

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

+ **CS(OS) 173/2008**

Reserved on 22nd May, 2012

Decided on 30th May, 2012

HIRA LAL SHARMA

..... Plaintiff

Through: Mr. K.K. Sharma, Sr. Adv.
with Mr. R.K. Singla, Adv.

versus

DAVINDER SINGH LAMBA

..... Defendant

Through: Mr. S.C. Singhal and
Mr. Sanajay Chowdhary,
Adv.

Coram:

HON'BLE MR. JUSTICE A.K. PATHAK

A.K. PATHAK, J.

1. Plaintiff has filed this suit against the defendant, for specific performance of an Agreement to Sell dated 11th April, 2007 (hereinafter referred to as “the Agreement”), in respect of the property bearing no. F-128, Vikas Puri, New Delhi – 110018 (hereinafter referred to as “suit property”), possession and permanent injunction.

2. Plaintiff's case, as set out in the plaint, is that vide above referred Agreement defendant had agreed to sell the suit property to plaintiff for a total sale consideration of ₹2.50 crores. A sum of ₹25 lacs was paid to defendant towards earnest money. Remaining sale consideration was to be paid on or before 31st July, 2007, subject to

conversion of the suit property from lease hold to free hold and execution of sale deed within 15 days from the date of conversion. It was further agreed that if there will be any delay in conversion of the suit property from lease hold to free hold, plaintiff shall make part payment of ₹75 lacs on or before 15th August, 2007. In terms of Clause 7 of the Agreement, parties had agreed that property shall be converted from lease hold to free hold and in this regard plaintiff shall make all the efforts and also bear expenses, however, defendant shall co-operate and remain present before the Competent Authority as and when required. Defendant did not co-operate and failed to appear before the Delhi Development Authority (DDA) resulting in delay in conversion of suit property from lease hold to free hold. Therefore, plaintiff did not make part payment of ₹75 lacs to defendant.

3. Vide legal notice dated 25th July, 2007, plaintiff called upon the defendant to co-operate with him in getting the suit property converted from lease hold to free hold so that proper sale deed could be executed. He also brought to the notice of defendant that the suit property was in the possession of one Shri Rajinder Pal Singh and which fact was concealed by the defendant at the time of finalization of deal. Defendant, in his reply dated 30th July, 2007, admitted that possession of the suit property was with his brother Shri Rajinder Pal Singh and his nephew Shri Amrit Pal Singh. Further, defendant

refused to comply with the terms and conditions of the agreement. Thereafter, a meeting was held in the office of mediator/property dealer M/s Kochhar & Kochhar Associates wherein it was mutually agreed by and between the parties that the suit property shall be converted from lease hold to free hold by the defendant; no part payment will be paid to defendant and the entire remaining amount, that is, ₹2.25 crores will be paid at the time of execution of sale deed, after conversion of the suit property to free hold and handing over of the possession to plaintiff.

4. On 28th December, 2007 suit property was converted from lease hold to free hold but this fact was not informed by the defendant to plaintiff. On 7th January, 2008 defendant's brother Shri Rajinder Pal Singh telephoned the plaintiff and threatened him that he should be paid half of the sale consideration since there was a family dispute pending between him and his brother i.e. defendant and further that he will not vacate the suit property in case he was not paid half of the sale consideration. Thereafter, plaintiff approached the defendant when he was assured by the defendant that all the formalities shall be completed on or before 15th January, 2008. Subsequent thereto, occupiers of the suit property and one Shri Surinder Pal Singh, brother-in-law of the defendant, came to the plaintiff along with two-three property dealers of the area and threatened the plaintiff to

withdraw himself from the deal. Plaintiff informed about this incident to defendant who feigned his ignorance about the same. He also straightway refused to complete the deal. Plaintiff has always been ready and willing to perform his part of obligation. As against this, defendant was not willing to perform his part of obligation as property prices had gone up. Thereafter, plaintiff sent another notice dated 11th January, 2008 through his lawyer, to the defendant through speed post as well as UPC calling upon the defendant to comply with the terms and conditions of the Agreement and accept the balance sale consideration, inasmuch as, hand over peaceful possession of the suit property, after executing the sale deed, but to no effect. Hence, the present suit.

