Sunil Sood vs M/S Shri Krishna Builders & Ors. on 7 September, 2018

Author: Valmiki J.Mehta

Bench: Valmiki J.Mehta

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*            IN THE HIGH COURT OF DELHI AT NEW DELHI

+                        RFA No.751/2018

%                                          7th September, 2018

SUNIL SOOD
                                                        ..... Appellant
                         Through:       Mr. Anuj Aggarwal, Advocate
                                        (M. No.9891363718).
                         versus

M/S SHRI KRISHNA BUILDERS & ORS.
                                                      ..... Respondents

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

To be referred to the Reporter or not?


VALMIKI J. MEHTA, J (ORAL)
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C.M. No.36303/2018 (for condonation of delay)

1. For the reasons stated in the application, delay of 11 days in re-filing the appeal is condoned.

C.M. stands disposed of.

RFA No.751/2018 and C.M. Nos.36302/2018(stay) & 36304/2018(exemption from filing copy of decree sheet)

2. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the plaintiff in the suit impugning the Judgment of the Trial Court dated 16.4.2018 by which trial court has dismissed the suit for specific performance, injunction etc filed by the appellant/plaintiff.

3. The facts of the case are that the appellant/plaintiff was a tenant in first floor of the property no. K-23-A, Kalkaji, New Delhi (hereinafter "suit property") at a monthly rental of Rs.1,050/-. The entire property belonged to the respondent no.3/defendant no.3, (now deceased and represented through her legal heirs). Respondent no.1/defendant no.1, M/s Shri Krishna Builders through the

respondent no.2/defendant no.2 entered into a Collaboration Agreement dated 12.9.2005 with the respondent no.3/defendant no.3 for reconstructing the entire property. For this purpose, an MOU dated 10.10.2005/Ex.PW1/2 was entered between the appellant/plaintiff, respondent no.1/defendant no.1 and the respondent no.3/defendant no.3. Between the appellant/plaintiff and the respondent no.1/defendant no.1 simultaneously an Agreement to Sell of the same date was entered into with respect to the first floor of the property which was to be constructed. The total price under the Agreement to Sell was fixed at Rs.17 lacs of which a sum of Rs.1 lac was paid by the appellant/plaintiff and the balance amount of Rs. 16 lacs was payable within 15 days of completion of construction and at the time of execution and registration of the Sale Deed in favour of the appellant/plaintiff. The appellant/plaintiff pleaded that to enable reconstruction, he had to shift from the tenanted premises and the respondent no. 1/defendant no.1 agreed to provide alternative accommodation on rent, the rent for which was to be paid by the respondent no.1/defendant no.1. Therefore, the appellant/plaintiff shifted to the third floor of the property no.G-48, Kalkaji, New Delhi at rent of Rs.7,000/- per month and for the said premises, rent was paid by the respondent no.1/defendant no.1 till the disputes arose. The case of the appellant/plaintiff was that the respondent no.1/defendant no.1 was to construct the first floor of two bedrooms, drawing/dining, kitchen and two toilets as per the document Annexure-A to the Agreement to Sell, and there was also attached a site plan to the same.

The appellant/plaintiff pleads that the respondent no.1/defendant no.1 and respondent no.2/defendant no.2 (partner of the respondent no.1/defendant no.1 partnership firm) however failed to carry out construction in terms of Annexure-A and that the construction made was inferior and sub-standard. The appellant/plaintiff pleaded that he was to be given possession by October, 2006 which was not done and instead in December, 2006 the respondent nos.1 and 2/defendant nos.1 and 2 asked the appellant/plaintiff to bear for another 3-4 months. The appellant/plaintiff therefore left his tenanted premises and shifted to another rented accommodation at J-218, third floor, Kalkaji, Delhi at rent of Rs.5,000/- per month. The appellant/plaintiff pleads that when he approached the respondent no.1/defendant no.1 for reimbursement of rent from 15.12.2006 alongwith penalty of Rs.10,000/- as per the Agreement to Sell, the respondent nos.1 and 2/defendant nos.1 and 2 refused to honour their commitments and instead the respondent no.3/defendant no.3 handed over a copy of the notice dated 20.12.2006/Ex.PW1/DX2 whereby the Agreement to Sell was cancelled by the respondent nos.1 and 2/defendant nos.1 and 2.

Therefore the subject suit for specific performance, decree for recovery of rent paid at Rs.5,000/- per month for J-218 property from 1.12.2006 to 28.2.2007, mandatory and permanent injunction etc was filed against the respondents/defendants.

