

(2010) 07 BOM CK 0155
In the Bombay High Court
Case No : Suit No. 979 of 1982

A.H. Mistry and Co.

APPELLANT

Vs

Awadh Narayan Singh Shiv Nayak Singh and Others

RESPONDENT

Date of Decision : 19-07-2010

Acts Referred:

Contract Act, 1872 — Section 18
Evidence Act, 1872 — Section 91
Urban Land (Ceiling and Regulation) Act, 1976 — Section 16, 27, 6

Citation : (2010) 6 BomCR 469

Hon'ble Judges : Roshan Dalvi, J

Bench : Single Bench

Advocate : Shailesh Shah and Mamta Sadh, instructed by Malvi Ranchhoddas and Co, for the Appellant; K.P. Tiwari and Shailesh Kumar Rai, instructed by K.P. Tiwari and Co. for Deft. Nos. 1 to 5 and Bobby Malhotra Paul, for Deft. No. 6, for the Respondent

Judgement

Roshan Dalvi, J.—This suit is filed by the Plaintiff initially against Defendant Nos. 1 to 5 (the Defendant) for specific performance of the agreement for sale entered into by these parties on 1.11.1979 as vendors and in the alternative for return of the earnest/part consideration of Rs. 32,000/- paid by the Plaintiff to Defendant Nos. 1 to 5 with interest at 18% per annum thereon and for other ancillary reliefs consequent upon the specific performance being granted, pending the suit. The Defendant as vendors entered into an agreement with Defendant No. 6, which agreement has been challenged as void and not binding on the Plaintiff.

2. The Agreement dated 1.11.1979 is the usual agreement for sale of land with occupants by the owners to a purchaser/developer. Under the agreement, the amount of Rs. 3 Lakhs was the consideration amount paid. Rs. 30,000/- were the earnest payable. Rs. 5,000/- were paid prior to the execution of the agreement on 2.10.1979. The remainder of the earnest amount plus Rs. 2,000/- are claimed to have been paid by the Plaintiff. The Defendant claims that a little less than the

earnest amount was received which included the initial deposit of Rs. 5,000/-, for which a consolidated receipt was passed on the date of the execution of the agreement.

3. Under Clause 2 of the agreement, the sale was to be completed within 6 months as far as possible or within 2 months from the grant of the permission of the competent authority under the Urban Land (Ceiling and Regulation) Act, 1976 (ULCRA). Time was not made of the essence. It was to be made of the essence upon existence of the period for completion of sale, if required by the parties and upon written notice in that behalf. Under Clause 3, the Defendant had to immediately deliver the title deeds in their possession to the Plaintiff. Under Clause 4, the Defendant was to make out a marketable title free from all encumbrances. The suit land was stated to have been sold free from all encumbrances under the agreement. Under Clause 5, the Plaintiff was to send its requisitions of title for all necessary matters. Under Clause 6, for a default of the Plaintiff the Defendant was entitled to rescind the agreement. Under Clause 10, the vendor declared that there were occupants on the property, a list whereof was to be furnished; the Plaintiff was to vacate the occupants. Under Clause 14, the Defendant/vendor was to obtain the permission of Urban Land Ceiling Authority. But if the permission was not granted, it was not to be a default on the part of the vendor. Under Clause 16, the Defendant declared that the suit property was free from all encumbrances. Under Clause 18, the Defendant declared that the Defendant had not received any notices of any authorities under any legislative enactment, including any notification in respect of the suit property.

4. It is the Plaintiff's case that the only covenant of the Plaintiff was to make payment of the balance consideration. That was to be paid within 2 months of the Urban Land Ceiling Authority permission. That permission was to be obtained by the Defendant. That was not obtained and hence the balance consideration had not become due for payment.

5. It is further the Plaintiff's case that the title deeds were not given, the permission of the competent Authority under ULCRA was not obtained, marketable title was not made out and the Plaintiff found that despite the declaration of the Defendant that there was no notification in respect of the suit property a notification under the Maharashtra Slums Areas (Improvement, Clearance and Redevelopment) Act, 1971 (the Slums Act) was issued prior to the execution of the agreement in 1978 itself, which was suppressed from the Plaintiff.

