

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment Reserved on: 25th February, 2014

Judgment Pronounced on: 01st July, 2014

CS(OS) 1447/2010

SURJIT SINGH BHATIA & OTHERS

..... PLAINTIFFS

Through: Mr. Ravi Gupta, Senior
Advocate with Mr. Abhijat, Mr.
Ajay Mohan Gulati and
Mr. Harsh Hari Haran, Advocates
versus

TEJ RAJ SINGH GOEL (HUF)

..... DEFENDANT

Through: Mr. Sandeep Sethi, Senior
Advocate with Mr. Ashish
Aggarwal and Mr. Varun
Sharma, Advocates

CORAM:

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

SANJEEV SACHDEVA, J.

1. The Plaintiffs have filed the present suit seeking specific performance of Agreement to Sell dated 27.06.2008 in respect of property bearing No. D-104,

Defence Colony, New Delhi, admeasuring 333 sq. yards.

2. The property was purchased by the Defendant by Sale Deed dated 18.02.1984, and was converted from leasehold to free-hold vide Deed of Conveyance dated 02.12.2005.
3. As per the Plaintiffs during the months of May-June, 2008, the Plaintiffs were approached by one Mr. Virender Kumar Baweja – a property dealer, through whom the meetings were arranged with the Defendant and for a total sale consideration of Rs.15 crores 80 lacs, the Plaintiffs agreed to purchase and the Defendant agreed to sell the suit property, subject to certain terms and conditions.
4. The Plaintiffs claim to have paid to the Defendant earnest money in the sum of Rs. 1 lac in cash on 26.06.2008, and on 27.06.2008 an Agreement to Sell was executed and a further sum of Rs.1 crore was paid to the Defendant. It was agreed that the balance consideration would be paid to the Defendant within

100 days of the date of the execution of the agreement i.e. on or before 06.10.2008.

5. As per the Plaintiffs on 05.07.2008 a further sum of One crore was paid in cash to the Defendant towards part consideration of the sale transaction and in the receipt dated 05.07.2008 the karta of the Defendant assured the Plaintiffs that he would call all the members/coparceners of the HUF to personally sign and execute the sale deed/sale documents in favour of the purchasers.
6. As per the Plaintiffs, on 05.08.2008 a further payment of Rs.60 lacs was made to the Defendant towards part sale consideration.
7. Further, it is alleged that a payment of Rs.5 lacs was also made in cash to Mr. Sayad Saleem (alleged constituted attorney of the Defendant) on the directions of the karta of the Defendant HUF.
8. As per the Plaintiffs with a view to facilitate timely completion of the sale transaction on 26.10.2008, the Plaintiffs called upon the karta of the Defendant to

execute the necessary documents including call the other members of the HUF.

9. As per the Plaintiffs, the karta of the Defendant HUF failed to ensure that all the members of the Defendant HUF were present at the time of execution and registration of the sale deed. It is alleged that the Plaintiffs was at all time ready and willing to perform the obligations under the agreement and to complete the sale transaction.
10. As per the Plaintiffs, the Defendant issued a letter dated 08.10.2008 claiming that the Plaintiffs had sought for extension of time to execute the sale deed and in response to the said alleged request, the Defendant granted a 'One Time Extension' to the Plaintiffs to complete the transaction upto 15.11.2008. As per the Plaintiffs, the Defendant defaulted in completing the transaction of sale. The Plaintiffs thus filed the present suit, claiming specific performance of the Agreement to Sell dated 27.06.2008.

11. The Defendant filed the written statement contending that the suit was barred by the provisions of Section 14 of the Specific Relief Act. For non-performance of a contract, where compensation of money is adequate relief, the same could not be specifically enforced.
12. The Defendant denied that the sum of Rs.1 lac was paid on 26.06.2008 or that any sum of Rs. 5 lacs was paid to Mr. Sayad Saleem or that he was the constitution attorney of the Defendant for the purposes of accepting any money on behalf of the Defendant. Defendant has contended that Plaintiffs had no means to pay the balance sale consideration and they had themselves defaulted and as such, the Defendant had forfeited the earnest money paid by the Plaintiffs.
13. On 4.3.2011, the following issues were framed:-
 - (i) “Whether the suit is liable to be rejected under Order 7 Rule 11 (a) ? OPD
 - (ii) Whether the suit is barred under Section 14 of the Specific Relief Act, if so, to what effect? OPD

- (iii) Whether the Plaintiff was and is ready and willing to perform his part of the agreement to sell dated 27.6.2008, if so, to what effect? OPP
- (iv) Whether time was the essence of the agreement to sell dated 27.6.2008, if so to what effect? OPP
- (v) If answer to issue Nos. (iii) and (iv) are in affirmative, whether the Plaintiffs is entitled to specific performance of the agreement to sell dated 27.6.2008? OPP
- (vi) Whether the Plaintiff is entitled to refund of the earnest money paid by the Plaintiff to the Defendant? OPP
- (vii) Relief.”

