

(2012) 01 DEL CK 0324

In the Delhi High Court

Case No : Regular First Appeal (OS) No"s. 34 and 60 of 2000

Kamal K. Oswal and Another

APPELLANT

Vs

Kailash Kanwar
 Kailash Kanwar Vs Kamal K. Oswal
and Another

RESPONDENT

Date of Decision : 16-01-2012

Acts Referred:

Citation : (2012) 01 DEL CK 0324

Hon'ble Judges : Pratibha Rani, J;Pradeep Nandrajog, J

Bench : Division Bench

Advocate : Sanjay Jain, with Mr. D.R. Bhatia, Mr. Siddhartha Jain, Mr. Risabh, Mr. Ankur Bansal, in RFA OS No. 34/2000 and Mr. Pradeep Kumar Bakshi with Mr. H.S. Jaggi, in RFA OS No. 60/2000, for the Appellant; Pradeep Kumar Bakshi with Mr. H.S. Jaggi, Advocates in RFA (OS) No. 34/2000 and Mr. Sanjay Jain with Mr. D.R. Bhatia, Siddhartha Jain, Risabh, Ankur Bansal, Advocates in RFA (OS) No. 60/2000, for the Respondent

Final Decision : Disposed Off

Judgement

Pratibha Rani, J.—This common judgment will dispose of RFA (OS) No. 34/2000 and RFA (OS) No. 60/2000 directed against the judgment and decree dated 26.05.2000 passed by learned Single Judge in CS (OS) No. 538/94.

2. Since both the parties felt aggrieved and impugned the judgment referred to above before us, subject matter of both the appeals being the agreement to sell dated 29.02.1988, for the sake of convenience hereinafter they would be referred to by their rank in the suit i.e. Sh. Kamal K. Oswal and Sh. Primal Oswal (Vendees) as plaintiffs and Sh. Kailash Kanwar (Vendor) as defendant. The facts are not in dispute. The parties entered into an agreement to sell in respect of property No. C-422, Defence Colony, New Delhi measuring 325 sq.yds. on 29.02.1988. The consideration for the transaction was settled at Rs. 28 lakhs and a sum of Rs. 1 lakh was paid by the plaintiffs to the defendant vide pay order no. 801555 dated 11.03.1988 drawn on Punjab and Sind Bank, Defence Colony

branch, Delhi as earnest money, at the time of signing of the agreement for sale.

3. As per the terms and conditions of the agreement, the defendant was required to obtain necessary permission from the concerned authorities and the balance consideration was agreed to be paid within 30 days from the date of receipt of intimation from the defendant about the needful being done.

4. In order to perform their obligation to seek necessary permission under the agreement dated 29.02.1988, the parties applied to Income Tax authorities vide application dated 11.03.1988, however, u/s 269UD (1) of Income Tax Act, vide order dated 16.05.1988, the Appropriate Authority of Income Tax passed an order of pre-emptory sale of the said property.

5. The plaintiffs filed W.P. (C) No. 1051/1988 along with CM No. 5578/1988 challenging the order dated 16.05.1988 of Appropriate Authority of Income Tax.

6. Since the defendant was required to hand over the vacant possession of the property no. C-422, Defence Colony, New Delhi where he was residing, to the plaintiffs and had no other unit to reside, he searched for a cheaper property and entered into an agreement to sell with one Mr. Chaman Lal for purchase of property no. 80/7AB, Malviya Nagar for a consideration of Rs. 17 lakhs. He only paid Rs. 50,000/- towards earnest money. The Appropriate Authority also granted NOC to the owner of property no. 80/7AB, Malviya Nagar. As the defendant could not get sale price of his property from plaintiffs/Government and was not having necessary funds to pay the balance consideration, the deal could not materialize.

7. On 29.07.1988, on being served W.P. (C) No. 1051/1988, opposing grant of stay, he filed an affidavit seeking payment of the balance amount either from the plaintiffs or from the Appropriate Authority, Income Tax so that he could save his earnest money being forfeited and complete the transaction in respect of Malviya Nagar property. However, his prayer was not acceded to resulting in forfeiture of the earnest money as he could not arrange balance sale consideration to pay to complete the transaction.

8. In W.P. (C) No. 1051/1988 following the judgment of the Apex Court in JT 1992 SC 678 titled C.B. Gautam vs. Union of India, vide order dated 14.10.1993, the impugned order of Appropriate Authority dated 16.05.1988 for pre-emptory sale was quashed with direction to decide the matter afresh. The Appropriate Authority vide its order dated 10.01.1994, granted NOC in respect of subject matter of agreement dated 29.02.1988.

9. On 25.01.1994, a notice was sent by the plaintiffs informing the defendant regarding issuance of certificate u/s 269UL3 (3) of Income Tax Act and no objection to the transfer of the said property to them, for consideration of Rs. 28 lakhs. This notice also called upon the defendant to obtain sale permission from:- (i) L&DO, New Delhi, (ii) Income Tax Clearance certificate on Form No. 34A and thereafter, inform to enable them to arrange the balance payment of Rs. 27 lakhs

and execute a registered sale deed within 30 days of receipt of confirmation from the defendant that he has obtained the necessary permission.