4. A joint written statement was filed by the respondents/defendants. Respondents/Defendants pleaded that respondent no.1/defendant no.1 complied with all terms and conditions of the Agreement to Sell and MoU dated 10.10.2005 and construction was completed within the stipulated time by the third week of October, 2006. An intimation was given by the respondent no.2/defendant no.2 to the appellant/plaintiff and also to the respondent no.3/defendant no.3 regarding completion of construction, with a request to shift to their respective portions as per the MOU and the Agreement to Sell dated 10.10.2005. Both the appellant/plaintiff and respondent no.3/defendant

no.3 duly inspected the suit property in October, 2006. Though respondent no.1/defendant no.1 offered to the appellant/plaintiff to take possession of the first floor on making payment of the balance consideration of Rs.16 lacs, with the fact that the respondent no.3/defendant no.3 duly shifted in November, 2006 to the newly constructed ground floor portion, but however the appellant/plaintiff who was required to make payment of balance sale consideration of Rs.16 lacs within 15 days of completion of construction and so intimated to the appellant/plaintiff in the third week of October, 2006, failed to make the balance payment of Rs. 16 lacs. The appellant/plaintiff in fact sought extension of time citing family problems and financial constraints. At the time of extending the time by 20-25 days, the respondent no.1/defendant no.1 made it clear to the appellant/plaintiff that in case the balance amount is not paid within 20-25 days, then, the Agreement to Sell and MOU dated 10.10.2005 would stand cancelled. The appellant/plaintiff yet in spite of reasonable time being given failed to make the payment of the balance consideration of Rs.16 lacs and therefore the notice dated 20.12.2006 was served upon the appellant/plaintiff cancelling the Agreement to Sell and forfeiting the amount of Rs.1 lac paid by the appellant/plaintiff under the Agreement to Sell. After cancellation of the Agreement to Sell, the first floor of the property was let out by the respondent no.1/defendant no.1 to one Ms. Navneet Sachdev vide Lease Agreement dated 4.1.2007 (Ex.DW1/2) and since then the tenant Ms. Navneet Sachdev is in continuous possession of the suit property being the first floor of the newly constructed building of K-

23-A, Kalkaji, Delhi. The respondents/defendants further denied that there was any document Annexure-A to the Agreement to Sell dated 10.10.2005 and that this so called Annexure was a document forged by the appellant/plaintiff. On account of the appellant/plaintiff falsely telling the public that he has a right in the suit property, therefore the respondent no.1/defendant no.1 was constrained to issue caution notice in two newspapers on 06.02.2007 being the newspapers „The Hindu (Ex.DW1/3) and „Veer Arjun (Ex.DW1/4) informing the public at large that the appellant/plaintiff had no right, title and interest in the suit property being the first floor of K-23-A, Kalkaji, Delhi. It was hence pleaded that the suit be dismissed.

5. After pleadings were complete, trial court framed the following issues:-

> "1.Whether the plaintiff is entitled to decree for relief of Specific Performance of the Contract/Agreement to Sell and MOU dated 10.10.05? OPP
>
> 2. Whether the plaintiff is entitled to recovery for sum of Rs.45,000/- as rent/damages/penalty? OPP
>
> 3. Whether the plaintiff is entitled to decree of mandatory and permanent injunction as claimed? OPD
>
> 4. Whether the Agreement to Sell and MOU dt. 10.10.05 had been cancelled and rescinded legally and validly as was being claimed by the defendants? OPD

> 5. Whether the present suit is barred under provisions of Specific Relief Act and there does not exist any cause of action in favour of plaintiff as was being claimed by the defendants? OPD
>
> 6. Relief."

6. Trial court has dismissed the suit for specific performance filed by the appellant/plaintiff by holding that the appellant/plaintiff is not entitled to the specific performance of the Agreement to Sell dated 10.10.2005 or for recovery of the amount towards rent or damages. Trial court has held that appellant/plaintiff failed to prove his financial capacity because as per the bank statement of the appellant/plaintiff filed in the Court, there existed only a sum of approximately Rs.5 lacs on 02.12.2006, and this would still leave a balance of Rs.11 lacs for which no document whatsoever has been filed by the appellant/plaintiff showing his ability to pay the balance sale consideration of Rs.16 lacs. Trial court has disbelieved the self-

