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

Reserved on : 21st February, 2018
Date of decision : 12th March,, 2018

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RFA 135/2007

VISHAL GUPTA

..... Appellant

Through Mr. Anil Kher, Senior Advocate
with Mr. Siddhartha Jain, Mr. Kunal
Kher (M : 9910072729) and Mr. D.
R. Bhatia, Advocate (M:9811604566)

versus

MOHAN LAL & ANR.

..... Respondents

Through Mr. Rajiv Aneja (M : 9910109815)
and Mr. Rajiv Aggarwal, Advocates

CORAM:

JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. The Appellant/Plaintiff (*hereinafter 'Plaintiff'*) has filed the instant appeal impugning the judgment and decree dated 15th December, 2006 by which the suit for specific performance instituted by the Plaintiff has been dismissed.

Brief background

2. The parties entered into an agreement to sell dated 8th November, 2004 in respect of property bearing Plot No.108 and 108-A, measuring 233 sq. yds. Out of Khasra No.36/22/1, situated in the area of Village Nangloi Jat, Abadi, known as Rajindra Park, Part-I, New Delhi. The total sale

consideration of the said agreement was Rs.18,64,000/-. The agreement is exhibited as Ex.PW-1/A. Along with the said agreement, receipt for the sum of Rs.1 lakh paid on 8th November, 2004 and a further receipt for the sum of Rs.2.5 Lakhs dated 24th November, 2004 are exhibited as Ex.PW-1/B & C. The last date for execution of the sale deed as per the agreement to sell was 31st January, 2005. The parties entered into an extension agreement (Ex.PW-1/D) by which the period for conclusion of the transaction was extended by 3 months i.e. till 30th April, 2005.

Appellant/Plaintiff's submissions

3. It is the case of the Plaintiff, as submitted by Mr. Anil Kher, Senior Advocate, that the Plaintiff, tried to repeatedly contact the Respondents/Defendants (*hereinafter 'Defendants'*) for execution of the sale deed within the time specified in the last week of April, 2005. When the Defendants were untraceable, a telegram was issued by the Plaintiff to the Defendants dated 29th April, 2005 (Ex.PW-1/E) but no response was received. On the same day i.e. 29th April, 2005 (Ex.PW-1/G), a notice was issued to the Defendants calling upon the Defendants to execute the sale deed. In order to keep the authorities notified, this notice Ex.PW-1/G10, was also copied to the SHO P.S. Paschim Vihar. The Plaintiff further submitted that he visited the Sub-Registrar's Office on 2nd May, 2005 and the receipt of the said visit is also on record exhibited as Ex. DW-1/1.

4. In response dated 3rd May, 2005 Ex.PW-1/H1-4, the Defendants merely denied the allegations in the notice. The Defendants further stated in their reply that the Plaintiff failed to perform the obligations of contract. Mr. Kher submits that there was no response by the Defendants to the

averments relating NOC to be obtained from Land Acquisition Collector as required under the Delhi Land Reforms Act. He, thus, submits that the Defendants, firstly having not been traceable and then having not replied to the telegram or to the legal notice within the date specified i.e. 30th April, 2005, have breached and failed to perform their obligations. In response to the reply given by the Defendants, the Plaintiff addressed another letter dated 7th May, 2005 (Ex.PW-1/I). This was responded to by the Defendants on 10th May, 2005 (Ex.PW-1/J1-6) wherein the Defendants again merely gave evasive denials to the just requisitions of the Plaintiff. Thus, the Plaintiff filed the subject suit seeking the specific performance, possession and perpetual injunction. The reliefs prayed for in the suit are as under:

“(i) A decree of Specific Performance of the Agreement to Sale dated 08.11.2004, which was subsequently extended by mutual consent on 24.1.2005 upto 30.04.2005 by execution of the sale deed by the defendants in favour of the plaintiff in respect of Plot Nos.108-108A, areas measuring 233 sq. yds. (116.1/2 sq. yds. each), out of Kh. No.36/22/1, situated in the area of Village Nangloi Jat, Abaddi Known as Rajindra Park, Part-I, New Delhi, and for delivering the physical possession of the said plot to the plaintiff.

