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

Reserved on: 03.05.2025
Pronounced on: 01.07.2025

\+ **CS(OS) 3316/2015 & I.A. 5362/2025**

KRISHAN KUMAR WADHWA & ORS .....Plaintiffs
Through: Mr.Samar Bansal, Mr.Bhargav R. Thali Mr.Vipul Kumar, Mr.Pranav Garg, Advs.

versus

ARJUN SOM DUTT & ORS .....Defendants
Through: Mr.Sanjeev Mahajan, Mr.Pranjal Tandon, Advs. for D-1.
Mr.Munindra Dvivedi and Mr.Abhishek Chauhan, Advs. for D-2.
Mr.Danish Aftab Chowdhury, Adv. for D-3 (VC)
Mr.B. B. Gupta, Sr.Adv. with Ms.Meghna Mishra, Mr.Achal Gupta, Mr.Ankit Rajgarhia, Mr.Karan Jain and Ms.Yashodhara, Advs. for D-4.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

J U D G M E N T

1. This Suit has been filed by the plaintiffs praying for the following reliefs:

> *"i. Pass a decree of recovery of Rs. 10,00,00,000/- (Rupees Ten Crore) in favour of the Plaintiffs and against the Defendants, jointly and / or severally;*
> *ii. Pass a decree for recovery of Rs.*

7,10,98,438/- against the Defendants jointly and / or severally, being compound interest @ 15% p.a., on Rs. 10,00,00,000/- from 01.03.2012 till the date of filing of the suit;
iii. Award pendente lite and future compound interest @ 15% p.a. on the aforesaid outstanding amount in favour of the Plaintiffs and against the Defendants, jointly and / or severally from the date of filing of the suit till date of realization;"

Brief Facts

2. It is the case of the Plaintiffs that the immovable property bearing no. B-8, Maharani Bagh, New Delhi (hereinafter referred to as the "Suit Property"), was owned jointly by the Defendants herein as co-owners, with their respective shares having been delineated in a Family Settlement dated 31.12.1991, entered into *inter se* between the Defendants.

3. In 2007, certain disputes arose between the Defendants *qua* the shares in the Suit Property, therefore, a Suit seeking partition of the Suit Property was filed by the Defendant No. 4 herein, being C.S. (OS) No. 206/2007 titled ***Smt. Roop Talwar v. Sri Arun Som Dutt & Ors.*** (**Ex.D2/1**) (hereinafter referred to as 'the Partition Suit').

4. In the said Partition Suit, this Court, on 10.11.2010, passed a Preliminary Decree (**Ex. P-2**), thereby, declaring the shareholding of the co-owners/Defendants as follows:

- Defendant No.1 (D1) - 18.75%,
- Defendant No.2 (D2) - 37.50%,
- Defendant No.3 (D3) - 18.75%,
- and Defendant No.4 (D4) - 25%.

5. The said Preliminary Decree was further affirmed by this Court *vide* the Final Judgment and Decree dated 22.11.2010 (**Ex.P-3**).

6. Aggrieved thereof, the Defendant No.1 preferred appeals, being FAO(OS) Nos. 701-702/2010.

7. The Division Bench of this Court, by its Order dated 22.03.2011, confirmed the aforementioned share of each of the Defendants in the Suit Property, and further recorded the statements of the Defendants that the Suit Property shall be sold by them as a 'single unit', and the sale proceeds thereof shall be divided amongst them in accordance with their share determined by the Preliminary Decree.

8. It is the case of the Plaintiffs that in late 2011, while the said FAO(OS) Nos. 701-702/2010 were pending, the Defendants approached the Plaintiffs, representing that they were in urgent need of funds and were looking to sell the Suit Property in entirety. Relying on such representations, the Plaintiffs entered into an Agreement to Sell dated 03.01.2012 (**Ex. P-1**) (hereinafter referred to as 'the ATS'), with all the four Defendants, for a total Sale Consideration of Rs. 65 Crores. A sum of Rs. 10 Crores was paid by the Plaintiffs at the time of execution of the ATS, comprising of Rs. 2.50 Crores as earnest money and Rs. 7.50 Crores as part Sale Consideration.

9. It is averred that in furtherance of the ATS, the Defendants filed a Joint Compromise Application, being CM No. 664/2012 in the FAO(OS) Nos. 701-702/2010, apprising the Court of the ATS with the Plaintiffs. The appeals were accordingly disposed of on 13.01.2012, with the Court recording the existence of the ATS and noting the Plaintiffs as the identified buyers. Importantly, the Division Bench

also recorded the Defendants' joint undertaking to sell the Suit Property as a 'single unit' and to divide the proceeds in accordance with their respective shares.

10. It is averred that following the ATS, the Suit Property was converted from leasehold to freehold, and a Conveyance Deed dated 28.02.2013 (**Ex. DW-3/1**) was executed in favour of the Defendants.

11. It is averred that the Defendant No.2 acting for all Defendants, wrote to the Plaintiffs on 21.03.2013 (**Ex.PW1/D1**), proposing a meeting to finalise the execution of the Sale Deed for the Suit Property. The Plaintiffs responded by an email dated 04.04.2013 (**Ex.PW-1/D2**), agreeing to the meeting, and stating that the date for execution of the Sale Deed shall be fixed subject to the fulfilment of the necessary formalities envisaged under the ATS.

12. It is the case of the Plaintiffs that the meeting was held on 17.04.2013, however, the Defendant No.1 was conspicuously absent therein.

13. It is asserted that the Defendant No.1, by the letter dated 29.05.2013 (**Ex. P-10**), purported to unilaterally terminate the ATS in respect of his 18.75% share. Alongside the said letter, he sent three cheques, of Rs. 46.87 lakhs each, to the Plaintiffs, which represented refund of his shares of advance Sale Consideration, while forfeiting his share of earnest deposit made by the Plaintiffs under the ATS. In this letter, the Defendant no.1 asserted that the Plaintiffs had requested for 5-6 months more time to pay the balance sales consideration, which was not acceptable to the Defendant no.1.

14. The Plaintiffs promptly replied to the said letter by a letter dated

02.06.2013 (**Ex. P-11**), rejecting the purported termination of the ATS, and reiterating their willingness to complete the transaction. The Plaintiffs sought confirmation from the Defendant no.1 that whether the 'compulsory requirements' under Clause 2(d) of the ATS had been completed. The Plaintiffs also returned the cheques to Defendant No.1. The Plaintiffs also sought for a personal meeting with the Defendant no.1 for resolving the issues.

15. In spite of the above letter of the Plaintiffs and in response thereto, the Defendant No.1 issued another letter dated 07.06.2013 (**Ex. P-12**), re-stating the termination of the ATS and enclosing three fresh cheques representing refund of the balance Sale Consideration. He also alleged that the Plaintiffs lacked funds to complete the transaction. Importantly, in this letter, Defendant no.1 claimed that for transferring the title to the Plaintiffs, the only legal requirement was to convert the property to freehold from leasehold, which had been done on 28.02.2013. The Defendant no.1 did not answer if the other 'compulsory requirements' under Clause 2(d) of the ATS had been completed.

16. It is the case of the Plaintiffs that to the utter shock and surprise of the Plaintiffs, on 13.06.2013, the Defendant No.1 issued a public notice in the daily English newspaper- Times of India, publicly asserting termination of the ATS *vis-a-vis* his share (**Ex. P-13**).

17. It is averred that despite these developments, Defendant Nos. 2 to 4 continued to engage with the Plaintiffs, and a meeting was held on 29.06.2013 between Plaintiffs and the Defendant nos. 2 to 4, again without Defendant No.1.

18. It is only thereafter that, on 25.07.2013, the Defendants applied to the South Delhi Municipal Corporation (SDMC) for seeking mutation of the Suit Property, which was approved by the Competent Authority of the SDMC on 07.08.2013 (**Ex. P-14**).

