
(2011) 01 DEL CK 0027
In the Delhi High Court
Case No : CS (OS) No. 705 of 1994

Boots Pharmaceuticals Ltd.	Vs	APPELLANT
Rajinder Mohindra and Another		RESPONDENT

Date of Decision : 17-01-2011

Acts Referred:

Income Tax Act, 1961 — Section 230, 269(1)

Citation : (2011) 177 DLT 260 : (2011) 123 DRJ 202 : (2011) 2 ILR Delhi 507

Hon'ble Judges : Manmohan Singh, J

Bench : Single Bench

Advocate : Neeraj Kishan Kaul, Darpan Wadhva, R.N. Karanjawala, Akhil Sachar, Simran Brar and Abhishek Roy, for the Appellant; S. Vaidialingam, for the Respondent

Final Decision : Dismissed

Judgement

Manmohan Singh, J.—The present suit has been filed by the plaintiff for specific performance of Agreement to sell dated 20.11.1989 executed between the plaintiff and the defendants. The prayers sought in the present suit are as under:

a) Pass a decree for specific performance of the Agreement dated 20th November, 1989 in relation to property No. E/44-10, Okhla Industrial Area, Phase II, New Delhi-110020 in favour of the Plaintiff, directing the Defendant Nos. 1 and 2, their servants, agents successors and assignees to sell, transfer assign and convey the property to the Plaintiff;

b) alternatively pass a decree for recovery of Rs. 23 lakhs against the Defendant Nos. 1 and 2 in case this Hon"ble Court

comes to the conclusion that the Plaintiff is not entitled to specific performance;

c) award cost of the suit; and

d) pass such other and further decree as this Hon"ble Court may deem fit and proper in the facts and circumstances of the case.

2. The brief facts leading up to the filing of this suit are that the Plaintiff company was a lessee of property No. E-44/10 Okhla Industrial Area (Phase I), New Delhi - 110020 measuring approximately 501.67 square meters (hereinafter referred to as the "demised premises") and the Defendants were owners thereof, having purchased the demised premises at a bid. The lease deed dated 08.04.1986 between the parties was for a period of five years, initially renewable by the lessee for two successive periods of five years at an enhanced rate each time of 25% and thereafter on mutually agreeable terms.

3. The thrust of the plaint is that when the demised premises were bought the Defendants were Indian citizens but by virtue of staying abroad for very long, they both acquired the citizenship of the United States of America. At this juncture, the Defendants were directed by the Reserve Bank of India to dispose of the demised premises as the policy as it stood then did not allow foreign nationals of Indian origin to own/hold any commercial property for investment purposes like earning rental income etc.

4. Being unable to find any buyers for the demised premises, the Defendants approached the Plaintiff and after negotiations and discussion it was agreed that the said premises would be sold to the Plaintiff for a total sale consideration of Rs. 23 lac and agreement to sell dated 20.11.1989 was executed between the parties. Various permissions were to be obtained by the parties from different departments and authorities including the Appropriate Authority under Chapter XX-C of the Income Tax Act, 1961, DDA and the RBI for enforcement of the agreement to sell.

5. The above-said Appropriate Authority i.e the Income Tax Department by order dated 19.01.1990 decided to acquire the property stating that under Sub-section (1) of Section 269UE the right over property vests in the Central Government from 19.01.1990 which was challenged by the Plaintiff before this Court in WP (C) No. 310/1990. The order of acquisition was set aside by the Court and thereafter the appropriate authority granted the "no objection" certificate permitting the Defendants to sell the demised premises.

6. The Plaintiff was informed in June, 1993 that the necessary approvals have been granted vide RBI's letter dated 10.05.1993. The Plaintiff thereafter sent the amount of Rs. 3 lac vide demand draft No. 298670 dated 08.06.1993 along with letter dated 09.06.1993 to the Defendants.

7. Admittedly, the approval of the DDA was not granted to the Defendants and they were not interested to go ahead with the agreement as pointed out by the Plaintiff in its letter dated 04.12.1993. However, the Defendants rescinded the agreement dated 20.11.1989 through their letter dated 28.12.1993 stating that they were using the option given to them in Clause 6 of the said agreement as the RBI had granted permission to NRI's to retain/hold property in India and the Defendants did not wish to enforce the agreement to sell in view of the same. The bank draft of Rs. 3 lac was returned to the Plaintiff. The present suit was

filed on 24.03.1994.

8. The suit was listed before court on 25.03.1994 when this Court directed the parties to maintain status quo with regard to the possession as well as the title of the demised premises. The Plaintiff was also directed to continue paying rent to the Defendants. This interim order of the Court was made absolute on 27.11.1997.

9. The written statement was filed by the Defendants taking many defences inter alia that the Plaintiff's suit was barred being contrary to the public policy of the Government of India which had clearly permitted non-resident Indians to hold, acquire and dispose of Immovable property in India. It was further stated that the agreement dated 20.11.1989 was entered into under great pressure and fear of prosecution under the Foreign Exchange and Regulation Act, 1973 (in short =FERA'') and was an act of taking advantage on the Plaintiff's part, amounting to coercion and undue influence.

10. As per the Defendants, the demised premises were admittedly bought by their father at a bid on 26.05.1972 in the name of the Defendants i.e. his sons and at this time both Defendants held Indian passports. Defendant No. 1 left for the United States of America in 1967 to pursue studies. Defendant Nos. 1 and 2 became Unites States'' citizens in February, 1976 and March, 1984 respectively by which time FERA, 1973 had come into force, being notified in the Official Gazette on 20.09.1973.

11. The lease deed dated 08.04.1986 has been admitted by the Defendants. However, the Defendants raised doubt as to whether the said lease deed was permissible under the perpetual lease deed drawn by the DDA in favour of the Defendants as the Plaintiff was using the demised premises for the purposes of manufacturing medicines.

12. It is admitted by the Defendants that they had made an application dated 04.04.1987 to the RBI seeking information whether they could continue to hold the demised premises in India despite acquiring US citizenship as law abiding persons although Section 31(1) of FERA prohibited foreign nationals from owning/ holding property in India without the RBI's permission.

13. The Defendants'' application was disallowed and Reserve Bank of India (in short RBI) stated that it would prosecute the Defendants under the provisions of FERA if the demised premises were not sold to an Indian National Resident. Thus the Defendants'' General Attorney i.e. their mother started looking for prospective buyers. However, there were few prospective buyers and as per Defendants even these were dissuaded by the Plaintiff's officials on misrepresented/fabricated stories about the Plaintiff having a permanent lease in its favour etc., but the suit property was agreed to be sold to the Plaintiff vide agreement dated 20.11.1989. According to the Defendants, the said document included Clause 6 which was specially incorporated into the agreement to sell so that the Defendants had an option to withdraw from the agreement at any stage

with the only liability of refunding the amount received by them from the Plaintiff. On the date of execution of agreement, admittedly no earnest or advance amount was received by the Defendants from the Plaintiff.

14. The Defendants have averred in the written statement that the reason for rescinding the agreement was that the RBI, by a Notification dated 26.05.1993 granted permission to foreign citizens of Indian origin to hold/acquire Immovable properties in India provided the entire purchase consideration is paid out of foreign exchange brought into India through normal banking channels or out of funds held in Non-Resident (External) Rupee Account or Foreign Currency Non-Resident Account maintained by purchaser in India.

15. In the replication, it was contended by the Plaintiff that the notification of the RBI was a general permission and the Plaintiff enquired of the RBI in letter dated 28.07.1994 whether under the said policy the Defendants were generally or specifically allowed to retain or hold the demised premises. In reply the RBI conveyed to the Plaintiff through its letter dated 03.10.1994 that the notification was vis-à-vis acquisition of Indian property by a foreign citizen of Indian origin after the date of the notification and the same had no retrospective effect. The Defendants being Indian citizens when the demised premises were bought and sale consideration for the same not having been paid out of foreign exchange, the situation as far as the Defendants were concerned had not changed and they were still obliged to dispose of the premises.

16. The Plaintiff has also alleged that the lease deed between the parties dated 08.04.1986 was duly registered on the same date with the Sub-Registrar of Assurances under Sr. No. 562 at Asaf Ali Road, New Delhi and was renewed from time to time under the provisions of the perpetual lease in favour of the Defendants.

17. It is averred by the Plaintiff in its replication that the sale of the demised premises by way of agreement was voluntary and without any coercion/influence at the prevalent market rate at that time. The return of the earnest money amounting to Rs. 3 lac is admitted by the Plaintiff.

18. The following Issues were framed vide order dated 22.04.1999:

1. Whether the Defendants were coerced to execute the agreement of sale dated 29th November, 1989?
2. Whether the Plaintiff has been and is willing and ready to perform his part of the contract?
3. Whether the Defendants rescinded the contract in terms of the agreement dated 20.11.1989?
4. Whether the contract stood frustrated on the grounds stated in the written statement?
5. Whether the suit is barred by time?

6. Relief and costs.

19. The parties were directed to file their list of witnesses and evidences. An affidavit Ex. PW1/A was filed by way of evidence in lieu of examination-in-chief on behalf of the Plaintiff by Mr. N. Gopal Krishnan (PW-1), Depot Manager of the Plaintiff company. The affidavit reiterated the statement made in the plaint. On behalf of the Defendants an affidavit Ex.DW1/A in evidence of Mr. Ranvir Mohindra (DW-1) was filed and then he was called for further examinations on various dates. During the pendency of the Suit, the name of the Plaintiff was changed to Abbot India Ltd. Copy of fresh certificate of incorporation dated 01.07.2002 was produced and necessary order dated 07.03.2005 was passed in I.A. No. 1813/2005.

20. Firstly this Court inclines to decide the issue No. 5 of limitation which had been framed at the instance of the Defendants. Issue No. 5 Whether the suit is barred by time?

21. The agreement Ex DW1/38 is dated 20.11.1989. The suit was filed on / about 20.03.1994. Admittedly, no date for performance was fixed in the agreement. As per Defendants the limitation has to be reckoned from the date when the Plaintiff had notice that specific performance is refused. The Defendants on this issue have referred the statement in para 7 and para 15 of the written statement in the following terms: ?

