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

Judgment delivered on: 07.01.2013

+ CS(OS) 312/2012

RAHUL GUPTA & ANR

..... Plaintiff

Through: Mr.Ujjawal Jha, Advocate

versus

ASHOK BISWAL AND ANOTHER

..... Defendant

Through: Mr. Pradeep Diwan, Sr. Advocate with
Mr. Aditya Singh and Mr. Aman Garg,
Advocate For defendant no.1.
Mr. Rajiv Aneja, Advocate for
defendant no.2.

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

1. By this order, I propose to decide the preliminary issue no.1. By an order dated 13.08.2012, the following issues were framed:-

- 1) Whether the suit is barred limitation?*
- 2) Whether the plaintiff is entitled to seek relief of specific performance of the agreement to sell dated 02.08.2006 ?*
- 3) Whether the plaintiff is entitled to relief of mandatory injunction as prayed for?*
- 4. whether the plaintiff is entitled to permanent injunction?*
- 5. Whether the agreement to sell dated 2nd August, 2006 stood terminated and the amount forfeited by defendant No.1 on account of default in payment of the balance sale consideration amount by the plaintiff?*
- 6. Whether the plaintiff has not properly valued the present suit for the purposes of the Court fees therein?*
- 7. Relief.*

Considering the fact that the issue no.1 concerns the very maintainability of the present suit, therefore, the same was directed to be treated as a preliminary issue.

3. Addressing arguments on the said preliminary issue, Mr. Ujjawal Jha, learned counsel appearing for the plaintiffs submitted that present suit filed by the plaintiffs is within the prescribed period of limitation as envisaged under Article 54 of the Limitation Act, 1963. Counsel further submitted that the plaintiffs in the present suit are seeking specific performance of an Agreement to sell dated 2.8.2006 which was executed by the defendant no. 1, in order to sell the property bearing no. E- 929, Chittranjan Park, New Delhi- 110019 in favour of the plaintiffs for a total sale consideration amount of Rs. 85 lacs. Counsel further submitted that the plaintiffs have already paid an amount of Rs. 30 lacs to the defendant no. 1 and the balance consideration amount was to be paid by the plaintiffs in terms of the Schedule of payment as set-out in the said Agreement to Sell. Counsel further submitted that an amount of Rs. 20 lacs was paid by the plaintiffs by way of three separate cheques of the same date i.e, 2.8.2006, while an amount of Rs. 10 lacs was paid in cash by the plaintiff no.1 on 14.8.2006, in good faith, without any receipt.

4. Counsel also submitted that the time period for completion of

the contract was 9 months, as per the agreement, from the date of execution of the Agreement to Sell, but since defendant no. 1 himself derived his strength by virtue of Agreement to Sell dated 27.12.2005, therefore, defendant no.1 was not in a position to transfer the title of the property in favour of the plaintiffs before the execution of the sale deed of the suit property by the erstwhile owners in his favour. Counsel also submitted that the plaintiffs had approached the defendant no.1 on various occasions and every time; the defendant no.1 gave an assurance that he will execute the sale deed in favour of the plaintiffs immediately after the sale deed is executed in their favour by the erstwhile owners.

5. Counsel further submitted that it is only in the 2nd week of November, 2011, that the plaintiff no.1 came to know that the sale deed in respect of the aforesaid property has been executed by the erstwhile owners in favour of the defendant no. 2 and immediately thereafter, the plaintiffs approached the defendant no.1, requesting them to transfer the title of the suit property in their favour and when no action was taken by the defendant no.1, the plaintiffs approached this court by way of filing the present suit. Counsel further stated that the defendant no.1 has perfected his title over the said property through his nominee, who is the wife of defendant no.2, therefore, the suit filed by the plaintiffs is well within the prescribed period of limitation. In support of his arguments,

learned counsel for the plaintiff placed reliance on a judgment of the Punjab & Haryana High Court in the case of ***HARNAM SINGH VERSUS MANGAT SINGH, AIR 2001 PUNJAB AND HARYANA 257.***

6. Counsel for the plaintiffs also placed reliance on Section 13 of the Specific Relief Act, 1963 to support his argument that where the vendor or lessor has subsequently acquired interest in the property, then the purchaser or lessee can compel it, to make good the contract out of such interest. Contention raised by the counsel was that, at the time of execution of the agreement to sell dated 02.8.2006, the defendant no.1 didn't have any perfect title over the subject property and the said title of defendant no.1 became perfect when the erstwhile owners had executed the sale deed in favour of the wife of the defendant no.1, who is his nominee and therefore, the plaintiff has every right to seek enforcement of the said Agreement to Sell against the nominee of the defendant no.1.

