

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

+ **RFA No. 2/2019**

% **07th January, 2019**

M.K.CHABBRA

..... Appellant

Through: Mr. Ashwani Kumar Dhatwalia,
Ms. Iti Sharma and Mr. Jawahar
Chawla, Advocates.

versus

DAMANJIT KAUR

..... Respondent

Through: Mr. Jaspal Singh and Ms.
Namrah Nasir, Advocates
(9650969579)

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? **YES**

VALMIKI J. MEHTA, J (ORAL)

Caveat No. 5/2019

Counsel appears for the caveator. Caveat stands discharged.

**RFA No. 2/2019 & CM No. 77/2019 (Stay) & CM No. 78/2019 (U/o
XLI Rule 27 CPC)**

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

impugning the Judgment of the trial court dated 28.07.2018 by which the trial court has dismissed the suit filed by the appellant/plaintiff for specific performance of the Agreement to Sell dated 28.03.1993 with respect to the suit property bearing No. A-229, Shivalik, New Delhi (200 sq. yds.). I may note that by the self-same impugned judgment, the counter-claim filed by the respondent/defendant seeking to recover damages of a sum of Rs. 25,50,000/- from the appellant/plaintiff was also dismissed. The respondent/defendant/counter-claimant, in this appeal, had filed an appeal being **RFA No. 888/2018**, and this appeal after arguments was disposed of as not pressed in terms of the Order dated 30.10.2018. This present appeal is now the appellant's/plaintiff's appeal dismissing the suit seeking the relief of specific performance.

2. The facts of the case are that the appellant/plaintiff filed the suit seeking specific performance of the Agreement to Sell dated 28.03.1993 for the suit property. It was pleaded by the appellant/plaintiff that the suit plot was allotted to the respondent/defendant but since the respondent/defendant was not successful in taking possession of the same as well as getting the

Lease Deed executed, hence she approached the appellant/plaintiff for getting the needful done. The respondent/defendant was settled in Canada, and therefore, the respondent/defendant said that it was not possible for her to pursue her case before various authorities and was in need of money, and therefore, it was pleaded that the parties, hence, entered into the subject Agreement to Sell on 'as is where is' basis for a total sale consideration of Rs. 15,00,000/- being 50% of the market price of the property as on the date of the execution of the Agreement to Sell. The appellant/plaintiff paid an amount of Rs. 1,00,000/- of the total sale consideration of Rs. 15,00,000/-. A further Document dated 23.07.1993 was also executed between the parties whereby the price was increased to be 50% of the market value on the date of execution of the Lease Deed. It was pleaded by the appellant/plaintiff that he spent time, money and energy and got issued the Letters dated 14.05.1993, 22.03.1994 and 07.02.1995 from the office of the Registrar Cooperative Societies and the Society for execution of the Lease Deed. The appellant/plaintiff pleaded that the respondent/defendant wanted to back out of the Agreement to Sell and sell the suit property to someone else, and therefore a Legal Notice

dated 24.07.2001 was issued to the respondent/defendant. It was pleaded that as on the date of the filing of the suit, the market value of the suit property was approximately Rs. 48,00,000/-. It was pleaded that the appellant/plaintiff was always ready and willing to perform his part of the contract/Agreement to Sell, and therefore, the suit be decreed.

3. Respondent/Defendant had contested the suit. Though originally the case of the respondent/defendant was that the Agreement to Sell/Receipt dated 28.03.1993 were signed by them after appellant/plaintiff had exercised misrepresentation, fraud and concealment, this issue however is not so pressed on behalf of the respondent/defendant before this Court as the trial court has given a finding that the parties with an open mind had entered into the Agreement to Sell/Receipt dated 28.03.1993 along with the Addendum dated 23.07.1993. The trial court has also held the suit for specific performance to be within limitation of three years by applying Section 15 of the Limitation Act, 1963 by excluding the period till the respondent/defendant came back to India as the respondent/defendant is a resident of Canada, and on this aspect, it is very vehemently

