IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on : 11.02.2011
Pronounced on: 11.07.2011

CS(OS) NO. 2580/1989

M/s Asman Investments Ltd. …Plaintiffs

Through: Dr. Arun Mohan, Sr. Advocate with Sh. D.P. Mohanty, Ms. Pallavi Sharma and Ms. Paula Ghose, Advocates.

Versus

Shri K.L. Suneja and Anr. …Defendants

Through: Sh. Gaurav Duggal, Advocate.

AND

CS(OS) NO. 1386/1990

Shri K.L Suneja and Anr. …Plaintiffs

Through: Sh. Gaurav Duggal, Advocate.

Versus

M/s Asman Investments Ltd. …Defendants

Through: Dr. Arun Mohan, Sr. Advocate with Sh. D.P. Mohanty, Ms. Pallavi Sharma and Ms. Paula Ghose, Advocates.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT

1.	Whether the Reporters of local papers may be allowed to see the judgment?	YES
2.	To be referred to Reporter or not?	YES
3.	Whether the judgment should be reported in the Digest?	YES

MR. JUSTICE S.RAVINDRA BHAT
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1 This judgment will dispose of two suits, CS (OS) 2580/1989 (hereafter the "specific performance suit") and CS (OS) 1386/90 (hereafter "the possession suit"), which were consolidated. The specific performance suit was filed by M/S Asman Investments Ltd. (hereafter "Asman" and "the Asman suit"); the defendant in this suit is K.L. Suneja (hereafter "Suneja"). Suneja filed the possession suit, (hereafter "the possession suit") against Asman for ejectment and recovery of damages/*mesne* profits for use and occupation of the property i.e Plot No.8 Malviya Nagar Extension (Saket) Community centre, New Delhi (hereafter "the suit property"; it is the subject matter of both suits).

Pleadings in the specific performance suit

2. The facts in the specific performance suit are that Asman, is a registered company under the Indian Companies Act. Suneja had purchased, in an auction from Delhi Development Authority (DDA), the suit property measuring 115.2 sq metres on 27.3.1980 for ₹ 6,15,000/-. The sale was confirmed by DDA through letter dated 15.4.1980. A perpetual lease deed was executed in favor of Suneja on 21.7.1986 by DDA (on behalf of President of India) and was registered on 1.8.1986. Suneja constructed a super structure on the suit property consisting of a basement, ground, second and third floors on a total covered area of about 6749 sq. feet. According to Asman, Suneja approached it offering to sell the suit property and the price was settled at ₹ 53.5 lakhs plus the charges payable to DDA.

3. Asman says that as the perpetual lease executed by DDA with Suneja imposed a bar on the transfer of the said plot for ten years therefore it entered into a "lease" arrangement along with an "Agreement to Sell" to doubly safeguard itself. Suneja agreed to the arrangement, provided the money that was paid as "rent" representing "interest" at prevailing market rates on the unpaid balance of sale consideration. A lease deed dated 12.08.1986 was executed and registered with the Sub Registrar, New Delhi, on 13.08.1986. The other document i.e. the Agreement to Sell was executed on 13.08.1986. ₹ 5,00,000/- was paid as part consideration to Suneja, through a cheque of the same date, drawn on State Bank of Saurashtra which was accepted by the defendants. The balance amount of ₹ 48,50,000/- was payable in terms of the

agreement. Asman took the possession of the said property which to their belief was primarily under the agreement to sell and additionally under the lease as well.

4. Asman avers that at the time of the lease the prevailing market rate of rent in that complex was between ₹ 7.75 to 8.25/- per sq.ft, per month while the sale price was ₹ 800/- per square feet. According to them the reason for this is that the rent is usually @ 1% of the sale value unlike interest which is normally 1.5 % per month. If what was being paid for the property was rent the same would have been at the rate prevailing in the market, i.e. ₹ 54,000/- and not ₹ 77,000/-.

5. As per requirement of law prevailing then (Section 269 AB of the Income Tax Act) a statement in Form 37EE was also filed before the Income Tax authorities. With effect from 1.10.1988 Chapter XX-C was introduced. Under the rules, as the transaction was above Rupees ten lakhs, a statement in Form 37 – I was also filed before the appropriate authority. The appropriate authority initiated proceedings and thereafter granted a "No Objection Certificate" dated 31.12.1986 under Section 269 UL of the Income Tax Act. Asman submits that after assuming possession it spent ₹ 29.41 lakhs to carry out extensive decoration keeping in mind that they were going to own the premises in terms of the agreement to sell. Under the agreement Suneja was to obtain all permissions and "No Objection Certificate" from the respective authorities and was to inform Asman about it, in writing. Asman was required to get the sale completed within 30 days of the notice from Suneja and to pay the balance consideration of ₹ 48,50,000/- at the time of registration of the Sale Deed.

6. Asman submits further that as the price of properties in the area rose, Suneja became dishonest, and wanted to extract more money from it (Asman). Therefore Suneja never formally applied to DDA in respect of transfer in favor of Asman and instead wrote some vague/incomplete letter, resulting in DDA issuing a letter dated 19.6.1987 to Suneja declining permission. Asman was kept in the dark and not told about any application for transfer made to DDA; such an application would have required its (Asman's) signature- an aspect completely ignored. Asman contends that as a result, DDA's rejection letter is not binding upon it and Suneja cannot be absolved of the liability to perform the agreement. Asman were later informed about the refusal by a letter dated 24.9.1987. It is also contended that Suneja was informed by it (Asman) through a letter dated 27.10.1987 that both parties were aware of the terms of lease

deed, which was the reason why option to determine the agreement was with Asman. It requested Suneja to keep the agreement in force. Suneja then approached Asman saying that since prices had risen, he would get the property transferred only if another Rupees ten lakhs were paid to him, which was unacceptable to Asman, who told him that he was bound by the original agreement. Suneja, by the letter dated 19.9.1988 sent a draft for ₹ 5,00,000 in alleged refund of the earnest money/part payment of the agreement, however, Asman refused to accept and encash the same.

7. Asman alludes to further correspondence between the parties by which Suneja asked for more money, which was declined by Asman; a notice by Suneja through which Asman was told that the tenancy had been terminated. However Asman insisted that it was ready with the balance money and the agreement had to be performed. Suneja's refusal led to filing of the specific performance suit; Asman avers that it was, and continues to be ready and willing to perform its part of the contract.

8. Suneja, defendants in the specific performance suit, deny the plaint averments, and assert that that there was no agreement to sell subsisting between the parties, entitling Asman to maintain a suit for specific performance, and alleges that the suit is barred by the provisions of Section 20 of the Specific Relief Act. Suneja questions the suit as not being instituted by a competent or authorized representative. Suneja clarifies that the amount paid by it to the DDA was ₹ 6,51,000/- instead of ₹ 6,15,000/- as alleged by Asman. It states that Asman had approached Suneja and offered to purchase the property. Suneja further denied that the lease created in respect of the suit property on 12.08 1986 was an additional lease. According to them, it was an independent transaction binding upon the parties having no nexus with the Agreement to sell dated 13.08.1986. The parties agreed and knew beforehand that the sale would be effected only when all the permissions required were granted by the competent authorities in their favor, and only then the tenancy would merge into ownership. Asman was to continue as tenant under the lease which was a separate, and distinct transaction. Suneja denied that the market rate in the Saket community centre at the time of lease was ₹ 7.75 to 8.25/- per month. According to them the prevailing market rent in that complex was ₹12/- per sq. ft; on negotiation Asman was able to get it reduced to ₹ 11.50 per sq. ft. The area of the building was 6749 sq. ft., the total rent worked out to be ₹ 77,613.50/- per month which was rounded off to ₹ 77,600/- per month.

Suneja denies that the buildings were sold @ ₹ 800/- per sq. ft. Buildings were sold in the complex as a whole as per the practices and usage of the market.

9. Suneja denies that the sale price of the suit property at ₹ 53.50 lakhs was arrived or settled at on the basis of the per sq. ft. price and also that the rent of the properties were at the rate of 1% of the sale price of the properties or that the interest was @1.5% per month. According to Suneja, the rent of any particular premises depends upon several factors such as locality, nature of construction, demand and supply and rent of similar premises etc. It is submitted that the interest for the year 1986 was 24% p.a. and the bank rate was 19% and above. Suneja's written statement avers that the prevalent rate of rent alleged by Asman as ₹ 54,000/- per month and not ₹ 77,600/- is false. This is evident from the fact that the balance consideration even on Asman's showing was ₹ 48,50,000/- and so, the amount of interest @ 18 % alleged by it, would have been ₹ 72,750/- per month and in no case it would have been ₹ 77,600/-. It is contended that if Suneja had really agreed to charge/receive ₹ 77,600/- per month as 'interest' on the unpaid balance consideration and not the rent for the premises as stipulated in the lease, then Asman would have assumed liability to pay house tax, ground rent and wealth tax etc., being a '*defacto* owner'.