6. The Plaintiff claims that the Defendant breached the agreement and did not carry out the vendors' reciprocal covenants.

7. It is the Defendant's case that the property was sold the suit property on as is where is basis. The title deeds were given to the Plaintiff on the date of the execution of the agreement; marketable title was made out. The Plaintiff knew about the occupants on the suit land and had to vacate the occupants. The

Plaintiff also knew about the notification under the Slums Act in respect of the suit land and the Plaintiff was handed over a copy of the returns of the Defendant u/s 6 of the ULCRA to obtain permission of the ULCA u/s 27 of the ULCRA. The Plaintiff did not pursue that application, did not seek any requisitions, did not vacate the tenants and did not make payment of the balance consideration. Hence, the Defendant called upon the Plaintiff to perform his part of the agreement and then terminated the contract and forfeited the earnest amount paid.

8. After the filing of the suit, the Defendant/vendors entered into a registered agreement with Defendant No. 6. Defendant No. 6 has been added as party to the suit consequent upon the later transaction between the original owners/vendors and Defendant No. 6 in February 2009.

9. There is a discrepancy with regard to the initial issue and receipt of the initial letter sent to the Plaintiff. It would be for the Defendant to prove it. However, a further notice of termination has been accepted. In substance, the Defendant terminated the contract in February/April 1981. The Plaintiff replied to the notice of termination and challenged the termination upon what the Plaintiff stated were the defaults of the Defendant.

10. The respective cases of the parties is as per the correspondence that ensued upon the agreement for sale admittedly executed on 1st November 1979.

11. The agreement and the correspondence as admitted documents are called upon for interpretation.

12. If the Plaintiff has breached its main covenant of paying the balance consideration, the Plaintiff cannot be granted any relief. If the Defendant has committed the breaches that the Plaintiff has specified as per the plain reading of the contract, the Defendant would not be entitled to terminate the contract.

13. Based upon the respective cases of the parties, the following issues have been framed by this Court on 24.1.2003 which are answered as follows:

(1) Whether the Defendants prove that the suit as framed and filed discloses no cause of action against the Defendants and therefore the same is liable to be dismissed with costs as submitted in paragraph 1 of the Plaint.-

Yes against Defendant Nos. 2, 3 & 5. No against Defendant Nos. 1 & 4.

(2) Whether the Defendants prove that the suit as filed is not maintainable in law on the ground that Defendant No. 2 is not the signatory or the executing party to the Agreement dated 1.11.1979 and therefore the suit is liable to be dismissed with costs as against his as submitted in paragraph 2 of the Plaint.-

Yes against Defendant Nos.2, 3 & 5. No against Defendant Nos.1 & 4.

(3) Whether the Defendants prove that the suit is misconceived or bad in law for misjoinder of parties and causes of action as vaguely pleaded in paragraph 3 of

the Written Statement. -

Yes against Defendant Nos.2, 3 & 5. No against Defendant Nos.1 & 4.

(4) Whether the firm of the Plaintiff are a registered partnership firm, if not so, is the suit liable to be dismissed with costs.-

Yes.

(5) Whether the Defendants prove that they have furnished to the Plaintiff the Title Deeds to the Property as agreed to in Clause 3 of the Agreement for sale. -

Yes.

(6) Whether the Plaintiff proves that it has paid to the Defendants a sum of Rs. 5,000/- in addition to the admitted amount of Rs. 27,000/- received by the Defendants as disputed by the Defendants in paragraph 7 of the Written Statement.-

Yes.

(7) Whether the Defendants prove that they have obtained permission for sale from the Competent Authority under the Urban Land (Ceiling and Regulation) Act, 1976. -

Yes.

(8) Whether the Defendants prove that they have furnished the list of occupants and the monies/rents paid by them. -

No.

(9) Whether the Defendants prove that they have made out a marketable title to the property free from all encumbrances and free from reasonable doubts and at their own costs taken all steps to clear defects in title. -

No.

(10) Whether the Defendants took any steps to clear encumbrance on the suit property declared as a slum area. -

No.

