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

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RESERVED ON: 21.04.2016
PRONOUNCED ON: 25.05.2016

+ RFA (OS) 160/2014, CM APPL.20644/2014

SURJIT SINGH BHATIA & ANR. Appellants
Through: Mr. Samar Bansal and Mr. Vinayak
Mehrotra, Advocates.

versus

TEJ RAJ SINGH GOEL (GOEL) Respondent
Through: Mr. Ashish Aggarwal, Advocate.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MS. JUSTICE DEEPA SHARMA

S.RAVINDRA BHAT, J.

1. An unsuccessful plaintiff whose suit for decree for specific performance was dismissed, appeals the decision of a learned single judge.
2. The facts, to the extent they are uncontroverted, are that the plaintiff entered into an agreement to purchase the suit property i.e. D-104 Defense Colony (hereafter "the suit property") on 27.06.2008. The total consideration agreed to be paid to the defendants by the plaintiff was ₹15.80crores in terms of the agreement to sell-which was exhibited in court during the trial as Ex. PW-1/2, the plaintiff did pay the sum of Rupees one crore, at the time of execution of the agreement and also that the further sum of ₹60 lakhs was paid on 05.08.2008. According to the plaintiff a further amount of ₹5 lakhs was paid to a representative of the defendant vendors.

This was disputed; likewise the plaintiff's assertion that he paid Rupees one lakh a day before entering into the agreement to sell was also disputed. Two conditions stipulated in the agreement are important: one that the entire transaction was to be completed within 100 days or in other words on or before the 06.10.2008. The second condition was that since the suit property belongs to Hindu Undivided Family (HUF), the "No objection certificate" (NOC, hereafter) of other members of the family or coparceners was to be obtained before execution of the sale deed.

3. In the suit the plaintiff alleged that despite stipulation of a specific date (for completion of the sale transaction) which was the essence of the contract, the defendant did not honor his commitments in that the NOCs of the coparceners were not made available. Furthermore the coparceners were not in India at the time the Agreement to Sell was entered into. It was alleged that the defendant unilaterally granted a one-time extension to the plaintiff alleging that the latter was in default of compliance with the terms of the agreement in its letter of 08.10.2008; the extension was up to 15.11.2008. The plaintiff protested the letter contending that he was always ready and willing to perform his contract and highlighted that the defendant on the other hand had not complied with the time requirements. The plaintiff alleged further in the suit that in accordance with the agreement and in order to facilitate compliance he had applied-on behalf of the defendants to the Municipal Corporation of Delhi ("MCD") for appropriate clearance in respect of the construction on the suit property. The suit mentioned a notice of 04.12.2008 to the defendant drawing attention to a condition of the agreement i.e. cl. 14 which highlighted that time was the essence of the contract and the parties were bound to adhere to it. The defendant on the

other hand submitted that the plaintiff did not make any specific commitments as regards the date and time by which all members of the HUF would be available in New Delhi for completion of the sale transaction and executing the registered sale deed. It was submitted that in this background of circumstances the so-called extension of time was entirely sham and bogus and that the defendant deliberately took no steps to discharge his obligations. The plaintiff wrote a letter on 15.01.2009 protesting against the defendant's conduct and alleged about having suffered losses; the plaintiff also complained about the defendant's lack of interest in performing their obligations.

4. The defendant once again by letter of 24.01.2009 unilaterally extended the time by 15 days for performance of the contract. The plaintiff denies ever having asked for this extension and on the other hand relies upon the terms of its letter of 04.02.2009 through its counsel. This letter reiterated that the defendant had committed a breach of agreement to sell and miserably failed to perform its part of the contract. The defendant time and again continued to extend the time for performance of the contract, insisting that the obligations under the Agreement to Sell continued to bind parties. The plaintiff submits that at the time the reply and the letters of the defendant were sent to it, the suit property had become nonmarketable on account of an order of the Debt Recovery Tribunal (DRT) of 16.01.2009 attaching the suit property. The defendant had filed an appeal to the Debt Recovery Appellate Tribunal (DRAT). On account of these the defendant would not have complied with the agreement to sell, and conveyed the title yet it continued to insist that the obligations could be discharged. The plaintiff alleged that throughout this time, the defendant negotiated the sale

