M/S Hotz Industries Pvt. Ltd. vs Dr. Ravi Singh (Since Deceased Through ... on 28 February, 2018

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Bench: Valmiki J.Mehta

* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ CS(OS) No. 1261/1995

% Reserved on: 27th February, 2018
Pronounced on: 28th Februray, 2018

M/S HOTZ INDUSTRIES PVT. LTD. ..... Plaintiff
Through: Mr. Pravin Kumar Jain, Advocate.

versus

DR. RAVI SINGH (SINCE DECEASED THROUGH LRs) & ORS.
..... Defendants
Through: Mr. Manish Vashisht, Mr. Sameer Vashisht, Mr. Rakesh Kumar, Ms. Trisha Nagpal and Ms. Astha Gupta, Advocates.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? YES

VALMIKI J. MEHTA, J (DICTATED IN OPEN COURT IN THE PRESENCE OF PARTIES)

1. This is a suit for specific performance of the agreement to sell dated 10.2.1995 with respect to the property bearing no. G-6 (previous no. C-63) Maharani Bagh, New Delhi (herein after referred to as the „suit property) situated on a plot of 800 sq. yards. Plaintiff is the proposed buyer and the four defendants in the suit are the proposed

sellers. Defendant no. 1 is the owner of 50% share in the suit property and defendant nos. 2 to 4 are the joint owners of the other 50% share in the suit property.

2. The case pleaded by the plaintiff is that the parties entered into the subject agreement to sell dated 10.2.1995 with respect to the suit property for a total sale consideration of Rs.2.55 crores. At the time of entering into of the agreement to sell in terms of the agreement to sell a total sum of Rs.45 lacs was paid by the plaintiff to the defendants, though it is now the admitted position on record that defendants did not receive a sum of Rs.45 lacs but received only a sum of Rs.37 lacs before the entering into of the agreement to sell. Plaintiff has pleaded that it is the defendants who are guilty of breach of contract and therefore plaintiff should be held entitled to the relief of specific performance as the plaintiff has always been and continues to be ready and willing to perform its part of the contract/agreement to sell including paying the balance sale consideration. Out of the balance sale consideration, as per the agreement to sell a sum of Rs.1 crore was payable by the plaintiff to the defendants when the defendants obtained the necessary clearance from the Income Tax

authorities with respect to validity of the subject agreement to sell under the then prevailing provision of Section 269 UC of the Income Tax Act, 1961. Thereafter further sum of Rs.10 lacs was to be deemed to be paid on the tenant M/s. S.M.S. Udyog Limited attorning to the plaintiff as the tenant of the plaintiff in the suit property and plaintiff

taking over of the liability of the defendants to pay Rs.10 lacs to the tenant towards the tenant s security deposit. The balance sale consideration of Rs. 1crore was payable at the time of execution of the sale deed of the suit property in favour of the plaintiff by the defendants. I may note that since only Rs.37 lacs were paid out of the sum of Rs.45 lacs mentioned in the agreement to sell, the balance sale consideration at the time of obtaining of Income Tax clearance or earlier/later would be a sum of Rs.2.18 crores instead of Rs.2.10 crores in terms of the agreemen to sell. Plaintiff has pleaded that the suit for specific performance be decreed and the defendants be directed to execute the sale deed of the suit property in favour of the plaintiff and handover possession of the suit property to the plaintiff.

3. Defendant nos. 1, 2 and 3 have contested the suit. It is relevant to at this stage to state that defendant no. 4 in the suit has

compromised the matter with the plaintiff thereby defendant no.4 has executed a registered agreement to sell, power of attorney, Will, etc in favour of the plaintiff and this aspect of compromise entered into between the plaintiff and defendant no. 4 is recorded by the Court under Order XXIII Rule 3 CPC in terms of I.A. No. 1014/2005 vide order dated 9.2.2005. I may note that defendant no. 4 was the 1/6 th owner of the suit property and by virtue of the compromise entered into by the plaintiff with the defendant no. 4, plaintiff is claiming rights under Section 53A of the Transfer of Property Act, 1882 etc with respect to 1/6th share of the defendant no.4 in the suit property,

and through the suit the plaintiff is claiming decree of specific performance with respect to the balance 5/6th share in the suit property remaining in the defendant nos. 1, 2 and 3.

4. Defendant nos. 1 to 3 as per their joint written statement plead that there was no valid agreement to sell entered into between the parties as the defendant no.1 was illegally persuaded as also misrepresented with regard to the facts for entering into of the agreement to sell. Defendant no. 1 has signed the subject agreement to sell for self and as attorney of defendant nos. 2 and 3. Since the

agreement to sell was pleaded to be invalid in law, therefore the suit for specific performance is prayed to be dismissed. Defendant nos. 1 to 3 have also denied that the plaintiff was and continued to be ready and willing to perform its part of the agreement to sell. Defendant nos. 1 to 3 have also pleaded that plaintiff is not entitled to the discretionary relief of specific performance.

5. The following issues have been framed in this suit on 12.11.2003:-

"1. Whether the suit has been signed, verified and instituted by duly authorized person?
2. Whether agreement to sell dated 10.2.1995 was entered into between the parties?
3. Whether W.S. is liable to be rejected for want of verification?
4. Whether draft agreement dated 17.12.1994 can be construed as agreement to sell executed between the parties? If so, its effect?
5. Whether the agreement to sell dated 10.2.1995, Form No. 37-I and receipt of Rs.18 lac is an outcome of fraud, cheating or mis-representatin as alleged in written statement?
6. Whether the plaintiff has been ready and willing to perform its part of agreement to sell dated 10.2.1995?
7. Whether the plaintiff is entitled to decree for specific performace of

agreement to sell dated 10.2.1995?

8. If issue No. 7 is decided against the plaintiff, whether the plaintiff is entitled to refund of the amounts paid to the defendants?

