

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

Date of decision: 12th November, 2013.

+ **RFA 163/2002**

**M/S ANSAL PROPERTIES AND INDUSTRIES PVT.
LTD.**

..... Appellant

Through: Mr. Sanjeev Kumar Dubey, Mr.
Manoj Taneja, Ms. Meenakshi Midha
and Mr. Chetan Priyadarshi,
Advocates.

Versus

RATNU (DECEASED) THROUGH LRS & ORS Respondents

Through: Mr. N.S. Vashisht and Mr. Arpan
Sharma, Advocates for R-2(b)-2(e).

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

1. The appeal impugns the judgment and decree dated 24th November, 2001 (of the Court of Additional District Judge (ADJ), Delhi in Suit No.278/1993) of dismissal of the suit for specific performance of an Agreement of Sale of immovable property filed by the appellant and the respondent No.3 Sh. N.K. Jain.

2. The suit was filed on 11th March, 1983, pleading:

(i) that the deceased respondents/defendants No.1 & 2 namely Sh.

Ratnu and Sh. Sarjeet, both sons of Sh. Thakar Dass were *Bhumidars*

of land admeasuring 19 bighas and 4 biswas bearing Khasra Nos.13/22, 13/23, 13/24 and 26/4 in Village Deoli, Tehsil Mehrauli, New Delhi;

(ii) that the respondents/defendants No.1 & 2 had entered into an Agreement to Sell of the said land with the respondent No.3 Sh. N.K. Jain; it was agreed that the respondents/defendants No.1 & 2 will be paid for the sale of their land @ Rs.60,000/- per acre; they were paid a sum of Rs.24,000/- as part payment and the balance money will be paid to them at the time of registration of the Sale Deed; that the respondents/defendants No.1 & 2 were to obtain 'No Objection Certificate' (NOC) from the Competent Authorities as well as the clearance certificate from the Income Tax Authorities;

(iii) that the respondents/defendants No.1 & 2 executed a formal Agreement to Sell dated 23rd March, 1980 in favour of the respondent No.3 Sh. N.K. Jain;

(iv) that the respondents/defendants No.1 & 2 were to sell the land within five months from the dated of execution of Agreement to Sell dated 23rd March, 1980, after excluding the time taken by them in obtaining the necessary clearances from the various authorities; time

was thus not the essence of the contract;

(v) that it was further a term of the Agreement to Sell that the Sale Deed would be executed in the name of the respondent No.3 Sh. N.K. Jain or in the name of his nominee;

(vi) that the respondents/defendants No.1 & 2 had till then not obtained the required certificates as they were required to obtain;

(vii) that the respondent No.3 Sh. N.K. Jain had appointed the appellant as his nominee of the Agreement to Sell and the respondents/defendants No.1 & 2 were duly informed thereof;

(viii) that the appellant and the respondent No.3 Sh. N.K. Jain had called upon the respondents/defendants no.1 & 2 to obtain the necessary NOCs and clearances but to no effect;

(ix) that ultimately a registered notice dated 25th February, 1983 was got sent to the respondents/defendants No.1 & 2 calling upon them to complete the sale;

(x) that the said notice was received back unclaimed;

(xi) that the respondents/defendants No.1 & 2, in violation of the Agreement to Sell, were wanting to sell the land to somebody else.

Accordingly, the suit was filed seeking a direction to the respondents/defendants No.1 & 2 to obtain necessary NOCs from the Competent Authorities and clearance certificates from the Income Tax Authorities and to execute and register the Sale Deed in favour of the appellant; alternately, it was pleaded that if the Sale Deed could not be executed in favour of the appellant as the nominee of the respondent No.3 Sh. N.K. Jain, the Sale Deed be got executed in the name of the respondent No.3 Sh. N.K. Jain.

3. Vide interim order dated 14th March, 1983 in the aforesaid suit, the respondents/defendants No.1 & 2 were restrained from alienating, encumbering or parting with possession of the land. The said order was confirmed on 14th September, 1984.

4. The respondents/defendants No.1 & 2 contested the suit by filing written statement, on the grounds:

(a) denying having entered into any Agreement to Sell with the respondent No.3 Sh. N.K. Jain;

(b) it was however pleaded that a person had approached the respondents/defendants No.1 & 2 and represented himself as an employee of the appellant and approached for purchase of the land;

that the respondents/defendants No.1 & 2 were willing to dispose off the land at that stage; the said person offered to purchase the land @ Rs.1,60,000/- per acre;

(c) denying that any sum of Rs.24,000/- was received or that the respondents/defendants No.1 & 2 had agreed to obtain any NOCs or clearances; it was pleaded that the said representative of the appellant had represented that all necessary formalities, permissions and clearances will be completed by the appellant;