7. Counsel further submitted that three years period under Article 54 of the Limitation Act is to be reckoned from the date of refusal of performance by the vendor and in the present case, such refusal came from the side of defendant no. 1, only in the 2nd week of November, 2011 and finally on 18.1.2012, when a legal notice was issued by the plaintiff to the defendant no.1 thereby calling upon the defendant no.1 to honour his part of the obligation to execute

sale deed of the subject property.

8. On the other hand, Mr. Pradeep Diwan, Sr. Advocate appearing for defendant No.1, submitted that original owners, Sh. B.N Chakrovarty, Smt. Bhattacharjee and Smt. Tapti Chakrovarty had sold the subject property in favour of defendant No.1, vide agreement to sell dated 27.12.2005, but defendant No.1 could not pay the total sale consideration to the original owners as named above within the prescribed period under agreement to sell and therefore, the said agreement eventually got terminated due to non-fulfilment of the obligation on the part of defendant No. 1. Counsel further submitted that the defendant No.1 had entered into the sale transaction of the same very property with the plaintiffs on 2nd August, 2006 in order to sell the said property for a total sale consideration of Rs. 85 lakhs. An amount of Rs. 20 lakhs was paid by the plaintiffs to the defendant No.1, as an earnest money and in consideration thereof, defendant No.1 had executed agreement to sell dated 2nd August, 2006, in favour of the plaintiffs. Counsel further submitted that the plaintiffs failed to honour his commitment in terms of the agreement to sell dated 2nd August, 2006 as they failed to pay the balance sale consideration amount within the agreed period, due to which the defendant No.1 could not honour their commitment under the said agreement dated 27.12.2005. Counsel further submitted that since defendant No.1 had failed to fulfil his part of the obligation,

therefore, the original owners of the said property had sold the same in favour of defendant No.2, who happens to be the wife of defendant No.1 vide sale deed dated 23rd May, 2011, for a total sale consideration of Rs. 1 crore. Counsel also submitted that the original owner; Smt. Bhattacharjee had also forfeited the earnest amount of Rs. 45 lakhs, which was paid by defendant No. 1 at the time of the execution of the agreement to sell in his favour.

9. Counsel thus stated that in the background of the facts of the present case Section 13 of the Specific Relief Act, 1963 will not apply. Counsel also submitted that it is not the case of the plaintiffs in the plaint, that defendant No.2 is the nominee of defendant No. 1. Counsel also submitted that the plaintiffs have also not sought cancellation of the sale deed dated 23rd May, 2011. Counsel further submitted that case set up by the plaintiffs in the present plaint is that, the defendant No.2 is bound to execute the sale deed in favour of the plaintiffs, although without disclosing any reasons as to, what is the right of the plaintiffs to claim such a direction against defendant No.2. Counsel further submitted that the limitation to file a suit for specific performance began on the expiry of 9 months from the date of the execution of the agreement to sell dated 2nd August, 2006, as stipulated in the said agreement and therefore, filing of this suit by the plaintiffs in January, 2012 is clearly barred by limitation.

10. Counsel further placed reliance on *clause* 10 of the agreement to sell, wherein it is mentioned that on the expiry of 9 months period, the defendant No. 1 became responsible to pay the penalty of Rs. 15,000/- per month to the plaintiffs for the delayed period beyond 9 months and, therefore, through this clause it was quite clear that remedy of the plaintiff to file a specific performance is to be reckoned from the date of expiry of 9 months period. Counsel also stated that under Article 54 of the Limitation Act, 1963, three years period got expired on 1st June, 2007. Counsel further submitted that second part of the Article 54 of the Limitation Act will not apply in the present case, as in the agreement to sell the period was already fixed for the completion of the agreement. Counsel further submitted that the judgment cited by the counsel for the plaintiffs, in the case of *Harnam Singh (supra)* is not applicable to the facts of the present case as in that case, the property was mutated in favour of the seller at a later date and due to this reason the Court said that limitation would apply from the date when the mutation of the property in favour of the seller had taken place. To support his arguments counsel placed reliance on the judgment of this Court in the case of ***Subhash Chander kathuria vs Umed Singh & Anr. 127 (2006) DLT 292.***

