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

% **Date of Decision: 31st October, 2018**

\+ CS(OS) 2841/2012

DEEPAK SINGLA ..... Plaintiff

Through: Mr.Arun Vohra and Mr.Dilip Kumar, Advocates

versus

KANTA NAGPAL ..... Defendant

Through: Mr.Dinesh Garg and Ms.Rachna Agrawal, Advocates with defendant in person

CORAM:
HON'BLE MR. JUSTICE J.R. MIDHA

J U D G M E N T

1. The plaintiff instituted this suit for specific performance of the agreement dated 28th January, 2010 in respect of second floor apartment along with one servant quarter, two car parking spaces in the driveway and terrace rights in property bearing No.S-513, Greater Kailash-II, New Delhi, hereinafter referred to as *'the suit property'*.

2. On 28th January, 2010, the plaintiff entered into an agreement (Ex.P-1) with the defendant to purchase the suit property for a total sale consideration of Rs.5,10,00,000/-. The plaintiff paid advance money of Rs.50,00,000/- to the defendant at the time of the agreement and the balance sale consideration was agreed to be paid on or before 15th April, 2010.

Relevant portion of the agreement dated 28th January, 2010 is reproduced hereunder:

> *"That on or before 15-4-10, the FIRST PARTY will execute and get the Sale Deed of the said Unit registered, in favour of the SECOND PARTY or his nominee/s, on receipt of the full and final balance amount, failing which either party shall be entitled to get the Sale Deed registered through the court of law by SPECIFIC PERFORMANCE OF THE CONTRACT, at the cost and expenses of the defaulting party."*
>
> *(Emphasis supplied)*

3. Vide notice dated 24th April, 2010 (Ex.PW-1/2), the defendant notified the plaintiff that he had failed to pay the balance sale consideration of Rs.4,60,00,000/- by the agreed date despite reminders made in the end of March, 2010 and first week of April, 2010 and therefore, the defendant cancelled the agreement and forfeited the advance money of Rs.50,00,000/-. The defendant also notified the plaintiff that he had suffered loss as he had made advance payment for purchase of another property. The defendant also claimed loss of Rs.2,00,000/- per month as rental for the suit property. Relevant portion of the notice dated 24th April, 2010 is reproduced hereunder:-

> *"5. It was also agreed that remaining amount of Rs.4,60,00,000/-(Rupees Four Crore Sixty Lacs Only) shall be paid to my client on or before 10th April, 2010 and that my client shall get the Registration of the property and in the event of non-payment of remaining amount of Rs.4,60,00,000/-, within the stipulated time of 10th April, 2010, my client shall have the right to cancel the deal and forfeit the advance.*
>
> *6. My client approached you by making a phone call during the end of March 2010 and remained you about the balance payment of Rs.4,60,00,000/-.*

7. <u>My client again remained you during first week of April, 2010, and you have informed my client that the money could not be arranged</u>.
8. By your failure of paying the balance amount within the agreed period of 10th April, 2010, my client has to bear mental as well as financial loss. He had already made advance payment for purchase of other property in anticipation of receiving the balance amount from you which shall not be refunded if the timely payment is not made. The property is vacant and my client has to bear expenses related to electricity, water maintenance of garden/house, salaries of guards and so on. My client has also to bear a loss of Rs.2,00,000/- per month as rental of the property.

<u>No other option but to cancel the agreement and forfeit the advance money. Hence forth my client is free to sell his owned property to anybody whatsoever it may be at her own wish.</u>"

(Emphasis supplied)

4. The plaintiff sent a reply dated 26th May, 2010 (Ex. DW-1/3) to the defendant in which the plaintiff claimed that he was suffering from slip disc since end of March, 2010 and was advised bed rest and not to move out of Shillong. The plaintiff further claimed that he was advised not to move for another 50-60 days. The plaintiff further stated that he would pay the balance sale consideration after recovery from the slip disc. The relevant portion of the reply dated 26th May, 2010 is reproduced hereunder:

"5. That the para 5 is false as the agreement to sell dated 28-01-2010 does not have any clause of cancellation. Rather para 3 of the page 5 of the agreement is in favour of my client which states that in case the first party fails to execute the sale deed in that case second party will have the right to get the Sale Deed executed through the Court of Law.
6. That my client is not keeping well as he is suffering from slip disc since end of March' 2010 and was advised by the Doctors to have bed rest and not to move out of Shillong. These

circumstances were, explained/informed to your client during the first week of the April 2010 directly by my client on phone and your client was kind enough to wait till he recovers. Now we are surprised to see the aforesaid notice. However you may please be inform that my client is still at bed rest at Shillong and has been advised not to move for another 50-60 days.

Immediately after this recovery from slip disc which is natural calamity my client will pay you the balance amount of four crores and sixty lakhs and then you may execute the sale deed. Otherwise he will be compelled to go to Delhi courts as per the clause of the Agreement to sell for executing the sale deed."

(Emphasis supplied)

5. Vide notice dated 11th September, 2010 (Ex.PW-1/6), the plaintiff called upon the defendant to accept the balance sale consideration of Rs.4,60,00,000/- within 15 days failing which the plaintiff would initiate the legal proceedings against the defendant.

6. On 15th September, 2010, the plaintiff published a public notice (Mark-'A') in the Hindustan Times newspaper notifying to the public that the plaintiff had an agreement dated 28th January, 2010 with the defendant and anybody dealing with the suit property, would be doing it at their own risk and peril.

