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

Judgement reserved on **18.11.2020**
Judgement pronounced on **15.02.2021**

\+ **CS (OS) No. 1765/2008**

SHRI SUBHASH AGGARWAL .....Plaintiff
Through : Mr. Kirti Uppal, Sr. Adv. with Ms. Rachna Aggarwal, Adv.

versus

SHRI MAHENDER PAL CHABRA & ANR. .....Defendants
Through : Mr. A.K. Singh, Sr. Adv. with Mr. Rajeev Chauhan, Adv. for D-1.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J.:

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Preface: -

1. *Via* the instant action, the plaintiff, essentially, is seeking a judgement and decree of specific performance *qua* an immovable property located at C-20, Ashok Vihar, Phase-I, Delhi - 110052 [hereafter referred to as, "suit property"].

1.1. The suit property ad-measures 300 sq. yds. The defendants have a leasehold interest in the suit property; the lessor being the Delhi Development Authority [in short 'DDA'].

1.2. The plaintiff has also sought alternate reliefs. First, that the earnest money is returned in terms of Clause 12 of the Agreement to Sell dated 22.01.2008 [hereafter referred to as, "ATS"]. In terms of this clause, the plaintiff has sought the return of twice the amount paid as earnest money i.e. Rs. 1,20,00,000/- (2 x Rs.60,00,000). Second, Rs. 30,00,000/- paid towards sale consideration be returned. Lastly, for issuance of direction for payment of interest on the abovementioned amounts at the rate of 18% per annum from the date the said amounts were paid to the defendants till the date of refund to the plaintiff.

1.3. The defendants have resisted the suit, although, in the course of the final hearing, their counsel offered a refund of the amount received by them, *albeit*, without interest. This offer was, however, not acceptable to the plaintiff.

Background facts: -

2. Thus, to adjudicate upon this suit, the following backdrop, which emerges from the pleadings and the record, is required to be noticed.

2.1. As noticed above, the ATS was executed between the parties on 22.01.2008. The ATS envisaged the purchase of the suit property by the plaintiff. The sale consideration was pegged at Rs. 6,11,00,000/-. At the time of the execution of the ATS, the plaintiff paid Rs. 60,00,000/- to the defendants - which is, duly recorded in what is Clause 4 of the said agreement. The balance amount i.e. Rs. 5,51,00,000/- was payable by the plaintiff on or before 10.05.2008 or on the date when the relevant documents were executed by the defendants in the office of the concerned Sub-Registrar in favour of the plaintiff or his nominee with the added requirement of handing over the possession of the suit property by the aforementioned date. This condition stands incorporated in Clause 5 of the ATS.

2.2. The defendants, on the other hand, were required to get the suit property converted from leasehold to freehold, and have the same mutated in their name by 10.05.2008. Clause 6 of the ATS made a provision, in this behalf, and also indicated, in no uncertain terms, that the final payment, which was the balance amount, indicated hereinabove, would be made only if the conversion of the suit property from leasehold to freehold and mutation was carried out by the defendants. The defendants were, thus, required to deliver original title documents concerning the suit property to the plaintiff at the time when final payment was made or at the time when the sale deed concerning the same was registered as per the provisions of Clause 7 of the ATS.

2.3. The failure by the plaintiff to pay the balance amount, that is, to comply with his part of the bargain triggered the right of the defendants to forfeit the amounts already paid in terms of Clause 12 of the ATS. In contrast, if the defendants failed to perform their part of the obligations, as captured in the ATS, the plaintiff could either demand the refund of twice the amount of the earnest money paid by him or sue for having the transaction completed by taking recourse to an action for specific performance.

2.4. Admittedly, apart from the Rs. 60,00,000/- paid by the plaintiff at the time of the execution of the ATS, a further amount of Rs. 30,00,000/- was paid by him, in cash, to the defendants on 24.03.2008. The defendants, *inter alia*, take the plea that there was an oral agreement arrived at between the plaintiff and the defendants [hereafter collectively referred to as, "parties"] that the former [i.e. the plaintiff] would pay Rs. 1,40,00,000/- and not just Rs. 30,00,000/- in and about the same time i.e. March 2008.

3. Be that as it may, the plaintiff claims that on 10.05.2008, he visited the house of the defendants to pay the balance amount when he was told that the defendants had left for Punjab and would return only after two weeks. The plaintiff also asserts that thereafter, he made several attempts to consummate the sale transaction which did not bear fruit and, hence, a notice dated 16.07.2008 was served on the defendants *via* his advocates. The plaintiff goes

on to state that since no response was received *qua* his notice wherein he, *inter alia*, stated that he was and is still ready and willing to perform his part of the obligations cast upon him under the ATS, including payment of the balance sale consideration, he was propelled to institute the present suit action.

4. The defendants, upon being served with the summons, filed a joint written statement. *Inter alia*, the defendants averred that at the time of execution of the ATS, the plaintiff had deducted Rs. 2,00,000/- from the earnest money and paid the same to, one, Mr. R.K. Tejwani, who was also a witness to the execution of the ATS, to have the suit property converted from leasehold to freehold.

4.1. It was suggested that Mr. R.K. Tejwani was assigned this task as his father and brother i.e. Mr. S.L. Tejwani and Mr. Ashok Tejwani were carrying on the business of documentation and liaison work respectively which involved converting immovable properties from leasehold to freehold.

4.2. It was averred that, accordingly, necessary documents were executed by the defendants on that very date i.e. 22.01.2008. These documents were, however, lost by Mr. R.K. Tejwani, and therefore, a fresh set of documents were executed by the defendants for submission to the DDA on 01.04.2008.

4.3. Furthermore, it was averred, something that I have alluded to hereinabove, that on 24.03.2008, the plaintiff had assured the defendants that he would pay a further sum of Rs. 1,10,00,000/- once the second set of documents, which were to be lodged with the DDA for the conversion of the suit property from leasehold to freehold, were executed by the defendants.

4.4. Besides this, the defendants averred that the plaintiff had concealed the fact that his vocation was that of a builder and/or contractor and that he carried out this business under the name, M/s S.P. Associates.

4.5. This apart, the defendants also sought to highlight the fact that Mr. R.K. Tejwani was a realtor, who was carrying on his business under the name, M/s J.K. Properties, and that he along with the plaintiff had entrapped the defendants into executing the ATS and thereby, creating a logjam by paying only the earnest money. The suggestion was that the plaintiff intended to sell the suit property to a third party for a premium before the "date of finalization" and because he could not enter into such a transaction, the ATS could not be consummated. In other words, according to the defendants, the plaintiff had never intended to complete the subject sale transaction.

4.6. It was averred that the plaintiff would adopt this *modus operandi* frequently in cahoots with realtors whereby a pretence was made of buying an immovable property by paying the earnest money and, thereafter, the property was sold to a third party at a premium.

4.7. In support of the aforementioned pleas, reliance was placed on Ex. PW-1/D-3 and Ex. PW- 3/1.

5. The defendants also asserted that the plaintiff, in line with what was stated by him in his notice dated 16.07.2008, should be called upon to establish

that he was "capable of" or "willing to" pay the balance sale consideration in the period between 22.01.2008 and 10.05.2008.

5.1. In this context, it was also asserted by the defendants that if the plaintiff was "serious, willing and capable of finalizing" the sale transaction, he ought to have retained a notional amount as security for the balance sale consideration or ought to have obtained an "undertaking, indemnity or such other document" to ensure that the suit property was converted from leasehold to freehold.

5.2. To demonstrate that the plaintiff did not have the wherewithal to pay the balance sale consideration, reference was made to an application (I.A.No.10183/2008) moved by the plaintiff to seek an extension of time for payment of deficit court fee which was disposed of *via* order dated 26.08.2008.

6. The plaintiff *via* his replication, outrightly, denied having deducted Rs. 2,00,000/- from the earnest money paid by him to the defendants to have the suit property converted from leasehold to freehold to the good offices of Mr. R.K. Tejwani.

6.1. The suggestion that Mr. R.K. Tejwani was assigned the said task because his father and brother were in that business was also denied. The plaintiff, however, admitted that Mr. R.K. Tejwani was known, both, to the plaintiff and the defendants and, therefore, was chosen to witness the execution of the ATS.

6.2. The plaintiff emphasized the provision made in Clause 6 of the ATS which, according to him, obliged the defendants to undertake the task of converting the suit property from leasehold to freehold and having the same mutated in their favour.

6.3. The plaintiff also denied that the defendants executed a set of documents, as averred by them, for being submitted to the DDA, either on 22.01.2008 or, a fresh set of documents on 01.04.2008, when the earlier set documents were purportedly lost.

6.4. The plaintiff stressed the fact that the ATS was executed in his "individual" capacity. The plaintiff admitted that he had, in the past, carried on business under the name, M/s S.P. Associates, which had not been operable since 2005 and that since 1978, he has been in the business of dealing in cycles and cycle parts under the name, M/s Commercial Agency.

6.5. The plaintiff did not deny the assertion that defendant no. 1 had lodged a complaint with the police station located at Ashok Vihar, Delhi.

7. It is in this background that the suit was listed before the Court for the first time on 26.08.2008 when, while issuing summons, the court had restrained the defendants from creating third-party rights in the suit property.

