

Supreme Court, Larger Full Bench

Rt. Honorable Chief Justice Cholendra Shamsher J.B.R.

Hon. Justice Deepak Kumar Karki

Hon. Justice Meera Khadka

Hon. Justice Hari Krishna Karki

Hon. Justice Ishwor Prasad Khatiwada

Hon. Justice Prakash Man Singh Raut

Hon. Justice Tej Bahadur K.C.

Judgement

Date of Decision: 2076/3/29 (corresponding to 14 July, 2019)

066-DF-0019

Appellant/Plaintiff: Tula Ratna Bajracharya resident of Lalitpur District, Lalitpur Sub-metropolitan City, Ward No. 3, Block No. 33, Pulchowk

Vs.

Respondent/Defendant: Tara Shrestha Patrabansha resident of Lalitpur District, Lalitpur Sub-metropolitan City, Block No. 33

- It would be neither reasonable nor just for this Court to direct the execution or registration of a deed purporting to transfer rights in immovable property on the basis of a premature instrument. Where the formalities prescribed by law have not been duly completed, or where registration as required under law in the relevant government office has not been effected, no right in immovable property can be extinguished in one person and vested in another solely on the basis of such an incomplete (premature) instrument

(Para No. 13)

On behalf of Appellant/Plaintiff: Learned Senior Advocate Mr. Shambhu Thapa, Mr. Indra Kharel and Learned Advocates Mr. Pitambar Silwal, Mr. Purushottam Dhungana, Mr. Phaniraj Silwal, Ms. Signdha Bhatt

On behalf of Respondent/Defendant: Learned Senior Advocates Mr. Sushil Pant, Mr. Mukti Pradhan, Mr. Chandra Kant Gyawali and Learned Advocates Ms. Laxmi Aryal and Mr. Liladhar Upadhaya

Precedents Cited:

Relevant Laws:

Court of First Instance:

Honorable Justice Narayan Prasad Shrestha

Lalitpur District Court

Decision at the Appellate Level

Honorable Justice Ali Akbar Mikrani

Honorable Justice Madhav Prasad Chalise

Supreme Court Division Bench

Honorable Justice Ran Bahadur Bam

Honorable Justice Awadesh Kumar Yadav

Judgment

Hon. Justice Hari Krishna Karki: Pursuant to the order of the Division Bench of this court dated 2066/10/17 (corresponding to 31 January, 2010), directing the present matter be presented before the Full Bench pursuant to Rule 3 (1) d) of the Supreme Court Regulation, 2049, the brief facts of the case and the decisions are as follows:

The plaint submitted by plaintiff Tula Ratna Bajracharya on 2059/4/20 (corresponding to 5 August, 2002) is as follows: a plot of land having plot no. 16 measuring 0-6-0 and a house constructed thereon jointly owned by the defendant and his brother Krishna Dev Shrestha (Patrabansha) located in Lalitpur District, formerly Ward No. 20 (b). A partition was made to demarcate my share, comprising 0-3-0 of land along with the house on it, maintaining the existing east–west length and a width of 13 feet in the north–south direction. Upon receipt of the land revenue certificate, the defendant proposed to sell the land and house at the rate of Rs. 1,050,000 per aana, valuing the total property at Rs. 31,50,000. On 2057/5/21 (corresponding 6 September, 2020), I executed an agreement under the Contract Act, 2056, in the presence of the defendant’s wife and daughter as witnesses, agreeing to purchase the said property and paid the defendant Rs. 3,00,000 (three lakh) as earnest money.

After the respective share of the house and land was partitioned and allotted in favor of the defendant, a condition was incorporated in the agreement stipulating that the remaining amount would be received from me and the registration would be completed within ten (10) months; failing which, I would be entitled to have the house and land transferred in accordance with law. In accordance with the said condition, on the date 2058/06/18 (corresponding to 4 October, 2001), the defendant’s share was partitioned and demarcated, and land ownership certificate for plot no. 798, measuring 0-3-0, along with the house, was issued in the defendant’s name. Thereafter, when I requested the defendant to accept the remaining amount and execute the transfer of the house and land, the defendant, without accepting the said amount, evaded and failed to register and transfer the property. As the defendant has failed to comply with the agreement dated 2057/05/21 (6 September, 2000), I hereby deposit the outstanding amount of NPR 2,850,000/- (Rupees Twenty-Eight Lakh Fifty Thousand only) payable to the defendant before this honorable court, and respectfully pray that the said amount be paid to the defendant through the court and that the registration and transfer of the house and land be executed and recorded in my name in enforcement of the said agreement. In the event that the said transfer cannot be effected, I

respectfully pray that, pursuant to Section 83 of the Contract Act, 2056, compensation be recovered from the defendant in the amount of NPR 300,000/- (Rupees three hundred thousand) paid as earnest money, together with additional amounts, totaling NPR 600,000/- (Rupees six hundred thousand).

The rejoinder submitted by defendant Chet Sundar Shrestha is as follows: In the month of Bhadra 2057, due to household necessities, I requested the plaintiff for a loan of NPR 300,000/- (Rupees three hundred thousand) for a period of one year. It was agreed that, in the event of my failure to repay the said amount within one year, the plaintiff would be entitled to recover the amount from the house and land that would fall to my share. Accordingly, on 2057/05/21, I borrowed the said amount of NPR 300,000/- solely as a loan. I did not execute any document for the sale or transfer of the house and land in favor of the plaintiff. The transaction was purely in the nature of a loan and not an agreement of sale. I am not aware of the nature, contents, or legal character of any document alleged by the plaintiff. Therefore, upon being shown and explained the said document in accordance with No. 78 of the Court Proceedings (*Adalati Bandobasta*), I reserve my right to ascertain the nature and character of the document. Had the document been a contract, a copy thereof ought to have been provided to me as well. At the time when the brothers were living jointly as an undivided family, it was uncertain as to when partition would take place and, upon such partition, which portion of land would fall to my share. In the absence of such certainty, no agreement could have been executed on the basis of mere assumption or speculation. Furthermore, the Contract Act, 2056, does not provide any legal provision for entering into an agreement for the sale and purchase of house and land. It has been established as a legal principle in Nepal Law Reporter 2048, Issue No. 11, page 708, Decision No. 4406, that, pursuant to Section 1 of the Registration Act, registration is mandatory for the transfer of ownership of immovable property, including house and land, in transactions of sale and purchase. The opposing party has failed to state or prove that any such agreement has been duly registered. Pursuant to Section 88 of the Contract Act, 2056, the parties to a contract are required to comply with the prevailing law; therefore, any contractual instrument relating to house and land must be duly registered in accordance with Section 1 under the Chapter of Registration. Further, under No. 6 under the Chapter of Registration, ownership or possession of immovable property cannot be claimed or enforced on the basis of an unregistered instrument; however, the creditor may recover the amount as a debt in the same manner as a promissory note. I have never stated that I would refuse to repay the loan taken from the plaintiff. Since no valid contract was executed, the plaintiff is not entitled to claim compensation as alleged. It has been held as a legal principle in Supreme Court Bulletin Year 4, Issue 17, Part 83, pg. 23 that a contract executed with only one person for house and land held in joint names is not valid. Moreover, no agreement could have been executed with the plaintiff on the basis of an uncertain or indefinite arrangement. As the plaint was filed without depositing the requisite court fee, the complaint is liable to be dismissed. I therefore respectfully pray that the false claims in the complaint be rejected, and that I be allowed to be relieved from the said allegations.

The Lalitpur District Court had set aside an order directing that the original document allegedly dated 2057/05/21, which had been submitted by the plaintiff, be shown and explained to the defendant in accordance with No. 78 of the Court Proceeding, and that a statement thereon be recorded and submitted.

The defendant Chet Sundar Shrestha's deposition before the court is as follows: Upon having the document dated 2057/05/21 read and explained to me, I acknowledge that I had borrowed NPR

300,000/- (Rupees three hundred thousand) from the opponent. At that time, I was not informed that the said document was being presented as a contract. The thumb impression affixed on the said document is mine and I had signed the document considering it to be a debt acknowledgment instrument (*kapali tamasuk*). The said document is forged.

The deposition made by Tula Ratna Bajracharya before the District Court is as follows: The document dated 2057/05/21 is genuine and not a forgery. The defendant had agreed to give his house and, in consideration thereof, a value was determined, for which I paid NPR 300,000/- (Rupees three hundred thousand), and the defendant has acknowledged receiving the same. The said document bears the testimony of the defendant's wife and daughters as witnesses.

The deposition made by Bibek Rimal, witness of the plaintiff before the court is as follows: The plaintiff, Tula Ratna Bajracharya, the defendant Chet Sundar Shrestha and the defendant's wife and daughter had all agreed to the sale and purchase of the land which was effected at a consideration of NPR 1,050,000/- (Rupees one million fifty thousand) per anna.

The deposition made by Karma Maharjan witness of the defendant before the court is as follows: A sum of NPR 300,000/- (Rupees three hundred thousand) was taken as a loan. No contract document was executed.

The deposition made by Shankar Maharjan, witness of the plaintiff before the court is as follows: On the date 2057/05/21, both parties, Tula Ratna Bajracharya and Chet Sundar Shrestha, mutually agreed to the sale and purchase of the house, and a contract was executed accordingly. A sum of NPR 300,000/- (Rupees three hundred thousand) was paid as an advance. I have not studied the document. One copy of the document was taken by Tula Ratna Bajracharya.

The deposition made by Ram Chandra Khatri, witness of the plaintiff before the court is as follows: The document dated 2057/05/21 cannot be considered a forgery. The document was read and signed in the presence of the defendant's wife and daughters. The document was prepared as a contract for the sale and purchase of the house.

The decision of the Lalitpur District Court dated 2061/9/22 (corresponding to 6 January, 2005) reads as follows: In accordance with Section 40(1) of the Contract Act, 2056, as it is not possible to enforce the contractual condition requiring the registration of the house and land, the plaintiff's claim seeking registration of the said property pursuant to the contract cannot be regarded as maintainable under the present circumstances. The contract dated 2057/05/21 contains no provision stipulating that, in the event of a breach, the parties would be liable to pay compensation equivalent to the amount paid as consideration. In the absence of any such contractual obligation, the plaintiff's claim for recovery of NPR 300,000/- (Rupees three hundred thousand) from the defendant as damages under Section 83 of the Contract Act, 2056 cannot be regarded as legally maintainable. As the defendant has acknowledged having borrowed NPR 300,000/- (Rupees three hundred thousand), it is evident that the plaintiff is entitled to recover the said sum along with interest thereon at the rate of 10% from the defendant. However, the plaintiff's claim seeking enforcement of the contractual obligation to effect the registration of the house and land, together with an additional amount of NPR 300,000/- (Rupees three hundred thousand) as damages from the defendant cannot be sustained. In the absence of any evidence to substantiate the allegation of forgery, the defendant's claim that the document is forged is not sustainable.

The appeal petition filed by the plaintiff Tula Ratna Bajracharya before the Appellate Court, Patan is as follows: With respect to a contract executed for the sale and purchase of immovable property, the fundamental issue in this case has been erroneously interpreted as falling outside the scope of the Contract Act, 2056. Chapter 7 of the Contract Act, 2056 contains provisions relating to contracts for the sale of goods. The Act provides a more detailed framework than the earlier Contract Act, 2023. Nowhere, does the Act restrict contracts solely to movable property, nor does it define that immovable property cannot be the subject of a contract. In this context, the District Court has adopted a narrow interpretation, concluding that, under the Contract Act, 2056, it is not possible to enforce the registration of the house and land. However, in Nepal Law Reporter 2049, Issue No. 1, pg. 1, Decision No. 4447, it has been established that only contracts that are capable of being performed can be enforced. With regard to the claim for damages, the plaintiff has sought recovery from the defendant for actual loss suffered as a result of the alleged breach; accordingly, the claim cannot be characterized as speculative or unreal. The contract was executed with the defendant's wife and daughters as witnesses. Therefore, the initial decision is contrary to law, justice, and established judicial precedent. The decision ought to be set aside, and the plaintiff's claim should be allowed to the extent of enforcing the obligations under the contract between the appellant and the defendant, and directing the registration of the house and land in my name.

