

IN THE HIGH COURT OF DELHI AT NEW DELHI

**CS (OS) 2906/1995 & I.A. Nos. 13733/2008, 15371/2008,
2551, 3884, 4565 and 4566/2009**

Reserved on: 17th September 2009

Decision on: 20th October 2009

J L GUGNANI HUF

..... Plaintiff

Through: Mr. Arvind Nigam, Sr. Adv. with
Mr. Samrat Nigam, Advocate

versus

O P ARORA & ANR.

..... Defendants

Through: Defendant No. 1 in person.
Mr. Ajay Choudhary and
Mr. K.L. Mishra, Advocates for D-3.

CORAM:

HON'BLE DR. JUSTICE S. MURALIDHAR

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| 1. Whether reporters of the local newspapers
be allowed to see the judgment? | No |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

JUDGMENT

20.10.2009

S. Muralidhar, J.

1. This suit seeks specific performance of an agreement to sell dated 26th November 1994 in respect of a property at E-1/13, Vasant Vihar, New Delhi (the `suit property`) as well as a decree of permanent injunction restraining the Defendants from parting with or transferring possession of the suit property in favour of any other person. The further prayers are for a declaration that any document executed by Defendant No.1 in favour of Defendant No.2 is null and void; that Defendant No.2 has no right, title or interest in the suit property; further that an enquiry should be ordered into the damages suffered by the Plaintiff and a decree be passed in

favour of the Plaintiff in terms thereof on account of the breaches by the Defendant No.1 of its obligations under the said agreement to sell.

2. The plaint was originally filed against three Defendants, i.e. Shri O.P. Arora, M/s Gupta Brothers and M/s. Syndicate Bank respectively. The Plaintiff is a Hindu undivided family (HUF) consisting of Shri J.L. Gugnani (the Karta), Ms. Raj Kumari Gugnani, Shri Kundan Lal Gugnani and Shri Yash Pal Gugnani.

3. Defendant No.1 is the owner of the suit property which, at the time of entering into the agreement to sell dated 26th November 1994, was a single-storied building constructed on a plot of land measuring 630 sq. yds. Defendant No.2 was a partnership firm and according to the Plaintiff a trespasser in the suit property. Defendant No.3 Syndicate Bank was sued in its capacity as mortgagee of the suit property, in possession of the title deeds thereto.

4. The Plaintiff's case is that by an agreement dated 26th November 1994 the Defendant No.1 agreed to sell the suit property to the Plaintiff HUF for a total consideration of Rs.2.6 crores. According to the Plaintiff, Defendant No.1 represented to the Plaintiff that the suit property was subject to an equitable mortgage in favour of Defendant No.3 for an outstanding credit balance of Rs.90 lakhs. Defendant No.1 agreed to get the suit property released from the mortgagee Syndicate Bank and thereafter execute the sale deed in favour of the Plaintiff.

5. Cheque No.239209 dated 26th November 1994 for a sum of Rs.75,00,000/- and Cheque No.239210 dated 31st December 1994 for another sum of Rs.75,00,000/- were given by the Plaintiff to the Defendant No.1 at the time of execution of the aforementioned agreement to sell. It was agreed that the balance sum of Rs.1.10 crores would be received by the seller (Defendant No.1) at the time of the registration of the sale deed. It was stated in the agreement that the suit property was lying vacant and was in actual physical possession of the Defendant No.1 and further that he would not induct any other person in the suit property. It was agreed that the actual physical, vacant and peaceful possession of the first floor of the suit property would be delivered to the Plaintiff after the cheque dated 31st December 1994 was encashed.

6. In terms of the agreement to sell, the obligations of Defendant No.1 were to obtain:

- “1. Sale permission from DDA and Society, in terms of the perpetual sub lease deed.
2. Sale permission from the Competent Authority, of the Urban Land (Ceiling and Regulation 2976 Act of 1976), if applicable to the property.
3. Income Tax Clearance Certificate on Form No.34A under Section 23 of the Income Tax Act, 1961.
4. Permission from Appropriate Authority on Form No.37(1) under Section 269-UC of the Income Tax Act, 1961.”

7. It was further agreed that after the above permission and any other permission as required in law were obtained, Defendant No.1 would inform the Plaintiff by registered post of the obtaining of such approvals.

Within thirty days of such intimation, the Plaintiff would pay to Defendant No.1 the balance consideration amount and on receiving the same, Defendant No.1 would execute the sale deed in respect of the suit property in favour of the Plaintiff. It was agreed that if Defendant No.1 failed to do so, the Plaintiff “would be entitled to get the sale deed registered through the Court of law by specific performance of the contract at the costs and expenses of the Vendor”. If after Defendant No.1 had informed the Plaintiff that he had obtained all the necessary permissions, the Plaintiff failed to make the payment of the balance consideration within thirty days, then the Plaintiff would be liable to pay Defendant No.1 interest at 21% on the balance amount for such delayed period. Clause 5 of the agreement stated: “However in the event the vendee is desirous of taking possession of the property pending approval/permission, the vendee can do so by making the balance payment and vendor executing registering all necessary documents, like GPA, will supplementary agreement etc., and as may be desired by the vendees solicitor.”

