

(2015) 09 DEL CK 0155
In the Delhi High Court
Case No : CS(OS) 335 of 2005

Sewa International

APPELLANT

Vs

Kalawati Mathrani and Others

RESPONDENT

Date of Decision : 01-09-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 3 Rule 2, Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 39
Contract Act, 1872 — Section 54
Income Tax Act, 1961 — Section 16(c), 230A(1), 269UC, 269UL
Limitation Act, 1963 — Section 10, 11, 12, 13, 14, 14
Mental Health Act, 1987 — Section 51
Specific Relief Act, 1963 — Section 16, 21, 22(2)

Citation : (2015) 234 DLT 214

Hon'ble Judges : Najmi Waziri, J

Bench : Single Bench

Advocate : Anil Sapra, Senior Advocate and Sunil Magon, for the Appellant; Mukul Talwar, and Sachidanand, Advocates for the Respondent

Judgement

Najmi Waziri, J—This suit seeks specific performance of an agreement to sell dated 24.04.2000 (hereafter "agreement ") in respect of property bearing No. 16, Poorvi Marg, Vasant Vihar, New Delhi-110057 (for short "suit property"), admeasuring 1219 sq. yds. It is not in dispute that Rs. 1.125 crores, i.e., 15% out of the total sale consideration of Rs. 7.50 crores stands paid.

2. Although the suit was instituted against one Mrs. Kalawati Mathrani (hereafter "deceased defendant"), she passed away on 25.08.2005. Hence, her Legal Representatives (for short LRs) namely Mr. Ranjit Mathrani, Mr. Nirmal Mathrani, Ms. Aparna Choudhary and Ms. Sheila Mathrani were brought on record and impleaded as defendant Nos. 1 to 4. Issues were framed on 08.10.2007.

Issue wise contentions and findings

Issue No. (i): Whether the plaintiff was ready, willing and able to perform its

obligations under the Agreement to Sell dated 24.04.2000? OPP

3. Mr. Anil Sapra, the learned Senior Advocate appearing for the plaintiff drew the attention of the Court to a letter dated 10.08.2000 (Ex. PW-1/G) whereby the deceased defendant's son (defendant No. 1) intimated the plaintiff that one of the two requisite permissions, i.e., under Section 269UC of the Income Tax Act, 1961 (for short "IT Act") in Form 37-I had been obtained. The deceased defendant was stated to be ill and hospitalised and further, that she would execute the necessary documents the moment she recoups from her illness. He submitted that the said letter was responded to by a letter dated 25.08.2000 (Ex. PW-1/H) whereby the plaintiff showed its eagerness to complete the formalities apropos sale of the suit property as soon as possible. He further submitted that no progress being had been made, hence, the plaintiff served a legal notice dated 19.9.2000 upon the deceased defendant (Ex. PW-1/I) whereby readiness and willingness to perform its part of the agreement was reiterated; the deceased defendant was asked to furnish Income Tax Clearance Certificate in Form 34-A under Section 230A(1) of the IT Act; and the deceased defendant was also requested to take appropriate steps for concluding the sale as per the agreement.

4. It was further submitted that in August 2000, an application under the Mental Health Act, 1987 (hereafter "MHA proceedings") was moved by defendant Nos. 1, 2 and 3 wherein the deceased defendant, inter alia, was stated to be comatose; she briefly opened her eyes but was unable to communicate and showed little signs of recognition; she had no control over her bodily functions; and she was unable to comprehend or write. Other relevant averments made in the MHA proceedings are reproduced as under:

"However, since there was no improvement by the evening of the 2nd July, 2000, the 2nd petitioner i.e. Mr. Ranjit Mathrani arrived in Delhi on 3.7.2000 and personally spoke to the attending physician and was advised to move his mother to Escorts Hospital at New Delhi, which he did. Ultimately on 4.7.2000, the said Mrs. Kalawti Mathrani was moved by the petitioners to the Indraprastha Apollo Hospital at Mathura Road, Sarita Vihar, New Delhi. At that hospital it was diagnosed that the said Mrs. Kalawti Mathrani was suffering from the ailment Herpes Simplex Encephalitis, a serious inflammation of the brain leading to mental disorder. She has been in that hospital ever since..... That the said Mrs. Kalawti Mathrani is possessed of property both movable and immovable, the details of which are annexed as Annexure B.I. might be mentioned that by an Agreement to Sell dated 24.4.2000, the said Smt. Kalawati Mathrani has agreed to sell her immovable property to M/s. Sewa International Fashion Ltd., 5 Furniture Block, Kirti Nagar, New Delhi for a sum of Rs. 7,50,00,000/- (Rupees Seven Crores Fifty Lakhs Only). She has also received a sum of Rs. 1,12,50,000/- (Rupees One Crore Twelve Lakhs Fifty Thousand Only) towards part payment of the Sale consideration from vendee. A copy of the said agreement is annexed as Annexure C."

5. The following reliefs were sought in the said MHA proceedings:

"(i) To hold an Inquisition into the mental condition of the aforesaid Smt. Kalawati Mathrani and for that purpose to;

(a) Issue notice to Maj. Gen. B.M. Aiyanna, Director Medical Services, Indraprastha Apollo Hospital, Sarita Vihar, New Delhi, to submit a report concerning the mental state of the aforesaid Mrs. Kalawati Mathrani, widow of Late Shri Kewalram Pribhdas Mathrani, currently undergoing treatment as an inpatient in the Medical ICU 2121 at the said hospital.

(b) For the purpose of the inquisition applied for, to appoint Dr. Mukul Varma, M.D., D.M., Senior Consultant Neurologist and Dr. G.K. Ahuja, visiting Consultant Neurophysician at the same hospital, or such person or persons that this Hon'ble Court deems fit in the facts and circumstances of the case, to act as assessors.

(ii) On completion of the inquisition, to record a finding under Section 51 of the Mental Health Act 1987, that the aforesaid Smt. Kalawati Mathrani is in fact mentally ill and that she is incapable of taking care of herself and of managing her property."

6. It was submitted that defendant Nos. 1, 2 and 3 had acknowledged the agreement and had made substantial averments about it in the MHA proceedings; they sought a declaration to the effect that the deceased defendant would be unable to take care of her interests and consequently, for appointment of a guardian; however, it remained pending and nothing came about; a medical certificate dated 8th August, 2000 (Ex. P-4) from Dr. Mukul Verma certifies that the deceased defendant was under his care with a serious illness as a result of which she was mentally incapacitated and was unable to manage her affairs; hence, on 26th September 2000, the plaintiff filed an interim application (Ex. D-1) in the MHA proceedings for appointment of a Manager to conclude the transaction and execute a sale deed in terms of the agreement, however, the said application was objected to by the present defendants (Ex. D-2); in the meantime, the MHA proceedings had become infructuous because the deceased defendant passed away during its pendency; and before her death, the suit was filed.

