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

\+ CS(OS) 2296/2013

ASHA WAZIR ..... Plaintiff
Through: Mr. Rajan Tyagi, Advocate with Mr. Desh Deepak Tyagi, Advocate.

versus

APEX APARTMENTS PVT. LTD. & ORS. ..... Defendants
Through: Mr.Arun Vohra with Ms.Aakriti Vohra, Advocates.

% Date of Decision: 26th September, 2017

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

J U D G M E N T

MANMOHAN, J: (Oral)

1. Present suit has been filed for specific performance of contract, mandatory and permanent injunction and damages in respect of allotment letter and agreement to sell both dated 28th September, 1989, in respect of Flat No. T-2, 3rd Floor, at No.E-480, Greater Kailash-II, New Delhi for a sum of Rs. 8,55,000.

2. This Court vide order dated 17th November, 2014 framed a preliminary issue and ordered as under:

"1. Whether the suit is barred by limitation? OPD

xxxx xxxx xxxx xxxx

It is agreed by the learned counsel for the parties that issue No.1 be treated as a preliminary issue. They do not want to lead evidence on this issue. ....”

3. With consent of the parties, the issue of limitation has been taken up for hearing.

4. The relevant facts of the present case are that in pursuance to advertisements issued by defendant No.1 for sale of sixteen flats to be constructed on plot No.E-480, Greater Kailash-II, New Delhi, the father of the plaintiff late Mr. S.L. Shakdhar booked a residential flat on third floor admeasuring 1200 sq.ft. on 28th September, 1987 for a total consideration of Rs.8,55,000/- out of which, an amount of Rs.85,500/- was paid as earnest money.

5. On 28th September, 1987, the defendants issued an Allotment Letter-cum-Agreement to Sell (hereinafter referred to as 'Allotment Agreement') wherein it was agreed between the parties that the construction shall be completed by 30th September, 1989.

6. In accordance with the schedule of payment stipulated in the said Agreement to Sell, the plaintiff's father paid installments to the defendant No.1 totalling to Rs.7,26,750/- till 05th November, 1988. The details of the payments made by the plaintiff's father are reproduced hereinbelow:-

Cheque No.	Date	Amount	Drawn On
495954	28.09.1987	85,500/-	State Bank of India
495958	28.10.1987	85,500/-	State Bank of India
758487	27.12.1987	85,500/-	State Bank of India
495959	23.01.1988	35,500/-	State Bank of India

758491	23.01.1988	50,000/-	State Bank of India
758492	22.01.1988	85,500/-	State Bank of India
495965	15.03.1988	1,28,250/-	State Bank of India

Receipt No.	Date	Amount
AAPL/SALES/87/165	05.11.1988	85,500/-
AAPL/SALES/87/152	28.05.1988	85,500/-

7. It is averred in the plaint that the plaintiff's father shifted to Bombay to reside with the plaintiff due to which he could not keep a track of the construction and the completion of the flat purportedly allotted to him.

8. On 18th May, 2002, the plaintiff's father died at Delhi and since he left behind a Will, the same was probated by the High Court of Bombay on 26th September, 2003 whereby the suit property devolved upon the plaintiff.

9. The defendants in their written statement have contended that initially a provisional allotment of Unit No. T-2 at third floor was made in favour of the plaintiff. Later, the allotment of the said unit was changed to G-2 on the ground floor.

10. Mr.Arun Vohra, learned counsel for the defendants states that that the construction of building was completed on 30th September, 1989 as per contract. He states that since the plaintiff failed to pay the last two instalments i.e. the 9th and 10th instalments in accordance with the schedule of payment, the allotment in favour of the plaintiff was cancelled on 3rd May, 1990. The letter dated 03rd May, 1990 is reproduced hereinbelow:-

"Ref.AAPL/G2/E-480/39/90 May 3 1990

Shri S.L. SHAKDHAR,
2, Palam Marg,
Vasant Vihar,
New Delhi.

Dear Sir Re: Termination of Allotment Letter dated 28 Sept. 1987.

Please refer to the installment call notices sent to you and numerous communications calling upon you to make the payments as per the agreed Schedule of the Allotment Letter dated 28 September 1987 between us, wherein it was specifically agreed that " Time for payment is to be treated as the essence of the Agreement" .

You have not paid the installment no.9 for Rs.85,500/- and have committed default of the agreed terms of the Allotment Letter dated 28 September 1987. You have further not given any response to the communications made with you.

In spite of all our best efforts and utmost cooperation, you have failed to make the agreed payments as per the Allotment Letter, and have breached the terms and conditions of the above said Allotment Letter agreed to by you. In pursuance to Clause 2 of the Allotment Letter dated 28 September, 1987, we therefore cancel/terminate the allotment of the flat no.G2 made to you under the said Allotment Letter. As provided in clause 2 of the said Allotment Letter we have forfeited your 20% of the agreed cost of the flat.

