# Parveen Garg vs Satpal Singh & Anr. on 11 May, 2018

## Author: Valmiki J. Mehta

## Bench: Valmiki J.Mehta

* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ RFA No. 383/2018

% Judgment reserved on: 7th May, 2018
Judgment pronounced on: 11th May, 2018

PARVEEN GARG ..... Appellant
Through: Ms. Tamali Wad and Ms. Annu Bagai, Advocates.

versus

SATPAL SINGH & ANR. ..... Respondents

Through: Ms. Vijay Laxami Mewara, Advocate.

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J

Since counsel for the caveator has entered appearance the caveat stands discharged.

C.M. Appl. No.18622/2018 (for exemption)

1. Exemption allowed, subject to just exceptions.

C.M. stands disposed of.

RFA No. 383/2018 and C.M. Appl. No. 18621/2018 (for stay)

2.(i) 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 27.1.2018 by which trial court has dismissed the suit filed by the appellant/plaintiff seeking specific performance of the Agreement to Sell dated 1.9.2003/Ex.PW1/1 and the Compromise Agreement dated

24.11.2004/Ex.PW1/5, pertaining to property no. 3/153, Sunder Vihar, Paschim Vihar, New Delhi, measuring 133 sq. yards. Trial court by the impugned judgment has however passed a money decree for a sum of Rs.4,00,000/- in favour of the appellant/plaintiff along with interest at 12% per annum on account of this amount having been paid by the appellant/plaintiff to the respondent no. 1/defendant no. 1 under the subject agreement to sell.

(ii) At the outset it requires to be mentioned, and this is an aspect which will otherwise be dealt with in this judgment, that the agreement to sell and the compromise deed which were entered into were of the appellant/plaintiff with the respondent no. 1/defendant no.1 whereas admittedly the owner of the suit property is the respondent no. 2/defendant no. 2, the wife of the respondent no.

1/defendant no. 1.

3. The facts of the case are that the appellant/plaintiff pleaded that the Agreement to Sell dated 1.9.2003 was entered into for sale of the suit property in favour of appellant/plaintiff for a total sale consideration of Rs.33,25,000/-. Appellant/plaintiff and his father are Government contractors engaged in the business of construction and were on look out for a property. As per the plaint, on the date of entering into of the agreement to sell, a sum of Rs.1,00,000/- in cash was paid by the appellant/plaintiff to the respondents/defendants as earnest money. On the next day being 2.9.2003, a further sum of Rs.3,00,000/- in cash was paid by the appellant/plaintiff to the respondent no. 1/defendant no. 1. The sale transaction, as per the appellant/plaintiff, was to be completed by 1.11.2003 and this was subject to the respondents/defendants getting converted the property from leasehold to freehold. Appellant/plaintiff has pleaded that he was never shown the title deeds of the suit property and he requested the respondents/defendants to give him the copies of the title deeds as also certificate of conversion from leasehold to freehold so that the transaction could be completed, and to which the respondents/defendants stated that on account of unavoidable circumstances in the short period, the permission could not be obtained for converting the property from leasehold to freehold. In the plaint it is further pleaded that in April, 2004 the respondent no.

1/defendant no. 1 called the appellant/plaintiff to his residence and informed the appellant/plaintiff that it is not the respondent no.

1/defendant no. 1 who is the sole owner of the suit property but that both the respondents/defendants are joint owners. Appellant/plaintiff pleads that a further sum of Rs.8,00,000/- was demanded from him and since the appellant/plaintiff was interested in completing the transaction, therefore he paid in cash a sum of Rs.5,000/- on 9.4.2004 and prepared a bank draft dated 10.4.2004 of Rs.7,95,000/-, and asked the respondents/defendants to show the title deeds of the suit property before handing over the bank draft, but since the copies of the title deeds were not shown to the appellant/plaintiff, therefore the bank draft was not handed over to the respondents/defendants.

