

\$~

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **RFA 158/2007 & CRL.M.A.1993/2015 (u/s 340 Cr.P.C)**

Reserved on : 4th January, 2018
Date of decision : 31st January, 2018

VEENA SHARMA Appellant
Through: Mr. D.K. Rustagi & Mr. Mayank
Rustagi, Advocates.
Appellant in person
versus

RAMAN MONGA & ANR. Respondents
Through: Mr. Sandeep Khurana, Mr. Mohit
Gupta, Mr. Divij Soni and Ms.
Seemab Ali Fatima, Advocates for R-
2.

CORAM:
JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh J.,

1. The present appeal arises out of the final judgment/decreed dated 24th May, 2006 by which, the learned Additional District Judge rejected the Appellant's prayer for specific performance and directed refund of Rs.12,00,000/- (Rupees Twelve Lakhs) with costs and interest @ 6% per annum.

Brief Background

2. The Appellant/Smt. Veena Sharma was the Plaintiff in the suit (*hereinafter 'Plaintiff'*) Respondent No. 1/Mr. Raman Monga was

Defendant No. 1 in the suit (*hereinafter* 'D1') and Respondent No. 2/Sh. Horam Singh was Defendant No. 2 in the suit (*hereinafter* 'D2').

3. The Plaintiff entered into an agreement to sell and purchase dated 28th October, 2003 with the Defendants for the purchase of the second floor of property bearing No. 29/39, West Patel Nagar, New Delhi, admeasuring 100 square yards. The total sale consideration was Rs.13 lakhs. The Plaintiff has made a total payment of Rs.12 lakhs. The various payments and the dates on which these payments were made are as under:-

Payment Chart

Date	Amount	Mode of Acknowledgment	Exb. No.
02.08.2003	Rs.2,00,000/-	Receipt cum Agreement Signed by D1 & D2	PW1/2
05.09.2003	Rs.3,00,000/-	Agreement to Sell & Purchase	PW1/2 or PW1/X
20.10.2003	Rs.4,00,000/-	Agreement to Sell & Purchase	PW1/2 or PW1/X
20.05.2004	Rs.1,00,000/-	Receipt Signed by D1	PW1/3
15.06.2004	Rs.2,00,000/-	Receipt Signed by D1	PW1/4

4. The original owner of the property was one Sh. Ved Prakash Mahna (*hereinafter* 'Owner'). The Defendants, who were builders, entered into a collaboration agreement dated 26th April, 2003 with the Owner. As per the

said collaboration agreement, it was agreed that the following floors would be constructed in the property:

- (i) Lower Ground floor (*hereinafter 'LGF'*);
- (ii) Upper Ground floor (*hereinafter 'UGF'*);
- (iii) First floor;
- (iv) Second floor; and
- (v) Barsati floor.

5. It was further agreed that a basement would be constructed at the rear side of the property equal to 50 square yards and the said basement shall be given to the owner. Both the Defendants/builders were to construct the entire property and the division between the owner and Defendants were to take place as under:

- (i) ½ Basement at the rear – Share of Owner;
- (ii) the entire lower ground floor (floor finish level – road level clear), and upper ground floor - Share of Owner;
- (ii) the entire first floor, entire second floor and the entire Barsati floor with roof terrace rights - Share of Defendants/builders.

6. Subsequent to this collaboration agreement, the Plaintiff entered into an agreement to sell and purchase dated 28th October, 2003 with the Defendants. There is some controversy as to whether this agreement to sell related to the first floor or the second floor of the property. The authenticity of the first page of this agreement has been disputed by D2.

Proceedings before the Trial Court

7. Since the Defendants did not execute the documents and handover possession of the property, a suit was filed seeking specific performance and other reliefs. The prayers made in the suit are as below:

“It is, therefore, most respectfully prayed that this Hon'ble Court may please to pass a decree in favour of the plaintiff and against the defendants with cost of the suit, thereby:

a) Ordering and directing specific performance of the AGREEMENT TO SELL AND PURCHASE dated 28.10.03 and directing the defendants to perform their part of contract and execute and registered Sale Deed of IInd floor measuring 100 sq. yds. of property bearing no 29/39, West Patel Nagar, New Delhi as shown red in the site plan attached with the plaint after receiving the balance sale consideration of Rs. 1,00,000/- and delivered its possession to the plaintiff in performance of the Agreement:

b) Restraining the defendants permanently from selling, transferring, conveying alienating, part with the possession conveying, alienating, part with the possession and creating third party interest in respect of IInd floor measuring 100 sq. yds. of the property no. 29/39, West Patel Nagar, New Delhi as shown Red in the site plan to any other person or proposed buyers.

c) Pass a decree for recovery of Rs. 12,00,000/- plus Interest @ 24% p.a. alongwith charges in favour of the plaintiff and against the defendants alternatively. Any other order / relief which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case may also be passed in favour of the plaintiff and against the defendants”.

