

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

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Judgment reserved on: 28.08.2012
Judgment pronounced on: 30.08.2012

+ **CS(OS) 643/2009**

MR. NAVENDU

..... Plaintiff

Versus

MR. AMARJIT S. BHATIA

..... Defendant

Advocates who appeared in this case:

For the Plaintiff : Mr. Gaurav Gupta

For the Defendant : Mr. Anukul Raj

CORAM:

HON'BLE MR. JUSTICE V.K.JAIN

V.K. JAIN, J.

1. The defendant, who is the owner of the property bearing number Q-12-B, Jangpura Extension, New Delhi-110 014, entered into an agreement dated 17.11.2008 to sell the first floor of the above referred property to the plaintiff for a consideration of Rs.69,50,000/- and received a part consideration of Rs.20 lac from him on the same day. The balance amount was agreed to be paid within two months i.e. by 17.01.2009, at the time of registration of the sale deed, and the defendant was to handover possession of the property to the plaintiff at that time. It is alleged that despite requests made by the plaintiff from time to time, defendant refused to

produce the original documents of title of the aforesaid property for perusal of the representative of the bank from which the plaintiff intended to take a loan. It is further alleged that the plaintiff arranged the entire balance payment required for completing the transaction and vide notice dated 13.01.2009 called upon the defendant to bring the original papers and execute the sale deed on or before 17.01.2009. He also informed the defendant that the balance sale consideration was ready with him. The plaintiff also visited the Office of Sub-Registrar on 16.01.2009, but the defendant did not turn up on that date. It is further alleged that in the second week of February, 2009, the defendant assured the plaintiff that he would produce the original documents in the second week of February, 2009 and that the plaintiff should arrange the sale consideration partly in cash and partly by way of a demand draft of Rs.19 lac. The defendant kept on assuring the plaintiff that he would be able to locate the original title deeds. Apprehensive of the intentions of the defendant, the plaintiff issued a public notice on 22.02.2009 in the newspapers informing the public in general with respect to the agreement which the defendant had executed with him. Since the transaction was not completed, the plaintiff has filed this suit claiming specific performance of the agreement dated 17.4.2008, production of the original title deeds and execution of conveyance deed in his favour. He also claimed an alternative relief for recovery of Rs.20 lac as also such damages as may be quantified by the Court.

2. The defendant has contested the suit. He has admitted execution of the agreement with the plaintiff as also receiving Rs.20 lac from him. It is alleged in the written statement that the original sale deed has been misplaced and a certified copy was, therefore, obtained by the defendant from the Office of Sub-Registrar, well before signing the agreement with the plaintiff. The defendant provided this information to the plaintiff and only thereafter did the plaintiff request him to sell the property. It is also alleged that in December, 2008, the plaintiff asked the defendant to sell the property at a lesser price since there was a recession in the market. The defendant, however, denied the illegal demand of the plaintiff and asked him to pay the balance amount as per the agreement. It is further alleged that the plaintiff informed the defendant that he did not have the remaining amount to pay to him. The receipt of the letter/ notice dated 13.5.2009 has however not been disputed in the written statement.

3. On 24.11.2009, the following issues were framed on the pleadings of the parties:

“1. Whether the plaintiff has always been willing and ready to perform his part of the contract under the agreement 17th November 2008? OPP

2. Whether the plaintiff is entitled to specific performance of the agreement dated 17th November 2008? OPP

- 3. Whether in case specific performance is not granted, in alternative, plaintiff is entitled to recovery of Rs.20 lac as damages along with interest, as claimed? OPP*
- 4. Whether it was defendant who failed to perform his part of the contract? OPP*
- 5. Relief.”*

4. **Issue No.1 to 4:** These issues are interconnected and, therefore, can be conveniently decided together.

A perusal of the agreement to sell dated 27.11.2008 (Ex.PW1/1) would show that the balance sale consideration of Rs.49,50,000/- was to be paid by the plaintiff to the defendant at the time of registration of the sale deed in the office of Sub-Registrar, within two months from the date of the agreement. This would mean that the balance sale consideration could be paid to the defendant on or before 17.11.2009.

