

X. PROPOSING AN ALTERNATE LEGAL INTERPRETATION OF AGREEMENTS FOR SALE- A BUYER-FRIENDLY APPROACH

- Tarun Ashok*

ABSTRACT

The questions surrounding the legal ramifications of agreements for sale have occupied the limelight in property sale transactions. A document pivotal to transactions for sale of property, they have been used and abused by sellers to the detriment of unsuspecting purchasers of property. Aggrieved buyers have been forced to resort to remedies under different laws such as the Specific Relief Act, 1963 and the Indian Contract Act, 1872 to enforce their rights under the contract. This article puts forth avenues of recourse to buyers within the four corners of the Transfer of Property Act, 1882- the primary law governing immovable property in India. In furtherance of the same, it first analyses provisions related to a charge on property through a contract for sale. Then it examines existing jurisprudence surrounding agreements for sale in India. It also considers the questions of part performance, obligations annexed to the land and the English Equitable Doctrine. Finally, it advances a mechanism to establish a charge on the property in the interest of the buyer to shield them against deceitful sellers. It primarily focuses on Section 55 (6) (b) of the Transfer of Property Act, to articulate an interpretation that fully realizes the rights of the buyer, in the form of a charge on property. The existing judicial approach generally steers buyers towards recourse such as specific performance or refund of earnest money. This article propounds a novel re-imagination of this interpretation by securing a charge on the property in the hands of the buyer.

I. Introduction..	242	IV. Analysis of Alternate Remedies under Contract Law in India	249
II. Sale Contract for Sale- A Brief Analysis of Key Concepts	243	A. Remedies Under the Indian Contract Act, 1872	249
III. Judicial Interpretation Of Contracts For Sale.....	245	B. Remedies Under the Specific Relief Act	251
A. Whether a Contract for Sale Would Prevail Over a Claim for Attachment of Immovable Property?	245	V. S. 54 V S. 55 (6) (B) – Making the Case for Buyer’s Charge on the Property	254
B. Whether Part Payment Gives the Transferee Certain Protections Against the Transferor?	246	A. Buyer’s Charge on the Property- the Interpretation and Need	254
C. Whether the English Equitable Doctrine Finds Application in India?	248	B. Earnest Money and Purchase Price- The Conundrum	256
		C. Section 55 (6) (b)- The Resolution	258

* The author is a second-year student of B.A. LL.B. (Hons.) at National Law School of India University, Bangalore. Views stated in this paper are personal.

D. Case Laws- Laying the Foundations	VI Conclusion	261
.....	259	

I. INTRODUCTION

The legal validity and enforceability of a contract for the sale of immovable property have been an area of significant contention for courts over the years. Despite a plethora of judicial decisions, there is still no definite consensus regarding the nature of contracts for sale and their consequent implications on the buyer and seller's rights. Various conflicting approaches by the Supreme Court, as well as High Courts, have complicated the issue. The various questions surrounding earnest money, payment and refund of the purchase money, and a charge on property in the context of agreements for sale have been left largely unanswered. This article propounds a novel, buyer-friendly approach to such contracts, by proposing an alternate interpretative framework of certain key sections pertaining to the law on the sale of property in India.

Various sections of the Transfer of Property Act, 1882 (“**TP Act, 1882**”), among other legislations, deal with this concept. This article will engage with these sections in detail to inspect the protections offered to the transferee, as well as the impact of a contract for sale on the transferor. It will engage in a wide-ranging and comprehensive analysis of the sale of property and agreements for sale, connecting various provisions and reading them in conjunction.

In furtherance of this objective, the article is divided into four main sections. The first section will expound on the main concepts associated with the sale and contract for the sale of immovable property (**II.**). The second section deals with the judicial interpretation of key provisions to discern the court's assessment of the legal implications of an agreement for sale (**III.**).

The third part will conduct a study of the alternate remedies available under Indian contract law and Property law (IV.). It will delve into the Indian Contract Act, 1870 as well as the Specific Relief Act, 1963, and analyze case laws on the same. Finally, it will build the argument for establishing a buyer's charge in a contract for sale by propounding an alternative interpretation. It aims to achieve this by identifying the need for a charge on property, resolving the earnest money-purchase price conundrum, and examining case laws that have laid the foundation for a buyer-friendly interpretation (IV.)

