

THE HIGH COURT OF DELHI AT NEW DELHI

%

Judgment delivered on: 14.12.2010

CS(OS) No. 2489/1998

SHRI NARESH JAIN

..... PLAINTIFF

Vs

SMT KRISHNA RANI

..... DEFENDANT

Advocates who appeared in this case:

For the Plaintiff : Mr Gurbaksh Singh with Ms Manjeet Kaur, Advs.
For the Defendant: Mr Neeraj Jain alongwith Mr Ashok Malhotra & Mr Vinod Kumar LRs of deceased defendant.

CORAM :-

HON'BLE MR JUSTICE RAJIV SHAKDHER

- | | | |
|----|--|-----|
| 1. | Whether the Reporters of local papers may be allowed to see the judgment ? | No |
| 2. | To be referred to Reporters or not ? | No |
| 3. | Whether the judgment should be reported in the Digest ? | Yes |

RAJIV SHAKDHER, J

1. The instant suit has been filed to claim reliefs of specific performance and possession. The specific performance is sought by the plaintiff qua an agreement to sell dated 25.09.1995 (Ex. P-1) in relation to an immovable property situate at 58, Block B, Dera Ismail Khan Co-operative Housing Building Society Limited, Delhi consisting of basement, ground floor, first floor, second floor alongwith roof, admeasuring 173.33 sq. yds. (hereinafter referred to as 'the said property'). In addition to the above, the plaintiff has made consequential prayers requiring appointment of a court official to execute the sale deed in his favour in the event the defendant refuses to comply with the decree of specific performance in order to effectuate the sale. Similarly, prayer is also made to the effect that the defendant be directed to pay arrears of water, electricity and house tax upto the execution of the sale deed or in the alternative, the plaintiff be permitted to adjust the amount against the balance consideration payable to the defendant. There is one other

prayer of the plaintiff whereby, the plaintiff seeks damages on account of delay in execution of the sale deed and for use of money given as advance by the plaintiff to the defendant under the afore-mentioned agreement to sell (Ex.P-1).

2. There is no dispute, it appears, with respect to the fact that the plaintiff paid towards sale consideration a sum of Rs 6,50,000/- in three tranches; the first two tranches were in the sum of Rs 2 lacs and the third was in the sum of Rs 2,50,000/-. The payments were made by the plaintiff evidently on 23.09.1995 (Ex.P-2), 24.09.1995 (Ex.P-3) and 25.09.1995 (Ex.P-4). This fact, as noticed above, has not been disputed by the defendant.

2.1 It is pertinent to note it is averred in the plaint that the defendant was required to execute the sale deed on or before 31.01.1996. It is the case of the plaintiff that despite a legal notice dated 29.01.1996 (Ex.PW2/1) issued by the plaintiff to the defendant calling upon it to fulfill the pre-requisites for execution of the sale deed, the defendant did not do the needful in that regard. As a matter of fact, it is alleged that the defendant neither replied to nor complied with the request made by the plaintiff in the afore-mentioned notice. It is alleged that the plaintiff thereafter on number of occasions called upon the defendant to fulfill its obligations, in particular, obtain the necessary approvals from the Income Tax authorities which at the relevant point of time were applicable to the transaction in issue. It is alleged that since the defendant procrastinated in the matter, the plaintiff apprehending that his action would be barred by limitation issued another notice dated 23.10.1998 (Ex.PW2/27). Since the defendant failed to comply with the request made by the plaintiff and, apprehending that the defendant would create third party interest in the property, the instant suit was filed on 03.11.1998.

3. The case set up by the defendant, on the other hand, is that it is the plaintiff who had breached obligations undertaken by him under the agreement to sell. The peculiar aspect of this stand is that while the defendant has accepted that an agreement to sell (Ex.P-1) was executed between herself and the plaintiff; a dispute has been raised with respect to the agreement to sell (Ex.P-1) filed by the plaintiff; which is dated 25.09.1995. It is the defendant's contention that the agreement to sell (Ex.P-1) which is dated

25.09.1995 and is filed by the plaintiff is not the document which was executed between the plaintiff and the defendant. This defence is sought to be made out by adverting to the fact that the date of purchase of stamp paper on which the purported agreement to sell (Ex. P-1) has been drawn up is 26.09.1995, whereas the document on the face of it has been executed on 25.09.1995. It is, therefore, the contention of the defendant that the agreement to sell (Ex.P-1) produced by the plaintiff is not genuine or the actual agreement which was executed between her and the plaintiff.

3.1 Furthermore, in her defence, the defendant has said that since time was of the essence and the plaintiff was in breach of his obligations the relief of specific performance ought not to be granted to the plaintiff. The defendant has averred that since the prices of immovable properties had fallen, the plaintiff took no interest in effectuating sale, despite the defendant calling upon him to do so for more than two years. In these circumstances, the defendant says that the relief for specific performance at this stage has become unrealistic in so far as the defendant is concerned.

3.2 The defendant furthermore has submitted that the delay has adversely affected her interest, in as much as, the defendant on the assurance that she would receive money against property in issue had entered into a back-to-back agreement with one, Prem Wati on 29.09.1995. By virtue of this agreement, the defendant agreed to purchase from Prem Wati, an immovable property situate at Ganesh Nagar-II, Gali No.8, Shakarpur Khas, Shahadra, Delhi-52 admeasuring 100 sq.yards (hereinafter referred to in short as ‘Ganesh Nagar property’). In view of the agreement evidently arrived at between her and Prem Wati on 29.09.1995, the defendant paid a sum of Rs 4,50,000/- to Prem Wati. The balance consideration in respect of Prem Wati’s property was to be paid by the defendant by 28.02.1996. The defendant has in this regard filed a receipt dated 29.09.1995 (Ex. DW1/3) issued by the Prem Wati.

