

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

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Judgment reserved on: 25.07.2012
Judgment pronounced on: 03.08.2012

+ **CS(OS) 2336/2008**

SH. KAILASH NEWAR & ANR
Through
versus

..... Plaintiffs

SH. SATISH NEWAR & ANR
Through

..... Defendants

Advocates who appeared in this case:

For the Petitioner	:	Mr. J.P. Sengh, Sr. Advocate with Ms. Gurkamal and Mr. Sumit Batra.
For the Respondent	:	Mr. Arvind K. Nigam, Sr. Advocate with Mr. Sumehar Bajaj.

CORAM:
HON'BLE MR. JUSTICE V.K.JAIN

V.K. JAIN, J.

1. This is a suit for specific performance of a Memorandum of Understanding and grant of damages. Defendant No.1 is the brother of plaintiff No.1 and defendant No.2 is the wife of defendant No.1. Plaintiff No.2 is the wife of plaintiff No.1. The parties to the suit were carrying various businesses and owned different properties in the names of the various partnerships/companies formed by them. One of such properties was property bearing No.116, Sector 59, Faridabad. Certain disputes arose between the parties which were resolved through intervention of an arbitrator and an MOU dated 28th August/11th September, 2001 was entered into between

2. In the parties. The MOU, to the extent it is relevant, provided that plot No. 116, Sector 59, Faridabad which had been acquired in the name of M/s Excellent Hosiery Products, shall belong to the plaintiffs. It was further agreed that the loans raised by another firm Excellent Hosiery Products against the above referred plot shall be repaid by the defendants immediately on the plaintiffs relinquishing/transferring their share in property No. 5, B.D. Estate, Lancers Road, Timarpur, Delhi, in favour of defendant Nos. 1 and 2. It is alleged that pursuant to the aforesaid MOU, the plaintiffs executed release/relinquishment deeds as also a gift deed in favour of the defendants, but on their part, the defendants failed to transfer their right, title and interest in plot No. 116, Sector 59, Faridabad to the plaintiffs, despite their assurance that the same would be done within a week of registration of the release deed/relinquishment deeds. It is further alleged that the defendants also failed to pay the loan of about Rs. 1 crore which M/s Excellent Hosiery Products has raised from Bank of Rajasthan against another property which also had come to the share of the plaintiffs.

The plaintiffs filed CS(OS) 1048/2004 for declaring the said MOU cancelled/revoked/incapable of being performed/null and void and not legally enforceable. Consequential reliefs were also sought in the said suit. The defendants filed written statement affirming their readiness and willingness to perform their part of the obligation contained in the said MOU. Two applications, including an

application for amendment of plaint, filed in the aforesaid suit having been dismissed by learned Single Judge of this Court, the plaintiff filed FAO(OS) 442/2007 which was disposed of by a Division Bench of this Court vide order dated 28.7.2008. The learned Single Judge, while dismissing IA Nos. 5891/2005 and 3310/2007 in CS(OS) 1048/2004, had observed that the suit was barred by limitation. The Division Bench while disposing of the appeal, made it clear that the observations were made while deciding an application under Order VI R. 17 CPC. It was further observed that it was open to the appellants/plaintiffs to withdraw the suit and file a fresh suit and when such a suit is filed it would be equally open to the respondent/defendant to take whatever legal plea were available to them, including the plea of limitation.

3. It is further alleged in the plaint that in September, 2003, plaintiffs came to know that defendant No.1 had since 1998 been prosecuting a suit titled **Excellent Hosiery Product v. HSIDC** in respect of plot No. 116, Sector 59, Faridabad, wherein he had challenged the enhanced charges claimed by HSIDC in respect of the above referred plot and had also challenged threatened resumption of the plot by HSIDC, on account of failure to pay enhanced charges. It is alleged that in July, 2004, plaintiff No.1 sought substitution in that civil suit and was actually substituted as such. The suit was later withdrawn by plaintiff No.1 under legal advice.

4. It is alleged that the market value of the aforesaid plot on the date of signing the MOU was Rs. 1 crore and the defendants are liable to pay that much amount to the plaintiff along with interest thereon at the rate of 12% per annum w.e.f. 11.09.2001. It is claimed that the defendants are also liable to pay all the dues of Bank of Rajasthan amounting to Rs.95,50,532.49 along with interest @ 19% per annum in terms of MOU dated 11.9.2001. The amount of interest claimed by the plaintiffs on the damages of Rs. 1 crore is Rs. 1,28,04,530/- till 31st August, 2008. The plaintiffs have accordingly claimed the following reliefs in the present suit.

