

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

Date of decision: 5th August, 2013.

+ **RFA 206/2008**

RAJENDER SINGH DABAS Appellant
Through: Ms. Ekta Kalra Sikri and Mr. Ajay
Pal Singh, Advocates.

Versus

SMT. RAMJANO Respondent
Through: None.

**CORAM:
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW**

RAJIV SAHAI ENDLAW, J.

1. This first appeal under Section 96 of the Civil Procedure Code (CPC), 1908 impugns the judgment and decree dated 4th March, 2008 of the learned Additional District Judge (ADJ) of dismissal of Suit No.172/2004 filed by the appellant for specific performance of an Agreement of Sale of immovable property, being land admeasuring four bighas and sixteen biswas situated in Khasra No.117/77 of Village-Kanjhawala, Delhi.

2. The appeal was admitted for hearing and vide *ex-parte* ad interim order dated 23rd May, 2008, the parties directed to maintain status quo as regards title and possession of the subject property. Vide order dated 8th July, 2008 in this appeal, it was clarified that the Khasra number in which

the land agreed to be sold was situated was wrongly mentioned in the impugned judgment as 117/77 and 117/7 and the correct Khasra number was 117/17. The earlier ad interim order was made absolute vide order dated 14th March, 2013 and the hearing of the appeal expedited in view of the respondent being a senior citizen. CM No.11257/2013 has been filed by the appellant under Order 41 Rule 27 of CPC.

3. The counsel for the appellant has been heard. Though the counsel for the respondent appeared when the counsel for the appellant had opened her arguments but has thereafter failed to appear. Since the Trial Court record is available and the written synopsis of submissions dated 6th April, 2013 of the counsel for the respondent is on record, need is not felt to await the counsel for the respondent any further.

4. The appellant filed the suit from which this appeal arises pleading:

(i) that the respondent/defendant had vide Agreement to Sell dated 19th December, 1997 agreed to sell the subject land to the appellant/plaintiff on the terms and conditions contained therein, for a total sale consideration of Rs.10 lakhs out of which an amount of Rs.1 lakh was paid by the appellant/plaintiff to the respondent/defendant as part payment on 19th December, 1997 and the balance amount of Rs.9

lakhs was payable by the appellant/plaintiff to the respondent/defendant before the Sub-Registrar on execution and registration of the Sale Deed;

(ii) that the respondent/defendant approached the appellant/plaintiff for further payment claiming to be in dire need of money and the appellant/plaintiff paid a further amount of Rs.3,80,000/- on 21st December, 1997 and Rs.2,70,000/- on 23rd February, 1998 to the respondent/defendant against receipts in acknowledgement thereof;

(iii) that as per the Agreement to Sell, the respondent/defendant was to obtain 'No Objection Certificate' (NOC) from the Revenue Authorities and the Income Tax Certificate from the Tax Authorities and the necessary permissions as required under the law for execution and registration of Sale Deeds within the stipulated period;

(iv) that the appellant/plaintiff at the time of entering into the Agreement, also signed, the proposed Sale Deed and the necessary forms required for obtaining the necessary permission to sell and also for obtaining the income tax clearance as well as the applications and documents to be submitted before the authorities;

- (v) that thus though the appellant/plaintiff had performed all his obligations under the Agreement to Sell and was only required to purchase the stamp papers for the Sale Deed after receipt of intimation from the respondent/defendant of having obtained the necessary permissions and was ready and willing to perform his part of the contract and repeatedly contacted the respondent/defendant but the respondent/defendant showed her inability and sought more time;
- (vi) that the appellant/plaintiff vide letter dated 26th March, 1998 requested the respondent/defendant to intimate the status of the permissions; that in response to the said letter, the respondent/defendant sent letters dated 28th April, 1998 and 29th April, 1998;
- (vii) that the appellant/plaintiff thereafter met the respondent/defendant along with respectable persons of the village and the respondent/defendant apologised and undertook to execute the Sale Deed within ten days;
- (viii) that the appellant/plaintiff thereafter sent another letter dated 13th May, 1998 and in response where to the respondent/defendant sent the legal notice dated 14th May, 1998;