3.3 Since the plaintiff failed to effectuate the sale transaction with regard to property in issue in the instant suit; it had a cascading effect on the defendant and consequently defendant in turn failed to fulfill her obligations towards Prem Wati and hence, the sum

of Rs 4,50,000 was forfeited by the Prem Wati. This caused pecuniary loss and damage to the defendant. Therefore, for these reasons the defendant avers that she has forfeited the sum of Rs 6,50,000/- paid to her, by the plaintiff.

3.4 It is also the stand of the defendant that the property being lease hold property, it did not require a No Objection Certificate (hereinafter referred to as 'NOC') from the Income Tax Department. It is averred that title of the property could have been transferred by execution of a General Power of Attorney (in short 'GPA'), agreement to sell, Special Power of Attorney (in short 'SPA') and receipt etc.

3.5 The plaintiff's stand was that he was ready and willing to effectuate the sale transaction qua the property in issue; has been refuted by the defendant. It is specifically averred that the defendant had brought to the knowledge of the plaintiff that she had entered into an agreement with the afore-mentioned Prem Wati for purchase of another property from the amount she was to receive against the sale of the property in issue from the plaintiff. Furthermore, the defendant has averred that the plaintiff did not have the wherewithal, i.e., the balance funds for purchase of the property in issue.

4. In the replication, the plaintiff while refuting the stand of the defendant taken in the written statement has reiterated the averments made in the plaint. It has been specifically highlighted that the legal obligation for obtaining the approval of the Income Tax Authorities was that of the defendant. In this connection the plaintiff has asserted that if the defendant was also ready and willing as was averred to effectuate the sale then, the defendant should have as well initiated the process of executing a GPA, agreement to sell and SPA as was contended by her in her defence. The fact was that, the plaintiff reasserted that not only was he ready and willing to perform his obligations under the agreement to sell, but also had the necessary wherewithal to do so. In this connection, it was asserted that the defendant, on the other hand, did not supply the plaintiff with the copy of the title deeds so that he could prepare the necessary documentation for effecting a sale.

4.1 As regards the agreement to sell (Ex.P-1) not being the original agreement to sell, the plaintiff has refuted the said allegation of the defendant. The plaintiff has submitted that the defendant has while impugning the agreement to sell filed by the plaintiff not stated the terms and conditions of the agreement to sell supposedly entered into between the plaintiff and the defendant and how was it different from the one which is placed on record by him.

5. In support of their pleadings, the plaintiff cited two witnesses these being: Mr Naresh Jain (PW-1) and Mr Ramesh Kumar (PW-2); while the defendant examined only one witness i.e., Mr Ashok Malhotra (DW-1), the son and power of attorney holder of the defendant. The examination-in-chief of witnesses was carried out by way of affidavits of evidence.

5.1 In his examination-in-chief PW-1, replicated the stand taken in the plaint. PW-1 proved the agreement to sell (Ex.P-1). PW-1 stated that the agreement to sell (Ex.P-1) was executed in his presence and bore his signatures at point A, on each page of the said agreement. PW-1 went on to say that at point B, on each page of the agreement to sell (Ex.P-1), are appended signatures of the defendant. PW-1 identified the signatures of the defendant and, stated that she had signed the said agreement to sell (Ex.P-1) in his presence. PW-1 further stated that the signatures of the witnesses at points C and D were also appended on the said agreement to sell (Ex.P-1), in his presence. Similarly, the witness proved the three receipts dated 23.09.1994 (Ex.P-2), 24.09.1995 (Ex.P-3) and 25.05.1995 (Ex.P-4) evidencing the payment of Rs 6,50,000/- to the defendant in three tranches, out of which, two were in the sum of Rs 2 lac each and, the third, amounting to Rs 2,50,000/-. The witness accepted the fact that the total consideration agreed to between the parties was a sum of Rs 63,50,000/- and that the transaction had to be completed before 31.01.1996; subject to the caveat that the defendant would obtain the approvals of the Income Tax Authorities and the society; and clear all pending dues in respect of the property in issue before 31.01.1996. The society, according to the witness, had to give a NOC for the sale of property in issue. The witness further deposed that

since the defendant had failed to execute the sale deed and documents to effectuate transfer of the property in issue the instant suit for specific performance was filed by him. PW-1 further stated that prior to instituting the instant suit, a legal notice dated 29.01.1996 (Ex.PW2/1) was issued to the defendant calling upon her to fulfill the pre-requisites for effecting a sale. In this regard PW-1 relied upon the said notice and the following receipts to establish that the said notice had been dispatched by various modes. These being: three original postal receipts (Exs.PW2/2, PW2/3 and PW2/4), UPC (Ex.PW2/5), three receipts of speed post (Exs.PW2/6, PW2/7, and PW2/8), and two courier receipts (Exs.PW2/9 and PW2/10). The witness also relied upon the telegram dated 29.01.1996 alongwith postal receipt issued in that connection being (Ex.PW1/18 and Ex.PW1/19). Since the notice sent through speed post was sent back, PW-1 also relied upon the return being (Exs.PW2/20, PW2/20, PW2/22). The witness further deposed that a second notice dated 29.02.1996 (Ex.PW2/19) was issued to the defendant. In this connection, the witness relied upon the postal receipts, UPC, two Acknowledgment Due cards and one return envelop which were marked as Ex.PW1/23 to PW1/30 respectively. There was, according to the witness PW-1, a third notice issued through his lawyer dated 23.10.1998 (Ex.PW2/27) prior to institution of the present suit. The witness, once again relied upon the said legal notice and three postal receipts, UPC which were exhibited as Exs.PW1/28, PW2/29, PW2/30, PW2/31. The witness testified that he was ready and willing to perform his part of the obligations including payment of balance consideration of Rs 57 lacs. The witness testified that since the defendant did not fulfill her obligations despite personal visits, telephonic calls and legal notices, he was constrained to institute the present suit.