7.1. It may also be relevant to note that the defendants had applied to the Court during the pendency of the suit, under the provisions of Order VII Rule 11 of the Code of Civil Procedure, 1908 [in short "CPC"], for having the plaint rejected, principally, on the ground that the court fee paid was deficient. This application was, however, dismissed as withdrawn on 12.03.2009 after the Court recorded that the plaintiff had paid the deficit court fee.

7.2. The record shows that the interim order dated 26.08.2008 was made absolute on 12.03.2010 with the consent of counsel for the defendants. Thus, I.A. No. 10182/2008 preferred under Order XXXIX Rules 1 and 2 read with Section 151 of the CPC was disposed of.

7.3. *Via* the same order, in the plaintiff's other application, being I.A. No. 8949/2009, for the reasons given therein, the defendants were directed to deposit Rs. 90,00,000/- with the Registry of the Court. This application was also disposed of on the same date. Furthermore, the following issues were framed in the suit:

> "(i) Whether the plaintiff is entitled to specific performance of [the] agreement to sell dated 22.01.2008 (Ex. P4)? OPP
>
> (ii) Whether the sum of Rs 30 lacs paid by the plaintiff to the defendant on 24.03.2008 was pursuant to an oral agreement of even date (i.e., 24.03.2008) arrived between the plaintiff and the defendants? If so to what effect? OPD.
>
> (iii) Relief(s)"

8. It would be pertinent to note that the defendants carried the order dated 12.03.2010 in appeal to the extent that it required the defendants to deposit Rs. 90,00,000/- with the Registry of the Court. The Division Bench, based on the consent of the plaintiff i.e. the respondent in the appeal, issued a direction that I.A. No. 8949/2009 would be deemed to have been withdrawn and, consequently, the direction issued to the defendants to deposit Rs. 90,00,000/- which they had, admittedly, received from the plaintiff towards sale consideration was not required to be deposited with the Registry of the Court. The appeal was disposed of, accordingly.

8.1. In this foreground, arguments on behalf of the plaintiff were advanced by Mr. Kirti Uppal, learned senior counsel, and Ms. Rachna Aggarwal while submissions on behalf of defendant no. 1 were made by Mr. A.K. Singh, learned senior counsel, instructed by Mr. Rajiv Chauhan.

8.2. At this juncture, I must note that Mr. A.K. Singh informed me, on 27.08.2020, when the matter came up before me, for the first time, for final hearing, that, at one point of time, he had filed his *vakalatnama* on behalf of, both, defendant nos. 1 and 2 and once he was designated as a senior advocate, a fresh *vakalatnama* had to be filed, at which point in time, Mr. Rajeev Chauhan [who is led by Mr. Singh] filed a *vakalatnama* only on behalf of defendant no. 1 as defendant no. 2 refused to execute a *vakalatnama* in his name. Accordingly, as a measure of abundant caution, fresh notice was directed to be issued to defendant no. 2 *via* all means including e-mail informing him that the matter is ripe for final hearing. Despite service, which was effected on defendant no. 2, on 30.09.2020, no representation was made on his behalf. Consequently, he was proceeded *ex parte* on 05.11.2020.

<u>Submissions advanced on behalf of the plaintiff: -</u>

9. Mr. Uppal and Ms. Aggarwal, broadly, advanced the following submissions:

(i) The plaintiff was always ready and willing to perform his part of the obligations as captured under the ATS. The plaintiff, in the first instance, at the time of execution of the ATS had paid Rs. 60,00,000/- which was followed by payment of an additional amount of Rs. 30,00,000/- since the defendants conveyed that they required further funds. This amount was paid on 24.03.2008. The assertion of the defendants that they would pay not just Rs. 30,00,000/- but a further additional amount of Rs. 1,40,00,000/- was false.

(ii) It was the obligation of the defendants to get the suit property mutated in their favour and have the same converted to freehold. In support of this plea, reliance was placed on Clauses 6 and 7 of the ATS. The submission was that the end date for payment of the balance consideration i.e. Rs. 5,51,00,000/- [which later on got reduced to Rs. 5,21,00,000/-] as provided in Clause 6 of the ATS, which was 10.05.2008, could have been relied upon by the defendants, in their defence, only if they had fulfilled their part of the bargain which was to obtain mutation and have the suit property converted from leasehold to freehold before the said date.

(iii) The defendants' attempt to shift the responsibility on to the plaintiff by weaving a false case that the realtor/broker Mr. R.K. Tejwani was tasked with the job of having the suit property converted from leasehold to freehold, and that for this purpose, he was purportedly handed over Rs. 2,00,000/- (after adjusting the same from the earnest money paid to the defendants) on 22.01.2008, had not succeeded as, both, Mr. R.K. Tejwani [PW-3] and Mr. Davinder Singh [PW-2] had denied that any such steps had been taken by the plaintiff on the aforementioned date.

(iv) The defendants had failed to place any evidence on record to establish that Mr. R.K. Tejwani had been assigned the task of getting the suit property converted from leasehold to freehold and, for this purpose, he had been handed over Rs. 2,00,000/- on 22.01.2008. The defendants had, to muddy the waters, filed a suit against Mr. R.K. Tejwani for recovery of Rs. 2,00,000/- which was dismissed by the Senior Civil Judge (North), Rohini Courts *vide* judgement dated 09.02.2017.

(v) The plaintiff had placed on record his ITRs for the assessment years 2005-2006 to 2008-2009 pursuant to I.A.No.25174/2014 filed by defendant no.1 to, *inter alia,* summon a witness from the Income Tax Department (which was disposed of on 06.07.2015) to demonstrate that he had the necessary wherewithal to pay the balance sale consideration.

(vi) In sum, the emphasis was that there was evidence on record that would establish that not only was the plaintiff ready but also willing to pay the balance sale consideration.

9.1. In support of their plea, Mr. Uppal and Ms. Rachna Aggarwal relied upon the following judgements: -

i. ***Metropolis Travels & Resorts Pvt. Ltd. vs. Sumit Kalia & Anr.,*** 2002 (64) DRJ 72 (DB).

ii. ***Kalu Ram vs. Sita Ram.***, 1980 RLR Note (44).

iii. ***Nathulal vs. Phool Chand,*** 1970 AIR (SC) 546.

iv. ***Neelpadmaya Consumer Products Pvt. Ltd. vs. Satyabir @ Satbir & Ors.*** (2016) DLT 654.

v. ***P.D. Souza vs. Shondrila Naidu***, (2004) 6 SCC 649.

vi. ***Yogesh Tyagi vs. Kela Devi***, 156 (2009) DLT 717 (DB).

vii. ***A. Kanthamani vs. Nasreen Ahmed***, JT (2017) (3) SC 124.

viii. ***R.K. B.K. Fiscal Services Pvt. Ltd. vs. Ishwar Dayal Bansal***, 210 (2014) DLT 66 (DB).

Submissions advanced on behalf of the defendant no. 1: -

10. As against this, Mr. Singh made the following submissions.

10.1. Mr. R.K. Tejwani was a person known to the plaintiff. Two lakh rupees [Rs. 2,00,000/-] was paid to him after deducting the same from Rs. 60,00,000/- which was paid by the plaintiff to the defendants as earnest money. Mr. R.K. Tejwani was given the task of getting the suit property mutated and having the same converted from leasehold to freehold as his father and brother were in the same business.

10.2. Although the defendants had signed the necessary forms and documents on 22.01.2008, Mr. R.K. Tejwani had lost the same and therefore, another set of documents was signed by the defendants on 01.04.2008. The defendants had retained copies of these documents i.e. Ex. DW-1/1 to Ex. DW-1/8. Mr. R.K. Tejwani failed to fulfil his mandate.

10.3. The plaintiff, on 24.03.2008, paid only Rs. 30,00,000/- to the defendants as against Rs.1,40,00,000/-. This circumstance showed that a subsequent oral agreement had been entered into between the parties as envisaged under Section 92 proviso (4) of the Indian Evidence Act, 1872 [in short "Evidence Act"]. The plaintiff had not complied with the terms of the subsequent oral agreement and, thus, the defendants had proven issue no. 2.

10.4. The plaintiff was engaged in the business of construction. He conducted his business through an entity known as M/s S.P. Associates. The plaintiff along with Mr. R.K. Tejwani, the broker, who carried on his business in the name of an entity known as M/s J.K. Properties, entrapped the defendants in the subject transaction by paying the earnest money and a part of the sale consideration without having any intention of consummating the sale. The attempt was to sell the suit property to the third party at a premium before the end date prescribed in the ATS i.e. 10.05.2008.

10.5. The plaintiff was neither ready nor willing to pay the balance sale consideration. In this context, the emphasis was laid on the fact that the plaintiff had not made an offer for payment of balance sale consideration on 10.05.2008 when he visited the house of the defendants. The fact that the plaintiff in his testimony had stated that he had entered into an Agreement to Sell *vis-à-vis* one of his immovable properties only demonstrated that he did not have the requisite funds to pay the balance sale consideration *qua* the suit property. The plaintiff did not place on record any particulars concerning the transaction which he supposedly entered into to garner funds for purchasing the suit property.

