



* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 05th December, 2023

Pronounced on: 09th January, 2024

CS(OS) 1384/2012 & I.As. 6375/2016, 8542/2016

1. **SURESH SHAH**
S/o Late Sh. K.D. Shah
B-141, Ashok Vihar, Phase 1,
New Delhi-52.

2. **SUBHASH CHOPRA**
S/o Late Lekh Raj Chopra,
H-26, Ashok Vihar, Phase 1,
New Delhi-52.

..... **Plaintiffs**

Through: Mr. Bhagat Singh, Advocate.

versus

1. **MRS. SARITA GUPTA**
W/o Suresh Gupta
E-1091, Saraswati Vihar,
New Delhi.

2. **MRS. SUSHILA SHAH**
W/o Suresh Shah
B-141, Ashok Vihar, Phase-1,
New Delhi-52.

..... **Defendants**

Through: None.

CORAM:

HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T

NEENA BANSAL KRISHNA, J.

1. A suit for *Specific Performance of Agreement to Sell* dated 20.05.2008 and *Permanent Injunction*, has been filed by the plaintiffs.
2. The plaintiffs entered into an Agreement to Sell dated 20.05.2008 for



the purchase of property bearing No.E-1091, Saraswati Vihar, New Delhi with land underneath admeasuring 156 sq. mts. and superstructure standing thereon (hereinafter referred to as “*suit property*”), with defendant No.1, represented herself to be the exclusive owner and in possession of the suit property. Defendant No.2 Mrs. Sushila Shah is the wife of plaintiff No.1.

3. The total sale consideration was agreed to be Rs.4,00,00,000/- (Rupees Four Crores) out of which the plaintiffs paid Rs.2,00,00,000/- (Rupees Two Crores) in cash to defendant No.1 for which a receipt was duly issued.

4. According to the terms of the Agreement to Sell, the balance of Rs.2,00,00,000/- (Rupees Two Crores) was to be paid upon execution of the Sale Deed post conversion of suit property from leasehold to freehold. The plaintiffs reserved the prerogative to decide the name of the person in whose favour the transfer of the rights, title and interest in the suit property was to be made by defendant No.1.

5. The possession of Ground Floor of the suit property was agreed to be handed over to the plaintiffs at the time of applying for conversion of the suit property, the charges for which were to be borne by defendant No.1 exclusively. However, in part performance of the Agreement of Sell, vacant physical possession of the First Floor and Terrance of the suit property was handed over to the plaintiffs.

6. The plaintiff asserted that the parties agreed that the possession of First Floor and Terrance shall be secured under a registered Agreement to Sell and Power of Attorney in pursuance whereof the documents were executed by defendant No.1 in favour of defendant No.2 and were registered on 26.05.2008. The husband of defendant No.1 acting as Attorney, also



executed a General Power of Attorney for consideration in favour of defendant No.2 (wife of plaintiff no.1) qua the said portion of the suit property. The consideration paid under this Agreement was to be adjusted from the balance amount.

7. In the month of June, 2008 plaintiffs contacted defendant No.1 seeking an update on the status of conversion of the suit property to freehold and transfer of possession qua remaining portion of the suit property. However, defendant No.1 sought more time to perform his obligations on the ground that she was not keeping well and was unable to apply for conversion. The plaintiffs faced same excuse when he approached defendant No.1 again in July, 2008.

8. Thereafter, in September, 2008 during the course of discussions between the plaintiffs and defendant No.1, the latter informed that she has misplaced the original Power of Attorney qua the suit property under which she had acquired title to the suit property, and is in the process of searching the documents. The original Power of Attorney being a condition precedent for conversion, she was unable to move the appropriate application.

9. Defendant No.1 informed the plaintiffs on 03.01.2009 that all the documents required for the conversion application are ready and assured that she would file the application without delay. The application was then filed in the 3rd week of January, 2009.

10. In March, 2009 when the plaintiffs contacted defendant No.1, she informed that the property has been inspected recently by the officials of DDA and it would take another two months for the completion of the task of conversion. Subsequently, in May, 2009 defendant No.1 informed that the status remained the same because of some reshuffling of the staff of DDA.



11. However, in June, 2009, defendant No.1 updated the plaintiffs that DDA has demanded an exorbitant amount of Rs.60,00,000/- under various heads for the conversion of the property to freehold and she is taking steps to challenge the demand.

12. The plaintiffs have claimed that they regularly followed up with defendant No.1 but were unable to get any satisfactory response. The plaintiffs had various rounds of meetings and discussions with defendant No.1 and her husband and lastly in the last week of July, 2009 after which defendant No.1 agreed to conclude the transaction, but demanded an additional amount over and above the agreed sale consideration. Therefore, she failed to perform her obligations under the Agreement to Sell.

13. The plaintiffs have submitted that they are ready and willing to perform their part of the Contract and hereby offer the balance sale consideration. However, the defendant No.1 despite being under an obligation under Agreement to Sell, is negotiating with others for sale of the suit property. Hence, the plaintiffs by way of the present suit sought specific performance of Agreement to Sell dated 20.05.2008 and in the alternative sought a decree of Rs.2,00,00,000/- (Rupees Two Crores) along with interest @ 18% per annum along with Permanent Injunction for restraining defendant No.1 from selling, alienating or transferring the suit property.

