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

+ CS (OS) 394/2015

% *Judgment dated 27th September, 2016*

RAJINDER VOHRA Plaintiff

Through : Mr.Akhil Mittal, Adv.

versus

M/S FOUNTAIN LOGDE PVT LTD & ORS Defendants

Through : Mr.Alok K. Agarwal, Mr.Gaurav
Tomar and Ms.Isha Agarwal, Adv. for
defendants no.1 to 3 and 6 to 10.

Defendants nos. 4 and 5 are *ex parte*
vide order dated 30.07.2015

Mr.Rishi Manchanda and Mr.Ankur
Gosain, Adv. for defendant no.11.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

G.S.SISTANI, J (ORAL)

I.A. 3221/2016 (under Order VII Rule 11 CPC)

1. This is an application filed by defendants no. 9 and 10 under Order VII Rule 11 of the Code of Civil Procedure, 1908 (briefly 'CPC') seeking rejection of the plaint on two grounds; firstly, as being barred by the provisions of Order XXIII Rule 1 (4) and secondly, as being barred by limitation.
2. The plaintiff has filed the present suit for cancellation of the Sale Deed dated 17.04.2013 and specific performance of an Agreement to Sell dated 04.07.2008; as an alternative, the plaintiff has prayed for damages of rupees two crore.
3. As per the plaint, the plaintiff with a view to invest money in a property at Pahar Ganj, Delhi, the plaintiff came in contact with defendants no. 2

and 3, who were the directors of defendant no. 1 company. The defendant no. 1 company was the owner of a semi built-up property bearing Plot No. 55, Basti Arakashan Scheme, bearing Municipal no.XV/8651/1, situated at Arakshan Road, Paharganj, New Delhi, *ad measuring* about 233.24 sq. yards (hereinafter referred to as the '*suit property*').

4. The plaintiff and defendant no. 11 had agreed to purchase the suit property from the defendant no. 1 for a total sale consideration of Rs. 3.45 crores. Accordingly, the plaintiff and defendant no. 11, being the buyers and the defendants no. 1/ seller entered into an Agreement to Sell dated 04.07.2008. Out of the total sale consideration, the plaintiff and defendant no.11 equally paid Rs. 35.00 lakhs as an advance part-payment to defendant no. 1. As per Clause 4 of the said Agreement, the transaction, including the payment of balance amount and registration, was to be completed within six months from the execution of the agreement. This period could have been extended only upon the mutual understanding of both the parties. It was also agreed that defendants no. 2 and 3 will execute the Sale Deed in favour of the plaintiff and defendant no. 11 or their nominees, representative, etc. As per Clause 8 of the Agreement to Sell dated 04.07.2008, it was agreed that in case the suit property is re-sold to a third party then any sale consideration over Rs. 3.45 crores shall be shared equally between the plaintiff, defendant no.11 and defendants no.2 and 3 in the profit sharing ratio of 40:60, i.e. 40% of the additional amount would fall to the share of defendants no. 2 and 3 and 60% of the additional amount would fall to the share of plaintiff and defendant no.11. Defendants no. 2 and 3 also agreed to hand over original title deeds of the suit property to the plaintiff and defendant no.11 at the time of registration of the

Sale deed. It is also claimed that besides Rs. 35.00 lakhs paid as earnest money, another sum of Rs. 20.00 lakhs was incurred by the plaintiff and defendant no.11 towards removal of *malba* from the property, repairs, fixing of iron grills and other expenditure at the suit property. Thus, it is claimed by the plaintiff and defendant no.11 that Rs.55.00 lakhs were paid by them to defendants no.1 to 3.

