

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

Reserved on: 14.12.2015
Pronounced on: 22.12.2015

+ CS(OS) 48/2006

M/s. ANANT RAJ AGENCIES PVT. LTD. Plaintiff
Through: Mr. C.S. Vaidyanathan & Mr. Ravi Gupta,
Sr. Advs. with Ms. Biji Rajesh,
Ms. Anuradha Mukherjee, Mr. Abhijit
Mittal & Mr. Abhay Pratap Singh, Advs.

versus

M/s. SHRINGAR HOTELS PVT. LTD. Defendant
Through: Mr. Sandeep Sethi, Sr. Adv. with
Mr. Amit Sanduja, Adv.

CORAM:
HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J.

1. This suit seeks, *inter alia*, specific performance, directing the defendant to execute the Sale Deed in terms of the Agreement to Sell dated 16.09.2005 (Ex.PW1/3), in respect of the property admeasuring 16 Bighas and 13 Biswas, bearing Mustatil No. 1 and 8, Killa No. 17/12 (2-04), 18/2/1 (1-08), 24 (4-16), 3/3 (2-08), 4 (3-08) with boundary wall, structure of farm house, situated at Village Bijwasan, Tehsil Mehrauli, Vasant Vihar, District South West Delhi (hereinafter referred to as the “suit property”) against the receipt of the balance sum in terms of the Agreement.

2. It is the plaintiff's case that the defendant had agreed to transfer the rights and title in the suit property to the plaintiff for a consideration of Rs. 16.99 crores. Accordingly, the plaintiff paid a sum of Rs. 2.5 crores as earnest money in the following manner:

- a) Rs.1 Crore vide cheque No. 481501 dated 06.09.2005 drawn on State Bank of India, Chanderlok Building, Janpath, New Delhi - 110 001;
- b) Rs. 1.50 Crores in cash.

It is pertinent to mention that the defendant acknowledged the receipt of this money in the Agreement itself, as well as in a separate receipt (Ex.PW-1/4).

3. The plaintiff was to make a payment of the balance consideration of Rs.14.49 crores on or before 20.01.2006. The plaintiff submits that it was all along ready and willing to make the balance payment to the defendant even before the date of execution of the Agreement; that on 14.12.2005, it received a letter (Ex.P-1) which stated that although the defendant had received an amount of Rs. 1.5 crores in cash, it had not received the cheque of Rs. 1 crore and that therefore, the agreement stood cancelled; that upon checking with its bankers, the plaintiff realised that the defendant had not presented the cheque for encashment; that the defendants were illegally trying to deny the receipt of the said cheque; that the plaintiff vide letter dated 16.12.2005 (Ex.PW-1/9) replied to the letter dated 14.12.2005 and denied its contents; that the plaintiff further offered to issue a fresh cheque of the same amount in case the defendant had lost the original cheque. On

receiving no positive response from the defendant, the plaintiff preferred the present suit. The suit was preferred before the arrival of the date of performance of the Agreement by the plaintiff, i.e., 20.01.2006. The plaintiff had filed the suit on 9th January, 2006 which was first listed on 12th January, 2006 wherein it was noted that :

“IA No.351/2006

Issue notice, returnable on 06.02.2006.

This is a suit for specific performance of an agreement to sell dated 16.09.2005 whereby the suit property was allegedly agreed to be sold by the defendant to the plaintiff. A sum of Rs.2.5 crores was to be paid at the time of entering into the agreement. The said amount was paid in two parts, one is by a cheque of Rs.1 crore and Rs. 1.5 crores in cash. The learned counsel for the plaintiff has referred to the agreement in original which is filed at page 114 of the documents file and he has also filed a receipt at page No.120 of the documents file to indicate that both the cash amount as well as the cheque had been received by the defendant and insofar as the plaintiff is concerned all that was required to be done by it had been done. On the other hand, the defendant was to get a no objection certificate as indicated in clause No.3 of the agreement by 31.12.2005 which the defendant has allegedly failed and neglected to get. The learned counsel for the plaintiff further pointed out that the balance amount of Rs.14.49 crores was to be paid by the plaintiff by 20.1.2006 which it is ready and willing to do provided the defendant gets the requisite no objection certification. It is in these circumstances that the plaintiff has filed this application seeking ex parte ad interim directions restraining the defendant, its agents, representatives, employees from in any

manner selling, transferring, assigning, disposed of, alienating or parting with possession of the property admeasuring 16 bighas and 13 Biswas bearing Mustatil No.1 and 8, Killa No.17/2 (2-04), 18/2/2 (1-08), 24 (4-16), 3/3 (2-08), 4 (3-08) with boundary wall, structure of farm house, situated at Village Bijwasan, Tehsil Mehrauli, Vasant Vihar, District South West Delhi in favour of anyone except the plaintiff in terms of the agreement dated 16.09.2005.

After considering all the circumstances, I am of the opinion that the plaintiff is entitled to ex parte orders. Directions as prayed for and mentioned above are granted till the next date of hearing.”

4. The defendant's Written Statement denies the averments made by the plaintiff. It is the defendant's case that the agreement is dated 06.09.2005 and not 16.09.2005 as claimed by the plaintiff, and the plaintiff had forged and manipulated the date to read as '16' instead of '6' by adding the numeral '1'. The defendant submits that vide its letter dated 09.09.2005 (Mark DW-1/2), it had demanded the payment of Rs. 1 crore to be made by the plaintiff; that since there was no response to the said letter, it issued another letter dated 01.10.2005 (Mark DW-1/4), thereby rescinding/revoking the Agreement to Sell; that the Agreement to Sell is not a registered document as required under Section 17 of the Registration Act, 1908 and thus has no sanctity in law.

5. Mr. C.S. Vaidyanathan, the learned Senior Advocate for the plaintiff, submits that on 12th January, 2006, the plaintiff had categorically stated before the Court that they are ready and willing to perform their part

of the agreement, provided the defendant gets the requisite no objection certification and additional clearances.

6. The following issues were framed vide order dated 13th September, 2007:

- (1) *“Whether the suit has not been signed, verified and filed by a competent person? OPD*
- (2) *Whether the agreement dated 16.09.2005 is a valid and subsisting agreement between the parties? OPP*
- (2A) *Whether the agreement to sell dated 16.09.2005 is barred by the provisions of Section 17 of the Registration Act? OPD*
- (3) *Whether the plaintiff was and is ready and willing to perform its part of the obligations as per the purported agreement to sell dated 16.09.2005? OPP*
- (4) *Whether the plaintiff has paid a sum of Rs. 1 crore to the defendant by way of a cheque as alleged in the plaint? OPP*
- (5) *Whether the plaintiff is entitled to the relief of specific performance as prayed for in the plaint? OPP*
- (6) *Whether the plaintiff is entitled to the relief of permanent injunction as prayed for? OPP.*
- (7) *Any other relief.”*

7. Furthermore, on 13th August, 2008, this Court had recorded that the plaintiff was ready and willing to pay the entire sale consideration to the defendant subject to the defendant handing over the possession of the suit

property to the plaintiff, at which time the learned counsel for the defendant had sought to get instructions. However, the defendant did not agree to hand over possession of the suit property. The learned Senior Advocate for the plaintiff states that there is no defence for non performance of the agreement. The signatures on the photocopy of the cheque were disputed and were referred to handwriting experts for examination and both the experts have given their respective opinions.

Issue No. 1

8. The learned Senior Advocate for the plaintiff submits that it is only the date of the Agreement that has been disputed by the defendant; that insofar as the substance of the Agreement has been permitted, there can be no dispute about it. The plaintiff had adduced the authority letter supported by a resolution of the plaintiff-company dated 28th December, 2005 along with the minute book which shows that the Mr. Anil Sarin and Mr. Pankaj Nakra, Directors of the plaintiff-company, have signed, verified and filed the suit and the affidavit supporting it. Therefore, this issue is returned in favour of the plaintiff.