Appellant/plaintiff further pleads that then he therefore filed police complaints on 7.10.2004 and 9.11.2004 and whereby matter was settled between the parties in the Police Station as per which compromise dated 24.11.2004 the respondent no. 1/defendant no. 1 undertook to execute and

register the sale deed of the suit property in favour of the appellant/plaintiff on or before 16.12.2004. It is further pleaded in the plaint that appellant/plaintiff again withdrew a sum of Rs.7,25,000/- in cash from his bank account on 7.12.2004 for giving it to the respondents/defendants but since the respondents/defendants again refused to show the title deeds hence this amount was not given to the respondents/defendants. Appellant/plaintiff pleads sending of the legal notice dated 9.12.2004 to the respondents/defendants for completing the transaction after obtaining necessary permissions, and thereafter the subject suit for specific performance was filed.

4. Respondents/defendants contested the suit and filed their separate written statements. It was pleaded that it was the appellant/plaintiff who did not have financial capacity and therefore the sale transaction could not be completed initially by 1.11.2003. It was also pleaded by the respondents/defendants that photocopies of the title deeds were handed over to the appellant/plaintiff before entering into of the agreement. It was also pleaded by the respondents/defendants that in the agreement to sell which is in the form of a single page Receipt-cum-Agreement, the appellant/plaintiff had interpolated the words that the transaction will be completed and payment made by 1.11.2003 or on the respondents/defendants making the property freehold whichever is later, whereas the appellant/plaintiff had to make payment of the sale consideration by 1.11.2003 and since in doing of which appellant/plaintiff failed, hence the amount paid by the appellant/plaintiff of the amount of Rs.4,00,000/- was forfeited. It was also pleaded that specific performance suit cannot be maintained because Agreement to Sell dated 1.9.2003 and the subsequent Compromise Agreement dated 24.11.2004 was only signed by the respondent no. 1/defendant no. 1 and not by the respondent no. 2/defendant no.2 who was the owner of the suit property and therefore the suit for specific performance did not lie as the owner is not a party to the agreement to sell and the Compromise Agreement dated 24.11.2001. It was further pleaded that in terms of the Compromise Agreement dated 24.11.2004 appellant/plaintiff had to pay the balance amount by 6.12.2004 but he again changed the date of 6.12.2004 to 16.12.2004 and did not complete the transaction by making payment of the balance sale consideration by 6.12.2004. Financial capacity of the appellant/plaintiff, and the appellant/plaintiff's readiness and willingness was also denied. The suit was therefore prayed to be dismissed.

5. After pleadings were complete the trial court framed issues and parties led evidence, and which aspects are recorded in paras 6 to 12 of the impugned judgment, and these paras read as under:-

"6. After completion of pleadings, vide order dated 27.04.2009, the following issues were framed:-

> (i) Whether the plaintiff is entitled for specific performance of agreement dated 01.09.2003 and alleged compromise dated 24.11.2004 in respect of property bearing no. 3/153, Sunder Vihar, Paschim Vihar, New Delhi? OPP.

(ii) Whether the plaintiff has always been ready and willing and is still ready and willing to perform his part of agreement? OPP.

(iii) Whether there was no agreement between the plaintiff and defendant no. 2, as alleged by the defendant no. 2? If so, to what effect? OPD-2.

(iv) Whether the is entitled for recovery of vacant possession, in case a decree of specific performance is passed in favour of the plaintiff and against the defendants? OPP.

(v) Relief.

7. The plaintiff has examined total 4 witnesses in his evidence to prove his case whereas the defendants have examined 3 witnesses in their defence evidence.

PLAINTIFF'S EVIDENCE:-

8. PW-1 is the plaintiff himself and PW-2 is Sh. Ram Karan Gupta, father of the plaintiff. Both these witnesses have filed their affidavits in evidence reiterating and reaffirming the same facts as stated by them in the plaint.

9. PW-3 is Sh. M. K. Mondal from State Bank of Bikaner & Jaipur, who has proved the demand draft dated 10.04.2004 got issued by the plaintiff in favour of defendant no. 2. This witness has also proved the bank statement for the period w.e.f. 01.12.2004 to 31.03.2005 of the plaintiff which is Ex. PW-3/1.

10. PW-4 is HC Jitender, who has proved the copy of office order bearing no. 1941-80/HAR/W dated 03.02.2012. As per order, the record pertaining to compromise dated 24.11.2004 has been weeded out.

DEFENDANTS' EVIDENCE:-

11. DW-1 is defendant no. 1 himself and DW-2 is defendant no. 2. Both these DWs have filed their affidavits in evidence reiterating and reaffirming the same facts as stated by them in their written statements.

