

* IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 06th March, 2023
Pronounced on: 19th April, 2023

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RFA(OS) 74/2019 & CM APPL. 36005/2019

DEVENDERJEET SINGH SETHI Appellant
Through: Mr. Arun Vohra & Mr. Dilip
Kumar, Advocates.

versus

OM PRAKASH ARORA & ORS. Respondents
Through: Mr. Tarun Diwan & Ms. Pyari,
Advocates for R-1 & 2.
Mr. Sunil Dalal, Sr. Advocate with
Mr. Hirein Sharma, Ms. Sonali
Gupta, Ms. Manisha Saroha, Mr.
Pratibha Varun & Mr. Nikhil
Beniwal, Advocates for R-3.

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T

NEENA BANSAL KRISHNA, J

1. The appellant (who was the plaintiff in the suit) has challenged the Judgement dated 01.07.2019 whereby his suit for Specific Performance of the Agreement to Sell dated 05.03.2010 and Permanent Injunction, has been dismissed.

2. **Facts in brief** are that Shri Jeevan Dass, father of the respondents (*who were the defendants in the original suit*), was the recorded owner of the premises bearing no. 7/13 Roop Nagar, Delhi-110007 admeasuring about 515 square yards (*hereinafter referred to as "the suit property"*). He

died intestate on 13.03.1979 leaving behind his legal heirs i.e, his sons and daughters who relinquished their legal rights in the suit property in favour of the mother, Smt. Ram Pyari, who became the owner of the suit property. Smt. Ram Pyari died on 22.09.1999 leaving behind a registered Will dated 08.01.1981 bequeathing the suit property in favour of respondent nos. 1 to 3. The suit property was accordingly mutated in favour of the three respondents *vide* Mutation Letter No. TAX/CLZ/CENRANGE/04-392 dated 21.06.2005 on the basis of the Will of late Smt. Ram Pyari and the No Objection Certificates given by other legal heirs of late Smt. Ram Pyari.

3. The appellant (*who was the plaintiff in the original suit*) entered into an Agreement to Sell dated 05.03.2010 with the respondents No.1 to 3 in respect of the suit property for a sale consideration of Rs. 10,42,50,000/-. It was informed by respondent no. 1&2 that though *No Objection Certificates* have already been given by the other legal heirs of Smt. Ram Pyari, and they had no title interest in the suit property, but fresh *No Objection Certificates* of the other legal heirs shall still be provided to the appellant. Both respondent nos. 1 and 2 also informed the appellant that respondent no. 3, who was based in the US, was likely to travel to India shortly and that they both were fully authorised and competent to conclude the sale transaction on his behalf. Due consent and confirmation was taken from respondent no. 3 telephonically by respondent nos. 1 and 2, in the presence of the appellant. Accordingly, Rs. 5,00,000/- was paid by the appellant as an advance sale consideration for which formal Receipt-cum-Agreement dated 05.03.2010 was signed and executed by Respondents no. 1 and 2 acknowledging and confirming

the sale transaction in respect of the suit property which was duly witnessed by two brokers, namely Gagan Makkar and Harmeet Singh. In terms of the Reciept-cum-Agreement to Sell, the final date for payment of balance consideration was agreed to be on or before 05.10.2010.

4. The appellant claimed that with a view to further effectuate the agreed sale transaction, he made a further payment of Rs. 45,00,000/- in cash to respondent nos. 1 and 2 on 15.06.2010 in the presence of the broker Sh. Harmeet Singh and his cousin, Sh. Hardev Singh Suri. In good faith, the appellant did not insist upon issuing of receipt of the said payment as respondent nos. 1 and 2 represented and assured the appellant that the respondent no. 3 was travelling to India shortly and that they would jointly execute and issue the receipt. They also assured the appellant that they had obtained fresh *No Objection Certificates* from the other legal heirs of Late Smt. Ram Pyari.

5. However, Respondent no. 3 turned dishonest and started correspondence with his broker, Shri. Gagan Makkar through e-mails. He made vague and evasive proposals demanding modification/variation in the consideration amount for the sale transaction. The appellant on becoming aware of the same, confronted respondent nos. 1 and 2. He also sent a Legal Notice dated 01.09.2010 calling upon respondents to execute the Agreement to Sell and to hand over the vacant, peaceful and physical possession of the suit property on or before 05.10.2010 and also expressed that he was ready and willing to pay the balance consideration amount of Rs. 9,92,50,000/-.

6. The respondents failed to give any reply to the Legal Notice dated 01.09.2010. The appellant considering the evasive conduct of the

respondents, issued a Public Notice dated 22.09.2010 in English and Hindi Editions of “The Hindustan Times”. Thereafter, several correspondences were exchanged between the parties whereby Respondents no. 1 and 2 acknowledged sale transaction for a sale consideration of Rs. 10,42,50,000/- and of having received Rs. 5,00,000/- towards the advance amount. The confirmation by respondent no. 3 of the sale transaction with the balance amount to be paid on or before 05.10.2010, was also acknowledged. However, the respondents denied having received Rs. 45,00,000/-.

7. In the meanwhile, the respondent nos. 1 and 2 called upon the appellant *vide* Letter dated 23.09.2010 to prove his readiness and willingness to complete the sale transaction within the time frame, failing which they claimed that they would forfeit the advance money. They also filed a caveat petition before this Court.