10.6. Furthermore, the plaintiff in his cross-examination did admit that he had not moved an application to deposit the balance consideration with this Court.

10.7. The suggestion made to defendant no. 1 in his cross-examination that the plaintiff was receiving rent from tenants in the context of his attempt to show that he had the necessary resources to pay the balance sale consideration, on the contrary, demonstrated that he did not have funds readily available for payment of the balance sale consideration. In any event, the plaintiff did not examine any of the officials working with the tenant and, therefore, had failed to substantiate his plea.

10.8. Likewise, the plaintiff had also suggested to defendant no.1 in his cross-examination that he had entered into a contract to sell a property described as 29/4, Shakti Nagar, Delhi [in short "Shakti Nagar property"] *qua* which, as well no evidence was placed on record.

10.9. The suggestion made on behalf of the plaintiff to defendant no.1 during his cross-examination that he had created a fixed deposit with a nationalised bank equivalent to Rs. 2.10 crores also went on to establish that there was a gap in the resources available with the plaintiff required to pay the balance sale consideration. Importantly, neither did the plaintiff place on record any evidence concerning fixed deposits nor did the fixed deposits find mention in the ITRs placed on record by the plaintiff.

11. A perusal of the ITRs [Ex DW1/PX3-PX6], as analysed hereafter, would show the falsity of the claim made by the plaintiff that he had the necessary resources available to pay the balance sale consideration:

(i) In Financial Year (FY) 2005-2006 (AY 2006-2007), the gross income is shown as Rs.7,33,501.33. The rental income was shown as Rs.9,76,826/-. The liabilities shown are more than Rs.13,00,000/-.

(ii) In FY 2006-2007 (AY 2007-2008), the total income is shown as Rs.10,50,150/-. The rental income is shown as Rs.11,90,748/-. The liabilities shown are over Rs.12.50 lakhs.

(iii) In FY 2007-2008 (AY 2008-2009), the rental income is shown as Rs.46,30,020/-. This amount was, perhaps, available to the plaintiff for day-to-day expenses and savings and, therefore, could not have been utilized for payment of balance sale consideration. The plaintiff has also shown that he had a 25% share in a property described as C-2/29, Ashok Vihar, PH-II, Delhi-110052 which is valued at Rs. 11,42,689/- apart from the plot at Kondli valued at Rs.14,25,100/- and the Shakti Nagar property valued at Rs.35,54,148/-. Even if these properties were sold, they would not generate funds sufficient enough to pay the balance sale consideration of Rs.5.21 crores. Moreover, liabilities in this FY were pegged at Rs.92,00,000/-. On the asset side of the balance sheet, reference is made to the sum of Rs.90,00,000/- already paid to the defendants. This asset is not available to the plaintiff.

(iv) The return for FY 2007-2008 (AY 2008-2009) concerns the plaintiff's HUF. The income disclosed is Rs.9,95,725/-. The fixed assets are pegged at Rs.1.20 crores which are nothing but shares in immovable properties. The liabilities are shown to be more than Rs.40,00,000/-.

11.1. In sum, the plaintiff's ITRs reveal that he had personal fixed assets worth Rs.51.50 lakhs. The plaintiff's HUF owned fixed assets worth Rs.1.20 crores. All told, the total assets available to the plaintiff were worth Rs.1.70 crores. Against this, the plaintiff was required to discharge the personal liabilities amounting to Rs.90,00,000/-. The plaintiff's HUF had accumulated liabilities amounting to Rs.46,00,000/-. Therefore, the claim of the plaintiff that he had funds available with him to pay the balance sale consideration was completely untenable.

11.2. The plaintiff's attempt to rely upon the chartered accountant's certificate would fail as the orders dated 06.07.2015 and 19.11.2015 passed by this Court permitted the plaintiff to place on record only his ITRs.

11.3. The plaintiff's [PW-1] claim that he had contacted the defendants on 06.06.2008 when they had purportedly sought 10 days to discharge their obligation, was false, as in his cross-examination he stated he could not remember how he had established contacts with the defendants on the said date.

11.4. Likewise, although in paragraph 8 of the plaint, the plaintiff had asserted that in the second week of June/July 2008, he had contacted the defendants *via* telephone in his cross-examination, he had stated that he was not sure as to whether he had called the defendants and then went on to state that he had visited the defendants.

11.5. A similar assertion is made in paragraph 8 of the plaint which is that he met the defendants on 22.06.2008 and made entreaties with them to fulfil their part of the obligations and that they refused to do so and instead threatened him with dire consequences. In the cross-examination, the falsity of this assertion is established as the plaintiff deposed he did not remember the dates when he had approached the defendants. The plaintiff had also stated in his cross-examination that he had reported the matter to the police on 22.06.2008, although, no such complaint was placed on record.

12. In nutshell, the plaintiff had failed to prove the essential prerequisites for grant of the relief of specific performance as provided in Section 16 (c) of the Specific Relief Act, 1963 [in short "SRA"]. In other words, the plaintiff was neither ready nor willing to perform his obligations under the ATS and hence, the suit should be dismissed.

13. In support of his submissions, -Mr. Singh relied upon the following judgements:

i. ***N.P. Thirugnanam (Dead) by Lr's vs. Dr. R. Jaganmohan Rao and Ors.*** (1995) 5 SCC 115.

ii. ***Man Kaur (Dead) by Lr's vs. Hartar Singh Sangha,*** (2010) 10 SCC 512.

iii. ***His Holiness Acharya Swami Ganesh Dassji vs. Sita Ram Thapar,*** (1996) 4 SCC 526.

iv. ***Mrs. Saradamani Kandappan vs. S. Rajalakshmi and Ors.,*** AIR 2011 SC 3234.

v. ***Dinesh Kumar Jain vs. Sanjeev Chaudhary,*** 244 (2017) DLT 423.

vi. ***Dheeraj Developers Pvt. Ltd. vs. Dr. Om Prakash Gupta,*** JT 2016 (3) SC 70.

vii. ***Parakunan Veetilljoseph vs. Nadumvra Kuruvilla's son,*** AIR 1987 SC 2328.

viii. ***Satya Jain (D) through Lr's & Ors. vs. Anis Ahmed Rushdie,*** (2013) 8 SCC 131.

ix. ***K. Prakash vs. B.R. Sampath Kumar,*** (2015) 1 SCC 597.

x. ***Sh. Neelpadmaya Consumer Products Pvt. Ltd. vs. Satyabir @Satbir & Ors.***, 227 (2016) DLT 654.

xi. ***RadhaKrishan Dharmartha Pvt. Trust vs. Paramanad Soni through Lr's,*** (2011) 15 SCC 692.

xii. ***Siddharth Tayal vs. Dinesh Goel & Anr.,*** 237 (2017) DLT 733.

xiii. ***Niranjan Kumar and Ors. vs Dhyan Singh,*** AIR 1976 SC 2400.

xiv. ***Ritu Saxena vs J.S. Grover and Anr.,*** 2019 SCC OnLine 1214.

xv. ***Urvashi Aggarwal & Another vs. Kushagr Ansal***, 2019 SCC OnLine 327.

xvi. ***Mehboob-Ur-Rehman vs Ahsanul Ghani,*** 2019 SCC OnLine 203/AIR 2019 SC 1178.

Analysis and Reasons: -

14. Before I commence discussion on the merits of the case, let me cull out the principles enunciated by the judgements cited by the counsels for the parties and make a reference to the relevant provisions of the SRA.

i. The plaintiff, seeking a decree of specific performance, should not only aver but also prove that he has performed or he is ready and willing to perform the essential terms of the contract *qua* which an obligation has been placed upon him under the contract. The only exception, which is carved out, is where the plaintiff is prevented from performing his obligation or the defendant has waived performance[1].

ii. The obligation to demonstrate readiness and willingness is continuous. It commences from the date of the agreement and comes to an end only when the decree is passed.

iii. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the Court must take into account the conduct of the

[1] See: Section 16(c) of the SRA [After the amendment Act 18 of 2018, the words "who fails to aver and prove" have been substituted with the words "who fails to prove".]

plaintiff both before and after the institution of the suit along with other attendant circumstances.

iv. There is a distinction between "readiness" and "willingness" to perform the contract. Readiness involves assessing the capacity of the plaintiff to perform the contract which includes his financial wherewithal to pay the purchase price. Willingness involves the conduct of the plaintiff whereby, the Court has to ascertain, based on the evidence on record, whether the plaintiff was serious about consummating the sale transaction.

