

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

+ **RFA No. 113/2006**

% **31st July, 2018**

BHARAT BHUSHAN KAPUR Appellant

Through: Mr. Rohit Puri, Advocate.

versus

M/S. NEHA DEEP CONSTRUCTION Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

RFA No.113/2006 and C.M. Appl. Nos. 2629-30/2006

1. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the plaintiff in the suit impugning the judgment of the trial court whereby the trial court has dismissed the suit for specific performance and injunction filed by the appellant/plaintiff. Specific performance was claimed by the appellant/plaintiff with respect to two office spaces bearing nos. H-7 and H-8 having an approximate area of 225 sq. feet each situated in the building constructed on plot no. 1, Rajendra Place, New Delhi, by

the respondent/defendant. Trial court has dismissed the suit as being barred by limitation and has therefore given no findings on other issue nos. 2 to 4.

2. At the outset I would like to note that the trial court has observed that it does not have to decide issue nos. 2 to 4 because the suit is held to be barred by limitation as per decision on issue no.1, but this is not a correct approach of the trial court because all issues have to be decided by the trial court in view of Order XIV Rule 2 CPC unless the trial court held that it lacked jurisdiction. There is no issue of lack of jurisdiction of trial court and therefore trial court should not have only decided the issue of limitation and dismissed the suit and the trial court should also have decided issue nos. 2 to 4.

3. The facts of the case are that the appellant/plaintiff filed the subject suit for specific performance with respect to the suit properties pleading existence of two Agreements to Sell dated 17.1.1983 for a total sale consideration of Rs.4,50,000/- i.e. Rs.2,25,000/- for each of the spaces H-7 and H-8. The application which is termed as the Agreements to Sell by the trial court, and dated 17.1.1983, was followed by a proper Agreement to Sell dated

16.3.1983. Appellant/plaintiff has pleaded in the plaint that he regularly waited for receiving intimation with respect to various payments to be made in installments inasmuch as the respondent/defendant was to construct the entire property at 1, Rajendra Place, New Delhi, but ultimately finding no response of the respondent/defendant, the appellant/plaintiff issued his Letters dated 30.12.2003 and 7.3.2004 that the respondent/defendant must receive the balance payment and hand over possession of the suit properties to the appellant/plaintiff, but in spite of the appellant/plaintiff being ready and willing to perform his part of the contract the respondent/defendant did not transfer the suit properties to the appellant/plaintiff and hence the subject suit was filed by the appellant/plaintiff for specific performance and injunction.

4. The respondent/defendant contested the suit and prayed for dismissal of the suit on the ground of being time barred because Agreements were of the year 1983 and the suit was filed on 27.8.2004, i.e. after around 21 years of the Agreements to Sell. Trial court has referred to Article 54 of the Limitation Act, 1963 which provides for three year period of limitation with respect to suit a for specific

performance and accordingly trial court has held that there cannot be specific performance of a contract after approximately 18 years. The relevant observations of the trial court with respect to issue of limitation are contained in para 9 of the impugned judgment and this para reads as under:-

“9. Now the controversy exists as to whether the present suit has been filed within a period of limitation or not. Article 54 of Limitation Act, 1963 lays down limitation pertaining to specific performance of a contract which is three years from the date fixed for the performance or, if no such date is fixed, when the plaintiff has noticed that performance is refused. The aforesaid Article of Limitation Act makes it abundantly clear that in a suit for specific performance of contract, limitation is three years from the date fixed for purpose or when the plaintiff received notice when performance of the contract was specifically refused by the defendant. In the present case, as admitted by the plaintiff himself, the contract was to be specifically performed by defendant on or before the last day of June, 1985. Clause 3-NB-11 of Agreement to Sell dated 16/3/83 lays down that the time was the essence of the contract. It is strange that plaintiff did not did not take the trouble to ask the defendant to perform the contract specifically by June, 1985 nor within three years thereafter. The plaintiff woke up from deep slumber after a gap of more than 18 years urging the defendant to hand over the possession and issued a notice. The law of Limitation impose an embargo on the litigants not to raise claim after period of limitation as prescribed under the law. The object of law of limitation is that a party should be prompt to agitate his rights within a reasonable time. It is now well settled that in a suit for specific performance of contract the plaintiff should approach the defendant to perform the contract within reasonable time. However, asking defendant to perform the contract specifically after a gap of 18 years cannot, by any stretch of imagination, be termed as reasonable. The plaintiff has specifically pleaded in para 14 of the plaint that there was no refusal on the part of defendant at any point of time till filing of the suit except his refusal to reply legal notice dated 7/3/2004. The bare perusal of the contents of the plaint clearly indicate that the suit of the plaintiff is barred by limitation. Accordingly, the issue is decided in favour of the defendant and against the defendant.”

