

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

Date of Decision: 04.07.2014

+ **CS(OS) 1042/2008 and CC 13/2009**

M/S BDR BUILDERS AND
DEVELOPERS PVT. LTD

..... Plaintiff

Through

Mr. Harish Malhotra, Senior
Advocate with Mr. Sanjay Goswami,
Advocate

versus

SHRI SHYAM LAL ARORA

..... Defendant

Through

Dr.M.P. Raju and Ms. Mary Scaria,
Advs.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

1. The present suit is filed seeking a decree of specific performance of Agreement to Sell dated 28.10.2005 pertaining to property No.E-4, Kalkaji, New Delhi measuring 280 sq.yds. owned by the defendant. As per the Agreement to Sell the agreed sale/transfer price was ₹3.60 crores. An amount of ₹20 lacs was paid at the time of signing of the agreement by the plaintiff to the defendant. The Agreement further provided that an additional sum of ₹1.10 crores will be paid to the defendant on demand by the defendant or within two weeks of the date of signing of the Agreement, whichever occurs earlier. The balance sum of ₹2.30 crore was to be received by the defendant at the time of handing over the vacant physical possession of the property to the plaintiff within five months i.e. by 27.03.2006. Simultaneously the defendant was to sign and execute all relevant documents such as sale deed etc.

2. As per the plaintiff, at the time of the agreement there were a number of positive representations and claims made by the defendant regarding the utility and market value of the said property and that the plaintiff was given an impression that the user of the property was for commercial purposes as it was located on the main Kalkaji Road and that commercial user had been approved by the defendant by depositing all necessary charges under various ad hoc schemes of MCD and L&DO inasmuch as the defendant was running his Information Technology (IT) unit under the name and style M/s.Irish Infotech Pvt.Ltd. It is also stated that there was an understanding between the plaintiff and the defendant that the requisite documents like title deeds, completion certificate, and permission from MCD etc. would be handed over by the defendant before the next payment. It is further averred that the defendant thereafter did not show any inclination to conclude the transaction and kept on avoiding the issue of execution of the Sale Deed on one pretext or the other and also never handed over the requisite documents though it is averred that the plaintiff was always ready and willing and was possessed with sufficient funds to purchase the property in question. It is further stated that in the meantime prices of real estate were also on the rise and the same was also the reason for the reluctance of the defendant to conclude the deal.

3. The plaintiff thereafter issued a legal notice dated 09.03.2006 through his counsel to the defendant reiterating the above averments and seeking production of necessary permission from DDA/L&DO as regard the land use. The counsel for the defendant sent a reply on 18.03.2006 which denied the contentions and allegations of the plaintiff. It was denied in the notice that the defendant had at any stage made any representation stating that the property in question can be used as commercial. It was further reiterated that there are also no such terms in the Agreement to Sell dated 28.10.2005

between the parties. It was averred that as the plaintiff has failed to make necessary payment in terms of the Agreement, the plaintiff is now coming up with false and concocted pleas. It was also pointed out that the plaintiff is a builder and developer by profession dealing in real estate and cannot make false contentions relating to issues which are available in public records inasmuch as the Master Plan of Delhi is a public document and the plaintiff cannot claim user contrary to the Master Plan.

4. The plaintiff thereafter sent a second legal notice on 24.09.2007. Counsel for the defendant sent a reply on 3.10.2007. The present suit for specific performance was filed on 26.05.2008. The defendant has filed the written statement. In the written statement it is admitted that the defendant set up a professional I.T. unit in a small permissible portion of the ground floor of the house about 14 years ago. As the unit grew and there was not enough space available in the house, the defendant decided to shift his unit to Noida and to raise funds for the said purpose decided to sell the said house. The contents of the Agreement to Sell dated 28.10.2005 are admitted. It is averred that the plaintiff failed to make the payment of ₹1.10 crores as agreed within the time and that the plaintiff told the defendant that he was unable to make the payment since he was short of funds but promised to do the needful within a few weeks when the defendant would find a suitable property in Noida. It is further stated that though in January 2006 the defendant had found a suitable property in Noida, the plaintiff still defaulted in payment of the said sum of ₹1.10 crores inasmuch as the plaintiff is stated to have told the defendant that one of his properties in Jungpura was sealed pursuant to orders pertaining to illegal construction by the Hon'ble Supreme Court and another such property had been demolished. It is agreed in the written statement that sympathizing with the plaintiff the defendant agreed

