(2012) 04 DEL CK 0249

In the Delhi High Court

Case No : Regular First Appeal No. 421 of 2003

M/s Krishna Sweet House APPELLANT

Vs

Shri Gurbhej Singh @ Happy and Others RESPONDENT

Date of Decision : 30-04-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 96
Evidence Act, 1872 — Section 114(i), 63, 73
Income Tax Act, 1961 — Section 131
Specific Relief Act, 1963 — Section 12, 20(1), 20(3), 34

Citation : (2012) 04 DEL CK 0249

Hon'ble Judges : Valmiki J Mehta, J

Bench : Single Bench

Advocate : Rajat Aneja, for the Appellant; Harish Malhotra with Mr. M.G. Vacher, Advocate for Respt. Nos. 3 and 4, for the Respondent

Final Decision : Dismissed

Judgement

Valmiki J Mehta, J.—The challenge by means of this Regular First Appeal (RFA) filed u/s 96 of Code of Civil Procedure, 1908 (CPC) is to the impugned judgment of the trial Court dated 27.2.2003 dismissing the suit filed by the appellant/ plaintiff for specific performance of an agreement to sell dated 16.10.1993 with respect to the property being front portion of house No. H-4/7, Model Town, Delhi-110009. Prayer was also made for cancelling of the sale deed executed by the original owners/defendant Nos.1 and 2 in favour of the defendant Nos.3 and 4/respondent Nos. 3 and 4/subsequent purchasers. It is relevant to note that the appellant/plaintiff was a tenant in a shop in the ground floor portion forming part of the property comprised in the agreement to sell, and from where the appellant/plaintiff runs the business of a sweet shop. The facts of the case are that the appellant/plaintiff pleaded that the parties had entered into an agreement to sell of the suit property, vide a receipt-cum-agreement dated 16.10.1993. The total sale consideration was fixed at Rs. 4,70,000/-, of which the appellant/plaintiff states to have paid an amount of Rs. 10,000/- on the date of the agreement to sell. The original seller/defendant No.1-Sh. Hardit Singh and his wife-Smt. Inder Kaur/defendant No.2 expired during the pendency of the suit and were, thereafter, represented by their legal heirs. (For the sake of convenience, in this judgment, I am referring to the original proposed sellers as defendant Nos. 1 and 2.) The balance amount was stated to be payable as per the receipt-cum-agreement dated 16.10.1993 on respondent Nos.1 and 2/ defendant Nos. 1 and 2/proposed sellers intimating to the plaintiff/proposed buyer of having obtained clearance from the income tax authorities. The receipt-cum-agreement to sell was signed only by defendant No.1/husband and not defendant No.2/Smt.Inder Kaur/wife. In the receipt-cum-agreement dated 16.10.1993 it was mentioned that defendant No.1 was fully competent to sell the same. The case of the appellant/plaintiff was further that defendant No.1 in January, 1995 asked for further payment and, therefore, on 4.1.1995 an amount of Rs. 50,000/- was paid in cash to defendant No.1, and to evidence which defendant No.1 executed a receipt, not only acknowledging the amount of Rs. 50,000/-, but also the agreement to sell contained in the previous receipt-cum-agreement dated 16.10.1993. The appellant filed the subject suit in December, 1995 alleging breach on the part of the defendant Nos. 1 and 2 because defendant Nos.1 and 2 wanted to receive the balance amount of consideration in cash, to avoid payment of income tax, and which was not agreeable to the appellant/plaintiff.

2. The defendant Nos. 1 and 2 contested the suit and denied that an agreement to sell was ever entered into between the parties. It was pleaded by defendant Nos. 1 and 2 that the signatures of defendant No. 1 were forged, and possibly copied from the lease agreement entered into between the parties. It was pleaded that in any case defendant No.2/wife of defendant No.1-Smt. Inder Kaur being not a party to the agreement to sell, no suit for specific performance would lie. Defendant Nos. 1 and 2 pleaded malafides on the part of the appellant/ plaintiff in not suing the subsequent purchasers as parties to the suit, although, to the knowledge of appellant/plaintiff, the suit property, around six months prior to filing of the suit, had already been sold to two persons, namely, Sh. Pradeep Arora and Sh. Ashmeet Singh(defendant Nos.3 and 4) by means of a registered sale deed on 17.5.1995. The fact of this sale had been duly brought to the notice of the appellant/plaintiff through a notice dated 17.5.1995. At this stage, it may be stated that it is only after the filing of the suit, and on objection being taken by the defendant Nos. 1 and 2, that the necessary parties being the subsequent purchasers were not made parties, the subsequent purchasers were added as defendant Nos. 3 and 4 in the suit.

