

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

+ **RFA No.535/2005**

% **3rd July, 2018**

BHASKAR SAINI Appellant
Through: Mr. Vishal Sharma, Advocate.

versus

SATBIR SINGH Respondent
Through: Mr. Gagan Gupta, Advocate.

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 Code of Civil Procedure, 1908(CPC) is filed by the defendant in the suit impugning the judgment of the Trial Court dated 20.4.2005 by which trial court has decreed the suit for specific performance filed by the respondent/plaintiff with respect to the Agreement to sell dated 29.8.2000 entered into between the parties for two plots of land bearing nos. 29 and 30, admeasuring 320 sq yds, out of khasra No.47/2/2/3 situated in the area of village Mundka, New Delhi 110041 also known as Gulshan Park, Block-II, Nangloi, New Delhi

(hereinafter referred to as 'suit property'). Respondent/plaintiff was directed to pay the balance sale consideration of Rs.5.40 lacs (out of the total sale consideration of Rs.6 lacs) within a period of one month and the appellant/defendant was directed to execute the necessary transfer documents of title in favour of the respondent/plaintiff.

2. The facts of the case are that admittedly the parties entered into an Agreement to Sell dated 24.8.2000 with respect to the suit property. Also there is no dispute that at the time of entering into of the agreement to sell an amount of Rs.60,000/- was paid by the respondent/plaintiff to the appellant/defendant out of the total sale consideration of Rs.6 lacs. The period of performance fixed was of two months i.e up to 23.10.2000. Pleading that the appellant/defendant was guilty of breach of contract in not specifically performing the Agreement to Sell, a legal notice dated 17.10.2000 was sent by the respondent/plaintiff to the appellant/defendant for being present before the Sub Registrar when the respondent/plaintiff would be present before the Sub Registrar with the balance sale consideration and the necessary stamp papers. Respondent/plaintiff pleaded that in spite of appellant/defendant being served with the legal notice and the

respondent/plaintiff appearing before the Sub Registrar, the appellant/defendant failed to appear before the sub Registrar for signing the transfer documents of the suit property in favour of the respondent/plaintiff and hence committed breach of Agreement to Sell dated 24.8.2000. Again on 24.10.2000, the respondent/plaintiff sent a legal notice and in reply to which the appellant/defendant pleaded that he had purchased the suit property from Sh. Hawa Singh but there seems to be some documents in favour of one Sh. Net Ram. Pleading that the appellant/defendant was guilty in failing to perform the agreement to sell, the subject suit for specific performance was filed.

3. Appellant/defendant contested the suit and pleaded that parties had cancelled the Agreement to Sell dated 24.8.2000 and respondent/plaintiff had received back the sum of Rs.60,000/- on 6.9.2000 by executing valid receipt in the presence of three persons, namely Sh. Ramesh Kumar, Sh. Ajendra Pal Kataria and Sh. Gyan Chand Saini. It was pleaded that the Agreement to Sell dated 24.8.2000 is highly unreasonable, inequitous and pre-judicial to the interest of the appellant/defendant and hence unforceable and thus the suit for specific performance should be dismissed. It was further

pleaded in the written statement by the appellant/defendant that on the respondent/plaintiff being made aware of the suit filed by one Smt. Nihalo Devi claiming ownership of the suit property, the respondent/plaintiff said he was no longer interested in purchase and demanded repayment of the earnest money paid of Rs.60,000/-. The appellant/defendant agreed to refund the amount subject to returning of the original Agreement to Sell but respondent/plaintiff pleaded unavailability of the original Agreement to Sell but the respondent/plaintiff signed the receipt cum cancellation deed in the presence of three witnesses, namely Sh. Ramesh Kumar, Sh. Ajendra Pal Kataria and Sh. Gyan Chand Saini. It was also pleaded that suit filed by Smt. Nihalo Devi was dismissed as withdrawn. The subject suit was therefore prayed to be dismissed.

4. After pleadings were complete, the trial court framed the following issues:-

“i) Whether the plaintiff is entitled to specific performance of the agreement dated 24.08.2000? OPP

ii) In the alternative whether the plaintiff is entitled to damages to the tune of Rs.6,00,000/- alongwith interest at the rate of 12% per annum as claimed? OPP

iii) Whether the plaintiff received back amount of Rs.60,000/- vide receipt dated 06.09.2000? OPD.

iv) Whether the agreement between the parties was rescinded by the defendant, if so, what was the effect? OPD

v) Relief.”

5. Issue nos.3 and 4 were dealt with together by the trial court and the trial court has held these issues in favour of the respondent/plaintiff by holding that no such receipt Ex.DW1/C as pleaded by the appellant/defendant was executed by the respondent/plaintiff for cancelling the subject Agreement to Sell and the respondent/plaintiff receiving back the amount of Rs.60,000/-. Trial court held that depositions of the three witnesses Sh. Ramesh Kumar (DW2), Sh. Ajendra Pal Kataria (DW3) and Sh. Gyan Chand Saini (DW4) cannot be believed on account of discrepancies in their statements with respect to whether receipt was already typed one day before or was prepared then and there or as to whether there were only the witnesses and the executants of the receipt who were present or that even the brother of the appellant/defendant was present. Trial court accordingly held that the Agreement to Sell was not cancelled and the amount of Rs.60,000/- was not returned to the respondent/plaintiff. The relevant observations of the trial court in this

regard are contained in paras 16 to 20 of the impugned judgment and these paras read as under:-