8. In the preamble clauses of the agreement, it was acknowledged that the suit property was subject to the equitable mortgage in favour of Defendant No.3 Bank for an amount of Rs.90 lakhs and that Defendant No.1 had agreed to get the suit property released from the mortgage before executing the sale deed. In clause 7 of the Agreement to Sell, Defendant No.1 assured the Plaintiff that the suit property was free from all encumbrances, except the equitable mortgage in favour of Syndicate Bank. In terms of the said clause, Defendant No.1 undertook that he

would be liable and responsible to make good the loss suffered by the Plaintiff if there was any dispute or litigation or acquisition or requisition in respect of the suit property. In clause 8, it was recorded that pending the completion of sale, Defendant No.1 would not enter into any agreement to sell, in respect of the suit property or any part thereof.

9. The first cheque dated 26th November 2004 in the sum of Rs.75 lakhs was encashed by Defendant No.1. According to the Plaintiff, cash in the sum of Rs.14 lakhs was also paid to Defendant No.1. However, no document was produced by the Plaintiff to substantiate this. According to the Plaintiff, despite agreeing to forthwith apply for statutory permissions, Defendant No.1 did not take any steps in that regard. The Plaintiff further discovered that the dues owed by Defendant No.1 to the Syndicate Bank was around Rs.1.5 crores and not Rs.90 lakhs as held out in the agreement. The Plaintiff states that by failing to perform his obligations in terms of the agreement, the bonafides of Defendant No.1 became doubtful. In the circumstances, in order to protect its interests, the Plaintiff by letter dated 31st December 1994 informed its bankers to stop payment of the cheque dated 31st December 1994 for Rs.75 lakhs. The Plaintiff claimed that “due intimation was also given to the defendant verbally”.

10. The Plaintiff states that although the Defendant No.1 failed to apply for the necessary permissions, the Plaintiff on 3rd January 1995 applied to the Appropriate Authority in Form No.37(1) under Section 269-UC of the Income Tax Act, 1961 (‘Act’) for a no objection of that Authority. By

a letter dated 30th January 1995, the Appropriate Authority informed the Plaintiff that without the signatures of the Defendant No.1, the application could not be considered.

11. In the meanwhile, Defendant No.1 wrote to the Plaintiff on 3rd January 1995 protesting against the stoppage of the payment of the said cheque dated 31st December 1994. By letters dated 5th January 1995 and 14th January 1995, the Plaintiff replied to the said letter through counsel pointing out the breaches committed by Defendant No.1. The Plaintiff offered that the matter should be discussed so that an amicable solution could be found. Simultaneously, the Plaintiff published a notice dated 13th January 1995 in a leading English daily informing the public of the agreement to sell entered into between the parties. In the correspondence that ensued between the Plaintiff and Defendant No.1, allegations and counter-allegations were traded. The Plaintiff wrote to the Defendant No.3 Bank on 28th March 1995 seeking information as to the outstanding dues of Defendant No.1.

12. The Plaintiff claims that some time in April 1995, the Defendant No.1 approached the Plaintiff and agreed to resolve the disputes. The Plaintiff states that Defendant No.1 expressed his willingness to perform his obligations under the agreement to sell. According to the Plaintiff, as a first step, Defendant No.1 agreed to apply to the Income-tax authorities for permission to sell under Section 269 UC. The Plaintiff states that thereupon they jointly signed and executed forms and under the cover of the letter dated 26th April 1995, the Plaintiff once again submitted the

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concerned forms to the income-tax authorities. The Plaintiff claims that the income-tax authority granted permission on 31st July 1995. A photocopy of the permission purporting to be a certificate issued under Section 269 UC (3) of the Act as issued by the Appropriate Authority, has been placed on record. However, the Plaintiff has failed to place on record the original of this document.

13. The Plaintiff claims that thereafter on 30th November 1995, the Karta of the Plaintiff HUF, on a visit to the suit property, was shocked to see the board of M/s. Gupta Brothers (Defendant No.2). According to the Plaintiff it was evident from this that the suit property was not in the possession of Defendant No.1. According to the Plaintiff, on 7th June 1995 it received an undated letter from the Advocate for the Defendant No.1 in which it was alleged that the Plaintiff had failed to perform his part of the contract. It was stated therein that “as already communicated to your client, the agreement stood cancelled on account of the breaches committed by your client of the said agreement, which position stood accepted by your client and that is the reason your client slept over the same”. This was denied by the Plaintiff by a letter dated 28th June 1995. On 18th July 1995, the lawyer for the Defendant No.1 again wrote to the lawyer for the Plaintiff reiterating that the agreement to sell stood cancelled.

14. The reliefs in the present suit have been claimed on the basis of the above averments. The suit first came to be listed before this Court on 14th

December 1995 and while directing the summons to issue, an ad interim
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ex parte injunction was granted restraining the Defendants from creating any third party rights and from entering into any other agreement with any other party including the Defendant No.2.

15. In the written statement filed by Defendant No.1, it was categorically denied that the parties had jointly applied to the income-tax authorities for permission on 26th April 1995. Defendant No.1 denied being aware of any such letter or the filing of any Form 37-I with the income-tax authority either on 3rd January 1995 or thereafter. The stand of Defendant No.1 was that inasmuch as the Plaintiff did not have the balance sum of Rs.75 lakhs available on 31st December 1994, he got the encashment of the cheque of that date stopped. Since this was a condition precedent for Defendant No.1 to take further steps, the Plaintiff had by committing the most fundamental and essential breach of the agreement to sell, frustrated its compliance. The case of Defendant No.1 was that on account of this breach by the Plaintiff, Defendant No.1 suffered huge losses since he had made commitments in the hope that he would be able to redeem the mortgage with the Defendant No.3 Bank.

