

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

% **Date of decision: 10th October, 2018**

+ **RFA 293/2017**

SUNIL KAPOOR

..... Appellant

Through: Mr. Akshay Makhija with Mr. Aditya
Goyal, Ms. Mahima Bahl & Ms.
Seerat Deep Singh, Advs.

Versus

HIMMAT SINGH & ORS

..... Respondents

Through: Mr. Sanjiv Kakra, Mr. Irfan Khan &
Ms. Savi Abbot, Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This First Appeal under Section 96 of the Code of Civil Procedure Code, 1908 (CPC) impugns the judgment and decree [dated 24th December, 2016 in Suit No.193/16/04 (Unique Case ID No.02406C0024022016) of the Court of Additional District Judge-04, South-East] of dismissal of the suit filed by the appellant / plaintiff for specific performance of an Agreement of Sale of property described as first floor of house No.N-246, Greater Kailash, Part-I, New Delhi.

2. This appeal came up first before this Court on 15th March, 2017 when the counsel for the respondents / defendants appeared on caveat. The appeal, on 14th December, 2017 was admitted for hearing. Mediation, to which the parties were referred, remained unsuccessful. On 2nd August, 2018, finding that the appellant / plaintiff, in possession of the property agreed to be sold, admittedly inducted as a tenant therein, was wanting to keep this appeal pending to perpetuate his possession of the premises, last opportunity was given to the appellant / plaintiff to argue the appeal on 29th August, 2018.

However, on 29th August, 2018 also the appellant / plaintiff was not willing to argue the appeal and wanting to keep the appeal pending. Resultantly, the interim arrangement recorded in the order dated 14th May, 2018 was vacated and the appeal ordered to be listed in the category of 'Regulars' and respondents / defendants permitted to recover possession in pursuance to a decree for ejectment in a separate proceeding in their favour. However, upon the counsel for the appellant / plaintiff on the same day subsequently mentioning the matter and assuring that he will argue the appeal on the next date, the appeal was posted for hearing today.

3. The respondents / defendants have not recovered possession as yet.
4. The counsel for the appellant / plaintiff, without prejudice to his rights and contentions, at the outset states that the appellant / plaintiff would not press this appeal if the respondents / defendants grant two years time to the appellant / plaintiff to vacate the premises and if the respondents / defendants refund to the appellant / plaintiff the sum of Rs.10,00,000/- received under the Agreement to Sell for a total sale consideration of Rs.80,00,000/-.
5. The aforesaid proposal is not agreeable to the counsel for the respondents / defendants who also denies that a sum of Rs.10,00,000/- has been received.
6. The counsel for the appellant / plaintiff states that the finding in this regard has been returned by the Suit Court in favour of the appellant / plaintiff and the respondents / defendants have not challenged the said finding by preferring an appeal or by preferring cross-objections.
7. The counsel for the respondents / defendants contends that though the finding is in favour of the appellant / plaintiff but the respondents / defendants dispute receipt of Rs.8,00,000/- and admit receipt of

Rs.2,00,000/- only. It is further contended that the respondents / defendants are entitled in this appeal to, without filing cross-objections, demonstrate to this Court that the finding with respect to remaining Rs.8,00,000/- in favour of the appellant / plaintiff is contrary to law.

8. Be that as it may, the counsels have been heard on merits.

9. The undisputed position is, that the appellant / plaintiff was a tenant under the respondents / defendants on the entire first floor of property no.N-246, admeasuring 800 sq.yds., Greater Kailash, Part-I, New Delhi, since the year 1990 and the lease deed in favour of appellant/plaintiff was last renewed on 13th November, 2002, till 31st October, 2005, at a rent of Rs.4,000/- per month.

