

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

+ **RFA No.246/2018**

% **12th March, 2018**

SUDHIR KUMAR Appellant
Through: Mr. Siddharth Bambha,
Advocate with Mr. Shyam D.
Nandan, Advocate, Mr. Dhruv
Dwivedi, Advocate and Mr.
Sheikh Bakhtiyar, Advocate.

versus

VIRENDER KUMAR GOEL Respondent

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

Caveat No.198/2018

No one appears for the caveators. Caveat accordingly stands discharged.

C.M. Nos.9446-47/2018 (exemption)

Exemption allowed subject to just exceptions.

C.Ms stand disposed of.

RFA No.246/2018 and C.M. No.9445/2018 (stay)

1. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the plaintiff in the suit

impugning the judgment of the trial court dated 25.1.2018 by which trial court though has dismissed the suit seeking specific performance filed by the appellant/plaintiff but however the suit has been decreed for recovery of the amount paid by the appellant/plaintiff to the respondent/defendant under the agreement to sell of the sum of Rs.7 lacs along with interest @ 18% per annum simple from the date of the agreement dated 26.9.2005.

2. The subject suit was filed by the appellant/plaintiff pleading that an agreement to sell dated 26.9.2005 was entered into by which the respondent/defendant agreed to sell to the appellant/plaintiff the suit property bearing no. H-14, Shivaji Park, New Delhi-110026. An amount of Rs.7 lacs was paid as an earnest money under the agreement to sell and thus the balance sale consideration which remained payable was the amount of Rs.59 lacs. The balance sale consideration as per the appellant/plaintiff was to be paid by 27.12.2005, whereas the case of the respondent/defendant was that the said date was 27.11.2005. Appellant/plaintiff claimed that he was always ready and willing to perform his part of contract but the respondent/defendant failed to execute the sale deed of the suit

property in favour of the appellant/plaintiff, and therefore after serving the legal notice dated 8.12.2005, the subject suit was filed.

3. Written statement was filed by the respondent/defendant wherein it is not dispute that the agreement to sell dated 27.9.2005 was entered into between the parties, but it was slender that the date of performance was 27.11.2005 which is specifically stated in the agreement and not the date of the 27.12.2005 which was the case of the appellant/plaintiff. It was pleaded in the written statement that the period of 90 days mention in the agreement to sell was a typographical error and the agreement was for payment of the balance sale consideration to the respondent/defendant by 27.11.2005, but since the same was not done, therefore the appellant/plaintiff was guilty of breach of contract and hence not entitled to the relief of specific performance.

4. The following issues were framed in the suit:-

- "(1) Whether the plaintiff is entitled for specific performance of the contract dated 26.09.2005? OPP
- (2) Whether the plaintiff is entitled to a decree of perpetual injunction restraining the defendant from selling, transferring, alienating or creating third party interest or parting with possession of the suit property in favour of any other person?

- (3) Whether the defendant was ready to perform his part of the agreement but the plaintiff failed to make the balance sale consideration. If so, to what effect? OPD
- (4) Whether the defendant is entitled to forfeit the earnest money amount of Rs.7 lacs as received by him from the plaintiff?OPD
- (5) Whether the plaint disclose no cause of action? OPD
- (6) Whether the written statement has been filed by the defendant as per the provisions of Order VIII Rule 1 CPC. If not, its effect? OPD”

5. The relevant issues for discussion were issue nos.1 to 3 and 5 and these issues have been dealt with by the trial court together. Trial court on the aspect of readiness and willingness has held that the appellant/plaintiff except in an around the date of 24.12.2005 did not have the balance sale consideration with him. Trial court has therefore held that the appellant/plaintiff was not always ready and willing at all points of time to perform the agreement to sell. Trial court also notes that amounts appearing on 23.12.2005 and 24.12.2005 in the bank account of appellant/plaintiff of Rs.50,25,557/- and Rs.54,25,557/- did not inspire confidence as before those dates and after those dates the balance amount in the account of the appellant/plaintiff was barely around Rs.25,000/-. The relevant observations of the trial court in this regard are contained in paras 11 to 16 of the impugned judgment and these paras read as under:-

“11. It was further the case of the plaintiff that when in the first week of December 2005, the plaintiff came to know that defendant was negotiating sale of suit property with some property dealers, he sent a registered notice dated 08.12.2005 wherein he informed the defendant that he was ready and willing to perform his part of agreement from the very beginning and he was also ready with the balance consideration to be paid to the defendant. Subsequent thereto, a meeting dated 11.12.2005 was held at the residence of the defendant, when again the plaintiff informed defendant that he was ready with balance sale consideration and willing to perform his part of agreement, but the defendant flatly refused to honour the agreement dated 26.09.2005.

