



ENFORCEMENT OF CONTRACTS RELATING TO OWNERSHIP TRANSFER OF IMMOVABLE PROPERTY

*Sudeep Kumar Dwivedi**

ABSTRACT

Rationale of this research is to educate its stakeholders regarding concept, legal provisions and practices of enforcement of contract in relation to ownership transfer of immovable property especially court order of specific performance since uncertainty or penumbra prevails in this area of law. In addition researcher recommends various circumstances to the judges for granting order of specific performance in this area. This research work has applied doctrinal research methods. Primary data are collected from the laws and decisions and secondary data are collected from the published research works, books, journals, articles, electronic media, etc. Findings of the research is that, court order granting specific performance on the basis of agreement to sale contract for ownership transfer of immovable property is also meant an order given to the Land Revenue Office for the registration of a sales deed or sales contract to transfer ownership right on immovable property from seller to the buyer. Court can grant an order of specific performance on contract of ownership transfer of immovable property considering various recommended circumstances. Such recommendations are, court must consider various circumstances in addition to the legal requirements such as; contract must fulfill requirements as prescribed in the law or registration requirement; said order shall be granted only in favor of the buyer; buying

* Advocate.

immovable property must not be for money making or real estate motive; order is granted only to the residential purchaser; immovable property must be unique or at least an acceptable substitute is not readily available in the market; said order is an equitable and discretionary remedy or prerogative power of the court; prospective buyer at first must attempt to perform the contract by depositing the said amount in the court (Nepalese court practice) and etc. Conclusion of this research work is, 'Order of specific performance as an enforcement of contract shall be granted if agreement to sale contract for ownership transfer of immovable property is registered, prospective buyer proved that compensation is not adequate, and all the conditions as prescribed in law for the order of specific performance has been satisfied.'

Key Words: Enforcement of Contract (EOC), Ownership Transfer of Immovable Property (OTIP), Specific Performance (SP), The National Civil Code, 2017 (Civil Code), Land Revenue Office (LRO)

BACKGROUND

In addition to other various reasons, uncertainty on EOC is also due to no clarity of understanding, meaning, concept, and provisions of contract. Generally, EOC means performance of contract via court order in case one party to the contract do not perform their respective obligation as per the objective of the contract. Since, scope of EOC is very wide we only consider EOC in OTIP only. Specially we focus on SP under EOC. In Nepal there are a lot of cases in the courts regarding EOC in OTIP but rarely order of SP has been granted to pursue the primary objective as prescribed in the contract. Contract is the backbone of the society and economy. Uncertainty in EOC creates negative impact in every aspect of the social and economic system. Disparities in court decisions regarding EOC in OTIP has resulted in decline of the international creditability which adversely affected to the foreign investment too. This kind of uncertainty of law leads to injustice to the people, barriers to the economic development, and decline in the trustworthiness of the international community and ultimately leads to non-development of the country. So, due to above mentioned reasons writer determined to do research and clarify the concept and applicable laws regarding EOC in OTIP for the sole purpose to benefit its stakeholders.

LEGAL PROVISIONS

Definition of Contract: ‘Contract means an agreement, enforceable by law, concluded between two or more parties, for performing or not performing any work.’¹ According to Salmond contract is an agreement which creates and defines obligations between the parties (contract is a law of obligation).² ‘An agreement enforceable by law is a contract.’³ An agreement (promise) for breach of which the law gives a remedy.⁴ Among these definitions, if we segregate the definitions provided by the section 5(1) of The Civil Code, we can conclude that to be a contract there must be at least two parties, an agreement (accepted offers), condition to do any act or restrain to do any act, and enforceable by law.

Essential Elements of a Valid Contract: To be a valid or enforceable contract an agreement must be enforceable at first. As any general contract, OTIP contracts too has to fulfill some essential elements (conditions) of a contract as prescribed by the prevailing contract law(Civil Code) to be an enforceable agreement or to form and conclude a valid contract, such as; (1) Must be at least two parties, an agreement (accepted offers), condition to do any act or restrain to do any act, and enforceable by law.⁵; (2) Must be valid offer, acceptance and legal relationship i.e. must be intention to create legal relationship⁶; (3) Must be lawful object⁷ and consideration⁸.; (4) Must not be void agreements/ contracts or agreements or contracts not expressly declared void⁹; (5) Must be free consent of the parties or must not be voidable contracts ¹⁰; (6) Must be competent parties or Capacity of parties¹¹; (7) Must be certainty in meaning or Clarity¹²; (8) Must be possible to perform¹³; (9) Legal formalities must

¹ Section 504(1) of the *The National Civil Code, 2017*.

² Legal Service India, E-journal, *Law of Contract*, (Jan. 23, 2024, 11:00AM), <https://www.legalserviceindia.com/legal/article-4749-law-of-contract.html>.