5. The plaintiff claims that, during the pendency of the Agreement to Sell, the defendants nos. 2 and 3 approached the plaintiff and informed that they had a prospective buyer of the suit property offering a consideration of Rs. 6 crores. In view of Clause 8 of the Agreement to Sell dated 04.07.2008, the plaintiff agreed to the said sale. Thereafter, an Agreement to Sell and Purchase dated 23.06.2011 was executed between the defendant no. 1 company and the defendant no. 4 and 5 for the sale of the suit property for a total consideration of Rs. 6 crores. It is pertinent that both the plaintiff and the defendant no. 11 were parties/collaborators to the said agreement. At the time of execution of the Agreement, an amount of Rs. 50 lakhs was paid to the defendant no. 1. The plaintiff claims that no part of the said 50 lakhs received was given to the plaintiff in violation of Clause 8 of the Agreement to Sell dated 04.07.2008. Accordingly, suspecting a *mala fide* intention on the part of the defendant nos. 1 to 3, a notice dated 21.10.2011 was served upon them. On 10.11.2011, the defendants no. 1 to 3 replied to the notice alleging that the Agreement to Sell dated 04.07.2008 had expired as the same was not extended beyond the initial period of 6 months, i.e. after 03.01.2009. In the said reply, the defendants no. 1 to 3 had alleged that the agreement dated 04.07.2008 had ceased to have any legal effect.

6. The defendants no. 4 and 5 (purchasers in the Agreement dated

23.06.2011) had filed a suit, being CS (OS) 1770/2012, before this Court *inter alia* seeking specific performance of the Agreement dated 23.06.2011. The plaintiff as well as the defendant no. 11 were parties to the said suit. When the plaintiff received summons in the said suit, it claims to have learnt of a Memorandum of Understanding ('MOU') also dated 23.06.2011 executed surreptitiously between the defendants no. 1 to 5, wherein an additional amount of Rs. 1.30 crores was agreed to be paid to the defendant no. 1 as agreed conversion charges and other miscellaneous expenses. The plaintiff has further alleged that the defendant nos. 1 to 5 and 11 herein, being the other parties in CS (OS) 1770/2012, had settled the matter without considering the right of the plaintiff herein and accordingly an application (IA 2262/2013) was filed for withdrawal of the suit. The suit was dismissed as withdrawn on 11.02.2013, without the notice of the plaintiff herein.

7. As per the plaint, the plaintiff filed a suit in the court of Senior Civil Judge, Tis Hazari Courts (being CS 62/2013) for permanent and mandatory injunction against the defendants no. 1 to 3 and 11 herein. During the pendency of the said suit, the plaintiff claims to have learnt that the suit property was already sold by a Sale Deed dated 17.04.2013 by the defendant no. 1 in favour of the defendants no. 6 to 10 for a lower price of Rs. 1,90,50,000/-. The plaintiff claims that the same was to play a fraud upon the plaintiff herein and deprive him of his right under Clause 8 of the Agreement dated 04.07.2008. Accordingly on 08.07.2013, the plaintiff withdrew the suit CS 62/2013 with liberty to file a fresh suit before the appropriate court.
8. An application (IA 16458/2013) was filed by the defendant no. 5 herein/ plaintiff no. 2 therein for restoration of CS (OS) 1770/2012 alleging fraud have been played upon it. On 15.09.2014, this

application was also withdrawn by the defendant no. 5 herein as the matter was settled. In the meanwhile, the plaintiff had filed another suit, being CS (OS) 101/2014, *inter alia* seeking specific performance of the Agreement to Sell dated 04.07.2008. The said suit was withdrawn on 21.01.2014.

9. The plaintiff has prayed for the following reliefs:

- “a) *Pass a decree of declaration in favour of the Plaintiff and against the defendant no.1 to 3 and defendant no.6 to 10 thereby declaring the registered sale deed dated 17.04.2013 in respect of the suit property No. 55, Basti Arakshan Scheme, bearing Municipal No. XV/8651/1 situated at Arakshan Road, Paharganj, New Delhi, measuring 233.24 sq. yds. as registered document no. 2853 in Addl. Book No. I, Volume No. 15106 at pages 88 to 104 on 18.04.2013, as void document and same ordered to be cancel* [sic: cancelled].
- b) *Pass a decree of specific performance of Agreement to Sell & Purchase dated 04.07.2008 in favour of the plaintiff and against the defendants No.1 to 3, directing the defendant no.1 to 3 to execute the registered sale deed in respect of suit property bearing No. 55, Basti Arakshan Scheme, bearing Municipal No. XV/8651/1 situated at Arakshan Road, Paharganj, New Delhi, measuring 233.24 sq. yards on receipt of the balance sale consideration price;*
- c) *Pass a decree of permanent & mandatory injunction thereby restraining the defendants no.6 to 10 their agents, servants, assigns, administrators, successors & alienates etc. not to raise construction, additional structure changes, alienate, gift, mortgage, transfer, or from creating any third party interest in any manner whatsoever in respect of the suit property No. 55, Basti Arakshan Scheme, bearing Municipal No. XV/8651/1 situated at Arakshan Road, Paharganj, New Delhi, measuring 233.24 sq. yds. till final disposal of the suit;*
- d) *Or in Alternate, a money decree of Rs.2,00,00,000/- may be passed in favour of the plaintiff and against the*

