

IN THE HIGH COURT OF DELHI AT NEW DELHI

SUBJECT : SUIT FOR SPECIFIC PERFORMANCE

CS(OS) 2341/2008

DATE OF DECISION : DECEMBER 03, 2008

SHRI ASHOK KAPOOR Plaintiff
Through Mr. Rajesh Banati and Mr. Sanjay
Gupta, Advocates.

versus

SHRI VIDYA SHANKAR SHARMA Defendant
Through Nemo.

SANJIV KHANNA, J.

1. Statement of the plaintiff has been recorded today in the Court.
2. I have heard the learned counsel for the plaintiff.
3. Mr. Ashok Kapoor as per the plaint and as per his statement recorded today in the Court has stated that he was inducted as a tenant in shop no. 2470, Gali No.9, Beadon Pura, Karol Bagh, New Delhi-110005 in the year 1985 by the defendant, who at that time was a minor, by his mother as a natural guardian.
4. The plaintiff has filed the present suit for specific performance of undated receipt, which as per the statement of the plaintiff, was executed on 24th April, 2003. Photocopy of the said receipt is placed on record and reads under:- Receipt I, Vidya Shanker Sharma s/o Shri Mool Shanker Sharma, R/o E-135, Dilshad Garden, Delhi-110095 do hereby confirm the receipt of Rs.1,11,000/- vide Ch. No. 359747 of Indian Overseas Bank (Rupees One lakh eleven thousand only) as token money from Sh. Ahok Kumar Kapoor S/o Sh. Sohan Lal Kapoor of A-80, Ashok Vihar, Phase- III, New Delhi against the sale of propriety right of my property bearing No. 2470, Gali No. 9, Ajmal Khan Road, Karol Bagh, New Delhi, which is already in possession of Sh. Ashok Kumar Kapoor for a total sale consideration of Rs.47,00,000/- (Rupees forty seven lakhs only). The balance sum of Rs.45,89,000/- (Rs. Forty five lakhs eighty nine thousand only).(sic) Will be received by me on or before 31st day of July, 2003.

Sd-

(VIDYA SHANKER SHARMA)
S/O MOOL SHANKER SHARMA

5. The plaintiff admits that the defendant by legal notice dated 15th October, 2003 had repudiated and cancelled the said receipt. Photocopy of the said notice has been placed on record. Paragraphs 2 to 5 of the said notice read as under:- 2. That you came and met me at my chamber abd(sic) express your intent to buy the shop No. 2470, Gali No. 9, Beadon Pura, Ajmal Khan Road, Karol Bagh, New Delhi-110005 and then you met my adopted son Vidya Shankar Sharma at E-135, Mangal Bazar, Dilshad Garden, Delhi-110095 and agreed to purchase the shop No. 2470, Gali No. 9, Beadon Pura, Ajmal Khan Road, Karol Bagh, New Delhi-110005 for ECHO is on. a total consideration of Rs.47,00,000/- (Rupees Forty Seven Lacs only) and made a payment of Token Money of Rs.1,11,000/- (Rupees one lac eleven thousand only) through cheque No. 359747 of Indian Overseas Bank on 27.4.2003 and further agreed to make the payment of balance amount of Rs.45,89,000/- on or before 31/7/03. 3. That howeverm (sic) you craftily drafted the receipt as Rs.45,89,000/- will be received by me on or before 31st day of July, 2003 and when you were asked to sign the copy of the same as a mark of agreeing to the agreement-cum- receipt you just put a chuggi at the right hand of the same and since then you had not contacted the Vendor for making over the balance amount paid to him and you have left no contact number hence this notice. 4. That since you had to intention to make the payment of the balance amount within the stipulated period till 31st of July, 2003 and complete the deal and have not taken any steps despite reminders to you through your employee through telephonic messages delivered time and again my client Sh. Vidya Shankar Sharma cancels the Agreement and the Token Money paid by you stands forfeited.

