from the date of grant. Sub-section (1) of Section 61 of the Reforms Act begins with a non-obstante clause. It is thus clear that, the unambiguous legislative intent is that no such mortgage, transfer, sale, etc. would be permitted for a period of 15 years from

> the date of grant. Undisputedly, even according to the plaintiff, the grant is of the year 1983, as such, the transfer in question in the year 1990 is beyond any doubt within the prohibited period of 15 years. Sub-section (3) of Section 61 of the Reforms Act makes the legislative intent very clear. It provides, that any transfer in violation of sub-section (1) shall be invalid and it also provides for the consequence for such invalid transaction.
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> 25. Undisputedly, both, the predecessor-

in-title of the defendant(s) as well as the plaintiff, are confederates in this illegality. Both, the plaintiff and the predecessor-in-title of the defendant(s) can be said to be equally responsible for violation of law.

26. However, the ticklish question that arises in such a situation is:"the decision of this Court would weigh in side of which party"? As held by Hidayatullah, J. in Kedar Nath Motani [Kedar Nath Motani v. Prahlad Rai, (1960) 1 SCR 861 : AIR 1960 SC 213] , the question that would arise for consideration is as to whether the plaintiff can rest his claim without relying upon the illegal transaction or as to whether the plaintiff can rest his claim on something else without relying on the illegal transaction. Undisputedly, in the present case, the claim of the plaintiff is entirely based upon the agreement to sell dated 15- 5-1990, which is clearly hit by Section 61 of the Reforms Act. There is no other foundation for the claim of the plaintiff except the one based on the agreement to sell, which is hit by Section 61 of the Act. In such a case, as observed by Taylor, in his "Law of Evidence" which has been approved by Gajendragadkar, J. in Immani Appa Rao [Immani Appa Rao v. Gollapalli Ramalingamurthi, (1962) 3 SCR 739 : AIR 1962 SC 370] , although illegality is not pleaded by the defendant nor sought to be relied upon him by way of defence, yet the Court itself, upon the illegality appearing upon the evidence, will take notice of it, and will dismiss the action ex turpi causa non oritur actio i.e. no polluted hand shall touch the pure fountain of justice. Equally, as observed in Story's Equity Jurisprudence, which again is approved in Immani Appa Rao [Immani Appa Rao v. Gollapalli Ramalingamurthi, (1962) 3 SCR 739 : AIR 1962 SC 370] , where the parties are concerned with illegal agreements or other transactions, courts of equity following the rule of law as to participators in a common crime will not interpose to grant any relief, acting upon the maxim in pari delicto potior est conditio defendentis et possidentis."

53. This Court in Narayanamma (supra) finally found as follows:

> "28. Now, let us apply the other test laid down in Immani Appa Rao [Immani Appa Rao v. Gollapalli Ramalingamurthi, (1962) 3 SCR 739 : AIR 1962 SC 370] . At the cost of repetition, both the parties are common participator in the illegality. In such a situation, the balance of justice would tilt in whose favour is the question. As held in Immani Appa Rao [Immani Appa Rao v. Gollapalli Ramalingamurthi, (1962) 3 SCR 739 : AIR 1962 SC 370] , if the decree is granted in favour of the plaintiff on the basis of an illegal agreement which is hit by a statute, it will be rendering an active assistance of the court in enforcing an agreement which is contrary to law. As against this, if the balance is tilted towards the defendants, no doubt that they would stand

> benefited even in spite of their predecessor-in-title committing an illegality. However, what the court would be doing is only rendering an assistance which is purely of a passive character. As held by Gajendragadkar, J. in Immani Appa Rao [Immani Appa Rao v. Gollapalli Ramalingamurthi, (1962) 3 SCR 739 : AIR 1962 SC 370] , the first course would be clearly and patently inconsistent with the public interest whereas, the latter course is lesser injurious to public interest than the former." CASES OF CONDITIONAL DECREE OF SPECIFIC PERFORMANCE

54. The decision, which first comes to mind and is oft quoted, is the decision of the Privy Council in Motilal v. Nanhelal5. The Court, in the said case, affirmed the decision of the Judicial Commissioner, decreeing a Suit for Specific Performance, taking note of Section 50 of the Central Provinces Act of 1920, which read as follows and the Court, inter alia, held as follows thereafter:

> "If a proprietor desires to transfer the proprietary rights in any portion of his sir land without reservation of the right of occupancy specified in s. 49, he may apply to a revenue-officer and, if such revenue- officer is satisfied that the transferor is not wholly or mainly an agriculturist, or that the property is self-acquired or has been acquired within the twenty years past preceding, he shall sanction the transfer." In view of the above mentioned construction of the agreements of September 4, 1914—namely, that Sobhagmal agreed to transfer the cultivating rights in the sir land—there was, in their Lordships' opinion, an implied covenant on his part to do all things necessary to effect such transfer, which would include an application to the revenue-officer to sanction the transfer."

55. In other words, in an agreement wherein the vendor agrees to convey property, which is permissible only with the permission of some Authority, the Court can, 5 AIR 1930 PC 287 in appropriate cases, grant relief. We need only notice two recent Judgments which have reiterated the principle, the first of which is reported in Vishwa Nath Sharma v. Shyam Shanker Goela and another6, which is relied upon, in fact, by the respondents. The decision of this Court, again relied upon by the respondents in Ferrodous Estates (Pvt.) Limited v. Gopiratnam (Dead) and others7 also reiterates the said view. In Ferrodous Estates (supra), the matter arose under the Tamil Nadu Urban Land (Ceiling and Regulation) Act, 1978. The High Court, in the impugned Judgment, had dismissed the Suit for Specific Performance, taking the view that till 1999, when the Tamil Nadu Urban Ceiling Act was repealed, the agreement was not enforceable. That apart, under the agreement of sale, vacant land, in the aggregate, exceeding the ceiling limit of the plaintiff, would have to be conveyed to him, attracting the VETO contained in Section 5(3) read with Section 6 of the State Act. It was this view, which was reversed by this 6 (2007) 10 SCC 595 7 AIR 2020 SC 5041 Court, following the Judgments, which we have referred to which relate to conditional decrees. This result was arrived at by this Court, after finding that agreement to sell contemplated transfer of the land only after getting exemption. Clause (4) of the Agreement contemplated that the vendor was to obtain permission from the Competent Authority under the Urban Land Ceiling Act. We need not multiply authorities. All that is necessary to notice and find is that when an agreement to sell is entered into, whereunder to complete the title of the vendor and for a sale to take place and the sale is not absolutely prohibited but a permission or approval from an Authority, is required, then, such

a contract is, indeed, enforceable and would not attract the shadow of Section 23 of the Indian Contract Act, 1872.

CERTAIN OTHER DECISIONS

56. We may examine some of the decisions, which have been referred to by the respondents. In the decision reported in T. Dase Gowda v. D. Srinivasaiah8, a 8 (1990) SCC Online Karnataka 613 Division Bench of the High Court of Karnataka was considering the Suit for Specific Performance in the context of the very Rules, which arise before us. The defendant/appellant in the said case, entered into an oral agreement with the plaintiff therein on 01.09.1981, to sell the Suit site along with an incomplete structure. The defendant received certain amounts thereafter. This was followed by a written agreement on 01.10.1981 wherein the defendant agreed to sell. According to the plaint averments, the plaintiff was put in possession and he completed the construction. It was the plaintiff's further case that he was dispossessed by the defendant. The High Court, under Point 6, considered the question whether agreement was legally enforceable. The Court has referred to Rule 18 of the Rules, which, apparently, was invoked by the defendant. Answering the point, the Court took the view that there was no transfer of interest, which results from an agreement to sell and, therefore, Rule 18(2)(a)(iii), did not apply, as there was no alienation on a mere agreement to sell being executed. The Court distinguished the decision, which was relied upon by the defendant in the said case and, interestingly, the appellant before us, viz., the decision of a learned Single Judge in K. Chandrashekar Hegde v. Bangalore City Corporation and N.B. Menon v. Bangalore Development Authority9. We may further notice that the high court in the said case took the view that a period of ten years had expired even during 1985 and there was no impediment with reference to the enforceability, it was further found. It was next found that the plaintiff in the said case was, on evidence, found residing in a rented house and that he had purchased the plaint schedule property for self- occupation. It was found that the building which was constructed was a residential one. It was, therefore concluded that the element of public policy (public interest) was also not affected. The court granted decree for specific performance. In Yogambika V. Narsingh10, a Division Bench, followed the decision in T. Dase Gowda (supra), noting further that the earlier decision had been affirmed by this Court by the 9 ILR 1988 KAR 356 10 ILR 1992 KAR 717 dismissal of the SLP by Order dated 17.07.1991. We may notice also that, in its discussion, the Division Bench, has laid store by the line of decisions commencing with Motilal (supra).

