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

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Date of decision: 23.01.2017

+ CM(M) 1350/2013 & CM No.20067/2013

SHRI RAJINDER AGGARWAL Petitioner

Through Ms.Sonali Malhotra and Mr.Amit
Sanduja,Advocates

versus

SHRI VINOD KAKKAR & ORS Respondent

Through Mr.Anurag Sharma, Advocate for
Ms.Ruchira Gupta, Advocate for DJB/R-4

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.(ORAL)

1. By the present petition under Article 227 of the Constitution of India the petitioner seeks to impugn the order dated 1.10.2013 by which the preliminary issue framed regarding limitation was decided against the petitioner.
2. The respondent/plaintiff has filed the present suit for declaration and mandatory injunction. As per the plaint the respondent has purchased 1/3rd undivided share each in the property except the shop on the ground floor bearing No.24, Patel Road, West Patel Nagar, New Delhi which property

was purchased vide registered sale deed dated 18.11.2009. An agreement to sell dated 15.5.1991 had already been entered into in respect of shop No.1 on the ground floor with M/s.Delhi Tyres and by virtue of the said agreement to sell rights have been transferred to the petitioner. The case of the respondent is that the petitioners are violating the terms and conditions of the agreement to sell dated 15.5.1991 and have encroached upon open areas in front of the said Shop No.1. They have installed water connection in the said shop No.1 which is in breach of the terms of the agreement and they have also made unauthorised and illegal construction. Hence, the suit was filed seeking a decree of declaration declaring the agreement to sell dated 15.5.1991 has ceased to exist between the parties as petitioners have violated the terms and conditions of the agreement. A decree of mandatory injunction was also sought.

3. The trial court has decided two issues as preliminary issues including the issue as to whether the suit is barred by limitation. The trial court by the impugned order held that the respondents have purchased the property on 18.11.2009. It concluded that since the respondent has acquired interest in part of suit property only in November 2009 they could not possibly have any cause of action against any impermissible use of the suit property before 2009. The suit being filed in 2012 was held to be within limitation.

4. I have heard learned counsel for the petitioner. None has appeared for respondents No.1 to 3 despite service. Learned counsel appearing for respondent No.4 submits that he is only a proforma respondent.

5. Learned counsel for the petitioner has vehemently argued that the respondent cannot seek a declaration about an agreement of 1991 in 2012

when the suit was filed. It is urged relying upon Article 58 of the Schedule to the Limitation Act and the judgment of the Supreme Court in *Khatri Hotels Private Limited and Another vs. Union of India and Another*, [2011] 15 (Addl.) S.C.R. 299 that the cause of action to sue for a declaration regarding the agreement arose long back.

6. The argument of the petitioner is misconceived. The relevant prayer which is sought in the plaint which is the bone of contention is as follows:-

“a) a decree for declaration, declaring that the agreement to sell dated 15.05.1991 is ceased to exist between the parties as the defendants No.1 to 3 have violated the terms and conditions of the said agreement, intentionally and deliberately.”

7. It is obvious from a reading of the prayer clause that what the respondent seeks is a relief to hold the Agreement to Sell of 1991 to be ineffective as the petitioner has violated the terms and conditions of the said agreement. It does not seek a declaration that the said agreement is null and void. No doubt the relief is drafted in a casual manner but what it seeks actually is a declaration regarding breach of agreement. It is manifest that the cause of action to sue for a declaration for breach of agreement would arise only when the actual breach of agreement is alleged to have taken place. In fact the para on cause of action states that the same arose when the respondent noticed the unauthorized construction carried out by the petitioner etc. This aspect would be a disputed question of fact. It is not clear as to why the trial court has decided the matter as a preliminary issue. In any case, the settled position of law is that questions of limitation would normally be a disputed question of law and fact. The trial court could not

have recorded a finding on the issue of limitation based merely on the pleadings without the parties leading evidence.

8. Reference in this regard may be had to the judgment of the Supreme Court in the case of ***Ramesh B. Desai and Ors. vs. Bipin Vadilal Mehta and Ors.***, AIR 2006 SC 3672: MANU/SC/2996/2006 where in para 16 the Court held as follows:

“16. A plea of limitation cannot be decided as an abstract principle of law divorced from facts as in every case the starting point of limitation has to be ascertained which is entirely a question of fact. A plea of limitation is a mixed question of law and fact. The question whether the words "barred by law" occurring in Order VII Rule 11(d) CPC would also include the ground that it is barred by law of limitation has been recently considered by a two Judge Bench of this Court to which one of us was a member (Ashok Bhan J.) in Civil Appeal No. 4539 of 2003 (Balasaria Construction Pvt. Ltd. v. Hanuman Seva Trust and Ors.) decided on 8.11.2005 and it was held: -

After hearing counsel for the parties, going through the plaint, application under Order 7 Rule 11(d) CPC and the judgments of the trial court and the High Court, we are of the opinion that the present suit could not be dismissed as barred by limitation without proper pleadings, framing of an issue of limitation and taking of evidence. Question of limitation is a mixed question of law and fact. Ex facie in the present case on the reading of the plaint it cannot be held that the suit is barred by time.”

9. In the light of the above, I set aside the order dated 1.10.2013 to the extent that it adjudicates the issue of limitation as a preliminary issue. This issue would be decided upon at the time of final adjudication of the suit after

parties have led their evidence.

10. Petition stands disposed of. All pending applications, if any, also stand disposed of.

JAYANT NATH, J

JANUARY 23, 2017

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