12. DW-3 is Sh. Vijay Kohili, one of the witness of compromise dated 24.11.2004. He has deposed that the said compromise was written in the hand writing of Sh. R.K. Gupta, father of the plaintiff, in the presence of this DW. He has further stated that as per the said compromise the completion date of the sale was 06.12.2004.

Witnesses of both the parties were cross examined by each others' counsels, however, cross examination of DW-2/Defendant no. 2 could not be completed due to her non-availability."

6.(i) Trial court has dismissed the suit for specific performance by holding that the agreements dated 1.9.2003 and 24.11.2004 with respect to the suit property which were entered into were only between the appellant/plaintiff and respondent no.1/defendant no. 1, and since the respondent no.2/defendant no. 2 who was the owner was never a signatory to the two agreements, therefore the

respondent no.2/defendant no. 2 cannot be successfully sued for grant of the relief of specific performance. Trial court has held that though the appellant/plaintiff could have initially been under the wrong impression as to whether it was the respondent no.1/defendant no. 1 or respondent no.2/defendant no. 2 who was the owner of the suit property, but admittedly the appellant/plaintiff in April, 2004 came to know that respondent no.2/defendant no. 2 was the owner of the suit property and therefore there could be no reason why the agreement dated 24.11.2004 was not entered into by the appellant/plaintiff with the respondent no. 2/defendant no. 2. Trial court therefore held that once there was no agreement between the owner/respondent no. 2/defendant no. 2 and the appellant/plaintiff hence therefore the appellant/plaintiff cannot be successful in seeking to get transfer the ownership rights in his favour of the suit property because there was no privity of contract with the respondent no.

2/defendant no. 2 who was the owner of the suit property.

(ii) In my opinion, trial court is well justified in dismissing the suit for specific performance inasmuch as admittedly there is no agreement to sell of the suit property between the owner/respondent no.2/defendant no. 2 and the appellant/plaintiff. It is not the case of the appellant/plaintiff that respondent no.1/defendant no. 1 was the power of attorney holder of his wife the respondent no.2/defendant no.

2 because the appellant/plaintiff only pleaded the existence of consent of respondent no.2/defendant no. 2 to the respondent no.1/defendant no. 1 for entering into of the original agreement to sell dated 1.9.2003 and the subsequent compromise in the police station on 24.11.2004.

Even for the sake of arguments if we take that the original agreement to sell was with the consent of respondent no.2/defendant no. 2, yet the subsequent agreement in the police station on 24.11.2004 was only of the appellant/plaintiff with the respondent no.1/defendant no. 1 and admittedly as on this date the appellant/plaintiff very much knew (since he knew since April, 2004 of respondent no.2/defendant no. 2 being the owner of the suit property), then there was no reason why the appellant/plaintiff did not enter into any agreement whatsoever with the respondent no.2/defendant no. 2 i.e the agreement dated 24.11.2004 is not with respondent no.2/defendant no. 2 but has been signed only by the respondent no.1/defendant no. 1. The argument of the counsel for the appellant/plaintiff that the appellant/plaintiff has been duped by the respondents/defendants, is an argument which goes against the appellant/plaintiff because once it is found that the respondents/defendants may have duped/defrauded the appellant/plaintiff by misrepresenting the respondent no.1/defendant no.1 to be the owner of the suit property and he was not the owner, then the result would be that admittedly there is no agreement to sell of the suit property of the respondent no.2/defendant no. 2 with the appellant/plaintiff, and once there is no agreement, then there cannot be specific performance of a non-existent agreement of the respondent no.2/defendant no.2 with the appellant/plaintiff. Any doubt in this regard is removed when we see the police complaint dated 7.10.2004 Ex.PW1/3 filed by the appellant/plaintiff with the police because in this police complaint the complaint of the appellant/plaintiff was of being duped into entering into of the agreement to sell although the respondent no.1/defendant no. 1 was not the owner of the suit

property, and therefore obviously how can there be specific performance qua a property with respect to which there is no agreement to sell and the result would at best be of alleged duping of the appellant/plaintiff but definitely not of the grant of the relief of the specific performance. The relevant paras in the complaint dated 7.10.2004 of the appellant/plaintiff to the police read as under:-