3. After the pleadings were complete, the trial Court framed the following issues:-

(i) Whether defendant No. 1 prior to his death had entered into an agreement of sale with the plaintiff to sell his property bearing No. H-4/7, Model Town-II, Delhi - 110009 and had received Rs.60,000/- as part sale consideration vide two receipts dated 16.10.93 for Rs.10,000/- and receipt dated 4.1.1995 for

Rs.50,000/- from the plaintiff as alleged in the plaint? OPP

(ii) Whether the receipts dated 16.10.1993 for Rs.10,000/- and dated 4.1.1995 for Rs.50,000/- alleged to had been executed by defendant No. 1 in favour of the plaintiff, are forged and fabricated as alleged in the written statement of defendant No. 1 and 2? OPD

(iii) Whether defendants No. 3 and 4 are the bonafide purchasers of the suit property excluding the terrace rights thereon alleged to had been purchased by them from defendants No. 1 and 2 for consideration vide duly registered sale deed in their favour dated 17.5.1995? OPD

(iv) Whether the plaintiff is entitled to the relief in respect of the suit property claimed by it in the present suit? OPP

(v) Relief.

4. The trial Court while dealing with the issue Nos. 1 and 2 has come to a finding that the receipts dated 16.10.1993 and 4.1.1995, Ex. PW1/3 and PW1/2A are not proved as the originals of the same were not filed on record. The trial Court held that the receipts were not proved because no efforts were made by the plaintiff to seek permission of the Court to lead secondary evidence with respect to the receipts dated 16.10.1993 and 4.1.1995. Trial Court has also made pertinent observations with regard to the fact that no independent witnesses have been examined by the appellant/plaintiff to prove the execution of receipts. Trial Court has also referred to the fact that though there may be a statement, Ex.PW2/2 recorded of the partner of the appellant/plaintiff-Sh. Chhanga Mal Gupta before the Income Tax Officer, which may seem to suggest the existence of originals, however, the said statement exhibited as Ex.PW2/2 was held not to have been proved on record. Trial Court has also disbelieved the transaction between the parties as an agreement to sell, inasmuch as, an amount of Rs. 10,000/-which was stated to have been paid by cheque under the agreement to sell to defendant Nos. 1 and 2 by the appellant/plaintiff was found to have been returned by a cheque Ex.PW1/DX1 of the defendant No. 1 to the appellant/ plaintiff, and the reverse of which cheque contained a noting that the cheque was being issued for return of the loan of Rs. 10,000/-, the amount which was mentioned in the agreement to sell/ receipt dated 16.10.1993 being the alleged advance price paid out of the total price of Rs. 4,70,000/-. The original cheque, Ex.PW1/DX1, issued by defendant No. 1 in favour of the appellant/plaintiff was produced from the custody of defendant No.1, inasmuch as, it was proved that the cheque was returned to defendant No.1 after payment of an amount of Rs. 10,000/- in cash to the appellant/plaintiff by defendant No.1.

5. The trial Court has held that another reason that there did not exist contract for sale of property was because when the appellant/plaintiff filed the suit for permanent injunction in March, 1995 for the alleged illegal construction on the terrace forming part of the suit property, the appellant/plaintiff described itself only as a tenant in the suit property, and in the plaint no rights were claimed in

the suit property under the so called agreement to sell dated 16.10.1993 and the subsequent receipt dated 4.1.1995, which otherwise it was natural for the appellant/plaintiff to allege because if there existed an agreement to sell then the appellant/plaintiff would have rights in the terrace pursuant to the agreement to sell. The plaint in the injunction suit, claiming injunction against defendant Nos. 1 and 2 from making any construction on terrace of the suit property was proved and exhibited as Ex. DW2/2. So far as the aspect of readiness and willingness is concerned, the trial Court held that the fixed deposit receipts (FDRs) which were filed were only photocopies and hence not proved in accordance with law. Ultimately, the trial Court has held that even if there was an agreement to sell, on receipt back of the amount of Rs. 10,000/- by the appellant/plaintiff as evidenced by the transaction qua the cheque, Ex.PW1/DX1, rights under the agreement to sell came to an end. Trial Court has also held that the appellant/ plaintiff was not entitled to the discretionary relief of specific performance inasmuch as in spite of knowledge the subsequent purchasers/ defendant Nos.3 and 4 were not initially made as parties to the suit and hence appellant/plaintiff did not come to the Court with clean hands.