serving ipse dixit of the appellant/plaintiff that he had available with him the balance sale consideration of Rs.16 lacs. Trial court has also disbelieved the evidence led on behalf of the appellant/plaintiff of his entitlement to a loan from M/s JSG Leasing Ltd., on whose behalf deposition was given by its Managing Director Mr. G.S. Chawla (PW2), inasmuch as at no point of time in any pleadings of the appellant/plaintiff there was even a whisper that the appellant/plaintiff would arrange the balance sale consideration by taking a loan from M/s JSG Leasing Ltd. Also trial court has reasoned that a leasing company is not entitled to give any loan for transferring of an immovable property and that no Articles/Memorandum of Association of the company M/s JSG Leasing Ltd was filed showing that such company could have given loan to the appellant/plaintiff for the purpose of purchasing an immovable property. Trial court further held that since the leasing company was a non-banking finance company approved by the RBI to give loan, the statement of PW2 that loan could be given for an immovable property, has to be disbelieved on account of no requisite certificate being filed from the appropriate authority of RBI. Trial court also held that no documents whatsoever were filed of this leasing company showing how this company had finance to advance the loan to the appellants/plaintiffs. Trial court has also reasoned that self-serving statement of loan being granted and the property being mortgaged would not be sufficient because obviously the repayment capacity of the appellant/plaintiff had to be seen and that the appellant/plaintiff had not proved on record his capacity to repay the loan by EMIs with the further fact that what are the EMIs were not even stated in the sanction letter Ex.PW1/X.

7. I completely agree with the aforesaid reasoning and conclusions which have been given by the trial court in paras 17 and 18 of the impugned judgment, and these paras 17 and 18 read as under:-

> "17. Plaintiff has miserably failed to establish his readiness and willingness to perform his part of the contract. Together with the plaint, plaintiff had placed no material whatsoever on the judicial record to show that he had with him the total balance amount of Rs. 16 lacs. Plaintiff s bank statement of account from HDFC Bank, placed on the judicial record on 24.05.2007, showed a balance of five lakh odd rupees only as on 02.12.2006. But then, this would still leave a balance of Rs. 11 lacs.

No pay order or any demand draft or any banker's cheque of the relevant period of the remaining amount of Rs. 11 lacs was shown or furnished to the Court. In short, plaintiff furnished no document whatsoever to show that he had with him total balance amount of Rs. 16 lacs at the relevant time. Plaintiff's self-serving ipse dixit, sans any material whatsoever on record that he had total balance amount of Rs. 16 lacs available with him, would not suffice.

18. Plaintiff in his endeavour to prove his readiness and willingness relied on the evidence of Mr. G.S. Chawla (PW2), who represented himself to be Managing Director of M/s JSG Leasing Ltd. PW2 in his examination-in-chief deposed that plaintiff's request for a home loan for buying 1st floor of property no. K-23A, Kalkaji, Delhi was considered and on the basis of decision of the Board, letter dt. 16.10.2006 (Ex.PW1/X) was issued. He went on to depose that loan of Rs. 15 lacs was approved and that the same was to be disbursed in December, 2006 with prior notice/intimation of 15 days for completion of paper formalities. He further deposed that sanction letter dt. 16.10.2006 (Ex. PW1/X) was valid till 31.03.2007. This Court is of the view that this evidence of PW2 does not at all advance plaintiff's case for multiple reasons. Plaintiff in his plaint, or in his replication, or for that matter in his evidence by way of affidavit (Ex. PW1/A), never made any averment that he had applied for a home loan and had been sanctioned the same by a company namely M/s JSG Leasing Ltd. The evidence on this score that is forthcoming through PW2 is clearly beyond the pleadings. It is pertinent to mention that this document (Ex. PW1/X) came to be filed on the judicial record much later on 03.09.2010. That apart, a company cannot just one fine day take a decision to start advancing loans to the public at large. The company, in order to do so, has to have such an object of advancing loans to the public at large set out in its Articles/Memorandum of Association. Further, this company is certainly not a bank. Neither any document was furnished to show that it was a Non-Banking Financial Company (NBFC) as approved by Reserve Bank of India (RBI). It must also be mentioned here that a NBFC has to have RBI approval for making loans/advances to the public as its business. Nothing was brought on record to show that the company in question had the RBI approval or that it had the business of advancing loans as one of its objects. PW2 explained this away by saying that the company stood closed about two years ago (in the year 2011) and that in year 2006 it did have the certificate/authority from RBI to do business of leasing/financing. This averment, sans the requisite certificate/authority from RBI being placed on record, would not suffice. If PW2 was not in possession of the requisite certificate/authority from RBI, then copy of such certificate/authority could very well have been obtained from RBI office or a concerned official from RBI could have been summoned and examined. The best evidence in this regard was the document itself showing RBI approval. On this score, mere oral evidence of PW2 would not suffice. That apart, it is also doubtful that the company in question had in fact sanctioned Rs.15 lacs to the plaintiff. It is not shown, much less proved, that the company in question possessed sufficient means to advance the loan. The balance sheet, statement of profit/loss account etc. of the company of the relevant period