19. Thereafter, Defendant No.3, *vide* letter dated 20.08.2013 (**Ex. P-15**), informed the Plaintiffs that all compulsory conditions under the ATS had been fulfilled, and requested the Plaintiffs to make the payment of the balance sale consideration within 70 days.

20. In their detailed response dated 05.09.2013 (**Ex. PW-1/1**), the Plaintiffs explained the untenable position created by Defendant No.1's unilateral termination of the ATS, and stated their continued readiness to proceed provided that the Defendant No.1 withdrew the termination letter and the public notice. It was also stated that one of the cheques returned by the Defendant No.1 had been kept in an interest bearing Suspense Account, reflecting the Plaintiffs' *bona fides* to complete the transaction. Herein itself, it is further relevant to note that the remaining two cheques were also presented for encashment by the Plaintiffs nos.2 and 3, however, as they had been presented beyond their period of validity, the same were returned unpaid by the bank.

21. The Defendant No.1 responded by his letter dated 13.09.2013 (**Ex. DW-1/3**), asserting the finality of his termination and advising the Plaintiffs not to engage with him further.

22. Nevertheless, the Plaintiffs issued further communications on 05.10.2013 and 01.11.2013 (**Ex.PW-1/3** and **PW-1/5**, respectively), reaffirming their willingness to perform the ATS and cautioning the Defendants against any third-party dealings in the Suit Property.

23. In turn, Defendant no.3 issued a legal notice dated 22.02.2014 (**Ex.DW3/11**), accusing the Defendant no.1 of high handed behaviour of obstructing the sale, and further asking for his cooperation in finding a new purchaser.

24. The Defendant Nos. 2 and 4 also served legal notices dated 26.02.2014 (**Ex. DW-3/12**) upon Defendant No.1, informing him that they, along with Defendant no.3, have been able to identify another buyer. They accused the Defendant no.1 of obstructing the sale to the Plaintiffs.

25. Defendant no.1 issued a common response letter dated 14.03.2014 (**Mark B**) to the Defendant nos.2 to 4, stating, *inter alia*, that he was willing to cooperate to find a new buyer for the Suit Property, however, the impasse on the issue of payment of earnest money/Sale Consideration needs to be sorted out first with the Plaintiffs, and that the sale of the Suit Property to a new buyer is not possible before the necessary cancellation documents are signed by the Plaintiffs.

26. The Defendant Nos. 2 to 4 filed CM No. 5283/2014 in the FAO(OS) Nos. 701-702/2010, wrongly asserting that the ATS with the Plaintiffs stood terminated due to non-payment by the Plaintiffs and further alleging encashment of the returned cheques. However, the said application was dismissed as not pressed on 25.03.2014 (**Ex. P-18**).

27. The Plaintiffs, in turn, filed a criminal complaint against the Defendants, alleging fraud and other offences (**Ex. PW-1/7**).

28. In retaliation, the Defendant No.1 instituted CS No. 244/2014,

titled ***Shri Arjun Som Dutt v. Shri Krishan Kumar Wadhwa & Ors.*** (**Ex. PW-3/5**), *inter alia* seeking to injunct the Plaintiffs from interfering with his share in the Suit Property. The Plaintiffs moved an application under Order VII Rule 11 of the Code of Civil Procedure, 1908 (in short, 'CPC'), seeking rejection of the said Plaint (**Ex. 3/1**). By an Order dated 24.02.2015 (**Ex. 3/4**), the said Suit was rejected, *inter alia*, on the grounds that the ATS was not validly terminated, compulsory requirements were not met, and the Plaintiffs had acted in good faith.

29. The Defendant no.1 challenged the said order by way of an appeal, being R.C.A. D.J. No. 20154/2016. The same, however, was dismissed *vide* order dated 31.07.2019 (**Ex. DW-1/P1**).

30. Defendant no.2 thereafter issued a legal notice dated 17.10.2014 to the Plaintiffs, stating therein that the stand of the Defendant no.1 withdrawing from the ATS was on frivolous ground and was not acceptable to the other Defendants. He informed the Plaintiffs that the other Defendants had, therefore, filed CM No. 5283/2014 seeking enforcement of the undertaking furnished by the Defendant no.1 before the Division Bench, which application was, however, withdrawn. He further stated that the Defendant nos.2 to 4 tried to convince the Defendant no.1 to abide by the ATS, however, such talks have failed. They, therefore, have filed an Execution Petition seeking execution of the Order dated 13.01.2012 in order to enable the parties, including the Defendant no.1, to give effect to the ATS. Therefore, clearly the Defendant nos.2 to 4 changed their stand and now accused the Defendant no.1 of not abiding by the terms of the settlement.

31. The Defendant nos.2 to 4 then filed the Execution Petition, being Ex.P. 389/2014 (**Ex. P-19**), before this Court, wherein, by an Order dated 10.09.2015 (**Ex. P-20**), the Defendant no.1 was permitted to ascertain the price of the Suit Property. The said execution was withdrawn on 22.01.2016 post the filling of the present suit by the Plaintiffs.

32. Faced with the above, the Plaintiffs addressed a legal notice dated 22.10.2015 (**Ex.P-21**), terminating the ATS and calling upon the Defendants to return the amount advanced to the Defendants, including the earnest money, under the ATS along with interest. The Plaintiffs, thereafter, filed the present suit.

Proceedings in the Suit and during the Suit

33. This Court, by its *ad interim* Order dated 18.11.2015, while issuing summons in the Suit, further directed that in case the Defendants sell the Suit Property, then, out of the sale consideration received, firstly, an amount of Rs.15 crores will be deposited by them in this Court.

34. As noted hereinabove, the Defendant no.2 had withdrawn Ex.P. 389/2014 on 22.01.2016. The Defendant nos. 2 to 4 have now jointly filed an Execution Petition, being Ex.P 17/2016, again seeking a direction to the Defendant no.1 to act in terms of the Decree dated 13.01.2012 and for the sale of Suit Property by public auction. This Court, by an Order dated 12.11.2018 passed in the said Execution Petition, directed the auction of the Suit Property. The Defendant no.1 challenged the said order by way of an appeal, being EFA (OS)

1/2019, which was disposed of by a Division Bench of this Court *vide* its Order dated 17.11.2022, directing the Suit Property to be sold through public auction with the first charge on the Sale Consideration being towards the Stamp Duty, which shall be deposited by the Court Auctioneer with the Registry of the Court. The Defendant no.1 still not being satisfied, challenged the same by way of a Special Leave Petition, being SLP (C) No. 6967/2023, which was dismissed by the Supreme Court on 28.04.2023.

35. The Suit Property was eventually sold by way of an auction for a sum of Rs. 67 crores on 10.02.2025.

36. In the meantime, this Court by a detailed Judgment dated 22.02.2018, passed a Preliminary Decree on an application filed by the Plaintiffs under Order XII Rule 6 of the CPC, directing the Defendants to pay to the Plaintiffs a sum of Rs.7,03,12,500/- (being Rs.7,50,00,000/- minus Rs.46,87,500/- already received by the Plaintiffs) on or before 02.07.2018. This Court, however, at that stage, declined the prayer of the Plaintiffs for interest as the rate of interest had not been stipulated either in the ATS or in any other contemporaneous document. The Court clarified that the issue of interest shall be considered at the stage of final disposal of the Suit, after considering the evidence led.

37. As the Defendants failed to pay the above amount, the Plaintiffs were forced to file Ex.P. 61/2018, wherein, after much delay, the Plaintiffs were able to recover the said amount from the Defendants and this Court, *vide* its order dated 19.10.2022, recorded the satisfaction of the Partial Decree.

Written Statements

38. In the Written Statement filed by the Defendant no.1, the Defendant no.1 pleaded that the ATS had been rightfully terminated by him after forfeiting the 25% of the advance payment as earnest money. It was pleaded that the mutation from the MCD does not confer any title in the property and, therefore, lack of mutation of the Suit Property was only an excuse of the Plaintiffs to avoid the performance of the ATS. It was pleaded that the Plaintiffs have also failed to furnish any proof of having a requisite balance Sale Consideration available with them to perform their obligation under the ATS.

