

Dr. Kimti Lal vs Harpal Singh & Anr on 26 September, 2018

Equivalent citations: AIRONLINE 2018 DEL 1855

Author: Valmiki J.Mehta

Bench: Valmiki J.Mehta

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ RFA No. 436/2016

% 26th September, 2018

DR. KIMTI LAL

..... Appellant

Through: Mr. Ashish Dholakia, Mr. Rajiv Dewan and Mr. Angad Singh, Advocates (Mobile No. 9811673338).

versus

HARPAL SINGH & ANR

..... Respondents

Through: Mr. Anil K. Kher, Sr. Advocate with Mr. Rishi Manchanda, Mr. Kunal Kher and Mr. D.R. Bhatia, Advocates (Mobile No. 9910072729).

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

RFA No. 436/2016 and C.M. Appl. Nos. 26409/2016 (for stay), 39689/2018 (under Section 340 (2) Cr.P.C., filed by the respondents)

1. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 („CPC) is filed by the defendant in the suit impugning the Judgment of the Trial Court dated 14.05.2016 by which the trial court has decreed the suit for specific performance filed by the respondents/plaintiffs with respect to half undivided share of property no. A-3, Kirti Nagar, New Delhi-15 situated on a plot of 698 sq. yards and having 2 ½ storey built up structure. The subject Agreement to Sell is dated 26.08.2004.

2. The facts of the case are, that the parties entered into an Agreement to Sell on 26.08.2004 for the suit property for a total sale consideration of Rs. 55,00,000/-. Admittedly, only a sum of Rs.

5,00,000/- was paid by the respondents/plaintiffs to the appellant/defendant under the Agreement to Sell. Time fixed under the agreement to sell for completing the transaction was 31.03.2005 and the respondents/plaintiffs claimed that though they were ready to pay the balance sale consideration, but the sale transaction could not go through as income tax clearance certificate was not obtained by the appellant/defendant. The appellant/defendant is an NRI and therefore did not present himself for completion of the sale contract, although the respondents/plaintiffs claim to be always ready and willing to perform their part of the contract. It was also pleaded in the plaint that on the instructions of the appellant/defendant, the respondents/plaintiffs took possession of different parts of the property from the outgoing tenants.

3. The appellant/defendant contested the suit by filing a written statement. It was pleaded that it was not the appellant/defendant but the respondents/plaintiffs who were guilty of breach of contract because they did not complete the sale transaction by 31.03.2005, as they did not have the balance payment/amount to fulfill their end of the bargain. It was pleaded that on account of violation of the respondents/plaintiffs to complete their part of the obligation, hence the agreement to sell was cancelled, and the earnest money of Rs. 5,00,000/- was forfeited. The suit was also prayed to be dismissed because there was a clause in the agreement to sell which entitled the respondents/plaintiffs to seek a refund of double the amount paid. The suit for specific performance was also prayed to be dismissed on the ground that there was a delay of 18 months in filing of the present suit and therefore discretionary relief of specific performance should not be granted.

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

"1) Whether the plaintiffs have been ready and willing to perform their part of the agreement to sell and if so, to what effect? OPP

2) Whether the discretion in the grant of the relief of specific performance is to be exercised in favour of the plaintiff? OPP

3) Whether time for payment of balance sale consideration was of the essence of the agreement and if so, whether the plaintiff has failed to pay the balance consideration and to what effect? OPD

4) Relief."

5. The subject agreement to sell is an admitted document and the same has been exhibited as Ex.PW1/2. There are two issues which arise for consideration and the first being whether the respondents/plaintiffs had the financial capacity and were thus ready to perform their part of the contract, this aspect of readiness/financial capacity is the sine qua non as per Section 16(c) of the Specific Relief Act, 1963. The second aspect is as to whether merely by having made a payment of Rs.5,00,000/- only out of a total sale consideration of Rs.

55,00,000/-, whether the respondents/plaintiffs were entitled to the discretionary relief of specific performance.

6. The trial court has held that the respondents/plaintiffs had the financial capacity because during the course of cross-examination of respondent no. 1/plaintiff no. 1 as PW1 on 09.09.2009, they brought the bank statement. This bank statement was filed on record by the appellant/defendant, and therefore, the trial court has held that the respondents/plaintiffs have proved their readiness i.e. financial capacity.

7. In my opinion, the trial court has committed a complete illegality in holding that the respondents/plaintiffs had the financial capacity because financial capacity cannot be judged on the basis of self-serving ipse dixit. Financial capacity is one of the most important ingredients of a sale transaction because not only is this aspect related to the breach of contract being non-performance by a buyer because of not having requisite moneys, the readiness or financial capacity independently under Section 16(c) of the Specific Relief Act is an aspect which has to be proved right from the date of the agreement to sell till the decree of the suit vide N.P. Thirugnanam (D) through LRs v. Dr. R. Jagan Mohan Rao & Ors, 1995 (5) SCC 115. The relevant para of this judgment is para 5 which reads as under:-

"5. 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 alongwith 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 ready and was always ready and willing to perform his part of contract."

