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

+ C.R.P. No.197/2017

ABDUL RASHID RATHER Petitioner

Through: Mr. Bharat Ahuja, Adv.

versus

RAJU @ RAJU KUMAR & ORS Respondents

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

% **05.09.2017**

CM No.32359/2017 (for condonation of 18 days delay in filing).

1. For the reasons stated, allowed.
2. The application stands disposed of.

CM No.32358/2017 (for exemption).

3. Allowed, subject to just exceptions.
4. The application stands disposed of.

C.R.P. No.197/2017.

5. This Revision Petition under Section 115 of the Code of Civil Procedure, 1908 (CPC) impugns the order (dated 24th April, 2017 in CS No.111/2017 of the Court of Additional District Judge-02, Central, Delhi) of dismissal of the application of the petitioner / plaintiff under Order VII Rule 11 of the CPC for rejection of the counter claim filed by the respondent / defendant no.4 Ashok Puri to the suit filed by the petitioner / plaintiff.
6. The counsel for the petitioner / plaintiff has been heard.

7. The petitioner / plaintiff instituted the suit, from which this petition arises, for recovery of possession of immovable property from respondents / defendants no.1 to 4 claiming title to the property on the basis of the Sale Deed executed in favour of the petitioner / plaintiff by the respondent / defendant no.2 Savitri Devi and who had in turn purchased the property from respondent / defendant no.4 / counterclaimant Ashok Puri.

8. The respondent / defendant no.4 / counterclaimant Ashok Puri filed counter claim for cancellation of the Sale Deed executed by him in favour of the respondent / defendant no.2 Savitri Devi and consequently the Sale Deed executed by the respondent / defendant no.2 Savitri Devi in favour of the petitioner / plaintiff, averring that the Sale Deed executed in favour of the respondent / defendant no.2 Savitri Devi was on the premise of the consideration paid vide cheque being received and since the consideration was not paid, the Sale Deed was void and non-est and liable to be cancelled.

9. The petitioner / plaintiff applied under Order VII rule 11 of the Code of Civil Procedure, 1908 (CPC) for rejection of the said counter claim *inter alia* pleading that the same, as per the averments in the counter claim, was barred by time and the respondent / defendant no.4 / counterclaimant Ashok Puri having executed the Sale deed in favour of the respondent / defendant no.2 Savitri Devi as Power of Attorney Holder of some other persons was in any case not entitled to maintain the counter claim and the entitlement if any to maintain the counter claim was of the persons as whose Power of Attorney Holder respondent / defendant no.4 / counterclaimant Ashok Puri had executed the Sale Deed in favour of the respondent / defendant no.2 Savitri Devi.

10. The learned Additional District Judge, in the impugned order, has not dealt with the second of the aforesaid contention and with respect to the aspect of limitation has held that the question of limitation was not a pure question of law in the facts aforesaid “in as much as while on the one hand the applicant is claiming that limitation starts to run from the date of execution of the document / sale deed in question whereas the counter claimant says that the limitation starts from the date when the counter claimant and defendant no.1 came to know about the forgery and manipulation having been committed in the light of the fact that the possession of the property had never been transferred at any point of time which fact is again disputed by the applicant Abdul Rashid Rather”.

11. The counsel for the petitioner / plaintiff on enquiry as to the Article of the Schedule to the Limitation Act, 1963 applicable to the relief in the counter claim, has referred to Article 59 which, for a suit for cancellation or setting aside of an instrument or for rescission of a contract, provides limitation of three years commencing from the date when the facts entitling the plaintiff to have the instrument cancelled or the contract rescinded first become known to the plaintiff.

12. The contention of the counsel for the petitioner / plaintiff is that since the sale consideration was paid by the respondent / defendant no.2 Savitri Devi to the respondent / defendant no.4 / counterclaimant Ashok Puri by cheque, the cause of action pleaded would accrue to the respondent / defendant no.4 / counterclaimant Ashok Puri immediately on dishonour of the said cheque or

latest on expiry of the period of validity of the cheque and the counter claim was filed after more than three years therefrom.

