* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **CS(OS) 292/2006**

ISHWAR DAYAL KANSAL & ANR. ..... Plaintiffs
Through: Plaintiff No.1 in person.

versus

RKBK FISCAL SERVICES PVT. LTD. .... Defendant
Through: Mr. C.U. Singh, Sr. Advocate with Mr. P.K. Seth and Ms. Pratibha Sinha, Advocates.

% Date of Decision : December 21, 2012

CORAM:
HON'BLE MS. JUSTICE REVA KHETRAPAL

J U D G M E N T

: REVA KHETRAPAL, J.

FACTS

1. The facts leading to the filing of the aforementioned suit for specific performance, declaration and mandatory injunction are that the Plaintiff No.1 – Mr. Ishwar Dayal Kansal entered into an Agreement to Sell dated 9th February, 2005 with the erstwhile Defendant Company – The Khas Joyrampur Colliery Co. P. Ltd. through its authorised representative – Mr. Ramajee Dwivedee, in respect of a Farm House situated at Village Bijwasan, New Delhi together with the easements and appurtenants attached thereto, fixtures, fittings and movable assets, for a total sale consideration of ₹

7,35,00,000/- (Rupees Seven Crore and Thirty Five Lacs Only) [hereinafter referred to as "Surabhi Farm House"]. The Plaintiff No.1 made part payment of ₹ 1,10,00,000/- (Rupees One Crore and Ten Lacs Only) to the Defendant Company vide cheque No.050556 dated 9th February, 2005 drawn on IDBI Bank, K.G. Marg, New Delhi at the time of the execution of the said Agreement to Sell and the balance of ₹ 6,25,00,000/- (Rupees Six Crore and Twenty Five Lacs Only) was payable by the Plaintiff No.1 at the time of the completion of sale formalities by the Defendant Company which was agreed to be done by 30th April, 2005 [Clause 1(b) of the Agreement to Sell]. By virtue of Clause 9 of the said Agreement, it was agreed that the Plaintiff No.1 has the option to get the sale formalities completed in favour of his nominee, and if the plaintiff No.1 so desired, the Defendant Company shall have no objection in executing the documents of transfer of the said Surabhi Farm House in favour of the said nominee. Since, at the relevant time, in Delhi, selling of any Farm House or Agricultural Land required a No Objection Certificate (NOC) from the Competent Authority without which no registration of Sale Deed could take place, it was agreed that the Defendant Company would apply and obtain No Objection Certificate (NOC) from the Competent Authority for the transfer of the said Surabhi Farm House and shall provide the said NOC/Permission/Sanction from the Competent Authority to the Plaintiff No.1, and thereafter on completion of sale formalities, the Plaintiff No.1 will make payment of the balance sale consideration of ₹ 6,25,00,000/- to the Defendant Company. Clause 4 of the Agreement to Sell is apposite, which stipulated that in case the

Defendant Company failed to provide NOC from the Competent Authority by or before 30th April, 2005, then both the parties will find a mutually acceptable way to complete the transaction and to transfer the suit property in favour of the Plaintiff No.1.

2. Plaintiff alleges that the Defendant Company applied for NOC on 24th March, 2005, which was not pursued by the Defendant Company with the Competent Authority. When Plaintiff No.1 did not receive any information regarding the NOC from the Defendant Company, the Plaintiff No.1 met Mr. Dwivedee on 18th April, 2005 and 26th April, 2005, and was informed that the NOC was still pending with the Tehsildar Office. It is pleaded that when NOC was not received by the Plaintiff No.1 from the Defendant Company, the Plaintiff No.1 wrote a letter dated 29th April, 2005 asking the Defendant Company to find a mutually acceptable way to transfer Surabhi Farm House to him in terms of Clause 4 of the Agreement. On 3rd May, 2005, Plaintiff No.1 again telephoned Mr. Dwivedee invoking Clause 4 of the Agreement, and on 4th May, 2005 Plaintiff No.1 sent a letter confirming the telephonic conversation of 3rd May, 2005 and requesting for a meeting to sort out the issue. In the meanwhile, on 2nd May, 2005 the NOC was issued to the Defendant Company, but Plaintiff No.1 on 5th May, 2005 received a letter dated 30th April, 2005, cancelling the Agreement on the pretext that the Board of the Defendant Company had not approved of the said Agreement and, therefore, they were sending a demand draft of ₹ 1,10,00,000/- drawn on UTI Bank in return of the part consideration paid by the Plaintiff No.1 on 9th February, 2005. The Plaintiff No.1

also received a copy of the caveat petition dated 3rd May, 2005 filed by the Defendant Company.

3. The Plaintiff No.1 did not accept the cancellation of the Agreement and replied to the Defendant Company vide his letter dated 19th May, 2005, stating that the Agreement was valid and in full force, and expressing his readiness and willingness to perform his obligation under the Agreement by paying the balance sale consideration of ₹ 6,25,00,000/- on the Defendant Company completing the sale formalities. The Plaintiff No.1 also wrote that he was not accepting the bank draft of ₹ 1,10,00,000/- sent by the Defendant Company, and asked the Defendant Company to take back the same and complete the sale formalities. The Defendant Company paid no heed to the aforesaid communication of the Plaintiff No.1 till the second week of June, 2005, when, the Plaintiff No.1 was informed by Mr. Dwivedee that the Board of Directors of the Defendant Company had reconsidered and approved the Agreement to Sell dated 9th February, 2005 and the General Meeting of Shareholders of the Defendant Company had also accorded its approval on 8th June, 2005, and the Defendant Company was again applying for NOC, as the earlier NOC had expired on 1st June, 2005. The application for NOC was filed by the Defendant Company on 13th June, 2005, but in the meanwhile by a Circular dated 1st June, 2005 issued by the Government of NCT, Delhi, issuance of NOC in respect of sale of agricultural land of less than 8 acres was banned. The Plaintiff No.1 contends that although the Defendant Company was aware of the aforesaid ban issued by the order of the Divisional Commissioner, Government of NCT, Delhi, it

malafidely filed an application for NOC within 12 days of the expiry of the first NOC.

4. On 8th July, 2005, the Plaintiff No.1 received a communication from Mr. Dwivedee enclosing photocopies of the Special Power of Attorney dated 17th June, 2005 in favour of Mr. Dwivedee, the resolution passed by the shareholders of the Defendant Company on 8th June, 2005 and by its Board dated 25th January, 2005 and 5th July, 2005. The Defendant Company requested the Plaintiff No.1 by the said letter to return the bank draft of ₹ 1,10,00,000/- sent by them with their letter dated 30th April, 2005 and stated that sale formalities should be completed within 15 days of receipt of NOC from the Competent Authority and providing the same to the Plaintiff No.1 by the Defendant Company. Pursuant to the said communication, the Plaintiff No.1 on 9th July, 2005 returned the bank draft of ₹ 1,10,00,000/- to the Defendant Company and also delivered to the Defendant Company, the draft of Proposed Sale Deed duly initialed by the Plaintiff No.1. The Plaintiff No.1 alleges that thereafter he remained in constant touch with Mr. Dwivedee and every time he was assured that the application for NOC was still pending and they will think of some other mutually acceptable way to transfer Surabhi Farm House to the Plaintiff No.1 only if the application for NOC is rejected.

5. On 14th September, 2005, the High Court of Delhi in WP(C) 13035 of 2005 in the case of ***M/s. Breme Developers (P)Ltd. vs. Govt. of NCT Delhi,*** declared the Circular dated 1st June, 2005 issued by the Divisional Commissioner, Government of NCT, Delhi, illegal if a person sells his complete holding. In the last week of November,

2005, Mr. Dwivedee informed the Plaintiff No.1 that the Defendant Company wanted to file a writ petition in the Delhi High Court against Delhi Government as NOC was not being issued by the Competent Authority, and requested the Plaintiff No.1 to become a co-petitioner. On 2nd December, 2005, Mr. Dwivedee brought typed and duly signed copies of the writ petition to the Plaintiff No.1 for his signatures, which, according to the Plaintiff No.1, he signed in good faith after seeing the prayer clause on the last page and giving his vakalatnama as co-petitioner. The Plaintiff No.1 states that he did not even visit the Oath Commissioner for getting his affidavit attested as the writ petition was drafted and filed solely by the Defendant.

6. On the same day, i.e., on 2nd December, 2005, the Plaintiff No.1 also informed Mr. Dwivedee that the Plaintiff No.1 was in the process of forming a Private Limited Company under the name and style of Surabhi Vatika Private Limited, which was likely to be incorporated within the next 3-4 weeks and he wanted the Sale Deed of Surabhi Farm House to be executed in favour of the said Company. He informed Mr. Dwivedee that the Special Power of Attorney dated 17th June, 2005 in the latter's favour contained no reference to the execution of the Sale Deed by the Defendant Company in favour of nominee of Plaintiff No.1 in terms of Clause 9 of the Agreement, and in the absence of such reference, execution of the Sale Deed in favour of the nominee may not be possible. Thus, reference of Clause 9 of the Agreement was required to be made by making amendment in the Power of Attorney and Board Resolution would also be required in this regard. Further, the common Seal of the Company in terms of

Section 48 of the Companies Act should also have been affixed on the Power of Attorney in the presence of two Directors or as the Articles of the Defendant Company prescribed.

7. On 23rd December, 2005, Mr. Dwivedee again met Plaintiff No.1 and informed him that the High Court of Delhi had disposed of the writ petition filed by the parties on 20th December, 2005 as Government of NCT, Delhi had agreed to issue the NOC. Mr. Dwivedee, therefore, required the Plaintiff No.1 to sign a fresh application for the NOC, brought by him in triplicate, which was duly filled and signed by the Plaintiff No.1 and handed over to Mr. Dwivedee, mentioning the name 'Surabhi Vatika Private Limited', as the nominee of the Plaintiff No.1. On 25th December, 2005, the Plaintiff No.1 tried to contact Mr. Dwivedee but learnt that he was hospitalized and was in the ICU of Apollo Hospital due to some serious illness. Thereafter, the Plaintiff No.1 regularly tried to contact Mr. Dwivedee till 2nd January, 2006 when the Plaintiff No.1 met Mr. B.K. Sinha, the Advocate of the Defendant Company and came to know that the Defendant Company was sending another Power of Attorney shortly, appointing some other person in place of Mr. Dwivedee for executing the Sale Deed.

8. On 3rd January, 2006, the Plaintiff No.1 wrote a letter to the Defendant Company at their Kolkata office narrating all the aforesaid facts, including the fact that the Plaintiff No.1 had got incorporated a Company in the name and style of Surabhi Vatika Private Limited as its nominee in terms of Clause 9 of the Agreement to Sell. The Plaintiff No.1 also mentioned that the registered Power of Attorney

should contain a specific para regarding Plaintiff No.1's nomination, and that he should be informed about the name of the person authorized to sign the Sale Deed on behalf of the Defendant Company along with the details of registered Power of Attorney in his favour, as the said details were required to be mentioned in the proposed Sale Deed to be submitted by him for stamping to the SDM/Collector of Stamps. The Plaintiff No.1 also requested the Defendant Company to provide him the NOC with copy of the High Court order, Power of Attorney and Board resolution, Copy of Articles, proof of payment of house-tax and electricity bill, etc. Letter dated 3rd January, 2006 was dispatched by the Plaintiff No.1 on the same day by Registered Post with Acknowledgment Due Card to the Defendant Company, and admittedly was received by the Defendant Company. Since no reply to the said letter was received by the Plaintiff No.1 and the Plaintiff No.1 learnt on 6th January, 2006 by visiting the office of the Tehsildar of the concerned area that NOC had already been issued to the Defendant Company which was valid upto 22nd January, 2006 and Mr. Dwivedee continued to be hospitalized, the Plaintiff No.1 again sent a letter dated 7th January, 2006 to the Defendant Company at their Kolkata office with a copy at the address of Mr. Dwivedee, stating that he had not been informed about the appointment of any other Attorney, nor any letter had been received by him suggesting any other way to complete the sale formalities. He requested the Defendant Company in the said letter to either send the name of any other Attorney along with the registration details of Power of Attorney or to send the name of two Directors who would sign the Sale Deed

under the Common Seal of the Defendant Company to enable him to fill the said details in the Proposed Sale Deed to be submitted to the Collector of Stamps for stamping. The Plaintiff No.1 called upon the Defendant Company to furnish the aforesaid information latest by 12th January as about 10 days' time was required by the Authorities for stamping the Sale Deed. A similar communication was addressed by the Plaintiff No.1 to the Defendant Company again on 12th January, 2006.

9. On 13th January, 2006, the Plaintiff No.1 was shocked to receive a photocopy of a Notice of Cancellation dated 7th January, 2006, purportedly signed by one Mr. Puneet Saran claiming himself as Attorney of the Defendant Company. However, no copy of any Power of Attorney or any Authority Letter was enclosed. By the said notice, Mr. Puneet Saran threatened the Plaintiff No.1 that in the absence of furnishing the bank draft of ₹ 6,25,00,000/- by 9th January, 2006, the Agreement to Sell dated 9th February, 2005 shall be treated as cancelled and null and void. Several other allegedly false, fabricated and baseless allegations were made in the said notice of cancellation, which shall be adverted to at the relevant stage. Suffice it to state that on the same day, that is, 13th January, 2006 the Plaintiff No.1 again wrote to the Defendant Company, informing that he had received photocopy of a letter dated 07.01.2006 mentioning the name of Defendant Company and signed by one Mr. Puneet Saran claiming himself as their Attorney, that no such person named Mr. Puneet Saran had ever met him nor he had received any instructions in this regard from the Defendant Company, and that the *locus standi* of the said Mr.

