IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No.816 of 2015(O&M)

Date of decision: 18.12.2019

Vipin Kumar …..Appellant

VERSUS

Mohinder Kumar .....Respondent

*****

CORAM: HON'BLE MRS. JUSTICE REKHA MITTAL

Present: Mr. Gaurav Chopra, Advocate for the appellant.

Ms. Vibha Mahajan, Advocate for the respondent.

*****

REKHA MITTAL, J.

The present appeal directs challenge against decree and judgment dated 28.01.2015 passed by the Additional District Judge, Gurgaon whereby appeal against judgment and decree dated 13.02.2014 passed by the trial Court was accepted, impugned decree and judgment were reversed and suit filed by respondent/plaintiff was decreed to the following effect:-

> "In view of the discussion made above, the judgment and decree dated 13.2.2014 is wrong, against law and facts and is not liable to be sustainable in the eyes of law and is hereby ordered to be set aside. Hence, the appeal is hereby allowed. The suit of the appellant-plaintiff is hereby ordered to be decreed with costs to the effect that the defendant is hereby

> directed to get the sale deed executed/registered within the period of 40 days after receiving the remaining sale consideration, failing which the appellant-plaintiff would be entitled to get the sale deed executed through the process of law….."

The facts, in brief, are that the appellant is owner of shop/plot No.12, Block H, measuring 310 square feet situated at Gurgaon. He entered into agreement dated 21.04.1994 to sell the suit property at the rate of Rs.3000/- per square feet including all the charges of security, external development and contingency deposit. An agreement – cum- receipt dated 21.04.1994 was executed by the appellant in favour of the respondent. An amount of Rs.50,000/- was paid to the appellant towards part-payment/earnest money and remaining amount was agreed to be paid at the time of registration of sale deed after obtaining income tax clearance (ITC) by the appellant. It was averred that the appellant never moved income tax authorities for grant of ITC nor gave any information in this regard despite repeated reminders including telegram dated 06.06.1994. The appellant, instead of performing his part of contract, preferred to send notice through counsel dated 05.06.1994 stating that since respondent failed to pay the remaining amount of sale consideration within 40 days from the date of agreement, the amount of part payment stood forfeited. The date has been mentioned as 05.06.1994 but the notice, in fact, was issued on 06.06.1994. The respondent sent reply to the notice and expressed his readiness and willingness to perform his part of the agreement. Vide another notice dated 05.08.1994, the respondent requested the appellant to obtain ITC immediately and get sale deed executed on or before 20.08.1994. The respondent attended office of Sub Registrar on 20.08.1994, 21.08.1994 and 22.08.1994. He got his presence recorded on 22.08.1994 but the appellant did not appear.

The appellant initially filed the written statement on 22.11.1995 but later amended the written statement in pursuance of order dated 26.08.2000. He raised preliminary objections inter alia regarding maintainability, cause of action, concealment of facts, locus standi and privity of contract. The execution of agreement-cum-receipt dated 21.04.1994 has been admitted but it is stated that the same was not signed by the respondent rather was signed by Sh. Harbhans Mahajan. The time was essence of the agreement, to be executed within 40 days but despite repeated requests of the appellant, Harbhans Mahajan failed to send copy of the agreement duly signed by the respondent, required to be presented before the Registrar for obtaining ITC. The agreement was not handed over because the respondent did not have the means to make payment of balance sale consideration that too within 40 days. The agreement had already been revoked by way of notice dated 05.06.1994 and earnest money of Rs.50,000/- stands forfeited. Subsequent reminders by the respondent are nothing but an act of taking advantage of his own wrong. All other material averments of the plaint were denied with a prayer for dismissal of the suit.

The respondent filed replication and reiterated his stand taken in the plaint.

The controversy between the parties led to framing of following issues by the trial Court:-

1. Whether the plaintiff has already been and is still ready and willing to perform his part of the contract as alleged? OPP
2. Whether the plaintiff is entitled to deed executed on the payment of remaining amount of sale consideration? OPP
3. Whether the plaintiff has not disclose any cause of action? OPD
4. Whether the plaintiff has not come with clean hands to the Court. If so to what effect? OPD
5. Whether the agreement in question stands canceled vide notice dated 05.06.1994? OPD
6. Whether the plaintiff has no locus standi to file the present suit? OPD
7. Whether the defendant was ready and willing to perform his part of the contract? OPD
8. Relief.