³ Section 2 (h) of *Indian Contract Act, 1872*.

⁴ U.SECTION, *The American Restatement of Contract Act, SECTION 1*.

⁵ SECTION 504 (1) of *The National Civil Code, 2017*.

⁶ SECTION 504 (2), (3) & clarification clause of *The National Civil Code, 2017*.

⁷ SECTION 517 (2)(K) of *The National Civil Code, 2017*.

⁸ SECTION 505 (1)(d) of *The National Civil Code, 2017*.

⁹ SECTION 517 of *The National Civil Code, 2017*.

¹⁰ SECTION 507 & 518 of *The National Civil Code, 2017*.

¹¹ SECTION 506 of *The National Civil Code, 2017*.

¹² SECTION 517 (2) (i) of *The National Civil Code, 2017*.

¹³ SECTION 517 (2) (h) of *The National Civil Code, 2017*.

be fulfilled¹⁴ or written and registration.; and (10) Authorized representative must not act beyond the scope of authority.¹⁵

Enforcement of Contract (EOC): ‘A contract that is enforceable by the court shall be regarded as an enforceable contract.’¹⁶ For our purpose, ‘enforcement of contract’ means execution of contract via court order. EOC means performance of contract via court order if one party do not perform their respective obligation (primary objective) of the contract. Court order of EOC against the injuring party as a remedy for the aggrieved/ loss incurring party either, be in the form of compensation or, in the form of SP. Court primarily grant an order of compensation as a regular remedy but if compensation is not adequate then only order of SP is granted. But my contention is, since spirit or objective of contract is to perform or not perform certain work in certain situation, SP must get priority over compensation.

Before enactment of the ‘Contract Act, 2056 B.S.’, SP used to get priority over compensation but later after enactment of the said act compensation got priority over SP. The Country Civil Code, 2074 B.S. too has given priority to the compensation instead of SP but alternatively the Civil Code has prescribed some condition for the order of SP. But, court practice shows that court were unwilling to grant the order of SP. Not only in Nepal, universal trend is that whenever compensation is inadequate court order of SP is granted.

If contract is not enforced by the contracting party then only it is enforced through the court order known as EOC. Sometimes contract may not be enforced even after fulfilling all the essential elements. The reason behind that is due to technical defects and non-compliance of provisions or principles of laws. For instance every plaint (claim) before registering at the court must satisfy three conditions such as; jurisdiction of the court (right place), Locus standi (right person), and statute of limitation (right place). Section 7 of Administration of Justice Act, 2073 and Section 17 of Civil Procedural Code, 2074 has made provision

¹⁴ SECTION 505 (3) & 519 of The National Civil Code, 2017.

¹⁵ SECTION 519 (2) (c) of The National Civil Code, 2017.

¹⁶ SECTION 519(1) of The National Civil Code, 2017.

regarding jurisdiction of the District Court. Section 10 and Section 86 of Civil Procedural Code, 2074 has made provision regarding locus standi of the person. Section 484, Chapter 15 (Provision Relating Transaction), Part 4 of the Civil Code has made provision for statute of limitation for deed execution on lending money. Period of deed execution in household pursuant to this chapter shall not exceed ten (10) years. So, according to this legal provision document or contract of time barred debt (debt exceeding 10 years of time period) cannot be enforced through the court order.

Agreement Enforceable by Law : A contract concluded in fulfillment of the following conditions shall be deemed to be a contract enforceable by law: - (a) The consent expressed by a person to a contract to bind himself or herself, (b) Capacity or qualification of a person to a contract to conclude the contract, (c) Certain matter for the creation of an obligation, and (d) Lawful obligation. (2) A contract may be made in written or verbal form or even by conduct of the parties to it. (3) Notwithstanding anything contained in sub-section (2), if there is a requirement that a particular contract be concluded in fulfillment of any particular procedure or formality, such a contract may not be enforceable unless such procedure or formality is completed.¹⁷ These are prime pre-requisites of a valid contract. In fact, all these contract enforceable conditions has been included under above mentioned ‘essential elements of a contract.’ So, we can say that, if an agreement has fulfilled prescribed essential elements an agreement will be a contract which is enforceable by the law or through the court order. According to the Civil Code, even though contract is valid at the time of formation if it does not fulfill above mentioned conditions it cannot be enforced through the court order.

Unenforceable Contracts: ‘A contract that is not enforceable by the court shall be regarded as an unenforceable contract. Any of the following contracts is not enforceable by the court in spite of its being concluded in fulfillment of the procedures under Chapter-2 of this Part: - (a) A contract required to be made in written form according to law is not

¹⁷ SECTION 505 of The National Civil Code, 2017.

concluded in written form, (b) A contract required to be made in fulfillment of any particular formality or procedure or to be registered with anybody according to law is not so made in fulfillment of such formality or procedure or is not so registered, (c) Where a contract is concluded on behalf of another person, the contract is concluded on a matter not authorized by, or concluded beyond the authority given by, that other person¹⁸ These unenforceable conditions has been included under above mentioned 'essential elements of a contract'.