14. The **defendant No.1 in her Written Statement** has taken the **preliminary objections** claimed that the suit was maliciously and vexatiously filed with ulterior motives. It was asserted that material and relevant facts were suppressed and false statements have been made on Oath. The suit does not disclose *any cause of action*. It is *barred by limitation* as it is filed after a period of four years. It is further asserted that



plaintiffs in collusion with defendant No.2 i.e. wife of plaintiff No.1, has played *fraud* on defendant No. 1 and her husband.

15. **On merits**, it is admitted that an Agreement to Sell dated 20.05.2008 was executed between the plaintiffs and defendant No.1 in respect of the suit property for a sale consideration of Rs.4,00,00,000/- (Rupees Four Crores). However, the defendant no.1 has claimed that the plaintiffs were not able to arrange the necessary funds for payment of the entire *bayana* which was in the sum of Rs.2,00,00,000/- (Rupees Two Crores) and requested for few more days. However, they were unable to pay any amount despite repeated requests. The possession of the suit property was thus, not handed over to the plaintiffs and the entire suit property continues to be in possession of defendant No.1 till date. Since no consideration whatsoever was paid by the plaintiffs or accepted by the defendant, the purported Agreement to Sell dated 20.05.2008 became void and not enforceable in law.

16. The defendant No.1 has further explained that plaintiff No.1 once again approached the defendant No.1 and her husband and expressed his interest in acquiring only a portion of the suit property instead of entire property. He further requested that an Agreement for the same be executed in favour of defendant No.2/ wife of plaintiff No.1. Consequently, an Agreement to Sell dated 26.05.2008 was executed in respect of First Floor and the roof rights for a consideration of Rs.25 lakhs. Along with this Agreement, a Power of Attorney dated 26.05.2008 was executed by husband of defendant No.1 in favour of defendant No.2 to enable her to manage the affairs of the subject property. Under this Agreement entire payment of Rs.25,00,000/- (Rupees Twenty Five Lakhs) was to be made to defendant No.2 at the time of execution of the Agreement. Two cheques in the sum of



Rs.12,50,000/- (Rupees Twelve Lakh Fifty Thousand) each were mentioned in the Agreement to have been handed over to defendant No.1, when in fact no cheques were given by the plaintiffs. The plaintiff No.1 and defendant No.2 sought some more time to make arrangement of the funds.

17. Thereafter, defendant No.1 and her husband called upon defendant No.2 in June, 2008 for making the payment, and informed them that the failure to pay the Sale consideration would result in the cancellation of the Agreement. Yet again, defendant No.2 failed to make any payment to defendant No.1 despite repeated requests.

18. The defendant No.2 again sought time, but neither gave the cheques as were mentioned in the Agreement to Sell nor made any payment. Since the consideration amount was not paid, the possession of the First Floor along with roof was not handed over to defendant No.2 and the entire property continues to be in possession of the defendant No.1. There had been no interaction or any correspondence exchanged between the parties since execution of the two Agreements on 20.05.2008 and 26.05.2008 in the last four years.

19. The defendant No.1 has asserted that in the interim, on 21.09.2010, the defendant No.1 executed an Agreement to Sell in favour of Mrs. Sangeeta Malhotra in respect of entire suit property for a consideration of Rs.5,46,00,000/- (Rupees Five Crores and Forty Six Lakhs), out of which she has received an earnest amount of Rs.50 lakhs (Rs.30 lakhs were paid in cash while Rs.20 lakhs were given by way of a cheque dated 22.09.2012). However, Sangeeta Malhotra also failed to make the payment of the balance consideration and the said Agreement dated 21.09.2010 also stands cancelled and the earnest money paid by her was forfeited.



20. The defendant no.1 asserted that it has recently come to her knowledge that without having any title thereto, defendant No. 2 has purportedly transferred a portion of suit property to third person namely Vaijanti Jain. The defendant No.1 along with her husband had filed *Writ Petition No.820/ 2008* for directing DDA to restore the Leasehold rights in the suit property in favour of defendant No.1. By way of Order dated 10.01.2011 the Writ was allowed and DDA was directed to restore the original Lease and to allow the application of defendant No.1 for conversion of the suit property from Leasehold to Freehold. Pursuant to this Order, defendant No.1 and her husband have been continuously following up with DDA for restoration of the lease. In around February, 2012 husband of defendant No.1 visited the office of DDA and were shocked to learn that another similar application for conversion had been filed in respect of the First Floor of the suit property for which reason the DDA had not processed their application.

21. On further inquiry, it was found that defendant No.2 on the basis of Agreement to Sell and Power of Attorney dated 26.05.2008 was asserting to be the owner and had fraudulently got transferred the rights of the First Floor along with roof of the suit property to one Vaijyanti Jain under a purported Agreement to Sell dated 06.06.2011.