of property with various third parties for amounts higher than the consideration agreed under the contract with the plaintiff. In May 2009 the plaintiff was shocked to learn that the defendant had dishonestly concealed from him about the attachment of the property by the DRT through the order of 10.07.2001. The plaintiff obtained information and documents from the DRT and realized that the defendant had deliberately concealed material facts. It was asserted that in the note received in August 2009 the Defendant approached the plaintiff and assured that it had every intention of completing the sale transaction and that it would take all possible steps to settle its disputes with the Bank which had approached the DRT. The plaintiff had complained to the police; the defendant requested that the complaint may be withdrawn. Alleging that the defendant was negotiating for the sale of the property to a third party the plaintiff approached the court seeking the decree for specific performance.

5. The defendant, on being served, filed written statement and denied ever having concealed material facts. The written statement asserted that there was no impediment to the sale of the suit property and that on the contrary the initial attachment order had been vacated in 2007. Though an appeal (by the bank which had claimed amounts against the defendant), was pending, in fact there was no stay order. Thus there was no impediment to the sale of the suit property. The defendant denied having received Rs. One lakh on 26.06.2008 or that it had received ₹ 5lakhs from a representative of the plaintiff. It contended on the other hand that the plaintiff started resiling from its commitments. The written statement alleged that the defendant had furnished the NOCs. Given that the plaintiff did not object to the extension of time, once the NOCs were issued to the plaintiff by the other coparceners

(who were impleaded as parties in the suit), formalities from the defendant's end were complete and the plaintiff was free to proceed and fulfill his part of the bargain, by paying the agreed balance amount. Instead the plaintiff by three unequivocal letters stated that the commitments and agreement had been canceled. Reliance is placed upon the said three letters dated 27.10.2008, 14.11.2008 and 04.12.2008.

6. The defendant alleged that the plaintiffs' submission with respect to being prejudiced on account of the stay order of 30.08.2007 is irrelevant because according to it in May 2009 it became aware of the proceedings. Had it wished to cancel the contract on those terms, the plaintiff could have done so. Instead the suit expressly stated that the parties had renegotiated and that the defendant had assured the plaintiff that the sale deed would be executed. In these circumstances the defendant's conduct could not have been gone into and the plaintiff was obliged to perform his part of the contract. Since the defendants waited for an unduly long period, the plaintiff as a protective measure appears to have filed this suit. The defendant had intimated the plaintiff and it stated in the written statement that the amounts received were liable to be forfeited since the plaintiff did not adhere to the terms of the contract especially in the respective payment of the amounts before the stipulated and agreed date that 06.10.2008 and in any case before 15.11.2008 it is submitted that the defendant did all that was expected including the production of the NOCs which was contemplated under the agreement to sell and on the other hand the plaintiff continuing to insist that the agreement between the parties had ended, the question of refunding the amount did not arise. The question of specific performance of the agreement could not have under any circumstances arisen at all. The defendant

furthermore urged that the plaintiff failed to prove that it had the requisite means to pay the balance amount of ₹13.19 crores, as on the date agreed between the parties or even on the later date.

Impugned judgment

7. In the impugned judgment the learned single judge took into consideration the documentary and oral evidence led on behalf of the parties. He noted that the plaintiffs letter or notice through counsel dated 14.11.2009, had terminated the agreement to sell. Contrary to the terms of the letter itself the plaintiff in cross-examination stated that the agreement was terminated on 15.10.2008. It was so found that no letter of 27.10.2008 terminating the agreement with effect from 15.10.2008 was placed on the record. It was further noted that the letters dated 14.11.2008 (Ex. PW 1/7); 14.12.2008 (Ex-PW1/9); 15.01.2009 (ExPW-1/10); 04.02.2009 (Ex.PW-1/12) and a police complaint addressed by the plaintiff dated 04.06.2009 (Ex. PW1/14) sought for refund of the amounts paid. It was held that once the plaintiff sought refund of the amounts from the defendant there was no question of it being ready and willing to perform its part of the contract. The learned single judge took note of the repeated extensions granted by the defendant to comply with the agreement relying on its letters dated 24.11.2008 Ex. DW-1/8; letter dated 24.01.2009 Ex. DW-1/11; notice dated 07.02.09 Ex. DW-1/13. It was held that the repeated opportunities granted by the defendant to the plaintiff showed the latter's *bona fides* on the one hand and failure on the part of the plaintiff for the belated enforcement of the Agreement in a suit for specific performance. The single judge found that the plaintiffs' conduct showed that he was unable to prove readiness and willingness to perform his part of the contract. The findings were based on