“16. Now coming to the receipt Ex.DW-1/C vide which Rs.60,000/- is alleged to have been refunded to the plaintiff, there are glaring discrepancies in the testimony of the defendant and his witnesses which makes the execution of this receipt highly doubtful. It has come in the cross examination of the defendant that at the time of execution of this receipt, Gyan Chand was brought by the plaintiff to his house. Ajendra Pal was called on telephone and witness Ramesh Kumar was called from neighbourhood. Plaintiff has reached his house at about 10 a.m. In the room where this receipt was written brother of defendant Subhash Chand Saini was also present. This receipt was prepared by his elder brother Sh. Dharam Pal Saini in his office and his brother works in Ministry of Communication at Delhi. He could not say whether the receipt is typed or computerized. He went on stating that his brother got the receipt prepared one day before it was signed i.e. on 05.09.2000. He could not say if there is a requirement of law that whenever a witness signs, his father's name and address is also required to be mentioned. He could not say if cross on the revenue stamp is in black ink or blue ink. He pleaded his ignorance whether half of the signatures are required to be on half of the revenue stamp and half on the paper. As regards the testimony of the attesting witnesses are concerned, it is pertinent to note that the examination in chief of these witnesses was filed by way of affidavit. All the affidavits are exactly similar and all the affidavits are silent regarding the signatures of the witness on the receipt. Every witness deposes about the signing of the receipt by the plaintiff and the other witnesses but none of the witnesses deposes that the receipt was signed by them also. DW-2 Ramesh Kumar in his cross examination has deposed that he was called from his house by the defendant by stating that agreement is being cancelled and defendant was returning the amount. When he reached at the house of defendant at about 10/11 am, plaintiff and other witnesses were already present. Besides them, no other person was present. Receipt was prepared at the spot in his presence. he could not say whether the receipt was prepared by typewriter or computer He could not say if there was any cross on the receipt or who had made that cross. He pleaded his ignorance if there was any requirement that half of the signatures should be on the revenue stamp and half on the paper. He admitted that he did not mention his father's name and address on the receipt.

17. DW-3 Gyan Chand Saini in his cross examination, has deposed that the receipt Ex.DW-1/C was executed in the house of defendant at about 10/11 am. Plaintiff came to his house on 05.09.2000 at about 8 pm

and brought the receipt wherein his name was written as witness. When he reached the house of defendant alongwith the plaintiff, only defendant was present. Thereafter, Ramesh Kumar, Ajendra Pal came. No other persons were present at that time. As regards the revenue stamp, the witness deposed that if he is given a revenue stamp on a paper then he will sign the revenue stamp. Moreover, the plaintiff had put a cross on the revenue stamp and signed after his name. He did not ask plaintiff to sign on the revenue stamp. He also admitted that whenever one signs as a witness, father's name and address is required to be written however, in the receipt his father's name and address was not written.

18. As regards DW-4 Ajendra Pal is concerned, in cross examination, the witness has deposed that receipt Ex.DW-1/C was executed at the house of the defendant. He was informed in the evening of 05.09.2000 and was also asked to come on the telephone on the morning of 06.09.2000. When he reached the house of the defendant at that time only defendant and his brother Subhash was present. Again said, 4/5 other persons were present. Plaintiff was also present and Ramesh came lateron.

19. A perusal of the testimony of the aforesaid witnesses goes to show that the execution in chief of the all the witnesses is completely silent regarding the fact that the receipt was signed by them. All the witnesses admitted that as attesting witnesses to the receipt, they were required to mention their father's name and the address but none of the witnesses have mentioned their father's name or the address . As regards the number of persons who were present at the time of executing this receipt, there is a dispute in as much as DW-2 Ramesh Kumar and DW-3 Gyan Chand Saini does not speak about the presence of Subhash brother of defendant at the spot. Moreover, some of the witnesses have tried to depose that the receipt was prepared at the spot but it is the case of the defendant that it was prepared one day before i.e 05.09.2000. Moreover, DW-3 Ghan Chand Saini has tried to depose that receipt was brought to him at his house on 05.09.2000 by the plaintiff at about 8 p.m. which is not even the case of the defendant. The writer of the receipt is alleged to be brother of the defendant Dharam Pal Saini and although the defendant sought opportunity to examine this witness but for the reasons best known to him, he did not produce him as such, a material witness has been withheld by the defendant for which adverse interference has to be drawn against him.

20. This suit was instituted before Hon'ble High Court and the proceedings goes to show that an application was moved by the plaintiff for permission to appoint a handwriting expert. Although as per the order sheet dated 26.07.2002, defendant wanted that the matter be sent to CFSL or FSL however, Hon'ble High Court directed the parties to appoint their own handwriting expert of their choice and a date was fixed for taking photographs and signatures of the plaintiff. Thereafter signatures of the

plaintiff on two separate sheets were taken before Asstt. Registrar. The record further reveals that on 22.04.2003, the plaintiff informed the Court that his handwriting expert has died and subsequently plaintiff informed the Court that he does not feel it necessary to obtain a report from handwriting expert. The defendant can not get any benefit from these proceedings in as much as onus of proving the execution of receipt is upon the defendant. In fact if the plaintiff was not examining any handwriting expert it would have been all the more beneficial for defendant to have examined handwriting expert to prove the signatures of the plaintiff on the receipt. Once the plaintiff did not chose to examine handwriting expert, the defendant also did not examine any other handwriting expert with the result from the testimony of the defendant and his witnesses which is contradictory and is not convincing coupled with the different stand taken by the defendant in the reply to the legal notice and the written statement, the defendant miserably failed to prove that the agreement was rescinded by the plaintiff or that Rs.60,000/- was refunded to him vide receipt dated 06.09.2000. I have carefully gone through the authority **A.C. Arulappan (Supra)** relied upon by the Ld. Counsel for defendant. With due respect, this authority does not help the defendant in as much as in that case agreement for sale of tenanted and mortgaged, suit property was filed, without stipulation as to time of execution of sale deed, showing that primary purpose of defendant-vendor was to clear his substantial debts; respondent-plaintiff twice demanded back advance payment made by her, with interest. Some evidence indicating that coercion was used to get appellant-defendant to enter into second more stringent agreement for sale. Respondent also tried during litigation process to gain possession of suit property by colluding with tenant. Under those circumstances, it was held by Hon'ble Apex Court that respondent had tried to take unfair advantage of appellant/defendant and had approached Court with unclean hands and had behaved unfairly throughout. It was further held by Hon'ble Apex Court that grant of specific performance is an equitable relief. Discretion of Court regarding grant of specific relief is not to be exercised in arbitrary or unreasonable manner. In the instant case, facts are entirely different. As observed above, nothing has come on record to cast any doubts on the conduct of the plaintiff. On the order hand, as observed above, defendant although had taken the plea that the contract was rescinded by the plaintiff and Rs.60,000/- was refunded to him but the defendant has miserably failed to prove this fact. As such, this authority does not help the defendant in any manner."

6. Though counsel for the appellant/defendant has argued that once all the three attesting witnesses to the receipt Ex.DW1/C

appeared and deposed in favour of the appellant/defendant, therefore the minor contradictions in their testimonies cannot take away the factum of proof of the receipt Ex.DW1/C, however in my opinion since two equally possible views can be drawn from the evidence on record, this Court would not like to interfere with the findings of the trial court in favour of the respondent/plaintiff and against the appellant/defendant with respect to issue nos.3 and 4.

