* IN THE HIGH COURT OF DELHI AT NEW DELHI

% *Reserved on: 13th February, 2026*
Pronounced on: 7th May, 2026

+ **RFA 438/2025, CM APPL.29764/2025**

SAYED NAIM SHAFI
(Deceased) Through his LRs
1. **SAYED NAVED SHAFI**

2. **SAYED AZIZ SHAFI**
Both S/o Late Sayed Saim Shafi
R/o 898, Nawab House,
Chatta Sheikh Mangloo
Jama Masjid, Delhi-110006.

….Appellants

Through: Mr. Sumant De, Mr. Rohit Kumar Singh, Ms. Shweta Priyadarshini, Mr. Nishi Singh and Ms. Bhagwati, Advocates

VERSUS

1. **ATA UR REHMAN**
S/o Sh. Rafiq-Ur Rehman
R/o 898, Nawab House
Chatta Sheikh Mangloo
Jama Masjid, Delhi-110006.

2. **SAYED SHUJA SHAFI**
S/o Sayed Naim Shafi
R/o 207, Falak Avenue,
OPP. Anmol Farms, CC Canal Road,
Amber Tower Road
Sarjhej, Landmark Mariyam House
Ayesha Masjeed, Ahmedabad, Gujarat.

….Respondents

Through: Mr. R.K. Saini, Advocate

CORAM:
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T

NEENA BANSAL KRISHNA, J.

1. ***Regular First Appeal*** under *Section 96 read with Order 41 Rule 1 Code of Civil Procedure, 1908* (*Hereinafter referred to as 'CPC'*) has been filed by the ***Appellants / Defendants*** to challenge the Judgment and Decree dated 25.01.2025 whereby, in the *Suit of the Plaintiff for Specific Performance,* the ***Appellant / Defendant No.1*** (since deceased) has been *directed to return the earnest money of Rs.10 Lakhs paid* under the Agreement to Sell.

2. The *Plaintiff / Respondent No.1* had instituted a *Civil Suit CS DJ NO.615841/2016 for Specific Performance and Permanent Injunction.*

3. The **facts in brief,** are that the *Defendant / Appellant Sayed Naim Shafi* (since deceased), now represented by the Legal Heirs, was the owner of 1/3rd undivided share in the property bearing No. 898, Chhatta Sheikh Mangloo, Nawab House, Part-II, Jama Masjid, Delhi-110006 (*Hereinafter referred to as 'Suit Property'*). He entered into an ***Agreement to Sell*** *dated* ***18.06.2013*** (*hereinafter referred to as 'ATS'*) with the *Plaintiff / Respondent No.1 Ata Ur Rehman,* in respect of the Ground Floor admeasuring 230 sq. yards and Roof over it forming part of the Suit Property for a sale consideration of Rs.80 Lakhs. A sum of Rs.10 Lakhs as *earnest money*, was paid to the Defendants in cash at the time of signing of Agreement to Sell.

4. The *Defendant No. 2 Hijab Naeem Shafi*, wife of *Defendant No.1 Sayed Naeem Shafi*, had an active hand in finalizing the deal and had received the *earnest money*. The Agreement to Sell was executed in the presence of witnesses *Sayed Shuja Shafi* and *Mohd. Irfan,* and was signed, and thumb impressions of both the Defendants, was put.

5. The *Defendant No.1* agreed to execute the Sale Deed in respect of the *portion as mentioned in the Agreement to Sell* after receiving the balance sale consideration of Rs.70 Lakhs, *on or before **17.12.2013***. It was further agreed that at the time of execution of Sale Deed, the actual vacant possession of the specified portion of the Suit Property, shall be handed over to the Plaintiff. In case the Defendants refused to deliver the possession of the Suit Property or refused to sign the Sale Deed in favour of the Plaintiff, *the Defendants were liable to return double the amount of earnest money*. The Defendants assured the Plaintiff that the Suit Property was free from all kinds of encumbrances and the Defendant shall be liable for any loss or damages, if suffered or sustained by the Plaintiff.

6. The Plaintiff, on or about 15.11.2013, approached the Defendants to accept the balance sale consideration and to execute the Sale Deed. However, they failed to respond properly and made some excuses. The Plaintiff, from their behaviour, concluded that Defendants never intended to receive the balance sale consideration and execute the Sale Deed.