defendant no.1 to 10 on account of damages and losses suffered by the plaintiff;

e) Pass the order of costs in favour of the Plaintiff and against the defendants throughout in the present suit;”
(Emphasis Supplied)

10. Summons in the suit and notice in the application were issued on 12.02.2015. The defendants, except defendants no. 4 and 5, entered appearance and have also filed their respective written statements. Defendants no. 4 and 5 have chosen not to appear and have been proceeded *ex parte* on 30.07.2015.
11. Mr. Agarwal, learned counsel appearing on behalf of the applicants, submits that the applicants herein primarily seek rejection of the plaint on two grounds. The first ground for rejection of the plaint is that the plaintiff had filed an earlier suit, being CS(OS) 101/2014, which was dismissed as withdrawn, however, no liberty was sought by the plaintiff to file another suit on the same cause of action. Counsel further submits that the second ground is that the first Agreement to Sell pertains to the year 2008 and as per Article 54 of the Limitation Act, the present suit would be barred by limitation. In support of the said grounds, learned counsel contends that after the Agreement to Sell dated 04.07.2008 was executed, the seller entered into a fresh Agreement to Sell dated 23.06.2011, which was in the knowledge of the present plaintiff and wherein the plaintiff was a conforming party, and on the basis of the said Agreement to Sell, the suit property was agreed to be sold by defendants no.1 to 3 to defendants no. 4 and 5. It is further contended by Mr. Agarwal, counsel for the applicant, that since the transaction arising out of the second Agreement to Sell was not being completed, defendants no. 4 and 5 had filed CS (OS) 1770/2012 in which the

plaintiff and defendant no.11 were also impleaded as parties. Thereafter, the matter was compromised and a Sale Deed dated 17.04.2013 was executed by the defendant no. 1 in favour of defendants no. 6 to 10. Thus, it is contended by the learned counsel for the applicants that the entire proceedings arising out of the second Agreement to Sell were in the knowledge of the plaintiff and a second suit based on the same cause of action would not lie and even otherwise the present suit is patently barred by limitation. In order to fortify his submissions, learned counsel has relied upon the decisions of the Supreme Court in ***K.S. Bhoopathy & Ors. v. Kokila & Ors.*, (2000) 5 SCC 458** and ***Sarguja Transport Service v. State Transport Appellate Tribunal, M.P., Gwalior, and Ors.*, (1987) 1 SCC 5**.

12. Mr. Agarwal, counsel for the applicants, further submits that after CS (OS) 101/2014 was dismissed as withdrawn by the plaintiff herein, plaintiff had filed an application, being I.A. 20828/2014 in CS (OS) 1770/2014 seeking review. This review application was dismissed as withdrawn on 28.10.2014, however, the plaintiff did not take recourse to any remedy thereafter and in effect he accepted the order, which was passed in the application.
13. Per contra, Mr.Mittal, learned counsel for the plaintiff/non-applicant, submits that the present application under Order VII Rule 11 CPC is not maintainable. It is further contended that the applicants/defendants no. 9 and 10 are not *bona fide* purchasers of the suit property. Counsel contends that the subsequent Sale Deed has been executed fraudulently for Rs.1,90,50,000/-, much below the market price, and in violation of the Agreement to Sell and Purchase dated 04.07.2008. It is also contended that the present application under Order VII Rule 11 CPC is not maintainable and is liable to be dismissed as the plaintiff had

withdrawn the earlier suit, being CS (OS) No.101/2014, with liberty to take recourse to appropriate remedies in accordance with law.

