
(2009) 01 DEL CK 0175

In the Delhi High Court

Case No : Regular Second Appeal No. 99 of 2003 and CM 373 of 2003

Smt. Sunita Aggarwal

APPELLANT

Vs

Smt. Manorma Aggarwal and Another

RESPONDENT

Date of Decision : 14-01-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 21, Order 41 Rule 27
Contract Act, 1872 — Section 46
Evidence Act, 1872 — Section 101
Limitation Act, 1963 — Article 54

Citation : (2009) 01 DEL CK 0175

Hon'ble Judges : V.K. Shali, J

Bench : Single Bench

Advocate : Suruchi Aggarwal, for the Appellant; Manish Sharma, for the Respondent

Final Decision : Dismissed

Judgement

V.K. Shali, J.—This is a Regular Second Appeal filed by the appellant against the judgment and decree dated 26th April, 2003 passed by Sh. S.M. Chopra, the then Additional District Judge, Tis Hazari Courts, Delhi by virtue of which the learned ADJ had upheld the judgment and decree dated 27th January, 2003 passed by Sh. Rajesh Kumar Singh, Civil Judge dismissing the suit for specific performance of the appellant.

2. Briefly stated the facts leading to the filing of the present Regular Second Appeal are that the appellant had filed a suit for specific performance against the defendants alleging therein that property No. 2742/1-A, Gali No. 13, Ranjit Nagar, New Delhi-110008 measuring about 209 sq. yards which was purchased by one Mr. Harish Chand Aggarwal from its previous owner one Sh.Durgadas on 7th June, 1957 by virtue of a registered sale deed. It is further alleged that after purchasing the said property, one Mr. Sita Ram was inducted as a tenant into the suit property by Late Sh. Harish Chand Aggarwal. Sh. Sita Ram is purported to have further sublet the property to one Sh. Mushadi Lal who is presently in

occupation of the said property. Sh. Harish Chand Aggarwal is purported to have expired on 3rd September, 1964 leaving behind four sons and one daughter who are stated to have inherited the property jointly as co-owners and legal heirs. One of the sons of Late Harish Chand Aggarwal was Mr. J.K. Aggarwal who is the husband of respondent No. 1 and the father of respondent No. 2. It is stated that Sh. J.K. Aggarwal had inherited 1/5th share, which comes to 20% of the suit property. It is stated that as per deed of partition the plot in question was divided into five plots and the plot No. 5 had fallen to the share of Sh. J.K. Aggarwal. It is further alleged that Sh. J.K. Aggarwal on 7th June, 1993 had after partition of the property agreed to sell his 1/5th share to the appellant for a total consideration of Rs. 20,000/- out of which a sum of Rs. 5,000/- was alleged to have been paid by the appellant to him at the time of signing of the agreement to sell. The balance RSA No. 99/2003 consideration of Rs. 15,000/- was to be paid at the time of perfecting the title of the appellant before the Sub-Registrar. It was alleged that unfortunately Sh. J.K. Aggarwal died on 29th November, 1993 and after his death the share of Sh. J.K. Aggarwal was inherited by his two legal heirs i.e. his wife and daughter who are the respondents herein. It is alleged that although Sh. J.K. Aggarwal was ready and willing to perfect the title of the appellant during his life time yet the transaction could not be completed. After the demise of Sh. J.K. Aggarwal, it is stated that the appellant approached the respondents number of times to perfect her title, however, all in vain. A notice was sent on 14th February, 1999 calling upon respondents to accept the balance sale consideration and execute the sale deed in her favour in terms of the agreement to sell dated 7th June, 1993. It is alleged that although on receipt of this notice, appellant was assured that needful would be done but this was not done accordingly another notice dated 16th August, 1999 was issued to the respondents. The respondents sent a reply dated 24th September, 1999 denying that their predecessor in interest having signed any agreement to sell. On the contrary, it was alleged that Sh. J.K. Aggarwal around the time in 1993 when the agreement to sell is purported to have been signed, was confined in hospital and his elder brother one Sh. K.K. Aggarwal, father of the appellant, obtained signatures on some papers which are surreptitiously alleged to have been used to draw an agreement to sell on the basis of which the present suit has been filed.