> "Thus, it is evident and ample clear that Satpal Singh and Smt. Charanjeet Kaur, from the very beginning, knowing fully well that Satpal Singh alone is not the absolute owner of the property, by hatching a criminal conspiracy, by deceiving me fraudulently and dishonestly, induced me to enter into an agreement with Satpal Singh on 1-9-2003 and thereby to deliver him a sum of Rs. 4 lac, which has caused damage and harm to me in my reputation and property, besides illegal gain to them and illegal loss to me and is a clear fraud and cheating.
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> Further, in the month of April 2004 the intentional threat of Satpal Singh and Smt. Charanjeet Kaur that in case I do not pay to them Rs. 8 lac more as advance, they would sell the property to some one else, and thus, putting me under the fear of injury of loss of property, loss of reputation and mental torture and agony and thereby dishonestly inducing me to deliver to them a sum of Rs.5,000/- and an attempt for Draft of Rs.7,95,000/-, to which they were neither legally entitled to receive nor I would have, otherwise, paid to them, had I not been so put under the fear of aforesaid injury by them, falls within the purview of extortion and blackmailing.
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> It is therefore, requested that necessary action be taken against Satpal Singh and Smt. Charanjeet Kaur for the aforesaid offences committed by them." (underlining added)

7. Therefore in my opinion, since admittedly the respondent no.2/defendant no. 2 has not entered into any agreement to sell with the appellant/plaintiff, i.e there is no privity of the contract of the respondent no. 2/defendant no. 2 with the appellant/plaintiff, because the case of the appellant/plaintiff is that he has been duped and cheated, therefore, the relief of specific performance has been rightly declined by the trial court by observing as under:-

> "17. Both these issues are inter-connected, therefore, taken up together for consideration. The onus of proof to prove these issues was upon the plaintiff. The plaintiff has stated that he entered into an agreement to sell dated 01.09.2003 with defendant no. 1 for purchasing the suit property for total sale consideration amount of Rs. 33,25,000/-. The amount of Rs. 4 lacs was paid by the plaintiff to the defendant no. 1 as earnest money. As per the agreement to sell, the transaction has to be completed on 01.11.2003 or when the property would be converted from lease hold to free hold whichever is later. The execution of agreement to sell dated 01.09.2003 is admitted by defendant no. 1. Defendant no. 1 has also admitted

receiving of earnest money, however, he has stated that the owner of the suit property was defendant no. 2, therefore, he had no authority to enter into an agreement to sell with the plaintiff due to which the said agreement to sell is null and void. Defendant no. 2 has also taken the same defence that she is the owner of the suit property, therefore, her husband i.e. defendant no. 1, had no authority to enter into any agreement with the plaintiff, therefore, the said agreement is not enforceable. The defendants have also disputed the hand written portion on the bottom of agreement to sell, however, this contention shall be dealt in the order in the succeeding para. The plaintiff has stated that at the time of entering into agreement to sell dated 01.09.2003, defendant no. 1 did not disclose him that defendant no. 2 is the owner of the suit property but he pretended himself to be the owner of the same. Plaintiff came to know in April-2004 that it is defendant no. 2 who is the owner of the suit property. At that point of time, defendant no. 1 told to the plaintiff that defendant no. 2 is demanding Rs. 8 lacs for confirming the sale. On this, the plaintiff paid cash of Rs. 5000/- to defendant no. 2 and got prepared demand draft of Rs. 7,95,000/- in favour of defendant no. 2. Admittedly, no such demand draft was given by the plaintiff to either of the defendants. The plaintiff has stated that demand draft was not handed over to the defendants as they were not showing the sale deed of the suit property to him. From the present set of facts, it is clear that it came into the knowledge of the plaintiff in the year April-2004 that defendant no. 2 is the owner of the suit property and not the defendant no. 1. It is also admitted fact that on 07.10.2004 and subsequently on 09.11.2004, plaintiff filed some police complaints in the concerned police station against the defendants. On 24.11.2004, the defendants were called in the police station and there the compromise was reached between the plaintiff and defendant no. 1 which was witnessed by plaintiff's father and one Sh. Vijay Kohli. At this juncture, it is relevant to mention that even in the said compromise, defendant no. 2 was not the party. This court is unable to convince itself that when plaintiff became aware in April2004 that defendant no. 2 is the owner of the suit property then why again in November-2004, he entered into a compromise with defendant no. 1 alone who had nothing to do with the suit property. From the facts of the case, it is clear that there was no privity of contract between plaintiff and actual owner of the suit property, therefore, the relief of specific performance cannot be granted in favour of the plaintiff." (underlining added)

