(2008) 11 DEL CK 0210

In the Delhi High Court

Case No : CS (OS) No''s. 571 and 633 of 1990

Mohan Lal Ahuja and Others — APPELLANT

Vs

Tarun Chandra
 Veena Ahuja Vs Tarun Chandra and Another — RESPONDENT

Date of Decision : 28-11-2008

Acts Referred:
Contract Act, 1872 — Section 56, 73
Income Tax Act, 1961 — Section 269U
Specific Relief Act, 1963 — Section 19, 20, 21

Citation : (2009) 157 DLT 216

Hon'ble Judges : Sanjay Kishan Kaul, J

Bench : Single Bench

Advocate : Arvind Nigam and Abhishek Mishra, for the Appellant; S.K. Luthra in CS(OS) No. 571 of 1990 and for D-1 in CS(OS) No. 633 of 1990, for the Respondent

Judgement

Sanjay Kishan Kaul, J.—The two suits for specific performance are result of relationships which have gone sour. The specific performance is being sought in respect of proposed purchase of flats on the 4th floor of the building to be constructed on property bearing No. 34, Feroze Shah Road, New Delhi (''the said property'' for short). In suit No. 571/1990 (''first suit'' for short), an agreement to sell was executed while in respect of suit No. 633/1990 (''second suit'' for short) only a receipt for the money was executed. The receipt of money in both the cases is undisputed. The purchasers in the first suit are Mr. Mohan Lal Ahuja, his wife and children as per the agreement to sell dated 02.04.1988 for 1866 square feet on the 4th floor of the said property along with a garage while the receipt in the second suit dated 31.01.1988 is once again for a flat of 1866 square feet on the 4th floor of the said property. The phraseology used in the receipt is ''provisional booking''. The second suit is filed by Smt. Veena Ahuja, who is the wife of the brother of Sh.Mohan Lal Ahuja, first plaintiff in the first suit. The common seller in the two suits is Sh. Tarun Chandra, who was undisputedly a family friend. The issues were framed separately in the two matters and trial has been conducted separately, but thereafter the hearing proceeded simultaneously in the two suits as there were certain interlinked factors. It is in view thereof that the common facts are being set out hereinafter and the issues are being dealt with separately on the basis of testimony led in each of the suits.

2. The said property belonged to one Lala Adishwar Lal who passed away on 16.04.1950. On his demise, the property passed on his surviving sons and widow. A partition deed dated 30-31.03.1972 was executed whereby the property was sought to be partitioned by metes and bounds. The property is stated to have been mutated thereafter in the name of Class I heirs. The owners of the property entered into an agreement dated 02.08.1979 with M/s Kailash Nath Associates for development of the said property. This agreement is stated to have been followed up by a supplementary agreement dated 06.11.1986. A total of 50 flats are stated to have been constructed in two towers and disputes arose between the builder and the owners. The owners filed suit No. 321/1996 (much after the filing of the present two suits). It is the case of the common defendant in the present two suits that the owners arrived at a settlement dated 24.05.1999 dividing the flats with an arrangement of 19:29 between the owners and the builder and 2 flats were jointly owned.

3. It is the common case of the plaintiffs that the supplementary agreement dated 06.11.1986 was not disclosed by the defendant nor was the aforesaid settlement disclosed before this Court. Interim injunction orders were passed only in the second suit and possession of one flat bearing No. 403 on the 4th floor of the said property was directed to be retained. This injunction order and the retention of the flat separately is also stated to have formed a part of the settlement agreement dated 24.05.1999 recording that the possession would be handed over to the person as stated by the Court in the present legal proceedings.

4. One other fact which is required to be noticed in respect of this flat which had been preserved is the plea of the defendant that the flat actually belongs to one of his cousin brothers namely Mr. Anurag Chandra, who is also a signatory to the settlement. Mr. Anurag Chandra did approach this Court by filing an interim application seeking vacation of the Order against flat No. 403 but was not successful. The other flat which forms subject matter of the first suit is alleged to have been sold by the defendant to one Ms.Sushila Sukumaran under the circumstances discussed hereinafter.

Facts in relation to First Suit - CS(OS)571/1990

5. It is the case of the plaintiffs that the defendant represented to them that he was constructing a multi storey building at the said property and it is in view thereof that a flat with a covered area measuring 1866 square feet facing South on the 4th floor of the said property was agreed to be sold to the plaintiffs for a

total consideration of Rs. 13,50,000/- along with a garage for Rs. 40,000/-. The agreement is dated 02.04.1988, but payments were made prior to the agreement. The first payment was made for a sum of Rs. 1,00,000/- through two bank drafts for which a receipt was executed on 22.10.1986 (ExPW1/1). The phraseology used in the receipt is ''provisional booking of a flat'' measuring 1844 square feet on the 4th floor. Another sum of Rs. 1 lakh was paid under the cover of the letter dated 25.02.1987 (ExPW1/2). The third letter dated 07.03.1987 of the defendant (ExPW1/4) acknowledged the receipt of two demands drafts totalling Rs. 1,00,000/- on account of the residential flat. The letter also talks about the other booking in the name of Mrs. Veena Ahuja and reads as under:

Dear Mohan Uncle, I have duly received the 2 demand drafts totaling Rs. 1,00,000/- in your account for the residential flat. As discussed you have not sent me a draft of Rs. 50,000/- in the account of Mrs. Veena Ahuja.

I would request you to send the same immediately on receipt of this letter as the money is urgently required by me.

Moreover, I would require another in-account payment of Rs. 2,00,000/- by 1st week of April. So kindly arrange the same. This payment may be divided half and half between your account and Veena Aunty''s account.

Rest is all fine. I hope to receive the draft of Rs. 50,000/- at the earliest.

With warm regards,

Sincerely,

(Tarun Chandra)

6. The manner of addressing the above letter itself shows the close relationship between the parties where the plaintiff No. 1 has been addressed as ''Mohan Uncle''. This letter was followed up by another letter dated 30.04.1987 (ExPW1/5) which reads as under:

Mr. M.L.Ahuja

Builders and Govt. Contractors,

Camp: P.O. Raipur,

Dehradun (U.P.)