10. On not getting any response from the defendant, the plaintiffs filed the suit for specific performance of the agreement to sell dated 29.02.1988 in respect of property no. C-422, Defence Colony, New Delhi. After completing the pleadings, following issues were settled by learned Single Judge:-

(i) Whether the agreement to sell dated 29.2.1988 lapsed by efflux of time? OPD, (ii) Whether the suit filed by the plaintiffs is malafide and is an abuse of the process of law? OPD, (iii) Whether the suit is bad for non-joinder of necessary parties? OPD, (iv) Whether the Plaintiffs failed to pay the sale consideration in time? If so, what is its effect? OPD, (v) Whether the agreement to sell dated 29.2.1988 is void and inexecutable? in executable? OPD, (vi) Whether the Plaintiffs are entitled to relief as claimed? OPP, (vii) Relief.

11. After considering the evidence adduced by the parties and the rival contentions as well relevant case law, the learned Single Judge considered the case of the parties not only from the angle of price rise during the pendency of the litigation but also the hardships faced by the defendant that marriage of his daughter could not take place for want of funds, that he also lost his right to purchase another property apart from forfeiting the earnest money of Rs. 50,000/-. Referring to the decision of Division Bench Ex. PW Y dated 5th January in C.M. No. 1394/1988 filed in W.P. No. 1051/1988 indicating intention to compensate by way of interest for delay in payment, on ground of equity and further that specific performance of the agreement was being ordered after nearly 11 years of entering into the agreement for no fault of the defendant, deliberating on the aspect that time is not the essence of the contract of sale of immoveable property though it should be performed within a reasonable time especially when property is a house located in an urban area having the tendency of sky rise in prices, held that these ground are not sufficient to deny the relief of specific performance as in that situation, this relief could hardly be granted in any case.

12. The concluding paragraphs of the judgment which incorporates the reasons for decreeing the suit for specific performance and the conditions to be complied with by the plaintiffs are recorded in paras 11.3 and 12 which are extracted as under :-

11.3 While it is not be possible to say that the plaintiff failed to take any appropriate step in time for the time has lapsed on account of the refusal of the income tax Authorities to grant permission, nor that of the defendant. This Court in afore-mentioned circumstances, is called upon to do the equity in between the parties. It appears desirable, therefore, that both the parties should gain and suffer equally and the claim of both the parties should be adjusted by allowing interest @ 30% per annum from 5th January, 1989 the date of order in Ex.PW1/1 till the date of execution of the sale and thereby the defendant would

be compensated by way of interest also, by selling the property worth about Rs. 1.85 crores approximately today.

12. In the aforesaid circumstances, I feel that it would be appropriate that the suit for specific performance may be decreed subject to the following conditions.

(a) The plaintiffs deposit Rs. 27 Lakhs with interest @ 30% from 5th January, 1989 up-to-date within a period of six weeks;

(b) In case the plaintiffs fail to deposit the amount within six weeks, the suit for specific performance shall stand dismissed. However, in that case the plaintiffs shall be entitled to recover Rs. 1 lakh with interest thereon @ 30% per annum with effect from 5th January, 1989 up-to-date;

(c) In case the plaintiffs deposit the amount within six weeks, the defendant shall move appropriate application before the L & DO within two weeks from the date of deposit of the amount by the plaintiffs. In case of failure of the defendant to do so, the plaintiffs shall be entitled to get an officer of the court appointed for moving the application for seeking permission from the L & DO."

13. The plaintiffs challenged the order of learned Single Judge on the following grounds :

(i) The foundation of assessing the value of the suit property as Rs. 1,83,00,500/- was wrong for the reason that calculation was made taking the value of the plots auctioned in 1996-1997 whereas this transaction pertained to the year 1988.

(ii) The findings that both the parties were not at fault was wrong as the plaintiffs were always ready and willing to perform their part. It was the defendant who continued delaying the case since 1994 on flimsy grounds while enjoying the property throughout.

(iii) Imposing of condition of payment of interest @ 30% per annum w.e.f. 05.01.1989 imposed huge liability of Rs. 90 lakhs approximately which was much more than the value of the property and infact the cost of the property would be much less than the liability of the interest.

(iv) While imposing liability of interest @ 30%, learned Single Judge failed to ignore that the defendant continued to enjoy the property throughout and this rate of interest was against the provisions of CPC as well as Interest Act.

(v) The order of Division Bench in W.P. (C) No. 1051/88 that the respondent/defendant could be compensated by way of interest for delay in payment, has not been correctly interpreted as it was not a direction but an impression, while dismissing the application of the respondent/defendant.

14. Their prayer in the appeal is to set aside condition (a) in para 12 of the impugned judgment and modify the decree accordingly.

15. The defendant challenged the impugned order on the following grounds :

(i) As per the agreement, in case the property is not mutated in the name of vendor by the time of receiving the other permissions, he was entitled to receive the advance alongwith interest @ 24% per annum. Thus, specific performance could not be granted in this case.

(ii) In the given facts and circumstances, when the plaintiffs had agreed for alternative relief of damages, the same should have been granted.

(iii) The plaintiffs filed the Writ without his knowledge or consent and obtained the stay order, thus, leaving him in a situation that he could not get the sale consideration either from the Appropriate Authority or from the plaintiffs.

(iv) After considering the reserve price of residential plots for auction in the neighbouring area and the price for which the same were auctioned in the area of Lajpat Nagar and Defence Colony, mean rate of the residential plot was taken to assess the value of the plot of the defendant but Learned Single Judge failed to take into account that the defendant could not acquire another property and had to forfeit the earnest money and by the time the decree has been passed, the property which he agreed to purchase would not be available even at the increased rate.