7. The suit is clearly barred by limitation having been filed on or about 24th March 1994, seeking specific performance of an alleged agreement dated 20th November, 1989.

15. The contents of paragraph 15 are incorrect and denied. The suit is hopelessly barred by time.

22. The submission of the Defendants is that the relevant date for commencement of limitation is 05.07.1990 (when the Defendants who were Respondents 6 & 7 in CWP 310/1990 of the Plaintiff against the decision of the Income Tax Appropriate Authority (AA) filed/served copy of their counter affidavit on the Petitioner/Plaintiff (Ex DW 1/60). In the counter affidavit, the Defendants had put the Plaintiff on notice and made him aware that specific performance was refused and not being agreed to and questioned the validity/enforceability of the agreement, thereby resulting in commencement of the period of limitation. The suit filed beyond 3 years thereafter i.e. on 24.03.1994 is barred by time.

23. In support of his submission learned Counsel for the Defendants has referred the two cases:

(i) In the case titled as Gunwantbhai Mulchand Shah and Others Vs. Anton Elis Farel and Others, the Hon"ble Supreme Court held that the Court has to determine the date of notice of refusal and see whether the suit is filed within 3 years of such date.

(ii) In the case titled as Ahmadasahab Abdul Mulla (D) by proposed LRs. Vs. Bibijan and Others, the Hon"ble Supreme Court held that the word date" in Article 54 is suggestive of a definite date for both parts thereof.

24. The submission of the Plaintiff is that the relevant date for refusal is 28.12.1993 (Ex DW 1/37) and not 05.07.1990 when the counter affidavit was served.

The Plaintiff has referred to the Defendants" letter dated 28.12.1993 addressed to the Plaintiff. The relevant extracts are reproduced below-:

We are hereby exercising the option given to us to treat the agreement as closed and inoperative, under Clause 6 of the said agreement You are also informed that even otherwise the said Clause (6) of the agreement has taken effect. That apart, even your letter dated 4.12.93 confirms that Clause (6) is liable to take effect.

It may also be noted that the said agreement was entered into apparently pursuant to an order of the Reserve Bank of India and was subject to Reserve Bank approvals/decisions. Subsequently, with effect from 26.5.93 the Reserve Bank has granted permission for retention of the subject property. Accordingly, the agreement has also been rendered non-est by the Reserve Bank decision as follows:

The Bank Draft No, 298670 dated 8.6.93 on ANZ Grindlays Bank, PLO for Rs 3 lakhs sent by you is returned herewith. You are kindly requested to acknowledge.

25. It is necessary to refer the cross-examination of DW-1 recorded on 19.11.2008 wherein the Defendants were unable to prove their case that the relevant date of refusal of specific performance is 05.07.1990 and not 28.12.1993 when the Defendants issued letter to the Plaintiff by rescinding the agreement and returned back the bank draft dated 08.06.1993 amounting to Rs. 3 lacs. The relevant portion of the cross-examination of DW-1 who is Defendant No. 2 in the matter is reproduced as under:

Q. I put to you that the appropriate authority of income tax department after the directions were passed by the Hon"ble High Court of Delhi in Writ Petition 310/1990 on 22.2.1993, examined the matter and gave permission for the sale of the property to the Plaintiff. What have you to say?

Q. How many months prior to passing of the order did you decided to exit from the agreement?

Ans. The decision was not made on any single day but over a period of time in 1993. There is a letter on record from us in late 1993 advising Boots of this decision.

Q. The order was passed in February 1993 and you have stated in the earlier question that by that time you had decided to exit the agreement. My question is how many months prior to February 1993 did you decide to exit the agreement?

Ans. I do not remember as to how many months prior to February 1993 we had taken the said decision. It was some time during the 36 months between 1990 and 1993.

26. The period of limitation for filing a suit for specific performance of contract as provided under Article 54 of the Limitation Act, 1963 is three years which is to be calculated from the date fixed for the performance, or, if no such date is fixed, it would be the date when the Plaintiff has noticed that performance is refused. So far as the present ?Agreement to Sell? is concerned, no date was fixed for performance.

27. In Ahmmadsahab Abdul Milla (dead) by proposed Lrs. Vs. Bibijan and Others, , in a reference made to a three-judge bench whether the use of the expression "date" used in Article 54 of the Schedule to the Limitation Act 1963 is suggestive of a specific date in the calendar in the affirmative, the Supreme Court at Para 11 and 12 of the reference has observed the following-:

11. The inevitable conclusion is that the expression "date fixed for the performance" is a crystallized notion. This is clear from the fact that the second part "time from which period begins to run" refers to a case where no such date is fixed. To put it differently, when date is fixed it means that there is a definite date fixed for doing a particular act. Even in the second part the stress is on when the Plaintiff has notice that performance is refused here again, there is a definite point of time, when the Plaintiff notices the refusal. In that sense both the parts refer to definite dates. So, there is no question of finding out an intention from other circumstances". 12. Whether the date was fixed or not the Plaintiff had noticed that performance is refused and the date thereof are to be established with reference to materials and evidence to be brought on record. The expression "date" used in Article 54 of the Schedule to the Act definitely is suggestive of a specified date in the calendar.

28. In the instant case, no doubt, the Defendants in their counter affidavit filed in W.P.(C) No. 310/1990 has specifically stated that the agreement was contingent agreement and was entered into under mistaken belief and under the fear of FERA, however it was also stated that the Defendants were obliged to obtain various approvals. In reply to the interim application being C.M. No. 419/1990, the Defendants had prayed that the status quo order already granted be maintained till the decision of the writ petition. The writ petition was disposed of on 22.02.1993. Thus, it is clear that till the disposal of the petition, the Defendants consent for continuation of interim order was there. Thus, the later part of Article 54 shall govern the period of limitation. The suit was filed on 24.03.1994 and the same is on the face of it within the period of limitation. Issue No. 5 is accordingly decided in favour of the Plaintiff and against the Defendants. Issue No. 1 Whether the Defendants were coerced to execute the agreement to sell dated 20.11.1989?

29. The onus of proof of issue No. 1 is on the Defendants. The Defendants in

para 4, of written statement alleged that the suit is based upon documents and actions that were undertaken by the Defendants through their mother and General Attorney under fear of prosecution under the provisions of Foreign Exchange Regulation Act 1973 (FERA). The Defendants have contended that the transaction was done under immense pressure and fear and the Plaintiff had taken advantage of it. There was also pressure from the officials of the Plaintiff to sell the property to the Plaintiff. The stringent and statutory provisions of FERA amounted to coercion and undue influence and under pressure from the Plaintiff, the transaction was done by the Defendants.

30. The Plaintiff on the other hand denied the argument of the Defendants and has referred following documents in support of its submissions:

(i) Letter dated 29.10.1988 (Ex. PW-1/D5) on behalf of the Defendants to the Plaintiff clearly states that they had given priority to the Plaintiff with respect to the sale of the property. The Defendants had also stated that they would not consider any other offer and were looking forward to hear from Plaintiff with respect to the transaction.

(ii) Defendants have in the letter dated 02.02.1989 (Ex. DW1/42) addressed to the Plaintiff further averred that the sale transaction was pending since October 1988 and they would like to finalize it without further delay.

(iii) The Defendants in their letter dated 01.03.1989 (Ex. DW1/43) addressed to the Plaintiff have further averred that three year period allowed by DDA to sub-let the property was about to expire on 31.03.1989 and it was in the mutual interest of both the parties to commence negotiations early so as to finalize the sale of the property before that date. This in fact showed that the Defendants were trying to unduly use an incorrect interpretation of the DDA permission, which only gave the fees payable to it for three years. this permission did not affect or limit the lease in any way. After the three year period, the fresh fee schedule, if any, was to be applied by the DDA. This did not meant that the valid and registered lease of the Plaintiff was shortened to three years as was being unfairly urged by the Defendants to pressurize the Plaintiff into purchasing the property soon.

(iv) In its letter dated 25.03.1989 (Ex. DW1/44) addressed to the Plaintiff, the Defendants have stated that in view of the Plaintiff's interest in buying the property, the Defendants were not giving consideration to any other offers.

(v) The Defendants have also in their letter dated 25.03.1989 (Ex. DW1/45) addressed to the Plaintiff reiterated the fact that it was in the mutual interest of both the parties to finalize the sale of the property without any further delay.

(vi) The Defendants have in their letter dated 30.03.1989 (DW1/46) addressed to the Plaintiff again reiterated the fact that it was imperative for both the parties to finalize as soon as possible the sale of the suit property.

31. It is a settled law that there should be clear pleadings pertaining to coercion

and fraud and it must be specifically pleaded i.e. the names, date, time, etc. so that the party who is required to answer, must have the full details. The plea of the Defendants that their mother was feeling the pressure of FERA was without any substance in view of the correspondence exchanged between the parties after execution of the agreement, even the mother was never brought in as a witness. The general allegations are insufficient about an averment of fraud unless specific allegations are made against a particular person.

32. In the instant case, in his cross-examination DW-1 was not able to prove the case of the Defendants on the issue of coercion. The details of few answers given by DW-1 in his cross examination are referred as under:

Q. I put to you that your assertion that there was any duress is absolutely false. Can you tell me that if there was any truth in the said assertion why was a letter dated 2.12.1998 i.e. Ex. DW1/41, letter dated 2.2.1989 i.e. Ex. DW1/42, Ex. DW 1/43 i.e. letter dated 1.3.1989, Ex. DW1/45 i.e. letter dated 25.3.1989, Ex. DW 1/46 i.e. letter dated 30.3.1989 written by the Defendants. What have you to say?

Ans. I do not need to see the letters. All these letters are dated after we got the order from the Reserve Bank of India and the learned Counsel is welcome to check the dates of the order from the Reserve Bank of India.

Q. You have stated that you were under duress and as such Boots knew that you would be forced to cooperate with them. Was there any pressure being exerted on you by Boots doing the proceedings before the Hon'ble High Court of Delhi whereby Boots had challenged the acquisition of the property by the appropriate authority ?

