

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

+ **RSA No.132/2004**

% **14th July, 2016**

DR. D.C. KHOSLA (DECEASED) THROUGH LRS. Appellants
Through: Mr. Ashish Dholakia, Advocate with Mr.
Gautam Bajaj, Advocate.

versus

VINOD KUMAR JAIN Respondent
Through: Ms. Monisha Handa, Advocate with Mr.
Mohit D. Ram, Advocate.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not? **Yes**

VALMIKI J. MEHTA, J (ORAL)

1. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) is filed by the appellants/plaintiff against the impugned Judgment of the First Appellate Court dated 10.2.2004 whereby the first appellate court instead of granting specific performance of the Agreement to Sell dated 30.11.1978 only granted compensation to the appellants/plaintiff as stated in the agreement to sell. The original plaintiff has expired *pendente lite* and is now represented by his legal heirs. Appellants are aggrieved because in spite of holding that there did exist an agreement to sell, there was breach of contract on behalf of the defendant/respondent, time was held not to be of the essence of the contract,

and, the plaintiff had proved his readiness and willingness, yet, the first appellate court instead of granting specific performance only granted compensation. It is argued by the appellants that the conclusion of the first appellate court is based upon the judgment of the Supreme Court in the case of ***Dadarao and Another Vs. Ramrao and Others (1999) 8 SCC 416*** but the ratio of this judgment in the case of ***Dadarao (supra)*** has been held to be *per incuriam* as per the subsequent judgment in the case of ***P. D'Souza Vs. Shondrilo Naidu (2004) 6 SCC 649*** wherein it is observed that the judgment in the case of ***Dadarao (supra)*** had failed to take note of the earlier binding ratio of the judgment of the Supreme Court in the case of ***M.L. Devender Singh and Others Vs. Syed Khaja (1973) 2 SCC 515***.

2. Learned counsel for the appellants/plaintiff accordingly argues that the substantial question of law framed by this Court on 31.10.2013 that whether the judgment of the first appellate court below suffers from perversity should be answered in favour of the appellants/plaintiff inasmuch as the first appellate court has not followed the correct law and wrongly relied upon a judgment which has been held to be *per incuriam*.

3. The facts of the case are that admittedly the parties entered into an Agreement to Sell dated 30.11.1978 whereby the defendant/respondent agreed to sell to the erstwhile plaintiff shop no.865 and garage no.870 situated at Kedar Building, Subzi Mandi, Delhi. The agreed sale consideration as per the Agreement to Sell dated 30.11.1978 was Rs.23,500/- of which the respondent/defendant has

received a sum of Rs.5,000/- leaving the balance payment due of Rs.18,500/-. This balance payment under the agreement to sell was payable at the time of execution and registration of the sale deed. Though as per the agreement to sell the transaction was to be completed by March, 1979, the defendant himself applied for permission to sell the property to the authority under the Urban Land (Ceiling and Regulation) Act, 1976 on 1.7.1980 and which was granted on 30.7.1980 and therefore time was not of the essence of the contract. The case of the appellants/plaintiff further was that the plaintiff repeatedly contacted the defendant to execute the sale deed but the respondent/defendant failed to do so. Ultimately the plaintiff purchased the stamp papers of Rs.1,880/- and got the Sale Deed typed on 7.1.1981 and again requested the respondent/defendant to execute the sale deed. The respondent/defendant failed to do so. The plaintiff was ready with an amount of Rs.18,500/- with him but since the respondent/defendant failed to come forward and execute the sale deed, thereupon, plaintiff deposited this amount in his account no.7215, State Bank of India, Clock Tower, Subzi Mandi, Delhi on 17/18.1.1981. Plaintiff thereafter sent a telegram Ex.PW1/3 vide postal receipt Ex.PW1/2 and thereafter wrote a Letter on 23.3.1981 Ex.PW1/4 and since no effective response was received from the respondent/defendant hence the Legal Notice dated 5.11.1981, Ex.PW1/5 was sent and thereafter the present suit for specific performance was filed on 24.3.1982.

