

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

% *Judgment reserved on : 07.04.2015*
Judgment delivered on : 13.04.2015

+ CS(OS) 519/2011, I.A.No.3415/2011, I.A.No.6414/2011,
I.A.No.6415/2011, I.A.No.9681/2011, I.A.No.11525/2011,
I.A.No.13594/2012, I.A.No.4785/2013, I.A.No.4786/2013
PREM KUMAR BANSAL

..... Plaintiff

Through Plaintiff with his counsel
Mr.Vinod Tyagi, Mr. Ashok
Rajagoplan, Mrs. Madhu Tyagi,
Ms. Aditi Tyagi, Mr. Sidharth
Tyagi and Mrs. Monika Tyagi,
Advts.

versus

AMBRISH GARG

..... Defendant

Through Defendant with his counsel Mr.
Rahul Gupta and Mr. Shekhar,
Advts.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1 Present suit has been filed by the plaintiff Prem Kumar Bansal seeking specific performance of para 15 of the agreement to sell dated 18.02.2005 in respect of property bearing No. E-27, Kalindi Colony, New Delhi (hereinafter referred to as the 'suit property'). The other reliefs are for mandatory and permanent injunction.

2 The case set up by the plaintiff is that on 18.02.2005, the plaintiff and the sole defendant (Ambrish Garg) had entered into an agreement to sell whereby the defendant had agreed to sell the entire ground floor of the aforementioned suit property with a right to construct the basement for which a sale deed was to be executed at a later date. In terms of this agreement, it was agreed that the parties will jointly demolish this property and reconstruction will be raised upon it in a period not exceeding five years. The basement and ground floor would fall to the share of the plaintiff and the first and second floor would fall to the share of the defendant. The garage, drive way, passage and the terrace floor would be common for both the parties. The consideration of the agreement was Rs. 27 lacs which was paid by the plaintiff to the defendant on the same date.

3 On 22.02.2005, in part performance of the aforesaid agreement, the defendant executed the sale deed in favour of the plaintiff qua the aforementioned property. It was reiterated that a sum of Rs.27 lacs had been received by the defendant from the plaintiff and the plaintiff had become the owner of the ground floor; he had a right to realize the rent from the

ground floor which at that point of time was under tenancy. The plaintiff got the suit property vacated. The property was also mutated in his name on 22.08.2007. The mutation documents specify that the plaintiff is the owner of the ground floor with 50% terrace rights.

4 Further averments in the plaint show that the period of five years as stipulated in the agreement dated 18.02.2005 expired on 17.02.2010. The defendant had not come forward to reconstruct the property in terms of the agreement inspite of repeated calls and demands made by the plaintiff. The defendant was evading this issue. Statutory notice was also sent to the defendant on 20.05.2010 but to no avail. The suit was filed seeking the relief of specific performance qua para 15 of the agreement dated 18.02.2005 followed by mandatory and permanent injunction.

5 Written statement was filed disputing the averments contained in the plaint. The primary objection was that clause 15 of the agreement to sell dated 18.02.2005 has been superseded by the registered sale deed dated 22.02.2005. The agreement to sell was no longer in existence. Clause 15 of the agreement to sell does not find mention in the sale deed dated 22.02.2005 and this subsequent document having superseded the

agreement dated 18.02.2005 making it inoperative and enforceable; present suit was thus not maintainable. No cause of action had arisen in favour of the plaintiff. The second objection was that the sale deed was dated 22.02.2005; the agreement to sell was dated 18.02.2005; the plaintiff had to express his grievance within three years from the date of the agreement which period expired in 2008. Legal notice dated 20.05.2010 would not enlarge the period of limitation. Suit filed in May 2010 was time barred. On merits, the averments in the plaint were denied. It was reiterated that the plaintiff is not entitled to seek any relief of specific performance qua the agreement dated 18.02.2005 which stood superseded by the sale deed dated 22.02.2005. It was denied that the plaintiff is entitled to get the suit property sold and to share the proceeds equally. Submission being that there was no mention in the sale deed dated of clause 15; the property already mutated in the names of the plaintiff as also the defendant. Present suit has been filed only to create pressure upon the defendant and to mentally harass him; the plaintiff being the Chartered Accountant of the defendant was misusing his position.