39. In the Written Statement, the Defendant no.1 further raised a claim of set-off against the Plaintiffs, claiming therein that with the termination of the ATS, the Plaintiffs had no right over the Suit Property, however, continued to claim themselves as the owner of the Suit Property with the right to sell the same to a third party. The Plaintiffs also issued advertisement in newspapers through their agents/brokers, offering to sell the Suit Property, including the share of the Defendant no.1 in the same. As a reason thereof, the Defendant no.1 was prevented from selling his share in the Suit Property after the termination of the ATS, thereby incurring a loss. The Defendant no.1 asserted that he would have been able to sell his share in the Suit Property for Rs.10,68,76,750/- to a third party and, therefore, is entitled to interest at the rate of 8% per annum on the same, from the Plaintiffs with effect from 05.09.2013, amounting to Rs.1,71,00,280/-,

which the Defendant no.1 for purposes of claim of set-off limits to Rs.93,75,000/-.

40. The Defendant nos.2 and 4 filed their Written Statement also asserting that with the conversion of the Suit Property to free hold on 28.02.2013, the Plaintiffs were under an obligation to pay the balance Sale Consideration to the Defendants within 70 days therefrom. The Plaintiffs, however, did not pay the balance Sale Consideration and instead were trying to sell the Suit Property to a third party by representing that they had acquired title and interest in the Suit Property. It was asserted that even assuming that the mutation of the property was also an essential condition, the same stood completed on 07.08.2013, however, the Plaintiffs even after being informed about the same, did not show any interest in the purchase of the Suit Property, but rather tried to wriggle away from their obligations under the ATS.

41. Defendant no.3 in her Written Statement, also took a stand that the mutation of the Suit Property by the MCD does not confer a title and, therefore, lack of mutation could not give a right to the Plaintiffs to not pay the balance Sale Consideration in terms of the ATS. She asserted that even after the mutation had been obtained on 07.08.2013, the Plaintiffs did not come forward to pay the balance Sale Consideration, and to perform their obligations under the ATS.

Issues

42. This Court, *vide* its Order dated 26.07.2018 read with the Order dated 28.01.2019, framed the following issues in the suit:

"1. Whether the Plaintiffs are entitled to pendent lite and future interest upon the partially decreed amount of Rs.7.50 crores? If so, at what rate, and for what period? ***OPP***

2. Whether the Plaintiffs are entitled to a decree for, recovery of balance principal, amount of Rs.2.50 crores? Whether Plaintiffs are entitled to pendent lite and future interest, thereupon, and if so, then at what rate and for what period? ***OPP***

3. Whether the Plaintiffs are entitled to a decree of recovery of Rs.7,10,98,438/- being accrued interest @ 15% p.a. from 03rd January, 2012 till date of filing of suit? ***OPP***

4. Whether the Plaintiffs failed to pay the balance consideration within the stipulated time as per the terms of the agreement dated 03rd January, 2012? ***OPD***

5. Whether the Defendants are entitled to forfeit the 25% of the earnest money i.e. Rs.2.5 crores in terms of the agreement dated 03rd January, 2012? ***OPD***

Whether the Defendant no.1 is entitled to the set off of the amounts as claimed in the written statement against the claims of the Plaintiffs in the suit? OPD1"

Evidence led by parties

43. The Plaintiffs examined Plaintiff no.2 as PW-1, and Plaintiff no.3 as PW-6, in support of their claim in the Suit. The Plaintiffs also examined PW-2-Shri Rakesh Kumar, J.A. Record Room, Delhi High

Court, New Delhi; PW-3-Shri Abhya Kishore Kujur, Junior Judicial Assistant, District and Sessions Judge's Office, Saket District Court, New Delhi; PW-4-Shri Devender Prasad Singh, Area Inspector, South Delhi Municipal Corporation Assessment & Collection Department, Central Zone; and PW-5-Shri Rajesh Kumar Singh, Head Constable, in support of their contentions in the Suit.

44. As far as the Defendants are concerned, Defendant nos.1, 2 and 3 appeared as witnesses, as DW1, DW2 and DW3 respectively. Defendant no.4 did not enter the witness box.

Submissions of the learned counsel for the Plaintiffs

45. Mr.Samar Bansal, the learned counsel for the Plaintiffs, asserts that in terms of the ATS, the Suit Property was to be sold as a 'single unit'. He submits that the Plaintiffs paid a sum of Rs.10 crores to the Defendants (Rs.2.50 crores as earnest money and Rs.7.50 crores as part Sale Consideration), at the time of the execution of the ATS. He submits that in terms of Clause 2 (b) of the ATS, the Plaintiffs were required to pay the balance sales consideration within 70 days from the date of completion of 'compulsory requirements', as set out in Clause 2(d) of the ATS, by the Defendants. He submits that in terms of Clause 2(d) of the ATS, the Defendants were to obtain mutation of the Suit Property in their names from the MCD and the DDA. Placing reliance on the judgment of this Court in ***K.S. Bakshi & Anr. v. State & Anr***., 146 (2008) DLT 125, and of the Court of Appeal in ***Lombard North Central PLC v. Butterworth***, (1987) 2 WLR 7, he submits that the parties having stipulated the mutation of the Suit Property to be an

essential condition for the obligation of the Plaintiffs to pay the balance consideration to arise, the Defendants cannot now plead that the mutation of the property was not essential for such obligation to arise.

46. He submits that in terms of Clause 3 of the ATS, the earnest money can be forfeited by the Defendants only if the Plaintiffs failed to pay balance Sale Consideration within the stipulated time despite the Defendants being ready and willing to perform the ATS. He submits that, therefore, the termination of the ATS by the Defendant no.1, *vide* the notice dated 29.05.2013, before the mutation of the Suit Property, was illegal and the earnest money was not entitled to be forfeited by the Defendants. The same, therefore, deserves to be refunded to the Plaintiffs by the Defendants along with interest.

47. He submits that though the mutation of the Suit Property was eventually granted by the SDMC on 07.08.2013, and the information thereof was given by the Defendant no.3 to the Plaintiffs, *vide* the letter dated 20.08.2013, the same would still not give rise to an obligation on the Plaintiffs to pay the balance Sale Consideration, as the Defendant no.1 did not withdraw his unilateral termination of the ATS.

48. He submits that the Defendant no.1 did not have a right to terminate a part of the ATS only *qua* his share in the Suit Property. He reiterates that as the Suit Property was agreed to be sold as a single unit, even the termination of the ATS could have been done only jointly by the Defendants.

49. He submits that the deposit of the three cheques that had been

given by the Defendant no.1, along with his termination notice and thereafter, would also not amount to an acceptance of termination of the ATS by the Plaintiffs, as the same was without prejudice to the rights of the Plaintiffs, and proceeds of one of the cheques had been kept in a separate Suspense Account to earn interest, while the remaining two of the three cheques did not even get honoured on presentation.

50. He submits that the Plaintiffs do not have to show the presence of funds to pay the balance Sale Consideration under the ATS, as the time for paying the same had not arisen. He submits that even otherwise, the Plaintiffs were always ready and willing to perform their obligations under the ATS, and in this regard, has drawn my attention to various letters, a reference to which has been given hereinabove.

51. He submits that the Plaintiffs are also entitled to the interest as the money received by the Defendants has been used by the Defendants for commercial gains. He submits that the refund along with interest is also a statutory right of the Plaintiffs under Section 55(6)(b) of the Transfer of Property Act, 1882 (in short, 'TP Act'). He places reliance on the Judgment of the Supreme Court in ***DDA v. Skipper Constructions Co. Pvt. Ltd. & Ors.***, (2000) 10 SCC 130.