7. On 08th April, 2011, the plaintiff issued a second legal notice (Ex.PW-1/11) calling upon the defendant to accept the balance sale consideration of Rs.4,60,00,000/- within seven days failing which the plaintiff would initiate the legal proceedings against the defendant.

8. On 06th February, 2012, the plaintiff issued a third legal notice (PW-1/15) again calling upon the defendant to accept the balance sale consideration of Rs.4,60,00,000/- within seven days failing which the plaintiff would initiate legal proceedings against the defendant.

9. On 14th September, 2012, the plaintiff instituted this suit for specific performance against the defendant.

10. The defendant filed the written statement dated 31st October, 2012 in which the defendant raised the following defenses:-

(i) The plaintiff defaulted in the payment of the balance sale consideration of Rs.4,60,00,000/- by the agreed date of 15th April, 2010 and therefore, the defendant cancelled the agreement and forfeited the advance money of Rs.50,00,000/-.

(ii) Three reminders were sent to the plaintiff on his mobile on 25th March, 2010, 01st April, 2010 and 08th April, 2010 but the plaintiff did not respond. The contents of the SMS sent by the defendant are reproduced in para 1 (c) of the written statement.

(iii) The reply of the plaintiff dated 26th May, 2010 showed that the plaintiff was not ready and willing to perform his part of the contract.

(iv) The plaintiff kept quiet for four months and thereafter, sent a legal notice dated 11th September, 2010 calling upon the defendant to execute the sale deed within 15 days and simultaneously, issued a public notice dated 15th September, 2010 in order to malign the suit property and not with an intention to complete transaction.

(v) The plaintiff did not get the pay order for the balance sale consideration; did not get the sale deed drafted and did not purchase the stamp paper.

(vi) The plaintiff did not place any document on record to show that he was all throughout had been ready and willing to perform his part of the contract.

(vii) The date for payment of balance sale consideration was 15th April, 2010 and defendant cancelled the agreement and forfeited the advance money vide notice dated 24th April, 2010.

(viii) The plaintiff filed the present suit after expiry of 29 months from the date of termination notice and on expiry of almost 32 months from the date of agreement to sell.

(ix) The plaintiff was not ready and willing to perform his part of the contract and was not ready with the balance sale consideration.

(x) Vide notice dated 24th April, 2010 the plaintiff informed the defendant that the suit property was lying vacant and he was suffering rental loss of Rs.2,00,000/- per month. The defendant had suffered losses of more than Rs.50,00,000/- due to breach of contract made by the plaintiff.

11. On 28th January, 2014, the following issues were framed by this Court:

> *"(i) Whether the plaintiff has also been and is still ready and willing to perform his part of the agreement? OPP*
> *(ii) Whether the plaintiff is entitled to a decree of specific performance as prayed for? OPP*
> *(iii) Relief"*

12. The plaintiff appeared in the witness box as PW-1 and reiterated the averments made in the plaint. In cross-examination, PW-1 stated that he had applied for a home loan for payment of sale consideration. He admitted that he had not placed on record any document to show that he had applied for home loan and the same was sanctioned prior to 15th April, 2010. He further admitted that he sought extension of 50-60 days to complete the transaction vide letter dated 26th May, 2010 but he did not prepare any demand draft/pay

order even after the expiry of the said period. He further admitted that he did not make out any demand draft/pay order at any time prior to the filing of the suit. He further admitted that he did not get the sale deed drafted**.** He further admitted that he did not purchase any stamp papers for the sale deed. He further admitted that the credit balance in any of his bank accounts from the date of the agreement till the date of filing of the suit was never Rs.4,60,00,000/-. He admitted that the suit property was not occupied by a tenant for about six months after the date of agreement.

13. The defendant appeared in the witness box as DW-1 and reiterated the averments made in the written statement. The defendant deposed that the plaintiff had committed breach of the agreement by failing to pay the balance sale consideration by 15th April, 2010 and therefore, she cancelled the agreement and forfeited the advance amount. The defendant deposed that the defendant kept the suit property vacant in order to give the possession of the same to the plaintiff. The defendant deposed that the suit property was let out at a monthly rent of Rs.1,75,000/- w.e.f. 15th January, 2015. The defendant claimed to have suffered loss of rent of more than Rs.50 lakh for keeping the suit property vacant for more than two years.

14. Learned counsel for the plaintiff urged at the time of the hearing that the plaintiff had suffered from slip disc since end of March, 2010 and was advised complete bed rest and not to move out of Shillong due to which he could not make payment of the balance sale consideration of Rs.4,60,00,000/- to the defendant. Vide reply dated 26th May, 2010, the plaintiff sought extension of 50-60 days to pay the balance sale consideration which was not responded by the defendant. It was submitted that the plaintiff was ready and willing to make the payment of the balance

sale consideration to the defendant who did not respond to the notices dated 11th September, 2010, 08th April, 2011 and 06th February, 2012. It was further submitted that the plaintiff paid Rs.50,00,000/- as advance money which cannot be forfeited as there was no forfeiture clause in the agreement.

