

13.

\$~

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

+

CS(OS) 2814/2011

BUILDMORE INDIA LTD

..... Plaintiff

Through : Mr. G.L. Rawal, Sr. Adv. with
Mr. Kuljeet Rawal, Adv.

versus

LALIT CHAWLA & ORS

..... Defendants

Through

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

ORDER

%

17.01.2012

G.S.SISTANI, J. (ORAL)

I.A.NO.20526/2011.

1. This is an application filed by the plaintiff under Order VI Rule 17 CPC seeking amendment in the plaint.
2. Since the suit is at the initial stage and summons are yet to be issued in the suit, present application is allowed. Let amended plaint be taken on record.
3. Application stands disposed of.

CS(OS) 2814/2011

4. Plaintiff has filed the present suit for specific performance and grant of decree of mandatory injunction, in the alternate compensation of Rs.5.0 crores. Since upon reading of the plaint present suit seems to have been filed beyond the period of limitation, counsel for the plaintiff was requested to address arguments to satisfy the court that the present suit has been filed within the period of limitation.

5. The present suit arises out of an Agreement to sell dated 30.08.1997. Late

Signature Not Verified
Digitally Signed
By:AMULYA

Dr. Gyan Chand Chawla, was holding lease-hold rights / ownership rights

of property bearing No.D-240, Defence Colony, New Delhi. A lease deed was executed in his favour on 10.07.1973 and was registered at serial No.4550 in additional book no.1 volume No.3180 and registered on 18.07.1973. Dr.Gyan Chand Chawla died on 20.12.1996 and his wife had pre-deceased him. She died on 15.01.1991. As per his Will, the above said property was to devolve upon his three sons, namely, Mr.Anil Chawla, Mr.Lalit Chawla and Mr.Ashok Chawla and all the three legal heirs were to inherit $\frac{1}{3}$ rd share each.

6. Further as per the plaint, Mr.Anil Chawla who was residing at A-32, Connaught Place, New Delhi agreed to sell in terms of Agreement to Sell dated 30.08.1997, his undivided $\frac{1}{3}$ rd share in the suit property to the plaintiff for a total sale consideration of Rs.45.0 lakhs, out of which Mr.Anil Chawla, was paid Rs.21,000/- in cash and Rs.1,54,000/- was paid by means of a cheque, totaling to Rs.1,75,000/-. Admittedly, Mr.Anil Chawla died on 29.09.2000. Mr.Anil Chawla was unmarried and the only legal heirs of Mr.Anil Chawla, are his two brothers, who have been arrayed as defendants no.1 and 2 in the present suit.
7. Mr.Rawal, learned senior counsel for the plaintiff submits that as per the agreement to sell, balance sale consideration was to be paid to Mr.Anil Chawla, upon property being converted from lease-hold to free-hold. The relevant clause of the agreement to sell dated 30.08.1997 reads as under:

“That in pursuance of this Agreement to Sell and in consideration of a total sum of Rs.45,00,000/- (Rupees Forty Five Lacs Only) out of which the FIRST PARTY receives, this day, a sum of Rs.1,75,000/- (Rupees One Lacs Seventy five thousand only) i.e. Rs.21,000/- by cash and Rs.1,54,000/- vide two cheques No.767791 and 767792 dated 30.08.97 and 15.09.97 of the sum of Rs.50,000/- and Rs.1,04,000/- drawn on Punjab & Sind Bank, New Delhi, from the SECOND PARTY, as advance earnest money and part sale consideration, the receipt of which the FIRST PARTY admits and

4

acknowledges hereby. The remaining balance consideration shall be received by the FIRST PARTY from the SECOND PARTY, within 30 days from the date of the registration of Conveyance Deed, freehold conversion of the aforesaid property and the handing over of the possession of the Demised Property equivalent to the 1/3 undivided share."

