

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

+ **RFA No. 225/2018**

% **6th March, 2018**

ASHOK NANDA Appellant
Through: Mr. Sauyam Khetrapal,
Advocate.

versus

MOHINDER KUMAR SHARMA & ANR. Respondents

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

CM No. 8433/2018 (delay in re-filing of 26 days)

For the reasons stated in the application, delay in re-filing is condoned.

CM stands disposed of.

RFA No. 225/2018 & CM No. 8432/2018 (stay)

1. This Regular First Appeal is filed under Section 96 of the Code of Civil Procedure, 1908 (CPC) by the plaintiff in the suit impugning the judgment of the trial court dated 27.9.2017 by which the trial court has while dismissing the suit for specific performance

granted relief of return of the amount of Rs.7,10,000/- paid along with interest at 18% per annum.

2. The subject suit was filed by the appellant/plaintiff for specific performance of the agreement to sell with respect to 150 sq. yards out of 300 sq. yards in property no. E-63, Mansarovar Garden, New Delhi. Agreement to sell is dated 21.10.2004 and the total sale consideration was Rs.47,50,000/-. A sum of Rs.7,10,000/- was admittedly paid by the appellant/plaintiff to the respondents/defendants under the agreement to sell. As per the appellant/plaintiff since the respondents/defendants failed to execute the sale deed, therefore after serving a legal notice dated 7.5.2005, the subject suit for specific performance was filed pleading that appellant/plaintiff has already been ready and willing to perform his part of contract.

3. Respondents/defendants contested the suit and filed their written statement and prayed for dismissal of the suit. Respondents/defendants also pleaded right to forfeit the amount of Rs.7,10,000/- on account of breach by the appellant/plaintiff because

the appellant/plaintiff is pleaded not to have paid the balance sale consideration in spite of requests made by the respondents/defendants.

4. After pleadings were complete the trial court framed the issues and parties led evidence and which aspects are recorded in paras 10 to 12 of the impugned judgment which read as under:-

“10. Vide order dated 21.08.2008, the Hon'ble High Court of Delhi where the instant suit was then pending, framed the following issues as :-

1. Whether there is any interpolation and unauthorized changes made in the agreement to sell dated 21.10.2004? If, yes the effect and consequences thereof? OPD

2. Whether the defendant had not handed over possession or part possession of the suit property to the plaintiff? OPD

3. Whether the plaintiff has been ready and willing to comply with the terms of the agreement to sell dated 21.10.2004? OPD

4. Whether the plaintiff is entitled to a decree of specific performance? OPP

5. Relief.

11. Plaintiff in order to prove his case has examined himself as PW-1.

Plaintiff has relied upon the following documents :-

S.No.	Particulars of documents	Exhibition of documents
1	Site Plan	Ex.PW1/1
2	Agreement to Sell dated 21.10.2004	Ex.PW1/2
3	Receipts	Ex.PW1/3 & Ex.PW1/4
4	Legal Notice dated 07.05.2005	Ex.PW1/5
5	Copy of Telegram	Ex.PW1/6
6	Postal Receipt	Ex.PW1/7
7	Speed Post receipt, UPC mentioned as Ex.PW1/8 to Ex.PW1/10	Deleted as not filed on record
8	Registered envelopes	Ex.PW1/11 and Ex.PW1/12

12. Defendants in order to prove their case have examined the defendant no.1 as DW-1. The defendants have relied upon the following documents as :-

S.No.	Particulars of documents	Exhibition of documents
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1.	Sale Agreement dated 10.10.2004 with Sh. Rajesh Kumar Sharma	Ex.DW1/1
2.	Receipt executed by Sh. Sanjay Sharma	Ex.DW1/1
3.	Sale Agreement dated 04.11.2004 between the defendant no.2 and one Sh. Sanjay Sharma	Ex.DW1/3
4.	Payment receipt executed by Sh. Rajesh Kumar Sharma.	Ex.DW1/4
5.	Local Commissioner's report	Ex.PW1/D1
6.	Legal Notice dated 30.04.2005	Ex.DW1/5
7.	Postal receipt	Ex.DW1/6
8.	UPC Receipt	Ex.DW1/7

5. The only issue argued before this Court is as regards denial to the appellant/plaintiff of the relief of specific performance by deciding issue no.3 against the appellant/plaintiff holding that appellant/plaintiff is not found to have been ready and willing to perform his part of contract. This is so observed by the trial court in paras 50 to 52 of the impugned judgment and which paras read as under:-

“50. It was for the plaintiff to prove readiness and willingness to perform the obligation under the agreement. The plaintiff was not entitled to seek the execution of the sale deed without paying balance sale consideration of Rs.40,40,000/-. Had the plaintiff approached the defendants with balance consideration amount on the stipulated date of performance i.e. 30.04.2005, or on the alleged date of 25.04.2005, the plaintiff would have prepared draft in favour of the defendants or would have withdrawn cash amount from his bank account or would have put forth evidence about the arrangement of funds or atleast written to the defendant prior to the stipulated date of performance of availability of funds and his willingness to tender money on the stipulated date of performance or extended date of performance. The testimony of the plaintiff that he did not purchase the stamp paper as the

defendants were not in touch and were sending legal notice, would not absolve the plaintiff from showing his readiness and willingness to perform his part of the agreement. Sending of telegram on 05.05.2005 is of no help to the plaintiff since as per own case of the plaintiff, the unilateral extension of date upto 06.05.2005 by the defendants vide legal notice dated 30.04.2005 was not in his knowledge as he had received legal notice only on 12.05.2005. Further, the plaintiff has not proved any document filed by him regarding his financial capacity to pay the balance sale consideration amount of Rs.40,40,000/-.