16. An application (IA 3854/1996) was filed on behalf of Defendant No.2 under Order VII Rule 11 CPC for rejection of the plaint. This was heard on 10th September 1996 along with the application under Order XXXIX Rules 1 and 2 CPC (IA No.12510/1995) filed by the Plaintiff. This Court prima facie concluded on the basis of the pleadings on record that “the case of the plaintiff-applicant that the first defendant joined with the applicant in applying to the appropriate authority is not correct”. It was

noticed by this court in its order dated 10th September 1996 that in view of the Plaintiff having issued instructions to his bankers to stop payment of the cheque dated 31st December 1994 he had “acted in violation of the provisions of the agreement and, therefore, he cannot claim the equitable relief of specific performance”. Clarifying that this was only a prima facie view, this Court held that the balance of convenience was also not in favour of the Plaintiff.

17. In the same order, it was noted by the court that the counsel for the Defendant No.1 had offered to return Rs.75 lakhs to the Plaintiff. However, the learned counsel for the Plaintiff refused to receive the amount. It was then directed that Defendant No.1 would deposit the said sum of Rs.75 lakhs in a fixed deposit in his name for a period of three years and would deposit in court the fixed deposit receipt issued by the bank. IA 12510 of 1995 under Order 39 Rule 1 and 2 CPC was accordingly dismissed.

18. As regards the application (IA No.3854 of 1996) filed by Defendant No.2 under Order VII Rule 11 CPC, it was the contention of the Defendant No.2 that the Plaintiff was aware of the agreement in favour of Defendant No.2 even at the time of entering into the agreement to sell dated 26th November 1994. It was observed by this Court that “if the second defendant has got an agreement with the first defendant it is for him to sue the first defendant for the specific relief. He cannot file application under Order 7 Rule 11 CPC and seek an adjudication on the question which is the prior agreement as between the two”. Accordingly

the said application was dismissed without prejudice to the rights of Defendant No.2 to claim appropriate relief.

19. An appeal FAO (OS) No.367 of 1996 was filed by the Plaintiff against the aforementioned order dated 10th September 1996 in which it was directed by the Division Bench that status quo would be maintained by the parties till the next date of hearing. However, on 19th February 1998 the suit itself was dismissed for non-prosecution. IA No.1691 of 1998 was filed thereafter by the Plaintiff for restoration of the suit. This also was dismissed in default on 14th September 1998. A fresh application (IA 9920/98) was thereafter filed on 2nd November 1998. In the meanwhile, since the suit itself had been dismissed, FAO (OS) No.367 of 1996 was dismissed on 15th February 1999. Meanwhile, in the application for restoration of the suit, despite several adjournments the Defendant was not served. Accordingly IAs 1601/98 and IA 9920/98 were both dismissed for non-prosecution by this court on 3rd December 1999. A further application IA 12754/1999 was thereafter allowed by this Court on 9th February 2000. The earlier applications for restoration were restored subject to the payment by the Plaintiff of Rs.5000 as costs. IA 1691/1998 was thereafter allowed by order dated 9th October 2002 subject to the costs of Rs.2000/-. The delay in filing the application for restoration was also allowed subject to the costs of Rs.1,000/-.

20. It may be mentioned that the plaintiff filed an IA No.10122/2002 for striking out the defence of Defendant No.1 since he had not deposited Rs.75 lakhs pursuant to the order dated 10th September 1996. On 16th

February 2004 a statement was made by counsel for defendant No.1 that he would be depositing the said amount. He was directed to deposit it within a week with the Registrar General of this Court and the amount was directed to be kept in a fixed deposit and kept renewed till further orders. Counsel appearing for Defendant No.2 stated that he would be filing an application for deletion of his name from the array of parties. On the next date, i.e., 9th March 2004 this court was informed that in compliance with the earlier orders, the Defendant No.1 had deposited Rs.75 lakhs. The said amount was directed to be kept in fixed deposit for a period of six months and kept renewed till further orders of the Court. IA 10122/2002 was disposed of as having become infructuous.

21. On 27th September 2004, the Court while considering IA 6443/2004 filed by the Plaintiff issued a direction to the Defendant No.1 not to demolish the structures on the suit property. At that stage, this Court was informed by the counsel for Defendant No.1 that the suit property had already been demolished and the Defendant No.1 was in the process of re-constructing the same. The court then appointed a Local Commissioner to visit the suit property and file a report. On 20th April 2005, the Court dismissed IA 3031/2005 filed by the Plaintiff seeking a decree on admissions under Order XII Rule 6 CPC. It was observed by the Court that “perusal of the written statement filed shows that there are serious issues which have to be contested between the parties. I do not find any admission of the defendant”.

22. On 27th September 2005, the Court disposed of IA 8432/2004 filed by

Defendant No.2 seeking deletion on the ground that Defendant No.2 had abandoned its claim in the suit property and had no interest therein. It was also stated that the Defendant No.2 was not in possession of the suit property and, therefore, there was no cause of action as far as Defendant No.2 was concerned. The learned counsel for the plaintiff did not object to the deletion of Defendant No.2. Accordingly, the Defendant No.2 was deleted from the array of parties. Consequently in the present suit since then there have been only two defendants.