8. Mr. Rawal, learned senior counsel for the plaintiff further submits that upon the death of Mr. Anil Chawla, the plaintiff had enquired from his brothers, being defendants No.1 and 2 with regard to the progress of the property being converted from lease-hold to free-hold, and the plaintiff was informed by them that steps were being taken. Attention of this court is also drawn to the letters sent to the defendant i.e. letters dated 16.12.2009, 30.04.2010, 09.08.2010, 14.12.2010 and 28.03.2011. As per para 12 of the plaint, in May, 2008 the plaintiff was surprised to learn that the property was put to auction and thereafter the counsel for the plaintiff made efforts to find the details of the case which was pending in this court and learnt about the suit for partition which was pending between defendants No.1 and 2.
9. It is firstly contended by counsel for the plaintiff that question of limitation would be a question of fact and law and secondly the plaint has to be read as a whole, which would show that the plaintiff had taken all necessary steps and the plaintiff has always been ready and willing to comply with his part of the agreement and, thus, the suit filed is within limitation.
10. In support of his submission, counsel for the plaintiff has placed reliance in the case Hardesh Ores (P) Ltd. Vs. Hede and Company reported in (2007) 5 SCC 614 and more particularly paragraphs 25, and paragraph 23 of a case decided by a Single Judge of this court in Jitender Kaur Vs. Surinder Kaur & Ors. reported in 184 (2011) DLT 661. It is submitted

that defendants no.1 and 2 have stepped into the shoes of the deceased, Sh.Anil Chawla, their brother and they are bound by the terms of the agreement.

11. Counsel for the plaintiff has placed reliance on Article 54 of the Limitation Act, in support of his plea that in case where there is no time is fixed, the period of limitation would run when the plaintiff has noticed that the performance has been refused, Article 54 reads as under:

Description of Suit	Period of Limitation	Time from which period begins to run.
54. For specific performance of a contract	Three years	The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused.

12. Counsel for the plaintiff submits that plaintiff has been following up the matter with Sh.Anil Chawla till he was alive and thereafter with his brothers, who in turn informed the plaintiff that steps were being taken to get the property converted from lease-hold to free-hold. Para 7 of the plaint reads as under:

“7. Plaintiff have been following deceased Shri Anil Chawla and have been enquiring about steps taken by him along with his brothers, Defendant No.1 and 2 of getting the property converted from leasehold rights to freehold rights. It was representatives that steps were taken and plaintiff was bonafidely believing the same.”

13. I have heard learned senior counsel for the plaintiff and am of the view that present suit filed by the plaintiff is patently barred by limitation for the following reasons:
14. Bare reading of the plaint would show that plaintiff had entered into an

agreement to sell with the brother of the defendants, Sh.Anil Chawla, vide an agreement to sell dated 30.08.1997 and at the time of signing the agreement to sell, a sum of Rs.1,75,000/- was paid to Sh.Anil Chawla. In terms of the agreement to sell balance sale consideration was to be paid by the plaintiff to Sh.Anil Chawla within 30 days from the date of registration of the Conveyance Deed and the property being converted from lease-hold to free-hold and upon handing over of possession of 1/3rd undivided share of the property bearing No.D-240, Defence Colony, New Delhi. Unfortunately, Sh.Anil Chawla died on 29.09.2000. There is no averment in the plaint that the plaintiff did not come to know about the factum of death of Sh.Anil Chawla, or came to know about his death at a late stage. As per para 12 of the plaint, plaintiff came to know in the end of May, 2008 that the entire property bearing No.D-240, Defence Colony, New Delhi had been put to auction by the Court and so it created panic in the mind of the plaintiff. It has also been stated in para 12 of the plaint that thereafter the plaintiff through its advocate found out the particulars of the proceedings pending in this court and inspected the record. It will be useful to reproduce para 12 of the plaint:

“12. Plaintiff was stund when Plaintiff came to know in end of May, 2008 that the entire property bearing No.D-240, Defence Colony, New Delhi have been put to auction by this Ld. Court & so it created panic so immediately, the Plaintiff through Advocate found particulars of the proceeding before this Ld. Court & inspected the record and came to know certain facts which are relevant to mention came to its knowledge. From the record, it transpired amongst other to the following:

- (a) That Defendant No.1 filed a Suit for partition impleading Defendant No.2 as well as deceased Shri Anil Chawla being Defendant in the said Suit.
- (b) By an exparte Order of 3/12/1996 in the said Suit, ad

10

interim Order was issued against the Defendants of the said Suit namely; Defendant No.2 herein and deceased Shri Anil Chawla from creating any third party interest which was not served.

