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

% Judgment delivered on: 09.12.2015

\+ **FAO (OS) No. 367/2015 & CM No. 12138/2015**

M/S KAMAWAL HOUSING PVT. LTD. .... Appellant

versus

V.P. TYAGI & ORS. ..... Respondents

<u>Advocates who appeared in this case:</u>
For the Petitioner : Mr Arvind Chaudhary, Advocate.
For the Respondents : Mr Arjun Singh Bhati, Advocate

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE SANJEEV SACHDEVA

<u>JUDGMENT</u>

<u>BADAR DURREZ AHMED, J (ORAL)</u>

1. This appeal is directed against the order dated 07.05.2015 passed by a learned Single Judge of this Court whereby the defendant/appellant's application under Order VII Rule 11 CPC being IA No. 18280/2014, raised on the point of limitation, was rejected. At the same time, while framing issues in the suit, the learned Single Judge did not frame any issue on limitation in the following manner:-

> "This Court has already answered the application under Order VII Rule 11 CPC dismissing the plea of limitation sought to be set up by the defendant. No such separate issue on limitation has been framed."

2. We have heard the counsel for the parties. We may point out that the consideration of an application under Order VII Rule 11 CPC is based entirely on the averments made in the plaint and on the basis of documents accompanying the plaint without any reference to the defence taken by the defendant in the written statement. Therefore, to conclude that because the plea of limitation for the purposes of Order VII Rule 11 CPC has been rejected, no issue of limitation can be framed based upon the averments made in the plaint and the written statement when a specific plea is raised on limitation, is not correct in our view.

3. From a reading of the pleadings, we find that a specific plea with regard to limitation has been raised by the defendant, inter-alia, in paragraph 1 of the Preliminary Objections contained in the written statement.

4. The learned counsel for the respondents/plaintiffs submitted that earlier a winding up petition had been filed by the respondents/plaintiffs before the Company Court. The winding up petition was dismissed as withdrawn by virtue of the order dated 14.05.2012. The said order passed in the company petition bearing No. 304/2008 reads as under:-

> "Today, Mr Arvind Chaudhary, learned counsel for the respondent states that the respondent without prejudice to its rights and contentions has no objection to the status quo order dated 4th November, 2008 being continued by this Court for a period of one year provided the petitioner files recovery proceedings in accordance with law within a period of four weeks.
>
> Mr Vivek Singh, learned counsel for the petitioners, on instructions of Mr V.P. Tyagi, petitioner

no. 1 who is personally present in Court, accepts the aforesaid offer provided the time spent in prosecution the present petition along with the aforesaid period of four weeks is excluded while computing the period of limitation for the recovery proceedings. Learned counsel for the respondent has no objection to the same.

The aforesaid statements made by both the counsel are accepted by this Court and both the parties are held bound by the same.

Accordingly, with the consent of the parties, the present petition is disposed of with a direction to the petitioner to file recovery proceedings in accordance with law within a period of four weeks. The interim status quo order dated 4th November, 2008 passed by this Court shall continue for a period of one year. It is made clear that the status quo order would either be continued or discontinued or varied or modified by the competent court. It is clarified that in the event the suit is not filed within a period of four weeks, the status quo order dated 4th November, 2008 shall stand vacated.

Needless to say, this order is without prejudice to the rights and contentions of both the parties. Further, the competent court is directed to decide the matter without being influenced by any observations of this Court.

The amount of Rs. 50,000/- deposited by the petitioner shall be refunded to the petitioner along with interest, if any. For this purpose, list the matter before the Registrar on 25th May, 2012.

With the aforesaid observations, the present petition and pending applications stand disposed off."

(underlining added)

5. On the basis of the said order, the learned counsel for the respondents submitted that the appellant had conceded on the point of limitation. Therefore, no issue with regard to limitation could be raised. The learned counsel for appellant draws our attention to the said order and particularly to the second paragraph where it has been stated that the offer made was that the time spent in prosecuting the winding up petition along with another period of 4 weeks could be excluded "while computing the period of limitation for the recovery proceedings." It is submitted by the learned counsel for the appellant that the concession was for exclusion of the time spent in the Company Court and a further period of 4 weeks and was not a concession with regard to entire period of limitation as such, which in any event, had to be computed after excluding the said period in the said paragraph. The learned counsel for the appellant submitted, and we entirely agree with the said submission, that the period of limitation was yet to be computed for the purpose of recovery proceedings. And, that period had to be computed by the court in which the recovery proceedings were initiated.

6. Coming back to the impugned order, the learned Single Judge had not framed an issue on limitation merely because the plea taken in the application under Order VII Rule 11 CPC was rejected. In our view, the correct approach in law, if a specific plea had been taken with regard to limitation in the plaint and the same is disputed by the defendant in the written statement, is that an issue would have to be framed. In fact, even if the plea of limitation is not taken by any of the parties, it is incumbent

upon the court to examine whether a particular suit is within limitation or not.

7. Consequently, we allow this appeal to the extent of framing the following additional issue:-

"1. Whether the suit is within limitation? OPP."

8. This issue be treated as issue no. 1 and the existing issue nos. 1 to 4 be renumbered as issues no. 2 to 5, respectively.

9. The appeal stands allowed to the aforesaid extent. The cost of Rs. 10,000/- also stands waived off.

BADAR DURREZ AHMED, J

DECEMBER 09, 2015 **SANJEEV SACHDEVA, J**
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