

Rajender Kumar vs Rama Bala Gupta on 14 January, 2019

Equivalent citations: AIRONLINE 2019 DEL 67

Author: Valmiki J. Mehta

Bench: Valmiki J. Mehta

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ RFA No. 322/2017

% 14th January, 2019

RAJENDER KUMAR Appellant
Through: Mr. P.K. Malik, Advocate with
Ms. Meena Jindal, Advocate.
versus

RAMA BALA GUPTA Respondent
Through: Ms. Manisha Parmar, Advocate
with Ms. Siddhi Mittal,
Advocate (M. No.9899689681).

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. 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 29.11.2016 by which the trial court has dismissed the suit for specific performance filed by the appellant/plaintiff with respect to the suit property bearing no. E-2, Upper Ground Floor, Jawahar Park, Laxmi Nagar, Delhi-110092 and with respect to which, the parties had entered into two agreements on 20.02.2008, one being an Agreement to Sell and another being an Memorandum of Understanding (hereinafter „MOU).

2. The facts of the case are that the appellant/plaintiff pleaded that he had entered into two agreements with the respondent/defendant, with the appellant/plaintiff being the buyer and the respondent/defendant being the seller, whereby the suit property was agreed to be sold to the appellant/plaintiff for a sum of Rs. 27 lakhs. The first agreement is the Agreement to Sell is dated 20.02.2008, and this document records the receipt of Rs. 4.50 lakhs as advance earnest money by the respondent/defendant. The MOU of the same date i.e. 20.02.2008 records that the appellant/plaintiff has to take a housing loan with respect to the property, and that if the appellant/plaintiff is not successful in getting the housing loan, then the agreement to sell will stand

superseded and the respondent/defendant will return the earnest money amount of Rs.

4.50 lakhs. The MOU refers to cheque no. 993885 dated 18.08.2008 drawn on the Oriental Bank of Commerce, Rohini, Delhi being handed over by the respondent/defendant to the appellant/plaintiff as security for return of the earnest money. The appellant/plaintiff pleaded that it was the respondent/defendant who was guilty of breach of contract in not completing the Agreement to Sell, and the appellant/plaintiff was ready and willing to perform his part of the contract. Hence, the subject suit for specific performance was filed.

3. The respondent/defendant contested the suit and denied that the parties had entered into any agreement to sell. The respondent/defendant contended that parties had actually only entered into a loan transaction whereby the respondent/defendant had taken a sum of Rs. 4 lakhs from the appellant/plaintiff as loan and was to return a sum of Rs. 4.50 lakhs by 18.08.2008, with the amount of Rs.

50,000/- comprised in a sum of Rs. 4.50 lakhs being towards the interest payable. It was also denied that the appellant/plaintiff was ready and willing to perform his part of the contract. The suit was therefore prayed to be dismissed.

4. Issues were framed in the suit and parties led evidence, and these aspects are recorded in paras 4 to 6 of the impugned judgment and these paras read as under:-

"ISSUES:-

4. From the pleadings of the parties, following issues were framed:- (1) Whether the transaction between the parties was that of a loan and not of agreement to sell? OPD.

(2) Whether the agreement to sell was contingent upon the plaintiff getting a housing loan sanctioned and if so, to what effect? OPD. (3) What is the effect, if any, of issuance of the cheque for Rs.4.50 lac by the defendant in favour of the plaintiff? OPP.

(4) Whether the plaintiff has been ready and willing to perform his part of the agreement to sell? OPP.

(5) Whether the discretion in the grant of the relief of specific performance is to be exercised in favour of the plaintiff? OPP. (6) Relief.

PLAINTIFF'S WITNESSES

PW1
PW2

PW3

Rajender Kumar, the plaintiff
Smt. Lajwanti, mother of the
plaintiff
Sh. Prayas, LDC from the office
of Sub-Registrar VIII, Geeta
Colony, Delhi

5. PW1 Rajender Kumar (the plaintiff) and PW2 Smt. Lajwanti have prove their affidavits as Ex.PW1/A and Ex.PW2/A respectively.

