

(2009) 02 DEL CK 0297
In the Delhi High Court
Case No : CS (OS) 1669 of 1989

Canara Bank

APPELLANT

Vs

K.L. Rajgarhia

RESPONDENT

Date of Decision : 12-02-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 14 Rule 5, Order 39 Rule 1, Order 39 Rule 2
Contract Act, 1872 — Section 23, 24, 65
Income Tax Act, 1961 — Section 269UC
Specific Relief Act, 1963 — Section 10, 12, 12(3), 14, 14(3)

Citation : (2009) 02 DEL CK 0297

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Pradeep Dewan and Rajiv Samaiyar, for the Appellant; T.K. Ganju A.K. Thakur, Bharat Gupta and R.K. Mishra, for the Respondent

Judgement

Rajiv Sahai Endlaw, J.—The suit for specific performance of an agreement dated 27th December, 1984 between the parties and for other reliefs is for final adjudication. The plaintiff approached the court with a case that in or about 1984 the plaintiff bank had felt the need for purchase of residential flats for the use of its officers; the plaintiff entered into negotiations with the defendant who owned the plot of land admeasuring 300 sq yards bearing No. B-9, East of Kailash, New Delhi; that the defendant agreed to construct residential flats on the said plot and to hand over the same to the plaintiff; that agreement dated 27th December, 1984 was entered into between the parties.

2. At this stage, the salient terms of the said agreement, insofar as relevant for the present, may be discussed. In the said agreement, the defendant is described as the vendor and the plaintiff as the purchaser; the agreement records that in pursuance to payment of Rs 27,100/- the Delhi Development Authority on behalf of the President of India has granted a lease of the aforesaid plot of land to the defendant on the terms and conditions contained in the perpetual lease deed, copy whereof is annexed to the agreement; that the

defendant had proposed that he will construct residential flats on the said plot of land in accordance with plan annexed to the agreement and of the area as specified in Schedule I to the agreement, at his own costs for the use of the plaintiff as residential premises and that the defendant had agreed to sell to the plaintiff the said flats alongwith the leasehold rights over the plot of land and the plaintiff had agreed to purchase the same. The plaintiff under the said agreement agreed to pay a total sum of Rs 32,07,500/- to the defendant as consideration for the flats set out in Schedule I to the agreement together with the leasehold rights over the land and at the rate of Rs 340/- per sq. ft. of covered area of the flat and Rs 250/- per sq. ft. of the covered area in the basement as described in Schedule II to the agreement and in the instalments set out in Schedule III to the agreement; that the total consideration had been arrived at by taking into consideration the approximate area of each flat as mentioned in Schedule I but the said consideration was subject to variation and was to be finally determined after completion of the construction in all respects and after the actual area was measured - the total consideration payable was on the actual covered area ascertained on actual measurement; that as per the then plan, the ground floor, first floor and second floor each was to contain two flats of approximate covered area of 1000 sq. ft. and mezzanine floor and the third floor of barsati each were to contain one flat of 1000 sq. ft., besides basement of an approximately covered area of 1950 sq ft. It was further provided that if the defendant constructed additional two flats, the defendant shall sell the same only to the plaintiff at the same rates and subject to the same conditions and specifications as applicable to the other flats. It was further agreed that the defendant shall not construct even if permissible to do in excess of ten flats and basement. The obligation for obtaining of the necessary permission from the DDA or other governmental authorities for transferring and conveying all rights, title and interest in respect of land and the flats to the plaintiff was of the defendant and all expenses, charges in connection with transfer including payment of any statutory dues or amount by way of unearned increase in the value of the plot to the Delhi Development Authority or any other authority was also to be borne by the defendant. The defendant had agreed to complete the flats within the period of 18 months from the date of the agreement.

3. Some of the clauses of the aforesaid agreement which would be relevant for the discussion hereunder are set out hereinbelow.

3. It is agreed that on the plot of land in question, no other structure or building will be erected; the intention being that no one else other than the purchaser will have any right, title or interest to any part of the plot or any structure thereon.

5. It shall be the duty of the vendor to obtain all the necessary permissions from the Delhi Development Authority or other Governmental authorities for transferring and conveying all the rights, title and interest in respect of the land and the flats to the purchaser. If for whatever reason, the vendor is not able to convey and transfer the right, title and interest as mentioned hereinabove to the

purchaser, the entire amount paid by the purchaser to the vendor shall be treated as a loan advanced by the purchaser to the vendor and will be repayable on demand with interest at 18% per annum compounded quarterly from the date on which the flats are to be handed over under this agreement. It is specifically agreed that all expenses, charges in connection with transfer including the payment of any statutory dues or amount by way of unearned increase in the value of the plot to the Delhi Development Authority or any other authority shall be borne by the vendor.

6. it is specifically understood that the purchaser is interested in purchasing the flats to be constructed thereon alongwith the rights concerning the plot of land and not the rights over the land alone and therefore the construction of the flat within the period and subject to the specification set out herein is the essential term of this agreement. The Vendor therefore shall not sell or lease or otherwise transfer the flats to any other person.

8. It is agreed that in the event of the vendor failing to complete the construction in all respects and put the purchaser in possession after obtaining completion certificate and all other necessary certificates and permissions from the authorities concerned for making it legally possible for the purchaser to occupy the flats within the period mentioned above, the Vendor shall be liable to pay to the purchaser damage at the rate of Rs. 1000/- per day till the date of which the purchaser is lawfully put in possession of all the flats.

8 (a) if at any time, the Vendor abandons the building project or if the purchaser is of the opinion that the Vendor is neglecting to complete the construction or if the purchaser has reason to believe that the building is not likely to be completed within a reasonable period after the due date, it shall be open to the purchaser to cancel the contract and to demand repayment of the entire amount paid by the purchaser to the Vendor with interest at 18% p.a. treating the said payments as loan and further the Vendor will have no claim whatsoever against the purchaser either by way of damages or otherwise arising out of or attributable to such cancellation.

10. The purchaser, if at any time immediately after the completion of the above mentioned period is of the opinion that the Vendor is neglecting or unwilling or unable for any reason except as provided to complete the construction and hand over possession, may itself complete the remaining part of the work at such costs and expenses as it thinks necessary and all such expenses and costs shall be treated as loan advanced to the Vendor by the purchaser and the amount will be repayable on demand with interest at 18% per annum compounded quarterly from the date of incurring of such expenditure. PROVIDED further the purchaser is not obliged to complete the construction as hereinabove mentioned.