The parties were permitted to adduce evidence in support of their respective contentions, evidence led by them is noticed in detail in paras 5 and 6 of the judgment of trial Court. Having heard counsel for the parties in the light of materials on record, the trial Court determined issues No.2 and 5 taken up together with issues No.1 and 7 in favour of the respondent/plaintiff but eventually suit of the plaintiff was dismissed with costs. As has been noticed hereinbefore, the Appellate Court reversed the judgment and decree passed by the trial Court and decreed the suit by allowing principal relief of specific performance of agreement to sell dated 21.04.1994.

Counsel for the appellant has assailed the judgment primarily on three grounds. It is vehemently argued that appellant filed an application under Order 14 Rule 5 of the Code of Civil Procedure, 1908 (in short 'CPC') for framing following additional issues:-

(i) Whether the receipt dated 21.04.1994 constitutes a contract between the parties.

(ii) Whether their existed a concluded contract between the parties.

The application was dismissed by the trial Court vide order dated 07.01.2013 and the same became subject matter of challenge in civil revision No.640 of 2013 before the High Court. The aforesaid civil revision was disposed of vide order dated 04.12.2013 (Annexure A/7) and it was held that eight issues were framed earlier, same are comprehensive in nature and lis can be decided on the basis of issues already framed. It is argued with vehemence that the Courts have not decided whether there was agreement/concluded contract between the parties, therefore, the impugned judgment cannot be allowed to sustain.

Another submission made by counsel is that the respondent/plaintiff is not entitle to specific performance of agreement of sale in exercise of discretionary jurisdiction by the Court for the following reasons:-

1. The respondent in the replication in para 10 and 13 had raised the plea that there exist valid agreement between the defendant and the plaintiff and same is in possession of the

defendant but no such agreement has seen light of the day even though the trial Court while deciding application under Order 6 Rule 16 CPC for striking of pleadings had allowed the application vide order dated 19.04.2006 only to the extent that the original document to be in possession of defendant.

2. The respondent/plaintiff has failed to prove that he always remained ready and willing to perform his part of the agreement i.e. payment of balance sale consideration of Rs.8,80,000/- and expenses of registration of sale deed.

To bring home his contention with regard to the respondent being not ready to perform his part of the agreement, it is argued that in sub para (3) of para 2 of the plaint, he has averred that there was no such agreement between the parties that plaintiff will make final payment to the defendant which is quite big amount within 40 days from the date of agreement without first completing formalities by the defendant. Counsel has laid much stress on the words 'quite big amount' to support his contention that the respondent was not ready to discharge his liability under the alleged agreement of sale.

The last submission made by counsel is that vide notice dated 05.06.1994, admittedly received by the respondent/plaintiff and replied vide reply dated 11.06.1994, the agreement was cancelled and earnest money was forfeited. The respondent/plaintiff never sought any declaration to challenge termination/rescission of the agreement, therefore, suit for specific performance of the contract is not maintainable. In support of his contention, heavy reliance has been placed upon judgment of

Hon'ble the Supreme Court **I.S. Sikandar (D) by LRs Vs. K. Subramani and others, 2013(15) SCC 27**. Further reference has been made to judgment of Delhi High Court **Dharampal Satyapal Ltd. Vs. Sanmati Trading and Investment Ltd. and another, 2017(175) AIC 855,** judgments of this Court **Lokesh and others Vs. Rameshwar Tyagi, 2018(1) RCR (Civil) 248** and **Mohinder Singh and another Vs. Jarnail Singh and others, RSA No.4590 of 2010, decided on 04.05.2016.**

