

M/S J.M. Construction Pvt. Ltd. vs Smt. Krishna Sachdev & Ors on 4 January, 2016

Author: Manmohan Singh

Bench: Manmohan Singh

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment pronounced on: 4th January, 2016

+ I.A. No.700/2014 in CS(OS) 1409/2007

M/S J.M. CONSTRUCTION PVT. LTD. Plaintiff
Through Mr.N.K.Vohra, Adv. with
Mr.Jitender Vohra, Adv.

versus

SMT.KRISHNA SACHDEV & ORS Defendants
Through Mr.Vijay Kishan Jetly, Adv. with
Mr.Vikram Jetly, Adv. for D-1 to 9.
Mr.Sandeep Sethi, Sr.Adv. with
Mr.Rajiv Bakshi & Ms.Bhanita,
Advs. for D-14.
Defendants No.10 to 13 are ex
parte.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The plaintiff has filed the suit for specific performance of the agreement as contained in Memorandum of Understanding dated 17th June, 1996 and in alternative of the collaboration agreement dated 22nd May, 1997, entered into and executed by and between plaintiff and Smt.Sheela Devi (since deceased) through her legal representatives/defendants.

2. By way of this order, I propose to decide the pending application under Order VII Rule 11 CPC filed by defendant No.14. The prayer is opposed by the plaintiff. The defendant Nos.1 to 9 have supported the prayer made in the application.

3. The subject matter of the present suit is an immovable property being the house property constructed on Plot No.10 in Block-C, Defence Colony, New Delhi-110024 admeasuring 325 sq. yards and the plot was made free hold vide registration No.9002 in Volume-I pages from 61-64 dated 14th October, 1996 (hereinafter referred to as the "suit property") owned by Smt.Sheela Devi (since deceased) having the exclusive and absolute legal owner and in exclusive and absolute

possession of the aforesaid house property (hereinafter referred to as "the owner") during her lifetime.

4. By a written Memorandum of Understanding (MOU) executed on 17th June, 1996, the aforesaid owner of the suit property had agreed to sell the suit property to the plaintiff-Company for a total sale consideration of Rs.2,60,00,000/- and the plaintiff-Company had agreed to purchase the suit property for the said amount of consideration.

5. The agreement stipulated as per one of the terms that the plaintiff-Company from its own funds shall make payment of conversion charges to the Land and Development Officer, Ministry of Urban Development and get the suit property converted from leasehold to freehold. In discharge of this obligation under agreement, the plaintiff-Company, from its own money, on 10th July, 1996, got made a pay order for Rs.77,955/- being the required amount of conversion charges for conversion of the suit property from lease hold to free hold and deposited the same with the concerned authority, i.e. Land and Development Officer.

In addition to the amount of the aforesaid pay order for Rs.77,955/- and upon further asking for some more money from the remainder part of the balance sale consideration of the sale of suit property to the plaintiff-Company, by late Smt.Sheela Devi, the plaintiff-Company on 18th September, 1996 paid Rs.2,00,000/- to the said late Smt.Sheela Devi, by way of an account payee cheque No.523400 dated 18th September, 1996 favouring Smt.Sheela Devi drawn on Bank of Maharashtra, Greater Kailash-I Branch, New Delhi for Rs.1,50,000/- and Rs.50,000/- in cash.

6. It is the case of the plaintiff that the agreement to sale i.e. the MOU subsists on the date of filing of this suit and remains binding on the legal representatives of late Smt.Sheela Devi. Under this agreement, a right exists with the plaintiff-Company as per which it can make the payment of remaining balance sale consideration of Rs.2,58,00,000/- and get the purchase transactions of the suit property completed in its favour. It is alleged in the plaint that since during the lifetime of the owner, disputes had broken out among her family members with regard to distribution of the sale consideration of the suit property, the owner could not complete the transaction but kept the performance of her part of obligations in abeyance. Moreover, the owner herself and even after her death, her legal heirs always assured the plaintiff-Company that no other person would have the right to purchase the suit property. However, it was somewhere in the second week of May, 1997 that the owner had apprised the plaintiff- Company that the internal family disputes among her family members could not be resolved and as an alternative requested the plaintiff- Company to execute a collaboration agreement for the demolition of the suit property and construction of a new building by the plaintiff- Company on joint venture basis. After discussions, the parties entered into and executed a Collaboration Agreement on 22nd May, 1997.

7. As per the Collaboration Agreement, the plaintiff-Company was to demolish the existing structure built on the suit property and thereafter at its own costs, construct a new building on the vacant plot comprising of a basement, ground floor, first floor and the barsati floor. It was further agreed that after the new building is built up, Smt.Sheela Devi shall be entitled to own and retain the entire ground floor of the new building and the plaintiff-Company shall be entitled to own and retain the

entire basement, first floor, barsati floor with terrace. The cash consideration of collaboration agreement authorizing the plaintiff-Company to demolish the then existing structure of the building on the suit property and reconstruction of new building on space sharing basis was settled at Rs.1,50,00,000/- out of which, simultaneously along with the execution of the aforesaid collaboration agreement on 22nd May, 1997. It is alleged that the plaintiff-Company paid to the owner a sum of Rs.2,82,045/- in cash being part payment of cash consideration specified in the collaboration agreement. Out of this part cash consideration, the owner paid Rs.1,00,000/- to the defendant No.7. The balance sum of Rs.1,46,90,000 /- was required to be paid by the plaintiff-Company to the owner within 30 days after getting Form No.37-I permission from competent authority and simultaneously at the time of taking the vacant physical possession of the suit property.

8. It is alleged in the plaint that the plaintiff-Company, after signing the collaboration agreement, handed over Form 37-I to the owner for countersigning the same and returned to the plaintiff-Company for onward submission to the Income Tax Department for the permission required to be obtained under law. The original conveyance deed, which was with the plaintiff-Company, was also handed over to the owner for getting the mutation done in her name and for showing to the competent authorities, if need arose.