DOCUMENTS RELIED UPON OR PUT TO THE PLAINTIFF:-

Ex.PW1/1	Agreement to sell/bayana executed between the defendant and the plaintiff on 20.02.2008
Ex.PW1/2	M.O.U.
Ex.PW1/3	Cheque bearing no.973885 dated 18.08.2008 drawn on Oriental Bank of Commerce
Ex.PW1/4	Sale deed of the suit property executed in favor of the defendant
Ex.PW1/5 to Ex.PW1/7	The notice and postal receipts
Ex.PW1/8	Public Notice published in the newspaper „Dainik Jagran dated 01.07.2008
Ex.PW1/9	Receipt issued by the office of Sub-Registrar VIII regarding inspection
Ex.PW1/10	Legal notice dated 17.08.2008
Ex.PW1/11	Envelope
Ex.PW1/12	Legal notice dated 02.09.2008, issued on behalf of the defendant
Ex.PW1/13	Envelope
Ex.PW1/14	Certificate u/s 65-B of Indian Evidence Act
Ex.P1	CD

Ex.P2

Transcription of the CD

Ex.PW1/D1

Kalandra dated 13.03.2009 u/s
107 & 150 Cr.P.C.

DEFENDANT'S WITNESSES

DW1

Smt. Ram Bala, the defendant

DW2

Shri Surender Dayal Gupta,
husband of the defendant

6. DW1 Ram Bala and DW2 Surender Dayal Gupta have proved their affidavits as Ex.DW1/A and Ex.DW2/A respectively.

DOCUMENTS RELIED UPON OR PUT TO THE DEFENDANT

Ex.DW1/1

Marriage card of daughter of
defendant

5. The first issue was as to whether the transaction between the parties was an agreement to sell as contended by the appellant/plaintiff and denied by the respondent/defendant or whether the transaction between the parties was only a loan agreement entered into as was the case of the respondent/defendant. The trial court has held this issue, which was subject matter of issue no. 1, against the respondent/defendant and in favour of the appellant/plaintiff and in this regard the trial court has relied upon Section 92 of the Evidence Act, 1872 that once there is an agreement in writing between the parties, then the parties cannot plead an oral agreement to show that the agreement was not the agreement as was entered into between the parties but there was some other agreement. The trial court, accordingly, by reference to the terms of the Agreement to Sell dated 20.02.2008/Ex.PW1/1 and the MOU of the same date/Ex.PW1/2 has rightly held that there was indeed an Agreement to Sell between the parties and simultaneously the respondent/defendant agreed under the second agreement being the MOU that in case the Agreement to Sell does not go through, then in such a situation the respondent/defendant will refund the sum of Rs. 4.50 lakhs, received by the respondent/defendant, to the appellant/plaintiff, as received under the Agreement to Sell. To these findings of the trial court, in my opinion, there cannot be any valid counter arguments because admittedly the Agreement to Sell/Ex.PW1/1 and the MOU/Ex.PW1/2 are admitted to have been signed not only by the respondent/defendant but also the fact of the matter is that the husband of the respondent/defendant was admittedly a witness to both the Documents dated 20.02.2008, and this is so admitted by the husband of the respondent/defendant when he

appeared as DW-2. The trial court has dealt with these aspects in detail from paras 8 to 8.5 of the impugned judgment and I agree with this reasoning and the said paras are reproduced as under:-

"ISSUE NO.1 :-

Whether the transaction between the parties was that of a loan and not of agreement to sell? OPD.

8. The onus is upon the defendant to prove the transaction between the parties was that of a loan and not of agreement to sell. In her affidavit, DW1 Ram Bala Gupta has affirmed that on account of solemnization of marriage of her daughter Anuradha on 09.03.2008, she took a friendly loan of Rs.4 lac on 20.02.2008 from the plaintiff and it was agreed that the said loan was to be refunded on or before 18.08.2008. The marriage card of the daughter of the defendant is Ex.DW1/1. It was mutually agreed that at the time of refund of money the defendant would return Rs.4.50 lac in place of loan of Rs.4 lac which included Rs.50,000/-as interest. In her cross-examination, DW1 has stated that she is a graduate. She admitted her signatures on Ex.PW1/1(agreement to sell / bayana) which is bearing her signatures at point X, X1 and X2. The signature at point X3 of her husband has also been identified by her. It would be appropriate to reproduce the relevant portion of Ex.PW1/1 an agreement to sell/bayana executed between the defendant and the plaintiff on 20.02.2008 in respect of the suit property which is as under:-

1. "And whereas the first party for his/her/their bonafide needs and requirements the first party has agreed to sell, transfer, convey all his/her/their rights, interests, titles in respect of the above said property, to the second party for a sum of Rs.27,00,000/- (Rupees Twenty Seven Lacs only) out of which the First party has received a sum of Rs.4,50,000/- (Rupees Four Lakh Fifty Thousand only), and balance payments of Rs.22,50,000/-

(Rupees Twenty Two Lakh Fifty Thousand only) shall be paid by the second party to the First party on or before 18.08.2008.

