Hasvantbhai Chhanubhai Dalal vs Adesinh Mansinh Raval on 12 April, 2019

Equivalent citations: AIRONLINE 2019 GUJ 44

Author: J. B. Pardiwala

Bench: J.B.Pardiwala

C/FA/1539/2015 CAV JUDGMENT

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/FIRST APPEAL NO. 1539 of 2015

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE J.B.PARDIWALA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ? YES

2 To be referred to the Reporter or not ? YES

3 Whether their Lordships wish to see the fair copy of the judgment ? NO

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ? NO

CIRCULATE THIS JUDGEMENT IN THE SUBORDINATE JUDICIARY.

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HASVANTBHAI CHHANUBHAI DALAL

Versus

ADESINH MANSINH RAVAL & 7 other(s)

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Appearance:
MR SN SHELAT, SENIOR ADVOCATE WITH MR HRIDAY BUCH(2372) for the Appellant(s) No. 1
MR MC BHATT, SENIOR ADVOCATE WITH MR JIGAR P RAVAL(2008) for the Defendant(s) No. 3.1,3.3
RULE NOT RECD BACK(63) for the Defendant(s) No. 3,8
RULE SERVED(64) for the Defendant(s) No. 2,3.2,3.4,4,5,6,7,8.2,8.3,8.4

RULE UNSERVED(68) for the Defendant(s) No. 1
UNSERVED EXPIRED (R)(69) for the Defendant(s) No. 8.1
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CORAM: HONOURABLE MR.JUSTICE J.B.PARDIWALA

Date : 12/04/2019

CAV JUDGMENT

1 This First Appeal under Section 96 of the Code of Civil Procedure, 1908 (for short, 'the C.P.C.') is at the instance of the original plaintiff and is directed against the judgment and decree passed by the 9th Additional Senior Civil Judge, Vadodara dated 30th June 2015 in the Special Civil Suit No.219 of 2003, by which the Civil Court dismissed the suit filed by the plaintiff seeking specific performance of contract based on an agreement of sale.

□CASE OF THE PLAINTIFF:

2 The respondents herein are the original defendants. They are the lawful owners of the suit land bearing survey No.585 admeasuring 14,346 sq. mtrs. situated at village : Gorva, District : Vadodara. The suit land is of restricted tenure land. To put it in other words, the property in dispute is a new tenure. The owners of the property executed an agreement of sale dated 21st January 1993 Exhibit : 98 with respect to the suit land in favour of the plaintiff. The owners decided to sell their land at the rate of Rs.10.90 per sq. ft. The three main conditions, as stipulated in the agreement of sale, are :

(1) The sale deed was to be executed within a period of three years;

(2) The plaintiff agreed to obtain all the necessary permissions from the revenue authorities including the payment of the amount of premium, etc, that may be fixed by the concerned authorities;

(3) In the event of the necessary permission being declined by the concerned authorities, the amount paid by the plaintiff to the owners would have to be paid back to the plaintiff.

3 It appears from the materials on record that the agreement of sale dated 21st January 1993 Exhibit : 98 referred to above came to be cancelled with the mutual understanding of the parties on the ground that the plaintiff failed to pay the requisite amount towards the sale consideration to the owners in time. It also appears that the agreement of sale dated 21st January 1993 Exhibit : 98 was extended for a further period of one year i.e. upto 24th January 1996. A second agreement to sale came to be executed by the owners in favour of the plaintiff dated 27th October 1997 Exhibit : 96 with respect to the very same property. The sale price fixed in the said agreement Exhibit : 96 was Rs.17/□per sq. ft. It was understood between the parties that if the necessary permissions were not obtained by the plaintiff within a period of one and half years, then the time period to perform the contract would be extended only with the consent of the owners.

4 It is the case of the plaintiff that as the suit land is of restricted tenure and is covered under Section 43 of the Bombay Tenancy and Agricultural Lands Act, 1948 (for short, 'the Tenancy Act, 1948), he applied with the office of the Collector for the necessary permission to convert the new tenure land to old tenure. The plaintiff received a communication dated 16th September 2000 Exhibit : 100 from the office of the Collector, Vadodara, calling upon the plaintiff to deposit an amount of Rs.1,02,03,724/□(in words : Rupees One Crore Two Lakh Three Thousand Seven Hundred Twenty Four only) towards the premium. The plaintiff was also conveyed that the premium amount shall have to be deposited within twenty one days. The area of the suit land shown in the communication Exhibit : 68 is 12,150 sq. mtrs.

5 It is the case of the plaintiff that he failed to deposit the premium amount referred to above as he intended to transfer his rights under the agreement of sale to a third party. However, the fact remains that the premium amount could not be paid by the plaintiff and he has very candidly admitted the same. In such circumstances, the permission granted by the Collector to convert the new tenure land to old tenure automatically lapsed. The land, as on date, continues to be of the restricted tenure.

6 It is the case of the plaintiff that the land owners issued a public notice dated 14th January 2003 in a daily newspaper 'Sandesh' for the purpose of obtaining the title clearance certificate.

7 The plaintiff having read the public notice published in the newspaper tendered his objections dated 19th January 2003 on the ground that he has an agreement of sale duly executed by the owners in his favour.

8 According to the plaintiff, he received a letter from the owners dated 4th February 2003 Exhibit : 90 informing him that the agreement of sale stood cancelled as the plaintiff failed to discharge his obligation, as stipulated in the agreement of sale. The owners also asked the plaintiff to collect the amount of Rs.18,30,000/□(in words : Eighteen Lakh Thirty Thousand only) paid by the plaintiff to the owners in the said transaction.

9 The cancellation deed dated 10th February 2003 Exhibit : 147 has been placed on the record of this case.

10 The plaintiff addressed a letter dated 15th February 2003 Exhibit :

> 91 to the owners conveying to them that the agreement in question was very much in force and that the owners were not cooperating with the plaintiff for the purpose of obtaining the necessary permissions from the concerned authorities.

11 The land owners, through their advocate, got a notice issued to the plaintiff dated 20th February 2003 Exhibit : 92 communicating that the plaintiff had failed to comply with the terms of the agreement of sale; the said agreement has been cancelled and the deed of cancellation had been registered dated 10th February 2003.

12 In such circumstances referred to above, the plaintiff instituted the Special Civil Suit No.219 of 2003 in the Civil Court at Vadodara and prayed for the following reliefs:

"[8] Therefore, I pray that:

1) As the respondents have received full amount consideration regarding suit property, kindly pass an order directing the respondents to execute Registered Sale Deed after obtaining necessary permission as per agreement of the suit property.

2) To pass an order that necessary permission can be obtained and Registered Sale Deed can be executed through the court commissioner, if the respondents commit default to do so.

3) To declare that the respondents have no right or authority to transfer of assign the suit property to any other person or institute or company as full amount of consideration towards the suit property has been accepted by the respondents and to grant permanent injunction that the respondents do not enter into any transaction regarding the suit property.

3A) The respondents have arbitrarily and ex□parte canceled the Registered Agreement for to Sell by Cancellation Agreement, which is registered with the office of registrar on 10/02/2003 under Sr. No.1337, which is illegal. Hence, it is prayed to pass an order to quash the ex□parte act of the respondents to cancel Registered Agreement to Sell dated 27/10/1997.

3B) To pass an order to hold that the respondents do not have right or authority to transfer the suit property except of the plaintiff and to declare null and void, if any transaction or transfer has been done by the respondent regarding the suit property.

4) To pass an order directing the respondents to complete the procedure to convert the suit property bearing Survey No.585 from new tenure to old tenure and to execute Registered Sale Deed in favour of us.

5) To pass an order that if the respondents commit default or fail to complete the procedure to convert the new tenure land into old tenure land, in such circumstances, the same procedure could be completed by the court commissioner."

□CASE OF THE DEFENDANTS:

13 According to the owners of the property in question, the agreement of sale is not enforceable in law, as the same is hit by the provisions of Section 43 of the Tenancy Act, 1948. To put it in other words, it is the case of the owners that the agreement of sale being invalid in law cannot be enforced for the purpose of seeking the discretionary relief of specific performance. The case of the owners is that the plaintiff committed breach of the terms of the contract. According to the owners, the amount of Rs.18,30,000/□paid by the plaintiff is not the full sale consideration. According to the owners, the assertion on the part of the plaintiff that the entire sale consideration has been paid is

not true and correct. The land agreed to be sold admeasured 14,346 sq. mtrs., which is equal to 1,54,362 sq. ft. According to the owners, the total sale consideration at the rate of Rs.17 per sq. ft. comes to Rs.26,24,170/-(in words : Rupees Twenty Six Lakh Twenty Four Thousand One Hundred Seventy only). It is also the case of the owners that in the application filed by the plaintiff seeking permission for conversion of the tenure of the land, it has been stated that the permission be granted after deducting 1250 sq. mtrs. If 1250 sq. mtrs. are converted to square feet, the figure would be 13,074 sq. ft. At the rate of Rs.17/-, the sale consideration would be Rs.22,22,478/-(in words : Twenty Two Lakh Twenty Two Thousand Four Hundred Seventy Eight only).

14 According to the owners, the plaintiff was not ready and willing to perform his part of the contract. According to the first agreement dated 21st January 1993 Exhibit : 98, the sale consideration was fixed at the rate of Rs.10.90 per sq. ft. and the time period of performance of the contract was fixed, as three years with the consent of the parties, the time period was extended by a further period of one year for the payment of the sale consideration at the rate of Rs.15/-per sq. ft. Even thereafter, the plaintiff failed to pay the entire sale consideration within the extended period of one year, and in such circumstances, the agreement was cancelled vide document dated 27th October 1997 Exhibit : 96. The plaintiff admitted in the deed of cancellation that he was not able to pay the sale consideration in the first instance, and therefore, time period had to be extended, but even thereafter, the plaintiff could not pay the sale consideration and get the executed.

15 It is the case of the owners that on the same day i.e. on 27th October 1997, a fresh agreement of sale Exhibit : 96 came to be executed fixing the price at the rate of Rs.17/-per sq. ft and the time limit of one and half years was fixed to perform the contract. According to the owners, indisputably, the amount could not be paid by the plaintiff within one and half years commencing from 27th October 1997.

16 It is also the case of the owners that the plaintiff kept them in dark. Although the plaintiff had received the communication dated 16th September 2000 from the office of the Collector as regards the conversion of the new tenure land to old tenure, he deliberately did not disclose such fact before the owners. According to the owners, the plaintiff had no funds with him to pay the premium amount and his intention was to sell the land to a third party on the strength of the agreement of sale.

17 Having regard to the pleadings of the respective parties and the documentary evidence on record, the Civil Court framed the following issues:

> 1. Whether the plaintiff proves that the defendants have executed an agreement to sale on 24/1/96 and thereafter on 27/1/97 ?
>
> 2. Whether the plaintiff proves that he has paid full amount of consideration of the suit property in tune of Rs.18,30,000/-to the defendants ?
>
> 3. Whether the plaintiff proves that he was and is ready to perform his part of agreement to sale ?

4. Whether the plaintiff proves that the defendants are failed to fulfill the condition of agreement to sale ?

5. Whether the plaintiff proves that the defendants do not have any rights to transfer or to assign the present suit land ?

5(A).Whether the plaintiff proves that the cancellation of an agreement by defendants is illegal and invalid?

5(B).Whether the defendant proves that the agreement to sale in respect of Revenue Survey No.585 of suit□property is against in a law and decree can not be drawn for said property?

5(C).Whether the defendants proves that plaintiff is entitled for damages only?

5(D).Whether the defendants proves that the sale□deed is not executed in favour of the plaintiff because of in action of plaintiff?

5(E).Whether the plaintiff proves that land is not acquired or is not going to be acquired from Survey No.585 ?

5(F).Whether the plaintiff proves that inspite of injunction order, defendants have handed over the suit property to one Shantilal Chhotabhai and they have willfully made disobedience of Court's order?

6. Whether the plaintiff proves that he is entitled to get relief as prayed for ?

7. What order and what decree?"

18 The issues framed referred to above came to answered as under::

"(7) My findings, are as under :□

1.Partly affirmative.

2.Partly affirmative.

3.Negative.

4.Negative.

5.Affirmative.

5(A). Negative.

5(B). Affirmative.

5(C). Partly affirmative.

5(D). Affirmative.

5(E). Negative.

5(F). Negative.

6. Negative.

7. As per final order."

19 For the purpose of answering the two first issues framed by the Civil Court, the reasons assigned are as under:

> "(26) I gone through the documents produced by both the sides and the oral evidences of both the sides and the judgments and the arguments submitted by both the sides. On perusal of records and the oral evidences it is admitted by both the sides at the initial stage in the year 1993 there was an execution of agreement to sale between both these parties and which was produced at Ex.98.It is also undisputed that at that time a development agreement was also executed for the present suit land which is produced at Ex.108. It is the contention of the plaintiff that both the deeds are cancelled due to greediness of the defendants. It is the contention of the plaintiff that on 24/1/96 a new agreement to sale has been executed and it was registered at Sr.305 in the office of registrar but on perusal of records of the documents which are exhibited from the side of the plaintiff, there is no document which shows the agreement to sale dated 24/1/96. However in the oral evidence of the plaintiff also there is no mention about execution of any agreement to sale in the year 1996.

The plaintiff has produced examination in chief at Ex.50, Ex.76 and Ex.160 there is no averments in any of the examination in chief of plaintiff, regarding the agreement to sale of the year 1996 nor any copy of such agreement to sale has been produced by either sides. However both the sides admitted about the new agreement to sale dated 27/1/97 and Ex.96 is original agreement to sale dated 27/1/97 which is also registered therefore it is undisputed that there is an execution of agreement to sale dated 27/10/97 therefore, I inclined to hold partly affirmative to the issue no.1.

(27) Further, in the issue no.2 it is stated whether the plaintiff's proves that he has paid Rs.1,83,000/□to defendants but considering the facts and evidences produced by both the sides it is typographical error and it is required to be read for the amount as 18,30,000/□ On perusal of record in the plaint as well as in oral evidence of plaintiff and the document at Ex.90 which is letter by the defendants and Ex.92 the copy of the notice given by defendants to the plaintiff and the present application filed at Ex.72 by the defendants in which he has applied for deposit

Rs.18,30,000/- All the documents shows that plaintiff has paid Rs.18,30,000/-to the defendants. Further there is no denial by the defendants about receipt of the amount in tune of Rs.18,30,000/-. Even in the cross examination and in the deposition of the defendants at Ex.162, the defendants admitted about the receipt of Rs.18,30,000/-in toto for all the agreement to sale, therefore it is undisputed issue that the plaintiff have paid Rs.18,30,000/-to the defendants. But it is the case of the plaintiff that it is the amount of the full consideration of the suit land while as per the contention of the defendants the amount of the full consideration is in tune of Rs.26,25,000/-as stated in his examination in chief of defendants at Ex.162. On perusal of the last agreement to sale between the parties which is produced at Ex.96 which is executed on 27/10/97 in this document it is stated that after deduction of the part of acquired land from the authorities the remaining free hold land would be decided to sell at the rate of Rs.17 per Sq.ft. However there is no specific amount or lumsum amount is determined for the present suit land. He further stated in agreement to sale that there is pendency of form-1 under ULC Act and the land which is retainable for the owner under the ULC Act and the excess land in which as per provisions of section 21(1) a scheme would be floated and that land also agreed to sale to the plaintiff. However there is no rate is mentioned for such excess land and the land which remains free hold under the ULC Act. Thus, under this circumstances it is very much clear that what is the space would be remained in the present suit land after deduction of the land which would be acquired by authorities is not clear therefore what would be actual total amount as a full consideration for the suit land is not clear. Under this circumstances the amount which has been paid to the defendants in tune of Rs.18,30,000 is cannot be said it is the amount of full consideration for the suit land.

(28) The plaintiff also failed to prove in his oral evidence or in his documentary evidence how he has enumerated this amount of Rs.18,30,000/-as a full consideration in his plaint. The plaintiff do not mentioned how much land remains clear to sell by the defendants to the plaintiff. However in examination in chief he has mentioned that 9966 Sq.mt remains free to sell to the present plaintiff. But, it is not clear as how he has counted in tune of 9966 Sq.mt as free land from the disputed suit land. On perusal of Ex.100 ie. The order passed by Ld.Collector Vadodara on 16/9/2000 in which the authorities has declared 12,150 Sq.mt for the NA purpose. Thus, the contention of the plaintiff that the land admeasuring 9966 Sq.mt. Out of the present suit land is different from the order passed by Ld.Collector Vadodara. In this situation how the plaintiff has enumerated in tune to 9966 Sq.mt is not clarified and therefore it cannot be said that the amount which has been paid by the plaintiff on the basis of 9966 Sq.mt is the amount of full consideration, particularly when the defendants claimed amount of Rs.26,25,000/-as a amount of full consideration. Under this circumstances in my view plaintiff failed to prove the contention that Rs.18,30,000/-is amount for the full consideration of the present suit land. Thus, it is undisputed that plaintiff has paid Rs.18,30,000/-to the defendants but it cannot be said it is the amount for full consideration. Therefore, I replied partly affirmative to issue no.2 ."

20 On the issue whether the plaintiff was ready and willing to perform his part of contract, the findings recorded by the Civil Court are as under:

> "(29) Further on perusal of the records it is the contention of the plaintiff that he is ready and willing to perform his part of agreement to sale. On perusal of agreement

to sale at Ex.96 ie. Latest agreement to sale executed between the parties in which the defendants admitted that Rs.1,25,000/-as earnest money by cheque no. 06510 & 79367. It is further stated that from the date of agreement to sale every six months Rs.1,00,000/-is required to pay for one and half year and thereafter remaining amount of full consideration is required to pay by plaintiff. This agreement to sale was executed on 27/10/97. Therefore on perusal of the payment receipt along with its statement we have to verify that on and after 27/10/97 for period of one and half year how much money have been paid. On 29/1/98 Rs.1,00,000/-are paid thereafter on 5/3/98 Rs.50000/-and 16/6/98 Rs.25,000/-and 8/1/99 Rs. 50,000/-and on 11/1/99 Rs.50,000/-and on 4/2/99 Rs.1,00,000/-and on 19/2/99 Rs. 1,00,000/- and on dt.6/3/99 Rs.1,00,000/-has been paid and thereafter plaintiff have to pay remaining amount of consideration and he has to execute the registered sale deed. It is further mentioned in the agreement to sale if necessary permission is not acquired then time for execution would be extended. However in this agreement to sale there is no specific amount is mention that what would be the amount of total consideration for the suit land and it is not clarified which party has to get the necessary permissions and will pay the amount of the premium and in this situation we have to verify the oral evidence and cross examination of the plaintiff.

(30) In the cross examination of the plaintiff it is admitted that the condition mentioned at page no.5 of agreement to sale for the year 1993 is true. On perusal of the agreement to sale of the year 1993 at Ex.98 and on page no.5 it is specifically stated that all the permission under the law is required to be get by the purchaser and the amount of premium is also to be paid by purchaser ie. By plaintiff. Further in the next line it is admitted that there was an order passed by an authority granting NA permission on 16/9/2000. It is further admitted that he has not deposited the amount of premium in tune of RS.1,20,03,724/- In the page no 3 of deposition it is admitted by the plaintiff that he had received the letter dated 16/9/2000 which is produced at Ex.100.

(31) Further on perusal of the oral evidence of defendants at Ex.162, in the cross examination at page no.11 it is admitted that the plaintiff has proceeded for procedure for change of tenure. However it is denied that because the defendants have created the rights in favour of Shantilal Chotalal, the plaintiff has not deposited the amount of premium for change of tenure. Thus, it is admitted by the plaintiff that plaintiff is liable to deposit the amount of premium but it is the contention that due to creation of rights to Shantilal Chotalal the plaintiff has not deposited the said amount. It is the contention of plaintiff that the defendants have created a rights in favour of Mr.Shantilal Chotalal. But this contention of the plaintiff is not found in the suit or in the amendment plaint, that the defendants have created a third party rights in favour one Shantilal Chotalal therefore he has not paid the amount of premium. Further on perusal of plaint at page no.5 in para no,3 a in amended plaint it is stated that plaintiff has to bear all the cost for permission regarding the suit land and defendants have to cooperate for such permissions. Further in the cross examination

of plaintiff at page no.10 it is admitted by the plaintiff that the defendants have cooperated for necessary permission and therefore permission of NA was received. Thus it is very much clear that the defendants have fully cooperated to the plaintiff for necessary permission regarding change of tenure from new to old tenure but the plaintiff failed to deposit the amount of premium as per his own admission."

