Sushil Kumar Bagga vs Dewan Chander Batra & Anr. on 20 January, 2014

Author: Rajiv Sahai Endlaw

Bench: Rajiv Sahai Endlaw

*IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of decision: 20th January, 2014.

+ RFA No.268/2010

SUSHIL KUMAR BAGGA ..... Appellant
Through: Mr. K.R. Chawla & Mr. Sunil Verma & Advs.

Versus

DEWAN CHANDER BATRA & ANR. ..... Respondents
Through: Ms. Maninder Acharya, Sr. Adv. with Mr. Yashish Chandra, Adv. for R-1.

CORAM :-
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

1. The appeal impugns the judgment and decree (dated 19th December, 2009 of the Court of the Additional District Judge (ADJ), Delhi in CS No.98/2008 filed by the respondent No.1/plaintiff against the appellant Sh. Sushil Kumar Bagga and the respondent No.2 Smt. Chander Kanta Sharma) of specific performance of the Agreement to Sell dated 16th September, 1985 by the respondent No.2/defendant No.1 in favour of the respondent No.1/plaintiff with respect to property No.198/17A, Garhi, East of Kailash, New Delhi and further declaring the Sale Deed dated 9th March, 1999 executed by the respondent No.2/defendant No.1 in favour of the appellant with respect to the said property to be hit by the principles of lis pendens and of cancellation thereof.

2. Notice of the appeal was issued and vide ex-parte ad-interim order dated 7th May, 2010, the operation of the impugned judgment and decree was stayed. The appeal was on 9th July, 2010 admitted for hearing and the Trial Court record requisitioned. On 29th July, 2011, the earlier interim order was confirmed and the appeal was listed for hearing in the category of regular matters. Hearing was expedited for the reason of the respondent No.1/plaintiff being a senior citizen. The counsels have been heard.

3. The respondent No.1/plaintiff on 31st July, 1986 instituted the suit from which this appeal arises, originally against the respondent No.2/defendant No.1 Smt. Chander Kanta Sharma only, pleading:

(i) that the respondent No.2/defendant No.1 had on 16th September, 1985 entered into an Agreement for Sale of the property to the respondent No.1/plaintiff for a total sale consideration of Rs.1,65,000/- and in pursuance thereto the respondent No.1/plaintiff paid a sum of Rs.20,000/- in cash towards the sale price and the balance amount of Rs.1,45,000/- was payable by the respondent No.1/plaintiff at the time of registration of the Sale Deed latest by 31st December, 1985;

(ii) that the respondent No.2/defendant No.1 requested the respondent No.1/plaintiff for extension of time upto 31st March, 1986 for registration of the Sale Deed on the plea that the sons of the respondent No.2/defendant No.1 were appearing for examination and she wanted time to deliver possession of the property;

(iii) that the respondent No.2/defendant No.1 also approached Sh. N.R. Gupta, the then landlord of the respondent No.1/plaintiff and requested him to allow the respondent No.1/plaintiff to continue staying as a tenant in Sh. N.R. Gupta s house upto 31st March, 1986;

(iv) that the respondent No.1/plaintiff acceded to the request of the respondent No.2/defendant No.1 for extension of time and an Agreement for extension of time for the registration of the Sale Deed and handing over physical possession was executed on 30th December, 1985;

(v) that the respondent No.2/defendant No.1 again requested the respondent No.1/plaintiff for extension of time for registration of the Sale Deed and delivery of possession upto 30th April, 1986 on the plea that the sons of the respondent No.2/defendant No.1 were appearing for competitive examination and again an Agreement for extension of time for registration of the Sale Deed was executed on 28th March, 1986;

(vi) that the respondent No.1/plaintiff before 30th April, 1986 approached the respondent No.2/defendant No.1 to register the Sale Deed and hand over possession but the respondent No.2/defendant No.1 again requested for some more time as her brother-in-law Sh. N.S. Sisodia, Sub Inspector was going to be married in the month of May, 1986 at Bulandshahar, U.P.;

(vii) that the respondent No.1/plaintiff however did not agree to the extension;

(viii) that the respondent No.1/plaintiff vide letter dated 27th April, 1986 called upon the respondent No.2/defendant No.1 to vacate the premises and get the Sale Deed registered;

(ix) that no reply was given by the respondent No.2/defendant No.1 thereto;

(x) that the respondent No.1/plaintiff sent another letter dated 13th May, 1986 again calling upon the respondent No.2/defendant No.1 to perform her part of the Agreement;

(xi) that the respondent No.2/defendant No.1 however vide notice dated 14th May, 1986 cancelled the Agreement to Sell and forfeited the amount of Rs.20,000/- on a false plea;

(xii) that a reply dated 19th May, 1986 was given by the respondent No.1/plaintiff to the aforesaid legal notice;

(xiii) that the respondent No.1/plaintiff was ready and willing to perform her part of the Agreement to Sell.

Accordingly, the suit for specific performance and in the alternative for damages equivalent to the price of the property prevailing at that time was filed.

4. Summons of the suit were issued and vide ex-parte ad-interim order dated 1st August, 1986, the respondent No.2/defendant No.1 restrained from transferring, alienating or parting with possession of the property.

5. The respondent No.2/defendant No.1 in her written statement/reply to the application for interim relief stated that since she needed money for construction of her own property at Noida, she had already sold the property in question to Sh. Sushil Kumar Bagga i.e. the appellant herein, Sh. Brij Bhushan Bagga, Sh. Naresh Kumar Bagga and Ms. Raj Rani and handed over vacant and peaceful possession of the property to the said persons, though owing to the Sale Deeds being not registered by the Registrar, formal Sale Deed had not been registered.

6. The respondent No.2/defendant No.1 else, though admitting the Agreement to Sell in favour of the respondent No.1/plaintiff, pleaded:

> (a) that it was the respondent No.1/plaintiff who had been approaching the respondent No.2/defendant No.1 for extension of time for making payment of the balance amount of sale consideration for the reason of being unable to collect the balance sale consideration payable at the time of execution and registration of the Sale Deed;
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> (b) that the respondent No.2/defendant No.1 was very keen to sell the house by December, 1985 and move to a new premises so that her son could settle down in the new house for his 12th Class examination during March/April, 1986;
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> (c) that the respondent No.2/defendant No.1 had agreed to extend the time upto 31st March, 1986;
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> (d) that similarly the extension of time for execution of the Sale Deed till 30th April, 1986 was also at the request of the respondent No.1/plaintiff, though the same was inconvenient to the respondent No.2/defendant No.1 for the reason of her other son s B.A.-I examination being in April, 1986;

(e) denying receipt of letter dated 27th April, 1986;

(f) that since the respondent No.1/plaintiff did not have financial resources to honour the Agreement to Sell dated 16th September, 1985 and because of the delaying tactics of the respondent No.1/plaintiff, the respondent No.2/defendant No.1 out of her frustration, on 14th May, 1986 cancelled the Agreement, because of the failure of the respondent No.1/plaintiff to fulfill his obligations;

(g) denying that there was any increase in the price of the property, after the Agreement dated 16th September, 1985;

(h) denying that the respondent No.1/plaintiff was in a position to make payment of the balance sale consideration;

(i) that the occasion for the respondent No.2/defendant No.1 to apply for permission to the Income Tax Department did not arise since the respondent No.1/plaintiff did not have the balance sale consideration.

7. Needless to state that the respondent No.1/plaintiff filed a replication reiterating his case.

8. The following issues were framed in the suit on 11th September, 1987:

"1. Whether the plaintiff has always been ready and willing to perform his part of the agreement?

2. Whether the defendant has sold the property to Sh. Sushil Kumar Bagga, Shri Brij Bhushan Bagga, Shri Naresh Kumar Bagga and Mrs. Raj Rani wife of Ashwani Kumar, as stated in para 3 and 4 of the written statement, is so, its effect?

3. Whether the plaintiff is entitled to specific performance of the agreement?

4. To what damages the plaintiff is entitled?"

9. The respondent No.2/defendant No.1 was proceeded against ex-parte on 25th May, 1990 and the respondent No.1/plaintiff led her ex-parte evidence. However, on the application of the respondent No.2/defendant No.1, the order proceeding ex-parte against her was recalled on 29th November, 1990. The respondent No.1/plaintiff again examined himself and only one other witness namely Sh. K.K. Nayyar and closed his evidence in affirmative. On 30th August, 1999, the counsel for respondent No.2/defendant No.1 stated that the respondent No.2/defendant No.1 has to examine only one witness namely Sh. Sushil Kumar Bagga. No witness was however examined by the respondent No.2/defendant No.1 and the respondent No.2/defendant No.1 on 24th November, 1999 closed her evidence.