4. The respondent/defendant appeared in the suit and raised various contentions including as to the time of performance being of the essence of the contract and since the transactions did not go through by March, 1979 hence the transaction failed. Various other defences were raised but as they are not urged before this Court on behalf of the respondent/defendant, which are not relevant except the issue which is argued on behalf of the respondent/defendant before this Court that plaintiff was not ready and willing to perform his part of the contract as plaintiff has failed to show his financial capacity to go ahead with the sale transactions.

5. Since all these issues are decided in favour of the appellants/plaintiff by the first appellate court in its judgment in a very exhaustive and thorough manner, therefore I propose to reproduce these paras 12 and 13 of the Judgment of the first appellate court dated 10.2.2004 dealing with these aspects, and these paras are reproduced as under:-

“12. A perusal of the pleadings of the parties goes to show that it is undisputed case of the parties that father of the appellant was initially a tenant in respect of shop no.865 situated at Kedar Building, Subzi Mandi, Delhi and subsequently the rent was enhanced to Rs.18.75 per month. An agreement to sell dated 30.11.1978 was executed between the parties for the shop including garage for a sum of Rs.23,500/- out of which a sum of Rs.5,000/- was paid as earnest money to the defendant. The balance amount was to be paid before the Sub-Registrar at the time of execution of the sale deed. Permission from competent authority was also obtained. However, according to the plaintiff, since the defendant did not come forward to executed the sale deed in spite of repeated requests and legal notice, he was constrained to file the present suit for specific performance of the contract. The suit was resisted by the defendant on number of counts that the agreement is void in as much as both the parties were under a mistake that the property can be sold without permission from a competent authority the suit premises is a HUF property and there was no legal necessity for the defendant to sell the same, minors had interest in the suit

premises and the defendant alone could not sell their share without permission from the court. The agreement is for inadequate consideration, the agreement is a fraud on public exchequer as the value of the property was deliberately shown less to avoid tax and time was the essence of the contract. All the pleas were considered by Id. trial court and it was rightly held by Id. trial court that as regards the plea of the respondent that there was a mistake regarding obtaining permission from the competent authority, the same was immaterial in as much as admittedly, the permission was obtained from the competent authority and as such, the agreement cannot be said to be void for the mistake of the parties that permission from competent authority was not required. Even regarding the plea that the suit premises was HUF property and there was no legal necessity for the defendant to sell the same, it was rightly observed that in the agreement Ex.DW1/P3, it was specifically stated that the defendant is the owner of the suit premises as Karta of HUF and in the agreement itself, it was mentioned that the defendant is selling the property as he was in need of money for making arrangement for marriage of his daughter namely Kumari Neeta Jain. In view of Section 91 and 92 of the Indian Evidence Act, the defendant was precluded from leading any evidence contrary to the averments made in the agreement. As regards his plea that minors were also having interest in the property, it was rightly observed that defendant nowhere disclosed either the names of the minors or how much minors were having interest in the property. Under the circumstances, the bald and bare averments made by the defendant was not sufficient to show that minors were having any interest in the suit property. It is also settled principle of law that inadequacy of consideration ipso facto does not make the agreement void. As regards the plea that time was essence of the contract, it is clear that in cases of contract for sale of immovable property, time is not the essence of the contract unless expressly stipulated at the time of contract. A perusal of the agreement Ex.DW1/P3 goes to show that there was no stipulation that time was essence of the contract. Moreover, the conduct of the parties also goes to show that it was never contemplated that time was essence of the contract in as much as although the agreement was dated 30.11.1978, the permission from competent authority was sought by the defendant on 01.7.1980 and the same was granted on 30.7.1980, meaning thereby the firstly the time was not the essence of the contract. Moreover, by his own conduct in seeking and obtaining permission from the competent authority, defendant made it clear that time was not the essence of the contract. The other plea of the defendant was that the agreement was a fraud on public exchequer in as much as the value of the property was deliberately shown less in the agreement to avoid tax and as such, the same is void and cannot be enforced. In this regard, it may be mentioned that defendant had stated that value of the property was Rs.70,000/-. However, he has deposed that value was shown as Rs.23,500/- to avoid tax on the advise of Sh. D.D. Gupta that in case more value is written in the agreement, then tax has to be paid. The contention of Id. counsel for the plaintiff that such a question was never put to the plaintiff and the cross-examination was recorded in his absence by some lady employee of the Id. Civil Judge who was busy hearing arguments in some case is absolutely devoid of merits. It may be mentioned that there is nothing on record to show that any such application was moved by the appellant at the earliest opportunity