6 Replication was filed reiterating the averments contained in the
plaint and denying the averments in the written statement.

7 On 18.05.2012, the following issues were framed:-

- i. *Whether the plaintiff is entitled to a decree for specific performance against the defendant directing the defendant to fulfill all his obligations in terms of the Agreement to Sell dated 18.02.2005 in respect of the property bearing No. E-23, Kalindi Colony, New Delhi? OPP*
- ii. *Whether the plaintiff is entitled to a decree for mandatory injunction directing the defendant to provide the plaintiff free access to the terrace of the second floor for the maintenance of his water tanks/TV antenna and servant quarters in the suit property? OPP*
- iii. *Whether the plaintiff is entitled to a decree of permanent injunction in his favour and against the defendant restraining the defendant from transferring, alienating, encumbering or parting with the possession of the suit property or from making any additions, alterations or new constructions therein? OPP*
- iv. *Whether the present suit is not maintainable for the reasons set out in the written statement? OPD*
- v. *Whether the suit is barred by limitation as alleged by the defendant? OPD*
- vi. *Whether the present suit is barred by Sections 10, 12 and 14 of the Specific Relief Act, 1963? OPD*
- vii. *Whether the plaintiff had relinquished and abandoned his rights under clause 15 of the Agreement to Sell dated 18.02.2005? OPD*
- viii. *Whether the Agreement to Sell dated 18.02.2005 became inoperative or unenforceable and stood performed, culminated, substituted, novated and superseded by Sale Deed dated 22.05.2005? OPD*
- ix. *Whether the plaintiff has been ready and willing to perform his part of contract? OPP*
- x. *To what relief, if any, is the plaintiff entitled? OPP*

8 Parties led their evidence. The plaintiff in support of his case has entered the witness box as PW-1. The sole defendant also entered the witness box as DW-1.

9 Arguments have been heard. Record has been perused.

10 Issuewise finding read as under:-

Issues No. (i) to (iv) and (vi) to (viii)

11 These issues will be decided by a common discussion. The onus to discharge first three issues was upon the plaintiff. The onus to discharge issues No. (iv) and (vi) to (viii) was upon the defendant.

12 PW-1 has reiterated the averments made in the plaint. He has proved agreement to sell dated 18.02.2005 as Ex.P-1. It is reiterated that this is a collaboration made between the defendant the plaintiff wherein it was agreed that the ground floor of the suit property i.e. House No.E-27, Kalindi Colony, New Delhi would be sold to the plaintiff for a sum of Rs.27 lacs. On 22.02.2005, the sale deed in part performance of Ex.P-1 was executed. Para 15 (iv) of the agreement dated 18.02.2005 (Ex.P-1) had fixed an outer limit of five years for the performance i.e. to

reconstruct the property after demolition. This period expired on 17.02.2010. The defendant did not come forward to demolish and reconstruct the property. The plaintiff had kept his portion vacant to enable such demolition and reconstruction for which purpose he had also suffered losses. On 20.05.2010, legal notice was sent to the defendant asking him to comply with the directions contained in the agreement dated 18.02.2010. The original postal receipts have been proved as Ex.PW-1/3 and Ex.PW-1/4. It is reiterated that the plaintiff was ready and willing to perform his part of the agreement. It was reiterated that the terrace on the second floor was common to both the parties. It was reiterated that the cause of action arose after the stipulated period of five years expired which was on 17.02.2010 after which a legal notice dated 20.02.2005 was served upon the plaintiff. Present suit filed on 02.03.2011 is within limitation.