The decision of the Appellate Court, Patan dated 2063/1/21 (corresponding to 4 May, 2006) is as follows: Section 40 (1) of the Contract Act, 2056 refers to movable property as "goods," and, under this legal provision, it does not appear that a contract can be executed to effect the sale and purchase of immovable property. Accordingly, the plaintiff's claim seeking registration of the house and land pursuant to such a contract cannot be sustained. As the defendant has admitted in writing to the execution of the debt acknowledgment document (*kapali tamasuk*) and an alternative claim has also been filed in the complaint, and considering that the plaintiff has already obtained a judgment from the Lalitpur District Court dated 2061/09/22, directing the defendant to repay the principal along with interest in accordance with law, the said decision appears to be proper and justified. Consequently, the content of the appeal petition is not sustainable.

The petition filed by the plaintiff before this court is as follows: The decision appears to have been based on the erroneous interpretation that contracts or instruments relating to the sale and purchase of immovable property fall outside the scope of the Contract Act, 2056 and that the Act does not apply to transactions involving immovable property. In fact, the Contract Act, 2056 was enacted to provide a broader and more timely framework than the earlier Contract Act. Chapter 4 of the Act contains provisions relating to guarantees and damages, while Chapter 7 governs contracts for the sale of goods. Section 2 (a) of the Contract Act, 2056 (B.S.) defines a "contract" as an agreement enforceable by law concluded between two parties for performing or not performing any work. In this context, movable property alone cannot be regarded as a subject matter suitable for a contract. Section 74 of the Contract Act, 2056 deals with the fulfillment of contractual obligations while Section 89 (2) provides for matters relating to the limitation. It is not permissible to adopt a narrow interpretation holding that immovable property cannot be the subject of a contract. The claim in the present case falls under Sections 2 (a), 74, and 89 (2) of the Contract Act, 2056, and is not a claim under Section 40 (1). With regard to the claim for damages, since the claim for registration of the document could not be granted, the claim for compensation has been made. In assessing such damages, consideration must be given to the expenses incurred in the matter, the value of the effort and labor, the time elapsed, and any increase in cost that would arise if the plaintiff were required to purchase another house and land elsewhere. A decision holding

that the claim for damages is not maintainable is neither consistent with law nor justifiable. In the contract dated 2057/05/21, the defendant's wife and daughters also acted as witnesses and gave their consent. In these circumstances, they are clearly estopped under Section 34 of the Evidence Act, 2031 (B.S.). Moreover, the principle laid down by the Full Bench in Nepal Law Reporter, 2048, Issue 1, Decision No. 4447, concerning the fulfillment of contractual obligations, is fully applicable. Accordingly, having erred in the application of the aforementioned law and precedent, the decision rendered by the Appellate Court, Patan, is liable to be set aside. It is respectfully submitted that the matter pursuant to Section 12 (1) (a) and (b) of the Judicial Administration Act, 2048 be revised.

An order had been set aside by this court on 2063/3/15 (corresponding to 29 June, 2006) which reads as follows: It appears that the contract between the plaintiff and the defendant includes a provision for the transfer of property. Section 2 (a) of the Contract Act, 2056 defines a "contract" as an agreement enforceable by law concluded between two parties for performing or not performing any work. Section 40 (1) of the Act provides that an agreement whereby a seller agrees to deliver a good immediately or in the future by receiving a price paid by the buyer shall be deemed to be a contract for the sale of goods. Further, Section 47 stipulates that each party to a contract is obliged to fulfill their contractual obligations. Since it is necessary to determine whether the term "goods" used in Section 40 (1) refers solely to movable property or also encompasses immovable property, and given that the judgment of the Appellate Court contains errors in the interpretation of Sections 2 (a), 40 (1), and 74 of the Contract Act, 2056, an order for revision is hereby issued pursuant to Section 12 (1) (a) of the Judicial Administration Act, 2048,.

An order had been set aside by this court on 2066/10/17 (corresponding to 31 January, 2010) which reads as follows: As the matter involves complex legal questions arising under Sections 2 (a), 3, and 40 (1) of the Contract Act, 2056, and since the principles enunciated in Nepal Law Magazine 2063, Decision No. 7673, p. 395, and 2065, Decision No. 7915, p. 46, appear to differ and have led to conflicting rulings, the case has been directed to be presented before the Full Bench for uniform interpretation. Accordingly, by order of this Bench today, enforcement of the contractual obligations under Civil Appeal Nos. 106 and 8258 similar to this case has been granted. As the present case raises similar legal questions and issues regarding the interpretation of precedents, it is considered appropriate that it be heard together with the other cases so that all questions may be addressed collectively, a uniform principle may be established, and the arising issues may be resolved. Accordingly, the present case shall be placed before the Full Bench in accordance with Rule 3 (1) (g) of the Supreme Court Regulation, 2049 and removed from the registry of the Division Bench.

An order had been set aside by the Full Bench on 2073/7/25 (corresponding to 10 November, 2016) which reads as follows: It has become necessary to determine as to whether or not advance payment document constitutes a contractual instrument, and as to whether or not the transfer of rights of immovable property can be affected through a contract. In this regard, the precedents published in Nepal Law Reporter, 2063, Decision No. 7673, p. 395, and 2065, Decision No. 7915, p. 46, appears to adopt differing perspectives. Having regard to the interpretation rendered by a Full Bench of five honorable justices as reported in Nepal Law Reporter, 2064, Decision No. 7896, p. 1421, it appears appropriate to resolve the questions arising in the present dispute, to develop a clear and definite perspective, and to ensure uniformity in the interpretation of the law. In view of the significance and complexity of the questions to be determined in this case, it is considered appropriate that the present dispute be heard by a Full Bench comprising more than three honorable

justices. For this purpose, the case pursuant to Rule 3 (2) of the Supreme Court Regulation, 2049, shall be presented before the Rt. Honorable Chief Justice. Additionally, the cases bearing registration numbers 066-DF-0020, 066-DF-0021, 066-DF-0022, and 066-DF-0023 shall also be included for hearing.

On 2073/10/27 (corresponding to 9 February, 2017) an order had been set aside by a Full Bench of this court which reads as follows: Pursuant to the order of this court's Full Bench dated 2073/07/25, it was deemed appropriate that the present dispute be heard by a Full Bench comprising more than three honorable justices and be presented before the Rt. Honorable Chief Justice in accordance with Rule 3 (2) of the Supreme Court Regulation, 2049 for sanction. Subsequently, by order of the Rt. Honorable Chief Justice dated 2073/08/07 (corresponding to 22 November, 2016), the matter was directed to be placed before a Full Bench of more than three justices. However, the case was presented before a Bench comprising only three justices. Therefore, the Bench orders and directs that the case be presented before a Full Bench comprising of more than three justice and that the cases bearing registration numbers 066-DF-0020, 066-DF-0021, 066-DF-0022, and 066-DF-0023, also be submitted for hearing.

An order had been set aside by the Full Bench of this court on 2075/5/14 (corresponding to 30 August, 2018) which reads as follows: Having regard to the necessity of ensuring uniformity in legal interpretation in light of the principle laid down in Nepal Law Reporter, 2064, Issue 11, Decision No. 7896, the present case was initially presented before a bench of five honorable justices. In view of the fact that the said precedent was itself adjudicated by a Bench of five justices, it is deemed appropriate that the present dispute be heard by a Full Bench comprising more than five Justices. Accordingly, for the purpose of achieving consistent interpretation and resolution, the relevant case along with the other case files shall be placed before a Full Bench of more than five Justices.

In the present case, the learned senior advocates Mr. Shambhu Thapa and Mr. Indra Kharel along with learned advocates Mr. Pirambar Silwal, Mr. Purushottam Dhungana, Mr. Phaniraj Silwal and Ms. Snigdha Bhatta on behalf of the appellant/plaintiff Tularatna Vajracharya argued that the provisions of the Contract Act, 2023 and the Contract Act, 2056 are substantially similar. The latter Act, Contract Act, 2056, was enacted by repealing the Contract Act, 2023, and incorporating additional provisions from Chapters 4 to 9. Under the provisions of the Contract Act, 2023, the court in the case of *Tirtharaj Kumari Rana* and duly reported in *Nepal Law Reporter, 2049, Decision No. 4447* laid down the principle that contracts could be entered into in respect of immovable property. The Contract Act, 2056 does not prohibit entering into contracts in respect of houses or land (immovable property). Where the law does not expressly prohibit a subject matter, the parties are at liberty to contract thereon. Furthermore, in cases where a contract is made concerning immovable property, the parties to such a contract are obliged to perform their contractual obligations, and in the event of non-performance, the contract may be enforced as per the provisions of Section 86 of the Contract Act, 2056. The principle laid down in *Nepal Law Reporter, 2064, Decision No. 7996* pertains to cases involving transactional disputes and is therefore not applicable to the facts of the present case. Under the terms of the contract, the defendant has failed to deliver the house and land despite receipt of the payment. The plaintiff has, however, placed the requisite amount in court as security to ensure performance of the contract. As held in *Nepal Law Reporter, 2070, Decision No. 8969*, where the plaintiff has complied with the contractual obligations by placing the payment in deposit, the defendant is likewise obliged to

perform the contract, and in the event of non-performance, the court is empowered to enforce compliance.

It has already been held in *Decision No. 4447* that contracts can be validly executed in respect of immovable property under the Contract Act, 2023. Since the provisions of the Contract Act, 2023 and the Contract Act, 2056 are substantially similar the same principle applies under the Contract Act, 2056. Although the interpretation in *Nepal Law Reporter, 2063, Decision No. 7673* appears to have created some confusion, the principle established in *Decision No. 4447* remains authoritative. The interpretation in *Decision No. 7673* is limited to the facts of that case and cannot be extended to prohibit contracts relating to immovable property, and any such restriction would be inconsistent with the law.

The term “movable property” mentioned in Section 40 of the Contract Act, 2056 is applicable only within the context of Sections 40 to 55 of the same Act. The provisions of Section 88 of the Act, on the other hand, apply to contracts which, under prevailing law, require fulfillment of specific formalities. For instance, Section 88 is applicable to contracts executed under the Foreign Investment and Technology Transfer Act, 2049. Even where a contract exists between two parties under that Act, the provisions of the contract cannot take effect until the requisite procedures including registration are duly completed under the Department of Industry or the Office of the Company Registrar. Similarly, even where a contract is entered into between parties under the Public Contracts and Government Agreements Act, 2020, the parties are required to obtain the necessary lease or official receipt from the relevant authority. Accordingly, the provisions of Section 88 of the Contract Act, 2056 do not apply to immovable property; rather, they are applicable to situations where compliance with procedures under other prevailing laws is required. In *Nepal Law Reporter, 2061, Decision No. 7379*, it has been held that transactions conducted merely through a contract instrument cannot invoke the provisions of the *Muluki Ain* relating to general transactions. Similarly, in *Nepal Law Reporter, 2058, Decision No. 7034*, it was held that where a contract involves a condition for transfer of land, any claim must be made strictly under the Contract Act and cannot be made under the general transaction. Applying these principles to the present case, it is clear that the plaintiff is entitled to seek specific performance. Given that the subject matter of the contract is such that specific performance is applicable, the court cannot adopt an interpretation contrary to this position.

The question of whether specific performance should be granted in any contract must be determined by examining the elements of the contract. In the present case, primary consideration must be given to whether a substitute or alternative plot of land exists for the land specified in the contract, and whether such an alternative is feasible or not. If an identical or equivalent plot of land is available, specific performance may not be appropriate. However, if no such alternative exists and the subject matter is unique, specific performance becomes applicable against the parties to the contract. This principle reflects the established jurisprudential concept underlying the remedy of specific performance.

