

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

+ **RSA No.158/2012**

% **29th January, 2014**

SH. RAJESH KUMAR Appellant
Through: Mr. Rajeev Aneja, Advocate.

VERSUS

GOVT. OF NCT OF DELHI AND ORS. Respondents
Through: Mr. Amiet Andlay, Advocate.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This Regular Second Appeal is filed against the impugned judgment dated 11.7.2012 of the first appellate court by which the first appellate court allowed the appeal filed by the respondent herein/defendant in the trial court.

2. Trial court by its judgment dated 8.9.2010 had decreed the suit for declaration and injunction filed by the appellant herein and by which suit

the appellant/plaintiff had sought quashing of the letter dated 29.10.1991 issued by the respondent herein cancelling the allotment of plot bearing No.699, Narela Industrial Estate, Delhi. Allotment was cancelled on the ground that the appellant's application was treated in the SC/ST category but actually the appellant/plaintiff did not fall in the SC/ST category. The first appellate court has reversed the judgment of the trial court on the ground that the suit of the plaintiff was barred by limitation. The first appellate court held that the cancellation letter issued by the respondent/defendant is dated 29.10.1991 and if three days are given for reaching of this letter to the appellant/plaintiff then the same would have reached on 2.11.1991. The suit therefore had to be filed on or before 2.11.1994 but the suit was filed much later i.e on 22.12.1995 and consequently the suit was barred by limitation. Appellate Court in this regard has held that even if benefit of two months of limitation under Section 80 of Code of Civil Procedure, 1908 (CPC) is given to the appellant, yet, the suit filed in December, 1995 still will be well beyond limitation. The appellate court in this regard has made the following pertinent observations for holding the suit to be barred by limitation:-

“9. Trial Court after hearing the arguments decreed the suit of respondent no.1 deciding all the issues in favour of the plaintiff. Appeal is filed challenging the order. The main ground taken is that the Trial Court committed error in deciding the case particularly issue no.1. Learned counsel submitted that suit of the plaintiff is for

declaration seeking that the order no.DSIDC/NAC/6393/91/79 dated 29.10.1991 is illegal. The suit is for declaration and should have been filed within three years from the date of issue of this letter i.e. if 29.10.1991 is to be left then the limitation expires on 29.10.1994. Learned counsel submitted that even if three days time is to be added for service then the limitation will start running from 02.11.1991 and the limitation will expire on 1.11.1994 but the present suit has been filed on 22.12.1995 i.e. much beyond the period of limitation and was therefore liable to be dismissed on the ground that it is barred by limitation but the Trial Court gave the reasoning that the cheque was not got encashed and the defendant has not proved the sending of the cheque. As the cheque was not got encashed by the respondent no.1 and the appellant herein has not shown any document to show that the cheque was sent, therefore, simply sending the letter for cancellation was not clinching the issue and the limitation did not start running. It would have started running only after the appellant has made the payment to the respondent no.1/plaintiff, this is the wrong assumption. Learned counsel submitted that once defendant has issued the letter along with the cheque and it has been received, the limitation started running and could not be stopped thereafter. The suit should have been filed within three years. Even if notice u/S 80 CPC is to be considered that will add only two months period in that event it should have been filed on or before 02.01.1995 but the suit has been instituted in December 1995 and therefore hopelessly time barred. Learned counsel submitted that on this count itself appeal is liable to be allowed and the order of the Trial Court is liable to be set aside.” (underlining added)

3. Before me, counsel for the appellant argued that the suit is very much within limitation because the respondent/defendant failed to prove as to when the appellant/plaintiff can be said to have received the cancellation letter dated 29.10.1991. It is further argued that this issue of limitation could not have been decided by the appellate court because this issue of limitation was given up by the respondent and as so recorded in para 9 of the judgment

of the appellate court. It is argued that misreading of the evidence amounts to a substantial question of law as per the judgment of the Supreme Court in the case of ***D.R. Rathna Murthy Vs. Ramappa (2011) 1 SCC 158.***

4. I may note that two substantial questions of law were framed by a learned Single Judge of this Court on 14.1.2013 and which read as under:-

“1. Whether the defective memorandum of appeal would result in defective judgment of the appellate court, in view of Section 28 of the Court Fees Act, 1870?

2. Whether the question of limitation, which according to the appellant was a mixed question of law and fact and which had been conceded by the parties before the first court, could be a ground for setting aside the judgment of the trial court?”

Substantial questions of law are required to be framed when the appeal is admitted for hearing. This appeal is not yet admitted for hearing and therefore really substantial question of law do not have to be framed. If the Regular Second Appeal is not to be admitted for consideration, inasmuch as no substantial question of law arises, there is no requirement of framing a substantial question of law. In any case since the substantial questions of law have been formulated, I would also deal with the same inasmuch as the arguments which have been raised by the appellant are on the two heads on which two substantial questions of law were framed on 14.1.2013.