13 PW-1 was subjected to a lengthy cross-examination. He admitted that he was the Chartered Accountant of the defendant. He reiterated that the agreement dated 18.02.2005 was executed in three parts i.e. to transfer the title in favour of the plaintiff, to demolish the property and

thereafter to rebuild it and in case the property is not built within the outer limit of five years, the property was to be sold and the sale proceeds were to be shared equally between the plaintiff and the defendant. He admitted that clause 15 in the agreement dated 18.02.2005 was not included in the sale deed dated 22.02.2005. He denied that suggestion that this was for the reason that clause 15 stood superseded by the subsequent agreement dated 22.02.2005. He reiterated that he had called upon the defendant several times in the preceding five years to demolish and reconstruct the property but to no avail. He admitted that no written request, demand or notice was served upon the defendant during this period of five years. He admitted that all the work including sanction of building plans, engagement of contractors, architects and engineers were to be done jointly by both the parties. He had told the defendant to engage an architect but he did not do so. On 31.08.2009, he again made a request to the defendant for demolition of the suit property but excuses were made by the defendant. He denied the suggestion that he was not ready and willing to perform his part of the agreement.

14 The sole defendant had also come to the witness box and he had proved his affidavit in chief as Ex.DW-1/A. He denied the averments made in the plaint. He had deposed that the sale deed dated 22.02.2005 had superseded the agreement to sell dated 18.02.2005 and since clause 15 of the agreement dated 18.02.2005 did not find mention in the sale deed dated 22.02.2005, it was for the reason that this clause 15 stood superseded; it was no longer operational. It was averred that the parties by their conduct and agreement had abandoned this agreement to sell and that is why it was not mentioned in the sale deed dated 22.02.2005.

15 In his lengthy cross-examination, he admitted that he had taken loan of Rs.70 lacs from SIDBI which was in the year 1999 and one time settlement was arrived at in which the plaintiff had given financial assistance. The plaintiff was known to him since 1997. He was his auditor. The amount of Rs.103 lacs required by him for payment to SIDBI was arranged by the plaintiff. He admitted that the transaction between himself and the plaintiff was described as a collaboration agreement. He reiterated that the agreement dated 18.02.2005 was superseded on the execution of the sale deed dated 22.02.2005 and since

the clause for demolition and reconstruction in the sale deed was dropped, there was no need for novation. No agreement was executed between the parties thereafter. The plaintiff never came forward for the reconstruction of the property. The defendant had performed his part of the performance by executing the sale deed. On a specific query put to DW-1 as to whether the plaintiff was ready and willing to perform his obligation, the answer was that the plaintiff had never come forward to perform his part of the contract. He reiterated that whatever was not stated in the sale deed was not agreed to by the parties.

16 Learned counsel for the defendant has placed reliance upon 2001 (5) SCC 101 Her Highness Maharani Shantidevi P. Gaikwad Vs. Savjibhai Haribhai Patel & Others as also 2010 (8) SCC 101 Vinod Seth Vs. Devinder Bajaj & Anr to support his submission that a collaboration agreement is not specifically enforceable; such an agreement is neither practical and nor possible for the Court to enforce. The plaintiff in his pleadings has admitted that this is a collaboration agreement. This also finds mention in his evidence. In terms of Section 14 (1) (b) of the Specific Relief Act, 1963, such an agreement is not

enforceable. He has also placed reliance upon 129 (2006) DLT 14 (DB) Arun Khanna & Anr. Vs. Rajeev Gupta and Others as also AIR 1974 Delhi 223 M/s Dadri Cement Co. and Anr. Vs. M/s Bird & Co. Pvt. Ltd. to support his argument that the sale deed dated 22.02.2005 which was subsequent to the agreement to sell dated 18.02.2005 had superseded the agreement dated 18.02.2005 and clause 15 on which the foundation of the case of the plaintiff rests was superseded by agreement dated 22.02.2005. The proposition at law being that when a new arrangement was entered into between the parties, the original contract dated 18.02.2005 was substituted and there was novation of this contract which had then become inoperative and unenforceable. Submission being reiterated that this is clear from the fact that the sale deed dated 22.02.2005 did not specifically mention par 15 of the agreement dated 18.02.2005 in the absence of which the suit of the plaintiff must die.

