

**THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment Reserved on: 10.01.2011  
Judgment Pronounced on: 14.01.2011

+ **CS(OS) No. 998/1998**

**SHRI B.B. SABHARWAL & ANR.** **.....Plaintiff**

**- versus -**

**M/S. SONIA ASSOCIATES** **.....Defendant**

**Advocates who appeared in this case:**

For the Plaintiff: Mr Sandeep Sethi, Sr Adv. with  
Mr Nikhil Bhalla.

For the Defendant: Mr Girdhar Govind, Adv.

**CORAM:-**

**HON'BLE MR JUSTICE V.K. JAIN**

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

**V.K. JAIN, J**

1. This is a suit for specific performance of Agreement to Sell dated 20<sup>th</sup> June, 1997 or in the alternative for recovery of Rs.40,00,000/- as damages.

2. The case of the plaintiffs is that on 20<sup>th</sup> June, 1997, the defendant agreed to sell the entire first floor of property No.D-144, New Rajinder Nagar, New Delhi to them for a consideration of Rs.40,00,000/-. A sum of Rs.5,00,000/- was paid to the defendant towards earnest money and the balance amount of Rs.35,00,000/- was agreed to be paid within 15 days from the date of the agreement. The defendant was required to obtain NOC as also Income Tax Clearance certificate required for execution and registration of the sale deed in favour of the plaintiff. According to the plaintiffs, the balance sale consideration was to be paid after the defendant had obtained necessary sale permission, Income Tax Clearance etc., had presented the sale deed for registration and delivered possession of the property to the plaintiff. A further sum of Rs.15,00,000/- is alleged to have been paid by the plaintiffs to the defendant on 25<sup>th</sup> June, 1997. The case of the plaintiffs is that despite receiving the aforesaid sums from them, the defendant did not apply for Income Tax Clearance Certificate and necessary permission from Land and Development Office for execution and registration of the sale deed in their favour.

3. It is also alleged that the amount of Rs 15 lacs,

which the defendant took from the plaintiffs on 25<sup>th</sup> June, 1997, was invested by her in purchasing a shop where she is running business under the name and style of M/s Tilak Exclusif. The plaintiff has accordingly sought specific performance of the agreement dated 20<sup>th</sup> June, 1997. It is further prayed that if on account of any unavoidable circumstance the sale of the aforesaid property is not admissible and performance of the agreement dated 20<sup>th</sup> June, 1997 is not permissible, a decree for damages to the tune of Rs 40 lacs be passed.

4. The defendant has contested the suit. He has admitted having entered into an agreement dated 20<sup>th</sup> June, 1997 to sell the first floor with roof rights of Property No. D-144, New Rajinder Nagar, to the plaintiffs, for a sale consideration of Rs 40 lacs and receipt of Rs 5 lacs as the earnest money. It is claimed in the written statement that the agreement provided that in case of failure of the defendant to execute the sale deed or hand over vacant possession of the property or to get NOC or Income-tax Clearance Certificate from the Competent Authority, the plaintiffs were to get double the amount of earnest money and in the case of failure of the plaintiffs to make the

balance payment of the sale consideration, the earnest money was to stand forfeited. It is also alleged that the plaintiffs failed to make payment of the balance sale consideration within the time stipulated in the agreement in this regard and, therefore, the earnest money paid by them stood forfeited. It is also claimed that since the suit property was a freehold plot, no permission from Land & Development office was required for its sale. The defendant has denied receiving a sum of Rs 15 lacs from the plaintiffs and has claimed that she is not the owner of the shop Tilak Exclusif which was taken on lease by her husband in the year 1984-85. It is further stated that the plaintiff No.1 had also entered into an agreement with the defendant in the name of their daughters in respect of the basement and store of D-144, New Rajinder Nagar vide Agreement dated 20<sup>th</sup> June, 1997 and the sale in respect of the aforesaid portion was concluded on 04<sup>th</sup> July, 1997.

5. The following issues were framed on the pleadings of the parties:-

1. Whether the plaintiff is entitled to a decree for specific performance of the agreement dated 20.06.1997, directing the defendant to execute the sale deed in respect of first floor and the roof rights of

the first floor of the property bearing No. D-144, New Rajinder Nagar, New Delhi, as prayed in the suit? OPP

2. Whether the plaintiff was always ready and willing to perform his obligations under the agreement? OPP

3. Whether the defendant purchased the shop "Tilak Exclusif" for Rs 15 lakh paid by the plaintiff to the defendant on 25.06.1997? OPP

4. Whether in the alternative plaintiff is entitled to the damages of Rs 40 lakh due to non-performance of the agreement dated 20.06.1997 by the defendant? OPP

5. Whether the plaintiff failed to pay the balance consideration, as per the agreement and defendant was entitled to forfeit the earnest money? OPD.

6. Relief

### **Issue No. 1**

6. It was contended by the learned counsel for the defendant that since clause 4 of the agreement stipulated refund of the earnest money of Rs 5 lacs to the plaintiffs alongwith penalty of Rs 5 lacs in case of the failure of the defendant to complete the sale transaction, the plaintiff, at best, is entitled to an amount of Rs 10 lacs from the defendant and specific performance of the contract cannot be granted to them. I, however, find no merit in this

contention. Payment of Rs 10 lacs to the plaintiffs, including the amount of earnest money, was only an alternative remedy made available to the plaintiffs, which they could avail at their option, but it does not disentitle them from seeking specific performance of the contract if it is otherwise made out in the facts and circumstance of the case.

