

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

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Decided on: 23.01.2017

+ **CS(OS) 283/2013 & I.A. 2466/2013**

ADISHWAR KUMAR JAIN

..... Plaintiff

Through: Mr. Mr. Raman Kapur, Sr. Advocate
along with Mr. Dhiraj Sachdeva,
Advocate.

versus

SARITA GUPTA

..... Defendant

Through: Mr. Pradeep Dewan, Sr. Adv. with
Mr. O.P. Verma and Ms. Anupam
Dhingra, Advocate.

**CORAM:
HON'BLE MS. JUSTICE DEEPA SHARMA**

JUDGMENT (Oral)

1. This Court had framed the issues in this case on 03.09.2013 and issue no. 3 i.e. "*Whether Suit is barred under Order 2 Rule 2 CPC ? OPD*" was treated as preliminary issue.

2. Accordingly, arguments of the parties are heard on this issue.

3. It is argued by the learned counsel for the plaintiff that he could not have filed the suit for specific performance because the last date of performance of the agreement was 15.01.2013 and that there was no

repudiation of the contract by the defendant. In support of his contention, he has relied on the case of *Inbasegaran and Another vs. S. Natarajan (Dead) through Lrs.* 2014 XII A.D. (S.C) 420 and it is argued that in this case, the Court had held that the subsequent suit for specific performance was maintainable even though the plaintiff had earlier filed a suit for injunction only. It is further argued that the suit for specific performance could not have been filed earlier because the defendant in her letter dated 05.01.2013 extended the time of performance of the agreement by giving plaintiff three more days for the payment of balance money by way of Demand Draft/Pay order.

4. Learned counsel for the defendant has argued that in view of the fact that the plaintiff has himself pleaded in several paragraphs in his earlier suit as well as in the present suit that the defendant has failed to perform her part of the contract, it amounts to repudiation of the contract by the defendant and that simply because the last date of performance of the agreement was 15.01.2013, it does not postpone the date on which the cause of action to sue for breach of the contract/seek performance of the Contract had arisen. Even the fact that the same cause of action had arisen on other dates and time, does not give rise to a fresh cause of action, it is the continuation of the

cause of action which had already arisen and since it had arisen on the date when the plaintiff alleges that defendant had failed to honour the Contract, the cause of action to sue for specific performance of the said contract was already there at the time when the first suit was filed by the plaintiff. It is also argued that although now the plaintiff argues that the period of performance of the Contract was extended by the defendant vide letter dated 05.01.2013, however, in para 5 of his replication, has categorically denied having received the letter of defendant dated 05.01.2013. It is further submitted that the plaintiff who had all along been defaulting in making the payment and thus not complying with the terms and conditions of the agreement and even chosen not to claim specific performance while filing the earlier suit for injunction and he cannot be allowed to file a fresh suit and this suit is liable to be rejected under Order 2 Rule 2 CPC. Reliance is placed on the findings in the case of **Virgo Industries (Eng) Private Limited vs. Venturetech Solutions Private Limited**, (2013) 1 Supreme Court Cases 625 and it is submitted that the facts of that case are similar to that of this case. It is submitted that in that case also, the agreement to sell were entered into between the parties. The plaintiff in that case filed two suits no. CS(OS) Nos. 831 and 833 of 2005 before the Madras High Court seeking a decree of

permanent injunction and restraining the defendant from alienating the property to create any third party interest on the plea that the defendant wanted to frustrate the agreements to sell and had no intention to honour the said agreements. Thereafter, the plaintiff also filed two OS Nos. 202 and 203 on 29.05.2007 for specific performance of the agreement to sell and seeking a decree against the defendant for execution and registration of the sale deeds in respect of the suit properties. In that case also, the defendant took the plea that the suit for specific performance was not maintainable under Order 2 Rule 2 CPC and the plaintiff took the plea that at the time when the suit for injunction was filed, the suit for specific performance was premature and hence the suit for specific performance could not have been filed along with the first suit for injunction. It is argued that the Court had rejected the plea of the plaintiff that the suit for specific performance was premature and hence not hit by Order 2 Rule 2 of CPC and held that since the cause of action had already arisen at the time of filing of the suit for injunction and the plaintiff had opted not to claim a relief for specific performance in the earlier suit, the second suit for claim for specific performance was not maintainable in view of provisions of Order 2 Rule 2 CPC.

