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

+ CS(OS) 1506/2014

% ***Judgment dated 23.05.2014***

SUNIL ARORA

..... Plaintiff

Through: Ms.Shivali Bansal, Advocate

versus

V.K. VADHERA

..... Defendant

Through

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

G.S.SISTANI, J (ORAL)

1. Plaintiff has filed the present suit for specific performance of agreement to sell dated 27.11.1991 in respect to property bearing No.4, Block B-1, Phase-II, Ashok Vihar, Delhi. A decree of permanent injunction is also sought. Counsel for the plaintiff was requested to address arguments on the question of limitation, as on a bare reading of the plaint the Court was of the view that the present suit was hopelessly barred by limitation.
2. The facts of the case as stated by the plaintiff in the plaint are that the plaintiff is one of the legal representatives of deceased, Sh.Des Raj Arora. The said Sh.Des Raj Arora had been authorized by a special power of attorney by other legal representatives to institute the present suit. (It may be noted that all the legal heirs have not been made a party to the suit). Sh. Des Raj Arora died on 3.3.2013. Sh.Des Raj Arora entered into an agreement to sell with the defendant on 27.11.1991 with respect to property No.4, Block B-1, Phase-II, Ashok Vihar, Delhi, for a total sale consideration of Rs.58.0 lacs, out of which Rs.4.0 lacs was paid to the

defendant as earnest money vide pay order No.000853 dated 27.11.1991 drawn on State Bank of India, Rana Pratap Bagh, Delhi. Plaintiff further paid another sum of Rs.6.0 lacs in cash to the defendant as part of the sale consideration.

3. According to the plaint out of Rs.58.0, Rs.10.0 lacs stand paid to the defendant and the balance sale consideration was to be paid at the time of execution of the sale deed i.e. transfer of property in favour of the plaintiff. The defendant agreed to get the property mutated in his name in the record of the DDA. Defendant was also to get extension of time for construction of the building at his own cost and at the time of the agreement to sell the defendant had already applied for mutation and the same was being processed.
4. It is also averred in the plaint that it was agreed between the parties that after the aforesaid formalities i.e. mutation and extension of time for construction, is granted by the DDA, the balance sale consideration would be paid within 15 days thereafter. It has been averred in paragraph 10 of the plaint that to secure performance of the agreement to sell dated 27.11.1991 the plaintiff issued a legal notice dated 7.11.2008 to the defendant. In reply to the said legal notice it was stated by the defendant that the plaintiff was no longer entitled to seek performance of the agreement to sell and the earnest money paid by the plaintiff stood forfeited on account of the failure on the part of the plaintiff to complete the transaction. It was also stated that the earnest money stood forfeited and nullified. Paragraph 11 of the plaint reads as under:

“11. That the defendant in his reply dated 01.12.2008 to the legal notice dated 7.11.2008 sent by the plaintiff, showed his reluctant intention to perform the Agreement to Sell. However, the Plaintiff did not press upon the same as it was at a pre mature stage due to not fulfilment of the terms of the Agreement to Sell.”

5. It is submitted that since the mutation was not carried out in favour of the defendant, neither extension was sought by the defendant, the plaintiff is not to be blamed for the delay in complying with the transaction. Counsel for the plaintiff also submits that the plaintiff made a complaint to the DDA against the defendant and at that stage, plaintiff and the defendant compromised the matter. An affidavit was filed by the defendant as also the plaintiff; and the fact that the plaintiff withdrew his complaint would show that the defendant had agreed to extend the time to complete the transaction. It is also stated that the complaint made by the plaintiff, was withdrawn on 11.3.2010
6. Counsel further submits that after the complaint was withdrawn the defendant again changed his mind which led to filing of another complaint dated 13.1.2011 to the DDA. The complaint made on 13.1.2011, was withdrawn on 14.4.2011.
7. Counsel for the plaintiff also submits that the subsequent conduct of the defendant after the year 2008 would show that the defendant recognized the agreement to sell of the year 1991 and he had agreed to honour the same and it is for this reason that defendant had submitted an affidavit to the DDA and withdrew his complaint against the defendant and thus it is a fit case where a summon should be issued to the defendant.
8. Counsel for the plaintiff has placed reliance on **Kamlesh Agarwal & Anr. Vs. E.C.E. Industries Ltd.** reported at 163 2009 DLT 477 and more particularly paragraphs 9 to 13 and on **Anisuddin & Anr. Vs. Vimla Sethi & Ors.** reported at 152 (2008) DLT 342 and more particularly paragraphs 8 and 31, to show that the Court keeping in view the subsequent events had reached a conclusion and time had been extended. Paragraphs 9 to 13 of **Kamlesh Agarwal (Supra)** read as under:

“9. Now, coming to the question of limitation, which is the subject matter of issue No.7, I find that the learned trial Judge while holding that the suit filed by the appellants was barred by the law of limitation has solely relied upon exhibit PW-1/M which as noticed above was a letter from the respondent to the appellants dated September 01, 1989. As per the trial Judge, by means of the said letter the respondent refused to act upon the “Agreement to Sell” dated June 15, 1977 and, therefore, in terms of Article 54 of the Limitation Act, 1963, the appellants ought to have filed the suit within three years of such refusal which they did not do and hence, the suit was barred by time.

10. The period of limitation for filing a suit for specific performance of contract as provided in Article 54 of the Limitation Act is three years and this period of three years is to be calculated "from the date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused."

11. There is no dispute that in so far as the present “Agreement to Sell” is concerned, no date was fixed for performance. Therefore, it is the RFA No.223 of 2000 Page 5 of 7 later part of Article 54 which will govern the period of limitation, i.e., "when the plaintiff has notice that performance is refused." In this view of the matter, the question that arises for consideration is whether the letter dated September 01, 1989 constitutes refusal on the part of the respondent. The relevant part of the letter in question reads as under: -

"Further please note that since you have not purchased the proportionate land of your flat, your registration of sale deed cannot be executed immediately."

12. It will be seen from the aforequoted paragraph that the respondent did not specify as to which was that proportionate land of their flat which the appellants had not purchased and in so far as the “Agreement to Sell” is concerned, it does not talk of any proportionate land that the appellants were required to purchase. Hence, what was stated in the letter dated September 01, 1989 Ex.PW-1/M was outside the terms and scope of the “Agreement to Sell”. It was, therefore, not open to the respondent to put any pre-condition to the execution of the sale deed which was not borne out from the terms of “Agreement to Sell”. Be that as it may, the letter in question could not be construed as refusal on the part of the

respondent to execute the “Agreement to Sell”. It simply stated that the execution could not be done immediately. It did not rule out execution at a future date and time. Therefore, it did not tantamount to refusal. A refusal has to be clear, unequivocal, cut and dry. The letter gave no such signal or indication. The learned trial Judge, thus, misconstrued the text of the letter and wrongly held that the respondent thereby refused to execute the “Agreement to Sell”.

13. It will not be out of place to mention that as per the learned counsel for the appellants, even after the appellants had sent legal RFA No.223 of 2000 Page 6 of 7 notice to the respondent calling upon it to execute the sale deed in their favour, respondent till date is collecting rent on their behalf from the tenant and depositing the same in their bank account. What does this show? It shows that the letter dated September 01, 1989 was not intended to be a refusal even from the point of view of the respondent.

