Supreme Court of India
Jai Narain Parasurampuria (Dead) ... vs Pushpa Devi Saraf & Ors on 24 August, 2006
Author: S.B. Sinha
Bench: S.B. Sinha, P.P. Naolekar

CASE NO.:
Appeal (civil) 3801 of 1999

PETITIONER:
Jai Narain Parasurampuria (Dead) & Ors

RESPONDENT:
Pushpa Devi Saraf & Ors

DATE OF JUDGMENT: 24/08/2006

BENCH:
S.B. Sinha & P.P. Naolekar

JUDGMENT:

J U D G M E N T With CIVIL APPEAL NO.3802 of 1999 S.B. SINHA, J :

Background facts:

Kanpur is a metropolitan town. The respondents herein were owners of a house property bearing municipal number 7/169, on a freehold plot bearing No.22, measuring 2978 sq. yards, situate in Block B, Scheme No.7, Gutaiyya, Swaroop Nagar in the said town ('the property' for short). The 1st respondent-Pushpa Devi Saraf and the 2nd respondent-Mohan Lal Saraf intended to promote a company in the name of the 5th respondent-M/s. Kanpur Exports (P) Ltd. ('the Company' for short). They filed an application therefor as promoters of the Company on 15.2.1979. They acquired the property in their capacity of promoters or Directors of the proposed company from one Shanti Narain Verma by a registered Deed of Sale dated 24.2.1979 at a price of Rs.2 lakhs. The said Deed of Sale contained a clause of re-conveyance of 'the property'.

The Company was incorporated on 19.6.1979. The amount of consideration paid to said Shanti Narain Verma was repaid by the Company by two cheques of Rs.1,11,250/- each to Mohan Lal Saraf and Pushpa Devi Saraf (hereinafter referred to as "Sarafs"). The first balance sheet of the Company was signed by the 2nd respondent herein on 30.6.1980, wherein also 'the property' was shown to be that of the company. With a view to do away with the said clause of re-conveyance, a suit was filed by the Company against the said Shanti Narain Verma. The said suit was decreed. The First Directors' Report dated 15.11.1980 and the balance sheet of the Company for the year ending 30.6.1981, signed by the 2nd respondent herein also disclosed the property to be that of the Company. Directors of the Company, viz., 'Sarafs' resolved to sell the property in favour of the appellants herein. A resolution to let out the property in favour of one Manoj Kumar Poddar was also adopted by it. A General Power of Attorney was also executed by the Company in favour of one M.M. Aggarwal who had specially been invited to attend the said meeting. Pursuant to or in furtherance of the said resolution, an agreement of sale of the said property was executed by Sarafs

as Directors of the Company, wherefor the total consideration was fixed at Rs.11 lakhs. Out of the said amount, a sum of Rs.10 lakhs was paid in advance through Bankers' Cheques and Cash Orders dated 11.6.1984 and 12.6.1984. The remaining amount of Rupees One lakh was to be paid at the time of execution and registration of the Deed of Sale.

A registered Deed of Lease pursuant to the said resolution was also executed and registered in favour of said Shri M.K. Poddar, the sister's son of the appellant, on the same day. There exists a dispute, to which we would advert to at an appropriate stage, as to whether the possession of the property had been handed over to Shri M.K. Poddar or not.

Proceeding :

The appellants herein issued a notice asking the respondents to execute a Deed of Sale on 5.8.1984. They also got a public notice published in Newspaper notifying the execution of the agreement for sale between the appellants and the contesting respondents. Another Agreement for sale was purported to have been executed on 4.6.1984 by 'Sarafs' in favour of one Surendra Kumar Mittal stated to be a close relation (brother-in-law) of Mohan Kumar Saraf.

The appellants filed a suit against the respondents for injunction. Subsequently, a relief by way of decree of specific performance of the agreement for sale was also prayed for. A further prayer was made therein that the purported Agreement of Sale dated 4.6.1984 executed by the defendant Nos.2 to 4 in favour of the said Surendra Kumar Mittal was a sham.

The said M.K. Poddar also instituted a suit for injunction on 25.5.1984, which was numbered as Suit No.612 of 1984, wherein an interim order of injunction, directing the parties not to interfere with his possession was passed. In the said suit, an Advocate Commissioner was also appointed. He found the said M.K. Poddar to be in possession of the property.

A purported dispute, however, was raised as regards ownership of the said property by and between the Company on the one hand and the Sarafs on the other. One Shri B.S. Mathur, Advocate was appointed as sole Arbitrator. He made an Award holding the property to be belonging to Sarafs. They were directed to refund an amount of Rs.2,22,500/- to the Company; they having received the same from the Company. The Award was made Rule of the Court. An Execution Case was filed to execute the decree. In execution of the said decree a warrant of delivery of Possession was issued against the Company and M.K. Poddar was said to have been dispossessed.

M.K. Poddar, indisputably filed an application under Order 21 Rule 99 of the Civil Procedure Code for restoration of possession of the said property. In response to the notice issued thereupon, the respondents contended that they intended to raise a multi-storied building upon demolition of the existing building.

Suits and other proceedings initiated by the appellants :

A suit was filed by the appellants and the said M.K. Poddar in the Delhi High Court for a declaration that the Decree dated 21.2.1985 passed by the said Court was obtained by fraud and thus was a nullity. Another suit was filed by the appellants for declaration and appointment of Receiver before the Civil Judge, Kanpur Dehat being Suit No.237 of 1989, wherein a declaration was sought for that the defendants therein, in view of the Agreement of Sale dated 12.6.1984, had no authority to cause any damage to the suit property. Symbolic possession was directed to be given in favour of the appellants therein by an order dated 23.10.1989. However, the said suit later on was withdrawn. Another suit was filed by the appellants in the Court of Munsif, Kanpur praying for an order restraining Sarafs from interfering with their right to manage and maintain the suit property, which was registered as Original Suit No.2256 of 1989. The said suit was also dismissed as withdrawn by an order dated 26.8.1991. The appellants also filed a suit for permanent injunction, which was registered as Suit No.677/91 for restraining the respondents from causing any disturbance in their peaceful possession. The said suit was also dismissed. It is furthermore not in dispute that one G.P. Tiwari claiming himself to be the caretaker of the property filed a suit against the respondents and by an order dated 13.7.1987 an ex-parte decree was passed in terms of the provisions of the U.P. Rent Control Act. An application for setting aside the said ex-parte decree was filed by Mohan Lal Saraf. The first respondent herein also filed a writ petition for quashing the said ex-parte decree before the Allahabad High Court, which was numbered as Writ Petition No.21985 of 1989. The said ex-parte decree was set aside by an order dated 8.2.1990. The said suit was also withdrawn by G.P. Tiwari. The writ petition filed by respondent No.1 herein was also dismissed as having become infructuous, whereagainst Pushpa Devi Saraf preferred a Special Leave Petition which was also dismissed by an order dated 19.9.1990. However, the said order dated 19.9.1990 was recalled by this Court by an order dated and the petition was disposed of on 14.8.1991, directing the District Judge, Kanpur to nominate a Receiver for taking charge of the property.

Suit and other proceedings initiated by the respondents :

On 8.7.1980, the Company through its Directors, Sarafs, filed a suit against Shanti Narain Verma for declaration that the Company was the absolute owner in possession of the suit premises. However, as noticed hereinbefore, before the Trial Court, the respondents, inter alia, raised a contention that the Sarafs were the owners of the suit property and not the Company. The learned trial Court negatived the said contention. As noticed hereinbefore, the said suit questioning the grant of symbolic possession was decreed in favour of the appellants. A writ petition was filed on 9.5.1990 which was numbered as Writ Petition No.24301/89. The order granting symbolic possession was quashed by the High Court by an order dated 23.10.1989 on the premise that there had been no sufficient service and the matter was remanded to the Trial Court for fresh consideration thereof. A Criminal Misc. Writ Petition No.23804/89 was filed in the High Court of Judicature at Allahabad for a direction that a criminal case be registered for protection of life and property of the Sarafs and for payment of damages for damages allegedly caused to them. By an order dated 9.12.1993, the High Court directed investigation into the allegations made by Sarafs by the Central Bureau of Investigation. Upon completion of the investigation by the Central Bureau of Investigation, a charge-sheet was filed against the appellants and the trial against them is pending.