7. That takes us to the issues as to whether respondent/plaintiff has proved himself to be ready and willing to perform his part of the contract as required by Section 16(c) of the Specific Relief Act, 1963 and as to whether respondent/plaintiff should be granted the discretionary relief of specific performance with respect to the subject agreement to sell.

8. On the aspects of what is the evidence required to prove readiness that is the financial capacity and as to when should discretion be exercised for grant of specific performance, I have recently considered these aspects in detail in the judgment dated 28.2.2018 in CS(OS) No.1261/1995 titled as *M/s Hotz Industries Pvt. Ltd. Vs. Dr. Ravi Singh (Since Deceased Through LRs) & Ors.* In

this judgment I have held that readiness as required by Section 16(c) of the Specific Relief Act pertains to financial capacity as held by the Supreme Court in a catena of judgments and such financial capacity cannot be believed of a proposed buyer/plaintiff simply on oral statements. For this purpose, this Court placed reliance upon the observations made in the earlier judgment in the case of ***Baldev Behl & Ors. Vs. Bhule & Ors. (2012) 132 DRJ 247***. It was held in the case of ***Baldev Behl & Ors. (supra)*** that self-serving averments cannot prove financial capacity and financial capacity has to be proved categorically by evidence, including credible documentary evidence, which the court would believe on preponderance of probabilities. As regards the grant of discretionary relief of specific performance, this Court relied upon the observations made in an earlier judgment in the case of ***Jinesh Kumar Jain Vs. Iris Paintal and Ors. ILR (2012) 5 Delhi 678*** that unless substantial consideration is paid, the discretionary relief for specific performance should not be granted and that payment of just about 10% to 20% of sale consideration would not be substantial consideration for specific performance being granted. Reliance was placed by this Court on the judgment of the

Supreme Court in the case of *Saradamani Kandappan vs. S. Rajalakshmi and Others*, 2011 (12) SCC 18 that nominal price paid as advance of 10% is not good enough for grant of relief of specific performance. This Court has also elaborated on the aspect that a buyer who seeks specific performance must also show as to why only the subject property would satisfy his needs, and especially where only 10% consideration is paid, inasmuch as by the availability with the buyer of balance 90% consideration and by adding thereto an amount, the plaintiff/buyer could have purchased the same or similar type of property in same or similar area. The relevant observations of this Court in the judgment in the case of *M/s Hotz Industries Pvt. Ltd.* (*supra*) are contained in paras 14 to 23 of the judgment and these paras read as under:-

“14. The next issue which arises is that even if the defendants have to be held guilty of the breach of contract being the agreement to sell dated 10.2.1995, whether the plaintiff is entitled to specific performance of the subject agreement to sell. In order to decide the issue of entitlement of the plaintiff to get specific performance of the agreement to sell, two issues have to be decided in favour of the plaintiff. One issue is that the plaintiff has to prove that it always has been and continued to be ready and willing to perform its part of the agreement to sell, and as is so required by Section 16(c) of the Specific Relief Act, 1963, the subject matter of the issue no.6. I note that the issue no.6 framed is not happily worded as it does not contain the requirement of continuous readiness and willingness as the requirement of Section 16(c) of the Specific Relief Act is that a plaintiff in a suit for specific performance must always be and continues to be ready and willing to perform his part under the agreement to sell, and therefore

issue no.6 is read as modified in terms of the requirement of the language of Section 16(c) of the Specific Relief Act. One other issue would be whether plaintiff is entitled to discretionary relief for specific performance.

15. Let us now examine as to whether plaintiff has led evidence and proved in this suit that the plaintiff has always been and continues to be ready and willing to perform its part of the contract.

16. In my opinion the expression “has always been and continues to be ready and willing to perform the contract” includes that plaintiff must show that he always has had the financial capacity to perform its part of the contract for making payment of balance sale consideration of Rs.2.10 crores/Rs.2.18 crores. No doubt financial capacity which is to be proved under the term readiness and willingness is not that plaintiff has to show that it had with it liquid moneys, but however it is equally necessary for the plaintiff to show its financial capacity, and having much assets, for being able to pay the balance sale consideration.

17.(i) When we examine the facts of the present case it is found that plaintiff in order to prove readiness and willingness has relied upon two aspects. The first aspect is the availability of the balance sale consideration as on 22.5.1995 in terms of the certificate filed and proved by the plaintiff as Ex.PW1/8, and which is a certificate issued by the A.B.N. Amro Bank, Sansad Marg Branch, New Delhi that it was the plaintiff who had got prepared as on 22.5.1995 bank drafts in favour of the defendant no.1 in this suit for amounts of Rs.18 lacs, Rs.1.45 crores, Rs.30 lacs, Rs.15 lacs and Rs.10 lacs, and which amounts total to the balance sale consideration. The second aspect of the plaintiff being ready and willing has been argued on behalf of the plaintiff on the basis that when the plaintiff entered into the compromise with the defendant no.4 in the suit in February, 2005, the plaintiff had paid a consideration of Rs.42.50 lacs to the defendant no.4 and which is so recorded in the order of this Court dated 9.2.2005. It is argued that therefore as on 9.2.2005 and even thereafter the plaintiff has proved his financial capacity and therefore readiness and willingness.