7. In **Man Kaur (dead) by LRS. Vs. Hartar Singh Sangha** 2010 (9) UJ 4569 (SC), one of the terms of the agreement for sale of immovable property provided that if the vendor committed a default, he was to pay the double of the earnest money to the purchaser and if the purchaser committed any default, the sum of Rs 10 lacs paid as earnest money would be forfeited. The contention of the appellant before the Supreme Court was that since the agreement of sale only provided for damages in the event of breach by either party and did not provide for specific performance in the event of breach of by the vendor, their intention was that in the event of breach by the vendor, the purchaser will be entitled to double the earnest money and nothing more and, therefore, the vendee was not entitled to specific performance of the contract. Repelling the contention, the Supreme Court held that for a plaintiff to

seek specific performance of a contract of sale relating to immovable property and for a Court to grant such specific performance, it is not necessary that the contract should contain a specific provision that in the event of breach, the aggrieved party will be entitled to specific performance. It was further held that if the legal requirements for seeking specific performance of a contract are made out, it could be enforced even in the absence of a specific term for specific performance in the contract. Legal position was clarified by the Supreme Court giving the following illustrations (not exhaustive):

“(A). The agreement of sale provides that in the event of breach by the vendor, the purchaser shall be entitled to an amount equivalent to the earnest money as damages. The agreement is silent as to specific performance. In such a case, the agreement indicates that the sum was named only for the purpose of securing performance of the contract. Even if there is no provision in the contract for specific performance, the court can direct specific performance by the vendor, if breach is established. But the court has the option, as per Section 21 of the Act, to award damages, if it comes to the conclusion that it is not a fit case for granting specific performance.

(B). The agreement provides that in the event of the vendor failing to execute a sale

deed, the purchaser will not be entitled for specific performance but will only be entitled for return of the earnest money and/or payment of a sum named as liquidated damages. As the intention of the parties to bar specific performance of the contract and provide only for damages in the event of breach, is clearly expressed, the court may not grant specific performance, but can award liquidated damages and refund of earnest money.

(C). The agreement of sale provides that in the event of breach by either party the purchaser will be entitled to specific performance, but the party in breach will have the option, instead of performing the contract, to pay a named amount as liquidated damages to the aggrieved party and on such payment, the aggrieved party shall not be entitled to specific performance. In such a case, the purchaser will not be entitled to specific performance, as the terms of the contract give the party in default an option of paying money in lieu of specific performance.”

Noticing that in the case before it, the agreement did not specifically provide for specific performance nor did it bar specific performance and it provided for payment of damages in the event of breach by other party, Supreme Court was of the view that the provision for damages in the agreement was not intended to provide the vendor an option of paying money in lieu of specific performance and,

therefore, the plaintiff was entitled to seek specific performance even in the absence of a specific provision therefor, subject to his proving breach by the defendant and that he was ready and willing to perform his obligation on the contract in terms of the contract.

8. In **P. D'Souza Vs. Shondrilo Naidu** (2004) 6 SCC 649, the relevant clause in the agreement of sale read as under:

“7. That if the vendor fails to discharge the mortgage and also commits any breach of the terms in this agreement and fails to sell the property, then in that event he shall return the advance of Rs. 10,000/- paid as aforesaid and shall also be liable to pay a further sum of Rs. 2,000/- as liquidated damages for the breach of the agreement.”

It was held by Supreme Court that it was for the plaintiff to file a suit for specific performance of a contract, despite having an option to invoke the option provision and it would not be correct to contend that only because such a clause exists a suit for specific performance of a contract would not be maintainable.

9. In **M.L. Devender Singh and Ors. Vs. Syed** 1973 (2) SCC 515, the terms of the contract between the parties provided that in case of failure to comply with the terms of

the agreement, the vendor shall be liable not only for the refund of the advance received by him, but also to pay a similar amount as damages to the vendee. There was no mention anywhere in the contract that a party to it will have the option either to fulfil the contract or pay the liquidated damages stipulated for a breach, as an alternative to the performance of the contract. The Supreme Court divided the contracts into the following three classes:

(i) Where the sum mentioned is strictly a penalty-a sum named by way of securing the performance of the contract, as the penalty is a bond :

(ii) Where the sum named is to be paid as liquidated damages for a breach of the contract :

(iii) Where the sum named is an amount the payment of which may be substituted for the performance of the act at the election of the person by whom the money is to be paid or the act done.

It was held that where the stipulated payment comes under either of the two first-mention heads, the Court enforce the contract, but where it comes under the third head, the Court is satisfied by payment of money and there is no ground to compel the specific performance of the other alternative of the contract.

In the case before this Court, the contract between the parties would fall either under category (i) or category (ii) and, therefore, the Court is required to enforce the contract if the plaintiff is otherwise entitled to such a relief in law.

10. In **Manzoor Ahmed Margray Vs. Gulam Hassan Aram & Ors.** 1997 (7) SCC 703, the default clause provided for payment of Rs 10,000/- as penalty in case of violation of the terms and conditions of the agreement by either party. It was held that this was a penalty clause for securing performance of the contract and would not mean that the contract is not to be performed. I, therefore, hold tht the penalty clause contained in the agreement does not by itself disentitle the plaintiffs from claiming specific performance of the contract, provided they were always ready and willing to perform their part of the contract. The issue is decided accordingly.

### **Issue No. 3**

11. As regards the alleged payment of Rs 15 lacs, the case of the plaintiffs, as set out in the plaint, is that the defendant approached them, claimed to be in financial problems and sought money to obtain Income-tax Clearance certificate and permission from Land & Development office

for the purpose of execution and registration of sale deed and, therefore, they paid the aforesaid sum to him on 25<sup>th</sup> June, 1997. This is also the case of the plaintiffs that the aforesaid sum of Rs 15 lacs was invested by the defendant for purchasing a shop at Azmal Khan Road, Karol Bagh, New Delhi under the name and style of Tilak Exclusif.

12. In his affidavit by way of evidence, plaintiff No.1 stated that within a couple of days of execution of the agreement, Sonia Ahuja approached him, represented that she was in urgent need of funds and did not have money to arrange the requisite permissions required for the sale and requested him to pay her a further sum of Rs 15 lacs out of the balance sale consideration.

He also stated that the defendant used the aforesaid amount for renovation of a shop under the name and style of Tilak Exclusif. The plaintiff further stated that to enable the payment of the balance sale consideration, he entered into an agreement for sale of a factory which he had in Noida and that property was eventually sold and the sale proceeds kept with the bank with the object of encashing it, as and when required for payment to the defendant.