9. Whether the plaintiff is entitled to damages? If so, to what extent?

10. Whether the defendants 2 and 3 are entitled to recover any amount from the plaintiffs as claimed by way of counter claim? If so, to what extent?

11. Whether the plaintiff is entitled to interest? If so, on what amount, at what rate and for what period?

12. Relief."

ISSUE NOS. 1, 3 AND 10

6. These issues are not pressed by the respective parties.

ISSUE NO. 4

7. Under this issue whereas defendant nos. 1 to 3 have argued that there was no valid agreement to sell dated 10.2.1995, and for which purpose reliance is placed upon various documents and negotiations prior to the agreement to sell dated 10.2.1995, the plaintiff in response has also similarly relied upon negotiations, documents and other aspects between the parties occuring prior to entering into of the subject agreement to sell dated 10.2.1995. In my opinion any fact or evidence or negotiation or statement or any other aspect being of a point of time prior to the entering into an agreement to sell dated 10.2.1995 cannot be looked into by this Court in view of specific bar contained in Section 91 of the Indian Evidence Act, 1872. Section 91 of the Indian Evidence Act states that what is the contract between the parties can only be seen from the written contract entered into between the parties and nothing else. Section 92 of the Indian Evidence Act thereafter provides that once a written agreement is proved in accordance with Section 91 of the Indian Evidence Act, then

no parol evidence is permitted to add or to substract or to modify etc,

the written agreed terms as found in the written contract. In view of this reason, issue no. 4 is decided by holding that the draft agreement dated 17.12.1994 cannot be looked into to decide what are the terms which were agreed between the parties and what is the contract between the parties will be the contract as comprised in the agreement to sell dated 10.2.1995, on it being held, and so held below, that there was indeed a valid agreement to sell dated 10.2.1995 entered into between the parties.

ISSUE NOS. 2 AND 5

8.(i) There is no dispute that the agreement to sell bears the signatures of the plaintiff, the defendant no. 1 for self and defendant nos. 2 and 3, and the defendant no. 4. So far as therefore execution is concerned, it is not denied that the agreement to sell was indeed executed. The contention of the defendant nos. 1 to 3 is that on account of negotiations which took place prior to 10.2.1995, and assurances which were given at the time of entering into of the agreement to sell dated 10.2.1995, the defendant nos. 1 to 3 were illegally persuaded/misrepresented for entering into of the agreement to sell. It is argued that but for these various assurances which were

given to defendant nos. 1 to 3 prior to and at the time of entering into the agreement to sell dated 10.2.1995, the defendants would not have entered into the subject agreement to sell.

(ii) In my opinion, decision on these issues will partly be covered by the decision of issue no. 4 above because, as already held above no evidence or aspect or document or factual statement prior to entering into of the agreement to sell dated 10.2.1995, etc which have happened can be looked into to add, or substract or modify the terms of the agreement to sell dated 10.2.1995 entered into between the parties. Therefore, the defendants cannot use any fact or aspect or evidence or talks and so on prior to 10.2.1995 to justify and contend that the agreement to sell dated 10.2.1995 is vitiated on account of any such misrepresentation. Also in my opinion the stand of the defendants with respect to agreement to sell not being validly entered into has no legs to stand upon because if that was so then why did the defendants did not forthwith or soon after entering into of the agreement to sell dated 10.2.1995 return to the plaintiff the amount of Rs.27 lacs which the defendants had received at the time of entering into of the agreement to sell dated 10.2.1995. In fact, besides the

amount of Rs.27 lacs a further sum of Rs.10 lacs was already received by the defendants earlier on 20.12.1994, and which amount too would have been returned if there was no valid agreement to sell as is the plea of the defendant nos. 1 to 3.

9. It may be noted that one of the contentions of the defendant nos. 1 to 3 is that the agreemen to sell dated 10.2.1995 is not a valid agreement to sell because the agreement to sell talks of receipt of Rs.45 lacs whereas it has come on record that admittedly the

defendants have only received a sum of Rs.37 lacs at the time of entering into of the agreement to sell, but this argument is misconceived because the agreement to sell dated 10.2.1995 forms part of the set of entire documentation of the same date (in law entire set of documents forming the transaction have to be looked at together) and one of which document is the receipt Ex.PW1/DX1 recording that out of the amount of Rs.45 lacs a sum of Rs.18 lacs is received by means of cheque i.e an amount of Rs.18 lacs was received by cheque by the defendants being part of the total amount of Rs.45 lacs. Merely because the defendants for their own reasons did not encash the cheque of Rs.18 lacs, would not mean that as on date when

the agreement to sell was entered into between the parties on 10.2.1995, a total amount of Rs.45 lacs was not paid by the plaintiff to the defendants, inasmuch as out of the amount of Rs.45 lacs an amount of Rs.18 lacs was by means of cheque received by the defendants as evidenced by the receipt Ex.PW1/DX1. This argument of the defendant nos. 1 to 3 therefore has no merit and is therefore rejected.

10. Self-serving depositions and statements made cannot be sufficient for the Court to hold discharge of onus of proof and therefore in my opinion onus of proof is not discharged by the defendant nos. 1 to 3 that there was no valid agreement to sell dated 10.2.1995 as contended by the defendant nos. 1 to 3, and this is all the more so because the agreement to sell dated 10.2.1995 is and has to be

taken as exhaustive so far as terms of the contract which have been entered into between the parties.

11. Issue nos. 2 and 5 are therefore decided in favour of the planitff and against defendant nos. 1 to 3.

ISSUE NOS. 6 AND 7

12. The discussion on these issues will also encompass the issue as to whether it is the defendant nos. 1 to 3 who are guilty of breach of contract or the plaintiff is to be held to be guilty of breach of contract being the agreement to sell dated 10.2.1995. Since there is no separate issue which has been got framed by the parties as to who was guilty of breach of contract it is therefore agreed by the counsels for the parties that the issue as to who is guilty of breach of contract would be covered under issue nos.6 and 7. It is after the decision on issue with respect to who is guilty of breach of contract is decided would then arise the issue as to whether plaintiff has always been ready and willing to perform its part of agreement to sell and as to whether plaintiff is entitled to the discretionary decree specific performance of the agreement to sell dated 10.2.1995.