v. For the plaintiff to prove that he is a ready and willing purchaser, it is not necessary for him to "produce the money or to vouch [for] a concluded scheme for financing the transaction". [See: ***Bank of India, Limited, and Others vs. Jamsetji A.H. Chinoy and Messrs. Chinoy and Company***, 1949 SCC OnLine PC 81; followed by the Supreme Court in ***Nathulal vs. Phoolchand***, 1970 SCR (2) 854; Also see: ***A. Kanthamani vs. Nasreen Ahmed***, AIR 2017 SC 1236]

vi. Where, in an agreement to sell, the obligations of the parties have to be performed in a particular sequence, one of the parties to such a contract cannot require compliance of the obligations contained in the contract, from the other party, without discharging its obligations, in the first instance, which are, sequentially, to be performed at an earlier point in time under the contract. That being said, the order in which the terms of the agreement are outlined in the contract does not necessarily decide the sequence of performance. [See: ***Nathulal vs. Phoolchand***, 1970 SCR (2) 854; and ***Saradamani Kandappan vs. S. Rajalakshmi***, (2011) 12 SCC 18]

vii. Where an amount is mentioned in an agreement to sell for securing performance, or as liquidated damages to be paid upon breach of the contract, the Court will enforce the contract. However, where a sum is stipulated and the payment of such amount can substitute the performance of the act upon election by the person by whom the amount is to be paid or the act is to be done - the Court may, if satisfied, with the amount provided, deny specific performance and instead grant alternate relief in the form of the stipulated payment[2]. [See: ***M.L. Devender Singh vs. Syed Khaja***, 1973 (2) SCC 515; followed in ***PD Souza vs. Shondrilo Naidu***, (2004) 6 SCC 649]

viii. The provisions of Section 20 of the SRA [which stood before its substitution by Act 18 of 2018] when read with Explanation (1) and (2) did not prevent a Court from employing its discretion to grant specific performance merely because the dispute had been pending in Court for a long period in the absence of compelling circumstances. The mere fact that the consideration was inadequate or the contract was onerous to the defendant or improvident would not constitute an unfair advantage.

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[2] See: Section 23 of the SRA.

Hardship to the defendant should be one which results from any act of the plaintiff after the contract. [See: ***PD Souza vs. Shondrilo Naidu***, (2004) 6 SCC 649] The Court has to assess facts and circumstances in each case before it concludes that it is a fit case to deny specific performance. The guiding parameter would be the "principles of fairness and reasonableness" as may be dictated by peculiar facts of a given case; which a Court should be in a position to assess. [See: ***Satya Jain vs. Anis Ahmed Rushdie***, (2013) 8 SCC 131]

ix. Although, as a general proposition of law, time is not of the essence of the contract in the sale of immovable properties, yet parties can, by express terms or circumstances necessitating sale set out in the contract make time the essence for performance of the contract. Therefore, the Courts, while exercising discretion, in suits for specific performance, must accord significance to this aspect and, in this behalf, also take into account how quickly the plaintiff approached the Court notwithstanding the time available to him under the statute of limitation. [See: ***Saradamani Kandappan vs. S. Rajalakshmi***, (2011) 12 SCC 18]

15. Given the foregoing, the controversy at hand, in my view, principally, revolves around the scope and effect of the obligation cast on the defendants under Clause 6 of the ATS. That being said, the plaintiff is required to establish that he was ready and willing to fulfil his part of the obligation under the ATS, as provided in Section 16(c) of the SRA. Thus, insofar as the plaintiff is concerned, he is required to demonstrate that not only was he willing but

also that he had the necessary financial wherewithal to pay the balance consideration.

16. In this context, it would be important to note the following undisputed facts which have emerged from the record.

16.1. First, the parties entered into an ATS [Ex. P-4] and on the same date i.e. 22.01.2008, the defendants were paid Rs. 60,00,000/-as earnest money.

16.2. Second, although, under the ATS, the balance consideration i.e. Rs. 5,51,00,000/- was required to be paid before 10.05.2008 once the defendants had got the suit property mutated in their name and converted the property from leasehold to freehold, on 23.03.2008, a further sum of Rs. 30,00,000/- was paid by the plaintiff to the defendants *qua* which there was no provision in the ATS. Against the said payment of Rs. 30,00,000/-, a receipt of even date i.e. 24.03.2008 (Ex. P-1) was issued which bore the signatures of defendant no. 2 and Mr. R.K. Tejwani, in his capacity as a witness, and the person who had brokered the transaction-in-issue.

16.3. Third, the notice dated 16.07.2008 (Ex. P-2) issued by the plaintiff *via* his advocates to the defendants before the institution of the suit elicited no response from the defendants.

16.4. Therefore, all that the plaintiff was required to demonstrate was that he was ready and willing to fulfil the obligations placed on him by the ATS. In this context, it may be relevant to set out hereinafter the relevant terms of the

ATS. The terms which are crucial as regards the decision on this aspect of the matter are Clause 5, 6 and 7.

> "5. That balance amount of Rs.5,51,00,000/- (Rupees five crore fifty one iacs only) is to be paid by the Second Party on or before 10.05.2008, or on the execution of relevant documents by the First Party, in the office of the. concerned Sub-Registrar in the name of the above said purchaser or his Nominee.(s) and handing over possession by this date.
>
> 6. That the first party has agreed above shall get the mutation and freehold done before the final date of payment i.e. 10.05.2008. The final payment will be made only after the conversion and mutation of above mentioned property is completed.
>
> 7. That the First Party shall deliver all the original documents relating to the said Property to the Second Party at the time of final payment of the sale consideration by the Second Party or at the time of registration of Sale-Deed in the office of concerned Sub-Registrar."

16.5. A plain reading of the aforesaid clauses would show that the balance amount which was payable on the date of execution of the ATS, that is, Rs. 5,51,00,000/- was to be paid on or before 10.05.2008 or upon the execution of relevant documents by the defendants in favour of the plaintiff or his nominee in the office of the Sub-Registrar; with a caveat that the possession of the suit property was to be handed over by this date. The defendants were, thus, provided a leeway for obtaining mutation and having their interest in the suit property converted from leasehold to freehold before the final date of payment, which was stipulated as 10.05.2008. The parties, in no uncertain terms, agreed that final payment would be made only after mutation was obtained and the conversion of the suit property from leasehold to freehold was completed.

16.6. Furthermore, the defendants had undertaken to deliver original documents concerning the suit property to the plaintiff at the time of either receipt of the final payment or registration of the sale deed in the office of the Sub-Registrar.

16.7. The aforementioned provisions of the ATS, thus, provided, unambiguously, not only who, as between the two parties, was required to fulfil which part of the transaction-in-issue, but also the sequence in which each party was required to fulfil its obligations.

16.8. Undoubtedly, an obligation was cast on the defendants to have the suit property mutated in their name, and have their interest in the same converted from leasehold to freehold before they would be entitled to lay claim to the balance sale consideration. The defendants were provided, for this purpose, leeway till 10.05.2008.

16.9. The plaintiff [PW-1], in line with his pleadings, in his deposition, has brought this point to the fore by stating that he had visited the house of the defendants on 10.05.2008 for completion of the sale transaction when he was told that they were away to Punjab.

17. To the question as to whether he had carried any bank draft, the plaintiff stated that he did not do so as he had not been furnished the documents concerning the conversion of the suit property. At that juncture, the plaintiff had also, voluntarily, stated [and, this was, perhaps, to show that he had the necessary wherewithal] that he had entered into an Agreement to Sell *qua* one of his immovable properties.

17.1. The relevant part of the plaintiff's testimony, in that behalf, is extracted hereafter.

Mr. Subhash Aggarwal [PW-1]

> "(Witness is put to Para 5 of the affidavit). I had visited the defendant's home on 10.05.2008 as it was the last date agreed for the completion of the transaction in terms of the agreement. (Vol. the defendants were to get the property converted into free hold and supply the documents in order to enable us to make the final payment). It is incorrect to suggest that I have wrongfully claimed that on that day ladies were present who had informed me that the defendants were away to Punjab. I was neither informed about their destination in Punjab nor about their mode of transport.
>
> I was not carrying any bank draft for the balance payment on that day. (Vol. I had already entered an agreement for selling one of my property and the payment was to be realized therefrom. Again said, since the defendants did not supply me the documents in respect of conversion of the property, I did not make the payment)."

17.2. As noticed above, the defendants attempted to set up a case that when the ATS was executed on 22.01.2008, out of Rs. 60,00,000/-; Rs. 2,00,000/- was paid to Mr. R.K. Tejwani, the realtor/the broker, to have the suit property converted from leasehold to freehold. The plaintiff, categorically, denied the suggestion put to him in that behalf. He also denied the suggestion that Mr. R.K. Tejwani's father and son were assigned the task of getting the suit property converted to freehold. This aspect comes to fore upon a perusal of the following extract from the plaintiff's testimony.

Mr. Subhash Aggarwal [PW-1]

> "It is incorrect to suggest that at the time of execution of Ex.P4, a sum of Rs. 2 Lakhs were given by me to Mr. R.K Tejwani for getting the property converted into freehold from DDA. It is incorrect to suggest that it was the understanding that Mr. S.L Tejwani and Sh. Ashok Tejwani would get the conversion done. It is incorrect to suggest that Sh. R.K Tejwani had undertaken to get the conversion of property into

freehold done well in advance and before 10.05.08, through his father and brother, named about."

17.3. What is, perhaps, of greater relevance is the testimony of Mr. R.K. Tejwani [PW-3] and Mr. Davinder Singh [PW-2] who were, admittedly, present when the ATS [Ex. P-4] was executed on 22.01.2008 and had appended their signatures as witnesses to the said document.