21 On the issue that the agreement of sale is not enforceable being hit by Section 43 of the Tenancy Act, 1948, the findings recorded by the Civil Court are as under:

"(34) Further on perusal of records it is undisputed that the present suit land bearing survey no,585 is of a new tenure land and there is no evidence till today that the present suit land is converted into old tenure land or converted into non□agricultural land therefore there is statutory bar over the defendants to sell or transfer in favour of any party except they get the permission from the authorities under the Tenancy Act. On perusal of Ex.100 order passed by Collector for depositing amount of premium tune of Rs.1,02,03,724/□so the procedure for conversion of non□ agricultural land would be proceeded further. The amount of the premium required to be paid within 21 days. There is no evidence on record which disclosed the fact that the amount of premium has been paid within 21 days. Therefore considering the fact of the order at Ex.100 is of the date of 16/9/2000, it cannot be said till today this order is in force or not. Thus, it is undisputed that the present suit is still not converted into non□agricultural land nor converted into old tenure land. Therefore as discussed above there is statutory bar to transfer over such land therefore, I inclined to hold affirmative issue no.5.

(35) Further it is the contention of the plaintiff that the cancellation of the agreement to sale by defendants are illegal and invalid as it is executed unilateral way. On perusal of both the agreement to sale at Ex.96 & Ex.98, there is a specific condition that if plaintiff failed to get the necessary permission for sale by the authorities in that case time for execution of payment of full consideration and time for registration of sale deed would be extended with the consent of both the parties. It is undisputed that after the execution of agreement to sale within 3 years the necessary permissions were not acquired nor the land was converted into non□agricultural land. Further in agreement to sale dated 27/10/97 at page no.4 it is specific stated that if procedure for necessary permission would not be completed within one and half year in that case with the consent of both the parties the time period for execution for registered sale deed and payment of remaining amount of consideration would be extended but on perusal of record it is nowhere found that such time period of extension was executed. There was no documents on record which discloses after the lapse of one and half year of the last agreement to sale of 1997 the parties are agreed to extend the time period for execution of registered sale deed. It is contention of the defendants that the plaintiff failed to fulfill the conditions of agreement to sale and though there was full cooperation from the defendants, plaintiff failed to get permission from the authorities as per law and also failed to pay the amount of the full consideration and

therefore in the year 2003 cancelled the agreement to sale due to fault of plaintiff and this cancellation is also registered in the registrar office. Thus it is clear from the record after the lapse of one and half year from the last agreement to sale there was no extension was carried out by the parties as contemplated in the agreement to sale. Under this circumstances after awaiting for more than period of three years after passing of order for premium when the defendants decided to cancel the agreement to sale it cannot be said illegal. Thus in my view when the plaintiff failed to get necessary permission for the suit land within stipulated time period and in absence of any extension by both the parties it cannot be said defendants have illegally cancel the agreement to sale though it is unilateral. Considering the factual aspect of the case as the plaintiff failed to deposit amount of premium and passing of the time period of more than two years, then the action of cancellation has been taken by defendants.

(36) Further on perusal of records it is undisputed that the transaction between present plaintiff and defendants starts from the year 1993 to 2003 in which two agreement to sale were executed between the parties but plaintiff failed to get necessary permissions from authorities as contemplated in both the agreement to sale. Further the plaintiff also failed to transform the present suit lands into non agricultural land for such a long period of ten years and particularly when he get the permission for procedure for NA at that time also he remains failed to submit the amount of the premium to the Government. Under this circumstances it cannot be said though the plaintiff frequently failed to perform his part for such a long time period, the defendants have to sit with the folded hand awaiting for plaintiff's performance. In this circumstances in my view when there is no extension as contemplated in agreement to sale which is executed in the year 1997 after waiting till year 2003 by the defendants for its execution or its cancellation in this circumstances the action of the defendants to cancel such agreement to sale cannot be said arbitrary or illegal. In my view plaintiff failed to prove that how the cancellation of such agreement to sale by defendants in unilateral way is illegal and invalid particularly when he himself failed to preform his part or fulfillment of the condition mentioned in the agreement to sale.

Therefore though I humbly agreed with the principles settled in the judgment cited at AIR 2000 Bombay,187 (Hareshkumar Mehta case), it is not helpful to the plaintiff as in the present case plaintiff himself failed to prove that he is willing to perform his part. Therefore, I inclined to hold negative to reply issue no.5A.

(37) Further as discussed above this suit land is still in the nature of new tenure land which cannot be transferred nor any sale deed can be executed without the permission of Government. Further section 43 of the tenancy Act provides that no land or interest therein purchased by a tenant under section 17(B), 32, 32(F), 32(I), 320, or sold any person under section 32(P) or 34 shall be transferred or shall be agreed by an instrument by in writing to be transferred by sale, gift, exchange mortgage, lease or assignment, without the previous sanctioned of the collector and except in consideration of

payment of such amount as the state Government may be general or special order determined and no such land or any interest therein shall be partition without the previous sanctioned of the Ld.Collector. Further 43(2) provided that any transfer or partition or any agreement of transfer or any land or any interest therein, in contravention of subsection 1 or subsection 1(C) shall be invalid. Thus any agreement to sale regarding the present new tenure land cannot be said a legal one except with the prior sanction of the Ld.Collector.

(38) In the present case there is no contention that the parties have get the prior sanction to such agreement to sale therefore this agreement to sale against the provisions of law. Further as per the provisions of law such suit land of new tenure cannot be transferred by sale deed to any third party without any sanction. Therefore, a decree cannot be passed to execute sale deed for such suit land. Further as principles laid down in 2011(2)GLH 760 (Rameshbhai Chaturbhai case) even in case of compromise also where the party agreed to execute compromise deed such agreement which is against the provision of law cannot be allowed. Further, as discussed above that when on the facts of the case, it is established that plaintiff failed to perform his part, in that case though I humbly agreed with the principles and ratio laid down in the cited judgments by plaintiff on the point that a conditional decree may be passed and on the point that one cannot set benefit of his own wrong, these judgments do not help to the plaintiff in the present case. Therefore, I inclined to hold affirmative to issue no.5B."

22 The Civil Court, ultimately dismissed the suit filed by the plaintiff. Being dissatisfied with the judgment and decree passed by the Civil Court dismissing the suit, the plaintiff is here before this Court with this appeal.

□CONTENTIONS ON BEHALF OF THE PLAINTIFF:

23 Mr. S. N. Shelat, the learned senior counsel assisted by Mr. Hriday Buch, the learned counsel for the plaintiff vehemently submitted that the Civil Court committed a serious error in dismissing the suit. It is submitted that the Trial Court committed a serious error in taking the view that the agreement of sale is not enforceable in law as the same having invalid in view of the provisions of Section 43 of the Tenancy Act, 1948. It is submitted that upon grant of the necessary permissions by the competent authority, a conditional decree can always be passed by the Civil Court. However, the learned counsel fairly conceded that although the necessary permission, as prayed for by the plaintiff, was granted by the Collector, but the amount towards premium fixed for the conversion could not be paid. In such circumstances, as on date, the land still remains of a restricted tenure. It is submitted that the plaintiff would apply a fresh with the Collector, get the amount fixed and will pay the premium and subject to the same, the decree of specific performance may be granted.

24 The learned senior counsel submitted that it cannot be said that the plaintiff was not ready and willing to perform his part of contract. It is submitted that the findings recorded by the Civil Court that the amount of Rs.18,30,000/□is not towards the full sale consideration, is erroneous in law and contrary to the evidence on record. The learned senior counsel submitted that the plaintiff was always ready and willing and even as on date, is ready and willing to perform his part of the contract.

25 In such circumstances referred to above, the learned senior counsel prays that there being merit in this appeal, the same be allowed and the decree of specific performance be granted.

26 The learned senior counsel, in support of his submissions, has placed reliance on the following decisions:

> [1] Premiben Durlabhbhai Patel vs. Sumanbhai Premabhai Patel (Dhodia) [Second Appeal No.7 of 2010 decided on 26th November 2010 by this Court] [2] Shah Jitendra Nanalal vs. Patel Lallubhai Ishverbhai [1985 GLH 53] □CONTENTIONS ON BEHALF OF THE DEFENDANTS -
>
> ORIGINAL OWNERS:

27 Mr. M.C. Bhatt, the learned senior counsel assisted by Mr. Jigar Raval, the learned counsel appearing for the original owners vehemently submitted that no error, not to speak of any error of law could be said to have been committed by the Civil Court in dismissing the suit filed by the plaintiff seeking discretionary relief of specific performance.

28 Mr. Bhatt submitted that the evidence on record clearly indicates that the plaintiff was not ready and willing to perform his part of contract. On the aspect of readiness and willingness, the Civil Court has assigned cogent reasons and no interference is warranted in the present appeal with the view taken by the Civil Court. Mr. Bhatt submitted that that this appeal deserves to be dismissed only on the ground that the agreement of sale is not enforceable in law being a nullity. According to Mr. Bhatt, this Court may not go into any other issue as the initial transaction itself was hit by Section 43 of the Tenancy Act, 1948. Mr. Bhatt submitted that his clients are ready and willing to refund the amount of Rs.18,30,000/□at a reasonable rate of interest to the plaintiff, as may be directed by this Court. According to Mr. Bhatt, this litigation is now almost sixteen years old. In fact, it all started in the year 1993. Ultimately, after a period of ten years, the plaintiff instituted the suit i.e. in the year 2003. He submitted that the relief of specific performance being discretionary in nature, this Court may not grant such relief just because it is lawful to grant the same. Mr. Bhatt submitted that on one hand, the plaintiff failed to deposit the amount of premium and thereby could not obtain the necessary permission, and on the other hand, he blames the owners of having failed to perform their part of the contract. This conduct of the plaintiff itself is sufficient to decline the grant of discretionary relief of specific performance. He submitted that the conduct of the plaintiff seeking the discretionary relief of specific performance is one of the most relevant considerations in law. The entire conduct of the plaintiff has been discussed threadbare by the Civil Court in its judgement. Mr. Bhatt, the learned senior counsel laid much emphasis on the fact that any instrument in writing for transfer of land hit by Section 43 of the Tenancy Act, 1948 is invalid unless prior permission or sanction is obtained from the concerned authorities. According to Mr. Bhatt, there is no provision in the Act for grant of retrospective permission. In such circumstances, when the suit agreement itself was invalid at the time of its execution, the same cannot be enforced in the Court of law for the purpose of seeking relief of specific performance.

29 Mr. Bhatt submitted that the judgement of this Court in the case of Premiben (supra), on which strong reliance has been placed by the plaintiff does not lay down the correct proposition of law. He further submitted that the Full Bench decision of this Court in the case of Shah Jitendralal Nanalal has also no application because in the said case, the Full Bench dealt with the provisions of the Urban Land Ceiling Act. Mr. Bhatt submitted that it will be too much for this Court to direct the owners to execute the sale deed in favour of the plaintiff after almost a period of twenty six years from the date of the first agreement of sale.

30 In such circumstances referred to above, Mr. Bhatt prays that there being no merit in this appeal, the same may be dismissed with appropriate order for refund of the amount of Rs.18,30,000/□at a reasonable rate of interest. Mr. Bhatt, in support of his submissions, has placed reliance on the following decisions:

> [1] Ajaib Singh vs. Tulsi Devi [2000(6) SCC 566] [2] H.P. Pyrarejan vs. Dasappa (dead) by Lrs. 2006(2) SCC 496 [3] A.K. Lakshmipathy (dead) vs. Rai Saheb Pannalal H. Lahoti Charitable Trust 2010(1) SCC 287 - para 18 [4] Ashwinkumar Manilal Shah vs. Chhotabhai Jethabhai Patel 2001(1) GCD 611 [5] H.P. Pyrarejan vs. Dasappa (dead) by Lrs. 2006(2) SCC 496
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> - para No.5, [6] B. Vijaya Bharathi vs. P. Savitri AIR 2017 SC 3934 [7] Ashabhai Dhulabhai Patel vs. Shardaben Wd/o Chandulal [8] Rameshbhai Chaturbhai Prajapati and others vs. Minaxiben Wd/o Rasiklal Tilakram and others 2011 (2) GLH [9] Rajasthan Housing Board vs. New Pink City Nirman Sahkari Samiti Limited 2015(7) SCC 501

31 Having heard the learned counsel appearing for the parties and having gone through the materials on record, I propose to frame the following points for determination:

> [1] Whether a suit of specific performance of contract based on an invalid agreement of sale hit by Section 43 of the Tenancy Act, 1948 is maintainable in law? In other words, whether an agreement of sale hit by Section 43 of the Tenancy Act, 1948 is enforceable in law?
>
> [2] Whether it would be lawful for the Court to grant a conditional decree of specific performance of contract based on an invalid agreement of sale being hit by the provisions of Section 43 of the Tenancy Act, 1948?
>
> [3] Whether the plaintiff has established on the basis of the evidence on record that he was always ready and willing to perform his part of the contract?
>
> [4] Having regard to the overall evidence on record, is any case for grant of the discretionary relief of specific performance made out by the plaintiff? Even if this Court holds that the agreement of sale is enforceable in law and a conditional decree or discretionary relief can be granted subject to the sanction or permission that may

> be accorded by the competent authority under the provisions of the Tenancy Act, will it be appropriate for this Court to grant the discretionary relief of specific performance after a period of twenty six years?

32 As the issue with regard to Section 43 of the Tenancy Act and the grant of conditional decree being a neat question of law, I propose to take it up first.

33 Indisputably, the land in question is of a restricted tenure. It is also not in dispute that the plaintiff had applied with the Collector seeking necessary permission to convert the land from new tenure to old tenure and such permission was granted at one point of time subject to deposit of the amount of premium. This was way back in the year 2000. It is also not in dispute that the plaintiff was not able to deposit the amount towards the premium, and in such circumstances, the permission lapsed. The plaintiff has failed to offer any reasonable explanation in this regard. On the contrary, from his own admission, it appears that he intended to transfer the land in favour of a third party on the strength of his rights under the agreement of sale and get out of the transaction.

34 I may only refer to the relevant part of Section 43 of the Act, 1948. Section 43(1) of the Act, 1948 reads thus:

> "Restriction on transfers of land purchased or sold under this Act.□(1) No land or any interest therein purchased by a tenant under section 17B, 32, 32F, 32I, [32U, 43□ 1D or 88E] or sold to any person under section 32P or 64 shall be transferred or shall be agreed by an instrument in writing to be transferred by sale, gift, exchange, mortgage, lease or assignment, without the previous sanction of the Collector and except in consideration of payment of such amount as the State Government may by general or special order determine; and no such land or any interest, therein shall be partitioned without the previous sanction of the Collector."

35 Section 43(2) of the Act reads thus:

> "Any transfer or partition, or any agreement of transfer, or any land or any interest therein in contravention of sub□section (1) [or sub□section (1C)] shall be invalid."

36 Before substitution of Section by Act No.30 of 1997, Section 43 of the Act, 1948 in terms provided as under:

> "Section 43 : (1) No land purchased by a tenant under section 32, 32F, [32I, 320 or 32U] or sold to any person under section 32P or 64 shall be transferred by sale, gift, exchange, mortgage, lease or assignment, without the previous sanction of the Collector and except in consideration of payment of such amount as the State Government may by general or special order determine.
>
> (2) Any transfer or partition, or any agreement of transfer, or any land or any interest therein in contravention of sub□section (1) [or sub□section (1C)] shall be invalid."

37 Thus, before substitution of Section by Gujarat Act No.30 of 1997, the prohibition was only against the transfer by sell, gift, exchange, mortgage, lease or assignment. But, by the amendment, it is provided that no instrument in writing shall be made for the transfer of a land governed by Section 43 of the Act. Thus, an agreement to sale is now covered under Section 43 of the Amendment Act.

38 It is abundantly clear from the plain language of Section 43 of the Act that any instrument in writing for transfer of the land governed by Section 43 would be invalid unless prior permission is obtained. There is no provision in the Act for grant of retrospective permission. There is no escape from the fact that the suit agreement at the time of its execution was invalid as there was no permission of the competent authority in that regard. At this stage, let me look into the decision of the learned Single of this Court delivered in the case of Premiben (supra), on which strong reliance has been placed by the plaintiff. Premiben (supra)'s case was a Second Appeal, in which, the following three substantial questions of law were raised in the memorandum of the Second Appeal:

> 1. Whether the First Appellate Authority is correct in saying that Civil Court would have jurisdiction to try the suit for specific performance of contract in spite of bar of Sec. 73AA of Bombay Land Revenue Code as well as Sec. 43 of Bombay Tenancy & Agricultural Lands Act applying with all force to the facts of the case and also keeping in mind Sec. 73AC of the Bombay Land Revenue Code?
>
> 2. Whether the Civil Court would have jurisdiction to pass decree of specific performance of an agreement to sale which is a void agreement in terms of Sec. 43 of Bombay Tenancy and Agricultural Lands Act?
>
> 3. Whether the Civil Court would have jurisdiction to entertain the suit of specific performance in anticipation of post facto permission at the end of the revenue authority, more particularly when Sec.

73AA of Bombay Land Revenue Code and Sec. 43 of Bombay Tenancy and Agricultural Lands Act is applicable to the facts and circumstances of the case?"

> In the said case, the Trial Court had rejected the plaint under Order VII Rule 11 (D) on the ground that the suit for specific performance of contract was not maintainable as the transaction was hit by Section 43 of the Act and Section 73(AA) of the Bombay Land Revenue Code. The First Appeal came to be allowed by the District Court and the order passed by the Civil Court rejecting the plaint was quashed and set aside. Being dissatisfied, the original defendant came before this Court with a Second Appeal. While dismissing the Second Appeal, the learned Single Judge observed as under:
>
> "4. The substantial questions of law which are posed in this second appeal with regard to the jurisdiction of the civil court regarding specific performance of the contract in spite of bar under sec. 43 of Bombay Tenancy and Agricultural Lands Act

r/w sec. 73AA of the Bombay Land Revenue Code has been considered by the High Court while deciding Special Civil Application No. 17525 of 2003 referring to the provisions of both the Act and the Code.

5. Reliance has been placed on a judgment reported 1985 GLH 53 in the case of Shah Jitendra Nanalal v. Patel Lallubhai Ishverbhai wherein it has been held that a conditional decree for specific performance of the contract can be passed and as can be seen from the provisions it is subject to getting necessary permission from the competent authority, meaning thereby such an agreement or contract is not totally barred or prohibited, but what is required is a clearance or permission as required under the aforesaid statute and the Bombay Land Revenue Code.

6. Therefore, once it is provided that permission could be obtained, it implies that the permission may be granted depending upon the facts of each case. In other words, when the permission is to be granted by the competent authority, it implies that such a transaction could be valid after the permission is obtained meaning thereby it is a matter of complying with the procedural requirement of law and it is not totally barred and the agreement would not be void.

7. It is in these circumstances, while considering similar position with regard to specific performance of the contact and the bar of Urban Land Ceiling Act with regard to vacant land, the Full Bench of this Court in a judgment in the case of Shah Jitendra Nanalal v. Patel Lallubhai Ishverbhai and ors. reported in AIR 1984 Gujarat 145(1) has considered the same contentions and it has been clearly observed that the court can pass a conditional decree for specific performance subject to the exemption being obtained from the competent authority under the Ceiling Act.

8. In the same way, the provisions of Sec. 43 of Bombay Tenancy and Agricultural Lands Act which refers to 'Restriction on transfer of land purchased or sold under this Act' clearly provide that such transaction without the previous sanction of the Collector would be invalid and Sec. 43(1A) refers to the fact that subject to some conditions the sanction may be given.

9. Similarly, the provisions of Sec. 73A and 73AA of the Bombay Land Revenue Code refers to restriction on the right of transfer of such land. The bar as stated in this refer to the decision by the tribunal established under the Act and it refers to necessary sanction subject to the compliance of the requirement of law.

10. Therefore, when there is no absolute bar and when the law as interpreted by the court including the Full Bench of this court has made it clear that conditional decree could be passed, the impugned judgment and order by the lower appellate court cannot be said to be erroneous and the substantial questions of law proposed to be raised in the present appeal are no longer res integra and in fact have been considered and decided and therefore there is no substantial question of law which

can be said to have arisen in the present Second Appeal.

11. It is well accepted that the scope of second appeal under sec. 100 of CPC is very limited and as observed by the Hon'ble Apex Court in a judgment in the case of Mst. Sugani v. Rameshwar Das & anr., reported in AIR 2006 SC 2172, only when substantial question of law is involved it could be entertained."

