

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

% Date of decision: 23rd May, 2020

+ CS(OS) No.970/2008

PRADEEP KUMAR BHATIA

..... Plaintiff

Through: Mr. Hemant Chaudhri with Mr.
Piyush Arora & Mr. Gaurav, Advs.

Versus

PARAMJIT KAUR PAINTAL

..... Defendant

Through: Mr. Tanmaya Mehta with Mr. Manjeet
Singh & Mr. Anurag Sahay, Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The plaintiff has instituted this suit for specific performance of an Agreement of Sale of front portion ad-measuring 315 sq. yds. of property No.E-26/6, Rajouri Garden, New Delhi. The suit, post completion of trial, came up before the undersigned on 27th August, 2019 when the counsels were partly heard. The hearing was completed on 10th February, 2020, when judgment in the suit was reserved.

2. The suit, as originally instituted on or about 19th May, 2008, besides against the defendant herein was also against the Oriental Bank of Commercial (OBC), impleaded as defendant no.2, and with which the property subject matter of Agreement of Sale was mortgaged. The said OBC filed IA No.8828/2016 for deletion from the array of parties, stating that present sole defendant and the then defendant no.1 had redeemed the mortgage and the defendant no.2 OBC had released the property and titled documents in favour of the defendant no.1. Vide order dated 9th August,

2016, the said application was allowed and OBC was deleted from the array of parties and the plaintiff directed to file fresh memo of parties.

3. The case of the plaintiff in the plaint was, that (i) the defendant, desirous to sell the property, had represented to the plaintiff that the same was mortgaged to OBC and a sum of about Rs.30,00,000/- to Rs.40,00,000/- only remained repayable to OBC and which the defendant would definitely pay before the time stipulated for executing the Sale deed; (ii) an Agreement to Sell dated 24th January, 2007 was executed by the parties and per Clause 4 thereof also, the defendant could call upon the plaintiff for a further amount of Rs.40,00,000/- to Rs.50,00,000/- for clearing the dues of OBC and redeem the mortgage; (iii) under the Agreement to Sell, the plaintiff as against the total sale consideration agreed of Rs.2,70,00,000/-, paid to the defendant Rs.2,00,000/- by way of earnest money and Rs.8,00,000/- by way of advance sale consideration and the remaining sale consideration of Rs.2,60,00,000/- was to be paid within 120 days of the date of the agreement i.e. on or before 23rd May, 2007, at the time of execution of Sale Deed and delivery of title documents of the property; (iv) in the event of the defendant calling upon the plaintiff to pay Rs.40,00,000/- to Rs.50,00,000/- to redeem the mortgage, the defendant was to execute Sale Deed of one third portion of the property i.e. one floor, in the name of the plaintiff and to also handover possession of the said floor; (v) the defendant was unable to clear the dues of OBC and approached the plaintiff and requested for a further period to clear the bank dues; (vi) the plaintiff agreed to extend the time by a further period of 60 days i.e. upto 24th July, 2007 and an Agreement dated 22nd May, 2007 of Extension was executed between the parties and in which it was also agreed that upon the defendant getting clearance of the mortgage from OBC, shall

give a written notice to the plaintiff, granting 15 days time to the plaintiff to pay the balance sale consideration and get the sale deed executed; (vii) the defendant failed to conclude the Sale Deed by 24th July, 2007 also and in the circumstances the plaintiff got issued a legal notice dated 25th July, 2007 calling upon the defendant to, within ten days redeem the mortgage and thereafter execute Sale Deed in favour of the plaintiff; (viii) the plaintiff also got a public notice issued in the newspapers; (ix) the defendant, on receipt of notice approached the plaintiff and requested the plaintiff for some further payment to enable her to clear the dues of OBC and the plaintiff, on 11th September, 2007 and 17th September, 2007 paid a further amount of Rs.30,00,000/- to the defendant in cash as well as by cheque, taking the total payment made by the plaintiff to the defendant to Rs.40,00,000/-; (x) on the defendant still failing to redeem the mortgage, the plaintiff sent a letter dated 25th September, 2007 calling upon the defendant to immediately execute the Sale Deed of one-third portion of the property i.e. one floor and to get the property released from OBC and thereafter execute Sale Deed of the remaining portion of the property; (xi) the defendant then turned dishonest and got sent a reply dated 8th October, 2007 claiming that she had shown a settlement arrived at with OBC to the plaintiff and it was the plaintiff who was in default, and threatening to forfeit the earnest money; (xii) the plaintiff got sent a communication dated 15th October, 2007 to the defendant, denying that the plaintiff was in default; (xiii) on receiving no further response from the defendant, the plaintiff got issued notice dated 24th March, 2008 to the defendant enquiring the status of redemption of mortgage from OBC and to which a reply dated 8th April, 2008 was got sent by the defendant, again taking a false stand of having shown some alleged settlement with OBC to

the plaintiff and refusing to honour the Agreement to Sell; and, (xiv) the plaintiff, on making enquiries learnt that OBC had already initiated recovery proceeding before the Debt Recovery Tribunal (DRT).

4. The suit came up first before this Court on 21st May, 2008 when the defendant appeared on caveat and the hearing adjourned to 27th May, 2008. Vide order dated 27th May, 2008, while issuing summons of the suit, the undertaking on behalf of the defendant, not to sell, transfer, alienate or encumber the property till the next date of hearing was recorded.