As the members of the family of Smt.Sheela Devi used to reside with her in the suit property and the disputes relating to distribution of the proceeds did not resolve even after the collaboration agreement, she kept on delaying the handing over of the possession to the plaintiff-Company.

9. Smt.Sheela Devi expired on 5th May, 1998. The plaintiff alleges that till the time Smt.Sheela Devi was alive, she had not either orally or in writing cancelled, revoked, abandoned, dispensed with or withdrawn the collaboration agreement dated 22nd May, 1997. After her death, she was survived by the defendants. Defendant No.1 is the widow of the elder son of the owner of the suit property. The defendant Nos.2 and 3 are the children of the predeceased elder son of the owner of the suit property. The defendant No.4 is the daughter of the owner of the suit property. The defendant Nos.5 and 6 are the children of the aforesaid daughter of the owner of the suit property. The defendant No.7 is the widow of the other predeceased son of the owner of the suit property. The defendant Nos.8 and 9 are the children of predeceased son of the owner of the suit property.

10. It is alleged in the plaint that in the month of November 1998 the plaintiff-Company came to know about the death of the Smt.Sheela Devi. The Directors of the plaintiff-Company contacted the legal heirs of the owner and the executors who being fully aware about the agreements qua the suit property promised to perform the obligations of late Smt.Sheela Devi. The defendant Nos. 1, 7 and 10 specifically represented to the plaintiff-Company that the obligations under the aforesaid agreements shall be performed by them after their disputes over the distribution of the balance consideration are resolved. The said defendants also informed that they would also handover vacant, peaceful and physical possession of the suit property to the plaintiff-Company and would inform the company about the resolution of their internal disputes and complete the transaction. In all the personal meetings, the defendants promised and repeatedly affirmed to the plaintiff-Company that as soon as the disputes among the defendants are resolved, they shall

definitely perform their part of the obligations arising out of the aforesaid agreements. However, they expressed their inability to hand over vacant, peaceful and physical possession and take balance consideration for the suit property.

11. It is stated in the plaint that in the first week of February 1999, the plaintiff-Company came to know that some of the legal heirs of the Smt. Sheela Devi had locked parts of the suit property in their respective usage and thus, the dispute between the defendants relating to distribution of sale proceeds of the suit property had intensified to such an extent that the inter se dispute between the defendant shall have to go to court of law for adjudication. The possession could not have been handed over to the plaintiff-Company, unless and until all the legal heirs vacated the portions occupied and/or locked. Thus, the plaintiff-Company was informed that it shall have to wait for resolution of the disputes or even for a judgment of Court of law so that the family disputes are judicially resolved among the legal heirs of late Smt. Sheela Devi.

Thereafter, the plaintiff-Company issued a legal notice dated 9th February, 1999 issued through its counsel to known six legal heirs namely Dr. Major Deepti Sablok (defendant No.2), Major Deepak Sachdev (defendant No.3), Smt. Krishna Sachdev (defendant No.1), Smt. Shano Parkash (defendant No.7), Lt. Pradeep Parkash (defendant No.8), Sh. Vishal Parkash Sachdev (defendant No.9) - all served at address: C- 10, Defence Colony New Delhi and executor Lt. Col. D.D. Sachdev (defendant No.10) at his Punjabi Bagh address calling upon them to perform the obligations of late Smt. Sheela Devi. In the month of November 1999, the Directors of the plaintiff-Company again asked the defendants to complete the transaction and were enquiring about the solution to the aforesaid internal family disputes among the legal heirs of late Smt. Sheela Devi but they were informed that the said disputes have deepened even more and the matter in fact has landed up in the Court. However, the plaintiff was assured by the legal heirs that the moment the aforesaid disputes among them are resolved and the defendant No.7 and other family members would vacate the occupied portions in the suit property, the defendants would hand over the peaceful and vacant possession of the suit property and that they would themselves inform the plaintiff-Company about the same but till that happens the matter may be kept in abeyance.

12. Thereafter, the plaintiff-Company got published another legal notice through its counsel in the newspaper about the rights, charge, lien, encumbrance, title and interests of the plaintiff-Company in the suit property in the November 1999. After publication of the aforesaid public notice, the defendants No.1, 7 and 10 met the Directors of the plaintiff-Company and assured that in accordance with agreements, the defendants shall perform their part of the contract in respect of the suit property and hand over the vacant and peaceful and physical possession of the suit property to the plaintiff-Company.

The defendants No.1, 7 and 10 and other defendants between December 1999 to June 2005 repeatedly visited the office of the plaintiff-Company and on all such meetings the defendants assured and held out to the plaintiff-Company that the defendants shall not negotiate with anybody else/third person in respect of the suit property. The assurances/representations were made by, among others, defendant Nos.1, 7 and 10 and two others defendants who repeatedly remained in touch with the plaintiff-Company. Till June, 2005 some of the defendants used to take the plea that

the defendants No.7, 8 and 9 are creating troubles and are not vacating the portions occupied by them and unless and until the said defendants vacate the portions occupied by them, the plaintiff-Company may bear with them.

13. It was somewhere in the end of the month of June 2005 the plaintiff-Company came to know from the property dealers in the locality of Defence Colony that the defendants No.1,7 and 10 were trying to dispose off the suit property to some third parties. It was also gathered that defendants No.7 and 10 were telling the property dealers that the suit filed by defendant No.1 against defendant No.10 and others has been decided by this Court and the suit property has been mutated in the names of legal heirs of late Smt.Sheela Devi in the records of the Municipal Corporation of Delhi.