51. The Apex Court in the judgment reported as AIR 1996 SC 116 titled as N.P. Thirugnanam to R. Jagan Mohan Rao observed as:-

" 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 s.20 of the Specific Relief Act 1963 (for short, 'the Act'). Under s.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."

52. Conjoint reading of the ratio of aforesaid case along with Section 16© of the Specific Relief Act, 1963 envisage that the plaintiff has to prove readiness and willingness on the date of execution of the agreement till the date of filing of the suit and even during pendency of the suit. The onus was on the plaintiff to prove that he was having readiness to

pay the balance amount till date. No evidence has been placed on record by the plaintiff to prove his capacity to pay the balance consideration amount of Rs. 40,40,000/- as on date to the defendants. It is therefore held that the plaintiff has failed to comply with the requirement of Section 16 (c) of the Specific Relief Act. Issue No. 3 is thus decided against the plaintiff and in favour of the defendants.”

6. A reading of the last line of para 50 of the impugned judgment shows that admittedly not a single document was filed by the appellant/plaintiff to prove his financial capacity to pay the balance consideration of Rs.40,40,000/-. In my opinion a self-serving averment of financial capacity cannot be held to be discharge of onus of proof of readiness and willingness and this is so held by this Court in the case of *Shri Baldev Behl and Ors. Vs. Bhule & Ors.* CS(OS) No. 2458/1989 decided on 10.9.2012 and paras 26(i) and (ii) of which read as under:-

"26(i). This issue pertains to plaintiff No.1 being ready and willing to perform his part of the agreement to sell. As per Section 16(c) of the Act, every plaintiff in a suit for specific performance must aver and prove that the plaintiff has always been and continues to be ready and willing to perform his part of the contract/agreement to sell. Readiness is financial capacity to go ahead with the agreement to sell and willingness is the intention. I may, at this stage, specifically invite attention to the observations of the Supreme Court in the case of *Balraj Taneja and Anr. (supra)*, and relevant paras have been reproduced above, and which show that in a suit for specific performance even if there is no defence of the defendant, yet, the aspect of readiness and willingness has to be specifically proved by the plaintiff. This is stated by the Supreme Court in para 30 of the said judgment. The question is whether the plaintiff No.1 has proved his readiness and willingness at the relevant time and also continues to be ready and willing to perform his part of the contract/agreement to sell.

(ii) Readiness to perform the obligations by a proposed purchaser is a very important aspect and it has to be proved by categorical evidence. Mere oral evidence and self-serving depositions cannot be a substitute for categorical evidence on the specific statutory requirement of Section 16(c). It is not disputed on behalf of the plaintiff No.1 that plaintiff No.1 has not filed any income tax returns or any bank account or proof of any other assets/properties or any other evidence to show the financial capacity of the plaintiff No.1 to pay the balance sale consideration. As per the case of the plaintiff No.1, the balance sale consideration would be approximately ` 19.5 lacs and there is no evidence worth the name in the record to show the plaintiff No.1's financial capacity for this amount. Of course, while on this argument, I am assuming that there is a certainty as to consideration because in reality there is no certainty as to balance sale consideration inasmuch as the plaintiff No.1 has failed to exercise the option in terms of the agreement to sell as to which area of the balance land less the hutment/portion the plaintiff No.1 seeks specific performance of. Also, as already stated above, this area claimed by the plaintiff No.1 has to be further conditioned by an area of 12 bighas which has already been sold to be defendant No.3 under the sale deed dated 8.4.1988. In any case, I need not state anything further inasmuch as there is not a single piece of paper on record or any credible evidence which proves the financial capacity of the plaintiff No.1. I accordingly hold that plaintiff No.1 has miserably failed to prove his readiness to perform his obligations under the agreement to sell dated 27.8.1988. In fact, even willingness on the part of the plaintiff No.1 is absent inasmuch as there is no certainty of any option exercised by the plaintiff No.1 as to specific area which the plaintiff No.1 seeks to purchase, and which specific area had necessarily to be clear inasmuch as there is the issue of lessening the area whether on account of hutments or on account of 12 bighas of land already purchased by the defendant No.3 vide sale deed dated 8.4.1988 and hence of clarity as to for what area and for what price the agreement to sell has to go ahead."

7. Therefore once the appellant/plaintiff failed to prove his readiness and willingness, and which is *sine qua non* as per Section 16(c) of the Specific Relief Act, trial court was justified in dismissing the suit for specific performance. In fact, I may note that appellant/plaintiff is lucky that he has got an extremely high rate of

interest at 18% per annum with a money decree for the amount of Rs.7,10,000/- because courts these days grant interest ordinarily between 9% to 12% per annum depending on facts of each case.

8. There is no merit in the appeal. Dismissed.

MARCH 06, 2018/ib

VALMIKI J. MEHTA, J

