

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

+ **CS(OS) 2476/1998**

% **18th September, 2012**

A.K. NARULA Plaintiff

Through: None.

VERSUS

SH. IQBAL AHMED AND ORS. Defendants

Through: None.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This old suit is of the year 1998. Already this suit was once dismissed in default on 21.11.2011, and thereafter it was restored on 28.2.2012. Subsequently, on 1.5.2012, no one appeared for the parties and in the interest of justice, the case was re-notified. Today, although it is 1.00 P.M. no one appears for the parties. I have therefore perused the record and am proceeding to pass a judgment in this case.

2. The subject suit is a suit for specific performance of an agreement to sell dated 7.10.1997. The agreement to sell was with respect to

five plots bearing Nos.H-3 to H-7 situated at Nilothi village (total area measuring 1000 sq. yds) falling in khasra No.16/6, Delhi. The total price agreed to be paid under the agreement to sell was Rs. 20.5 lacs and a sum of Rs. 1 lakh was paid on the date of agreement to sell. The plaintiff also claimed that an additional amount of Rs. 1 lakh on 19.10.1997 was paid to the defendant No.1 through Sh. Davinder Gulia. In the suit plaint, the plaintiff states defendant failed to obtain the necessary permissions and therefore a legal notice dated 25.8.1998 was sent, which having failed to invoke the desired response, the subject suit for specific performance was thereafter filed.

3. Defendant No.1, the proposed seller, filed his written statement. The agreement to sell was not disputed, however, defendant No.1 claimed that it was the plaintiff who had committed breach of the contract inasmuch as after entering into of the agreement to sell, in addition to ₹ 2 lacs which was received by the plaintiff, 50% of the sale consideration was to be paid within 60 days and which the plaintiff failed to do. Defendant No.1 admitted payment to him through Sh. Davinder Gulia of Rs. 1 lakh on 19.10.1997. Defendant No.1 also pleaded that the balance sale consideration was to be paid by 20.1.1998, however, plaintiff not only failed to pay the balance sale consideration but even did not make the payment of half of the sale consideration within 60 days. It is pleaded that the plaintiff therefore being

guilty of breach of contract is not entitled to specific performance. It is also pleaded that plaintiff is not entitled to discretionary relief of specific performance.

4. The following issues were framed in this suit on 7.1.2008:-

“1. Whether the specific performance of the agreement to sell dated 7.10.1997 cannot be granted in view of the specific stipulation in the contract providing for seller’s liability to pay double the earnest money in case of refusal to complete the bargain? OPD

2. Whether this suit is barred by limitation? OPD-3 to 5

3. Whether the plaintiff is entitled to a decree of specific performance of agreement to sell dated 7.10.1997 in respect of the suit property? OPP

4. Whether the plaintiff was ready and willing to perform his part of the contract under the agreement to sell dated 7.10.1997. OPD-4

5. Whether the plaintiff is entitled to a decree of damages in the alternative and if so, how much and against whom?

6. Whether the plaintiff is entitled to a decree of permanent injunction as prayed for in the suit? OPD

7. Relief.”

Issue Nos.1 and 3

5. Issue Nos.1 and 3 can be dealt with together and are being disposed of together. The issue is as to who is guilty of breach of contract. A reference to the written statement filed by the defendant No.1 shows that there was no question of obtaining any permission inasmuch as defendant No.1 had in his favour from the previous owner only usual documents being the

agreement to sell, power of attorney etc and therefore there was not to be executed any sale deed in favour of the plaintiff. Once there is no question of execution of the sale deed, there did not arise any issue of the defendant No.1 applying for any permission or sale of the suit property to the plaintiff. Also, when we refer to the admitted agreement to sell dated 7.10.1997, Ex.P1, it is nowhere specified that the defendant No.1 will be liable to take any permission from any authority. In fact, the document Ex.P1 contains a clause that the power of attorney etc can be got registered in favour of the plaintiff. Further the plaintiff has failed to prove payment of 50% of sale consideration within 60 days of the date of entering into receipt-cum-agreement to sell Ex.P1 as was mandated under the agreement to sell Ex.P1. Also, as per the agreement to sell Ex.P1, the last date of payment was 20.1.1998 and the plaintiff has failed to file any proof on record of his having the necessary capacity to pay the balance sale consideration of Rs. 18.5 lacs as a total sum of Rs. 2 lacs was paid to the defendant No.1. I therefore hold that it was the plaintiff who was guilty of breach of agreement to sell dated 7.10.1997.