(v) There was no documentary evidence to prove the readiness/willingness of the plaintiffs to perform their part and even as per their own admission/documents even in the year 1994, they need to make arrangement for paying the same consideration. The plaintiffs also failed to lead any evidence to prove their financial capacity or the arrangement made by them.

(vi) At the time of entering into sale, he was in need of funds to meet his pressing needs i.e. to purchase a smaller house as well as to save the funds for marriage of his daughter and due to the conduct of the plaintiffs, the funds could not be made available to him resulting in great loss to his disadvantage and even defeating the purpose for which he wanted to sell the property.

(vii) Though no specific time for completing the transaction was mentioned in the agreement to sell, the Court should have inferred reasonable time from the surrounding circumstances and pressing needs behind entering into the sale of the house, which though not forming part of the agreement, were brought to the notice of the plaintiffs.

(viii) The defendant in his evidence specifically stated that due to non-receipt of sale consideration at the appropriate time, neither the marriage of his daughter could be performed nor alternative accommodation could be purchased and there being no cross examination on this aspect, the same is deemed to be admitted under Sec. 138 of Evidence Act.

(ix) The defendant had to suffer monetary loss and mental agony for no fault of his own, the learned Single Judge should have considered that relief of specific performance being discretionary in nature had to be exercised of sound reasonable and judicial principles and hardships of the defendant had to be taken

note of.

16. On behalf of plaintiffs (in RFA (OS) No. 34/2000), it has been submitted that :-

(i) The defendant claimed himself to be the absolute owner of the suit property while executing the agreement dated 29.02.1988 whereas property was in the name of his father and yet to be mutated in his name.

(ii) It was for the defendant to obtain the necessary permission and receive the balance payment at the time of completion of the transaction which he failed to do.

(iii) At the time of execution of agreement, he did not mention that he needed the funds for the marriage of his daughter and purchase of alternative smaller accommodation in another locality.

(iv) The hardship as claimed by him during trial regarding not being able to perform marriage of his daughter for want of funds or the reasons for which he wanted to sell the suit property never formed part of the agreement and he cannot be permitted to plead his hardship to defy the specific performance.

(v) The order of Appropriate Authority of Income Tax, ordered pre-emptory purchase on 16.05.1988 whereas the appellant agreed into the agreement with Chaman Lal for purchasing property No. 80/7-AB, Malviya Nagar on 26.05.1988 i.e. after the order of pre-emptory purchased was passed.

(vi) After the NOC dated 10.01.1994 was received from Appropriate Authority, immediately thereafter defendant was called upon to take the steps for execution of the sale agreement pursuant to the agreement dated 29.02.1988 and confirm, so that within 30 days of that confirmation, the transaction could be completed.

(vii) Plaintiffs were always ready and willing to perform their part of agreement and even the order of Appropriate Authority, Income Tax was challenged by filing writ by them which further shows their willingness to perform their part of the agreement. It is the defendant who failed to obtain the necessary permissions even after receiving the notice dated 25.01.1994 thereby compelling the plaintiffs to file a suit to get the specific performance of the agreement enforced. He has relied upon (i) 142 (2007) DLT 483 (DB) titled as Vijaya Myne vs. Satya Bhushan Kaura, and (ii) Laxman Tatyaba Kankate and Another Vs. Smt. Taramati Harishchandra Dhatrak, in support of his contentions.

17. During the course of arguments, learned counsel for the plaintiffs submitted that the plaintiffs are ready to withdraw their appeal and pay the balance consideration with 30% interest in terms of the order passed by learned Single Judge.

18. On behalf of defendant, it has been submitted that after entering into agreement to sell on 29.02.1988, he applied to Income Tax authorities vide his application dated 11.03.1988. However, u/s 269UD (1) of Income Tax Act, vide

order dated 16.05.1988, the Appropriate Authority of Income Tax passed an order of pre-emptory sale of the said property. If the necessary permission was not granted and the Appropriate Authority, Income Tax ordered pre-emptory sale of the property, agreed to be sold to the plaintiffs, he cannot be blamed for the situation. He had every intention to honour his commitment which can be well gathered from the fact that he entered into an agreement to purchase a cheaper property in Malviya Nagar for Rs. 17 lakhs and paid earnest money and even necessary permission/NOC was granted to Mr. Chaman Lal on 14.07.1988.

19. It is urged that defendant filed his affidavit in the writ petition No. 1051/88 asking for money from whosoever was interested in purchase of the property i.e. the Income Tax department or the plaintiffs, so that he could make the balance payment of Rs. 17 lakhs as agreed vide agreement dated 26.05.1988. Neither the money was paid by the plaintiffs nor the same could be received from the Appropriate Authority, Income Tax because of the stay granted in Writ Petition. Rather he had to suffer loss of Rs. 50,000/- forfeited by Mr. Chaman Lal. It has been urged before us that what else the defendant could have done in the matter except to ask for the amount from any of the purchaser so that he could buy another property for his residence. At that time, nobody came to his rescue and till date his daughter is unmarried and the property is in the same condition in which it was in the year 1988.

20. It has been submitted that while seeing the equity and the hardship, learned Single Judge failed to consider that after about 11 years i.e. at the time of passing decree, it was not possible for him to sell his house with no other alternative property to shift. It has been further submitted that in the given facts and circumstances especially in view of the conduct of the plaintiffs, comparatively greater hardship being faced by the defendant in case specific performance of the agreement dated 29.02.1988 is enforced, the Court should have ordered for interest/compensation being awarded to the plaintiffs in terms of the agreement.