Puneet Saran in the matter be clarified by the Defendant Company. Plaintiff No.1 further stated that on the Defendant Company furnishing the details of the authorized person who will sign the Sale Deed, he will immediately start the process of stamping which will take about 10 days and he or his nominee – M/s. Surabhi Vatika Private Limited (the plaintiff No.2) will make the payment of ₹ 6,25,00,000/- at the time of the execution of the Sale Deed.

10. On 14th January, 2006, however, the Plaintiff No.1 was again shocked to receive another letter dated 12th January, 2006 (photocopy) signed by the said Mr. Puneet Saran in reply to his letter dated 7th January, 2006, stating that the Agreement to Sell stood cancelled, and a bank draft of ₹ 55,00,000/- dated 12th January, 2006 was being sent along with the letter, whereas no such draft was in fact enclosed. It is alleged that the aforesaid letter was again full of false allegations against the Plaintiff No.1. In these circumstances, the Plaintiff No.1 through his counsel issued a legal notice dated 18.01.2006 to the Defendant Company, whereby the Defendant Company was called upon to fulfill its part of the obligations in pursuance of the Agreement to Sell dated 09.02.2005. The said notice was duly received by the Defendant Company and replied by them through their counsel vide letter dated 31.01.2006. This led to the filing of the present suit in which it is pleaded that though the Plaintiff No.1 was always ready and willing to perform his part of the obligations as enumerated in the Agreement to Sell, the Defendant Company was in breach of the Agreement to Sell and the plaintiffs are, therefore, entitled to a decree for specific performance of the Agreement, a decree of declaration

declaring the Notice of Cancellation dated 7th January, 2006 as invalid and a decree of permanent injunction restraining the Defendant Company from creating any third party interest in the suit property.

DEFENCE

11. In the written statement filed, the Defendant Company admitted the execution of the Agreement to Sell dated 09.02.2005 and that it had received the sum of ₹ 1,10,00,000/- from the Plaintiff No.1 as part of the sale consideration, leaving a balance of ₹ 6,25,00,000/- to be paid at the time of completion of the sale formalities. It was pleaded that the Agreement to Sell dated 09.02.2005 stood terminated for the reason that the Plaintiff No.1 was in breach of the Agreement by not making the payment of balance sale consideration within 15 days of the receipt of the No Objection Certificate by the Plaintiff No.1 on 24th December, 2005 (subsequently corrected by this Court at the instance of the Defendant Company to read as 23rd December, 2005) and the communication of the factum of appointment of Mr. Puneet Saran as new Power of Attorney of the Defendant Company to the Plaintiff No.1 on 26th December, 2005, vide Power of Attorney dated 26.12.2005 registered on 27.12.2005. It was pleaded that the Defendant Company had sent Notice of Cancellation of Agreement to Sell and the said notice dated 07.01.2006 had mentioned that in case the Plaintiff No.1 is not able to furnish bank draft of ₹ 6,25,00,000/- by 09.01.2006, the Agreement to Sell dated 09.02.2005 shall be treated as cancelled, and null and void automatically, without any further notice. In spite of that, the Plaintiff No.1 neither came forward to get the Sale Deed executed on 09.01.2006 or to make payment of

the balance sale consideration. The Plaintiff No.1 was, therefore, again informed on 12.01.2006 about the cancellation of the Agreement to Sell with effect from 10.01.2006 vide the said notice of cancellation. Along with the said letter dated 12.01.2006, the Plaintiff No.1 was also returned 50% of the advance money, i.e., ₹ 55,00,000/- vide a demand draft. The Defendant Company had thus discharged their obligations under the Agreement to Sell which had been breached by the Plaintiff No.1, leading to the cancellation of the same. The plaintiffs were, therefore, not entitled to any relief as prayed for by them.

12. In the replication filed by the Plaintiff No.1, the Plaintiff No.1 reiterated the contents of the plaint and denied the contents of the written statement.

13. On the basis of the pleadings of the parties, the following issues were settled by this Court on 30th March, 2007:-

> *"1. Whether any cause of action arises in favour of the plaintiff to file the present suit for specific performance?*
> *2. Whether there is any termination of the agreement to sell by the alleged Notice of Cancellation dated 7.1.2006?*
> *3. Whether cancellation of agreement dated 9.2.2005 by the defendant for violation of the terms of the contract is valid?*
> *4. Whether cancellation of power of attorney dated 17.6.2005 of Mr.Ramajee Dwivedi was communicated to the plaintiff? If not, its effect?*
> *5. Whether particulars of new power of attorney dated 26.12.2005 along with a copy of new power of attorney was delivered/sent to the plaintiff?*

6. *Whether the defendant has delivered the No Objection Certificate to the plaintiff on 24.12.2005?*
7. *Whether the Board of the Defendant Company approved the draft of sale deed submitted by the plaintiff on 9.7.2005 and communicated the same to the plaintiff? If so, its effect?*
8. *Whether the defendant has performed its reciprocal obligation under the agreement to sell dated 9.2.2005?*
9. *Whether the plaintiff was always ready and willing to perform his part of the obligation under the agreement to sale dated 9.2.2005?*
10. *Whether time was the essence of the agreement to sell?*
11. *Whether in the absence of registration of the agreement to sell the same is hit by Sections 53(a) and 54 of the Transfer of Property Act read with Section 17 of the Registration Act and the suit is liable to be dismissed as not maintainable?*
12. *Whether the suit is properly valued?*
13. *Whether the plaintiff is entitled to decree of specific performance?*
14. *Relief."*

14. In support of his case, the Plaintiff No.1 examined himself as PW1, PW2 – Shri Uday Singh from the Karol Bagh Post Office, PW3 – Shri Madan Mohan Singh, Joint Managing Director, Consortium Securities Pvt. Ltd., PW4 – Shri Rajiv Maheswari, Accountant, M/s. Multi Media & Entertainment Ltd. and PW5 – Shri B.L. Aggarwal, Chartered Accountant.

15. In his testimony, the Plaintiff No.1 deposed in tandem with the averments made in the plaint and proved on record documents Exhibits P-1 to P-18 and Exhibits PW1/1 to PW1/21.

16. The Defendant Company examined Mr. Puneet Saran as DW1 and Mr. S.M. Barmecha as DW2, both representatives of the Defendant Company, DW3 – Mr. Naveen Chaturvedi, an employee of the Defendant Company, DW4 – Shri Barun Kumar Sinha, Advocate and DW5 – Mr. Sushil Kumar, also an employee of the Defendant Company. The Defendant Company also proved on record documents Exhibits D1 to D15.

17. In order to avoid prolixity, it is proposed to deal with the evidence adduced by the parties and their respective contentions and submissions while dealing with the related issue(s), upon which exercise I now embark. It is proposed to deal first with Issue No.1 and thereafter with Issue Nos.6, 4 and 5, 7, 8, 9, 10, 2 and 3, 11, 12, 13 and 14, in the said order.

18. ISSUE NO.1

> *"1. Whether any cause of action arises in favour of the plaintiff to file the present suit for specific performance?*

19. On the aforesaid issue, it was contended by the learned senior counsel for the Defendant Company that there is no cause of action against the Defendant Company to file the present suit for Specific Performance of the Agreement dated 09.02.2005 and Supplementary Agreement dated 08.07.2005 for the following reasons:-

(i) There is no privity of contract between the Plaintiff No.2 and the Defendant Company as the Plaintiff No.2 came into

existence on 29.12.2005. Therefore, as on 09.02.2005 when the Agreement to Sell was executed and on 08.07.2005 when the Supplementary Agreement was executed, it was not in existence. Prayer No.(a) in the plaint which is on behalf of the Plaintiff No.2 only, therefore, cannot be entertained.

(ii) There is no Board resolution by the Plaintiff No.2 in favour of Plaintiff No.1 to file suit against the Defendant and, therefore, the suit instituted by the Plaintiff No.1 on behalf of the Plaintiff No.2 is not maintainable, and is liable to be dismissed. Reliance is placed in this regard on the judgment of the Hon'ble Supreme Court in ***State Bank of Travancore vs. Kingston Computers India Private Limited, (2011) 11 SCC 524,*** wherein it is held that the letter of authority issued by the Chief Executive Officer of the Company in favour of a Director of the Company was nothing but a scrap of paper without a resolution passed by the Board of Directors delegating its powers to the Chief Executive Officer to authorize another person to file a suit on behalf of the Company, and as such the trial court had rightly dismissed the suit.

(iii) The assignment of the Agreement to Sell dated 09.02.2005 by Plaintiff No.1, in favour of Plaintiff No.2, transferring/assigning his rights to the Plaintiff No.2 Company attracts the provisions of Section 17(b) of the Registration Act and, consequently, the bar of Section 49 of the said Act, in view of the fact that the Agreement to Sell dated 09.02.2005 in the present case is not a

registered document. [See ***Dina Ji vs. Daddi, AIR 1990 SC 1153***]

(iv) The Agreement to Sell dated 09.02.2005 was cancelled vide Notice of Cancellation dated 07.01.2006 and admittedly the Plaintiff No.1 received the said Notice of Cancellation on 13.01.2006. In view of Section 14(1)(c) of the Specific Relief Act, if the contract is determinable in nature, a suit for specific performance cannot be maintained. The Agreement/Contract in the present case was determinable in nature, as is evident from a reading of Clause 10 of the Agreement to Sell dated 09.02.2005 and Clause 4 of Supplementary Agreement dated 08.07.2005.

20. Before dealing with the aforesaid contentions, it is deemed expedient to reproduce the aforesaid Clauses of the Agreement to Sell and the Supplementary Agreement, which read as follows:

Clause 10 of the Agreement to Sell dated 09.02.2005

"That in case the Second Party fails to fulfill his obligations under this agreement by making payment of the balance sale consideration amount within stipulated time in this agreement and to get the sale formalities completed as stated in this agreement, the First Party shall be entitled to forfeit 50% of the advance amount paid by the Second Party to the First Party at the time of this agreement and shall refund the balance 50% amount to the Second Party without any interest thereon."

Clause 4 of Supplementary Agreement dated 08.07.2005

"In case you fail to fulfill the commitment on your part within the stipulated time as stated in para 1

hereinabove, the said Agreement to Sell dated 9.2.2005 to sell the said "Surabhi Farmhouse" to you will automatically stands cancelled and as per the terms under Clause 10 of the said Agreement dated 9.2.2005 the seller company M/s. KJCL will return you only the 50% of advance amount paid by you at the time of agreement by forfeiting the balance 50% of the amount i.e. Rs.55,00,000.00 (Rupees fifty five lacs only)."

21. As regards the contention of the defendant's counsel that there is no privity of contract between the Plaintiff No.2 and the Defendant Company, it is contended by the Plaintiff that there is no pleading by the Defendant that the suit is bad for misjoinder of parties nor any issue has been framed in this regard. Without any pleadings, the defendant has no right to raise this issue at the time of final arguments. I find from a perusal of para 2 of the plaint and the corresponding para of the written statement that it is indeed so. In para 2 of the plaint, it is asserted that the plaintiff No.2 is a Company promoted by plaintiff No.1. In reply to the aforesaid paragraph, the defendant has raised no objection about the authority of the plaintiff No.1 and merely stated that it is a matter of record and needs no comments. Conceivably, had the defendant raised any objection in his written statement or at the time of framing of issues, the plaintiffs would have filed the documentary evidence including Board Resolutions to meet the defendant's objections and also led evidence to rebut the same.

22. The reliance placed by the defendant's counsel on the case of ***State Bank of Travancore (Supra)*** to urge that in the absence of a Board Resolution passed by the plaintiff No.2 in favour of the plaintiff No.1, the suit must fail, is also wholly misconceived for the reason

that in the said case the defendant had raised a preliminary objection in their written statement about the authority of one Mr. A.K. Shukla, who had filed the suit and a specific issue in this regard had also been framed whereas, in the present case, the defendant has not raised any such objection except at the time of final arguments nor any issue has been framed.

23. Reference in the aforesaid context may be made to the judgment of the Hon'ble Supreme Court in ***Kalyan Singh Chouhan Vs. C.P. Joshi (2011) 11 SCC 786*** wherein referring to its earlier decisions on the aspect that the object and purpose of pleading is to enable the adversary party to know the case it has to meet, the Supreme Court held that *"The Court cannot travel beyond the pleadings, and the issue cannot be framed unless there are pleadings to raise the controversy on a particular fact or law. It is, therefore, not permissible for the Court to allow the party to lead evidence which is not in the line of the pleadings. Even if the evidence is led that is just to be ignored as the same cannot be taken into consideration*."

