

**(2013) 07 DEL CK 0290**

**In the Delhi High Court**

**Case No :** Regular First Appeal 350 of 1997

L.M. Nagpal and Others

APPELLANT

Vs

M/s. Fatehji and Co. and Others

RESPONDENT

**Date of Decision :** 19-07-2013

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11  
Contract Act, 1872 — Section 63  
Evidence Act, 1872 — Section 92  
Limitation Act, 1963 — Section 18

**Citation :** (2013) 138 DRJ 464

**Hon'ble Judges :** Rajiv Sahai Endlaw, J

**Bench :** Single Bench

**Advocate :** M.L. Mahajan and Mr. Gaurav Mahajan, for the Appellant; Abhinav Vasisht and Mr. Naveen Kumar Chaudhary and Mr. Gulshan Chawla, for the Respondent

**Final Decision :** Allowed

## Judgement

Rajiv Sahai Endlaw, J.—The appeal impugns the order dated 07.08.1997 of the Court of Additional District Judge, Delhi rejecting the plaint, in suit No. 87/1994 filed by the appellants/plaintiffs for specific performance of an Agreement of Sale of immovable property, on an application of the respondents/defendants under Order 7 Rule 11 of the CPC. The appeal was admitted for hearing and the Trial Court record requisitioned. The counsels have been heard.

2. The Trial Court in the impugned order has held:

(i) That specific performance was claimed of a written Agreement to Sell dated 02.07.1973;

(ii) That as per the Agreement to Sell, peaceful possession of the entire property agreed to be sold had been delivered to the appellants/plaintiffs;

(iii) That the suit for specific performance was filed on 29.04.1994;

- (iv) That as per the written Agreement to Sell, the time for performance of the contract fixed in the agreement was till 02.12.1973;
- (v) That as per the provisions of Article 54 of the Limitation Act, 1963, the limitation for filing a suit for specific performance is three years from the date fixed for performance and if no such date is fixed, when the plaintiff has notice that performance is refused;
- (vi) That though the appellants/plaintiffs have filed some letters extending the time for performance but the said time also was extended last for six months with effect from August, 1976 i.e. expiring on 01.02.1977 and the suit filed in 1994 was beyond three years therefrom also;
- (vii) That the appellants/plaintiffs had also pleaded that sons and grandsons of one of the respondents/defendants had in July, 1985 filed a suit for declaration and permanent injunction to restrain the respondents/defendants from selling the property and to have the sale made by the respondents/defendants in favour of the appellants/plaintiff declared as null and void but the said suit was also dismissed on 05.04.1989;
- (viii) That the suit filed in 1994 was beyond three years therefrom also;
- (ix) That there was no acknowledgment in writing within the meaning of Section 18 of the Limitation Act which can give a fresh period of limitation for filing the suit;
- (x) That though the appellants/plaintiffs have pleaded that the respondents only after August, 1991 had started avoiding the appellants/plaintiffs and till then were assuring the appellants/plaintiffs that they will obtain the requisite permissions for execution of the Sale Deed and execute the Sale Deed but the said assurances were verbal only; oral acknowledgment cannot be proved since oral acknowledgment cannot give a fresh period of limitation u/s 18 of the Limitation Act which requires the acknowledgment to be in writing;
- (xi) That the respondents/defendants were not going to admit any such cause of action having arisen and accrued to the appellants/plaintiffs in the month of August, 1991 and thereafter;
- (xii) That the fact that the appellants/plaintiffs were in possession of the property agreed to be sold did not make any difference to the aspect of limitation;
- (xiii) That the appellants/plaintiffs were not diligent and slept over their rights and there was nothing preventing them from within three years of expiry of the last extension as aforesaid in February, 1977 institute the suit;
- (xiv) That nothing prevented the appellants/plaintiffs from filing the suit for specific performance when they came to know from the suit filed by the sons and grandsons of the respondents/defendants at Kurukshetra that the intentions of the respondents/defendants had gone dishonest; even though the said suit was dismissed on 05.04.1989 but the appellants/plaintiffs still kept sleeping till 1994;

and

(xv) That since the time for performance was fixed in the present case, the limitation has to be counted from the said date only;

It was thus held that the suit was barred by time and the plaint rejected under Order 7 Rule 11 of the CPC.

