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

\+ CS(OS) 543/2016

RAMA ARORA & ANR ..... Plaintiffs

Through: Mr. Aditya Nayyar, Adv.

versus

DAVINDER SINGH NARANG & ORS ..... Defendants

Through: Mrs. Inderjeet Saroop and Mr. Raghav Saroop, Advs. for D-5&6.
Mr. Sanjeev Bhandari and Mr. Prateek Kumar, Advs. for Cholamandalam Bank.
Mr. Samarendra KR, Adv. for Corporation Bank.
Ms. Usha Singh, Adv. in IA No.12763/2017.
Ms. Yamini Khurana and Mr. Sanjeet Singh, Advs. in IA No.2283/2018.

**CORAM:**
**HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW**

**ORDER**

% **09.01.2019**

**IA No.13169/2016 (u/O XXXIX R-1&2 CPC).**

1. In this suit for specific performance of an Agreement of Sale of immovable property, vide *ex parte ad interim* order dated 24th October, 2016 the defendants no.1 to 7 namely (i) Davinder Singh Narang; (ii) Kulvinder Kaur; (iii) N.S. Narang; (iv) Ravinder Kaur; (v) Jasbir Singh Narula; (vi) Dippy Narula; and, (vii) S. Amandeep Singh Narang, who were then the only defendants, were restrained from selling, alienating, transferring or parting with possession of property no.S-210, Greater Kailash, Part-II, New Delhi.

2. The counsel, only for defendants no.5&6 Jasbir Singh Narula and Dippy Narula appears and none appears for defendants no.1 to 4 or

defendant no.7.

3. The appearing counsels inform that the defendants no.1 to 7 had entered into an Agreement to Sell with the two plaintiffs for sale of entire property no.S-210, Greater Kailash Part-II, New Delhi comprising of basement, ground, first and second floors with terrace above. It is further stated that in the said Agreement to Sell, separate price was agreed qua the second floor, which is owned only by defendants no.5&6. The counsel for defendants no.5&6 states that the defendants no.5&6, notwithstanding the breach of the plaintiffs, are even today ready and willing to sell the second floor of the property to the plaintiffs at the agreed price and deliver vacant peaceful physical possession thereof to the plaintiffs provided that the plaintiffs pay balance price immediately.

4. It is further informed that the defendants no.1 to 4 & 7 are the owners of the remaining floors of the property and are not appearing because the said floors are mortgaged with Cholamandalam Investment and Finance Company Limited and Corporation Bank, application for whose impleadment is pending consideration and whose counsels appear.

5. In the circumstances aforesaid, I have enquired from the counsel for the plaintiffs, whether the plaintiffs are willing to purchase the second floor from the defendants no.5&6.

6. The counsel for the plaintiffs first states that the parties be referred to mediation.

7. Mediation cannot be an excuse for adjournment and it has again been enquired from the counsel for the plaintiffs, whether the plaintiffs are willing to purchase the second floor.

8. The counsel for the plaintiffs now states that he needs to obtain instructions.

9. The counsel for the defendants no.5&6 then states that the said defendants in their written statement also have pleaded so.

10. The plaintiffs thus had notice and the counsel ought to have taken instructions beforehand and cannot derail the hearing today on the pretext of taking instructions.

11. From the aforesaid it is evident that the plaintiffs are not ready and willing to perform their part of the Agreement to Sell for specific performance of which this suit has been filed. Without the plaintiffs being so ready, the *ex parte* injunction cannot be continued.

12. The *ex parte* injunction dated 24th October, 2016 is thus vacated qua the second floor of property no. S-210, Greater Kailash Part-II, New Delhi.

13. As far as the other floors of the said property are concerned, the defendants no.1 to 4 and 7 having not opposed the suit and having not appeared, the *ex parte* injunction dated 24th October, 2016 is confirmed.

14. The application is disposed of.

**IA No.12763/2017 (of Sachin Jain and Renu Jain u/O I Rule 10 of the CPC for impleadment).**

15. The counsel for the applicants states that the applicants have purchased the first floor of the property from one B.D.R. Builders Pvt. Ltd. vide Sale Deed dated 20th July, 2015 i.e. prior to the Agreement to Sell dated 23rd March, 2016 subject matter of the present suit. The counsel for the applicants, on enquiry whether the applicants want the Agreement in favour

of the plaintiffs to be enforced against them, without the plaintiffs wanting so, withdraws the application.

16. Dismissed as withdrawn.

**IA No.12764/2017 (for condonation of 12 days delay in re-filing of IA No.12763/2017.**

17. This application is infructuous with the withdrawal of IA No.12763/2017 and is disposed of.

**IA No.2283/2018 (of Manish Kalra for impleadment in the present suit)**.

18. The applicant claims to have purchased the terrace above the second floor from the defendant no.7 S. Amandeep Singh Narang vide Sale Deed dated 14th August, 2013 i.e. of a date prior to the date of the Agreement to Sell for specific performance of which the present suit has been filed.

19. It has been enquired from the counsel for this applicant also, whether the applicant wants the Agreement to be enforced against the applicant, notwithstanding the plaintiffs not wanting so.

