

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ CS(OS) 1206/1998

Reserved on 06.02. 2008

Date of decision : April 23rd , 2008

NITIN JAIN

.... Plaintiff

Through: Mr. Dinesh Garg, Mr. Kapil Sekri, Advocates,

Versus

MURARI LAL BEHL

... Defendant

Through:

CORAM:

MR. JUSTICE S. RAVINDRA BHAT :

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| 1. | Whether reporters of local papers may be allowed to see the judgment.? | YES |
| 2. | To be referred to the Reporter or not? | YES |
| 3. | Whether the judgment should be reported in the Digest? | YES |

MR. JUSTICE S. RAVINDRA BHAT:

1. In this suit, the plaintiff seeks a decree against the defendant for specific performance of an Agreement to Sell dated 7.6.1995 in respect of the second floor and terrace thereupon of the property being No.Y-39, Hauz Khas, New Delhi, (hereinafter called “the suit property” and “the plot”) measuring 200 sq.yds after obtaining Income Tax Clearance Certificate in Form 34-A from the appropriate authorities. Alternatively, in the event the Court finds that decree for

specific performance cannot be granted, the plaintiff claims, as alternative relief, a decree for refund of Rs.4 lakhs along with interest @ 24% per annum calculated with effect from the date of payment which amounts to Rs.2,56,000/- as well as decree for damages to the tune of Rs.22 lakhs along with interest, totaling Rs.28,56,000/-.

2. The plaint averments are that one Shri Narender Nath Chadha had purchased the plot through a registered sale deed on 18.3.1959. He sold it to Smt. Ram Lubhai through a registered sale deed, dated 26.9.1961. Smt. Ram Lunbhai constructed a two and a half storied building on the plot with her funds. She executed a registered Will before her death. The Will was registered on 10.12.1987. In its terms, her son, Kundan Lal Behl got the entire ground floor; another son Prakash Chander Behl got the first floor and the defendant – Murari Lal Behl got the entire second floor. The plaintiff also avers that mutation of the property was carried out in favour of three sons/heirs in the records of the Municipal Corporation of Delhi(MCD) on 9.6.1994.

3. It is averred that the plaintiff and defendant entered into a binding and concluded agreement on 7.6.1995 through which it was agreed that the former would purchase the second floor with terrace and structures on the terrace, as well as fittings and fixtures for a total sale consideration of Rs.30 lakhs. This was on the understanding that the defendant was the exclusive and absolute owner of the second floor, i.e. suit property. The Agreement to Sell acknowledged the receipt of part payment of Rs.2,50,000/- by the plaintiff on 1.6.1995. The Plaintiff also states that further payment of Rs.25,000/- was made, under the said Agreement to Sell dated 7.6.1995. The balance sale consideration was to be paid by the plaintiff at the time

of registration of sale deed before the Sub-Registrar, New Delhi, within ninety days of the Agreement, i.e. within ninety days of the execution of Agreement to Sell. It is also stated that this was subject to clauses 5 and 6 of the said Agreement to Sell dated 7.6.1995, which obliged the defendant to apply for and obtain Income Tax Clearance Certificate in Form 34-A and also obtain a Probate Order from the competent Court, concerning the Will of Smt. Ram Lubhai as well as No Objection Affidavits of certain persons.

4. The plaintiff states though he was under no obligation to pay any further amount, yet at the defendant's request, he did pay Rs.1,25,000/- on 21.6.1995 which was duly received and acknowledged. The Plaintiff alleges that instead of complying with the terms of the Agreement to Sell, the defendant sent a notice on 11.9.1995 to execute the document and to make further payments to the plaintiff to pressurize him to pay more, knowing well that no such obligation existed till compliance of the terms of the said clauses of the Agreement to Sell by the defendant. The plaintiff refers to another notice dated 10.10.1995 which admitted the subsistence of the Agreement to Sell but stated that it could not be performed since one co-owner, i.e. Smt. Kamla Behl refused to furnish a No Objection Certificate and Affidavit. The defendant had also offered the refund of Rs.4 lakhs paid by the plaintiff further to the Agreement to Sell. According to the plaintiff, the notices were afterthoughts and based on falsehood. Smt. Kamla Behl had already given her No Objection Certificate to the defendant; it is alleged that the latter took advantage of price escalation of the suit property and sought to avoid the terms of Agreement to Sell. In these circumstances, the plaintiff sent a registered notice on 1.1.1996 calling upon the defendant to obtain Income Tax Clearance Certificate and No Objection Certificate from the co-owners. The defendant replied on 18.1.1996 now stating