Ans. Yes, there was a pressure on me.

33. In *Ladli Prasad Jaiswal Vs. Karnal Distillery Co. Ltd. and Others*, , the Supreme Court has observed that:

O.6 r.4 of the CPC provides that in all cases in which the party pleading relies on any misrepresentation, fraud breach of trust, willful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms in the Appendix particulars (with dates and items if necessary) shall be stated in the pleading. The reason of the rule is obvious. A plea that a transaction is vitiated because of undue influence of the other party thereto, gives notice merely that one or more of a variety of insidious forms of influence were brought to bear upon the party pleading undue influence, and by exercising such influence, an unfair advantage was obtained over him by the other. But the object of a pleading is to bring the parties to trial by concentrating their attention on the matter in dispute, so as to narrow the controversy to precise issues, and to give notice to the parties of the nature of testimony required on either side in support of their respective cases. A vague or general plea can never serve this purpose; the party pleading must therefore be required

to plead the precise nature of the influence exercised, the manner of use of the influence, and the unfair advantage obtained by the other. This rule has been evolved with a view to narrow the issue and protect the party charged with improper conduct from being taken by surprise. A plea of undue influence must, to serve that dual purpose, be precise and all necessary particulars in support of the plea must be embodied in the pleading: if the particulars stated in the pleading are not sufficient and specific the Court should, before proceeding with the trial of the suit, insist upon the particulars, which give adequate notice to the other side of the case intended to be set up.

34. In *Andhra Sugars Ltd. and Another etc. Vs. State of Andhra Pradesh and Others*, , the Supreme Court has observed that the Compulsion of Law is not coercion as defined in Section 15 of the Contract Act, 1872.

35. In *Siddheshwar Sahakari Sakhar Karkhana Ltd. Vs. Commissioner of Income Tax , Kolhapur and Others*, , the Supreme Court observed that: ?

The mere fact that the contract has to be entered into in conformity with and subject to restrictions imposed by law does not per se impinge on the consensual element in the contract. Compulsion of law is not coercion and despite such compulsion in the eyes of law the agreement is freely made

36. In view of the aforesaid settled law and correspondence exchanged between the parties prior to and after the execution of an agreement to sell it appears to the court that the plea of the Defendants is without any force, even otherwise, it is settled law that ?compulsion of law cannot amount to coercion?. Thus, Issue No. 1 is decided against the Defendants.

37. I shall now take up issue No. 2 for consideration. Issue No. 2 2. Whether the Plaintiff has been and is willing and ready to perform his part of the contract?

38. On issue No. 2, it is submitted by the Defendants that the Plaintiff has not only failed to aver but also failed to prove the readiness and willingness as per Section 16(c) read with Expl. (i) & (ii) of the Specific Relief Act, 1963.

39. In support of his submissions, the learned Counsel for the Defendants has referred the following decision:

i) In *Abdul Khader Rowther Vs. P.K. Sara Bai and Others*, , the Supreme Court while relying on *Ouseph Varghese Vs. Joseph Aley and Others*, held that a plaint in a suit for specific performance has to conform to the requirements of Forms 47 and 48 Schedule I CPC and that a Plaintiff has to aver that he has applied to the Defendant to perform the agreement and that the Defendant has not done so as also that he has been and is still ready and willing to perform his part.

ii) In *Pukhraj D. Jain and Others Vs. G. Gopalakrishna*, , it was held that apart from the averment in the plaint the surrounding circumstances must also indicate that the readiness & willingness continue from the date of the contract till the hearing of the suit. It was held as settled law that the equitable remedy of

specific performance cannot be had on the basis of pleadings which do not contain averments of readiness and willingness to perform his contract in terms of said Forms 47 and 48.

iii) In *Umabai and Another Vs. Nilkanth Dhondiba Chavan (Dead) by Lrs. and Another*, , it was held a bare averment in the plaint or a statement made in the examination-in-chief would not suffice

and the entire attending circumstances must be given regard for determining whether the Plaintiff was all along and still are ready and willing to perform their part of the contract. It was further held that in terms of Forms 47 and 48 of Appendix A to the Code, the Plaintiff must plead that 'he has been and still is ready and willing specifically to perform the agreement on his part of which the Defendant has had notice' or 'the Plaintiff is still ready and willing to pay the purchase money of the said property to the Defendant.

iv) In *Manjunath Anandappa Urf. Shivappa Hanasi Vs. Tammanasa and Others*, , the Supreme Court considered even categorical statements in evidence as not amounting to compliance with Section 16(c) as it was incumbent on the Plaintiff both to aver and prove that he had all along been ready and willing to perform.

v) In *Syed Dastagir Vs. T.R. Gopalakrishnasetty*, , the Supreme Court construed a plea of readiness and willingness to sub serve to the requirement of Section 16(c) of the Specific Relief Act. 1963 and the interpretation of its Explanation and it was held that Explanation (i) does not mean that unless the court directs the Plaintiff cannot tender the amount to the Defendant or deposit in Court. It was held that the Plaintiff can always tender the amount to the Defendant or deposit into court towards performance of its obligation and that

such tender exhibits the willingness of the Plaintiff to perform his part of the obligation. This view was reaffirmed in *Manjunath Anandappa v. Tammanasa* (supra) and in other following cases:

a) *Bal Krishna and Another Vs. Bhagwan Das (Dead) and Others*, .

b) *Inderchand Jain (D) through L.Rs. Vs. Motilal (D) through L.Rs.*, .

c) *Pushparani S. Sundaram and Others Vs. Pauline Manomani James (Deceased) and Others*, .

40. The case of the Plaintiff is that the Plaintiff has always been ready and willing to perform its part of agreement and is awaiting conveyance / assignment in its favour with respect to the suit property. It is stated that the averments about the readiness and willingness are specifically mentioned in para 14 of the plaint which have been evasively denied by the Defendants in their written statement. The overall conduct of the Plaintiff shows that the Plaintiff has been and shall continue to be willing and ready to perform its part of the contract.

41. In order to determine as to whether the Plaintiff was ready and willing to perform its part of the contract, the sequence in which the obligation under the

contract are to be performed are required to be taken into consideration. While examining the requirement of Section 16(c), the Supreme Court in *Syed Dastagir Vs. T.R. Gopalakrishnasetty*, held as follows:

So the whole gamut of issue raised is, how to construe a plea specially with reference to Section 16(c) and what are the obligations which the Plaintiff has to comply with reference to his plea and whether the plea of the Plaintiff could not be construed to conform to the requirement of the aforesaid Section, or does this section require specific words to be pleaded that he has performed or has always been ready and is willing to perform his part of the contract. In construing a plea in any pleading, Courts must keep in mind that a plea is not an expression of art and science but an expression through words to place fact and law of one's case for a relief. Such an expression may be pointed, precise, some times vague but still could be gathered what he wants to convey through only by reading the whole pleading, depends on the person drafting a plea. In India most of the pleas are drafted by counsels hence aforesaid difference of pleas which inevitably differ from one to other. Thus, to gather true spirit behind a plea it should be read as a whole. This does not distract one from performing his obligations as required under a statute. But to test, whether he has performed his obligations one has to see the pith and substance of a plea. Where a statute requires any fact to be pleaded then that has to be pleaded may be in any form. Same plea may be stated by different persons through different words then how could it be constricted to be only in any particular nomenclature or word. Unless statute specifically require for a plea to be in any particular form, it can be in any form. No specific phraseology or language is required to take such a plea. The language in Section 16(c) does not require any specific phraseology but only that the Plaintiff must aver that he has performed or has always been and is willing to perform his part of the contract. So the compliance of "Readiness and willingness" has to be in spirit and substance and not in letter and form. So to insist for mechanical production of the exact words of an statute is to insist for the form rather than essence. So absence of form cannot dissolve an essence if already pleaded

Again in *Motilal Jain Vs. Smt. Ramdasi Devi and Others*, , it was held:

The other contention which found favour with the High Court, is that plaintiff averments do not show that the Plaintiff was ready and willing to perform his part of the contract and at any rate there is no evidence on record to prove it. Mr. Choudhary developed that contention placing reliance on the decision in *Ouseph Varghese Vs. Joseph Aley and Others*, . In that case, the Plaintiff pleaded an oral contract for sale of the suit property. The Defendant denied the alleged oral agreement and pleaded a different agreement in regard to which the Plaintiff neither amended his plaint nor filed subsequent pleading and it was in that context that this Court pointed out that the pleading in specific performance should conform to Forms 47 and 48 of the First Schedule of the Code of Civil Procedure. That view was followed in *Abdul Khader Rowther Vs. P.K. Sara Bai and*

Others, .

It was further held in Motilal Jain (supra)

9. That decision was relied upon by a three-Judge Bench of this Court in Syed Dastagir case wherein it was held that in construing a plea in any pleading, Courts must keep in mind that a plea is not an expression of art and science but an expression through words to place fact and law of one's case for a relief. It is pointed out that in India most of the pleas are drafted by Counsel and hence they inevitably differ from one to the other; thus, to gather the true spirit behind a plea it should be read as a whole and to test whether the Plaintiff has performed his obligations, one has to see the pith and substance of the plea. It was observed- "Unless a statute specifically requires a plea to be in any particular form, it can be in any form. No specific phraseology or language is required to take such a plea. The language in Section 16(c) of the Specific Relief Act, 1963 does not require any specific phraseology but only that the Plaintiff must aver that he has performed or has always been and is willing to perform his part of the contract. So the compliance of "readiness and willingness" has to be in spirit and substance and not in letter and form."

42. Readiness and willingness cannot be treated as a Strait-jacket formula and that had to be determined from the facts and circumstances which are relevant to the intention and conduct of the parties concerned and upon a consideration of the entire material placed before the court.

