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HIGH COURT OF DELHI AT NEW DELHI

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RSA No.15/2015

Decided on : 14^h January, 2015

M/S BINDAL EXPORTS & IMPORTS

..... Appellant

Through: Mr.S.N.Gupta, Adv.

versus

MANIK GUPTA

..... Respondent

Through:

CORAM:

HON'BLE MR. JUSTICE V.K. SHALI

V.K. SHALI, J. (ORAL)

CM No.682/2015

1. Allowed subject to deficiency being rectified.
2. The application stands disposed of.

R.S.A. No.15/2015

1. This is a regular second appeal filed by the appellant against the judgment dated 22.11.2014 passed by the first appellate court upholding the judgment and decree passed by the trial court on 05.02.2013 decreeing the suit of the respondent/plaintiff for permanent and mandatory injunction.

2. The learned counsel for the appellant/defendant has contended that the present appeal raises two substantial questions of law.

3. Firstly, that the suit of the respondent/defendant was barred by time and secondly that cause of action according to the respondent/plaintiff in the plaint arose on 06.05.2003 and, therefore, the suit could not have been filed by the respondent for seeking a mandatory direction of removal of the ACs and billboard displayed on the first floor chajja of the property in question in respect of which a sale deed is purported to have been executed by one of the partners of the present appellant. It has been further contended that the first floor of the suit property in respect of which the sale deed was executed in favour of the respondent was under the occupation of the bank and it was specifically stated that in the sale deed that the respondent/plaintiff will have the right to use the concerned chajja for the purpose of user of the first floor only after the premises in question are vacated by the bank. It is accordingly contended that this factum, though admitted by the respondent, in his cross-examination and in the sale deed, yet the suit of the respondent has been decreed by the two courts below by

a concurrent finding and accordingly this raises a substantial question of law.

4. I have considered the submissions made by the learned counsel for the appellant.

5. Before dealing with the submissions of the learned counsel for the appellant, it may be pertinent to mention here that it is not disputed that the respondent herein is purported to have purchased the first floor of the suit property from the wife of one of the partners of the present appellant by virtue of a sale deed wherein it was incurred as under:

“17. That the VENDEE is the owner of front and rear facade of first floor. The VENDEE will use the front facade of first floor after the bank vacates the premises without damaging any civil structure of the said building.”

6. The respondent herein filed a suit against the appellant/defendant seeking permanent and mandatory injunction where in clause 10, it was averred as under:

“ 10. That the cause of action arose in favour of the plaintiff and against the defendant on 06.05.2003 when the first floor premises was purchased by the plaintiff, it again arose when the tenancy of the tenant bank was duly transferred in the name of the

plaintiff, it again arose on different dates when the tenant bank requested the defendant to remove the display boards and the air conditioners, it again arose on 23.09.2006 and 14.10.2006 when the tenant bank required the plaintiff to get the display boards removed and the plaintiff requested the defendants in this regard and the defendant failed to remove such display boards, and it finally arose on 10.11.2006 when the plaintiff issued the legal notice upon the defendant to remove such display boards and the same is still continuing and subsisting as the defendant has failed to remove such display boards from the first floor portion owned by the plaintiff and in legal possession of the tenant bank.

7. The reply to this clause was given by the present appellant in the written statement in para 2 of the preliminary objection which reads as under:

“2. That no cause of action ever arose in favour of the plaintiff and against the defendant for filing the present suit. The plaintiff has not come with clean hands and has suppressed/concealed the material facts from this Hon’ble Court. From the perusal of the plaint, it is clear that the contents of the plaint contradictory with the sale deed dated 06.05.2003 executed by Smt.Pooja Bagla in favour of the plaintiff. It is submitted that at the time of purchase of the property in question by the plaintiff from Smt.Pooja Bagla, the display boards on the front side of the first floor of the said property were already in existence and the Union Bank of India was also a sitting tenant at that time. The air

conditioner on the back side chajja was already in existence. The defendant has neither installed any new A.C. or display boards in the front side. It is also submitted that Smt.Pooja Bagla had sold the entire first floor without roof/terrace rights (without backside staircase) forming part of said property to the plaintiff and Smt.Pooja Bagla had given symbolic possession to the plaintiff at the time of selling the said property. It was also made clarified in the said sale deed that the plaintiff will be owner of front and rear facade of the first floor and the plaintiff will use the front facade of first floor after the Bank will vacate the said premises without damaging any civil structure of the said building. Hence, the suit filed by the plaintiff is liable to be dismissed with exemplary costs as provided under Section 35-A of CPC.”

8. On the basis of the aforesaid pleadings, though no question of limitation was framed, but the first point which has been urged by the learned counsel for the appellant that since the respondent herein himself has averred that the cause of action accrued to him for the first time on 06.05.2003 when he is purported to have purchased the suit property, makes the suit of the respondent/plaintiff barred by time as it has been filed only on 12.12.2006 and the suit for mandatory injunction is to be filed within a period of three years while as the present suit was filed beyond the period of three years.

9. I have considered this submission made by the learned counsel for the appellant.

10. The averment made in the pleading especially in para 10 is not be read in isolation. The whole of paragraph giving the cause of action has to be read in its entirety. No doubt, the respondent herein shows that the cause of action accrued to him for the first time against the respondent when he is purported to have purchased the suit property on 06.05.2003. However, in the subsequent sentences, he specifically avers that the said cause of action continued to be in existence in his favour as he had specifically asked the respondent to remove the said billboard and the AC units on 23.09.2006, 14.10.2006 & 10.11.2006 and as the present appellant failed to do so, therefore, the respondent/plaintiff was constrained to file the suit.

11. No doubt, the suit for mandatory injunction deserves to be filed within a period of three years, but in the instant case, there is a specific averment that the billboard and the AC units were not removed despite a request having been made in this regard to the present appellant. Even if the period of limitation is taken from any of the three dates mentioned in 2006, the suit is within the

period of limitation. Therefore, the question of limitation does not make the suit of the respondent as barred by limitation notwithstanding the fact that no issue in this regard has been framed. The same analogy would be equally applicable to the cause of action clause.

12. Assuming for a moment that no cause of action would have accrued to the respondent and the present appellant/defendant would have filed an application under the under Order 7 Rule 11(a) CPC, the learned trial court would have considered the said plea under the said provision. This has not been done.

13. As a matter of fact, with regard to the cause of action clause also although an issue was framed, however, the said issue was decided against the present appellant by a concurrent finding of the two courts below. The said concurrent finding of the two courts below on issues of fact as to whether cause of action accrued to the respondent or not, cannot be said to be a substantial question of law so as to confer the jurisdiction on the present appellate court so as to tinker with the said finding.

14. For the reasons mentioned above, I feel that the present appeal does not raise any question of law much less a substantial question of law.

15. Dismissed.

C.M. No.681/2015

1. In view of the dismissal of the appeal, no further directions are called for on this application.

2. Dismissed.

V.K. SHALI, J

JANUARY 14, 2015/dm