8. The appellant responded *vide* Letter dated 30.09.2010 denied the averments made by the respondent nos. 1 and 2 and reiterated his readiness and willingness to pay the balance amount of the sale consideration. The appellant also provided details of three separate Pay Orders/ Drafts dated 29.09.2010 in favour of the three respondents specifying the amounts and the Bankers name and the drafts numbers.

9. The respondents no. 1 and 2 through their counsels responded *vide* their Letter dated 01.10.2010 making vague and evasive denial of the facts stated in the appellant’s Letter. The respondent nos. 1 and 2 also questioned the authenticity of the three Pay Orders/ Demand Drafts as merely draft numbers totalling to Rs. 9,92,50,000/- were mentioned without enclosing the copies of the Drafts along with the Letter.

10. The appellant/appellant herein *vide* its Letter dated 08.10.2010 reiterated the contents of his earlier Letter and enclosed the copies of the Bank Drafts. He also called upon the respondents to intimate him in writing about the date of arrival of Respondent no. 3 from USA along with his valid travel documents, date on which the suit property shall be vacated, and the status of *No Objection Certificates* from all the other legal heirs of the Late Smt. Ram Pyari so as to enable him to purchase the requisite Stamp Papers for the Sale Deed and proceed for its execution, signing and registration.

11. The appellant had claimed that Respondent nos. 1 and 2 through the Letter dated 18.10.2010 made vague and evasive allegations that appellant had no funds to perform his part of the Contract despite having been given photocopies of the three Demand Drafts/Pay Orders. The respondents further raised an untenable objection of it being a Benami Transaction. The appellant made all possible efforts to prevail upon the respondents to perform their part of sale transaction in terms of the admitted receipt-cum-Agreement dated 05.09.2010, but to no avail. Hence, the appellant filed the suit for specific performance and injunction.

12. The **respondent nos. 1 and 2 in their written statement** claimed that the appellant had no source of money to show his readiness and willingness to pay the balance sale consideration. They denied having received Rs. 45,00,000/- in cash as claimed by the appellant. Further, only the photocopies of three drafts worth Rs. 9,92,50,000/- drawn from the account of one Shree Ganesh Jewellery House Ltd. who was not a party or privy to the transaction and with whom the appellant had no concern, were forwarded by the appellant along with his Legal Notice. Moreover,

the said Company was not engaged in the business of housing finance. Respondent nos. 1 and 2 therefore, refused to accept the payment on the ground that the amount tendered by way of Bank Drafts was less than the balance sale consideration agreed upon by the parties and they were the drafts of Shree Ganesh Jewellery House Ltd. which was a Benami transaction hit by Section 3 read with Section 2(a) of Benami Transaction (Prohibition), Act 1998.

13. The **respondent no. 3 in his written statement** contended that the suit was not maintainable against him as he was not a signatory to the Receipt-cum-Agreement dated 05.03.2010. He denied having given consent to the sale of the suit property. He also asserted that appellant had no money to purchase the suit property, and that the drafts of money tendered were of a third party with whom the respondents had no privity of contract.

14. The appellant in his respective **replication** to the Written Statements, reaffirmed his assertions.

15. The **issues** were framed on the pleadings on 24.07.2012 which read as under:

“1. Whether the appellant is entitled to the relief of specific performance of the Agreement to Sell dated 5.3.2010 in respect of the property bearing No.7/13, Roop Nagar, Delhi-110007? OPP

2. Whether the appellant had been ready and willing and is ready and willing to perform his part of the Agreement? OPP

3. Whether the appellant is entitled for a decree of permanent injunction, as prayed for? OPP

4. Whether the appellant has paid a sum of Rs. 45.00 lacs in cash to Defendants No. 1 & 2 on 15.6.2010? OPP

5. Whether the transaction by the appellant is a Benami

transaction? OPD

6. Relief”

16. Additional issues were framed on 06.03.2013 which read as under:

“7). Whether the defendant No.3 is not bound by the alleged Receipt-cum-agreement to Sell dated 5.3.2010 signed by the appellant and the Defendant No. 1 & 2? (OPD-3)

8). If issue No.7 is decided in the affirmative, whether the present suit is not maintainable against the Defendant No.3? (OPD-3)”

17. The appellant in support of his case, examined himself as **PW-1** and **PW-2, Shri Harmeet Singh** and **PW-3, Shri Gaggan Makkar**, the two brokers who have deposed about the sale transaction as narrated above.

18. **D1W1, Shri Vijay Kumar Arora**, representative of the respondents no.1&2, deposed in their support.

19. **D1W2 Sh. Prabhas Kumar, Assistant Manager, Standard Chartered Bank** produced the account details of Shree Ganesh Jewellery House Limited Ex. D1W2/A, and also produced Letter dated 08.10.2010, Ex. D1W2/E, written by Shree Ganesh Jewellery House Limited to the Bank Manager requesting for the cancellation of the three demand drafts.

20. **No evidence was led by respondent no. 3.**

21. The learned Single Judge in its impugned Judgement came to the conclusion that the appellant had not been able to prove that the payment of Rs. 45,00,000/- towards part sale consideration and was also not able to prove his readiness and willingness to perform the Contract and *vide* impugned Judgement the suit was dismissed.