43. The burden of issue No. 2, no doubt, was upon the Plaintiff who has given the following reasons in order to satisfy the condition of Section 16(c) of the Act:

a) In pursuance of the agreement to sell, a joint application was moved by the Plaintiff and the Defendants for permission from the Appropriate Authority under Chapter XX-C of the Income Tax Act, 1961. The filing of joint application proves the fact that the Plaintiff was ready and willing to perform its part of the contract.

b) The Appropriate authority decided to acquire the suit property vide its order dated 19.1.90 (exhibit DW-I/53). The Plaintiff challenged the acquisition order by filing a Civil Writ Petition No. 310/1990. The said Writ Petition was pursued by the Plaintiff and the order of acquisition was set aside by this Court by order dated 22.2.1993 and the matter was referred back to the Appropriate Authority who vide its order dated 24.03.93 (exhibit DW-1/57) granted the No Objection Certificate to the Defendants.

c) The Plaintiff's readiness and willingness to perform its part of the contract could be further substantiated by the fact that it forwarded a sum of Rs. 3 lakhs (Vide DD No. 298670 dt. 8.6.93) as earnest money. This fact has been admitted by the Defendants at Para 8, of their Written Statement. The Plaintiff had also written various letters to the DDA requesting it to grant permission to Defendants to sell/ transfer/assign the suit property at the earliest.

d) The fact that the Plaintiff has been ready and willing to perform its part of the

agreement has been admitted by the Defendants in their cross examination dated 24.02.09 where DW-1 has admitted the fact.

44. In paras 8 and 9 of the plaint, it is averred by the Plaintiff that after obtaining the necessary permission from the Appropriate Authority, the matter was pursued by the Plaintiff with Reserve Bank of India who informed that the Defendants have been granted permission for sale of the said property vide their letter dated 10.05.2003. Upon coming to know this the Plaintiff by its letter dated 09.06.1993 forwarded a sum of Rs. 3 lac to the Defendants as earnest money in terms of the agreement to sell. The Defendants were making an excuse to resile from their obligation by not pursuing the matter with the DDA for getting the approval despite of reminders issued by the Plaintiff. The Defendants rather by their letter dated 28.12.1993 exercised their option under Clause 6 of the said agreement to treat the agreement as closed and inoperative.

45. The Defendants in their written statement have denied para 14 of the plaint and have also denied the fact that the Plaintiff was not aware of the RBI communication dated 10.05.1993. It was stated in para 8 of the written statement that the alleged demand draft dated 08.06.1993 for Rs. 3 lac and letter dated 09.06.1993 was returned to the Plaintiff along with their letter dated 28.12.1993.

46. Admittedly, no offer was made in the affidavit of PW-1 either to tender or to deposit the earnest money or total consideration of the money in court in order to show its bona fide.

47. It is true that the specific performance of the contract cannot be enforced in favour of the person who fails to aver and prove his readiness and willingness to perform essential terms of the contract. Exp. ii to Clause (c) of Section 16 makes it clear that the Plaintiff must have readiness and willingness to perform the contract according to its true construction. The compliance of requirement of Section 16(c) is mandatory and in the absence of proof of the same the suit cannot succeed.

48. The readiness and willingness of the Plaintiff to perform the essential part of the contract would be required to be demonstrated by the Plaintiff from the institution of the suit till the final determination of the suit. If the Plaintiff has failed to establish that he is ready and willing to perform its part of the contract strictly as per terms of the agreement, the relief sought by the Plaintiff for specific performance cannot be granted.

49. The basic principle behind Section 16(c) read with explanation (ii) is that any person seeking relief of the specific performance of the contract must manifest that his conduct has been unblemished throughout entitling him to the relief claimed. The provision imposes a personal bar. Section 16(c) of the Act mandates the Plaintiff to aver in the plaint and establish evidence that it has always been ready and willing to perform its part of the contract.

50. In the present case, the Plaintiff has averred in the plaint that the Plaintiff has always been ready and willing to perform its part of the agreement, although there is no specific statement in the plaint that the Plaintiff has performed and was still ready to perform. Even in evidence, no specific statement was made or proved. The objection about the readiness and willingness has been seriously argued by the learned Counsel for the Defendants during the hearing of the case. But it is also a matter of fact that in the written statement the Defendants have merely denied para 14 of the plaint. It is also a settled law that denial of the averment in the plaint is deemed admission of the averment made by the other side.

51. No doubt, it was incumbent upon the Plaintiff both to aver and prove that it had all along been ready and willing to perform and it has to conform to the requirements of Forms 47 and 48 of Appendix-A CPC. It is also true that apart from the averment in the plaint the surrounding circumstances have also to be considered by the court. No doubt, the learned Counsel for the Defendants has made very serious and valid submissions in this regard. But at the same time, there are no pleadings about the objection raised during the course of hearing, rather in the cross-examination of the Defendants DW-1 has admitted the said fact in favour of the Plaintiff. The relevant portion of the cross examination of DW-1 is reproduced hereunder:

It is correct that after we obtained the permission from Reserve Bank of India the Plaintiff was to pay us a sum of Rs. 3 lacs as earnest money. It is correct that we did not inform the Plaintiff regarding the obtaining of the permission from the Reserve Bank of India. It is also correct that the Plaintiff on learning about the grant of the permission from the Reserve Bank of India had sent a sum of Rs. 3 lacs to us by a bank draft. It is correct that in the portion underlined red and side marked C1C1 there is only reference to approvals. Vol. there is also mention regarding payment. It is correct that the Plaintiff was all along ready and willing to perform its part of the contract. It is correct that for the first time we wrote to the Plaintiff vide letter dated 28.12.1993 which is Ex. PW1/D6 and returned the bank draft to the Plaintiff

52. In view of the admission made by DW-1, this Court has no option but to decide the issue No. 2 in favour of the Plaintiff.

53. The issue Nos. 3 and 4 are taken together along with the issue of reliefs and costs. Issue No. 3 Whether the Defendants rescinded the contract in terms of the agreement dated 20.11.1989? Issue No. 4 Whether the contract stood frustrated on the grounds stated in the written statement?

54. Before any further discussions thereon and in order to arrive at a finding on these issues, it is necessary to refer the relevant dates and events as well as the details of relevant exhibited documents, the same are:

27.09.1944 Date of birth of Defendant No. 1 in Delhi. 12.10.1948 Date of birth of Defendant No. 2 in Delhi. 1967 Defendant No. 1 as an Indian citizen went to the

U.S.A. 1970 Defendant No. 2 also as an Indian citizen went to the U.S.A. 26.05.1972 Father of the Defendants bids for a plot at DDA auction and allotted plot No. E-46/10 measuring about 501.67 sq.mt. (DW1/3). At the time of purchase, the Defendants were Indian citizens. Feb. 1976 Defendant No. 1 became a U.S. citizen.

03.01.1983 DDA executes perpetual lease in favour of the Defendants. (DW1/39) March, 1984 Defendant No. 2 became a U.S. citizen. Sept. 83 -June. 86 Building of approx. 6869 sq.ft. Constructed on the plot by the Defendants. 02.01.1986 Letter from Plaintiff for taking property on lease for a total period of 15 years subject to the Defendants obtaining the requisite permission from the DDA. (DW1I4) 07.03.1986 Permission for sub-letting was granted by DDA for 1 year (DW1/5) 10.03.1986 Sub-letting charges paid to DDA (DW1/6). 30.03.1986 Defendants inform Plaintiff of DDA's subletting permission (DW 1/7). 08.04.1986 Registered lease executed between Plaintiff and Defendants for 5 years and 2 renewal options of 5 years each. Plaintiff occupied the property as a tenant. 08.05.1986 Office copy of letter from Deputy Director (Indl.) DDA regarding subletting permission for packing/re-packing finished goods and intimating that it was for a maximum of 3 years (DW1/8). 29.04.1987 Defendant No. 1 writes to Reserve Bank of India (R.B.I.) to inquire if any permission was required to hold the property in view of the change in citizenships of the Defendants (DW1/10). 08.02.1988 R.B.I. replies informing that provisions of FERA are being violated and that the property should be transferred within 6 months failing which action under FERA would be attracted as Bank does not permit non-resident foreign nationals of Indian origin to acquire any commercial property for investment purpose. (DW1/11). 26.03.1988 Defendants inform the Plaintiff that the lease would have to be pre-maturely terminated by 31.3.1989 as DDA's sub-letting permission was granted only for a maximum of 3 years (DW1/14) also (PW1/D3).

28.03.1988 Office copy of the letter on behalf of Defendants to the DDA requesting for revalidation permission for the period 01.11.1988 to 30.03.1989. 05.07.1988 Plaintiff responds and rejects the request and insists on a 15 years lease (DW1/17). 21.07.1988 An Extension Application by way of letter was made by the Defendants informing to RBI that buyers were scarce as the property was under a long lease (DW1/40). 31.08.1988 R.B.I. granted time till end Dec., 1988 to dispose the property and stated that on failure to comply the Defendants would render themselves liable under FERA (DW1/18). 27.09.1988 Defendants by referring to the letter dated 20.07.1988 asked the Plaintiff to respond to DDA response (DW1/19 also PW1/D4). 21.10.1988 Plaintiff informs Defendants that they would revert on the above request in a months time with regard to purchase the property (DW1/20). 29.10.1988 Defendants inform the Plaintiff that they would not consider any offer and await the decision of the Plaintiff on the above request and would give priority to the Plaintiff (DW1/21). 02.12.1988 Second Extension Application to RB.I. again stating scarcity of Buyers and that in the absence of others, the Defendants were talking to the Plaintiff (DW1/41). 24.12.1988 R.B.I. grants extension (second extension) till 30.6.1989 for

disposing of the property (DW1/22) 01.02.1989 Offer of Aryan Builders to purchase the said property of Rs. 25 lac exclusive of the unearned increase which will be payable by the Defendants Ex. DW1/23.