Dear Mohan Uncle,

In continuation to my last letter to you regarding the Flat at 34, Ferozeshah Road, I wish to inform you that we are now ready to enter into an agreement of sale and complete all other formalities regarding the above. I would request you to come to Delhi before the end of the week to complete the formalities.

Down payment o the flat which made at the time of booking has to be made at the time of signing of the agreement hence the earlier you can come the better so that the same be explained to you in person.

I am planning to be out of Delhi from 10th May onwards for a month or so hence it is important that the arrangement may be formalized at the earliest.

With regards,

Sincerely,

(Tarun Chandra)

7. It is only thereafter that the agreement to sell dated 02.04.1988 (ExPW1/8) was executed by the defendant in favour of the plaintiffs. The recital of this agreement refers to a flat No. (to be allotted) facing South on the 4th floor and a garage No. (to be allotted) by lease in perpetuity in respect of the construction on the land comprised in the said property for a total consideration as referred to aforesaid of an area of 1866 square feet with a right to the seller to increase/ decrease the area by 10 per cent. The aspect of payment was recorded in the agreement as under:

1) Amount already paid by way of deposit towards revisional booking of space prior to the date of signing this agreement Rs. 2,70,000 = 00 by cheques in favour of Mr.Tarun Chandra.

2) Rs. 1,35,000 + 40,000/- for Garage within 30 days from the date of signing of this agreement.

3) ___________ Balance amount will be payable by the buyer as follows in seven equal instalments

1) Rs. 1,35,000/- at the time of laying of basement.

2) Rs. 1,35,000/- at the time of laying of Ist floor.

3) Rs. 1,35,000/- at the time of laying of 3rd floor.

4) Rs. 1,35,000/- at the time of laying of 4th floor.

5) Rs. 1,35,000/- at the time of laying of 5th floor.

6) Rs. 1,35,000/- at the time of laying of 6th floor.

7) Rs. 1,35,000/- at the time of laying of 7th floor.

Balance if any payable at the time of handing over possession of the residential flat and garage to the Buyer(s).

8. The defendant informed plaintiff No. 1 vide a letter dated 13.07.1988 (ExPW1/9) to contact him immediately as certain changes were to be made in the agreement. The changes are however not specified. The next communication proved on record is a letter by plaintiff No. 1 to the defendant dated 19.06.1989 (Ex.PW/1/12) in which the problems expressed by the defendant to the plaintiff No. 1 have been set out. The letter records that the defendant had expressed

some doubts arising from the non filing/registering of the agreement along with form 37(I) with the Income Tax Authorities for which the plaintiff No. 1 had sought advice and found out that it would create no difficulty with a request to fill form 37(I) immediately.

9. The payments made by the plaintiffs from time to time were as under:

--------------------------------- Date Amount (in Rs.) --------------------------------- 01.07.1986 1,00,000/- 25.02.1987 1,00,000/- 23.04.1987 60,000/- 19.03.1988 70,000/- ---------------------------------

10. The plaintiffs also paid a sum of Rs. 75,000/- on 07.05.1988 and thus the total amount paid was Rs. 4,05,000/-. There is thus no dispute about the said amount. It is the case of the plaintiffs that though the agreement dated 02.04.1988 laid down the schedule of payment linked to the stage of construction, but the parties had agreed to pay the balance amount only at the stage of handing over of possession of the flat and the garage as per the stipulation in the said agreement extracted aforesaid. The plaintiffs claim that despite their best efforts, the defendant neither submitted the form 37(I) nor took other steps for completion of the sale. No further payments are stated to be taken allegedly on account of the wish of the defendant to make certain changes in the agreement as referred to in the letter of the defendant. The plaintiffs thus sent a legal notice dated 18.12.1989 (ExPW1/13) setting out the aforesaid facts and stating that even the form 37(I) had been got signed from the plaintiffs but not filed. It is alleged in the notice that on account of increase in prices, the defendant was trying to wriggle out of the transaction and called upon the defendant to complete the transaction in question. Another legal notice was also sent on 29.01.1990 (ExPW1/15) on the same terms. The plaintiffs were thereafter constrained to file the suit for specific performance of the agreement dated 02.04.1988 and in the alternative for damages of Rs. 36 lakhs. The plaint was, however, subsequently amended in the year 2001 whereby the claim of damages was increased to Rs. 1.5 crores.

11. The defendant has resisted the suit on certain technical pleas arising from the court fees and the lack of registration under the Income Tax Act, 1961 (''Income Tax Act'' for short). The receipt of payment of Rs. 4,05,000/- towards part payment is not denied, but it is the case of the defendant that the plaintiffs had abandoned the agreement and were not ready and willing to perform the obligations. It was claimed that the amount paid had thus been forfeited by the defendant. The defendant also claimed that the specific performance of the agreement was even otherwise not possible as the description of the flat was not certain and the agreement was too vague to be specifically performed even if the plaintiffs were so entitled.

12. On the pleadings of the parties, the following issues were framed:

1. Whether proper court fee has not been paid? OPD

2. Is the description of the flat given in the plaint not sufficient? If so, to what effect? OPD

3. Whether the agreement of sale of the flat and garage is void on account of vagueness and to what effect? OPD

4. What is the effect of the defendant not getting the agreement registered with the appropriate authority u/s 269U of the Income Tax Act? OPD

5. Whether the plaintiff has been ready and willing to perform their part of the contract? OPP

6. Is the plaintiff not entitled to the specific performance on the ground mentioned in the written statement? OPD

7. In case the plaintiffs are not entitled to specific performance for any reason, is plaintiff not entitled to damages in the alternative, and if so, to what amount the plaintiffs are entitled? OPP

8. Relief.

13. The defendant, however, did not press the issue Nos. 1 and 4 for which the onus was on the defendant. The plaintiffs examined four witnesses to support their case being plaintiff No. 1 as PW1, Sh. R.K. Mudgil, Officer, Canara Bank as PW2, Sh. Ashok Kumar, Record Keeper, South Indian Bank Ltd as PW3 and Sh. P.N. Sharma, Architect and Government approved valuer as PW4. The last three witnesses only proved the documents. PWs 2 and 3 were examined to prove the funds lying with the plaintiffs while PW4 was examined to prove the current market value of the flat.