A contract is a part of the law of obligations and is also regarded as a promise. If the contract does not contravene the law, the parties are obliged to perform it. Were parties are free to make promises through contracts and yet be allowed to disregard them at will, the very foundation of contract law would be undermined, potentially giving rise to disorder in society. Accordingly, the parties are obliged to perform the contract, and if they fail to do so, the court must compel its performance. This constitutes the authority and force of contract law. In the present case, the document in

question constitutes a contractual instrument. The document itself is described as a contract, and although the opposing party has alleged forgery, the court has already held that it is not forged. Having been established as a contract, and given that the document contains a stipulation regarding the transfer of the house and land, there is no ground to take any other view. The house and land specified in the document must be delivered to the plaintiff.

Although the precedents reported in *Nepal Law Reporter*, 2063, *Decision No. 7673*, and 2065, *Decision No. 7915*, adopt differing perspectives, it is observed that in *Decision No. 7673*, the claim was for recovery of compensation under the contract, whereas in *Decision No. 7915*, the claim related to receiving the advance payment in accordance with the contract. In the latter case, since the claimant did not deposit the required security, the court held that the claimant had failed to fulfill their contractual obligation. In the present case my party has lodged the claim in court after depositing the amount payable to the defendant as security. Therefore, the factual circumstances of the present case differ from those in the aforementioned cases.

An “Agreement for Sale” and a “Sale Deed” are distinct instruments. The document in the present case constitutes an Agreement for Sale. There is no mandatory requirement to register such an agreement. By its very nature and legal principle, the obligations under an Agreement for Sale are typically performed at a future date, and its execution does not take effect immediately like a Sale Deed. Where a party obligated to perform a contract fails to do so, thereby committing a breach, the courts cannot interpret the law in a manner that benefits the breaching party. Under the principle of unjust enrichment, a party in breach cannot be allowed to gain from its own default. In the present case, if Specific Performance is not granted, the party in breach would unjustly benefit, which is impermissible even from a theoretical standpoint.

Accordingly, with regard to the doctrinal principles governing contracts, prevailing international practice, the precedents laid down by this Supreme Court, and the legal provisions of the Contract Act, 2056, the decision rendered by the Appellate Court, Patan, in the present matter is found to be erroneous. The said decision therefore should be set aside, and it is prayed that the contract be enforced in its entirety and the rights of the petitioner be duly protected. Likewise, respective case briefs have also been submitted jointly.

Similarly, on behalf of the respondent, Tara Shrestha Paatravansh, the learned senior advocates Mr. Susil Pant, Mr. Mukti Pradhan, and Mr. Chandrakant Gyawali, along with learned advocates Mr. Laxmi Aryal and Mr. Liladhar Upadhyay, argued that Section 2 (a) of both the Contract Act, 2023 and the Contract Act, 2056, defines the term “contract.” According to Section 2 (a) of the Contract Act, 2023, any consent given between two or more parties to perform or not to perform any work is regarded as a “contract.” Similarly, under Section 2 (a) of the Contract Act, 2056, a “contract” is defined as an agreement enforceable by law concluded between two or more parties for performing or not performing any work. The Contract Act, 2056, repealed the Contract Act, 2023, and has been in force since 2057/03/14. Considering that the document between the appellant and the respondent was executed on 2057/05/21, it is clear that the said document must be examined, interpreted, and analyzed in accordance with the Contract Act, 2056. Pursuant to Section 2 (a) of the Contract Act, 2056, any agreement that is capable of being enforced by law qualifies as a contract. However, the document executed on 2057/05/21 between the appellant and our party relates to a house and land that was not, at the time of execution, in the name of our party, Chet Sundar Shrestha. The document merely stipulates that the said property may be transferred to the name of our party in the future, without specifying whether, when, or to what extent it would

be transferred. At the time of execution, the enforceability and certainty of performance of the document were therefore unclear. Consequently, in view of Section 2 (a) of the Contract Act, 2056, the document cannot be regarded as a valid contract. Section 2(h) of the Indian Contract Act, 1872 similarly defines a contract as an agreement that is capable of being enforced by law. An agreement that cannot be enforced in accordance with law cannot be recognized as a valid contract. Moreover, an advance payment document functions merely as a promissory note and, as held by this court in *Nepal Law Reporter, 2064, Decisions Nos. 7896 and 7874*, as well as *2052, Decision No. 6122*, entitles the holder only to recovery of the amount paid, and no other remedy is available thereunder. In view of these principles, the present case does not warrant the grant of specific performance.

There are two distinct principles in contract law regarding agreements relating to immovable property: an agreement to sell and a sale deed. An agreement to sell constitutes a promissory instrument, whereas a sale deed constitutes the actual deed of transfer of ownership. An agreement to sell must be capable of being enforced in accordance with law. However, an analysis of the circumstances of the present case, particularly the instrument executed between the appellant and the respondent, indicates that the said document does not possess the requisite characteristics to be enforceable as a contract. While allowing a review of the appeal petition, reference to Section 40 (1) of the Contract Act, 2056, concerning the acceptance to transfer of goods in the future and Chapter 7 regarding the contracts for sale of goods was accepted. This provision as such is not directly relevant to the circumstances of the present case. As has already been analyzed in *Nepal Law Reporter 2049, Decision No. 4447* an **Agreement to Sale** and a **Sale Deed** are distinct instruments; an Agreement to Sale cannot be treated or construed as a Sale Deed. Granting Specific Performance requires a separate Act. In countries such as the United Kingdom and India, separate statutes exist governing the enforcement of agreements for the sale of immovable property; however, no such distinct legislation has yet been enacted in Nepal. In the absence of a specific law on Specific Performance, where a party breaches a contract, the aggrieved party is generally entitled only to claim damages. In the present case, the plaintiff has instituted the suit while also claiming damages along with the main relief. Given that an alternative remedy of compensation is available, there is no basis to grant Specific Performance.

While interpreting a statute, the principle of **organic interpretation** must be duly observed. Under rule of organic interpretation, the interpreter is required to consider the statute in its entirety and in its broader context. Section 40 of the Contract Act, 2056 defines "goods" as movable property; it does not expressly provide for contracts relating to immovable property. Therefore, even if a contract concerning immovable property is executed, it would not be appropriate for the court to order its enforcement under this provision. In *Nepal Law Reporter, 2062, Decision No. 7480*, it has been held that while interpreting a statute, if an interpreter assumes the existence of a word or provision not actually found in the law, such interpretation amounts to law-making rather than interpretation; and that the Court has no authority to amend or legislate. Similarly, in *Nepal Law Reporter, 2073, Decision No. 9538*, it was reiterated that the court has no power to add to or subtract from a statute. Accordingly, immovable property cannot be regarded as falling within the scope of the Contract Act in this context. Since immovable property does not fall within the scope of the Contract Act, any purported contract concerning such property cannot be regarded as valid. Consequently, the appellant cannot claim an absolute right under such a contract, and the claim effectively seeks double or alternative remedies.

Accordingly, considering international practice, the precedents laid down by this Supreme Court, and the legal provisions of the Contract Act, 2056, it appears that the claim for registration of the house and land as sought in the present case cannot be granted. The appeal court's decision denying the plaintiff Specific Performance is, therefore, proper and should be upheld. It is further noted that along with the arguments deliberation briefs were also presented.

Upon hearing the arguments presented on behalf of the appellant and the respondent, and after studying the submitted case briefs and records, it appears that under the contract dated 2057/05/21, the house and land to be transferred as per the agreement were not delivered. The plaintiff accordingly filed the present case seeking either delivery of the said property or recovery of the advance amount paid along with compensation. The trial court, in its judgment, held that the plaintiff was entitled to recover the advance amount of NPR 300,000 (three hundred thousand rupees) along with interest at the rate of 10% from the defendant, and the Appellate Court in Patan upheld the same. The plaintiff has now reiterated the claim for specific performance, i.e., to have the property delivered as per the contract. The matter involves interpretative questions regarding Section 40 (1) of the Contract Act, 2056, as well as the need to ensure uniformity with the precedents laid down by this court. The present case has been duly presented before this Bench, and the hearing for delivering the judgment has been scheduled today. Accordingly, the primary questions for consideration, analysis, and evaluation in this case are as follows:

1. What constitutes a contract, and what subject matters can a contracted?
 2. How can a contract be entered and what procedures must be followed when entering into a contract concerning immovable property?
 3. In practice, can an advance payment document effectuate the transfer of rights in immovable property, and can such a contract be duly enforced?
 4. In the present case, is the appellant entitled to have the contract specifically performed as agreed, or not?
 5. In the present case, is the appellant's appeal sustainable or not? Further, is the judgment of the Appellate Court, Patan, dated 2063/01/21, sustainable?
2. What constitutes a contract, and what subject matters can a contracted? Upon consideration of this question, it is evident that when two or more parties agree and mutually consent to perform or refrain from performing any act, such an agreement is recognized as a contract. Accordingly, from a legal doctrinal perspective, a contract is a form of legally enforceable agreement. A contract is legally recognized, enforceable, and based on the free consent of the parties. It creates rights and obligations for the parties involved, and the law presumes that the parties will act in good faith to fulfill these obligations. Moreover, if any party acts contrary to this understanding and fails or refuses to perform their contractual duties, the aggrieved party is entitled to seek legal remedies from the competent authority. In human society various types of agreements may arise between individuals. However, not all such agreements are equally enforceable or protected by law in every circumstance. Agreements that cannot be legally enforced cannot be classified or treated in the same manner as enforceable contracts. For this reason, the creation and execution of any contract must occur strictly within the framework of the law. On the basis of these principles and legal doctrines relating to contracts, it is

established that while all contracts are agreements, however, not all agreements qualify as contracts.

3. The genesis and development of our contract law is rooted in the ancient moral and religious principle that one must perform what one promises or act faithfully in accordance with one's undertaking. Initially, contracts were sought to be regulated and guided through the provisions of the *Muluki Ain*. Subsequently, the Contract Act, 2023, having defined a contract as the consent or agreement between two or more parties to perform or not to perform any act, laid the foundation for the modern and doctrinal understanding of contracts within the Nepalese legal system. Continuing and refining this doctrinal conception, the Contract Act, 2056, also defines a contract. Section 2 a) of the Contract Act, 2056, provides that **“a contract means an agreement enforceable by law concluded between two or more parties for performing or not performing any work.”** This definition is legally clearer and more precise than that contained in the Contract Act, 2023. The Indian Contract Act, 1872, defines a contract as “an agreement enforceable by law.” Similarly, Chapter 1, Section 1 of the American *Restatement of the Law of Contracts* defines a contract as “a promise or a set of promises for the breach of which the law provides a remedy, or the performance of which the law in some way recognizes as a duty.” Under this definition in American law, a contract is regarded as a promise or agreement that gives rise to a legal remedy or is recognized by law as a binding obligation.
4. From the perspective of the statutory definitions, doctrinal principles, and the theoretical foundation and concept of contract, there is no dispute that an agreement between parties, made by mutual consent to perform or not to perform any act, which creates rights and obligations enforceable by law and for the breach of which a legal remedy is available, constitutes a contract. Accordingly, from the perspective of the stated definitions and doctrinal principles, the scope of a contract is wide; that is, persons or parties competent to contract may, on the basis of mutual consent, enter into a contract in any field or regarding any subject matter that is capable of being lawfully executed or enforceable under the law. However, in the event of a breach, it becomes essential that the contract be based on subject matter capable of being enforced. Accordingly, the subject matter of a contract is never absolute but is always relative to the law and the circumstances.
5. A review of the provisions relating to contracts under our law shows that fundamental aspects such as the definition of a contract, its essential elements, and the qualifications required to enter into a contract are similarly provided under both the Contract Act, 2023 and the Contract Act, 2056. Nevertheless, a comparative study of the structural framework of the two Acts reveals significant differences in their overall design and approach. Primarily, the Contract Act, 2056 appears to have made broader and more comprehensive provisions than the Contract Act, 2023 by expressly elaborating the subject-matter and sectoral scope of contracts. Chapter 4 of the Contract Act, 2056 deals with contracts relating to guarantee, indemnity, and bailment; Chapter 5 addresses contracts relating to deposit; Chapter 6 governs contracts relating to pledge and security; Chapter 7 concerns contracts for the sale of goods; Chapter 8 regulates contracts of agency; and Chapter 9 provides for contracts relating to the carriage of goods. Thus, the Act adopts a systematic and directive legislative approach by regulating contracts through distinct Chapters based on their subject matter and nature. Among these provisions, the contracts relating to pledge or security provided under Chapter 6 appear to be applicable to both movable and immovable property. However, under Chapter 7, which deals with contracts for the sale of goods, Section 40 provides that **“where a seller, agrees to hand over any goods to the buyer**

immediately or in the future by receiving a price shall be deemed to be a contract relating to the sale of goods.” Further, the Explanation to the same section expressly stipulates that *“for the purposes of this Chapter, the term ‘goods’ means any type of movable or immovable property except current used currency, security or actionable claim”*. From this provision, it is evident that immovable property has been expressly excluded from the ambit of contracts for the sale of goods.