13.(i) While deciding issue nos.2 and 5, it has been held by this Court that there is a valid agreement to sell dated 10.2.1995 entered into between the parties. The issue to be decided now is who is guilty of breach of contract i.e whether it is the plaintiff or the defendants who are guilty of non-performance of the terms as stated in the

agreement to sell.

(ii) It is categorically stated in the subject agreement to sell Ex.PW1/10 that the responsibility for taking the necessary clearances and permissions from the Income Tax authority will be upon the defendants in the suit. It is stated in para 8 that it will be the duty of the defendants to apply for necessary permissions and clearance from all authorities including Income Tax authority, DDA etc. It is also mentioned in para 4 of the said agreement to sell and that "parties will pursue the appropriate authority with respect to the prescribed Form 37-I of the Income Tax Act for taking clearance for entering into the sale deed between the parties pursuant to the subject agreement to sell". It is not the defendants case as argued before this Court that plaintiff had to obtain the necessary permissions and clearances for entering into of the sale deed. With respect to the aforesaid terms for obtaining permissions or clearances or any term related thereto, the agreement to sell does not provide for any outer limit or a specific date before which the necessary permissions would have to be obtained by the defendants. Once there is no specific outer date which is fixed and no limit is provided, time of performance cannot be stated to be the essence of the agreement to sell so far as performance by the plaintiff

was required of its obligations to the defendants. It was only after obtaining of the necessary Income Tax clearance under the agreement to sell that the plaintiff had to pay a sum of Rs.1 crore to the

defendants i.e this amount had to be paid only on receipt of clearance on Form 37-I from the appropriate authority under the Income Tax Act. Defendants therefore cannot contend that plaintiff should be held guilty of breach of contract on account of non-performance by the plaintiff of its obligations to pay further sums under the agreement to sell inasmuch as payment of further sums was subject to the compliance of the pre-conditions of obtaining appropriate permissions from different authorities by the defendants.

(iii) Also it is seen that there is no dispute that defendant nos.1 to 3 had earlier entered into an agreement to sell with respect to the suit property with one from Sh. J.K. Rajgarhia, and who had filed a suit for specific performance against the defendants in this Court being Suit no.451/1995. In that suit the present plaintiff had moved an application under Order I Rule 10 CPC in March, 1995 for being added as a party. The defendants herein, and who were also the defendants in Suit no.451/1995, filed their reply Ex.DW1/P2 in around

April, 1995. In this reply the defendants put the present plaintiff to notice that the defendants were not liable to perform the subject agreement to sell dated 10.2.1995 as according to the defendants, and as per the reply Ex.DW1/P2, the agreement to sell was not valid as it had been brought about on account of misrepresentation and fraud. There were also other breaches alleged to have been committed by the present plaintiff and consequently the defendants herein by filing their reply in April, 1995 to the application under Order I Rule 10 CPC of

the present plaintiff in the Suit no.451/1995, is found to have contended that the plaintiff was not entitled to the relief of finalization of the subject agreement to sell by a sale deed of the suit property to be executed by the defendants in favour of the plaintiff.

(iv) In my opinion by filing the reply Ex.DW1/P2 the defendants have to be held guilty of breach of contract inasmuch as defendants had no valid ground to contend that there was no valid agreement to sell or that the present plaintiff had committed a breach of contract to sell inasmuch as admittedly in April, 1995 defendants had not made themselves capable of performing the agreement to sell because the necessary clearance in Form 37-I had not been obtained by the

defendants from the appropriate Income Tax authority. Plaintiff had to take no further steps under the subject agreement to sell till the defendants had first obtained the necessary clearances from the appropriate authorities, including under Form 37-I read with Section 269 UC of the Income Tax Act and therefore it has to be held that plaintiff was entited to wait for taking the further steps under the agreement to sell including of making payment of further consideration, till the defendants had obtained the necessary permissions, and that even before obtaining the appropriate permissions since the defendants, by their reply Ex.DW1/P2 filed in the application under Order I Rule 10 CPC of the present plaintiff in the Suit no.451/1995 filed by Sh. J.K. Rajgarhia against the present defendants, had denied the entitlement of the plaintiff for any sale

deed being executed pursuant to the subject agreement to sell, therefore in my opinion it is the defendants who are guilty of breach of subject agreement to sell dated 10.2.1995.

14. The next issue which arises is that even if the defendants have to be held guilty of the breach of contract being the agreement to sell dated 10.2.1995, whether the plaintiff is entitled to specific

performance of the subject agreement to sell. In order to decide the issue of entitlement of the plaintiff to get specific performance of the agreement to sell, two issues have to be decided in favour of the plaintiff. One issue is that the plaintiff has to prove that it always has been and continued to be ready and willing to perform its part of the agreement to sell, and as is so required by Section 16(c) of the Specific Relief Act, 1963, the subject matter of the issue no.6. I note that the issue no.6 framed is not happily worded as it does not contain the requirement of continuous readiness and willingness as the requirement of Section 16(c) of the Specific Relief Act is that a plaintiff in a suit for specific performance must always be and continues to be ready and willing to perform his part under the agreement to sell, and therefore issue no.6 is read as modified in terms of the requirement of the language of Section 16(c) of the Specific Relief Act. One other issue would be whether plaintiff is entitled to discretionary relief for specific performance.

15. Let us now examine as to whether plaintiff has led

evidence and proved in this suit that the plaintiff has always been and continues to be ready and willing to perform its part of the contract.