24. Reference may also be made on the aforesaid aspect to the decision in ***Prem Lala Nahata Vs. Chandi Prasad Sikaria*** reported in ***AIR 2007 SC 1247,*** wherein the Hon'ble Supreme Court laid down that it cannot be said that a suit barred for misjoinder of parties or of causes of action is barred by law. It is open to the Court to proceed with the suit notwithstanding the defect of misjoinder of parties or misjoinder of causes of action and if such a suit results in a decision, the same cannot be set aside in appeal.

25. Apart from the aforesaid law laid down by the Supreme Court, I am of the view that in the present case even if the name of the plaintiff No.2 is deleted from the array of parties, it would still be open to the plaintiff No.1 to seek specific performance of the contract being the first part of prayer (a) and, thus, the contention of the defendant that the suit must fail on account of the fact that there is no privity of contract between the plaintiff No.2 and the Defendant Company is wholly untenable. Had the defendant asserted in its written statement that the plaintiff No.1 had no authority on behalf of plaintiff No.2, as already stated above, the plaintiff No.1 would have filed the Board Resolution or other documentary evidence to meet the aforesaid objection.

26. Even otherwise, as things stand, the plaintiff No.2 is not a plaintiff in the real sense and clearly appears to have been impleaded in order to avoid any technical objection being raised by the defendant as to non-joinder. Further, as clarified in the pleadings and the evidence of the plaintiffs, the plaintiff No.2 is merely the nominee of plaintiff No.1 in terms of Clause 9 of the Agreement to Sell and not an assignee as is sought to be made out by the defendant in the course of arguments, again without any pleading to this effect. There is, therefore, no question of the provisions of Section 17 (b) and Section 49 of the Registration Act being attracted.

27. As regards the contention of the learned counsel for the defendant that a Suit for Specific Performance is not maintainable in view of the provisions of Section 14(1)(c) of the Specific Relief Act, and at the most in terms of Clause 4 of the Supplementary Agreement

dated 08.07.2005, the plaintiff will be entitled to the return of only 50% of the advance amount paid by the plaintiff at the time of the agreement, that is, Rs. 55 lakhs, it cannot be lost sight of that Clause 4 upon which reliance is placed by the defendant's counsel to urge that the contract is determinable in nature begins with the words "***In case you (plaintiff) fail to fulfill the commitment on your part within the stipulated time……***". The case of the plaintiffs being that the defendant has not performed its part of the obligations despite letters dated 03.01.2006, 07.01.2006 and 12.01.2006 sent by the plaintiff, and instead sent a Notice of Cancellation dated 07.01.2006, dispatched by the defendant on 09.01.2006 refusing to honour its commitment under the Agreement, it cannot be said without delving into the evidence adduced by the parties that no cause of action has accrued in favour of the plaintiff.

28. Issue No.1 is accordingly answered in the affirmative in favour of the plaintiff.

29. ISSUE NO.6

> *"6. Whether the defendant has delivered the No Objection Certificate to the plaintiff on 24.12.2005?"*

30. The submission of the defendant's counsel is that the plaintiff, who was a party to the writ petition filed by the plaintiff and the Defendant Company before the Delhi High Court on 03.12.2005 and was aware of the fact that vide order dated 20th December, 2005, the

said writ petition was allowed with a direction to the Tehsildar, Vasant Vihar to issue the "No Objection Certificate" to the representative of the Defendant Company and was also a signatory to the fresh application for issuance of "No Objection Certificate" made on 23.12.2005, could not subsequently turn around and say that he was not aware of the issuance of the "No Objection Certificate".

31. In the aforesaid context, my attention has been invited by the learned counsel for the defendant to the evidence of DW-1, Puneet Saran, who in his affidavit by way of evidence (Exhibit DW1/A), stated that the plaintiff had come to the office of the defendant at B-32, Greater Kailash Part-I, New Delhi on 23rd December, 2005 in the morning and put his signatures on the fresh application for "No Objection Certificate" (Exhibit D-4). It is, in his (DW1's) presence, that Shri Ramajee Dwivedee also informed the plaintiff that by the evening "No Objection Certificate" will be delivered as per directions of Hon'ble High Court. DW-1 further deposed that "No Objection Certificate" was in fact obtained on 23.12.2005 by the Defendant (Exhibit D-5) and that on 24.12.05, the plaintiff was sent a copy of the "No Objection Certificate" along with a letter dated 23.12.2005 for getting the sale deed executed within a period of 15 days from the date of the "No Objection Certificate", which letter with the NOC was sent by hand through a messenger, namely, Sh. Sushil Kumar at the residence of the plaintiff at East of Kailash, where his wife refused to accept the same on the telephonic instructions of the plaintiff. Thereafter, Shri Sushil Kumar, went to the office of the plaintiff No.1 at 7135, (sic.7/35) Ansari Road, Darya Ganj, Delhi where his office

staff also refused to accept the copy of the "No Objection Certificate" and letter dated 23.12.2005. Since 25.12.2005 was Sunday, therefore, the "No Objection Certificate" and letter were sent to the plaintiff by First Flight Couriers/Speed Post on 26.12.2005. Courier receipt in respect of the same is marked as Exhibit D-6.

32. The plaintiff has categorically denied the aforesaid communication or any other communication from the Defendant apprising him of the fact that "No Objection Certificate" had been issued till 13.01.2006, when the plaintiff received the Notice of Cancellation of Agreement. According to the plaintiff, the malafide intentions of the Defendant Company are clearly reflected from the following amongst other facts and circumstances:-

(i) Defendant vide its letter dated 30.04.05 (Exhibit P-12) in the first instance tried to cancel the Agreement to Sell on the pretext that the General Meeting of the Shareholders/Board of Directors did not want to sell the farmhouse. The said letter was received by the plaintiff No.1 on 05.05.05.

(ii) Before the above letter was received by the plaintiff, the defendant filed a Caveat Petition in the Delhi High Court on 03.05.05 (Exhibit DW4/P1).

(iii) On 2nd May, 2005, the first "No Objection Certificate" was issued by the Competent Authority to the Defendant, but the defendant did not communicate/deliver the same to the plaintiff and concealed this vital information from the plaintiff, allowing the "No Objection Certification" to expire on 01.06.05.

(iv) After expiry of the first "No Objection Certificate", and when the defendant learnt that the Delhi Government had issued a Notification in the first week of June, 2005 banning the sale of agricultural land of less than 8 acres, the defendant cleverly met the plaintiff on 07.06.05 asking the plaintiff for his signature on the **second application** for "No Objection Certificate" only to show to the plaintiff that they were ready and willing to sell the farmhouse. Defendant knew fully well about the ban and that the Government would reject the "No Objection Certificate". Predictably, the said "No Objection Certificate" was not granted in view of the ban.

(v) Thereafter, though the plaintiff, on the request of the defendant, had agreed to become co-petitioner with the Defendant in Civil Writ Petition Nos.23019-20/2005, wherein prayer for issuance of a "No Objection Certificate" had been made, he had merely signed the Vakalatnama in favour of the Advocate of the defendant in good faith and this fact has been clearly pleaded in the plaint and no evidence to the contrary has been adduced by the defendant.

(vi) Yet, the defendant states that the plaintiff was aware of the order dated 20th December, 2005 passed in Writ Petition (Civil) Nos. 23019-20/2005 but has nowhere stated so either in its pleadings or in any documentary evidence and as a matter of fact, DW-4, Mr. B.K. Sinha, Advocate through whom the writ petition had been filed has also not stated that the plaintiff No.1

was informed about the said order, i.e., order dated 20th December, 2005.

(vii) Plaintiff No.1 had specifically asked Mr. Ramajee Dwivedee on 23.12.05 at the time of signing of the third application for "No Objection Certificate" for a copy of the order of the Delhi High Court and had been assured by him that the copy would be sent to him. This assurance of Mr. Dwivedee was mentioned by the plaintiff in his letter dated 03.01.06 to the defendant (Exhibit PW-1/4) to which the defendant sent their reply dated 07.01.06 **stating that copy of the order can be collected by the plaintiff from the office of the Advocate.**

(viii) Though, in terms of Clause 3 of the Agreement to Sell, the defendant is required to inform in writing and also to provide copy of the "No Objection Certificate" to the plaintiff, this was not done by the defendant, when the defendant eventually obtained the "No Objection Certificate" on its third application made for the aforesaid purpose.

(ix) The defendant in para 1 of the written statement in the first instance stated that it had sent the "No Objection Certificate" with letter dated 24.12.05 but when the plaintiff asked the defendant to produce the said letter and postal receipt, they changed their stand to say that no such letter existed. The defendant then filed an amendment application, being IA No.12501 of 2006 for changing the date of the letter from 24th to 23rd December, 2005.

(x) Defendant's contention that plaintiff was informed vide letter dated 23.12.05 is also patently false as no such letter or its carbon copy has been filed by the defendant till date in the present suit nor any notice under Order XII Rule 8 was given to the plaintiff by the defendant for production of the said letter. On the other hand, the plaintiff in his application being IA No.10248/2006 asked for production of the receipt of the Speed Post and despite the order of this Court directing the defendant to produce the same, the same has not been produced till date.

(xi) DW3, Mr. Naveen Chaturvedi stated in his cross-examination that he had gone to the office of the Tehsildar at about 3.30 p.m. on 23rd December, 2005 and received the "No Objection Certificate" at about 6.00 p.m. On a specific query put to the witness as to whether he had met Mr. Ramajee Dwivedee on 23.12.05, DW-3 replied that he had met Mr. Ramajee Dwivedee on 24.12.05. Thus, clearly no letter could have been written on 23.12.05.

(xii) DW-5, Mr. Sushil Kumar in his cross-examination stated that on Monday, the 26th December, 2005, Shri Ramajee Dwivedee had again handed over the envelope to him for sending the same through Speed Post and courier and that he had on 26.12.2005 met him at his office at about 10.00 a.m. whereas admittedly Ramajee Dwivedee was in the ICU of Apollo Hospital since 25.12.05.

(xiii) Plaintiff has specifically denied his signatures on the courier receipt dated 26.12.05 (Exhibit D-6) in his pleadings as well as

in his evidence. Despite this, no witness was summoned from the concerned courier company/First Flight Couriers to prove the same.

33. Apart from the aforesaid conspectus of facts, there is also no denial by the Defendant of the fact that on 3rd January, 2006, the Plaintiff had in clear and categorical terms asked the Defendant Company for a copy of the "No Objection Certificate" but the same was not furnished to him. Be it noted that DW-1, Puneet Saran in his cross-examination stated that "*the letter dated 23.12.05 alongwith NOC was sent to the plaintiff by hand on the evening of 23.12.05 as well as on the morning of 24.12.05. The said letter was sent by courier and speed post on 26.12.05 and not before that date."* In his subsequent cross-examination, DW-1 stated that "*The letter dated 23.12.2005 alongwith NOC was sent through Mr. Sushil Kumar on 23.12.2005 itself",* whereas Mr. Sushil Kumar, who appeared in the witness box as DW-5 in his cross-examination stated "*Sh. Ramjee Dwivedee handed over to me letter dated 23.12.2005 on 24.12.2005 at about 10-11 AM. The said letter was in a closed envelope. I did not read the contents of the said letters. I did not open the envelope. It is correct that I have never seen the letter, which was in a closed envelop. It is correct that I do not know as to what was written in the said letter."*

34. Then again, DW-1, Puneet Saran, in his cross-examination stated *"I gave the instructions to get the courier and speed post done on 26.12.2005. I was in Delhi on that day".* But earlier in his cross-examination, he had stated that the Power of Attorney was executed in

his presence at Kolkata, which is dated 26.12.05 and was presented for registration on 27.12.05, thereby falsifying his stand that he was in Delhi on 26.12.05. As regards the courier receipt dated 26.12.05, apart from the plaintiff's assertion that the said receipt is a forged document, a bare glance at the said receipt shows that neither the sender's name is of the defendant but of RKBK nor the address of the plaintiff is given on the said courier receipt. Further, it is apparent from a cursory glance that the signatures of the plaintiff "Ishwar" on the said receipt do not tally with any of the signatures on any of the documents on record, including the Agreement to Sell and the plaint. No witness from the Courier Company having been examined nor any handwriting expert summoned, the courier receipt is of no avail to the Defendant. Thus, the averment of the defendant regarding sending of "No Objection Certificate" to the plaintiff is not established from the record.