Counsel representing the respondent/plaintiff, on the contrary, has supported the judgment passed by the Court in appeal. It is argued that receipt Ex.P1 contains all the terms and conditions of a valid agreement and has rightly been accepted so by the Court. It is further argued that the Courts have adverted to the question whether there was a valid agreement of sale between the parties and question of readiness and willingness of the respondent to perform his part of the agreement and accepted his plea on correct appreciation of warring claims, oral and documentary evidence on record. It is further argued that the appellant has not disputed that receipt/agreement Ex.P1 has been signed by him, therefore, his plea that the same does not constitute a contract has rightly been rejected. It is further argued that the mere fact that the receipt/agreement has not been signed by the respondent/purchaser would be of no consequence in he face of correspondence between the parties prior to filing of the suit which is more than sufficient to show that the respondent accepted the agreement signed by vendor alone. For this purpose, reference has been made to judgment of Hon'ble the Supreme Court **Alka Bose Vs. Parmatma Devi and others, 2009(1) RCR (Civil) 450** and of this Court **Fakir Chand and others Vs. Sona Devi and ohers, 2019 (3) RCR (Civil) 671.**

While refuting contention of the appellant that respondent has not been able to prove his readiness and willingness to perform his part of the agreement, it is argued that in respect of agreement dated 21.04.1994, the respondent sent telegram dated 05.06.1994 calling upon the appellant to get necessary income tax clearance in terms of agreement Ex.P1 and till August 1994, there was exchange of several notices/replies between the parties and eventually the suit was filed on 01.10.1994. Counsel would inform that statement of the respondent/plaintiff in support of his plea of readiness and willingness to perform his part of the agreement remains unrebutted and unchallenged as the appellant did not avail opportunity to cross examine him given by the trial Court and by the High Court. It is further argued that statement of the appellant to counter plea of the respondent regarding readiness and willingness is beyond pleadings as well as his first version given in the notice Ex.PA, admittedly dispatched on 06.06.1994. Counsel would further argue that in the entire correspondence between the parties prior to institution of the suit, there is no reference to any additional agreement having executed between the parties subsequent to execution of document Ex.P1 by the appellant, therefore, the appellant cannot derive any advantage to his contention from averments raised in para 10 and 13 of the replication, sought to be highlighted by his counsel.

Counsel has countered plea of the appellant that suit for specific performance is not maintainable without seeking declaration against cancellation of the agreement vide document Ex.PA. It is argued that since in the present case, the appellant is guilty of non-performing his part of the agreement by getting necessary income tax clearance from the concerned authority at any point of time either before he issued notice

Ex.PA or before filing of the suit, he cannot seek any aid to his contention from the judgment in **I.S. Sikandar's case** (supra) passed in view of peculiar facts and circumstances, noticed while answering question No.1 by Hon'ble the Supreme Court. It is further argued that since the respondent always remained ready and willing to perform his part of the agreement, the appellant cannot escape his liability created under the agreement Ex.P1 by taking advantage of his own wrong. It is vehemently argued that as termination of the agreement in view of notice Ex.PA is void, there was no reason for the appellant to seek declaration to assail termination of the agreement. For this purpose, reference has been made to judgments of this Court **Mandhir Singh Vs. Gurjant Singh, 2014(3) RCR (Civil) 728** against which Special Leave to Appeal (C) No.27615/2014 was dismissed by Hon'ble the Supreme Court vide order dated 01.12.2014; **Nirmal Singh and others Vs. Vijay Kumar Bansal, 2018(3) RCR (Civil) 103** and **Brahm Dutt Vs. Sarabjit Singh, RSA No.2943 of 2017 decided on 06.11.2017**.

I have heard counsel for the parties, perused the paper-book and records.

