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

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Date of Decision: August 22, 2016

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RFA(OS) 42/2015

JAGDIP SINGH

..... Appellant

Represented by: Mr.Pranay Agrawala, Advocate

versus

JASVINDER SINGH & ORS

..... Respondents

Represented by: Mr.Raman Kapur, Sr.Advocate
instructed by Mr.Aviral Tiwari,
Advocate for R-3 to R-5
Mr.Gigi C.George, Advocate for R-6

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE PRATIBHA RANI

PRADEEP NANDRAJOG,J. (ORAL)

CM No.17875/2016

Allowed as prayed for. Respondent No.7 and 8 are deleted from the memo of parties.

RFA (OS) No.42/2015

1. Suit filed by the appellant has been rejected holding that the same is barred by limitation. There is also a finding that adequate court fee has not been paid and for which we find that the learned Single Judge has not given an opportunity to the appellant to make good the deficiency in the court fee. As per clause (b) and (c) of Order VII Rule 11 of the Code of

Civil Procedure unless an opportunity is granted to correct the valuation and pay proper court fee within the time granted a plaint cannot be rejected. Of course, if within the time granted needful is not done a plaint can be rejected. To this extent, the impugned order suffers from a serious infirmity.

2. But at the heart of the matter lies the finding that the plaint is hopelessly barred by limitation.

3. In the plaint declaration and permanent injunction is prayed for. The declaration is that the compromise dated April 24, 2007 in CS(OS) No.2066/2006 between defendants No.2 and defendants No.4 & 5 is illegal with further declaration that defendants No.1 and 2 and their predecessor-in-interest late Kanwarni Padmini Shah has no title in the suit property and consequently defendants No.3 to 5 have no interest therein.

4. The pleadings on which the prayer is founded is that the suit property was demised in perpetuity by the President of India to late Sh.Har Kishan Singh the father of the appellant who constructed a building on the suit property and entered into an agreement to sell with Kanwarni Padmini Shah on August 18, 1959 and executed a receipt on October 07, 1959. He received ₹1,20,000/- (Rupees One Lacs Twenty Thousand only) out of the agreed sale consideration in sum of ₹1,35,000/- (Rupees One Lacs Thirty Five Thousand only). In the year 1998, a suit bearing No.295/1998 was filed by Kanwarni Padmini Shah against the appellant and his sisters and mother seeking a decree for specific performance of the agreement to sell which was decreed ex-parte on January 21, 1999. In execution of the decree an order was passed on March 01, 2002 directing execution of the sale-deed

and on March 02, 2002 a sale-deed was executed. Defendants No.1 and 2 are pleaded to be the purchasers from Kanwarni Padmini Shah and the purchase is under an agreement to sell and a power of attorney. It is also pleaded that defendants No.4 and 5 also claimed title on the strength of an agreement to sell and a power of attorney executed in their favour by Kanwarni Padmini Shah. Defendant No.3 stated to claim a right in his favour under an agreement to sell executed by defendant No.2 in his favour. The inter-se disputes between the said defendants became the subject matter of CS(OS) No.2066/2006 which was compromised with benefit acknowledged by defendants No.2 and 3 in favour of defendants No.4 and 5 who, on the strength of the compromise got mutated the suit property in their names. It is pleaded that neither the appellant nor his sisters or mother were served at the given address and the ex-parte decree was obtained.

5. On the subject of limitation the learned Single Judge has noted that the appellant had admitted loss of possession when his father had entered into an agreement to sell on August 18, 1959 followed by a receipt dated October 07, 1959 being issued. The learned Single Judge has thus held that the suit filed in the year 2009 was grossly barred by limitation.

6. The impugned judgment does not guide us as to what was the date when limitation commenced as per learned Single Judge.

7. Challenge in the suit is to a decree pursuant to a compromise passed in CS(OS) No.2066/2006 and the same is dated June 26, 2008.

8. Thus, for purposes of limitation the suit would be within limitation. However, a most fundamental question arises to the very maintainability of the suit and we heard learned counsel for the parties in respect thereof.

9. The plaint admits appellant's father having agreed to sell the suit property for ₹1,35,000/- (Rupees One Lacs Thirty Five Thousand only) and having received ₹1,20,000/- (Rupees One Lacs Twenty Thousand only) and possession handed over in the year 1959. The plaint admits the purchasers having filed a suit for specific performance and the same being decreed on January 21, 1999. The said decree has not been sought to be avoided. The plea is that the appellant has filed an application under Order IX Rule 13 of the Code of Civil Procedure to recall the ex-parte decree. Concededly the said application has been withdrawn and a separate suit has been filed challenging the said ex-parte decree on the plea of fraud. Now, as long as the said ex-parte decree stands the appellant can lay no claim to the suit property and cannot question any subsequent sale of the property by the decree holder of suit No.295/1998. This would make the instant suit not maintainable.

10. As noted hereinabove the appellant has laid a challenge to the ex-parte decree in suit No.295/1998 and would be better advised to seek an amendment in the said suit to challenge further transactions which were the result of the ex-parte decree.

11. Issues concerning sufficient possessory rights accruing in favour of Kanwarni Padmini Shah protectable under Section 53A of the Transfer of Property Act could be raised as defences. Admissions of the predecessor-in-interest relied upon by the respondents that he received full sale consideration could also be relied upon as a defence. Whether or not said suit itself is maintainable because if a suit is decreed ex-parte and the plea is that the defendants were not served properly the remedy would be under

Order IX Rule 13 of the Code of Civil Procedure would also be opened to the defendants.

12. Though not for the reasons given by the learned Single Judge we affirm the rejection of the plaint without there being any order as to costs in the appeal which is dismissed.

(PRADEEP NANDRAJOG)
JUDGE

(PRATIBHA RANI)
JUDGE

AUGUST 22, 2016
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