35. Issue No.6 is accordingly decided against the defendant.

36. ISSUE NOS. 4 and 5

> *"4. Whether cancellation of power of attorney dated 17.6.2005 of Mr.Ramajee Dwivedi was communicated to the plaintiff? If not, its effect?*
>
> *5. Whether particulars of new power of attorney dated 26.12.2005 along with a copy of new power of attorney was delivered/sent to the plaintiff?"*

37. Plaintiff has categorically asserted that the defendant never informed the plaintiff about the cancellation of Power of Attorney of

Mr.Ramajee Dwivedee dated 17th June, 2005 and execution of new Power of Attorney in favour of Mr. Puneet Saran. There is no specific denial of this in the written statement, though there is a vague denial. It is, however, admitted by the defendant that Mr. Ramajee Dwivedee was seriously ill and was in hospital on 25.12.2005 and even thereafter till his death. Thus, during the cross-examination of DW-1, Puneet Saran, the said witness, with reference to Mr. Ramajee Dwivedee stated "*I am sure that he was admitted in hospital on 25.12.2005. I do not know as to when he got discharged from hospital. It is correct that he was not discharged till 31.12.2005."* DW-3, Shri Naveen Chaturvedi, an employee of the Defendant Company, in his cross-examination stated that *"He (Mr. Ramajee Dwivedee) had (been) suffering from Mouth Cancer for about 5-6 months prior to December, 2005 and his condition was critical."* DW-5, Mr. Sushil Kumar, also an employee of the Defendant Company stated *"It is correct that Mr. Ramjee Dwivedee was admitted in the hospital but I do not remember whether it was 24.12.2005 or not. It is correct that Mr. Ramjee Dwivedee expired in hospital and he did not come back after his admission in the hospital."*

38. There is not only no positive assertion by the Defendant Company in its written statement that it had communicated to the plaintiff No.1 about the cancellation of the Power of Attorney dated 17.06.05 favouring Mr. Ramajee Dwivedee, but no evidence has been adduced in respect thereof, and as a matter of fact in his cross-examination DW-1 Puneet Saran, when asked if the defendant had ever informed the plaintiff regarding cancellation of Power of

Attorney dated 17.06.05 favouring Mr. Ramajee Dwivedee, replied that **he was not aware of the same**, though volunteered to state that he had got the new POA in his favour on 26.12.2005 and on the very same day through the defendant's counsel, the plaintiff was informed about this new POA.

39. On the other hand, the case of the plaintiff is that there was no communication of any kind by any mode received from the Defendant Company by him after 26.12.05, except the alleged notice of cancellation dated 7th January, 2006 signed by Mr. Puneet Saran claiming to be the Attorney of the Defendant Company, which, according to the plaintiff was sent by courier and received by him on 13th January, 2006. In para 38 of the plaint, the plaintiff has asserted that by his letter dated 03.01.06 (Exhibit PW1/4) he had requested the defendant to provide some documents including NOC, order of the High Court, Power of Attorney and Board Resolution, which request was reiterated in his letter dated 07.01.06 (Exhibit PW1/8) wherein he requested the defendant *"either to send the name of another attorney alongwith registration details of Power of Attorney or send the name of two Directors, who may sign the sale-deed to enable the plaintiff No.1 to fill the details in the proposed sale-deed……."*. In his letters dated 12.01.06 (Exhibit PW1/10) and 13.01.06 (Exhibit PW1/13), the plaintiff again requested the defendant to send the details of Power of Attorney and to complete the formalities. It is submitted by the plaintiff that despite all these letters sent by him, he neither received the Power of Attorney nor details of the same and even the Notice of Cancellation of the Agreement was not

accompanied by a copy of the Power of Attorney of Mr. Puneet Saran nor the particulars thereof were mentioned in the said Notice.

40. Now, a look at the written statement and the documentary evidence on record in this regard. In para 1 of the written statement, it is stated that *"Power of Attorney was executed on ……. **(Space left blank)** and intimation to this effect was sent to Plaintiff No.1 through our counsel, Sh. Barun K. Sinha on 26-12-05 and also about NOC. Plaintiff No.1 met Sh. Barun K. Sinha on 2-1-06 in his office and they talked to Sh. Puneet Saran, Power of Attorney over telephone about the Power of Attorney when Sh. Puneet Saran asked Plaintiff No.1 to inspect the Power of Attorney in his office at Okhla Industrial Area Phase-III, New Delhi on 02-01-06."* In para 27 of the written statement, the aforesaid facts are again reiterated, but in para 28 it is stated that the Power of Attorney dated 26.12.05 was registered on 27.12.05 and this fact was brought to the notice of plaintiff on 26.12.05. In document Exhibit D-9, that is, letter dated 12.01.06 sent by the defendant to the plaintiff, the defendant, however, stated that the plaintiff had been already informed about the newly constituted Power of Attorney, namely, Shri Puneet Saran to execute the sale deed and "*descriptions about was already furnished to you (the plaintiff) on 24.12.05 for drafting of the sale deed."* In document Exhibit D10, defendant's reply dated 31.01.06 to plaintiff's legal notice, it is stated that the plaintiff *"**was informed about the newly constituted Power of Attorney, namely, Puneet Saran on 26.12.05 and he was also given particulars of the new Power of Attorney on 02.01.06**,*" and in the very next paragraph of the said letter (Exhibit D-10), it is stated that it

was **on 03.01.06 that the plaintiff was offered inspection of Power of Attorney by Sh. Puneet Saran**.

41. Apart from the aforesaid contradictions and inconsistencies what clearly emerges from the record is that the Power of Attorney though dated 26.12.05 was in fact presented for registration on 27.12.05 and actually delivered to the defendant Company on 29.12.2005 (which date also finds mention in the POA) presumably in the presence of Mr. Puneet Saran. In his cross-examination, DW-1, Puneet Saran admitted that the Special Power of Attorney was executed in his presence at Kolkata and in further cross-examination was unable to deny the suggestion put to him that he had returned from Kolkata after 09.01.06. Even assuming for the sake of argument that the defendant's version that the plaintiff was offered inspection of the Power of Attorney by Mr. Puneet Saran over the telephone on 02.01.06 or on 03.01.06 is correct, it is not understandable as to how Notice of termination of the agreement was given within four-five days thereof, that is, on 7th January, 2006.

42. Regarding the claim of the defendant that they had provided the particulars of the Power of Attorney to the plaintiff through their Advocate, Mr. Barun K. Sinha, the said claim is not corroborated by DW-4, Mr. Barun K. Sinha, who was altogether silent on this aspect of the matter. Pertinently also, in the Notice of Cancellation dated 07.01.06, apart from vague averment that particulars of newly constituted Power of Attorney were brought to the notice of Plaintiff, there is no explanation as to how and in what manner it was done. There is also no mention of any date either 24.12.05 or 26.12.05 or 2nd

January/3rd January, 2006 in the said notice regarding providing the particulars of the new Power of Attorney to the Plaintiff and, thus, the necessary corollary, in my view, is that no details of the Power of Attorney were ever furnished to the plaintiff prior to the cancellation of the Agreement to Sell.

43. I am buttressed in coming to the aforesaid conclusion from the admission made by DW-1, Puneet Saran in his cross-examination that he did not meet the plaintiff between 26.12.05 (date of execution of the Power of Attorney) and 14.02.06 (date of filing of the suit). As regards sending of the new Power of Attorney to the plaintiff, there is not even a plea in the written statement of the defendant that the defendant had sent the Power of Attorney to the plaintiff. Interestingly, in his cross-examination, DW-1 stated that the defendant had sent copy of the Power of Attorney alongwith a letter dated 03.01.06 and that the said letter was signed by Mr. Ramjee Dwivedee, which had been seen by him. When asked to produce the said letter, DW-1, Mr. Puneet Saran altogether resiled from his aforesaid statement and stated "*there is no such letter of 03.01.2006.*" Thus, it is clear that the defendant neither informed the plaintiff about the cancellation of the Power of Attorney in favour of Shri Ramjee Dwivedee nor apprised him or sent/delivered to him the new Power of Attorney in favour of Mr. Puneet Saran.

44. Issues No.4 and 5 are accordingly answered in the negative and against the defendant.

45. ISSUE NO. 7

> *"7. Whether the Board of the Defendant Company approved the draft of sale deed submitted by the plaintiff on 9.7.2005 and communicated the same to the plaintiff? If so, its effect?"*

46. The Plaintiff's case is that the Plaintiff had delivered to the Defendant Company the draft of the proposed Sale Deed duly initialed by the Plaintiff and the said draft of proposed Sale Deed contained all the requisite details except the name of nominee of the Plaintiff and the details of NOC. In order to substantiate his aforesaid contention, the Plaintiff has placed on record the duplicate copy of the letter dated 09.07.2005 containing the acknowledgment of receipt of draft Sale Deed in the handwriting of and signed by Mr. Ramajee Dwivedee (the earlier Power of Attorney holder of the Defendant) along with copy of the draft Sale Deed for the approval of the Defendant. The signature of Mr. Ramajee Dwivedee on the said document has been admitted by the Defendant and the document marked as Exhibit P-18.

47. The Plaintiff has asserted in the plaint that the Defendant Company did not send its approval of the draft Sale Deed given to them on 09.07.2005 (paras 45 and 59). This plea has not been denied by the Defendant in the written statement nor any evidence in rebuttal adduced by the Defendant. Not even a query has been put to the Plaintiff (PW1) in this regard during his cross-examination nor DW1 Puneet Saran, who is the principal witness of the Defendant, has stated anything about the approval of the draft Sale Deed sent by the Plaintiff to the Defendant. On a specific query put to him in cross-examination

as to whether the Defendant Company had got prepared any draft of the Sale Deed, he replied *"I do not remember if draft of the Sale Deed was ever got prepared by the Defendant Company or not."* Thus, it is clear that the Defendant Company neither approved the draft of the Sale Deed delivered to them by the Plaintiff on 09.07.2005 nor sent its own draft of proposed Sale Deed to the Plaintiff.

48. Issue No.7 is accordingly answered in the negative in favour of the Plaintiff and against the Defendant.

49. ISSUE NO.8

> *"8. Whether the defendant has performed its reciprocal obligation under the agreement to sell dated 9.2.2005?*

50. The foundation of the Plaintiff's case is that the Defendant Company is not ready and willing to perform its part of the contract in that the Defendant Company failed (i) to provide NOC to the Plaintiff, (ii) to inform the Plaintiff of the alternative arrangement for executing the Sale Deed when the Power of Attorney holder of the Plaintiff (Mr. Ramajee Dwivedee) was hospitalized, and (iii) to approve the draft of the proposed Sale Deed sent by the Plaintiff to the Defendant Company and/or to send to the Plaintiff its own draft of the proposed Sale Deed. The Plaintiff contends that his only obligation was to pay the stamp duty and to pay the balance sale consideration of ₹ 6,25,00,000/- at the time of the registration of the Sale Deed. The Plaintiff alleges that the reciprocal obligations of the Defendant

(including delivery of NOC to the Plaintiff, approval of draft Sale Deed, furnishing of particulars of new Power of Attorney for mentioning in the Sale Deed at the time of his getting it typed and stamped from the Collector of Stamps, and availability of the Power of Attorney Holder for submitting it before the Sub-Registrar for registration and completion of sale formalities) were not honoured by the Defendant Company. The Sale Deed, therefore, could not have been executed or even got typed without the draft of the Sale Deed being approved by the Defendant Company and the particulars of the NOC and of the new Power of Attorney being typed in the Sale Deed. Thus, this issue goes to the root of the matter for even if the Defendant failed in any one of its aforesaid obligations, the Sale Deed obviously could not have been executed.

51. The Defendant Company contends to the contrary and asserts that it had discharged its obligations under the Agreement to Sell in toto. I have already dealt with the aforesaid aspect of the matter at great length and while dealing with Issue No.6 it has been held by me that there is unimpeachable evidence on record to show that the Defendant Company failed to deliver the No Objection Certificate to the Plaintiff on 23.12.2005 or on 24.12.2005 or on any other date prior to the date of Notice of Cancellation of the Agreement to Sell, i.e., 07.01.2006. While dealing with Issue Nos.4 and 5, it has been held by me that the Defendant Company failed to provide a copy of or even the particulars of the new Power of Attorney to the Plaintiff and while dealing with Issue No.7 the conclusion has been recorded that there is no evidence on record to suggest that the Board of the Defendant

Company ever approved the draft of the Sale Deed submitted by the Plaintiff on 09.07.2005 or delivered to the Plaintiff any other draft Sale Deed. The inevitable corollary is that the Defendant Company failed to perform its reciprocal obligations under the Agreement to Sell.

52. My aforesaid conclusions are reinforced by the conduct of the Defendant Company throughout, which is reflected from the following amongst other acts and deeds of the Defendant Company:-

(i) The Defendant by their letter dated 30th April, 2005 (Ex.P12) tried to cancel the Agreement on the pretext that the Board of Directors/Shareholders of the Defendant Company did not want to sell the farm house.

(ii) The aforesaid letter was received by the Plaintiff on 05.05.2005, but before the said date the Defendant Company had filed a Caveat in the Delhi High Court on 03.05.2005 (Ex.DW4/P1) in anticipation of the litigation which the Defendant Company well knew would be initiated by the Plaintiff.

(iii) The NOC dated 2nd May, 2005 issued by the Competent Authority to the Defendant Company for the sale of the farm house was neither communicated nor delivered to the Plaintiff. The Defendant Company in fact concealed this vital information from the Plaintiff and allowed the NOC to expire. The said NOC expired on 1st June, 2005.

(iv) On 13th June, 2005, the authorized representative of the Defendant Company, namely, Mr. Ramajee Dwivedee met the Plaintiff and informed him that the general meeting of the

shareholders of the Defendant Company had accorded its approval on 08.06.2005 to sell the farm house to him and cleverly asked him to append his signature on the second application for NOC by saying that they wanted to apply afresh, the devious plan of the Defendant Company being that the Government would reject the NOC and thereafter they could terminate the Agreement without getting any blame for the cancellation thereof.