“a. pass a decree of specific performance thereby directing the defendants no.1 and 2 to perform their part of the obligations as stated in the Memorandum of Understanding dated 11th September, 2001 duly executed between the plaintiffs and the defendants no.1 and 2;

b. pass a decree of damages thereby directing the defendants no.1 and 2 to pay a sum of Rs.2,28,04,530/- (Rupees two crores twenty eight lacs four thousand five hundred and thirty only) to the plaintiffs alongwith interest, pendente lite and future interest till realization, at the rate of 12% p.a. compounded quarterly”

5. The defendants have filed IA No. 3042/2009 under Order VII Rule 11 of the Code of Civil Procedure for rejection of the plaint on the ground that it does not disclose any cause of action, is barred by law, specifically barred by limitation and also barred by principles of *res judicata*. It is alleged in the plaint that CS(OS) 1048/2004, which the plaintiff had earlier filed against the defendants, was in

contradiction to the instant suit since the allegations in that suit were to the effect that the MOU had been obtained by fraud and without consent of the plaintiff, whereas in the present suit they were seeking specific performance of that very MOU. It is also alleged that in the instant suit, the plaintiffs have not even averred that they were ready and willing to perform their part of the obligation under the said MOU which is a pre-condition for seeking specific performance of an agreement.

6. The application has been opposed by the plaintiffs. In their reply, the plaintiffs have claimed that the suit is within limitation as cause of action of filing the suit arose on various dates when the defendants did not perform their part of the MOU. It is further alleged that the cause of action also arose when the defendants filed written statement in CS(OS) 1048/2004 stating therein that all major terms of the MOU had already been accepted implemented and acted upon and that as far as the remaining terms were concerned, they were ready and willing to do whatever was necessary.

7. It is settled proposition of law that while considering an application under Order VII Rule 11 of CPC for rejection of plaint, the Court can take into consideration only the averments made in the plaint and the documents filed by the plaintiff. Neither the defence taken in the written statement nor the documents filed by the defendant can be looked into at this stage. It is also a settled proposition of

law that the truthfulness or otherwise of the averments cannot be examined while considering such an application.

8. In CS(OS) No. 1048/2004, a copy of which has been filed by them, the plaintiffs, *inter alia*, stated as under:-

“5. That thereafter, the defendants No. 1 and 2, with mala fide intentions, induced the plaintiff by misrepresentation and fraud to sign unregistered document titled Memorandum of Understanding dated 11th September, 2001 which was signed by the defendants No. 1 and 2 on 28.08.2001 itself.

9. That thereafter in performance of the said MoU, defendants No. 1 and 2 got the plaintiffs to sign, execute and register release/relinquishment deeds and a gift deed detailed below on 11.09.2001 where by the defendants No. 1 and 2 got the plaintiffs to transfer their rights in various portions of the built up property bearing 5, B.D. Estate, Lancers Road, Timarpur, Delhi in favour of the defendant No. 1, but however the defendants No. 1 and 2 failed to transfer their rights, title or interest in property bearing No. 116, Sector-59, Faridabad, Haryana in favour of the plaintiffs despite their assurance that the same shall be within a week of registration of the release/relinquishment deeds. **(emphasis supplied)**

10. That it is submitted that the plaintiffs bonafidely acted on the said MoU and performed their initial part of the said MoU, in good faith believing the representations of the defendants No. 1 and 2 that they shall be performing their part of the obligations and further that they shall be executing their part of the documents immediately upon the execution of documents by the plaintiffs.

12. That aforesaid release deeds/relinquishment deeds, gift deed etc. were acquired by the defendants No. 1 and 2 by making false representations and inducement with malafide intentions that the defendants No. 1 and 2 shall pay the loan of the Bank of Rajasthan amounting to Rs 1 crore (Aprox.), raised by M/s. Excellent Hosiery Products against property No. 101, Sector-24, Faridabad, Haryana and further the defendants No. 1 and 2 would execute necessary documents of transfer of property bearing No. 116, Sector-59, Faridabad, Haryana, which was acquired in the name of M/s. Excellent Hosiery Product in favour of the plaintiffs.