were not furnished. For that matter, even the bank statement of account of the company of the relevant period was not produced. In the absence of these documents, the bare assertion that a loan of Rs. 15 lacs had been sanctioned in terms of letter Ex. PW1/X would not hold much water. Further, the approval of Board of Directors of the company to sanction the loan was also not furnished to this Court. Next, it is somewhat difficult to believe that way back in year 2006 the company would have advanced a loan of Rs. 15 lacs without keeping anything as security. Letter Ex. PW1/X states that the property in question was being mortgaged for the loan. But this is doubtful for several reasons. It is plaintiff s own case that even in October, 2006 (when the loan was purportedly sanctioned) the suit property was still under construction. PW2 in his cross-examination concedes that copy of the agreement was not kept in record despite the fact that plaintiff had shown him the same. When asked as to what the agreement was, he (PW2) replied that he could not remember but perhaps it was an agreement with the builder for the first floor. It is thus rather very strange that the company goes about sanctioning the loan and keeping the property under mortgage without even taking on record any property documents and also without doing the necessary background checks vis-à-vis the title etc. of an under- construction building. It is highly doubtful in the backdrop of the evidence of PW2 that the company in question had done the due diligence exercise etc. before sanctioning the loan. PW2 when asked as to whether the company used to sanction loans without documents, replied that since it was the third loan application of the plaintiff and that he had good track record with the company, the loan was granted to him without going into the documents. This explanation of PW2 does not appear convincing. Whether the loan for an immovable property is being taken for the first time or for the third time, no institution, much less a registered company, would make such an advance without even going through the document or doing the necessary background checks. This is simply unheard of. There are no documents to substantiate the assertion that plaintiff had earlier availed of two loans from the very same company. Not only this, merely adding a line in a letter addressed to the loan applicant (plaintiff herein) that his property stood mortgaged certainly does not have the effect of placing the property under mortgage. Certain legal formalities as contemplated under the law are required to be undertaken for placing a property under mortgage. What is also surprising to note is that this sanction letter Ex. PW1/X does not specify as to what EMI (Equated Monthly Installment) the plaintiff was to pay over the next 84 months. Next, plaintiff and/or PW2 Mr. G.S. Chawla did not deem it appropriate to place on record the loan application form that he (plaintiff) had filled in and submitted for availing of the loan. Lastly, a company, advancing a loan of Rs. 15 lacs would not do so merely and merely on the basis of one single letter (Ex. PW1/X). The evidence of PW2 is highly doubtful. Document Ex. PW1/X inspires no confidence whatsoever. Given the umpteen number of missing links in the evidence of PW2, possibility of this document (Ex. PW1/X) having been ante-dated by using an old letterhead can certainly not be ruled out. A fact is set to be 'proved' when after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man, under the circumstances of

> the particular case, to act upon the supposition that it exists (section 3, Evidence Act). This Court is of the view that it stands 'not proved' that the company of which PW2 represented himself to be the Managing Director had sanctioned a loan of Rs. 15 lacs to the plaintiff in October, 2006. Rather, the discussion hereinabove would show that his evidence is replete with several doubts and loopholes, which remained unanswered. Consequently, plaintiff s assertions that he had the requisite funds at the relevant time (October-December, 2006) is without any substance."

(Underlining Added)

8. Nothing was pointed out to this Court on behalf of the appellant/plaintiff as to how the discussion, reasoning and conclusion of the trial court arrived at in paras 17 and 18 of the impugned judgment are in any manner illegal and so have to be set aside.

9. Counsel for the appellant/plaintiff sought to argue that PW2 had stated that the appellant/plaintiff had earlier taken loans from M/s JSG Leasing Ltd., and therefore the appellant/plaintiff would have got a loan from M/s JSG Leasing Ltd., however it is seen that no details whatsoever including such record was filed on behalf of M/s JSG Leasing Ltd. as to what were the earlier loans allegedly granted to the appellant/plaintiff, of what amounts and how such loan amounts were allegedly repaid by the appellant/plaintiff. Also, this Court would like to note that most probably the alleged loans, if earlier given to the appellant/plaintiff by the leasing company would be towards vehicle or some machinery and that is why no such documents were filed on behalf of the appellant/plaintiff in the trial court because such documents would not have been to the benefit of the appellant/plaintiff to prove his entitlement to grant of loan of immovable property from M/s JSG Leasing Ltd. and which was not in the business of giving loan for purchasing of immovable properties.