available before the Id. trial court. It is for the first time that in the grounds of appeal, such a plea has been taken which is not fortified by the judicial record. However, plaintiff had examined PW2 Sh. Rambir Singh, LDC from the office of Sub-Registrar, who proved the sale deed Ex.PW2/1 and PW2/2. A perusal of these sale deeds goes to show that by virtue of sale deed Ex.PW2/1, the respondent sold another portion of the property for a sum of Rs.23,000/- on 5.10.1981 and vide sale deed Ex.PW2/2, the respondent sold shop and garage in the same building on 29.8.1980 for a sum of Rs.17,000/- only. As such, these sale deeds which were executed much later than the agreement in question and that too for a lesser amount which was agreed upon by the parties in the instant case, to my mind, it cannot be said that the value of the property was written less in order to avoid tax so as to commit a fraud on the exchequer. At the most, the tax could have been charged, but for that reason, the agreement cannot be said to be void. Under the circumstances, the finding of the Id. trial court that the agreement is a fraud on public exchequer and is against the public policy and as such is void deserved to be set aside.

13. Furthermore, issue no.2 has been decided against the plaintiff by observing that plaintiff did not had sufficient funds at the relevant time and as such he had no cause of action to file the present suit. Basically, reliance was placed by Id. trial court on the fact that the plaintiff had failed to place on record the receipt or the copy of pass book vide which plaintiff had deposited the amount of Rs.18,500/- in his bank. In this regard, it may be mentioned that plaintiff has categorically deposed that after the permission was granted by the competent authority Sh. L.D. Gupta, he purchased stamp papers worth Rs.1,880/-. The sale deed was written on 07.1.1981. He approached the defendant to sign the sale deed and get it registered before the Sub-Registrar. The defendant kept on postponing the execution of the sale deed on one pretext or the other. He approached the defendant at least 12 times and told him that everything is ready and requested him to execute the sale deed. Amount of Rs.18,500/- was ready with him, which was to be paid to the defendant. He further deposed that he offered the balance amount of Rs.18,500/- to the defendant but he did not pay any heed. Thereupon, he deposited this amount in his account no.7215, State Bank of India, Clock Tower, Subzi Mandi, Delhi on 17/18.1.1981. He brought the original receipt and the pass book. Thereafter, he sent a telegram Ex.PW1/3 vide postal receipt Ex.PW1/2. Thereafter, he wrote a letter on 23.3.1981, carbon copy of which is Ex.PW1/4. In spite of the telegram and letter, the defendant did not execute the sale deed. He also got a notice Ex.PW1/5 sent to the defendant through his counsel. He was always ready and willing to get the sale deed registered but the defendant did not execute the same. He further deposed that he is still ready and willing to get the sale deed registered. He denied the suggestion that he was not having sufficient funds. **Except for this cross-examination, record reveals that testimony of plaintiff on all material particulars in regard to this issue was not challenged by the respondent. Under the circumstances, in view of the authority M/s. Chunni Lal Dwarka Nath (Supra) relied upon by Id. counsel for the appellant, since no cross-examination has been affected on these points, testimony of appellant is deemed to have been admitted by the**