7. The legal notice sent by the plaintiff was replied to by defendant No. 1 vide a letter dated 21.10.2000 whereby he reiterated that complete disclosure apropos the agreement was made in the MHA proceedings; defendant No. 4 was contesting the said proceedings while challenging the agreement; and that the plaintiff was free to take appropriate legal recourse.

8. In view of the aforesaid, the learned Senior Advocate for the plaintiff submitted that the plaintiff's conduct shows that it has all along been ready and willing to perform its part of the agreement; the agreement stipulates payment of balance sale consideration simultaneous with execution of the sale deed; and since the deceased defendant passed away without appointing anyone as the

Manager or Executor of her estate, the only way out was to obtain appropriate orders in the MHA proceedings.

9. In reply, Mr. Mukul Talwar and Dr. Arun Mohan, the learned Senior Advocates appearing for defendant Nos. 1 to 3, defendant No. 4 respectively submitted that for the grant of discretionary relief under Section 16 of the Specific Relief Act, the plaintiff has to show that it was ready and willing, at all times, to perform its part of the contract. They submit that the plaintiff never tendered the balance sale consideration although the same was payable within 30 days of approval(s) being given by the appropriate authority; the approval having been granted was intimated to the plaintiff by a letter dated 10.08.2000; the plaintiff should have at least tendered the amount; neither was it done prior to the expiry of the limitation period of three years, i.e., 1.6.2004 nor till date despite a lapse of nearly 15 years; therefore, the plaintiff's conduct shows that it was not serious about pursuing the matter and was not ready and willing to perform its part of the agreement.

10. They drew the attention of the Court to a certificate dated 14.07.2009 issued by the plaintiff's Chartered Accountant (for short "CA") which enlists the amounts held by the plaintiff as FDRs and margin money in banks as on 31.03.2001, 31.03.2002, 31.03.2003 and 31.03.2004. According to the learned Senior Advocates, the said certificate would not be sufficient proof to show readiness and ability to make payments to the tune of Rs. 6,37,50,000/- since it only contains details of FDRs and margin money in banks; it does not reflect the liabilities and other assets of the plaintiff Company; upon cross examination of the said CA, he admitted that the statement was trucked and did not reveal the true financial position of the plaintiff Company; hence, the said document is wholly unreliable. The relevant deposition of the said witness is reproduced as under:

"we have nowhere stated that the certificate states the total financial position of the company. The only thing that we are mentioning is that "M/s. Sewa International Fashions Limited had the following financial details for the period mentioned against each figure."

11. Dr. Arun Mohan, the learned Senior Advocate had taken the Court through the records of the MHA proceedings to show the manner in which the interim application filed by the plaintiff was pursued. A perusal of the same would show that the plaintiff had abandoned its application on 23.04.2001 and this suit was filed in November, 2004, i.e., after more than three years.

12. The learned Senior Advocate for defendant No. 4 relied upon the judgment of a co-ordinate Bench of this Court in Ved Parkash Kharbanda Vs. Vimal Bindal, (2013) 198 DLT 593 : (2013) 198 DLT 555 to contend that the plaintiff is not entitled to the relief of specific performance when it itself is in breach of the agreement, i.e., it did not pay the balance sale consideration after having been informed of the necessary approval being granted.

13. He further relied upon an order of the Supreme Court in N.P. Thirugnanam (D) by L.Rs., Vs. Dr. R. Jagan Mohan Rao and others, AIR 1996 SC 116 : AIR 1995 SC 116 : (1995) 5 JT 553 : (1995) 4 SCALE 465 : (1995) 5 SCC 115 : (1995) 2 SCR 53 Supp which held thus:

"To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit alongwith other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances."

14. He further submitted that the plaintiff never tendered the amounts and relies upon Syed Dastagir Vs. T.R. Gopalakrishnasetty, AIR 1999 SC 3029 : (1999) 5 JT 642 : (2000) 124 PLR 348 : (1999) 4 SCALE 697 : (1999) 6 SCC 337 : (1999) 1 SCR 351 Supp : (1999) AIRSCW 2959 : (1999) 7 Supreme 175 to contend that to be entitled to the discretionary relief of specific performance, the plaintiff ought to have tendered the amounts. Insofar as the said judgment is relevant, it reads as under:

"This does not mean that unless the court directs the plaintiff cannot tender the amount to the defendant or deposit in the Court. Plaintiff can always tender the amount to the defendant or deposit it in court, towards performance of his obligation under the contract. Such tender rather exhibits willingness of the plaintiff to perform his part of the obligation. What is "not essential" only means need not do but does not mean he cannot do so."

15. He further relied upon the judgment of a learned Single Judge of the High Court of Andhra Pradesh in B.R. Koteswara Rao Vs. C. Rameswari Bai @ Devi and Another, (2002) 3 ALD 337 : (2002) 6 ALT 1 : (2002) 1 APLJ 496 which held thus:

"20. In another case the Supreme Court has also laid down that the readiness and willingness of the party should be evident at every stage right from the execution of the agreement. It is in this context that it needs to be examined as to whether the defendant was ready and willing to perform his part of the contract.

23. One of the circumstances to verify as to the readiness and willingness of the party claiming specific performance is the plea taken before the Court and the steps taken to prove his bona fides. Normally, in addition to taking the plea as to the readiness and willingness the parties also make deposit of the balance of the sale consideration. Though that act by itself will not entitle the party for the relief, it is a circumstance to be taken into account in recording a finding on the issue."

16. Dr. Arun Mohan, the learned Senior Advocate further submitted that the unwillingness of the plaintiff to perform its part of the agreement is evident from the fact that along with the plaint, an application for interim injunction under Order XXXIX, Rules 1 & 2 was not filed; and an interim injunction in its favour would mean it being directed to deposit the balance sale consideration. He drew the attention to the cross examination of PW-1, which to the extent relevant, reads as under:

"Q. I put it to you that the Plaintiff did not even file any application interim injunction purposely because they were not ready with the funds and any application for interim injunction would have required the Plaintiff to deposit the balance sale consideration in the Court?

A. I cannot answer whether such an application was filed by the counsel or not as I have not got much knowledge about this. It is incorrect to suggest however that we did not have funds to pay the balance sale consideration."

17. He further submitted that on 9.11.2000, the plaintiff transferred monies to the extent of Rs. 6.43 crores to its subsidiary company Teletech Industries Pvt. Ltd., which in return purchased a property bearing Plot No. 19, Sector-18, Udyog Vihar, Gurgaon, Haryana, admeasuring 11,223.60 sq. mts.; yet again on 06.05.2002, the plaintiff purchased a commercial plot bearing No. 7, Shivaji Place District Centre, Raja Garden, New Delhi for a consideration of Rs. 9.35 crores; therefore, the plaintiff did not have the requisite monies to purchase the suit property and was not able, ready and willing to perform its part of the agreement.

