

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

+ **RFA No. 265/2017**

% **16th August, 2018**

MANOHAR LAL KHETRAPAL & ORS. Appellants

Through: Mr. Baldev Krishan, Advocate
(9810134261)

versus

HARI CHAND (DECD.) THR. LRS. & ANR. Respondents

Through: Mr. Akhil Mittal, Addl.
Standing Counsel and Mr.
Vineet Mishra, Adv. for R-1/
(LRs. (i) to (iv) (9212504099)
Mr. Karan Sharma and Mr.
Rohit, Advocates for DDA.
(9999777847)

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the plaintiffs in the suit impugning the Judgment of the Trial Court dated 19.11.2016 by which the trial court has dismissed the suit for specific performance filed by

the appellants/plaintiffs against the defendant no.1 Sh. Hari Chand (now deceased and represented by his legal heirs). The suit property is property no. 50, Transport Center, Rohtak Road, New Delhi situated on a plot of 50 sq. yds.

2. There is no dispute that parties did enter into an Agreement to Sell on 3.7.1987. Total sale consideration was fixed at Rs. 4,00,000/-. The case of the appellants/plaintiffs was that they paid a sum of Rs.50,000/- to the respondents no.1 (i) to (iv)/ defendant no.1 in terms of two banker's cheques of Rs.30,000/- and Rs.20,000/- dated 2.7.1987 and 3.7.1987 drawn on Bank of Baroda, Punjabi Bagh, New Delhi, however it is noted that admittedly the factual position is that for whatever reason, these bank drafts were never encashed by the respondents no.1 (i) to (iv)/defendant no.1. Disputes and differences arose between the parties that who was liable to pay the unearned increase charges with respect to the suit property to the respondent no.2/defendant no.2/DDA inasmuch as the suit property is a leasehold property from the DDA and if DDA gives permission to transfer the suit property then DDA takes unearned increase i.e 50% of the difference of price at which the leasehold rights in the property were

transferred to respondents no.1 (i) to (iv)/defendant no.1 and the sale price. The case of the appellants/plaintiffs was that in terms of the Agreement to Sell, it was the respondents no.1 (i) to (iv)/defendant no.1 who were liable to pay the unearned increase and not the appellants/plaintiffs. As the respondents no.1 (i) to (iv)/defendant no.1 have failed to execute the sale documents of the suit property in favour of the appellants/plaintiffs therefore, the subject suit for specific performance was filed.

3. At this stage, it is also required to be noted that admittedly the appellants/plaintiffs were already tenants in the suit property since November, 1986 at a rent of Rs.1500/- per month and this position continues i.e the appellants/plaintiffs are tenants in the suit property with rent at Rs.1500/- per month i.e the tenancy of the appellants/plaintiffs is protected under the Delhi Rent Control Act, 1958, i.e irrespective that the appellants/plaintiffs fail to get a favourable result with respect to their suit for specific performance yet the appellants/plaintiffs will continue in possession of the suit property as tenants of the property under the defendant no.1 through his legal heirs. It is also required to be noted that by the Judgment dated

19.11.2016, the counter-claim filed by the respondents no.1 (i) to (iv)/defendant no.1 for possession of the suit property against the appellants/plaintiffs has been dismissed, but to the extent of the entitlement of the respondents no.1 (i) to (iv)/defendant no.1/landlords for payment of a monthly rental charges of Rs.1500/- per month, the same was decreed holding the entitlement of the landlords to the amount of rent at Rs.1500/- per month from 3.7.1987 (the date of Agreement to Sell). Certain other aspects as regards money decree would also be necessary in this regard, and as discussed hereinafter, inasmuch as the appellants/plaintiffs had deposited the amounts totaling to Rs.4,00,000/- (amount equal to sale price) in the Court and in terms of the directions issued by the Court from time to time.

4. Respondents no.1 (i) to (iv)/ Defendant no.1 contested the suit and pleaded that payment of unearned increase was the liability of the appellants/plaintiffs and not the respondents no.1 (i) to (iv)/defendant no.1. Respondents no.1 (i) to (iv)/Defendant no.1 pleaded that they never received any amount under the Agreement to Sell as the bank drafts of Rs.50,000/-were taken back by the appellants/plaintiffs on the plea that the said amount would be paid

back as the appellant no.3/plaintiff no.3 had not executed the Agreement to Sell and when he will execute the Agreement to Sell the amount of Rs.50,000/- will be paid to the respondents no.1 (i) to (iv)/defendant no.1. Respondents no.1 (i) to (iv)/Defendant no.1 pleaded that the suit for specific performance be dismissed including for the reason that the Agreement to Sell was cancelled.