Upon hearing such information, the Directors of the plaintiff- Company made several attempts to contact the defendants but remained unsuccessful as the defendants were avoiding meeting the Directors of the plaintiff-Company. However, on or about 7th July, 2005 defendant No.7 met the Directors of the plaintiff-Company at the suit property and gave incorrect information that the suit property has been mutated in their names i.e. names of the legal heirs and that this Court had decided the Suit No.2020 of 1999.

In these circumstances, the plaintiff-Company on 8th July, 2005 itself served the legal heirs and defendant No.10, a legal notice dated 8th July, 2005 reminding the legal representatives of their obligations in respect of the suit property and called upon them to complete the transactions kept by them in abeyance as above.

14. It is alleged in the plaint that subsequently the defendant No.1 sent a reply dated 20th July, 2005 to the legal notice dated 8th July, 2005 of the plaintiff-Company wherein, for the first time, the defendant No.1 impliedly refused to perform her obligations i.e. the obligations of late Smt.Sheela Devi arising out of the aforesaid agreements on false and concocted pretexts. Also the defendant No.1 without any reason or asking by the plaintiff-Company, unilaterally sent a pay order for Rs.3,10,000/- which was annexed with the reply dated 20th July, 2005.

15. It is stated in the plaint that in its reply the defendants have referred to an alleged document dated 22nd May, 1997 which is alleged to have been signed on the date of signing of the collaboration agreement. The plaintiff which is a private limited company has not executed any such document. In the event, if there was any private understanding between the owner Smt.Sheela Devi and any of the shareholders/office bearers of the plaintiff-Company, the plaintiff- Company would not be bound by the same. The plaintiff is a private limited company registered under the Companies Act and acting on the basis of Memorandum of Article of Association. Moreover, the alleged document was never acted upon by any party to that document. The document never saw the light of the day at any time before the reply of the counsel dated 20th July, 2005. The plaintiff-Company as back in February 1999 had asked for performance of the defendants' part of the agreement. None of the defendants at any time before the legal reply dated 20th July, 2005 ever referred to the alleged document or acted upon the same. There was no reference to that document in the Suit No.2020/1999 or in the proceedings and on the other hand the defendants had been repeatedly referring to the rights and interests of the plaintiff-Company in the suit property. The

defendants were representing that they would perform their part of the obligation after their inter se disputes are settled and the family suit is decided. There was no occasion for the parties to enter into collaboration agreement and also another document of the nature referred to in the reply. Even otherwise, since the defendants had not performed their part of obligations under the agreement, the obligations, if any, under the document had no meaning as the same could not have been acted upon. The defendants did not handover Form 37-I to the plaintiff-Company. It is respectfully submitted that on account of sudden increase in prices of the suit property, the defendants have colluded with each other to defeat and injure the rights and interest of the plaintiff in the suit property. Moreover, the plaintiff-Company had never received any letter dated 19th August 1997 to which the reference was made in the reply dated 20th July, 2005. The plaintiff-Company did not accept the said pay order for Rs.3,10,000/- and did not encash the same. Similar replies were also sent by defendant Nos.7, 8 and 9 to the aforesaid legal notice dated 8th July, 2005 and therein the said defendants also for the first time denied performance of their obligations arising out of the MOU and in alternative collaboration agreement.

16. The plaintiff-Company also got published a public notice in the newspaper 'Hindustan Times' on 30th July, 2005 for placing true and correct facts in the knowledge of the general public as also the defendants. The copy of the notice has been placed on record. The Directors of the plaintiff-Company after issuing the aforesaid public notice on 30th July, 2005 repeatedly visited the suit property but the defendant No.7 did not even entertain them. The plaintiff-Company on 22nd August, 2005 received a legal notice on behalf of the defendant No.7 addressed to Sh.J.K. Malhan, one of the Directors of the plaintiff- Company, repeating therein, false defence, non-est, frivolous, blatantly false and concocted versions as raised in the aforesaid reply dated 22nd July, 2005. The plaintiff-Company one more time advised defendant No.1 to collect the pay order for Rs.3,10,000/- and again asked the defendants to collect Rs.2,58,00,000/- and execute the necessary documents in respect of the suit property. A true copy of the legal notice dated 12th December, 2005 along with proof of dispatch has been placed on record. The plaintiff-Company found that the defendant Nos.1 to 9 malafidely and illegally cut open envelopes containing the legal notice dated 12th December, 2005 in collusion with the postal employees and thereafter returned the same with false remarks on the reverse side of the said envelopes. No reply was given by the defendants to the said legal notice dated 12th December, 2005 nor did the defendant No.1 come to the office of the plaintiff-Company to collect the aforesaid pay order for Rs.3,10,000/-.

17. The plaintiff-Company sent another legal notice dated 4th January, 2006 whereby the plaintiff-Company once again called upon the defendants to receive the remainder part of the balance consideration and came forward and complete the transaction with respect to the suit property and hand over physical and vacant possession of the suit property, was also served on the defendants.

18. One more legal notice dated 21st August, 2006 was sent by the plaintiff-Company through its counsel to the defendants thereby one more time legally notifying the defendants and calling them to come on 29th August, 2006 during working hours at his court chamber to receive the remainder balance sale consideration in sum of Rs.2,58,00,000/- and then execute the documents and simultaneously called upon them to hand over the vacant, physical and peaceful possession of the

suit property.

The plaintiff-Company submits that the defendants in collusion with Sh.K.K.Sharma (defendant No.14) and certain other persons whose names are not known have demolished the suit property. Illegal and unauthorized construction activities are being carried on the plot of the suit property. The plaintiff-Company is also craving the leave of this Court to bring on record other persons as defendants as and when the plaintiff-Company would come to know about the same. Defendant No.13 has been made a party as he also claimed that he had some interest in the suit property at one time.