to postpone buying a property in Noida until plaintiff was able to make payment to the defendant. The written statement also confirms in paragraph 8 that the plaintiff requested for extension of time by five months for the completion of the Agreement to Sell. It is further stated that instead of paying the balance consideration the plaintiff sent a legal notice dated 9.3.2006 making a series of false statements advancing baseless claims. It is further averred that after issue of legal notice dated 09.03.2006 and reply by the defendant, the plaintiff kept completely silent. Later he started pressurizing the defendant's wife on telephone to return the earnest money. Feeling threatened, the defendant is stated to have filed a police complaint.

5. The defendant has also filed a counter claim seeking a decree for an amount of ₹6,11,000/- from the plaintiff. Reliance is placed on the Agreement to Sell dated 28.10.2005 which stipulates that in case of breach of contract a penalty of ₹25 lacs would be imposed for default of the payment. The defendant already having received ₹20 lacs, recovery of balance ₹5 lacs and other dues are sought on account of damages for breach of agreement, legal fees etc.

6. Following issues were framed on 8.7.2009:-

“1) Whether the agreement to sell dated 28.10.2005 was a valid and legally enforceable agreement between the parties? OPP

2) Whether the plaintiff was ready and willing to perform the plaintiff's part within the stipulated time and as per the terms of the said agreement? OPP

3) Whether time was the essence of the agreement as alleged by the defendant? OPD

4) Whether the agreement could not be performed on account of any fault of the plaintiff? OPD

5) Whether the defendant at the time of the agreement had represented that the suit property, i.e., the property bearing No.E-4, Kalkaji, New Delhi was a commercial property and

it was located on a commercially notified road and the defendant was running an I.T Call Centre from the said property? OPP

6) Whether the defendant is entitled to forfeit the amount of Rs.20,00,000/- (Rupees Twenty Lacs only) paid by the plaintiff as advance under the agreement to sell in view of the plaintiff's default in performing his part of the agreement? OPD

7) Whether the plaintiff is entitled to specific performance of the agreement dated 28.10.2005? OPP

8) If not, whether the defendant is entitled to damages from the plaintiff as claimed by the defendant in the counter claim? OPD

9) Relief.”

7. The plaintiff has led the evidence of four witnesses, namely, PW-1 Rajesh Gupta, Director of the plaintiff company, PW-2 Dinesh Gupta, Director of the plaintiff company and associate companies, namely, M/s.Rishi Promoters Pvt.Ltd. and M/s.Renu Builders and Promoters Pvt.Ltd. PW-3 Mr.D.K.Maggo, Branch Manager, HDFC Bank, Jungpura Branch, New Delhi and PW-4 Mr.Hardeep Singh, Real Estate Agent/Property Broker who had introduced the Directors of the plaintiff company to the defendant. PW-1 has exhibited one document marked as Ex.PW1/1. Two documents have been marked as mark ‘A’ and mark ‘B’. PW-2 has exhibited one document marked as Ex.PW2/1 and one document is marked as mark ‘A’. PW-3 has exhibited four documents marked as Ex.PW3/1 to Ex.PW3/4. The defendant has filed his evidence, namely, as DW-1 i.e. Shri Shyam Lal Arora. He has exhibited six documents marked as Ex.DW1/1 to DW1/6. Eight documents filed by the plaintiff have been marked as Ex.P-1 to P-8. Some of the same documents have also been filed by the defendant, namely, second original of the Agreement to Sell, original legal notice received from the counsel for the plaintiff etc. which have been marked as Ex.D-1 to D-6.

8. I will first deal with issue No.1 which reads as follows:-

“1) Whether the agreement to sell dated 28.10.2005 was a valid and legally enforceable agreement between the parties? OPP”

Learned Senior counsel appearing for the plaintiff has submitted that there is nothing to show that the Agreement to Sell between the parties dated 28.10.2005 (Ex.P-1) is not legally enforceable. He submits that merely because one of the parties is at default will not imply that the Agreement can be termed to be not enforceable.

9. There is no contention by the defendant regarding the validity and legal enforceability of the agreement between the parties. Accordingly, it is held that the Agreement to Sell dated 28.10.2005 is a valid Agreement.