(ix) that the appellant/plaintiff left with no alternative, got sent a legal notice dated 23rd June, 1998 calling upon the respondent/defendant to execute the Sale Deed;

(x) that subsequently, the respondent/defendant informed the appellant/plaintiff that as the consolidation of the land holdings in the village was taking place, the NOC had not been issued by the Revenue Authorities and assured the appellant/plaintiff that as and when the respondent/defendant was allotted the land bearing new Khasra number during re-partition, the Sale Deed will be executed;

(xi) that in the said consolidation proceedings the respondent/defendant has been allotted land comprised in Khasra Nos.143/76 (0-6), 142/777 (2-2), 75/6 (4-4) and 75/15 (0-8).

However, owing to the respondent's/defendant's delay in performing her part of the Agreement, the suit aforesaid was filed.

5. The respondent/defendant contested the suit pleading:

(a) that the respondent/defendant had never approached the appellant/plaintiff for further payment and the sums of Rs.3,80,000/- and Rs.2,70,000/- had not been paid by the appellant/plaintiff to the respondent/defendant and the receipts of payment of Rs.3,80,000/-

and Rs.2,70,000/- have been fabricated by the appellant/plaintiff;

(b) that the suit was barred by time;

(c) that the suit was barred as the land could not be transferred without seeking NOC from the competent authority;

(d) that the respondent/defendant made sincere efforts to procure NOC and Income Tax Certificate for execution and registration of the Sale Deed and for which purpose the respondent/defendant had also approached the appellant/plaintiff on 1st March, 1998 and 8th April, 1998 for obtaining signatures of the appellant/plaintiff on the relevant documents but the appellant/plaintiff sought time on one pretext or the other; that on 10th April, 1998, the appellant/plaintiff obtained the thumb impressions of the respondent/defendant on the form for obtaining the NOC from the Revenue Authorities and clearance from the Income Tax Authority; however when the appellant/plaintiff did not discharge the duty which he had assured, the respondent/defendant sent legal notices dated 28th April, 1998 and 29th April, 1998 calling upon the appellant/plaintiff to comply with the terms of the Agreement but the appellant/plaintiff did not respond thereto; thereafter a legal notice dated 14th May, 1998 was sent

informing the appellant/plaintiff that due to his failure to comply with the Agreement, the amount of Rs.1 lakh had been forfeited;

(e) that a reply dated 23rd June, 1998 was given by the appellant/plaintiff to the said legal notice;

(f) that the appellant/plaintiff is a land grabber who by gaining trust and taking advantage of illiteracy of the small landholders makes them sign or put their thumb impressions on documents to usurp their lands;

(g) that the letters dated 28th April, 1998 and 29th April, 1998 sent by the respondent/defendant were not in response to any letter dated 26th March, 1998 of the appellant/plaintiff and there was no meeting of the appellant/plaintiff and the respondent/defendant after the notice dated 14th May, 1998 in the presence of respectable persons of the village; that no letter dated 13th May, 1998 had been received by the respondent/defendant from the appellant/plaintiff and the legal notice dated 14th May, 1998 was not in response to any such letter dated 13th May, 1998;

(h) that there had been no meetings as claimed by the appellant/plaintiff.

6. A replication was filed by the appellant/plaintiff to the written statement filed prior to the amendment of the plaint but there is no replication on the Trial Court record to the written statement of the respondent/defendant to the amended plaint. It is even otherwise not deemed necessary to refer to the replication filed.

7. On the pleadings of the parties, the following issues were framed:

*“1. Whether the suit is filed within period of limitation?
OPP*

2. Whether suit is barred by provisions of Delhi Land Reforms Act as alleged by the defendant? OPD

3. Whether plaintiff is entitled for relief of specific performance of the contract as alleged? OPP

4. Relief.”

8. The appellant/plaintiff examined himself and the two witnesses namely Mr. Anil Kumar and Mr. Hem Chandra Bhatt to the receipts of Rs.3,80,000/- and Rs.2,70,000/- and closed his evidence. The respondent/defendant did not appear as a witness and her son Mr. Nawab examined himself as a witness on behalf of the respondent/defendant; Head-constable, Delhi Police, North West was also examined as DW-2 to produce the original complaint dated 1st May, 1998 made by the respondent/defendant with the Police Station-Kanjhawala, but the records for the relevant period were reported to have been destroyed.