In terms of the Will dated 29th October, 1995 of the late Smt. Sheela Devi, defendant Nos.10, 11 and 12 were appointed as executors of that Will and accordingly, they are made parties to the present suit for complete and effective adjudication.

19. It is stated that the defendants have failed to complete the transaction of sale of the suit property whenever called upon to do so by various means. As the defendants have jointly and severally failed and neglected to comply with and fulfil the terms of the MOU the present suit for specific performance of MOU has been filed and in the alternative if this Court feels that the MOU does not survive for any reason whatsoever, in alternative and simultaneously for specific performance of the contract of collaboration agreement dated 22nd May, 1997 enabling the plaintiff-Company to construct a new building on the plot of land underneath the suit property.

20. During the pendency of the suit, the defendant No.14 has filed an application under Order VII Rule 11 read with Section 151 CPC for rejection of plaint on the ground that the plaint against the defendant No.14 does not disclose any cause of action against the applicant/ defendant No.14. It is submitted that para-55 of the plaint which deals with the cause of action against the defendants does not make any whisper or any allegation pertaining to defendant No.14 to show that there is a cause of action against the said defendant for filing the present suit. The plaintiff has also not claimed any relief against the defendant No.14. There is no privity of contract between the plaintiff and defendant No.14. No document has been filed on record to disclose the cause of action against the defendant No.14, hence the present suit is not maintainable against the defendant No.14 and the same is liable to be rejected, under the provisions of Order VII Rule 11 CPC.

21. It is argued on behalf of all the defendants as well as on behalf of the defendant No.14 that the suit filed by the plaintiff is barred by limitation under Article 54 of the Limitation Act. It is submitted that the present suit has been filed on the basis of alleged MOU dated 17 th June, 1996 and alleged Collaboration Agreement dated 22 nd May, 1997, but the plaintiff has failed to take any action for invoking the specific performance of the aforesaid documents for complete 10 years.

The alleged MOU dated 17th June, 1996 has been fizzled out and non-est since admittedly the alleged MOU dated 17th June, 1996 has been substituted by yet another document i.e. alleged collaboration agreement and MOU dated 22nd May, 1997.

22. The defendants Nos.1 to 9 in their written statement at para-26 have denied their visits to the office of the plaintiff; the said fact stood admitted by the plaintiff in the corresponding para of the pleadings. The plaintiff has also not denied the aforesaid rebuttal of the defendant Nos.1 to 9 in its para-26 of the replication. The plaintiff admittedly issued another notice on 8th July, 2005 i.e. after a gap of about six years from its first notice dated 9th February, 1999 and the same was replied to by defendant Nos.1 to 9 vide reply dated 20th July, 2005

23. It is submitted by the defendants that the plaintiff cannot extend the period of limitation once expired, by issuing repeated notices. On 9th February, 1999 the plaintiff itself had the knowledge of the refusal of the defendant Nos.1 to 9 to perform their obligations under the alleged Collaboration Agreement dated 22nd May, 1997 which has been substantiated by the plaintiff's earlier notice dated 9th February, 1999 threatening the defendant Nos.1 to 9 for initiation of the legal action by the plaintiff.

24. It is also submitted that the defendant Nos.1 to 9, in para 1(a) of preliminary objections of their written statement have stated that under the orders dated 7th October, 1999 and 13th October, 1999 passed by this Court in Suit No.2020/99, the aforesaid property was put for sale vide advertisement in Times of India, Delhi Edition dated 6th November, 1999 and 7th November, 1999 and the same is a clear and candid refusal by the defendant Nos.1 to 9 and a sufficient notice to the plaintiff to take appropriate legal action for enforcing the terms of alleged collaboration agreement dated 22nd May, 1997.

25. In any case, the public notice dated 6th November, 1999 and 7th November, 1999 for sale of the property of Late Smt.Sheela Devi under the orders of this Court, was an unequivocal, unambiguous refusal by the defendant Nos.1 to 9 and even from 6th November, 1999, the limitation to enforce the alleged collaboration agreement dated 22nd May, 1997 stood expired on 5th November, 2002.

It is submitted by the defendants that the defendant No.14 being the lawful and bonafide purchaser of the undivided half share of the suit property had nothing to do either with the plaintiff or other defendants in the suit. The defendant No.14 has never met in his life time either the plaintiff, or its Directors or any of defendants except defendant No.13.

26. The defendant No.14 along with his wife had purchased the aforesaid property in equal shares for a valuable consideration from Ms.Ruchi Srivastava D/o Sh.P.C. Srivastava, R/o D-6, Ground Floor, Saket, vide two sale deeds duly registered with the office of Sub Registrar, New Delhi on 25th May, 2006. The plaintiff has not impleaded Ms.Ruchi Srivastava as a party to the suit. Hence, the plaint is liable to be rejected.

27. The defendant No.14 also submits that even otherwise, the alleged collaboration agreement dated 22nd May, 1997 is not enforceable under law in as much as this Court and the Apex Court have settled the law to the effect that once the third party interest has already been created in respect of the property, collaboration agreement between the owner of the property and the builder cannot be enforced. The suit of the plaintiff for enforcement for the alleged collaboration agreement dated 22nd May, 1997 between the plaintiff and late Smt.Sheela Devi is not maintainable.

28. It is submitted by the defendants that admittedly, the alleged MOU dated 17th June, 1996 between the plaintiff and deceased Smt. Sheela Devi stood substituted by the alleged collaboration agreement dated 22nd May, 1997, therefore, the suit for specific performance of MOU dated 17th June, 1996 is unwarranted and untenable under law. The plaintiff has concealed the material facts from the Court that apart from the alleged collaboration agreement dated 22nd May, 1997, another document i.e. MOU dated 22nd May, 1997 was also executed by the same person i.e. Sh. J. K. Malhan who is the Director/ Chairman of the plaintiff-Company on the same day and the MOU is a continuation of the alleged collaboration agreement dated 22nd May, 1997 which is quite evident from the recitals of the MOU.