3. Notice was issued to the respondents/defendants, however, the respondents despite service did not appear and consequently they were proceeded ex parte. The appellant in support of her case has filed two affidavits by way of evidence. The appellant's affidavit purported to prove the agreement to sell Ex.PW2/1 and other documents Ex. PW1/1 to PW1/3 executed by Sh.J.K.Aggarwal. In addition to this, Sundar son of Sh. Sudhir has also filed affidavit by way of evidence in support of her case.

4. Learned Civil Judge after hearing arguments dismissed the suit of the appellant on the ground that the same is barred by limitation. For the purpose of limitation, learned Civil Judge referred to Article 54 of the Limitation Act, 1963, which lays down a period of three years within which the suit for specific

performance has to be filed. It was observed by the learned Civil Judge even if the period of limitation is reckoned with effect from 14th February, 1999, it was observed that though the suit may be within the period of limitation however, it was still inordinately delayed. On account of this delay, it was observed by the Civil Judge that the grant of relief under the Specific Relief Act is discretionary and the same cannot be claimed as a matter of course by the appellant. On the basis of this reasoning, the suit of the appellant for specific performance was dismissed.

5. Feeling aggrieved by the judgment dated 27th January, 2003, passed by the Ld. Civil Judge, the appellant preferred a Regular First Appeal, which came to be heard by Sh. S.M. Chopra, ADJ, Delhi. The learned Additional District Judge upheld the dismissal of the suit by the learned Civil Judge as it did not find any infirmity in the judgment of the Ld. Civil Judge. The First Appellate Court also observed that the bonafides of the appellant were also suspect and so were the signatures of Shri J.K. Aggarwal on the agreement to sell which were compared with the signature of Sh. J.K. Aggarwal on the purported copy of the partition deed, which is mark X. It may be pertinent here to mention that this copy of the partition deed was filed by the appellant herself in the first appeal.

6. The appellant feeling aggrieved by the judgment dated 26th April, 2003 passed by Sh. S.M. Chopra, learned Additional District Judge, Tis Hazri Court, Delhi upholding the judgment and decree, and dismissing of the suit passed by the learned Civil Judge dated 27th January, 2003 filed the present Regular Second Appeal. In the appeal the learned Counsel for the appellant has formulated the following questions which according to her are of substantial questions of law which are arising in the instant appeal.

(i) Whether the plaintiff is not entitled to the decree for specific performance, when her averments, made in the plaint remained un rebutted, by the defendants/ respondents, as the defendants did not choose to appear and contest the suit and did not file their written statement, nor appeared in the appeal, in spite of service?

(ii) Whether the suit for specific performance can be dismissed, on the grounds of alleged delay and laches, on the part of the plaintiff, otherwise the suit is well within the period of limitation?

(iii) Whether the first appellate court was justified in arriving at the conclusion, without any pleadings/allegations on the part of the defendants, that the signatures of Shri J.K. Aggarwal (Vendor) differ from the admitted signatures on the Partition Deed, while the Partition Deed itself confirms the execution of the agreement to sell and the defendants in their reply to the legal notice, admitted her signatures and that of Shri J.K. Aggarwal.

(iv) Whether the first appellate court was justified to make out a new case for the defendants that inordinate delay on the part of the plaintiff in coming to the court, is sufficient to decline the relief of specific performance.

(v) Whether the Trial Court erred in law inferring, without any evidence on record and without any opposition to the suit, from the defendants that there is delay in approaching the Court, even though the suit was well within limitation, particularly when the suit was between near relations and findings of delay, in approaching the Court, is based on mere ipse-dixit and is a result of surmises.

7. It was contended by the learned Counsel Ms. Suruchi Aggarwal for

the appellant that the factum of the agreement to sell in respect of the share of the respondents purporting to have been executed by their predecessor-in-interest on 7th June, 1993 was not in dispute. It was also urged that Late Sh. J.K. Aggarwal during his life time or even the respondents herein who are the successor in interest of Sh. J.K. Aggarwal would not deny to perfect her title. Since title was not perfected, therefore, the appellant was constrained to first send a notice on 14th February, 1999 to which again no reply was given them. The second notice was sent on 16th August, 1999 asking them to perform their part of the contract perfecting the title of the appellant after consideration of Rs. 15,000/- and since this was not done she filed a suit on 17th January, 2002 which is well within three years from the date of refusal of the respondents to perform the specific performance part of their contract. The learned Counsel for the appellant contended that in terms of the agreement, there is no specific time laid down for the performance of the contract and accordingly, the suit was maintainable as the same was filed within three years from the date on which the appellant came to know about the refusal by the respondents to perform their part of the contract. This refusal is to be taken from the date of a reply of the respondents which is dated 24th September, 1999 and hence the suit of the appellant is within time and has been wrongly dismissed by the courts below. The learned Counsel for the appellant in support of her contention relied upon *Parvatharaj Gupta v. K.C. Jayadeva Reddy* (2006) 2 SCC 28 and *Gunwantbhai Mulchand Shah and Others Vs. Anton Elis Farel and Others*,