5. The defendant has contested the suit by filing a written statement, pleading that (a) the plaintiff was to pay the amount to the defendant to clear the mortgage but the plaintiff failed to do the same; (b) the Extension Agreement dated 22nd May, 2007 was signed by the defendant under coercion; (c) no copies of the executed Agreement to Sell and Extension Agreement were furnished to the defendant; (d) the plaintiff has not been ready and willing to perform his part of the Agreement; (e) the defendant did not request the plaintiff for a further amount of Rs.30,00,000/- for payment to OBC; in fact the defendant told the plaintiff that she needed Rs.1,00,00,000/- to be paid to OBC; however the plaintiff had no amount in his bank account and therefore he failed to pay the same and which clearly shows that the plaintiff was never ready and willing to perform his part of the contract; (f) the plaintiff wanted to block the property by just paying Rs.40,00,000/- for the property which was worth more than Rs.2,67,00,000/-; (g) the defendant, vide letter dated 8th October, 2007 had called upon the plaintiff to pay the balance sale consideration before 15th October, 2007 but the plaintiff had no money; (h) the plaintiff is a property

speculator and never had any intention to perform his part of the contract; (i) the defendant, vide his reply dated 8th April, 2018 also, gave an opportunity to the plaintiff to perform his part of the contract but the plaintiff had no money; and, (j) the defendant had already settled the dispute with OBC and which was duly informed to the plaintiff and the plaintiff, to take unfair advantage is showing ignorance of the same as he had failed to perform his part of the contract within the stipulated time.

6. The plaintiff filed a replication denying that the defendant at any point of time asked the plaintiff to give Rs.1,00,00,000/- to the defendant to clear the debt of OBC and further pleading that as per the terms of the Agreement also the defendant could not have asked any amount beyond Rs.40,00,000/- to Rs.50,00,000/- to clear the outstanding dues of OBC. It was further pleaded that it was also incumbent upon the defendant to at the time of receiving monies to pay the dues of OBC, execute sale deed of one third portion of the property in favour of the plaintiff.

7. Vide order dated 28th May, 2010, the application of the plaintiff for interim relief and qua which the undertaking given by the defendant was continuing, was ordered to be taken up along with the main suit and the following issues were framed in the suit:

“1. Whether the plaintiff is entitled to Specific Performance of Agreement to Sell of 24th January, 2007 or in the alternative to damages of Rupees one crore, fifty lacs only with interest and if so, at what rate? OPP

2. *Whether defendant No.1 had not performed and was not ready to perform her part of the Agreement to Sell? OPP*
3. *Whether defendant No.1, vide Notice of 8th October, 2007, had called upon the plaintiff to pay the balance of the sale consideration before 15th October, 2007 and to get the Agreement in question executed? OPD-1.*
4. *Whether the Agreement to Sell of 24th January, 2007 stood expired / terminated as per Notice of 24th March, 2008 of the plaintiff? OPD-1.*
5. *Relief?”*

and the parties relegated to evidence.

8. The plaintiff filed IA No.11801/2016 seeking a direction to the defendant to deposit in this Court the title deeds of the property agreed to be sold and which title deeds had since been released by OBC. The said application came up before this Court on 26th September, 2016, when it was enquired from the counsel for the plaintiff whether the plaintiff was willing to deposit the balance sale consideration in the Court. The plaintiff, after taking instructions, on 29th September, 2016 withdrew the said application.

9. The plaintiff, in his evidence, besides examining himself has examined the broker to the transaction and the witness from OBC. The defendant, besides herself has examined her son Sukhbir Singh Paintal.

10. I will first deal with the documents including the Agreement to Sell, of which specific performance is sought, and the contents thereof.

11. The Agreement to Sell dated 24th January, 2007, beside being an admitted document, has Ex.PW1/1 endorsed thereon. Clauses 1 to 4, 6, 10

and 11 thereof, in which the plaintiff is described as the 'Second Party' and the defendant as the 'First Party', are as under:

- “1. That in pursuance of this Agreement and in consideration of a total of Rs.2,70,00,000/-(Rs. Two Crore Seventy Lacs only), out of which the First Party received a sum of 2,00,000/- (Rs. Two Lacs only) from second party, as Byana/earnest money on 19.01.2007 and part payment of Rs.8,00,000/- received by first party from the second party on 24.01.2007 by cheque, vide cheque No.160077 dated 24.01.2007 drawn on ABN Amro Bank, Rajouri Garden, New Delhi and the remaining balance of Rs.2,60,00,000/- (Rs. Two Crore Sixty Lacs only) will be received by the first party from the second party within 120 days on or before 23.05.2007 from the date of this agreement. The terms and conditions of this Agreement shall be essence of this Agreement.*
- 2. That the first party will transfer the sale deed and/or ownership of above said property to the second party at the time of registration of documents, as and when the balance payment of Rs.2,60,00,000/- (Rs. Two Crore Sixty Lacs only) is made to the first party. In case the payment is not made by the second party by the stipulated period/date the earnest money will be forfeited by the first party. In case the first party fails to transfer the Sale Deed in favour of the second party or his nominee/nominees, then the first party will pay*

double the amount of the money received and also money can not be considered as the only compensation.

3. *That at the time of receiving the total consideration amount i.e. Rs.2,70,00,000/- (Rs. Two Crore Seventy Lacs only), then First Party has assured to hand over the related original documents of the property to the second party.*
4. *That the said property under sale is mortgaged to some Bank by the first party and she undertake to get it cleared on or before 120 days from the date of this agreement if there would be further some time required by the first party then it may not in any case exceeds total 150 day i.e. 4+1=5 months. If the first party requires around 40-50 Lacs of rupees for paying bank debt then the second party will facilitate the first party with a prior notice of minimum 15 days and then the first party will got 1/3rd of the said property register in the second party/'s name alongwith the possession.*
5. *.....*
6. *That whenever the presence of the first party is required to the second party for the completion of this transaction then the first party shall come forward and execute the relevant documents in favour of the second party.*
7. *.....*
8. *.....*

9.