57. In Subbireddy v. K.N. Srinivasa Murthy11, the question fell for decision under Section (3) of the Karnataka Village Offices Inam Abolition Act. The Single Judge found that under the agreement, the transfer was to be effected only after the expiry of the period of non-alienation prescribed in Section 5(3) of the Act in question. This case must be understood in the light of the Clause which contemplated the sale being affected, after the expiry of the period, during which, the alienation was prohibited. The vendor was to take permission for the execution of the sale deed.

58. In Syed Zaheer and others v. C.V. Siddveerappa12, a Division Bench decreed a Suit for Specific Performance wherein the agreement contemplated execution of sale deed, after the period of non-alienation prescribed under the grant. The Suit was 11 AIR 2006 Karnataka 4 12 ILR 2010 Karnataka 765 filed, in fact, after the lapse of the period of fifteen years.

59. In Balwant Vithal Kadam v. Sunil Baburaoi Kadam13, this Court rejected the contention that the agreement, which was sought to be specifically enforced, fell foul of Section 48 of the Maharashtra Cooperative Societies Act. It was found that an agreement to sell did not create an interest in land unlike a sale.

60. In Punjab & Sind Bank v. Punjab Breeders Ltd. and another14, this Court was dealing with a case of the effect of violation of the conditions, under which, a one-time settlement was extended. The conditions included the stipulation that the mortgaged property should not be sold for three years without prior permission, inter alia. An agreement to sell was found not to be a sale.

61. In Suraj Lamp & Industries (P) Ltd. (2) Through Director v. State of Haryana and another15, this Court, while dealing with the effect of what has been 13 (2018) 2 SCC 82 14 (2016) 13 SCC 283 15 (2012) 1 SCC 656 described as GPA Sales in Delhi, inter alia, and considering the scope of an agreement to sale, declared that "a transfer of immovable property by way of sale, can only be by a Deed of Conveyance (Sale Deed)". No title is transferred by a mere agreement to sell, it was further found.

62. In K. Chandrashekar Hegde (supra), which is relied upon by the appellant, a Single Judge of the High Court of Karnataka, was dealing with batch of Writ Petitions. Among the issues, which prominently arose, was the objection taken to the construction of multi-storey buildings, wherein claims were made on the basis of allotment under the Act, as repealed by the Bangalore Development Act and the Rules. The learned Single Judge has elaborately considered the scheme of the Rules. He has further explored the impact of the Forms prescribed under the Allotment Rules, 1964 and similar provisions were found in the subsequent Rules. This Judgment has been distinguished by the Judgment in T. Dase Gowda (supra).

63. Jambu Rao Satappa Kocheri v. Neminath Appayya Hanamannayar16 is an important decision. This Court was dealing with a Suit for Specific Performance. One of the questions, which arose was whether the enforcement of the contract, would defeat the provisions of the Bombay Tenancy and Agricultural Lands Act, 1948. The appellant before this Court had agreed to sell 41 acres and odd of jairayat land. Under Section 5 of the Act, the ceiling area, inter alia, was prescribed as 48 acres of jairayat land. Section 34 of the Act provided as follows – "Subject to the provisions of Section 35, it shall not be lawful, with effect from the appointed day, for any person to hold, whether as owner or tenant or partly as owner and partly as tenant, land in excess of the ceiling area". Section 35 declared acquisition of land in excess of the area prescribed in Section 34, as invalid. Section 84-C, reads as follows:

> "(1) Where in respect of the transfer of acquisition of any land made on or after the commencement of the amending Act, 1955, the Mamlatdar suo motu or on the application of any person interested in such land has reason to believe that such transfer or 16 AIR 1968 SC 1358 acquisition is or becomes invalid under any of the provisions of this Act, the Mamlatdar shall issue a notice and hold an inquiry as provided for in Section 84-B and decide whether the transfer or acquisition is or is not invalid.

(2) If after holding such inquiry, the Mamlatdar comes to a conclusion that the transfer or acquisition of land is invalid, he shall make an order declaring the transfer or acquisition to be invalid.

(3) On the declaration made by the Mamlatdar under sub-section (2),—

(a) the land shall be deemed to vest in the State Government, free from all encumbrances lawfully subsisting thereon on the date of such vesting, and shall be disposed of in the manner provided in sub-section (4); ***"

64. The contention taken by the defendant was that the plaintiff was already holding 31 acres and 2 guntas of jairayat land and, therefore, by acquiring the plaint schedule property by way of the decree the plaintiff, would hold land in excess of the ceiling area. We may notice the following discussion with specific reference to Section 23 of the Indian Contract Act, in particular:

> "6. By Section 23 of the Contract Act, consideration or object of an agreement is unlawful if it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent. Both the parties to the contract are agriculturists. By the agreement the appellant agreed to sell jirayat land admeasuring 41 acres 26 gunthas for a price of Rs 32,000. The consideration of the agreement per se was not unlawful, for there is no provision in the Act which expressly or by implication forbids a contract for sale of agricultural lands between two agriculturists. Nor is the object of the agreement to defeat the provisions of any law. The Act has imposed no restriction upon the transfer of agricultural lands from one agriculturist to another. It is true that by Section 35 a person who comes to hold, after the appointed day, agricultural land in excess of the ceiling, the lands having been acquired either by purchase, assignment, lease, surrender or by bequest, the acquisition in excess of the ceiling is invalid. The expression "acquisition of such excess land shall be invalid" may appear somewhat ambiguous. But when the scheme of the Act is examined, it is clear that the legislature has not declared the transfer or bequest invalid, for Section 84-C provides that the land in excess of the ceiling shall be at the disposal of the Government when an order is made by the Mamlatdar. The invalidity of the acquisition is therefore only to the extent to which the holding exceeds the ceiling prescribed by Section 5, and involves the consequence that the land will vest in the Government.
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> xxx xxx xxx
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> 8. An agreement to sell land does not under the Transfer of Property Act create any interest in the land in the purchaser.

By agreeing to purchase land, a person cannot be said in law to hold that land. It is only when land is conveyed to the purchaser that he holds that land.

Undoubtedly the respondent was holding some area of land at the date of the agreement and at the date of the suit, but on that account it cannot be inferred that by agreeing to purchase land under the agreement in question his object was to hold in excess of the ceiling. It was open to the respondent to transfer or dispose of the land held by him to another agriculturist. The Act contains no general restrictions upon such transfers, and unless at the date of the acquisition the transferee holds land in excess of the ceiling, the acquisition to the extent of the excess over the ceiling will not be invalid. There is nothing in the agreement, nor can it be implied from the circumstances, that it was the object of the parties that the provisions of the Act relating to the ceiling should be transgressed. The mere possibility that the respondent may not have disposed of his original holding at the date of the acquisition of title pursuant to the agreement entered into between him and the appellant will not, in our judgment, render the object of the agreement such, that, if permitted, it would defeat the provisions of any law. The Court, it is true, will not enforce a contract which is expressly or impliedly prohibited by statute, whatever may be the intention of the parties, but there is nothing to indicate, that the legislature has prohibited a contract to transfer land between one agriculturist and another. The inability of the transferee to hold land in excess of the ceiling prescribed by the statute has no effect upon the contract, or the operation of the transfer. The statutory forfeiture incurred in the event of the transferee coming to hold land in excess of the ceiling does not invalidate the transfer between the parties.