14. The Plaintiffs in support of his case has examined Shri Pramod Kumar Aggarwal as PW-1. Shri Pramod Kumar Aggarwal has filed two affidavits by way of evidence. Affidavit dated 10.5.2011 was exhibited as PW1/A, and affidavit dated 21.7.2012 was exhibited as Ex.PW1/B.
15. The Defendant in support of the case has examined Mr. Tej Pal Singh Goel, the karta of Defendant as DW-1.

His affidavit by way of evidence was exhibited as Ex.DW1/A.

16. The Defendant examined Mr. Amit Bhatnagar, Advocate, as their second witness and his affidavit dated 10.7.2013 was exhibited as DW-2/A.
17. The Plaintiffs after the conclusion of evidence had moved an application (IA No. 7844/2013) under Order 1 rule 10 CPC, seeking impleadment of the coparceners of the Defendant HUF.
18. On 09.01.2014, during the hearing of the application under Order 1 rule 10, the Senior Counsel for the Plaintiffs had contended that if the other coparceners of the HUF mentioned in the application confirm that the affidavits Ex.DW1/P-2 to Ex.DW1/P-5 had been signed and executed by them, he would not press his application.
19. Learned Senior Counsel appearing for the proposed coparceners had confirmed that the coparceners admitted the signing and execution of the said

affidavits. In view of the said statement, the application was not pressed and was dismissed as such.

20. Learned Senior Counsel for the Plaintiffs contended that it was a pre condition of the agreement to sell that the Defendant would get the NOC of the other family members. He relied upon the receipt Ex.PW1/3 to contend that the Defendant had undertaken that they shall call all the members/coparceners of the HUF to be personally present and sign the sale documents in favour of the purchasers as conforming parties.
21. Learned Senior Counsel for the Plaintiffs relied upon Ex.PW1/6 to contend that the Defendant had unilaterally granted an extension of time and no such extension of time was sought for by the Plaintiffs.
22. Learned Senior Counsel for the Plaintiffs relied upon Ex.PW1/7 to contend that on account of the default of the Defendant, the Plaintiffs was constraint to cancel the agreement to sell and seek refund of the entire amount paid to the Defendant along with damages to the tune of Rs. 2 crores. Learned Senior Counsel

further contended that by letter Ex. PW1/3, the Defendant instead of refunding the amount, extended the time for performance of the contract unilaterally and called upon the Plaintiffs to pay the balance within 7 days, failing which the entire earnest money of Rs.1 crore, 1 lac along with other part payments made on 05.07.2008 and 05.08.2008 would be forfeited.

23. Learned counsel for the Plaintiffs further contended that the property of the Plaintiffs was attached by an order passed by the Debt Recovery Tribunal (DRT) and he relied on Ex.DW1/P-6 (colly). He contended that the fact that the property was under attachment by the DRT was concealed by the Defendant. The Plaintiffs became aware of the said fact only after the cancellation of the agreement to sell. Learned Senior Counsel contends that the Defendant were not ready to perform their part of the transaction and that is why they kept on extending the time and did not terminated the contract despite the Plaintiffs' not paying the balance consideration within the stipulated period. The

Plaintiffs made a police complaint in June, 2009, in view of the default of the Defendant.

24. Learned Senior Counsel for the Plaintiffs further contends that it was in May, 2010, that the Plaintiffs came to know that the property had been freed from the attachment order passed by the DRT. Learned Senior Counsel for the Plaintiffs contended that the police complaint was not pressed on the assurance of Mr. Sayad Saleem, the authorized representative of the Defendant and accordingly in July, 2010 the present suit was filed.
25. Learned Senior Counsel for the Plaintiffs submitted that since the Defendant were not ready and in a position to perform their part of the contract, the readiness and willingness of the Plaintiffs or otherwise is not relevant. Learned Senior Counsel for the Plaintiffs relied upon Ex.PW 1/3 to contend that the said receipt clearly mentions that all the members/coparceners of the HUF shall personally sign and execute the sale deed as conforming parties and the stand of the Defendant is that the Defendant was not