2. That the first party shall handover the vacant physical possession of the said property to the second party at the time of full and final payments and also handed over the photocopy of the relating document the said property to the second party at the time of Bayana payments, in respect of the said Property.....

5. That after receiving the full and final sale proceeds in respect of the said property the first party shall execute and appear before Sub-Registrar concerned for the execution and registration of proper transfer papers in favour of the second party or his / her nominee(s), representatives or any other person with the sole discretion of Second party."

8.1 DW1 Ram Bala Gupta has stated that she signed Ex.PW1/1 on the mutual understanding with the plaintiff as he requested her to sign the same. She did not remember whether any undue influence or force was used by the plaintiff for obtaining her signatures on Ex.PW1/1. She did not read the document before signing. Her husband did not read it in her presence. The original sale deed of the suit property was with the plaintiff. It was given to him as he requested for some security for loan given by him to her. She did not know whether any document was prepared for the loan taken by her from the plaintiff. She volunteered that her husband must be aware. She did not remember whether any other document was signed by her apart from Ex.PW1/1.

8.2 DW2 Shri Surender Dayal Gupta, husband of the defendant also admitted that all the original documents of the suit property were with the plaintiff. They handed over the same to him in good faith. No loan document was executed between the plaintiff and the defendant and himself.

8.3 It is not believable that DW1 Ram Bala Gupta signed Ex.PW1/1 only on the request of the plaintiff. The defendant herself states that she did not remember whether any undue influence or force was used by the plaintiff for obtaining her signatures on Ex.PW1/1. The defendant did not read the document before signing. No prudent literate person would ever sign a written or typed document only on the request of somebody. This is beyond comprehension and appears to be a white lie. If any undue influence or force had been exercised upon her she would have certainly remembered the same. Her evasive answer reflects that the plaintiff did not use any undue influence or force upon her to sign Ex.PW1/1. If it was not a deal / transaction in respect of the suit property there was no reason to hand over the original sale deed of the suit property to the plaintiff. If the transaction had got nothing to do with the suit property, it is unbelievable that for a loan of Rs.4 lacs the defendant would handover the documents of the suit property which was worth much more than Rs.4 lacs. DW1 Ram Bala Gupta stated that she did not know whether any document was prepared for the loan taken by her from the plaintiff. If there had been a loan agreement, the parties would have certainly executed some loan agreement, but from the documents on record it can be clearly made out that it was a property transaction and not a loan agreement. 8.4 DW2 Shri Surender Dayal Gupta admitted that Ex.PW1/1 bears his signatures at point X, X1 and X2 and that of the plaintiff at point A. He stated that as and when he signed the document he read it before signing. He admitted that M.O.U Ex.PW1/2 bore his signatures at point Y-2 and that of his wife at point Y and Y-1. He admitted that he signed Ex.PW1/1 and Ex.PW1/2 after reading the contents. It would be relevant to refer to the contents of Ex.PW1/2 which also gives a clear picture regarding the nature of transaction:-

"Whereas the First party is the owner of Built up Entire Upper Ground floor Part of Property bearing no.E-2, land area measuring 100 sq. yards, out of Khasra no.466/467, situated in the area of Village Mandawali Fazalpur, Shahdara, Delhi-110092, abadi of known as Jahawar Park, Delhi, hereinafter called the said property.

NOW THIS AGREEMENT WITNESSETH AS UNDER:-

That the First party has issued Post Dated Cheque no.973885 dated 18.08.2008, drawn on Oriental Bank of Commerce, Rohini, Delhi-110085 in favour of Second

party in token of security for refund of bayana amount, which is paid by the Second party to the First party on account of bayana amount of above said property.

That the deal is valid subject to Home Loan to be availed by the Second party against the said property, and in case, the Second party fails to get the housing loan, the present deal stands null and void and cancelled, and the First party shall be bound to return the bayana amount to the Second party without any interest, penalty etc. and if the First party shall be bound to return the bayana amount to the Second party without any interest, penalty etc. and if the First party fails to return the bayana amount, the Second party shall have right to realise the above said cheque and recover his bayana amount."

