

Sarabjeet Singh vs Anup Sharma & Ors on 20 November, 2024

Author: Vibhu Bakhru

Bench: Vibhu Bakhru

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* IN THE HIGH COURT OF DELHI AT NEW DELHI
% Judgment Pronounced on: 20.11.20

+ RFA(OS) 56/2016
SARABJEET SINGHApp

versus

ANUP SHARMA & ORS. Resp
Advocates who appeared in this case:
For the Appellant : Mr. Sanjeev Singh, Mr. Satish K
and Ms. Sandipa Bhattacharjee,
Advocates with Appellant in per
For the Respondents: Mr. Arun Aggarwal, Mr. Shivam S
and Mr. Praful Rawat, Advocates
R1 and R3.
Mr. Sangramsingh R Bhonsle, Mr.
Nupal A Digankan, Ms. Pushkana
Bhonsle and Mr. Naman Shrestha,
Advocates for R-4, R-7 and R-8.
Mr. Raman Kapur, Senior Advocat
with Mr. Varun Kapur, Advocate
9.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU
HON'BLE MS. JUSTICE TARA VITASTA GANJU
JUDGMENT

TARA VITASTA GANJU, J.:

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Preface	

1. The present Appeal has been filed impugning judgment and decree dated 17.05.2016 in CS(OS) No.439 of 2008 passed by the learned Single Judge of this Court [hereinafter referred to as "Impugned Judgment"] wherein the suit for specific performance of two Agreements to Sell dated 19.06.2006 and for declaration of Gift Deed dated 05.09.2006 as null and void filed by the Appellant/Plaintiff was dismissed.

2. The present appeal is in respect of a free hold property bearing Plot No. 16-G, Block No. D, admeasuring 247-9/10 sq. yards located in Hauz Khas Enclave, Village Kharera, Delhi [hereinafter referred to as "subject premises"] wherein Sh. Jagdish Chander Sharma, the predecessor-in-interest of Defendant/Respondent Nos. 1 to 3, was the owner of the ground floor portion of the subject premises [hereinafter referred to as "Ground Floor of the subject premises"] and Late Shri Badri Nath Sharma, survived by the Defendant/Respondent Nos. 4, 5, 8 and 9, were the co-owners of the first floor, second floor and portion above the second floor of the subject premises.

Brief Facts

3. The subject premises originally belonged to one Lt. Smt. Kasto Devi, who was the mother of Lt. Sh. Jagdish Chander Sharma [hereinafter referred to as "JCS"] and Lt. Sh. Badri Nath Sharma [hereinafter referred to as "BNS"], who had purchased this property by a sale deed dated 15.05.1956.

3.1 Lt. Smt. Kasto Devi bequeathed the subject premises in terms of Will dated 28.10.1976, wherein the entire ground floor, rear courtyard and open space on the Ground Floor was bequeathed to JCS while the bequest for the rest of the property, being the first and second floor and above, was bequeathed to her older son BNS.

3.2 A family settlement deed was executed between the two brothers, whereafter, mutation was carried out in their respective names in the records of the Municipal Corporation of Delhi on 03.06.1980. The share of JCS was bequeathed to his two sons and his wife, who are Defendant/Respondent Nos.1 to 3 herein.

3.3 Two Agreements to Sell and a Memorandum of Understanding [hereinafter referred to as "MoU"], all dated 19.06.2006 were entered into between the Appellant/Plaintiff and Defendant/Respondent Nos.1 to 3 and BNS.

4. The first Agreement to Sell [hereinafter referred to as "First Agreement"] was between the Appellant/Plaintiff and Defendant/Respondent Nos. 1 to 3 for the sale of the Ground Floor of the subject premises for a total sale consideration of Rs.1,71,00,000/- with an advance payment of Rs.25,00,000/- made by the Appellant/Plaintiff.

5. The second Agreement to Sell dated 19.06.2006 [hereinafter referred to as "Second Agreement"] was signed between the Appellant/Plaintiff and BNS for the sale of the second floor and floor above the second floor of the subject premises for a total sale consideration of Rs.33,00,000/- with a payment of Rs.5,00,000/- as an advance to BNS by the Appellant/Plaintiff.

5.1 Additionally, an MoU was also executed between the Appellant/Plaintiff and BNS on the same date as the First Agreement and the Second Agreement i.e., 19.06.2006. In terms of the MoU, the Appellant/Plaintiff undertook to reconstruct the entire property at his own cost, and of the reconstructed property, the newly constructed basement, ground floor, second floor and terrace above the second floor would remain with the Appellant/Plaintiff, while the newly constructed first floor was to remain with BNS. The MoU also contained the clause that the construction of the

building was to be completed within nine months from the date of sanction of the building plan.

5.2 In addition, the following documents were executed between the parties, all dated 19.06.2006:

- (i) A receipt dated 19.06.2006 was executed by Defendants No.1 to 3 upon receipt of Rs.25,00,000/- from Appellant/Plaintiff;
- (ii) A receipt dated 19.06.2006 was executed by BNS for receiving Rs.5,00,000/- from Appellant/Plaintiff;
- (iii) Defendant No.1 to 3 also executed No Objection Certificates/Affidavits stating that they had No Objection to BNS entering into Agreement to Sell for sale of second floor with entire terrace rights to the Appellant/Plaintiff; and
- (iv) No Objection Certificate/Affidavit also executed by BNS stating that he had no objection for the sale of the ground floor of subject premises as entered between Appellant/Plaintiff and Defendant Nos.1 to 3.

5.3 As stated above, the total amount advanced by the Appellant/Plaintiff to BNS and Defendant/Respondent Nos.1 to 3 was Rs.30,00,000/-, which comprised of advance payments amounting to Rs.25,00,000/- for the First Agreement and Rs.5,00,000/- for the Second Agreement.

