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NIRMALA ANAND

v.

ADVENT CORPORATION (P) LTD. AND ORS.

SEPTEMBER 30, 2002

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[G.B. PATTANAIK, Y.K. SABHARWAL AND H.K. SEMA, JJ.]

Contract Act, 1872:

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Agreement for purchase of flat—Part payment made by purchaser—Before completion of construction lease of the land was cancelled by Corporation—Seller could not perform his obligation—Suit for specific performance—Single Judge rejected prayer for specific performance but directed payment of damages—Affirmed by Division Bench—On appeal, two-Judge Bench Held, purchaser entitled to specific performance of agreement—

D

Difference of opinion between the Judges on the amount to be paid by the purchaser to the seller in lieu of unpaid balance—Matter referred to three-Judge Bench—Held, purchaser was ready and willing to perform her part of the contract and seller committed breach in not performing his part of agreement by denying the possession of flat in question—Purchaser directed to pay to seller certain reasonable additional amount.

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Appellant-purchaser entered into an agreement with the sellers (Respondent Nos. 1 and 2) for purchase of a flat. Appellant made part-payment of consideration amount. However, before completion of the construction, lease of the land was cancelled by the Municipal Corporation.

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Appellant filed a suit against the Respondents for the specific performance of the agreement. Single Judge of the High Court found sellers guilty of having committed breach in carrying out the terms of the agreement but did not allow the relief of specific performance, but awarded certain amount in lieu of damages. The judgment and decree was affirmed by Division Bench of the High Court. Hence this appeal. The Division Bench

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of this Court allowed the appeal by holding that the appellant was entitled to the specific performance of the agreement. However, there was a difference of opinion among the Judges on the amount to be paid by the purchaser to sellers in lieu of unpaid balance. Hence matter was referred to three-Judge Bench to determine as to whether the appellant/purchaser should be directed to pay any additional sum, and if so, what amount.

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Allowing the appeal, the Court

HELD: 1.1. It is evident that the appellant is ready to take incomplete flat and pay further sum on account of phenomenal increase in the market price of the flat during the pendency of this litigation for over three decades. There appears no reason why the appellant cannot be allowed to have the entire benefit of manifold mega increase of the value of real estate property in the locality. It would not be unreasonable and inequitable to make the appellant the sole beneficiary of the escalation of real estate prices and the enhanced value of the flat in question. [710-A-C]

2. While balancing the equities, one of the consideration to be kept in view is as to who is the defaulting party. It is also to be borne in mind whether a party is trying to take undue advantage over the other as also the hardship that may be caused to the defendant by directing the specific performance. There may be other circumstances on which parties may not have any control. The totality of the circumstances is required to be seen. In the instant case, the suit was filed by the plaintiff within a month of the date when the possession under the agreement was to be delivered to her. She had already paid more than 50% of the sale consideration. There was no occasion for her to pay the balance consideration to the seller. The Courts have concurrently found that the appellant has always been ready and willing to perform her part of the contract and the seller committed breach in not carrying out the terms of the agreement. While others left, the appellant has been single handedly fighting for her rights under the agreement. She has agreed to take the flat on as-is-where-is-basis without claiming any reduction in purchase price and without making the seller liable for anything incomplete in the building.

[710-F-H; 711-A-B]

3. For the revival of the building plans, revival of lease and other such steps, the sellers and/or their assignees may have to take steps as per agreement between them but to ask the appellant to pay to Respondent Nos. 1 and 2, a sum of Rs. 40,00,000 would be too onerous and would almost amount to denying her specific performance. It would also amount to putting a premium on the breach committed by Respondents 1 and 2. Along with the remaining amount of the sale consideration, the appellant can also be directed to pay to Respondents 1 and 2 a some reasonable additional amount, they having been deprived of the amount of Rs. 25,000 during all these years. Having regard to the totality of circumstances,

A appellant is directed to pay to Respondents 1 and 2 a sum of Rs. 6,25,000 instead of Rs. 25,000. The impugned judgment and decree of the High Court shall stand modified and altered accordingly and there shall be a decree in the Suit on the file of the original side of the High Court on the above terms. [711-B-F]

B *Nirmala Anand v. Advent Corporation (P) Ltd. and Ors.*, [2002] 5 SCC 481, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 574 of 1988.

C From the Judgment and Order dated 15.7.1987 of the Mumbai High Court in A. No. 204 of 1981.

Gourab Banerji, R.N. Karanjawala, Arunabh Choudhary and Ms. Meghna Mishra for Mrs. M. Karanjawala, for the Appellants.

D P.P. Tripathi, Ms. Nina Gupta, Ms. Bina Gupta, Ms. A. Mahajan, Ms. Shalini Rai, Ms. Neha Misra, V.N. Raghupathy, C. Mukund, G.K. Singh, Ms. Sudha Sharma, T.V. Ratnam and D.N. Mishra, for the Respondent.