Facts in relation to Second Suit - CS(OS) 633/1990

14. It has already been explained that the facts as set out in the plaint in both the cases are almost identically except the nature of documents executed. This is so since in the first suit, the agreement was executed while in the present suit no such agreement was executed. The receipt dated 30.01.1988 has been executed by the defendant No. 1/Mr.Tarun Chandra (ExPW1/1) acknowledging the receipt of a total sum of Rs. 2 lakhs by bank drafts towards ''provisional booking of a flat'' measuring 1866 square feet on the 4th floor at the rate of Rs. 723/- per square feet. There is also another communication dated 20.02.1988 (ExPW1/2) addressed to the defendant No. 1 by the plaintiff stating that an assurance had been held out by the defendant No. 1 for signing of the agreement in January-February, 1998 and asking as to when the agreement was to be actually executed. There is also a reference to the fact that probably the price was Rs. 697/- per square feet and not Rs. 723 per square feet. The question of form 37(I) is referred to in the letter dated 01.06.1989 of the plaintiff. The plaintiff also sent a letter to defendant No. 1 dated 06.10.1989 (ExPW1/4) referring the avoidance by the defendant No. 1 of execution of the agreement. The details of payments are as under:

-- Date Amount (in Rs.) 18.01.1986 20,000/- 20.10.1986 80,000/- 11.12.1986 40,000/- 23.01.1987 10,000/- 03.04.1987 50,000/- ----------- 2,00,000/- -----------

15. It is the case of the plaintiff that the defendant No. 1 avoided the execution of the agreement to sell as the prices had risen. The plaintiff ultimately filed a suit for specific performance or in the alternative for damages of Rs. 36 lakhs which was again increased to Rs. 1.5 crores as per the amendment made to the plaint on a similar pattern as in the first suit.

16. The defendants resisted the suit. Mr. Tarun Chandra has been arrayed as defendant No. 1 while M/s Kailash Nath Associates have been arrayed as defendant No. 2. The relief of specific performance and damages is only against defendant No. 1 and defendant No. 2 has been arrayed as a party for seeking the injunctive relief. Defendant No. 1, apart from raising the same technical plea, as in the first suit, claimed that only a small amount had been accepted from the plaintiff on the clear understanding that it would be treated as ''provisional booking for a flat'' only in case at any stage the flat of the property became available on account of entitlement to make further construction in the property from the statutory authorities. The agreement is alleged to be uncertain and the defence of non registration of the agreement under form 37(I) of the Income Tax Act was also taken.

17. In view of the pleadings of the parties, the following issues were framed:

1. Whether proper court fee has not been paid by the plaintiff on the plaint? OPD-1

2. Whether the plaintiff is not entitled to get a decree on account of the evasive description of the flat? OPD-1

3. Whether the agreement for the sale of flat inter se the plaintiff and the defendant No. 1 was provisional and is void on account of uncertainty? OPD-1

4. Whether the agreement was required to be registered by the plaintiff under form 37(I) of the Income Tax Act? If so, to what effect? OPD-1

5. In case, it is held that the agreement is valid, whether the plaintiff has been ready and willing to perform her part of the contract? OPP

6. Whether the agreement is void u/s 56 of the Contract Act? OPD-1

7. Whether the specific performance of the Contract cannot be granted to the plaintiff without obtaining prior permission of the Government of India as alleged by Defendant No. 1? OPD-1

8. Whether the plaintiff is entitled to get the flat in question and is entitled to get the specific performance of the agreement to sell? OPP

9. To what relief is the plaintiff entitled to? OPP

10. Whether the suit against defendant No. 2 is maintainable? OPP

11. Relief.

18. The defendant No. 1 did not press issue Nos. 1 and 4 for which the onus was on him on the similar pattern as in the first suit. The plaintiff examined two witnesses in support of her case being herself as PW1 and Sh. Raj Kumar, Engineer and Government approved valuer. PW2 was only examined for purposes to prove damages by reason of the current valuation of the property on the date of the report. The defendant No. 1 only examined himself as DW-1. Not only that, the parties agreed for the cross examination of the said defendant No. 1 as recorded in the first suit to be read as his cross examination in the present suit to the extent the same covers the facts of the present case. This is so recorded in the proceedings before the local commissioner dated 28.06.2007 where evidence was recorded.

19. In view of the spectrum of facts as set out hereinabove, it would be prudent to decide the issues separately in the two suits, but as to what relief can be granted would have to be examined as a composite relief. There is only one flat under the restraint order which is available. The plaintiffs, faced with this position, made a common request through their Counsel that the total payments made under both the suits should be treated as a payment against the flat in question for purposes of specific performance as there were no two flats available. On the other hand, defendant(s) naturally opposed this request on the ground that the flat in respect of the first suit stood allotted while the flat against which the injunction had been granted in the second suit was not owned by him and his cousin had a share in the said flat.

20. It may also be noticed that the family settlements were much subsequent to the institution of the suit.

Findings on the issues in the first suit

21. The evidence led by the parties is being discussed in the conspectus of the issues framed and the findings arrived at are set out hereinafter.

Issue No. 1

1. Whether proper court fee has not been paid? OPD

22. This issue for which the onus was on the defendant was not pressed by the defendant. Thus, no findings are called for on this issue.

Issue Nos. 2 and 3

2. Is the description of the flat given in the plaint not sufficient? If so, to what effect? OPD

3. Whether the agreement of sale of the flat and garage is void on account of vagueness and to what effect? OPD

23. The defendant has taken the plea that neither the description of the flat in the plaint is sufficient to describe the property nor are terms of sales set out in the agreement to sell dated 02.04.1988 clear and unambiguous. The onus to prove these issues has been placed on the defendant. The description of the flat as per the area is set out in the agreement that it is measuring 1866 square feet. The floor of the building on which the flat was agreed to be sold is stated to be 4th floor and the location of the flat is stated to be towards South. Even though these details are available, no specific plan of the flat is annexed to the agreement.

