REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 10683-86 OF 2014

Kapilaben & Ors. ...Appellants

Versus

Ashok Kumar Jayantilal Sheth Through POA Gopalbhai Madhusudan Patel & Ors. …Respondents

J U D G M E N T

—

MOHAN M. SHANTANAGOUDAR, J.

1. These appeals arises out of judgement of the High Court of Gujarat at Ahmedabad dated 31.7.2014, allowing the appeals of the respective Respondent Nos. 1 in the four Civil Appeal Nos. 10683-86 of 2014 before us (hereinafter 'Respondent Nos. 1'), against judgement and order of the Additional District Judge,

Vadodara dated 2.4.2013 and order dated 30.12.2011 of the Additional Senior Civil Judge, Vadodara; and decreeing the suits SCS Nos. 657-660/1988 filed by Respondent Nos. 1 for specific performance against the Appellants herein.

I. Background Facts

2. This case concerns four suits for specific performance filed by the Respondent Nos. 1/Plaintiffs against the Appellants/Defendants Nos. 1-5. One Naranbhai Ramdas Patel (Defendant No. 1, now deceased) was the original owner of property bearing Survey No. 354/1, admeasuring 1 acre and 31 gunthas in Village Manjalpur of Vadodara district (hereinafter 'suit property'). He, along with Defendants Nos. 2-5 (relatives of Defendant No. 1) executed agreement to sell dated 11.3.1986 ('1986 agreement') in respect of the suit property in favour of Respondent Nos. 3-11/Defendants Nos. 6-9 (hereinafter 'original vendees'), for which the original vendees paid earnest money of Rs. 1,54,251. The suit property was included in Town Planning Scheme No. 19 of the Vadodara Municipal Corporation and possession of the suit property was to be given to the original

vendees once the aforesaid Scheme was finalized. A registered sale deed in respect of the suit property was to be executed upon receipt of the remaining consideration from the original vendees, the deadline for which was within three months of finalization of the Town Planning Scheme.

The case of Respondent Nos. 1 is that the original vendees thereafter executed four agreements to sell dated 14.9.1987 (‘1987 agreements’) in respect of four different portions of the suit property, assigning the former’s rights under the 1986 agreement in the latter’s favour, and that earnest money of Rs. 5000/- was paid under each agreement. Notably, the Appellants were not parties to the 1987 agreements.

Under the 1987 agreements, it was purportedly open to Respondent Nos. 1 to make preparations for construction of a housing scheme over the suit property and issue advertisement for the same. Hence they claim that consequently, possession of the suit property was given to them, that a *Bhoomi Pujan* was conducted for laying foundation stone on the land and the members of the housing scheme were also registered. Further,

that they also obtained the layout plan and construction permission for the housing scheme from Vadodara Municipal Corporation at their own cost, and the deceased original owner Mr. Naranbhai Patel had put his signature on the layout plan.

Subsequently, dispute arose between the parties, and the original vendees filed suit SCS No. 194/1988 on 4.4.1988 before the Learned Civil Judge (Senior Division) at Vadodara (hereinafter 'trial court'), seeking specific performance of the 1986 agreement against the Appellants. They claimed that they had served notice to the Appellants on 11.3.1988 seeking execution of sale deed in their favour, but the latter had given evasive reply to the same; that they were deliberately avoiding execution of sale deed so as to take advantage of increase in real estate prices. *Per contra*, the Appellants claimed that they had on 25.3.1988, by way of reply to the original vendees' legal notice, cancelled the 1986 agreement as the original vendees had not paid the remaining consideration as required.

Respondent Nos. 1 were not party to SCS No. 194/1988; and no averment was made in the said suit regarding the 1987

agreements. Instead, on 21.11.88, Respondent Nos. 1 filed four separate suits SCS Nos. 657-660/1988 against the Appellants and the original vendees seeking specific performance of the *1987 agreements*. Respondent Nos. 1 alleged that the Appellants and the original vendees were conniving with each other to deny their rights under the 1987 agreements, so as to sell the land to a third party in view of the increasing price of real estate in Vadodara.

The Appellants in their written statements to SCS Nos. 657-660/1988 denied having any dealings with Respondent Nos. 1 and also stated that the original vendees had never informed them about the 1987 agreements. They averred that since the original vendees had never become the legal owners of the suit property, they did not have any right or authority to enter into any kind of transaction *qua* the land with Respondent Nos. 1; and that the plaints were concocted to usurp the land.