14. Counsel for the plaintiff/non-applicant clarifies that no doubt the plaintiff was impleaded as a party in CS(OS) 1770/2012 but the seller/defendant no. 1 and the buyer/defendants no. 4 and 5 came to an amicable settlement and in the absence of the present plaintiff and defendant no.11, application under Order XXIII Rule 3 CPC was filed wherein no notice was issued to the present plaintiff and in the absence of the plaintiff, the suit was withdrawn.
15. Counsel further submits that as per Clause 8 of the first Agreement to Sell dated 04.07.2008, the plaintiff was entitled to receive his share in profit in case the suit property was re-sold. It is also contended that the sellers entered into a subsequent Agreement to Sell in the year 2011 and the sellers sold the property, but they did not hand over the share which was to be received by the plaintiff and defendant no. 11. In view thereof, counsel contends that the plaintiff and defendant no.11 are entitled to specific performance of the Agreement to Sell dated 04.07.2008. Counsel further submits that the cause of action for recovery of this amount arose only in the year 2014 when the seller/defendant no.1 executed a Sale Deed in favour of defendants no. 6 to 10. Counsel for the non-applicant also submits that the present suit is barred by limitation as the cause of action arose only in the year 2014.
16. I have heard learned counsel for the parties and considered their rival submissions. I deem it appropriate to reproduce Order VII Rule 11 CPC; which reads as under:

“11. Rejection of plaint.- The plaint shall be rejected in the following cases:—

...

(d) where the suit appears from the statement in the plaint to be barred by any law;

...

(Emphasis Supplied)

17. Before the rival submissions of the counsel for the parties can be considered, a few undisputed facts may be noticed. It is not in dispute that the plaintiff had entered into an Agreement to Sell with defendant no. 1 company, represented by defendants no. 2 and 3 on 4.7.2008 with respect to the suit property.
18. It is also not in dispute that in the year 2011 another Agreement to Sell dated 23.06.2011 was entered into between defendant no. 1 (seller) and defendants no. 4 and 5 (buyers) in the present suit, with respect to the same suit property. It is also not in dispute that in the second Agreement to Sell, the present plaintiff and defendant no.11 were parties referred to as 'Collaborators' and have executed/signed the second Agreement to Sell. It is also not in dispute that as disputes and differences had arisen between the parties to the second Agreement to Sell dated 23.06.2011, CS (OS) 1770/2012 was filed by the defendants no. 4 and 5, wherein the plaintiff and defendant no. 11 were also made parties. It is also not in dispute that the said suit was compromised and dismissed as withdrawn. As per the compromise, the property was sold by defendant no. 1 to defendants no. 6 to 10.
19. The pleadings, however, show that based on the settlement, the suit property stands sold to defendants no. 6 to 10 and a sale deed has been executed by defendants no.1 to 3 in favour of defendants no.6 to 10. It is also not in dispute that aggrieved by the fact that the plaintiff and defendant no.11 were not given any benefit which understanding is being claimed between the sellers, plaintiff and defendant no.11, the plaintiff filed CS(OS) 101/2014, a copy of which has been placed on

record. The relief claimed in the said suit is extracted hereinbelow:

- a) pass a decree of specific performance of Contract/Agreement to Sell & Purchase dated 04.07.2008 in favour of the plaintiff and against the defendants No. 1 to 3, directing them to execute, transfer and register transfer documents in respect of property No.55, Basti Arakshan Scheme, bearing Municipal No.XV/8651/1 situated at Arakshan Road, Paharganj, New Delhi, measuring 233.24 sqr. yards on receipt of the balance sale consideration price;
- b) pass a decree of declaration that the Sale deed dated 17.04.2013 in respect of the property being property bearing No.55, Basti Arakshan Scheme, bearing Municipal No.XV/8651/1 situated at Arakshan Road, Paharganj, New Delhi, measuring 233.24 sqr. yds. Which was executed by the defendants no.1 to 3 in favour of defendants no.6 to 10 and was registered with the Sub-Registrar, Asaf Ali Road, New Delhi as document No.2853, Addl. Book No.1, Volume No.15106 at page 88 to 104 on 18.04.2013, is a void document and is not binding on the plaintiff;
- c) pass a decree of cancellation cancelling the Sale Deed dated 17.04.2013 in respect of the property being property No.55, Basti Arakshan Scheme, bearing Municipal No.XV/8651/1 situated at Arakshan Road, Paharganj, New Delhi, measuring 233.24 sqr. yds. which was executed by defendants No.1 to 3 in favour of defendants No.6 to 10 and was registered with the Sub-Registrar, Asaf Ali Road, New Delhi as document No.2853, Addl. Book No.1, Volume No.15106 at page 88 to 104 on 18.04.2013, is cancelled and is not binding on the plaintiff;
- d) pass a decree directing the defendant No.12, DDA to restore the leasehold of the property being property No.55, Basti Arakshan Scheme, bearing Municipal No.XV/8651/1 situated at Arakshan Road, Paharganj, New Delhi, measuring 233.24 sqr. yds. and to grant permission to transfer the said leasehold rights in favour of the