Best example of unenforceable contract is 'non-registered contract or deeds lending more than Rs. 50,000.'¹⁹ In the same way OTIP via Purchase and Sale i.e. sales deed or sales contract becomes valid/enforceable contract only after registration from the LRO²⁰ (perfect right), otherwise this type of contract is also unenforceable contract (imperfect right). In addition to that, though not prescribed as an condition of unenforceable contract in above mentioned provision, pre-suit considerations if not according to the legal provision such as time limitation(right time), court's jurisdiction(right place), and locus standi(right person) will also falls under the unenforceable contract.

Void and Voidable Contracts: A contract which is not valid according to law shall be deemed to be a void contract.²¹ A contract which, at the initiation of its party, may be declared void by the court shall be deemed to be a voidable contract.²² Section 517(2) and 518(2) has subsequently prescribed various kinds of void and voidable contracts in detail. As above mentioned, these contracts too falls under the 'unenforceable contracts'.

Void contract is not void from its inception and that it is valid and binding on the parties when originally entered but subsequent to its formation it becomes invalid and destitute of legal effect because of certain reasons such as; (a) Contract expressly declared void by contract law or

¹⁸ SECTION 519 of The National Civil Code, 2017.

¹⁹ SECTION 36(2) of The National Civil Procedural Code, 2017.

²⁰ SECTION 464 (1)(a) of The National Civil Code, 2017.

²¹ SECTION 517(1) of The National Civil Code, 2017.

²² SECTION 518(1) of The National Civil Code, 2017.

any other law of the land, (b) Supervening impossibility, (c) Subsequent illegality, (d) Repudiation (to discard/stop/end) of a voidable contract, and (e) Contingent contract when future event becomes impossible.

Contract without free consent of the party is voidable contract, which can be avoided by the aggrieved party at his option. Every valid contract requires free consent of the parties. Consent is free if there is absence of coercion, undue influence, fraud, misrepresentation, and mistake.

Types of Contracts: A contract may be made in written or verbal form or even by conduct of the parties to it.²³ Despite of this direct provision made by the civil code under part 5 regarding company types there are other more types of contracts provisioned in different sections of the Act and prevails in practice, such as; (1) On the basis of Validity or Enforceability (valid, voidable, void , enforceable, unenforceable contract; Void agreement, illegal or unlawful agreement), (2) On the basis of Formation (Expressed, implied, and quasi contract), (3) On the basis of Performance (Executed and executory contract), (4) On the basis of Creation of Obligation (General and contingent contract), (5) On the basis of Liability (Unilateral and bilateral contract), (6) On the basis of Formality (Formal contract i.e. contract of record and contract under seal) and simple contract), (7) On the basis of Part (Divisible and indivisible contract), and (8) Registered and Non-registered contract.

Immovable Property: Any goods attached to a building or land permanently is deemed immovable property.²⁴

Deeds for Transfer of Immovable Property to be Registered: A deed transferring the right in an immovable property in any manner shall be got registered with the concerned office.²⁵ Here, concerned office refers to the concerned LRO.

Deeds for Lending Money to be Registered²⁶: In the case of any deed which involves transaction of more than fifty thousand rupees

²³ SECTION 505(2) of The National Civil Code, 2017.

²⁴ SECTION 253 (1)(b) of The National Civil Code, 2017.

²⁵ SECTION 464 (1)(a) of The National Civil Code, 2017.

²⁶ SECTION 36(2) of The National Civil Procedural Code, 2017.

(Rs.50,000) and requires affixation of signature or thumb impression pursuant to this Chapter or which involves transaction of an amount in excess of such an amount, the concerned parties shall appear before the office of the Local Level or ward committee of the Local Level and have the deed certified on top of it by such an office, and in so certifying a deed, the certifying office shall cause the executors of such a deed to affix their respective signature or thumb impressions on the deed.