8. The learned Counsel for the appellant also contended that she has filed an application bearing CM. No. 373/2003 under Order 41 Rule 27 of the CPC for seeking permission to adduce additional evidence to prove the partition deed mark "X" which had been executed among Late Sh. J.K. Aggarwal and his brothers by virtue of which the suit property was partitioned. It has been averred by the learned Counsel for the appellant in the application that although the other legal heirs of Late Sh. Hari Chand had perfected the title of the appellant with regard to their respective shares, it was only the Late Sh. J.K. Aggarwal or the respondents herein who had failed to keep their promise of perfecting the title of the appellant and therefore, it was necessary to prove the partition deed between the parties. This partition deed has been taken cognizance of by the learned Appellate Court. The learned Counsel contended that the proof of this document is very essential for the just decision of the case. The appellant has placed reliance in support of her application under Order 41 Rule 27 of the CPC on *Lachhman Singh (Deceased) through Legal Representatives and Others Vs.*

Hazara Singh (Deceased) through Legal Representatives and Others, North Eastern Railway Administration, Gorakhpur Vs. Bhagwan Das (D) by Lrs., and Sarada (Smt) and Others Vs. Manikkoth Kombra Rajendran, as well as Phool Pata and Another Vs. Vishwanath Singh and Others, to urge that additional evidence can be adduced even at the stage of the second appeal.

9. The learned Counsel for the respondent has contested the submissions made by the appellant on both these grounds. So far as the merits of the second appeal are concerned, it was contended by the learned Counsel for the respondent that the second appeal is maintainable only if a substantial question of law is involved in the appeal. As against this there is a concurrent finding of fact that the suit of the appellant is barred by limitation although the reasoning which has been given by the courts below is varying but the outcome of the matter remains same. The suit having been filed after more than three years from the date of the death of Sh. J.K. Aggarwal, it is barred by time. It was also contended that even if it is assumed that there was no time fixed for the specific performance of the agreement dated 7th June 1993 still it had to be performed within a reasonable time. As against this the appellant has chosen to file the present suit after expiry of almost nine years from the date of purported agreement to sell in question. The learned Counsel for the respondent also placed reliance on case titled as The State of Gujarat and Another Vs. Mahendrakumar Parshottambhai Desai (Dead) by L.Rs.,

10. So far as the application of the appellant under Order 41 Rule 27 of the CPC for seeking permission to adduce additional evidence to prove the partition deed is concerned, the learned Counsel for the respondents took this Court through the contents of the said application and pointed out that the said application does not fall in any of the Sub-clauses (a), (aa) and (b) of the Order 41 Rule 27 of the CPC nor does the proof of the said partition deed advanced the substantial justice as is sought to be urged by the appellant. It was contended that the document which is sought to be proved by the appellant was well within their knowledge as the factum about the partition deed is mentioned in the suit itself. Further a copy of the same was filed by way of a photocopy before the first appellate court by the appellant herself and if at all such an application was entertainable it ought to have been filed before the first appellate court. Having failed to do so it is not open the appellant to maintain the present application Order 41 Rule 27 of the CPC so as to fill up the lacuna in their case by filing the present application at the stage of the second appeal.

11. I have thoughtfully considered the submissions of the respective sites and perused the judgments cited by the learned Counsel for the appellant.

12. First, I deal with the application under Order 41 Rule 27 of the CPC filed by the appellant. One of the objections which was raised by the learned Counsel for the respondent that the present application under Order 41 Rule 27 of the CPC has been filed at the stage of the Second Regular Appeal, and therefore, ought not to be entertained. The learned Counsel for the appellant has cited a

judgment titled as Phool Pata and Another Vs. Vishwanath Singh and Others, which was a case in which additional evidence was permitted to be taken at the stage of the Second Regular Appeal. In my view that is not the issue in this case. In a given case if the fact situation so warrants and the requirement of Order 41 Rule 27 CPC are met, the Court may permit additional evidence even in second appeal.