6. When viewed in isolation, the definition of “contract” under Section 2 (a) of the Contract Act, 2056 may appear to suggest that the subject matter of a contract is of an unlimited nature. However, interpreting the scope or subject matter of a contract as unlimited merely by relying on a part of that definition, while disregarding the overall scheme and other substantive provisions of the Act, would not be consistent with the settled principles of statutory interpretation. It is a well-established rule that, while construing the meaning of any word, phrase, or provision of a statute, due regard must be given to the structure, object, and legislative intent of the Act as a whole. In certain circumstances, interpreting a word or phrase of a statute in an absolute or literal manner may defeat the overall intent and object of the Act. Therefore, while construing the meaning or scope of any word, phrase, or provision of a statute, such interpretation must be made in light of the purpose of the Act as a whole, so as to ensure a harmonious construction whereby the provisions complement, rather than contradict, one another. In this sense, the definition of “contract” under Section 2 (a) of the Contract Act, 2056 cannot be construed in an absolute manner so as to imply that a contract may be entered into on any subject whatsoever and that such contract would invariably be enforceable by law. This is because Chapters 4 to 9 of the Contract Act, 2056 specifically delineates and regulates contracts relating to particular subject matters, thereby defining the permissible scope of contractual relations. A careful reading of these Chapters reveals that no provision has been made therein governing contracts relating to the transfer of immovable property. Section 88 of the same Act provides that in case prevailing laws prescribe 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. Therefore, while adjudicating contractual disputes arising from contracts concluded after the commencement of the Contract Act, 2056, it is incumbent upon the court to take due notice of the aforesaid provisions of the Act and to interpret contracts in a harmonious manner consistent with the overall object, structure, and legislative intent of the Contract Act, 2056.
7. Turning to the second question, namely, how can a contract be entered and what procedures must be followed when entering into a contract concerning immovable property? It is observed that the Contract Act does not prescribe any explicit procedural mechanism governing the manner in which contracts are to be executed. In principle, the parties to a contract enjoy autonomy in determining the form, modality, and subject matter of a contract. However, such autonomy is not an absolute rule of contract; rather, it operates only as a general principle, subject to limitations imposed by law. Depending upon the nature and subject matter of a contract, it may be necessary to adopt either a simple or a formal procedure, or in certain cases, both. As a general rule, parties may enter into an agreement without following any specific statutory procedure, and such an agreement may attain legal recognition as a contract. This constitutes the ordinary or general mode of formation of a contract. However contracts cannot be validly concluded through this general procedure in all matters. In certain subject areas, an agreement entered into between the parties attains the status of a contract only after additional

formal and statutory procedures are duly complied with. Under such circumstances, mere consensus between the parties is not sufficient; rather, after the formation of a basic agreement, the contract must be perfected by following the further legal processes prescribed by the relevant legislation in order to acquire legal recognition and enforceability.

8. In practice, the procedure to be followed whether general or formal depends on the subject matter of the contract chosen by the parties. Section 88 of the Contract Act, 2056, under the heading Prevailing Law to be Observed provides that “*in case prevailing law prescribes that any specific contract, or that any specific procedures 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*”. The requirement for a formal procedure to execute a contract, as provided under Section 88 of the Contract Act, 2056, was not present in the Contract Act, 2023. In the absence of such a legal provision, under the Contract Act, 2023, the parties intending to enter into a contract could do so based on mutual agreement, and such an agreement would be recognized as a valid contract. That is, under the Contract Act, 2023, a contract could be executed following the general procedural rules, and a contract concluded in accordance with such general rules would be considered valid and enforceable. Further, under this Act, in the event that a contract is breached by any party and cannot be performed, the other party to the contract is entitled to submit a petition or complaint to the court, and the court is empowered to adjudicate and determine the issues arising therefrom. On the basis of the legal provisions of the Contract Act, 2023, in the case registered between the appellant, Tirtharaj Kumari Rana, and the respondent, Binod Shankar Shrestha, concerning the entitlement to pass a deed in accordance with the contract, the Full Bench of seven judges of this Court, on 2046/12/2 (corresponding to 15 March, 1990) held that, since the contract contained a stipulation to sell and transfer the immovable property at a future date, the deed in question did not constitute a Sale Deed but was, in fact, an Agreement to Sale. In Nepal Law Reporter 2049, Decision No. 4447, it has been held that there is no mandatory requirement to register such a deed. Accordingly, a document executed for the purpose of transferring land, commonly known as a advance payment document (*Baina*), can be regarded as a contractual instrument without any impediment to the transfer of immovable property under such document or contract.
9. Prior to the enactment of the Contract Act, 2056, the principle established in the case of Tirtha Raj Kumari Rana was based on contracts executed under the legal framework of the Contract Act, 2023, in relation to immovable property. However, with the repeal of the Contract Act, 2023 and the subsequent enactment of the Contract Act, 2056, Section 88 provides that “*in cases 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.*” Under the *Muluki Ain*, No. 1 of the Chapter of Registration, it is provided that “in the case of immovable property, a deed in which ownership is transferred, divided, or consolidated, as well as other deeds relating to immovable property as specified hereunder, must be registered.” Subsection no.1 specifically mentions “**a deed by which ownership is sold or otherwise relinquished.**”
10. The provisions under Section 88 of the Contract Act, 2056 and Section 1 under the Chapter of Registration of the *Muluki Ain* concerning registration are interrelated. A close analysis of this interrelationship indicates that, in the context of immovable property, a contractual agreement executed by the parties through mutual consent under the general procedure attains

completeness and becomes legally enforceable as a contract only after it is duly registered with the relevant government office. Thus, regarding the procedure for executing contracts related to immovable property, the provisions under the Contract Act, 2023 and the Contract Act, 2056 are fundamentally different in nature. Consequently, after the enactment of the Contract Act, 2056, even if the parties to a contract concerning immovable property execute a contractual instrument based on mutual consent, such an instrument cannot be considered a duly completed and legally enforceable contract unless it is registered in accordance with the law. Once the parties to a contract intend to enter into an agreement regarding the transfer of immovable property and have mutually executed a contractual instrument, the obligation to complete the procedures prescribed by law and thereby render the contractual instrument legally valid also rests upon the parties themselves. If the parties fail to complete the legal formalities, including registration of the contractual instrument as required by law, a court cannot, merely on the basis of such instrument, direct its registration. Such a course would be inconsistent with the fundamental principle of contract law, namely that only contracts enforceable under law are capable of being enforced. In the context of the Contract Act, 2056, where the subject matter concerns the transfer of rights in immovable property, the parties desiring to enter into a contract must strictly comply with the legal procedures and conditions prescribed by the Act. Only when such legal formalities are meticulously observed and the contractual instrument is thereby perfected does the instrument acquire the status of a valid contract and become enforceable under law.

11. In interpreting and analyzing a contractual agreement between the parties concerning the transfer of rights in immovable property under the prevailing Contract Act, 2056, primary regard must be given to the spirit and intent of Section 88 of the Act. Moreover, only when the precedents and principles previously laid down also reflect and uphold the purpose of Section 88 can continuity in legal reasoning be maintained. Following the repeal of the Contract Act, 2023, and the enactment and enforcement of the new Contract Act, 2056, which provides a broader and distinct legal framework compared to the 2023 Act for giving validity to contracts concerning the transfer of rights in immovable property, the interpretation of any contract relating to such transfer under the Contract Act, 2056 must be carried out in a manner consistent with the Act's overall provisions, objectives, and purpose. The contractual instrument must therefore be interpreted in light of the legislative intent and spirit of the 2056 Act. After the enactment of the new Act in 2056, if a contractual instrument concerning the transfer of rights in immovable property is interpreted without adhering to the provisions of the new Act, such interpretation would, in effect, encroach upon the legislature's exclusive authority to make law, contrary to the principle of separation of powers, which is not permitted under our constitutional framework. If the prevailing legal framework fails to meet the needs of society, or produces adverse effects within society, the responsibility and authority to amend such law, or to repeal it and enact a new law, is vested solely in the legislature. In this context, a principle has emerged that a law enacted by the legislature can overrule prior judicial precedents. In the present situation, with the Contract Act, 2056 having been enacted to replace and repeal the Contract Act, 2023, the question of whether a contract relating to the transfer of immovable property that has not been registered is enforceable must be resolved by a harmonious interpretation of Section 88 of the Contract Act, 2056, along with the relevant provisions of the *Muluki Ain* and No. 1 under the Chapter of Registration. In the present context, it is not practical to interpret a single law in a mechanical manner. In such cases, it becomes necessary to adopt a creative interpretation that takes into account the objectives of

all relevant laws, so as to achieve the purpose of the statute in a coherent manner. Accordingly, in this context, an agreement relating to the transfer of immovable property (Agreement to Sale) can acquire legal validity and be enforceable only if the procedures prescribed under No. 1 under the Chapter of Registration of the *Muluki Ain*, and Section 88 of the Contract Act, 2056 are duly followed and completed.