Both sets of suits, SCS No. 194/1988 and SCS Nos. 657-660/1988, remained pending for a number of years. During that period, notably, the Appellants and the original vendees acting together executed a Power-of-Attorney dated 11.11.2001 in

favour of one Dhananjay Vallabhbhai Patel. It was stated in the Power-of-Attorney that the Appellants and the original vendees are relinquishing their rights in the suit property to Mr. Dhananjay Patel for the purpose of executing sale deed in favour of one Kantilal Ambalal Patel, who is the uncle of the said Dhananjay Patel.

A. Proceedings in SCS No. 194/1988 (Original vendees' suit)

3. The original vendees filed withdrawal pursis on 26.7.2002 seeking to unconditionally withdraw SCS No. 194/1988 on the ground that the 1986 agreement was fraudulently registered; that they were not aware of the identity of the true owners of the suit property at the time of the 1986 agreement as it was executed through a broker, that the original owners of the suit property had not signed the agreement, nor had they received any consideration; and the 1986 agreement was fraudulently registered, hence no dispute could be raised regarding the suit property. On the same day, Respondent Nos. 1 sought impleadment as co-plaintiffs in SCS No. 194/1988.

The trial court by way of common order dated 22.9.2002 rejected the original vendees' withdrawal application and allowed the impleadment applications of Respondent Nos. 1. The High Court in revision reversed the trial court's order, though without going into the merits of the claim made by Respondent Nos. 1. The Court held that the original vendees had an absolute right to withdraw their suit unconditionally irrespective of their motivations for the same. Further, that it was open to Respondent Nos. 1 to raise all available contentions in their separate suits, including admissions, if any, made by the original vendees in their suit SCS No. 194/1988. It was noted that Respondent Nos. 1 cannot be permitted to substitute the original vendees as plaintiffs, as otherwise substantial amendment would be required to the original vendees' plaint. The special leave petitions filed by Respondent Nos. 1 against the High Court judgement were dismissed by this Court by order dated 16.11.2004 in SLP (Civil) Nos. 22664-65/2004.

Respondent Nos. 1 subsequently made application in SCS No. 658 of 2008, for revival of SCS No. 194/1988, contending that

the original vendees had been misled into withdrawing the latter suit; however the application was dismissed by the trial court and the High Court by orders dated 24.1.2008 and 25.3.2008 respectively. Hence the withdrawal of the original vendees' suit has attained finality.

B. Proceedings in SCS Nos. 657-660/1988 (Present suit)

4. It is relevant to note that though the original plaints in SCS Nos. 657-660/1988 were seeking specific performance only of the 1987 agreements, Respondent Nos. 1 amended their plaints in 2005 to seek a declaration that the 1986 agreement is still in force and that the Appellants were bound to execute the 1986 agreement on the basis of the assignment made in their favour.

The trial court by common order dated 30.12.2011 dismissed all four suits. It rejected Respondent Nos.1/Plaintiffs' contention that the original vendees had withdrawn their suit SCS No. 194/1988 in collusion with the Appellants herein. This was based on the reasoning that the High Court and this Court had, in the

earlier proceedings, sanctioned the unconditional withdrawal of SCS No. 194/1988 and not made any finding of judicial impropriety or fraud.

The trial court further found that in light of revocation of the 1986 agreement by the Appellants and withdrawal of SCS No. 194/1988 by the original vendees, it was not open to the Plaintiffs to re-agitate for specific performance of the said agreement. That in any case, even if the 1986 agreement was assumed to be in force, the original vendees could not have assigned their outstanding obligation to pay the remaining consideration without the written consent of the original owner i.e., Defendant No. 1 Naranbhai. Since the 1987 agreements and the 1986 agreement were not *ad idem*, and new conditions were laid down in the 1987 agreements, such consent was indispensable.

That neither of the Appellants had given any such consent, either verbally or by conduct; nor was there any evidence that the original vendees had paid the remaining consideration to the Appellants, such that the former’s rights under the 1986 agreement had fortified and consequently passed on to the

Plaintiffs under the 1987 agreements. Therefore the 1987 agreements were void, illegal and unenforceable. Further, that the 1987 agreements were also vague and unenforceable inasmuch as the suit property was not specifically defined therein.

The trial court additionally held that the Plaintiffs had not taken any steps, such as depositing the remaining consideration owed by the original vendees, or paying betterment tax as per the terms of the 1987 agreements, to show that they themselves were ready and willing to perform the contracts. Hence this was not a fit case to grant either specific performance or damages, though Respondent Nos. 1 were held entitled to return of the earnest money paid by them with interest.