22. Aggrieved by the dismissal of the suit, the present appeal has been filed.

23. **The main ground of challenge** agitated by the appellant are that the final date of concluding the transaction was on or before 05.10.2010, but before that, the respondents raised *non-est* issues and failed to comply with the terms of the Agreement-cum-Receipt, compelling the appellant to file the present suit on 12.11.2010 i.e. within the period of 45 days fixed for performance. The appellant offered before the Court to deposit a sum of Rs.9,92,50,000/- without prejudice to his rights and without going into the question of payment of Rs. 45,00,000/- claimed to have been paid in cash, but the respondents did not agree and status quo was directed to be maintained by the Court *viz-a-viz* the suit property.

24. It is argued that the appellant was ready and willing to perform his part of the contract before the agreed date of completion and had also sent copies of three drafts for a total balance amount of Rs. 9,92,50,000/- after adjusting Rs. 50,00,000/- which had already been paid. Initially, the details of the draft were sent but subsequently to establish the bona fide, the photocopy of the drafts was also sent to the respondents. The learned Single Judge has failed to appreciate the testimony of the appellant and the two brokers in regard to payment of Rs. 45,00,000/- and has erroneously concluded that the amount of Rs. 45,00,000/- had not been paid by the appellant to the defendants. Moreover, the tender of remaining balance amount through the three drafts dated 29.09.2010 and their cancellation on 11.10.2010 after they were refused to be accepted by the respondents, has not been appreciated in the right perspective,. The date of preparation and date of cancellation of Drafts were duly proved by D1W2, Prabhas Kumar, Assistant Manager from Standard Chartered Bank. The issue of Benami Transaction has also not been appreciated in

the right perspective. The impugned Judgement is therefore, liable to be set aside.

25. **The respondent nos. 1 and 2**, in their written submissions, pointed out the inconsistency in the testimony of the Appellant's own witness PW3, Shri Gagan Makkar apropos the alleged payment of Rs. 45,00,000 in cash to respondent nos. 1 and 2. He first stated that the payment was made in the month of March, 2010 and immediately changed his stance by stating that no such payment was made to respondent nos. 1 and 2. Further, the Legal Notice dated 14.09.2010, Ex D-1 served by the appellant suggests only the presence of the appellant at the time of alleged payment of Rs. 45,00,000/- as opposed to the plaint which mentions the presence of Harmeet Singh and Hardev Singh. The letter dated 30.09.2010 sent by the appellant, PW1/13 mentions the presence of the appellant, broker and witness. The contradictions and different stance taken at different times discredits and disproves the payment of Rs. 45,00,000/-.

26. Further, during the trial at the time of seeking an injunction, the Appellant abandoned his plea of payment of Rs. 45,00,000/- and offered to pay the balance payment along with interest @ 6% per annum, while he later on defended the plea. In addition, it was submitted that the learned Single Judge has appreciated the facts correctly to dismiss the suit and the appeal is also liable to be dismissed with costs as being without any merit.

27. **Respondent No. 3**, in its written submission took the stance that the impugned Judgement is a well reasoned one and the suit has rightly been dismissed as being a false, frivolous and vexatious suit.

28. **Submissions Heard.**

29. It would be pertinent to first examine the principles for seeking

specific performance before evaluating the facts of the case. The principles relating to specific performance contained in Sections 16(c), 20, 21, 22 and 23 of the Specific Relief Act, 1963 read with Forms 47/48 of Appendix A to C of the Code of Civil Procedure, 1908 were summarized by the Supreme Court in Kamal Kumar v. Premlata Joshi 2019 SCC OnLine SC 12 as under:

*“10. It is a settled principle of law that the grant of relief of specific performance is a discretionary and equitable relief. The material questions, which are required to be gone into for grant of the relief of specific performance, are **First**, whether there **exists a valid and concluded contract** between the parties for sale/purchase of the suit property; **Second**, whether the appellant **has been ready and willing to perform** his part of contract and whether he is still ready and willing to perform his part as mentioned in the contract; **Third**, whether the appellant **has, in fact, performed his part of the contract** and, if so, how and to what extent and in what manner he has performed and whether such performance was in conformity with the terms of the contract; **Fourth**, whether it will be equitable to grant the relief of specific performance to the appellant against the defendant in relation to suit property or it will cause any kind of hardship to the defendant and, if so, how and in what manner and the extent if such relief is eventually granted to the appellant; and **lastly**, whether the appellant is entitled for grant of any other alternative relief, namely, refund of earnest money etc. and, if so, on what grounds.”*

30. The **first aspect for consideration** is whether there was a concluded Agreement to Sell vide Receipt-cum-Agreement dated

05.03.2010 between the parties. Admittedly, the suit property which was originally owned by Shri. Jeevan Dass, was bequeathed by him to his wife, Smt. Ram Pyari who further bequeathed it to the three respondents no. 1 to 3 in whose name the suit property was mutated. There is no challenge to the three respondents being the joint owner of the property. It is also not in dispute that the appellant agreed to purchase the suit property for a sum of Rs. 10,42,50,000/- from the three respondents. An initial payment of Rs. 5,00,000 was made vide Receipt-cum-Agreement to Sell dated 05.03.2010, Ex.P-1 to respondent nos. 1 and 2 who accepted the same on their behalf as well as Respondent No3 who was based in USA and was signed by respondent no.1 &2.

