

# DOCTRINE OF PART PERFORMANCE & SPECIFIC PERFORMANCE OF CONTRACT: AGREEMENT TO SELL, SALE DEED AND THE FORMALITY OF REGISTRATION

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## PREFACE

It is a settled proposition of law that, an agreement of sale comes into existence when the vendor agrees to sell and the purchaser agrees to purchase, for an agreed consideration on agreed terms. It can be oral. It can be by exchange of communications which may or may not be signed. It may be by a single document signed by both parties. It can also be by a document in two parts, each party signing one copy and then exchanging the signed copy as a consequence of which the purchaser has the copy signed by the vendor and a vendor has a copy signed by the purchaser. It can also be by the vendor executing the document and delivering it to the purchaser who accepts it.<sup>1</sup>

An agreement for sale and purchase simpliciter is a reciprocal arrangement imposing obligations and benefits on both parties and is enforceable at the instance of either. The interpretation of such a contract would be governed by the laws of contract relating to the performance of reciprocal promises.<sup>2</sup> Where under an agreement an option to a vendor is reserved for repurchasing the property sold by him, the option is in the nature of a concession or privilege and it may be exercised on strict fulfilment of the conditions on the fulfilment of which it is made exercisable.<sup>3</sup>

It is important to note that: **(a)** Execution of sale deed does not need any attesting witness like gift deed which requires at least two attesting witnesses at the time of its execution as per Section 123 of the Transfer of Property Act, 1882; and, **(b)** Section 68 of the Indian Evidence

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<sup>1</sup> *Aloka Bose V/s Parmatma Devi & Ors*, (2009) 2 SCC 582

<sup>2</sup> *Bhagaban Behera V/s Kishore Chandra Dash*, 2018 (1) Civ. C.R. 177 (Ori)

<sup>3</sup> *K. Simrathmull V/s Nanjalingiah Gowder*, AIR 1963 SC 1182

Act, 1872 which deals with examination of attesting witness to prove the execution of document, does not apply to sale deed which is governed by Section 54 of the Transfer of Property Act, 1882.<sup>4</sup> Moreover, it is intrinsic to note the difference between 'sale' and 'exchange' of property. If a property is transferred in exchange for something other than money, such a transaction would be called an 'exchange'; the difference between a sale and an exchange is that, in the former, the price is paid in money, while in the latter it is paid in goods, by way of barter.<sup>5</sup>

In the matter of: *Suraj Lamp & Industries (P) Ltd. V/s State of Haryana*<sup>6</sup>, it was held that, an immovable property can legally and lawfully be transferred or conveyed only by a registered deed of conveyance and that sale vide General Power of Attorney (GPA) does not convey any title. A grant of power of attorney is essentially governed by Chapter X of the Indian Contract Act, 1872. A deed of power of attorney is executed by the principal in favour of the agent. The agent derives a right to use his name and all acts, deeds and things done by him and subject to the limitations contained in the said deed, the same shall be read as if done by the donor. A power of attorney is executed by the donor so as to enable the donee to act on his behalf. A power of attorney is a document of convenience. Except in cases where power of attorney is coupled with interest, it is revocable.<sup>7</sup>

The law relating to power of attorney is governed by the provisions of the Powers of Attorney Act, 1882. It is well settled therein that an agent acting under a power of attorney always acts, as a general rule, in the name of his principal. Any document executed or thing done by an agent on the strength of power of attorney is as effective as if executed or done in the name of the principal, that is, by the principal himself. An agent, therefore, always acts on behalf of the principal and exercises only those powers, which are given to him in the power of attorney by the principal. Any act or thing done by the agent on the strength of power of attorney, is therefore, never construed or treated as having been done by the agent in his personal capacity so as to create any right in his favour but is always construed as having been done by the

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<sup>4</sup> *Bayanabai Kaware V/s Rajendra*, (2018) SCCR 1

<sup>5</sup> *CIT V/s Motor and General Stores (P) Ltd.*, AIR 1968 SC 200

<sup>6</sup> 2012 (1) SCC 656

<sup>7</sup> *State of Rajasthan V/s Basant Nahata*, (2005) 12 SCC 77

principal himself. An agent, therefore, never gets any personal benefit of any nature by acting as power of attorney for his principal.<sup>8</sup>

In the matter of: *Joginder Kumar Goyal V/s Government of NCT of Delhi & Ors*, W.P. (C) No. 3012/2016 (Date of Decision: 17.05.2016, High Court of Delhi), it was held that, any general power of attorney even if it provides for power to the attorney to convey title on behalf of the grantor or is deemed to be irrevocable cannot be recognized as a deed of title.