10. It is at this stage noted that trial court has however granted the money decree for a sum of Rs.95,000/- in favor of the appellant/plaintiff, out of the total amount of Rs.1 lac which was received by the respondent no.1/defendant no.1 under the Agreement to Sell dated 10.10.2005, and this is done after deducting an amount of Rs.5,000/- being the nominal amount as damages on account of breach by the appellant/plaintiff of the Agreement to Sell dated 10.10.2005.

This amount of Rs.95,000/- has in fact been returned alongwith pendente lite and future interest @ 4% per annum.

11. One more reason why the trial court has dismissed the suit for specific performance is because it has been held that merely by paying an amount of Rs.1,00,000/- (i.e 6%) out of the total sale consideration of Rs.17 lacs, discretionary relief of specific performance cannot be granted to the appellant/plaintiff. I agree with this finding and conclusion of the trial court and so stated in the following paragraph 24 of the impugned judgment and which reads as under:-

> "24. Further, in the case at hand, only Rs. 1 lac had been paid, which is about 6% of the total consideration amount. Plaintiff was out of possession of the property in

question. Rather, the evidence would show that he did not take possession of the first floor despite being asked to do so. This aspect of taking possession would be dealt with in later part of this judgment. Section 20 (3), Specific Relief Act mandates that unless „substantial acts are done under the agreement to sell, specific performance need not be granted. What are „substantial acts in the context of section 20 (3), Specific Relief Act, 1963 was adverted to in M/s Krishna Sweets vs. Shri Gurbhej Singh @ Happy and Ors., MANU/DE/2851/2012. It was held, "In certain cases where substantial consideration i.e. at least 50% of the consideration is paid, or possession of the property is delivered under the agreement to sell in addition to paying advance price, the proposed buyer is vigilant of his rights and he files the suit soon after entering into the agreement to sell, then in accordance with totality of facts and circumstances, Courts may decree specific performance...." In the case of Shri Sushil Jain V/s Shri Meharbaan Singh and Ors., MANU/DE/3870/2012, this principle was reiterated. To sum up, in the opinion of this Court, for these multiple reasons plaintiff is not entitled to the discretionary relief of specific performance."

12. I have on this very aspect that discretionary relief for specific performance cannot be granted where just about 15 odd percent of the price is paid, held so in the recent judgment in the case of M/s Hotz Industries Pvt. Ltd. Vs. Dr. Ravi Singh (Since Deceased Through LRs) & Ors (2018) 249 DLT 638. The relevant paras of this judgment are paras 20 to 22 and these paras read as under:-

"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.

xxxxx xxxxx xxxxx

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.

13. Therefore the appellant/plaintiff having only paid a sum of Rs. 1 lac out of the total sum of Rs.17 lacs is a valid reason for the appellant/plaintiff being denied the discretionary relief of specific performance.

14(i) One of the issues which arose was as to whether the Legal Notice dated 20.12.2006 (Ex.PW1/DX2) was or was not sent by the respondent no.1/defendant no.1/builder to the appellant/plaintiff cancelling the Agreement to Sell dated 10.10.2005.

(ii) In this regard though the appellant/plaintiff has denied receiving this notice, trial court has held that notice is received because postal receipts have been filed and proved with the fact that the appellant/plaintiff did not deny the fact that the address contained in the notice is the address of the appellant/plaintiff. The relevant para of the trial court Judgment in this regard is para 35, and this para 35 with which I agree, reads as under:-

> "35. Coming to the first limb of this issue. It is already been held hereinabove that plaintiff cannot be entitled to the relief of specific performance in view of the bars of sections 16 (c) and 20 (3), Specific Relief Act, 1963. He is also not entitled to relief of specific performance for reasons indicated in paragraphs 23 and 24 of this judgment. There is another reason. Plaintiff filed this suit without seeking the relief of declaration that the cancellation of the agreement in question by defendants no. 1 & 2 was not tenable or that the same was null and void. In the legal notice Ex. PW1/DX2 dispatched to the plaintiff, defendant no.1, through its partner defendant no.2, had brought it to plaintiff s knowledge that the agreement stood canceled. It was stated in paragraph 11 thereof, "Therefore, by this notice you are hereby notified that for the default committed by you and for the reasons stated herein above the agreed transaction under agreement to sell dated 10.10.2005 stands cancelled and your earnest money paid to our client pursuant to the said agreement stands forfeited. You have been left with no right, title and/or any interest under the said agreement and/or the memorandum of understanding dated 10.10.2005." Plaintiff claims that he did not receive this notice Ex. PW1/DX2. This notice was dispatched through registered post to the address J-218, 3rd Floor, Kalkaji, Delhi where the plaintiff started to reside with effect from 01.12.2006. This notice was also dispatched to the plaintiff at the address 52/114, 3rd Floor, Chitranjan Park, Delhi. Plaintiff (PW1) in his cross-examination admits that this address (52/114, 3rd Floor, Chitranjan Park, Delhi) was his and that he had purchased the same, albeit for his sister. The postal receipts by which it was dispatched to the plaintiff at both the addresses are on record. In ordinary course of business, in terms of section 27, General Clauses Act, this legal notice is presumed to have been served upon the plaintiff. This legal notice Ex. PW1/DX2 was also dispatched to defendant no.3 Ms. Joginder Kaur. However, it is plaintiff s own case that when he approached defendant no.3 in order to ask her to intervene and get the contract honoured by defendants no.1 and 2, she (defendant

