

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

+ **RFA No. 1056/2017 and C.M. No.46210/2017(stay)**

% **22nd November, 2018**

RAJ RANI

..... Appellant

Through: Mr. Anil Sharma, Advocate
with Mr. Arun Baali, Advocate
(M. No.9999315171).

versus

PRAFULLA KUMAR

..... Respondent

Through: Mr. Sucharita Ghosh, Advocate
with Mr. Naveen Sinha,
Advocate and Ms. Swati
Verma, Advocate (M.
No.9899090109).

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the defendant in the suit impugning the Judgment of the trial court dated 30.08.2017 by which

the trial court has decreed the suit for specific performance filed by the respondent/plaintiff with respect to property bearing no. BH-269, Shalimar Bagh (East), Delhi. Specific performance has been decreed by simultaneously directing payment of the balance sale consideration of Rs. 27,00,000/- to the appellant/defendant.

2. The facts of the case are that the respondent/plaintiff filed the subject suit for specific performance of the Agreement to Sell dated 07.09.2007 entered into between the appellant/defendant and the respondent/plaintiff with respect to the suit property. The total sale consideration was fixed at Rs. 33,01,000/-, of which Rs. 6,01,000/- was admittedly paid by the respondent/plaintiff at the time of entering into of the agreement to sell. The respondent/plaintiff claimed that the appellant/defendant could not get the property converted into freehold by 30.11.2007, and therefore time was extended first till 15.02.2008 and then till 29.03.2008 and finally till 30.04.2008. The respondent/plaintiff pleaded that the appellant/defendant then asked for a further sum of Rs. 2,00,000/- over the agreed sale consideration. Accordingly, the respondent/plaintiff sent a Legal Notice dated 08.04.2008 to the appellant/defendant to perform the contract, and on

failure of the appellant/defendant to do the needful, the subject suit was filed.

3. Appellant/Defendant contested the suit by filing the written statement. Execution of the agreement to sell is admitted. The extension of time upto 15.02.2008 is admitted but thereafter the extensions are denied pleading that extensions till 29.03.2018 are forged endorsements. It was pleaded that the respondent/plaintiff was guilty of breach of contract. The suit was therefore prayed to be dismissed.

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

“1) Whether the defendant no.1 had extended the time for making of balance payment by the plaintiff firstly upto 29.03.2008 and then to 30.04.2008, as alleged in the plaint? OPP

2) Whether the plaintiff has always been ready and willing to perform his part of the contract? OPP.

3) Whether the plaintiff is entitled to specific performance of the agreement to sell dated 07.09.2007? OPP

4) Relief?”

5. Evidence which has been led in the trial court has been referred to in para 7 of the impugned judgment and this para 7 reads as under:-

“7. During trial, the plaintiff has examined Sh. Preetam Kumar Sinha, his brother as PW-1 who tendered his affidavit as Ex.PW-1/A and additional affidavit as Ex.PW-1/B. He also relied upon documents i.e. plaint as Ex.PW-1/1, site plan as Ex.PW-1/2 (also Ex.P1), original sale agreement Ex.PW-1/3(also Ex.P6), coloured photocopy of the sale agreement as Ex.PW-1/4, perpetual lease deed Ex.PW-1/5 (also Ex.P2), receipt dated 18.11.2007 as Mark A, notice dated 08.04.2008 Ex.PW-1/7 (also Ex.P3), Notice dated 16.04.2008 Ex.PW-1/8(also Ex.P4), reply dated 01.05.2008 as Ex.PW-1/9(also as Ex.P5). Plaintiff examined himself as PW-2 and tendered his affidavit as Ex.PW-2/A and he relied upon the documents which were relied by PW-1 in his examination. After conclusion of PE, defendant led DE and examined Sh. Shyam Sunder as DW-1 who tendered his affidavit as Ex.DW-1/1.”

6. The trial court has decreed the suit by holding that the respondent/plaintiff was ready and willing to perform his part of the contract and that there was a breach of contract on behalf of the appellant/defendant.