Mr. Raj Kumar Tejwani [PW-3]

"Meeting dated 22.01.08 took place in my office. At that time, defendant no.l &2, plaintiff, one Sh. Devinder Singh and Mr. Vikas Gupta were present at that time. The total sale consideration was agreed to be 6.11 V Crores. A sum of Rs. 60 Lakhs was given as earnest money. It was agreed that the deal would be finalized by 10.05.08 subject to the condition that the defendants would get the property converted from leasehold to freehold and get the mutation done in their favour, in the mean time. An agreement to sell was also executed between the parties.

Defendant no. l &2 and the plaintiff had signed the agreement. I had also signed as a witness, along with Sh.' Devinder Singh.

Ex.P4 is the agreement dated 22.01.2008 which bears my signatures at Point B.

xxx **xxx** **xxx**

It is correct that prior to 22.01.08 there had been no direct telephonic conversation between the plaintiff and defendant no.l &2. (Vol. It was being done through me). It is incorrect to suggest that even during telephonic conversations referred above, the defendants no.l &2had never represented that they would be getting mutation or conversion done, on their own. It is incorrect to suggest that no term other than the total sale consideration was decided or communicated at that time."

Mr. Davinder Singh [PW-2]

"I am a Graduate. I am into real estate business and operate from Ashok Vihar area. I know the plaintiff for around last 12 years. I know him through my father and myself, as well. I must have come for around 5-6 times earlier in connection with this case. (Vol. At all times when I was required to come as a witness). It is correct that I am not summoned witness and have come to the court at the plaintiffs instance. It is incorrect to suggest that I do not know the defendants or that I was not acquainted or familiar with them before execution ofEx.P4. The agreement was signed in the office of real estate agent namely Mis J.K Properties at Ashok Vihar. As far as Iam able to recollect, the same, was signed sometime close to 1200 noon.

xxx **xxx** **xxx**

I have seen at Point Aon Ex.P4. The entries made at Point A, in relation with my parentage and address are correct and the same are in my hand. It is incorrect to suggest that I have falsely claimed or stated that the defendants were present before Notary at the time of notarizing of document Ex.P4. It is incorrect to suggest that nobody amongst the defendants had signed the register of the notary or that it is for this reason that the document does not contain any entry pertaining to the number etc. from the register.

I have seen portion A of Ex.P4. It is incorrect to suggest that I had signed as a witness at Point A after the document was attested by Notary. It is incorrect to suggest that it is for this reason that the entries in my hand are placed in such a manner. It is incorrect to suggest that I had not witnessed the execution of document or that I had only signed later. It is incorrect to suggest that I had signed the documents belatedly at the instance of the plaintiff

It is incorrect to suggest that I was not present at the time when Ex.P4 was executed. It is incorrect to suggest that I am not aware about anything which had transpired from the plaintiff and the defendants. It is incorrect to suggest that I had been introduced as a witness to the document only subsequently or that I am not aware about any facts or circumstances involved in the present case. It is incorrect to suggest that no transaction or exchange of money had taken place in my presence. It is incorrect to suggest that I was never acquainted with or known to the defendants nb.l &2. It is incorrect to suggest that being a well wisher of the plaintiff I have simply signed the document Ex.P4 subsequently on the asking of the plaintiff It is incorrect to suggest that I was never a part of negotiations or that I had no knowledge of any of the dealings / understandings between the parties. It is incorrect to suggest that the plaintiff had not paid any amount to the - defendants in my presence or that a sum of Rs. 2Lakhs out of Rs. 60 Lakhs was paid to Mr. R.K Tejwani for the purpose of conversion of property from leasehold to freehold. It is incorrect to suggest that on the said date itself, the \ defendant no.I &2had handed over a set of documents containing the application, the bond and affidavits etc. supported with the photocopies of documents of title, duly signed by the defendants, to Mr. Tejwani. It is incorrect to suggest that the above documents were handed over to Mr. Tejwani for the purpose of conversion. It is incorrect to suggest that the documents were got drafted and prepared by Mr. Tejwani at the instance of the plaintiff It is incorrect to suggest that the same were got signed from the' defendants at the time of execution of Ex.P4. It is incorrect to suggest that the said amount was so paid to him as his brother as well as father had been into the services for getting the property converted. It is incorrect to suggest C- that there had been subsequent deliberations between the parties or that the terms were altered by way of mutual consent. It is incorrect to suggest that as per the re-negotiated terms, the plaintiff was to make a substantial payment to the defendants in March, 2008 in order that the necessary documents could be signed. It is incorrect to suggest that despite the non payment m terms of oral understanding, the defendants had signed the documents in token of their willingness to. proceed with the deal and in good faith.

It is incorrect to suggest that the plaintiff defaulted in making the payment as he was not possessed with sufficient means or that he was not ready and willing to perform his part of the obligations as recorded in Ex.P4 or even as per the subsequent oral understanding. …"

17.4. Thus, a conjoint reading of the testimonies of the plaintiff [PW-1], Mr. R.K. Tejwani [PW-3] and Mr. Davinder Singh [PW-2] would show that the plaintiff was willing, not only to complete the sale transaction but, for this purpose, had tried to reach out to the defendants on several occasions. On behalf of the defendants, doubt was sought to be cast as to whether the plaintiff had attempted to establish contact on 10.05.2008, 06.06.2008, or even 26.06.2008.

17.5. It is required to be noticed that though Mr. R.K. Tejwani [PW-3] had not accompanied the plaintiff to the defendants' house on 10.05.2008, he does state, in his testimony, that the plaintiff did attempt to establish contact with the defendants on 06.06.2008 and 22.06.2008 to consummate the subject sale transaction.

<u>Mr. Raj Kumar Tejwani [PW-3]</u>

> "… On 06.06.08,1 along with the plaintiff approached the defendants with the request for completion of the deed, as per the agreement. By that time as well, the property was neither converted nor mutated.
>
> There had been number of telephone calls and request to the defendants, in the mean time, and on 22.06.08, a meeting was organized between the parties. I was present. There was some neighbours of the plaintiff as well as defendants. Nothing materialised as the defendant no. l had become furious.
>
> I was never approached by the defendants for mutation or conversion. (Vol. As the defendants were obliged to get the some done on their own, as per the agreement).
>
> Plaintiff had remained ready and willing to perform his part of the obligations all throughout. He is still ready and willing, as per my information."

17.6. Although I have referred to these dates to show that there is material on record to demonstrate that the plaintiff was willing to complete the sale transaction, the important aspect, as captured in the ATS, was that the plaintiff's obligation to pay the balance sale consideration would get triggered only if the defendants had obtained mutation and got the suit property converted from leasehold to freehold.

17.7. The testimonies of Mr. R.K. Tejwani [PW-3] and Mr. Davinder Singh [PW-2] attain significance inasmuch both these witnesses have deposed that, firstly, there was no conversation held on 22.01.2008, to the effect, that Mr. R.K. Tejwani [PW-3] would have the suit property converted to freehold and secondly, that a sum of Rs. 2,00,000/- was given to Mr. R.K. Tejwani [PW-3] after deducting the same from the earnest money received by the defendants for the said purpose. Mr. Davinder Singh [PW-2] refuted the suggestion made to him that a set of documents were signed by the defendants on 22.01.2008 for conversion or thereafter, in March 2008 when according to the defendants, the terms of the ATS were renegotiated.

17.8. It stretches credulity to even suggest that defendants would agree to the deduction of Rs. 2,00,000/- from the earnest money for payment to Mr. R.K. Tejwani [PW-2] without having a receipt generated or having this part of the transaction incorporated in the ATS. While on this aspect, it may also be relevant to advert to the relevant parts of the testimony of defendant no. 1 i.e. Mahinder Pal Chhabra [DW-1] concerning the receipt of Rs. 30,00,000/- by him on 24.03.2008 as against his demand for Rs. 1.40 crores. Defendant no. 1/Mahinder Pal Chhabra [DW-1], while deposing that he had demanded Rs. 1.40 crores and was given only Rs. 30,00,000/- conceded that the parties did not enter into any written agreement and that everything was done in good faith and that he never made any enquiries, either orally or in writing, from Mr. R.K. Tejwani [PW-3] regarding submission of papers to DDA for conversion before 23.03.2008.

> "Q. I put it to you that the Defendants including you requested the plaintiff to pay further sum of Rs. 30 lacs on the representation that you require funds in order to purchase the alternative property?
>
> Ans. It is incorrect. I did not ask for 30 lacs. I demanded full amount of Rs. 1.40 crores for purchasing the alternative property.
>
> L.C. question. When such demand was made?.
>
> ANS. The demand was made as per commitment of the plaintiff on 20.2.2008 and repeated again on telephone after 3-4 days to the Defendant.
>
> **xxx** **xxx** **xxx**

Q. Was any minutes of meeting as told by you were reduced into writing and what was the result of that meeting?

Ans. In the meeting it was represented by the Plaintiff Subhas Aggarwal on 2nd/3rd March, 2008 that it was the month of March, closing of the financial year. He was arranging the payment. The payment will be arranged within 10-15 days. The minutes of the meeting were not reduced in the writing.

Q. I suggest to you that the story regarding the meeting and assurance by Subhash Aggarwal as deposed by you is your concoction. No such meeting happened nor any assurance ever made. Even this fact has not been mentioned in your examination-in-chief in Ex DWl/A.