16. In my opinion the expression "has always been and continues to be ready and willing to perform the contract" includes that plaintiff must show that he always has had the financial capacity to perform its part of the contract for making payment of balance sale consideration of Rs.2.10 crores/Rs.2.18 crores. No doubt financial capacity which is to be proved under the term readiness and willingness is not that plaintiff has to show that it had with it liquid moneys, but however it is equally necessary for the plaintiff to show its financial capacity, and having much assets, for being able to pay the balance sale consideration.

17.(i) When we examine the facts of the present case it is found that plaintiff in order to prove readiness and willingness has relied upon two aspects. The first aspect is the availability of the balance sale consideration as on 22.5.1995 in terms of the certificate filed and proved by the plaintiff as Ex.PW1/8, and which is a certificate issued by the A.B.N. Amro Bank, Sansad Marg Branch, New Delhi that it was the plaintiff who had got prepared as on 22.5.1995 bank drafts in favour of the defendant no.1 in this suit for amounts of Rs.18 lacs, Rs.1.45 crores, Rs.30 lacs, Rs.15 lacs and Rs.10 lacs, and which

amounts total to the balance sale consideration. The second aspect of

the plaintiff being ready and willing has been argued on behalf of the plaintiff on the basis that when the plaintiff entered into the compromise with the defendant no.4 in the suit in February, 2005, the plaintiff had paid a consideration of Rs.42.50 lacs to the defendant no.4 and which is so recorded in the order of this Court dated 9.2.2005. It is argued that therefore as on 9.2.2005 and even thereafter the plaintiff has proved his financial capacity and therefore readiness and willingness.

(ii) I cannot agree with the argument urged on behalf of the plaintiff that plaintiff had proved its readiness and willingness as required by Section 16(c) of the Specific Relief Act. As already observed above, readiness and willingness has to be a continuous act from the date of entering into the agreement to sell till at least the leading of evidence by the plaintiff in the suit, if not even as on date at the stage of final arguments, and in this regard it is seen that the plaintiff has at best proved that it had the balance consideration with it only in May, 1995. Having financial capacity in May, 1995 in the opinion of this Court will not enable the plaintiff to show financial capacity of the plaintiff

for the period from after May, 1995 till the evidence has been concluded by the plaintiff in the present suit in August, 2010. In fact the plaintiff has to be held to be guilty of the concealing documents from this Court, and which documents are in the special knowledge of the plaintiff and therefore required to be proved by the plaintiff in terms of Section 106 of the Indian Evidence Act. These documents in

possession of the plaintiff with respect to its financial capacity would be the documents of the bank accounts of the plaintiff, any fixed deposit receipts of the plaintiff of amounts in its bank, audited Balance Sheets and Profit and Loss accounts of the plaintiff from the year 1995 till plaintiff s evidence was closed in August, 2010 in terms of the statement made on behalf of the plaintiff. Section 16(c) of the Specific Relief Act deliberately requires continuous rediness and willingness i.e continuous financial ability to complete the transactions. The stage of complying with obligations under the agreement to sell by a proposed buyer even if does not arise, yet Section 16(c) of the Specific Relief Act requires the plaintiff to show continuous financial capacity to prove the balance sale consideration. In my opinion, it has to be held that the plaintiff in this regard has

miserably failed because merely by showing financial capacity as on date on 22.5.1995 cannot mean that the plaintiff had financial capacity from 23.5.1995 till the plaintiff concluded its evidence in August, 2010. As already stated above the plaintiff has not filed any document with respect to its financial capacity like Balance Sheets, Profit and Loss accounts and therefore against the plaintiff adverse inference has to be drawn under Section 114 of the Indian Evidence Act on account of the plaintiff having deliberately not filed such documents. It is therefore held that the plaintiff cannot be held to have complied with Section 16 (c) of the Specific Relief Act merely because plaintiff has proved the certificate of bank Ex.PW1/8 dated 5.1.2004 showing that plaintiff had prepared pay orders with respect to balance sale

consideration on one day and date of 22.5.1995. Also and simply because the plaintiff has paid a sum of Rs.42.50 lacs to defendant no. 4 in February, 2005 would also not mean that plaintiff is to be held that it had always the capacity to pay the entire balance sale consideration to defendant nos. 1 to 3 with the fact that payment by plaintiff to defendant no. 4 of a sum of Rs.42.50 lacs will only show financial capacity of the plaintiff of Rs.42.50 lacs and not with respect

to total balance sale consideration payable by the plaintiff to the defendant nos. 1 to 3 of Rs.2.18 crores.

(iii) It was argued on behalf of the plaintiff that plaintiff s Managing Director has deposed in plaintiff s favour that plaintiff had the financial capacity, and this is sufficient evidence to prove readiness and willingness. This argument is however misconceived not only because PW-1 Sh. Arun Kumar Jain had been cross-examined appropriately by suggesting that plaintiff did not have financial capacity and plaintiff was not ready and willing but also because self-serving deposition cannot be held to be discharge of onus of proof and so observed by this Court in the case of Baldev Behl & Ors. Vs. Bhule & Ors. (2012) 132 DRJ 247, paras 26 (i) and (ii) of which reads as under:-

> "26(i). This issue pertains to plaintiff No.1 being ready and willing to perform his part of the agreement to sell. As per Section 16(c) of the Act, every plaintiff in a suit for specific performance must aver and prove that the plaintiff has always been and continues to be ready and willing to perform his part of the contract/agreement to sell. Readiness is financial capacity to go ahead with the agreement to sell and willingness is the intention. I may, at this stage, specifically invite attention to the

observations of the Supreme Court in the case of Balraj Taneja and Anr. (supra), and relevant paras have been reproduced above, and which show that in a suit for specific performance even if there is no defence of the defendant, yet, the aspect of readiness and willingness has to be specifically proved by the plaintiff. This is stated by the Supreme Court in para 30 of the said judgment. The question is whether the plaintiff No.1 has proved his readiness and willingness at the relevant time and also

continues to be ready and willing to perform his part of the contract/agreement to sell.