11. Arguing for defendant No.2, Mr. Rajiv Aneja, submitted that the sale deed, which was executed by the original owner in favour of defendant No. 2 nowhere mentions that the same was executed

in her favour as nominee of her husband defendant No. 1 herein. Counsel further submitted that there is no privity of contract between the plaintiffs and the defendant No. 2 and, therefore, the plaintiffs cannot seek any specific performance of the contract against defendant No. 2, who has become owner of the said property in her own independent right.

12. I have heard learned counsel for the parties. Before I deal with the rival contentions raised by the counsel for the parties, let me first, briefly give narration of the facts which are not in dispute between the parties. The property in question is the subject property bearing no E- 929, Chittranjan Park, New Delhi 110019. Shri B. N. Chaturvedi, Smt. Tripta and Smt. Sati Bhattacharjee were the co-owners of the said property. These co-owners had agreed to sell the entire property (basement floor and the ground floor) in favour of defendant no.1, Mr. Ashok Biswal vide Agreement to Sell dated 27.12.2005 for a total sale consideration amount of Rs. 90 lacs.

13. An amount of Rs. 45 lacs was paid by the defendant no.1 to the erstwhile owners at the time of the execution of the said Agreement to Sell dated 27.12.2005 and the balance amount of Rs. 45 lacs was to be paid by the defendant no.1 within a period of 9 months from the date of the execution of the said Agreement to Sell. It was also agreed between the erstwhile owners and the defendant no. 1, that the payment of the balance sale consideration of Rs. 45 lacs was to be made by the defendant no.1 on or before

26.9.2006 and the said time period shall be the essence of the said Agreement to Sell. Before the said time of 9 months came to expire, the said defendant no.1, had agreed to sell the basement floor and the ground floor of the suit property in favour of the plaintiffs vide Agreement to Sell dated 2.8.2006 for a total sale consideration amount of Rs. 85 lacs.

- 14.** An amount of Rs. 20 lacs was paid by the plaintiffs to the defendant no.1 by way of three separate cheques on the date of execution of Agreement to Sell and the balance amount was to be paid by the plaintiffs to the defendant no.1, as per the Schedule of payment as set out in para 1 of the Agreement to sell dated 02.08.2006

The said para 1 of the Agreement to Sell dated 02.08.2006 reads as under :-

“1. That in pursuance of this Agreement to Sell and in consideration of a total sum of Rs. 85,00,000/- (Rupees eighty five lacs) out of which the first party receives, this day, a sum of Rs. 20,00,000/-(Rupees twenty lacs only) in the following manner:

- a) Rs. 7, 00,000/- vide cheque no. 000147 dated 02.08.2006 drawn on United Bank of India, Tansen marg, New Delhi*
- b) Rs. 7,00,000/- vide cheque no. 266788 dated 02.08.2006 drawn on Canara Bank, South Extension, New Delhi*
- c) Rs. 6,00,000/- Vide cheque no. 416802 dated 02.08.2006 drawn on Canara Bank, South Extension, New Delhi, from the second party, as advance earnest money and part payment, at the time of signing of this Agreement to Sell. The remaining balance sum of Rs. 65,00,000/-(Sixty five*

lacs) shall be received by the first party, from the second party in the following manner:

- a) Rs. 10,00,000/- (Rupees ten lacs only) on or before 15.08.2006.*
- b) Rs. 20,00,000/- (Rupees twenty lacs only) on completion of structure of the building.*
- c) Rs. 20,00,000/- (Rupees twenty lacs only) after flooring, plastering and fixing of chawkhats.*
- d) Rs. 15,00,000/- (Rupees fifteen lacs only) at the time of handing over the vacant and physical possession of the said portion, complete in all respects, to the second party, within nine months from the date of this agreement to sell."*

15. As per the plaintiff no.1, he had paid an amount of Rs. 10 lacs in cash to the defendant no.1, but without any receipt and in good faith. The defendant no.1 has vehemently denied the receipt of the said payment of Rs. 10 lacs as alleged by the plaintiff. It is not in dispute between the parties that further payments were not made by the plaintiff to the defendant no.1. It will also be manifest from the aforesaid schedule in the Agreement to Sell that a final payment of Rs. 15 lacs was to be made by the plaintiffs to the defendant no.1 within a period of 9 months from the date of the Agreement to Sell when at the same time, the defendant no.1 was to hand over the vacant and peaceful possession of the said portions, complete in all respects.