15. Learned counsel for the defendant urged at the time of the hearing that the plaintiff had not proved the availability of the balance sale consideration of Rs.4,60,00,000/- with him at any point of time and in cross-examination, the plaintiff admitted that he did not have the aforesaid amount and he further admitted that he had to obtain a home loan to make the payment. It was further submitted by the counsel for the defendant that the plaintiff could not even produce documents to prove that he had applied for home loan. According to the defendant, the plaintiff had failed to prove readiness and willingness and therefore, was not entitled to the specific performance. It was further submitted that the plaintiff filed the suit on 14th September, 2012 almost after 32 months of the agreement. It was further submitted that the defendant had suffered loss of more than Rs.50,00,000/- by keeping the suit property vacant. The suit property was let out in 2015 at a monthly rent of Rs.1,75,000/-. Learned counsel for the defendant further urged that the plaintiff had not claimed the refund of the advance money and therefore, no issue was framed relating to refund or forfeiture of advance money and therefore, the plaintiff cannot claim the refund of the advance money. Reference is made to Section 22 of the Specific Relief Act. Reliance is placed on ***K.S. Vidyanadam v. Vairavan***, AIR 1997 SC 1751; ***Saradamani Kandappan v. S. Rajalakshmi***, AIR 2011 SC 3234; ***B. Vijaya Bharathi v. P. Savitiri***, 2017 (4) Civil Court Cases 291 (S.C.) and ***Gulshan Kumar v. Sat Narain Tulsian***, 206 (2014) DLT 443.

Legal Position

16. ***Section 16(c) of the Specific Relief Act, 1963***

16.1 In a suit for specific performance, the plaintiff has to prove a valid sale agreement; the breach of the contract by the defendants; and readiness and willingness of the plaintiff to perform his part of the contract.

16.2 Section 16(c) of the Specific Relief Act mandates ***"readiness"*** and ***"willingness"*** on the part of the plaintiff as a condition precedent to seek specific performance. Section 16 (c) is reproduced hereunder:-

> *"**Section 16. Personal bars to relief.-***
> *Specific performance of a contract cannot be enforced in favour of a person-*
>
> *xxx xxx xxx*
>
> *(c) 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 the performance of which has been prevented or waived by the defendants.*
>
> *Explanation.- For the purposes of clause (c),-*
>
> *(i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendants or to deposit in court any money except when so directed by the court;*
>
> *(ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction."*

16.3 The ***"readiness"*** and ***"willingness"*** are two separate issues. The former depends on the availability of requisite funds whereas the latter depends on the intention of the purchaser.

16.4 The "***readiness***" has to be proved by the purchaser by leading evidence relating to the availability of the funds whereas the intention has to be inferred from his conduct and circumstances.

16.5 If there is no availability of funds with the purchaser, he can be non-suited on the ground of non-readiness alone.

16.6 If the plaintiff is able to prove the availability of the balance sale consideration with him at the time fixed for performance in the agreement, it is an indication of his readiness but his willingness/intention to perform cannot be inferred from readiness alone.

16.7 When the parties enter into an agreement relating to an immovable property, they amicably agree on the sale consideration, earnest money as well as the payment of the balance sale consideration. If both the parties are ready and willing, they usually complete the transaction within the stipulated time in the following manner:-

16.7.1 The purchaser makes arrangement for the balance sale consideration within the stipulated time.

16.7.2 If the purchaser has to take loan from a bank or other financial institution, the purchaser has to complete all the formalities and obtain the loan before the stipulated date.

16.7.3 The purchaser informs the seller about the arrangement having been made.

16.7.4 The purchaser drafts the sale deed and sends the draft sale deed to the seller for approval.

16.7.5 The seller approves the draft sale deed and returns it back to the purchaser.

16.7.6 The purchaser purchases the requisite stamp duty for the sale deed.

16.7.7 The purchaser prepares the sale deed on the requisite stamp papers.

16.7.8 Both the parties fix the date, time and place for payment of balance sale consideration, execution of sale deed, registration of the sale deed and handing over of the possession.

16.7.9 The parties complete the sale transaction on the agreed date, time and place.

16.7.10 In normal parlance, both the parties remain in touch either personally or through the property dealer.

16.8 The problem arises when one of the parties turns dishonest. However, the party in breach purports to be ready and willing and creates fake evidence to that effect. At times, both the parties visit the office of Sub-Registrar on the last day of performance for obtaining a receipt of having attended the office of the Sub-Registrar to later on contend that they were ready and willing to perform and were waiting for other party. If the seller is in breach, he creates false evidence of readiness to avoid specific performance by the purchaser and to illegally forfeit the earnest money. On the other hand, if the purchaser is in breach, he creates false evidence of readiness and willingness to file a case of specific performance.

16.9 It is the duty of the Court to find out which party has not performed and is trying to wriggle out of the contract.

16.10 The Court has to take into consideration the ordinary course of human conduct and common sense to draw necessary inference. Drawing presumptions is the backbone of the judicial process.

16.11 The silence or absence of correspondence by any party may be indicative of his dishonest intention. The dishonest intention of the seller can be inferred where the purchaser repeatedly contacts the seller for providing copies of the title documents or approval of the draft sale deed or fixing time for payment of balance sale consideration or execution/ registration of the sale deed but the seller does not respond or avoids contact. On the other hand, the dishonest intention of the purchaser can be inferred where the purchaser does not contact the seller for approval of the sale deed and fixing date, time and place for payment of balance sale consideration and execution/registration of the sale deed and unilaterally visits the office of the Sub-Registrar to prepare a false ground that he was ready and willing to complete the sale. At times, the dishonest purchaser relies on an application for loan to the bank or financial institutions without completing the necessary formalities for taking the loan in order to create the false ground of readiness. By the time the suit is finally decreed, the purchaser would get the property at the price fixed in the agreement although the prices would have increased manifold. The Court has to minutely examine the conduct of the parties in order to ascertain the truth. The purchaser would not be entitled to a decree merely because he had the sale consideration with him and had visited the office of the Sub-Registrar before the time fixed in the agreement.