## **CONCLUDED CONTRACT IS CAPABLE OF ENFORCEMENT THROUGH A SUIT FOR SPECIFIC PERFORMANCE OF CONTRACT**

- i. According to Section 16 (c) of the Specific Relief Act, 1963 in order to get a decree for specific performance of contract, the plaintiff is not only required to aver his readiness and willingness to purchase the suit property all throughout in his pleadings<sup>9</sup> but he is also required to prove his readiness and willingness to perform his part of the obligations under the contract all throughout in course of trial of the suit.<sup>10</sup>
- ii. In the matter of: *Ramesh Chandra V/s Chuni Lal*<sup>11</sup>, it was held that, readiness and willingness cannot be treated as a straitjacket formula. These have to be determined from the entirety of facts and circumstances relevant to the intention and conduct of the party concerned.
- iii. In case of specific performance of a contract it cannot be doubted, that the jurisdiction to order specific performance of a contract is based on the existence of a valid and enforceable contract. The law of contract is based on the ideal of freedom of contract and it provides the limiting principles within which the parties are free to make their own contracts. Where a valid and enforceable contract has

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<sup>8</sup> *Kasthuri Radhakrishnan & Ors V/s M. Chinnian & Anr*, (2016) 3 SCC 296

<sup>9</sup> It is a settled law that, in construing a plea in any pleading, courts must keep in mind that a plea is not an expression of art and science but an expression through words to place facts and law of one's case for a relief before the court of law. Such an expression may be pointed, precise and sometimes vague but still meaning is to be gathered by reading of the whole of the pleadings. In India most of the pleas are drafted by counsels. To gather the true spirit behind a plea it should be read as a whole. (See: *Syed Dastagir V/s T.R. Gopalakrishna Setty*, (1999) 6 SCC 337)

<sup>10</sup> *Amit Mondal V/s Pannalal Das & Ors*, 2018 (1) Civ. C.R. 80 (Cal)

<sup>11</sup> AIR 1971 SC 1238

not been made by the parties to operate amongst them, the court will not make a contract for them. Specific performance of a contract will not be ordered if the contract itself suffers from some defect which makes the contract invalid or unenforceable. For ordering specific performance of a contract it is necessary first to see whether there has been a valid and enforceable contract and then to see the nature and obligation arising out of it. The contract being the foundation of the obligations that the parties are to discharge *inter se* between each other, the order of specific performance of contract is to enforce those obligations.<sup>12</sup>

- iv. In the matter of: *Shivaji Yallappa Patil V/s Ranajeet Appasaheb Patil & Ors*<sup>13</sup>, it was held that, “...*The possibility of injury to the interest of third party does not, by itself, disentitle the plaintiff from specific performance but it depends upon the facts and circumstances of each case which will be considered by the court in the exercise of its discretion. The court may properly exercise discretion to decree specific performance, in any case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance...*”

Further, in the matter of: *Durga Prasad & Anr V/s Deep Chand & Ors*<sup>14</sup>, the Hon’ble Supreme Court of India while dealing with the issue: ‘...*what form of decree should be passed in the case of specific performance of contract where the suit property is sold by the defendant, i.e., the owner of the suit property to another person and later he suffers a decree for specific performance of contract directing him to transfer the suit property to the plaintiff in terms of the contract...*’, observed that:

“...*Where there is a sale of the same property in favour of a prior and subsequent transferee and the subsequent transferee has, under the conveyance outstanding in his favour, paid the purchase-money to the vendor, then in a suit for specific performance brought by the prior transferee, in case he succeeds, the question arises as to the proper form of decree in such a case. The practice of the Courts in India has not been uniform and three distinct lines of thought emerge. According to one point of view, the proper form of decree is to declare the subsequent purchase void as against the prior transferee and direct conveyance by the vendor alone. A*

<sup>12</sup> *Satish Kumar V/s Karan Singh & Anr*, 2016 (1) Civ. C.R. 686 (SC)

<sup>13</sup> [2018] SCCR 354

<sup>14</sup> AIR 1954 SC 75

*second considers that both vendor and vendee should join, while a third would limit execution of the conveyance to the subsequent purchaser alone. According to the Supreme Court, the proper form of decree is to direct specific performance of the contract between the vendor and the prior transferee and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the prior transferee. He does not join in any special covenants made between the prior transferee and his vendor; all he does is to pass on his title to the prior transferee...”*