7(i) Ld. counsel for the appellant/defendant has strenuously argued two aspects before this Court. Firstly, it is argued that in a suit for specific performance, the plaintiff/proposed buyer has to prove readiness as required by Section 16(c) of the Specific Relief Act, 1963 i.e. financial capacity must exist to go through with the transaction, right from the date of entering into the agreement to sell till the decree

of the suit and that in this regard the respondent/plaintiff has miserably failed. It is argued that financial capacity is not proved on self-serving statements and the onus of financial capacity is only discharged by proving on record sufficient documentary evidence in the form of bank accounts, tax returns or documents as to ownership of movable and other properties which the respondent/plaintiff has clearly failed to do. Reliance is placed in this regard upon the judgment of the Supreme Court in the case of *N.P. Thirugnanam (Dead) by LRs. v. Dr. R. Jagan Mohan Rao and Others*, (1995) 5 SCC 115. The relevant para of this judgment which is relied upon is para 5 which reads as under:-

“5. It is settled law that remedy for specific performance is an equitable remedy and is in the discretion of the court, which discretion requires to be exercised according to settled principles of law and not arbitrarily as adumbrated under Section 20 of the Specific Relief Act 1963 (for short, 'the Act'). Under Section 20, the court is not bound to grant the relief just because there was valid agreement of sale. Section 16(c) of the Act envisages that plaintiff must plead and prove that he had performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than those terms the performance of which has been prevented or waived by the defendant. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit alongwith other attending

circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was always ready and willing to perform his part of the contract.” (underlining added)

7(ii). It is further argued on behalf of the appellant/defendant that the relief of specific performance is a discretionary relief in terms of Section 20 of the Specific Relief Act, and that courts including the Supreme Court, have consistently held that where only a minor/small percentage of the sale consideration is paid in advance as consideration, then in such cases, specific performance cannot be decreed. One such judgment of the Supreme Court in this regard is the judgment in the case of *Saradamani Kandappan v. Mrs. S. Rajalakshmi*, (2011) 12 SCC 18. The counsel for the appellant/defendant also places reliance upon the judgment passed by this Court in the case of *M/s Hotz Industries Pvt. Ltd. v. Dr. Ravi Singh (Since Deceased Through LRs) & Ors.*, 2018 SCC Online Del 7618 to argue that in this judgment this Court has extensively considered both the aspects of financial capacity and the discretionary nature of the relief of specific performance, and therefore it is argued

that the trial court was unjustified in decreeing the suit merely on self-serving statements of existence of financial capacity which in law is not sufficient to discharge the onus of proof.

8. The ld. counsel for the respondent/plaintiff has very vehemently argued that the appellant/defendant is guilty of breach of contract, and therefore the trial court was justified in decreeing the suit for specific performance. It is also argued that respondent/plaintiff had deposited in the trial court in January, 2012 the entire sale consideration and therefore the trial court has rightly held that respondent was ready and willing to perform his part of the contract as required by Section 16(c) of the Specific Relief Act.

9. Since both the issues which are required for decision by this Court, being of readiness/financial capacity, and whether the discretionary relief of grant of specific performance should or should not be granted where only about 17% of the sale consideration is paid, have been the subject matter of exhaustive discussion by this Court in the judgment in the case of *M/s Hotz Industries Pvt. Ltd. (supra)*, the relevant paras of this judgment are reproduced as under:-

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

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

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

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

lacs to the defendant no.4 and which is so recorded in the order of this Court dated 9.2.2005. It is argued that therefore as on 9.2.2005 and even thereafter the plaintiff has proved his financial capacity and therefore readiness and willingness.

(ii) I cannot agree with the argument urged on behalf of the plaintiff that plaintiff had proved its readiness and willingness as required by Section 16(c) of the Specific Relief Act. As already observed above, readiness and willingness has to be a continuous act from the date of entering into the agreement to sell till at least the leading of evidence by the plaintiff in the suit, if not even as on date at the stage of final arguments, and in this regard it is seen that the plaintiff has at best proved that it had the balance consideration with it only in May, 1995. Having financial capacity in May, 1995 in the opinion of this Court will not enable the plaintiff to show financial capacity of the plaintiff for the period from after May, 1995 till the evidence has been concluded by the plaintiff in the present suit in August, 2010. In fact the plaintiff has to be held to be guilty of the concealing documents from this Court, and which documents are in the special knowledge of the plaintiff and therefore required to be proved by the plaintiff in terms of Section 106 of the Indian Evidence Act. These documents in possession of the plaintiff with respect to its financial capacity would be the documents of the bank accounts of the plaintiff, any fixed deposit receipts of the plaintiff of amounts in its bank, audited Balance Sheets and Profit and Loss accounts of the plaintiff from the year 1995 till plaintiff's evidence was closed in August, 2010 in terms of the statement made on behalf of the plaintiff. Section 16(c) of the Specific Relief Act deliberately requires continuous readiness and willingness i.e continuous financial ability to complete the transactions. The stage of complying with obligations under the agreement to sell by a proposed buyer even if does not arise, yet Section 16(c) of the Specific Relief Act requires the plaintiff to show continuous financial capacity to prove the balance sale consideration. In my opinion, it has to be held that the plaintiff in this regard has miserably failed because merely by showing financial capacity as on date on 22.5.1995 cannot mean that the plaintiff had financial capacity from 23.5.1995 till the plaintiff concluded its evidence in August, 2010. As already stated above the plaintiff has not filed any document with respect to its financial capacity like Balance Sheets, Profit and Loss accounts and therefore against the plaintiff adverse inference has to be drawn under Section 114 of the Indian Evidence Act on account of the plaintiff having deliberately not filed such documents. It is therefore held that the plaintiff cannot be held to have complied with Section 16 (c) of the Specific Relief Act merely because plaintiff has proved the certificate of bank Ex.PW1/8 dated 5.1.2004 showing that plaintiff had prepared pay orders with respect to balance sale consideration on one day and date of 22.5.1995. Also and simply because the plaintiff