10. Suneja states that the "agreement to sell" required the permission of DDA as provided by the statutory law, without which it is a contract forbidden by law and contrary to public policy. Thus the present agreement to sell is void as it is being hit by Section 23 of the Contract Act. Therefore, Asman cannot seek the specific performance or enforcement of the alleged agreement.

11. Suneja denies that possession of the demised premises was given primarily in terms of the "Agreement to sell" and additionally under the lease as well. According to them Asman's allegations are baseless, and contrary to the terms of lease, the agreement to sell, as well as other documents such as Statement in Form of 37 E prescribed under sec 269 AB (2) of the Income Tax Act, 1961; Statement in Form 37- I prescribed under rule 48-L under sec 269 U C of the above said Act; and various admissions made by Asman to various competent authorities, besides being barred by Sections 91 and 92 of the Evidence Act and Section 23 of the Contract Act.

12. Asman, alleges Suneja, is estopped and barred from making any allegation contrary to the representation made by them before the Income Tax Authorities under the form 37-EE and form

37 I in which they have specifically stated/admitted that the possession of the suit property was delivered to them under the registered lease dated 12.8.1986. Asman now cannot claim that the possession was delivered to it under part-performance of the agreement to sell. Suneja further denies not having applied in the prescribed manner to DDA for obtaining permission to sell the suit property. The allegation about the application or letters written to the authority being vague and incomplete, or that Suneja did not place proper facts before it (DDA) are denied. Asman was informed about all the applications made and its signatures were not required. Suneja denies the allegation of their not performing their part of the contract. Moreover, since sale permission was refused, the agreement came to an end and no longer subsists. It cannot therefore, be specifically enforced. It is also submitted that the agreement to sell was in facts and circumstances of the case, a contingent contract which become void and unenforceable on the refusal of permission by DDA.

Pleadings in the possession suit

13. Suneja, the plaintiff, is owner of the suit property. Asman, by a registered deed dated 12.08.1986 took the suit property on lease from Suneja for a fixed period of 36 months commencing from 12.8.1986 and expiring on 11.8.1989, at a monthly rental of ₹ 77,660/- exclusive of other charges. As per terms of the lease deed, Asman had the option to renew it (the lease deed) in the first instance for a period of 36 months on the expiry of that fixed period of 36 months at an enhanced rate of rent by 17.5 % on the last paid rent. Asman were also given a further option to renew the lease once again for another period of 36 months on a further enhanced rate of 17.5% on the last paid enhanced rent. It was further stipulated that Asman would be entitled to exercise the option to renew the lease only if a prior notice in writing was given by them atleast three months before the expiry of the period of the lease.

14. The period of the said lease for 36 months expired on 11.8.1989. Asman did not exercise its option to renew the lease before the expiry of the aforesaid period or at any other time with the consequence that the lease expired on 11.8.1989. Suneja, by their letter dated 4.8.1989 informed Asman that since the option of renewing the lease had not been exercised, they should vacate the demised premises on 12.8.1989 at 10.00 AM, which was not done. Thereafter Suneja approached Asman on several occasions but the latter failed and neglected to vacate the suit premises. Thus on expiry of the said lease, Asman's continued possession of the suit premises

became wrongful and unauthorized; it became liable to pay damages/mesne profits for use and occupation the said premises @ ₹1,14,733/- per month according to the prevailing market rate of rent. Suneja also served a notice to quit dated 1.12.1989 through their counsel and thereby terminated the lease which was to expire at the end of tenancy month on 11.1.1990 or the date on which, according to the defendant's reckoning, its tenancy month was to expire. Asman refused to vacate and by reply dated 21.12.1989 stated that the matter was under litigation in suit CS(OS) No. 2580/1989 pending in this court.

15. It is alleged that despite service of notice to quit, Asman sent two demand drafts dated 29.12.1989 each for ₹ 77,660/- styling the same as "rent" for the months of December 1989 and January 1990. They also sent another demand draft dated 6.2.1990 for ₹ 77,660 styling the same as "advance rent" for the month of February 1990. Asman had to pay the amount as damages/mesne profits at the aforesaid rate of ₹ 1,14,733/- per month, but they wrongly and illegally sent the said drafts as 'rent' and that too of ₹ 77,660/-. Suneja, mentions having informed Asman, by a letter dated 27.03.1990 that the amounts sent by them could not have been sent as the 'rent' but only as damages/mesne profits and the payment was only a part payment towards the arrears of damages/mesne profits, and that the said amounts would be treated and appropriated as part payment towards damages for use and occupation of the suit property. Asman were asked to pay the balance amount of damages for the period from 12.8.1989 to 31.3.1990 to the extent of ₹3,67,487.80. They did not pay the amount and also did not vacate the demised premises forcing the plaintiffs to file the present suit for ejectment and recovery of damages/mesne profits.

16. Asman, as the defendants in the possession suit, while reiterating the claims in their specific performance suit, further submit that Suneja, in this present case, are bound by the agreement to sell and Asman are ready and willing to perform their part of the contract. Asman earlier also sent the balance consideration of ₹ 48.5 lakhs by Cheque no.039126 dated 11.4.1990 which was returned by Suneja. They were also ready and willing to pay the DDA charges. Asman have, on the basis of the representation of Suneja, and the agreement, spent huge amounts on the suit property and did not acquire any other property in Delhi. According to Asman, Suneja are bound by the agreement and also estopped from trying to resile from it. Asman further submits that the lease was only supplementary to the main agreement to sell and Suneja are in

part possession thereof, so there is no liability to deliver vacant possession. They are also not liable to pay any damages/mesne profits.

17. The combined issues of both the suits are :-

Re: CS (OS) 2580/1989: the Specific Performance suit, by Asman

1. Whether the suit has been instituted, signed, and verified by a duly authorized person?
2. Whether the lease dated 12.8.1986 between the parties to the suit constituted a part of the same transaction as the agreement to sell dated 13.8.1986 or it is a collateral transaction and not a real transaction, intended to create lease as alleged by the plaintiffs.
3. Whether the Deed referred in Issue no.2 is contrary to Section 23 of Indian Contract Act and Sections 91 and 92 of the Evidence Act and is not permissible and open to Asman.
4. Whether any application to sell was made to DDA by K.L Suneja and whether the same was declined vide order dated 19.6.1987. If so, to what effect?
5. Whether the agreement to sell gave the option only to the purchaser to terminate the agreement as provided by clause 3 (b) of the agreement?
6. Whether the plaintiff has been ready and willing to perform its part under the agreement to sell;
7. Whether the plaintiff has spent a sum of ₹ 29,41,000/- to decorate and equip the property? If so, to what effect;
8. Whether in the facts and circumstances of the case the specific performance should be declined under Section 20 of the Specific Relief Act? If so, on what terms; OPD
9. Relief.

Re: CS (OS) 1386/90: the eviction suit by Suneja

1. Whether Asman is not liable to be evicted from the premises in the suit, as alleged by the defendants?
2. Whether Asman is liable to pay any damages for use and occupation amounting to Rs 3,67,487.80 /- paise as claimed, after the termination of the tenancy.
3. What amount of damages/mesne profit, and at what rate does Asman have to pay?
4. Relief.

The Court proposes to discuss the arguments and facts in the specific performance suit by Asman first, and then deal with the possession suit.

The Specific Performance suit

Re issue No.1

18. This issue appears to have been framed at the behest of the defendant, Sunjea. Although pleadings exist on this aspect, and the plaintiff Asman led evidence, the issue was not seriously contested during the hearing. The same is accordingly answered in favour of the plaintiff Asman; the suit is held to have been instituted by a duly authorized person.

Issue No2: Whether the lease dated 12.8.1986 between the parties to the suit constituted a part of the same transaction as the agreement to sell dated 13.8.1986 or it is a collateral transaction and not a real transaction, intended to create lease as alleged by the plaintiffs.

19. Asman submits that the lease dated 12.08.1986 (Ex P-3) fixes the rent at ₹ 11.50 per sq. ft. which was more than the market rent. To prove this it relies on cross examination of Suneja on the point of rent exceeding Rs 8/- per sq.ft. at any point of time prior to 12.08.1986. Suneja had stated that rent at that point of time was around ₹ 11/- to ₹ 12/- per sq. ft. per month, which also depends on the building and the parties taking the premises on rent. Asman terms this answer evasive, as according to them, Suneja concealed his letting out at ₹ 1.75/- per sq. ft per month, in year January 1985 (Ex DW6/P2). It also relies on the cross examination of DW 3 and DW 5 to say that the prevailing market rent in August 1986 was far below the rent which was being paid by Asman, thus trying to show the true purpose of the monthly compensation.