6. Within a few days of the execution of the above-mentioned Agreements and the MoU, two legal notices both dated 23.06.2006 were sent on behalf of the Defendant/Respondent Nos. 5 and 6 (who were the daughter and daughter-in-law of BNS) to the Sub-Registrar, Mehrauli, and to the Appellant/Plaintiff, claiming co-ownership of the subject premises and challenging the Second Agreement, citing the same was executed without their consent.

6.1 In addition, family members of JCS (Defendant/Respondent Nos.1 to 3) claimed ownership of the subject premises based on the validity of the unregistered Will dated 12.05.2002, by which JCS bequeathed his share of subject property to Defendant/Respondent Nos.1 to 3.

7. Subsequently, the Appellant/Plaintiff became aware that BNS had mortgaged the First Floor and the Second Floor of the subject premises to Punjab National Bank. However, this was not disclosed in the Second Agreement dated 19.06.2006, wherein it was stated that the Second Floor of the subject premises was free from any encumbrances, including mortgages. This led to the Appellant/Plaintiff issuing a legal notice on 24.07.2006 to Defendant/Respondent Nos.1 to 3 and BNS asking them to return the monies advanced by the Appellant/Plaintiff paid under the First Agreement and Second Agreement, respectively.

7.1 In addition, a criminal complaint dated 01.08.2006 was lodged by the Appellant/Plaintiff against the Defendant/Respondent Nos. 1 to 3 and BNS which lead to an FIR No. 647/2006 dated 14.10.2006 being registered by the SHO, PS, Hauz Khas, New Delhi against Defendant/Respondent Nos. 1 to 3 and BNS for the offences of criminal conspiracy, cheating, and criminal intimidation.

7.2 Two additional facts are of relevance. Firstly, on 05.09.2006, BNS registered a gift deed in favour of his grandson, Sh. Ashit Sharma, i.e. Defendant/Respondent No.7 wherein he gifted the entire first floor, second floor and the terrace over the second floor. Secondly, the mortgage against the subject premises was cleared by the Bank on 07.03.2007.

8. The Appellant/Plaintiff thereafter filed a suit for specific performance before this Court i.e., CS(OS) 439/2008 captioned as Sarabjeet Singh vs. Anup Sharma & Ors. on 25.02.2008 for specific performance of First Agreement and the Second Agreement (both dated 19.06.2006) and for declaration that the gift deed dated 05.09.2006 executed between BNS and Defendant/Respondent No.7 be declared as null and void.

8.1 In terms of said suit, the Appellant/Plaintiff claimed to be ready and willing to perform his part of the agreement even before the stated 40 days time period, however, the Defendant/Respondents sought time for clearing dues and sorting out inter se internal family issues. It was contended that even though the Appellant/Plaintiff was not informed of the mortgage at the time of entering into the Agreements to Sell and that clause 3 of both the First Agreement and the Second Agreement set out that the property was free from any encumbrances, the mortgage was still subsisting at the time of filing of the suit. It was contended in the suit by the Appellant/Plaintiff that he is ready and willing to deposit the balance consideration and perform his part of the contract.

9. The said suit was contested by the Defendant/Respondents submitting that the First Agreement and the Second Agreement were invalid due to lack of consensus among all owners and BNS had no right to sell the portion of subject premises as the same was an ancestral property and BNS was only one co-owner and not the sole owner.

9.1 It was further contended that the Appellant/Plaintiff had breached the agreement and was never ready and willing to perform his part of the contract.

9.2 The suit was contested by Defendant/Respondent Nos.1 to 3 qua the ground floor portion in the First Agreement and Defendant/Respondent Nos. 4, 7, 8 and 9 with respect to the Second Agreement. The Defendant/Respondent Nos.5 and 6 although did not file any written statement, their stand was culled out by the learned Single Judge, as asserted in their Legal Notices dated 23.06.2006 sent to the Appellant/Plaintiff, that BNS was only a co-owner and not the sole owner.

Impugned Judgment

10. The learned Counsel for Defendant/Respondent Nos. 1, 2 and 3 in their Written Statement contend that the Appellant/Plaintiff breached the First Agreement by failing to pay the remaining balance, even after receiving a notice on 19.07.2006 reminding Appellant/Plaintiff of the payment deadline. Instead of fulfilling his payment obligations, the Appellant/Plaintiff filed complaints and initiated police investigations, which ultimately resulted in a police report clearing the Defendants of any wrongdoing. It was reiterated by Defendant/Respondent Nos.1 to 3 that they possess a valid title and that they were ready to perform the contract but it was the Appellant/Plaintiff who backed out by his Notice.

10.1 In their Written Statement, Defendant/Respondent Nos. 4, 7 and 8 contended that the Agreement to Sell, and MoU demonstrated that time was of essence, and the Appellant/Plaintiff, has defaulted to fulfil its duties under the said documents, in a timely manner.

10.2 Defendant/Respondent No.9 in its Written Statement contended that transactions between the Appellant/Plaintiff and other family members, particularly those involving BNS and Defendants 1 to 3, were unauthorized since these parties lacked exclusive ownership. It was contended that Smt. Kasto Devi held the property in a fiduciary capacity, with her descendants, including Defendant 9, were co-owners by birth.

11. The learned Single Judge on 16.07.2013 framed 10 issues in the matter, which are set out below:

"1. Whether the plaintiff is entitled to specific performance of Agreements dated 19.06.2006 entered into between the plaintiff and defendant Nos. 1, 2 and 3 and defendant Nos. 4, 7 and 8 respectively? OPP.

2. Whether the plaintiff was ready and willing to perform his part of the aforesaid Agreements to Sell with defendant Nos. 1, 2 and 3 and 4, 7 and 8 within the time stipulated in the agreement? OPP.

3. Whether time was of essence of the contracts comprised in Agreements to Sell between the plaintiff and defendant Nos. 1, 2 and 3 and defendant Nos. 4, 7 and 8? OPD 1, 2 and 3 and 4,7 and 8.