29. As per the MOU dated 22nd May, 1997 the claim of the plaintiff was limited to Rs. 3.10 lakhs only. The said MOU is duly witnessed by defendant No. 10. The said MOU dated 22nd May, 1997 reads as under:-

"MEMORANDUM OF UNDERSTANDING This Memorandum of Understanding is made on the 22nd day of May, 1997 between Smt. Sheela Devi w/o Lt. Col. Satya Prakash r/o C-10, Defence Colony, New Delhi hereinafter called the seller of the First Part.

AND Mr. J.K. Malhan s/o late Sh. P.L. Malhan having their residence at B-9, Saket, New Delhi hereinafter called the purchaser of the second part.

Whereas both the parties has signed a collaboration agreement in respect of property No. C-10, Defence Colony and has further agreed that the owner will be at liberty to sell the above said property within 90 days from the signing this Memorandum of Understanding and refund the builder sum of Rs. 3,10,000/- (Rs. Three lacs ten thousand only) paid by him against collaboration agreement. On refunding the above said amount the collaboration agreement will stand null and void. In case the owner fails to sell the above said property within 90 days then the builder will be at sole liberty to pay a further sum of Rs. 15,00,000/- (Rs. Fifteen lacs only) within ten days from the date of expiry of 90 days. And sign four sale agreement and Memorandum of Understanding performa of both sale agreement and Memorandum of Understanding is attached herewith. In case the builder fails to make the above payment after the expiry of 90 days within 10 days then the owner will be at liberty to sell the above said property and refund the builder amount of Rs. 3,10,000/- (Rs. Three lacs ten thousand only) without any time limitation. Till the time the money is not refunded to the builder the builder shall have lien of the above said amount on the above said property C-10, Defence Colony, New Delhi. In witness whereof both parties have put their respective hands on this memorandum of understanding on the date, month and year mentioned above in the presence of following witnesses:

Sd/-

Witnesses
Sd/-

OWNER

1. Lt. Col. D.D. Sachdev (defendant No.10)
S/o late Sh.Harkishan Das

Sd/-
BUILDER"

It is alleged on behalf of the defendants that in view of the aforesaid MOU dated 22nd May, 1997, the present suit does not disclose any cause of action and makes the suit not maintainable.

30. It is alleged on behalf of the defendants that the plaintiff in total has paid only a sum of Rs.3,10,000/- against the said Memorandum of Understanding dated 17th June, 1996 by which sale consideration was fixed at Rs.2,60,00,000/- and collaboration Agreement dated 22nd May, 1997 by which plaintiff was to construct a building on the said suit premises and give the entire floor for Rs.1,50,00,000/- to late Smt.Sheela Devi. The filing of the said suit for specific performance 10 years after the said two agreements disentitled the plaintiff for seeking relief of specific performance.

31. Reply on behalf of the plaintiff to an application under Order VII Rule 11 read with Section 151 CPC has been filed, wherein it is stated that defendant No.14 has no locus standi to seek relief of rejection of the plaint since he is merely a subsequent purchaser and defendant No.14 has purchased the suit property with full knowledge of prior encumbrances on the suit property because in the Agreement to sell entered by and between defendant No.14 and previous owner Ms.Ruchi Srivastava specifically provides that the lien of Sh.J.K. Malhan on the suit property shall be cleared by the previous owner.

32. The present application is liable to be dismissed because legal notice dated 8th July, 2005 calling upon the defendants to perform their contractual obligations contained in MOU dated 17th June, 1996 and money receipts, has been admitted by the defendants. The defendants have also admitted the reply dated 18th July, 2005 to perform the obligations under the said contracts and it is an admitted position on record that the present suit is filed on 31 st May, 2007 therefore, the present suit is within the limitation as prescribed by law.

33. In view of the specific pleadings with regard to limitation and that the cause of action arose on or about 18th July, 2005 when for the first time the defendants refused to perform the agreement dated 17 th June, 1996 and the present suit has been filed on 31 st May, 2007 therefore, the application is not maintainable as it is well settled law that the question of limitation is a mixed question of fact and law which can only be decided after the issue has been prayed and evidence has been led by the parties.

34. It is stated on behalf of the plaintiff that the defendant No.14 has raised several pleas only on the basis of written statement of the defendants and as per settled law, the defences raised in the written statement cannot be looked upon at the time of deciding an application under Order VII Rule 11 CPC. Therefore, the present application is liable to be dismissed. The defendant No.14 has no locus standi to either make any comments on the basis of Collaboration Agreement dated 22nd May, 1997 under any provision of law since, defendant No.14 was not a party to the said agreement.

35. It is argued on behalf of the plaintiff that the suit is not barred by limitation. The limitation begins to run from the date the plaintiff discovered in 2005 that the defendants refused to perform their duty and thereafter, the suit was filed in 2007 within limitation.

36. It is settled law and it has been held in many judgments that a disputed question cannot be decided at the time of considering an application filed under Order VII Rule 11 CPC and the plaint cannot be rejected on the basis of the allegations made by the defendant in his written statement or in an application for rejection of the plaint. The Court has to read the entire plaint as a whole to find out whether it discloses a cause of action and if it does, then the plaint cannot be rejected by the court exercising the powers under Order VII Rule 11 of the Code. Whether the plaint discloses a cause of action is a question of fact which has to be gathered on the basis of the averments made in the plaint in its entirety taking those averments to be correct. A cause of action is a bundle of facts which are required to be proved for obtaining relief and for said purpose, the material facts are required to be stated but not the evidence except in certain cases where the pleadings relied on are in regard to misrepresentation, fraud, wilful default, undue influence or of the same nature. So long as the plaint discloses some cause of action which requires determination by the court, mere fact that in the opinion of the Judge the plaintiff may not succeed cannot be a ground for rejection of the plaint. Reliance is placed on Popat and Kotecha Property v. State Bank of India Staff Association, (2005) 7 SCC 510 (para 10) and Mayar (H.K.) Ltd. v. Owners & Parties, Vessel M.V. Fortune Express, AIR 2006 SC 1828.