that a property broker, Shri Upendera Pandey had approached him for sale of second floor and offered to pay him Rs.19 lakhs by 14.9.1995 on behalf of his purchaser, i.e. the plaintiff. The plaintiff also alleges that the defendant sought to resile from Agreement stating that it had been signed by his father who was not shown as Attorney of the plaintiff.

5. It is alleged that the defendant's moves were part of a pre-planned strategy to avoid executing the sale deed, as required by the Agreement to Sell.

6. The defendant had entered appearance and filed the written statement on 12.2.1999. He was represented in the proceedings but subsequently his counsel stopped appearing. Consequently, by order dated 17.9.2002, the defendant was set down ex-parte. An application to recall that order was made being IA No.10844/2002. That application too was dismissed on 2.12.2002. During the course of recording of evidence, however, the defendant participated in the proceedings and even produced witnesses in support of his case before a Local Commissioner appointed by the Court.

7. The plaintiff relied upon his testimony and deposed as PW-1. He was cross-examined on behalf of the defendant, in the proceedings dated 14.5.2004. The plaintiff also exhibited documents, i.e. original receipts dated 1.6.1995 (Ex. PW-1/1 and PW-1/2); Agreement to Sell dated 7.6.1995 (Ex. PW-1/3); receipt dated 21.6.1995 (Ex. PW-1/5) and the defendant's notice dated 11.9.1995 (Ex. PW-1/6); legal notice issued by defendant on 10.10.1995 (Ex. PW-1/7) and legal notice dated 1.1.1996 issued by the plaintiff (Ex. PW-1/8). The defendant's reply to the last legal notice dated, 18.1.1996 was marked as Ex. PW-1/9.

8. The issues framed by this Court requiring trial are as follows:-

“B. ISSUES:

1. *Whether the plaintiff had ever agreed to pay a sum of Rs.19,00,000/- to the defendant on or before 14.09.1995 as stated by the defendant in preliminary objection No.2 of the written statement, if so, its effect? OPD.*
2. *Whether the defendant had performed his part of obligations under Clause 4, 5 and 6 of the Agreement to Sell dated 07.06.1995, if not, its effect? OPD.*
3. *If issues No.1 & 2 are decided in negative, whether the defendant was ready and willing to perform his part of contract, if not, its effect? OPD.*
4. *Whether the defendant is liable to forfeit the amount of Rs.4,00,000/- OPD.*
5. *Whether the plaintiff was ready and willing to perform his part of contract? OPP.*
6. *Whether the plaintiff is entitled to the relief of the specific performance? OPP.*
7. *Relief.”*

9. **Issue No.1** The legal notices of the defendant which are part of the record being Exhibit PW-1/4 and PW-1/5, advert to the Agreement dated 7.6.1995, Besides the said Agreement have been marked in evidence as Exhibit PW-1/3. In the circumstances, it has to be held that the existence of the Agreement is not in dispute. The question, however, is whether the defendant has proved that the plaintiff agreed to pay Rs.19 lakhs on or before 14.9.1995. This is founded on the defendant’s preliminary objection in paragraph 2 of the written statement, where he claimed that through a separate undertaking such an amount had to be paid on or before 14.9.1995 upon which the defendant had to deliver possession of two rooms. According to the

defendant, the plaintiff paid only Rs.4 lakhs. He has reiterated this in affidavit dated 26.7.2004.

The defendant was examined as DW1/1 and also cross-examined on behalf of the plaintiff. He admitted to signing the Agreement to Sell on 7.6.1995. He denied about the plaintiff not having agreed to the arrangement of paying Rs.19 lakhs on or before 14.9.1995.