(ii) A Decree for Perpetual injunction thereby perpetually restraining the defendants, their agents, attorneys from alienating, by way of sale or in any other way or from creating any interest therein or any encumbrance thereon or parting with the possession thereof to anyone else in respect of plot Nos.108-108A, areas measuring 233 sq. yds. (116.1/2 sq. yds. each), out of Kh. No.36/22/1, situated in the area of Village Nangloi Jat, Ababdi Known as Rajindra Park,

Part-I, New Delhi.

(iii) The costs of the suit may also be awarded to the plaintiff and against the defendants.

(iv) Any other relief/s which this Hon'ble Court deems fit and proper under the facts and circumstances of the case for doing complete justice between the parties in favour of the plaintiff and against the defendants."

5. Mr. Kher, thereafter, points to the written statement filed on record to the effect that the Defendants did not dispute the receipt of bayana money. He further submits that the Defendants also do not dispute the fact that NOC was not obtained.

6. It is his submission that the Plaintiff had duly led the evidence of three witnesses including a bank official and an official from the Sub-Registrar's office. The witness PW-2 from the Sub-Registrar's office had categorically averred in cross-examination that the NOC is a pre-condition for permitting the transfer of the property. Reliance is placed on the cross examination of PW-2 to show that the official from the Sub-Registrar's office admits that the NOC is required at the time of sale deed and the application is required to be signed by both the parties. Reliance is also placed upon the evidence of the official from the bank who produced a letter dated 22nd June, 2005 to the effect that the balance in the Plaintiff's account as on 22nd June, 2005 to the tune of Rs.17,00,914.86 (Ex.PW-1/N). On the strength of this evidence, learned Senior Counsel for Plaintiff submits that the Plaintiff was entitled to specific performance.

7. Reliance is placed upon the following statement of DW-1 Mr Mohan Lal:

“It is incorrect to suggest that the Plaintiff never contacted me on 27.04.2005 and 28.04.2005 and it was further never agreed that the parties will reached the office of S. R. on 02.05.2005.”

8. Plaintiff also relies upon the cross examination of Smt. Sudesh to show that she went to the office of Sub-Registrar only on the advice of her lawyer and she was not aware of anything else.

9. In view of these pleadings and evidence, Mr. Kher submits that there was no reason whatsoever for the Trial Court to arrive at a finding that the Plaintiff was not ready and willing to perform his part of the contract. A specific challenge is made to the findings of the Trial Court in paragraphs 28 to 31 of the impugned judgement. It is submitted that the Trial Court has completely ignored the telegram issued, the notices and the replies which were of all sent within the deadline of 30th April, 2005. It is submitted that heavy reliance is placed by the Trial Court on the fact that the Plaintiff did not go to the Sub-Registrar's office on 2nd May, 2005. It is submitted that the Plaintiff had no obligation to go to the Sub-Registrar's office on 2nd May, 2005 inasmuch as, once notice was issued on 29th April, 2005, visiting the Sub-Registrar's office had no meaning as the Plaintiff was never informed that he should reach the Sub-Registrar's office on 2nd May, 2005. He submits that the findings of the Trial Court on issue nos.1 & 3 are completely contrary to the documentary and oral evidence. The Trial Court has completely ignored the fact that NOC is required under law irrespective as to whether the same is mentioned in the agreement to sell or not. Mr. Kher relies upon the following judgments:

- ***Mrs. K. Kanthamani v. Mrs. Nasreen Ahmed, (2017) 4 SCC 654***

- *J. P. Builders and Anr. v. A. Ramadas Rao & Anr. (2011) 1 SCC 429*
- *Aniglase Yohannan v. Ramlatha & Ors. 2005 VIII AD (SC) 343*
- *Manzoor Ahmed Magray v. Gulam Hassan Aram & Ors. AIR 2000 SC 191*
- *Motilal Jain v. Ramdasi Devi & Ors. (2000)6 SCC 420*
- *Nathulal v. Phoolchand, AIR 1970 SC 546*
- *Vijaya Myne v. Satya Bhushan Kaura, 142 (2007) Delhi Law Times 483 (DB)*
- *Hari Das Sood v. Narinder Singh Oberoi AIR 1984 NOC 320 Del*
- *Panchanan Dhara & Ors. v. Monmatha Nath Maity 2006(5)SCC 340*