(d) it was further pleaded that the said representative of the appellant had asked the respondents/defendants No.1 & 2 to put thumb impression on printed forms and blank papers so that necessary formalities could be completed;

(e) denying that they had agreed to sell the land @ Rs.60,000/- per acre or that any of the alleged terms were settled or agreed;

(f) pleading that it was represented by the aforesaid representative of the appellant that the respondents/defendants no.1 & 2 will receive the entire sale consideration within five months of the date when their thumb impression and signatures as aforesaid were taken;

(g) that the respondents/defendants No.1 & 2 are illiterate and trusted the representative of the appellant and kept on approaching the appellant for balance sale consideration but the same was not paid;

(h) that the respondent/defendants No.1 & 2 at that time were in dire need of money;

(i) denying receipt of any notice dated 25th February, 1983;

(j) accusing the appellant of non-performance;

5. The appellant and the respondent No.3 Sh. N.K. Jain filed a replication to the written statement aforesaid, denying the contents thereof and reiterating the case set out in the plaint.

6. On the pleadings aforesaid of the parties, the following issues were framed in the suit on 2nd February, 1995:

- “1. Whether the suit has been filed by a duly authorised person on behalf of the plaintiff Co.?”*
- 2. Whether the agreement to sell dated 23.3.1980 was validly executed by the defendant in favour of the plaintiff No.2? OPP*
- 3. Whether the suit has been properly valued for the purposes of court fees and jurisdiction?*
- 4. Whether the plaintiff is entitled to a decree for possession and specific performance in respect of the suit land?*
- 5. Relief.”*

7. The respondent/defendant No.2 Sarjeet died during the pendency of the suit and his legal heirs were substituted vide order dated 7th July, 1997. The respondent/defendant No.1 Sh. Ratnu also died during the pendency of the suit and his legal heirs were also substituted vide order dated 1st October, 1999. The defence of the respondents/defendants No.1 & 2 was struck off vide order dated 4th July, 2001 for their failure to pay the costs imposed on them. The respondent no.3/plaintiff and an officer of the appellant examined themselves in evidence; they were not even cross examined by the counsel for the respondents/defendants no.1&2.

8. Notwithstanding the defence of the respondents/defendants no.1&2 having been struck off and the contention of the counsel for the appellant before the learned ADJ being that the appellant was thus entitled to a decree on their unrebutted evidence, the learned ADJ has dismissed the suit, finding/observing/holding;

- (i). that the appellant/plaintiff had failed to prove that the suit had been filed and the plaint signed and verified by a duly authorized person on behalf of the appellant/plaintiff;
- (ii). that though the witness of the appellant/plaintiff had deposed that the appellant/plaintiff was a duly incorporated Company

under the Companies Act and the suit had been filed and the plaint signed and verified by Shri Gopal Ansal who was authorized to institute the suit vide Resolutions passed by the Board of Directors of the appellant/plaintiff proved before the Court, but had failed to prove any document showing incorporation of the appellant/plaintiff as a Company under the Companies Act;

- (iii). that in the absence of proof of the appellant/plaintiff being a Company under the Companies Act, the Resolutions of the Board of Directors of the appellant/plaintiff were of no avail;
- (iv). that the appellant and the respondent no.3/plaintiffs had also failed to prove that there existed a valid Agreement to Sell dated 23rd March, 1980, for the following reasons:-

- (a). that the deposition of the witnesses, of payment of Rs.24,000/- in cash by the respondent no.3/plaintiff and of execution of receipt thereof was beyond pleadings since in the entire plaint it was nowhere pleaded that Rs.24,000/- was paid at the time of Agreement to Sell in the presence of

the witness Shri Jage Ram and that the receipt had been executed and signed by either of respondents/defendants no.1&2 on any date including the date on which Agreement to Sell dated 23rd March, 1980 was executed;

- (b). that the only plea in the plaint was of it having been agreed between the respondents/defendants no.1&2 on the one hand and the respondent no.3/plaintiff on the other hand that a sum of Rs.24,000/- would be paid; there was however no plea of such payment having been made;
- (c). that even in the Agreement to Sell, the amount of Rs.24,000/- in figures was written in a different ink and there was overwriting and Rs.6,000/- had been inserted in different ink;
- (d). that while one page of the Agreement to Sell was typed, others were printed;
- (e). that no details of the payment in cash of Rs.24,000/- had been given;

- (f). that though the Agreement to Sell provided for details of payment to be given but the same were not filled up and therefrom it was evident that no such amount was paid at the time of Agreement to Sell;
- (g). that thus no payment of Rs.24,000/- was made to the respondents/defendants no.1&2 at the time of Agreement to Sell;
- (h). that cuttings, overwritings and insertions had been made in the Agreement after getting the thumb impression of the respondents/defendants no.1&2;
- (i). that the Agreement to Sell had been illegally manipulated behind the back of the respondents/defendants no.1&2;
- (j). that the endorsement on the Agreement to Sell was only of