7. Some of the relevant observations of the trial Court giving the aforesaid conclusions read as under:-

9. ISSUE No. I & II

Both these issues are inter-related and so they are being taken up together. It is not the case of the plaintiff that any formal agreement to sell in receipt to the suit property was reduced into writing. Plaintiff relies upon the photocopy of earnest money receipt dated 16.10.93 of Rs.10,000/- and another receipt dated 04.01.95 of Rs.50,000/- (said to be part payment) to prove the agreement between the parties regarding sale of the suit property by defendants No. 1 and 2 to the plaintiff. It is the case of the plaintiff that during the pendency of his suit, original earnest money receipts exbt. PW-1/3 and PW-1/2A were lost and NCR/report dated 06.08.98 exbt. PW-1/17 was lodged with the police post Tis Hazari, Delhi and a public notice regarding the loss of earnest money receipts was published in newspaper "National Herald" on 27.08.98 and the copy of the said notice has been placed on record as exbt. PW-1/19. The above-referred earnest money receipts are said to have been lost in August, 1998 and the evidence of the plaintiff has been recorded in January, 2003 only but no efforts have been made by the plaintiff to seek the permission of the court to lead secondary evidence in respect of earnest money receipts exbt. PW-1/3a nd PW-1/2A. Otherwise also, NCR report exbt. PW-1/17 and public notice exbt. PW-1/19 have not been duly proved on record. Plaintiff has sought to establish the existence of originals of earnest money receipts exbt. PW-1/3 and PW-1/2A by getting examined Inspector, Mahesh Sharma, PW-2 from Income Tax Department and after going through the evidence of this witness. I find that he had not produced the originals of statement exbt. PW-2/2 of the partner of the plaintiff firm recorded u/s 131 of the Income Tax Act and this witness has admitted in cross-examination that he has not seen the original of statement exbt. PW-2/2, which is stated to be attested by Sh. R.K. Arora, Income Tax Officer. It is not proved on record as to by which Income Tax Officer, this statement exbt. PW-2/2 was recorded. Even Sh. R.K. Arora, Income Tax Officer, who is stated to have been attested this statement is not produced in evidence. This attested copy exbt. PW-2/2 has not been produced by Inspector, Mahesh Sharma, PW-2 and so, it cannot be said that this statement exbt. PW-2/2 is duly proved on record. Plaintiff has relied upon the statement exbt. PW-2/2 to prove the existence of original earnest money receipts as in this statement exbt. PW-2/2, it is mentioned that original document (receipts) have been shown to you but it is not clear from this statement exbt. PW-2/2 as to who was the Income Tax Officer before whom original receipts were produced. Inspector, Mahesh Sharma, PW-2 has admitted in his cross-examination that he was not present at the time of recording of statement exbt. PW-2/2. The writer of receipts exbt. PW-2/2A and PW-1/3 has not been got examined by the plaintiff. Moreover, the address of defendants No. 1 and 2 as shown in receipt exbt. PW-1/3 is 2472, Hudson Line whereas, defendants No. 1 & 2 were residing in house No. 2452, Hudson Line as per document exbt. DW-1/1 when these receipts are purportedly issued. No independent witness has been got examined by the plaintiff to establish the veracity of execution of receipts exbt. PW-1/3 and PW-1/2A. All this creates serious doubt about execution of receipts exbt. PW-1/3 and PW-1/2A by defendant No.1.

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12. In view of what is observed in para no :9 above, I hold that the existence of originals of earnest money receipts exbt. PW-1/3 and PW-1/2A does not stand proved on record. No secondary evidence has been led in terms of Section 63 of the Indian Evidence Act, 1872 to prove the copies of earnest money receipts exbt. PW-1/3 and PW-1/2A. Accordingly, I hold that the plaintiff has failed to prove the existence of any agreement to sell between the plaintiff and defendant No. 1 & 2 in respect to the suit property.

13. Since the original sale deed of the suit property has not been produced before the court by the plaintiff, it is to be seen whether there was any concluded agreement to sell of the suit property between the plaintiff and defendants No. 1 & 2. According to the plaintiff, earnest money of Rs.10,000/- was paid to defendant No. 1 whereas according to the defendants No. 1 and 2, it was a friendly loan and it is so mentioned on the back side of cheque exbt. PW-1/DX1. It has come in evidence of the plaintiff that the cheque exbt. PW-1/DX1 is the same cheque which he had given to defendant No.1 and the said cheque had bounced on presentation and it was returned to the plaintiff (PW-1) by defendant No.1 after about one year when the plaintiff had asked defendant No.1 to either return the money or to complete the transaction. Plaintiff has categorically admitted in cross-examination that he had accepted Rs.10,000/- from defendant No.1 vide cheque and he (PW-1) had deposited the same with his banker for

collection.