9. The learned ADJ has in the impugned judgment found/observed/held:
- (I) that the suit filed by the appellant/plaintiff was within limitation and not barred by the provisions of the Land Reforms Act;
 - (II) that there was no dispute of the execution of the Agreement to Sell;
 - (III) that the appellant/plaintiff had failed to prove the notices/letters dated 26th March, 1998 and 13th May, 1998 claimed to have been sent to the respondent/defendant;
 - (IV) that the receipt by the appellant/plaintiff of the letters/notices dated 28th April, 1998, 29th April, 1998 and 14th May, 1998 got sent by the respondent/defendant was admitted by the appellant/plaintiff in the plaint itself;
 - (V) that the respondent/defendant in the letters dated 28th April, 1998 and 29th April, 1998 specifically mentioned that only a sum of Rs.1 lakh had been paid and the balance consideration of Rs.9 lakhs was payable by the appellant/plaintiff upto 30th April, 1998 and if the appellant/plaintiff failed to pay the same, the advance amount of Rs.1 lakh will be forfeited; no reply controverting the said material fact was sent/got sent by the appellant/plaintiff; had the appellant/plaintiff

before 28th April, 1998 paid a total sum of Rs.7,50,000/- (i.e. Rs.1,00,000/- + Rs.3,80,000/- + Rs.2,70,000/-) as claimed by him, the appellant/plaintiff would have immediately responded to the letters dated 28th April, 1998 and 29th April, 1998;

(VI) that similarly the legal notice dated 14th May, 1998 got sent by the respondent/defendant also admits receipt of Rs.1 lakh only and no reply was sent by the appellant/plaintiff thereto also;

(VII) that thus the version of the appellant/plaintiff of payment of Rs.3,80,000/- and Rs.2,70,000/- i.e. total Rs.6,50,000/- could not be believed and had not been proved;

(VIII) that in the receipts relied upon by the appellant/plaintiff of the said payments proved as Ex. PW-1/B and PW-1/C also there was no mention of the said amounts of Rs.3,80,000/- and Rs.2,70,000/- having been received as part payment in terms of Agreement to Sell dated 19th December, 1997;

(IX) that it is even otherwise unbelievable that the appellant/plaintiff in contravention of the Agreement to Sell would have additionally paid Rs.6,50,000/- without pressing for delivery of possession of the land;

(X) that the appellant/plaintiff had also failed to prove his version, of the respondent/defendant after the letters dated 28th April, 1998 and 29th April, 1998 having apologized to the appellant/plaintiff and having assured to execute the Sale Deed;

(XI) that the appellant/plaintiff in his cross-examination had not been able to prove that the thumb impression or the signatures on the receipts of Rs.3,80,000/- Ex. PW-1/B and Rs.2,70,000/- Ex. PW-1/C were of the respondent/defendant or her son;

(XII) that though the payments of Rs.3,80,000/- and Rs.2,70,000/- were claimed to be in cash but the appellant/plaintiff in his cross-examination admitted that he could not show any bank entry to show withdrawal of such an amount;

(XIII) that the testimonies of PW-2 Mr. Anil Kumar and PW-3 Mr. Hem Chandra Bhatt, the witnesses to the receipts for Rs.3,80,000/- and Rs.2,70,000/- is not reliable, being inconsistent to the version of the appellant/plaintiff and even otherwise;

(XIV) that since the appellant/plaintiff at best had the intention to pay out of the balance sale consideration of Rs.9 lakhs, only a sum of Rs.2,50,000/- by claiming payment of Rs.6,50,000/- which had not

been proved, the appellant/plaintiff could not be said to be ready and willing to perform his part of the Agreement to Sell;

(XV) that the appellant/plaintiff had not claimed or prayed for relief of return of Rs.1 lakh and was thus not entitled thereto.