(ii) Readiness to perform the obligations by a proposed purchaser is a very important aspect and it has to be proved by categorical evidence. Mere oral evidence and self-serving depositions cannot be a substitute for categorical evidence on the specific statutory requirement of Section 16(c). It is not disputed on behalf of the plaintiff No.1 that plaintiff No.1 has not filed any income tax returns or any bank account or proof of any other assets/properties or any other evidence to show the financial capacity of the plaintiff No.1 to pay the balance sale consideration. As per the case of the plaintiff No.1, the balance sale consideration would be approximately ` 19.5 lacs and there is no evidence worth the name in the record to show the plaintiff No.1 s financial capacity for this amount. Of course, while on this argument, I am assuming that there is a certainty as to consideration because in reality there is no certainty as to balance sale consideration inasmuch as the plaintiff No.1 has failed to exercise the option in terms of the agreement to sell as to which area of the balance land less the hutment/portion the plaintiff No.1 seeks specific performance of. Also, as already stated above, this area claimed by the plaintiff No.1 has to be further conditioned by an area of 12 bighas which has already been sold to be defendant No.3 under the sale deed dated 8.4.1988. In any case, I need not state anything further inasmuch as there is not a single piece of paper on record or any credible evidence which proves the financial capacity of the plaintiff No.1. I accordingly hold that plaintiff No.1 has miserably failed to prove his readiness to perform his obligations under the agreement to sell dated 27.8.1988. In fact, even willingness on the part of the plaintiff No.1 is absent inasmuch as there is no certainty of any option exercised by the plaintiff No.1 as to specific area which the plaintiff No.1 seeks to purchase, and which specific area had necessarily to be clear inasmuch as there is the issue of lessening the area whether on account of hutments or on account of 12 bighas of land already purchased by the defendant No.3 vide sale deed dated 8.4.1988 and hence of clarity as to for what area and for what price the agreement to sell has to go ahead."

18. It is, therefore, held that plaintiff has failed to show that it had always been and continued to be always ready and willing to perform its part of agreement to sell by having the necessary financial

capacity to pay the balance sale consideration of Rs.2.18 crores till

February, 2005 and thereafter till August, 2010 for the sum of Rs.2.18 crores less the sum of Rs.42.50 lacs paid to the defendant no.4.

19. Issue no. 6 is therefore decided against the plaintiff and in favor of defendant nos. 1 to 3.

20.(i) The next aspect to be considered is as to whether plaintiff is entitled to the discretionary relief of specific performace. In law, merely because there is an agreement to sell, and that the proposed seller is found to be guilty of breach of agreement to sell, yet it does not automatically follow that a proposed buyer is only for that reason entitled to the specific performance of the agreement to sell. In fact, besides the defendants/proposed sellers being guilty of breach of contract, and that even if the proposed buyer/plaintiff proves that there was financial capacity in the plaintiff to pay the balance sale consideration, yet the plaintiff is not necessarily and automatically entitled to specific performance, and this is because the grant of relief of specific performance is a discretion vested in the Court as per Section 20 of the Specific Relief Act.

(ii) An agreement to sell is a contract between the parties and contracts between the parties are subject matter of the Indian Contract Act, 1872. The effect of breach of contract is provided under Section 73 of the Indian Contract Act. If there is a breach of contract then an

aggrieved party is entitled to monetary damages as per Section 73 of the Indian Contract Act and which monetary damages is the amount of loss which is caused to the aggrieved party under the contract. An aggrieved party who was the proposed buyer under the agreement to sell will suffer loss if in case on the date and in around the date of breach, the value of a similar property as the contracted property under the agreement to sell, which could be purchased by the plaintiff as a proposed buyer, had increased. To the extent of increase of price of the property a plaintiff who is a proposed buyer suffers loss when a proposed seller/defendant does not sell the property under an agreement to sell, because a buyer has to pay a higher price for purchase of a similar property, and thus ordinarily whenever there is a breach of contract of an agreement to sell on account of the breach by the defendant/proposed seller, then the plaintiff/proposed buyer becomes entitled ordinarily to damages/loss under Section 73 of the

Indian Contract Act being the difference of the contract price and the higher price of a similar property in around the date of breach. The Specific Relief Act contains provisions that in spite of a plaintiff who is the proposed buyer, and against whom breach of contract is caused by a defendant in the suit being the proposed seller, the plaintiff/proposed buyer need not ask for and be granted damages in such a case where the plaintiff/proposed buyer pleads and seeks that there should be specific performance of the contract and not the breach of the contract. In a way therefore the provisions of Specific

Relief Act directing specific performance of a breached agreement to sell are in the nature of Exceptions or Provisos to Section 73 of the Indian Contract Act. What is being stated by this Court is that if there is a breach of contract then an aggrieved party on account of the breach of the contract gets under Section 73 of the Indian Contract Act monetary damages but where instead of grant of damages because of the contract being broken, a plaintiff/proposed buyer instead seeks/prays that the contract should be specifically performed, then such a scenario is in the nature of an Exception or a Proviso to the ordinary situation comprised in Section 73 of the Indian Contract Act

that breach of contract entitles a person to monetary damages on account of the loss caused. Therefore once the provisions of Specific Relief Act with respect to specific performance are not the normal consequence of a breach of contract being of grant of damages as per Section 73 of the Indian Contract Act, therefore the provisions of the Specific Relief Act; with the important provision therein being Section 20 of the Specific Relief Act; provides that Court has the discretion whether or not to grant specific performance and that merely because it is lawful to do so, the Court will not grant specific performance but instead may only grant damages with the measure of damages being those as provided in Section 73 of the Indian Contract Act. This aspect has been considered by this Court in detail in the judgment in the case of Jinesh Kumar Jain Vs. Iris Paintal and Ors. ILR (2012) 5 Delhi 678. The relevant paras of this judgment are paras 13 to 18 and these paras read as under:-

"13. Now let us assume that the agreement to sell dated 26.9.1988 was not hit by the 1972 Act; the defendants were guilty of breach of their obligation to perform their part of contract; and that the plaintiff was ready and willing to perform his part; even then, can it be said that the plaintiff is yet entitled to the discretionary relief of specific performance. It will be appropriate at this stage to refer to Section 20 of the Specific Relief Act, 1963, and more particularly sub-Section 3 thereof. Section 20 reads as under:-

20. Discretion as to decreeing specific performance.-

(1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capably of correction by a court of appeal.