the entire conduct of the parties. It was further held that the plaintiff did not possess the means to pay the agreed balance amount to the defendant either on the date it pleaded or on the date it filed the suit or even thereafter. On the basis of these findings the single judge dismissed the suit.

Submission of parties

8. The plaintiff argues that there could be no dispute about payment of ₹2.61 crores to the defendant. Reliance was placed upon the affidavit and the documents produced during the trial which included the Agreement to sell, proof of payment of two cheques on 5.7.2008 which was acknowledged by the defendant and that further payment of ₹60 lakhs was made on 5.8.2008 which too was acknowledged. It was asserted that in addition another amount of ₹5 lakhs was paid to Mr. Sayed Salim who was examined during the course of the trial.

9. Mr. Samar Bansal, advocate arguing for the appellant emphasized that at no stage did the plaintiff seek extension of time for performance of his part of the bargain, and that even though the sale could not be completed by the date specified, i.e., 6.10.2008 (due to the defendant's inability to produce the No Objection Certificates), according to their admission extension was given till 15.11.2008 by letter dated 08.10.2008. This extension was unilateral; the plaintiff said so in his letter of 15.10.2008.

10. The plaintiff applied to the MCD seeking sanction of the building plan but was taken aback to receive the defendant's letter dated 26.10.2008 stating that the plans were sanctioned and that the requisite charges paid by the plaintiff would not be part of the sale consideration. This, submitted the counsel, was a dishonest ploy. It was in this context that the plaintiff demanded repayment of amount on 14.11.2008. The defendant did not

accept the demand and instead expressed its eagerness to complete the transaction. Learned counsel relied upon the letter of the defendant, dated 24.01.2009. Though the plaintiff sought for refund by their letter, dated 04.02.2009, the defendant rejected this proposal and insisted that the agreement had to be performed by the plaintiff. The defendant gave further extension of time by ten days.

11. It was argued that unilateral extension of time was a deceitful tactic to delay the performance of the agreement. The defendant, significantly, did not show any specific commitment as regards the time by which all members of the HUF were to make themselves available for completion of the sale. Mr. Bansal highlighted that the suit property was no longer marketable because of a stay order attaching the property. He relied upon the terms of the order of the Debt Recovery Tribunal dated 16.01.2009 (Ex.PW-1/14). It was submitted that these facts were by design withheld and the defendant gave a false impression that there the suit property was not encumbered. Counsel also submitted that the attachment order continued until in due course the defendant settled his dues with the Bank, which had filed the claim proceedings before the DRT, in March 2010. That order clearly stated that ₹90 lakhs were paid by the defendant.

12. Learned counsel highlighted that having regard to the conspectus of facts, the defendant was unable to establish that the plaintiff was never ready and willing; on the contrary the so called NOC produced during the trial could not have withstood the scrutiny because they were dated 29.10.2008 and 12.11.2008. Secondly the NOCs were clearly at variance with the Agreement to sell; the NOCs stated that executants had no objection to the sale of the property for ₹6 Crores, in fact the agreement to sell was for

consideration of ₹15.8 Crores. The terms of the NOC Ex.DW-1/P2 and DW-1/P-5 were relied upon.