10. The counsel for the appellant has argued:

(i) that the date of completion of the transaction as per the admitted Agreement to Sell was 30th April, 1998;

(ii) that the letters dated 26th March 1998 and 13th May, 1998 which the appellant/plaintiff claimed to have sent were held by the Trial Court to have been not proved because no proof of dispatch thereof had been filed; that the appellant/plaintiff by the application under Order 41 Rule 27 of CPC is seeking to place on record and prove the postal certificates under which the said letters were dispatched to the respondent/defendant;

(iii) that it was the respondent/defendant only who could have appeared and denied her thumb impressions on the receipts of Rs.3,80,000/- and Rs.2,70,000/-; that the respondent/defendant failed to appear as a witness and adverse inference is to be drawn against her; that the appellant/plaintiff along with application under Order 41

Rule 27 CPC has also filed certified copies of proceedings in another suit filed by the respondent/defendant and in which the respondent/defendant had appeared in the Court to have her statement recorded; it is thus not as if respondent/defendant is *pardanashin* and adverse inference is to be drawn from her non-appearance in the present case and the learned ADJ has failed to consider the effect of non-appearance of the respondent/defendant in the witness box;

(iv) that the amount of Rs.1 lakh admittedly paid was also paid in cash and the parties to the transaction are villagers who keep cash at home and the learned ADJ has erred in disbelieving the payments of Rs.3,80,000/- and Rs.2,70,000/- for the reason of the source of payment thereof having not been proved;

(v) that the respondent/defendant had withheld the best evidence;

(vi) that the respondent/defendant has not proved having applied for or obtained the NOC and without which the transaction of execution of the Sale Deed could not have been completed and thus when the respondent/defendant herself was not in a position to execute the Sale Deed, the question of the appellant/plaintiff being ready and willing to perform his part of the Agreement did not arise;

(vii) that permission under Section 30 of The East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948 was required since admittedly the consolidation proceedings had begun in the village;

(viii) that the learned ADJ in the impugned judgment has made certain observations that the respondent/defendant was illiterate and which was not even the case of the respondent/defendant;

(ix) that the respondent/defendant had not given any reason for her non-appearance;

(x) that the son of the respondent/defendant who alone appeared as a witness and as an attorney of the respondent/defendant did not even depose in first person and deposed in third person;

(xi) reliance is placed on:

(A) *Iswar Bhai C. Patel alias Bachu Bhai Patel Vs. Harihar Behera* (1999) 3 SCC 457; and,

(B) *Janki Vashdeo Bhojwani Vs. Indusind Bank Ltd.* (2005) 2 SCC 217.

on the effect of non-appearance of a party in the witness box;

(C) *Mahender Singh Jain Vs. Ganga Parshad* (1982) 21 DLT 30; and,

(D) *North Eastern Railway, Administration, Gorakhpur Vs. Bhagwan Das (Dead) by LRs* (2008) 8 SCC 511.

on the scope of Order 41 Rule 27; and, on

(E) *Nathulal Vs. Phoolchand* (1969) 3 SCC 120; and,

(F) *P. D'souza Vs. Shondrilo Naidu* (2004) 6 SCC 649.

in support of the contention that the appellant/plaintiff could have been called upon to pay the balance of the price only if the respondent/defendant/seller had performed his part of the Agreement and on the performance of reciprocal obligations.

11. The counsel for the respondent/defendant in the written submission has contended:

- (a) that the conduct of the appellant/plaintiff of fabricating receipts of payment of Rs.3,80,000/- and Rs.2,70,000/- disentitled him from the discretionary relief of specific performance;
- (b) that the non-reply to the notice dated 29th April, 1998 amounts to admission by the appellant/plaintiff of the contents thereof;

(c) that the appellant/plaintiff has failed to prove that he had sufficient cash and financial capacity to pay the balance sale consideration of Rs.9 lakhs;

(d) reliance is placed on:

(i) ***J.P. Builders Vs. A. Ramadas Rao*** VIII (2010) SLT 546;

(ii) ***His Holiness Acharya Swami Ganesh Dassji Vs. Shri Sita Ram Thapar*** AIR 1996 SC 2095;

(iii) ***Smt. Nirmala Devi Vs. Niranjana Singh Tyagi*** AIR 2007 Delhi 264; and,

(iv) ***Dadarao Vs. Ramrao*** JT 1999 (8) SC 608.