Please call upon us after making a prior appointment to collect the amount lying in your account after necessary deductions of 20% as provided in the above said Allotment Letter.

Very truely yours,

Sd/-
ADITYA VIKRAM VAID
Director"

11. Mr. Vohra emphasises that there is an admission on behalf of the plaintiff that her father i.e. the original applicant had moved to Bombay and occasionally came to Delhi due to which he could not keep a track of the construction and completion of the flat.

12. Learned counsel for defendant states that the cause of action for filing the present suit arose on 30th September, 1989, as the said date was stipulated in the Agreement as the date for performance. In support of his contention, he relies on Clause 4 of the Allotment Agreement, which is reproduced hereinbelow:-

> *"4. The Building is proposed to be completed barring unforeseen circumstances by 30th September, 1989 (Subject to usual force majeure clause)."*

13. In the alternative, learned counsel for defendant contends that as on 24th August, 2007, the plaintiff had sent a legal notice to the defendants alleging that they had been delaying the transfer of the flat on false grounds and had no intention of transferring the flat in favour of the plaintiff, the cause of action for filing the suit arose at least on said date. He states that as the present suit has not been filed within three years of the said date, it is barred by limitation.

14. Per contra, Mr.Rajan Tyagi, learned counsel for plaintiff states that though the required payments in accordance with the schedule of payment were made by the plaintiff, yet the defendants did not complete the construction by 30th September, 1989.

15. Learned counsel for plaintiff points out that on coming to know that the construction of the third floor had not yet been completed, the plaintiff vide communication dated 20th April, 2004 enquired as regards the status of the

construction from the defendants and was informed that the same was held up due to a Court case pending at Delhi. Mr. Tyagi states that the defendants in response to the said communication vide their lawyer's letter dated 27th April, 2004 requested the plaintiff to provide a certified copy of the Death Certificate as well as the Probate Certificate to proceed in the matter. Subsequently, the plaintiff enquired through her attorney and came to know that there was no sanction for construction of the third floor.

16. Learned counsel for plaintiff states that the averment made by the defendants in their written statement to the effect that the construction of the building was complete by 30th September, 1989 is incorrect as the building remained sealed from 1991 till 2001. He states that delay in construction of flat has deprived the plaintiff of the benefits of her property. He relies upon the statement of defendant No.2-Mr. Aditya Vikram Vaid recorded by the Joint Assessor and Collector, MCD in 2005 to show that the building was not complete even on 3rd February, 2005 much-less in 1989. Learned counsel for plaintiff emphasises out that the said statement was made by defendant so that no tax was levied on the incomplete building. The statement of Sh. Aditya Vikram Vaid is reproduced hereinbelow:

> *"Property No.E-480, G.K.II*
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> *Shri Aditya Vikram Vaid appeared in connection with the rectification and finalization of the pending proposal and informed that the property consisting of basement on Front side (West), GF, FF, having CA of 3405 sft. (each floor) and 2520 sft. On the SF and rear basement floor (East Side) having CA of 3618 sft., total 16353 sft. And out of this, they sold out 2991 sft. at rear basement (East Side). CA of 627 sft. rear basement (east side), 3405 sft. (GF), 3405 sft. FF and 2520 sft. SF-total 9957 sft. was incomplete and is still incomplete and has never been in habitable condition*

since there is no flooring, no doors, windows etc. Since the construction is un-finished hence is not fit for living purpose. Only 3405 sft. basement (LGF) on Front Side (West) is under self residential use and tax should be levied only on this portion only...."

17. Consequently, according to Mr.Rajan Taygi, the stage for making the last two instalments has not arrived till date and the present suit is within limitation.

18. In support of his contention, learned counsel for plaintiff relies on the judgment of this Court in ***L.M. Nagpal & Ors. Vs Fatehji & Co. & Ors., 2013 (138) DRJ 464*** wherein it has been held as under:-

"*18. In this regard, it may also be noticed that though the written Agreement to Sell between the parties did fix a date for performance but the parties subsequently by their writings gave a go-by to the date so fixed for performance and extended it from time to time. The appellants/plaintiffs plead that it was still further extended orally. The senior counsel for respondents/defendants has been unable to contend that there was any bar to such oral extension of the time fixed for performance. Once it is held that it was permissible for the parties to after some written extensions of the time fixed for performance, orally/verbally extend the time for performance, it becomes a matter of evidence whether they did orally/verbally extend the time for performance till after the receipt of the permissions from the L&DO and Income Tax Department. If the appellants/plaintiffs prove such a oral/verbal agreement or representations, then the first part of Article 54 of the Schedule to the Limitation Act would cease to apply and the time from which the limitation of three years prescribed for filing a suit for specific performance would commence would be from the date when the appellants/plaintiffs had notice that performance is refused and which date as per the averments in the plaint is within three years prior to the institution of the suit.*