10. The appellant / plaintiff claims, that on 23rd February, 2004, the respondents / defendants orally agreed to sell the entire first floor with terrace above the second floor to the appellant / plaintiff for a total sale consideration of Rs.80,00,000/-. The said oral Agreement to Sell is evidenced by three receipts. The said receipts are as under:

“TOKEN RECEIPT

Received a sum of Rs.2,00,000/- (Rupees Two Lacs only) from Sh. Sunil Kapoor S/o Sh. S.N. Kapoor R/o N-246, Greater Kailash-I, New Delhi-110048, as token money against the sale of Ist floor, my share in the N-246, Greater Kailash-I, New Delhi including the terrace rights of IInd floor. The details term & condition and price shall be discussed and formal agreement to sell shall be made within two months. The total consideration is Rs.80,00,000/- (Eighty Lakhs Only).

Sd/-

(HIMMAT SINGH)

C/o Late Mr. Inderjit Singh

R/o N-246, Greater Kailash-I
New Delhi-110048

‘Witness’

Sd/-

1. Harveen Kaur

Sd/-

2. Sonia Kapoor

23-2-04

XXXXXXXXXX

Received further sum of Rs.8 lacs (Rs.6,04,000/- in cash and Rs.1,96,000/- i.e., the amount already received through various cheques after adjusting rent till 31/05/04) from Shri Sunil Kapoor as part payment against total sale consideration of Rs.80 Lacs for 1st floor with terrace rights of 2nd floor of House no.N-246, Greater Kailash-I, N. Delhi. Thus total sum of Rs.10 Lacs received till today.

Sd/-

(HARVEEN KAUR)

N-246, G.K.-I

NEW DELHI

Dated: 08/05/2004

XXXXXXXXXX

As agreed registered sale deed pertaining to sale of property No. N-246, G.K. I, N.D. would be executed by 31/08/04 on receipt of balance payment. No rent would be charged w.e.f. August, 04, the amount received in excess of rent till then will be adjusted against sale consideration.

Sd/-

(HARVEEN KAUR)

N-246, G.K.-I

NEW DELHI

Dated: 08/07/2004”

11. The counsel for appellant/plaintiff contends that, (i) the respondents / defendants however got issued a notice dated 22nd July, 2004 of termination of tenancy of the appellant / plaintiff as permitted under Clause 6 of the lease deed; (ii) another notice dated 24th August, 2004 also of termination of lease was got served on the appellant / plaintiff; (iii) the appellant / plaintiff, on 21st September, 2004 instituted the suit from which this appeal arises; (iv) the Suit Court has dismissed the suit holding that there was no concluded agreement of sale of which specific performance was claimed and the said finding was primarily based on the alleged discrepancy in the description in the plaint of the property agreed to be sold and the description of the property in the tenancy of the appellant / plaintiff as contained in the lease deed dated 13th November, 2002; and, (v) while in the plaint, it was *inter alia* pleaded that the Agreement to Sell was of the entire premises in the tenancy of the appellant / plaintiff but the lease deed was not found to be with respect to the entire premises of which Agreement to Sell was claimed.

12. During the hearing, it has also emerged that (a) the appellant / plaintiff, with effect from the month of August, 2004, stopped paying the rent of Rs.4,000/- per month which the appellant / plaintiff had agreed to pay under the lease deed; (b) the respondents / defendants, in the year 2004 itself instituted a suit for ejectment, after termination of tenancy of the appellant / plaintiff, from the subject premises and in which suit a decree on admissions of ejectment was passed in favour of the respondents / defendants and against the appellant / plaintiff on 31st January, 2011; (c) in RFA No.251/2011 preferred by the appellant / plaintiff against the decree for ejectment, a limited compromise was arrived at between the parties and under which it was agreed that the appellant / plaintiff, till the decision of the

suit for specific performance and the appeal if any preferred thereagainst, could continue in possession of the premises subject to payment with effect from 1st August, 2013 of Rs.50,000/- per month; (d) the appellant / plaintiff has made the said payments; (e) vide order dated 14th May, 2018 in this appeal, the said amount was enhanced with effect from 1st June, 2018 to Rs.75,000/- per month and which payments have been made by the appellant / plaintiff; and, (f) the appellant / plaintiff, for the period from August, 2004 till 31st July, 2013 did not pay any amount whatsoever to the respondents / defendants towards rent and/or use and occupation charges of the property.