12. I have considered the rival contentions. I may at the outset mention that ***Dadarao*** supra on which reliance has been placed has in the subsequent judgment in ***P. D'Souza*** supra been held to be *per incuriam*.

13. The star argument of the counsel for the appellant/plaintiff on which most emphasis was laid, of non-appearance of the respondent/defendant in the witness box, in my view would have no relevance. If this Court were to agree with the findings of the learned ADJ of the appellant/plaintiff having failed to prove payments of Rs.3,80,000/- and Rs.2,70,000/- to the

respondent/defendant and the necessary corollary whereof would be of the appellant/plaintiff in support of his claim for specific performance taking a false plea and relying upon receipts of payment which were not made.

14. The grant of the relief of specific performance is a discretionary one. The Supreme Court as far back as in *Madamsetty Satyanarayana Vs. G. Yellogi Rao* AIR 1965 SC 1405 held that under Section 20 of the Specific Relief Act, 1963, relief of specific performance is discretionary, though not arbitrary and discretion must be exercised in accordance with sound and reasonable judicial principles; diverse situation may arise which may induce a Court not to exercise the discretion in favour of the plaintiff. The said situations were left undefined with the reiteration that the discretion is not arbitrary but has to be sound and reasonable and to be guided by judicial principles. The same principle was reiterated in *R.C. Chandiok Vs. Chuni Lal Sabharwal* (1970) 3 SCC 140 where it was however observed that the conduct of the plaintiff is an important element for consideration in exercise of discretion. Similarly in *Lourdu Mari David Vs. Louis Chinnaya Arogiaswamy* (1996) 5 SCC 589 the Supreme Court, finding the plaintiff in a suit for specific performance to have in the plaint set up a false case of possession of the property having been delivered to him in pursuance to the

Agreement of Sale and further finding the plaintiff to have in the plaint set up a plea of having informed the subsequent purchaser of the prior Agreement to Sell and which plea was not proved and yet further having claimed a payment which was not made and which plea was also found to be false held that a party who seeks to avail of the equitable jurisdiction of the Court and specific performance being equitable relief, must come to the Court with clean hands and a party who makes false allegations does not come with clean hands and is not entitled to the equitable relief.

15. Outside of the suits for specific performance also it is the settled principle in law, that a party guilty of suppression of material facts (*Hanamantha Ranoji Vs. Sri Mahadev Channabasappa* (2000) 6 SCC 120) a party who approaches the Court with a pair of dirty hands (*Mohammedia Coop. Building Society Ltd. Vs. Lakshmi S. Coop Building Society Ltd.* (2008) 7 SCC 310) is not entitled to a relief which is discretionary and equitable. Reference may also be made to the celebrated case of *S.P. Chengalvaraya Naidu Vs. Jagannath* AIR 1994 SC 853 laying down that a person whose case is based on falsehood has no right to approach the Court and can be thrown out summarily; non-production and even non-mentioning of a material document was held to be tantamounting

to playing a fraud on the Court.

16. Mulla in his commentary on Indian Contract and Specific Relief Act, 12th Edition also under Section 20 of the Specific Relief Act opines that the Court can take into consideration the conduct of the person who asks for specific performance; the plaintiff must come to Court with clean hands and when the plaintiff does not come with clean hands, as where he is guilty of fraud or some other practice, he may ordinarily get no relief by way of specific performance. Halsbury's Laws of England, 4th Edition, Reissue, Volume 44 (1), para 891 opining that “if the conduct of the plaintiff in a suit for specific performance is wanting in good faith, honesty or righteous dealing, discretion in his favour will not be exercised and the relief of specific performance will be refused”.

17. Now I proceed to discuss whether the appellant/plaintiff has been able to prove the payments of Rs.3,80,000/- and Rs.2,70,000/-.

18. The said payments were not due from the appellant/plaintiff to the respondent/defendant under the Agreement to Sell as per which the entire balance sale consideration of Rs.9 lakhs was payable only against delivery of possession of the land and execution of the Sale Deed.

19. The appellant/plaintiff in the plaint did not plead that the time for

completion of the transaction was 30th April, 1998.