OTIP VIA PURCHASE AND SALE

We cannot find any restrictions on concluding or forming a contract relating to OTIP via purchase and sale upon review of above mentioned legal provisions. Despite of that, if we see previous national and international practice too regarding OTIP via Purchase and Sale we can found various instances. Thus, we can say that contract for OTIP via Purchase and Sale can be concluded. Procedure for concluding contract/ deed of OTIP via purchase and sale can be concluded into following two steps;

Agreement to Sale Contract (Executory Contract): In an agreement to sale contract it is agreed for OTIP in future and in this sense this contract is also known as ‘executory contract’. In this contract seller takes price of the property fully or partially. Executory means that which remains to be carried into effect. A contract under which parties have promised to do or not to do something but promise need to be performed respectively is known as executory contract. The parties to an executory contract only make plan at the time of forming contract and implement such plan in future according to the provisions of the contract. Contract concluded for paying some advance money to purchase land is the example of executory contract (agreement to sale contract). According to the Nepalese legal provision as mentioned above, ‘Deeds for Lending Money to be Registered’.²⁷ That means, to enforce agreement to sell contract or pay in advance document, it must be certified/ registered at the local level or ward office if the amount is more than Rupees fifty thousand. In this sense registered agreement to sale contract (pay in advance document)

²⁷ SECTION 36(2) of The National Civil Procedural Code, 2017.

concluded for OTIP is a valid contract in the eye of law. Later we will analyze it in detail. Actually, this document is the proof of lending money (pay in advance for OTIP) but primarily it is a document of OTIP or primary purpose is OTIP.

Sales Contract (Executed Contract): Sales contract is an executed and performed contract also known as sales deed or document of OTIP. Executed means that which is done. Hence, a contract with the inclusion of completed work is executed contract. An executed contract consists of the work fulfilled by both the parties. Seller receives the agreed amount of money and buyer receives ownership on the said land or/and building. When a work is completed or performed by one party only then it becomes executed contract for the work completed or performed party and executory contract for the work not completed party. Thus, a completed or performed work of one or both parties is inserted in executed contract. OTIP from seller to the buyer by registering at the LRO is an executed or sales contract recognized as the perfect enforced rights. This is valid contract in the eye of law. According to the Nepalese legal provision as mentioned above, 'Deeds for Transfer of Immovable Property to be Registered.'²⁸ In this sense registered sales contract is a valid contract in the eye of law. Later we will analyze it in detail.

EOC RELATING TO OTIP

If parties to the contract do not perform contract by fulfilling their respective obligation then the aggrieved/injured party (generally prospective buyer) may enforce contract through the court order. In this scenario if prospective seller do not OTIP as per 'registered agreement to sale contract' then prospective buyer can file case at the court demanding either for the 'compensation' or for the 'SP' (demanding OTIP) but court has discretionary power either to give order of 'compensation' or 'SP' as an remedy in favor of the prospective buyer. Generally court do not grant order of SP in favor of the prospective buyer in a case of agreement to sale contract for OTIP. Instead it grants an order of 'compensation' as a remedy. Whenever compensation is inadequate court

²⁸ SECTION 464 (1)(a) of The National Civil Code, 2017.

order of SP is granted. It's an universal practice including Nepal. My contention is 'SP must get priority over compensation', since spirit or objective of contract is to perform or not perform certain work which demand SP. In this scenario, researcher has found latest decided case in Nepal and in foreign country in favor of the buyer granting court order of SP as an EOC relating to OTIP. EOC relating to OTIP can be understood in following two steps;

Enforcement of Agreement to Sale Contract: In Nepal, if conflict arises between the parties on agreement to sales contract of OTIP (also an lending document) court gives an order or decision in favor of the creditor (dhani) to recover debt from the debtor (rini) and if prescribed in the document then to return debt along with interest as the compensation. But, court never gives an order of SP for OTIP in favor of the prospective buyer. Actually reason behind this is court do not recognize lending document as the document of OTIP. And the second reason is contract law (Civil Code) has prescribed compensation as the regular or primary remedy and SP as an alternative remedy.

As we already discussed, today in Nepal we rarely find any court order granting SP for OTIP in favor of the creditor (dhani) or prospective buyer on the basis of agreement to sell contract. But exceptionally in 'Tularatna Bajracharya Vs. Tara Shrestha' case,²⁹ Justice Ishwori Prasad Katiwada has made minority decision even though not enforced but made a conceptual clarity regarding SP for OTIP. Foundation of analysis is based on the landmark decision of 'Tirtha Rajkumari Rana Vs. Ramshankar Shrestha'³⁰ case where it has stated as, "Agreement to sell contract, as an enforceable contract on the basis of which land and/or building ownership can be transferred from the seller to the buyer. There is no mandatory provision to register 'agreement to sell contract' at the government office (But now as per civil code it's mandatory to register' at the local level ward office). Granting SP is the prerogative power of the court. Parties are obliged to perform their respective obligation which are in tune with the prevailing laws."

²⁹ NKP 2077 BS, D.N. 10548.

³⁰ NKP 2049 B.S., D.N. 4447.