10. Now, I will take up issue No.3 which reads as under:-

“3) Whether time was the essence of the agreement as alleged by the defendant? OPD”

No valid submissions have been made to suggest that the time as stipulated in the Agreement to Sell was of essence. It is the own stand of the defendant as elaborated in paragraphs 7 and 9 of the written statement that finding the plaintiff to be in a difficult financial position, the defendant had agreed to the request of the plaintiff for postponement of the date for making payment of the balance consideration. Even otherwise, the settled legal position is that time in a sale of an immovable property is not normally the essence of the contract. (See *Gomathinayagam Pillai & Ors. v. Pallaniswami Nadar AIR 1967 SC 868*)

11. Accordingly, I hold that time was not the essence of the contract.

12. I will now deal with issue No.5 which is the main bone of contention between the parties i.e.:-

“5) Whether the defendant at the time of the agreement had represented that the suit property, i.e., the property bearing No.E-4, Kalkaji, New Delhi was a commercial property and it was located on a commercially notified road and the defendant was running an I.T Call Centre from the said property? OPP”

13. The entire stand of the plaintiff as to why the transaction could not be completed is that at the time when they entered into the contract it was represented to the plaintiff that the property in question had a user for commercial purposes as it was located on the main Kalkaji Road and that defendant had the approval from MCD and L&DO by deposit of necessary charges. It is further the stand of the plaintiff that the defendant was using the entire property for commercial purposes and running an IT firm, namely, M/s Iris Infotech Pvt. Ltd. It is stated that based on these representations and facts, the plaintiff had agreed to buy the suit property.

14. Learned senior counsel appearing for the plaintiff has relied upon paragraph 5 of the written statement to contend that there is a clear admission in the said para that the plaintiff had bought the property for commercial use. Paragraph 5 of the written statement reads as under:-

“5.That it was understood, as a matter of common knowledge and as expressed by the plaintiff himself, that the plaintiff’s reason for buying the property was his plan to demolish the old structure and construct a new building on the plot with a basement mainly for commercial use as was the builders’ practice in general at the time.”

Reliance is also placed on clause 5 of the Agreement to Sell (Ex.P-1) to contend that the term “dues and payments of the concerned authorities” as used in the said clause impliedly means commercial user charges. The said

clause 5 of the Agreement to Sell reads as follows:-

“5. That the first party shall pay all charges, taxes, House Tax, lease money, electricity and water bills, or any other “dues and demands of the concerned authorities” in respect of the property under sale, up to the date of handing over the vacant and physical possession of the said property to the second party, and thereafter the same shall be paid by the second party.”

Reliance is also placed on paragraph 8 of the written statement relevant portion of which reads as follows:-

“8. That, believing the plaintiff, the defendant found a suitable property to buy in Noida in January 2006, and called upon the plaintiff to pay. By that time under orders of the Hon’ble Supreme Court, MCD had started the process of demolition of illegal constructions in Delhi and sealing of shops, etc. in residential houses which dealt a death blow to the plaintiff’s plans about defendant’s property.”

15. It is strenuously urged that a conjoint reading of the above two paragraphs of the written statement and the clause of the Agreement to Sell unequivocally leads to a conclusion that defendant had represented to the plaintiff that the property can be used for commercial user.

16. A perusal of the Agreement to Sell (Ex.P-1) clearly shows that there is no reference to commercial user of the property. Hence, admittedly there is nothing in the Agreement to Sell (Ex.P-1) to show that the defendant represented that the property in question can be put to commercial user. Reliance of the plaintiff on Clause 5 of the Agreement to Sell is misplaced. This clause merely talks of payment of charges including dues and payments of the concerned authorities. These words do not mean that this clause relates to dues and payments of the concerned authorities pertaining to

commercial usage of the suit property. The obvious conclusion is that the Agreement to Sell is silent about user of the property.

17. The plaintiff strongly also seeks to rely on an alleged oral representation made to the plaintiff by the defendant stating that the property in question was for commercial user. This oral representation is said to have been made before the execution of the Agreement to Sell. The said contention of the defendant is also to be rejected for two reasons. Firstly, the contention lies in the face of section 92 of the Indian Evidence Act which reads as under:-

“92. Exclusion of evidence of oral agreement -

When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms.”

