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

%   **Date of decision: 6th March, 2018**

\+   **CS(OS) 95/2018 & IA Nos. 3143-3145/2018**

BRIJPAL ..... **Plaintiff**

Through : Mr. Rakesh Tiku, Sr. Adv. , Mr. J. K. Sharma, Mr. Siddharth Pandit, Mr. Atul Bansal, Advs.

versus

PGF LIMITED AND ORS ..... **Defendants**

Through : None

CORAM:
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The plaintiff has instituted this suit (i) for specific performance of an agreement to sell of property situated at A-52 (New number RZ D-92), which is part of Khasra No. 78/24, admeasuring 500 sq. yds., in the locality Tej Ram Park, Nihal Vihar, Village Nagloi Jat, Delhi; and in the alternative, (ii) for the refund of earnest money with interest at 18% per annum; and, (iii) for permanent injunction restraining the two defendants i.e. PGF Limited and its director Mr. C. B. Dhillon from dealing with said property; and, (iv) for declaration of the plaintiff as owner of the property.

2. The plaint is accompanied with IA 3143/2018 under Section 5 of the Limitation Act, 1963 for condonation of delay of 37 days in institution of the suit.

3. Section 5 of the Limitation Act does not apply to suits and there can be no condonation of delay in institution of the suit

4. On admission of the plaintiff, that the suit has been instituted beyond

the period of limitation, the plaint is liable to be rejected.

5. The grounds pleaded in the application for condonation of delay do not fall within the confines of Sections 12 to 18 of the Limitation Act.

6. However, the senior counsel appearing for the plaintiff seeks to withdraw the application for condonation of delay, stating that it has been wrongly filed.

7. Even if the application were to be permitted to be withdrawn, it is the case of the plaintiff in the plaint:

(i) that the defendant No.2 C.B. Dhillon as Director and Authorised Representative of the defendant No.1 PGF Limited had, vide agreement to sell dated 1st November, 2013, agreed to sell another immovable property to the plaintiff and earnest money of Rs.2 crores was paid by the plaintiff to the defendant No.1 company at the time of execution of the Agreement to Sell and the date fixed for performance of the Agreement to Sell was of 20th April, 2014;

(ii) that it was a term of the Agreement to Sell dated 1st November, 2013, that in the event of breach by the plaintiff, the earnest money paid by the plaintiff would be forfeited and in the event of breach by the defendants, the defendants would be liable to pay double the earnest money i.e. Rs. 4 crores to the plaintiff;

(iii) that the defendants failed to perform their part of the Agreement to Sell dated 1st November, 2013 and the plaintiff also learnt that a case of cheating, fraud and criminal conspiracy has been registered against the defendants by the CBI;

(iv) that the plaintiff thus asked the defendants to return double the earnest money in terms of the Agreement to Sell dated 1st November, 2013;

(v) that the defendants, at that time offered sale of property situated at A-52 (New number RZ D-92), which is part of Khasra No. 78/24, admeasuring 500 sq. yds., in the locality Tej Ram Park, Nihal Vihar, Village Nagloi Jat, Delhi to the plaintiff and further stated that earnest money of Rs. 2 crores received earlier will be adjusted in the sale consideration of the said property;

(vi) that another agreement to sell dated 13th March, 2014 was entered into between the parties with respect to the said property;

(vii) that the date for performance of the Agreement to Sell dated 13th March, 2014 was 15th May, 2014;

(viii) that the plaintiff, at the time of Agreement to Sell dated 13th March, 2014, also handed over a cheque for Rs. 10 lacs to the defendants but the said cheque was not encashed by the defendants;

(ix) that the plaintiff visited the office of the defendant No.1 for performance of the Agreement to Sell dated 13th March, 2014 but was always sent back on one excuse or the other and the defendants did not furnish documents of title of the property subject matter of Agreement to Sell dated 13th March, 2014 to the plaintiff;

(x) that ultimately, the defendants stopped entertaining the plaintiff on telephone or otherwise.