8. The written statement filed by D1 clearly and categorically states that the said he is ready and willing to execute the sale deed in favour of the Plaintiff, if she pays the balance amount of Rs. 1 lakh. D1 admitted the existence of the agreement dated 20th October, 2003 as also the receipts issued. D1, further, states that the Plaintiff is not in any manner concerned

with the litigations which are pending between the Defendants *inter se*. The written statement of D1 reads as under:

“2. That para No. 2 of the plaint is a matter of record. It is admitted that there is receipt dated 2.8.2003 and an agreement dated 20.10.2002 are not denied. Defendant No. 1 is still ready and willing to perform his part of the contract subject to payment of the balance sale price to the defendant no.1. It is the inter-se dispute between the defendants and the plaintiff has nothing to do with the same, which litigations are pending between the defendants in the courts of law.

3. Para no. 3 of the plaint is wrong and denied. The construction of the suit property stands completed and the defendant no. 1 is still ready and willing to perform his part of the contract, subject to the payment of the balance sale price. Rest of the para are not concerning the defendant no.1 and same are denied for want of knowledge. It is submitted that the defendant no. 1 is not at all liable to pay any interest because the defendant no. 1 was/is willing and ready to execute the documents in favour of the plaintiff qua the suit property.”

9. D2, however, takes a completely contrary stand and alleges that the agreement to sell dated 28th October, 2003 is a document which is tampered with. Though the signature of D2 on the second page of the agreement is not disputed, the contents of the first page of the agreement are disputed. It is further submitted that what was agreed to be sold to the Plaintiff was the first floor of the property and not the second floor. D2 alleges collusion between D1 and the Plaintiff. He further submits that he has not received the amounts paid by the Plaintiff and that all the amounts have been received by D1, except the initial sum of Rs.2 Lakhs. D2 further submits that the suit as

framed is not maintainable as it seeks specific performance qua the second floor of the property which has already been sold to one Mr. Vikas Sharma on 8th April, 2004.

10. The Plaintiff, D1 and D2 were examined before the Trial Court. Vide the impugned judgment, the relief of specific performance had been rejected and a decree for the sum of Rs.12 Lakhs along with interest @ 6% per annum, from date of filing the suit, has been passed.

11. The Trial Court came to the conclusion that the second floor had already been sold to Sh. Vikas Sharma and hence, the relief of specific performance cannot be granted. The Court further held that the conduct of the Plaintiff was not upright and fair as she has sought for specific performance of the second floor, when the agreement appears to have been only for the first floor. The Trial Court also concluded that the *inter se* disputes between the Defendants are not the subject matter of the suit and hence, when the Defendants jointly and severally admitted to have received Rs.12 Lakhs, the said amount is liable to be refunded to the Plaintiff.

12. Initially, notice was issued in this appeal and the parties were directed to maintain status quo. Vide order dated 25th August, 2009, this court recorded as under:

“Learned counsel for the respondents, on instructions, submit that in view of the fact that an early hearing of the appeal has been ordered they would not execute any kind of agreement in respect of the property in question with any party till the disposal of the appeal. The application stands disposed of accordingly and the respondents shall be bound by the aforesaid statements given by their respective counsel.”

This order continues to subsist till date.

Submissions of the Appellant/Plaintiff

13. Learned counsel for the Plaintiff submits that the Plaintiff having paid Rs. 12 Lakhs out of Rs.13 Lakhs, which was the agreed consideration, the Plaintiff is entitled to the relief of specific performance. Mr. Rustagi, learned counsel appearing for the Plaintiff submits that the disputes being raised with respect to the authenticity of the agreement to sell is completely misplaced inasmuch as D1 admits to the execution of the agreement to sell and the documents. He further submits that D2 is taking advantage and trying to create confusion as to the identification of the floor that was to be sold to the Plaintiff. He submits that different terminologies are being used by the Defendants in different documents for different floors in the property and hence, the Court needs to uphold and give effect to the true intent and purport of the same. He relies upon the following documents in support of his submission that different terminologies are being used for identification of different floors of the property:

- (i) Collaboration agreement dated 26th April, 2003;
- (ii) Sale deed between the owner and D2 for the first floor of the property, dated 20th February, 2004;
- (iii) Agreement to sell between the defendants and Sh. Vikas Sharma for the third floor of the property along with the roof rights dated 25th December, 2003;
- (iv) Sale deed between the defendants and Sh. Vikas Sharma, that described defendants as the owners of the entire second floor with terrace roof rights.

