

* **HIGH COURT OF DELHI : NEW DELHI**
Judgment reserved on: January 07, 2011
Judgment pronounced on: January 25, 2011

+ **CS (OS) No. 539 of 2008**

% Sh. Jagbir Singh & Ors. ... Plaintiffs
Through: Mr. Chetan Sharma, Senior
Advocate with Mr. Sushil R. Pandey,
Advocate.

versus

Sh. Jtender Kumar & Ors. ... Defendants
Through: None.

CORAM:
HON'BLE MR. JUSTICE SUNIL GAUR

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

SUNIL GAUR, J

1. A specific performance of Agreement to Sell of 2nd March, 2005, for the sale of agricultural land bearing *Khasra* No.234/170 min bearing *Khasra* No.146/23 (4-16), 152/3 (4-16), 6(3-5), 7 (4-16) and 8 (4-16) total measuring 22 *bighas* 9 *biswas* situated in the Revenue Estate of Village Dichaun Kalan, Delhi, (hereinafter referred to as the 'suit property') is sought by the plaintiffs in this case.

2. According to the plaintiffs, defendants had entered into

an Agreement to Sell (Ex. PW-1/1) in respect of their 37.5% share in the suit property with Shri Lal Singh, Shri Jagbir Singh and Shri Satya Dev for a total consideration of Rs.65 lacs, out of which defendants have received Rs.4,60,000/- as earnest money, vide Receipt (Ex. PW-1/2) of 2nd March 2005. Vendees to Agreement to Sell sent a legal notice (Ex. PW-1/3) of 12th December 2007 to the Defendants and thereafter transferred their rights and interest in the aforesaid Agreement to sell in favour of the plaintiffs vide Deed of Assignment and Receipt (Ex. PW-1/5) of 20th January 2008 for a total consideration of Rs.5,00,000/-. It is averred that the plaintiffs were always ready and willing to perform their part of Agreement to Sell but despite being served with legal notice of 12.12.2007, the defendants have not come forward to perform their part of the Agreement in question.

3. Defendants, upon service, shoes not to contest and were set *ex parte* on 22nd May 2009, and the *ex parte* evidence led is of Plaintiff No.1 - Mr. Jasbir Singh (PW-1) and plaintiff No.2 – Hoshiyar Singh (PW-2) who had filed their evidence by way of affidavit (Ex. PW-1/A and Ex. PW-2/A respectively) on 6th January 2010. Plaintiffs also got examined Mr. Satbir Singh (PW-3), who is the only witness to the Agreement to Sell (Ex. PW-1/1).

4. Learned Senior Counsel for the plaintiffs had been heard at length and the evidence on record has been scrutinized.

5. The parameters for grant of discretionary relief of specific performance, have been reiterated by the Apex Court in *Krishna & Another Vs. Bhagwan Dass (dead) by LRs & Others* **AIR 2008 SC 1786** in the following words:-

“Section [16](#) of the Specific Relief Act, 1963 (hereinafter referred to as 'the Act') corresponds with Section 24 of the old Act of 1877 which lays down that the person seeking specific performance of the contract, must file a suit wherein he must allege and prove that he has performed or has been ready and willing to perform the essential terms of the contract, which are to be performed by him. The specific performance of the contract cannot be enforced in favour of the person who fails to aver and prove his readiness and willingness to perform essential terms of the contract. Explanation (ii) to Clause (c) of Section [16](#) further makes it clear that plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction. The compliance of the requirement of Section [16\(c\)](#) is mandatory and in the absence of proof of the same that the plaintiff has been ready and willing to perform his part of the contract suit cannot succeed. The first requirement is that he must aver in plaint and thereafter prove those averments made in the plaint. The plaintiff's readiness and willingness

must be in accordance with the terms of the agreement. The readiness and willingness of the plaintiff to perform the essential part of the contract would be required to be demonstrated by him from the institution of the suit till it is culminated into decree of the court. It is also settled by various decisions of this Court that by virtue of Section [20](#) of the Act, the relief for specific performance lies in the discretion of the court and the court is not bound to grant such relief merely because it is lawful to do so. The exercise of the discretion to order specific performance would require the court to satisfy itself that the circumstances are such that it is equitable to grant decree for specific performance of the contract. While exercising the discretion, the court would take into consideration the circumstances of the case, the conduct of parties, and their respective interests under the contract. No specific performance of a contract, though it is not vitiated by fraud or misrepresentation, can be granted if it would give an unfair advantage to the plaintiff and where the performance of the contract would involve some hardship on the defendant, which he did not foresee. In other words, the court's discretion to grant specific performance is not exercised if the contract is not equal and fair, although the contract is not void."

6. The factum of execution of Deed of Agreement of 2nd March, 2005 (Ex. PW1/1) stands established from the deposition of Mr. Satbir Singh (PW-3) who was a witness to this Agreement. Receipt (EX.PW1/2) indicating payment of

the earnest money of Rs.4,60,000/- to the defendants remains un rebutted. The second party i.e. the predecessor in interest of the plaintiffs were to make payment of the balance sale consideration within nine months from the date they received the possession of the suit property. This appears to be somewhat strange. In normal course of events, possession is handed over at the time of receiving of the balance sale consideration. The revenue record (EX. PW1/6) shows that the possession of the suit property is still with the defendants. According to the plaintiffs, the legal Notice (EX.PW1/3) has not been responded to. Since the possession of the suit property has not been handed over to the plaintiffs or predecessor in interest of the plaintiffs, therefore, defendants were not entitled to forfeit the earnest money.

7. There is un rebutted evidence on record to show that the plaintiffs were ready and willing to perform their part of Agreement but it is not found to be equitable to grant decree for specific performance of the Agreement in question, especially in view of the fact that the Legal Notice was sent by the plaintiffs after an inordinate and unexplained delay of nearly three years. However, by virtue of Deed of Assignment (EX. PW1/5) the plaintiffs are entitled to refund

of the earnest money.

8. In the light of the aforesaid, this suit is partly decreed with costs to the extent of refund of earnest money of Rs.4,60,000/- only against the defendants jointly and severally with interest at the rate of 9% p.a. from the date of institution of this suit till realization. Decree sheet be accordingly drawn.

9. This suit is accordingly disposed of.

Sunil Gaur, J

January 25, 2011
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