argued by the respondent/defendant, before this Court, that the suit should be held barred by limitation because Section 15 of the Limitation Act applies only when an Indian goes abroad and then returns to India but the respondent/defendant is a permanent resident of Canada. On behalf of the respondent/defendant, it was also argued and contended that the letters which have been stated by the appellant/plaintiff in his plaint which were issued by the Registrar Cooperative Societies and Society for execution of the Lease Deed were issued in normal course and not because of any efforts of the appellant/plaintiff. It was pleaded that the Agreement to Sell was entered into as the respondent/defendant was to leave for Canada and the appellant/plaintiff had given a hint that if the respondent/defendant did not go by the advice of the appellant/plaintiff, then possibly the respondent/defendant may lose the property all together. It was denied that the appellant/plaintiff was ready and willing to perform the Agreement to Sell. The receipt of the Legal Notice dated 24.07.2001 was denied. It was contended on behalf of the respondent/defendant that the suit was filed after a gap of 8 years i.e. in December 2001 whereas the Agreement to Sell was first entered into in March 1993,

and therefore, the suit was liable to be dismissed. As already stated above, the respondent/defendant had also filed a counter-claim which was dismissed by the self-same impugned judgment and an appeal filed in this Court by the respondent/defendant challenging the judgment denying grant of money decree of damages was disposed of as not pressed.

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

“1. Are the agreement dated 28.3.1993 and the agenda dated 23.7.1993 capable of being specifically enforced?

2. Did the plaintiff get the two documents mentioned in Issue No.1 signed by the defendant by misrepresentation and fraud?

3. Is the suit barred by limitation?

4. Has the plaintiff failed to perform his part of the obligations in the contract?

5. Was the grant of lease in favour of defendant delayed because of acts of omission of the plaintiff?

6. Is the defendant entitled to damages including interest, if so, how much?

7. Was the agreement and the agenda entered into by the parties only to create right of the co-sharer of the plaintiff in the suit property?

8. Is the plaintiff entitled to specific performance/execution of sale deed?

9. Is the counterclaim barred by limitation?

10. To what relief is the plaintiff/defendant entitled?”

5. At this stage, it is noted that whereas the appellant/plaintiff led evidence and proved various documents, no evidence has however been led on behalf of the respondent/defendant. These aspects are recorded in paras 5 and 6 of the impugned judgment, and these paras read as under:-

“5. In support of his case, the plaintiff has stepped into the witness box as **PW-1** and has tendered his evidence by way of affidavit **Ex.PW1/A**. In his affidavit he has deposed in consonance with the case set forth by the plaintiff and proved the following documents:

- i. Agreement to sell cum receipt dated 28./03.1993 **Ex.PW1/1**.
- ii. Addendum to the receipt cum agreement executed on 23.07.1993 is **Ex.PW1/2**.
- iii. Copy of letter dated 01.05.1998 written by Sh. Joginder Judge Khurana- Brother of the defendant requesting to expedite the matter is **Ex.PW1/3**.
- iv. Copy of legal notice dated 24.07.2001 & A.D, Card is **Ex.PW1/4** & **Ex.PW1/5** respectively.
- v. Copy of letters dated 14.05.1993, 22.03.1994 & 07.02.1995 issued by office the Registrar co-operative societies regarding execution of the lease deed are marked as **Mark-A, B & C** respectively.

PW-1 was duly cross-examined by the defendant.

No other witness was examined by the plaintiff. Vide order dated 21.07.2017. PE was closed and the matter was posted for DE.

6. In defence evidence, no witness has been examined. After the matter was posted for defendant's evidence, adjournment was sought by Ld. Counsel for the defendant, stating the defendant to be an old and aged lady and that she was not keeping well. On the next date of hearing also adjournment was sought which was allowed subject to

cost being imposed upon them. Thereafter, on an application moved by Ld. Defence counsel, permission for recording of evidence of the defendant through video conferencing was granted. Ld. defence counsel thereafter sought some time for making arrangements for recording of evidence through video conferencing. Despite grant of three opportunities for the said purpose, no arrangements were made. Vide a detailed order dated 19.12.2017 the opportunities of the defendant to lead evidence was closed.”