24. The defendant appears to be drawing strength from the fact that as per his statement there was no flat available on the 4th floor as part of the share of the defendant. The defendant, in my considered view, seems to have lost sight of the fact that the onus of proving these issues was on the defendant. The description of the flat given in the agreement can hardly be said to be vague or uncertain. The total constructed area of a floor is known and even which side of the building is the flat to be located is specified. There appears to be no uncertainty on this account and this plea is only a ruse on the part of the defendant to get out of the obligation of making a flat available to the plaintiffs. The flats were being sold on the building to be constructed. Sale of such space has been done in the manner as is normally done with sufficient particulars available. Not only that, the agreements of the similar nature have been entered into with different buyers of the space in the building.

25. There is no uncertainty in the agreement in respect of the area, price, total consideration, floor of the building and the side of the floor where the flat was to be located.

26. Learned Counsel for the defendant sought to rely upon the judgment of this Court in Agarwal Hotels Pvt. Ltd v. Focus Properties Pvt. Ltd. (1966) (2) AD (Delhi) 625 to advance the proposition that the grant of a decree for specific performance u/s 20 of the Specific Relief Act, 1963 is a discretionary relief and such discretion has to be exercised on sound judicial principles of the existence of a valid and enforceable contract. Specific performance is not to be enforced if the contract itself suffers from some defects which make the contract invalid or unenforceable. A reference has also been made to the decision of the Supreme Court in Mayawanti Vs. Kaushalya Devi, . The relevant paras are as under:

8. In a case of specific performance it is settled law, and indeed it cannot be doubted, that the jurisdiction to order specific performance of a contract is based on the existence of a valid and enforceable contract. The Law of Contract is based on the ideal of freedom of contract and it provides the limiting principles within which the parties are free to make their own contracts. Where a valid and enforceable contract has not been made, the court will not make a contract for them. Specific performance will not be ordered if the contract itself suffers from some defect which makes the contract invalid or unenforceable. The discretion of the court will be there even though the contract is otherwise valid and

enforceable and it can pass a decree of specific performance even before there has been any breach of the contract. It is, therefore, necessary first to see whether there has been a valid and enforceable contract and then to see the nature and obligation arising out of it. The contract being the foundation of the obligation the order of specific performance is to enforce that obligation.

....

11. If the above correspondence were true, it would appear that the contract was in the alternative of either whole or half of the property and that the offer and acceptance did not correspond. It is settled law that if a contract is to be made, the intention of the offeree to accept the offer must be expressed without leaving room for doubt as to the fact of acceptance or to the coincidence of the terms of acceptance with those of the offer. The rule is that the acceptance must be absolute, and must correspond with the terms of the offer. If the two minds were not ad idem in respect of the property to be sold, there cannot be said to have been a contract for specific performance. If the parties themselves were not ad idem as to the subject matter of the contract the court cannot order specific performance. If the plaintiff understood the terms to have included the building but the defendant understood it to have excluded the building and the so called memorandum Ext. PW-11/A did not mention the building, there is no contract before the court for specific performance. While Mr. Subramaniam would argue that the land was also included, Mr. Nariman rightly points out that land was nowhere mentioned in PW-11/A. It is true that Issue Nos. 2 and 3 were whether the defendant delivered possession of the property to the plaintiff pursuant to the agreement and whether the possession was illegally taken by the defendant, and the Trial Court found no independent evidence and Kasturilal admitted that there was no document to prove the delivery of possession, However, on basis of a suggestion to Kasturilal that it was "incorrect to suggest that any goods, i.e. gunny bags, oil, khal, was in possession having been taken out from the factory building at the time of repairs", the trial court concluded that delivery of possession was there. The first appellate court also took it to be a "vital and material suggestion" and upheld the finding. Admittedly the possession was with the defendant at the time of the suit and there was no proceeding to recover the possession by the plaintiff. This inferential finding, therefore, can not have any bearing on the subject matter of the contract contrary to what was stated in Ext. PW-11/A which was heavily relied on by the plaintiff.

27. There is no doubt about these well established principles but the question is of the applicability of the principles to the facts of the present case. There is no impediment pointed out to us whereby the specific performance of the agreement dated 02.04.1988 cannot be enforced. There is of course the question of a flat having been sold by the defendant to a third party, but that would be an aspect to be taken into consideration while moulding the relief and not as a defence to the defendant to defeat the rights of the plaintiffs.

28. The aforesaid issue Nos. 2 and 3 are thus answered in favour of the plaintiffs

and against the defendant.

Issue No. 4

4. What is the effect of the defendant not getting the agreement registered with the appropriate authority u/s 269U of the Income Tax Act? OPD

29. This issue for which the onus was on the defendant was not pressed by the defendant. Thus, no findings are called for on this issue.

Issue No. 5

5. Whether the plaintiff has been ready and willing to perform their part of the contract? OPP

30. The readiness and willing on the part of a party seeking enforcement of specific performance is an essential criteria to be met. The documents referred to aforesaid in the form of receipts prior to the agreement dated 02.04.1988 as also the payments made under the agreement show that a total sum of Rs. 4,05,000/- had been paid by the plaintiffs to the defendant. Out of a total consideration of Rs. 13,90,000/-, Rs. 13,50,000/-was for the flat and Rs. 40,000/- was for the garage. A question thus arises whether at any stage the plaintiffs were required to make further payment and despite being called upon failed to do so. The agreement was executed on 02.04.1988 and thereafter it was to be registered with the Income Tax Authorities. It is, however, the defendant who felt the need to make certain changes in the agreement and in that behalf addressed a letter dated 13.07.1988 (ExPW1/9) asking the plaintiff No. 1 to contact him for the said purpose. On a specific query being posed, the defendant who appeared in the witness box as DW-1, stated that he did not remember what changes were required to be made in the agreement, but possibly it were about the price and mode of payment. The payment schedule as per the prescribed pro forma was apparently not adhered to for the reason that the stage of construction was different than the stage of commencement and different amounts asked for by the defendant from time to time were paid by the plaintiffs. The defendant has not placed a single document on record to show that he demanded any amount at any stage of time which was not paid. It was the plaintiffs who were running after the defendant to ensure about due compliance of the requirement of filing form 37(I) with the Income Tax Authorities so as to facilitate the completion of transaction. The defendant has acknowledged in his deposition that the plaintiffs had met the defendant once in pursuance to the letter dated 13.07.1988 regarding the changes to be made in the agreement.