II. SALE AND CONTRACT FOR SALE- A BRIEF ANALYSIS OF KEY CONCEPTS

Section 54 (“s. 54”) of the TP Act, 1882 defines a sale and contract for sale.¹ It essentially postulates that an agreement to sell an immovable property on agreed-upon terms constitutes a contract for sale. Further, it asserts that the mere existence of such a contract does not inherently create an interest in the property. A sale is defined as the transfer of ownership with a reciprocal consideration of a price paid or promised. There is a wholesale transfer of rights along with the title from the seller to the purchaser.²

The main principles associated with a sale and the creation of a sale deed are as follows

- *First*, the sale of immovable property with a value over Rs 100 must be registered.
- *Second*, there must be a written sale deed, which is properly attested.
- *Lastly*, the transferor must be validly authorized to dispose of it.³

¹ Transfer of Property Act 1882 (Act 4 of 1882), s 54 (“TP Act”).

² Poonam Pradhan Saxena, *Property Law* (3rd edn, Lexis Nexis 2017) 302.

³ *ibid* 304.

A contract for sale is in the nature of an executory contract and is an antecedent to a sale deed.⁴ Price is an integral component of a contract for sale without which there exists no enforceable contract.⁵ The text of s. 54 reads as follows:

“Contract for sale. - A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties. It does not, of itself, create any interest in or charge on such property.”

Although no charge is created on the property in favor of the purchaser in s. 54, section 40 (“s. 40”) of the TP Act, 1882 clearly states that certain obligations are attached to the land.⁶ Various cases have solidified this position and held that these obligations might be specifically enforced.⁷

Section 53A (“s. 53A”), introduced through a 1929 amendment, deals with part performance. In essence, it confers certain protections to the transferee.⁸ It enables him to defend his possession of the property against any actions of the transferor seeking to enforce his rights in the property.⁹ For the purposes of this section, the agreement to transfer property necessarily needs to be registered.¹⁰ The next part of the article will delve into three crucial issues that have arisen in relation to contracts for sale.

⁴ Sir Dinshaw Fardunji Mulla, *Mulla on the Transfer of Property Act* (13th edn, Lexis Nexis 2018) 473.

⁵ *ibid* 455.

⁶ TP Act, s 40.

⁷ *Bai Dosabai v. Mathurdas Govinddas and Ors* (1980) 3 SCC 545.

⁸ AK Srivastava and Bal Kishna, ‘Nature of Right Under Section 53A of the Transfer of Property Act 1882’ (1973) 15(4) *Journal of Indian Law Institute* 608.

⁹ *Achayya v. Venkata Subba Rao* AIR 1957 AP 854.

¹⁰ *cf* Mulla (n 4) 431.

III. JUDICIAL INTERPRETATION OF CONTRACTS FOR SALE

A. Whether a Contract for Sale Would Prevail Over a Claim for Attachment of Immovable Property?

The answer to this pertinent question resolves itself with the assistance of a hypothetical situation. Consider a situation where a seller draws up a contract for sale with a purchaser for a certain price. Later, the property is attached by a creditor in the clearance of dues. This creditor then proceeds to sell this property as though it was the absolute and unqualified property of the debtor. In this scenario, what recourse is available to the initial purchaser? s. 40 protects the purchaser against this sale to enforce his rights.

The Calcutta High Court, in the case of *Purna Chandra Basak v. Daulat Ali Mollah*, had to adjudge whether an agreement for sale before the attachment of the property would prevail over the attachment.¹¹ It held that the agreement for sale created a “personal obligation of a fiduciary character”, which could be enforced against the seller as well as a subsequent purchaser who had notice of the subsisting contract for sale.¹²

Similarly, the Supreme Court put forth that the equitable ownership doctrine of English law finds incorporation in s. 40 of the TP Act.¹³ This doctrine will be expounded on in the latter part of this article. A contrary stance was taken by the High Court of Punjab & Haryana in *Mohinder Singh and Anr v. Nanak Singh* where the claim of the attaching creditor was given precedence.¹⁴ The Supreme Court, however, has settled these conflicting

¹¹ AIR 1973 Cal 432.

¹² *ibid* [8].

¹³ *Bai Dosabai* (n 7).

¹⁴ *Mohinder Singh v. Nanak Singh* AIR 1971 P&H 381.

interpretations.¹⁵ It held that despite an attachment, a contract for sale entered into prior attachment, although the conveyance is completed after, vests a valid title in the hands of the purchaser.¹⁶

B. Whether Part Payment Gives the Transferee Certain Protections Against the Transferor?

Section 55(6)(b) (“s. 55(6)(b)”) of the TP Act, 1882 provides the transferee additional rights and protections against unscrupulous sellers. The relevant portion of this section is reproduced as follows:

“The buyer is entitled- unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him to the extent of the seller's interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount; and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission.”