## **DOCTRINE OF PART PERFORMANCE OF CONTRACT**

Doctrine of Part Performance of Contract is contained in Section 53-A of the Transfer of Property Act, 1882 (hereinafter referred to as ‘TPA’). Section 53-A of the TPA was added to the statute book in the year 1929 and is a modified form of the equity principle of part performance which got developed in England in the case of: *Elizabeth Maddison V/s John Alderson*, (1883) 8 App. Cases 467. The following postulates are sine qua non for basing a claim on Section 53-A of the TPA:

- i. There must be a contract to transfer for consideration any immovable property.
- ii. The contract must be in writing signed by the transferor, or by someone on his behalf.
- iii. The writing must be in such words from which the terms necessary to construe the transfer can be ascertained.
- iv. The transferee must in part performance of the contract take possession of the property, or, of any part thereof.
- v. The transferee must have done some act in furtherance of the contract.
- vi. The transferee must have performed or be willing to perform his part of the contract.

It is settled law that Section 53-A of the TPA confers no right on a party who was not willing to perform his part of the contract. A transferee has to prove that he was honestly ready and willing to perform his part under the contract.

In the matter of: *WG. CDR. (Retd.) Sh. Yeshvir Singh Tomar V/s Dr. O.P. Kohli & Ors*, CS (OS) No. 2128/2015, High Court of Delhi, Date of Decision: 03.08.2015 (Coram: Valmiki Mehta, J.), it was held that:

- i. That by virtue of the amendment brought about to Section 53-A of the TPA with effect from 24.09.2001 by the Act 48 of 2001, an Agreement to Sell in the nature of part performance cannot create rights unless the agreement is registered and stamped at 90 percent of the duty as of the sale deed as per Article 23-A of the Schedule I of the Indian Stamp Act, 1899 as applicable to Delhi which was accordingly amended by the Act 48 of 2001.
- ii. A power of attorney which effectively gives ownership rights of a property by allowing the attorney to sell the immovable property by virtue of Article 48 (f) of the Indian Stamp Act as applicable to Delhi will have to have the stamp duty as a conveyance deed as per Article 23 of the Indian Stamp Act for the amount of consideration.
- iii. Summarizing the position of law, the Hon'ble High Court of Delhi ruled as under:  
*"...7. In view of the aforesaid settled position of law, this suit is not maintainable by virtue of Section 53-A of the Transfer of Property Act read with the amended Article 23-A of the Indian Stamp Act as applicable to Delhi as the Agreement to Sell is unregistered and unstamped and the Power of Attorney besides not entailing the plaintiff to indirectly achieve what cannot be directly achieved is also not stamped on the value of the conveyance deed as required by Article 48 (f) of the Indian Stamp Act as applicable to Delhi..."*
- iv. It is important to note that Article 48 (f) of the Indian Stamp Act as applicable to Delhi states that power of attorney when given for consideration and authorizing the attorney to sell the immovable property, the proper stamp duty to be paid is the stamp duty as leviable on conveyance deed for the amount of consideration.

Therefore, the necessary corollary is that, if a power of attorney is executed by X in favour of Y, and X and Y, both are relatives and the purpose of execution of the power of attorney is grant of authority by X to Y to sell the property owned by X. The contents of Article 48 (f) of the Indian Stamp Act as applicable to Delhi would not be applicable because here the power of attorney is not executed for consideration, X and Y being relatives. So, here the power of attorney needs to be stamped at Rs. 50/- as per the Indian Stamp Act as applicable to Delhi.

**DICTION IN THE MATTER OF: *SUHRID SINGH V/S RANDHIR SINGH & ORS*, AIR 2010 SC 2807**

In the matter of *Suhrid Singh* (Supra), the Hon'ble Supreme Court of India held as follows: (a) Where the executant of a deed wants it to be annulled, he has to seek cancellation of the deed. But if a non-executant seeks annulment of a deed, he has to seek a declaration that the deed is invalid, or *non-est*, or illegal or that it is not binding on him; (b) The difference between a prayer for cancellation and declaration in regard to a deed of transfer or conveyance, can be brought out by the following illustration relating to X and Y, two brothers. X executes a sale deed in favour of Z. Subsequently, X wants to avoid the sale. X has to sue for cancellation of the deed. On the other hand, if Y, who is not the executant of the deed, wants to avoid it, he has to sue for a declaration that the deed executed by X is invalid/void and *non-est*/illegal and he is not bound by it. In essence both may be suing to have the deed set aside or declared as non-binding. But the form is different and the court fee payable is also different; (c) If X, the executant of the deed, seeks cancellation of the deed, he has to pay ad valorem court fee on the consideration stated in the sale deed. If Y, who is a non-executant, is in possession and sues for a declaration that the deed is null or void and does not bind him or his share, he has to merely pay a fixed court fee as mentioned under Article 17 (iii) of the Second Schedule of the Court-Fees Act, 1870; and, (d) If Y, a non-executant, is not in possession, and he seeks not only a declaration that the sale deed is invalid, but also the consequential relief of possession, he has to pay an ad valorem court fee as provided under Section 7 (iv) (c) of the Court-Fees Act, 1870.