The Learned Additional District Judge, Vadodara by judgement dated 2.04.2013 affirmed the trial court's findings. It was re-emphasized that a party to a contract cannot assign their obligations thereunder without the other party's consent. There was nothing on record to show that the Appellants had given such consent. In any case, since the original vendees had never shown their readiness and willingness to pay the balance consideration

due by them, no right of specific performance had accrued in their favour. Further, that the original vendees had anyway waived their rights by withdrawing their suit in SCS No. 194/1988. Hence the question of assignment of such a right to Respondent Nos. 1, such that they could claim specific performance of the 1986 agreement as representatives-in-interest of the original vendees under Section 15(b) of the Specific Relief Act, 1963 ('Specific Relief Act') did not arise.

However, the High Court in the impugned judgement found that there was a definite linkage between the 1986 agreement and the 1987 agreements such that there was a valid assignment of rights in favour of Respondent Nos.1, which made them 'representatives-in-interest' of the original vendees for the purpose of Section 15(b) of the Specific Relief Act. The High Court reasoned that since all the material rights under the 1986 agreement were assigned under the 1987 agreements, supplementary conditions specified in the latter did not change the nature of the basic contract.

Further, that reading Sections 40 and 54 of the Transfer of Property Act, 1882 ('Transfer of Property Act') and Section 15(b) of the Specific Relief Act together, the 'interest' assignable under Section 15(b) need not be an interest in the property or a charge created in the property. A contractual interest in the form of an obligation annexed to ownership of the property may also be assignable. It was discernible from the facts and evidence on record that the Appellants had given implied consent for such assignment. Mr. Naranbhai Patel's signature on planning permissions and his presence at the *Bhoomi Pujan* ceremony were taken as proof that the original owners had consented to the involvement of Respondent Nos. 1 in developing a housing scheme on the suit property. Therefore, it was found that the 1986 agreement remained alive, and the rights derived therefrom in favour of the original vendees were validly assigned under the 1987 agreements.

Additionally, since the High Court and this Court had clarified while sanctioning withdrawal of SCS No. 194/1988 that such withdrawal would not preclude Respondent Nos. 1 from pursuing

their independent remedies, the withdrawal of the original vendees' suit could not prejudice the rights of Respondent Nos. 1 to specific performance. That actual tendering of money was not necessary to evince readiness and willingness to perform the contract as required under Section 16(c) of the Specific Relief Act, and the specific averments made in the pleadings by Respondent Nos. 1 would suffice.

It may be relevant to note at this juncture that the High Court by interim order dated 27.6.2013 had directed Respondent Nos. 1 to deposit an amount equal to five times the amount of original consideration under the 1987 agreements, and Respondent Nos. 1 have submitted that they are ready and willing to forfeit the entire amount deposited in respect of the relief of specific performance, so as to balance equities between the parties.

We further note from the order sheets maintained by this Court that the parties have been directed to maintain status quo during the pendency of the appeal and no steps have been taken for the execution of the impugned judgement.

II. Issues and Submissions made by the Parties

5. Therefore, upon a perusal of the entire record, the following issues arise for our consideration:

Firstly, whether there was a valid assignment of rights by the original vendees in favour of Respondent Nos. 1 under the 1987 agreements?

Secondly, whether the right of Respondent Nos. 1 to seek specific performance survives subsequent to the cancellation of the 1986 agreement by the Appellants and withdrawal of suit in SCS No. 194/1988 by the original vendees?

Thirdly, whether relief may be granted to Respondent Nos. 1, and if so, of what nature?

6. Learned senior counsel for the Appellants, Mr. Ranjit Kumar argued that there was no privity of contract between the Appellants and Respondents Nos. 1 in the respective appeals. That the 1987 agreements were contingent contracts under Section 31 of the Indian Contract Act, 1872 (‘Contract Act’), as the rights therein could only be enforced upon the completion of the 1986 agreement, and the interest created under the 1987

agreements was also a ‘contingent interest’ under Section 21 of the Transfer of Property Act. Since the 1986 agreement was cancelled, Respondent Nos. 1 could not seek specific performance of the 1987 agreements.

Further, that the purported ‘assignment’ under the 1987 agreements practically amounted to a novation of the 1986 agreement, and the Appellants had not accorded any consent for such an assignment. Even if such an assignment had taken place, there was no evidence to show that Respondent Nos. 1 were ready and willing to perform their contractual obligations. Respondent Nos. 1 had never communicated their willingness to complete their contractual obligations under the 1986 agreement to the Appellants.