19. That it is now in the interest of justice that the release deeds and gift deed as detailed above obtained by defendants No. 1 and 2 by misrepresentation and fraud be declared as null and void and the same be directed to be cancelled. If the said documents are left outstanding the same may cause serious injuries to the plaintiffs.

20. That the MoU between the plaintiffs and the defendants No. 1 and 2 has been legally frustrated and is not capable of being enforced/performed. Further as the defendants No. 1 and 2 have failed to perform their obligations under the terms of the said MoU, the said MoU dated 11.09.2001 has stood cancelled/revoked/is incapable of being performed/is null and void. The plaintiffs are entitled to be placed in the same situation as they were at the time of signing of the MoU and the aforesaid registered deed as detailed in para 9 above are liable to be cancelled and the properties belonging to plaintiffs are liable to be restored back to the plaintiffs.

24. It is, therefore, most respectfully prayed that this Hon'ble Court may be pleased to:-

a. pass a decree of declaration in favour of the plaintiffs and against the defendants No.1 and 2 that the MoU dated 28.08.2001 stands cancelled/revoked/is in

incapable of being performed/is null and void and the same is not legally enforceable on the plaintiffs.”

8. It would thus be seen from a perusal of the above extracted averments made in CS(OS) 1048/2004 that not only had the plaintiffs abandoned the MoU are now seeking to enforce, also sought the same to be declared null and void, having been obtained by misrepresentation, inducement and fraud. They made a specific prayer to the Court in this regard. They also claimed that the said MoU had been frustrated and had become incapable of performance.

In the present suit, the plaintiffs are seeking specific performance of the very same MoU, which they had in the previous suit, claimed to be tainted with fraud and misrepresentation and, therefore, not enforceable in law. The plaintiffs, therefore, want to take a plea which is absolutely contrary to the plea taken in the previous suit. In fact, the plea taken by the plaintiffs in the previous suit and the plea taken in the present suit with respect to the MoU dated 11.09.2001, are mutually destructive. Having made an election by seeking to challenge the validity of the MoU and seeking its annulment, the plaintiffs are now estopped in law from seeking specific performance of that very agreement between the parties.

9. In **Bank of India v O.P. Swarnakar** [(2003) 2 SCC 721, the Supreme Court referred to the following passage from **Halsbury's Law of England**, 4th Edn. Vol.16 (Reissue), para 957:

“On the principle that a person may not approbate and reprobate and special species of estoppels has arisen. The principle that a person may not approbate and reprobate expresses two propositions”

(1) That the person in question, having a choice between two courses of conduct is to be treated as having made an election from which he cannot resile.

(2) That he will be regarded, in general at any rate, as having so elected unless he has taken a benefit under or arising out of the course of conduct, which he has first pursued and with which his subsequent conduct is inconsistent.”

In **Asha Sharma v. Sanimya Vajijiya Pvt. Ltd. and Others** [IA Nos. 9577/2007 in CS(OS) No.1883/2006 (decided on 20.08.2008), the respondent before this Court sought declaration that the documents executed by Smt. Satyawati Sharma in the year 1995 in relation to the suit property were void and illegal. It was noted by this Court that respondent had earlier approached this Court by way of a Civil Revision No.316/2004 wherein they had stated that they were not disputing the sale deed executed by Smt. Satyawati Sharma, Rejecting the plaint, a learned Single Judge of this Court, *inter alia*, held as under:-

“18. A litigant who approaches the court for relief should not be doing so, in derogation of a previously held and articulated position. It needs hardly be emphasized that inconsistent pleas are not permitted in the same action. Equally inconsistent pleas are not permitted in two different actions. This was held to be so in Cooke v. Rickman [(1911) 2 KB 1125]. The Court there

held that the rule of estoppel could not be restricted to a matter in issue, stating :

"... The rule laid down in Hawlett v. Tarte (1) C.B. (N.S.) 813 - was that if the defendant in a second action attempts to put on the, record a plea which is inconsistent with any traversable allegation in a former action between the same parties there is an estoppel. ..."