5.2 In his cross-examination PW1 accepted the fact that he was not aware whether the property was freehold property or with the society. PW1 further accepted that he had approached the defendant for the first time between 10th and 15th January 1996 to ascertain whether the necessary documents, i.e., the NOC and approval of the income tax authority had been obtained, and if it were so, he would arrange for the balance

consideration. PW1 further put the onus of obtaining the NOC from the society on the defendant. To a specific question as to whether he had produced any document evidencing the fact that he had arranged the balance consideration of Rs 57 lacs, the witness answered by saying that his uncle, who was a diamond exporter, had assured him regarding the availability of the amount. The witness went on to say that he was to obtain the amount from his uncle only after necessary approvals were obtained by the defendant. The witness refuted the suggestion that he was told either by the defendant or her husband that the husband had utilized the money received from the plaintiff towards purchase of the property of Prem Wati. The witness further went on to state that he was unaware of the fact that if he were not to effectuate the sale transaction in respect of the property in issue, the sum of Rs 4.50 lacs paid to Prem Wati by the defendant would stand forfeited. Importantly, PW1 accepted the fact in his cross-examination that, he had for the first time, asked for the original title documents, only in, January, 1996 and furthermore, at the time of agreement to sell he had seen photocopy of the documents of the property in issue. PW1 further accepted the fact that no notice prior to 29.01.1996 was issued to the defendant to effectuate the sale transaction.

5.3 The other witness, i.e., Mr Ramesh Kumar (PW2) referred to the legal notice dated 29.01.1996 (Ex.PW2/1) and the three postal receipts (EXs. PW2/2, PW2/3 and PW2/4), the UPC (Ex. PW2/5) and the speed post receipts (Ex. PW2/6, PW2/7 and PW2/8) as well as the proof of delivery of return notice of the courier (EXs. PW2/9, PW2/10, PW2/11 and PW2/12), the return envelopes (EXs. PW2/13, PW2/14, PW2/15, PW2/16, PW2/17 and PW2/18) as also the postal receipts (EXs. PW2/20, PW2/21 and PW2/22), UPC (Ex. PW2/23), and two A.D. cards (Exs. PW2/24 & 25). He also placed reliance on the returned envelop (Ex. PW2/26). PW2 also went on to depose that notice dated 23.10.1998 (Ex. PW2/27) was sent. He also referred to the postal receipts (Exs. PW2/28, PW2/29 and PW2/30) and UPC (Ex. PW2/31) for this purpose. The said witness accepted the fact that the cut off date for effectuating the sale transaction was 31.01.1996, as per the information he had received from the plaintiff. Importantly, PW2

accepted the fact that notice dated 29.01.1996 (PW2/1) was dispatched only on 31.01.1996 by all three modes, that is, registered post, courier and UPC. According to him, the said notice was sent by speed post on 30.01.1996. The witness deposed that defendant received the notice by courier on 31.01.1996. The witness went on to say that on the return envelopes (Ex. PW2/13-18) there was no date mentioned which indicate as to when they were returned to him. PW2 accepted the fact that both parties were required to perform their respective obligations before 31.01.1996. He testified that he was not in a position to say that to effectuate the transaction whether a sale deed had to be executed or other mode of conveyance were required to be employed.

5.4 To be noted in the examination-in-chief, DW1 basically rebutted the stand taken in the written statement. As indicated above, the defendant examined DW1. DW1 deposed that he was son of the Power of Attorney (POA) holder of the defendant. In this regard he proved his signatures on the Special Power of Attorney (SPA) (Ex. DW1/1) executed in his favour by the defendant at points 'A' and 'B'. He testified that since the defendant, that is, his mother was old; being: 70 years of age, she could not attend court. In support of his contention, he relied upon a medical certificate (Ex. DW1/2). He also proved the receipt (Ex. DW1/3) executed by Prem Wati in favour of the defendant. DW1 refuted the suggestion that he had obtained a forged medical certificate on 23.01.2005 and immediately thereafter, on the next date got a SPA executed in his favour. DW1 asserted that the stamp paper, on which the agreement to sale (Ex. P-1) was drawn up, was purchased on 26.09.1995. He also stated that therefore, the agreement to sell (Ex. P-1) could not have been executed prior to the date of purchase of stamp paper. DW1, however, testified that the date on the agreement to sell (Ex. P-1) was written as 25.09.1995, since the document was executed on the said date, i.e., 25.09.1995. He also deposed that exhibits P-1 to P-4 had already been drawn up, and that the plaintiff and the defendant had put their signatures on the document. He categorically accepted the fact that dates were not mentioned by the signatories on the agreement to sell (Ex. P-1). It is important to note that the DW1 accepted the fact that apart from documents, i.e., (Ex. P-1

to P-4 “*no other document was executed between the defendant, i.e., his mother and the plaintiff*”. He categorically accepted the fact that *on the said document at point ‘X’ are appended the signatures of the defendant, i.e, his mother and similarly, at point ‘Y’ are appended the signatures of the plaintiff*. In regard to the payment of dues, with regard to the property in issue, DW1 stated that at the relevant point in time all dues stood paid, and intimation in that regard had been sent to the plaintiff, through the property dealer who was acting as the intermediary in the matter of sale of property in issue.

5.5 To a specific question whether the defendant, i.e., his mother was required to obtain an approval of the income tax authority, and a NOC from the society, the witness answered as follows:

“The suit property is on the lease hold plot of the society and the sale deed was not required to be executed and only GPA was to be executed and as such no income tax clearance was required”.