Per contra, learned senior counsel for Respondent No. 1, Mr. C.U. Singh argued that the Appellants i.e. the landowners were colluding with the original vendees to avoid sale of the suit property, as evidenced by the fact that the original vendees had not contested the suit at any point of time. He brought to this Court’s notice that there could not have been a termination of the

1986 agreement in 1988 given that in the Power-of-Attorney dated 11.11.2001 (supra) executed by Defendant Nos. 1-9 (the Appellants and the original vendees) in favour of Mr. Dhananjay Patel, it is stated that the original vendees have acquired rights in the suit property under the 1986 agreement. It is not open to the Appellants to accept the existence of the 1986 agreement in the Power-of-Attorney and reject it for the purpose of these suits.

He further relied upon this Court's decisions in ***Shyam Singh* v. *Daryao Singh (Dead) By LRs. and Others***, (2003) 12 SCC 160, ***Ram Baran Prasad* v. *Ram Mohit Hazra and Others***, AIR 1967 SC 744 and ***Habiba Khatoon* v. *Ubaidul Huq and others***, (1997) 7 SCC 452 to argue that no implied prohibition can be read into the 1986 agreement against assignability of the interest therein. The requirement of consent of the other party for assignment under Section 15(b) of the Specific Relief Act is only applicable in cases where the obligation is of a personal nature or where there is an express bar in the contract prohibiting such assignment of interest. Further, that in any case, the original owner Naranbhai Patel's conduct in

arranging for development permissions and consenting to publication of advertisement regarding development of housing scheme in the suit property shows that there was implied consent for assignment of rights under the 1986 agreement in favour of Respondent Nos. 1.

III. Validity of Assignment of Rights under 1987 Agreements.

A. General principles governing assignability of contracts

7. Upon considering the facts and circumstances of the present case, it is evident that there is no privity of contract between the Appellants and Respondent Nos. 1. Respondent Nos. 1 were not party to the 1986 agreement. *Vice versa*, the Appellants were not party to the 1987 agreements, though whether or not they had knowledge of the same is disputed. Hence Respondent Nos. 1 cannot seek specific performance of the 1986 agreement, or for that matter, the 1987 agreements, against the Appellants, except by suing as 'representatives-in-interest' of the original vendees under Section 15(b) of the Specific Relief Act. Section 15(b) provides that:

> "**15. Who may obtain specific performance.**— Except as otherwise provided by this Chapter, the specific performance of a contract may be obtained by —
>
> ...(b) the representative in interest or the principal, of any party thereto: Provided that where the learning, skill, solvency or any personal quality of such party is a material ingredient in the contract, or where the contract provides that his interest shall not be assigned, his representative in interest or his principal shall not be entitled to specific performance of the contract, unless such party has already performed his part of the contract, or the performance thereof by his representative in interest, or his principal, has been accepted by the other party..."

It is well-settled that the term 'representative-in-interest' includes the assignee of a contractual interest. Though the provisions of the Contract Act do not particularly deal with the assignability of contracts, this Court has opined time and again that a party to a contract cannot assign their obligations/liabilities without the consent of the other party. A Constitution Bench of this Court in ***Khardah Company Ltd* v. *Raymon & Co (India) Private Ltd.,*** AIR 1962 SC 1810 has laid out this principle as follows:

> "...An assignment of a contract might result by transfer either of the rights or of the obligations thereunder. But

> there is a well-recognised distinction between these two classes of assignments. As a rule obligations under a contract cannot be assigned except with the consent of the promisee, and when such consent is given, it is really a novation resulting in substitution of liabilities. On the other hand, rights under a contract are assignable unless the contract is personal in its nature or the rights are incapable of assignment either under the law or under an agreement between the parties."
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> (emphasis supplied)

In ***Khardah Company***, the Appellant jute manufacturers were entitled to receive price for the jute from the buyer/dealer of jute only upon delivery of certain shipping documents. Question arose as to whether such an obligation coupled with a benefit was assignable. This Court held, based on the above-mentioned principle, that the terms of the contract strongly implied that the rights thereunder are non-transferable.

