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IN THE HIGH COURT OF DELHI AT NEW DELHI

DECIDED ON: 02.07.2010

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CS (OS) 2167/1996

KARAN MAHENDRU & ANR

..... Plaintiffs

Through: Mr. D.R. Bhatia with Mr. Kapil Kher, Advocates.

versus

VATIKA PLANTATIONS (P) LTD.

..... Defendant

Through: Mr. S.K. Sahni, Advocate.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

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

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

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1. In the present suit, decree for specific performance of an agreement dated 16.07.1988 entered into with the defendant is claimed. In the event this relief is inadmissible, the plaintiff claims, in the alternative, a decree for damages to the tune of ₹25 lakhs.
2. Though the matter has been shown in the category of 'FINALS', no one has appeared on behalf of the defendants. Order XVII, Rule 2 CPC reads as under:

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***2. Procedure if parties fail to appear on day fixed.*—Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to**

dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit.

4[Explanation.—Where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the Court may, in its discretion, proceed with the case as if such party were present.]

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3. The Supreme Court in *B. Janakiramaiah Chetty v. A.K. Parthasarathi*, AIR 2003 SC 3527 has held that the Court can exercise jurisdiction under Explanation to Rule 2 of Order XVII CPC when evidence on record is sufficient to substantiate the absentee party's stand and for disposal of the suit. If the evidence on record is sufficient for disposal of suit then there is no need for adjourning the suit or deferring the decision.

4. The facts emerging from the pleadings are that the defendant solicited applications from the members of the public in respect of a scheme for the development of an area of 300 acres. The defendant held-out that the area would be developed and suitably greened; it was also held that trees would be planted in the area. According to the averments made to the general public, inviting desired persons to participate in the venture, it was stated as follows:

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All these facilities for an investment of Rs. 85,000/- for one acre, Rs.200,000/- for 2 ½ acres and Rs.400,000/- for 5 acres of developed land, which includes all other expenses incurred by the promoters. The land purchased by you will be registered in your name and you will be required to transfer the power of attorney to the promoters. At the end of 6 years this amount will fetch you the sales proceeds of 800 trees per acre. Because of its proximity to the other colonies, land appreciation is also inevitable. You have yet another option, to put your land to second coppicecrop of eucalyptus which will give a 25% additional produce. When combined with the 25% price escalation (approx) you will get an income of nothing less than 50% more in the second 6-year rotation.

Now it is time to take advantage of this offer, as this price of Rs. 85,000/- is getting to shoot upto Rs. 100,000/- by the end of 1986. Now a few words about the Promoters and the Directors. The group is headed by Mr. Ravi Chandhok, an industrialist, and Mr. Anil Bhalla, a business. There are three other members too. They are Mr. S.D. Singh, Ex-Managing Director; Indian Oxygen Ltd., Mr. B.K. Uppal, Consultant, World Bank and Ex-member Irrigation, Bhakra Beas Management Board, and Mr. V.K. Gulati, Real Estate Promoter.

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5. It is not in dispute that the plaintiff applied and paid a sum of ₹2 lakhs; they are evidenced by Ex. P-3 and P-4 (receipts issued by the defendant on 05.06.1987 and 19.11.1987, each for ₹50,000/-). The parties thereafter entered into an agreement in question, specific performance of which is sought by the suit. The same has been produced as Ex. P-5 dated 16.07.1988. The material portions of the said agreement to sell disclose the extent of the property as 2.5 acres and also designated it as A-10(a); the agreement itself acknowledged receipt of ₹50,000/- and stated that the total consideration for the transaction was ₹1 lakh. The relevant stipulations, i.e. Clauses 1, 2, 3 and 6 are reproduced for the sake of convenience as follows:

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1. *That the Vendor has agreed to sell and the FARM-HOLDER has agreed to purchase all that piece of land comprised in Farm-House bearing private No. A-10(a) having an area of 2.5 acres hereinafter called the “Farm- House” more fully described in Schedule-I mentioned hereunder.*

Consideration

2. *Towards consideration to the above sale, the Farm-Holder shall pay to the Vendor in all a sum of Rs.1,00,000/- which shall be paid in the following manner:*

- (a) Rs. 50,000/- at the time of entering into this agreement.*
- (b) Rs. _____*
- (c) Rs. _____*
- (d) Rs. 50,000/- at the time of registration of sale deed of the Farm House.*

Registration of Sale Deed and terms of sale.