13. Learned counsel submitted that the reliance placed upon *Jay Pee Hotels* and the other decisions by the Single Judge was misplaced. All material circumstances and facts pointed out to the default on the part of the defendant. Even though initially the title was not marketable, in the facts of this case, the cloud on the title was lifted on 27.03.2009. In the circumstances, the suit was maintainable. The question of the plaintiff having to prove its resources, having regard to the default of the defendant, did not arise. It was argued by learned counsel moreover that the Single Judge entirely overlooked that the defendant could not have forfeited the amounts as claimed by it. It led no evidence to show that the sum retained by it constituted reasonable compensation; nor was it of the kind that the parties contemplated, as liquidated damages in the totality of circumstances. Learned counsel relied upon the judgment of the Supreme Court in *Kailash Nath Associates v. Delhi Development Authority*, (2015) 4 SCC 136 and *Shri Hanuman Cotton Mills & Ors. v. Tata Aircraft Ltd.* 1969 (3) SCC 522. Learned counsel relied upon the judgment of this Court reported as *Sonia Associates v. B.B. Sabharwal*, 2012 (V) AD (Del) 258 to say that in the absence of proof, the question of permitting the defendant to retain the earnest money did not arise. He also relied upon the judgment in *Capital Hotels and Developers v. DDA* (W.P.(C)1513/1999, decided on 22.09.2004) to submit that if there is an impediment to transfer in terms of Section 55 which results in a cloud on account of pendency of litigation, the purchaser is entitled to disclosure of such circumstances, in the absence of which the seller cannot claim to be aggrieved.

14. Mr. Bansal also argued that on the issue of the plaintiff's readiness and willingness, it was not necessary for him to lead any evidence because the defendant never denied that the Plaintiffs had the means to pay the consideration agreed. Learned Counsel argued that even though the Plaintiffs had earlier cancelled the agreement and sought refund subsequently after the said order of the DRT, agreement to sell was revived and Mr. Sayed Saleem, the defendant's authorized representative was paid an additional amount of ₹5 lakhs. It was urged that the receipt of this amount as well as the defendant's authorization of Mr. Sayed Saleem was not denied by the Defendant. He did not produce Mr. Sayad Saleem as a witness and the best evidence was withheld and as such presumption should be drawn against the Defendant. It is further submitted that on this aspect, the Plaintiff has not been questioned in the cross-examination.

15. Mr. Ashish Agarwal, learned counsel for the defendant, urged that the impugned judgment is in consonance with law and correctly held that the plaintiff was neither ready and willing, nor was he entitled to claim a decree for specific performance. It was highlighted that the plaintiff had sought refund, not once, but on four occasions. In fact, after October, 2009, the entire endeavor of the plaintiff was to somehow blame the defendant and allege that he had breached the agreement, and escape from its obligations. Counsel submitted that so far as the allegation that the NOCs were not issued is concerned, the certificates were produced and proved in court. The plaintiff never objected to them on the ground that they were defective. It was also submitted that the plaintiff could not take advantage of the so-called cloud over the title to the property for the reason that there was no

cloud as was sought to be made out. The initial attachment order made in 2001 was vacated in 2007. There was no impediment or bar to the defendant entering into an agreement for selling the suit property; thus the agreement to sell was binding and the plaintiff had to comply with its terms.

16. Counsel for the Defendant argued that the reply dated 04.12.2008 issued on behalf of the plaintiff's counsel was relied on to establish that an earlier letter was sent; this was belied by the fact that the plaintiff's letter of 14.11.2008 did not refer to any letter dated 15.10.2008. The plaintiff did not prove this letter. It was argued that in the reply to the plaintiff's reply of 14.11.2008 the Defendant had stated that no objection certificates had been received from the other coparceners. The letter also pointed out that the physical presence of the coparceners was not in the agreement; at the request of the Plaintiffs their affidavits were executed, notarized and attested by the Indian Consulate in USA and sent to India. The Plaintiffs themselves provided the draft of the affidavits.

17. It was submitted that the order attaching the suit property was issued on 10.01.2001, but was withdrawn on 05.10.2007. In these circumstances, the plaintiffs were not aware of the attachment order till the cancellation of the agreement to sell, it could not form the basis of the cancellation.