11. Immediately after the construction of the flats are complete to its satisfaction, the purchaser may at its discretion occupy the flats without any specific permission by the vendor to so occupy the flats.

13. It is agreed that the purchaser shall be entitled at its discretion to specifically enforce this agreement including every clause if it.

19. It shall be the responsibility of the Vendor to obtain all licences, permissions or sanctions at his own cost from the authorities for the purpose of construction of these flats for procuring of the building materials and for taking of all and every step for fully and effectually implementing this agreement.

4. The plaintiff further averred in the plaint that it had in part performance of the contract paid to the defendant a sum of Rs 28,86,750/- which constituted about 90% of the total sale consideration; that the defendant was bound to complete the construction and hand over the possession of the flats on or before 27th June, 1986 and in any case before 27th December, 1986 but had failed to do so; that the defendant was failing to complete the construction due to steep rise in prices of the property and was thus avoiding to perform his part of the agreement and had abandoned the construction and not resumed the same despite requests. The plaintiff pleaded that it was ready and willing to perform its part of the contract and was seeking specific performance of the agreement and also the damages stipulated in the agreement for delay in delivery of the flats. Relying upon Clause 10 (supra) the plaintiff also sought the relief of mandatory injunction for directing the defendant to hand over to the plaintiff the plot and the incomplete construction thereon so that the plaintiff could complete the balance work and occupy the flats. The plaintiff also claimed the decree for accounts. The plaintiff in the event of the court not finding it entitled to the relief of specific performance also claimed the relief of damages in the sum of the difference in the contracted rate and the current rate of the property on the date of pronouncement of judgment. On an application of the plaintiff for interim relief being IA. No. 4644/1989 vide ex parte order dated 13th July, 1989 the defendant was restrained from selling, alienating, transferring, dispossessing of or encumbering in any manner or dealing with the suit property in favour of any person except the plaintiff till further orders. The application for interim relief was not got listed for hearing after notice and the order dated 13th July, 1989 continued during the pendency of the suit.

5. The defendant contested the suit by filing the written statement dated 20th November, 1989 on, inter alia, the following grounds:

- i. that the agreement dated 27th December, 1984 was intended to be and was, in fact, a loan transaction between the plaintiff and the defendant;
- ii. that the defendant, in accordance with the terms of the perpetual lease, was required to complete the construction on the plot within two years from possession;
- iii. that the defendant did not have funds for the same and approached the plaintiff, with whom several of his companies had financial arrangements, for financial assistance for construction on the aforesaid plot of land by creating equitable mortgage of the property as security;

- iv. that the officers of the plaintiff bank, however, informed the defendant that though the bank had no scheme or policy for grant of loan for construction of houses and suggested grant of loan under the cover of an agreement to sell the residential flats which the defendant was intending to construct on the said plot of land. Reliance was placed in this regard on the clause in the agreement which gave an option to the plaintiff bank to at any time opt out of the agreement by claiming refund of the monies advanced till then with interest at 18% per annum thereon;
- v. acting on the said basis the defendant also handed over the original title deeds of the property to the plaintiff by way of equitable mortgage;
- vi. The defendant thus denied that the plaintiff was entitled to specific performance and pleaded that he was ready and willing to pay to the plaintiff the entire advance of Rs 28,86,750/- alongwith interest at 18% per annum;
- vii. that the agreement was not a result of fair bargaining and was vitiated by undue coercion by the plaintiff and their officers being in a dominating position;
- viii. The agreement was therefore claimed to be voidable and not enforceable against the defendant;
- ix. that the agreement was unconscionable and unreasonable and was one sided and lacked mutuality. Again various clauses of the agreement were referred to in this regard;
- x. that the consideration for the sale of the flat was unconscionable and did not represent the fair market price. It was pleaded that the total cost of the land and construction and other charges payable under the agreement by the defendant was Rs 48.60 lacs while the consideration under the agreement was about Rs 32 lacs only;
- xi. that the performance of the agreement would cause undue hardship to the defendant which he had not foreseen at the time of execution of the agreement;
- xii. the defendant had no other house or suitable accommodation in Delhi and was residing in tenanted accommodation alongwith his family and needed the accommodation in the property for his own residence;
- xiii. that the agreement was unenforceable u/s 20 of the Specific Relief Act for the aforesaid reasons;
- xiv. that the plaintiff would be fully protected if received back the amount paid together with interest at 18% per annum with quarterly rests upto the date till which the defendant had offered the said monies to the plaintiff;
- xv. that the plaintiff would not suffer any hardship by non performance of the agreement;
- xvi. that under Clause 5 of the agreement, if the defendant was unable to convey and transfer the rights as agreed to the plaintiff, the amount paid by the plaintiff

to the defendant was to be treated as loan repayable with interest at 18% per annum. It was thus contended that the subsequent clauses 10 and 13 reproduced hereinabove entitling the plaintiff to specific performance ought not to and the earlier of the two clauses ought to prevail;

xvii thus the plaintiff bank was not entitled to specific performance and was entitled only to refund of monies advanced with interest and which was sufficient compensation;

xviii that the agreement was unenforceable in view of Section 269UC contained in chapter XX C of Income Tax Act inasmuch as the parties had not complied with the provision thereof and which further showed that the parties were not ready and willing;

xix it was pleaded that the relief claimed by the plaintiff of mandatory injunction was not maintainable u/s 14(3) of the Specific Relief Act;

xx that the plaintiff had committed breach of the agreement by interfering in the construction activity and was thus not entitled to the relief of specific performance.

6. The plaintiff filed a replication dated 19th May, 1999. It was denied that the transaction between the parties was a loan transaction or unfair or unreasonable or as a result of unequal bargaining power.