39 By placing reliance on the aforesaid decision rendered by a learned Single Judge, it has been argued on behalf of the plaintiff that a conditional decree can be passed and the transaction cannot be said to be a nullity. It appears that the learned Single Judge placed strong reliance on a Full Bench decision of this Court in the case of Shah Jitendra Nanalal (supra). In my opinion, the Full Bench decision of this Court has been misinterpreted. Let me elaborate my views in this regard.

40 The Full Bench in Shah Jitendra Nanalal (supra) interpreted Section 20 read with Section 5 of the Urban Land (Ceiling and Regulations) Act, 1976. The Full Bench took the view that the right to transfer the excess vacant land by the land owner is a dormant right and it would be permissible to execute an agreement of sale of such vacant land subject to grant of exemption by the Government. Section 5 of the repealed U.L.C. Act reads as under:

"5. Transfer of vacant land:

(1) In any State to which this Act applies in the first instance, where any person who had held vacant land in excess of the ceiling limit at any time during the. period commencing on the appointed day and ending with the commencement of this Act, has transferred such land or part thereof by way of sale, mortgage, gift, lease or otherwise, the extent of the land so transferred shall also be taken into account in calculating the extent of vacant land held by such person and the excess vacant land in relation to such person shall, for the purposes of this Chapter, be selected out of the vacant land held by him after such transfer and in case the entire excess vacant land cannot be so selected, the balance, or, where no vacant land is held by him after the transfer, the entire excess vacant land, shall be selected out of the vacant land held by the transferee :

Provided that where such person has transferred his vacant land to more than one person, the balance, or, as the case may be, the entire excess vacant land aforesaid, shall be selected out of the vacant land held by each of the transferees in the same proportion as the area of the vacant land transferred to him bears to the total area of the land transferred to all the transferees.

(2) Where any excess vacant land is selected out of the vacant land transferred under sub□section (1), the transfer of the excess vacant land so selected shall be deemed to be null and void.

(3) In any State to which this Act applies in the first instance and in any State which adopts this Act under clause (1) of Article 252 of the Constitution, no person holding vacant land in excess of the ceiling limit immediately before the commencement of this Act shall transfer any such land or part thereof by way of sale, mortgage, gift, lease or otherwise until he has furnished a statement under section 6 and a notification regarding the excess vacant land held by him has been published under sub□section (1) of section 10; and any such transfer made in contravention of this provision shall be deemed to be null and void."

41 Section 20, which provides 'power to exempt', reads as under:

"20. Power to exempt (1) Notwithstanding anything contained in any of the foregoing provisions of this Chapter,□

(a) where any person holds vacant land in excess of the ceiling limit and the State Government is satisfied, either on its own motion or otherwise, that, having regard to the location of such land, the purpose for which such land is being or is proposed to be used and such other relevant factors as the circumstances of the case may require, it is necessary or expedient in the public interest so to do, that Government may, by order, exempt, subject to such conditions, if any, as may be specified in the order, such vacant land from the provisions of this Chapter.

(b) where any person holds vacant land in excess of the ceiling limit and the State Government, either on its own motion or otherwise, is satisfied that the application of the provisions of this Chapter would cause undue hardship to such person, that Government may by order, exempt subject to such conditions, if any, as may be specified in the order, such vacant land from the provisions of this Chapter :

Provided that no order under this clause shall be made unless the reasons for doing so are recorded in writing.

(2) If at any time the State Government is satisfied that any of the conditions subject to which any exemption under clause (a) or clause (b) of sub□section (1) is granted is not complied with by any person, it shall be competent for the State Government to withdraw, by order, such exemption after giving a reasonable opportunity to such person for making a representation against the proposed withdrawal and thereupon the provisions of this Chapter shall apply accordingly."

42 It is apparent that Section 5 of the U.L.C. Act in no manner prohibits the execution of any instrument in writing to transfer the land. On the other hand, Section 43 specifically prohibits such transfer by way of an agreement of sale. Section 43, prior to its amendment, was at par with Section 5 of the U.L.C Act. However, with the amendment, the pre□condition of execution of any instrument in writing of sale of land without prior permission has been made invalid. Prima facie, it appears that such distinction was not pointed out to the learned Single Judge in the case of

Premiben (supra). There are two decisions of this Court holding the field as on date. I may first refer to decision in the case of Hardik Harshadbhai Patel vs. Amarsang Nathaji as himself and as Karta and Manager and others decided on 12-13th April 2016. A Coordinate Bench has examined this issue in details. I may refer to the relevant observations as under:

> "15 Now, so far as the validity or enforceability of the agreements in question is concerned, it has been submitted on behalf of the learned Counsel for the respondents that the agreements in question having been executed in violation of Section 43(1) of the Tenancy Act, the same were invalid and not legally enforceable. In this regard, it may be stated that undisputedly, the land was of restricted tenure. The relevant parts of Section 43(1) and 43(2) are reproduced as under:-Section 43 Restriction on transfer of land purchased or sold under this Act.-(1) No land or any interest therein purchased by a tenant under section 17B, 32, 32F, 32-1, [32-O], [32U, 43-1D or 88E] or sold to any person under 32P or 64 shall be transferred or shall be agreed by an instrument in writing to be transferred, by sale, gift, exchange, mortgage, lease or assignment, without the previous sanction of the Collector and except in consideration of payment of such amount as the State Government may by general or special order determine; and no such land or any interest therein shall be partitioned without the previous sanction of the Collector.] To sub-sec.(1), the following provisos shall be added, namely:-Provided that, no previous sanction of the Collector shall be required, if the partition of the land is among the members of the family who have direct blood relation or among the legal heirs of the tenant:
>
> Provided further *** (2) [Any transfer or partition, or any agreement of transfer, of any land or any interest therein] in contravention of sub-section (1) shall be invalid.] 16 From the afore-stated provision, it clearly transpires that the land of restricted tenure could not be transferred or agreed to be transferred or sold without the previous sanction of the Collector and that any transfer or any agreement of transfer of land or interest therein, if made without the previous sanction of the Collector would be invalid. At this juncture, it may be noted that as per Section 10 of the Indian Contract Act, all agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not expressly declared to be void in the Act. Section 23 of the Contract Act, inter alia, states that the consideration or object of the agreement is lawful, unless it is forbidden by law or is of such a nature that if permitted, it would defeat the provisions of any law. It further states that in such cases, the consideration or object of an agreement is said to be unlawful, and every agreement of which the object and consideration is unlawful is void. Since the agreements for sale in question, executed without the previous sanction of the Collector were forbidden under Section 43(1), they were invalid under Section 43(2) of the Tenancy Act. The consideration or object of such agreements would also, therefore, be unlawful and such agreements would be void agreements in view of Section 23 of the Contract Act. There is no provision in the Tenancy Act, which would authorize any authority under the said Act to validate such agreements of sale executed without the previous sanction of the Collector and

in violation of Section 43(1) of the said Act.

Therefore, in the opinion of the Court, such agreements, which are unlawful and void, in view of Section 23 of the Contract Act read with Section 43 of the Tenancy Act, could not be enforced, nor any decree for specific performance of such agreements could be passed by the Court. 17 Mr.Soparkar, learned Sr. Counsel has tried to draw the distinction between the invalid agreement and void agreement relying upon the decision of this Court in the case of Mavjibhai Dharsibhai & Ors. Vs. State of Gujarat & Ors. (supra), however, the facts of the said case are entirely different from the present one. In the said case, the issue was whether the concerned authority was justified in taking action under Section 84C of the Tenancy Act, and while interpreting Section 83A, it was observed that an invalid transaction was equivalent to a voidable transaction and not void transaction. The Court had no occasion to deal with the agreement executed in violation of Section 43(1) of the Tenancy Act, or to examine whether such agreement would be void or not in the light of Section 23 of the Contract Act. In the instant case, the agreements, which are executed in violation of Section 43(1) and per se invalid in view of the provisions contained in Section 43(2) of the Tenancy Act, would be void agreements in view of the provisions contained in Section 23 of the Contract Act, and, therefore, could not be specifically performed. At this juncture, it may be stated that as per Section 9, the person against whom the relief of specific performance is claimed, is entitled to plead by way of defence, any ground available to him under the law relating to contracts. Hence, if the agreements are void in view of Section 23 of the Contract Act, the same cannot be treated as voidable as sought to be submitted by the learned Counsel for the appellant plaintiff. So far as Section 43 (1A) of the Tenancy Act is concerned, it relates to the sanction under Sub-section (1) to be granted by the Collector on the conditions, as may be prescribed by the State Government. The said provision would apply when the sanction is sought prior to entering into the agreement in question. However, there is no provision in the said Act, which would permit the Collector to validate the agreement by granting sanction subsequent to the execution of such agreement. Of course now, the land has been converted into old tenure and necessary permission has also been granted for using the same for non-agricultural purpose on payment of the premium amount as per the orders passed by the Collector, at the instance of the respondents owners and the subsequent purchasers, nonetheless the alleged agreements in question having been executed in contravention of the provisions of Section 43 of the Tenancy Act at the relevant time of their execution, the same were invalid and unenforceable in the eye of law."

43 In the aforenoted decision, Her Ladyship has made herself very clear that there is no provision in law permitting the Collector to validate the agreement by granting ex-post facto sanction i.e. subsequent to the execution of such invalid agreement hit by Section 43 of the Act. In my view, Hardik Harshadbhai Patel (supra) lays down the correct proposition of law and I am in full agreement with the same.

44 I may now refer to one another decision rendered by a learned Single Judge of this Court in which the Full Bench decision of this Court in the case of Jitendra Nanalal Shah (supra) has been referred to and discussed. In the case of Rameshbhai Chaturbhai Prajapati (supra). The issue before the learned Single Judge revolved around the non-irrigated agricultural lands which originally belonged to a Charitable Trust. One Rasiklal Tilakram Jaiswal was declared as a tenant of the said

land by the Mamlatdar and A.L.T. in the tenancy proceedings. By virtue of such declaration, Rasiklal became the deemed purchaser thereof and the same was confirmed by the Gujarat Revenue Tribunal, thereafter by this Court and by the Apex Court. The respondents Nos.1 to 8 before the learned Single Judge preferred four suits against the petitioners and the respondents Nos.9 to 11 for a declaration that the registered sale deed dated 14th October 1999 in respect of the plot Nos.1 to 4 were not binding on the plaintiffs and for a declaration that the petitioners were not entitled to demand from the respondents Nos.10 and 11 any building permission and further to restrain them from dealing, plotting, alienating, allotment, etc. of the land in question. In the pending suits, a compromise was arrived at between the petitioners and the respondents Nos.1 to 8 and the same was reduced into writing. It appears that the Trial Court declined to accept such compromise and pass a consent decree on the premise that such compromise was in violation of the provisions or restrictions under Section 43 of the Act and no consent decree could be passed on such a invalid settlement. Before the learned Single Judge, it was argued that the parties can enter into a contract for transfer of land and the Court can pass a conditional decree for specific performance subject to the sanction being obtained. For the purpose of making such submission good, reliance was placed on the Full Bench decision of this Court in the case of Shah Jitendra Nanalal (supra). The learned Single Judge, while rejecting all the petitions and while discussing the Full Bench decision of this Court in the case of Shah Jitendra Nanalal (supra) at length, held as under:

> "20. The decision of the Full Bench of this Court in the case of Shah Jitendra Nanalal {1985 GLH 53} [supra], relied upon by learned Senior Advocate Mr. S.B. Vakil for the petitioners, was in a different context and under the statutory provisions of Urban Land [Ceiling and Regulation] Act,1976 whether right to claim exemption under section 20 of the ULC Act was available to the holder of the excess vacant land. In the above decision, agreement to sell certain land was executed on 4.7.1966 and further agreement was entered into on 1.7.1967 and the civil suit, being Civil Suit No.1915 of 1970, was filed while another suit filed by the defendants as the plaintiffs being Civil Suit No.2063 of 1969 was compromised between the parties thereto and, on the basis of the settlement, a decree was passed on 5.7.1972. Subsequent to institution of the suit, Gujarat Vacant Lands in Urban Areas [Prohibition of Alienation] Act,1972 came into force which later on ceased to operate in its place on the advent of Urban Land [Ceiling and Regulation] Act, 1976. Further, right to claim exemption by the owner of the land under the ULC Act continued until vesting under section 10(3) of the ULC Act and, therefore, a conditional decree for specific performance subject to exemption being obtained under section 20 of the ULC Act was held to be permissible. In the facts of the case, transfer/alienation of tenure land viz. a land given to a tenant by the Government under various provisions of Tenancy Act to the tiller of the land, subject to restriction of Section 43 of the Act, is clearly impermissible without previous sanction of the Collector/Competent Authority, therefore, the law laid down by the Full Bench in Jitendra Nanalal [supra] is not applicable to the facts and circumstances of the present case.
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> 22. In the case of V. Narasimharaju (AIR 1963 SC 107) [supra], the Apex Court held with regard to unlawful consideration that the agreement would be treated as invalid

for the reason that such consideration is opposed to public policy and particularly when previous sanction of the Collector was a mandatory and, admittedly, such previous sanction was not obtained by the parties and the agreement to sell an agricultural land is invalid and even Section 53A of the Transfer of Property Act, 1882 would also not safeguard such agreement. The above aspect is also dealt with by the Bombay High Court in the case of Himatrao Ukha Mali vs. Popat Devram Patil, AIR 1999 Bombay 10, [supra], wherein it is held that Section 43 imposes a total prohibition or legal bar on alienation of the lands vested in favour of the tenants under the provisions of the Tenancy Act. If an agreement of sale or any instrument in respect of the subject land is executed without taking previous sanction of the Collector under section 43(1) of the Tenancy Act, the said agreement shall be invalid as per Section 43(2) of the said Act. Suffice it to say that Section 43(1) of the Tenancy Act bars even entering into agreement or alienating the land and usage of term 'shall' twice in the section including in the penultimate part of the section reveals mandatory character of the language contained therein and to be interpreted as such and, particularly when the agreement/ transaction was barred by sub-section (1) of Section 43 of the Tenancy Act and sub-section (2) of Section 43 of the said Act clearly refers such agreement or transfer shall be invalid, the trial court has rightly concluded by not probing into the question of declaration of such transaction/agreement as invalid. The satisfaction of the learned Judge based on the understanding of the language contained in sub-sections (1) and (2) of Section 43 of the Tenancy Act and the relevant materials on record of the case for not passing the decree as prayed for cannot be said to be in any manner contrary to law warranting any interference by this Court in exercise of powers under Articles 226 and 227 of the Constitution of India.

24. Further, the Division Bench of this Court considered spectrum of Section 43 of the Tenancy Act in the case of Shashikant Mohanlal Desai {AIR 1970 Gujarat 204} [supra] and examined the objects of the Act and while interpreting Section 43 of the Tenancy Act the restrictive nature of tenancy and specific bar contained about previous sanction of the Collector/Competent Authority in case of conversion of such land was held to be statutory and, therefore, according to this Court, the learned Judge has not committed any error either of jurisdiction or of law in considering the nature of agreement whether void or voidable and, therefore, no interference is called for. Further, the learned Judge has taken into consideration all the aspects of the matter as directed by this Court [Coram: M.R. Shah, J.] vide judgment and order dated 22.8.2008 in Special Civil Application Nos. 3117 to 3120 of 2008 and passed the order, which cannot be said to be contrary to said order dated 22.8.2008.

26 In the case of Lotan Ramchandra Shimpi [Manu/MH/0784/1994] {supra}, it is held that, without sanction under Section 43 of the Tenancy Act, the impugned agreement is invalid and possession given to the purchaser is invalid and the same is not protected under Section 53A of the Transfer of Property Act."

45 The proposition of law has been made very clear by the learned Single Judge while distinguishing the Full Bench decision in the case of Shah Jitendra Nanalal (supra). The learned Single Judge has taken the view that the right to claim exemption by the owner of the land under the U.L.C. Act would continue till the vesting under Section 10(3) of the U.L.C. Act and in such circumstances, a conditional decree for specific performance subject to the exemption being obtained under Section 20 of the U.L.C. Act would permissible. However, transfer / alienation / agreement to sale of tenure land i.e. the land given to a tenant by the Government under the various provisions of the Tenancy Act subject to the restriction of Section 43 of the Act, is clearly impermissible without the previous sanction of the Collector. In my view, the position of law as regards Section 43 of the Tenancy Act is very clear in view of the two decisions referred to above and discussed above. There is no scope for this Court to take any different view on this issue. Even otherwise, the two decisions of the Coordinate Bench are binding to this Court.

46 The learned Single Judge in Rameshbhai Chaturbhai Prajapati (supra), while distinguishing the Full Bench decision in the case of Shah Jitendra Nanalal (supra), has taken the view that the right to claim exemption by the owner of the land under the U.L.C. Act would continue till the vesting under Section 10(3) of the U.L.C. Act, and in such circumstances, a conditional decree for specific performance subject to the exemption being obtained under Section 20 of the U.L.C. Act would be permissible. However, transfer / alienation / agreement to sale of a tenure land i.e. the land given to a tenant by the Government under the various provisions of the Tenancy Act subject to the restrictions of Section 43 of the Act is clearly impermissible without the previous sanction of the Collector.

47 I also take notice of the fact that the Full Bench decision of this Court in the case of Shah Jitendra Nanalal (supra) finds reference in the Supreme Court decision in the case of Van Vibhag Karamchari Griha Nirman Sahkari Sanstha Maryadit (Registered) vs. Ramesh Chander and others reported in (2010) 14 SCC 596, wherein the Supreme Court has observed in paras 27, 28 and 29 as under:

> "27. The aforesaid purported justification of the appellant is not tenable in law. If the alleged statutory bar referred to by the appellant stood in its way to file a suit for Specific Performance, the same would also be a bar to the suit which it had filed claiming declaration of title and injunction. In fact, a suit for Specific Performance could have been easily filed subject to the provision of Section 20 of the Ceiling Act.
>
> 28. Similar questions came up for consideration before a Full Bench of Gujarat High Court in the case of Shah Jitendra Nanalal v. Patel Lallubhai Ishverbhai [AIR 1984 Guj 145]. The Full Bench held that a suit for Specific Performance could be filed despite the provisions of the Ceiling Act. A suit for Specific Performance in respect of vacant land in excess of ceiling limit can be filed and a conditional decree can be passed for Specific Performance, subject to exemption being obtained under Section 20 of the Act. (Paras 11□3)
>
> 29. We are in respectful agreement with the views of the Full Bench in the abovementioned decision and the principles decided therein are attracted here."

48 At this stage, I may refer to a Division Bench decision of this Court in the case of Ashwinkumar Manilal Shah vs. Chhotabhai Jethabhai Patel [First Appeal No.654 of 1988 decided on 8th September 2000], in which the observations made in paras 24 and 25 are as under:

> " 24 Shri J.M. Patel, learned counsel for the respondents, contended that under Chapter IV of the Bombay Tenancy and Agricultural Lands Act, 1948, which applies for area of the State of Gujarat, there is a clear provision after amendment introduced by the Gujarat Act NO.30 of 1977 through Section 5(1) (i) under sub clause (c) of clause (a), that no agreement made by an instrument in writing for the sale, gift or exchange, lease or mortgage of any land or interest therein shall be valid in favour of a person who is not an agriculturist. On the basis of this, Shri Patel contended that since the plaintiffs are not agriculturists, the agreement to sell the land in their favour has become invalid. Shri Oza, however, contended that the provisions of Section 63 of the Bombay Tenancy and Agricultural Lands Act will not be applicable because there is evidence on record that the area under which the land is situated came under the Town Planning Scheme and in view of the Gujarat Town Planning and Urban Development Act, 1976, read with Gujarat Act No.4 of 1986, such agreement to sell is not rendered invalid. Brief legislative history is required to be noted at this juncture. For appreciating the legislative history it should be remembered that the agreement to sell was executed on 1.2.1979. At that time Gujarat Town Planning and Urban Development Act, 1976, was in force. Section 121 of this Act provided that the provisions of the said Act do not to apply to areas under Town Planning Scheme. For showing that the area fell under the Town Planning Scheme, attempt was made to file as additional evidence the zoning certificate. Reliance was also placed on the recital of the boundary of the land in dispute in the agreement to sell. Mr Oza contended that since in the agreement itself it is mentioned that towards north of the disputed land T.P. Final Plots Nos.52, 53 and 54 of Revenue Survey No.17/1 existed and towards South T.P. Final Plot No.72 of Revenue Survey No.17/3 existed, hence, it can be inferred that Revenue Survey No.17/2 was also included in the Town Planning Scheme, and as such the provisions of the Tenancy Act did not apply to the area which fell under the Town Planning Scheme. However, Section 121 of the Gujarat Town Planning and Urban Development Act, 1976, was deleted by Gujarat Act No.4 of 1986. This Act was published in the Official Gazette on 6.2.1986. It was given retrospective effect inasmuch as Section 1(2) of Gujarat Act No.4 of 1986 provided that it shall be deemed to have come into force on 12th June 1985. Consequently, it is clear that retrospective effect of Act No.4 of 1986 was given with effect from 12.6.1985. It will therefore be deemed that since 12.6.1985 Section 121 of the Principal Act, 1976 is to be deleted for which Section 5 of the Gujarat Act No.4 of 1986 can be referred.
>
> 25 The effect of deletion of Section 121 will be that with effect from 12.6.1985 Section 121 will be deleted and if this is so, then at the time when we are deciding the appeal, provisions of Bombay Tenancy and Agricultural Lands Act, 1948, shall apply and in view of Section 63(3) of Chapter V, agreement to sell by a person in favour of a

> person who is not an agriculturist shall not be valid. If the agreement is rendered invalid under Section 63 (c) of the Bombay Tenancy and Agricultural Lands Act, 1948, such agreement is incapable of being specifically enforced. If the agreement to sell itself is invalid, no decree for specific performance could be passed by the trial Court. The agreement which is invalid is in its nature determinable. Section 14(1)(c) of the Specific Relief Act provides inter alia that a contract which is in its nature determinable cannot be specifically enforced. For this reason also, the suit for specific performance of agreement to sell could not have been decreed."