12. To prove that plaintiff had requisite balance sale consideration amount ready and available with him from the very inception of Agreement to Sell (Ex.P2), he examined Sh.Rajeshwar Prasad Singh, Store Clerk, Bank of Baroda, Punjabi Bagh, New Delhi as PW4 who proved the Statement of Account (Ex.PW4/1) of the plaintiff pertaining to his A/c bearing No.SSB104 in Bank of Baroda with respect to period 01.12.2005 to 31.12.2005. The bare perusal of Ex.PW4/1 reveals that as on 05.12.2005, the balance amount in the account of plaintiff was Rs.25,474; as on 16.12.2005, the balance amount was Rs.25,557/-; as on 23.12.2005 the balance amount was Rs.50,25,557/-; as on 24.12.2005, the balance amount was Rs.54,25,557/-; as on 26.12.2005, the balance amount was Rs.2,75,557/-; as on 28.12.2005, the balance amount was Rs.25,557/-; as on 30.12.2005, the balance amount was Rs.25,047/- and as on 31.12.2005, the balance amount was Rs.25,047/-. Thus, the plaintiff did not ever have the requisite balance sale consideration amount of Rs.59,00,000/- in his savings bank account at any point of time. Further, the Statement of Account as on 23.12.2005 and 24.12.2005 reveal that plaintiff had arranged Rs.54,25,557/- but the same was transferred on 26.12.2005, thereby leaving an amount of Rs.2,75,557/- only in his account. Thus, from the Statement of Account of the plaintiff, it is apparent that only a partial amount of balance sale consideration was arranged by the plaintiff. The plaintiff, thus, miserably failed to prove that he was willing to perform his part of agreement and was ready with the balance sale consideration amount of Rs.59,00,000/- from the very beginning and then subsequently on 08.12.2005 and 11.12.2005.

13. It has been time and again reiterated by Hon'ble Supreme Court that plaintiff at the time of filing the suit for specific performance not only has to aver that he was ready and willing to perform his part of agreement but he also has to prove that he has the required amount to be paid as balance sale consideration at the relevant time. It has been held in **JUGRAJ SINGH VS. LABH SINGH** reported as **AIR 1995 SC 945** as under:

"The substance of the matter and surrounding circumstances and the conduct of the plaintiff must be taken into consideration in adjudging readiness and willingness to perform the plaintiff's part of the contract."

14. Similarly, the Hon'ble Supreme Court in **GARIKAPATI VEERAYYA VS. NANNAPANENI SUBBYA CHOWDHURY** reported as **1996 11 SCJ 789** has held that:

"In a suit for specific performance the plaintiff must aver in his plaint that he was ready and willing to perform his part of the contract and if the said averment is traversed, he must prove the said averment. Law does not require that in order to prove his readiness and willingness, the plaintiff must show that he had ready in his hands the requisite amount which had to be paid by him to his vendor. If he proves that he had in his hands such ready amount at all material times and was willing to pay it and get conveyance executed in his favour, then that of course, is a very clear case of the plaintiff's readiness and willingness. But the same fact can be proved, if the plaintiff can show that at all material times, he could have arranged the said amount and was willing to do so and was prepared to perform his part of the contract and carry out the stipulations binding on him. If the plaintiff fails to allege and prove his readiness and willingness in this matter, he has no right to claim specific performance."

15. Similarly, in **J.P. BUILDERS AND ANR. VS. A.RAMADAS RAO AND ANR.** reported as **(2011) 1 SCC 429** and relied upon by learned counsel for plaintiff, it was observed as follows:

"21. Among the three clauses, we are more concerned about clause (c). "Readiness and willingness" is enshrined in clause (c) which was not present in the old Act of 1877. However, it was later inserted with the recommendations of the 9th Law Commission's Report. This clause provides that the person seeking specific performance must prove that he has performed or has been ready and willing to perform the essential terms of the contract which are to be performed by him.

22. The words "ready" and "willing" imply that the person was prepared to carry out the terms of the contract. The distinction between "readiness" and "willingness" is that the former refers to financial capacity and the latter to the conduct of the plaintiff wanting performance. Generally, readiness is backed by willingness.

23. In **N.P. Thirugnanam v. Dr. R.Jagan Mohan Rao** at SCC para 5, this Court held: (SCC pp. 117-18) "5. Section 16(c) of the Act envisages that the 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 along with other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of the contract."

Since, it is apparent from the testimony of PW4 that the plaintiff did not have the balance sale consideration amount during the relevant period, it can be safely concluded that he was neither "ready" nor "willing" to perform his part of agreement.

16. Therefore, no decree of specific performance can be granted to the plaintiff. Since two months period was stipulated in Ex.P2 to execute the sale deed, it can easily be concluded that time was of essence between the parties with respect to the performance of contract." (underlining added)