14. The abovesaid vital admission made by the plaintiff in his cross-examination clearly shows that the plaintiff had abandoned the alleged agreement/contract sale of suit property by accepting so called refund of earnest money amount of Rs.10,000/- and by depositing the same with his banker for collection. According to the plaintiff, this happened after about one year of the alleged deal with defendants No. 1 & 2. Part payment of Rs.50,000/- in cash vide recipt exbt. PW-1/2A is not duly proved on record and as per plaintiff''s own admission, earnest money of Rs.10,000/- was returned to him by the defendant no. 1 and he accepted the cheque of Rs.10,000/-. Thus, I am of the considered opinion that there was no concluded contract of sale regarding the suit property between the plaintiff and defendants No. 1 & 2. It is evident from the original sale deed on record that the suit property was jointly owned by defendants No. 1 & 2. Plaintiff has failed to prove on record that the defendant No.1 had any authority or power of attorney from defendant No.2 to enter into any agreement to sell with the plaintiff. In taking the view that there was no concluded contract of sale of suit property between the plaintiff and defendant No. 1 & 2. I rely upon the plaint exbt. DW-2/2 which was filed by the present plaintiff against defendant No.1 for permanent injunction and in the said plaint exbt. DW-2/2, plaintiff in March, 1995 had described himself as tenant of defendant No. 1 and 2 and in para -4 of the said plaint, present plaintiff had categorically stated that the plaintiff is regularly paying the rent to defendant No.1 and bank certificate to this effect was filed with the said plaint. Apart from this, plaintiff (PW-1) in his evidence has admitted that the plaintiff was a tenant at a rental of Rs.500/- per month in the suit property under defendant No. 1 & 2 and vide document exbt. PW-1/DX3, Rs.3,000/- was paid by him vide cheque to defendant No. 1 towards rent of the suit property on 16.10.93 and again vide cheque exbt. PW-1/DX4 Rs.6600/- was paid by plaintiff to the defendant No.1 towards rent on 11.11.94.

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20. In the present case, plaintiff had not called upon defendants No. 1 & 2 to obtain income tax clearance etc. by means of a notice and it is proved from the evidence of plaintiff (PW-1) that he had sought refund of advance money of specific performance and had accepted refund of Rs.10,000/- by means of a cheqye and he had presented the same to this banker for collection. Relief sought u/s 34 of the Specific Relief Act is a discretionary relief and to obtain this relief of specific performance of agreement to sell etc., plaintiff has to come to the court with clean hands. In the plaint initially filed by the plaintiff in the paragraph of cause of action, it is mentioned by the plaintiff that the defendant had sent letter dated 17.05.95 informing the plaintiff that they have sold the suit property to third party. A copy of the legal notice exbt. PW-1/14, sent by the plaintiff to defendant No. 1 prior to filing of the suit reveals that the copy of this legal notice was also sent to defendants No. 3 & 4 also but the plaintiff has filed to explain why defendants No. 3 & 4 were not impleaded as a party to the suit

filed by the plaintiff.

(underlining added)

7. Before this Court, learned counsel for the parties argued the appeal under the following heads:-

i) Whether an agreement to sell dated 16.10.1993 was entered into between defendant Nos. 1 and 2 and the appellant/plaintiff with respect to the suit property or the said documents are forged and fabricated documents.

ii) If there existed an agreement to sell, whether the appellant/plaintiff was guilty of breach of contract and not the defendant Nos. 1 and 2 and, therefore, the appellant/plaintiff was not entitled to the relief of specific performance.

iii) Even if there existed an agreement to sell, whether rights in the same were given up on the receipt of an amount of Rs. 10,000/- by the appellant/plaintiff vide transaction involving cheque of Rs. 10,000/-, Ex.PW1/DX1.

iv) Whether the appellant/plaintiff was always ready and willing to perform its part of the contract.

v) Whether the appellant/plaintiff is not entitled to the discretionary relief of specific performance on the grounds that

(a) Only an insubstantial sum of Rs. 60,000/-, out of the total price of Rs. 4,70,000/- was paid, and this aspect has to be taken with the passage of time and thus it would be wholly inequitable to grant specific performance considering the phenomenal rise in the value of the property from 1995 till the decision in the suit and, thereafter, during the pendency of this appeal,

(b) The agreement to sell dated 16.10.1993 and the subsequent receipt dated 4.1.1995 are at best uncertain documents and on such uncertain documents (originals of which has not been seen till the date) discretionary relief cannot be granted for specific performance; and

(c) Third party rights have come into existence, i.e. the suit property has been sold to the defendant Nos. 3 and 4 and that too around seven months prior to the filing of the suit. In this period the appellant/plaintiff did nothing, although the appellant/plaintiff was duly aware of the existence of the sale transaction with respect to the suit property by defendant Nos. 1 and 2 in favour of defendant Nos. 3 and 4.

(vi) Whether the suit for specific performance does not lie because admittedly no agreement was entered into between defendant No. 2 and the appellant/plaintiff and, there is nothing proved on record that the defendant No.1 was at any point of time the attorney of defendant No.2/wife of defendant No.1.