13. In her affidavit by way of evidence, the defendant

stated that no further payment was made to her by the plaintiff after payment of earnest money amounting to Rs 5 lacs on 20<sup>th</sup> June, 1997. She has also stated that the shop in question was purchased by them from their own resources in the year 1994-95.

14. There is no receipt of the alleged payment of Rs 15 lacs and no convincing reason has been given by the plaintiffs for not obtaining the receipt of the payment, alleged to have been made by them to the defendant on 25<sup>th</sup> June, 1997. This is not as if the deal between the parties was oral, based on mutual trust. The Agreement to Sell between the parties was in writing and, therefore, in the normal course of human conduct, the plaintiffs would have obtained a written acknowledgement of the payment alleged to have been made to the defendant or would have made the payment by way of a payees account cheque/bank draft/pay order so as to have a documentary proof of the payment.

15. There is contradiction in the pleading and evidence of the plaintiffs as regards the utilization of the amount of Rs 15 lacs alleged to have been paid by them to the defendant. The case, set up in the plaint, is that the

aforesaid amount was utilized by the defendant for purchase of the shop, whereas in his affidavit by way of evidence, the plaintiff No. 1 has stated that the aforesaid amount was utilized for renovating the shop.

16. The plaintiff claims to have sold a property in Noida in order to arrange funds for payment of the balance sale consideration to the defendant. In his cross-examination, plaintiff No. 1 stated that the amount of Rs 15 lacs which he paid to the defendant was received by him by sale of a property in Noida which he sold in the month of June, 1997. He stated that under an Agreement to Sell, executed by him in respect of Noida property, he had received Rs 15 lacs in cash from one Mr Umesh Kapoor and that amount was forfeited by him and the property was later sold to one Mr Rajiv Kapoor. However, no document has been filed by the plaintiffs to prove the receipt of Rs 15 lacs from Mr Umesh Kapoor nor have they produced the purchaser Mr Umesh Kapoor in the witness-box to prove that he had paid Rs 15 lacs to the plaintiff in June, 1997. In fact, there is no documentary proof of any such transaction. Mr Umesh Kapoor, according to the plaintiff No.1, is distantly related to him. Hence, there could have been no

difficulty in the plaintiffs producing him in the witness-box. Even the date of the alleged receipt of money by the plaintiffs from Mr Umesh Kapoor has not been stated in the affidavit of the plaintiff No.1. In fact, even the name of Mr Umesh Kapoor did not find mention in the affidavit and it was only during his cross-examination that the plaintiff No. 1 came out with the name of Mr Umesh Kapoor. Though plaintiff No.1 has claimed that the sale consideration received by him on sale of the property in Noida was kept by him in his bank, no documentary proof such as bank statement has been filed by the plaintiffs to prove any such receipt by plaintiff No. 1. Though the plaintiffs claim that the defendant had utilized the amount of Rs 15 lacs received from him in connection with the shop at Ajmal Khan Road, Karol Bagh, New Delhi, there is no proof of the defendant having purchased that shop or having spent a sum of Rs 15 lacs on its renovation in or around June, 1997. In his affidavit by way of evidence, DW-2 Shri Dinesh Ahuja, husband of the defendant has stated that the shop named "Tilak" was taken on lease by him in the year 1984-85 and, thereafter shop No. 6/64, Ajmal Khan Road, Karol Bagh, New Delhi, whereas building in which the aforesaid

shop was situated was purchased by Dinesh & Associates, of which he was a partner, in the year 1996 much before the deal between the plaintiffs and defendant. The copy of the Partnership Deed of M/s Dinesh & Associates is Ex.DW-2/1, whereas the copy of the sale deed of property No.6/64, Ajmal Khan Road, New Delhi is Ex.DW-2/2. A perusal of the Partnership Deed dated 22<sup>nd</sup> December, 1995 would show that Shri Dinesh Ahuja and Shri Dinesh Wadhwa had entered into a partnership to carry business under the name and style of Dinesh & Associates at 15A/64 WEA, Karol Bagh, New Delhi. A perusal of the Sale Deed dated 22<sup>nd</sup> March, 1996 executed by Shri Rajinder Singh Lamba and Shri Pritam Singh Lamba in favour of Dinesh & Associates, through its partner Shri Dinesh Wadhwa would show that Property No.6/64, WEA, Karol Bagh was sold by them to Dinesh & Associates vide that sale deed. These documents leave no reasonable doubt that no money was taken by the defendant from the plaintiffs for purchase of a shop in Property No.15A/64 WEA and the plea taken by the plaintiffs in this regard is totally false. Also, there is absolutely no evidence of the defendant having even carried out renovation in the aforesaid shop in and around June,

1997 when the deal was struck between the plaintiff and the defendant.

17. As noted earlier, the case of the plaintiffs is that the defendant had sought further payment from them in order to enable her to obtain Income-tax Clearance Certificate and permission from Land & Development office so that she could execute the sale deed in their favour and get the same registered. It has come in the evidence that the property subject matter of the agreement is a freehold property. No one can expect that a sum of Rs 15 lacs would be required for obtaining Income-tax Clearance certificate and/or permission from Land and Development office, assuming that the plaintiffs did not know on 25<sup>th</sup> June, 1997 that the suit property was a freehold property and no permission from Land & Development office was required for its sale to them. It is, therefore, difficult to accept that the plaintiffs would have paid a sum of Rs 15 lacs to the defendant on 25<sup>th</sup> June, 1997 (i) without obtaining any receipt from her; (ii) without ensuring that the defendant had actually applied for grant of Income-tax Clearance and; (iii) without obtaining possession of the suit property or even a part of it. No buyer is likely to make payments in the

manner stated by the plaintiffs without at least obtaining a written acknowledgment of the payment and/or possession of a part of the property subject matter of the agreement. In these circumstances, I hold that the plaintiffs have failed to prove the alleged payment of Rs 15 lacs to the defendant on 25<sup>th</sup> June, 1997. The issue is decided against the plaintiffs and in favour of the defendant.