aware of this condition as this receipt was a pre-signed receipt. He further submits that the karta of the Defendant has verified the amount paid and signed on the receipt, which shows that the Defendant had read and confirmed the receipt. Learned Senior Counsel further contended that the NOCs were neither filed nor given to the Plaintiffs and even two of the NOCs were executed after the stipulated date and the NOC mentions the sale consideration as Rs.6 crores and not Rs.15 crores 80 lacs. In so far as the receipt dated 05.07.2008 Ex.PW1/3 is concerned there is no suggestion put to the witness about the plea that the Defendant was not aware or made aware of the contents of the receipt.

26. Learned Senior Counsel for the Plaintiffs contended that on the issue of readiness and willingness of the Plaintiffs, the Plaintiffs was not required to lead any evidence as the Defendant had not denied that the Plaintiffs had sufficient means to pay the requisite money. Learned Senior Counsel for the Plaintiffs fairly conceded that the Plaintiffs had not placed on record

any document to show his financial status or availability of the funds. No evidence on this aspect, documentary or oral has admittedly been led.

27. Learned Senior Counsel for the Plaintiffs submitted that even though the Plaintiffs had earlier cancelled the agreement and sought refund subsequently after the said order of the DRT, agreement to sell was revived and Mr. Sayad Saleem, the authorized representative of the Defendant was paid an additional amount of Rs. 5 lacs. It is contended that the receipt of this amount and the fact that Mr. Sayad Saleem was an authorised representative had not been denied by the Defendant, the Defendant have failed to produce Mr. Sayad Saleem as their witness and the best evidence has been withheld and as such presumption should be drawn against the Defendant. It is further submitted that on this aspect, the Plaintiff has not been put any question in the cross-examination.

28. Learned Senior Counsel for the Defendant submitted that the Plaintiffs himself terminated the contract and asked for refund and as the Plaintiffs had terminated

the contract and sought refund, the Plaintiffs was disentitled from seeking specific performance of the agreement. He further contended that the Plaintiffs have fabricated the documents and have filed a false case and as such the Plaintiffs are disentitled from grant of any discretionary relief.

29. Learned Senior Counsel further contended that as the Defendant had abandoned the contract, there was no question of any readiness and willingness on the part of the Plaintiffs and there is thus a presumption that the Plaintiffs is not ready and willing to perform his part of the contract and thus is disentitled from seeking specific performance. He further contended that the Plaintiffs admittedly have not led any oral or documentary evidence to prove their readiness and willingness and the availability of funds.
30. Learned Senior Counsel further contended that the Defendant had paid earnest money as a promise to comply with the terms of the agreement and as he failed to comply with the obligations despite several opportunities granted by the Defendant to enable him to

comply with his part of the contract, the Defendant was entitled to forfeit the entire amount paid by the Plaintiffs as earnest money.

31. Learned Senior Counsel further contended that specifically issue No.3 had been framed on this aspect whether the Plaintiffs was ready and willing to comply his part of the agreement to sell and as the Plaintiffs has admittedly not led any evidence on this aspect, the Plaintiffs is disentitled from the relief for specific performance.
32. Learned Senior Counsel for the Plaintiffs submitted that the letter dated 15.10.2008 was a forged and fabricated letter, which is fortified from the letter Ex.P-5. IT is contended that the subsequent letter dated 14.11.2008 does not refer to either letter dated 15.10.2008 or 27.10.2008 and that even no letter dated 27.10.2008 has been placed on record.
33. Learned Senior Counsel for the Defendant has contended that the reply dated 04.12.2008 sent through Mr. Naresh Gupta Advocate has been used to show, as

if a letter of 15.10.2008 has been sent, however the reply dated 14.11.2008 does not even refer to any letter dated 15.10.2008, further the postal receipt placed on record is Speed Post receipt, whereas in the affidavit it is referred to as the letter having been sent by registered post. The said receipt has not even been sought to be exhibited.

34. Learned Senior Counsel for the Defendant has contended that in reply to notice dated 14.11.2008, signed by the Plaintiffs, the Defendant had informed the Plaintiffs that no objection certificates had been received from the other coparceners and it was also mentioned that the personal presence of the coparceners was neither agreed upon nor necessary and it was at the request of the Plaintiffs that the affidavits were executed, notarized and attested by the Indian Consulate in USA and sent to India. Learned Senior Counsel contended that the draft of the affidavits was provided by the Plaintiffs themselves.