Ans. It is incorrect. (At this stage the witness is given an opportunity through counsel to look into the affidavit and point out, if in the affidavit any such fact is mentioned) .

Q. Is it correct that you were paid Rs. 30 lacs on 24.3.2008?

Ans. It is correct. The payment was given to me by Sh. Raj Kumar Tejwani.

It is incorrect to suggest that payment of Rs. 30 lacs was given to me by plaintiff Subhash Aggarwal directly. It is incorrect to suggest that payment was not given to me through Sh. R.K. Tejwani.

Q. I put it to you that Rs. 30 lacs received by you from the plaintiff on 24.3.2008 was in pursuance of your representation to buy other property?

Ans. My demand was of Rs. 1.40 crores for purchase of alternate property. With what understanding the plaintiff Subhash Aggarwal gave Rs. 30 lacs on 24.3.08 through Sh. R.K. Tejwani, I am not aware. Vol. I was given Rs. 30 lacs and my demand was not adhered to. While giving me Rs. 30 lacs R.K. Tejwani told me that the balance amount would be arranged shortly.

Q. I put it to you please tell the court on what account you received Rs. 30 lacs?

Ans. I was to receive the balance money. The money belonged to me for the sale of the property. I received the money towards sale of the property.

Q. Did you make in a writing to the plaintiff that you were given Rs. 30 lacs only and the balance 1.10 crores have not been given to you?

Ans. No writing was done. Everything was done on good faith.

Q. When Mr. Tejwani told you about the loss of papers as stated by you in paragraph 5 of your affidavit and did he tell in what manner he lost the papers?

Ans. Mr. Tejwani told me on 24.3.2008 when he made the payment of Rs. 30 lacs. Mr. Tejwani did not tell me how and in what manner there was loss of papers.

Q. I put it to you that you never made any inquiry or sought any information in writing from R.K. Tejwani about the alleged loss of paper regarding conversion of property from leasehold to freehold from 22.1.2008 till 24.3.2008?.

The question be modified as the story of loss of paper as per deposition of the witness has come to the knowledge of the witness on 24.3.08. The question of any inquiry prior to 24.3.08 does not arise. Let question be modified.

Q. I put it to you that you also never made any inquiry in writing with regard to submission of papers with regard to conversion of the property submitted to DDA or result thereof from R.K. Tejwani from 22.1.2008 till 24.3.2008?

Ans. I did not make any enquiry either oral or in writing from R.K. Tejwani regarding the papers of conversion to be submitted/submitted to the DDA or result thereof prior to 24.3.2008.

xxx **xxx** **xxx**

Vol. When on 24.3.2008 when R.K. Tejwani told me that the papers had been lost, I inquired of him that he was informing me about this after two months. I questioned him when you will obtain my signatures and when you will submit the papers to DDA. To this R.K. Tejwani told me that it his job and that I should not get worry about the same.

Q. I put it to you that whether you took any legal action against R.K. Tejwani for his negligence as referred by you above regarding loss of conversion papers by him?

Ans. No.

xxx **xxx** **xxx**

Q. Is it correct that since entering of deal with the plaintiff till date you and your brother i.e. Defendants never attempted personally to get the property converted into freehold to DDA and get the same mutated in the DDA?

Ans. We did not get the property mutated or converted in our names till date.

Q. Did Defendants receive any notice regarding mutation /conversion from DDA since Jan, 2008 till date?

Ans. No.

We did not make any enquiry from DDA regarding mutation /conversion since Jan, 2008 till date.

I do not have any written proof with me with regard to plaintiff assuring or promising to me payment of 1,10,00,000/- to Defendants at the time of signing of second set of documents for conversion. I do not have j any acknowledgment in writing from plaintiff/R.K. Tejwani regarding Defendants delivering second set of documents for conversion.

Q. What you suspected in your mind while getting the photocopies made of the documents delivered second time.?

Ans. I got the photocopy done because only one month was left and documents which were given two months earlier but nothing was done.

Q. I put it to you that the Defendants never personally accompanied Sh. R.K. Tejwani for submissions and getting necessary orders regarding conversion of the property to freehold ?

Ans. Defendants did not go.

The Defendants did not give any writing /notice regarding non-payment of Rs. 1,10,00,000/- but talked orally. The Defendant did not refuse signing documents second time for non-payment of Rs. 1,10,00,000/- because plaintiff has assured payment in one or two days. Defendants did not give any notice in writing after expiry of two days regarding Rs. 1.10 crores.

It is wrong to suggest that all the allegations made in para 5 & 6 of my affidavit Ex DW l/A are false, baseless and cooked up. It is wrong to suggest that plaintiff and or Sh. R.K. Tejwani never got any set of documents which have been marked as Ex DW 1/1 to DW 1/8 signed from Defendants on 1.4.2008 or at any other time."

17.9. Furthermore, while the defendants have relied upon the documents Ex. DW-1/1 to DW-1/8 [which are photocopies] in support of the plea that the said documents were executed for submission to DDA for having the suit property converted to freehold, there is nothing by way of evidence on record that R.K.

Tejwani received the documents. As a matter of fact, apropos the notice for production of documents dated 29.08.2012 [Ex DW 1/A] served upon R.K. Tejwani by Mr. Rakesh Choudhary, the advocate for the defendants, the defendant no. 1 [DW-1] stated the following.

Mr. Mahinder Pal Chhabra [DW-1]

> "Q. Please see documents Ex DW 1/A dated 29.8.2012. Did you issue any notice /writing to Sh. R.K. Tejwani for return of the documents given by you for conversion of the property from leasehold to freehold as deposed by you.
>
> Ans. I did not write or give any notice. Vol. I told orally to Mr. R.K. Tejwani for return of documents.
>
> I demanded orally once or twice but I cannot tell the date, time and place. No other legal person was present when I asked for the return of documents of conversion.
>
> It is incorrect to suggest that with a view to create false evidence I got issued notice Ex DW 1/A. The DW 1/A was sent by the Advocate Sh. Rakesh Chaudhary. I do not have any A.D. of the notice. I am not aware, if notice reached Sh. R.K. Tejwani or not. I have not filed any legal action against Sh. R.K. Tejwani for return of documents."

18. Likewise, in relation to DW-1/1 to DW-1/8, defendant no. 1 had following to state.

> "Q. Can you tell why you have not got completed the entire set of doc\aments which has been marked as Ex DW 1/1 to DW 1/8 and then took photocopies of the same instead of only blank?
>
> The question may be modified as document DW 1/1 is not blank, document Ex DW 1/4 is executed although not witnessed. Affidavit DW 1/5 to DW 1/8 are duly signed but not attested. DW 1/2 is only blank. The question may be answered with respect to DW 1/2.
>
> Now further question why did you not obtain copy of document when it was duly filled, got witnessed and affidavit attested.

Ans. I did not demand photocopies of documents from Sh. R.K. Tejwani duly filled and duly attested and witnessed.

It is wrong to suggest that all the set of documents DW 1/1 to DW 1/8 have been created by me to raise a false defence with ulterior motives. I do not have any writing regarding the facts stated in paragraph 13 of my affidavit. From my side I was alone. I have not returned 90 lacs to the plaintiff. I would have returned the said amount if the plaintiff insisted. It is wrong to suggest that I was not having 90 lacs at my command on 22nd June, 2008. The cash amount of Rs. 90 lacs which the plaintiff had given to me was available to me on 22.6.2008. I do not want to tell where this money was with me on that date, certainly it was not in the bank. I did not give any notice in writing to the plaintiff to take back the money as stated by me in paragraph 13 i.e. the plaintiff had no money to complete the transaction, the plaintiff was asked for return of money and to take back the money, failing which the money would be forfeited."

18.1. The argument advanced on behalf of the defendants that R.K. Tejwani was assigned the task of getting the suit property converted to freehold and for that purpose, Rs. 2,00,000 were paid to him or that the defendants signed the documents twice, the first time around on 22.01.2008, and thereafter on 01.04.2008 is not sustainable as neither is there any evidence on record to that effect nor is the evidence that has submitted, whether in the form of testimony of DW-1 or documents, reliable or credible.

18.2. This conclusion is fortified by adverting to the evidence of the DDA official Mr. Balraj Singh [DW-2] which is extracted hereafter. A perusal of DW-2's testimony would show that the relevant documents necessary for conversion were never filed with DDA. In the ordinary course of things, one would have expected the defendants to enquire as to what was the status of the conversion application if, as contended before me, that Tejwani's were assigned this task. The testimony of defendant no. 1/DW-1, on this aspect of the matter, which is also extracted hereinbelow, does point in the direction that the defence set up that Tejwani's, in particular, Mr. R.K. Tejwani was tasked with the responsibility of getting the suit property converted to freehold was without substance, to say the least.