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20. The plaintiffs categorically stated, in the previous revisional proceeding that they were not challenging the sale deeds of 1995; they have also averred to that effect, in the revision petition, admittedly filed by them. Also, the revision itself arose out of an application filed by the applicant defendants here, under Order 22 Rule 10, CPC. The plaintiff's predecessor in interest, as a matter of pleading, categorically averred having executed the sale deeds. She contested the right to recover rents for a certain period, and having conferred residual rights. However, as far as validity of the impugned sale deeds are concerned, she did not deny them.

21. In the totality of the above circumstances, the court is of the opinion that the plaintiffs are estopped from maintaining the suit; they are also deemed to have acquiesced to the applicant's title. The averments in the suit are not that they became aware of the so called fraud, after the order of this court; indeed, the cause of action, according to them, arose after the death of Satyawati Sharma.

22. In the decision reported as N.V. Srinivasa Murthy v. Mariyamma , (2005) 5 SCC 548, while advertng to the T. Arivandandam v. T.V. Satyapal 1977 (4) SCC 467 it was held:

"This is a fit case not only for rejecting the plaint but imposing exemplary costson the appellant on the observations of this Court in the case of T. Arivandandam v. T.V. Satyapal:

"The trial court must remember that if on a meaningful — not formal — reading of the plaint it is manifestly vexatious and meritless in the sense of not disclosing a clear right to sue, it should exercise its power under Order 7 Rule 11 CPC taking care to see that the ground mentioned therein is fulfilled. If clever drafting has created the illusion of a cause of action, the court must nip it in the bud at the first hearing by examining the

party searchingly under Order 10 CPC. An activist judge is the answer to irresponsible law suits. The trial courts would insist imperatively on examining the party at the first hearing so that bogus litigation can be shot down at the earliest stage. The Penal Code is also resourceful enough to meet such men (Chapter 11) and must be triggered against them.”

23. The previous pleadings adverted to above, by this court, clearly estop the plaintiffs from disputing the validity of the documents, impugned in these proceedings. Though the suit alleges fraud, the elements and basis of such fraud are tell tale and vague. The suit is a disguised attempt to attack the title to something which the vendor herself did not dispute in her lifetime; the plaintiffs elected in their pleadings, in the revision, not to challenge these documents.

Therefore, the suit is not maintainable on the principle of estoppel by pleading, and acquiescence.

24. In view of the above discussion, the plaint in the suit is barred, under Order VII, Rule 11 (d), CPC. It is accordingly rejected. The suit and all pending applications are therefore rejected.”

An appeal against this order was preferred by the plaintiff before this Court. Rejecting the appeal, a Division Bench of this Court vide its decision dated 11.05.2012 in **Asha Sharma and Ors. v Sanimiya Vanijiya P. Ltd. and Others** **RFA(OS) No.35/2009**, *inter alia*, observed and held as under:

“19. By admitting having executed six sale-deeds by her when she filed Suit No.2361/1996, if not more, Satyawati Sharma manifested her knowledge of the existence of the six sale-deeds. In her reply to the application under Order XXII Rule 10, she opposed impleadment by stating that the right transferred by her under the six sale-deeds was prior to when she filed the suit. She pleaded that

Order XXII Rule 10 would apply where interest is transferred during pendency of a suit. Thus, the contention of the appellants that Satyawati Sharma never executed the six sale deeds is a plea which is barred by the principle of estoppel by RFA (OS) 35/2009 pleading. Satyawati Sharma never questioned the six sale-deeds executed by her inspite of being having knowledge thereof and there is thus clearly estoppel by acquiescence. The appellants, while filing the Civil Revision Petition No.316/2004 clearly admitted to Satyawati Sharma having executed the six sale-deeds, validity whereof was never questioned by them. Principle of estoppel by pleading is squarely attracted to the appellants as well.

21. Submission urged by learned senior counsel for the appellants that Order VII Rule 11(d) of the Code of Civil Procedure relates to when the suit appears from the statement in the plaint to be barred by law, and that the plea of estoppel by pleading cannot apply for the plaint to be rejected, is noted and rejected by us for the reason the law pertaining to estoppel by pleading would result in a suit being barred by law. Needless to state, if with reference to previous pleadings in a suit, a party is barred from pleading to the contrary in a subsequent suit, the principle of estoppel by pleading is squarely attracted.