8.5 The oral evidence brought on record on behalf of the defendant is contrary to the documentary evidence. Whenever the oral evidence is contrary to the documentary evidence the documentary evidence is always given precedence over the oral testimony. Documentary evidence has more value than the oral evidence. Court is bound to accept the documentary evidence but oral evidence may be taken into consideration but that needs some corroboration. If there are two types of evidence given by the parties, oral and documentary evidence, the value of oral evidence is less than documentary evidence because the law always requires the best evidence. Oral proof cannot be substituted in the place of written document where written documents exists in proof of certain transactions referred to in Section 91 of the Evidence Act as the written document is of higher grade, more certain and more reliable than oral evidence. As per Section 91 of the Evidence Act, when the terms of contract have been reduced to the form of a document, no evidence can be given in proof of the terms of such contract except the document itself. The document itself is the best evidence to prove the fact regarding the terms of contract between the parties. Section 92 of the Indian Evidence Act says that when the terms of any contract have been reduced in the form of a document no evidence of oral agreement shall be admitted, for the purpose of contradicting, varying, adding to or subtracting from its term. The documentary evidence always takes precedence over oral evidence. Accordingly, I hold that the transaction between the parties was not that of a loan but it was an agreement to sell."

6. The issue, however, is that whether the appellant/plaintiff was ready and willing to perform his part of the contract. What is important is that a buyer such as the appellant/plaintiff must prove his readiness i.e. the financial capacity to make payment of the balance sale consideration as required by Section 16(c) of the Specific Relief Act, 1963. The total consideration in this case was Rs. 27 lakhs, of which a sum of Rs. 4.50 lakhs is said to have been paid as advance earnest money, and the same is recorded in the Agreement to Sell and the MOU dated 20.02.2008, and therefore, there will remain a balance due and payable by the appellant/plaintiff to the respondent/defendant of an amount of Rs. 22.50 lakhs. The issue is whether the appellant/plaintiff has proved his readiness to make the payment of the balance sale consideration of Rs. 22.50 lakhs. In this regard, in my opinion, the trial court has rightly held that the appellant/plaintiff has miserably failed to prove his financial capacity because self-serving ipse dixit averment of the appellant/plaintiff having the balance sale consideration in cash would not discharge the onus of proof upon the appellant/plaintiff. The trial court has held, and I agree that financial capacity has not been proved as not a single document has been filed by the appellant/plaintiff to show his financial capacity to pay the balance sale

consideration of Rs. 22.50 lakhs, and also further noting that no bank account or income tax returns or any other documents have been filed by the appellant/plaintiff to prove his financial capacity to pay the balance sale consideration of Rs. 22.50 lakhs. The trial court has exhaustively and very correctly considered these aspects by referring to Section 16(c) of the Specific Relief Act and the judgments passed by this Court, and this discussion is contained in paras 10.2 to 10.13 of the impugned judgment, and these paras read under:

"10.2 PW1 Rajender Kumar in his cross-examination has denied the suggestion that he had no money lying in his savings account since February, 2008, till date. The maximum amount lying in his bank account was Rs.4 to 5 lacs. He admitted that he had not filed details of his bank accounts in the present suit. He admitted that he did not have the amount of Rs.27 lacs in his bank accounts. He volunteered that the amount of Rs.27 lacs was lying with him in cash. He was an income-tax assessee. He had not filed any document relating to the income-tax returns.

10.3 DW2 Shri Surender Dayal Gupta has stated that the plaintiff was not competent to pay the total amount of Rs.27 lacs since in the M.O.U it was mentioned that the plaintiff would take a loan for purchasing the property.

10.4 It was incumbent upon the plaintiff to have proved that all through he was ready and willing to perform the essential terms of the contract. 10.5 Section 16(c), of the Specific Relief Act, which is relevant for the purpose of this case, to the extent it is material, is reproduced below:-

"16. Personal bars to relief□□

(a)

(b)

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

Explanation.- For the purpose of Clause (c)

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

(ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction"

10.6 There is difference between readiness and willingness. According to Bouvier's Law Dictionary, IIIrd Revision, the expression 'ready and willing' has been defined as

"implies capacity to act as well as disposition". In Stroud Dictionary, this expression is defined as under:-

"It implies not only the disposition but the capacity to do the act."