Similarly, in ***Indu Kakkar* v. *Haryana State Industrial Development Corporation Ltd. and Another***, (1999) 2 SCC 37, the Respondent Corporation allotted certain land subject to the condition that the allottee shall complete construction of a building unit on the plot within a period of two years. Upon the allottee's failure to comply with the said condition, the Respondent resumed the land. The allottee filed a civil suit

challenging the resumption order, during the pendency of which he assigned his rights in the plot to the Appellant. The issue was whether such an assignee could challenge the resumption order. A two-judge Bench of this Court held, in reliance upon ***Khardah Company*** (supra), that:

> "19....Answer of the said question depends upon the terms of allotment. Assignment by act of parties may cause assignment of rights or of liabilities under a contract. As a rule a party to a contract cannot transfer his liabilities under the contract without consent of the other party. This rule applies both at the Common Law and in Equity (vide para 337 of *Halsbury's Laws of England*, Fourth Edition, Part 9). Where a contract involves mutual rights and obligations an assignee of a right cannot enforce that right without fulfilling the co-relative obligations."
>
> (emphasis supplied)

8. Even in a case of assignment of rights *simplicitor*, such assignment would necessarily require the consent of the other party to the contract if it is of a 'personal nature'. This is elucidated by learned authors **Pollock and Mulla** in their commentary on *The Indian Contract and Specific Relief Acts* (R. Yashod Vardhan, and Chitra Narayan eds., 15th edn., Vol. I) at page 730:

> "A contract which is such that the promisor must perform it in person, *viz*. involving personal considerations or personal skill or qualifications (such as his credit), are by their nature not assignable. The benefit of contract is assignable in 'cases where it can make no difference to the person on whom the obligation lies to which of two persons he is to discharge it.' The contractual rights for the payment of money or to building work, for e.g., do not involve personal considerations." (emphasis supplied)

9. It is true that Section 15(b) of the Specific Relief Act does not specifically state that 'obligations' may not be assigned except with the consent of the other party. However a reading of Section 15(b) shows that it is nothing but a statutory formulation of the ratio laid down in the above-mentioned precedents. The rule stated in Section 15(b) is that any interest in a contract can be specifically enforced by the assignee thereof, except where the 'personal quality' of the party is a material ingredient in the contract; or where the contract, expressly or by necessary implication, prohibits the beneficiary from transferring their contractual interest to third parties. Hence Section 15(b) does not contradict the general law on assignability of contracts as laid down by this Court, but rather clarifies that the same conditions

will have to be satisfied if an assignee seeks to secure specific performance of the assigned contract.

Therefore, for example, a contract for a singing performance or a painting may not be assignable as it involves a personal skill and even if it is assigned, the assignee cannot seek specific performance in respect of such a contract. Whereas it may be said that general contracts for payment of money or building work do not involve any personal considerations, as it makes no difference as to who discharges the obligation to pay or perform a certain act under the contract. Hence the assignees of parties to such contracts may seek specific performance.

10. It is important to note that in the modern context where parties frequently enter into complex commercial transactions, it is perhaps not so convenient to pigeonhole contracts as being either ‘general’ or of ‘personal nature’ or as involving the assignment of purely ‘rights’ or ‘obligations’. It is possible that a contract may involve a bundle of mutual rights and obligations which are intertwined with each other. However, as this Court has held in ***Indu Kakkar*** (supra), the same rule as laid down in

Khardah Company (supra) and as stated in Section 15(b) of the Specific Relief Act, may be applied to such contracts as well. Where the conferment of a right or benefit is contingent upon, or coupled with, the discharge of a burden or liability, such right or benefit cannot be transferred without the consent of the person to whom the co-extensive burden or liability is owed.

It further has to be seen whether conferment of benefits under a contract is based upon the specific assurance that the co-extensive obligations will be performed only by the parties to the contract and no other persons. It would be inequitable for a promisor to contract out his responsibility to a stranger if it is apparent that the promisee would not have accepted performance of the contract had it been offered by a third party. This is especially important in business relationships where the pre-existing goodwill between parties is often a significant factor influencing their decision to contract with each other. This principle is already enshrined in Section 40 of the Contract Act:

> "**40. Person by whom promise is to be performed.**—If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the

> promisor himself, such promise must be performed by the promisor. In other cases, the promisor or his representative may employ a competent person to perform it."

It is clear from the above that the promisor 'may employ a competent person', or assign the contract to a third party as the case may be, to perform the promise *only* if the parties did not intend that the promisor himself must perform it. Hence in a case where the contract is of personal nature, the promisor must necessarily show that the promisee was agreeable to performance of the contract by a third person/assignee, so as to claim exemption from the condition specified in Section 40 of the Contract Act. If the promisee's consent is not obtained, the assignee cannot seek specific performance of the contract.