4. Whether the plaintiff is guilty of concealment of material facts and mala fides in relation to the present suit? OPD 1, 2 and 3 and 4, 7 and 8.

5. Whether any cause of action arose or survives in favour of the plaintiff and against the defendant Nos. 1, 2 and 3 and/or defendant Nos. 4, 7 and 8? OPP.

6. Whether the plaintiff is entitled to a decree of declaration declaring the gift deed dated 05.09.2006 executed by late Badri Nath in favour of Mr. Asit Sharma, defendant No. 7 to be null and void? OPP.

7. Whether the suit has been correctly valued for purposes of court fees and jurisdiction and appropriate/proper court fees paid thereon? OPP.

8. Whether the plaintiff has any cause of action against defendant Nos. 5, 6 and 9? OPP.

9. Whether the plaintiff is entitled to the decree of specific performance in respect of the two agreements dated 19.06.2006 and if so, against which defendant? OPP.

10. Relief."

12. The learned Single Judge, after examining the evidence and documents on record, rejected the argument of the Appellant/Plaintiff that the First Agreement, Second Agreement and the MoU were linked in terms of their performance, and held that the Appellant/Plaintiff was not entitled to delay the specific performance of the First Agreement in view of the breaches committed by BNS/legal heirs qua the Second Agreement. It was further held that the fact that the Appellant/Plaintiff sent a legal notice requesting for refund of his payment meant that the Appellant/Plaintiff was guilty of breach of contract and such a party could not be held to be entitled to specific performance of such a contract/agreement to sell.

12.1 In addition, the learned Single Judge found that the Appellant/Plaintiff has not sought specific performance of his contract in his legal notice dated 24.07.2006, and thus, he was not ready and willing under Section 16(c) of the Specific Relief Act, 1963 [hereinafter referred to as "SR Act"] to go through with the specific performance as per his own admission, and thus, is not entitled to specific performance.

12.2 Learned Single Judge further gave a finding that the Appellant/Plaintiff could not have claimed that since there was a cloud on the title of the subject property of the Second Agreement, the First Agreement could not be performed. The learned Single Judge found this was not a valid reason to delay the performance and found the Appellant/Plaintiff guilty of breach and not entitled to specific performance of the First Agreement as well. The learned Single Judge, thus, dismissed the Suit of the Appellant/Plaintiff.

13. By orders dated 19.03.2008 and 31.03.2008, the learned Single Judge had directed the Appellant/Plaintiff to deposit Rs. 1.74 crores with the Registry of this Court which was deposited by him and converted into an FDR no. 410120 for a sum of Rs. 1,74,00,000/- dated 28.03.2008. Pursuant to the orders dated 30.09.2010 and 18.11.2010, Defendant/Respondents were also directed to maintain the advance amount of Rs. 30,00,000/- paid by the Appellant/Plaintiff in an FDR, which by the Impugned Judgement was directed to be encashed by the Defendant/Respondents, since a money decree was not sought by the Appellant/Plaintiff.

14. This led to the filing of the present Appeal. A Coordinate Bench of this Court on 18.07.2016 had directed that parties maintain status quo in respect of the title and possession of the subject premises and this order continued thereafter. Subsequently, on 28.07.2017, the FDR deposited with this Court by Appellant/Plaintiff was directed to be converted into four FDRs by a Coordinate Bench of this Court.

Contentions

15. Learned Counsel for the Appellant/Plaintiff submits that none of the documents presented by both parties were disputed and have been accepted as evidence. He further submits that the Appellant/Plaintiff had proven his ability and capacity to pay the agreed consideration by depositing the balance sale amount of Rs. 1,74,00,000/- in Court, as ordered by the learned Single Bench on 19.03.2008 and 31.03.2008. This crucial evidence was overlooked in the Impugned Judgement dismissing the suit.

15.1 The Learned Counsel for the Appellant/Plaintiff had relied upon RFA (OS) No. 34/2015 titled Jagjit Singh Oberoi Vs. Ranjeet Kaur & Another,¹ passed by the Division Bench of this Court by order dated 09.07.2015 to submit that the ratio of this decision was not correctly appreciated by the learned Single Judge despite being cited.

15.2 It was further submitted that the balance sale amount was to be paid only when the property was confirmed to be free of disputes and encumbrance. However, a dispute was raised by Defendant/Respondent Nos. 5 and 6 claiming co-ownership of the subject premises. In addition, Second Floor of the subject premises was found to be mortgaged with Punjab National Bank, this information was concealed from the Appellant/Plaintiff by Defendant/Respondent Nos. 1, 2, 3, and late BNS.

15.3 It is submitted by the learned counsel for the Appellant/Plaintiff that by the Impugned Judgment, the learned Single Judge held that the 2015 SCC OnLine Del 10251 Appellant/Plaintiff was not ready to fulfil the contract because he sought a refund of Rs. 30,00,000/- (paid as earnest money) by notice dated 24.07.2006. However, the Defendant/Respondent Nos. 1, 2, and 3 replied on 28.07.2006, refusing the refund and citing forfeiture of the said amount, without addressing the dispute about joint ownership with Defendant/Respondent Nos. 5, 6 and 9. This response however, showed that it was the Defendant/Respondents who were unwilling to meet their contractual obligations.

15.4 The learned Counsel for the Appellant/Plaintiff submitted that he was justified in initiating criminal charges for cheating against Defendant/Respondent Nos. 1 to 3 and late BNS due to the aforementioned issues. The police filed a charge sheet against BNS, but he had passed away. A closure report was filed on 08.05.2007. The Appellant/Plaintiff then filed a protest petition on 26.11.2007, and on 14.02.2008, a police report confirmed that the subject premises was free from encumbrances. Following this, the Appellant/Plaintiff promptly filed the suit for specific performance in February 2008, demonstrating readiness and willingness to fulfil the obligations of the agreements and MoU dated 19.06.2006.