31. The respondent no. 3 has claimed that he was not a party to the Agreement and had not signed the Receipt-cum-Agreement dated 05.03.2010. He also denied that he had authorised respondent nos. 1 and 2 to enter into any Agreement on his behalf. However, these challenges have been raised by respondent no. 3 at the subsequent stage which are contrary to his averments in his written statement wherein he had unequivocally admitted that he had been persuaded by respondent no. 1 and 2 to sell his 1/^{3rd} undivided share in the suit property. However, he qualified it by claiming that his consent was obtained under misrepresentation as respondent no. 1&2 were not transparent in their dealings and committed breach of trust and he withdrew his consent subsequently. The relevant part of the Written Statement is reproduced as under:

“8.(g) That it is further submitted that, the answering Defendant alleged to have agreed/consented to sell his

share in the suit property on a total sale consideration of Rs. 10.5 crores but in the month of July, 2010, the answering Defendant came to know that the Defendant No. 1&2 in collusion with the said broker and the Appellant and without the knowledge of the answering Defendant in fact agreed to sell the suit property for Rs.16.5 crores. However, it was represented to the answering Defendant that the Appellant has agreed to purchase the suit property for a sum of Rs. 10, 42,50,000/- However, at the time of giving consent to sell the suit property, it was made clear by the answering Defendant to the Defendant No. 1&2 that the deal should be transparent between the parties but the Defendant No. 1&2 acted contrary to what was agreed between the parties and misrepresented to have finalized the deal on Rs. 10,42,50,000/- with the purpose to cause unlawful gains to themselves and loss to the answering Defendant.”

32. The respondent no. 3 thus, consented orally to the Agreement to Sell which is recognised as valid in law. The Apex Court in Brij Mohan and Ors. v. Sugra Begum and Ors. (1990) 4 SCC 147, observed that there is no requirement of law that an Agreement or contract of sale of immovable property should be in writing. The oral agreement to sell was held to be a valid Agreement. In Alka Bose v. Parmatma Devi and Ors. (2009) 2 SCC 582, the Supreme Court referred to Section 10 of the Contract Act which provides that all agreements are contracts if they are made with the free consent by the parties who are competent to contract, for a lawful consideration and with a lawful object, and are not expressly declared to be void under the provisions of the Contract Act. The *proviso* makes it explicit that this Section shall not apply where the contracts are required to be executed in writing or in the presence of witnesses or required registration.

33. The respondent no. 3 had asserted that he had subsequently

withdrawn his consent given initially for sale of suit property, when he found the transaction to be not truthful and dishonest viz-a-viz respondent nos. 1 and 2, but has failed to adduce any evidence to prove that his consent was not free or the alleged circumstances of mis-representation compelling him to subsequently withdraw his consent.

34. PW-3, Mr. Makkar, his property broker proved various e-mails along with Certificate under Section 65B of the Indian Evidence Act, 1872, Ex PW 3/1 (Colly.) that were exchanged between him and Respondent No.3 vide his e-mail dated 26.06.2010 written to Mr. Makkar recorded his consent to close and conclude the deal in respect of his 1/3rd Share with or without earnest money with the deadline of 05.10.2010. He even suggested to make a separate Purchase-Sale Agreement in respect of his 1/3rd share as there was no legal joint entity to make joint decisions on behalf of each other. The relevant part of the e-mail dated 26.06.2010 in Ex PW 3/1 (Colly.) reads as under:

“Mr. Makker, I made the suggestion of making a separate Purchase/Sale Agreement based on the fact that I am 1/3rd owner according to our mother’s will. Legally (technically) there is no legal joint entity to make joint decisions on each other’s behalf. For one brother to make joint decision that will be a legal binding to all will require that we three brothers form a legal entity first, and draw a list of rules and assign responsibilities to one or two officers of such a group for taking joint decisions. That is the legal position in USA. I will have to get legal opinion about this from my Attorney in India. I will be comfortable in signing a separate Buy/Sale Agreement and limit my liabilities to myself”

“Pertaining to list of documents you want the seller to supply, please give the seller you gave token money to and ask him for the documents and let him comply by a certain

date to expedite the process and move forward. Since I was not present at the negotiation table, I do not know what agreements were made between the buyer and the sellers. I will honour whatever they have agreed with the buyer in the past. However, since I am now communicating with you as my representative broker as well, I will let you know my interests and view points that I need to safeguard myself. I would like to limit my liabilities to my actions only. Thanks."

35. Respondent no. 3 in his e-mail dated 27.06.2010 again reiterated to have a separate Purchase and Sale Agreement with three parties and to have one registry at the time of closing the deal, thereby admitting the Agreement to Sell.

36. Significantly, the respondent no. 3 in his e-mail dated 07.08.2010, Ex. PW3/1 (Colly) had expressed a concern that better price may be fetched for closure of the deal. It was responded to by PW3, Gagan Makkar on the same day i.e. 07.08.2010 as under:

"Sir, u have already entered into the agreement with Mr. Jhonny of which last date is Oct. 15,2010.

He is interested very much interested in the deal he has done with u. He is only asking for the NOCs from the other three brothers that is if n I guess he is not asking for anything irrelevant.

Now that s upto u wen u can provide him that

As far as deal is concerned, no visible improvement is there in roop nagar, whomsoever has given u the feedback of 3 lac/sq yard is not updated.