Respondents/Defendants' Submissions

10. Mr. Rajiv Aneja, learned counsel appearing for the Defendants submits that in the present case, time is of the essence. He specifically refers to clause 2 of the agreement to sell which provides that the payment of balance consideration has to be made by 31st January, 2005. He submits that the Plaintiff did not have the funds available with him. It was for this reason that the first extension was also granted. He relies on the reply to the legal notice dated 3rd May, 2005, wherein the Defendant has categorically stated that the Plaintiff did not have sufficient funds to perform the agreement, and hence the extension was requested. He submits that the entire story of the Defendants being untraceable is a complete falsehood and the arguments have been created as an afterthought in order to cover up the breaches by the Plaintiff. He specifically highlights the contradictory

statements made in the plaint, in the Plaintiff's evidence, in the letters written by the Plaintiff and in the Replication.

11. He further submits that the Defendants have always been consistent in their stand. When the Plaintiff visited the Defendants' shop on 27th April, 2005 and 28th April, 2005, they were told clearly that no further extension is possible. The cross examination of DW-1 is relied on to submit that the Defendants had given all the details as to the visit of the Plaintiff on 27th April, 2005 and 28th April, 2005 and the persons who were accompanying the Plaintiff. He submits that the Defendants had informed the Plaintiff that the transaction should be concluded on 2nd May, 2005 as 30th April, 2005 and 1st May, 2005 were Saturday and Sunday.

12. It is further submitted that the Plaintiff has been dishonest in his conduct, which is evident from the fact that he describes the payment of Rs.2.5 lakhs as an earnest money, though the receipt for Rs.2.5 lakhs, which is written by the Plaintiff's father, describes it as part payment. This was a dishonest act on the part of the Plaintiff, as the Plaintiff wanted to claim back double the amount of the earnest money paid, as the agreement had a clause for refund of double the amount of earnest money, in case the agreement didn't go through due to a lapse by the Defendants. Serious dispute has also been raised as to the readiness and willingness of the Plaintiff. It is submitted that the Plaintiff has admitted in his cross examination that he had not purchased the stamp paper even as on 29th April, 2005. Further, the Plaintiff did not have funds in his account as even the official from the ICICI bank brought a letter confirming the bank balance on 22nd June, 2005 and not 30th April, 2005 which was the last date for executing the sale deed. Reliance is also placed on Exhibit PW-1/K which

is a letter dated 18th May, 2005 sent by the Plaintiff in response to the Defendant's letter dated 10th May, 2005. He submits that this letter would show that the NOC, which was being insisted upon, was a false bogey and pretext. In this letter, it is admitted by the Plaintiff that non-obtaining of the NOC would merely lead to the sale deed being kept under objection by the Sub-Registrar and nothing more. He submits that the entire excuse of the NOC has been created only because the Plaintiff did not have the resources to make the payment of the balance consideration. Learned counsel for the Defendants relies on the following authorities:

- *Futuristic Solutions Ltd v. Nirmal Promoters (2016) 233 DLT 409*
- *Saradamani Kandappan v. S. Rajalakshmi and Ors (2011) 12 SCC 18*
- *Kalavati v. Rakesh Kumar 16th Feb, 2018 in Civil Appeal 2244/2018*

Rejoinder Submissions by Plaintiff

13. In rejoinder, Mr. Kher submits that the extension was on mutual agreement of parties, as recorded in the extension agreement itself. He submits that it is the settled law that in specific performance contracts for immovable property, the presumption is that time is not of the essence. He further submits that it is not necessary to show ready availability of cash in order to prove readiness and willingness. He submits that the vendor, having not obtained the NOC, cannot take advantage of his own wrong.