19. The Supreme Court in Panchanan Dhara v. Monmatha Nath Maity, (2006) 5 SCC 340 has held that the question as to whether a suit for specific performance of contract will be barred by limitation or not would not only depend upon the nature of the agreement but also the conduct of the parties and also as to how they understood the terms and conditions of the agreement. It was further held that even where the time is fixed for performance of the Agreement of Sale, if any case of extension of time for performance is pleaded and established, the suit would not be barred by limitation. It was yet further held that extension of time for performance of a contract is not necessarily to be inferred from written document and it could be implied also; the conduct of the parties in this behalf is relevant and once a finding of fact has been arrived at that the time for performance of the contract had been extended by the parties, the time to file a suit shall be deemed to start running only when the plaintiff had notice that performance had been refused. It was yet further held that if certain statutory formalities are required to be complied with or permissions required to be obtained, a Deed of Sale cannot be registered till the said requirements are complied with and in a given situation the vendor may not be permitted to take advantage of his own wrong in not taking steps for complying with the statutory provisions and then to raise a plea of limitation. Reference was made to Section 63 of the Indian Contract Act, 1872 providing that every promisee may extend time for performance of the contract and it was held that such an agreement to extend time need not necessarily be reduced to writing and may be proved by oral evidence or by conduct including forbearance on the part of the other party. A question of limitation, it was held, can be decided only after taking evidence and recording finding as to the date on which the plaintiff had such notice.

19. Having heard the learned counsel for parties, this Court is of the view that the plaintiff has erroneously presumed that the limitation for filing a suit for specific performance commences when the defendant offers to hand over possession of the suit property to the plaintiff. The plaintiff's presumption

would be apparent from the para in the plaint pertaining to the cause of action. The said para is reproduced hereinbelow:-

> *" 33. That the cause of action for the suit originates on 28.09.1987 when the father of the plaintiff obtained the allotment letter agreement in respect of the suit property by paying Rs.85,000/- having believed and acted upon the representation/offer/scheme of the defendants. The cause of action had further accrued on the dates the instalments were paid to the defendants under receipts. The cause of action thereafter arose because of death of Shri S.L. Shakdhar and on obtaining the Probate certificate granted by Bombay High Court whereby the suit property devolved on the plaintiff. The cause of action further arose on different dates and times when the communications were addressed to the defendants about the plaintiff becoming the claimant of the suit property. Since the suit property has not been handed over to the plaintiff, the cause of action subsists and continuing day by day hence the suit."*

(emphasis supplied)

20. In fact, the limitation in a suit for specific performance of contract is three years and it commences from the date fixed for the performance and in case no such date is fixed then, in that cases, when the plaintiff has noticed that performance is refused. Article 54 of the Schedule 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."*

21. This Court is of the view that though the date for completion of the Allotment Agreement was stipulated in Clause 4 of the said Agreement as 30th September, 1989, yet the said date cannot be taken as the date of cause of action for filing the present suit as subsequent thereto, the plaintiff at the instance of the defendants had supplied certain documents like Death Certificate, Probate Certificate etc. As held in ***L.M. Nagpal*** (supra), the date for performance can be waived by the parties. Consequently, in the present case, the first Part of Article 54 of the Schedule II of the Limitation Act would not apply and the time from which the limitation of three years prescribed for filing a suit for specific performance would commence would be the date when the plaintiff had notice that performance is refused.

22. In the present case the plaintiff vide legal notice dated 24th August, 2007 had alleged that the performance of the Allotment Agreement had been refused by the defendants. The relevant portion of the plaintiff's legal notice dated 24th August, 2007 is reproduced hereinbelow:-

> *"4. That you have been delaying the transfer of the said flat on false, frivolous and flimsy grounds and it seems that you have no intention of transferring the flat in favour of my client and neither are you replying to the correspondence of our client."*

23. Keeping in view the aforesaid legal notice dated 24th August, 2007, this Court is of the opinion that it constitutes an admission on behalf of the plaintiff that the defendants had refused performance on 24th August, 2007. In any event, there is no averment in the plaint that the time for the said performance had been extended by the parties either orally or in writing beyond 24th August, 2007.

24. Since the present suit has been filed on 12th November, 2013, the same is barred by limitation. Consequently, the present plaint is rejected on the ground of limitation.

MANMOHAN, J

SEPTEMBER 26, 2017
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