10. Thereafter, an application under Order I Rule 10 of the Civil Procedure Code (CPC), 1908 was filed by the appellant for impleadment in the suit inter alia pleading that the respondent No.2/defendant No.1 had vide Agreement to Sell dated 16th June, 1986 agreed to sell the property to the appellant for a sum of Rs.60,000/- and put the appellant into possession of the property and subsequently a Sale Deed was also registered in favour of the appellant on 9th March, 1999. The said application was dismissed vide order dated 10th November, 2000 on the ground that the Agreement to Sell on the basis whereof impleadment was sought was dated 16th June, 1986 i.e. during the subsistence of the Agreement to Sell dated 16th September, 1985 in favour of the respondent No.1/plaintiff and the Sale Deed in favour of the appellant was in violation of the restraint order against the respondent No.2/defendant No.1 in the suit.

11. The appellant preferred an appeal against the order of dismissal of his application for impleadment, which was also dismissed by the Division Bench of this Court vide order dated 21st March, 2001. The appellant thereafter preferred a Special Leave Petition (SLP) which was granted and converted into Civil Appeal No.3295/2002 and which was allowed vide order dated 3rd May, 2002 of the Supreme Court, permitting the appellant to file a written statement and directing this Court to proceed with hearing of the suit thereafter.

12. Accordingly, the appellant was vide order dated 10th May, 2002 in the suit impleaded as defendant No.2 to the suit. The respondent No.1/plaintiff accordingly applied for and was allowed to amend the plaint seeking the relief of specific performance against the appellant/defendant No.2 also.

13. The appellant/defendant No.2 contested the suit by filing a written statement inter alia on the same grounds as the respondent No.2/defendant No.1 and further pleading:

> (I) that the provisions of Section 52 of the Transfer of Property Act, 1882 were not applicable as the property had been sold to the appellant/defendant No.2 vide Agreement dated 16th June, 1986 i.e. before the institution of the suit (on 31st July, 1986); (II) denying that the appellant/defendant No.2 had purchased the property without knowledge of the Agreement to Sell dated 16th September, 1985 in favour of the respondent No.1/plaintiff; (III) that though the Agreement to Sell dated 16th June, 1986 was in favour of the appellant/defendant No.2 along with four others but the said others sold their shares to the appellant/defendant No.2 and the Sale Deed dated 9th March, 1999 was only a family arrangement between the original buyers of the property.

14. The suit was thereafter transferred to the District Court owing to the changes in the pecuniary jurisdiction of the Courts.

15. The respondent No.1/plaintiff filed replication to the written statement of the appellant/defendant No.2 and fresh issues as under were framed in the suit on 3rd December, 2005 and corrected on 29th August, 2009:

"1. Whether the plaintiff is entitled to the relief as prayed for? OP Parties.

2. Whether the plaintiff has been ready and willing to fulfil his obligations at all times? OPP

3. Whether the defendant No.1 colluded with the defendant No.2 and transferred the property during the pendency of the lis?

4. Whether the defendant No.2 is a bonafide purchaser without notice and for consideration? If so, its effect?

5. Whether the plaintiff is entitled to any damages, if so, to what extent and from whom? OPP.

6. Relief."

16. The respondent No.2/defendant No.1 stopped appearing and was proceeded against ex-parte on 15th October, 2004.

17. The respondent No.1/plaintiff again examined himself and two other witnesses.

18. The learned ADJ, in the impugned judgment has, found/observed/held:

(a) (the learned ADJ has taken into account the deposition of Sh.

K.K. Nayyar supra examined by the respondent No.1/plaintiff as well as the deposition of respondent No.2/defendant No.1, both of whom were examined prior to the appellant/defendant No.2 becoming a party to the suit);

(b) that the respondent No.2/defendant No.1 in her deposition had admitted the Agreements for extension of time for completion of sale from 31st December, 1985 to 31st March, 1986 and thereafter to 30th April, 1986 to be in her own handwriting and the stamp papers on which the said Agreements were engrossed were also bought in the name of the respondent No.2/defendant No.1;

(c) that if the reason for extension of time was to give more time to the respondent No.1/plaintiff to arrange for money, there was no reason for the respondent No.2/defendant No.1 to have not stated so in the said Agreements of which she herself was the scribe;

(d) that the positive assertions made by the respondent No.1/plaintiff in his examination-in-chief of the reason for extension being the request of the respondent No.2/defendant No.1 had not been challenged in the cross-examination by the respondent No.2/defendant No.1 of the respondent No.1/plaintiff;

(e) that thus the version of the respondent No.1/plaintiff for the reason for extension was more credible than that of the respondent No.2/defendant No.1;

(f) that the respondent No.1/plaintiff had proved sending letter dated 27th April, 1986 by UPC and since the same was addressed at the correct address of the respondent No.2/defendant No.1, there was presumption of service;

(g) that the readiness and willingness of the respondent No.1/plaintiff to perform his part of the Agreement was evident from the said letter;

(h) that the conduct of the respondent No.2/defendant No.1 not replying to the said letter shows her to be the unwilling party;

(i) that the conduct of the respondent No.1/plaintiff of issuing the reminder dated 13th May, 1986 referring to the previous letter dated 27th April, 1986 also showed that the respondent No.1/plaintiff had the requisite funds to pay the balance sale consideration;

(j) that the respondent No.2/defendant No.1 had admitted receipt on 17th/18th May, 1986, of letter dated 13th May, 1986 and had further admitted that she thereafter did not ask the respondent No.1/plaintiff to pay the money or offer to execute the Sale Deed;

(k) that the conduct of the respondent No.2/defendant No.1 of not replying to the letter dated 13th May, 1986 demonstrated that the respondent No.2/defendant No.1 was not ready to honour her commitment and that she was the unwilling party;

(l) that the respondent No.2/defendant No.1 in her cross- examination had also admitted having received the letter dated 13th May, 1986 prior to issuance of the notice dated 14th May, 1986 of cancellation of the Agreement to Sell;

(m) that the promptness of the respondent No.1/plaintiff in replying on 19th May, 1986 itself to the notice dated 14th May, 1986 of cancellation of the Agreement to Sell also shows the willingness of the respondent No.1/plaintiff;

(n) that the respondent No.2/defendant No.1 had not proved any effort on her part to get any document executed to enable the transfer of the property;

(o) that the legal notice dated 14th May, 1986 thus appeared to be antedated;

(p) that the admission by the respondent No.2/defendant No.1 of her sons having examinations in March/April, 1986, corroborated the version of the respondent No.1/plaintiff of the reason for extension of time for completion of the sale;

(q) that the respondent No.2/defendant No.1 in her written statement did not specify the date of sale in favour of the appellant/defendant No.2 and others;

(r) that the reason given by the respondent No.2/defendant No.1 for her hurry to sell the house i.e. to construct her house in Noida and her being not eligible for house building advance loan for the reason of her impending retirement from service on 31st July, 1993, was false as the respondent No.2/defendant No.1 in May, 1985 still had seven years of service left and could easily avail house building advance loan, thus her claim for distress sale could not be believed;

(s) that the claim of the respondent No.2/defendant No.1 in her cross-examination that she contacted the respondent No.1/plaintiff on telephone and despite which the respondent No.1/plaintiff did not bring the money could not be believed as the same was beyond pleadings;

(t) that while the Agreement to Sell in favour of the respondent No.1/plaintiff was for consideration of Rs.1,65,000/-, the sale to the appellant/defendant No.2 and others which was claimed to be for Rs.60,000/-, was improbable;

(u) that the respondent No.1/plaintiff was a teacher with D.A.V. Senior Secondary School for the last 23 years and had testified to getting a salary over Rs.3,000/- per month and his wife working as a Government School Teacher also getting a salary of Rs.2,200/- per month and had proved having a bank balance of Rs.35,000/-, cash in hand of Rs.15,000/- and jewelry of Rs.1,10,000/-;

(v) that the brother of the wife of the respondent No.1/plaintiff had also deposed that the wife of the respondent No.1/plaintiff had deposited Rs.1,00,000/- with him;

(w) that there was thus no reason to disbelieve that the respondent No.1/plaintiff was in a position to arrange for the balance sale consideration of Rs.1,45,000/-;