52. He submits that the reliance of the learned counsel for the Defendant no.1 on Section 3(1)(b) of the Interest Act, 1978 (in short, 'Interest Act') to contend that the interest shall be payable only from the date of legal notice of demand, that is, 22.10.2015, is also fallacious inasmuch as the said notice demanded interest from the

Defendants from the date of payment of the amount under the ATS by the Plaintiffs. In support, he places reliance on ***B.V. Radhakrishna v. Sponge Iron India Ltd.***, (1997) 4 SCC 693.

53. On the claim of the Defendant no.1 to a set-off, he submits that Defendant no.1 himself has been creating hurdles in the sale of the Suit Property not only to the Plaintiffs (as is also admitted by the Defendant nos.2 to 4), but also to third parties in the Execution Petitions, which have been referred hereinabove. He submits that, therefore, the claim of interest that the Defendant no.1 may have earned had the Suit Property being sold, is completely illusionary and without basis. He submits that so is the alleged claim over the share of the Defendant no.1, had the Suit Property been sold, for which no evidence was led by the Defendant no.1.

54. He prays that the Suit, therefore, be Decreed, directing the Defendants to return Rs.2.50 crores along with interest to the Plaintiffs. The Defendants be also directed to pay interest on Rs.7.50 crores from the date of its payment by the Plaintiffs, by first adjusting the amount paid/recovered from the Defendants towards interest due thereon. The Plaintiffs be also granted costs of the Suit.

Submissions of the learned counsel for Defendant no.1

55. Mr.Sanjeev Mahajan, the learned counsel appearing for Defendant no.1, on the other hand, while reiterating that the mutation of the property by the Defendants was not essential for the obligation of the Plaintiffs to pay the balance sale consideration to arise, submits that in any case, the mutation was granted by the MCD on 07.08.2013,

and the same was informed by the Defendant no.3 to the Plaintiffs *vide* the letter dated 20.08.2013. In terms of Clause 2(d) of the ATS, the Plaintiffs were under an obligation to pay the balance Sale Consideration to the Defendants within 70 days of the same. In terms of Clause 2(c) of the ATS, the Plaintiffs were to send a copy of the demand draft got prepared by them to show their readiness and willingness to perform their obligations under the ATS to the Defendants at least three days in advance of the said date. The Plaintiffs, however, failed to do so in spite of having been informed of the mutation of the Suit Property in favour of Defendants. He submits that, therefore, in terms of Clause 3 of the ATS, the Defendants were entitled to forfeit the earnest money paid by the Plaintiffs.

56. He submits that the Plaintiffs cannot rely upon the termination of the ATS by the Defendant no.1 to escape their above obligations, as they continued to assert their rights under the ATS even thereafter. In support, he places reliance on the orders passed in the suit and other proceedings filed by the Defendant no.1 against the Plaintiffs.

57. He further submits that by presenting the cheques issued by the Defendant no.1 for return of his share of advance Sale Consideration, the Plaintiffs, in fact, accepted the termination of the ATS. Though, the Plaintiffs claim that the amount of the cheque, which was encashed on such presentation, has been deposited by them in a separate account, details thereof have not been provided to the Defendants or this Court.

58. Placing reliance on the judgment of the Supreme Court in ***Srihari Hanumandas Totala v. Hemant Vithal Kamat & Ors.***, (2021)

9 SCC 99, he submits that rejection of a plaint under Order VII Rule 11 of the CPC, cannot act as a *res judicata* in terms of Section 11 of the CPC. Therefore, any finding in the order rejecting the plaint filed by the Defendant no.1 or further proceedings there-against by the Defendant no.1, cannot act as a *res judicata* against the Defendant no.1.

59. Placing reliance on the Judgment of the Supreme Court in ***U.N. Krishnamurthy (since deceased) through Legal Representatives v. A.M. Krishnamurthy***, (2023) 11 SCC 775, he submits that the Plaintiffs have to prove the availability of funds with them to meet their obligations under the ATS, and having failed to do so in the present case, the Defendants were entitled to forfeit the earnest money.

60. Placing reliance on Section 3 of the Interest Act, he submits that the ATS not having prescribed that the amount of advance Sale Consideration shall be refunded by the Defendants to the Plaintiffs along with interest, interest on the same shall be payable only from the date of the legal notice of demand for the same by the Plaintiffs, that is, 22.10.2015. He submits that even otherwise, the rate of interest, in terms of Section 2(b) of the Interest Act, can be the rate of interest paid by the Schedule Bank on a savings account. He submits that no proof of the same has been filed by the Plaintiffs and, therefore, they are not entitled to payment of any interest. He also places reliance on Section 34 of the CPC in this regard.

61. He further submits that the Defendant no.1 is also entitled to his claim for set-off inasmuch as, in spite of validly terminating the ATS

and the Plaintiffs not being able to prove their readiness and willingness to perform their obligations under the ATS, the Plaintiffs continued to assert a right over the Suit Property, thereby preventing it from being sold to a third party. He submits that had the Suit Property been sold to a third party, the Defendant no.1 would have earned his share of Rs.10,68,76,750/- on the same. The Plaintiffs are, therefore, liable to pay interest over the said amount with effect from 05.09.2013 till 22.10.2015, which is when they issued the legal notice declaring the termination of the ATS by them. The Defendant no.1, however, limits the claim of set-off to Rs.93,75,000/-.

Submissions on behalf of the learned senior counsel for Defendant no.4

62. Mr.B.B. Gupta, the learned senior counsel appearing for Defendant no.4, submits that the Defendant nos.2 to 4 were always ready and willing to perform their obligations under the ATS. They complied with all the compulsory requirements in terms of Clause 2(d) of the ATS, including obtaining mutation of the Suit Property from the SDMC on 07.08.2013. He submits that the termination of the ATS unilaterally by the Defendant no.1 was illegal. However, the Defendant nos.2 to 4 took all steps, including filing Execution Petitions, to force the Defendant no.1 to perform his obligations under the ATS. The Defendant nos.2 to 4, therefore, cannot be saddled with a liability for the acts of the Defendant no.1.

63. He submits that the Plaintiffs neither challenged the illegal termination of the ATS by the Defendant no.1, nor filed a suit for

seeking Specific Performance of the ATS. It is only after the suit filed by the Defendant no.1 had been dismissed, that by the notice dated 22.10.2015, the Plaintiffs terminated the ATS. As on that day, in fact, the Plaintiffs could have sought Specific Performance of the ATS, which they did not do as they were not in a position to comply with the terms of the ATS. He submits that, therefore, forfeiture of the earnest money by the Defendant nos.2 to 4 was justified. In support, he places reliance on the judgment of the Supreme Court in ***Satish Batra v. Sudhir Rawal***, (2013) 1 SCC 345.

Submissions of the learned counsels for Defendant nos.2 and 3

64. The learned counsels for Defendant nos.2 and 3 adopted the submissions made by the learned senior counsel for Defendant no.4.

Analysis and findings:

65. I have considered the submissions made by the learned counsels for the parties and have also perused the records.

66. At the outset, I would first take note of the terms of the ATS. In the ATS all the Defendants have been collectively referred to as the 'Vendors'. The obligations are also placed on them collectively, and not individually. It is not a sale of the Suit Property in parts or as individual share of the Defendants, but as a whole.

67. The relevant terms of the ATS are reproduced hereinbelow:-

> *"1. That in consideration of payment of the total sum of Rs. 65,00,07,000/- (Rs. Sixty Five Crores Seven. Thousand Only), to be paid by the Vendees to the Vendors in the manner as stipulated hereunder and upon the terms and conditions contained herein, the Vendors*

do hereby agree to sell, convey, transfer and assign the said property, (fully described above), alongwith ownership rights in the said plot of land measuring 1150. Sq. Yds., with all fittings, fixtures, connections, structure' standing thereon, free from all encumbrances, unto the Vendees.

