

Jitender Kumar vs Vijender Kumar on 12 November, 2018

Equivalent citations: AIRONLINE 2018 DEL 1989

Author: Valmiki J.Mehta

Bench: Valmiki J.Mehta

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ RFA No. 275/2014

% 12th November, 2018

JITENDER KUMAR

..... Appellant

Through: Mr. B.S. Mathur, Mr. Rajat Mathur and Mr. Divyank Tyagi, Advocates (Mobile No. 9873724057).

versus

VIJENDER KUMAR

..... Respondent

Through: Mr. Tarun Diwan, Advocate (Mobile No. 999779373).

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 defendant in the suit impugning the Judgment of the trial court dated 28.05.2014 by which the trial court has decreed the suit for specific performance filed by the respondent/plaintiff and has ordered the appellant/defendant to specifically perform the Agreement dated 19.02.2004 and execute the sale deed in favour of the respondent/plaintiff with respect to one fourth share out of land bearing no. Lal Dora Hakdar No.1031 to 1086 out of Khasra Nos. 108/451(0-06), 323 (0-06), 106/94 (1-06), 95 (1-

08), 93 (2-02), land situated in extended Lal Dora and agricultural land out of Khasra No. 86/9 min (2-10), situated in the Revenue Estate of Village Khera Kalan, Delhi.

2. The appellant/defendant has been directed to execute the sale deed after taking the necessary permissions from the requisite competent authorities on the respondent/plaintiff paying the balance sale consideration of Rs. 10,50,000/-.

3. The facts of the case are that the parties entered into an Agreement to Sell dated 19.02.2004 whereby the appellant/defendant agreed to sell his one fourth share out of various Khasra numbers situated in the Revenue Estate, Village Khera Kalan, Delhi to the respondent/plaintiff. The total area in question was 7 bighas 18 biswas i.e. approximately 7900 sq. yds of land. The total sale consideration of the suit property was fixed at Rs. 11,00,000/- of which the respondent/plaintiff paid a sum of Rs. 50,000/- as earnest money and for this, a Receipt dated 19.02.2004 was executed by the appellant/defendant. It was pleaded that appellant/defendant had failed to perform the contract within the stipulated period up to 18.05.2004, thus, the subject suit for specific performance was filed. It was also pleaded in the suit plaint that the respondent/plaintiff sent a Legal Notice dated 07.05.2004 stating that the respondent/plaintiff would be present before the Sub-Registrar at Pitampura on 14.05.2004 at 11:00 am alongwith the balance sale consideration of Rs. 10,50,000/-, but the appellant/defendant failed to turn up at the office of the Sub-

Registrar for executing the sale deed. The suit for specific performance was hence prayed to be decreed. In the alternative, the respondent/plaintiff claimed a decree for damages for a sum of Rs.

11,00,000/- alongwith interest at 18% per annum.

4. The appellant/defendant contested the suit by filing a written statement. It was pleaded that it was the respondent/plaintiff who was guilty of breach of contract. It was also pleaded that a co-

sharer cannot sell his undivided share. The appellant/defendant also denied execution of the agreement to sell. It was pleaded that there was no reason why a property worth crores of rupees could be sold by the appellant/defendant for a sum of Rs. 11,00,000/- only. The appellant/defendant even denied receipt of the sum of Rs. 50,000/-

towards earnest money which was paid by the respondent/plaintiff to the appellant/defendant under the subject Agreement to Sell.

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

"1) Whether the suit has been properly valued for the purpose of court fee and jurisdiction? (OPP).

2) Whether the agreement to sell dated 19.02.2004 of the suit property is unlawful and unenforceable? (OPD)

3) Whether the plaintiff is entitled to decree of specific performance of agreement to sell against defendant? (OPP)

4) Whether the plaintiff is entitled to decree of permanent injunction as has been claimed in his suit? (OPP)

5) Relief."

6. In a suit for specific performance, a proposed purchaser must necessarily prove his financial capacity, and which is a sine qua non as per Section 16(c) of the Specific Relief Act, 1963. Section 16(c) of the Specific Relief Act requires that a proposed purchaser must always be and continue to be ready and willing to perform his part of the contract. Readiness has been interpreted to mean financial capacity. Financial capacity must exist to pay the balance sale consideration right from the time of entering into of the agreement to sell till the disposal of the suit. This is held by the Supreme Court in the judgment in the case of N.P. Thirugnanam (D) by L.Rs. v. Dr. R. Jagan Mohan Rao and others, (1995) 5 SCC 115 and the relevant para 5 of this judgment 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 Section 20 of the Specific Relief Act 1963 (for short, 'the Act'). Under Section 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 always ready and willing to perform his part of the contract."