7. In the aforesaid state of pleadings, the following issues were struck on 16th July, 1993:

1. Whether the plaint has been signed and verified and suit instituted by a person duly authorized? OPP

2. Whether the agreement dated 27th December, 1984 was intended to be and is in fact a loan transaction? OPD

3. Whether the agreement dated 27th December, 1984 is vitiated by undue influence and coercion exercised by the plaintiff and is against public policy? OPD

4. Whether the suit is not maintainable and the plaintiff is not entitled to specific performance of the contract u/s 20 of the Specific Relief Act? OPD

5. Whether the refund to the plaintiff of total amount received by defendant along with interest 18% p.a. as per agreement disentitles plaintiff for specific performance of agreement u/s 14 of the Specific Relief Act? OPD

6. Whether the stipulation regarding refund of the total amount to the plaintiff along with interest @18% p.a. as per Clause 5 of the said agreement amounts to an alternative contract, the performance of which discharges the defendant from specific performance of agreement dated 27th December, 1984? OPD

7. Whether the agreement dated 27th December, 1984 is unenforceable, illegal and void under chapter XXC and u/s 269UC of the Income Tax Act? OPD

8. Whether the plaintiff has been ready and willing to perform his part of the contract? OPD

9. Relief.

8. The counsel for the plaintiff, by referring to the contemporaneous correspondence between the parties, sought to belie the plea of the defendant in the written statement of the transaction being a loan transaction and not an agreement for sale / purchase of immovable property. The counsel for the plaintiff was heard on 25th September, 2008, 1st October, 2008 and 27th November, 2008. The senior counsel for the defendant before commencing his submission on 29th January, 2009, on instruction, stated that the defendant was not pressing the pleas in the written statement of the transaction between the parties being a loan transaction or of the agreement being vitiated by undue influence and coercion exercise by the plaintiff or the plea of the contract being for refund of total amount paid by the plaintiff alongwith interest at 18% per annum.

9. It was informed that upon withdrawal of the said pleas by the defendant, the issue No. 2, the part of the issue No. 3 dealing with the plea of undue influence and coercion do not fall for adjudication. The senior counsel for the defendant confined his submission to the construction of 8 flats/dwelling units as per the agreement being not possible on the property - neither at the time of entering into the agreement nor even today, being prohibited by master plan, building bye laws and the sanctioned building plan. The only submission thus was that the contract was incapable of specific performance. Attention of the senior counsel for the defendant was drawn to Section 12 of the Specific Relief Act and it was inquired as to why, subject to the plaintiff agreeing, order thereunder could not be made. The senior counsel for the plaintiff made his submission on the same which will be discussed hereunder. However, in view of the aforesaid turn of events, the same were recorded in the order of 29th January, 2009 and the statement of the counsel for the plaintiff was also recorded qua Section 12 of the Specific Relief Act.

10. It is now apposite to return findings issue wise and on the new pleas raised during the arguments by the senior counsel for the plaintiff.

11. Re: Issue No. 1 ("1. Whether the plaint has been signed and verified and suit instituted by a person duly authorized? OPP)

12. Though the senior counsel for the defendant did not address on this issue but informed that the defendant was not conceding the same.

13. The suit has been instituted and the plaint signed and verified by Mr R.K. Arora who, in para 2 of the plaint, is described as the Manager of the plaintiff at its circle office and incharge and principal officer of the premises and general Section, Delhi circle of the plaintiff and holding a power of attorney authorizing him to institute the suit and to do other things in connection therewith. The

defendant, of course, denied the contents of the said paragraph of the plaint leading to the framing of the issue. Exhibit P24 is a photocopy of the general power of attorney dated 3rd February, 1977 by the Chairman and Managing Director of the plaintiff bank in favour of Shri Rajindra Kumar Arora in service of the bank. The same authorizes the said Shri R.K. Arora to transact various acts as described therein on behalf of the plaintiff bank. Exhibit P25 is the photocopy of the supplement power of attorney dated 15th July, 1995 executed by the plaintiff bank in favour of Shri R.K. Arora aforesaid recording that pursuant to the general power of attorney dated 3rd February, 1977 (supra) the said Mr R.K. Arora had, on behalf of the bank from time to time, filed suits and in which the authority of the said Mr A.K. Arora had been challenged, necessitating the execution of the supplemental power of attorney ratifying all acts, deeds and things done by the said Mr R.K. Arora in pursuance to the power of attorney. The said power of attorney ratifies each and every suit filed by the said Mr Arora and further authorizes him to continue prosecuting or defending legal proceedings and to do other things in connection therewith.

14. The Division Bench of this Court in Chet Ram Gupta v. Motian Devi Lamba 148 (2008) DLT 473 has held that any defect in institution, signing, verification of legal proceedings is not fatal and is curable by ratification. Thus even though supplemental power of attorney Ex. P-25 is of a date post institution of present suit, if ratifies the institution of suit, can be considered.

15. The plaintiff has also examined Mr R.K. Arora who has proved the aforesaid power of attorneys in his favour. The plaintiff also examined its Manager Mr S.K. Sharma who identified the signatures of Mr R.K. Arora on the plaint and also deposed about the power of attorneys aforesaid which were brought in original by him to the court. Neither in the cross examination of Mr R.K. Arora nor of Mr S.K. Sharma anything has come out to discredit the power of attorneys as aforesaid. Even otherwise the Apex Court in United Bank of India Vs. Naresh Kumar and others, in relation to the nationalized banks as the plaintiff, though in the matter of suits/legal proceedings for recovery of dues has held that a technical view on issues such as this cannot be taken and suits cannot be dismissed. Though the present is not a suit by a nationalized bank against a debtor but the property/rights involved are on the same parity of reasoning, public properties and the ratio shall apply. I therefore find the plaintiff to have proved the issue No. 1, which is decided in favour of the plaintiff and against the defendant.

16. Re: Issue No. 2. (Whether the agreement dated 27th December, 1984 was intended to be and is in fact a loan transaction? OPD)

17. Since the defendant has withdrawn the plea in the written statement on which the aforesaid issue was struck, this issue is deleted in exercise of power under Order 14 Rule 5 of the CPC.

18. Re Issue No. 3 (Whether the agreement dated 27th December, 1984 is

vitiated by undue influence and coercion exercised by the plaintiff and is against public policy? OPD)

19. The defendant has withdrawn the pleas of undue influence and coercion exercised by the plaintiff. As far as the plea of the agreement being against the public policy is concerned, the same shall be considered while adjudicating the new plea raised by the defendant for the first time during the course of arguments.

20. Re Issues 4, 5,6 and 8.

4. Whether the suit is not maintainable and the plaintiff is not entitled to specific performance of the contract u/s 20 of the Specific Relief Act? OPD

5. Whether the refund to the plaintiff of total amount received by defendant along with interest 18% p.a. as per agreement disentitles plaintiff for specific performance of agreement u/s 14 of the Specific Relief Act? OPD

6. Whether the stipulation regarding refund of the total amount to the plaintiff along with interest @18% p.a. as per Clause 5 of the said agreement amounts to an alternative contract, the performance of which discharges the defendant from specific performance of agreement dated 27th December, 1984? OPD

8. Whether the plaintiff has been ready and willing to perform his part of the contract? OPD

21. These issues being interconnected are taken up together. No arguments were advanced on these. However, since the plea on which these issues were framed were not given up, they have to be adjudicated. The agreement dated 27th December, 1984 which is not disputed and has been proved as Exhibit P1 is of transfer of immovable property. The same is not challenged in the written statement. The only challenge, as aforesaid, was that it was, in fact, not an agreement of transfer of immovable property but a loan transaction and which plea has now been withdrawn. Under the explanation to Section 10 of the Specific Relief Act, until the contrary is proved there is a presumption that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money.