23. An application (IA 4258/2004) was filed by the Defendant No.1 praying that the relief for specific performance of the agreement to sell dated 26th November 1994 should be declined to the Plaintiff since he had also prayed in the alternative for the relief of damages and further that the Defendant No.1 had already deposited Rs.75 lakhs in this Court by way of refund. This application was, however, dismissed by this court on 16th November 2005 noting that the question whether the plaintiff was entitled to specific performance of the agreement to sell could be decided “only after adjudicating all the pleas and contentions of the parties and not at an interim stage on the basis of the pleas of the defendant that he has refunded the amount received by him by depositing the same in the Court”.

24. On 21st April 2006, this Court disposed of IA 1588/2005 filed by the Plaintiff seeking a direction to the Defendant No.1 to deposit a sum of Rs.2.70 crores which, according to the Plaintiff, was the interest earned by the Defendant No.1 on the sum of Rs.75 lakhs that was supposed to

have been deposited by the Defendant No.1 in this Court on 10th September 1996. It was directed that the Registry would keep the said amount in a fixed deposit till the disposal of the suit. The question whether Defendant No.1 was liable to pay any interest on the said sum in the event of the suit being decreed in the alternative would be decided at the time of the disposal of the suit.

25. In IAs 6443/2004, 5463/2005 and 6708/2005 the prayers of the Plaintiff were for maintenance of the status quo in respect of the suit property and for appointment of a receiver. As regards the prayer by Defendant No.1 for vacation of the ad interim injunction, the court in its order dated 21st April 2006 noted that the suit property had been demolished and that Defendant No.1 was seeking to raise a construction thereon. It was observed that it could not serve anybody's interest if the land was not constructed upon. Defendant No.1 was accordingly permitted to construct upon the suit property at his own risks and costs and that it would not create any equities in his favour and would be subject to the final outcome of the suit. The Defendant was also restrained from transferring or alienating the suit property or from parting with possession in favour of anybody else. It was noted that the Defendant No.1 had entered into agreement with one M/s. Kataria Constructions Pvt. Ltd., who had filed a Suit CS(OS) No.1080 of 2005 in this Court and an interim injunction had been granted in that suit on 8th August 2005 directing the Defendant No.1 to maintain status quo. Consequently, it was felt that there was no need to appoint any receiver.

26. Thereafter, this court framed the following issues by the order dated 21st April 2006:

“1. Whether the suit for performance of the agreement dated 26th November, 1994 is not maintainable under the provisions of the Specific Relief Act, as alleged in the objections? OPD

2. Whether Defendant No.1 had made any misrepresentation about the mortgage/charge of the suit property with the Syndicate Bank at the time of signing the agreement dated 26th November, 1994 and the extent thereof? If so, its effect? OPP

3. Whether Defendant No.1 complied with his obligation under Clause 2 of the agreement to sell dated 26th November, 1994 within time, and if so, its effect? OPD

4. Whether the Plaintiff has been ready and willing to perform his part of the agreement to sell dated 26th November, 1994, if so to what effect? OPP

5. Whether Defendant No.1 has created any third party interest in favour of Defendant No.2 prior to 26th November, 1994, if so, its effect? OPD

6. Whether the Plaintiff is entitled to specific performance of the agreement to sell dated 26th November, 1994 as prayed? OPP

7. Whether the Plaintiff is entitled to the relief of permanent injunction as prayed? OPP

8. Whether the Plaintiff is entitled to any amount towards damages? OPP

9. Whether the Plaintiff is entitled to interest? If so, at what amount, rate and period? OPP

10. Whether the Plaintiff has not approached this Court with clean hands? OPD

11. Relief.

27. It is also noted in the said order that apart from the suit filed by M/s. Kataria Constructions CS(OS)No.1080/2005) there was another suit filed by the Plaintiff against M/s Krishna Estates being Suit No.2110 of 2002 seeking specific performance of agreement in respect of the suit property. Defendant No.1 had filed CrI.Mic.No.2923/2005 under Section 340 CrPC which was directed to be taken up along with the suit at the time of final disposal.

28. On behalf of the Plaintiff Mr. J.L. Gugnani was examined as PW1. His cross-examination was completed after several orders passed by this court including imposition of costs on Defendant No.1. On 6th December 2008, Defendant No.1 was asked to file his affidavit of evidence within one week. PW2 was Mr. Ashok Kumar working as Assistant Manager, Vijaya Bank. His examination concluded on 18th March 2009. PW3 Mr. Yashpal working as Tax Assistant, Appropriate Authority, Income-tax Department produced a letter dated 12th March 2009 (ExPW3/A) of Ms. Sushma Duggal, ITO Headquarters, Appropriate Authority. Photocopies of the relevant entries in the no objection certificate/dispatch register containing entries at Sr. Nos. 5 and 6 were marked as Ex.PW3/B. On behalf of the Defendant No.1, he did not examine himself but one Mr. SC Chopra, Senior Manager, Syndicate Bank on 28th July 2009. A statement was made before this Court on 3rd August 2009 that Defendant No.1

wished to close his evidence. Accordingly the case was listed for final arguments.

29. Mr. Arvind Nigam, the learned Senior Counsel appearing on behalf of the Plaintiff contended that as far as the Plaintiff HUF was concerned, it was always willing to perform its obligations under the agreement to sell dated 26th November 1994. There was no forfeiture clause in the agreement and, therefore, time was not the essence of the contract. It was submitted that since the agreement to sell stated that Defendant No.1 would apply for the permissions 'forthwith', this had to be done immediately upon the agreement to sell being entered into and not, as contended by Defendant No.1, after encashment of the second cheque dated 31st December 1994 for a sum of Rs.75 lakhs. Defendant No.1 had not been candid with the Plaintiff and had suppressed the fact that the amount owing to the Syndicate Bank was over Rs.1.5 crores and not Rs.90 lakhs as held out. Consequently Defendant No.1 also suppressed the fact of his having entered into a separate agreement to sell with M/s Gupta Brothers. He pointed out that there was a settlement arrived at between the parties in April 1995 pursuant to which the Form 37-I jointly signed by both the parties was presented to the Appropriate Authority and the certificate was issued on 31st July 1995.