(2) The following are cases in which the court may properly exercise discretion not to decree specific performance:-

(a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or

(b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff; or

(c) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.

(3) The court may properly exercise discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

(4) The court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the party."

14. Sub-Section 3 makes it clear that Courts decree specific performance where the plaintiff has done substantial acts in consequence of a contract/agreement to sell. Substantial acts obviously would mean and include payment of substantial amounts of money. Plaintiff may have paid 50% or more of the consideration or having paid a lesser consideration he could be in possession pursuant to the agreement to sell or otherwise is in the possession of the subject property or other substantial acts have been performed by the plaintiff, and acts which can be said to be substantial acts under Section 20(3). However, where the acts are not substantial i.e. merely 5% or 10% etc of the consideration is paid i.e. less than substantial consideration is paid, (and for which a rough benchmark can be taken as 50% of the consideration), and/or plaintiff is not in

possession of the subject land, I do not think that the plaintiff is entitled to the discretionary relief of specific performance.

15. The Supreme Court in the recent judgment of Saradamani Kandappan vs. Mrs. S. Rajalakshmi, 2011 (12) SCC 18 has had an occasion to consider the aspect of payment of a nominal advance price by the plaintiff and its effect on the discretion of the Court in granting the discretionary relief of specific performance. Though in the facts of the

case before the Supreme Court, it was the buyer who was found guilty of breach of contract, however, in my opinion, the observations of the Supreme Court in the said case are relevant not only because I have found in this case the plaintiff/ buyer guilty of breach of contract, but also because even assuming the plaintiff/buyer is not guilty of breach of contract, yet, Section 20 sub-Section 3 of the Specific Relief Act, 1963 as reproduced above clearly requires substantial acts on behalf of the plaintiff/proposed purchaser i.e. payment of substantial consideration. Paras 37 and 43 of the judgment in the case of Saradamani Kandappan (supra) are relevant and they read as under:

> "37. The reality arising from this economic change cannot continue to be ignored in deciding cases relating to specific performance. The steep increase in prices is a circumstance which makes it inequitable to grant the relief of specific performance where the purchaser does not take steps to complete the sale within the agreed period, and the vendor has not been responsible for any delay or non-performance. A purchaser can no longer take shelter under the principle that time is not of essence in performance of contracts relating to immovable property, to cover his delays, laches, breaches and "non-readiness". The precedents from an era, when high inflation was unknown, holding that time is not of the essence of the contract in regard to immovable properties, may no longer apply, not because the principle laid down therein is unsound or erroneous, but the circumstances that existed when the said principle was evolved, no longer exist. In these days of galloping increases in prices of immovable properties, to hold that a vendor who took an earnest money of say about 10% of the sale price and agreed for three months or four months as the period for performance, did not intend that time should be the essence, will be a cruel joke on him, and will result in injustice. Adding to the misery is the delay in disposal of cases relating to specific performance, as suits and appeals therefrom routinely take two to three decades to attain finality. As a result, an owner agreeing to sell a property for rupees one lakh and received rupees ten thousand as advance may be required to execute a sale deed a quarter century later by receiving the remaining rupees ninety thousand, when the property value has risen to a crore of rupees.
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> xxxxx xxxxx xxxxx
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> 43. Till the issue is considered in an appropriate case, we can only reiterate what has been suggested in K.S. Vidyanandam.
>
> (i) The courts, while exercising discretion in suits for specific

performance, should bear in mind that when the parties prescribe a time/period, for taking certain steps or for completion of the transaction, that must have some significance and therefore time/period prescribed cannot be ignored.

(ii) The courts will apply greater scrutiny and strictness when considering whether the purchaser was "ready and willing" to perform his part of the contract.

(iii)Every suit for specific performance need not be decreed merely because it is filed within the period of limitation by ignoring the time-limits stipulated in the agreement. The courts will also "frown" upon suits which are not filed immediately after the breach/refusal. The fact that limitation is three years does not mean that a purchaser can wait for 1 or 2 years to file a suit and obtain specific performance. The three-year period is intended to assist the purchasers in special cases, as for example, where the major part of the consideration has been paid to the vendor and possession has been delivered in part-performance, where equity shifts in favour of the purchaser."

(emphasis is mine)

16. A reading of the aforesaid paras shows that Courts have a bounden duty to take notice of galloping prices. Surely it cannot be disputed that the balance of convenience i.e. equity in the present case is more in favour of the defendants who have only received 10% of the consideration. If the hammer has to fall in the facts of the present case, in my opinion, it should fall more on the plaintiff than on the defendants inasmuch as today the defendants cannot on receiving of the balance consideration of `44,00,000/-, and even if exorbitant rate of interest is received thereon, purchase any equivalent property for this amount. Correspondingly, the plaintiff has had benefit of 90% of sale consideration remaining with him (assuming he has any) and which he could have utilized for purchase of assets including an immovable property. In specific performance suits a buyer need not have ready cash all the time and his financial capacity has to be seen and thus plaintiff can be said to have taken benefit of the 90% balance with him. It is well to be remembered at this stage that in a way that part of Specific Relief Act dealing with specific performance is in the nature of exception to Section 73 of the Contract Act, 1872 i.e. the normal rule with respect to the breach of a contract under Section 73 of the Contract Act, 1872 is of damages, and, the Specific Relief Act, 1963 only provides the alternative discretionary remedy that instead of damages, the contract in fact should be specifically enforced. Thus for breach of contract the remedy of damages is always there and it is not that the buyer is remediless. However, for getting specific relief, the Specific Relief Act, 1963 while providing for provisions of specific performance of the agreement (i.e. performance instead of damages) for breach, requires discretion to be exercised by the Court as to whether specific performance should or should not be granted in the facts of each case or that the plaintiff should be held entitled to the ordinary relief of damages or compensation.