10. *That the first party understand that the second party has made a part payment of Rs.8,00,000/- to the first party on the solemn representation of the first party that she shall transfer the said property and/or land to the second party free from all encumbrances by executing the Sale Deed after receiving the balance payment and/or default and/or neglect on the part of first party to perform her obligations under the said Agreement to Sell dated 24.01.2007 then second party shall be entitled to all the remedies that may be available to the second party in the court of law. The party undertakes and convents not to do anything and/or generate any third party interest which may in any way impede the transfer of the said property in favour of the second party.*
11. *That on receipt of full and final sale price, the first party shall execute proper relevant deeds and documents in favour of the second party or his/her nominees and to get the same registered in the office of the sub registrar concerned.”*

The said document is witnessed *inter alia* by H.K. Juneja, the broker to the transaction.

12. The Agreement of Extension dated 22nd May, 2007, also an admitted document with Ex.PW1/3 endorsed thereon, and in which also the defendant is described as the ‘First Party’ and the plaintiff as the ‘Second Party’, *inter alia* provides as under:

“WHEREAS the First Party entered into an Agreement to Sell (Bayana) on 24th January, 2007 for the sale an area measuring 315 Sq. Yards situated in front portion of property No. E-26/6, Rajouri Garden, New Deihi-110027 for a total consideration of Rs.2,70,00,000/-out of which the First Party has already received a sum of Rs.10,00,000/- and acknowledged the same vide said Agreement of Sell itself.

AND WHEREAS as per Clause 4 of said Agreement to Sell it has been mentioned that the said property is lying mortgaged with the bank and the First Party has agreed to get the said mortgage cleared so that the First Party could sell and hand over the possession of the said property to the Second Party free from all sorts of encumbrances.

AND WHEREAS as per the terms and conditions contained in said Agreement to Sell the First Party agreed to execute the documents of sale within 120 days of the execution of said Agreement to Sell i.e. upto 24.05.2007.

AND WHEREAS the documents of sale could not be executed and registered within the said period of 120 days therefore a further extension of 30 days has been agreed and provided under said Agreement to Sell itself. Since the documents of sale of said property could not be executed within the period of 120 days therefore both the parties mutually agreed to extend the time for the performance of

sale for a further period 30 days on further terms and conditions agreed between them and incorporated hereunder :

NOW THIS AGREEMENT OF EXTENSION SHALL WITNESSTH AS UNDER:

- 1. That the period for performance of said Agreement to Sell dated 24.01.2007 executed between the parties has been further extended by further 60 days i.e. upto 24-7-07. However still in case the documents of sale of said property could not be executed for any reason the period for the performance of the agreement to sell can further be extended by the parties with their mutual consent in writing.*
- 2. That both the parties will make efforts to complete the sale transaction within the above extended period and in fact in case the First Party requires any further amount to clear the mortgage with the bank then the First Party may Inform the Second Party will felicitate with the said amount within the, period the 15 days after receiving the request of the First Party and the same shall be treated part payment towards the consideration amount the First Party will act as per clause 4 of said Agreement to Sell dated 24.01.2007.*

3. *That it has been agreed that the necessary information in writing will be given to the Second Party after getting the clearance of the mortgage granting 15 days time therein so that the Second Party may get the transaction of sale completed and documents, of sale executed and registered.”*

The said document also bears the signature of H.K. Juneja aforesaid, the broker to the transaction.

13. Though the plaintiff has sought to prove as Ex.PW1/6 a public notice got issued by the plaintiff, informing the public at large of the Agreement of Sale by the defendant in his favour with respect to the property aforesaid but the said document dated 25th July, 2007 is on the letterhead of the then advocate of the plaintiff and there is no proof of publication thereof in any newspaper or elsewhere accessible to the public at large.

14. Though the defendant during admission/denial of documents denied the legal notice dated 25th July, 2007 got sent by the plaintiff to the defendant but in the same admission / denial admitted the advocate's reply dated 8th October, 2007 got sent thereto. The said legal notice has been proved as Ex.PW1/7. The plaintiff thereby notified the defendant of his readiness and willingness to perform his part of the agreement and called upon the defendant to within ten days get the property released from the bank and to execute the sale deed in favour of the plaintiff against receipt of balance sale consideration.

15. The plaintiff has also filed copy of a letter dated 25th September, 2007 claimed to have been sent to the defendant. The defendant denied receipt

thereof and in cross-examination of the plaintiff also controverted that any such letter was sent by the plaintiff to the defendant. The said document remains unproved, with Mark 'C' endorsed thereon and cannot be read against the defendant. However the same having been filed by the plaintiff, can always be read against the plaintiff. The plaintiff, vide the said letter, has admitted:

“.....in first week of September you informed me that you got the necessary clearance from the bank and you urgently required Rs.29,00,000/-. I without waiting paid you the said amount of Rs.29,00,000/- on 11.09.2007 not only by cheques but also even by cash.

After paying the total amount of Rs.39,00,000/- you further approached me on 17.09.2007 through telephone and required me to pay Rs.1,00,000/- for which you informed me that you shall be sending the son of your cousin brother Harpal Singh which amount was also paid in cash to said son of Harpal Singh. By 17th September 2007 you received Rs.40,00,000/- from me as such you should have executed the sale deed in respect of one third of the above property alongwith the possession as was agreed in Agreement to Sell dated 24.01.2007 since while receiving the said amount of Rs.29,00,000/- you represented to have got the property cleared from the bank but you have been continuously avoiding to do execute the sale deed.