(emphasis supplied)

8. Therefore, it is seen that in law to prove readiness under Section 16(c) of the Specific Relief Act, a buyer/plaintiff must show his financial capacity to pay the balance sale consideration right from the time of entering into the agreement to sell, till the decree of the suit. In the present case, the Agreement to Sell is dated 26.08.2004 and evidence was led by the respondents/plaintiffs in 2009, and therefore, it is to be seen that whether there is any evidence on record which satisfies the judicial conscience of this Court that the respondents/plaintiffs have the financial capacity to pay the balance sale consideration of Rs. 50,00,000/-.

9. Before considering the arguments urged on behalf of the respondents/plaintiffs, as also the evidence existing on the trial court record on the aspect of financial capacity/readiness, it is required to be observed that financial capacity has to be proved by clear cut evidence to the satisfaction of the Court being an extremely important aspect in a suit for specific performance. I have in the case of Baldev Behl & Ors. v. Bhule & Ors., (2012) 132 DRJ 247 held that financial capacity has to be proved to the satisfaction of the Court by clear cut documentary evidence and self serving ipse dixit cannot be held to discharge the onus of proof with respect to the aspect of readiness/financial capacity. The relevant paras of the judgment in the case of Baldev Behl & Ors. (supra) are paras 26(i) and 26(ii) and these paras read 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 Rs.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."

(emphasis is mine)

10. In the present case, it is seen that admittedly no documentary evidence whatsoever has been filed by the respondents/plaintiffs with respect to their financial capacity. No income tax returns have been filed. No proof of bank deposits have been filed. No proof that balance sale consideration existed in the bank account of the respondents/plaintiffs has been filed. No documents have been filed to show that respondents/plaintiffs were owners of various properties or had other means to show financial capacity to pay the balance sale consideration of Rs. 50,00,000/-. In my opinion, therefore, the trial court was completely unjustified in holding that the respondents/plaintiffs have proved their financial capacity. I cannot agree with the arguments urged on behalf of the respondents/plaintiffs that since the respondent no. 1/plaintiff no.

1/PW1 had in his cross-examination dated 09.09.2009 stated that he had brought with him the bank pass book, therefore, it should be held that the respondents/plaintiffs have proved their financial capacity.

The contents of document can only be known if the document is filed and in the absence of the document, it cannot be assumed as to what was the content of the document.

11. I may note that the onus of proof of financial capacity is on the plaintiff in a suit for specific performance and there is no need of any rebuttal evidence by the seller, as is argued on behalf the respondents/plaintiffs, once the primary onus by a buyer/plaintiff itself is not discharged by leading such evidence which will satisfy the judicial conscience of the Court to establish capacity to pay balance sale consideration.

12(i). Learned counsel for the respondents/plaintiffs places reliance upon the judgment passed by this Court in the case of D.C. Khosla v. Vinod Kumar Jain, 232 2016 DLT 354 to argue that this Court has held in the said case that once there is an oral statement of a witness having brought a

bank account statement, then in such a case financial capacity is held to be proved.

12 (ii). I, however, cannot agree with this argument urged on behalf of the respondents/plaintiffs because the facts of the case in D.C. Khosla (supra) were completely different and those facts showed that the buyer had the money which was deposited in his bank. In the case of D.C. Khosla (supra), the financial capacity was held to be proved because the witness in the said case specifically gave the bank account no. as 7215 of State Bank of India, Clock Tower, Sabzi Mandi, Delhi, and the deposit of the balance amount of sale consideration was also evidenced from the receipt and pass book of the account which were brought in court. Therefore, in the facts of the said case where there was categorical evidence of the amount as also the bank account in question, hence it was held that financial capacity existed. In the present case, however, besides a PW1 making a statement in his cross-examination, that he had brought his bank account statement, it is not shown that the bank account statement was of which bank, whether the amount of Rs. 50,00,000/- was available in that bank account, what was the account number of the bank and what was the period of existence of the alleged Rs. 50,00,000/- in the bank account. Also, at best the respondents/plaintiffs would have proved an amount existing in the bank account on a specific date, this specific amount though is not exactly mentioned, whereas the requirement of readiness/financial capacity is to be shown right from the date of entering into the agreement to sell till the decision in the suit for specific performance, and therefore on the basis of just one line in the cross-examination of PW1 of his having brought his bank account statement, without any details, whatsoever, it cannot be said that such evidence exists which this Court must believe in the facts of this case for holding that the respondents/plaintiffs have proved their financial capacity.

13. I, therefore, hold that the respondents/plaintiffs have failed to prove their readiness as required by Section 16(c) of the Specific Relief Act and on this ground itself the suit for specific performance was liable to be dismissed.

14. The second aspect is that whether the suit of the respondents/plaintiffs can be decreed for specific performance because the respondents/plaintiffs have only paid an amount of Rs.

