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

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**CS(OS) NO. 390/2010 & IAS 2750-52/2010 & 5851/2010**

**Date of Decision : 04.5.2010**

**Munish Ohri**

**..... Plaintiff**

Through: Sh. H.C. Vashisht, Adv.

Versus

**Vimla Manchanda**

**..... Defendants**

Through: Mr. S Dutt and Mr. Naresh  
Arora, Advocates

**CORAM :**

**HON'BLE MR. JUSTICE V.K. SHALI**

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|----|-----------------------------------------------------------------------|-----|
| 1. | Whether Reporters of local papers may be allowed to see the judgment? | YES |
| 2. | To be referred to the Reporter or not?                                | YES |
| 3. | Whether the judgment should be reported in the Digest?                | YES |

**V.K. SHALI, J. (oral)**

1. This is a suit for specific performance of agreement dated 03.10.2004 and for permanent injunction.
2. Briefly stated the facts of the case as set out in the plaint which was filed on 17.02.2010 are that the plaintiff Munish Ohri had entered into an agreement for sale/purchase of property at the ground floor bearing flat no. J-27, Ali Ganj, B.K. Dutt Colony, New Delhi-110003 (hereinafter referred as the 'suit property') from Shri Akash Manchanda for a total sale consideration of Rs.70,00,000/-. A sum of Rs.7,00,000/- is purported to have been paid to Akash Manchanda and receipt dated 03.10.2004 was executed by him wherein it is stated that the balance sale consideration of Rs.63,00,000/- shall be paid by the plaintiff to Akash Manchanda, the defendant, on or before 03.12.2004 by which date Akash Manchanda was required to perfect the title of

the plaintiff. It is alleged in the plaint that one of the condition precedent in the agreement to sell was that Akash Manchanda had assured the plaintiff that encroachment which was available on or around the suit property in the form of one Pan Beedi shop shall be got vacated, and thereafter, the possession of the suit property will be transferred to the plaintiff. Unfortunately Akash Manchanda died in the month of October, 2005 and after his death, his mother Smt. Vimla Manchanda and two sisters, namely, Bharti and Jagriti who are the defendants herein claimed the title to the property in the capacity of legal heirs. They assured the plaintiff that they would go ahead with the transactions. It is alleged that despite the plaintiff approaching the defendants they did not remove the encroachment from the suit property and perfect the title of the plaintiff. On 02.03.2005 a legal notice was issued by the plaintiff to the defendants reminding them to clear the encroachment within seven days of receipt of the notice and execute the sale deed in favour of the plaintiff or alternatively refund of double the amount paid. It is alleged that the defendants did not reply to the said notice but on the contrary on account of rise in prices of the property they with a malafide intention are threatening the plaintiff that they would transact the property in favour of the other person. It is alleged in the plaint that since the defendants did not perfect the title and complete the sale transaction in favour of the plaintiff, despite the possession of the property having been allegedly given in August, 2008 consequently he has been constrained to file the present suit for specific performance for which the cause

of action has arisen when the defendant failed to remove the encroachment.

3. It is stated that in August, 2008 the plaintiff was put in possession of the suit property and the said cause of action is continuing till date.
4. The defendant filed her written statement and took a preliminary objection regarding the maintainability of the suit itself on two grounds. The first contention was that the suit is hopelessly barred by time.
5. It was stated that according to the averments made by the plaintiff himself in the plaint, the receipt-cum-agreement dated 03.10.2004 mentioned that as the time within which the transaction was to be completed and since the transaction was not completed the plaintiff ought to have filed a suit within a period of three years starting from 03.10.2004 which period expired on 02.10.2007. Since this was not done, therefore, the present suit having been filed in the year 2010 on 17.02.2010 is hopelessly barred by time. It is stated that it is not a case where the plaintiff was not aware about the names of the legal heirs of the defendant, therefore, he ought to have taken steps for suing the defendant immediately on the death of Akash Manchanda. It is further contended that even assuming the averments made in the plaint to be correct the plaintiff of his own saying has stated that he has been put in possession in August 2008. That being the position, the present suit for specific performance is not maintainable because the transaction has been completed and the plaintiff at best could file suit for mandatory injunction.

6. The second plea which was taken in the written statement was that the present suit is barred by Order II Rule 2 CPC. In this regard, it was stated that the plaintiff had earlier filed a suit in the Court of Senior Civil Judge, Patiala House Courts being Suit No. 1157/2009 titled **Munish Ohri Vs. Vimla Manchanda**. In the said suit the plaintiff had specifically averred that the plaintiff had served a notice on 02.03.2005 to the present defendant calling upon her to complete the sale transactions. A reference was also made and since they did not respond, therefore, a notice was again given in 2005. It is, therefore, contended that a fresh cause of action arose to file the present suit within a period of three years from the date of refusal on the part of the defendant to file the present suit for specific performance. While as the plaintiff chose to file only a suit for permanent injunction against the defendant.
7. Order II Rule 2 CPC categorically lays down that the suit is to include whole of the claim and in case any part of the claim is left out by a party then that is treated to have been abandoned.
8. The plaintiff has filed his replication to the suit and has not given any cogent reply to these averments. On the basis of the pleadings of the parties and with their consent the question regarding the maintainability of the suit was taken up and arguments were heard.
9. It is not in dispute that the present suit for specific performance is essentially based on agreement to sell-cum-receipt dated 03.10.2004. It is also not in dispute that in the agreement, it is specifically mentioned that the sale transaction is to be

completed by 03.12.2004 by payment of balance amount of Rs.63,00,000/- as Rs.7,00,000/- was received by the predecessors of the defendants as a part payment. It is not in dispute that in the receipt-cum-agreement to sell, there is no mention that there was any encroachment on the suit land or flat and consequently it could not be assumed that there was any encroachment. The receipt-cum-agreement to sell between the parties clearly shows that the time was the essence of the agreement. If that be so according to Section 54, the period of limitation for filing the suit for specific performance is three years and the period is reckoned from the date fixed for the performance & if no such date is fixed for the performance then the date on which the performance has been refused.

