

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

+ RFA NO. 286 OF 2005

% Date of Decision: 3rd July, 2009

M/S. AGENCY SALES LIMITED ...Appellant
! Through: Mr. T.A. Francis and Mr. Mahesh
Katyayan, Advocate

Versus

\$ **DELHI VIDYUT BOARD AND ANOTHER** ...Respondents
^ Through: None

CORAM:
* **HON'BLE MR. JUSTICE P.K.BHASIN**

1. Whether Reporters of local papers may be allowed to see the Judgment?(No)
2. To be referred to the Reporter or not?(No)
3. Whether the judgment should be reported in the digest?(No)

JUDGMENT

P.K.BHASIN, J(ORAL)

This appeal has been filed by an unsuccessful plaintiff who had filed a suit for damages against the respondents herein but the trial Court vide judgment dated 19th January, 2005 has rejected the plaint under Order VII Rule 11(d) of the Code of Civil Procedure, 1908('CPC' in short).

2. The relevant facts are that the appellant-plaintiff, a Company having Registered office in England and run by Non Resident Indians, had purchased property no. 11/78, West Punjabi Bagh, Delhi in a public auction conducted by the Income Tax Department on 15th February, 1995 to start its office in India also. The Company obtained its physical possession on 31-05-1995. After taking over the possession of the said property the plaintiff found that there was no electricity connection installed there and so to get the electricity connection it approached Delhi Vidyut Board, respondent no.1 herein, sometime in the first week of August, 1995. The request of the plaintiff for sanction of electricity connection, however, was not accepted for quite some time and the decision was being postponed for one reason or the other and bribe was also being demanded by the officials of respondent no. 1 through touts. Finally, the plaintiff was constrained to file a writ petition in this Court seeking a direction to Delhi Vidyut Board to sanction the electricity connection applied for. Notice of the Writ Petition was issued for 23rd January, 1996. However, before that date the electricity meter was installed by the respondent no.1 herein in the afore-said premises. On 23rd January, 1996 when the writ petition was taken up for hearing the Court was informed by the counsel for Delhi Vidyut Board that electricity meter had already been installed and consequently the Writ Petition was disposed of as having become infructuous. The plaintiff, however, felt

aggrieved by the delay caused by the officials of respondent no. 1 granting the electricity connection and so it had served a notice dated 24-02-1996 under Section 80 CPC upon the Delhi Government, respondent no.2 herein, and Delhi Vidyut Board claiming damages to the extent of Rs. 10,00,000/-. Since the demand of damages was not met by the respondents the plaintiff Company filed a suit on 29th April, 2007 for recovery of Rs. 10,00,100/- along with pendente lite and future interest @ 24% p.a. The plaintiff claimed that it had suffered loss of business because it could not set up its office in the aforesaid premises because of the delay in installation of electricity meter and on that account a sum of Rs.7,00,000/- was claimed as damages. Rs.3,00,000/- were claimed as damages on account of expenses incurred by the Director of the plaintiff Company in coming to India from United Kingdom on many occasions in connection with the sanction of the electricity connection. Rs.10,00,000/- were claimed on account of compensation due to physical and mental agony suffered in following up the matter with the respondents. On account of loss of business also a sum of Rs.4,00,000/- was claimed. Rs.25,000/- were claimed on account of legal expenses etc. Although the total amount which according to the plaintiff it was entitled to claim as compensation was Rs.24,25,000/- but the relief in the suit was restricted to a sum of Rs.10,01,000/- only. Joint and several decree for this amount was prayed for against both the respondents-defendants.

3. The respondents-defendants filed a joint written statement and resisted the plaintiff's claim, inter-alia, on the grounds that the suit was time barred having been filed beyond the period of limitation prescribed under Article 72 of the Limitation Act, 1963; the suit had not been filed, signed and verified by a duly authorized person; the suit was not maintainable against Government of National Capital Territory of Delhi in view of the provisions of Section 52 of the Government of National Capital Territory Act, 1991 and that the suit was liable to be dismissed for want of notices under Section 80 CPC or Section 477 of the Delhi Municipal Corporation Act. On merits, the suit claim was resisted on the grounds that the sanction of the electricity connection applied for by the plaintiff had got delayed because the plaintiff was asking for restoration of old connection in the name of original owner of the property which was disconnected in 1986 for non-payment of electricity dues and its restoration was not possible without completion of certain formalities which the plaintiff was not willing to fulfil. The plaintiff then had applied for new connection on 04/12/95 alongwith the requisite documents and the connection was released on 19/12/95.

