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**(2012) 02 DEL CK 0440**

**In the Delhi High Court**

**Case No :** Regular First Appeal (OS) No. 72 of 2011

Suresh Chand Jain and Sons H.U.F.

APPELLANT

Vs

Phalphor Builders (P) Ltd. and Others

RESPONDENT

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**Date of Decision :** 21-02-2012

**Acts Referred:**

Registration Act, 1908 — Section 17, 49

**Citation :** AIR 2012 Delhi 73

**Hon'ble Judges :** Pratibha Rani, J;Pradeep Nandrajog, J

**Bench :** Division Bench

**Advocate :** B.B. Sawhney, in structed by Sunil Kumar, for the Appellant;

**Final Decision :** Dismissed

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## **Judgement**

Pradeep Nandrajog, J.—Appellant's endeavour to have the four sale deeds Ex.PW-1/11.Ex.PW-1/12, Ex.PW-1/13 and Ex.PW-1/14 dated June 24, 1993, September 10, 1991 and January 05, 1993 respectively got cancelled has failed and the suit filed has been dismissed vide impugned judgment and decree dated September 08, 2010. Undisputably M/s. Suresh Chand Jain & Sons HUF was the owner of plot bearing Municipal No. 3. Parmanand Estate, New Delhi and on January 09, 1989, vide Ex.PW-1/6, had entered into a construction agreement with respondent No. 1 as per which said respondent was to construct 13,000 sq.ft. building out of which 5,000 sq.ft. was the share of the appellant and the remainder had to be sold. The agreement Ex.PW-1/6 is the source of litigation as also an unregistered power of attorney Ex.PW-1/7. both executed simultaneously on January 09, 1989. The unregistered General Power of Attorney seeks to confer power and authority upon Vikram Kumar S/o Tilak Raj to do various acts, listed in the General Power of Attorney, on behalf of M/s. Suresh Chand Jain & Sons HUE As per the appellant, vide Ex.PW-1/8, dated March 20, 1991, the power conferred under Ex.PW-1/7 was revoked and the revocation notice was sent under UPC evidenced by the receipt Ex.PW-1/9 followed by a public notice Ex.PW-1/10 dated March 27, 1991. The relevant terms of the construction

agreement, Ex.PW-1/6 read as under:

3. THAT the BUILDER will at its own expense carry out the construction of the residential building complex on the said plot of land to the maximum permissible extent including basement and upper floors. All the expenditure required for the construction of the said residential complex including the cost of all materials and services as also supervision charges and other charges required for making the said residential complex habitable shall be incurred in the first instance by the Builder.....

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5. THAT the BUILDER had also agreed to deposit a sum of Rs. . 10.00,000/- (Rupees ten lacs only) to be paid by the BUILDER to the OWNER as interest free Security Deposit. A sum of Rs. . 5,00,000/- (Rupees five lacs only) has been paid already to the OWNER by Bank Pay Order No. 1763/872048 dated 15th Nov. 1988 issued by Canara Bank, Connaught Circus, New Delhi-1. The remaining sum of Rs. . 5,00,000/- (Rupees five lacs only) has been paid by the BUILDER to the OWNER at the time of the execution of this Agreement, in the manner following:

(a) Rs. . 2,50,000/- (Rupees two lacs and fifty thousand only) by Cheque No. 705061 dated 30th Dec, 1988 drawn on the State Bank of Indore, Greater Kailash-II. New Delhi.

(b) Rs. . 2,50,000/- (Rupees two lacs and fifty thousand only) by Cheque No. 705064 dated 8.1.1989 on State Bank of Indore, Greater

Kailash. New Delhi.

In this manner the OWNER has received the aggregate Security Deposit amount of Rs. . 10.00,000/ (Rupees ten lacs only).

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7. THAT the OWNER shall be entitled to sell portions of the said building complex to buyers on such terms as the OWNER may deem fit. However, the BUILDER shall be paid Rs. . 300/- for each sq.ft. of the covered super area of the building constructed by them, and all amounts paid by the PURCHASERS for any part of the said Buildings upto Rs. . 300/-per square foot of constructed area shall be payable to the BUILDER.