35. Learned Senior Counsel for the Defendant submitted that the attachment order in respect of the said property

was issued on 10.01.2001, but was withdrawn on 05.10.2007 and the property was never attached thereafter. Learned Senior Counsel for the Defendant contended that when the Plaintiffs were not even aware of the attachment order till the cancellation of the agreement to sell, the same cannot form the basis of the cancellation.

36. Learned Senior Counsel for the Defendant contended that the Defendant is entitled to forfeit the entire earnest money paid and as per the agreement all money that is paid as part money becomes earnest money and thus, liable to be forfeited. He further contended that the time was the essence of the contract. He further submitted that the stand of the Defendant is that sum of Rs.2.61 crores was earnest money and the Defendant was not cross-examined on this aspect.
37. Learned counsel for the Defendant further contended that Mr. Sayad Saleem was not the authorised representative of the Defendant to receive any amount on behalf of the Defendant. He was a power of attorney holder only for the purposes of legal

proceedings and not for the purposes for sale or receipt of any money under the transaction. Further that the Plaintiffs have not referred to the alleged payment in any of their correspondences.

38. Learned Senior Counsel for the Defendant referred to the un-amended plaint of the Plaintiffs to show that originally the balance amount mentioned in the plaint was shown as Rs.13 crores 19 lacs and in case the amount of Rs. 5 lacs had been paid the balance would have been Rs.13 crores 14 lacs. It is contended that this fortifies the fact that the plea of payment of Rs.5 lacs is false. Further when the amendment of the plaint was sought, the Plaintiffs did not seek amendment of the prayer paragraph, which shows the balance consideration as Rs.13 crores 19 lacs. Learned counsel for the Plaintiffs contends that in the amended plaint in the prayer paragraph the Plaintiffs has unauthorisedly amended the amount to show as Rs.13 crores 14 lacs without seeking such permission from the Court.
39. Learned Senior Counsel for the Defendant contended that as per the original agreement there was no

requirement for personal presence of the coparceners and the agreement only stipulated that NOC would be obtained. He further contended that the fact that the draft of the NOC was provided by the Plaintiffs fortifies the fact that the personal presence of other coparceners was not required. He further contended that the NOCs were duly received from the other coparceners and placed on record.

40. Learned Senior Counsel for the Defendant submitted that the Plaintiffs in all its communications had sought refund of the amount paid and only in the disputed letter dated 15.10.2008 has sought enforcement of the contract and only at the stage of the filing of the plaint the Plaintiffs realising that he would not be in a position to seek specific performance, in view of his repudiation of the contract, he fabricated the letter of 15.10.2008.

41. Learned Senior Counsel for the Plaintiffs contended that under Section 55 of the Transfer of Property Act the seller was bound to disclose any defect in the execution of contract. The seller had not disclosed the

attachment by the DRT and as such it excluded the plea of lack of readiness and willingness.

42. He further contended that earnest money deposit means the first payment made on execution of contract. He submits that since Rs.1 lac was paid one day prior to the execution of the contract, the earnest money deposit would be only Rupees one lac.
43. Before dealing with the factual matrix of the matter to decide the issues arising, it would be expedient to look at certain judicial pronouncements that in my view would have some bearing.
44. The Supreme Court of India in the case of ***J.P. BUILDERS V. A. RAMADAS RAO, (2011) 1 SCC 429*** held *as under:*

22. The words “ready” and “willing” imply that the person was prepared to carry out the terms of the contract. The distinction between “readiness” and “willingness” is that the former refers to financial capacity and the latter to the conduct of the Plaintiffs wanting performance. Generally, readiness is backed by willingness.

23. In **N. P. THIRUGNANAM V. DR. R. JAGAN MOHAN RAO** [(1995) 5 SCC 115] at SCC para 5, this Court held: (SCC pp. 117-18)

“5. ... Section 16(c) of the Act envisages that the Plaintiffs must plead and prove that he had performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than those terms the performance of which has been prevented or waived by the Defendant. The continuous readiness and willingness on the part of the Plaintiffs is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the Plaintiffs fails to either aver or prove the same, he must fail. To adjudge whether the Plaintiffs is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the Plaintiffs prior and subsequent to the filing of the suit along with other attending circumstances. The amount of consideration which he has to pay to the Defendant must of necessity be proved to be available. Right from the

date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the Plaintiffs was ready and was always ready and willing to perform his part of the contract.”