5. The contentions of the parties in this case rest on the provisions of Order 2 Rule 2 CPC and the relevant provisions is reproduced as under:-

Order 2 Rule 2-

(2) Relinquishment of part of claim—Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

6. While filing a suit, the plaintiff is required to include whole of his claim he is entitled to on any particular cause of action. Liberty however is given to him to relinquish any part of the claim and when the plaintiff omits or intentionally relinquishes any portion of his claim, he cannot afterwards sue the other party in respect of the claim so omitted or relinquished. Further, if a person is entitled to more than one relief in respect of the same cause of action, he may sue for all or any of such reliefs, but if he omits, except with the leave of the Court to sue for such relief to which he was entitled to on the same cause of action, cannot afterwards sue for the relief so omitted.

7. The present suit has been filed by the plaintiff for specific performance with the prayer that the defendant be directed to obtain necessary permission from concerned authorities and execute the sale deed

in respect of property i.e. piece of agricultural land area measuring 4 bigha 18 biswas out of khasra no. 148 (2-09), 147 (2-02) & 146 (0-07) (hereinafter referred to as the suit property) and in case, no decree for specific performance could be passed then pay damages to the tune of Rs. 3.70 crore.

8. The admitted facts of the case are that the plaintiff and defendant had entered into an agreement dated 17.08.2012 for the sale of the suit property and the sale deed was to be executed on or before 15.01.2013. Prior to this, the defendant was to obtain a Non-Objection Certificate (hereinafter referred to as “NOC”) from the concerned revenue officer. The plaintiff has filed the suit on the contentions that despite the number of requests to the defendant, she did not obtain the necessary permission and continued postponing the matter on one pretext or the other. He approached the defendant on 14.12.2012 ready with the balance sale consideration and again requested the defendant to obtain the permission/Non-Objection Certificate from the concerned authorities. The defendant demanded a sum of Rs. 10 crore for the sale of the suit property and refused to obtain NOC (details are mentioned in para 6 of the plaint).

9. In para 7 of the plaint, the plaintiff has stated that the defendant also threatened him to create a third party interest in the suit property.

Thereafter, he served the legal notice dated 19.12.2012 calling upon the defendant to comply with the terms of the agreement to sell. The defendant, however, instead of complying with the terms and conditions of the said agreement threatened to create third party interest and did not even bother to reply the notice. The last threat to this effect was given by the defendant. The plaintiff filed a suit for injunction simpliciter in the Civil Court and a notice was ordered to be issued to the defendant but on account of certain subsequent events, withdrew the said suit and thereafter filed the present suit.

10. Reminders dated 11.01.2013 and 14.01.2013, as stated by the plaintiff in para 9 of the plaint, were also sent to the defendant but were of no avail.

11. In para 10 of the plaint, the plaintiff has stated that after he received a letter dated 19.01.2013 from the defendant, he tried to contact the defendant on 30.01.2013 but the defendant still refused to execute the sale deed. In para 11 of the plaint, the plaintiff has again stated that the defendant with the *malafide* intention had not applied for issuance of Non-Objection Certificate.

12. The plaintiff has also averred that he has always been willing to perform his part of the contract and that the balance consideration of money was always ready with him.

13. The plaintiff, in para 28 and 29 of the plaint, has stated the way cause of action has arisen in his favour. It is reproduced hereunder:-

“28. That the cause of action to file the present suit arose in favour of the plaintiff and against the defendant firstly on 17.08.2012, when an Agreement to Sell was made and executed between the parties, it further arose on 19.12.2012 and 14.01.2013, when the plaintiff got issued a legal notice to the defendant but to no avail, it further arose on 15.01.2013 when the plaintiff reached the office of sub-Registrar, Delhi but the defendant did not reach there, the cause of action further arose on various dates when the defendant have flatly refused to execute the sale documents in favour of the plaintiff and rather threatened to create a third party interest in the manner as stated above on 30.01.2013; it is still continuing, hence, the present suit.

29. That the cause of action to file the present suit arose in favour of the plaintiff and against the defendant at Delhi, the parties to the suit also reside and work for gain at Delhi, the property in question is also situated at Delhi, hence this Hon'ble court has got the territorial jurisdiction to entertain and try the present suit. This Hon'ble court also has pecuniary jurisdiction to entertain the present suit.”

14. In the earlier suit, the following paragraph deals with the cause of action. It reads as under:-

*“12. That the cause of action to file the present suit arose in favour of the plaintiff and against the defendant firstly on 17.8.2012 when the parties entered into an Agreement to Sell, it further arose thereafter on various dates **when the defendant failed to honour her part of the agreement**, it further arose on 9.12.2012 when a legal notice was sent to the defendant, it further arose on 4.1.2013 when the defendant threatened the plaintiff that she will create a third party interest in respect of the suit property, the cause of action is still in continuation, hence the present suit.*

13. That the cause of action to file the present suit arose in favour of the plaintiff and against the defendant at Delhi, the parties to the suit also reside and work for gain at Delhi, the property in question is also situated in Delhi, hence this Hon'ble Court has got the territorial jurisdiction to entertain and try the present suit.