15.5 It is submitted that the Defendant/Respondent No. 5 filed a civil suit (No. 1273/2006) before the Trial Court against the Appellant/Plaintiff and other Defendant/Respondents seeking an injunction to stop the sale of the subject premises. The Appellant/Plaintiff submitted a written statement showing his readiness to pay the remaining sale amount.

15.6 Lastly, it is contended by the Appellant/Plaintiff that the learned Single Judge failed to recognize that Rs. 30,00,000/- given as earnest money, currently held by the Defendant/Respondents as FDRs in compliance of order dated 18.11.2010, belongs to the Appellant/Plaintiff. Despite this, the learned Single Judge dismissed the suit directing that the amount of Rs. 30,00,000/- be restored in favor of the Defendant/Respondents, which is a clear error in the Impugned Judgment.

16. The learned counsel for the Defendant/Respondent Nos. 4, 7 and 8 raised the following contentions. It was submitted that the Appellant/Plaintiff was required to pay the remaining sale

amount of Rs. 28,00,000/- to Defendant/Respondent Nos. 4, 7, and 8 within 40 days, as per the Second Agreement. However, the Appellant/Plaintiff did not make this payment, as noted in the Impugned Judgment. Even after receiving a legal notice on 19.07.2006, the Appellant/Plaintiff failed to pay. Despite Defendant/Respondent Nos. 4, 7 and 8 confirming their willingness to proceed with the Second Agreement, the Appellant/Plaintiff still did not make the payment.

16.1 The Appellant/Plaintiff's claim that legal notices from Defendant/Respondent Nos. 5 and 6 justified not fulfilling the term of the Agreement, has no legal basis. Defendant/Respondent Nos. 5 and 6 had no rights in the suit premises, a fact known to the Appellant/Plaintiff, and even admitted in his own pleadings.

16.2 The learned Counsel for the Defendant/Respondent Nos. 4, 7 and 8 further submitted that the Appellant/Plaintiff's refusal to pay the remaining sale amount based on the legal notices from Defendant/Respondent Nos. 5 and 6 is not legally sustainable. The Appellant/Plaintiff was rightly found to have breached the Second Agreement with Defendant/Respondent Nos. 4, 7, and 8, by the learned Single Judge.

16.3 The learned Counsel for the Defendant/Respondent Nos. 4, 7 and 8 contended that the Appellant/Plaintiff's claim regarding the gift deed dated 05.09.2006 in favor of Defendant/Respondent No. 7 is irrelevant, as it did not prevent the Appellant/Plaintiff from seeking specific performance from Defendant/Respondent No. 7 instead of the heirs of late BNS. However, the Appellant/Plaintiff never sought specific performance of the Second Agreement to Sell or the MoU, both dated 19.06.2006.

16.4 The learned Counsel for the Defendant/Respondent Nos. 4, 7 and 8 further contested that simply having funds and stating readiness and willingness in the plaint is not enough. The Appellant/Plaintiff filed the suit nearly two years after the first cause of action arose on 23.06.2006. Therefore, he was required to show readiness and willingness from the date of the agreement, including the period before filing the suit. It was further contended that even thereafter, the Appellant/Plaintiff showed conditional readiness to perform his part of the Agreement to Sell, stating he would only do so if directed by the Court. During his cross-examination on 05.01.2015, he admitted that while Defendant/Respondent Nos. 4, 7, and 8 were willing to fulfil their obligations, however, he was not interested due to the stance of Defendant/Respondent Nos. 5 and 6.

17. Learned Counsel for Defendant/Respondent Nos.1 to 3 reiterated that the Appellant/Plaintiff never showed any readiness or willingness to perform his contract and instead sent the legal notice on 24.07.2006 for a refund of the money. The Defendant/Respondents sent a notice to Appellant/Plaintiff on 19.07.2006 to pay the balance amount of Rs.1.46 crores, which was responded to by the Appellant/Plaintiff on 24.07.2006 asking for a refund of advance money and that the same was admitted in his cross-examination of 10.10.2014 as well. It has further been submitted that the Appellant/Plaintiff's lack of readiness and willingness throughout is evident from the legal notice dated 24.07.2006, addressed to Defendant/Respondent Nos. 1 to 3 and late BNS. In this notice, the Appellant/Plaintiff requested a refund of the amount paid instead of pursuing

specific performance. Additionally, the Appellant/Plaintiff did not provide any evidence at any relevant time to show that he had sufficient financial resources to pay the remaining sale amount.

17.1 Learned Counsel for Defendant/Respondent Nos.1 to 3 further contended that being experienced in sale and purchase of immovable properties, the Appellant/Plaintiff would have been aware of all documents and records of the subject premises and would have done his due diligence prior to entering into the Agreement. It was contended that the Appellant/Plaintiff could not place any document on record to show his readiness and willingness for making the balance payment of Rs.1.46 crores with respect to the First Agreement for the ground floor.

17.2 Lastly, it was contended that the Impugned Judgment passed by the learned Single Judge is a well-reasoned judgment. The Appellant/Plaintiff did not place any evidence that he was ready and willing to perform his agreement. Reliance was placed on the judgement of the Supreme Court in K.S. Vidyanadam & Ors. vs Vairavan² to submit that time was of the essence and since readiness and willingness had not been shown by the Appellant/Plaintiff, the value of the property had multiplied manifold. It was contended that the disputes with respect to the second floor did not have anything to do with the Defendant/Respondent Nos.1 to 3, and since the Appellant/Plaintiff was in breach, the learned Single Judge had rightly dismissed the present Suit.

Analysis & Findings

18. As stated above, the learned Single Judge while deciding the issues in the suit held that the Appellant/Plaintiff is guilty of breach of contract in respect of both JCS and BNS and, thus, not entitled to specific performance of the Agreements to Sell. The learned Single Judge further held that since the subject premises was cleared of the mortgage on 31.07.2006, it cannot be held that the Appellant/Plaintiff was unable to proceed with the execution of the sale deed. Since, the issue qua mortgage was cleared within two days, it was held that this mortgage cannot be a ground for the Appellant/Plaintiff to claim that he could not, for this reason, seek specific performance.