(x) that accordingly Issue Nos.1 & 2 framed on 3rd December, 2005 were decided in favour of the respondent No.1/plaintiff and against the appellant and the respondent No.2/defendant; (y) that the respondent No.2/defendant No.1 did not file the documents of sale or copies thereof executed in favour of the appellant/defendant No.2 and others and it was only in the year 1994 when the respondent No.2/defendant No.1 attempted to file certain documents but which was not permitted;

(z) that though the respondent No.2/defendant No.1 had pleaded sale in favour of the appellant/defendant No.2 and four others but the possession letter dated 28th March, 1986 filed by the appellant/defendant No.2 was of delivery of possession to one Sh. Vinod Kumar Bagga only who was not the purchaser as pleaded by the respondent No.2/defendant No.1;

(aa) that the said possession letter further recorded the Agreement to Sell dated 16th June, 1986 to be with the said Sh. Vinod Kumar Bagga only;

(ab) that the said possession letter also mentions a General Power of Attorney (GPA) dated 18th June, 1986 having been executed by the respondent No.2/defendant No.1 in favour of the said Sh. Vinod Kumar Bagga;

(ac) that the said possession letter thus contradicted the claim of the appellant and respondent No.2/defendants of sale to the appellant/defendant No.2 and Sh. Brij Bhushan Bagga, Sh. Naresh Kumar Bagga and Mrs. Raj Rani and the said discrepancy had remained unexplained;

(ad) that none of the aforesaid persons had also been examined in the evidence to prove the sale if any of 16th June, 1986; (ae) that even if the Agreement to Sell dated 16th June, 1986 were to be believed as genuine, the same did not transfer the ownership of the suit property and thus the appellant and the respondent No.2/defendants had failed to prove that the property was sold before filing of the suit;

(af) that the alleged Agreement to Sell dated 16th June, 1986 and subsequent Sale Deed dated 9th March, 1999 were mentioned for the first time in the application for impleadment filed by the appellant/defendant No.2;

(ag) that thus the claim of sale of the property before filing of the suit was difficult to believe;

(ah) that when the respondent No.1/plaintiff in the amended plaint took the plea of the Sale Deed dated 9th March, 1999 being bogus, the appellant/defendant No.2 claimed the same to be only a family settlement and the sale having taken place vide Agreement to Sell dated 16th June, 1986;

(ai) that the appellant/defendant No.2 in his evidence did not mention any Power of Attorney or Will and only deposed about the Agreement to Sell dated 16th June, 1986;

(aj) that the documents proved by the appellant/defendant No.2 of his possession of the property were of the year 1988 and after; (ak) that the payment of Rs.60,000/- by the appellant/defendant No.2 to the respondent No.2/defendant No.1 on 16th June, 1986 had also not been proved;

(al) that the respondent No.2/defendant No.1 was vide order dated 20th February, 1987 expressly restrained from transferring or alienating the property recording that no formal document of sale had been registered till then;

(am) that the respondent No.2/defendant No.1 had inspite of directions of the Court not filed the documents allegedly executed of sale and which circumstance cast a doubt on the authenticity of the Agreement dated 16th June, 1986 which was filed only on 17th April, 2007;

(an) that the appellant/defendant No.2 at least as on 13th July, 1989 when it was stated that he was the only witness to be examined on behalf of the respondent No.2/defendant No.1, aware of the suit; (ao) that the stand of the Sale Deed dated 9th March, 1999 being a family arrangement was also contradictory;

(ap) that the said Sale Deed dated 9th March, 1999 was also disclosed for the first time in the application dated 24th November, 1999 for impleadment; in the said application, it was pleaded that the respondent No.2/defendant No.1 had executed the Sale Deed through her Attorney;

(aq) that no registered Will or Power of Attorney to show the sale of the suit property on 16th June, 1986 had been produced or proved; (ar) that the Agreement to Sell dated 16th June, 1986 had not even been proved by the respondent No.2/defendant No.1; (as) that the witnesses to the Agreement to Sell had also not been examined;

(at) that the only inference thus was that the property was not sold on 16th June, 1986;

(au) that the Sale Deed dated 9th March, 1999 was for a sale consideration of Rs.1,60,000/- and does not contain any mention of the Agreement to Sell dated 16th June, 1986 or of the transaction being a family arrangement;

(av) that it was accordingly held that the respondent No.2/defendant No.1 had colluded with the appellant/defendant No.2 and transferred the suit property during the pendency of the lis and the appellant/defendant No.2 was not a bona fide purchaser without notice and for consideration; accordingly, Issues No.3 & 4 were decided in favour of the respondent No.1/plaintiff and against the appellant and the respondent No.2/defendants.

Resultantly, the suit was decreed as aforesaid.

19. Needless to state that the respondent No.2/defendant No.1 has not appeared in this appeal.

20. Though the senior counsel for the respondent No.1/plaintiff during the hearing on 29th August, 2013 contended that only plea available to the appellant/defendant No.2 as the subsequent purchaser is with respect to Section 19(b) of the Specific Relief Act, 1963 and the subsequent purchaser is not entitled to challenge inter alia the readiness and willingness of the purchaser/decree holder by placing reliance on Jugraj Singh Vs. Labh Singh (1995) 2 SCC 31 but her attention was invited to Ram Awadh Vs. Achhaibar Dubey (2000) 2 SCC 428 overruling Jugraj Singh supra.

21. The counsel for the appellant/defendant No.2 has argued:

> (i) that the admission by the respondent No.2/defendant No.1 of the Agreements dated 30th December, 1985 and 28th March, 1986 of extension of time for completion of sale being in her handwriting is not admission of contents of the documents;
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> (ii) that the appellant/defendant No.2 did not have knowledge of the Agreement to Sell in favour of the respondent No.1/plaintiff and is a bona fide purchaser for consideration after making enquiries from the neighbours and which did not reveal the Agreement to Sell in favour of the respondent No.1/plaintiff;
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> (iii) that it is not the case of the respondent No.1/plaintiff that the appellant/defendant No.2 had knowledge of the Agreement to Sell in favour of the respondent No.1/plaintiff;

(iv) that even though the Sale Deed dated 9th March, 1999 in favour of the appellant/defendant No.2 has been executed during the pendency of the suit but the principle of lis pendens will not apply since the same is in pursuance to the Agreement to Sell dated 16th June, 1986, which is prior to the date of institution of the suit.

Reliance in this regard is placed on S.K.M. Mohammed Amanullah Vs. T.C.S. Ramasangu Pandian AIR 1995 AIHC 964 (Madras);

(v) reliance is also placed on V. Muthusami Vs. Angammal AIR 2002 SC 1279 and Rajan Vs. Yunuskutty AIR 2002 Kerala 339 (DB) to contend that the discretion implicit in the grant of relief of specific performance is not to be exercised when the property has already been sold to another person;

(vi) attention is invited to the order dated 10th November, 2000 in the suit in which the contention of the counsel for the appellant/defendant No.2 of the property having been sold vide Agreement to Sell dated 16th June, 1986 is recorded and it is thus contended that the finding in the impugned judgment of the same having been disclosed for the first time on 24th November, 1999 in the application for impleadment, is erroneous;

(vii) attention is invited to the application filed by the appellant/defendant No.2 for impleadment in which also the Agreement to Sell dated 16th June, 1986 is expressly pleaded and the copy of the Agreement to Sell is also pleaded to have been annexed to the application for impleadment;

(viii) that the appellant/defendant No.2 cannot be punished for non- disclosure by the respondent No.2/defendant No.1 of the said Agreement to Sell;

(ix) that in the application for impleadment reference is also made to a Power of Attorney having been registered by respondent No.2/defendant No.1 on 11th July, 1986 with the Sub Registrar, Noida in favour of Sh. Vinod Kumar Bagga, brother of the appellant/defendant No.2;

(x) attention is invited to the judgment of this Court in Asha M. Jain Vs. Canara Bank 94 (2001) DLT 841 (DB) to contend that judicial notice was taken of properties being transacted through the medium of Agreement to Sell and Power of Attorney;

(xi) that the Ration Card of the appellant/defendant No.2 at the address of the property is of 26th July, 1986;

(xii) that the Sale Deed dated 9th March, 1999 in favour of the appellant/defendant No.2 is in pursuance to the Agreement to Sell dated 16th June, 1986 and the Power of Attorney registered on 11th July, 1986;

(xiii) attention is invited to the written statement verified on 30th October, 1986 of the respondent No.2/defendant No.1 in which also the sale in favour of the appellant/defendant No.2 and Sh. Brij

Bhushan Bagga, Sh. Naresh Kumar Bagga and Mrs. Raj Rani is pleaded;