> no.3) handed over photocopy of 'false' notice dt. 20.10.2006 (Ex. PW1/DX2) to him. The point therefore is that even as per his own averment, the plaintiff had knowledge of the legal notice dt. 20.10.2006 (Ex.PW1/DX2). He thus had the knowledge that defendants no.1 and 2 had proceeded to treat the contract as cancelled. In the case of I. S. Sikandar (D) by LRs. Vs. K. Subramani and Ors., 2014 (1) SCALE 1, it has been held that in the absence of declaration to declare the agreement to sell as bad in law, the suit for grant of specific performance on the basis of agreement to sell and the consequential relief of relief of permanent injunction is not maintainable in law. In view thereof it is held that this suit was not maintainable in the absence the relief of declaration to the effect that the termination of agreement to sell by defendants no.1 and 2 was bad in law. First limb of this issue is accordingly answered against the plaintiff and in defendants favour."

(Underlining added)

15. The next aspect which was urged on behalf of the appellant/plaintiff was that the respondent no.1/defendant no.1/builder is guilty of not completing the flat as per the specifications, but this aspect has been rightly rejected by the trial court by noting that the Annexure-A which is relied upon by the appellant/plaintiff is not a document which is entered into between the parties because admittedly this Annexure-A (and which is accompanied by the site plan) did not bear the signatures of the parties to the Agreement to Sell dated 10.10.2005. Trial court has thus held that this document Annexure-A cannot be relied upon by the appellant/plaintiff for contending that the property as constructed is not as per the standards as agreed upon. Trial court has held that in fact on the contrary what binds the party is Annexure-A being Ex.DW1/1; Ex.DW1/DX4 inasmuch as the appellant/plaintiff did not dispute his signatures on this document and also that in his cross-examination the appellant/plaintiff admitted the signatures on this document of the respondent no.3/defendant no.3. Trial court has also in this regard rightly held that the contention of the property having been constructed being inferior and sub-standards cannot also be believed because there is nothing on record to prove this fact except, the self serving vague statement made by the appellant/plaintiff. Trial court also notes that what has been left in the construction has not been pleaded in the plaint or in the evidence led by the appellant/plaintiff.

Trial court has also further in this regard rightly noted that the appellant/plaintiff claimed that he never visited the suit property, and if that is so, that the appellant/plaintiff never went inside the newly constructed building, then how could the appellant/plaintiff say that materials used were inferior or sub-standard as compared to the other floors. The appellant/plaintiff also raised no such grievance by corresponding with respondent no.1/defendant no.1/builder. The relevant discussion in this regard of the trial court is contained in para 25 of the impugned judgment and with which I agree, and which para 25 reads as under:-

> "25. It was plaintiff s argument that it was for the fault of defendants no.1 and 2 that the contract for transfer of the property could not fructify. He argued that the property in question had not been constructed in terms of Annexure A (Mark A). He further argued that construction of 1st floor was not in accordance with the agreed

specifications and the material used therein was of much inferior and sub-standard quality than the other floors. He thus urged that defendant no.1 and 2 were therefore not in a position to hand over possession of 1st floor by October, 2006 to him as stipulated and for this reason he had to take another rented accommodation at request of defendants no.1 and 2 at J-218, 3rd Floor, Kalkaji, Delhi at monthly rent of Rs.5,000/-. This argument of the plaintiff lacks merit. It appears highly doubtful that Annexure A (Mark A) was part of the agreement between the parties. This document Annexure A (Mark A) does not at all bear names and/or signatures of any person. It does not have the stamp/seal of defendant no.1. The property number, which was to be constructed, also finds no mention therein. Similarly, the site plan Mark B (filed by plaintiff) also does not bear signatures of any person. For the similar reasons as aforesaid, it is doubtful if site plan Mark B relate to the property and/or the transaction in question. The mere fact that document Annexure A (Mark A) has 'Shri Krishna Builders' written on top of it would not ipso facto connect it with the property/transaction in question. It may even be possible that this document related to some other project. On the contrary, I find that Annexure A (Ex. DW1/1 : Ex. DW1/DX4) filed by defendants inspires confidence. This document bears the signature of defendants no.2 and 3. Plaintiff does not in his cross examination dispute their signatures on this document Annexure A (Ex. DW1/1 : Ex. DW1/DX4). He rather in his cross examination identified signatures of defendant no.3 thereon and stated that another signature thereon appeared to be that of the builders. This Court on consideration of the material on record is not inclined to go by plaintiff s assertions that the building was to be constructed in terms of Annexure A (Mark A). This Court on consideration of material on record is instead inclined to believe that the construction was to be done in terms of the Annexure A (Ex. DW1/1 :