31. The most material fact which emerges is that the defendant instead of complying with his obligations with the plaintiffs sold the flat to one Ms. Sushila Sukumaran for a much higher price of Rs. 23 lakhs in September, 1988. The defendant has failed to establish that there was any abandonment on the part of the plaintiffs in performing the obligations under the agreement, but on the other

hand, the plaintiffs have established through their various communications including ExPW1/6, ExPW1/7, ExPW1/12, ExPW1/13 and ExPW1/15 that they persisted and were desirous of concluding the agreement. On a specific query being posed in the cross examination, the plaintiff No. 1 who appeared in the witness box as PW1 has categorically stated that he was possessed of sufficient means to comply with the obligations of the balance sale consideration.

32. In respect of the aforesaid aspect, learned Counsel for the plaintiffs has drawn the attention of this Court to a judgment of the Supreme Court in T. Mohan Vs. Kannammal and Another, where in para 10 it has been observed as under:

...Further, the question of readiness and willingness to pay the balance consideration money is not much of importance in view of the admitted factual position that the vendor had parted with possession of the property in favour of the purchaser even before expiry of the period stipulated in the agreement.

33. Learned Counsel for the defendant sought to emphasize that in none of the communications is there an offer on the part of the plaintiffs to make the balance payment and referred to the judgment of the Supreme Court in Smt. Chand Rani (dead) by LRs. Vs. Smt. Kamal Rani (dead) by LRs., . The Supreme Court observed that a purchaser is not entitled to specific performance of a contract if he is not willing to make the part payments of the amount within the specified time. The refusal to make part payment on the part of the purchaser without obtaining Income Tax Clearance Certificate was held to amount to default. This decision has been referred to in K.S. Vidyanadam and Others Vs. Vairavan, . A reference on the same lines has also been made to a judgment of the Supreme Court in Nirmala Anand Vs. Advent Corporation (P) Ltd. and Others, . The relevant paras of Nirmala Anand''s case (supra) are reproduced below:

5. The appellant is prepared and willing to take possession of the incomplete flat without claiming any reduction in the purchase price and would not hold respondent Nos. 1 and 2 responsible for anything incomplete in the building. It has been concurrently held that she did not commit breach of the agreement to sell. She has always been ready and willing to perform her part of the agreement. The appellant is ready and willing to pay to respondents 1 and 2 interest on sum of Rs. 25,000/-. The breach was committed by respondents 1 and 2 as noticed hereinbefore. It is evident that the appellant is ready to take incomplete flat and pay further sum as noticed, most likely on account of phenomenal increase in the market price of the flat during the pendency of this litigation for over three decades. We see no reason why the appellant cannot be allowed to have, for her alone, the entire benefit of manifold mega increase of the value of real estate property in the locality. In our view, it would not be unreasonable and inequitable to make the appellant the sold beneficiary of the escalation of real estate price and the enhanced value of the felt in question. There is no reason why the appellant, who is not a defaulting party, should not be allowed to reap to herself the fruits of increase in value.

6. It is true that grant of decree of specific performance lies in the discretion of the court and it is also well settled that it is not always necessary to grant specific performance simply for the reason that it is legal to do so. It is further well settled that the court in its discretion can impose any reasonable condition including payment of an additional amount by one party to the other while granting or refusing decree or specific performance. Whether the purchaser shall be directed to pay an additional amount to the seller or converse would depend upon the facts and circumstances of a case. Ordinarily, the plaintiff is not to be denied the relief of specific performance only on account of the phenomenal increase of price during the pendency of litigation. That may be, in a given case, one of the consideration besides many others to be taken into consideration for refusing the decree of specific performance. As a general rule, it cannot be held that ordinarily the plaintiff cannot be allowed to have, for her along, the entire benefit of phenomenal increase of the value of the property during the pendency of the litigation. While balancing the equities, one of the consideration to be kept in view is as to who is the defaulting party. It is also to be borne in mind whether a party is trying to take undue advantage over the other as also the hardship that may be caused to the defendant by directing the specific performance. There may be other circumstances on which parties may not have any control. The totality of the circumstances is required to be seen.

The evidence produced by the plaintiffs in their favour in the form of PW2 and PW3 has been referred to contend that the period in question when the monies are stated to be available in the account was not contemporaneous with the execution of the agreement.

34. In my considered view the aspect of ability, readiness and willingness on the part of the plaintiffs to make the payment has to be seen in the context of the documents exchanged between the parties. The documents establish the follow up action on the part of the plaintiffs while the defendant was only into raking up the issues like even re-writing the agreement. It is not the case of the defendant that at any stage of time, the balance amount was called for and not paid. Not only that, the defendant also did not follow up the matter of obtaining permission from the Income Tax Authorities by filing form 37(I) of the Income Tax Act and possibly had other ideas in his mind insofar as the agreement with the plaintiffs was concerned.

35. The object of such prevarication on the part of the defendant is apparent from the sale of the flat in September, 1988 to a third party at a much higher price. It appears that there was escalation in the property prices and that is what made the defendant greedy. The payments in the present case were made prior to the agreement at the time of provisional booking and continued to be made thereafter till the agreement was executed. Thus there was a lapse of time between the first payment made and the execution of the agreement and thereafter the sale of the flat which was after the high appreciation in the value of the flat. This is so since the defendant does not dispute the agreed

consideration as per the agreement dated 02.04.1988 or the agreement with the third party.

36. I am thus of the considered view that it is the defendant who defaulted in complying with his obligations while the plaintiffs were ready and willing to do the needful. This is more so in view of the observations made by the Supreme Court in T. Mohan v. Kannammal and Anr. case (supra).

37. The issue is accordingly answered in favour of the plaintiffs.

Issue Nos. 6 and 7

6. Is the plaintiff not entitled to the specific performance on the ground mentioned in the written statement? OPD

7. In case the plaintiffs are not entitled to specific performance for any reason, is plaintiff not entitled to damages in the alternative, and if so, to what amount the plaintiffs are entitled? OPP

38. The plaintiffs having succeeded in establishing the basic ingredients for the claim of specific performance, the next question which arises for consideration is whether such specific performance ought to be granted in the given facts of the case or in the alternative the relief for damages ought to be granted.