22. Immediately, thereafter the husband of defendant No.1 addressed a letter dated 16.02.2012 to the concerned officer of DDA informing that defendant No.1 was the sole and absolute owner of the suit property as the Agreement to Sell dated 26.05.2008 had been rendered null and void. The husband of defendant No.1 had also addressed a letter to the office of Sub-Registrar VIA, Pitampura apprising the relevant facts to enable the



Authority to investigate the fraud committed by defendant No.2 and made a request that no document in respect of the suit property be registered.

23. Contempt proceedings were also initiated by defendant No.1 against DDA for non-compliance of the Order dated 10.01.2011 passed in the Writ Petition since in a prior Contempt Petition, DDA had expressed its inability to comply with the Orders on account of the application made by Vaijyanti Jain for conversion of the portion of the property from Leasehold to Freehold. It is thus, claimed that relevant facts have been suppressed and the plaintiffs have not approached the Court with clean hands and the suit is liable to be dismissed on this ground itself. All the averments made in the petition have been thus, denied.

24. **The defendant No.2 was duly served but failed to file any Written Statement and her right to file Written Statement was closed vide Order dated 30.11.2012.**

25. The **issues** were framed on 29.04.2014 as under:

(i) *Whether the present suit has been filed within the period of limitation? OPP*

(ii) *Whether the present suit has been filed by the plaintiffs in collusion with defendant no.2 and if so, its effect? OPD-1*

(iii) *Whether the plaintiff and defendant no.2 have jointly perpetrated a fraud upon defendant no. 1 and her husband and if so, its effect? OPD-1*

(iv) *Whether the present suit is liable to be dismissed inasmuch as the plaintiffs are guilty of concealment of material facts thereby disentitling them from seeking any reliefs? OPD-1*

(v) *Whether the plaintiffs have not made any payment towards the consideration contained in the purported Agreement dated 20th May, 2008? OPD-1*

(vi) *Whether the purported Agreement dated 20th*



May, 2008 was rendered cancelled, void and invalid on account of the failure of the plaintiffs to make any payment towards the consideration in respect thereof? OPD-1

(vii) Whether the plaintiffs are or were ever ready and willing to perform their obligations under the purported Agreement dated 20th May, 2008? OPP

(viii) Whether the plaintiffs are entitled to specific performance of the purported Agreement dated 10th May, 2008? OPP

(ix) Relief.

26. The **plaintiff Shri Suresh Shah** in support of its case **appeared as PW1** and tendered his evidence by way of affidavit as Ex.PW1/A. However, at the stage of Plaintiff's Evidence, the defendants stopped appearing and no cross-examination was conducted of PW1.

27. **PW2 Shri Subhash Chopra appeared as PW2** and tendered his evidence by way of affidavit Ex.PW2/A. PW2 was partly cross-examined by the counsel for defendant No.1, but thereafter none appeared. On 15.07.2022 the right to further cross-examine PW2 was closed.

28. Since, none was appearing on behalf of the **defendants**, they **were proceeded ex-parte vide Order dated 15.09.2022**. No evidence has been led on behalf of the defendants.

29. **Submissions heard and record perused.**

30. My **issuewise findings** are as under:

Issue No.1: *"Whether the present suit has been filed within the period of limitation?" OPP*

31. The defendant had taken a preliminary objection that the suit has been filed after four years after entering into an Agreement to Sell dated 20.05.2008 Ex.P1 and, therefore, is beyond the period of three years and is



barred by limitation.

32. The perusal of the Agreement of Sell Ex.P1 shows that though the Agreement to Sell was executed on 20.05.2008, the time limit for performance of the Agreement was 30.04.2009 as stipulated in the said Agreement itself. The present suit has been filed on 16.04.2012 and, therefore, the suit has been filed within the period of limitation of three years.

33. This issue is decided in favour of the plaintiffs and against defendant No. 1.

Issue No.5: *“Whether the plaintiffs have not made any payment towards the consideration contained in the purported Agreement dated 20th May, 2008?”*
OPD-1

Issue No.6: *“Whether the purported Agreement dated 20th May, 2008 was rendered cancelled, void and invalid on account of the failure of the plaintiffs to make any payment towards the consideration in respect thereof?”* *OPD-1*

34. The plaintiffs by way of the present suit have sought the performance of the Agreement to Sell dated 20.05.2008 (*hereinafter referred to as first ATS*) that was executed between two plaintiffs and defendant No.1 in respect of the entire property No.E-1091, Saraswati Vihar, Delhi for a sale consideration of Rs.4,00,00,000/- (Rupees Four Crores).

35. The Agreement to Sell Ex.P1 has been executed on a Stamp Paper of Rs.50/- which was purportedly purchased in the name of Sarita Gupta/ defendant No.1 who is the seller/ owner of the suit property. A perusal of this Agreement to Sell reflects that it does not disclose anywhere how



defendant No.1 acquired a right, title or ownership in the suit property. It merely states that the seller has agreed to sell the entire suit property to the plaintiffs. Significantly, Clause 1 of the Agreement states that the vacant, peaceful possession of First Floor with Terrace was handed over on 20.05.2008 without any dispute and Rs.2,00,00,000/- (Rupees Two Crores) were also paid in cash for which a receipt Ex.PW2/1 was issued.