18. Finally, it was argued on behalf of the defendants that since the requirement of permission under Section 230A(1) of the IT Act in Form 34-A was done away with w.e.f 1st June, 2001, the balance sale consideration was payable by 30th June, 2001, i.e., within 30 days as stipulated in the agreement and that time was the essence of the agreement.

19. However, Mr. Sapra, the learned Senior Advocate for the plaintiff submitted that the only thing which needs to be established is whether the plaintiff was ready and willing to perform its part of the agreement and in case there was any delay, whether the same could be attributed to it. He submitted that in a suit seeking specific performance of a contract, it first needs to be seen that the requirement of readiness and willingness to perform the contract is satisfied. In support of his contention, he relied upon a judgment of the Supreme Court in Syed Dastagir Vs. T.R. Gopalakrishnasetty, AIR 1999 SC 3029 : (1999) 5 JT 642 : (2000) 124 PLR 348 : (1999) 4 SCALE 697 : (1999) 6 SCC 337 : (1999) 1 SCR 351 Supp : (1999) AIRSCW 2959 : (1999) 7 Supreme 175 , wherein it was observed as under:

"8. On the other hand, learned counsel for the respondent submits, in the absence of averment of the actual words by the plaintiff in his pleading, i.e., ready and willing to perform his part under the contract, which is mandatory in

nature, the plaintiff disentitles himself to any relief in view of Section 16(c). His submission with reference to the explanation of Section 16(c) is, even if any balance amount as in the present case Rs. 120/- had been tendered by the plaintiff in Court, that cannot be construed to comply with the provisions of the aforesaid Section. He emphasised, the use of word except when so directed by the Court used in the explanation (i) of the aforesaid Section, means such payment could only be construed to be such, if he deposit this amount only under the direction of the court, which is not in the present case."

20. He further relied upon R.C. Chandiok and Another Vs. Chuni Lal Sabharwal and Others, AIR 1971 SC 1238 : (1970) 3 SCC 140 : (1971) 2 SCR 573 : (1971) 3 UJ 35 , wherein it was observed as under:

"2. On July 18, 1955, the appellants entered into an agreement with the respondents for the purchase of plot No. 8 measuring 1500 Sq. Yds in Jangpura B, New Delhi for Rs. 22,500/-. The contract was evidenced by receipt Exhibit P-6 which was in the following terms:

"Received with thanks from Messrs. Ramesh Chander Chandiok and Kailash Chandra Chandiok the sum of Rs. 7,500/-(Rupees Seven thousand and five hundred only) as earnest money of the purchase money of Rs. 22,500/- (Rupees Twenty two thousand and five hundred) for the sale of Plot No. 8 measuring 1500 sq. yds in Jangpura B., purchased from the Rehabilitation Ministry and owned by us. The balance of Rs. 15,000 (Rupees Fifteen Thousand only) shall be paid to us by them within one month of the execution of this receipt on the execution of the sale deed by us in their favour."

It is common ground that the aforesaid plot had been allotted by the Rehabilitation Ministry to the respondents and that its, possession was to be delivered after payment of rent of lease money up-to-date and after execution of the lease deed. The lease deed was actually executed in favour of the respondents on April 21, 1956. Meanwhile on August 11, 1955 the respondents wrote a letter to the appellants as follows:

"With reference to the receipt dated 18.7.1955 execute by us in your favour, acknowledging receipt of Rs. 7,500/- as earnest money for the sale of Plot No. 8 measuring 1500 sq. yds in Jungpura B. owned by us, and agreed to be sold to you by us, since it will take about a month more to obtain sanction of the Rehabilitation Ministry, the execution of the sale deed by us cannot be complete without the said sanction, it is hereby mutually agreed between us or orally that the period for execution of the sale deed shall remain extended till the time of the receipt of the said sanction and we hereby confirm the said oral agreement. We will inform you as soon as the said sanction is received and within a week thereof, we will execute the necessary sale-deed in your favour and get the same registered against payment of the balance money. Please sign the duplicate of this letter in confirmation of the said oral arrangement."

A notice dated June 15, 1956 was served by counsel for the respondents on the

appellants saying that the balance of consideration according to the terms of the agreement dated July 18, 1955 was to be paid by the appellants and the sale deed was to be got registered within one month of July 18, 1955. It was further stated that extension had been given as desired by the appellants but the balance amount had not been paid. In para 3 it was stated "my clients are not prepared to wait indefinitely and therefore cancel your agreement for want of certainty and hereby give you an offer, without prejudice to their legal rights, to receiver back the sum of Rs. 7,500/- paid by you as earnest money less the amount of loss suffered by them on account of lease and interest etc. within one week of the, receipt of this letter, failing which my clients would be entitled to forfeit the earnest money and treat the agreement cancelled."

.....

5. The High Court found that both the respondents were bound by the letter Exhibit P-7 dated August 11, 1955 to which reference has already been made. It was noticed that sanction of the Rehabilitation Ministry was required before the sale could be, completed but it was held that there was nothing to indicate that the absence of such a sanction invalidated the transfer ab initio, or rendered it void. In agreement with the trial court the High Court held that even a defeasible interest could be the subject matter of sale; in other words the sale could be effected without the sanction having been previously obtained. The view of the High Court was that Exhibit P-7 did not contain any such language which would justify the importing of a condition that until the respondents obtained sanction for the transfer of the property the appellants were not bound to get the sale completed. It was, also decided that the appellants had not satisfactorily shown that they had sufficient funds to pay the balance amount of Rs. 15,000/- from which it could be concluded that they were not ready and willing to perform their part of the contract. Yet another point was decided against the appellants on the basis of, certain execution proceedings stated at the Bar to have been taken during the pendency of the appeal. According to the High Court once the appellants had obtained satisfaction of the decree for Rs. 7,500/- they became disentitled to a decree for specific performance.