Judgment of the Court :

On the backdrop of several litigations between the parties and allegations and counter allegations made by one party against the other therein, the learned Trial Court decreed the Appellants' suit for specific performance of contract. The said judgment and decree came to be challenged before the High Court. A Division Bench of the High Court allowed the appeal on the premise that the Trial Court had wrongly exercised its discretionary jurisdiction under Section 20 of the Specific Relief Act, 1963; as the appellants were guilty of demolition of the existing structures on the land. The learned Judges of the Division Bench of the High Court, however, differed in their opinion on other issues.

Both the parties are, thus, before us.

Submissions :

Mr. Rakesh Dwivedi, learned Senior Counsel appearing on behalf of the appellants raised the following contentions:

i) The High Court committed a serious error in holding that the Sarafs had purchased the property for the benefit of the Company ignoring the decree passed in favour of the Company as also the representations made by the Sarafs to the State Bank of India, before the Courts of Law as also the society at large.

(ii) Sarafs were estopped and precluded from denying the title of the Company and setting up their own title over the property in view of their representations made to the appellants and the world at large.

iii) Even if Sarafs were owners of the property, the Agreement of Sale executed in favour of the appellants was valid as the Company itself was being represented by them who were even otherwise authorized to execute the Agreement on behalf of the company and, thus, by reason of their conduct, they must be held to have executed the said Agreement on their own behalf also.

iv) The Court failed to apply the doctrine of lifting the corporate veil, as the same was necessary for determining the real issue between the parties.

(v) Assuming that the Award passed by the Arbitrator, as also the decree passed by the High Court pursuant thereto are valid in law, in terms whereof Sarafs were declared to be owners of the property, the agreement of sale would be binding on them.

vi) The Award and the decree, having been obtained by practicing fraud as envisaged under Section 44 of the Evidence Act, were void ab initio and the Trial Court rightly having applied the said principle, the same could not have been overturned by one of the Judges of the Division Bench of the High Court.

vii) Withdrawal of Suit No. 1252/85 filed by the appellants for setting aside the Award and the consequent decree, would not debar the appellants from raising the said issue as a plea of fraud can

be raised at any stage and even in a collateral proceeding.

viii) The Award and the decree of the Delhi High Court, in any view of the matter, would not adversely affect the interest of the appellants, which could not have been relied upon by the respondents as they were not parties thereto.

ix) Both the Hon'ble Judges of the High Court committed a manifest error in arriving at a finding that the appellants were responsible for demolition of the existing structures and institution of the rent case through G.P. Tiwari.

(x) Even assuming that the said findings are correct, the same by itself could not have been a ground for denying the appellants the relief by way of a decree for specific performance of contract.

Mr. Sudhir Chandra, learned Senior Counsel appearing on behalf of the respondents, on the other hand, would support the impugned judgment contending :

(i) The High Court has rightly arrived at a finding that the suit property was demolished on 23.9.1989 illegally by the appellant No.1 and his associates and thus, they became disentitled from obtaining the discretionary relief of specific performance of contract;

(ii) The said finding of the High Court being based upon the materials on record including the judgment of another Division Bench of the Allahabad High Court passed in Criminal Writ Petition No.23804/89, as also the charge-sheet issued by the Central Bureau of Investigation upon investigation made pursuant to the order of the High Court and various other orders passed by this Court, the impugned judgment should not be interfered with.

(iii) The High Court rightly came to the conclusion that Shri G.P. Tiwari was set up by the appellants which would be evident from the fact that they had a common counsel and, had furthermore approached this Court as appellants against the orders passed by the High Court.

(iv) Shri G.P. Tiwari himself having admitted that he had handed over possession of the suit premises to one of the brothers of the appellant, collusion between himself and the appellants stood established.

(v) The appellants had abused the process of court, as they not only got the aforementioned Rent Case No. 99/87 instituted by Shri G.P. Tiwari, but also initiated multiple proceedings against Sarafs with a view to obtain ex-parte orders through one Nand Lal Jaiswal, Advocate and in that view of the matter they were not entitled to any discretionary relief in terms of Section 20 of the Specific Relief Act, 1963.

(vi) The purported Agreement of Sale dated 12.6.84 was in effect and substance an agreement of loan.

(vii) The agreement dated 12.6.84 itself having stipulated that in the event of defect in the right or title of the parties of the first part or the said Company, or any other encumbrance or legal hurdle in respect of the suit property, the appellants would have an option to refund the advance money of Rs.10 lakhs together with interest @18% per annum, no relief by way of specific performance of contract could have been granted.

In view of the following surrounding and attending circumstances, the purported agreement to sell should be construed to be an Agreement for Loan:

(a) Sudhir Kumar Parasrampuria, while examining himself as P.W.1 in his deposition, categorically stated that he had been informed by respondent No.2 that the property belonged to the Company as also individuals which would demonstrate that he was aware of the ownership of Sarafs thereover;

(b) The said property having not been mentioned in the Articles of Association of the Company, it could not have been treated to be the owner thereof in law;

(c) Shanti Narain Verma having sold the property in favour of Sarafs by a deed of sale dated 24.2.1979 and the Company having admittedly been incorporated on 19.6.1979, the title in respect thereof did not vest in the Company and, thus, the provisions of Section 15(h) and 19(e) of the Specific Relief Act, 1963 would have no application in the instant case. As on the date of execution of sale, the Company had no funds of its own and the amount of consideration, admittedly, having been paid by Sarafs, the Company could not be declared to be the owner thereof by a Court of law as was purportedly done by reason of the judgment dated 19.8.1987 in the suit filed by the Company against Shanti Narain Verma.

(d) The controversy in Suit No.267/80 being confined to the applicability of the re-conveyance clause contained in the deed of sale dated 24.2.1979, the question of ownership of the property having been vested in the Company did not and could not arise and in that view of the matter, the judgment rendered therein was inadmissible in evidence to prove the Company's title thereover.

Ownership issue :

The property in question was purchased by the Promoters of the company, namely, Sarafs. An application for registration of the company was filed on 15.2.1979 under the Companies Act, 1956 and the company was registered on 19.6.1979. Sarafs at the relevant were the only Directors and shareholders of the Company. In the deed of sale, they described themselves as Promoters/Directors of the company. As on the date of execution of the deed of sale, the company being not registered, the property was purchased in the name of the Promoters. In the balance sheet, income tax return, annual report, audit accounts and other relevant documents, the company had been shown to be the owner of the property. On its registration, the company also paid a sum of Rs.2,22,500/- to Sarafs. The company in its report dated 15.11.1980 categorically mentioned that it had acquired fixed assets of Rs.3,03,924/- including free hold land valued at Rs.1,02,500/- . The balance sheet also mentioned that the disputed property was the assets of the company. The company had taken a loan from the State Bank of India, Kanpur Branch upon mortgaging the property as a security.

We have noticed hereinbefore that a suit was filed by the company through Sarafs against Shanti Narayan Verma praying for a declaration that the property belonged to the company. The said suit was decreed by a judgment dated 19.8.1982 declaring that the company is the absolute owner thereof. It is also not in dispute that the Board of Directors of the company adopted a resolution on 6.9.1984 for sale of the said property in favour of the appellant herein for a sum of Rs.11,00,000/-. The agreement for sale was signed by the Directors, namely, Pushpa Devi Saraf and Mohan Lal Saraf and their son Sandeep Saraf. The company also discharged a part of the debts of State Bank of India, out of the amount of the advance of Rs.10,00,000/- received by it from the appellants herein. The company had also adopted another resolution for leasing out the property to Manoj Kumar Poddar. The deed of lease in favour of Manoj Kumar Poddar was also signed by Sarafs. In the said documents it was clearly and unequivocally stated that the property belonged to the company.