Analysis and Findings

14. The Trial Court had framed the following issues in the suit:

“1. Whether the plaintiff has committed breach of Contract by not paying the balance sale

*consideration of Rs.15,14,000/- by 30.4.2005?
OPD-2*

2. Whether the plaintiff has always been ready and willing to perform his part of contract and was also ready with the requisite amount of money for getting the sale deed executed but the defendants have avoided to execute it? OPP

3. Whether the defendants were required to obtain NOC from the authority for registration of sale deed? OPP.

4. Whether the extension of time of agreement dated 24.1.2005 was obtained from the defendants by undue influence and misrepresentation committed by the plaintiff? OPD

5. Whether the plaintiff is entitled to a decree of specific performance of Agreement to Sale deed dated 8.10.2004 as prayed? OPP.

6. Whether the plaintiff is entitled to decree of perpetual injunctions as prayed? OPP.

7. Relief.”

15. The foremost issue, that needs to be adjudicated, is as to whether time is of the essence of the contract in this case. The presumption that was relied upon by the Plaintiff that time is not the essence of the contract has several exceptions. The Supreme Court has observed in ***N.Srinivasa v. Kuttukaran Machine Tools Limited (2009)5 SCC 182*** as under:

“In a contract for sale of immovable property, normally it is presumed that time is not the essence of the contract. Even if there is an express stipulation to that effect, the said presumption can be rebutted. It is well settled that to find out

whether time was the essence of the contract, it is better to refer to the terms and conditions of the contract itself”

16. Thus, the general presumption that time is not of the essence is a rebuttable one and depends on the facts of each case. In the facts of the present case, the agreement dated 8th November, 2004 stipulates as under:

“Whereas the Party No.1 for his/he/their bonafide needs and requirements has agreed to sell the afore said property for a total sale consideration of Rs.18,64,000/- (Rupees Eighteen Lacs and Sixty Four Thousand only) and Party No.2 has agreed to purchase the same on the following terms and conditions of this agreement:

NOW THIS AGREEMENT WITNESSETH AS UNDER:-

1. That the Party No.2 has paid an amount of Rs.1,00,000/- (Rupees One Lac Only) as earnest money.

2. The balance sale consideration amount of Rs.17,64,000/- (Rupees Seventeen Lacs and Sixty Four Thousand Only) will be paid latest by 31/01/2005.

3. All liabilities up to the date of finalization of deal will be paid by Party No.1 and the same will be paid by Party No.2 after finalization of the deal.

4. That the Party No.1 shall not create any charges over the said property after the execution of this agreement and Party No.1 has no right to sell it to any body else after the signing of this agreement.

5. That all the expenditure regarding registration shall be borne by the Party No.2.

6. That Party No.2 has agreed to purchase the

said property from Party No.1 on the condition that Party No.1 undertakes to bear all losses which may be suffered by Party No.2, in case the ownership title of Party No.1 of the said property is found to be defective.

7. That the Party No.1 will deliver the vacant physical possession of the said property at the time of full and final payment and registration of concerned documents in favour of the purchaser or his nominee.

8. If the Party No.1 could not execute this agreement to sell then the Party No.1 will pay double amount of the earnest money to Party No.2 and if Party No.2 fails to pay the balance consideration amount within the due date then the amount of earnest money will be forfeited by Party No.1.”

17. A perusal of the above clauses reveals that a specific date has been mentioned for the payment of the balance consideration. Clause 2 mentions the date for payment of the balance consideration but the vacant and peaceful possession is to be handed over *at the time of full and final payment and registration of the documents*. The agreement does not end here. It also provides for consequences of non-payment. If the Defendants do not execute the documents of sale for any reason, the Plaintiff would be entitled to double the amount of the earnest money. In the same vein, if the balance sale consideration is not paid by the Plaintiff, then the earnest money would be forfeited by the Defendants.

18. For whatever reasons, the transaction did not conclude by 31st January, 2005 and hence an extension agreement was negotiated between the parties, and it was agreed that the last date for finalisation would be

extended upto 3 months i.e., 30th April 2005.