(ii) I cannot agree with the argument urged on behalf of the plaintiff that plaintiff had proved its readiness and willingness as required by Section 16(c) of the Specific Relief Act. As already observed above, readiness and willingness has to be a continuous act from the date of entering into the agreement to sell till at least the leading of evidence by the plaintiff in the suit, if not even as on date at the stage of final arguments, and in this regard it is seen that the plaintiff has at best proved that it had the balance consideration with it only in May, 1995. Having financial capacity in May, 1995 in the opinion of this Court will not enable the plaintiff to show financial capacity of the plaintiff for the period from after May, 1995 till

the evidence has been concluded by the plaintiff in the present suit in August, 2010. In fact the plaintiff has to be held to be guilty of the concealing documents from this Court, and which documents are in the special knowledge of the plaintiff and therefore required to be proved by the plaintiff in terms of Section 106 of the Indian Evidence Act. These documents in possession of the plaintiff with respect to its financial capacity would be the documents of the bank accounts of the plaintiff, any fixed deposit receipts of the plaintiff of amounts in its bank, audited Balance Sheets and Profit and Loss accounts of the plaintiff from the year 1995 till plaintiff's evidence was closed in August, 2010 in terms of the statement made on behalf of the plaintiff. Section 16(c) of the Specific Relief Act deliberately requires continuous rediness and willingness i.e continuous financial ability to complete the transactions. The stage of complying with obligations under the agreement to sell by a proposed buyer even if does not arise, yet Section 16(c) of the Specific Relief Act requires the plaintiff to show continuous financial capacity to prove the balance sale consideration. In my opinion, it has to be held that the plaintiff in this regard has miserably failed because merely by showing financial capacity as on date on 22.5.1995 cannot mean that the plaintiff had financial capacity from 23.5.1995 till the plaintiff concluded its evidence in August, 2010. As already stated above the plaintiff has not filed any document with respect to its financial capacity like Balance Sheets, Profit and Loss accounts and therefore against the plaintiff adverse inference has to be drawn under Section 114 of the Indian Evidence Act on account of the plaintiff having deliberately not filed such documents. It is therefore held that the plaintiff cannot be held to have complied with Section 16 (c) of the Specific Relief Act merely because plaintiff has proved the certificate of bank Ex.PW1/8 dated 5.1.2004 showing that plaintiff had prepared pay orders with respect to balance sale consideration on one day and date of 22.5.1995. Also and simply because the plaintiff has paid a sum of Rs.42.50 lacs to defendant no. 4 in February, 2005 would also not mean that plaintiff is to be held that it had always the capacity to pay the entire balance sale consideration to defendant nos. 1 to 3 with the fact that payment by plaintiff to defendant no. 4 of a sum of Rs.42.50 lacs will only show financial capacity of the plaintiff of Rs.42.50 lacs and not with respect to total balance sale consideration payable by the plaintiff to the defendant nos. 1 to 3 of Rs.2.18 crores.

(iii) It was argued on behalf of the plaintiff that plaintiff's Managing Director has deposed in plaintiff's favour that plaintiff had the financial capacity, and this is sufficient evidence to prove readiness and willingness. This argument is however misconceived not only because PW-1 Sh. Arun Kumar Jain had been cross-examined appropriately by suggesting that plaintiff did not have financial capacity and plaintiff was not ready and willing but also because self-serving deposition cannot be held to be

discharge of onus of proof and so observed by this Court in the case of *Baldev Behl & Ors. Vs. Bhule & Ors. (2012) 132 DRJ 247*, paras 26 (i) and (ii) of which reads as under:-

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

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

his obligations under the agreement to sell dated 27.8.1988. In fact, even willingness on the part of the plaintiff No.1 is absent inasmuch as there is no certainty of any option exercised by the plaintiff No.1 as to specific area which the plaintiff No.1 seeks to purchase, and which specific area had necessarily to be clear inasmuch as there is the issue of lessening the area whether on account of hutments or on account of 12 bighas of land already purchased by the defendant No.3 vide sale deed dated 8.4.1988 and hence of clarity as to for what area and for what price the agreement to sell has to go ahead."

18. It is, therefore, held that plaintiff has failed to show that it had always been and continued to be always ready and willing to perform its part of agreement to sell by having the necessary financial capacity to pay the balance sale consideration of Rs.2.18 crores till February, 2005 and thereafter till August, 2010 for the sum of Rs.2.18 crores less the sum of Rs.42.50 lacs paid to the defendant no.4.

19. Issue no. 6 is therefore decided against the plaintiff and in favor of defendant nos. 1 to 3.

20.(i) The next aspect to be considered is as to whether plaintiff is entitled to the discretionary relief of specific performance. In law, merely because there is an agreement to sell, and that the proposed seller is found to be guilty of breach of agreement to sell, yet it does not automatically follow that a proposed buyer is only for that reason entitled to the specific performance of the agreement to sell. In fact, besides the defendants/proposed sellers being guilty of breach of contract, and that even if the proposed buyer/plaintiff proves that there was financial capacity in the plaintiff to pay the balance sale consideration, yet the plaintiff is not necessarily and automatically entitled to specific performance, and this is because the grant of relief of specific performance is a discretion vested in the Court as per Section 20 of the Specific Relief Act.

(ii) An agreement to sell is a contract between the parties and contracts between the parties are subject matter of the Indian Contract Act, 1872. The effect of breach of contract is provided under Section 73 of the Indian Contract Act. If there is a breach of contract then an aggrieved party is entitled to monetary damages as per Section 73 of the Indian Contract Act and which monetary damages is the amount of loss which is caused to the aggrieved party under the contract. An aggrieved party who was the proposed buyer under the agreement to sell will suffer loss if in case on the date and in around the date of breach, the value of a similar property as the contracted property under the agreement to sell, which could be purchased by the plaintiff

as a proposed buyer, had increased. To the extent of increase of price of the property a plaintiff who is a proposed buyer suffers loss when a proposed seller/defendant does not sell the property under an agreement to sell, because a buyer has to pay a higher price for purchase of a similar property, and thus ordinarily whenever there is a breach of contract of an agreement to sell on account of the breach by the defendant/proposed seller, then the plaintiff/proposed buyer becomes entitled ordinarily to damages/loss under Section 73 of the Indian Contract Act being the difference of the contract price and the higher price of a similar property in around the date of breach. The Specific Relief Act contains provisions that in spite of a plaintiff who is the proposed buyer, and against whom breach of contract is caused by a defendant in the suit being the proposed seller, the plaintiff/proposed buyer need not ask for and be granted damages in such a case where the plaintiff/proposed buyer pleads and seeks that there should be specific performance of the contract and not the breach of the contract. In a way therefore the provisions of Specific Relief Act directing specific performance of a breached agreement to sell are in the nature of Exceptions or Provisos to Section 73 of the Indian Contract Act. What is being stated by this Court is that if there is a breach of contract then an aggrieved party on account of the breach of the contract gets under Section 73 of the Indian Contract Act monetary damages but where instead of grant of damages because of the contract being broken, a plaintiff/proposed buyer instead seeks/prays that the contract should be specifically performed, then such a scenario is in the nature of an Exception or a Proviso to the ordinary situation comprised in Section 73 of the Indian Contract Act that breach of contract entitles a person to monetary damages on account of the loss caused. Therefore once the provisions of Specific Relief Act with respect to specific performance are not the normal consequence of a breach of contract being of grant of damages as per Section 73 of the Indian Contract Act, therefore the provisions of the Specific Relief Act; with the important provision therein being Section 20 of the Specific Relief Act; provides that Court has the discretion whether or not to grant specific performance and that merely because it is lawful to do so, the Court will not grant specific performance but instead may only grant damages with the measure of damages being those as provided in Section 73 of the Indian Contract Act. This aspect has been considered by this Court in detail in the judgment in the case of *Jinesh Kumar Jain Vs. Iris Paintal and Ors. ILR (2012) 5 Delhi 678*. The relevant paras of this judgment are paras 13 to 18 and these paras read as under:-