16. Under Clause 10 of the said Agreement to Sell, it was also

agreed between the parties that if the vendor had failed to hand over the possession of the said portion to the plaintiff within a period of 9 months from the date of the Agreement to Sell, then the seller shall become liable and responsible to bear and pay a penalty of Rs. 15,000/- per month to the purchasers i.e, the plaintiffs for the delayed period beyond 9 months period. Clause 10 of the said Agreement to Sell dated 02.06.2008 reads as under :-

"10. That if the first party fails to handover the possession of the said portion to the second party within nine months from the date of this Agreement to Sell, the first party shall be liable and responsible to bear and pay a penalty of Rs. 15,000/- (Rupees fifteen thousand only) per month to the second party for the delayed period beyond nine months."

17. Another fact which is not in dispute between the parties is that the erstwhile owners instead of executing the sale deed of the said property in favour of the defendant no. 1 had finally executed the sale deed dated 16.05.2011 in favour of the wife of the defendant no.1, who has been impleaded as defendant no. 2 in the present case. As per this sale deed, the property in question has been sold by the erstwhile owners in favour of defendant no.2 for a total sale consideration of Rs.1crore and the entire sale consideration amount was received by the erstwhile owners from the defendant no. 2. In pursuance to the said execution of the sale deed dated 16.05.2011, an amount of Rs. 50 lacs was paid by the defendant no. 2 by way of a pay order dated 20.4.2011, Rs. 20 lacs by way of pay order dated 19.4.2011 and another sum of Rs. 20 lacs by way of pay order on

16.5.2011 and the remaining amount of Rs. 10 lacs by way of cheque dated 19.5.2011. In fact, there was no Agreement to Sell which that was executed between the defendant no.2 and the erstwhile owners prior to the execution of the sale deed dated 16.05.2011.

18. In the background of the aforesaid admitted facts, the plaintiffs in the present suit seek to enforce the Agreement to sell dated 02.08.2006 against the defendants. Although, in the plaint, there is no averment alleging that the plaintiffs are seeking enforcement of the Agreement to Sell through the alleged nominee of the defendant no.1, yet in the arguments, counsel for the plaintiffs laid strong emphasis to build a case for specific performance against the defendant no.1 through the alleged nominee, i.e. the defendant no.2 herein.

19. It is beyond the comprehension of this Court as to how the wife of the defendant no. 1 can be treated as his nominee. The defendant no.2 has an individual identity of her own and, cannot bind herself to fulfil the obligations of her husband in terms of the Agreement to Sell dated 02.08.06. This Court cannot appreciate the argument advanced by the counsel for the plaintiffs that the status of the defendant no.2 is that of a 'nominee' because she happens to be the wife of defendant no.1. Therefore, in order to clarify this aspect, it would be pertinent to note the legal meaning of the term

‘nominee’. The definition of a nominee has been given in Black's Law Dictionary, 1149, 72 (9th ed.2009), which reads as under :-

“[a] person designated to act in place of another, [usually] in a very limited way,” or “[a] party who holds bare legal title for the benefit of others .” and an agent as “[o]ne who is authorized to act for or in the place of another; a representative.”

20. As per the afore-noted definition, this Court cannot comprehend that unless so intended by the defendant no.1, the defendant no. 2 can be accepted as a nominee of defendant no.1. Merely because the defendant no. 2 happens to be the wife of defendant no.1, it cannot be assumed that because of this relationship, she automatically becomes his nominee.

21. In my considered view, the plaintiff has no right to seek specific performance of the contract against defendant no.2; firstly, because there is no privity of contract between plaintiff no.1 and the defendant no.2 and secondly, the defendant no.2 cannot be held to be a nominee of the defendant no.1, merely because she happens to be his wife.