17 There is no gainsaying that a suit for specific performance is a relief which is based upon the discretionary powers of the Court. The Court is not bound to grant such a relief merely because it is lawful to do so. The Court must be guided by judicial principles. The performance of the contract involving some hardship on the defendant which he did

not foresee while non-performance involving no such hardship on the plaintiff is one of the circumstances in which the Court may properly exercise discretion not to decree specific performance. The doctrine of comparative hardship has been statutorily recognized in India. The mere inadequacy of consideration or the fact that the contract is onerous to the defendant or improvident in its nature shall not constitute an unfair advantage on the defendant. This discretion should not be exercised arbitrarily.

18 As rightly pointed out by the learned counsel for the plaintiff, the circumstances of the case and the conduct of the parties is relevant.

19 Ex.P-1 dated 18.02.2005 is an admitted document. By virtue of this document, the defendant had agreed to sell the ground floor along with lawn, courtyard, back verandah, garage and drive way as also the terrace on the second floor for joint common use with all right, title and interest to the plaintiff with a further right to construct its basement for a consideration of Rs.27 lacs. The covenants attached to the parties were contained in clause 3 of the agreement dated 18.02.2005. It stipulated that there was no encumbrance over the suit property and this has been certified by the defendant. The plaintiff (purchaser) was entitled to

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realize the rent of the property which was at that point of time was under tenancy. Clause 11 stipulated that the sale deed would be executed in favour of the plaintiff within a period of one month and time was the essence of the contract. Clause 14 lays down the reconstruction plan which was that after the sale of this property i.e. ground floor by the defendant to the plaintiff, a new building would be constructed by demolition of the existing structure. The new building would comprise a basement, ground floor, garage bloc, first floor and second floor. The entire basement and ground floor including garage block up to the height ground floor would fall to the share of the plaintiff. The first and the second floors and area on the garage block beyond the height of the ground floor would fall to the share of the defendant. The front courtyard, lawn, verandah would be owned by the plaintiff. The terrace of the second floor as also the drive way would be common. The costs of construction including the wood work would be shared by both the parties. On the completion of the new building, the provisions contained in the following clause i.e. clause 15 would become null and void.

20 Clause 15 is the relevant clause. In fact the whole foundation of the case of the plaintiff is based on this clause. In terms of clause 15, the

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period of demolition and reconstruction was specified not exceeding five years w.e.f. 18.02.2005. After the reconstruction is completed, the parties would be permitted to sell their own respective shares i.e. 50% of the entire property. Clause (iv) of para 15 (heavily relied upon by the learned counsel for the plaintiff) reads herein as under

(iv) In case of re-construction of the "THE ENTIRE PROPERTY" is not feasible for any reason whatsoever, the parties hereto agree to sell, unless otherwise agreed mutually in writing. "THE ENTIRE PROPERTY" in the open market at the best price available and share the proceeds equally i.e. 50% each of the "THE ENTIRE PROPERTY". In case of any difference of opinion on the best market price of "THE ENTIRE PROPERTY" and/or any other matters related thereto the decision of Mr.Arvinnder Dhingra s/o Late Sh. A.S. Dhingra, who is also the sole arbitrator, shall be final and binding on both the parties.

21 Admittedly after four days of this agreement, the sale deed was executed. This was on 22.02.2005. By virtue of this registered sale deed, the defendant had sold the ground floor of the suit property to the plaintiff along with indivisible 50% ownership interest in the land with right to construct the basement. The consideration was Rs.27 lacs. It was reiterated that the first and the second floors would fall to the share of the defendant. The terrace rights would be common. The covenants

between the parties were contained in para 3 of the sale deed. The plaintiff was to pay all municipal taxes w.e.f. 22.02.2005. Clause 10 of this sale deed is by and large a reproduction of clause 14 of the agreement to sell dated 18.02.2005. This lays down the time plan for the reconstruction or demolition of the existing structure. It was agreed that the new building would consist of basement, ground floor, garage block, first floor and second floor. The basement and ground floor would fall to the share of the plaintiff and the first and second floors would fall to the share of the defendant. The garage block up to the height of ground floor would fall to the share of the plaintiff and the garage block beyond the height of ground floor would fall to the share of the defendant. The front courtyard, lawn and verandah would be owned by the plaintiff. The terrace of the second floor would be common. The drive way would also be common. Cost of constructions would be borne by both the parties.