10.7 In Webster Dictionary page 796, 'ready' is defined as "prompt in performance or action" and 'willing' at page 1138 is defined as "having the mind inclined not averse, desirous, ready, relating to or pertaining to power of process of choice, volitional".

10.8 The words 'ready and willing' imply that the person was prepared to carry out the term of the contract. The former refers to the financial capacity and the latter to the conduct of the plaintiff wanting performance. Generally readiness is back to back willingness.

10.9 I would also refer to the judgment titled as "Shree Aadhiya Build Well Pvt. Ltd. Vs. Kartar Singh & Ors, 228 (2016) Delhi Law Times 10, wherein the Hon'ble Court has observed as under:-

"9. Onus of this issue was on the plaintiff on account of the provision of Section 16 (c) of the Specific Relief Act, 1963. This provision requires that a proposed purchaser has always to be and continues to be ready and willing to perform its part of the agreement to sell. It is settled law that the expressions 'readiness' and 'willingness' refer to the capacity to pay so far as the expression 'readiness' is concerned and the intention to go through with the transaction as reflected in the expression 'willingness.....' We will therefore have to examine as to whether the plaintiff was always ready and willing to enter into the sale deed till the time of the present final arguments and from the date of entering into the agreement to sell.

Readiness pertains to the financial capacity of a proposed purchaser to make payment of the balance consideration under the agreement to sell.

It has to be shown that plaintiff had necessary financial capacity to pay the balance sale consideration at all points of time after the agreement to sell was entered into. The aspect of a plaintiff/ proposed purchaser always being ready to perform its part of the contract i.e. having the necessary capacity to pay the sale consideration is because specific performance is a discretionary relief and an alternative to the relief of grant of damages. A suit for specific performance is filed because the plaintiff/proposed purchaser alleges breach of contract by defendants/ proposed sellers and ordinarily a breach of contract gives right to remedy and relief of damages under Section 73 of the Indian Contract Act, 1872. Specific performance is the alternative to the relief of damages and Courts have in view of Section 20 of the Specific Relief Act held that the even if the proposed sellers are guilty of breach of contract, it is not necessary that a suit for specific performance has to be decreed, and that a proposed purchaser can always be granted an alternative relief of damages.

10....Plaintiff cannot claim specific performance unless and until plaintiff has proved its capacity to pay right from the time of entering into an agreement to sell till the time of the present final arguments.

12..... The issue of breach of contract by the defendants is not determinative of the entitlement of the plaintiff to the grant of specific performance in its favour because grant of specific performance is not an automatic consequence on proving breach of agreement to sell by the defendants, but, grant of specific performance is an alternative benefit to the proposed purchaser on the proposed purchaser proving that the defendants/ proposed sellers are guilty of breach of contract. As already stated above, plaintiff has to prove to the satisfaction of the Court his readiness i.e. capacity to pay at all points of time and which is implicit in the expression 'has always been ready and willing' as found in Section 16(c) of the Specific Relief Act and, therefore, plaintiff has to prove his capacity from 4.11.2006 till date in the year 2016. Has the plaintiff proved so? The answer to this has to be in an emphatic no, and the reasons for the same are given hereinafter.....

15..... Therefore and in any case even if the issue has to be looked de hors the aspect of discretionary nature of the relief of specific performance, yet the plaintiff has miserably failed to prove the plaintiff's capacity to pay even from February' 2007 till the present date in February, 2016, as required from the word 'always' in Section 16(c) of the Specific Relief Act, and onus to discharge which was a sine qua non upon the plaintiff in terms of Section 16 (

c) of the Specific Relief Act, hence I hold that the plaintiff has miserably failed to prove issue No. 4 that plaintiff has always been ready and willing to perform its part of the Agreement to Sell dated 4.11.2006. No money decree for amounts paid by plaintiff is passed as plaintiff is not seeking through this Court the recovery of moneys paid by the plaintiff as consideration to either of the defendants under the agreement to sell.

Plaintiff as already stated above does not seek any relief of money decree being the consideration paid by the plaintiff to the defendants under the agreement to sell. Also plaintiff has not led any evidence to show what are the amount of damages which the plaintiff will be entitled to, inasmuch as, plaintiff had to prove damages by leading evidence as to how there was an increase in the prices of the property for the difference in the prices of property on the date of breach being the amount which the plaintiff would be entitled to as damages."