Rabindra Nath Banerjee v. Harendra Kumar Chakravarty and Ors evince that an agreement for sale is generally accompanied by partial payment of the price.¹⁷ In this situation, a charge proportional to the amount of purchase money paid is created on ownership of the property in favour of the transferee. Since s. 54 emphasizes that a contract for sale “of itself” does not create a

¹⁵ S A Kader, ‘Contract for Sale of Immovable Property — Its Effect on Subsequent Attachment of the Said Property’ (2007) 2 Law Weekly 25.

¹⁶ *Vannarakkal Kallalathil v. Chandramaath Balakrishnan* 1990 SCC (3) 291.

¹⁷ AIR 1956 Cal 462.

charge, the part payment attracts s. 55(6)(b) of the TP Act, 1882, and the buyer is invested with an interest in the property he can specifically enforce.¹⁸

The Supreme Court in *Videocon Properties Ltd v. Dr. Bhalchandra Laboratories & Ors* explained that the principle underlying this section is that of justice, equity, and good conscience.¹⁹ Unless the purchaser improperly refuses delivery or has contractually agreed to waive off its right to have a charge on the property, the buyer's charge would exist until the conveyance is properly completed. Further, s. 55(6)(b) of the TP Act, 1882 also contemplates payment of interest on the part payment advanced unless it has been forgone through the contract i.e., through the agreement to sell executed between the parties in relation to the property under sale.

Karsandas Purshottamdas v. Gopaldas Trikamji enunciated that deposit money created a charge on the property under s. 55(6)(b) of the TP Act, 1882.²⁰ Therefore, notwithstanding s. 54 of the TP Act, 1882 clearly emphasising that an agreement for sale conveys no charge on the property, s. 55(6)(b) confers certain rights upon the purchaser which are subject to the terms of the contract. The final part of this article will expound further on this idea of part payment, purchase money, and a charge on property, to make the argument for a charge on the property by reading s. 54 and s. 55(6)(b) in conjunction.

¹⁸ *ibid* [16].

¹⁹ (2004) 3 SCC 711.

²⁰ (1923) 25 BOMLR 1144.

C. Whether the English Equitable Doctrine Finds Application in India?

If the transferor has unilaterally breached the contract to sell the property and decided to sell the property to a different purchaser at a higher price, the buyer has no interest in the property except a right to litigate. There is an imbalance of power relations in this case, with the vendor retaining the upper hand.

The doctrine enunciates that when a contract for the sale of immovable property is concluded, the purchase money paid in advance is included in the transferor's estate, and the land becomes a part of the transferee's estate.²¹ It was first put forth in *Seaton v Slade* by the Court of Chancery.²² In *Chhatra Kumari Devi v. Mohan Bikram Shah*, the Patna High Court stated that Indian Property Law does not recognize the concept of legal and equitable estates.²³

However, it has been postulated by the Supreme Court that there has been a modified import of the equitable doctrine in s. 53A of the TP Act, 1882.²⁴ It creates an estoppel in favour of the buyer against the seller of the property. Estoppel is a legal principle that prevents a party from taking a position or making a claim contrary to their previous position. *Shrimant Shamrao Suryavanshi & Anr. v. Pralhad Bahiroba Suryavanshi* laid down the requirements to be satisfied by the transferee to avail of this equitable remedy under s. 53A.²⁵ Encapsulating it briefly, there must be a written contract with specific terms of transfer, and the transferee must take possession of the property. Additionally, the transferee must have taken steps to fulfill the

²¹ R T Miller, 'Equitable Conversion by Contract' (1937) 26(1) Kentucky Law Journal 56.

²² *ibid.*

²³ AIR 1931 PC 196.

²⁴ *Rambhau Namdeo Gajre v. Narayan Bapuji Dhotra (Dead)* AIR 2004 SC 4342.

²⁵ 2002 (3) SCC 676.

contract.²⁶ In conclusion, the hypothetical situation above would say that the land has passed to the purchaser in equity. However, the land still vests in the hands of the seller in law.