(11) Whether the purported cancellation and purported forfeiture of the earnest money by the Defendants and/or repudiation of the Agreement is illegal, wrongful, mala fide and made with ulterior motive and not binding on the Plaintiff. -

Yes.

(12) Whether the said Agreement for sale dated 1.11.1979, Exhibit-B to the Plaint, is valid and subsisting.

Yes.

(13) Whether the said Agreement for sale dated 1.11.1979, Exhibit B to the Plaint, should be specifically performed by the Defendants.

(14) Whether, if the answer to the immediately proceeding issue is in the negative, the Plaintiff is entitled to refund the said sum of Rs. 32,000/- paid by it as the earnest money together with Rs. 13,920/- @ 18 p.a. till date of suit and with further interest on Rs. 32,000/- @ 18% p.a. from the date of the Suit till the date of redemption thereof until payment at the same rate or at such other rate as this Hon'ble Court may deem fit and proper as per particulars of claim annexed to the Plaint.

(15) Whether the Plaintiff is entitled to receive in lieu of specific performance damages and/or compensation in the sum of Rs. 3 Lakhs as per particulars of claim Exhibit-I.

(16) Whether the Plaintiff is entitled to a declaration that the payment of the amounts mentioned in Exhibit-H and I respectively to the plaint and the costs of the suit be secured by a valid and subsisting statutory charge on the suit property described in Exhibit-A to the Plaint.

(17) Whether the Plaintiff is entitled to enforce the said security and necessary orders be passed for the said purpose.

(18) Whether the Defendants be ordered to pay the costs of the suit. If so, the quantum thereof. -

Issue Nos. (13) to (18) As Per final order.

14. Defendant No. 6 was added as party Defendant after the issues were framed. Defendant No. 6 claims that it has entered into the contract with Defendant Nos. 1 to 5, pending the suit. This is in fact, pending the appointment of Court Receiver. The rights, if any, of the Defendant No. 6 would be subject to the rights under the suit agreement dated 1.11.1979 between the Plaintiff and the original Defendants. Hence, no separate issues have been framed as against Defendant No. 6.

15. The Plaintiff examined one of its partners. The Defendant examined the signatory of the agreement (Defendant No. 1) and another witness. The parties have produced the aforesaid documents being the Agreement dated 1.11.1979 and the correspondence that ensued thereafter. These are the admitted documents. It may at once be mentioned that the agreement being admittedly executed, the parties are governed by what is contained in the agreement and any oral evidence, which is contrary thereto, stands excluded u/s 91 of the Indian Evidence Act. The oral evidence, only to the extent of explaining how the agreement was executed and how the parties actually acted thereunder is relevant.

16. Issue Nos. (1), (2) & (3): The agreement is shown to have been entered into by five persons as vendors. It is, however, shown to be signed and executed by

only two of them. The Suit is filed against all the five vendors (Defendant). Defendant Nos. 1 and 4 have signed the agreement. No cause of action against Defendant Nos. 2, 3 and 5 is, therefore shown. The Suit is not maintainable against Defendant Nos. 2, 3 and 5. Issue Nos. (1), (2) and (3) are, therefore, answered in the affirmative, against Defendant Nos. 2, 3 and 5 and in the negative against Defendant Nos. 1 and 4.

17. Issue No. (4): The Plaintiff has produced the registration certificate of the Plaintiff's firm with the Registrar of Firms in evidence. The entry relating to the registration of the Plaintiff's firms certified by the competent authority under the Partnership Act being the Registrar of Firms. Hence, issue No. (4) is answered in the affirmative.

18. Issue No. (5): The Agreement dated 1.11.1979 was executed when the parties were represented by a common Advocate one Mr. S.R. Singh. Under Clause 3 of the agreement, the Defendant was to deliver the title deeds immediately upon execution to the purchaser's Advocate and render co-operation to enable the purchaser Advocate to investigate the title.

19. It is the Defendant's oral evidence that the title deeds were delivered at the time of the execution of the agreement itself. It is the Plaintiff's case that the title deeds were not sent and title could not be investigated.