22 Conspicuously clause 15 of the agreement to sell (dated 18.02.2005) was absent. There was also no mention in the sale deed that this document was in continuation of the agreement dated 18.02.2005; there was no mention of the agreement to sell dated 18.02.2005 in the sale deed dated 22.02.2005. The construction plan had been outlined in

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para 10 and details of the manner in which the property would devolve upon the plaintiff and the defendant was delineated. There was however no specification that the parties would complete the construction in a period of five years and in case this property could not be reconstructed within this period for any feasible reason, the property would be sold and the sale proceeds would be divided 50% each between the parties.

23 The document dated 22.02.2005 was also acted upon. It is the own case of the plaintiff himself that in the year 2007, the ground floor as also the common passage, drive way and 50% roof rights stand mutated in his favour. From the conduct of the parties, it appears that the parties while executing the document dated 22.02.2005 had agreed that the suit property would be demolished and reconstructed; the share of the property was detailed in clause 10. However, the conspicuous absence of sub-para (iv) of clause 15 of the agreement to sell dated 18.02.2005 by virtue of which the parties had earlier agreed that in case the construction of the property is not completed within a period of five years, the property would be sold and the sale proceeds would be jointly divided between the two parties was absent. Having not mentioned in the sale deed, this absence of clause 15 in the sale deed leads this Court

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to believe that the parties had given up this part of the agreement. This is also for the reason that although in the agreement to sell, there was an outer limit of five years for the reconstruction plan but in the sale deed although the demolition and reconstruction of the building had to be carried out but there was also no time limit within which this plan was to be effected. This was a conscious agreement arrived at between the parties. By entering into this new arrangement, the parties had substituted the original agreement to sell by the subsequent sale deed; there was novation of the original contract and thus this Court is of the view that the agreement to sell dated 18.02.2005 had become inoperative and unenforceable.

24 Section 62 of the Indian Contract Act, 1872 reads herein as under:-

62. Effect of novation, rescission, and alteration of contract.- If the parties to a contract agreed to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

25 Under Section 62 of the Indian Contract Act, if the parties to a contract agree to substitute a new contract for the original contract or rescind or alter it, the original contract need not be performed. This has

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to be gathered from the intention and conduct of the parties as also the circumstances of the case. The sale deed dated 22.02.2005 executed four days after the agreement to sell dated 18.02.2005 contained the demolition and reconstruction clause but was consciously absent on the time period within which this demolition and reconstruction was to be carried out as also the features that in case for any feasible reason, the demolition and reconstructions is not carried out, the parties will sell the property and share the proceeds half and half. This conscious decision of the parties not to include this clause in the sale deed while at the same time incorporating the clause for demolition and reconstruction leads this Court to believe that the sale deed was substituted the original agreement to sell had brought novation of the agreement to sell.

26 Even otherwise, the plaintiff and the defendant both in their respective pleadings and evidence had admitted that this was a collaboration agreement which had been entered into between the parties. PW-1 in para 2 of this examination-in-chief has admitted that Ex.P-1 (agreement to sell) was a collaboration made between himself and the defendant. This has also been reiterated in para 9 of his affidavit.

27 Section 14 (1)(d) of the said Act is relevant. It reads herein as

under:-

14. Contracts not specifically enforceable- (1) The following contracts cannot be specifically enforced, namely:-

(a)

(b)

(c)

(d) a contract the performance of which involved the performance of a continuous duty which the court cannot supervise.