It is the company again which executed a general power of attorney in favour of Shri M.M. Agarwal for executing the deed of sale of the disputed property in favour of the appellants, upon getting the property released from the Bank. In the said power of attorney also, the company had been described as owner of the property.

There cannot, therefore, be any doubt whatsoever that for all intent and purport the Company was the owner of the property and at all material times Sarafs had made representations as such to the appellants as also to others thereabout.

Unincorporated Corporation issue :

At the time when the property was released from the charge held by the State Bank of India, a notice in terms of Section 138 of the Companies Act was issued by Shri Mohan Lal Saraf. In the registers maintained by the Registrar of the Companies under Section 132 of the Companies Act, it was shown that a charge of the said property had been made in favour of the State Bank of India.

Under the English Common Law, an unincorporated corporation could not have become an owner of the property. The law in India, however, is different.

Before we advert to the statutes operating in the field, in passing we may notice a wholly untenable submission of Shri Sudhir Chandra that an unregistered deed of sale only having been executed in favour of the company by Sarafs, no title passed to the company in view of Section 54 of the Transfer of Property Act. Section 54 of the Transfer of Property Act, defines sale and provides for a procedure as to how the same shall be made. It does not speak of conveyance of ownership. Section 54 of the Transfer of Property Act does not lay down a law as to whether in all situations an apparent state of affairs as contained in a deed of sale would be treated to be the real state of affairs. It does not bar a benami transaction. There is no embargo in getting a property registered in the name of one person; although real beneficiary thereof would be another.

Sections 15(h) and 19(e) of the Specific Relief Act, 1963 read as under :-

"15. Who may obtain specific performance. - Except as otherwise provided by this Chapter, the specific performance of a contract may be obtained by xx xxx xxx xxx

(h) when the promoters of a company have, before its incorporation, entered into a contract for the purposes of the company, and such contract is warranted by the terms of the incorporation, the company :

Provided that the company has accepted the contract and has communicated such acceptance to the other party to the contract."

"19. Relief against parties and persons claiming under them by subsequent title. - Except otherwise provided by this Chapter, specific performance of a contract may be enforced against xxx xxx xxx xxx

(e) when the promoters of a company have, before its incorporation, entered into a contract for the purpose of the company and such contract is warranted by the terms of the incorporation, the company :

Provided that the company has accepted the contract and communicated such acceptance to the other party to the contract."

In terms of Section 15(h) of the Specific Relief Act, the Promoters of a company before its incorporation could enter into a contract for the benefit of the company and such contract may be warranted by the terms of incorporation of the company. The said provision is subject to the proviso that the company should accept the said transaction. In the instant case, indisputably it was done. Section 19(e) of the Act provides for grant of a decree of specific performance of a contract against a company when the promoters of a company before incorporation entered into a contract for the purpose of the company and such contract is warranted by the terms of incorporation. The said provision applies herein.

In Weavers Mills Ltd., Rajapalayam vs. Balkis Ammal & Ors. [AIR 1969 Mad. 462], the Madras High Court clearly held that Section 19(e) of the Specific Relief Act carves out an exception from the common law of England, stating :

"While we accept the position that a promoter is neither an agent nor a trustee of the company under incorporation, we are inclined to think that in respect of transactions on behalf of it, he stands in a fiduciary position. For the plaintiff-company Sections 92 and 94 of the Indian Trusts Act, 1882, were relied upon. It seems to us that neither of these sections is of assistance to it. These sections, as we think, contemplate transactions as between persons in existence. In any case, it seems to us that no trust as defined by Section 3 of the Act is brought about by the purchases made by the promoters. The legal position of a promoter in relation to his acts, particularly purchase of immoveable properties on behalf of the company under incorporation, is a peculiar one not capable of being brought into any established or recognised norms of the law as to its character as an agent or a trustee. But, at the same time, it is impossible, to our minds, to deny that he does stand in a certain

fiduciary position in relation to the company under incorporation. When he does certain things for the benefit of it, as for instance, purchase of immoveable properties, he is not at liberty to deny that benefit to the company when incorporated. We are prepared to hold that in such a case the benefit of the purchase will pass on to the company when incorporated."

The said decision has been followed by a Division Bench of the Andhra Pradesh High Court in Vali Pattabhirama Rao & Anr. vs. Sri Ramanuja Ginning & Rice. Factory (P.) Ltd. & Ors. [AIR 1984 A.P. 176], wherein it was held :

"Thus, we hold that if the constitution of the partnership firm is changed into that of a company by registering it under Part 9 of present Act (Part 8 of previous Act), there shall be statutory vesting of title of all the property of the previous firm in the newly incorporated company without any need for a separate conveyance."

The company upon incorporation has accepted the contract and communicated such acceptance to the other party. Besides that, purchase of the property was for the purpose of the company. Submissions of Mr. Sudhir Chandra that acquisition of a property for the benefit of the company must find place in the articles of association of the company, is wholly misplaced. What is meant by acceptance of the contract by the company which is to be warranted by its incorporation, is that it is not ultra vires the purpose for which the company had been incorporated. The distinction sought to be made by the learned counsel between Section 27 of the Specific Relief Act, 1877 and Section 19 of the 1963 Act is not of much significance. Under the 1877 Act, not only ratification and adoption of the contract was mandatory, such contract was to be warranted by the terms of the incorporation. The words 'ratified and adopted" have been dropped from the main section and in Section 19 of the 1963 Act, a proviso has been added that the company has accepted the contract and communicated such acceptance to the other party of the contract. An express ratification of the contract, therefore, is no longer warranted. In view of the fact that the Company, in the suit filed against Verma, sought for a declaration that it was the owner of the property, the same, in our opinion, would amount to acceptance of the contract and communication thereof to the other party thereto.

Reliance placed by the learned senior counsel for the respondent on Shamsu Suhara Beevi v. G. Alex & Anr. [(2004) 8 SCC 569, para 11] is not apposite, wherein it was held :

" On equitable considerations court cannot ignore or overlook the provisions of the statute. Equity must yield to law."

In the said decision this Court was not concerned with the interpretation of Section 19(e) of the Specific Relief Act.

Transfer of Property Act does not prohibit an oral transfer. The statute merely provides that if the value of the said property is more than Rs.100/- a registered document is required to be executed. Section 5 of the Transfer of Property Act provides for transfer in favour of the company which was unincorporated. The effect of the Transfer of Property of Act, therefore, postulates transfer in favour of unincorporated company. It does not create any bar.

Our attention was drawn to a statement made by the appellant No.1 before the trial court in cross-examination. He stated that Sarafs had informed him that the company was the owner. He, however, volunteered that he himself as also the company became owners. He probably gave the said answer having regard to the fact that an agreement for sale had been executed in his favour; and furthermore Manoj Kumar Poddar had been granted a lease and thus, he also became the owner thereof. His claim may not be correct in law, but by reason thereof, it cannot be said that the representation made by Sarafs that the company was the owner of the property had been whittled down or the appellants were all along aware that Sarafs were the owners thereof.

The High Court, therefore, in our opinion committed a gross error in opining that the object and purport of the proceedings in OS No.267 of 1980 was mainly for seeking foreclosure of the right of reconveyance of Vendor S.N. Verma.

Estoppel issue :

It may be true that no issue as regards title between Sarafs and the said S.N. Verma having been framed in O.S.No.267 of 1980, the principle of res judicata is not applicable. In the said proceedings, however, Sarafs as also the said S.N. Verma being parties, there cannot be any doubt or dispute whatsoever that a claim was laid by the company that it was the owner of the property which was accepted not only by Verma but also by Sarafs. The Sarafs or Verma did not deny or dispute the same. In fact company spoke only through Sarafs. The High Court overlooked the fact that the plaint was signed by Sarafs and the company was represented by them. It is they who had made solemn statement before a competent court of law that the company was the owner of the property. Hence, they are bound by the said statement. The principle of estoppel and/or acquiescence would, thus, be applicable.