Issue No. 2

9. The substance of the agreement to sell is not in dispute. The evidence of the plaintiff is reproduced as under:

8. I say that the receipt of the above mentioned consideration was admitted and acknowledged by the Defendant in clause 2 of the said Agreement to Sell. The said amount of Rs.1,00,00,000/- (Rupees One Crore only) vide cheque No.481501 dated 6.9.2005 drawn on State Bank of India,

*Chanderlok Building, Janpath, New Delhi – 110001; and Rs.1,50,00,000/- (Rupees One Crore and Fifty Lacs only) in cash were duly handed over by me to Shri S. Satinder Singh Chhabra and S. Satinder Singh Chhabra accepted the same on behalf of the defendant at the time of execution of the agreement to sell in the presence of the witnesses namely Shri Dilvir Singh and Shri Raghubir Singh Chhabra. Shri S Satinder Singh Chhabra further signed the photocopy of the cheque as acknowledgement of the receipt of the above cheque of Rs.1,00,00,000/- (Rupees One Crore only) in my presence at the time of execution of the said agreement to sell. The copy of the cheque bearing No.481501 dated 6.9.2005 drawn on the State Bank of India, Chanderlok Building, Janpath, New Delhi 110001 for a sum of Rs.1,00,00,000/- with the signature of Shri S. Satinder Singh Chhabra thereby showing the receipt of the said cheque by the defendant is exhibited as **Exhibit – PW 1/4**.*

15.I say that the Defendant had received the amount of Rs.2.5 crores, out of which a sum of Rs.1.5 crores has already been received by the Defendant in cash, and a cheque of the sum of Rs. 1 crore was handed over to the defendant, which cheque was not presented by the defendant for encashment in violation of the said agreement dated 16.9.2005. The Plaintiff had made out a cheque for a sum of Rs.1,00,00,000/- in the name of the Defendant, and had handed over the said cheque to the authorized signatory, and Director of the defendant company Shri Satinder Singh Chhibber, which fact was duly acknowledged by the said Shri Satinder Singh Chhibber of the Defendant in the body of the Agreement to sell dated 16.9.2005 as also on the photocopy of the said Cheque by way of inscription of his signatures in token of having received the same from the Plaintiff. Despite the fact that the Defendant received the said cheque for Rs.1,00,00,000/- from the

Plaintiff, the defendant with a view to rescind from the said agreement to sell and to avoid their responsibility and liability under the said agreement to sell, deliberately, wilfully and fraudulently, did not present the cheque in clearing for encashment, AND clandestinely took the stand that the Plaintiff had not delivered the said cheque to them at the first instant. While taking this stand the Defendant was blissfully unaware that their representative Director Shri Satinder Singh Chhabra had affixed his signatures on the photocopy of the said cheque and had delivered the same to the Plaintiff in token of his having received the said cheque in original on behalf of the Defendant on the date of the agreement. The Defendant Company has itself failed, and deliberately avoided to encash the said cheque and therefore, no fault in this regard can be attributed to the Plaintiff. I further say and submit that the plaintiff is and has always been ready and willing to make the payment of the balance amount of consideration subject to the terms of the said agreement and there was no question of its failing to make the payment of the initial amount of Rs.1,00,00,000/- which amount it had already paid by cheque and had made the necessary arrangement to ensure that it would be encashed on presentation.

Though the actual date of payment of the balance amount was 20.1.2006, the Plaintiff is even now ready and willing to make the balance payment immediately against registration of the concerned Sale Deed. I say that since the Defendant has illegally, fraudulently and wilfully claimed cancellation of the said Agreement to Sell in an attempt to deprive the Plaintiff of its legitimate right to purchase the said property for which it had already made advance payment of substantial sum of money, the Plaintiff had no other option but to force specific

performance by way of instituting this suit before this Hon'ble Court.

18.I say that the plaintiff had got the entire funds available with it all through out from the date of execution of the agreement to sell dated 16.09.2005 till date and is in a position to make the entire payment even prior to the agreed date and is ready and willing to incur all expenses for the stamp duty required for execution of the Sale Deed and also for its registration. There is absolutely no impediment at the end of the Plaintiff in fulfilling its obligations. The Plaintiff has all along been and is even today ready and willing to perform its part of the obligation under the agreement to sell dated 16.9.2005.

I say that the Plaintiff has always been ready and willing and is still ready and willing to perform its obligations and, in fact, the Plaintiff has written on two occasions by means of registered A.D. letters to the defendant expressing its willingness to make the balance payment and to get the sale deed executed and it is the Defendant alone who unnecessarily opted for delaying the performance of the contract because greed had prevailed upon the Defendant due to the rise in prices subsequent to the signing of the agreement to sell dated 16.9.2005."

10. It is submitted that no cross-examination was carried out against the said deposition. Accordingly, the statement of Mr. Pankaj Nakra remains unrebutted and this issue is decided in favour of the plaintiff.

Issue No. 2A

11. Mr. C.S. Vaidyanathan submits that since the plaintiff was in possession of Agreement to Sell which transferred the rights and interest in the suit property, it was not required to be registered and that registration would only be required when possession was actually transferred to the plaintiff. He relies upon the dicta of the Supreme Court in the case of ***S.Kaladevi vs. V.R. Somasundaram & Ors. (2010) 5 SCC 401***, paras 11, 12, 13 and 16 read as under:

"11. Section 49 gives teeth to Section 17 by providing effect of non-registration of documents required to be registered. Section 49 reads thus:

"S.49.- Effect of non-registration of documents required to be registered.- No document required by section 17 or by any provision of the Transfer of Property Act, 1882 (4 of 1882), to be registered shall-

(a) affect any immovable property comprised therein, or

(b) confer any power to adopt, or

(c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered:

Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (3 of 1877), or as evidence of any collateral transaction not required to be effected by registered instrument."

12. The main provision in Section 49 provides that any document which is required to be registered, if not registered, shall not affect any immovable property comprised therein nor such document shall be received as evidence of any transaction affecting such property. Proviso, however, would show that an unregistered document affecting immovable property and required by 1908 Act or the Transfer of Property Act, 1882 to be registered may be received as an evidence to the contract in a suit for specific performance or as evidence of any collateral transaction not required to be effected by registered instrument. By virtue of proviso, therefore, an unregistered sale deed of an immovable property of the value of Rs. 100/- and more could be admitted in evidence as evidence of a contract in a suit for specific performance of the contract. Such an unregistered sale deed can also be admitted in evidence as an evidence of any collateral transaction not required to be effected by registered document. When an unregistered sale deed is tendered in evidence, not as evidence of a completed sale, but as proof of an oral agreement of sale, the deed can be received in evidence making an endorsement that it is received only as evidence of an oral agreement of sale under the proviso to Section 49 of 1908 Act.

13. Recently in the case of K.B. Saha and Sons Private Limited v. Development Consultant Limited, this Hon'ble Supreme Court noticed the following statement of Mulla in his Indian Registration Act, 7th Edition, at page 189:-

".....The High Courts of Calcutta, Bombay, Allahabad, Madras, Patna, Lahore, Assam, Nagpur, Pepsu, Rajasthan, Orissa, Rangoon and Jammu & Kashmir; the former Chief Court of Oudh; the Judicial Commissioner's Court at Peshawar, Ajmer and Himachal Pradesh and the Supreme Court have held that a document which requires registration under Section 17 and which is not admissible for want of registration to prove a gift or mortgage or sale or lease is nevertheless admissible to prove the character of the possession of the person who holds under it....."

This Court then culled out the following principles:-

"1. A document required to be registered, if unregistered is not admissible into evidence under Section 49 of the Registration Act.

2. Such unregistered document can however be used as an evidence of collateral purpose as provided in the proviso to Section 49 of the Registration Act.

3. A collateral transaction must be independent of, or divisible from, the transaction to effect which the law required registration.

4. A collateral transaction must be a transaction not itself required to be effected by a registered document, that is, a transaction creating, etc. any right, title or interest in immovable property of the value of one hundred rupees and upwards.

5. If a document is inadmissible in evidence for want of registration, none of its terms can be admitted in evidence and that to use a document for the purpose of proving an important clause would not be using it as a collateral purpose."

To the aforesaid principles, one more principle may be added, namely, that a document required to be registered, if unregistered, can be admitted in evidence as evidence of a contract in a suit for specific performance.