14. Mr. Rustagi further submits that the agreement to sell between the Plaintiff and the Defendants, acknowledges the payment of Rs. 9 Lakhs out of the total consideration of Rs. 13 Lakhs. The Plaintiff, thereafter, has made a further payment of Rs. 3 Lakhs. He further submits that D2 does not dispute the execution of the agreement to sell but merely argues that the agreement relates to the first floor of the property and not the second floor. He submits that it is not necessary to implead Sh. Vikas Sharma as a party to the suit inasmuch as, in fact, Sh. Vikas Sharma has the third floor and roof rights of the property. The second floor is lying vacant and is in the possession of the Defendants. He relies upon Sections 43 and 42 of the Indian Contract Act, 1872 to submit that when there is a joint liability, the devolution of the said liability is on both the parties, however, even one person can be compelled to fulfill the promise and perform the agreement.

Submissions of D2

15. Mr. Sandeep Khurana, with Mr. Mohit Gupta, addressed submissions on behalf of D2. It was submitted by D2 that there are only three prayers in the plaint namely, for grant of specific performance qua the second floor of the property, for injunction, or for the alternative relief of payment of Rs. 12 Lakhs with interest. D2 submits that no declaration has been sought by the Plaintiff qua the identification or the description of the floor, which is the subject matter of the agreement to sell. D2 further submits that the agreement to sell dated 28th October, 2003 is manipulated, as it does not bear his signatures on the first page of the agreement. The written statement of D2 categorically asserts that the second floor has been sold to Sh. Vikas

Sharma and despite the said fact, the Plaintiff chose not to implead Sh. Vikas Sharma.

16. It was submitted that D1 filed a suit against Sh. Vikas Sharma seeking a declaration that the floor is incorrectly described in the sale deed entered into with Sh. Vikas Sharma. The said suit was dismissed. The Plaintiff has not yet sought execution for the amount of Rs. 12 Lakhs with interest. D2 takes severe umbrage to the fact that the Plaintiff is making contradictory submissions with respect to the original agreement to sell. In the plaint, the Plaintiff stated that the original agreement is with ICICI Bank, from whom, she has taken a loan, but thereafter, in a most surprising manner, the Plaintiff issued a notice to the Defendants under Order XII Rule 8 of the Code of Civil Procedure, 1908 (*hereinafter* 'CPC') seeking production of the agreement to sell. As per the agreement, the sale was to be concluded by 30th November, 2003 and since the same was not concluded, the property was sold to Sh. Vikas Sharma. It was urged that both the agreement to sell and the Receipt dated 2nd August, 2003 are forged and tampered with. On this basis, D2 submits that they have not challenged the decree for payment of Rs. 12 Lakhs along with interest and no fault can be found with the Trial Court's judgment rejecting the relief of specific performance. D2, is thus, agreeable to pay back the amount of Rs. 12 lakhs with interest.

Analysis and Findings

17. The facts of the case are extremely stark. The Plaintiff is a widow, who has made payment of more than 90% of the sale consideration prior to the filing of the suit. At the time of the execution of the agreement to sell and purchase, an amount of Rs. 9 Lakhs out of the total sale consideration of

Rs. 13 Lakhs was paid and is acknowledged in the agreement to sell itself and records that “second party/purchaser has paid a sum of Rs. 2,00,000/- on dt. 2.08.2003 and Rs. 3,00,000/- on dt. 5.09.2003 and Rs. 4,00,000/- on dt. 20.10.2003...” This constitutes more than 75% of the sale consideration of Rs. 13 Lakhs. Receipt dated 2nd August, 2003, which is signed by both the Defendants records as under:

“RECEIPT

Received with thanks a sum of Rs. 2,00,000/- (Rs Two Lack Rupees only) as advance money/Part Payment from :Mrs. Veena Sharma D/o Sh. T.R. Sharma, R/o EA-1/63 Inderpuri D-12 against the sale of Entire Second Floor (without Terrace rights:out of property No. 29/39, West Patel Nagar, New Delhi – 110008, comprising with three bed room set admeasuring 100 sq. yds.

WITNESS WHEREOF this Receipt is made at Delhi on this 2/08/03 in present of following witness:

WITNESSES :

Sd/-

2.8.03

EXECUTANTS :

HORAM SINGH

*R/O : 7/53, Old Rajinder
Nagar, N. Delhi.*

RAMAN MONGA

*R/O: 2944, Gali No. T3,
Ranjeet Nagar, N.
Delhi.”*

18. D1 admits the existence, the authenticity and the validity of the agreement to sell as also the receipts issued. D1 categorically asserts in his written statement that Rs. 1 Lakh is due from the Plaintiff and that he is willing to execute the sale deed in favour of the Plaintiff. The stand of D2 is quite suspicious inasmuch as, while, D2 admits his signatures on the second

page of the agreement to sell as also the signatures on the receipts, what is disputed by D2 is the identity of the floor which was to be sold to the Plaintiff. Thus, the agreement to sell is taken to be proved, as there is no serious dispute regarding the same and the allegation of manipulation or forgery is not made out.