(xiv) that the respondent No.1/plaintiff had only Rs.35,000/- in his bank account;

(xv) that though the respondent No.1/plaintiff in support of his version of the extension of time for completion of sale being at the instance of the respondent No.2/defendant No.1 had pleaded that the respondent No.2/defendant No.1 had also contacted Sh. N.R. Gupta the then landlord of the respondent No.1/plaintiff but the said Sh. N.R. Gupta was not produced in evidence;

(xvi) that no presumption can be drawn of service of the letter dated 27th April, 1986 sent by UPC;

(xvii) that the respondent No.1/plaintiff has not proved knowledge by the appellant/defendant No.2 of the Agreement to Sell in favour of the respondent No.1/plaintiff;

(xviii) that though the respondent No.1/plaintiff had also pleaded that the respondent No.2/defendant No.1 had spoken to Sh. N.R. Gupta supra in presence of other persons but the said persons also were not examined;

(xix) that the respondent No.1/plaintiff in his deposition on 15th May, 1991 had stated that his wife had since the year 1985 been depositing her salary with her brother and as a result of which she had saved nearly Rs.1,00,000/- but on the basis of her salary disclosed as Rs.2,200/- per month, the saving even if of the entire salary for one year could be of Rs.26,400/- only and not of Rs.1,00,000/-; (xx) that the valuer who had given the report of valuation of jewelry possessed by the respondent No.1/plaintiff was also not produced as a witness;

(xxi) that no source of acquisition of jewelry by the respondent No.1/plaintiff and his wife was proved;

(xxii) that the respondent No.1/plaintiff in his deposition on 5th February, 1992 attempted to improve his case by deposing of owning other properties from sale whereof sale consideration for purchase of the subject property could be arranged; the same shows that the respondent No.1/plaintiff was trying to improve his case and had no ready money with him;

(xxiii) attention is invited to the cross-examination on 6th February, 1992 of the respondent No.1/plaintiff to contend that the statements recording readiness and willingness and availability of funds are inconsistent;

(xxiv) that though the respondent No.1/plaintiff prior to the impleadment of the appellant/defendant No.2 had examined his brother-in-law Sh. K.K. Nayyar but did not examine him thereafter; (xxv) that the learned ADJ vide separate order of the same date as the impugned judgment on the application of the respondent No.1/plaintiff under Order XXXIX Rule 2A of the CPC has also held the respondent No.2/defendant no.1 guilty of violation of the order under Order XXXIX Rules 1 & 2 of the CPC and imposed fine of Rs.30,000/- on her;

(xxvi) that the evidence of Sh. K.K. Nayyar recorded prior to the impleadment of the appellant/defendant No.2 cannot be read against the appellant/defendant No.2;

(xxvii) that the subject land measured 88-90 sq. yds. and the appellant/defendant No.2 has since purchased adjoining 16 sq. yds. of land also and raised construction of four stories on the total land; the document of purchase of the said 16 sq. yds. of land has been proved as DW-2/16;

(xxviii) that the respondent No.1/plaintiff in the cross-examination recorded on 8th August, 1994 of the respondent No.2/defendant No.1 did not challenge delivery of possession of the property by the respondent No.2/defendant No.1 to the appellant/defendant No.2 and the other purchasers;

(xxix) that the photocopy of the GPA executed by the respondent No.2/defendant No.1 in favour of Sh. Vinod Kumar Bagga registered at Noida on 11th July, 1986 exists at pages 607 to 611 of Part-II of the Trial Court record, though has not been proved;

(xxx) that similarly the photocopy of the Sale Deed dated 9th March, 1999 exists at pages 745 to 757 of Part-II of the Trial Court record, though has not been proved;

(xxxi) that the respondent No.1/plaintiff in his affidavit by way of examination-in-chief after the impleadment of the appellant/defendant No.2 has not deposed that the appellant/defendant No.2 had knowledge of the Agreement to Sell in favour of the respondent No.1/plaintiff before 16th June, 1986;

(xxxii) that the respondent No.1/plaintiff in his cross-examination recorded on 5th March, 2007 has admitted having come to know of the purchase of the property by the appellant/defendant No.2 during July, 1986 and is now not entitled to challenge the same; (xxxiii) that the counsel for the respondent No.1/plaintiff in the cross- examination of the appellant/defendant No.2 recorded on 24th July, 2007 suggested that the appellant/defendant No.2 had been coming along with the respondent No.2/defendant No.1 to the Court since 16th June, 1986 as and when he received notice from the Court, again admitting the sale in favour of the appellant/defendant No.2 of 16th June, 1986;

(xxxiv) reference has also been made to:

> (a) Muktakesi Dawn Vs. Haripada Mazumdar AIR 1988 Calcutta 25 (DB) laying down that in a suit for specific performance of an Agreement of Sale if the defendant is not restrained from selling a property to a third party and third party purchases the same bona fide for value without any notice of pending litigation and spends huge amount in construction thereof, the equity in his favour may intervene to persuade the Court to decline the equitable relief of specific performance and to award damages only;
>
> (b) Ram Kumar Tiwari Vs. Deenanath AIR 2002 Chhattisgarh 1 laying down that sale prior to the institution of the suit is not hit by Section 52 of the Transfer of Property Act;

(c) Kanshi Ram Vs. Om Prakash Jawal (1996) 4 SCC 593 where the offer of the defendant in a decree for specific performance to pay Rs.10 lakhs instead of the alternative relief claimed for recovery of damages of Rs.10,000, was accepted;

(d) judgment dated 8th August, 2012 of this Court in CS No.1735/1997 titled Sushil Jain Vs. Meharban Singh where on the failure of the plaintiff in a suit for specific performance to file his income tax return or bank account statement to show availability of funds to pay the balance sale consideration, the mere averment of readiness and willingness was not accepted and the plaintiff was held to be not ready and willing to perform his part of the Agreement and also laying down that where the plaintiff in a suit for specific performance has paid less than 50% of the consideration, he is not entitled to the discretionary relief of specific performance;

(e) Javer Chand Vs. Pukhraj Surana AIR 1961 SC 1655 laying down that once a document has been marked as an exhibit and has been used by the parties in examination and cross-examination, it is not open to the Court to go behind the said order;

(f) Bishan Singh Vs. Khazan Singh AIR 1958 SC 838 laying down that if the sale is a transfer in recognition of a pre-

existing subsisting right, it would not be affected by the doctrine of lis pendens as the said transfer does not create new title pendente lite;

(g) Ram Awadh Vs. Achhaibar Dubey AIR 2000 SC 860 to contend that the plea of the plaintiff being not ready and willing was available, both to the defendant as well as subsequent purchasers.

22. The senior counsel for the respondent No.1/plaintiff has argued:

(I) that the appellant/defendant No.2 is not a bona fide purchaser for value without notice prior to the Agreement to Sell; thus the readiness and willingness of the respondent No.1/plaintiff is immaterial;

(II) that the Sale Deed dated 9th March, 1999 is not relatable to the alleged transaction of 16th June, 1986;

(III) attention is invited to the order dated 13th July, 1989 in the suit recording the presence of the appellant/defendant No.2 as a witness and it is contended that the appellant/defendant No.2 appeared for the first time in the suit on the said date only and his claim of purchase on 16th June, 1986 is bogus;

(IV) in the written statement dated 30th October, 1986 of the respondent No.2/defendant No.1, there is no mention of any GPA having been executed by the respondent No.2/defendant No.1 in favour of the appellant/defendant No.2 or his

nominee; (V) attention is invited to the order dated 19th December, 2009 of the Trial Court on the application of the respondent No.1/plaintiff under Order XXXIX Rule 2A of the CPC recording the findings of the sale to the appellant/defendant No.2 being in violation of the interim injunction in the suit;

(VI) attention is invited to the possession letter dated 28th June, 1986 executed by the respondent No.2/defendant No.1 to contend firstly that it is inconceivable as to why possession in pursuance to the Agreement to Sell dated 16th June, 1986 would be given on 28th June, 1986 and secondly that the possession is recorded to have been given in pursuance to the Agreement to Sell to Sh. Vinod Kumar Bagga, whereas the plea is of Agreement to Sell dated 16th June, 1986 in favour of the appellant/defendant No.2 and others and not Sh. Vinod Kumar Bagga;

(VII) that such inconsistencies cast a doubt as to the alleged transaction on 16th June, 1986;

(VIII) that on enquiry, it is stated that no evidence has been led by the respondent No.1/plaintiff of any increase in prices between the date of the Agreement to Sell in favour of the respondent No.1/plaintiff and the date fixed for completion of sale;