6. We are unable to concur with the reasoning or the conclusions of the High Court on the above main points. It is significant that the lease deed was not executed in favour of the respondents by the Government until April 21, 1956. So long as their own title was incomplete there was no question of the sale being completed. It is also undisputed that according to the conditions of the lease the respondents were bound to obtain the sanction of the Rehabilitation Ministry transferring the plot to any one else. The respondents were fully aware and conscious, of this situation much earlier and that is the reason why on August 11, 1955 it was agreed while extending the period for execution of the sale deed that the same shall be got executed after receipt of the sanction. The statement contained in Exhibit P-7 that the execution of the sale deed "by us cannot be complete without the said sanction" was unqualified and unequivocal. The

respondents further undertook to inform. the appellants as soon as sanction was received and thereafter the sale deed had to be executed within a week and got registered on payment of the balance amount of consideration. We are wholly unable to understand how in the presence of Exhibit P-7 it was possible to hold that the appellants were bound to get the sale completed even before any information was received from the respondents about the sanction having been obtained. It is quite obvious from the letter Exhibit P-8 dated June 15, 1956 that the respondents were having second thoughts and wanted to wriggle out of the agreement because presumably they wanted to transfer it for- better consideration to some one else or to transfer it in favour of their own relation as is stated to have been done later. The respondents never applied for any sanction after August 11, 1955 and took up the position that they were not prepared to wait indefinitely in the matter and were therefore cancelling the agreement "for want of certainty". We are completely at a loss to understand this attitude nor has any light been thrown on the uncertainty contemplated in the aforesaid letter. It does not appear that there would have been any difficulty in obtaining the sanction if the respondents had made any attempt to obtain it. This is obvious from the fact that when they actually applied for sanction on November 11, 1956 it was granted after a week. The statement contained in Exhibit P-10 dated July 4, 1956 that the sanction was not forthcoming has not been substantiated by any cogent evidence as no document was placed on the record to show that any attempt was made to obtain sanction prior to November 11, 1956. Be that as it may the respondents could not call upon the appellants to complete the sale and pay the balance money until the undertaking given in Exhibit P-7 dated August 11, 1955 had been fulfilled by them. The sanction was given in November, 1956 and even then the respondents did not inform the appellants about it so as to enable them to perform their part of the agreement of safe. There was no question of time having ever been made the essence of the contract by the letters sent by the respondents nor could it be said that the appellants had failed to perform their part of the agreement within a reasonable time."

21. Insofar as the other defences set up by the defendants such as (i) the agreement was entered into when the value of the suit property was depreciated (ii) and time was the essence of the agreement are concerned, Mr. Sapra, the learned Senior Advocate submitted that there is no such clause in the agreement and in the absence of any such stipulation, the same cannot be inferred simply because of the passage of time. He relied upon the dicta of the Supreme Court in Balasaheb Dayandeo Naik (Dead) through LRs. and Others Vs. Appasaheb Dattatraya Pawar, AIR 2008 SC 1205 : (2008) 2 CLT 460 : (2008) 1 CTC 530 : (2008) 1 CTLJ 299 : (2008) 2 JT 63 : (2008) 1 SCALE 705 : (2008) 4 SCC 464 : (2008) AIRSCW 1183 : (2008) 1 Supreme 673 .

22. The learned counsel for the plaintiff submitted that clearance in Form 34A was essential as per Clause 4 of the agreement. He drew the attention of the Court to the cross examination of PW-1 which reads as under:

"Q. Mr. Chauhan I Put it to you that with effect from 1st June, 2001, a permission under Section 230A(1) of the Income Tax Act in form No. 34A was not required?

A. Our agreement with Mrs. Kalawati Mathrani took place in year 2000 in which this requirement was mentioned. If any change in law occurred after that the same was not brought to our notice."

23. He also relied upon an extract from the 11th Edition of Pollock and Mulla, Indian Contract and Specific Relief Acts, which in Volume II at Page No. 1287 reads as under:

"Readiness and willingness of a person seeking performance in a case where time is provided for performance means that the person claiming performance has kept the contract subsisting with preparedness to fulfil his obligations and accept performance when the time for performance arrives. But it does not mean that he had command of necessary money throughout the existence of the contract. But to prove readiness and willingness a purchaser has not necessarily to produce the money or vouch a concluded scheme for financing the transaction. Failure to find money or prove possession of money before time for performance cannot entitle the vendor to refuse performance. The plaintiff does not have to go about jingling money to demonstrate his capacity to pay the purchase price. Thus, even where the plaintiff had stated that she did not have the means to pay the Court fees but did in fact pay the full Court fees before the time for claiming specific performance expired, the Court held that it could not be said that she was not ready and willing to perform her obligation. Clause (1) of Explanation of Section 16(c) clearly enacts that money need be produced only when directed by the Court."

24. Furthermore, he relied upon a judgment of the Privy Council reported as Bank of India, Limited and Others vs. Jamsetji A.H. Chinoy AIR 1950 90 (Privy Council) , in particular para 21 whereof which reads as under:

"21. (4) What plaintiff 1 entitled to relief by way of specific performance as ordered by the appellate Court? The matter raised by this question have narrowed considerably during the course of proceedings. Specific performance was sought against the additional appellants under S. 27(b), Specific Relief Act, 1977. As it was admitted that they took their transfers of the shares in question with notice of the contract sued upon, the applicability of this enactment is not in doubt. It is also the opinion of the Board that, having regard to the nature of the company and the limited market for its shares, damages would not be an adequate remedy. This leaves as the matter for decision under this head whether plaintiff 1 was ready and willing to perform his obligations under the contract. On this aspect of the case, the defendants, up to a point, followed two lines of attack. In the first place they said that Jassetji had taken no step to procure the permission of the Reserve Bank to payment under R. 92A (2) or to acquisition under R. 93(2), and was thus never in a position to implement the contract, and secondly they urged that on his own showing he was financially incapable of

finding the price. The first of these contentions no longer raises a live issue. The learned trial Judge found and at their Lordships Bar counsel for the parties agreed, that if the contract was made a reasonable period for its completion would be two months, that would have made the date for completion of 9th September, 1942. But the Dinshaws had repudiated long before that and the course of events thereafter produced a situation which enabled the parties consenting to the order of 9th October, 1947, to take the steps directed thereby without reference to the Reserve Bank. The second contention, however, remains to be considered. The learned Trial Judge upheld it. His views thereon were obiter for he had already found that Jamsetji had not agreed to purchase; and for the same reason and on account of the theory of conspiracy which he had formed he would obviously have experienced difficulty in holding otherwise. The appellate Court found on the evidence that Jamsetji was ready and willing to fulfil his financial obligations under the sale. Their lordships agreed with this conclusion and the grounds on which it was based. It is true that plaintiff 1 stated that he was buying for himself, that he had not sufficient ready money to meet the price and that no definite arrangements had been made for finding it at the time of repudiation. But in order to prove himself ready and willing a purchaser has not necessarily to produce the money or to vouch a concluded scheme for financing the transaction. The question is one of fact and in the present case the appellate Court had ample material on which to found the view it reached. Their Lordships would only add in this connection that they fully concur with Chagla A.O.J. when he says:

"in my opinion, on the evidence already on record it was sufficient for the Court to come to the conclusion that plaintiff 1 was ready and willing to perform his part of the contract. It was not necessary for him to work out actual figures and satisfy the Court what specific amount a bank would have advanced on the mortgage of his property and the pledge of these shares. I do not think that any jury if the matter was left to the jury in England - would have come to the conclusion that a man, in the position in which the plaintiff was, was not ready and willing to pay the purchase price of the shares which he had bought from defendants 1 and 2."