6. In fact, issue Nos.1 and 3, beside the issue No.6, will also include the subject as to whether plaintiff is entitled to discretionary relief of specific performance. I have recently in the judgment in the case of ***Shri Jinesh Kumar Jain Vs. Smt. Iris Paintal and Ors.*** in CS(OS) No.1154/1989 decided on 10.7.2012 held that if a nominal consideration is paid as advance

price, then, plaintiff in such a case even assuming defendant is guilty of breach of contract will not be entitled to specific performance. Paras 13 to 18 of the said judgment are relevant and the same read as under:-

“13. Now let us assume that the agreement to sell dated 26.9.1988 was not hit by the 1972 Act; the defendants were guilty of breach of their obligation to perform their part of contract; and that the plaintiff was ready and willing to perform his part; even then, can it be said that the plaintiff is yet entitled to the discretionary relief of specific performance. It will be appropriate at this stage to refer to Section 20 of the Specific Relief Act, 1963, and more particularly sub-Section 3 thereof. Section 20 reads as under:-

“20. Discretion as to decreeing specific performance.-

(1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capably of correction by a court of appeal.

(2) The following are cases in which the court may properly exercise discretion not to decree specific performance:-

(a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or

(b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff; or

(C) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.

(3) The court may properly exercise discretion to decree

specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

(4) The court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the party.”

14. Sub-Section 3 makes it clear that Courts decree specific performance where the plaintiff has done substantial acts in consequence of a contract/agreement to sell. Substantial acts obviously would mean and include payment of substantial amounts of money. Plaintiff may have paid 50% or more of the consideration or having paid a lesser consideration he could be in possession pursuant to the agreement to sell or otherwise is in the possession of the subject property or other substantial acts have been performed by the plaintiff, and acts which can be said to be substantial acts under Section 20(3). However, where the acts are not substantial i.e. merely 5% or 10% etc of the consideration is paid i.e. less than substantial consideration is paid, (and for which a rough benchmark can be taken as 50% of the consideration), and/or plaintiff is not in possession of the subject land, I do not think that the plaintiff is entitled to the discretionary relief of specific performance.

15. The Supreme Court in the recent judgment of *Saradamani Kandappan vs. Mrs. S. Rajalakshmi, 2011 (12) SCC 18* has had an occasion to consider the aspect of payment of a nominal advance price by the plaintiff and its effect on the discretion of the Court in granting the discretionary relief of specific performance. Though in the facts of the case before the Supreme Court, it was the buyer who was found guilty of breach of contract, however, in my opinion, the observations of the Supreme Court in the said case are relevant not only because I have found in this case the plaintiff/ buyer guilty of breach of contract, but also because even assuming the plaintiff/buyer is not guilty of breach of contract, yet, Section 20 sub-Section 3 of the Specific Relief Act, 1963 as reproduced above clearly requires substantial acts on behalf of the plaintiff/proposed purchaser i.e. payment of substantial consideration. Paras 37 and 43 of the judgment in the case of *Saradamani Kandappan (supra)* are relevant and they read as under:

“37. The reality arising from this economic change cannot continue to be ignored in deciding cases relating to specific performance. The steep increase in prices is a circumstance which makes it inequitable to grant the relief of specific performance where the purchaser does not take steps to complete the sale within the agreed period, and the vendor has not been responsible for any delay or non-performance. A purchaser can no longer take shelter under the principle that time is not of essence in performance of contracts relating to immovable property, to cover his delays, laches, breaches and “non-readiness”. The precedents from an era, when high inflation was unknown, holding that time is not of the essence of the contract in regard to immovable properties, may no longer apply, not because the principle laid down therein is unsound or erroneous, but the circumstances that existed when the said principle was evolved, no longer exist. In these days of galloping increases in prices of immovable properties, to hold that a vendor who took an earnest money of say about 10% of the sale price and agreed for three months or four months as the period for performance, did not intend that time should be the essence, will be a cruel joke on him, and will result in injustice. Adding to the misery is the delay in disposal of cases relating to specific performance, as suits and appeals therefrom routinely take two to three decades to attain finality. As a result, an owner agreeing to sell a property for rupees one lakh and received rupees ten thousand as advance may be required to execute a sale deed a quarter century later by receiving the remaining rupees ninety thousand, when the property value has risen to a crore of rupees.

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43. Till the issue is considered in an appropriate case, we can only reiterate what has been suggested in *K.S. Vidyamandam*.