7. The Plaintiffs thus, sent a ***Legal Notice dated 18.11.2013*** through his Counsel, to the Defendants for execution of the Sale Deed. However, the Defendants avoided receiving the Legal Notice, which was returned back with the endorsement "*information delivered and unclaimed*".

8. The Plaintiff asserted that *he was always ready and willing to perform* his part of the Contract of the Agreement to Sell. Hence, he filed a ***Suit for Specific Performance of the Agreement to Sell dated 18.06.2013, and also sought Permanent Injunction for restraining the Defendants from***

creating Third Party Rights in the Suit Property.

9. The **Defendants** in their **Written Statement,** denied all the averments made in the Plaint. It was claimed that the Suit was vexatious and was without cause of action, which had been filed only to harass the Defendants and it amounted to gross abuse of process of law. The only intention of the Plaintiff in filing the Suit was to arm twist the Defendants and derive undue benefit, to which they were not legally entitled. The Defendants claimed that *the Agreement to Sell was obtained by fraud and by misrepresentation. No Agreement to Sell had ever been executed by the Defendants, in respect of the Suit Property*.

10. It was explained that *Mr. Sayed Naim Shafi*, *Sayed Saeed Shafi,* and *Mr. Sayed Saleem Shafi represented through his legal representatives i.e.,* ***Smt. Zeenat S. Shafi*** *(wife),* ***Syed Ariz Shafi*** *(son), and* ***Anam Ayesha Shafi*** *(daughter),* were the co-owners of the Suit Property and were in joint possession. ***Civil Suit No.413/1968*** was filed *inter-se* the parties for Partition, which was decreed *vide* Judgment dated 17.12.1968, and all three brothers *were declared as co-owners entitled to* $1/3^{rd}$ *share each in the Suit Property.* Thereafter, *Sayed Saleem Shafi* died on 11.09.1993. By the rules of Succession, *the undivided share of Mr. Sayed Saleem Shafi devolved upon his legal heirs*.

11. It was claimed that *Plaintiff / Respondent No.1, Sh. Ata Ur Rehman* along with *Respondent No.2 Sayed Shuja Shafi*, son of the Defendant, hatched a conspiracy and cheated the Defendant. They fraudulently and by misrepresentation, got the Agreement to Sell executed. The Defendants denied having received any part of sale consideration in respect of the transaction. It was alleged that the Defendants had lodged a Complaint dated

14.10.2013 with the *SHO, P.S. Jama Masjid* against the *Plaintiff* and his son, *Respondent No. 2 Sayed Shuja Shafifor fraud, cheating and misrepresentation and to declare that the Agreement to Sell was an outcome of fraud and thereby, non-est and not binding.*

12. It was further stated that at the time of issuance the Notice of the present Suit, the Plaintiff was directed to deposit the balance sale consideration within four weeks, but he failed to do so, making it abundantly clear that *he was neither ready nor willing to perform his part of the Contract.*

13. The Defendants further asserted that the Suit Property was *never partitioned by metes and bounds*. There was no division of the Suit Property in any manner and no specific portion of the joint property could be claimed by any of the three co-owners. The three co-owners continued to reside in the Suit Property and are in joint occupation. The Agreement to Sell purported to a *defined portion on the Ground Floor,* which could not have been the subject matter of the Agreement to Sell, as there was no defined share of Defendant in the Suit Property.

14. It was further stated that the Plaintiff had earlier filed ***Suit No. 178/2013*** titled as '*Praveen Naaz & Ors. v. Sayed Aziz Shafi & Ors.*' stating himself to be the guardian of the Plaintiffs, *namely Master Mohd. Areeb and Master Mohd. Saim*, being his children. The Plaintiff was also a Defendant in ***CS (OS) No. 1798/2013*****,** titled as '*Sayed Ariz Shafi v. Sayed Naim Shafi*' wherein he had filed his Written Statement. These two litigations had not been disclosed by the Plaintiff, in the present Suit.