- (c) The Defendant No.1 & 2 also were fully conscious of the Agreement to Sell not only, as was deliberated and promised to do needful for transferring share in favour of the Plaintiff on the demise of their brother Shri Anil Chawla concealed the said facts and further but it is found that an application under Order 39 Rule 2A read with provision of Contempt Act filed for taking action against Plaintiff as well as deceased Shri Anil Chawla for entering into Agreement to Sell being the subject matter of the present Suit.
- (d) None were to put to notice. The said agreement 30.8.1997 were there knowledge and concealed. Plaintiff was not party & no such option was served on it."

15. It has been contended before this court that the plaintiff was never aware of the ex parte order, which was passed in the suit for partition, which is also pending in this court. As per the plaint, the plaintiff has been writing various letters to the brothers of Mr. Anil Chawla, the defendants herein. Photocopy of the letters have been placed on record, including the postal receipt of one communication issued to Sh. Lalit Chawla, defendant no.1 dated 16.12.2009. Although the postal receipt of Sh. Ashok Chawla has also been placed on record, however, no such copy of the letter has been placed on record and all the letters filed are addressed only to Sh. Lalit Chawla. According to Article 54 of the Limitation Act, the period of limitation with regard to a suit for specific performance of a contract is three years, however, the time would begin to run either from the date fixed for the performance or if no such date is fixed, when the plaintiff has noticed that performance is refused. In the present case admittedly no precise date was fixed for the performance and thus, the period of limitation would run when the plaintiff has noticed that the

11

performance has been refused. On reading of the plaint it would show that as per the own showing of the plaintiff, Mr. Anil Chawla died on 29.09.2000. Between the period 2000 to 16.12.2009 except for a bald statement that the plaintiff approached the brothers of Mr. Anil Chawla, there is not a single communication on record to show that the plaintiff knowing fully well that Mr. Anil Chawla had died, brought the agreement to sell to the notice of the defendants or called upon them to get the property converted from lease-hold to free-hold or requested them to complete the transaction. Even assuming that the plaintiff had made verbal request to defendants which is of no value, even as per para 12 of the plaint it came to the knowledge of the plaintiff in May, 2008, that the entire property had been put to auction. This in my view would show that the LRs of Anil Chawla (defendants herein) openly refused to recognize any right of the plaintiff in the suit property and the date of knowledge of auction would be the starting point for limitation to run. Even if the plaintiff is given benefit of the period between 2000 to 2009, the plaintiff could have at best file the present suit within three years of the knowledge i.e. end of May, 2008, however, present suit was only filed on 05.10.2011 much beyond a period of three years of knowledge of refusal on the part of the defendants to perform the contract.

16. Counsel for the plaintiff has also placed on record copy of the order dated 02.07.2009 passed in IA.No.9242/2008 and 9244/2008 (both the applications were filed by the present plaintiff in the suit for partition, pending between the brothers. It would be useful to reproduce the relevant paragraphs of this order. Paragraphs 15, 16, 17, 18, 23, 30 & 31 of the order dated 02.07.2009 read as under:

“15. However, before the next date an application being I.A.No.9244/08 was filed by one M/s. Buildmore India Ltd.

12

(hereinafter referred to as „Builder“) under Order 21 Rule 54 CPC read with Sections 47 and 151 CPC for adjudication of the claim of the said party. The prayer in this application was made to the extent that this court should allow the claim of the applicant i.e. M/s.Buildmore India Ltd in respect of 1/3rd undivided share of the deceased (defendant No.2) in the property bearing No.D-240, Defence Conony, New Delhi and prayer was also made to keep aside the 1/3rd share of the sale proceeds out of the sale of the said property.

16. Another application being I.A. No. 9742/08 was filed by the Builder under Order XXI Rule 59 read with Order XXI Rule 92 CPC with the prayer that stay of confirmation of sale in favour of the Purchaser be stayed pending adjudication of the claim of the Builder made in I.A. No.9244/08 and alternatively keep aside 1/3rd amount of the sale proceeds out of the total sale consideration of property bearing No. D-240, Defence Colony, New Delhi.