13. A perusal of the counter claim shows the respondent / defendant no.4 / counterclaimant Ashok Puri to have pleaded that the respondent / defendant no.2 Savitri Devi from time to time assured the respondent / defendant no.4 / counterclaimant Ashok Puri that she would be paying the sale consideration and that the respondent / defendant no.4 / counterclaimant Ashok Puri should not worry since the possession of the property remained with the tenant who was paying rent to the respondent / defendant no.4 / counterclaimant Ashok Puri and that the respondent / defendant no.4 / counterclaimant Ashok Puri learnt of the *mala fides* of the respondent / defendant no.2 Savitri Devi only on receipt of summons of the suit, when it was for the first time realised that the respondent / defendant no.2 Savitri Devi had executed the Sale Deed in favour of the petitioner / plaintiff.

14. Thus, according to the respondent / defendant no.4 / counterclaimant Ashok Puri, the facts entitling him to have the Sale Deed cancelled and the contract therein contained rescinded, first came to his knowledge only on receipt of summons and the counter claim was filed within three years therefrom.

15. The contention of the counsel for the petitioner / plaintiff is that the respondent / defendant no.4 / counterclaimant Ashok Puri in para 8 of the counter claim admitted that though the validity of the cheque expired but neither was the cheque revalidated nor any fresh cheque handed over.

16. Undoubtedly so; but the cause of action claimed cannot be dissected for the purpose of Order VII Rule 11 of the CPC and has to be read as a whole as laid down by the Supreme Court recently in ***Kuldeep Singh Pathania Vs. Bikram Singh Jaryal*** (2017) 5 SCC 345 at the stage of deciding an application under Order VII Rule 11 of the CPC, as distinct from the stage of deciding preliminary issues, only the claim and the replication if containing any admissions of facts pleaded in the written statement are to be seen. When the said counter claim is read as a whole, as per the respondent / defendant no.4 / counterclaimant Ashok Puri cause of action had accrued within three years prior to the institution of the counter claim and it is a different matter if ultimately in evidence the said averments are proved to be false. Thus no error can be found with the decision impugned, to the extent it holds that no ground for rejection of counter claim on the ground of claim therein being barred by time is made out.

17. As far as the second ground urged for rejection and on which no finding has been returned in the impugned order is concerned, I am unable to find the same also to be constituting a ground for rejection of the plaint.

18. Though the Sale Deed was executed by the respondent / defendant no.4 / counterclaimant Ashok Puri as attorney but it is the admitted fact that the cheque towards consideration was in the name of the respondent / defendant no.4 / counterclaimant Ashok Puri. The counsel for the petitioner / plaintiff also fairly does not press the said ground.

19. The counsel for the petitioner / plaintiff has in addition argued that on the basis of the Sale Deed recording consideration to have been paid and

possession and title having been delivered, the remedy if any of the respondent / defendant no.4 / counterclaimant Ashok Puri was not for having the Sale Deed declared as bad but for recovery of sale price. Reference in that regard made to Section 55(4) of the Transfer of Property Act, 1882.

20. The said ground was admittedly not taken in the application under Order VII Rule 11 of the CPC though the counsel for the petitioner / plaintiff contends that it was argued.

21. There is no finding also in this respect in the impugned order. It thus cannot be accepted that the ground was urged.

22. The counsel for the petitioner / plaintiff seeks liberty to urge the same.

23. It is made clear that dismissal of this petition shall not come in the way of the petitioner / plaintiff seeking rejection of the counter claim on the ground aforesaid and which application if made shall be dealt with in accordance with law keeping in mind *Rajinder Vs. Harsh Vohra* 2010 (114) DRJ 410 and *Butna Devi Vs. Amit Talwar* (2014) 144 DRJ 342 as well as the judgment of the Supreme Court in *Kaliaperuman Vs. Rajagopal* (2009) 4 SCC 193.

24. Else, the petition is dismissed.

No costs.

RAJIV SAHAI ENDLAW, J

SEPTEMBER 05, 2017

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