**Issue No. 5**

18. The case of the defendant is that since the balance sale consideration amounting to Rs.35 lakhs was required to be paid by the plaintiffs within 15 days from the date of the agreement and the plaintiffs failed to pay that amount, the earnest money of Rs.5 lakhs paid by them stood forfeited. The main question which, therefore, comes up for consideration is as to whether the balance payment of Rs 35 lacs was required to be made to the defendant within 15 days from the date of the agreement even if the defendant had not obtained Income Tax Clearance certificate. The following clauses of the agreement between the parties are relevant in this regard:-

“3. That the SECOND PARTY undertakes to make payment of the balance sale consideration on Rs

35,00,000/- (Thirty Five Lacs Only) to the First Party ON OR BEFORE 15 days (fifteen days) from the date of this agreement which has been settled between the parties.

4. That the first party fails to complete the terms of this sale transaction in time i.e. fails to execute the sale papers in favour of the second parties or fails to hand over the vacant peaceful possession of the aforesaid property in time or fails to get the NOC or ITC from competent office/authorities connected with the aforesaid property in time then the second party shall have right to get the earnest money of Rs 5,00,000/- (Rs.Five Lacs) alongwith it's equal penalty of Rs 5,00,000/- total amounting to Rs 10,00,000/- (Rs. Ten Lacs) from the FIRST PARTY, and if the SECOND PARTY fail to make the balance payment of this transaction in time, then their earnest money shall stand forfeited with the FIRST PARTY and this sale transaction shall be deemed as cancelled.

5. That the vacant and peaceful possession of the aforesaid property shall be handed over by the FIRST PARTY to the SECOND PARTY within fixed time as above, after the FIRST PARTY has received the full & final payment of the sale consideration, as mentioned above from the SECOND PARTY.”

Clause 3 thus envisaged payment of the balance

sale consideration to the defendant within 15 days from the date of the agreement and this clause contains no reference to the Income-tax clearance and/or NOC. Clause 4 on the other hand stipulated that if the defendant failed to execute the sale deed in favour of the plaintiffs or hand over peacefully possession of the property to them or to get the NOC or ITC from competent authorities 'in time', the plaintiffs would have right to get a sum of Rs 10 lacs, being the earnest money of Rs 5 lacs alongwith the penalty of the same amount. This clause, however, did not stipulate any particular time for the defendant to obtain Income-tax Clearance and/or NOC from the competent authorities. Similarly, clause 5, which provided for possession of the property being handed over to the plaintiff within fixed time, did not by itself stipulate any particular time period for this purpose.

19. All the clauses contained in the agreement need to be given a harmonious construction and a workable meaning. If clause 3 of the agreement alone is given effect without any reference to clause 4, the terms requiring the seller to obtain the NOC/Income-Tax Clearance, execute the sale deed and give possession of the property subject matter

of the agreement would become meaningless and cannot be given effect to. If clause 4 and 5 of the agreement are read without aid of clause 3, there would be no time limit to complete the transactions by obtaining NOC/Income-Tax Clearance, executing the sale deed and for handing over the possession of the property to the vendee, despite the clause requiring the vendor to do the same 'in time'/'fixed time'. Therefore, in my view the only harmonious and meaningful construction which can be given to clauses 3, 4 and 5 of the agreement is that the vendor was required to obtain the NOC/Income-tax Clearance and execute the sale deed in favour of the vendee within 15 days from the date of the agreement, the vendee had to make balance payment of Rs.35 lacs to the vendor at the time of execution of the sale deed, after she had obtained the Income Tax Clearance and informed them of the same and the possession of the property subject matter of the agreement was to be simultaneously given by the vendor to the vendees, immediately on receiving the balance consideration. The obligation of the plaintiffs to pay the balance amount of Rs.35 lacs to the defendant, therefore, did not arise till the time income tax clearance was obtained by the defendant

and they were informed of the same. There is no documentary proof of the defendant having applied for grant of income tax clearance within 15 days of the agreement or even thereafter. In her cross-examination, the defendant stated that she had already applied for permission required under Section 230A of the Income Tax Act in Form 34A. However, neither she has filed the copy of Form 34A in the Court nor has she produced any official from the Income Tax Department to prove that she had applied for the requisite clearance. In her cross-examination, the defendant stated that the plaintiffs had refused to sign the proposed sale deed and, therefore, she did not pursue the permission already applied to the Income Tax Department. However, admittedly, the defendant did not write to the plaintiffs, at any point of time, asking them to sign the proposed sale deed. In fact, there is no documentary proof of the defendant having even got any draft sale deed prepared and provided the same to the plaintiffs. When the defendant was asked as to whether she could produce any document to show that she had applied for permission under Section 230 A of the Income Tax Act, she gave an evasive reply and stated that she would have to check and

was not very sure. She, thereafter, stated that whatever permissions required to be sought, were to be obtained by her lawyer and she was not aware whether her lawyer had obtained permission under Chapter XXII of the Income Tax Act. It is, thus, quite obvious that the defendant did not apply for requisite income tax clearance under Section 230A of the Income Tax Act at any point of time. Consequently, the plaintiffs were not obliged to pay the balance sale consideration to the defendant. Since the defendant herself committed breach of the agreement by not applying for income tax clearance, she could not have forfeited the earnest money paid to her by the plaintiffs. The issue is decided against the defendant and in favour of the plaintiffs.

**Issue No. 2**

20. Section 16(C) of Specific Relief Act provides that specific performance of a contract cannot be enforced in favour of a person who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms, the performance of which has been prevented or waived by the defendant.

Explanation (i) provides that where the contract involves

payment of money it is not essential for the plaintiff to actually tender the money to the defendant or to deposit it in the Court unless so directed by the Court.