While applying the procedural law like principle of estoppel or acquiescence, the court would be concerned with the conduct of a party for determination as to whether he can be permitted to take a different stand in a subsequent proceeding, unless there exists a statutory interdict. If principle of estoppel applies, Sarafs will not be permitted by a court of law to raise the contention that the company was not the owner of the property.

It is one thing to say that the property did not vest in the company as there was a statutory embargo in that behalf; but it is another thing to say that a person is estopped from raising a question of title. The provisions of the Indian Evidence Act are clear like Section 116, whereby in certain situation a person may be estopped from pleading a title in himself.

We are, however, not oblivious of the principle of law that mere admission does not create title but while determining such a question that intention of the parties as to in whom the title of the property shall vest, the conduct of the parties assumes significance.

In the instant case, it was Sarafs who represented the company. They had made the representation that the company was the owner of the property. Such a representation had been made to the appellant herein not only in terms of the decree obtained in the said O.S. No.267 of 1980, but by

reason of execution of the other documents including creation of mortgage of the property and discharge thereof in favour of the State Bank of India. If by reason of such representation, a third party alters his position, indisputably, the principle of estoppel would apply. We may, however, hasten to add that where there exists a statutory embargo, vesting of title in a person shall be subject thereto. We have, however, in this case, no doubt whatsoever that there did not exist any statutory embargo in this behalf.

In Bank of India & Ors. etc. vs. O.P. Swarnakar & Ors. etc. [(2003) 2 SCC 721], this Court took notice of the following passage from Halsbury's Law of England, 4th Edn., Vol.16 (Reissue), para 957 at p.844:

"On the principle that a person may not approbate and reprobate a special species of estoppel has arisen. The principle that a person may not approbate and reprobate expresses two propositions:

(1) That the person in question, having a choice between two courses of conduct is to be treated as having made an election from which he cannot resile.

(2) That he will be regarded, in general at any rate, as having so elected unless he has taken a benefit under or arising out of the course of conduct, which he has first pursued and with which his subsequent conduct is inconsistent."

In Gillett v Holt and another [2000 (2) All. E.R.-289], the Court of Appeal, upon referring to a large number of decisions, developed the doctrine of proprietary estoppel opining:

"The overwhelming weight of authority shows that detriment is required. But the authorities also show that it is not a narrow or technical concept. The detriment need not consist of the expenditure of money or other quantifiable financial detriment, so long as it is something substantial. The requirement must be approached as part of a broad inquiry as to whether repudiation of an assurance is or is not unconscionable in all the circumstances."

In Indu Shekhar Singh & Ors. vs. State of U.P. & Ors. [2006 (5) SCALE 107], this Court stated :

"They, therefore, exercised their right of option. Once they obtained entry on the basis of election, they cannot be allowed to turn round and contend that the conditions are illegal."

In Pawan Alloys and Casting Pvt. Ltd. , Meerut vs. U.P. State Electricity Board & Ors. [(1997) 7 SCC 251], this Court applied the principle of promissory estoppel.

The doctrine of estoppel by acquiescence was not restricted to cases where the representor was aware both of what his strict rights were and that the representee was acting on the belief that those rights would not be enforced against him. Instead, the court was required to ascertain whether in the particular circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he had allowed or encouraged another to assume to his detriment. Accordingly, the principle would apply if at the time the expectation was encouraged.

[See also Taylor Fashions Ltd. v. Liverpool Victoria Trustees Co. Ltd. (1981) 1 All ER

897.] Similarly, in Amalgamated Investment & Property Co. Ltd. vs. Texas Commerce International Bank Ltd. [(1981) 1 All ER 923], it was held :

"Where the estoppel alleged was founded on active encouragement or representations made by the representator, it was only unconscionable for the representator to enforce his strict legal rights if the representee's conduct was influenced by the encouragement or the representation. However, it was not necessary for the encouragement or representation to have been the initial cause of the representee's conduct in order to be unconscionable but merely that his conduct was so influenced by the encouragement or representation that it would be unconscionable for the representor to enforce his legal rights."

Mr. Sudhir Chandra placed strong reliance in Mahboob Sahab v. Syed Ismail & Ors. [(1995) 3 SCC 693], wherein this Court was dealing with the issue of res judicata.

As in this case, we have already held that the principle of res judicata may not have any application, it is not necessary to advert thereto. It is also not a case where fraud was alleged, as was the fact involved therein.

Reliance placed on Chhaganlal Keshavlal Mehta vs. Patel Narandas Haribhai [(1982) 1 SCC 223 : AIR 1982 SC 121] was misplaced. Therein it was held that a person is entitled to plead estoppel in his individual character and not as a representative of his assignee. In this case ingredients constituting an estoppel and in particular the representation made by Sarafs that it was the company which was the owner of the property, were raised specifically.

In the context of the present case it is of some significance to note the following observations made in Chapleo and Wife v. The Brunswick Permanent Building Society and Others [1881 QBD 696]:

" Being not incorporated the individual members might be liable like any other individuals for what has been done under an implied authority given to their agent to borrow. That the borrowing power was exceeded is a matter which could only be known to the officers of the society, and not to the persons who lent their money, and the society must be liable for the fraud or wrongful act of their agent who was held out as having authority to borrow for the society "

It was further held :

"It must be taken that when the directors represented that they had authority which they had not, by reason of the limit to borrowing having been passed, they nevertheless warranted to the plaintiff Chapleo that they had that authority. Therefore upon that ground they are liable."

The Judicial Committee in Sarat Chunder Dey and Others v. Gopal Chunder Laha and Others [(1892) Vol. XIX Law Report 203], as regards the conditions of estoppel under the Evidence Act, opined :

" The law of this country gives no countenance to the doctrine that in order to create estoppel the person whose acts or declarations induced another to act in a particular way must have been under no mistake himself, or must have acted with an intention to mislead or deceive. What the law and the Indian statute mainly regard is the position of the person who was induced to act; and the principle on which the law and the statute rest is, that it would be most inequitable and unjust to him that if another, by a representation made, or by conduct amounting to a representation, has induced him to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it. If the person who made the statement did so without full knowledge, or under error, sibi imputet. It may, in the result, be unfortunate for him, but it would be unjust, even though he acted under error, to throw the consequences on the person who believed his statement and acted on it as it was intended he should do."

Lifting the Corporate Veil :

In a case of this nature, keeping in view the facts and circumstances of the case, even the doctrine of lifting the corporate veil would be applicable.

We would, in this regard, notice some precedents operating in the field.

In Kapila Hingorani vs. State of Bihar [(2003) 6 SCC 1], this Court opined :

"It is now well settled that the corporate veil can in certain situations be pierced or lifted. The principle behind the doctrine is a changing concept and it is expanding its horizon as was held in State of U.P. v. Renusagar Power Co. The ratio of the said decision clearly suggests that whenever a corporate entity is abused for an unjust and inequitable purpose, the court would not hesitate to lift the veil and look into the realities so as to identify the persons who are guilty and liable therefor."