Finally, on s. 40 and the import of the English equitable doctrine in Indian jurisprudence. Under s. 40 of the TPA, 1882, a purchaser under an agreement of sale of land is entitled to the benefit of an obligation arising out of that contract and it provides that the obligation may be enforced against a transferee with notice. The Calcutta High Court, in *Purna Chandra Basak*,²⁷ held that an agreement for sale created an obligation annexed to the land. Therefore, an agreement for sale would prevail over subsequent attachment by a creditor. Furthermore, the Supreme Court in *Vannarakkal Kallalathil*,²⁸ opined that the nature of the right envisioned in s. 40 is an equitable right. Therefore, the equitable doctrine has found recognition within the four corners of Indian jurisprudence and serves as the foundation for the argument advanced by this article. The following section will explore the remedies in law available to the buyer.

IV. ANALYSIS OF ALTERNATE REMEDIES UNDER CONTRACT LAW IN INDIA

A. Remedies Under the Indian Contract Act, 1872

Section 73 of the Indian Contract Act, 1872 (“ICA, 1872”) applies equally to land and immovable property agreements.²⁹ The Madras High Court held that Section 73 (“s. 73”) of the ICA, 1872 must be construed widely to

²⁶ *ibid.*

²⁷ AIR 1973 Cal 432.

²⁸ 1990 SCC (3) 291.

²⁹ Pollock and Mulla, *The Indian Contract and Specific Relief Acts* (16th edn., Lexis Nexis 2019) 1599.

cover contracts of immovable property and provide relief to the party suffering damages.³⁰

The Supreme Court in *Ghaziabad Development Authority v. Union of India* established that a vendor who breaches a contract for the sale of land is liable to pay damages for losses incurred by the purchaser.³¹ Damages can be unliquidated damages, as per s. 73 of the ICA, 1872, or liquidated, as per Section 74 of the ICA, 1872 (“s. 74”).³² A provision for damages in the contract, however, is more often targeted at the purchaser’s breach, that is, forfeiture of earnest money.³³

Furthermore, it was laid down in *Ranchhod Bhawan v. Manmohandas Ramji* that in case of the vendor’s inability to deliver the title in a transaction of sale of property, the damages must be assessed in the usual manner.³⁴ The Bombay High Court in *Nagardas v. Ahmedkhan* held that “The legislature has not prescribed a different measure of damages in the case of contracts dealing with land from that laid down in the case of contracts dealing with commodities.”³⁵

Finally, on the idea of earnest money in connection with s. 74 of the ICA, 1872. The general judicial consensus is that the forfeiture of the deposit amount under an agreement for the sale of the property would not fall within the realm of s. 74.³⁶ However, if the forfeiture is in the nature of a penalty stipulated in the contract, then it could fall within s. 74.³⁷ The following

³⁰ *Adikesavan Naidu and Ors. v. M.V. Gurunatha Chetti*, (1917) 32 MLJ 180.

³¹ (2000) 6 SCC 113.

³² Indian Contract Act 1872.

³³ Samuel Williston, ‘The Risk of Loss after an Executory Contract of Sale in the Common Law’ (1895) 9(2) Harvard Law Review 106.

³⁴ (1907) 9 BOMLR 1087.

³⁵ (1895) I.L.R. 21 Bom. 175.

³⁶ *Maula Bax v. Union of India* (1969) 2 SCC 554.

³⁷ *Shri Hanuman Cotton Mills v. Tata Air Craft Ltd* 1969 3 SCC 522.

section will analyze remedies under the Specific Relief Act, to articulate the reliefs available as well as critique its application as an alternate remedy, by highlighting the issues buyers face while resorting to it.

B. Remedies Under the Specific Relief Act

S. 10 of the Specific Relief Act, 1963 (“**SRA, 1963**”) post the 2018 amendment, posits that specific performance is generally ordered except in certain circumstances.³⁸ It reduces the discretionary power of the court to award specific performance.³⁹ It no longer necessitates the plaintiff to aver or state “readiness” or “willingness” to perform the contract, which was earlier the mandate as per section 16 (c) of the SRA, 1963 (“**s. 16 (c)**”).⁴⁰

The construction of “readiness and willingness” is dependent on the facts and circumstances of the case.⁴¹ Further, the party praying for a specific performance must approach the court with “clean hands”.⁴² Additionally, a formalist approach would defeat the purpose of this equitable remedy. Concurrently, it is crucial to note that specific performance is not granted simply because it is legal.⁴³ The court in *Syed Dastagir v. T.R. Gopalakrishna Setty*⁴⁴ held that the compliance of “readiness and willingness” has to be in spirit and not in form while making averments in the plaint.

The recent amendment, however, has substituted s. 20 of the SRA, 1963. Previously, it enunciated that the court must use its discretion while

³⁸ Specific Relief Act, 1963 (Act 47 of 1963) (“SRA”).