16.12 Upon refusal of the seller to complete the sale in terms of the agreement, the purchaser is expected to issue a notice to place on record the refusal on the part of the seller to furnish copies of the documents or giving a response to the draft sale deed or fixing the schedule for execution and registration of sale deed. The purchaser can also notify the date and time for visiting the office of the Sub-Registrar along with the proof of the balance sale consideration to the seller. The purchaser is also expected to immediately file a suit for specific performance. Any delay in this regard may indicate his intention that he was not ready and willing and the Court may refuse to grant specific performance.

16.13 In a rising market, the purchaser makes a profit by the delay. He may tie down a seller by creating false excuses and use the money for buying some other property. If the purchaser is in a property trade, he may tie down several properties and then decide on which one he can make more profit on. These factors have to be taken into consideration by the Court for deciding the '*readiness*' and '*willingness*'.

16.14 Once a seller has entered into an agreement to sell an immovable property, he is looking for the sale consideration within the period stipulated in the agreement. If he does not get the money within the stipulated period, his plan to use the money for whatever purpose he has intended would get frustrated. He may have a plan to buy some other property or for some other purpose. Secondly, the delay in completion of sale also causes injustice to the seller as the property prices keep on increasing in normal parlance. As such, more the delay, the seller may suffer loss due to rise in property price and greater is the profit which the purchaser would derive by tying down a property and not paying the sale consideration within the stipulated period.

16.15 In ***J.P. Builders*** **v.** ***A. Ramadas Rao***, (2011) 1 SCC 429, the Supreme Court explained the distinction between "readiness" and "willingness". The former refers to financial capacity and the latter to the conduct of the plaintiff wanting performance.

16.16 In ***N.P. Thirugnanam*** **v.** ***Dr. R. Jagan Mohan Rao***, (1995) 5 SCC 115, the Supreme Court held that 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 to adjudge the "readiness" and "willingness" of the plaintiff. The amount of balance sale consideration must be proved to be available with the purchaser right from the date of execution till the date of decree. The Court upheld the dismissal of the suit for specific performance on various grounds *inter alia* that the plaintiff was dabbling in real estate business without means to purchase the suit property and the very contract was speculative in nature.

16.17 In ***R.C. Chandiok* v. *Chuni Lal Sabharwal***, (1970) 3 SCC 140, the Supreme Court held that 'readiness' and 'willingness' cannot be treated as a straitjacket formula. It has to be determined from the entirety of facts and circumstances relevant to the intention and conduct of the party concerned.

17. ***Section 20 of the Specific Relief Act, 1963***

17.1 Section 20 of the Specific Relief Act, 1963 provides that the jurisdiction to decree of specific performance is discretionary and the Court is not bound to grant such relief merely because it is lawful to do so. Section 20 is reproduced hereunder:-

> ***"Section 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 property 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 void able, gives the plaintiff an unfair advantage over the defendants; or*
> > *(b) Where the performance of the contract would involve some hardship on the defendants which he did not foresee, whereas*

its non-performance would involve no such hardship on the plaintiff, or

(c) Where the defendants entered into the contract under circumstances, which though not rendering the contract void able, 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."

17.2 The specific performance is an equitable relief. Section 20 of the Specific Relief Act, 1963 preserves judicial discretion. The Court is not bound to grant specific relief merely because it is lawful to do so. The relief sought under Section 20 is not automatic as the Court is required to see the totality of the circumstances which are to be assessed by the Court in the light of facts and circumstances of each case.

17.3 The specific performance is usually granted where substantial sale consideration has been paid and the possession of the property has been delivered to the purchaser.

17.4 In the event of any delay/inaction on the part of the purchaser, it would be inequitable to give the relief of specific performance to the purchaser. The rationale behind refusal of the Court to grant the specific performance where long time has elapsed is that the prices of the property may have increased many times with the passage of time and it would be injustice to a person who has not received the sale consideration within the time stipulated in the agreement.

17.5 If under the terms of the contract, the plaintiff gets an unfair advantage over the defendant, the Court may not exercise its discretion in favour of the plaintiff. Specific relief may not be granted if the defendant would be put to undue hardship which he did not foresee at the time of agreement. If it is inequitable to grant specific relief, then also the Court would desist from granting a decree to the plaintiff.

17.6 If the sale consideration fixed under the agreement is given to the seller years after the agreement, great prejudice may be caused to the seller who may have intended to purchase another property with the sale consideration.

17.7 While a purchaser cannot be made to suffer because of Court delays, one cannot lose sight of the fact that he retained the sale consideration with him and the seller could not use the money when he wanted. The Court also has to consider that whereas the value of the property may have risen manifold with the passage of time, the value of the sale consideration would have reduced due to inflation. These factors have to be taken into consideration by the Court.

17.8 The party who seeks specific performance being an equitable relief, must come to the Court with clean hands. In other words, the party who makes false allegations and/or does not come with clean hands is not entitled to the equitable relief.

17.9 While exercising the discretion, the Court would take into consideration the circumstances of the case, the conduct of parties and the motive behind the litigation.