15. The plaintiff has clearly mentioned in this paragraph that the cause of action arose in his favour *“firstly on 17.08.2012 when the parties entered into an Agreement to Sell and it further arose thereafter on various dates when the defendant failed to honour her part of the agreement.”*

16. Apparently, what the plaintiff meant by this statement *"that the defendant failed to honour her part of the agreement"* was that the defendant had failed to execute the sale deed in his favour. From the bare reading of this averment, it is clear that the cause of action for filing the suit for

specific performance had arisen on the date when the defendant allegedly failed to honour the agreement to sell. Besides that in other paragraphs of his earlier suit, the plaintiff has categorically stated that the cause of action had arisen in his favour on the date when the defendant refused to honour the agreement to sell. This fact is clear from the averments in paragraph 6, 7, 9 and 11 of the earlier plaint. Despite the fact that in his earlier suit for permanent injunction, plaintiff has taken the plea that defendant had failed to comply with the terms and conditions of the agreement to sell, opted not to seek specific performance of the agreement to sell.

17. The sole plea before this Court is whether the claim for specific performance of the agreement to sell dated 17.8.2012 was available to the plaintiff at the time when he filed the earlier suit for injunction. There is no dispute that the plaintiff had never sought the leave of the Court at the time when he filed the first suit.

18. From the averments in the earlier suit, it is apparent that the plaintiff had taken a categorical plea that the cause of action first arose on 17.08.2012 then on various other dates when the defendant failed to execute the sale deed and also on service of notice dated 19.12.12. Vide this notice, the plaintiff had asked the defendant to do certain acts which she was required

to do under the agreement to sell. The contents of the said notice are reproduced hereunder:-

*To
Smt. Sarita Gupta
Wife of Shri Sushil Gupta
r/o B-L77, MIG Flats
Ashok Vihar-IV
Delhi-110052.
Madam,*

Under instructions from and on behalf of my client Shri Adishwar Kumar Jain, son of late Shri G.C. Jain, r/o 26/86, Near Aggarwal Marg, Shakti Nagar, Delhi- 11 0007, I hereby serve you with the following legal notice:-

- 1. That you are owner of a piece of agricultural land area measuring 4 bigha 18 biswas out of Khasra No.148 (2-09), 147 (2-02) & 146 (0-07) in the Revenue Estate of Village Ibrahimpur, Delhi.*
- 2. That an Agreement to sell dt. 17th August, 2012 was executed between you and my client for a total sale consideration of Rs,7,00,00 000/- (Rupees Seven Crores only), out of which, my client has paid a sum of Rs.70,00,000- (Rupees seventy lacs only) as earnest/advance money at the time of signing of this Agreement agreed to pay the balance amount to you on or before 15.1.2013.*
- 3. That you agreed with my client that you would obtain the necessary permission from the concerned authorities for selling of the property in question in favour of my aforesaid client.*
- 4. That my client number of times had requested you to take the necessary permission from the concerned authorities for sale of the property in question but you had been post-poning the matter on one pretext or the other.*
- 5. That lastly, my client approached you on 14.12.2012 in this regard and informed you that my client has got sufficient*

remaining sale amount with him and requested you to obtain the necessary permission/NOC from the concerned authorities but you flatly refuse to take the said permission and also demanded from my client the exorbitant amount of Rs. 10 Crores from my client on the plea that the prices of the property in question have increased.

- 6. That my client was shocked/disturbed with your uncalled and illegal demands. Even not only you refused to seek the necessary permission but you also refused to perform your part of obligations and also threatened my client that you would create a third party interest in respect of the property in question by selling the same to some other person as you are getting a higher price of the property in question.*
- 7. That your aforesaid acts are illegal, unlawful, uncalled for, unjust, improper, arbitrary, malafide and you have no right to create a third party interest as threatened by you to my client.*
- 8. That in case, you indulge in the aforesaid illegal activities, in that event, you shall be liable for civil and criminal action to be initiated by my client in this regard.*

By means of this notice, I hereby call upon you to seek the necessary permission/NOC from the competent authority and further not to create a third party interest in respect of the property in question in any manner whatsoever; failing which, my client shall be constrained to seek appropriate legal remedy in this regard against you in the competent courts of law at your costs, risk and consequences which you may please note.

Copy kept ”

19. The cause of action for filing a suit for specific performance arises as soon as one of the party to the agreement to sell refuses to honour the terms of the contract or from its conduct such an intention can be inferred.