3. The counsel for the appellants/plaintiffs has contended that since the appellants/plaintiffs have pleaded that the appellants/plaintiff as purchasers were in possession of the property, the learned Additional District Judge erred in applying Article 54 and the suit of the appellants/plaintiffs could not have been barred by time.

4. I am unable to agree. Article 54 of the Limitation Act does not make any difference between a case where possession of the property agreed to be sold has been delivered in part performance of the Agreement to Sell or otherwise and lays down the limitation to commence from the date fixed for performance and if no such date is fixed then from the date when the appellants/plaintiffs have notice that performance is refused. No fault can thus be found in the order of the learned District Judge in holding the factum of the appellants/plaintiffs to be in possession to be irrelevant for the said purpose.

5. The counsel for the appellants/plaintiffs has next argued that the land underneath the property is leasehold and the sale could not have been completed without obtaining the permission of the superior lessor i.e. the Land & Development Office (L & DO) and the Agreement to Sell also required the respondents/defendants to take such permission. It is contended that the said permission has not been taken till now. It is further contended that the cause of action in such a situation would arise only when the respondents/defendants are in a position to execute the Sale Deed and not prior thereto. It is thus argued that the suit could not have been dismissed as barred by time. Reliance in this regard is placed on Mrs. Chandnee Widya Vati Madden Vs. Dr. C.L. Katial and Others, Rojasara Ramjibhai Dahyabhai Vs. Jani Narottamdas Lallubhai (Dead) by Lrs and Another, and Shri Sewa Singh and Another Vs. Shri R.S. Malhotra,

6. I am unable to agree with the said proposition also. Even if any permission is to be obtained prior to the performance/completion of the contract, mere fact that the respondents/defendants have not obtained the said permission would not lead to inference that no cause of action for suing for specific performance would arise. It has been held in Shri Vishwa Nath Sharma Vs. Shyam Shankar Goela and Another, K. Raheja Constructions Ltd. Vs. Alliance Ministries and others, and Van Vibhag Karamchari Griha Nirman Sahkari Sanstha Maryadit (Regd.) Vs. Ramesh Chander and Others, that even where such permissions are to be obtained, the decree for specific performance can be passed directing the seller to take the said permissions and the decree for specific performance is to be made subject to the grant of said permissions. The judgments cited by the counsel for the appellants/plaintiffs do not deal with the said aspect and the

reliance thereon is misconceived.

7. The senior counsel for the respondents/defendants has at the outset contended that since Clause 11 of the Agreement to Sell which is as under:

11. That in the event of sale not materializing by the date 2nd December, 1973, through no cause attributable to the Vendors, the earnest money of Rs. 20,000/- already paid by the prospective Purchaser shall stand forfeited by the Vendors. In case the transaction fails to materialise through causes direct or indirect attributable to the Vendors, within the period aforesaid, the vendors shall be liable to repay Rs. 20,000/- to the Prospective Purchaser as earnest money plus Rs. 20,000/- as penalty to the Prospective Purchaser in addition to the aforesaid sum of Rs. 55,000/- (Rupees Fifty five Thousand only) paid as advance and earnest money.

provides for the respondents/defendants as sellers, even if in default of performance, to only pay double the amount of earnest money received from the appellants/plaintiffs and does not provide for the remedy of specific performance, the claim for specific performance is misconceived and is liable to be dismissed.

8. Though the aforesaid ground did not form part of the application of the respondents/defendants under Order 7 Rule 11 of the CPC and the learned Additional District Judge has not rejected the plaint on this ground but I may state that the same even otherwise has no merit.

9. The Supreme Court though in Dadarao and Another Vs. Ramrao and Others, had held so but subsequently in P. D'Souza Vs. Shondrilo Naidu, the judgment in Dadarao was held to be per in curium and it was held that merely because the Agreement to Sell provides for payment by the sellers of compensation in the event of being in breach does not take away the right of the purchaser to in law seek specific performance of the Agreement to Sell. Recently, in Man Kaur (dead) by LRS. Vs. Hartar Singh Sangha, also it has been held that for agreement purchaser to seek specific performance of a contract of sale relating to immovable property it is not necessary that the contract should contain a specific provision that in the event of breach, the aggrieved party will be entitled to specific performance and the provision for damages is not intended to provide vendor an option of paying money in lieu of specific performance.