28 This provision provides that a contract the performance of which involved the performance of a continuous duty which the Court cannot supervise is not specifically unenforceable. Being a collaboration agreement, there was obligations and counter obligations on both the parties. The building plans had to be sanctioned; the architect and the contractors had to be engaged. This had to be done jointly by both the parties. The agreement was ever otherwise vague and incomplete as there was no detail mentioning the manner in which the parties were to execute this agreement. The performance and obligation of the respective parties under this collaboration agreement would be impractical to enforce. Even if the Court was to decree the suit fo the plaintiff, it would not be practical or possible for the Court to ensure that

the plaintiff will perform his part of the obligations and the counter obligations will be performed by the defendant. What would happen if the construction plan is not sanctioned; who would decide upon the common name of an architect or a contractor; who would ensure that the quality of the construction, fitting and fixtures agreed to be put up in the building would be as per specification of the respective parties?

29 This would be specially keeping in view the acrimony which has developed between the parties since the filing of this litigation. Every effort for reconciliation was also made by this Court but to no avail. In this hostile environment which is now prevailing inter-se the parties, it would in fact be impossible to execute this joint venture.

30 The Supreme Court in Vinod Seth (supra) had an occasion to consider such a collaboration agreement in a suit for specific performance. In this context, the observation of the Apex Court are relevant and they read herein as under:-

12. It is doubtful whether the collaboration agreement, as alleged by the appellant, is specifically enforceable, having regard to the prohibition contained in Sections 14(1)(b) and (d) of the Specific Relief Act, 1963. The agreement propounded by the appellant is not an usual agreement for sale/transfer, where the contract is enforceable and if the defendant fails to comply with the decree for specific performance, the court can have the contract performed by appointing a

person to execute the deed of sale/transfer under order 21 Rule 32(5) of the code of Civil Procedure (“the Code”, for short).

13. The agreement alleged by the appellant is termed by him as a commercial collaboration agreement for development of a residential property of the respondents. Under the alleged agreement, the obligation of the respondents are limited, that is, to apply to DDA for conversion of the property from leasehold to freehold, to submit the construction plan to the authority concerned for sanction, and to deliver vacant possession of the suit property to the appellant for development. But the appellant-plaintiff has several obligations to perform when the property is delivered, that is, to demolish the existing building, to construct a three-storeyed building within one year in accordance with the agreed plan, deliver the first and second floors to the respondents and also pay a token cash consideration of Rs.3,71,000/-. The performance of these obligations by the appellant is dependent upon his personal qualifications and volition.

31 Thus, on this ground also, the plaintiff is not entitled to this equitable relief. The agreement besides being vague and not containing the details which have to be followed up by the respective parties, it would even otherwise involve performance of a continuous duty which the Court would not be able to supervise and in view of the provision of Section 14 (1)(d) of the said Act, this not being a usual agreement for sale, it would neither be practical and nor possible for the Court to allow specific performance of this contract.

32 Thus clause (iv) of para 15 of the agreement to sell dated CS (OS) No. 519/2011

18.02.2005 having superseded by the sale deed dated 22.02.2005, the agreement to sell had become inoperative and unenforceable. Further this agreement being a collaboration agreement, in view of Section 14 (1)(d) of the said Act, it would also be impossible to enforce such an agreement.

33 These issues are accordingly decided in favour of the defendant and against the plaintiff.

Issue No. (v)

34 The onus to discharge this issue was upon the defendant. The contention of the defendant being that the agreement is dated 18.02.2005 and limitation would expire on or before 17.02.2008 in terms of period of three years which is envisaged to enforce a suit for specific performance of an agreement to sell. The suit has been filed in March, 2011 i.e. six years from the date of the alleged agreement. Learned counsel for the defendant has placed reliance upon (2009) 5 SCC 462 *Ahmadsahab Abdul Mulla (2) (dead) by proposed LRs. Vs. Bibijan and Others* as also (2007) 15 SCC 174 *Janardhanam Prasad Vs. Ramdas* to support his submission on this count. Submission being that the plaintiff did not have to wait for the outer limit of five years to bring the present CS (OS) No. 519/2011

suit; his own case is that the defendant has refused to perform his part of the agreement and although no specific dates had been averred in the plaint yet this period being prior in time to the period of five years noted in the agreement, limitation would have commenced making the present suit filed in March, 2011 outside the period of limitation.