22. Coming back to the issue of limitation, this Court does not find that there is any term in the agreement to sell which envisages any time period for the execution of sale deed in favour of the plaintiff. The only period stipulated in the agreement to sell to complete the sale transactions was 9 months period within which, the plaintiff was to pay the entire balance sale consideration amount and

correspondingly, the defendant no.1 was to hand over the peaceful and vacant possession of the ground and basement floor of the said premises.

23. It is quite bizarre that at no stage, prior to the serving of a legal notice dated 18.01.2012, the plaintiffs ever called upon the defendant no.1 to offer payment of the balance sale consideration amount, and did not even whined about the non-completion of the structure of the said property. The plaintiffs also did not call upon the defendant no.1 to pay a penalty of Rs. 15,000/- per month because of his failure to hand over the possession of the said agreed portions to the plaintiffs. Under the said agreement to sell, what was to be specifically performed by the plaintiffs was to pay the balance sale consideration amount at various stages in terms of Clause 1 as stated in the Agreement to Sell dated 02.08.2006 and the corresponding obligation of the defendant no.1 was to hand over the vacant and peaceful possession of the said portion on the expiry of 9 months period.

24. The case of the plaintiffs thus will squarely fall under Part-I of Article 54 of the Limitation Act, 1963, which reads as under:

"a period of three years for a suit for specific performance of a contract from the date fixed for the performance or if no such date is fixed, when the plaintiff has notice that performance is refused."

In the present case, the date is already fixed between the parties, the parties have clearly mentioned the time within which the contract should be performed. The three years period therefore in

the present case, has to be reckoned from the date of expiry of the period of 9 months which came to an end on 1.06.2007. It is only in a case where time is not an essence of the contract and no time is fixed for the performance of the contract, that three years period under Article 54, will be reckoned from the date when the plaintiff has noticed that the performance of the contract has been refused. The plaintiffs in the present case have taken the limitation period from the date when they came to know about the execution of the Sale deed dated 16.05.2011 by the erstwhile owners in favour of defendant no.2, but in my considered view in the face of the time period of nine months stipulated in the agreement to sell dated 02.08.2006, the present suit filed by the plaintiffs is clearly barred under Article 54 of the Limitation Act, 1963. In any event of the matter, the plaintiff cannot arbitrarily extend the period of the limitation stretching the same to the date when the sale deed of the said property was executed by the erstwhile owners in favour of defendant no.2.

25. For taking this view, I find support from the judgment of this Court in the case of ***Subhash Chandra Kathuria V. Umed Singh & Anr., 127 (2006) DLT 292***, wherein in similar set of the facts, the Court after placing reliance on the judgment of the Supreme Court in the case of ***T.L. Muddukrishana Versus Smt. Lalitha Racchandra Rao, 1997 II AD 32***, in paragraph 20 held as under:

"20. In the case of *T.L. Muddukrishana v. Smt. Lalitha Ramchandra Rao* reported as 1997 II AD SC 32, the Supreme

Court held that for the purpose of limitation, what is material is that the limitation begins to run from the date the parties have stipulated for performance of the contract. The suit is required to be filed within three years from the date fixed by the parties under the contract. For this reason, in the said case, the court even rejected the application for amendment of the plaint which came to be filed after the expiry of three years on the ground that it would change the cause of action."

26. In the facts of the present case, a time period of 9 months was the essence of the contract which as per the terms of the agreement came to an end on 1.06.2007, and therefore, filing of the present suit at this stage, at the very outset is clearly barred by limitation.

27. So far as the judgment of Punjab & Haryana Court as cited by the counsel for the plaintiffs in the case of *Harnam Singh (supra)* is concerned, the ratio of the same will not help the case of the plaintiffs as in the facts of the said case, under the agreement itself, it was agreed between the parties that after the mutation was sanctioned, the plaintiff will serve one month's notice to the defendant for execution of the sale deed and only after notice, the sale deed was to be executed. In the present case, there was no such stipulation in the agreement to sell dated 02.08.2006.

28. In the light of the above discussion the preliminary issue no.1 is decided in favour of the defendants and against the plaintiffs. The present suit is accordingly dismissed being barred by limitation as prescribed under Article 54 of the Limitation Act, 1963. The Parties are directed to bear their own costs.

It is ordered accordingly.

KAILASH GAMBHIR, J

JANUARY 07, 2013