9. We hold that a contract for purchase of land entered into with the knowledge that the purchaser may hold land in excess of the ceiling is not void, and the seller cannot resist enforcement thereof on the ground that, if permitted, it will result in transgression of the law."

65. We may cull out the ratio in the following terms:

> Whatever may be intention of the parties, a contract which is expressly or impliedly prohibited by a Statute, may not be enforced by the Court. The Bombay Act did not prohibit a contract of sale of agricultural land between two agriculturists. The invalidity of the acquisition of land in excess, involved the consequence that the land would vest in the Government. In the context of the said Act, the Court has taken the view that a person can be said to hold land only when it is conveyed to him, which would not take place when there is a mere agreement to sell. The further reasoning of the Court appears to be that it is open to the buyer to transfer or dispose of land already held by him to another agriculturist and unless at the date of acquisition, the buyer held the land in excess of the ceiling limit, the acquisition to the extent of the excess over the ceiling, would not be invalid. It was further declared that the mere possibility that the respondent/buyer may not have disposed of his original holding on the date of acquisition of title under the agreement to sell, would not render the object of the agreement such that, if permitted, it would defeat the provisions of any law. Thus, the contract was found to be not void.

66. This Judgment came to be followed in Bhagat Ram v. Kishan and others17. In the said case, the question arose under Section 23 of the Delhi Rent Reforms Act, 1954, in a Suit for Specific Performance. Section 23 reads as follows:

> "23. Use of holding for industrial purposes.—(1) A Bhumidhar or Asami shall not be entitled to use his holding or part thereof for industrial purposes, other than those immediately connected with any of the purposes referred to in Section 22, unless the land lies within the belt declared for the purpose by the Chief Commissioner by a notification in the Official Gazette:
>
> Provided that the Chief Commissioner may, on application presented to the Deputy Commissioner in the prescribed manner, sanction the use of any holding or part thereof by a Bhumidhar for industrial purposes even though it does not lie within such a belt."

67. This Court in Bhagat Ram (supra) held as follows:

> "5. Bhumidhari right is transferable and the Defendant 1 is entitled to use the land even for the purpose other than those enumerated in Section 22 if he obtains permission of the Chief Commissioner. Therefore, the agreement for transfer of land does not become invalid by itself. The Defendant 1 after obtaining the property could use it for the intended purpose on obtaining permission of the Chief Commissioner or if no such permission was obtained, he could 17 (1985) 3 SCC 128 use the land for the purposes authorised under Section 22 of the Act. In our opinion, the High Court went wrong in holding that the agreement was opposed to public policy or transfer under the agreement was hit by Section 23 of the Act. Support for our view is available from the decision of this Court in Jambu Rao Satappa Kocheri v. Neminath Appayya Hanammannaver [AIR 1968 SC 1358 :
>
> (1968) 3 SCR 706] . The suit by the plaintiff for declaration that the agreement is bad had rightly been dismissed by the trial court as also the first appellate court and the High Court on an erroneous view reversed the same. In our opinion the suit is liable to be dismissed."

68. We have set out the provisions of the Rules and the lease-cum-sale agreement. Before we deal with the question as to whether the agreement in question, falls foul of Section 23 of the Indian Contract Act, we shall deal with the contention raised by the respondent that there is no law, as understood in this case, which would be defeated by the agreement and what is holding the field is only the Rules. It is true that this Court in Union of India v. Col. L.S.N. Murthy18, has observed as follows:

> "17. In Pollock & Mulla, Indian Contract and Specific Relief Acts, 13th Edn., Vol. I 18 (2012) 1 SCC 718 published by LexisNexis Butterworths, it is stated at p. 668:
>
> "The words 'defeat the provisions of any law' must be taken as limited to defeating the intention which the legislature has expressed, or which is necessarily implied from the express terms of an Act. It is unlawful to contract to do that which it is unlawful to do; but an agreement will not be void, merely because it tends to defeat

> some purpose ascribed to the legislature by conjecture, or even appearing, as a matter of history, from extraneous evidence, such as legislative debates or preliminary memoranda, not forming part of the enactment." It is thus clear that the word "law" in the expression "defeat the provisions of any law" in Section 23 of the Contract Act is limited to the expressed terms of an Act of the legislature."

69. With respect, the principle laid down, does not commend itself to us. We do agree that the illegality cannot be a matter of conjecture nor the purpose divined by the Court from parliamentary debates. But that is not to say that as found by this Court in AIR 1968 SC 1358 (supra), which decision was not considered by this Court, that it cannot be implied. But we must find that the Court was dealing with a Notification, which was, in fact, a 'letter' written by the Government of India. We can have no quarrel with the proposition that a 'letter' cannot be law within the meaning of Section 23 of the Indian Contract Act. The Court, in the said case, was not dealing with Subordinate Legislation in the form of Statutory Rules. The Rules in question before us are, undoubtedly, Statutory Rules. Therefore, we do not think it is necessary for us to refer the matter to a larger Bench on account of the observations found in the Judgment in paragraph-17. What is contemplated under Section 23 of the Indian Contract Act is law, in all its forms, being immunised from encroachment and infringement by a contract, being enforced. Not only would a Statutory Rule be law within the meaning of Article 13 of the Constitution of India but it would also be law under Section 23 of the Indian Contract Act.

70. Section 10 of the Contract Act declares as to what agreements are contracts and all agreements are declared contracts, if they are made by the free consent of parties competent to contract with a lawful consideration and with the lawful object and not expressly declared to be void under the Contract Act. Section 23 must be read with Section 10. Without the illustrations, Section 23, reads as follows:

> "23. What consideration and objects are lawful, and what not. —The consideration or object of an agreement is lawful, unless— — The consideration or object of an agreement is lawful, unless—" it is forbidden by law; 14 or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies, injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy. In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void."

71. The very first head under which an agreement become unlawful is, when the consideration or object of agreement is forbidden by law. In regard to the same, we may notice the view of a Bench of three learned Judges in Gherulal Parakh v. Mahadeodas Maiya and others19. Therein, quoting from Pollock and Mullah from their work Indian Contract Act, this Court has stated as follows:

"8. xxx xxx xxx An act or undertaking is equally forbidden by law whether it violates a prohibitory 19 AIR 1959 SC 781 enactment of the Legislature or a principle of unwritten law. But in India, where the criminal law is codified, acts forbidden by law seem practically to consist of acts punishable

under the Penal Code and of acts prohibited by special legislation, or by regulations or orders made under authority derived from the Legislature." (Emphasis supplied)

72. In regard to the Commentary by the very same Author, under the Second Head of "illegal object or consideration" in Section 23 of the Contract Act, viz., if the consideration or object is of such a nature that if permitted, it would defeat the provisions of any law, it is that, this Court took the view that law for the purpose of Section 23 would be, law made by the Legislature. Quite apart from the fact that what is involved in the said case was only a letter, the Judgment of this Court in Gherulal Parakh (supra) and the Commentary from the very same Author, was not noticed by this Court. Therefore, it becomes all the more reason as to why we need not refer the matter to a larger Bench. We may also notice that 'law', for the purposes of Clauses (1) and (2) cannot be different. It is very clear that Regulations or Orders made under the Authority derived from the Legislature referred to by this Court, are species of subordinate legislation. Statutory Rules would also, therefore, clearly be law.

73. In the facts of this case, the question would, therefore, be, as to whether the enforcement of the agreement to sell dated 17.11.1982, expressly or impliedly, lead to palpably defeat the law in question, which is contained in the Statutory Rules or is prohibited by the same.