*“confirmed and endorsed in favour of
Messrs Ansal Properties & Industries
(P) Ltd., 115 Ansal Bhawan, 16 K.G.
Marg, New Delhi, and or its nominee
or nominees*

*Sd/-
(N.K.Jain)”*

and the same did not constitute nomination of the appellant/plaintiff as inheritor of the rights of the respondent no.3/plaintiff under the Agreement to Sell;

- (k). no date, time and place of making such endorsement had been proved;
- (l). that the aforesaid endorsement did not also have the consent of the respondents/defendants no.1&2;
- (m). there was no evidence of such endorsement having been even conveyed to the respondents/defendants no.1&2;
- (n). that the nomination claimed in favour of the appellant/plaintiff was invalid and a further instance of illegal manipulation;
- (o). that the receipt proved of Rs.24,000/-, was not only beyond pleadings but though in typed form again had blanks which were filled in later on and not before taking the thumb impression of the respondents/defendants No.1 & 2 and its contents

were not established beyond reasonable doubts;

- (p). there were insertions in hand in the said receipt also and in different inks;
- (q). that the receipt was also a glaring instance of illegal manipulation;
- (r). that the thumb impression on the revenue stamp on the receipt was of one of the respondents/defendants no.1&2 only and the receipt was thus not validly proved against the other respondent/defendant whose thumb impression was not on revenue stamp;
- (s). that the similar endorsement on the receipt also in favour of appellant/plaintiff was without any date, time and place; and,
- (t). that the appellant and the respondent no.3/plaintiffs had also failed to prove due service of the notice preceding the suit.

- (v). that the suit had been properly valued for the purpose of Court Fees and jurisdiction;
- (vi). that the appellant and the respondent no.3/plaintiffs had in the replication not controverted the plea of the respondents/defendants no.1&2 of their having agreed to sell at a Rs.1,60,000/- per acre;
- (vii). that there was no specific denial in the replication of the averments in the written statement of the respondents/defendants no.1&2 having been approached by the representative of the appellant who had obtained the thumb impression of the respondents/defendants no.1&2 on blank papers and printed forms;
- (viii). that the cuttings, overwritings and different prints/font of the agreement and receipt supported the aforesaid plea of the respondents/defendants no.1&2;
- (ix). that the respondents/defendants no.1&2 were uneducated persons and the Agreement to Sell and the receipt were in English language;

- (x). that the Agreement to Sell and the receipt were got executed from the respondents/defendants no.1&2 by misrepresentation, taking advantage of their illiteracy; and,
- (xi). that the appellant and the respondent no.3/plaintiffs were thus not entitled to the relief of specific performance.

resultantly the suit was dismissed.

9. Notice of the appeal was issued and vide *ex parte ad interim* order dated 4th March, 2002 *status quo* directed to be maintained. On 23rd October, 2003 the appeal was admitted for hearing and the earlier interim order made absolute. An application under Order1 Rule 10 of the CPC was made by the legal representatives of some of the respondents (in turn being the legal representative of respondents/defendants no.1&2) who had died and which was allowed on 14th May, 2007.

10. CMs No.7648-49/2007 were filed jointly by the appellant and the respondents no.1(i) to 1(iv) being all the legal heirs of the deceased respondent/defendant Ratnu and by respondent no.2(a) being one of the legal heirs of the deceased respondent Sarjeet, stating that a settlement had been arrived at. Vide order dated 29th May, 2007 the said settlement was taken on record and the factum of satisfaction of claim of the appellant

against the said respondents was recorded and it was further recorded that the possession of the share belonging to the said respondents had been handed over to the appellant.

11. CM No.840/2008 was filed by the respondents no.2(b) to 2(e) for recall of the order dated 29th May, 2007 recording the settlement between the appellant on the one hand and the respondents no.1(i) to 1(iv) and 2(a) on the other hand. The said application was dismissed vide order dated 23rd April, 2010 observing that the settlement was qua the parties thereto only and was not binding upon the respondents no.2(b) to 2(e).

12. CM No.11748/2010 was thereafter filed by respondents no.2(b) to 2(e) seeking clarification of the *status quo* order dated 23rd October, 2003. The said application was also dismissed vide order dated 10th September, 2010 observing that the *status quo* ordered was qua property and not person specific.

13. Mediation attempted between the appellant and the respondents no.2(b) to 2(e) thereafter, remained unsuccessful.

14. The counsel for the appellant and the counsel for the respondents no.2(b) to 2(e) have been heard. None has appeared for the respondents no.1(i) to 1(iv) and respondent no.2(a) and respondent no.3.