39. It is not in dispute that the defendant did represent to the plaintiffs of having rights in a flat on the 4th floor of the said property which was sought to be sold to the plaintiffs and the plaintiffs on such representation paid monies whereafter the agreement was entered into on 02.04.1988. There can also be no dispute about the validity of the agreement in view of what is set out hereinbefore. The plaintiffs were ready and willing to comply with the terms of the agreement. There are, however, two factors, which arise making it difficult to grant specific performance of the agreement and which weigh in favour of the consideration of damages as an alternative remedy. The first aspect is the sale of the flat in question to Ms. Sushila Sukumaran in September, 1988 which is five months after the date of execution of the agreement between the parties. Not only that, the time period differential is only about two months between the defendant expressing his desire to plaintiff No. 1 to make certain changes in the agreement and actual sale of the flat. The result is that the flat in question was sold to Ms. Sushila Sukumaran and the defendant admitted that he had not informed the plaintiffs about the same.

40. The second is the long passage of time from the date of agreement as 20 years have passed since then. It may be noticed that the defendant entered into an agreement to sell in respect of two flats - one flat in respect of each of the two suits. A formal agreement to sell was not executed in respect of the second suit though monies were received in advance and receipt executed specifying the area, floor and price. The defendant has sought to obfuscate the issues by claiming that he had actually got flats on different floors and was not given two full flats. If at all such a situation had arisen, the same is a consequence of the

mutual arrangements between the co-owners in the building. The defendant entered into an agreement with Ms. Sushila Sukumaran in respect of a flat on the 4th floor of the said property and subsequently entered into a supplementary agreement changing the floor from 4th to 5th floor. Such an admission has come in the cross examination of the defendant in the following terms:

It is correct that I had executed a supplementary agreement dated 09.09.1991 with Ms. Sushila Sukumaran. This agreement related to the change of flat. It was a change from the fourth floor to fifth floor. It is correct that initially I had agreed to sell the flat on the fourth floor. (The date has been wrongly mentioned as 09.09.1991 whereas it should have been 20.09.1991).

41. The defendant by way of affidavit has stated that he did not own two complete flats. However, in the recitals of the Supplementary Agreement dated 20.09.2001, he has represented himself to be the sole owner of a flat on the 5th floor. The reason for the change of flat is stated to be the desire of the defendant to reside in close proximity of his parents. The defendant has probated and reprobated on this issue. The defendant, in fact, has been making testimony as it suits him and in the said process contradicting himself. One such example is the defence taken in the written statement that the plaintiffs had abandoned the agreement apprehending the acquisition by the Income Tax Authorities in view of the apparent consideration while in the affidavit filed by way of examination in chief, the defence sought to be made out is of failure of the plaintiffs to pay the balance consideration resulting in rescinding of the agreement. Thus evidence has been led by the defendant affirming to a fact which is not even pleaded in the written statement. It is no doubt true that a flat bearing No. 403 has been retained in pursuance to the injunction order passed in the second suit and the plaintiffs in the two suits collectively prayed that instead of getting specific performance of the two agreements and thus two flats (the availability of second flat itself is in doubt), the payment should be treated as having been made against one flat. However, a question mark has been sought to be raised by the defendant even about the title of the said flat. As noticed above, at times in certain circumstances, the passage of time and the aforesaid fact itself would give rise to a favourable consideration of a decree for compensation or damages in lieu of specific performance. The defendant no doubt has raised a preliminary defence of the passage of time doing inequities between the parties as the prices had gone up manifold and the consideration paid was only 30 per cent of the total price. That by itself would not have been sufficient but for the other facts noticed aforesaid.

42. The next question to be examined is the quantification of compensation in lieu of specific performance. The defendant received advance payments of Rs. 4,05,000/- against the total amount to be paid of Rs. 13,90,000/- towards the price of flat and garage. The quantification of compensation at times can become a difficult task without the contemporaneous evidence, but fortunately in the present case there is a sale of flat in question to Ms. Sushila Sukmaran for Rs. 23

lakhs, which was originally to be sold to the plaintiffs. The plaintiffs thus earned an extra amount of Rs. 9,10,000/- in close proximity of time to the agreement with the plaintiffs. Thus if the date of the breach is taken as the relevant date, this would be the amount of compensation apart from the entitlement of the plaintiffs to get back the money originally paid.

43. There have been divergent pleas raised in respect of the date which is relevant for determination of compensation by way of damages. It is the case of the defendant that if at all damages are payable, same should be in consonance with the provisions of Section 21 of the Specific Relief Act, 1963 providing for the amount of compensation to be guided by the principles specified in Section 73 of the Contract Act, 1872, which should be the date of the breach. The relevant provisions are as under:

Section 21 of the Specific Relief Act

21. (1) In a suit for specific performance of a contract, the plaintiff may also claim compensation for its breach, either in addition to, or in substitution of, such performance.

(2) If, in any such suit, the court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant, and that the plaintiff is entitled to compensation for that breach, it shall award him such compensation accordingly.

(3) If, in any such suit, the court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

(4) In determining the amount of any compensation awarded under this section, the court shall be guided by the principles specified in Section 73 of the Indian Contract Act, 1872 (9 of 1872).

(5) No compensation shall be awarded under this Section unless the plaintiff has claimed such compensation in his plaint:

Provided- that where the plaintiff has not claimed any such compensation in the plaint, the court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just, for including a claim for such compensation.

Explanation: The circumstance that the contract has become incapable of specific performance does not preclude the court from exercising the jurisdiction conferred by this section.

Section 73 of the Indian Contract Act, 1872

73. Compensation for loss or damage caused by breach of contract ? When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss

or damage caused to him thereby, which naturally arose in the usual course of things form such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract - When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

Explanation- In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by non-performance of the contract must be taken into account.

44. The plaintiffs, on the other hand, claimed that the compensation should be on the current value and thus have relied upon the valuation report ExPW4/1, but the same is a valuation made on 09.09.2004.