21. Learned counsel for the defendant has relied upon (i) K. Narendra Vs. Riviera Apartments (P) Ltd., , (ii) J.P. Builders and Another Vs. A. Ramadas Rao and Another, , (iii) N.P. Thirugnanam (D) by L.Rs., Vs. Dr. R. Jagan Mohan Rao and others, , (iv) (1967) 1 SCR 277 SC 868 titled as Gomathinayagam Pillai and others vs. Palaniswami Nadar, (v) (2009) 14 SCC titled as Inderchand Jain (Dead) through L.Rs vs. Motilal (Dead) through L.Rs, (vi) K.S. Vidyanadam and Others Vs. Vairavan, , and (vii) AIR 2011 SC 3234 titled as Mrs. S. Rajalakshmi & ors. Vs Mrs. Saradamani Kandappan & Anr. in support of his contentions.

22. We have considered the rival contentions. It is time to deal with the contentions of the plaintiffs raised before us. While raising contention regarding claim of the plaintiffs being absolute owner, it has been tried to be projected as if there was some kind of misrepresentation in this regard. It would be relevant to mention what PW-1 has to say on this aspect. He admits negotiations being started between the plaintiffs and defendant in the end of December, 1987 and

beginning of January, 1988. He also admits that he came to know about the deal from Balraj Behl of Om Behal Company (property brokers). It is worth nothing that Balraj Behl is a witness to this agreement which is sufficient to show that deal was struck through him and even on this aspect, PW-1 did not come out truthfully. While denying that the agreement to sell Ex.DW1/X3 was got prepared through lawyer, he volunteered that it was prepared by them (plaintiffs). As the agreement was drafted by them, they knew and understood the implication of each and every clause. No doubt, in portion "X" of the agreement, it is written that Vendor is the absolute owner/lessee in respect of the suit property, in the succeeding paragraphs complete details as to how he was acquiring the titled, is incorporated including that the property was yet to be mutated in his name. Clause 12 of this agreement clears the confusion, if any, tried to be created by the plaintiffs.

23. The second contention is in respect of obligation of the defendant/vendor to obtain necessary permission and receive the balance payment at the time of completion of the transaction thus attributing failure on his part in performing his part of obligation. The plaintiffs were well aware that subject matter of the agreement required permission from Appropriate Authority, Income Tax. There was no lack of co-operation by the defendant/vendor as just after 10 days of the deal, necessary application was filed by the parties. The turning point was the order dated 16.05.1988 by Appropriate Authority, Income Tax ordering pre-emptory sale with direction to handover the vacant possession of the suit property by 31st May, 1988 and for his own convenience, with prior intimation to the concerned authority regarding compliance. When the first step in the direction to obtain permission, proved to be final, by taking away the property from the hands of the defendant, there was hardly anything left for him to perform his part of the agreement.

24. So far as the contention of learned counsel for the appellant regarding non-mentioning about his (defendant's) needs of funds in the agreement is concerned, the circumstances leading to entering into an agreement to sell of property No. C-422, Defence Colony, New Delhi, were the personal problems of the vendor and not even required to be shared with the plaintiffs or disclosed publically. The defendant was residing in Defence Colony and was son of an army officer who was the original allottee/lessee of the said property. It was for him to manage his problems and arrange funds for his needs. He was under no legal, moral or contractual obligation to incorporate his personal or family needs of money in this agreement. So, the plaintiffs cannot gain anything out of it except putting the defendant to some kind of embarrassment regarding his financial condition despite being residing in a posh area like Defence Colony.

25. The contentions regarding the hardship claimed by the defendant due to not being able to get the sale price either from the plaintiffs or from Appropriate Authority, Income Tax resulting in forfeiture of his earnest money by Mr. Chaman Lal with whom he entered into an agreement is challenged on the ground that

this agreement was entered into by him despite knowing that Appropriate Authority, Income Tax has opted for pre-emptory sale on 16.05.1988. In this regard, it is not out of place to mention here that the negotiations started with the defendant by the plaintiffs in December, 1987 and concluded on 29.02.1988 taking about three months to finalize the deal. Then how the defendant whose deal was finalised only on 29.02.1988 could have an alternative option readily available without even knowing as to what the Appropriate Authority, Income Tax had in store for him.

26. Mere fact that he signed an agreement on 26.05.1988 with Mr. Chaman Lal, indicate that he knew he had to sell the property, the vendee could be Government, if not the plaintiffs. It is pertinent to note that the draft paid by the plaintiffs to the defendant in pursuant to the agreement Ex.DW1/X3 executed on 29.02.1988 was prepared on 11.02.1988. Getting the draft for Rs. 1 lakh prepared on 11.02.1988 and keeping close to the chest for 18 days, lead to the inference that deal must have been finalised before 11.02.1988 and only thereafter the draft could have been got prepared. If the plaintiffs had been taking so much time in executing the agreement, even after finalising the deal, how the agreement entered into by the defendant could be looked with suspicion if entered on 26.05.1988 i.e. after the orders of pre-emptory sale was passed.