20. The Defendant contends that the purchaser Advocate was not known as there was a common Advocate of the parties for execution of the agreement for sale. It would, therefore, be for the Plaintiff to show who was his separate Advocate to whom the title deeds were to be sent for investigation of title.

21. Time was not of essence for delivering the title deeds. Assuming that they were not delivered, the Plaintiff could have called upon the Defendant to deliver the title deeds upon showing who his Advocate was. This is not shown to be done. Since the Plaintiff did not make any requisition on the Defendant's title, it can be accepted that the Defendant did hand over the title deeds to the Plaintiff on the date of the execution of the agreement itself, which was not separately receipted.

22. Under these circumstances, the evidence of the Defendant that the title deeds were given to the Plaintiff at the time of the execution of the agreement is not misplaced and will have to be accepted. Consequently, issue No. (5) is answered in the affirmative.

23. Issue No. (6): Rs. 5,000/- were admittedly paid prior to the execution of the agreement itself. It is receipted on a stamp paper dated 1.2.1979. The earnest amount was Rs. 30,000/-. The receipt clause in the agreement shows receipt of Rs. 20,000/- in cash. The Plaintiff has produced the first receipt on the stamp paper on 1.2.1979 as also another receipt of Rs. 7,000/- dated 4.12.1979. These documents are admittedly executed. The Defendant contends that they received Rs. 20,000/- and Rs. 7,000/-, making a total of Rs. 27,000/-. Rs. 5,000/- are

included in the receipt of Rs. 20,000/-. The Plaintiff contends that it paid Rs. 5,000/- in February 1979, Rs. 20,000/- on 1.11.1979 and Rs. 7,000/- on 4.12.1979, making a total of Rs. 32,000/-. It is true that the agreement does not show the receipt of the total sum of Rs. 20,000/- until that date which would include Rs. 5,000/- paid in February 1979. It shows a receipt of earnest in cash. It shows that Rs. 20,000/- were received on the date of the agreement in cash. A plain reading of the agreement would show, therefore, receipt of the total sum of Rs. 32,000/-. The Defendants have examined the witness to the agreement as DW2. He has deposed that only Rs. 27,000/- were in all received. He has also deposed how Rs. 7,000/- came to be paid for obtaining possession from one of the occupants. His evidence shows how the adjustment of Rs. 5,000/- earlier paid under the receipt executed in February 1979 was made though that aspect has not been stated in the receipt clause of the agreement. Such oral evidence stands excluded by the documentary evidence contained in the receipt clause of the agreement itself. If, therefore, deserves to be rejected. Hence, issue No. (6) is answered in the affirmative.

24. Issue No. (7): Under Clause 14 of the agreement, the Defendant was to obtain the necessary permission u/s 27 of the Urban Land Ceiling Act. Under that clause if the permission was not granted, it was not to be a default on the part of the vendors. The Defendant, therefore, covenanted to apply for the permission. Within 2 months of the grant of the permission, the Plaintiff was required to complete the contract under Clause 2 of the agreement.

25. Neither party has shown the application made before the ULCRA. A reading of Clause 14 would show that the Defendant had to make at least the application to the competent authority under the ULCRA. It is only then that it could be granted or rejected. If it was not granted, the sale would not be completed because the sale had to be completed within 2 months from the grant of the permission unless the parties extended the period of completion of sale by making time of the essence. Time has never been made of the essence by either party. Neither party has given a notice in that behalf.

26. Defendant No. 1 is shown to be the vendor representing and acting on behalf of the other vendors, though each of the owners was required to execute the agreement. Defendant No. 1 was serving in Hyderabad at the relevant time. He had come to Mumbai for negotiations and execution of the agreement with regard to his property. It is his evidence that upon the execution of the agreement he informed the Plaintiff's partner that whatever documents that were required by the Plaintiff, must be got executed by him on that day itself since he had to return to Hyderabad for his duty. Under these circumstances, he has deposed that he had executed the application to be made for permission of the competent authority which was to be obtained u/s 27 of the ULCRA and handed it over to the Plaintiff. He had no copy. He has produced none. Since the suit land was to be transferred to the Plaintiff and the Plaintiff was to develop the property, only the Plaintiff would be interested in keeping a copy of the

application, if any. It is the case of the Defendant that Clause 7 of the agreement was suitably mended. The original document does not show any such amendment. Only a typographical correction is made therein in ink. The clause is to the effect that the Defendant would not be responsible, if the permission u/s 27 of the Urban Land Ceiling Act was not obtained.