Reference may be had to the judgment of a Division Bench of this Court in the case of *Shailendra Nath Endlay & Anr. vs. Kuldip Gandotra, 180 (2011)DLT 769 DB* relevant portion of which reads as follows:-

“9. It is a well settled principle of interpretation that Evidence Act forbids proving the contents of a writing other than by the writing itself. This doctrine described by the Supreme Court as "best evidence rule" is in reality a doctrine of substantive law, namely, that in case of a written contract all proceedings and contemporaneous oral expressions of the thing are merged in the writing and displaced by it. In other words, when persons express their agreement in writing, it is for the express purpose of getting rid of any indefiniteness and to put their ideas in such shape that there can be no misunderstanding, which so often occurs when reliance is placed upon oral statements. Written contracts presume deliberation on the part

of the contracting parties and it is natural they should be treated with careful consideration by the courts and with a disinclination to disturb the conditions of matters as embodied in them by the act of the parties. The Supreme Court in *Roop Kumar* (supra) has observed:

‘17. It is likewise a general and most inflexible rule that wherever written instrument are appointed, either by the requirement of law, or by the contract of the parties, to be the repositories and memorials of truth, any other evidence is excluded from being used either as a substitute for such instruments, or to contradict or alter them. This is a matter both of principle and policy. It is of principle because such instruments are in their own nature and origin, entitled to a much higher degree of credit than parol evidence. It is of policy because it would be attended with great mischief if those instruments, upon which men's rights depended, were liable to be impeached by loose collateral evidence. (See *Starkie on Evidence*, p. 648.)’

10. Thus, it is seen that the provisions of the Evidence Act come into operation for the purpose of excluding evidence of any oral agreement or statement for the purpose of contradiction, varying, adding or subtracting from its terms, after the document has been produced to prove its terms.”

18. In view of the above legal position it is not possible to accept the contentions of the plaintiff that there were certain oral representations made to him regarding user of the property and that such representations were in addition to the terms of the Agreement to Sell dated 28.10.2005.

19. Secondly, even on facts, in my view the plaintiff has not been able to substantiate the contention that any representation was made by the defendant pointing out that the property in question was for commercial user. Normally had any representation been made the same would have been incorporated explicitly in the terms and conditions of the contract

(Ex.P-1). The omission of such a representation in the Agreement to Sell is a significant omission. Further the reliance of the plaintiff on paragraphs 5 and 8 of the written statement to contend that these paragraphs contain an admission on the part of the defendant accepting that he had made a representation holding out that the property can be used for commercial use is also a contention that cannot be accepted. The contentions of the plaintiff are contrary to a plain reading of the contents of paragraphs 5 and 8 of the written statement. It cannot be said that there is any admission on the part of the defendant admitting to having made any such representation as claimed by the plaintiff.

20. PW-1 Shri Rajesh Gupta has in his evidence by way of affidavit reiterated that the defendant had shown to the said witness his IT Centre operating from the said premises and that the Agreement to Sell was entered into on account of the representation of the defendant that the defendant had got approval of commercial user of the property from MCD and other authorities including the L&DO. Relevant portion of the evidence of PW-1 to this effect is as follows:-

“3. The defendant at the time of negotiation, with the plaintiff and its directors for the sale of property No.E-4, Kalkaji, New Delhi (the suit property) claimed that the property was on a commercial road and the defendant had been using the property for running an IT Centre from the ground floor and the other portions of the said property for the last number of years. The defendant during negotiation showed to the deponent the working of his IT Centre and the certificate of the registration etc. of his company Iris Infotech Pvt. Ltd. which the defendant claimed to have been registered in August 1994. The defendant also showed to the deponent his visiting card and other stationary in the name of Iris Infotech Pvt. Ltd., of the business that the defendant was running from the said premises. ...

4. That on the representation of the defendant that the said property was permissible to be used as a commercial property

and the defendant had got approved the commercial user of the property for Iris Infotech Pvt. Ltd. from the MCD and other authorities including L&DO. ...”