9. Paragraphs 8 and 31 of Anisuddin & Anr. (Supra) read as under:

“8. It was also stated in the written statement that “the possession of the plot detailed herein below has been given to the purchaser as contractor for construction under a contract for construction executed between the parties.” It is further averred that the alleged agreement for building construction dated 23.04.1981 / 05.05.1981 was void ab initio and that, therefore, possession of the said plot had been illegally taken by the plaintiffs and they continue to be in illegal occupation thereof. It is also stated in the written statement of the defendant No.1 that the said agreement to sell and the alleged agreement for building construction were repudiated by the defendant No.1 through the legal notice of her advocate Mr Gopendra Nath Dutta dated 03.11.1988 and, as such, the present suit, which was filed on 13.01.1992, was barred by limitation inasmuch as the three-year period taken from 03.11.1988 expired on 03.11.1991. It is stated that the confirmations / acknowledgments dated 31.03.1984, 30.03.1987 and 29.03.1990 issued by Mr Riazuddin, father of the plaintiffs, as alleged power of attorney holder of the defendant No.1, are collusive and in a set pattern and the same appeared to have been back dated at the instance of the plaintiffs. It has also been averred that the alleged power of attorney in favour of Mr Riazuddin was ab initio void because it related to the said agreement to sell and the alleged

agreement of building construction which were also ab initio illegal and void. The defendant No.1 also alleged that the building construction agreement was void because the same was executed in Calcutta, whereas the stamp paper was purchased at New Delhi as also because there was no meeting of minds and as indicated by the several blanks left in the agreement in respect of material aspects.

31. This letter clearly establishes that it is the defendant No.1 who has been attempting to resile from the original agreement of 23.04.1981/05.05.1981. Perhaps because the property prices had gone up in the meanwhile, the defendant No.1 was trying to re-negotiate a better deal for herself, forgetting that she had accepted the entire sale consideration upon a solemn promise to execute the sale deed when the plaintiffs required her to do so. This letter also clearly indicates that the story of repudiation / refusal was not tenable because the defendant No.1 clearly indicated that she was still willing to cooperate with the plaintiffs so that whatever was agreed upon between them could be acted upon at least in the spirit in which it was agreed upon. The expression “but without any loss to me materially or otherwise”, is clearly indicative of the fact that the defendant No.1 wanted to make some extra money out of the transaction which had been concluded. This letter clearly indicates that on 03.11.1988, there was no refusal to perform the contract, but only a desire to re-negotiate so as to enable the defendant No.1 to receive something more than what had been agreed upon. The same sentiment is discernible from this letter dated 03.08.1991 (Exhibit DW-1/P-15).”

10. Reliance is also placed on *Ahmmadsahab Abdul Mulla Vs. Bibijan & Ors.* reported at AIR 2009 SC 2193 and more particularly paragraph 7, which reads as under:

“7. The inevitable conclusion is that the expression ‘date fixed for the performance’ is a crystallized notion. This is clear from the fact that the second part “time from which period begins to run” refers to a case where no such date is fixed. To put it differently, when date is fixed it means that there is a definite date fixed for doing a particular act. Even in the second part the stress is on ‘when the plaintiff has notice that performance is refused’. Here again, there is a definite point of time, when the plaintiff notices the refusal. In

that sense both the parts refer to definite dates. So, there is no question of finding out an intention from other circumstances. Whether the date was fixed or not the plaintiff had notice that performance is refused and the date thereof are to be established with reference to materials and evidence to be brought on record. The expression `date' used in Article 54 of the Schedule to the Act definitely is suggestive of a specified date in the calendar. We answer the reference accordingly. The matter shall now be placed before the Division Bench for deciding the issue on merits.”

- 11. Reliance is also placed on L.M. Nagpal & Ors. Vs. Ratehji & Co. & Ors. reported at 2013 (138) DRJ 464 in support of her submission that limitation would be a mixed question of fact and law and thus summons should be issued in the suit and the defendant should be called upon to file their written statement.
- 12. I have heard counsel for the plaintiff.
- 13. Article 54 of the Limitation Act reads as under:

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.
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- 14. Paragraphs 10 and 11 of the plaint fairly disclose that to secure performance of the agreement to sell dated 27.11.1991, the plaintiff had issued a legal notice dated 7.11.2008 to the defendant. Since a copy of the reply to the legal notice has been filed, I deem it appropriate to reproduce the same:

“1st December, 2008

Mr.Hitender Kapur,

Advocate,
Chamber No.X-33A
Civil Wing
Tis Hazari Courts
Delhi-110 054

Subject: Notice dated 7th November, 2008 issued by you on behalf of Mr.Desraj Arora to my client.