19. D1 and D2 appear to be having *inter se* litigations; however, this Court is not concerned with the said *inter se* litigations between the Defendants. D2, while admitting that there exists an agreement to sell has not produced any other document in place of what the Plaintiff has produced. D2 repeatedly states that what was to be sold to the Plaintiff was the first floor and not the second floor of the property. On a specific query put by the court, as to whether D2 has any copy of the agreement to sell mentioning the first floor of the property, the answer is in the negative. What appears to the Court, from the pleadings is that the Plaintiff has made payment of more than 90% of the sale consideration, but the Defendants are either creating a smoke screen of a dispute or are having a genuine dispute between each other. However, what is clearly the admitted position is that the payments have been made. D2 has raised a dispute as to the identity of the floor that was to be sold to the Plaintiff.

20. In view of the above, it is necessary to notice a few facts. The property is a 100 square yards property in a posh locality of New Delhi, located at West Patel Nagar. It is a prime property. The practice of using different terminologies for various floors of the building is extremely prevalent in Delhi, which is also evident from the various documents, relied upon by the Plaintiff. A perusal of the documents on record and the description of the various floors is set out below:

- Collaboration agreement dated 26th April, 2003 – Floors described as LFG, UGF, first floor, second floor, and Barsati and Mumty Floor;
- The sale deed between the owner Sh. Ved Prakash Mahna and D2 dated 28th February, 2004 was for the sale of entire first floor without the terrace roof rights. This sale deed also records that D2 can install the T.V. Antenna on the terrace roof of the top floor of the property and shall also go to the terrace/roof for the purpose of repair and for checking of water tank, etc [*Exhibit No.DW-2/X*];
- The agreement to sell and purchase between the Defendants and Sh. Vikas Sharma dated 25th December, 2003 records that the Defendants are the exclusive co-owners and co-sharers of the built-up entire third floor with terrace and roof rights of the property bearing No. 29/39, West Patel Nagar, New Delhi. As per this agreement, the consideration was Rs.11,45,000/- [*Exhibit No.DW-1/2*]; and
- The sale deed dated 8th April, 2004 entered into between the Defendants and Sh. Vikas Sharma. In this document, the Defendants describe themselves as being the exclusive owners of the built-up entire freehold property bearing No. 29/39, West Patel Nagar, New Delhi with terrace roof rights with super structure. Vide this document, the Defendants sold the entire second floor with terrace roof rights for a sum of Rs. 5 Lakhs [*Exhibit No.D2/W2*]. Thus there is an inconsistency between the agreement to sell and the sale deed entered into with Mr. Vikas Sharma. In the former the floor sold is the third floor with terrace rights and in the latter it is the second floor with terrace rights.

21. A perusal of all the above agreements shows that the Defendants are not being true and candid. The description of the property is different in different documents and the fact that the agreement with the Plaintiff described the floor of the Plaintiff as the second floor whereas D2 contends the same to be first floor, appears to be a complete red herring. For the purpose of clarity, as per the collaboration agreement, there were supposed to be the following floors in the property:

- (i) Basement at the rear of 50 square yards- owner's share;
- (ii) Lower ground floor (floor finish level—ready level clear) - owner's share;
- (iii) Upper ground floor - owner's share;
- (iv) First floor - Defendants' share;
- (v) Second floor - Defendants' share;
- (vi) Barsati floor with roof rights – Defendants' share.

22. A tabular representation of the various floors as per the collaboration agreement is set out below:

Floor Name Given by Court	Floor description as per Collaboration Agreement	Share as per Collaboration Agreement	
R	Roof/Barsati	DEFENDANTS	
D	2 ND FLOOR	DEFENDANTS	Second floor described as third floor in the agreement to sell between the Defendants and Sh. Vikas Sharma. Therefore, this constitutes the third floor.
C	1 ST FLOOR	DEFENDANTS	Lying vacant - with the Defendants, and constitutes the second floor. This floor is

			described as 2nd Floor in the Agreement to Sell with the Plaintiff.
B	UGF	OWNER	UGF described as the first floor in the sale deed between the owner and D2
A	LGF	OWNER	