49 Thus, the ratio discernible from the above referred Division Bench decision of this Court is that an invalid agreement is incapable of being specifically enforced. In the case before the Division Bench, the subject-matter was Section 63(c) of the Act, 1948. The Division Bench took the view that if the agreement is rendered invalid under Section 63(c) of the Act, 1948, the same would be incapable of being specifically enforced. The Division Bench relied upon Section 14(1)(c) of the Specific Relief Act, which provides inter alia that the contract which is in its nature determinable cannot be specifically enforced. In such circumstances, the Division Bench took the view that the suit for specific performance of agreement to sale could not have been decreed. The very same principle would apply in the case on hand. In the case on hand, the subject-matter is Section 43 of the Act, 1948. Section 43 of the Act, 1948 makes it very clear that any agreement of sale with respect to a new tenure land without prior sanction of the Collector would be invalid.

50 A learned Single Judge of the Bombay High Court in the case of Chandrabhan Chunnilal Gour vs. Dr. Shrawan Kumar Khunnolal Gour reported in AIR 1980 Bombay 48 had the occasion to consider almost an identical issue. The subject-matter before the learned Single Judge was Section 36 of the Bombay Public Trust Act (29 of 1950). In the said case, before the Bombay High Court, the property was transferred without prior permission of the Charity Commissioner. The Trial Court took the view that the transaction was not void as the plaintiff had obtained ex-post facto sanction from the Charity Commissioner. It was argued before the learned Single Judge that what was contemplated by Section 36 is a previous sanction and not an ex-post facto sanction. It was argued that on a true construction of Section 36 of the Act, if the previous sanction from the Charity Commissioner is not obtained by a public trust for sale of property belonging to it, the transaction would be invalid and void and of no legal effect. The learned Single Judge, while upholding the contention that ex-post facto sanction would not validate and otherwise, invalid and void transaction, observed as under:

> "5. Sub-Section (1) of Section 36 which is relevant for the purpose of this Revision Application is in the following terms.
>
> "(1) Notwithstanding anything contained in the instrument of trust.
>
> (a) no sale, exchange or gift of any immovable property, and
>
> (b) no lease for a period exceeding ten years in the case of agricultural land or for a period exceeding three years in the case of non-agricultural land or a building belonging to a public trust, shall be valid without the previous sanction of the Charity

> Commissioner, Sanction may be accorded subject to such condition as the Charity Commissioner may think fit to impose, regard being had to the interest, benefit or protection of the trust;
>
> (c) it the Charity Commissioner is satisfied that in the interest of any public trust any immovable property thereof should be disposed of, he may, on application, authorise any trustee to dispose of such property subject to such condition as he may think fit to impose, regard being had to the interest or benefit or protection of the trust."

It may be mentioned here that the words beginning with "sanction may be accorded" and ending with "benefit or protection of the trust" have been added in this Sub-Section by the Amending Act, 1971. Now a plain reading of this Sub-Section would indicate that sale, exchange or gift of any 4 immoveable property belonging to a public trust would not be valid without the previous sanction of the Charity Commissioner. It has to be noted that the legislature has used the word "previous" before the word "sanction" which clearly means that the sanction contemplated by this Sub-Section has to be obtained from the Charity Commissioner before the transaction is completed, Construing the Sub-Section in any other way would render the word "previous" superfluous. It is well settled that the legislature does not waste its words and every word in an enactment has to be given its due meaning. Now if the legislature says that the sale, exchange or gift of any unmoveable property belonging to public trust shall not be valid without the previous sanction of the Charity Commissioner, it clearly intends that such a sanction has to be obtained and granted before such transaction is completed and not thereafter. Since the language of this Sub-Section is plain, clear, unambiguous and unequivocal there is hardly any room for construing it one way or the other. In such cases the question of interpretation or construction does not arise. Strictly speaking, there is no place for interpretation except where the words of a statute admit of two meanings. Rules of construction are laid down because of the obligation imposed upon the Courts to attach an intelligible meaning to confused and unintelligible sentences. It therefore, follows that if the language of the statute is clear and intelligible and does not admit of two meanings, effect must be given to the words used and thus the intention of the legislature must be carried out.

6. Mr. Voditel relying on the words which have been added to the Sub-Section by the Amending Act, 1971, submits that the word 'sanction' used therein is not qualified or preceded by the word 'previous' and hence what is contemplated by this Sub-Section is that the sanction could be obtained even after the transaction is contemplated. Mr. Voditel does not appear to be on firm ground in advancing this argument. The first sentence in this Sub-Section which provides for the sanction clearly states that it has to be prior to the transaction, The second sentence merely authorises the Charity Commissioner to impose such condition as he may think fit while granting the sanction. Now the legislature once having said that the sanction has to be previous, it was not necessary for it to repeat the same language again while it empowered the Charity Commissioner to impose condition at the time of according the sanction. This would have been mere repetition which the legislature generally avoids. Hence merely because the word 'sanction' in the second sentence of this Sub-Section is not preceded by the word 'previous' it cannot be said that the Legislature had empowered the Charity Commissioner to accord the sanction even after the sale, exchange or gift as the case may be.

7. Mr. Voditel further contended that it is cl.(g) of Section 69 of the Act which in fact empowers the Charity Commissioner to accord sanction to a sale, mortgage, exchange, gift or lease of immoveable property belonging to a public trust under Section 36. Mr. Voditel submits that this clause does not lay down that the sanction has to be prior in time to the transaction. It is true that this clause merely gives power to the Charity Commissioner to sanction sale, mortgage, exchange, gift or lease of immoveable property belonging to a public trust under Section 36, but at the same time it should be noted that this clause refers to sanction under Section 36 and if as seen above, this Section itself requires the sanction to be previous, clause (g) of Section 69 cannot be taken to enlarge the scope of Section 36. This clause merely gives power to the Charity Commissioner to accord sanction to these transactions and the mechanism for the exercise of his power is provided in Sub-Sec. (1) of Section 36. In other words, if the Charity Commissioner has to exercise the power given to him under Section 69, he can exercise it only in the manner provided for in Sub-Section (1) of Section 36. Hence if Section 36 requires that the sanction should be previous, there is no power in the Charity Commissioner to accord sanction after the transaction is completed and validate it by the so-called ex post facto sanction. Giving such a sanction would be against the express requirement of Sub-Section (i) of Section 36. Obviously in enacting the provision that the Charity Commissioner must give the sanction before the transaction is completed, the legislature intended that he should have full control over the transaction and should be in a position to prevent it and not allow the transaction to be completed in case he finds that it is not in the interest of the public trust concerned. This purpose would not be effectively achieved by sanction accorded after the transaction is completed.

8. Mr. Voditel next submitted that if legislation can be given retrospective operation, there is no reason why sanction could not be retrospective. He has referred me to the decision of Supreme Court in Ratanlal v. State of Punjab (AIR 1965 SC 444). It is difficult to see how the observation of the Supreme Court in this case could help him. In that case the question before the Supreme Court was whether Section 11 of the Probation of Offenders Act 1958 was retrospective in its operation. While dealing with this question, the Supreme Court observed that every law that takes away or impairs the vested right is retrospective and that every ex post facto law is necessarily retrospective. There cannot be any dispute that in certain circumstances a legislature can enact a law with retrospective operation. But it is difficult to see how this analogy can be applied to the power of Charity Commissioner in according sanction under Section 36 of the Act. As seen above, Sub-Section (1) of Section 36 expressly provides that the sanction has to be previous to the transaction and if the law itself provides so, it would not be open for the Charity Commissioner to exercise his power to accord an ex post facto sanction and thus validate a transaction which was otherwise in valid.

9. Mr. Voditel then contended that after all what Section 36 of the Act lays down is the procedure for alienation of the trust property by the trusts. He submits that the provision of this Section and particularly of Sub-Section (1) thereof are technical. According to him, if in such circumstances the Charity Commissioner accords the sanction not previously, but after the transaction, it could at the most be termed as an irregularity, but not an illegality. In this connection, he seeks to rely on the observations of the Supreme Court in State of Punjab v. Shamlal (AIR 1976 SC 1177). Now in the case before the Supreme Court the question was whether Rule 3 of the Punjab and Haryana High

Court Rules which prescribes the number of copies of memorandum of appeal, judgement and paper book to be filed along with the appeal under Letters Patent, is mandatory. This question arose in the context of the fact that the required number of copies were not furnished by the appellant. In dealing with this question the Supreme Court held that the copies of all the documents prescribed had been furnished, but three copies of each were not furnished and this omission or default was only a breach which could be characterised as an irregularity to be corrected by condonation on an application by the party fulfilling the condition within a time allowed by the Court. The Supreme Court then made the following observations.

> "We must always remember that processual law is not to be tyrant, but a servant, not an obstruction but an aid to justice. It has been wisely observed that procedural prescriptions are the hand□maid and not the mistress, lubricant, not a resistant in the administration of justice. Where the non□compliance the procedural, will thwart fair hearing or prejudice doing of justice to parties, the rule is mandatory. But grammar apart, if the breach can be corrected without injury to a just disposal of the case, we should not enthrone a regulatory requirement into a dominat desideratum. After all, Courts are to do justice and not to wreck this end product on technicalities. Viewed in this perspective even what is regarded as mandatory traditionally may, perhaps, have to be moderated into wholesome directions to be complied with in time or in extended time."

Now these observations of the Supreme Court may apply in so far as the provision which is to be construed, is connected with procedure. However, in my view Sub□S. (1) of S.36 is not merely procedural or technical as contended by Mr. Voditel. As stated above, this provision has been enacted to enable the Charity Commissioner to exercise control over the alienations to be made by the trustees of the trust properties. Granting or refusal of sanction would, therefore, affect the substantive rights of the party concerned. It is therefore not possible to say that he said provision is purely technical or procedural.

10. Mr. Voditel lastly submitted that in any case S.41□E of the Act empowers the Charity Commr. to grant temporary injunction or make such other order for the purpose of staying and preventing the wasting, damaging, alienations, sale, removal or disposition of a trust property, if it is brought to his notice that any such property is in danger of being wasted, damaged, or improperly alienated by any trustee or any other person. Mr. Voditel contends that in case any trustee or trustees are about to alienate trust property in contravention of the provisions contained in Sub□S. (1), of S.36 of the Act, the Charity Commissioner can intervene by virtue of the power given by Sub□S. (1) of the S.41□E and prevent such an alienation. Mr. Vodital submits that if instead of taking such an action under S.41□E the Charity Commissioner grants ex post facto sanction, it must be held that he holds the alienation proper and legal. It would appear that Sub□S. (1) of S.41□E of the Act empowers the Charity Commissioner to grant a temporary injunction or to make any other order for the purpose of staying and preventing the alienation. It appears that the Charity Commissioner can exercise the power for protection of the trust property only for staying or preventing alienation. This, therefore, postulates that the power would be exercised before the alienation. This Section does not make any provision for the contingency where the trustee or trustees have already alienated the property

without the previous sanction of the Charity Commissioner and have parted with it. In that case the only thing which could be said is that the alienation itself is invalid because of the requirements laid down in Sub-S. (1) of S.36. Apart from this what has to be considered in this case is as to whether the Charity Commissioner had power to accord ex post facto sanction and if as pointed out above, the Act does not make any provision in this direction, but on the contrary makes an express and specific provision that the sanction has to prior to the transaction, it is difficult to see how S.41-E could be said to empower the Charity Commissioner to grant an ex post facto sanction. In my view, therefore, no assistance can be drawn from S.41-E in support of the proposition that the Charity Commissioner can accord ex post facto sanction.

11. In my view therefore the sanction which has been obtained in the present case after the transaction of sale had been completed on 26-9-1972, was not a sanction at all in the eye of law and if that was so, the said transaction would not be valid as provided for in Sub-S. (1) of S.36. It is needless to say that there is no real difference between a transfer being void or not being valid. (See Mohammad Ibrahim v. Sugrabi, 1955 Nag LJ 344), Even if Sub-S. (1) of S.36 says that such transfer shall not be valid, the effect would be that it is void, if the previous sanction of the Charity Commissioner is not accorded."

51 A Division Bench of the Karnataka High Court in Sri Venkatanarayannappa vs. Sri Siddappa reported in ILR 2007 KAR 1323 had the occasion to consider Section 4 of the Karnataka Schedule Caste and Scheduled Tribes (Prohibition of Transfer of Certain Lands) Act, 1978. Section 4 of the Act, 1978 reads thus:

> "4. Prohibition of transfer of granted lands. (1) Notwithstanding anything contained in any law, agreement, contract or instrument, any transfer of granted land made either before or after the commencement of this Act, in contravention of the terms of the grant of such land or the law providing for such grant, or sub-section (2) shall be null and void and no right, title or interest in such land shall be conveyed or be deemed ever to have conveyed by such transfer.
>
> (2) No person shall, after the commencement of this Act, transfer or acquire by transfer any granted land without the previous permission of the Government.
>
> (3) The provisions of sub-sections (1) and (2) shall apply also to the sale of any land in execution of a decree or order of a Civil Court or of any award or order of any other authority."

In the case before the Karnataka High Court, the possession was not delivered in part performance of the agreement to sell. It was argued that mere agreement to sale without delivery of possession would not come within the ambit of sub-section (2) of Section 4 of the Act referred to above. Such contention was negatived by the Court by placing reliance on the legislative intent. The Court took the view that the legislative intent was quite clear that the previous permission of the Government is a condition precedent for the agreements for sale of granted lands. I may quote the relevant observations:

> ".....Sub-section (2) of Section 4 provides for the permission of the Government for such transfer. But the way the said sub-section is worded makes it clear that no person shall, after the commencement of this Act transfer or acquire by transfer any granted land without the previous permission of the Government. Sub-section 4(1) deals with transfer of lands being in violation of the terms of the grant before the Act came into force. But sub-section (2) deals with 27 transfer of lands after the Act came into force. In other words, even if the transfer is not in contravention of the terms of the grant, but if that transfer takes place after the Act came into force, such transfer requires previous permission of the Government. Therefore for all transfers subsequent to the passing of the Act, previous permission of the Government is a must. Otherwise it would be null and void."

It has been further held as under:

> "In the Scheme of the Act, it is clear whether to sell the property by way of a sale or to enter into an agreement to purchase a granted land previous permission of the Government is a must. It is a condition precedent. If previous permission is not obtained prior to the agreement of sale, then it amounts to transfer under Section 3(e) of the Act and thus it is null and void. While interpreting this provision the Courts have to keep in mind the legislative intent. When the legislature declares that the transfer in contravention of Section 4(2) of the Act is null and void, no contract in the eye of law has come into existence. The legislature did not stop there. It made 28 its intentions explicitly clear by further declaring that "no right, title or interest in such land shall be conveyed or be deemed ever to have conveyed by such transfer". An agreement to sell the granted land under the Act, is opposed to Section 4(2) of the Act, and therefore is not a contract. It is also opposed to public policy. Therefore, it is not enforceable in Court of law."

52 The Supreme Court in Dharma Naika vs. Rama Naika and another (2008) 14 SCC 517 dealt with the very same section i.e. Section 4(1) of the Act, 1978. The Supreme Court held that Section 4(1) of the Act declares any transfer of granted land made either before or after the coming into force of the Act, to be null and void if it is in contravention of any one of the conditions specified therein i.e. (a) the terms of grant of such land; or (b) the provisions of the law providing for such grant; or (c) Section 4(2). It has been further held as under:

> "It is true, the word "transfer" as defined in Section 3(1)(e) of the 1978 Act is an inclusive definition. That is to say, it includes 'sale' as well as 'agreement for sale', although an agreement for sale under the Transfer of Property Act. 1882 is not a transfer and the right, title or interest in the land does not pass until the sale deed is executed and registered. An agreement to sell does not pass until the sale deed is executed and registered. An agreement to sell does not by itself create any interest of the proposed vendee in the immovable property but only creates an enforceable right in the parties. Thus, under the general law, that, is under the Transfer of Property Act, 1882 an 'agreement for sale' is not the same as 'sale' and in the case of an

agreement for sale, the title of the property agreed to be sold still remains with the vendor but in the case of 'sale', title of the property is vested with the vendee. Therefore, an agreement for sale is an executory contract whereas sale is an executed contract."

53 A Division Bench of the Karnataka High Court in the case of Bhemanna vs. Deputy Commissioner, Chitradurga District and others [ILR 2010 KAR 5011] has held as under:

"A conjoint reading of sub-sections (1) & (2) of Section 4 of the Act shows that if the transfer of granted land is made in violation of the terms of the grant of such land or the law providing for such grant whether such transfer is before or after the Act came into force, the same is rendered null and void. Whereas, in the case of transfer of land after the commencement of the Act even though the said transfer is not in contravention of the terms of the grant or the law providing for such grant, the same is rendered null and void.

It is thus clear that the intention of the Legislature is that, after the commencement of the Act, there shall be prohibition for transfer of granted land even though the period of non-alienation had expired and the grantee was otherwise entitled to transfer. It is therefore clear that the term 'granted land' as defined under Section 3(1)(b) of the Act cannot be given a restricted meaning to say that the land losses the characteristic of a granted land after the expiry of non-alienation period."

54 The Karnataka High Court in the case of Smt. Narasamma vs. Sri K.V. Ramprasad [Writ Petition No.12971 of 2012 decided on 10th July 2012] had the occasion to consider the very same issues. S. Abdul Nazeer, J. (as His Lordship then was) has observed as under:

"28. As has been noticed above, there is a clear bar for entering into an agreement to sell of the granted lands without previous permission of the Government. If an agreement is entered into in respect of the granted land in violation of Section 4(2), it is void-ab-initio. Section 23 of the Indian Contract Act, 1872 bars the enforcement of a contract if it is forbidden by law. An agreement offending a statute or public policy or forbidden by law is not merely void but it is invalid from nativity. The term 'law' in this Section must be understood in the sense of the term explained in Article 13(3) of the Constitution. Thus, what is done in 35 contravention of the provisions of any law cannot be made the subject matter of an action. If the contract is expressly prohibited by law, it is void-ab-initio and cannot be enforced. In the circumstances, Courts cannot grant a decree for specific performance subject to the permission, which may be obtained by one of the parties from the Government. I am of the view that the suits filed by the plaintiff for enforcement of the void agreements cannot be entertained by the Civil Court. "

55 A learned Single Judge of the Bombay High Court in the case of Smt. Saraswati Shamrao Dhere vs. Khutub Babu Malani and others [Writ Petition No.1484 of 1992 decided on 5th February 2015]

had the occasion to consider Section 43 of the Bombay Tenancy Act with which I am concerned on the very same issue as regards the legality and validity of an agreement of sale of a tenure land without the prior sanction or permission of the Collector. The learned Single Judge has observed as under:

> "14 In this case, Section 43(2) of the said Act provides that a transfer in contravention of sub-section (1) shall be invalid. When consequences of nullification on failure to comply with a prescribed requirement is provided by the statute itself, there can be no manner of doubt that such statutory requirement must be interpreted as mandatory. Besides the provisions of Section 43(1) of the said Act provide that no land purchased by a tenant under specified sections of the said Act shall be transferred without previous sanction of the Collector. Thus the legislature has made use of negative words. One of the well known modes of showing a clear intention that the provision enacted is mandatory, is by clothing the command in a negative form. CRAWFORD, on statutory construction has observed that prohibitive or negative words can rarely, if ever, be directory and this is so even though the statute provides no penalty for disobedience.
>
> 15 The provisions specifically makes reference to 'previous sanction'. If the objective of said enactment is taken into consideration alongwith phraseology employed by the legislature, then the mandatory nature of the requirement contained in Section 43(1) cannot be diluted by permitting some post-facto sanction for a transfer in breach of Section 43(1) of the said Act. This would render the provisions of Section 43(2) as otiose. Accordingly, there is no merit in the contention that the provisions of Section 43 of the said Act are are only directory and that post-facto sanction constitutes substantial compliance.
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> 16 In the case of Ashok Baburao (supra), this Court has held that even if portion of the land purchased by the tenant under the statutory provisions were to be transferred without obtaining previous sanction of the Collector under Section 43 of the said Act, that would tender such transaction invalid and the entire land will have to be resumed by the State Government in terms of Section 84 -C(4) of the said Act, because Section 43 of the Act opens with the expression 'no land' which would mean that even if portion of the land is transferred without previous sanction of the Collector, the entire land will have to be resumed and would vest in the State Government free from all encumbrances for disposal in terms of Section 84-C of the Act.
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> 17 In case of Dadu Rau Yelavade decd. by his heirs & Lrs.(supra), the Supreme Court has held that where the sale by the landlord of his land was void in view of the provisions of Section 64(8), declaring that any transfer by a landlord after tiller's day would be void, the tenant would not acquire rights or title under the sale deed, even though subsequently, the proceedings under Section 32G were decided in favour of the tenant, the sale certificate issued in favour of tenant was regularised by ratifying

the earlier transaction of sale. This is because, the sale of land by one of the tenant again would be invalid when it was effected prior to the date of the order of Revenue authorities under Section 32G, as on that date, the tenants would have no title of land in view of Section 64(8) of the said Act, which they could validly convey in favour of the purchasers. Further even if the subsequent conferment title on them by the order under Section 32G be treated to date back to the date of sale deed, still vendor being a tenant, who acquired title under the said Act, is sale his sale to purchaser will fail in view of the provisions of Section 43(2) of the said Act, providing restrictions on transfer of the land purchased under the said Act.