17. The prayer made in the abovementioned two applications filed by Builder are based upon on the following averments :

- (i) That Builder/applicant has come to know that the property in question was put to public auction through court auction in the present proceedings.
- (ii) The Builder has a claim in the property in question and is entitled to receive part of the sale proceeds. It was alleged in the application that the Builder had entered into an agreement to sell dated 30th August, 1997 with original defendant No.2 Mr. Anil Chawla (since deceased in the suit herein) in respect of 1/3rd undivided share in the property in question for a total consideration of Rs.45 lacs which he inherited on demise of his father.
- (iii) The Builder had paid Rs.1,75,000/- to Mr.Anil Chawla as advance earnest money and part sale consideration i.e. Rs.21,000/- in cash on 30th August, 1997 and Rs.1,54,000/- by two cheques for Rs.50,000/- dated 30th August, 1997 and another for Rs.1,04,000/- dated 15th September, 1997 and both the cheques were encashed by Mr.Anil Chawla and the money was appropriated towards part payment of the sale

consideration. Copies of the agreement dated 30th August, 1997 and receipts alongwith copies of the cheques were annexed with the said application. (iv) It is also mentioned in the application that the balance consideration was to be paid by the Builder within 30 days from the date of registration of the conveyance deed for freehold conversion of the property in question and handing over possession of the property equivalent to 1/3rd undivided share. However, in September, 1997 when the Builder was waiting for the division of the property in question amongst the three brothers, i.e. Mr. Anil Chawla (Defendant No.2) and his brothers i.e. plaintiff and defendant No.1, Mr. Anil Chawla informed the builder about the institution of the present suit by the plaintiff. It is the case of the Builder that Mr. Anil Chawla was informed about the passing of the order dated 23rd December, 1996 restraining the parties hereto from creating any third party interest in the property in question and taking possession thereof. However, Mr. Anil Chawla assured the Builder that there was no cause for concern and represented that he had informed his brothers of the agreement to sell and assured the Builder of its 1/3rd undivided share in the property in question.

18. In the last week of May, 2008, the Director of the Builder was informed by one Mr. Sanjay Sharma that the property in question has been put to auction by this court in the present proceedings. The Director, therefore, approached his counsel and also got inspected the record of the present case and petition was prepared which was filed on 28th May, 2008.

23. In the light of the abovesaid facts and circumstances, the allegations of the Builder are that the parties to the suit i.e. plaintiff and defendant No.1 have fraudulently wriggled out of the obligations undertaken by their brother under the agreement to sell dated 30th August, 1997 and have tried to usurp the suit property by over-reaching the rights of the Builder since the Builder is not a party to the present suit for partition and thus had no means to know of the proceedings and the orders passed herein.

[Emphasis supplied]

30. The replies to these three applications being I.A. Nos. 9244, 9741 and 9742 of 2008 have been filed by the plaintiff as well as defendant. In the nutshell, the execution of the alleged agreement dated 30th August 1997 between Mr. Anil Chawla and the builder has been denied. It is stated that the alleged claim of the builder is patently time barred and the alleged agreement without consideration is void in law. The alleged agreement with Mr. Anil Chawla whose mind was not developed and who was unable to comprehend himself is not valid in law. It is alleged that the Builder took advantage of the mental condition of Mr. Anil Chawla and when the agreement was entered into, the present suit had already been filed in which a restraint order was issued by this court not to create an third party interest in the suit property.

[Emphasis supplied]

31. It is further submitted that the Builder was aware that the property can only be converted into freehold on the application of all the three co-owners and if the Builder was serious about the same, he would have also approached the other co-owners. The question of division of properties amongst the parties did not arise as long as the property was leasehold with the office of L & DO."

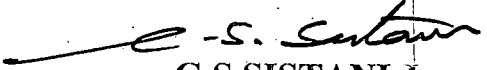
17. The purpose of extracting the above paragraphs of the order passed by this court on 02.07.2009 is to show that plaintiff was aware that the LR's of Mr. Anil Chawla (defendants herein) were trying to wriggle out of the agreement to sell. It is for this reason that the plaintiff herein filed the applications on 13.08.2008 in the suit pending between the brothers for partition. This makes it abundantly clear that in May, 2008, plaintiff became aware of the auction of the property and by 13.08.2008 plaintiff had absolute knowledge that defendants herein have no intention to comply with the terms of the agreement to sell dated 30.08.1997 and in view thereof he filed the application in the suit for partition. The period of limitation would begin from May, 2008 and more particularly on

13.08.2008.

18. As I find the suit is patently beyond the period of limitation, I do not consider it appropriate to issue summons. The suit is dismissed.

JANUARY 17, 2012

ssn


G.S.SISTANI, J.