has paid a sum of Rs.42.50 lacs to defendant no. 4 in February, 2005 would also not mean that plaintiff is to be held that it had always the capacity to pay the entire balance sale consideration to defendant nos. 1 to 3 with the fact that payment by plaintiff to defendant no. 4 of a sum of Rs.42.50 lacs will only show financial capacity of the plaintiff of Rs.42.50 lacs and not with respect to total balance sale consideration payable by the plaintiff to the defendant nos. 1 to 3 of Rs.2.18 crores.

(iii) It was argued on behalf of the plaintiff that plaintiff's Managing Director has deposed in plaintiff's favour that plaintiff had the financial capacity, and this is sufficient evidence to prove readiness and willingness. This argument is however misconceived not only because PW-1 Sh. Arun Kumar Jain had been cross-examined appropriately by suggesting that plaintiff did not have financial capacity and plaintiff was not ready and willing but also because self-serving deposition cannot be held to be discharge of onus of proof and so observed by this Court in the case of **Baldev Behl & Ors. Vs. Bhule & Ors. (2012) 132 DRJ 247**, paras 26 (i) and (ii) of which reads as under:-

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

(ii) Readiness to perform the obligations by a proposed purchaser is a very important aspect and it has to be proved by categorical evidence. Mere oral evidence and self-serving depositions cannot be a substitute for categorical evidence on the specific statutory requirement of Section 16(c). It is not disputed on behalf of the plaintiff No.1 that plaintiff No.1 has not filed any income tax returns or any bank account or proof of any other assets/properties or any other evidence to show the financial capacity of the plaintiff No.1 to pay the balance sale consideration. As per the case of the plaintiff No.1, the

balance sale consideration would be approximately ` 19.5 lacs and there is no evidence worth the name in the record to show the plaintiff No.1's financial capacity for this amount. Of course, while on this argument, I am assuming that there is a certainty as to consideration because in reality there is no certainty as to balance sale consideration inasmuch as the plaintiff No.1 has failed to exercise the option in terms of the agreement to sell as to which area of the balance land less the hutment/portion the plaintiff No.1 seeks specific performance of. Also, as already stated above, this area claimed by the plaintiff No.1 has to be further conditioned by an area of 12 bighas which has already been sold to be defendant No.3 under the sale deed dated 8.4.1988. In any case, I need not state anything further inasmuch as there is not a single piece of paper on record or any credible evidence which proves the financial capacity of the plaintiff No.1. I accordingly hold that plaintiff No.1 has miserably failed to prove his readiness to perform his obligations under the agreement to sell dated 27.8.1988. In fact, even willingness on the part of the plaintiff No.1 is absent inasmuch as there is no certainty of any option exercised by the plaintiff No.1 as to specific area which the plaintiff No.1 seeks to purchase, and which specific area had necessarily to be clear inasmuch as there is the issue of lessening the area whether on account of hutments or on account of 12 bighas of land already purchased by the defendant No.3 vide sale deed dated 8.4.1988 and hence of clarity as to for what area and for what price the agreement to sell has to go ahead."

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

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

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

performance, and this is because the grant of relief of specific performance is a discretion vested in the Court as per Section 20 of the Specific Relief Act.