36. However, it is also significant to refer to the second Agreement to Sell Ex.P2 between defendant No. 1 and Sushila Shah defendant No. 2 (wife of Plaintiff No.1) which had been executed barely six days later i.e. on 26.05.2008 (*hereinafter referred to as second ATS*). The said Agreement was in respect of the First Floor and the Terrace in favour of defendant No.2.

37. *Interestingly, this second Agreement to Sell is witnessed by Shri Subhash Chopra i.e. plaintiff No.2.* The first most significant aspect that thus, emerges is that since the first Agreement To Sell Ex.P1 executed in respect of the entire suit property was well within the knowledge of the plaintiffs, they could not have been agreed to again purchase a part of the suit property i.e. first floor with terrace again vide second Agreement to Sell Ex.P2 and that too, barely six days later.

38. *Secondly*, while the first ATS Ex P1 records that vacant possession of the first floor and terrace has been handed over to the plaintiffs, the second Agreement to Sell Ex.P2 records in Clause 1 that defendant No. 1 has delivered the peaceful, vacant possession of the suit property (First Floor along with Terrace) at the spot under this Agreement along with the photocopies of all the original documents relating to the subject property, to defendant No. 2. Had the possession of the First Floor and Terrace been



handed over already on 20.05.2008 as is mentioned in the first Agreement to Sell Ex.P1, the same could not have been again handed over to defendant No.2 on 26.05.2008.

39. *Thirdly*, the second Agreement to Sell Ex.P2 has been executed on a proper stamp paper of Rs.1,00,000 and has also been registered before the Sub-registrar. It also contains the full recital of the chain of transfer of ownership. The Agreement Ex P2 indicates that the property was originally owned by Ms. K.D. Sikand daughter of Mr. G.B. Singh vide perpetual Sub lease executed in her favour. She sold the property through Agreement to Sell dated 18.03.1988 to one Smt. Sarla Devi and executed a General Power of Attorney (GPA) in favour of Shri Anil Kumar. Shri Anil Kumar as the GPA of Ms. K.D. Sikand executed the Agreement to Sell dated 08.12.1989 in favour of Smt. Sarita Gupta/ defendant No.1 who in turn entered into the subject Agreement to Sell Ex.P2. Incidentally, all these recitals are missing in the Agreement to Sell Ex.P1.

40. *Fourthly*, while second Agreement to Sell Ex.P2 is duly registered on the requisite stamp paper, the first Agreement to Sell Ex.P1 is executed on a stamp paper of Rs.50/- and is only Notarized. Moreover, the possession of the first floor and the terrace is given to the Defendant No.2, wife of plaintiff no.1, no possession of the subject property had been given under the first ATS.

41. *The fifth* significant aspect is that the consideration for the entire suit property was valued at Rs.4 Crores while barely after six days, the First Floor and Terrace of the suit property was *resold* to the wife of plaintiff no.1 for a bare and paltry consideration of Rs.25 lakhs.

42. *Sixthly*, despite the second ATS being in respect of first floor and



terrace of suit property for which the first ATS had already been executed barely six days back, which fact was well within the knowledge of Plaintiffs, ***the second ATS is not the subject matter of challenge.***

43. *Seventhly*, if the second ATS is not under challenge, how can there be the Specific performance of the First ATS which is in respect of the entire property including the First floor and the terrace.

44. *The eighth aspect* of relevance which actually explains the two transactions is that in the Clause 3 of first ATS which reads as under:

"That the first party are bound to appear for the execution and registration of all transfer documents by their personal presence before the office of Sub-Registrar Concerned in respect of the said premises in favour of the purchaser or any other person desired by the second party"

45. It has been clearly mentioned that the plaintiffs reserved the prerogative to decide the name of the person in whose favour the transfer of the rights, title and interest in the suit property was to be made by defendant No.1, thereby reflecting that in fact, this Agreement was to follow another ATS, which infact was executed six days later on 26.05.08.

46. These aspects now need to be considered in the light of the testimony of the plaintiffs. PW1 Suresh Shah has deposed that in furtherance of the part performance of first ATS Ex.P1, possession of First Floor and Terrace of the property was handed over on 20.05.08 ***and to secure this transaction***, a second registered Agreement to Sell dated 26.05.2008 in favour of his wife Sushila Shah/ defendant No.2 was executed on 26.05.2008. A registered Power of Attorney dated 26.05.2008 was also executed in favour of defendant No.2. ***It was further deposed that the consideration paid in this***



Agreement Ex P2 was to be adjusted from the balance payment. These two admissions make it abundantly clear It is clearly evident that the actual Agreement to Sell that was executed was Ex.P2 between defendant No.1 and defendant No.2 and the first Agreement to Sell Ex.P1 which is the subject matter of the present suit, was only a precursor to the second Agreement to Sell Ex.P2.

47. It also stands proved that the sale consideration paid under the first ATS had been accordingly adjusted towards the second ATS. This also corroborates that the sum of Rs.2 crores which was paid vide receipt Ex.PW1/2 was in fact the consideration adjusted towards the purchase of the First Floor and the Terrace vide Agreement to Sell Ex.P2.