12. Considering the question of whether, in practice, a customary advance payment document (*baina-batta*) can affect the transfer of rights in immovable property, and whether such an agreement can be enforced as is, it appears from the foregoing cases, the interpretations therein, and the legal provisions of Section 88 of the Contract Act, 2056 and No. 1 under the Chapter of Registration of the *Muluki Ain*, that a contract concerning immovable property attains legal completeness only after the prescribed procedures are duly followed. In this context, an agreement made solely on the basis of mutual consent between the parties, without registration, cannot be regarded as a valid contract for the transfer of immovable property. Such an agreement must instead be treated as a simple agreement between the parties. Even on the basis of the universally accepted principle that **“all contracts are agreements, but all agreements are not contracts,”** a document executed without fulfilling the conditions and procedures prescribed by law, and without completing the legally mandated formalities, cannot be regarded as a legally effective instrument (contract) for the purpose of transferring immovable property. Therefore, in view of the aforementioned legal and theoretical foundations, an agreement executed for the purpose of transferring the right to immovable property (Agreement to Sale) cannot effectuate such transfer in the absence of registration. Likewise, the specific performance of such an agreement cannot be enforced.
13. Considering the question of whether the appellant can enforce specific performance of the contract in the present case, it appears that between the plaintiff/appellant and the defendant/respondent, an agreement to sell (Agreement to Sale) was executed on 2057/5/21 regarding 0-3-0 portion of land and the house thereon, which is part of 0-6-0 land situated in Lalitpur District, Lalitpur Sub-Metropolitan City, former Ward No. 20 (b), plot no. 16, currently registered jointly in the name of the defendant and his brother, Krishna Dev Shrestha. Under the agreement, the defendant upon receiving Rs. 3,00,000 (three hundred thousand rupees) as advance agreed to transfer the ownership of the specified portion of land and house to the appellant for a total consideration of Rs. 31,50,000 (three million one hundred and fifty thousand rupees). However, the said agreement has not been registered with the competent government office in accordance with Section 88 of the Contract Act, 2056, and the provisions of under No. 1 under the Chapter of Registration Act of the *Muluki Ain*. On the basis of Section 88 of the Contract Act, 2056, which provides that “if the law requires registration in any government office for a particular type of contract, such contract shall not be valid without completing that formality,” and considering the analysis in the aforementioned cases, it is observed that the contractual writing executed between the appellant and the respondent on 2057/5/21, has not been registered. Consequently, the said agreement, under which earnest money (*baina*) was received for the purpose of transfer and sale of the immovable property, does not acquire legal validity. Accordingly, since the contractual formalities required by law were not completed, the contract did not attain full legal effect. In view of this, it cannot be said that the agreement dated 2057/5/21 is capable of being enforced in its original terms. Moreover, it would be neither reasonable nor just for this Court to direct the execution or registration of a deed purporting to transfer rights in immovable property on

the basis of a premature instrument. Where the formalities prescribed by law have not been duly completed, or where registration as required under law in the relevant government office has not been effected, no right in immovable property can be extinguished in one person and vested in another solely on the basis of such an incomplete (premature) instrument dated 2057/5/21.

14. Upon consideration as to whether or not the appellant's appeal is sustainable and the judgment of Appellate Court, Patan dated 2063/1/21 is sustainable, it is observed as follows: The appellant sought a direction for the specific performance of the agreement dated 2057/5/21, praying that the immovable property registered in the name of the respondent be transferred and registered in their name, or, in the alternative, that the respondent be directed to pay Rs. 3,00,000 received as earnest money and other related amounts totaling Rs. 6,00,000 as damages under Section 83 of the Contract Act, 2056. However, in light of the foregoing analysis, it is evident that the agreement dated 2057/5/21 between the parties could not attain legal validity, as the formalities required under law for the transfer of immovable property were not completed. Consequently, specific performance of such an agreement could not be legally enforced, nor could the appellant claim compensation under the same agreement. Accordingly, the appellant's prayer for specific performance of the agreement dated 2057/5/21 and for recovery of damages from the respondent under Section 83 of the Contract Act, 2056 does not appear to be legally sustainable or justified.
15. Considering that the respondent/defendant, both at the trial court and before this court, has admitted receiving Rs. 300,000 (three hundred thousand rupees) as earnest money from the appellant/plaintiff on 2057/5/21, and that the appellant/plaintiff has also claimed recovery of the said amount along with other related sums, it is apparent that a dispute arose from the transaction dated 2057/5/21. Judicially evaluating the peculiar circumstance that this dispute has remained pending before the courts for nearly three decades without an appropriate resolution, it would not be just or equitable to conclude that the appellant/plaintiff is not entitled to recover the amount transacted between the parties. Accordingly, in relation to the transaction between the appellant/plaintiff and the respondent/defendant dated 2057.5.21, the earnest money of Rs. 300,000 (three hundred thousand rupees) along with interest at the statutory rate of 10% thereon, calculated in accordance with law, is recoverable. Provided that the total of the principal and interest exceeds twice the amount of the principal, the appellant/plaintiff shall be entitled to recover only up to twice the principal amount from the respondent/defendant.
16. Accordingly, having regard to the foregoing analysis, interpretation, and discussion of the various precedents, it is evident that in the present case the appellant cannot compel the respondent to execute the agreement dated 2057/5/21 for registration of the land in the appellant's name. Likewise, the appellant is not entitled to claim compensation under the said agreement. Accordingly, in the present case, the appellant's claim for specific performance of the agreement and for compensation cannot be upheld. The appellant is, however, entitled to recover from the respondent the earnest money of NPR 300,000 (three hundred thousand rupees), together with interest thereon as provided by law, up to a maximum of double the principal amount, and is also entitled to the return of the deposit of NPR 28,50,000 (two million eight hundred and fifty thousand) deposited at the time of filing the initial suit. In view of the above, the judgment dated 2063/1/21 of the Appellate Court, Patan, confirming the decision of the Lalitpur District Court dated 2061/9/22, is hereby affirmed. Consequently, the appellant's appeal is dismissed.

17. In the present case, in view of the analyses, reasoning, and determinations made in the aforementioned cases, it is established as a legal principle that an agreement relating to immovable property cannot acquire validity or be enforceable unless registered in accordance with Section 88 of the Contract Act, 2056, and No.1 under the Chapter of Registration of the *Muluki Ain*. Consequently, any prior principles or precedents (including Nepal Law Reporter 2065, Decision No. 7915) and rulings to the effect that rights in immovable property could be transferred on the basis of an unregistered earnest-money document (*Bainabatta*) are hereby rendered inapplicable, overruled, and ineffective from this date, as they are inconsistent with the statutory requirements under the Contract Act, 2056, Section 88, and No. 1 under the Chapter of Registration of the *Muluki Ain*.
18. Furthermore, it is noted that the decisions in *Nepal Law Reporter 2063, Decision No. 7673*, and *Nepal Law Reporter 2065, Decision No. 7915* had expressed divergent reasoning, resulting in a split of rulings. The need for uniformity in interpretation was emphasized by this court's Full Bench in its order dated 2066/10/17. In the present case, based on the analyses, reasoning, and determinations in the aforementioned matters, it is established as a principle that an agreement relating to the transfer of rights in immovable property cannot acquire legal validity or be enforceable if it has not been registered in accordance with Section 88 of the Contract Act, 2056, and No. 1 under the Chapter of Registration of the *Muluki Ain*. Accordingly, all prior precedents inconsistent with this principle, including those laid down in *Nepal Law Reporter 2063, Decision No. 7673*, and *Nepal Law Reporter 2065, Decision No. 7915*, are overruled and rendered inapplicable. Therefore, there is no necessity to issue additional interpretations or analyses to reconcile the principles in *Nepal Law Reporter 2063, Decision No. 7673*, and *Nepal Law Reporter 2065, Decision No. 7915*, as uniformity is already achieved through the present reasoning. It is hereby ordered to do as per the particulars mentioned hereunder.

Particulars

As held in the foregoing determination, the appellant/plaintiff is entitled to recover from the respondent/defendant the amount of NPR 300,000 (three hundred thousand rupees) received as earnest money (*Baina*), together with interest thereon as prescribed by law, up to a maximum of double the principal amount. Accordingly, the lower court is directed to ensure that, upon application filed by the appellant/plaintiff in accordance with law, the said amount along with interest is paid to the appellant/plaintiff in accordance with applicable legal provisions.

Further, the appellant/plaintiff is entitled to the return of the security deposit amounting to NPR 2,850,000 (two million eight hundred and fifty thousand rupees) initially deposited at the time of filing the plaint in the lower court. The lower court is directed to ensure that, upon the appellant/plaintiff's request in accordance with law, the said security deposit is returned to the appellant/plaintiff in accordance with applicable legal provisions.

It is hereby directed to upload the decision in the electronic system and remove the case from the case registry and to submit the case file accordingly.

Concurring with the above Opinion

Chief Justice Cholendra Shamsher J.B.R.

Justice Deepak Kumar Karki

Justice Meera Khadka

Justice Prakash Man Singh Raut

Justice Tej Bahadur K.C.

Opinion of Honorable Justice Ishwor Prasad Khatiwada

In the present matter, regarding the determination of the relief to be granted, as I do not concur with the opinion of the Honorable Chief Justice and the majority of the Honorable Justices as outlined above, I hereby state a different opinion:

First Question for Determination: Whether the definition of “contract” under Section 2 (a) of the Contract Act, 2056 encompasses the transfer of rights in immovable property; and whether it is legally permissible to enter into a contract for the transfer of rights in immovable property. This question requires primary consideration and determination. Section 2 (a) of the Contract Act, 2056 defines a “contract” as an “agreement enforceable by law concluded between two or more parties for performing or not performing any work”. It is noted that Subsection (1) of Section 504 of the National Civil Code, 2074 has continued to uphold the same definition. Examining the definition and concept of a contract in our own legal practice¹ as well as in other jurisdictions², it appears that, in essence, there is no significant difference or divergence. The first phrase of the definition in the Contract Act, 2056 and the National Civil Code, 2074, which refers to an agreement “between two or more parties to perform or not to perform any act act,” is self-explanatory and leaves no room for doubt or ambiguity. However, the second phrase, which describes a contract as “an agreement enforceable by law,” requires further analysis from a jurisprudential perspective. The phrase “an agreement enforceable by law” contained in Section 2 (a) of the Contract Act, 2056 is both significant and purposive. It delineates the essential elements or fundamental conditions required for a valid contract. Furthermore, the said phrase provides guidance regarding the scope of a contract. Any agreement between parties that cannot be enforced under law cannot be regarded as a valid contract. In this context, it becomes necessary to distinguish between contracts that are enforceable by law and those that are not. The Contract Act, 2056 does not appear to contain any explicit provision specifying which agreements can or cannot be regarded as “agreements enforceable by law.” However, the National Civil Code, 2074, which was enacted to replace even the Contract Act, 2056, contains clear provisions in Sections 505 and 519 regarding contracts that

¹ Under No. 37 under the Chapter of Transaction of the *Muluki Ain*, it was provided that, in respect of any transaction not otherwise regulated in the other sections of that Chapter, if there exists a written acknowledgment or agreement and the contents of such writing are not contrary to law, the transaction shall be governed by the terms of that writing. Subsequently, Section 2 (a) of the Contract Act, 2023, repealed this provision and defined a “contract” as an agreement between two or more parties to perform or not to perform any work. Later enactments, namely the Contract Act, 2056 and the National Civil Code, 2074, further clarified the definition by expressly adding the phrase “capable of being enforced under law,” thereby providing conceptual clarity to the notion of a contract.

² In the Indian context, the Contract Act, 1872 defines a contract as “an agreement enforceable by law.” In the United States, a contract has been described as “a promise or a set of promises for the breach of which the law gives a remedy or the performance of which the law in some way recognizes as a duty.” Under English law, a contract is defined as “a legally binding promise (written or oral) by one party to fulfill an obligation to another party in return for consideration.” Similarly, *Black’s Law Dictionary* defines a contract as “an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.”

are enforceable by law and those that are not. By considering these provisions as well, a logical and reasoned conclusion can be drawn on the present issue³.

Section 505 of the National Civil Code, 2074 provides that 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,
- (d) Lawful obligation.

As a general principle, unless a later-enacted law expressly provides otherwise, the validity of a contract must be tested according to the law in force at the time the contractual obligation was created. However, in relation to remedies available for breach of the contract, the provisions of the new law shall apply. This principle has been elaborated by this court in the case of *Summit Hotel Pvt. Ltd. v. Sharda Prasai* (068-CI-0344, Decision dated 2069/05/25). In light of this interpretation, it is apparent that the provisions of the National Civil Code, 2074 can be referred to in order to determine questions relating to remedies for contractual disputes. While the Contract Act, 2056 does not explicitly contain provisions corresponding to Sections 505 and 519 of the Civil Code, the underlying concepts embodied in those sections were implicitly present within that Act.

Having regard to the aforementioned provisions, it follows that a contract relating to the transfer of rights in immovable property in the future shall be deemed to constitute a contract capable of being enforced by law if: the party entering into the contract has manifested consent to bind themselves; the party possesses the legal capacity or competence to contract; the contract pertains to a specified subject matter capable of creating an obligation⁴; and the obligation so created is lawful. Viewed in this light, a contract executed in the form of an agreement that includes a stipulation for the future transfer of rights in immovable property shall be deemed a “contract capable of being enforced by law” if the conditions or circumstances as outlined above are present.