20. Asman argues that the lease (Ex P-3) was only to support the Agreement to sell (Ex P-4) and was an integral part of one transaction though both the documents were executed on different dates. To support this point of view they have relied on *Whitbread v. Smith* [(1854) 3 De G.M. & G. 727], *Smith v. Chadwick* [(1882) 20 Ch. D. 27,62,63], *Manks v. Whiteley* [(1912) 1 Ch.735,'54], *Chattanatha Karyalar v. Central Bank* (AIR 1965 SC 1856), *Indra kaur v. Sheo Lal Kapoor* (1988 (2) SCC 488), *Thakur Raghunath Ji Maharaj v. Ramesh Chandra* (2001 (5) SCC 18) and *The Associated Bombay Cinemas (P) Ltd v. Urmi Developers (P) Ltd.(*1997-2 Bom CR 257*).*

21. It is urged that PW1 and PW2 in their examination in chief have deposed that both the agreements were executed at the same time on the same day in the Sub Registrar's office. Further the absence of the security deposit, customary as six month's rent, is also indicative that the lease was not an independent transaction. It also does not provide for any advance rent or even acknowledgement receipt of the first month rent, whereas the agreement to sell provides for earnest money and also the advance rent and its adjustment. The rent was also structured not on

prevailing market rates but a price which represented the interest on the balance payment to cover the period till the DDA permission was received.

22. Asman submitted that the rent was only a method of providing compensation on the balance sale price till the DDA permission was received. The question is not of nomenclature whether it is called "rent" or "interest" but of receipt of monthly return or compensation till the lapse of ten years (and for reasonable period thereafter) by whatever name it is called. In support of this, Asman has cited *Sardar Gurdeep Singh v. Amiya Kumar Datta (1993 MPLJ 854), Sankalchand Kuberdas v. Jointaram Ranchod* (AIR 1949 Bom193).

23. There can be no dispute about the proposition that an agreement for sale of immovable property is a species of contract; as long as the essential ingredients of a binding and enforceable contract, i.e. an offer, acceptance and a valid consideration are established, the agreement can be enforced like any other. In *Ouseph Varghese v. Joseph Aley* 1969 (2) SCC 539, the Supreme Court held that such oral contracts can be subject matter of suit, claiming decree for specific performance. Here, however, the question which arises is whether, the Lease Deed, Ex. P-3 and the agreement Ex. P-4, together were part of the same transaction. The decisions cited do indicate that there is no hard and fast rule that the entirety of a contract ought to be contained in one document; several documents or series of correspondence and letters can disclose the terms of a lawful and binding contract.

24. In the present case, the two documents were not executed on the same date; though they pertained to the property and were between the same parties, i.e. Asman and Suneja, who yet consciously chose to have them separately registered. Ex. P-3, the lease deed demises the property for a period of three years at an agreed monthly rental and further entitles Asman to seek two extensions on terms stipulated in the document. The agreement to sell, Ex. P-4 was executed the next day, i.e. 13.08.1986. Crucially, Clause 4(b) and clause 6 of Ex. P-4 specifically mention that Asman entered the premises as a tenant; there is an allusion to the sum of Rs. 4,65,600/- adjustable against the rent for the first 12 months of the tenancy. Clause-6 further states that

> *"should this sale transaction be completed before the said sum is adjusted in full, the unadjusted balance shall be deducted by the purchaser from the balance sale consideration……."*.

25. The above reference to the lease deed, Ex. P-3, in the subsequent agreement to sell, Ex. P-4 was done as a mechanism for adjustment of the consideration payable in the event the sale was completed within the period of tenancy. This itself, in the opinion of the Court, establishes that the two transactions – the lease deed and the agreement to sell were separate and independent. In these circumstances, it is held that the lease transaction was not a sham transaction but was independent. Had the intention of the parties been that amounts payable during the subsistence of the lease or any extended period was to be treated as a consideration for the sale transaction, the structure of clause-6 in Ex. P-3 would not have been as it is. The parties would have provided that all amounts payable by Asman to the owner, Suneja, would have been adjusted in the same manner or in some other mutually acceptable terms.

26. In *Chattanatha Karyalar's case* (supra) undoubtedly, the Supreme Court concluded that the mere circumstance that two documents are consciously executed by parties, would not imply that they embody separate transactions, and that the court would have to discern from the surrounding facts to hold whether they are part of the same transaction, or are indeed different. Indeed, the nomenclature and chronology of the documents can be ignored, in order to ascertain the real nature of the bargain between the parties. There are, however, other decisions (*G. Narayana Raju v G. Chama Raju* AIR 1968 SC 1276; *State Bank Of India & Another V. Mula Sahakari Sakhar Karkhana Ltd*. 2006 (6) SCC 293) which indicate that there is no hard and fast rule that the entirety of a contract ought to be contained in one document; several documents or series of correspondence and letters can disclose the terms of a lawful and binding contract. Having regard to the overall conspectus of facts and circumstances, it is held that the two deeds in question in the present case, embodied separate and independent transactions. Issue No.2 is therefore, answered against the plaintiff Asman, and in favour of the defendant Suneja.

Issue No.3. : Whether the deed referred to in Issue No.2 is contrary to Section 23 of the Contract Act and Sections 91 and 92 of the Evidence Act, and is not permissible and bound to the plaintiff?

27. The onus of proving this issue is cast on the defendant, who had taken the position that the two agreements were not part of the same transaction but were separate and independent.

28. In support of this argument, it was urged that the effect of holding that a binding agreement, regardless of the terms imposed by the superior lessor, i.e. the Central

Government/DDA existed by virtue of Ex. P-4 would have resulted in the contract being opposed to public policy and, therefore, being void as contrary to Section 23 of the Contract Act. Learned counsel for Suneja has also urged that Clause 4(a) of the perpetual lease dated 21.07.1980 had created a bar for the sale of the property except with previous consent of the lessor (i.e. the DDA). Besides this, learned counsel for Suneja had also relied upon Sections 91 and 92 of the Evidence Act to say that in oral evidence as to existence of facts, contrary or in addition to the terms of a written document, could not be looked into by the Court.

Clause 4(a) of the perpetual lease, Ex. P-1 reads as follows:

"XXXXXX XXXXXX XXXXXX

(4)(a) The Lessee shall not sell, transfer, assign or otherwise part with the possession of the whole or any part of the commercial plot except with the previous consent in writing of the Lessor which he shall be entitled to refuse in his absolute discretion.

PROVIDED that such consent shall not be given for a period of ten years form the commencement of this Lease unless in the opinion of the Lessor, exceptional circumstances exist for the grant of such consent.

PROVIDED FURTHER that in the event of the consent being given the Lessor may impose such terms and conditions as he thinks fit and the Lessor shall be entitled to claim and recover a portion of the unearned increase in the value (i.e. the difference between the premium paid and the market value) of the plot at the time of sale, transfer, assignment, or parting with the possession, the amount to be recovered being fifty percent of the unearned increase and the decision of the Lessor in respect of the market value shall be final and binding.

PROVIDED FURTHER that the Lessor shall have the pre-emptive right to purchase the property after deducting fifty percent of the unearned increase as afore-said.

XXXXXX XXXXXX XXXXXX"

29. The decisions reported in *Roop Kumar v. Mohan Thadani* 2003 (6) SCC 595 and *S. Saktivel v. M. Venugopal Pillai* 2007 (7) SCC 104 have ruled that wherever written instruments are executed either by the requirement of law or by contract of parties, their terms alone are deemed to be the repositories of what the parties wish to state and in oral evidence to the contrary, is excluded. Here, both the agreements are comprehensive about the terms of what the parties desired, and their relative rights and liabilities. Therefore, in the opinion of the court, it is not open, by virtue of Section 92 of the Evidence Act, to rely on oral evidence, to consider

whether they were part of the same transaction. In view of this and in view of the findings on Issue No. 1, the present issue is found in favor of Suneja and against the plaintiff Asman.

Issue No. 4: Whether any application to sell was made to DDA by K.L Suneja and whether the same was declined vide order dated 19.6.1987. If so, to what effect.
Issue No. 5: Whether the agreement to sell gave the option only to the purchaser to terminate the agreement as provided by clause 3 (b) of the agreement;

30. The two issues, Nos. 4 and 5 are interlinked, and are therefore, taken up for consideration together. Asman urged, and sought to prove that no proper application to DDA was ever made. The question according to them is that when did Suneja become eligible to make an application to make an exception. Asman submitted that there are two parts to this question. First is making the application before the lapse of ten years i.e., jumping the queue; and the second is of the application on merits, i.e., in a proper form and made after the lapse of ten year period or could be made simultaneously on an assumption that the first (jumping the cue) would be permitted. The meaning of a proper application and when it has to be made has been explained by the division bench in *La Medica Manufaturing Pvt. Ltd v. DDA* [73(1998) DLT 362]

> *"……what is an application complete in all particulars? If an application is made, which is substantially in the form prescribed if any, and gives all such particulars as may be relevant and necessary for the decision by DDA on the issue of granting permission to sell, the application is a valid application. If the DDA raises any additional queries for its on satisfaction or calls for some additional documents it is free to do so but it will not result into altering the date of application. However if the application suffers from any such substantial defect or is associated with failure to annex any such material document as would render the application itself an invalid one or on account of which defect or deficiency the application would cease to be an application in the eye of law then the application would be deemed to have been filed only on such date which the defects are removed or deficiencies are made up or the essential documents are supplied, as the case may be……".*

Asman urges that on applying this law to the present case, the application made on 22.12.84 was complete in all material particulars. It did not suffer from any fatal deficiency to invalidate it. Suneja went on calling for incidental or secondary information and documents and also went on insisting on production of building certificate for which the plaintiff Asman could not be blamed. The DDA was, therefore, obliged to calculate the unearned increase by working out the difference between the premium paid and the value of the plot on the date of application dated 22.12.84. Thus the need for giving all such particulars which were relevant and necessary for the

decision by the DDA on the issue of granting permission to sell, the application is a valid application. Asman asserts that there is no prescribed form of DDA to apply for permission to sell/lease old property was submitted nor was the information given wherefore the question of DDA considering the transaction or the transferee could not arise. To support this fact they rely on Suneja's cross examination.