To another question as to whether the aforementioned fact was intimated to the plaintiff, the witness answered as follows:

“We had informed the property dealer well in advance a week before the date of execution of document that income tax/ society clearance was not required.”

5.6 DW2 further submitted that 15 days prior to the date provided for execution of the sale deed, they had informed the property dealer that they were ready to perform their part of the contract. To another question as to when the defendant became aware of the fact that the plaintiff was not responding to the intimation given by defendant to the property dealer, the DW1 stated as follows:

“On the last day of agreement, i.e., 31.1.1996 we were informed by the property dealer that the plaintiff had no arrangement of money and as such agreement could not be completed.”

5.7 The witness further went on to say that they did not contact the plaintiff directly; the transaction was effectuated through the property dealer, who was claiming fee from both sides. DW1 stated that they did not know the plaintiff personally. DW1 further went on to say that the money receipts P-2, P-3 and P-4 were executed in the presence of

the plaintiff and the property dealer. The DW1 accepted the fact that the defendant had not written any letters to the plaintiff in connection with execution of the sale agreement. DW1 refuted the fact that they had received a telegram (Ex. PW1/18). DW1 testified that he was present when the agreement/receipt (Ex. DW1/3) was executed between the plaintiff and the defendant and that the said exhibit bears his signatures at point 'A'. To a specific question as to whether any documents have been filed to demonstrate the genuineness of the transaction entered into between the defendant and Prem Wati; the witness stated that they did not feel that it was necessary to file such document as the receipt (Ex. DW1/3) was signed in their presence, and because Prem Wati was the owner of the property, which the defendant intended to buy. DW1 accepted the fact that they have not sent any notice to Prem Wati or filed a suit against her. He also accepted the fact that Prem Wati also, had not issued any notice to the defendant or filed any suit against them. Suggestions that DW1/3 was fabricated or that Prem Wati did not exist or even that her signatures on DW1/3 were forged – was refuted. The witness also refuted the suggestion that defendant had not advanced any money to Prem Wati, as stated in exhibit DW1/3. The witness also refuted that because in January, 1996 there was escalation in the price of property to the extent of Rs 15-20 lacs, she did not come forward to effectuate the sale. The witness also refuted the suggestion that the plaintiff had arranged the funds and that since approvals, as provided in clause 6 and 7 of the agreement to sale (Ex. P-1) were not obtained, he did not come forward to perform his part of the obligation. The suggestion that: because the defendant did not come forward to perform her part of the agreement, the plaintiff was forced to issue the notice (Ex. PW2/1) and telegram (Ex. PW1/18 & 19), was negated by the witness. The witness also refuted the suggestion that because of the conduct of the defendant, the plaintiff had suffered a loss.

6. In the light of the pleadings and evidence placed on record Mr Gurbaksh Singh addressed arguments on behalf of the plaintiff, while submissions on behalf of the defendant were made by Mr Neeraj Jain. In support of the plaintiff's case Mr Gurbaksh

Singh apart from drawing my attention to the averments in the plaint and the documentary evidence placed on record laid stress on the following:-

- (i) there is no dispute that a sum of Rs 6.50 lacs has been paid to the defendant;
- (ii) the plaintiff has always been ready and willing to perform his part of the obligations undertaken under the agreement to sell (Ex.P-1). It was reiterated that the plaintiff was ready and willing to perform his part of the obligations even today;
- (iii) it is the defendant who was in breach of her obligations under the agreement to sell (Ex.P-1) in as much as she had failed to get an approval from the Income Tax Authorities as well as the society from whom the suit property was obtained on lease by the defendant and pay all outstanding dues towards house tax, electricity charges, ground rent etc.
- (iv) the defendant's evidence cannot have of much value in view of the fact that the defendant has not examined herself, and instead examined her son Ashok Malhotra (DW-1) who had no personal knowledge of the transaction entered into between the plaintiff and the defendant. In support of his submissions he relied upon the judgment of the Supreme Court in the case of ***Janki Vashdeo Bhojwani & Anr vs Indusind Bank Ltd: (2005) 2 SCC 217;***
- (v) in order to demonstrate the plaintiff's readiness and willingness to consummate the sale transaction reliance was placed on the following: notice dated 29.01.1996 (Ex.PW2/1), notice dated 29.02.1996 (Ex.PW2/19), telegram dated 29.01.1996 (Ex.PW1/18) and legal notice dated 23.10.1998 (Ex.PW2/27).

It was also contended that in order to test the plaintiff's readiness and willingness what had to be looked at by a Court was the ability of the plaintiff who seeks specific performance of an agreement to sell to pay the amount in issue and not whether he had with him actual physical possession of the money. Reliance in this regard was placed on the judgment of this Court in the case of ***Raj Kumar Sharma vs Pushpa Jaggi & Ors.: 128(2006) DLT 96 at Page 112 Paragraph 21.***

(vi) it was further submitted that merely because Clause 8 in the agreement to sell (Ex.P-1) provides that in case of breach by the seller/the defendant, the plaintiff/the buyer would be entitled to double the amount of the earnest money that would not by itself prevent the plaintiff from seeking seek specific performance of the agreement to sell (Ex. P-1). In this regard reliance was placed on the judgment of this Court in the case of *Yogesh Tyagi vs Kela Devi: 156 (2009) DLT 717* para 25.