(IX) that the Power of Attorney on the basis of which Sh. Vinod Kumar Bagga executed the Sale Deed dated 9th March, 1999 in favour of the appellant/defendant No.2 has also not been proved; (X) attention is invited to the deposition recorded on 8th August, 1994 of the respondent No.2/defendant No.1 to highlight the admission that the respondent No.2/defendant No.1 after receipt of letter dated 13th May, 1986 from the respondent No.1/plaintiff had not contacted the respondent No.1/plaintiff;

(XI) that the discrepancies with respect to the documents evidencing the alleged transaction of sale of a date prior to the institution of the suit are relevant as the appellant/defendant No.2 is attempting to connect the Sale Deed dated 9th March, 1999 to the said transaction, when it is not;

(XII) that though the Agreement to Sell dated 16th June, 1986 records the sale consideration of Rs.60,000/- to have been paid under a separate legal receipt but no such receipt has been proved; (XIII) that though it was deposed that the said sale consideration was paid by bank drafts but no such bank drafts have been proved; (XIV) that the respondent No.1/plaintiff has never admitted sale of the property prior to the institution of the suit; (XV) that the Agreement to Sell dated 16th June, 1986 has not even been proved and there is no attempt even to prove the same in the affidavit by way of examination-in-chief of the appellant/defendant No.2;

(XVI) that it is inexplicable as to why the Power of Attorney in pursuance to the Agreement to Sell dated 16th June, 1986 would be executed on 18th June, 1986 and registered on 11th July, 1986 and possession delivered, as aforesaid, on 28th June,

1986; (XVII) that the plea in the written statement of the appellant and the respondent No.2 defendants of delivery of possession on 16th June, 1986 is falsified from the possession letter showing delivery of possession on 28th June, 1986;

(XVIII) that if the sale was complete vide the document of 1986 why the Sale Deed dated 9th March, 1999 would be executed after 13 years and the same is also indicative of the sale vide Sale Deed dated 9th March, 1999 being not relatable to the alleged transaction of 16th June, 1986;

(XIX) that the plea of Agreement to Sell dated 16th June, 1986 is an afterthought and it is for this reason only that the respondent No.2/defendant No.1 did not produce any document in support thereof;

(XX) that similarly though the appellant/defendant No.2 appeared in the suit for the first time on 13th July, 1989 but did not produce the said documents for a period of 10 years till the year 1999; (XXI) that the authenticity of the Agreement to Sell dated 16th June, 1986 could have been proved by examining the witnesses thereto who have not been examined;

(XXII) that the admitted extension of the date fixed for completion of the sale is also indicative of the respondent No.2/defendant No.1 being satisfied of the readiness and willingness of the respondent No.1/plaintiff as else she would not have agreed to the extension; (XXIII) alternatively, it is argued that even if the Sale Deed dated 9th March, 1999 is relatable to the alleged transaction of 16th June, 1986 i.e. prior to the institution of the suit, even then the principle of lis pendens would apply. Reliance in this regard is placed on Rajender Singh Vs. Santa Singh (1973) 2 SCC 705 and Jayaram Mudaliar Ayyaswami (1972) 2 SCC 200 laying down the genesis of the said doctrine and it is contended that the sale during the pendency of a suit, even if in pursuance to an earlier Agreement to Sell, will be hit by the said doctrine;

(XXIV) that the Agreement to Sell does not create any rights in immovable property;

(XXV) that even if a Sale Deed is considered as perfecting or bettering the title/possession, the same amounts to variation of the status quo existing on the date of the grant of interim order; (XXVI) reliance is placed on Har Narain Vs. Mam Chand (2010) 13 SCC 128 laying down that a sale is not complete even on the execution of the Sale Deed and until the registration thereof is complete and that the registration does not relate back to the date of execution of the Sale Deed and where the Sale Deed, though executed prior to the institution of the suit, is registered after the institution of the suit, the principle of lis pendens would apply; (XXVII) reliance is also placed on:

(A) Raj Kumar Vs. Sardari Lal (2004) 2 SCC 601 laying down that bringing of a lis pendens transferee on record, is not as of right but in the discretion of the Court as a

transferee pendente lite is treated in the eye of law as a representative-in-

interest of the judgment-debtor and bound by the decree; (B) Guruswamy Nadar Vs. P. Lakshmi Ammal (2008) 5 SCC 796 laying down that notwithstanding the subsequent purchaser having purchased the property in good faith, in such sale during the pendency of a suit, the principle of lis pendens will certainly be applicable, notwithstanding the fact that under Section 19(b) of the Specific Relief Act, his rights could be protected;

(C) Joginder Singh Bedi Vs. Sardar Singh Narang 26 (1984) DLT 162 (DB) clarifying that the decision of the Court is binding not only upon the litigant parties but also on those who derive title under them by alienations made pending the suit, whether such alienees had or had no notice of the pending proceedings and also to contend that the Court in the said judgment on the basis of discrepancies as in the present case pertaining to the alleged transaction of 16th June, 1986 did not believe the transaction besotted with such discrepancies; (D) Surjit Singh Vs. Harbans Singh (1995) 6 SCC 50 laying down that if alienation/assignment made in defiance of the restraint order were to be permitted to be ignored, it would defeat the ends of justice and be against the prevalent public policy and that when the Court intends a particular state of affairs to exist while it is in seisin of a lis, that state of affairs is not only required to be maintained, but it is presumed to exist till the Court orders otherwise;

(E) Arjan Singh Vs. Punit Ahluwalia (2008) 8 SCC 348 again laying down that a sale pendente lite would not come in the Court s way in passing a decree of specific performance and a transferee pendente lite would be deemed to be aware of the pendency of the suit;

(F) Bhim Singh Vs. Amar Nath 149 (2008) DLT 34 again laying down that it is immaterial whether the alienee pendente lite had or had no notice of pending proceedings;

(G) Sh. Raj Kumar Sharma Vs. Smt. Pushpa Jaggi AIR 2006 Delhi 156 laying down firstly that the jurisdiction vested in the Court to decline specific performance is a jurisdiction of equity and good conscience and where an Agreement to Sell is proved and the purchaser has acted without undue delay and has pursued his remedy in accordance with law without infringing the settled canon of equity, equity demands that the Agreement be specifically performed and secondly that the law does not impose an obligation on a purchaser to physically demonstrate the availability of the balance sale consideration with him and it is sufficient to prove that he posses or is capable of gathering sufficient means to perform his part of the contract; (H) Azhar Sultana Vs. B. Rajamani (2009) 17 SCC 27 also laying down that it is not necessary that the entire amount of consideration should be kept ready and the plaintiff must file proof in respect thereof;

(I) Rambhau Namdeo Gajre Vs. Narayan Bapuji Dhotra (2004) 8 SCC 614 laying down that the protection provided under Section 53A of the Transfer of Property Act is only against the transferor and it has nothing to do with the ownership of the proposed transferor who remains full owner of the property till it is legally conveyed by executing a registered Sale Deed and that the right under Section 53A cannot be pressed against a third party;

(J) Sujata Sanzgiry Vs. Ankush R. Naik AIR 2005 Bom. 404 laying down that the expression „transferee under Section 19(b) of the Specific Relief Act contemplates a person to whom the conveyance has been made and a person in whose favour a conveyance or document of title has not been executed would not be covered by Section 19(b) of the Specific Relief Act; an Agreement for Sale subsequent to the original contract is out of the purview of Section 19(b) of the Specific Relief Act (it is also pointed out that SLP (Civil) No.24958/2005 preferred against the said judgment was dismissed in limine on 13th December , 2005.) (it is further pointed out that the same is not the view of the Madras and Guwahati High Courts);

(K) Suraj Lamp & Industries Pvt. Ltd. Vs. State of Haryana 183 (2011) DLT 1 (SC) also laying down that the protection under Section 53A of the Transfer of Property Act is available only against the transferor and not against a third party and that Agreement to Sell even if coupled with delivery of possession and GPA, SPA and Will, cannot be treated as complete transfer or conveyance;

(L) Narbad Devi Gupta Vs. Birendra Kumar Jaiswal JT (2003) 8 SC 267 laying down that mere production and marking of a document as exhibit by the Court cannot be held to be a due proof of its contents till its execution has been proved by admissible evidence i.e. by the evidence of those persons who can vouchsafe for the truth of the facts in issue;

(J) P. D'Souza Vs. Shondrilo Naidu (2004) 6 SCC 649 laying down that readiness and willingness on the part of the plaintiff to perform his part of the contract would also depend on whether the defendant did everything which was required of to be done in terms of the Agreement;

(K) that mere passage of long time and raising of construction by the appellant/defendant No.2 will not create equity in his favour;

(L) that the transferee pendente lite is liable to join the respondent No.2/defendant No.1 in execution of conveyance in favour of the respondent No.1/plaintiff.