I still have properties at the rates u have sold it at.

I would like to request u to come here n solve the problem

The buyer does not intend to leave the deal.

Regards,

Gagan Makker."

37. Furthermore, the respondent No.3 Dr. Kanwal Maniktahla in his E-mail dated 08.08.2010, PW3/1 (colly) addressed to Shri Gagan Makker stated that he remembered getting an e-mail from Shri Gagan Makker and informed that the appellant is no longer interested in the deal because he was not pleased with the documents. Consequently, Shri Gagan Makker himself was organizing a builder as a buyer in case the appellant backed out from the transaction. The respondent no.3 had sought a clarification of what was signed and what was agreed verbally, what happened to the deposit of money, when the appellant decided that he has no interest in the property and; why was there a change of amount and whether it was of the appellant or of the broker? He further stated that when Shri Gagan Makker brokered the deal and passed on the deposit money to his brothers, PW3, Gagan Makkar was presumably representing the respondent No. 3 along with his brothers. He further claimed that after the initial deal, he had got in touch with Shri Gagan Makker to explore if the buyer would buy his share which would save him the trip to India.

38. The exchange of e-mails between the respondent No. 3 and the PW3 Gagan Makker (the broker) clearly reflects that the respondent No. 3 had agreed for the sale of suit property and had all throughout been exploring the possibility of selling his share independently to the appellant so as to save him a trip to India. The claim of the respondent No. 3 that the consent was obtained through misrepresentation or that it was not a free consent, is clearly belied by his own exchange of e-mails with the property broker.

39. The exchange of e-mails, Ex PW3/1 (Colly) between PW3, Gagan

Makkar and respondent no. 3 re-confirm that respondent no.3 had freely consented to sale of suit property, and it is only in his written submissions that he tried to wriggle out of the transaction by claiming that there was no free consent as it was shrouded by misrepresentation.

40. It has thus, been rightly concluded by the learned Single Judge that respondent no. 3 who was having 1/3rd share in the suit property, had consented to sell the property to the appellant and there was an Agreement to Sell between the parties.

‘Readiness and Willingness’:

41. The **second aspect for consideration** is the ‘*readiness and willingness*’ on the part of the **appellant to perform his part of the Contract.**

42. The distinction between “readiness” and “willingness” and the method of ascertaining the same has been explained by the Apex Court in J.P. Builders v. A. Ramdas Rao (2011) 1 SCC 429. It was observed that readiness pertains to the financial capacity of the appellant while willingness is determined through the conduct of the appellant who is in turn seeking specific performance.

43. Kerala High Court in George M. Mathews @ George v. Muhammed Haneefa Rawther RFA No. 156/2014 decided on 08.02.2023, while relying on J.P. Builders (Supra) stated that “*while readiness refers to the financial capacity of the appellant/vendor to pay the sale consideration, willingness is a different component referable to the conduct of the vendor. Therefore, it is not axiomatic that one who is ready is automatically willing to perform the contract. Per contra, one who is*

ready with the funds can still be unwilling to perform the contract for different reasons altogether, say for example, the vendor deems the transaction not feasible/profitable for commercial reasons.”

44. Furthermore the appellant may have had the financial capacity at the time of entering into the Agreement, but to be successful in a decree for Specific performance, continuous readiness and willingness from the date of the contract to the time of the hearing, to perform the contract on his part has to be proved as held by the Apex Court in H.P. Pyarejan v. Dasappa (Dead) By L.Rs. &Ors. (2006) 2 SCC 496. Failure to make good these averment brings with it and leads to the inevitable dismissal of the Suit. In Motilal Jain v. Ramdasi Devi, (2000) 6 SCC 420, the Apex Court had expounded the same principle that the averments in the plaint must reflect the readiness and willingness on the part of the appellant.

45. It may thus be considered whether the appellant has been able to prove his readiness by having tendered the entire sale consideration of Rs. 10,42,50,000 as agreed between the parties.

46. Admittedly, the appellant had paid Rs. 5,00,000/- vide Receipt-cum-Agreement dated 05.03.2010 Ex. P-1. It was his claim that additional amount of Rs. 45,00,000/- was paid in cash by him on 15.06.2010, which was denied by the respondents. He thereafter, tendered to pay the balance amount of Rs. 9,92,50,000/- to the respondents and in proof thereof sent photocopies of Bank drafts, which were got prepared by him.

47. It therefore, needs to be ascertained if the sum of Rs. 45,00,000/- was in fact, paid as claimed by the appellant. Admittedly, no receipt in regard to payment of Rs. 45,00,000/- was executed between the parties. Significantly, while a Receipt dated 05.03.2010 Ex.P-1 duly signed by

respondent nos. 1 and 2 and the two brokers namely PW-2 Sh. Harmeet Singh and PW-3 Gagan Makkar was executed for the initial payment of Rs. 5,00,000/-, there is no explanation as to why the alleged payment of Rs. 45,00,000/- was not witnessed by a written receipt. While due care and caution was taken to secure the proof of payment of Rs. 5,00,000/-, no prudent person would pay Rs. 45,00,000/- without getting a receipt.