6. That you are further required to make the payment of rent @ Rs.1335/- p.m. exclusively for G.F. of shop No. 2470, Gali No. 9, Beadon Pura, Ajmal Khan Road, Karol Bagh, New Delhi-110005 and w.e.f. 1/4/03 rent at for first floor at the Market Rate as already claimed through previous notice demanded of you for the last three years within the prescribed period failing which I have clear instructions from my client to file a suit for recovery of amount due with interest @ 15% per annum and also an Eviction Petition at your costs and consequences which please note. Copy kept. 6. The receipt specifically states that the date of performance is 31st July, 2003.

7. Suit for specific performance is governed by Article 54 of the Limitation Act, 1963. The said Article reads as under:- 54. For specific performance of a contract. The date fixed for the performance, or, if no such date is fixed, when the plaintiff has noticed that performance is refused.

8. The said Article consists of two parts. The first part applies when date is fixed for performance of the agreement. If date is fixed in the agreement, a suit for specific performance has to be filed within three years from the said date. The date and time fixed in the receipt was 31st July, 2003 i.e. the date on which balance payment of Rs.45,89,000/- had to be paid. The plaintiff did not make the said payment on or before 31st July, 2003. This is admitted in the plaint and also in the statement of the plaintiff recorded on oath. The present suit was filed on 3rd November, 2008, after more than five years from the date fixed under the agreement i.e. 31st July, 2003.

9. Parties can mutually extend time for performance of a contract. Extension of time can be implied and can be also gathered from the conduct of the parties. There can be contracts in which no time is fixed for performance of a contract. Time is normally not of essence in contracts for purchase of an immovable property. In such cases where extension of time is pleaded or no time is fixed, second part of Article 54 applies and period of limitation begins from the date when the plaintiff has notice that performance has been refused. In *S. Brahmanand and Others versus K.R. Muthugopal and Others*, reported in (2005)12 SCC 764 it has been observed as under:- Section 63 of the Contract Act, 1872 provides that every promise may extend time for the performance of the contract. Such an agreement to extend ECHO is on. time need not necessarily be reduced to writing, but may be proved by oral evidence or, in some cases, even by evidence of conduct including forbearance on the part of the other party. Thus, in this case there was a variation in the date of performance by express representation by the defendants, agreed to by the act of forbearance on the part of the plaintiffs. What was originally covered by the first part of Article 54, now fell within the purview of the second part of the article.....

10. As already stated above, in the present case the defendant by notice dated 15th October, 2003 had repudiated and cancelled the receipt/agreement to sell and had also expressed his intention not to go ahead and perform the agreement. In view of second part of Article 54, period of limitation started running from the said date when the plaintiff received legal notice dated 15th October, 2003. The present suit was filed on 3rd November, 2008 nearly five years after the defendant had already cancelled and repudiated the receipt relied upon by the plaintiff. The suit is also barred by limitation under Second Part of Article 54 of the Limitation Act, 1963.

11. Learned counsel for the plaintiff submitted that defendant was required to perfect his title by applying for mutation and obtain permission from statutory authority and, therefore, the period of limitation did not begin/start inspite of notice dated 15th October, 2003. Period of limitation will begin only after the plaintiff had obtained mutation/permission and the plaintiff had knowledge.

12. Period of limitation under Article 54 is determined by deciding whether the first part or the second part of the said Article applies. Thereafter, the starting point has to be determined to decide whether the suit is within limitation. 31st July, 2003 is a fixed date mentioned in the written document. The said document does not talk of mutation and/or any approval. Permission/approval is not mentioned as a pre-condition in the said receipt.