B. Application of the above principles to the present case

11. Hence, in light of the above discussion, whether or not an assignee can seek specific performance would depend upon the construction of the contract in each case. The Court would have to determine the nature of interest sought to be transferred, whether such interest was meant to be enforceable only between

the parties to the contract and whether the contract expressly or by necessary implication bars assignment of such interest.

In the present case, the 1986 agreement provided that the Appellants shall execute sale deed in favour of the original vendees or ‘name proposed by the vendee’ *subject to* the assurance that the latter would pay the remaining consideration and betterment tax within the stipulated time, and that the former would obtain the necessary permissions for construction on the suit property.

We are of the opinion that the term ‘name proposed by the vendee’ in the 1986 agreement refers to a nominee to be proposed at the time of execution of the sale deed and not a subsequent assignee. At the same time, it is true the 1986 agreement does not contain any express bar against assignability. The question which arises then is whether the purported assignment in favour of Respondent Nos. 1 under the 1987 agreements is legally valid.

The decisions in ***Shyam Singh*** (supra) and ***Ram Baran Prasad*** (supra) relied upon by Respondent Nos. 1 will not help

their case as this Court found *on the particular facts* of those cases that the terms of the contracts in those cases did not implicitly bar assignment. These decisions cannot be taken to lay down a blanket rule that in every case where there is no express bar against assignability stipulated in the contract, assignment of the interest therein should be upheld without looking at the context in which the parties contracted with each other. It has to be seen whether the terms of the contract, and the circumstances in which the contract was entered into, lead to an inference that the parties did not intend to make their interest therein assignable. This is the principle of law as authoritatively stated by the Constitution Bench in ***Khardah Company*** (supra):

> "…We agree that when a contract has been reduced to writing we must look only to that writing for ascertaining the terms of the agreement between the parties but it does not follow from this that it is only what is set out expressly and in so many words in the document that can constitute a term of the contract between the parties. If on a reading of the document as a whole, it can fairly be deduced from the words actually used therein that the parties had agreed on a particular term, there is nothing in law which prevents them from setting up that term. The terms of a contract can be expressed or implied from what has been expressed. It is in the ultimate analysis a question of construction of the contract. And again it is well

established that in construing a contract it would be legitimate to take into account surrounding circumstances. Therefore on the question whether there was an agreement between the parties that the contract was to be non-transferable, the absence of a specific clause forbidding transfer is not conclusive. What has to be seen is whether it could be held on a reasonable interpretation of the contract, aided by such considerations as can legitimately be taken into account that the agreement of the parties was that it was not to be transferred. When once a conclusion is reached that such was the understanding of the parties, there is nothing in law which prevents effect from being given to it."

(emphasis supplied)

12. Section 40 of the Transfer of Property Act states that a contract for sale of immovable property is a contract that "a sale shall take place on *terms settled between the parties*". It is a settled position that such a contract does not by itself create any interest in or charge on the property. The buyer only obtains a right to get the sale deed executed, upon fulfilment of the applicable terms and conditions as consented to by all the parties. Hence the 1986 agreement, being an agreement to sell the suit property, is a clear case of a contract combining mutual rights and obligations. The original vendees were to obtain the right to

get the sale deed executed in respect of the suit property upon fulfilment of the conditions specified in the 1986 agreement.

The 1987 agreements purport to assign the aforesaid rights and obligations of the original vendees in favour of Respondent Nos. 1/ Plaintiffs. Upon comparison of the 1986 agreement and the 1987 agreements, we find that the 1987 agreements amount to nothing but a substitution of liabilities wherein Respondent Nos. 1 have assumed the same obligations which the original vendees were supposed to have performed under the 1986 agreements. This includes not only the obligation to pay betterment tax but also the obligation to reimburse the cost of acquiring planning permissions and to get the suit property levelled for the purpose of construction.

Additionally, the 1987 agreements also provide that the plaintiffs can prepare the scheme for construction of housing society on the suit property, get the members of the society registered and execute agreements with them, and publish advertisement boards regarding the scheme. Hence this is not a case of assignment of agreement for sale *simplicitor*, but

assignment of what is akin to a development agreement for a housing scheme on the suit property. A contract of this nature is ordinarily based upon certain personal understanding between the parties regarding the course of business to be undertaken on the suit property.

It is not disputed that the original vendees had not fulfilled their obligations under the 1986 agreement prior to the purported 'assignment' under the 1987 agreements. Hence they had not 'performed their part of the contract' as required under Section 15(b) of the Specific Relief Act. Applying the law as stated above, the assignment of such a contract cannot be enforced without proving that it was with the knowledge and consent of the original owners/Appellants.