48. The testimony of PW1 leaves no room for doubt that the two Agreements to Sell reflected one transaction which materialised only in respect of the First Floor and the Terrace of the Suit property. The possession of the said portion was handed over and a registered Agreement to Sell Ex.P2 was duly executed in favour of defendant No.2.

49. The aforesaid factors on analysis in the light of the testimony of plaintiff No. 1, leads to an inevitable conclusion that the receipt Ex.PW2/1 acknowledging receipt of Rs.2 Crores in cash by defendant No.1 was in fact was part sale consideration in respect of second Agreement to Sell Ex.P2. The entire transaction has been given a colour of the two independent Agreements which is belied by the facts as mentioned above. Had the first Agreement to Sell Ex.P1 been a genuine document, the plaintiffs would not have permitted the execution and registration of the second Agreement to Sell Ex.P2 between defendant No. 1 and defendant No. 2 (wife of plaintiff No. 1) in respect of part property i.e. First floor with terrace, for which ATS



plaintiff No. 2 is the attesting witness.

50. This is further corroborated by PW2/ plaintiff No. 2 who is his cross examination, when questioned regarding the date of possession of the first floor and terrace, stated that the possession of the said portion of the suit property was handed over to the plaintiffs six days after the execution of first Agreement to Sell Ex P1 i.e. 26.05.2006. The date of possession of the first floor and terrace of the suit property corresponds to the date on which the second Agreement to Sell Ex P2 was executed, proving that the possession was only granted under Ex P2 and not under Agreement to Sell dated 20.05.2008 Ex P1 as was claimed by the plaintiffs.

51. *It is therefore held that there was no two separate ATS executed between the parties but first ATS was only a precursor to the second ATS which had been duly executed and registered and under which the entire Sale consideration was paid and possession handed over. The impugned Agreement to Sell Ex.P1 stood merged with the second ATS and thus, it is held to be inexecutable independently.*

52. **The Issue No.5 and 6 are decided against the plaintiffs and in favour of the defendant.**

Issue No.2: *“Whether the present suit has been filed by the plaintiffs in collusion with defendant no.2 and if so, its effect?” OPD-1*

Issue No.3: *“Whether the plaintiff and defendant no.2 have jointly perpetrated a fraud upon defendant no.1 and her husband and if so, its effect?” OPD-1*

Issue No.4: *“Whether the present suit is liable to be dismissed inasmuch as the plaintiffs are guilty of concealment of material facts*



thereby disentitling them from seeking any reliefs?” OPD-1

53. From the discussions made in Issue No.5, it is quite apparent that in fact the present suit has been filed in collusion with defendant No.2. An Agreement to Sell Ex.P2 was executed between defendant No.1 and 2 pursuant to which the possession has also been received by defendant No.2 who in turn had further sold the portion of suit property in her possession to one Vaijanti Jain vide Agreement to Sell dated 06.06.2011. It is for this reason that no specific performance has been sought of the second Agreement to Sell Ex.P2.

54. As concluded above, the Agreement to Sell dated 20.05.2008 is only a precursor to the second Agreement to Sell and the present suit has been filed by the plaintiffs in collusion to defendant No.2. Though they have not concealed the factum of the two Agreements, the plaintiffs have failed to disclose that the two Agreements in fact were part of one transaction as is evident from the testimony of PW1 and PW2. *The plaintiffs have therefore fraudulently attempted to also seek the specific performance of the Agreement to Sell Ex.P1 for the entire suit property when they themselves were privy to the execution of subsequent Agreement to Sell in respect of part property, in favour of defendant no.2.*

55. Therefore, from the own documents and the testimony of the plaintiffs, it is evident that there stands no agreement in respect of the entire property and by implication the Agreement to Sell dated 20.05.2008 Ex P1 got cancelled/merged in the second Agreement to Sell Ex.P2 in respect of part property.

56. The issue No. 2, 3 and 4 are decided against the plaintiffs and in favour of the defendant.



Issue No.7: *“Whether the plaintiffs are or were ever ready and willing to perform their obligations under the purported Agreement dated 20th May, 2008?” OPP*

57. The plaintiffs have asserted that they are ready and willing to pay the balance consideration under the Agreement to Sell dated 20.05.2008 Ex P1. However, it has been concluded above that the said Agreement is invalid. Be that as it may, this issue shall be ascertained on merits.

58. Before evaluating the facts of the present case, it would be appropriate to first examine the principles of seeking Specific Performance in terms of an Agreement to Sell. *Section 16 of the Specific Relief Act, 1963* stipulates the circumstances when a relief for specific performance shall not be granted by a court. The relevant part of the provision of it reads as under:

“Section 16 Personal Bars to Relief – Specific performance of a contract cannot be enforced in favour of a person–

(a)

(b)

(c) [who fails to prove] that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.

Explanation – For the purpose of clause (c), –

(i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court;

(ii) the plaintiff [must prove] performance of, or readiness and willingness to perform, the contract according to its true construction.”