18.1 The learned Single Judge further gave a finding that the gift deed dated 05.09.2006 could not have prevented the Appellant/Plaintiff from seeking specific performance and rejected this contention of the Appellant/Plaintiff. The learned Single Judge thus found that the Appellant/Plaintiff was not entitled to specific performance. In addition, (1997) 3 SCC 1 in view of the fact that no money decree has been sought for, the amounts kept in FDR in the sum of Rs. 30 lacs with the Defendant/Respondents, were directed to be encashed by the Defendant/Respondents.

19. The issues as framed in the suit have been reproduced in paragraph 10 above. Issue nos.1 to 3, 5 and 6 were held against the Appellant/Plaintiff and in favour of the Defendants which were with respect to the specific performance of the Agreements to Sell dated 19.06.2006 and the readiness/willingness of the Appellant/Plaintiff to perform his part of the Contract and whether the gift deed dated 05.09.2006 can be declared as null and void was held against the Appellant/Plaintiff.

20. In the opinion of this Court, the Impugned Judgment turns on two aspects. First, that two Agreements to Sell, one being for the ground floor with Defendant/Respondent Nos. 1 to 3 and the other being for the second floor and above with late BNS, were not interlinked as regard to their performance. The Appellant/Plaintiff was also held to be guilty of breach of Contract and thus not entitled to seek specific performance. The Impugned Judgment also rests on the fact that in its legal notice dated 24.07.2006, the Appellant/Plaintiff had asked for a refund of money. Thus, the claim for specific performance was only as an afterthought and the Suit for specific performance was filed after almost two years, after the date of the Agreements to Sell. This also indicated that the Appellant/Plaintiff was not ready and willing to go through with the Contract.

21. It is necessary to set out the following undisputed facts:

First Agreement-Legal Heirs of JCS [Respondent Nos. 1 To 3]

(i) The subject premises was divided amongst BNS/JCS and subsequently their legal heirs in view of the fact that the Will of Lt. Smt. Kasto Devi assigned/bequeath different parts of the property to her two sons. Thus, two separate Agreements to Sell were executed. The MoU was executed by BNS (as first party), and the Appellant/Plaintiff (as second party).

(ii) The First Agreement entered into with the legal heirs of JCS for a consideration of Rs. 1.71 crores for the entire ground floor including open space in front as well as the entire rear courtyard, with right to dig/construct Basement, with structure standing therein, fittings and fixtures installed along with proportionate undivided, indivisible share of ownership rights in the land underneath, of which Rs.25 lakhs had already been paid by the Appellant/Plaintiff to Defendant/Respondent Nos. 1 to 3. Paragraph 1 of the agreement provided that the balance Rs.

1.46 crores for the entire ground floor shall be received at the time of registration of the sale deed within 40 days from the date of agreement. It also records that the BNS shall be a confirming party in the sale deed. The relevant extract reads as follows:

"1... from the second party, as advance earnest money and part payment, at the time of signing of this Agreement to Sell. The remaining balance sum of Rs. 146,00,000/- (Rupees one crore forty Six lacs only) shall be received by the first party, from the second party, at the time of registration of regular Sale Deed, before the Sub-Registrar, New Delhi, within 40 days from the date of this Agreement to Sell. The first party hereby confirms and ensure that Shri Badri Nath Sharma, son of Late Shri Mangat Ram Sharma Shall be made Confirming Party in the Sale Deed to be executed in favour of the second party or his nominee(s)."

[Emphasis is ours]

(iii) Clause 3 of the First Agreement contains an averment that the subject portion is free from encumbrances. Clause 8 provides that the Defendant/Respondent Nos. 1 to 3 shall sign all requisite documents for sanctioning of building plans within a week from the date of the signing of the agreement. Clause 10 provides that the agreement to sell is subject to the specific performance at the risk and costs of the defaulting party.

(iv) Affidavits of no objection all dated 19.06.2006 were also executed by BNS, wherein their no objection to the First Agreement was set out. The receipt dated 19.06.2006 was also executed for the sum of Rs. 25 lakhs.

(v) Upon receipt of legal notice from Ms. Anita Sharma/Respondent No. 6 dated 23.06.2006 claiming that she was a co-owner/had rights in the subject premises. The Appellant/Plaintiff sent a legal notice accusing BNS and Defendant/Respondent Nos. 1 to 3 of cheating and asked for the refund of Rs. 30 lakhs, advance/earnest money paid by the Appellant/Plaintiff. He alleged that the aforesaid persons had concealed the fact that the ownership of the premises as well as the fact that BNS had mortgaged a part of the premises with Punjab National Bank.

Second Agreement-BNS/Legal Heirs [Respondent Nos 4,7 And 8]

(vi) The Second Agreement was entered into with the BNS for a consideration of Rs. 33 lakhs for the entire Second Floor with entire Terrace over and above the second floor, with structure standing therein, alongwith proportionate undivided, indivisible and impartible share of ownership rights in the land underneath, of which Rs. 5 lakhs had already been paid by the Appellant/Plaintiff to BNS. Paragraph 1 of the Second Agreement provided that the balance Rs. 28 lakhs for the second floor and terrace shall be received at the time of registration of the sale deed within 40 days from the date of the agreement. It also records that the legal heirs of JCS shall be a confirming party in the sale deed. The relevant extract reads as follows:

"1..from the second party, as advance earnest money and part payment, at the time of signing of this Agreement to Sell. The remaining balance sum of 28,00,000/- (Rupees Twenty Eight Lacs Only) shall be received by the first party, from the second party, at the time of registration of regular Sale Deed, before the Sub-Registrar, New Delhi, within 40 days from the date of this Agreement to Sell. The first party hereby confirms and ensure that (1) Shri Anup Sharma, son of Late Shri Jagdish Chander Sharma, (2) Shri Ajay Sharma, son of Late Shri Jagdish Chander Sharma, and (3) Smt.Urmil Sharma, wife of Late Shri Jagdish Chander Sharma, all residents of D-16/G, Ground Floor, Hauz Khas Enclave, New Delhi, shall be made Confirming Party in the Sale Deed to be executed in favour of the second party or his nominee(s)."