74. A contract may expressly or impliedly, be prohibited by provisions of a law. The intentions of the parties do not salvage such a contract. [See AIR 1968 SCC 1328 (supra)]. What is involved in this case, may not be a mere case of a conditional decree for specific performance being granted as was the case in the line of decisions commencing with Motilal (supra) and ending with Ferrodous Estates (supra). The Rules contemplate a definite scheme. Land, which is acquired by the Public Authority, is meant to be utilised for the particular purpose. The object of the law is to invite applications from eligible persons, who are to be selected by a Committee and the sites are allotted to those eligible persons, so that the chosen ones are enabled to put up structures, which are meant to be residential houses. It is implicit in the Rules, and what is more, in the lease-cum-sale agreement, that the allottee, who is treated as a lessee under Rule 7, will remain in possession and, what is more, proceed to fulfil his obligation under the lease-cum-sale agreement and the Rules. The obligations of the allottee/lessee are unambiguous. He has held himself out to be in dire need of a plot of land for the purpose of constructing a residential building. He has to disclose his annual income and any other means indicating his capacity, not only to purchase the site applied for but also to construct the house. He has to respond to the query as to whether any member of the family, of which he is a member, owns or has been allotted a site or a house by the Board or any other Authority, within the area under jurisdiction of the Board. The applicant must, furthermore, disclose whether he already owns a house or house site in the city or outside the city. Whether the applicant's wife, husband or minor child owns a house or house site, is another matter, he must disclose. Incorrect information in any of these matters, would entitle the Board to resume the site. Rule 11 specifically announces among the principles as relevant for selecting an applicant for allotment, the income of the applicant to build the house on the site for his residence. No doubt, it is not applicable to certain classes, which include the other backward classes. Rule 11(3) declares further that the number of years, the applicant has been waiting for allotment of a site, inter alia, as a relevant principle.

75. It may be true that as contended by Shri R. Basant, learned senior counsel for the respondent that despite the fact no building was put up by the allottee, the BDA has not deemed it fit to cancel the allotment. We gather the impression that the BDA has been lax in the pursuit of the lofty goals of the law. We do not pursue the matter further as BDA is not a party.

76. If the agreement between plaintiff and the first defendant is taken as it is and it is enforced, the following would be the consequences. The allotment to the first defendant was made on 04.04.1979. In fact, the first defendant was obliged, in law, to construct a residential building within two years under Rule 17(6). No doubt, the time could be extended thereunder. But, at the time, the agreement dated 17.11.1982 was entered into, the first defendant was already in breach. The result, however, of the agreement dated 17.11.1982, is as follows:

> The first defendant would be liable to convey the right in the site to the plaintiff. The price would be Rs.50,000/- for the site, proceeding on the basis of the concurrent findings by the Court.
>
> This is on the supposition that the parties contemplated that the site would be conveyed after the period of ten years from the date of allotment upon the expiry of which alone, the allottee, viz., the first defendant would be entitled to the conveyance under Rule 17(7) of the Rules. It must be noticed that in fact, under the lease-cum-sale agreement and the Rules, what is contemplated is that on events leading up to the stage where the elements of Rule 17(7) are satisfied alone, a right or duty would accrue to the allottee/ lie upon the party. However, what is more important in the context of the facts of this case is the following facet.
>
> Under the agreement, the parties contemplated and have expressly provided that the plaintiff was to be put in possession of the site on the date of the agreement, i.e., on 17.11.1982. Did the parties contemplate the construction of the building residential in nature, for the purpose of which, the site was allotted to the first defendant? Is it not a clear case where enforcing the agreement, as it is, would necessarily result in the first defendant not acting in accordance with lease-cum-
>
> sale agreement, which, she entered into with the BDA and, what is even more crucially important, against the mandate of the law, as contained in the Rules, which contemplated that the allotment was made for the construction of a residential building by the allottee and the construction was to be completed within the period of two years or an extended period? The agreement between the parties contemplated giving a short shrift to the mandate of the law. This is clear from the fact that under the agreement, the first defendant was obliged to sell the site as it is. Construction of the building became a practical impossibility. The price, which was agreed upon, was qua the site alone. The consideration and the other terms of the agreement, in other words, ruled out the possibility of a residential building being constructed by the first defendant, who as the allottee, was, under the law, obliged to construct the building. Assuming for a moment that the construction was put up, which assumption must be

premised on possession not being handed over to the plaintiff and which is contrary, not only to the terms of the agreement, but also pleading of the plaintiff and the consistent stand in the evidence adduced on behalf of the plaintiff and even proceeding, however, on the basis that as found by the Trial Court, that the plaintiff has failed to establish that possession was handed over to him on the date of agreement and that the possession continued with the first defendant, the terms of the agreement, which included, the price being fixed for conveying the right for the site, necessarily, would have the effect of freezing the first respondent in even attempting to put up a construction.

77. We, therefore, reject the contention of the plaintiff that there was nothing, which could have prevented putting up a building. The argument of plaintiff involves rewriting of the contract. This is different from a situation where an allottee, without being trammelled by an agreement, is unable to put up a building even for the whole of ten years and action is not taken under Rule 17(6) and yet conveyance is made in his favour under Rule 17(7). The direct impact of the agreement is that it compelled the party to abstain from performing its obligation in law apart from breaching the agreement with BDA. In other words, taking the agreement as it is, it necessarily would be in the teeth of the obligation in law of the first respondent to put up the construction. The agreement to sell involved clearly terms which are impliedly prohibited by law in that the first defendant was thereunder to deliver title to the site and prevented from acting upon the clear obligation under law. This is a clear case at any rate wherein enforcing the agreement unambiguously results in defeating the dictate of the law. The 'sublime' object of the law, the very soul of it stood sacrificed at the altar of the bargain which appears to be a real estate transaction. It would, in other words, in allowing the agreement to fructify, even at the end of ten-year period of non-alienation, be a case of an agreement, which completely defeats the law for the reasons already mentioned.

78. Going by the recital in the agreement entered into between the plaintiff and the first defendant, possession is handed over by the first defendant to the plaintiff. The original Possession Certificate is also said to be handed over to the plaintiff. The agreement, even according to the plaintiff, contemplated that within three months of conveyance of the site in favour of the first defendant, the first defendant was to convey her rights in the site to the plaintiff. It is quite clear that the parties contemplated a state of affairs which is completely inconsistent with and in clear collision with the mandate of the law. On its term, it stands out as an affront to the mandate of the law.

79. The illegality goes to the root of the matter. It is quite clear that the plaintiff must rely upon the illegal transaction and indeed relied upon the same in filing the suit for specific performance. The illegality is not trivial or venial. The illegality cannot be skirted nor got around. The plaintiff is confronted with it and he must face its consequences.

The matter is clear. We do not require to rely upon any parliamentary debate or search for the purpose beyond the plain meaning of the law. The object of the law is set out in unambiguous term. If every allottee chosen after a process of selection under the rules with reference to certain objective criteria were to enter into bargains of this nature, it will undoubtedly make the law a hanging stock.

80. To elucidate the matter a little further, let us take another example. If the agreement was entered into by the first defendant, under which, the first defendant would abide by her obligations, both under the lease-cum-sale agreement and, more importantly, the Rules and were to put up a building and the agreement contemplated, conveying the site along with the building, to a buyer after the expiry of ten years and upon getting the conveyance from the BDA, such an agreement, perhaps, being not an alienation in itself, may have passed muster.

81. At this juncture, we must also deal with the argument of the plaintiff that the agreement to sell is not a sale and, what is prohibited under the Rules and lease-cum-sale agreement, was only alienation. There can be no quarrel with the proposition that no interest in property could be conveyed by a mere agreement to sell. But the question is, whether the agreement to sell in this case is in the teeth of Section 23 of the Contract Act. For reasons, which we have indicated, on a conspectus of the scheme of the Rules, we have no hesitation in holding that the contract was unenforceable for reason that it clearly, both expressly and impliedly, would defeat the object of the Rules, which are statutory in nature. The contract was patently illegal for reasons already indicated.