7. On the other hand, Mr Neeraj Jain in support of the defendant's case stressed upon the following submissions apart from the stand taken in the written statement:-

- (i) the agreement to sell (Ex.P-1) filed by the plaintiff was not the agreement to sell executed between the parties. In this connection, as noted hereinabove, it was stated that while, the agreement is dated 25.05.1995, the stamp paper on which the agreement is engrossed appears to be the dated 26.09.1995. If this be correct; the agreement to sell (Ex. P-1) cannot be held to be valid. The logical fall out of which would be that, the plaintiff can not seek specific performance of the agreement;
- (ii) the plaintiff's contention that he was ready and willing to perform his part of the obligation, that is, he was in a position to pay the balance consideration is; belied by the plaintiff's own testimony. In this regard my attention was drawn to the testimony of the plaintiff (PW-1) wherein, to a specific question as to whether he had placed on record any documentary proof regarding balance funds having been arranged by him, he responded by saying that the funds were to be arranged by his uncle, who was a diamond exporter; after necessary clearance for sale of property in issue had been obtained by the defendant.

7.1 My attention was also drawn to clauses 6 and 7 of the agreement to sell (Ex.P-1) to show that those clauses, wherein obligation is cast evidently on the defendant to clear dues and obtain clearances from the Income Tax Authority, and a NOC from the society – were circumstance dependant. Since, no dues were outstanding in respect of house tax,

electricity charges, ground rent etc., nothing was required to be done by the defendant. Similarly, in so far as clearance from the Income Tax Department was concerned, it was not necessary, according to the defendant, since the suit property was a lease hold property.

7.2 Apart from the above, it was the contention of the learned counsel for the defendant that the plaintiff's lack of readiness and willingness and his disinterest in effectuating the transaction was demonstrable from the fact that even though, according to the plaintiff, he became aware in January, 1996 that the defendant was seeking to negotiate the sale of the property in issue with third persons no proceedings in Court were filed till 1998. In support of this contention reliance was placed by Mr Neeraj Jain on the judgment of this Court in the case of *S K Mittal vs Kalinga Estate (P) Ltd & Ors.: 162 (2009) DLT 341*. The reason, according to the learned counsel was, since the prices of property had fallen, the defendant chose to wait, in the interregnum, till prices rose again. The learned counsel for the defendant denied the receipt of legal notice dated 29.01.1996 (Ex.PW2/1). Similarly, the receipt of telegram (Ex.PW1/18) is denied.

7.3 As regards the contention of the plaintiff, that the testimony of DW-1 did not have any evidentiary value, it was submitted that DW-1 was not just a power of attorney holder of the defendant who, is his mother but, was also a witness to the agreement to sell (Ex.P-1). It was thus contended that DW-1's testimony cannot be put at par with a power of attorney holder, who has neither a close relationship with a person who is party to the agreement to sell nor, involved with the transaction. It was contended that the POA dated 24.01.2005 (Ex.DW1/1) was executed since the defendant, i.e., his mother had taken ill. Reliance in this regard was placed on the medical certificate dated 23.01,2005 (Ex.DW1/2).

7.4 Mr Jain summed up his arguments by contending that the plaintiff in the facts and circumstances of the case was not entitled to specific performance. As a matter of fact, since the defendant had suffered damages qua her transaction with Prem Wati whereby, a sum of Rs 4,50,000/- paid to Prem Wati was forfeited by her; the defendant in-turn, was

CS(OS) 2489/1998

entitled to forfeit the plaintiff's earnest money amounting to Rs 6,50,000/-. In this regard reliance was placed on a purported receipt issued by Prem Wati dated 29.09.1995 (Ex.DW1/3).

8. I have perused the pleadings and the evidence placed on record as also the submissions made by counsels appearing for the parties before me.

8.1 In my view, the first and foremost issue which requires determination is: whether the agreement to sell (Ex.P-1) on which reliance has been placed by the plaintiff was a legal and valid agreement. The defendant in her testimony has impugned the agreement to sell (Ex.P-1) on the ground that the date on which the agreement was entered into between the parties was 25.05.1995. The stamp paper on which the agreement is engrossed is admittedly, dated 26.09.1995. Based on this, it was contended that the agreement to sell (Ex.P-1) placed on record is not the agreement which was executed between the parties. A perusal of the agreement would show that while, the date and the month has been written in figures, in hand, the year "1995" is typed. Undoubtedly, the stamp paper on which the agreement has been engrossed bears the date: 26.09.1995. However, in the testimony of DW-1 he accepts that the signatures on Ex.P-1 amongst other documents (i.e., the receipts) at points 'X' and 'Y' are those of the plaintiff and his mother i.e., the defendant. It is not the stand taken in the pleadings or in the examination-in-chief that the signatures of the defendant were obtained on blank papers. The defendant has not been able to articulate in the pleadings that if, the agreement to sell (Ex.P-1) which has been placed on record by the plaintiff, was not the agreement which was entered into with the defendant then, firstly; who was in custody of that agreement and secondly; what were the terms of such an agreement. It would be difficult to believe that if there was any such agreement the defendant would not at least have had in her possession a copy of the agreement. In these circumstances, it appears to me that even though the stamp paper on which the agreement to sell (Ex.P-1) was engrossed was purchased on 26.09.1995; inadvertently, the date which has been entered by hand, in the agreement to sell (Ex.P-1) was written 25 as against 26. This obviously, is an inadvertent

mistake. There is nothing to show that agreement to sell (Ex.P-1) was not executed. As a matter of fact, the learned counsel for the defendant while seeking to contend that the testimony of his witness DW-1 who, is the son of the defendant would have weight, has relied upon the fact that DW-1 is a witness to the said agreement to sell; a fact which can be evidenced from (Ex. P-1). In my view, the defendant, on this aspect of the matter is taking stand which is inconsistent with his plea that he is witness to the agreement to sell (Ex. P-1). If there is another agreement to which DW-1 is a witness surely, as indicated by me hereinabove, a copy of such an agreement to sell would be in possession of the defendant who ought to have produced the same. Therefore, in my opinion, the agreement to sell (Ex.P-1) is valid and, is the agreement which obtains between the parties.