21. Relevant portion of cross-examination of PW-1 of the above evidence of the said witness reads as follows:-

“...Somebody told me that the road on which the suit property fell is notified as commercial. Defendant has told me that the property in question was a commercial property. As I had relied on the words given by the defendant, I did not inquire further in this regard. The defendant had told me about this at the time of negotiation and probably about 15 days back prior to signing the agreement. It is incorrect to suggest that defendant had not made any such statement. Vol. The defendant had also shown me the letter head of his company “Iris Infotech Pvt. Ltd.”. It is incorrect to suggest that the IT office which was running at that time could have been running even in the residential area. I cannot comment if in some of the residential properties, the same could be used for commercial purpose. It is incorrect to suggest that I was fully aware about the status of the suit property if the same was commercial or not. It depends on property to property to verify further by myself or refer it to someone else with regard to finding out the status of property being residential or commercial or both.”

22. The above evidence led by the plaintiff to claim that some representation was made to him about the suit property being permitted to be used for commercial purpose cannot be believed. The statement of PW-1 is nothing but a self serving statement without any basis whatsoever. Further the first time such a contention is made by the plaintiff is after the time for making payment of ₹1.10 crores had lapsed and the legal notice was sent by counsel for the plaintiff on 9.3.2006 (Ex.P-2). Counsel for the defendant had immediately thereafter on 18.3.2006 (Ex.P-3) sent a reply clearly denying the contention of the plaintiff that any such representation was made by the defendant claiming that the property in question can be used for commercial

purpose. The statement of the plaintiff cannot be accepted.

23. One also cannot ignore the facts which are self evident. Even as per PW-1 Mr.Rajesh Gupta, the plaintiff company for the last number of years alongwith the associate companies have been dealing with real estate development. The balance sheet as filed by PW-2 being Ex.PW-2/1 of the plaintiff for the year ending 31.3.2006 shows annual turn-over of ₹16 crores. The plaintiff is not an innocent party who would gullibly rely on the representation of a layman like the defendant. Being in the business of real estate, they would very well be aware that user of a particular area as commercial would depend upon statutory provisions including the Master Plan, zonal plan etc. It is inconceivable that the plaintiffs would not be aware of the nature of user of the property or if not aware would not have prudently investigated regarding the permitted user of the area in question.

24. One cannot also forget that after having entered into the Agreement to Sell in October 2005 it is sometime in the year 2007 that the area in question was declared commercial. This fact is admitted by both the sides. The suit has been filed only thereafter by the plaintiff.

25. Given these facts, the version of the plaintiff even on facts cannot be believed. I hence hold issue No.5 against the plaintiff and hold that the defendant at the time of entering into the Agreement to Sell did not represent the suit property to be a commercial property.

26. I will now deal with issues No.2, 4 and 7 which read as follows:-

“2) Whether the plaintiff was ready and willing to perform the plaintiff's part within the stipulated time and as per the terms of the said agreement? OPP

4) Whether the agreement could not be performed on account of any fault of the plaintiff? OPD

7) Whether the plaintiff is entitled to specific performance of the agreement dated 28.10.2005? OPP”

27. On the issue of availability of funds, learned senior counsel for the plaintiff relies on paragraph 14 of the written statement to claim that the defendant himself admits the financial capabilities of the plaintiff. Reliance is also placed on Ex.PW-2/1, the balance sheet of the plaintiff and the bank statement of Centurian Bank of Punjab Limited pertaining to the account of the plaintiff company, the bank statement of M/s.Rishi Promoters Private Limited of Centurian Bank of Punjab Limited filed by PW3 (Ex.PW3/3) for the period 01.04.2005 to 31.03.2007. Similar statement is filed for M/s Renu Builders and Promoters Pvt. Ltd. (Ex.PW3/2). A perusal of the above document shows that M/s Rishi Promoters Private Limited which is also stated to be the sister concern of the plaintiff and having common Directors had a balance on 30.03.2006 of about ₹3.5 crores. Reference may also be had to the statement of account of M/s.Renu Builders and Promoters Private Limited which is also stated to be the sister concern of the plaintiff which shows balance as on 30.03.2006 to the extent of ₹1.79 crores.

28. Further, reference may also be had to the statement of PW-2 Shri Dinesh Gupta who has stated that the plaintiff company, M/s.Rishi Promoters Private Limited and M/s. Renu Builders and Promoters Private Limited are closely held private limited companies. Their shareholders are also family members and close friends. He has also stated that the three companies are doing business in real estate development for the last several years and providing financial loan facilities to each other as per business requirements. He has also stated that he has been signing the balance sheets of the three companies and also the annual returns. PW-2 is also a Director in all the three companies. There is no worthwhile cross-examination of the said PW-2 by the counsel for the defendant.