30. Referring to Sections 101 and 102 of the Evidence Act Mr.Nigam submits that the burden of proof was on the Defendant No.1 in respect of

the facts alleged by him. It is submitted that of the ten issues framed by this court on 21st April 2006, issues 1, 3, 5 and 10 were to be proved by Defendant No.1 by leading evidence. Since Defendant No.1 had failed to examine himself, he must be held not to have proved the above issues which went to the very root of the matter. Once Defendant No.1 had failed to discharge his burden, the suit for specific performance had to be decreed. Mr. Nigam submitted that although the copy of the original income-tax clearance dated 31st July 1995 was not available, the evidence of PW3 being the official of the Appropriate Authority, should be sufficient to show that the statutory requirement of getting income-tax clearance was in fact fulfilled. Reliance is placed on the decision of this court in *Sudershan Kumari Jain v. Pran Nath Jain 2009 (157) DLT 626* to contend that no objection could be raised by the Defendant No.1 to the decree for specific performance being passed in favour of the plaintiff since the essential statutory permissions from the income-tax authorities had been obtained and other statutory permissions could always be directed to be obtained by the court even while decreeing in the suit for specific performance.

31. Defendant No.1 appeared in person and also submitted a written note of arguments. He pointed out that the essential requirement in order to succeed in a suit for specific performance was that the Plaintiff should show that it was ready and willing to perform its part of the obligations. By issuing stop payment instructions vis-à-vis the cheque dated 31st December 1994 the Plaintiff had demonstrated that it was in fact not

ready or willing to perform its part of the obligations. The evidence of PW2, the Assistant Manager of the Vijaya Bank showed that the balance in the account of the Plaintiff as on 31st December 2004 was less than Rs.75 lakhs. This was in fact the reason why the stop payment instruction was issued. In so far as the Plaintiff had miserably failed to demonstrate its readiness and willingness to perform its part of the obligations, no decree for specific performance could be granted in favour of the Plaintiff.

32. Referring to the answers given by Mr. Gugnani in his cross-examination, Defendant No.1 submitted that admittedly even during the pendency of the present suit, the Plaintiff had entered into an agreement to sell dated 6th June 1996 with M/s Krishna Estates in respect of certain agricultural land in village Wazirabad. As part payment of the consideration for the said property, the Plaintiff herein had sold all its rights and interests flowing from the present agreement to sell to the said M/s Krishna Estates. Thus it was plain that the Plaintiff was not interested in getting the agreement to sell specifically performed for itself. Yet another agreement to sell had been entered into on 10th June 1999 (Ex.PW1/D-5) with the said M/s Krishna Estates for purchase of agricultural land. It is submitted that in respect of those transactions also a suit for specific performance had been filed in this Court by the Plaintiff who was only interested in speculating in real estate. Defendant No.1 referred to the forgery committed by the Plaintiff in preparing an alleged receipt in the sum of Rs.14 lakhs. In respect thereof an FIR

No.245/2005 had been registered against the Plaintiff and charges had been framed by the learned ACMM on 26th February 2006.

33. According to Defendant No.1, the documents submitted to the Income-tax Department by the Plaintiff were forged as he had never signed any such document. He contested the contention of the Plaintiff that any valid NOC had been issued by the Appropriate Authority on 31st July 1995 in favour of the Plaintiff. It is submitted that there was no reason why without receiving the second payment of Rs.75 lakhs the Defendant No.1 would take steps to get clearance. The Plaintiff was fully aware of the mortgage created in favour of the Defendant No.3 Bank and if the said payment of Rs.75 lakhs had been realized by the Defendant No.1, it would have cleared the outstanding dues of Syndicate Bank and got the title documents released. It was the Plaintiff's stoppage of payment without any prior notice to the Defendant No.1 that had frustrated the agreement to sell.

34. Defendant No.1 points out that the attempt by the Plaintiff to have the records of the Bank for producing the statement of account of the dues after 31st December 1994 was negated by this court by an order dated 23rd March 2009. Accordingly, the Plaintiff had miserably failed to prove that as on 31st December 1994, it had sufficient money for performing its obligations of paying Rs.75 lakhs to the Defendant No.1 and that even thereafter it had sufficient sum to pay the balance consideration.

Defendant No.1 also points out that there were certain criminal proceedings in which the Plaintiff had Defendant No.1 arrested on 4th March 2004. He submitted that he had suffered enormous hardship and harassment at the hands of the Plaintiff. He prays for dismissal of the suit with exemplary costs. As regards the sum of Rs.75 lakhs deposited in this Court, it is submitted that there is no prayer made by the Plaintiff for return of the said money together with the amount of interest accrued thereon and therefore it should be directed to be returned to Defendant No.1.