20. In this suit and also in the earlier suit, the plaintiff has categorically stated that the cause of action had arisen when the defendant failed to honour her part of the agreement. So apparently on the date when the plaintiff filed the first suit for injunction, cause of action for claiming specific performance of the Contract had also arisen. The contention that cause of action for filing a suit for specific performance could not have arisen in favour of the plaintiff before 15.01.2013; the last date of performance has no merit in view of the findings of the Supreme Court in the case **Virgo Industries** (*supra*) wherein the Court has observed in paragraphs 15 and 16 as under:-

15. Furthermore, according to the Plaintiff, which fact is also stated in the plaints filed in C.S. Nos. 831 and 833, on the date when the aforesaid two suits were filed the relief of specific performance was premature inasmuch as the time for execution of the sale documents by the Defendant in terms of the agreements dated 27.7.2005 had not elapsed. According to the Plaintiff, it is only after the expiry of the aforesaid period of time and upon failure of the Defendant to execute the sale deeds despite the legal notice dated 24.2.2006 that the cause of action to claim the relief of specific performance had accrued. The above stand of the Plaintiff found favour with the High Court. We disagree. A suit claiming a relief to which the Plaintiff may become entitled at a subsequent point of time, though may be termed as premature, yet, can not per se be dismissed to be presented on a future date. There is no universal rule to the above effect

inasmuch as "the question of a suit being premature does not go to the root of the jurisdiction of the Court" as held by this Court in Vithalbhai (P) Ltd. v. Union Bank of India 2005 (4) SCC 315.

16. In Vithalbhai (P) Ltd. case this Court has taken the view that whether a premature suit is required to be entertained or not is a question of discretion and unless "there is a mandatory bar created by a statute which disables the Plaintiff from filing the suit on or before a particular date or the occurrence of a particular event", the Court must weigh and balance the several competing factors that are required to be considered including the question as to whether any useful purpose would be served by dismissing the suit as premature as the same would entitle the Plaintiff to file a fresh suit on a subsequent date. We may usefully add in this connection that there is no provision in the Specific Relief Act, 1963 requiring a Plaintiff claiming the relief of specific performance to wait for expiry of the due date for performance of the agreement in a situation where the Defendant may have made his intentions clear by his overt acts. (emphasis is mine).

21. In the earlier suit, the plaintiff has clearly held that the defendant had failed to honour her part of the Contract and therefore the cause of action for specific performance of the Contract was available to the plaintiff at the time of filing of the first suit. The plaintiff has also relied on the case *Inbasegaran (supra)* contending that the second suit is still maintainable in view of the findings in *Inbasegaran* case wherein Supreme Court had allowed the second suit of specific performance to continue despite the fact that an earlier suit for injunction had been filed.

22. The supreme Court in *Inbasegaran* case (supra) in para 30 relying of the words of Lord Denning has held that decision in each case has to be understood in the background of the facts of that case:-

“30. It is well settled that the ratio of any decision must be understood in the background of the facts of that case. The following words of Lord Denning in the matter of applying precedence have been locus classicus. “Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect, in deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive.”

23. The fact in *Inbasegaran* case were that the parties while had entered into an agreement to sell, had also agreed that the possession of the plot be handed over to the plaintiff and the plaintiff shall raise construction on the said plot and that the defendant i.e. the seller shall help the plaintiff in getting the requisite permission from the authorities for raising the construction on the said plot. Pursuant to this, the plaintiff raised the construction. One of the terms of condition before the execution of the sale deed was that the seller would get the sale deed executed in his favour from Housing Board. In that case, the seller had always represented to the

plaintiff that no sale deed has been executed in his (the seller) favour by the Housing Board. When the plaintiff i.e. the buyer felt the threat from the seller of dispossession, he filed a suit for permanent injunction restraining the defendant from dispossessing him. While, the said suit was pending, the buyer came to know that the seller had misrepresented to him that the sale deed was not executed in his favour by the Housing Board while in fact; the Housing Board had already executed the sale deed in his (seller) favour. He then filed another suit for specific performance. The plea taken by the seller was that the second suit was not maintainable on the ground that the cause of action for relief for specific performance was available to the buyer at the time when he filed the first suit for injunction. It was on these facts that the Supreme Court took the view that since in the earlier suit, the plaintiff had alleged that defendant was threatening to alienate the possession of the property to a third party in order to frustrate the agreement, no cause of action for filing the suit for specific performance had arisen in favour of the buyer at that time and it was on these facts that the Supreme Court had distinguished the findings in the case of the *Virgo Industries (supra)* and gave the reasons given in para 29 of the judgment .