- 3. *(a) Upon the payment of a sum of Rs. 1,00,000/- being the full price of the Farm lands, the Vendor shall execute and get registered in favor of the Farm Holder, a Sale Deed in respect of the Farm.*
- (b) The sale deed shall embody the terms of this agreement relating to the raising of Eucalyptus trees, their reaping and sharing of dividends as mentioned hereafter. A specimen of the sale deed to be executed by the Vendor in favor of the Farm Holder is available for inspection at the registered office of the Vendor.*
- (c) That the cost of execution and registration of the sale deed shall be borne by the Farm Holder. The original of the Sale Deed shall be in the custody of the Farm Holder.*

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6. *Plantation and Inter Crops*

- (i) *The entire land in the farm house saving the land reserved or used for inroads, passages provided further, in case the Farm Holder opts for a dwelling unit, saving the land specified for the farm house and the open set back all around the farm house, roads, passages, the remaining cultivable portion of the farm shall be utilized by the Vendor at his own costs for agricultural purposes by growing Eucalyptus trees together with inter-crops in accordance with the horticultural pattern which the Vendor may be advised or deem fit.*

Lease Deed of Land and its Terms.

- (ii) (a) *To enable the Vender to do the plantations, its maintenance, irrigation and upkeep, the farm holder shall create a lease of the farm land, saving the dwelling unit or the area meant for it, in favor of the Vendor. A specimen of the lease deed to be so executed is available for inspection at the registered office of the Vendor.*
(b) *The lease of the said lands in favor of the Vendor shall be for a period of seven years from the date of its execution. The lease deed shall be executed and registered in favor of the Vendor simultaneously with the sale deed of the Farm Land which the Vendor shall execute in favor of the Farm Holder.*
(c) *It is specifically agreed that the Vendor shall not be entitled to assign, sub-lease, mortgage or in any other manner transfer the lease hold rights created in its favor by the Farm Holder.*
(d) *After the expiry of the period of lease, the Vendor shall have no right or concern with the land held by it under lease. However, right is reserved in favor of the Vendor to cut his share of the Eucalyptus trees and inter—crops, if standing, after the expiry of seven years but not later than one monsoon from the expiry of seven years commencing from the monsoon next arriving from the date of the plantation of trees, which period is hereinafter stated as the “maturity period.” Notwithstanding the above, after the expiry of the period of lease, the ownership rights of the Farm Holder with respect to the Farm House shall be absolute.*

Maintenance, upkeep of Plants and Crops.

- (iii) (a) *The Vendor shall plant the saplings of Eucalyptus trees, maintain, irrigate, supervise and grow them up at his own costs and expenses.*
(b) *In case any plant dies in the course of its growth, the Vendor shall immediately replace it by another healthy plant at his own cost.*
(c) *The dominant user of the said lands will be for plantation and growth of Eucalyptus trees. The Vendor is, however, permitted and authorized to grow inter crops also besides the Eucalyptus trees which is advised under the agricultural science.*
(d) *In no event the Vendor shall grow a higher number of Eucalyptus trees which may exceed the rate of 1300 trees per acre.*

Return and Dividends of Eucalyptus Trees and Crops

- (iv) (a) *On the advent of the maturity period, the Vendor will and over to the Farm Holder in standing position fully grown up Eucalyptus trees at the rate of 800 trees per acre.*
- (b) *It shall be the absolute choice of the Farm Holder to select the particular trees which he may like to retain towards his share of trees. The choice of the Farm Holder shall be acceptable and binding upon the Vendor and the Vendor shall not be entitled to raise any objections against the same.*
- (c) *Saving the Eucalyptus trees selected by and falling to the share of the Farm Holder, the Vendor shall be entitled to remove within a period of twelve weeks from the maturity period without any objection, interference or hindrance from the Farm Holder the remaining Eucalyptus trees and the inter-crop, if standing at the said lands and which trees and crops shall be the absolute and exclusive property of the Vendor. It is further stipulated that before the expiry of the above stated period, the Farm Holder shall have no right to compel the Vendor to remove the standing trees and/or crop.*
- (d) *The Vendor shall, upon request from the Farm Holder make necessary arrangement for the cutting and sale of the Eucalyptus trees falling in the share of the Farm Holder and, for which services the Vendor may claim necessary remunerations by way of commission or otherwise as may be agreed upon.*