20. The appellant/plaintiff in the plaint relied on the letter dated 26th March, 1998 purported to have been sent to the respondent/defendant and in which (as per copy on the Trial Court record) it was undoubtedly stated that the appellant/plaintiff out of the total sale consideration of Rs.10 lakhs had already paid Rs.7,50,000/-. The Trial Court has held the said letter to be not proved. The counsel for the appellant/plaintiff has not controverted the said finding of the learned ADJ; she however wants to prove the said letter now by producing and proving the postal certificate under which the same was sent. The reason given for non-production of the said postal certificate of dispatch of the said letter is that when the appellant/plaintiff during the pendency of the appeal engaged new Advocate to argue and the matter was discussed at length; that the appellant/plaintiff was under a *bona fide* belief that the postal certificate of the said letter was on record; however when the new counsel went through the records, it was found that it is not and the impact thereof on the decision realised; the appellant/plaintiff on searching his records discovered the said postal certificate.

21. I am not convinced with the aforesaid reasoning. The suit for specific performance was filed on 16th August, 2000; the written statement thereto in

which the said letter dated 26th March, 1998 as well as payments of Rs.3,80,000/- and Rs.2,70,000/- were denied, was filed on 20th August, 2001; the appellant/plaintiff thus knew what was in issue; though a replication dated 2nd December, 2002 thereto was filed, therein also it was not stated as to how the said letter had been dispatched. The appellant/plaintiff along with the suit had filed only photocopies of documents and placed reliance on originals thereof. Original documents were filed on 19th July, 2005. The appellant/plaintiff in his affidavit dated 10th July, 2006 by way of examination-in-chief though deposed having written letter dated 26th March, 1998 to the respondent/defendant, did not even attempt to prove as to which was the said letter and did not even attempt to put an exhibit mark or other mark on the carbon copy of the said letter. Naturally, he was not cross-examined with respect thereto. It would thus be seen that the appellant/plaintiff having not proved the office copy of the letter dated 26th March, 1998, the question of now giving an opportunity to the appellant/plaintiff to prove postal certificate of dispatch thereof does not arise. The appellant/plaintiff in his evidence having not even identified which was the letter dated 26th March, 1998, the question of application under Order 41 Rule 27 of CPC allowing evidence to prove postal

certificate of its despatch does not arise.

22. The respondent/defendant vide letters/notices dated 28th April, 1998 and 29th April, 1998 while notifying the appellant/plaintiff that the time for completion was upto 30th April, 1998 and the appellant/plaintiff had not offered the balance sale consideration, clearly mentioned that out of the total sale consideration of Rs.10 lakhs, what had been paid was Rs.1 lakh only. Though the appellant/plaintiff in the plaint purported to build a case that the letters dated 28th April, 1998 and 29th April, 1998 are in response to the letter dated 26th March, 1998 but the same is neither borne out from the contents of the letters dated 28th April, 1998 and 29th April, 1998 nor is it likely in the normal course of events. The respondent/defendant has proved the postal receipts of dispatch of the letters dated 28th April, 1998 and 29th April, 1998 on the same dates i.e. on 28th April, 1998 and 29th April, 1998. The learned ADJ is correct in observing that the appellant/plaintiff upon receipt of the said letters dated 28th April, 1998 and 29th April, 1998 knew that the respondent/defendant was accepting payment of Rs.1 lakh only and not of Rs.7,50,000/- and the appellant/plaintiff in the normal course of human conduct would have immediately protested. The appellant/plaintiff however in this regard relies only on oral understandings. The same is

unbelievable. In the face of the respondent/defendant having taken a stand of having received Rs.1 lakh only, the appellant/plaintiff, even if there had been any oral understanding, in the normal course of human conduct would have either got the said letters withdrawn from the respondent/defendant or got a re-confirmation in writing of receipt of Rs.7,50,000/-.

23. The appellant/plaintiff has again portrayed as if the lawyer's notice dated 14th May, 1998 got sent by the respondent/defendant was in response to the letter dated 13th May, 1998 of the appellant/plaintiff which in any case has not been proved and the position with respect thereto is the same as the letter dated 26th March, 1998. The letter dated 13th May, 1998 of the appellant/plaintiff, claimed to have been sent by ordinary post could not have reached the respondent/defendant by 14th May, 1998. The notice dated 14th May, 1998 does not refer at all to the letter dated 13th May, 1998. The reply thereto was sent after more than a month on 23rd June, 1998, which is again inconsistent with the normal human conduct and appears to be an afterthought.