6. There are three main issues to be decided in this appeal.

The first is as to whether the appellant/plaintiff can be said to have financial capacity or readiness to go ahead with the Agreement to Sell as required by Section 16(c) of the Specific Relief Act, 1963. The second aspect is as to whether in the facts of the present case where the appellant/plaintiff only paid a sum of Rs. 1,00,000/- out of the total sale consideration of Rs. 15,00,000/-, on only paying such minor advance sale consideration whether the discretionary relief of specific performance should be granted to the appellant/plaintiff. The third issue is as to whether the trial court rightly decided the suit to be within limitation by applying Section 15 of the Limitation Act.

7(i). The trial court has held that the appellant/plaintiff has failed to prove his financial capacity, an aspect which is required in the term of readiness found under Section 16(c) of the Specific Relief Act. On this aspect, it is argued on behalf of the appellant/plaintiff

that the readiness/financial capacity of the appellant/plaintiff stood proved firstly because there is no denial on this aspect by the respondent/defendant in the written statement when in para 15 of the plaint, the appellant/plaintiff pleaded existence of his readiness and willingness. Secondly, it is argued that during the course of cross-examination of the appellant/plaintiff on 02.05.2011, the appellant/plaintiff stated that he is an income tax payee having various bank accounts, but the respondent/defendant did not call upon the appellant/plaintiff to file the aforesaid documents. In support of this argument, reliance is placed by the appellant/plaintiff on the judgment of the Hon'ble Supreme Court in the case of *Indira Kaur (Smt) and Others v. Sheo Lal Kapoor, 1988 (2) SCC 488*. In further support of this argument of financial capacity, Ld. counsel for the appellant/plaintiff has placed reliance upon an application, being **CM No. 78/2019**, under Order XLI Rule 27 CPC filed in this Court, and by this application, the appellant/plaintiff seeks to file in this Court his Fixed Deposit Receipts from the year 2001 to show the financial capacity of the appellant/plaintiff, and therefore compliance of Section 16(c) of the Specific Relief Act.

7(ii). In my opinion, the trial court has rightly rejected the case of the appellant/plaintiff that the appellant/plaintiff has proved his readiness/financial capacity to go ahead with the subject transaction. The trial court in my opinion has very lucidly and exhaustively dealt with this issue by referring to various judgments passed by this Court as also the Hon'ble Supreme Court for holding that the appellant/plaintiff has failed to prove his readiness and willingness. In my opinion, since the said discussion of the trial court on the above issue is very exhaustive, the same is reproduced as under:-

“Issue No. 8:- Is the plaintiff entitled to specific performance/execution of sale deed?

and

Issue No. 10:- To what relief is the plaintiff/defendant entitled?

Issue no. 8 & 10 are taken up together in as much as they are inter-related and outcome of one issue shall have bearing on the outcome of the other issue.

Ld. Counsel for the plaintiff has argued that the plaintiff had always been ready & willing to perform his part of contract under the agreement. After entering into the agreement with the defendant, he had made efforts, spent a lot of time, energy & money in meeting various officials of various authorities and due to his efforts, letters Mark-A to Mark-C were issued by the Office of Registrar Cooperative Societies for execution of the Lease Deed. He had also served legal notice dated 24.07.2001 Ex.PW1/4 to the defendant calling upon her to receive the balance consideration

and to execute the Sale Deed. However, the defendant did not come forward to execute the Sale Deed.

On the other hand, apart from the preliminary objections regarding the enforcement of the agreement, Ld. Counsel for defendant has submitted that the in terms of the agreements Ex.P-1 & Ex.P-2, the plaintiff completely failed to perform his part of the obligations and he failed to bring about the execution of the perpetual sub-lease deed in favour of the defendant in respect of the property in question. Rather, by writing letters to Rehabilitation Ministry Employees Cooperative House Building Society Limited and to CBI, he blocked the execution/ registration of the perpetual lease deed in favour of the defendant. Because of the acts of the plaintiff, the lease deed could not be executed in her favour. Thus, the plaintiff is not at all entitled to the relief of specific performance.