13. A perusal of under Order 41 Rule 27 of the CPC would clearly show that the application for additional evidence can be filed at the appellate stage provided the requirements mentioned in Sub-clause 27 of the order are satisfied.

27. Production of additional evidence in Appellate Court.-(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate court. But if-

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or]

(b) The Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.

14. A perusal of the aforesaid rule would clearly show that unless and until any of the aforesaid three conditions is satisfied by the by the appellant the additional evidence cannot be admitted at the appellate stage. In the instant case the appellant in the suit itself has mentioned that after the death of Late Sh. Hari Chand Aggarwal the suit property was partitioned in five shares among the brothers which included one Sh. J.K. Aggarwal and his brothers and sister as a consequence of which the appellant was entitled to an area of 41.8 sq. mtrs. by way of plot No. 5. Therefore, the factum of the partition having been done by meets and bounds was within the knowledge of the appellant and it was open to the appellant, if it so desired to place reliance on the partition deed, to prove the same. The appellant does not seem to have placed reliance on the said partition deed nor was the said deed filed before the Trial Court. After the dismissal of the suit during the pendency of the appeal the appellant herself had filed a photocopy of the said partition deed before the appellate court. It could not be said that the document in question was not within her knowledge or that it could not be produced despite due diligence. The case of the appellant does not fall in Clause (bb). The case of the appellant also does not fall in Clauses (a) or even in

Clause (b) also as would be clear from the plain reading of the said sub-clauses. The Court has not refused to admit the partition deed nor does the court want to look to the partition deed in order to decide the case. The proof of partition deed was not required to be produced for the pronouncement of the judgment by the court. On the filing of the photocopy of the partition deed the learned appellate court had compared the signatures of Late Sh. J.K. Aggarwal on the purported agreement to sell dated 7th June, 1993 with the signatures purporting to be appearing on the photocopy of the partition deed filed by the appellant himself and observed that the signatures do not tally and this raises doubt about the signatures on the agreement to sell itself purported to have been executed by late Sh. J.K. Aggarwal. But it is not on this ground alone that the appeal has been dismissed. The learned ADJ has also agreed with the finding of the learned Civil Judge that the suit of the appellant is barred by limitation in view of Article 54 of Limitation Act, 1963 and it is in light it has been observed that there is inordinate delay in filing the suit.

15. After having suffered dismissal of the first appeal it is not open to the appellant now to file the appeal as well as the present application under Order 41 Rule 21 of the CPC seeking permission to adduce additional evidence to prove the partition deed by urging that the proof of the partition deed is essential for the just decision of the case. On the contrary, I am of the considered opinion that by filing an application at such a belated stage of second appeal after having suffered an adverse concurrent finding of the fact, the appellant has tried to fill up a lacuna left in the case of the appellant. Even otherwise I do not feel that proof of partition deed in any manner whatsoever advances the substantial justice in the case.

16. The case of the appellant in the suit is that there was an agreement dated 7th June, 1993 executed by Late Sh. J.K. Aggarwal and for a total consideration of Rs. 20,000/- out of which a sum of Rs. 5,000/- was paid to Sh. J.K. Aggarwal at the time of the execution of the agreement. It is alleged that Sh. J.K. Aggarwal is purported to have never denied to perfect the title of the appellant yet the appellant did not get the title perfected. Admittedly, Late Sh. J.K. Aggarwal died on 29th November, 1993 and immediately on account of his death, the appellant did not file the suit for specific performance and has averred in the plaint that neither Late Sh. J.K. Aggarwal nor his successor in interest, namely, the respondents denied the agreement yet they did not perfect the title of the respondent, and therefore, she was constrained to give notices on 14th February, 1999 and on 16th August, 1999 to which reply dated 24th September, 1999 was received, and therefore, a suit was filed within a period of three years from the said date. If this is the fact situation, I fail to understand as to how the partition deed becomes relevant for the proof of the agreement to sell or the performance of the said agreement to specific performance. As against this in the application seeking additional evidence a new case has been set up by stating that she has also purchased the remaining 80% of the property in question from other co-shares and they have perfected her title while as it was in fact of this 20% only

that the respondent was trying to wriggle out. It is in my opinion is totally an irrelevant consideration for allowing the application for additional evidence.