22. The plea is that Clause 5 of the agreement, while providing that it is the duty of the defendant to obtain all the necessary permissions for transferring and conveying all rights in respect of the land and the flats to the plaintiff, further provides that if for whatever reason the defendant is not able to convey and transfer the right title and interest as mentioned hereinabove to the plaintiff, the entire amount paid by the plaintiff to the defendant shall be treated as a loan advanced by the plaintiff to the defendant repayable with interest at 18% per annum compounded quarterly. The case appears to be that since the parties have so agreed, the plaintiff, as purchaser, is not entitled to specific performance but is only entitled to money.

23. Undoubtedly if the parties agree that in the event of breach by the seller, a specified amount shall be paid to the purchaser, in my view, the agreement would be not specifically enforceable. The Apex Court as well as Division Bench of this Court has in Dadarao and Another Vs. Ramrao and Others, and Shri Ashok Kumar Ratra Vs. Smt. Simi Katyal and others, has taken the same view. This is so because a party claiming specific performance of the contract is bound by the terms of the contract and cannot plead at variance therewith. But that is not the contract in the present case. Clause 5 pleaded by the defendant in this regard in his written statement relates to permissions from DDA or other governmental authorities for transferring and conveying the rights, title and interest in respect to the land and the flats to the purchaser. In that context, it is provided that if such conveyance and transfer is not possible then the monies would be refunded. It is neither pleaded nor argued that such conveyance or transfer is not possible. Thus Clause 5 would not be attracted.

24. The perpetual lease of the land underneath the property has been proved as Exhibit P9 (admitted document). Clauses II (4) (a) thereof prohibits sale, transfer, assignment or parting with possession of whole or in part of the plot (as distinct from super structure thereon) except with the previous consent in writing of the superior lessor i.e., the President of India. It further provides that the superior lessor as a term of granting such consent/permission may impose levy of unearned increase. Thus, it is not as if conveyance/transfer as provided for in Clause 5 is prohibited. The parties were fully aware of the same and had, in Clause 5, itself provided for payment of all charges, expenses including unearned increase for such transfer. Thus, the contingency of the plaintiff/purchaser being entitled to refund of advance sale consideration paid with agreed interest is to arise only in the event of the conveyance/transfer being not possible and not otherwise. But that is not the case. It is neither pleaded, proved or argued that it is not possible to convey, transfer right, title, interest in the property agreed to be transferred. The government of India has also brought out a scheme for conversion of lease hold rights in such plots of land into freehold. Upon such conversion also, no unearned increase even is payable. Judicial notice can be taken of the fact that the charges for freehold conversion are much lower than the unearned increase and of, it being a term of most agreements of sale of leasehold properties of the seller prior to executing the sale deed having the leasehold rights converted into freehold. In the present case, the responsibility for payment of all charges for such conveyance/transfer was taken by the defendant and it is the choice of the defendant to either pay the unearned increase for obtaining permission for sale / transfer or to have the leasehold rights converted into freehold and whereafter no such permission from the present superior lessor of the land shall be required. It is also to be noticed that the suit was filed before the stage for conveyance/transfer was reached. The suit was filed owing to the abandonment of the work of the construction by the defendant.

25. Thus, while Clause 5 (supra) of the agreement is not attracted, there are

other specific clauses of the agreement dealing with these contingencies. Clause 8 provides for payment of damages by the defendant/seller at the rate of Rs 1000/- per day for failing to complete the construction and put the plaintiff / purchaser into possession within the agreed time. Clause 8(a) (supra) provides for the contingencies of the defendant/ vendor abandoning the building project and entitled the plaintiff / purchaser to demand repayment of the advance sale consideration paid with interest in such contingency. This was, however, the option of the plaintiff. The words are "it shall be open to the purchaser....." Thus it cannot be argued that upon abandonment of work by the defendant, the said consequence automatically follows. Clause 10 entitles the plaintiff in the event of the defendant failing to complete the work of construction to enter into possession and complete the works itself. Clause 13 entitles the plaintiff to the relief of specific performance in its discretion.

26. On a reading of all the aforesaid clauses, what follows is that upon the defendant not completing the work of construction as is the present situation, the plaintiff had a choice of either cancelling the agreement and demanding refund with interest or seeking a specific performance of the agreement alongwith agreed damages or to enter into possession of the property and to complete the remaining works itself. It thus cannot be said that it was the agreement of the parties that upon the defendant not completing the works of construction, the plaintiff will only be entitled to refund of advance sale consideration with interest. The Apex Court in P. D'Souza Vs. Shondrilo Naidu, has held that where such a choice has been vested in the purchaser, the claim for specific performance cannot be defeated for the reason of other monetary choice being also available under the agreement to the purchaser.

27. As far as the readiness and willingness of the plaintiff to perform its part of the contract is concerned though nothing has been argued, the only plea in the written statement even in that regard is of the plaintiff interfering with the work of construction. The said plea is also bereft of any particulars whatsoever and is, in fact, no plea in the eyes of law. The defendant examined only himself as the witness and in paras 16 and 20 of his affidavit by way of examination in chief repeated the said plea. It is deposed that the plaintiff in violation of the agreement appointed their own architects who started making unwarranted objections and raised non existing deficiencies, shortcomings in the work and for which reason the construction was held up. The defendant was cross examined at his residence on commission and on being asked whether he was intimated of the appointment of the architect by the plaintiff bank replied that he did not know whether he was intimated or not but further deposed that after being intimated by the bank he had objected to the same. However, he further deposed that he did not write any letter in this regard and also denied knowledge whether his architects were at times taking instructions from the architect of the plaintiff.

28. In response to another question he deposed that he had met the officer of the bank to apprise them of the objections being created by officers of the bank

but further stated that he did not remember whether he issued any letter or notice in this regard. Significantly in response to another question he deposed that the work at the site was stopped sometime in February/March 1989 and because the contractor abandoning the work. He did not remember whether the architects of the plaintiff were visiting the site or not. In this regard it may be stated that the suit itself was instituted on 10th July, 1989. He denied the suggestion that the architect of the plaintiff had never caused any obstruction.