8.2 The next issue which arises for consideration is whether the plaintiff was ready and willing to fulfill the terms of the agreement to sell (Ex. P-1). It is settled that the readiness and willingness of the plaintiff to fulfill his part of the obligations should not only be “pleaded” but also “proved”.{See observations in *Man Kaur (dead) by LRS. vs. Hartar singh Sangha : 2010 (9) UJ 4569 (SC) contained in para 15*}. It is also settled that the readiness and willingness should obtain not only at the stage of filing of the plaint but also at a subsequent stage i.e., hearing. (See *Shri Deewan Arora Vs. Smt. Tara Devi Sen and Ors. 163 (2009) DLT 520*). The plaintiff in order to demonstrate his readiness and willingness has alluded to the fact that he had issued communications to the defendant to fulfill her part of the obligations. In this regard reliance was placed upon notice dated 29.01.1996 (Ex.PW2/1) notice dated 29.02.1996 (Ex. PW2/19), telegram dated 29.01.1996 (PW1/18) and legal notice of 23.10.1998 (Ex.PW2/27). The defendant has denied the receipt of any of the communications except notice dated 29.02.1996 (Ex.PW2/19). A perusal of the receipts of the post office (Ex.PW2/2, PW2/3 and PW2/4), the certificate of posting (Ex.PW2/5), Speed post receipts (Ex.PW2/6, PW2/7 and PW2/8) and courier receipts (Ex.PW2/9, PW2/10) do not indicate that the defendant has received the communications. The same is the situation with the legal notice dated

23.10.1998 (Ex.PW2/27) and the receipts accompanying the same Ex.PW2/28, Ex.PW2/29 and Ex.PW2/30. The only communication that the defendant evidently seems to have received is one dated 29.02.1996 (Ex.PW2/19). This communication was sent after the date fixed for completion of transaction (i.e., 30.01.1996) had lapsed. What relevance it would have, if any, in the context of the time taken to approach the court, I would come back to a little later. Before I do that let me at this juncture advert to plaintiff's testimony with regard to availability of funds. The plaintiff in answer to a specific question in that regard has deposed as follows:-

“....Q. I put to you, whether you can produce any documentary proof regarding arrangement of balance amount of Rs 57 lacs.

Ans. My uncle Sh. Uttam Chand Jain, who was a diamond exporter assured me regarding availability of this amount. It was to take money from him after getting the clearance certificate from the defendants as mentioned above.

It is wrong to suggest that as I had no arrangement of the balance consideration amount of Rs 57 lacs, I was taking the pretext of the aforesaid clearance from the defendant...”

Q. Have you any documentary proof regarding the fact that you had arrangement of balance consideration of Rs. 57 Lacs?

Ans. I was supposed to arrange the money from my resources only after getting clearance from the 1st party....”

9. A mere assertion of the plaintiff that his uncle had assured that the balance funds would be able was not sufficient to show readiness and willingness to pay the balance consideration. A perusal of the evidence filed would show that the plaintiff has placed nothing on record to show that he had the requisite funds available with him to pay the balance consideration. Neither was the uncle examined nor any document placed on record to show the financial capacity of the uncle to pay the balance consideration. Bald averments in the plaint and in the deposition cannot supplant actual proof of readiness and willingness. It had to be backed with requisite evidence; perhaps financial statements of the uncle, if not the plaintiff. It may not be necessary to show availability of funds but the bare minimum; which is, a demonstrable accessibility to funds. Such is not the situation in the instant case and hence, I have no hesitation in coming to the conclusion that the defendant was not in a position to perform his part of the obligation. This is buttressed by the fact that even though admittedly the plaintiff became aware of the fact,

in January, 1996, that the defendant was negotiating with third parties, the instant action was filed in Court only in November, 1998. The delay in approaching the Court has not been explained by the plaintiff. It is not to say that the plaintiff's suit was not maintainable. The plaintiff was well within the period of limitation but in ascertaining readiness and willingness of the plaintiff before the institution of the case this aspect attains criticality which, the Court cannot ignore. This aspect, when examined in the light of the fact that a singular notice dated 29.02.1996 (Ex. PW2/19) was issued by the plaintiff to assert his right, shows the lackadaisical approach adopted by the plaintiff. The only inference which can be drawn is that since he did not have the funds he did not want to precipitate the matter. Therefore, in my opinion, the plaintiff's contention that he was ready and willing to perform his part of the obligations is not borne out in the facts and circumstances of the case at hand. In these facts the ratio of the judgment in the case of **Raj Kumar Sharma** (*supra*) can have no applicability.

10. As regards the contention of the plaintiff that, the defendant was in breach of its obligations, contained in clause 6 and 7 of the agreement to sell, I am of the view that the said contention is not borne out from the evidence on record. First and foremost thing to be noticed is the wording of clause 6 and 7 of the agreement to sell (Ex. P-1). Clause 6 envisages, that uptill date of execution of the agreement to sell the defendant, i.e., the seller shall bear expenses towards electricity charges, house tax, ground rent and other outgoings. The said clause, further, explicitly provides that after the date of execution of the agreement to sell, expenses with regard to the aforesaid will be borne by the plaintiff, i.e., the buyer. The defendant in its written statement has taken the stand that since nothing was outstanding, the obligations stood fulfilled. The plaintiff, apart from a bald averment, has not placed any evidence on record that the dues were outstanding. Therefore, to allege that the defendant was in breach of her obligation under clause 6, was, in my view, not made out. As a matter of fact this stand of the plaintiff seems to be an after thought, as even in the legal notice dated 29.01.1996 (Ex. PW2/1), there is no reference to the fact that the plaintiff did not comply with the provisions of clause 6 of

the agreement to sell (Ex. P-1). If, the plaintiff was aggrieved, I would have expected him to make a specific grievance with regard to this issue and, at least provide some specific details of dues outstanding in respect of the property which, according to him, the defendant was required to defray. The position is no different vis-à-vis the telegram dated 29.01.1996 (Ex. PW1/18), legal notice dated 29.02.1996 (Ex. PW2/19), and legal notice dated 23.10.1998 (Ex. PW2/27). There is no reference to the said dues being outstanding and, therefore, payable by the defendant.