Now, I may note that the remedy of specific performance being one in the realm of equitable jurisdiction, the burden clearly is on the plaintiff to prove the positive facts of readiness & willingness on his/her part. The defendants are not expected to prove the negative. In this reference, the observations made by Hon'ble Supreme Court in the case of **N. P. Thirungnanam v. R. Jagan Mohan Rao, (1995) 5 SCC 115** can be taken as the guiding principles.

The observations made in paragraph 5 of the said judgment are reproduced hereinunder:

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

Further on this aspect I also rely upon the judgment of **Shree Aadhiya Build Well Pvt. Ltd. Vs. Kartar Singh & Ors, 228 (2016) DLT 10:**

"....This provision (Section 16(c) of Specific Relief Act, 1963) requires that a proposed purchaser has always to be and continues to be ready and willing to perform its part of the agreement to sell. It is settled law that the expressions 'readiness' and 'willingness' refer to the capacity to pay so far as the expression 'readiness' is concerned and the intention to go through with the transaction as reflected in the expression 'willingness'. These are the meanings of the expressions 'readiness' and 'willingness' as held in various judgments of the Supreme Court and one such judgment of the Supreme Court in this regard is in the case of J.P. Builders and Another v. A. Ramadas Rao and Another, VIII (2010) SLT 546=IV (2010) CLT 492 (SC)=(2011) 1 SCC 429. We will therefore have to examine as to whether the plaintiff was always ready and willing to enter into the sale deed till the time of the present final arguments and from the date of entering into the agreement to sell. At the time of considering this issue, no doubt, it is borne in mind that the plaintiff has to be willing to perform its part of the contract only when the defendants have obtained the NOC, however, Section 16(c) of the Specific Relief Act requires not one but two aspects to be proved by the plaintiff ie both readiness and willingness. In law the aspect of willingness being there is one which is to be acted upon by making the payment when the defendants make themselves capable of performing the agreement to sell

by taking the necessary NOC, however, as contrasted from willingness, readiness is an aspect which has to be independently proved. Readiness pertains to the financial capacity of a proposed purchaser to make payment of the balance consideration under the agreement to sell. The issue with respect to readiness and willingness is overlapping with the issue to defendants being guilty of breach of contract, but, the expression "has always been ready and willing" is an expansive expression not only encompassing therein that it has to be shown that the defendants are guilty of breach of contract, but also that it has to be shown that plaintiff had necessary financial capacity to pay the balance sale consideration at all points of time after the agreement to sell was entered into. The aspect of a plaintiff/proposed purchaser always being ready to perform its part of the contract i.e. having the necessary capacity to pay the sale consideration is because specific performance is a discretionary relief and an alternative to the relief of grant of damages...."

Also, I may rely upon the recent judgment of Hon'ble Delhi High Court passed in **RFA No.518/2018 decided on 17.07.2018** in the case of **Ritu Saxena v. J.S. Grover & Anr.**, wherein the aspect of readiness & willingness and the grant of discretionary and the principles governing grant of discretionary relief of specific performance and agreement in agreements regarding sale of property, was dealt with in detail. Reliance therein was placed upon the judgment of **CS(OS) No.1261/1995 titled as M/s Hotz Industries Pvt. Ltd. Vs. Dr. Ravi Singh (Since Deceased Through LRs) & Ors.** and which paras 14 to 17 reads 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 RFA No.518/2018 Page 23 of 38 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.*

Thus, it is abundantly clear that the amount of consideration, which a buyer must pay to the seller, must be necessarily proved to be available and only on proof of which readiness & willingness would stand established.

Now testing the case of the plaintiff on the above touchstone, it has to be seen whether the plaintiff has been able to prove the necessary ingredient i.e. the readiness & willingness.

Before considering this aspect, I am revisiting the plaint and quoting para 15 thereof in verbatim. The same reads as under:

"15. That as a part of his obligation, plaintiff is ready and willing to pay the balance amount of consideration as per agreement dated 28.3.1993 and the addendum dated 23.7.1993. The estimated market value of the plot as on date is approximately Rs.48 lakhs. The plaintiff is ready and willing to pay Rs.24 lakhs to the defendant as per the agreement between the parties."