plaintiff by the defendants lessee i.e. defendants No.1 to 3, after restoring the same;

e) pass a decree of permanent & mandatory injunction thereby restraining the defendants, their agents, servants, assigns, administrators, successors & alienates etc. not to alienate, gift, mortgage, transfer, or from creating any third party interest in any manner whatsoever in respect of the property being property No.55, Basti Arakshan Scheme, bearing Municipal No.XV/8651/1 situated at Arakshan Road, Paharganj, New Delhi, measuring 233.24 sqr. yds. or in favour of any other person except to the plaintiff;

f) allow costs of the plaintiff to him against the defendants throughout;”

(Emphasis Supplied)

20. In this backdrop, the counsel for the applicant has pleaded rejection of the plaint on two grounds; first, as being barred by limitation and second, as being barred under Order XXIII Rule 1 (4).

BAR TO SUBSEQUENT SUIT [Order XXIII Rule 1(4)]

21. The first question, which arises for consideration is whether the suit, which is identical in nature seeking identical relief to a previous suit, can be entertained or not.

22. Prior to dealing with the rival contentions of the parties, I deem it appropriate to reproduce Sub-rules (3) and (4) of Rule 1 Order XXIII of the Code of Civil Procedure, which read as under:

“1. Withdrawal of suit or abandonment of part of claim.

...

(3) Where the Court is satisfied,—

(a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim,

it may, on such terms as it thinks fit, grant the plaintiff

permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.

(4) Where the plaintiff—

(a) abandons any suit or part of claim under sub-rule (1),
or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3),

he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.”

(Emphasis Supplied)

23. The argument of learned counsel for the applicant is that the second suit is not maintainable as identical prayers were made in CS (OS) 101/2014. On the contrary, submission of counsel for the non-applicant is that CS (OS) 101/2014 was, infact, dismissed as withdrawn, but leave was granted to the plaintiff to take recourse to such remedies, which would be available to him in accordance with law.
24. The law in respect of Order XXIII Rule 1 is well settled, when any person withdraws from a suit without seeking permission under Rule 1 (3), then he is precluded from instituting any fresh suit in respect of the same action. This is as when a person exhausts his remedy by instituting a suit and later withdraws the same, it is presumed that he has abandoned his claim. This ofcourse is subject to leave being taken from the court to institute a fresh suit. The scope of the Rule was considered by the Supreme Court in *Sarguja Transport Service (Supra)*, the relevant paragraph of which reads as under:

“7. The Code as it now stands thus makes a distinction between “abandonment” of a suit and “withdrawal” from a suit with permission to file a fresh suit. It provides that where the plaintiff abandons a suit or withdraws from a suit without the permission,

referred to in sub-rule (3) of Rule 1 of Order XXIII of the Code, he shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim. The principle underlying Rule 1 of Order XXIII of the Code is that when a plaintiff once institutes a suit in a court and thereby avails of a remedy given to him under law, he cannot be permitted to institute a fresh suit in respect of the same subject-matter again after abandoning the earlier suit or by withdrawing it without the permission of the court to file fresh suit. Invito beneficium non datur — the law confers upon a man no rights or benefits which he does not desire. Whoever waives, abandons or disclaims a right will lose it. In order to prevent a litigant from abusing the process of the court by instituting suits again and again on the same cause of action without any good reason the Code insists that he should obtain the permission of the court to file a fresh suit after establishing either of the two grounds mentioned in sub-rule (3) of Rule 1 of Order XXIII. The principle underlying the above rule is founded on public policy, but it is not the same as the rule of res judicata contained in Section 11 of the Code which provides that no court shall try any suit or issue in which the matter directly or substantially in issue has been directly or substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court. The rule of res judicata applies to a case where the suit or an issue has already been heard and finally decided by a court. In the case of abandonment or withdrawal of a suit without the permission of the court to file a fresh suit, there is no prior adjudication of a suit or an issue involved, yet the Code provides, as stated earlier, that a second suit will not lie in sub-rule (4) of Rule 1 of Order XXIII of the Code when the first suit is withdrawn without the permission referred to in sub-rule (3) in order to prevent the abuse of the process of the court.