29. Apart from the above, PW-3 D.K.Maggo, Branch Manager of the

HDFC Bank also filed statements under the Banker's Book Evidence Act, 1891 of the three companies being Ex.PW-3/1 to Ex.PW-3/3 and has stated that the said three companies are part of the same group. He has also stated that the turnover of the plaintiff company is ₹33 crores for the aforesaid period while that of Renu Builders is ₹19 crores and that of Rishi Promoters is ₹12 crores. The minimum and maximum balance maintained in the account of the plaintiff is ₹10,000/- to ₹3.07 crores, in the case of M/s.Renu Builders it is ₹8,000/- and ₹2.30 crores and the case of M/s.Rishi Promoters it is ₹20,000/- and ₹3.89 crores respectively.

30. In my view the above documents clearly show that the plaintiff was sufficiently possessed of adequate funds. The legal position remains that the plaintiff was not required to have the funds actually in his account but has to demonstrate the ability to gather the funds and tender the payment. Reference may also be had to the judgment of the Supreme Court in the case of *Sukhbir Singh and Ors. vs. Brij Pal Singh and Ors*, AIR 1996 SC 2510 where in paragraph 5 the Supreme Court held as follows:-

“5. Law is not in doubt and it is not a condition that the respondents should have ready cash with them. The fact that they attended the Sub-Registrar's office to have the sale deed executed and waited for the petitioners to attend the office of the Sub-Registrar is a positive fact to prove that they had necessary funds to pass on consideration and had with them the needed money with them for payment at the time of registration. It is sufficient for the respondents to establish that they had the capacity to pay the sale consideration. It is not necessary that they should always carry the money with them from the date of the suit till date of the decree. It would, therefore, be clear that the courts below have appropriately exercised their discretion for granting the relief of specific performance of the respondents on sound principles of law.”

31. Accordingly, I hold that the plaintiffs were possessed of sufficient funds to make necessary payment to the defendant.

32. However, in view of my findings to issue No.5 above, it is obvious that the plaintiff defaulted in making payment of the balance due to the plaintiff in terms of the Agreement to Sell between the parties. It is the own stand of the plaintiff all along that it did not complete the transaction as the defendant failed to show proof of having tendered payment regarding commercial usage of the property to DDA/L&DO. In the legal notice dated 9.3.2006 (Ex.P-2) counsel for the plaintiff has categorically given the main reason for non-fulfillment of the agreement as failure of the defendant to produce to the satisfaction of the plaintiff necessary permission from DDA/L&DO regarding land use of the property being converted to commercial and other such clearances. The legal notice requests the defendant to produce the said documents to enable the plaintiff to complete the formalities and so that the plaintiff would maintain the time schedule for making payment as agreed vide Agreement to Sell by 27.3.2006. The notice further provides that in case of failure to do the same, the plaintiff would be entitled to seek specific performance and also claim refund of ₹20 lacs alongwith damages. The same request is repeated in the legal notice sent by counsel for the plaintiff on 24.09.2007 (Ex.P-4).

33. In view of my findings above that there was no representation on the part of the defendant that the premises in question is being used for commercial purpose, the basis for non performance of the agreement as stated by the plaintiff is clearly erroneous. Accordingly it has to be held that the plaintiff has failed to perform the obligations cast upon him in terms of the Agreement to Sell. I, therefore, hold that the plaintiff was not willing to perform his part of the Agreement. Therefore I hold issue No.2 against the

plaintiff and hold that the plaintiff was not ready and willing to perform the plaintiff's part of the agreement within the stipulated time. I also hold issue No.4 against the plaintiff and hold that the agreement could not be performed on account of the fault of the plaintiff. Accordingly, it has to be held that the plaintiff would not be entitled to specific performance of the Agreement dated 28.10.2005.

34. I may also take into account another reason as to why the plaintiff would not be entitled to specific performance of the Agreement to Sell.

35. Reference may be had to the judgment of the Hon'ble Supreme Court in the case of *Saradamani Kandappan vs. S.Rajalakshmi and Ors. AIR 2011 SC 3234* relevant portion of which reads as under:-

“43.Till the issue is considered in an appropriate case, we can only reiterate what has been suggested in *K.S.Vidyanadam v. Vairavan (1997) 3 SCC 1*.

(i)..