10. The material part of the Agreement to Sell (Ex.PW-1/3), in this regard, contained in clause (1), which states as follows:-

“The remaining balance sum of Rs.27,25,000/- (Rupees twenty seven lacs twenty five thousand only) shall be received by the first party, from the second party, at the time of registration of regular Sale Deed, before the Sub-Registrar, New Delhi, which registration shall be done within 90 days from the date of this Agreement to Sell, subject to Clause No.5 & 6 of this Agreement.”

Clauses 5 and 6 of the Agreement read as follows:-

“5. That the first party will apply and obtain the Income Tax Clearance Certificate in Form 34-A under the provisions of section 230-A-(1) of the Income Tax Act, 1961, and/or in any other Form prescribed by the competent authority, from the concerned department, at his own costs and expenses, to facilitate the execution of proper Sale Deed. Further, the first party shall get the Probate Order from the competent authority regarding the will left by Smt. Ram Bubhai, and No Objection Affidavits from Smt. Kamla Behl, W/o.late Shri Kundan Lal Behl, and Shri Prakash Chander Behl, for the sale of the entire Second Floor with terrace thereupon.

6. That after obtaining the Income Tax Clearance Certificate, Probate Order from competent authority, and No Objection Affidavits from Smt. Kamla Behl, w/o late Shri Kundan Lal Behl and Shri Prakash Chander Behl, the first party will inform the second party in writing and within 30 days from the date of receipt of such intimation, the second party will get the Sale Deed registered in the office of the Sub-Registrar, New Delhi, by paying the balance payment to the first party.”

11. The defendant in addition to his own statement, relied on the deposition of Upendra Kumar Pandey, who was allegedly aware of the understanding concerning payment of Rs.19 lakhs on or before 14.9.1995. He deposed about his signatures in PW-1/1 and PW-1/4. He also deposed that he had been negotiating for the suit property with other prospective buyers to finalize the sale. He also adverted to a slip Ex.DW-2/1 said to have been affixed on PW-1/D-1, a letter which had been put to the plaintiff in his cross-examination. That letter was addressed to the defendant by Upendra Kumar Pandey. It stated that all documents including No Objection Certificate etc. would be furnished to him within three months and that the purchaser was ready to pay the balance amount. It was stated that the agreed terms for payment were contained in the slip DW-2/1 which indicated the payment schedule; a total sum of Rs.19 lakhs was to be paid on or before 14.9.1995 and in that event, the seller, i.e., the defendant was to give possession of the two rooms on the second floor. The said letter, i.e. PW-1/D-1 is dated 25.8.1995.

12. An overall consideration of the materials on record shows that undeniably the agreement was executed on 7.6.1995. In its terms, the balance amount of Rs.27,50,000/- was payable within ninety days subject to the defendant furnishing Income Tax Clearance Certificate and No Objection Certificates of certain named persons. The defendant alleged that this was also subject to the further condition of having to pay Rs.19 lakhs on or before 14.9.1995 in which event two rooms were to be given over to the plaintiff.

13. Besides the defendant, the only witness who has mentioned about this arrangement of having to pay Rs.19 lakhs is DW-3. However, that witness does not anywhere state that this

arrangement /agreement was ever reduced into writing or agreed upon by the plaintiff. Instead the defendant has relied upon a letter written by the said DW-3 to him on 25.8.1995. At the foot of that letter, certain figures have been marked; they refer to different dates and are co-related with amounts. It is urged that these prove the arrangement of the plaintiff having to pay Rs.19 lakhs by 14.9.1995. On the one hand, the agreement is categorical; it places a limit of ninety days subject to compliance with clauses 5 and 6. On the other hand, the defendant has set up an alternative agreement containing a different time schedule and different conditions altogether.

14. Apart from the question whether the defendant has complied with Section 91 of Evidence Act and whether his contention falls within the exceptions spelt out in Section 92, the Court will have to examine whether the materials presented support his argument. Exhibit DW-2/D-1 is a part of Exhibit PW-1/D-1. The most important aspect of this document is that it was not addressed to the plaintiff, nor does it bear his signatures. No doubt, it adverts to sale of the suit property but it was clearly addressed to the defendant. DW-3 is a broker and he refers to the plaintiff as “my purchaser”. The slender basis for the argument about an alternative arrangement is the reverse of what appears to be a visiting card, to the letter containing the time schedule. However, that time schedule has not been spelt out in the dates. Besides the plaintiff’s consent – express or tacit – has never been proved. In these circumstances, the Court is of the opinion that the defendant has not been able to prove about the arrangement concerning payment of Rs. 19 lakhs on or before 14.9.1995. The issue is accordingly held against the defendant and in favour

of the plaintiff.