24. In **P. D'SOUZA V. SHONDRIL NAIDU** [(2004) 6 SCC 649] this Court observed: (SCC p. 654, paras 19 and 21)

“19. It is indisputable that in a suit for specific performance of contract the Plaintiffs must establish his readiness and willingness to perform his part of contract. The question as to whether the onus was discharged by the Plaintiffs or not will depend upon the facts and circumstances of each case. No straitjacket formula can be laid down in this behalf. ...

21. ... The readiness and willingness on the part of the Plaintiffs to perform his part of contract would also depend

upon the question as to whether the Defendant did everything which was required of him to be done in terms of the agreement for sale.”

25. Section 16(c) of the Specific Relief Act, 1963 mandates “readiness and willingness” on the part of the Plaintiffs and it is a condition precedent for obtaining relief of grant of specific performance. It is also clear that in a suit for specific performance, the Plaintiffs must allege and prove a continuous “readiness and willingness” to perform the contract on his part from the date of the contract. The onus is on the Plaintiffs.

26. It has been rightly considered by this Court in **R. C. CHANDIOK V. CHUNI LAL SABHARWAL [(1970) 3 SCC 140]** that “readiness and willingness” cannot be treated as a straitjacket formula. This has to be determined from the entirety of the facts and circumstances relevant to the intention and conduct of the party concerned.

27. It is settled law that even in the absence of specific plea by the opposite party, it is the mandate of the statute that the Plaintiffs has to comply with Section 16(c) of the Specific Relief Act and when there is non-compliance with this statutory mandate, the court is not bound to grant specific

performance and is left with no other alternative but to dismiss the suit. It is also clear that readiness to perform must be established throughout the relevant points of time. “Readiness and willingness” to perform the part of the contract has to be determined/ascertained from the conduct of the parties.

(Emphasis Supplied)

45. In view of the law as laid down by the Supreme Court in the case of ***J. P. BUILDERS (SUPRA)*** the following principles emerge:

- (i) The distinction between “readiness” and “willingness” is that the former refers to financial capacity and the latter to the conduct of the Plaintiffs wanting performance.
- (ii) The Plaintiffs must plead and prove that he had performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than those terms the performance of which has been prevented or waived by the Defendant.
- (iii) Readiness and willingness on the part of the Plaintiffs is material and relevant and is required to be considered by the court while granting or refusing to grant the relief.

- (iv) To adjudge whether the Plaintiffs is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the Plaintiffs prior and subsequent to the filing of the suit along with other attending circumstances.
- (v) The amount of consideration which he has to pay to the Defendant must of necessity be proved to be available.
- (vi) The Plaintiffs must establish his readiness and willingness to perform his part of contract. If the Plaintiffs fails to either aver or prove readiness and willingness, he must fail.
- (vii) The continuous readiness and willingness on the part of the Plaintiffs is a condition precedent to grant the relief of specific performance.
- (viii) Right from the date of the execution of the contract till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract.
- (ix) The readiness and willingness on the part of the Plaintiffs to perform his part of contract would also depend upon the question as to whether the Defendant did everything which was required of him to be done in terms of the agreement for sale

- (x) The onus is on the Plaintiffs.
- (xi) Even in the absence of specific plea by the opposite party, it is the mandate of the statute that the Plaintiffs has to comply with Section 16(c) of the Specific Relief Act
- (xii) When there is non-compliance with this statutory mandate, the court is not bound to grant specific performance and is left with no other alternative but to dismiss the suit.

46. In the light of the above cited judgment of the Supreme Court, I would first like to deal with the following issues, the onus of which is on the Plaintiffs:

(iii) Whether the Plaintiffs was and is ready and willing to perform his part of the agreement to sell dated 27.6.2008, if so, to what effect? OPP

(iv) Whether time was the essence of the agreement to sell dated 27.6.2008, if so to what effect? OPP

(v) If answer to issue Nos. (iii) and (iv) are in affirmative, whether the Plaintiffs is entitled to specific performance of the agreement to sell dated 27.6.2008? OPP