37. There is no dispute about the settled legal proposition that it is only the averments made in the plaint and the accompanying documents which can be gone into for the purpose of dealing with an application under Order VII Rule 11 CPC. In T.Arivandandam v. T.V. Satyapal, (1977) 4 SCC 467, the Supreme Court while dealing with the powers of the Court under Order VII Rule 11 CPC had noted that where the meaningful reading of the plaint disclosed that the suit which had been filed was in fact vexatious and meritless; it being a case of clever drafting which has created the illusion of a cause of action, it must be nipped in the bud by the Court.

38. Let me consider the present application in view of the facts and circumstances of the present case as well as the settled law on the subject. It is necessary to refer to the certain admitted facts in the matter.

39. The present suit has been filed by the plaintiff for specific performance in respect of the suit property on the basis of the Collaboration Agreement dated 22nd May, 1997 entered into between late Smt.Sheela Devi and the plaintiff. The plaintiff has a construction business. The date of Collaboration Agreement is 22 nd May, 1997 entered into between the plaintiff and Smt.Sheela Devi

(since deceased) who was admittedly the owner of the property. The present suit was filed on 31st May, 2007 (more than 10 years after the said Collaboration Agreement dated 22nd May, 1997).

40. Since late Smt. Sheela Devi was the absolute and exclusive owner of the suit property, collaboration agreement was binding on defendant Nos.1 to 9, who are her legal heirs. There was no dispute between the said legal heirs about their shares in the suit property as is clear from order dated 7th October, 1999 passed in Suit No.2020/1999 which was between the said legal heirs.

41. No date is fixed for performance in MOU dated 22nd May, 1997. In para 56 of the plaint, it is alleged that the suit is within limitation, as it has been filed within 3 years, from the date of earliest refusal of performance under the MOU and collaboration agreement.

42. The averments made in para 23 of the plaint would show that on 9th February, 1999, the plaintiff for the first time had noticed that the defendant Nos.1 to 9, being the legal heirs of Late Smt. Sheela Devi, were trying to sell the aforesaid property to some third party which is a clear and candid refusal to perform the obligations under the alleged Collaboration Agreement dated 22nd May, 1997 on the basis of which the plaintiff got the legal notice issued stating therein that if within 7 days of the receipt of the said notice, the defendant Nos.1 to 9 failed to perform their obligations under the alleged Collaboration Agreement dated 22nd May, 1997, the plaintiff shall file a suit for Specific Performance against the defendants. It is therefore, submitted that the limitation for filing the suit itself started on 9th February, 1999 when the plaintiff had the knowledge /notice of refusal of the defendant Nos.1 to 9 to perform their obligations under the alleged Collaboration Agreement dated 22nd May, 1997.

43. The plaintiff in para-25 of the plaint refers to alleged public notice dated 19th November, 1999 which further indicates that the plaintiff had knowledge that the defendant Nos.1 to 9 were not willing to perform their obligations under the alleged Collaboration Agreement dated 22nd May, 1997. The plaintiff has made a vague averment regarding the meetings/visits of the defendants in the office of the plaintiff-Company, but the said averments are not supported/ corroborated by any material on record. The documents in possession of the defendant No.14 reveal that respective portion of the aforesaid property was sold by the legal heirs of late Smt. Sheela Devi, the defendant Nos.1 to 9, in 2004 to defendant No.14 on different dates but the plaintiff has deliberately ignored the aforesaid fact, which was within the knowledge of the plaintiff since as per its own admission the plaintiff was in regular touch with the defendants No.1 to 9.

44. As per specific averments made in the plaint and according to statement made in paragraph 23 of the plaint, it is alleged that the limitation for filing the said suit commenced after a week from 19th February, 1999 when the plaintiff served notice on defendants

45. The limitation to enforce the alleged collaboration agreement dated 22nd May, 1997 stood expired on 5th November, 2002. Since 9th February, 1999 to 8th July, 2005 there is no action or endeavour on the part of the plaintiff to seek the specific performance of the alleged Collaboration Agreement dated 22nd May, 1997. Even the aforesaid property was sold to defendant No.14 by defendant No.1 to 9, after the expiry of the limitation for filing the suit on 8th February, 2002 and

issuance of subsequent legal notice and the reply by the defendants No.1 to 9 in July 2005 do not extend the period of limitation when the same is already stood expired in 2002 itself.

46. The limitation for filing the said suit also commenced from 19th November, 1999 when plaintiff got published a legal notice in the newspaper. The said publication/legal notice shows that plaintiff was aware of intention of defendant Nos.1 to 9 that the said defendants are trying to sell the suit property to any another buyer than the plaintiff.

47. Admittedly, the defendants No.1 to 9 neither supplied any document nor performed any part of collaboration agreement in response to the said notice dated 19th February, 1999.

48. According to the plaintiff as per its notice dated 12th December, 2005, it is mentioned and pleaded in paragraph 35 of the plaint, that the plaintiff was fully in knowledge of and aware that late Smt. Sheela Devi died on 5th May, 1998 and thereafter her legal representatives were refusing to perform their part of the contract. The relevant portions thereof reads as under:-

"It is undeniable that the late Smt. Sheela Devi and after her death you, the legal heirs have been avoiding performance of your part of the contract."