15. It was further claimed that allegedly, the entire payment was made to the *Defendant in cash*, but it is not proved either by the Receipt or acknowledgment on behalf of the Defendants. *In fact, the amount of Rs.10 Lakhs was never received by the Defendants.*

16. Furthermore, as per the recitals of Agreement to Sell, *the sale was only for a period of six months* and, therefore, the Contract was completely violative of *Contract Act* and was *not enforceable*. Moreover, the period under the Agreement to Sell was to commence from 18.06.2013 and thereby the same had lapsed and expired and, therefore, the Plaintiff was not entitled to Specific Performance of Agreement to Sell.

17. Moreover, the Plaintiff had shown his residential address as that of the Suit Property, which is completely erroneous as Plaintiff is not residing in the part of theSuit Property. In fact, the said portion of the Suit Property is lying locked and none has an access to it. The Plaintiff has been trying hard to break open and illegally occupy the Suit Property. There is no material to show that the Plaintiff is in possession of the Suit Property.

18. It is also asserted that the Plaintiff was never ready and willing to abide by his part of Agreement to Sell and had no proof of having the balance sale **consideration of Rs.70 Lakhs in his possession.**

19. On **merits**, all the averments made in the Plaint, were denied. It was, therefore, claimed that the Suit be dismissed.

20. The **Replication** was filed by the Plaintiff to the **Written Statement**, wherein he reaffirmed the averments made in the Plaint and denied the allegations made by the Defendants in the Written Statement.

21. **Issues** on the pleadings were framed on 12.03.2015 as under:

> *"(i) Whether the parties entered into a binding and valid Agreement to Sell regarding Suit Property bearing No.898, Nawab House, Chatta Sheikh, Mangaloo, Delhi-110006? OPP*

(ii) If answer to the above issue is in the affirmative whether the plaintiff has been ready and willing to perform his part of Contract? OPP
(iii) Whether the plaintiffs have fraudulently got executed blank papers from the defendant and misused them for preparing the Agreement to Sell? OPD
(iv) If the answer to the above issue is in favour of the plaintiff, whether the plaintiff is entitled to a decree of specific performance of the Agreement? OPP
(v) Whether the defendant is only a co-owner of the suit property? If so, its effect? OPD
(vi) Relief."

22. The ***Plaintiff*** examined himself as ***PW1***, and ***PW2*** *Mohd. Irfan*, ***PW3*** *Mohd. Zahid* and ***PW4*** *Muzarrat Hushain,* in support of his case.

23. The legal heirs of Defendants examined ***DW1*** *Syed Naved Shafi*. All the witnesses deposed in respect of their respective pleadings.

24. The **learned District Judge** in the impugned Judgment, observed the execution of the Agreement to Sell dated 18.06.2013 was proved and it was a fact, not disputed. The only defence taken by the Defendants / Appellants was that it was an act of *fraud*, *misrepresentation* and *collusion* between the Plaintiff and his own son *Sayed Shuja Shafi*.

25. However, on appreciation of the evidence, learned District Judge noted that there was aside from a bald assertion that there were a collusion and fraud, *no details of any kind were disclosed and, therefore, the defence of avoiding the Agreement to Sell on the ground of fraud, was* ***rejected***. However, it was observed that the Agreement to Sell was specifically in respect of Ground Floor portion of the property in question, *when in fact the Defendants had an undivided $1/3^{rd}$ share in the entire property, and he could not have possibly sold a specific part of the Suit Property i.e., the Ground*

Floor to the Plaintiff and on this ground, ***the Agreement to Sell was held to be vitiated.***

26. Specific performance was, declined on the grounds of the Appellant / Defendant merely holding an undivided 1/3rd share in the unpartitioned Suit Property, rendering the transfer of the defined ground floor and roof portion incompetent. *Also,* the Plaintiff / Respondent failed to establish his readiness and willingness *qua* the balance consideration of Rs. 70 Lakhs, for the execution of the Agreement to Sell.