8. THAT the area to be constructed on the said plot of land by the BUILDER will be approximately 13.000 sq.ft. but the BUILDER agrees that the maximum area permitted to be constructed on the said plot of land under the Municipal Regulations shall be constructed by it. Out of the said approximate area of 13.000 sq.ft. the OWNER shall retain the area aggregating to 5.000 sq.ft. and the remaining area of 8.000 sq.ft. shall be sold by the OWNER to repay partially the cost of the construction of the residential complex and also to refund the said Security of Rs. . 10,00,000/- (Rupees ten lacs only) furnished by the BUILDER

and also to pay the cost of the said retained area of 5.000 sq.ft. approximately at the rate of Rs. . 300/per sq.ft. In this manner, the OWNER shall pay to the BUILDER Rs. . 15,00,000/- (Rupees fifteen lacs only) for the said retained areas, in addition to the cost of 8,000 sq.ft. at Rs. . 300/- per sq.ft.. besides which the owner shall also refund the entire Security amount.

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10. THAT the OWNER shall make agreements with the prospective Flat Buyers for sale of specific parts of the building complex to such persons as the OWNER may deem fit but in no case the price payable to the BUILDER will be less than Rs. . 300/- per sq.ft. of the super area and the amount generated from the sale of constructed area to third party who will pay the value of the final constructed area by installments shall in the first instance to be repaid to the extent of Rs. . 300/- per sq.ft. by the OWNER to the BUILDER, in payment of the cost of the building constructed by it and also for the refund of the Security Deposit of Rs. . 10,00,000/- (Rupees ten lakhs only) made by the BUILDER. The BUILDER shall, however, be invariably associated in joining the Flat Buyers Agreements as the "Confirming Party".

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13. THAT all dues of the BUILDER including refund of Security Deposit of Rs. . 10 lakhs shall be paid by the OWNER to the BUILDER at the time of the receipt of the possession of the entire property. However, fifty per cent, of the above dues of the BUILDER shall be paid by the OWNER when fifty percent, of the construction to be put up on the aforesaid plot shall be completed by the BUILDER. As already stated the OWNER shall pay the BUILDER out of the amounts paid by the diverse persons booking specified portions of the residential complex and the payments made by such PURCHASERS for the same.

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21. THAT to avoid any misunderstanding between the parties the following amounts shall be paid by the OWNER to the BUILDER in connection with this Agreement.

(a) Refund of the Security Deposit of Rs. ten lacs.

(b) Cost of 5.000 sq.ft. of the constructed area on the said plot of land to be retained by the OWNER for their own use at Rs. . 300/- per sq.feet amounting to Rs. . 15,00,000/- (Rupees fifteen lakhs only) in the aggregate.

(c) Cost of the remaining constructed area of 8000 sq.feet to be sold by the OWNER at Rs. . 300/- per sq.feet amounting to Rs. . 24,00,000/- (Rupees twenty four lakhs only).

(d) Additional amount of Rupees two lakhs as per Clause 15 and 16 above.

(e) That amount shall be repaid by the OWNER to the BUILDER as provided

herein before.

(f) That the final possession of the built-up property to be retained by the OWNER shall only be handed over to the OWNER against the receipt of the entire amounts by the BUILDER as specified above.

(g) That in the event of any reduction / or increase in the super/covered area the payment to the BUILDER shall be proportionately reduced/enhanced accordingly.

2. The relevant terms of the Power of Attorney Ex.PW 1/7 read as under:

2. To carry out any correspondence with the statutory authorities including Municipal Corporation of Delhi, Competent Authority under the Urban Land (Ceiling & Regulation) Act, 1976, the DESU. being the wing of the MCD, Water and Sewerage Board, being the other wing of the MCD in connection with the matters of the said plot and construction of the Residential Complex, thereon, and the Delhi Development Authority.

3. To negotiate the sale/transfer of any part of the Residential Complex, except the covered area to be retained by the Executant, on the basis of out-right sale or sale by installments to such persons/purchasers as the said General Attorneys may deem proper. In this context the Executant herein agrees, declares, and records that he shall join as a paramount Vendor in all Agreements for Sale/Conveyance Deeds to be given to the Prospective Flat Buyers.

4. THAT the said General Attorneys shall be entitled to cause the Executant to execute and to get all agreements/Conveyance Deeds, for the transfer by sale or exchange of any specific portion of the building, registered with the Registrar of Assurances on such terms as the said General Attorneys may deem fit at their absolute discretion.