Thus, he was firstly required to prove the market rate of the property at the time of filing of the suit and secondly, availability of sale consideration as per the market rate of the property.

However, no evidence whatsoever, has been led by the plaintiff to show as to on which basis he has stated Rs.48 lacs to be the market value of the property. Now, even if as per the plaintiff averments, I assume the market value of the property to be Rs.48 lacs, then also according to the agreement Ex.P-2, plaintiff had to pay Rs.15 lacs plus 50% of the market value which comes to Rs.39 lacs (15L + 24L). Even interpreting this clause to mean Rs.15 lacs + 50% of the value after deducting Rs.15 lacs i.e. 50% of Rs.33 lacs (Rs.48L - Rs.15L) which comes to Rs.16.50 lacs, then also the plaintiff had to pay Rs.31.50 lacs (15L + 16.5L). The plaintiff, therefore, ought to have at least Rs.31.50 lacs with him at the time of filing of the suit. The availability of the said amount would signify his financial preparedness - readiness or willingness. Now though he has averred in para 15 of his plaint that he had the money available with him to purchase the plot but has not substantiated the said averment by leading any evidence. During cross-examination of plaintiff, on the aspect of financial capacity, he has deposed that he has not filed on record any Income Tax Return pertaining to the year 1993 onwards till date. He further deposed that he had three bank accounts at that point of time and was even ready to file the bank records. Despite the same, neither any bank record or any bank statement was filed nor there was any specific averment as to the source of funds to pay the balance sale consideration. Thus, in the absence of there being any evidence regarding availability of funds with the plaintiff, the averment is nothing more than a bald averment carrying no weight. In this regard it would be important to note down the observations made by Hon'ble Delhi High Court in the case of **Madan Mohan v. Sheel Gulati, 223 (2015) DLT 57**. In the said case, it was observed that mere self-serving *ipse dixit* can't be held to be discharge of onus of prove with respect to a very important issue of readiness & willingness

which is required to be proved by a proposed buyer in terms of Sec. 16(c) of The Specific Relief Act, 1963.

Thus, the plaintiff has not at all been able to show that he had, at any point of time, the balance consideration of Rs. 39 lacs or even Rs. 31.50 lacs and thus the essential ingredient of readiness of his part, is not established.

Further, I may also note that out of the total agreed consideration of Rs. 15 lacs plus 50% of the market value of the property at the time of execution of sale deed, only a sum of Rs.1 lac was admittedly paid by the plaintiff which is not even 5% of the consideration amount. The Hon'ble Supreme Court in the recent judgment of **Saradamani Kandappan vs. Mrs. S. Rajalakshmi, 2011 (12) SCC 18**, had also considered 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. Para 37 and 43 of the said judgment are extracted hereinunder:

"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 RFA No.518/2018 Page 28 of 38 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.

xxxxx xxxxx xxxxx

43. Till the issue is considered in an appropriate case, we can only reiterate what has been suggested in K.S. Vidyanandam.

(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 timelimits 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 partperformance, where equity shifts in favour of the purchaser."

Also, Hon'ble Delhi High Court in the case of **Baldev Behl & Ors. v. Bhule & Ors., 2012 SCC OnLine Del 4730**, while giving interpretation to the term 'substantial acts' as mentioned in Sec. 20(3) of Specific Relief Act, has held that where

substantial consideration is not paid (and for which a rough benchmark can be taken as 50% of the consideration) and where the plaintiff is not in possession of the subject property, the plaintiff is not entitled to the discretionary relief of specific performance.

Reverting to the facts of the case, *dehors* the fact that there was no readiness and willingness on part of the plaintiff, on the basis of these guidelines, as no substantial act has been done by the plaintiff, even otherwise he is not entitled to the discretionary relief of specific performance.”

(Underlining Added)

8. A reference to the aforesaid paras shows that the trial court has arrived at the following valid conclusions:-

(i) A mere *ipse dixit* is not sufficient to prove readiness/financial capacity to pay the balance sale consideration.