27. It was, therefore, **concluded** that the Plaintiffs were not entitled to the Specific Performance of Agreement to Sell dated 18.06.2013. However, it was held that though the earnest money of Rs.10 Lakhs were paid in cash, but the payment was clearly recorded in the Agreement to Sell which had the signatures of the Defendants. It was thus, held that *the cash payment of Rs.10 Lakhs as earnest money was made to the Defendants which they are liable to return to the Plaintiffs, but considering the totality of circumstances it was held that the Plaintiff was not entitled to any interest.*

28. Consequently, ***the Suit of the Plaintiff for Specific Performance was dismissed, but the Defendants were directed to return the amount of Rs.10 lakhs***.

29. Aggrieved by the Judgment dated 25.01.2025, the **Appellants** have preferred the present Appeal.

30. The ***grounds of challenge*** are that there was no legal basis to prove the payment of earnest money, and the conclusion of the learned District Judge was based on conjectures and presumptions. There was no credible evidence or document to corroborate that the *earnest money* had in fact, been paid to the Defendants. Furthermore, the Plaintiff had failed to show his creditworthiness to pay a sum of Rs.10 Lakhs at the time of execution of the Agreement to Sell dated 18.06.2013, despite which the Trial Court has taken a contradictory stand. From the plain reading of the Agreement to Sell itself, it emerges that it was only suggestive of payment of earnest money in cash. There were no Income Tax records produced to corroborate this payment of Rs. 10 Lakhs in cash. Furthermore, Income Tax prohibits any transaction of more than 20,000/- in cash.

31. Moreover, the Plaintiff had failed to place on record, the necessary documents such as Bank Statements or credits in his account or loan or credit being taken from the third party, though not limited to Financial Institutions *etc.*, Despite all this, the refund of Rs.10 Lakhs has been allowed to the Plaintiff / Respondent No.1.

32. Though, the Plaintiff had examined two witnesses to prove that Rs.5 Lakhs and Rs.2 Lakhs respectively were taken from them, but their testimony was not believable. Moreover, the Plaintiff had admitted in his cross-examination that he was planning to pay the Defendant No.1 the balance amount, only after selling his property at *Daryaganj*, which had not been sold till 2024. Therefore, it is evident that Plaintiff had no money or any capacity to pay the sale consideration.

33. Reliance is placed on *Jitender Kumar vs. Vijender Kumar,* 2018 SCC OnLine Del 12315, wherein it was held that the Suit for Specific Performance and in the alternative, relief of damages, is based on the *principle that the seller is guilty of breach of Contract and not the proposed purchaser.* The Plaintiff should have had the financial capacity and should be in a position to perform his Agreement to Sell.

34. Secondly, entitlement of damages under *Section 73 of the Indian*

Contract Act, 1872 can only be if it is shown that there was a specific higher price of the subject property being paid in the market price, on the date fixed for specific performance. Hence, it is submitted that the impugned Judgment is liable to be set aside.

Submissions heard and record perused.

35. The Appellant is aggrieved by the Judgment wherein he has been directed to refund the sum of Rs.10 Lakhs that were allegedly paid by the Plaintiff as earnest money, at the time of entering into the Agreement to Sell.

36. The controversy in the present Appeal thus, distils to the propriety of the aforesaid refund decree. The following issues arise for determination:

i. Whether the Agreement to Sell dated 18.06.2013 was vitiated by fraud and misrepresentation;

ii. Whether Rs. 10,00,000/- was paid thereunder as earnest money; and,

iii. Whether the Plaintiff / Respondent was entitled to the refund thereof, regard being to the co-ownership, un-partitioned status and contract stipulations?

I. *Whether the Agreement to Sell dated 18.06.2013 was Vitiated by Fraud and Misrepresentation:*

37. The Agreement to Sell dated 18.06.2013 *Ex. PW1/2,* was **executed**, which was **denied** by the Defendants.

38. The Defendant/ Appellant, in support of his assertion, examined **DW1 Sh. *Syed Naved Shafi***, who had deposed that the Agreement to Sell in fact, was never executed as per law and his father *Sh. Sayed Naim Shafi* never intended to transfer any right in favour of the Plaintiff with respect to the Suit Property, under any circumstances. He denied that Plaintiff had ever offered any amount towards the alleged sale consideration of Rs.80 Lakhs and denied that his father ever received Rs.10 Lakhs.