23. From the above tabular representation, it is clear that the building has five floors, apart from the basement at the rear. The floor described as 'B' which is described as the First Floor in the agreement between the owner and D2, was purchased from the owner. This floor was obviously not in the share of the defendants - which is why D2 purchased the same from the owner. The floor above Floor B i.e., Floor 'C' is the second floor which is being called the First Floor by D2. This floor 'C' which falls in the share of the Defendants/Builders as per the collaboration, was the floor referred to as the second floor in the agreement to sell with the Plaintiff and is not the floor which was sold to Sh. Vikas Sharma. As admitted by the learned counsel for D2, this floor is lying vacant as on date. The Floor sold to Sh. Vikas Sharma is Floor 'D', along with the terrace rights, which is the top most floor of the building. In the Agreement to Sell with Sh. Vikas Sharma it is described as the third floor but in the Sale deed, for whatever reason, it is described as the second floor. That does not mean that the second floor has been sold to Sh. Vikas Sharma. What is sold to him is Floor D. The entire argument as to the description of the floor has been raised only to conflate the issue and raise an argument that specific performance cannot be ordered. Even during arguments, the counsel for D2, on instructions have confirmed that Floor 'C' above, described as the First floor in the

collaboration agreement and described as second floor in the agreement to sell with the Plaintiff, is lying vacant and is in the possession of the Defendants. Thus, the issue as to the identity of the floor rests. It is Floor 'C' - irrespective of whatever name it is described as in the various documents.

24. Coming to the relief that can be granted in the suit, it is the settled position in law that specific performance is an equitable remedy and the Court while granting specific performance is exercising discretionary jurisdiction. In ***Zarina Siddiqui v. A. Ramalingam @ R. Amarnathan, (2015) 1 SCC 705*** (hereinafter, '*Zarina Siddiqui*'), the Supreme Court held as under:

“24. It is well settled that remedy for specific performance is an equitable remedy. The court while granting decree of specific performance exercises its discretionary jurisdiction. Section 20 of the Specific Relief Act specifically provides that the Court’s discretion to grant decree of specific performance is discretionary but not arbitrary. Discretion must be exercised in accordance with sound and reasonable judicial principles.”

25. Under Section 20 of the Specific Relief Act, 1963 the discretion vested in the Courts is not to be limited in any manner and the boundaries to the exercise of the said relief would depend on the facts of each case. In ***Satya Jain (dead) through LRs & Ors. v. Anis Ahmed Rushdie (dead) through LRs. (2013) 8 SCC 131***, the Supreme Court held as under:

“40. The discretion to direct specific performance of an agreement and that too after elapse of a long period of time, undoubtedly, has to be exercised on sound, reasonable, rational and acceptable principles. The parameters for the exercise of discretion vested by Section 20 of the Specific Relief Act, 1963 cannot be

entrapped within any precise expression of language and the contours thereof will always depend on the facts and circumstances of each case. The ultimate guiding test would be the principles of fairness and reasonableness as may be dictated by the peculiar facts of any given case, which features the experienced judicial mind can perceive without any real difficulty. It must however be emphasized that efflux of time and escalation of price of property, by itself, cannot be a valid ground to deny the relief of specific performance. Such a view has been consistently adopted by this Court. By way of illustration opinions rendered in P.S. Ramakrishna Reddy v. M.K. Bhagyalakshmi and more recently in Narinderjit Singh v. North Star Estate Promoters Ltd. may be usefully recapitulated.”

26. It is also well settled that the Plaintiff has to show readiness and willingness to perform his or her part of the contract. In **Zarina Siddiqui** (*supra*) the Court also held that the conduct of the parties would also govern the grant or non-grant of specific performance. The Court's observation as to conduct of parties is as under:

“33. The equitable discretion to grant or not to grant a relief for specific performance also depends upon the conduct of the parties. The necessary ingredient has to be proved and established by the plaintiff so that discretion would be exercised judiciously in favour of the plaintiff. At the same time, if the defendant does not come with clean hands and suppresses material facts and evidence and misleads the court then such discretion should not be exercised by refusing to grant specific performance.”

27. In **Zarina Siddiqui** (*supra*), finally the Supreme Court held that the conduct of the Defendant disentitled them for exercise of discretion in their

favour. However, in the facts of the said case the Court granted a sum of Rs 15 lakhs in favour of the Plaintiff.