47. Learned Senior Counsel for the Plaintiffs admitted that the Plaintiffs have not led any evidence on the issue of readiness and willingness. The Plaintiffs have admittedly not led any evidence on the financial capacity of the Plaintiffs. The Plaintiffs in its evidence has not placed on record any document or material to show that the Plaintiffs had the financial capacity to pay the balance sale consideration.
48. On the contrary, it is duly proved on record that the Plaintiffs sought refund of money from the Defendant. The Plaintiffs asked for refund vide Letter dated 14.11.2008 (Ex.PW1/7), letter dated 04.12.2008 (Ex.PW1/9), letter dated 15.01.2009 (Ex.PW1/10), Letter dated 04.02.2009 (Ex.PW1/12) and the Police complaint dated 03.06.2009 (Ex.PW1/14).
49. The Plaintiffs have not been able to establish that any amount was paid on 26.06.2008. The agreement to sell was executed on 27.06.2008. There is a reference to payment of Rs. 1,00,000/- in cash but it is not stated that the said amount was paid on 26.06.2008. There is no material placed on record by the Plaintiffs to

establish that any payment was made on 26.06.2008 prior to the execution of the agreement to sell dated 27.06.2008 (Ex.PW1/2).

50. Clauses 2, 11 and 14 of the agreement Ex PW 1/2 stipulate as under:

2. If the vendee fail to pay and execute the 'SALE DEED' on or before the agreed date and make full and complete payment the VENDOR shall have the absolute right to forfeit the earnest/part money paid by the VENDEE and all rights of the VENDEE shall cease to exist with regard to the property.

11. That the Vendor hereby declares and represent that the "Said Property" is HUF property and its Karta shall get the 'No Objection' for sale from the other members of the HUF."

14. That the "time is the essence" of this agreement and both the parties shall adhere to the time period.

51. The balance payment of Rs.14,79,00,000/- as per the agreement was to be paid in the following manner:

(a) Rs.1,00,00,000/- (Rupees one crore) on or before 5th July, 2008.

(b) Rs.60,00,000/- (Rupees sixty lacs) only on or before 5th August, 2008.

(c) Rs.13,19,00,000/- (Rupees thirteen crores nineteen lacs) only on or before 6th October, 2008.

52. The Plaintiffs paid the amount of Rs. 1,00,00,000/- on 05.07.2008 and the sum of Rs. 60,00,000/- on 05.08.2008. (Exhibit PW1/3 and PW1/4).

53. The Plaintiffs claims to have paid a further sum of Rs. 5,00,000/- in cash to one Mr. Sayad Saleem. The payment is disputed by the Defendant. The Plaintiffs have not filed any document or receipt evidencing the payment. No authority of the said Sayad Saleem has been placed or proved on record by the Plaintiffs to show that he was ever authorised to receive any payment on behalf of the Defendant. The Plaintiffs have failed to even plead the date on which the payment has been made. The plea of the Plaintiffs that payment of Rs. 5,00,000/- was made thus cannot be believed.

54. The plea that the members of the HUF were required to be personally present is also not believable. The agreement stipulates that the Karta shall obtain No objection certificate (NOC) from the other members of the HUF. The Plaintiffs had themselves forwarded the draft of the NOC. (Para 11 page 6 of the affidavit of PW 1 Shri Pramod Kumar Aggarwal Ex PW1/A and Ex.DW1/3). The Karta of an HUF is empowered to sell the property of the HUF. There is no necessity of the coparceners to join in the execution of the sale deed. The coparceners have executed the NOCs and have not raised any objection to the sale of the property or the execution of the sale deed by the Karta. Even in these proceedings the coparceners have not raised any objection rather have confirmed that the karta was empowered to sell the property (Ex.DW1/P2, Ex.DW1/P3, Ex.DW1/P4 & Ex.DW1/P5). The coparceners are the wife and children of the Karta, who through their advocate have even before the court confirmed the NOCs. The plea of the Plaintiffs that the coparceners were mandatorily required to be produced personally is thus not substantiated.

55. With regard to the plea of the Plaintiffs, that the title of the Defendant was under a cloud as the property was attached by the DRT is also not believable. By order dated 30.08.2007 the Recovery Officer, DRT-II, Delhi in RC No.77 of 2000 in the matter titled 'UBI Vs Logic Systems Pvt. Ltd.' had withdrawn the attachment orders and the proclamation of sale. The Plaintiffs have not been able to show that there was ever any stay of the order dated 30.08.2007 or any subsequent attachment of the property. The Agreement to sell was entered into after the withdrawal of the attachment and proclamation. Further, the Plaintiffs admittedly were not even aware of the proceedings pending before the DRT till they had themselves cancelled the agreement and sought refund. The plea of the Plaintiffs that the performance of the agreement on the part of the Plaintiffs was waived cannot be believed.