13. It is further relevant to note that under the 1987 agreements, payment of the remaining consideration amount is to be made to the original vendees, not the Appellants, and possession of the suit property is to be handed over by the original vendees. Even the consideration to be paid was twice the rate as specified in the 1986 agreement. The 1987 agreements

nowhere provide for discharge of the original vendees' pending obligations towards the Appellants by Respondent Nos. 1. Hence we are inclined to accept the Appellants' argument that the 1987 agreements were not a case of assignment but appear to be independent agreements for sale which were contingent on the execution of the 1986 agreement. Therefore, the only way Respondent Nos. 1 can seek specific performance of the 1986 agreement against the Appellants is by proving the Appellants' knowledge of and consent to transfer of the original vendees' rights and liabilities to Respondent Nos. 1.

14. It is true that Section 15(b) does not stipulate in what form the promisee's 'acceptance' of performance by a representative-in-interest of the promisor should be communicated. It may be either through express written consent, or implied from the actions of the promisee; though as a matter of caution, the former mode of acceptance would inevitably have higher evidentiary value. However in the present case, as the trial court and the Learned District Judge have rightly appreciated on facts, we do not find that the Appellants have either by words or by conduct,

consented to the assignment of the 1986 agreement in favour of Respondent Nos. 1.

The mere fact that the original owner Mr. Naranbhai Patel signed the development permissions for the suit property and may have been present at the *Bhoomi Pujan* does not indicate that he consented to assignment of the 1986 agreement. The 1986 agreement stipulated that the original owners would give their signatures for obtaining necessary permissions for the proposed development on the suit property. Hence, as the trial court has rightly noted, Mr. Naranbhai Patel was only carrying out his contractual obligation as he had promised to the original vendees. This does not indicate that he was under the impression that the said permissions were now to be obtained for the benefit of Respondent Nos. 1.

It is pertinent to note that Respondent Nos. 1 conceded before the trial court that the Appellants had given their signatures on the layout plan for the housing scheme on the suit property to the original vendees, not to Respondent Nos. 1. Even the advertisement regarding the ‘Unnati Park’ housing scheme

nowhere indicates that the Appellants/original owners were developing the project on the suit property in partnership with Respondent Nos. 1.

Thus we conclude that there was no valid assignment of rights flowing from the 1986 agreement to Respondent Nos. 1, and they cannot seek specific performance against the Appellants.

IV. Whether the Plaintiffs are entitled to Specific Performance?

15. Having found that Respondent Nos. 1 cannot seek specific performance of the 1986 agreement, it may be considered whether they can seek any remedy *qua* the 1987 agreements as against the Appellants and the original vendees. Since there is no privity of contract between the Appellants and Respondent Nos. 1 there no longer remains any question of granting specific performance as against the former.

16. Further, as noted above, the terms of the 1987 agreements indicate that they are contingent contracts, as defined under Section 31 of the Contract Act:

> "**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."

Sections 32 and 35 further state that:

> "**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."
>
> "**35. When contracts become void, which are contingent on happening of specified event within fixed time.**—Contingent contracts to do or not to do anything, if a specified uncertain event happens within a fixed time, become void if, at the expiration of the time fixed, such event has not happened, or if, before the time fixed, such event becomes impossible."

The 1987 agreements are clearly contingent contracts inasmuch as they could only be enforced had the original vendees obtained the right to get the sale deed executed, and taken possession of the suit property as per the terms of the 1986 agreement. Once the 1986 agreement was cancelled by the Appellants, the original vendees' rights thereunder ceased to exist.

17. Respondent Nos. 1 contend that the Power-of-Attorney dated 11.11.2001 (supra) in favour of Mr. Dhananjay Patel shows that the 1986 agreement was not cancelled and that the original vendees continued to retain their right to get the sale deed executed in their favour. It was brought to our notice by the Appellants that the aforesaid Power-of-Attorney was subsequently cancelled by the original vendees on 6.6.2003, on the ground that Mr. Dhananjay Patel had obtained the Power-of-Attorney through misrepresentation. However, it is important to note that the original vendees have stated in the aforesaid cancellation notice that they have 'joint ownership' of the suit property. Therefore we find some merit in the argument that the Appellants and the original vendees are acting in collusion.