13. The counsel for the appellant / plaintiff has also argued that (i) of the three respondents / defendants who are owners of the property, the first receipt aforesaid is signed by the respondent / defendant no.1 and witnessed by the respondent / defendant no.2; (ii) the second and third receipts aforesaid are signed by the respondent / defendant no.2; (iii) though neither of the three receipts is signed by respondent/defendant no.3 Ashok Singh, but the lease deed dated 13th November, 2002 is also signed only by the respondent / defendant no.2 Harveen Kaur on behalf of respondents / defendants no.1 and 3, and the respondent / defendant no.3 in her cross-examination recorded on 11th March, 2014 agreed that though no Power of Attorney had been executed by either of the respondents / defendants in favour of each other with respect to their respective share in the property but each of the respondents / defendants often acted on behalf of each other without specific authority, as there was an implicit understanding between the three of them; (iv) thus the factum that neither of the three receipts bore the signature of respondent / defendant no.3, which has been decided by the Suit Court against the appellant / plaintiff, has been wrongly decided; (v)

once the Suit Court had believed that there was some transaction between the appellant / plaintiff on the one hand, and the respondents / defendants on the other hand, as evidenced from the receipts aforesaid, in the absence of any explanation by the respondents / defendants of the transaction, the version of the appellant / plaintiff ought to have been believed; (vi) the Suit Court, even if not inclined to grant specific performance in favour of the appellant / plaintiff, notwithstanding the appellant / plaintiff in the plaint having not sought refund of the amounts which have been believed to be paid, ought to have granted the relief of refund of Rs.10,00,000/- with interest to the appellant / plaintiff; reliance in this regard is placed on ***Uma Kapoor Vs. Kapil Aggarwal*** 2014 SCC OnLine Del 4413 and ***Kiri Associates (P) Ltd. Vs. Pramod Kumar Mittal*** 2016 SCC OnLine Del 3745; (vii) the appellant / plaintiff has also filed an application in this appeal for amendment of the plaint to also claim the relief of recovery of Rs.10,24,000/- with damages; and, (viii) the Suit Court even if of the view that there was no Agreement to Sell by the respondent / defendant no.3 who had not signed any of the receipts, ought to have granted the decree for specific performance with respect to the share of the respondents / defendants no.1&2 in the property notwithstanding the appellant / plaintiff having not shown any inclination or willingness thereof; reliance in this regard is placed on ***Kartar Singh Vs. Harjinder Singh*** (1990) 3 SCC 517.

14. I have enquired from the counsel for the appellant / plaintiff, whether the appellant / plaintiff, in response to the notices dated 22nd July, 2004 and 24th August, 2004 admittedly got served by the respondents / defendants on the appellant / plaintiff of termination of tenancy, gave a reply that the respondents / defendants had agreed to sell the property and executed the last

receipt on 8th July, 2004 and were not entitled to terminate the tenancy on 22nd July, 2004.

15. The counsel for the appellant / plaintiff states that no replies were given but it is the case of the appellant / plaintiff that the appellant / plaintiff, after receipt of notice dated 22nd July, 2004, had approached the respondents / defendants but the respondents / defendants avoided the issue on one pretext or another.

16. I have next enquired from the counsel for the appellant / plaintiff as to what steps the appellant / plaintiff took to have the Agreement to Sell, as set up by the appellant / plaintiff, implemented before 30th August, 2004, the last date stipulated for execution of the sale deed and whether the appellant/plaintiff tendered the balance sale consideration to the respondents / defendants and / or forwarded the draft of the proposed sale deeds to the respondents / defendants and / or purchased the stamp duty for the sale deed.