The Judgment of the Court was delivered by

E **Y.K. SABHARWAL, J.** The appellant, who was plaintiff No. 4 in the suit, entered into an agreement dated 6th September, 1966 with Respondent Nos. 1 and 2 for the Purchase of Flat No. 71, on the 7th Floor of the building known as 'Divya Prabha' situated at 12-A, Foreshore Road, Bombay. The sale consideration payable under the agreement is Rs. 60,000. The agreement stipulated that the building was to be completed and possession of the flat delivered to the appellant by 30th June, 1969 up to which time, the appellant had already paid Rs. 35,000 out of the sale consideration leaving a balance of Rs 25,000 Just a few days before the date fixed for completion and delivery of possession, the lease of the plot of land on which the flats were being constructed was cancelled by the Bombay Municipal Corporation. At that stage, the building was incomplete. Admittedly, it is incomplete till date.

F Similar agreements in respect of different flats were also entered into by the sellers with other flat purchasers, On 30th July, 1969, a suit, out of which the present appeal has arisen, was filed seeking specific performance of the flat purchase agreements. The plaintiffs other than plaintiff Nos. 4 and **H** 7 settled their case with sellers during the pendency of the suit and plaintiff

No. 7 also settled during pendency of the appeal before the Division Bench of the High court. There was, however, no settlement between the plaintiff-appellant and respondents 1 and 2. In the decision of the suit, learned Single Judge of the High Court held that the appellant was always ready and willing to perform her part of the contract and it was the sellers who committed breach in not carrying out the terms of the agreement. Learned Single Judge was, however, of the view that the grant of specific performance being discretionary remedy in equity, taking into account several and serious imponderabilities and further considering that huge sums may be required to complete the building, which amount cannot be properly assessed, the appellant was not entitled to the relief of specific performance and instead it was directed that the seller shall pay to the appellant damages as assessed by the Commissioner for taking accounts with interest at 6% per annum from the date of the decree till the date of payment/realization, in addition to the repayment of Rs. 35,000 with interest thereon at 9% per annum from 4th October, 1967 till the date of decree and for the subsequent period, at 6% per annum till the date of payment/realization. The judgment and decree of the learned Single Judge was affirmed by a Division Bench of the High Court in appeal. Aggrieved therefrom, the present appeal was filed on grant of leave.

The appeal was heard by a two Judge Bench. The learned Judges have concurred that the appellant is entitled to the specific performance of the agreement dated 8th September, 1966. There has, however, been difference of opinion between learned Judges on the condition in respect of additional amount that may be paid by the appellant to respondents Nos. 1 and 2 and, therefore, the matter has been placed before this three Judge Bench. The opinions of the learned Judges are reported in *Nirmala Anand v. Advent Corporation (P.) Ltd. and Ors.*, [2002] 5 SCC 481. In the opinion expressed by brother Justice Doraiswamy Raju, the appellant has been directed to pay sum of Rs. 40,00,000 in addition to the sum already paid to respondents 1 and 2 and in the view of brother Justice Ashok Bhan, it would be unfair to impose the condition of payment of Rs. 40,00,000 and the appellant is entitled to specific performance of agreement to sell on the price mentioned in the agreement.

We have heard learned counsel for the parties. The only question to determine is as to whether the appellant shall be directed to pay respondents 1 and 2 any additional sum and if so what amount.

The appellant is prepared and willing to take possession of the incomplete flat without claiming any reduction in the purchase price and would not hold

- A respondent Nos. 1 and 2 responsible for anything incomplete in the building. It has been concurrently held that she did not commit breach of the agreement to sell. She has always been ready and willing to perform her part of the agreement. The appellant is ready and willing to pay to respondents 1 and 2 interest on sum of Rs. 25,000. The breach was committed by respondents 1 and 2 as noticed hereinbefore. It is evident that the appellant is ready to take
- B incomplete flat and pay further sum as noticed, most likely on account of phenomenal increase in the market price of the flat during the pendency of this litigation for over three decades. We see no reason why the appellant cannot be allowed to have, for her alone, the entire benefit of manifold mega increase of the value of real estate property in the locality. In our view, it
- C would not be unreasonable and inequitable to make the appellant the sole beneficiary of the escalation of real estate prices and the enhanced value of the flat in question. There is no reason why the appellant, who is not a defaulting party, should not be allowed to reap to herself the fruits of increase in value.
- D 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
- E other while granting or refusing decree or specific performance. Whether the purchaser shall be directed to pay an additional amount to the seller or converse would depend upon the facts and circumstances of a case. Ordinarily, the plaintiff is not to be denied the relief of specific performance only on account of the phenomenal increase of price during the pendency of litigation. That may be, in a given case, one of the consideration besides many others to be
- F 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 consideration to be kept in view is as to who is the defaulting party. It is also to be borne in mind whether a party is trying to
- G take undue advantage over the other as also the hardship that may be caused to the defendant by directing the specific performance. There may be other circumstances on which parties may not have any control. The totality of the circumstances is required to be seen.
- H In the present case, the suit was filed by the plaintiff within a month