31. Asman also says that judicial notice can be taken of DDA's policy that it did not grant any permission before the lapse of ten years, for not a single such case has been pointed out; and after the lapse of ten years , not a single case of refusal has been pointed out. For all the agreements to sell which were entered into for leasehold and sub leasehold lands, the DDA always, when the time came, granted permission as a routine and has never refused permission in a single case. They have maintained that the refusal of permission to jump the queue was not on merits and this refusal cannot be a ground for frustration of the agreement or result in discharging Suneja from their obligation. In August 1986, the parties were aware that the permission before the expiry of ten years (13.04.1992) was an exception and not the norm whereof they structured the contract accordingly, i.e., (1) did not provide for a fixed date of performance ; (2) the tenancy extended to 3 years 4 months after the commencement of the period when, ordinarily, permission would be available; (3) the tenancy gave adequate returns on the balance sale price; and (4) the option to terminate was reserved only to Asman as the intending purchaser and not the Suneja.

32. Asman submitted that refusal to grant permission by DDA was temporary and not final. Keeping in mind the agreement and the facts of the case permission was really to be obtained after 13.04.1992 (when the bar of 10 year would have expired) and the chances of the waiver of the ten year bar were next to nil and the parties had accordingly moulded the agreement. To support this contention they have relied on judgement of the division bench in *La Medica Manufacturing* which discusses the point of time of 'eligibility to move the application'.

33. A great deal of emphasis was placed on the concerned condition in the Agreement, Ex. P-4, i.e clause 3 (b) which reads as follows:

> *"It is hereby clearly understood that since the permissions required to be obtained by the VENDORS in terms of the Agreement, and if the vendors fail to obtain the said permission/ sanctions within the stipulated period of 12 months, the PURCHASER shall have this Agreement in which event the sum of Rs. 5,00,000/- (Rupees five lacs only) paid as advance sale consideration upon execution of the Agreement by the PURCHASER to the VENDORS shall become*

adjustable by the PURCHASER against future rent for the said building in the PURCHASER'S capacity as Lessee thereof under the Lease Deed dated 12th August 1986 notwithstanding the aforesaid and in any event, should the VENDORS fail to fulfil their obligations hereunder or to complete the sale transaction within the time specified thereunder, the PURCHASER shall be entitled to have this Agreement specifically enforced through court. The Purchaser shall also be entitled to claim any damages resultant upon the VENDORS delay or failure, except when such delay or failure is due to reasons beyond the control of the VENDORS.."

It was urged by learned senior counsel for Asman that the obligation to secure permission of DDA and other statutory authorities was that of Suneja, and that it (Asman) as the Vendee/ Purchaser had the option of seeking specific performance of the Agreement for which no time limit had been prescribed. It was submitted that since for a contract for sale of immovable property, time is not of the essence of the contract, Asman could approach the court within the prescribed three years time limit, and seek a decree for specific performance, which it has done by the present action.

34. It was urged that when a condition such as the one contained in the Perpetual Lease deed Ex. P-1 exists, requiring the lessee to await lapse of a certain period, and permission of the competent authority, an agreement to sell entered into by the owner or lessee is not void, as held by the Supreme Court, in *Chander Vidyawati Madeen v Dr. C.L. Katial* AIR 1964 SC 978. It was also urged that this court, in some judgments, such as *Balwant Rai v Smt. Prakash Devi* (RSA 221/1977 decided on April 17, 1979) and *Ravinder Nath Sahni v DDA* 45 (1991) DLT 226 and *Mrs. Neirah Bhargava v Lt. Governor, Delhi* 43 (1991) DLT 745 have ruled that courts can issue decree for specific performance of agreement to sell, containing such restrictive covenants, which require permissions to be obtained from official agencies, and that vendor defendants cannot merely apply for such approval or permissions, and have an obligation to follow up the applications.

35. Asman opposed Suneja's contention that the Agreement to Sell came to an end by frustration with the refusal of DDA to grant permission to sell by letter dated 19.6.1987 (Ex. P-9; also Ex. DW-1/4) and therefore the suit for its specific performance is not maintainable. Asman relied on Section 56 of the Contract Act, arguing that it is a positive rule relating to frustration of contracts and the court cannot travel outside its terms, which are exhaustive. Asman relied on the decisions of the court in *Satyabrata Ghose v. Mugneeram Bangur and Co.*(AIR 1954 SC 44)

and *Smt. Sushila Devi v. Hari Singh* (AIR 1971 SC 1756) where it was held that 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 well be said that the promisor found it impossible to do the act which he promised to do. Asman contends that the lapse of the ten year bar (on 13.4.1992) has to be excluded from computing the reasonable period time. Further the monthly rent ensured that there was no loss to the defendant builder, which 'compensation' was not there for the seller (*Mungeeram Bangur*) in the case before the Supreme Court, and still specific performance was granted. Asman also points out that DDA refused permission because the ten year period has not expired and not because Suneja were undesirable people. Asman have also relied on the cross examination of Suneja to prove that he was a professional builder-developer and was well versed with the DDA, their policies and their working.

36. Suneja counters Asman's arguments, submitting that the Agreement to sell dated 13.08.1986 (Ex P-4) was a contingent contract. In its recitals the agreement acknowledged that by a lease dated 12.08.1989 (Ex P3) the premises were leased out to Asman as tenant. The parties thereafter agreed for sale and purchase of the property, under clause 2 of Ex P-4. The importance of "permission" to be obtained from the DDA has been unequivocally declared in Clause 3(b) of the Agreement to sell. The permission envisaged in the Clause 2 of the document is the very foundation of the Agreement, as the sale and could not be concluded without it. Both the parties being commercial entities were well aware that there was a great deal of uncertainty in getting the permission to transfer the lease from DDA and were also not desirous of continuing the respective obligations of the parties for an indefinite period of time. Hence, the agreement to sell did not contemplate anything being done after the expiry of the said fixed time period of 12 months. Suneja have laid emphasis on Mulla's Indian Contract and Specific Relief Acts (12 Edn.), wherein it has been stated on pg 1144

> *"contract requiring permission, or consent for performance of contract may become void, if the performance is made conditional upon such permission or consent, the refusal of permission rendering the contract void. Such cases should properly fall within the scope of sec 32 and not section 56. Section 32 will apply, not only when the contract expressly provides that the performance is subject to a condition that its performance will be subject to the happening of an event, but also in those cases where in the absence of express provision, such condition is implied".*

37. Suneja submits that a contract requiring permission from any authority or court would be a contingent contract and if the contingency fails, there would be no obligation which can be the basis for a decree for specific performance. To support this contention the defendants have relied on *Delsukh M. Pancholi v. The Guarantee Life and Employment Insurance Co. Ltd. and Ors.* (AIR 1947 PC 182), *Matadin Agarwal v. Syed Abdul Razak* (AIR 1997 AP 103), *Baij Nath v. Ansal and saigal Prrops Pvt Ltd* (AIR 1993 Del 285), *K. Narendra v. Riviera Apartments (P) Ltd.* [(1999) 5 SCC 77], *HPA International v. Bhagwandas Fateh Chand Daswani and Ors.* [(2004) 6 SCC 537] *etc.*

38. Suneja distinguishes the present case from *Satyabrata Ghose v. Mugneeram & Co* (AIR 1954 SC 44) as in the present case a fixed period of time within which the contract for sale had to be completed. For the agreement to sell a fixed time period of 12 months was specified to obtain the permission from DDA from 13.08.1986.This agreement therefore, was a contingent contract and could have been enforced only when the permission was granted and as the specified event did not take place within the specified time period by virtue of Section 35 Indian Contract Act the agreement became void.