10. Based on the aforesaid Section the date of performance having been fixed as 03.10.2004, the period of limitation shall start running from 04.10.2004 and will come to an end on 03.10.2007. Even if it is assumed that the period of limitation is not reckoned from 04.10.2004 even then taking the date of refusal as the date from which the period is to be reckoned, this notice is given by the plaintiff on 02.03.2005 to the defendants wherein it is clearly mentioned that the defendants are trying to wriggle out from the agreement. If it is accepted then on 02.03.2005 the plaintiff had the knowledge that the defendants are refusing to perfect the title of the plaintiff more so when no reply to the notice has been received by the plaintiff, therefore, the period of limitation of three years is to be reckoned at least from 02.03.2005 and if that period is reckoned even then the

period of limitation of three years comes to an end much earlier than on the date when the suit has been filed.

11. It has been specifically laid down by the Apex Court that where the plaint is on the face of it barred by limitation the suit is liable to be rejected. Reliance in this regard placed on the following judgments:

**S. Brahmanand & Ors. Vs. K. R. Muthugopa (D) & Ors.** 2005 (4) RCR (C) 508

**N.V. Srinivasa Murthy & Ors. Vs. Mariyamma (Dead)** AIR 2005 SC 2897

**T. Arivandandam Vs. T. V. Satyapal & Anr.** (1977) 4 SCC 467

**Gunwantbhai Mulchand Shah & Ors. Vs. Anton Elis Farel & Ors.** (2006) 3 SCC 634

**Deva Ram & Anr. Vs. Ishwar Chand & Anr.** (1995) 6 SCC 733

**R. K. Parvatharaj Gupta Vs. K. C. Jayadeva Reddy** (2006) 2 SCC 428

**Sidramappa Vs. Rajashetty & Ors.** AIR 1970 SC 1059

12. The learned counsel for the plaintiff has not been able to show any judgment or any point in his favour either from the plaint or otherwise which would show that the suit is not barred by limitation or it deserves to be put on trial. On the contrary, it is laid down by the Apex Court in above-mentioned authorities where the suit is liable to be rejected and where the entire exercise after the trial is going to be futile, it is not necessary that the defendants should be made to undergo harassment and arduous trial. Consequently, on this score the suit is liable to be rejected.
13. The second ground which was taken by the defendants is also a ground on which the suit deserves to be rejected under Order II Rule 2 CPC. Order II Rule 2 CPC reads as under:-

**“2. Suit to include the whole claim.--** (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) **Relinquishment of part of claim.—**Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) **Omission to sue for one of several reliefs.—**A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.”

14. The plaintiff has not disclosed or filed a copy of the plaint in which he had made a prayer of permanent injunction against the defendants. This suit was filed in the year 2009 bearing suit No. 1157/2007 titled **Munish Ohri Vs. Vimla Manchanda**. The defendant has placed a copy of the said suit filed by the plaintiff in the Court of Senior Civil Judge, Patiala House Courts being Suit No. 1157/2009 titled **Munish Ohri Vs. Vimla Manchanda** wherein the relief of the permanent injunction was prayed for. The learned counsel has drawn the attention of the Court to the averments where the plaintiff himself has stated that he was aware of the fact that the defendant was refusing to perfect the title and complete the sale transaction. The learned counsel for the defendant has also shown to the Court that the notice was purported to have been issued by the plaintiff to the defendants on 02.03.2005 wherein it has been specifically admitted by the plaintiff that the defendants are trying to wriggle out from the agreement. If that be so then in the suit for

permanent injunction itself the plaintiff ought to have claimed specific performance of the agreement whereas he has chosen or rather elected to sue only for permanent injunction. Having chosen to file a suit for permanent injunction clearly shows that the plaintiff has abandoned his other reliefs and is thus prevented from filing a second suit and the same cause of action for claiming a part of the relief which is in the instant case is for specific performance. Even otherwise also the notice which has been issued by the plaintiff to the defendants was way back in 2005 clearly shows that the plaintiff was interested in claiming double the amount of the earnest money paid and not the specific performance which further goes to show that the plaintiff himself was aware of the fact that he does not want specific performance of the agreement, and accordingly, I feel that the point which has been taken by the defendant that the suit is barred by Order II Rule 2 CPC has been considerable merit and the present suit cannot be proceed.

15. For the foregoing reasons, I am of the considered opinion that the present suit is barred by the limitation as it is filed beyond three years from the date of the accrual of the cause of action which has to be reckoned from 04.10.2004 and in any case w.e.f. 02.03.2005. Even otherwise the suit is barred by Order II Rule 2 CPC in as much as the plaintiff has chosen to file earlier a suit for permanent injunction where he had made a categorical admission that the defendants were not prepared to execute the sale deed in his favour, and therefore, the said suit ought to have contained the entire claim or whole of the claim including the relief of specific performance. Since this has not been done,

therefore, the present suit claiming a part of the relief of specific performance would not lie, accordingly, the present suit is barred by limitation as well as barred by Order II Rule 2 CPC as well. Ordered accordingly.

**V.K. SHALI, J.**

**MAY 04, 2010**  
**KP**