"13. Now let us assume that the agreement to sell dated 26.9.1988 was not hit by the 1972 Act; the defendants were guilty of breach of

their obligation to perform their part of contract; and that the plaintiff was ready and willing to perform his part; even then, can it be said that the plaintiff is yet entitled to the discretionary relief of specific performance. It will be appropriate at this stage to refer to Section 20 of the Specific Relief Act, 1963, and more particularly sub-Section 3 thereof. Section 20 reads as under:-

20. Discretion as to decreeing specific performance.-

(1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.

(2) The following are cases in which the court may properly exercise discretion not to decree specific performance:-

(a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or

(b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff; or

(c) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.

(3) The court may properly exercise discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

(4) The court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the party.”

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 the possession of the subject property or other substantial acts have been performed by the plaintiff, and acts which can be said to be substantial acts under Section 20(3). However, where the acts are not 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.

15. The Supreme Court in the recent judgment of *Saradamani Kandappan vs. Mrs. S. Rajalakshmi, 2011 (12) SCC 18* has had an occasion to consider the aspect of payment of a nominal advance price by the plaintiff and its effect on the discretion of the Court in granting the discretionary relief of specific performance. Though in the facts of the case before the Supreme Court, it was the buyer who was found guilty of breach of contract, however, in my opinion, the observations of the Supreme Court in the said case are relevant not only because I have found in this case the plaintiff/ buyer guilty of breach of contract, but also because even assuming the plaintiff/buyer is not guilty of breach of contract, yet, Section 20 sub-Section 3 of the Specific Relief Act, 1963 as reproduced above clearly requires substantial acts on behalf of the plaintiff/proposed purchaser i.e. payment of substantial consideration. Paras 37 and 43 of the judgment in the case of *Saradamani Kandappan (supra)* are relevant and they read as under:

“37. The reality arising from this economic change cannot continue to be ignored in deciding cases relating to specific performance. The steep increase in prices is a circumstance which makes it inequitable to grant the relief of specific performance where the purchaser does not take steps to complete the sale within the agreed period, and the vendor has not been responsible for any delay or non-performance. A purchaser can no longer take shelter under the principle that time is not of essence in performance of contracts relating to immovable property, to cover his delays, laches, breaches and “non-readiness”. The precedents from an era, when high inflation was unknown, holding that time is not of the essence of the contract in regard to immovable properties, may no longer apply, not because the principle laid down therein is unsound or erroneous, but the circumstances that existed when the said principle was evolved, no longer exist. In these days of galloping increases in prices of immovable properties, to hold that a vendor who took an earnest money of say about 10% of the sale price and agreed for three months or four months as the period for performance, did not intend that time should be the essence, will be a cruel joke on him, and will result in injustice. Adding to the misery is the delay in disposal of cases relating to specific performance, as suits and appeals therefrom routinely take two to three decades to attain finality. As a result, an owner agreeing to sell a property for rupees one lakh and received rupees ten thousand as advance may be required to execute a sale deed a quarter century later by receiving the remaining

rupees ninety thousand, when the property value has risen to a crore of rupees.

XXXXX

XXXXX

XXXXX

43. Till the issue is considered in an appropriate case, we can only reiterate what has been suggested in *K.S. Vidyandam*.

(i) The courts, while exercising discretion in suits for specific performance, should bear in mind that when the parties prescribe a time/period, for taking certain steps or for completion of the transaction, that must have some significance and therefore time/period prescribed cannot be ignored.

(ii) **The courts will apply greater scrutiny and strictness when considering whether the purchaser was “ready and willing” to perform his part of the contract.**

(iii) Every suit for specific performance need not be decreed merely because it is filed within the period of limitation by ignoring the time-limits stipulated in the agreement. The courts will also “frown” upon suits which are not filed immediately after the breach/refusal. The fact that limitation is three years does not mean that a purchaser can wait for 1 or 2 years to file a suit and obtain specific performance. The three-year period is intended to assist the purchasers in special cases, as for example, where the major part of the consideration has been paid to the vendor and possession has been delivered in part-performance, where equity shifts in favour of the purchaser.”

(emphasis is mine)

16. A reading of the aforesaid paras shows that Courts have a bounden duty to take notice of galloping prices. Surely it cannot be disputed that the balance of convenience i.e. equity in the present case is more in favour of the defendants who have only received 10% of the consideration. If the hammer has to fall in the facts of the present case, in my opinion, it should fall more on the plaintiff than on the defendants inasmuch as today the defendants cannot on receiving of the balance consideration of `44,00,000/-, and even if exorbitant rate of interest is received thereon, purchase any equivalent property for this amount. Correspondingly, the plaintiff has had benefit of 90% of sale consideration remaining with him (assuming he has any) and which he could have utilized for purchase of assets including an immovable property. In specific performance suits a buyer need not have ready cash all the time and his financial capacity has to be seen and thus plaintiff can be said to have taken benefit of the 90% balance with him. It is well to be remembered at this stage that in a way that part of Specific Relief Act dealing with specific performance is in the nature of exception to Section 73 of the Contract Act, 1872 i.e. the normal rule with respect to the breach of a contract under Section 73 of the Contract Act, 1872 is of damages, and, the Specific Relief Act,

1963 only provides the alternative discretionary remedy that instead of damages, the contract in fact should be specifically enforced. Thus for breach of contract the remedy of damages is always there and it is not that the buyer is remediless. However, for getting specific relief, the Specific Relief Act, 1963 while providing for provisions of specific performance of the agreement (i.e. performance instead of damages) for breach, requires discretion to be exercised by the Court as to whether specific performance should or should not be granted in the facts of each case or that the plaintiff should be held entitled to the ordinary relief of damages or compensation.