59. The principles relating to specific performance as 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 succinctly summarized by the Supreme Court in Kamal Kumar vs 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 **plaintiff 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 **plaintiff 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 plaintiff 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 plaintiff; and **lastly**, whether **the plaintiff is entitled for grant of any other alternative relief**, namely, refund of earnest money etc. and, if so, on what grounds.*

60. It was further observed by the Apex Court in Kamal Kumar vs Premlata Joshi (supra), that *these requirements have to be properly pleaded by the parties in their respective pleadings and proved with the aid of evidence in accordance with law. It is only then the Court is entitled to exercise its discretion and accordingly grant or refuse the relief of specific*



performance depending upon the case made out by the parties on facts.

61. The **first** requirement is the existence of a valid and concluded agreement between the parties. The impugned Agreement to Sell Ex P1 cannot be construed as a valid and concluded agreement between the parties as a subsequent Agreement Ex P2 has been entered into and registered between defendant No. 1 and Defendant No. 2 for a part of the same property, to which the plaintiffs were witness and privy too. Therefore, the first requirement has not been satisfied.

62. Regardless of the invalidity of the Agreement to Sell dated 20.05.2008 Ex P1 the **second** aspect for consideration is the “**readiness and willingness**” of the plaintiff to pay the balance sale consideration.

63. The Legislature has chosen to use two phrases, namely “**readiness**” and “**willingness**”. While the “**willingness**” indicates his state of mind which is determined through the conduct of the plaintiff, the “**readiness**” indicates the financial capacity of the plaintiff which is required to be proved through evidence that he had the financial capacity to perform the Agreement, as has been explained in the case of K.V. Balan (Dead) Through Legal Representatives vs Bhavyanath, 2015 SCC OnLine Kel 298.

64. In Syed Dastagir vs T.R. GopalakrishnaSetty, (1999) 6 SCC 337, the Apex Court while construing the connotation of “readiness” and “willingness”, observed that the compliance of “**Readiness and Willingness**” has to be in spirit and substance and not in letter and form. So, to insist for mechanical production of the exact words of a statute is to insist for the form rather than essence. Therefore, the absence of form cannot dissolve an essence if already pleaded. It was also observed that the plea of “**readiness and willingness**” is not an expression of art and science, but an



expression through words to place fact and law of one's case for a relief. In order to gather true spirit behind a plea it should be read as a whole and to test whether the plaintiff has performed his obligations, one has to see the pith and substance of the plea. Unless statute "*specifically require a plea to be made in any particular form, it can be in any form. No specific phraseology or language is required to take such a plea.*"

Readiness:

65. The evidence required to be pleaded and proved by the plaintiff to establish his "**readiness**" in the context of Section 16 was explained in Raghunath Rai & Another vs. Jageshwar Prashad Sharma, (1999) 50 DRJ 751. The intending purchaser need not produce the money or vouch a concluded scheme for financing the transaction; it is sufficient for the purchaser to establish that he has the capacity to pay. However, the financial capacity has to be proved strictly and self-serving statements cannot discharge the burden of proving existence of financial capacity as noted by this Court in the case of Baldev. vs. Bhule, (2012) 132 DRJ 247.

66. The "**readiness**" has to be continuous as explained by the Apex Court in the case of N.P. Thirugnanam vs. Dr. R. Jagan Mohan Rao (1995) 5 SCC 115, by stating that the continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances. The amount of consideration which he has to pay



to the defendant must of necessarily be proved to be available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was ready and willing to perform his part of the contract.

67. Further, in H.P. Pyarejan v. Dasappa (Dead) By L.Rs. & Ors., (2006) 2 SCC 496, the Apex Court observed that the plaintiff is required to prove continuous readiness and willingness from the date of the contract to the time of the hearing, to perform the contract on his part. Failure to make good that 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 averments in the plaint must reflect the readiness and willingness on the part of the plaintiff.

68. Apart from the averment made in the plaint regarding the readiness to pay the balance consideration, the plaintiff has failed to produce any document to prove his financial capacity in the form of assets, bank statements etc to perform his obligations under Agreement to Sell dated 20.05.2008 Ex P1.

69. Significantly, the **PW1/plaintiff No. 1** in his affidavit by way of evidence Ex PW1/A has stated that he has the following assets at his disposal for making the balance payment:

“a. Super savings / FDI Bank Account No. 00980100005897 with Bank of Baroda, Paharganj, New



Delhi. Even today it has a balance of more than sixty two lacs;

b. Flat No. 81, Adarsh Cooperative Group Housing Society at 85 IP Extension, New Delhi - 92;

c. Agricultural lands admeasuring 20 acres at village Aggarwal, Pargana Tehsil Khurja, District Bulandshar, UP.”

70. This list of assets provided in the Affidavit of PW1 is nothing more than a self-serving statement in the absence of any proof regarding the ownership of the aforementioned properties. Therefore, merely stating the “readiness” in the plaint or listing the names of a few assets in the affidavit by way of evidence itself is not sufficient to meet the rigors of Section 16 of the Specific Relief Act, 1963.