5. The following issues were framed in the suit.

- “1. Whether the alleged agreement dated 03.07.1987 was executed for valid consideration and an enforceable contract came into existence?*
- 2. Whether the alleged agreement dated 03.07.1987 was executed with illegal objects and is therefore, not valid?*
- 3. Whether the said agreement was executed by all the parties, if not, to what effect?*
- 4. Whether the agreement was partly performed as alleged?*
- 5. Whether the suit is maintainable in the absence of notice under Section 53(B) of the DDA Act, 1957?*
- 6. Whether the suit is barred by time?*
- 7. Whether the defendant no.1 has revoked/cancelled/rescinded the agreement or about 17.07.87, if so, with what effect?*
- 8. Whether the defendant no.1 is entitled to retrieve possession of the suit property?*
- 9. Whether the defendant no.1 is entitled to the damages for unauthorized use and occupation of the suit premises, if so at what rate and for what period?*
- 10. Whether the defendant no.1 in fact let out the property to the plaintiff or was this clause sham and introduced to evade lax laws?*

11. *Whether the plaintiff made fraudulent variation in the agreement to include the provisions that the vendor shall bear the charges on taking sale permission?*

12. *Whether the plaintiff no.1 got executed the receipt from defendant no.1 without giving the two bank drafts of Rs.50,000/-?*

13. *What relief?"*

6. Though there is no specific issue, it need not be gainsaid that in every suit for specific performance a purchaser has to prove his readiness and willingness as required by Section 16(c) of the Specific Relief Act, 1963. Readiness means financial capacity and willingness means intention to go ahead with the transaction. In the facts of the present case, we are concerned with the readiness ie the financial capacity of the appellants/plaintiffs to complete the sale transaction.

7. The Supreme Court in the judgment in the case of ***N.P.Thirugnanam (Dead) by LRs. Vs. Dr. R.Jagan Mohan Rao and Others (1995) 5 SCC 115*** has held that the readiness and willingness on the part of the purchaser is right from the date of execution of the agreement to sell till the passing of the decree in the suit for specific performance. This is stated in para 5 of the said judgment and this para 5 reads as under:-

“5. 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 Section 20 of the Specific Relief Act 1963 (for short, 'the Act'). Under Section 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 always ready and willing to perform his part of the contract.” (underlining added)

8. *Dehors* any other aspect as discussed in the impugned judgment, and in exercise of powers under Order XLI Rule 24 CPC which allows this Court to give additional reasoning in order to sustain the impugned judgment, I have put it to the counsel for the appellants/plaintiffs as to whether the appellants/plaintiffs have led any documentary evidence whatsoever to show that the appellants/plaintiffs had with them the financial capacity to pay the

balance amount of Rs.3,50,000/- from the date of the Agreement to Sell being 3.7.1987, and thereafter till 18.11.1993 when a sum of Rs.3,05,000/- was deposited in this Court, and on 26.4.1994 when the sum of Rs.40,000/- was deposited in Court. Thereafter also on 17.5.1994 when the balance amount of Rs.55,000/- was deposited in this Court but that has no bearing as Rs.3,45,000/- stood deposited by 26.4.1994. Learned counsel for the appellants/plaintiffs could not dispute and nor he could have disputed, that the appellants/plaintiffs have not filed any documentary proof whatsoever of the financial capacity of the appellants/plaintiffs to pay the balance sale consideration of Rs.3,50,000/- from 3.7.1987 till the date of deposit of the amounts in the court till 26.4.1994 as stated above. Neither any bank accounts statements of the appellants/plaintiffs have been filed and proved on record, nor any documents showing ownership of the properties of the appellants/plaintiffs(both immovable and moveable) have been filed, and nor income tax returns of the appellants/plaintiffs have been filed, and therefore, it has to be held that appellants/plaintiffs have failed to prove their readiness i.e their financial capacity.