On 20.09.2007 I took the trouble to enquire from the bank about the status of your mortgage and I was shocked to know that

the property under sale was still not released by the bank as such you cannot and could not execute the sale deed either of part or whole of the property in my favour and/or in favour of my nominee/nominees. It was further learnt that in fact the money which was received by you was not deposited in the bank for the release of the property under sale.....”

16. Since the payment by the plaintiff to the defendant of total Rs.40,00,000/- is not in dispute, the receipts of the said amount, also on record, are not being referred to.

17. The defendant, vide advocate's reply dated 8th October, 2007 (Ex.PW1/10), to the legal notice dated 25th July, 2007 got sent by the plaintiff, while contending that the Agreement to Sell expired on 24th July, 2007 and that it was the plaintiff who was not ready and willing to fulfill his part of the agreement inspite of the defendant calling upon the plaintiff to do so, further stated “That my client even showed settlement of the bank also to your client but your client has not shown any bona fide”, and inspite of the agreement having expired, by way of abundant caution, gave opportunity of seven days i.e. on or before 15th October, 2007, to the plaintiff to perform his part of the Agreement to Sell by paying the balance sale consideration, failing which earnest money paid was threatened to be forfeited and it was stated that the Agreement to Sell shall stand terminated and cancelled.

18. The plaintiff, vide rejoinder dated 15th October, 2007 Ex.PW1/11 to the reply dated 8th October, 2007 supra and receipt of which rejoinder dated 15th October, 2007 is not disputed by the defendant, stated that (a) the delay from 25th July, 2007 to 8th October, 2007 in sending the reply itself

demonstrated dishonesty of the defendant; (b) as per enquiries made on 20th September, 2007 from the bank, the property under sale had not been released by the bank and the monies received by the defendant from the plaintiff had not been deposited in the bank; (c) in fact the monies received from the plaintiff had been transferred by the defendant to her son-in-law who had flown to Canada; (d) that after the legal notice dated 25th July, 2007, a letter dated 25th September, 2007 had been sent by the plaintiff to the defendant and which had remained un-replied and in fact the reply dated 8th October, 2007 was a counterblast to the letter dated 25th September, 2007; (e) there was no occasion for the defendant to demand any further amount without complying her part of the agreement; (f) in the reply dated 8th October, 2007 no mention was made of Rs.30,00,000/- received by the defendant from the plaintiff in September, 2007 itself; and,(g) the defendant should supply proof of release of documents by the bank to the plaintiff and after verifying correctness whereof the plaintiff will arrange for the balance sale consideration.

19. The plaintiff, before filing the suit, got served yet another legal notice dated 27th March, 2008 Ex.DW2/X1 on the defendant and to which a response dated 8th April, 2007 Ex.PW1/12 was got sent by the defendant.

20. The defendant, in cross-examination of the plaintiff, put to the plaintiff a complaint dated 24th March, 2008 Ex.CW1/D1A lodged by the plaintiff with the police, to contend that the plaintiff vide the said complaint, only wanted the monies paid by him to be refunded and was not interested in purchasing the property. However having gone through the said complaint,

no such intent of the plaintiff to give up the relief of specific performance can be deciphered.

21. The witness from OBC examined by the plaintiff has proved as Ex.PW2/5, a letter dated 22nd September, 2007 of OBC accepting the offer contained in the letter dated 20th July, 2007 of the defendant of an amount of Rs.1,00,00,000/- by way of one time settlement of all dues owed by the defendant and her family to the bank, on the condition that the said sum of Rs.1,00,00,000/- in lump sum was paid within 45 days from the date of filing of the application for consent decree in the DRT and all legal proceedings filed by the defendant and her family members against the bank be withdrawn immediately; vide the said letter dated 22nd September, 2007, OBC also informed, that the security mortgaged shall be released only after the entire amount of Rs.1,00,00,000/- was paid.

22. The witness from OBC examined by the plaintiff has also proved as Ex.PW2/4, the proceedings of 6th December, 2004 of DRT-II, Delhi in the Original Application instituted by OBC against defendant and her family members, certifying that a settlement had been arrived at before the Lok Adalat on 6th December, 2014 and as per which settlement OBC was entitled to recover only a sum of Rs.70,00,000/- from the defendant and her family members in full and final settlement, by way of twelve monthly installments of at least Rs.6,00,000/-, with the first installment being payable on or before 30th December, 2014 and the last installment being paid on or before 30th November, 2015 and if two consecutive installments were not paid, OBC shall be entitled to recover the entire balance due from the defendant and her family members.

23. Analyzing the documents aforesaid and from which truth can best be deciphered, it follows that (i) as per the Agreement to Sell, the defendant was required to have the property agreed to be sold to the plaintiff freed from mortgage and the defendant, to so have the property released from mortgage, if required Rs.40,00,000/- to Rs.50,00,000/- for paying to the bank, was required to give a minimum fifteen days notice to the plaintiff and the plaintiff had agreed to pay the said sum of Rs.40,00,000/- to Rs.50,00,000/- against execution of sale deed with delivery of possession of one-third of the total property agreed to be sold; (ii) as per the Extension Agreement, if the defendant required any further amount to clear the mortgage with the bank, the plaintiff had agreed to pay the same within fifteen days of receipt of request in this regard; (iii) thus a material change from the Agreement to Sell was brought about in the Extension Agreement; while under the Agreement to Sell, the amount which the defendant could call upon the plaintiff to pay, for having the property released from mortgage, was limited to Rs.40,00,000/- to Rs.50,00,000/- out of the balance sale consideration of Rs.2,60,00,000/-, under the Extension Agreement the defendant could call upon the plaintiff to pay any further amount out of the said sale consideration and the plaintiff had agreed to pay the same; however in accordance with Clause 4 of the Agreement to Sell, against the said payment also sale deed with delivery of possession of one-third portion of the total property agreed to be sold was to be executed; (iv) I may mention that mortgage of a property is no bar to execution of sale deed thereof; the only consequence is that the sale is subject to mortgage and the purchaser does not acquire any better rights than the seller; (v) though the plaintiff in the plaint has not pleaded that the defendant at any time after the Extension Agreement dated 22nd