24. Though the appellant/plaintiff, to explain not responding to letter dated 28th April, 1998 and 29th April, 1998 pleaded the respondent/defendant to have apologised in front of respectable persons of

the village, but inspite of denial thereof by the respondent/defendant in the written statement, did not examine any such respectable person of the village as a witness and there is no explanation also for such non-examination. The said plea of the appellant/plaintiff also thus remains unproved and has to be held to be false.

25. The learned ADJ is thus correct in holding the appellant/plaintiff to have at least on the basis of the contemporaneous correspondence, having not proved the payment of Rs.3,80,000/- and Rs.2,70,000/-.

26. With respect to the application of the appellant/plaintiff under Order 41 Rule 27 of the CPC, I may also state that a postal certificate is a very weak and unreliable evidence of dispatch through post of a letter. Such postal certificates comprise of the name and address of the addressee written by the sender/his representative on any piece of paper with the seal of the Post Office. The Post Office does not keep any record of the postal certificates issued. The seal of the Post Office is often available to non-employees also and is in-fact often handed over by the postal staff to peons/representatives of senders of bulk mail, for stamping the letters. Cases of postal certificates being available without actual dispatch of the letter are not unknown. It is for this reason only that letters of which record

is intended to be maintained/kept are necessarily sent by registered post A.D. and which entails payment of fee therefor to the postal staff and issuance of money receipt thereof by the postal staff. The appellant/plaintiff in sending the letter dated 26th March, 1998, claimed to have been sent by him asserting a valuable right of calling upon the respondent/defendant to perform the Agreement the last date fixed for performance whereof was just about one month away i.e. on 30th April, 1998, in the ordinary course of human behaviour, would have sent such a letter by registered post A.D. and not under postal certificate. Be that as it may, the letter dated 13th May, 1998 claimed to have been sent by the appellant/plaintiff is of after the letters dated 28th April, 1998 and 29th April, 1998 of the respondent/defendant and in which the respondent/defendant had not admitted the receipt of additional Rs.6.5 lakhs claimed to have been paid by the appellant/plaintiff. The appellant/plaintiff in this circumstance would have definitely sent the letter dated 13th May, 1998 which is also claimed to have been sent under postal certificate only, by registered post. I am therefore not inclined to accept the applications of the appellant/plaintiff under Order 41 Rule 27 of the CPC. Even otherwise, the purport of Order 41 Rule 27 of CPC is not to give a second chance to a litigant or to permit

fresh trial on engagement of new Advocate. The reasons given by the appellant/plaintiff for non-filing the postal certificates before the Trial Court do not fall within the ambit of Order 41 Rule 27 CPC. The said applications being CMs No.11257/2013 & 11762/2013 are accordingly dismissed.

27. As far as the receipts of the said payments are concerned, I have gone through the testimony of the appellant/plaintiff and the two witnesses to the said receipts and am unable to find any error in the reasoning given by the learned ADJ, of the same being unreliable.

28. As far as the argument of the counsel for the appellant/plaintiff of non-appearance of the respondent/defendant in the witness box to deny her thumb impressions on the receipts of Rs.3,80,000/- and Rs.2,70,000/- is concerned, I am in the facts unable to, merely from the said non-appearance, draw adverse inference against the respondent/defendant. Such adverse inference undoubtedly can be drawn but only where the testimony of the party which had failed to appear in the witness box is found to be material for adjudication of the matter in controversy. Such is not found to be the case here.