35 On this count, learned counsel for the plaintiff has placed reliance upon AIR 2011 SC 41 Van Vibhag Karamchari Griha Nirman Sahakari Sanstha Maryadit Vs. Ramesh Chander and Others as also 152 (2008) DLC 342 Anisuddin and Nr. Vs. Vimla Sethi and Others. Submission being that his suit is within the period of limitation.

36 Suit was admittedly filed in March, 2011. In terms of the agreement to sell dated 18.02.2005, the parties had to demolish and reconstruct the building within a period of five years. This was stipulated in para 15 (i). This period of five years admittedly expired on or before 17.02.2010. Under Article 54 of Schedule I of the Limitation Act, the date fixed for performance if based on a crystallized notion; time begins to run from the date fixed for performance or in the second alternate when the plaintiff has notice that the performance has been refused by the defendant.

37 The averments in para 5 of the plaint disclose that the period of five years stipulated in para 15 (iv) of the agreement expired on 17.02.2010 but the defendant never come forward to demolish and reconstruct the property inspite of repeated calls and demands. PW-1 had deposed that on 31.08.2009, defendant first refused to perform his part of the contract. In view of this categorical deposition and there being nothing contrary which could discredit the testimony of PW-1 on this count, this Court is of the view that the suit filed in March, 2011 is within the period of limitation.

38 The judgments relied upon by the learned counsel for the defendant are all distinct on their factual matrix.

39 This issue is decided in favour of the plaintiff and against the defendant.

Issue No. (ix)

40 The onus to discharge this issue was upon the plaintiff. In para 9, the plaintiff has made a statement that he was ready and willing to perform his part of the contract since 18.02.2005 but the defendant has not come forward to demolish and reconstruct the property. On oath PW-1 has reiterated this version. However, in his cross-examination, he

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admitted that after 18.02.2005, he had not contacted the MCD or any other competent authority to find out the demolition procedure of the property and for raising new construction. He also admitted that he did not in writing give any notice and demand to the defendant. He did not contact any contractor or architect to carry out the demolition and constructions in the property since all the activities were to be done jointly by the parties. He did not get any estimate or cost prepared to be incurred towards the demolition and reconstruction.

41 On this count, DW-1 in his cross-examination has stated that the basement could have been constructed in the suit property without demolition of the existing structure but no effort was made by PW-1 on this count.

42 The Supreme Court in (2011) 12 SCC 18 Saradamani Kandappan Vs.S. Rajalakshmi and Others had held that the Courts while exercising discretion in a suit for specific performance should bear in mind and examine with greatest scrutiny and strictness as to whether the purchaser was 'ready and willing' to perform his part of the contract.

43 Section 16 (c) (ii) of the said Act is relevant. It reads herein as under

16. Personal bars to relief.—Specific performance of a contract cannot be enforced in favour of a person—

(a) xxxxx

(b) xxxxx

(c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant. Explanation.—For the purposes of clause (c),—

(i) xxxxx;

(ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction.

44 Section 16 of the said Act postulates that a person seeking specific performance of a contract, must file a suit wherein he must aver that he is ready and willing to perform the essential terms of the contract which are to be performed by him. The specific performance of a contract cannot be enforced in favour of a person who fails to aver and prove his readiness and wiliness to perform the essential terms of the contract. Explanation (ii) of clause (c) further makes it clear that the plaintiff must aver performance or readiness and willingness to perform the contract according to its true construction. The compliance with the requirement of Section 16 (c) is mandatory and in the absence of proof of the same that the plaintiff has been ready and willing to perform his

part of the contract, the suit cannot succeed.