(v) When the Plaintiff came to know about the ban order issued by the Government of NCT of Delhi, thereafter, in the month of October, 2005 the Defendant Company offered to get the Agreement to Sell registered on the Plaintiff making payment of the balance amount of ₹ 6,25,00,000/-, knowing fully well that the Plaintiff would not be ready to spend such a huge sum of money without a Sale Deed in his favour.

(vi) The Defendant Company though in receipt of the draft of the Sale Deed given to them on 9th July, 2005 by the Plaintiff and duly received by their authorized representative Mr. Ramajee Dwivedee did not take a single step in the direction of approval of the same. Admittedly, no communication in this regard was sent to the Plaintiff, not even to state that they had any objection to any of the clauses.

(vii) The ban imposed by the Government of India having been lifted and an NOC on the third application of the parties having been obtained by the Defendant Company on 23.12.2005, the same was deliberately not provided to the Plaintiff under the garb of

the illness of Mr. Ramajee Dwivedee, the Power of Attorney holder of the Defendant Company.

(viii) By his letter dated 3rd January, 2006, when the Plaintiff asked for a copy of the said NOC, the same was still not furnished to him and instead a Notice of Cancellation dated 7th January, 2006 (dispatched on 9th January, 2006 and received by the Plaintiff on 13th January, 2006) was sent by the Defendant Company to again cancel the Agreement to Sell.

(ix) The new Power of Attorney obtained by the Defendant Company on 29th December, 2005 was not made available to the Plaintiff nor the details thereof provided to the Plaintiff despite Plaintiff's letter dated 03.01.2006 sent to the Defendant to appoint a new Power of Attorney holder in place of Mr. Ramajee Dwivedee for the execution of the Sale Deed.

(x) Instead on 09.01.2006, the Defendant sent a Notice of Cancellation dated 07.01.2006 to the Plaintiff asking the Plaintiff to furnish the bank draft of ₹ 6,25,00,000/- by 9th January, 2006, failing which the Agreement would stand cancelled.

(xi) The said communication as borne out from the record was sent to the Plaintiff on 9th January, 2006, i.e., the date on which the Agreement was to stand cancelled and was received by the Plaintiff on 13th January, 2006.

(xii) The present suit was immediately instituted by the Plaintiff on 14th February, 2006 expressing his readiness and willingness to

pay the balance sale consideration on registration of the Sale Deed.

(xiii) This Court passed an *ex parte ad interim* injunction order on February 17, 2006 directing the Defendant to maintain *status quo* in regard to the title of the suit property. The Defendant, in order to violate the said order, filed a petition before the Kolkata High Court for transferring the suit property to another Company under the cover of amalgamation. Thus, though fully aware of the order dated 17.02.2006, the Defendant transferred the suit property in June, 2006 to M/s. RKBK Fiscal Services Pvt. Ltd., which fact the Defendant Company chose not to disclose to this Court even though it amended its written statement on two separate occasions. As a matter of fact, the Defendant Company did not disclose this fact to the Court till the Plaintiff came to know of the same and moved an application, being IA No.5963/2009 under Order XXXIX Rule 2A alleging that the Defendant had violated the Court's order and committed contempt by not disclosing to the Court that the Defendant Company was a non-existent company and had for three years contested the litigation under its erstwhile name, i.e., M/s. Khas Joyrampur Colliery Co. Pvt. Ltd. until it inadvertently slipped from one of the witnesses on 24th February, 2009.

(xiv) On 4th August, 2010, the Plaintiff's contentions were upheld by this Court (Hon'ble Mr. Justice S. Ravindra Bhat) by passing the following order:-

"***I.A. No.5963/2009***

The plaintiffs in this application allege that the defendant has violated the Court's order and committed contempt. It is alleged that the defendant intentionally withheld information about its amalgamation with M/s. RKBK Fiscal Services Pvt. Ltd. and that this came to light during cross-examination of defendant's witness. In the reply placed on record, the defendant does not deny the amalgamation. The amalgamation order of the Kolkata High Court dated 05.06.2006 has been disclosed. In that order, M/s. RKBK Fiscal Services Pvt. Ltd. is designated as the transferee company with which the defendant was amalgamated, along with all its rights and liabilities, including pending proceedings instituted by or against it.

The circumstances of this case undoubtedly point to negligence, if not deliberate, flouting all the Court's order in withholding relevant information. The previous orders would disclose that originally, the defendants sought for and were granted leave to amend the written statement on two separate occasions – even then the amalgamation was not brought to the notice of the Court.

Learned counsel for the defendant submitted that the Court may take a lenient view as there was no intention to withhold or suppress relevant facts and that the application may be disposed of imposing certain terms.

In the light of the submissions made, the Court is of the view that the Cause Title should be appropriately amended to substitute the transferee company in the array of defendants and delete the sole defendant. The said defendant, M/s. RKBK Fiscal Services Pvt. Ltd. should also be bound by the interim status quo order vis-à-vis the suit

property till final disposal. The authorized representative/Director of M/s. RKBK Fiscal Services Pvt. Ltd. should file an affidavit undertaking not to dispose of the suit property till disposal of the present suit.

The affidavit shall be supported by the relevant authorization in the form of Board Resolution empowering such Director or representative to depose to the affidavit.

In the circumstances, M/s. RKBK Fiscal Services Pvt. Ltd. is hereby directed to bear costs of this application, quantified at Rs.50,000/- to the plaintiffs within four weeks. I.A. No.5963/2009 is disposed of in the above terms.

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In view of the orders made today in I.A. No.5963/2009, M/s. RKBK Fiscal Services Pvt. Ltd., 216, A.J.C. Bose Road, Kolkata 700017 is hereby substituted as the sole defendant in respect of existing defendant. Let the corrected/amended Memo of Parties be filed within three days.

The newly added defendant, M/s. RKBK Fiscal Services Pvt. Ltd. is directed to file affidavit undertaking not to dispose of or transfer the suit property or encumber the suit property till final disposal of the suit. The affidavit shall be filed by its Director, who shall also include the Board Resolution empowering him to depose on behalf of M/s. RKBK Fiscal Services Pvt. Ltd. The affidavit shall be filed within four weeks. List the suit before the Joint Registrar on the dates fixed, i.e. 10.11.2010 and 11.11.2010 for further proceedings to enable parties to record evidence.

List before the Court on 08.02.2011.

Order dasti."

53. Thus, it is crystal clear that the Defendant had from the outset no intention of honouring its reciprocal obligations to enable registration of the Sale Deed in favour of the Plaintiff. Issue No.8 is decided accordingly.

54. ISSUE NO.9

> *"9. Whether the plaintiff was always ready and willing to perform his part of the obligation under the agreement to sale dated 9.2.2005?"*

55. In the aforesaid context, Plaintiff relies upon the averments made by him in the pleadings and the fact that he specifically mentioned his readiness and willingness to perform his part of the obligations under the Agreement to Sell in his letters dated 19th May, 2005 (Ex.PW1/3), 12th January, 2006 (Ex.PW1/10) and legal notice dated 18th January, 2006 (Ex.PW1/16).

56. *Per contra*, the case of the Defendant Company is that the Plaintiff lacked readiness and willingness as required by Section 16(c) of the Specific Relief Act, 1963, in that at no point of time the Plaintiff offered payment of the sale consideration or made any effort from his side to get the Sale Deed executed within time. Plaintiff did not contact the Defendant Company to find out about NOC and for completion of sale formalities. He had no knowledge of the bank balance in his account or in the account of Plaintiff No.2 as on 07.01.2006 and 13.01.2006. He deliberately did not disclose the authorized share capital and paid-up share capital of the Plaintiff No.2

from where the financial capacity of the Plaintiff No.2 could be established. By his letter dated 03.01.2006, the Plaintiff demanded originals of certain documents which were to be handed over to him at the time of the execution of the Sale Deed in terms of the Agreement. The evidence on record, including that of PW4 and PW5 clearly establishes that the shares held by the Plaintiff in various companies could not be taken into consideration for the purpose of assessing the readiness of the Plaintiff to make payment of the balance sale consideration to the Defendant Company. Learned senior counsel for the Defendant, on the aspect of readiness and willingness of the Plaintiff, relied upon the following decisions:-

(i) ***N.P. Thirugnanam (Dead) by LRs vs. Dr. R. Jagan Mohan Rao and Others, (1995) 5 SCC 115*** – In the said case, the Hon'ble Supreme Court held that *"the amount of consideration which he (the plaintiff) 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……..The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of the contract."*

(ii) ***Bharti Rani Singh vs. Rajinder Singh Bedi, 1997 (42) DRJ (DB) 19*** – In this case, a Division Bench of the High Court after delving into the entire gamut of case law held that the plaintiff must show his bonafides and it cannot be left to the *ipsi dixit* of the plaintiff and it was necessary for the plaintiff to prove his

financial position or capacity to finance the purchase price right from the date of the execution till the date of the decree. It held that there was no material on record in the said case to show what estate and assets were available with the plaintiffs to raise money or to convert into money or what arrangement had been made by them for financing and completing the sale. Thus, the learned Single Judge had rightly held that the defendants had not committed breach of the Agreement on their part.

(iii) ***Nitin Jain vs. Murari Lal Behl, 2008 (106) DRJ 672*** – In the said case, though the requirements of pleadings had been fully complied with and the plaintiff had deposed about his readiness and willingness, a learned Single Judge of this Court held that the plaintiff had not proved readiness and willingness to perform his part of the contract, as he had not adduced any *"objective material to show readiness or even about his capacity to perform the contract when he filed the suit, or at the stage of trial."* It was further held that *"though it is not necessary to deposit the amount in Court, yet some objective material such as availability of funds at the stage of the filing of the suit or at the stage when performance was offered and also at the stage when the deposition was recorded, could well be produced. In the absence of any such objective material, the court is now called upon to merely accept the plaintiff's version that he was always ready and capable of performing the contract. This course is not acceptable."*

(iv) ***A.K. Lakshmipathy (Dead) and Others vs. Rai Saheb Pannalal H. Lahoti Charitable Trust and Others, (2010) 1 SCC 287*** – In this case, on consideration of the evidence on record, the Hon'ble Supreme Court affirmed the concurrent findings of the trial court as well as the High Court that the appellants were not ready and willing to perform the terms and conditions of the Agreement for Sale and had abandoned the contract. It was further held that in order to show that they were ready and willing to perform their part of the contract, the appellants should have borne the remaining amount of the contract price and then agitated the matter for specific performance before the Court.

(v) ***Man Kaur (Dead) by LRs vs. Hartar Singh Sangha, 2010 X AD (S.C) 304*** – The Hon'ble Supreme Court in this decision highlighted that in the absence of evidence as to availability of money for purchase and about the readiness and willingness of the plaintiff to perform the contract, the suit must fail for want of compliance with Section 16(c) of the Specific Relief Act. It was held that the material on record showed that the respondent/plaintiff had committed breach.

57. The Plaintiff, in his turn, relied upon the judgment of the Privy Council in the case of ***The Bank of India Ltd. and Ors. vs. Jamsetji A.H. Chinoy and Messrs. Chinoy and Co.*** reported in ***AIR (37) 1950 Privy Council 90***, and in particular the following extract of the said decision:-

"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.C.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."***

For the foregoing reasons their Lordships answer question (4) in the affirmative."

58. The Plaintiff also relied upon the judgment of the Hon'ble Supreme Court in the case of ***Nathulal vs. Phoolchand, AIR 1970 SC 546***, and in particular the observations made in paragraph 6 of the said judgment, which read as under:-

"6. Phoolchand could be called upon to pay the balance of the price only after Nathulal performed his part of the contract. Phoolchand had an outstanding

arrangement with his Banker to enable him to draw the amount needed by him for payment to Nathulal. 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: ***Bank of India Ltd. v. Jamsetji A.H. Chinoy and Messrs. Chinoy and Co. 77 Ind App 76 at p.91 = (AIR 1950 PC 90 at p.96)****."*

59. Reference was also made by the Plaintiff to the judgment of this Court in ***S.K. Gupta (since deceased through) vs. Avtar Singh Bedi & Ors., 2005 VII AD (Delhi) 61***, wherein on the aspect of readiness and willingness, a learned Single Judge of this Court relying upon the judgment of the Privy Council in ***The Bank of India Ltd. and Ors. vs. Jamsetji A.H. Chinoy and Messrs. Chinoy and Co. (supra)*** observed:-

"33. To be prepared for something would mean to be equipped with what is needed for the action or event. Prepared to pay money would not mean that the plaintiff has to prove that he went about jingling money to demonstrate his capacity to pay the purchase price. It is sufficient if the plaintiff establishes that he had means to arrange for payment of the consideration payable by him. One cannot lose sight of the fact that many a sale transaction is financed by back up loans. Wealth tax assessment of the deceased for the year in question establishes that he was a man of means. His conduct, evidenced from PW-1/3, PW-1/8 and PW-1/11 and 12, establishes that the plaintiff was always ready and willing to perform his part of the agreement."