17.10 In ***K.S. Vidyanadam* v. *Vairavan*,** (1997) 3 SCC 1, the Supreme Court held that in case of delay/inaction on the part of the plaintiff for two and a half years, it would be inequitable to give a relief of specific performance to the plaintiff. The finding of the Supreme Court is reproduced hereunder:

> *"13. In the case before us, it is not mere delay. It is a case of total inaction on the part of the plaintiff for 2½ years in clear violation of the terms of agreement which required him to pay the balance, purchase the stamp papers and then ask for execution of sale deed within six months. Further, the delay is coupled with substantial rise in prices – according to the defendantss, three times – between the date of agreement and the date of suit notice.* ***The delay has brought about a situation where it would be inequitable to give the relief of specific performance to the plaintiff."***
>
> *(Emphasis supplied)*

17.11 In ***Saradamani Kandappan v. S. Rajalakshmi***, (2011) 12 SCC 18, the Supreme Court declined to grant the discretionary relief of specific performance to the purchaser who had made payment of nominal advance to the seller. The finding of the Supreme Court is reproduced hereunder:-

> *"25. 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 Rs.One lakh and received Rs.Ten Thousand as advance may be required to execute a sale deed a quarter century later by receiving the remaining Rs.Ninety Thousand, when the property value has risen to a crore of rupees.

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36.…The third quarter of the twentieth century saw a very slow but steady increase in prices. But a drastic change occurred from the beginning of the last quarter of the twentieth century. There has been a galloping inflation and prices of immovable properties have increased steeply, by leaps and bounds. Market values of properties are no longer stable or steady. We can take judicial notice of the comparative purchase power of a rupee in the year 1975 and now, as also the steep increase in the value of the immovable properties between then and now. It is no exaggeration to say that properties in cities, worth a lakh or so in or about 1975 to 1980, may cost a crore or more now.

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.*

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43. Till the issue is considered in an appropriate case, we can only reiterate what has been suggested in K.S. Vidyanadam [(1997) 3 SCC 1]:

(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 supplied)

17.12 In ***B. Vijaya Bharathi v. P. Savitri***, 2017 (4) Civil Court Cases 291 (S.C.), the Supreme Court declined the specific performance to the purchaser who stayed quiet for one year and eleven months after the repudiation of the agreement by the seller. The Supreme Court held that no prudent person would stay quiet for such a long period if he was interested in completing the sale. The Supreme Court drew the inference from the plaintiff's conduct that he cannot possibly be said to be ready and willing to perform the agreement. The relevant portion of the Supreme Court judgment is reproduced hereunder:

> *"12. One crucial fact that stares us in the face is that on 13.03.1992 the first defendant ran away from the Registering Authority making it clear that she did not want to act in furtherance of the Agreement in executing a General Power of Attorney in favour of the plaintiff's husband. The High Court was right in stating that no prudent person would stay quiet for a period of one year and eleven months after such an unequivocal repudiation 7 of the agreement if they were really interested in going ahead with the sale transaction. The only inference, therefore, from this is that the plaintiff cannot possibly be said to be ready and willing throughout to perform their part of the agreement."*

17.13 In ***Parakunnan Veetill Joseph's Son Mathew v. Nedumbara Kuruvila's Son***, 1987 Supp SCC 340, the Supreme Court held that the motive behind the litigation should also enter into the judicial verdict. The Court should take care to see that it is not used as an instrument of oppression to have an unfair advantage to the plaintiff.

17.14 In ***Lourdu Mari David v. Louis Chinnaya Arogiaswamy***, (1996) 5 SCC 589, the Supreme Court held that the party seeking equitable jurisdiction and specific performance being equitable relief, must come to the Court with clean hands. In other words the party, who makes false allegations and/or does not come with clean hands is not entitled to the equitable relief.

17.15 In ***K. Narendra v. Riviera Apartments (P) Ltd.***, (1999) 5 SCC 77, the Supreme Court held that the performance of the contract involving some hardship on the defendant which he did not foresee while non-performance involving no such hardship on the plaintiff, is one of the circumstances in which the Court may properly exercise discretion not to decree specific performance. However, mere inadequacy of consideration or the mere fact that the contract is onerous to the defendants or improvident in its nature, shall not constitute an unfair advantage to the plaintiff over the defendants or unforeseeable hardship on the defendants.

17.16 In ***A.C. Arulappan v. Ahalya Naik (smt)***, (2001) 6 SCC 600, the Supreme Court held that if under the terms of the contract the plaintiff gets an unfair advantage over the defendant, the Court may not exercise its discretion in favour of the plaintiff. Also, specific relief may not be granted if the defendant would be put to undue hardship which he did not foresee at the time of agreement. If it is inequitable to grant specific relief, then also the Court would desist from granting a decree to the plaintiff.

17.17 In ***Bal Krishna v. Bhagwan Das***, (2008) 12 SCC 145, the Supreme Court held that while exercising the discretion, the Court would take into consideration the circumstances of the case, the conduct of parties, and their respective interests under the contract. No specific performance of a contract, though it is not vitiated by fraud or misrepresentation, can be granted if it would give an unfair advantage to the plaintiff and where the performance of the contract would involve some hardship on the defendant, which he did not foresee.

17.18 In ***G. Jayashree v. Bhagwandas S. Patel***, (2009) 3 SCC 141, the Supreme Court held that the plaintiff is expected to approach the Court with clean hands. His conduct plays an important role in the matter of exercise of discretionary jurisdiction by a Court of law. The Courts ordinarily would not grant any relief in favour of the person who approaches the Court with a pair of dirty hands.