Further Justice Ishwori Prasad Katiwada stated that, “this precedent (propounded principle) has been obeyed and followed for the long time. So, now we cannot say and is not logical saying that transferring ownership of immovable property based on agreement to sell contract cannot get legal validity or cannot be treated as contract or cannot say such contract must be registered as per ‘number one of chapter of Registration’ of the Country Code (Muluki Ain) (law at that time) or Section 88 of the Contract Act 2056 B.S. (law at that time) or Section 464 of the National Civil Code, 2017 (prevailing law). This kind of attitude will misinterpret the legal provision and breach the principles of contract which we are adopting and applying since a long time. Section 505 (3) of the Civil Code has made provision in different ways than Section 88 of the Contract Act 2056. Obviously legislature has made these differences to eradicate the confusion created by the Section 88 of the Contract Act 2056.”

Further he stated, “Section 505 (3) of the Civil Code states, ‘If there is a requirement that a particular contract be concluded in fulfillment of any particular procedure or formality, such a contract may not be enforceable unless such procedure or formality is completed.’ Section 88 of the Contract Act 2056 states, ‘In case prevailing law prescribes that any specific procedure must be followed for executing any specific contract, or that any specific contract, must be registered at any government office, a contract signed without fulfilling such formalities shall not be valid.’ Since, Civil Code and other prevailing specific law has not prescribed any particular procedure or formality to conclude and enforce agreement to sell contract for transferring ownership on land, general principles and provisions of contract law will be applied in this case. Section 505(3) has not limited or restricted to conclude agreement to sell contract for transferring ownership on land and building. In the Summit Hotel case, court has decided stating; ‘document containing conditions to purchase land and building is not a sale deed/ contract instead agreement to sell contract, so in this type of contract Section 88 of The Contract Act, 2056 (equivalent to Section 505 (3) of The Civil Code) will not be applied. Section 88 is not self-contained or self-sufficient provision in itself rather is a directive provision to indicate that contract concluded without fulfilling

procedure prescribed by related specific law/ Act will not be a valid/ enforceable contract. In this way analysis of scope of application of this section has been done.”

Enforcement Sales Contract: OTIP from seller to the buyer by registering sales deed or sales contract at the LRO is in itself an executed contract recognized as the perfect enforced rights. This contract is also known as performed contract since seller receives the agreed amount of money and buyer receives ownership on the said immovable property. In other words primary objective of ‘registered agreement to sale contract’ is to conclude ‘registered sales contract’. So, at this point there is no any dispute regarding OTIP between the contracting parties. Only question exists is to ‘enforce agreement to sale contract and that is registered sales contract.

SP OF OTIP CONTRACT

‘If monetary compensation is not reasonable and adequate for the actual loss or damage suffered by the aggrieved party because of the breach of contract, the aggrieved party may claim for the SP of the contract instead of compensation.’³¹ SP is an equitable remedy available to the aggrieved party in case of a Breach of Contract, whereby a court issues an order requiring a party to perform a specific act under the contract.³² SP is to perform the work as stated in the contract. In the situation of breach of contract injured or innocent party has right to get remedy in the form of compensation through the court order which is general or regular process. SP as a remedy is only granted in the exceptional case only. ‘SP may not be claimed in any of the following circumstances:

- (a) If monetary compensation is an adequate remedy for the breach of contract,
- (b) If the court cannot supervise the performance of the act under the contract,

³¹ SECTION 540 of The National Civil Code, 2017.

³² Management Dynamics (Shankar Dev Campus), E-journal, Judicial Response to the Doctrine of Specific Performance in Nepal (Jan. 23, 2024, 0:45AM), <https://www.nepjol.info/index.php/md/article/download/35811/27997/103938>.

- (c) If the contract is for providing services of personal ability, skill or knowledge,
- (d) If the contract cannot specifically be performed,
- (e) If the party in breach of the contract claims for its specific performance.’³³

Supreme Court Decision: Though the majority decision (will state later) is not in the favor of SP on OTIP contract in the ‘Tularatna Bajracharya Vs. Tara Shrestha’ case³⁴, minority opinion provided by the Justice Ishwori Prasad Katiwada regarding SP on OTIP contract is worth making in the realm of contract and the order of SP. Part of such opinion is as follows;

“At the beginning, when there were no clear and certain legislative laws while providing justice court used to use self-discretionary power to provide remedy of SP. Equity, justice, and good conscience was/is the basis of self-discretionary power. But later on changes in the traditional remedial methods has been found in those countries which has enacted and implemented Specific Relief Act such as Specific Relief Act, 1877 in Britain and Specific Relief Act, 1963 in India. Those countries which have Specific Relief Act must do as provided by the Act and for that reason while providing SP it is found decrease in the use of self-discretionary power of the court. In respect of Nepal remedy of SP has to be provided according to the contract act since there is no any Specific Relief Act is use. Court order of SP is rarely found even though prevailing Civil Code has provided grounds for SP. In Nepal granting order of SP is taken as discretionary power of the judges. In addition, no any specific analysis is found in respect of principle basis of SP of contract. Courts should analysis in relative to the provisions made by the Act since at present situation law made by legislation is certain and has incorporated circumstances and scope of SP. Now it is not reasonable to adopt reference of equitable remedy as the precedent since Act made by legislature has determined conditions for the SP of contract. After studying decisions

³³ SECTION 540 (2) of The National Civil Code, 2017.