5. The contention of the counsel for the appellant/plaintiff that there is substantial question of law because the defendant had failed to prove
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when the cancellation letter dated 29.10.1991 was received by the appellant is a misconceived argument because the appellate court rightly notes that the appellant/plaintiff in the plaint himself admits that there is no dispute with respect to receipt of this letter. It is not the stand of the appellant/plaintiff as per the plaint that the letter of cancellation has been received on and after 2.11.1994 for the suit to be within limitation as the same was filed on 22.12.1995. Appellate court has dealt with the aspect of admission of the appellant/plaintiff in receiving cancellation letter dated 29.10.1991 alongwith cheque of Rs.16,000/- in paras 11 to 13 of the impugned judgment, and which read as under:-

“11. It is important to refer to the plaint for deciding the issue of limitation. The suit is for seeking declaration that the letter no.DSIDC/NAC/693/91/79 dated 29.10.1991 be declared null and void and inoperative. It is not disputed that the limitation for seeking such declaration is three years from the date of arising of cause of action. Now, it is to be seen as to when the cause of action has arisen from the pleadings particularly para no.6 which is reproduced herein:

“Para 6- That surprisingly and shocking for the plaintiff that ultimately, vide another letter bearing reference No.DSIDC/NAC/693/91/78 dated 29.10.1991, the plaintiff was informed that since he failed to furnish/submit documentary proof in token of his having been belonging to ‘SC/ST’ Category, so allotment of the Plot allotted in his favour, stood cancelled and so, a Cheque bearing No.139339 dated 17.09.1991, drawn on ‘Oriental Bank of Commerce’, Azad Pur Branch, Delhi-110033 for a sum of Rs.16,000/- (Rupees Sixteen Thousand only) as an ‘Account Payee’ in favour of the plaintiff, was also sent to the plaintiff and thus ultimately, the Plot already allotted to the

plaintiff was also cancelled. The copies of all the said relevant documents are also annexed hereto.”

12. It is clear that plaintiff does not dispute the receipt of the letter and also the cheque. First line of para no.7 is important in this respect which reads as follows:

“Para 7- That upon receipt of the above referred to ‘Cancellation-letter’ and ‘Cheque’ in question, the plaintiff got shocked and stunned and he immediately started visiting the concerned higher Officers of the defendants, even from bottom to top, time and again and made requests-representations of his bonafides, but none paid and heed to it except giving assurances that after due inquiry, the matter would be resolved and the Plot will be restored and thus, the plaintiff remained waiting for months together for fruitful results.”

13. From bare perusal of those two paragraphs, it is clear that respondent no.1 not only received the letter dated 29.10.1991 but also the cheque bearing no.139339 dated 17.09.1991 drawn on “Oriental Bank of Commerce”, Azad Pur Branch, Delhi for a sum of Rs.16,000/- which was in favour of the respondent no.1 herein and was account payee. The contention of the respondent no.1 is that he received cheque under protest but there is no such document available on record even otherwise once this letter was received along with the payment limitation started running. Respondent no.1 cannot stop the limitation to run by his unilateral act by not getting the cheque encashed. It is well settled principle of law that the limitation once start running then it cannot be stopped. Therefore, it was incumbent upon the respondent no.1 herein to file the suit within three years from the date of his cause of action i.e 29.10.1991. If three days of service is to be added then the limitation start from 02.11.1994. Three years period will expire on 02.11.1994. If two months period of the notice u/S 80 CPC is added to this even then the limitation will expire on 02.01.1995. The suit has been filed on 22.12.1995, the same is hopelessly time barred.” (underlining added)

6. I do not find any illegality or perversity of gross misreading of evidence as argued on behalf of the appellant because the appellate court has rightly held the suit for challenging the cancellation letter dated 29.10.1991

as being time barred having been filed on 22.12.1995. I put a query to the counsel for the appellant that how much time would a letter dated 29.10.1991 which is admittedly received by the appellant/plaintiff would take, but the counsel for the appellant very astutely did not reply to this query and therefore applying the principle contained in Section 114 of the Evidence Act, 1872 for drawing of the inference from normal course of human conduct as also of official acts having been done properly, if not by three days as held by the appellate Court, and even if we take a huge period of one month and plus another two months from notice under Section 80 CPC, for filing of the suit limitation would definitely commence on or around 31.1.1992. Even if further benefit of one month is given to the appellant, which I doubt can be given, yet by no stretch of imagination limitation can be extended from 1.3.1992 till 25.12.1992 for the suit which has been filed on 22.12.1995 to be held within limitation. Appellate court therefore, in my opinion, has not in any manner committed any illegality or perversity in holding the issue of limitation against the appellant.