(i) The courts, while exercising discretion in suits for specific performance, should bear in mind that when the parties prescribe a time/period, for taking certain steps or for completion of the transaction, that must have some significance and therefore time/period prescribed cannot be ignored.

(ii) **The courts will apply greater scrutiny and strictness when considering whether the purchaser was “ready and willing” to perform his part of the contract.**

(iii) Every suit for specific performance need not be decreed

merely because it is filed within the period of limitation by ignoring the time-limits stipulated in the agreement. The courts will also “frown” upon suits which are not filed immediately after the breach/refusal. The fact that limitation is three years does not mean that a purchaser can wait for 1 or 2 years to file a suit and obtain specific performance. The three-year period is intended to assist the purchasers in special cases, as for example, where the major part of the consideration has been paid to the vendor and possession has been delivered in part-performance, where equity shifts in favour of the purchaser.”

(emphasis is mine)

16. A reading of the aforesaid paras shows that Courts have a bounden duty to take notice of galloping prices. Surely it cannot be disputed that the balance of convenience i.e. equity in the present case is more in favour of the defendants who have only received 10% of the consideration. If the hammer has to fall in the facts of the present case, in my opinion, it should fall more on the plaintiff than on the defendants inasmuch as today the defendants cannot on receiving of the balance consideration of ₹44,00,000/-, and even if exorbitant rate of interest is received thereon, purchase any equivalent property for this amount. Correspondingly, the plaintiff has had benefit of 90% of sale consideration remaining with him (assuming he has any) and which he could have utilized for purchase of assets including an immovable property. In specific performance suits a buyer need not have ready cash all the time and his financial capacity has to be seen and thus plaintiff can be said to have taken benefit of the 90% balance with him. It is well to be remembered at this stage that in a way that part of Specific Relief Act dealing with specific performance is in the nature of exception to Section 73 of the Contract Act, 1872 i.e. the normal rule with respect to the breach of a contract under Section 73 of the Contract Act, 1872 is of damages, and, the Specific Relief Act, 1963 only provides the alternative discretionary remedy that instead of damages, the contract in fact should be specifically enforced. Thus for breach of contract the remedy of damages is always there and it is not that the buyer is remediless. However, for getting specific relief, the Specific Relief Act, 1963 while providing for provisions of specific performance of the agreement (i.e. performance instead of damages) for breach, requires discretion to be exercised by the Court as to whether specific performance should or should not be granted in the facts of each case or that the plaintiff should be held entitled to the ordinary relief of

damages or compensation.

17. I have recently in the case titled as ***Laxmi Devi vs. Mahavir Singh*** being RFA No. 556/2011 decided on 1.5.2012 declined specific performance, one of the ground being payment of only nominal consideration under the agreement to sell. Para 11 of the said judgment reads as under:-

“11. Besides the fact that respondent/plaintiff was guilty of breach of contract and was not ready and willing to perform his part of the contract lacking in financial capacity to pay the balance consideration, in my opinion, the facts of the present case also disentitle the respondent/plaintiff to the discretionary relief of specific performance. There are two reasons for declining the discretionary relief of specific performance. The first reason is that the Supreme Court has now on repeated occasions held that unless substantial consideration is paid out of the total amount of consideration, the Courts would lean against granting the specific performance inasmuch as by the loss of time, the balance sale consideration which is granted at a much later date, is not sufficient to enable the proposed seller to buy an equivalent property which could have been bought from the balance sale consideration if the same was paid on the due date. In the present case, out of the total sale consideration of ₹5,60,000/-, only a sum of ₹1 lakh has been paid i.e. the sale consideration which is paid is only around 17% or so. In my opinion, by mere payment of 17% of the sale consideration, it cannot be said that the respondent/plaintiff has made out a case for grant of discretionary relief or specific performance.....”

18. Therefore, whether we look from the point of view of Section 20 sub-Section 3 of the Specific Relief Act, 1963 or the ratio of the judgment of the Supreme Court in the case of ***Saradamani Kandappan (supra)*** or even on first principle with respect to equity because 10% of the sale consideration alongwith the interest will not result in the defendants even remotely being able to purchase an equivalent property than the suit property specific performance cannot be granted. In fact, on a rough estimation, the property prices would have galloped to at least between 30 to 50 times from 1988 till date. I take judicial notice of this that in the capital of our country, like in all other megapolis, on account of the increase in population and rapid urbanization, there is a phenomenal increase in the prices of urban

immovable property.