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6. That from the funds generated by the sale of portions of the Residential Complex, to be put up on the said plot of land by the aforesaid Builder, the General Attorneys are specifically empowered to make such payments as may be required from the funds. coming upto the hands of the General Attorneys, to the Builders in respect of the amounts due and payable to the Builders in connection with the construction of the residential complex and refund of security deposit of Rs. . 10 lacs made by the Builders to the Executant hereof. The said General Attorneys shall be specifically entitled to refund any part of the building cost or security amount to the Builders and the Executant hereof shall never raise any objection to the refund of the said amount.

7. The General Attorneys shall be empowered to make application to the MCD for the sanction of any building plans and make further applications for sanctions of electricity and potable water as also sullage water, if available in connection with the residential complex.

3. Suffice would it be to state that the fulcrum of the case pleaded was that since

the Power of Attorney, Ex.PW-1/7, was revoked on March 20, 1991. the sale deeds executed on subsequent dates were without any authority of law, apart from being executed in breach of the terms of the construction agreement; and hence were liable to be cancelled.

4. With respect to the power conferred vide Ex.PW1/7. it was firstly urged before the learned Single Judge that being an unregistered power of attorney, it could not operate to confer any power to sell moveable property and secondly the power conferred was not to execute the sale deeds and lastly that the power to sell was expressly reserved by the appellant.

5. Confronted with the situation that the appellant had permitted the Attorney to act pursuant to the unregistered Power of Attorney and the appellant had received possession of 5000 sq.ft. built up area and in addition had received Rs. . 10 lakhs and admittedly had paid no amount to the builder, and as per the ostensible terms of the collaboration agreement, the appellant was obliged to pay Rs. . 39 lakhs (price @ Rs. . 300/-per sq.ft. for 13.000 sq.ft. area), which amount was never paid and yet possession was received, the argument of the appellant that since the power of attorney Ex.PW-1/7 was not registered, and there cannot be any estoppel against the statute, the learned Single Judge, in paras 14 to 16 of the impugned decision, has opined as under:--

14. As far as the argument that the defendants could not have conveyed the title to the subsequent purchasers i.e. Defendant Nos. 4 to 10 is concerned, it is no doubt true that the General Power of Attorney based on which the said transactions were completed, is unregistered. Yet. the Court cannot but notice that the same General Power of Attorney was used by the first three defendants to obtain sanction and construct on the property. At that stage, the plaintiff did not register any protest. He. on the other hand, allowed the defendants to suffer disadvantage by expending amounts and using energy and labour. Having done so and even proceeding to accept the first floor portion, working out to above 5.000 sq.ft.. this Court is of the view that the plaintiff cannot now question the first three defendants' authority in having transferred the other portions in favour of the defendant Nos. 4 to 10. The plaintiff in fact acquiesced in the transactions of the first three defendants with the purchasers/Defendant Nos. 4 to 10.

15. Learned counsel for the plaintiff had relied upon several judgments, such as Commissioner of Income Tax (Central) Vs. B.N. Bhattacharjee and Another, and Santosh Kumar Meena v. GNCT of Delhi W.P. 1343/2010. decided on 07.09.2010. and certain other decisions to say that estoppel cannot operate against provisions of law and that Sections 17 and 49 of the Registration Act are mandatory in constituting a bar from recognizing the title to immovable property if it is conveyed on the authority of unregistered documents.

16. Here the plaintiff has approached the Court for equitable relief of cancellation of documents executed in favour of third parties. The basis for the action is that

such conveyance was effected on the strength of unregistered documents. The plaintiff, further, is not disputing some portions of the agreement, which were finalized by the parties and which are not in question in these proceedings. These are inter alia the steps taken by the first three defendants, to construct upon the property; including obtaining sanctions and completion certificate; depositing the compounding fee; spending their money etc. and what is most important, the plaintiff's acceptance of 5000 sq.ft. of the constructed portion in early March 1994. The plaintiff has also not established that the amount of Rs. . 39 lakhs, payable as construction fee ( Rs. . 300/-per sq.ft.) was ever offered or tendered to the first three defendants at the relevant time. Having accepted an important and substantial part of the obligations arising out of the very same documents, i.e. Ex.PW-1/6, and not having performed their part of the bargain, this Court is of the opinion that the plaintiff cannot approbate and reprobate. In other words, the plaintiff having accepted the performance in respect of the documents cannot question the consequence flowing from the other part, particularly arising out of its non-adherence to the contract. In this regard, the doctrine of approbate and reprobate has been explained as a species of estoppel, where, a party to a contract, elects to appropriate benefits out of it. after which, he would not be allowed to repudiate other parts. In *Kok Hoong v. Leong Cheong Kweng Mines Ltd.* 1964 AC 993. it was held that:

a litigant may be shown to have acted positively in the face of the court, making an election and procuring from it an order affecting others apart from himself, in such circumstances the court has no option but to hold him to his conduct and refuse to start again on the basis that he has abandoned."

In *New Bihar Biri Leaves Co. and Others Vs. State of Bihar and Others*, the Supreme Court observed that a fundamental principle of general application is that one, voluntarily accepts a contract on certain terms and works it out. he cannot be allowed to adhere to and abide by some of the terms of the contract which prove advantageous to him and repudiate the other terms of the same contract which might be disadvantageous to him. The maxim, *qui approbat non reprobat* (one who approbates cannot reprobate), was applied, in the context. These principles were reiterated and applied, in later judgments, too (See *Union of India (UOI) and Others Vs. Krishan Lal Arneja and Others*, Here, the plaintiff clearly elected to take benefits under the contract, and took no steps to effectuate cancellation or revocation of the power of attorney alleged by him. Not only was construction completed, even possession was given, of different portions to various defendants, after which he (the plaintiff) accepted - unreservedly - about 5000 square feet area, in 1994. In the circumstances, the principle of approbate and reprobate bars the reliefs claimed in the present case.

6. Assailing the findings returned by the learned Single Judge, it was urged that the learned Single Judge had overlooked clauses 7.8.10 and 13 of the Construction Agreement which stipulate that only the appellant was to sell the 8000 sq.ft. area and the amount realized on sale was to be first utilized to effect

payment to the builder. Extending the argument, it was urged that the Power of Attorney, Ex.PW-1/7, simply empowered the attorney to deal with the municipal and statutory authorities and to negotiate for the sale/ transfer of 8000 sq.ft. area; making it clear that the appellant had to join, as the paramount seller, when the sale deeds would be executed. It was urged that notwithstanding the General Attorney being empowered to receive the sale consideration, the attorney was not authorized to effect the sale deed. It was lastly urged that in any case, the builder was not entitled to receive a penny more than Rs. . 300/- per sq.ft. for the entire 13,000 sq.ft. area constructed and was thus entitled to only Rs. . 39,00,000/-(Rupees thirty nine lakhs) and not the remainder.

7. Needless to state, these were the submissions urged before the learned Single Judge and have been accordingly dealt with.

8. We shall be dealing with the issue of the applicability of the Doctrine of Approbate and Reprobate as a species of estoppel, as applied by the learned Single Judge soon hereinafter, but before than we deal with the issue of the power conferred upon the attorney and the interpretation of the various clauses of the Construction Agreement which clauses were pressed in aid by learned counsel for the appellant while arguing the appeal.

9. It may be recorded at the outset that the sale deeds under attack have been executed by the Attorney constituted by the appellant and thus it would be useless to discuss the terms of the builder's agreement. It is trite that where an Attorney is constituted by the Principal and is clothed with the authority to perform acts and execute deeds on behalf of the Principal, it is the document conferring said power(s) which alone matters.

10. Vide Clause-3 of the Power of Attorney, the Attorney constituted has been authorized to negotiate the sale/transfer of any part of the residential concept, except the covered areas to be retained by the executant. The language of Clause-3. after recording as aforesaid proceeds to convey something more evidenced by the use of the expression "on the basis of out-right sale or sale by installments to such persons/purchasers as the said General Attorney may deem proper". Further, vide Clause-6 of the Power of Attorney, the General Attorney is empowered to generate funds" by the sale of portions of the residential complex and make payments from the fund to the builder in respect of the amounts payable to the builder.

11. A conjoint reading of Clause-3 and Clause-6 of the Power of Attorney make it abundantly clear that the General Attorney was empowered to receive sale consideration and sell 8,000 sq.ft. covered area i.e. the builder's share and thus the argument that the power constituted upon the attorney did not empower the attorney to sell any portion of the constructed property is incorrect.