18 In case of Chandrabhan Chunnilal Gour (supra) in the context of Section 36(1) of the Bombay Public Trusts Act, 1950, this Court has held that the previous sanction is necessary to validate the transaction of transfer of trust property. Ex-post facto sanction cannot validate such a transaction. Section 36(1) of the Bombay Public Trust Act 1950, inter alia provided that no sale, exchange or gift or any immovable property and no lease for a period exceeding ten years in case of agricultural land and for a period exceeding three years in case of non agricultural land or building belonging to a public trust, shall be valid without the previous sanction of the Charity Commissioner. Sanction may be accorded subject to condition as the Charity Commissioner may think fit to impose, regard being had to the interest, benefit or protection of the trust. In this context, this Court has held that the use of the word 'previous' before the word 'sanction' in Section 36(1) means that sanction contemplated by sub-section (1) has to be obtained before the transaction is completed and not thereafter. Ex-post facto sanction cannot validate the transaction. Further, Section 36(1) is not merely procedural or technical and the provisions contained in Section 41E do not empower the Charity Commissioner to grant an ex-post facto sanction.

19 In case of Shri Deu Rudreshwar Temple Arvalem, Sanquelim, Bicholim, Bardez (supra), this Court was concerned with provisions under the Devasthan Regulations, which provided that a Devasthan cannot institute a suit without previous sanction of the Tribunal. In the context of the provisions of Devasthan Regulations and upon considering the scheme thereof, this Court held that the sanction contemplated was not necessarily previous sanction. The decision, cannot afford any assistance to the facts and circumstances of the present case.

20 The Section 84C of the said Act empowers a Mamlatdar to either suo motu or an application by a person interested to decide whether transfer or acquisition, made in contravention of any of the provisions of the said Act is or or is not invalid. In the present case, the Mamlatdar may not have exercised suo moto jurisdiction. The jurisdiction may have been exercised on basis of complaint by the petitioner. But, it may not be correct to accept that the petitioner is not at all the person interested in the property. Admittedly, the petitioner and respondent Nos. 1 and 2 purchased the said property under the provisions of the said Act. Section 83C(4) provides that once

a transaction in respect of the land purchased and sold by a tenant is found to be invalid, such land shall vest in the State Government free from encumbrances. Thereafter it is for the Mamlatdar to determine the reasonable price and grant such land on new and impartible tenure in the prescribed manner and upon following order of priority. The priority list in this regard is contained in Section 32P(2)

(c), which inter alia includes an agriculturist who holds either as owner or tenant or partly as owner and partly as tenant landless in area than an economic holding and who are artisans.

21 Taking into consideration such provisions, it cannot be said that the petitioner was not a person interested. Besides the phrase 'person interested', in the context in which it finds place under Section 84C of the said Act has to be construed liberally. It is open to person to point out to the Mamlatdar that there has been a transfer of land in breach of the provisions of the said Act. Upon verifying the credibility of such information, if the Mamlatdar had reason to believe that the same is true, then it is for the Mamlatdar to initiate suo motu proceedings under Section 84C. In such circumstances, there is no merit in the contention of Mr. shah that the proceedings under Section 84C were without jurisdiction.

22 A similar objection was rejected by this Court in case of Ashok Baburao (supra), by holding that even though the persons referred to under Section 32P of the said Act may be the only 'interested persons', the fact remains that suo motu proceedings can always be initiated by the authorities. Thus, even if, the complainant had no locus standi, this Court in exercise of writ jurisdiction will be justified in maintaining the order passed, if it was more than convinced that the reasons recorded were sound and tenable. Moreover, this Court would be loathe to exercise writ jurisdiction if erroneous order were to be restored. Accordingly, no merit was found in the objection based on doctrine of locus standi.

23 There is no necessity to go into the issue as to whether the amendment effected to Section 43 by the Maharashtra Act I of 2014 is retrospective in operation or not. This is because in the present case the transaction in question was effected on 13 December 1983 and the same was questioned by the petitioner soon thereafter, i.e., in the year 1984. At the date when the transfer was questioned, ten years had not lapsed from the date of purchase or sale of land under the sections mentioned in the sub section. This is also not a case where conditions specified in the amendment are alleged to have been complied with. Accordingly, amendment of 2014, even if the same is applied to the transaction in□question, the same does not save the transaction from being declared as invalid.

24 The rest of the decisions relied upon by Mr. Surel Shah were basically in the context of requirement taking cognizance of change in legal position. These decisions were referred in the context of the amendment effected to Section 43 by Maharashtra

> Act□ of 2014. As noted earlier, there is no necessity to go into this issue, because in the present case, the transaction in□question was effected on 13 December 1983 and the same was questioned soon thereafter, that is in the year 1984. In fact, the Tahasildar by order dated 2 September 1985 had declared the transaction as invalid. Accordingly, amendment of 2014, does not further the case of the respondents.
>
> 25 The Tahsildar and the Assistant Collector had rightly declared the transaction as invalid. The MRT was not right in observing that in the present case the requirement of previous sanction was not mandatory in character and that even a post facto sanction would suffice. Such view is contrary to the expressed provisions contained in Section 43 of the Act as also the decisions of this Court as well as the Supreme Court in the context of similar legislations."

56 As regards the issue of Section 43 of the Tenancy Act, the learned counsel appearing for the plaintiff submitted that there is a fine distinction between "invalid transaction" and "void transaction". Any transaction in breach of Section 43 of the Tenancy Act is an "invalid transaction" and not a "void transaction". The submission is that the transaction cannot be said to be a nullity from its inception. In such circumstances, it is competent for the Court to pass a conditional decree. I take notice of the fact that the distinction between an "invalid transaction" and a "void transaction" has been discussed by the Coordinate Bench in the case of Hardik Harshadbhai Patel (supra). The very same argument was canvassed before the Coordinate Bench. The learned Single Judge dealt with the said argument and negatived the same keeping in mind Section 23 of the Contract Act. The learned Single Judge has taken the view that if the agreement is otherwise void in view of Section 23 of the Contract Act, the same cannot be treated as voidable.

57 In the context of the transaction being invalid or void, I may refer to a Division Bench decision of the Nagpur High Court in the case of Mohammad Ibrahim Khan Ikramkhan vs. Sugrabi Abdul Rashid reported in AIR 1955 Nagpur 272. M. Hidayatullah, C.J., (as His Lordship then was), speaking for the Bench, while dealing with Section 58(c) of the Transfer of Property Act (4 of 1882) and Section 15(1) and Section 15(2) of the C.P. and Berar Relief of Indebtedness Act (14 of 1939) has observed as under:

> "17. As we have already said, there is yet another point in the case, namely, the application of S.15 (1), Relief of Indebtedness Act. That section occurs in a portion of the Act which is headed 'Invalidity of transfer made by debtors in certain circumstances'. It is contended that there is a difference in the phraseology of sub□s. (1) and sub□s. (2). Whereas sub□s. (2) mentioned the word 'void', the first sub□ section used the words 'No transfer shall be valid'.

There is no real difference between the two. The transaction entered into by a person whose petition for the settlement of debts was pending before a Debt Relief Court is to be regarded as invalid, that is to say, of no effect in the eye of the law. If the transaction was invalid then no consequence would flow, and the plaintiff would be entitled to claim back the property."

Thus, their Lordship took the view that there is no real difference between the word "void" and the word "valid".

☐DIFFERENCE BETWEEN "VOID" AND "ILLEGAL" AGREEMENT:

58 The Indian Contract Act, 1872 has made it clear that there is a thin line of difference between void and illegal agreement. A void agreement is one which may not be prohibited under law, while an illegal agreement is strictly prohibited by law and the parties to the agreement can be penalized for entering into such an agreement. A void agreement has no legal consequences, because it is null from the very beginning. Conversely, the illegal agreement is devoid of any legal effect, since it is started. All illegal agreement are void, but the reverse is not true. If an agreement is illegal, other agreements related to it are said to be void. An agreement that violates any law or whose nature is criminal or is opposed to any public policy or immoral is an illegal agreement. These agreements are void ab initio, and so the agreements collateral to the original agreement are also void. Here the collateral agreement refers to the transaction associated or incidental to the main agreement. The difference between void and illegal agreement can be drawn clearly on the following grounds:

> [1] An agreement which loses its legal status is a void agreement. An illegal agreement is one which is not permissible under law.
>
> [2] Certain void agreements are void ab initio while some agreements become void when it loses its legal binding. On the other hand, an Illegal agreement is void since the very beginning. A void agreement is not prohibited by Indian Penal Code (IPC), but IPC strictly prohibits an illegal agreement.
>
> [3] The scope a void contract is comparatively wider than an illegal contract as all agreements which are void may not necessarily be illegal, but all illegal agreements are void from its inception.
>
> [4] A void agreement is not punishable under law whereas an illegal agreement is considered as an offence, hence the parties to it are punishable and penalised under Indian Penal Code (IPC).
>
> [5] Collateral agreements of a void agreement may or may not be void i.e. they may be valid also. Conversely, collateral agreements of an illegal agreement cannot be enforceable by law as they are void ab initio.
>
> It is quite clear that the void and illegal agreement are very different. One of the factors that make an agreement void is the illegality of the contract, such as contract whose object or consideration is unlawful. Moreover, in both the two agreements loses its enforceability by law.

59 Keeping in mind the ratio of the aforesaid decisions referred to above, I may refer to few more decisions of the Supreme Court on this line.

60 In the case of Rajasthan Housing Board vs. New Pink City Niarman Sahkari Samiti Limited reported in 2015(7) SCC 601, the Supreme Court had the occasion to consider the provisions of the Rajasthan Tenancy Act, 1955. The litigation before the Supreme Court had something to do with the land acquisition proceedings. In the said case, the parcels of land were transferred by the Scheduled Caste khatedars in favour of a person who was not the member of the Scheduled Caste. The Supreme Court held that the agreement of sale of land by the Scheduled Caste khatedars to the Housing Society could be termed as void ab initio. The Supreme Court took the view that the decree for specific performance of the agreement obtained by the society being prohibited under Section 42 of the Rajasthan Tenancy Act, 1955 and opposed to public policy could be termed as a nullity and unenforceable. Of course, it is true that the word used in Section 42 of the Rajasthan Tenancy Act, 1955 is "void", whereas the word used in Section 43 (2) of the Tenancy Act, 1948 is "invalid". However, if the transaction is found to be opposed to public policy, the same cannot be enforced. This principle would be applicable irrespective of the fact whether the transaction is invalid or void. Section 43 of the Tenancy Act has its own importance. There is a fine distinction between a restricted tenure and old tenure. If a person derives land in accordance with the provisions of the Tenancy Act, such acquisition is one of a restricted tenure land. The land is given for a specific purpose keeping in mind the object of the Act, 1948. I may quote the observations made by the Supreme Court in paras 26, 27, 28 and 30 as under:

> "26 In the instant case, the transaction is ab initio void that is right from its inception and is not voidable at the volition by virtue of the specific language used in section 42 of the Rajasthan Tenancy Act. There is declaration that such transaction of sale of holding "shall be void". As the provision is declaratory, no further declaration is required to declare prohibited transaction a nullity. No right accrues to a person on the basis of such a transaction. The person who enters into an agreement to purchase the same, is aware of the consequences of the provision carved out in order to protect weaker sections of Scheduled Castes and Scheduled Tribes. The right to claim compensation accrues from right, title or interest in the land. When such right, title or interest in land is inalienable to non□SC/ST, obviously the agreements entered into by the Society with the Khatedars are clearly void and decrees obtained on the basis of the agreement are violative of the mandate of section 42 of the Rajasthan Tenancy Act and are a nullity. Such a prohibited transaction opposed to public policy, cannot be enforced. Any other interpretation would be defeasive of the very intent and protection carved out under section 42 as per the mandate of Article 46 of the Constitution, in favour of the poor castes and downtrodden persons, included in the Schedules to Articles 341 and 342 of the Constitution of India.
>
> 27. In State of Madhya Pradesh v. Babu Lal and Ors. [1977 (2) SCC 435] : (AIR 1977 SC 1718), the provisions contained in section 165(6) of M.P. Land Revenue Code, 1959 came up for consideration before this Court. The High Court directed the State to file a suit for declaring the decree null and void. The decision was set aside. It was held that the case was a glaring instance of violation of law as such the High Court erred in not issuing a writ. The decision of the High Court was set aside. The transfer which was in violation of proviso to section 165(6) transferring the right of Bhuswami

belonging to a tribe, was set aside.

28. This Court in Lincal Gamango and Ors. v. Dayanidhi Jena and Ors. [AIR 2004 SC 3457] while considering the provisions of Orissa Scheduled Areas Transfer of Immovable Property (by Scheduled Tribes) Regulation, 1956 which prohibited alienation of rural property by a tribal to a non-tribal, declared such transaction to be null and void. This Court while relying upon the decision in Amrendra Pratap Singh v. Tej Bahadur Prajapati and Ors. [AIR 2004 SC 3782] has laid down that no right can be acquired by adverse possession on such inalienable property. Adverse possession operates on an alienable right. It was held that non-tribal would not acquire a right or title on the basis of adverse possession.

30. This Court in Amrendra Pratap, (AIR 2004 SC 3782) (supra) has laid down that the expression 'transfer' would include any dealing with the property when the word 'deal with' has not been defined in the statute. Dictionary meaning as the safe guide can be extended to achieve the intended object of the Act. The transaction or the dealing with alienable property to transfer title of an aboriginal tribe and vesting the same in non-tribal was construed as transfer of immovable property. Extending the meaning of the expression 'transfer of immovable property' would include dealing with such property as would have the effect of causing or resulting in transfer of interest in immovable property. When the object of the legislation is to prevent a mischief and to confer protection on the weaker sections of the society, the court would not hesitate in placing an extended meaning, even a stretched one, on the word, if in doing so the statute would succeed in attaining the object sought to be achieved. When the intendment of the Act is that the property should remain so confined in its operation in relation to tribals that the immovable property to one tribal may come but the title in immovable property is not to come to vest in a non-tribal the intendment is to be taken care by the protective arm of the law and be saved from falling prey to unscrupulous devices, and this Court concluded any transaction or dealing with immovable property which would have the effect of extinguishing title, possession or right to possess such property in a tribal and vesting the same in a non-tribal, would be included within the meaning of 'transfer of immovable property'.

61 In Ram Karan vs. State of Rajasthan [(2014) 8 SCC 282], the Supreme Court has laid down that the transfer of holding by a member of Scheduled Caste to a member not belonging to the Scheduled Caste by virtue of Section 42 of the Rajasthan Tenancy Act is forbidden and unenforceable. Such a transaction is unlawful even under Section 23 of the Contract Act and an agreement or such transfer would be void under Section 2(g) of the Contract Act. This principle of law, as explained by the Supreme Court in Ram Karan (supra) fortifies the view taken by the learned Single Judge of this Court in the case of Hardik Harshadbhai Patel (supra). Keeping this principle in mind, I have arrived to the conclusion that the word "invalid" or the word "void", so far as the Section 43 of the Tenancy Act is concerned, would not make by difference. The true test is whether the transaction is unlawful, as opposed to the public policy. Whether such transaction would defeat the very object

with which such restriction has been imposed in Section 43 of the Tenancy Act.

62 I am of the view that in the matter of granting decree for specific performance in cases where consent / sanction or permission of any officer, authority or Government is required, the law is settled. If a condition is laid down with the transferor is bound to do everything to give effect to the contract, the specific performance cannot be obtained with a direction to the transferor to obtain the required consent or permission. The general principle is that if the transaction itself is unlawful, it cannot be enforced directing the defendant to take such steps as are necessary for effecting the contract.

63 The language of Section 43 of the Tenancy Act is plain and simple. There is no absolute bar or an embargo as regards the transfer of a new tenure land or entering into an agreement of sale with respect to a new tenure land. Section 43 only says that the parties cannot enter into such agreement without the prior permission of the Collector and if the parties have entered into such agreement without the permission of the Collector, such transaction would be invalid. Thus, it is for the Collector to decide whether permission should be granted or not. It is for the Collector to consider whether such transfer would be in consonance with the Constitutional Scheme in Part IV of the Directive Principles. The Collector may also consider whether the agreement is void under Section 23 of the Contract Act as opposed to the public policy. Before the permission is given, the Collector is enjoined, by operation of Article 46 of the Constitution, to inquire whether such alienation is void under law or violates the provisions of the Constitution and whether the permission could be legitimately given. In that behalf, the competent authority is enjoined to look to the nature of the property, subject matter of the proposed conveyance and pre-existing rights flowing thereunder and whether such alienations or encumbrances violate the provisions of the Constitution or the law. If the answer is in the positive, then without any further inquiry the permission straightway would be rejected. Even in case the permission is granted, it would be decided on the anvil of the relevant provisions of the Constitution and the law [Murlidhar Dayandeo Kesekar vs. Vishwanath Pandu Bardu reported in 1995 AIR SCW 2224].

64 Having regard to the importance of the issue, I decided to look into the same closely. While working on this issue, I could lay my hands on few decisions of the Supreme Court and other High Courts. I would like to discuss those judgements. It would be appropriate for me to state at this stage that all those judgements, which I propose to discuss hereinafter, if not read closely, then the same would given an impression that it is permissible for the Court to grant a conditional decree of specific performance even if the agreement of sale is invalid. However, the close reading of all those judgements makes it very clear that the same have not dealt with the issue with which I am concerned.

65 Contract' is a bilateral transaction between two or more than two parties. Every contract has to pass through several stages beginning with the stage of negotiation during which the parties discuss and negotiate proposals and counter-proposals as also the consideration resulting finally in the acceptance of the proposals. The proposal when accepted gives rise to an agreement. It is at this stage that the agreement is reduced into writing and a formal document is executed on which parties affixed their signatures or thumb impression so as to be bound by the terms of the agreement set out

in that document. Such an agreement has to be lawful as the definition of contract, as set out in Section 2(h) provides that "an agreement enforceable by law is a contract". Section 2(g) sets out that "an agreement not enforceable by law is said to be void".

66 Section 10 of the Contract Act provides as under:

> "10. What agreements are contracts.—All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.
>
> Nothing herein contained shall affect any law in force in India and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents."

67 The essentials of contract set out in Section 10 above are:

> (1) Free consent of the parties (2) Competence of parties to contract (3) Lawful consideration (4) Lawful object.