48. The explanation given by the appellant was that he was assured by respondent nos. 1 and 2 that respondent no.3 would soon be coming to India and that they three would sign the receipt together. On the face of it, this explanation is not tenable for the simple reason that even if respondent no. 3 was expected to come in near future, there was no reason why the receipt could not have been signed by respondent nos. 1 and 2 as was done for the previous receipt. This is the first circumstance which creates a doubt about the payment of Rs. 45,00,000/- to respondent nos. 1 and 2.

49. The appellant was questioned about his source and was asked to explain from where he got this Rs. 45,00,000/- which was allegedly paid by him in cash to respondent nos. 1 and 2.

50. Admittedly, the appellant in his Notice dated 14.09.2010 Ex. D1 had stated that he had paid the sum of Rs. 45,00,000/- from the money received by him after disposal of one of his properties. However, in his cross examination, he stated that it was the cash in hand in his personal name as was reflected in his accounts. He sought to explain that, he had sold the second and third floor of property bearing no. A-151, Gujranwala Town, Delhi, but was unable to give any date or month of sale of this property or produce any sale document in respect of the said property. He

was even unable to disclose if it was before or after 15.06.2010.

51. The appellant had further deposed that he had entered into an Agreement with M/s. Shree. Ganesh Jewellery House Limited for sale of his property for approximately a sum of Rs. 14 to 15 crores under a Letter of Intent dated 16.08.2010. The alleged Letter of Intent for sale of the property is dated 16.08.2010 which is much latter to the alleged date of payment of Rs. 45,00,000/- on 15.06.2010.

52. The appellant had further sought to account for Rs. 50,00,000/- (Cumulative of the admitted payment of Rs. 5,00,000 and the disputed payment of Rs. 45,00,000) which were allegedly paid by him by proving his Income Tax Returns for the year 2011-2012 as Ex. PW1/D2. He claimed to have received the cash from Dhawan Securities Limited as a loan. However, he was unable to produce any document to show either that Dhawan Securities Private Limited was a genuine concern or of the alleged loan transaction.

53. It is pertinent to mention here that the Income Tax Returns are of the year 2011-2012 which were filed subsequent to the filing of the present suit in 2010. The Income Tax Returns allegedly showing an amount of Rs. 50,00,000/- has rightly been rejected by the learned Single Judge since it has neither got any details nor any supporting documents. Moreover, it is merely an entry which in itself does not explain the alleged cash claimed by the appellant to be in his account especially when different explanations have been given by him in his evidence to explain the source of this money.

54. The contrary explanations to the source of Rs. 45,00,000/- further creates a doubt whether the appellant ever had this money in his hand in

the first place, to give this amount to the respondents.

55. In the plaint, it was claimed that the appellant made the payment in the presence of Shri Harmeet Singh and Shri. Hardev, cousin of the appellant as has also been deposed by way of affidavit, Ex. PW 1/A.

56. Significantly, the appellant had issued a Notice dated 01.09.2010 Ex P-4 or Ex. PW1/2 in regard to the Agreement to Sell and had stated that in the month of June, 2010, the appellant along with Shri Harmeet Singh had visited the property and made further payment of Rs.45 lakhs to appellant No.1 and 2 and had sought receipt from all the three respondents, wherein respondent No.2 informed that respondent No.3 is likely to come shortly and then the receipt of Rs.45 lakhs shall be executed by all three respondents and would be issued. In the subsequent legal Notice dated 14.09.2010 Ex. D-1 addressed to all the three respondents, the appellant had asserted that to honour the commitment given by the appellant he had given Rs.45 lakhs in cash to the respondents in the month of June, 2010 which they immediately took in custody and pass on inside the house, but asserted that the receipt would be issued when respondent No.3 arrive in India. PW1 in his cross-examination conducted on 14.09.2014 has clarified on a specific question been put that the sum of Rs.45 lakhs was paid to respondent No.1 and 2 Shri Om Prakash and Shri Vijay Arora on 15.06.2010 on the Ground Floor in the drawing room of the house. In the third legal Notice dated 30.09.2010 Ex.PW1/13 it is mentioned that the payment of Rs.45 lakhs was made in the presence of the broker and other witnesses.

57. Pertinent here would be to refer to the emails dated 08.08.2010 of Shri Gagan Makkar collectively Ex.PW3/1 (colly) wherein Shri Gagan

Makkar in response to the clarifications sought by respondent No.3 had explained that a sum of Rs.5 lakhs as advance money has been received from the appellant for the sale transaction. The email of property broker shows that till August, only Rs.5 lakhs had been received and Rs.45 lakhs had never been paid in his presence. PW3 has explained this in his cross-examination wherein he has said that he was not present when the payment of Rs.45 lakhs was given to respondent No.1 and 2, but was informed about this payment after two days by Shri Harmeet Singh the other broker. Further, on being specifically asked if he had informed respondent No.3 about the payment of Rs.45 lakhs during the exchange of emails, he deposed that he did not remember having written about it any email, but he had informed respondent No.3 verbally many a times about the same. PW2 Shri Harmeet Singh the property broker had deposed that on 15.06.2010 the appellant, he and Shri Hardev Singh had met respondent No.1 and 2 for making the payment of Rs.45 lakhs.