5. Section 16(c) of the Specific Reliefs 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. The explanation to Clause (c) provides that where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to

deposit in court any money except when 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.

6. As observed by the Supreme Court in **His Holiness Acharya Swami Ganesh Dassji v Sita Ram Thapar** [1996 (4) SCC 526], there is a distinction between readiness to perform the contract and willingness to perform the contract. By readiness is meant the capacity of the plaintiff to perform his part of the contract including his financial position to pay the sale consideration whereas willingness signifies his intention and conduct to complete the transaction. As held by the Supreme Court in **Sukhbir Singh and others v Brij Pal Singh and others** [AIR 1996 SC 2510] that it is sufficient for the purchaser to establish that he had the capacity to pay the sale consideration. It is not necessary that he should always carry the money with them from the date of the suit till date of the decree.

7. In the case before this Court, a perusal of Ex.PW4/A which is the statement of the accounts of the plaintiff with Oriental Bank of Commerce, Defence Colony, New Delhi would show that on 14.01.2011, there was a credit balance of Rs.13,51,806.42 in his account. It further shows that on the same day, a sum of Rs.12,50,000/- was debited from his account by way of auto sweep which mean

that the amount was transferred to the FD account of the plaintiff. Thereafter, three cheques, one for Rs.6,01,582/-, second for Rs.17,787/- and the third for Rs.1,91,787/- were credited in his account on 17.01.2009. Thus, the plaintiff had Rs.21,62,962.42 in Oriental Bank of Commerce, Defence Colony, New Delhi on that date. A perusal of Ex.PW5/A which is the statement of account with HDFC Bank, would show that the plaintiff had a credit balance of Rs.21,81,349.70 in the aforesaid account on 14.01.2009. Thus, the plaintiff had a total sum of Rs.43,44,311/- available with him on 17.01.2009.

It was contended by the learned counsel for the defendant that the credit balance of the plaintiff with Oriental Bank of Commerce on 13.01.2009, even after taking into credit the sweep entry of Rs.12,50,000/-, was Rs.13,51,806.42 and if this amount is added to the amount available in HDFC Bank, the total would come only to Rs.35,33,156/-. In my view, the contention is misconceived. The very fact that the three cheques were credited in the account of the plaintiff with Oriental Bank of Commerce on 17.01.2009 clearly shows that he had the financial capacity to raise the aforesaid amount even on 16.01.2009, since the cheques which were credited on 17.01.2009 must have been deposited in the bank account on or before 16.01.2009. This is also the case of the plaintiff that in addition to the amount available in the banks, he also had cash amounting to Rs.7.5 lac with him which he had also carried to the office of the Sub-Registrar. However, the plaintiff was not

cross examined with respect to this part of his deposition. He was not asked wherefrom he had arranged the cash amounting to Rs.7.5 lac. He was not asked why he had kept so much of cash with him and fromwhere that money was arranged by him. No suggestion was given to him that he did not have Rs.7.5 lac in cash with him. In absence of any cross examination of plaintiff with respect to this part of his deposition, the defendant is deemed to have admitted that the plaintiff did have Rs.7.5 lac in cash with him. If the aforesaid cash amount of Rs.7.5 lac is added to the amount available with the plaintiff with Oriental Bank of Commerce and HDFC Bank, it is evident that the plaintiff had made arrangements for payment of Rs.49,50,000/- to the defendant on or before 17.01.2009.

8. It was contended by the learned counsel for the defendant that since the three cheques, one of Rs.6,01,582/-, second for Rs.17,787 and the third for Rs.1,91,797/- were credited in the account of the plaintiff only on 17.01.2009, this much amount was not available with him on 13.01.2009 when he went to the office of Sub-Registrar. The case of the plaintiff is that he was to pay Rs 7.5 lakh in cash and the balance by way of a cheque. Considering the fact that the last date stipulated in the agreement for payment of the balance sale consideration was 17.10.2009, it would be sufficient compliance with the requirement of Section 16(c) of the Specific Reliefs Act. If the plaintiff has been able to prove that he had financial capacity to pay Rs.49,50,000/- to the defendant even on 17.01.2009.