Before adverting to the submissions made by counsel for the parties, it is pertinent to note that document Ex.P1 titled as 'receipt' was admittedly signed by the appellant whereby he received Rs.50,000/- in cash from Sh. Mohinder Kumar as part payment and earnest money for sale of plot number/House No.12 Block –H, measuring 310 square feet in D.L.F Qutab Enclave Complex, Gurgaon. The price of the property was settled at Rs.3000/- per square feet including all the charges i.e. security, external development charges, contingency deposit paid by him. Perusal of the judgments passed by the Courts makes it evident that both the Courts have categorically and clearly held that there was a valid agreement of sale and purchase between the parties and the respondent/plaintiff remained ready and willing to perform his part of the agreement. However, the trial Court by taking into consideration notice dated 05.06.1994 Ex.PA and by relying upon judgment of Hon'ble the Supreme Court in **I.S. Sikandar's case** (supra) had held that since the respondent/plaintiff has not sought a declaratory relief qua termination of agreement of sale being bad in law, the respondent/plaintiff is not entitle to specific performance of agreement to sell. When counsel for the appellant was confronted with findings of the Courts in respect of agreement of sale as well as on the aspect of readiness and willingness of the respondent/plaintiff, he did not reiterate his contention with regard to the Courts having not decided the issues relevant in that context that also covered additional issues sought to be framed in view of application filed by the appellant that came to be dismissed by the trial Court and civil revision filed before this Court also met the same fate.

The plea of the appellant that there was no concluded contract between the parties either on account of document Ex.P1 having not been signed by the respondent or otherwise has rightly been rejected by the Courts. Taking into consideration the contents of document Ex.P1 correspondence exchanged between the parties prior to institution of the suit in view of notice dated 05.06.1994 Ex.PA issued by the appellant, reply dated 11.06.1994 Ex.P4, notice dated 05.08.1994 Ex.P6 by the respondent through counsel and reply thereto by the appellant through his counsel Sh. T.C.S. Sapra Ex.P5 when examined in the light of judgment of

Hon'ble the Supreme Court in **Alka Bose's case** (supra), it is difficult to accept contention of the appellant that findings recorded by the Courts that there was a concluded contract between the parties can be faulted with much less to say that the same suffer from perversity.

This brings the Court to the other two submissions made by counsel which are intermingled and interwoven. The question of readiness and willingness of the respondent, to some extent is relevant for deciding the question of maintainability of the suit without seeking declaration qua cancellation of the agreement, in view of judgment of Hon'ble the Supreme Court in **I.S. Sikandar's case** (supra). I would first deal with the first contention of the appellant raised in the context of respondent being not entitle to discretionary relief of specific performance of agreement of sale. There is no denial that in the plaint, there is no reference to any other document except the receipt executed by the appellant on the basis whereof the suit was filed. No doubt, in replication to para 10 and 13 of the written statement, the respondent has averred that there exists valid agreement between the defendant and plaintiff and the same is in possession of defendants. The pleadings with regard to 'document being in possession of the defendant' were struck off by partly allowing application of the appellant filed under Order 6 Rule 16 CPC vide order dated 19.04.2006. The first detailed communication, subsequent to document dated 21.04.1994 (Ex.P1) is notice dated 05.06.1994 marked as Ex.PA issued at the behest of appellant/defendant. A perusal thereof leaves no manner of doubt that except reference to agreement dated 21.04.1994 in paras 1 and 2, there is no reference to any other agreement having been executed between the parties subsequent to agreement dated 21.04.1994. Perusal of averments raised in application filed under Order 6 Rule 16 CPC for striking off pleadings with regard to agreement between the parties raised in para 10 and 13 of the replication would further reveal that appellant denied any such agreement between the parties. In the entire correspondence exchanged between the parties subsequent to execution of receipt Ex.P1, there is no reference to any other agreement having been executed between the parties. In the given circumstances, the appellant cannot seek setting aside judgment of the Appellate Court by contending that since the respondent has not produced copy of that agreement, he is not entitle to discretionary relief of specific performance. It appears that plea raised in para 10 and 13 of the replication is the result of miscommunication or failure of counsel to draft the replication in a proper manner and using correct words.

There is a serious dispute between the parties with regard to interpretation of the terms and conditions incorporated in the document Ex.P1 on the basis whereof the appellant sought to terminate the agreement, forfeit the earnest money and raise contention that suit is not maintainable for non-seeking declaration against cancellation of the agreement. To decide this controversy, a relevant extract from the receipt/agreement Ex.P1 needs to be noticed, reads thus:-

> "The purchaser will get the Plot Registered in his/her/their own name or in the name of his/her/their nominee/s within <u>40 days</u>. the first party will inform the second party in writing after getting the Income Tax clearance Certificate regarding this plot from the concerned authority.

