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

+ CM(M) 1309/2016

JAMNA DASS	 Petitioner
Through	Mr. Praveen Agarwal, Advocate.
versus	
AKASH DRALL	 Respondent
Through	

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

ORDER

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20.12.2016

CM No.46992/2016 & 46994/2016(exemption)

Allowed subject to all just exceptions.

CM(M) 1309/2016 & CM No.46993/2016(stay)

1. By the present petition filed under Article 227 of the Constitution of India, the petitioner seeks to impugn the order dated 23.08.2016 by which a request of the petitioner to frame a preliminary issue regarding limitation and maintainability was dismissed.
2. The respondent has filed the suit for recovery of Rs. 30 lacs. The parties entered into an agreement to sell on 12.03.2007 for sale of a property in village Daulat Pur, Delhi. As per the agreement to sell dated 12.03.2007, the respondent paid an advance of Rs. 30 lacs as earnest money out of the total agreed sale consideration of Rs.90 lacs. The present suit is filed for recovery of the said sum of Rs. 30 lacs paid in advance.
3. I have heard the learned counsel for the petitioner.
4. He has strenuously relied upon the agreement to sell to submit that as

per the agreement to sell, the balance Rs.60 lacs was to be paid by the respondent on or before 12.05.2007. Hence, he submits that the limitation to recover the advance of Rs. 30 lacs has expired at best on 11.05.2010. He submits that the present suit has been filed after 11.05.2010 and is clearly barred by limitation.

5. The trial court has refused to frame a preliminary issue holding that this is a disputed question of fact.

6. A perusal of the plaint filed by the respondent would show that in para 10 of the plaint a clear averment is made that as per the terms and conditions of the agreement to sell, it was the obligation of the petitioner to obtain an NOC from the concerned authority. In case the petitioner fails to obtain the NOC and ITCC within the agreed period, the agreed period would automatically get extended till the necessary permissions would be obtained by the petitioner and the same are intimated to the respondent. Clause 10 of the agreement to sell states the said clause.

7. In view of the said clause, reliance cannot prima facie be placed on the time schedule fixed in the agreement to sell dated 12.03.2007 for making payment.

8. The question when the right to file the suit would arise would be a disputed question of fact. The Supreme Court in the case of **Ramesh B. Desai & Ors. vs. Bipin Vadilal Mehta and Ors., AIR 2006 SC 3672 (MANU/SC/2996/2006)** held as follows:-

“16. A plea of limitation cannot be decided as an abstract principle of law divorced from facts..... A plea of limitation is a mixed question of law and fact.”

9. In the light of the above, there are no reasons to interfere with the

impugned order.

10. The petition is accordingly dismissed.

11. All pending applications also stand dismissed.

JAYANT NATH, J

DECEMBER 20, 2016

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