17. I have recently in the case titled as ***Laxmi Devi vs. Mahavir Singh*** being RFA No. 556/2011 decided on 1.5.2012 declined specific performance, one of the ground being payment of only nominal consideration under the agreement to sell. Para 11 of the said judgment reads as under:-

“11. Besides the fact that respondent/plaintiff was guilty of breach of contract and was not ready and willing to perform his part of the contract lacking in financial capacity to pay the balance consideration, in my opinion, the facts of the present case also disentitle the respondent/plaintiff to the discretionary relief of specific performance. There are two reasons for declining the discretionary relief of specific performance. The first reason is that the Supreme Court has now on repeated occasions held that unless substantial consideration is paid out of the total amount of consideration, the Courts would lean against granting the specific performance inasmuch as by the loss of time, the balance sale consideration which is granted at a much later date, is not sufficient to enable the proposed seller to buy an equivalent property which could have been bought from the balance sale consideration if the same was paid on the due date. In the present case, out of the total sale consideration of `5,60,000/-, only a sum of `1 lakh has been paid i.e. the sale consideration which is paid is only around 17% or so. In my opinion, by mere payment of 17% of the sale consideration, it cannot be said that the respondent/plaintiff has made out a case for grant of discretionary relief or specific performance.....”

18. Therefore, whether we look from the point of view of Section 20 sub-Section 3 of the Specific Relief Act, 1963 or the ratio of the judgment of the Supreme Court in the case of ***Saradamani Kandappan (supra)*** or even on first principle with respect to equity because 10% of the sale consideration alongwith the interest will not result in the defendants even remotely being able to purchase an equivalent property than the suit property specific performance cannot be granted. In fact, on a rough estimation, the property prices would have galloped to at least between 30 to 50 times from 1988 till date. I

take judicial notice of this that in the capital of our country, like in all other megapolis, on account of the increase in population and rapid urbanization, there is a phenomenal increase in the prices of urban immovable property.

I therefore hold and answer issue no. 5 against the plaintiff and in favour of the defendants holding that the plaintiff is not entitled to discretionary relief of specific performance. ” (underlining added)

21. The ratio of the judgment passed by this Court in ***Jinesh Kumar Jain (supra)*** has been thereafter followed by this Court in the following cases:-

(i) ***Sushil Jain Vs. Meharban Singh and Others (2012) 131 DRJ 421.***

(ii) ***Baldev Behl & Ors. Vs. Bhule & Ors. (2012) 132 DRJ 247*** (In para 25 of this judgment it is noted that the appeal against the judgment in the case of ***Jinesh Kumar Jain (supra)*** being RFA(OS) No.75/2012 stands dismissed by a Division Bench of this Court on 31.8.2012).

(iii) ***A.K. Narula Vs. Iqbal Ahmed and Others ILR (2013) I Delhi 315.***

22.(i) A reading of the ratio of the aforesaid judgment of this Court in the case of ***Jinesh Kumar Jain (supra)*** shows that a proposed buyer as a plaintiff when only has paid a very limited amount of consideration, then such a plaintiff may not ordinarily be entitled to the discretionary relief of specific performance when the grant of specific performance is being decided after a long period of time having elapsed after entering into the agreement to sell and the suit for specific performance coming up for final disposal. The logic is very simple that from the balance sale consideration which has to be paid by the plaintiff/proposed buyer under an agreement to sell to the defendant/proposed seller, even by adding thereto interest, surely the defendant/proposed seller from the balance sale consideration plus interest cannot purchase a property of an equivalent type as would have been purchased by receipt of the sale consideration at the time when the agreement to sell was entered into many many years earlier.

(ii) As a result of rise in the prices of a property, that in the facts of the present case this Court can take judicial notice that prices of properties in Delhi, and that prices in the year 1995 would be far far lesser than the prices of the property today in the year 2018, and that too more so with the fact of the suit property being situated in one of the prime colonies of the Delhi being Maharani Bagh, grant of specific performance will severely and gravely prejudice the defendants. On a conservative estimate the value of the suit property as on today would be at least around 20 times more than what was the price of the suit property in the year 1995 and that

therefore with the balance sale consideration payable to the defendants as on today even with interest, the defendants will not be able to purchase the property as the defendants could have purchased with the value of the balance sale consideration in the year 1995.

(iii) In my opinion in such cases as the present the plaintiff in fact should be extremely careful in such a suit for specific performance; that when evidence is led the plaintiff also leads requisite evidence as to the loss which would be caused to the plaintiff on account of the breach of contract by the defendants/proposed sellers, so that the Court can grant monetary damages to the plaintiff/proposed buyer on account of the breach of contract by the defendants/proposed sellers along with the interest, but indubitably the position on record in the present case is that the plaintiff has led no evidence whatsoever as to what was the difference of the property price in around April/May, 1995 than what was the price of the property on the date of entering into agreement to sell on 10.2.1995. Once a plaintiff fails to lead any evidence whatsoever to prove loss, then the plaintiff harms its own case because the Court in equity when it exercises discretionary power to deny specific performance because of Section 20 of the Specific Relief Act, and that the Court wants to grant damages on the principles under Section 73 of the Indian Contract Act, the Court cannot do so since it does not have any evidence before it in order to grant monetary damages to the plaintiff/proposed buyer and which loss/monetary damages the plaintiff would have been entitled to on account of defendants/proposed sellers held guilty of breach of agreement to sell. **After all it is not that the plaintiff has pleaded and proved why it wants to be the owner only and only of the suit property and that why any other property in the same or similar area would not be sufficient for the plaintiff's needs. Therefore since plaintiff with the balance sale consideration with it plus an additional amount could well have purchased a similar property in the same or similar area in around May, 1995 and within some reasonable time thereafter, but yet plaintiff has chosen not to, hence the plaintiff is held disentitled to the discretionary relief of specific performance. It is therefore held that since the plaintiff has only paid approximately 14.5% of the sale consideration as on the date of entering into the agreement to sell being the amount of Rs.37 lacs, therefore plaintiff is not entitled to the discretionary relief of specific performance.**

(iv) It is also relevant that since plaintiff has over this period from the year 1995 to 2018 had moneys in its pocket of the balance sale consideration of Rs.2.18 crores, the plaintiff would/could have invested wisely for obtaining returns on this amount of balance sale consideration.