(ii) In a suit for specific performance, the onus is upon the plaintiff to prove financial capacity, and such financial capacity has to be to the satisfaction of the judicial conscience of the court and greater scrutiny and strictness is applied to decide readiness and willingness.

(iii) Financial capacity in terms of the judgment of the Hon'ble Supreme Court in the case of ***N.P. Thirunghanam v. R. Jagan Mohan Rao, (1995) 5 SCC 115*** has to be proved to exist right from

the date of entering into the agreement to sell till the date of disposal of the suit, and in this regard, the present appellant/plaintiff had miserably failed.

9. Admittedly, in the record of the trial court, there is not even a single document filed by the appellant/plaintiff to show his financial capacity, being the documents of income tax returns of the appellant/plaintiff or the bank accounts of the appellant/plaintiff or any other property papers or any other documents which show the financial capacity of the appellant/plaintiff. The connected issue to be examined is that whether on account of the appellant/plaintiff only orally stating in his cross-examination conducted on 02.05.2011 that he filed income tax returns and had moneys in his bank account, read with the ratio of the judgment of the Hon'ble Supreme Court in the case of *Indira Kaur (supra)*, whether it can be held that the appellant/plaintiff has proved his readiness/financial capacity. The relevant portion of the cross-examination which is relied upon on behalf of the appellant/plaintiff {alongwith the ratio of the *Indira Kaur's case (supra)*} is as under:-

“I am income tax payee. It is correct that I have not filed on record of this case any income tax return pertaining to the year 1993 onwards till date. I hold three bank accounts at present. *Volunteered:* I held a number of bank accounts which kept being opened and closed till date since 1993. I cannot tell as to how many accounts I had or I closed during the period from 1993 till date. It is incorrect to suggest that I never had sufficient money to pay the balance considerations of the suit property, so I have concealed all my bank records and income tax returns. *Volunteered:* I am ready to file the same.”

10(i). In my opinion, the argument urged on behalf of the appellant/plaintiff is to be rejected that the appellant/plaintiff has proved his readiness and willingness as per oral statements made in his cross-examination on 02.05.2011, with the fact that the appellant's/plaintiff's application to allow fresh evidence filed in this Court under Order XLI Rule 27 CPC being **CM No. 78/2019** has to be rejected.

10(ii). Firstly as regards **CM No. 78/2019**, it is seen that even in this Court, the appellant/plaintiff has only filed documents showing his Fixed Deposit Receipts from the year 2018 onwards, which can be taken by this Court as per the statement made by the appellant/plaintiff that these Fixed Deposits are those which are continuing from the year 2001. The appellant/plaintiff has, however, neither filed copies of his bank accounts from the date of entering into the Agreement to Sell in March 1993 till the suit is filed in December 2001 and nor has the

appellant/plaintiff filed income tax returns to show his financial capacity from March 1993 to December 2001 when the subject suit was filed. In fact, there is a mismatch between the statements made by the appellant/plaintiff in his cross-examination of financial capacity in terms of the income tax returns and bank accounts existing from the years 1993 to 2001, inasmuch as before this Court, the financial capacity is sought to be proved only from 2001, when the suit has been filed, with no documents being filed of any nature, whatsoever, to show financial capacity of the appellant/ plaintiff from March 1993 to December 2001. The ratio of the judgment in the case of *N.P. Thirungnanam (supra)* is very clear that the financial capacity must exist right from the date of entering into the agreement to sell till the date of disposal of the suit, and therefore, even if I take the documents which are now sought to be relied upon by the appellant/plaintiff as per *CM No. 78/2019* to show readiness and willingness, no financial capacity is, however, shown from March 1993 to December 2001, and therefore it is held that the appellant/plaintiff has failed to prove his continuous readiness and willingness as required by law, as already held by the trial court.