5. In the written statement, defendant has alleged that plaintiff cannot seek specific performance of the Agreement, in view of Clause 9 of the Agreement, which provides that in case defendant fails to comply with the terms and conditions of the agreement then defendant shall pay double the amount of earnest money to plaintiff; whereas in case plaintiff fails to pay the balance sale consideration on the final date of payment as agreed, then the amount paid towards earnest money shall be forfeited and Agreement shall stand cancelled. It was further alleged that it is the plaintiff who had failed to perform his part of obligation, thus, was not entitled to specific performance of the

Agreement. It is alleged that in terms of Clause 7 of the Agreement, though steps to get the suit property converted from lease hold to free hold were to be taken by the defendant but all the expenses were to be borne by the plaintiff. However, plaintiff did not tender any conversion charges. Defendant took the steps in this direction and, in fact, pursued the matter with DDA and got the suit property converted into free hold on 28th December, 2007. In terms of the agreement, plaintiff was to pay ₹75 lacs on or before 15th August, 2007 even if there was any delay in the process of conversion of the property into free hold. However, plaintiff failed to pay ₹75 lacs, on flimsy grounds. In fact, he had no money to make payment. Even at the time of entering into Agreement plaintiff paid ₹14 lacs in cash and ₹11 lacs through cheque (one cheque for ₹1 lac and other for ₹10 lacs). Plaintiff was not having ₹10 lacs in his bank even at that stage, therefore, on a later date he paid ₹10 lacs in cash and took back the cheque for ₹10 lacs. This shows that the Defendant has rendered full co-operation to plaintiff. Notice dated 30th July, 2007 sent by the plaintiff was duly replied by the defendant wherein, it was clearly stated that plaintiff shall pay ₹75 lacs on or before 15th August, 2007, irrespective of delay in conversion process. Plaintiff was reminded by the defendant that in case this amount was not paid on or before 15th August, 2007 the deal shall stand cancelled and earnest money of ₹25

lacs shall be forfeited. In spite of this plaintiff did not make payment resulting in forfeiture of the earnest money. Defendant has alleged that he was not in possession of the suit property even on the date when the deal was matured between him and the plaintiff. Property was in the occupation of his brother Shri Rajinder Pal Singh which fact was within the knowledge of plaintiff. Plaintiff had assured to buy the property on 'on as is where is' basis. As per the defendant, no meeting took place in the office of M/s. Kochhar & Kochhar Associates. It was denied that Rajender Pal Singh or any other relative of defendant threatened the plaintiff. Defendant alleged that the deal came to an end on non-payment of ₹15 lacs, therefore, there was no occasion for the defendant or his relatives to extend any such threats to the plaintiff.

6. In the replication plaintiff has denied the contents of written statement and has reiterated and reaffirmed the averments made in the plaint.

7. Following issues were framed on 2nd March, 2009:-

1. Whether the plaintiff was ready and willing to perform his part of agreement and still willing and ready to perform his part of agreement? OPP
2. Whether the plaintiff is entitled to decree of specific performance of agreement? OPP

3. Whether the suit is not maintainable as contract is determinable in nature as mentioned in the preliminary objection no. 1 of written statement? OPD
4. Whether the plaintiff has not come to Court with clean hands? OPD
5. Relief.

8. I have heard senior counsel for the plaintiff, counsel for the defendant and have perused the entire material on record and my issue-wise findings are as under:-

Issue No. 1

9. In a suit for specific performance plaintiff has to prove that he was always ready and willing to perform his part of obligation. He has not only to aver this fact but also to prove such plea, by leading cogent evidence. **In J.P. Builders vs. A. Ramadas Rao (2011) 1 SCC 429**, Supreme Court has explained the concept of “readiness” and “willingness” in relation to a suit for specific performance, thus : the words ‘ready’ and ‘willing’ imply that the person was prepared to carry out the terms of the contract. The distinction between “readiness” and “willingness” is that the former refers to financial capacity and the latter to the conduct of the plaintiff wanting performance. Generally readiness is backed by willingness”. In **N.P. Thirugnanam (D) by L.Rs. vs. Dr. R. Jagan Mohan Rao & Ors. AIR 1996 SC116**, Supreme Court has held that Section 16(C) of the

Specific Relief Act, 1963 envisages that the plaintiff must plead and prove that he had 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 those terms the performance of which has been prevented or waived by the defendant. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of suit along with other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of the contract.