".....And since the late Smt. Sheela Devi was avoiding execution of the sale deed and other documents agreed by her to be executed that is why on the aforesaid facts and circumstances, she did not come forward to take the balance payment - sale consideration and did not perform her part of the contract."

The aforesaid averments made in the notice dated 12th December, 2005 would show that the present suit filed on 31st May, 2007 on the basis of MOU dated 22nd May, 1997 is hopelessly barred by limitation, as according to the said averments period of limitation for filing the present suit started right from during the life time of late Smt. Sheela Devi.

49. Even the alleged oral extensions alleged in the plaint cannot be taken note of, as no particulars as to when and how long those were, were not mentioned in the plaint, as held by the Supreme Court in *Fatehji & Company and Another v. L. M. Nagpal and Others* (2015) 8 SCC 390. Their Lordships in the above mentioned case in paragraph 9 of their judgment held as under:-

"Though the plaintiffs claimed that oral extension of time was given, no particulars as to when and how long were mentioned in the plaint."

The abovesaid judgment of the Supreme Court is fully applicable to the present suit.

50. The alleged oral extensions stated in the plaint do not extend period of limitation. Even according to paragraph 30 in *Manjunath Anandappa Urf Shivappa Hansi v. Tammanasa and others*, AIR 2003 SC 1391, it was held that the plaintiff, who has not approached the court within a reasonable time, is not entitled to the relief of specific performance. In para 30 of the said judgment, the Supreme Court held as under:-

"30. There is another aspect of the matter which cannot be lost sight of. The plaintiff filed the suit almost after six years from the date of entering into the agreement to sell. He did not bring any material on records to show that he had ever asked defendant No. 1, the owner of the property, to execute a deed of sale. He filed a suit only after he came to know that the suit land had already been sold by her in favour of the appellant herein. Furthermore, it was obligatory on the part of the plaintiff for obtaining a discretionary relief having regard to Section 20 of the Act to approach the court within a reasonable time. Having regard to his conduct, the plaintiff was not entitled to a discretionary relief."

51. The Division Bench of this Court in *Minu Chibber & Ors. v. Lt. Col. (Retd.) S.S. Chibber* 2014 (IV) AD Delhi 289 held that "where a suit, from statement in the plaint can be said to be barred by time certainly a case for rejection under O.7 R.11 CPC is made out."

52. In another case of *Sushila Devi (Deceased) through LR's v. Adeline D. Lall (Deceased) through LR's & Anr.*, 2013 (139) DRJ 594, para 22, it has been held as under:-

"22. The delay on the part of the respondents/plaintiffs/ purchasers in instituting the suit, of more than one and a half years from the expiry of the limitation fixed of the Agreement to Sell and of more than two years from the date by which the appellant/defendant was to obtain the permissions and which had not been obtained, is to be looked at in the aforesaid light. The Supreme Court in *K.S. Vidyanadam Vs. Vairavan* (1997) 3 SCC 1 reiterated in *Sardamani Kandappan supra* has held that Courts will frown upon suits which are not filed immediately after breach/refusal and the fact that limitation is three years does not mean that a purchaser can wait for one or two years to file a suit and obtain specific performance. It was further held that three year period is provided to assist the purchaser in special cases, as where major part of the consideration has been paid and possession delivered in part performance. The bare pleas and statements of the respondents/plaintiffs of having approached the appellant/defendant from time to time, would not suffice."

53. In the case of *Shikha Misra & Anr. v. S. Krishnamurthy*, (2014) 213 DLT 356 (para 46) it was held as under:-

"46. On the aspect of limitation also I am unable to agree with the senior counsel for the plaintiffs. According to the plaintiffs, the completion of the sale was dependent upon the action of the defendant and no time therefor was fixed. In my view, even in such cases the plaintiff has to approach the Court for specific performance within a reasonable time and cannot wait endlessly and file the suit for specific performance whenever the plaintiff may choose to do so. The plaintiffs, from the defendant for an unusually long time not having the flat transferred to his name as the plaintiffs claim he had promised to do, ought to have had notice that the defendant was refusing to perform his part of the Agreement to Sell and ought to have filed the suit for specific performance by compelling the defendant to have the flat so transferred to his name

and thereafter sell the same to the plaintiffs, within a reasonable time of Agreement to Sell dated 19th April, 1992. The suit as aforesaid has been filed after nearly 20 years therefrom."

54. In Abdul Rahim & Ors vs. Abdul Zabar & Ors., (2009) 6 SCC 160 it was held as under:

"28. A suit for cancellation of transaction whether on the ground of being void or voidable would be governed by Article 59 of the Limitation Act. The suit, therefore, should have been filed within a period of three years from the date of knowledge of the fact that the transaction which according to the plaintiff was void or voidable had taken place. The suit having not been filed within a period of three years, the suit has rightly been held to be barred by limitation.

29. In Mohd. Noorul Hoda v. Bibi Raifunnisa ((1996) 7 SCC 767) this Court held: (SCC p. 771, para 6) "6. ... There is no dispute that Article 59 would apply to set aside the instrument, decree or contract between the inter se parties. The question is whether in case of person claiming title through the party to the decree or instrument or having knowledge of the instrument or decree or contract and seeking to avoid the decree by a specific declaration, whether Article 59 gets attracted? As stated earlier, Article 59 is a general provision. In a suit to set aside or cancel an instrument, a contract or a decree on the ground of fraud, Article 59 is attracted. The starting point of limitation is the date of knowledge of the alleged fraud. When the plaintiff seeks to establish his title to the property which cannot be established without avoiding the decree or an instrument that stands as an insurmountable obstacle in his way which otherwise binds him, though not a party, the plaintiff necessarily has to seek a declaration and have that decree, instrument or contract cancelled or set aside or rescinded. Section 31 of the Specific Relief Act, 1963 regulates suits for cancellation of an instrument which lays down that any person against whom a written instrument is void or voidable and who has a reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, can sue to have it adjudged void or voidable and the court may in its discretion so adjudge it and order it to be delivered or cancelled. It would thus be clear that the word 'person' in Section 31 of the Specific Relief Act is wide enough to encompass a person seeking derivative title from his seller. It would, therefore, be clear that if he seeks avoidance of the instrument, decree or contract and seeks a declaration to have the decrees set aside or cancelled he is necessarily bound to lay the suit within three years from the date when the facts entitling the plaintiff to have the decree set aside, first became known to him."