13. Even if mutation, permission etc. are regarded as pre-conditions and the time fixed was extended, the case of the plaintiff would fall in the second part of Article 54 and period of limitation would begin from the date when the plaintiff received notice dated 15th October, 2003 repudiating and cancelling the agreement. Decision of the Supreme Court in *Panchanan Dhara and Others versus Monmatha Nath Maity and Another*, reported in (2006) 5 SCC 340 relied upon by the plaintiff does not support his case rather it goes against the plaintiff. Paragraph 16 of the said judgment reads as under:- 16. A bare perusal of Article 54 of the Limitation Act would show that the period

of limitation begins to run from the date on which the contract was to be specifically performed. In terms of Article 54 of the Limitation Act, the period prescribed therein shall begin from the date fixed for the performance of the contract. The contract is to be performed by both the parties to the agreement. In this case, the First Respondent was to offer the balance amount to the Company, which would be subject to its showing that it had a perfect title over the property. We have noticed hereinbefore that the courts below arrived at a finding of fact that the period of performance of the agreement has been extended. Extension of contract is not necessarily to be inferred from written document. It could be implied also. The conduct of the parties in this behalf is relevant. Once a finding of fact has been arrived at, that the time for performance of the said 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. Performance of the said contract was refused by the Company only on 21.8.1985. The suit was filed soon thereafter. The submission of Mr. Mishra that the time fixed for completion of the transaction was determinable with reference to the event of perfection of title of the Second Respondent cannot be accepted. The said plea had never been raised before the courts below. Had such a plea been raised, an appropriate issue could have ECHO is on. been framed. The parties could have adduced evidence thereupon. Such a plea for the first time before this Court cannot be allowed to be raised. Even otherwise on a bare perusal of the agreement for sale dated 18.4.1971, it does not appear that it was intended by the parties that the limitation would begin to run from the date of perfection of title.

14. Obligation to apply for permission/mutation, does not fix a date for performance. Even if the stand of the plaintiff in respect of mutation and permission from the authorities is accepted and presumed to be an agreed term, date of performance of the agreement was uncertain and not fixed. Therefore, second part of Article 54 of the Limitation Act, 1963 would apply. Cause of action accrued when notice dated 15th October, 2003 was received.

15. Decision of this Court in Avtar Singh Narula versus Dharambir Sahni Cinevision 150 (2008) DLT 760 refers to the power of the Court under Order VII, Rule 11 and states that while exercising the said power, the Court is to confine itself only to the averments made in the plaint and is not supposed to look into the defence raised by the defendant in the written statement. It further states that if after examination of the plaint and documents filed by the plaintiff, the Court finds that the suit is not maintainable, it must reject the plaint under the said provision. Parties in the said case had entered into an agreement dated 25th March, 2004, which was repudiated by the owner by legal notice dated 2nd September, 2006 and thereupon within three years a suit for specific performance was filed. In the context of clause 7 of the agreement to sell, controversy arose whether it was the obligation of the plaintiff or the defendant therein to apply for mutation. In that context, certain observations have been made by the Division Bench. The said observations are not relevant and are not germane to the facts of the present case.

16. The plaintiff has filed reply dated 14th December, 2007. Relevant portions of the reply read as under:- Before advertng to the parawise reply to your notice, it is worth

mentioning that your client has not returned a sum of Rs.1,11,000/- which he has conveniently misappropriated without my clients consent.. By this reply, I also call upon your client to refund a sum of Rs.1,11,000/- alongwith in interest @ 18% p.a. with in 15 days from the receipt of this reply/notice. Needless to say that in the event of non-payment of Rs.1,11,000/- alongwith interest my client shall be at liberty to deduct the said amount from future rents.

17. The plaintiff did not in the said letter make any claim for specific performance, rather he had asked for refund of Rs.1,11,000/- along with interest and in the event of non-payment, right or liberty to deduct the said amount from future rents. The plaintiff himself did not regard the agreement as executable but one which had exhausted itself. Restitution was claimed.

18. The present suit for specific performance has been filed only after the defendant had filed the eviction petition against the plaintiff under the Delhi Rent Control Act, 1958.

19. In view of the above, the plaint is rejected and it is held that the present suit for specific performance is barred by limitation under Article 54 of the Limitation Act, 1963 in view of the notice of the defendant dated 15th October, 2003 cancelling and repudiating the agreement to sell.

Sd./-
SANJIV KHANNA, J.

DECEMBER 03, 2008