23. The counsel for the appellant/defendant No.2 in rejoinder has argued:

(i) that the Supreme Court in Suraj Lamp & Industries Pvt. Ltd.

supra has clarified that Agreements entered into before the date of pronouncement of that judgment i.e. 11th October, 2011 may be relied upon to apply for regularization of allotments/leases by the Development Authorities; that the Agreement dated 16th June, 1986 in favour of the appellant/defendant No.2 is of much prior thereto and is thus protected;

(ii) that the Bombay High Court in Sujata Sanzgiry supra was concerned with a case where the full consideration had not been paid and the possession had not been given and in fact did not follow its earlier judgment in Mahadeo Keshav Lingarkar Vs. Shamrao Balwant Keserkar AIR 1972 Bom 100 for the said reason;

(iii) that since no objection was taken to the proof of the Agreement to Sell dated 16th June, 1986, the principle as laid down in Javer Chand supra and in Dayamathi Bai Vs. K.M. Shaffi (2004) 7 SCC 107, will apply;

(iv) that the Supreme Court in Azhar Sultana supra refused specific performance because the subsequent purchaser was in possession for 27 years and it was felt that he should not be forced to vacate;

(v) that the respondent No.1/plaintiff opposed the impleadment of the appellant/defendant No.2 and which led to the delay;

(vi) that S.K.M. Mohammed Amanullah supra and Rajan supra relied upon by the counsel for the respondent No.1/plaintiff are not applicable as in those cases there was either no evidence to show notice of the subsequent purchaser or the Agreement to Sell itself was during the pendency of the suit, while the Agreement to Sell dated 16th June, 1986 is of a date prior to the institution of the suit;

(vii) that the respondent No.1/plaintiff in the notice dated 13th May, 1986 did not say that he was ready and willing;

(viii) that the respondent No.1/plaintiff only had Rs.35,000/- in his bank account and the NSEs referred to were to mature long thereafter in the year 1991 and else no fixed deposits or jewelry was produced;

(ix) that the respondent No.1/plaintiff having paid only 11.3% of the total sale consideration is not entitled to specific performance;

(x) that a careful perusal of the passbook produced by the respondent No.1/plaintiff which is at page 651 of the Trial Court record in fact shows availability of Rs.15,963.38 paise and not even Rs.35,000/-.

24. The senior counsel for the respondent No.1/plaintiff in sur-rejoinder has argued:

> (a) that Hem Chandra De Sarkar Vs. Amiyabala De Sarkar AIR 1925 Calcutta 61 lays down that ordinarily when a party claimed exception from a general provision of law, the onus lies upon him to prove that he comes within the said exception and that the onus to prove that the subsequent purchase was in good faith for valuable consideration and without notice of the prior Agreement to Sell is on the subsequent purchaser and not on the plaintiff in a suit for specific performance;
>
> (b) that though a Division Bench of this Court in Asha M. Jain supra had held that judicial notice can be taken of the practice prevalent in the city of Delhi of properties changing hands through the medium of Agreement to Sell and accompanied by General Power of Attorney and Will etc. but the Supreme Court in Suraj Lamp & Industries Pvt. Ltd. supra has overruled the view of the Division Bench of this Court;

even otherwise in Asha M. Jain supra judicial notice of such transactions where it was not possible to have the Sale Deed executed was taken; here, there is nothing to show that as on 16th June, 1986 the Sale Deed could not have been executed in favour of the appellant/defendant No.2;

(c) that house tax mutation is not title;

(d) that the distinction sought to be made out by the counsel for the appellant/defendant No.2 from the view taken in Sujata Sanzgiry supra is fallacious as the principle laid down therein is not based on any facts;

(e) that Bishan Singh supra cited by the counsel for the appellant/defendant No.2 relates to a case of preemption and will not be thus applicable;

(f) that the Supreme Court in Nirmala Anand Vs. Advent Corporation (P) Ltd. (2002) 5 SCC 481 has held that in cases of contract for sale of immovable property, the grant of relief of specific performance is the rule and its refusal an exception and that the defendant cannot take advantage of his own wrong and then plead that decree for specific performance would be an unfair advantage to the plaintiff;

(g) reliance is placed on S.V.R. Mudaliar Vs. Rajabu F. Buhari (1995) 4 SCC 15 laying down that before reversing a finding of fact, an Appellate Court has to bear in mind the reasons ascribed by the Trial Court;

(h) reliance is placed on Gobind Ram Vs. Gian Chand (2000) 7 SCC 548 laying down that where the seller tries to wriggle out of the contract because of escalation in price, the purchaser is entitled to get a decree for specific performance, as he has not taken any undue or unfair advantage and it will be inequitable and unjust to deny the decree after the two Courts had decided in his favour;

(i) reliance is placed on Prakash Chandra Vs. Angadlal AIR 1979 SC 1241 laying down that the relief of specific performance should not be denied where the purchaser has acted fairly throughout and there is nothing to show that by any act of omission or commission, he encouraged the seller to enter into another transaction with respect to the property and where the purchaser is not shown to have taken any unfair advantage of the seller;

(j) that the readiness and willingness of the respondent No.1/plaintiff could have been doubted only when he had been asked to perform and had defaulted;

(k) that the respondent No.1/plaintiff could not have done anything more;

(l) reliance is placed on Nathulal Vs. Phoolchand (1969) 3 SCC 120 to contend that if the contract is to be performed in a certain sequence, one of the parties cannot require compliance with the obligation of the other without in the first instance performing his part;

(m) reliance is placed on Sukhbir Singh Vs. Brij Pal Singh (1997) 2 SCC 200 laying down that it is not a condition that the purchaser should have ready cash with him and the fact that the purchaser attended the Sub Registrar s office to have the Sale Deed executed and waited for the seller is a positive fact to prove that the purchaser has necessary funds to pass on consideration and had with him the needed money for payment at the time of registration and that it is sufficient for the purchaser to establish that he had capacity to pay the sale consideration and it is not necessary for the purchaser to always carry with him the money.

25. The counsel for the appellant/defendant No.2 in sur-sur-rejoinder contended that the facts in Surjit Singh supra were entirely different.

26. I have considered the rival submissions and perused the Trial Court record.

27. The agreement to sell dated 16th September, 1985 of which specific performance was claimed in the suit and which is an admitted document required the respondent no.2/defendant no.1 to, at the time of receipt of the balance sale consideration of Rs.1,45,000/- from the respondent no.1/plaintiff, hand over vacant physical possession of the property consisting of three rooms, one kitchen, one bath room, one latrine and open court yard in front side with electric and water fixtures and to sign the papers in the Court in the name of respondent no.1/plaintiff or in the name of his nominee latest by 31st December, 1985. The respondent no.2/defendant no.1 in the said agreement had also agreed not to enter into any agreement with anyone in any manner whatsoever and not to encumber the property "in future". It further provided that if the respondent no.2/defendant no.1 did so, the respondent no.1/plaintiff would have full right to file a suit for specific performance to get the possession of the property and to get the property transferred either in his name or in the name of his nominee. The agreement further required the respondent no.2/defendant no.1 to pay house tax, electricity charges, water charges or any other dues and demands of the concerned authority upto the date of handing over the physical vacant possession of the property.

28. The two agreements of "extension" of the aforesaid agreement to sell dated 16th September, 1985 are on stamp papers and hand written and which handwriting was admitted by the respondent no.2/defendant no.1 to be hers. The first of the said agreement is as under:

> "Extension Agreement to sell dated 16.09.1985 An agreement to sell was signed between Smt. Chander Kanta w/o Late Brij Mohan R/o 198/17A, Garhi (the seller) and Sh. Dewan Chand Batra s/o Late Sh. Karan Chand Batra r/o 10A, Amrit Puri, Garhi (the purchaser) on 16.9.1985 the last date of handing over the physical possession of House and signing the papers in the court was fixed 31.12.1985 in this agreement. Now the last date of handing over the physical possession and making payment is extended latest by 31st March, 1986. All other terms and conditions of the

previous agreement dated 16.9.85 will remain same."

and the second is as under:

> "Extension of Agreement to Sell dated 16.9.1985 and 31.12.85. As per Agreement of Sale dated 16.9.85 and further extension of the same dated 30.12.85 between myself (Mrs. Chander Kanta) R/o 198/17A, Garhi and Sh. Dewan Chand R/o 207/2 Prakash Mohalla, Garhi, the date of making the full and final payments by the purchaser and handing over the physical possession by the seller was fixed on or before 31.3.86, date of handing over the possession is fixed on or before April, 30th 1986."