16. The issue before us is only with regard to the admissibility of unregistered sale deed dated 27.2.2006 in evidence and, therefore, it is neither appropriate nor necessary for us to consider the contention raised by learned counsel for the respondents about the maintainability of suit as framed by the plaintiff or the circumstances in which the sale deed was executed. If any issue in that regard has been struck by the trial court, obviously, such issue would be decided in accordance with

law. Suffice, however, to say that looking to the nature of the suit, which happens to be a suit for specific performance, the trial court was not justified in refusing to admit the unregistered sale deed dated 27.2.2006 tendered by the plaintiff in evidence.”

12. Accordingly, this issue is returned in favour of the plaintiff.

Issue No. 3

13. In this regard, right from the day on which the suit was filed, the plaintiff had averred his readiness and willingness to perform the contract and even during the course of the proceedings, this aspect of readiness and willingness, as reiterated by way of deposition of PW-1, was never in question. In fact, on 13th August, 2008, this Court had categorically recorded that the plaintiff was ready and willing to pay the entire sale consideration to the defendant subject to the latter handing over the possession of the suit property to the plaintiff. Admittedly, the issue too is settled in favour of the plaintiff.

Issue No. 4

14. The Agreement to Sell as well as the receipt/acknowledgment dated 16.9.2005, which has been admitted by the parties, records that an amount of Rs. 1.50 crore was paid in cash and Rs. 1 crore by way of a cheque bearing No. 481501. Clearly, the amount is admitted to have been received by the defendant. In the circumstances, to say that the monies were not paid to or received by the defendant is without basis. This issue too is returned in favour of the plaintiff.

15. This Court is of the opinion that once the Agreement has specifically recorded the receipt of the payment, there can be no requirement of any further acknowledgement.

Issue No. 5, 6 and 7

16. The letters dated 09.09.2005 and 01.10.2005, which are stated to have been sent by the defendant, seeking to call upon the plaintiff to pay the disputed amount of Rs. 1 Crore of earnest money and restrain/rescind the contract were sent to the Jhandewalan Extension address of the plaintiff. At the outset, these letters have been denied by the plaintiff. The address of the plaintiff recorded in the affidavit in support of the Plaint pertains to Connaught Circus, Connaught Place, whereas the defendants had their office in N-13, NDSC, Part-I. The first time the plaintiff corresponded with the defendant at the Jhandewalan Extension address was by a letter dated 24th November, 2005. There was no occasion for the defendant to address any letter at the said address prior thereto. Furthermore, it is noted that the aforesaid letters dated 09.09.2005 and 01.10.2005 have been inscribed on a plain sheet of the paper bearing no recognition whatsoever with the defendant's organisation, whereas the postal receipt, i.e., UPC is on the letter head of the defendant, showing its address at 1, Curzon Road.

17. The plaintiff relies upon the judgment of this Court in ***State Bank of India vs. H.C. Takyar (HUF & Ors.)*** dated 13th February in RFA No.6/2004:-

“5. I completely agree with the aforesaid findings and the conclusions of the Trial Court. At the outset, I must refer to

the decision of the Supreme Court in the case of Caltex (India) Ltd. vs. Bhagwan Devi Marodia, AIR 1969 SC 405, and the ratio of which judgment of Supreme Court lays down that there cannot be extension of a lease, unless, an option to extend the lease is exercised specifically within a period as provided for, inasmuch as, time is the essence of the contract in such cases and the tenant in equity cannot overcome the consequences of neglect on his part and which could have been avoided by reasonable diligence. I completely agree with the findings and conclusions of the Trial Court as to the lack of genuineness of the letter dated 6.4.1998 inasmuch as it is inconceivable that a huge bank like State Bank of India, for sending of such an important letter, would use the basis of UPC, when hundreds and hundreds of letters everyday on behalf of the bank are sent by the registered post AD. A letter as important as the letter dated 6.4.1998 exercising an option to renew a lease, therefore, cannot be said to be one which would have been sent by UPC. More importantly no internal correspondence or other documents of the bank have been filed to show the decision to extend the lease and accordingly send the necessary communication to the landlords. Obviously, the concerned officers of the bank did not do their homework and thereafter, having realized their mistake, this letter dated 6.4.1998 was thereafter contrived. I may also add that the argument as raised on behalf of learned counsel for the appellant-bank that there is a mention of this letter in the reply notice dated 29.9.1998 is an argument not only of desperation but on the contrary it proves the fact that the appellant-bank was trying to play fast and loose. This I say so because even in the reply notice dated 29.9.1998 issued by the appellant-bank to the landlords/respondents, there is no specific date mentioned of the letter by which the option was exercised. Obviously, by this date when the reply to notice

was sent, the UPC would not have been procured by the concerned officer of the appellant-bank who must have been in hot waters, therefore, this date was not mentioned in the reply dated 29.9.1998. It is only when the UPC must have been procured, that a specific date was mentioned in a subsequent notice sent by the appellant-bank dated 19.12.1998. Such practices on behalf of a responsible bank such as the appellant-bank needs to be very strongly deprecated.”

18. In ***Shiv Kumar v. Hansita***, 171 (2010) DLT 346, this Court held as under:

“8. It is a settled legal position that the abandonment of service cannot be readily inferred. Abandonment of service is a question of intention which can be gathered from the totality of the facts and circumstances of each case. There has to be a clear evidence on record to show that despite grant of reasonable opportunity to the employee by the management, he failed to join back his duties without any sufficient reasons and therefore in the absence of any such cogent and convincing evidence, voluntarily abandonment on the part of the employee cannot be readily inferred. As per the respondent management, the petitioner remained absent from his duties w.e.f. 19.06.1992 without permission or leave and was called upon to join back his duties vide letter dated 22.06.1992 which was proved on record by the management as Ex. RW 1/I with certificate of posting proved on record as RW 1/II. On the failure of the petitioner to join back his duties another letter dated 30.06.1992 was sent by the respondent yet again through UPC thereby giving one last opportunity to the petitioner to return back to his work latest by 7.7.1992, failing which the necessary presumption would be drawn against the petitioner that he had abandoned his services. Yet

another letter dated 8.7.1992 was sent by the respondent management to the petitioner by UPC and this time an amount of Rs.33,500/- was also sought to be returned by him, which amount the respondent management found outstanding against him. None of these letters were sent by the respondent management through registered AD and on the other hand the petitioner sent a demand notice dated 21.7.1992 through registered AD which was replied by the respondent management vide their reply dated 24.08.1992 wherein the respondent management also gave reference of the above said letters sent to the petitioner by UPC. The petitioner in his rejoinder dated 3.9.1992 clarified to the respondent management that such letters were never received by him. The petitioner also sought to castigate the respondent in adopting dubious means in obtaining some certificates of posting from the post office to prove service of the said letters. No doubt that under Section 27 of the General Clauses Act service through UPC does give rise to a presumption but certainly service through UPC is a frail piece of evidence. The respondent management has failed to prove on record any dispatch register or any other documentary evidence to show that the said letters were dispatched by the respondent management in their normal and ordinary course of business. The petitioner who had put in 16 years of long service is not expected to be thrown out of employment just based on three UPC letters purported to have been sent to him requiring him to join back his duties. Had the petitioner been not willing to join back his duties, he would not have sent demand notices just within a period of one-and-a-half month of his termination and immediately thereafter having raised an Industrial Dispute.”

19. The defendant has failed to show that the said letters were recorded on the despatch register or were sent in accordance with its normal practice

of posting letters. The defendant has not been able to prove that it generally corresponded through UPC and not through registered AD post or speed post. Incidentally, it was only while sending the letter dated 14.12.2005 that the defendant used registered post AD. The said letter was posted at both the addresses i.e. Connaught Circus, Connaught Place and Jhandewalan Extension address. In the circumstances, this Court does not find the letters dated 09.09.2005 and 01.10.2005 to be credible.

20. On behalf of the defendant, Mr. Sandeep Sethi, the learned Senior Advocate, submits that in a suit for specific performance of an agreement, the plaintiff has to show that he was, at all times, including during the pendency of the suit, ready and willing to perform his part of the contract; that 'readiness' means availability of requisite funds in the account; that the plaintiff had not pleaded so. He refers to Section 16(c) of the Specific Relief Act, 1963, which reads as under:

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

(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.”