Evidence showcasing the tenuous stand of the defendants: -

Mr. Balraj Singh [DW-2]

> "Application for conversion Ex. DW1/2 in the form of brochure is issued by DDA. The brochure includes Ex. DW1/3. The document Ex. DW1/2 &Ex. DW1/3 has not been submitted to the DDA as I do not find the same in the allotment file which 1 have brought today. Brochure is issued by the Sale Counter of DDA. No record for the issuance of the brochure is maintained in the DDA which I state off the record. PR Cell can correctly tell about this.
>
> XXXXX by Ms. Rachana Aggarwal, Advocates for the Plaintiff.
>
> It is correct that form of brochure can be purchased from the Sale Counter of DDA or designated Banks on payment of charges. **1 cannot tell to which year and month the application Ex. DW1/2 and DW1/3 relates. I have no personal knowledge of the application form Ex. DW1/2 and DW1/3 mentioned in the record of the case. The application for conversion is filed aiongwith the documents mentioned along with brochure. Had the application been submitted to the DDA, then application must have reached the allotment file which I have brought today**."

[Emphasis is mine]

Mr. Mahinder Pal Chhabra [DW-1]

> "I had demanded the receipt of documents submitted to DDA by Sh. Tejwani which he did not give and stated that the same was with his brother. He will obtain from him and deliver to me. The name of his brother is Sh. Ashok Kumar. I had demanded the receipt from Tejwani either at the end of January, 2008 or in the first week of Feb, 2008 on telephone. Receipt was never brought to me. **I did not give any notice or letter in writing to Sh. Tejwani or Sh. Ashok Tejwani for not delivering the receipt obtained from DDA regarding conversion of property. I did not ever go to DDA to check if application for conversion was submitted to DDA since Mr.**

R.K. Tejwani had undertaken the responsibility. My brother also did not check as I was directly involved in the matter. I was mainly responsible for dealing with the plaintiff but I had done everything with the consent of my brother and his knowledge. I did riot make any further payment to Sh. Raj Kumar Tejwani or the plaintiff regarding conversion from leasehold to freehold. **I did not give any power of attorney or any authority letter either to Sh. Tejwani or to plaintiff regarding conversion for dealing with DDA on our behalf**.

Q. I suggest you that you do not know and can not give particulars of specific transaction in which father and brother of R.K. Tejwani were involved in getting any property converted from leasehold to freehold?

Ans. I am not aware whose work father and brother of Raj Kiomar Tejwani got gone in the matter of conversion of property.

I had never any direct dealing with the father and brother of Sh. Tejwani. I had not sought details of Rs. 2 lacs where and what manner such amount could be incurred by Tejwani's. Vol. I was only told that conversion involved and expenditure of 2.5 lacs. Out of which 1.28 lacs or so would be deposited in DDA. I did not sign any challan nor my brother regarding deposit of money to DDA."

[Emphasis is mine]

18.3. What makes me doubt the defence set up by the defendants is their stance [as taken by defendant no. 1 in his testimony] that he would have returned Rs. 90,00,000 had the plaintiff insisted and that he never once gave any notice to the plaintiff to pay the balance amount or suffer forfeiture of the earnest money paid by him. A perusal of the following part of DW-1's testimony establishes the same.

Mr. Mahinder Pal Chhabra [DW-1]

"Q. I suggest it to you that you never gave any notice in writing for failing of the plaintiff to pay the balance amount and my claim of forfeiture of the earnest money.

A I did not give any notice in writing to this effect.

Q. Is it correct that the agreement dated 22.1.2008 Ex. P4 between you and the plaintiff contained the writing, " that the first party has agreed above shall get the mutation and freehold done before the final date of payment i.e. 10.05.2008. the final payment will be made after the conversion and mutation of above mentioned property is completed" as mentioned in para No. 6 that the first party shall deliver all the original documents relating to the said property to the second party at the time of final payment of the sale consideration by the second party or at the time of registration of Sale-Deed in the office of concerned Sub-Registrar" as mentioned in para 7?

A It is correct.

xxx **xxx** **xxx**

Q. Is it correct that you defendant never gave any notice in writing to the plaintiff that you are willing to execute the sale deed and deliver vacant possession of the suit property?

A It is correct. I did not sent any such notice in writing."

18.4. What makes the plaintiff's case believable that he was willing to complete the subject sale transaction is the fact that when notice dated 16.07.2008 [Ex. P-2] was served on the defendants, they chose not to respond to the same. The plea put forth by the defendants was that they chose not to reply to the said notice as talks were going on between the parties, presumably, for settling the matter. The relevant part of defendant no. 1's [DW-1] testimony is extracted hereafter.

"Q. Is it correct that you and your brother never gave any reply to the notice dated 16.7.2008 Ex. P2 given on behalf of the plaintiff before filing the present suit?

A It is correct that we did not reply to the notice but it was not intentional. The reason was that the talks were going between two parties and the plaintiff represented that the notice was formal.

It is incorrect to suggest that the notice was not replied because we have no defence to the averments made in that notice."

18.5. Furthermore, there appears to be some truth in the submission made on behalf of the plaintiff that the defendants entered into the ATS in January 2008, perhaps to garner funds to perform the marriage of their daughters. The defendant no. 1 [DW-1] has admitted, to the fact, that his daughter one, Ms. Shally and his niece one, Ms. Neelu were married in February 2008 and that the marriage proposal was settled in October-November 2007 with dates fixed for performance of marriage in January 2008.

> "… It is correct that my daughter Shally was married in February 2008. The daughter Neelu of my brother was also married in February 2008. The marriage was settled sometime in October-November, 2007. The dates of marriage were fixed sometime in January 2008."

18.6. As noticed hereinabove, the defendants had attempted to establish that Mr. R.K. Tejwani was handed over Rs. 2,00,000/- on 22.01.2008 to have the suit property converted by filing a civil suit i.e. CS No. 864/2009 with the district court in Delhi, which was dismissed by a reasoned judgement dated 09.02.2017. This judgement has attained finality and thus, in my view, closed any argument advanced on behalf of the defendants on this aspect of the matter.

19. This brings me to the other aspect of the matter as to whether the plaintiff was ready to pay the balance sale consideration during the relevant period i.e. commencing from the date on which ATS was executed up until today. The plaintiff, in this behalf, had stated that he had rental income available of nearly Rs. 47,70,060/-

19.1. The plaintiff, in this context, has *inter alia* placed reliance on the ITRs filed by him both as an individual as well as Karta of the HUF in pursuance of the order dated 19.11.2015, passed by this Court.

19.2. A perusal of the profit & loss account and balance sheet appended to the ITR for the financial year 2006-2007 [AY 2007-2008] would show that the plaintiff not only earned a substantial rental income but also had shares in immovable assets. [See: Ex.DW1/PX4].

19.3. It is to be borne in mind that the immovable assets are ordinarily shown in the balance sheet at book value and that their market value could be much higher. The fact that the building located at 29/4, Shakti Nagar, Delhi obtained an annual rent of Rs. 47 lakhs would show that it would have, approximately, a value of Rs. 9.40 crores if a rate of return of even 5% in the form of rent is taken into account.

Assessee	Subhash Chand Aggarwal		Assessee	Subhash Chand Aggarwal (H.U.F)	
Particulars	Income Tax Return FY 2006-07	Income Tax Return FY 2007-08	Particulars	Income Tax Return FY 2006-07	Income Tax Return FY 2007-08
(A)Rent received from following immovable properties: (i) 29/4, Nangia Park, Shakti Nagar, Delhi-110007 (B) Income from shares	 17, 52,500	 47,40,060 9,01,759	(A)Rent received from following immovable properties: (i) C-3, Ashok Vihar, PH-I, Delhi-110052 (ii) 91/7, Wazirpur Industrial area,		 13,11,000 3,13,500

(C) Net profit as per profit and loss a/c	17,50,280		Delhi-110052 (iii) C-14, Second floor, South Ext-II, New Delhi, Delhi-110049 (iv) Shree Sawan Knowledge Park, D-507, T.T.C Industrial Area, MIDC, Turbhe, Navi Mumbai, Maharashtra-400705 (B) Net profit as per profit and loss a/c		1,67,318 5,82, 413 16,55,462
	Balance Sheet as on 31.03.2007	Balance Sheet as on 31.03.2008		Balance Sheet as on 31.03.2007	Balance Sheet as on 31.03.2008
(A)Fixed assets (i) 29/4, Nangia Park, Shakti Nagar, Delhi-110007 (ii) C-2/29, Ashok Vihar, PH-II, Delhi-	 35,54,140 3,51,000	 35,54,140 11,42,689	(A)Fixed assets (i)Agricultural Land (20% share) Main Road Palla, Bakhtawarpur, Delhi-110036 (ii) C-2/29,		 27,83,906 41,02,417

Signature Not Verified
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By:VIPIN KUMAR RAI
Signing Date:16.02.2021
12:06:31

110052 (25% Share)			Ashok Vihar, PH-II, Delhi-110052		
(iii) Plot at Kundli	14,17,500	14,25,100	(iii)C 91/7, Factory (30% share), Wazirpur Industrial Area, Delhi-110052		48,62,000
(B)Investment in PPF	12,01,458				
(C) UTI Bank S/B	3,87,090	13,68,041	(B)Investment in PPF		4,10,664
(D) Loans and advances			(C)Current assets		3,93,021
(i)Manoj Kumar c/o Chabra Bhai		12,00,000	Axis Bank		
(ii)Nitika Aggarwal		5,00,000			
(iii) Skylark Industries		2,20,740			

19.4. The aforesaid would show that the plaintiff had the necessary wherewithal to pay the balance sale consideration. It is established law that in demonstrating to the Court, in an action for specific performance, that the plaintiff has the financial capacity to fulfil the bargain, he is not required to place before the Court a stitched-up scheme of finance. All that the plaintiff is required to demonstrate is that he has the necessary financial wherewithal. [See: ***Bank of India, Limited, and Others vs. Jamsetji A.H. Chinoy and***

Messrs. Chinoy and Company[3], 1949 SCC OnLine PC 81; followed by the Supreme Court in ***Nathulal vs. Phoolchand***[4], 1970 SCR (2) 854]

19.5. There is, thus, to my mind, enough evidence placed on record that the plaintiff had the means of obtaining funds to pay the balance sale consideration contrary to the contention advanced on behalf of the defendants.