15. The counsel for the respondent no.2(b) to 2(e) has at the outset contended that there is no *Vakalatnama* from the appellant in favour of any of the counsels who are appearing today to argue the matter.

16. Though on perusal of the Court file, no such *Vakalatnama* in favour of any of the counsels is found but Mr. Dubey arguing counsel for the appellant has contended that there is a *Vakalatnama* on record in favour of the father of the counsel instructing him and has stated that a fresh *Vakalatnama* can be obtained.

17. Though the *Vakalatnama* referred to is from Ansal Infrastructure Ltd. and not the appellant, the appeal being old, it is not deemed appropriate to adjourn the matter on the said ground.

18. The counsel for the respondents no.2(b) to 2(e) has however further contended that the counsels are being not instructed by the appellant Ansal Properties and Industries Pvt. Ltd. It is contended that CM No.7649/2007 under Order 23 Rule 3 of the CPC which though was allowed, was also not of settlement between the respondents no.1(i) to 1(iv) and respondent no.2(a) on the one hand and the appellant on the other than but itself recorded that the appellant had referred the said respondents no.1(i) to 1(iv) and respondent no.2(a) to its nominee Shri Vinod Rajoria and the

application was neither signed nor supported by the affidavit on behalf of the appellant. It is argued that it is evident therefrom that the appellant has also assigned its rights in favour of the said Shri Vinod Rajoria. It is yet further contended that in fact the compromise, only between the parties to the suit could have been recorded and the compromise disclosed in CM No.7649/2007 being not between the parties to this appeal but being between respondents no.1(i) to 1(iv) and respondent no.2(a) on the one hand and Shri Vinod Rajoria, a non party to the appeal, on the other hand, could not have been accepted.

19. On enquiry as to what prejudice the respondents no.2(b) to 2(e) have suffered on account of such compromise being recorded, the counsel for the respondents no.2(b) to 2(e) contends that on account of this Court having put its *imprimatur* on the compromise, Shri Vinod Rajoria who otherwise has acquired no rights in the land is claiming possession thereof and which he cannot, the shares of the respondents no.1(i) to 1(iv) and respondent no.2(a) on the one hand and of the respondents no.2(b) to 2(e) on the other hand having not been segregated.

20. Per contra Mr. Manoj Taneja, Adv. also appearing for the appellant contends that though an FIR was lodged by the respondents no.2(b) to 2(e)

against Mr. Vinod Rajoria of the offence of trespass but thereafter the respondents no.2(b) to 2(e) settled the matter and accepted the cancellation report filed with respect thereto.

21. Mr. Dubey, counsel for the appellant/plaintiff has of course assailed the reasons given in the impugned judgment denying the relief of specific performance, of the suit having not been filed and the plaint having not been signed and verified by a duly authorized person on behalf of the appellant/plaintiff and of the appellant/plaintiff having not pleaded the payment of Rs.24,000/-. He has further contended that the defence of the respondents/defendants having been struck off, the conclusion reached by the learned Addl. District Judge of the thumb impressions of the deceased respondents/defendants no.1&2 having been taken on blank papers and the Agreement to Sell and receipt of Rs.24,000/- having been manipulated thereon, cannot be sustained.

22. The reasoning given by the learned Addl. District Judge for dismissal of the suit, of the appellant/plaintiff having not proved institution by a duly authorized person certainly cannot be sustained. The Supreme Court in ***Uday Shankar Triyar Vs. Ram Kalewar Prasad Singh*** (2006) 1 SCC 75 and ***Grafitek International Vs. K.K. Kaura*** 96 (2002) DLT 385 has held

that such irregularities cannot be fatal. The learned Addl. District Judge, if of the view that it was essential for the appellant/plaintiff to prove the Certificate of Incorporation of the appellant/plaintiff as a Company, ought to have first given an opportunity to the appellant/plaintiff to prove the same and could not without giving such opportunity have dismissed the suit. In this regard it is also significant that even in the written statement, the factum of the appellant/plaintiff being a Company under the Companies Act was not disputed and rather it was the case of the respondents/defendants no.1&2 that the representative of the appellant/plaintiff Company had approached them for purchase of the land.

23. Similarly, the view taken by the learned Addl. District Judge, of the appellant/plaintiff having not pleaded payment of Rs.24,000/- is also found to be an extreme and harsh one. The litigants ought not to be penalized for the poor drafting skills of their Advocates particularly when on a reading of the pleading as well as the documents filed, the case put up was clear.

24. Before I deal with the third reason given by the learned Addl. District Judge, of the appellant/plaintiff having failed to prove the existence of valid Agreement to Sell, it is deemed appropriate to deal with the some other aspects and for the reason whereof the appellant/plaintiff in any case is not

found entitled to the relief of specific performance.