18. The Defendant contended that it was entitled to forfeit the earnest money paid and in terms of the agreement all amounts paid as part consideration became earnest money and were thus, liable to be forfeited. He further contended that time was the essence of the contract and that sum of ₹2.61 crores was earnest money and the Defendant was not cross-

examined on this aspect. It was further argued that Sayed Saleem was not the defendant's authorized representative. He could not receive any amount on their behalf and was a power of attorney holder only for the purposes of legal proceedings but not for the purposes of sale or receipt of any money under the transaction. The Plaintiffs omitted reference to the alleged payment in any of their correspondences. A reference was made to the un-amended plaint which stated that the balance amount was ₹13.19 crores and in case the amount of ₹5 lakhs had been paid the balance would have been ₹13.14 crores. It was submitted that this fortifies that the plea regarding payment of ₹5 lacs was false. Further when the amendment of the plaint was sought, the Plaintiffs did not seek amendment of the prayer paragraph, which shows the balance consideration as ₹13.19 crores.

Analysis and conclusions

19. As in all actions for specific performance, it is of paramount importance that the plaintiff establishes firmly that he was always ready and willing to perform the contract and that he continued to do so. The first part is the conduct of the parties. The averments in the suit first led to the controversy about the precise amounts paid by the plaintiffs to the defendant. The plaintiff stated that a total amount of ₹2.66 crores was paid to the defendant; the latter, on the other hand, disputed and stated that he received ₹2.60 crores. According to the plaintiff, the amounts paid were ₹1,00,00,000/- on 05.07.2008 and the sum of ₹60,00,000/- on 05.08.2008. (Exhibit PW1/3 and PW1/4). The Plaintiff claims to have paid a further sum of ₹5,00,000/- in cash to one Mr. Sayed Saleem. The defendant disputed this payment. The Plaintiffs did not produce any document or receipt evidencing

the payment. Nothing to establish that Sayed Saleem was authorized to receive amounts on behalf of the defendant was produced, on the record of the court. Likewise, the averment about having paid Rs.One lakh a day before the Agreement to sell was executed, is unsupported by any evidence. The Plaintiffs failed to plead the date on which the payment of ₹5 lakhs was made. Therefore, the findings of the single judge disbelieving that amounts of ₹ 1 lakh and ₹ 5 lakhs were paid to the defendant are in order and in accord with the evidence.

20. The relevant terms of the Agreement to sell, Ex. PW-1/2 are as follows:

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

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

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

21. According to Ex. PW-1/2, the balance payment of ₹14,79,00,000/- was payable as follows: (i) ₹1,00,00,000/- (Rupees one crore) on or before 5th July, 2008. (ii) ₹60,00,000/- (Rupees sixty lakhs) only on or before 5th August, 2008. (iii) ₹13,19,00,000/- (Rupees thirteen crores nineteen lakhs)

only on or before 6th October 2008. Undeniably, the plaintiffs paid ₹1,00,00,000/- on 05.07.2008 and ₹60,00,000/- on 05.08.2008. (Exhibit PW1/3 and PW1/4). However, the plaintiff's allegation of having paid further ₹6 lakhs was not established. Therefore, what stood established was that ₹2.60 crores was paid in terms of the time schedule; no other amount was paid in terms of the Agreement.

22. If one considers the case in the context of the above proven facts, the question is whether the plaintiff was justified in complaining that the defendant had failed to ensure that other coparceners of his HUF were not present and their NOCs were not available as on the date stipulated. There is undoubtedly some substance in the requirement of NOC, because as on 06.10.2008, none of the NOCs were in existence. The three NOCs were prepared later, but all before end of November 2008. Those documents (Ex.DW1/P2, Ex.DW1/P3, Ex.DW1/P4 & Ex.DW1/P5) also appear to be at variance with the terms of the agreement because the consideration amount mentioned in the NOCs is far less than what was agreed in Ex. PW1/2. Yet, this is to be viewed in the overall background of the plaintiff's conduct and not in isolation.

23. It is here that the plaintiff's letters become crucial. These were produced during the trial as Ex.PW1/7 (letter dated 14.11.2008), Ex.PW1/9 (letter dated 04.12.2008), Ex.PW1/10 (letter dated 15.01.2009) and Ex.PW1/12 (letter dated 04.02.2009). In each of these, he categorically claimed refund of the amounts paid previously to the defendant. These letters are inconsistent with the plaintiff's argument that he was always ready and willing to perform his part of the bargain. This finding of the

single judge, in our opinion cannot be termed as erroneous. Even if the plaintiff had never sought the extensions that the defendant gave (*arguendo* on unilateral basis), nevertheless the claim for refund entirely undermines the plaintiff's averment that he was always ready and willing to perform his part of the bargain.