8. Trial court, in my opinion, was therefore justified in dismissing the suit for specific performance in terms of the impugned judgment by rightly holding that there was no privity of contract of the respondent no. 2/defendant no. 2 with the appellant/plaintiff.

9. Even for the sake of arguments even if we take that there was an agreement to sell of the suit property of the appellant/plaintiff with the respondent no. 2/defendant no. 2, yet the appellant/plaintiff cannot be granted the discretionary relief of specific performance.

The relief of specific performance is a discretionary relief in terms of Section 20 of the Specific Relief Act, 1963 and the trial court in this regard has rightly made the following observations to deny the

discretionary relief of specific performance to the appellant/plaintiff:-

> "21. Otherwise also, the entire conduct of the plaintiff is beyond the normal course in which the things happen in the society. The plaintiff is a government contractor so is his father. Both, father and son, were part of each and every transaction entered between the parties. It is unbelievable for the court that despite being government contractor, plaintiff entered into the agreement to sell dated 01.09.2003 with the defendant no. 1 without seeing title documents of the property. Even when in April-2004, he was informed that both the defendants were joint owners then also the plaintiff did not take any action nor sent any notice to the defendants calling upon them to show the title deeds instead he got prepared the demand draft in favour of defendant no. 2 without seeing the title documents in her favour. Again, without seeing title documents on 24.11.2004 and without taking defendant no. 2 into confidence, he entered into a compromise with defendant no. 1.
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> 22. As per Section 20 of Specific Relief Act, the relief of specific performance is a discretionary relief and as per sub-clause 3 of Section 20, the court can exercise discretion to decree the suit for specific performance where the plaintiff has done substantial act or has suffered losses due to the agreement of which specific performance is sought. In "Jinesh Kumar Jain" (Supra), the Hon'ble High Court has held that substantial act would obviously mean and include payment of substantial amount of money and the substantial amount is approximately 50% or more of the consideration amount and in case of less payment the plaintiff should have been put into the possession of the property. In the said judgment, it has also been held that in cases where substantial act has not been done, the plaintiff will not be entitled for the decree of specific performance. In the case in hand, admittedly the plaintiff has paid only Rs. 4 lacs as earnest money out of total sale consideration amount of Rs. 33,25,000/-, hence, in view of the judgment of "Jinesh Kumar Jain" (Supra), plaintiff is not entitled for the decree of specific performance of receipt-cum-agreement to sell dated 01.09.2004 followed by compromise dated 24.11.2004, on this count also.
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> In view of my aforesaid discussion, issues no. 1 & 2 are decided in favour of the defendants and against the plaintiff. " (underlining added)

10. In addition to the aforesaid findings of the trial court this Court would like to observe that though counsel for the appellant/plaintiff has with reference to the bank account of the appellant/plaintiff proved as Ex.PW3/1 argued that the appellant/plaintiff had the necessary financial capacity as on 16.12.2004, however in my opinion this argument urged on behalf of the appellant/plaintiff even if accepted as correct, will not result in the appellant/plaintiff being successful in proving readiness and willingness as is required under Section 16(c) of the Specific Relief Act. The language of Section 16(c) of the Specific Relief Act is that the plaintiff in a suit for specific performance has always been and continues to be ready and willing to perform his part of the contract.