82. Now, let us look at it from a different perspective. The agreement is dated 17.11.1982. We have noticed the correspondence by the plaintiff. We have also noticed the terms of the agreement between the plaintiff and the first defendant. In the first letter sent by the plaintiff which incidentally was within four months of the date of agreement, the plaintiff called upon the first defendant to execute the sale deed. There is no mention about the first defendant attempting to sell the property to anybody. It is noteworthy that the plaintiff has stated that he intends to sell the property to his nominee. This further indicates that he was not a person who was in need of this site for the purposes of putting up of residential building unlike even the plaintiff in the case considered by the High Court of Karnataka and relied upon by the plaintiff, namely, T. Dase Gowda v. D. Srinivasaiah (supra). We have already noticed the command of the law as contained in Rule 18(3) of the Rules read with Rule 17. If an allottee who is treated as a lessee for reasons which are indicated in Rule 18(3) wishes to sell the site (which is applicable in this case as no building has been put up) then he can sell the site only as was provided in Rule 18(3), that is to say, if going by the correspondence by the plaintiff wherein the first defendant was called upon to execute the sale deed of the site, this would be clearly in the teeth of Rule 18(3), the scope of which has already explained. The plaintiff could not have asked for decree commanding the first defendant to sell the site in terms of the correspondence with which he began communicating with the first defendant. In other words, a sale of a site to any other person clearly stood prohibited and unless the allottee/lessee is compelled to sell in the circumstances mentioned in Rule 18(3) the law permitted the sale of the site only to the authority itself. Therefore, if the plaintiff wanted to enforce the agreement for the sale of the site on an immediate basis it would clearly attract the embargo that it was completely prohibited. IS THE SUIT PREMATURE? SCOPE OF ARTICLE 54 OF THE LIMITATION ACT.

83. The further question which is raised by the second defendant is that the suit itself was pre-mature. We have found that the trial court has entered into a clear finding that there is absolutely no evidence to support the projected apprehension that first defendant was about to dispose of the property. There is no material to support the finding otherwise. In fact, any such sale would have been completely illegal being prohibited by law as that is the inevitable and necessary implication flowing from Rule 18(3). There is absolutely no foundation for the plaintiff to have instituted the suit except perhaps the repudiation.

84. One of the contentions, which is raised by the learned Counsel for the second defendant is that, under Article 54 of the Limitation Act, 1963, the period of limitation would begin to run from the time of repudiation of the agreement to sell only when the contract does not provide for the time at which the contract is to be performed. In other words, the contention of the second defendant is that the agreement dated 17.11.1982, contemplated, even according to the plaintiff, in Clause 4 that the first defendant must convey the title within a period of three months from the date on which, BDA conveyed the title to her. According to the second defendant, therefore, in this case, the time for performance of the obligation by the vendor, was fixed. Therefore, there was no need for the plaintiff and, what is more, no justification for the plaintiff, to institute the Suit prematurely, almost four years prior to the appointed date.

85. Article 54 of the Limitation Act, reads as follows:

> "54. Suits for Specific Performance. 3 years. The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused."

86. Article 54 contemplates that when a date is fixed for the performance of the contract, then, the period of limitation begins to run from that date. When such a date is not fixed in an agreement to sell, then, refusal or breach by the vendor will start the clock ticking.

87. However, we may notice, in this regard, what the Court has opined. In Ramzan v. Hussaini20, a Bench of two learned Judges of this Court took the view that the word 'date' in Article 54, need not be expressly mentioned in an agreement and it can be found out from the other terms of the agreement. If this were so, there may be merit in the second defendant contention. In a later decision, a Bench of three learned Judges in Ahmadsahab Abdul Mulla (2) (dead) v. Bibijan and others21, has, however, taken the view that the word 'the date' in Article 54, means that the specific date must be indicated in an agreement as the date of performance. No doubt, the Court, in fact, went on to distinguish the earlier decision Ramzan v. Hussaini (supra) and held as follows:

> "Para 5. In Tarlok Singh's case (supra) the factual scenario was noticed and the case was decided after referring to Article 54 of the Schedule to the Act. Ramzan's case (supra) related to the specific performance of contingent contract. It was held that the expression "date fixed for performance" "need not be ascertainable in the face of the contract deed and may be ascertainable on the 20 (1990) 1 SCC 104 21 (2009) 5 SCC 462 happening of a certain contingent event specified in the contract".

Para 8. The judgments in Ramzan and Tarlok Singh cases (supra) were rendered in a different factual scenario and the discussions do not throw much light on the controversy at hand. Para 11. The inevitable conclusion is that the expression “date fixed for the performance” is a crystallized notion. This is clear from the fact that the second part "time from which period begins to run" refers to a case where no such date is fixed. To put it differently, when date is fixed it means that there is a definite date fixed for doing a particular act. Even in the second part the stress is on “when the plaintiff has notice that performance is refused”. Here again, there is a definite point of time, when the plaintiff notices the refusal. In that sense both the parts refer to definite dates. So, there is no question of finding out an intention from other circumstances.”

88. No doubt, the Court took the view, inter alia, that the Judgment in Ramzan v. Hussaini (supra), was a case of a contingent contract. It could still be argued that the rights of the defendant were only that, if all went well, and the BDA conveyed the title to her, she was to convey her rights within a period of three months. We would think that in the facts of this case, we need not disturb the finding of the High Court particularly when we find that the contract itself is unenforceable. IS IT A NEW CASE?

89. Yet another objection raised by the plaintiff is that the Court must not permit the plea of the appellant that the contract was void or that it was unenforceable and that it is a new point. Quite apart from the fact and ignoring even the same that before the Trial Court, the second additional issue was, as to whether the contract was void but not ignoring the first point which was raised by the High Court, which was as to whether the Suit was maintainable, wherein the High Court has discussed the matter, it appears to us to be a question of law, which is to be applied to facts, which are not in dispute and, therefore, we reject the said contention. Even absent a plea by the defendant illegality by putting the contract side by side with the Rules is writ large. IMPACT OF ABSENCE OF PRAYER QUESTIONING REPUDIATION BY FIRST DEFENDANT?

90. The second defendant has raised a contention that since the first defendant has repudiated the contract and as the plaintiff has not prayed for a declaration that the repudiation was bad, the Suit would not lie. Reliance is placed on the judgment of this Court in I.S. Sikandar (Dead) by Lrs. v. K. Subramani and others22. In the said judgment, we find that this Court has taken the view that when the vendor has cancelled the agreement, it is incumbent upon the vendee to seek a declaration that the cancellation was illegal. This is what the Court has held:

> “Para 36. Since the Plaintiff did not perform his part of contract within the extended period in the legal notice referred to supra, the Agreement of Sale was terminated as per notice dated 28.03.1985 and thus, there is termination of the Agreement of Sale between the Plaintiff and Defendant Nos. 1-4 w.e.f. 10.04.1985.
>
> Para 37. As could be seen from the prayer sought for in the original suit, the Plaintiff has not sought for declaratory relief to declare the termination of Agreement of Sale as bad in law. In the absence of such prayer by the Plaintiff the original suit filed by him before the trial court for grant of decree for specific performance in respect of the suit schedule property on the basis of Agreement of Sale and consequential relief of

> decree for permanent injunction is not maintainable in law."

91. The said view has been followed in the judgment of this Court reported in Mohinder Kaur v. Sant Paul Singh23. We do not however need to rest our decision to non-suit the plaintiff on this score in view of our finding that the agreement dated 17.12.1982 should not be enforced. 22 (2013) 15 SCC 27 23 (2019) 9 SCC 358 LIS PENDENS

92. The Doctrine of Lis Pendens is based on the maxim "pendente lite nihil innovetur". This means that pending litigation, nothing new should be introduced. Section 52 of the Transfer of Property Act, 1882 (for short, 'the TP Act'), which incorporates the Doctrine of Lis Pendens, is based on equity and public policy. It pours complete efficacy to the adjudicatory mechanism. This is done by finding that any disposition of property, as described in the Section by a party to the litigation will, in not any way, detract from the finality of the decision rendered by the court. It is clear that it is not based on the ground of Notice as laid down by Lord Craanworth in Bennamy v. Sabine, which has been followed by the Privy Council in the decision in 34 Indian Appeals 102. We may notice the following discussion in this regard in "The Transfer of Property, by Mulla, 12th Edition:

> "The rule is, therefore, based not on the doctrine of notice, but on expediency, ie, the necessity for fine adjudication. It is immaterial whether the alienee pendente lite had, or had not, notice of the pending proceeding. This is, of course, no longer the case in England, or in Gujarat and Maharashtra, where the doctrine only affects transactions pendente lite if the lis has been duly registered."