May, 2007 informed the plaintiff of a settlement having been arrived at with OBC and in the replication has denied the averment to the said affect in the written statement but the plaintiff in his letter dated 25th September, 2007 to the defendant and which as aforesaid, though unproved, being the plaintiff's document can always be read against the plaintiff, unequivocally admitted that defendant had informed the plaintiff that she had "got the necessary clearance from the bank"; (vi) not only so, the plaintiff in the said letter has also admitted to being in touch directly with OBC and to have learnt from OBC that the mortgage of the property had not been cleared; (vii) the witness from the bank examined by the plaintiff himself, has proved that the defendant, after the Extension Agreement dated 22nd May, 2007 whereunder the defendant was entitled to call upon the plaintiff to pay further monies for release of mortgage, without the said monies being limited to Rs.40,00,000/- to Rs.50,00,000/- as under the Agreement to Sell, and before 24th July, 2007 whereby the sale was to be completed, on 20th July, 2007 made a one time settlement offer to OBC of Rs.1,00,00,000/- and which offer was accepted by OBC on 22nd September, 2007; and, (viii) the plaintiff in his letter dated 25th September, 2007 admits that the defendant informed him of the settlement arrived at with the bank.

24. A perusal of the affidavits by way of examination-in-chief and cross-examination of the plaintiff, the broker, the defendant and the defendant's son shows that while according to the defendant, the defendant called upon the plaintiff to pay the money, evidently Rs.1,00,00,000/-, required to be paid to OBC for release of mortgage with respect to the property agreed to be sold, the plaintiff expressed inability to pay the said amount. It is thus the case of the defendant that the plaintiff was not ready and willing. On the

contrary, it is the case of the plaintiff that no settlement arrived at with the bank was shown and no such demand made besides of Rs.30,00,000/- which was paid and that the plaintiff has always been ready and willing.

25. It has also come on record that after another seven years of the settlement offer dated 22nd September, 2007 of Rs.1,00,00,000/-, ultimately settlement was arrived at between the defendant and her family members on the one hand and OBC on the another hand, for Rs.70,00,000/- only.

26. What needs to be thus determined is, the readiness and willingness of the plaintiff at or about September, 2007, to proceed with his part of the Agreement to Sell as modified by the Extension Agreement.

27. From the admission of the plaintiff in the letter dated 25th September, 2007 of the defendant having informed the plaintiff of the settlement arrived at with the bank and further from the admission of the plaintiff of the plaintiff being in touch with the bank to find out the status of mortgage with respect to the property which the plaintiff had agreed to purchase, I am inclined to believe the version of the defendant of the defendant having informed the plaintiff of acceptance by OBC of the proposal of the defendant for settlement of all claims of the bank on lump-sum payment of Rs.1,00,00,000/-; I am also inclined to believe the version of the defendant of having asked the plaintiff for the said sum of Rs.1,00,00,000/- out of total balance consideration then remaining of Rs.2,60,00,000/- and of which the plaintiff paid only Rs.30,00,000/-. The suppression by the plaintiff in the plaint of what was stated in the letter dated 25th September, 2007 (though copy of the letter dated 25th September, 2007 was filed with the plaint) and the denial in the replication by the plaintiff of the defence to the said effect in

the written statement is contradictory to the stand taken in the letter dated 25th September, 2007. It defies normal human conduct, why the defendant, when the proposal for one time settlement with OBC was of Rs.1,00,00,000/-, would represent the same to the plaintiff to be for Rs.29,00,000/- or Rs.30,00,000/-. Therefrom it follows that the plaintiff in or about September, 2007 was not willing to pay Rs.1,00,00,000/- to the defendant for satisfying the mortgage inspite of having committed so in the Extension Agreement. Further, from the plaintiff having not led any evidence of being possessed of Rs.1,00,00,000/- in or about September, 2007, the probability of the plaintiff not being able to pay the said amount of Rs.1,00,00,000/-, as contended by the defendant, cannot be ruled out.

28. However the aforesaid, according to me, would not lead to a finding under the issues aforesaid, of the plaintiff having not been ready and willing to perform his part of the Agreement to Sell and being thus disentitled to specific performance. My reasons therefor follow.

29. The defendant, under the Agreement to Sell as well as Extension Agreement, was required to give fifteen days prior notice to the plaintiff to pay the monies required for clearing the mortgage. Not only was no such notice given but the defendant, in the letter dated 8th October, 2007, while belatedly replying to the legal notice dated 25th July, 2007, also did not mention the settlement offer dated 22nd September, 2007 for Rs.1,00,00,000/- and did not specifically mention that the plaintiff was called upon to pay the said amount of Rs.1,00,00,000/- and of which he paid only Rs.30,00,000/-, though it was vaguely stated that the plaintiff was shown the settlement with the bank and given an opportunity, which he had failed to avail of. In view