(xi) "that after about two years the plaintiff went to the residence of the defendant No. 2 and asked him to return the money with interest......";

(xii) that the defendant No. 2 stated that the earnest money of Rs. 2 crores was with the defendant No.1 and the plaintiff should claim the same from defendant No.1;

(xiii) that the plaintiff, at the time of Agreement to Sell dated 13th March, 2014, was put into possession thereof but his possession is being threatened by one Vikas Puri and one Neeraj Vridhi;

(xiv) that the plaintiff met Nirmal Singh Bhangoo, Chairman-cum-Managing Director of the defendant No.1 company, who was in judicial custody, when he came to attend a hearing and learnt that all title documents of the property subject matter of Agreement to Sell dated 13th March, 2014 are in the name of Nirmal Singh Bhangoo, Chairman-cum-Managing Director of the defendant No.1;

(xv) that Nirmal Singh Bhangoo also assured the plaintiff that the defendant No.1 will compensate the loss of the plaintiff including due to drastic fall in price of the property agreed to be sold by the Agreement to Sell dated 13th March, 2014;

(xvi) that the plaintiff has lodged a complaint on 31st March, 2017 against the defendants;

(xvii) that the plaintiff has been ready and willing to pay the balance sale consideration of Rs. 65 lacs under the Agreement to Sell dated 13th March, 2014; and,

(xviii) that the plaintiff got issued legal notice dated 23rd June, 2017 to the defendants but no response was received thereto also;

8. The present suit was instituted, first on 28th February, 2018 and re-

filed on 1st March, 2018 and is listed today for admission.

9. Interestingly, the prayer clause in the plaint qua the relief of specific performance does not claim specific performance of the Agreement to Sell dated 13th March, 2014 but claims execution of sale/title transfer documents of the property subject matter of Agreement to Sell dated 13th March, 2014 in favour of the plaintiff at circle rate that is Rs. 46,200/- per sq. mts. and not at the price subject matter of Agreement to Sell dated 13th March, 2014.

10. Needless to state, the Court can only decree specific performance of the Agreement, if it finds a case therefor to be made out, but cannot make a new contract between the parties. The relief claimed for specific performance is thus in any case misconceived.

11. Not only so, as per the plaintiff, neither of the defendants are owners of the property subject matter of Agreement to Sell dated 13th March, 2014 and Nirmal Singh Bhangoo, learnt by the plaintiff to be the owner of the property, has not been impleaded and no specific performance of an Agreement to Sell can be granted against a person who is not the owner.

12. As far as the plea, of the plaintiff having been delivered possession and being in possession of the property is concerned, Agreement to Sell dated 13th March, 2014 is admittedly not registered and pursuant to the amendment with effect from September, 2001 of the Transfer of Property Act, 1882, the Registration Act, 1908 and Indian Stamp Act, 1899, the benefit of Section 53A of the Transfer of Property Act is not available qua an unregistered agreement to sell.

13. Even otherwise, the threat of dispossession is not from the defendants but from Vikas Puri and Neeraj Vridhi, who have also not been

made parties to the suit.

14. Though the senior counsel for the plaintiff, at the behest of the counsel for the plaintiff states that Nirmal Singh Bhangoo, who is the owner, is the Managing Director of the defendant No.1 company but the identity of a company is distinct from that of its Managing Director and an agreement to sell by the company cannot be enforced against the property of Chairman-cum-Managing Director of the company, especially when he is not claimed to have at any time represented so or claimed to have been involved in the making of the Agreement to Sell.