(Emphasis Supplied)

25. In **K.S. Bhoopathy (Supra)**, the Supreme Court observed as under:

“13. The provision in Order XXIII Rule 1 CPC is an exception to the common law principle of non-suit. Therefore on principle an

application by a plaintiff under sub-rule (3) cannot be treated on a par with an application by him in exercise of the absolute liberty given to him under sub-rule (1). In the former it is actually a prayer for concession from the court after satisfying the court regarding existence of the circumstances justifying the grant of such concession. No doubt, the grant of leave envisaged in sub-rule (3) of Rule 1 is at the discretion of the court but such discretion is to be exercised by the court with caution and circumspection. The legislative policy in the matter of exercise of discretion is clear from the provisions of sub-rule (3) in which two alternatives are provided; first where the court is satisfied that a suit must fail by reason of some formal defect, and the other where the court is satisfied that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim. Clause (b) of sub-rule (3) contains the mandate to the court that it must be satisfied about the sufficiency of the grounds for allowing the plaintiff to institute a fresh suit for the same claim or part of the claim on the same cause of action. The court is to discharge the duty mandated under the provision of the Code on taking into consideration all relevant aspects of the matter including the desirability of permitting the party to start a fresh round of litigation on the same cause of action. This becomes all the more important in a case where the application under Order XXIII Rule 1 is filed by the plaintiff at the stage of appeal. Grant of leave in such a case would result in the unsuccessful plaintiff to avoid the decree or decrees against him and seek a fresh adjudication of the controversy on a clean slate. It may also result in the contesting defendant losing the advantage of adjudication of the dispute by the court or courts below. Grant of permission for withdrawal of a suit with leave to file a fresh suit may also result in annulment of a right vested in the defendant or even a third party. The appellate/second appellate court should apply its mind to the case with a view to ensure strict compliance with the conditions prescribed in Order XXIII Rule 1(3) CPC for exercise of the discretionary power in permitting the withdrawal of the suit with leave to file a fresh suit on the same cause of action. Yet another reason in support of this view is that withdrawal of a suit at the appellate/second appellate stage results in wastage of public time of courts which is of considerable importance in the present time in view of large accumulation of cases in lower courts and inordinate delay in

disposal of the cases.”

(Emphasis Supplied)

26. In the present suit, admittedly an identical suit was filed, being CS (OS) 101/2014, and the same was dismissed as withdrawn and by coincidence by the same Court, which is hearing the application for rejection of plaint today. The order dated 21.01.2014 in CS (OS) 101/2014 reads as under:

“Counsel for the plaintiff on instructions wishes to withdraw the present suit and the applications, to enable him to take recourse to such remedies which are available to him in accordance with law. As the suit is withdrawn at the initial stage, plaintiff is entitled to refund of the Court Fee.”

(Emphasis Supplied)

27. To say that leave was granted by the Court to seek such remedy as available in accordance with law would mean that leave was granted to file a fresh identical plaint again is unacceptable for the reason that if the intent was to file a fresh suit, there was no reason for withdrawing the first suit especially keeping in view that both the plaints are almost identical in nature. It is also not in dispute that after the plaintiff withdrew CS (OS) 101/2014, he filed an application for review in CS (OS) 1770/2012, being IA 20829/2014, wherein the following order was passed on 28.10.2014:

“IA No.20828/2014 (u/s 152 r.w. 151 CPC)

Learned counsel for the defendant No.5/ applicant seeks permission to withdraw the IA.

The I.A. dismissed as withdrawn.”