The philosophy behind the aforesaid statutory provision is that a person who comes to the Court seeking specific performance of a contract to which he is a party must show and satisfy the Court that his conduct having been blemishless he is entitled to grant of specific performance of the contract. There is a distinction between readiness to perform the contract and willingness to perform the same. By readiness is meant the capacity of the plaintiff to perform the contract which includes his financial position to pay the purchase price.

In **Ardeshir H Mama Flora Sassoon** (supra), Privy Council held that in a suit for specific performance of a contract, the plaintiff has to allege and if the fact is traversed also to prove a continuous readiness and willingness from the date of the contract to the time of hearing, to perform the contract on his part and failure to make good that averment brings with it and leads to inevitable dismissal of the suit. The view taken by the Privy Council was approved by Supreme Court in **Premraj vs.**

**DLF Housing and Constriction Pvt. Ltd. AIR 1968 SC 1355.**

21. In his affidavit by way of evidence, plaintiff No.1 Shri B.B. Sabharwal has stated that at the relevant time he held 240 equity shares of Larsen and Turbro Ltd., 300 equity shares of BSES Ltd. and 169 shares of TISCO Ltd., all of which were quoted at various stock exchanges and were sealable at short notice. The shares are stated to have been sold in July, 1999 vide sale voucher, which is Ex.7. He has further stated that he had applied for a loan of Rs.20 lakhs to M/s Bathla & Co. Ltd. and the letter conveying the approval for grant of loan is Ex.13. He also stated that he was holding 2000 units of Growing Monthly Income Unit Scheme of the Unit Trust of India and the amount covered by those units was Rs.20,000/-. The certificate purporting to be issued by the UTI in this behalf is Ex. 23. He also stated that his mother Smt. Savitri Sabharwal was also holding 2000 units of the aforesaid scheme vide certificate Ex. 24. He also claimed that his mother Smt. Savitri Sabharwal owned and possessed jewellery of the value of Rs.4.54 lakhs and the jewellery was valued by M/s Bagga Jewellers Pvt. Ltd vide Ex. 6. Ex. 27, according to the

plaintiff, are 50 Non-convertible Debentures of Atlas Cycle Industries Ltd. which were issued to him whereas Ex. 27A is the certificate whereby 25 bonus shares of Atlas Cycle Industries Ltd. were allotted to him. Ex. 28 purport to be share certificates in respect of 200 equity shares of Essar Gujarat Ltd allotted to plaintiff No.1. He also claimed that he along with his wife Ratna Sabharwal was holding 100 equity shares of Lan Eseda Steels Ltd vide certificate Ex. 30. Ex. 32 is the share certificate whereby his mother Savitri Sabharwal was holding 32 equity shares of Lakhanpal National Ltd. Ex. 33 are the certificates whereby plaintiff No.1 held 11 equity shares of Phillips India Ltd. Ex. 35 is the certificate whereby he held 33 master shares of Unit Trust of India and Ex. 36 is the certificate whereby he was allotted 2 bonus shares by the Unit Trust of India. Ex. 38 are the share certificates whereby the plaintiff purchased 300 shares of Indian Acrylics Ltd.

22. In her affidavit by way of evidence, Smt. Ratna Sabharwal, wife of the plaintiff stated that at the relevant time, she owned jewellery worth Rs.4.24 lakhs which was valued by Bagga Jewellers Pvt. Ltd. vide Ex. P-2/1. She also claimed that she had about Rs.15,720/- in her account

with Indian Overseas Bank, New Rajinder Nagar and Ex.P2/2 is the certificate issued by the bank in this regard. Ex. P2/3 purports to be the Fixed Deposit Receipt of Rs.34,428/- in the name of Smt. Ratna Sabharwal in Standard Chartered Bank, New Delhi Metro Main Branch whereas Ex. P2/4 is the FDR of Rs.30,000/- in her name in the Standard Chartered Bank, Sansad Marg, New Delhi. She further stated that at the relevant time, she was holding 2000 units of Growing Monthly Income Unit Scheme of Unit Trust of India for Rs.20,000/- vide certificate Ex. P2/5, 200 equity shares of Mangalore Refinery and Petro-Chemicals Ltd. vide certificates Ex. P2/6 and 17 shares of Tata Iron and Steel Company Ltd. vide certificate Ex. P2/8. She also claimed that she was jointly holding 100 equity shares of Lan Eseda Steels Ltd and 50 equity shares of Jai Prakash Industries Ltd. She further stated that she was holding 50 debentures of Mangalore Refinery and Petro-Chemicals Ltd. vide certificate Ex. P-2/9. According to her, all her movable properties could be sold immediately in the market and proceeds thereof could be headed over to her husband for completing the transaction in respect of first floor and roof rights of property D-144, New Rajinder Nagar, New Delhi.

23. Ms. Heena Sabharwal, daughter of plaintiff No.1 stated that at the relevant time she was having about Rs.1.65 lakhs in her bank account with Indian Overseas Bank, New Rajinder Nagar and the certificate issued to her in this regard is Ex. P4/1. She further stated that she had fixed deposit of Rs.1,00,656/- with Bathla and Company Ltd. vide certificate Ex. P4/2 and FDR of Rs.30,000/- with Standard Chartered bank, Sansad Marg, New Delhi vide Ex. P4/3 in addition to 2000 units of Growing Monthly Income Unit Scheme of Unit Trust of India covering a sum of Rs.20,000/- vide certificate Ex. P-4/4.

24. Ms. Jolly Sabharwal is the other daughter of plaintiff No.1. In her affidavit by way of evidence, she has stated that at the relevant time, she was having Rs.1.54 lakhs in her bank account with Indian Overseas Bank, New Rajinder Nagar as shown in the certificate Ex. P4/1. She further stated that she was having Rs.34,208/- in her account with Punjab National Bank, New Rajinder Nagar Branch and a copy of the certificate issued by the bank in this regard is Ex.P.4/2. She also claimed to have an FDR of Rs.34,428/- with Standard Chartered Bank, New Delhi Metro Main Branch vide certificate Ex.P4/3 and a fixed

deposit of Rs.1,13,428/- with Bathla & Company Ltd. vide certificate Ex. P4/5. She further claimed FDR of Rs.30,000/- with Standard Chartered Bank, Sansad Marg, New Delhi vide certificate Ex. P4/6.