6. I completely agree with the observations and conclusions of the trial court that the appellant/plaintiff failed to prove his readiness and willingness as required by Section 16(c) of the Specific Relief Act, 1963 because the requirement of Section 16(c) of the Specific Relief Act is that a plaintiff who seeks specific performance must at all times be ready and willing i.e plaintiff has to be ready and willing right from the date of the contract till the date of final

arguments in the suit. I need not burden this judgment with a catena of judgments of the Supreme Court as also of this Court that readiness and willingness has to be not on one date but continues till the date of final arguments in the suit and some of which have already been referred to by the trial court. No doubt readiness and willingness is not to show liquid moneys available with the plaintiff/proposed purchaser but readiness and willingness has to be that there exists financial capacity. As seen from para 12 of the impugned judgment mysteriously only on two dates of 23.12.2005 and 24.12.2005 there were amounts of Rs.50,25,557/- and Rs.54,25,557/- in the bank account of the appellant/plaintiff but before and after those dates there was barely an amount of Rs. 25,000/- in the account of the appellant/plaintiff. Appellant/plaintiff is also failed to explain why and how the account of the plaintiff mysteriously had the amount of Rs. 50,25,557/- and Rs.54,25,557/- on two dates in December i.e what was the source of those amounts and why such amounts appeared and then disappeared. The appellant/plaintiff has not led any evidence of his financial capacity including of his being owner of any property or properties, and what is the position in the income tax returns, if filed

by the appellant/plaintiff. In my opinion therefore the trial court has rightly held that the appellant/plaintiff did not fulfill the requirements of Section 16(c) of the Specific Relief Act by leading appropriate evidence and therefore the appellant/plaintiff has been rightly held guilty of not being ready and willing to perform his part of the contract.

7. I would like to note at this stage that the appellant/plaintiff admittedly led no evidence of loss suffered by the appellant/plaintiff on account of the stated breach by the respondent/defendant. Also trial court has discussed in para 10 of the impugned judgment as to how the date of 27.11.2005 was written by the respondent/defendant in hand in the presence of the appellant/plaintiff. Relevant para 10 of the impugned judgment reads as under:-

“10. Issue Nos.1, 2, 3 and 5 are interconnected and are therefore being decided together. To corroborate his averment in the plaint and replication, plaintiff examined himself as PW1 and his affidavit in evidence was proved as Ex.PW1/A. Agreement to Sell dated 26.09.2005 was proved as Ex.P2, whereas, receipt dated 26.09.2005 was proved as Ex.P3. During his examination, it was claimed by PW1 that he was to pay the balance sale consideration within a period of 90 days from 26.09.2005 and not 27.11.2005 as written by the defendant in his handwriting in Ex.P2. However, the plaintiff during his cross- examination, categorically admitted that the date 27.11.2005 was written by the defendant in his presence

and that he thereafter signed the Agreement to Sell (Ex.P2). He also admitted that after the Agreement to Sell (Ex.P2) was signed by him, the same remained in his possession till he filed Ex.P2 in the Court. Since, it is not the case of the plaintiff that he is an illiterate person, a presumption is raised that Agreement to Sell (Ex.P2) was signed by the plaintiff after reading the contents of the same. The plaintiff to prove his case also examined his brother/Pradeep Mukhi as PW2 who proved his affidavit in evidence as Ex.PW2/A. Sh.Pradeep Mukhi/PW2 deposed that Ex.P2 (Agreement to Sell) was scribed/typed by Sh.Surender Shrivastava/PW3 in his presence as well as in presence of the plaintiff, defendant and his son. He also stated that both plaintiff and defendant signed Ex.P2 in presence of each other, in presence of Y.K. Goel (son of defendant) and his presence after admitting the contents of Ex.P2. He further testified that he and Sh.Y.K. Goel had signed Ex.P2 in presence of both plaintiff and defendant as witnesses and that after execution of the said agreement and receipt Ex.P3, the same were retained by the plaintiff whereas, the copies were retained by the defendant. In his cross-examination, he admitted that the date of 27.11.2005 was written by the defendant in his presence and that no objection was raised by the plaintiff qua the date of 27.11.2005 having written by the defendant. The plaintiff PW1 and his brother Pradeep Mukhi/PW2 thus themselves demolished the claim of the plaintiff that date of maturity of Agreement to Sell was 90 days and not 27.12.2005.” (underlining added)

8. In my opinion therefore trial court has also rightly found the appellant/plaintiff being the person guilty of breach of contract. As already stated above appellant/plaintiff has by the impugned judgment been successful in obtaining the money decree for a sum of Rs.7 lacs being the amount paid by the appellant/plaintiff to the respondent/defendant under the subject agreement to sell. Trial court in my opinion however has clearly been unnecessary benevolent by granting high rate of interest to the appellant/plaintiff who has been

found not only guilty of breach of contract but has been found speculating in litigation by failing to prove his financial capacity and therefore readiness and willingness to go ahead with the transaction. Such high rates of interest ordinarily ought not to be granted in favour of the guilty party to a contract however since I do not have any appeal of the respondent/defendant I need not observe anything further.

9. In view of the aforesaid discussion, there is no merit in the appeal and the same is dismissed with costs of Rs.20,000/- which shall be deposited with website of www.bharatkeveer.gov.in within a period of four weeks from today as the appellant/plaintiff is guilty of deliberately speculating in litigation. Affidavit of compliance of order of deposit of costs be filed in this Court within eight weeks from today.

MARCH 12, 2018
ib/Ne

VALMIKI J. MEHTA, J