39. Suneja further argued that the parties entered into two distinct and separate agreements i.e. the Lease and the Agreement to sell. This was done not only to protect the earnest money of 5 lacs by Suneja but also to clarify that time was the essence of the agreement to sell i.e. for obtaining the requisite permission necessary for entering into a sale deed. Asman had initially secured the possession for a period of 3 years (with an option to extend the same for two more terms of 3 years each subject to fulfillment of certain conditions). Thereafter the parties, being aware of the fact that under the "lead lease" no transfer could take place for 10 years except under exceptional circumstances to the satisfaction of the lead-lessor, entered into the Agreement to sell, with a clear understanding that efforts would be made to obtain the requisite permissions within 12 months from the date of the agreement. It (Suneja) applied for DDA's permission the day after execution of the agreement to sell, i.e. on 14.08.1986 (Exhibit D1), and sent a remainder on 28.11.1986 (Exhibit D2). In response to that letter DDA addressed a letter to Suneja on 15.01.1987 (Exhibit D3) and directed them to submit a copy of completion certificate and to also furnish specific reasons under which they wished to sell the specific plot of land. Suneja, by their efforts, obtained the completion certificate for the suit schedule property and as

desired by the DDA, furnished a copy of the same by their letter dated 12.02.1987 (Exhibit D4). In the said letter Suneja furnished reasons for seeking the permission of the DDA to transfer the said plot of land. The reasons were personal; K.L Suneja was in dire need of funds as, in his existing business, he was passing through difficult days. Kailash Suneja w/o K.L Suneja also stated that she was anxious to assist K.L Suneja with the sale proceeds of the above said property. However, the DDA by their letter dated 19.08.1987 (Exhibit D5), declined to grant the permission on the ground that the request could not be acceded to in view of Clause II (4) (a) of the lead lease executed by and between the DDA and K.L Suneja. The said letter was not received by Suneja, who learnt about the same only after a few months, by making enquiries at the DDA's office. Suneja, thereafter, by their efforts obtained a Photostat copy of the letter dated 19.06.1987 and immediately informed Asman about the same (Exhibit D6). Asman did not question the orders passed by the DDA then.

40. A bare reading of the Lease restriction, contained in Clause 4 of Ex. P-1 concededly reveals that the Lessor's (DDA's) permission for transfer (of possession or of title) to the plot was necessary. The main part of the condition reads as follows:

> *"The Lessee shall not sell, transfer, assign or otherwise part with the possession of the whole or any part of the commercial plot except with the previous consent in writing of the Lessor which he shall be entitled to refuse in his absolute discretion…."*

The first proviso to the condition (Clause 4) states that permission would not be granted

> *"form the commencement of this Lease unless in the opinion of the Lessor, exceptional circumstances exist for the grant of such consent."*

There can be no doubt that the parties were in the know about this prohibition; the Agreement to Sell Ex. P-4 expressly mentioned that the vendor Suneja was obliged to seek it; Asman was given the option to extend the Agreement to sell from the initial period of 12 months. The first question is whether Suneja had indeed applied, in terms of the Agreement, for permission to sell, and if DDA had rejected that application. Now, the argument of Asman was that there was no set format or form for applying; a fact endorsed by the official who deposed from the DDA, in the case, i.e DW-1. Suneja had relied on a number of letters and brought their copies on the record, to say that the application was made to DDA, and also followed up, despite which the authority did not agree to grant consent. Asman had denied the correspondence. Suneja relied on the

testimony of DW-1, an official of DDA, who also produced the relevant records. The testimony of DW-1 reads as follows:

> *"I am working in the Commercial Land Branch. I brought the office file of the property bearing No. 8 CC Community Centre, Malviya Nagar, Saket, New Delhi. The defendant had applied to the DDA for grant of permission to sell this property. The last letter on the file written by the defendants seeking permission is dated 12-2-1987. The first letter written by the defendants for grant of permission was on 14-8-1986. On 15-1-1987, the DDA wrote to the defendants to give the reasons why they were seeking pemission to sell the property To this letter reply was given by the defendants on 12-2-1987. The DDA refused to grant permission to the defendants to sell the property and wrote a letter on 19-6-1987 informing the defendants about such rejection. This letter was sent by certificate of posting. I have seen the copies of the letters dated 14-8-1986, 12-2-1987 written by the defendants to the DDA as also the letters dated 15-1-1987 and 19-6-1987 written by the DDA to the defendants of which copies are available on my record. The documents shown to me are correct – copies of original of record of DDA. These documents are Ex. DW-1/1 to DW-1/4."*

In cross examination, the witness stated that he had no personal knowledge about the case, and that DDA normally did not grant permission to sell to lessor/allottees in cases where the lease had not completed ten years; he also confirmed that there was no prescribed form for applying (for permission) to DDA. Shri K.L. Suneja, who deposed as DW-2, stated that he did not know about the rejection letter issued by DDA, and became aware about it upon inquiry and later obtained a photocopy of that letter.

41. There is no material on the record to suggest that Suneja had applied in a half hearted manner, or that its application was rejected on 19-8-1987 due to any deficieny or lacunae, as is urged by Asman. The last letter written by Suneja – ie both Shri K.L. Suneja and his mother, Ms. Kailash Suneja, clarifies, in response to DDA's query, about the need to sell the property as dire need of funds for K.L. Suneja's existing business. Apparently, to substantiate this contention, the defendants have filed income tax and wealth tax returns for different years. The copy of the income tax returns of the second defendant (KL Suneja), Ex. D-73, records that his total income (salary, business, rental and other sources) for the year ending 31-3-1987 was ₹ 2,17,569/-. This included an entry of loss of ₹ 12,418/- in respect of the said defendant's business. The plaintiff,

Asman did not cross examine any defence witness on this aspect. Therefore, Suneja's assertion about the need for sale of the property being on account of business losses, mentioned in the letter dated 12-2-1987, goes unchallenged.

42. Having regard to the entire conspectus of evidence, particularly documentary evidence on the record, it is held that the vendor Suneja had applied for permission to sell the property to Asman, and written letters to the DDA. The latter rejected the request, and declined to grant permission. Issue No. 4 is accordingly answered in favour of Suneja, the defendant, and against the plaintiff Asman.

43. As to Issue No. 5, the relevant condition in the Agreement to Sell reads as follows:

> *"…notwithstanding the aforesaid and in any event, should the VENDORS fail to fulfil their obligations hereunder or to complete the sale transaction within the time specified thereunder, the PURCHASER shall be entitled to have this Agreement specifically enforced through court. The Purchaser shall also be entitled to claim any damages resultant upon the VENDORS delay or failure, except when such delay or failure is due to reasons beyond the control of the VENDORS…"*

In this case, the Perpetual Lease Deed, though entered into in 1986, was effective from 14th April, 1982. Asman's argument was that though there was a restriction on sale, DDA did not normally accede to requests for transfer during the subsistence of the 10 year embargo period, and granted it thereafter. It relies on the letter of 27th October, 1987 written to Sunjea, expressing its intention not to terminate the agreement to sell, or accept the proposal regarding refund of ₹ 5,00,000/-. It was argued by Asman's senior counsel that having regard to DDA's consistent policy not to grant approval to sell any leasehold property, during the subsistence of the 10 year embargo period, the plaintiff could secure specific performance of the agreement, *after* that period expired, i.e after 13-4-1992.

44. There can be no doubt that an absolute restriction on sale in the Perpetual Lease deed (Ex. P-1) would have altogether prevented the Vendor allottee from selling the property. However, the structure of the relevant term – Clause 4 is conditional. The lessee could not sell or transfer the property without DDA's permission; such permission within 10 years of the entering into of the lease was possible only under exceptional

circumstances. In this case, while deciding Issue No. 4, the court held that Suneja had applied for permission, and also disclosed the reasons why sale permission was sought. That permission was declined. Asman sought to rely on the deposition of DW-1 saying that permission was normally not granted within subsistence of the 10 year embargo period. However, to prove that *invariably*, DDA granted permission – or that such permission was seldom, if never refused, Asman has not brought anything on the record. While it is one thing to say that the obligation to secure the necessary permissions are with the owner (Ref *Chander Vidyawati Madeen* (supra)) in case there is nothing express, a plaintiff, in a specific performance suit is under a positive obligation to prove his case that where such embargos exist, they are nominal after the period mentioned in the deed, ends. Here, the restriction to secure permission of the lessor (DDA) continues, by virtue of the proviso to Clause 4, even *after* the 10 year period. That proviso only clarifies that the permission would be granted during the 10 year period, for exceptional reasons. While what constitutes exceptional reasons is not the subject matter of debate in this suit (and that the judgment of the lessor in such instances based upon its capacity as owner of the premises) nevertheless, the important aspect is that the expiry of the 10 year period in no manner loosens the control of the DDA, over the question of permission. Therefore, the lack of any material renders Asman's argument that permission could be granted as a matter of course, (or a formality) after the 10 year period, insubstantial. Permission had to be obtained. Moreover, the court also notes that significantly, the suit was filed in 1989; three years before the 10 year embargo ended in April, 1992. There is no material to suggest that the plaintiff Asman ever called upon Suneja to apply again, to the DDA, for permission after the embargo period; nor were the pleadings amended to incorporate any such fact. Furthermore, the plaintiff has not cared to implead DDA as a party, or even challenge the rejection letter. Its entire case was that there was no rejection, and that despite rejection of the request, the court can nevertheless decree a suit for specific performance.