thereof, notwithstanding the plaintiff in the letter dated 25th September, 2007 having admitted being informed of the settlement though not of a settlement of Rs.1,00,00,000/- or demand for Rs.1,00,00,000/-, I am on preponderance of probabilities not inclined to hold that the plaintiff was in default at that stage. Without the defendant having complied with her obligation under the Agreements to give fifteen days notice, the plaintiff cannot be held to be in breach of payment in terms thereof. Even if the plaintiff had been verbally informed and shown the settlement dated 22nd September, 2007 arrived at with the bank and called upon to pay Rs.1,00,00,000/- out of the total balance sale consideration, then remaining of Rs.2,30,00,000/-, and had failed to pay the same, the defendant was required to give a fifteen days notice in writing calling upon the plaintiff to pay the same and only if the plaintiff had failed to pay the same, could the plaintiff have been held to be in default at that stage. It cannot also be forgotten that the payment at that stage had to be against sale deed of one-third portion of the property agreed to be sold, with delivery of possession of one floor of the property. The defendant was not entitled to only demand payment for making the property free of mortgage, without also complying with her obligation under the agreements to execute the said sale deed. The opportunity of fifteen days given in the reply dated 8th October, 2007, without specifying the amount and without readiness to execute sale deed of one-third portion of the property with delivery of possession against receipt of Rs.1,00,00,000/-, cannot be said to be in terms of the Agreement to Sell and the Extension Agreement. Rather, it is found that the defendant neither in the communication dated 8th October, 2007 nor in any subsequent communication referred to above was willing to take a categorical stand with

respect to the status of the mortgage and which in the evidence has turned out, was released only in 2014.

30. That brings me to the aspect of readiness and willingness otherwise and to which arguments were confined by the counsels, with the counsel for the defendant contending that the plaintiff inspite of specific plea in the written statement of the defendant to the effect that the plaintiff was not possessed of the balance sale consideration and inspite of specific issue having been framed thereon has not led any evidence, of being possessed of the balance sale consideration at any point of time since the Agreement to Sell. It was contended by the counsel for the defendant that not only did the plaintiff not lead any evidence of his own in this respect but inspite of being quizzed in the cross-examination also, avoided to produce his bank statement and income tax record. On the contrary, the counsel for the plaintiff contended that the plaintiff is a business person and has deposed that he had the capacity to arrange for the funds at any time, including to pay the balance sale consideration.

31. The counsel for the plaintiff referred to:

- (i) ***Tanu Goel Vs. Girish Chopra*** (2014) 210 DLT 778 to contend that availability of liquid funds is not required and that payment by the plaintiff to the defendant of a further amount of Rs.30,00,000/- shows the readiness and willingness of the plaintiff.
- (ii) ***Madhukar Nivrutti Jagtap Vs. Pramilabai Chandulal Parandekar*** (2019) SCC OnLine SC 1026 to contend that execution of supplementary agreement itself establishes the

readiness and willingness of the plaintiff and that the plaintiff need not continuously approach the defendant with payment.

- (iii) **Chennadi Jalapathi Reddy Vs. Baddam Pratapa Reddy** (2019) 14 SCC 220 to contend that averment in plaint of readiness and willingness is sufficient.
- (iv) **V. Pechimuthu Vs. Gowrammal** (2001) 7 SCC 617 to contend that sending legal notice and averment in the plaint proves readiness and willingness.
- (v) **Rakesh Kumar Vs. Kalawati** 2014 (206) DLT 363 to contend that the Court ought not before the final adjudication order the plaintiff to deposit the balance sale consideration in the Court [but this judgment save on this aspect has been set aside by Supreme Court in **Kalawati Vs. Rakesh Kumar** (2018) 3 SCC 658].

32. Per contra, the counsel for the defendant referred to (i) **Saradamani Kandappan Vs. S. Rajalakshmi** AIR 2011 SC 3234 holding that in a contract for sale of immovable property stipulation fixing time schedule for payment of consideration and further clause providing for mode of payment leads to the inference that time of payment was the essence of the agreement and also holding that 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; (ii) **Ravinder Nath Sahni Vs. Poddar Construction Co. Pvt. Ltd.** (2014) 211 DLT 561 holding that even if seller was wrong in taking the stand that the

Agreement to Sell stood terminated, the buyer was required to show readiness and willingness to perform his part of the Agreement to Sell; (iii) ***Om Prakash Aggarwal Vs. Raj Kumar Mittal*** (2019) 258 DLT 248, ***Girdhari Lal Batra Vs. Krishan Lal Batra*** 2018 SCC OnLine Del 12547 and ***Gulshan Kumar Vs. Sat Narain Tulsian*** (2014) 206 DLT 443, all to contend that in similar circumstances as of the present case, buyer was held to be not ready and willing and owing to long delay and increase in price and finding that the plaintiff had paid merely 10% of the sale consideration, specific performance was not ordered.

33. I have considered the rival contentions and the judgments cited and am of the view that once it has been found that the defendant did not act in terms of the Agreement to Sell, by not issuing a notice in writing to the plaintiff, informing the plaintiff of the settlement dated 22nd September, 2007 offered by the bank and did not call upon the plaintiff to within fifteen days pay Rs.1,00,00,000/- to have the property released from mortgage and did not inform the plaintiff that against payment of the said Rs.1,00,00,000/- the defendant was willing to execute sale deed of one-third portion of the total property agreed to be sold and to deliver possession thereof to the plaintiff and further since the defendant did not give the said details in the reply dated 8th October, 2007 inspite of legal notice dated 25th July, 2007 having been got sent by the plaintiff and further once the defendant at any subsequent point of time also did not give an opportunity to the plaintiff by calling upon the plaintiff to perform his part of the agreement, the plaintiff was not required to hold the balance sale consideration in his bank for payment to the defendant, to be able to succeed in a claim for specific performance. In fact, it has emerged that the defendant at no point of time till 6th December, 2014