68 The Supreme Court had the occasion to deal with the contract which can be enforced and others which cannot be enforced on account of certain statutory bar in the matter of Firm of Pratapchand Nopaji v. Firm of Kotrike Venkata Setty and Sons [AIR 1975 SC 1223] observed as under at Page 1228:—"If an agreement is merely collateral to another or constitutes an aid facilitating the carrying out of the object of the other agreement which, though void, is not in itself prohibited, within the meaning of Section 23 of the Contract Act, it may be enforced as a collateral agreement. If on the other hand, it is part of a mechanism meant to defeat what the law has actually prohibited, the Courts will not countenance a claim based upon the agreement because it will be tainted with an illegality of the object sought to be achieved which is hit by Section 23 of the Contract Act. It is well established that the object of an agreement cannot be said to be forbidden or unlawful merely because the agreement results in what is known as a "void contract". A void agreement, when coupled with other facts, may become part of a transaction which creates legal rights, but this is not so if the object is prohibited or "mala in se." Therefore, the real question before us is : Is the agreement between the parties in each case, which was to be carried out in Bombay, so connected with the execution of an object prohibited by either a law applicable in Bombay or a law more widely application so as to be hit by Section 23 of the Contract Act ?"

> After discussion, the Supreme Court gave answer to the question posted in para 19 of the judgment as under:
>
> "The result is that we think that he objects of contracts set up by the plaintiff cannot be carried out by merely entering into them outside Bombay or engaging third parties as sub-agents, or in any other capacity, to execute them. The provisions of the Control Order are applicable throughout India and are not confined to forward contracts entered into or meant to be carried out in any particular part of India. Their

> violation is a criminal offence. A claim for indemnification, under Section 222 Contract Act, is only maintainable if the Acts, which the agent is employed to do, are lawful. Agreements to commit criminal acts are expressly and specifically excluded, by Section 224 of the Contract Act, from the scope of any right to an indemnity."

69 It is well□settled principle of law that agreement to sell is merely an agreement signifying the intention of the transferor to sell the property in question for a specified consideration on some specified date or on the happening on certain acts to be performed by the transferor or the transferee. By the Agreement to sell nothing is transferred or sold. At best it can be called a memorandum of understanding recorded in relation to sale which could be given effect to after conditions of the memorandum of understanding has been fulfilled and parties have performed their obligations under such agreement.

70 The Supreme Court in the case of Sita Ram vs. Radha Bai reported in AIR 1968 SC 534 has very succinctly explained the law on the subject. I may quote the relevant observations as under:

> "12. The principle that the Courts will refuse to enforce an illegal agreement at the instance of a person who is himself a party to an illegality or fraud is expressed in the maxim In pari causa potior est conditio possidentis . But as stated in Anson's 'Principles of the English Law of Contracts', 22nd Ed., p. 343: "there are exceptional cases in which a man will be relieved of the consequences of an illegal contract into which he has entered□cases to which the maxim does not apply They fall into three classes (a) where the illegal purpose has not yet been substantially carried into effect before it is sought to recover money paid or goods delivered in furtherance of it (b) where the plaintiff is not in pari delicto with the defendant: (c) where the plaintiff does not have to rely on the illegality to make out his claim."

13. There was in this case no plea by the plaintiff that there was any illegal purpose in entrusting the jewellery to Lachhmi Narain. It was also the plaintiff's case that Gomti Bai knew that the jewellery in dispute was entrusted by the plaintiff to Lachhmi Narain, and if the averments made in the plaint are to be the sole basis for determining the contest, Gomti Bai did not suffer any loss in consequence of the entrustment. Assuming that the Trial Court was competent without a proper pleading by the appellant and an issue to enter upon an enquiry into the question whether the plaintiff could maintain an action for the jewellery entrusted by her to Lachhmi Narain, the circumstances of the case clearly make out a case that the parties were not "in pari delicto". It is settled law that "Where the parties are not in pari delicto, the less guilty party may be able to recover money paid, or property transferred, under the contract. This possibility may arise in three situations.

First, the contract may be of a kind made illegal by statute in the interests of a particular class of persons of whom the plaintiff is one. * * * Secondly, the plaintiff must have been induced to enter into the contract by fraud or strong pressure. * * * Thirdly, there is some authority for the view that a person who is under a fiduciary duty to the plaintiff will not be allowed to retain property, or to refuse to account for moneys received, on the ground that the property or the moneys have come into his hands as the proceeds of an illegal transaction," See Anson's 'Principles of the English Law

of Contract' p.

346..."

71 In Rojasara Ramjibhai Dahyabhai vs. Jani Narottamdas Lallubhai (dead of LRs) and another reported in AIR 1986 SCC 1912, the appellant had entered into an agreement to purchase plots recorded as the Girasdari agricultural land of which he was a tenant from the Girasdari. The agreement stipulated that the appellant was to apply for permission from the Collector to convert the agricultural land into village site i.e. for non□agricultural use. The sale deed was to be executed by the appellant after he had obtained the requisite permission from the Collector. Within a month from the agreement with the Girasdar the appellant by a contract covenanted to sell the same property to other person. The agreement provided that the appellant as vendor was to get the land converted into village site at his own expense. The appellant applied to the Collector for grant of permission to convert the land into village site, but his application was rejected. The Saurashtra Land Reforms Act, 1951 came into force with effect from 1st September 1951. Under the provisions of the Act, there was an extinguishment of the right and title of the Girasdar as the ex□Girasdar of the land and the appellant was recognized to be an occupant thereof under the provisions of the Bombay Land Revenue Code, 1898. The revenue authorities granted permission for conversion of 1000 sq. yards out of the two plots which prior to 1958 were agricultural land into village site. Thereafter, the revenue authorities granted permission for converting the remaining area of the land into village site. The appellant obtained permission for converting both the plots for non□agricultural use. The respondents called upon the appellant to execute a conveyance of the property in accordance with the agreement of sale between the parties and on his failing to comply, commenced the suit for specific performance. The appellant contested the suit on two grounds, first aht he had an imperfect title and secondly that the contract with the respondents was contingent contract dependent on appellant's vendor obtaining the permission for conversion of land. The Civil Judge dismissed the suit holding that the same was barred by limitation and further that the contract between the parties, the parties being a contingent contract, the agreement in view of the events that had happened made it unenforceable. On appeal, the High Court reversed the decree and held that the agreement between the parties had not been cancelled by mutual consent. On the question as to whether the agreement was a contingent contract or a contract creating absolute liabilities as between the parties without contemplating any contingency, the High Court held that the agreement clearly contemplated that the sale deed was to be executed after the requisite permission was obtained from the Collector for use of the land as a village site and that the land was not to be sold as agricultural land but as village site. The Supreme Court, while dismissing the appeal, observed as under:

> "7. Following the decision of Chagla, C. J. in F. Ranchhodas v. Nathmal Hirachand and Co. (1949) 51 Bom LR 491: (AIR 1949 Bom 356), the High Court held that the words "after the permission is obtained" in Exh. 26 and the words "after the land is converted" in Exh. 25 both indicate the point of time at which the sale□deed within the contemplation of the parties had to be executed in accordance with the terms of the document. In the circumstances, the High Court held that the contract could not be interpreted as a contingent contract. Upon that view, it held that there was no

contingency whatsoever and even though Rana Mohabat Singh had failed to obtain the requisite permission to convert the land into village site, as and when such permission was obtained by the appellant, the rights of the respondents for the performance of the agreement came into existence. It also held that the respondents were entitled to rely on the doctrine of 'feeding the estoppel' embodied in S. 13 of the Specific Relief Act, 1963. It held that at the time when the agreement was entered into between the parties in 1949, the appellant had only a right to get the land in suit conveyed to him by Rana Mohabat Singh in pursuance of the agreement (Exh. 26). However, by virtue of the provisions of the Saurashtra Land Reforms Act, his title as an occupant became complete and he had obtained the permission to convert the land into village site and the respondents were therefore entitled to get specific performance of the agreement in respect of the rights which he had at the date of the suit. It further held that the permission to convert the disputed land into village site having been obtained on August 26, 1958, insofar as a part of the land was concerned and on September 10, 1959, as regards the balance thereof it could not be said that the respondents' suit was barred by limitation. Upon these findings, the High Court reversed the decree of the learned Civil Judge and decreed the respondents' suit for specific performance.

8. Two questions are raised upon this appeal. First of these is whether the agreement embodied in the suit Banakhat (Exh. 25) dated November 14, 1949 was a contingent contract and as the contingency failed, there was no contract which could be made the basis for a decree for specific performance, and the second is that the suit as framed was barred by limitation under Art. 113 of the Limitation Act, 1963. As to the first contention, it is urged that the High Court proceeded on the erroneous belief that the grant of permission by the Collector was a certain event and therefore its finding that the contract was an absolute and unconditional one, is vitiated. It is said that the appellant's vendor Rana Mohabat Singh having failed to obtain permission from the Collector in 1950□51 in terms of the agreement (Exh. 26) entered into by him with the appellant for converting the land into village site and execute a deed of conveyance in his favour the appellant had an imperfect title and therefore the right to specific performance of the suit Banakhat (Exh. 25) did not arise inasmuch as the conversion of the Girasdari lands at the instance of Rana Mohabat Singh was a condition on which the mutual rights and obligations of the parties would arise. The submission proceeds on the basis that the two transactions were interdependent and Rana Mohabat Singh's application for permission for conversion of the agricultural land to non□agricultural purposes having been rejected, the appellant was relieved of his obligation to convey the suit lands under the Banakhat (Exh. 25). In support of the contention, reliance is placed on the decision of the Privy Council in Dalsukh M. Pancholi v. Guarantee Life and Employment Insurance Company Ltd., AIR 1947 PC 182.

9. We do not see any basis for the submission that the contract between the parties as embodied in the suit Banakhat (Exh. 25) was contingent contract, the performance of

which was dependent upon fulfilment of the condition under the earlier agreement (Exh. 26) by which the appellant's vendor Rana Mohabat Singh had undertaken upon himself the obligation of procuring the necessary sanction from the Collector. As to the appellant having an imperfect title the question is purely hypothetical. May be, initially the two transactions were not independent of each other but were interdependent, for the performance of one depended upon the fulfilment of the other agreement. If there was no abolition of proprietary rights, it could well be said that the suit Banakhat (Exh. 25), being subject to the fulfilment by Rana Mohabat Singh of the terms of the earlier agreement (Exh. 26), the appellant had an imperfect title and therefore the contract between the parties was contingent on Rana Mohabat Singh obtaining the approval of the Collector and as he could not secure such approval and execute a conveyance in favour of the appellant, no effective agreement came into being which could be ordered to be specifically enforced. But the contention that unless the appellant's vendor Rana Mohabat Singh conveyed title by execution of a proper conveyance, the contract as between the parties became impossible of performance and further that for want of such conveyance the appellant had an imperfect title, does not take into account the subsequent events.

10. It is common ground that shortly thereafter, the Saurashtra Land Reforms Act, 1951 came into force w.e.f. September 1, 1951. Under the provisions of the Act, there was an extinguishment of the right and title of Rana Mohabat Singh as a Girasdar of the suit land and the appellant was recognised to be an occupant thereof under the provisions of the Bombay Land Revenue Code. It would, therefore, appear that the contention that the appellant had an imperfect title is without any basis whatever. With the extinction of the title of Rana Mohabat Singh and the conferral of the rights of an occupant on the appellant, the property became transferable by him. As such occupant, it is undisputed that the appellant made an application to the revenue authorities permitting the conversion of the disputed land into village site. Thereafter, there was no legal impediment in the way of the appellant in executing a sale deed. Under the terms of the suit Banakhat (Exh. 25), the appellant had undertaken the obligation of getting the land converted into village site. As indicated, the word 'we' in the document (Exh. 25) refers to the vendor i.e. the appellant and 'you' refers to the respondents. The terms of the document are clear and explicit and admit, of no ambiguity. The appellant had by the contract bound himself to furnish a certified copy of the permission whereby the land was converted into village site apart from bearing all expenses in connection with the grant of such Permission.

12. Although Rana Mohabat Singh having failed to fulfil the terms of his contract with the appellant and execute a sale deed in his favour might have rendered the contract between them incapable of performance, but with the extinction of the title of Rana Mohabat Singh and the conferral of the rights of an occupant on the appellant, the property became transferable subject; of course, to the express covenant on the part of the appellant to do all things necessary to give effect to the agreement. Here, the suit Banakhat (Exh. 25) embodies an express covenant to that effect. There is always

> in such contracts an implied covenant on the part of the vendor to do all things necessary to give effect to the agreement, including the obtaining of the permission for the transfer of the property. The principles on which a term of this nature may be implied in contracts are well-settled. It is enough to refer to Halsbury's Law of England, Vol. 8, 3rd Edn., p. 121 where the principles are summarised as follows "In construing a contract, a term or condition not expressly stated may, under certain circumstances be implied by the Court, if it is clear from the nature of the transaction or from something actual found in the document that the contracting parties must have intended such a term or condition to be part of the agreement between them. Such an implication must in all cases be founded on the presumed intention of the parties and upon reason, and will only be made when it is necessary in order to give the transaction that efficacy that both the parties must have intended it to have, and to prevent such a failure of consideration as could not have been within the contemplation of the parties."

Chitty on Contract, Vol. 1, 23rd Edn. paragraphs 694-95 points out that a term would be implied if it is necessary in the business sense, to give efficacy to the contract.

13. In this context, reference may be made to the decision of the Privy Council in Motilal v. Nanhelal Ghasiram, (1930) 57 Ind App 333 : (AIR 1930 PC 287). There, the facts were these. In that case, the plaintiff Mst. Jankibai entered into an agreement to purchase from Raibahadur Seth Jiwandas of Jabalpur four annas proprietary share of Mauja Raisalpur together with the sir and khudkast lands appurtenant thereto, with cultivating rights in the sir lands. The property was subject to the provisions of the Central Provinces Tenancy Act, 1920. She filed a suit for specific performance of the said contract. The Privy Council held that the contract was for a transfer of the sir lands without reservation of the right of occupancy, and that the sanction of the Revenue Officer to the transfer was necessary under S. 50(1) of the Act, which was in these terms :

> "S. 50(1): If a proprietor desires to transfer the proprietary rights in any portion of his sir land without reservation of the right of occupancy specified in S. 49, he may apply, to a revenue-officer and, if such revenue-officer is satisfied that the transferor is not wholly or mainly an agriculturist, or that the property is self-acquired or has been acquired within the twenty years last preceding, he shall sanction the transfer."

14. It was contended before the Privy Council that a decree for specific performance of the agreement of sale could not be made, because such performance would necessitate an application by or on behalf of the vendor to the Revenue Officer for sanction to transfer the cultiivating rights in the sir land, and that the Court had no jurisdiction to require the vendor to make such an application. In repelling the contention, the Privy Council observed that in view of their construction of the agreement, namely, that the vendor agreed to transfer the cultivating rights in the sir land :

> "(T)here was, in their Lordships' opinion, an implied covenant on the part of the vendor to do all things necessary to effect such transfer, which would include an application to the Revenue Officer to sanction the transfer."

It was further observed that it was not necessary for their Lordships to decide whether in that case the application for sanction to transfer must succeed, but that it was material to mention that no facts were brought to their Lordships' notice which would go to show that there was any reason why such sanction should not be granted. After making the said observations, the Privy Council held that in those circumstances the Court had jurisdiction to enforce the contract under the Specific Relief Act, 1877 and Order 21, R. 35 of the Code of Civil Procedure, 1908 by a decree ordering the vendor to apply for sanction and to execute a conveyance on receipt of such sanction. The decision of the Privy Council in Motilal v. Nanhelal Ghasiram, supra, therefore is an authority for the proposition that if the vendor agrees to sell the property which can be transferred only with the sanction of some Government authority, the Court has jurisdiction to order the vendor to apply to the authority within a specified period, and if the sanction is forthcoming to convey to the purchaser within a certain time. See also: Mrs. Chandee Widya Vati Madden v. Dr. C. L. Katial, (1964) 2 SCR 495 : (AIR 1964 SC 978) and Ramesh Chandra Chandiok v. Chuni Lal Sabharwal, (1971) 2 SCR 573: (AIR 1971 SC 1238) where this Court following the Privy Council decision in Motilal v. Nanhelal Ghasiram's case, supra, reiterated the same principle."

72 A learned Single Judge of the Delhi High Court in the case of Raghunath Rai and another vs. Jageshwar Prashad and another reported in AIR 1999 Delhi 383 has observed in para 17 as under:

> "In the agreement to sell defendant had agreed to do certain acts and things. There is mostly always an implied covenant on the part of the vendor to do all things necessary to give effect to the agreement, including the obtaining of the permission or clearance for the transfer of the property. The law is well settled that if the vendor agrees to sell the property which can be transferred only with the sanction of some Government authority, the Court has jurisdiction to order the vendor to apply to such authority within a specified period, and if the sanction is forthcoming to convey the property to the purchaser within a certain time. (See Motilal v. Nanhelal, AIR 1930 PC 287; Mrs. Chandnee Widyavati Madden v. Dr. C. L. Katial, AIR 1964 SC 978; and Rojasara Ramjibhai Dahyabhai v. Jani Narottamdas Lallubhai (dead by LRs.), AIR 1986 SC 1912)."

73 The Supreme Court in the case of Govindbhai Gordhanbhai Patel and others vs. Gulam Abbas Mulla Allibhai and others reported in AIR 1977 SCC 1019, while dealing with Section 63 of the Bombay Tenancy Act, has observed in paras 11 and 12 as under:

> "11. We find ourselves in complete accord with this view which also finds support from the decisions of this Court in Satyabrata Ghose v. Mugneeram Bangur and Co., (AIR 1954 SC 44) (supra) and Smt. Sushila Devi v. Hari Singh, (1971) 2 SCC 288 = (AIR 1971 SC 1756) where it was held that the performance of a contract becomes impossible if it becomes impracticable from the point of view of the object and the purpose which the parties had in view and if an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their bargain it can very well be said that the promisor found it impossible to do the act which he promised to do. IT would be advantageous at this stage to refer to the

following observations made by Mukherjee J. Satyabrata Ghose v. Mugneeram Bangur and Co. (supra) which is a leading authority on the subject of the frustration:

"The first paragraph of the section lays down the law in the same way as in England. It speaks of something which is impossible inherently or by its very nature, and no one can obviously be directed to perform such an act. The second paragraph enunciates the law relating to discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done. The wording of this paragraph is quite general and though the illustrations attached to it are not at all happy, they cannot derogate from the general words used in the enactment This much is clear that the word "impossible" has not been used here in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and unless from the point of view of the object and purpose which the parties had in view; and if an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their bargain, it can very well be said that the promisor found it impossible to do the act which he promised to do.

"Although various theories have been propounded by the Judges and jurists in England regarding the judicial basis of the doctrine of frustration, yet the essential idea upon which the doctrine is based is that of impossibility of performance of the contract : in fact impossibility and frustration are often used as interchangeable expressions. The changed circumstances, it is said, make the performance of the contract impossible and the parties are absolved from the further performance of it as they did not promise to perform an impossibility."

12. In the instant case, there is no term or condition in the agreement in question which stipulates that the agreement would be treated as having become impracticable on the refusal of the Prant Officer to grant the permission under Section 63 of the Act. The parties are, therefore, governed purely by Section 56 of the Contract Act according to which a contract becomes void only if something supervened after its execution which renders it impracticable. On the contention advanced on behalf of the respondents, the question that arises is whether the above quoted order of the Prant Officer, Thana Prant, dated December 8, 1958, rendered the contract impracticable. The answer to this question is obviously in the negative. The said order, it will be noted, was not of such a catastrophic character as can be said to have struck at the very root of the whole object and purpose for which the parties had entered into the bargain in question or to have rendered the contract impracticable or impossible of performance. A careful perusal of the order would show that it was neither conclusive nor was it passed on the merits of the aforesaid application. The permission was refused by the Prant Officer only on the technical ground that the appellants had not obtained the requisite certificate as contemplated by Rule 36 (f) of the Rules. It did not in any way prohibit the appellants from making a fresh application to the Collector, Thana Prant, who in view of the phraseology of Section 63 of the Act read with clause (f) of Rule 36 of the Rules appears to be the only authority competent to grant the requisite certificate. The said order also did not put any fetter on the appellants to apply to the Collector or the Additional Collector for grant of the requisite

permission for sale and purchase of the land after obtaining the aforesaid certificate. We are, therefore, clearly of the opinion that no untoward event or change of circumstances supervened to make the agreement factually or legally impossible of performance so as to attract Section 56 of the Contract Act."