17. Accordingly, I am of the view that not only the application under Order 41 Rule 27 of the CPC filed by the appellant is totally misconceived as it does not satisfy the requirement of Order 41 Rule 27 of the CPC but this is only a ploy to keep the matter pending so that it is used as a lever for settlement. So far as the authorities which have been cited by the learned Counsel for the appellant with regard to adducing of additional evidence are concerned, I am of the view that there is no dispute about the proposition of law laid down thereunder but they are not applicable to the facts of the present case.

18. Accordingly, the application bearing No. 373/2003 of the appellant under Order 41 Rule 27 of the CPC is dismissed.

19. Coming back to the merits of the case there is no dispute about the fact that Article 54 of the Limitation Act, 1963 specifies a period of three years for filing the suit for specific performance unless and until the time is specified therein under the agreement itself. The exact language of Article 54 of the Limitation Act, 1963 of schedule I of the Limitation Act reads as:

54 For specific Three years The date fixed for performance of a the performance, contract. or, if no such date is fixed, when the plaintiff has notice that performance is refused.

20. Admittedly, in the instant case there is no dispute about the fact in terms of agreement to sell dated 7th June, 1993 time was not specified. Therefore, the second limb of the aforesaid article comes into operation that is that the suit has to be filed within the period of three years from the date on which the plaintiff/appellant became aware of the refusal to perform the specific performance by the respondent. If that be the condition then the period of limitation is to be reckoned from the date from such a date.

21. It may be pertinent here to refer to Section 46 of the Indian Contract Act, 1872 also which reads as under:

46. Time for performance of promise, where no application is to be made and no time is specified.-

Where, by the contract, a promisor is to perform his promise without application by the promise, and no time for performance is specified, the engagement must be performed within a reasonable time.

22. A perusal of Section 46 of the Contact Act, 1872 specifically lays down that if no time for performance of contract is specified then it is to be performed within a reasonable time. The explanation to the Section specifically laid down that what constitutes reasonable time is a question of fact in each of the case.

23. The appellant has filed a suit for specific performance in which para 6 and 7 reads as under:

(6) That Shri J. K. Aggarwal, the predecessor in interest of the defendant died on 29.11.1993 and the defendants are the legal heirs of Shri J.K. Aggarwal.

(7) That even after the death of Shri J. K. Aggarwal, the plaintiff approached the defendants for acceptance of the balance sale consideration amount and for Section of the sale deed in respect of 20% share (Plot No. 5 measuring 41.8 sq. yards) but all the time the defendants had been postponing the same on one lame excuse or the other. Being close relations, the plaintiff did not insist for execution of the sale deed and acceptance of the balance sale consideration amount but the defendants never denied the execution of the same.

24. There is no dispute on the fact that respondents were set ex-parte as they had failed to appear despite service. The appellant in support of his case had filed two affidavits by way of evidence one that of his own self and another that of PW-2. In the evidence the agreement dated 7th June, 1993, Ex.PW1/1 a first notice as exhibit PW 1/1 on 14th February, 1999 and second notice on 16th August, 1999 exhibit PW1/2 to which reply dated 24th September, 1999 exhibit PW1/3 have been proved. Although in the plaint it has been averred that Late Sh. J.K. Aggarwal or his successor in interest, namely, respondents had been giving lame excuses for perfecting the title of the appellant yet the appellant did not take any effective step to get her title perfected from the court within a reasonable time. No averment has been made much less evidence adduced to show the date, time or the place where Late Sh. J.K. Aggarwal or their successor in interest, namely, the respondents were approached and they admitted the agreement to sell and yet kept on postponing the execution of the sale deed in favour of the appellant. The general principle of proof is contained in Section 101 of the Evidence Act, 1872 which lays down that one who asserts must prove. The appellant has failed to prove as to when and how she had approached Late Sh. J.K. Aggarwal or the respondents for the purpose of perfecting her title or when they had refused. On the contrary, there is no evidence that at any point of time the appellant during the life time of Late Sh. J.K. Aggarwal had approached him during his life time for the purpose of perfecting her title. Even if it is assumed that Late Sh. J.K. Aggarwal was not approached during his life time for the purpose of perfecting the title of the appellant at least from the date of his death that is on 29th November, 1993 the appellant ought to have gone to the Court for the purpose of perfecting her title as the death of Late Sh. J.K. Aggarwal meant literally refusal which was known to the appellant. The appellant could not simply make an averment in the plaint without any proof that she had been approaching Late Sh. J.K. Aggarwal during his lifetime and thereafter his successor in interest who had been avoiding and then one fine morning wakes up and gives a notice on 14th February, 1993 to the respondents for the purpose of perfecting her title followed, by another notice on 16th August, 1999.