11. This brings me to the other contention of the plaintiff, that the obligation placed on the defendant by virtue of clause 7 of the agreement to sell was also not fulfilled by the defendant. Firstly, a bare reading of the clause would show that the defendant/ seller had undertaken to obtain the income tax clearance at her own expense for effectuating transaction, “if” the same was required. A similar obligation was placed on the defendant, vis-a-vis her having to obtain a “NOC” from the society. The plaintiff has not placed on record any material to show that at the relevant point of time in respect of the property in issue the provisions of Income Tax Act required a prior approval. No doubt, between 1995 till 01.07.2002 Section 269UC of the Income Tax Act, 1961 required parties to obtain permission by furnishing in a prescribed form (i.e., Form 37I) to the appropriate authority, information with respect to properties involving transfer of interest above prescribed value; in the plaint, however, there is no averment either with regard to the provision or, the form that had to be filled. Furthermore, there is not even an averment that in so far as the plaintiff is concerned it had done all that was necessary for obtaining approval. For instance, he had signed and handed over the prescribed form to the defendant or, had given necessary authority to the defendant to act on his behalf to get an approval. At the relevant point of time Form 37I required signatures of both the transferor/ defendant and the transferee/ plaintiff. In these circumstances, to say that the defendant was in breach, is an allegation which is not substantiated.

11.1 The position in respect of allegation of the plaintiff with regard to failure of defendant to obtain a NOC from the society is no different. There is a complete absence

of pleading and evidence on record in regard to the position of bye-laws of the society in regard to this aspect. The assertion made, is bereft of material particulars. The initial onus, in the very least, with regard to these assertions would be on the plaintiff. DW1 in her testimony has taken a stand that since they were acting through the property dealer, the plaintiff was informed well in advance that no clearance either from the income tax authority or the society was required. Therefore, on a bare assertion without material particulars, this plea of the plaintiff cannot be accepted.

12. The contention of the plaintiff that the testimony of defendant no. 1 ought not to be accepted, is also, in my view, without merit for the following reasons: The instant case is not one where the POA holder has no personal knowledge of the transaction at hand. A perusal of the agreement to sell (Ex. P-1) would show that DW1 was a witness to the said agreement to sell (Ex. P-1). In his testimony the DW1 specifically asserted, and as a matter of fact volunteered that he was associated with the entire transaction. In his examination-in-chief DW1 asserted that he was well conversant with the case; being the son of the defendant. DW1 in his cross-examination has specifically stated that he along with his mother, the plaintiff and the property dealer were present when, at the point in time the agreement to sell (Ex. P-1) and the receipts exhibits P2, P3 and P4 were executed. The crucial part of his testimony in this regard is extracted hereinbelow:

“It is wrong to suggest that the defendant has not authorized me to depose with regard to the transaction effected by the defendant with the plaintiff. (Vol. I was associated with the whole transaction effected with my mother with the plaintiff.)

At the time of the execution of receipt exhibit P-2, apart from me and my mother, plaintiff was also present with property dealer. Same is my reply to the answer regarding execution of receipts P-3 & P-4 an agreement to sell exhibit P-1. The document exhibit P-1 to P-4 were already prepared and then only they were signed by the plaintiff and the defendant.”

12.1 Therefore, to suggest that DW1’s testimony ought to be rejected as he had no personal knowledge is not borne out from the evidence on record. DW1 being the son of the defendant and being present at the time when the agreement to sell (Ex. P-1) was

executed and when, the earnest money was paid, cannot be bracketed with a POA holder, who is not personally aware of the transaction. The judgment in the case of *Janki Vashdeo Bhojwani* (*supra*) is distinguishable.

13. As regards the background in which the POA (Ex. DW1/1) was executed by the defendant in favour of DW1 is borne out from his testimony wherein, he refutes the suggestion that the medical certificate was obtained after the POA was executed in his favour. It is pertinent to note that the POA exhibit DW1/1 was attested on 24.01.2005, while the medical certificate is dated 23.01.2005. Though the medical certificate is not proved and hence, may not be invalid piece of evidence, the fact remains that the POA (Ex. DW1/1) was not put in issue. In these circumstances, even if I were to rely only on this POA, DW1 was empowered to prosecute the case on behalf of the defendant. Therefore, in the instant case once this aspect is accepted, then both the defence, as articulated in the written statement as well as the testimony of DW1, can be looked at, in my view, by the court.

14. This brings me to the contention of the defendant that she was entitled to forfeit the earnest money in view of the breach of the agreement to sell (Ex. P-1) by the plaintiff. Reliance in this regard has been placed on clause 9 of the agreement to sell (Ex. P-1). In support of this contention the defendant, as noticed hereinabove, has sought to argue that she was entitled to forfeit the sum of Rs 6.50 lacs paid by the plaintiff as earnest money on the ground that she had entered into a back-to-back contract with one Prem Wati for the purchase of another property situate at Ganesh Nagar. It was contended by the defendant that out of the sum of Rs 6.50 lacs, Rs. 4.50 lacs was advanced to Prem Wati for the said purpose. In this connection the defendant has placed reliance on the receipt dated 29.05.1995 (Ex. DW1/3) evidently issued by Prem Wati. To a specific question as to whether any other document had been placed on record to establish the genuineness of the transaction with Prem Wati; DW1 while, admitting that no document, other than DW1/3 was filed, went on to say that the same was not done as Prem Wati was the owner of the property. The genuineness of DW1/3 was sought to be established by DW1 by

testifying that he was present at the time the said receipt was issued and, that he had signed the receipt DW1/3 as a witness. In an answer to another question, as to whether the defendant had issued a notice to Prem Wati or filed a suit against her or; Prem Wati, in turn, had issued a notice to the defendant, or filed a suit against her; DW1 testified that neither did they trigger any precipitative action against the plaintiff nor, did she take any such steps.