28. In ***Balraj Taneja & Anr. v. Sunil Madan & Anr. (1999) 8 SCC 396***, the Supreme Court held that the readiness and willingness should be pleaded by the Plaintiff and the Court is under an obligation to scrutinize as to whether all the elements of the conditions contained in Section 16 of the Specific Relief Act, 1963 are complied with or not. The Supreme Court held as under:

“30. Applying these tests to the instant case, it will be noticed that in a suit for specific performance it is mandatorily required by Section 16 of the Specific Relief Act to plead readiness and willingness of the plaintiff to perform his part of the contract. The court, before acting under Order 8 Rule 10 has to scrutinize the facts set out in the plaint to find out whether all the requirements, specially those indicated in Section 16 of the Specific Relief Act, have been complied with or not. Readiness and willingness of the plaintiff to perform his part of the contract is a condition precedent to the passing of a decree for specific performance in favour of the plaintiff. ”

29. In a recent judgment – ***Nadiminti Suryanarayan Murthy v. Kothurthi Krishna Bhaskara Rao & Ors. (2017) 9 SCC 622***, the Supreme Court granted relief of specific performance and recognized an agreement to sell dated 18th January, 1983 and directed the Plaintiff therein to pay the balance sale consideration. The Supreme Court noticed that the Defendants had created a bogus agreement to sell only to disentitle the Plaintiff. Under these circumstances, the Court followed the dictum of Justice Vivian Bose in ***Durga Prasad v. Deep Chand AIR 1954 SC 75***. The Supreme Court

recognized primacy of the prior transferee, despite subsequent transfer of the property having taken place. Even in the circumstances where the same property was sold to 'A' and then re-sold to person 'B', the Court came to the conclusion that 'A' is entitled to specific performance and hence 'B' would be obliged to transfer the property back to 'A'. Thus, even in cases where there was a subsequent transfer of the same property, specific performance was granted to the prior transferee - though in the present case, as found hereinabove, there is no subsequent transferee as the floor sold to Sh.Vikas Sharma is not the same floor that was sold to the Plaintiff.

30. In ***Krishna Sweet House v. Gurbhej Singh*** (in RFA 421/2003 dated 30th April, 2012), a learned Single Judge of this Court observed that where substantial consideration i.e. 50 % of the consideration is paid and the proposed buyer is vigilant, he has a right in filing the suit after entering into an agreement to sell, then the Court may grant specific performance. The Appellant has referred to ***Jinesh Kumar Jain v. Iris Paintlal*** 2012 (5) ILR (Del) 678 which is to the same effect. This Court held as under:

“14. Sub-section 3 makes it clear that Courts decree specific performance where the plaintiff has done substantial acts in consequence of a contract/agreement to sell. Substantial acts obviously would mean and include payment of substantial amounts of money. Plaintiff may have paid 50% or more of the consideration or having paid a lesser consideration he could be in possession pursuant to the agreement to sell or otherwise is in possession of the subject property or other substantial acts have been performed by the plaintiff, and acts which can be said to be substantial i.e., merely 5% or 10% etc of the consideration is paid i.e., less than substantial consideration is paid (and for which a rough

benchmark can be taken as 50% of the consideration), and/or plaintiff is not in possession of the subject land, I do not think that the plaintiff is entitled to the discretionary relief of specific performance.”

31. The propositions of law being settled, the same need to be applied to the facts of the present case. The conclusions that can be drawn from the factual conspectus are:

- a) The agreement to sell with the Plaintiff is not disputed, though D2 has attempted to raise doubts as to its authenticity without any basis.
- b) The agreement to sell and its contents are duly corroborated by the receipt of Rs. 2 lakhs, which is an admitted document by all the parties.
- c) The description of various floors by different terminologies cannot be used as a ruse for refusing enforcement of the agreement to sell.
- d) More than 90% of the consideration i.e. Rs.12 lakhs of Rs.13 lakhs stands paid.
- e) Rs.9 lakhs out of Rs.13 lakhs stood paid on the date of agreement to sell.
- f) The consideration for one floor is higher than what Mr. Vikas Sharma paid for the top floor with terrace rights. Under the agreement with the Plaintiff, the consideration was Rs.13 lakhs. In the subsequent agreement to sell with Sh. Vikas Sharma, for a higher floor along with terrace rights, the consideration was Rs.11.45 lakhs and the consideration in the sale deed is only Rs. 5 lakhs.

- g) Floor C i.e. 2nd floor of the property, which is described as the 1st floor by D2 continues to remain vacant and is in the possession of the Defendants.
- h) Only Rs.1 lakh remains to be paid.

32. The conduct of the Defendants in this case is far from being bona-fide. They have deliberately created confusion in the terminology which led to the Trial Court refusing the relief of specific performance. The objection being raised that the Plaintiff ought to have prayed for specific performance in relation to the 1st floor of the property itself shows that the Defendants have not acted fairly. The Defendants have enjoyed more than 90% of the sale consideration for almost 15 years. The non-appearance of D1 and the haze of the disputes being created between the two Defendants, has resulted in the Plaintiff not enjoying the property for which she has paid such a huge consideration. D2 has all along attempted to deceive the Plaintiff by claiming that the floor which was meant for the Plaintiff has been sold to Sh. Vikas Sharma. From an understanding of all the agreements, this position is not true. Sh. Vikas Sharma has acquired rights to the floor above the Plaintiff's floor (*by whatever name it may be called*) along with terrace rights. The Defendants disentitle themselves for exercise of discretion in their favour and render the Plaintiff fully entitled for the relief of the specific performance. The Plaintiff has demonstrated readiness and willingness to perform her part of the contract, which fact is not being disputed by the Defendants.