[Emphasis is ours]

(vii) Clause 3 of the agreement contains an averment that the subject portion is free from encumbrances. Clause 8 provides that the Defendant/Respondent Nos. 1 to 3 alongwith BNS shall

sign all requisite documents for sanctioning of building plans within a week from the date of the agreement. Clause 10 provides that the agreement to sell is subject to the specific performance at the risk and costs of the defaulting party.

(viii) Affidavits of no objection all dated 19.06.2006 were also executed by the Defendant/Respondent Nos. 1 to 3 wherein their no objection to the Second Agreement was set out. The receipt dated 19.06.2006 was also executed for the sum of Rs. 5 lakhs by BNS.

(ix) Neither the MoU nor the Agreements to Sell both of which are identical, refer to any part of the property being mortgaged with Punjab National Bank. However, the certificate of Punjab National Bank dated 07.03.2007 (Ex. D-2) shows that the mortgage of the subject premises was cleared by BNS on 31.07.2006, within a few days of the receipt of legal notice and thus, the statement of the Appellant/Plaintiff that in view of the mortgage, he has asked for his money to be refunded by the legal notice and hence, was in breach cannot be accepted.

(x) Forty days from 19.06.2006 expired on 29.07.2006. The gift deed was executed by BNS and registered on 05.09.2006 in favour of his grandson gifting the second floor and terrace portion of the subject premises in favour of his grandson/Respondent No.7.

22. A perusal of the above shows that the two agreements are only interlinked to the limited extent that the legal heirs of the JCS had signed affidavits giving their no objection to the Second Agreement while BNS had signed an affidavit giving his no objection to the First Agreement. The significance of doing so was to preclude either party from raising any objection to the sale of the portion of the subject premises, which had fallen to the share of the other party and his legal heirs.

22.1 We are unable to accept that the import of signing these affidavits, of no objection or of the MoU has any significance other than as noted above. The bargain entered into by BNS with the Appellant/Plaintiff, and the bargain entered into by the heirs of JCS with the Appellant/Plaintiff, were entirely different. The transactions covered under the two Agreements to Sell were separate and distinct. Whereas BNS desired to participate as a collaborator and sought to retain a portion of the redeveloped property, the heirs of JCS had agreed to sell their right, title and interest in their share of the subject property, in entirety. The consideration agreed to be paid by the Appellant/Plaintiff to BNS and to the heirs of JCS under their respective agreements was also distinctive and separate. The heirs of JCS had not agreed that First Agreement with the Appellant/Plaintiff would be contingent on performance of the Second Agreement between the Appellant/Plaintiff and BNS. The Appellant/Plaintiff had entered into separate agreements for acquiring the subject premises, however, from the perspective of the sellers their respective bargains were separate and distinctive.

23. As stated above, the learned Single Judge relied upon the legal notice dated 24.07.2006 to hold that the Appellant/Plaintiff was in breach of the contract. Section 16(c) of the SR Act states that specific performance of a contract cannot be enforced in certain circumstances. These include circumstances where the person seeking the specific performance fails to prove that he is, and always was, ready and willing to perform the essential terms of the contract.

23.1 Since the present case predates the 2018 amendment, the provision of the SR Act as it stood prior to 2018 is set out below:

"16. Personal bars to relief.--Specific performance of a contract cannot be enforced in favour of a person--

....

(c) who fails to aver and 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."

23.2 Explanation (i) to Section 16(c) of the SR Act states that it is not essential for the Plaintiff to tender money to the Defendant where the contract involves payment of money, unless so directed by a Court. However, Explanation (ii) provides that the Plaintiff must aver readiness and willingness to perform the contract according to its true scope and construction. The explanation to Section 16(c) of the SR Act as it stood prior to 2018 is reproduced below:

"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 aver performance of, or readiness and willingness to perform, the contract according to its true construction."

24. It is no longer *res integra* that a plaintiff must establish that he was both ready and willing to perform the contract and his conduct must be consistent with such a claim. The Supreme Court in *J.P. Builders And Another v. A. Ramdas Rao and Another*³ has held that the readiness and willingness is a condition precedent to obtain specific performance and that the onus of proof is on the Plaintiff. It was further observed that the readiness refers to the financial capacity and willingness refers to the conduct of the Plaintiff wanting the performance. The relevant extract is below:

"25. Section 16(c) of the Specific Relief Act, 1963 mandates "readiness and willingness" on the part of the plaintiff and it is a condition precedent for obtaining relief of grant of specific performance. It is also clear that in a suit for specific performance, the plaintiff must allege and prove a continuous "readiness and willingness" to perform the contract on his part from the date of the contract. The onus is on the plaintiff.

26. It has been rightly considered by this Court in *R.C. Chandiok v. Chuni Lal Sabharwal* [(1970) 3 SCC 140] that "readiness (2011) 1 SCC 429 and willingness" cannot be treated as a straitjacket

formula. This has to be determined from the entirety of the facts and circumstances relevant to the intention and conduct of the party concerned.

27. It is settled law that even in the absence of specific plea by the opposite party, it is the mandate of the statute that the plaintiff has to comply with Section 16(c) of the Specific Relief Act and when there is non-compliance with this statutory mandate, the court is not bound to grant specific performance and is left with no other alternative but to dismiss the suit. It is also clear that readiness to perform must be established throughout the relevant points of time. "Readiness and willingness" to perform the part of the contract has to be determined/ascertained from the conduct of the parties."