This has been interpreted by the Supreme Court to mean that financial capacity of a plaintiff must be proved by leading evidence not only at the relevant time before the suit is filed but also that the financial capacity of the plaintiff must be continued to exist till the disposal of the suit. It is seen that the best evidence of the appellant/plaintiff is of readiness and willingness as on 16.12.2004 but there is no evidence on record whatsoever of financial capacity of the appellant/plaintiff from 16.12.2004 till the suit was disposed of in terms of the impugned judgment dated 27.1.2018. Appellant/plaintiff therefore has clearly failed to prove the mandatory requirement of Section 16(c) of the Specific Relief Act of being continuously ready and willing to perform his part of the subject agreement to sell. I may also note that the trial court has rightly denied specific performance by holding that once only a sum of Rs.4,00,000/- was paid out of the total sale consideration of Rs.33,25,000/- payment of such consideration amount which would be around only 12% of the total sale consideration, specific performance would have to be denied. This aspect I have examined and considered in detail in the recent judgment passed in the case of M/s Hotz Industries Pvt. Ltd. Vs. Dr. Ravi Singh (Since deceased through L.Rs) & Ors. CS(OS) No. 1261/1995 decided on 28.2.2018. The relevant paras of this judgment are paras 17 to 23 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.
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> (ii) I cannot agree with the argument urged on behalf of the plaintiff that plaintiff had proved its readiness and willingness as required by Section 16(c) of the Specific Relief Act. As already observed above, readiness and willingness has to be a continuous act from the date of entering into the agreement to sell till at least the leading of evidence by the plaintiff in the suit, if not even as on date at the stage of final arguments, and in this regard it is seen that the plaintiff has at best proved that it had the balance consideration with it only in May, 1995. Having financial capacity in May, 1995 in the opinion of this Court will not enable the plaintiff to show financial capacity of the plaintiff for the period from after May, 1995 till the evidence has been concluded by the plaintiff in the present suit in August, 2010. In fact the plaintiff has to be held to be guilty of the concealing documents from this Court, and which documents are in the special knowledge of the plaintiff and therefore required to be proved by the

plaintiff in terms of Section 106 of the Indian Evidence Act. These documents in possession of the plaintiff with respect to its financial capacity would be the documents of the bank accounts of the plaintiff, any fixed deposit receipts of the plaintiff of amounts in its bank, audited Balance Sheets and Profit and Loss accounts of the plaintiff from the year 1995 till plaintiff's evidence was closed in August, 2010 in terms of the statement made on behalf of the plaintiff. Section 16(c) of the Specific Relief Act deliberately requires continuous rediness and willingness i.e continuous financial ability to complete the transactions. The stage of complying with obligations under the agreement to sell by a proposed buyer even if does not arise, yet Section 16(c) of the Specific Relief Act requires the plaintiff to show continuous financial capacity to prove the balance sale consideration. In my opinion, it has to be held that the plaintiff in this regard has miserably failed because merely by showing financial capacity as on date on 22.5.1995 cannot mean that the plaintiff had financial capacity from 23.5.1995 till the plaintiff concluded its evidence in August, 2010. As already stated above the plaintiff has not filed any document with respect to its financial capacity like Balance Sheets, Profit and Loss accounts and therefore against the plaintiff adverse inference has to be drawn under Section 114 of the Indian Evidence Act on account of the plaintiff having deliberately not filed such documents. It is therefore held that the plaintiff cannot be held to have complied with Section 16 (c) of the Specific Relief Act merely because plaintiff has proved the certificate of bank Ex.PW1/8 dated 5.1.2004 showing that plaintiff had prepared pay orders with respect to balance sale consideration on one day and date of 22.5.1995. Also and simply because the plaintiff has paid a sum of Rs.42.50 lacs to defendant no. 4 in February, 2005 would also not mean that plaintiff is to be held that it had always the capacity to pay the entire balance sale consideration to defendant nos. 1 to 3 with the fact that payment by plaintiff to defendant no. 4 of a sum of Rs.42.50 lacs will only show financial capacity of the plaintiff of Rs.42.50 lacs and not with respect to total balance sale consideration payable by the plaintiff to the defendant nos. 1 to 3 of Rs.2.18 crores.

(iii) It was argued on behalf of the plaintiff that plaintiff's Managing Director has deposed in plaintiff's favour that plaintiff had the financial capacity, and this is sufficient evidence to prove readiness and willingness.