2. (a) That out of the total consideration of Rs. 65,00,07,000/- (Rs. Sixty Five Crores Seven Thousand Only), the Vendees have paid to the Vendors a sum of Rs. 10,00,00,000/- (Rs. Ten Crores Only), (i.e. Rs. 2,50,00,000/- as earnest money and Rs. 7,50,00,000/- as part sale consideration), at the time of execution of this Agreement to Sell in the following manner:-

Rs. 83,33,333/- vide Cheque No. 671011, dt. 03.01.2012

Rs. 83,33,333/- vide Cheque No. 671526, dt. 03.01.2012

Rs.83,33,334/- vide Cheque No. 672007, dt. 03.01.2012

all favouring Ms. Roop Talwar;

Rs. 1,25,00,000/- vide Cheque No. 671008, dt. 03.01.2012

Rs. 1,25,00,000/- vide Cheque No. 671527, dt. 03.01.2012

Rs. 1,25,00,000/- vide Cheque No. 672008, dt. 03.01.2012

all favouring Shri Vivan Som Dutt;

Rs. 62,50,000/- vide Cheque No. 671012, dt. 03.01.2012

Rs. 62,50,000/- vide Cheque No. 671530, dt. 03.01.2012

Rs. 62,50,000/- vide Cheque No. 672011, dt. 03.01.2012

all favouring Shri Arjun Som Dutt;

Rs. 62,50,000/- vide Cheque No. 671013, dt. 03.01.2012

Rs. 62,50,000/- vide Cheque No. 671531, dt. 03.01.2012

Rs. 62,50,000/- vide Cheque No. 672012, dt. 03.01.2012

All drawn on Bank of Maharashtra, N.D.S.E.-I, Branch, New Delhi

(b) The balance sale consideration of Rs.55,00,07,000/- (Rs. Fifty Five Crores Seven Thousand Only), shall be paid by the Vendees to the Vendors on or before 30.06.2012, or, within 70 (seventy) days from the date of completion of compulsory requirements by the date of completion of compulsory requirements by the Vendors, whichever is later, simultaneously upon receipt of the balance sale consideration, the Vendors shall hand over the vacant physical possession of the said property to the Vendees and at the same time all the deeds and documents as may be required by the Vendees for the conveyance, transfer and sale of the said property will also be executed and registered by the Vendors in favour of the Vendees or their nominee.

c) That the Vendees hereby confirm and undertake to prepare a pay order for the balance sale consideration atleast 3 (three) days before due date of completion and send photocopies of the pay orders to the Vendors so as to enable the Vendors to be present for execution and registration of the sale deed.

d) That before due date of final payment, the Vendors undertake to complete the following Compulsory Requirements, at their own costs and expenses;

i) Obtain appropriate order for the sale of the said property to the Vendees from the Hon'ble High Court in the partition Suit bearing No. 206 of 2007, titled as "Smt. Roop Talwar Vs. & and share the Shri Arun Som Dutter others than preliminary sale proceeds in terms of decree in the said partition suit as also. mentioned hereinabove

ii) Get the said property mutated in their own names in the records of D.D.A., and also in the records of M.C.D.

iii) Get the said property converted into freehold in their joint names and also get the freehold Conveyance Deed registered in their favour;

iv) Pay and clear, all dues and demands of house tax, water, electricity, lease money, ground

rent and other dues and demands payable to any concerned authority/ department in respect of of the said property for the period upto date of handing over possession to the Vendees and provide upto date payment receipts thereof to the Vendees;

v) Get the Special Power of Attorney executed by Ms. Roop Talwar in favour of Shri Gurvirendra Singh Talwar duly authenticated from Collector of Stamps, New Delhi, within 7 (seven) days from the date hereof;

herein referred to as 'THE COMPULSORY REQUIREMENTS'. Upon completion of the Compulsory Requirements, the Vendors will inform the Speed Post at the residential "skkwadhwa@gmail.com" and Speed Post address of the Vendees as mentioned above.

3. That time of payment of the balance sale consideration is the essence of this agreement for sale and it is upon this assurance and undertaking of the Vendees, the Vendors have agreed to sell the said property to the Vendees. In the event the Vendees fail to make the balance payment within the stipulated period, despite the Vendors being ready, willing and having complied terms of this agreement, the Vendors shall forfeit a sum of Rs. 2,50,00,000/- (Rs. Two Crores Fifty Lacs Only), paid under this Agreement and the balance shall be refunded immediately by way of demand drafts to the Vendees. The Vendees shall upon such refund have no objection and claim to the said property and the Vendors shall be free to sell the said property to any other prospective buyer(s) without any let or hindrance from the Vendees.

******

8. That the Vendors have offered and agreed to sell the said property to the Vendees by further representing:

a) That the said property is free from all liens, mortgages, tenancies, charges, lispendens (except the partition suit as mentioned hereinbefore), encumbrances or any restrictions and there is no notices of

attachment, acquisition or requisition or notices thereto, relating to the said property.

b) That, the Vendors are the exclusive & absolute owners and in possession of the said property and have good and marketable title thereto and none else other than the Vendors has any interest, share, right, title thereto.

c) That there are no outstanding government dues or dues of any local authority of M.C.D., D.D.A., electricity authority, water department etc. whatsoever n nature including the attachment by the Income Tax Authorities or under any law in force, in respect of the said property.

d) That, the Vendors, have not entered into any Agreement with any person (s) or with any bank (s) or financial institution for the sale of the said property or any part thereof.

e) That there is no legal impediment or bar (except, however the terms and conditions of the perpetual sub-lease conditions of dated 19.05.1965), whereby the Vendors can Vendors can be prevented from selling transfer vesting the absoluting transferring and property, in favour of the Vendees.

f) That there is no notice of default or breach on the part of the Vendors or their pre-decessors in interest of any provisions of law in respect of the said property.

g) That as stated above that upon demise of Major General D. Som Dutt, the said M/s D. Som Dutt HUS stood dissolved and the Vendors herein are holding the said property as absolute owners thereof and in terms of the shares as mentioned hereinabove and have full authority and power to sell the said property and receive the sale consideration in proportion to their respective shares as mentioned hereinabove."

68. A reading of the above Clauses would show that the Suit Property was agreed to be sold by the Defendants to the Plaintiffs as one whole and as one single unit. The sales consideration was for the

entire Suit Property, though was to be paid proportionately to the Defendants in their respective shares. This was also admitted by the Defendant no.1 in his cross-examination, as under:-

> *"Q8. Is it correct that in the agreement to sell dated 03.01.2012 (Ex.P1), wherever the term "Vendors " is used it means that all 4 (four) Defendants are being collectively referred to?*
> *Ans. Yes.*
> *Q9. Is it correct that Ex.P1 was for sale of the entire Suit Property comprising super structure and plot of land measuring 1159 Sq.Yds.?*
> *Ans. Yes. It was not for portions.*
> *Q10. Is it correct that upon payment of balance sale consideration the possession of the entire Suit Property was to be collectively handed over by all 4 Defendants to the Plaintiffs?*
> *Ans. Yes.*
> *Q11. Is it correct that upon payment of balance sale consideration, the Sale Deeds were to be executed collectively by all 4 Defendants in favour of the Plaintiffs?*
> *Ans. Yes."*

69. Out of Rs.10 crores that was paid by the Plaintiffs to the Defendants at the time of execution of the ATS, Rs.2.50 crores reflected the earnest money, while Rs.7.50 crores was the part Sale Consideration. In terms of Clause 2(b) of the ATS, the balance Sale Consideration was payable by the Plaintiffs to the Defendants on or before 30.06.2012 or within 70 days from the date of completion of 'compulsory requirements' by the Defendants, whichever is later.

70. Clause 2(d) (ii) stipulated one of the 'compulsory requirements', as the Defendants to obtain mutation of the Suit Property in their own names in the records of the DDA and also in the

records of MCD. It further stipulated that on completing all the 'compulsory requirements', the Defendants shall inform the Plaintiffs by way of e-mail at the given email address and by speed post. Clause 2(c) states that the Plaintiffs shall confirm and undertake to prepare a pay order for the balance Sale Consideration, at least three days prior to the 'due date' of completion, and send photocopies of the same to the Defendants. It is only on failure of the Plaintiffs to make the balance payment 'within stipulated period', despite the Defendants being ready, willing and 'having completed terms of this agreement' that the Defendants shall be entitled to forfeit the earnest money while 'the balance shall be refunded'.