{See also Union of India & Ors. vs. M/s. Playworld Electronics Pvt. Ltd. & Anr. [(1989) 3 SCC 181 : AIR 1990 SC 202], State of U.P. & Ors. vs. Renusagar Power Co. & Ors. [(1988) 4 SCC 59 : AIR 1988 SC 1737] and Yukong Line Ltd. of Korea v. Rendsburg Investments Corp of Liberia and Others (No 2) [(1998) 4 All ER 82 (QBD)} The application of the said doctrine becomes relevant in view of the fact that in the Memorandum of Association of the company Sarafs alone were shown to be the subscriber members of the company. In the Article of Association they were naturally inducted as the first Directors. Subsequently they included their son as a Director; and it was all the three of the Directors who executed the agreement for sale. There had, thus, been no shareholder except Sarafs. Since, they had been attempting to use the personality of the company for furthering their own personal object the doctrine of lifting the veil is applicable. They did so in furtherance of their dishonest and fraudulent design. They in fact were the alter ego of the company. It was, therefore, impossible for them to take a different stand vis-`-vis the interest of the company Withdrawal of suit effect of :

One of the judges of the High Court in the impugned judgment opined that in view of the fact that the appellant had withdrawn the suit questioning the said award and the decree subsequent to

passing of the judgment and decree of the trial court, they became disentitled to raise the said question. In so opining, the High Court committed a manifest error. The appellant had contended that the said award and the consequent decree passed by the Delhi High Court was a fraudulent and collusive one. The appellants having obtained a decree, it was not necessary for them to obtain another decree. It might not have been able to file another suit, but the same would not mean that they were not entitled to question the validity or otherwise of the said award in the suit for specific performance of contract. If a judgment or decree is vitiated by fraud, the same would be a nullity. In such an event, Section 44 of the Indian Evidence Act would be attracted. As a plea of fraud can be raised even in a collateral proceeding and the trial court having recorded a specific finding that the jurisdiction of the Delhi Court was created artificially by including a Delhi property, in respect whereof there was no dispute, the said decree must be held to have been obtained by Sarafs by concealment of material facts and by a collusive and fraudulent exercise.

In the arbitration proceedings, Sarafs stated that the agreement dated 12.06.1984 was in fact a sale transaction. In paragraph 8 of the written statement, the stand taken by them was that the agreement was a sham document entered into by and between the parties so as to enable them to secure removal of padlocks by State Bank of India, Kanpur.

In the said written statement itself they, however, disclosed about the execution of an agreement for sale in favour of the defendant no.5. The said agreement was registered on 29.09.1984 i.e. much after the execution of agreement for sale dated 12.6.1984 as also after the institution of the suit.

It is now well settled that fraud vitiated all solemn act. Any order or decree obtained by practicing fraud is a nullity. {See - (1) Ram Chandra Singh vs. Savitri Devi & Ors. [(2003) 8 SCC 319] followed in (2) Vice Chairman, Kendriya Vidyalaya Sangathan & Anr. vs. Girdhari Lal Yadav [(2004) 6 SCC 325]; (3) State of A.P. & Anr. vs. T. Suryachandra Rao [(2005) 6 SCC 149]; (4) Ishwar Dutt vs. Land Acquisition Collector & Anr. [(2005) 7 SCC 190]; (5) Lillykutty vs. Scrutiny Committee, SC & ST Ors. [(2005 (8) SC 283]; (6) Chief Engineer, M.S.E.B. & Anr. vs. Suresh Raghunath Bhokare [(2005) 10 SCC 465]; (7) Smt. Satya vs. Shri Teja Singh [(1975) 1 SCC 120]; (8) Mahboob Sahab vs. Sayed Ismail & Ors. [(1995) 3 SCC 693]; and (9) Asharfi Lal vs. Smt. Koili (Dead) by LRs. [(1995) 4 SCC 163].} The submission of Mr. Sudhir Chandra that withdrawal of the Suit No.1252 of 1985 without obtaining liberty to file a fresh suit would constitute a bar in filing of a second suit under Order 23, Rule 1 of the Code of Civil Procedure, in the factual matrix obtaining herein, cannot be accepted. By withdrawal of the said suit, the appellant did not and could not have given up their right to contend that the said award and decree were fraudulent.

It was not necessary for the appellants to reserve their right to raise the said contention by instituting another suit as they had earlier done it in their suit. In fact they had already obtained the decree for specific performance of the agreement to sell.

In that view of the matter, the decision of this Court in Hulas Rai Baij Nath vs. Firm K.B. Bass & Co. [(1967) 3 SCR 886], relied on by the Sudhir Chandra is not applicable.

Nature of transaction :

One of the learned Judges of the High Court also held that the said agreement dated 12.06.1984 was in fact an agreement for obtaining loan. There was no warrant for such a proposition. Clause 7 of the agreement on the basis whereof such a finding was arrived at reads as under :

"(7) That it is further agreed that in case any defect in the right or title of the parties of the first part or the said company is found or any other encumbrance or legal hurdle is found in respect of the said house property then in both the circumstances the second party shall have option for the refund of advance money of Rs.10 lacs together with interest @ 18% per annum."

It is interesting to note that the sale deed dated 24.02.1979 whereby Sarafs purchased the property also contain an identical clause. Such types of clauses normally are found in the agreement so as to enable the vendee to protect his interest against the defects in vendor's title, if any. The agreement records the valuation of property at Rs.11 lakhs. The respondents relying on or on the basis of another purported agreement dated 04.06.1984 executed by Sarafs in favour of their son-in-law, original defendant No.5, S.K. Mittal stated that the property was worth Rs.25 lakhs. The trial court, in our opinion, correctly arrived at an opinion that the said agreement was a shame one. The original defendant No.5 did not file any suit for specific performance of contract. The said agreement for sale had not been acted upon by the parties. Reliance placed on the said agreement by a learned Judge of the High Court was, therefore, unwarranted.

The High Court in its judgment did not show as to how the said finding of the learned trial court in that behalf was wrong. Moreover, except the said agreement, no other legal evidence was brought on record to establish as to what was the actual market value of the property.

The value of the property, as noticed hereinbefore, was only Rs.2 lakhs in the year 1979. Within a period of 5 years thereof as per the agreement for sale, its price went up five times over the original. It is, wholly unlikely that the property which was valued at Rs.2 lakhs in 1979, would be worth Rs.25 lakhs in 1984.

In any view of the matter inadequate consideration by itself would not lead to the conclusion that the same was an agreement of loan. Inadequate consideration, it is trite, is also not a ground for refusing to grant a decree for specific performance of contract.

Clause 5 of the said agreement required the company to satisfy the appellants in regard to the ownership of the company in the said property and the same was free from encumbrances, the reason wherefor is not far to seek. The provisions of the Urban Land Ceiling Act were in force. Permission was required for completing the said transaction both under the Urban Land Ceiling (Regulation) Act, 1976 as also under the Income Tax Act. In terms of Sections 26 of 1976 Act, a notice was required to be served on the competent authority. At least the parties appear to have proceeded on that basis. Strong reliance has been placed on the circumstance that when an advertisement issued in the newspaper on 5.8.1984 notifying the existence of agreement for sale between the appellants and the respondents, Sarafs responded thereto alleging that the said transaction was a loan transaction. By reason of such self-serving statement alone, an agreement for sale validly entered into by and between the parties would not be treated to be a loan agreement. It

is furthermore interesting to note that in the said purported response to the advertisement published in the paper also, Sarafs did not raise any plea that the company had already entered into an agreement for sale of property with a third person or that the dispute as regard title thereof was pending adjudication before an arbitrator. If Sarafs claimed themselves to be the owner of the said property, they should have challenged the subsequent agreement also. The contention of the respondents that the said agreement was merely one of loan was an afterthought.

Conduct of Sarafs :

It is in the aforementioned situation, the conduct of Sarafs assumes significance. The agreement for sale was executed on 12.6.1984, pursuant to the resolution of the Board of Directors dated 08.6.1984, which was followed by execution of a General Power of Attorney in favour of M.M. Agarwal for the purpose of redeeming the mortgage from State Bank of India, Kanpur and other purposes. They evidently with a design either to defraud the State Bank of India or for other purposes best known to them, purported to have inducted Vijay Kumar as Director of the company on 4.6.1984. Soon thereafter a purported dispute was raised on 6.6.1984 by and between the said Vijay Kumar on the one hand and Sarafs on the other, as regards the ownership of the property. One B.S. Mathur, Advocate, was appointed as arbitrator on 7.6.1984. If the said documents were in existence on 8.6.1984, Sarafs themselves could not have been a party to the resolution in regard to the execution of the agreement for sale of the company's property in favour of the appellant as also letting out of the same to Manoj Kumar Poddar. It has not been denied nor disputed that the said Vijay Kumar was merely an employee.