45. Suneja had asserted that the contract for selling the property was contingent upon the grant of permission to do so by DDA; since that permission or approval was rejected, the contract was rendered incapable of performance. Asman, on the other hand, contended that there was no question of the obligation ending, and that the contracting

parties had provisioned expressly for this, stating that it (Asman) could apply for specific performance, after 12 months from the date of entering into the agreement to sell, if the permission were not forthcoming.

46. The relevant provisions of the Contract Act are as follows:

> *"**31. "Contingent contract" defined.—**A "contingent contract" is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen.*
>
> ***Illustration***
>
> *A contracts to pay B Rs. 10,000 if B's house is burnt. This is a contingent contract.*
>
> ***32. Enforcement of contracts contingent on an event happening.—**Contingent contracts to do or not to do anything if an uncertain future event happens, cannot be enforced by law unless and until that event has happened.*
>
> *If the event becomes impossible, such contracts become void.*
>
> ***Illustrations***
>
> *(a) A makes a contract with B to buy B's horse if A survives C. This contract cannot be enforced by law unless and until C dies in A's lifetime.*
>
> *(b) A makes a contract with B to sell a horse to B at a specified price, if C, to whom the horse has been offered, refuses to buy him. The contract cannot be enforced by law unless and until C refuses to buy the horse.*
>
> *(c) A contracts to pay B a sum of money when B marries C. C dies without being married to B. The contract becomes void.*
>
> ***33. Enforcement of contracts contingent on an event not happening.—** Contingent contracts to do or not to do anything if an uncertain future event does not happen, can be enforced when the happening of that event becomes impossible, and not before.*
>
> ***Illustration***
>
> *A agrees to pay B a sum of money if a certain ship does not return. The ship is sunk. The contract can be enforced when the ship sinks."*

In one of the cases cited, i.e *HPA International (supra)* the Supreme Court expressly dealt with an argument relating to specific performance of a contract for conveyance of interest in immovable property, depending upon obtaining consent of a statutory authority. It was held that**:**

> *"**94.** On behalf of the vendee, reliance is heavily placed on Satyabrata Ghose v. Mugneeram Bangur & Co.[24]. The decision is distinguishable. In that case, the defendant Company for the purpose of developing certain land, entered into the contract with the plaintiff for sale of its plot. The sale deed was to be executed after construction of drains and roads. After the execution of the agreement and when construction of public roads and drains was half done, the land was requisitioned by the Government for military*

purposes. The defendant Company could not further undertake the road construction work and therefore, wrote to the plaintiff to treat the agreement as cancelled. It is on these facts that this Court held: (SCR pp. 311-12)

"[T]hat having regard to the nature and terms of the contract, the actual existence of war conditions at the time when it was entered into, the extent of the work involved in the scheme fixing no time-limit in the agreement for the construction of the roads etc., and the fact that the order of requisition was in its very nature of a temporary character, the requisition did not affect the fundamental basis of the contract; nor did the performance of the contract become illegal by reason of the requisition, and the contract had not therefore become impossible within the meaning of Section 56 of the Indian Contract Act."

95. *Such is not the position in the present case. The vendor could not have waited indefinitely for the final result of the sanction suit as coercive proceedings for recovery of tax were likely to be initiated at any time. We have held above that reasonable period for obtaining sanction from the Court has to be read as an implied condition of the contract in view of the urgent necessity of sale to satisfy the tax dues and save the property from coercive recovery. The vendor had agreed for transfer of full interest in the property including his own life interest and of the reversioners. As the reversioners objected and ultimately the sanction suit failed, the performance of contract, as agreed for transfer of full interest in the property, had become impossible. There was no agreement between the parties that if sanction was not granted, the vendor would transfer his life interest. On the contrary, the agreement clause specifically stated that if the sanction was not obtained, the advance money shall be returned. This stipulation shows an intention contrary to the parties agreeing for transfer of life interest of the vendor, if transfer of reversioners' interest was not possible for want of court's sanction.*

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100. *In the case before us, we have not found that the vendor was guilty of rendering the suit for sanction infructuous. It did terminate the contract pending the suit for sanction but never withdrew that suit. The vendee himself prosecuted it and rendered it infructuous by his own filing of an affidavit giving up his claim for the interest of reversioners. In such a situation where the vendor was not in any manner guilty of not obtaining the sanction and the clause of the contract requiring the Court's sanction for conveyance of full interest, being for the benefit of both the parties, the contract had been rendered unenforceable with the dismissal of the sanction suit.*

101. *Where the clause requiring obtaining of sanction was to protect interest of both the parties and when the sanction could not be obtained for reasons beyond the control of the parties, the contract cannot be directed to be specifically enforced. The House of Lords in the case of New Zealand Shipping Co. Ltd. v. Societe Des Ateliers Et Chantiers De France*[26] *in similar circumstances, negatived the claim of specific performance. It was held in that case that where two parties are equally blameless and none of them could be said to have brought about a situation by their act or omission to frustrate the contract, the contract cannot be directed to be specifically enforced.*

102. *On behalf of the vendee, support for his claim was sought from the following observations of Lord Atkinson: (All ER pp. 556 I-557 A)*

"The application to contracts such as these of the principle that a man shall not be permitted to take advantage of his own wrong thus necessarily leaves to the blameless party an option whether he will or will not insist on the stipulation that the contract shall be void on the happening of the named event. To deprive him of that option would be but to effectuate the purpose of the blameable party. When this option is left to the blameless party it is said that the contract is voidable, but that is only another way of saying that the blameable party cannot have the contract made void himself, cannot force the other party to do so, and cannot deprive the latter of his right to do so. Of course the parties may expressly or impliedly stipulate that the contract shall be voidable at the option of any party to it. I am not dealing with such a case as that. It may 582 *well be that the question whether the particular event upon the happening of which the contract is to be void was brought about by the act or omission of either party to it may involve a determination of a question of fact."*

(emphasis supplied)

103. *As has been observed by Lord Atkinson, it is always a question of fact to be determined in each case as to who is guilty of the act or omission to render the contract void or unenforceable. In the case of New Zealand Shipping Co. Ltd.*[26] *on facts the ultimate conclusion reached unanimously by Their Lordships was that the clause of the contract in that case was a stipulation in favour of both the parties and the situation was not brought about by any of the parties to give rise to avoidance. It was found that the failure to fulfil the contract was not due to any fault on the part of the respondents but was due to a cause beyond their control."*

Dealing with a fact situation where permission of an outside agency was required to effectuate a contract for sale of property, the Supreme Court held, in *M. Meenakshi* (supra) that a decree could not be granted if the permission was rejected or not forthcoming:

"Only because the plaintiff-respondents are ready and willing to perform their part of contract and even assuming that the defendant was not entirely vigilant in protecting his rights in the proceedings before the competent authority under the 1976 Act, the same by itself would not mean that a decree for specific performance of contract would automatically be granted. While considering the question as to whether the discretionary jurisdiction should be exercised or not, the orders of a competent authority must also be taken into consideration. While the court upon passing a decree for specific performance of contract is entitled to direct that the same shall be subject to the grant of sanction by the authority concerned, as was the case in Chandnee Widya Vati Madden v. Dr. C.L. Katial[3] *and Nirmala Anand v. Advent Corpn. (P) Ltd.*[4]*; the ratio laid down therein cannot be extended to a case where prayer for such sanction had been prayed for and expressly rejected. On the face of such order, which, as noticed hereinbefore, is required to be set aside by a court in accordance with law, a decree for specific performance of contract could not have been granted."*

The recent decision in *J.P. Builders v A. Ramdas Rao* 2011 (1) SCC 429 clarifies that the occurrence of an event, occasioned by a party's unwillingness to perform something, does not

clothe it with the right to claim that the contract was rendered void for the reason of the contingency envisioned by the parties, not happening. Here, however, the court has concluded that the defendant Sunjea had applied for, and sent reminders to the DDA, seeking approval to sell the property; DDA rejected the request. There is nothing to suggest that Suneja was at fault. *Purvankara Projects v Hotel Venus International* 2007 (10) SCC 33 is an authority on the issue that the government or a statutory agency cannot be compelled on account of a contract between third parties, to exercise discretionary power in a particular manner. Therefore, the court is of opinion that in this case, DDA cannot be directed to grant permission, nor can the decree be granted to Asman on the assumption that DDA would act in that manner.