(ii)...

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

36. The Agreement to Sell was entered into on 28.10.2005. The present suit has been filed on 26.05.2008 almost a little short of three years from the date of the Agreement to Sell. On this ground also the plaintiff would not be entitled to specific performance of the Agreement to Sell. I accordingly also

hold issue No.7 against the plaintiff and hold that the plaintiff is not entitled to specific performance of the agreement dated 28.10.2005.

37. We now come to issues No.6 and 8 which read as follows:-

“6) Whether the defendant is entitled to forfeit the amount of Rs.20,00,000/- (Rupees Twenty Lacs only) paid by the plaintiff as advance under the agreement to sell in view of the plaintiff's default in performing his part of the agreement? OPD

8) If not, whether the defendant is entitled to damages from the plaintiff as claimed by the defendant in the counter claim? OPD”

38. Reference may now be had to the terms of agreement to sell (Ex.P-1).

Clause 1 of the said agreement reads as follows:-

“1. That in pursuance of this Agreement to Sell/Purchase and in consideration of a total sum of ₹3,60,00,000/- (Rupees three crores sixty lacs only) out of which the first party receives, this day, a sum of ₹20,00,000/- (Rupees twenty lacs only) vide Cheque No.809946 dated 28th Oct, 2005 drawn on Bank of Punjab Ltd., Jangpura Ext., N.Delhi, from the second party, as advance earnest money and part payment, at the time of signing of this Agreement to Sell/Purchase.”

39. Clause 1.3 of the Agreement to Sell reads as follows:-

“1.3. The parties to this Agreement agrees that a penalty of ₹25,00,000/- (Rupees twenty five lacs only) shall be imposed for default of the Agreement. If the default is by the first party, he shall return all the money received by him with an additional amount of ₹25,00,000/- (Rupees twenty five lacs only) to the second party. If the default is by the second party, the first party will retain an amount of ₹25,00,000/- (Rupees twenty five lacs only) and return the balance to the second party.”

40. The defendant has already received an amount of ₹20 lacs when Agreement to Sell dated 28.10.2005 was executed. In the counter claim he

claims the balance sum of ₹5 lacs as stipulated in the said clause 1.3 of the Agreement. He further claims a sum of ₹1,11,000/- for damages and legal fees.

41. I will first come to the alternate claim of the defendant pertaining to damages for breach of Agreement for a sum of ₹1 lac and for legal fee for reply notice for a sum of ₹11,000/- being a total of ₹1,11,000/-. In evidence of the defendant, DW-1, he has merely led evidence making general statements about having suffered loss and damages, loss of reputation, mental stress and agony on account of non-receipt of payment from the plaintiff. These are all remote damages which have also not been properly elaborated in the evidence by way of affidavit by the defendant. Hence the claim for the said sum of ₹1,11,000/- as stated in the counter-claim is rejected.

42. Now, issue comes as to whether the defendant is entitled to retain the sum of ₹20 lacs received as advance and in addition entitled to another sum of ₹5 lacs as provided for in clause 1.3 of the Agreement between the parties. Learned senior counsel for the plaintiff has argued that clause 1.3 of the Agreement actually provides payment for a penalty and in terms of Section 74 of the Contract Act this clause is not enforceable. Reliance is placed on the judgment of the Supreme Court in the case of ***Maula Bux vs. Union of India, 1969(2) SCC 554*** to argue that where loss in terms of money can be determined the party claiming compensation must prove the loss suffered by him. It is urged that no proof of any loss is placed on record by the defendant. Hence, it is urged that if for some reason specific performance cannot be granted, plaintiff would be entitled to refund of ₹20 lacs with interest. Learned counsel for the defendant has on the other hand relied upon judgment of the Supreme Court in the case of ***Oil & Natural***

Gas Corporation Ltd. vs. Saw Pipes Ltd. (2003) 5 SCC 705 to contend that in view of clause 1.3 of the Agreement, the defendant is entitled to recover the balance of ₹ 5 lacs.