74 The Supreme Court in Mrs. Chandnee Widya Vati Madden vs. Dr. C.L. Katial and others reported in AIR 1964 SCC 978 discussed Sections 12 and 21 of the Specific Relief Act, 1877. In the said case, the plaintiffs entered with a contract of sale of a house belonging to the defendant on the plot granted by the Government. One of the terms of the contract was that the vendor shall obtain necessary permission of the Government for sale within two months of the agreement and if the permission was not forthcoming within that time, it was open to the vendors to extend the date or to treat the agreement as cancelled. The vendor made an application for permission but for the reasons of her own, withdrew the same. In the suit filed by the vendees for specific performance of the contract or in the alternative for damages, it was found that the vendees were always willing and ready to perform their part of the contract, that it was the vendor who wilfully refused to perform her part of contract and that the time was not of the essence of the contract. The Supreme Cort, while holding that the High Court was entirely correct in decreeing the suit for specific performance of the contract, has observed as under:

> "2. The trial Court in a very elaborate judgment dismissed the suit for specific performance of contract and for a permanent injunction and decreed the sum of Rs. 11550/□by way of damages, with proportionate costs, against the defendant. Though the Court found that the plaintiffs had been throughout ready and willing, indeed anxious, to perform their part of the contract, and that it was the defendant who backed out of it, it refused the main relief of specific performance of the contract on the ground that the agreement was inchoate in view of the fact that the previous sanction of the Chief Commissioner to the proposed transfer had not been obtained.
>
> 3. The High Court on appeal came to the conclusion that the agreement was completed contract for sale of the house in question, subject to the sanction of the Chief Commissioner before the sale transaction could be concluded, but that the Trial Court was in error in holding that the agreement was inchoate, and that therefore, no decree for specific performance of the contract could be granted. The High Court relied mainly on the decision of their Lordships of the Judicial Committee of the Privy Council in Motilal v. Nanhelal, 57 Ind App 333 : (AIR 1930 PC 287) for coming to the conclusion that there was a completed contract between the parties and that the condition in the agreement that the vendor would obtain the sanction of the Chief Commissioner to the transaction of sale did not render the contract incomplete. In pursuance of that term in the agreement, the vendor had to obtain the sanction of the Chief Commissioner and as she had withdrawn her application for the necessary sanction, she was to blame for not having carried out her part of the contract. She had to make an application for the necessary permission. The High Court also pointed out that if the Chief Commissioner ultimately refused to grant the sanction to sale, the plaintiff may not be able to enforce the decree for specific performance of

the contract but that was no bar to the Court passing a decree for that relief. Though it was not necessary in the view the High Court took of the rights of the parties, it recorded a finding that a sum of Rs. 5,775/- would be the appropriate amount of damages in the event of the plaintiffs not succeeding in getting their main relief for specific performance of the contract.

4. The main ground of attack on this appeal is that the contract is not enforceable being of a contingent nature and the contingency not having been fulfilled. In our opinion, there is no substance in this contention. So far as the parties to the contract are concerned, they had agree to bind themselves by the terms of the document executed between them. Under that document it was for the defendant-vendor to make the necessary application for the permission to the Chief Commissioner. She had as a matter of fact made such an application but for reasons of her own decided to withdraw the same. On the findings that the plaintiffs have always been ready and willing to perform their part of the contract, and that it was the defendant who wilfully refused to perform her part of the contract, and that time was not of the essence of the contract, the Court has got to enforce the terms of the contract and to enjoin upon the defendant-appellant to make the necessary application to the Chief Commissioner. It will be for the Chief Commissioner to decide whether or not to grant the necessary sanction.

5. In this view of the matter, the High Court was entirely correct in decreeing the suit for specific performance of the contract. The High Court should have further directed the defendant to the Chief Commissioner, which was implied in the contract between the parties. As the defendant vendor, without any sufficient reasons, withdrew the application already made to the Chief Commissioner, the decree to be prepared by this Court will add the clause that the defendant within one month from to-day shall make the necessary application to the Chief Commissioner or to such other competent authority as may have been empowered to grant the necessary sanction to transfers like the one in question, and further that within one month of the plaintiffs the property in suit. In the event of the sanction being refused, the plaintiffs shall be entitled to the damages as decreed by the High Court. The appellant sought to raise certain other pleas which had not been raised in the High Court; for example, that this was not a fit case in which specific performance of contract should be enforced by the Court. This plea was not specifically raised in the High Court and the necessary facts were not pleaded in the pleadings. It is manifest that this Court should not allow such a plea to be raised here for the first time."

75 A Division Bench of the Oudh High Court in the case of Munshi Tajammul Hussain vs. Contonment Board reported in AIR (30) 1943 Oudh 99 has observed as under:

"The Board, he contends, contracted to do something which it had not the power to do and therefore has not done. The contract, proceeds his argument, was ultra vires and illegal and is therefore void, even though the appellant knew of the position. He

relies on Ss.10, 23 and 24, Contract Act.

*** *** *** Tests have been laid down in various cases and it has been held inter alia that where a statute prescribes no penalties an agreement in breach of a condition imposed under powers given by it does not fall under S. 23, and that where a condition is imposed under statute purely for administrative purposes an agreement in violation thereof is not void. We are clearly of opinion that the consideration of the agreement in the present case was not unlawful within the meaning of S. 23, Contract Act. We find that the suit was rightly dismissed and we dismiss this appeal with costs."

76 A Division Bench of the Allahabad High Court in the case of Dip Narain Singh vs. Nageshar Prasad and others reported in AIR 1930 Allahabad 1 Full Bench has explained the fine distinction between a contract which still remains to be performed and specific performance of which may be sought and a conveyance by which the title to the property has actually passed. The Full Bench has also explained the distinction between an agreement forbidden by law and one declared to be void. His Lordship Justice Sulaiman, in his separate judgement, has observed as under:

"There can be no doubt that there is a clear distinction between a contract which still remains to be performed and specific performance of which may be sought, and a conveyance by which title to property has actually passed. Cases of mere contract are governed by the provisions of the Contract Act.. Cases of transfer of immovable property are governed by the Transfer of Property Act.. A mere contract to mortgage or sale would not amount to an actual transfer of any interest in the immovable property (S. 54, T.P. Act), but a deed of sale or mortgage, if duly registered, would operate as a conveyance of such interest. Once a document transferring immovable property has been registered the transaction passes out of the domain of a mere contract into one of a conveyance. Such a completed transaction would be governed by the provisions of the Transfer of Property Act, and only so much of the Contract Act as are applicable thereto.

It is significant that the whole of the Contract Act has not been made applicable to transfer of immovable properties. Section 4, T.P. Act, merely makes certain provisions of the Transfer of Property Act, relating to contracts as part of the Contract Act and not vice versa.

It is Section 6(h), T.P. Act, which lays down that no transfer can be made for an unlawful object or consideration within the meaning of Section 23, Contract Act. Sub-clause (i), further provides that nothing in that section would authorise a tenant having an untransferable right of occupancy to assign his right as such tenant.

Thus an attempted transfer of an untransferable right of an occupancy tenant is merely declared to be unauthorised and therefore void and ineffectual. Similarly, a transfer for an unlawful object or consideration is declared to be void and ineffective. So far as these sections go they do not lay down the law that if such a non-transferable interest is included among other transferable properties the

whole transaction is illegal. It is noteworthy that in order to bring in the operation of Section 6(h), the object or consideration for the transfer should be unlawful. The section would be inapplicable where the object of the consideration for the transfer is itself not unlawful but the transfer may be ineffective on some other ground.

Coming to the Agra Tenancy Act, it is also quite clear that the transfer of occupancy lands has been merely declared to be void on the ground of the incompetency of the tenant to make the transfer and has not been actually forbidden or prohibited by law or declared to be otherwise illegal. Section. 20, Agra Tenancy Act (Act 2 of 1901) provided that the interest of an occupancy tenant is not transferable, that is to say, the interest cannot pass from the tenant except in the cases mentioned therein. Similarly Section 21 of that Act made it clear that where the interest of a tenant is not transferable he shall not be competent to transfer his holding. These provisions merely make an attempted transfer absolutely void and incapable of being enforced by a Court of law. The language of these two sections does not justify the inference that such a transfer has been expressly forbidden and prohibited by law. Nor can we widen the scope of the cases which fall under the category of being opposed to public policy.

Coming back to the question how much of the provisions of the Contract Act, are to be deemed to have been incorporated in the Transfer of Property Act. I must point out what has in some cases been overlooked that Section 24, Contract Act, has not been made applicable to transfers of immovable property. There is therefore no justification for stating broadly that even if the transfers of several items of properties can be split up and separated, the whole transaction is void because one part of it may be vitiated. Of course where the object of the consideration of the transfer is unlawful, as that word is defined in Section 23, Contract Act, the transfer is not effective.

Section 23, Contract Act, makes the consideration or object of an agreement unlawful where (1) it is forbidden by law or (2) is of such a nature that, if permitted, it would defeat the provisions of any law or (3) is fraudulent or involves or implies injury to the person or property of another, or is immoral or opposed to public policy.

Leaving out the third category which is not applicable to the case itself, we have to see whether the mortgage was forbidden by law or is of such a nature that if permitted it would defeat the provisions of any law.

There is a clear distinction between an agreement which may be forbidden by law and one which is merely declared to be void. In the former ease the legislature penalises it or prohibits it. In the latter case, it merely refuses to give effect to it. If a void contract has been carried out and consideration has passed the promisor may not in equity be allowed to go back upon it without restoring the benefit which he has received. But if the promisee comes to Court to enforce it he would receive no help from a Court of law. As pointed out above the transfer of an occupancy tenancy is not actually forbidden by law but is declared to be void. If the effect of enforcing the contract would necessarily be to defeat the provisions of any law the contract would undoubtedly be void, but if it consists of several distinct parts which can be separated, the whole transaction would not be bad unless the provisions of Section 24, Contract Act, are applicable to it.

The general rule which prevails in England as stated by Wallis, J., in Pickering v. Ilfracombe Railway 3 C.P. 250:

> "Where you cannot sever the illegal from the legal part of a covenant the contract is altogether void, but where you can savor them, whether the illegality be created by statute or any law, you may reject the bad part and retain the good."

Now contracts may be invalidated either by the illegality of the object or the consideration itself or by the incapacity of the promisor to enter into such contracts. In cases of the inherent illegality, it is sometimes impossible to say whether the legal or the illegal portion of the consideration affected the mind of the promisor most. But if we take the case of a contract only partly beyond the competence of the promisor, there is no good ground why the promisee, who has paid good consideration should not be allowed to enforce that part of the promise which the promisor was competent to make.

In the case before us the consideration passing from the mortgagee was hard cash. That in itself was not unlawful. The difficulty came in from the side of the mortgagor inasmuch as he was not competent to mortgage a part of the property. It would therefore follow that if without defeating the provisions of the Transfer of Property Act or the Tenancy Act part of the mortgage could be enforced, the whole transaction cannot be bad.

Taking the case of an out□and□out sale it can hardly be contended that if a vendor has purported to sell his zamindari property along with certain occupancy lands and has received full consideration agreed upon, the title to the transferable property has not legally passed. Under the Property Act both sales and mortgages are transfers and are governed by similar principles. The only distinction is that the mortgagee may have to come into Court to enforce the covenants entered into by the mortgagor but he does so not under the provisions of the Specific Relief Act or the Contract Act but under the statutory right given to him by the Transfer of Property□Act. If that Act does not debar him from claiming partially I fail to see why he should be completely thrown out of Court."

77 A learned Single Judge of the Madhya Pradesh High Court, Rajendra Menon, J. (as His Lordship then was), after an exhaustive review of the case law on the subject, has observed in Rameshwarlal vs. Dattatraya and others reported in AIR 2010 Madhya Pradesh 187 as under:

> "34. A Division Bench of this Court in the case of Nimar Industrial Corporation Private Limited, Khandwa v. M.P. Electricity Board, Jabalpur, 1973 MPLJ 846, has considered the question of a contract to sell the land without the consent of the Government and the question of granting a decree for specific performance after considering the provisions of Sections 10 and 23 of the Contract Act and Section 21 of the Specific Relief Act, it has been held that if a lease of land is transferred without consent of the Government, the only effect of the requirement of consent being passed would be that a decree for specific performance if passed, has to be subject to approval of the State Government.

35. It is, therefore, clear on an analysis of the principles laid down by the Supreme Court and various High Courts in the matter of granting decree for specific performance in cases where consent, sanction or permission of any officer, authority or Government is required. The principle laid down is that if a condition is laid down that the transferor is bound to do everything to give effect to the contract, specific performance can be obtained with a direction to the transferor to obtain the required consent or permission. The general principle is that until and unless the transaction itself is unlawful, it may be enforced directing the defendant to take such steps as are necessary for affecting the contract. Reference may be made to a judgment of the Andhra Pradesh High Court, in the case of Somisetti Ramanaiah v. The District Supply Officer, Chittoor, AIR 1979 AP 19. The principle laid down by the Privy Council in the case of Motilal (supra) and by the Supreme Court in the cases of Mrs. Chandnee Widya (supra) and Rojasara Ramjibhai Dahyabhai (supra), all together if considered would indicate that the principle laid down is that if the vendor has agreed to sell property, which can be transferred only with the sanction of some Government authority, the Court has jurisdiction to order the vendor to apply to the authority and if sanction is not forthcoming, to convey to the purchaser the same and on the ground that the sanction is not available, decree for specific performance cannot be refused. It is held in most of the cases that when permission from some authority is required to be obtained, obtaining of the same is not a condition precedent for grant of decree for specific performance, if after grant of decree permission can be obtained. The conditional decree for specific performance can be granted making it subject to obtaining permission or exemption as contemplated in the statute. It is held that a relief can be moulded to such an effect that defendant is directed to obtain permission or consent. It has been the consistent view that on the ground of non□availability of consent or permission a defendant cannot avoid such an agreement. There are series of judgments in this regard by various High Courts, which have followed the principles laid down in the case of Mrs. Chandnee Widya (supra); Motilal (supra), and some of the judgments in this regard are Khan Bahadur C.B. Taraporwala v. Kazim Ali Pasha, AIR 1966 AP 361; Indra Prasad Saxena v. Chaman Lal Malik, AIR 1994 All 105; and, Shri Rajesh Agrawal v. Shri Balbir Singh, AIR 1994 Delhi 345.

36. If the case in hand is analysed in the backdrop of the aforesaid principles, it would be seen that a decree for specific performance can be granted subject to a rider being placed directing the appellant herein to get the permission and, therefore, the contention of Shri Ravish Agrawal, learned Senior Advocate, to the effect that no decree for specific performance can be granted, cannot be accepted. As already indicated hereinabove the judgments relied upon by Shri Ravish Agrawal, deal with prohibition under the law in the matter of execution of the agreement, however, when the question of specific performance of a contract of the nature involved in the present case is evaluated, this Court is of the considered view that the judgments relied upon by Shri Agrawal may not be applicable in the facts and circumstances of the present case."

78 The common factor, in all the aforesaid decisions, is that prior permission was not required for entering into an agreement of sale of the property. In the case on hand, an agreement entered into without previous permission of the Collector is invalid. It could be termed as an illegal agreement, as the same is prohibited by law. Permission of the competent authority is a condition precedent. Therefore, in my view, the aforesaid decisions, which I have referred and discussed, have no application to the facts of the present case.

79 Thus, having regard to the aforesaid discussion, I have reached to the conclusion that the transaction between the parties being hit by Section 43 of the Tenancy Act and being opposed to the public policy, as explained under Section 23 of the Contract Act, is not enforceable in law. There is a clear bar for entering into an agreement to sell of the granted lands without previous the permission of the Collector. If an agreement is entered into in respect of the granted land in violation of Section 43, it is invalid. Section 23 of the Indian Contract Act, 1872 bars the enforcement of a contract if it is forbidden by law. An agreement offending a statute or public policy or forbidden by law is not merely void but it is invalid from nativity. The term 'law' in this Section must be understood in the sense of the term explained in Article 13(3) of the Constitution. Thus, what is done in contravention of the provisions of any law cannot be made the subject matter of an action. If the contract is expressly prohibited by law, it is void□ab□initio and cannot be enforced. In the circumstances, Courts cannot grant a decree for specific performance subject to the permission, which may be obtained by one of the parties from the Collector. I am of the view that the suit filed by the plaintiff for enforcement of the invalid agreement cannot be entertained by the Civil Court.

80 The principle that the Courts will refuse to enforce an illegal agreement at the instance of a person who is himself a party to an illegality has been very succinctly explained by the Supreme Court in its decision in the case of Sita Ram (supra) by applying the maxim in pari causa potior est conditio possidentis. The Supreme Court, by referring to Anson's 'Principles of the English Law of Contracts', explained that there are exceptional cases in which a person would be relieved of the consequences of an illegal contract into which he has entered and the above referred maxim is not applied. The Supreme Court classified the three exceptional circumstances : (a) where the illegal purpose has not yet been substantially carried into effect, (b) where the plaintiff is not in pari delicto with the defendant, and (c) where the plaintiff does not have to rely on the illegality to make out his claim. This principle explained by the Supreme Court in Sita Ram (supra) applies on all fours to the case on hand. The plaintiff could be said to be in pari delicto with the defendants and he has no other option, but to rely upon the invalid agreement of sale for the purpose of seeking the discretionary relief of specific performance. It is not the case of the plaintiff that he had been induced to enter into the contract by fraud or strong pressure.

81 Having taken the view that the transaction is hit by Section 43 of the Tenancy Act and the agreement of sale is enforceable, I could have stopped over here and proceeded to dismiss the appeal. However, I also propose to look into the other issues.

82 Section 20 of the Specific Relief Act, 1963, provides as follows :

> "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;

(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 other party."

83 The relief of specific performance having its roots in equity, the Specific Relief Act, 1963, has preserved the discretion of the Court not to grant the relief even though the agreement is specifically performable in law. The only fetters imposed by the statute on the exercise of the discretion are that the discretion must not be exercised arbitrarily but soundly and reasonably and guided by judicial principles. The phrase "capable of correction by a Court of appeals" has been inserted possibly to indicate the necessity for the trial Court to state the reasons for exercising its discretion in a particular way. The circumstances when specific performance mentioned in the Clauses (a), (b) and (c) of Sub□section (2) of Section 20 cannot be granted are not expressly exhaustive. They indicate the situations in which the Court may properly exercise discretion not to decree specific performance. However, certain considerations have been excluded as relevant factors. These are

contained in Explanations 1 and 2 to the Section as well as in Section 20(4). It is to be noticed that each of these exclusions are preceded by the word "mere". The word "mere" in the context means "sole". In other words, any one of those factors by itself would not justify the exercise of discretion against granting specific performance. The factors cumulatively or with other factors may form the basis of a decision not to grant specific performance.

84 Hardship of the defendant may be one of the grounds which may be taken into consideration for exercising its discretion by the Court in refusing to grant a decree for specific performance of contract.

85 Section 20 of the Specific Relief Act embodies a Common law that is grant of a decree for specific performance of a contract is a discretionary one. The Court may, in a given situation, take into consideration the subsequent events.

86 Long years have been passed by in the case on hand and the trial Judge does not seem to have taken this fact into consideration while granting the decree for specific performance.

87 In Spry on Equitable Remedies, it is stated:□□"On principle, indeed, Courts of equity must take account of all the circumstances known to exist at the time when an order is sought as well as of circumstances likely to occur subsequently, when they are called upon to decide whether the effect of ordering specific performance will be to cause such great hardship as to account to an injustice. There is no sufficient reason why a cause of hardship should be ignored merely because it did not exist at the time when the material contract was entered into. Certainly the fact that it has occurred subsequently may be a matter of weight, and if it appears that the parties contemplated that events might occur such as have in fact occurred the alleged causes of hardship will usually be of little importance indeed. But this is not to say that they are irrelevant or that sometimes they may not be decisive so as to incline the balance of justice against the grant of relief.

Fortunately, however, this matter does not depend solely on principle, for there may be " found various decisions where events occurring after the date of entry into the agreement in question have been treated as relevant. Furthermore, it will subsequently be seen that any hardship of the defendant, if specific performance were ordered, must be weighed against the inconvenience or hardship which would be caused to the plaintiff if specific performance were refused. And in determining how great any such hardship or inconvenience to the plaintiff will be once again events and probable events as known at the date of the hearing are taken into account and there is no arbitrary restriction or limitation to events taking place at the time of entry into the material agreement.

It must not be forgotten that as soon as it is shown that damages and other legal remedies arc inadequate an applicant will be held prima facie entitled to specific performance of a valid and enforceable agreement. Specific performance will not be refused merely because inconvenience or even hardship to the defendant would be caused thereby. But if the hardship suffered by the defendant, if specific enforcement took place, would be so much greater than the detriment which would be suffered by the plaintiff if he were confined to his remedy at law that it would be

unreasonable and oppressive to grant relief, specific enforcement will be denied."