21. Mr. Sethi further refers to Clause 2 of the Agreement whereby the plaintiff was required to pay a total consideration of Rs.16.99 crore, out of which Rs.1.50 crore was to be paid in cash and an amount of Rs. 1 crore was to be paid by cheque, which was never handed over to the defendant. He then refers to para 10 of the plaint, which reads as under:

“10. That since the defendant is now after the receipt of Rs.2.5 crores, out of which a sum of Rs.1.5 crores has already been received by the defendant in cash, and a cheque of the sum of Rs.1 crore was handed over to the defendant, which cheque is not being illegally presented by the defendant for encashment, therefore, no fault in this regard can be made attributable to the plaintiff. It is further submitted that since the plaintiff was ready and willing to make the payment; though the actual date of payment of the balance amount is 20.1.2006, but the plaintiff is even ready and willing to make the balance payment immediately against registration of the Sale Deed and since the defendant has illegal alleged the cancellation for which it has no right to do so, therefore, the necessity has arisen to file the present suit.”

22. According to him, the non-receipt of the cheque had been duly intimated to the plaintiff vide letter dated 14.12.2005. He submits that despite this, the plaintiff failed to deliver the requisite cheque to the defendant; that hence, in the absence of the cheque, there could be no question of presenting anything for encashment; that insofar as the part performance of the contract is concerned, it shows that the plaintiff never had the funds to pay either Rs. 1 crore or the remaining Rs. 14.99 crore.

23. The learned Senior Advocate for the defendant submits that the plaintiff failed to lead any evidence to show that it had the money at the relevant time. He further refers to the evidence of one Deputy General Manager of the plaintiff-Company, Mr. S.P. Berry, who deposed as under:

“3. That by following the settled practice, the plaintiff never checked whether the cheque No.481501 dated 6.9.2005 drawn on State Bank of India, Chanderlok Building, Janpath, New Delhi issued to the defendant was encashed by the defendant

or not from 16.9.2005 till the date the letter dated 14.12.2005 was received by the plaintiff, inasmuch as the reconciliation of the bank statements pertaining to the deposit as well as encashment of the above cheque was to be done in the month of January, 2006.”

24. He submits that it is unlikely that a company would not bother whether a cheque amount of Rs. 1 crore had been encashed or not, since it is not a small amount. In his opinion, the contention that the Chief Accounts Officer checked the bank statements only twice a year is implausible. Effectively, it would mean that the Accounts Department of the plaintiff-company had no work to do and they would tally the statement in respect of the balance in the account only twice a year. He contends that neither the Director nor the Chief Finance Officer of the plaintiff-company brought forward any bank records to show that they had the requisite amount of Rs. 1 crore in their bank account, let alone an amount of Rs.14.99 crore to be paid subsequently; that in the absence of the plaintiff producing any evidence in this regard, the Court shall, as a logical corollary, draw an adverse inference against the plaintiff. He relies upon the dicta of the Supreme Court in ***N.P. Thirugnanam (Dead) By LRs v. Dr. R. Jagan Mohan Rao & Ors.* (1995) 5 SCC 115** for the proposition that it is for the plaintiff to show that at all times, he was both ready and willing to perform his part of the obligation. In particular he relies upon para 5 of the above judgement, which reads as under:

“5. It is settled law that remedy for specific performance is an equitable remedy and is in the discretion of the court, which discretion requires to be exercised according to settled principles of law and not arbitrarily as adumbrated under

Section 20 of the Specific Relief Act 1963 (for short, 'the Act'). Under Section 20, the court is not bound to grant the relief just because there was valid agreement of sale. Section 16(c) of the Act envisages that plaintiff 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 plaintiff 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 plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit alongwith 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 plaintiff was ready and was always ready and willing to perform his part of contract.”

25. Mr. Sethi submits that the plaintiff has failed to meet the legal requirement and the obligation to establish the fact that he had the wherewithal to pay the amounts to the defendant. He also relies upon the dicta of the Supreme Court in ***His Holiness Acharya Swami Ganesh***

Dassji v. Sita Ram Thapar (1996) 4 SCC 526 wherein it was observed as under:

“2. There is a distinction between readiness to perform the contract and willingness to perform the contract. By readiness may be meant the capacity of the plaintiff to perform the contract which includes his financial position to pay the purchase price. For contract, the conduct has to be properly scrutinised. There is no documentary proof that the plaintiff had ever funds to pay the balance of consideration. Assuming that he had the funds, he has to prove his willingness to perform his part of the contract. According to the terms of the agreement, the plaintiff was to supply the draft sale deed to the defendant within 7 days of the execution of the agreement, i.e., by 27.2.1975. The draft sale deed was not returned after being duly approved by the petitioner. The factum of readiness and willingness to perform plaintiff's part of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of the contract. The facts of this case would amply demonstrate that the petitioner/plaintiff was no ready no capacity to perform his part of the contract as he had no financial capacity to pay the consideration in cash as contracted and intended to bit for the time which disentitles him as time is the essence of the contract.”

26. He then refers to the Agreement to Sell and the receipt to show that numeral ‘1’ (one) has been added to ‘6th September’ and therefore, it has been tampered with and is not the document on which the parties were *ad idem*. He contends that the date of the cheque too has been written over from 6th September, 2005 to 16th September, 2005 while there is no corresponding endorsement by the parties in this regard as has been done

for Clause 8 of the Agreement. He submits that ordinarily when a cheque is issued, the issuer always ensures that the said cheque amount is available in his account and no prudent business organisation would block an amount of Rs. 1 crore for an agreement yet to be entered into. Referring to the receipt, he submits that there are two places where there is obvious over-writing, which have been duly countersigned by the parties but the addition of the numeral '1' (one), which is before the typed date of 6th September, 2005, does not bear the signature of the defendant; that the typed date refers to 6th September and not 16th September, therefore, the Agreement to Sell is not the document in which the agreement was entered into between the parties and it cannot be admitted in evidence; that the Agreement to Sell (Ex.PW1/3) is not the original document but one set-up by the plaintiff. The learned Senior Advocate submits that there is no explanation why the cheque issued was dated 6th September, 2005 when the Agreement was of 16th September, 2005. Even the affidavit of PW-1 gives no plausible explanation in this regard. He draws the attention of the Court to the resolution dated 28th December, 2005 to point out that that resolution was passed only with respect to the filing of the present suit but no such resolution has been placed on record to agree upon the purchase of the suit property.

27. Mr. Sethi relies upon the letters dated 09.09.2005 (Mark DW1/2) and dated 01.10.2005 (Mark DW1/4), which purportedly intimated the plaintiff that the aforesaid cheque dated 06.09.2005 for an amount of Rs. 1 crore had not yet been received by the defendant. However, de hors the said communication and without acknowledging the same, the plaintiff

wrote to the defendant by the letter of 24th November, 2005 (Ex. PW1/6) that it had paid Rs.2.5 crore on 16.09.2005 and balance of Rs.14.49 crore was to be paid on or before 24.01.2006 provided the requisite NOC and other documents be obtained from the relevant authorities. However, Mr. Sethi submits that no such clearance was required from the Income Tax authorities. Incidentally, this letter was written two and a half months after the Agreement. By letter of 14.12.2005 (Ex. P-1), the defendant had intimated to the plaintiff that the latter was in serious default of the agreement insofar as it had not given the required cheque of Rs. 1 crore which was supposed to have been given to the defendant at the time of signing of the Agreement. Accordingly, the agreement stood cancelled/revoked since the plaintiff had defaulted in making the payment as agreed. Upon a query being raised by the Court, Mr. Sethi states there was no clause in the Agreement which stipulated that non payment of such amount would automatically render the Agreement cancelled.

28. By a letter of 16.12.2005 (Ex. PW1/9), the plaintiff had communicated to the defendant that in case they have lost their previous cheque which was given to them of Rs. 1 crore, a fresh cheque could be issued in lieu thereof, which could be immediately encashed. However, Mr. Sethi submits that this itself proves that the plaintiff had never paid the said amount nor did it intend to pay this amount, perhaps because it did not have the requisite funds in its bank account; that had it intention to pay the amount, it would have easily made a demand draft and attached it with the said letter to establish their *bona fides*.