Section 519 of the National Civil Code, 2074, provides the following provisions with respect to “unenforceable contracts:

- (1) A contract that is not enforceable by the court shall be regarded as an unenforceable contract.
- (2) 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:

³ As a general rule, unless a subsequent law explicitly provides otherwise, the validity of a disputed contract must be tested according to the law in force at the time the contractual obligation was created. However, in relation to remedies available for breach of contract, the provisions of the new law apply. This principle was expounded by this court in the case of *Summit Hotel Pvt. Ltd. v. Sharda Prasai* (068-CI-0344, judgment dated 2069/05/25). In light of this interpretation, it is evident that, by reference to the provisions of the National Civil Procedure Code, 2074, questions relating to remedies for the disputed contract can be determined. Although the Contract Act, 2056 does not explicitly incorporate provisions analogous to Sections 505 and 519 of the Civil Code, the concepts underlying those provisions are implicitly embedded in the Act.

⁴ The term “specified subject” encompasses obligations arising under a contract, including, but not limited to, immovable property such as land and buildings, as well as other matters capable of creating contractual obligations.

- (a) A contract required to be made in written form according to law is not 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 person.

Section 13 of the Contract Act, 2056, provides for void contracts, while Section 14 deals with voidable contracts. A void contract is invalid from the outset, whereas a voidable contract becomes invalid only when the aggrieved party elects to avoid or rescind it. Contracts of this nature may be regarded as “agreements incapable of being enforced by law.” Additionally, where any agreement is required by law to fulfill certain conditions in order to be recognized as a valid contract, a contract executed without complying with such conditions cannot be enforced under the law. For instance, under Section 3 of the Foreign Investment and Technology Transfer Act, 2049, any foreign individual or entity intending to invest in Nepal or provide technical services to a Nepali company must obtain prior approval from the Department of Industry and register the contract with that Department. Failure to comply with these statutory requirements renders the contract unenforceable. A contract executed by a foreigner without fulfilling the aforementioned statutory conditions cannot be enforced under the laws of Nepal. Similarly, in the context of government contracting or public procurement, specific procedures are prescribed for entering into contracts or agreements, and such contracts are required to be in writing. Any contract executed in a manner contrary to these legally mandated conditions cannot be given legal effect or enforced.

The parties to the contract are independent in determining the subject matter of a contract. The ultimate authority to stipulate the terms of the contract also rests with the parties themselves. The concept of Freedom of Contract is recognized⁵ by Section 4 of the Contract Act, 2056 which states that ***“the parties to a contract, subject to this Act shall be free to choose the form and content of contract and to determine consideration and its quantum, the terms and conditions of the contract and the nature of the remedy in the event of its violation as well as to determine the measures for resolving disputes under the contract”***. Unless contrary to the prevailing law of Nepal, the terms and conditions determined by the parties to a contract are valid and binding upon them. Questions regarding the propriety or impropriety of contractual terms are not relevant, except in cases where such terms are contrary to the existing law of Nepal. The implication is that the full authority or freedom to add, modify, or determine the terms of a contract remains exclusively with the parties themselves. From this perspective, the parties are at liberty to enter into a contract and include any subject matter or condition, so long as it does not contravene the prevailing law.

In this context, a comprehensive review of the prevailing Nepalese law indicates that there is no prohibition on entering into contracts for the transfer of rights in immovable property. A survey of

⁵ Section 507 of the National Civil Code, 2074 provides that: The parties to a contract shall, subject to this Act, be autonomous to choose the form and contents of the contract, to determine terms and conditions of the contract and the nature of the remedy for its breach as well as to determine the measures for resolving disputes arising out of it”. This provision does not appear to differ fundamentally from the provision contained in Section 4 of the Contract Act, 2056.

past practice similarly demonstrates that numerous agreements executed for the transfer of immovable property rights have been recognized and effectively enforced. It is apparent that this very court has, on multiple occasions, recognized and affirmed this principle in its judgments⁶. A review of the practices in jurisdictions such as the United Kingdom, India, and the United States demonstrates the existence of numerous instances where contracts have been entered into for the transfer of rights in immovable property. Similarly, in the context of Nepal, this is not a prohibited subject matter; the prevailing Nepalese law does not expressly prohibit entering into contracts for the transfer of immovable property. In the contemporary context, where contracts have become a vital instrument for commercial and economic transactions, it is not appropriate to construe the meaning of a contract in a manner that unduly restricts its conceptual scope. The law has not redefined or limited the term in any novel way. Against this background of conceptual usage, and in light of the present legal developments that clearly recognize the autonomy of contracting parties, the view that contracts for the transfer of rights in immovable property are impermissible, or that such contracts cannot be entered into, appears neither logical nor justifiable.

Second Question for Determination: Whether a written instrument executed in the form of an advance payment document (*Bainabatta*) can be regarded as a contract deed. It is observed that the law does not prescribe any specific form or template for a contract⁷. The mere fact that a written instrument is not explicitly titled as a “contract deed,” or that it does not follow a particular formal structure, does not preclude it from being recognized as a contract. The Contract Act does not mandate that a contract must adhere to a particular format or designation; hence, it cannot be contended that a contract must necessarily conform to a prescribed structure⁸. Except in the case of certain special types of contracts, no specific format is prescribed for ordinary contracts. Consequently, for a contract to be valid, it is not necessary that it be executed in a formal document bearing the signatures of all parties⁹. From the nature of the advance payment document (*bainabatta*), it is evident that the parties have, in some manner, accepted that certain obligations or responsibilities arise between them. Such instruments are prepared with the consent of both parties, though, as a matter of practical practice, they are often signed by only one party. Since the document records the obligations of both parties and specifies the terms accordingly, even if only one party has signed the advance payment document, it is to be regarded as having the same effect as if both parties had executed it. To determine whether a particular document constitutes a contract, it must be examined whether the instrument imposes an obligation on two or more persons to perform or refrain from certain acts, and whether there exists a mutual consent (meeting

⁶ In various precedents, including *Tirtha Rajkumari Rana v. Ramshankar Shrestha* through *Vinod Shankar Shrestha*, Nepal Law Reporter 2049, Decision No. 4447, Full Bench; *Dhanmaya Maharjan v. Tulsi Maharjan*, Nepal Law Reporter 2062, Vol. 8, No. 7583, Division Bench; *Lakh Bahadur Mawo v. Chandra Bahadur Mawo*, 067-NF-0010, Full Bench, Judgment dated 2072/03/03; *Indra Bahadur Rai v. Mangalimaya Kushle*, Nepal Law Reporter 2066, Vol. 11, No. 8268, Division Bench; *Summit Hotel Pvt. Ltd. v. Sharda Prasai et al.*, 068-CI-0344, Division Bench, Judgment dated 2069/05/25; *Pradeep Raj Pandey v. Karmalakshmi Kansakar*, 067-CI-0147, Judgment dated 2071/07/25; *Nani Chhori Maharjan v. Rahindra Maharjan et al.*, Nepal Law Reporter 2062, Vol. 10, No. 7610, Division Bench; *Budhiyadevi Chamrani v. Amiri Mahara Chamr*, Nepal Law Reporter 2062, Vol. 9, No. 7593, Division Bench; *Sitaram Timilsina v. Bhakta Bahadur Tamang*, Nepal Law Reporter 2059, Vol. 1/2, No. 7060; *Veer Shankar Kasai v. Anita Lama*, Nepal Law Reporter 2063, Vol. 3, No. 7673; and *Parasmani Bharti v. Hemraj Van*, Nepal Law Reporter 2064, Vol. 11, No. 7896, Full Bench, among others, contracts executed for the transfer of rights in immovable property have been recognized as valid contracts.

⁷ *Dhanamaya Maharjan vs. Tulasi Maharjan* (Nepal Law Reporter 2062, Unit 8, Decision No. 7583, Division Bench)

⁸ *Tirtha Rajkumari Rana vs. Binod Shankar Shrestha*, Nepal Law Reporter 2049 (a), Unit 1, Decision No. 4447

⁹ *Lakh Bahadur Mabo vs. Chandra Bahadur Mabo* (067-NF-0010), Full Bench, Date of Decision: 2072/03/03; *Dhanamaya Maharjan vs. Tulasi Maharjan* (Nepal Law Reporter 2062, Unit 8, Decision No. 7583, Division Bench); *Indra Bahadur Rai vs. Mangalimaya Kusle* (Nepal Law Reporter 2066, Unit 11, Decision No. 8268, Division Bench)

of the mind) between the parties to perform the acts as stipulated in the contract. This principle has been elucidated by this court in the case of *Tirtha Rajkumari Rana*¹⁰. This court, through its Division Bench, Full Bench, and Larger Full Bench, has repeatedly held and analyzed that a document executed for the sale of immovable property commonly referred to as an “Agreement to Sell” or an advance payment instrument constitutes a valid contract¹¹. On the other hand, in the case of *Sitaram Timilsina*, it was observed that the plaint pertained not to the terms of the contract deed itself but to a separate instrument documenting the advance transaction. Accordingly, it was held that a plaint cannot be construed as challenging the terms of the contract deed, and that any matter under the advance payment instrument cannot be adjudicated under the Contract Act, 2023. Therefore, a plaint filed under No. 40 of the Chapter on Transactions in such circumstances cannot be interpreted otherwise¹². It has also been observed that the mere giving or taking of an advance amount (*baina*) cannot, by itself, be construed as falling within the definition of a contract. Notwithstanding a few isolated decisions to the contrary, in the majority of cases, including those following the precedent set in the case of *Tirtha Rajkumari Rana*, this court has consistently recognized advance payment (*bainabatta*) instruments as valid contractual instruments¹³.

There are also precedents in which remedies have been sought and granted under the Chapter on Transaction of the *Muluki Ain* in relation to matters concerning documents executed by way of advance payment (*bainabatta*)¹⁴. Upon examining such practice, it was also contended that the advance payment document cannot be treated as a subject matter falling under the Contract Act. This court has long and consistently recognized the principle that, where more than one legal remedy is available, the choice to pursue any one of such remedies lies with the disputing party. In *Tirtha Rajkumari Rana*’s case, it has been interpreted that, since a remedy may be sought in accordance with what is written in the advance payment (*bainabatta*) document, the taking of an alternative plea as provided in the document itself cannot be regarded as an uncertain or vague claim. In line with this very principle, it must be accepted that, in relation to an advance payment document, remedies have been granted in accordance with the Chapter on Transaction. This, however, does not mean that the advance payment document can never fall within the subject matter of contract law. Rather, the matter must also be examined in light of its contextual circumstances. Despite the existence of a long and consistent line of interpretations recognizing advance payment documents as contracts, no reasonable or cogent justification has been shown

¹⁰ *Tirtha Rajkumari Rana vs. Binod Shankar Shrestha*, Nepal Law Reporter 2049 (a), Unit 1, Decision No. 4447

¹¹ *Tirtha Rajkumari vs. Binod Shankar Shrestha*, Nepal Law Reporter 2049 (a), Unit 1, Decision No. 4447; *Summit Hotel Pvt. Ltd. vs. Sharada Prasain and others* (068-CI-0344, Division Bench, Date of Decision 2069/05/25); *Pradeep Raj Pandey vs. Karma Laxmi Kansakar* (067-CI-0147, Date of Decision: 2071/07/25); *Nani Chori Maharjan vs. Rahendra Maharjan and others* (Nepal Law Reporter 2062, Unit 10, Decision No. 7610, Division Bench); *Budhiya Devi Chamarni vs. Amiri Mahara Chamar*, Nepal Law Reporter 2062, Unit 9, Decision No. 7593, Division Bench

¹² *Sitaram Timilsena vs. Bhakta Bahadur Tamang* (Nepal Law Reporter 2059, Unit 1/2, Decision No. 7060, Case: Transaction, Full Bench comprising of three justices); *Bir Shankar Kasai vs. Anita Lama*, Nepal Law Reporter 2063, Unit 3, Decision No. 7673, Division Bench, Date of Decision 2062/12/13

¹³ *Bir Shankar Kasai vs. Anita Lama*, Nepal Law Reporter 2063, Unit 3, Decision No. 7673, Date of Decision 2062/12/13, Division Bench; *Parasmani Bharati vs. Hem Raj Ban*, Nepal Law Reporter 2064, Unit 11, Decision No. 7896, Larger Full Bench); *Prithivi Bahadur Maharjan vs. Birat Bahadur Khadka*, Nepal Law Reporter 2064, Decision No. 7874

¹⁴ Similar interpretation has been made in *Parasmani Bharati vs Hem Rah Ban*, (Nepal Law Reporter 2064, Unit 11, Decision No 7896, Larger Full Bench); *Prithivi Bahadur Maharjan vs. Birat Bahadur Khadka*, Nepal Law Reporter 2064, Decision No 7874; *Bir Shankar Kasai vs. Anita Lama* (Nepal Law Reporter 2063, Unit 3, Decision No. 7673)

for disregarding that position and, contrary to established judicial practice, abruptly adopting a different view at present by holding that an advance payment document is not a contract at all.