29. As against the aforesaid evidence of the defendant, the plaintiff examined its architect Mr G.L. Kak as PW4. He deposed that the defendant and the contractor were fully aware of about their appointed as the architect by the plaintiff bank; that he visited the site once in a week or a fortnight and that he was supposed to report to the bank about the progress of the work or the deviation in the work from the specification appended to the agreement dated 27th December, 1984. He further deposed that the shortcomings in the construction were also informed to the representative of the contractor at the site and that the construction done till then was basically a shell construction of columns, beams and slabs and only part of plastering and plumbing had been done but no sanitary fittings had been installed; flooring had not been completed and the doors had not been affixed. The said witness was cross examined by the counsel for the defendant. Significantly not a single instance of obstruction of the work was put to him. This alone, in my view, is clinching material to discard the plea of the defendant of obstructions caused by the architect of the plaintiff. The other witnesses of the plaintiff, namely, Mr R.K. Arora and Mr K.S. Mohan Parmeshwaram were also not cross examined in this regard. It appears that the defendant till that stage was banking on the plea of the loan transaction only and which has been given up now.

30. Had the plaintiff caused any obstruction in construction leading to an inference of the plaintiff not being ready and willing to perform its part of the agreement, the defendant would have definitely written a letter or given a notice in this regard calling upon the plaintiff to remove such obstruction.

31. Clause 16 of the agreement provides that if the plaintiff / purchaser at any time pointed out any defect or shortcoming in construction than as specified in the annexure thereto and or suggested any alteration, the defendant shall ratify or carry out the same. It further provides that if any of the said works suggested by the plaintiff necessitated any extra expenditure the same after mutual agreement shall borne by the plaintiff. Clause 17 of the agreement permitted the plaintiff and their duly authorized men including the architects to visit the site for the purposes of inspecting the construction work without however, being obliged to do so. The said clauses of the agreement totally falsify the stand of the defendant in cross examination of the plaintiff having appointed the architect in contravention of the agreement. The correspondence which has been proved also shows that the parties were exchanging letters as to the progress of the work. The said correspondence of the contemporaneous time also does not suggest any

obstruction in the construction work by the officers or architect of the plaintiff. The plaintiff has also proved as exhibit P-22 the letter dated 31st October, 1985 receipt whereof was admitted in admission/denial whereby the defendant was informed of appointment of the architect by the bank to supervise the construction. Exhibits P2 and P3 dated 20th November, 1985 and 10th January, 1986, the receipt whereof are again admitted, make observations with respect to the report submitted by the architect to the bank. Exhibit P21 dated 15th October, 1986 is a letter of the defendant to the plaintiff reporting that the work had been completed to the extent of 90 per cent and hoping that the plaintiff had got similar confirmation from its architect. The aforesaid contemporaneous documents again falsify the plea of the defendant of obstruction caused by the architect of the plaintiff.

32. Save for the said plea there is no other plea challenging the readiness and willingness of the plaintiff.

33. The plaintiff, as the purchaser, was required to pay only the sale consideration as aforesaid. 90% of the total agreed sale consideration has been paid. As per the calendar of payment contained in schedule III to the agreement, 90 per cent of the payment was to be paid up to the completion of the second floor and out of the balance, 5% on completion of 3rd Floor and handing over possession of the entire building and 5% on execution of the sale deed. There is no plea that the plaintiff is in breach of the said calendar.

34. The plaintiff has, in accordance with Section 16(c) of the Act, averred that it has performed and has been ready and willing to perform the essential terms of the contract and in the absence of any other plea save of obstruction as aforesaid in this regard it also stands proved that the plaintiff has performed and has been ready and willing to perform the essential terms of the contract to be performed by it.

35. The next aspect is as to the discretion of this Court in grant of the relief of specific performance. Section 20(2) lays down the cases in which the court may properly exercise the discretion not to decree the specific performance. The plea of the circumstances existing at the time of entering into the agreement, and of the exercise of coercion and undue influence by the officials of the plaintiff has now been given up. In fact, no arguments were addressed on this aspect at all. It was, of course, argued that this being the only property of the defendant and his family members at Delhi, specific performance would involve undue hardship to the defendant. The said plea, even if considered, is meritless. The argument is that the defendant was staying in tenanted premises and from which he has been evicted. However, no material has been brought on record as to when the eviction proceedings were initiated. Even otherwise tenancy rights are not such owing to which the defendant ought to have had an assurance of permanency. If the defendant was, at the time of entering into the agreement was residing in the tenanted premises, merely because he has subsequently been evicted from the same would not amount to a hardship within the meaning of Section 20(2)

(b) of the Act and which the defendant could not foresee. Similarly, the pleadings about inadequacy of consideration (which has not been proved) etc do not constitute a hardship. No circumstances making it inequitable to enforce specific performance have been pleaded, proved or argued. The plea of the defendant being now required to use property as a residence is even otherwise misconceived. The defendant was not intending to build on the property as a residence for himself and his family members. The defendant was treating the construction on the aforesaid plot as a commercial venture of constructing several flats to reap maximum value by selling the same. The plaintiff has proved as exhibit P6 the letter dated 25th November, 1983 of the defendant to the plaintiff informing the plaintiff that a new building was being constructed by him on the aforesaid property comprising of seven independent flats and offering the same for sale to the plaintiff. Exhibit P7 (dated 5th April, 1984) Exhibit P8 (undated), Exhibit P10 (dated 2nd August, 1984), Exhibit P11 (dated 9th July, 1984) and Exhibit P12 (dated 2nd June, 1984) are the other letters of negotiation between the parties. The defendant in his evidence also has not established any factor/reason against exercise of discretion for specific performance.

36. The Division Bench of this Court in *Vijaya Myne v. Satya Bhushan Kaura* 142 (2007) DLT 483 (DB) held that if the intention of the seller had been to shift to the property agreed to be sold, she would not have entered into agreement and such a plea cannot constitute hardship within the meaning of Section 20. It was further held that there have to be valid and cogent reasons for refusal of the relief of specific performance and applying the exception. It was further held that it is not just one or two factors but sum total of various factors which are required to enter into judicial verdict.