45. Learned Counsel for the defendant relied upon the judgment in Firm Kidar Nath v. Firm Shimbu Nath AIR 1927 Lahore 176 where it has been laid down that in a suit for damages for breach of contract for sale, the measure to be applied is the difference in contract price and the market price on the date of breach. A similar view has been taken in Indore Malwa United Mills Ltd. Vs. Ramkaran Ghisslal, and Dwarka Prasad Poddar v. Kathlen Florence Burns AIR 1955 Nagpur 38. The basic principle of compensation is stated to be the restitution of the plaintiffs to the same position where they would have been if the breach had not been committed and the agreement performed, which should be on the date when the breach was committed. The last judgment relied upon in this behalf is in M.N. Gangappa (Dead) by Lrs. Vs. Atmakur Nagabhushanam Setty and Co. and Another, where it has been held that computation of damages on the basis of the difference between the contract rate and the lowest market rate prevailing at the time of breach of the contract is neither unreasonable nor illegal.

46. Learned Counsel for the plaintiffs, however, relied upon the judgment in Malhotra v. Choudhury (1979) 1 All E.R. 186 and Wroth and Anr. v. Tyler (1973) 1 All E.R. 897. However, it cannot be disputed that we have to be guided by the provisions under our Specific Relief Act and the Contract Act and the legal position vis-a-vis England is somewhat different. No doubt, u/s 19 of the Specific Relief Act, 1963, the compensation/damages is intended to place the plaintiffs in the same position as they would have been if the breach had not been committed and the agreement performed. Learned Counsel for the plaintiffs sought to distinguish the judgments referred to by the Counsel for the defendant on the ground that except Dwarka Prasad Poddar v. Kathlen Florence Burns''s case (supra), all other judgments pertain to moveable property. However that, in

my considered view, would make no difference. The question of balancing equities between the parties to a suit for specific performance of an agreement to sell of an immovable property after long lapse of time has been examined by the Supreme Court in Pratap Lakshman Muchandi and Others Vs. Shamlal Uddavadas Wadhwa and Others, . The agreement in question was of 1982 and the sale consideration was raised taking advantage of the long lapse of time. Para 8 of the said judgment reads as under:

8. But at the same time it is also true that the agreement to sell was executed way back in the year 1982. Since after 1982 much water has flown under the bridge, the value of the real estate has shoot up very high, therefore, while exercising our jurisdiction u/s 20 of the Specific Relief Act, 1963 we would like to be equitable and would not allow the sale of property to be executed for a sum of Rs. 1,20,000/-. The litigation has prolonged for almost 25 years and now at last reached at the end of the journey. Therefore, we have to settle the equity between the parties. We hold that the agreement to sell was genuine and it was executed for bona fide necessity but because of passage of time we direct that the respondents shall pay a sum of Rs. 5 lacs in addition to Rs. 1,10,000/- as out of Rs. 1,20,000/-, Rs. 10,000/- has already been paid as advance. On receipt of Rs. 1,10,000/- and Rs. 5 lacs [Rs. 6,10,000/-] the appellants shall execute the sale deed for the property in question.

47. I am of the view that the important aspect is the vast escalation in prices of property that has taken place over this period of time which itself is a matter of common knowledge, as noticed in various pronouncements. The plaintiffs have also led evidence by proving the valuation report ExPW4/1 which was proved by a government approved valuer Mr. P.N. Sharma. The date of the report is 09.09.2004 and is in respect of a flat on the same floor and the same building. Valuation is stated to be of Rs. 1.80 crores. Thus, though in determining the damages, it is the date of breach of performance which would be relevant, the plaintiffs are liable to be paid compensation to place them in the same position in which they would have been if the defendant had not breached the agreement. The difference in price as around the date of breach is Rs. 9,10,000/- (Rs. 23,00,000/- less Rs. 13,90,000/-). This amount could have been realized by the plaintiffs if they owned the flat and sought to sell the same as on that date in view of the appreciation of the value of the real estate. As noticed above, it is a matter of common knowledge that the real estate valuation as increased manifold times during this period of time. The suit has also unfortunately dragged on for about 20 years. The report of the valuer as in the year 2004 is available.

48. I am of the view that one method which can be adopted is to calculate interest at the rate of 15 per cent per annum from the time of the breach till date, if this interest amount is calculated on this differential of price amount. This method subserves the basic object of compensating the plaintiffs who would have otherwise been entitled to specific performance of the contract. If the

amount is calculated in this manner, it would approximately amount to Rs. 28 lakhs. It is this amount which I deem appropriate to determine as compensation. The plaintiffs are not only entitled to the aforesaid compensation, but in addition are entitled to refund of the amount paid to the defendant amounting to Rs. 4,05,000/-, which should also carry interest at the rate of 15 per cent per annum. In fact, as noticed above, the escalation in prices of property have been much higher than even the commercial rates of interest.

49. The result of the aforesaid is that the plaintiffs are held entitled to the following amounts:

i) The amount of Rs. 4,05,000/- along with interest at 15 per cent per annum simple interest from the date of deposit till date of refund (dates of deposit as per para 9 and 10 of this judgment)

ii) Compensation in lieu of specific performance amounting to Rs. 28 lakhs with interest at the rate of 15 per cent per annum from the date of decree till date of realization.

50. The issues are answered accordingly.

Findings on the issues in the second suit

51. The findings have been given on the issues in respect of the first suit. The position is really no different for the second suit except on the aspect of absence of an agreement to sell and there being only a receipt.

Issue No. 1

1. Whether proper court fee has not been paid by the plaintiff on the plaint? OPD-1

52. This issue for which the onus was on the defendant No. 1 was not pressed by defendant No. 1. Thus, no findings are called for on this issue.

Issue Nos. 2 and 3

2. Whether the plaintiff is not entitled to get a decree on account of the evasive description of the flat? OPD-1

3. Whether the agreement for the sale of flat inter se the plaintiff and the defendant No. 1 was provisional and is void on account of uncertainty? OPD-1

53. The findings on issue Nos. 2 and 3 in the first suit can be read as findings in the present suit except for there being a different document defining the property that has to be taken into account. The relevant receipt dated 30.01.1988(ExPW1/1) reads as under:

Receipt

Received Rs. 1,50,000/- by cheque in 1986 and Rs. 50,000/- by cheque in 1987 from Mrs. Veena Ahuja towards provisional booking of a flat measuring 1866 square feet in the Group Housing Scheme at 34, Feroze Shah Road, New Delhi-11001 on the 4th floor @ 723/- per square feet.