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i.e. long after the institution of this suit in May, 2008 was not in a position to perform his part of the Agreement to Sell inasmuch as till then the property agreed to be sold remained mortgaged with the OBC. What is clear from the agreements between the parties and what is not disputed by the defendant also is, that the completion of sale by execution of sale deed against payment of balance sale consideration was to be only on the property being free from the mortgage. Though the defendant had an option under the Agreement to Sell, to so have the property freed from mortgage demand further consideration from the plaintiff and which consideration under the Agreement to Sell was limited to Rs.40,00,000/- to Rs.50,00,000/- but the said limit was also removed in the Extension Agreement, but the defendant did not avail of the same in the manner agreed and did not fulfill her part of the condition for demanding such further payment. In the absence thereof, it is the defendant who is found to be not in a position to perform her part of the Agreement to Sell till the property was so free from mortgage. Once it is the defendant who was not in a position to convey title to the plaintiff as agreed, the plaintiff cannot be denied the relief of specific performance for not having any financial document showing the availability of balance sale consideration. Monies are held in diverse forms. Though advocates and judges, by the very nature of their earnings and their work and commitment thereto, normally keep their money in bank accounts, bank deposits and sometimes in stocks but it cannot be said to be true of people from all other walks of life and vocation. Rather, the oft heard adage is that money kept in banks depreciates and appreciates only if invested in trade and commerce. Money so invested in trade and commerce cannot as clearly be reflected in the form of documents, as clearly as monies kept in banks, owing to persons

of trade and commerce being entitled to lawfully manage their taxation (not avoid taxation which qualifies as illegal), such monies may not often be visible in books of accounts either. It has otherwise come in evidence that the plaintiff in the year 2007 purchased another property and it is in fact the plea of the defendant that the plaintiff indulges in purchase and sale of properties for profit and which can be possible only on availability of funds with the defendant. Not only so the plaintiff, without insisting on execution of sale deed of one-third portion of the property agreed to be sold, did pay Rs.30,00,000/- to the defendant and which also shows the readiness and willingness of the plaintiff. For a defendant to defend a claim for specific performance by pleading inability of the plaintiff to pay the balance sale consideration, it is incumbent on the defendant to first show own readiness and willingness to perform own part of the Agreement to Sell and giving of notice thereof to the plaintiff. Only then, if the plaintiff does not perform plaintiff's part of the Agreement to Sell of which specific performance is sought, can the plaintiff be held guilty of non-readiness and non-willingness and denied the relief of specific performance.

34. Supreme Court recently in ***Madhukar Nivrutti Jagtab*** supra has held that (i) the question whether the plaintiff seeking specific performance has been ready and willing to perform his part of the contract is required to be examined with reference to all the facts and the surrounding factors of the given case; (ii) the requirement is not that the plaintiff should continuously approach the defendant with payment or make incessant requests for performance; (iii) the plaintiff must be found standing with the contract and the plaintiff's conduct should not carrying any such blame worthiness so as to considered inequitable ; (iv) the requirement of readiness and willingness

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of the plaintiff is not theoretical in nature but is essentially a question of facts which needs to be determined with reference to the pleadings and evidence of the parties as also to all the material circumstances having bearing on the conduct of the parties, the plaintiff in particular. In ***Chennadi Jalapathi Reddy*** supra it was held that the plaintiff having specifically averred in the plaint that he was ready and willing to perform his part of the contract and had been demanding performance from the defendant and the defendant having been avoiding the specific performance of the Agreement to Sell, all the conditions for granting a decree of specific performance had been fulfilled. In the present case also in the facts and circumstances as have emerged in evidence and have come on record, the condition of readiness and willingness stands satisfied by the plaintiff.

35. Moreover, the Specific Relief Act, 1963 itself, in Section 28 thereof, provides the remedy for non-readiness and non-willingness of the plaintiff. As aforesaid, the question of readiness and willingness of the plaintiff has arisen only after the property was released from mortgage in 2014. The defendant thereafter also has not called upon the plaintiff to pay the balance sale consideration. Though the counsel for the defendant during the hearing drew attention to the orders dated 26th September, 2016 and 29th September, 2016 supra whereby the plaintiff withdrew the application filed for deposit of title deeds in the Court on being asked whether is willing to deposit the balance sale consideration in the Court but the same also does not come to the rescue of the defendant. It is not as if the defendant at that time offered to sell the property if the sale consideration was paid/deposited. Of course, if the defendant within the time stipulated in the decree for specific performance if passed hereunder and which time considering all the facts and

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circumstances of the case will now be ordered to be of the essence of the agreement, does not deposit the balance sale consideration in this Court, it will be open to the defendant to apply for rescission of the Agreement to Sell under Section 28 supra.

36. In view of the above, I answer issue no.2 “Whether defendant No.1 had not performed and was not ready to perform her part of the Agreement to Sell? OPP” in favour of the plaintiff and against the defendant. I also answer issue no.3 “Whether defendant No.1, vide Notice of 8th October, 2007, had called upon the plaintiff to pay the balance of the sale consideration before 15th October, 2007 and to get the Agreement in question executed? OPD-1” in favour of the plaintiff and against the defendant.

37. As far as issue no.4 “Whether the Agreement to Sell of 24th January, 2007 stood expired / terminated as per Notice of 24th March, 2008 of the plaintiff? OPD-1” is concerned, what has emerged is that it is the defendant who has been in default of performance of her obligations under the Agreement to Sell by having not been able to have the property released from mortgage till much after the institution of the suit and in not notifying the plaintiff in terms of the Agreement to Sell and Extension Agreement of the amount which the plaintiff was required to pay to enable the defendant to have the property released from mortgage. Once the defendant herself is in breach of her obligations and the plaintiff is found to have been calling upon the defendant to perform her part of the Agreement to Sell and signifying his readiness and willingness, it was not open to the defendant to terminate the Agreement to Sell. To allow the defendant to do so would tantamount to

giving a premium to own default. Thus issue no.4 also is decided against the defendant.