9. As regards willingness of the plaintiff to complete the transaction, a perusal of the letter dated 13.01.2009 (Ex.PW1/2) would show that vide this letter the plaintiff had informed the defendant that he had balance payment ready with him and had requested the defendant to show the original documents to him before 17.01.2009, complete the registration and transfer of the property on or before 17.01.2009. This letter written by the plaintiff to the defendant well before expiry of the last date stipulated for completing the transaction clearly indicates his willingness to come forward for the transaction and complete the same in accordance with the terms agreed between the parties. The plaintiff also inserted a public notice in the newspapers on 22.02.2009 and also got prepared a demand draft of Rs.19 lac in favour of the defendant on 19.02.2009. This is yet another proof of willingness of the plaintiff to complete the transaction. It is true that vide letter dated 13.01.2009, the plaintiff had also asked the defendant to show the original title documents to him. But, since the agreement between the parties did not take away the right of the plaintiff to seek inspection of the original documents of title, he was well within his right in seeking inspection of the original documents of title. Section 55 of the Transfer of Properties Act to the extent it is relevant provides that in the absence of a contract to the contrary, the seller is bound to produce to the buyer, at his request, for examination, documents of title relating to the property which are in the seller's possession or power. The case of the

defendant is that the original of the title had been lost by him and this was brought to the notice of the plaintiff at the time of execution of the agreement. However, no such indication is found in the agreement Ex.PW1/1. Had the defendant disclosed to the plaintiff that the original document of title have been lost, the parties would, in the natural course of human conduct, certainly have stated so in the agreement. Moreover, even on receipt of the letter dated 13.01.2009 from the plaintiff, the defendant did not write to him, saying that the original document of title had been lost and this fact had already been brought by him to the knowledge of the plaintiff at the time of execution of agreement dated 17.11.2008. Even after the plaintiff issuing a public notice in the newspaper on 22.02.2009, the defendant did not write to him stating therein that the original documents had been lost/ misplaced and this fact was in the knowledge of the plaintiff.

10. The defendant, even after publishing the public notice in the newspapers did not write to the plaintiff stating therein that he had failed to perform his part of the agreement and that he did not have the balance sale consideration available with him. The case of the defendant is that after execution of the agreement, the plaintiff asked him for reduction of the sale price on the ground that prices in the market had gone down. The defendant, however, has not been able to substantiate this plea. Neither any reply to the letter dated 13.01.2009 nor any response to the public notice published in the newspaper was given by the defendant claiming that

it was the plaintiff who wanted reduction in the sale consideration and, therefore, was not willing to go ahead with the transaction.

11. The learned counsel for the defendant has placed reliance upon the decision of the Supreme Court in **J.P. Builders and another v A. Ramadas Rao and another**[(2011) 1 SCC 429], following the view was taken by it in **N.P. Thirugnanam v Dr. R. Jagan Mohan Rao** [(1995) 5 SCC 115]:

“5. Section 16(c) of the Act envisages that 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 the 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 contract.”

The following view was taken in **P.D'Souza v Shondrilo Naidu** [(2004) 6 SCC 649], was also referred in the case of **J.P. Builders** (supra):

“19. It is indisputable that in a suit for specific performance of contract 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 fact and circumstances of each case. No straitjacket formula can be laid down in this behalf....

21. The readiness and willingness on the part of the plaintiff to perform his part of contract would also depend upon the question as to whether the defendant did everything which was required of him to be done in terms of the agreement for sale.”

This judgment does not help the defendant in any manner since the plaintiff has been able to establish his readiness and willingness to perform his part of the contract and the conduct of the plaintiff has also been found to be consistent with such readiness and willingness on his part. It is the defendant who was not ready and willing to go ahead with the transaction as is evident from his conduct in not responding either to the letter dated 13.01.2009 or to the public notice dated 22.02.2009.

12. For the reasons hereinabove, I have no hesitation in holding that the plaintiff had always been ready and willing to perform his part of the agreement dated 17.11.2008 and it was the defendant who committed breach of the aforesaid agreement by not coming to execute the sale deed in favour of the plaintiff.