71. Therefore, obtaining the mutation of the Suit Property in their own names by the Defendants, was a pre-condition for the obligation of the Plaintiffs to pay the balance sale consideration to arise. Admittedly, the Defendants applied for mutation of the Suit Property in their own names to the SDMC only on 25.07.2013. The same was allowed by the SDMC on 07.08.2013. The obligation of the Plaintiffs to pay the balance Sale Consideration, in terms of the ATS, therefore, would arise only within 70 days of the completion of the mutation of the Suit Property by the SDMC in the names of the Defendants.

72. However, even prior to the said obligation arising, the Defendant no.1 terminated the ATS, not as a whole but only *qua* his own share, *vide* a letter dated 29.05.2013, and even issued a public notice for the same on 13.06.2013. The termination was, therefore, premature, as the obligation of the Plaintiffs to pay the balance sale consideration had not arisen as on the said date. It was even otherwise

illegal, as it was only by the Defendant no.1 and not by the other Defendants.

73. The Defendant no.1 has pleaded that for transfer of title of the Suit Property, the mutation of the same in the records of the SDMC in favour of the Defendants was not essential. Even in his cross-examination, he maintains the same as under:-

> *"Q14. Is it correct that Clause 2 (d) of **Ex.P1**, contains 5 prerequisites that were to be completed by Defendants prior to occasion arising for Plaintiffs' to tender balance sale consideration?*
> *Ans. Yes. Vol. This was something very minor and would not have obstructed sale in anyway.*
> *Q15. Is it correct that all 5 prerequisites mentioned in the last question have been described at 3 places in clause 2(d) of Ex.P1 as being 'compulsory requirements'?*
> *Ans. Yes. Vol. It was very minor.*
> *Q16. I put it to you that all 5 prerequisite conditions were compulsory and it was not open to any Defendant to unilaterally decide that some were optional. What do you have to say?*
> *Ans. Yes. It was very minor and more than a year had passed. The Plaintiffs were using this as an excuse to find another buyer."*

74. I cannot agree with the above submission. Once the parties have stipulated the mutation of the Suit Property as a 'compulsory requirement', that is, an essential condition for the obligation of the Plaintiffs to pay the balance sale consideration to arise, the Defendants cannot unilaterally change the terms of the Agreement by contending that the mutation was not essential or was only a minor condition, non-compliance of which would not have any effect on the obligation of the Plaintiffs to arise.

75. In ***Lombard North Central PLC*** (supra), the Court of Appeal has explained that the parties to an agreement may by express provision in the agreement make a term a condition of contract, even though in normal parlance it may not be so. Breach of such condition is treated as going to the root of the contract, entitling the injured party to elect to terminate the contract and claim damages, whatever the gravity of the breach. I quote from the judgment as under:-

> *"....The fourth was not, I believe, challenged before us, but I would in any event regard it as indisputable. That there exists a category of term, in respect of which any breach whether large or small entitles the promisee to treat himself as discharged, has never been doubted in modern times, and the fact that a term may be assigned to this category by express agreement has been taken for granted for at least a century: see, by way of example only, Bettini v. Gye (1876) 1 Q.B.D. 183, 187; Hongkong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd. [1962] 2 Q.B. 26, 70; Financings Ltd. v. Baldock [1963] 2 Q.B. 104; Photo Production Ltd. v. Securicor Transport Ltd. [1980] A.C. 827, 849E; Bunge Corporation, New York v. Tradax Export S.A., Panama [1981] 1 W.L.R. 711, 715, 719; Cheshire & Fifoot, Law of Contract, 11th ed. (1986), p. 148."*

76. The above dictum was also followed by this Court in ***K.S Bakshi*** (supra), by holding as under:

> *"**27.** Thus an obligation which is a condition, if breached, hits at the root of the contract and by contract it is open for the parties to make a term a condition which otherwise under ordinary circumstances it may not be."*

77. Even otherwise and as noted hereinabove, the termination of the

ATS could not have been done solely by the Defendant no.1. The Defendant no.1 in order to justify the termination of the ATS, has also contended that in the meeting held between the Plaintiffs and the Defendant nos.2 to 4 on 17.04.2013, the Plaintiffs had sought for more time to pay the balance sale consideration. It is, however, admitted that the Defendant no.1 did not attend this meeting. In his cross-examination, he stated that this fact was informed to him by his sister, however, also admitting that none of the other Defendants had stated this fact in their contemporaneous correspondence to the Plaintiffs. This statement at best is therefore, only a hear-say and cannot be admitted in evidence.

78. The Defendant no.1 also relied upon the e-mail dated 04.04.2013 addressed by the Plaintiffs, arguing that it made a request for seeking further time to make the payment of the balance sale consideration. I cannot accept the said reliance. The e-mail does not contain any such request, as would be evident from the reproduction thereof as under:-

> *"Dear Vivan,*
> *This is further to your emails dated 11 March 2013 and 21 March 2013, and our email dated 4 March 2013.*
> *At the outset, I apologize for the delay in getting back to you – my mother in law who was admitted on 18 March 2013 in ICU with Septicemia could not be saved in spite of all the efforts of the doctors and ultimately she passed away on 27 March 2013. Due to this reason my brothers and I were away in Calcutta for the last rites. I have just returned a day ago. I have to again go back to Calcutta to attend some further religious rites - and I will be back in Delhi next week. Would it be*

possible to fix up a meeting at the earliest convenient to all the parties any time next week, so that we can take this forward? In the meanwhile, we can take steps to ensure that we both fulfil requisite compliances at our respective ends. The date of execution of the Sale Deed can then be fixed in accordance with the agreement and our understanding.
At the same time, you will appreciate that we have consistently co-operated with you over the last one and a half years that it has taken to process the matter, (while I understand that this was occasioned by various reasons - you will recall that the original understanding was about 4 to 6 months). I hope you will keep this mind as we proceed further.

Best Regards,
KK Wadhwa"

79. In fact, from the narration of facts given hereinabove, it is evident that even the Defendant nos.2 to 4 have blamed the Defendant no.1 of unilaterally and illegally terminating the ATS and creating hurdles in the due performance of the ATS by the parties.

80. From the above, I hold that the termination of the ATS by the Defendant no.1 was contrary to the terms of the ATS and, therefore, illegal.

81. The Defendant no.1 has submitted that the mutation of the Suit Property having been obtained on 07.08.2013, the Plaintiffs should have made the payment of the balance sale consideration within 70 days of the communication of the said fact to them. I do not find any merit in the same. Admittedly, in spite of asking by the Defendant nos.2 to 4 to abide the terms of the ATS, the Defendant no.1 not only refused to do so, but in fact, also went ahead and filed a suit, being CS

No. 244/2014, seeking a restraint against the Plaintiffs from interfering in his rights in the Suit Property. The said suit came to be rejected only on 24.02.2015, which order was also challenged by the Defendant no.1, and which challenge was rejected on 31.07.2019, that is, after the filing of the present suit. In view of the same, to expect that the Plaintiffs should have paid or offered to pay the balance Sale Consideration, would be completely absurd and not sustainable. In fact, the Plaintiffs till the notice terminating the ATS, that is, 22.10.2015, were not only contesting the suit filed by the Defendant no.1, but also calling upon the other Defendants to persuade the Defendant no.1 to honour the terms of the ATS, with the Defendant nos.2 to 4 expressing their helplessness for the same.