17. The counsel for the appellant / plaintiff states that the appellant / plaintiff did not take any such steps since the respondents / defendants, by their notices dated 22nd July, 2004 and 22nd August, 2004 of termination of tenancy, had shown their intent to renege from the Agreement to Sell and the appellant / plaintiff straightaway instituted the suit for specific performance on 21st September, 2004. It is further stated that the appellant / plaintiff has led evidence of availability of balance sale consideration with the appellant / plaintiff.

18. I am unable to agree. Section 16(c) of the Specific Relief Act, 1963 provides that specific performance of a contract cannot be enforced in favour of a person who fails to aver and prove that he has 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 terms of the performance of which has been prevented or waived by the defendant. The explanation thereto provides that the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction.

19. According to the true construction of the contract of which appellant / plaintiff was seeking specific performance, the sale deed in pursuance to the oral Agreement to Sell was to be executed by 31st August, 2004 on payment of balance sale consideration by the appellant / plaintiff and it was on the said premise only that according to the appellant / plaintiff the respondents / defendants had agreed not to charge any rent with effect from August, 2004. Even if the respondents / defendants, by issuance of notices aforesaid of termination of tenancy, had shown an intent to renege from the Agreement to Sell, the same did not prevent the appellant / plaintiff from performing or showing readiness and willingness to perform his part of the Agreement to Sell i.e. of having the sale deed executed by payment of balance sale consideration on or before 31st August, 2004. The appellant / plaintiff admittedly did not do anything whatsoever in this regard. No attention has been drawn to any pleading or evidence if any led by the appellant / plaintiff in this regard. Mere issuance of notices of termination of tenancy did not prevent the appellant / plaintiff, within the meaning of Section 16(c), from performing his part of the agreement i.e. of having the draft sale deed prepared for approval of the respondents / defendants as sellers, purchasing the stamp paper for engrossing the sale deed and tendering the balance sale consideration. The appellant / plaintiff, as an ordinary prudent person, in the ordinary course of human conduct was also required to immediately respond to the notices of termination of tenancy and which also was not done. The

only inference which can be drawn is that the appellant / plaintiff, immediately on receipt of notices of termination of lease which was not protected by the provision of the Delhi Rent Control Act, 1958, was preparing for a legal battle and was not interested in performance of Agreement to Sell.

20. The appellant / plaintiff could not have presumed that even upon the appellant / plaintiff performing his part of the Agreement to Sell, the respondents / defendants would not agree to the same. If such pleas were to be available to a plaintiff in a suit for specific performance, each party to an agreement, not desirous of immediately performing its part of the agreement, would take a plea of having not taken any steps or not performed its part for the reason of counter indication from the other party to the agreement. It is significant that what Section 16(c) requires is proof of readiness and willingness of the plaintiff in a suit for specific performance to perform the essential terms of the contract and not the resistance thereto by the respondents / defendants. Supreme Court in *Man Kaur Vs. Hartar Singh Sangha* (2010) 10 SCC 512 held that the assumption that readiness and willingness on the part of the plaintiff need not be proved, if the plaintiff is able to establish that the defendant refused to execute the sale deed, is not correct. It was further held that if the defendant commits a breach, specific performance is still barred if the plaintiff fails to establish his own readiness and willingness. In the facts of the present case, since the appellant/plaintiff was in possession of the property, it was incumbent on him to tender the sale consideration. Supreme Court, in *Syed Dastagir Vs. T.R. Gopalakrishna Setty* (1999) 8 SCC held that such tender could also be by deposit in Court. The appellant/plaintiff not only did not tender prior to institution of suit, he,

along with plaint also not deposit the sale consideration in Court.

21. In my view, the appellant / plaintiff has been rightly denied the relief of specific performance on the above ground alone, irrespective of the merits even if any in the contentions aforesaid of the counsel for the appellant / plaintiff.