25. The learned counsel for the plaintiff submitted that it is not necessary for the plaintiff to prove availability of funds to show its readiness and willingness; in any case, the plaintiff has shown that there were sufficient funds available by way of FDRs and other investments should the need for payment have arisen; therefore, the defendants' argument that monies which were due towards the balance sale consideration were used for the purchase of other properties is meaningless; rather, it shows the plaintiff's financial soundness. He relied on a sale deed dated 7.8.2001 (Ex. PW1/K) to show that half of the purchase price of Rs. 6.00 crores was paid for by the plaintiff; however, this money was lent from the plaintiff's sister concern; this fact has been admitted by Mr. Subhash Chauhan, PW-1; and the second property was purchased by the plaintiff for Rs. 9.35 crore on 6.2.2002 in Delhi but this money too was not available with the

plaintiff as has been admitted by PW-1.

26. Having heard the learned counsel for the parties and on a perusal of the evidence, the Court is of the view that the plaintiff was not ready and willing to perform its part of the agreement. The plaintiff was intimated by a letter dated 10.08.2000 (Ex. PW-1/G) that the requisite permission under Section 269UL of the IT Act in Form 37-I had been received. It was also intimated that the sale deed could be executed as soon as the deceased defendant recovered from her illness. Pertinently, there was no mention of receiving any clearance under Section 230A(1) of the IT Act. Hence, the plaintiff ought to have taken steps to pay the balance sale consideration and get a sale executed in its favour. In any event, it is not in dispute that obtaining the said clearance had been dispensed with w.e.f. 1st June, 2001. Therefore, the balance sale consideration became due at least on 30th June, 2001 in terms of the agreement. Accordingly, the argument made on behalf of the plaintiff that the change in law was not brought to its notice and that it was an essential condition for performance of the agreement are untenable and ought to be rejected. It is settled that a party cannot plead ignorance of law and a party cannot be forced to perform an act which is impossible.¹

27. The Court finds that instead of instituting a suit for specific performance of the agreement, the plaintiff preferred to intervene in the MHA proceedings. However, it abandoned its interim application on 23.04.2001. Perusal of the orders passed in the said proceedings reveals that on at least 10 occasions, the counsel representing the plaintiff was not present and on 6 occasions, he/she did not press the interim application.

28. The Court also finds merit in the argument of the defendants that while instituting the suit, the plaintiff never preferred an application under Order XXXIX, CPC since the same would have resulted in the plaintiff paying/depositing the balance sale consideration or at least a substantial part of it. It is settled law that the plaintiff must, at all times, be ready and willing to pay the sale consideration to be entitled to the discretionary relief of specific performance. Hence, the contention of the learned counsel for the plaintiff that the plaintiff need not show availability of funds at all times for proving readiness and willingness, is without merit and is accordingly, rejected. Moreover, the plaintiff never tendered any amount towards payment of balance sale consideration both before and after institution of the suit. Therefore, as held in *Koteswara Rao* (supra), the plaintiff ought to have tendered amounts towards payment of balance sale consideration to prove its bona fides which has not been done. Furthermore, while a sale deed apropos the suit property had not been executed, the plaintiff admittedly purchased two properties, one in Gurgaon, Haryana and the other in Raja Garden, New Delhi; that too in 2001 and 2002, i.e., within two years of the agreement being entered into. Where the monies which could have been expended for purchase of the suit property is otherwise utilized, an adverse inference shall be drawn against the plaintiff. Right from the day the agreement

to sell is entered into, the plaintiff must show that it is ready and capable of performing its part of the contract. Its conduct, prior to and after institution of the suit necessarily needs to be considered keeping in mind the attending circumstances.

29. The Court would also note that no cogent evidence has been led by the plaintiff to prove that it had sufficient monies to pay the balance sale consideration. Insofar as reliance on the certificate issued by the CA is concerned, the Court is of the view that the said document is wholly unreliable since it only enlists the FDRs and margin money held by the plaintiff in banks. Furthermore, the CA categorically deposed that the said certificate does not disclose the true and correct financial position of the company. The Court would also note that PW-1 was repeatedly asked why FDRs held by the plaintiff were not produced. However, he gave evasive answers. The relevant depositions are reproduced as under:

"Q. Can you give details to the Court about the money which was available with the Plaintiff before issuance of legal notice dated 19.09.2000 (Exhibit PW-1/I) i.e. from the date of agreement Exhibit P-1 to the date of issuance of the said legal notice?

A. I have already filed the copies of the record made available duly certified by the CA and certified copies of the documents of purchase of properties. Volunteered- we had arrangements for the money as we had stocks, duty draw back and advances from the buyers to meet the purchase price of the property and this is why we had issued the legal notice.

Q. Can you give details of these FDRs?

A. I will furnish whatever details are available with us.

Q. Have you brought the details of FDRs of your Company?

A. I have already filed the certificates etc. by the Auditors.

Q. I put it to you that you are deliberately not giving the details of money in the Bank account of your Company from 19.9.2000 to 8.10.2000 because the details would show that your Company did not have sufficient amount in the Bank for purchasing the suit property.

A. We have already provided the certificate from the C.A. as also the balance sheets to prove that we had the necessary funds."

30. In view of the above discussion, the Court is of the view that the plaintiff was not ready, willing and able to perform its obligations under the agreement. This issue is returned in favour of the defendants and against the plaintiff.

Issue No. (ii) Whether late Smt. Kalawati Mathrani suffered from any mental infirmity making her incapable of entering into the Agreement to Sell dated 24.04.2000? OPD

31. Mr. Sapra, the learned Senior Advocate for the plaintiff submitted that the Written Statement (for short WS) has been filed by the attorney of defendant Nos. 1 to 3 and he has also deposed on behalf of the said defendants; an attorney cannot depose for his principal on issues of which he has no personal knowledge; and this issue stands settled in view of the dicta of the Supreme Court in Janki Vashdeo Bhojwani and Another Vs. Indusind Bank Ltd. and Others, AIR 2005 SC 439 : (2005) 123 CompCas 154 : (2005) 3 CTC 128 : (2004) 10 JT 264 : (2005) 140 PLR 1 : (2004) 10 SCALE 244 : (2005) 2 SCC 217 : (2004) AIRSCW 7064 : (2005) 3 Supreme 275 . He relies upon paras 20, 21, 24, 28 & 29 of the said judgement, which read as under:

"20. However, in the case of Shri Humberto Luis and another Vs. Shri Floriano Armando Luis and another, (2000) 1 ALLMR 648 : (2000) 2 BomCR 754 : (2000) 1 MhLj 690 on which the reliance has been placed by the Tribunal in the present case, the High Court took a dissenting view and held that the provisions contained in order III Rule 2 of CPC cannot be construed to disentitle the power of attorney holder to depose on behalf of his principal. The High Court further held that the word "act" appearing in order III Rule 2 of CPC takes within its sweep "depose". We are unable to agree with this view taken by the Bombay High Court in Floriano Armando (supra).