02.02.1989 Defendants reminder to the Plaintiff stating that the three year old period granted by the DDA was about to expire on 31.03.1989. Thus, it was required that the Plaintiff Company executes the agreement to sell

with the Defendants. It was also assured that when an agreement to sell shall be executed no further permission will be required from the DDA and the issue will be automatically resolved. (DW1/42). 01.03.1989 Defendants inform the Plaintiff that it is futile to seek DDA permission to sublet beyond 3 years. It was also stated that the three year period was about to expire therefore it was in their mutual interest to finalize the sale of the property. (DW1/43). 03.03.1989 Letter on behalf of the Defendants to the DDA stating that the sub-letting charges paid for 01.04.1989 to 31.03.1990. 15.03.1989 Plaintiff informs Defendants that it would enforce its 15 years lease and to take the permission from DDA and also that it would consider purchase (DW1/25). Original Valuation report of M/s. Sahni Deshraj Associates (Value of Construction - Rs. 16,65,000/-) 25.03.1989 Defendants inform the Plaintiff to indicate their view on purchase as R.B.I had granted time till 30.6.1989 (DW1/44). 25.03.1989 Another letter from the Defendants to the Plaintiff regarding the purchase of the property by the Plaintiff (DW1/45). 30.03.1989 Another letter from the Defendants to the Plaintiff informing that DDA has refused further permission to sublet (DW1/46). 29.04.1989 Defendants apply to the RBI for permission to retain the property in view of changing policies regarding N.R. Ls (DW1/26). 30.05.1989 RBI reminded by Defendants of above request (DW1/27). 16.06.1989 R.B.I. responds and grants 3rd extension of 2 months i.e. till 15/8/89 and threatens to take a serious view of the matter advising them to transfer the property in favour of Indian National. (DW1/28). 07.08.1989 R.B.I. grants 4th extension of 6 months (DW1/29).

09.08.1989 Plaintiffs letter to the Defendants setting out the terms and conditions on which it was ready to purchase the property (DW1/30). 30.08.1989 Plaintiffs letter to the Defendants enclosing the Agreement and valuation reports and advising regarding the manner in which valuation should be made to the Appropriate Authority LT. Act 61 to avoid under valuation (DW1/47): Valuation of only building at Rs. 16,65,000/- Valuation of only land @ DDA rate Rs. 23,82,933 DW 1/49 Valuation of entire property (land and building) at Rs. 8,66,7801--- Wealth Tax Act valuation (DW1/49) . 20.11.1989 Agreement executed (DW1/38). 24.11.1989 Appropriate Authority under the Income Tax Act, 1961 seeks various information (DW1/50). 04.12.1989 Defendants submit information to the Appropriate Authority (DW1/51). 29.12.1989 R.B.I. asks for valuation of property and an NOC from the I.T. Department (DW1/52). 19.01.1990 Appropriate Authority decides to purchase the property under Sub-section (1) of Section 269UE. (DW1/53). Appropriate Authority directs the taking of possession

(DW1/54). 25.01.1990 Certified copy of the W.P.(C) No. 310/1990 filed by the Plaintiff for setting aside the order dated 19.01.1990 passed by the Appropriate Authority. 27.01.1990 Defendants apply to R.B.I. seeking approval to sell the property to the Appropriate Authority and receive the payment from them (DW1/55). 30.01.1990 Plaintiff files CW.P. 310/1990 in this Hon"ble Court (DW1/59).

31.01.1990 Court grants stay of the order dated 19.01.90 of the Appropriate Authority. Deposit of the sale

consideration by the Appropriate Authority also suspended.(DW1/58). 08.02.1990 Defendants informed by the Plaintiff of the order and asked to maintain status quo. Plaintiff also informs that it will continue payment of rent and asks Defendants to take steps with DDA for their consent to them continuing as tenants. (DW1/31). 15.02.1990 Counterfoil of the Application form with copy of the banker"s cheque. 26-02-1991 Stay order confirmed till disposal with added stipulation that Petitioner(Boots) will not encumber the property. 11.04.1990 R.B.I. declines to grant sale approval and returns the application (DW1/33). 23.04.1990 R.B.I. informed of Appropriate Authority developments & that it is for the AA to seek RBI approval and letter on behalf of the Defendants to the RBI with original receipt (DW1/34). 25.06.1990 Defendants filed counter affidavit in the said writ petition in which they question the enforcement of the agreement to sell and its validity and claim that they could not be deprived of their rights in the intervening case period (DW1/60). 05.07.1990 Certified copy of the counter affidavit of Defendants (Respondents Nos. 6 and 7 in W.P.(C) No. 310/1990). 04.09.1990 Counter affidavit filed by Respondent Nos. 1 to 5 in W.P. (C) No. 310/1990. 24.10.1990 Plaintiffs filed rejoinder Ex. DW1/62 in the said writ petition to the counter affidavit filed by the Defendant and also filed Rejoinder to the reply of R-1 to 5. (DW1/63) 22.02.1991 Reply on behalf of R-1 to 5 to the counter affidavit on behalf of Respondent Nos. 6 and 7 was filed. (DW1/64).

22.02.1993 The final decision of CWP 310/1990 till 22-02-93 when it was allowed and the matter was remanded to

the Appropriate Authority to take a decision after affording an opportunity to the Plaintiff (DW1/58) 01.03.1993 Plaintiff directly submitted its explanations to the Appropriate Authority with a copy to the Defendants to proceed with sale and transfer of property (DW1/56). 24.03.1993 Appropriate Authority grants no-objection (DW1/57). 22.07.1993 Plaintiffs letter to the Defendants regarding DD of Rs. 3 lakhs, which was sent on 8th June, 1993 requesting them to fulfill their obligations wit respect to the property (DW1/35). 04.12.1993 Plaintiffs issued notice take legal action (DW1/36). 28.12.1993 Defendants informed Plaintiff that the Agreement is closed and inoperative and return un-encashed DD (DW1/37). 24.03.1994 Suit filed.

55. The onus of proof of issue No. 3 as to whether the Defendants rescinded the

contract is upon the Defendants. The issue has been framed on the basis of the Defendants' pleading in the written statement at para 5 which reads as under:

5. The Agreement to sell dated 20th November 1989 in Clause 6 thereof granted a complete option and discretion to the Defendants to opt out of the agreement in which even both parties had specifically contemplated that the only consequence would be that any money paid by the Plaintiff either to the Defendants or to the D.D.A. would be returned. This option was incorporated because both the parties were aware that governmental policies were changing towards liberalization of holdings in India of Non Resident Indians. The Defendants exercised the option and duly notified the Plaintiff. No monies having been paid by the Plaintiff, the question of any refund did not arise and the matter stood closed. The Plaintiff has then no cause of action in its favour

56. The plea of the Plaintiff is that there is no evidence from the Defendants as to how Clause 6 was incorporated in the Agreement to Sell. It was averred that the Defendants' reliance on Clause 6 of the Agreement to Sell is not correct. The Defendants rescinded the agreement to sell (Ex. DW1/38) by wrongly relying upon Clause 6 in their letter dated 28.12.1993 to resile from their obligations. The interpretation / construction of Clause 6 of the said agreement does not permit any option to the Defendants to treat the agreement as closed and inoperative. It was also submitted that the RBI had not granted any permission to the Defendants for retention of the said property. The RBI had merely issued a notification dated 26.05.1993 granting general permission to foreign citizens of Indian origin to acquire and dispose off any immovable property subject to the terms and conditions of the said notification. Even otherwise the requirement for obtaining permission from the Government Authority is not a condition precedent for passing a decree for specific performance of the contract. The Court has power to enforce the terms of the contract in case the Defendants have willfully refused to perform their part of the contract. The following decisions have been referred in support of its submissions:

- (i) Mrs. Chandnee Widya Vati Madden Vs. Dr. C.L. Katial and Others, .
- (ii) R.C. Chandiok and Another Vs. Chuni Lal Sabharwal and Others, .
- (iii) Nirmala Anand Vs. Advent Corporation Pvt. Ltd. and Others, .
- (iv) Vinod Singh Vs. Smt. Phutori Devi (Since Deceased) through her LRs., .

57. Learned Senior Counsel for the Plaintiff has also argued that any self serving interpretation which either destroys the binding nature of contracts or allows a party to take advantage of their own wrong, cannot be applied. He also referred the case of New Zealand Shipping Co. Ltd. v. Societe Des Ateliers Et Chantiers De France [1919] A.C. 1 wherein Lord Atkinson speaking for the House of Lords has observed that:-

(v) But if the stipulation be that the Contract shall be void on the happening of an event which one or either of them can by his own act or omission bring about,

then the party, who by his own act or omission brings about that event, cannot be permitted either to insist upon the stipulation himself, or to compel the other party, who is blameless, to insist upon it, because to permit the blamable party to do either would be to permit him to take advantage of his own wrongs, in the one case directly, and in the other case indirectly in a round about way, but in either way putting an end to the contract. The application to contract such as these of the principle that a man shall not be permitted to take advantage of his own wrong thus necessarily leaves to the blameless party an option whether he will or will not insist on the stipulations that the contract shall be void on the happening of the named event. To deprive him of that option would be but to effectuate the purpose of the blameless party.

58. The stand in the written statement of the Defendants was that the RBI policy was liberalized in 1993. The agreement was entered into apparently pursuant to an order of the RBI. Since the RBI had granted permission for retention of the property, therefore, the Defendants exercised their right under Clause 6 to close the contract.

59. Let me now consider the submissions of the parties on these issues. It is not in dispute that the Plaintiff company was the lessee of the suit property which culminated into an agreement to sell dated 20.11.1989. The salient features of the said agreement are reproduced below: a. Clause 1 of the said agreement - According to Clause 1 it was agreed that Defendant Nos.

a clause1 and 2 would sell, transfer and assign and the Plaintiff would purchase and acquire from Defendant Nos. 1 and 2 the said premises at a consideration of Rs. 23 lakhs only.

b. Under Clause 2 of the said agreement, the Plaintiff was to pay to the Defendant Nos. 1 and 2, an earnest money of Rs. 3 lakhs after the Defendant Nos. 1 and 2 obtained the necessary permission from Reserve Bank of India. The said earnest money was to be adjusted against the total consideration to be paid by the Plaintiff to the Defendant Nos. 1 and 2 at the time of completion of the sale, assignment and transfer of the suit property.

c. As per Clause 3 of the said agreement, it was the obligation of Defendant Nos. 1 and 2 to obtain all approvals and permission as provided in the said Clause. Clause 3 envisaged

" i. Approval of RBI under the Foreign Exchange Regulation Act, 1973 (FERA).

ii. Permission from the Appropriate Authority under Chapter XX-C of the Income Tax Act, 1961.

iii. Income Tax Clearance Certificate u/s 230A of the Income Tax Act, 1961.

iv. Approval of the Delhi Development Authority and

v. Approval of any other local bodies or Authorities such as the Urban Land Ceiling Regulation Act, 1976 as may be necessary.