25. The Agreement to Sell in the present case is dated 23rd March, 1980.

The same *inter alia* is for 4 acres of land, and

- A. for a total sale consideration calculated @ Rs.60,000/- per acre;
- B. provides that the vendors i.e. the respondents/defendants no.1&2 were in need of funds for investment thereof in other agricultural land with a view to augment their economic and other resources and as an act of prudence and of better management of their affairs. (Cl. 4)
- C. thereunder, out of total sale consideration, a sum of Rs.24,000/- was paid to the vendors in cash and out of which an amount of Rs.6,000/- was paid by way of earnest money and the balance amount as and by way of part sale consideration.
- D. provides that the purchaser i.e. respondent no.3/plaintiff Shri N.K. Jain was entitled to obtain the conveyance of the land in his favour on paying the balance sale consideration at any time within a period of five months from the date of execution of the Agreement to Sell. (Cl.11) A printed clause no.12 in the Agreement to Sell which enabled the purchaser to, by payment

of some additional amount, defer the date of completion of the transaction by two years had been deleted.

- E. provides that if required, the vendor will obtain the required Income Tax, Wealth Tax and Estate Duty Clearance Certificate and the required certificate from the prescribed authority under the Delhi Land (Restriction on Transfer Act), 1972 as well as the permission of any other statutory authority required for execution and registration of the Conveyance Deed (Cl. 14); and,
- F. enabled the purchaser i.e. the respondent no.3/plaintiff Shri N.K. Jain to get the Sale Deed executed and registered in his own name or in the name of his nominee.

26. Attention of the counsel for the appellant/plaintiff has been invited to ***Saradamani Kandappan Vs. S. Rajalakshmi*** (2011) 12 SCC 18 where it has been held:-

- (i). that the question, whether time is the essence of the contract, with reference to the performance of a contract, may arise for consideration either with reference to the contract as a whole or with reference to a particular term or condition of the

contract which is breached;

- (ii) in a contract relating to sale of immovable property, if time is specified for payment of the sale price but not in regard to the execution of the sale deed, time will become the essence only with reference to payment of sale price but not in regard to execution of the sale deed;
- (iii) normally in regard to contracts relating to sale of immovable properties, time is not considered to be the essence of the contract unless such an intention can be gathered either from the express terms of the contract or impliedly from the intention of the parties as expressed by the terms of the agreement;
- (iv). the intention to make time stipulated for payment of balance consideration will be considered to be essence of the contract where such intention is evident from the express terms or the circumstances necessitating the sale, set out in the agreement;
- (v). even if the urgent need for the money within the specified time is not set out, if the words used clearly show an intention of the parties to make time the essence of the contract, with reference

to payment, time will be held to be the essence of the contract.

- (vi). though in the absence of contract to the contrary, the purchaser is bound to tender the balance consideration only at the time and place of completing the sale but if it is found that there is a conscious effort to delink the terms relating to payment of balance price from the term relating to execution of sale deed and making the time of essence only in regard to the payment of the balance sale consideration, it is a clear indication that while time would be the essence of the contract in regard to the terms relating to payment of balance price, time would not be the essence of the contract in regard to the execution of the sale deed;
- (vii). 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 because the circumstances that existed when the said principle was evolved, no longer exist;
- (viii). the principle that time is not of the essence of contracts relating to immovable properties took shape in an era when market

value of immovable properties were stable and did not undergo any marked change even over a few years; however there has been a galloping inflation and prices of immovable properties have increased steeply, by leaps and bounds; market values of properties are no longer stable or steady; 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; in such circumstances 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'.

- (ix). to hold, that a vendor who took an earnest money of say about 10% of the sale price and agreed for three 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;

(x). in these circumstances, the greater scrutiny and strictness has to be applied in considering whether the purchaser was ready and willing to perform his part of the contract.

and it was enquired as to how the appellant/plaintiff could be said to have been ready and willing to perform the contract when the time provided in the Agreement to Sell for completion of the transaction was five months from the date of the Agreement to Sell i.e. 23rd March, 1980 and when the appellant/plaintiff from the date of the Agreement to Sell and till at least the issuance of the notice dated 25th February, 1983 if not till the institution of the suit on 11th March, 1983 had maintained a total quietus and not taken any steps whatsoever.

27. The counsel for the appellant/plaintiff argues that the said period of five months provided in the Agreement for completion of transaction has to be read with Clause 14 supra of the Agreement to Sell which required the respondents/defendants no.1&2 to obtain all clearances for execution of the Sale Deed. It is contended that since without the said clearances and permissions and the responsibility for obtaining which was of the respondents/defendants no.1&2, the Sale Deed could not be executed, the said period of five months cannot be of any significance. It is yet further

contended that it being not the case of the respondents/defendants no.1&2 that they had performed their obligation to obtain the said clearances, the appellant/plaintiff cannot be found fault with for having not completed the transaction within five months.