5,00,000/- out of the total sale consideration of Rs. 55,00,000/- i.e. just 9-10% of the total sale price. This aspect has been considered by this Court in detail in the case of M/s Hotz Industries Pvt. Ltd. v. Dr. Ravi Singh (Since deceased through L.Rs) & Ors., CS(OS) No. 1261/1995 decided on 28.02.2018 and it was held that a buyer of a property merely on the payment of about 10% of the price is not entitled to the discretionary relief of specific performance. Detailed reasons have been given in the judgment in the case of Hotz Industries Pvt. Ltd.

(supra), that object of an agreement to sell is to see that the seller is able to buy an equivalent property as agreed to be sold by receipt of consideration, and once a considerable amount of time lapses between the date of the agreement to sell and the decree of the suit for specific performance, a seller cannot get a property of equivalent value much later than the date of agreement to sell as per the consideration of the property agreed to be sold which is of many years earlier. Also, this Court has noted in the case of Hotz Industries Pvt. Ltd. (supra) that the seller within his pocket if has the balance sale consideration, such balance sale consideration to the extent of 90% would have been

used by the seller either for purchasing a property or for making investment or for getting other returns, and therefore it is not as if that the buyer is in any manner prejudiced if the suit for specific performance is not granted when only about 10% of the sale consideration is paid and especially when for breach of contract he can be compensated by awarding monetary damages/compensation. The relevant paras of the judgment in the case of Hotz Industries Pvt. Ltd. (supra) are paragraphs 20(i) to 23 and these paragraphs read as 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 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 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 favor of the defendant nos. 1 to 3 and against the plaintiff." (emphasis added)

15. In view of the ratio in the case of Hotz Industries Pvt.

Ltd. (supra,) and the fact that admittedly the respondents/plaintiffs have paid just about 9% to 10% of the total sale consideration, it is held that the respondents/plaintiffs are not entitled to the discretionary relief of specific performance.

16.(i) Learned counsel for the respondents/plaintiffs finally argued that the respondents/plaintiffs have taken possession of different parts of the property from the tenants by paying consideration to the tenants and therefore specific performance be granted in the facts of the present case as equities are in the favour of the respondents/plaintiff. Unfortunately, however, this argument urged by the respondents/plaintiffs is a blatant lie being argued in this Court because not only under the

agreement to sell, possession was not to be received by the respondents/plaintiffs till the sale deed was registered inasmuch as the Agreement to Sell clearly states that the possession will be delivered i.e. will be delivered in future but also that para 9 of the plaint of the respondents/plaintiffs itself concedes that they received possession from the tenants only because tenants wanted to vacate and the appellant/defendant told them to receive possession on his behalf from the tenants. This para 9 of the plaint admitting that the respondents/plaintiffs did not receive possession from the tenants after paying them consideration but only receive possession for and on behalf of the appellants/defendants reads as under:-

"9. That at the time of entering into the agreement the defendant was in possession of 2 rooms, kitchen, latrine, 2 bathrooms on ground floor and had been occupying the same. Besides this the defendant had inducted a tenant namely Chetan Oberio with respect to the portion upon garage on the second floor. There was another tenant having possession of office on the first floor and godown in the basement in the said property."

(ii). Any doubt in this regard is removed from the admission made by the respondent no.1/plaintiff no. 1/ PW1/ in his cross-

examination on 09.09.2009 where it is clearly admitted by the plaintiff no. 1 that he had taken possession from the tenants of the appellant/defendant on behalf of the defendant and as the trustee of the appellant/defendant.

(iii). This argument, therefore, urged on behalf of the respondents/plaintiffs is clearly a blatant lie and falsehood in the face of the Court in view of the aforesaid discussion, and therefore the same is rejected.

17. In view of the aforesaid discussion, this appeal is allowed. The impugned judgment of the trial court dated 14.05.2016 is set aside. The suit of the respondent/plaintiff for specific performance will stand dismissed. Decree sheet be prepared.

18. Appellant/defendant is entitled to costs of the entire litigation till date and with respect to which the appellant/defendant will file the certificate of fees and costs in this Court within a period of two weeks from today.

19. It is also finally observed that counsel for the respondents/plaintiffs had initially sought to impugn the General Power of Attorney executed by the appellant/defendant in favour of his attorney Mr. Pradeep Kharbanda, and who is none other than the brother-in-law of the appellant/defendant, and photocopy of this General Power of Attorney duly notarized and dated 21.12.2010 is on the record, the counsel for the appellant/defendant in response says that to remove any doubt whatsoever a fresh Power of Attorney will be executed by the appellant/defendant in favour of his brother-in-law Sh. Pradeep Kharbanda and filed in this Court within four weeks from today, and which will be duly notarized or attested by Indian Embassy in United Kingdom. The Power of Attorney now being filed will also confirm with respect to execution of the earlier Power of Attorney

dated 21.12.2010 and also ratifying all acts of Sh. Pradeep Kharbanda taken both in the suit as also this appeal.

20. The appeal is accordingly allowed and disposed of in terms of the aforesaid observations.

SEPTEMBER 26, 2018/AK

VALMIKI J. MEHTA, J