Nevertheless, regardless of what may be stated in the Power-of-Attorney, it has to be seen whether the original vendees have *legally* acquired any rights in the suit property. Respondent Nos. 1 have admitted in their plaints that the Town Planning Scheme was finalized prior to the 1986 agreement. Hence the deadline stipulated under the 1986 agreement for payment of

remaining consideration by the original vendees, i.e., within three months of finalization of the Scheme, has long since lapsed. Since the original vendees never paid the remaining consideration within the time specified in the 1986 agreement, their rights thereunder never fructified.

Even assuming that the original vendees acquired some interest in the suit property, the subsequent withdrawal of the suit SCS No. 194/1988 shows that the original vendees do not intend to enforce the 1986 agreement. The trial court has found that though the suit property *de jure* vested with the concerned government authority under the Town Planning Scheme, the *de facto* possession of the property remains with the Appellants and the original vendees have not taken possession thereof. Furthermore, both the trial court and the learned District Judge have on facts found that the original vendees have not shown any readiness or willingness to pay the remaining consideration to the Appellants. Hence since the original vendees have abandoned their rights under the 1986 agreement, enforcement of the 1987 agreements has become virtually impossible and Respondent

Nos. 1 cannot seek specific performance of the latter. Consequently the 1987 agreements are void and unenforceable as provided under Sections 32 and 35 of the Contract Act.

18. It is relevant to note at this juncture that Respondent Nos. 1 have also pleaded that the Power-of-Attorney dated 11.11.2001 (supra) was executed in breach of the interim injunction order issued by the trial court directing maintenance of status quo in respect of the suit property. Hence they seek that action should be taken against the Appellants and the original vendees under Order XXXIX, Rule 2A of the Code of Civil Procedure, 1908 for breach of the injunction order. However, we are in agreement with the trial court's findings that the Plaintiffs' application under Order XXXIX was moved after a delay of three years and six months, and the said delay has not been satisfactorily explained. Hence the application is barred by laches. In any case, since the original vendees have revoked the Power-of-Attorney, status-quo has been restored, and the Plaintiffs' cause of action no longer exists. The Learned District Judge and the High Court in the impugned judgement have affirmed the trial court's reasoning on

this aspect, and we see no reason to overturn their concurrent findings on this matter.

It was also re-iterated before us by Respondent Nos. 1 that the original vendees were misled into withdrawing their suit SCS No. 194/1988 and that the same should not be binding upon the plaintiffs. However given that the withdrawal of the suit has attained finality before this Court, and the Trial Court and the High Court have concurrently found in the separate application made by the plaintiffs in SCS No. 658/1988, by orders dated 24.1.2008 and 25.3.2008 supra (respectively), that the original vendees cannot be compelled to continue their suit against their desire, we are not inclined to interfere with the same.

V. Alternative Remedy to be given to the plaintiffs

19. Though we have found that on facts and law, Respondent Nos. 1 are not entitled to specific performance of the 1986 and 1987 agreements, *prima facie* it does appear that the Appellants and the original vendees have colluded to frustrate performance of the 1987 agreements. The trial court had directed the original vendees to reimburse earnest money of Rs. 5000 paid by

Respondent Nos. 1 towards each of the 1987 agreements with an interest of 9% p.a. from 14.9.1987 till the date of realization. We are in agreement with the aforesaid direction.

With regard to the appropriate remedy to be provided to Respondent Nos. 1, it may also be pertinent to refer to Section 53 of the Contract Act, which provides that:

> "**53. Liability of party preventing event on which the contract is to take effect.**—When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented: and he is entitled to compensation from the other party for any loss which he may sustain in consequence of the non-performance of the contract."

Therefore, since the original vendees seem to have relinquished their rights in the 1986 agreement so as to frustrate performance of the 1987 agreements, it would be just in these circumstances to award compensation to the Plaintiffs for the loss of opportunity and inconvenience suffered by them. Though no remedy is available as against the Appellants on account of absence of privity of contract, we consider it apposite to direct the original vendees, that is, Respondent Nos. 3-11 in the four

appeals, to pay Rs. 1,80,000/-, with interest at the rate of 9% per annum from the date of the suits, as damages to the Plaintiffs/Respondent Nos. 1 in these appeals, as prayed for in their pleadings. We also direct the High Court to expeditiously release and remit back the consideration amount deposited by Respondent Nos. 1 in lieu of specific performance.

20. Hence these appeals are partly allowed, and the impugned judgement is set aside, in the aforesaid terms.

.....J.
(MOHAN M. SHANTANAGOUDAR)

.....J.
(ANIRUDDHA BOSE)

New Delhi;
November 25, 2019