28. It has however further been put to the counsel for the appellant/plaintiff that the time of five months under Clause 11 of the Agreement being from the date of execution of the Agreement to Sell and not from the date of obtaining of such permissions/clearances for execution of the Sale Deed, whether not the appellants/respondent no.3/plaintiffs were required to, within the said period of five months chase the respondents/defendants no.1&2 for obtaining the said permissions and on their failure to do so within five months, to compel them to do so immediately on expiry of said five months, without waiting for a further period of nearly 2 ½ years.

29. No satisfying answer is forthcoming.

30. I am of the view that where the agreement provides a period for the purchaser to obtain the conveyance in his favour on paying the balance consideration, the purchaser cannot be said to have been ready and willing if notwithstanding the seller on whom the same agreement places the

responsibility for obtaining permissions for execution of the Sale Deed not obtaining the said permissions, does not take any action and sits quiet till about the last date before the expiry of three years from the date of Agreement to Sell. The only inference in such a situation can be of the purchaser being not ready and willing. The Supreme Court in ***Saradamani Kandappan*** supra has now clearly held that in the changed circumstance of galloping inflation and prices of immovable properties and the market values of properties being no longer stable, greater scrutiny and strictness has to be applied in considering whether the purchaser was ready and willing to perform his part of the contract and it will be a cruel joke on the seller who has received only about 10% of the sale price and agreed for the balance consideration to be received say as in the present case within five months therefrom, to remain bound to agree at the same rate even after 2 ½ years.

31. Not only so, the aspect of readiness and willingness in the present case has another strange feature. The respondent no.3/plaintiff who had entered into Agreement to Sell claims to have assigned his right thereunder i.e. right to purchase the same to the appellant/plaintiff. The date when he so assigned the rights, has not been disclosed. The said assignment could have

been on the very next date after the Agreement to Sell dated 23rd March, 1980 or could have been one day prior to the issuance of the Notice dated 25th February, 1983 preceding the suit. In the absence of the said date, it cannot be known as to who was ready and willing to perform purchasers part of the contract from the date of the agreement i.e. 23rd March, 1980 till the institution of the suit on 11th March, 1983 i.e. whether the appellant/plaintiff or respondent no.3/plaintiff. In fact, the respondent no.3/plaintiff appearing as PW-1 has not even deposed that he was so ready and willing. He has merely deposed that being entitled under Clause 19 of the Agreement to Sell to nominate any other person, he had so nominated the appellant/plaintiff. The official of the appellant/plaintiff who deposed as PW-2 has merely deposed that after the appellant/plaintiff had been nominated by the respondent no.3/plaintiff, the appellant/plaintiff had been approaching the respondents/defendants no.1&2 to perform their part of the agreement. However without there being anything to show as to on which date the appellant/plaintiff was so nominated, it is not clear as to when the appellant/plaintiff, even if believed to have so approached the respondents/defendant, started doing so.

32. In this context another contention of the counsel for the respondents/defendants no.1&2 may be noted. It is contended that the respondent no.3/plaintiff could not have assigned its obligations under the Agreement to Sell. Reliance in this regard is placed on recent judgment dated 8th October, 2012 of this Court in CS(OS) No.2414, 2415 & 2421/1989 titled ***M/s A.D. Overseas Vs. Smt. Sneh Lata Sharma*** where this Court, relying upon ***Khardah Company Ltd. Vs. Raymon and Company (India) Pvt. Ltd.*** AIR 1962 SC 1810 (where it has been held that an assignment of a contract though may result by transfer either of the rights or of the obligations thereunder but there is a well recognized distinction between these two classes of assignments; as a rule obligations under a contract cannot be assigned except with the consent of the promisee and when such consent is given, it is really novation resulting in substitution of liabilities; on the other hand rights under a contract are assignable unless the contract is personal in its nature) held that even if there is a nomination clause in the Agreement to Sell, the same does not permit transferring of obligations of the purchaser, as the seller/vendor may have dealt with the purchaser for the reason of being comfortable in dealing with the purchaser.

33. Applying the aforesaid ratio, Clause 19 of the Agreement to Sell only entitled the respondent no.3/plaintiff as purchaser to get the Sale Deed executed either in his name or in the name of his nominee without any objection from the respondents/defendants no.1&2 and did not entitle the respondent no.3/plaintiff/purchaser to assign his obligations *inter alia* to pay the balance sale consideration to the respondents/defendants no.1&2 to any other person. Though Clause 20 of the Agreement to Sell also provides that the terms vendor and the purchaser shall include their respective heirs, successors, executors, administrators and assignees but the same in the light of the express clause of nomination cannot be held as a consent by the respondents/defendants no.1&2 to assignment by the respondent no.3/plaintiff/purchaser of his obligations under the Agreement to Sell in favour of any other person.