17.19 In ***Krishna Sweet House v. Gurbhej Singh***, MANU/DE/2851/2012, this Court held that in certain cases where substantial consideration i.e. at least 50% of the consideration is paid, or possession of the property is delivered under the agreement to sell in addition to paying advance price, the proposed buyer is vigilant for his rights and he files the suit soon after entering into the agreement to sell, then in accordance with totality of facts and circumstances, Courts may decree specific performance.

17.20 In ***Laxmi Devi v. Mahavir Singh***, MANU/DE/1930/2012, this Court held that unless substantial consideration is paid out of the total amount of sale 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.

17.21 In ***Jinesh Kumar Jain v. Iris Paintal***, MANU/DE/3387/2012, this Court held that the plaintiff is entitled to a decree of 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. The 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) of Specific Relief Act. 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, the plaintiff is not entitled to the discretionary relief of specific performance.

17.22 In ***Sushil Jain v. Meharban Singh***, 2012 (131) DRJ 421, this Court held that the plaintiff cannot be held entitled to the discretionary relief of specific performance inter alia for the reasons that not only the prices would have gone up about 20 to 30 times during this period but also that the plaintiff has taken benefit of the balance of about 87% of the consideration which he would have wisely invested in any other assets including in an immovable property.

17.23 In ***Gulshan Kumar v. Sat Narain Tulsian***, 206 (2014) DLT 443, this Court following ***K.S. Vidyanadam v. Vairavan*** (supra) and ***Saradamani Kandappan v. S. Rajalakshmi*** (supra) held that the Courts will frown upon suits which are not filed immediately after breach/refusal and the fact that limitation is three years does not mean that a purchaser can wait for one or two years to file a suit and obtain specific performance. It was further held that the three year period is provided to assist the purchasers in special cases, as where major part of the consideration has been paid and possession delivered in part performance. The relevant portion of the judgment is as under:-

> *"30. The relief of specific performance is undoubtedly a discretionary one. The facts of the present case are such which also require the discretion to be not exercised in favour of the appellants/plaintiffs. The agreement pleaded by the appellants/plaintiffs is of 13th April, 1978 with a date of completion thereof within six months i.e. by 12th October, 1978. The fist missive*

as aforesaid from the appellants/plaintiffs is dated 29th January, 1980 i.e. after nearly one year and three months of the date stipulated for completion. The Supreme Court in K.S. Vidyanadam v. Vairavan, (1997) 3 SCC 1 reiterated in Sardamani Kandappan v. S. Rajalakshmi, (2011) 12 SCC 18 has held that the <u>Courts will frown upon suits which are not filed immediately after breach/refusal and the fact that limitation is three years does not mean that a purchaser can wait for one or two years to file a suit and obtain specific performance.</u> It was further held that the three year period is provided to assist the purchasers in special cases, as where major part of the consideration has been paid and possession delivered in part performance. The bare pleas and statements of the appellants/plaintiffs of having approached the defendant from time to time would not suffice. ………………… The Supreme Court in Umabai v. Nilkanth Dhondiba Chavan, (2005) 6 SCC 243 has held that mere bare statement in the plaint or in the examination-in-chief of readiness and willingness would not suffice and 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. "

<u>Summary of principles</u>

18. **<u>Section 16 (c) of the Specific Relief Act, 1963</u>**

- In a suit for specific performance, the plaintiff has to prove a valid agreement of sale; the breach of the contract by the defendant; and readiness and willingness of the plaintiff to perform his part of the contract.
- Section 16(c) of the Specific Relief Act mandates "readiness" and "willingness" on the part of the plaintiff as a condition precedent to seek specific performance.
- The "readiness" and "willingness" are two separate issues. The former refers to financial capacity whereas the latter depends upon the intention of the purchaser.
- "Readiness" and "willingness" cannot be treated as a straitjacket formula. It has to be determined from the entirety of facts and circumstances relevant to the intention and conduct of the party concerned.

- 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 to adjudge the "readiness" and "willingness" of the plaintiff.
- When the parties enter into an agreement relating to an immovable property, they amicably agree on the total sale consideration, earnest money as well as the payment of the balance sale consideration. If both the parties are ready and willing, they usually complete the transaction within the stipulated time in the following manner:-
  - The purchaser makes arrangement for the balance sale consideration within the stipulated time.
  - The purchaser informs the seller about the arrangement having been made.
  - The purchaser drafts the sale deed and sends the draft sale deed to the seller for approval.
  - The seller approves the draft sale deed and returns it back to the purchaser.
  - The purchaser prepares the sale deed on the requisite stamp papers.
  - Both the parties fix the date, time and place for payment of balance sale consideration, execution of sale deed, registration of the sale deed and handing over of the possession.
  - The parties complete the sale transaction on the agreed date, time and place.
- In normal parlance, both the parties remain in touch either personally or through the property dealer.
- The problem arises when one of the two parties turn dishonest. However, the party in breach purports to be ready and willing and creates evidence to that effect. At times, both the parties visit the office of Sub-Registrar on the last day of performance for obtaining a receipt of having attended the office of the Sub-Registrar to later on contend that they were ready and willing to perform and were waiting for other party. If the seller is in breach, he creates false evidence of readiness to avoid specific performance by the purchaser and to illegally forfeit the earnest money. On the other hand, if the purchaser is in breach, he creates false evidence of readiness and willingness to file a case of specific performance.
- It is the duty of the court to find out which party has not performed and is trying to wriggle out.