21. We hold that the view taken by the Rajasthan High Court in the case of Shambhu Dutt Shastri (supra) followed and reiterated in the case of Ram Prasad (supra) is the correct view. The view taken in the case of Floriano Armando Luis (supra) cannot be said to have laid down a correct law and is accordingly overruled. In the view that we have taken we hold that the appellants have failed to discharge the burden that they have contributed towards the purchase of property at 38, Koregaon Park, Pune from any independent source of income and failed to prove that they were co- owners of the property at 38, Koregaon Park, Pune. This being the core question, on this score alone, the appeal is liable to be dismissed."

32. In view of the above, it was argued that the defendants' attorney could not have deposed apropos the mental incapacity of the deceased defendant in entering into the agreement since he had no personal knowledge about the same; on the contrary, the letter dated 8.8.2000 as well as paragraph 14 of the application filed by defendant Nos. 1 to 3 in the MHA proceedings quite clearly admit to the agreement; indeed, they sought appointment of a guardian since she was not in a position to take care of her interests. Finally, Mr. Sapra submitted that since the agreement was always admitted by defendant Nos. 1 to 3, the plea regarding competence of the deceased defendant in entering into the agreement is only an afterthought and ought to be rejected.

33. It appears that this issue was framed since the defendants have contested/ challenged the competence/capacity of the deceased defendant in entering into the agreement. However, it is noted that no cogent evidence has been led by the defendants. In fact, defendant Nos. 1 to 3 had all along been acknowledging the

agreement and further, that the deceased defendant would execute a sale deed once she recovers from her illness. No challenge was ever made apropos the deceased defendant's competence/capacity to enter into the agreement due to any mental infirmity.

34. Insofar as defendant No. 4 is concerned, it would be pertinent to refer to her evidence. In paragraph 10 thereof, she deposes that the deceased defendant was bedridden due to a fracture of her right femur and that she was not able to walk on her own. There is only a vague reference to her mental incapacity in entering into the agreement. In the absence of any cogent evidence on record, it is to be held that the defendants have not discharged their burden to prove this issue.

35. The Court also finds merit in the submission advanced by Mr. Sapra that the attorney of defendant Nos. 1 to 3 could not have deposed to this effect since he had no personal knowledge of the same. The Supreme Court in *Janki Vashdeo* (supra) while affirming the dicta of the Rajasthan High Court held thus:

"On the question of power of attorney, the High Courts have divergent views. In the case of *Shambhu Dutt Shastri Vs. State of Rajasthan and Others*, (1986) 2 WLN 713 it was held that a general power of attorney holder can appear, plead and act on behalf of the party but he cannot become a witness on behalf of the party. He can only appear in his own capacity. No one can delegate the power to appear in witness box on behalf of himself. To appear in a witness box is altogether a different act. A general power of attorney holder cannot be allowed to appear as a witness on behalf of the plaintiff in the capacity of the plaintiff."

36. In view of the discussion hereinabove, this issue is accordingly, returned in favour of the plaintiff and against the defendants.

(iii) Whether the suit is barred by time? OPD

37. It was argued on behalf of the defendants that the suit is barred by limitation. According to them, the period of limitation at best would commence from 30th June, 2001 i.e., after 30 days after the day whence approval in Form 34A was no longer required; and three years as prescribed under Article 54 of the Schedule to the Limitation Act, 1963 expired on 30th June, 2004. However, according to the learned Senior Advocate for plaintiff, this argument is untenable because the plaintiff's interim application in the MHA proceedings seeking appointment of a Manager was pending; the balance consideration could not be paid since the deceased defendant was certified to be incapacitated by the Doctor concerned; defendant Nos. 1 to 3 themselves admitted to the agreement in the MHA proceedings; and the balance sale consideration could not have been paid till the time of execution of the sale deed.

38. It was further submitted on behalf of the plaintiff that there was no fixed date for execution of the sale deed; it was contingent upon receiving clearances under Form 37I and Form 34 A from the Income Tax Department; once clearance under Form 34A had become redundant as of 1st June, 2001, the plaintiff should

have been called upon to pay the balance sale consideration; however, the deceased defendant had become incapacitated; hence, the occasion for payment of balance consideration never arose; at no point of time, was performance of the agreement refused, either by the deceased defendant or defendant Nos. 1, 2 and 3; therefore, the suit is within the period of limitation. The learned Senior Advocate relied upon Article 54 of the Schedule to the Limitation Act, 1963 which reads as under:

"The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused."

39. In support of his contentions, he relied upon the dicta of the Supreme Court in Ahmmadsahab Abdul Milla (dead) by proposed Lrs. Vs. Bibijan and Others, AIR 2009 SC 2193 : (2009) 1 CLR 945 : (2009) 14 JT 364 : (2009) 5 SCALE 437 : (2009) 5 SCC 462 : (2009) 5 SCR 476 : (2009) 3 UJ 1538 which held inter alia as under:

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

40. Dr. Arun Mohan, the learned Senior Advocate for defendant No. 4 submitted that the legal notice dated 19.09.2000 issued by the plaintiff required the deceased defendant to adhere to the terms of the agreement and consequently, execute a sale deed within two weeks therefrom; it was also stated that the plaintiff would take action for specific performance if the notice was not complied with; however, no steps to file a suit was taken by the plaintiff. He draws the attention of the Court to the cross examination of PW-1 which reads as under:

"Q. Is it correct that Mrs. Kalawati Mathrani did not comply with your legal notice dated 19.9.2000 (Exhibit PW-1/1) (The witness is shown the notice from the court file)

A. It is correct that she did not comply.

Q. Is it correct that despite your legal notice dated 19.9.2000 (Exhibit PW-1/I)

whereby you informed the recipients that you would take action for specific performance of the Agreement (Exhibit P-1) after the expiry of notice period, you did not institute any litigation for specific performance till filing of the present suit?

A. It is correct that we did not immediately file any suit. Volunteered- as no decision could be taken because proceedings were pending in the MHA court, therefore, we did not file the suit immediately and we thereafter file the present suit."