**PRINCIPLES GOVERNING PAYMENT OF STAMP DUTY: *SHIV KUMAR SAXENA & ORS V/S MANISHCHAND SINHA & ORS*, 2004 (2) MPJR 269**

In the matter of *Shiv Kumar Saxena & Ors* (Supra) it was held that-

- i. Stamp duty is leviable on the instrument and not on the transaction;
- ii. The substance of the transaction embodied in the instrument determines the stamp duty and not the form or title of the instrument;

- iii. To find out the true character of an instrument for the purpose of stamp duty, the document should be read as a whole and the dominant purpose of the instrument should be identified.

**DECISION IN THE MATTER OF: *AMEER MINHAJ V/S DIERDRE ELIZABETH (WRIGHT) ISSAR & ORS*, CIVIL APPEAL NO. 18377 OF 2017 (DATE OF DECISION: 04.07.2018, SUPREME COURT OF INDIA)**

In the matter of *Ameer Minhaj* (Supra) it was held that-

- i. On a plain reading of Section 17 of the Registration Act, 1908, it becomes amply clear that the document containing contract to transfer the right, title or interest in an immovable property for consideration is required to be registered, if the party wants to rely on the same for the purposes of Section 53-A of the Transfer of Property Act, 1882 to protect its possession over the stated property. If it is not a registered document, the only consequence provided in Section 17 of the Registration Act, 1908 is to declare that such document shall have no effect for the purposes of Section 53-A of the Transfer of Property Act, 1882.
- ii. A document which is required to be registered by virtue of Section 17 read with Section 49 of the Registration Act, 1908 if unregistered, can still be admitted as evidence of a contract in a suit for specific performance.
- iii. Section 17 (1A) of the Registration Act, 1908 came into force with effect from 24.09.2001 and it is prospective in operation. According to the purport of Section 17 (1A) of the Registration Act, 1908, an unregistered agreement to sell cannot be made the basis for preferring a suit for part performance of the contract.

## IRREVOCABLE POWER OF ATTORNEY OR AGENCY COUPLED WITH INTEREST

According to Section 185 of the Indian Contract Act, 1872, consideration (*quid pro quo*) is not necessary for creating an agency. In the matter of: *Vimla Devi V/s Pushpa Devi & Anr*<sup>15</sup>, it was held that, according to the purport of Section 202 of the Indian Contract Act, 1872, where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest. Therefore, if X gives authority to Y to sell X's land, and to pay himself, out of the proceeds, the debts due to him from X. X cannot revoke this authority, nor can it be terminated by his insanity or death. Similarly, if P consigns 100 bales of cotton to Q, who has made advances to him on such cotton, and desires Q to sell the cotton, and to repay himself out of the price the amount of his own advances. P cannot revoke this authority, nor is it terminated by his insanity or death.

It is intrinsic to note that, an instrument of power of attorney is to attract the same stamp duty as a conveyance deed if-

- i. It authorizes the attorney to sell the immovable property on behalf of the owner of the immovable property, or,
- ii. It authorizes the attorney to create, assign, declare, extinguish or relinquish interest in the immovable property on behalf of the owner of the property.

However, as per the dictum in the matter of: *Hardip Kaur V/s Kailash*<sup>16</sup>: **(a)** The words '*an interest in property which forms the subject matter of the agency*' in Section 202 of the Indian Contract Act, 1872 are of wider amplitude than the words '*an interest in or charge on such property*' in Section 54 of the TPA; **(b)** A right to possession of an immovable property arises not only from a complete ownership right in the property but having a better title or a better entitlement/right to the possession of the property than qua the person who is in actual physical possession thereof; **(c)** According to the purport of Section 202 of the Indian Contract Act, 1872, a power of attorney coupled with interest is irrevocable and cannot be revoked/terminated even upon the death of the principal; **(d)** Where the performance of the

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<sup>15</sup> 2017 SCC Online Del 8694

<sup>16</sup> 193 (2012) DLT 168

agency is not to secure the interest or the benefit of the agent then the agency is not irrevocable. The term 'interest' regard being had to Section 202 of the Indian Contract Act, 1872 does not mean ownership or title but an advantage, benefit or a legally enforceable right; and (e) Power of attorney coupled with interest executed by debtor in favour of the creditor-bank, giving authority to the creditor-bank to sell the property owned by the debtor to satisfy the dues that creditor-bank has against the debtor is irrevocable power of attorney, but nonetheless, it has to be stamped as per Article 48 (f) of the Indian Stamp Act as applicable to Delhi. Further, even an irrevocable power of attorney which creates, assigns, declares, extinguishes or limits, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of Rs. 100/- and upwards, to or in an immovable property would require compulsory registration in view of Section 17(1) of the Registration Act, 1908.