82. The submission of the Defendants that by presenting the cheques sent by the Defendant no.1 refunding the advance Sale Consideration to the Plaintiffs, the Plaintiffs have accepted the termination of the ATS, is also fallacious. The Plaintiffs, simultaneous to the presentation of the cheques for encashment, addressed a letter dated 05.10.2013, informing the Defendants that they are ready and willing to perform their obligations under the ATS. The Plaintiffs *inter alia* further stated that without prejudice to their rights and contentions, they are depositing the cheques issued by the Defendant no.1 and will be retaining the amount so received in a separate account to demonstrate their *bona fides* and as indication of their readiness and willingness to move forward with the ATS. Though much was tried to be made out by the learned counsel for the defendant no. 1 by contending that this letter was posted only on 10.09.2013, it would not

make any difference as by the presentation of the cheques, it cannot be said that the Plaintiffs accepted the termination of the ATS or waived its performance by the Defendants.

83. Interestingly, two out of the three cheques issued by the Defendant no.1, were returned by the bank as they had been presented beyond their validity period. The Defendant no.1 knew of this fact and in its letter dated 13.9.2013, informed the Plaintiffs that he would keep this money in his own account and shall pay the same to the Plaintiffs only on receiving an acknowledgment from the Plaintiffs that the ATS stands terminated. The Defendant no.1, therefore, was well aware and was himself of the opinion that the Plaintiffs have, at least till that date, not accepted the termination of the ATS. I quote from the letter as under:

> *"Since you only want the money to secured as such in respect of the two cheques which were presented after due dates, I assure you that the same are lying in my account and I would immediately issue fresh cheques on receiving an acknowledgement from your side that the same are towards refund of the money paid by you at the time of agreement to sell and pursuant to the termination of the said agreement to sell. In addition I would also require the earlier cheques which are lying with you to issue fresh cheques."*

84. The Defendant no.1 has further asserted that the Plaintiffs have failed to give the account details in which the proceeds of one of these cheques has been kept by them as a suspense account. This would also not make any difference to the facts of the case, for the reasons which have been stated hereinabove. As held earlier, the presentation

of the cheques does not show the intent of the Plaintiffs to accept the termination of the ATS by the Defendant no.1.

85. For a discharge of a contract by waiver, such waiver must be unambiguous and clear and equivocal. The Court must consider the conduct of a party, while considering the plea of waiver. I may draw support from the Judgment of Supreme Court in ***Kalpraj Dharamshi & Anr. v. Kotak Investment Advisors Ltd. & Anr.***, (2021) 10 SCC 401, wherein, the Supreme Court, while examining the plea of waiver, though in different context, held as under:

> *"**117.** The word "waiver" has been described in Halsbury's Laws of England, 4th Edn., Para 1471, which reads thus:*
>
> > *"1471. Waiver.—Waiver is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct. ... A person who is entitled to rely on a stipulation, existing for his benefit alone, in a contract or of a statutory provision, may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waiver of this kind depends upon consent, and the fact that the other party has acted on it is sufficient consideration.*
>
> *It seems that, in general, where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, so as to alter his position, the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him, but he must*

accept their legal relations subject to the qualification which he has himself so introduced, even though it is not supported in point of law by any consideration."

118. *In Halsbury's Laws of England, Vol. 16(2), 4th Edn., Para 907, it is stated:*

> *"The expression "waiver" may, in law, bear different meanings. The primary meaning has been said to be the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct. It may arise from a party making an election, for example whether or not to exercise a contractual right… Waiver may also be by virtue of equitable or promissory estoppel; unlike waiver arising from an election, no question arises of any particular knowledge on the part of the person making the representation, and the estoppel may be suspensory only… Where the waiver is not express, it may be implied from conduct which is inconsistent with the continuance of the right, without the need for writing or for consideration moving from, or detriment to, the party who benefits by the waiver, but mere acts of indulgence will not amount to waiver; nor may a party benefit from the waiver unless he has altered his position in reliance on it."*

119. *For considering, as to whether a party has waived its rights or not, it will be relevant to consider the conduct of a party. For establishing waiver, it will have to be established, that a party expressly or by its conduct acted in a manner, which is inconsistent with the continuance of its rights. However, the mere acts of indulgence will not amount to waiver. A party claiming waiver would also not be entitled to claim the benefit of waiver, unless it has altered its position in reliance on the same.*

*****

> ***127.*** *Thus, for constituting acquiescence or waiver it must be established, that though a party knows the material facts and is conscious of his legal rights in a given matter, but fails to assert its rights at the earliest possible opportunity, it creates an effective bar of waiver against him. Whereas, acquiescence would be a conduct where a party is sitting by, when another is invading his rights. The acquiescence must be such as to lead to the inference of a licence sufficient to create a new right in the defendant. Waiver is an intentional relinquishment of a right. It involves conscious abandonment of an existing legal right, advantage, benefit, claim or privilege. It is an agreement not to assert a right. There can be no waiver unless the person who is said to have waived, is fully informed as to his rights and with full knowledge about the same, he intentionally abandons them."*

86. In the present case, the conduct of the Plaintiffs was anything but to the contrary to the plea of waiver taken by the Defendants. In fact, the Plaintiffs thereafter not only issued another letter dated 05.10.2013, but also contested the suit filed by the Defendant no.1. This also militates any plea of waiver or acceptance of the termination by the Plaintiffs.

87. The plea of the Defendants that as the Plaintiffs had been informed by the letter dated 20.08.2013 by the Defendant no.3 that the mutation of the Suit Property has been received, the period of 70 days for making the payment of the balance Sale Consideration would commence, also cannot be accepted. The Defendant no.1 did not withdraw his termination notice in spite of the letter dated 05.09.2013 from the Plaintiffs. In the letter dated 05.09.2013, the Plaintiffs, as has

been stated hereinabove, had expressed their readiness and willingness to perform the terms of the ATS, while highlighting that the ATS requires the Defendants to act collectively as one unit. It was highlighted that the Defendant no.1 therefore, has to withdraw the termination notice and all the vendors must together inform the Plaintiffs of their concurrence to honour their obligations under the ATS, for the 70 days period to commence. The Defendant no.1, however, by the letter dated 13.09.2013, refused to withdraw the termination of the ATS, reiterating that the ATS in respect of his share of 18.75% in the Suit Property stands terminated. In such circumstances, the Plaintiffs cannot be expected to block further money and the 70 days period for making the balance payment of the Sale Consideration cannot be said to have begun.

88. The plea of the Defendants that the Plaintiffs have failed to furnish any proof of availability of the balance Sale Consideration with them for payment to the Defendants, is also fallacious. Even before the obligation of the Plaintiffs to make the payment of the balance sale consideration to the Defendants had arisen under the ATS, the Defendant no.1 had illegally terminated the ATS with respect to his share in the Suit Property, by the letter dated 29.05.2013. Therefore, there was no obligation on the Plaintiffs to show the possession of the requisite funds with them thereafter. Be that as is it may, the present suit is not for seeking specific performance of the ATS but to claim refund of the advance paid by the Plaintiffs to the Defendants under the ATS as earnest money and as advance Sale Consideration, on account of the illegal termination of

the ATS by the defendant no. 1. The relief claimed by the Plaintiffs is, therefore, a consequence of the breach of the ATS by the Defendants. For the said reason, the judgment of the Supreme Court in ***U.N.Krishnamurthy*** (supra) can also not be of any assistance to the Defendants.

89. For the above reasons, the Defendants, being in breach of the contract, cannot also claim a right to forfeit the earnest money paid by the Plaintiffs under the ATS. In terms of Clause 3 of the ATS, the Defendants could have forfeited the earnest money paid by the Plaintiffs only if the Defendants themselves were ready, willing and had complied with the terms of the ATS. In the present case, the Defendant no.1 was never ready or willing to comply with the terms of the ATS and, on the date of the termination of the ATS by him and even thereafter, the Defendants had not complied with the terms of the ATS.

90. For the above reasons, the plea of set-off claimed by the Defendant no.1 can also not be accepted. The Plaintiffs had earlier sought for the Defendants to comply with their obligations under the ATS. Having realized the stubborn attitude of the Defendant no.1 and being left with no choice, the Plaintiffs terminated the ATS by their notice dated 22.10.2015. Since thereafter, at least, there was no embargo on the Defendants to deal in the Suit Property. On the contrary, the proceedings in the execution and otherwise suggest and prove that it was the Defendant no.1 who had, at all stages, created hindrances in the sale of the Suit Property. The claim of set off of the Defendant no.1 therefore, at best, can be described as most fanciful

and devoid of any merit. The same also lacks any legal evidence to support the same.