- The Court has to take into consideration the human probabilities, ordinary course of human conduct and common sense to draw necessary inference. Drawing presumptions is the backbone of the judicial process.
- The silence or absence of correspondence by any party may be indicative of his dishonest intention. The dishonest intention of the seller can be inferred where the purchaser repeatedly contacts the seller for approval of the draft sale deed and for fixing time for payment of balance sale consideration and execution/registration of the sale deed but the seller does not respond or avoids contact. On the other hand, the dishonest intention of the purchaser can be inferred where the purchaser does not contact the seller for approval of the sale deed and fixing date, time and place for payment of balance sale consideration and execution/registration of the sale deed.
- Upon refusal of the seller to complete the agreement, the purchaser is expected to issue a notice and immediately file a suit for specific performance. Any delay in this regard may indicate his intention that he was not ready and willing and the Court may refuse to grant specific performance.

19. **<u>Section 20 of the Specific Relief Act, 1963</u>**

- The specific performance is an equitable relief. Section 20 of the Specific Relief Act preserves judicial discretion. The Court is not bound to grant specific relief merely because it is lawful to do so. The relief sought under Section 20 is not automatic as the Court is required to see the totality of the circumstances which are to be assessed by the Court in the light of facts and circumstances of each case.
- The specific performance is usually granted where substantial sale consideration has been paid and the possession of the property has been delivered to the purchaser.
- In the event of any delay/inaction on the part of the purchaser, it would be inequitable to give the relief of specific performance to the purchaser. The rationale behind refusal of the Court to grant the specific performance where long time has gone by is that the prices of the property may have increased many times with the passage of time and it would be injustice to a person who has not received the sale consideration within the time stipulated in the agreement.

- If under the terms of the contract, the plaintiff gets an unfair advantage over the defendant, the Court may not exercise its discretion in favour of the plaintiff. Specific relief may not be granted if the defendant would be put to undue hardship which he did not foresee at the time of agreement. If it is inequitable to grant specific relief, then also the Court would desist from granting a decree to the plaintiff.
- The party who seeks specific performance being an equitable relief must come to the Court with clean hands. In other words, the party who makes false allegations does not come with clean hands and is not entitled to the equitable relief.
- The Court has to consider whether it would be fair, just and equitable. The Court is guided by the principles of justice, equity and good conscience.
- While exercising the discretion, the Court would take into consideration the circumstances of the case, the conduct of parties, and the motive behind the litigation.

Findings

20. The plaintiff agreed to purchase the suit property from the defendant for a total sale consideration of Rs.5,10,00,000/- out of which the plaintiff paid advance money of Rs.50,00,000/- at the time of the agreement on 28th January, 2010 and the balance sale consideration of Rs.4,60,00,000/- was payable by the plaintiff on or before 15th April, 2010. The time for payment of the balance sale consideration of Rs.4,60,00,000/- was the essence of the contract.

21. The plaintiff committed breach of the agreement dated 28th January, 2010 by failing to pay the balance sale consideration of Rs.4,60,00,000/- to the defendant by the agreed date of 15th April, 2010.

22. The plaintiff has failed to prove the availability of the balance sale consideration of Rs.4,60,00,000/- with him during the period 28th January, 2010 upto 15th April, 2010. The plaintiff admitted in his cross-examination that he never had Rs.4,60,00,000/- in his bank accounts. The plaintiff has

also failed to prove the availability of the aforesaid amount of the balance sale consideration of Rs.4,60,00,000/- with him even after 15th April, 2010 upto the date of the filing of the suit or even thereafter.

23. The plaintiff's case is that the balance sale consideration was available with him but he could not tender the same due to serious illness. However, the plaintiff chose not to lead any evidence to prove the averment of his alleged illness as well as the availability of funds with him to pay the balance sale consideration. In the cross-examination, a new plea was sought to be set up by the plaintiff that he had to take home loan for making balance sale consideration of Rs.4,60,00,000/- to the defendant but no document was produced to show that he had applied for a home loan. The plaintiff stated in his cross-examination that he had to take home loan for making payment of the balance sale consideration of Rs.4,60,00,000/- to the defendant but he admitted that he did not produce any document to show that he applied for the home loan.

24. In para 7 of the notice dated 24th April, 2010 (Ex.PW-1/2), the defendant recorded that the plaintiff had informed him in first week of April, 2010 that he could not arrange the balance sale consideration. The plaintiff in his reply dated 26th May, 2010 had not disputed this statement which clearly shows that the plaintiff was unable to arrange the balance sale consideration.

25. During the course of the hearing, learned counsel for the defendant referred to the Income Tax Returns of the plaintiff showing capital gain to the tune of Rs.3,28,01,394/-. On being asked as to status of this amount, learned counsel for the plaintiff stated that the capital gain amount of Rs.3,28,01,394/- had been used in the business and was not available in the

bank accounts, meaning thereby that the aforesaid amount was not available with the plaintiff to make the payment to the defendant.

26. On 26th May, 2010, the plaintiff sent a reply to the defendant's notice seeking extension of time for 50-60 days on the ground of illness. No document has been placed on record to prove the illness. Even otherwise, the illness by itself is not a ground for extension of an agreement when the time was the essence of the contract. In that view of the matter, this Court is of the view that the plaintiff was never willing to make the payment of balance sale consideration to the defendant.