5. At the outset, I would like to note that learned counsel for the appellant/plaintiff has only pressed this present appeal, by giving up the relief of specific performance, and has prayed only for the refund of the sum of Rs.2,25,000/- paid by the appellant/plaintiff to the respondent/defendant under the Agreements to Sell dated 16.3.1983 in exercise of powers of this court under order VII rule 7 CPC. The details of the payments made by the appellant/plaintiff to the respondent/defendant are stated in paragraph 9 of the plaint and this para 9 reads as under:-

“9. It is to mention here that out of the total sale consideration of Rs. 4,50,000/-, the Plaintiff had paid the following instalments towards part sale consideration from time to time as and when demanded by the Defendant which were duly received and acknowledged by the Defendant vide following respective receipts:

FOR OFFICE SPACE H-7

<u>DATES</u>	<u>PAYMENTS (Rs.)</u>	<u>RECEIPTS NO.</u>
1. 17-01-1983	45,000/-	30
2. 16-03-1983	22,500/-	33
3. 06-12-1983	22,500/-	77
4. 25-06-1984	22,500/-	149
Total	1,12,500/-	

FOR OFFICE SPACE H-8

<u>DATES</u>	<u>PAYMENTS (Rs.)</u>	<u>RECEIPTS NO.</u>
1. 17-01-1983	45,000/-	29
2. 16-03-1983	22,500/-	34
3. 06-12-1983	22,500/-	78

4. 25-06-1984	22,500/-	150
Total	1,12,500/-	

The balance instalments were to be paid by the Plaintiff only on demand to be raised by the Defendant through minimum seven days Registered notice, the Defendant never sent after the last instalment paid on 25-06-1984 till date.”

6. The law with respect to entitlement of a buyer of a suit property for refund of the price paid is well settled, and this law is that inspite of a buyer being guilty of breach of contract, a seller cannot forfeit the amounts paid under the agreement to sell unless the seller pleads and proves the loss, especially a specific monetary amount, which is caused to him on account of the stated breach of a plaintiff/buyer. This aspect has been considered by me in detail in the recent judgment in the case of *M.C. Luthra Vs. Ashok Kumar Khanna 2018 (248) DLT 161*, and against which judgment an SLP was filed in the Supreme Court, and which SLP was dismissed by the Supreme Court vide Order dated 15.5.2018 in SLP (C) No. 11702/2018. In the facts of the present case it is seen that respondent/defendant has not pleaded or proved that any loss was caused to him, much less a specific loss figure equivalent to the amount paid by the appellant/plaintiff to the respondent/defendant

under the subject agreements to sell, and therefore, the respondent/defendant, subject to the decision of issue on limitation ,is not entitled to forfeit the amounts paid totalling to Rs.2,25,000/- under the two Agreements to Sell dated 16.3.1983.

7. A reading of the record of the trial court, being the pleadings of the parties as also the evidence led by the parties, shows that at no point of time any letter was addressed by the respondent/defendant to the appellant/plaintiff that on account of breach by the appellant/plaintiff of the two Agreements to Sell dated 16.3.1983, the respondent/defendant had forfeited the total amount of Rs.2,25,000/- paid by the appellant/plaintiff under the subject agreements to sell. In fact, the case of the respondent/defendant in the written statement paragraph 8 was that the appellant/plaintiff had given a particular different address in the application for grant of spaces and which address was subsequently changed but the respondent/defendant was not intimated of the change of address by the appellant/plaintiff.

8. In the facts of the case such as the present, limitation of the appellant/plaintiff/buyer to claim the amounts under the

Agreements to Sell, and which are paid to the respondent/defendant/seller, would only commence if the respondent/defendant has pleaded a case of forfeiture. Not only there is no pleading by the respondent/defendant of forfeiting of the amounts paid by the appellant/plaintiff, there is no pleading in the written statement of the respondent/defendant that prior to filing of the subject suit the respondent/defendant had ever sent a communication to the appellant/plaintiff that the amounts paid by the appellant/plaintiff to the respondent/defendant would stand forfeited on account of the alleged breach by the appellant/plaintiff of the two Agreements to Sell dated 16.3.1983. In such a scenario the amount which remains with the respondent/defendant is in the nature of a deposit by the appellant/plaintiff/buyer, and the right to claim back the deposit arises only once a notice is issued seeking refund of the amount deposited. A period of three years of limitation will thereafter start for the deposit in view of Article 113 of the Limitation Act. As already discussed above, since in the present case at no point of time the respondent/defendant claimed forfeiture, and therefore since the amount of the appellant/plaintiff is with the respondent/defendant as a

deposit, and since respondent/defendant is not entitled to forfeit the amount as no loss, much less any specific amount of loss, is pleaded and proved as required by law and elaborated in the judgment the case of *M.C. Luthra (supra)*, consequently this appeal is allowed to the extent that a money decree for a sum of Rs.2,25,000/- is passed in favour of the appellant/plaintiff and against the respondent/defendant along with *pendente lite* and future interest at the rate of 9% per annum simple.

9. The appeal is allowed and disposed of to the extent as stated above. Parties are left to bear their own costs. Decree sheet be prepared accordingly.

JULY 31, 2018/AK

VALMIKI J. MEHTA, J