The arbitrator was appointed in undue haste. Within a few days, so many events took place, which itself is a pointer to the evil design on the part of Sarafs. It is of some significance to note that the appointment of Shri Vijay Kumar as Director of the company was intimated to the Registrar of the Companies on 29.9.1984, and the same had been received in his office only on 7.1.1985.

Not only Sarafs intended to wriggle out of the agreement to sell, they even intended to play fraud on the State Bank of India as 'the property' was charged in its favour and the amount received from the appellant by way of advance, had been utilized for the purpose of redeeming the mortgage.

The arbitrator made an award on 20.11.1984. It has not been denied or disputed that the decree dated 19.8.1982 passed in O.S. No.267 of 1980 had not been placed before the arbitrator. Attention of the arbitrator had also not been drawn to the proceedings of pending suit filed by the appellant herein for specific performance of the said agreement of sale dated 12.6.1984 being O.S. No.537 of 1984. The arbitrator furthermore was not made known about the pendency of another suit filed by Manoj Kumar Poddar against the company being Suit No.612 of 1984 and the order of ex parte injunction passed therein on 31.8.1984. The arbitrator while passing an award on 20.11.1984 might not have any other option but to declare Sarafs to be the owners of the property as the purported lis between the parties went uncontested. Interestingly by reason of the said award, Sarafs were directed to refund Rs.2,22,500/- to the company, which had been paid to them. The company did not raise any objection evidently because nobody else could factually represent it before the arbitrator; all the parties being on the same side.

It is interesting to note that before the arbitrator, the company was shown to be the claimant and thus, the company itself is said to have appointed Shri Mathur as sole arbitrator. Such appointment of the arbitrator, being in the teeth of the decree passed in Suit No.267 of 1980, arbitration award and the decree passed by the Delhi High Court, had rightly been held by the learned trial judge as collusive and fraudulent. It was thus a nullity. Even in the proceedings for making the award a rule of the court before the Delhi High Court being Suit No.1857-A of 1984, there was no opposition on the part of the company. Although a decree for delivery of possession was passed against the company, the lessee Shri Manoj Kumar Poddar or the appellant had not been made parties therein. We would have occasion to deal with the effect of our discussions hereafter.

Subject matter of the agreement :

One of the learned Judges of the High Court also opined that as the agreement to sell referred to only the house or the bungalow, the parties did not agree to sell the land. We have gone through the agreement for sale and are of the opinion that the views taken by the learned judge were wholly unwarranted. Apparently the respondents intended to sell what they had purchased. There is nothing in the averments of the agreement to suggest that the intention of the respondents was restricted to the house alone and not the lands. There was no basis for arriving at the said findings. In any event, expression 'the house' will also include the land appurtenant thereto.

In P. Ramanatha Aiyar's Advanced Law Lexicon, Volume 2, 2005, the word "house" has been defined to mean :

"HOUSE" means a house suitable for occupation by a Military Officer or a military mess. The term includes the land and buildings appurtenant to a house.

[Cantonment (House Accommodation) Act (6 of 1923), S. 2(f)] "HOUSE" includes any building or part of a building with its appurtenances and outhouses used for any purpose whatsoever [Orissa House Rent Control Act, 1967 (4 of 1968), S. 2(3)].

"HOUSE" includes

(a) any part of a building occupied or intended to be occupied as a separate dwelling, and

(b) any yard, garden, outhouses and appurtenances belonging to it or usually enjoyed with it [Housing Act, 1996 (c. 52 1996), S. 6B(1)]"

In 'Word and Phrases, Permanent Edition, Volume 19A, it is stated :

"The word "building" necessarily embraces the foundation on which it rests; and the cellar, if there be one, under the edifice, is also included in the term "house" or "building". If there be a cellar, the word "building" includes it, unaffected by the height above the foundation Benedict v. Ocean Ins. Co., 31 N.Y. 389,

394."

Furthermore, it is now well settled that the building includes the land on which it stands, unless by express stipulation it is excluded. [See T. Lakshmipathi & Ors. vs. P. Nithyananda Reddy & Ors. (2003) 5 SCC 150, paras 19 to 24] Re : Demolition of the building:

Both the learned judges of the High Court found that the appellants were responsible for demolition of the building forming the part of the property.

Before adverting to the said question, we may, at the cost of repetition, notice the contentions, which, according to Mr. Dwivedi, sufficiently indicate that Sarafs alone were responsible therefor.

On the basis of the Award of the Arbitrator, a decree was passed by the Delhi High Court on 21.2.1985. Sarafs executed the said decree. A warrant of delivery of possession was issued against the Company. Pursuant thereto or in furtherance thereof Manoj Kumar Poddar was said to have been dispossessed, despite an order of interim injunction passed in Suit No.612 of 1984 on 19.10.1984 operating in this behalf. An application for restoration of possession was filed by the said Manoj Kumar Poddar under Order 21 Rule 99 of the Code of Civil Procedure in the said execution case, which was registered as Miscellaneous Case No.184/74 of 1985. In the said application, Sarafs were sought to be restrained from damaging and destroying any portion of the suit property and from parting with the possession. An order of injunction restraining Sarafs from causing any damage or destruction and parting with the possession of the suit property was passed.

In response to the said application, Sarafs contended that they were required to execute a project of construction work. The contentions of Sarafs were noted by the learned trial Judge in the following words:

"The opp. parties maintained that they have to execute project of construction work in place of existing disputed building. It is therefore, clear that the opp. parties No.1 and 2 have intention to demolish or change the nature of the existing premises."

It was further opined:

"The applicant would suffer irreparable injury in case the opp. parties are successful in demolishing the building."

The said findings by itself, as was submitted by Mr. Dwivedi, in our opinion, would not be sufficient to draw an inference that Sarafs were responsible for demolition of the building. We are not oblivious of the fact that thereafter G.P. Tiwari instituted Rent Case numbered as Rent Case No.99/87 against the Sarafs. The appellants were not impleaded as parties therein. G.P. Tiwari was allegedly the caretaker of the building. An ex- parte order was passed on 25.8.1989 directing eviction of Sarafs and granting possession of the premises in his favour. The said order was implemented and possession of the said premises was delivered on 23.9.1989. It is not in dispute that the building was demolished on the same day. It is furthermore not in dispute that Mohan Lal Saraf filed an

application for setting aside the said ex-parte order dated 23.9.1989. On 24.9.1989, in relation to the said order, Smt. Pushpa Devi Saraf also filed a Writ Petition being W.P. No.21985/89 for quashing of the ex-parte order dated 25.8.1989. The ex-parte order was recalled. The writ petition was dismissed only on the premise that the ex-parte order had been recalled. In fact, the Rent Case itself was withdrawn by G.P. Tiwari on 8.2.1990. The respondents contended that G.P. Tiwari was the man of the appellants. We have, in this behalf, hereinbefore noticed the conduct on the part of the appellants. One of the appellants and G.P. Tiwari filed a special leave petition together. They had also engaged the same counsel for defending themselves in the proceedings before this court.

It has been found by the High Court while determining the writ petition that Sarafs had represented before various authorities, Government functionaries and police complaining about the said unauthorized demolition of the structure. Collusion of the police authorities with the appellants had also been alleged, although not substantiated. Only on 23.9.1989 a First Information Report was lodged. Charge-sheets were filed against the appellants in terms of an order dated 9.12.1993 in Criminal Writ Petition No.23804/89, in terms whereof the Central Bureau of Investigation was directed to record a First Information Report against the appellants and others. It is not disputed that in April, 1994, the Central Bureau of Investigation, after investigation filed a charge-sheet against the appellants for demolition of the said building and for alleged commission of other offences relating to theft, criminal conspiracy, trespass, etc. It is also not in dispute that in the said proceedings, charges have been framed and a large number of witnesses have already been examined.