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

"26(i). This issue pertains to plaintiff No.1 being ready and willing to perform his part of the agreement to sell. As per Section 16(c) of the Act, every plaintiff in a suit for specific performance must aver and prove that the plaintiff has always been and continues to be ready and willing to perform his part of the contract/agreement to

> sell. Readiness is financial capacity to go ahead with the agreement to sell and willingness is the intention. I may, at this stage, specifically invite attention to the observations of the Supreme Court in the case of Balraj Taneja and Anr. (supra), and relevant paras have been reproduced above, and which show that in a suit for specific performance even if there is no defence of the defendant, yet, the aspect of readiness and willingness has to be specifically proved by the plaintiff. This is stated by the Supreme Court in para 30 of the said judgment. The question is whether the plaintiff No.1 has proved his readiness and willingness at the relevant time and also continues to be ready and willing to perform his part of the contract/agreement to sell.
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> (ii) Readiness to perform the obligations by a proposed purchaser is a very important aspect and it has to be proved by categorical evidence.

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

18. It is, therefore, held that plaintiff has failed to show that it had always been and continued to be always ready and willing to perform its part of agreement to sell by having the necessary financial capacity to pay the balance sale consideration of Rs.2.18 crores till February, 2005 and thereafter till August, 2010 for the sum of Rs.2.18 crores less the sum of Rs.42.50 lacs paid to the defendant no.4.

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

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

(ii) An agreement to sell is a contract between the parties and contracts between the parties are subject matter of the Indian Contract Act, 1872. The effect of breach of contract is provided under Section 73 of the Indian Contract Act. If there is a breach of contract then an aggrieved party is entitled to monetary damages as per Section 73 of the Indian Contract Act and which monetary damages is the amount of loss which is caused to the aggrieved party under the contract. An aggrieved party who was the proposed buyer under the agreement to sell will suffer loss if in case on the date and in around the date of breach, the value of a similar property as the contracted property under the agreement to sell, which could be purchased by the plaintiff as a proposed buyer, had increased. To the extent of increase of price of the property a plaintiff who is a proposed buyer suffers loss when a proposed seller/defendant does not sell the property under an agreement to sell, because a buyer has to pay a higher price for purchase of a similar property, and thus ordinarily whenever there is a breach of contract of an agreement to sell on account of the breach by the defendant/proposed seller, then the plaintiff/proposed buyer becomes entitled ordinarily to damages/loss under Section 73 of the Indian Contract Act being the difference of the contract price and the higher price of a similar property in around the date of breach. The Specific Relief Act contains provisions that in spite of a plaintiff who is the proposed buyer, and against whom breach of contract is caused by a defendant in the suit being the proposed seller, the plaintiff/proposed buyer need not ask for and be granted damages in such a case where the plaintiff/proposed buyer pleads and seeks that there should be specific performance of the contract and not the breach of the contract. In a way therefore the provisions of Specific Relief Act directing specific performance of a breached agreement to sell are in the nature of Exceptions or Provisos to Section 73 of the Indian Contract Act. What is being stated by this Court is that if there is a breach of contract then an aggrieved party on account of the breach of the contract gets under Section 73 of the Indian Contract Act monetary damages but where instead of grant of damages because of the contract being broken, a plaintiff/proposed buyer instead seeks/prays that the contract should be specifically performed, then such a scenario is in the nature of an Exception or a Proviso to the ordinary situation comprised in Section 73 of the Indian Contract Act that breach of contract entitles a person to monetary damages on account of the loss caused. Therefore once the provisions of Specific Relief Act with respect to specific performance are not the normal consequence of a breach of contract being of grant of damages as per Section 73 of the Indian Contract Act, therefore the provisions of the Specific Relief Act; with the important provision therein being Section 20 of the Specific Relief Act; provides that Court has the discretion whether or not to grant specific performance and that merely because it is lawful to do so, the Court will not grant specific performance but instead may only grant damages with the measure of damages being those as provided in Section 73 of the Indian

Contract Act. This aspect has been considered by this Court in detail in the judgment in the case of Jinesh Kumar Jain Vs. Iris Paintal and Ors. ILR (2012) 5 Delhi 678. The relevant paras of this judgment are paras 13 to 18 and these paras read as under:-

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

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

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

> (a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or
>
> (b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff; or
>
> (c) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance. (3) The court may properly exercise discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.
>
> (4) The court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the party."