45 The observations of the Supreme Court in (2008) 12 SCC 145 Bal Krishan and Another Vs. Bhagwan Das (dead) By Lrs. and others in this context are relevant and reads herein as under:-

“The first requirement is that he must aver in the plaint and thereafter prove those averments made in the plaint. The plaintiff’s readiness and willingness must be in accordance with the terms of the agreement. The readiness and willingness of the plaintiff to perform the essential part of the contract would be required to be demonstrated by him from the institution of the suit till it is culminated into decree of the Court.”

46 The words ‘ready and willing’ have been implied to mean 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 plaintiff wanting performance. Generally, readiness is backed by willingness.

47 In the instant case, it has clearly come on record that it was agreed between the plaintiff and the defendant that the demolition and reconstruction of the building would be carried out by the parties jointly. PW-1 has candidly admitted that it was a joint venture. He however did not approach any contractor or architect in this intervening period or

contact any competent authority including any municipal body to find out as to how the demolition and reconstruction was to be carried out. He also did not give any notice to the defendant on this count. He actually lay in slumber. His averment is that he was waiting for the defendant to carry out the work. However since, the agreement provided that it was a joint venture and the expenses were to be borne jointly by both the parties; the non-performance and unwillingness on the part of the plaintiff become evident in view of the aforementioned categorical admissions made by him. The averment in para 9 of the plaint are contrary to the evidence. PW-1's testimony establishes that the readiness and willingness on the part of the plaintiff was missing; the suit of the plaintiff on this count also must fail.

48 This issue is decided in favour of the defendant and against the plaintiff.

Issue No. (x) (Relief)

49 There are four prayers made in the present suit. The first prayer relates to a decree of specific performance in terms of para 15 of the agreement to sell dated 18.02.2005. The other two reliefs are mandatory

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and permanent injunction. The fourth relief is a general relief. This Court in the preceding discussion has already held that the agreement to sell dated 18.02.2005 was superseded by the sale deed dated 22.02.2005 and para 15 of the agreement to sell has thus become inoperative and unenforceable. Relief to the plaintiff cannot be granted on any count.

50 Although no argument has been addressed by the learned counsel for the plaintiff on the alternate relief of compensation yet this Court is not inclined to grant any compensation in the present suit. The bar under Section 21 of the said Act would operate against the defendant.

51 Section 21 (5) of the said Act reads herein as under:-

“21. Power to award compensation in certain cases.—

(1) xxxxx.

(2) xxxxx.

(3) xxxxx.

(4) xxxxx

(5) No compensation shall be awarded under this section unless the plaintiff has claimed such compensation in his plaint: Provided that where the plaintiff has not claimed any such compensation in the plaint, the court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just, for including a claim for such compensation. Explanation.—The circumstance that the

contract has become incapable of specific performance does not preclude the court from exercising the jurisdiction conferred by this section.”

52 The plaint clearly discloses that the plaintiff has not made any claim for compensation for the breach of the agreement to sell or in substitution non-performance of the agreement. He has not asked for compensation. Section 21 (5) emphatically provides that no compensation shall be awarded unless the relief for compensation has been claimed either in the plaint or included later by amending the plaint by any application. No such application has been filed.

53 The observation of the Apex Court in (2004) 8 SCC 569 Shamsu Suhara Beevi Vs. G. Alex and Another are relevant. This was a case where the High Court while decreeing the suit had granted compensation under Section 21 of the said Act. The observations of the Apex Court in this context had noted as under:-

“In our view, the High Court has clearly erred in granting the compensation under Section 21 in addition to the relief of specific performance in the absence of prayer made to that effect either in the plaint or amending the same at any later stage of the proceedings to include the relief of compensation in addition to the relief of specific performance. Grant of such a relief in the teeth of express provisions of the statute to the contrary is not permissible. On equitable

consideration court cannot ignore or overlook the provisions of the statute. Equity must yield to law”

54 The plaintiff is not entitled to any relief. The suit of the plaintiff stands dismissed. No order as to costs.

55 All pending applications have also become infructuous. They are disposed of accordingly.

INDERMEET KAUR, J

APRIL 13, 2015

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