47. For the above reasons, it is held that the DDA's refusal to grant permission, to Suneja, rendered the contract (for sale of the suit property) unenforceable; Asman has not proved that Suneja was at fault on this score. Nor has it proved that despite this refusal, the contract could be performed after 13-4-1992, ie. lapse of the 10 year period in terms of Ex. P-1. Issue No. 5 is therefore, held against the plaintiff, Asman, and in favour of Suneja.

Issue No. 6 Whether the plaintiff has been ready and willing to perform its part under the agreement to sell;

48. In order to succeed, in a suit for specific performance, a plaintiff has to aver and prove that he was always and continued to be ready and willing to perform his part of the bargain. In this case, the necessary averments in the suit are present. The plaintiff also relies, in addition, to the letters exchanged between the parties, whereby it (Asman) took the position that the rejection by DDA for the request to sell did not end the contract, and that it chose not to terminate it. Furthermore, it is submitted that the plaintiff declined to accept refund of the security amount from Sunjea, and its witness also deposed about the readiness and willingness to perform the contract.

49. In a recent judgment of the Supreme Court, i.e. *J.P. Builders v. A. Ramadas Rao,* (2011) 1 SCC 429 the concept of readiness and willingness in a suit for specific performance was explained thus:

> *"The words "ready" and "willing" imply that the person was prepared to carry out the terms of the contract. The distinction between "readiness" and "willingness" is that the former refers to financial capacity and the latter to the conduct of the plaintiff wanting performance. Generally, readiness is backed by willingness.*

23. *In N.P. Thirugnanam v. Dr. R. Jagan Mohan Rao[1] at SCC para 5, this Court held: (SCC pp. 117-18)*

"5. ... Section 16(c) of the Act envisages that the plaintiff must plead and prove that he had 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 those terms the performance of which has been prevented or waived by the defendant. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of the contract."

24. *In P. D'Souza v. Shondrilo Naidu[2] this Court observed: (SCC p. 654, paras 19 and 21)*

"19. It is indisputable that in a suit for specific performance of contract the plaintiff must establish his readiness and willingness to perform his part of contract. The question as to whether the onus was discharged by the plaintiff or not will depend upon the facts and circumstances of each case. No straitjacket formula can be laid down in this behalf.

...

* * *

21. ... The readiness and willingness on the part of the plaintiff to perform his part of contract would also depend upon the question as to whether the defendant did everything which was required of him to be done in terms of the agreement for sale."

25. *Section 16(c) of the Specific Relief Act, 1963 mandates "readiness and willingness" on the part of the plaintiff and it is a condition precedent for obtaining relief of grant of specific performance. It is also clear that in a suit for specific performance, the plaintiff must allege and prove a continuous "readiness and willingness" to perform the contract on his part from the date of the contract. The onus is on the plaintiff.*

26. *It has been rightly considered by this Court in R.C. Chandiok v. Chuni Lal Sabharwal[3] that "readiness and willingness" cannot be treated as a straitjacket formula. This has to be determined from the entirety of the facts and circumstances relevant to the intention and conduct of the party concerned."*

50. In this case, the defendant Suneja has proved that whatever necessary for securing DDA's approval to sell the property, was done by them despite which DDA rejected the request. It has also proved that the sale of property was on account of need of finances at that stage- a fact

disclosed to DDA. These have not been challenged during the course of the trial. Furthermore, the court notices that apart from the letter dated 27th October, 1987, the plaintiff did not take any step immediately to say that it would enforce the contract for sale of the property. In this context, a look at Ex D-8 to Ex. D-29 (letters exchanged between Suneja and Asman for the period 19th November 1987 and 30th May, 1989) reveal that the parties reiterated their respective positions, Suneja maintaining that the contract for sale of the property had stood terminated, due to rejection of the application by DDA, and tendering refund of ₹ 5,00,000/-, whereas Asman kept stating that the contract for sale of the property subsisted, since it (Asman) opted not to terminate it, and also that it was refusing to accept the refund of money. Significantly, apart from stating these facts, Asman did nothing else; there is no material suggesting that Asman offered to apply on behalf of Suneja, or sought power of attorney to do so; or volunteered to help in the effort. Most importantly, Asman never displayed its willingness or readiness by tendering the amount any time before the suit was filed; the first time this appears to have been done, was in the plaint averments. Furthermore, during pendency of the suit, Asman tendered a cheque (Ex. DW-2/P-2) dated 11th April, 1990, which was returned by Suneja under cover of letter dated 28th April, 1990 (Ex. DW-2/P-1). The cheque was for ₹ 48,50,000/-. The specific performance suit was filed on 14th August, 1989. The plaintiff Asman has not led any evidence that at the relevant time, when it asserted that the agreement was not being terminated by it, the required balance was available; it was certainly not tendered to Suneja. For these reasons, it is held that Asman has been unable to prove its readiness and willingness to perform the contract. Issue No. 6 is found against it, and in favour of Suneja.

Issue No. 7: Whether the plaintiff has spent a sum of ₹ 29,41,000/- to decorate and equip the property? If so, to what effect;

51. The reason for framing this issue is obscure; there are no pleadings or assertions in the suit, by the plaintiff Asman, about having spent the said amount of ₹ 29,41,000/-. None of the three plaintiff witnesses who deposed in the case, said anything about any such amount having been spent by the plaintiff to decorate and equip the suit property; there is also no documentary material in support of this claim. In the circumstances, it is held that the plaintiff has not been able to prove the issue.

Issue No. 8 Whether in the facts and circumstances of the case the specific performance should be declined under Section 20 of the Specific Relief Act? If so, on what terms;

Issue No. 9. Relief

52. The decisions in *G. Jayashree v. Bhagwandas S. Patel,* (2009) 3 SCC 141; *Mohammadia Coop. Building Society Ltd.* v. *Lakshmi Srinivasa Coop. Building Society Ltd* 2008 (7) SCC 310; *Sanjana M. Wig* v. *Hindustan Petroleum Corpn. Ltd* 2005 (8) SCC 242; have established that grant of a decree for specific performance of contract is a discretionary relief; and that discretion has to be exercised judiciously. The court also ruled that exercise of discretion depends upon the facts and circumstances of each case for which no hard-and-fast rule can be laid down. In *K.S. Vidyanadam* v. *Vairavan* 1997 (3) SCC 1 the court held that a new look has to be given and the rigour of the rule (that in a contract for sale of immovable property, time is not of the essence) is required to be relaxed by the courts since, when the said principle was evolved the prices and values were stable and inflation was unknown. The court held that if there are stipulations for time, in a given contract it must have some significance and that such time-limit(s) cannot be ignored altogether on the ground that time has not been made the essence of the contract.

53. Suneja submitted that Asman is disentitled to the discretionary relief of specific performance as the contingency in the agreement to sell did not materialize. Further, the agreement to sell does not envisage anything being done after the expiry of 12 months from 13.08.1986. Hence the agreement to sell cannot be enforced by law by virtue of Sections 32 and 35 of the Indian Contact Act, 1872. K.L Suneja have relied on *V. Pechimuthu v. Gowrammal* [(2001) 7 SCC 617] and *Swarnam Ramachandram v. Aravacode Chakungal Jayapalan* [(2004) 8 SCC 689] to show that rise in price of land agreed to be conveyed is a relevant factor in denying the suit for specific performance. Asman, as noticed earlier, resisted this contention saying that the contract gave it the right to terminate the contract, - an option it chose not to exercise. It submits that having regard to Suneja's conduct, and its claim for the property, right from inception, the court should exercise its discretion to decree the relief.

54. This court has already held that the contract was contingent, and that the refusal by DDA to sanction permission is a material and relevant factor which would influence the relief in the case. Furthermore, the court has also noted that Suneja had not displayed any fault or deficiency in applying for permission to sell; Asman, on the other hand, did not prove that such permission could be granted as a matter of course or was a mere formality. The other relevant circumstance is that the court has already held that Asman did not prove its readiness and willingness to perform the contract, in the present case. Having regard to these facts, and the overall conspectus

of circumstances, the court is of opinion that it would be inexpedient and iniquitous to exercise discretion to grant a decree for specific performance. The said suit therefore, has to fail. Issue Nos. 8 and 9 are accordingly answered in favour of the defendant Suneja and against the plaintiff.

Possession suit

Issue No. 1: Whether Asman is not liable to be evicted from the premises in the suit, as alleged by the defendants;

55. The onus of proving that Asman had a right to continue in the suit was upon it, in view of the nature of the issue. Here, what the court notices is that Asman relies on the averments made by it in the specific performance suit, as a defence in the written statement, filed in the possession suit. Suneja's suit alleges that the parties had entered into a registered lease deed, whose tenure was to end on 11-8-1990 and that it issued a notice terminating the tenancy with effect from 1-1-1990. Suneja has placed on record that notice as Ex. PW-1/21; it also states that in any case, the lease was to end by efflux of time. There is no dispute that the lease deed was registered. Even if the notice Ex. PW-1/21 were not binding, Asman does not say how it continued to occupy the premises after expiry of the lease, in the absence of any fresh arrangement. By virtue of the operation of Sections 107 and 111, its occupation and continued presence in the premises, beyond 11-8-1990 was not justified in law. This court has already found against Asman, in the specific performance suit filed by it, that the two transactions – i.e lease and the agreement to sell, were independent of each other. Having regard to these facts, it is held that Asman has not been able to prove that it was authorized or justified in continuing in the premises for the period beyond 11-8-1990.