33. In the overall facts and circumstances, the Plaintiff is held entitled to the decree of specific performance. A decree for specific performance is

passed in favour of the Plaintiff against the Defendants. Accordingly, the following directions are issued:

- (i) Defendants are directed to deposit the keys of the suit property in Court on the next date.
- (ii) Plaintiff is directed to hand over the balance sale consideration of Rs. 1 lakh to the Defendants by Demand Draft on the next date.
- (iii) The Defendants are directed to execute the sale deed for Floor No. C i.e., 2nd floor of the suit property (described as 2nd floor in the agreement to sell and described as 1st floor by the Defendants) bearing No. 29/39, West Patel Nagar, New Delhi. The sale deed shall be executed by the Defendants in favour of the Plaintiff on or before 15th February 2018.

Conduct of the Defendants

34. This case raises serious concerns as to the manner in which property is being sold by real estate agents/builders like the Defendants. The Plaintiff is an individual widow who has invested her hard earned money with the Defendants. The facts that emerge from the record are;

- (i) The agreement to sell is of 2003 and the suit for specific performance was filed in 2004. The Plaintiff has been litigating with the Defendants for the last over 14 years.
- (ii) Both the trial court and the Plaintiff were repeatedly misrepresented that the floor which was agreed to be sold to the Plaintiff was sold to Sh. Vikas Sharma and a deliberate confusion was created as to the terminologies used for the different floors;

(ii) It appears that the Defendants have also seriously undervalued the property in their transactions. In the agreement to sell with the Plaintiff, one floor has been sold for Rs. 13 lakhs. However, the consideration for the top floor along with the Barsati was shown as Rs. 11.45 lakhs in the agreement to sell with Sh. Vikas Sharma but in the final sale deed the consideration is only Rs. 5 lakhs. It is not clear as to how and why the consideration can be so different in two documents relating to the same transaction and the same property.

(iii) In the sale deed with Sh. Vikas Sharma the defendants represent themselves as being owners of the entire property.

(iv) From the facts it is clear that the floor sold to Sh. Vikas Sharma is not the floor which was to be sold to the Plaintiff. The Defendants appear to be making incorrect representations to buyers and also appear to be depriving the government exchequer by not paying full stamp duty;

35. D1 has not appeared before the Court in the appeal proceedings, but as per his written statement filed before the Trial court, it is his stand that he is ready and willing to execute a sale deed in favour of the Plaintiff on payment of the balance consideration amount. D1 had also, in fact, filed a suit for declaration against Sh. Vikas Sharma to declare the portion of property sold to him as the third floor. This suit was however dismissed. Thus, it appears from the record, that it is only D2 who is creating a dispute with respect to the description of the suit property. D2's claim in his pleadings to the effect that the floor meant for the Plaintiff has been sold to Sh. Vikas Sharma appears to be, prima facie, a 'false claim' as envisaged

under Section 209 of the Indian Penal Code, 1860 (*hereinafter*, 'IPC').
Section 209 is reproduced below:

“209. Dishonestly making false claim in Court –
Whoever fraudulently or dishonestly or with intent to injure or annoy any person, makes in a Court of Justice any claim which he knows to be false, shall be punished with imprisonment of either description for a term which may extend to two years, and also shall be liable to fine.”

36. The law on Section 209 is well settled. In ***H.S.Bedi Vs. NHAI 2016 (155) DRJ 259*** (*hereinafter*, 'H.S. Bedi'), this Court has laid down the scope of Section 209 of the IPC and held that the said provision has been enacted to preserve the sanctity of the Court and as a deterrent against making of false claims. The relevant part of the judgment reads:

“15.1 Section 209 of the Indian Penal Code makes dishonestly making a false claim in a Court as an offence punishable with imprisonment upto two years and fine.

15.2 The essential ingredients of an offence under Section 209 are: (i) The accused made a claim; (ii) The claim was made in a Court of Justice; (iii) The claim was false, either wholly or in part; (iv) That the accused knew that the claim was false; and (v) The claim was made fraudulently, dishonestly, or with intent to injure or to annoy any person.

15.3 A litigant makes a 'claim' before a Court of Justice for the purpose of Section 209 when he seeks certain relief or remedies from the Court and a 'claim' for relief necessarily impasses the ground for obtaining that relief. The offence is complete the moment a false claim is filed in Court.