25. PW2 Shri Sudhir Bhathla, director of Bathla & Company Ltd. has stated that in June, 1997 they had approved loan application of Mr. B.B.Sabharwal and had agreed to finance him for Rs.20 lakhs. Ex. P5/1 is the copy of the application approved by them in this regard. He further stated that Heena Sabharwal, daughter of Mr. B.B. Sabharwal had deposited a sum of Rs.1,00,656/- with them whereas his other daughter Jolly Sabharwal had deposited rs.1,13,428/- with them on which interest amounting to Rs.16,035/- and Rs.18,222/- respectively was paid by them in the year 1997-98.

26. PW-6 Ramesh Chander, clerk, Punjab National Bank, New Rajinder Nagar, New Delhi has proved the certificate Ex. PW-6/1 whereas PW-7 Suresh Chand, Clerk Cashier, Indian Overseas Bank, New Rajinder Nagar, New Delhi has proved certificates Ex. 9 and 10 pertaining to saving bank account Nos.9298 and 12983 respectively.

27. The voluminous documentary evidence produced

by the plaintiffs, coupled with the depositions of plaintiff No.1, his wife, his daughters and the depositions Mr Sudhir Bhathla, director of Bhathla and Company Ltd. does show that the plaintiff possessed requisite means to pay the balance sale consideration to the defendant at the time balance sale consideration was agreed to be paid by them. The plaintiffs need not necessarily have the entire balance consideration lying with them in cash or in their banks. It is sufficient if they had the capacity to pay the balance sale consideration to the defendant. Bhathla and Company Limited had approved a loan of Rs 20 lacs to the plaintiffs, the mother of the plaintiff possessed jewellery worth Rs 4.54 lacs, whereas his wife possessed jewellery worth about Rs 4.24 lacs at the relevant time. It is true that the plaintiffs have not produced the jeweller, who is alleged to have issued valuation certificates to plaintiff No.1, but, that, in my view, would not be necessary since I see no reason to disbelieve the oral evidence produced by the plaintiffs in this regard. One daughter of the plaintiff had a deposit of Rs 1 lac with Bhathla and Company, whereas the other daughter at about Rs 1,13,000/- with them. One daughter of the plaintiff Ms Heena Sabharwal had about Rs 1.65 lacs in her

bank account, whereas his other daughter Ms Jolly Sabharwal had Rs 1.54 lacs in her bank account with Indian Overseas Bank, New Rajinder Nagar. All these deposits could have been cancelled and the amount of the deposits could have been made available to plaintiff No. 1 at a short notice. Ms Heena Sabharwal had an FDR of Rs 35,000/- with Standard Chartered Bank, whereas Ms Jolly Sabharwal had two FDRs of Rs 64428/- with that bank. His wife had also had an FDR of Rs 34428/- with Standard Chartered Bank, New Delhi, Main Branch and Rs 13,000/- with its Sansad Marg Branch. This money also could have been made available to plaintiff No.1 for payment of the balance sale consideration to the defendant. Plaintiff No.1 was holding 240 equity shares of Larsen and Turbro Ltd., 300 equity shares of BSES Ltd.m 169 shares of TISCO Ltd., and 200 shares of Essar Gujarat Ltd. at the relevant time. Though value of these shares had not been proved by the plaintiffs, these being the shares of reputed companies which are listed on Stock Exchange. It was possible for plaintiff No. 1 to sell them at a short notice and utilize the sale proceeds for the payment of the balance sale consideration to the defendant. Plaintiff No. 1 as well as his

wife and his daughter Ms Heena Sabharwal had 2000 unites each of Growing Monthly Income Unit Scheme of UTI, covering a sum of Rs 20,000/- each. The wife of plaintiff No.1 also had some shares at the relevant time. It is, therefore, difficult to dispute that the plaintiffs possessed sufficient means and, therefore, were in a position to pay the balance sale consideration to the defendant at the time they had agreed to pay the same to her.

28. For determining the willingness of the plaintiff to perform his part of the contract, his conduct needs to be scrutinized by the Court. Grant of specific performance of an agreement is an equitable relief and the Court may in its discretion, in appropriate cases, refuse to grant this relief, if it comes to the conclusion that by his conduct, the plaintiff has disentitled himself from grant of such relief. Equity demands that a person approaching the Court must come with true facts and should not have conducted himself in a manner which would indicate that he at any point of time was unwilling to perform his contractual obligation, as agreed with the defendant. This principle finds statutory recognition in Section 16(C) of Specific Relief Act and, therefore, is back by force of law. If a person, sets up a plea

which is false to his knowledge, the Court will not be justified in coming to his rescue, even if he later on is agreeable to make amends this regard.

29. In **Sobharam vs. Totaram** AIR 1952 Nagpur, 244, the allegation of the purchaser was that he had paid Rs 15 to the vendor after execution of the agreement. This averment was found to be false. Relying on the decision in **Rustomali vs. Ahoideh Rahaman** 45 CWN 837, it was held that making a false plea that a certain obligation under the contract had been discharged shows an unwillingness on the part of the transferee to abide strictly by the contract entered into between him and the transferer. It was held that the vendee was not willing to perform his part of the contract and, therefore, could not be allowed the benefit of Section 53A of Transfer of Property Act. In **Bishwanath Mahto vs. Srimati Janki Devi**, AIR 1978 Patna, 190, the plaintiff had alleged a part payment of Rs 200/- which was denied by the defendant. Referring to the provisions contained in clause (c) of Section 16 of Specific Relief Act and relying on the decision of Privy Council in **Ardeshir H. Mama Flora Sassoon**, AIR 1928 PC 208 and decision of Supreme Court in **Gomathinayagam Pillai vs.**