“29. Mr. R. Balasubramanian, learned senior counsel appearing for the respondents put reliance on the decision of

this Court in the case of Virgo Industries (Eng.) Private Limited (supra). After going through the decision given in the said case, we are of the view that the facts of that case were different from the facts of the instant case. In the case of Virgo Industries (supra) two sale agreements were executed by the defendant in favour of the plaintiff in respect of the two plots. In the suit filed by the plaintiff for injunction it was pleaded that the defendant is attempting to frustrate the agreement on the pretext that restriction to transfer of land may be issued by the Excise Department on account of pending revenue demand. Further, the defendant was trying to frustrate the agreement by alienating and transferring the suit property to third parties. On these facts, the Court observed :-

“5. While the matter was so situated the defendant in both the suits i.e. the present petitioner, moved the Madras High Court by filing two separate applications under Article 227 of the Constitution to strike off the plaints in OSs Nos. 202 and 203 of 2007 on the ground that the provisions contained in Order 2 Rule 2 of the Civil Procedure Code, 1908 (for short “CPC”) is a bar to the maintainability of both the suits. Before the High Court the defendant had contended that the cause of action for both sets of suits was the same, namely, the refusal or reluctance of the defendant to execute the sale deeds in terms of the agreements dated 27-7-2005. Therefore, at the time of filing of the first set of suits i.e. CSs Nos. 831 and 833 of 2005, it was open for the plaintiff to claim the relief of specific performance. The plaintiff did not seek the said relief nor was leave granted by the Madras High Court. In such circumstances, according to the defendant-petitioner, the suits filed by the plaintiff for specific performance i.e. OSs Nos. 202 and 203 were barred under the provisions of Order 2 Rule 2(3) CPC.

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13. A reading of the plaints filed in CSs Nos. 831 and 833 of 2005 show clear averments to the effect that after execution of the agreements of sale dated 27-7-2005 the plaintiff received a letter dated 1-8-2005 from the defendant conveying the information that the Central Excise Department was

contemplating issuance of a notice restraining alienation of the property. The advance amounts paid by the plaintiff to the defendant by cheques were also returned. According to the plaintiff it was surprised by the aforesaid stand of the defendant who had earlier represented that it had clear and marketable title to the property. In Para 5 of the plaint, it is stated that the encumbrance certificate dated 22-8-2005 made available to the plaintiff did not inspire [pic]confidence of the plaintiff as the same contained an entry dated 1-10-2004. The plaintiff, therefore, seriously doubted the claim made by the defendant regarding the proceedings initiated by the Central Excise Department. In the aforesaid paragraph of the plaint it was averred by the plaintiff that the defendant is “finding an excuse to cancel the sale agreement and sell the property to some other third party”. In the aforesaid paragraph of the plaint, it was further stated that “in this background, the plaintiff submits that the defendant is attempting to frustrate the agreement entered into between the parties”.

14. The averments made by the plaintiff in CSs Nos. 831 and 833 of 2005, particularly the pleadings extracted above, leave no room for doubt that on the dates when CSs Nos. 831 and 833 of 2005 were instituted, namely, 28-8- 2005 and 9-9-2005, the plaintiff itself had claimed that facts and events have occurred which entitled it to contend that the defendant had no intention to honour the agreements dated 27-7-2005. In the aforesaid situation it was open for the plaintiff to incorporate the relief of specific performance along with the relief of permanent injunction that formed the subject-matter of the above two suits. The foundation for the relief of permanent injunction claimed in the two suits furnished a complete cause of action to the plaintiff in CSs Nos. 831 and 833 to also sue for the relief of specific performance. Yet, the said relief was omitted and no leave in this regard was obtained or granted by the Court.”

In the instant case, as discussed above, suit for injunction was filed since there was threat given from the side of the defendant to dispossess him from the suit property. The plaintiff

did not allege that the defendant is threatening to alienate or transfer the property to a third party in order to frustrate the agreement.”

24. From the facts disclosed by the plaintiff in his first suit for injunction, it is apparent that he had taken the plea that the defendant had violated the terms of agreement to sell. Therefore, findings in the case *Inbasegaran (supra)* are not applicable on the facts of this case. This case therefore is squarely covered by the findings of the Supreme Court in *Virgo Industries (supra)* as the facts in both the cases are similar.

25. In view of the clear bar under Order 2 Rule 2 CPC, the present suit is liable to be rejected. The application is allowed and the suit is hereby rejected being barred under the provision of Order 2 Rule 2 CPC.

**DEEPA SHARMA
(JUDGE)**

JANUARY 23, 2017

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