³⁴ *NKP 2077 B.S.*, D.N. 10548.

made by courts it has been found that before implementing Contract Act 2056, court decisions were made on the assumption, “if contract is valid then SP of contract is must.” “Whenever parties breaching the contract claim for the SP, court shall not give an order of SP” is a verdict given by the Supreme Court in the cases and instances including the case of ‘Summit Hotel Pvt. Ltd.’ and ‘Lakhbahadur’. If we see in the wholeness it is not analyzed and described in reference to the provisions made under Sub-section (1) and (2) of Section 86 of the Contract Act, 2056 (Similar to the conditions for the order of SP of contract made under Section 540 of the Civil Code). Section 86 of the Contract Act, 2056 in itself is clear and meaningful. In reference to the change in law, in all situation claim of SP cannot be reached. In general, granting order of SP is treated as a discretionary power of the court. In all the situation contract concluded having condition to transfer ownership right of immovable property (land or/and building) is not seem to be SP. This is also to be evaluated on the basis of provisions made under Contract Act, 2056 (Section 540 of the prevailing Civil Code). While evaluating relatively in reference to the various aspects of the available alternative there may be a situation of granting an order of SP such as; whenever cash compensation is not reasonable and adequate; specific situation of land and/or building considering religious, cultural, trading or familiar importance aspects of house or land. But, it must be claimed and proved clearly that such situation existed. It is not legitimate granting order (decision) of SP mechanically until it is not proved.”

In the same way latest decision made by the Supreme court in the case of Pawan Rajbhandari V. Ram Shrestha³⁵ regarding SP on OTIP contract is worth making in the realm of contract and the order of SP. Part of such opinion is as, “In the case, two sited bench has granted order of SP where agreement to sale contract has been registered at the LRO. In addition, buyer has paid 96% of the land price at the time of concluding pay in advance document (Agreement to Sale Contract) is also vital fact. Opinion given stating SP of agreement to sale contract (pay in advance document) can be granted validity even though pay in

³⁵ NKP 2078 B.S, D.N. 10724.

advance document is not registered at the LRO is a milestone opinion provided in this case which is opposite to the order provided in the above mentioned case³⁶ but is in tune with minority opinion given by the Justice Ishwori Prasad Katiwada in the same case. Actually this decision is in tune with the contracting principles, international practice and principles propounded in the above mentioned case of Tirtha Rajkumari Rana but technically decision granted on Tularatna Bajracharya case gets priority due to higher sited bench. And hope that upcoming decision at the court will follow the trend of granting order of SP on OTIP contract

NEPALESE DECIDED CASES GRANTING SP IN OTIP CONTRACT

Tirtha Rajkumari Rana V. Ramshanker Shrestha³⁷: Any document to be a contract there must be at least two contracting parties, parties must be obliged to do or not to do anything and meeting of mind between the parties to do or not to do anything. Since this document satisfies all the essential elements to be a valid contract so document is a valid contract. Nepalese laws has not provided any specific format of contract or has not mentioned mandatory provision to write word contract in the document. Deed contains conditions to sale house and land after some time so it's an 'agreement to sale' instead 'sale deed'. There is no mandatory provision to register 'agreement to sale' in the government office (*But in the present context it's mandatory to register even 'agreement to sale'*). Granting SP is the prerogative power of the court. Parties are obliged to perform their respective obligation which are in tune with the prevailing laws.

Dhanmaya Maharjen V. Tulsi Maharjan³⁸: Nepalese laws has not provided any specific format of the contract. Since, document has included respective obligation of the parties and signed and thumb stamped properly it can be said that document incorporates all the essential elements for the valid contracts, so document is a contract. Parties are obliged to perform their respective obligation which are prescribed in the form of

³⁶ *NKP 2077 B.S., D.N.10548.*

³⁷ *N.K.P 2049 B.S., D.N 4447.*

³⁸ *NKP 2062 B.S., D.N. 7583.*

conditions of the contract and condition is to sale the land so buyer can claim for the transfer of ownership of the land.

Budhiyadevi Chamarni V. Amiri Mahara Chamar³⁹: Deed contains conditions to sale house and land after some time so it's an 'agreement to sale' instead 'sale deed'. There is no mandatory provision to register 'agreement to sale' in the government office (*But in the present context it's mandatory to register even 'agreement to sale'*). Since document is of contractual nature obligation of the dead seller is transferred to his wife.

Nanichori Maharjan V. Rahindra Maharjan⁴⁰: Respective contractual obligation of both the parties has been aroused through the disputed document and plaintiff has filed lawsuit within the time limitation so defended must transfer the ownership of land to the plaintiff according to the conditions prescribed in the contract.