Should the Purchaser fail to make the payments of the balance of the price as agreed upon the earnest money paid by him/her/their shall stand forfeited and the deal stand cancelled. Similarly the Purchaser reserves the right to get the Sale Deed effected (registered or transfered) accordingly at the cost and damages of the seller through the Court of Law."

In **<u>I.S. Sikandar's case</u>** (supra), under the head 'answer to point No.1', para 33 to 38 reads, quoted thus:-

"33. The first point is answered in favour of Defendant 5 by assigning the following reasons: it is an undisputed fact that there is an agreement of sale executed by Defendants 1-4 dated 25-12-1983 in favour of the plaintiff agreeing to sell the schedule property in his favour for a sum of Rs 45,000/- by receiving an advance sale consideration of Rs 5000/- and the plaintiff had further agreed that the remaining sale consideration will be paid to them at the time of execution of the sale deed. As per Clause 6 of the agreement of sale, the time to get the sale deed executed was specified as 5 months in favour of the plaintiff by Defendants 1-4, after obtaining necessary permission from the competent authorities such as the Urban Land Ceiling Authority and the Income Tax Department for execution and registration of the sale deed at the cost and expenses of the plaintiff. If there is any delay in obtaining necessary permission from the above authorities and the payment of layout charges, the time for due performance of agreement shall further be extended for a period of two months from the date of grant of such permission.

34. In the instant case, permission from the above authorities was not obtained by Defendants 1-4. The period of five months stipulated under Clause 6 of the agreement of sale for execution and registration of the sale deed in favour of the plaintiff had expired. Despite the same, Defendants 1-4 got issued a legal notice dated 6-3-1985 to the plaintiff pointing out that he has failed to perform his part of the contract in terms of the agreement of sale by not paying the balance sale consideration to them and getting the sale deed executed in his favour and called upon him to pay the balance sale consideration and get the sale deed executed on or before 18-3-1985.

35. The plaintiff had issued reply letter dated 16-3- 1985 to the advocates of Defendants 1-4, in which he had admitted his default in performing his part of contract and prayed time till 23-5-1985 to get the sale deed executed in his favour. Another legal notice dated 28-3-1985 was sent by the first defendant to the plaintiff extending time to the plaintiff asking him to pay the sale consideration amount and get the sale deed executed on or before 10-4-1985, and on failure to comply with the same, the agreement of sale dated 25-12-1983 would be terminated since the plaintiff did not avail of the time extended to him by Defendants 1-4.

36. Since the plaintiff did not perform his part of contract within the extended period in the legal notice referred to supra, the agreement of sale was terminated as per notice dated 28-3-1985 and thus, there is termination of the agreement of sale between the plaintiff and Defendants 1-4 w.e.f. 10-4-1985.

37. As could be seen from the prayer sought for in the original suit, the plaintiff has not sought for declaratory relief to declare the termination of agreement of sale as bad in law. In the absence of such prayer by the plaintiff the original suit filed by him before the trial court for grant of decree for specific performance in respect of the suit schedule property on the basis of agreement of sale and consequential relief of decree for permanent injunction is not maintainable in law.

38. Therefore, we have to hold that the relief sought for by the plaintiff for grant of decree for specific performance of execution of sale deed in respect of the suit schedule property in his favour on the basis of non- existing agreement of sale is wholly unsustainable in law. Accordingly, Point (i) (see para 32.1) is answered in favour of Defendant 5."

In the notice Ex.PA, wherein there is reference to cancellation of the agreement and forfeiture of Rs.50,000/-, thrust of the appellant is that as addressee No.1 namely Sh. Mohinder Kumar (respondent herein) and addressee No.2 Sh. Harbhans Mahajan did not pay the balance amount of Rs.8,80,000/- and fulfill other formalities pertaining to the agreement/receipt within 40 days as agreed upon, the agreement stands cancelled.

The first question for consideration is, whether there was an agreement that balance sale consideration, admittedly Rs.8,80,000/-, was agreed to be paid by the purchaser within 40 days w.e.f. 21.04.1994.