56. As per the Plaintiffs' notice dated 14.11.2008, the agreement was terminated vide the letter dated 27.10.2008. However subsequently during the cross examination, the stand has been changed to the effect

that the agreement was terminated by notice dated 15.10.2008. The Defendant has denied both the letter dated 15.10.2008 and 27.10.2008. No letter of 27.10.2008 has been placed on record by the Plaintiffs. The Defendant has deposed that the Plaintiffs had sent Diwali greeting on 27.10.2008 and not the letters (Ex.DW1/5 and Ex.DW1/6). In the cross examination the stand of the Plaintiffs changed to the effect that reference to letter dated 27.10.2008 in the correspondence was a mistake and in fact the letter was dated 15.10.2008. No postal receipt for posting of letter dated 15.10.2008 has been proved and there is no reference to the said letter in any subsequent correspondence. Even if the said letters were to be believed, the fact that emerges is that the Plaintiffs by Letter dated 14.11.2008 (Ex.PW1/7), letter dated 04.12.2008 (Ex.PW1/9), letter dated 15.01.2009 (Ex.PW1/10), Letter dated 04.02.2009 (Ex.PW1/12) and the Police complaint dated 03.06.2009 (Ex.PW1/14) sought for refund of the amount paid.

57. The Plaintiffs by the disputed letter dated 27.10.2008 claim to have terminated the agreement (Para 6 of Legal notice dated 04.12.08 Ex.PW1/9). Even otherwise seeking of refund amounts to termination of the agreement by the Plaintiffs. Once the Plaintiffs have sought refund of the amount from the Defendant, there is no question of the Plaintiffs being ready and willing to perform their part of the agreement. The Defendant on the other hand repeatedly extended time by granting further time to the Plaintiffs to comply with the agreement and to make the payment (letter dated 24.11.2008 Ex.PW1/8, letter dated 24.01.2009 Ex.PW1/11, Legal Notice dated 07.02.09 Ex.PW1/13). The repeated opportunities granted by the Defendant to the Plaintiffs shows the bonafides of the Defendant and the failure on the part of the Plaintiffs.
58. The Plaintiffs after a gap of over one year and 7 month of the alleged termination by the alleged letter dated 27.10.2008 (not on record) sought performance of the agreement by their letter dated 24.05.2010 (Ex.PW1/15).

59. Applying the principles as laid down by the Supreme Court of India in the case of **J. P. BUILDERS (SUPRA)** in my view, the Plaintiffs have failed to prove that they had performed or had always been ready and willing to perform the essential terms of the contract, which were to be performed by them. The Plaintiffs have failed to prove that the amount of consideration, which they had to pay to the Defendant, was available. The Plaintiffs have failed to prove that right from the date of the execution of the contract till date they were ready and have always been willing to perform their part of the contract. Rather the evidence is to the contrary. The Plaintiffs have themselves terminated the contract and sought refund. Even in the absence of specific plea by the Defendant, the Plaintiffs had to comply with Section 16(c) of the Specific Relief Act. Since the Plaintiffs have failed to comply with the statutory mandate of section 16(c), the Plaintiffs are not entitled to the relief of specific performance of the agreement to sell.

60. Further the Supreme Court of India in the case of *I.S. SIKANDAR VERSUS K. SUBRAMANI 2014 (1) SCALE 1* has laid down that in the absence of a prayer, seeking declaratory relief to declare the termination of Agreement of Sale as bad in law, the original suit filed by the Plaintiffs for grant of decree for specific performance in respect of the suit property on the basis of Agreement of Sale and consequential relief of decree for permanent injunction is not maintainable in law. Further it has laid down that the relief sought for by the Plaintiffs for grant of decree for specific performance of execution of sale deed in respect of the suit property in his favour on the basis of non existing Agreement of Sale is wholly unsustainable in law.
61. In the present case, since the agreement to sell has been terminated by the Plaintiffs themselves and they have not sought a declaration that the termination of the agreement to sell is bad in law, the suit for specific performance is not maintainable.
62. In my view, there is no merit in the contention of the Senior Counsel for the Plaintiffs that adverse inference

should be drawn since the Defendant failed to produce Mr. Sayad Saleem. Even the Plaintiffs did not seek production of the said witness and even otherwise the Plaintiffs had to prove their own case and no credible evidence on the said dispute has been produced. Nothing has been placed on record by the Plaintiffs that the said Sayad Saleem was authorised to receive any payment on behalf of the Defendant or that any payment has been made to him. The Plaintiffs have been corresponding with the Defendant. The alleged payment has been made after a police complaint has been lodged by the Plaintiffs. No document or receipt evidencing payment to Sayad Saleem has been produced or proved on record. It is also not believable that the Plaintiff at that juncture would make a payment of Rs. 5 lacs in cash without execution of any receipt or document.