***Issue No.4:** Whether the Plaintiff has been ready and willing to perform his part of the agreement to sell dated 26th November, 1994, if so to what effect?*

***Issue No.6:** Whether the Plaintiff is entitled to specific performance of the agreement to sell dated 26th November, 1994 as prayed?*

35. The above two issues are taken up for consideration first. This is a suit for specific performance. It is the Plaintiff, an HUF, which has to first satisfy the Court that it has always been ready and willing to perform its part of the obligations under the agreement to sell of which specific performance is being sought. In para 15 of the plaint, the Plaintiff has made the necessary averment that it “has at all times been and continues to be ready and willing to perform all their obligations under the agreement to sell dated 26th November, 1994. The Plaintiff is and has all times been ready and willing to pay the balance sale consideration provided the said Defendant fulfills all their obligations under the

aforesaid agreement to sell dated 26th November, 1994.” However, the evidence in support of this averment requires to be examined.

36. The facts narrated hereinbefore show that on the date of entering into agreement to sell, the Plaintiff was aware that the property stood mortgaged to the Syndicate Bank. The amount for which the mortgage was created in favour of the Syndicate Bank as indicated in the agreement to sell is Rs.90 lakhs. The allegation of the Plaintiff is that it discovered subsequently that the amount owed to the said Bank was approximately Rs.1.5 crores. In response to the averment to this effect in para 10 of the plaint, the Defendant No.3 in its written statement only gives the outstanding liability owed by the Defendant No.1 to the Bank as on the date of the written statement, i.e., 10th July 1996. This is split up into non-fund based liability to the tune of Rs.95.95 lakhs and funds based liability to the tune of Rs.162.45 lakhs. This written statement is, therefore, not helpful in ascertaining the exact amount owed to the Defendant No.3 Bank by Defendant No.1 as on the date of the agreement to sell. In any event this does not appear to have deterred the Plaintiff from seeking specific performance of the agreement because on its own showing, it kept corresponding with the Defendant No.1 even thereafter.

37. It appears that on 14th January 1995 itself, the lawyer for the Plaintiff had written to the Defendant No.1 stating that “it has now transpired from letter dated 1/12/94 of Syndicate Bank that the liability of the Bank

is existing Rs.1.5 Crore”. The Plaintiff was also aware of the further collaboration agreement in favour of Defendant No.2 and yet by that letter the Plaintiff was still seeking specific performance of the agreement to sell. This was, of course, denied by the Defendant No.1 through his lawyer by the reply dated 22nd January 1995. It was also denied that any sum of Rs.14 lakhs was received in cash. Defendant No.1 expressed shock that the Plaintiff had given a stop payment instruction behind the back of the Defendant No.1 and therefore by the letter dated 3rd January 1995 Defendant No.1 cancelled the agreement.

38. A perusal of the agreement to sell shows that the applications for statutory permissions were to be made by Defendant No.1 “forthwith”. However, the time period within which this had to be done was not indicated. It was also not envisaged that the Plaintiff would stop payment of the cheque of Rs.75 lakhs dated 31st December 1994 if the Defendant No.1 did not apply for and obtain the permissions “forthwith”. The undisputed fact is that the Plaintiff did issue a stop payment instruction vis-a-vis the cheque dated 31st December 1994. The Plaintiff did so without informing Defendant No.1. The letter addressed by the Plaintiff to its bankers giving such instruction is dated 31st December 1994. The Plaintiff had has not been candid and truthful in stating that it was not aware that the payment of Rs.1.5 crores to the Defendant No.3 was one of the essential conditions to be fulfilled. This is significant because even according to the Plaintiff, it knew that as on the date of the agreement to sell, an equitable mortgage in the sum of Rs.90 lakhs was created in

favour of the Syndicate Bank. One of the essential conditions of the agreement to sell was that the Defendant No.1 would liquidate the dues of Syndicate Bank and get the total dues realized. Only then would it be possible for the sale deed to be executed in favour of the Plaintiff. Obviously the said amount could not have been liquidated by Defendant No.1 himself without receiving the two payments by the two cheques issued by the Plaintiff in his favour.

39. The second significant aspect was that the vacant possession of the first floor of the suit property was to be delivered by Defendant No.1 to the Plaintiff soon after the encashing of the cheque dated 31st December 1994. This also the Plaintiff did not permit to happen.

40. Then we have the evidence of the Bank official PW2. He had brought to the court the statement of account of the Plaintiff which showed that as on 31st December 1994 the balance in the account was Rs.69,80,125/-. Clearly, therefore, if the cheque dated 31st December 1994 in the sum of Rs.75 lakhs had been presented for payment, it would have been dishonoured. The attempt by the Plaintiff to get the bank official again summoned to bring the statement of account beyond that date was not permitted by this Court by an order dated 23rd March 2009. In the circumstances, the Plaintiff has miserably failed to prove that it had the capacity to pay the amounts owing to the Defendants under the agreement to sell either on 31st December 1994 or even thereafter.

Therefore, this essential obligation of the Plaintiff under the agreement to sell has not been fulfilled by it and the Plaintiff has, therefore, not been able to show its readiness to perform its part of the obligation.

41. Then we have the conduct of the Plaintiff in entering into an agreement dated 6th June 1996 with M/s Krishna Estate. That agreement was for the purchase by the Plaintiff of 434 bighas and six biswas of agricultural land from M/s Krishna Estates for a total consideration of Rs.11.04 crores. In clause 9 of that agreement, it was stated that “sum of Rs.1 crore had already been paid”. In clause 9(b) of the said agreement, an express reference was made to the fact that the Plaintiff was holding an agreement to sell in respect of the suit property and that they had paid to the Defendant No.1 a sum of Rs.89 lakhs and they have received no objection from the income-tax authority and that the balance would have to be paid through Defendant No.1 for the sale deed to be executed. It was mentioned that a suit had already been filed by the Plaintiff in this Court pending adjudication and that the first party to the agreement dated 6th June 1996, i.e., M/s Krishna Estates had no objection to the right and title of the interest of the second party, i.e., (J.L. Gugnani) in respect of the said property. It was agreed that the total consideration of Rs.2.5 crores included the amount of Rs.90 lakhs paid by the second party to the owner (i.e., the Defendant No.1 herein). Clearly, therefore, the karta of the Plaintiff, J.L. Gugnani, held out M/s Krishna Estates that it was still holding an agreement to sell although it did not correctly represent the amount paid to the Defendant No.1.