Issue Nos.2,3 & 4:-

15. These issues concern compliance with the conditions of the contract by the defendant and his readiness to perform it. It is a matter of record that the defendant did not furnish the certificates, required under clauses 4,5 & 6. He has deposed that he entered into an agreement to invest the money received out of sale consideration of the suit property to purchase a flat at Old Rajinder Nagar. He further deposed of having told the plaintiff that he had marketable title. In his cross-examination he admitted to have signed the document. He also deposed of not having obtained any income tax clearance certificate since he was advised that such certificate was not required. Likewise, he also did not obtain any probate order, upon his counsel's advice. He deposed of having obtained a No Objection Affidavit from Smt. Kamla Behl and Sh. Prakash Chander Behl before 7th June, 1995 and that one such affidavit was already already with Sh. D.C. Jain. To another question, the defendant answered that he did not remember whether he informed the plaintiff about obtaining No Objection Certificate. He admitted to having send notices dated 5.9.1995 and 11.9.1995.

16. The notice dated 5.9.1995 (Ex. DW 1/D-1) mentions that the defendant had a talk with other co-owners and that despite best persuasion they had not agreed to abide by the promise to not object to the sale. In the next notice dated 11.9.1995 (Ex. D-1) however, the defendant

for the first time mentioned about the arrangement of receiving Rs.19,00,000/- by 14.9.1995 and also gave seven days notice to the plaintiff to take back Rs.4,00,000/- received by him till then. This version was reiterated in the final legal notice dated 18.1.1996 marked as D-2.

17. A complete reading of the three documents shows that the defendant was unwilling to go ahead with the transaction. In the notice dated 5.9.1995 he clearly mentioned that the co-owners were not agreeable to the sale. Yet, in the subsequent course of the proceeding, in the cross-examination, he clearly admitted to having secured the No Objection and stated that one of them was with Sh. D.C. Jain. All these not only reveal contradictory and inconsistent stands but point to non-compliance with the terms of the contract and unwillingness of the defendant to go ahead with it. Issue Nos. 2 and 3 are answered against the defendant. It is held that he did not comply with the terms of the contract and was not ready and willing to abide by its terms and sale the property.

18. As far as issue No.4 is concerned, there is no condition enabling either party to forfeit any amount. The clause which has any bearing is clause 11; it stipulates that the contract is subject to specific performance and in case of default on the part of either party it would be at the cost of the defaulting party. In these circumstances, it has to be held that there is no question of forfeiting the amount of Rs.4,00,000/-. This issue is answered accordingly.

Issue Nos. 5 & 6

19. In this case, the agreement between parties was entered into on 7.6.1995. The defendant had agreed to sell his second floor of the suit property with terrace to the plaintiff for a total consideration of Rs.30,00,000/-. Rs.2,75,000/- was paid contemporaneously with

the signing of the agreement; the material on record also shows that Rs.1,25,000/- was paid subsequently on 21.6.1995. The defendant sought to resile from his obligations by issuing notices on 5.9.1995 (Ex. DW 1/D-1); dated 11.9.1995 (Ex. PW 1/6 & Ex. D-1) and notice dated 10.10.1995 (Ex. PW 1/7). In all these documents, the unequivocal intention of the defendant not to proceed with the transaction was clearly manifested. Of course, there were some internal contradictions. In the first notice Ex. Dw 1/D-1, the defendant mentioned about the other co-owners not agreeing to issue No Objection. This was, however, contradicted in the course of cross-examination when he admitted that the certificates were available at the time of execution of the agreement to sell. This stand about inability of co-owners to give no objection was itself later not pursued –in the subsequent notices, the defendant started mentioning about the later understanding whereby the plaintiff was to pay Rs.19,00,000/- on or before 14.9.1995 and take possession of two rooms. Despite these contradictions, the defendant's intention not to proceed with the transaction manifested itself from early September onwards. In each letter the defendant called upon the plaintiff to seek refund of the amounts paid to him. The plaintiff, however, kept quiet and caused a notice to be issued on 1.1.1996 (marked as Ex. PW 1/8). He made no effort to insist that the defendant should not to resile the agreement. The notice issued on behalf of the plaintiff on 1.1.1996 does not even advert to the previous three notices issued on behalf of the defendant; it recites Clauses 5 & 6 of the agreement to sell and that despite the defendant's inability to obtain a No Objection Certificate, he (the plaintiff) was prepared to give forbearance to that condition as well as the condition governing probate and income tax certificate; he called upon the defendant to have the sale deed executed within 30 days. The defendant replied to this through his legal notice