39. However, **DW1** in his cross-examination admitted that the Agreement to Sell dated 18.06.2013 was pertaining to the year 2013 and was not executed in his presence, as he was in Mumbai. Therefore, his evidence is in the realm of *hearsay* and therefore, inadmissible. Moreover, the line of defence is not that the Agreement was not signed by Defendant, but that it was vitiated by fraud, thereby admitting that the Agreement was indeed executed.

40. The Appellant then asserted that the Agreement to Sell *was sham and was made in hurry*, because the *sale was claimed to be only for six months* thus, the contract was unenforceable. **DW1** deposed that *Md. Irfan* was an associate of Plaintiff and *was his accomplice in fraud played by him,* and in fact, it was never executed. He further asserted that the Plaintiff along with his younger brother, had hatched the conspiracy to cheat his father, who never received any money.

41. From the evidence of **DW-1**, it emerges that he has not denied the signatures of his father on the Agreement to Sell, but has **challenged its validity**. The first ***reason for so claiming is that*** the Agreement was executed *in haste,* and that the sale was only for six months and was not enforceable.

42. However, this argument is built on a hyper technical ground, since the holistic reading of the Agreement shows that six months were stipulated for execution of Sale Deed and it did not define the period of validity of Sale Deed, as has been projected. Moreover, there is no explanation of the circumstances to define this alleged haste or the circumstances for execution of Sale Deed within six months. In fact, this interpretation is antithetical to the concept of sale.

43. The ***next main ground*** is that the *Agreement was a result of fraud and misrepresentation,* by his own son, Shuja Shafi who had colluded with the Plaintiff, and the Agreement to Sell was fraudulent. Aside from bald assertions of there being fraud and misrepresentation, not an iota of evidence was led to explain what was the fraud or the misrepresentation was committed by the Plaintiff.

44. The reason for alleging this defence, is evident as faced with a situation wherein his own son Shuja Shafi was a witness to this Agreement to Sell, there was no other escape from the Agreement, except to conveniently take a plea of fraud and collusion by his own son with the Plaintiff, which is neither supported by the circumstances defining the fraud nor by any evidence whatsoever.*In fact, the son being a witness, is a testimony to the genuineness of the Agreement.*

45. The learned District Judge, therefore, *rightly concluded that the evidence of the Plaintiffs coupled with the evidence of the Defendant, proved that the* ***Agreement to Sell*** *Ex. PW1/2* ***was duly executed by the Appellant in favour of the Plaintiffs and no fraud or misrepresentation on the part of Plaintiffs could be proved****.*

46. The Agreement to Sell dated 18.06.2013 stands duly proved as a genuine and binding contract, untainted by fraud, misrepresentation, or collusion.

II. Whether Rs.10,00,000/- were Paid under the Agreement to Sell:

47. The next aspect for consideration is whether Rs. 10 Lakhs was paid thereunder as *earnest money*, as contended by the Respondent and acknowledged therein. This is assailed by the Appellants on grounds of non-payment, source of money not explained and the validity of cash transaction.

48. The Appellant had contended that, in fact, no such payment of Rs.10,00,000/- was ever received by the Defendant No. 2, wife of the Appellant No.1.

49. In the said Agreement to Sell, it was specifically mentioned that the consideration of Rs.10 Lakhs in cash, had been received by the Appellant from the Plaintiff at the time of signing of Agreement to Sell, as an advance / earnest money

50. The learned District Judge *rightly observed that Defendant No.1 / Appellant No.1 was not an illiterate person and while signing the document, was well aware of the contents of the Agreement to Sell.* Moreover, while denying having received the earnest money, the original Defendant failed to step into the witness box; he being the best witness to prove that he had not received any amount. Despite he being alive, only his son *DW1 Syed Naved Shafi* had stepped into the witness box, *who admittedly was not present at the time of execution of Agreement to Sell and was in Mumbai.*

51. The testimony of *DW1* denying of receipt of Rs. 10 Lakhs was, therefore, nothing but hearsay. The *DW1 Syed Naved Shafi, who was the* *best witness, despite being available,* ***did not step into the witness box thereby leading to an adverse inference of his not stepping into the witness box***.

