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

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Date of decision: 03.10.2016

+ CM(M) 999/2016 & CM Nos.36468-36469/2016

M/S V B M ESTATES PVT LTD & ANR Petitioner
Through Mr.Rajesh Yadav and Ms.Ruchira,
Advs.

versus

SIRI BHAGWAN Respondent
Through Mr.Pankaj Vivek, Adv.

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.(ORAL)

CM No.36469/2016

Allowed subject to all just exceptions.

CM(M) 999/2016 & CM No.36468/2016

1. By the present petition the petitioner seeks to impugn the order dated 8.9.2016 of the trial court by which issues were framed. The grievance of the petitioner is that two issues have not been framed regarding (i) that the suit is barred under Section 34 of the Specific Relief Act as relief of possession has not been sought by the respondent and (ii) that the suit is barred by limitation.
2. The respondent has filed the present suit for cancellation of release dated 13.11.2006 and declaration of ownership. On 18.5.2015 when the matter was pending before this court the learned Single Judge of this court recorded the statement of the respondent under Order 10 CPC and held that

the suit is barred by limitation and dismissed the suit. A Division Bench of this court in an appeal vide judgment dated 11.9.2015 restored the suit to its position holding that the findings recorded by the learned Single Judge are erroneous. The petitioners filed a Special Leave Petition against the said judgment of the Division Bench which was dismissed on 6.11.2015.

3. Learned counsel appearing for the petitioner has submitted that the two issues would arise from the pleadings of the parties. He further submits that the judgment of the Division Bench dated 11.09.2015 does not confer finality on the issue of limitation. He relies upon the grounds of the appeal filed by the respondent before the Division Bench to contend that it was the stand of the respondent all along that the issue of limitation is a mixed question of law and fact. On the second issue of applicability of Section 34 of the Specific Relief Act he submits that the petitioner is in possession of the suit property and in view of the same the present suit would be barred under Sections 34 of the Specific Relief Act.

4. Learned counsel for the respondent has on the issue of limitation submitted that the judgment of the Division Bench dated 11.09.2015 is conclusive on the issue of limitation and no issue of limitation can be framed. On the contention that an issue be framed regarding maintainability of the suit under section 34 of the Specific Relief Act he submits that the respondent is in possession of the suit property and hence the said contention of the petitioner has no basis.

5. Coming to the issue of limitation, a perusal of the order of the learned Single Judge would show that statement of the plaintiff/respondent was recorded under Order 10 CPC and thereafter the learned Single Judge dismissed the suit amongst others on the ground of limitation. The suit was

dismissed at the preliminary stage without recording evidence.

6. The respondent filed an appeal. In the grounds of appeal before the Division Bench, the respondent urged as follows:

“C. Because there was no application under Order VII Rule 11 of CPC, therefore issues were required to be framed as the pleadings in the suit were complete.

D. Because the dismissal of the suit on the ground of limitation was not warranted as it is a mixed question of law and fact in the facts of the case. In AIR 2006 SC 3672 title as “Ramesh B Desai v. Bipin Vadilal Mehta”, it was held by Hon’ble Supreme Court that”

....

It was emphasized in para 25 of the reports that the statement in the plaint without addition or subtraction must show that it is barred by any law to attract application of Order 7 Rule 11 CPC. The principal is, therefore, well settled that in order to examine whether the plaint is barred by any law, as contemplated by Sub-Rule (d) of order VII rule 11 CPC, the averments made in the plaint alone have to be seen and they have to be assumed to be correct. It is not permissible to look into the pleas raised in the written statement or to any piece of evidence.”

7. The Division Bench in its judgment dated 11.09.2015 concluded as follows:

“8. In the light of these facts the averment of Siri Bhagwan that not being well-conversant with English he was not aware of the contents of the documents and was informed that the same was a deed of agreement to sell and the sale deed would be executed on the balance payment of `70 lakhs cannot be brushed aside.

9. The learned Single Judge dismissed the suit being barred by limitation on the count that the release deed was executed on November 13, 2006 and the suit was instituted on August 20, 2014 which finding deserves to be set aside.

10. It is well settled that the cause of action to sue accrues to a person only when fraud comes to his knowledge and as per Article 59 of the Limitation Act the period of limitation starts when the facts entitling the plaintiff to have the instrument cancelled first become known to him. In the present case the same would be September 10, 2013 when he appeared before the Tehsildar and became aware that the document dated November 13, 2006 was not a deed for agreement to sell but a release deed. In the plaint Siri Bhagwan pleaded that cause of action to file the suit arose in the first week of September 2013 when he learnt that V.B.M.Estates had applied for mutation on the basis of release deed dated November 13, 2006 and on subsequent events. The suit was thus wrongly dismissed by the learned Single Judge holding it to be barred by limitation.”

8. Hence, the Division Bench was considering the impugned order where the suit was dismissed at a preliminary stage before evidence was recorded. The stand of the respondent was that at this stage the suit cannot be dismissed on limitation as the grounds of limitation was a mixed question of law and fact in the facts of the case. In that background, the above findings were recorded by the Division Bench. Prima facie it cannot be said that the findings recorded on limitation were conclusive. This is also evident from the facts that the Division Bench had noted the principles for dismissal of suit under Order 7 Rule 11 CPC in para 14 as follows:

“14. In the decision reported as (2007) 5 SCC 614 Hardesh Ores Pvt. Ltd. RFA(OS) 62/2015 Page 7 of 7 Vs. Hede and Company the Supreme Court held that whether the plaint discloses a cause of action or not is essentially a question of fact and the test to be applied is whether the averments made in the plaint if taken to be correct in their entirety a decree would be passed. It was held that the averments in the plaint have to be read as a whole and it was not permissible to cull out a sentence or a passage and to read it out of context in isolation.”

9. In the light of the above grounds raised by the respondent before the Division Bench and the findings recorded by the Division Bench, in my opinion, the conclusions of the Division Bench were prima facie for the purpose of deciding whether the suit would be dismissed at a preliminary stage. The decision was prima facie not a final decision. Hence, it will be necessary to frame an issue of limitation in the present suit. I may note that I have taken only a prima facie view and it would be open to the parties to urge all their contentions on the issue of limitation at the time of final adjudication of the suit.

10. As far as the issue on applicability of Section 34 of the Specific Relief Act is concerned, section 34 reads as follows:-

“34. Discretion of court as to declaration of status or right.—Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.”

11. In the present case the issue is whether the respondent/plaintiff should seek further relief than mere declaration of title. It is submitted by the petitioner that the petitioner is in possession of the suit property and hence the plaintiff/respondent was obliged to seek relief of possession of the suit property and having failed to do so cannot seek a decree of declaration. The respondent has denied that the petitioner is in possession and has asserted that it is the respondent who is in possession of the suit property. Hence, the issue of possession would also be required to be framed in the case as reflected in the pleadings.

12. Accordingly, the impugned order is modified. Following two issues are also framed:-

(i) whether the suit is barred by limitation? OPD

(ii) Whether the defendant is in possession of the suit property? If so, its consequences? OPD

13. In view of the above, the present petition stands disposed of. Pending applications, if any, also stand disposed of.

JAYANT NATH, J.

OCTOBER 03, 2016

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