respondents. Moreover, as regards non placing on record, the receipt or the copy of the pass book, it may be mentioned that in the peculiar circumstances of the present case, the same is of no consequence **because the appellant had brought the original receipt and the pass book but no question was asked by the respondent in cross examination to rebut the same. Moreover, once the appellant had brought the original receipt and the pass book, he could have been asked to place the copy of the same on record. Things would have been different if he had not brought the receipt or the pass book and then the court may have come to the conclusion that for non production of material documents, an adverse inference has to be drawn against the appellant. But once the appellant had brought the original pass book and receipt when his statement was being recorded, the mere fact that the copy was not placed on record, same does not give rise to any presumption against him.** Moreover, the applicant had given his account number, name of the bank and date of deposit of the amount and as such, the respondent if so desired could have rebutted his testimony by summoning the relevant record from the bank, but that was not done. On the other hand, the respondent tried to take a plea that the agreement was terminated by him on failure of plaintiff to perform his part of the contract by sending letters Ex.D1 to D3. The Id. trial court came to the conclusion that the letter Ex.D1 to D3 and the UPC receipt are forged in as much as the letter Ex.D2 is dated 24.2.1980 which strangely speaks about the permission granted by competent authority on 30.7.1980. Under the circumstances, the defendant failed to prove that the contract was ever terminated by him which entitle him to forfeit the earnest money. It was observed by Id. trial court that the telegram and letters written by the plaintiff are not sufficient to show that plaintiff had sufficient funds with him at the relevant time. In this regard, it may be mentioned that in the authority Sukhbir Singh & Ors. relied upon by Id. counsel for the appellant, it was held by Hon'ble Apex Court that it is sufficient for the purchaser to establish that he had the capacity to pay the sale consideration and it is not necessary that he should always carry money with him from the date of suit till date of decree. In that case, the respondent had attended the Sub-Registrar's Office to have the sale deed executed and waited for the petitioners to attend the office of Sub-Registrar and it was observed that this was a positive fact to prove that they had necessary funds to pass off consideration and had with them the needed money for payment at the time of registration. In the instant case, the appellant has led ample evidence to show that after the grant of permission by the competent authority, he purchased the stamp paper worth Rs.1,880/- sale deed was got typed and respondent was approached to sign the same but he did not do so. Thereafter also, defendant was approached number of times to execute the sale deed by writing letters and by sending telegram and ultimately as per the showing of the appellant since the respondent did not pay any heed to his request, the amount was deposited in the bank. Under the circumstances, the appellant had proved his readiness and willingness to perform his part of the agreement and therefore, the finding of Id. trial court in this regard that the plaintiff did not have sufficient funds and as such has no cause of action to file the present suit deserves to be set aside.” (emphasis is mine)

6. I completely agree with the discussions and conclusions of the first appellate court inasmuch as once the respondent/defendant himself applied for the permission to the competent authority under the Urban Land (Ceiling and Regulation) Act, 1976 in July, 1980, then, the respondent/defendant could not contend that time of performance was of the essence and the transaction had to be completed by March, 1979. Even assuming for the sake of completion of arguments that if time was of the essence of the contract the respondent/defendant by his conduct proceeded that time of performance should not be treated as essence of the contract. The first appellate court has dealt with the same in paras which are reproduced above and there is no perversity of any manner in the same for this Court to interfere as contended on behalf of the respondent/defendant.

7. The next issue is as to whether plaintiff was ready and willing to perform his part of the contract i.e whether the plaintiff had financial capacity to complete the sale transaction. It is argued on behalf of the respondent/defendant that no documents have been filed on record by the plaintiff to establish his financial capacity to pay the balance sale consideration of Rs. 18,500/-. It is therefore argued that once the plaintiff failed to prove his readiness and willingness, this issue should be decided in favour of the respondent/defendant and consequently, the present appeal had to be dismissed.

8. In my opinion, the arguments urged on behalf of the respondent/defendant that plaintiff has failed to prove his readiness and willingness

are arguments which completely lack substance inasmuch as the first appellate court has very exhaustively dealt with this aspect in para 13 of the impugned judgment wherein the first appellate court notes that merely not placing on record the deposit receipt or the copy of the pass book was not material in the facts of the present case wherein the plaintiff had brought the original pass book to the court and had made a statement on the basis of that pass book and in spite of the same the respondent/defendant did not contest the content of the pass book including by asking the pass book to be filed on record. The first appellate court rightly notes that things had been different if plaintiff had not brought the receipt of deposit of the amount or the pass book, and in which case court could have come to a conclusion that there is no production of material documents and thus raising of adverse inference against the plaintiff, but that cannot be once the plaintiff has brought the original pass book and receipt during his deposition. The mere fact that these copies were not placed on record cannot lead to any presumption against the plaintiff with respect to his lack of financial capacity in the facts of this case. Learned first appellate court also rightly notes that if really the case of the plaintiff of lack of financial capacity was doubted by the respondent/defendant, then since the plaintiff had given the number of his account, name of the bank, the date of deposit, as also the amount, the respondent/defendant could have well rebutted the testimony of the plaintiff by summoning the relevant record from the bank but the respondent/defendant failed to do so. In my opinion, therefore, there is no perversity in the findings of the first appellate court for this Court to interfere