17. I have recently in the case titled as Laxmi Devi vs. Mahavir Singh

being RFA No. 556/2011 decided on 1.5.2012 declined specific

performance, one of the ground being payment of only nominal consideration under the agreement to sell. Para 11 of the said judgment reads as under:-

"11. Besides the fact that respondent/plaintiff was guilty of breach of contract and was not ready and willing to perform his part of the contract lacking in financial capacity to pay the balance consideration, in my opinion, the facts of the present case also disentitle the respondent/plaintiff to the discretionary relief of specific performance. There are two reasons for declining the discretionary relief of specific performance. The first reason is that the Supreme Court has now on repeated occasions held that unless substantial consideration is paid out of the total amount of consideration, the Courts would lean against granting the specific performance inasmuch as by the loss of time, the balance sale consideration which is granted at a much later date, is not sufficient to enable the proposed seller to buy an equivalent property which could have been bought from the balance sale consideration if the same was paid on the due date. In the present case, out of the total sale consideration of `5,60,000/-, only a sum of `1 lakh has been paid i.e. the sale consideration which is paid is only around 17% or so. In my opinion, by mere payment of 17% of the sale consideration, it cannot be said that the respondent/plaintiff has made out a case for grant of discretionary relief or specific performance....."

18. Therefore, whether we look from the point of view of Section 20 sub-Section 3 of the Specific Relief Act, 1963 or the ratio of the judgment of the Supreme Court in the case of Saradamani Kandappan (supra) or even on first principle with respect to equity because 10% of the sale consideration alongwith the interest will not result in the defendants even remotely being able to purchase an equivalent property than the suit property specific performance cannot be granted. In fact, on a rough estimation, the property prices would have galloped to at least between 30 to 50 times from 1988 till date. I take judicial notice of this that in the capital of our country, like in all other megapolis, on account of the increase in population and rapid urbanization, there is a phenomenal increase in the prices of urban immovable property.

I therefore hold and answer issue no. 5 against the plaintiff and in favour of the defendants holding that the plaintiff is not entitled to discretionary relief of specific performance. " (underlining added)

21. The ratio of the judgment passed by this Court in Jinesh Kumar Jain (supra) has been thereafter followed by this Court in the following cases:-

(i) Sushil Jain Vs. Meharban Singh and Others (2012) 131 DRJ 421.

(ii) Baldev Behl & Ors. Vs. Bhule & Ors. (2012) 132 DRJ 247 (In para 25 of this judgment it is noted that the appeal against the judgment in the case of Jinesh Kumar Jain (supra) being RFA(OS) No.75/2012 stands dismissed by a Division Bench of this

Court on 31.8.2012).

(iii) A.K. Narula Vs. Iqbal Ahmed and Others ILR (2013) I Delhi 315.

22.(i) A reading of the ratio of the aforesaid judgment of this Court in the case of Jinesh Kumar Jain (supra) shows that a proposed buyer as a plaintiff when only has paid a very limited amount of consideration, then such a plaintiff may not ordinarily be entitled to the discretionary relief of specific performance when the grant of specific performance is being decided after a long period of time having elapsed after entering into the agreement to sell and the suit for specific performance coming up for final disposal. The logic is very simple that from the balance sale consideration which has to be paid by the plaintiff/proposed buyer under an agreement to sell to the defendant/proposed seller, even by adding thereto interest, surely the defendant/proposed seller from the balance sale consideration plus interest cannot purchase a property of an equivalent type as would have been purchased by receipt of the sale consideration at the time when the agreement to sell was entered into many many years earlier.

(ii) As a result of rise in the prices of a property, that in the facts of the present case this Court can take judicial notice that prices of properties in Delhi, and that prices in the year 1995 would be far far lesser than the prices of the property today in the year 2018, and that too more so with the fact of the suit property being situated in one of the prime colonies of the Delhi being Maharani Bagh, grant of specific performance will severly and gravely prejudice the defendants. On a conservative estimate the value of the suit property as on today would be at least around 20 times more than what was the price of the suit property in the year 1995 and that therefore with the balance sale consideration payable to the defendants as on today even with interest, the defendants will not be able to purchase the property as the defendants could have purchased with the value of the balance sale consideration in the year 1995.

(iii) In my opinion in such cases as the present the plaintiff in fact should be extremely careful in such a suit for specific performance; that when evidence is led the plaintiff also leads requisite evidence as to the loss which would be caused to the plaintiff on account of the breach of contract by the defendants/proposed sellers, so that the Court can grant monetary damages to the plaintiff/proposed buyer on account of the breach of contract by the defendants/proposed sellers along with the interest, but indubitably the position on record in the present case is that the plaintiff has led no evidence whatsoever as to what was the difference of the property price in around April/May, 1995 than what was the price of the property on the date of entering into agreement to sell on 10.2.1995. Once a plaintiff fails to lead any evidence whatsoever to prove loss, then the plaintiff harms its own case because the Court in equity when it exercises discretionary power to deny specific performance because of Section 20 of the Specific Relief Act, and that the Court wants to grant damages on the principles under Section 73 of the Indian Contract Act, the Court cannot do so since it does not have any evidence before it in order to grant monetary damages to the plaintiff/proposed buyer and which loss/monetary damages the plaintiff would have been entitled to on account of defendants/proposed sellers held guilty of breach of agreement to sell. After all it is not that the plaintiff has pleaded and proved why it wants to be the owner only and only of the suit property and that why any other property in the same or similar area would not be sufficient for the

plaintiff's needs. Therefore since plaintiff with the balance sale consideration with it plus an additional amount could well have purchased a similar property in the same or similar area in around May, 1995 and within some reasonable time thereafter, but yet plaintiff has chosen not to, hence the plaintiff is held disentitled to the discretionary relief of specific performance. It is therefore held that since the plaintiff has only paid approximately 14.5% of the sale consideration as on the date of entering into the agreement to sell being the amount of Rs.37 lacs, therefore plaintiff is not entitled to the discretionary relief of specific performance.