(underlining added)

7. No doubt financial capacity does not mean that a proposed purchaser has to jingle the moneys i.e. a proposed purchaser need not prove existence of liquid funds, however, financial capacity does mean and require that the proposed purchaser/respondent/ plaintiff must show that he had the necessary funds or the properties or other necessary means which would enable him to pay the balance sale consideration. Such financial capacity also has to be strictly proved and self-serving statements cannot amount to discharge of requisite onus of proof of existence of financial capacity, and this has been so held by this Court in the judgment in the case of Baldev Behl & Ors. v. Bhule & Ors., (2012) 132 DRJ 247, and the relevant paras of this judgment 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 ` 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)

8. In the present case, taking that there is an agreement to sell entered into between the parties and the respondent/plaintiff paid a sum of Rs. 50,000/- out of the total sale consideration of Rs.

11,00,000/-, the issue is whether the respondent/plaintiff has led such evidence to satisfy the judicial conscience of this Court that the respondent/plaintiff, as the proposed purchaser, had the financial capacity to pay the balance sale consideration. In this regard, it is noted that not a single document whatsoever has been filed by the respondent/plaintiff to prove his financial capacity in the form of his bank accounts or income tax returns or property documents etc.. By self-serving averments, the financial capacity cannot be held to be proved. This Court also rejects the argument urged on behalf of the respondent/plaintiff that the respondent/plaintiff had the financial capacity because he owned land of about 5 acres inasmuch as there are no details whatsoever in the trial court record as to where is this so called 5 acres of land, what are the khasra numbers thereof, where is this land located, and more importantly where are the property papers/title documents to show ownership of the respondent/plaintiff of the said 5 acres of land. Also, the existence of immovable property in itself is not enough, in the facts of the present case, to prove financial capacity because an immovable property is not equivalent to availability of such funds for completing the transaction. Further, as held by the Supreme Court in the judgment in the case of N.P. Thirugnanam (D) by L.Rs (supra), the financial capacity must be proved right from the date of entering into the agreement to sell till the disposal of the suit, and in this regard the respondent/plaintiff has miserably failed. This Court therefore holds that respondent/plaintiff did not have the financial capacity and therefore was guilty of breach of contract in not completing the transaction of sale under the subject Agreement to Sell.

9(i). Learned counsel for the respondent/plaintiff very strongly argued that the respondent/plaintiff had deposed about his readiness and willingness, and which is not opposed on behalf of the appellant/defendant, however, this argument has no merit because, as already stated above, self serving averments of financial capacity cannot be held to be discharge of the onus of proof. This Court also rejects the argument urged on behalf of the respondent/plaintiff that since the respondent/plaintiff was present at the office of the Sub-

Registrar, the respondent/plaintiff should be held to be ready and willing to perform his part of the contract as envisaged by Section 16(c) of the Specific Relief Act.

(ii) This Court, therefore, holds that the respondent/plaintiff has failed to prove his financial capacity or readiness to go ahead with the subject agreement to sell.

10. In my opinion, there is another reason why the respondent/plaintiff is not entitled to specific performance inasmuch as the respondent/plaintiff has only paid a nominal amount of Rs.

50,000/- out of total sale consideration of Rs. 11,00,000/- i.e. barely about 4.5% of the total sale consideration. The grant of specific performance is a discretionary relief and this has been so held by the Supreme Court in a number of judgments and one such judgment being the judgment of the Supreme Court in the case of Saradamani Kandappan v. Mrs. S. Rajalakshmi, 2011 (12) SCC 18. I have had an occasion to examine this judgment of the Supreme Court alongwith other related aspects in the judgment in the case of M/s Hotz Industries Pvt. Ltd. v. Dr. Ravi Singh (Since Decd. Thr. LRs) & Ors., 2018 SCC Online (Del) 7618, and wherein this Court has held that payment of nominal consideration of 5%, 10% or 20% will not entitle grant of discretionary relief of specific performance because even if the proposed seller on the suit being decreed much later than the date of agreement to sell gets only the sale price with interest, and that with this amount the seller cannot purchase an equivalent property which he would have purchased many years earlier when the agreement to sell was entered into. Today, we are in the year 2018 and the subject Agreement to Sell was of the year 2004, and therefore for the price of the property in the year 2004, an equivalent property in the year 2018 surely cannot be purchased, and these aspects have been considered in detail in the following paragraphs of the judgment in the case of Hotz Industries Pvt. Ltd. (supra):-

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.

XXXXX XXXXX XXXXX

43. Till the issue is considered in an appropriate case, we can only reiterate what has been suggested in K.S. Vidyanandam.