13. During the course of arguments, it was contended by the learned counsel for the defendant that since there has been steep appreciation in the value of the suit property during the pendency of this suit and the defendant is living there with his family, specific performance of the contract, which is otherwise a discretionary relief and cannot be claimed as a matter of right, should not be granted to the plaintiff.

14. It is true that the Court is not bound to grant specific performance of an agreement to sell immovable property merely because it is lawful to do so, but, the discretion whether to grant or refuse specific performance of such an agreement being a judicial discretion, cannot be exercised arbitrarily and needs to be guided by sound and reasonable judicial principle. It is neither possible nor desirable to classify the cases where specific performance should be granted and the cases where it should be refused. Ordinarily, in the cases where the plaintiff has not played any fraud and has duly performed his obligations under the agreement, the Court should direct specific performance of an agreement unless it is satisfied that in the facts and circumstances of the case, it would be unreasonable, inequitable

and unconscionable to do so. The inordinate delay, if any, in coming to the Court, which results in steep appreciation in the value of the property in the interregnum, is one of the factors which the Court can take into consideration in such cases. If the vendor, anticipating receipt of sale consideration from the vendee, has entered into another transaction for purchase of some other property and delay in payment of balance sale consideration by the vendee results in that transaction getting cancelled, leading to the vendor being deprived of appreciation in the value of the other property which he contracted to purchase, would be yet another circumstance, which, if found to exist, can be taken into consideration by the Court. If the vendor had agreed to sell the property on account of a time bound requirement of money and he is unable to meet that requirement on account of delay on the part of the vendee in making payment of the balance sale consideration, that would be yet another relevant factor which the Court can take into consideration in appropriate cases.

I find that no evidence has been led by the parties to prove as to how much has been appreciation in the value of the suit property during pendency of this suit, though it can hardly be disputed that there must have been substantial appreciation in line with appreciation of the immovable properties throughout the country. What is important in this regard is that there has been no delay on the part of the plaintiff in coming to the Court. He sent a written notice /letter to the defendants four days

before the last date stipulated in completion of the transaction. This was followed by giving a public notice in newspapers on 22.02.2009. The defendant did not write to the plaintiff at any point of time saying that since he did not pay the balance sale consideration within the stipulated period, the part payment made by him had been forfeited by him and the agreement, therefore, stood terminated.

The present suit was filed on 6.4.2009. The plaintiff had paid 30% of the sale consideration to the defendant at the time of execution of the agreement on 18.11.2008. The written statement in this case was filed on 23.06.2009. In the written statement, the defendant did not express any desire to complete the transaction on receipt of the balance sale consideration with or without any interest on that amount. The plea taken by him on the other hand was that the part payment made to him by the plaintiff stood forfeited on account of his failure to pay the balance sale consideration within the stipulated time. Had the defendant, while filing written statement, expressed desire either to accept balance sale consideration with interest or refund the amount received by him from the plaintiff with appropriate interest, one of them could have purchased another property since there would not have been much appreciation between 17.1.2009 when the transaction was to be completed and 23.6.2009 when the written statement was filed. During the course of arguments, the learned counsel for the plaintiff stated that though it is the defendant who has been in breach of the agreement and has

been in possession of the suit property throughout during pendency of this suit, the plaintiff is willing to pay the balance sale consideration along with interest on that amount @ 15% per annum. This proposal, however, was rejected by the defendant who gave a counter offer to refund the amount received from the plaintiff at a higher interest.

15. In **Gobind Ram Vs. Gian Chand** [AIR 2000 SC 3106], Supreme Court, in order to mitigate the hardship resulting to the vendor due to lapse of time and escalation of prices of urban properties, directed payment of further compensation to the vendor while granting a decree for specific performance, in terms of the agreement between the parties.