of the date when the possession under the agreement was to be delivered to her. By that time, she had already paid more than 50% of the said consideration. There was no occasion for her to pay the balance consideration to the seller. The courts have concurrently found that the appellant has always been ready and willing to perform her part of the contract and the seller committed breach in not carrying out the terms of the agreement. While others left, the appellant has been single handedly fighting for her rights under the agreements. She has agreed to take the flat on as is where is basis without claiming any reduction in purchase price and without making the seller liable for anything incomplete in the building. Further the building except the flat in question has been sold by respondents 1 and 2 to the 7th respondent. For the revival of the building plans, revival of lease and other such steps, the sellers and/or their assignees may have to take steps as per agreement between them but to ask the appellant to pay to respondents Nos. 1 and 2, a sum of Rs. 40,00,000 would be too onerous and would almost amount to denying her specific performance. It would also amount to putting a premium on the breach committed by respondents 1 and 2. Along with the remaining amount of the sale consideration, the appellant can also be directed to pay to respondents 1 and 2 some reasonable additional amount, they having been deprived of that amount of Rs. 25,000 during all these years.

Having regard to the totality of circumstances, we would direct the appellant to pay to respondents 1 and 2 a sum of Rs. 6,25,000 instead of Rs. 25,000. The amount of Rs. 40,00,000, wherever it appears in the opinion of Justice Doraiswamy Raju, would be read as Rs. 6,25,000. All other conditions will remain.

The appeal is accordingly allowed and the impugned judgment and decree of the High Court shall stand modified and altered and there shall be a decree in Suit No. 744 of 1969 on the file of the original side of the High Court, Bombay in the following terms:

- (i) There shall be conditional decree for specific performance of the agreement dated 8.9.1966 entered into between the 4th plaintiff and Defendants 1 and 2 and Defendants 1 and 2 shall execute a sale deed as envisaged in the agreement for sale of Flat No. 71 on 7th Floor of the building known as "divya Prabha" situated at No. 12-A, Foreshore Road, Bombay, on "as-is-where-is condition".
- (ii) That the appellant-plaintiff 4, within a period of six weeks, shall

- A pay the defendants-respondents 1 and 2, a sum of Rs. 6,25,000 (Rupees six lakh and twenty five thousand only) in addition to the sum already paid by her. The appellant shall be entitled to have the sale deed executed in her favour only on prior compliance and satisfaction of this condition.
- B (iii) The rights and interest in the land shall be as agreed to between parties and as per scheme and arrangement contained in the agreement dated 8-9-1996.
- C (iv) Defendants 1 and 2 and/or the 7th respondent in this appeal viz. Gaurav Overseas Private Ltd. 92, Maker Chambers, Nariman Point Bombay 400 020, as and when they secure the necessary renewal of the lease and revalidation of the building plan, the same shall be for the benefit of the appellant-Plaintiff 4 also, subject to the condition that she shall contribute her share of the monetary commitments and expenses incurred therefor, on being intimated by any of them in writing four weeks from the date of such receipt of the intimation. In case of dispute about the quantum, the same shall be got determined and settled before the Commissioner for taking accounts, on being moved by either of them. The sum so determined shall be a charge on the property comprised in Flat No. 71, till it is paid and shall be entitled to be recovered, accordingly.
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- E (v) The appellant and the 7th respondent shall be at liberty to mutually agree for completion of the incomplete building at such prevailing market rates as would be applicable for the work and manner of its completion and the mode of payment. If there can be no such mutual agreement among the appellant and the 7th respondent in this regard, as and when the sale deed is executed by the 1st and 2nd defendants, as per this decree, the appellant shall be at liberty to make her own arrangement to have her flat completed through approved and licensed architects.
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- G (vi) The sale/conveyance pursuant to the decree in the suit shall be subject to all such rights and liabilities and obligations of respective parties (the appellant, respondents 1, 2 and 7) under the suit agreement, as are available to each of them against the others, had the sale been effected even without the intervention of this Court, by mutual agreement of parties.
- H (vii) The appellant falling to comply with the terms of the conditional

decree passed as above, shall stand denied and lose her right and entitlement to get specific performance of the agreement dated 8-9-1966 in her favour and consequently, the appeal shall stand dismissed with the appellant's rights secured as per the judgments and decrees dated 23-3-1981 and 15-7-1987 firmly affirmed and settled, and the rights to have them executed in the manner known to law, alone serving to the appellant.

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(viii) Each party shall bear their respective costs in this Court.

The appeal is allowed in above terms.

S.K.S.

Appeal allowed.