10. In **P D'Souza Vs. Shondrilo Naidu: (2004) 6 SCC 649**, Supreme Court has held that the plaintiff must establish his readiness and willingness to perform his part of contract. The question as to whether the onus was discharged by the plaintiff or not will depend upon the facts and circumstances of each case. No straitjacket formula can be laid down in this behalf.

11. It is, thus, clear that Section 16(C) of the Act mandates “readiness and willingness” on the part of the plaintiff and it is a condition precedent for obtaining grant of relief of specific performance. It is also clear that in a suit for specific performance, the plaintiff must allege and prove a continuous “readiness and willingness” to perform the contract on his part from the date of the contract. The onus is on the plaintiff to prove his “readiness” and “willingness”. “Readiness” and “willingness” on the part of the plaintiff has to be determined from the entirety of the facts and circumstances relevant to the intention and conduct of the party concerned.

12. In this case, in para 19 of the plaint, plaintiff has alleged that defendant was not ready and willing to perform his part of obligation as with the passage of time rates of real estate have gone up but on the other hand, plaintiff has always been ready and willing to perform his part of the agreement. However, plaintiff has failed to prove this fact,

inasmuch, no evidence has been led by him to show that he was ready with the balance sale consideration either in cash or in his bank. He has even failed to adduce any evidence to show as to in what manner and from which sources he could have generated the balance sale consideration of ₹2.25 crores. In his cross examination, plaintiff has admitted that as on the date of sending notice he was not in possession of ₹2.25 crores either in his bank or in cash. He volunteered that he could have arranged the same. However, he has failed to disclose the resources and/or channels through which he could have generated such a huge amount of ₹2.25 crores nor has adduced any evidence in this regard. Bald statement in this regard cannot be accepted.

13. Plaintiff's conduct also raises serious doubt about the availability of the kind of amount involved in this case. Initially, though he had issued cheques for ₹10 lacs but, admittedly, this amount was not available in his bank account. Subsequently, it appears that he paid this amount in cash and took back the cheque. He did not pay ₹75 lacs on or before 15th August, 2007, as was agreed by him. It has been mentioned at the foot of Agreement, which noting has even been signed by both the parties, that if there will be any delay in the conversion of the suit property from lease hold to free hold, the second party (purchaser) shall make part payment of ₹75 lacs on or before 15th August, 2007. This payment was to be made by the plaintiff

irrespective of the fact whether property was converted from lease hold to free hold or not by 15th August, 2007. Vide Exhibit P-3, which is a notice dated 25th July, 2007 sent by the plaintiff to defendant through his counsel, plaintiff has tried to put entire blame on the defendant, for not having obtained necessary permission of conversion from the DDA and attempted to wriggle out from his obligation of making payment of ₹75 lacs on or before 15th August, 2007. He stated in the notice that “since you are not co-operating with my client that is why my client is not willing to make you the part payment of ₹75,00,000/- (Rupees Seventy Five Lacs Only)”. This notice was duly replied by the defendant through his advocate on 30th July, 2007 (Exhibit P-4). Defendant has reiterated that he had been pursuing the matter with the DDA and plaintiff shall make payment of ₹75 lacs on or before 15th August, 2007 failing which deal shall stand cancelled. Despite this, plaintiff did not make payment, at his own risk, cost and consequences. Though, plaintiff has stated that subsequently defendant had agreed in the meeting held in the office of the M/s Kochhar & Kochhar Associates that ₹75 lacs may not be paid on or before 15th August, 2007 and entire balance sale consideration shall be paid at the time of execution of sale deed after conversion. However, plaintiff has failed to prove this fact. Affidavit of Surinder Pal Singh, proprietor of M/s Kochhar & Kochhar Associates, was filed

but this witness has not been tendered for his cross-examination. On 3rd May, 2011 counsel for the plaintiff stated that he had refused to appear. First of all, affidavit in examination-in-chief of this witness cannot be read. Secondly, an adverse inference can be drawn that had he appeared he would not have supported the plaintiff. Be that as it may, plaintiff has failed to prove that defendant had waived the condition of payment of ₹75 lacs on or before 15 August, 2007.