93. It is further important to notice that when a transaction is done, lis pendens or pending a case, the transaction is, as such, not annulled. The transaction is, in other words, not invalidated. In fact, as between the transferor and the transferee, it does not lie in the mouth of the transferor to set up the plea of lis pendens to defeat the disposition of property. Equally, the Principle of Lis Pendens is, not to be confounded with the aspect of good faith or bonafides. In other words, the transferee or the beneficiary of the property, which is disposed of by a party, cannot set up the case that he acted bonafide or in good faith. This enables the court and the parties in a Suit or a proceeding, which otherwise is in conformity with requirements of Section 52, to proceed in the matter on the basis that the adjudication by the court, will not, in any way, be subverted or delayed, when the day of final reckoning arrives.

94. The cardinal and indispensable requirement, which flows both from Section 52 and the principle, it purports to uphold, is that the transfer or dealing of the property, which is the subject matter of the proceeding, is carried out by a party to the proceeding. Section 52 uses the word 'party' twice. It refers to the disability of a party to transfer or otherwise deal with the property, pending adjudication. This embargo is intertwined with the beneficiary of the veto against such transfer, being any other party thereto. In fact, the Special Bench of the Madras High Court in Manjeshwara Krishnaya v. Vasudeva Mallya and Four Others24, puts the Doctrine of Lis Pendens as an extension of the Doctrine of Res Judicata. Thus, the sine qua non for the Doctrine of Lis Pendens to apply is that the transfer is made or the property is otherwise disposed of by a person, who is a party to the litigation. The Doctrine of Lis Pendens, only subject, however, the transfer or other disposition of

property to the final decision that is rendered. The 24 AIR 1918 Madras 578 person/party, who finally succeeds in the litigation, can ask the court to ignore any transfer or other disposition of property by any party to the proceeding. This is subject to the condition that transfer or other disposition is made during the pendency of the lis.

95. The first defendant died pending the Suit on 06.08.1994. Her death was reported before the Court on 16.01.1995. The plaintiff brought on record, the husband of the first defendant by Order dated 25.08.1995, as defendant No. 1(a). Defendant No. 1(b), who is the son of the second defendant, sold the property on 19.09.1996, in favour of the appellant. It is thereafter that on 09.04.1997, the predecessor in interest of the appellant, viz., the son of the first defendant, and the second defendant were impleaded on 09.04.1997. The transfer made in favour of the second defendant was, therefore, made at a time, when the son of the first defendant was not a party to the Suit. Therefore, it is that the contention was taken before the Trial Court successfully by appellants that the transfer in favour of the appellant was not hit by Doctrine of Lis Pendens.

96. The High Court in the impugned Judgment reversed this finding. The High Court, in doing so, employs, inter alia, the following reasoning:

> "78. The position of law with regard to the rights and obligation of a dead person can be succinctly stated thus: The rights which a dead man thus leaves behind him vests in his representative. They pass to some person whom the dead man, or the law on his behalf, has appointed to represent him in the world of the living. This representative bears the person of the deceased, and therefore, has vested in him all the inheritable rights, and has imposed upon him all the inheritable liabilities of the deceased. Inheritance is in some sort a legal and fictitious continuation of the personality of the dead man, for the representative is in some sort identified by the law with him whom he represents. The rights which the dead man can no longer own or exercise in propria persona, and the obligations which he can no longer in propria persona fulfil, he owns, exercises, and fulfils in the person of a living substitute. To this extent, and in this fashion, it may be said that the legal personality of a man survives his natural personality, until, his obligations being duly performed, and his property duly disposed of, his representation among the living is no longer called for. Just as many of a man's rights survive him, so also do many of his liabilities; and these inheritable obligations pass to his representative, and must be satisfied by him. As far as the estate of a dead man is concerned, there are two class of persons who are entitled to it, namely, creditors and beneficiaries. A beneficiary possesses a dual capacity, while he may benefit by inheriting the dead man's estate is also liable to the dead man's obligations. He survives even after his death, especially the obligations concerning immovable property. The beneficiaries who are entitled to the residue after satisfaction of the creditors, are of two classes: (1) those nominated by the last will of the deceased and (2) those appointed by the law in default of any such nomination. They succeed respectively by testamentary succession (ex testamento) or intestate succession (ab intestate) (source: Salmond on Jurisprudence Twelfth Edition, P.J. Fitzgerald). Section 2(11) of the Code of Civil Procedure, 1908 (CPC)

> defines legal representative to mean a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of • the party so suing or sued. The aforesaid definition is both exhaustive as well as an inclusive definition. It is exhaustive in the sense that a legal representative means a person who in law represents the estate of immovable property. The beneficiaries who are entitled to the residue after satisfaction of the creditors, are of two classes: (1) those nominated by the last will of the deceased and (2) those appointed by the law in default of any such nomination. They succeed respectively by testamentary succession (ex testamento) or intestate succession (ab intestate) (source: Salmond on Jurisprudence Twelfth Edition, P.J. Fitzgerald)."

97. Thereafter, the High Court proceeded to consider the distinction between a legal representative as defined in Section 2(11) of the Code of Civil Procedure, 1908 and legal heirs. Still further, the Court also considered the scheme of Order XXII of the CPC and finally proceeds to find as follows:

> "79. ... Even though defendant No. 1(b) was not arrayed along with his father as a legal heir of the deceased defendant No.1, the fact remains that the estate of defendant No.1, which also includes the suit schedule property was represented through defendant No. 1(a), the husband of defendant No.1. Therefore, the contention that the sale that was made by defendant No. 1(b) in favour of defendant No.2 when defendant No. 1(b) was not a party to the suit is not subject to any direction that may be issued in the suit, and that Sec. 52 of the Act would not apply in the instant case is not a correct understanding of the position of law. Further, in the instant case, defendant No.1(a) also did not inform the trial court that his son was also a legal representative of deceased defendant No.1 and therefore, he also ought to be brought on record as the heir of the deceased defendant No.1 when the application was filed by the plaintiff to bring only him on record as legal heir of deceased defendant No.1. Therefore, it is held that in ' the instant case, the estate of the defendant No.1 was represented through defendant No.1(a) in the suit and that the alienation made by defendant No.1(b) to defendant No.2, even in the absence of defendant No.1(b) being made a party to the suit has no significance.
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> That apart, it is also noted from the evidence of defendant No.2, who has deposed as DW-1, that when the talks for the sale of the suit property took place in June, 1996, defendant No.1(a) along with defendant No.1(b) and the broker Battanna were present. The reason as to why defendant No.1(a) did not disclose about the pendency of the suit when he was by then arrayed as the legal heir of deceased defendant No.1 in the said suit is for obvious reasons. Defendant No.1(a) did not disclose about the pendency of the suit to defendant No.2 only with an intention to deprive the right of the plaintiff in the suit property i.e., by creating third party rights in the said property. Also, it cannot be believed that defendant No.1 (b), though not arrayed as a legal representative of deceased defendant No.1 (his mother) at that point of time was

totally unaware about the pendency of the suit. The legal heirs of deceased defendant No.1 namely her husband and only son resided at the same address. Therefore, constructive, if not actual, notice has to be attributed to defendant No. l(b) regarding the pendency of the suit. By selling the same to defendant No.2 would result in plaintiff's right being jeopardised. As already noted from the evidence of DW-1 and 2, talks for the sale of the suit site by defendant Nos.1 (a) and l(b) were held with defendant No. in the first week of June, 1996. In fact, at that point of time, the BDA had not yet conveyed the site in the name of the defendant No.1(b). BOA did so only on 14/06/1996. ..." The High Court has relied on the decision of the Madras High Court in Nallakumara Goundan v. Pappayi Ammal and Another25. In the said case, after the death of the party, a legal representative disposed of the plaint schedule property within the period provided for substituting the dead person with the legal representative. It was in the said context held by the Madras High Court as under:

"...The same principle should, I think, apply to a case where as here the original defendant died and the alienation was made after his death and before the filing of the application to bring his legal representative on record. The suit must be deemed to be pending against the legal persona of the deceased i.e., against his legal representative and must be deemed to continue until at least the expiration of the time limited by any law of limitation to bring him on record. Whether if an application is made long after the expiration of the time fixed for bringing the legal representative on record and an alienation is made by the legal representative and later on the plaintiff in the action seeks to set aside the abatement and to bring the legal representative on record, and that is ordered, the doctrine of lis pendens applies or not does not arise and need not be considered. There may be difficulties in such a case, but where the alienation is made within the time prescribed for bringing the legal representative on record, it is a clear case and there can be no doubt whatever that the rule does apply..." 25 AIR 1945 Mad 219

98. Thereafter, the Court concluded that in the circumstances, Section 52 of the TP Act squarely applied.

99. It would appear that the High Court has, in arriving at the finding that the transfer in favour of the appellant is hit by lis pendens, taken into consideration the Doctrine of Notice/Constructive Notice. We have already observed that the Doctrine of Notice and Constructive Notice would be inapposite and inapplicable. Neither the fact that the transferee had no notice nor the fact that the transferee acted bonafide, in entering into the transaction, are relevant for applying Section 52 to a transaction. This is unlike the requirement of Section 19(1)(b) of the Specific Relief Act whereunder these requirements are relevant.

100. The decision of the Madras High Court in Nallakumara Goundan (supra) turned on in its own facts as indicated by the said court itself. In other words, that was a case where even within the period of limitation for substitution of the legal representative of a deceased party in a suit, the legal representative purported to deal with the property. It was in the said context that the court

proceeded to hold that lis pendens would apply. In this case the transfer in favour of the second defendant took place on 16.09.1996. The vendor and the vendee namely defendant 1(b) and the second defendant were not parties on the date of the transaction. They were impleaded only almost one year thereafter. No doubt we are not oblivious to the role played by defendant 1(a) namely the husband of the first defendant who gave his 'no objection' to the assignment of the entire rights in favour of his son namely defendant 1(b) without which BDA could not have assigned the right in favour of defendant 1(b). Though not urged by the plaintiff, could it be said that as defendant 1(a) was already a party and this must be treated as a case were defendant 1(a) as 'otherwise dealt' with the property within the meaning of Section 52 without which the title would not vest in defendant 1(b). A transfer which is made lis pendens it is settled law, is not a void document. It does create rights as between the parties to the sale. The right of the party to the suit who conveys his right by a sale is extinguished. All that Section 52 of the Transfer Property Act provides is that the transfer which is made during the pendency of the proceeding is subjected to the final result of the litigation. Even assuming for a moment that the conduct of defendant 1(a) the father of defendant 1(b), in giving a no objection and thereby enabling defendant 1(b) to derive the title exclusively to the property and which title stood conveyed to the second defendant attracted, the principle of lis pendens, it would still not invalidate the sale. At best, the plaintiff can contend that, should he be entitled for a decree of performance the sale in favour of the second defendant should be subjected to such decree. As far as the transfer is made by defendant 1(b) to the second defendant in his own right and in so far as defendant 1(b) was not a party and by the time the sale was effected the period of limitation for impleading defendant 1(b) had already clearly expired even the principle laid down in the decision of the Madras High Court would not apply and the High Court was not correct in finding that the sale by defendant 1(b) in favour of second defendant was hit by lis pendens. IS THE SECOND DEFENDANT, A BONAFIDE PURCHASER?

101. The Trial Court has found that the second defendant is a bonafide purchaser. The High Court holds otherwise. The purchase of the Suit site is purported to be made by the second defendant on 17.09.1996. The High Court, after going through the evidence, enters the following findings.

The negotiations took place first time in June, 1996 and, at that time, the Suit was pending. The BDA has not yet registered the conveyance in favour of defendant 1(b). Even before the BDA executed the sale deed in favour of defendant 1(b), he had decided to enter into the agreement. The conveyance in favour of defendant 1(b) was entered only on 14.06.1996 and he executed the sale deed in favour of the second defendant on 19.09.1996. The second defendant has deposed that he met not just DW2 along with the broker but he had also met the father of DW2, viz., defendant 1(a), who was arrayed as the legal representative of the first defendant. Only photocopies of documents were given to the second defendant before the sale. Defendant No.2 did not make any inquiry about the original. It must be presumed that second defendant had notice of the agreement to sell the Site in respect of which the Decree for Specific Performance was sought. The Court, then, referred to Section 3 of the TP Act and brings in the concept of constructive notice. Had the second defendant made inquiries with regard to the original possession certificate, the truth would have been revealed. Much is said about no inquiry is being made about the original possession certificate. The High Court notes that the agreement to sell with the plaintiff is not registered but, again, it draws inference from absence of inquires by the second defendant about why the original possession

certificate was not handed over to him. The fact that defendant 1(a) did not reveal to the second defendant about the pendency of the Suit, is, on the one hand noted but the Court holds that even then, the second defendant ought to have made inquiry about pendency of any litigation. The fact that second defendant 1(b) as DW2 admitted that he had no material to support the fact that he had received Rs.4,50,000/-, was a very valuable in mid 1990s, if considered.

The Court questions the idea that second defendant who was only 20 years of age and involved in agricultural operations and milk vending business, who had no intention of settling in Bangalore, would have thought of purchasing a site in Bangalore. The amount of consideration was not deposited in any bank. The Court proceeds to hold that on an overall reappreciation, it was found that he was not a bonafide purchaser for value without notice. Thereafter the High Court further proceeds to pose the question as to why the second defendant, who is the resident of Nagamangala Taluk, engaged in agricultural operation and milk vending business, should enter into an agreement in Bangalore, that too, when he is 20 years old. Betanna-the alleged broker, was not examined. Thereafter, the High Court proceeds to even find that the entire transaction between defendant No. 1(b) and the second defendant is a sham transaction, made only to defeat the plaintiff. In the next paragraph, however, applying Sections 3 and 54 of the TP Act, it is again found that the second defendant is not a bonafide purchaser for value. Finally, it was found, by answering point No.2, that second defendant is not a bonafide purchaser for value without notice of the agreement to sell in favour of the plaintiff.

102. We must, in the first place, notice that on a perusal of the plaint, even after the amendment, there is no case set up by the plaintiff that the sale deed executed in favour of the second defendant, is a sham transaction. A sale deed, which is a mere sham and a purchase, which is not bonafide, are two different things. In the case of sham transaction, no title is conveyed to the purchaser. In the case a sale transaction, which is not a sham, the title of the transfer is, indeed, conveyed to the transferee. A purchase may be bonafide or not bonafide. In a sale, which is not a bonafide, words “bonafide sale”, is used in the context of pending Suit and from the point of view of Section 19(1)(b) of the Specific Performance Act. It is difficult to dub it as a sham transaction. A transaction cannot be a sham transaction and a sale, which is afflicted with absence of bonafides, at the same time. Even proceeding on the basis that the second defendant was not a bonafide purchaser, it is not the same thing as holding that it is a sham transaction.

103. In the plaint, which was amended, the plaintiff has averred, inter alia, as follows:

> “lOC. The Plaintiff submits that taking advantage of the fact that the son was not on record, the husband accorded no objection in favour of the BDA so as to ensure that the Sale Deed was executed in favour of HK Sudarshan alone and thereafter the Second legal representative sold the Schedule Property in favour of the Second Defendant. The Plaintiff submits that the Defendants are aware of the pendency of the suit and of the subsistence of the Agreement of Bale in favour of the Plaintiff. The Sale Deed en executed in favour of the said person i.e., the Second Defendant is hit by the Doctrine of lis pendens and the Second Defendant's title to the Schedule Property is subject to the outcome of the present suit.