dated 18.1.1996 (Ex. PW 1/9).

20. Now there is no doubt that the mere stipulation of some time in an agreement to sell or purchase in immovable property, itself does not amount to time being of the essence of the contract. In this case, the suit was filed on 25.5.1998 i.e. about two weeks before expiry of three years of the date when the agreement to sell was entered into between the parties. The suit no doubt is within the period of limitation. Yet, the plaintiff was aware right from January, 1996 onwards that the defendant was not willing to perform his part of the contract.

21. The requirement of having to prove readiness and willingness by the plaintiff to perform his part of the contract, in terms of Section 16 (c) of the Specific Relief Act exists not only as on the date of the contract but also continues to exist till the hearing of the suit. (See *Mrs. Sandhya Pani Vs. Smt. Sudha Rani* AIR 1978 SC 537). The question of readiness and willingness has to be seen in a broad perspective and cannot be treated as a straight jacket formula. Thus all factors which go into determining whether the plaintiff or the defendant (as the case may be) was ready and willing to perform his part of the contract has to be gathered from the entirety of facts and attendant circumstance, relevant to the intention and conduct of the party concerned. (*Ramesh Chandra Vs. Chunni Lal* AIR 1978 SC 1238.)

22. In the judgment reported as *Raj Rani Bhasin & Another Vs. Kartar Singh*, AIR 1975 (Del) 137, the distinction between the two expressions, “Readiness” and “Willingness” was noticed. The Court held that readiness of the buyer to perform his contract includes financial

capacity to pay the stipulated price. However, the question of Willingness turns upon his conduct. This distinction was also noticed in another judgment i.e. *Vijai Bahadur Vs. Shri Kumar* , AIR 1985 All 223 where it was held that :

“Readiness and Willingness are sometimes treated as synonymous but there is a clear cut distinction between the two”

While Willingness is merely mental process, “Readiness” is something to do with translating that Will into action and is preceded by necessary preparation for being in a position to be ready. In short, readiness must be said to be the total equipment of a person who is willing to do a thing before he actually does it.”

23. This distinction between the two concepts was noticed and the views of this Court and of the Allahabad High Court, impliedly endorsed by the Supreme Court in the judgment reported as *Hira Acharya Swami Ganesh Dass Ji Vs. Sita Ram Thapar* 1996 (4) SCC 526. The decision in *Indian Financial Association of Seventh Day Adventists Vs. M.A. Unneerikutty* 2006 (6) SCC 351 is also an authority on the proposition that the party insisting on obtaining a decree for specific performance should not only plead readiness and willingness but also prove the requirement during the trial.

24. Keeping all the above factors in mind, it would be immediately noticed that the plaintiff has undoubtedly pleaded readiness and willingness to perform his part of the contractual obligations in para 20 of the suit. He has reiterated this in the course of his deposition, i.e. in para 18 of the affidavit dated 10.10.2002. He was also cross-examined by counsel on behalf of the defendant. During the course of cross-examination, undeniably nothing was elicited

adverse to him. The question is, under these circumstances, whether the Court can infer and conclude that the plaintiff was both ready and willing to perform his part of the contract.

25. It has been held that the jurisdiction of the Court under Section 20 of the Specific Relief Act to decree specific performance is on the basis of sound exercise of judicial discretion based; in turn dependent on settled principles (See *Para Kunnen Veetil Joseph's Son Methew Vs. Nuda Bara Kisuvile Sori* AIR 1987 SC 2328 and *Govind Ram Vs. Gian Chand* AIR 2000 SC 3106). Thus the Court is not bound to grant specific performance merely it is lawful to do so.