22. No other argument has been urged.

23. The main concern of the appellant / plaintiff even otherwise appears to be to obtain Rs.10,00,000/- with interest from the respondent / defendant. Though the appellant / plaintiff having not claimed such a relief is statutorily barred by the provisions of Sections 21 and 22 of the Specific Relief Act to get such a relief that too now after 14 years of the institution of the suit but even if it was to be held that the same is left to the discretion of the Court notwithstanding the statutory bar, in my opinion the appellant / plaintiff in the present case does not deserve any exercise of discretion in his favour. It cannot be lost sight of that the appellant / plaintiff, by using the process of law to his advantage, managed to reside in the premises without paying any amount whatsoever therefor with effect from August, 2004 and till 31st July, 2013 and which alone disentitles the appellant / plaintiff from exercise of discretion in his favour. It has however come on record that the claim of the respondents / defendants in their suit for ejection and for recovery of arrears of rent and *mesne* profits was put to trial and is now ripe for final hearing. However, since the appellant / plaintiff, owing to the long time of 7 years which even a decree for ejection on admission took to be passed and of 13 years in the suit for specific performance, cannot now be heard to cry having suffered any injury. In the end, it is the appellant / plaintiff who has emerged victorious in this litigation, by managing to continue his possession

of the premises for a period of 14 years, inspite of determination of his tenancy in July, 2004. Mention may however also be made of *Shamsu Suhara Beevi Vs. G. Alex* (2004) 8 SCC 569 holding that language of Section 21 of the Specific Relief Act, 1963 bars grant of such relief as is now being claimed by appellant/plaintiff, unless it is claimed by a proper pleading. No case for allowing the appellant/plaintiff at this stage, to amend the plaint, and which would result in fresh round of trial, is made out.

24. As far as the argument of the counsel for the appellant / plaintiff of the Suit Court being required to decree the performance of part of the Agreement to Sell is concerned, the Specific Relief Act in Section 12 thereof provides therefor. Sub-Section (1) thereof provides that except as provided therein, the Courts would not direct the specific performance of a part of the contract. Sub-Section (2) thereof provides that where a party to a contract is unable to perform the whole of his part of it, the part which must be left unperformed by only a small proportion to the whole in value and admits of compensation in money, the Court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency. The appellant / plaintiff does not satisfy the said requirement. The argument of the counsel for the appellant / plaintiff ignores the said statutory provision which provides that part specific performance can be ordered only when a party to a contract is unable to perform the whole or part of it. Once it is held that the respondent / defendant no.3 was not a party to the contract, the question of his being unable to perform the whole of it vis-à-vis him does not arise. Moreover, the requirement is of the party seeking specific performance seeking specific performance of the part. The appellant / plaintiff admittedly did not at any

point of time show willingness to have performed only the contract vis-à-vis respondents / defendants no.1&2. Reliance placed by the counsel for the appellant / plaintiff on **Kartar Singh** supra in this regard is thus misplaced.

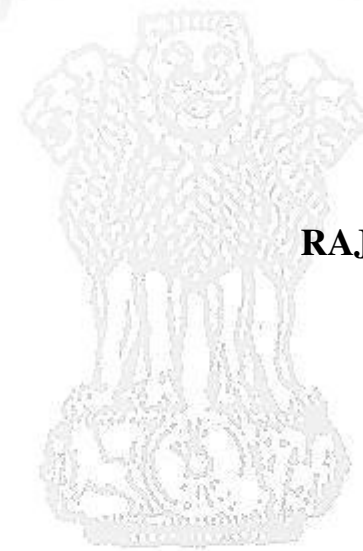
25. The Suit Court, in its judgment running into 78 pages, has dealt in detail with all the contentions raised and the issues framed. However, need to make this judgment also run into as many pages is not felt owing to the limited challenge aforesaid thereto by the counsel for the appellant / plaintiff.

26. There is thus no merits in this appeal. The same is dismissed with costs of Rs.2,00,000/-.

OCTOBER 10, 2018

‘gsr’..

RAJIV SAHAI ENDLAW, J



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