38. I do not find any merit in the contention of the counsel for the defendant, with the support of the judgments supra cited, that there has been increase in price of the property over the last thirteen years since when the Agreement to Sell was entered and it would inequitable to now in the year 2020 compel the defendant to sell the property to the plaintiff at price agreed as far back as in the year 2007. This argument is made without proving any increase in price. On the contrary, judicial notice can be taken of the general trend of fall in prices of real estate in the capital city of Delhi in the last decade. The Court cannot be unmindful of the now prevalent Covid 19 circumstances, the national lockdown for over two months, fall in economies of all countries across the globe. All this is likely to further contribute to fall in price of real estate in Delhi. Though undoubtedly the suit has remained pending from the year 2008 till now but it is also not as if there was any delay or undue delay on the part of the plaintiff in institution of the suit or in pursuing the suit. No argument, of the plaintiff, at any stage, having delayed proceedings in the suit has been raised. In such circumstances, especially after finding the defendant / seller to be in default of her obligations under the Agreement, specific performance cannot be denied on the ground of increase in prices even if any. The defendant forgets that she also has been holding Rs.40,00,000/- of the plaintiff these last thirteen years and enjoying the benefit thereof.

39. In this context, question also arose during the hearing, with respect to the amendments of the year 2018 to the Specific Relief Act i.e. whether the

same are retrospective. The counsel for the plaintiff placed before the Court ***Mukesh Singh Vs. Saurabh Chaudhary*** 2019 SCC OnLine All 5523 and ***Church of North India Vs. Ashoke Biswas*** 2019 SCC OnLine Cal 3842 to contend that the amendments are retrospective and would apply to all pending cases where decree has not been passed. However the need for me to go into the said aspect is not felt inasmuch as the plaintiff, as per the un-amended provisions of the Specific Relief Act also is found to be entitled to a decree for specific performance. It cannot be forgotten that under the Agreement to Sell the defendant seller had agreed to, before conveying the property to the plaintiff, have the same freed from mortgage. The property as aforesaid, as aforesaid, till the institution of the suit was not free from mortgage and has been freed from mortgage after nearly six years of the institution of this suit. Though I have hereinabove, on preponderance of probabilities held that the plaintiff in September, 2007 was informed by the defendant of the one time settlement offer of OBC of Rs.1,00,00,000/- but the fact remains, that the defendant, after more than seven years therefrom, succeeded in settling with OBC for Rs.70,00,000/- only. From the entire conduct of the defendant, of being not willing to pen in her communications to the plaintiff about the said offer of Rs.1,00,00,000/-, it appears that the defendant herself was not willing to abide thereby and was waiting to further beat down OBC to settle with her for much less. The plaintiff for this reason also cannot be denied the relief of specific performance.

40. The counsel for the plaintiff during the hearing also referred to ***R. Lakshmikantham Vs. Devaraji*** (2019) 8 SCC 62, ***Sankar Chandra Saha Vs. Badal Krishna Pal*** 2017 SCC OnLine Cal 9544 and ***Jageshwar Prashad Sharma Vs. Raghunath Rai*** MANU/DE/2889/2012 (DB), all to contend that

mortgage is to be cleared first and only then the balance sale consideration has to be paid and that if the defendant fails to clear the mortgage with the money paid by the plaintiff, it is the defendant which is in breach of the Agreement to Sell, but the need to delve therein to is not felt.

41. Similarly, the counsel for the plaintiff also referred to **Zarina Siddiqui Vs. A. Ramalingam** (2015) 1 SCC 705 and **K. Prakash Vs. B.R. Sampath Kumar** (2015) 1 SCC 597, to contend that rise of prices is not a ground to refuse specific performance and to **Canara Bank Vs. K.L. Rajgharia** (2009) 157 DLT 344 to contend that specific performance is to be encouraged and **Saradamani Kandappan** supra qua reciprocal promises, but again the need to deal therewith, in view of what has been held hereinabove, is not felt.

42. I thus answer issue no.1 “Whether the plaintiff is entitled to Specific Performance of Agreement to Sell of 24th January, 2007 or in the alternate to damages of Rupees one crore, fifty lacs only with interest and if so, at what rate? OPP”, also in favour of the plaintiff and against the defendant. The plaintiff having been found entitled to a decree of specific performance of the Agreement to Sell, the question of considering the alternate relief of damages does not arise.

43. Axiomatically, a decree is passed in favour of the plaintiff and against the defendant, of specific performance of the Agreement to Sell dated 24th January, 2007 as modified by the Extension Agreement dated 22nd May, 2007, by (i) directing the plaintiff to, on or before 30th June, 2020, and which time shall be deemed to be the essence of the agreement, deposit the balance sale consideration of Rs.2,30,00,000/- in this Court alongwith draft of the proposed sale deed sought to be got executed from the defendant as well as

the non-judicial stamp paper for drawing up of the sale deed for a total sale consideration of Rs.2,70,00,000/-; (ii) directing the defendant to, within ten days of the said deposit, execute and register the sale deed, deliver vacant peaceful physical possession of the entire property agreed to be sold and the original title documents with respect to the property to the plaintiff and immediately whereafter the defendant shall be entitled to withdraw Rs.2.30 lacs to be deposited by the plaintiff in this Court.

In the circumstances of the case, no costs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

MAY 23, 2020
'gsr'..