In **Nirmala Anand Vs. Advent Corporation (P)Ltd. and Ors.** (2002) 8 SCC 146, Hon“ble Mr Justice Doraiswamy Raju, after noticing the facts and circumstances of the case, including that out of the total sale consideration of Rs 60,000/-, only a sum of Rs 35,000/- had been paid by the purchaser, observed that it would be not only unreasonable, but too inequitable for Courts to make the appellant the sole beneficiary of the escalation of real estate prices and the enhanced value of flat in question which the respondents had all along preserved by keeping alive the issues pending with the authorities of the Government and municipal bodies. The Hon“ble Judge was of the view that the balance of equity has also to be struck taking into account all the relevant aspects of the matter,

including the lapses which had occurred and parties respectively responsible therefor. The Hon'ble Judge felt that before decreeing the specific performance, it is obligatory for the Courts to consider, whether by doing so any unfair advantage would result for the plaintiff over the defendant, the extent of hardship that may be caused to the defendant and if it would render such enforcement inequitable, besides taking into consideration the totality of the circumstances of each case. The Court, therefore, directed the appellant to pay at least a sum of Rs 40 lakh to the respondent Nos. 1 and 2, in addition to the amount which she had already paid. She was also held entitled to a decree for specific performance only subject to compliance of condition for this additional amount. Hon'ble Mr Justice Ashok Bhan, however, had reservations with respect to this part of the order. Noticing that in certain cases, the Court in equity and to mitigate the hardship to the vendor had directed the vendee to pay further compensatory amount, His Lordship was of the view that this is not a principle of universal application and payment of additional compensation would depend on the facts and circumstances of each case. His Lordship was of the view that escalation of price during the period may be relevant consideration under certain circumstances for either refusing to grant the decree of specific performance or for decreeing the specific performance with a direction to the plaintiff to pay an additional amount to the defendant and compensate him. It would depend upon on the facts and circumstances of each

case. His Lordship observed that the respondents cannot take advantage of their own wrong and then plead that the grant of decree of specific performance would amount to an unfair advantage to the appellant. The view taken by his Lordship is that the appellant was entitled to specific performance of the agreement on the prices stipulated in the agreement to sell.

16. It would thus be seen that in appropriate cases, the Court while directing specific performance of an Agreement to Sell may grant additional compensation to the vendor on account of appreciation in the prices of the property subject matter of the agreement though it is not a rule of law that the court must direct payment of additional compensation in each and every case merely because there has been overall appreciation in the prices of the properties. Whether additional compensation should be directed to be paid or not and if so how much would depend upon the facts and circumstances of each case, the purpose being to balance the equity between the parties.

17. **Issues No. 5:** In view of my findings on the above issues, the plaintiff is entitled to a decree for specific performance of the agreement to sell dated 17.11.2008. However, considering the overall appreciation in the value of immovable properties, I am of the view that the defendant should be paid the balance sale consideration along with interest on that amount @ 24% per annum by way of additional compensation, so as to balance the equities between the parties.

18. For the reasons stated hereinabove, a decree for specific performance of the agreement to sell dated 17.11.2008 is hereby passed in favour of the plaintiff and against the defendant by directing the defendant to execute the sale deed in favour of the plaintiff of the first floor of the property bearing number Q-12-B, Jangpura Extension, New Delhi-110 014 in favour of the plaintiff, subject to the plaintiff depositing the balance sale consideration of Rs. 49,50,000/- with interest on that amount @ 24% per annum with effect from 17.01.2009 till date, towards additional compensation, by way of a pay order in the name of Registrar General of this Court, within six weeks. The defendant is also directed to handover peaceful and vacant possession of the first floor of the aforesaid property to the plaintiff as soon as the aforesaid amount is deposited. The sale deed would be executed by the defendant within six weeks of plaintiff's depositing the balance amount in terms of this order, under intimation to him. If the defendant fails to execute the sale deed in favour of the plaintiff and/or fails to handover peaceful and vacant possession of the first floor of the aforesaid premises to him, it would be open to the plaintiff to approach to the Court for appointment of a Court Commissioner to execute the sale deed and for issuing warrants of possession of the first floor of the aforesaid premises in his favour. The amount which the plaintiff deposits, in compliance of this order shall be kept by the Registry in a short term FDR and shall be released to the defendant on his executing the sale deed and handing over the possession of the

first floor premises to the plaintiff. In the facts and circumstances of the case, there shall be no orders as to costs. Decree sheet be drawn accordingly.

V.K.JAIN, J

August 30, 2012
Rd/bg