(ii) An agreement to sell is a contract between the parties and contracts between the parties are subject matter of the Indian Contract Act, 1872. The effect of breach of contract is provided under Section 73 of the Indian Contract Act. If there is a breach of contract then an aggrieved party is entitled to monetary damages as per Section 73 of the Indian Contract Act and which monetary damages is the amount of loss which is caused to the aggrieved party under the contract. An aggrieved party who was the proposed buyer under the agreement to sell will suffer loss if in case on the date and in around the date of breach, the value of a similar property as the contracted property under the agreement to sell, which could be purchased by the plaintiff as a proposed buyer, had increased. To the extent of increase of price of the property a plaintiff who is a proposed buyer suffers loss when a proposed seller/defendant does not sell the property under an agreement to sell, because a buyer has to pay a higher price for purchase of a similar property, and thus ordinarily whenever there is a breach of contract of an agreement to sell on account of the breach by the defendant/proposed seller, then the plaintiff/proposed buyer becomes entitled ordinarily to damages/loss under Section 73 of the Indian Contract Act being the difference of the contract price and the higher price of a similar property in around the date of breach. The Specific Relief Act contains provisions that in spite of a plaintiff who is the proposed buyer, and against whom breach of contract is caused by a defendant in the suit being the proposed seller, the plaintiff/proposed buyer need not ask for and be granted damages in such a case where the plaintiff/proposed buyer pleads and seeks that there should be specific performance of the contract and not the breach of the contract. In a way therefore the provisions of Specific Relief Act directing specific performance of a breached agreement to sell are in the nature of Exceptions or Provisos to Section 73 of the Indian Contract Act. What is being stated by this Court is that if there is a breach of contract then an aggrieved party on account of the breach of the contract gets under Section 73 of the Indian Contract Act monetary damages but where instead of grant of damages because of the contract being broken, a plaintiff/proposed buyer instead seeks/prays that the contract should be specifically performed, then such a scenario is in the nature of an Exception or a Proviso to the ordinary situation comprised in Section 73 of the Indian Contract Act that breach of contract entitles a person to monetary damages on account of the loss caused. Therefore once the provisions of Specific Relief Act with respect to specific performance

are not the normal consequence of a breach of contract being of grant of damages as per Section 73 of the Indian Contract Act, therefore the provisions of the Specific Relief Act; with the important provision therein being Section 20 of the Specific Relief Act; provides that Court has the discretion whether or not to grant specific performance and that merely because it is lawful to do so, the Court will not grant specific performance but instead may only grant damages with the measure of damages being those as provided in Section 73 of the Indian Contract Act. This aspect has been considered by this Court in detail in the judgment in the case of *Jinesh Kumar Jain Vs. Iris Paintal and Ors.* ILR (2012) 5 Delhi 678. The relevant paras of this judgment are paras 13 to 18 and these paras read as under:-

"13. Now let us assume that the agreement to sell dated 26.9.1988 was not hit by the 1972 Act; the defendants were guilty of breach of their obligation to perform their part of contract; and that the plaintiff was ready and willing to perform his part; even then, can it be said that the plaintiff is yet entitled to the discretionary relief of specific performance. It will be appropriate at this stage to refer to Section 20 of the Specific Relief Act, 1963, and more particularly sub-Section 3 thereof. Section 20 reads as under:-

20. Discretion as to decreeing specific performance.-

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

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

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

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

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

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

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

14. Sub-Section 3 makes it clear that Courts decree specific performance where the plaintiff has done substantial acts in consequence of a contract/agreement to sell. Substantial acts obviously would mean and include payment of substantial amounts of money. Plaintiff may have paid 50% or more of the consideration or having paid a lesser consideration he could be in possession pursuant to the agreement to sell or otherwise is in the possession of the subject property or other substantial acts have been performed by the plaintiff, and acts which can be said to be substantial acts under Section 20(3). However, where the acts are not substantial i.e. merely 5% or 10% etc of the consideration is paid i.e. less than substantial consideration is paid, (and for which a rough benchmark can be taken as 50% of the consideration), and/or plaintiff is not in possession of the subject land, I do not think that the plaintiff is entitled to the discretionary relief of specific performance.