> 10D. The Plaintiff submits that the Second Defendant is not a bonafide purchaser for value. The sale in favour of the Second Defendant is with the sole intention of complicating the matters in controversy and to prejudice the case of the Plaintiff. Therefore, the Plaintiff submits that the Sale Deed executed in favour of the Second Defendant does not in any way restrict the right of the Plaintiff to seek Specific Performance of the Agreement of Sale executed in favour of the Plaintiff."
>
> 104. Therefore, we are inclined to hold, in the first place that the High Court erred in finding that the transaction was a sham transaction. As far the question, as to whether second defendant was not a bonafide purchaser, it is the case of the second defendant that the High Court has erred in not noticing that in the evidence, the second defendant deposed that his vendor disclosed to him that the original possession certificate was lost and produced duplicate possession certificate. This evidence is incongruous with the finding of the High Court that the second defendant had not made any inquiry as to why the original possession certificate was not handed over.

The second defendant had deposed about inquiry being made and being informed that the original possession certificate was lost. The second defendant further complains that the High Court itself has found that the vendor of the second defendant has admitted that no information was given to the second defendant regarding the pendency of the Suit and, therefore, the High Court has erred in reversing the finding of the Trial Court, which had found that inquiry as contemplated in Section 3 of the TP Act had been made by the second defendant for purchasing the property. Second Defendant had visited the Site. The finding based on defendant being 20-years old or the husband of the vendor, being an MLA, was pointed out to be irrelevant. It is further the case of the second defendant that construction was made and he is living in the property since more than 17 years. The value of the property is stated to be about 2.5 crores.

105. Per contra, the learned Senior Counsel for the plaintiff, would support the finding of the High Court. It was pointed out that the High Court is the final fact-finding Court.

106. We have already found that the sale in favour of the second defendant is wrongly found to be a sham transaction, a case, which even the plaintiff did not have. If it is not a sham transaction and the issue is, as to whether the second defendant, is not a bonafide purchaser, the following aspect looms large.

107. We have already found that the agreement to sell dated 17.11.1982, is to be painted with the brush of illegality and pronounced unenforceable. It is undisputed that the plaintiff has paid Rs.50,000/- on the strength of the said agreement. It would appear to be true that a part of this amount was received on the date of the agreement. It may be true that further amount were received by defendant 1(a), the husband of the first defendant. The first defendant died pending the Suit. It is while the Suit was pending that defendant 1(b), the son of the first defendant, had executed the sale deed on 16.09.1996 in favour of the second defendant. It is again undisputed that at the time when the sale deed was executed, both the second defendant and his vendor, defendant 1(b), were not

parties in the Suit. We have already found that the sale deed in favour of the second defendant, cannot be treated as a sham transaction and the finding, in fact, on point No.2 by the High Court, also that the second defendant is not a bonafide purchaser. Once we come to the conclusion that the agreement, relied upon by the plaintiff, cannot be enforced, as to whether, even proceeding on the basis that the sale in favour of the second defendant was made, not in circumstances which would entitle the second defendant to set up the case that he is a bonafide purchaser, the question of granting relief to the plaintiff must first be decided. In other words, in view of the illegality involved in enforcing the agreement dated 17.11.1982, the question would arise, whether, on principles, which have been settled by this Court, the Court should assist the plaintiff or the defendant. We have noted the state of the evidence, in particular, as it is revealed from the deposition of PW2. We have found that the agreement, relied upon by the plaintiff, cannot be acted upon. In such circumstances, we would think that, even if we do not reverse the finding of the High Court that the second defendant is not a bonafide purchaser, it will not itself advance the case of the plaintiff. This is for the reason that his case is in the teeth of the law, as found by us, making it an unenforceable contract. The plaintiff is seeking the assistance of the Court which must be refused.

108. We, therefore, need not explore further the complaint of the second defendant that the High Court erred in arriving at the finding that the second defendant was not a bonafide purchaser. NOT A CASE UNDER ARTICLE 136?

109. Is it a case which should not be allowed under Article 136? The argument of the plaintiff is that having regard to the facts as it emerges this is not a fit case for this court to exercise its jurisdiction which originated from grant of special leave under Article 136. It is undoubtedly true that at both the stages namely while granting special leave and also even after special leave has been granted under Article 136 that is when the court considers an appeal the court would not be oblivious to the special nature of the jurisdiction it exercises. It is not axiomatic that on a case being made otherwise that the court would interfere. The conduct of the parties and the question as to whether interference would promote the interests of justice are not irrelevant considerations. Being the final court, it is not without reason that this court is accordingly also clothed with the extraordinary powers under Article 142 to do compete justice between the parties.

110. There is another aspect which is also projected by the plaintiff which must receive our attention. The plaintiff sought to persuade us should the court find the agreement to sell unenforceable for the reason that it falls foul of Section 23 of the Contract Act, it may declare the law but not interfere with the judgment of the High Court.

111. We are of the view that on both these grounds we are not with the plaintiff. It is not a case where the condition of the plaintiff is such that the interests of justice would overwhelm our findings that the agreement relied upon by the plaintiff constituted a clear intrusion into the requirement of the law. In fact, we would consider the contract an open and brazen instance of parties entering into a bargain with scant regard for the law. If that were not enough, the very first letter addressed to the first defendant dated 01.03.1983 betrays the real purpose of the contract. The plaintiff in no uncertain terms has declared his intention to sell the property to his nominee. It is clear as day light that the plaintiff had no intention whatsoever to make use of the site for the purpose of putting up a

residential building. The communications indicate that the plaintiff was a contractor. The evidence of PW 2 his son further indicated that he has been in the business since 1960. What is even more revealing is the admission relating to the properties belonging to or in the possession of the plaintiff and his family members which we have dealt with. The final nail in the coffin, as it were, is driven home in the case by showing the case of the plaintiff in its true colours when PW 2 deposed that if the suit is dismissed it would occasion 'a monetary loss'. Thus, the bargain was to buy up precious public land which was vested with the Bangalore Development Authority by acquiring it from some person with the laudable object of housing a homeless person in Bangalore. The result of the agreement being enforced would be to clearly frustrate the object of the law and make the site the subject matter of a property deal with the object of making a profit.

112. The upshot of the above discussion is, we must hold that the High Court has clearly erred in holding that the Suit was maintainable. We would find that the Suit to enforce the agreement dated 17.11.1982, should not be countenanced by the Court.

113. Then, the question would arise, as to the final Order to be passed in the facts. While, we are inclined to overturn the impugned Judgment by holding that the Suit itself, was not maintainable, we must notice that the High Court had decreed the Suit on the appeal by the plaintiff. The defendants did not challenge the Decree of the Trial Court. Therefore, the setting aside of the Judgement of the High Court would not result in dismissal of the Suit. What is more, we are of the further view that to do complete justice between the parties, while we allow the appeals, we must pass an Order, which will result in a fair amount being paid to the plaintiff. Having regard to the entirety of the evidence and the conduct of the parties, noticing even the admitted stand of the second defendant that the plaint schedule property has a value of Rs.2.5 crores and the plaintiff has paid, in all, a sum of Rs.50,000/, which constituted the consideration for the agreement to sell several years ago, while we dismiss the Suit for Specific Performance, we should direct the appellants to pay a sum of Rs.20,00,000/- in place of the Decree of the Trial Court.

114. Accordingly, Appeals are allowed. The impugned Judgement shall stand set aside. The Suit for Specific Performance will stand dismissed. There will be a Decree, however, for payment of Rs.20,00,000/-(Rupees twenty lakhs) by the appellants to the respondents (the Legal Representatives of the plaintiff) within a period of three months from today. If the aforesaid amount is not paid as aforesaid, the appellants shall be liable to pay interest at the rate of 8 per cent per annum after the expiry of 3 months from today on the said amount as well. Parties are directed to bear their respective costs.

... ... J. [K.M. JOSEPH]
.....J. [PAMIDIGHANTAM SRI NARASIMHA] NEW DELHI;

DATED: JANUARY 18, 2022.