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6. The plaintiff submits that on account of the six-year waiting period, no steps were taken but that after the expiration of that period, since the defendant did not come forward either to register the Sale Deed conveying the property or to hand over possession, a legal notice was issued on 24.02.1996. A copy of the same has been produced as Ex. P-6. The relevant portions of the said legal notice are extracted below:

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We are further advised that you as Vendor agreed and had undertaken in furtherance of the said agreement and upon payment of the total consideration of Rs. 1.0 lakh, execute and register in favor of our clients a sale deed in respect of the said farm.

We are further advised that notwithstanding your having received the full sale consideration for the said farm land, it has now come to our clients’ notice that you have not fulfilled the obligations undertaken in terms of the said agreement and have refused to execute the said deed in favor of our clients. You have even refused to meet our clients’ representative and have made it known that you are not prepared to execute the sale deed in respect of the said land subject matter of the agreement to sell.

It is thus too obvious to emphasize that your willful refusal to fulfil your

obligations as also to execute the sale deed in favor of our clients in respect of the land subject matter of the said agreement dated July 16, 1988 is intended to sell the said farm land to third parties on higher price. You are in breach of the agreement entitling your clients to seek specific performance of the agreement dated July 16, 1988 and in addition thereto, claim damages as a result of your now having refused to fulfil your obligations undertaken under the said agreement.

Under the circumstances, we have instructions from your clients to call upon you, which we hereby do, to fulfil your obligations in that, to execute the sale deed in respect of the said farm land subject matter of the agreement dated July 16, 1988 within thirty days of receipt by you hereof. If you fail therein, we have pre-emplory instructions to file suit for specific performance of the agreement and in addition thereto, to claim damages from you at the rate of Rs. 10,00,000/- per Acre amounting to Rs. 25,00,000/- at your costs and consequences.

This is without prejudice to our clients' rights to proceed against you for such other actions as our clients will deem appropriate including the winding up of your company under the provisions of Companies Act.

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On the basis of the above allegations, it is contended that the Court should direct the defendant to execute the Sale Deed and register the same and also hand-over possession of the property.

7. After issuance of the summons, the defendant entered appearance and resisted the claim in the suit. Besides the allegation that the suit is time-barred, it is also contended that the total consideration payable was not ₹1 lakh, but ₹2 lakhs. The defendant also sought to place reliance upon a letter – marked as Ex. PW-2/1 to say that the plaintiff was asked on 28.10.1988 to pay further amounts and that despite this demand, he defaulted in making payment.

8. The material defence set-out in para 6 of the written statement is as follows:

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It is humbly submitted and stated that as per the own contentions of the plaintiffs the plaintiffs agreed to purchase the land in suit after reading the invitation/pamphlet issued by the defendant which has been annexed at page 17 of the plaint and it is clear from the reading of the said pamphlet that the agreed price/sale consideration of 2.5 acres of land was Rs. 2 lakhs. Even if the contentions of the plaintiffs are assumed to be true, the plaintiffs have alleged that they have paid a sum of Rs. 1 lakh and no amount thereafter. So even upon the contention of the plaintiffs themselves since the default has been committed by the plaintiffs, the plaintiffs are estopped and barred from filing the present suit and the suit is liable to be dismissed.