27. Regarding next contention that he contacted the defendant to comply the remaining two conditions and on not hearing from him for a considerable time, he sent the letter dated 25.01.1994 Ex.PW1/3 by post vide postal receipt Ex.PW1/4, the contents of Ex.PW1/3 contain no such previous contact/communication with the defendant requiring any response from him. PW-1 Mr. Kamal K. Oswal also did not state how defendant was contacted i.e. whether personally or telephonically.

28. In order to meet this contention, we would like to extract the relevant paragraphs of affidavit and supplementary affidavit filed in Writ Petition No. 1051/1988 and the prayer made therein and prayer made in the SLP, to ascertain the circumstances in which the defendant was put by the plaintiffs with no solution in sight to come out of the situation. In para 10 of the affidavit filed in Writ Petition No. 1051/1988, after incorporating the terms of the agreement entered into with the plaintiffs as well as by him with Mr. Chaman Lal, submitted as under :-

in either case whether the petitioners succeed or fail, the price of his property would remain sealed for number of years, and after the disposal of the petition one way or the other, he would be obliged to vacate the house and start looking for house once again.

He further continued as under :-

the value of the immoveable property is increasing day by day and whereas he would be bound by the sale price of his house; he would have to arrange for much higher amount for purchasing the new property after the lapse of number

of years and it would be impossible for him to purchase the house at that time with this amount - which would be given to him at that time. Besides he would suffer mental torture all throughout which cannot be compensated in terms of money.

He prayed that :-

interim relief should be granted in such terms that he should get the balance of the sale price of his house either from the petitioner or from the Government against taking possession of his house.

29. Para 6 of the supplementary affidavit filed by the defendant in Writ Petition No. 1051/1988 extracted as under :-

It is humbly submitted that it is a litigation between the purchaser of my house and the Department, but I am being penalised for nothing inasmuch as I am ready and willing to deliver the vacant possession of the house against payment of the same price. It is further submitted that it would not be just and proper for this Hon''ble Court to freeze the price of his house for a number of years only because the petitioner has chose to challenge the order of respondent No. 2. The said interim orders would amount to deprivation of my legal and fundamental rights to honour the agreement to sell by receiving payment against delivery of the vacant possession and to purchase a smaller house for my family. This Hon''ble Court would appreciate that it is not a matter of year or so but the petition may not be heard and disposed of by the Supreme court and in the meanwhile I would suffer irreparable loss and injury. Interest, if awarded would not compensate me in any manner."

In any event, I need funds to marry my daughter and I sold the present house for the said purpose so that I can marry my daughter and live in a smaller house. The interim order would ruin me totally.

30. In the SLP, after mentioning in para 8 that if the petitioner has challenged the order of Appropriate Authority, Income Tax, he must show that he is ready and willing to perform his part of the obligation which he failed to do, in para 9, it has been submitted that the High Court order of stay is resulting into substantial injustice to the petitioner who has not challenged the acquisition order and who is interested to receive the balance of the sale price against delivery of the vacant possession either to the purchaser (plaintiffs) or the acquiring authority (Appropriate Authority, Income Tax).

31. The case law cited by learned counsel for the plaintiffs deal with the conditions and circumstances to be considered while deciding whether decree of specific performance should be passed or the suit be decree by awarding the damages alone. The legal principles laid in this regard are not in controversy. What we have to consider is whether the facts and circumstances of this case require awarding of decree of specific performance.

32. Perusal of agreement Ex.DW1/X3 reveals that :-

(i) it was a contingent one and in view of the fact that Appropriate Authority, Income Tax ordered for pre-emptory sale, the entire agreement became unenforceable in law. In that circumstance, discretion vested under Sec. 20 of Specific Relief Act could not have been exercised in favour of the plaintiffs.

(ii) That right from the date of entering into agreement, the plaintiffs were aware that defendant was only son of Late Major P.D. Lala, the lessee and had relinquishment deed executed in his favour by his mother and sister, so whatever title he had on the date of agreement, was well known to the plaintiffs.

(iii) It has been admitted by the plaintiffs that agreement was got prepared by them and whatever conditions have been imposed in case of its non-performance, were incorporated in Clause 12 of the agreement.

(iv) Clause 12 of the agreement clearly indicates that in case of deficiency in title i.e. failure to get the property mutated in his name, they were entitled to earnest money with interest @ 24 % per annum.

(v) The copy of order dated 16.05.1988 was communicated by Appropriate Authority, Income Tax immediately. Thus, in May, 1988 itself they came to know that the premises No. C-422, Defence Colony, New Delhi stood vested in the Government. Parties became aware that the voyage undertaken by them was in rough sea and ship was destined to sink. It was something unanticipated by the plaintiffs at the time of entering into agreement, otherwise they would have safeguarded their interest in this regard also as was done in clause 12 i.e. in case of mutation not effected in favour of defendant.

(vi) As per clause 6 and the agreement Ex..DW1/X3, the interest of defendant/vendor was protected only to the extent that in case plaintiffs/vendees failed to get the sale deed registered within stipulated time i.e. within 30 days from the date of receipt of intimation from the vendor that necessary permission had been acquired, the advance money and part payment of Rs. 1 lakh could have been forfeited by him.

(vii) On the date of agreement, the plaintiffs were aware about deficiency in the title of the defendant resulting in incorporating clause-12. They were conscious that the execution of sale deed was dependent on permission/clearance from various authorities. The defendant was under obligation to apply for permissions to various departments but the very first speed breaker i.e. seeking permission from Appropriate Authority, Income Tax proved fatal. He was required to apply to the Appropriate Authority, Income Tax for necessary permission/NOC which the parties to the agreement complied within reasonable time i.e. just after 10 days of entering into the agreement, however, on the outcome, the defendant had no control. If the agreement became unenforceable due to the act of the Government by resorting to pre-emptory sale, the agreement ceased to remain enforceable.