34. Thus the readiness and willingness, which had to be averred and proved, was to be essentially of the respondent no.3/plaintiff and could not be of the appellant/plaintiff.

35. It is the settled position in law that such readiness and willingness has to be not only till the date of institution of the suit but has to continue even after the decree and till the execution of the Sale Deed. Reference in this

regard can be made to *Kishan Lal Chhabra Vs. Anil Arora* 156 (2009) DLT 779 and *Kumar Dharendra Mullick Vs. Tivoli Park Apartments (P) Ltd.* (2005) 9 SCC 262.

36. Once that is found to be the legal position, the respondent no.3/plaintiff whose readiness and willingness is requisite, having chosen not to even appeal or join in the appeal against the dismissal of the suit, cannot be said to be ready and willing and the appellant/plaintiff cannot be entitled to the relief on this ground alone. Though in the suit, , execution of the Sale Deed was claimed in the name of the appellant/plaintiff and in the alternative in the name of the respondent no.3/plaintiff but from the respondent no.3/plaintiff having failed to appeal or join as appellant, it is obvious that the respondent no.3/plaintiff is now not willing to have the Sale Deed in his name and if that be the position, he cannot be said to be ready and willing and the appellant/plaintiff who has only been nominated to have the Sale Deed executed in its name cannot in the absence of the readiness and willingness of the respondent no.3/plaintiff be granted the relief.

37. There is another interesting aspect of the matter. The endorsement on the Agreement to Sell and the receipt is under the signatures of the respondent no.3/plaintiff only. It is not signed by the appellant/plaintiff. In

the absence of the signatures of the appellant/plaintiff, even if it were to be believed that the appellant/plaintiff had approached the respondents/defendants no.1&2 at any time, there was nothing for the respondents/defendants no.1&2 to know that the appellant/plaintiff had taken over the obligations earlier of the respondents no.3/plaintiff under the Agreement to Sell.

38. I am of the view that where the Agreement to Sell provides time for completion of the transaction and also provides for the seller to obtain permissions and even if the seller, within the said time, fails to obtain the permissions, the purchaser ought to immediately take steps for so forcing the seller and cannot wait till the last day of limitation and if does so runs the risk of being found to be not ready and willing to perform its part of the Agreement to Sell. The Supreme Court in ***K.S. Vidyanadam Vs. Vairavan*** (1997) 3 SCC 1 reiterated in ***Saradamani Kandappan*** supra has held that the Courts will frown upon suits which are not filed immediately after the breach/refusal and the fact that limitation is three years does not mean that a purchaser can wait for one or two years to file a suit and obtain specific performance. It was further held that the three year period is intended to assist the purchasers in special cases, as where major part of consideration

has been paid and possession delivered in part performance.

39. The counsel for the appellant/plaintiff has however referred to the judgment of the Division Bench of this court in **Kulbhushan Seth Vs. Seema Seth** 2008 (2) ILR (Del) 698 to contend that once the defence of the respondents/defendants no.1&2 had been struck off, their written statement could not be seen at all and the learned Addl. District Judge has erred, in, notwithstanding the same, looking into the written statement.

40. However a perusal of the aforesaid judgment shows the same to have relied on **Modula India Vs. Kamakshya Singh Deo** (1988) 4 SCC 619 which lays down that notwithstanding the defence being struck off, subject to the exercise of an appropriate discretion by the Court on the facts of the particular case, the defendant would generally be entitled to cross examine the plaintiff's witnesses and to address arguments on the basis of the plaintiff's case but would not be entitled to lead any evidence of his own nor to cross examine by travelling beyond the very limited objective of pointing out the falsity or weaknesses of the plaintiff's case.

41. The aforesaid judgments are not found to come to the rescue of the appellant/plaintiff. As the aforesaid discussion would show, all that has been done is to find the lacunas/deficiencies in the appellant's/plaintiff's case

without any recourse to the defence of the respondents/defendants no.1&2.