### **WHETHER 'ADDENDA' TO A REGISTERED LEASE DEED WOULD REQUIRE REGISTRATION?**

In the matter of: *Prasad Technology Park (P) Ltd. V/s Sub-Registrar & Ors*<sup>17</sup>, it was observed that:

- i. In case of a lease transaction, the person who transfers the property is known as the *lessor*, the transferee is known as the *lessee* and the price paid is called the *premium*. The price may be paid by way of money or any other thing of value, to be rendered periodically or on specified occasion to the transferor.
- ii. A lease transaction is essentially governed by Section 105 of the TPA. If a supplementary arrangement is entered into between the lessor and the lessee albeit the leased premises which does not alter the period of lease and the quantum of the premium that is to be paid then the same cannot be construed as a fresh transaction entailing necessary consequences of payment of stamp duty and registration.
- iii. The terms and conditions of a lease can be changed by mutual consent, unless the essential ingredients thereof as contained in Section 105 of the TPA are not altered.

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<sup>17</sup> (2006) 1 SCC 473

**DECISION IN THE MATTER OF: *EGON ZHENDER INTERNATIONAL (P) LTD. V/S M/S. NAMGAYAL INSTITUTE FOR RESEARCH ON LADAKH ART & CULTURE & ORS*, HIGH COURT OF DELHI, OMP NO. 637/2012 (DATE OF DECISION: 25.10.2013, AND, CORAM: RAJIV SHAKDHER, J.)**

In the matter of: *Egon Zhender International (P) Ltd.* (Supra) it was held that-

- i. Section 107 of the TPA requires that a lease of an immovable property from year to year or any term exceeding one year or reserving yearly rent, could only be made via a registered instrument. All other leases for immovable property may be made either by an instrument or by oral agreement.
- ii. If a lease on account of non-registration could not be admitted as evidence, then all its terms would be inadmissible in evidence, including those which relate to renewal of lease, and that use of such a document for said purposes, is not, a collateral purpose, referred to in proviso to Section 49 of the Registration Act, 1908.
- iii. An unregistered document could at best be used for the purposes of demonstrating nature of possession, but it does not create any right in favour of the lessee to continue as such, for a period of a year or more. Creation of lease is not a collateral purpose nor are the terms of lease 'collateral' within the meaning of Section 49 of the Registration Act, 1908.

**DOCTRINE OF SUBSTITUTED PERFORMANCE: THE SPECIFIC RELIEF (AMENDMENT) ACT, 2018 (18 OF 2018), DATED: 01.08.2018**

By virtue of Section 10 of the Specific Relief (Amendment) Act, 2018, Section 20 of the principal Act has been substituted to introduce the concept of 'substituted performance of the contract'.

Essentials of Section 10 of the Specific Relief (Amendment) Act, 2018-

- i. Where a contract is broken due to non-performance of promise by any party to the contract; the party who suffers by such breach shall have the option of substituted

performance through a third-party or by his own agency, and recover the expenses and other costs actually incurred, spent or suffered by him, from the party committing the breach.

- ii. No substituted performance of contract can be undertaken unless the party who suffers such breach has given a notice in writing, of not less than 30 days, to the party in breach calling upon him to perform the contract within such time as specified in the notice, and on the refusal or failure of the party in breach to do so, the party at sufferance can get the same performed by a third party or his own agency.
- iii. The party at sufferance shall not be entitled to recover the expenses and costs unless the party at sufferance gets the contract performed through a third party or by his own agency.
- iv. If the aggrieved party, that is the party suffering from the breach of contract, gets the contract performed through a third party or by his own agency after giving notice of minimum of 30 days to the breaching party, then the aggrieved party shall not be entitled to claim relief of specific performance of contract against the breaching party.
- v. The party suffering from breach of contract shall be entitled to sue the breaching party for the purposes of claiming compensation for the inconvenience and hardship caused to the aggrieved party as a result of the breach of contract committed by the breaching party.