29. Mr. Sethi further submits that the Agreement dated 16.09.2005 is not the one on which the parties agree, therefore, it is unenforceable in law. He submits that the document on which the defendant had agreed was one dated 06.09.2005, which was purportedly interpreted by the plaintiff as 16.09.2005, for reasons best known to the plaintiff, and the same cannot be enforced by way of the present proceedings.

30. Mr. Sethi, the learned Senior Advocate, directs the Court's attention to an extract of the letter dated 16.12.2005, which reads as under:

“Please note the agreement dated 6th September, 2005, though written as 16th September, 2005 is still valid, subsisting and binding upon the parties and you have no right to escape from the obligations contained in the said agreement.”

He submits that the letter is entirely silent about the date of the Agreement having been wrongly mentioned as 16.09.2005. There is no explanation in the document of 16.12.2005 as to how the document of 06.09.2005 was written as of 16.09.2005 and therefore, this plea is an afterthought.

31. He further submits that issue No.2 does not lie since possession of the property had never been handed over; that for the purposes of determination of issue No.3, the plaintiff was required to show all along that it had the wherewithal, i.e., it was ready and also willing to pay the entire consideration amount starting from 6th or 16th September, 2005 whichever date is taken, till the tenure which was mentioned in the Agreement. He argues that the plaintiff is required to demonstrate its ability to pay the requisite amount by showing the bank statement or any

other financial instrument that established that the money is readily available to fulfil the sale consideration immediately and throughout the pendency of these proceedings, no such documents have been adduced.

32. In view of the aforesaid, Mr. Sethi insists that issue No. 5 should be returned in the negative. He relies upon Section 20 of the Specific Relief Act, 1963, which reads as follows:

“20. Discretion as to decreeing specific performance.—

(1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.

(2) The following are cases in which the court may properly exercise discretion not to decree specific performance:—

(a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or

(b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff; or

(c) where the defendant entered into the contract under circumstances which though not rendering the contract

voidable, makes it inequitable to enforce specific performance. Explanation 1.—Mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of clause (a) or hardship within the meaning of clause (b). Explanation 2.— The question whether the performance of a contract would involve hardship on the defendant within the meaning of clause (b) shall, except in cases where the hardship has resulted from any act of the plaintiff subsequent to the contract, be determined with reference to the circumstances existing at the time of the contract.

(3) The court may properly exercise discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

(4) The court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the party.”

33. He submits that in exercising the discretionary powers for decreeing specific performance of the Agreement, this Court would need to determine whether the conduct of the plaintiff is unblemished, which according to him is not the case owing to the conflicting position taken by the plaintiff apropos the date of the document being 6th or 16th September, 2005, in addition to the fact that no payment of Rs. 1 crore had been made

till date. He submits that it is settled law that where the purchaser has paid less than 10% of the consideration amount, the Courts would not be inclined to grant specific performance. He relies upon the judgment in the case of **Jinesh Kumar Jain v. Iris Paintal & Ors. ILR (2012) V DELHI 678** wherein it was held by this Court that specific performance of a contract may be decreed only where the plaintiff has done substantial acts in furtherance of the contract; that where the acts are not substantial, i.e., merely 5% or 10% of the consideration has been paid, the plaintiff is not entitled to the discretionary relief of specific performance.

34. Mr. Sethi submits that contrary reports have been filed by two hand writing experts, who examined the signatures appended to the cheque dated 6th September, 2005. Therefore, Mr. Sethi contends that the evidence sought to be adduced by the plaintiff that the signature of the Director of the plaintiff-company was genuine ought not to be relied upon in view of the Supreme Court's dicta that such opinions of hand writing experts have to be proven by other corroborative evidence. He relies upon the judgment in **Bhagwan Kaur v. Maharaj Krishna Sharma (1973) 4 SCC 46**. He submits that no such corroborative evidence has been adduced in this regard. The handwriting experts could not determine as to who had received the cheque and signed on the photocopy of the cheque nor could the experts determine as to who had added the numeral '1' to the agreement dated 6th September, 2005.

35. Mr. Sethi further once again avers that the fundamental requirement in a suit seeking specific performance of a contract under the Specific Relief Act, 1963 is that plaintiff should be ready and willing to perform his

part of the contract at all times throughout the pendency of the suit and must so prove otherwise it will be fatal to his cause. For his purpose, the plaintiff would be required to show (i) availability of funds at all times; (ii) financial wherewithal at all times and (iii) willingness to perform his part of the contract. He relies upon Section 16 of the Act. In support of his contention, he relies upon the following judgements:

(i) ***Smt.Laxmi Devi Vs. Shri Mahavir Singh, RFA 556 of 2011***, decided on 01.05.2012 wherein it was held as under:

“9. I am of the opinion that the respondent/plaintiff is also not entitled to specific performance because pleading and proving of readiness and willingness is a sine qua non in a suit for specific performance. Readiness and willingness is by means of showing capacity to pay balance sale consideration. Of course, depending on facts of each case, it may not be necessary for amounts being immediately available to be shown, however, the financial capacity of the buyer (i.e. the respondent/plaintiff) has necessarily to be established on record and in the absence of financial capacity to pay the balance consideration it cannot be said that respondent/plaintiff was always ready and willing to perform his part of the contract. In the present case, there is no dispute that the respondent/plaintiff filed absolutely no document whatsoever of his financial capacity to pay the balance sale consideration. No bank account was filed, no income tax returns were filed and no details of any properties or other means by which the respondent/plaintiff had to pay the balance sale consideration, were filed. I therefore, hold that the respondent/plaintiff was not ready and willing to perform his part of the contract being not in a position to pay the balance sale consideration and was thus not entitled to the relief of specific performance.

10. Learned counsel for the respondent/plaintiff sought to place reliance upon the judgment of the Supreme Court in the

case of Azhar Sultana Vs. B. Rajamani and Ors. 2009 (17) SCC 27 to argue that there is no requirement to file proof with respect to the balance consideration. Attention of this Court is drawn to para 31 of the judgment which reads as under:-

31. We are, however, in agreement with Mr. Lalit that for the aforementioned purpose it was not necessary that the entire amount of consideration should be kept ready and the plaintiff must file proof in respect thereof. It may also be correct to contend that only because the plaintiff who is a Muslim lady, did not examine herself and got examined on her behalf, her husband, the same by itself would not lead to a conclusion that she was not ready and willing to perform her part of contract. If the plaintiff has failed to establish that she had all along been ready and willing to perform her part of contract, in our opinion, it would not be necessary to enter into the question as to whether Defendants 5 and 6 were bona fide subsequent purchasers for value without notice or not.

In my opinion, the argument raised on behalf of the respondent/plaintiff by reference to para 31 of the judgment in the case of Azhar Sultana (supra) is misconceived inasmuch as the observations in para 31 have to be read in the light of the arguments which were urged on behalf of the buyer in the said case and which are contained in para 19(2) of the said judgment and which reads as under:-

*19(1) xxxx xxxx xxxx (19)2 For the purpose of establishing the plea of readiness and willingness on the part of the vendee, it was not necessary to prove that she had enough liquid cash in her hand inasmuch as for the said purpose it would be sufficient to show that she could arrange such an amount for payment of consideration at the appropriate stage. xxxx xxxx
xxxx xxxx*

(underlining is added)

Therefore, it is clear that what was argued on behalf of the buyer in that case was that there may not be required liquid cash and it was enough if the buyer could arrange for the payment of the balance sale consideration i.e. the buyer did have a financial capacity. It is in this context that the observations were made by the Supreme Court in para 31 that the entire amount of consideration need not be kept ready i.e. the entire amount of balance consideration need not be kept ready in cash/liquid form and it is enough if the proposed buyer has a capacity to arrange for payment of the balance consideration.

I therefore reject the argument that it is the law that a buyer in a suit for specific performance need not prove his financial capacity to pay the balance sale consideration.