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under Section 100 CPC by holding that appellants/plaintiff should be held not to have necessary financial capacity. Learned counsel for the appellants/plaintiff is also justified in arguing that the cross-examination of the plaintiff as PW1 was only on the aspect that plaintiff did not have the financial capacity and there was no cross-examination that the plaintiff did not have the deposit receipt and the pass book showing the actual deposit of the amount of Rs.18,500/- in his bank account and which deposit was done by the plaintiff on account of the defendant/respondent having refused to receive this balance amount of sale consideration.

9. Reliance placed by the counsel for the respondent on the judgment of the learned Single Judge of this Court (Hon'ble Mr. Justice R.C.Lahoti, as he then was) in the case of ***Sudhir Engineering Company Vs. Nitco Roadways Ltd 1995 (34) DRJ 86*** is misconceived because the said judgment deals with the admitting or denying documents at the stage of admission/denial of documents before the issues are framed and not with respect to proving of documents during the course of recording of testimonies of the witnesses and deposing on the basis of the same and the failure of the opposite party i.e respondent/defendant to cross-examine on the same. The judgment therefore relied in the case of ***Sudhir Engineering Company (supra)*** does not help the respondent/defendant.

10. The only issue now to be decided is whether the first appellate court was justified in denying specific performance to the plaintiff and only granting

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decree for damages. The first appellate court has relied upon the judgment in the case of *Dadarao (supra)* and this judgment has been held to be *per incuriam* judgment in the judgment in the case of *P. D'Souza (supra)*. The relevant paragraphs of *P. D'Souza's* case (*supra*) are paras 27 and 29 to 34 and which read as under:-

"27. The clause as regard payment of damages as contained in Clause (7) of agreement of sale reads as under:

"(7). That if the vendor fails to discharge the mortgage and also commits any breach of the terms in this agreement and fails to sell the property, then in that event he shall return the advance of Rs. 10,000/- paid as aforesaid and shall also be liable to pay a further sum of Rs. 2,000/- as liquidated damages for the breach of the agreement."

XXXXX

29. Clause (7) of the Agreement of Sale would be attracted only in a case where the vendor is in breach of the term. It was for the plaintiff to file a suit for specific performance of contract despite having any option to invoke the said provision. It would not be correct to contend that only because such a clause exists, a suit for specific performance of contract would not be maintainable.

30. Section 23 of the Specific Relief Act, 1963 read as under:

"23. (1) A contract, otherwise, proper to be specifically enforced, may be so enforced, though a sum be named in it as the amount to be paid in case of its breach and the party in default is willing to pay the same, if the court, having regard to the terms of the contract and other attending circumstances, is satisfied that the sum was named only for the purpose of securing performance of the contract and not for the purpose of giving to the party in default an option of paying money in lieu of specific performance.

(2) When enforcing specific performance under this section, the court shall not also decree payment of the sum so named in the contract."

31. In *M.L. Devender Singh v. Syed Khaja* the following statement of law appears: (SCC p.522, para 16)

"The question always is: What is the contract? Is it that one certain act shall be done, with a sum annexed, whether by way of penalty or damages, to secure the performance of this very act? Or, is it that one of the two

things shall be done at the election of the party who has to perform the contract, namely, the performance of the act or the payment of the sum of money? If the former, the fact of the penal or other like sum being annexed will not prevent the Court's enforcing performance of the very act, and thus carrying into execution the intention of the parties; if the latter, the contract is satisfied by the payment of a sum of money, and there is no ground for proceeding against the party having the election to compel the performance of the other alternative.