Parasmani Bharati V. Homeraj Bun⁴¹: Documents contains conditions to recover the paid advance money from the property of the seller in case of the breach of contract by the seller. So, time limitation to file the law suit starts from the completion of such time limitation prescribed in the document.

Chandra Bahadur Mabo V. Lakh Bahadur Mabo⁴²: Prospective buyer at first must attempt to perform the contract by depositing the said amount in the court. If first attempt fails then only after the completion of such time limitation prescribed in the document, prospective buyer can claim for the return of the paid advance money.

Tularatna Bajracharya Vs. Tara Shrestha Patrabamsha⁴³: It is not reasonable and legal to order for the transfer of ownership of immovable property from the owner to the prospective buyer on the basis of premature document which has not fulfilled legal requirement

³⁹ NKP 2062 B.S., D.N. 7593.

⁴⁰ NKP 2062 B.S., D.N. 7610.

⁴¹ NKP 2064 B.S., D.N. 7896.

⁴² NKP 2065 B.S., D.N. 7915.

⁴³ NKP 2077 B.S., D.N. 10548.

such as document which has not fulfilled the procedures as prescribed by the law or not registered at the government office as prescribed in the law. (*Order of SP shall be granted if agreement to sale contract for OTIP is registered, prospective buyer proved that compensation is not adequate, and all the conditions as prescribed in law for the order of SP has been satisfied.*)

Pawan Rajbhandari Vs. Ram Shrestha⁴⁴: Order of SP shall be granted where agreement to sale contract (pay in advance document) has been registered at the LRO. In addition, buyer has paid 96% of the land price at the time of concluding pay in advance document (Agreement to Sale Contract) is also vital fact. Opinion was given stating SP of agreement to sale contract (pay in advance document) can be granted validity even though pay in advance document is not registered at the LRO. (*Actually this decision has followed the precedent propounded in the above mentioned case of Tularatna Bajracharya*)

FOREIGN DECIDED CASES

Price v Strange (England)⁴⁵: The vendor is only interested in receiving its money so despite of 'the principle of mutuality' seller cannot claim for the SP of the contract from the buyer. Rather seller can claim for the remedy in the form of damage or compensation

Midtown Ltd v City of London Real Property Co Ltd (England)⁴⁶: SP is not ordinarily the remedy for non-completion of a contract concerning personality or money making (Real-estate) activity. SP is granted only if the subject-matter is unique or at least an acceptable substitute is not readily available in the market. Otherwise damage (compensation) would be an adequate remedy.

Semelhago v Paramadevan (Canada)⁴⁷: SP is granted only to the residential purchaser because residential purchaser typically examine

⁴⁴ *N.K.P 2078 B.S., D.N. 10724.*

⁴⁵ Hanham James (Maitland Chambers, London), *THE REMEDY OF SPECIFIC PERFORMANCE AND CONTRACTS FOR THE SALE OF LAND: A BRIEF SURVEY* p. 4 (Mar. 23, 2023. 09M30AM), <https://www.chba.org.uk/for-members/library/overseas-seminars/3b-specific-performance-and-injunctions-jh>.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*, p.5.

many properties and make a selection on the basis of combination of price, location, design, and many other subjective factors which will usually make it very difficult to find another house which exhibits all of these same features.

Landco Albany Ltd v Fu Hao⁴⁸ (New Zealand): In refusing the order of SP to the buyer the court has concluded, “Must have entered into the transaction in order to make a profit and in those circumstances damages would be an adequate remedy.”

EC Investment Holdings Pte Ltd v Ridout Residence Pte Ltd & Ors (Singapore)⁴⁹: In refusing the purchaser’s application for SP, the court preferred expressly to base its decision upon the circumstances of the case “SP being an equitable and discretionary remedy.”

New Dennis Arthur & Or v Greesh Ghai Monty (Singapore)⁵⁰: The vendor sought the remedy, damages were likely to be an adequate remedy because his interest was likely to be “purely financial in nature.”

Jinesh Kumar Jain Vs, Iris Paintal and Ors.⁵¹: It is settled law that without giving a reasonable notice to the other party to complete the contract within a specified time, the contract cannot be cancelled at the sweet will of the party. SP is the discretionary power of the court under Specific Relief Act and damage (compensation) is the regular remedy under the contract Act. (**Note:** Since there is no any Specific Relief Act in reference to Nepal, either order of compensation or order of SP of contract must be granted being under the Contract Act.)

Jayakantham and Others versus Abaykumar⁵²: Based upon the fundamental principle of law with respect to granting relief of SP of a contract, the Supreme Court of India recently in this judgment set aside the decree of SP of an agreement to sell an immovable property and

⁴⁸ *Ibid*, p.6.