³⁹ Karl Shroff, ‘Specific Performance — Principles Revisited’ (*SCC Blog*, 18 June 2020) <<https://www.scconline.com/blog/post/2020/06/18/specific-performance-principles-revisited/>> accessed 27 July 2022.

⁴⁰ *ibid.*

⁴¹ *R.C Chandiook v. Chuni Lal Sabharwal* (1970) 3 SCC 140.

⁴² *Lourdu Mari David v. Louis Chimmaya Arogiaswamy* (1996) 5 SCC 589.

⁴³ *Nirmala Anand v. Advent Corporation Ltd and Ors* (2002) 8 SCC 146.

⁴⁴ (1999) 6 SCC 337.

being guided by certain principles such as non-arbitrariness evident from the proviso prior to the 2018 amendment. A line of cases including, *Parakunnan Veetill Joseph's Son Mathew v. Nedumbara Kuruvila's Son*,⁴⁵ among others, had previously held that specific performance was an equitable remedy and must not be used as an “instrument of oppression in the hands of the plaintiff.”

Section 22 of the SRA, 1963 confers the power to award various other remedies, including a refund of earnest money paid by the transferee, grant of possession, and the like.⁴⁶ Section 21 states that the plaintiff may claim compensation apart from specific performance.⁴⁷ Notwithstanding the amendment, the Supreme Court has continued to mandate that the plaintiff must demonstrate that he has already fulfilled or has been ready and willing to undertake the material requirements of the contract required of him under s. 16(c) of the SRA, 1963.⁴⁸

In *Man Kaur (Dead) By Lrs v. Hartar Singh Sangha*, the agreement for sale provided for damages in the instance of breach by either party.⁴⁹ The court, however, opined that it was not necessary for a contract for sale to contain a clause providing for specific performance in the event of a breach. This was consistent with s. 23 of the SRA, 1963.⁵⁰ However, suppose the contract for sale envisioned a scenario where the defaulting vendor will be liable only to pay liquidated damages and return the deposit money, in that case, the court may not grant specific performance.⁵¹

⁴⁵ 1987 Supp SCC 340 [14]; *Gobind Ram v. Gian Chand* (2000) 7 SCC 548.

⁴⁶ SRA, s 22.

⁴⁷ SRA, s 21.

⁴⁸ cf Shroff (n 39).

⁴⁹ (2010) 10 SCC 512.

⁵⁰ SRA, s 23.

⁵¹ (2010) 10 SCC 512 [18].

It is vital to note that the amendments to the SRA, 1963 are prospective in nature as postulated in *Smt. Katta Sujatha Reddy v. Siddamsetty Infra Projects Ltd.*⁵² Therefore, all cases arising prior to 2018 will need to be adjudicated on the pre-amended provisions of the SRA, 1963, this is another barrier to enforcement of specific performance in cases relating to agreements for sale arising prior to the amendment as the courts can still retain a certain amount of discretion while awarding the relief of specific performance. Furthermore, Article 62 of the Limitation Act grants 12 years for enforcing payment of money secured by a mortgage or otherwise charged upon the immovable property. However, the time period for specific performance is only three years, as per Section 54 of the Limitation Act. This is another limiting factor of the relief of specific performance and an additional reason for adopting the alternate imagination this article proposes in the next part.⁵³

Considering that specific performance is the primary remedy in disputes arising regarding contracts for sale, this article will briefly examine a recent judicial decision on this issue. The Supreme Court, in *P. Daivasigamani v. S. Sambandan*,⁵⁴ awarded specific performance of an agreement for sale to the plaintiff. It relied on *Syed Dastagir*, noting that the requirements under s. 16(c) of the SRA, 1963 had been made out. It directed the plaintiff to deposit an amount of Rs 1 Crore towards sale consideration, following which the sale agreement would be drawn up in his name.

Therefore, while the relief of specific performance is certainly an alternate remedy, it does not provide a holistic and sure-shot remedy to buyers as it is a discretionary relief. The court would be guided by past jurisprudence

⁵² Civil Appeal No. 5822 of 2022.

⁵³ *P. Muthusamy v. K. Arumugam* Second Appeal No.426 of 2015.

⁵⁴ 2022 SCC OnLine SC 1391.

on the same, which vests immense power in them by allowing them to apply their volition. The factor of limitation is also an important drawback to this remedy. In view of all these reasons outlined above, the following section of this article will lay down the argument for creating a charge on property in the hands of the buyer.