10. The senior counsel for the respondents/defendants has next invited attention to pages no. 1231-1241 of the Trial Court record containing the successive letters issued by the respondents/defendants to the appellants/plaintiffs extending the time for execution of the Sale Deed on the ground that the requisite permissions from the superior lessor i.e. L & DO and from the Income Tax department had not been received till then. He has contended that the last of such letters extends time from 01.08.1976 by six months and which would expire on 31.01.1977; the suit should have been filed within three years therefrom. It is argued that since the extensions were always in writing and for a period of three months or six months, the case of the appellants of oral

extensions ought not to be believed and rejected.

11. It is contended that mere clever drafting on the part of the counsel for the appellants/plaintiffs should not be allowed to maintain a suit which otherwise is palpably barred by time. Reliance in this regard is placed on the observations in T. Arivandandam Vs. T.V. Satyapal and Another, as reported in The Church of Christ Charitable Trust and Educational Charitable Society, represented by its Chairman Vs. Ponnamman Educational Trust represented by its Chairperson/Managing Trustee, It is contended that the very fact that the respondents/defendants from 1974 till 1976 were issuing letters of extension of time for performance and stopped doing that should have been construed by the appellants/plaintiffs as refusal of performance and the limitation would commence therefrom.

12. At this stage it is apposite to notice the pleas in paras no. 10 to 16 of the plaint, which are as under:-

10. That since the defendants could not obtain the aforesaid permission to sell the property no. C-39, Defence Colony, New Delhi from the lessor i.e. the President of India, acting through Land & Development Office, the defendants asked for extension of time for execution of the sale deed in favour of late Smt. Ram Piari Nagpal, the predecessor-in-interest of the plaintiffs from time to time, some time by written letters and sometimes on oral request. While asking for these extension it was made clear and was also so understood between the parties to the said agreement to sell that time would not, for the purpose of the said agreement, be the essence of the said agreement to sell. No time for performance was fixed by the parties to the said agreement for the purpose of execution and completing performance of the said agreement to sell when request for enlargement of time for the performance of the contract in question after the expiry of the period mentioned in clause (11) of the said Agreement to Sell was agreed and acceded to. The late Smt. Ram Piari Nagpal and after her death the plaintiffs, who were in complete control and possession of the entire building in question in pursuance to the agreement to sell in question, right from the day of the execution thereof, had readily agreed to the proposal and suggestions of the plaintiffs to given a go bye to clause (11) of the agreement and to have the said Agreement being performed by the defendants on their obtaining the aforesaid permission from the Lessee. Even otherwise and inspite of clause (11) time cannot be said to be the essence of the contract in question which relates to the sale of the immovable property. All along with plaintiffs are treating themselves as owners of the said property.

Since, the sale in question could not be executed by the defendants without getting and obtaining the requisite permission from the Lessor, the period of limitation, for enforcement/performance of the contract in question would commence only after the said permission had been obtained and granted and due information thereof had been intimated to the plaintiffs by the defendants. Even otherwise, the plaintiffs being in possession and control of the property in

question, in pursuance of the agreement to sell entered into between the parties, the question of any limitation on the part of the plaintiff for seeking enforcement and performance of the said agreement does not arise. The parties to the said agreement did not fix any time while permitting the defendants to apply and obtain the said permission from the lessor particularly after time was extended on number of occasions and fixing no time limit thereafter.

11. That late Smt. Ram Piari Nagpal had done all that was required of her to be done under the terms and conditions of the said agreement to sell, inasmuch as she had paid the full consideration towards the sale of the property in question and was always ready and willing to perform her part of the contract.

12. That the defendants always assured and represented to Smt. Ram Piari Nagpal that they are always ready and willing to execute the sale deed in question, but since they have not been able, for one reason or the other, to obtain the requisite permission/approval for the sale of the said property in favour of her, they are not in the position to execute the sale deed, but they assured the said Smt. Ram Piari Nagpal and after her death the plaintiffs, that the defendants should be getting the said permission any day and on the receipt thereof would execute the sale deed.