[Emphasis is ours] 24.1 The Supreme Court in *His Holiness Acharya Swami Ganesh Dassji v. Sita Ram Thapar*⁴ has held that readiness would mean financial capacity to pay to perform the contract, while to ascertain the willingness, the conduct of the Plaintiff is required to be scrutinised. It is relevant to refer to the following extract from the said decision:

"2. There is a distinction between readiness to perform the contract and willingness to perform the contract. By readiness may be meant the capacity of the plaintiff to perform the contract which includes his financial position to pay the purchase price. For determining his willingness to perform his part of the contract, the conduct has to be properly scrutinised. There is no documentary proof that the plaintiff had ever funds to pay the balance of consideration. Assuming that he had the funds, he has to prove his willingness to perform his part of the contract. According to the terms of the agreement, the plaintiff was to supply the draft sale deed to the defendant within 7 days of the execution of the agreement, i.e., by 27-2-1975. The draft sale deed was not returned after being duly approved by the petitioner. The factum of readiness and willingness to perform plaintiff's 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 was always ready and willing to perform his part of the contract. The facts of this case would amply demonstrate that the petitioner/plaintiff was not ready nor had the capacity to perform his (1996) 4 SCC 526 part of the contract as he had no financial capacity to pay the consideration in cash as contracted and intended to bide for the time which disentitles him as time is of the essence of the contract."

[Emphasis is ours] 24.2 The Supreme Court in *P. Meenakshisundaram v. P. Vijayakumar & Anr.*⁵, has held that the readiness and willingness must be all through the contract that is right from the signing of the agreement till the date of the suit. The relevant extract reads as follows:

"8. As regards suit for specific performance, the law is very clear that the plaintiff must plead and prove his readiness and willingness to perform his part of the contract all through i.e. right from the date of the contract till the date of hearing of the suit. If Respondent 1 was well aware about the encumbrance and the parties had chosen that the balance consideration be paid to the appellant before 20-3-2001 so

that the sale deed could be registered without any encumbrance, it was for Respondent 1 to have taken appropriate steps in that behalf for completion of transaction. The facts on record disclose that the first step taken by Respondent 1 after the suit agreement was well after four months, when further amount of Rs 2 lakhs was paid on 21-1-2001. Thereafter nothing was done till 20-3-2001 by which the transaction had to be completed. The record is completely silent about any communication sent around 20-3-2001 towards completion of transaction. As a matter of fact the first step thereafter was six months after the deadline, namely, on 22-9-2001 when the communication (Ext. A-6) was sent along with amount of Rs 10 lakhs. The written submissions filed on behalf of Respondent 1 also do not indicate any steps till this time so as to say that he was all the while ready and willing to complete the transaction.

9. The assertion made by Respondent 1 in Para 7 of the plaint is a mere assertion without any relevant details as to what exactly he had done towards fulfilment of his obligations and completion of the transaction. The factual aspects as detailed above are quite clear that Respondent 1 had completely failed in his obligations and was not ready and willing to perform his part of the contract. Even going by the case set up by Respondent 1, that around 29-7-2002 an arrangement was arrived at, under which out of the balance amount Rs 19.5 lakhs, Rs 13.5 lakhs were to be made over by Respondent 1 to the bank directly and rest of the sum of Rs 6 lakhs was to be paid to (2018) 15 SCC 80 the appellant in cash, the facts do not indicate any observance of these conditions. Beyond filing an application for impleadment which came to be dismissed, Respondent 1 did not take any step. The amount of Rs 13.5 lakhs was independently deposited and discharge was obtained by the appellant."

[Emphasis is ours] 24.3 A similar view was taken by the Supreme Court in *Balraj Taneja & Anr. v. Sunil Madan & Anr.*⁶ and *H.P. Pyarejan v. Dasappa (Dead)* by LR's & Ors.⁷, that to ascertain the readiness and willingness even the first Appellate Court is duty bound to examine whether there was continuous readiness and willingness.

25. The conspectus of the decisions referred to above shows that a Plaintiff must establish that he was both ready and willing to perform this contract and more importantly, his conduct must be consistent. While readiness would mean the financial capacity to pay, to ascertain the Plaintiff's willingness, his conduct is required to be scrutinised. The readiness and willingness must be throughout the term of the contract, right from the signing of the Agreement, till that of the filing of the suit. The Plaintiff must show that throughout this period he has taken appropriate steps for completion of transaction. Thus, the readiness and the willingness is to be continuous. The onus of proof to show both readiness and willingness is on the Plaintiff. The Court is not bound to grant relief of specific performance but the Court's discretion must be exercised on sound and reasonable principles.

(1999) 8 SCC 396 (2006) 2 SCC 496

26. The conspectus of facts in the present case shows the contrary. The Appellant/Plaintiff within a few days of the signing of the Agreements addressed a legal notice dated 24.07.2006 to BNS and Defendant/Respondent Nos.1 to 3 calling upon them to return the payment of Rs.30 lacs made by him as an advance. This was followed by various other steps being undertaken by the Appellant/Plaintiff for return of the monies to him, which included filing of criminal complaints against the Defendant/Respondent Nos.1 to 3 and BNS and pursuing criminal proceedings against them leading to the registration of an FIR. Almost for two years no other steps were taken by the Plaintiff to show his readiness and willingness and it was only in 2008 that the suit for specific performance was filed by the Plaintiff.

27. Thus, even though, the Appellant/Plaintiff may have established his financial capacity to discharge the consideration, his willingness was lacking throughout this period.

28. As noted above, the heirs of JCS simply wanted to sell their share of the subject premises. The terms of the First Agreement do not include any clause that rendered the payment due to them, contingent on any other transaction.

28.1 Viewed from the aforesaid perspective, it is apparent that the Appellant/Plaintiff had failed to perform his part of the contract. On the contrary, his actions indicate that he sought to effectively resile from the same. The Appellant/Plaintiff may have had his reasons for doing so. It is also evident that he harboured an apprehension whether BNS and heirs of JCS would perform their obligations under the respective agreements. However, that is not the point. The fact is that the Appellant/Plaintiff had at the material time elected to withdraw from the two Agreements and had sought refund of the amount of advances paid. Thus, the Appellant's claim that he was always ready to perform the agreements in question, is belied by his conduct.