58. There are evident contradictions in the testimony and the documents relied by the appellant. It is clear that the appellant has been inconsistent in his stand to explain the source of Rs. 45,00,000/- and had given contradictory explanations in various letters, documents and evidence about the source from where he had procured Rs. 45,00,000/-. The explanation given by the appellant in his plaint was that he did not insist for the receipt of Rs. 45,00,000/- because of the assurances given by the respondent nos. 1 and 2 that they both along with respondent no. 3 would jointly execute the receipt in respect of payment of Rs. 45,00,000/-. However, the explanation given for non-execution of the receipt witnessing the payment of Rs. 45,00,000/- is shrouded with suspicion and

the learned **Single Judge** has rightly concluded that the appellant has **not been able to prove** the payment of Rs. 45,00,000/-.

59. The Apex Court in Ram Kumar Aggarwal v. Thawar Das AIR 1999 SC 3248 held that where the plea as to payment was not bona fide or is not proved before the Trial Court, it cannot be presumed that the appellant was ready to perform his part of the Agreement. Punjab and Haryana High Court in Malkiyat Singh v. Om Prakash AIR 2004 P&H 253 held that offering of an amount less than the amount of sale consideration cannot tantamount to readiness and willingness on the part of the appellant to perform the agreement.

60. In the circumstances, the alleged tender of balance amount of Rs. 9,92,50,000/- without any further deliberation, cannot be considered as valid in the light of the observations of the Apex Court in the case of Ram Kumar Aggarwal (supra) and P&H High Court in Malkiyat Singh (supra).

61. Though it has been established from evidence on record that the sum of Rs. 45,00,000/- had not been paid by the appellant towards part sale consideration, but leaving that aside it may be further examined if the appellant had in fact, tendered the sum of Rs. 9,92,50,000/- which according to the appellant was the remaining balance amount.

62. The appellant had in order to further establish his 'readiness' to pay the balance sale consideration, had deposed that he had sent a Letter dated 30.09.2010 Ex. PW1/13 reiterating his readiness and willingness to perform the Agreement and even provided details, the number and the Banker's name on which the three Pay Orders/Drafts dated 29.09.2010 in the sum of Rs. 9,92,50,000/- were drawn. When faced with the denial by respondent nos. 1 and 2 in their reply dated 01.10.2010, the appellant sent

the photocopies of the three Pay Orders along with his Letter dated 08.10.2010 Ex. P-8 or PW 01/18 drawn by Shree Ganesh Jewellery House Limited and not the appellant.

63. The appellant had explained that in order to generate money for purchase of suit property, he had agreed to sell his property bearing No. 7 /13 Roop Nagar, Delhi, 110007 admeasuring about 515 square yards to Shree Ganesh Jewellery House Limited. During his cross-examination, the appellant had produced his Letter of Intent dated 16.08.2010 and Receipt-cum-Agreement dated 30.09.2010 wherein it has been clearly mentioned that the sale transaction envisaged between appellant and M/s Shree Gansh Jewellery House Limited could not be completed and pursuant to the request they have mutually agreed to cancel the sale transaction and the three drafts that were handed over to the appellant Devenderjeet Singh in full and final payment along with receipt-cum-agreement dated 30.09.2010, also stood cancelled. The appellant also produced Letter dated 05.10.2010 for cancellation of this transaction.

64. D1W2 Shri Prabhash Kumar, Assistant Manager, Standard Chartered Bank produced the account details of Shree Ganesh Jewellery House Limited Ex. D1W2/A, and also produced Letter dated 08.10.2010, Ex. D1W2/E, written by Shree Ganesh Jewellery House Limited to the Bank Manager requesting for the cancellation of the three demand drafts.

65. The admissions of the appellant in the cross-examination along with the documents so produced, establish that this sale transaction on account of which these Pay Orders were allegedly given to the appellant, stood cancelled vide request letter dated 08.10.2010, Ex. D1W2/E, written by Shree Ganesh Jewellery House Limited which was the date on which the

copies of drafts were sent by the appellant to the respondents. Even if the Bank Drafts were cancelled subsequently on 11.10.2010 but the sale transaction itself stood rescinded making the appellant liable to return the money to Shree Ganesh Jewellery House Limited.

66. The other aspect is that even if in fact the appellant intended to make payment of the sale consideration through the Bank Drafts, he should have established his bonafide by sending the original bank drafts; there was nothing which prevented him from handing over the original Bank Draft. Firstly, by merely giving the details and secondly, by sending the photocopies of bank drafts pertaining to a sale transaction which already stood cancelled, leads to the irresistible conclusion that there was no valid subsisting sale transaction/agreement between the appellant and Shri. Ganesh Jewellery Housing Limited on 08.10.2010, when the Bank Drafts were allegedly tendered to the defendants.

67. The only inference that can be drawn from sending a copy of Demand Drafts is that it was merely a defence was sought to be created by the appellant but there was no real intent to make the payment; the sending of the photocopies of Bank Drafts cannot be held as a valid tender of the balance payment since they could not be possibly encashed by the respondent. Furthermore, as already held that the tendered amount of Rs. Rs. 9,92,50,000/- was short by Rs. 45,00,000/- which though claimed to have been paid, but have been proved to not have been paid to the defendants.

68. A reference be made to Raghunath Rai v. Jageshwar Prashad Sharma (1999) 50 DRJ 751 wherein it was observed that to constitute readiness, it is not essential that the appellant must produce or prove that

he has money in hand but what is required is that he has a capacity to pay. This Court in Baldev v. Bhule (2012) 132 DRJ 247 observed that the financial capacity has to be strictly proved as self serving statements cannot discharge that burden of proving existence of financial capacity.