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

“37. The reality arising from this economic change cannot continue to be ignored in deciding cases relating to specific performance. The steep increase in prices is a circumstance which makes it inequitable to grant the relief of specific performance where the purchaser does not take steps to complete the sale within the agreed period, and the vendor has not been responsible for any delay or non-performance. A purchaser can no longer take shelter under the principle that time is not of essence in performance of contracts relating to immovable property, to cover his delays, laches, breaches and “non-readiness”. The precedents from an era, when high inflation was unknown, holding that time is not of the essence of the contract in regard to immovable properties, may no longer apply, not because the

principle laid down therein is unsound or erroneous, but the circumstances that existed when the said principle was evolved, no longer exist. In these days of galloping increases in prices of immovable properties, to hold that a vendor who took an earnest money of say about 10% of the sale price and agreed for three months or four months as the period for performance, did not intend that time should be the essence, will be a cruel joke on him, and will result in injustice. Adding to the misery is the delay in disposal of cases relating to specific performance, as suits and appeals therefrom routinely take two to three decades to attain finality. As a result, an owner agreeing to sell a property for rupees one lakh and received rupees ten thousand as advance may be required to execute a sale deed a quarter century later by receiving the remaining rupees ninety thousand, when the property value has risen to a crore of rupees.

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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. Vidyandam*.

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

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

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

(emphasis is mine)

16. A reading of the aforesaid paras shows that Courts have a bounden duty to take notice of galloping prices. Surely it cannot be disputed that the balance of convenience i.e. equity in the present case is more in favour of the defendants who have only received 10% of the consideration. If the hammer has to fall in the facts of the present case, in my opinion, it should fall more on the plaintiff than on the defendants inasmuch as today the defendants cannot on receiving of the balance consideration of ₹44,00,000/-, and even if exorbitant rate of interest is received thereon,

purchase any equivalent property for this amount. Correspondingly, the plaintiff has had benefit of 90% of sale consideration remaining with him (assuming he has any) and which he could have utilized for purchase of assets including an immovable property. In specific performance suits a buyer need not have ready cash all the time and his financial capacity has to be seen and thus plaintiff can be said to have taken benefit of the 90% balance with him. It is well to be remembered at this stage that in a way that part of Specific Relief Act dealing with specific performance is in the nature of exception to Section 73 of the Contract Act, 1872 i.e. the normal rule with respect to the breach of a contract under Section 73 of the Contract Act, 1872 is of damages, and, the Specific Relief Act, 1963 only provides the alternative discretionary remedy that instead of damages, the contract in fact should be specifically enforced. Thus for breach of contract the remedy of damages is always there and it is not that the buyer is remediless. However, for getting specific relief, the Specific Relief Act, 1963 while providing for provisions of specific performance of the agreement (i.e. performance instead of damages) for breach, requires discretion to be exercised by the Court as to whether specific performance should or should not be granted in the facts of each case or that the plaintiff should be held entitled to the ordinary relief of damages or compensation.

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

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

has made out a case for grant of discretionary relief or specific performance.....”

18. Therefore, whether we look from the point of view of Section 20 sub-Section 3 of the Specific Relief Act, 1963 or the ratio of the judgment of the Supreme Court in the case of *Saradamani Kandappan (supra)* or even on first principle with respect to equity because 10% of the sale consideration alongwith the interest will not result in the defendants even remotely being able to purchase an equivalent property than the suit property specific performance cannot be granted. In fact, on a rough estimation, the property prices would have galloped to at least between 30 to 50 times from 1988 till date. I take judicial notice of this that in the capital of our country, like in all other megapolis, on account of the increase in population and rapid urbanization, there is a phenomenal increase in the prices of urban immovable property.

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

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

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

(ii) *Baldev Behl & Ors. Vs. Bhule & Ors. (2012) 132 DRJ 247*

(In para 25 of this judgment it is noted that the appeal against the judgment in the case of *Jinesh Kumar Jain (supra)* being RFA(OS) No.75/2012 stands dismissed by a Division Bench of this Court on 31.8.2012).

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

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

(ii) As a result of rise in the prices of a property, that in the facts of the present case this Court can take judicial notice that prices of properties in Delhi, and that prices in the year 1995 would be far far lesser than the prices of the property today in the year 2018, and that too more so with the fact of the suit property being situated in one of the prime colonies of the Delhi being Maharani Bagh, grant of specific performance will severely and gravely prejudice the defendants. On a conservative estimate the value of the suit property as on today would be at least around 20 times more than what was the price of the suit property in the year 1995 and that therefore with the balance sale consideration payable to the defendants as on today even with interest, the defendants will not be able to purchase the property as the defendants could have purchased with the value of the balance sale consideration in the year 1995.

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

into the agreement to sell being the amount of Rs.37 lacs, therefore plaintiff is not entitled to the discretionary relief of specific performance.