19.6. The other argument advanced on behalf of the defendants that there was an oral agreement, whereby, the ATS was modified, in my view, does not, in any manner, advance the case of the defendants.

19.7. All that which has emerged from the evidence is the fact that on 24.03.2008 after the ATS was executed on 22.01.2008 [Ex. P-4], Rs. 30,00,000/- was paid by the plaintiff to the defendants. This transaction is recorded in Ex. P-1 and, as indicated hereinabove, bears the signatures of Mr.

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[3] "… The question is one of fact, and in the present case the Appellate Court had ample material on which to found the view it reached. Their Lordships would only add in this connexion that they fully concur with Chagla A.C.J. when he says: "In my opinion, on the evidence already on record it was sufficient for the court to come to the conclusion that the first plaintiff was ready and willing to perform his part of the contract. It was not necessary for him to work out actual figures and satisfy the court what specific amount a bank would have advanced on the mortgage of his property and the pledge of these shares. I do not think that any jury—if the matter was left to the jury in England—would have come to the conclusion that a man, in the position in which the plaintiff was, was not ready and willing to pay the purchase price of the shares which he had bought from defendants Nos. 1 and 2.""

[4] "6. Phoolchand could be called upon to pay the balance of the price only after Nathulal performed his part of the contract. Phoolchand had an outstanding arrangement with his Banker to enable him to draw the amount needed by him for payment to Nathulal. To prove himself ready and willing a purchaser has not necessarily to produce the money or to vouch a concluded scheme for financing the transaction: Bank of India Ltd. v. Jamsetji A.H. Chinoy and Messrs. Chinoy and Company [LR 77 IA 76,91]."

R.K. Tejwani [PW-3]. The document has been admitted by the defendant no. 1 [DW-1] although the same has been denied by defendant no. 2. In the common written statement or the written statement filed by defendant no. 1, after the amendment of the plaint, does not allude to modification of the ATS [Ex. P-4]. There is only a vague assertion both in the common written statement as well as the written statement filed by defendant no. 1, that the plaintiff made an oral promise to pay Rs. 1,40,00,000/-. If there was a modification/renegotiation of the ATS, as contended on behalf of defendant no. 1, then, in the very least, the contours of the renegotiated agreement should have been spelled out in the written statement(s).

19.8. At this juncture, I must deal with the submission advanced on behalf of defendant no. 1 that evidence could be led as to the existence of an oral agreement entered into between the parties to modify a written contract. The argument advanced was that the receipt dated 24.03.2008 which recorded payment of Rs. 30,00,000/- by the plaintiff to the defendants could be read as evidence of modification of the ATS. In my opinion, one cannot quibble with the proposition that a party can lead evidence to prove existence of a distinct subsequent oral agreement which modifies a written contract, save and except, where the contract is by law required to be in writing or has been registered according to the law in force, for the time being, as to the registration of documents. This is what emerges on a plain reading of proviso (4) to Section 92 of the Evidence Act. That being said, in the instant case, as noted above, there is neither any pleading, nor any evidence, which would show that the

ATS was modified or renegotiated. This was also what the Supreme Court ultimately found [i.e. lack of evidence] in ***Niranjan Kumar and Others vs. Dhyan Singh and Another***, AIR 1976 SC 2400 which was relied upon by Mr. Singh.

19.9. Furthermore, none of the defendants, as noticed above, responded to the plaintiff's legal notice dated 16.07.2008 [Ex. P-2] in which there is a reference to this aspect of the matter. The fact that the defendants chose not to respond to the aforementioned legal notice and went on to propound a case that there has been a modification of the ATS, by an oral agreement, at the stage of trial when it finds no mention in the pleadings, shows not only that it was an afterthought but it has no weight in law.

20. The fact that payment of balance consideration was accelerated by payment of an additional tranche of Rs. 30 lakhs cannot help the cause of the defendants as there is nothing on record to show that any fundamental change was brought about either *qua* the obligation cast on the defendants under Clause 6 of the ATS [Ex. P-4] which required them to have the property mutated and converted into freehold or, that the plaintiff had committed that he would pay over and above Rs. 30,00,000/- another sum of Rs. 1,10,00,000/-.

21. It may also be relevant to point out that the plaintiff has acted with due alacrity, inasmuch as within three (3) months of the deadline of 10.05.2008 provided in the ATS having been crossed, the instant suit was filed, which was interspersed with the legal notice dated 16.07.2008. To my mind, if anyone has

procrastinated in the consummation of the sale transaction, it is definitely the defendants.

22. I must also reject the argument of prejudice advanced on behalf of defendant no. 1 that the plaintiff was a builder and therefore was only interested in blocking the sale of the suit property by paying the earnest money and selling the same to a third party at a premium. The evidence on record is that while the plaintiff at some point in time was in the business of construction, this business was closed and that he earned his living by carrying out sale of cycle and cycle-parts/accessories under the aegis of an entity known as M/s Commercial Agency. Even if I were to assume that the plaintiff was a builder, that by itself, cannot be the reason of denying him the relief, if he is otherwise entitled in law, by stereotyping all builders as persons who are out to fleece those with whom they enter into transactions.

22.1. The other argument advanced on behalf of defendant no. 1 that the discretion vested in the Court to grant specific performance should not be exercised in favour of the plaintiff also, has no merit, in view of the fact that there are no averments made, to the effect, that if such a relief is granted, the defendants would suffer hardship. On the contrary, the testimony of defendant no. 1 demonstrates that the only reason he did not refund Rs. 90,00,000/- to the plaintiff was because the plaintiff did not insist that it be returned. In my view, the plaintiff ought not to be deprived of the relief of specific performance, in the facts and circumstances of this case. In this context, it is pertinent to bear in mind that the plaintiff has already forked out a substantial amount i.e. Rs.

90,00,000/- which is nearly 15% of the total consideration, and that too, as far back as in early 2008. On the other hand, the defendants have retained the money and made good use of the same and, in fact, resisted its refund when they had an opportunity to do so in 2010. It is, perhaps, for this reason that the plaintiff declined the offer made on behalf of defendant no. 1, in the course of the final hearing in the matter, to return Rs. 90,00,000/- to him. The fact that the suit could not culminate earlier cannot be the reason, in my opinion, to deny the plaintiff the relief which he is, otherwise, entitled to in law.

Conclusion: -

23. Thus, having regard to the aforesaid, my answer to the issues framed is as follows.

23.1. Issue no. 1: The plaintiff, in my view, is entitled to a decree of specific performance in respect of the ATS entered into between the parties.

23.2. Issue no. 2: The plaintiff did pay Rs. 30,00,000/- to the defendants as evidenced by the receipt dated 24.03.2008 [Ex. P-1]. There is, however, no evidence on record that this payment was made under an oral agreement which modified the ATS. In other words, the fundamental terms of the ATS, which included the obligation undertaken by the defendants, that they will have the suit property mutated and converted to freehold was not modified or altered.

23.3. Issue no. 3: Given the foregoing discussion, I am inclined to agree with the plaintiff that this is a fit case, in which, I should exercise my discretion both, in consonance with equity and law, in his favour, and pass a decree of specific performance.

24. Consequently, a decree of specific performance is granted, as prayed, in favour of the plaintiff and against the defendants *qua* the ATS. The plaintiff will pay the balance sale consideration amounting to Rs. 5,21,00,000/- at the time of registration of the sale deed before the concerned Sub-Registrar. Before the defendants execute the sale deed, they shall get the suit property mutated in their name and have the same converted from leasehold to freehold. In the event, the defendants fail to execute the sale deed concerning the suit property, in favour of the plaintiff, he will be entitled to get the sale deed executed by taking recourse to the provisions of Order XXI Rule 32 of the CPC. In such a situation, the balance sale consideration will be deposited by the plaintiff with the Registry of this Court. Before monies are released to the defendants', adjustment will be made in respect of expenses incurred towards mutation, conversion and other charges that they were required to incur, to pass on to the plaintiff, a good and clear title to the suit property.

25. The cost will follow the result of the suit. A decree sheet will be prepared accordingly.

26. The instant suit is disposed of in the aforesaid terms. The pending application(s) shall stand closed. The case papers will be consigned to record.

RAJIV SHAKDHER, J

FEBRUARY 15, 2021

<u>*Click here to check corrigendum, if any*</u>