37. Even otherwise, in modern, orderly society, specific performance of agreement ought not to be interfered with and ought to be encouraged. The modern trend of law is squarely in favour of extension of Specific Relief at the expense of traditional primacy of damages. A man should honour his word and should be bound by his agreement. If he does not do so, the court shall enforce. The conduct of the defendant even otherwise in this case does not call for the exercise of any discretion in favour of the defendant. The suit has been pending for 20 years in the court of first instance. The defendant took elaborate pleas denying the agreement of transfer of immovable property itself and claiming it to be a sham and pleading the real transaction to be of a loan. Such pleas by the defendant insisted framing of issues and a lengthy trial. The defendant, in my view, did not even make any attempt to establish the case pleaded. The pleas of a loan transaction, undue influence and coercion exercised by the bank officials appear to have been taken only to delay the disposal of the suit. Had the said pleas not been taken and had the defence been what has been finally argued, no trial even may have been necessary and the suit could have been disposed of on submissions / arguments only. The endeavour of the defendant appears to be to, by involving the plaintiff in lengthy litigation, prevail upon the plaintiff and its

officials to settle with the defendant and to the advantage of the defendant. Having ultimately failed in the said endeavour, there was nothing worth arguing also on the pleas taken. Time has come that the litigants indulging in such practices are severely dealt with. Discretion in the grant of relief even if exercisable in favour of such litigants ought not to be exercised. If in spite of indulging in such practices they become entitled to exercise of discretion and indulgence in their favour, it will only encourage such practices and to the detriment of the legal system and the society. As aforesaid, pleas were taken to show that the costs of land and the cost of construction were higher than what was agreed. No witness whatsoever was examined in this regard. Obviously, the defendant knew that the said pleas could not withstand the test of cross examination.

38. The plaintiff has led positive evidence of its readiness and willingness. The plaintiff has even invoked Clause 10 of the agreement to complete the remaining works of construction itself. The counsel for plaintiff even on 29th January, 2009 gave a statement that the plaintiff shall bring the exiting construction in accordance with law on its own.

39. Reference to Section 14(3) of Specific Relief Act is made in Preliminary Objection XI in the written statement by stating that the defendant has not obtained possession of the land subject matter of agreement. It is further pleaded that the building work to be carried out runs into minute and numerous details dependant in personal qualification or volition which cannot be specifically enforced.

40. There is no merit in the said plea also. Section 14(3)(c) provides for enforcement of contract of construction of building. I find that all the three conditions laid down therein are met in the present case. The first condition is of the building work required to be done being precisely described. In the present case, it is the own letter of the defendant that 90% work has been completed and only 10% remain. The "Brief Specifications for construction of plot No. B- 9, East of Kailash, New Delhi belonging to Mr. K.L. Rajgarhia" appended to the agreement are fairly precise as to plastering, flooring, terracing, tiles, woodwork, fittings, finishing etc. Moreover, the agreement itself permitted the plaintiff to complete the remaining works itself and which option the plaintiff has exercised. Thus no personal qualification or volition of defendant arises. The court is also not required to supervise the said works in as much as the plaintiff is to carry out remaining works itself. No continuous duty on the part of the defendant which the court cannot supervise is also involved.

41. The second condition of Section 14 of plaintiff having substantial interest in performance and for which compensation in money is not adequate is also met. The plaintiff has agreed to purchase immovable property and paid approximately 90% of agreed consideration. The defendant was not merely a building contractor but was a seller of immovable property to be constructed and which according to defendant himself has been 90% constructed. There has been

tremendous increase in prices of immovable properties in Delhi, as noticed by court also. The plaintiff ought not to be deprived of right of specific performance, ordinarily attaching to agreement of sale of immovable property merely because 10% of work of construction is remaining; more so when the agreement enabled the plaintiff to complete the remaining works. The essence of the agreement was sale of flats and not construction of flats on the property. Thus plaintiff has substantial interest in performance of contract.

42. The last condition of the defendant having obtained possession of land on which building is to be constructed. Admittedly, the defendant is in possession of the land and has already carried out 90% work of construction. The plea has been taken in the written statement under misconception that for Section 14(3) to be applicable, the plaintiff is required to be in possession. The reason for this condition is that even if the defendant had agreed to sell the flats on land to be allotted to him but if the defendant himself was not put in possession of land, no specific performance could be directed against him.

43. Thus, the plea of Section 14 of Specific Relief Act in the written statement is misconceived.

44. The issues 4,5,6,&8 are thus decided in favour of plaintiff and against the defendant.

45. Re Issue 7. (Whether the agreement dated 27th December, 1984 is unenforceable, illegal and void under chapter XXC and u/s 269UC of the Income Tax Act? OPD)

46. The Senior counsel for the defendant has fairly stated that though he is not giving up the said plea but the law as laid down and as in force today is against him. Even otherwise in view of the said judgment, the failure of the parties to apply under Chapter XX C of the Income tax Act (which was then in force and has since been deleted) does not make the agreement of transfer of immovable property illegal and void.

47. Re: New plea of the defendant.

The arguments of the senior counsel for the defendant may be succinctly recorded as under:

A. that no plan as stated to be annexed to the agreement was, in fact, annexed and has not been filed or proved by any party. A photocopy of a sanctioned plan for construction on the property was handed over;

B. The agreement was not for sale of a plot of land but for construction. Attention was invited to Schedule I to the Agreement providing for construction of 8 residential units.

C. It was argued that, as per the then master plan, only 2.5 residential units were permissible on a plot of land admeasuring 300 sq yd and as per the prevalent master plan also maximum 5 dwelling units are permissible.

D. The construction was also sanctioned for 2.5 dwelling units only i.e., one on the ground floor, one on the first floor and half on the second floor. Per contra, the agreement was for construction of two dwelling units on each of the ground, first and second floor and one in the mezzanine and one on the terrace.

E. The agreement provided for construction of two additional flats making a total ten flats.

F. The defendant before sale had to construct 8 and maximum 10 flats.

G. Differences in the areas and the accommodation in the construction as per the agreement and as permitted under the building bye laws and as sanctioned were pointed out.

H. Attention was invited to appendix Q of the building bye laws to urge that additional construction envisaged in the agreement was not even compoundable.

I. It was argued that the contract was therefore illegal and contrary to law contained in the master plan bye laws, sanctioned plan and was thus void and not specifically enforceable.

J. It was further argued that because the contract was illegal, the relief of refund of advance sale consideration also could not be granted in favour of the plaintiff inasmuch as the agreement was void on the date of making and not discovered to be void within the meaning Section 65 of the Contract Act.

48. The counsel for the plaintiff naturally contended that this was not the plea of the defendant and could not be taken up. In response thereto reliance was placed on *Smt. Surasaibalini Debi v. Phanindra Mohan Mazumdar* AIR 1965 SC 1634, *Waman Shrinivas Kini Vs. Ratilal Bhagwandas and Co.*, *Universal Plast Limited Vs. Santosh Kumar Gupta*, *State Bank of India Vs. Aditya Finance and Leasing Co. Pvt. Ltd. and Another*, and *Koteswar Vittal Kamath Vs. K. Rangappa Baliga and Co.*, to urge that illegality of the contract even if not pleaded could be set up at any stage and would be considered by the court. It was argued that the defendant could not be directed to perform an action which was illegal and thus the plaintiff was not entitled to the relief of specific performance.