From what has been said it will be gathered that contracts of the kind now under discussion are divisible into three classes—

- (i) Where the sum mentioned is strictly a penalty—a sum named by way of securing the performance of the contract, as the penalty is a bond;
- (ii) Where the sum named is to be paid as liquidated damages for a breach of the contract;
- (iii) Where the sum named is an amount the payment of which may be substituted for the performance of the act at the election of the person by whom the money is to be paid or the act done.

Where the stipulated payment comes under either of the two first - mentioned heads, the Court will enforce the contract, if in other respects it can and ought to be enforced, just in the same way as a contract not to do a particular act, with a penalty added to secure its performance or a sum named as liquidated damages, may be specifically enforced by means of an injunction against breaking it. On the other hand, where the contract comes under the third head, it is satisfied by the payment of the money, and there is no ground for the Court to compel the specific performance of the other alternative of the contract."

This Court further stated: (SCC p.523, paras 20-21)

"20. The fact that the parties themselves have provided a sum to be paid by the party breaking the contract does not, by itself, remove the strong presumption contemplated by the use of the words "unless and until the contrary is proved." The sufficiency or insufficiency of any evidence to remove such a presumption is a matter of evidence. The fact that the parties themselves specified a sum of money to be paid in the event of its breach is, no doubt, a piece of evidence to be considered in deciding whether the presumption has been repelled or not. But, in our opinion, it is nothing more than a piece of evidence. It is not conclusive or decisive.

21. The second assumption underlying the contentions on behalf the Defendants-Appellants is that, once the presumption, contained in

explanation to Section 12 of the old Act, is removed, the bar contained in Section 21 of the old Act, against the specific enforcement of a contract for which compensation in money is an adequate relief, automatically operates, overlooks that the condition for the imposition of the bar is actual proof that compensation in money is adequate on the facts and circumstances of a particular case before the Court. The effect of the presumption is that the party coming to Court for the specific performance of a contract for sale of immovable property need not prove anything until the other side has removed the presumption. After evidence is led to remove the presumption, the plaintiff may still be in a position to prove, by other evidence in the case, that payment of money does not compensate him adequately."

32. A distinction between liquidated damages and penalty may be important in common law but as regards equitable remedy the same does not play any significant role.

33. In *Manzoor Ahmed Magray v. Ghulam Hassan Aram* this Court reiterated the ratio laid down in *M.L. Devender Singh* (See also *A. Abdul Rashid Khan v. P.A.K.A. Shahul Hamid.*)

34. In *Dadarao whereupon Mr. Bhat* placed strong reliance, the binding decision of *M.L. Devender Singh* was not noticed. This Court furthermore failed to notice and consider the provisions of Section 23 of the Specific Relief Act, 1963. The said decision, thus, was rendered per incuriam."

11. Clearly, therefore, merely because the agreement provides for grant of damages would not mean that courts simply on that basis can deny specific performance. In fact, the facts of the present case are much stronger than the facts before the Supreme Court in the case of *P. D'Souza (supra)* inasmuch as in the relevant Clause 8 in the agreement in question, the mention of payment of damages is without prejudice to the right of the plaintiff/proposed purchaser to seek specific performance. This Clause 8 of the agreement to sell reads as under:-

"8. That if the transaction of sale hereby made between the parties hereto is not in any case completed by the First Party. The Second Party shall be entitled to get back the earnest money of Rs.5,000/- hereby said together with the compensation amounting to Rs.10,000/- and shall be entitled to recover the said amount through a proper court of law with all costs incurred and interest accrued

on the earnest money @ 19% per annum till the actual receipt of the same without prejudice to get the transaction specifically performed.” (underlining added)

12. Clearly therefore, not only the first appellate court erred in relying upon the judgment in the case of *Dadarao (supra)* even the facts of the present case are different than the facts of *Dadarao (supra)* inasmuch as the subject Clause 8 of the agreement to sell does not restrict the right on account of breach of the contract by the seller for the buyer only to claim damages, but, the said clause provides that the right to claim damages by the plaintiff/proposed purchaser is without prejudice to the rights of the plaintiff/proposed purchaser to claim specific performance. This additional reason I am giving in exercise of my powers under Order XLI Rule 24 CPC read with the ratio of the judgment of the Supreme Court in the case of *Lisamma Antony and Another Vs. Karthiyayani and Another (2015) 11 SCC 782* wherein the Supreme Court has said that the appellate court must decide cases without remanding the matters once the appellate court can decide on the basis of the trial court record. The relevant paragraphs of the judgment in the case of *Lisamma Antony and Another (supra)* read as under:-

“14. Rule 23 of Order 41 of Code of Civil Procedure, 1908, (for short "the Code") provides that where the court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, which directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject all just exceptions, be evidence during the trial after remand.