While advancing the argument that an advance payment document should not be regarded as a contract, it was also contended that such a document does not bear the signatures of all parties to a contract. This contention does not appear to be consistent with the established concept of contract law and its long-standing practice. By way of illustration, in the Summit Hotel¹⁵ case, it has been observed that when a person consumes food at a restaurant or hotel and pays the bill, or purchases goods from a shop counter and pays the price as per the bill, a contract is thereby created and performed, and the contractual relationship is simultaneously brought to an end. When a passenger pays the prescribed fare for travel on a public means of transportation and is issued a ticket, such ticket, even though it does not bear the passenger's signature, is recognized in law as a document establishing a contractual relationship for the purpose of travel. Similarly, tickets issued for entertainment such as in cinema or theatre do not carry the signature of the purchaser or viewer; however, once consideration is received and the ticket is sold, a corresponding obligation arises to permit participation in the scheduled program. This, too, falls within the realm of a contractual relationship. There are several other practical instances of a similar nature. In accordance with sub-section (2) of Section 505 of the National Civil Code, 2017, a contract may be formed "in writing, orally, or through the conduct of the contracting parties." Contracts relating to wages and labor may be taken as one such illustration. No prevailing law appears to mandate that, in every type of contract, a formal written agreement must be prepared and signed by all contracting parties. This implies that, in determining whether a document constitutes a contract, greater weight must be given to whether the document defines mutual obligations and consideration between the parties, rather than to the question of whose signatures appear, or do not appear, on the document. Upon consideration of the overall circumstances discussed above, it is found appropriate to accord recognition to an advance payment (*bainabatta*) document as a contract.

Now, the third question requiring determination: Where a contract is entered into with a condition for the transfer of rights in immovable property, can the right in immovable property be transferred, or not, on the basis of a contract document executed in a private setting (*gharsar*)? In view of the provision contained in Section 88 of the Contract Act, 2056, it has become necessary to determine whether a contract executed privately, incorporating a condition for the transfer of rights in immovable property, is valid or legally enforceable. On behalf of the parties contending that a contract providing for the transfer of rights in immovable property cannot be entered into, reliance has been placed, in support of such contention, upon Section 88 of the Contract Act, 2056 and the provision contained in No. 1 of the Chapter on Registration of the then prevailing *Muluki Ain*. Section 88 of the Contract Act, 2056 provides that "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." Similarly, sub-section (2) of Section 505 of the National Civil Code, 2074 states that "A contract may be made in written or verbal form or even by conduct of the parties to it.." However, sub-section (3) of the same section further provides that "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. The provision contained in Section

¹⁵ Summit Hotel Pvt. Ltd. vs. Sharada Prasain and others (068-CI-0344, Division Bench, Date of Decision 2069/05/25)

505 (3) of the National Civil Code is, to some extent, similar to the provision set out in Section 88 of the Contract Act, 2056. The structure and legislative presentation of the Civil Code further indicate an intention to address and resolve the conceptual ambiguity that had persisted in this regard up to that time. The meaning and purpose of the phrase “*where any contract is required to be concluded only by fulfilling a specific procedure or formality*” are also clear. For instance, under Section 3 of the Foreign Investment and Technology Transfer Act, 2049, any contract entered into by a foreign individual or entity for making an investment in Nepal or providing technical services to a Nepali company must obtain approval from the Department of Industry and must also be registered with the Department of Industry. Similarly, under the Public Procurement Act, 2063 and the Government Contract and Financial Arrangement Act, 2020, certain conditions and procedures are prescribed for entering into contractual agreements. It appears that Section 88 of the Contract Act, 2056 and Section 505 (3) of the National Civil Code, 2074 address contracts of this nature. The provision contained in Section 88 of the Contract Act does not operate as a prohibition on entering into contracts generally; rather, it is limited in scope to regulating contracts that are required to be entered into in certain specific circumstances. Similarly, the provision contained in Clause 1 of the Chapter on Registration of the *Muluki Ain* requires that a document be registered when transferring rights in immovable property. This, however, does not appear to constitute a prohibition against entering into contracts concerning immovable property. In fact, the question of whether rights in immovable property can be transferred through a contract and the question of whether a contract can be entered into in relation to immovable property are two distinct matters. There is a fundamental distinction between stating that a contract **may be entered into** and stating that certain legal formalities must be completed for the contract to be enforceable. Under No. 1 of the Chapter on Registration of the *Muluki Ain*, the contract document itself may be registered by the parties if they so desire. If the document is duly registered, the contract will be recognized; however, it would not be reasonable to interpret the absence of registration as rendering the contract itself invalid. Accordingly, it is both justifiable and logical to conclude that a contract may be entered into even with a condition for the transfer of rights in immovable property.

The special procedures and conditions to be followed while entering into contracts under the Public Procurement Act, 2063, the Government Contract and Financial Arrangement Act, 2020, and the Foreign Investment and Technology Transfer Act, 2049 has already been discussed above. However, in the case of a contract executed with a condition for the transfer of rights in immovable property (Agreement to sell), no specific procedure or formality appears to be prescribed. In such a matter, the general principles and provisions of contract law are seen to be applicable. Section 88 of the Contract Act, 2056, does not appear to restrict or regulate the entering into of a contract containing a condition for the purchase and sale of immovable property. In the Summit Hotel case¹⁶, it was also observed that “since a document containing a condition for the purchase and sale of immovable property is an Agreement to sell and not a Sale Deed, and therefore, Section 88 of the Contract Act, 2056 is not attracted in respect of such a contract. In this case, while interpreting Section 88, it has been explained that the provision operates “not as a self-contained legislation, but only as a directive measure to render a contract invalid if it is concluded without completing the procedure prescribed under another law.” This clarifies the scope and application of the provision.

¹⁶ Summit Hotel Pvt. Ltd. vs. Sharada Prasain and others (068-CI-0344, Division Bench, Date of Decision 2069/05/25)

Under No. 1 of the Chapter on Registration of the *Muluki Ain*, it appears that a “document by which rights are sold or otherwise relinquished” (Sale Deed) is required to be registered¹⁷. However, no mandatory provision appears to exist requiring the registration of a contractual document executed with a condition to transfer rights in immovable property in the future (Agreement to sell). In the *Tirtha Rajkumari Rana* case, the principle was established¹⁸ that “a contractual agreement containing a condition to purchase and sell immovable property at a future date constitutes an Agreement to Sell and not a Sale Deed, and therefore, there is no mandatory requirement for registration of such a document. From this, it is evident that a contract containing a condition for the transfer of rights in immovable property does not require registration and is nevertheless recognizable as a valid contract. The principle thus laid down has also been followed in practice over a long period. Therefore, having regard to No. 1 of the Chapter on Registration of the currently prevailing *Muluki Ain*, Section 464 of the National Civil Code, 2074, and Section 88 of the Contract Act, 2056, it cannot be said that a contract containing a condition for the transfer of rights in immovable property is invalid, cannot be recognized as a contract, or must necessarily be registered. Such a view would not be reasonable or logical. If such a view were to be accepted, it would amount to a misinterpretation of the legal provisions and would run contrary to the long-standing understanding and principles regarding contracts that have been consistently recognized. The National Civil Code, 2-74 incorporates the provisions in a manner that is somewhat different or distinct from Section 88 of the Contract Act, 2056. Section 88 is to be understood as directing only that, where a procedure is prescribed under some other prevailing law, such procedure must be complied with. With regard to Section 505 (3) of the National Civil Code, 2074, there no longer arises any situation of ambiguity as was encountered in the application of Section 88 of the erstwhile Contract Act, 2056. Accordingly, a contract containing a condition for the future transfer of rights in immovable property, being an Agreement to sell and not a Sale Deed, does not encounter any legal obstacle to its execution.

Fourth question to be determined: It appears necessary to consider whether the term “contract relating to the sale of goods” as mentioned in Section 40 of the Contract Act, 2056 encompasses matters relating to the transfer of rights in immovable property or not. Section 40 (1) of the Contract Act, 2056 provides that “a contract relating to the sale of goods shall be deemed to have been concluded, provided, any seller agrees to hand over any goods to the buyer immediately or in the future by receiving a price”. The Explanation to the same section further states that “for the purposes of this Chapter, the term ‘goods’ shall mean any movable property or immovable property except currently used currency, securities, or actionable claims.” Thus, since the Act itself expressly and specifically refers to “movable property,” it is evident on the face of the statute that matters relating to immovable property do not fall within the ambit of the Contract Act, 2056. Section 40 in particular is confined to movable property, and does not extend to the transfer of rights in immovable property. This court in *Bir Shankar Kasai*¹⁹ has held that the provision of Section 40 cover movable property only and does not apply to the transfer of rights in immovable property. Therefore, it does not appear that matters relating to the transfer of rights in immovable

¹⁷ Section 464 (a) of the National Civil Code, 2074 prescribes that “A deed transferring the right in an immovable property in any manner, shall be registered with the concerned office”.

¹⁸ *Tirtha Rajkumari Rana vs. Binod Shankar Shrestha* Nepal Law Reporter 2049 (a) Unit 1, Decision No. 4447. The decision rendered by a majority of seven justices has not been overruled.

¹⁹ *Bir Shankar Kasai vs. Anita Lama*; Nepal Law Reporter 2063, Unit 3, Decision No.. 7673

property are encompassed within the “contract relating to the sale of goods” as provided under Section 40 of the Act.

Fifth question to be determined: Another important question that now arises for determination is whether an order may or may not be issued directing the specific performance of a contract entered into for the transfer of rights in immovable property. Since the present case is centered on the issue of “specific performance²⁰” of a contract, it appears necessary to examine the meaning of the concept as well as its historical background. The meaning or purport of specific performance of a contract is to require a party to the contract to carry out and complete the obligations strictly in accordance with the terms and conditions stipulated in the agreement. Its application and evolutionary development appear somewhat different in the common law and civil law systems. Nevertheless, in practice, both systems are seen to follow the accepted principle²¹ that an order of specific performance should be granted where the remedy of damages is inadequate. Among countries following the common law system, the origin and development of the concept of specific performance, as an equitable remedy, appear to have taken place in England. In the early stages of granting the remedy of specific performance, courts relied on the principles of equity, justice, and good conscience as the foundational basis. In the absence of clear and specific legislative enactments, it was perhaps both necessary and justified for the courts of that time to adopt and apply the doctrine of “equity, justice, and good conscience” in the administration of justice. However, with the enactment of the Specific Relief Act, 1877 in England and the Specific Relief Act, 1963 in India, a discernible shift occurred in the traditional approach to remedies in those jurisdictions. Taking into account the principles of equity and the necessity of an effective legal remedy through specific performance, this court, in the case of *Tirtha Rajkumari Rana*, interpreted the phrase “each party to a contract shall fulfill his or her obligation” contained in Section 10 (1) of the then Contract Act, 2023, and accordingly issued an order for specific performance. Although no detailed discussion appears to have been undertaken on the theoretical foundation of specific performance of contracts following the aforesaid case of *Tirtha Rajkumari Rana*, there are numerous precedents in which judgments have been rendered leading to the result of specific performance of contracts, including decisions permitting the plaintiff to obtain transfer of land by causing the defendant to execute and register the deed in his or her favor²².