11. Besides the fact that respondent/plaintiff was guilty of breach of contract and was not ready and willing to perform his part of the contract lacking in financial capacity to pay the balance consideration, in my opinion, the facts of the present case also disentitle the respondent/plaintiff to the discretionary relief of specific performance. There are two reasons for declining the discretionary relief of specific performance. The first reason is that the Supreme Court has now on repeated occasions held that unless substantial consideration is paid out of the total amount of consideration, the Courts would lean against granting the specific performance inasmuch as by the loss of time, the balance sale consideration which is granted at a much later date, is not sufficient to enable the proposed seller to buy an equivalent property which could have been bought from the balance sale consideration if the same was paid on the due date. In the present case, out of the total sale consideration of ` 5,60,000/- , only a sum of ` 1 lakh has been paid i.e. the sale consideration which is paid is only around 17% or so. In my opinion, by mere payment of 17% of the sale consideration, it cannot be said that the respondent/plaintiff has made out a

case for grant of discretionary relief of specific performance. The second reason for the respondent/plaintiff not being entitled to specific performance is that in the only legal notice dated 18.12.2007, Ex.PW1/2 issued on behalf of the respondent/plaintiff, there was no claim seeking specific performance, but the respondent/plaintiff only sought return of double the amount of earnest money alongwith interest. Obviously, the respondent/plaintiff himself, and who is a property dealer, only wanted double the amount of earnest money paid and not specific performance of the contract. As already stated, the respondent/plaintiff had failed to prove his financial capacity and when we take this fact with averment of only seeking return of money and not specific performance, in my opinion, the respondent/plaintiff cannot be held entitled to specific performance. This aspect also has to be considered with the issue of readiness and willingness inasmuch as readiness and willingness has to be continuous for seeking specific performance and once the respondent/plaintiff by issuing his legal notice dated 18.12.2007, Ex.PW1/2 only asked for payment of double the amount of earnest money and not specific performance, it cannot be said that respondent/plaintiff at all times was and always continued to be ready and willing for specific performance.”

(ii) **J.P. Builders and Anr. Vs. A. Ramadas Rao and Anr.**
(2011) 1 SCC 429 wherein it was held as under:

“Readiness and Willingness

20. Section 16 of the Specific Relief Act, 1963 provides for personal bars to relief. This provision states that:

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

a) who would not be entitled to recover compensation for its breach; or

b) who has become incapable of performing, or violates any essential term of, the contract that on his part remains to be performed, or acts in fraud of the contract, or wilfully acts at variance with, or in subversion of, the relation intended to be established by the contract; or

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) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court;

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

21. Among the three Sub-sections, we are more concerned about Sub-section(c). "Readiness and willingness" is enshrined in Clause (c) which was not present in the old Act of 1877. However, it was later inserted with the recommendations of the 9th Law Commission's report. This clause provides that the person seeking specific performance must prove that he has performed or has been ready and willing to perform the essential terms of the contract which are to be performed by him.

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 plaintiff wanting performance. Generally, readiness is backed by willingness.

23.. In N.P. Thirugnanam v. Dr. R. Jagan Mohan Rao and Ors. : (1995) 5 SCC 115 at para 5, this Court held:

...Section [16\(c\)](#) of the Act envisages that plaintiff 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 plaintiff 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 plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit alongwith 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 plaintiff was always ready and willing to perform his part of the contract.

24. In P. D'Souza v. Shondrilo Naidu : (2004) 6 SCC 649 paras 19 and 21, this Court observed:

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

21.....The readiness and willingness on the part of the plaintiff 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 plaintiff 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 plaintiff 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 plaintiff.

26.It has been rightly considered by this Court in R.C. Chandiok and Anr. v. Chuni Lal Sabharwal and Ors. : (1970) 3 SCC 140 that "readiness and willingness" cannot be treated as a straight jacket 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 plaintiff 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."

(iii) **Jinesh Kumar Jain vs. Iris Paintal & Ors. ILR (2012) V Delhi 678** to contend that merely stating that the plaintiff is ready and willing to perform his part of the contract is not sufficient, and the same is to be proved by clear cut evidence such as Income Tax Returns, statement of bank accounts and details of his assets in any form to show his financial capacity to pay the balance consideration.

36. He further submits that the Courts have held that till such time substantial amount of the sale consideration or contract amount have been paid, the Courts would restrain themselves from granting specific performance. In the present case, it is stated that the plaintiff has paid only an amount of Rs.1.00 crore. In the aforesaid judgment, the Court had relied upon the Supreme Court dicta in ***Saradamani Kandappan vs. Mrs. S. Rajalakshmi, 2011 (12) SCC 18*** which held as under:

"15. The Supreme Court in the recent judgment of Saradamani Kandappan vs. Mrs. S. Rajalakshmi, 2011 (12) SCC 18 has had an occasion to consider the aspect of payment of a nominal advance price by the plaintiff and its effect on the discretion of the Court in granting the discretionary relief of specific performance. Though in the facts of the case before the Supreme Court, it was the buyer who was found guilty of breach of contract, however, in my opinion, the observations of the Supreme Court in the said case are relevant not only because I have found in this case the

plaintiff/ buyer guilty of breach of contract, but also because even assuming the plaintiff/buyer is not guilty of breach of contract, yet, Section 20 sub-Section 3 of the Specific Relief Act, 1963 as reproduced above clearly requires substantial acts on behalf of the plaintiff/proposed purchaser i.e. payment of substantial consideration. Paras 37 and 43 of the judgment in the case of Saradamani Kandappan (supra) are relevant and they read as under:

37. The reality arising from this economic change cannot continue to be ignored in deciding cases relating to specific performance. The steep increase in prices is a circumstance which makes it inequitable to grant the relief of specific performance where the purchaser does not take steps to complete the sale within the agreed period, and the vendor has not been responsible for any delay or non-performance. A purchaser can no longer take shelter under the principle that time is not of essence in performance of contracts relating to immovable property, to cover his delays, laches, breaches and "non-readiness". The precedents from an era, when high inflation was unknown, holding that time is not of the essence of the contract in regard to immovable properties, may no longer apply, not because the principle laid down therein is unsound or erroneous, but the circumstances that existed when the said principle was evolved, no longer exist. In these days of galloping increases in prices of immovable properties, to hold that a vendor who took an earnest money of say about 10% of the sale price and agreed for three months or four months as the period for performance, did not intend that time should be the essence, will be a cruel joke on him, and will result in injustice. Adding to the misery is the delay in disposal of cases relating to specific

performance, as suits and appeals therefrom routinely take two to three decades to attain finality. As a result, an owner agreeing to sell a property for rupees one lakh and received rupees ten thousand as advance may be required to execute a sale deed a quarter century later by receiving the remaining rupees ninety thousand, when the property value has risen to a crore of rupees.

xxx xxx xxx

43. Till the issue is considered in an appropriate case, we can only reiterate what has been suggested in K.S. Vidyanandam.

(i) The courts, while exercising discretion in suits for specific performance, should bear in mind that when the parties prescribe a time/period, for taking certain steps or for completion of the transaction, that must have some significance and therefore time/period prescribed cannot be ignored.

(ii) The courts will apply greater scrutiny and strictness when considering whether the purchaser was "ready and willing" to perform his part of the contract.

(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.

(emphasis is mine)”

37. Finally, he relies upon the case of ***Umabai and Another v. Nilkanth Dhondiba Chavan (dead) by Lrs. & Another*** (2005) 6 SCC 243 which held as under:

“30. It is now well settled that the conduct of the parties, with a view to arrive at a finding as to whether the plaintiff-respondents were all along and still are ready and willing to perform their part of contract as it mandatorily required under Section 16 (c) of the Specific Relief Act must be determined having regard to the entire attending circumstances. A bare averment in the plaint or a statement made in the examination-in-chief would not suffice. The conduct of the plaintiff-respondents must be judged having regard to the entirety of the pleadings as also the evidences brought on records.”

31. In terms of Forms 47 and 48 appended to Appendix A of the Code of Civil Procedure, the plaintiff must plead that “he has been and still is ready and willing specifically to perform the agreement on his part of which the defendant has had notice” or “the plaintiff is still ready and willing to pay the purchase money of the said property to the defendant”. The offer of the plaintiff in the instant case is a conditional one and, thus, does not fulfil the requirements of law.

32. In Bank of India⁷, it was held (AIR p. 96, para 21):

“It is true that plaintiff 1 stated that he was buying for himself, that he had not sufficient ready money to meet the price and that no definite arrangements had been made for finding it at the time of repudiation. But in order to prove himself ready and willing a purchaser has not necessarily to produce the

money or to vouch a concluded scheme for financing the transaction. The question is one of fact and in the present case the appellate court had ample material on which to found the view it reached.”