23. Let us consider the circumstances which made the contract unenforceable.

24. The order dated 16.05.1988 by Appropriate Authority, Income Tax is on the subject "Proceeding under Chapter XXC of the income tax Act, 1961 in respect of immovable property situated at C-422, Defence Colony, New Delhi". The first paragraph reads as under : -

I am directed by the Appropriate Authority to serve on you a copy of the order made by it under sub-sec. (1) of Section 269 UD of the I.T. Ac, 1961 for the purchase by the Central Government of the immovable property situate at C-422, Defence Colony, New Delhi. Under sub-section (1) of Section 269 UE the property vests in the Central Government from 16.5.88, the date of the said order, free from all encumbrances.

After referring to the relevant provisions i.e. Section 269 UE (2), (3), (4) & Section 276 AB, in paragraph 3, the defendant/vendor was called upon to deliver possession of the immovable property to Mr. Gurmej Singh, Valuation Officer (III) in the office of the Superintendent Engineer (Valuation), 11th Floor, Rohit House, Tolstoy Marg, New Delhi, within 15 days of the service of the order u/s 269 UD(1). In paragraph 4 of the order, he was advised to intimate in advance, in any case before 31.05.1988, to the Appropriate Authority, the date and time he intended to surrender or deliver possession of the immovable property.

25. The plaintiffs were in the knowledge of order dated 16.05.1988 by Appropriate Authority as established from the fact that the Writ Petition No. 1051/1988 challenging that order was filed by them and not by the defendant. It is relevant to mention here that though the defendant/vendor surrendered to his fate, it was the plaintiffs/vendee who challenged the same by filing Writ Petition impleading defendant/vendor also as respondent No. 4 and obtained stay order.

26. The defendant in his testimony before the Court as DW-3, specifically stated that he opposed the grant of stay order, making request by filing affidavit and supplementary affidavit that he be provided money either by the plaintiffs or by the Government to enable him to honour his commitment qua Mr. Chaman Lal, whose property in Malviya Nagar he agreed to purchase. Mr. Chaman Lal had already obtained necessary permission from Appropriate Authority and was serving him with notices to either perform his part or face the forfeiture of earnest money. He has also stated that he was not even consulted at the time of filing Writ Petition by the plaintiffs. He came to know only through notice of Writ Petition.

27. The statement of PW-1 Mr. Kamal K. Oswal, plaintiff No. 1 needs some references to understand their conduct during the relevant period.

(i) He admits that application for requisite permission under Sec.37 (1) required to be filed jointly with the defendant was done on 11.03.1988. He admits passing of order for pre-emptory sale by Appropriate Authority on 16.05.1988. He claims filing of Writ Petition after discussion with the defendant in which he was impleaded as respondent and also that he made prayer before the Court for payment of balance sale consideration which prayer was declined on 05.01.1989

by the Court vide order Ex.PW1/1.

(ii) PW-1 also admits that the order of Division Bench on the rejection of prayer of the defendant to have balance sale price from any of purchaser, was challenged by him (defendant) before Supreme Court by filing SLP which was disposed of vide order Ex.PW1/2. (Though PW-1 has claimed that the SLP was dismissed but contents of the order show that in view of the order of Supreme Court in Civil Appeal arising out of SLP (C) No. 15036 of 1988, it was remanded to the High Court for disposal according to law in the light of their decision).

(iii) PW-1 admits that the Writ Petition was disposed of in view of the decision of Apex Court in C.B. Gautam's case and matter was remanded to Appropriate Authority vide order dated 14.10.1993.

(iv) PW-1 admits that the Appropriate Authority granted the permission vide order dated 10.01.1994 Ex.DW1/X2.

(v) PW-1 claims that thereafter he contacted the defendant to comply the remaining two conditions and on not hearing from him for a considerable time, he sent the letter dated 25.01.1994 Ex.PW1/3 by post vide postal receipt Ex.PW1/4.

(a) The first part of the statement regarding contacting the defendant is falsified from the contents of letter Ex.PW1/3 which starts with the words "We are pleased to inform to inform you that the office of Appropriate Authority, Income Tax Department, New Delhi has issued certificate u/s 269 UL(3) of Income Tax Act 1961 bearing No. AA/R910/93-94 dated 10.01.1994 confirming that it has no objections to the transfer of subject property by you to us for a consideration of Rs. 28,00,000/- as per the Agreement to Sell dated 29.02.1988." giving no reference of being contacted earlier to comply with other two conditions as per agreement or any complaint regarding no response from his (defendant's) side.

(vi) It is admitted by him that after entering into agreement to sell, despite repeated prayers to the Court, by the defendant asking for balance sale consideration from anyone interested in purchase i.e. the Government or the plaintiffs/vendee, no money was offered at any point of time. If not the entire balance sale consideration of Rs. 27 lakhs, atleast Rs. 17 lakhs could have been offered or paid which he urgently required to purchase alternative accommodation and was under constant threat of losing the bargain as well as forfeiture of earnest money.