(iv) It is also relevant that since plaintiff has over this period from the year 1995 to 2018 had moneys in its pocket of the balance sale consideration of Rs.2.18 crores, the plaintiff would/could have invested wisely for obtaining returns on this amount of balance sale consideration.

(v) Therefore on the one hand defendants cannot purchase a similar property in similar area as in the year 1995 when the agreement to sell was entered into with respect to the sale consideration of 1995 in the year 2018, on the other hand the plaintiff has had benefit of having enjoyed and put to use and derived benefits of the balance sale consideration of Rs.2.18 crores, assuming the plaintiff had such a balance sale consideration amount with it (and in reality though it does not have as held while deciding issue no.6) therefore if the plaintiff is granted specific performance in the facts of the present case there would result not only in grave jeopardy to the defendants but that situation would be accompanied by the benefit which the plaintiff has had by having with it and having used or could have used the balance sale consideration of Rs.2.18 crores.

23. I therefore hold that plaintiff in the facts of this case is not entitled to the benefit of being granted the discretionary relief of specific performance. Issue no. 7 is therefore decided in favor of the defendant nos. 1 to 3 and against the plaintiff.

24. This issue is decided in favour of the defendant nos. 1 to 3 and against the plaintiff because admittedly, and as already discussed above, there is no evidence which is led by the plaintiff of the higher price difference of a property similar to the suit property in and around the date of breach in April/May 1995 by the defendants. Issue with respect to damages to be granted to a proposed buyer/plaintiff is only if evidence is led to discharge the onus of proof as to the amount of loss/damages, and once there is no documentary evidence led whatsoever for proving the loss caused to the plaintiff, therefore monetary damages cannot be awarded to the plaintiff.

25. As per these issues it is to be decided whether the plaintiff is entitled to refund of any amount from the defendant nos. 1 to 3, and if so what amount and with what rate of interest.

26. As already discussed above, admittedly, the defendant nos. 1 to 3 have received an amount of Rs.37 lacs under the agreement to sell less the proportionate amount thereof which has been received by defendant no. 4. Since the total amout received under the agreement to sell by all the four defendants in the suit was Rs.37 lacs, and the ownership interest of defendant no. 1 was 50% with ownership interest of the defendant nos. 2 to 4 being jointly 50%, hence the defendant no.1 has received a sum of Rs.18.50 lacs under the agreement to sell and that defendant nos. 2 and 3 have received 2/3rd of Rs.18.50 lacs i.e Rs.12.34 lacs. Defendants since are held guilty of breach of

contract, and even if it was plaintiff who was held guilty of breach of contract but since defendants have not proved any loss caused to them on account of any alleged breach of contract by the plaintiff, in view of the ratio of the Constitution Bench judgment of the Supreme Court in the case of Fateh Chand Vs. Balkishan Dass AIR 1963 SC 1405, it is held that plaintiff will be entitled to refund of Rs.18.50 lacs from the defendant no. 1 and Rs.6.17 lacs each from the defendant nos. 2 and 3. Accordingly, this suit will stand decreed for the monetary amount of Rs.18.50 lacs in favour of the plaintiff and against the defendant no. 1 and for a sum of Rs.6.17 lacs in favour of the plaintiff and against each of the defendant nos. 2 and 3.

27. The next aspect which arises is that whether plaintiff would be entitled to any interest on the aforesaid amounts which have been decreed individually against the defendant nos. 1 to 3. In my opinion, the plaintiff cannot be granted any interest whatsoever because the plaintiff by the filing of the suit for the suit property has made the suit property into a disputed property and that the defendants were also injuncted by an interim order granted during the pendency of the suit to maintain status quo of the suit property. Defendants therefore have lost out on the user of the property itself, and therefore in my opinion plaintiff is held not be held entitled to any interest, and that the defendant nos. 1 to 3 are only liable to repay back the amount of Rs.18.50 lacs and Rs.12.34 lacs as already held above.

28. I may note that defendant nos. 1 and 3 expired during the pendency of the suit and the suit has thereafter continued as against their legal heirs. This Court however makes it clear that this Court has in no manner observed at all on merits as to upon whom and to what extent the estate of the deceased defendant nos. 1 and 3 has devolved and the representation by legal heirs in this suit is only for the purposes of contest in the present suit.

RELIEF

29. In view of the aforesaid discussion, the suit of the plaintiff seeking specific performace as against the defendant nos. 1 to 3 is dismissed. In favour of the plaintiff a money decree is passed, for a sum of Rs.18.50 lacs against the defendant no. 1, and against each of the defendant nos. 2 and 3 for a sum of Rs.6.17 lacs. Parties are left to bear their own costs. Decree sheet be prepared.

30. Since the suit is disposed of all pending applications or any other interim proceedings seeking relief would also stand disposed of in terms of the present judgment.

CCP (O) No. 3/2006 in CS (OS) No. 1261/1995

31. Since the main suit for specific performance stands disposed of, this contempt petition is also disposed of as not pressed, but liberty is granted in accordance with law to any of the defendants in the suit or their legal heirs to file any appropriate proceedings against the plaintiff in the suit, of course in accordance with law.

FEBRUARY 28, 2018 VALMIKI J. MEHTA, J