That as a matter of fact the plaintiffs approached and requested for allotment of farm land measuring 2.5 acres against which a sum of Rs. 1 lakh was paid by the plaintiffs and on the payment of balance sum of Rs. 1 lakh, the sale deed for the land was supposed to be executed and registered in favor of the plaintiffs. The plaintiffs were not able to make the payment in time and requested that let an agreement to sell be executed and they shall pay the balance sum of Rs. 1 lakh and get the sale deed executed and registered in their favor. It was at the request of defendant that on 16.7.88 an article of agreement was executed and it was clearly mentioned in the said agreement that towards consideration of the sale of land, the plaintiffs shall pay to the vendor a sum of Rs. 1 lakh and out of that Rs. 1 lakh, Rs. 50,000/- was agreed to be paid at the time of entering of the agreement and balance Rs. 50,000/- was to be paid at the time of registration of the sale deed. It is evident from the record and being submitted and stated by the defendant that neither the plaintiffs paid a sum of Rs. 50,000/-, agreed to be paid at the time of execution of the said agreement dated 16.7.88 in spite of repeated requests made by the defendant nor the plaintiffs came forward with the total sum of Rs. 1 lakh to warrant the registration of the sale deed. The defendant kept on asking the plaintiffs to pay the said sum of Rs. 1 lakh and get the land registered in their favor but when the plaintiffs failed to do the same, a final letter dated 28.10.88 was served upon the plaintiffs vide which the plaintiffs were called upon to pay the balance sale consideration in the sum of Rs. 1 lakh and interest thereon within 30.11.88 failing which the amount already paid by the plaintiffs shall stand forfeited and the agreement dated 16.7.88 shall stand cancelled. Copy of the said letter is being enclosed herewith.

It is humbly submitted and stated that interestingly the plaintiffs after a lapse of almost 8 years have come forward with a story that the sale consideration in total was Rs. 1 lakh which was paid by them and it was the defendant who had not executed and registered the sale deed in favor of the plaintiffs. Whereas on the contrary, the facts are otherwise which have been narrated above and from the bear reading of the said facts it is clear that the plaintiffs have committed breach of agreement and have failed to pay the balance sum of Rs. 1 lakh and thus defendant was very right to forfeit the amount paid by the plaintiffs and to cancel the agreement of sale. The plaintiffs have left with no right, title or interest or any claim in the land and the suit of the plaintiffs is liable to be dismissed.

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9. On the strength of the above averments and the documents placed on the record, this Court framed issues on 28.01.2004; they are as follows:

- (i) Whether the present suit has been instituted by a duly authorized person. If not, its effect?
(OPP)
- (ii) Whether this Court does not have territorial jurisdiction to try and decide the present suit?
(OPD)

- (iii) Whether the present suit is barred by Law of Limitation? (OPP)
- (iv) Whether the suit as filed by the plaintiff is not maintainable in its present form? (OPD)
- (v) Whether there is any arbitration agreement between the parties, and if so, its effect? (OPD)
- (vi) Whether the plaintiff failed to pay the sale consideration agreed to under the purchase agreement dated 16.7.1988 and if so, its effect? (Onus on parties)
- (vii) If the aforesaid issue is answered in favor of the defendant, whether the plaintiff also failed to perform his part under the purchase agreement dated 16.7.1988? (Onus on parties)
- (viii) Whether agreement dated 16.7.1988 was duly and rightly terminated, and if so, whether the defendant could also forfeit the advance consideration paid by the plaintiff? (OPD)
- (ix) Whether the plaintiff is entitled to a decree of specific performance or in the alternative for a decree of an amount of ₹25 lakhs as compensation? (OPP)
- (x) Reliefs.

10. The plaintiff relied upon the evidence of PW-1, their father since at the relevant time one of them was a minor. The defendant also relied on the deposition of two witnesses. Their principal witness was DW-2, who also marked the lone exhibit relied upon by them.

Issue No. 2.

11. This Court had by its order dated 22.04.2004 decided the maintainability of the suit on the ground of territorial jurisdiction, in favor of the plaintiff. That order was apparently accepted and not appealed against and has become final. Issue No. 2, is therefore, answered accordingly.

Issue No. 1

12. The onus of proving this issue is upon the plaintiff. In support of this issue, the plaintiff relies upon the General Power of Attorney executed for this purpose; both these were executed by the plaintiff on 17.08.1996. It is a matter of record that the first plaintiff was a major and competent to empower the Power of Attorney holder, who was none other than the father, to institute the suit. So far as the second plaintiff is concerned, concededly he was a minor. One of the objections by the defendant as to the maintainability of the suit is that no leave or permission was sought by the minor to sue and that no person was appointed as guardian on his behalf.