It is true that Sudhir Parasrampuria filed a suit in the Court of Civil Judge, Kanpur Dehat against Sarafs and also against the said G.P. Tiwari for a declaration that they had no right to damage the property and for its preservation through a Receiver contending that the Sarafs had got the house demolished through G.P. Tiwari who was their dummy. An interim order was passed in the said suit on 23.10.1989 permitting grant of symbolic possession to the appellants. But the said order, admittedly, had been set aside by the High Court by an order dated 9.5.1990 in Writ Petition No.21985/89 on the ground that service of notice had not been properly effected upon Sarafs and the matter was remanded to the competent court, but, in the meantime, the suit itself was withdrawn by an order dated 30.5.1990. G.P. Tiwari, in response to the application for recalling the ex- parte order passed in Rent Case No.99/87, stated that he had been appointed as caretaker by Manoj Kumar Poddar. It is not in dispute that Manoj Kumar Poddar is a cousin of Sudhir Parasrampuria. We may moreover notice that against the order dated 9.12.1993 passed by the Allahabad High Court, special leave petitions were filed by G.P. Tiwari and also by A.C. Verma, Civil Judge, Kanpur, which were dismissed. Circumstances pointed out hereinbefore prima facie do not lead to a conclusion that Sarafs were responsible for demolition of the structures in question.

In view of the pendency of the criminal case, we do not intend to express a definite opinion on one way or the other on the said issue. The sequence of events noticed hereinbefore would go to show that the balance in regard to demolition of the said structure tilts against the Appellants, in view of the charge-sheet filed by the Central Bureau of Investigation although the same itself may not be conclusive in nature. There is no reason for us, as at present advised, to take a different view from that of the High Court in this behalf.

There are other circumstances too which cannot be ignored.

The possession of the land in question was directed to be delivered by the Civil Court in favour of G.P. Tiwari. On the same date, the buildings were demolished. The respondents, therefore, on the said date were armed with the orders of the court; the Appellants were not. The circumstances are such which lead us to a finding for the purpose of disposal of this case that the Appellants were responsible for demolishing the building.

For the aforementioned reasons, we would uphold the findings of the High Court that the Appellants were responsible for demolition of the structures standing on the land in question.

Discretionary relief:

Both the parties hereto are guilty of serious misconduct. Both of them have abused the process of court. They initiated unnecessary nay frivolous proceedings against each another. Both the parties took recourse to abuse of judicial process against the other upon suppression of material fact, which would amount to fraud on court. The question in regard to exercise of discretionary jurisdiction for grant of a decree of specific performance of contract, as envisaged under Section 20 of the Specific Relief Act, must be considered from the said angle.

Section 20 of the Specific Relief Act reads thus:

"20. Discretion as to decreeing specific performance.- (1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.

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

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

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

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

Explanation 1.- Mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of clause (a) or hardship within the meaning of clause (b).

Explanation 2.- The question whether the performance of a contract would involve hardship on the defendant within the meaning of clause (b) shall, except in cases where the hardship has resulted from any act of the plaintiff subsequent to the contract, be determined with reference to the circumstances existing at the time of the contract.

(3) The court may properly exercise discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

(4) The court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the party."

Balancing of equities in a case of this nature is a difficult task. It is now well settled that compensation can be awarded in lieu of grant of decree of specific performance of contract. The courts are now evolving separate principles in regard to the remedy of compensation. (See Snells' Equity, page 452.) The learned author cites various cases to make home the point stating:

"18-17 A monetary award which is made in substitution for (or in addition to) non-monetary relief will frequently be determined on the basis of pecuniary performance or pecuniary rescission; but, in some cases, may also be determined by reference to the loss which has been suffered.

18-18 (a) Pecuniary performance. Pecuniary performance is a money substitute for the thing which the defendant would have been required to do, had specific relief been ordered. It is to be determined by identifying the difference between two values: (i) the value of the claimant's right to performance of the obligation and (ii) the value of the performance which the defendant is able to give. Where the defendant is not able to perform the obligation, the amount of the award will represent the value of the claimant's right to performance : in such a case, an order for pecuniary performance will be for a sum corresponding with the value of the claimant's right to performance. The position is similar where the court declines to grant non-monetary relief and thereby (in effect) releases the defendant from the need to perform the obligation in the future."

In Spry's Equitable Remedies, it is stated:

"In considering what circumstances induce the court, as a matter of discretion, to award equitable damages rather than relief in specie it must be borne in mind that when once the general conditions for the exercise of equitable jurisdiction have been established, that is, the inappropriateness of damages in respect of a matter coming within a recognized head of relief, prima facie there arises a right to specific performance or to an injunction, as the case may require. So it was observed by Lord Langdale, "I conceive the doctrine of the court to be this, that the court exercises a discretion, in cases of specific performance, and directs a specific performance unless it should be what is called highly unreasonable to do so." Similarly reference has been made to "the rule that where the plaintiff has established the invasion of a common law right, and there is ground for believing that without an injunction there is likely to be a repletion of the wrong, he is, in the absence of special circumstances, entitled to an injunction against such repetition."

On the one hand it is clear that the passage of provisions for equitable damages did not affect these general principles. So it has been affirmed that the authorities show "that Lord Cairns' Act did not revolutionise the principles upon which the equitable jurisdiction had been administered up to that time and that some special case must be shown before the court should exercise the jurisdiction under the Act". On the other hand, in cases where an injunction or an order of specific performance would be granted if there were no power to grant damages the statutory power of the court to award damages may, in special circumstances, be of critical weight. It may induce the court to conclude that any inconvenience or hardship which would be caused to the plaintiff if he were obliged to accept merely an award of damages would be so far outweighed by the hardship that would be caused to the defendant if specific enforcement were granted that damages constitute the most appropriate remedy. Hence where the court would otherwise have granted specific relief the importance of a power to grant equitable damages is found to lie primarily in its relation to considerations of hardship between the parties and to the balance of convenience."

In Gillett (supra), it was pointed out:

"Since Mr. Gillett has established his claim to equitable relief, this court must decide what is the most appropriate form for the relief to take. The aim is (as Sir Arthur Hobhouse said in Plimmer v Mayor of Wellington (1884) 9 App Cas 699 at 714) to 'look at the circumstances in each case to decide in what way the equity can be satisfied'. The court approaches this task in a cautious way, in order to achieve what Scarman LJ (in Crabb v Arun DC [1975] 3 All ER 865 at 880, [1976] Ch 179 at 198) called 'the minimum equity to do justice to the plaintiff'. The wide range of possible relief appears from Snell's Equity (30th edn, 1999) pp 641-

643."

For the aforementioned purpose it is necessary to have a broad approach, as was observed in Gillett (supra). Therein it was further held:

"That is in my view the maximum extent of the equity. The court's aim is, having identified the maximum, to form a view as to what is the minimum required to satisfy it and do justice between the parties. The court must look at all the circumstances, including the need to achieve a 'clean break' so far as possible and avoid or minimize future friction (see Pascoe v Turner [1979] 2 All ER 945 at 951, [1979] 1 WLR 431 at 438-

439)."

