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

\+ CS(OS) 206/2017 & I.A.Nos.5696-99/2017

SMT. UMA NIGAM

..... Plaintiff

Through Mr.Rajesh Aggarwal, Advocate.

versus

SH. SUDHIR KUMAR NIGAM & ANOTHER

..... Defendants

Through None.

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

<u>O R D E R</u>

% **09.05.2017**

The present suit is a suit for possession, recovery of damages and injunction. It has been filed on 12.4.2017.

Averments in the plaint disclose that the husband of the plaintiff (Ramesh Kumar Nigam-since deceased) was the brother of the defendant-Sudhir Kumar Nigam. They had a 50 % share each in the business run under the name and style of M/s National Art Press. This partnership firm had an asset in the nature of an industrial plot bearing no.65/2, Block-C, Okhla Industrial Area, Phase-II which had been allotted in the name of the firm. A perpetual lease deed dated 03.01.1976 was executed by the DDA in favour of the said firm. The partnership was dissolved on 01.4.2000 vide a deed of dissolution. The asset of the partnership i.e. the aforenoted plot was agreed by the parties to be used by them for the running of their own individual business; the husband of the plaintiff was running his business of printing. The defendant was running his business of printing under the name and style of "National Art Press". On 14.6.2006 the husband of the plaintiff expired. Defendant no.1 with mala fide intention attempted to occupy the property in possession and use of the plaintiff and started obstructing the user of common portion. The application of defendant no.1 seeking conversion of the status of the property from lease hold to freehold was rejected on 05.3.2012 as this application had been put up individually by defendant no.1.

Defendant no.1 with the help of defendant no.2 (builder) started demolishing the property. Pursuant thereto complaints were made by the plaintiff; this was in the year 2013. In the same year the plaintiff also filed a suit for injunction against the defendant titled as *Uma Nigam Vs. Sudhir Kumar Bigam and Ors.* which is yet pending before the District Court, Saket. Parties are actively contesting the suit.

Further averments disclose that defendant no.1 had entered into an agreement to sell in favour of defendant no.2 on 25.11.2011; submission being that besides the fact that the agreement to sell does not confer any right of ownership in favour of defendant no.2; even otherwise the plaintiff has a pre-emptive right to purchase this property in terms of Section 22 of the Hindu Succession Act. The covenant of the DDA also clearly stipulates that the property which is a lease hold property cannot be alienated except with the previous consent of the lessor (the DDA) in writing. This agreement is thus a collusive agreement between defendant no.1 and 2 which creates no rights in favour of defendant no.2. The cause of action has been detailed in para 23 of the plaint. As per these averments, the plaintiff has stated that her last cause of action arose on 01.5.2013 when defendant no.2 in his written statement (in the pending suit for injunction before Saket Court) stated that an agreement to sell dated 25.11.2011 had been executed by defendant no.1 in his favour.

The prayers in the suit seek a decree of possession as also damages, mandatory injunction seeking directions in terms of the preferential right of the plaintiff to purchase this property in terms of Section 22 of the Hindu Succession Act as also a decree of perpetual injunction restraining defendant no.2 from exercising any right in terms of the agreement to sell dated 25.11.2011 has been prayed for. They read as under:

i. *A decree of possession may kindly be passed in favour of the plaintiff and defendant No.2 be directed to vacate the suit property i.e., the area shown in yellow colour, sky blue colour and area shown in black colour stripes in the detailed site plan.*

ii. *Defendant No.2 be directed to pay damages of Rs.36 lakhs for the illegal user/occupation of the suit property for the preceding three years @ Rs.1 lakh per month (market prevailing rate), and to continue to pay mesne profits pendentelite and for such future period till defendant No.2 vacate.*

iii. *A decree for mandatory injunction be passed thereby directing the defendant No.1 to give preferential right of purchase to the plaintiff at such price determined by this Hon'ble court, and in the alternative to direct for the vertical division of the property bearing No.C-65/2, Okhla Industrial Area, Phase – II, Delhi, in* *equal shares amongst plaintiff and defendant No.1 with their respective exclusive possession thereof, in the interest of justice.*

iv *A decree of perpetual injunction be passed thereby restraining defendant No. 2 from asserting any right on the suit property, on the basis of agreement to sell dated 25.11.2011 executed between the defendants inter-se; and to direct that the aforesaid instrument is not binding upon the plaintiff.*

v. *Costs of the proceedings or any other relief which this Hon'ble court deems fit and proper be also passed in favour of the plaintiff and against the defendants".*