8. Firstly, on the aspect as to whether there exists an agreement to sell between the parties being receipt-cum-agreement to sell dated 16.10.1993. The case of defendant Nos.1 and 2 is that the signatures of defendant No.1 on the

documents being receipts dated 16.10.1993 and 4.1.1995, Ex.PW1/3, and Ex.PW1/2A are forged, and possibly copied from the lease deed entered into between the parties. I have considered the totality of facts and circumstances in the facts of the present case, including and especially in the light of the fact that the case of the appellant/plaintiff itself was that the relationship between the parties was indeed very cordial. After thinking and rethinking, I have come to the conclusion that the appellant/plaintiff has failed to prove the existence of any valid receipts dated 16.10.1993 and 4.1.1995, more particularly because it is the appellant who was the plaintiff in the suit and the onus of proof lies upon the appellant to prove the fact which it asserts. The following are salient reasons which persuade me to hold that there does not seem to have existed any valid agreement to sell between the parties:-

(I) (a) Except the factum of the receipts dated 16.10.1993 and 4.1.1995, there is absolutely no contemporaneous additional evidence to support the case of the existence of the receipts and that too for a sufficiently long period of one year and eight months from October, 1993 to May, 1995.

(b) Admittedly there are no witnesses to this agreement to sell and no evidence has been led by the appellant/plaintiff of the receipts dated 16.10.1993 and 4.1.1995 having been executed in the presence of any witnesses. Therefore, there are no witnesses who have affirmed existence of the agreement to sell between the parties.

(c) Further, there is also no correspondence at any point of time from October, 1993 till the property was sold by the defendant Nos.1 and 2 to the defendant Nos.3 and 4 in May, 1995 whereby it was affirmed by the appellant/plaintiff that there was an agreement to sell between the parties as evidenced by the receipts dated 16.10.1993 and 4.1.1995. Admittedly, there is not a single letter or a notice sent by the appellant/plaintiff to the defendant Nos.1 and 2 affirming the existence of the receipt and the agreement to sell.

(d) No notice was given by the appellant/plaintiff to the defendant Nos.1 and 2 to get the income tax clearance certificate.

(e) In the suit for injunction filed by the appellant/plaintiff in March, 1995 there is not even a whisper as to the existence of the receipts/agreement to sell dated 16.10.1993 and 4.1.1995 and therefore rights flowing to the appellant/plaintiff therefrom. To avoid repetition para 6 above is reiterated.

(II) An important aspect which has weighed in my mind is that surely it was not difficult for the appellant/plaintiff during trial to have summoned admitted signatures of the defendant No.1 and thereafter examined a hand writing expert to show that the receipts dated 16.10.1993 and 4.1.1995 bore the signatures of the defendant No.1. I am conscious of the fact that of course if both the parties had led experts? evidence, both the experts would have supported the respective cases of the parties who engaged them, and the evidence of an expert is therefore only taken as evidence in the case with substantial caveat, however, at least the appellant/plaintiff could have made an effort, and which would have shown that it was convinced that there existed genuine receipts dated 16.10.1993 and 4.1.1995. Lack of proactive steps as aforesaid by the appellant/ plaintiff, in my opinion, clearly goes against it. I may also state that there is an additional handicap for the Court to decide genuineness of the receipts in the facts of the present case, even assuming that there are no reports of the handwriting experts of both the parties, inasmuch as for no fault of the defendants/respondents the original receipts are not on the judicial file because they are said to have been lost by the appellant/plaintiff in the District Court premises (and for which the appellant/plaintiff is said to have filed a police report on 6.8.1998, Ex.PW1/17). u/s 73 of the Evidence Act, 1872 though a Court is empowered to compare the disputed signatures with the admitted signatures of the executants, and which the Courts do so warily if deemed fit in the facts of the particular case, but, even that cannot be done in the present case in the absence of the originals of the receipts as the same are not on record. Therefore, the position which emerges is that there is a contention of the defendant Nos.1 and 2 that the signatures of the defendant No.1 on the receipts dated 16.10.1993 and 4.1.1995 are forged and there is no contemporaneous evidence including correspondence affirming the existence of the receipts for a long period of one year and eight months, no expert evidence was sought to be relied upon by the appellant/plaintiff, no other admitted signatures of the defendant No.1 were sought to be summoned to compare the signatures on the receipts with the admitted signatures, no independent witness existed to depose qua the execution of the receipts, no mention of the receipts was made by appellant/ plaintiff in the injunction suit filed in March, 1995, and therefore, I am of the opinion that there is sufficient doubt cast on existence of the receipts dated 16.10.1993 and 4.1.1995, and in such nebulous state of facts which have come on record, it is not possible for this Court to hold that there existed genuine receipts dated 16.10.1993 and 4.1.1995.