V. S. 54 V S. 55(6)(B) – MAKING THE CASE FOR BUYER’S CHARGE ON THE PROPERTY

A. Buyer’s Charge on the Property- The Interpretation and Need

S. 54 and s. 55(6)(b) seemingly offer conflicting conclusions relating to the buyer’s interest and charge on the property. While the former articulates the definite non-creation of a charge or interest, the latter holds that a charge is created. This charge is subject to the transferee’s payment of part purchase money and persists unless and otherwise, the parties agreed to extinguish such right through the contract i.e., the agreement to sell the property. The key part of s. 54 regarding a contract for sale to be noted is as follows: “It does not, of itself, create any interest in or charge on such property”. Therefore, in the case of a standalone contract, there is no charge created on the property in question. However, the accompanying purchase money paid along with the contract would give rise to the possibility of an interpretation that confers a charge on the property in the hands of the buyer. This is also in line with the underlying concept of the English equitable doctrine, analyzed previously in this article.

It is vital at this juncture to understand the need to create an interest or charge in favour of the buyer in the seller’s property during the tenure of the agreement to sell or for such period which has been mutually agreed between the parties. An interest or charge on the property gives the buyer a degree of

control over the property's alienation or transfer. It serves as an encumbrance, and the seller would need to discharge such an encumbrance to affect a property sale (unless the subsequent transferee consents to discharge such an encumbrance). A registered agreement for sale is reflected in the encumbrance certificate of the property and the subsequent purchaser would *firstly*, have notice of such a subsisting charge, and *secondly*, would be less likely to purchase an encumbered property.

Section 100 of the TPA, 1882 elaborates on the meaning of a charge.⁵⁵ Essentially a charge provides the holder of such charge rights similar to a holder of a simple mortgage as all the provisions that apply to a mortgage apply to a charge. Additionally, a charge can be enforced in a suit. There have been various cases wherein the seller has unscrupulously sold the property without any consideration for the subsisting contract for sale.⁵⁶ Therefore, a charge on the property restores the power imbalance, by providing a buyer with a degree of control over the property.

Lastly, s. 57 of the TP Act, 1882, provides a mechanism for the court to adjudicate on incumbrances on property that has been subject to a sale.⁵⁷ The court may direct payment in relation to such incumbrance to persons entitled to such an amount. This is also a vital relief associated with the creation of a charge on the property. Furthermore, s. 55(1)(g) of the TP Act, 1882,⁵⁸ makes it compulsory for a seller to discharge all incumbrances on the property prior to sale. Therefore, in cases where agreements for sale create a

⁵⁵ TP Act, s 100.

⁵⁶ (2004) 3 SCC 711.

⁵⁷ TP Act, s 57.

⁵⁸ TP Act, s 55 (1) (g).

charge, thereby manifesting as an incumbrance on the property, the buyer has additional protections under the aforementioned sections of the TP Act, 1882.

B. Earnest Money and Purchase Price- The Conundrum

Moving on to the problem, in case of non-payment of the remaining purchase amount, the seller has the absolute right to forfeit the earnest money. However, suppose the seller fails to correctly deliver the property to a legitimate purchaser, who has paid the price. In that case, it is on the purchaser to sue for the return of earnest money, coupled with interest and costs. In most cases, the only recourse available to buyers is to litigate to enforce their rights under the SRA, 1963, or the ICA, 1872.

This power imbalance is partially resolved under a paradigm where the buyer retains a charge under s. 55(6)(b) of the TPA, 1882 unless such right has been contracted out by the parties. This is only possible when the earnest money also operates as part payment of purchase money.⁵⁹ The current jurisprudence on earnest money largely excludes it from purchase money, instead treating it as a security deposit paid to bind the contract. The Supreme Court in *Shree Hanuman Cotton Mills & Ors v. Tata Air-Craft Ltd*, referring to seminal texts like *Halsbury's Laws of England*, articulated the intimate connection between the two. It evolved certain principles relating to the earnest money. In essence, the earnest money is paid to bind the contract and is part of the purchase price when the transaction is carried out. Therefore, this interpretation allows for the reading of earnest money within the scope of 'purchase price'. This reading would allow the purchaser to retain a charge on the property under s. 55(6)(b) of the TP Act, 1882.

⁵⁹ *Ran Singh v. Capex Projects Pvt. Ltd* 2019 SCC OnLine P&H 7440.