60. The Plaintiff also relied upon the judgment of this court in ***Sh. Raj Kumar Sharma vs. Smt. Pushpa Jaggi & Ors., AIR 2006 Delhi***

156, and in particular on the observations made in paragraph 24 of the said judgment, the relevant portion whereof is reproduced hereunder:-

> *"……..Plaintiff claiming the relief of specific performance, is not required to exhibit the currency notes to show his ready and willingness. He should be capable and should have the capacity to pay on demand the sale consideration whether from his account or after arranging the same from reliable sources.* ***The law does not impose an obligation on a party requiring it to exhibit its mean by physical demonstration. Suffices it to say for a party that it possess and/or is capable of gathering sufficient means to perform its part of the contract by paying the balance sale consideration.*** *Readiness and willingness have various ingredients and one of them is that party to an agreement should be able to fulfill its obligations in regard to payment of the sale consideration. The purchaser need not establish that he had the required money with him or arrangements have been made for financing the transactions. What is required of him is to show that he was ready and willing to fulfill his terms of the agreement. A party would be well within its rights to say that he was in a position to arrange the payment of the requisite amount within the prescribed time.* ***Demonstrable possession of means is no sine qua non to satisfy the principle of ready and willingness. Every action follows its prescribed course and so does (sic.) a buyer should be able to show before the Court that he either possesses or can arrange the requisite funds for payment of the balance sale consideration within the stipulated period.*** *Obviously the fruits of this act fall in favor of the party only on completion of the act in accordance with the directions of the Court founded on the agreement between the parties. Fleri non debuit sed factum valet would normally apply to this aspect of ready and willingness on the part of the claiming party……."*

61. On a similar note, the Plaintiff referred to the judgment of the Hon'ble Supreme Court in ***Sukhbir Singh and Ors. vs. Brij Pal Singh and Ors., AIR 1996 SC 2510***, wherein the Supreme Court again reiterated that it is sufficient for the purchaser to establish that he has the capacity to pay the sale consideration. It is not necessary that he should always carry the money with him from the date of the suit till the date of the decree. He also relied upon the judgment of the Supreme Court rendered in ***Ramesh Chandra Chandiok and Anr. vs. Chuni Lal Sabharwal (dead) by his legal representatives and Ors., AIR 1971 SC 1238***, wherein it is laid down that readiness and willingness cannot be treated as a strait-jacket formula. These have to be determined from the entirety of the facts and circumstances relevant to the intention and conduct of the party concerned and that unless there is material on record to show that the purchaser at any stage did not have the necessary funds for payment at the time of the execution of the Sale Deed he must be held to be ready and willing to perform his part of the contract and, therefore, entitled to a decree for specific performance.

62. Distinguishing the judgments cited by the learned counsel for the Defendant, the Plaintiff urged that the facts in the said cases were altogether different from the facts of the present case. In the case of ***N.P. Thirugnanam (Dead) by LRs vs. Dr. R. Jagan Mohan Rao and Others (supra)***, the Court found that PW2 who had testified that he was willing and prepared to lend a sum of ₹ 2 lacs to the Plaintiff was himself possessed of no resources inasmuch as he did not have the cash, and admitted that he had to obtain the aforesaid sum of ₹ 2 lacs

by hypothecating his property and at the same time he was willing to lend on a pronote to the Plaintiff a sum of ₹ 2 lacs, which was hard to believe.

63. In ***Bharti Rani Singh vs. Rajinder Singh Bedi (supra)*** relied upon by the counsel for the Defendant, except alleging abstract readiness and willingness on her part, the Plaintiff had not disclosed about means and resources available to her to finance the sale. The husband of the Plaintiff who appeared in the witness box as PW1 stated that his younger brother had told him and his wife that he had sufficient amount in Bank which he would provide to them for payment of balance sale consideration. The brother, however, was not produced in the witness box to corroborate the statement. PW1 also stated that his wife and he had enough money to pay the balance amount but in cross-examination admitted that his wife had no money in the bank during the relevant period from 1969 to 1970. From his testimony, the Court came to the conclusion that there was no material on record to show what estate or assets were available to the Plaintiff to raise money or to convert it into money or what arrangement had been made for financing and completing the sale. In the circumstances, the Court observed, *"No doubt to prove himself ready and willing a purchaser has not necessarily to produce money or to vouch a concluded scheme for financing the transaction. But one has to show his bonafides and it cannot be left to the ipsi dixit of the plaintiff and for that purpose it is necessary that the plaintiff to be entitled to the relief of specific performance should prove his financial position or capacity to finance the purchase price."*

64. Likewise, in ***Nitin Jain vs. Murari Lal Behl (supra)***, the Plaintiff did not adduce any objective material to show availability of funds and the Court held that in the absence of any such objective material the Court cannot be called upon to merely accept the Plaintiff's version that he was ready and capable of performing the contract. The following observations of the learned Single Judge are apposite:-

> *"The standard of proof is not so high in such cases as to deter a litigant who desires exercise of discretion in his favor to compel a truant contracting party, to stand by his bargain, from disclosing some rudimentary facts regarding the question of readiness. In these proceedings, however, the plaintiff has chosen to keep away any material in that regard, from the Court."*

65. To the same effect are the findings of the Hon'ble Supreme Court in the case of ***A.K. Lakshmipathy (Dead) and Others vs. Rai Saheb Pannalal H. Lahoti Charitable Trust and Others (supra)*** where the appellants (Purchaser) in order not to execute the Agreement for Sale started seeking clarifications regarding the joining of all trustees in execution of the Sale Deed, asking the second respondent to enter into another Agreement by way of indemnifying the appellants for any loss due to defect in the title, etc. and making similar unjustified and unreasonable demands. In these circumstances, the Court concluded that in order to show that the appellants were ready and willing to perform their part of the obligation it was for them to come out with the sale consideration and then agitate the matter for specific performance before the Court.

66. In ***Man Kaur (Dead) by LRs vs. Hartar Singh Sangha (supra)***, the Court observed that the Plaintiff who ought to have given evidence never appeared and gave evidence and instead relied on the evidence of PW2 – Property Dealer to prove his readiness and willingness to perform the agreement. PW2, the Court held, could not become a substitute for the Plaintiff to give evidence about the finances or intentions or the readiness and willingness of Plaintiff which were within the personal knowledge of the Plaintiff. Thus, though there were necessary averments in the plaint about the readiness and willingness of plaintiff, there was no acceptable or valid evidence on record with regard to the same and in fact the correspondence between the parties indicated that the version of the Defendant about the Plaintiff informing him that the full amount of sale price was not available with him for proceeding with the sale was more probable and correct.

67. In view of the aforesaid, the Plaintiff contended that the decisions relied upon by the Defendant have no bearing on the present case where he has adduced cogent evidence with regard to his readiness as well as willingness to perform the contract.

68. After scrutinizing the record, I am in agreement with the Plaintiff as the record bears out the contention of the Plaintiff, who has filed his balance-sheet as on 31.03.2006 (Ex.PW1/18) which shows that the Plaintiff had sufficient investment in quoted/listed shares to the tune of ₹ 7,25,28,207/-. The Plaintiff has also filed the Statement of Holdings of his Depository Account bearing No.10043493 giving details of listed shares held by him in dematerialized form

(Ex.PW3/2); and a letter from Consortium Securities Pvt. Ltd., Depository Participant, certifying the value of said shares to be in the tune of ₹ 9,80,87,500/- as on 16.02.2006 as per the then prevalent market price (Ex.PW1/20). The Plaintiff contends and there is no denying the fact that the aforesaid shares could have been liquidated by him at any time in the Stock Market and the payment obtained on the third working day of the date of trading as is the norm of all stock exchanges in India. Thus, he would have within 15 days' time from the receipt of the NOC from the Defendant made payment of the entire sale consideration to the Defendant.

69. PW3 Mr. Madan Mohan Singh, the Joint Managing Director of Consortium Securities Pvt. Ltd. (a participant of National Security Depository Ltd.), in the course of his testimony confirmed the shareholding of the Plaintiff as set out in Ex.PW3/2 and proved on record the valuation certificate issued by his office as Ex.PW1/20. The said witness further confirmed that payment of the sold shares through the National Stock Exchange and Bombay Stock Exchange are made within three days of their sale as per norms.

70. An attempt was made by the learned senior counsel for the Defendant to urge that in the evidence of PW1 it has come on record that he did not have sufficient funds ready with him during the period from 09.02.2005 to 13.01.2006 and thereafter till the date of the filing of the suit. Learned senior counsel contended that the securities held by the plaintiff were in Companies which were sick industrial companies and their valuation was almost negligible. Thus, he had no sufficient corpus to get the Sale Deed executed and for this reason he

was disputing receipt of copy of the NOC, knowledge of the appointment of the Power of Attorney Shri Puneet Saran and receipt of the Notice of Cancellation and refusing to accept the bank draft of ₹ 55 lacs sent after the cancellation of the Agreement.

71. I am unable to agree with the aforesaid submission of the learned senior counsel for the Defendant. The Plaintiff has shown his capacity by filing his balance-sheet as on 31st March, 2006 (Ex.PW1/18) which shows that the Plaintiff was possessed of assets worth more than ₹ 27 crores. The Plaintiff has filed Statement of Holdings of his Depository Account with respect to listed shares held by him in Andhra Cements Ltd., Duncan Industries Ltd. and Snowcem Ltd. (Ex.PW3/2) and proved that the valuation of these shares which are listed shares is more than ₹ 9 crores. PW3 – Shri Madan Mohan Singh was produced in the witness box to prove the valuation certificate (Ex.PW1/20). PW3 also affirmed that all the aforesaid shares can be sold in the National Stock Exchange or Bombay Stock Exchange at any time and payment received on the third working day of the sale. PW4 – Shri Rajiv Maheswari, Accountant, M/s. Multi Media and Entertainment Ltd. (in which the Plaintiff held 1,00,21,500 number of shares), no doubt stated that the shares of the said company are not being traded in Stock Exchanges since the last five or six years, as there is no trading of shares in the stock exchanges of Delhi, Jaipur and Guwahati where the shares of Multimedia are listed, but it is noteworthy that the valuation certificate (Ex.PW1/20) does not pertain to or include the shares of Multimedia and only the shareholding of the Plaintiff in Andhra Cements Ltd., Duncan

Industries Ltd. and Snowcem Ltd. is taken into reckoning, though the shares of Multimedia are of more than ₹ 10 crores and the Plaintiff could have pledged them and taken loan against them. As a matter of fact, the plaintiff could have pledged any of his listed shares with any bank, NBFC and /or private financiers. Therefore, the plaintiff had more than one option to arrange the funds. It also deserves to be noted that during the cross-examination of the Plaintiff, the Defendant specifically asked the Plaintiff to file his accounts for the last three years, i.e., bank statements, income-tax returns, etc. which have been placed on record by the Plaintiff. All the aforesaid documents are collectively marked as Ex.PW1/D1. It is clear from the said accounts, including the balance-sheets as on 31.03.2005, 31.03.2006 and 31.03.2007 filed alongwith the respective Auditor's Reports and the Income-tax Returns for the aforesaid three years, that the Plaintiff was possessed of the capacity to arrange the funds for payment of the sale consideration at all relevant points of time. Availability of funds in hand or in bank accounts not being a *sine qua non* for proving that the Plaintiff was capable of paying the sale consideration to the Defendant at the time of the execution of the Sale Deed, the provisions of Section 16(c) of the Specific Relief Act can, in my opinion, by no means debar the Plaintiff in the instant case from claiming the relief of specific performance.

72. Issue No.9 is accordingly decided in favour of the Plaintiff and against the Defendant.

73. ISSUE NO.10

> *"10. Whether time was the essence of the agreement to sell?"*

74. The burden of proving this issue is upon the Defendant. The contention of the learned counsel for the Defendant is that the Plaintiff and the Defendant had agreed to treat time as the essence of the contract as is borne out from the document dated 8th July, 2005 (Ex.P13). For the facility of reference, the relevant portion of the said document is extracted below:-

> *"It is agreed and finally decided that you will complete the sale formalities within the stipulated time referred above* ***on receipt of NOC*** *from the competent authority* ***and providing the same to you by us****."*

75. Learned senior counsel for the Defendant has also placed reliance upon paragraph 14 of the writ petition, being Writ Petition (Civil) Nos.23019-20/2005 jointly filed by the Plaintiff and the Defendant for issuance of a writ of mandamus commanding the respondents to issue No Objection Certificate to the petitioners (the Plaintiff and the Defendant) pursuant to the application dated 13.06.2005. The relevant portion of the said paragraph reads as follows:-

> *"That the petitioner No.1 is ready and willing to execute the Sale Deed. Further, petitioner No.2 is also ready and willing to get the Sale Deed executed in his favour or in favour of his nominee within 15 days from the date of issuance of No Objection Certificate by paying the balance amount of Rs.6,25,00,000/- to the petitioner No.1 at the time of the execution of Sale Deed. Since No*

Objection Certificate is not issued to the petitioners, the transfer of agricultural land alongwith Farm House in favour of the petitioner No.2 or his nominee by the petitioner No.1 is not taking place. It is submitted that time is the essence of the present Agreement. The sale has to be concluded within 15 days of issuance of No Objection Certificate by the respondents. In case either No Objection Certificate is refused by the respondents or petitioner No.2 does not pay the balance consideration within 15 days of the issuance of No Objection Certificate, the Agreement to Sell is liable to be cancelled. Consequently, respondents need to take an immediate decision with regard to the petitioner's application for grant of No Objection Certificate."