60. The following permissions/approvals were sought and/or granted:

(i) Appropriate Authority - In pursuance of the agreement to sell, a joint application was made by the Plaintiff and Defendant Nos. 1 and 2 for permission from the Appropriate Authority under Chapter XX-C of the Income Tax Act. The Appropriate Authority however vide its order dated 19.1.1990 (DW-1/53,) ordered for the purchase of the suit property by the Central Government. The order dated 19.01.1990 was challenged by the Plaintiff in W.P.(C) No. 310/1990.

The order of acquisition of the suit property by the Appropriate Authority was set aside by this Court vide its order dated 22.02.1993 (DW-1/58). Thereafter, the Appropriate Authority duly granted the "No Objection Certificate" vide its order dated 24.03.1993. The requisite permission was obtained from the Appropriate Authority under Chapter XX-C of the Income Tax Act.

(ii) Permission from RBI - On 29.04.1987, an application was made by the Defendants to the RBI u/s 31(1) of the FERA, 1973 wherein the Defendants inquired whether they could hold the suit property in India as they had acquired US citizenship (DW-1/10). The RBI vide its letter dated 08.02.1988 (DW-1/11) advised the Defendants that they were not eligible to acquire/hold an immovable property in India. Thereafter, various correspondence were exchanged between the Defendants and the RBI during the period 21.07.1988 to 11.04.1990.

The RBI vide its letter dated 10.05.1993 addressed to the Defendants granted the permission for sale of the suit property to the Plaintiff. The Defendants had applied for such permission after the order of the Appropriate Authority, on 09.04.1993 seeking for permission in favour of the Plaintiff. The letter dated 10.05.1993 and the fact that RBI granted the requisite permission to the Defendants has been admitted by the Defendants at para 8 of the written statement.

(iii) The approval of the DDA was not granted.

61. Pursuant to the requisite permission granted by the RBI the Plaintiff forwarded a sum of Rs. 3 lac (vide DD No. 298670 dated 08.06.1993) as earnest money. Although, the demand draft was returned by the Defendants. The Plaintiff later on addressed a letter dated 04.12.1993 (DW-1/36) to the Defendants wherein the Plaintiff pointed out that deliberate default had been committed by the Defendants in obtaining the requisite permission from the DDA.

62. The main argument of the Defendants is that Clause 6 of the agreement allowed a complete option and discretion to the Defendants to opt out of the agreement. The only consequence would be that any money paid would be refunded and the said clause introduced into the agreement by the Plaintiff company who suggested the terms and conditions mentioned in its letter dated 09.08.1989 Ex. PW-1/30. The said Clause 6 reads as under:

6. Mohindras shall within 30 days from the date of receipt of all approvals, including Income Tax, Reserve Bank of India, DDA and their requisite stamp

paper from Boots, execute a deed of conveyance / assignment in favour of Boots and had over possession of the said premises. Failure to obtain any of the approvals shall make this agreement inoperative. Upon failure by Mohindras to obtain all or any of the necessary approval or to execute the deed of conveyance /

assignment as above after obtaining the necessary approvals within the time specified or such extended time as mutually agreed, Mohindras shall forthwith refund to Boots all the monies pay to Mohindras and paid on their behalf to DDA. In the event of Mohindras failing to repay / refund the monies, Boots shall be entitled to adjust and appropriate the same against any other sums payable by Boots to Mohindras. Upon failure by Boots to make the payment to DDA or the balance consideration as provided in this agreement, the earnest money paid by Boots shall be forfeited

63. In support of his submissions, the learned Counsel for the Defendants has relied on the following judgments:

1. Randhir Singh Chandok v. Vipin Bansal and Anr. 135 (2006) DLT 56 where while interpreting an agreement to sell Immovable property, it was held that a document has to be construed meaningfully and every attempt has to be made to give meaning to every phrase and every sentence in a written document.

2. Brokers and Brokers Pvt. Ltd. Vs. Mr. Om Prakash Bhola and Another, wherein this Court while referring Dadarao and Another Vs. Ramrao and Others, held that the clause involved in the said case providing for both parties to agree to terminate the agreement to sell was not a bar to a suit. This Court noted that in Dadarao, the agreement was very specific and itself provided as to what is to happen if either the seller refuses to sell or the purchaser refuses to buy.

3. In Dadarao (supra) the Hon''ble Supreme Court held that the relationship between the parties has to be regulated by the terms of the agreement between them and that it was important to note that the agreement itself provided as to what is to happen if either the seller refuses to sell or the purchaser refuses to buy. It was further held that in case the agreement had not stipulated as to what is to happen in the event of the sale not going through, then perhaps the purchaser could have asked for specific performance and proceeded to decline the relief. In Dadarao's case the agreement provided not only for refund but also for damages as such it was a case to which Section 23 was attracted. Subsequently in P. D'Souza Vs. Shondrilo Naidu, it was clarified that since Dadarao did not discuss Section 23 and its effect, it was a decision per incuriam, but the decision was not considered either as wrongly decided nor was it overruled. In fact in P. D'Souza (supra), the clause in Dadarao was referred to and held on facts as not creating a binding precedent. It appears that Dadarao though restricted to its facts has not been overruled. It is submitted that on facts the reasoning in Dadarao's case is binding on this Hon''ble Court.

64. No doubt, the relief sought by the Plaintiff for specific performance may not

be denied simply because sanction was not granted from any of the authorities. Even the contract cannot be frustrated in case a party tries to give its own self serving interpretation to close the agreement in order to take advantage, it is also not permissible for a party to take the ground of non approval of the permission by the Authorities, thus it is not necessary to discuss the judgments referred by the Plaintiff in this regard. But, in order to come to the final finding of the case, it is the duty of the court to examine each and every term agreed upon by the parties in the agreement to sell which has to be construed in a very careful and meaningful manner. The meaning of every sentence in a written document is to be examined.

65. I feel that it is necessary to refer few facts and circumstances in order to discuss the issue further:

(i) The Defendants, on their own, through their father sent a letter to the RBI enquiring about the formal permission of retention of property being foreign citizen. The RBI vide letter dated 08.02.1988 Ex. DW1/11 directed the Defendant to transfer the property in favour of Indian citizen residing in India permanently within the period of six months from the date of the said letter. The Plaintiff herein was already a tenant under a lease deed from April 1986 to 2001 and the Defendants also had a problem on losing the lease deed rights from DDA in view of sub-letting violation beyond three years of lease in favour of the Plaintiff.

(ii) Thereafter the property was offered to the Plaintiff by the Defendants by way of a letter Ex. DW1/42. The Plaintiff after the expiry of 13 months sent the terms and conditions which were accepted by the Defendant by letter dated 09.08.1989 Ex. DW-1/30. The said terms and conditions suggested by the Plaintiff were incorporated into the final agreement to sell and purchase dated 20.11.1989 Ex. DW-1/38.

(iii) The agreement did not contemplate any amount as advance or earnest. All payments were to be made on the happening of the event. The unearned increase amount payable to the DDA i.e. more than Rs. 10 lacs was included in the total price of Rs. 23 lacs.

(iv) Clause 6 of the agreement contemplates that in the event of failure to obtain any of the approvals, the agreement would become "inoperative". It was also mentioned in the said clause that on failure by the Defendants to execute the sale deed, even after obtaining approvals, any money paid to the DDA would be refunded. The manner of recovery was also contemplated.

(v) By order dated 19.01.1990 Ex. DW-1/53 the Appropriate Authority desired to acquire the property u/s 269UE 1 of the Income Tax Act, 1961. The Defendants on 27.01.1990 applied to RBI seeking approval to sell the property to the Appropriate Authority and received the payment from them.

(vi) By letter dated 08.02.1990 Ex. DW1/31 the Plaintiff informed the Defendant about the filing of writ petition before the High Court and also obtaining a stay of

the operation of the order dated 19.01.1990. (vii) On 11.04.1990 the RBI declined to grant sale approval and returned the application to the Defendant.

(viii) In June 1990 the Defendants filed the counter affidavit and in the counter the Defendants questioned the enforcement of agreement to sell and its validity. The writ petition W.P.(C) No. 310/1990 was finally decided on 22.02.1993 wherein the order of the Appropriate Authority dated 19.01.1990 was set aside.

(ix) By letter dated 01.03.1993 the Plaintiff directly submitted its representation to the Appropriate Authority with a copy to the Defendant to proceed with the sale and transfer of the property. On 24.03.1993 Appropriate Authority granted no objection. Thereafter the Plaintiff sent the letter dated 22.07.1993 Ex. DW-1/35 to the Defendants informing about the fulfillment of their obligation in respect of the suit property and finally the notice was issued on 04.12.1993 Ex. DW-1/36.

(x) As the RBI policy was liberalized in 1993, the Defendants had exercised their right under Clause 6 by closing the agreement as per information given to the Plaintiff vide letter dated 28.12.1993 Ex. PW-1/D6.

66. The said clause was admittedly incorporated with the agreement of the Plaintiff as it is evident from the Plaintiff's letter dated 09.08.1989 (Ex.DW1/30) addressed to the Defendants. It is also a matter of fact that the said clause has not been challenged by the Plaintiff. The Plaintiff has not produced any material or proved in evidence contrary to Clause 6. In fact, the Plaintiff has not filed any original documents in the matter, even the Plaintiff failed to file the original/ signed copy of agreement to sell although it was the admitted document between the parties. The Plaintiff has examined one witness namely Mr. N. Gopal Krishnan, Depot Manager of the Plaintiff company whose affidavit has been filed Ex. PW-1/A as evidence. The statement made in the affidavit is almost the same as mentioned in the plaint.