(a) The various replies sent by the defendant to Mr. Chaman Lal forming part of the record contain narration of his (defendant) helplessness, pathetic condition and inability to come out of the situation in which he was placed in legal battle between plaintiffs and the Government in the Writ Petition No. 1051/1988 vide which the order of pre-emptory sale was challenged by the plaintiffs.

38. Learned Single Judge though opined that none of the parties could be blamed

for failure of the transaction, but failed to take into account that within three months, the plaintiffs came to know about the orders dated 16.05.1988 by Appropriate Authority, Income Tax and the hurdles in the transaction to the extent that agreement became unenforceable. At that time, they could foresee that in view of the pre-emptory sale by Appropriate Authority, Income Tax for which certainly defendant could not be blamed, the safe course was to take back the earnest money and find out some other deal as price could not have escalated in such a short duration which was less than three months.

39. The plaintiffs are claiming discretionary relief of specific performance and this Court has to consider whether it is just, fair and equitable and also compare the hardships. Perusal of the impugned judgment by learned Single Judge reveal that he was convinced about the bonafide of defendant in the deal and no fault on his part for failure of the transaction. He failed to consider and compare the hardships faced by the defendant for more than a decade in view of the stay order dated 05.01.1989 in Writ Petition No. 1051/1988 filed by plaintiff which is extracted below :-

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Heard.

Counsel for the petitioner-transferee states that the transferee is not willing to accept an amount equal to the amount of apparent consideration from the income tax authorities. Consequently, objections pertaining to limitation, in view of sections 269UG or 269UH of the Income Tax Act, 1961 will not be raised.

The operation of the order dated 16th May, 1988 is stayed till the disposal of the writ petition.

The Income Tax authorities need not tender or pay either the transferee or the transferor an amount equal to the amount of apparent consideration till the disposal of the writ petition.

40. We were informed during arguments that till date the defendant and his family are living in two bedroom house. Thus, for almost 24 years, despite having house on a big plot in Defence Colony, he had been put in a miserable condition making him live in insufficient accommodation and not being able to meet his requirement of more space and growing needs of the family during last 24 years. What can be the more glaring example of hardships being faced by a defendant in a suit for specific performance.

41. The learned Single Judge also erred in returning the finding by assessing the value of this plot in view of escalation in prices of property and comparing the auction price of Defence Colony and Lajpat Nagar and awarding interest @ 30%. (Even that was found to be unjust and on higher side by the plaintiff and challenged before us).

42. The price of plot assessed and interest awarded after 11 years of the deal

while ordering specific performance, was neither sufficient to buy a suitable house for his family nor could set the hands of clock back as the right age of marriage of his daughter passed and the basic purpose of sale of house stood frustrated. The plaintiffs were not required to be informed at the time of agreement about his compelling circumstances in which he wanted to sell the house nor reasons for sale were required to be incorporated in the agreement. It was for the defendant to manage with his means and arrange funds to meet his requirements. Still in the affidavit and supplementary affidavit filed in Writ Petition bared his chest pleading all circumstances and dire need of funds. He was ready and willing to hand over vacant possession to plaintiffs or Government to secure their interest in property, if paid the sale consideration agreed vide agreement dated 29.02.1988. It was at that stage that plaintiff should have at least parted with Rs. 17 lacs required by him to purchase alternative residential unit for his family and enabled him to hand over possession and complete the transaction subject to decision of the court in Writ Petition under protection of stay order in their favour.

43. It cannot be ignored that writ petition was decided in view of judgment of Apex Court in C.B. Gautam's case decided on 14.10.1993 and matter was remanded to Appropriate Authority. But for the decision of Apex Court in C.B. Gautam's case, nobody could have anticipated the fate of that writ petition which remained pending for about 6 years. Even in the writ, plaintiffs were offered by Government amount equivalent to the earnest money which was not accepted by them. The plaintiffs' right in that situation required protection only to the extent of securing his earnest money, may be with interest at the rate maximum at 24% as per Clause 12. By not taking back the earnest money either from Government or from defendant and being armed with stay order, earlier in writ petition and later in the suit, they literally made the life hell for the defendant who was not only made to litigate upto Supreme Court by filing SLP for no fault of his own but also forced into litigation for almost 24 years despite himself being loser of Rs. 50,000/- paid as earnest money to Mr. Chaman Lal.

44. We are of the view that learned Single Judge failed to strike balance between the hardships faced by the parties. While for plaintiff, just by paying Rs. 1 lakh for a Defence Colony property, it was a safe investment and luxury litigation, for the defendant it became a life long misery. It was a case where specific performance ought not have been granted in view of the inequitable position in which defendant had been placed and the hardships faced by him since the date the Appropriate Authority, Income Tax ordered for pre-emptory sale. He was ready to handover vacant possession to the vendee (plaintiffs). Neither the plaintiff nor Appropriate Authority Income Tax came to his rescue by paying balance sale consideration to enable him to honour his commitment incurred by entering into an agreement to sell with Chaman Lal as well to have funds for performing the marriage of his daughter.

45. We would like to refer and rely on pronouncements by Apex Court laying

down the principles and guidelines to be considered in cases where specific performance has been sought to be enforced. In (2000) 7 Supreme Court Cases 548 Gobind Ram vs. Gian Chand, it was observed as under :-

7. It is the settled position of law that grant of a decree for specific performance of contract is not automatic and is one of the discretions of the court and the court has to consider whether it will be fair, just and equitable. The court is guided by principle of justice, equity and good conscience. As stated in P.V. Joseph's Son Mathew the court should meticulously consider all facts and circumstances of the case and motive behind the litigation should also be considered.