Ex. DW1/DX4), that was filed by the defendants. This Court also holds that „Annexure A referred to in clauses 19 and 20 of the Collaboration Agreement dt. 12.09.2005 (Ex. PW1/DX) executed between defendants no.1 and 3 is in fact the Annexure A (Ex. DW1/1 : Ex. DW1/DX4) filed by the defendants. Further, plaintiff s averments that construction of the building was not ready by October, 2006 also does not convince this Court. This Court also does not find convincing his averments that construction on his 1st floor was of inferior quality. In the present matter a Local Commissioner (LC) had been deputed to inspect the building in question. He inspected the building on 08.04.2007. Ld. LC in his report, furnished to the Court, stated that 1st floor was entirely constructed and was in a habitable condition. Secondly, plaintiff does not at all say in his plaint or in his evidence as to what it was that was left out in the construction. He neither states as to what it is that made him believe that construction on his floor was sub-standard and/or that the material used therein was of inferior quality in comparison to the other floors.

Plaintiff (PW1) in his cross examination conceded that he used to visit the premises while the construction was on and that he had visited the same on 3-4 occasions during the entire period of construction. He, however, added that he did not go inside the building. The point is that when he

had been visiting the property, there was nothing that stopped him from taking photographs of the portions of the building that had not been suitably constructed or which was of inferior and sub-standard quality. The explanation that he had not gone inside the building hold no water. Nobody had stopped him from going inside the building to check for himself the progress of construction. This leads to another aspect. If he never went inside the under construction building, how does he say that the material used on his floor was inferior or sub-standard compared to the other floors or that the same was not suitably constructed? That apart, at no point of time did he ever write to any of the defendants that the construction had not been done suitably and that inferior and sub-standard quality had been used on his floor and further that construction was not done within the fixed time schedule. Defendant no.3 took possession of her portion of the very same building and she never had any complaint whatsoever. Rather, DW2 Amarjeet Singh (son of deceased defendant no.

3) in his evidence clearly stated that construction was completed in third week of October, 2006 and that defendant no.1 had informed his mother (defendant no.3) and the plaintiff in this regard and pursuant thereto he (Amarjeet Singh), plaintiff and defendant no.3 inspected the property in the last week of October, 2006. He also deposed that at the time of inspection of property in last week of October, 2006 defendant no.2 had asked him (plaintiff) to take possession of 1st floor after making payment of the balance Rs. 16 lacs.

He also deposed that his mother (defendant no.3) took possession of ground floor in November, 2006 and that the construction was carried out in terms of Annexure A (Ex. DW1/1 : Ex. DW1/DX4) and there were no defects therein. Nothing came in his (DW2) cross-examination to detract from this portion of his evidence. Therefore, this argument of the plaintiff does not at all seem to be convincing and is discarded."

(Underlining added) 16(i) Finally, learned counsel for the appellant/plaintiff argued that no completion certificate was taken by the respondent no.1/defendant no.1/builder of the property, and therefore, such a property being incomplete, the respondent no.1/defendant no.1/builder is deemed to have committed the breach of the contract of the Agreement to Sell.

(ii) This argument has also been rejected by the trial court as meaningless in terms of the detailed discussion in para 26 of the impugned judgment holding that the provision of Section 346 of Delhi Municipal Corporation Act, 1957 does not bar transfer of a property/execution of the Sale Deed without there being a completion certificate. Also, this argument is only a ruse because I asked the counsel for the appellant/plaintiff as to what is the illegality in the construction because if the construction is illegal then a notice would have been issued by the MCD for demolition of the property and in response to this, counsel for the appellant/plaintiff agreed that compounding charges were paid and construction was regularized.