Dear Sir,

I am writing to you under instructions from and on behalf of my client, Mr.V.K. Vandhera, son of Late Shi L.N. Vadhera, Resident of 96, Gautam Nagar, New Delhi-110 049 and am instructed to address you as under:-

I state on instructions that the notice issued by you is being replied to by means of this reply.

In reply to the said notice, my client states that he is the owner of plot of land no.4, Block B-1, Ashok Vihar Phase-II, Delhi measuring 500 square yards, to the exclusion of all else. It is also true that in the year 1991, my client had entered into an agreement to sell the said plot of land to your client. However, your client was neither ready to complete the transaction, nor was he willing. Thereafter, on several occasions, my client called upon your client to complete the said transaction but your client failed to do so. It is obvious that your client abandoned the said transaction, and the proposed transaction was cancelled and nullified. As on date, there is no valid and pending agreement to sell between our clients.

We state on instructions that your client is illegally and wrongfully seeking to reopen the said transaction after the passage of 17 years, since he seems to be motivated by greed and avarice. Your client has got this highly belated notice issued but the same is of no effect. There is no valid agreement to sell between my client and your client, and the demand made in your notice is strongly refuted. The amount paid by your client towards earnest money already stands forfeited and the same has already been appropriated by my client.

Therefore, my client is not liable to sell the property in question to

you. Your demand for transfer of the said property to your is baseness and has no basis in law. My client is categorically declining to do so.

Your notice stands replied to and you may advice your client accordingly.”

15. Perusal of the reply to the show cause notice would show that the defendant categorically informed the plaintiff that since the plaintiff was neither ready and willing to complete the transaction, despite the defendant also clearly requesting him to complete the same on several occasions, the defendant informed the plaintiff that the agreement to sell stood abandoned and the transaction stood cancelled and nullified. Plaintiff was further informed in clear terms that there was no valid and binding agreement to sell between the parties and the issue cannot be open after a passage of 17 years. Plaintiff was also informed that the amounts paid stood forfeited; and the defendant was not liable to sell the property in question to the plaintiff.
16. In my view the denial by the defendant of the agreement to sell was categorical and the period of limitation as prescribed by Article 54 of the Limitation Act, species the period of limitation as 3 years from the date on which plaintiff has noticed that performance has been refused.. Article 54 reads as under:

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.
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17. As per Article 54 the period of limitation specified for a suit for specific performance is three years. The time would however, begin from the date fixed for performance and if no date is fixed, where the plaintiff has notice that the performance is refused. The refusal of the performance would thus start from 1.12.2008.
18. In the case of *Satya Prakash Gupta and Anr. V. Vikas Gupta and Ors.*, in R.F.A.(OS) No.23/2010 dated 24.11.2011, a Division Bench of this Court in para 13 has held as under:

“13. Rules of Limitation are meant to see that parties do not resort to dilatory tactics but to seek their remedy promptly. It is a policy of Limitation Acts that those who sleep upon their claims should not be assisted by the Courts and equal policy behind those acts, in that there shall be an end of litigation and protection shall be offered against stale demands. It is well settled that question of limitation can be raised at any time in the course of proceedings. Court can dismiss the suit on the ground of limitation even if the defence has not raised that plea, where on the face of the pleadings, the Court comes to the conclusion that the suit is barred by limitation.”