15. Not only so, the plaintiff, by pleading that he had initially asked for refund of earnest money paid and by further pleading in para 16 of the plaint that the plaintiff went to the residence of the defendant No.2 and asked him to return the money with interest, has disentitled himself from the relief of specific performance. For a suit for specific performance, to lie, the plaintiff is required to plead and prove having been ready and willing throughout, not only till the institution of the suit but also after the institution of the suit. The plaintiff, in the present case has candidly admitted that on failure of the defendants to perform their part of the Agreement, the plaintiff, instead of seeking specific performance of the same, initially asked for refund of earnest money. Such a plaintiff cannot be entitled to the relief of specific performance. Reference in this regard can be made to ***Rajeev Mehra Vs. Sudhir Kumar Sachdev*** 2009 (109) DRJ 84, ***Gurvinder Singh Vs. Maninder Pal Singh*** 2009 SCC OnLine Del 1868 and ***Chameli Farms Pvt. Ltd. Vs. DDA*** 2011 SCC OnLine Del 4729 (LPA 143/2012 preferred whereagainst was dismissed on 27th February, 2012).

16. Coming back to the aspect of limitation, though the senior counsel for the plaintiff has sought to contend that under Article 54 of the Schedule to the Limitation Act, limitation of three years commences from the date when the plaintiff has noticed that performance is refused, but the senior counsel for the plaintiff forgets the first part of the said Article which provides that when date for performance has been fixed, then the three years commence to run from the said date. It has been held in (i) ***Gunwantbhai Mulchand Shah Vs. Anton Elis Farel*** (2006) 3 SCC 634; (ii) ***Rathnavathi Vs. Kavita Ganashamdas*** (2015) 5 SCC 223; (iii) ***Madina Begum Vs. Shiv Murti Prasad Pandey*** (2016) 15 SCC 322; (iv) ***Chet Ram Vashist Vs. Ram Chander Goel*** 1999 (51) DRJ 694; (v) ***Ashok Kapoor Vs. Vidya Shankar Sharma*** 2009 (108) DRJ 505; and, (vi) ***Hajarilal Vs. Phoolchand*** AIR 1957 MP 177 that the said two parts of Article 54 are disjunctive and in cases where a date for performance is fixed, the latter part is not available and the period of limitation commences to run from the date for performance.

17. The date for performance of Agreement to Sell dated 13th March, 2014 admittedly was 15th May, 2014 and the period of three years therefrom expired on 14th May, 2017 and the suit has been filed long thereafter. Rather it is not understandable as to how delay of 37 days only has been calculated. The counsel for the plaintiff, on enquiry states that the period of 37 days has been calculated from the date of notice. The counsel is however unable to explain, why has the delay been computed therefrom.

18. Once the plaint, for specific performance, is barred by time, the limitation for a claim for refund of earnest money or for damages would also be guided by the same.

19. Not only is the suit liable to be dismissed for the reason of claim therein, as per averments in plaint being barred by time but also for other reasons aforesaid.

20. The senior counsel for the plaintiff has contended that the matter be adjourned to enable the plaintiff to file an application for amendment of the plaint. It is stated that the plea taken in the plaint, of the plaintiff having learnt that all title documents of the property subject matter of Agreement to Sell dated 13th March, 2014 were in the name of Nirmal Singh Bhangoo, Chairman-cum-Managing Director of the defendant No.1, has been taken on the basis of information furnished by the defendants and Nirmal Singh Bhangoo and the plaintiff has not independently verified the title.

21. The plaint, as per the amended CPC, is required to be and is supported by affidavit. The plaintiff cannot, upon being told that on the said facts pleaded is not entitled to relief, be permitted to change the facts. Moreover, as aforesaid, even if the property subject matter of Agreement to Sell dated 13th March, 2014 were to be of the defendant No.1 only and not of its Chairman-cum-Managing Director Nirmal Singh Bhangoo, there are other impediments in the way of the plaintiff as listed hereinabove. Thus, no need to adjourn is felt.

22. The suit is thus dismissed.

I refrain from imposing costs.

Decree sheet be prepared.

RAJIV SAHAI ENDLAW, J

MARCH 06, 2018/SRwt