28. The aforesaid order of dismissal of the review application has attained finality. In my view, when the first suit was withdrawn, the remedy which the plaintiff had in mind was to file a review in CS (OS) No.

1770/2012. It is not understandable that why the review application was withdrawn and the review petitioner allowed the order to attain finality.

29. Accordingly, in my view the present suit is barred under Order XXIII Rule 1(4) of the Code of Civil Procedure.

LIMITATION

30. The other ground to be considered is as to whether the present suit is barred by limitation?
31. Counsel for the applicant further submits that as far as the plea of limitation is concerned, the second/present suit is patently barred by limitation. Once the second agreement was entered into, it was tacit that the sellers were not interested to sell the suit property to the plaintiff. In fact the plaintiff was aware that the property was being sold and, as provided under Article 54 of the Limitation Act, period of three years would commence from the said date.
32. It is settled law that the plaint may be rejected as being barred by limitation if a holistic reading of the plaint and documents show that it is barred by limitation. All the averments in the plaint must be taken to be true at the time of considering such an application and at the same time, it must be ensured that it is not a case of astute drafting in order to avoid the consequence of Order VII Rule 11. Though there are numerous judicial pronouncements upon the subject, I deem it appropriate to notice *Arjan Singh v. Union of India*, AIR 1987 Del 165; *N.V. Srinivasa Murthy v. Mariyamma*, (2005) 5 SCC 548; and *Popat and Kotecha Property v. State Bank of India Staff Assn.*, (2005) 7 SCC 510 to avoid prolixity.
33. Article 54 of the Schedule to the Limitation Act reads as under:

“54.	<i>For specific performance of a contract.</i>	<i>Three years</i>	<i>The date of fixed for the performance, or, if no such date is fixed, <u>when the plaintiff has notice that performance is refused.</u>”</i>
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(Emphasis Supplied)

34. The limitation fixed in a suit for specific performance is three years, when a date is fixed for the performance and in case no date is so fixed then the date when the plaintiff has noticed that the performance has been refused.
35. In my view, when the second Agreement to Sell was entered into and which fact was within the knowledge of the plaintiff, the defendants had refused performance as the property was being sold to another person, the period of limitation would commence from the date the second Agreement to Sell was signed, i.e. from 23.06.2011.
36. To say that the period of limitation would begin from the date when defendants no. 1 to 3 had refused to perform their part of the Agreement in the year 2014 cannot be accepted more so when such an averment has not been made in the plaint. Further, the plaintiff himself allowed the seller/defendant no. 1 to sell the suit property to a third person. The plaintiff admittedly is a conforming party to the second Agreement to Sell dated 23.06.2011 and, thus, he accepted the sale of the suit property to a third party and at a subsequent stage he cannot be permitted to complain. Having given his tacit consent to the subsequent Agreement to Sell dated 23.06.2011, the first Agreement to Sell dated 04.07.2008 became dead and the plaintiff readily abandoned his right in the said Agreement.
37. The plaintiff has also placed on record, a copy of the legal notice dated

21.10.2011 which was addressed by the plaintiff to the defendants herein. In the concluding part of this notice, it has been stated that in case of non-compliance, the plaintiff would take recourse to such remedies as available in accordance with law. A reply to this notice was issued on 10.11.2011 refuting the claims of the plaintiff. In the reply, the defendants no. 1 to 3 had specifically stated that the Agreement dated 04.07.2008 was not extended after the initial period of six months and had expired. Though the reply dated 10.11.2011 is replete with such averments, I deem it to reproduce only one paragraph to avoid prolixity. Paragraph 1 of the parawise reply reads as under:

“1. That para No. 1 of your notice is not denied to the extent that earlier an Agreement to Sell & Purchase dated 4th July, 2008 between my clients as party No.1 and Shri Rajan Narula and your client Rajinder Vohra as party No.2, was executed. The terms and conditions of the said agreement are a matter of record. It is however submitted that time was the essence of the said contract and due to non-fulfillment of the obligations on the part of party No.2, the agreement had elapsed. It was later on duly acknowledge [sic: acknowledged] by both the parties concerned that the agreement having elapsed, ceased to have any legal effect. Subsequently, a fresh deal was entered into vide an Agreement to Sell & Purchase dated 23rd June, 2011 between my clients as party No.1 and Shri Rajan Narula and Rajinder Vohra as party No.2, and Shri Dharam Pal Vij and Chandeeep Sahni as party No.3. The very fact that this agreement dated 23rd June, 2011 was executed was confirmation of the fact that the agreement dated 4th July, 2008 ceased to survive. As a matter of fact, it was duly informed to your client vide reply dated 11.1.2010 by my client that the said agreement dated 4th July, 2008 was valid only for a period of 6 months w.e.f. the said date, and could not be enforced thereafter and that it was never extended after expiry w.e.f. 3rd January, 2009.”