71. **PW2/ plaintiff No. 2** in his affidavit by way of evidence Ex PW2/A has stated that he has the following assets at his disposal for making the balance payment:

“a. Savings Bank Account No. 1261153000029 with HDFC Bank, Ashok Vihar, New Delhi. I have brought the original pass book copy whereof is enclosed herewith and be marked as EXHIBIT PW 2/2;

b. Open Terrace Restaurant at Plot No. 26, Community Centre, Wazirpur Phase 1, New Delhi. I have brought the original property papers / title documents copy whereof is enclosed herewith and be marked as EXHIBIT PW 2/3 ”

72. PW2 has provided his HDFC Bank Statement ExPW2/3 for the period between 02.11.2015 to 19.04.2016 which reflects his closing balance as Rs. 1,34,025.60 on 19.04.2016, which obviously, is not sufficient to meet the obligation under the first ATS, specific performance of which has been sought. It is thus, observed that the a mere closing balance of Rs.



1,34,025.60 is not sufficient to prove the financial capacity of plaintiff No. 2 to fulfil the payment obligation of Rs. 2,00,00,000/- under the Agreement to Sell dated 20.05.2008.

73. Moreover, the said closing balance of 19.04.2016 provides no indication of the current financial position of plaintiff No. 2. There is no evidence whatsoever, that plaintiffs have the readiness till date for performance of ATS.

74. In order to prove the ownership of the property in Wazirpur, PW2 has produced the a Special Power of Attorney issued for the said property in his favour. Mere Special Power of Attorney neither makes him the owner nor does it reflect that he is ready with the consideration amount. A Power of Attorney is not an instrument by way of which any ownership in a property can be transferred. Therefore, there is no evidence produced on record to show that PW2/ plaintiff No. 2 is the owner/title holder of Plot No. 26, Community Centre, Wazirpur Phase 1, New Delhi.

75. As discussed above, the plaintiff had to not only mention in the plaint and evidence that he had the financial capacity to perform his obligations at the time of seeking specific performance but is also required to show the continuous availability of funds from which he intended to make payment of the balance sale consideration of Rs.2,00,00,000/- (Rupees Two Crores).

76. The plaintiff has neither disclosed his “**readiness**” to perform the Agreement at the time of seeking specific performance nor has he shown any continuous of his financial capacity to perform his obligations thereafter.

Willingness:



77. Next, the extent and the manner in which the Agreement has been performed and whether it was in conformity with the terms of contract needs to be further considered. The concept of “**Willingness**” has been examined by the Apex Court in the case of Aniglase Yohannan vs. Ramlatha and Others, (2005) 7 SCC 534, where it was 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 plaintiff 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.

78. *The conduct of the plaintiffs also does not support their averments of Readiness and Willingness; rather speaks a contrary language.* The plaintiffs claim to have contacted defendant No. 1 multiple times regarding the conversion of the suit property from leasehold to freehold so that the balance consideration of Rs. 2,00,00,000/- can be paid by them and the transaction can be concluded. However, these communications or correspondences have been denied by defendant No.1 in her Written Statement. In fact, the plaintiffs have failed to produce any documents to such effect. Though the plaintiffs have stated that they have followed up with defendant No. 1 regularly and assured that they would pay the balance amount, no proof of such initiative or conduct can be evinced from the pleadings and evidence of the plaintiffs.

79. Further, the plaintiffs had asserted that they kept enquiring from the Defendant No.1 about the status of freehold status of the property and conveniently kept believing the empty assurances of the defendant no.1 that she is pursuing the matter with DDA. Any prudent person who has invested



Rs. 2 crores in a transaction would not be persuaded to patiently wait on the empty assurances of the defendant No.1.

80. Another aspect of significance is the lack of prudence in the conduct of the plaintiffs during this period. The time period for fulfilling the obligations under the first ATS came to an end on 30.04.2009 and the present suit has been filed on 16.04.2012. Though the suit has been filed within the period of limitation, but it cannot be overlooked that it has been filed just before the limitation period would have expired i.e. around 14 days prior to the expiry of the limitation period.

81. The timelines to be adhered by the parties and their intention to conclude the Agreement in a time bound manner, are circumscribed by their conduct. To grant a Decree for Specific Performance lies in the discretion of the Court which the Court may not exercise due to the conduct of the plaintiff, as observed by the Apex Court in Nirmala Anand v. Advent Corporation (P) Ltd., (2002) 8 SCC 146.

82. The facts, as in hand, came up for consideration in Koli Satyanarayana (Dead) by LRs v. Valuripalli Kesava Rao Chowdary (Dead) through LRs & Ors. 2022 SCC OnLine SC 1306, wherein the Supreme Court observed that the defendant had communicated to the plaintiff on 12.04.1982 that since the requisite permission from the concerned authority could not be obtained, as the plaintiff cancelled the Agreement. The plaintiff, however, did not initiate any proceedings against the defendant. It was almost after a period of two years after the defendant gave the intimation about cancellation of their Agreement that the plaintiff chose to file the Suit. The learned Single Judge considered it relevant as the conduct of the plaintiff disentitling him from exercising discretion in favour of the



plaintiff in the Suit for Specific Performance even though it had been filed within the period of limitation as prescribed for filing such Suit. This conclusion not only met with approval by the Division Bench of the High Court, but was also upheld by the Apex Court which observed that despite being intimated about the cancellation of the Agreement, the plaintiff's conduct in not taking any action for more than two years, disentitled him from exercising discretion in his favour.