19. Execution of the extension agreement coupled with the clauses in the main agreement to sell leaves no doubt that time was of the essence of the contract. When the parties are consciously incorporating the last date for execution of the documents and conclusion of the contract, coupled with the other clauses, the general presumption of time not being of essence ought not to apply in the facts of this case. A perusal of the agreement to sell clearly shows that during the period after signing of the agreement, the vendor had no right to sell the property to anybody else. Thus, the agreement imposed strict obligations on both parties.

20. The Defendants, who appeared to be in bonafide need and requirement of the money, had bounded themselves to various obligations under the agreement to sell and it cannot be said that such obligations would extend indefinitely without an end date. The general presumption has been considerably watered down in ***Saradamani Kandappan v. S. Rajalakshmi and Ors (2011) 12 SCC 18*** which held as under:

“The above section deals with the effect of failure to perform at a fixed time, in contracts in which time is essential. The question whether time is the essence of the contract, with reference to the performance of a contract, what generally may arise for consideration either with reference to the contract as a whole or with reference to a particular term or condition of the contract which is breached. In a contract relating to sale of immovable property if time is specified for payment of the sale price but not in regard to the execution of the sale deed, time will become the essence only with reference to payment of sale price but not in regard to execution of the sale

deed. Normally in regard to contracts relating to sale of immovable properties, time is not considered to be the essence of the contract unless such an intention can be gathered either from the express terms of the contract or impliedly from the intention of the parties as expressed by the terms of the contract.”

21. In the context of immovable property, to hold generally in all cases, that time is not of the essence, would be contrary to the market reality. Prices of immovable property fluctuate based upon economic conditions, location and various other external factors. Thus, when the parties specify a date for conclusion of the transaction coupled with other factors like need of the Vendor, conduct of the Vendee, the presumption is rebuttable. In the present case, clearly the Vendor did not want to be bound down with the agreement to sell forever and any such interpretation would be contrary to the stipulations in the agreement both in letter and spirit.

Readiness and willingness of the Plaintiff.

22. A perusal of the evidence on record casts serious doubt as to the readiness and willingness of the Plaintiff. There are several factors which point to lack of readiness and willingness, which are:

(i) There is no stipulation in the Agreement that a NOC needs to be obtained by the Defendant. If the Plaintiff thought that the NOC was so important, a clause to this effect ought to have been inserted in the agreement. Even the extension agreement does not mention any NOC. It is not plausible to accept that for the entire period from the execution of the Agreement to Sell till the extension agreement was executed, the NOC was not thought of or demanded. It is also not clear as to from which authority the said NOC is required.

(ii) Though the Agreement was entered into on 8th November 2004, it was not until 29th April 2005 that a letter seeking the NOC was addressed to the Defendant. The last date was 30th April 2005. Prior to 29th April 2005, there is no evidence that the NOC was sought. The letter dated 29th April, 2005 addressed by the Plaintiff is vague and reads as under:

“The sale was to be completed by 31st of January, 2005 and you had promised that you will be ready with all the formal documents including ‘No Objection Certificate’ for getting the Sale Deed registered.”

(iii) It has now come in the evidence of PW-2 that the application for no objection is to be made by the parties jointly. The relevant extract from the cross examination of PW-2, an official from the Sub-Registrar’s office, reads as under:

“I have not brought any record regarding performa of NOC the draft of which on the record. It is correct that as per the contents Ex.PW-2/B Farm is to be required to submit by both the parties of the sale deed. In case of land which are shown to be situated in Khasra No. showing that these are agricultural land and NOC is required at the time of sale deed. I had not brought any resolution, Circular, Memorandum or any official document today which shows that suit property and such areas requires NOC. I have not seen any such documents, notification etc., which says that NOCs are required on the properties which are shown in Khasras/agricultural land.”

Thus, the Plaintiff's own witness admits that the joint application was to be made for NOC and no such effort has been made by the Plaintiff as per the

pleadings and documents.