7. The argument of the appellant appeared prima facie to be attractive inasmuch as an appeal cannot be heard unless Court fees are paid, however, once again counsel for the appellant is more than fair in conceding before me that this objection was not raised before the first appellate court

that in the absence of Court fees, the appeal should not be heard on merits. I may note that this objection is required to be raised on the principle enshrined under Order 7 Rule 11 CPC as per which if pleadings are not affixed with appropriate Court fees, then time is granted to a person who has not paid the correct Court fees to pay the correct Court fees so that the pleadings are not rejected. No objections having been taken by the appellant/plaintiff to the Court fees not having been filed by the respondent in the appeal, surely the appellate court could not have dealt with this issue for dismissing the appeal on account of non-payment of Court fees, and if this objection was brought to the notice of the appellate court, the appellate court would have surely given appropriate directions to the respondent herein, and who was the appellant in the first appellate court, to pay the Court fees. In any case to set the matter in controversy at rest, counsel for the respondent/defendant is now directed to file Court fees of Rs.4,785/- before the appellate court within a period of two months from today. I am exercising my powers to extend the time for payment of Court fees under Article 227 of the Constitution of India because the peculiar position in the present case is that appeal ought not to have been heard on merits but since no objection of non-payment of Court fees was taken by the appellant/plaintiff before the appellate court, appeal was heard on merits.

8. So far as the argument urged on behalf of the appellant that issue of limitation was given up before the trial court, I may note that the trial court in this case has committed a very grave perversity. On the one hand in beginning of para 8 of the judgment the trial court says that the issue was not pressed yet the trial court has decided this issue. I am quite confident that this issue must have been decided on merits because the trial court was not sure whether the parties have given up the issue because otherwise there was no need for the trial court to decide the issue of limitation on merits. My view is further strengthened from the fact that the appellant/plaintiff has not filed any reply before the first appellate court that the first appellate court should not decide the issue of limitation because it was given up by the respondent/defendant. Besides the fact that no reply in the first appellate court is filed, counsel for the appellant very fairly concedes that no such defence was taken up in the first appellate court that the first appellate court should not decide the issue of limitation in view of para 8 of the judgment of the trial court dated 8.9.2010.

9. Accordingly, I hold that there is no question of law much less a substantial question of law that the first appellate court has wrongly decided the issue that suit is barred by time. I may note that as per Section 3 of the *RSA No.158/2012*

Limitation Act, 1963 even if there is no defences of limitation, Courts are bound to consider *suo moto* as to whether the suit is filed within limitation.

10. The second issue which is argued is that the appellate court should not have entertained the first appeal because the respondent herein who filed the appeal in the first appellate court had not paid the requisite Court fees of Rs.4,785/- and which was the amount of Court fees which was paid by the appellant/plaintiff in the trial court. Reliance is also placed upon the judgment of Patna High Court in the case of ***Hitendra Singh and Ors. Vs. Rameshwar Singh and Ors. AIR 1921 Patna 88.***

11. Even if for the sake of arguments, the suit is to be treated as within limitation, I may note that a contract is final only if there is a *consensus ad idem* i.e both the parties to the contract agree to the same thing in the same sense. This was a case of contract of allotment. Contract of allotment was entered into by the respondent taking the appellant wrongly in the SC and ST category. The appellant/plaintiff admittedly did not fall in the SC/ST category and therefore in the draw of lots he could not have been put in the SC/ST category for the purpose of allotment of the industrial plot. I may note that for the purpose of this argument I am taking the issue in favour of the appellant/plaintiff that the appellant/plaintiff did not at all state that he did fall in SC/ST category, although on behalf of the

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respondent/defendant in the trial court a specific case was laid out that tick marking in the relevant place in the application showed that the application was filed in the SC/ST category. The fact of the matter is that the entitlement to allotment in the SC/ST category could only be if the appellant/plaintiff fell in the SC/ST category and admittedly the appellant/plaintiff does not fall in the SC/ST category. There was therefore no *consensus ad idem* for the contract to be entered into. No doubt, counsel for the appellant is correct in arguing that at the time of first framing of the scheme there was no category of SC/ST however the fact of the matter is that by the time allotment was to be made there was a category of SC/ST and allotment to the appellant/plaintiff was done by the respondent/defendant by taking the appellant/plaintiff in the SC/ST category although he was not in that category i.e there was lack of *consensus ad idem* with respect to a most vital fact for giving of allotment to the appellant/plaintiff and entering into of the contract.

12. In view of the above, there is no substantial question of law for this appeal to be entertained under Section 100 CPC and in any case I have already answered the substantial questions of law in favour of the

respondent/defendant. The appeal is therefore dismissed with costs of Rs.20,000/-.

JANUARY 29, 2014
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VALMIKI J. MEHTA, J.