Issue No. 2: Whether Asman is liable to pay any damages for use and occupation amounting to Rs 3,67,487.80 /- paise as claimed, after the termination of the tenancy.

Issue No. 3: To what amount of damages/mesne profit and at what rate is entitled to from Asman;

Issue No. 4: Relief

56. Suneja highlights that Asman have admitted, during the course of the cross examination of Shri B.P Singh, PW2 (in C.S (OS) No 1386/90) that the rent of the properties in the vicinity of suit property as far back as 1984 – 86 was ₹ 10/50 per sq. ft which contradicts its (Asman's) stand that the rent in the area where the schedule property was located was Rs.8 per sq. ft., but was artificially pegged at ₹ 77,600 so as to account for the unpaid balance sum of Rs. 48.50

lakhs. Suneja claimed that Asman allegation during the cross examination of DW3, Shri S.C Bansal, with respect to property No.13, community centre, Saket that the said property was let out on a monthly rental of ₹ 4.40 per sq. ft. or ₹ 28.125 per month. This assessment was not accepted by the house tax department, M.C.D in the assessment order (Exhibit DW-3/B). The rate according to the assessment worked out to be ₹ 12.16 per sq. ft. per month w.e.f. 25.7.87 area of property being 6200 sq. ft. Similarly Asman urges that DW5, Hazi Mohammed deposed that property was rented out in 1990 at ₹ 8 per sq. ft. This, urges Suneja is not correct, and relies on the cross examination and assessment order (Exhibit DW-5/C) which shows that the building was let out w.e.f 29.08.1990 for ₹ 95,000/- per month, area being 5625 sq.ft. which comes out to ₹ 16.88 per sq.ft. per month i.e. more than double of what is alleged by Asman.

57. Suneja relies on evidence to prove that the rent of properties in the vicinity of the suit property was in the range of ₹ 10.40 to ₹ 14 per sq. ft. DW6, a witness from house tax department has deposed regarding the rate of rentals in the vicinity of the suit schedule property (Ex DW6/P3). The witness has not been cross examined on the said ratable values of the surrounding properties nor the actual rent fetched by them. According to Suneja the contentions of Asman that the rent was a device for collecting the unpaid balance amount under the agreement to sell is misconceived. The total area of the premises being 6749 sq. ft. as per its admitted ratable value of ₹ 11.50, the total rent works out to be ₹ 77,613.50 which was rounded off by the parties to ₹ 77,600. It is urged that Asman has also by not specifically denied the averments in the legal notice as well as the plaint regarding the market rent, would be deemed to have admitted the market rent of the demised premises, as asserted by Suneja in their plaint paragraphs no. 10, 13, 14, 16, 17 and 18.

58. The deposition of K.L Suneja (PW1) during his examination in chief which has been tendered by way of affidavit contains the statements regarding market rent in paragraph no. 10, 11 and 13. In paragraph 10 he has stated that the letting value of the premises at the time of filing the suit was ₹ 17/00 per sq. ft. and since the filing of the suit there has been a huge increase in rent of commercial properties in Delhi. In the area of Saket Community Centre in particular, where the suit property was situated, the rents have increased to a great extent and with effect from the year 1991 to 1994, the letting value of the suit premises was ₹ 20 per sq. ft. i.e. Rs 1,34,980/- per month. Paragraph 11 contains the letting value of the suit property thereafter from time to time. He has not been impeached with regard to the said statements made in his

examination in chief during his cross examination. He was not cross examined on the issue of market rent.

59. PW2, Shri B.P Singh, Assistant Manager (legal) of M/s Ahluwalia Contract India Ltd. tendered his statement as evidence during the course of which he proved the original lease deed dated 03.06.2005 executed by and between M/s Ahluwalia Contracts (India) Ltd. and NIIT Ltd., in respect of the first, second and third floor, each measuring 1200 sq. ft. of property No. 4, Community Centre, Saket, New Delhi under which, the monthly rental is ₹ 2.80 lakhs. He also proved another lease dated 05.02.2008 which was executed by and between the same parties after the expiry of that lease at a monthly rent of ₹ 32,22,000 per month. PW3, Shri Ravi Trehan, UDC from the office of Sub-Registrar V, Mehrauli, New Delhi also tendered his statement as evidence during the course of which he proved the original lease dated 13.12.2005 executed by and between M/s Ahluwalia Contracts India Ltd. and Bennett Coleman Company Ltd. under which the monthly rent for 850 sq. ft. is ₹ 1,50,000 which works out to approximately ₹ 176.50 per sq. ft.The original of the lease deed PW-2/2 was proved from PW 3 Shri Ravi Trehan, U.D.C. from the Sub-Registrar V, Mehrauli, New Delhi at and which is Ex PW3/1.

60. The decisions of this court in *S. Kumar* v. *G.R. Kathpalia & Anr.* 77 (1999) DLT 266; *Vinod Khanna & Ors.* v. *Bakshi Sachdev* AIR 1996 Del. 32 and the Supreme Court judgment in *UCO Bank* v. *Kalicharan* 2006 (127) DLT 21 have ruled that the Court should be alive to the spiralling rates of rent while considering the question of mesne profits or fixing use of occupation charges for the period or periods after tenancies are terminated. In a similar vein, the court held in *Zulfiquar Ali Khan Thru Lrs. v. J.K. Helene Courtis Ltd.,* ILR (2010) 2 Del 151 that a realistic view must be taken while assessing mesne profits in a suit which claims that relief, besides a decree for possession.

61. In this case, the parties agreed that the rate of rent for the suit property- which measured 6749 sq. ft. The rent was ₹ 77,600/- or in other words, ₹ 11/50 per square feet. The evidence in the form of copies of other registered lease deeds, in the vicinity reveal that in 1990, the rent for a 5000 square feet premises was just above ₹ 16/- per square feet. The rent shown for the years 2005 and later, 2008, was about ₹ 176/- to ₹ 200/- per square feet.

62. Having regard to the above discussion, it is apparent that there has been a spiraling and upward movement of rentals in premises, in Delhi. If one were to adopt a conservative approach, whereby rental can be notionally increased by 50% over the prevailing rates, at the end of every

five years, the mesne profits, worked @ ₹ 18/- per square feet for the period 11-8-1990 to 10-8-1995, would be ₹ 72,28,920/-; for the period 10-8-1995 to 9-8-2000, it would be ₹ 1,08,73,380/-; for the period 9-8-2000 to 8-8-2005, it would be ₹ 1,63,10,070/- and for the period 8-8-2005 to 7-8-2010, it would be ₹ 2,44,65,105/-. For the period 7-8-2010 to 7-7-2011, it would be ₹ 44,85,269/25 (a monthly amount of ₹ 4,07,751/72 (Rupees four lakhs, seven thousand, seven hundred and fifty one and paise seventy two only, calculated on the basis of the last mesne profit amount indicated, for 11 months. The total of all these amounts would be ₹ 6,33,62,744/25. The plaintiff in the possession suit, i.e. Suneja is entitled to a decree for the said amount of ₹ 6,33,62,744/25 (Rupees six crores, thirty three lakhs, sixty two thousand, seven hundred and forty four and paise twenty five only). The court is also of the opinion that future interest, till realization, from the date of the decree, @ 9 per cent per annum, is payable, having regard to the overall circumstances.

63. In view of the above discussion, the two suits are decreed in the following terms:

(a) the suit for specific performance (CS (OS) 2580/1989) fails and is dismissed, with costs payable to the defendants.

(b) In view of the findings, Suneja's suit (CS (OS) 1386/1990) for possession is decreed; the defendant Asman shall hand over vacant and peaceful possession of the suit property to the plaintiff, Suneja, within two months from today. Suneja, the plaintiff is also entitled to the sum of ₹ 6,33,62,744/25 (Rupees six crores, thirty three lakhs, sixty two thousand, seven hundred and forty four and paise twenty five only) towards mesne profits for the period ending 7-7-2011, with future interest @ 9 per cent per annum. In case the defendant Asman defaults in handing over possession, the plaintiff Suneja is entitled to future mesne profits @ ₹ 4,07,751/72 (Rupees four lakhs, seven thousand, seven hundred and fifty one and paise seventy two only) per month, each month, till possession is handed over. Suit No. 1386/1990 is decreed in these terms, with costs, subject to the plaintiff Suneja paying the requisite balance court fee, for the amounts payable as mesne profits.

(S. RAVINDRA BHAT)
JUDGE

JULY 11, 2011