(iv) Further, there is no averment in any of the pleadings or in the evidence that any attempt was made by the Plaintiff, prior to 29th April, 2005 to download the form for issuance of NOC, fill up the same, or to request the Defendants to obtain the NOC. The excuse of NOC being required is being raised on the penultimate date when the transaction was to be concluded. This points to the conduct of the Plaintiff that the NOC was being used as an excuse to not honour the terms of the agreement.

(v) Plaintiff made no efforts to prove the availability of funds as on 30th April, 2005 or 2nd May, 2005. The letter from the bank merely mentions the balance as on 22nd June, 2005, which cannot by itself establish that the Plaintiff had any funds available on 30th April, 2005. Though, it may not be necessary to show ready cash, at least the resources for making payment of Rs.17,64,000/- ought to have been shown. Plaintiff has made a feeble attempt to file Annexure A10 in the appeal to demonstrate that the funds were available, but the said document in fact proves the contrary. Though, in an appeal additional documents, which are not proved in the Trial Court, cannot be taken on record, there was nothing preventing the Plaintiff from placing on record the evidence, which he now proffers in order to establish readiness and willingness. Thus, Annexure A10 cannot be taken on record to support the Plaintiff's case.

(vi) Plaintiff had to bear all charges for registration of the property on the sale deed as per clause 5 of the agreement to sell. The non-purchase of the stamp paper as admitted by the Plaintiff, even as on 30th April, 2005 goes to show that the Plaintiff was not ready and willing to perform his part of the contract. The Plaintiff has not established that he had any funds.

(vii) The Plaintiff did not purchase the stamp paper nor did he write any letter prior to 29th April, 2005 asking the Defendants to obtain the NOC. The letter dated 18th May, 2005 clearly shows that even without the NOC the sale deed could have been registered but would have been kept under objections. Lack of NOC would not have been an impediment to conclude the transaction.

Thus, the Plaintiff has been unable to show his readiness and willingness to conclude the transaction.

23. There is yet another dimension to the conduct of the Plaintiff namely the allegation that the Defendants were untraceable. In the plaint, an assertion has been made to the following effect:

“6. That the plaintiff started locating the defendants in the last week of April 2005 but he failed to trace them. He had ready money to make payment of balance consideration to them.

7. That when the plaintiff could not locate the defendants then on 29th April, 2005 the plaintiff issued telegrams to the defendants and in addition letters of confirmation regarding the telegrams were also issued to the defendants.”

In the replication, the Plaintiff submits as under:

“On 29.04.2005 the plaintiff attempted to locate the defendants but they were not traceable anywhere and therefore he issued telegram to both of them and the letter in confirmation were also sent. A notice was also issued to them and the copy thereof was also submitted to the P.S. Paschim Vihar, for getting help in locating the defendants.”

In the supplementary evidence, however, the Plaintiff again submits as under:

“That the address of the shop of defendant No.1 was known to the deponent and he had gone several times during the last week of April, 2005 but neither the defendant No.1 nor defendant No.2 were available to him and the person available on the shop gave evasive reply and misbehaved with the deponent.”

In the cross examination, the Plaintiff states as under:

“I along with my father went to the shop of the defendant at A-1, Lal Market, Paschim Vihar on 27 or 28.4.2005. The defendants were not available on their said shop on 27.4.2005 or 28.4.2005. It is wrong to suggest that I alongwith my father met the defendant on 27.4.2005 or 28.4.2005 at their above said shop. It is wrong to suggest that the defendants were available at their abovesaid shop. It is further wrong to suggest that I am taking a false plea of non-availability of the defendant to get the benefit to the clauses of the agreement.”

All of the above averments lack consistency. While the plaintiff claims that the Plaintiff started tracing the Defendant in the first week of April, 2005, the replication states that the Plaintiff attempted to locate the Defendants on 29th April, 2005. It is unusual conduct that the Plaintiff began tracing the Defendants on 29th April, 2005 and on the same day issued a legal notice and filed a complaint with the police. The evidence and the cross examination are also completely inconsistent.