(Emphasis Supplied)

38. Thus, the period of limitation would positively begin from 10.11.2011, while the present suit has been filed on 02.02.2015, which would make

the present suit barred by limitation.

ADDITIONAL PLEA

39. As far as the plea with regard to Clause 8 of the Agreement to Sell dated 04.07.2008 is concerned, learned counsel for the plaintiff/non-applicant has submitted that the prayer made in the second suit is based on specific performance of Clause 8 of the first Agreement to Sell dated 04.07.2008.

40. The argument of learned counsel for the non-applicant is to be tested on the basis of Clause 8 of the Agreement to Sell dated 04.07.2008, which reads as under:

“8. That, since the aforesaid property is a semi built-up property, the First Party has hereby Authorized the Second Party to furnish the building, to repair/ to remove the malba as per the norms of MCD / DDA or any local authority. The construction cost and other cost and other expenses for the aforesaid purpose shall be paid and borne by Second Party. That it is mutually agreed between the parties that at the time of resale of the aforesaid property to any other party, then profit sharing ration will be @ 40% (Forty Percent) share of the first party and 60% (Sixty Percent) share of the Second Party after deducting the settled price of Rs.345,00,000/- (Rupees three crores forty five lacs) of the First Party and also deducting the cost of construction and other expenses spent/invested by the Second Party on the above said property ”

41. The sum and substance of the arguments of the learned counsel for the plaintiff is that as per Clause 8 of the First Agreement to Sell dated 04.07.2008, the plaintiff was entitled to receive money in case the property was re-sold. It is also contended that the defendant no. 1 company/seller entered into a subsequent Agreement to Sell dated 23.06.2011 and the seller sold the property but they did not hand over the share which was to be received by the plaintiff and defendant no.11.

In view thereof, counsel contends that the plaintiff and defendant no.11 are entitled to specific performance of the Agreement to Sell dated 04.07.2008. Counsel further submits that the cause of action for recovery of this amount arose only in the year 2014 when the defendant no. 1 company/seller executed a Sale Deed in favour of defendants no. 6 to 10.

42. In my view, this argument is without any force, firstly, for the reason that there is no such prayer made in the present suit relating to Clause 8 of the first Agreement to Sell. The prayer clause, which has been extracted in para 9 foregoing would show that the plaintiff is seeking specific performance of Agreement to Sell dated 04.07.2008 and the specific performance is not with respect to Clause 8, but it is for execution of a Sale Deed in his favour. In my view, this submission of learned counsel for the plaintiff is an afterthought and is not borne out from the pleadings.
43. It is also not in dispute that barring the formal paragraphs wherein the plaintiff has brought to the notice of the Court that an earlier suit was filed, which was dismissed as withdrawn, and leave granted to seek such remedies, which may be available has led to filing of the second suit, no new facts are stated in the plaint. The plaintiff has not sought any relief qua Clause 8 of the first Agreement to Sell either in the first suit or in the second suit as the prayer in both the suits is for specific performance with respect to the sale of the suit property, as it is clearly borne out from the prayer clauses, which have been extracted hereinabove.
44. Accordingly, the present application is allowed primarily for two reasons i.e. (i) the present suit is barred by limitation; and (ii) the present suit is barred under Order XXIII Rule 1(4) Code of Civil

Procedure as an earlier suit filed by the plaintiff was dismissed as withdrawn and the subsequent suit filed was an identical suit with the same cause of action, which was also dismissed as withdrawn.

45. In view of above, the present plaint and application for interim stay (I.A.3068/2015) stand rejected.
46. I.A. 3221/2016 stands disposed of.

SEPTEMBER 27, 2016

//msr

G.S.SISTANI, J