27. A judicial notice is required to be taken of the fact that the Defendant/vendors would not be expected to pursue their application for permission of the competent authority once they agree to sell the suit land to the Plaintiff.

28. If the Defendant handed over the application to the Plaintiff, it would be for the Plaintiff to file and pursue the necessary application. The Plaintiff was the purchaser of the suit land with various occupants. The suit land admeasures 681 sq. meters equivalent to about 815 sq. yards. It would otherwise fall within the mischief of ULCRA and require the vacant land to be handed over to the Government. The Defendant would, therefore, be expected only to fill in the relevant forms to be submitted. The Plaintiff would be expected to do the ministerial acts. This is evident from the later part of Clause 14 of the agreement which states that if the permission was not granted, it was not to be considered a default on the part of the vendors. The Defendant is not expected to take the receipt from the Plaintiff of having handed over the returns required to be filed. A reading of Clauses 2 and 14 of the agreement coupled with the fact that the land was fully occupied does show that all that the Defendants were required to do was to make their application for permission upon filing their returns and the Plaintiff would thereafter pursue that application to obtain the permission. If that could not be obtained expeditiously, the parties would extend the time and make time the essence of the contract. Consequently, based upon the oral evidence of the Defendant read with Clauses 2 and 14 of the agreement, it can be seen that the Defendants were not, strictly speaking, to obtain permission for sale from the competent authority under the ULCRA but were to only sign the application in that behalf. Accordingly, issue No. (7) is answered in the affirmative.

29. Issue No. (8): Under Clause 10 of the Agreement, the Defendants declared that there were occupants occupying the suit property. A list of occupants and the rent paid by them was to be furnished by the Defendant to the Plaintiff. It is the Plaintiff's case that the list has not been provided. It is the Defendant's case that it was. There is nothing to show that the list is made out. No list is even furnished to Court or produced in evidence. Hence, the Defendant cannot be taken to have proved that they furnished the list of occupants. Issue No. (8) is, therefore, answered in the negative.

30. Issue Nos. (9) & (10): Clauses 1 and 16 of the agreement show that the suit property agreed to be sold by the Defendant to the Plaintiff is free from all encumbrances. Clause 18 shows that no notice of the government or any authority or any notification has been received by the Defendant. It is, however, an admitted position that the notification of declaration of slum has been issued prior to the execution of the agreement. It is an admitted case that the property

is even at present fully encroached upon.

31. It is the Plaintiff's case that the notification under the Slums Act was suppressed from it. The Plaintiff called upon the Defendant to get the notification cancelled which was not done. Hence, the encumbrance on the suit property has not been removed.

32. A subtle part of the evidence of the Defendant shows that the rent is not collected from any of the occupants. This is the evidence showing the declaration of slum. The Defendant's evidence shows that the Plaintiff was dealing directly with the occupants. However, in view of the declaration that the Defendant land was a slum not such could be done by the Plaintiff. The evidence of Defendant No. 1 shows that Clause 10 relating to the property being occupied by the occupants was amended in view of the notification. The amendment in ink shows that the Plaintiff would be responsible to vacate the occupants. This could not have been done by the Plaintiff simpliciter, if the property was declared a slum. The Plaintiff would have to proceed under the Slums Act. The property would have to be developed by the Slum Redevelopment Authority (SRA). In fact, this addition in ink shows that despite the notification being issued, the Defendant represented to the Plaintiff that the property could be developed by the Plaintiff by vacating the occupants. This would tantamount to a misrepresentation. The Plaintiff would be justified in not making any further payment of the balance consideration upon such a misrepresentation which would make the contract voidable at his option u/s 18 of the Indian Contract Act.