52. The Appellant also challenged the cash payment of Rs. 10,00,000/-, on the *ground that the source of income was not explained by the Plaintiff.*

53. To explain the source of payment, the Plaintiff/Respondent had examined *PW3 Md. Zahid*, who was running the show in front of the shop of the Plaintiff, who had deposed that he was running a friendly Committee, from where he had the money and paid Rs.5 Lakhs to the Plaintiff, on 18.06.2013.

54. The other witness examined by the Plaintiff was *PW4 Muzarrat Hushain*, who had deposed that he had given a loan of Rs.2 Lakhs to the Plaintiff while he admitted that he was earning about Rs.5,000/- per day from selling fast food, *i.e., sabji kachori, etc.,* since the last 25-30 years.

55. The learned District Judge observed that once a person is working for such a long time, for him to have Rs.2 Lakhs in savings cannot be doubted and, therefore, his testimony that he had given a loan of Rs.2 Lakhs, could not be disbelieved. More than the testimony of *PW3* and *PW4* about having given the money to the Plaintiff to pay to the Appellant No.1 as earnest money, *what was of significance was that the Agreement to Sell was proved to be signed by the Appellant No.1, wherein the payment was expressly recorded* and the Receipt of the same, was admitted and acknowledged.

56. The Appellant also tried to question the payment of Rs.10,00,000/- by asserting that the cash transactions of such huge amounts, is not permissible under law.

57. Much has been contended by claiming that no Income-Tax Returns have been proved to establish this payment of Rs.10,00,000/-. The Respondent may not have produced the Income-Tax Returns, but as already discussed above, he had produced cogent evidence in proof of having given Rs.10,00,000/- to the Appellant. Mere non-filing of Income-Tax Returns, cannot be a ground to discard the positive evidence, which has been led by the Respondent by examining the witnesses to prove that he had taken the money from them to pay Rs.10,00,000/-. In any case, non-filing of Income-Tax Returns may entail penalty under the Income-Tax Returns Act but per se cannot be a ground to disbelieve the payment of Rs.10,00,000/-.

58. The learned District Judge thus, rightly concluded that Rs.10 Lakhs was received by the Appellant at the time of execution of Agreement to Sell, through the Appellant's signatures on the Agreement acknowledging receipt, supplemented by the witness testimony, and adverse inference against non-examination of the original defendant.

III. <u>Whether the Respondent / Plaintiff was Entitled to Refund of Rs.10,00,000/-:</u>

59. The next question, which arises is whether the Appellants are liable to refund of Rs.10 lakhs, which is the alternative prayer made by Plaintiff / Respondent Ata Ur Rehman in his Plaint.

60. In order to ascertain this aspect, it is pertinent to refer the Agreement to Sell Ex.PW1/2, which was proved to have been executed between the parties. In the said Agreement to Sell, it was noted that the total sale consideration under the Agreement to Sell was Rs. 80 Lakhs, out of which, Rs.10 Lakhs were paid in cash, while the balance Rs. 70 Lakhs were agreed to be paid, on or before 17.12.2013.

61. To determine whether the Respondents have been rightly allowed the refund of the earnest money in the sum of Rs. 10 Lakhs, it is pertinent to note that there is a distinction between the term *Advance / Earnest* money though, in the present Agreement to Sell they have been used conjointly.

62. The term "*Advance Money"* means money forming part of the consideration of an Agreement paid before the same, becomes fully payable. On the other hand, "*Earnest Money"* means the sum of money given for the purpose of binding a contract which is forfeited in case the contract does not materialise.

63. In the case of *Videocon Properties Ltd. v. Bhalchandra Laboratories,* (2004) 3 SCC 711, it was observed that *it is not the description by words used in the agreement only that would be determinative of the character of the sum, but really the intention of parties and surrounding circumstances as well, that have to be looked into and what may be called an advance may really be a deposit or earnest money and vice-versa. The earnest money serves two purposes of being part-payment of the purchase money and also security for the performance of the contract by the party concerned.*

64. This concept was explained in the case of *Satish Batra v. Sudhir Rawal*, (2013) 1 SCC 345, wherein the fundamental principles as narrated in *Videocon Properties Ltd.* (supra) were reiterated. It was also held that the *part-payment of purchase price cannot be forfeited, unless it is a guarantee for the due performance of the contract. In other words, if the payment is made only towards part-payment of consideration and not intended as earnest money, then the forfeiture clause shall not apply.* This principle was re-affirmed and reconfirmed in the case of DDA v. Grihsthapana Coop. Group Housing Society Ltd., 1995 Supp (1) SCC 751.