14. Contention of learned senior counsel that defendant did not take any steps to get the property converted into free hold by diligently pursuing the matter with DDA, are belied from the evidence led by the defendant. Defendant, who has stepped into witness box as DW2, has categorically deposed that he had been pursuing the matter with the DDA and his this contention is duly corroborated by the records produced by DW1 Jagmal Singh, Lower Division Clerk of DDA. From his testimony coupled with the documents produced by him, it is clear that the defendant had been pursuing the matter with the DDA, after execution of the Agreement. At the time when Agreement was executed, application already filed by the defendant for conversion of the suit property was pending. In fact, said application was filed way back on 18th September, 1996 and conversion charges had also been paid partly in the year 1996 and thereafter on 7th February, 2002, that is, much prior to the execution of Agreement. It appears that defendant

had not pursued said application for conversion seriously before execution of the Agreement. However, after execution of the Agreement, defendant wrote a letter to DDA on 24th May, 2007 which was replied by the DDA on 12th September, 2007 and immediately thereafter, conversion charges appears to have been deposited on 28th September, 2007. DW1 has deposed that defendant had even attended public hearings organized by the DDA on 27th August, 2007, 3rd September, 2007 and 1st October, 2007. This fact, itself, indicates that defendant had been seriously pursuing the application for conversion, even though he was not rendered much assistance by the plaintiff though he had agreed to do so vide Clause 7 of the Agreement. In my view, defendant did all that was required under the agreement to get the property converted free hold and was not lacking in making efforts in this direction. It is the plaintiff, who breached the agreement by not making payment of ₹75 lacs. The plea taken by the plaintiff that he did not make the payment of ₹75 lacs since defendant did not take steps to get the property free hold appears to be an afterthought and this may be for variety of reasons including non availability of the funds. Once the plaintiff had agreed to pay ₹75 lacs on or before 15th August, 2007 irrespective of delay in processing of the application of conversion, he was under obligation to pay the same, in terms of the Agreement.

15. Reliance placed on **Saradamani Kandapan versus S. Rajalakshmi & Ors. (2011) 12 SCC 18** by senior counsel for the plaintiff to support his contention that since the agreement of sale laid down the order in which reciprocal promises were to be performed, it was obligatory on the part of the defendant to get the property converted from lease hold to free hold, in terms of the agreement, before ₹75 lacs was to be tendered, in view of Section 51 of the Indian Contract Act, 1872, is misplaced. Judgment Saradamani (supra) has been rendered in the context of different facts and is not applicable to the present case. In this case, a perusal of the Agreement makes it clear that plaintiff was to tender ₹75 lacs on or before 15th August, 2007 irrespective of conversion of the suit property from lease hold to free hold, thus, plaintiff could not have avoided to make payment on the pretext that property was not converted to 'free hold'. Similarly, judgment **Azhar Sultana versus B. Rajamani & Ors. AIR 2009 SC 2157**, reliance whereupon has been placed by the plaintiff, is in the context of different facts and is of no help to the plaintiff.

16. In the light of above discussions, I have no hesitation to conclude that the plaintiff has failed to prove that he was always ready and willing to perform his part of obligation. This issue is, accordingly, answered in favour of the defendant and against the plaintiff.

Issue No. 2

17. In view of the findings returned on Issue No. 1, I am of the view that plaintiff is not entitled to a decree of specific performance of Agreement to Sell dated 11th April, 2011. Accordingly, this issue is also decided against the plaintiff.

Issue Nos. 3 and 4

18. Onus to prove the aforesaid issues was on the defendant, which he has failed to discharge. Both these issues are disposed of, accordingly.

Issue No. 5

Relief.

19. In view of the findings returned on Issue Nos. 1 and 2, plaintiff's suit must fail and is accordingly dismissed. No orders as to cost.

A.K. PATHAK, J.

MAY 30, 2012

ga