38. Mr. Vaidyanathan, the learned Senior Advocate for the plaintiff, submits that facts of the present case are clearly distinguishable from the ones relied upon by Mr. Sethi since the plaintiff had approached this Court even before the expiry of the contract period and had pleaded his readiness and willingness to perform his part of the contract; that in the aforesaid case of ***His Holiness Acharya Swami Ganesh Dassji***, the petitioner had delayed execution of the Sale Deed on one pretext or the other. The letter written by the respondent too indicates that the respondent was willing to execute the sale deed. He submits that in the present case, the position is just reversed and the factum of readiness and willingness of the parties has to be adjudged keeping in mind the circumstances of the case.

39. Mr. Sethi then relies upon the ratio of ***N.P. Thirugnanam (Dead) by LRs vs. Dr. R. Jagan Mohan Rao and Others*** (1995) 5 SCC 115 which held:

“5. It is settled law that remedy for specific performance is an equitable remedy and is in the discretion of the court, which discretion requires to be exercised according to settled principles of law and not arbitrarily as adumbrated under Section [20](#) of the Specific Relief Act 1963 (for short, 'the Act'). Under Section [20](#), the court is not bound to grant the relief just because there was valid agreement of sale. Section [16\(c\)](#) of the Act envisages that plaintiff 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 plaintiff 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 plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit alongwith 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 plaintiff was always ready and willing to perform his part of the contract.”

40. Mr. Vaidyanathan, the learned Senior Advocate for the plaintiff, submits that this case too is distinguishable from the facts of the present case because the plaintiff had failed to discharge his part of the contract as he had neither deposited the amount of Rs.2.00 lacs as directed by the Court nor had given the Bank Guarantee and was instead dabbling in real

estate business. Furthermore, it is the plaintiff's case that it is ready and willing to perform its part of the contract and the same has neither been questioned in the Written Statement nor was the said averment in doubt during the cross-examination of the plaintiff.

41. On the issue of evidential value of the handwriting experts, Mr. Sethi relies upon ***Smt. Bhagwan Kaur Vs. Shri Maharaj Krishan Sharma and Ors.*** (1973) 4 SCC 46 which held that:

“The evidence of a handwriting expert, unlike that of a fingerprint expert, is generally of a frail character and its fallibilities have been quite often noticed. The courts should, therefore, be wary to give too much weight to the evidence of handwriting expert. In Sri Sri Kishore Chandra Singh Deo v. Babu Ganesh Prasad Bhagat and Ors. : [1954]1SCR919, this Court observed that conclusions based upon mere comparison of handwriting must at best be indecisive and yield to the positive evidence in the case..”

42. Mr. Vaidyanathan distinguishes the present case from each case relied upon by Mr. Sethi. He submits that the plaintiff at various times had offered to pay up the monies due under the Agreement; that there was no power given to either party to willingly revoke the contract. Therefore, the defendant's act of cancelling and revoking the Agreement by way of the letters dated 09.09.2005, 01.10.2005 and 14.12.2005 is meaningless and *non est*. Furthermore, the defendant had no right to forfeit the said monies. He contends that the plaintiff is not in default; that on the first day when the plaintiff moved the Court, the Agreement was actually in existence; that the entire amount had to be paid on or before 20.01.2006 subject to the

defendant providing the NOC, IT clearance under Section 281 of the Income Tax Act, 1961 and all other permissions required from the concerned authorities to complete the sale of the said property in favour of the plaintiff on or before 31.12.2005 and simultaneous upon the payment being made, the defendant was to execute and register the Sale Deed in favour of the plaintiff and hand over the physical, vacant and peaceful possession of the suit property to the plaintiff along with all the original title deeds. The case was first listed on 12.01.2006 when the Court had passed the following order:

“I.A. No. 351/2006

*Issue notice, returnable on
06.02.2006.*

This is a suit for specific performance of an agreement to sell dated 16.09.2005 whereby the suit property was allegedly agreed to be sold by the defendant to the plaintiff. A sum of Rs.2.5 crores was to be paid at the time of entering into the agreement. The said amount was paid in two parts, one is by a cheque of Rs.1 crore and Rs.1.5 crores in cash. The learned counsel for the plaintiff has referred to the agreement in original which is filed at page 114 of the documents file and he has also filed a receipt at page No. 120 of the documents file to indicate that both the cash amount as well as the cheque had been received by the defendant and insofar as the plaintiff is concerned all that was required to be done by it had been done. On the other hand, the defendant was to get a no objection certificate as indicated in clause No. 3 of the agreement by 31.12.2005 which the defendant has allegedly failed and neglected to get. The learned counsel for the plaintiff further pointed out that the balance amount of Rs.14.49 crores was to be paid by

the plaintiff by 20.01.2006 which it is ready and willing to do provided the defendant gets the requisite no objection certification. It is in these circumstances that the plaintiff has filed this application seeking ex parte ad interim directions restraining the defendant, its agents, representatives, employees from in any manner selling, transferring, assigning, disposing of, alienating or parting with possession of the property admeasuring 16 Bighas and 13 Biswas bearing Mustakil No. 1 and 8, Killa No. 17/2 (2-04), 18/2/1 (1-08), 24 (4-16), 3/3 (2-08), 4 (3-08) with boundary wall, structure of farm house, situated at Village Bijwasan, Tehsil Mehrauli, Vasant Vihar, District South West Delhi in favour of anyone except the plaintiff in terms of the agreement dated 16.09.2005.

After considering all the circumstances, I am of the opinion that the plaintiff is entitled to ex parte orders. Directions as prayed for and mentioned above are granted till the next date of hearing.”

43. It was reiterated on behalf of the plaintiff that it was willing to pay the entire sale consideration to the defendant subject to the defendant handing over the possession of the property to the plaintiff. The defendant sought time in this regard but on 12.03.2009, the learned counsel for the defendant stated that she had no instructions with regard to the offer given by the learned Senior Advocate for the plaintiff on 13.08.2008. In the circumstances, the *ex parte* order of 12.01.2006 was made absolute.

44. Furthermore, in reply to the defendant's letter of 14.12.2005, the plaintiff vide its letter of 16.12.2005 had stated that they were always ready and willing to pay the requisite amount even before 31.12.2005. In particular, this letter stated:

“We are shocked to learn that you are only admitting the receipt of Rs.1,50,00,000/- (Rupees One crore only) which was given to you by cheque. The said denial is totally malafide and dishonest. You had issued a Receipt-cum-Acknowledgment of not only the cheque, but for cash as well which was a collective receipt and therefore the denial of non receipt of cheque is absolutely wrong and hence denied. Even while issuing you the cheque, we got your signatures on the photocopy of the said cheque which we are still holding with us, therefore, you cannot deny that you have not received the said cheque. If you have not encashed the said cheque till today that clearly reveals your dishonest intention, but no fault can be attributed to us as so far as we are concerned, we have already paid you the amount in the mode in which it was agreed.

We, therefore, request you to present the cheque of Rs.1 crore to the bank for immediate encashment and do not withhold the same with yourself. However, if you have mis-placed the said cheque, please let us know, we will issue another cheque in lieu thereof but you cannot accuse us that we have not given you the said cheque of Rs.1 crore.

Please note we have always been ready and willing and are still ready and willing to complete the deal and money is completely lying ready with us and we are in a position to get the sale completed even before 31st December, 2005 and are only awaiting an NOC from ADM(LA) and income tax clearance under Section 281.

We deny your allegation that you have ever written to us any letter much less the letter dated 9th September, 2005 and 1st October, 2005 wherein you have mentioned to us that a sum of Rs.1 crore had not been paid to you. The said allegation is absolutely false, wrong and hence denied as factually and actually we have never received any such letters. We further deny your allegation that you have any right to terminate the said agreement. In this regard it is stated that since we have fulfilled all of our obligations as contained in the said agreement, therefore you have no right whatsoever to terminate the said agreement. Even otherwise,

there is no authority vested in law with you to terminate the said agreement. You cannot be allowed to take advantages of your own wrongs.