65. Now, coming to *the Agreement to Sell,* its *Clause 4, stated as under :*

> *4. That if the first party will refuse to deliver the possession of the said property unto the second party and refuse to signing /registration sale deed and all other necessary documents of the said property in favor of the second party, then the first party will pay the double amount of the said advance/earnest money to the second party similarly if the second party will fail to pay the remaining balance amount of the said property to the first party within the stipulated period, then advance earnest money shall stand forfeited.*

66. Applying the aforesaid principles, it is evident from *Clause 4* of the Agreement to Sell, that the parties themselves used the term *advance* and *earnest* in the alternative. From the comprehensive reading of Agreement to Sell and also considering the amount that was paid, ***it is evident that in fact, it was an advance money and not an earnest money.***

67. **The next question** which arises for consideration *is whether the Appellant / Seller failed to perform his part of the Agreement and consequently, became liable for return of earnest money.*

68. In the present case, admittedly, Defendant No. 1 entered into the Agreement to Sell to sell ***in regard to the ground floor of the property in which he had 1/3rd undivided share.***

69. *The question of law which arises is* ***firstly,*** *whether he could have entered into Agreement to Sell in respect of* ***his undivided 1/3rd share*** *in the property in question;* and **secondly**, *whether he could define the undivided share to be sold, as the ground floor and roof of the property in question.* These questions are pertinent to ascertain the question of refund of the money, received under the Agreement to Sell.

70. In this regard, reference is made to Section 44 of the *Transfer of Property Act, 1872*, (*hereinafter referred to as 'TPA'*) which reads as follows:

> *44.* ***Transfer by one co-owner****.—*
> *Where one of two or more co-owners of immoveable property legally competent in that behalf transfers his share of such property or any interest therein,* ***the transferee acquires as to such share or interest****, and so far as is necessary to give, effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property,* ***and to enforce a partition of the same,*** *but subject to the conditions and liabilities affecting at the date of the transfer, the share or interest so transferred.*
> *Where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house.*

71. *Section 44 TPA* explicitly recognizes the right of a co-sharer to sell his undivided share in the property and the purchaser enters into his shoes and may seek identification of his individual share, through a partition.

72. This aspect finds its endorsement in the case of *Kartar Singh vs. Harjinder Singh & Ors.,* (1990) 3 SCC 517, wherein the dispute arose from a written agreement for sale concerning a jointly owned property. It was held that the Agreement could be enforced against the executing co-owner to the extent of his own share.

73. Similarly, in *Maharaja Singh & Ors. vs. Karan Singh (D) thr. L.Rs. & Ors.,* AIR 2024 SC 3328, arising out of a registered Agreement for Sale and a Suit for Specific Performance, theApex Court restricted the Decree to the vendor's one-half undivided share, in the Suit Property.

74. *The legal position is thus, well-settled* that where property is held jointly and remains unpartitioned, each co-owner has a legal right in the *undivided interest* in the whole. **He is therefore, entitled to sell his undivided share to third party, and such Agreement is valid to the extent of his undivided share in the Property.**

75. The **second and more problematic aspect** is *whether despite the property being joint, the co-owner can sell any defined portion in the jointly held property.*

76. *In M.V.S. Manikayala Rao v. M. Narasimhaswami and Ors.,* [1966] 1 SCR 628, the Apex Court stated as follows:

> "Now, it is well settled that the **purchaser of a coparcener's undivided interest in the joint family property, is *not entitled to possession of what he had purchased*.** *His only right is to sue for partition of the property and ask forallotment*

to him of that which, on partition, might be found to fall to the shareof the coparcener whose share he had purchased."