(III) The final and a very important reason to hold that there was never any agreement to sell, is that the receipt-cum-agreement to sell dated 16.10.1993 talked of payment by cheque of Rs. 10,000/- to the defendant No.1, and the defendants/respondents have led sufficient evidence in the form of the cheque, Ex.PW1/DX1 which shows that really the so called amount of Rs. 10,000/- received by the defendant No.1 was in fact a loan given by the appellant/plaintiff to the defendant No.1 and which loan was returned by means of the cheque, Ex.PW1/DX1. The cheque, Ex.PW1/DX1 on its reverse contains a specific noting of having been issued for return of the loan, and the appellant/plaintiff during its evidence, has admitted this fact that this cheque was issued for return of the loan of Rs. 10,000/- given by the appellant/plaintiff to the defendant No.1. Since there is no other evidence on record when this loan of Rs. 10,000/- was paid by the appellant to the defendant No.1, and which the defendant No.1 returned by means of the cheque Ex.PW1/DX1, surely, the amount of Rs. 10,000/- would be the amount of Rs. 10,000/- given by the cheque of Rs. 10,000/- which is mentioned in the agreement to sell as being towards an advance under the agreement to sell and which was really the amount towards loan given by the appellant/plaintiff to defendant No.1. I may note that the cheque, Ex.PW1/DX1 was dishonoured when presented by the appellant/plaintiff, and thereafter this cheque was returned by the appellant/plaintiff to the defendant No.1 showing that by virtue of Section 114(i) of the Evidence Act, 1872 (which states that where a document creating an obligation in the hands of the obligor) the obligation under the cheque is discharged. The document in this case creating the obligation is the cheque, Ex.PW1/DX1, in favour of the appellant/plaintiff, and which ordinarily ought to have remained with the appellant/plaintiff after dishonour, and the fact that it has been returned back to the defendant No.1 shows that the obligation under the same has been discharged i.e. the amount of Rs. 10,000/- has been repaid back to the appellant/plaintiff by the defendant No.1.

(IV) Even if I take the statement made by the partner of the appellant Mr. Chhanga Mal Gupta, Ex.PW2/2, as proved yet a mere statement of Mr. Chhanga Mal Gupta before the Income Tax Officer that "originals have been shown to you" is not sufficient proof/discharge of onus, inasmuch as, unless the signatures on the receipts (and that too on the originals, as in photocopies signatures can be easily planted) are proved to be the signatures of defendant No.1, it cannot be said that they are genuine receipts dated 16.10.1993 and 4.1.1995. Proof of a document and weight to be attached to such document to establish existence of a fact are totally separate aspects. Merely because a document (Ex.PW2/2) is proved it cannot be said that by that very fact validity of other documents stated therein (being the two receipts dated 16.10.1993 and 4.1.1995) is also automatically proved. Merely proving existence of Ex.PW2/2 in the facts of this case mean that the vexed issue of existence of receipts can be taken to be proved.

(V) At this stage, I would also seek to deal with the argument of the appellant that since the original title deeds of the property are with appellant/plaintiff this shows that there was an agreement to sell. I disagree with the submission as there is no such pleading laid out of the original title deeds being with the appellant/plaintiff in furtherance of the agreement to sell. This stand of the original title deeds being proof of the agreement to sell, was for the first time taken in the evidence of the appellant/plaintiff and there has been sufficient cross-examination to show lack of credibility of such plea. No amount of evidence can be looked into for a plea which is not laid out. Also the admitted case of the appellant/plaintiff is of cordial relations with defendant Nos.1 and 2 and thus there can be valid reason(s) for original title deeds being with the appellant/ plaintiff.

(VI) In my opinion, therefore, the appellant/plaintiff has failed to discharge the onus of proof of existence, validity and genuineness of the receipts, Ex.PW1/3 and Ex.PW1/2A dated 16.10.1993 and 4.1.1995 and I hold so. Once there is no agreement to sell between the parties, this ground itself is enough for dismissal of the suit and the present appeal.

9. The second main reason for dismissal of the suit and the present appeal is that admittedly the suit property is not solely owned by the defendant No.1, but is jointly owned by the defendant Nos.1 and 2. It is the admitted case of the appellant/plaintiff that the so called receipts, Ex.PW1/3 and Ex.PW1/2A are only signed by defendant No.1-Sh. Hardit Singh and not by his wife-Smt. Inder Kaur/ defendant No.2. Therefore, there is no agreement whereby the defendant No.2 agreed to sell her half portion of the suit property to the appellant/plaintiff. Therefore, there cannot be specific performance of the suit property definitely as against the defendant No.2.