9. It has been held by this Court in the case of *Baldev Behl & Ors. Vs. Bhule & Ors. (2012) 132 DRJ 247* that requirement to prove the ingredient of readiness/financial capacity is a strict requirement and self-serving oral depositions of having financial capacity to make payment of balance sale consideration cannot be taken as discharge of onus of proof of readiness/financial capacity. The relevant paras of the judgment in the case of *Baldev Behl (supra)* are paras 26(i) and 26(ii) and therefore these paras 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 Rs.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." (emphasis is mine)

10. Therefore, it is clear that the appellants/plaintiffs have failed to prove their readiness, and which is a *sine qua non* as per Section 16(c) of the Specific Relief Act. The aspect of readiness or financial capacity is independent of the aspect as to who is guilty of breach of contract, and even if the seller is found guilty of breach of contract, that does not exempt the buyer to prove his financial capacity as required by Section 16(c) of the Specific Relief Act.

11. Accordingly, the suit of the appellants/plaintiffs for specific performance has to fail, and this appeal also has to fail, and thereby the impugned judgment passed by the trial court dismissing the suit for specific performance has to be sustained.

12(i) The only remaining aspect which has now to be considered is as to what are the directions to be passed for the amounts which have been deposited in this Court, being a total sum of Rs.4,24,000/- on different dates i.e Rs. 3,05,000/-(18.11.1993), Rs.40,000/-(26.4.1994) Rs.62,000/-(16.5.1994) and Rs.17,000/-(17.4.1994). Of the aforesaid amounts deposited, a sum of Rs.1,47,000/- was directed to be paid to the respondents no.1 (i) to (iv)/defendant no.1 during the pendency of the suit towards rent due in terms of the order dated 1.9.1995. The further amount lying deposited in this Court was directed to be paid to respondents no.1 (i) to (iv)/defendant no.1 in terms of the recent order dated 5.2.2018 passed by a learned Single Judge of this Court, whereby an amount of Rs.2,79,936/- was further directed to be received by the respondents no.1 (i) to (iv)/defendant no.1 out of the amounts deposited in this Court by the appellants/plaintiffs.

(ii) It is noted that in the impugned judgment, and this is otherwise an admitted fact, that from 3.7.1987 i.e from the date of entering into the Agreement to Sell, the appellants/plaintiffs have not paid the admitted rent at the rate of Rs.1500/- per month to the respondents no.1 (i) to (iv)/defendant no.1. In law simple interest is also payable at 15% per annum to a landlord who has not received rent, as per Section 26(1) of the Delhi Rent Control Act.

(iii) In view of the aforesaid factual position of non-payment of rent since 3.7.1987 the trial court therefore while passing the impugned judgment has passed a money decree in favour of respondents no.1 (i) to (iv)/defendant no.1 with respect to the rent due from 3.7.1987 by observing as under:-

(34) However, in so far as the damages for unauthorized use and occupation of the suit premises is concerned, on the one hand the plaintiffs claimed that the rate of rent was Rs.1,500/- per month whereas on the other hand the defendant no.1 claimed that it was Rs.7,500/- per month. However, the Ld. Counsel for the defendant no.1 had made a submission before Hon'ble Mr. Justice K. Ramamoorthy on **11.08.1995** that the plaintiffs were inducted as tenant in the premises on a monthly rent of Rs.1,500/- per month. Thereafter vide order dated **01.09.1995** the Hon'ble Court directed the plaintiffs to pay the rent @ Rs.1,500/- per month for the period 03.7.1987 upto 03.09.1995. Further, the Hon'ble Delhi High Court vide order dated **20.02.1999** clarified that it was only an interim order without prejudice to the rights and contentions of the parties and was subject to the final outcome of the case.