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

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

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

10(i). It is noted that in terms of the judgment of the Supreme Court in the case of *N.P. Thirugnanam (Dead) by LRs. (supra)* the requirement of proving financial capacity/readiness is right from the date of agreement to sell till the disposal of the suit, and since the respondent/plaintiff has deposited the balance sale consideration of Rs. 27,00,000/- in the suit in January, 2012 it is to be seen that whether the respondent/plaintiff had the financial capacity right from

the date when the Agreement to Sell was entered into on 07.09.2007 till 2012 i.e. for approximately a period of five years.

10(ii). In this regard, it is noted that except the self-serving averments/deposition of the respondent/plaintiff being ready and willing, there is no documentary evidence which is filed or proved on record by the respondent/plaintiff for the period from September, 2007 till 2012 that the respondent/plaintiff had the necessary financial capacity. No doubt financial capacity does not mean availability of liquid funds and that financial capacity has to be interpreted in a reasonable manner to show that a proposed buyer had the necessary financial capacity to pay the balance sale consideration, however, equally it is noted that financial capacity has to be proved to the judicial conscience of the court by sufficient documentary evidence. This has been held in the case of **Baldev Behl & Ors. v. Bhule & Ors.** (2012) 132 DRJ 247, and the relevant paras of this judgment have already been reproduced by this Court in para 17(iii) of **M/s Hotz Industries Pvt. Ltd. (supra)**, which are not reproduced again herein to avoid repetition. Therefore, once the respondent/plaintiff did not file any income tax return or any bank account statement or any wealth tax

return or any other document, whether liquid or reasonably liquid, to show the availability of financial capacity of the respondent/plaintiff that he could pay the balance sale consideration of Rs. 27,00,000/- from September, 2007 to 2012, it must therefore be held that the respondent/plaintiff did not have the financial capacity for this five year period and therefore the respondent/plaintiff has failed to prove the *sine qua non* requirement of Section 16(c) of the Specific Relief Act. The respondent/plaintiff therefore was not entitled to the relief of specific performance and the trial court has thus erred in decreeing the suit for specific performance despite the clear ratio of the Supreme Court in the case of ***N.P. Thirugnanam (Dead) by LRs. (supra)***.

11. On the second aspect with respect to the discretionary nature of specific performance, it is noted that approximately about 17 odd percent out of the sale consideration has been paid by the respondent/plaintiff. The rationale for declining the relief of specific performance has been dealt with in detail by this Court sub-paras (i) to (v) of para 22 of the judgment in the case of ***M/s Hotz Industries Pvt. Ltd. (supra)*** which have been reproduced above, and one such rationale/reason is that suits which are decreed many years later from

the date of entering into agreement to sell causes a lot of prejudice to the seller who has only received a small percentage of the total sale consideration inasmuch as from the amount of sale consideration fixed under an agreement to sell entered into many years earlier, the seller cannot purchase a property of equivalent value of money many years later when the suit for specific performance is decreed. In fact it is for this reason that a buyer has been mandated to lead sufficient evidence for grant of decree of damages because whenever there is a breach of contract, including a contract being an agreement to sell, two alternative reliefs are available, one being of specific performance and the second of grant of damages under Section 73 of the Indian Contract Act, 1872. In the present case, no claim has been laid out by the respondent/plaintiff for the grant of relief of damages under Section 73 of the Contract Act and no such evidence has been led as to the rise of the value of the suit property from the date of entering into the agreement to sell than as compared to the price of the property from the alleged date of breach in March, 2008. A decree for damages, which can be of a specific amount, cannot be granted to the respondent/plaintiff in the facts of the present case.

12. In view of the aforesaid discussion, this appeal is allowed. The impugned judgment of the trial court is set aside. The suit for specific performance filed by the respondent/plaintiff will stand dismissed. Parties are left to bear their own costs.

13. It is noted that this Court had put it to the counsel for the respondent/plaintiff that although there is no relief prayed for return of the amount of Rs. 6,01,000/-, this amount of Rs. 6,01,000/- along with reasonable rate of interest can be granted to the respondent/plaintiff on making such an oral prayer to this Court, by passing a money decree in favour of the respondent/plaintiff and against the defendant, however the counsel for the respondent/plaintiff after taking a pass over stated that she has instructions to argue the appeal on merits for dismissing the same.

14. The appeal is accordingly allowed and disposed of in terms of the aforesaid judgment.

NOVEMBER 22, 2018/Ne

VALMIKI J. MEHTA, J