Once that is, merely because there is no completion certificate, it would not mean that respondent no.1/defendant no.1/builder has committed breach of the Agreement to Sell and that the appellant/plaintiff was not bound to be ready and willing to perform his part of the Agreement to Sell. The relevant para 25(already reproduced above) and para 26 of the impugned judgment of the

trial court read as under:-

"26. Plaintiff pointed out that clause - 1 of MOU (Ex. PW1/2) stipulated that construction would be done after obtaining the plan sanctioned from the MCD/concerned department. Basing this argument on this clause, he urged that defendants no.1 and 2 could possibly not have transferred 1st floor portion to him without the requisite „completion certificate as contemplated in section 346, Delhi Municipal Corporation Act (for short „DMC Act). This argument too is meritless. There was no clause regarding completion certificate in the agreement to sell Ex.PW1/1 or MOU Ex. PW1/2. Even proceeding from the premise that completion certificate was a statutory requirement, yet the plaintiff has no case to make out. It has been observed hereinabove that plaintiff was neither ready nor willing to perform his part of the contract. Therefore, when the plaintiff himself was not ready and willing, he cannot then shift the blame to the other side for the ultimate failure of the deal. Had the plaintiff in the very first place proved his readiness and willingness, then the question of compliance or otherwise of section 346, DMC Act would have come into the picture. Plaintiff being himself at fault cannot therefore point fingers at defendants no.1 and 2 for their alleged non-compliance of section 346, Delhi Municipal Corporation Act. In other words, question of compliance or non-compliance of this provision and its effect on the outcome of the present suit would come into the picture only when the plaintiff proves in the first place that he was ready and willing to perform his part of the contract. Even assuming that there was non-compliance of this provision, yet the plaintiff cannot be held entitled to the relief of specific performance as sought for. It is the plaintiff's suit that would face an adverse outcome if he does not prove the existence of facts, which he asserts (section 101, Evidence Act). Plaintiff avers readiness and willingness on his part and therefore it is he who must prove it in terms of section 101, Evidence Act. Plaintiff cannot seek to prove his case in an indirect manner by urging that defendants' case has a certain deficiency or that there has been non-compliance of a certain legal provision on their part. Plaintiff cannot succeed on the basis of failure, if any, on the part of a defendant to prove his case and plaintiff must stand on its own legs. To put it in other words, a plaintiff must succeed on the basis and on the strength of his own case and not on the strength of deficiencies, if any, in defendant's case. He cannot raise the edifice of his case by highlighting the deficiencies / loopholes in defendants case. In this regard, the following decisions can be referred to: Sankar Kumar & Anr. vs. Mohanlal Sharma, AIR 1998 Orissa 117; Shiv Nandan Sachdeva (Sh.) vs. Smt. Ruby, 2009 V (Delhi) 55; Umesh Bondre vs. Wilfred Fernandes, AIR 2007 Bombay 29; M. P. Narayan vs. Sm. Sudhadevi & Ors., AIR 1986 Cal 256; State of West Bengal vs. Subimal Kumar Mondal & Anr., AIR 1982 Cal 251 and Sayed Muhammed Mashur Kunhi Koya Thangal Vs. Badagara Jumayath Palli Dharas Committee and Others, (2004)7 SCC 708 :

> JT 2004 (6) SC 556. Next, section 346, DMC Act does not bar transfer of a property/execution of any sale deed. Sub-section (1) of this provision mandates that within one month of completion of erection of the building, a notice shall be sent to the Commissioner. Sub-section (2) of this provision prohibits any person from 'occupying or permitting to be occupied' any such building in the absence of permission of the Commissioner. Therefore, this provision does not at all prohibit transfer of a property/execution of sale deed. It also appears from a bare reading of this provision that it does not prohibit one from taking symbolic possession of the

property. All that it prohibits is 'occupying or permitting to be occupied a property'.

Further, the plaintiff who takes the plea of not taking possession of the first floor portion of t he suit property, ought to explain whether he had insisted and demanded „compliance certificate earlier qua the properties that he had earlier occupied. In other words, whether in the past before occupying properties K-23-A, Kalkaji, G-48, Kalkaji, J-218, 3rd floor, Kalkaji and 52/114, 3rd Floor, Chitranjan Park did he insist on the „compliance certificate . Lastly, the issue of compliance certificate could very well have gone into once the sale deed as executed and symbolic possession of the first floor was taken. It appears that plaintiff took this plea merely to cover up his own shortfalls."

17. In view of the aforesaid discussion, I do not find any merit in the appeal. The appeal is therefore dismissed with costs of Rs.50,000/- to be deposited by the appellant/plaintiff within six weeks from today with the Chief Minister Distress Relief Fund of State of Kerala.

SEPTEMBER 07, 2018 VALMIKI J. MEHTA, J
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