24. The defendant's conduct, in not revealing that the suit property was facing litigation, urged the plaintiff, amounted to withholding material facts and that consequently, when the litigation ended, he was obliged to perform the agreement and execute the sale deed. Now, this argument is to be seen from the perspective of the plaintiff's conduct. It is evident from the record that the attachment order, issued by the DRT was not communicated to the plaintiff. When he did become aware, he filed a police complaint dated 03.06.2009 (Ex.PW1/14) and sought for refund of the amount paid. This clearly shows that he was at that stage- as also earlier, not interested in going through with the contract-understandably, given the fact that the property was mired in litigation and proceeding to purchase it would have meant buying litigation. Yet, that demand is inconsistent with his plea that he was ready and willing to perform his part of the bargain.

25. Section 16 (c) of the Specific Relief Act, prescribes the requirement of pleading and proving that one who seeks a decree for specific performance should both plead and prove that assertion:

“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 and 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; ...”

26. The authorities have repeatedly pronounced that the onus of proving readiness and willingness in a suit for specific performance is upon the plaintiff (Ref. *R.C. Chandiok & Anr. vs. Chuni Lal Sabharwal & Ors.* (1970) 3 SCC 140). The plaintiff has to 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.*” (Ref. *N.P. Thirugnanam vs. Dr. R. Jagan Mohan Rao & Ors.*, (1995) 5 SCC 115).

27. In judging whether the plaintiff is ready and willing to perform his part of the contract, the court has to consider the conduct of the plaintiff both before and after the suit is filed. It has to consider other related circumstances. It is also essential to prove that the plaintiff is possessed of the means or the resources to pay the amounts, which he had to pay, in terms of the contract (for sale of the property) to the defendant/seller. In other

words, the obligation to prove these requirements exists from date of the entering into contract to date of the decree. In *P.D'Souza vs. Shondrilo Naidu* (2004) 6 SCC 649 the Supreme Court observed as follows:

"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.... 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."

The police complaint dated 03.06.2009 (Ex.PW1/14) and each of the earlier letters Ex.PW1/7 (letter dated 14.11.2008), Ex.PW1/9 (letter dated 04.12.2008), Ex.PW1/10 (letter dated 15.01.2009) and Ex.PW1/12 (letter dated 04.02.2009), which had sought for refund of the amount paid, entirely undercuts the plaintiff's claim that he was ready and willing to go ahead and perform his part of the bargain. It in fact, establishes that he was not ready and willing to purchase the property because of the uncertainty and vicissitudes attendant with the pending litigation between the defendant and his Bank, which had claimed overdue amounts that had led to the issuance of the attachment order by the DRT. The court also notices that the single judge recorded a finding of fact as to the plaintiff's *financial capacity or ability* to perform the contract:

"47. Learned Senior Counsel for the Plaintiffs admitted that the Plaintiffs have not led any evidence on the issue of readiness and willingness. The Plaintiffs have admittedly not led any evidence on the financial capacity of the Plaintiffs. The Plaintiffs in its evidence has not placed on record any document or material to show that the

Plaintiffs had the financial capacity to pay the balance sale consideration.”

During the hearing of the appeal, there was no contest to the above finding; nor did the plaintiff's counsel show any proven fact which pointed to a contrary inference. As a result of the discussion, it is held that the plaintiff was unable to prove readiness and willingness to perform the contract for purchase of immovable property.

28. On the second question, i.e whether the defendant was entitled to forfeit the amount of ₹ 1 crore, the single judge analyzed the terms of the agreement (Ex. PW-1/2) especially Clause 2 which was the forfeiture condition. The defendant's argument that all the amounts paid by the plaintiff constituted earnest money, was rejected:

“Nowhere in the agreement is it stipulated that payment made after the execution of the agreement would also be covered by the forfeiture clause. The Earnest Money/Part Payment of Rs. 1,01,00,000/- as stipulated in clause 1 would alone be liable to be forfeited.”