(See also Sneh Gupta v. Devi Sarup [(2009) 6 SCC 194 :

(2009) 2 Scale 765].)"

55. The other aspect of the matter is about any cause of action against the defendant No.14 who is not a party to either the MOU dated 17th June, 1996 or to the alleged

collaboration agreement dated 22nd May, 1997 or to the MOU dated 22nd May, 1997. Neither the collaboration agreement dated 22nd May, 1997 nor the MOU dated 17th June, 1996 have ever been acted upon and as such the plaintiff itself has waived and abandoned its right by its own conduct with full knowledge against late Smt. Sheela Devi and her legal heirs.

The collaboration agreement dated 22nd May, 1997 cannot be enforced against the defendant No.14 who is not even a party to the alleged agreement. Even the defendant Nos.1 to 6 have categorically stated in their written statement that Smt. Sheela Devi vide letter dated 19th August, 1997 has requested the plaintiff's Director Sh.J.K. Malhan to come forward and execute further documents on payment of balance amount. However, Sh.J.K. Malhan failed to perform his part in terms of the MOU dated 22nd May, 1997 and even refrained from honoring the collaboration agreement dated 22nd May, 1997.

56. Thus, on the face of the record and averments made in the plaint, it is admitted position that the defendant No.14 has no privity of contract with the plaintiff or any of the defendants since the defendant No.14 is not a party and an absolute stranger to the alleged documents i.e. alleged Collaboration Agreement dated 22nd May, 1997 which are executed between the plaintiff and Late Smt. Sheela Devi. The execution of the said memorandum of understanding dated 22nd May, 1997 by Sh.J.K. Malhan, Director/Chairman of the plaintiff- Company is not denied by the plaintiff. There were at that time only two Directors of the plaintiff, i.e. Sh.J.K. Malhan and Mrs. Manju Malhan, wife of Sh.J.K. Malhan. Two subscribers (J.K. Malhan & his wife) were having 100% equity shares each. These facts are mentioned in the Memorandum and Article of Association of plaintiff-

Company. The plaintiff has filed the said Memorandum and Article of Association along with the plaint.

57. The present suit has been filed for enforcing specific performance of the alleged collaboration agreement dated 22 nd May, 1997 but for want of privity, the defendant No.14 cannot be obligated to perform terms of alleged collaboration agreement dated 22nd May, 1997 as such plaintiff is not entitled to claim a decree of specific performance of the alleged collaboration agreement dated 22 nd May, 1997 or any other discretionary/consequential relief or even damages against the defendant No.14.

58. The plaintiff has not shown or placed any document filed along with the plaint that there is any privity of contract between the plaintiff and defendant No.14 for asserting its rights against the defendant No.14 and as such the collaboration agreement does not bind the defendant No.14 in any manner and the plaintiff has any right to claim relief of specific performance against the defendant No.14 due to lack of privity of contract. Thus, there is no cause of action against the defendant No.14.

59. Even otherwise, the suit of the plaintiff is apparently time barred. Under the similar circumstances, this Court in the case of Ashok Malik v. Ramesh Malik, 2008 (150) DLT 693, speaking through my esteemed brother Sh.Badar Durrez Ahmed, J., in para 9 thereof has held as under:-

"9. In any event, the limitation prescribed for a suit for specific performance of a contract as per Article 54 of the Schedule to the Limitation Act, 1963 is three years. The time from which the period begins to run is the date fixed for the performance or, if no such date is fixed, when the plaintiff has notice that the performance is refused. As per the averments made in the plaint, there was no dated fixed for the performance. Therefore, the time from which the period begins to run would be when the plaintiff had notice that performance was refused. The averments contained in the plaint disclose that the plaintiff asked the defendant to execute the sale deed in March, 1993, but he did not. Therefore, the starting point of limitation would be March, 1993. The suit was filed on 05.09.2001. It was beyond the period of three years stipulated under the Limitation Act, 1963. Accordingly, the suit is time barred and the plaint is liable to be rejected on the ground that the suit appears from the statements made in the plaint to be barred by any law (in this case the law of limitation)."

60. The issuance of repeated legal notices/public notices does not extend the period of limitation. The effort of the plaintiff to bring the present suit within the period of limitation on the basis of its legal notice dated 8th July, 2005 and the reply by the defendant Nos.1 to 9 dated 20th July, 2005 is totally untenable under law, unlawful and the same does not lead to the extension of limitation period under Article 54 of the Limitation Act, as once the suit is already barred by limitation in the year 2002, either by the service of notice or any admission in reply after the expiry of limitation, no benefit can be derived by the plaintiff under Section 18 of the Limitation Act, 1963.

61. Under these circumstances, the present application filed by defendant No.14 is allowed, as the suit filed by the plaintiff against the defendant No.14 is barred by limitation and it also does not disclose any cause of action against the said defendant. The trial, therefore, is not necessary against the applicant/defendant No.14; it would be wastage of time of the Court and expenses of the parties. The plaint is accordingly rejected against the defendant No.14 as prayed for in the application.

62. No costs.

CS(OS) 1409/2007 List on 1st April, 2016 for framing of issues.

(MANMOHAN SINGH) JUDGE JANUARY 04, 2016