42. It requires to be recalled that a sum of Rs.75 lakhs had been paid to the Defendant No.1. According to the Plaintiff, it had also paid Rs.14 lakhs in cash which of course was disputed by the Defendant No.1. The Plaintiff has not made any attempt to prove the payment of Rs.14 lakhs by way of cash to the Defendant No.1. The Plaintiff also does not deny pendency of a criminal case arising out of the alleged forgery of the receipt of Rs.14 lakhs and the cancelled cheque for the said amount, photocopy of which document has been included as Annexure B to the Plaintiff's compilation in the present case. In his cross-examination, the Plaintiff also does not deny that "he entered into the second agreement dated 6th June 1996".

43. In the above context, the following questions and answers during the cross-examination of the karta of the Plaintiff HUF are significant:

"I have seen the certified copy of the plaint being suit no.2110/2002 titled 'J L Gugnani vs. Krishna Estates and Others' annexed with the affidavit and another agreement to sell dt.10th June 1999 which are correct but all these are not relevant qua the point in controversy. These also marked as Ex.PW1/D3, Ex.PW1/D4 and Ex.PW1/D5 respectively. (Objected to mode of proof)

Ques : I put it to you that you have filed the suit for specific performance of the agreement 6th June 1996 pending in this Hon'ble High Court?

Ans : Since the agreement was never materialized, so another agreement to sell was executed but I do not recall the exact date

of that agreement. However, the suit for specific performance was filed on the basis of subsequent agreement.

Ques : I put it to you that during the pendency of the present suit you dealt with M/s Krishna Estates with a view to sell the suit property?

Ans : It was proposed discussion and agreement by mentioning of suit no.2906/95 but the same was not materialized.”

The above admission of the Plaintiff is significant for determining its readiness and willingness to perform its part of the obligation.

44. The aspect of obtaining all income-tax clearance is also controversial. From the documents placed on record it appears that the Plaintiff unilaterally submitted Form 37-I to the Appropriate Authority on 3rd January 1995 knowing that it was not signed by the Defendant No.1. It is not possible to believe that the Plaintiff did not understand the consequences of submitting such a form without the signature of the Defendant No.1. Further, the said form was submitted after the Plaintiff had stopped payment of the cheque dated 31st December 1994. The Plaintiff has not been able to satisfactorily explain this conduct. Not surprisingly, therefore, on 30th January 1995 the Appropriate Authority wrote to the Plaintiff that since the statement “filed by you is not signed by the transferor”, another Form 37-I has to be filed. It is surprising, therefore, that the Plaintiff accuses the Defendant No.1 of not having taken steps “forthwith” when apparently the Plaintiff had himself

submitted this Form to the Appropriate Authority, even while not paying the Defendant No.1 the second instalment of Rs.75 lakhs, consequent to which the Defendant No.1 was to take steps to get the income tax clearance..

45. Although the Plaintiff states that the Defendant No.1 was “verbally” informed of the instruction issued to the bank to stop payment of the cheque dated 31st December 1994, the only document that has been produced in proof thereof is the letter dated 5th January 1995 written to Defendant No.1 in which for the first time the Plaintiff informed Defendant No.1 about having issued such an instruction. Significantly by this date on 3rd January 1995 itself the Defendant No.1 had written to the Plaintiff that the agreement stood cancelled since the cheque presented by the Defendant No.1 was returned dishonoured. In the letter dated 5th January 1995, the Plaintiff accused the Defendant No.1 of failing to “file the application in Form 37-I within the due date”. From the letter dated 30th January 1995 of the Income-tax Authority to the Plaintiff, it appears that the Plaintiff had itself sent such a form “unsigned by the Defendant No.1 to the Appropriate Authority”.

46. Then we have the letter dated 26th April 1995 again written by the Plaintiff to the Appropriate Authority admitting that when earlier the Form 37-I was submitted “the Transferee in spite of his best efforts could not get the form signed by the Transferor earlier. However, the same has

now been signed by the transferor and the duly filled and signed by both the parties is now enclosed herewith for your necessary action”. This belies the case of the Plaintiff that the Defendant No.1 did not take any steps. It is the Plaintiff who had unilaterally sent the Form 37-I to the Appropriate Authority without the Defendant No.1 signing on it. If the cheque dated 31st December 1994 was not going to be honoured, it was not surprising that the Defendant No.1 did not come forward to sign such a form. With the Defendant No.1 denying that he had ever signed such a form, the burden was on the Plaintiff to show that such a signed form had been submitted to the Appropriate Authority. That document has not seen the light of the day.