(35) This being the background, I hereby hold that defendant no.1 (now deceased – through LRs) is entitled to the damages for use and occupation of the property in question from the plaintiffs at the rate of **Rs.1,500/-** per month from 03.09.1995 onwards. Further, the defendant no.1 (now deceased - through LRs) is also entitled to increase of rent at the rate of 10 % per annum after every three years and accordingly the mesne profits are calculated as under:

Sr. No.	Period	Period Monthly Rent after increase of 10%	Total Amount
1.	03.09.1995 to 02.09.1998	Rs.1,650/-	Rs.59,400/-
2.	03.09.1998 to 02.09.2001	Rs.1,815/-	Rs.65,340/-
3.	03.09.2001 to 02.09.2004	Rs.1,996/-	Rs.71,856/-
4.	03.09.2004 to 02.09.2007	Rs.2,187/-	Rs.78,732/-
5.	03.09.2007 to 02.09.2010	Rs.2,388/-	Rs.85,968/-
6.	03.09.2010 to 02.09.2013	Rs.2,599/-	Rs.93,564/-
7.	03.09.2013 to 02.09.2016	Rs.2,820/-	Rs.1,01,520/-
8.	03.09.2016 to 19.11.2016	Rs.3,102/-	Rs.7,858/-
Total Amount			Rs.5,64,238/-

(36) However, I may clarify that the above amount is subject to the adjustment of the amount already lying deposited in the Court.

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XXX

XXX

(39) Further, the issue relating to right of the defendant no.1/ LRs to seek possession is left open to be decided in appropriate legal proceedings. In so far as the damages/ mesne profits is concerned, the defendant no.1 (now deceased – through LRs) has been held entitled to the recovery of **Rs.5,64,238/- (Rupees Five Lacs, Sixty Four Thousand, Two Hundred Thirty Eight only)** from the plaintiffs.”

(iv) Therefore, while sustaining the impugned judgment and decree dismissing the suit for specific performance and the passing by the trial court of a money decree for arrears of rent along with interest

in favour of the respondents no.1 (i) to (iv)/defendant no.1, and exercising powers under Order XLI Rule 33 CPC, it is directed that the appellants/plaintiffs are liable to pay rent at Rs.1500/- per month from 3.7.1987 till receipt of the respective amounts of Rs. 1,47,000/- and Rs.2,79,936/- by the respondents no.1 (i) to (iv)/defendant no.1 and a money decree is accordingly passed. The respondents no.1 (i) to (iv)/defendant no.1 will also be entitled to interest at 15% per annum simple as per Section 26(1) of the Delhi Rent Control Act and not at the rate of 10% per annum simple as granted by the trial court in the impugned judgment and to this extent also a money decree is passed in favour of respondents no.1 (i) to (iv)/defendant no.1. Whatever amount is received by the respondents no.1 (i) to (iv)/defendant no.1 pursuant to orders passed in the suit or by this Court the amounts received will be adjusted by the respondents no.1 (i) to (iv)/defendant no.1 for the amount of rent payable at Rs.1500/- per month along with interest at 15% per annum simple from 3.7.1987 till the dates of respective amounts/payments being received by respondents no.1 (i) to (iv)/defendant no.1. A chart of calculations be accordingly furnished by the respondents no.1 (i) to (iv)/defendant no.1 in this

Court as to how the aforesaid money decree passed in their favour is adjusted from the amounts received by them from the appellants/plaintiffs as per the orders of this Court or in the suit. If as per the calculations as regards the entitlement of the respondents no.1 (i) to (iv)/defendant no.1 of rent at Rs.1500/- per month from 3.7.1987 along with interest at 15% per annum simple till the receipt of the respective amounts, it is found that if the respondents no.1 (i) to (iv)/defendant no.1 have received any extra amount then this amount will be deposited in this Court by the respondents no.1 (i) to (iv)/defendant no.1 within a period of three months from today. In case as per the calculations due, the respondents no.1 (i) to (iv)/defendant no.1 are in fact entitled to certain balance amount from the appellants/plaintiffs then the respondents no.1 (i) to (iv)/defendant no.1 can execute the present money decree against the appellants/plaintiffs including by receiving any amounts which are lying deposited in the suit proceedings. The necessary calculations in terms of the present judgment with respect to the amount due and payable to the respondents no.1 (i) to (iv)/defendant no.1 be filed in

this Court within a period of three weeks from today with an advance copy to the counsel for the appellants/plaintiffs.

14. This appeal is therefore dismissed as regards the claim of the appellants/plaintiffs for specific performance, however, the money decree passed by the trial court is sustained in favour of the respondents no.1 (i) to (iv)/defendant no.1 and against the appellants/plaintiffs, with the modification of the increasing of rate of interest from 10% to 15% per annum simple as stated above. Decree sheet be prepared. Parties are left to bear their own costs.

AUGUST 16, 2018/ib

VALMIKI J. MEHTA, J

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