In Malhotra v Choudhury 1979 (1) All ER 186, Stephenson, LJ., in the fact situation obtaining therein, opined:

"But as counsel for the plaintiff pointed out, the question which the judges were summoned by their Lordships to answer and which was proposed for their consideration was 'Whether, upon a contract for the sale of real estate, where the vendor, without his default [my emphasis], is unable to make a good title, the purchaser is by law entitled to recover damages for the loss of his bargain?' That is the

question which was answered in the judgment of Pollock B, which was also the judgment of Kelly CB, Keating and Brett, JJ, and the question as it was stated by both Denman J and Pigott B. I note this is the way in which the rule is stated in Williams on Contract of Sale of Land, cited by Megarry J in Wroth v Tyler:

'Where the breach of contract is occasioned by the vendor's inability, without his own fault [my emphasis], to show a good title, the purchaser is entitled to recover as damages his deposit, if any, with interest, and his expenses incurred in connection with the agreement, but not more than nominal damages for the loss of his bargain.' It is not necessary to decide how far the words 'without his default' go, if I am right in thinking that inability without default is what one has to consider as attracting the rule in Bain v Fothergill.

There may be cases in which there has been no lack of bona fides, yet the rule in Bain v Fothergill has been excluded. I would not however venture to suggest that anything less than lack of good faith could exclude the rule. But it seems from later decisions that fraud, in the full sense of that word such as would found an action for deceit, may not be necessary to exclude the rule. No doubt Blackett-Ord V-C had in mind that fraud must be strictly alleged and proved in all ordinary circumstances. But in my judgment, unwillingness to use best endeavours to carry out a contractual promise is bad faith, and for there to be bad faith which takes the case out of this exceptional rule it is not necessary that there should be either a deliberate attempt to prevent title being made good or anything more than the unwillingness which I find it inevitable to infer in this case. If a man makes a promise and does not use his best endeavours to keep it, it cannot take much and, in my judgment, may not need more to make him guilty of bad faith and to entitle the victim of his bad faith to his full share of damages to compensate him for what he has lost by reason of that breach of contract and bad faith."

In so far as the principle relating to assessing damages in substitution for an order of specific performance is concerned, the learned Judge opined that a court of equity should follow law and address itself to find the proper substitute, stating that the equitable remedy of specific performance has features markedly different from damages at common law for breach of contract. [See also Horsler and another v Zorro, 1975 (1) All ER 584.] Having noticed the law operating in the filed vis-`-vis the conduct of the parties, we decline to grant a decree for specific performance of contract and opine that in its stead and place a decree for compensation should be granted.

What should be the amount of compensation is now the question.

Law as declared by this Court is that the quantum and measure of damages would vary from case to case.

We may notice a few of them.

In Lalit Kumar Jain & Anr. vs. Jaipur Traders Corporation Pvt. Ltd. [(2002) 5 SCC 383], this Court, while directing dismissal of the suit, opined:

" .However, in view of the fact that the defendants are not free from blame as discussed above and they have utilized the property to the best of their advantage right from day one without, at the same time, paying the balance sale price for several years, we put it to the counsel for the appellants whether they are willing to pay to the plaintiff a substantial amount over and above the sale price already deposited in the Court, in order to do justice to the parties. In fact, in the course of arguments by the learned counsel for the appellants, there was an indication that the appellants were prepared to offer a reasonable amount, without prejudice to their contentions. The learned counsel for the appellants has filed a letter dated 18-4-2002 stating that "the appellants can pay and agree to pay a further sum of Rs.35 lakhs (Rupees thirty-five lakhs) in 3 instalments of Rs.15 lakhs and Rs.10 lakhs and Rs.10 lakhs", in three weeks, by the end of August and by the end of November 2002 respectively. When we suggested to the learned counsel that it would be fair if some more amount is offered, the learned counsel for the appellants agreed on behalf of his clients for payment of Rs.40 lakhs in lump sum within a period of six months commencing from today. Having regard to the offer made in the letter coupled with the oral representation made today and to mete out justice to the parties, we direct that the undertaking to pay the sum of Rs.40 lakhs within six months should form part of the decree in the suit. This shall be in addition to the sale price already deposited in the Court. The same shall be deposited in the Court within a period of six months and the plaintiffs are entitled to withdraw the same in addition to the amount already deposited."

In Manjunath Anandappa urf Shivappa Hanasi vs. Tammanasa & Ors. [(2003) 10 SCC 390], was a member, a decree for specific performance was declined as the plaintiff did not approach the court within a reasonable time.

In P.D'Souza vs. Shondrilo Naidu [(2004) 6 SCC 649], this Court rejected the contention that inadequacy of consideration may be ground for refusing relief of specific performance, which may cause hardship stating:

"It is not a case where the defendant did not foresee the hardship. It is furthermore not a case that non-performance of the agreement would not cause any hardship to the plaintiff. The defendant was the landlord of the plaintiff. He had accepted part-payments from the plaintiff from time to time without any demur whatsoever. He redeemed the mortgage only upon receipt of requisite payment from the plaintiff. Even in August, 1981 i.e. just two months prior to the institution of suit, he had accepted Rs.20,000 from the plaintiff. It is, therefore, too late for the appellant now to suggest that having regard to the escalation in price, the respondent should be denied the benefit of the decree passed in his favour. Explanation I appended to Section 20 clearly stipulates that merely inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature would not constitute an unfair advantage within the meaning of sub-section (2) of Section 20."

The Court noticed that somewhat a different note was struck in Nirmala Anand vs. Advent Corpn. (P) Ltd & Ors. [(2002) 5 SCC 481] and opined:

"The said decision cannot be said to constitute a binding precedent to the effect that in all cases where there had been an escalation of prices, the court should either refuse to pass a decree on

specific performance of contract or direct the plaintiff to pay a higher sum. No law in absolute terms to that effect has been laid down by this Court nor is discernible from the aforementioned decision."

In Surinder Singh vs. Kapoor Singh (Dead) through LRs. & Ors. [(2005) 5 SCC 142], it was emphasized that discretionary jurisdiction must be exercised reasonably and having regard to the fact situation obtaining in each case. The present market value of the property is also a relevant fact. The prices must have gone up manifold. It is situate in a metropolitan town. It has a great potential value.

As noticed hereinbefore, the conduct of both the parties are blameworthy. The value of the property is now said to be a few crores. The appellants had deposited a sum of Rs.10 lakhs as far back as on 12.6.1984. The said amount must be directed to be refunded to the appellants with interest @15% per annum. Although we decline to grant any relief of specific performance of contract to which the Appellants were otherwise entitled to, we are of the opinion that it is a fit case where the respondents should be asked to compensate the Appellants. In view of the fact that the Sarafs are also responsible for bringing out such a situation, we are of the opinion that interest of justice would be met if the respondents are directed to pay a sum of Rs.50,00,000/- to the Appellants herein by way of compensation. Such amount should be in addition to the sum of Rs.10,00,000/- deposited by the Appellants together with interest at the rate of 12% per annum thereupon. This order shall not preclude Manoj Kumar Poddar to bring an independent action against the respondents herein, if he so desires.

Conclusion:

(i) The property in suit for all intent and purport was acquired for the benefit of the Company.

(ii) Only because at the time of acquisition of the property by Sarafs, the Company was unincorporated, the same would not mean that no title could have been passed in favour of the Company.

(iii) In view of their conduct, Sarafs were estopped and precluded from denying and disputing the title of the Company over the property in dispute.

(iv) Withdrawal of suit No. 1252 of 1982 by the appellants did not create any embargo in raising a contention that the award of the arbitrator and the consequent decree passed were void ab initio and of no effect.

(v) The agreement for sale dated 11.6.1984 was not a transaction for loan.

(vi) Saraf's conduct was condemnable so far as they not only raised false and frivolous pleas but also initiated frivolous proceedings in courts of law.

(vii) The subject matter of the agreement was not only the house in question but also the entire lands.

(viii) Prima facie the demolition of the house took place at the instance of the appellants.

(ix) However, it is not a case where the appellants are entitled to a decree for specific performance of contract.

(x) The respondents should refund the amount of advance of Rs.10,00,000/- (ten lakhs) with interest and furthermore pay compensation to the extent of Rs.50,00,000/- (fifty lakhs).

The appeals are allowed to the aforementioned extent. However, in the facts and circumstances of these cases, the parties shall bear and pay their own costs.