19. Counsel for the plaintiff has strenuously argued that the Court must consider the subsequent conduct of the defendant which would show that the defendant extended the time. Reliance is placed on the affidavit filed by the defendant before the DDA. Before this submission of counsel for the plaintiff can be considered, it would be necessary to notice that after the reply to the legal notice, the plaintiff did not chose to approach this Court instead the plaintiff made a complaint to the DDA on 3.9.2009, informing the DDA that the defendant had sold the plot to the plaintiff. The plaintiff also informed the defendant that he was willing to deposit any payment to the DDA which the DDA would demand, copy of the complaint was also sent to the Lieutenant Governor and the Ministry of

Urban Development. The DDA issued a letter to the defendant on 23.10.2009 calling upon the defendant to visit the office of the DDA and file documents pertaining to sale of plot.

20. It may be noticed that the plot could not have been sold by the defendant without seeking prior permission as per lease deed, and violation of the term of the lease would render the plot being cancelled. The defendant attended the public meeting and submitted an affidavit, wherein the defendant had deposed that there was no dispute between the defendant and the plaintiff. The plaintiff also filed an affidavit before DDA deposing that the deponent has given a personal loan of Rs.6.0 lacs to the defendant, which amount had been received back and he had thus no objection if the plot is mutated in favour of the defendant.
21. The copy of the affidavit has been placed on record by the plaintiff and the same reads as under:

“I, SH. DESH RAJ ARORA S/O SH PARMANAND R/O 601, TIME HOUSE WAZIRPUR IND. AREA DELHI – 52 do hereby solemnly affirm and declare as under:

1. That the deponent has filed a complaint against Sh. V.K. Vadhera R/O DDA PLOT NO- B-1/4, ASHOK VIHAR PH-II DELHI.

2. That the deponent has given a personal loan of Rs.6,00,000/- (Six Lakh Only) to SH V.K. VADHERA R/O PLOT NO-B-1/4 ASHOK VIHAR PH-II DELHI.

3. THAT the deponent have received the same back from SH. V.K. VADHERA for the abovesaid plot.

3. That I have NO-Objection for mutation in respect of the said plot/flat which is in the name of present owner i.e. SH V.K. VADHERA.

4. That I have no objection that if the DDA allow mutation in

the name of present purchaser/owner of the above said plot.

5. That the no ill will has been left out between the parties and there is no dispute between both the parties.”

22. In my view the affidavit filed before the DDA does not support the case of the plaintiff, as the plaintiff has himself deposed that he had only given a loan of Rs.6.0 lacs which had been returned back by the defendant to him. This by no means would show that the defendant had agreed to extend the time for completing the transaction or the period of limitation would be extended on the basis of this affidavit filed by the plaintiff.
23. Another aspect which may be noticed that a second complaint was made by the plaintiff to the DDA on 13.1.2011. This complaint was also withdrawn on 14.4.2011. Even if the argument of the plaintiff is taken to be correct that by the conduct the defendant had extended the period of limitation, the second complaint was withdrawn on 14.4.2011 and even thereafter 3 years period has elapsed even from that date as well.
24. The judgments sought to be relied upon by counsel for the plaintiff, in my view are not applicable to the facts of the present case. Perusal of the case of Kamlesh Agarwal (Supra), would show that the Court reached to the conclusion that the communication dated 1.9.1989 was not intended to be a refusal in that case. Similar are the facts in the case of Anisuddin & Anr. (Supra) wherein in paragraph 8, the Court was of the view that there was collusion in the matter and in paragraph 31 the Court came to the conclusion that there was no refusal to perform the contract, but only a desire to re-negotiate.
25. The purpose of extracting the reply to the legal notice would show that in this case refusal was firm, categorical and in fact the defendant informed the plaintiff that 17 years have passed and the plaintiff has not performed his part of the agreement, the plaintiff was informed that the entire

amount paid stood forfeited and the agreement would become void.

26. Taking into consideration the Article 54 of the Limitation Act, in my view, bare reading of the plaint shows that the present suit has been filed beyond the period of limitation. I see no reason to issue summons in the suit. The plaint is rejected as being barred by limitation.

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27. In view of the order passed in the suit today, the application stands disposed of.

G.S.SISTANI, J

MAY 23, 2014

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