10(iii). The judgment in the case of *Indira Kaur (supra)* would not apply to the facts of the present case inasmuch as the issue of financial capacity is case-fact specific and whereas in one case on a particular basis of evidence led, a court may hold the existence of a financial capacity, although in other set of facts, financial capacity can be said not to have been proved, and which is clearly so in the facts of the present case in view of the aforesaid discussion that no documents have been filed from March 1993 to December 2001 to show financial capacity of the appellant/plaintiff and as required by the ratio of the judgment in the case of *N.P. Thirungnanam (supra)*. Also, it is required to be noted that ordinarily, self serving *ipse dixit* statement of financial capacity of a buyer of an immovable property is not sufficient as greater scrutiny and strictness is required to prove financial capacity as per the ratio of the judgment of the Hon'ble Supreme Court in the case of *Saradamani Kandappan v. Mrs. S. Rajalakshmi, 2011 (12) SCC 18*, and this aspect is accentuated in the facts of the present case because the appellant/plaintiff has not filed any documents whatsoever of his financial capacity in the trial court for any period whatsoever and even the application *CM No. 78/2019*

filed in this Court is only for showing financial capacity from the year 2001.

10(iv). I also reject the argument of appellant/plaintiff that the respondent/defendant has not denied the averments of readiness and willingness made in para 15 of the plaint, as in para 15 of the written-statement not only there is no admission of appellant's/plaintiff's readiness and willingness, in fact there is a categorical and specific denial with regard to the appellant's/plaintiff's readiness and willingness.

10(v). It is therefore held that the trial court has rightly dismissed the suit by holding that the appellant/plaintiff had failed to prove the requirement of readiness and willingness, which is a *sine qua non* as per Section 16(c) of the Specific Relief Act.

11. I may note that Ld. counsel for the appellant/plaintiff very feebly sought to argue that the trial court has not framed any issue of readiness and willingness as required by Section 16(c) of the Specific Relief Act, and that this argument is liable to be rejected for two reasons. Firstly, if a plaintiff/buyer has to succeed in a suit for specific performance, the ingredients of Section 16(c) are

compulsorily to be proved by such a plaintiff/buyer, it cannot be argued that the trial court has not framed the issue as per Section 16(c) of the Specific Relief Act, and therefore the appellant/plaintiff is entitled to the relief of specific performance although the requirement of Section 16(c) of the Specific Relief Act is not complied with. Secondly, in my opinion, in any case, this aspect of readiness and willingness is definitely included in the issue as to whether the appellant/plaintiff is entitled to specific performance, and with respect to this aspect, Issue no. 8 has already been framed by the trial court. This argument of the appellant/plaintiff is, therefore, also rejected.

12. The next issue is as to whether a plaintiff/buyer of an immovable property who only pays around 7.5% of the sale consideration, should be entitled to the discretionary relief of specific performance. I have dealt with this aspect in great detail in the judgment in the case of *M/s Hotz Industries Pvt. Ltd. v. Dr. Ravi Singh (Since Deceased Through LRs) & Ors., 2018 SCC Online Del 7618*, (and which has been relied upon by the trial court), and in this judgment, this Court has relied upon the ratio of the judgment of the Hon'ble Supreme Court in the case of *Saradamani Kandappan*

(*supra*) that by payment of nominal advance sale consideration, and since years and years and sometimes even decades passed in disposal of the suit for specific performance, the discretionary relief for specific performance ought not to be granted. I have further expounded on this principle in the case of *M/s Hotz Industries Pvt. Ltd. (supra)*, that the object of an agreement to sell going ahead is to also see that for the price received by the defendant/seller, the defendant/seller is able to purchase an equivalent property when the suit is decreed, and the consideration stated under the agreement to sell is received by the respondent/defendant, and which cannot happen in view of rise of prices during years and years which are consumed during the pendency of a suit for specific performance, and accordingly, the courts can deny the discretionary relief of specific performance. I have also observed that in such a case, in fact an alternative relief of damages is efficacious and sufficient relief, and therefore, a plaintiff/buyer in the cases filed seeking specific performance must necessarily lead evidence that the appellant/plaintiff has suffered loss on account of increase in the value of the property, and this difference of price is granted by the civil court as

damages/mandatory relief as per Section 73 of the Contract Act, 1872 and admittedly, in the present case, there is no evidence led by the appellant/plaintiff to prove the difference in the market price i.e. on account of the rise in market values and therefore, the appellant/plaintiff cannot even be granted relief of damages. Therefore, I am of the opinion, that the trial court has rightly denied the discretionary relief of specific performance.