41. Dr. Arun Mohan would further submit that at the first instance, the period of limitation commenced from 09.09.2000, i.e., after 30 days of communication about receipt of permission from Appropriate Authority; secondly, the period of limitation commenced from 4/10.10.2000, i.e., after 14 days of issuance/receipt of legal notice. He submits that admittedly, no reply was sent by the deceased defendant, therefore, it amounts to refusal; hence, the second part of Article 54 of the Schedule to the Limitation Act, 1963 would be applicable. According to him, the plaintiff's argument that the deceased defendant had been mentally incapacitated and hence, the period of limitation would not commence till she recovered or died and her LRs were brought on record, would be an incorrect reading of Section 6 of the Limitation Act. In support of his contentions, he relied upon a judgment of the Rajasthan High Court in Smt. Kanchan Bai Vs. Khetidas and Others , which held thus:

"I may here state that a refusal of performance of a contract of sale need not be in writing or expressed in so many words. Refusal can always be inferred from circumstances of the case."

42. He further relied upon Laxmi Prasad Vs. Seth Ramdayal Jat, (2008) 2 MPJR 166 wherein the Madhya Pradesh High Court held as under:

"The notice (Ex. P-1) was sent on 12.5.98 and the same was received by the Defendant on 14.5.98 as per plaint para 3 and because no reply was sent by Defendant it would amount to refusal."

43. He then relied upon a judgment of the Andhra Pradesh High Court in Kota Sivaram Prasad Vs. Nagandla Veera Brahmam and others, (2012) 3 ALT 5 which to the extant relevant, reads as under:

"Even if the 1st respondent can be said to have, indeed, demanded Venkateswarlu to execute sale deed after expiry of three years, suit ought to have been filed within three years from the date of inaction on the part of Venkateswarlu. It is not necessary that refusal must be specific or in any particular form. If a demand was made and nothing positive is forthcoming, refusal can be implied."

44. Lastly, he relied upon Wasim Ahmad and others Vs. Haji Shamsuddin and others, (2012) 3 ADJ 187 : (2012) 3 AWC 2531 : (2012) 115 RD 268 , wherein the Allahabad High Court held thus:

"If twice or thrice executant of agreement for sale on being asked to execute the sale-deed defers the execution on one pretext or other, it amounts to refusal."

45. Mr. Mukul Talwar, the learned Senior Advocate for defendant Nos. 1 to 3 supported the arguments advanced by Dr. Mohan. Additionally, he submitted that the suit was filed on 10.11.2004; it remained pending under objections for a very long time; the objections were removed and the case was numbered on 15.03.2005; an application bearing I.A. No. 1967/2005 was moved seeking condonation of delay in refilling the plaint but only a vague reason was given, i.e., the plaintiff was out of station. Therefore, he submitted that even the application itself was not specific as to how many days of delay were to be condoned.

46. It was also submitted on behalf of the defendants that instead of filing a suit for specific performance, the plaintiff preferred to file an application for appointment of a Manager for concluding the sale in the MHA proceedings; the said application was not pursued bonafidely and was later abandoned; and therefore, the said period cannot be excluded for the purposes of limitation.

47. In rebuttal, Mr. Anil Sapra, the learned Senior Advocate for the plaintiff submits that the defendants' arguments are a total misconstruction of the agreement inasmuch as the balance sale consideration of Rs. 6,37,50,000/- was payable within 30 days of communication of the approval by the authority. He further submitted that most importantly, Clause 5 of the agreement provides that the balance sale consideration shall be paid simultaneously at the time of execution of a sale deed. It is reproduced as under:

"That the vendor shall execute the sale deed of the said property viz. GPA, Will Codicil etc. In favour of the Vendee or its nominee(s) simultaneously at the time of receiving the full and final sale consideration by the Vendor from the Vendee. The Vendor shall execute an Indemnity Bond satisfactory to the Vendor to keep the Vendor indemnified as a precondition to the Vendor being required to execute a GPA and Will Codicil".

48. It is submitted that in the interim, the plaintiff was informed by defendant No. 1 that the deceased defendant had become seriously ill and was not in position to execute the sale deed. The letter dated 10th August, 2000 (Ex. PW1/G) reads as under:

"This is to apprise you that we have received permission from Appropriate Authority under Section 269UC in Form 37, with regard to proceed further in respect of the sale agreement executed by our mother against property bearing No. 16, Poorvi Marg, Vasant Vihar, New Delhi.

Our Mother is seriously ill and confined to bed due to indisposition in Apollo Hospital, Delhi.

We request you to bear with us till she is in a position to execute the necessary documents, in favour of you."

(emphasis supplied)

49. Mr. Sapra submits that a reply to the aforesaid letter was promptly sent by the plaintiff by a letter of 25th August stating that it was eager to complete the transaction as early as possible and make the balance payment which was lying ready with it; it also showed its eagerness to know about the recovery of the deceased defendant so that the necessary formalities could be completed. The letter dated 25th August, 2000 reads as under:

"To Smt. Kalawati Marthani C/o Sh. Ranjit Marthani 16, Poorvi Marg, Vasant Vihar, New Delhi.

Dear Madam/Sir,

We are in receipt of your letter dated 10/8/2000, with regard to sale of property No. 16, Poorvi Marg, Vasant Vihar, New Delhi, we are sorry to learn regarding the illness of your mother (Smt. Kalawati Marthani) and wish her an earliest recovery.

We also understand that the permission under 37(I) from appropriate authority has been received by you.

We would like to complete the transaction as early as possible and make the balance payment which is lying ready with us. Kindly inform us as soon as she recover, so that we can complete the formalities.

Thanking you,

For Sewa International Fashions (P) Ltd."

50. He further submitted that there were inter se disputes between the defendants, i.e., the children of the deceased defendant and hence, there was no substantial progress in the MHA proceedings; perhaps because of their inter se disputes, the defendants did not pursue the MHA proceedings diligently which ultimately become infructuous upon the demise of the deceased defendant. He further submitted that the application filed by the plaintiff was never abandoned but just that there was lack of progress in the MHA proceedings.

51. In view of the above, Mr. Sapra submitted that quite clearly, the plaintiff was not called upon to pay the balance sale consideration since the deceased defendant was not in a position to execute the sale deed. He further submitted that limitation begins to start from the date so specified in the agreement or from the date when a party refuses to perform its part of the contract; in terms of Article 54 of the Schedule to the Limitation Act, 1963, time was to start running from the date when the plaintiff would have notice of refusal apropos performance of the agreement; the plaintiff had filed an application in the MHA proceedings seeking appointment of a Manager due to the mental incapacity of the deceased defendant; in fact, the MHA proceedings to the same effect had been filed by defendant Nos. 1 to 3 in which they had stated that their mother was not in a position to take care of her interests and therefore, for executing a sale deed under the agreement, a guardian need to be appointed. Therefore, he

submitted that till the time the application was decided, there was no refusal either by the deceased defendant or any of her successors.