13. That, however, sometime in the month of July, 1985 S/Shri Bhartinder Singh, Digender Singh both sons of Shri Tikka Khushwant Singh, defendant no. 2 alongwith minor Isham Singh son of Bhartinder Singh, Prithvi Singh, minor, son of Shri Deginder Singh residents of Village Indbari now in Village Kamoda, Tehsil Pehowa, Distirct Kurukshetra filed a suit for declaration and permanent injunction against both Shri Khushwant Singh, defendant no. 2 and Smt. Gunwant Kaur and the present plaintiffs as legal heirs of Late Smt. Ram Piari Nagpal praying that a decree of declaration be passed in their favour to the effect that the property in question namely C-39, Defence Colony, New Delhi is ancestral joint Hindu family of the plaintiffs and, therefore, the sale made by defendant no. 1 in favour of the plaintiffs herein be declared as null and void. The said suit being false and frivolous suit which was contested by the present plaintiffs and the same was dismissed on 05.04.1989.

14. That after the aforesaid suit filed by Bhartinder Singh and Digender Singh, sons of defendant no. 2 along with others, had been dismissed on 05.04.1989, the plaintiffs asked and requested the defendants to take immediate steps to obtain the requisite permission from the lessor, so as to enable the defendants to execute the sale deed of the property in question in favour of the plaintiffs. The defendants again assured and represented to the plaintiff that since the aforesaid suit filed by sons of defendant no. 2 and others had been dismissed, now there would be no hurdle or problem whatsoever in getting the requisite permission from the lessor for the sale of the property in question in favour of the plaintiffs. The plaintiffs accepted the said assurance and representation of the defendants as true and correct and hoped that the defendants would obtain the said permission from the Lessor.

15. That again when the plaintiffs did not hear anything from the defendants about the grant of the said permission, the plaintiffs contacted the defendants. The defendants told the plaintiffs that they are negotiating with the office of the Land & development for the amount of unearned increase, i.e. being demanded, on behalf of the lessor, for according the said permission of sale. The defendants also informed the plaintiffs that they are also arranging for the amount payable to the Lessor towards the unearned increase. These talks took place sometimes in August, 1991.

16. That the plaintiffs, again did not hear anything from the defendants and again tried to contact them but to their utter surprise found that the defendants are trying to evade and put-off the plaintiffs. The plaintiffs even thereafter in 1992 and in 1993 made efforts to contact the defendants, but could not succeed. It appears that after the assurance and representations made by the defendants to the plaintiffs in August 1991 for obtaining the said permission and payment of unearned increase in connection therewith, there seems to be some change in the minds of the defendants or may be the defendants backed out from making the payment of the unearned increase for obtaining the requisite permission. In any case, no intimation has been given by the defendants to the plaintiffs about the obtaining of any such permission from the Lessor. In fact, after August, 1991 the defendants almost have succeeded in hiding themselves from the plaintiffs. The plaintiffs were still under the impression that the defendants would be making arrangements for collection of the money for making payment to the Lessor towards the unearned increase.

(emphasis added)

13. The contention of the senior counsel for the respondents/defendants is that the averments in aforesaid paras of the plaint, of extension are bald, without any supporting documents and without any particulars as to which of the appellants/plaintiffs met which of the respondents/defendants and on which date. Reliance is placed on Hardesh Ores Pvt. Ltd. Vs. Hede and Company, laying down the law of limitation qua Article 54 in a suit for specific performance. It is stated that while some of the appellants/plaintiffs are abroad, all the respondents are in Dehradun and the pleas aforesaid, without stating as to how the alleged assurances were meted out cannot be believed.