29. One thing which is immediately evident is that in both the agreements the emphasis is on the last date agreed for handing over possession and for extension thereof and though reference is also made to the payment to be made at that stage but the emphasis nevertheless is on handing over possession. In the ordinary course of human behaviour, if the date was being extended at the instance of the purchaser and for the reason of the purchaser i.e. the respondent no.1/plaintiff being not ready with the balance sale consideration, the emphasis in the "extension" agreements would have been on extension of the date of payment and not on the date of delivery of possession, particularly when the seller i.e. the respondent no.2/defendant no.1 was herself writing the said agreements in her own hand. Also, the stamp papers on which the said two agreements are scribed were not only in the name of the respondent no.2/defendant no.1 seller as distinct from the stamp paper on which the agreement to sell dated 16th September, 1985 is typed, which is in the name of the respondent no.1/plaintiff purchaser but the stamp papers are bought from a different vendor than the stamp vendor from whom the stamp paper for agreement to sell dated 16th September, 1985 was bought. The stamp papers are shown to have been bought by the respondent no.2/defendant no.1 seller on 28th December, 1985 and on 27th March, 1986 i.e. a couple of days prior to the last date fixed for completion of the sale.

30. Again, in the ordinary course of human behaviour if it was the respondent no.1/plaintiff purchaser who had been wanting extension of time, the stamp paper for the "extension" agreements would have been bought by him and got prepared by him for obtaining the signatures thereon of the respondent no.2/defendant no.1 seller.

31. The said factors lead me to believe the version of the respondent no.1/plaintiff of the extension of time for completion of sale being at the instance of the respondent no.2/defendant no.1 and to disbelieve the version of the respondent no.2/defendant no.1 of the extension of the date for completion of the sale being at the instance of the respondent no.1/plaintiff.

32. Though as aforesaid, the emphasis in the extension agreements is on extension of the date for delivery of possession but it is neither the plea of the respondent no.2/defendant no.1 nor her evidence (and this plea could not have been taken by the appellant/defendant no.2) that the respondent no.2/defendant no.1 was in a position to on or before 31st December, 1985 being the original date fixed for completion of the sale or on 31st March, 1986 or on 30th April, 1986 being the extended dates for completion of the sale, to remove herself and her goods. It is the admitted

position that the respondent no.2/defendant no.1 at the time of agreement to sell dated 16th September, 1985 was residing in the said property and that she had before 31st December, 1985 or before 31st March, 1986 or before 30th April, 1986 not acquired any other accommodation or made a provision for vacating the subject property to deliver the vacant physical possession thereof to the respondent no.1/plaintiff. In my opinion, when the main defence of the respondent no.2/defendant no.1 was of the inability of the respondent no.1/plaintiff to pay the balance sale consideration inspite of the respondent no.2/defendant no.1 having agreed to give extension thereof and being herself ready and willing and further when it was the specific plea of the respondent no.1/plaintiff in the plaint that it was the respondent no.2/defendant no.1 who was unable to deliver possession on the dates/extended dates for completion of sale, it was incumbent upon the respondent no.2/defendant no.1 to plead and prove that she was in a position to deliver vacant possession of the property on the said dates by citing the alternative property of which she had made provision by the said dates for shifting her goods and family thereto.

33. This was more so when the suit was filed within three months of the last date of 30th April, 1986 fixed for completion of the sale i.e. on 31st July, 1986.

34. There is another interesting facet. The respondent no.2/defendant no.1 in her cross examination of the respondent no.1/plaintiff recorded on 27th February, 1992 put to him her own copies of the two extension agreements and which were admitted by the respondent no.1/plaintiff. The said copies also, though not on stamp paper are in the handwriting of the respondent no.2/defendant no.1. The same is also indicative of the respondent no.2/defendant no.1 having herself prepared the said documents and taken them for the signature of the respondent no.1/plaintiff instead of being the other way round.

35. The respondent no.2/defendant no.1 also admitted the examinations of her sons in the months of March/April, 1986. The said admission also is indicative of it being inconvenient to the respondent no.2/defendant no.1 to shift out of the property/house in December, 1985 or on 31st March, 1986 and the extensions being at her request.

36. For the aforesaid additional reasons, the finding of the learned Additional District Judge of the extensions of the date for completion of the sale being not indicative of the inability of the respondent no.1/plaintiff to pay the balance sale consideration but instead being at the instance of the respondent no.2/defendant no.1 owing to her own inability to vacate the premises, cannot be interfered with.

37. That brings me to the post 30th April, 1986 scenario.

38. Though the respondent no.1/plaintiff claims to have before that date sent a letter dated 27th April, 1986 to the respondent no.2/defendant no.1 but the only proof of dispatch thereof is a postal certificate and reference thereto in the subsequent letter dated 13th May, 1986 receipt whereof is admitted by the respondent no.2/defendant no.1. Since the respondent no.2/defendant no.1 denied the receipt of the letter dated 27th April, 1986, I deem it appropriate to ignore the same.

39. The respondent no.1/plaintiff in his letter dated 13th May, 1986 referred to the extensions aforesaid sought by the respondent no.2/defendant no.1 and further extension till 30th May, 1986 also sought by the respondent no.2/defendant no.1 giving the reason of the marriage and which was not agreed to by the respondent no.1/plaintiff. The respondent no.1/plaintiff wrote the said letter calling upon the respondent no.2/defendant no.1 to vacate the house within ten days and to intimate to him the date of delivery of possession and getting the payment.

40. Though undoubtedly the respondent no.1/plaintiff in the said letter did not use the words of being ready and willing to perform his part of the Agreement to Sell but it cannot be lost sight of that the said letter is written by the respondent no.1/plaintiff himself and not by any advocate on his behalf. Even otherwise a complete reading of the said letter leaves no manner of doubt of the readiness and willingness of the respondent no.1/plaintiff. The respondent no.1/plaintiff while calling upon the respondent no.2/defendant no.1 to vacate the property within ten days also requested the respondent no.2/defendant no.1 to intimate to him in writing the date when the respondent no. 2/defendant no.1 would be so vacating the property and delivering possession thereof and "getting the payment". It may be highlighted that there is no mention in the said letter of execution of the sale deed. The actions to be done, in the contemplation of the respondent no.1/plaintiff, were only of getting the possession against the payment.

41. The respondent no.2/defendant no.1 at least on 17th/18th May, 1986 i.e. soon after sending the legal notice dated 14th May, 1986 of termination was aware of the demand of the respondent no .1/plaintiff in the letter dated 13th May, 1986. The respondent no.2/defendant no.1 admittedly did not still ask the respondent no.1/plaintiff to make the payment.

42. On the contrary, the respondent no .1/plaintiff through advocate s letter dated 19th May, 1986 responded to the legal notice of termination. Even if it were to be believed that the respondent no.2/defendant no.1 as on 14th May, 1986 i.e. at the time of issuance of the legal notice of termination was of the view that the respondent no.1/plaintiff was not ready and willing, respondent no.2/defendant no.1 soon thereafter on 17th/18th May, 1986 was aware of the demand of the respondent no.1/plaintiff. The least which was expected of the respondent no.2/defendant no.1 was to give an opportunity to the respondent no.1/plaintiff to make the payment.

43. No such opportunity was admittedly given, not even after receipt of reply dated 19th May, 1986 of the advocate of the respondent no.1/plaintiff.

44. Further, the respondent no.2/defendant no.1 neither in her pleadings nor in her evidence denied having gone to her native place on 30th April, 1986 for the wedding of Mr. Sisodia Sub Inspector. The same also shows that the respondent no.2/defendant no.1 was even on 30th April, 1986 not in a position to vacate the property.

45. This becomes further clear from the cross examination recorded on 8th August, 1994 of the respondent no.2/defendant no.1. She though claimed to have sold the house in June, 1986 but deposed to have shifted to Noida only in the end of 1987. On being quizzed, though she explained that from June, 1986 till shifting to Noida she lived in a tenanted house partly at Mayur Vihar Phase

II and partly in Noida but did not prove the same. She further deposed having completed the construction of her own house in Noida and having shifted thereto only in December, 1987. In the absence of any proof by the respondent no.2/defendant no.1 of having shifted out of the suit property in June, 1986, the preponderance of probability suggests that the respondent no.2 / defendant no.1 found a buyer who was willing to allow her to continue in the premises till the end of the year 1987 and that she was not in a position to vacate and deliver the possession of the property till then and backed out from her transaction with the respondent no.1/plaintiff for this reason only.