(v) Therefore on the one hand defendants cannot purchase a similar property in similar area as in the year 1995 when the agreement to sell was

entered into with respect to the sale consideration of 1995 in the year 2018, on the other hand the plaintiff has had benefit of having enjoyed and put to use and derived benefits of the balance sale consideration of Rs.2.18 crores, assuming the plaintiff had such a balance sale consideration amount with it (and in reality though it does not have as held while deciding issue no.6) therefore if the plaintiff is granted specific performance in the facts of the present case there would result not only in grave jeopardy to the defendants but that situation would be accompanied by the benefit which the plaintiff has had by having with it and having used or could have used the balance sale consideration of Rs.2.18 crores.

23. I therefore hold that plaintiff in the facts of this case is not entitled to the benefit of being granted the discretionary relief of specific performance. Issue no. 7 is therefore decided in favor of the defendant nos. 1 to 3 and against the plaintiff.” (emphasis is mine)

9. Coming to the aspect of proof of readiness i.e financial capacity of the respondent/plaintiff in the facts of this case, the legal position is that a proposed buyer does not have to jingle money i.e the proposed buyer does not have to show ready availability of liquid money and it is enough if a proposed buyer proves his financial capacity. Financial capacity is proved by showing that the buyer is a person of means owning properties or bank accounts etc. In the present case, however, it is noted that except self-serving statements of the respondent/plaintiff having the balance sale consideration of Rs.5,40,000/-, there is no documentary evidence whatsoever filed to show that the respondent/plaintiff had the financial capacity to pay the balance consideration of Rs.5,40,000/-. Respondent/plaintiff in his

affidavit by way of evidence has pleaded that he carried cash of Rs.5,50,000/- before the Sub-Registrar; of which he had with him a sum of Rs.3,50,000/- and Rs.2,00,000/- was given by the sister of the respondent/plaintiff; but these averments are merely self-serving averments which this Court refuses to believe because how the respondent/plaintiff had not with him cash of Rs.3,50,000/- or how his sister gave him Rs.2,00,000/- are not at all elaborated upon and by cross reference to proved documents which will show the availability of total funds of Rs.5,50,000/- as claimed to be available with the respondent/plaintiff when he appeared before the Sub-Registrar on 23.10.2000. I would also like to note that the respondent/plaintiff has been extensively cross-examined on behalf of the appellant/defendant with respect to the lack of financial capacity of the respondent/plaintiff and suggestions have been given by the appellant/defendant to the respondent/plaintiff which show that in fact the respondent/plaintiff admittedly was facing a case under the Negotiable Instruments Act, 1881 for dishonour of his cheque, and that the respondent/plaintiff admittedly files no income tax returns. Also, the respondent/plaintiff admitted that he did not file any bank account to show any availability

of funds with him. This Court would also like to note that the contention of the respondent/plaintiff is misconceived that this Court should hold automatic financial ability of the respondent/plaintiff as respondent/plaintiff is the President of a Society running a school ,inasmuch as, there is no law that President of a Society which runs a school must necessarily be taken to have finances to complete any and every sale transaction of an immovable property. It is also noted that respondent/plaintiff in his cross-examination has admitted that his school is not recognized and the only evidence filed by him of his financial capacity was owning a Maruti Van and which too was admittedly purchased on installments. Therefore, in my opinion, respondent/plaintiff has failed to prove readiness i.e his financial capacity and therefore respondent/plaintiff has failed to prove the essential requirement of Section 16(c) of the Specific Relief Act for being granted the relief of specific performance.

10. Learned counsel for the respondent/plaintiff argued that this Court should hold that respondent/plaintiff has proved his readiness because trial court has so held as per paras 22 to 25 of its impugned judgment, however I cannot agree with the reasoning and

conclusion of the trial court because by simply making self-serving averments of carrying balance amount of sale consideration before the Sub-Registrar, the same cannot be said to have proved on preponderance of probabilities the financial capacity of the respondent/plaintiff to go ahead with the sale transaction once no documents have been filed and proved as to how could the respondent/plaintiff have with him a sum of Rs.5,50,000/- and as already stated above. Trial court in its paras 22 to 25 has not even cared to refer to the fact that no documentary evidence whatsoever has been filed by the respondent/plaintiff to prove his financial capacity and trial court has also not referred to the admissions of the respondent/plaintiff in his cross-examination of his facing a case of cheque dishonour as also his not filing any income tax returns and the fact that in his cross examination he had no answer as to how he allegedly had a sum of Rs. 3,50,000/- or how his sister had arranged Rs. 2,00,000/- and total of which amount in cash was of Rs.5,50,000/-. The relevant discussion of the trial court in this regard pertains to issue no.1 are contained in paras 22 to 25 of the impugned judgment and which I reject and hold that trial court has wrongly decided issue no.1

in favour of the respondent/plaintiff, and it is therefore held by this Court that respondent/plaintiff has failed to prove readiness for being successful for grant of the relief of specific performance.

11. On the aspect of whether the respondent/plaintiff should be held entitled to the discretionary relief of specific performance, the observations made by this Court in the cases of *M/s Hotz Industries (supra)* and *Jinesh Kumar Jain (supra)* squarely apply because it has been held by the Supreme Court in the case of *Saradamani Kandappan* case (*supra*) that mere payment of 10% of the consideration will not entitle grant of the discretionary relief of specific performance. In the facts of the present case, therefore in my opinion, respondent/plaintiff is not entitled to the discretionary relief of specific performance by simply having paid 10% of the sale consideration, and as so held by the Supreme Court in *Saradamani Kandappan* case (*supra*)

12. I may also note that this Court in *M/s Hotz Industries* case (*supra*) has given additional reason that once the relief of specific performance is a discretionary relief to the grant of damages under Section 73 of the Indian Contract Act, 1872 and the proposed buyer

could always have purchased the same or similar property in the same or similar locality with 90% of the sale consideration being available with the proposed buyer, then ordinarily the discretionary relief of specific performance cannot be granted as the object of ensuring specific performance is to enable a seller to purchase an equivalent property as the property which is sold. Today by grant of balance sale consideration to the appellant/defendant (even along with the interest), eighteen years down the line, surely the appellant/defendant cannot purchase a similar type of property with the subject consideration received under the present agreement to sell.