88 In S.G. Banerjee's Specific Relief Act, 10th Edn. At page 357, it is stated : "It is almost universally recognised that specific performance of a contract should not be granted, if in the circumstances of a case, it is inequitable to do so. The clause follows and gives statutory recognition to the universal rule. It enacts that where the defendant enters into the Contract under circumstances, which, though they do not render the contract voidable, yet make it inequitable to enforce specific performance, the Court may properly exercise discretion not to decree specific performance. What would or would not be inequitable would depend upon the facts and circumstances of the each case."

89 In Om Prakash v. Amarjit Singh, reported in 1988 Supp. SCC 780, the law is stated in the following terms:

> "This is a suit for specific performance on an agreement to sell. The grant of relief is discretionary. The Court after consideration of all relevant circumstances must be persuaded to exercise its equitable and discretionary jurisdiction in favour of specific enforcement. The jurisdiction is subject to all the conditions to which all discretionary jurisdictions are subject. There are certain personal bars to relief. Respondent 1, who was the plaintiff in the suit, did not enter the box and tender evidence. The subject-matter of the suit is a small piece of property of 68 sq. yds. And is said to be the only worldly goods of the appellant."

90 It is a settled principles of law that the provisions of Section 20 of the Specific Relief Act is not exhaustive. The same has to be considered and read with the Section 14 thereof. It is further well settled that the plaintiff does not have an absolute right to obtain a decree for specific performance of contract.

91 In Yohannan and another v. Harikrishnan Nair and others, reported in AIR 1992 Ker 49, it is stated :

> "The cases in which the Court may properly exercise discretion not to decree specific performance has been enumerated in Sub-section (2). They are (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 avoidable, 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 nonperformance would involve no such hardship on the plaintiff, (c) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance."

92 The discretion of the Court in the matter, thus, is not confined within the four corners of Section 20 of the Act.

> "39. In Dr. S.C. Banerjee's Specific Relief Act, 10th Edn. At page 326, the law is stated in the following terms :□□"The discretion is guided by judicial principles. The expression means that discretion is not to be arbitrarily exercised, but must be based on sound, reasonable and judicial principles, that is, the discretion must not be dependent upon the mere pleasure of the Judge but must be sound and reasonably guided by judicial principles. The Court must grant or withhold relief according to the circumstances of each particular case, when the general rules and principles do not furnish an exact measure of justice between the parties."

93 In granting or withholding the relief, the Court should take the following circumstances, conditions and incidents into consideration :

> "(1) The contract must be certain, unambiguous and upon a valuable consideration;
>
> (2) The contract must be perfectly fair in all its parts;
>
> (3) The contract must be free from any fraud misrepresentation, imposition or mistake;
>
> (4) The contract must not impose an unconscionable or hard bargain;
>
> (5) The performance of the contract must not impose any hardship on the defendant, such as he could not foresee; (6) The contract must be capable, of specific execution through a decree of the Court,"

94 The appeal Court should not interfere with the judgment of the trial Court only because it is not right but when it is clearly wrong. Even in regular suits, the appeal courts are loathe to interfere with the findings of fact arrived at by the trial Court on the basis of oral evidence. (See Ratanlal Nahata v. Nandita Bose reported in 1997(1) CHN

392).

95 There is no dispute that an order of specific performance is a discretionary one. In an appeal against such an order, the appellate Court generally does not interfere with the discretion exercised by the trial Judge unless it appears that while exercising such discretion the trial Judge has wrongly applied the principles for grant of such discretion or unless it is established that such discretion has been unreasonably or capriciously used. In this connection reference may be made to the decision of Supreme Court in Uttar Pradesh Cooperative Federation Ltd. v. Sunder Bros. Of Delhi, reported in AIR 1967 249. In that decision the Supreme Court was dealing with an appeal against an order granting stay in exercise of power under Section 34 of the Arbitration Act, which is undoubtedly a discretionary power. While discussing the scope of the said appeal the Apex Court held that where

the discretion vested in the Court has been exercised by the lower court, the appellate Court would be slow to interfere with the exercise of its discretion. In dealing with the matter raised before it at the appellate stage, the appellate Court would not be justified in interfering with the discretion under appeal solely on the ground that if it had considered the matter at the trial stage it might have come to a contrary conclusion. If the discretion has been exercised by the trial Court reasonably and in a judicial manner the fact that the appellate Court could have taken a different view may not justify such interference with the trial Court's exercise of discretion. If it appears to the appellate Court that in exercise of its discretion the trial Court had acted unreasonably or capriciously or has ignored the relevant fact, then it would be open to the appellate Court to interfere with the trial Court's exercise of discretion.

96 Let me now look into Section 16 of the Specific Relief Act. Section 16 of the Specific Relief Act provides that specific performance of a contract cannot be enforced in favour of a person (b) who has become incapable of performing or violates any essential term of the contract that remains to be performed on his part or willfully acts at variance with or in subversion of the relation intended to be established by the contract, or (c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him other than the terms performance of which has been prevented or waived by the defendant. Clause (c) has since been explained (I) that it is not essential where the contract involves payment of money, to actually tender to the defendant or to deposit in Court except when so directed by the Court; and (ii) the plaintiff must aver performance of readiness and willingness to perform the contract according to its true construction.

97 A plain reading of Section 16 of the Specific Relief Act makes it clear that in order to obtain specific performance of a contract, the plaintiff has to show that he has not violated any essential term of the contract that on his part remains to be performed or that he has not acted willfully at variance with or in subversion of the relation intended to be established by the contract and that he has averred and proved that he has performed and was always ready and willing to perform the essential terms of the contract to be performed by him unless prevented or waived by the defendant. The ingredients may be specified thus: (1) the plaintiff has become incapable of performing any part of the contract that remains to be performed by him; or (2) he has violated any essential term of the contract that remains to be performed by him; or (3) he acts in fraud of the contract; or (4) he willfully acts at variance with the relation intended to be established by the contract; or (5) he willfully acts In subversion of the relation intended to be established by the contract; or (6) he fails to aver that he has performed the essential terms of the contract to be performed by him; or (7) he was always ready and willing to perform the essential terms of the contract to be performed by him; or (8) he was prevented by the defendant from performing any part of the contract; or (9) the defendant had waived performance of any part of the contract; and (10) he has to prove the conditions contained in (6) to (8). According to the explanation, much readiness and willingness to perform the contract must be according to the true construction of the contract.

98 The King's Bench in Rookey's Case [77 ER 209; (1597)5 Co.Rep.99], it is said :

> "Discretion is a science, not to act arbitrarily according to men's will and private affection: so the discretion which is exercised here, is to be governed by rules of law and equity, which are to oppose, but each, in its turn, to be subservient to the other. This discretion, in some cases follows the law implicitly, in others or allays the rigour of it, but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this Court. That is a discretionary power, which neither this nor any other Court, not even the highest, acting in a judicial capacity is by the constitution entrusted with"

99 The Court of Chancery in Attorney General vs. Wheat [(1759)1 Eden 177; 28 ER 652] followed the Rookey's case and observed :

> "The law is clear and courts of equity ought to follow it in their judgments concerning titles to equitable estates; otherwise great uncertainty and confusion would ensue. And though proceedings in equity are said to be secundum discretionem boni vin, yet when it is asked, vir bonus est quis? The answer is, qui consulta partum, qui leges juraq servat. And as it is said in Rooke's case, 5 Rep. 99 b, that discretion is a science not to act arbitrarily according to men's will and private affection: so the discretion which is exercised here, is to be governed by rules of law and equity, which are to oppose, but each, in its turn, to be subservient to the other. This discretion, in some cases follows the law implicitly, in others or allays the rigour of it, but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this Court. That is a discretionary power, which neither this nor any other Court, not even the highest, acting in a judicial capacity is by the constitution entrusted with. This description is full and judicious, and what ought to be imprinted on the mind of every judge."

[100] In Satya Jain vs. Anis Ahmed Rushdie, (2013)8 SCC 131, at page 145, the Supreme Court observed :□"40. The discretion to direct specific performance of an agreement and that too after elapse of a long period of time, undoubtedly, has to be exercised on sound, reasonable, rational and acceptable principles. The parameters for the exercise of discretion vested by Section 20 of the Specific Relief Act, 1963 cannot be entrapped within any precise expression of language and the contours thereof will always depend on the facts and circumstances of each [pic]case. The ultimate guiding test would be the principles of fairness and reasonableness as may be dictated by the peculiar facts of any given case, which features the experienced judicial mind can perceive without any real difficulty. It must however be emphasised that efflux of time and escalation of price of property, by itself, cannot be a valid ground to deny the relief of specific performance. Such a view has been consistently adopted by this Court. By way of illustration opinions rendered in P.S. Ranakrishna Reddy v. M.K. Bhagyalakshmi (2007) 10 SCC 231 and more recently in Narinderjit Singh v. North Star Estate Promoters Ltd.(2012) 5 SCC 712 may be usefully recapitulated."

[101] In Nirmala Anand vs. Advent Corpn. (P) Ltd., (2002)8 SCC 146, at page 150, a three Judge Bench of the Supreme Court on a similar issue held as under :□"6. It is true that grant of decree of specific performance lies in the discretion of the court and it is also well settled that it is not always

necessary to grant specific performance simply for the reason that it is legal to do so. It is further well settled that the court in its discretion can impose any reasonable condition including payment of an additional amount by one party to the other while granting or refusing decree of specific performance. Whether the purchaser shall be directed to pay an additional amount to the seller or converse would depend upon the facts and circumstances of a case. Ordinarily, the plaintiff is not to be denied the relief of specific performance only on account of the phenomenal increase of price during the pendency of litigation. That may be, in a given case, one of the considerations besides many others to be taken into consideration for refusing the decree of specific performance. As a general rule, it cannot be held that ordinarily the plaintiff cannot be allowed to have, for her alone, the entire benefit of phenomenal increase of the value of the property during the pendency of the litigation. While balancing the equities, one of the considerations to be kept in view is as to who is the defaulting party. It is also to be borne in mind whether a party is trying to take undue advantage over the other as also the hardship that may be caused to the defendant by directing specific performance. There may be other circumstances on which parties may not have any control. The totality of the circumstances is required to be seen."

[102] In V. Pechimuthu vs. Gowrammal, (2001)7 SCC 617, at page 629 the Supreme Court held as under:□"25. Counsel for the respondent finally urged that specific performance should not be granted to the appellant now because the price of land had risen astronomically in the last few years and it would do injustice to the respondent to compel her to reconvey property at prices fixed in 1978.

26. The argument is specious. Where the court is considering whether or not to grant a decree for specific performance for the first time, the rise in the price of the land agreed to be conveyed may be a relevant factor in denying the relief of specific performance. (See K.S. Vidyanadam v. Vairavan). But in this case, the decree for specific performance has already been passed by the trial court and affirmed by the first appellate court. The only question before us is whether the High Court in second appeal was correct in reversing the decree. Consequently the principle enunciated in K.S. Vidyanadam (1997) 3 SCC 1 will not apply."

[103] In a judgment dated 22.9.2014 delivered in the Civil Appeal No.9047 of 2014 titled K. Prakash vs. B.R. Sampath Kumar, reported in AIR 2015 SC 9, the Supreme Court observed that:

> "17. The principles which can be enunciated is that where the plaintiff brings a suit for specific performance of contract for sale, the law insists a condition precedent to the grant of decree for specific performance that the plaintiff must show his continued readiness and willingness to perform his part of the contract in accordance with its terms from the date of contract to the date of hearing. Normally, when the trial court exercises its discretion in one way or other after appreciation of entire evidence and materials on record, the appellate court should not interfere unless it is established that the discretion has been exercised perversely, arbitrarily or against judicial principles. The appellate court should also not exercise its discretion against the grant of specific performance on extraneous considerations or sympathetic considerations. It is true, as contemplated under Section 20 of the Specific Relief Act,

> that a party is not entitled to get a decree for specific performance merely because it is lawful to do so. Nevertheless once an agreement to sell is legal and validly proved and further requirements for getting such a decree is established then the Court has to exercise its discretion in favour of granting relief for specific performance.
>
> 19. Subsequent rise in price will not be treated as a hardship entailing refusal of the decree for specific performance. Rise in price is a normal change of circumstances and, therefore, on that ground a decree for specific performance cannot be reversed.
>
> 20. However, the court may take notice of the fact that there has been an increase in the price of the property and considering the other facts and circumstances of the case, this Court while granting decree for specific performance can impose such condition which may to some extent compensate the defendant□owner of the property. This aspect of the matter is considered by a three Judge Bench of this Court in Nirmala Anand vs. Advent Corporation (P) Ltd. and Others, (2002)8 SCC 146."

[104] The equitable discretion to grant or not to grant a relief for specific performance also depends upon the conduct of the parties. The necessary ingredient has to be proved and established by the plaintiff so that discretion would be exercised judiciously in favour of the plaintiff. At the same time, if the defendant does not come with clean hands and suppresses material facts and evidence and mislead the Court then such discretion should not be exercised by refusing to grant specific performance.

[105] In my opinion, having regard to the evidence on record and the contentions of the plaintiff, the Trial Court committed no error in declining to grant the discretionary relief of specific performance of the agreement of sale.

[106] The first ground is non□compliance of the essential conditions of Section 16(c) of the Specific Relief Act. It provides that specific performance of a contract cannot be enforced in favour of a person who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him other than terms the performance of which has been prevented or waived by the defendant. From this provision it is clear that a person who fails to aver and prove that he has performed or has always been ready and willing and is still ready and willing to perform the essential terms of the contract is not entitled to a decree for specific performance of contract. It is essential that the plaintiff has to aver in the plaint that he has performed his part of the obligations under the contract or has always been ready and willing to perform his part of the contract. Readiness and willingness both have to be averred as well as proved by the plaintiff seeking a decree for specific performance. Even if there is averment about the plaintiffs' readiness to perform his part of the obligations under the contract but, there is omission or failure to allege in the plaint the willingness of the plaintiff to perform his part of the obligation under the contract, the suit for specific performance is bound to be dismissed. The law requires that there should be allegation in the plaint regarding readiness and willingness of the plaintiff to perform his part of the obligation under the contract and this readiness and willingness should have always been shown by the plaintiff. In addition to such allegation there should be specific allegation

and there should be specific proof by the plaintiff that he has been ready and willing to perform his part of the obligation under the contract. Again if in the evidence mere readiness of the plaintiff is established but not willingness the suit for a specific performance is bound to fail. Similarly, if the willingness of the plaintiff to perform his part of the obligation is proved but not readiness, in that case, no decree for specific performance can be granted. In addition to this, explanation

(ii) of Section 16 (c) of the Specific Relief Act provides that for the purposes of clause (c) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction.

[107] In light of this provision, I examined the allegations made in the plaint (the translated copy has been provided by the learned counsel appearing for the plaintiff). I have noticed something very disturbing. The plaintiff has made a false statement on oath in the plaint that on account of non-cooperation on the part of the land owners, he was not in a position to complete the legal formalities like obtaining of permission, etc, from the competent authority. At this stage, I may reproduce one paragraph from the Examination-in-Chief of the plaintiff by way of an affidavit under the provisions of Order XVIII Rule 4 of the C.P.C.:

> "I the plaintiff has paid full consideration amount to the defendants and the defendants were required to obtain the necessary permissions and to execute the sale deed in favour of me the plaintiff. I the plaintiff has also obtained the necessary permission u/s.43 of Tenancy Act. Even than, the defendants are not interested to execute the sale deed and therefore, I the plaintiff has filed the present suit for declaration and for specific performance of the banakhat."

[108] As against the aforesaid statement made by the plaintiff on oath in his Examination-in-Chief, the plaintiff, in his cross-examination, has deposed as under:

> "It is true that I the plaintiff had obtained the N.A. permission. The said N.A. permission was granted on 16/9/2000. It is true that as specified in the said N.A. order, I has not deposited the premium amount which came to Rs.1,02,03,724/- payable to the Government. It is true that the said N.A. permission was granted to me in the names of defendants. It is true that the defendants had extended necessary cooperation and support to us for getting N.A. permission and then only, the N.A. permission was granted. It is not true that the Declaration Form filled up by the defendants under the provisions of ULC Act was disposed of before the execution of banakhat-1997. I do not know as to whether the said order was passed in the year 1997 or not. It is true that the defendants had informed us about the cancellation of banakhat in the year 2003. I do not remember that the defendants had given me notice through their advocate Shri Shirke directing us not to make any correspondence through Power of Attorney holder. It is true that it was decided in the banakhat that the possession of the land shall be handed over after execution of sale deed. It is true that the possession receipt of suit land was prepared on 21/1/93 but the actual possession of the suit land was not given. It is true that it was decided in

> the terms and conditions of the banakhat that the possession of the land shall be handed over after execution of sale□deed. I know that the sale□deed cannot be executed till the land of new tenure land is turned into old tenure land. It is not true that it was decided in the terms and conditions of Banakhat that the sale□deed shall be executed only after the land of new tenure land is turned into old tenure land. It is true that the defendants have canceled the banakhat w.e.f. 4/2/2003 and they had given notice to give the amount back. It is not true that I have failed to comply with the terms and conditions of all three banakhats and therefore, I am not entitled to get the relief of specific performance of agreements. It is true that as on today, the names of defendants are seen as the possessors of the land in the revenue records. It is not true that I have filed false petition."

[109] It also appears from the materials on record that the plaintiff had asked rather insisted to the land owners to prefer an application under Section 70(o) of the Bombay Tenancy Act. It appears that the insistence to file such application was with an idea that if the owners would have been able to establish that they had purchased the suit land under the provisions of the Act, in their capacity as permanent tenants and held transferable rights in the tenancy of the land, then probably, the first part of Section 43 of the Act would not be applicable and the plaintiff may not have to pay the amount of premium. It has been pointed out that after such application was filed by the land owners at the instance of the plaintiff, it is the plaintiff himself who opposed the same before the competent authority and got it rejected. When I inquired as to why the plaintiff had to do so, I was given to understand that the plaintiff had an apprehension that if such application would be allowed, then the land owners may transfer the land to any other person. I am highlighting all these facts only to indicate that whatever was asked by the plaintiff, the land owners did the same. However, the fact remains that even on the date when the suit was instituted, the land remained of the restricted tenure, and therefore, even if the land owners wanted to execute the sale deed and transfer the land, they could not have done it. I am at one with Mr. Bhatt, the learned counsel appearing for the land owners that how long his clients should have waited. Mr. Bhatt is justified in his submission that the plaintiff had no means or the capacity to get the sale deed executed in his favour after making the necessary payment of premium.

[110] The remedy for specific performance is equitable remedy. The equitable principles are incorporated under Section 20 of the Specific Relief Act, 1963. These equitable principles are nicely incorporated in Section 20 of the Act. While granting the decree for specific performance, these salutary guidelines shall be in the forefront of the mind of the Court. The Trial Court, which had the added advantage of recording the evidence and seeing the demeanour of the witnesses considered the relevant facts and reached a conclusion. In such circumstances, the Appellate Court should be extremely loath and slow to disturb such a conclusion.

[111] My final conclusions on the points framed for determination are as under:

> [1] The suit for specific performance of contract based on an invalid agreement of sale hit by Section 43 of the Tenancy Act, 1948, is not maintainable in law. If the agreement is rendered invalid under Section 43 of the Bombay Tenancy and

Agricultural Lands Act, 1948, such agreement is incapable of being specifically enforced. If the agreement of sale itself is invalid, no decree for specific performance can be passed by the Trial Court. Section 14(1)(c) of the Specific Relief Act provides inter alia that a contract, which is in its nature determinable, cannot be specifically enforced. In such circumstances, the suit for specific performance of agreement of sale has rightly not been decreed.

[2] Even otherwise, independent of the issue of Section 43 of the Act, 1948, the plaintiff has not been able to make out any case for grant of decree of specific performance of contract based on an invalid agreement of sale.

[112] I hold that the plaintiff is not entitled to a decree of specific performance of an invalid contract. At the same time, I am of the view that the land owners should refund the amount of Rs.18,30,000/□paid by the plaintiff to them at the time of entering into the contract at a reasonable rate of interest. In fact, Mr. Bhatt, the learned counsel appearing for the land owners on his own free will and volition made a statement that the land owners would refund the amount with reasonable interest to the plaintiff.

[113] In view of the above, this appeal succeeds in part. The judgement and decree passed by the Civil Court, insofar as it declined to grant the decree of specific performance of contract is concerned, is hereby affirmed. At the same time, the defendants i.e. the land owners are directed to refund the amount of Rs.18,30,000/□ to the plaintiff at the rate of 8% simple interest within a period of two months from today.

(J. B. PARDIWALA, J) CHANDRESH