24. On the other hand, the Defendant in his cross examination has

asserted as under:

“On 27.04.2005, Plaintiff came to my shop at about 9:00 p.m. alongwith his father and property dealer. On 28.04.2005, father of the Plaintiff and property dealer Shri Raldu Ram Jain met me. It is wrong to suggest that Plaintiff never met me on 27.04.2005 and 28.04.2005. Vol. Plaintiff alongwith his father talked with me about 30 minutes and requested me to extend time.”

Thus, the Defendants clearly mentioned the time at which the Plaintiff had visited their shop, as also the persons who were accompanying the Plaintiff. On a balance, the testimony of the Defendants appears to be more credible. This is also consistent with the Defendants’ conduct that he informed the Plaintiff that no extension would be possible and accordingly went to the Sub-Registrar’s office for concluding the transaction on 2nd May, 2005.

25. The authorities relied upon by the Plaintiff are completely distinguishable, inasmuch as in ***Panchanan Dhara (supra)***, the clauses of the agreement to sell were different. In ***Hari Das Sood (supra)***, the cited report is a *Notes on Cases* and the facts are not stated. A general principle that the cash need not be ready cannot be applied to each and every case.

26. On the other hand, in the recent judgment of the Supreme Court in ***Kalawati (supra)***, the Court holds that even when an NOC is mentioned in an agreement to sell, since the nature of the NOC is not mentioned, the same appears to be without application of mind. The Supreme Court held:

“24. There is nothing to indicate the nature of the “no objection certificate” that the vendors were required to obtain and who were the

authorities from whom the “no objection certificate” was required, nor is there any indication of the purpose for which the “no objection certificate” was required. Similarly, there is no indication about the nature of the income tax clearance certificate required and for what purpose. This clause appears to have been inserted in the agreement to sell without any application of mind and it is quite possible, as alleged by the vendors that the agreement to sell was ante-dated after the introduction of Section 260-UC in the Income Tax Act, 1961. However, we need not go into this possibility in view of the vague nature of the clause.”

The Supreme Court thereafter set aside the judgment of the High Court and upheld the decree of the Trial Court refusing the decree of specific performance.

27. In the present case, there is no mention of any NOC, which was required, either in the agreement to sell or in the extension agreement. Under such circumstances, it is not possible to hold that the lack of NOC was a valid reason for the Plaintiff not to make the payment of the balance sale consideration. The Plaintiff having not made the payment of the balance sale consideration and having not established the readiness and willingness to do so, is not entitled to specific performance of the agreement to sell. The conduct of the Plaintiff prior and subsequent to the filing of the suit including the non-filing of the statement of accounts and non-leading of any evidence to show the availability of funds clearly leads to an adverse inference against the Plaintiff. The judgments cited by the Plaintiff in fact go to show that the financial readiness has to be established. See

Kanthamani (supra). This being a question of fact, in the facts of the present case, it is held that Plaintiff was neither ready nor willing as he has not demonstrated his financial resources and even by his conduct he has not demonstrated that he wants specific performance. The attempt appears to have been to simply keep the property embroiled in litigation and for this conduct the Plaintiff deserves to be saddled with costs of the litigation. The Plaintiff has paid the following sums:

- Rs.1 lakh – earnest money
- Rs.2.5 lakhs – as part payment
- Rs.9 lakhs – at the time of admission of appeal in the High Court.

28. The Plaintiff is entitled to a refund of the entire sum lying in the Registry of this Court along with the interest accrued thereon. The Defendants are held to be entitled to forfeit the earnest money of Rs.1 lakh. Plaintiff is directed to pay costs of Rs.1 lakh to the Defendants, which shall be deductible from Rs.2.5 lakhs to be returned to the Plaintiff. Accordingly, the Defendants are directed to pay a sum of Rs.1.5 lakhs to the Plaintiff within 8 weeks. The amount lying deposited in this Court be refunded to the Plaintiff within 10 days.

29. Appeal is dismissed in the above terms.

PRATHIBA M. SINGH, J.
Judge

MARCH 12, 2018/dk