At the outset, a question has been put to the plaintiff as to how her suit is within the period of limitation as even as per the plaintiff her cause of action lastly accrued to her on 01.5.2013 when in the written statement filed by defendant no.2 (in the suit for injunction filed in the Sake Court) the plaintiff learnt about the aforenoted agreement to sell dated 25.11.2015 executed by defendant no.1 in favour of defendant no.2. Learned counsel for the plaintiff in support of his submission has placed reliance upon a judgment of the Calcutta High Court reported as 1961 Calcutta 411 *Sanat Kumar Mitra Vs. Hem Chandra Dey and Ors.*, judgment of Assam High Court report as AIR 1964 Assam 4(V 50 C 2) *Niasha Chose Vs. Kari Siddek Ali and Ors.*; reliance has also been placed upon the judgment of the Rajasthan High Court reported as AIR 1954 Rajasthan 170 (Vol.41 C.N. 52) *Sukh Lal and Others. Vs. Devi Lal and Others* as also a judgment of the Full Bench of Madras High Court reported as 1960 Madrass 1 (V. 47, C 1) _Muppudathi Pillai Vs. Krishnaswami Pillai and others._ Submission is that where a document of which cancellation has been sought of which the plaintiff is not an executant, limitation would not run against him; submission being that the agreement to sell executed by defendant no.1 in favour of defendant no.2 dated 25.11.2011 is a document inter se defendant no.1 and defendant no.2 in which the plaintiff not being a party he would not be bound by the law of limitation. The other judgments are also relied upon to support this same proposition. The suit is not to be hit by the hurdle of limitation.

This Court is not in agreement with this submission of the plaintiff. The body of the plaint has been perused as also the prayer clause. This Court is of the view that the question of limitation has to be addressed first before summons can be issued in the suit.

All the prayers as enunciated supra in the plaint necessarily border upon the agreement to sell dated 25.11.2011. The decree of possession seeks a decree in favour of the plaintiff and against defendant no.2 (in whose favour the alleged agreement to sell had been executed); the relief for damages and perpetual injunction restraining defendant no.2 from asserting any right in the suit property are also based on this agreement to sell. Damages have been claimed from defendant no.2. All these prayers i.e. prayer (i), (ii), (iv), (v) are admittedly based on this document. All these prayers have to be answered within a time frame. Article 58 of the Schedule-I of the Limitation Act and Article 59 (to set aside the instrument) is applicable. The period of three years has to be reckoned from the date when right to sue first accrues or where the facts entitling the plaintiff to have the instrument cancelled becomes known to him. Admittedly, even as per the case of the plaintiff, the execution of the alleged document dated 25.11.2011 (between defendant no.1 and defendant no.2) became known to the plaintiff on 01.5.2013 when written statement was filed by defendant no.2 (in another suit for injunction filed by the plaintiff pending in the Saket Court). The present suit filed on 12.4.2017 is wholly outside that period of limitation. The submission of the plaintiff that his first prayer is a prayer for possession for which the period of twelve years is available to him and his suit is not barred qua the first prayer is misconceived. Admittedly, the plaintiff is in possession of her share of the property. She has a 50% share and another 50% belongs to the defendant no.1. Plaintiff is now seeking relief of possession from defendant no.2 which again is in terms of this alleged agreement to sell dated 25.11.2011. Qua prayer (iii) the prayer sought for by the plaintiff that a mandatory injunction be granted to the plaintiff giving her option to exercise her pre-emptive right under Section 22 of the Hindu Succession Act is also governed by the period of limitation. This right also has to be exercised within a period of one year; this is clear from Article 97 of Schedule-I of the Limitation Act which period has to be counted from the date when the purchaser takes the physical possession of the whole or part of the property or where the physical possession of the property cannot be admitted where the instrument of sale is registered. This prayer is again premised on the aforenoted agreement to sell dated 25.11.2011 and the period of one year of limitation prescribed is also against the plaintiff.

The judgments relied upon by the learned counsel for the plaintiff do not come to his aid. In fact in the judgment of *Niasha Chose* (supra) a Bench of the Assam High Court clearly stipulated that the period of limitation as enshrined in Article 91 (old Act of 1908 – pari materia Article 59 of the Act of 1963) would commence from the date when the facts entitling the plaintiff to have the instrument cancelled became known to him. At the cost of repetition, this was on 01.5.2013 when defendant no.2 in his written statement (filed in the injunction suit pending before the Saket Court) disclosed about the aforenoted agreement to sell dated 25.11.2011. Counting this period of three years from 01.5.2013, the present suit filed on 12.4.2017 is hopelessly barred by limitation. The mandate of Section 3 of the Limitation Act casts an obligation upon the Court to examine such a plaint and where it is prima facie evident that such a suit is outside the period of limitation, the plaint necessarily has to be rejected.

Suit is accordingly dismissed.

INDERMEET KAUR, J

MAY 09, 2017
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