

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

% *Date of Judgment : 23rd July, 2010*

+ **RSA No.141/2010 & CM No.12757/2010**

SMT. NASEEM

.....Appellant
Through: Mr.Sunil Satyarithi &
Mr. Raman Gandhi, Advocates.

Versus

ALI MOHD.

.....Respondents
Through: Nemo.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

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

INDERMEET KAUR, J.(Oral)

CM No.12758/2010 (for exemption)

Allowed subject to just exceptions.

RSA No.141/2010 & CM No.12757/2010

1. This second appeal has been directed against the judgment dated 20.4.2010 wherein the finding of the Trial Judge dated 3.4.2008 had been endorsed; the application of the defendant/respondent under order 7 Rule 11 CPC had been allowed and the plaint had been rejected amounting to a dismissal of the suit.

2. Briefly stated the facts of the case are as follows:-

(i) Plaintiff/appellant had filed a suit for specific performance of an agreement to sell dated 15.11.1996 qua the suit

property bearing No.D-74, Welcome, Seelampur, Delhi for a consideration of Rs.2,34,000/-. A sum of Rs.1,03,000/- was paid by the plaintiff to the defendant as earnest money. Vacant and peaceful possession of the suit property had been handed over to the plaintiff on the same day. Parties had agreed to execute a sale deed and get it registered before the concerned Registrar on or before 15.11.1998. As 15.11.1998 was a holiday, parties had agreed to reach the office of Sub Registrar on 16.11.1998 for executing the title deed and also for payment of balance amount of Rs.1,21,000/-.

(ii) Plaintiff reached the office of the Sub Registrar on 16.11.1998. Defendant failed to reach there. Legal notice was served by the plaintiff upon the defendant asking him either to execute the sale deed or return the double amount of Rs.1,03,000/- as agreed between them.

(iii) Plaintiff was ready and willing to perform her part of contract but the defendant was evading.

(iv) In the plaint, the cause of action has been described in para no.11 which states that the cause of action accrued firstly on 16.11.1998 when the defendant did not reach the office of Sub Registrar, it again accrued when the legal notice was served and lastly on 9.5.2002 when the defendant flatly refused to execute the title deed and refused to pay the double amount of the earnest money.

(v) Suit was filed on 03.6.2002. Along with the suit, the plaintiff had also filed an application under Section 5 of the Limitation Act seeking condonation of delay in filing the said suit. It is relevant to state that in this second appeal, the

application under Section 5 of Limitation Act has not been placed on record.

(vi) Defendant contested the suit by filing an application under Order 7 Rule 11 CPC. First contention was that the suit filed by the plaintiff on 3.6.2002 is time barred (although in the application the defendant has stated the date of filing of suit as 22.5.2002). In the reply filed by the plaintiff to this application there has been no denial whatsoever that the suit is not time barred; it is merely stated that the counsel for the plaintiff has played a fraud upon her.

(vii) On 20.10.2007 a preliminary issue, was framed, whether the suit filed by the plaintiff is barred by limitation and whether the delay, if any, can be condoned at the stage of institution?

(viii) On 17.12.2007 plaintiff filed an application under Order 23 Rule 1 CPC seeking permission of the Court to withdraw the suit with liberty to file a fresh suit. The said application under Order 23 Rule 1 CPC has also not been placed on the record of this Court.

(ix) On a perusal of the judgment dated 3.4.2008 passed by the Trial Judge it has been noted that in this application the plaintiff had averred that she wishes to withdraw the suit on the ground of a technicality; in the additional affidavit filed by her, she had specifically stated that her suit for specific performance had been filed after the period of limitation and hence she wishes to withdraw the suit with liberty to institute a fresh suit. This was not treated as a formal defect;

accordingly bar of limitation not being a formal defect the application of the plaintiff under Order 23 Rule 1 CPC was rejected.

(x) Trial Judge relied upon the provisions of Article 54 of the Indian Limitation Act 1963 and held that the present suit filed by the plaintiff on 3.6.2002 was timed barred. It had concluded that the suit for specific performance had been based on an agreement to sell wherein it has been agreed between the parties that the sale deed of the property would be executed by the defendant in favour of the plaintiff on 16.11.1998 on which date the balance payment would also be made. Suit filed on 3.6.2002 was after expiry of three years. Plaint was rejected.

(xi) The Appellate Court vide judgment dated 20.04.2010 had endorsed the finding of the Trial Court. It was held that Article 54 of the Limitation Act is attracted. Suit being time barred, the plaint had rightly been rejected. Application under Section 5 of the Limitation Act which had accompanied the suit is not maintainable; Section 5 of Limitation Act does not apply to suits.