46. Highlighting that specific relief does require consideration of various principles before ordering for enforcement, we may quote the observation of learned Hon''ble Supreme Court in Bal Krishna and Another Vs. Bhagwan Das (Dead) and Others, in para 7 which is extracted as under :-

14. It is also settled by various decisions of this Court that by virtue of Section 20 of the Act, the relief for specific performance lies in the discretion of the court and the court is not bound to grant such relief merely because it is lawful to do so. The exercise of the discretion to order specific performance would require the court to satisfy itself that the circumstances are such that it is equitable to grant decree for specific performance of the contract. While exercising the discretion, the court would take into consideration the circumstances of the case, the conduct of parties, and their respective interests under the contract. No specific performance of a contract, though it is not vitiated by fraud or misrepresentation, can be granted if it would give an unfair advantage to the plaintiff and where the performance of the contract would involve some hardship on the defendant, which he did not foresee. In other words, the court's discretion to grant specific performance is not exercised if the contract is not equal and fair, although the contract is not void. (Emphasis supplied by us).

47. In the case A.C. Arulappan Vs. Smt. Ahalya Naik, . the Hon''ble Supreme Court, in para 7, has made the following observations :-

7. The jurisdiction to decree specific relief is discretionary and the court can consider various circumstances to decide whether such relief is to be granted. Merely because it is lawful to grant specific relief, the court need not grant the order for specific relief; but this discretion shall not be exercised in an arbitrary or unreasonable manner. Certain circumstances have been mentioned in Section 20(2) of the Specific Relief Act, 1963 as to under what circumstances the court shall exercise such discretion. If under the terms of the contract the plaintiff gets an unfair advantage over the defendant, the court may not exercise its discretion in favour of the plaintiff. So also, specific relief may not be granted if the defendant would be put to undue hardship which he did not foresee at the time of agreement. If it is inequitable to grant specific relief, then also the court would desist from granting a decree to the plaintiff.

48. This aspect has been dealt with in detail in K. Narendra Vs. Riviera Apartments (P) Ltd., wherein it was held as under:-

Section 20 of the Specific Relief Act, 1963 provides that 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; 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. Performance of the contract involving some hardship on the defendant which he did not foresee while non-performance involving no such hardship on the plaintiff, is one of the circumstances in which the court may properly exercise discretion not to decree specific performance. The doctrine of comparative hardship has been thus statutorily recognized in India. However, mere inadequacy of consideration or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not constitute an unfair advantage to the plaintiff over the defendant or unforeseeable hardship on the defendant. The principle underlying Section 20 has been summed up by this Court in *Lourdu Mari David and others Vs. Louis Chinnaya Arogiaswamy and others*, by stating that the decree for specific performance is in the discretion of the Court but the discretion should not be used arbitrarily; the discretion should be exercised on sound principles of law capable of correction by an appellate court.

Chitty on Contracts (27th Edn., 1994, Vol.1, at p. 1296) states:

Severe hardship may be a ground for refusing specific performance even though it results from circumstances which arise after the conclusion of the contract, which affect the person of the defendant rather than the subject-matter of the contract, and for which the plaintiff is in no way responsible.

49. The learned Single Judge while decreeing the suit of the plaintiffs for specific performance, failed to take into account that with passage of time the purpose of entering into sale of property by defendant stood defeated and after 11 years of litigation situation drastically changed to the extent that by ordering enforcement and making him sell his only residential unit after 11 years, was bound to put him in greater hardships, whereas for the plaintiffs it was just reaping the harvest after investing a meagre sum of Rs. 1 lakh out of total sale consideration of Rs. 28 lacs in the year 1988. The defendant not only lost/forfeited Rs. 50,000/- paid to Mr. Chaman Lal out of that Rs. 1 lakh but also incurred the cost of litigation, apart from mental torture undergone by him in the situation he was put for no fault of his own.

50. Section 20 of the Specific Relief Act preserves judicial discretion of court as to decreeing specific performance and requires meticulous consideration of all facts and circumstances of the case before ordering enforcement. It is not to be ordered just because it is lawful to do so. The motive behind the litigation should enter the verdict which we find missing in the impugned judgment. The litigation resorted to by plaintiffs was used as an instrument of oppression to have an

unfair advantage over the defendant.

Despite knowing well that property stood vested in the Government vide order dated 16.05.1988 Ex.DW3/3 the plaintiffs did not ask for return the earnest money with interest. He refused to accept when equivalent amount was offered by the Government during hearing of writ petition.

51. Thus, we express our disagreement with learned Single Judge in respect of his finding ordering for specific performance of agreement. We are of the considered view that in this case, it was in consonance with justice that earnest money with interest should have been ordered to be paid instead of compelling enforcement of agreement.

52. In the result, we set aside the finding of learned Single Judge ordering for specific performance and order that plaintiffs shall be entitled to refund of Rs. 1 lakh paid as earnest money with simple interest @ 30% p.a. (which even as per plaintiffs is very high) from the date 16.05.1988 till date of payment. The date 16.05.1988 has been chosen keeping in view that after this order by Appropriate Authority, Income Tax, both the parties became aware that sailing was not smooth and ship could sink. It was the right time for them to either settle mutually or seek refund of the earnest money with interest as per agreement. Both the appeals stand disposed of in above terms. Parties to bear their respective costs.