22. Besides, a Court of Record has inherent power which a court of justice must possess to prevent misuse of its procedures in relation to an action initiated which would amount to an abuse of the process of the law. In the decision reported as (2006) 3 SCC 100 Mayar (H.K.) Ltd. & Ors. vs. Owners & Parties, Vessel M.V. Fortune Express & Ors., the Supreme Court had held that the power of a Court to reject a plaint which is an abuse of the process of the law is

not restricted to Order VII Rule 11 of the Code and if it is warranted, the inherent power of the Court can always be invoked.”

The view taken in the above referred decision squarely applies to the case before this Court. The plaintiffs having repudiated the MoU dated 11.09.2001 in the previous suit, they are estopped from seeking enforcement of the very same MoU and the plaint is liable to be rejected on this ground alone.

10. Coming to the plea of limitation, Article 54 of Limitation Act prescribes a period of limitation of three years for a suit for specific performance of a contract, beginning from the date fixed for purpose or if no such date is fixed when the plaintiff has noticed that performance is refused.

11. In the case before this Court, the plaintiffs have specifically alleged in para 9 of the plaint that in pursuance of the MoU, the defendants got them to sign, execute and register lease/relinquishment deed and a gift deed on 11.09.2001, but they failed to transfer their rights in property No. 116, Sector 59, Faridabad in favour of the plaintiffs, despite their assurance that the same shall be done within a week of registration of the release/relinquishment deeds.

It has also been alleged in para 8 of the plaint that it was further agreed between the parties that the loans raised by M/s Excellent Hosiery Products against property No. 101, Sector 24, Faridabad shall be repaid by defendants 1 and 2

immediately after the plaintiffs relinquished/transferred their share in property No. 5, B.D. Estates, Lancer Road, Timarpur, Delhi in their favour.

This is further alleged in para 9 of the plaint that the gift deed was got signed by defendants No. 1 and 2 from plaintiffs for transfer of rights in property No. 5, B.D. Estates, Lancer Road, Timarpur, Delhi, on 11.09.2001.

In para 13 of the plaint, it has been alleged that the cause of action for filing the suit arose on various dates when the defendants did not perform their part of MoU dated 11.09.2001.

It has also been alleged in para 13 of the plaint that as per the terms of MoU, the existing water arrangements between M/s Sarda Solvent Extraction Pvt. Ltd and M/s Harsh Raghun & Co. Pvt Ltd. was to continue, but defendant No. 1 with total disregard to his representations discontinued and disturbed the water supply to M/s Sarda Solvent Extraction Pvt. Ltd. to the same effect is the averment made in para 14 of the previous suit.

It has also been alleged in para 25 of the plaint that pendency of the suit filed by the defendants against HSIDC was never disclosed to them and plaintiff No. 1 had, in July, 2004, sought substitution in that civil suit and was subsequently substituted as plaintiff therein.

12. Thus, this is plaintiffs' own case in this suit is that the defendants had agreed to transfer their rights in property No. 116, Sector 59, Faridabad to them, within

one week of registration of the release/relinquishment deeds. Even with respect to the loans which had been raised by M/s Excellent Hosiery Products against property No. 101, Sector 24, Faridabad, the case of the plaintiffs is that the same were to be repaid by the defendants immediately after the plaintiffs relinquishing/transferring their share in property No. 5, B.D. Estates, Lancer Road, Timarpur, Delhi in favour of the defendants.

Since no specific date for performance of the obligations by the defendants was fixed in the MoU, and in order to bring the case within the purview of the first part of Article 54 of Limitation Act, there has to be a specific date fixed for performance of the contract, I would proceed on the basis that the case is covered under the second part of the said Article. I, therefore, have to decide when, as per the averments made in the plaint, the plaintiffs had notice of refusal by the defendants to perform their obligations under the MoU dated 11.09.2001. If I take one week after 11.09.2001, i.e., 18.09.2001 as the date when the plaintiff had notice that the defendants had refused to perform obligations of defendants under the MoU dated 28.08.2001 and 11.09.2001, the present suit having been filed on 27.09.2008, is hopelessly barred by limitation to the extent the plaintiffs are seeking enforcement of the MoU dated 11.09.2001. In any case, it can hardly be disputed that when the defendants, despite execution of gift deed by the plaintiffs in respect of property No. 5, B.D. Estates, Lancer Road, Timarpur, Delhi on