29. The appellant/plaintiff in his cross-examination admitted, (a) that the respondent/defendant is an illiterate lady; (b) that she was about 70 years of

age; (c) that the respondent/defendant had never come to the appellant/plaintiff showing her desire to sell her land; (d) that it was her son Gulab who had met the appellant/plaintiff in this regard; that the respondent/defendant had “approached through her son”; (e) that the respondent/defendant was not present when the Agreement to Sell was prepared; (f) that the signatures of the witnesses to the Agreement to Sell were obtained at their respective houses and the thumb impression of the respondent/defendant was obtained at her house in the presence of her sons; (g) that he did not know whether the thumb impressions on the receipts of Rs.3,80,000/- and Rs.2,70,000/- were not of the respondent/defendant; (h) that he had not signed any proposed Sale Deed and it was wrongly so mentioned in his affidavit (such a plea was taken in the plaint also); (i) that the demand for the sums of Rs.3,80,000/- and Rs.2,70,000/- was also made by the son of the respondent/defendant; (j) that the respondent/defendant had not put her thumb impression on the receipts of Rs.3,80,000/- and Rs.2,70,000/- in his presence and the money was given to the son of the respondent/defendant and the son of the respondent/defendant had handed over the receipts to him; (k) that he could not say if the receipts for Rs.3,80,000/- and Rs.2,70,000/- did not bear the thumb impressions of the

respondent/defendant.

30. It would thus be seen that the transactions claimed by the appellant/plaintiff are with the son of the respondent/defendant and not with the respondent/defendant. It thus cannot be said that the non-appearance of the respondent/defendant is fatal to her defence or that it calls for drawing any adverse inference against the respondent/defendant.

31. I am also of the view that it was incumbent upon the appellant/plaintiff to prove that he was on the dates of the respective payments possessed of the amounts of Rs.3,80,000/- and Rs.2,70,000/- and of which the appellant/plaintiff has given absolutely no evidence. The argument of the counsel for the appellant/plaintiff that since the admitted payment of Rs.1 lakh at the time of Agreement to Sell was also in cash, the subsequent payments claimed of Rs.3,80,000/- and Rs.2,70,000/- are also be believed, does not find favour with me. Merely because the admitted payment is made in cash is no reason for the appellant/plaintiff to not explain the source of the subsequent payments claimed and which are disputed. The argument that the appellant/plaintiff is a villager and the villagers keep cash in their houses, cannot be accepted. In fact, it is not so deposed even by the appellant/plaintiff. He has not stated as to from where

and which source the cash, even if available with him, had come. It thus has to be held that the appellant/plaintiff has not proved his capacity to pay the sums of Rs.3,80,000/- and Rs.2,70,000/- claimed to have been paid.

32. The result of the aforesaid discussion is that the plea of the appellant/plaintiff of having paid further sale consideration of Rs.6.50 lakhs remains unproved and is thus found to be false. Axiomatically, the receipts of payments are to be held to have been forged and fabricated by the appellant/plaintiff for the purposes of the suit. Once that is so, then in accordance with the principles enunciated hereinabove, the appellant/plaintiff cannot be found entitled to the discretionary relief of specific performance.

33. Not only so, the appellant/plaintiff in his cross-examination as noticed above has also admitted to the plea taken in the plaint and in his examination-in-chief of having signed the proposed Sale Deed and other documents necessary for obtaining the permissions which were required for the execution of the Sale Deed and having given the same to the respondent/defendant, to be false. Such a plea was taken in the plaint for the reason that without the appellant/plaintiff signing the said documents, the respondent/defendant could not have been expected to apply for

permissions and to show that the appellant/plaintiff had done all that was required of him to be done under the Agreement to Sell. However, the same stands falsified.

34. I may in this regard also notice another argument of the counsel for the appellant/plaintiff of no permissions in fact being required except under the Consolidation Act. Even if that be so, from the contemporaneous correspondence of the relevant time, even the appellant/plaintiff then appears to have been insisting upon the respondent/defendant obtaining the permissions. The performance/non-performance has to be seen as per the conduct of the parties at the relevant time and not based on legal advice of nearly fifteen years thereafter.

35. As far as the argument of the counsel for the appellant/plaintiff of the son of the respondent/defendant having deposed in third persons is concerned, it cannot be lost sight of that examination-in-chief in the form of affidavit are drafted by Advocates and a party cannot be penalized for the defect, if any in drafting by his Advocate. It is not the case of the appellant/plaintiff that the son of the respondent/defendant in his cross-examination deposed in third person.

36. I, therefore, do not find any merit in this appeal, which is dismissed. However, the counsel for the respondent/defendant having not argued, no order as to costs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

AUGUST 05, 2013

bs/pp