10.10 In the instant case, the plaintiff has not been able to show his financial capacity to carry out the terms of the agreement to sell. He has to show continuous readiness and willingness as a condition precedent to grant of relief of specific performance. The plaintiff has to prove through the evidence that he was all along ready and willing to perform his part of the contract. The court is required to take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit. The plaintiff PW1 in his statement has stated that he is a software engineer and develops

web applications for US and UK clients. He received payments in dollars which was transferred to his account in the bank. He had two saving accounts in ICICI Bank and Oriental Bank of Commerce and one joint account with his mother in ICICI Bank. He also had one current account in HDFC Bank. He denied the suggestion that there was no money lying in the saving account since February, 2008, till date. He stated that the maximum amount which was lying in his bank accounts was Rs.4 to 5 lacs. He admitted that he had not filed details of his bank accounts in the present suit. He admitted that he did not have the amount of Rs.27 lacs in his bank accounts. He volunteered that the amount of Rs.27 lacs was lying with him in cash. He was an income-tax assessee. The balance sheet was filed by the chartered accountant. He admitted that he had not filed any document relating to the income-tax returns.

10.11 The judgment reported as Dinesh Kumar Vs. Savita 2009 (107) DRJ 271 squarely applies in the facts and circumstances of this case. The plaintiff has not filed even a single document to show the availability of cash in such large volume along with the source of the same.

10.12 The plaintiff is claiming that the amount is lying with him in cash. However, he never produced any evidence to show Rs.27 lacs were lying with him. Did he borrow the amount from somebody or earned it except for the bald statement there is nothing on record to show his financial capacity. The plaintiff has not brought evidence worth the name to show his readiness and willingness to carry out the terms of the agreement to sell. I would also like to refer to N.P. Thirugnanam (D) by Lrs vs Dr. r. Jagan Mohan Rao & Ors, decided on 12th July, 1995, wherein it has been held as under:-

"It is settled law that remedy for specific performance is an equitable remedy and is in the discretion of the court, which discretion requires to be exercised according to settled principles of law and not arbitrarily as adumbrated under s.20 of the Specific Relief Act 1963 (for short, 'the Act'). Under s.20, the court is not bound to grant the relief just because there was valid agreement of sale. Section 16(c) of the Act envisages that plaintiff must plead and prove that he had performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than those terms the performance of which has been prevented or waived by the defendant. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may

infer from the facts and circumstances whether the plaintiff was always ready and willing to perform his part of contract."

10.13 The plaintiff was required to prove that he was ready and willing to perform his part of the agreement to sell. He was required to prove his financial capacity to pay the balance sale consideration at all points of time from the date on which the agreement to sell was executed till the time of final arguments. However, there is no sufficient oral evidence or documentary evidence to prove that he had the capacity to pay the balance sale consideration on the date on which evidence was recorded. The evidence on record brought by the plaintiff is not sufficient to prove the necessary financial capacity of the plaintiff. Accordingly, I hold that the plaintiff was not ready and willing at all times to perform his part of obligations as contained in the agreement to sell Ex.PW1/1. Inasmuch as the readiness and willingness is a necessary sine qua non for obtaining a decree for specific performance which the plaintiff has failed to meet, I hold that there is no sufficient evidence to prove that the plaintiff has been ready and willing to perform his part of agreement to sell and accordingly, the plaintiff is also not entitled for a decree of specific performance in terms of the agreement to sell Ex.PW1/1. Issue no.4 and 5 are, accordingly decided against the plaintiff and in favour of the defendants."

(Emphasis Added)

7. It is also noted that the trial court has rightly relied upon the judgment of the Hon ble Supreme Court in the case of N.P. Thirugnanam (Dead) by Lrs v. Dr. R. Jagan Mohan Rao and Others, (1995) 5 SCC 115, which holds that financial capacity has to be shown to exist right from the day of entering into the agreement to sell and till the suit is decreed. The appellant/plaintiff did not lead documentary evidence to show that he had the financial capacity to pay the balance consideration at the time of entering into the Agreement to Sell and thereafter, when the appellant/plaintiff had issued the Legal Notice dated 26.07.2008/Ex.PW1/5 to Ex.PW1/7.