76. *Per contra*, the contention of the Plaintiff is that in the Agreement to Sell dated 9th February, 2005 time was not the essence of the contract. It is contended by the Plaintiff that the conduct of the Defendant Company since the date of the Agreement shows that they never treated time to be the essence of the contract. Even otherwise, where there are reciprocal obligations as in the present case, time cannot be the essence of the contract as the execution of the contract depends on the performance of the reciprocal obligations by the respective parties in a sequence. The Defendant having failed to perform any of its obligations and the performance of the obligations of the Plaintiff being dependant upon the performance of the reciprocal obligations of the Defendant, the Defendant has no right to contend that time was the essence of the contract. Thus, it was for the Defendant to provide the No Objection Certificate to the Plaintiff and to approve the draft of the Sale Deed and send the same to the Plaintiff and/or to communicate its draft of the Sale Deed so as to enable the

Plaintiff to have the Sale Deed stamped from the Collector of Stamps and execute the Sale Deed on payment of the balance sale consideration.

77. I am wholly in agreement with the aforesaid contention of the Plaintiff. A bare glance at the Agreement dated 9th February, 2005 shows that time was not the essence of the contract in the said Agreement. This is also borne out from the conduct of the Defendant who kept dilly dallying on one pretext or the other even to the extent of allowing the No Objection Certificate dated 02.05.2005 earlier issued by the Competent Authority to lapse and expire. The Defendant's own case in fact is that the sale was eventually approved of by the general meeting of the shareholders held on 8th June, 2005. In this scenario, time was obviously not the essence of the contract.

78. As regards the contention of the Defendant that time was made the essence of the contract in the so-called Supplementary Agreement dated 8th July, 2005 to which the Plaintiff is a co-signatory, in my opinion, the said contention is of no avail to the Defendant. A bare glance at the document dated 8th July, 2005, the relevant portion of which has been extracted *supra* shows that what was agreed and finally decided between the parties was that the sale formalities would be completed ***"on receipt of NOC*** *from the competent authority* ***and providing the same to you (Plaintiff) by us (Defendant)."*** Thus, it was only on the providing of the NOC to the Plaintiff by the Defendant that the sale formalities were to be completed. After detailed discussion on Issue No.6, it has already been concluded by

me that the NOC was not furnished by the Defendant to the Plaintiff to enable completion of the sale formalities.

79. As regards the contention of the Defendant that in Writ Petition (Civil) Nos.23019-20/2005 an averment was made that time was the essence of the contract, it is the case of the Plaintiff that in fact these lines were added by the Defendant after getting it signed from him and without his knowledge and consent. In the course of his cross-examination, DW1 was confronted with certified copy of the writ petition by the Plaintiff on which the signature of the Plaintiff had been obtained by the Defendant and a query put to him with regard to the missing paragraphs in Ex.PW1/X1 (filed and relied upon by the defendant), in that after paragraph 'C' on page 187 there is paragraph 'E' on page 188 and DW1 was compelled to admit that one page was missing.

80. This Court has carefully compared both the copies of the writ petitions, one filed by the Defendant (Ex.PW1/X1) and the other tendered by the Plaintiff (Ex.DW1/PX) and on comparing both the copies of the writ petition it is evident that they are not the same. For instance, Clause D which finds mention in Ex.DW1/PX is conspicuously absent in document Ex.PW1/X1. The comparison of the two documents further reveals that the following averment in para 14 (supra) relied upon by the Defendant is totally absent from Ex.DW1/PX:-

> *"It is submitted that time is the essence of the present Agreement. The sale has to be concluded within 15 days of issuance of No Objection Certificate by the respondents. In case either No Objection Certificate is*

refused by the respondents or petitioner No.2 does not pay the balance consideration within 15 days of the issuance of No Objection Certificate, the Agreement to Sell is liable to be cancelled. Consequently, respondents need to take an immediate decision with regard to the petitioner's application for grant of No Objection Certificate."

One can also see the differences in blank spaces between paras 1 to 13 in juxtaposition to paras 14 to 19 of Ex.PW1/X1 and there appears to be reason to believe that the writ petition was substantially altered and page(s) replaced by the Defendant after the signing of the writ petition by the Plaintiff and before filing the same in the Court.

81. Even assuming such an assertion was made in the writ petition with the knowledge of the Plaintiff, the time would only start running from the date on which No Objection Certificate was furnished to the Plaintiff as quite obviously no Sale Deed could have been executed without the No Objection Certificate, which as has been held by me hereinbefore under Issue No.6, was not furnished to the Plaintiff. Even if for the sake of argument, it is assumed that the No Objection Certificate was couriered by the Defendant to the Plaintiff on 26.12.2005 and the same to be delivered to the Plaintiff on 27th December, 2005, in that case 15 days' time would have expired on 12th January, 2006. The Defendant had terminated the Agreement to Sell by letter dated 7th January, 2006 which was delivered to the Plaintiff on 13th January, 2006 as borne out by the record. Thus, quite clearly, the Defendant had no intention of living up to its obligations.

82. The reliance placed by the learned senior counsel for the Defendant on Section 55 of the Contract Act and the judgments of the Hon'ble Supreme Court in ***Citadel Fine Pharmaceuticals vs. Ramaniyam Real Estates Private Limited and Anr., (2011) 9 SCC 147*** and ***Coromandel Indag Products Private Limited vs. Garuda Chit and Trading Company Private Limited and Anr., (2011) 8 SCC 601***, to contend that the suit is hit by the provisions of Section 55 of the Indian Contract Act, is wholly misconceived. Section 55 of the Indian Contract Act reads as follows:-

> *"**55. Effect of failure to perform at fixed time, in contract in which time is essential**.—When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before a specified time, and fails to do any such thing at or before a specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract."*

83. A bare glance at the said Section shows that for the provisions of the said Section to apply the Court must arrive at the conclusion that the **intention of the parties was that time should be of the essence of the contract** and when a party to a contract promises to do a certain thing/things within a specified time and fails to honour its promise, the contract or so much of it as has not been performed becomes voidable at the option of the promisee. In the present case, the conduct of the parties throughout does not support the assertion of the Defendant that the parties intended that time was the essence of the contract. Even assuming time to be the essence of the contract, it was

the Defendant who had undertaken to provide the No Objection Certificate to the Plaintiff and only upon the Defendant doing so, the time fixed for execution of the Sale Deed, i.e., 15 days was to start running. As is borne out from the record, this was the Agreement arrived at on 8th July, 2005. No Objection Certificate was eventually obtained by the Defendant on 23rd December, 2005 without displaying any sense of urgency in the matter. On 7th January, 2006, the contract had been terminated by the Defendant and there is nothing to suggest that the No Objection Certificate had reached the hands of the Plaintiff. As a matter of fact, the Plaintiff by his letter dated 3rd January, 2006 (received by the Defendant on 7th January, 2006) specifically asked for the No Objection Certificate which was still not furnished to him.

84. The judgments relied upon by the Defendant rendered in the cases of ***Citadel Fine Pharmaceuticals vs. Ramaniyam Real Estates Private Limited and Anr. (supra)*** and ***Coromandel Indag Products Private Limited vs. Garuda Chit and Trading Company Private Limited and Anr. (supra)*** are altogether distinguishable on facts. In the first case, the stipulation as to the time being the essence of the contract was specifically mentioned in Clause 10 of the contract between the parties and the consequences of non-completion in Clause 9. The Hon'ble Supreme Court held that in the case of contracts relating to sale of immovable property, though time is not normally of the essence, this was not an absolute proposition and that in the case at hand time was the essence of the contract. Hence, the vendor was well within his right to terminate the contract for non-performance of

his part of the obligation by the Plaintiff purchaser within the stipulated period.

85. In the second case, *viz.*, ***Coromandel Indag Products Private Limited vs. Garuda Chit and Trading Company Private Limited and Anr. (supra)***, the Court after arriving at the conclusion that time was the essence of the contract between the parties held that by refusing to pay the balance sale consideration for the purchase of the property, the appellant company had not only committed breach of the Agreement but also showed that it was not ready and willing to complete the Agreement. It is noteworthy that in the said case the purchaser, though had seen the original title documents and got them verified from their Advocate and on the basis of their advice, had prepared the draft Sale Deed and fixed the date for execution of the said Sale Deed, thereafter started asking for the documents again which was held to be altogether unjustified in view of the fact that in the said case the vendor was in dire need of money and for that reason time was made the essence of the contract.

86. In view of the aforesaid discussion, Issue No.10 is decided in favour of the Plaintiff and against the Defendant.

87. ISSUE NOS.2 AND 3

> *"2. Whether there is any termination of the agreement to sell by the alleged Notice of Cancellation dated 7.1.2006?"*

"3. Whether cancellation of agreement dated 9.2.2005 by the defendant for violation of the terms of the contract is valid?"

88. Burden of proving these issues is upon the defendant. It is contended on behalf of the defendant that since the plaintiff has deliberately and intentionally violated Clause 10 of the Agreement to Sell dated 09.02.2005 and Clause 4 of the Supplementary Agreement dated 08.07.2005, the Agreement to Sell was legitimately terminated by the Defendant by Notice of Cancellation dated 07.01.2006 and the said termination is valid.

89. First, a look at the aforesaid clauses, which for the facility of reference are reproduced hereunder:-

Clause 10 of the Agreement to Sell dated 09.02.2005

"That in case the Second Party fails to fulfill his obligations under this agreement by making payment of the balance sale consideration amount within stipulated time in this agreement and to get the sale formalities completed as stated in this agreement, the First Party shall be entitled to forfeit 50% of the advance amount paid by the Second Party to the First Party at the time of this agreement and shall refund the balance 50% amount to the Second Party without any interest thereon."

Clause 4 of Supplementary Agreement dated 08.07.2005

"In case you fail to fulfill the commitment on your part within the stipulated time as stated in para 1 hereinabove, the said Agreement to Sell dated 9.2.2005 to sell the said "Surabhi Farmhouse" to you will automatically stands cancelled and as per the terms under Clause 10 of the said Agreement dated 9.2.2005 the seller company M/s. KJCL will return you only the

50% of advance amount paid by you at the time of agreement by forfeiting the balance 50% of the amount i.e. Rs.55,00,000.00 (Rupees fifty five lacs only).”

90. *Per contra*, the plaintiff submits that the Defendant Company failed to fulfill its obligations for completion of the sale formalities though the plaintiff at all times remained ready and willing to fulfill his part of the obligations under the Agreement to Sell dated 09.02.2005. In terms of Clause 2 and 3 of the said Agreement, the Defendant was required to get the No Objection Certificate (NOC) and requisite permission from the Competent Authorities and provide it to the Plaintiff No.1. Further, the details of the said NOC were to be given in the Proposed Sale Deed without which the registration of the Sale Deed was not possible. The Defendant failed to provide the NOC or to give the details thereof. Besides this, certain implied obligations were required to be performed by the Defendant prior to the execution of the Sale Deed. The Defendant being a Company having its Head Office at Kolkata was required to authorize some person by execution of a Power of Attorney to complete the sale formalities at Delhi, including execution of the Sale Deed before the Sub-Registrar, and to receive payment on behalf of the Defendant Company. The Defendant was also required to provide the particulars of the said Power of Attorney to the Plaintiff. These particulars were necessary as they were required to be mentioned in the Sale Deed. The Defendant was also required either to approve the draft of the Proposed Sale Deed handed over to it by the Plaintiff or to provide its own draft of Sale Deed to the Plaintiff for getting it typed and stamped

from the Collector of Stamps before its execution. Only after these formalities were completed, the Defendant was to be paid its balance sale consideration at the time of execution of the Sale Deed before the Sub-Registrar on a mutually agreed date and time.

91. The contention of the Plaintiff is that the Defendant though had appointed one Mr. Ramajee Dwivedee as their Power of Attorney holder (POA) for execution of the Sale Deed (Authorisation dated 25th January, 2005 in favour of Mr. Ramajee Dwivedee is placed on record as Ex.P-10 and extract of Minutes of the Board of Directors dated 25th January, 2005 as Ex.P-11), but due to his serious illness, Mr. Dwivedee was hospitalized and admitted in the ICU of Apollo Hospital in the morning of 25th December, 2005 and remained hospitalized for a long period until he eventually passed away. In these circumstances, the Plaintiff wrote letters dated 03.01.2006 (Ex.PW1/4), 07.01.2006 (Ex.PW1/8) and 12.01.2006 (Ex.PW1/10), requesting the Defendant to provide NOC and to authorize and depute some person to complete the sale formalities, but the Defendant Company did not respond. Instead, Mr. Puneet Saran claiming to be the new Power of Attorney holder (POA) of the Defendant, on 09.01.2006 sent a Notice of Cancellation dated 07.01.2006 (Ex.PW1/12) to Plaintiff No.1, asking the Plaintiff No.1 to furnish bank draft of ₹ 6,25,00,000/- by 09.01.2006, failing which Agreement to Sell dated 09.02.2005 shall be treated as cancelled and null and void. It is the case of the Plaintiff that this Notice was dispatched by the Defendant on 09.01.2006 and received by the Plaintiff on 13.01.2006 and replied to on the same date by his letter dated

13.01.2006 (Ex.PW1/13), stating that he had neither received any letter from the Defendant authorizing Mr. Puneet Saran as their Attorney nor seen any Power of Attorney in his favour, and requesting the Defendant to arrange a meeting immediately so that sale formalities could be completed at the earliest.