The apex court in *Videocon Properties case* advanced that “In other words, if the payment is made only towards part payment of consideration and not intended as earnest money then the forfeiture clause will not apply.”⁶⁰ This would necessarily mean that sellers would be unable to forfeit this amount properly paid by the purchaser as it would not constitute earnest money.

To conclude this section on the distinction between earnest and purchase money it is imperative to briefly examine the court’s crucial decision in *Satish Batra v. Sudhir Rawal*,⁶¹ wherein it opined the following, regarding earnest money and purchase money-“Earnest money is paid or given at the time when the contract is entered into and, as a pledge for its due performance by the depositor to be forfeited in case of non-performance, by the depositor. There can be a converse situation also that if the seller fails to perform the contract the purchaser can also get double the amount if it is so stipulated. It is also the law that part payment of the purchase price cannot be forfeited unless it is a guarantee for the due performance of the contract. In other words, if the payment is made only towards part payment of consideration and not intended as earnest money then the forfeiture clause will not apply.”⁶²

Therefore, a determination of whether an amount paid by a buyer falls into the category of earnest will be guided by the aforementioned judicial principles. In case a seller fails to perform the contract, the second limb of s. 55(6)(b) applies and the buyer is entitled to a refund of the earnest money paid. This forms a crucial aspect of the reliefs available to the buyer under the TP Act, 1882. The next section attempts to resolve this conundrum by offering an interpretation of s. 55(6)(b) of the TP Act, 1882.

⁶⁰ (2004) 3 SCC 711.

⁶¹ Civil Appeal No. 7588 of 2012.

⁶² *ibid* [17].

C. Section 55(6)(b)- The Resolution

*Maula Bax v. Union of India*⁶³ postulated that money paid with the intention to form a part of the purchase price could not be regarded as earnest money if the buyer is prepared to complete the transaction. In that case, this interpretation falls short, as earnest money is excluded from the purchase price and is outside the scope of the protection of a charge guaranteed in s. 55(6)(b). There needs to be clarification of this interpretation, to do complete justice to the purpose and intent of the provision by affirming the inclusion of earnest money in the purchase price to fully cover the buyer under s. 55(6)(b) of the TP Act, 1882. This article argues that this interpretation falls within the scope of s. 54 and s. 55(6)(b) of the TP Act, 1882, and must be adopted by courts, to realize the true intent of the section to confer a charge on the property.

First, the interpretation in *Maula Bax* would render the inclusion of the word ‘charge’ in s. 55(6)(b) essentially useless. This creation of an artificial distinction between earnest money and purchase money militates against the spirit of the section both in text and spirit. Therefore, the alternative interpretation fully realizes the text and intent of the section, by creating a charge on property, to the extent of purchase money paid.

Second, the purchase money paid towards the sale as consideration is non-refundable as it is distinguished from earnest money, which can be forfeited. However, if an unscrupulous seller alienates the property prior to the earnest money operating as part purchase money advanced, then it would be excluded from the charge envisioned in s. 55(6)(b). The court in two landmark decisions has dealt with this in detail. In *Maula Bax*,⁶⁴ the court held that “Earnest money is part of the purchase price when the transaction goes

⁶³ *Maula Bax* (n 33).

⁶⁴ *ibid* [4].

forward.” Earnest may therefore serve a dual purpose, in acting as security for the transaction as well as part of the purchase price. It would therefore be included in the first part of s. 55(6)(b) and confer a charge in favour of the buyer.

Therefore, the interpretation advanced, of s. 54 is to read the section purposively, in a manner that would do complete justice, both to its spirit and text of the spirit. A contract for sale “of itself” would not create a charge on the property. However, when it is accompanied by part purchase money, or in some cases, earnest money, a charge on the property would be created in favour of the buyer. This ensures that s. 54 of the TP Act, 1882, can be retained in its present form and would render such an alternate interpretation imagined by this article consistent within the four corners of the provision. The English equitable doctrine, as articulated in the second section also forms an underlying premise from which this re-interpretation may proceed. It strengthens the case by grounding itself in English jurisprudence and therefore such an interpretation is not unknown to common law.

D. Case Laws- Laying the Foundations

This section of the article will examine case laws substantially dealing with the question of a statutory charge under s. 55(6)(b) as well as earnest money and purchase price. It aims to lay the foundation for an alternative interpretation by relying on well-decided cases that provide a starting point for a buyer-friendly regime governing contracts for sale.