The appellant/plaintiff could have proved the existence of financial capacity at least during the pendency of the suit, and even this aspect has not been proved by the appellant/plaintiff to the satisfaction of the judicial conscience of this Court inasmuch as, not a single document has been filed by the appellant/plaintiff to prove his financial capacity.

The Hon ble Supreme Court in Saradamani Kandappan v. S. Rajalakshmi and Others, 2011 (12) SCC 18 has held that financial capacity is an aspect which has to be strictly proved.

8. I may note that in the case of M/s Hotz Industries Pvt.

Ltd. v. Dr. Ravi Singh (Since Deceased Through LRs) & Ors., 249 (2018) DLT 638 this court has considered in detail the requirement of financial capacity by referring to earlier judgments of this Court has held that self-serving ipse dixit of financial capacity cannot be held to be discharge of onus of proof. The relevant paras of the judgment in the case of M/s Hotz Industries Pvt. Ltd (supra) are paras 17.(i) to

17.(iii) and these paras read as under:-

"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 readiness 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 has 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."

(Underlining Added)

9. I, therefore, hold that the trial court has rightly held that the appellant/plaintiff failed to prove his financial capacity, and therefore there was lack of readiness to go ahead with the subject Agreement to Sell.

10. In my opinion, there is another reason why the appellant/plaintiff is not entitled to the relief of specific performance because the relief of specific performance is a discretionary relief.

Where a buyer has only paid a very small amount of the total sale consideration as advance payment under the agreement to sell, in such a scenario, the discretionary relief of specific performance should not be granted. This is the ratio of the judgment of the Hon'ble Supreme Court in the case of Saradamani Kandappan (supra) and this judgment has been referred to by this Court in the case of M/s Hotz Industries Pvt. Ltd (supra). In the present case, it is seen that the appellant/plaintiff has only paid a sum of Rs. 4.50 lakhs out of the total sale consideration of Rs. 27 lakhs, and therefore, the appellant/plaintiff has only paid approximately about 17% of the total sale consideration as advance and therefore, the discretionary relief of specific performance cannot be granted in such a case. One of the reasons for declining the specific performance, and as so observed by the Hon'ble Supreme Court in the case of Saradamani Kandappan (supra) is that since the specific performance suit takes years and years to decide, and as a result of which in the interregnum, the prices of property change and therefore a seller would not be able to purchase a similar property for the same

consideration when the specific performance suit is decreed many years later, as stated in the agreement to sell of many years earlier, and therefore, the specific performance relief is declined. In a suit for specific performance, a plaintiff/buyer, therefore, must also lead evidence with respect to the rise in the prices of the property, so that when a breach of contract is proved by the respondent/defendant, then in such a case, the court can grant monetary damages on the principles of Section 73 of the Indian Contract Act, 1872. Admittedly, in the present case, there is no evidence which is led by the appellant/plaintiff with respect to the increase in the prices of the property, and therefore there is no evidence available for grant of monetary relief of damages to the appellant/plaintiff under Section 73 of the Contract Act. The relevant paras of the judgment of in the case of M/s Hotz Industries Pvt. Ltd (supra) in this regard are paras 20 to 23 and these paras read with under:-

"20.(i) The next aspect to be considered is as to whether plaintiff is entitled to the discretionary relief of specific performance. 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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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

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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 severely 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 favour of the defendant nos.1 to 3 and against the plaintiff."

11. In view of the aforesaid discussion, the appellant/plaintiff is not entitled to the relief of specific performance as the appellant/plaintiff has not only failed to prove his financial capacity and which is a sine qua non under Section 16(c) of the Specific Relief Act, but also the appellant/plaintiff cannot be granted the relief of specific performance which is a discretionary relief as the appellant/plaintiff has admittedly paid only about 17% of the total sale consideration as advance.

12. There is no merit in the appeal. Dismissed. Pending applications, if any, are disposed of.

13. The original title documents of the suit property are lying in the trial court and the trial court will return the original title documents of the suit property to the respondent/defendant subject to the respondent/defendant returning the amount of Rs. 4.50 lakhs to the appellant/plaintiff alongwith interest @ 8% per annum simple from 18.08.2008 till the date of payment. This amount be otherwise deposited by the respondent/defendant in the trial court before the trial court returns the original title documents to the respondent/defendant.

JANUARY 14, 2019
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VALMIKI J. MEHTA, J