13. The Court has considered the materials. The defendant has not denied the execution of

agreement to sell (Ex. P-2). It is a matter of record that the plaintiff had also paid the amounts of money, evidenced by Ex. P-3 and P-4. The defendant has nowhere indicated at any point of time that such amounts were sought to be refunded on account of what is termed as failure to comply with the terms of agreement to sell. Facially, therefore, the plaintiff, including the second plaintiff had cause of action. Having regard to the salient proposition that rules and procedures are an aid to justice and not its masters, the Court is not inclined to return this finding in favor of the defendant. The facts of the case point to a grievance, which required to be entertained and tried by the Court of law, inuring in favor of the plaintiff. The first plaintiff was competent to institute the suit; even though there was a technical lapse in not moving an application for appointment of guardian *ad litem*, the Court is of the opinion that such a lapse does not go to the root of the matter to such an extent as to influence the said plaintiff. This Issue is accordingly answered in favor of the plaintiff and against the defendant.

Issue No.3

14. This issue was framed at the behest of the defendant who objected to the suit, contending that it is time-barred. The facts disclosed also show that the agreement to sell in this case was entered into by the parties on 16.07.1988. Clause 3 of the said agreement no doubt stipulated that immediately on the execution of the document, the defendant was to execute the sale of conveyance deed. At the same time, Clause-6, which follows Clause-3 clearly stipulates that the defendant had a right to continue in the premises, as a lessee for a period of six years. For that purpose, a separate lease deed had to be executed. No doubt, no such lease deed was executed by the defendant, but it continued to retain possession and on the other hand, did not execute sale deed, as required and took no further steps.

15. The relevant provision under the Limitation Act for a suit for specific performance of an agreement to sell immovable property is Article 54, which prescribes that the period of limitation commences from the time when the demand for enforcement of the agreement is denied or resisted, and where no date for performance is fixed, within three years from the time the plaintiff has notice that performance has been refused. The facts of this case indicate that the plaintiff could not have approached the Court during the Six Year period after 16.07.1988, i.e. on or before 15.07.1994 and the plaintiff has placed on record Ex. P-6 – a copy of the legal notice issued on 24.02.1996. Having regard to these facts, it is clear that the plaintiff has approached the Court within the three year period commencing from 24.02.1996. Even otherwise, the suit has been filed within three-years from 15.07.1994. This issue is accordingly answered in favor of the plaintiff and against the defendant.

Issue Nos. 4 and 5

16. These two issues were framed at the behest of defendant, who argued that the suit is not maintainable in the present form and that the parties are bound by arbitration agreement. The fourth issue, in the opinion of the Court is really a superfluous one because the maintainability of the suit on the ground of its incompetence and not having been filed by a duly authorized person; the suit being not maintainable on jurisdiction and time-barred were specifically raised. If the defendant was aggrieved that the suit is not maintainable on any other ground, it should have articulated the same in written statement and led evidence in that regard or argued in support. However, none of these courses of action have been adopted. So far as the question of arbitration agreement is concerned, the defendant has not produced any materials before the Court to support such an allegation. Undoubtedly, Clause 14 (xi) embodies the arbitration clause, enjoining the parties to refer the disputes to nominee of one Sh. Anil Bhalla. It further goes on to say that arbitration proceedings would be held in New Delhi.

17. Now there is nothing on record to indicate that the defendant moved any application at the available opportunity in accordance with Section 34 of the old Arbitration Act, 1940. It is settled law that even though the resistance to an interlocutory application would not amount to disclosing the defence, the obligation to move the Court at the earliest opportunity, seeking stay of the proceedings is upon the defendant and if the same is not opted for, the right to object to the suit is lost or deemed abandoned. The defendant has not pointed to any legal impediment as to the maintainability of the suit; in the event that it elected for arbitration, and moved the Court, appropriate orders would have been made. In the circumstances, this issue is answered in favor of the plaintiff and against the defendant.