15. Rule 23A of Order 41 of the Code provides that where the court from whose decree an appeal is preferred has disposed of the case otherwise than on a

preliminary point, and the decree is reversed in appeal and a re-trial is considered necessary, the appellate court shall have the same powers as it has under Rule 23.

16. Rule 24 of Order 41 of the Code further provides that where evidence on record is sufficient, appellate court may determine case finally, instead of remanding the same to the lower court.

17. Needless to say, in the present case, the suit was not disposed of on any preliminary issue by the trial court. The second appellate court should have restrained itself from remanding a case to the trial court. Remanding a case for re-appreciation of evidence and fresh decision in the matter like the present one is nothing but harassment of the litigant. The unnecessary delay in final disposal of a lis, shakes the faith of litigants in the court.”

13. The fact of the matter in the present case is that admittedly after the plaintiff paid the amount of Rs.5,000/- under the agreement to sell, as per this agreement to sell the plaintiff who was a tenant in the premises with regard to which agreement to sell was entered into no longer was liable to pay any future rent to the respondent/defendant/erstwhile landlord. Possession of the plaintiff therefore of the suit premises was effectively as a right of part performance under Section 53A of the Transfer of Property Act, 1882. I may note that the agreement to sell in the present case in the nature of part performance is prior to the amendment of Section 53A of the Transfer of Property Act which was done by Act 48 of 2001 w.e.f 24.9.2001 and whereafter an agreement to sell can be relied upon under Section 53A as per the doctrine of part performance only if the agreement to sell is stamped and registered.

14. One other important aspect in favour of the appellants/plaintiff is that normally entitlement to continue in possession pursuant to an agreement to sell by the doctrine of part performance is only if all consideration which is otherwise

accepted to be paid under the agreement to sell is paid to a proposed seller except the remaining balance stated sale consideration. Obviously whatever amounts the respondent/defendant was to receive under the subject transaction of the agreement to sell, the respondent/defendant had received, and only the balance sale consideration of Rs.18,500/- remained. The conclusion cannot be otherwise so, inasmuch as, surely, the respondent/defendant would not have allowed stopping the payment of rent by the plaintiff to the respondent/defendant for future after entering into of the agreement to sell. Also, counsel for the appellants/plaintiff says that after the agreement to sell the plaintiff was paying house tax with respect to the property which was sold to him under the agreement to sell.

15. In my opinion, for this additional reason that the plaintiff continued in possession under the doctrine of part performance, plaintiff is hence entitled to specific performance and not only the alternative relief of damages as has been done by the first appellate court.

On 31.10.2013, the following substantial question of law was framed:-

“Whether the judgments of the two courts below suffer from any perversity? If so, to what effect?”

16. In view of the above discussion, the substantial question of law is answered in favour of the appellants/plaintiff and against the respondent/defendant by holding that the first appellate court’s judgment falls into a perversity in

denying the relief of specific performance to the appellants/plaintiff by relying upon the judgment in the case of *Dadarao (supra)* which is in fact *per incuriam* judgment.