**Pallaniswami Nagar**, AIR 1967 SC 868, it was held that since the plaintiff had sent a notice to the defendants before filing the suit falsely asserting payment of a sum of Rs 200/- and showing readiness to pay only a sum of Rs 7,000/- out of the agreed sale consideration of Rs 7,200/-, the Court was of the view that the plaintiff was ready and willing to pay only a sum of Rs 7,000/- as the consideration for the Sale Deed when he sent a notice and when he filed the suit. The Court was, therefore, of the view that the plaintiff was not willing to perform the terms of the agreement which was to be performed by him. In **Kommisetti Venkatasubbayya vs. Karamestti Venkateswarlu** AIR 1971, Andhra Pradesh, 279, the plaintiff paid Rs 50 on the date of the execution of the agreement and claimed payment of a further sum of Rs 1500/- thereafter. It was found that his claim of having paid Rs 1500/- subsequent to the agreement was not true and, therefore, he was not ready and willing to perform his part of the contract since he was willing to pay only Rs 272.50/- though he was required to pay Rs 1,772.50/-. The Court was of the view that unless the readiness and willingness of the plaintiff was to pay the entire balance of the purchase

money, he was not entitled to a decree for specific performance. It was held that irrespective of any other fact, the averment in the plaint and in the notice with respect to payment of Rs 1,500/- was sufficient to hold that he was not ready and willing to perform his part of the obligation. In taking this view, the High Court relied upon the decision of a Division Bench of Madras High Court in **Subarayudu vs. Tatayya**, 1937 Mad. WN 1158, where it was held that if the plaintiff seeking relief of specific performance puts forth a false plea, he would be disentitled to an equitable and justifiable relief of specific performance. The High Court also relied upon its earlier decision in **Butchiraju vs. Sri Ranga**, AIR 1967, Andhra Pradesh 69, which case was carried to Supreme Court, and noted that the Supreme Court in that case, noticing that the plaintiff had set up a false case that they had offered on June 04, 1953 to the first defendant, the balance of the purchase price due and had sought to support that case by leading evidence which was false to their knowledge and that having regard to their contract, the Trial Court and the District Court had held that the plaintiffs were not entitled to a decree for specific performance, held that exercise of discretion by the Trial

Court and the District Court against the claim made by the plaintiffs was not arbitrary, but was reasonable and guided by judicial principles.

30. In **M.K. Mokbool Khan vs. Smt. Shamsunnisa & Ors.** AIR 2002 NOC 87 (Karnataka), the plaintiff was to pay the balance sale consideration in four instalments of Rs 6250 each. The plaintiff paid a sum of Rs 4,000/- towards the last instalment and regarding the balance amount of Rs 2250, he stated that he had incurred expenditure for repair of the house and payment of house tax which was more than the amount of Rs 2,250/- withheld by him. It was held that from the conduct of the plaintiff in non-payment of the instalment amount towards the consideration as per stipulation under the agreement, it could not be said that he was ready and willing to perform his part of the contract all through. The High Court was of the view that the expenditure incurred by the plaintiff for repair of the house in the absence of any stipulation in the agreement could not be recovered from the landlord.

31. In the case before this Court, the plaintiffs set up a false plea of the payment of Rs 15 lacs to the defendant on 29<sup>th</sup> June, 1997. This plea was set up in the notice sent by

them to the defendants on 12<sup>th</sup> November, 1997. Obviously, the notice indicated willingness of the plaintiff to pay only a sum of Rs 20 lacs to the defendant as the balance sale consideration. The payment of Rs 15 lacs was denied by the defendant in the reply sent by her through her counsel on 29<sup>th</sup> November, 1997. Despite that, no offer was made by the plaintiff to pay the entire balance consideration amounting to Rs 35 lacs to the defendant. In para 6 and 7 of the plaint, the alleged payment of Rs 15 lacs was reiterated by the plaintiffs. They came out with a false plea that aforesaid amount of Rs 15 lacs was utilized by the defendant for purchasing a shop under the name and style of "Tilak Exclusife" at Ajmal Khan Road, Karol Bagh, New Delhi. The plaintiffs persisted with the allegation of payment of Rs 15 lacs in the affidavit of plaintiff No. 1 Mr B.B. Sabharwal and took a plea that the aforesaid amount was utilized by the defendant for renovation of the shop at Ajmal Khan Road, New Delhi. It is, thus, quite clear that the plaintiffs were not willing to pay Rs 35 lacs to the defendant and wanted to pay only Rs 20 lacs to her. The plaintiffs, therefore, have failed to prove that they had all along been willing to perform their part of the contract.

32. It was contended by the learned counsel for the plaintiffs that since the defendant herself had not applied for Income-tax Clearance and, therefore, had not performed her part of the contract, the plaintiffs were not obliged to tender the balance sale consideration to her and consequently, their offer to pay only a sum of Rs 20 lacs to the defendant would be of no consequence and would not disentitle them from seeking specific performance of the agreement. In my view, the contention is devoid of merit. The obligation of the plaintiffs to aver and prove his readiness and willingness to perform his part of the contract is a statutory obligation incorporated in Section 16(C) of Specific Relief Act, based though it is on the principle of equity and fairplay and this statutory obligation is required to be performed by the person who is seeking specific performance of the contract to which he is a party, irrespective of any default on the part of the other party to the agreement. This, in my view, is no defence for the plaintiffs to say that since the defendant herself was in breach of the agreement, they also were not required to prove their willingness to perform the essential terms of the contract which were required to be performed by them. The

person who invokes jurisdiction of the Court in seeking specific performance of a contract must plead as well as prove that he has been ready and willing to perform those terms of the contract which were required to be performed by him and this readiness and willingness must be shown to exist not only from the date of agreement till the filing of the suit, but also thereafter. If the Court finds that the person coming to the Court seeking specific performance of a contract was not ready and willing to perform his part of the contract at any point of time, it would not be justified in directing specific performance of the contract at his behest.