33. The Defendant's evidence that the owners moved an application dated 25.1.1980 (barely 3 months after the execution of the Agreement between the parties) to the Deputy Collector (E & C) under the ULCA to withdraw the declaration of slum and handed it over to the Plaintiff to pursue the matter itself shows the issue of notification earlier which aspect was sought to be corrected and would not undo the consequences of the suppression of the fact of slum and the consequent misrepresentation. In any event, the Defendant's evidence shows that the application was rejected by the Deputy Collector (E & C) on 5.4.1980. Hence, issue Nos. (9) and (10) are answered in the negative.

34. Issue Nos. (11) & (12): The admitted agreement between the parties is not happily worded. It is executed by the parties having a common Advocate. It shows various contradictions in the agreement itself. Clauses 1 and 16 show that the suit land is free from encumbrances. Clause 10 shows that they are occupants occupying the suit property. Clause 18 shows that no notification (which would include a notification under the Slums Act) has been issued. However, the notification was issued prior to the agreement.

35. Defendant No. 1 is shown to be a party who knew the legal repercussions. He acted on behalf of the owners. He handed over the documents of title to the Plaintiff after the execution of the agreement. He handed over the application for permission under the ULCA. He entered into correspondence and the notice of

termination as shall be presently seen. He promptly wrote the letter dated 21.4.1980 a few days prior to the 6-month-period for obtaining the balance consideration. He cannot be taken to be an owner who did not know the factum of the issue of the notification and its aftermath.

36. The notification issued under the Slums Act is indeed an aspect required to be specifically stated by the Defendant. That was not done. It must be taken to have been a fact within the special knowledge of the Defendant. The declaration under Clause 18 was, therefore, wrongly recorded. It would amount to a suppression. It would tantamount to an encumbrance on the property. Consequently, the fact that the suit property was free from all encumbrances, as mentioned in Clauses 1 and 16 of the agreement, is seen to be false as on the date of the agreement.

37. It is seen that soon after the execution of the agreement the Plaintiff came to know that the property as declared a slum and no development could be carried out. In fact, soon after the execution of the Agreement, the Defendant applied to the relevant authority for withdrawal of the notification, which came to be rejected. The entire contract between the parties was frustrated by the suppression of the Defendant. It is under these circumstances that the Defendant's own termination of the Agreement, is required to be appreciated.

38. The Plaintiff contends that the termination or cancellation of the agreement between the parties is illegal and not binding on the Plaintiff. Of course, the Plaintiff has not acted upon the agreement at all. The Plaintiff has not made payment of the balance consideration. The Plaintiff has not sought to vacate any of the occupants. In view of the notification under the Slums Act, no occupants could be vacated. The permission of the competent authority also would be of no use to the Plaintiff. Consequently, in view of the suppression of the notification of declaration of slum in respect of the suit property and upon strict interpretation of the agreement, the Plaintiff cannot be seen to have committed any default including payment of consideration which would entitle the Defendant to rescind the agreement.

39. It is the Defendant's case that the suit property was sold on as is where is basis. that is not borne out by the agreement at all. The clauses of the agreement more specially Clauses 10 and 14 do not point to that aspect. In view of the suppression of the declaration of slum and not even mentioning how many occupants were occupying the suit property in Clause 10, this argument would be required to be rejected.

40. Hence, the agreement between the parties must be taken to be subsisting.

41. The termination of the agreement by party, who is guilty of suppression and by the party who has frustrated the entire contract by such act cannot be countenanced. Hence, the purported cancellation of the agreement is illegal and the agreement remains valid and subsisting between the parties. Consequently, issue Nos. (11) and (12) are answered in the affirmative.

42. Issue Nos. (13) to (18): These issues relates to the reliefs, if any, to be granted to the Plaintiff. The Plaintiff has sued for specific performance of the agreement. The Plaintiff has made the usual averment of readiness and willingness to perform its part of the agreement. The Plaintiff has not performed the main part of the agreement which was the payment of consideration. This was on the premise that the permission under the Urban Land Ceiling Act was not obtained by the Defendant which was the obligation of the Defendant and could not be obtained even by the Plaintiff since the suit property was declared a slum. It must be appreciated that since the property was declared a slum and that fact was not made known to the Plaintiff, it cannot be completely faulted for not proceeding or not being able to proceed with the development of the property. In fact, no such permission could have been granted by the competent authority under the Urban Land Ceiling Act for a property which was declared a slum. Consequently, the Plaintiff's case that the obligation to make payment of consideration did not come up cannot be fully rejected. The Plaintiff lost interest in the transaction soon after the execution of the agreement.