Please note the agreement dated 6th September, 2005, though written as 16th September, 2005 is still valid, subsisting and binding upon the parties and you have no right to escape from the obligations contained in the said agreement.

We therefore, request you to kindly withdraw the letter dated 14th December, 2005 and please confirm to us as to when you are sending us the NOC from the ADM(LA) and income tax clearance under Section 281 and fix the date for execution of sale deed so as to enable us to take the stamp papers and prepare pay orders in your favour well within time.”

45. In his statement in affidavit, PW-1 had averred to the availability of funds. This was never questioned and nothing has been placed on record by the defendant to show that the plaintiff did not have monies available with it. The learned Senior Advocate submits that the plaintiff had come to Court before the due date of the payment and had offered to pay the entire amount even in default of the requisite clearance in terms of NOC and Income Tax returns to be furnished by the defendant. This, according to him, shows the plaintiff's *bona fides*. Furthermore, the plaintiff had stated in the letter of 16.12.2005 that in case the cheque of Rs. 1 crore issued by it had for some reason been misplaced by the defendant, it would be ready to issue a fresh cheque of the same amount to the defendant.

46. Finally, Mr. Vaidyanathan argues that the defendant never offered to return the amount of Rs. 1.50 crore, which was appropriated by it without having any such power to do so. He refers to para 10 of the Written

Statement in which there is no specific mention of the readiness and willingness on part of the defendant to refund the amount.

He then relies upon the following judgments:

(i) ***The Bank of India Ltd. & Ors. Vs. Jamsetji A. H. Chinoy and M/s. Chinoy and Co., : AIR 1950 PC 90***

(ii) ***83 (2000) DLT 615***

(iii) ***2004 (8) SCC 689 para 13***

(iv) ***AIR (2014) SC 1582***

47. This Court is of the view that from the records of the case what emerges is that the plaintiff had all along set up a case that it was ready and willing to perform his part of the contract. It had paid Rs. 2.50 crore at the time of signing of the Agreement. In his affidavit, PW-1 Mr. Pankaj Nakra has deposed to the ready availability of funds to pay off the defendant. This availability of funds was neither questioned by the defendants nor was nothing brought on record to show that the plaintiffs did not have ready monies available with them. The plaintiffs have come to the Court before the expiry of date of payment and have offered to pay the entire amount even in default of the requisite clearance in terms of NOC from the administration and Income Tax Returns to be filed by the defendants.

48. In this suit for Specific Performance, what emerges is that as per the Agreement dated 16.09.2005, an amount of Rs. 14.99 crores was to be paid by 20.01.2006. By way of Ex. PW1/6, i.e., the letter of 24th November, 2005, an offer was made by the plaintiff to make the remaining payment

subject to the defendant furnishing an NOC from the concerned authorities. This letter was sent by Registered A.D. post to the defendant at its 1, Curzon Road, New Delhi – 110 001 address. Reply to the same was sent vide letter dated 14.12.2005 from the defendant's address at A.R.A. Centre, E-2, Jhandewala Extension, New Delhi – 110 055 to which the plaintiff replied vide letter dated 16.12.2005 (Ex. PW1/9) stating that it was surprised to know that the defendant was admitting receipt of only Rs. 1.50 crore by cash, especially since the defendant's had issued a receipt-cum-acknowledgement of not only the cash, but also for the cheque of Rs. 1 crore. This was a collective receipt and therefore, the denial of receipt of the cheque is not accepted by the Court. The plaintiff requested the defendant to present the cheque of Rs. 1 crore to the bank for immediate encashment and furthermore, offered to issue a fresh cheque in the event that the original cheque had been misplaced. The plaintiff has also denied receipt of any letters dated 09.09.2005 and 01.10.2005 wherein the defendant had mentioned that the sum of Rs. 1 crore had not been paid to it.

49. The Court would note that the said two letters were apparently written by the defendant from its Jhandewalan Extension address and that too through a UPC and not under a registered AD or Speed Post. It is rather odd that a company which was supposed to receive a cheque for an amount of Rs. 1 crore would take the matter so lightly as to intimate the purchaser/plaintiff that it had not received the cheque. Therefore, the defendant's contention that the cheque was never received by it would be an untenable argument. The Court would seriously doubt and hold

unreliable the endeavour of the defendant to address a letter on a plain paper and not on the company's letter head to the plaintiff at its Jhandewala Extension, New Delhi – 110 055 address. The defendants had no intimation or reason to send the said letter at the Jhandewala Extension address instead of the Connaught Place address while its office is based at 1, Curzon Road, New Delhi – 110 001. In a metropolis like Delhi, property prices have shot through the sky over the years and continue to rise spontaneously. It is possible that the defendant started to have second thoughts about the sale consideration and did not present the cheque for encashment.

50. The signatures of Mr. Satinder Singh Chhabra, Director of the defendant M/s. Shringar Hotels (P) Ltd. as an authorised signatory on each page of the Agreement to Sell dated 16.09.2005 are the admitted signatures of Mr. Satinder Singh Chhabra and have been marked as A1 to A9. The disputed signatures of Mr. Satinder Singh Chhabra have been marked Q-1 on the Revenue Stamp, Q-2 on the Receipt/acknowledgement adjoining the Revenue Stamp, Q-3 and Q-4 on the body cuttings of the writing of the receipt/acknowledgment of money. The disputed signature of Mr. Satinder Singh is marked Q-5 on the photocopy of the cheque as a token of having received the cheque No.481501 dated 6.9.2005 drawn on SBI Bank and one disputed signature of Mr. Satinder Singh on the Resolution of the company dated 2.9.2005 is marked as Q-6. According to the handwriting experts, the superficial differences in the disputed signatures Q-3, Q-5 and Q-6 can be attributed to the natural variations that are bound to occur in one's signature at different points of time.

51. From the aforesaid, it is clearly the signature of the Director of the defendant-company Mr. Satinder Singh Chhabra, as has been established by the hand writing expert, which has been appended on both the Agreement to Sell dated 16.09.2005 as well as on the receipt/acknowledgement of the payment of Rs.2.5 crore, i.e., Rs. 1 crore through cheque and Rs. 1.50 crore through cash. The Court is of the view that the defendant's defence is moonshine and an endeavour to resile from the contract.

52. The Court would note that the plaintiff has proved its *bona fides* to the defendant through the letters dated 24.11.2005 and 16.12.2005, which stated that it was ready and willing to pay the remaining monies, provided the defendant carries out its part of the contract. The plaintiff has duly published a public notice in the Hindustan Times, New Delhi edition on 21.12.2005 (Mark-A) intimating the public at large that it had agreed to purchase the suit property from the defendants for which substantial amounts have already been paid against written receipts and the balance amount is liable to be paid on or before 20.01.2006.

53. Furthermore, the plaintiff filed this suit on 09.01.2006 for which the Court fee stamp papers for a sum of Rs.16,99,00,000/- were obtained on 07.01.2006. The suit was listed for the first time before the Court on 12.01.2006, on which date, an *ex parte* injunction order was granted in terms of the prayers in I.A. 351/2006. The Court was satisfied that the plaintiffs had made out a *prima facie* case for the grant of an *ex parte* injunction. That position has not been altered till date. From the aforesaid, it is evident that the plaintiff has established its *bona fides* and

had, even on that day, shown to the Court that it was ready and willing to perform its part of the Agreement.

54. The suit was filed 11 days prior to the expiry of the period for payment of the balance sale consideration to the defendant. The Court did not deem it necessary to direct the plaintiff to deposit the balance amount in the Court. The availability of funds was never questioned at an earlier stage. The plaintiff approached the Court even before the date of execution of the Agreement. Therefore the plaintiff is not in default. Indeed, even two years after filing of the suit, an offer was made for payment of the entire amount on 13.08.2008.

55. In view of the above, the Court is of the view that the plaintiffs have made out a case for grant of reliefs sought in the plaint. Accordingly, the suit is decreed in terms of the prayers (i) and (ii).

56. The plaintiff is also awarded a cost of Rs.2.00 lacs.

57. Decree sheet be drawn up accordingly.

58. The suit is disposed off in the above terms.

NAJMI WAZIRI, J

DECEMBER 22, 2015/acm/b'nesh/ak/nrk