11.09.2001 did not transfer their rights in property No. 116, Sector 59, Faridabad and did not pay the dues of the Bank of Rajasthan in terms of their agreement with the plaintiffs, within a reasonable time, the plaintiffs had notice that the defendants had refused to perform their obligations under the said MoU. The case of the plaintiffs is that the defendants were to transfer Faridabad property to them within one week of execution of the relinquishment deed and gift deed on 11.09.2001 and they were to pay the dues of Bank of Rajasthan immediately after the plaintiffs transferring their rights in property No. 5, B.D. Estates, Lancer Road, Timarpur, Delhi. If I take a reasonable period of say 03 months, from the date of the MoU, for its implementation on the part of the defendants, the suit would still be barred by limitation, as far as enforcement of the MoU is concerned. This is not the case of the plaintiffs that after 11.09.2001/18.09.2001, the defendants had been promising to perform their obligations under the MoU and, therefore, they had no notice that they had refused to perform their obligation. Rather, their case in para 15 of the previous suit was that from the very beginning the defendants had no intention to perform their obligations.

Two reliefs have been claimed in the present suit. The first relief sought by the plaintiffs is specific performance of the MoU dated 11.09.2001 and the second relief claimed by them is damages, amounting to Rs 2,28,04,530/-. This amount comprises Rs 1 crore by damages and Rs 1,28,04,530/- as interest on that amount

with effect from 11.09.2001. The claim for damages is also based upon the alleged breach of the obligations contained in the MoU since according to the plaintiffs the value of property No. 116, Sector 59, Faridabad, which has since been resumed by HSIDC and in that suit, he had sought substitution as a plaintiff in July, 2004. It has been alleged in para 24 of the plaint that in the said suit HSIDC had filed written statement on 06.12.2003, stating therein that property No. 116, Sector 59, Faridabad had been resumed by them vide order dated 18.09.2003 on account of non-implementation of the project and possession of the plot had been taken over by them on 27.11.2003. The plaintiffs are thus claiming damages on account of breach of the contract (MoU), by the defendants, by not transferring Faridabad plot, which, on account of its having been resumed by HSIDC, had become incapable of being transferred to them. The said plot, according to the plaintiffs was to be transferred to them within one week of execution of the relinquishment deed on 11.09.2011. When the plaintiffs were substituted as plaintiffs in that suit in July, 2004, they certainly came to know that the defendants were no more in a position to transfer the said plot to them. Computed from 31.7.2004, the present suit would still be barred by limitation since the period of limitation prescribed for recovery of damages commenced from 18.09.2001. The suit is, therefore, patently barred by limitation, even with respect to this relief.

13. The case of the plaintiffs is that the loan taken from Bank of Rajasthan was agreed to be paid by the defendants. This was one of the obligations to be performed by the defendants under the MoU dated 11.09.2001. It is alleged in para 12 of the plaint that since the defendants failed to pay the dues of the bank, OA No. 211/2002 was filed by it against the firm as well as the plaintiffs as guarantors. It is also alleged that a notice dated 31.12.2002 was issued by the bank to the plaintiffs as well as Sarda Solvent Extraction Pvt. Ltd under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest(SARFESI) Act. On receipt of notice of the OA and notice dated 31.12.2002, the plaintiffs had notice that the defendants committed breach of the contract by not paying the dues of the bank. Computed from 31.12.2002, the suit is still barred by limitation. It appears that the dues of the bank have since been paid by the plaintiffs. The suit for recovery of the amount, on account of payment having been made by the plaintiffs could be within limitation, but, the suit for a direction to the defendants to pay that amount to the plaintiffs, when instituted, was barred by limitation.

14. The case of the plaintiffs is that in breach of the contract between the parties, the defendants disturbed the existing arrangement for supply of water between Sarda Solvent Extraction Pvt. Ltd. and Harsh Raghun & Co. Pvt Ltd. This averment was made in para 14 of the previous suit which was filed in September,

2004. Thus, by September, 2004, the plaintiffs had notice of breach of this part of the contract by the defendants. Computed from September, 2004, the suit is barred by limitation.

15. The plaintiffs have claimed interest on Rs.1 crore since 11.09.2001. This is yet another indicator as to when, according to the plaintiffs, the contract should have been performed by the defendants.