The court in *Videocon Properties*,⁶⁵ dealing with the question of earnest money and purchase consideration paid, articulated the intimate difference between the two. It evinced that a mere description in the agreement

⁶⁵ (2004) 3 SCC 711.

of the advance paid as earnest, would not exclude it from operating as a charge on the property. It may become a part of the purchase money advanced as its true purpose may not be to solely serve as security for the agreement. This proposition of law has been reaffirmed by the Punjab and Haryana High Court in *Ran Singh*, a 2019 judgement.⁶⁶

The court in *Videocon Properties* categorically stated that “The buyer's charge engrafted in clause (b) of sub-section (6) of Section 55 of the Transfer of Property Act would extend and enure to the purchase money or earnest money paid.”⁶⁷ This article is in complete agreement with this interpretation. Therefore, the earnest money may be covered under the statutory charge envisioned in s. 55(6)(b) of the TPA Act, 1882.

*Delhi Development Authority v. Skipper Construction Ltd*⁶⁸ was a landmark judgement of the Supreme Court. It was held that a charge under s. 55(6)(b) was of the nature of a statutory charge and could be enforced against not only the seller but all persons claiming under him. It, therefore, provides wider protection to the buyer as he may institute a suit not only against the seller but also subsequent transferees. It also observed that s. 73 of the TP Act, 1882 also envisions such a principle. Furthermore, the principle applicable to mortgages also applies to cases of a statutory charge.⁶⁹ Lastly, the period of limitation for enforcement of the charge created under s. 55(6)(b) is 12 years and not 3 years, which provides additional relief to the aggrieved buyer.⁷⁰

⁶⁶ 2019 SCC OnLine P&H 7440 [10].

⁶⁷ *ibid* [13].

⁶⁸ (2000) 10 SCC 130.

⁶⁹ *ibid* [30].

⁷⁰ *ibid* [33].

The Supreme Court, in *Asgar S Patel v. Union of India*,⁷¹ held that the charge on property envisioned under s. 55(6)(b) is analogous to the seller's charge under section 55(4)(b) of the TPA, 1882. It further opined that purchase money paid as consideration as well as earnest money properly paid would constitute a charge on the property and serve as an encumbrance on sale.⁷² The court opined that a charge under s. 55(6)(b) would be created as soon as there is the payment of purchase money.

Therefore, the aforementioned judicial pronouncements, by the country's apex court, clearly evince the possibility of adopting the alternate interpretation propounded by this article. Therefore, this section laid down not only a normative framework but is also accompanied by a doctrinal approach that grounds itself in Indian jurisprudence.

VI. CONCLUSION

This article has attempted to shed some clarity on the different complex and nuanced legal issues related to contracts for sale. Consequently, the article has engaged in an extensive assessment of case law, coupled with textual analysis of multiple related provisions of various legislations. It has also engaged in a brief foreign law analysis of English law to understand the background of the Equitable doctrine as well as examined concepts such as part-performance, attachment, and obligations annexed to the land.

The first part provides the theoretical foundation for the more nuanced issues articulated in the following sections. The second part engages with detailed questions revolving around the judicial interpretation of contracts for sale. It tackles key questions regarding part-performance, the English

⁷¹ (2000) 5 SCC 311.

⁷² *ibid* [10].

equitable doctrine, and the attachment of property. The third section illustrates the various recourse mechanisms available in contract law in the context of agreements for sale.

The fourth and final part of the article substantiates the central argument, where the friction between s. 54 and s. 55(6)(b) is alleviated by a buyer-friendly interpretation, intended to achieve the ends of equity. It advances a novel framework for reimagining a charge on the property with a buyer-friendly approach. To this end, it first analyzed the need for the creation of a charge on property, subject to the terms of the contract for sale. Subsequently, it examined the various roadblocks to this interpretation and mitigated the same by reconciling various conflicting provisions and concepts. Finally, it elaborated upon multiple landmark judgements that laid the foundation for such an alternate legal interpretation of contracts for sale.

The convoluted and inconsistent holdings of the courts with regard to contracts for sale have led to buyers suffering at the hands of unscrupulous sellers. The article advocates for creating a charge as a possible solution within the four corners of the law, that is, the TP Act, 1882, subject to the terms of the agreement for sale. It emphasizes the need for such an interpretation to be adopted by the judiciary to protect buyers. This alternative framework, it is argued, would ensure that agreements for sale are not reduced to mere pieces of paper, with buyers being at the receiving end of injustice at the hands of sellers. It advances various protective mechanisms, including a refund of earnest money as well as the creation of a charge, to herald a new framework that is buyer friendly, in the interests of equity and fairness.