This is not a case where the plaintiffs had not offered to pay the balance sale consideration to the defendant on the ground that she had not performed her part of the contract by not applying for Income-tax Clearance. Here, the plaintiffs made a false averment of payment of Rs 15 lacs to the defendant and they persisted with that false averment even throughout trial of this case.

33. It was contended by the learned counsel for the plaintiffs that if a person has not been able to prove a plea set up by him that, by itself, would not disentitle him from grant of specific relief of the contract to which he is

otherwise entitled as a contractual obligation of the defendant. In the case before this Court, the plaintiff set up a plea of payment of which never made to the defendant. The plea, obviously, was false to their knowledge and, therefore, clearly demonstrated their unwillingness to pay the balance sale consideration of Rs 35 lacs to the defendant. This false averment indicates that the plaintiffs wanted to pay only Rs 25 lacs for the property which they had contracted to purchase for Rs 40 lacs and, therefore, leaves no reasonable doubt that they were not willing to perform the terms which they had agreed with the defendant.

34. The learned counsel for the plaintiff has also referred to **S.V.R. Mudaliar (Dead) by Lrs. and Ors. Vs. Rajabu F. Buhari (Mrs) (Dead) by Lrs. and Ors.** *AIR 1995 SC 1607*. However, I find no such proposition in this case which would support the plaintiff in any manner. In fact, it is the plaintiffs who have played foul with equity by setting up a false plea of payment of Rs 15 lacs to the defendant.

35. The learned counsel for the plaintiff has referred to the decision of Supreme Court in **P. D'Souza Vs. Shondrilo Naidu** (2004) 6 SCC 649. In that case, a suit for

specific performance of an agreement for sale of an immovable property was filed by the respondent against the predecessor in interest of the appellant and the parties were required to perform their respective part of the contract within a period of 18 months expiring on 05<sup>th</sup> December, 1978. The suit property had been mortgaged by the defendant/appellant in favour of LIC and the defendant had not produced the original documents, title deeds and encumbrance certificate, despite assurance given by the plaintiff in this regard. Some part payments were made to the vendor from time to time. The defendant demanded some more payment and also wanted extension of time for registration of sale deed. The plaintiff called upon the defendant to execute the sale deed and conveyed her readiness and willingness to perform her part of the contract. In response to the letter of the vendor, the vendee cancelled the agreement and sought to forfeit the amount of Rs 35,000/- which she had paid. The High Court recorded a finding of fact that the plaintiffs had all along been ready and willing to perform their part of the contract. The requisite averment in terms of Section 16 (C) of the Specific Relief Act was also made in the plaint. It was contended by

the learned counsel for the appellant before Supreme Court that since the plaintiff did not perform her part of the contract by 05<sup>th</sup> December, 1978 which was the date by which the contract was to performed, she was not ready and willing to perform her part of the contract. Noticing that the defendant herself did not produce the original documents nor redeemed the mortgage, Supreme Court observed that if the mortgage was not redeemed and the original documents were not produced, the sale deed could not have executed and in that in view of the matter the question of plaintiff's readiness and willingness to perform his part of the contract would not arise. However, the case before this Court is not a case merely of the plaintiffs failing to pay or tender the balance sale consideration to the defendant. In the case before this Court the plaintiffs have set up a false plea alleging payment of Rs 15 lacs to the defendant and by doing so they expressed their willingness to pay only Rs 25 lacs to the defendant as against the agreed sale consideration of Rs 40 lacs. Moreover, in the case before Supreme Court, the defendant had accepted a sum of Rs 20,000/- from the plaintiff in August, 1981, whereby he himself had revived the contract at a later stage and he had

also sought extension of time for registering the sale deed till 31<sup>st</sup> December, 1981. The Supreme Court, therefore, felt that it was too late in the day for the defendant to contend that it was obligatory on the part of the plaintiff to show readiness and willingness as far back as on 05<sup>th</sup> December, 1978. This was not the position in the case before the Supreme Court. Therefore, the reliance on this judgment is wholly misplaced. Since the plaintiffs were not willing to perform their obligations under the agreement, they are not entitled to its specific performance. The issue is decided against the plaintiffs and in favour of the defendant.

**Issues No. 4 and 6**

36. In view of my finding on issues No. 2 and 3, the plaintiffs are not entitled to specific performance of the agreement dated 20<sup>th</sup> June, 1997. As noted earlier, in the event of her failure to complete the sale transaction in time, the defendant was required to refund the earnest money of Rs 5 lacs to the plaintiffs alongwith penalty, amounting to Rs 5 lacs, thereby making a total sum of Rs 10 lacs. Since the defendant did not even apply for grant of Income Tax Clearance within 15 days from the date of the agreement or even thereafter, she failed to complete the sale transaction

and, therefore, is liable to pay a sum of Rs 10 lacs to the plaintiffs. This obligation on the part of the defendant arises, irrespective of the false plea of payment of Rs 15 lacs set up by the plaintiffs, based since this is on the contractual obligations between the parties. It would be pertinent to note here that the plea of payment of Rs 15 lacs was set up by the plaintiffs much after the time stipulated in the agreement for completion of the transaction had expired.

Though the plaintiffs have claimed damages to the tune of Rs 40 lacs, no case for grant of damages to this extent has been made out by them and in any case in view of the provisions contained in clause 4 of the agreement to sell dated 20<sup>th</sup> June, 1997, they are not entitled to recover more than Rs 10 lacs from her. The issues are decided accordingly.

### **ORDER**

In view of my findings on the issues, a decree for recovery of Rs 10 lacs with proportionate cost and interest on that amount at the rate of 9% per annum from the date of filing of the suit till the date of decree and at the rate of 6% per annum thereafter, is hereby passed in favour of the

plaintiffs and against the defendants.

Decree sheet be prepared accordingly.

**(V.K. JAIN)**  
**JUDGE**

**JANUARY 14, 2011**  
**bg**