In fact, in the facts of the present case there cannot be specific performance of the agreement because the appellant/plaintiff claims specific performance of the agreement as a whole i.e. for whole of the property, and the appellant/plaintiff has not exercised an option u/s 12 of the Specific Relief Act, 1963 that the appellant/plaintiff be sold at least half the portion of the suit property for which there is an agreement to sell with the defendant No.1. I may note that right till date i.e. not only during the entire proceedings in the suit, but also during the entire proceedings in this appeal, at no point of time any option is exercised by the appellant/plaintiff for seeking specific performance of only half of the portion of the property which belonged to the defendant No.1. I am stating this aspect of Section 12 of the Specific Relief Act, 1963 because there are two judgments of the Supreme Court being Kammana Sambamurthy (D) by LRs. Vs. Kalipatnapu Atchutamma (D) and Others, and Kartar Singh Vs. Harjinder Singh and others, which grants decree for specific performance when the buyer specifically took up a stand in the pleadings and the evidence, of giving up the right with respect to balance portion of the property with respect to which no agreement to sell was entered into by the co-owner. In the present case, as already stated above, there is no case which is set up by the appellant/plaintiff of seeking only proportionate performance of the agreement to sell so far as the co-ownership interest of defendant No.1 is concerned, and therefore, there does not arise any issue of grant of specific performance qua only the share of defendant No.1. A reference in this behalf may be drawn to the judgment of the Supreme Court in the case of HPA International Vs. Bhagwandas Fateh Chand Daswani and Others, and which judgment makes it clear that the entitlement to claim proportionate specific performance of a part of agreement by paying proportionate consideration for a part of the property cannot arise unless at the very first instance a specific case is laid out; pleaded and pursued; for only a part performance of the agreement to sell. Therefore, I hold that since the appellant/plaintiff is claiming specific performance of the agreement as a whole, and the agreement is entered into only with one of the co-owners, there does not arise grant of relief of specific performance with respect to the whole suit property, as there is no agreement to sell for the whole property as the agreement to sell is not signed by one of the two co-owners.

10. On the issue of who is the person guilty of breach of contract assuming that there existed an agreement to sell between the parties, the case of the appellant/ plaintiff was that the defendant Nos.1 and 2 were guilty of breach of contract, inasmuch as, according to be appellant/plaintiff, the defendants no. 1 & 2, insisted that the balance amount of sale consideration be given only in cash and it is for that purpose that the agreement to sell could not go through. In my opinion, this argument of the appellant/plaintiff carries no weight inasmuch as a reference to the plaint and affidavit by way of evidence filed on behalf of the appellant/plaintiff shows that there is no pleading/evidence of any date, month or year as to when the defendant Nos.1 and 2 claimed that the balance amount of sale consideration be paid only in cash. Even assuming that mentioning of a date, month and year is not required, surely, once there was non-performance for a sufficiently long period of time of one year and eight months viz from October, 1993 to December, 1995, it was incumbent upon the appellant/plaintiff at least to have brought this fact on record by issuing of a letter/notice, because as per the appellant/plaintiff the defendant Nos.1 and 2 were committing breach of contract by refusing to accept the money by means of a cheque. However since there is not even a single letter/notice on record whereby the appellant/ plaintiff had brought such alleged factum of breach of contract of defendant Nos.1 and 2, it cannot be held that the defendant Nos.1 and 2 were guilty of breach of performance by allegedly insisting for payment of balance amount of consideration in cash. The case of the appellant/plaintiff therefore lacks credibility and I hold that even assuming there was an agreement to sell, it was the appellant/plaintiff who was guilty of breach of contract. In fact in my opinion, and as concluded above, this silence of not mentioning the alleged breach of defendant Nos.1 and 2 in insisting for payment of balance consideration in cash, further goes to show that in fact there was never any agreement to sell dated 16.10.1993 and as allegedly confirmed by the subsequent receipt dated 4.1.1995.

11. While on the aspect of breach, I would also hold that even assuming there was any agreement to sell, rights under the same were given up on taking back of the consideration of Rs. 10,000/- by the appellant/plaintiff at the time of return of the dishonoured cheque, Ex.PW1/DX1 and hence there is no question of breach of a contract which has been laid to rest by the parties as the appellant/ plaintiff received back the amount of Rs. 10,000/- vide cheque, Ex.PW1/DX1. This I am observing though otherwise the defendants/respondents have established that the amount of Rs. 10,000/- received by the defendant No.1 by a cheque on about 16.10.1993 was towards a loan and which was repaid in cash when cheque, Ex.PW1/DX1 was returned to the defendant No.1. This aspect of there not existing a live agreement to sell (assuming if there was one) has also to be taken with the fact that when in March, 1995 the appellant/plaintiff filed a suit for injunction against defendant Nos.1 and 2 and the Municipal Corporation of Delhi (MCD) seeking injunction to restrain the defendants from carrying on any construction in the terrace of the suit property, and which portion admittedly formed the part of the subject matter of the agreement to sell, the appellant/

plaintiff in the pleadings in the said suit, did not take up a case that the appellant/plaintiff was a proposed purchaser of the rights in the terrace under the so-called agreement to sell dated 16.10.1993, confirmed by the receipt dated 4.1.1995. If a live agreement to sell did exist, and under which rights existed as on March, 1995 surely in the plaint, (Ex.DW2/2) filed in March, 1995, the appellant/plaintiff would have definitely mentioned this fact. There is conspicuous silence in the plaint of existence of rights in favour of the appellant under the receipts dated 16.10.1993 and 4.1.1995, and I therefore am constrained to hold and believe that there was no existing and binding agreement to sell dated 16.10.1993/4.1.1995, assuming the receipts existed, and that the rights under the same stood extinguished/given up as on March, 1995.