A plain but careful reading of the aforesaid extract from document Ex.P1 makes it evident that the sale deed was to be registered within 40 days but the vendor was required to obtain the income tax clearance certificate and thereafter inform the purchaser in writing in this regard. There is no recital in the document Ex.P1 that sale deed was to be registered within 40 days w.e.f. 21.04.1994. There is also no specific recital that balance price shall be payable by the purchaser within 40 days from the date of execution of receipt/agreement dated 21.04.1994. It is also not plea of the appellant that no income tax clearance was required for enabling the appellant to get the sale deed registered in favour of the respondent/purchaser. Indisputably, the appellant did not apply to the income tax authorities for getting necessary clearance either within 40 days from the date of agreement on 21.04.1994 or prior to issuance of notice dated 05.06.1994 Ex.PA. In the notice Ex.PA, there is no reference to application of the appellant to get necessary income tax clearance from the concerned authority or the reasons that stood in his way to seek necessary permission/clearance. Not only this, nothing has been specifically mentioned therein as to what other formalities pertaining to the agreement/receipt were not fulfilled by the respondent or Sh. Harbhans Mahajan, a mediator in the transaction to be paid brokerage at the rate of 2% of total consideration by both the parties separately, incorporated in the agreement Ex.P1. In this view of the matter, it can safely be held that the appellant terminated the agreement without any valid reason much less due to fault of the respondent, therefore, the same cannot be allowed to stand in the way of respondent to seek specific performance of agreement without seeking declaration qua cancellation thereof. It appears that the appellant became dishonest and tried to wriggle out of his liability under the agreement by making out a case with regard to fault of the purchaser but without appreciating that sale deed could be registered within the prescribed period of 40 days on payment of balance sale consideration only if he had performed his part of the agreement by getting necessary income tax clearance from the concerned authority and thereafter informing the purchaser in writing. In this view of the matter, facts of the present case are absolutely distinguishable from the facts of the referred authority wherein the purchaser had admitted his fault and failed to get the sale deed executed and registered by 10^{th} of April 1985 despite his being given an opportunity by the vendor who had demanded balance sale consideration on or before 10.04.1985 and on failure thereof, the agreement to stand terminated in view of letter of cancellation dated 28.03.1985. That being so, the appellant cannot derive any advantage to his contention from the referred authorities.

I would hasten to add that the appellant in the written statement raised the plea that since time was essence of the agreement and execution of document pertaining to transfer was to be gone through within 40 days, he requested Sh. Harbhans Mahajan to send him a copy of agreement duly signed by the plaintiff and also the proposed agreement duly signed to be presented for the purpose of obtaining ITC. He has further averred that he also requested Sh. Harbhans Mahajan by way of written request but neither Harbhans Mahajan nor the plaintiff responded to the same with ulterior motives.

Sh. Harbhans Mahajan appeared in the witness box to support cause of the respondent/plaintiff. Counsel for the appellant has failed to point out any facts elicited in cross examination of Harbhans Mahajan from which it can be inferred much less proved that Sh. Harbhans Mahajan was ever approached by the appellant for making available copy of agreement under signatures of the respondent for the purpose of getting necessary clearance from income tax authorities. No such written communication sent by the appellant to Sh. Harbhans Mahajan has seen light of the day, therefore, an adverse inference is liable to be drawn against the appellant that he had raised a false plea with regard to his having contacted Harbhans Mahajan for making available agreement of sale with signatures of the respondent for the purpose of getting income tax clearance nor the appellant can be heard to say that he could not get the necessary income tax clearance due to fault of the respondent/plaintiff. It further appears that since the appellant never asked for any such document, though there was no such recital in the agreement Ex.P1 in this regard, for that reason, the appellant remained silent about income tax clearance in his first notice dated 05.06.1994. The story propounded by the appellant that he could not get necessary ITC for want of availability of agreement of sale with signatures of respondent is nothing but a cock and bull story concocted with the help of fertile legal brain to escape liability created under the agreement as price of the property had increased. In this view of the matter, there is no escape except to hold that it was the appellant who is guilty of non-performing his part of agreement qua income tax clearance, to facilitate execution of the sale deed within 40 days, therefore, he cannot be allowed to take advantage of his own wrong by issuing notice Ex.PA, based upon incorrect submissions, contradictory to the terms and conditions agreed between the parties as well.