91. As far as the claim of interest is concerned, Section 55(6)(b) of the TP Act reads as under:

> ***"55. Rights and liabilities of buyer and seller.***
>
> *xxxx*
>
> *(6) The buyer is entitled—*
>
> *xxxxx*
>
> *(b) unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all pesons claiming under him, to the extent of the seller's interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount; and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission."*

92. In ***Skipper Construction Co.(P) Ltd.*** (supra), the Supreme Court has explained the mandate of the above provision leading to the entitlement of interest of the buyer, as under:

> *"It is plain from the above provision that, in the absence of a contract to the contrary, the buyer will have a charge on the seller's interest in the property which is the subject-matter of the sale agreement insofar as the purchase money and interest on such amount are concerned, unless the buyer has improperly declined to accept delivery. The charge is available against the seller and all persons claiming under him. This charge in favour of the buyer is the converse of the seller's charge under Section 55(4)(b). The buyer's charge under this section is a statutory*

> *charge and differs from a contractual charge which a buyer may be entitled to claim under a separate contract [M.M.R.M. Chettiar Firm v. S.R.M.S.L. Chettiar Firm, AIR 1941 PC 47 : 46 CWN 57] . No charge is available unless the agreement is genuine [Trimbak Narayan Hardas v. Babulal Motaji, (1973) 2 SCC 154 : AIR 1973 SC 1363] . As pointed out in Mulla's Commentary on Transfer of Property Act, 8th Edn. (p. 411), the charge on the property under Section 55(6)(b) is enforceable not only against the seller but against all persons claiming under him. Before the amending Act of 1929, the words "with notice of payment" occurred after the words "all the persons claiming under him". These words were omitted as they allowed a transferee without notice to escape. After the amendment of 1929, notice to the purchaser has now become irrelevant."*

93. The reliance of the Defendants on Section 3 (1)(b) of the Interest Act, can also not be accepted, as in terms of Section 55(6)(b) of the TP Act, the liability to pay interest against the seller / Defendants herein shall arise from the date the purchase money for the Suit Property was paid by the Plaintiffs. Even otherwise, Section 3(1)(b) of the Interest Act has been explained by the Supreme Court in ***B.V.Radha Krishna*** (supra), by holding that interest will be payable from the date mentioned in the legal notice claiming the same, rather than the date of the legal notice itself. Even otherwise, the defendants having committed breach of the ATS, are under an obligation to refund the payment received by them along with interest from the date of receipt of the said amount.

94. Coming to the rate of interest, the Defendant no.1 in his cross examination stated that he had utilized the money paid by the

Plaintiffs for *inter alia* investment/acquisition of Gold Bars, Mutual Funds, etc. I quote from the cross examination as under:

> *"Q67. Did you invest any part of the amount paid to you by the Plaintiffs in Gold Bonds or Gold Bars?*
> *Ans. Yes. 1 had purchased Gold Bars which were encashed at Tanishq, South Extension. 1 do not hold any Gold Bars/Bonds presently.*
> *Q68. What was the amount realized by you from the encashment of*
> *Gold Bars?*
> *Ans. It was around Rs. 88 Lakhs."*

95. Similarly, Defendant no.2, in his cross-examination, stated that he had deposited the amount from the Plaintiffs in his bank account. I quote from the cross-examination as under:

> *"Q5. In what manner did you utilize the money received from the Plaintiffs at the time of execution of Agreement to Sell (Ex.D-2/3)?*
> *Ans. Entire sum was deposited with State Bank of India, New Friends Colony Branch and over the course of the years I have spent the money on me and my family's survival. Whatever money was left with me in my possession, the same was returned to the Plaintiffs as a result of the court orders. All statements in this regards have been filed in the Hon'ble Court.*
> *Q6. How much amount was received by you and how much was returned?*
> *Ans. I received Rs. 3,75,00,000/- (Rupees Three Crores Seventy Five Lakhs Only). I returned approximately Rs. 47,00,000/- (Rupees Forty Seven Lakhs Only)"*

96. The Defendant no.3 had admitted in her letter dated 14.03.2014, that she had utilized the money received from the Plaintiffs for her personal use. Defendant no.4 did not lead any evidence. The Plaintiffs claim that she utilized the amount received for purchase of property at

Dehradun.

97. What is most important is that the Defendant no.1 in his set off has claimed interest @ 8% per annum.

98. Keeping in view the above, in my opinion, the Plaintiffs are therefore, entitled to interest @8% per annum from the date of the payment made by them till such time that the amount is received back by them from the Defendants. The Plaintiffs shall be entitled to *pendente lite* and post decretal interest as well @8% per annum.

99. In this regard, pursuant to the Preliminary Decree dated 22.02.2018, the Plaintiffs have received the amount of Rs.7,03,12,500/- from the Defendants. Earlier, they have, by encashing one of the cheques from the Defendant no.1, received a sum of Rs.46,87,500/-. These amounts were towards the principal and therefore, interest on these amounts would run only till the recovery of the said amounts.

100. The plea of the defendant nos. 2 to 4 that they be not burdened with the liability to pay interest or costs of the Suit, or some leniency to be shown to them in the same, also cannot be accepted. Having transacted with the Plaintiffs as one whole and jointly, it was their obligation to persuade and ensure that the Defendant No. 1 does not act in breach of the terms of the ATS. Though they seemed to have tried to convince the Defendant No.1, as far as the Plaintiffs are concerned, they remain equally liable for the consequences of such breach. It will, however, be open for them to claim their own damages against the defendant no.1, if the law so permits and in accordance with law.

Issue wise finding

101. In view of the above, the Issues framed by this Court *vide* its Order dated 26.07.2018 read with Order dated 28.01.2019, are answered as under:

I. The Plaintiffs are held entitled to interest upon the partially decreed amount of Rs.7.50 crores at the rate of 8% p.a. from the date that they have made the payment of the said amount to the Defendants, that is, from 03.01.2012, till the recovery of the said amount or parts thereof by the Plaintiffs from the Defendants.

II. The Plaintiffs are held entitled to a decree for recovery of balance principal amount of Rs.2.50 crores, along with interest at the rate of 8% p.a. from the date that they have made the payment of the said amount to the Defendants that is, from 03.01.2012, till the recovery of the said amount by the Plaintiffs from the Defendants.

III. The Plaintiffs are held entitled to interest at the rate of 8% per annum from the date of the payment made by them, that is, 03.01.2012, till the filling of the present Suit.

IV. It is held that the Plaintiffs had no obligation to pay the balance sales consideration under the ATS, as the Defendant no.1 had refused to perform his obligation under the same and the Defendants, jointly, were in breach of the terms of the ATS.

V. The Defendants are not entitled to forfeit the earnest money, that is, Rs.2.50 crores, in terms of the ATS.

VI. The claim of the Defendant no.1 for a set-off is rejected.

Relief

102. The Suit is decreed directing the Defendants, severally or jointly, to pay to the plaintiffs a sum of Rs. 2.50 crores (Rupees two crores fifty lakhs) along with interest at the rate of 8% p.a. thereon from the date that they received the payment of the said amount from the Plaintiffs, that is, from 03.01.2012, till the refund thereof. The Defendants are further directed to pay, either severally or jointly, to the Plaintiffs, interest, upon the partially decreed amount of Rs.7.50 crores (Rupees seven crores fifty lakhs), at the rate of 8% p.a., from the date that they received the said amount from the Plaintiffs, that is, from 03.01.2012, till the payment thereof or parts thereof in terms of the Preliminary Decree. The Defendants shall also pay costs of the Suit to the Plaintiffs.

103. Let a decree sheet be drawn accordingly.

NAVIN CHAWLA, J

JULY 01, 2025/*rv*/RN/*VS*