52. Section 3 of the Limitation Act places an obligation on Courts to examine whether the suit was filed within the period of limitation as stipulated under the Act. However, it is subject to the other provisions contained therein, i.e., Sections 4 to 24. If the averments in the plaint indicate that the suit was filed beyond the stipulated period of limitation, the suit must be held to be not maintainable or in other words, barred by limitation.

53. From a reading of the plaint, it is evident that the suit was not filed within three years from the three crucial dates as aforementioned, i.e. (i) 09.09.2000 or (ii) 4/10.10.2000 or (iii) 30.06.2000. Hence, the plea of the plaintiff that (i) it was pursuing the MHA proceedings; (ii) there was never any refusal from the deceased defendant or her heirs needs; and (iii) till such time the MHA proceedings were decided, limitation would not commence, cannot be considered and are otherwise not tenable.

54. Perusal of the legal notice dated 19.09.2000 (PW-1/I) reveals that the plaintiff was aggrieved since considerable time had elapsed and a sale deed had not been executed thus far. It was made clear that if the needful was not done within two weeks therefrom, the plaintiff would be constrained to seek specific performance of the agreement. The relevant part of the notice is reproduced as under:

"Since the considerable has elapsed and you have not yet taken steps to register the sale deed after obtaining the above said Income Tax Clearance Certificate, I call upon you to do the needful immediately but not later than 2 weeks from the receipt of this notice, failing which my clients shall be constrained to seek specific performance of the said agreement for sale in a court of law as also claim damages, entirely at your risk and cost."

55. It is not in dispute that the legal notice was not replied to by the deceased defendant. It is also not in dispute that the plaintiff took no steps to file a suit. Accordingly, in view of the dicta in *Laxmi Prasad, Kota Sivaram Prasad and Wasim Ahmad (supra)*, the Court is of the view that the action of the defendant in not replying to the legal notice would amount to refusal. Therefore, according to the second part of Article 54 of the Schedule to the Limitation Act, the limitation period commenced from 4/10.10.2000, i.e., after expiry of 14 days of the issuance/receipt of the said legal notice. In any event, the limitation period commenced from 30.06.2001 when the requirement of clearance in Form 34A was dispensed with. Although Clause 4 of the agreement would have then required the deceased defendant to obtain clearance in Form 34A, the change in law w.e.f. 01.06.2001 has since removed this requirement. Hence, the said clause had become void in view of Section 54 of the Indian Contract Act, 1872.

56. Insofar as the contention that the plaintiff was pursuing the MHA proceedings and hence, the limitation period would not commence till the same was finally

adjudicated is concerned, the argument on the face of it is entirely untenable. It is evident on a perusal of the orders passed in the said proceedings that from the years 2001 to 2005, there was no effective representation by the plaintiff. It also reveals that on at least 10 occasions, the counsel representing the plaintiff was not present and on 6 occasions, he/she did not press the interim application. It is not even the case of the plaintiff that it is entitled to exclusion of time under Section 14 of the Limitation Act, 1963 for having proceeded in a Court without jurisdiction.

57. In view the above discussion, the Court is of the view that the suit has not been filed within the period of limitation and is barred under Section 3 of the Limitation Act, 1963.

Issue No. (iv) Whether the plaintiff is entitled to specific performance of the Agreement to Sell dated 24.04.2000? OPP

58. In view of the findings arrived at under issue Nos. (i) and (iii), this issue is returned in favour of the defendants and against the plaintiff.

Issue No. (v) If Issue No. (iv) is answered against the plaintiff, whether the plaintiff is entitled to any alternative relief for damages? OPP

59. At the outset, it would be apposite to refer to judgment of the Supreme Court in Banarsi and Others Vs. Ram Phal, AIR 2003 SC 1989 : (2003) 5 JT 224 : (2003) 2 SCALE 183 : (2003) 9 SCC 606 : (2003) 2 SCR 22 : (2003) 1 UJ 615 : (2003) AIRSCW 1494 : (2003) 3 Supreme 31 , which to the extent relevant, reads as under:

"In a suit seeking specific performance of an agreement to sell governed by the provisions of the Specific Relief Act, 1963 the court has a discretion to decree specific performance of the agreement. The plaintiff may also claim compensation under Section 21 or any other relief to which he may be entitled including the refund of money or deposit paid or made by him in case his claim for specific performance is refused. No compensation or any other relief including the relief of refund shall be granted by the court unless it has been specifically claimed in the plaint by the plaintiff."

60. Perusal of the plaint reveals that the plaintiff has not sought any compensation/damages in terms of Section 21 of the Specific Relief Act, 1963. Consequently, no evidence qua the same has been led. It is not even the case of the plaintiff that the deceased defendant or the defendants have breached the agreement which has resulted in the plaintiff suffering any injury for which it is entitled to claim compensation/damages. In the circumstances, this issue is returned in favour of the defendants and against the plaintiff.

(vi) Relief

61. At the time of final arguments, Dr. Arun Mohan, the learned Senior Advocate submitted that with prejudice to the defendants' rights and contentions, and

with the intent of settling the matter, the plaintiff could be repaid the earnest money along with interest @ 12% per annum till date, totalling to Rs. 3.15 crores.

62. The Court would note that the plaintiff has not specifically sought refund of earnest money as provided under Section 22(2) of the Specific Relief Act, 1963. However, proviso to the said provision obligates the Court, at any stage of the proceeding, to allow the plaintiff to amend the plaint so as to include such relief. Perusal of the record shows that the plaintiff has not been allowed to amend the plaint and at this stage, when final arguments have been heard, it would not be in the fitness of things to allow the plaintiff to amend the plaint so as to include the relief of refund of earnest money.

63. In view of the fact that (i) the plaintiff has not been allowed to amend the plaintiff; (ii) the suit being barred by time; (iii) the plaintiff was not ready and willing to perform its part of the agreement; but (iv) an offer to refund the earnest money has been made by Dr. Arun Mohan; accordingly the interest of justice would persuade the Court to direct that the plaintiff be refunded the earnest money of Rs. 1.125 crores along with interest @ 12% per annum.

64. In conclusion, the Court holds:

"1. The suit is barred by limitation;

2. Even otherwise, the plaintiff has not shown that it was ready and willing to perform its part of the agreement;

3. The plaintiff is not entitled to the relief of specific performance of the agreement;

4. However, lest the plaintiff be rendered remediless, it would be in the interest of justice that the plaintiff shall be refunded the earnest money of Rs. 1.125 crores along with interest @ 12% per annum from the date it was paid till realisation of the same."

65. Let the decree sheet be drawn up accordingly.

¹See Section 54 of the Indian Contract Act, 1872.