67. In his cross examination PW-1 Mr. N. Gopal Krishnan has admitted to the affidavit PW-1/A filed as evidence on behalf of the Plaintiff, that late Mr. D.M. Raja had signed the Plaint, after the death of Late D.M. Raja in the year 2004 Mr. K. M. Marfatia was working as President in the corporate office of the Plaintiff company and Mr. G.S. Kurmi was working as Company Secretary in the Corporate Office. Late Mr. D.M. Raja was to appear as a witness on behalf of the company however, he was instructed to file his affidavit in evidence of the Plaintiff company. He has also admitted that he has not signed any document or any paper which has been filed in the present suit on behalf of the Plaintiff company. His name is not mentioned in the list of witnesses and his affidavit was filed as per the information given by the Plaintiff company. He is not aware that the Plaintiff company has not filed even a single original document in the present suit. He admitted in the cross-examination that it was not in his jurisdiction to know anything relating to the proposal to purchase the suit property nor about the details of negotiation between the parties and copies of the correspondence

or the agreement reached between the parties were also not sent to him. His affidavit has been filed on the basis of the records being maintained by the Plaintiff company in its corporate office in Mumbai where the original documents relating to the present suit are also lying. He also admitted that he was never authorized to represent the Plaintiff company, before RBI, Income Tax Department as well as before the D.D.A. He is also not aware how much was the unearned increase which was to be paid to the D.D.A. in the year 1993. He has filed his affidavit of evidence as per orders received from the corporate office of the Plaintiff company. Further after the conclusion of the cross-examination of PW-1 the Plaintiff sought leave of this Court by filing of I.A. No. 10132/2007 to produce an additional witness viz. Mr. K.M. Marfatia, Vice President, which was dismissed by the court vide order dated 06.11.2007 on the ground that the Plaintiff was attempting to cover up the lapse in the evidence of its witness.

68. The Clause 6 of the agreement consists of two parts.

(i) The first part states that failure to obtain any of the approvals shall render the agreement inoperative".

(ii) The second part deals with the consequences of failure by the Defendants to execute the deed of conveyance / assignment even after the clearances are obtained within the time specified in the agreement or such extended time as mutually agreed, the Defendants shall forthwith refund to the Plaintiff all the monies paid to the Defendants and paid on their behalf to the DDA.

69. Clause 6 contemplates that failure to obtain any permission will render the agreement inoperative is applicable to both parties. There is also a provision for refund and forfeiture and are applicable to both the vendor and vendee. It is also stipulated that in the event of Defendants failing to repay / refund the money the Plaintiff would be entitled to adjust the same..

70. It appears to this Court that it is a rare clause which is usually not incorporated in most of the agreements of this nature, since it is available in the present agreement, it has to be construed meaningfully. Therefore, a decree for specific performance cannot be passed merely because the Plaintiff has been able to prove its ?readiness and willingness? in presence of the said clause.

The Plaintiff in its letter dated 10.01.1994 Ex. DW1/P1 sent to the Defendants through Advocates and Solicitors had also relied upon the said Clause 6 in the following manner:

On a careful reading of the said Clause 6, it would be clear that by reason of the default on the part of the said Mohindras our clients can claim back from the said Mohindras the amount that the said Mohindras may have received prior to such default.

71. The first submission of the Plaintiff is that the notification dated 25.05.1993 does not permit the Defendants to retain the property as it was a general permission granted under the notification to the foreign citizens of Indian origin

to acquire and dispose of the immovable property subject to certain conditions and, therefore, the Defendants cannot take advantage of the same as it is not applicable in the facts and circumstances of the present case. It is further alleged that the Defendants have not produced any evidence to prove the same and, therefore, reliance on Clause 6 by the Defendant in order to resile the agreement was not correct. The relevant extract of the said notification reads as under:

In terms of A.D. (M.A Series) Circular No. 3 dated 20.1.1992, general permission u/s 31(1) of the Foreign Exchange Regulation Act, 1973, has been granted to foreign citizens of Indian origin whether resident in India or not to acquire, hold, transfer or dispose of by sale or inheritance, Immovable properties situated in India subject, inter alia, to the condition that the sale proceeds of such properties and income accruing thereon will not be eligible for repatriation outside India.

72. As far as the retention of the property is concerned, after having gone through the notification it is clear that the said notification allows the foreign citizens of Indian origin to acquire, hold, transfer or dispose of the property by sale or inheritance subject to certain conditions. The submission made by the Plaintiff that after the said notification a party cannot retain the property has no force. In the present case, no doubt, it appears from the notification that the Defendants can retain the property.

73. As regards the second submission of the Plaintiff that the Defendants in order to opt Clause 6 have not produced any evidence and reliance of the said Clause was not correct, the said submission also has no force because of the reasons that as far as the pleadings of the Defendants are concerned, paras 2 and 5 of the preliminary objections and paras 2,5,11 and 12 of the written statement are very clear in this regard. As regards the evidence, the Defendants have filed the affidavit exhibit DW-1/A and the reliance on Clause 6 is mentioned in paras 26, 32 and 35 of the affidavit and supported documents have been proved. Even in the cross-examination of DW-1, the stand of the Defendants remains the same. Thus, it is not correct to say that the Defendants cannot rely upon Clause 6 which is obviously an essential Clause of the agreement.

74. The notification was admittedly issued after the grant of permissions by the Appropriate Authority on 24.03.1993 and RBI on 10.05.1993. The Defendants opted for Clause 6 of the agreement after the notification and they had not shown any interest to obtain the approval from the DDA after the notification. The Plaintiff has argued that after obtaining the permission from the Appropriate Authority and RBI, the Plaintiff wrote letters dated 02.04.1993, 08.06.1993 and 06.09.1993 to the DDA requesting therein to allow the parties to execute the agreement as there was no intention by the Defendants to execute the sale deed. As already discussed, the Plaintiff has not challenged Clause 6 of the agreement, further the alleged letters dated 02.04.1993, 08.06.1993 and 06.09.1993 to the DDA, office copies and postal receipts have not been produced and proved by the Plaintiff.

75. PW-1 in his cross-examination has admitted the fact that the Plaintiff has not filed a single original document before the court. It was not within his jurisdiction to know anything relating to the proposal of purchase of the suit property nor about the details of negotiation between the parties and copies of the correspondence and agreement were not sent to him. He has filed the affidavit as per orders received from the Plaintiff company. Thus in the absence of evidence, the contention of the Plaintiff cannot be accepted.

76. The third submission of the Plaintiff that the construction of Clause 6 of the said agreement does not give any option to the Defendants to treat the agreement as closed is also without any substance as both the parties themselves devised a mechanism for exiting from the agreement, the details of which can be gathered from the agreement to sell and the same are summarized as under:

a) No advance amount was contemplated to be paid. It was specifically contemplated that an amount of Rs. 3 lac would be paid as earnest money only after obtaining permission from the Reserve Bank of India for the transfer and assignment of the premises.

b) It was also stipulated that failure to obtain any of the necessary approvals from Delhi Development Authority, Income Tax Department, Reserve Bank of India or any other Authority(s) would make the proposed agreement inoperative.

c). The parties themselves had agreed that if the sellers failed to execute the conveyance/assignment sale document(s) even after obtaining necessary approvals, the consequence would only be that any money paid to them or paid on their behalf, would be refunded.

d). The parties clearly agreed that if the buyer (the Plaintiff herein) failed to make payment to the Delhi Development Authority or the balance consideration, earnest money, if paid shall be forfeited.

77. In view of the above, there is also no force in the submission made by the Plaintiff that the construction of Clause 6 does not permit the Defendants to exercise their option to close the agreement.

78. After considering Clause 6 of the agreement coupled with entire facts of the matter and the evidence produced by the parties, this Court is of the view that the contract between the parties was determinative in nature. The provisions of Section 14(c) of the Specific Relief Act, 1963 provides that the determinable contracts cannot be enforced by decree of Specific Performance. In Pollock & Mulla's Indian Contract and Specific Relief Acts 12th Edition Vol. 2 page No. 2499 Clause (c) of Section 14 of the Specific Relief Act, 1963 has been dealt with which reads as under:

Clause (c) of sub-s (1) corresponds with s 21(d) of the repealed Act. The word revocable" in the repealed s 21(d) was inaccurate and at the suggestion expressed in earlier edition of the book, the word determinable" has been

substituted.

A contract, which is in its nature revocable, or determinable as described in this Act, is not enforceable by specific performance. Specific performance is not decreed if the Defendant would be entitled to revoke or dissolve a contract when executed, as in the case of a contract containing an express power of revocation, since it would be idle to do that which might instantly be undone by one of the parties.

....Where the contract allows the Defendant to terminate the contract without notice and without assigning any reason, the contract is not specifically enforceable.

It appears from the reading of the Contract that the said Clause operates unconditionally and can relieve either party from its obligation and put the parties in the same position as if the Contract was never entered into. Thus, the Defendants have been able to prove their burden of issue No. 3 coupled with overall facts and circumstances of the matter which allow the Defendants to close the contract in terms of the agreement dated 20.11.1989. The issue Nos. 3 and 4 are accordingly decided.

79. Let this Court may also examine as to whether even otherwise, on the basis of facts and circumstances of the present case, the Plaintiff is entitled to the relief of Specific Performance u/s 10 and under Clause (a) (b) and (c) of Section 20 of the Specific Relief Act, 1963.