I therefore hold and answer issue no. 5 against the plaintiff and in favour of the defendants holding that the plaintiff is not entitled to discretionary relief of specific performance.”

7. The aforesaid ratio squarely applies to the facts of the present case inasmuch as the plaintiff only paid about 9.5% of the total consideration i.e. Rs. 2 lacs out of the total sale consideration of Rs. 20.5 lacs. Even therefore assuming defendant No.1 to be guilty of breach of contract, plaintiff is not entitled to discretionary relief of specific performance.

8. Issue No.3 is therefore decided in favour of the defendant No.1 and against the plaintiff. I also hold that plaintiff is not entitled to discretionary relief of specific performance inasmuch as after the plaintiff committed breach of contract, the suit property has already been transferred by means of usual documents to the defendant Nos.4 and 5 (documents dated 16.6.1998 etc) and which have been filed and proved on behalf of these defendants as Ex. D4W1/1 and Ex.D4W1/2. Once therefore third party rights have come into existence, and more so on account of breach of the agreement to sell on the part of the plaintiff, plaintiff is not entitled to the discretionary relief of specific performance.

Issue Nos.1 and 3 are decided in favour of defendant No.1 and against the plaintiff.

Issue No.2

9. Issue No.2 pertains to limitation. The agreement to sell in question is dated 7.10.1997. The suit in the present case was filed in about November, 1998. The suit is therefore well within limitation as the period of limitation in one part for the suit for specific performance is of three years of entering into of the agreement to sell as per Article 54 of the Limitation Act, 1963.

This issue is therefore decided in favour of the plaintiff and against the defendants.

Issue No.4

10. Issue No.4 is whether the plaintiff was willing to perform his part of the contract. In my opinion, the plaintiff has again miserably failed to prove this issue inasmuch as except making a self-serving statement of having the balance consideration amount, plaintiff has failed to file any concrete proof with respect to his financial capacity in the form of bank accounts, income tax returns, moveable or immovable properties and so on. Provision of Section 16(c) of Specific Relief Act, 1963 providing 'readiness and willingness' requires categorical evidence and not self-serving statements.

I accordingly hold that plaintiff has failed to prove that he was ready and willing to perform the agreement to sell dated 7.10.1997.

This issue is therefore decided against the plaintiff and in favour

of defendant No.1.

Issue No.5

11. Issue No.5 is with respect to entitlement of the plaintiff to damages. Once again except a self-serving deposition, there is no evidence on record led by the plaintiff with respect to the difference in the prices of the property as on the date of the alleged breach. In any case, I have already held that it is the plaintiff who is guilty of breach of contract and therefore plaintiff will not be entitled to damages. Even assuming the plaintiff not to be guilty of breach of contract and the defendant No.1 to be guilty of breach of contract, however, since the plaintiff has failed to lead any credible evidence with respect to damages, plaintiff is not entitled to any damages. Plaintiff ought to have filed instances of sale by documents and which the plaintiff has failed to file. Though an affirmative deposition of plaintiff is evidence, however, I refuse to give the same that much weight to hold that the plaintiff has sufficiently discharged onus of proof qua damages/losses caused.

Issue No.5 is therefore decided in favour of the defendants and against the plaintiff.

Issue No.6

12. In view of my aforesaid discussion, plaintiff will not be entitled to the relief of permanent injunction as prayed for and issue No.6 is decided against the plaintiff.

Relief

13. Admittedly the defendant No.1 had received a sum of Rs.2 lacs under the agreement to sell dated 7.10.1997. Defendant No.1 has not led any evidence to show as to how the amount of Rs. 2 lacs can be forfeited because in the absence of loss being caused the part price paid cannot be forfeited as per the ratio of the Constitution Bench judgment of the Supreme Court in the case of *Fateh Chand Vs. Balkishan Dass, AIR 1963 SC 1405*. Therefore, the plaintiff would be entitled to a money decree for a sum of Rs. 2 lacs alongwith pendente lite and future interest @ 12% per annum simple.

14. In view of the aforesaid discussion, suit of the plaintiff for specific performance will stand dismissed. A money decree is passed in favour of the plaintiff and against the defendant No.1 for a sum of Rs. 2 lacs alongwith pendente lite and future interest @ 12% per annum simple. Parties are left to bear their own costs. Decree sheet be prepared.

VALMIKI J. MEHTA, J

SEPTEMBER 18, 2012

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