25. Section 46 of the Contract Acts specifically lay down that if no specific time is laid down for the purpose of performance then the same is to be performed within a reasonable time and certainly giving of notice almost after 5 1/2 years

of the death of Late Sh. J.K. Aggarwal for the purpose of invoking the jurisdiction of the Civil Court and maintaining a suit for specific performance cannot be said to be a reasonable time by any stretch of imagination and therefore, the learned Civil Judge was perfectly right in dismissing the suit for specific performance as being barred by time and similarly the appellate court had also taken a correct view by upholding such a dismissal by observing that specific relief is a discretionary relief and since there has been inordinate delay on the part of the appellant invoking the jurisdiction of the court, therefore, the same cannot be granted. The concurrent finding of the courts below that of a Trial Court and first appellate court in dismissing the suit of the appellant as barred by time is not suffering from any illegality or perversity. On the contrary, the said finding is a question of fact which cannot be interfered with by the second appellate court. Merely, because the appellate court has gone a step further in observing that the signatures on the main agreement to sell of Late Sh. J.K. Aggarwal do not tally with the signatures on the photocopy of the partition deed mark "X" does not in any way digress from the main findings of the courts below that the suit is barred by time. Nor this observation entitle the appellant to file the application under Order 41 Rule 27 of the CPC by urging that the proof of partition deed is essential for the just decision of the case or that it would advance substantial justice. This plea of the appellant is totally misconceived and bereft of any merit.

26. The two authorities which have been cited by the appellant on the question of limitation also do not help the appellant in any manner whatsoever as they are reiterating the principle of limitation under Article 54 of the Limitation Act, 1963 for the purpose of filing the suit for specific performance. In R.K. Parthavatharaj Gupta's case (supra), the apex Court held that in respect of a property for sale of immovable property time is not the essence of the contract but the question as regards the conduct of the party must be considered the background of the case. In the said case, the time for performance was not fixed in the agreement but notice having been issued by the seller in the said case on 24th April, 1984 requiring the respondent/purchaser to perform his part of the contract within 15 days of the receipt of the notice failing which the agreement would stand cancelled the respondent/purchaser had notice about the refusal to perform the contract after expiry of 15 days and accordingly, the suit having been brought after more than three years after the expiry of 15 days was held to be barred by time.

27. So far as the present case is concerned, the very fact the seller Sh. J.K. Aggarwal died on 29th November, 1993, the appellant/purchaser is deemed to have notice about the inability of the deceased seller performing his part of the contract and therefore, the appellant ought to have filed the suit within three years of the death of Sh. J.K. Aggarwal. This was not done and on the contrary, the appellant waited for 5 1/2 years and issued notice on 14th February, 1999 and then 16.8.1999, and thereafter has chosen to file the suit for specific performance which is ex facie barred by time. The appellant can be permitted to wait at her will and then one fine morning set up and gives a notice to the

respondent and then wait for the reply or assure refusal and then file the suit so as to bring his suit within limitation. On the contrary, it shows that the conduct of the appellant, that the suit being barred by time has sought to be circumvented by giving a notice and then trying to reckon the period of limitation with reference to the same.

28. Similarly, in Anuwanti Bhai's case (supra) also the Apex Court has held that where no time for performance is fixed, it must be performed within envisaged in Section 46 of the Contract Act. This aspect has also been discussed in detail hereinabove and this authority also does not help the appellant in any manner whatsoever. The facts of this reported case are slightly different in as much as the relief of injunction was also prayed unlike in the present case and, therefore, the Apex Court had set aside the judgment of the High Court holding that the suit is barred by time so and as to consider the question of relief of injunction.

29. The so called substantial questions of law which are purported to have been formulated the details have been given hereinabove are essentially questions of fact which have already been answered by the Courts below by a concurrent finding against the appellant. They can by no stretch of imagination be termed as substantial question of law.

30. For the forgoing reasons, the Regular Second Appeal of the appellant is dismissed with cost of Rs. 10,000/-.