83. In Gulshan Kumar & Ors vs. Sat Narain Tulsian (Deceased) 206 (2014) DLT 443, reference was made to the observations of the Apex Court in Sardamani Kandappan vs. Rajalakshmi (2011) 12 SCC 18, that the courts frown upon Suits which are not filed immediately after breach/refusal and the fact that limitation is three years does not mean that a purchaser can wait for one year or two years to file a Suit and obtain specific performance. It was held that the three-year period is provided to assist the purchasers in special cases, where major part of the consideration has already been paid and possession delivered in part performance thereof.

84. In the present case, as per the averments of the plaintiffs, defendant No. 1 had allegedly claimed an additional amount of 60 lakhs in June, 2009 for the conversion of the suit property from leasehold to freehold. Yet, the Suit for Specific Performance has been filed more than two years after the alleged additional condition or refusal of the defendant to perform her obligation.

85. In conclusion, though the plaintiff has asserted that he is already been ready and willing but had failed to disclose anything about the resources which he had or from where he could make the payment of the balance sale consideration. Mere empty words of the plaintiff are not sufficient to



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establish that he had funds to make the payment of the balance amount nor



his conduct reflected that he was willing to perform his part of the Agreement.

86. *The plaintiff therefore has not been able to prove his readiness or willingness to perform his part of the Agreement.*

87. The ***Last*** aspect for consideration is: ***whether it is equitable in the given circumstances to grant the relief of specific performance to the plaintiffs.***

88. The time for performance of Agreement to Sell essentially has not been held to be the essence of performance of the ATS. The Constitution Bench of the Supreme Court in Chand Rani v. Kamal Rani, (1993) 1 SCC 519 observed that “... it is clear that in the case of sale of immovable property there is no presumption as to time being the essence of the contract. Even if it is not of the essence of the contract, the Court may infer that it is to be performed in a reasonable time from the following conditions: (1) the express terms of the contract; (2) the nature of the property; and (3) the surrounding circumstances, for example, the object of making the contract.” In other words, the court should look at all the relevant circumstances including the time-limit(s) specified in the Agreement and determine whether its discretion to grant specific performance should be exercised.

89. However, while these observations were made in 1993, the Courts have not been oblivious to the social realities. While earlier times did not witness drastic escalation in real estate with passage of time, the present times with the opening of economy and globalization, has seen sudden escalation in the rates of the properties. This aspect was noticed by the Apex Court in the case of K.S. Vidyanadam v. Vairavan, (1997) 3 SCC 1 wherein



it was observed that the Court cannot be oblivious to the reality *“as the reality is constant and continuous rise in the values of urban properties - fuelled by large scale migration of people from rural areas to urban centres and by inflation.”*

90. In the present case, the ATS is of the year 2008, implementation of which has to be considered in 2014 i.e. after almost 15 years. The real estate market has undergone significant turbulations and the prices have not maintained a consistent rate patterns. The plaintiffs claim to have paid an earnest money of Rs. 2,00,00,000/- to defendant No. 1 against a total consideration of Rs. 4,00,00,000/-, but has been held to be in regard to the second ATS and not in regard to the present ATS.

91. It is evident from the discussion above, that the plaintiffs have not disclosed the facts in right perspective and have already enjoyed the benefit of the ATS under the second ATS. The relief of specific performance is an equitable relief and the circumstances of the present case do not justify plaintiffs to any relief. Construed accordingly, it is held that plaintiffs are not entitled to any relief.

92. Moreover, in the Issues No.5 and 6 it has already been held that this Agreement to Sell Ex P1 was in fact only a precursor to the subsequent Agreement to Sell dated 26.05.2008 that was executed six days later in respect of First Floor and the Terrace of the suit property and was duly implemented and possession handed over. Having so concluded t nothing survives for granting the relief of specific performance.

93. The issue is decided against the plaintiff and in favour of the defendant.



Issue No.8: *“Whether the plaintiffs are entitled to specific performance of the purported Agreement dated 10th May, 2008?”*

OPP

94. In view of the findings on the above issues, it is hereby concluded that the plaintiffs are not entitled to relief of specific performance of the Agreement to Sell dated 20.05.2008 Ex.P1.

95. The issue is decided against the plaintiffs and in favour of the defendant.

Relief:

96. In view of the findings on the issues, as discussed above, it is held that the plaintiffs are not entitled to recovery of Rs.2,00,00,000/- (Rupees Two Crores), the recovery of which has also been sought in the alternative by the plaintiffs, and the suit of the plaintiff is hereby dismissed.

97. The suit along with pending applications stands disposed of.

98. Parties to bear their own costs. Decree sheet be prepared.

**(NEENA BANSAL KRISHNA)
JUDGE**

JANUARY 09, 2024

va/Ek