13(i). Finally, I may note that the trial court has held the suit filed in December 2001, to be within limitation, although in the replication, the appellant/plaintiff has pleaded that the respondent/defendant had shown inclination to not go ahead with the Agreement to Sell in June 1995 itself. For this purpose, the trial court has held the suit to be within limitation of three years under Article 54 of the Limitation Act and has relied upon Section 15(5) of the Limitation Act which provides that when a defendant/buyer is out of the country, then in such a case limitation does not begin till the defendant returns to the country. Section 15(5) of the Limitation Act reads as under:-

15. Exclusion of time in certain other cases.—

(5) In computing the period of limitation for any suit the time during which the defendant has been absent from India and from the territories outside India under the administration of the Central Government, shall be excluded.”

13(ii). In my opinion, the trial court has clearly erred in holding the suit to be within limitation by applying Section 15(5) of the Limitation Act. Admittedly, in the replication, the appellant/plaintiff has clearly stated that since June 1995, the *malafide* and dishonest intentions of the respondent/defendant had become clear with the fact that it is specifically stated in para 25 of the reply filed by appellant/plaintiff to the counter-claim of the respondent/defendant that in June 1995, the appellant/plaintiff came to know that the respondent/defendant was trying to back-out of the commitment. As per Article 54 of the Limitation Act, the limitation period for filing a suit for specific performance commences either when there is a date fixed for specific performance or where no date is fixed, then, when the appellant/plaintiff has notice of refusal of performance. In the facts of the present case, where once the refusal of performance was known to the appellant/plaintiff in June 1995, the subject suit for specific performance had to be filed by June 1998. The subject suit was however filed in December 2001 i.e. well beyond the period of

limitation. In my opinion, the trial court has clearly erred in applying Section 15(5) of the Limitation Act because Section 15(5) of the Limitation Act applies where the defendant is otherwise a resident of India, but goes out of India for a particular period, and in such circumstances, till the defendant returns to India, the limitation for the suit is excluded for the period the respondent/defendant is outside India, but Section 15(5) of the Limitation Act is not meant to apply to foreign residents who do not live in India. The above principle has been dealt with by the Hon'ble Supreme Court vide the judgment in the case of *Turner Morrison And Co. Ltd. v. Hungerford Investment Trust Ltd., (1972) 1 SCC 857*. In the present case, the respondent/defendant is settled in Canada and therefore, the trial court has clearly erred in applying Section 15(5) of the Limitation Act to bring the suit within limitation. By exercising powers under Order XLI Rule 24 CPC, I set aside the findings of the trial court that the suit is within limitation and it is held that the subject suit for specific performance was time barred as it ought to have been filed by June 1998 but, the suit has been filed much later in December 2001.

14. The facts of the present case show that the appellant/plaintiff is clearly harassing the respondent/defendant, who

is a lady who was in difficult circumstances when the Agreement to Sell was entered into in March, 1993. The very fact and admittedly since the agreement to sell was only for 50% of the market value of the property shows that the respondent/defendant was in trying circumstances and was under the compulsion for various reasons to enter into the agreement to sell. Not only that, only an amount of Rs. 1,00,000/- out of Rs. 15,00,000/- was paid by the appellant/plaintiff to the respondent/defendant. In the opinion of this Court, therefore, the respondent/defendant is being *malafidely* and illegally harassed by the appellant/plaintiff. Accordingly, while dismissing this appeal, the respondent/defendant is also held entitled to costs of Rs. 2,00,000/- from the appellant/plaintiff. These costs shall be paid by the appellant/plaintiff to the respondent/defendant within a period of six weeks from today.

15. In view of the aforesaid discussion, this appeal is accordingly dismissed and disposed of. All pending applications are also disposed of.

JANUARY 07, 2019/ib

VALMIKI J. MEHTA, J