13. Learned counsel for the respondent/plaintiff placed reliance upon the judgment of the Supreme Court in the case *Narinderjit Singh Vs. North Star Estate Promoters Limited (2012) 5 SCC 712* to argue that escalation in price is not a ground to deny specific performance, however there is no dispute to this proposition of law that escalation of price in itself cannot be a ground to deny specific performance, however the issue of grant of the specific performance is looked into under the different heads of discretionary

aspect for grant of specific performance including as to whether only about 10% of the sale consideration is paid and it is seen that there is no ratio laid down in the judgment of the Supreme Court in the case of *Narinderjit Singh (supra)* that in all cases where simply 10% sale consideration is paid yet specific performance should be granted in all cases. The judgment in *Narinderjit Singh* case (*supra*) therefore does not help the respondent/plaintiff in any manner to show that respondent/plaintiff is entitled to the discretionary relief of specific performance.

14(i) On behalf of the respondent/plaintiff then reliance was placed upon the judgment of the Supreme Court in the case of *Prakash Chandra Vs. Narayan (2012) 5 SCC 403* to argue that Supreme Court has held in this judgment that hardship of the seller is not a ground for denying the specific performance. To buttress this argument reliance was also placed by the counsel for the respondent/plaintiff upon the various sub-sections of Section 20 of the Specific Relief Act that these sub-sections show that the appellant/defendant has not been successful in proving a case of

hardship for the respondent/plaintiff to be denied the specific performance.

(ii) I cannot agree with the arguments urged on behalf of the respondent/plaintiff because there is a difference between whether the plaintiff/buyer is entitled to specific performance because specific performance is a discretionary relief which ought not to be granted in the facts of a particular case, and that there is a defence pleaded by the defendant/seller of the hardship to the seller, being one of the ground available to the seller to question the grant of specific performance as per the sub section(3) of Section 20 of the Specific Relief Act. Sub-section 1 of Section 20 of the Specific Relief Act is general in nature and the other later sub-sections only give instances of facts/circumstances/cases when discretionary relief of specific performance should be denied. Therefore, other later sub-sections after sub-section 1 are only indicative and not exhaustive of the reasons on which discretionary relief of specific performance should or should not be granted. That the relief of specific performance however is discretionary is undoubtedly the legal position in view of sub-section 1 of Section 20 of the Specific Relief Act and, in the facts

of the present case, and as already discussed in detailed above, the respondent/plaintiff by paying just 10% of the sale consideration cannot seek specific performance of the subject agreement to sell more so because there is no evidence led by the respondent/plaintiff that why only the suit property would serve the purpose of the respondent/plaintiff and as to why respondent/plaintiff with 90% of the sale consideration available with him plus certain additional amount did not or could not have purchased a same or similar property in same or similar locality as reasoned in the judgment in the case of *M/s Hotz Industries (supra)*.

iii). In my opinion, therefore, the judgment of the Supreme Court in the case *Prakash Chandra (supra)* does not help the respondent/plaintiff.

15. Learned counsel for the respondent/plaintiff then placed reliance upon the judgment of the Supreme Court in the case of *S.Kesari Hanuman Goud Vs. Anjum Jehan and others (2013)12 SCC 64* to argue that Supreme Court has held in this judgment that even oral evidence of existence of financial capacity is good enough to prove readiness as required by Section 16(c) of the Specific Relief

Act. I cannot agree with this argument because nowhere in this judgment Supreme Court has held that courts should in all cases take self-serving averments and without any documentary proof, for successfully as showing that a buyer/plaintiff has financial capacity. In the facts of the case as per the pleadings of ***S.Kesari Hanuman Goud's*** case (*supra*) as also certain evidence existing in the case before the Supreme Court, the Supreme Court held existence of readiness in that case, however, existence of readiness is dependent on facts of each case, and in the present case in view of the complete absence of any documentary evidence whatsoever filed by the respondent/plaintiff being bank accounts or income tax returns or property papers etc etc, in the opinion of this Court, the respondent/plaintiff has failed to discharge the onus of proof of having the financial capacity to complete the sale transaction and which is a *sine qua non* under Section 16(c) of the Specific Relief Act.

16. Finally, the counsel for the respondent/plaintiff has placed reliance upon the judgment of a Learned Single Judge of this Court in the case of ***Ishwar Dayal Kansal & Anr. Vs. RKBK Fiscal Services Pvt. Ltd. 197 (2013) DLT 41*** to argue that a Learned Single

Judge of this Court in this case granted specific performance inspite of finding escalation in prices and has granted interest to the seller to serve the interest of justice, however, it is noted that the judgment in *Ishwar Dayal Kansal* case (*supra*) will have no application to the facts of the present case because in *Ishwar Dayal's* case (*supra*) it was found as a matter of fact that the plaintiff had more than one option to arrange funds including by having filed balance sheet and income tax returns and which showed the financial capacity of that plaintiff in that suit to arrange funds, but whereas in the present case as already discussed above, no documentary evidence whatsoever exists to show financial capacity of the respondent/plaintiff to pay the balance sale consideration and importantly admissions exist of the respondent/plaintiff in his cross-examination of facing a case of dishonoured cheque and also not filing any income tax returns, etc etc.

17. In view of the aforesaid discussion, the impugned judgment of the trial court dated 20.4.2005 is set aside. The suit of the respondent/plaintiff for specific performance will stand dismissed. Since respondent/plaintiff has not sought the relief of refund of price paid, and the reliefs claimed in the suit are only of specific

performance and for damages, this Court would ordinarily not have been disinclined to grant any relief in this regard, however, in the interest of justice and by applying the Provisions of Order VII Rule 7 CPC, since the appellant/defendant has received a sum of Rs.60,000/- from the respondent/plaintiff pursuant to the subject Agreement to Sell dated 24.8.2000, hence the appellant/defendant is directed to return the amount of Rs.60,000/- to the respondent/plaintiff along with interest at 7.5% per annum simple from 24.8.2000 till the date of payment.

18. Appeal is accordingly allowed, and disposed of, to the extent as stated above, leaving the parties to bear their own costs.

CM(M) No. 255/2018

29. This petition is disposed of as not pressed.

JULY 03, 2018

VALMIKI J. MEHTA, J