²⁰ It is observed that Nepali users have, in different contexts, used different Nepali expressions for the English term “specific performance.” In the case of *Tirtha Rajkumari Rana*, the majority opinion referred to it as “**special performance**”, whereas in the same judgment, the Honorable Justice Shri Keshari Bastola, while expressing a separate opinion, used the term “**defined performance**” However, Section 86 of the Contract Act, 2056 and Section 540 of the National Civil Code, 2074 have employed the term “**specific performance**” to denote specific performance. Therefore, since this term is expressly incorporated in the statute itself, it is appropriate to use the statutory expression “specific performance” and the same has accordingly been adopted herein.

²¹ Clarifying the conceptual distinction between the common law and civil law systems, *Anson’s Law of Contract* (28th ed., pp. 632–633) states as follows: “An order for specific performance is one by which the Court directs the defendant to perform the contract in accordance with its terms. In contrast to civil law systems, which generally regard the innocent party’s primary recourse, in principle, as having the contract performed, the jurisdiction to order specific performance under the common law is supplementary to the remedy of damages. Notwithstanding this difference in principle, in practice, even in civil law systems, specific performance is granted only where the innocent party has a specific interest in performance that is not adequately satisfied by damages.”

²² Some examples: *Tirtha Rajkumari Rana vs. Binod Shankar Shrestha*, Nepal Law Reporter 2049 (a), Unit 1, Decision No. 4447, Pradeep Raj Pandey vs. Karma Laxmi Kansakar (067-CI-0147, Date of Decision: 2071/07/25, Division Bench), Nani Chori Maharjan vs. Rahendra Maharjan and others, Nepal Law Reporter 2062, Unit 10, Decision No. 7610, Division Bench; Budhiya

At present, the time, context, and legal framework have undergone significant change. In determining questions relating to the performance of contracts, there is no longer a compelling necessity to rely solely on the doctrines of equity, justice, and good conscience. Although these principles may still be taken into consideration in certain contexts of adjudication, the legal system is no longer required to rest entirely upon this conceptual foundation. Since the law enacted by the legislature itself contains clear and specific provisions regarding the circumstances and scope of specific performance, it has now become necessary for the courts as well to undertake their analysis with reference to the statutory provisions governing specific performance of contracts as expressly stipulated in the Act. Upon examining the relevant legal provisions, Section 86 of the Contract Act, 2056 is found to contain the following provision relating to “specific performance of contracts²³”:

- (1) In case the cash compensation paid in consideration of the actual loss or damage suffered by the aggrieved party as a result of a breach of contract is not reasonable or adequate, the aggrieved party may demand the execution of the contract as stipulated specific performance instead of making a claim for compensation.
- (2) Notwithstanding anything contained in sub-section (1), no claims for execution of the contract as stipulated specific performance shall be heard in any of the following circumstances:
 - (a) In case the amount paid in cash as compensation for breach of contract is adequate,
 - (b) In case the court cannot supervise whether or not the work to be performed under the contract has been actually performed,
 - (c) In case the contract has been signed for providing services relating to personal expertise, skill or knowledge;
 - (d) In case the situation is such that the contract cannot be executed as stipulated;
 - (e) In case the party violating the contract demands that the contract be executed as stipulated.

A review of this court’s earlier decisions concerning specific performance of contracts indicates that judgments have generally been rendered on the premise that, where a contract is valid, it ought to be specifically performed. However, in certain cases, including *Summit Hotel Pvt. Ltd.*²⁴ and *Lakh Bahadur Mawo*²⁵, precedents are also found in which it was held that where the party in breach of the contract itself seeks relief, an order directing specific performance need not be granted. On the whole, it appears that no detailed interpretation or analysis has been undertaken in the context of Sub-sections (1) and (2) of Section 86 of the Contract Act, 2056. In a situation where the legislature itself has prescribed the conditions for specific performance of contracts within the statute, it is no longer appropriate to follow or adopt the equitable remedy as a precedent. Section

Devi Chamarni vs. Amiri Mahara Chamar, Nepal Law Reporter 2062, Unit 9, Decision No. 7593, Division Bench; Dhanamaya Maharjan vs. Tulasi Maharjan, Nepal Law Reporter 2062, Unit 8., Decision 7583, Division Bench

²³ The same provisions have been prescribed in Section 540 of the Civil Procedure Code, 2074

²⁴ Summit Hotel Pvt. Ltd. vs. Sharada Prasai et.al. (068-CI-0344, Division Bench, Date of Decision: 2069/05/25)

²⁵ Lakh Bahadur Mawo vs. Chandra Bahadur Mawo (067-NF-0010, Full Bench, Date of Decision: 2072/03/03)

86 of the Contract Act is, in itself, clear and meaningful. In the changed legal context, a claim for specific performance cannot arise in all or any circumstances. Such a claim may be made only where the aggrieved party, on account of a breach of contract, would not be adequately or appropriately compensated by a claim for monetary damages for the actual loss suffered, and therefore seeks the specific performance of the contract instead of damages. In making such a claim, it is necessary to disclose and substantiate with proper reasons and factual basis that monetary compensation for the actual loss would not be adequate or appropriate. Moreover, where the court is unable to supervise the performance of the contract, or where the contract is for the provision of services requiring personal skill, expertise, or knowledge, or where it is not possible to perform the contract exactly as agreed, or where the party in breach itself seeks specific performance, the court cannot pass a decision or issue an order directing specific performance. This also demonstrates that the scope of specific performance is limited.

Generally, the granting of an order for specific performance of a contract is regarded as a matter within the court's discretionary authority²⁶. It does not follow that specific performance must be directed in all cases of a contract containing a term for the transfer of rights in immovable property (such as a house or land). Such cases must also be evaluated in accordance with the criteria set out in the Contract Act, 2056 (currently Section 540 of the National Civil Code, 2074). When assessed in relation to various factors, including the specific location of a house or land, its religious, cultural, commercial, or familial significance, and the availability of alternatives, it may be determined that monetary compensation would not be adequate or appropriate, thereby justifying an order for specific performance. However, it must be clearly asserted and substantiated that such circumstances exist. Until such proof is presented, mechanically issuing an order or judgment directing specific performance of the contract would not appear to be consistent with the law.

In light of the foregoing discussion, the final question to be determined is whether, in the present case, the plaintiff's claim for specific performance of the contract can succeed, and whether the decision of the Appellate Court, Patan, is in accordance with law. In this case, the plaintiff (appellant) and the defendant (respondent) are parties to a contract concerning immovable property situated in Lalitpur District, Lalitpur Sub-Metropolitan City, former Ward No. 20(b), plot no. 16, registered jointly in the name of the defendant and his brother, Krishna Dev Shrestha. The contract, executed on 2057/5/21, involved the sale and transfer of the defendant's share in the property, specifically half of the land (0-3-0, three aana) and the house thereon to the appellant for a consideration of Rs. 3,150,000, with an advance payment of Rs. 300,000 secured through an informal written agreement. The present case concerns the aforementioned land and house. In his plaint, the plaintiff has claimed that he be granted specific performance of the contract; and, in the event that such specific performance cannot be effected, that he be compensated under Section 83 of the Contract Act, 2056, for the advance payment of Rs. 300,000 and other amounts totaling Rs. 600,000. Although the disputed advance payment document may be regarded as a contractual instrument, in the present case, the plaintiff has not been able to clearly and specifically demonstrate in his claim the reasons why **"monetary compensation for the actual loss would be inadequate or insufficient"**, in order to substantiate a claim for specific performance. As a general rule, the innocent party is entitled to damages for breach of contract; the remedy of specific performance is available only in exceptional circumstances. In the present case, since the plaintiff has not explained the preconditions, basis, or reasons under Section 86 of the Contract Act, 2056,

²⁶ G.H. Treitel (8th ed., p. – 280) has mentioned the "Where the contract is valid, refusal of specific performance is a matter for the discretion of the court."

the issuance of an order directing specific performance by the court does not appear reasonable in light of the various precedents and considerations discussed above. Accordingly, it cannot be held that specific performance of the contract is warranted in this case.

It is noted that the Rt. Honorable and honorable justices, by a majority, have expressed the view that, with respect to contracts concerning immovable property, a contract cannot acquire legal validity or be enforceable if it has not been registered in accordance with Section 88 of the Contract Act, 2056, and the provisions of No. 1 of the Chapter of Registration Act under the *Muluki Ain*. Consequently, any prior principles or precedents, including those articulated by this Court (e.g., Nepal Law Reporter 2065, Decision No. 7915) would no longer remain applicable and are hereby held to be inoperative and overruled to the extent that they conflict with the present principle, as a contract evidenced by an unregistered advance payment document (*baina*) cannot effect the transfer of rights in immovable property under the current statutory framework. Since my opinion regarding the procedure for the transfer of rights in immovable property, the contractual validity of an advance payment document (*baina*), and related matters has already been stated above, there is no need to reiterate it. I also observe that the reference in the majority opinion to “all principles previously propounded by this court” creates further ambiguity and complexity. Moreover, with regard to the reasoning that precedents such as Nepal Law Reporter 2065, Decision No. 7915, are no longer to be regarded as valid or operative, it is noted that the Decision No. 7915 in *Chandra Bahadur Mawo vs. Lakh Bahadur Mawo* was rendered by a Division Bench. However, in view of the fact that the decision of the Division Bench has itself been subject to review and has been adjudicated by the Full Bench²⁷ of this court, there appears to be no relevance in declaring the principles propounded by the Division Bench as “invalid and inoperative.” From the perspective of the contractual law concepts discussed above, there is no reasonable or logical basis to hold that the precedents and principles established by this court regarding advance payment documents (*bainabatta*) should now be declared invalid.

Accordingly, with respect to the matters examined in the foregoing cases, namely, the concept of contracts, contracts containing terms for the transfer of rights in immovable property, the recognition of an advance payment document (*bainabatta*) as a contract, the application of the law regarding registration of instruments and its relation to contracting, the circumstances under which specific performance of a contract may be granted, and the ruling that precedents such as Nepal Law Reporter 2065, Decision No. 7915, are no longer valid or operative, I have noted above the points on which I am unable to concur with the majority opinion of the Rt. Honorable Chief Justice and the honorable justices. Except for the matters discussed in the foregoing cases, I concur with the majority opinion to the extent that, in accordance with the advance payment document (*baina*) dated 2057/5/21 between the appellant and the respondent, the appellant is entitled to recover from the respondent the principal amount of Rs. 300,000 (three hundred thousand rupees) along with interest at the rate of 10% (so long as the interest does not exceed the principal amount), as confirmed by the decision of the Appellate Court, Patan, dated 2063/1/21.

Bench Officer: Uddav Prasad Gajurel

Dated: Year 2076 of the Month of Ashar Date 29 Day 1

²⁷ In the case of *Lakh Bahadur Mawo vs. Chandra Bahadur Mawo* (067-NF-0010), it is noted that a decision was rendered by the Full Bench of this Court on 2072/03/03. In this manner, the decision of the original District Court was upheld by the Division Bench of this Court, and it is deemed to have been confirmed accordingly.

(Corresponding to Year 2019 of the Month of July Date 14 Day 1)