14. Sub-Section 3 makes it clear that Courts decree specific performance where the plaintiff has done substantial acts in consequence of a contract/agreement to sell. Substantial acts obviously would mean and include payment of substantial amounts of money. Plaintiff may have paid 50% or more of the consideration or having paid a lesser consideration he could be in possession pursuant

to the agreement to sell or otherwise is in the possession of the subject property or other substantial acts have been performed by the plaintiff, and acts which can be said to be substantial acts under Section 20(3). However, where the acts are not substantial i.e. merely 5% or 10% etc of the consideration is paid i.e. less than substantial consideration is paid, (and for which a rough benchmark can be taken as 50% of the consideration), and/or plaintiff is not in possession of the subject land, I do not think that the plaintiff is entitled to the discretionary relief of specific performance.

15. The Supreme Court in the recent judgment of Saradamani Kandappan vs. Mrs. S. Rajalakshmi, 2011 (12) SCC 18 has had an occasion to consider the aspect of payment of a nominal advance price by the plaintiff and its effect on the discretion of the Court in granting the discretionary relief of specific performance. Though in the facts of the case before the Supreme Court, it was the buyer who was found guilty of breach of contract, however, in my opinion, the observations of the Supreme Court in the said case are relevant not only because I have found in this case the plaintiff/ buyer guilty of breach of contract, but also because even assuming the plaintiff/buyer is not guilty of breach of contract, yet, Section 20 sub-Section 3 of the Specific Relief Act, 1963 as reproduced above clearly requires substantial acts on behalf of the plaintiff/proposed purchaser i.e. payment of substantial consideration. Paras 37 and 43 of the judgment in the case of Saradamani Kandappan (supra) are relevant and they read as under:

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

> 43. Till the issue is considered in an appropriate case, we can only reiterate what has been suggested in K.S. Vidyanandam.
>
> (i) The courts, while exercising discretion in suits for specific performance, should bear in mind that when the parties prescribe a time/period, for taking certain steps or for completion of the transaction, that must have some significance and therefore time/period prescribed cannot be ignored.
>
> (ii) The courts will apply greater scrutiny and strictness when considering whether the purchaser was "ready and willing" to perform his part of the contract.
>
> (iii) Every suit for specific performance need not be decreed merely because it is filed within the period of limitation by ignoring the time-limits stipulated in the agreement. The courts will also "frown"

upon suits which are not filed immediately after the breach/refusal. The fact that limitation is three years does not mean that a purchaser can wait for 1 or 2 years to file a suit and obtain specific performance. The three-year period is intended to assist the purchasers in special cases, as for example, where the major part of the consideration has been paid to the vendor and possession has been delivered in part-performance, where equity shifts in favour of the purchaser." (emphasis is mine)

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

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

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

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

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

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

> (i) Sushil Jain Vs. Meharban Singh and Others (2012) 131 DRJ 421.
>
> (ii) Baldev Behl & Ors. Vs. Bhule & Ors. (2012) 132 DRJ 247 (In para 25 of this judgment it is noted that the appeal against the judgment in the case of Jinesh Kumar Jain (supra) being RFA(OS) No.75/2012 stands dismissed by a Division Bench of this Court on 31.8.2012).

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

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

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

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

around May, 1995 and within some reasonable time thereafter, but yet plaintiff has chosen not to, hence the plaintiff is held disentitled to the discretionary relief of specific performance. It is therefore held that since the plaintiff has only paid approximately 14.5% of the sale consideration as on the date of entering into the agreement to sell being the amount of Rs.37 lacs, therefore plaintiff is not entitled to the discretionary relief of specific performance.

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

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

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

11. In my opinion, in the facts of the present case, even for the sake of arguments it is taken that the respondent no.1/defendant no.1 was guilty of breach of contract and there was an agreement to sell of the appellant/plaintiff with the respondent no. 2/defendant no. 2 (and which was not), even then the appellant/plaintiff is not entitled to the discretionary relief of specific performance not only because appellant/plaintiff failed to continuously prove his readiness and willingness till the disposal of the suit but also because on payment of a consideration of just 12% or so of the total sale price the proposed buyer cannot be successful in seeking specific performance as detailed in the ratio of the judgment in the case of M/s Hotz Industries Pvt.

Ltd. (supra) as reproduced above.

12. In view of the aforesaid discussion, I do not find any merit in the appeal. Dismissed.

MAY 11, 2018 VALMIKI J. MEHTA, J

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