3. In this second appeal, it has been averred that the finding of both the Courts below in rejecting the plaint of the plaintiff and thereby dismissing the suit of the plaintiff was an illegality; the provisions of Article 54 of the Limitation Act had not been correctly construed by both the Court below. It is stated that admittedly there was an agreement to sell which had postulated that on 16.11.1998 the parties would perform the agreement and the sale deed would be executed on the said date but thereafter the

defendant had extended the time in favour of the plaintiff and this is evident from the plaint filed by the defendant in a suit for possession which he had filed against the plaintiff and in which he himself had made this admission. Attention has been drawn to the certified copy of the said plaint (pages 102 -103 of the paper book). This was a suit for recovery of possession of the aforementioned suit property. On page 3 and again on page 4 of the plaint, it has been stated by the plaintiff (defendant herein) that Ali Mohd had allowed two months further time to execute the sale deed which two months were to be counted from 15.11.1998 thereby extending the period up to 15.1.1999; thereafter another 10 days extension was granted enlarging the period up to 8.2.1999. These admissions even as per the appellant at best extend the period to execute the sale deed up to 8.2.1999. This suit has been filed on 3.6.2002 which is again after the expiry of the period of three years.

4. Learned counsel for appellant has placed reliance upon the second part of Article 54 of the Limitation Act which inter alia reads as follows:-

“..... or, if no such date is fixed the plaintiff has notice that performance is refused.”

5. Contention of the appellant is that although admittedly there was an agreement to sell between the parties and in terms of the that agreement the parties had agreed to execute the title deed on 16.11.1998 but the subsequent enlargement of time by defendant up to 8.2.1999 had clearly changed the date of performance and as such applying latter condition as contained in Article 54, if no such date is fixed, the period of limitation of three years would be counted from the date when the plaintiff has noticed that performance is refused. For this proposition, he has placed

reliance upon a judgment of the Supreme Court reported in JT 2007(3) SC 187 Janardhanam Prasad Vs. Ramdas. The ratio of this judgment does not in any manner help the plaintiff. In this judgment the Supreme Court had held when no time for performance is fixed, in that eventuality the Court would find out the date on which the performance was refused to the plaintiff/appellant. That is not so in the instant case. Second judgment relied upon by the appellant, AIR 2006 SC 2281 Pancharan Dhara & Ors. Vs. Monmatha Nath Maity, is also of no help to the appellant. In this case the Court had held that limitation in a suit for specific performance of a contract would be computed from the period fixed for the execution of the sale deed which has subsequently been extended by the conduct of the parties. The appellant in this case has failed to show as to which part of the conduct of the parties had enlarged the period of limitation after 8.2.1999. The later part of Article 54 is not applicable; there was a specific date of performance between the parties.

6. Both the Courts below had on the averments of fact made in the pleadings endorsed the view that the suit of the plaintiff filed on 3.6.2002 was time barred. Plaint had been rejected on the pleadings contained therein. The Court had also kept in mind that along with the suit an application under Section 5 of the Limitation Act had been filed by the plaintiff; the plaintiff himself being aware of the fact that his suit was time barred; yet deliberately and for reasons best known to the appellant, the said application has not been filed along with this memo of appeal. The Courts below had also noted that the application filed by the appellant/plaintiff under

Order 23 Rule 1 CPC had specifically averred that the plaintiff seeks permission of the Court to withdraw the suit; in the additional affidavit which he had filed it had been averred that his suit is time barred, his application under Order 23 Rule 1 CPC had accordingly been dismissed on the ground that the plea of limitation is not a formal defect. All these admissions had been made by the appellant/plaintiff himself admitting that his suit was time barred.

7. The record before this Court shows that in terms of the agreement to sell the parties had last agreed to perform the terms of the contract by 16.11.1998. In the suit filed by the defendant/respondent for possession the admissions in the plaint extended the limitation up to 8.2.1999 for the purpose of performance of their agreement. The period of limitation has thus at best to be counted from 8.2.1999; suit filed on 3.6.2002 was much after the period of three years as prescribed under Article 54 of the Limitation Act. Suit was time barred and the finding of the Courts below cannot be faulted with. No question of law much less any substantial question of law has arisen in this matter. Appeal and the application are dismissed *in limine*. File be consigned to record room.

INDERMEET KAUR, J.

JULY 23, 2010
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