12. Now, on to the aspect as to whether the appellant/plaintiff was ready and willing to perform his part of the contract i.e. whether the appellant/plaintiff has demonstrated its financial capacity to pay the balance sale consideration. Though, before the trial Court the appellant/plaintiff did file photocopies of certain fixed deposit receipts (FDR), however, the said receipts are not a single document for a total amount of Rs. 4,10,000/-, the balance sale consideration. Different fixed deposit receipts (FDRs) are for different amounts of Rs. 62,000/-, Rs. 50,000/-, Rs. 45,890/- and Rs. 1,12,000/- etc. in the names of different persons, and that too of different points of time of 06.05.1993, 12.04.1998 and16.11.1994, therefore, it cannot be ruled out that there may be duplication of amounts with respect to certain receipts which could have been the renewal of the past receipts, and in any case the same would not show readiness and willingness during the entire period from October, 1993 till the filing of the suit in December, 1995 at all points of time of the amount of Rs. 4,10,000/-. I am for the sake of arguments taking the FDRs as proved and exhibited, though the trial Court has held that the said FDRs cannot be held to be proved and exhibited in the absence of originals. The appellant/plaintiff had through his Advocate closed his evidence without proving these FDRs.

13. Finally, in my opinion, the facts of the present case are such that the relief for specific performance ought not to be granted. It is trite that grant of relief for specific performance is discretionary, and which is so categorically stated in Section 20(1) of the Specific Relief Act, 1963 which reads as under:-

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

Section 20(3) further makes it clear that unless substantial acts are done under the agreement to sell, specific performance need not be granted. Considering that substantial acts necessarily will include substantial payment of the total sale consideration, and since even as per the best case of the appellant/plaintiff only a sum of Rs. 60,000/- has been paid under the agreement to sell out of the total consideration of Rs. 4,70,000/-, in my opinion, the discretionary relief for specific performance cannot be granted because today the prices in 2012 will be around 25 to 30 times or thereabouts higher than the prices prevailing in the year 1995, and even if the respondents/defendants are granted huge rate of interest on the balance price or even granted substantial increase in the balance price, the respondents/defendants will not be able to purchase an alternative property for the amount of the balance price as on date which they could have purchased in the year 1995. One is reminded, at this stage, of the observations of the division Bench of the three judges of the Supreme Court in the case of Nirmala Anand Vs. Advent Corporation (P) Ltd. and Others, which in para 6 has observed as under:-

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.

(underlining added)

14. Therefore, exercise of discretion whether to grant or refuse specific performance is a judicial discretion which depends on the facts of each case. In the present case there is total uncertainty to the existence of agreement to sell and which in fact in my opinion does not exist, even if the same existed there was in fact breach on the part of the appellant/plaintiff, and further even if the agreement to sell if entered into, rights under the same were given up on receiving back of the amount of Rs. 10,000/- in October, 1994 by the appellant/ plaintiff from defendant No.1 and finally third party rights have come into existence which compels me to hold that the appellant/plaintiff is not entitled to specific performance as prayed for. A seller cannot be indefinitely asked to wait, and it has otherwise come on record that defendant Nos. 1 and 2 were in urgent need of funds due to financial difficulties, and for which reason they were selling the suit property. In certain cases where substantial consideration i.e. at least

50% of the consideration is paid, or possession of the property is delivered under the agreement to sell in addition to paying advance price, the proposed buyer is vigilant for his rights and he files the suit soon after entering into the agreement to sell, then in accordance with totality of facts and circumstances Courts may decree specific performance, however, in the facts of the present case (as found and stated above) I do not think that the appellant is entitled to discretionary relief of specific performance. I may, at this stage, reiterate that the Supreme Court has said that merely because there is limitation for filing a suit for specific performance does not mean that a suit which is filed much after the entering into of an agreement to sell, and/or much later than the alleged breach, then such a suit for specific performance ought to be decreed merely because it is filed within the period of limitation. These are the observations which are made by the Supreme Court keeping in view the phenomenal rises in prices of immovable properties in urban areas. The Supreme Court has made categorical observations that in specific performance cases time of performance should be of the essence, and the doctrine of time not being of the essence should be given a go bye so far at least immovable properties are situated in urban areas vide K.S. Vidyanadam and Others Vs. Vairavan, and Mrs. Saradamani Kandappan Vs. Mrs. S. Rajalakshmi and Others, Though the observations of the Hon''ble Supreme Court are with respect to time of performance being not of essence in sales of immovable properties, I am referring to the same as they touch on the aspect of delay in seeking specific performance. In the facts of the case the existence of delay of at least one year from the last receipt dated 4.1.95 and seven months after third party rights were created is one factor, when taken with others, to hold that appellant/plaintiff is not entitled to the discretionary relief of specific performance.

15. No other point or issue was urged or pressed for before me, expect the above aspects which have been dealt by me hereinabove. In view of the above, there is no merit in the appeal, and the same is dismissed leaving the parties to bear their own costs. Trial Court record be sent back.