46. The respondent no.2/defendant no.1 claims to have made a distress sale of the property for Rs.60,000/- i.e. at a price less than 50% of the price which the respondent no.1/plaintiff had agreed to pay and had notified the respondent no.2/defendant no.1 in his letter dated 13th May, 1986 that he was willing to pay. The respondent no.2/defendant no.1 after the receipt on 17th/18th May, 1986 of the communication dated 13th May, 1986 of the respondent no.1/plaintiff must have been aware of such drastic drop in prices of the property in the area. It is again contrary to normal human behaviour that the respondent no.2/defendant no.1 would still not ask the respondent no.1/plaintiff to make the payment.

47. The settled principle of law has been that time is not of the essence in transactions pertaining to immovable property unless so made of the essence. Neither the agreement made the same of essence nor is it the plea of the respondent no.2/defendant no.1 that time was the essence or at any time made the essence. Rather the extensions admittedly agreed upon for completion of sale negate time being of the essence.

48. Though the Supreme Court in Sardamani Kandappan Vs. S. Rajalakshmi (2011) 12 SCC 18 has observed that time has come to change the said principle but has not done so till now. However taking note of the changing ground reality, the test of readiness and willingness has been made more stringent. The transaction however pertains to the year 1986 when the principle, of time being not ordinarily of the essence in such transactions was well entrenched. The time lag between 30th April, 1986 being the date agreed for performance and 14th May, 1986 i.e. of barely 15 days after which the respondent no.2/defendant no.1 exercised the right of cancellation has to be seen in the said context. The haste with which respondent no.2/defendant no.1 proceeded to terminate the agreement is indicative of the respondent no.2/defendant no.1 having changed her mind and being not in a position to deliver possession of the property. Alternatively even if it were to be held that the respondent no.1/plaintiff did not come forward within the agreed time of 30th April, 1986 to make the payment, the respondent no.2/defendant no.1 at least on 17th/18th May, 1986 after receipt of the letter dated 13th May, 1986 was aware of the readiness and willingness expressed by the respondent no.1/plaintiff. The conduct of the respondent no.2/defendant no.1 of not responding thereto or to the reply dated 19th May, 1986 shows that the respondent no.2/defendant no.1 was not interested in receiving payment of balance sale consideration from the respondent no.1/plaintiff and wanted to renege from the agreement to sell.

49. I am therefore in conformity with the finding of the learned Additional District Judge, of the breach being on the part of the respondent no.2/defendant no.1 and not of the respondent no.1/plaintiff. Though in view of the aforesaid and the judgments supra cited by the senior counsel

for the respondent no.1/plaintiff laying down that the purchaser cannot be ready and willing in vacuum without the seller being ready to sell (applicable in the present case as the respondent no.2/defendant no.1 seller has not established being in a position to offer or deliver vacant possession) but still for the sake of completeness I proceed to discuss the aspect of readiness and willingness of the respondent no.1/plaintiff.

50. There is undoubtedly a plea in terms of Section 16(c) of the Specific Relief Act. All that has to be thus seen is whether the respondent no.1/plaintiff has failed to establish the same.

51. The respondent no.1/plaintiff in his examination-in-chief recorded on 15th May,1991 deposed that he was a teacher in DAV School and his wife was also a teacher in a Government school; that they were at the contemporaneous time drawing salary of Rs.3000/-p.m. and Rs.2200/- p.m. respectively; that he had Rs.15,000/- in cash and Rs.35000/- in bank; that his wife had been depositing her salary with her brother and had so saved nearly Rs.1 lac; that he had a property in Faridabad and another property at Lajpat Nagar; that he had sold the Lajpat Nagar property in the year 1983 and purchased two plots in Sainik Nagar and the value was Rs.2 lacs.

52. I have perused the cross examination by the respondent no.2/defendant no.1 of the respondent no.1/plaintiff and do not find any dent to have been made to the said evidence of the readiness and willingness. The arguments made by the counsel for the appellant/defendant no.2 in this regard are on a misreading of the evidence.

53. I have also perused the cross examination by the appellant/defendant no.2 of the respondent no.1/plaintiff conducted on 5th March, 2007 and do not find any dent having been made therein also on the aspect of readiness and willingness of the respondent no.1/plaintiff. The finding of the learned Additional District Judge in this respect is also thus confirmed.

54. That leads to the question whether the defence under Section 19(b) of the Specific Relief Act is available to the appellant/defendant no.2 as a subsequent purchaser.

55. The position which emerges from the judgment supra is that the said defence is not available where the subsequent purchase is during the pendency of the suit.

56. The registered sale deed dated 9th March, 1999 in favour of the appellant / defendant no.2 is certainly during the pendency of the suit and would thus be hit by the principle of lis pendens. The question to be considered is that even if the respondent no.2/defendant no.1 had entered into an Agreement to Sell the property to the appellant/defendant no.2 on 16th June, 1986 i.e. before the institution of the suit on 31st July, 1986, and executed the sale deed dated 9th March, 1999 in pursuance thereto, whether the said principle of lis pendens not be applicable. In my opinion it would be. An Agreement to Sell confers no right in the immovable property and only confers a right to specific performance thereof. The law in this regard is succinctly discussed in the judgment of this Court in Jiwan Das Vs. Narain Das AIR 1981 Del 291 and has been followed in Sunil Kapoor Vs. Himmat Singh 167 (2010) DLT 806. It was held that the Agreement to Sell does not entitle the purchaser to exercise any right as owner of the property, not even when a decree for specific

performance is passed but till a conveyance deed in pursuance thereto is registered. Though undoubtedly the Division Bench of this Court in Asha M.Jain held that judicial notice can be taken of the transactions pertaining to immovable property prevalent in the city through the medium of agreement to sell coupled with delivery of possession and accompanied by general power of attorney etc but it came to be so held in the context of the rights to be exercised by a bank for recovery of its dues from the said property. Even otherwise the Supreme Court in Suraj Lamp & Industries Pvt. Ltd. has expressly overruled Asha M. Jain.

57. The contention of the counsel for the appellant/defendant no.2 that Suraj Lamp & Industries Pvt. Ltd. being prospective would thus not apply is not correct. As aforesaid this was the view of this Court as far back as in Jiwan Das supra (1981). Moreover the protection afforded in Suraj Lamp & Industries Pvt. Ltd. is for regularizing the transaction and cannot be used to contend that rights in property were created by an Agreement to Sell. Further the said protection is meant for claims of transferors after having transferred the property in such manner.

58. Though I had during the hearing inquired whether the rights created in Section 53A of the Transferor of Property Act are not title to the property but from the judgments supra cited by the senior counsel for the appellant/defendant no.2 it is clear that Section 53A is also intra-party only and cannot affect a third party as the respondent no.1/plaintiff in the present case is.

59. I may consider the matter from another aspect. If the sale deed dated 9th March, 1999 had not been executed and registered, the claim of the appellant/defendant no.2 would have been on the basis of the Agreement to Sell only. I tend to agree with the view taken by the Bombay High Court in Sujata Sanzgiry supra that the title arising subsequently referred to in Section 19(b) can be only title by way of a registered document and not by way of Agreement to Sell. An agreement purchaser as aforesaid has no title to the property and is at best a nominee of the seller. It is inconceivable that a seller can defeat the sale by merely entering into an Agreement to Sell. However I do not intend to take any final binding view in this regard as I am of the opinion that the appellant/defendant no.2 has failed to prove that he has paid money if any in good faith and without notice of the original contract. The Agreement to Sell dated 16th June, 1986 is for a consideration of Rs.60,000/- and consideration under the Sale Deed is of Rs.1,60,000/-. The appellant / defendant no.2 prior to the execution of the Sale Deed admittedly knew not only of the prior Agreement to Sell in favour of the appellant/defendant no.2 but also of the pendency of the suit. The payment by the appellant/defendant no.2 of Rs.1,60,000/- cannot thus be said to be in good faith and without notice of the original agreement.

60. For the aforesaid reasons, I am of the view that the provisions of Section 19(b) are not applicable to the appellant/defendant no.2.

61. There is thus no merit in the appeal, which is dismissed with costs. Counsel s fee is assessed at Rs.25,000/-.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

th JANUARY 20 2014 bs/M..