17. The only issue now remains is whether the respondent/defendant should get only the balance sale consideration or should get a higher amount. In my opinion, in facts such as the present, equities will stand balanced and respondent/defendant will be adequately compensated if I grant a very high rate of interest of 21% per annum simple from 1.8.1980 till date of the present decree. This I am doing so because the respondent/defendant has not had the benefit of the amount of Rs. 18,500/- from 1.8.1980 till date, 1.8.1980 being the date when the permission of the authority under the Urban Land (Ceiling and Regulation) Act, 1976 was available to the respondent/defendant and whereby the suit property could have been sold to the erstwhile plaintiff. I have granted this high rate of 21% in the judgment in the case of *Nehru Place Hotels Ltd Vs. Smt. Kanta Aggarwal 2011 (123) DRJ 148*. The relevant para of this judgment is para 18 and which reads as under:-

“18. There is finally one aspect which I need to address in favour of the appellant/defendant, though no argument was raised before me, being grant of interest on the charges which have been held to be payable by the trial Court in favour of the appellant/defendant and against the respondent/plaintiff. I note that the trial Court has not granted any interest to the appellant/defendant for the monies which are required to be paid by the respondent/plaintiff to the appellant/defendant. No doubt, it is because of the appellant/defendant that the situation came to the present pass inasmuch as the appellant/defendant wrongly changed the allocation of space from the prime location of upper ground floor to the lower ground floor and also reduced the area from 403 Sq. feet to 372 sq. feet, however, the respondent has used these monies which are

held payable by her to the appellant/defendant. However, while dealing with this aspect I must hasten to add that so far as the portion of charges relating to maintenance etc. under Clause 17, the respondent/plaintiff has not received the benefit of possession which would have been received by her on payment of these charges and the escalation charges, and also that the appellant/defendant itself has been using this allocated space as its own office space. Therefore, balancing the equities, though interest should be awarded to the appellant/defendant on the escalated cost portion of the price payable, the issue really would be of the rate of interest which ought to be awarded in favour of the appellant/defendant and against the respondent/plaintiff with respect to the escalation charges which are payable to the appellant/defendant as per the impugned judgment and whether interest should be payable on the charges other than the escalation charges. Nowadays the Supreme Court has been directing that the rates of interest which should be awarded by the Courts should be at a lower side in view of the changed economic scenario, liberalization of the economy and the consistent fall in the rates of interest. The recent judgments of the Supreme Court, in this regard, are ***Rajendra Construction Co. v. Maharashtra Housing & Area Development Authority and others*, 2005 (6) SCC 678, *McDermott International Inc. v. Burn Standard Co. Ltd. and others*, 2006 (11) SCC 181, *Rajasthan State Road Transport Corporation v. Indag Rubber Ltd.*, (2006) 7 SCC 700 & *Krishna Bhagya Jala Nigam Ltd. v. G.Harischandra*, 2007 (2) SCC 720 and *State of Rajasthan Vs. Ferro Concrete Construction Pvt. Ltd* (2009) 3 Arb. LR 140 (SC). The Supreme Court has granted rates of interest varying between @ 6% to 9%. per annum simple.**

In the facts of the present case, however, I find that instead of a lower rate of interest, the appellant/defendant should get a higher rate of interest considering that the transaction pertains to an immovable property and benefit of which will go to the respondent/plaintiff. Therefore, I hold the appellant/defendant entitled to pendente lite and future interest @ 21% per annum simple on the amount of escalation charges as decreed by the trial Court. For the other charges which are payable by the respondent/plaintiff to the appellant/defendant which have been granted by the trial Court, the same however would be without payment of any interest because the said charges are towards maintenance and other related charges with respect to the property and the respondent has not enjoyed the property during all this period which in fact the appellant/defendant has used.”

SLPs were filed by both the parties against the judgment in the case of ***Nehru Place Hotels Ltd (supra)*** and these SLPs being SLP (C) Nos.22130/2011 and 22065/2011 have been dismissed by the Supreme Court on 19.3.2012.

18. This second appeal is therefore allowed. The suit of the appellants/plaintiff for specific performance of the Agreement to Sell dated 30.11.1978 would stand decreed by directing the appellants to deposit the balance sale consideration in this Court within a period of six weeks from today, and on the appellants depositing in six weeks the balance sale consideration of Rs.18,500/- along with interest @ 21% per annum from 1.8.1980 till date, the respondent/defendant will execute the necessary sale deed in favour of the appellants. In case the respondent/defendant fails to execute the sale deed, the appellants will be entitled to the benefit of getting the sale deed executed in terms of the procedure provided under Order XXI Rule 32 CPC. Parties are left to bear their own costs.

JULY 14, 2016
ib/Ne

VALMIKI J. MEHTA, J