80. Section 20 of the Specific Relief Act, 1963 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 capable 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;

(c) where the Defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance. Explanation 1.- Mere inadequacy of consideration, or the mere fact that the contract is onerous to the Defendant or improvident in its

nature, shall not be deemed to constitute an unfair advantage within the meaning of Clause (a) or hardship within the meaning of Clause (b). Explanation 2.- The question whether the performance of a contract would involve hardship on the Defendant within the meaning of Clause (b) shall, except in cases where the hardship has resulted from any act of the Plaintiff subsequent to the contract, be determined with reference to the circumstances existing at the time of the contract. Explanation 1. - Mere inadequacy of consideration, or the mere fact that the contract is onerous to the Defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of Clause (a) or hardship within the meaning of Clause (b). Explanation 2. - The question whether the performance of a contract would involve hardship on the Defendant within the meaning of Clause (b) shall, except in cases where the hardship has resulted from any act of the Plaintiff subsequent to the contract, be determined with reference to the circumstances existing at the time of the contract.

81. It is settled law that the specific performance is an equitable relief. Section 20 of the Specific Relief Act, 1963 preserves judicial discretion. The court is not bound to grant specific relief merely because it is lawful to do so. The motive behind the litigation is to be examined. The court while granting or refusing the relief has to consider whether it would be fair, just and equitable. In case, where any circumstances u/s 20(2) are established, the relief is to be declined. Section 20 shall be at the forefront in the mind of the Court, the relief sought under this section is not automatic as the court is required to see the totality of the circumstances which are to be assessed by the court in the light of facts and circumstances of each case. The conduct of the parties and their interest under the contract is also to be examined.

82. The "conduct of the parties" and "circumstances" are the main factors from the time of agreement till the final hearing of the Suit in order to exercise courts jurisdiction under the said provisions of the Act. The following are the relevant circumstances which are to be considered in this regard:

a) It is the admitted position that the writ petition was pending for more than 3 years and by virtue of interim order, the Defendants could not have received the money from Appropriate Authority in February, 1990. Due to pending writ petition, admittedly unearned amount payable to the DDA was increased heavily..

b) The Plaintiff also continued to occupy the property despite of expiry of the lease.

c) It is also a matter of fact that on the first date of hearing when the matter was listed the Plaintiff took the stand before the court that the Plaintiff is not liable to pay rent. However, directions were issued by the court to pay the rent without prejudice. The Plaintiff did not offer to deposit the amount of Rs. 3 lac before the court nor offered to deposit the sale consideration though the Plaintiff wanted to treat the agreement as alive and subsisting. Even during the pendency of the suit the Plaintiff has not shown any interest to deposit the said amount.

d) As lease between the parties was extended till the year 2001, there seems to be a force in the submission of the Defendants that in view of the occupancy of the property by the Plaintiff, there were no buyers who were ready to purchase the suit property from the Defendants.

e) Since this property was on a perpetual lease, no sale or transfer of the property was permitted except with the prior permission of the Delhi Development Authority and on payment of 50% of the unearned increase i.e. the appreciation in the market rate, as fixed by the Government. At the relevant time the rate fixed by the Delhi Development Authority for the subject area for the purpose of unearned increase was Rs. 4,750/- per sq. mtr., which for 501.67 sq. mtr. worked out to a value of Rs. 23,82,933/- and 50% of the same being the amount payable to the Delhi Development Authority was Rs. 11,73,016/-.

The Plaintiff made an offer of Rs. 23 lac for purchase of the property inclusive of the unearned increase payable to the Delhi Development Authority. The amount of

unearned increase payable as per the rates fixed by the Delhi Development Authority was Rs. 11,73,016/- which means that what was being received by the Defendants was the balance namely approx. 11-12 lacs.

f) It is clear that at the time of agreement dated 20.11.1989 Plaintiff was aware of the fact that the Defendants were under the mandate of Reserve Bank of India and threat of action under FERA against the Defendants.

g) When the Appropriate Authority desired to acquire the property by order dated 19.01.1990 and the Defendants applied before the Reserve Bank of India seeking approval to sell the property to the Appropriate Authority vide letter dated 27.01.1990 Ex. DW1/55 the Plaintiff instead of allowing the Defendant to receive the money from the Appropriate Authority obtained the stay order which continued for more than three years. On the other hand the Plaintiff did not vacate the property despite of lapse of lease period without investing any amount for 21 years neither deposited any amount in the court.

83. The circumstances referred in para 82 of this judgment indicates that if the discretion of the relief of Specific Performance is exercised in favour of the Plaintiff, it would give the Plaintiff an unfair advantage over the Defendants within the meaning of Section 20(2)(a) of the Act.

84. It is also a matter of fact that Appropriate Authority by order dated 19.01.1990 desired to acquire the property. The Defendants sought approval from the RBI to receive the money from the Authority in January, 1990. It did not make any difference to the Defendants as to from whom they received the sale consideration, the Plaintiff on the other hand after the expiry of more than 15 years wants to enforce the agreement on its original terms. It is the admitted fact that the Plaintiff has not parted with any amount nor the Plaintiff has disclosed in the plaint or mentioned in the evidence about the return of earnest

money from the Defendants rather the Plaintiff enjoyed the property despite of lapse of lease under the conservative terms of 1986. Thus these circumstances show that it is not equitable to grant the relief to the Plaintiff in the present case u/s 20(2)(c) of the Specific Relief Act, 1963.

85. Further in case the said agreement in question is enforced, it would cause great hardship to the Defendants at present because of the reason that they shall have to pay towards unearned increase to the DDA which has now become due more than the total consideration. Thus the performance of the contract would tantamount to hardship to the Defendants within the meaning of Section 20(2)(b) of the Act, on the other hand there would be no such hardship to the Plaintiff which is a multinational company who did not invest even a single paisa from the date of agreement till the hearing of the suit.

86. No doubt, this Court is conscious about the law that the grant of relief of specific performance is a rule and it is for the Defendants to demonstrate as to how his case would fall with the exception carved out under the Sub-Section 2 of Section 20 of the Act. In support of this proposition, the learned Counsel for the Plaintiff has referred the following two decisions:

- (i) Gulzar Singh v. Harbans Kaur and Ors., 146 (2008) DLT 725 .
- (ii) Nirmala Anand (Supra).

87. In the case of Nirmala Anand (supra) the facts were that the Plaintiff entered into an agreement with the Defendant for purchase of flat at Mumbai. The sale consideration under the agreement was payable at Rs. 60,000/-. The agreement stipulated that the building was to be completed and the possession of the flat was to be delivered to the Plaintiff by 30.6.1969. The Plaintiff paid sum of Rs. 35,000/- out of sale consideration leaving a balance of Rs. 25,000/-. Just a few days before the date fixed for completion and the possession, the lease of the plot of the land on which the flats were being constructed was cancelled by the Bombay Municipal Corporation. It was also a matter of fact that similar agreements in respect of different flats were entered into by the seller with the other flat purchasers. The sellers were able to settle their case with the others during the pendency of the pendency of the suit. However, there was no settlement between the Plaintiff and Defendant in that case. Therefore, the Supreme Court had exercised its discretion in favour of the Plaintiff under the peculiar circumstances of the case. It was a matter of fact in that case that the Plaintiff was prepared and willing to take the possession of the incomplete flat without claiming any reduction in the purchase price and was also agreeable that the Defendant would not be held responsible for any incomplete in the building.

Under these circumstances, the discretion was exercised in favour of the Plaintiff and the relief for specific performance was granted with certain condition. There was no similar Clause 6 as available in the present case, thus it is quite evident that the facts in the case were materially different.

88. In the case of Gulzar Singh (supra), also the factual position of the matter was different. Some of the admitted facts between the parties were mentioned in para 13 of the judgment which reads as under:

13. From what is narrated above and after taking note of the facts on which there is a

dispute, we may first list those facts which are not in dispute as that would be of some help to take decision on the disputed aspects of the case. The admitted factual position is as under:

a) Agreement of sale dated 13.10.1972 entered into between the Plaintiff and the Defendant is not in dispute.

b) As per this agreement, the Defendant agreed to sell house No. 24/72, West Patel Nagar for a total consideration of Rs. 80,000/-. A sum of Rs. 5,000/- was paid as earnest money at the time of signing the agreement.

c) Though the balance amount was to be paid at the time of registration of the sale deed and delivery of vacant possession, some further amounts were paid by the Plaintiff to the Defendant. According to the Plaintiff, he paid an additional amount of Rs. 15,600/- (Rs. 5,000/- on 31.10.1972, Rs. 10,000/- on 4.12.1972 and Rs. 600/- on 18.12.1972), whereas the Defendant alleges that an additional of Rs. 15,000/- was only paid. However, it is not in dispute that further amounts were paid by the Plaintiff to the Defendant.

d) Part possession of the house in question was given by the Defendant to the Plaintiff.

e) At the time of execution of the agreement to sell, suit property was mortgaged with the Delhi Administration, which was to be redeemed. For redemption, the Defendant was to take further advance payment from the Plaintiff.

f) As per the agreement, the period of sale was two months within which the registered sale deed was to be executed by the Defendant in favour of the Plaintiff on receipt of balance price and the Defendant was to deliver vacant possession of the remaining property and clear title deeds of the property.?

The Court passed the decree for specific performance while considering the admitted facts between the parties. The period of sale was also agreed by the parties. The facts and circumstances in the present case are materially different. Therefore, the said decision was at its own facts and is not applicable to the facts of this case.

89. For the aforesaid reasons this Court is also not inclined to exercise its discretion to grant the relief for Specific Performance under the facts and circumstances of the present case as Clause 6 of the Contract is hit by Section 14(c) of the Specific Relief Act, 1963. The prayer sought by the Plaintiff in the present suit to pass a decree for specific performance of the agreement in relation to property No. E-44/10 Okhla Industrial Area (Phase I), New Delhi -

110020 is declined.

90. As regards the alternative prayer to pass a decree for recovery of Rs. 23 lac is concerned Clause 6 of the agreement did not stipulate damages and it only contemplates refund of monies paid by the Plaintiff and not any amount by way of liquidated damages/ compensation/penalty. Though Section 23 of the Specific Relief Act, 1963 provides that liquidation of damages is not a bar to specific performance. The Plaintiff has not produced and proved any evidence against the relief claimed. Alternative relief claimed by the Plaintiff is also rejected.

91. The suit is accordingly dismissed with costs.