16. In para 15 of the previous suit, the plaintiff alleged that the defendant had no intention of performing their obligations under the MoU. This averment clearly shows that before filing the first suit in September, 2004, the plaintiffs had notice of refusal by the defendant to perform their part of the contract. As stated earlier, computed from September, 2004, the suit would be barred by limitation.

17. The learned counsel for the plaintiff has relied upon the order of this Court in **Anil Rai v. Vinay Rai** IA No. 4533/2006 in CS(OS) No. 294/2006, decided on 23.10.2008. In the above-referred case, the defendant had sought rejection of the plaint under Order 7 Rule 11 (d) of CPC on the ground that in the e-mail communication exchanged between the parties, the defendant had turned the family settlement in question as a mere wish list not binding upon him and, therefore, the suit based upon that family arrangement, having been filed in the year 2006 was barred by limitation. This Court took note of the averments that the defendant had taken steps to give effect to the settlement on various dates in 2001 and 2004. The

Court also took note of the rule that if the plaint contains multiple causes of action, it cannot be rejected if some of the causes of action are barred by limitation. However, in the case before this Court, the whole of the suit is based upon failure of the defendants to perform their obligations under MoU dated 11.09.2001 and this is not the case of the plaintiffs that the defendants had, at a later stage, taken steps for implementation of the MoU. Therefore, this judgment does not apply to the case before this Court.

Relying upon the decision referred in Sub para 16 of the abovereferred judgment, the learned counsel for the plaintiffs contended that the MoU, which is in the nature of a family settlement, should be given effect to. There is no quarrel with regard to the preposition of law that attempt of the Courts should be, as far as possible, to uphold the family arrangements instead of disturbing the same on technical grounds. However, it is also a dicta of law that the civil Courts cannot grant a relief which is barred by limitation. It is well known that limitation defeats equity. A relief, howsoever, equitable it may be, cannot be entertained by the Courts if it is patently barred by limitation.

18. It was next contended by the leaned senior counsel for the plaintiffs that since the defendants had, in their written statement in the previous suit, clearly stated their readiness and willingness to perform their remaining obligations under the MoU, a fresh period of limitation computed from 11.09.2001 or 18.09.2001 or

three months thereafter starts from the date of filing of the written statement, in view of the provisions contained in Section 18 of Limitation Act. In my view, the contention is wholly misconceived. Section 18 of Limitation Act, to the extent it is relevant, provides that where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.

The defendants, in their written statement in the previous suit, did not acknowledge any liability in respect of any property or right subject matter of this suit. Moreover, the period of limitation had already expired even before the written statement in the previous suit was filed and an acknowledgment in order to come within the purview of Section 18 of the Limitation Act is required to be made before expiry of the prescribed period of limitation.

The written statement filed in the previous suit is dated 17th February, 2005. Even if computed from that date, the suit is barred by limitation, having been filed in August, 2008.

19. After this case was reserved for orders, the learned counsel for the plaintiffs submitted a compilation of judgments including some judgments which were not

referred during the course of arguments. I am, however, unable to take those judgments into consideration since the other party had no opportunity to rebut them during the course of arguments.

20. Section 16(C) of The Specific Relief Act, to the extent it is relevant, provides that specific performance of a contract cannot be enforced in favour of a person who fails to aver and prove that he had performed or had always been ready and willing to perform the essential terms of the contract which were to be performed by him, other than terms the performance of which had been prevented or waived by the defendant.

In the case before this Court, though, it is alleged in para 29 of the plaint that the plaintiffs “are ready and willing to perform their obligations under the MoU dated 11.09.2001’ there is no averment that they had always been ready and willing to do so. Though such an averment can be pleaded by way of amendment, the previous suit, repudiating the MoU and seeking its annulment leaves no doubt that at the time of filing the previous suit, they were not ready and willing to perform all their obligations under the MoU. Therefore, it cannot be said that the plaintiffs had always been ready and willing to perform the MoU. For this reason also, the plaint is liable to be rejected being barred by Section 16(C) of The Specific Relief Act, 1963.

21. For the reasons stated hereinabove, the plaint is rejected. The suit and all pending IAs stand disposed of.

V.K.JAIN, J

AUGUST 03, 2012
'raj'/bg