12. It is true that the attorney constituted was obliged, under the power conferred, to utilize the funds generated by firstly making payment to the builder by paying in Rs. 39 lakhs and the remainder had to be paid to the Principal, but

that would make liable the General Attorney to render accounts to the Principal and not that the sale deeds executed on the strength of the said Power of Attorney would be liable to be cancelled.

13. Now, we re-look at the transaction by removing the smoke screen created. If we look at the construction agreement and the power of attorney, it clearly emerges that the appellant was to receive 5000 sq.ft. covered area and the remainder was to be sold to third parties and in this context it assumes importance that the Power of Attorney holder is the living face of the builder and this clearly shows that the appellant had actually sold to the builder, for consideration received by him of Rs. . 10 lakhs and 5.000 sq.ft. covered area the remainder 8,000 sq.ft. covered area and this explains the fact of the builder handing over 5,000 sq.ft. covered area to the appellant and not insisting for the appellant to return him Rs. . 10 lakhs received by way of earnest money, which had to be refunded along with the price settled at Rs. 300/- per sq.ft. for the 5,000 sq.ft. covered area received by the appellant and further Rs. 300/- per sq.ft. to be paid to the builder for the remaining 8,000 sq.ft. covered area which was to be sold.

14. Dealing with the argument that the power of attorney was unregistered and was revoked before the sale deeds were executed, we agree with the learned Single Judge that having permitted the builder and the power of attorney holder to generate funds on the strength of the unregistered power of attorney and having received benefit in the form of 5,000 sq.ft. built up area being given possession of to the appellant, the Doctrine of Approbate and Reprobate which is a species of estoppel would be attracted in the instant case on the strength of the decisions noted by the learned Single Judge in paragraph 16 of the impugned decision.

15. We see no scope for any conflict with the substantive provisions of law enshrined in Sections 17 and 49 of the Registration Act for the reason the law of estoppel operates in the domain of the law of evidence and the said two sections operate in the field of substantive law. If estoppel bars a plea to be urged which is based upon a substantive law. the substantive law right cannot even be pressed for the reason the law of estoppel would prohibit any evidence being led on the subject.

16. On the issue of the Power of Attorney being revoked prior to the sale deeds being executed by the General Attorney constituted, suffice would it be to state that estoppel would come in the way of the appellant to even plead said fact for the reason the appellant received the benefit under the Construction Agreement even thereafter. The two documents i.e. the Construction Agreement and the General Power of Attorney, are supplementing documents and the real nature of the transaction has already been exposed by us.

17. We would like to pen a word upon the legal process being misused by unscrupulous persons, as the appellant is.

18. A perusal of the Construction Agreement and the Power of Attorney would reveal the attempt by the appellant to hoodwink the tax laws. Smoke screens have been created by the appellant to avoid paying tax. The Civil Litigation is being fought as if the transaction is a pious and a crystal clear transaction. This is not so. The smoke screens have to be removed to arrive at the truth. Courts are meant to resolve bona fide disputes of those who transact their affairs with purity, but unfortunately land up being confronted with legal issues, which arise bona fide and not due to the cunning acts of the parties. Courts are not meant to resolve the disputes of the cunning. But since our legal system permits even the cunning to litigate, then it would be the duty of the law to see through the cunningness and separate the grain from the chaff. It is trite that law exists to serve the needs of the society which is governed by it. If the law is to play its allotted role of serving the needs of the society, it must reflect the ideas and the ideologies of the society. It must keep time with the heart beats of the society and the needs and the aspirations of the people. Applied in the reverse, it would mean that where large sections of society resort to contrivance, as in the instant case by camouflaging sale transactions, notwithstanding the mandate of law that transfer of title in immovable property of the value of above Rs. . 100/- must be by a registered sale deed, the law would have to keep itself abreast with the time and may be the perverse heart beats of the society, requiring such transactions to be interpreted, as we have so done.

19. A word of caution for the appellant. The appellant must learn that it cannot Hunt with the hound and run with the hare simultaneously. Those who cheat on the revenue cannot complain that in the bargain they have been cheated. We find no merit in the appeal which is dismissed and since the respondents are not before us, there shall be no order as to costs.