63. The Plaintiffs have failed to discharge the onus of issues (iii) to (v) and as such, the same are held against the Plaintiffs.

64. In view of the findings recorded qua issues (iii) to (v), it is not necessary for me to deal with issues (i) and (ii) (i.e. (i) Whether the suit is liable to be rejected under Order 7 Rule 11 (a)? OPD & (ii) Whether the suit is barred under Section 14 of the Specific Relief Act, if so, to what effect? OPD).
65. Now coming to issues No. (vi) & (vii) (i.e. (vi) Whether the Plaintiffs is entitled to refund of the earnest money paid by the Plaintiffs to the Defendant? OPP and (vii) Relief).
66. As per clause 2 of the Agreement dated 27.06.2008 if the Plaintiffs failed to pay and execute the 'SALE DEED' on or before the agreed date and make full and complete payment, the Defendant had the absolute right to forfeit the earnest/part money paid by the Plaintiffs and all rights of the Plaintiffs ceased to exist with regard to the property.
67. Clause 1 of the agreement stipulates that the sale consideration has been fixed at Rs. 15,80,00,000/- and

further records that the vendor has received Rs. 1,01,00,000/- as Earnest/Part money.

68. Clause 2, which stipulates forfeiture of Earnest Money/Part payment, immediately succeeds clause 1 and as such, the entire payment mentioned in clause 1 would be covered by clause 2. The question is whether the payment stipulated in clauses thereafter are also covered in forfeiture clause 2.
69. The clause with regard to balance payment is clause 4. Nowhere in the agreement is it stipulated that payment made after the execution of the agreement would also be covered by the forfeiture clause. The Earnest Money/Part Payment of Rs. 1,01,00,000/- as stipulated in clause 1 would alone be liable to be forfeited.
70. The Supreme Court in the case of **SATISH BATRA VS. SUDHIR RAWAL JT 2012 (11) SC 70** has laid down that to justify the forfeiture of advance money being part of 'earnest money' the terms of the contract should be clear and explicit. Earnest money is paid or given at the time when the contract is entered into and, as a pledge

for its due performance by the depositor to be forfeited in case of non-performance, by the depositor. There can be converse situation also that if the seller fails to perform the contract the purchaser can also get the double the amount, if it is so stipulated. It is also the law that part payment of purchase price cannot be forfeited unless it is a guarantee for the due performance of the contract. In other words, if the payment is made only towards part payment of consideration and not intended as earnest money then the forfeiture clause will not apply.

71. In my view, the payments made by the Plaintiffs after the execution of the contract are payment made towards the balance and would not be covered by the term Earnest Monet/Part Payment as stipulated by Clause 2 of the Agreement.
72. The other Judgments relied upon by the Counsel for the Defendant in the case of V. Lakshmanan Vs. B.R. Mangalagiri & Ors. 1995 Supp (2) SCC 33, Shree Hanuman Cotton Mills &Ors. Vs. Tata Air Craft Ltd. 1969(3)SCC 522 and Videocon Properties Ltd. v. Dr.

Bhalchandra Laboratories and others (2004) 3 SCC 711 to contend that the entire amount paid till the date of termination is liable to be forfeited are not applicable in the facts of the present case.

73. The Defendant is thus entitled to forfeit the amount of Rs. 1,01,00,000/- and is liable to refund the balance amount of Rs. 1,60,00,000/-. I have already held that the Plaintiffs have not been able to prove the payment of Rs. 5,00,000/-. Since the Plaintiffs have been held liable for committing the breach of the contract, in my view ends of justice would be met if the Defendant were directed to refund the balance amount with interest only @ 8% per annum from the date of filing of the suit.

74. The issues are thus answered accordingly.

75. In view of the above, the suit of the Plaintiffs for the reliefs of Specific Performance and possession are dismissed. The suit is however decreed in favour of the Plaintiffs for the refund of Rs. 1,60,00,000/- alongwith interest @ 8% from the date of the filing of the suit till

payment. Since the suit has been decided partly in favour of the Plaintiffs and partly in favour of the Defendant, there shall be no orders as to costs. Decree Sheet be drawn up accordingly.

SANJEEV SACHDEVA, J

July 01, 2014
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