The notice Ex.PA was duly replied by the respondent/plaintiff through his counsel Sh. Suresh Aggarwal, Advocate vide Ex.P4. In para 4 of the reply, it has been stated that registration of the shop was to be completed only after the appellant had obtained income tax clearance certificate and communicating the same in writing to client of Sh. Suresh Aggarwal, Advocate. It has further been mentioned that since the appellant neither obtained nor communicated about obtaining ITC in spite of Mr. Harbhans Mahajan having talked to him on the phone as well as personally, question of forfeiting the earnest money and cancelling the deal did not arise. The appellant did not respond to reply Ex.P4. The respondent issued another notice dated 05.08.1994 Ex.P6 calling upon the appellant to get ITC and register the sale deed on or before 20.08.1994 by ensuring presence in the office of Sub Registrar, Gurgaon failing which the respondent shall be constrained to seek his remedy in the Court of law and appellant shall be liable for costs and damages suffered by Mohinder Kumar, client of Sh. T.C.S. Sapra, Advocate. The appellant sent reply vide Ex.P5 and in para 2 (i) and 2(iii), he pleaded to the following effect:-

> "2(i)……. Further since neither your client or for that matter Shri. Harbhans Mahajan contacted my aforesaid client either on the expiry of 40 days nor showed their intentions to perform their part of the agreement, hence there was no

question of my aforesaid Client obtaining the I.T.C from the concerned department…..

2(iii)…. It is wrong and denied that the obtaining of the ITC was a pre-requisite for getting the sale. In fact my aforesaid client contacted you prior to the 40 days, on the 40th day as to where, the documents were to be executed, but since there was no answer forthcoming from your client as such there was no question of getting the ITC….."

No such plea was raised by the appellant that he contacted Sh. Harbhans Mahajan for getting copy of agreement under signatures of the respondent for obtaining income tax clearance but since the same was not made available, he was rendered helpless to perform his part of the agreement qua income tax clearance. In this view of the matter, inevitable conclusion is that pleadings in the written statement with regard to fault of the respondent qua obtaining ITC are the result of an afterthought and cannot be accepted. This apart, counsel for the appellant has failed to point out the relevant provisions in the Income Tax Act or rules/regulations/instructions of that department requiring a copy of agreement with signatures of purposed buyer for getting income tax clearance. Sh. Harbhans Mahajan, in cross examination, stated that no such copy of agreement is required for obtaining necessary clearance and only a prescribed performa with necessary details is required to be submitted to the department. The appellant appeared in the witness box and expressed ignorance about various facts put to him in cross examination. Perusal of cross examination in extenso would reveal that the appellant tried to avoid giving positive answers and even failed to give any satisfactory explanation for failure to perform his part of the agreement with regard to getting income tax clearance. The materials on record are more than sufficient to suggest that the appellant did not approach the authorities for getting income tax clearance as he never wanted to get the sale deed executed and registered on payment of balance sale consideration. Conversely, testimony of respondent with regard to his readiness and willingness to perform his part of the agreement remains unchallenged for want of cross examination and the same amounts to admission on the part of appellant. The conduct exhibited by the respondent in reply to notice dated 05.06.1994, notice dated 05.08.1994 and filing the suit for specific performance on 01.10.1994 speaks volumes that respondent always remained ready and willing to perform his part of the agreement but the transaction could not fructify on account of default of the appellant who was hell-bent to wriggle out of his liability under the agreement for the reasons best known, may be, due to rise in price of property in question situated at Gurgaon. In the given circumstances, contentions raised by the appellant are not meritorious nor can he derive advantage from the referred authorities decided, in view of their peculiar facts and circumstances.

For the foregoing reasons, finding no merit, the appeal fails and is accordingly dismissed with costs.

DECEMBER 18, 2019 **(REKHA MITTAL)**
'D. Gulati' **JUDGE**

Whether speaking/reasoned : yes/no
Whether reportable : yes/no