26. As noticed earlier readiness is an objective state of affairs, whereas willingness is a matter of intention or conduct. Though the concepts are separate, sometimes they overlap and coalesce. In this case, although the requirements of pleading have been duly complied with and the plaintiff has deposed about his readiness and willingness, yet he has not adduced any objective material to show readiness or even about his capacity to perform the contract when he filed the suit, or at the stage of trial. Though it is not necessary to deposit the amount in Court, yet some objective material such as availability of funds at the stage of the filing of the suit or at the stage when performance was offered and also at the stage when the deposition was recorded, could well be produced. In the absence of any such objective material, the court is now called upon to merely accept the plaintiff's version that he was always ready and capable of performing the contract. This course is not acceptable. The standard of proof is not so high in such cases as to deter a litigant who desires exercise of discretion in his favour to compel a truant. contracting party, to stand by his bargain, from disclosing some rudimentary facts regarding the question of readiness. In these proceedings, however, the plaintiff has

chosen to keep away any material in that regard, from the Court.

27. In view of the above discussion, issue Nos. 5 and 6 are answered against the plaintiff. This held that the plaintiff has not proved readiness and willingness to perform his part of the contract and is thus not entitled to the relief of specific performance.

Issue No.7:-

28. A separate discussion on of this issue is necessary since the Court has held against the plaintiff on issue No.6 i.e. entitlement to a decree of specific performance. The discussion here has to revolve around relief clause (c). The plaintiff has claimed a decree for Rs.28,56,000/- which includes refund of Rs.4,00,000/- paid as advance to the defendant along with interest at Rs.24% per annum till date of filing the suit and damages to the tune of Rs.22,00,000/- along with interest 24% per annum.

29. As far as the question of refund of Rs.4,00,000/- is concerned, there can be no two opinions. In fact, the defendant himself wanted the plaintiff to take back this amount. Therefore, in view of the findings on the other issue, the plaintiff is entitled to a decree for Rs.4,00,000/-. The question is whether he is entitled to a further claim for damages and interest as made out in the suit.

30. The question of damages would arise if the plaintiff were to prove that contemporaneously with the accrual of cause of action or within reasonable time, from it, he had entered into another contract and purchased property, and had to pay higher amount to purchase similar property. This would depend on pleadings and the nature of proof adduced for the purpose having regard to the principles enacted under Section 73 of the Contract Act.

As held earlier, there was no forfeiture clause. The plaintiff has, however, chosen not to lead any evidence of his having suffered any damage or his entering into any contract leading to his paying higher amounts for purchasing similar or approximately similar property. In these circumstances, the Court is of the opinion that the plaintiff has not proved any entitlement damages.

31. As regards the question of interest, the materials on record show that right from September, 1995 itself, the defendant had offered to refund the amounts. This was not acceptable to the plaintiff. He approached the Court and sought a decree for specific performance, more than two years after the last communication with the defendant, i.e. in January, 1996. Neither any pleading nor any evidence has been led by the plaintiff to justify the claim for interest @ 24% per annum. The contract was not a commercial one; it was for sale of residential property. In these circumstances, in the absence of any special circumstances or express stipulation, the claim for 24% per annum is excessive and without any justification. However, this does not mean that the Court should not award any interest. The defendant has undeniably been in enjoyment of the plaintiff's money. He was clearly not entitled to this. In the circumstances interests of justice would best be sub-served if the defendant is directed to pay interest @ 9% per annum from 1.1.1996 on the amount of Rs.4,00,000/- till its realization to the plaintiff.

32. In view of the above findings, the suit is decreed in favour of the plaintiff and against the defendant so far as claim (c) is concerned, to the extent of Rs.4,00,000/- with interest @ 9% per annum from 1.1.1996 till date of realization. The plaintiff is also entitled to costs of the

proceedings; counsel's fee is assessed at Rs.35,000/-. The suit is decreed, partly, in the above terms.

Dated : April 23rd 2008

(S.RAVINDRA BHAT)
JUDGE