Thereafter, the single judge recorded the following finding:

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

29. In such cases, where a party alleges that a forfeiture clause constitutes a genuine pre-estimate of damages, two considerations have to be weighed

by the court. One, the task of scrutinizing whether the condition is in reality one that parties envisioned to be a genuine pre-estimate of damage likely to be suffered is to be viewed in the context of some proof of “reasonable damage” that Section 74 of the Contract Act mandates; two, that there might be cases where the likely damage is one which cannot be estimated with precision, given the nature of the contract, in which event, the court might consider if the amount stipulated was one foreseen as reasonable compensation payable to the aggrieved party without proof of damage or loss.

30. *Kailash Nath Associates v. Delhi Development Authority* (2015) 4 SCC 136 is a recent authority on the question of liquidated damages specified in a contract. The Supreme Court considered the law in *Fateh Chand v Balkishan Dass* AIR 1963 SC 1405 and several other decisions, and held as follows:

"The law laid down by a Bench of 5 Judges in Fateh Chand's case is that all stipulations naming amounts to be paid in case of breach would be covered by Section 74. This is because Section 74 cuts across the rules of the English Common Law by enacting a uniform principle that would apply to all amounts to be paid in case of breach, whether they are in the nature of penalty or otherwise..."

43. *On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:*

1. *Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the Court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount*

so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the Court cannot grant reasonable compensation.

2. Reasonable compensation will be fixed on well known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.

3. Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is sine qua non for the applicability of the Section.

4. The Section applies whether a person is a plaintiff or a defendant in a suit.

5. The sum spoken of may already be paid or be payable in future.

6. The expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.

7. Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application."

In *Fateh Chand* (supra), the Supreme Court had articulated the applicable principle as follows:

"In all cases, therefore, where there is a stipulation in the nature of penalty for forfeiture of an amount deposited pursuant to the terms of contract which expressly provides for forfeiture, the court has jurisdiction to award such sum only as it considers reasonable, but not exceeding the amount specified in the contract as liable to forfeiture."

31. In the present case, the defendant did not show how it was put to loss or damage. The record clearly establishes that though the attachment order

was vacated sometime in 2007, the Bank was pursuing the matter. It is not disputed that the pendency of the Bank's claim in DRT and the likely cloud on the property was never pointed out to the plaintiff. What is more, the defendant did not even reveal that an attachment order was issued in 2009. The plaintiff virtually stumbled upon that fact, as it were. It is doubtful whether the defendant would have been able to convey title for the amount agreed, either to the plaintiff or to anyone else, had the reality been disclosed. Having regard to this conduct, even though the plaintiff is held disentitled to a decree for specific performance, this court holds that the defendant cannot claim "reasonable compensation". Besides, no evidence of any kind to show that he was put to loss was led. As a result, it is held that the forfeiture of the amount of ₹One crore was not justified. Although the plaintiff sought refund repeatedly his conduct in insisting that the contract was nevertheless enforceable and the sale deed had to be executed to some extent disentitles him to interest from October, 2008. However, the record is clear that from May, 2009 (after he filed a police complaint seeking refund) he did not intend to go through with the contract; this court has also recorded that he did not prove his readiness and willingness. In these circumstances, in the interests of justice, it would be appropriate to direct the defendant to refund the sum of ₹One crore to the plaintiff and also pay 9% interest on that amount, with effect from the date of filing of the suit, till date of payment.

32. In view of the foregoing discussion, the appeal has to succeed partly; the plaintiff is disentitled to a decree for specific performance; at the same time, the defendant is directed to refund the sum of ₹One crore with interest @ 9 per cent per annum from the date of filing suit till date of payment. The

plaintiff is also entitled to interest at the rate of 9% per annum on the awarded sum of Rs.1.60 Cr. The appeal is accordingly allowed in these terms; there shall be no order as to costs.

**S. RAVINDRA BHAT
(JUDGE)**

**DEEPA SHARMA
(JUDGE)**

MAY 25, 2016