(i) The courts, while exercising discretion in suits for specific performance, should bear in mind that when the parties prescribe a time/period, for taking certain steps or for completion of the transaction, that must have some significance and therefore time/period prescribed cannot be ignored.

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

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

(emphasis is mine)

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

17. I have recently in the case titled as Laxmi Devi vs. Mahavir Singh being RFA No. 556/2011 decided on 1.5.2012 declined specific performance, one of the ground being payment of only nominal consideration under the agreement to sell. Para 11 of the said judgment reads as under:-

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

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

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

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

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

(ii) Baldev Behl & Ors. Vs. Bhule & Ors. (2012) 132 DRJ 247 (In para 25 of this judgment it is noted that the appeal against the judgment in the case of Jinesh Kumar Jain (supra) being RFA(OS) No.75/2012 stands dismissed by a Division Bench of this Court on 31.8.2012).

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

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

(ii) As a result of rise in the prices of a property, that in the facts of the present case this Court can take judicial notice that prices of properties in Delhi, and that prices in the year 1995 would be far far lesser than the prices of the property today in the year 2018, and that too more so with the fact of the suit property being situated in one of the prime colonies of the Delhi being Maharani Bagh, grant of specific performance will 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 is mine)

11. I may note that during the course of arguments, learned counsel for the appellant/defendant was fair enough to state that the respondent/plaintiff in addition to be paid the amount of Rs. 50,000/-

alongwith interest, can in fact be paid an amount of 500% over the amount received by the appellant/defendant from the respondent/plaintiff i.e. the appellant/defendant offered to pay further sum of Rs. 2,50,000/- to the respondent/plaintiff in full and final satisfaction of all claims of the respondent/plaintiff under the subject Agreement to Sell, however, the counsel for the respondent/plaintiff states that he has no instructions in this regard.

12(i). Another aspect which was argued before this Court is that the respondent/plaintiff is entitled to the alternative relief of damages of Rs. 11,00,000/- with interest @ 18% per annum, however this argument urged and relief claimed has to be rejected for two reasons. Firstly, entitlement to damages, as an alternative relief, is based on the principle that it is the proposed seller/appellant/defendant who is guilty of breach of contract and not the proposed purchaser/respondent/plaintiff, and it is already held above that the respondent/plaintiff did not have the financial capacity and nor therefore committed breach of contract and hence the respondent/plaintiff was not in a position to perform the subject Agreement to Sell. Secondly, entitlement to damages under Section 73 of the Contract Act, 1872 can only be if it is shown that what was the specific higher price of the subject property being the market price on the date fixed for specific performance, being the date of 18.05.2004 in this case. There is no categorical evidence on record as to what was the market price of the suit property on 18.05.2004 i.e. higher market price as on 18.05.2004, and therefore even assuming for the sake of argument that the appellant/defendant was guilty of breach of contract and the respondent/plaintiff had to be granted damages, yet no damages can be granted in the absence of requisite evidence as required by law.

12(ii). Learned counsel for the respondent/plaintiff sought to place reliance upon the cross-examination of the respondent/plaintiff conducted by the appellant/defendant on 22.02.2011 wherein a suggestion was put that price of the property had increased by 5 to 6 lakhs "in these two years", however, on such type of vague evidence, it cannot be held that there is such evidence which will result in discharge of the onus of proof of the market price of the property as on the date fixed for specific performance i.e. 18.05.2004. Once monetary relief has to be granted, then damages have to be proved as required by law towards the specific amount, and this could have been done by means of filing the sale deeds with respect to any similarly situated properties as around the date fixed for specific performance 18.05.2004, but this evidence is miserably lacking in the facts of the present case. In any case as already held above, it is the respondent/plaintiff who is guilty of breach of contract and there does not arise any issue of grant of damages to the respondent/plaintiff.

14. Finally, learned counsel for the respondent/plaintiff argues that the judgment of the Supreme Court in the case of Saradamani Kandappan (supra) is distinguishable, however, I fail to understand as to how the said judgment is distinguishable because it is the ratio of the judgment which binds,

and the ratio of the judgment in the case of Saradamani Kandappan (supra) and as relied upon in the case of Hotz Industries Pvt. Ltd. (supra) is that the discretionary relief of specific performance ought not to be granted by the courts where only a nominal amount is paid out of the total sale consideration.

15. In view of the aforesaid discussion, this appeal is allowed. Impugned judgment of the trial court dated 28.05.2014 is set aside. The suit of the respondent/plaintiff is dismissed. Parties are left to bear their own costs.

NOVEMBER 12, 2018
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VALMIKI J. MEHTA, J