Issue No. 6

18. This is the main issue. The present decision on this issue would determine the fate of the suit. This involves interpretation of the conditions agreed upon by the parties. In short, the plaintiff contends that the consideration payable to the defendant was ₹1 lakh whereas the defendant, on the other hand, contends that a further amount of ₹1 lakh was to be paid. The defendant apparently relies upon the representation made in the brochure (Ex. P-2) which seems to suggest that the total consideration for a plot of 2.5 acres would be ₹2 lakhs. However, on the other hand, the plaintiff relies upon the actual terms of the purchase agreement, enforcement of which is sought. The reference to the consideration payable appears in Clauses 2 and 3 thereof. The said terms have been extracted in an earlier part of the judgment. While Clause 2 distinctly sets-out four columns, two of which are filled-up, at the same time, the parties/their representatives signed on the margin. This, in the opinion of the Court, assumes significance because the purport and effect of Clauses 2 and 3 (a) is that the total consideration or full

price of the farm was agreed to be ₹1 lakh.

19. The defendant relies upon a letter said to have been addressed to the plaintiff on 28.10.1988, calling upon the latter to pay ₹1 lakh in addition to the similar amount paid earlier. Interestingly, in the cross-examination, DW-2, principal witness of the defendant was unable to confirm whether full base price had been paid by the plaintiff and was evidenced by Ex. P-3 and P-4 and conceded that the same was matter of record. He also agreed that he has no document to show that the plaintiff had agreed to pay ₹2 lakhs.

20. Having regard to the above state of affairs, the Court is of the opinion that the entire controversy as to what is the total consideration hinges on an interpretation of the documents and the conditions spelt-out expressly. A complete reading of Clauses 2 and 3 (Ex. P-5), in the opinion of the Court, clearly establishes that the total consideration was ₹1 lakhs, which had been concededly paid by the plaintiff before the agreements to sell dated 05.06.1987 and 19.11.1987 were signed. In the circumstances, it is held that the defendant has been unable to prove that the plaintiff failed to pay any assigned amount. It being noted that the plaintiff has paid the amount agreed upon, this issue is answered in favor of the plaintiff and against the defendant. The defendant has also not been able to establish that Ex. DW-2/1 was served as alleged. There is no document showing that the notice was sent under registered Post A/D receipt or any supporting material to substantiate that allegation has been placed on the record.

Issue No. 7

21. This issue supposes that in the event Issue No. 6 were to be answered in favor of the defendant – whether plaintiff had also failed to perform his part of the purchase agreement, in paying the full consideration agreed. The Court has held – while returning the findings on this that the plaintiff had paid the full consideration amount. Furthermore, Clauses 2 and 3 of the agreement to sell (Ex.P-5) also obliged the defendant to immediately execute the sale deed and register it. Concededly the defendant has not done it. Accordingly, this issue is answered in favor of the plaintiff and against the defendant.

Issue No. 8

22. The defendant had contended in the written statement that the agreement to sell (Ex. P-5) was terminated. The written statement is silent as to particulars and dates when such termination took place. Further, even the affidavit evidence of the defendant does not throw any light on this aspect. The most material evidence in this regard would be the purchase agreement, i.e. Ex. P-5. It nowhere points to any power with the defendant to forfeit any amount paid to it or any part thereof. In the circumstances, it is held that the defendant is unable to establish that any legal or lawful termination of the agreement as

alleged, took place; in any event, any such termination of the agreement in accordance with law was ever communicated to the plaintiff.

Issue No. 9

23. The suit has to, by reason of the above findings, succeed. The defendant is hereby directed to execute the Sale Deed and hand-over possession of the suit property, being plot on land bearing no. A-10 (a), having an area of 2.5 acres in Vatika Farms situated in the revenue estate of Village Siwana Kiranki, Sub-Tehsil Sohna, District Gurgaon (Haryana) to the plaintiff within four months from today. In the event of the defendant not complying with the direction, it is open to the plaintiff to have the sale deed executed with the help of a Court Officer to be appointed by this Court.

24. The suit is decreed in the above terms with costs. The counsel's fee is fixed at ₹1,00,000/-.

JULY 02, 2010

(S.RAVINDRA BHAT)

JUDGE