4. The learned trial Court framed the following four preliminary issues only on 07-07-2004 for decision:-

1. Whether the suit is within limitation?
2. Whether the suit has been instituted by authorized person?
3. Whether the suit is liable to be dismissed on account of mis joinder of parties due to non following of section 52 of Govt. of National Capital Territory Act, 1991?
4. Whether the suit is liable to be dismissed for want of notice u/s 80 CPC and/or Sec. 477 DMC Act?

While framing the afore-said four issues the learned trial Court had observed in its order that all these issues were purely legal issues requiring no evidence and so they were being treated as preliminary issues.

5. After hearing the arguments on the afore-said four preliminary issues from both the sides the learned trial Court vide judgment dated 19-01-2005 decided issue nos. 1,2 and 3 against the plaintiff and issue no. 4 was decided against the defendants on the ground that no notices under Section 80 CPC or Section 477 of the Delhi Municipal Corporation Act were required to be given by the plaintiff since neither the Union of India was a party to the suit nor the Municipal Corporation of Delhi. The final order which came to be passed as a result of the findings on issues no. 1,2 and 3 was the rejection of the plaint under order VII Rule 11(d) CPC. Feeling aggrieved by the said decision of the trial Court the plaintiff filed the present appeal.

6. I have heard the learned counsel for the appellant only since none appeared on behalf of the respondents.

7. In my view, none of the four issues framed and decided by the learned trial Court could be decided as preliminary issues nor could the plaint be rejected under Order VII Rule 11(d) CPC. Under Order XIV Rule 2 CPC the Court has the power to frame and decide certain issues as preliminary issues and postpone settlement of other issues which may also arise out of the pleadings of the parties but that can be done only if those issues relate to the jurisdiction of the Court or a bar to the suit of the suit created under any law for the time being in force. In the present case, the learned trial Court while treating the four issues as preliminary issues has not even stated in the order passed while framing the four issues that these issues were being treated as preliminary issues since they relate to the jurisdiction of the Court or to a bar to the suit created by any law for the time being in force.

8. The trial Court has held the suit to be time barred by invoking Article 72 of the Limitation Act under which the period of limitation for a suit for compensation “ for doing or for omitting to do an act alleged to be in pursuance of any enactment in force for the time being” is one year.

The question of limitation is a mixed question of law and fact. If the suit does not appear to be barred by limitation on the face of it, then the facts necessary to prove limitation must be pleaded and then proved. If any authority is needed on this point reference can be made to the judgment of the Hon'ble Supreme Court in "**Basaria Construction(P)Ltd. Vs Hanuman Seva Trust and ors.**", (2006)5 SCC 658.

9. The question of limitation in the facts of this case cannot be said to be a question of law only as has been considered by the trial Court. The plaintiff had filed a suit for damages/compensation on the grounds which have been noticed already. Whether Article 72 of the Limitation Act providing a shorter period of limitation of one year only for filing of suit for compensation was attracted, as was the plea of the respondents-defendants, or whether Articles 91 or 113(residuary article) providing three years period of limitation, as is the plea of the plaintiff, were attracted was a question which could be decided only after recording evidence on relevant facts and not merely on the basis of pleadings of the parties. If the officials of the respondents acted bona fide while processing the request of the plaintiff for grant of electricity connection the shorter period of limitation of one year under Article 72 may become applicable but if they are shown to have acted mala fide in delaying the plaintiff's request for new electricity connection, as is the plaintiff's case,

making the Government liable to compensate the plaintiff then normal period of limitation of three years would become applicable. These are the questions which normally arise for determination in suits for compensation against the Government for tortuous acts of Government servants and the same can be answered only after parties have led evidence. Regarding the applicability of Article 72 of the Schedule to the Limitation Act the Hon'ble Supreme Court had in "**State of Andhra Pradesh vs Chhalla Ramkrishna Reddy and ors.**" reported in **2002 Civil Law Reports 438** observed as under:

" This Article would be attracted to meet the situation where the public officer or public authority or, for that matter, a private person does an under power conferred or deemed to be conferred by an Act of the Legislature by which injury is caused to another person who invokes the jurisdiction of the Court to claim compensation for that act. Thus, where a public officer acting bona fide under or in pursuance of an Act of the Legislature commits a "tort", the action complained of would be governed by this Article which, however, would not protect a public officer acting mala fide under colour of his office. The Article as worded, does not speak of "bona fide" or "mala fide" but it is obvious that the shorter period of limitation, provided by this Article, cannot be claimed in respect of an act which was malicious in nature and which the public officer or authority could not have committed in the belief that the act was justifiable under any enactment."

10. The question whether any public servant acted bona fide or mala fide cannot be determined on the basis of pleadings alone. Similarly, it could not be said that the suit was barred by law of limitation on the face of it. While invoking Order VII Rule 11(d) CPC the Court is to assume the

averments in the plaint to be true and still if the Court finds that assuming all the averments in the plaint to be true the suit appears to be barred under some law for the time being in force only then the plaint can be rejected and if for deciding any point the defence of the defendant is to be taken into consideration then the provisions of Order VII Rule 11 CPC cannot be invoked. In the present case, the learned trial Judge has not even arrived at a finding that based on the averments in the plaint itself the suit was time barred. Casually it has been observed that Article 72 of the Schedule to the Limitation would be more appropriately applicable to the facts of this case, as was the plea of the defendants. The trial Judge certainly appears to have invoked Article 72 keeping in mind the defence of the defendants which approach was not correct. In **“C.Natarajan vs Ashim Bai”, AIR 2008 SC 363** , the Hon’ble Supreme Court while dealing with the applicability of Order VII Rule 11 CPC when a plea for rejection of the plaint is raised on the ground of limitation had observed as under in paras 7 and 8 of the judgment:

“7. An application for rejection of plaint can be filed if the allegations made in the plaint if given face value and taken to be correct in their entirety appear to be barred by any law. The question as to whether a suit is barred by limitation or not would, therefore, depend upon the facts and circumstances of each case. For the said purpose, only the averments made in the plaint are relevant. At this stage, the court would not be entitled to consider the case of the defence
.....

8. Applicability of one or the other provision of the Limitation Act per se cannot be decisive for the purpose of determining

the question of as to whether the suit is barred under one or the other article contained in the Schedule appended to the Limitation Act.”(emphasis laid)

11. Similarly, the question as to whether the suit had been filed by a duly authorized person or not is also not a question relating to the jurisdiction of the Court or to the maintainability of the suit. It is purely a question of fact requiring evidence from the side of the plaintiff to establish whether the suit had been filed by a duly authorized person on its behalf. Issue regarding the non-joinder of Government of India as a party to the suit also cannot be said to be an issue of law relating to the jurisdiction of the Court or to any bar to the maintainability of the suit and so even this issue based on the objection of the defendants of non-joinder of Government of India could not be treated as a preliminary issue.

12. I am, therefore, of the view that the impugned judgment of the trial Court cannot be sustained and is liable to be set aside and the matter is required to be remanded back to the trial Court for framing of other issues also arising out of the pleadings of the parties regarding the entitlement of the plaintiff for the damages claimed in the suit etc. and also for a fresh decision on the issues which were treated as preliminary issues after affording opportunity to the parties to adduce evidence in

support of their respective stands. This appeal is accordingly allowed and the impugned judgment and decree are set aside and the case is remanded back to the trial Court for disposal in accordance with the afore-said directions.

The case shall be taken up by the trial Court on 24th July, 2009 at 2 p.m.

P.K. BHASIN,J

July 03, 2009
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