49. Though even the sanctioned plan, copy of which has now been handed over has not been proved and cannot now be considered in the manner sought to be done but this Court cannot shut its eyes to the fact that in accordance with master plan and the building bye laws, the construction of 8 dwelling units on the plot may not have been possible then or now.

50. Thus, notwithstanding the absence of a plea or proof, while passing any order, the said factor has necessarily to be borne in mind. In my view it cannot be argued that the essence of the agreement between the parties was to construct of 8 flats by the defendant and sell thereafter to the plaintiff. If that had been the agreement between the parties, the agreement would not have provided that upon the failure of the defendant to complete the work of

construction, the plaintiff would be entitled to take over the same and complete the construction itself. The agreement between the parties was of sale of the aforesaid immovable property.

51. The following facts are relevant in this regard:

- a) It is the defendant who vide letter dated 5th April, 1984 Ex. P-7 had approached the plaintiff with the intention that he was in the process of constructing seven independent flats on the property and offering to sell the same to plaintiff.
- b) The agreement to sell between the parties fixed the consideration on per sq.ft. of the covered area basis - the total consideration being dependant on actual covered area constructed.
- c) The agreement was of sale of entire property with entire constructed area thereon.
- d) 90% of the work of construction, as per the defendant himself had been completed prior to institution of suit and is existing till date.

52. In the aforesaid circumstances the new plea aforesaid taken for the first time during arguments appeared to be malafide and an attempt to take advantage of own wrong. It was felt that even if the construction of eight flats in accordance with law was not permissible, whether the law permitted such dishonesty and the defendant wriggling out of the contractual obligation of sale of the property, to his obvious advantage and to the detriment of the plaintiff.

53. In the aforesaid light attention of the senior counsel for the plaintiff was invited to Section 12 of the Specific Relief Act which is as under:

12. Specific performance of part of contract.

(1) Except as otherwise hereinafter provided in this section the court shall not direct the specific performance of a part of a contract.

(2) Where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed by only a small proportion to the whole in value and admits of compensation in money, the court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency.

(3) Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed either -

(a) forms a considerable part of the whole, though admitting of compensation in money; or

(b) does not admit of compensation in money, he is not entitled to obtain a decree for specific performance; but the court may, at the suit of other party, direct the party in default to perform specifically to much of his part of the

contract as he can perform, if the other party -

(i) in a case falling under Clause (a), pays or has paid the agreed consideration for the whole of the contract reduced by the consideration for the part which must be left unperformed and a case falling under Clause (b), [pays or had paid] the consideration for the whole of the contract without any abatement; and

(ii) in either case, relinquishes all claims to the performance of the remaining part of the contract and all right to compensation, either for the deficiency or for the loss or damages sustained by him through the default of the defendant.

(4) When a part of a contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the court may direct specific performance of the former part.

54. The senior counsel for the defendant, at the outset, argued that since Clause 6 of the agreement was that the plaintiff was interested in purchasing flats to be constructed alongwith the land and not in the rights in the land alone Section 12 was not applicable. After some thought it was argued that for Section 12 to become applicable there has to be first a contract; if there was no enforceable contract owing to the illegality aforesaid and/or the agreement was void, the question of application of Section 12 would not arise. A question was posed to the senior counsel for the plaintiff, whether "inability to perform the whole of his part of the contract" within the meaning of Section 12 could not be inability owing to illegality of the contract? If that was so, whether inability to perform part only of the contract owing to illegality, would not u/s 12 permit Specific Performance of part which was legal. He of course answered in favour of his client; but no precedent has been cited to show that "inability" u/s 12 has to be for reasons other than of illegality. I do not find any justification for so restricting the wide and simple language and scope of Section 12. It is significant that Sections 23 and 24 of the Contract Act also do not prohibit enforcement of valid portion of transfer of property, if it is severable from the invalid portion (See B.O.I. Finance Ltd. Vs. Custodian and Others,). The English courts call it the Blue Pencil Rule i.e., severance can be effected when the part severed can be removed by running a blue pencil through it. So in my view, even if contract for sale of property with eight flats is illegal and void being contrary to building regulations and master plan, the agreement for sale of property with lesser number of flats, if permitted u/s 12, is enforceable.

55. I may at this stage notice Jambu Rao Satappa Kocheri Vs. Neminath Appayya Hanammannavar, . It entailed an agreement for sale of land. The suit for specific performance was contested on the ground that if the suit was decreed it would result in the plaintiff having land in excess of the ceiling limit and thus the agreement was pleaded to be void u/s 23 of the Contract Act. The Apex Court held that neither the object of the agreement nor consideration therefore was illegal or to defeat any law, even though the statute made the acquisition of

excess land to be invalid. It was further held that the object of the agreement could not be said to be to hold land in excess of ceiling. It was further held that it was open to the plaintiff to transfer the excess land or otherwise deal with the same to bring his holding within ceiling but there was nothing in the agreement, nor could it be implied from circumstances that it was the object of the parties that ceiling laws should be transgress; the mere possibility of that being the effect of agreement being so would not make the same void. Also the possibility of statutory forfeiture of excess land in the hands of plaintiff was held not to invalidate the agreement between parties.

56. In the present case also, as long as the plaintiff does not insist upon the defendant carrying out any works on the property in contravention of law, in my view the agreement to sell of which specific performance is claimed cannot be said to be invalid. Even if the construction as existing is not in accordance with law, it is always open to the plaintiff to after acquiring, bring the same in consonance with law.

57. Since the aforesaid and application of Section 12 required input from the plaintiff, its response was elicited. The counsel for the plaintiff stated that the plaintiff was willing to take the property as it is. The statement of the counsel for the plaintiff to the aforesaid effect was also recorded. The defendant after conclusion of hearing moved IA. No. 1806/2009 for rectification of statement of its counsel recorded on 29th January, 2009. The same was allowed on 9th February, 2009. On that date also, the counsel for the plaintiff stated that plaintiff was electing for the relief u/s 12 and waives / abandons any other claims or right which may be impediment thereto.