⁴⁹ *Ibid*.

⁵⁰ *Ibid*.

⁵¹ Kanoon, Jinesh Kumar Jain vs, Iris Paintal and Or Section (India, Jul. 10, 2012), (Jan. 23, 2024, 09:34AM), <https://indiankanoon.org/doc/124824943/>.

⁵² Kanoon, Jayakantham and Others vs. Abaykumar (India, Feb.21, 2017), (Jan. 23, 2024, 09:34AM), <https://indiankanoon.org/doc/70327981/>.

granted monetary compensation to the purchaser (Respondent) in lieu of the relief of specific performance. While granting SP in India following factors are considered as important factors while decided upon granting SP by the court upon demand of either buyer of the land or seller of the land.

- (a) Increase in the price of the property during the pendency of the litigation (time value of money);
- (b) Reasonable amount of earnest money (generally more than 50% of the price of the land fixed);
- (c) Payment of an additional amount on earnest money;
- (d) Who is the defaulting party?
- (e) Whether one party is trying to take undue advantage over the other?; etc.

Baldev Behl & Ors. v. Bhule & Ors., (2012) 132 DRJ 247⁵³:

This issue pertains to plaintiff No.1 being ready and willing to perform his part of the agreement to sell. As per *Section 16(c)* of the Act, every plaintiff in a suit for SP must aver and prove that the plaintiff has always been and continues to be ready and willing to perform his part of the contract/agreement to sell. Readiness is financial capacity to go ahead with the agreement to sell and willingness is the intention. No doubt financial capacity does not mean that a proposed purchaser has to jingle the moneys i.e. a proposed purchaser need not prove existence of liquid funds, however, financial capacity does mean and require that the proposed purchaser/respondent/ plaintiff must show that he had the necessary funds or the properties or other necessary means which would enable him to pay the balance sale consideration. Such financial capacity also has to be strictly proved and self-serving statements cannot amount to discharge of requisite onus of proof of existence of financial capacity.

M/s Hotz Industries Pvt. Ltd. v. Dr. Ravi Singh (Since Decd. Thr. LRs) & Ors., 2018 SCC Online (Del) 7618⁵⁴: Court has held that payment of nominal consideration of 5%, 10% or 20% will not entitle

⁵³ Kanoon, Baldev Behl & Or Section vs. Bhule & Others (India, Sep.10, 2012), (Jan. 23, 2024, 09:34AM), <https://indiankanoon.org/doc/118363592/>.

⁵⁴ Kanoon, M/s Hotz Industries Pvt. Ltd. vs. Dr. Ravi Singh (India, Feb. 28, 2018), (Jan. 23, 2024, 09:34AM), <https://indiankanoon.org/doc/159300322/>.

grant of discretionary relief of SP because even if the proposed seller on the suit being decreed much later than the date of agreement to sell gets only the sale price with interest, and that with this amount the seller cannot purchase an equivalent property which he would have purchased many years earlier when the agreement to sell was entered into. Today, we are in the year 2018 and the subject Agreement to Sell was of the year 2004, and therefore for the price of the property in the year 2004, an equivalent property in the year 2018 surely cannot be purchased.

CONCLUSION

Mandatory registration requirement of OTIP contract or document prescribed in the Civil Code only meant ‘matured or perfect rights of a buyer will establish only after the registration of a sales contract or deed.’ In fact, court can always grant an order of SP on the basis of ‘Registered Agreement to Sale Contract’ concluded for OTIP. Court order granting SP on the basis of ‘Agreement to Sale Contract’ concluded for OTIP is also an order given to the LRO for the registration of a ‘Sales Deed or Sales Contract’ transferring ownership right on immovable property from seller to the buyer. But while granting an order of SP for OTIP contract, court must consider legal requirements and other circumstances such as; registration requirement of a document or contract must be fulfilled as prescribed in the law; Order of SP on OTIP based upon agreement to sale contract shall be granted only to the buyer; buying immovable property must not be for money making or real estate motive; SP is granted only to the residential purchaser; subject matter (immovable property) must be unique or at least an acceptable substitute is not readily available in the market; SP is an equitable and discretionary remedy or prerogative power of the court; adequate earnest money must have been paid (51% to 90% of the property price), time value of money or increase in the price of the property during the pendency of the litigation must to be considered or increased price must pay to the seller; buyer must not be a defaulting party; buyer must be intentionally willful and financially ready to buy but the subject matter and financial capacity does not mean liquid funds rather proof of existence of financial capacity; prospective buyer at first

must attempt to perform the contract by depositing the said amount in the court (Nepalese court practice). In conclusion we can say that; 'Order of SP as an EOC shall be granted if agreement to sale contract for OTIP is registered, prospective buyer proved that compensation is not adequate, and all the conditions as prescribed in law for the order of SP has been satisfied.'

□