42. Coming back to the aforesaid line of reasoning, even the appellant/plaintiff is not now found to be ready and willing. The compromise entered into by the respondents no.1(i) to 1(iv) and 2(a) is not with the appellant/plaintiff but with one Shri Vinod Rajoria nominee of the appellant/plaintiff. It thus appears that the appellant/plaintiff has further assigned the rights if any in favour of the said Shri Vinod Rajoria. The said Shri Vinod Rajoria has chosen not to come before this Court. The Advocates continue to be appear as if authorized by the appellant/plaintiff. The appellant/plaintiff has not chosen to disclose as to why the nomination was made in favour of Shri Vinod Rajoria and on what terms. All these developments also support that the Agreement dated 23rd March, 1980 was entered into by the respondent no.3/plaintiff Shri N.K. Jain not for the purposes of himself purchasing the property but for the purposes of trading and profiteering therefrom. It has been held in **S.V.R. Mudaliar Vs. Rajabu F. Buhari** (1995) 4 SCC 15 that if the act of a third party is found to be champertous, the relief of specific performance should be refused. From the appellant/plaintiff choosing not to disclose the reason behind nomination of Shri Vinod Rajoria and Shri Vinod Rajoria choosing not to come before this

Court, the said possibility cannot be ruled out.

43. I am therefore of the view that the essential ingredients of readiness and willingness which the plaintiff in a suit for specific performance is required to satisfy remains unfulfilled in the present case and the appeal is liable to be dismissed on this ground alone.

44. That leaves the remaining finding of the learned Addl. District Judge, of the very Agreement to Sell to be invalid. The learned Addl. District Judge in this regard has been guided by the various elements of the Agreement to Sell being in hand and/or being in different fonts.

45. Though undoubtedly the appellant/plaintiff failed to examine Shri Jage Ram, the only witness to the Agreement to Sell who was the only independent person who could have testified about the execution of the Agreement to Sell but the said failure of the appellant/plaintiff has to be seen together with the admission of the respondents/defendants in their written statement of the thumb impressions, which the Agreement to Sell and the receipt bear, being theirs. The factum of some pages in the Agreement to Sell being in a different font and of other particulars having been filled up in hand however do not persuade me to agree with the finding of the learned Addl. District Judge of there being no valid Agreement to

Sell. The pages 2 to 6 of the Agreement to Sell are printed. The first page is on a stamp paper and is typed. The various blanks left on the first page relate to khasra numbers in which the land is situated. The blanks on the other printed pages are also qua the village in which the land is situated and the amounts, dates and the time. It is the case of the appellant/respondent no.3/plaintiffs that the respondent No.3 Sh. N.K.Jain was a broker meaning that he was scouting for the land on behalf of the appellant/plaintiff. It is the case of the respondents/defendants no.1&2 also (even if it were to be said that their written statement cannot be seen, the admissions made by them therein can always be read against them) that they were approached by a representative of the appellant/plaintiff. Judicial notice can be taken of the fact that the appellant/plaintiff is a developer/builder. Such developers/builders, for their projects generally acquire large tracks of land by entering into agreements with a large number of villagers owning land in the village. That explains the printed pages of the Agreement to Sell containing the standard terms & conditions on which the land was being acquired from the villagers. It is not unusual to leave blanks in the said printed pages, to be filled up in hand as per the agreement reached. Even otherwise there is no bar in law to the said practice. The first page of the

Agreement to Sell is typed being required to be on a stamp paper. However since the date of actual signing of the agreement and the details of khasra numbers also are not available at the time of typing, the blanks in that respect had been filled up in hand therein also. Though the learned Addl. District Judge has found some inconsistencies in the agreement but there are none. The rate agreed was of Rs.60,000/- per acre and the advance paid was Rs.24,000/-out of which Rs.6,000/- was paid towards earnest money and the balance towards part payment. The same is the position in the receipt also.

46. The counsel for the respondents no.2(b) to 2(e) has in this regard referred to judgment dated 15th March, 2012 of the Division Bench of this Court in RFA (OS) No.53/2007 titled **C.L. Jain Vs. Raghubir Singh** where the Agreement to Sell was held to be not proved. However such findings are in factual context and in the context of facts of present case, I am not inclined to agree with the finding of the learned Addl. District Judge of there being no valid Agreement to Sell between the parties. The said finding is thus set aside.

47. Notwithstanding the same, the appeal cannot succeed for the reasons aforesaid. The appeal is accordingly dismissed leaving the parties to bearing their own costs. Decree sheet be drawn up.

48. It is clarified that the acceptance by this Court of the compromise of the respondents no.1(i) to 1(iv) & 2(a) with Shri Vinod Rajoria as nominee of the appellant/plaintiff would not come in the way of the respondents no.2(b) to 2(e) contending that the transaction, whatsoever it may be, between the respondents no.1(i) to 1(iv) & 2(a) with the said Shri Vinod Rajoria is bad or in contending that no rights have flown to Shri Vinod Rajoria thereunder or in seeking any other relief with respect thereto.

RAJIV SAHAI ENDLAW, J

NOVEMBER 12, 2013

‘bs’/pp..