29. The First and Second Agreements provided for the Agreement to be conducted within 40 (forty) days, which expired on 29.07.2006. Since, the payment was not made within that said period, the BNS transferred his rights in his share of the subject premises by virtue of a gift deed to his grandson/Respondent No.7 on 05.09.2006, after the expiry of the 40 (forty) days period.

30. It is also relevant to examine at this stage an interim order passed in the suit, which has discussed the conduct of the Appellant/Plaintiff extensively as well. While examining the Applications for injunction filed, the learned Single Judge also found that the Appellant/Plaintiff took all steps to obtain the refund of the amount of Rs.30 lacs including a criminal complaint and thereafter, filed a petition under Section 156(3) of Code of Criminal Procedure, 1973 for the registration of an FIR wherein he took the position that BNS and Defendant/Respondent Nos.1 to 3 had cheated him. After a charge sheet was filed in the criminal case, a protest petition was also filed by the Appellant/Plaintiff. Thus, it was held that the Appellant/Plaintiff chose to pursue the remedy of criminal proceedings against the Defendant/Respondents and only when these proceedings were unsuccessful, did he turn around to make the claim for specific performance. The learned Single Judge thus declined to continue the interim injunction granted to the Appellant/Plaintiff, however directed the Defendant/Respondents to refund the amount of Rs.30 lacs to the Appellant/Plaintiff. The relevant extract of Interim Order dated 30.09.2010 passed by the learned Single Judge reads as

follows:

"12. The Court has considered all the submissions of the parties. It is evident that as is apparent from three agreements, the transactions recorded in the agreement pertaining to ground floor (with the first to third defendant) was to be completed by 29.07.2006. As regards other documents, it entailed and involved performance of mutual obligations; nevertheless, the plaintiff was to pay the entire balance consideration on or before 29.07.2006. It is a matter of record that the plaintiff paid the Defendant Nos. 1 to 3 Rs.25 lakhs as on that day, which was the amount paid on the day of the agreement. Similarly as far as the other vendees, Defendant Nos 4,7 and 8 are concerned, they too were paid Rs 5 lakhs on 19.06.2006, which continued to be the same position as on the said date, i.e. 29.06.2006. The plaintiff's notice dated 24.07.2006 is common one as against both sets of vendors, i.e. Defendant Nos. 1 to 3, late Sh. B.N. Sharma. It calls upon all of them to return the total sum of Rs 30 lakhs. At that stage, the defendants denied that they were trying to cheat the plaintiff and called upon him to perform his part of the bargain before the agreed date. The plaintiff further chose to approach the police authorities firstly by complaint to local police; when upon being successful, he approached the Magistrate under Section 156(3) Cr.PC. All along, he took the position that the vendors had cheated him and he had to be refunded the sum of Rs 30 lakhs. The last notice issued by the plaintiff, calling upon the defendants to perform their part of the bargain was dated 24.07.2006. He chose or elected to pursue with his allegation that the defendants were guilty of cheating and he had to be returned Rs 30 lakhs.

13. The fifth defendant's injunction application for ex-parte hearing in her suit to restrain her brothers from going-ahead with the transaction was rejected on 17.03.2007. The Court notices that the plaintiff did not mention in the suit that the chargesheet had been in fact filed on 08.05.2007 in the criminal proceedings; the chargesheet had been filed as on the date of filing of the suit; no copy of the same has been produced. On the other hand, the impression given in the suit was that no chargesheet was fled. A list of documents shows that copy of the Protest Petition shows that it had been filed. Although it is settled law (Chand Rani (dead) by L Rs v. Smt. Kamal Rani (dead) by L.Rs 1993 (1) SCC 519 of the Supreme Court, in a larger Bench ruling) that in a contract for sale of immovable property, time is never deemed of essence. Yet the Court indicated that as to what is reasonable time would depend on the facts and circumstances of each case. In the present circumstances, the plaintiff chose to pursue one line of remedies, i.e. criminal proceedings, primarily alleging that he was entitled to refund of the advanced/Earnest Money of Rs 30 lakhs right from July 2006. It is only when those proceedings were unsuccessful did he turn around and make the claim before this Court for specific performance.

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17. In view of the above discussion, the Court is of the opinion that the order dated 19.03.2006, granting ex-parte injunction (clarified by subsequent orders), should be vacated. Consequently, the plaintiff is entitled to withdraw the amount of Rs 1.74 crores deposited in Court forthwith with accrued interest. Defendant Nos. 1 to 3, for the above reasons, are directed to refund the sum of Rs 25 lakhs to the plaintiff within four weeks from today. Defendant Nos. 4, 7 and 8 are likewise directed to refund the sum of Rs 5 lakhs to the plaintiff within the said period of four weeks. LA. Nos. 2950/2008, 7878/2008 and 4045/2009 are disposed of in the above terms."

[Emphasis is ours] 30.1 The order dated 18.11.2010 passed in the suit, thereafter records that the amounts were offered to the Appellant/Plaintiff which he refused to accept. As stated above, the same offer was made by Respondent Nos.1 to 3, 4, 7 and 8 before this Court as well, which was also refused by the Appellant/Plaintiff.

31. The learned Single Judge was not inclined to exercise discretion in favour of the Appellant/Plaintiff. In view of the foregoing discussions, this Court concurs with decision of the learned Single Judge that the Appellant/Plaintiff is not entitled to a decree of specific performance as claimed by him.

32. The Appeal is accordingly dismissed. The Appellant/Plaintiff is however at liberty to withdraw the amounts that are available with the Registry of the Court, inclusive of interest.

TARA VITASTA GANJU, J VIBHU BAKHRU, J NOVEMBER 20, 2024/ha/r/pa/gj