14. The counsel for the appellants interjects informing that the letters of extension are from Delhi.

15. The arguments of the senior counsel for the respondents/defendants, though may be good at the post trial stage but lose sight of the fact that the present is a stage under Order VII Rule 11 of the CPC and thus cannot be given any credence at this stage. At the stage of Order VII Rule 11 of the CPC, the Supreme Court recently in Mayar (H.K.) Ltd. and Others Vs. Owners and Parties, Vessel M.V. Fortune Express and Others, has held, the averments in the plaint have to be taken to be true and the fact that the case of the plaintiff is weak and the

chances of success bleak cannot weigh with the Courts while deciding the same. The defence raised by the defendant is to be ignored at the said stage. Rejection of the plaint is a serious matter as it non-suits the plaintiff and kills the cause of action. Therefore, without satisfaction of requirement of Order VII Rule 11, the plaint cannot be rejected. Reference in this regard can be made to a detailed discussion in the recent judgment of this Court in Sh. Gopal Johari Vs. Sh. Anup Diwan and Others, It was further held that at the stage of Order VII Rule 11 of the CPC, the Court is not required to make an elaborate enquiry into doubtful or complicated questions of law or fact.

16. It is not the contention of the senior counsel for the respondents/defendants also that even if the averments in the plaint are to be believed, the claim for specific performance would still be barred by time. Rather I find that in view of the statements made in the paragraphs of the plaint set-out hereinabove, the objection of limitation raised by the respondents/defendants becomes a mixed question of law and facts which necessarily requires adjudication and the defence of limitation is to be considered after the trial is concluded and not at the threshold.

17. 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.

18. The Supreme Court in Panchanan Dhara and Others Vs. Monmatha Nath Maity (Dead) thr. L.Rs. and Another, 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. The Ld. Additional District Judge has held the suit of the plaintiffs to be time barred on the ground of there being no acknowledgment in writing-within the meaning of Section 18 of the Limitation Act-extending the limitation period commencing from the accrual of a cause of action to the plaintiffs. However, the application of Section 18 presupposes determination of the accrual of a cause of action and it governs only the question of extension of the limitation period commencing therefrom. In the present case, the precise date of accrual of a cause of action itself is disputed with the plaint suggesting that the time fixed for performance of the Agreement was deferred vide letters exchanged between the parties and subsequently through oral agreements between them. The question therefore before this court is the determination of the date from which the cause of action can be said to have accrued to the plaintiff and the question whether the same stood extended by virtue of Section 18 of the Limitation Act need not be gone into till the same is determined.

20. In this context, it is pertinent to note that while Section 92 of the Evidence Act prohibits oral evidence when the terms of a contract have been reduced in writing, however proviso IV thereof states:

The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

21. Thus, it would appear that the appellants/plaintiffs cannot be deprived of the opportunity to lead evidence to prove that the time fixed for performance of the Agreement was subsequently extended by way of oral agreements reached

between the parties.

22. It may also be highlighted that it is not in dispute that the appellants/plaintiffs were in pursuance to the Agreement to Sell put into possession of the property and are in possession thereof since the year 1973. A purchaser in possession cannot be expected to rush to the Court with a suit for specific performance, the end result whereof would only be the execution of a deed of title in favour of such agreement purchaser. Such an agreement purchaser, since enjoying the benefits of the property cannot be blamed for not pursuing the matter vigorously. Rather, during the hearing I had enquired from the counsels as to what was the stand of the respondents/defendants in the suit filed at Kurukshetra-whether the respondents/defendants pleaded that there was no sale as the appellants/plaintiffs had failed to enforce specific performance. However neither counsel was able to inform of the correct facts in this regard.

23. I had during the hearing also enquired whether any steps had been taken by the respondents/defendants for recovery of possession of the property from the appellants/plaintiffs. The senior counsel for the respondents/defendants on instructions stated that steps were being taken. That also shows that the respondents/defendants have not treated the rights of the appellants/plaintiffs in the property, under the Agreement to Sell, to have come to an end.

24. For all the aforesaid reasons, the impugned judgment and decree of rejection of the plaint in the suit for specific performance of an Agreement of Sale of immovable property on the ground of the claim therein being barred by time cannot be sustained. The appeal is accordingly allowed and the impugned judgment and decree is set aside. The appellants/plaintiffs are also awarded costs of this appeal in the sum of Rs. 25,000/- payable by the respondents/defendants on or before the next date of hearing before the Suit Court. Decree sheet be drawn up.

25. The parties to appear before the District Judge (South), New Delhi stated to be having jurisdiction over the property subject matter of the suit on 24th September, 2013. The Trial Court filed be returned forthwith to District Judge (South), New Delhi.