15.4 The word “claim” in Section 209 of the IPC cannot be read as being confined to the prayer clause. It means the “claim” to the existence or non-existence

of a fact or a set of facts on which a party to a case seeks an outcome from the Court based on the substantive law and its application to facts as established. To clarify, the word “claim” would mean both not only a claim in the affirmative to the existence of fact(s) as, to illustrate, may be made in a plaint, writ petition, or an application; but equally also by denying an averred fact while responding (to the plaint/petition, etc.) in a written statement, counter affidavit, a reply, etc. Doing so is making a “claim” to the non-existence of the averred fact. A false “denial”, except when the person responding is not aware, would constitute making a “claim” in Court under Section 209 IPC.

15.5 The word ‘claim’ for the purposes of Section 209 of the Penal Code would also include the defence adopted by a defendant in the suit. The reason for criminalising false claims and defences is that the plaintiff as well as the defendant can abuse the process of law by deliberate falsehoods, thereby perverting the course of justice and undermining the authority of the law.

15.6 The words “with intent to injure or annoy any person” in Section 209 means that the object of injury may be to defraud a third party, which is clear from the Explanation to Clause 196 in the Draft Code namely: “It is not necessary that the party to whom the offender intends to cause wrongful loss or annoyance should be the party against whom the suit was instituted.”

.....
15.15 Section 209 was enacted to preserve the sanctity of the Court of Justice and to safeguard the due administration of law by deterring the deliberate making of false claims. Section 209 was intended to deter the abuse of Court process by all litigants who make false claims fraudulently, dishonestly, or with intent to injure or annoy.

15.16 *False claims delay justice and compromise the sanctity of a Court of justice as an incorruptible administrator of truth and a bastion of rectitude.*

.....
15.21 *Filing of false claims in Courts aims at striking a blow at the rule of law and no Court can ignore such conduct which has the tendency to shake public confidence in the judicial institutions because the very structure of an ordered life is put at stake. It would be a great public disaster if the fountain of justice is allowed to be poisoned by anyone resorting to filing of false claims.*

15.22 *The Courts of law are meant for imparting justice between the parties. One who comes to the Court, must come with clean hands. More often than not, process of the Court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the Court-process a convenient lever to retain the illegal gains indefinitely. A person, who's case is based on falsehood, has no right to approach the Court. He can be summarily thrown out at any stage of the litigation.*

15.23 *The disastrous result of leniency or indulgence in invoking Section 209 is that it sends out wrong signals. It creates almost a licence for litigants and their lawyers to indulge in such serious malpractices because of the confidence that no action will result.*

15.24 *Unless lawlessness which is all pervasive in the society is not put an end with an iron hand, the very existence of a civilized society is at peril if the people of this nature are not shown their place. Further if the litigants making false claims are allowed to go scot free, every law breaker would violate the law with immunity. Hence, deterrent action is required to uphold the majesty of law. The Court would be failing in its duties, if false claims are not dealt with in a manner proper and effective for maintenance of*

majesty of Courts as otherwise the Courts would lose its efficacy to the litigant public.”

37. However, before coming to a final conclusion on the above aspect, D2 is given notice to show cause as to why action under Section 209 should not be taken.

38. Further with the enactment of the Real Estate (Regulation & Development) Act, 2016 (*hereinafter*, ‘RERA’), the Legislature has taken serious note of the conduct of real estate agents and promoters of real estate projects in treating customers unfairly. As per RERA, every State is expected to set up a Real Estate Regulatory Authority (*hereinafter*, ‘Authority’), which has to function for the promotion of the real estate sector and to protect the interests of the allottees. The said Authority has to take measures as contemplated under Section 32 of RERA. One of the functions of the said authority is maintenance of a database with the names and the photographs of the promoters and real estate agents who are defaulters, for public viewing, so that members of the public are cautioned. From publicly available records, it appears that an interim Regulatory Authority has been established in Delhi.

Conclusion

39. In conclusion, the following directions are passed:

- (i) Show cause notice is issued to D2 as to why proceedings under Section 209 of the IPC be not initiated against him;
- (ii) Show cause notice is issued to both the Defendants as to why directions ought not to be issued to the Regulatory Authority under RERA for uploading their names and photographs for public viewing, as defaulters.

A copy of this order be sent to the Standing Counsel, Govt of NCT for assisting the Court on this issue on the next date;

(iii) In the facts and circumstances of this case, the Plaintiff would be entitled to costs of Rs.2,00,000/- (Rupees Two Lacs) payable by the Defendants within one week.

PRATHIBA M. SINGH, J.
(JUDGE)

JANUARY 31, 2018

j