27. The defendant was ready and willing to implement the agreement upto 15th April, 2010. The defendant sent three messages by *sms* to the plaintiff on 25th March, 2010, 01st April, 2010 and 8th April, 2010 on his mobile but the plaintiff did not respond to the same. The plaintiff has denied the receipt of the *SMS* but the denial does not appear to be true.

28. The plaintiff's conduct shows that he was never ready and willing to complete the sale. First of all, the plaintiff did not contact the defendant for payment of balance sale consideration by the agreed date of 15th April, 2010. The plaintiff contacted the defendant for the first time by reply to the notice dated 26th May, 2010 after the receipt of the notice dated 24th April, 2010. There is no explanation for delay of one month to respond to the notice dated 24th April, 2010. The plaintiff thereafter waited for four months to issue the first legal notice. The defendant did not respond to the legal notice and the plaintiff, instead of filing the suit, again waited for seven months to issue a second legal notice and almost 17 months to issue the third legal notice. The suit was instituted after 29 months from the date of final

payment. The plaintiff's plea of readiness and willingness is inherently unconvincing and cannot be accepted.

29. The plaintiff's conduct shows that the plaintiff never had the money to pay the balance sale consideration; the plaintiff never purchased the stamp papers for obtaining the sale deed; the plaintiff neither got the sale deed drafted nor provided any draft of the sale deed to the defendant; the plaintiff never had the capacity to pay the balance sale consideration to the defendant; the plaintiff never got prepared the pay order for balance sale consideration nor ever had the sufficient amount in his bank accounts; the plaintiff never did any act, deed or thing towards discharge of his part of obligations and the plaintiff never approached or met the defendant for completion of sale.

30. The plaintiff's case appears to be improbable, artificial, indifferent, irresponsible and inconsistent. A prudent purchaser would not have behaved in this manner and applying the test of common course of natural events and human conduct, it is presumed that the plaintiff was not ready and willing to perform his part of the contract. The plaintiff's conduct is a strong indication of the intention of the plaintiff that he was not willing to perform his part of the contract. The natural inference which can be drawn under Section 114 of Evidence Act is that the plaintiff wanted to build-up a false plea of willingness in order to institute a suit for specific performance.

31. The plaintiff had not proved the availability of the balance sale consideration of Rs.4,60,00,000/- with him at any stage. The plaintiff is a dishonest litigant who had no means to pay the balance sale consideration and instituted a false claim with the hope that he would arrange the funds, if the suit is decreed in his favour.

32. Even assuming for the sake of argument that the plaintiff was ready and willing to perform his part of the contract, the plaintiff is still not entitled to the discretionary relief under Section 20 of the Specific Relief Act because of enormous rise of property prices during the last 8 years. Constant rise in property prices have been recognized by the Courts to refuse exercise of discretion under Section 20 of the Specific Relief Act. If the sale consideration fixed under the agreement is given to the seller years after the agreement, great prejudice would be caused to the seller.

33. Once a seller has entered into an agreement to sell an immovable property, he is looking for the sale consideration within the period stipulated in the agreement. If he does not get the money within the stipulated period, his plan to use the money for whatever purpose he has intended would get frustrated. He may have a plan to buy some other property or for some other purpose. Secondly, the delay in completion of sale also causes injustice to the seller as the property prices keep on increasing in normal parlance. As such more the delay, the seller may suffer loss due to rise in property price and greater is the profit which the purchaser would derive by tying down a property and not paying the sale consideration within the stipulated period.

34. The filing of the suit after 29 months from the date of the final payment also disentitles the plaintiff to seek the specific performance in terms of the principles laid down in ***K.S. Vidyanadam v. Vairavan*** (supra) and ***Saradamani Kandappan v. S. Rajalakshmi*** (supra).

35. Moreover, the plaintiff had not approached the Court with clean hands and had raised false claims and is, therefore, disentitled to the equitable relief on this ground also. The party, who seeks specific performance being an equitable relief, must come to the Court with clean hands.

36. In para 8 of the notice dated 24th April, 2010 (Ex.PW-1/2), the defendant also notified the plaintiff that the suit property was lying vacant and the defendant was suffering loss of Rs.2 lakh per month as rental of the property. This statement had also not been disputed by the plaintiff in his reply dated 26th May, 2010. The plaintiff admitted in his cross-examination that the suit property was not occupied by a tenant after six months of the date of the agreement.

37. Section 22 of the Specific Relief Act empowers the plaintiff to seek refund of the advance money of Rs.50,00,000/-. However, Section 22(2) provides that the refund of the advance money shall not be granted unless specifically claimed. Admittedly, the plaintiff had not claimed refund of the advance money of Rs.50,00,000/- and therefore, no issue was framed. On the other hand, the defendant had validly proved the cancellation of the agreement and the loss of rental income of the suit property. The suit property was on rent at the time of the agreement and the defendant got it vacated to handover the possession thereof to the plaintiff and the defendant kept the same vacant for a long time and thereby suffered the loss. The plaintiff is not entitled to the refund of the advance money of Rs.50,00,000/-.

<u>Conclusion</u>

38. The plaintiff had committed the breach of the agreement and is not entitled to the decree of specific performance against the defendant.

39. The suit is dismissed.

OCTOBER 31, 2018 **J.R. MIDHA**
dk **(JUDGE)**