14.1 An appreciation of the evidence placed on record in the form of receipt (Ex. DW1/3) evidently issued by Prem Wati and, the testimony on record clearly points to the fact that the defendant has not shored up adequate evidence to discharge her onus vis-à-vis this part of transaction. For reasons best known to the defendant, Prem Wati was not examined, who was the purported recipient of Rs 4.50 lacs evidently paid by the defendant to her towards purchase of Ganesh Nagar property. There is no evidence placed on record as to whether the defendant took any step either to retrieve the money evidently paid to Prem Wati or took steps to consummate the transaction.

14.2 In these circumstances, I am not persuaded to believe the stand taken by the defendant, that she had suffered a loss of Rs 4.50 lacs as the same was forfeited by Prem Wati. Therefore, once the edifice set up to bolster the reason for forfeiting the money advanced by the plaintiff to the defendant, falls to the ground, the defendant, in my view, ought to refund the money to the plaintiff. While, it cannot be argued that in terms of clause 9 a right of forfeiture of the earnest money, advanced by the plaintiff, did vest in the defendant in case the plaintiff breached his obligation; at the same time it cannot be said that, the defendant in law would be entitled to forfeiture without establishing injury and sufferance of consequent damages, where damages can be proved. (*See observations in Maula Bux vs. Union Of India: 1969 (2) SCC 554 in para 6 at page 559*). The defendant attempted to prove damages. However, the evidence produced by the defendant in this regard, as noticed above, being deficient, the forfeiture of the sum of Rs 6.50 lacs by the defendant, cannot be sustained. Therefore, the plaintiff would be entitled to return of Rs 6.50 lacs paid by him to the defendant.

15. The next question which would have to be answered is: whether the plaintiff ought to be granted interest. Even though I have come to the conclusion that the plaintiff has not been able to establish that the defendant was in breach of her obligation, I propose to grant simple interest at the rate of 6% per annum so as to negative, to some extent, the purchasing value of rupee, which has depreciated in the interregnum. The defendant shall thus be liable to pay simple interest at the rate of 6% per annum from the date of institution of the suit till the date of decree and thereafter further interest at the same rate (i.e., simple interest at 6% per annum) on the decretal amount till the date of payment.

16. At this stage let me advert to the issues framed by the court vide order dated 19.01.2004. For the sake of convenience they are extracted below:

- (i) Whether the plaintiff is entitled to the relief of specific performance of the agreement to sell dated 25.9.1995 in respect of the property No. 58, Block B, Dera ismail Khan, Cooperative Housing Building Society, Delhi? OPP
- (ii) Whether the plaintiff was ready and willing to perform his part of the agreement? OPD
- (iii) Whether the plaintiff is entitled to the decree of possession of the suit property? OPP
- (iv) Whether the plaintiff is entitled to damages, if so to what extent? OPP
- (v) Whether the plaintiff has defaulted in compliance of his obligations under the agreement date 25.9.1995? OPD
- (vi) Whether the defendant has rightly forfeited the earnest money and is not liable to specifically perform the agreement? OPD
- (vii) Whether the defendant has suffered any loss as alleged on account of the default on account of plaintiff, if so its effect on the present suit claim? OPD
- (viii) Relief.

17. In the light of the discussion above, my answers to each of the issues is as follows:

ISSUE NO. 1

17.1 Since I have held that the agreement to sell (Ex. P-1) is valid, the plaintiff is entitled to seek specific performance of the said agreement. The issue is, accordingly, answered in favour of the plaintiff.

ISSUE NO. 2

17.2 In my opinion, the plaintiff has not been able to establish that he was ready and willing to perform his part of the obligation, in particular, to pay the balance consideration of Rs 57 lacs. This issue is answered in favour of the defendant and against the plaintiff.

ISSUE NO. 3 & 4

17.3 In view of my answer to issue no. 2, this issue shall suffer the same fate, accordingly, this issue is decided in favour of the defendant and against the plaintiff. The plaintiff is not entitled to a decree of possession. Similarly, the plaintiff would not be entitled to damages.

ISSUE NO. 5

17.4 This issue is also decided against the plaintiff. Having come to the conclusion that the plaintiff did not have the wherewithal to pay the balance consideration, the only logical conclusion that one can reach is that the plaintiff, therefore, was never in a position to fulfill his obligation.

ISSUE NO. 6 & 7

17.5 These issues are decided in favour of the plaintiff and against the defendant. The defendant having failed to show that she had suffered an injury, and consequent damages, because of the failure of the plaintiff to discharge his obligations; the defendant, in my view, could not have forfeited the sum of Rs 6.50 lacs received by her from the plaintiff. The issues are decided accordingly.

ISSUE NO. 8

17.6 In view of the discussion above, the defendant would be required to refund, the sum of Rs 6.50 lacs paid by the plaintiff alongwith simple interest at the rate of 6% per

annum from the date of institution of the suit till the date of decree and thereafter at a future interest at the same rate (i.e., simple interest at the rate of 6% per annum) on the decretal amount till its realization.

18. The suit is, accordingly, disposed of. A decree sheet be drawn up in terms of the judgment. The suit be consigned to the record.

RAJIV SHAKDHER, J

DECEMBER 14, 2010
mb/kk