20. The counsel for the applicant replies in the affirmative inspite of being cautioned by the Court. The applicant Manish Kalra will be bound by the said statement and will be hereafter be not entitled to take the plea that the Agreement to Sell for specific performance of which the present suit is filed cannot be enforced against him inasmuch as Manish Kalra has himself opted to become a defendant in the present suit.

21. Now the counsel for this applicant also seeks to withdraw the application.

22. Dismissed as withdrawn.

**IA No.11319/2018 (of the plaintiffs under Order XXXIX Rule 2A CPC).**

23. The counsel for the plaintiffs/applicants withdraws the application.

24. Dismissed as withdrawn.

**IA No.11644/2014 (of the plaintiffs under Order I Rule 10 CPC).**

25. The plaintiffs/applicants seek to implead Cholamandalam Investment and Finance Company Limited and Corporation Bank as parties to this suit.

26. It is informed that basement and ground floor of the property are mortgaged with Cholamandalam Investment and Finance Company Limited since prior to the Agreement to Sell dated 23rd March, 2016 and Cholamandalam Investment and Finance Company Limited has in exercise of powers under the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (SARFAESI Act) already sold the basement and ground floor. The name of the buyer is not available at this moment. It is however informed that the outstanding amount is Rs.5.32 crores.

27. It is also informed that the ground floor of the property was jointly mortgaged with Cholamandalam Investment and Finance Company Limited and Corporation Bank and a sum of Rs.2.55 crores is due to Corporation Bank. The counsels for Cholamandalam Investment and Finance Company Limited and Corporation Bank state that if the plaintiffs deposit the outstanding amount immediately, Cholamandalam Investment and Finance Company Limited will not issue Sale Certificate and the mortgage will be released.

28. The counsel for the plaintiffs, as earlier, has no inkling and states that he has to seek instructions.

29. Unless the plaintiffs are willing to deposit the mortgage amount and have the mortgage released, no purpose will be served in impleading Cholamandalam Investment and Finance Company Limited and Corporation Bank as parties to the suit.

30. Since the counsel for the plaintiffs, inspite of moving an application has no instructions, the application is dismissed.

**CS(OS) No.543/2016.**

31. The right of defendants no.1 to 4 and 7 to file written statement has already been closed. The defendant no.8 is Ms. Neeti Mahajan. None appears for the defendant no.8. The right of defendant no.8 to file written statement has also been closed.

32. The defendants no.1 to 4 and 7&8 are proceeded against *ex parte*.

33. Though the suit is ripe for framing of issues qua defendants no.5&6, but since the plaintiffs have not shown willingness to purchase the portion of the defendants no.5&6 in the property inspite of the defendant no.5&6 being willing to sell today also, it appears that no purpose will be served in framing issues and in relegating the parties to recording of evidence inasmuch as it is the statutory requirement of Section 16(c) of the Specific Relief Act, 1963 that the plaintiff in a suit for specific performance should throughout be ready and willing to perform his part of the Agreement, including after passing of the decree. Once the plaintiffs are not found willing to perform their part of the Agreement to Sell, the question of the plaintiffs being entitled to the relief of specific performance with respect to the second floor does not arise.

34. As far as the other floors are concerned, it has come on record as

above that the defendants no.1 to 4 and 7, as on the date of entering into Agreement to Sell with the plaintiffs were not having any saleable interest therein. The plaintiffs can thus not be entitled to specific performance qua the same also.

35. The plaintiffs, in the plaint have claimed alternate relief of recovery of Rs.10,30,00,000/- with interest as damages. However once the plaintiffs themselves are found wanting in readiness and willingness, the plaintiffs cannot be entitled to any damages also.

36. The plaintiffs under the Agreement to Sell are informed to have paid Rs.89,00,000/- to the defendants no.5&6 by way of advance sale consideration, a sum of Rs.58,50,000/- to the defendant no.1, a sum of Rs.20,50,000/- to the defendant no.2, a sum of Rs.39,50,000/- to the defendant no.3, a sum of Rs.22,50,000/- to the defendant no.4 and a sum of Rs.40,00,000/- to the defendant no.7.

37. The counsel for the plaintiffs states that a decree for refund of the said monies be passed.

38. The counsel for the defendants no.5&6 has offered to refund Rs.89,00,000/- to the plaintiffs on or before 30$^{th}$ April, 2019.

39. A decree is accordingly passed, in favour of the plaintiffs and against,

(i) the defendants no.5&6 for recovery of Rs.89,00,000/- with interest after 30$^{th}$ April, 2019 @ 7% per annum from 1$^{st}$ May, 2019 till the date of payment.

(ii) the defendant no.1 for recovery of Rs.58,50,000/- with interest @ 7% per from today till the date of payment.

(iii) the defendant no.2 for recovery of Rs.20,50,000/- with interest @ 7% per annum from today till the date of payment.

(iv) the defendant no.3 for recovery of Rs.39,50,000/- with interest @ 7% per annum from today till the date of payment.

(v) the defendant no.4 for recovery of Rs.22,50,000/- with interest @ 7% per annum from today till the date of payment.

(vi) the defendant no.7 for recovery of Rs.40,00,000/- with interest @ 7% per annum from today till the date of payment.

However in the facts no costs.

Decree sheet be drawn up.

**RAJIV SAHAI ENDLAW, J**

**JANUARY 09, 2019**
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***(Corrected and released on 21st January, 2019).***