69. While the appellant in the present case has produced the copy of three Bank Drafts which he tendered on 08.10.2010 but they were not sufficient to establish that that was the money available with him especially when it is proved on record that the alleged sale transaction pursuant to which the Bank Drafts were given to the appellant by Shree. Ganesh Jewellery House Ltd. already stood cancelled on 29.09.2010. In fact, in his entire evidence, aside from one line that he was ready and willing to perform his part of the contract, there is no evidence what so ever that after the date of performance of the Agreement, he had the capacity to pay the sale consideration.

70. In N.P. Thirugnanam vs. Dr. R. Jagan Mohan Rao (1995) 5 SCC 115, the Apex Court explained that *“the continuous readiness and willingness on the part of the appellant is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the appellant fails to either aver or prove the same, he must fail. To adjudge whether the appellant is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the appellant prior and subsequent to the filing of the suit along with other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available. Right from the date of the execution till date of the*

decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the appellant was ready and willing to perform his part of the contract.”

71. In Aniglase Yohannan vs. Ramlatha and Others (2005) 7 SCC 534, the Apex Court further observed that the court has to grant relief on the basis of the conduct of the persons seeking relief. If the pleadings manifest that the conduct of the appellant entitles him to get the relief, on perusal of the plaint he should not be denied the relief. The averments in the plaint as a whole must clearly indicate the readiness and the willingness. Section 16(c) of the Specific Relief Act mandates the appellant not only to make averments in the plaint but also to establish fact by evidence adduced about his readiness and willingness to perform the Contract.

72. The appellant miserably failed to prove that he ever tendered the entire sale consideration or was throughout ready to meet his financial obligation to pay the agreed amount at the time of execution of the Agreement and till the filing of the suit.

73. Much has been argued on behalf of the appellant that respondent nos. 1 and 2 were in fact in default since they wanted to wriggle out of this transaction and intentionally refused to accept the Demand Drafts by raising a false plea of Benami Transaction. This was countered on behalf of the respondents who claimed that the Demand Drafts had been issued from an account of third party which reflected that the appellant was

intending to enter into a Benami Transaction and the respondents were well within their right to refuse such payment from the third party.

74. It may be observed that under the Indian Law, while the Doctrine of Privity of Contract is accepted, the Doctrine of Privity of consideration is not recognised. Therefore, even though the payment/consideration was allegedly being paid by the appellant from the account of a third person, the transaction was essentially between the appellant and the respondents and the respondents were not right in rejecting the Pay Orders. However, this aspect becomes otiose since there was no actual tender of original bank drafts by the appellant at any point of time which could have been encashed. The conduct of respondents in raising a plea of Benami Transaction would have been relevant only if there were any original bank drafts in the hand of respondents which they would have chosen not to encash. In the given facts, there was no bank draft to be encashed by the respondents. Merely producing photocopies of Bank drafts in the circumstances as discussed above cannot, by any rule of appreciation of evidence, be held to demonstrate the availability of funds and consequently the readiness of the appellant to perform his part of the Agreement. What is also significant to observe is that in the plaint not a word is disclosed about the financial viability of the appellants to purchase the property. As per his own case he had contemplated to sell one property to raise the funds, but admittedly the transaction got cancelled. Neither does he disclose in his plaint nor in his testimony how he intended to raise finances for purchase of the suit property or if he had sufficient finances available with him. Aside from one bald statement in his plaint that he was ready and willing to perform his part of contract, he

has failed to demonstrate availability of finances thereby demonstrating his readiness to honour the Agreement to Sell.

75. Even if for the sake of arguments it is assumed that the respondents had committed breach by taking a false plea, the onus was on the appellant to aver in the plaint and prove that he has always been ready and willing to perform the essential terms of the contract which were required to be performed by him as held by the Apex Court in the case of Man Kaur (Dead) By LRs. vs. Hartar Singh Sangha (2010) 10 SCC 512. The appellant has miserably failed to prove that he was ready with the money to conclude the sale transaction.

76. The subsequent conduct of the appellant is also relevant in so much as even during the trial he chose to tender in the court only an amount of Rs.9,92,50,000/- which again was not the entire balance amount due to be paid.

77. 'Willingness' is the other significant component in a suit for Specific Performance which is in reference to conduct, past, present and future, of the appellant. The learned Single Judge has rightly observed that the stand taken by the appellant in regard to his alleged sale transaction of property bearing no. A-151, Gujranwal Town, in anticipation of concluding the transaction with the respondents, is unproven and is dubious because of myriad inconsistencies in the explanation given in regard to the bank drafts allegedly issued by Shree Ganesh Jewellery House Limited. The narrative of the appellant is neither bonafide nor straightforward and truthful thereby disentitling him from the exercise of discretion in favour of the appellant.

78. We are in consonance with the conclusions of the learned Single

Judge who had rightly concluded that appellant had not been able to prove his '*readiness*' and "*willingness*" to perform his part of the agreement by tendering the entire sale consideration.

79. Thus, we find no ground for interfering with the impugned Judgement of the learned Single Judge and the appeal along with pending application, if any, is, therefore, dismissed.

**(NEENA BANSAL KRISHNA)
JUDGE**

**(SURESH KUMAR KAIT)
JUDGE**

**APRIL 19, 2023
PA**