77. In <u>*Sidheshwar Mukherjee v. Bhubneshwar Prasad Narain Singh and Ors.*</u>, MANU/SC/0089/1953: [1954]1SCR177, wherein this Court held as under:

> *"All that (vendee) purchased at the execution sale, was the undivided interest ofcoparcener in the joint property.* ***He did not acquire title to any defined share inthe property*** and was not entitled to joint possession from the date of hispurchase. He could work-out his rights only by a suit for partition and hisright to possession would date from the period when a specificallotment was made in his favour."

78. The Supreme Court in the case of <u>*Sk. Golam Lalchand vs. Nandu Lal Shaw & Ors.*</u>, AIR 2024 SC 4193, held that the Sale Deed, in accordance with *Section 44 TPA*, may be a valid document to the extent of the respective share in the property.

79. Further reference is made to <u>*Ramdas vs. Sitabai & Ors.*</u>, AIR 2009 SC 2735, MANU/SC/0910/2009, wherein the Hon'ble Supreme Court held as under:

> "**15.** *Without there being any physical formal partition of an undivided landed property, a co-sharer cannot put a vendee in possession although such a co-sharer may have a right to transfer his undivided share.*
>
> ...

> ***17.** In view of the aforesaid position there could be no dispute with regard to the fact that an undivided share of co-sharer may be a subject matter of sale, but possession cannot be handed over to the vendee, unless the property is partitioned by metes and bounds amicably and through mutual settlement or by a decree of the Court."*

80. The aforesaid Judgements have well explained that an Agreement to Sell relating to an undivided share, is not *per* se, incapable of specific enforcement, and a person having an undivided share in the property can sell the same to the buyer. Though, it comes with the qualification that he cannot define the portion of the property in the Agreement to Sell, since all the co-owners are the joint owners of the property and none of the co-owners can claim his right, title and interest in any specific portion of the property till the partition is affected.

81. In this case, admittedly, the partition had yet not taken place and thus, the Appellant could not have specifically entered into the Agreement to Sell in respect of the Ground Floor and Roof. The Agreement to Sell, in the present case, could at best have been specifically enforced only to the extent of the Defendant's undivided $1/3^{rd}$ share in the Suit Property, and the purported transfer of the ground floor and roof was ***unenforceable in its terms and required partition.*** The Defendant, possessing only an undivided $1/3^{rd}$ share in the unpartitioned property, ***lacked the competency to transfer exclusive title or possession of that specific portion.***

82. *Consequently, while the Agreement to Sell is not void entirely, the Decree for Specific Performance can only be granted in respect of the*

Defendant's undivided 1/3rd share, ***and not for the ground floor and roof as a distinct physical entity.***

83. In the circumstances, when the Respondent had bargained specifically for Ground Floor and the Roof, which he cannot get, as the undivided share was not partitioned, the relief for Specific Performance of Agreement to Sell was rightly declined, but alternatively, Respondent was granted the refund of his money paid under the Agreement to sell, by the learned District Judge.

84. It would also be relevant to observe that the learned District Judge concluded from the evidence, that the Plaintiff had failed to produce any evidence *to show his financial capacity to honour the Agreement*. He was even unable to deposit the balance sale consideration of Rs. 70 Lakhs in compliance of the directions of the learned District Court at the time of issuing of summons of the Suit. The learned District Judge had comprehensively considered the evidence and found that the Plaintiff was unable to produce any cogent evidence or the ideas or any other documents, to prove that he had the requisite funds of Rs.70 Lakhs, to honour the Agreement to Sell and thus, was unable to prove that he was ready and willing to perform his part of the Agreement. *However, the question of readiness and willingness would have arisen, only if specific performance of the Agreement to Sell dated 18.06.2013, was allowed.*

85. Thus, considering the aforesaid circumstances, *it can be easily concluded that the Agreement to Sell could not have fructified into a Sale Deed for a defined portion since no partition had taken place*. Therefore, it is held that the Appellants were liable to return the money taken by them under the Agreement to Sell.

Conclusion:

86. The Suit of the Plaintiff / Respondent for Recovery of Rs. 10 Lakhs has, therefore, **been rightly decreed in favour of the Respondent**.

87. There is **no merit** in the present Appeal, which is hereby **dismissed**. Pending Applications, if any, also stands **disposed** of.

(NEENA BANSAL KRISHNA)
JUDGE

MAY 7, 2026
va/n