43. The legal position regarding earnest money is quite clear. In ***Maula Bux vs. Union of India (supra)*** in paragraph 5 the Supreme Court held as follows:-

5. Forfeiture of earnest money under a contract for sale of property-movable or immovable-if the amount is reasonable, does not fall within Section 74. That has been decided in several cases : *Kunwar Chiranjit Singh v. Har Swarup* (supra); *Roshan Lal v. The Delhi Cloth and General Mills Company Ltd.*, ILR 33 All 166; *Muhammad Habibullah v. Muhammad Shafi*, ILR 41 All 324; *Bishan Chand v. Radha Kishan Das*, ILR 19 All 490. These cases are easily explained, for forfeiture of reasonable amount paid as earnest money does not amount to imposing a penalty. But if forfeiture is of the nature of penalty, Section 74 applies. Where under the terms of the contract the party in breach has undertaken to pay a sum of money or to forfeit a sum of money which he has already paid to the party complaining of a breach of contract, the undertaking is of the nature of a penalty.”

44. In ***Shree Hanuman Cotton Mills and Anr. vs. Tata Air Craft Ltd., AIR 1970 SC 1986*** in paragraph 24 it was held as follows:-

“24. From a review of the decisions cited above, the following principles emerge regarding “earnest”:

“(1) It must be given at the moment at which the contract is concluded.

(2) It represents a guarantee that the contract will be fulfilled or, in other words, “earnest” is given to bind the contract.

(3) It is part of the purchase price when the transaction is carried out.

(4) It is forfeited when the transaction falls through by reason of the default or failure of the purchaser.

(5) Unless there is anything to the contrary in the terms of the contract, on default committed by the buyer, the seller is entitled to forfeit the earnest.”

45. Reference may also be had to paragraph 20 of the said judgment of *Hanuman Cotton Mills (supra)* which noted the observations made in the case of *Howe vs. Smith* (1884) 27 Ch D 89 by Fry, LJ, which are as follows:-

“20..... Money paid as a deposit must, I conceive, be paid on some terms implied or expressed. In this case no terms are expressed, and we must therefore inquire what terms are to be implied. The terms most naturally to be implied appear to me in the case of money paid on the signing of a contract to be that in the event of the contract being performed it shall be brought into account, but if the contract is not performed by the payer it shall remain the property of the payee. It is not merely a part payment, but is then also an earnest to bind the bargain so entered into, and creates by the fear of its forfeiture a motive in the payer to perform the rest of the contract.”

Ultimately, the Court of Appeal rejected the claim of the plaintiff for refund of the deposit.”

46. A conjoint reading of clauses 1 and 1.3 of the Agreement to Sell (Ex.P-1) which is reproduced above, shows that ₹20 lacs is described as earnest money. It also fits into the description of earnest money inasmuch as it was paid at the time of signing of the Agreement and was to be a part of the transaction when the transaction went through. Clause 1.3 describes payment of ₹25 lacs by the defaulting party and describes it as a penalty. In view of the different descriptions given in Clause 1 and Clause 1.3 of the Agreement in my view the sum of ₹20 lacs paid at the time of signing of the Agreement to Sell would be an earnest deposit which in view of the legal position explained above would be liable to be forfeited by the defendant in case the plaintiff fails to complete the transaction. The sum of ₹25 lacs described in Clause 1.3 is in the form of a penalty which can only be

claimed by the defendant in case he falls in criteria stipulated in Section 74 of the Indian Contract Act. As I have held that the plaintiff has failed to conclude the Agreement, the defendant is entitled to forfeit the earnest deposit and retain the sum of ₹20 lacs paid at the time of execution of the Agreement to Sell.

47. Hence, I hold issue No.6 in favour of the defendant and hold that the defendant is legally entitled to retain the sum of ₹20 lacs paid as advance on execution of the Agreement to Sell.

48. The Counter-claim of the defendant for balance sum of ₹5 lacs as stated in clause 1.3 of the agreement has no merits. I have already held that the defendant has failed to show any cogent evidence pertaining to damages suffered. Clause 1.3 clearly stipulates that it is in the nature of penalty. Hence the claim of the defendant for an additional sum of ₹5 lacs is rejected.

Hence, I hold the issue No.8 regarding damages as claimed in the Counter-Claim against the defendant.

49. The last issue is relief. The suit of the plaintiff is dismissed. The Counter-Claim of the defendant for recovery of ₹6,11,000/- is also dismissed. The defendant is entitled to forfeit the sum of ₹20 lacs received at the time of execution of the Agreement to Sell. The defendant is also entitled to costs.

**JAYANT NATH
(JUDGE)**

JULY 04, 2014

n