92. On 18th January, 2006, legal notice dated 18th January, 2006 (Ex.PW1/16) was sent by the Plaintiff to the Defendant asking them to perform their part of the Agreement within a week, which also failed to yield any result. The Defendant vide their reply dated 31st January, 2006 (Ex.D-10) informed the Plaintiff that Agreement to Sell dated 09.02.2005 was cancelled vide Notice of Cancellation dated 07.01.2006 with effect from 10.01.2006. Hence, the institution of the present suit for specific performance.

93. Having carefully considered the rival contentions of the parties, and the evidence adduced by the parties, my findings on the aforesaid issues are recorded below.

94. As regards Issue No.2, the defendant in para 29 of the written statement alleged that the defendant company had sent a Notice of Cancellation dated 07.01.2006 for cancellation of the Agreement to Sell dated 09.02.2005 and the said notice-cum-cancellation was sent by registered post/courier/by hand to the plaintiff on 07.01.2006 itself. It is further alleged in the same paragraph that the defendant mentioned in the aforesaid notice that *"in case the plaintiff No.1 is not able to furnish the bank draft of Rs.6,25,00,000/- by 9.1.2006, the agreement to sell dated 09.02.2005 shall treated as cancelled null and void automatically without any further notice.*"

95. In the replication filed by him in reply to the corresponding paragraph of the written statement, the plaintiff has clearly stated that a copy of the Notice of Cancellation dated 07.01.2006 was received by him on 13th January, 2006 and that the said notice was received through courier. According to the plaintiff, therefore, he received the Notice of Cancellation after the Agreement to Sell stood cancelled by the Defendant Company.

96. In the aforesaid context, various inconsistent and contradictory pleas have been raised by the Defendant Company, which deserve to be noted and are being noted as follows:-

(i) Defendant in its reply dated 31.01.2006 (Exhibit D-10) to the plaintiff's legal notice dated 18.01.2006 (Exhibit PW-1/16) stated in paragraph 4 that the **plaintiff when contacted, refused to give his fax number** and, therefore, notice of cancellation was served by hand **on 07.01.2006**, which was received by the wife of the plaintiff No.1 at his residence…… However, defendant also sent the cancellation notice by courier/speed post and registered A.D. post.

(ii) In para 11 of the same document (Exhibit D-10), defendant changed its stand to state that the notice was sent by courier and speed post on 08.01.06 [Here there is no mention of sending by Registered A.D. Post and the date of sending is 08.01.06 instead of 07.01.06].

(iii) In para 2 of the defendant's letter dated 12.01.06 (Exhibit-D9), defendant stated that the **notice was sent by fax, as also delivered by hand at East of Kailash on 07.01.06** and also by

courier on 08.01.06 [Here there is no mention of speed post and Registered A.D. Post].

(iv) In para 29 of the written statement, the defendant alleged that on 07.01.2006 the plaintiff No.1 was not at his residence and his wife refused to receive the notice on telephonic instructions of plaintiff No.1, therefore, **same was sent by courier on 09.01.06 as 08.01.06 happened to be a Sunday.** [Here, there is no mention of Registered A.D. Post/Fax or Speed Post, and the date of sending of the notice is stated to be 9th January, 2006 in place of 07.01.06 or 08.01.06.]

(v) In para 32 of the written statement, the defendant again changed its stand and alleged that after refusal by wife of the plaintiff No.1 in the night of 07.01.06, a messenger, namely, Shri Sushil Kumar again on 08.01.06 tried to hand over the said letter to plaintiff No.1 at his residence where he again refused to accept the same, and therefore, it was sent by courier on 09.01.06 [Here it was the plaintiff, who refused to accept the same as well].

(vi) In para 33 of the affidavit of evidence of DW-1, Mr. Puneet Saran, similar statement as in para 32 of the written statement [recorded in point (v) above] is made. In this regard, it is noteworthy that DW-5, Mr. Sushil Kumar in his cross-examination clearly stated that he had not visited the house or office of plaintiff No.1 in the period intervening 24.12.05 and 14.01.06.

(vii) As regards, the defendant's plea of sending by fax, the defendant failed to produce the fax receipt and was also not able to give the fax number on which the fax had been sent. DW-1 in his cross-examination in answer to a query put to him in this regard stated that he did not ask the plaintiff to give his fax number. No other witness for proving of dispatch of the notice by fax was produced and as also noted above in document Exhibit D-10 dated 31.01.2006, the defendant stated *"Your client [plaintiff No. (1)], when contacted, refused to give his Fax Number"*.

97. Interestingly, DW-1 in his cross-examination also stated that the notice was sent by three modes, that is, fax, speed post and courier on 07.01.06. When asked for copies of the same, he replied that he would produce the same on the following day but on the following day, he stated that the same were not with the Company. Ultimately, DW-1 in his cross-examination on 2.2.2011 stated *"The letter dated 07.01.06 was only sent by courier on 09.01.06 and earlier it was sent by hand on the evening of 07.01.06."*

98. It may be noted at this juncture that the record shows that the plaintiff had filed an application under Order XI Rules 12 and 14 and Order XII Rule 8 read with Section 151 of the Code of Civil Procedure being IA No.10248/2006 for discovering the receipts of registered post/speed post and courier receipts dated 07.01.06 of the Notice of Cancellation. This Court by its order dated 2nd November, 2006 directed the defendant to discover on oath the said documents.

However, no receipts or documents were forthcoming, despite many opportunities given, and ultimately on 18.02.08, the Court noted that it will be deemed that no such receipts exist.

99. In the backdrop of the aforesaid evidence, I am inclined to believe the version of the plaintiff that the Notice of Cancellation was sent only by courier on 9.1.06, which was received by the plaintiff No.1 on 13.01.06, as is borne out by the proof of delivery filed by the defendant (Exhibit D-8). Thus, it is clear that the aforesaid notice was sent after the time limit specified in the said notice for execution of the sale-deed had expired, which clearly reflects the malafide intention of the defendant.

100. Even otherwise, the sale of the suit property, Surbhi Farmhouse having been approved by the General Body of Shareholders of the Defendant Company, and neither the General Body nor the Board of Directors of the Defendant Company having passed any Resolution for cancelling the Agreement or given any power/authorization to Mr. Puneet Saran or anyone else to cancel the Agreement, the cancellation *per se* was without authority. I am fortified in coming to the aforesaid conclusion from the Special Power of Attorney dated 26.12.2005 executed in favour of Mr. Puneet Saran filed on record by the Defendant (Exhibit D/A) wherefrom it is clear that he had been appointed as Attorney for completion of sale formalities and receiving the consideration in respect of transfer of subject property to the Plaintiff and he had no authority or power to cancel the Agreement.

101. In view of the aforesaid, Issue Nos.2 and 3 are decided in favour of the plaintiff and against the defendant.

102. ISSUE NO.11

> *"11. Whether in the absence of registration of the agreement to sell the same is hit by Sections 53(a) and 54 of the Transfer of Property Act read with Section 17 of the Registration Act and the suit is liable to be dismissed as not maintainable?"*

103. The sole contention of the Defendant on this issue was that in view of Section 54 of the Transfer of Property Act, the Agreement to Sell does not create any interest in favour of the proposed vendee and being unregistered, the Defendant was well within its rights to terminate the same vide Notice of Cancellation dated 07.01.2006. For the reasons recorded hereinabove, there is no merit in the contention that the Agreement to Sell being unregistered may be terminated at will by the vendor.

104. Issue No.11 is decided accordingly.

105. ISSUE NO.12

> *"12. Whether the suit is properly valued?"*

106. This issue was not pressed and hence needs no discussion.

107. ISSUE NOS.13 AND 14

> *"13. Whether the plaintiff is entitled to decree of specific performance?*
> *14. Relief."*

108. The only other question which survives for consideration is whether the relief of specific performance being a discretionary relief granted in equity should be refused to the Plaintiff. A three-Judge Bench of the Hon'ble Supreme Court in ***Prakash Chandra vs. Angadlal and Others, AIR 1979 SC 1241*** had held that the ordinary rule is that specific performance should be granted. It ought to be denied only when equitable considerations point to its refusal. As, for instance, when the conduct of the Plaintiff has been such as to disentitle him to the relief of specific performance. If, however, the Plaintiff has acted fairly throughout, and there is nothing to show that he secured an unfair advantage when he entered into the Agreement nor is there anything to prove that the performance of the contract would involve the Defendant in some hardship which they did not foresee, there is no reason why the Plaintiff should not be granted the relief of specific performance.

109. Sub-section (2) of Section 20 of the Specific Relief Act, 1963 clearly indicates the kind of cases where it is proper for the Court to exercise its discretion in not decreeing the suit for specific performance. Nothing has been brought to the notice of this Court to indicate or show that the case of the Plaintiff is covered under any of the exceptions carved under sub-clauses (a) to (c) of sub-section (2) of Section 20. The conduct of the Defendant is certainly not worthy of claiming any special equities while the conduct of the Plaintiff has been commensurate with the accepted standard demanded by equity [See ***Sardar Singh vs. Krishna Devi, 1994 (4) SCC 18***]. Pertinently also, the Plaintiff has pursued his remedy at the earliest point of time

and instituted the suit within a month of the Defendant resiling from the Agreement. For the last six years, the Plaintiff has been diligently pursuing his suit, and in the circumstances it is difficult to hold that he has acted in a malafide manner and thereby disentitled himself to the grant of equitable relief of specific performance in the discretion of the Court.

110. There is, however, no denying the fact that though the Plaintiff had filed the suit within a month of the date when the Agreement to Sell was to be executed, the Plaintiff had only paid ₹ 1,10,00,000/- out of total sale consideration of ₹ 7,35,00,000/-, that is to say, the Plaintiff had yet to pay substantial balance sale consideration to the Defendant. There is also no denying the fact that during the interregnum the value of real estate property in Delhi has escalated beyond imagination. Thus, in my opinion, the interest of justice would be subserved if the Plaintiff, along with the remaining amount of the sale consideration, is directed to pay to the Defendant some reasonable additional amount, the Defendant having been deprived of the balance sale consideration during all these years *albeit* for no fault of the Plaintiff.

111. In the case of ***Nirmala Anand vs. Advent Corporation (P) Ltd. and Others*** reported in ***(2002) 8 SCC 146***, wherein, the only question that arose for consideration before a three-Judge Bench of the Hon'ble Supreme Court was whether the appellant/plaintiff should be directed to pay to the respondent an additional sum, and if so, what amount, (the decree of specific performance having already been granted in her favour by a two-Judge Bench), the Supreme Court while observing on

the facts of the case that there was no reason why the appellant/plaintiff, who was not a defaulting party, should not be allowed to reap to herself the fruits of increase in value, nevertheless directed her to pay an additional sum of ₹ 6 lacs apart from the balance sale consideration of ₹ 25,000/-. The following apposite dicta was enunciated in paragraph 6 of its judgment by the Apex Court:- (SCC, Page 150)

> *"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 of 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 considerations 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 alone, 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 considerations 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 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."

112. Applying the aforesaid guidelines, this Court is required to take into consideration the totality of facts including, *inter alia*, the fact that the Defendant is the defaulting party in the instant case and has at all relevant times tried by one means or other to wriggle out of the contract, the fact that the Plaintiff has tirelessly pursued the Defendant and this litigation for the last half a dozen years, and that during this interregnum the prices of land have increased phenomenally. This Court is also conscious of the fact that two other circumstances which are of some importance are required to be factored in while considering the aspect of grant of relief to the Plaintiff. The first is that from the date of the Agreement to Sell till date the Plaintiff was left with the balance sale consideration, possibly in the form of shares on which he must have earned dividend, etc. The second equally important factor is that the defendant Company continued to enjoy the Farm House, which it must have utilized either for its own personal purposes or let out at substantial rent.

113. Keeping all the aforesaid in mind, this Court, after much cognition, seeks to balance the equities, which though incapable of being balanced perfectly, are sought to be balanced by granting the relief of specific performance to the Plaintiff on his paying interest on the balance of the sale consideration due to the Defendant.

114. Accordingly, a decree of specific performance is granted in favour of the Plaintiffs and against the Defendant in respect of the Agreement to Sell dated 09.02.2005 with the direction to the Plaintiffs

to pay to the Defendant interest at the rate of 6% per annum on the balance sale consideration of ₹ 6,25,00,000/- from the date of filing of the suit till the date of payment. The aforesaid amount shall be deposited by the Plaintiffs with the Registrar General of this Court within four weeks from today and Sale Deed executed by the Defendant in favour of the Plaintiffs forthwith. It is clarified that the Sale Deed shall be executed at the option of the Plaintiff No.1 either in his favour or in favour of his nominee, i.e., the Plaintiff No.2.

115. CS(OS) 292/2006 stands disposed of in the above terms.

REVA KHETRAPAL
JUDGE

December 21, 2012
km/sk