43. This is, therefore, a case where both the parties have not acted upon the agreement in its true spirit. The Defendant cannot be paid balance consideration. However, the Plaintiff's suit is for the discretionary relief of specific performance. The Plaintiff must show its continued readiness and willingness to perform its obligations under the contract at all material times from the time of the execution of the agreement until the filing of the suit and thereafter as held in the case of His Holiness Acharya Swami Ganesh Dassji Vs. Shri Sita Ram Thapar, . In that case the vendor sent the draft sale-deed which under the agreement was required to be finalised within 7 days and registered. The purchaser did not approve the draft sale-deed immediately, did not give any reply, did not have necessary cash for payment and did not offer cash. His conduct so scrutinised was held inconsistent with his averment of readiness and willingness in accordance with the terms of the contract.

44. In the case of Pushparani S. Sundaram and Others Vs. Pauline Manomani James (Deceased) and Others, , it was held that mere filing the Suit and taking the plea that the Plaintiff was ready and willing to perform the contract is not sufficient where he had not sent any communication or notice regarding his readiness and willingness, paid only an insignificant amount as advance, not obtained the permission of the ULC Authorities, not taken any steps to ascertain the valuation of the structure as required under the Agreement for sale, etc. It was observed in Para-5 of that judgment that what is required is not a plea but a proof of the same u/s 16(c) of the Act. In that case, the only circumstance relied upon by the Plaintiff was tendering the amount of Rs. 5,000/- after the Agreement for sale was entered. It was observed that Such small feeder to the vendor is quite often made to keep a vendor in good spirit. The mount was observed to be insignificantly short of the balance amount and is too weak filament to stand even to build an image of readiness and willingness.

45. The Agreement dated 1.11.1979 is not even executed by all the vendors. All of them cannot be directed to act upon the Agreement.

46. This is, therefore, not a case for grant of the relief of specific performance. However, it is seen that the part payment by way of earnest made by the Plaintiff has been forfeited by the Defendant, though the suit property could not be developed and the very substratum for the agreement was gone in view of the declaration of the suit property as a slum. The Plaintiff is, therefore, entitled to the return of the earnest paid as well as the further amount paid to the Defendant with interest thereon.

47. The Plaintiff claims to have paid Rs. 32,000/-. The Defendant claims that only Rs. 27,000/- were paid. Rs. 20,000/- is the earnest amount. Rs. 7,000/- is stated to be paid for obtaining possession from an occupant. Rs. 5,000/- was paid prior to the agreement being executed. There is nothing in the agreement to show that that amount was adjusted in the receipt clause of the agreement. The receipt clause shows Rs. 20,000/- paid in cash as earnest on the date of the agreement itself. It makes no reference to an earlier payment which has been separately receipted under the writing admittedly executed on a stamp paper by the Defendant. The Plaintiff is, therefore, entitled to be returned all the amounts paid and duly receipted and/or admitted by the Defendant. The total of this amount is Rs. 32,000/-. It must be returned with interest as claimed. However, the Agreement dated 1.11.1979 is signed only by Defendant Nos. 1 to 4. The amount shall have to be repaid by Defendant Nos. 1 and 4.

48. Hence, the following order:

ORDER

i) Prayers (a), (b), (c) and (c) (i) are refused.

ii) The Suit is decreed in terms of the alternative prayer (d) (i).

iii) Prayers (d) (ii), (iii), (iv), (v) and (vi) are also refused.

iv) Defendant Nos. 1 and 4 shall pay the Plaintiff Rs. 49,920/- with interest on the principal sum of Rs. 32,000/- paid by the Plaintiff to the Defendant at the rate of 18% per annum thereon from the date of payment till this date and from the date of this judgment at the rate of 10% per annum until payment/realization.

v) There shall be no order as to costs.