58. I may notice that in *Rachakonda Narayana Vs. Ponthala Parvathamma and Another*, a plea was raised that relief u/s 12(3) of Specific Relief Act should be pleaded in the plaint. The same was negated and it was held that relief u/s 12(3) can be granted at any stage of litigation. In the present case, no defence of inability of the defendant to perform the agreement was raised at any time prior to in final hearing as aforesaid and the plaintiff, immediately on such defence being raised has made election u/s 12(3).

59. At this stage, it will be apposite to quote Viscount Haldane in *Rutherford v. Acton-Adams* XXXII Indian Cases 47.

In exercising its jurisdiction over specific performance a court of equity looks at the substance and not merely at the letter of the contract. If a vendor sues, and is in opposition to convey substantially what the purchaser has contracted to get, the court will decree specific performance with compensation for any small and immaterial deficiencies, provided that the vendor has not, by misrepresentation or otherwise, disentitled himself to his remedy. Another possible case arises where a vendor claims specific performance and the court refuses it, unless the purchaser is willing to consent to a decree on terms that the vendor will make compensation to the purchaser, who agrees to such a decree on condition that he

is compensated. If it is the purchaser who is suing, the court holds him to have an even larger right. Subject to considerations of hardship, he may elect to take all that he can get, and to have a proportionate abatement from the purchase money.

60. In *Pirithi alias Sansi etc. Vs. Jati Ram and others etc.*, , the seller after the agreement to sell in favour of plaintiff had inducted others in possession of the property and the court below had declined specific performance on the ground that the others had been in possession for long and decreeing specific performance would entail further litigation. The Apex Court while decreeing specific performance held that if such contentions in defence were to be accepted, no contract could be enforced and the party seeking to avoid contract would always create such impediments.

61. Similarly in *Kartar Singh Vs. Harjinder Singh and others*, specific performance was directed of the sellers share of the property belonging to seller and his sister, when the seller had agreed to persuade his sister and agreed to sell the entire property and even after the sister of the seller had refused to sell her share.

62. *Khardah Company Ltd. Vs. Raymon and Co. (India) Private Ltd.*, and *Chatturbhuj Vithaldas Jasani Vs. Moreswar Parashram and Others*, relied upon by senior counsel for defendant and which do not relate to specific performance of an agreement are, in the face of aforesaid judgments, not found applicable.

63. There is yet another aspect of the matter. The agreement on meaningful reading only refers to proposal (see recital 5) of construction of eight flats. Else, the agreement was for payment of consideration on per sq. ft. of covered area constructed basis. Operative Clause 6 of the agreement also does not refer to eight flats and records only the intent of the purchaser to purchase the flats to be constructed on the property alongwith rights in land. Thus it can otherwise also not be said that what will be specifically enforced will be different from that agreed. The agreement nowhere is subject to or conditional upon construction of eight flats.

64. Though the exact status of the construction as existing is not before the court but as aforesaid the defendant in his letter ((supra) had informed the plaintiff that 90% of the construction was complete. During the arguments also it was suggested that the superstructure is complete. In reply to IA. No. 4644/1989 under Order 39 Rules 1 and 2 of the plaintiff also, the defendant stated on oath that the entire superstructure was ready and only the finishing or wood work was remaining. It may also be noted that the defendant during the pendency of the suit filed IA. No. 7491/2001 (which was dismissed on 6th December, 2005) pleading that owing to the dispute which had arisen, the further construction had been stopped but since he was to vacate his tenanted premises, he should be permitted to complete the same. It will be noted that what has been finally argued is contrary to the stand aforesaid. It was not

informed at the time of filing IA. No. 7491/2005 even that the construction was illegal or had to be demolished. On the contrary, it was portrayed as if merely by doing some finishing work or touches the defendant would be able to occupy the same. All these facts lead to conclusion, notwithstanding judicial notice of construction of 8 dwelling units being not possible, that the construction as existing with some modification is permissible and it is not as if the entire construction has to be demolished.

65. In the aforesaid state of fact, when the defendant has been taking inconsistent stand, in my view, the claim of the plaintiff for specific performance ought not to be defeated specially when the plaintiff has expressed willingness to act u/s 12 of the Act.

66. The next question which arises is as to the relief to be granted to the plaintiff. The agreement in the present case expressly provided for the plaintiff entering to possession and completing the works. The plaintiff has also claimed the specific performance of that clause of the agreement. The specific performance of that clause cannot be denied to the plaintiff. The plaintiff, of course, by stepping into the shoes of the defendant in the matter of raising construction shall not be entitled to raise any illegal/unauthorized construction even if that was the agreement. The plaintiff can raise only construction in accordance with law. The plaintiff has given its assent therefor. The defendant who has been found in default can be directed to perform specifically so much of his part of the contract as he can perform, i.e., by putting the plaintiff into possession of the property and by transferring/selling/conveying the property to the plaintiff as agreed. The defendant would, of course, have a choice whether to first have the leasehold rights in the property converted into freehold in his own name or to pay the unearned increase and transfer the leasehold rights in the land to the plaintiff.

67. The next question to be determined is of the balance sale consideration, if any, to which the defendant would be entitled from the plaintiff and with respect to the reduction of the agreed consideration for the part remaining unperformed and compensation, if any, payable by the defendant to the plaintiff. The plaintiff, as aforesaid, has claims for damages. Naturally much money would be spent now in being the existing construction in consonance with the building bye laws. The breach / deficiency of the defendant undoubtedly admit of compensation. However, in the exercise of discretion vested in the court and considering the long lapse of time, and the equitable nature of the relief, justice would be done if while so directing the defendant to put the plaintiff into possession and convey/transfer the property to the plaintiff, hold that neither the balance 10% of the consideration is payable by the plaintiff to the defendant nor is the plaintiff entitled to recover any compensation or damages or other amounts by way of delay or costs or breach or deficiency from the defendant. This is being done in a hope that with such an order the parties would not continue with the litigation.

68. Accordingly, a decree for specific performance of agreement dated 27th

December, 1984 is passed in favour of plaintiff and against the defendant by-

(a) directing the defendant to within 30 days put the plaintiff into vacant, peaceful, physical possession of property No. B-9, East of Kailash, New Delhi together with construction as existing thereon.

(b) the defendant is further directed to within six months, execute the conveyance/transfer deed in favour of the plaintiff after either getting the leasehold rights in land converted to freehold or after obtaining permission to transfer leasehold rights in the land. The plaintiff to sign all documents and do other acts required to be done in this regard, including of making the perpetual deed of leasehold rights available, if so required.

The plaintiff shall also be entitled to costs of the suit from the defendants. Counsels fee assessed at Rs 1 lakh.