30.01.1988 (Tarun Chandra)

8, Ishwar Nagar East

Mathura Road

New Delhi-110065

54. A reading of the aforesaid receipt shows that there is a description of the flat by area, floor and the price. Thus all the ingredients are specified making it certain where the flat is located. No doubt the expression used is ''provisional booking of a flat'' but use of these words does not defeat the intent with which the receipt was executed especially taking into consideration the understanding between the parties as reflected in the agreement executed in respect of the first suit. Not only that the plaintiff repeatedly wrote to defendant No. 1 to execute the agreement as in the first suit, but it was defendant No. 1 who was evading the same. It is the defendant No. 1 who expressed the problems of there being some technical difficulties. ExPW1/3 is a letter dated 01.06.1989 written by the plaintiff to defendant No. 1, which can be conveniently referred to in this behalf followed by the letter dated 06.10.1989 (ExPW1/4).

55. The question arises whether the execution of merely this receipt in the absence of an agreement makes the agreement incapable of being performed on account of uncertainty. In my considered view, the answer to the same is in the negative. The plaintiff has made a total payment of Rs. 2 lakh.

56. The issues are accordingly answered against defendant No. 1.

Issue No. 4

4. Whether the agreement was required to be registered by the plaintiff under form 37(I) of the Income Tax Act? If so, to what effect? OPD-1

57. This issue for which the onus was on the defendant No. 1 was not pressed by defendant No. 1. Thus, no findings are called for on this issue.

Issue No. 5

5. In case, it is held that the agreement is valid, whether the plaintiff has been ready and willing to perform her part of the contract? OPP

58. There is no separate discussion required in respect of the issue No. 5 and, in fact, both the learned Counsel for the parties really relied upon their submissions in respect of the first suit for arriving at a finding on this issue.

59. The issue is accordingly answered in favour of the plaintiff.

Issue No. 6

6. Whether the agreement is void u/s 56 of the Contract Act? OPD-1

60. Defendant No. 1 has raised a specific defence arising from the provisions of Section 56 of the Contract Act, 1872, which reads as under:

56. Agreement to do impossible act - An agreement to do an act impossible in itself is void.

Contract to do act afterwards becoming impossible or unlawful - A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful Compensation for loss through non-performance of act known to be impossible or unlawful - Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promise for any loss which such promisee sustains through the non-performance of the promise.

61. There is no question of any impossibility of performance since it was the own case of defendant No. 1 while making the booking that he was entitled to two flats in his own right and not merely as one of the co-owners. Defendant No. 1 cannot be subsequently permitted to plead that the proposal was tentative in view of prices of some additional flats to be so constructed as there is no such writing to that effect. The defendant No. 1 seems to suggest that the amount is a small one but then that appears so on account of passage of time. In 1988, a sum of Rs. 2 lakh was not a small one. The defendant No. 1 cannot take advantage of his failure to execute the agreement in pursuance to the receipt to defeat the rights of the plaintiff. In any case, in view of the findings arrived at hereinbefore in the first suit and followed in this suit relating to the grant of damages as an alternative to specific performance, it cannot be said that this plea of the defendant would come in the way of the grant of relief to the plaintiff.

62. The issue is answered accordingly against defendant No. 1.

Issue No. 7

7. Whether the specific performance of the Contract cannot be granted to the plaintiff without obtaining prior permission of the Government of India as alleged by Defendant No. 1? OPD-1

63. This issue for which the onus was on the defendant No. 1 was not pressed by defendant No. 1. Thus, no findings are called for on this issue.

Issue Nos. 8 and 9

8. Whether the plaintiff is entitled to get the flat in question and is entitled to get the specific performance of the agreement to sell? OPP

9. To what relief is the plaintiff entitled to? OPP

64. The findings in respect of the claim for specific performance and in the

alternative for compensation/damages is the same as in the first suit and the same principle must thus apply in the present case. There would, however, be difference in the calculation of the amount. The difference arises on account of the amount having been paid being different in the present case. The plaintiff paid the amounts to defendant No. 1 as under:

----------------------------------- Date Amount (in Rs.) ----------------------------------- 18.01.1986 20,000/- 20.10.1986 80,000/- 11.12.1986 40,000/- 23.01.1987 10,000/- 03.04.1987 50,000/- ----------------------------- The plaintiff would thus be entitled to:

i) The amount of Rs. 2,00,000/- along with interest at 15 per cent per annum simple interest from the date of deposit till date of refund (date of deposit as mentioned above)

ii) Compensation in lieu of specific performance amounting to Rs. 28 lakhs with interest at the rate of 15 per cent per annum from the date of decree till date of realization.

65. The issues are answered accordingly.

Issue No. 10

10. Whether the suit against defendant No. 2 is maintainable? OPP

66. The plaintiff has not really claimed any relief against defendant No. 2 except for injunction since defendant No. 2 is a builder and the object was to preserve the flat in question. One of the flats has been preserved as per the interim orders passed by this court and defendant No. 2 has not even appeared to contest the matter at the final hearing stage nor has any evidence been led by the said defendant.

67. The issue is accordingly answered in favour of the plaintiff. Issue No. 8 in respect of the first suit and Issue No. 11 in respect of the second suit Relief.

Suit No. 571/1990

68. A decree is passed in favour of the plaintiffs and against the defendant for recovery of money as under:

i) The amount of Rs. 4,05,000/- along with interest at 15 per cent per annum simple interest from the date of deposit till date of refund.

ii) Compensation in lieu of specific performance amounting to Rs. 28 lakhs with interest at the rate of 15 per cent per annum from the date of decree till date of realization.

iii) Costs.

Suit No. 633/1990

69. A decree is passed in favour of the plaintiff and against the defendant No. 1

for recovery of money as under:

i) The amount of Rs. 2,00,000/- along with interest at 15 per cent per annum simple interest from the date of deposit till date of refund.

ii) Compensation in lieu of specific performance amounting to Rs. 28 lakhs with interest at the rate of 15 per cent per annum from the date of decree till date of realization.

iii) Costs.

70. Flat No. 403, dealing of which has been injuncted, will remain attached and the injunction would continue to enure for the benefit of both sets of plaintiffs till the decrees are satisfied.

71. Decree sheets be drawn up accordingly.