47. A copy of the document dated 31st July 1995 purported to be issued by the income-tax authority indicating its no objection to the transfer of the property has been placed on record. It does not show the signatures of the Members of the Appropriate Authority. It is only a photocopy of a certified copy. No attempt has been made by the Plaintiff to lead secondary evidence in respect of this document. The evidence that has come on record in the form of PW3, the official from the Office of the Appropriate Authority, has only proved the letter dated 12th March 2009 (Ex.PW3/A) written by Ms. Sushma Duggal, ITO HQ.-Appropriate Authority stating that the record File No. 4532 “is not readily available in this office”. Although it shows that a NOC has been issued to the Plaintiff and Defendant No.1 and certain entries in the dispatch register kept in the office had been sought to be proved. This NOC by income-tax

authority shows that the Plaintiff and the Defendant No.1 jointly applied for income-tax clearance. In the light of the categorical denial by the Defendant No.1 of ever signing of such a document and accusing the Plaintiff of fabricating such a document, the burden was on the Plaintiff to show that in fact the Defendant No.1 had joined him in making such an application. This burden has not been discharged by the Plaintiff.

48. It is surprising that without the Plaintiff performing his part of the obligation of making payment of the sum of Rs.1.5 crores to Defendant No.1, it was expecting Defendant No.1 to take steps for performance of his obligations. Moreover the Plaintiff was clearly not interested in getting the property for itself as it had already parted with its rights even during the pendency of this suit to M/s Krishna Estates.

49. In the circumstances, the Plaintiff has miserably failed to prove that it has been ready and willing to perform its part of the obligations under the agreement to sell dated 26th November 1994. The Plaintiff is accordingly not entitled to seek specific performance of the said agreement. Accordingly, the issue Nos.4 and 6 are answered against the Plaintiff and in favour of the Defendant No.1.

Issue No.1: Whether the suit for performance of the agreement dated 26th November, 1994 is not maintainable under the provisions of the Specific Relief Act, as alleged in the objections?

50. In view of the findings on issues 4 and 6, it cannot be held that the

suit for specific performance is maintainable under the Specific Relief Act and therefore the issue is decided in favour of the Defendant No.1 and against the Plaintiff. Although the Defendant No.1 has not stepped into the witness box to lead the evidence, the evidence led by the Plaintiff himself has demonstrated that it has not been ready and willing to perform its part of the obligations.

***Issue No.2:** Whether Defendant No.1 had made any misrepresentation about the mortgage/charge of the suit property with the Syndicate Bank at the time of signing the agreement dated 26th November, 1994 and the extent thereof? If so, its effect?*

51. In the considered view of this Court, the Plaintiff has not been able to prove that Defendant No.1 made any misrepresentation as alleged. The issue is answered against the Plaintiff and in favour of Defendant No.1.

***Issue No.3:** Whether Defendant No.1 complied with his obligation under Clause 2 of the agreement to sell dated 26th November, 1994 within time, and if so, its effect?*

52. As already noticed, there was no specific time frame within which Defendant No.1 had to perform his obligations under the agreement to sell. Moreover, the said obligations did not arise if the payment of Rs.1.5 crores was not made to Defendant No.1. Admittedly, the Plaintiff unilaterally stopped the payment of the second cheque dated 31st December 1994. Consequently, it cannot be held that the Defendant No.1 failed to fulfill the obligations under clause 2 of the agreement to sell

within the time envisaged under that agreement. The issue is answered accordingly.

Issue No.5: Whether Defendant No.1 has created any third party interest in favour of Defendant No.2 prior to 26th November, 1994, if so, its effect?

53. The Defendant No.2 was dropped from the array of parties.

Therefore, this issue does not require to be answered.

Issue No.7: Whether the Plaintiff is entitled to the relief of permanent injunction as prayed?

Issue No.8 : Whether the Plaintiff is entitled to any amount towards damages?

Issue No.9 : Whether the Plaintiff is entitled to interest? If so, at what amount, rate and period?

54. In view of the Plaintiff having failed to succeed in issue Nos. 4 and 6, these issues are answered against the Plaintiff. The Plaintiff is not entitled to any further relief.

Issue No.10: Whether the Plaintiff has not approached this Court with clean hands?

55. The Defendant No.1 by not entering the witness box has really not been able to show that the Plaintiff has not approached this court with clean hands. This issue is therefore answered against the Defendant No.1.

56. The prayers in the plaint do not include a prayer for return of the sum of Rs.75 lakhs paid to the Defendant No.1. Accordingly it is not possible

to grant such a relief to the Plaintiff. Moreover the Plaintiff has not been able to show that it is entitled to any decree for specific performance. The question therefore of payment of any sum to the Plaintiff does not arise.

57. Consequently the suit is dismissed with costs of Rs.30,000 which is apart from the costs that will be determined in accordance with law. The costs of Rs.30,000 shall be paid by the Plaintiff to Defendant No.1 within four weeks. It is made clear that the court has not adjudicated upon any of the submissions made by Defendant No.1 vis-à-vis Defendant No.3 Syndicate Bank. That is a subject matter of separate proceedings which will be decided independent of the present judgment. The interim orders stand vacated. The amount deposited by the Defendant No.1 in this court which has been directed to be kept in a fixed deposit will be returned to Defendant No.1 within two weeks by the Registry together with the accrued interest. The pending applications stand disposed of.

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58. Having perused this application, this Court is of the view that the allegations made in the application need not be examined in the view of the fact that the Plaintiff has been denied relief for having failed to prove its case. Moreover, by not appearing in the witness box, the Defendant No.1 has failed to discharge the burden of even prima facie proving Issue No.10 as indicated above.

59. The application is accordingly disposed of.

S. MURALIDHAR, J.

OCTOBER 20, 2009

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