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

+ **FAO(OS) 32/2019 & CM. No. 6429/2019**

**NARAYAN DAS (DECEASED) THR LRS
& ORS**

..... Appellants

Through: Mr. Gourab Banerji, Sr. Adv. with
Mr. Anand Mishra, Ms. Vandita Nain,
Mr. Mohit Pandey & Mr. S.P.
Mukherjee, Advs.

versus

VED PRAKASH YADAV

..... Respondent

Through:

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE V. KAMESWAR RAO

ORDER

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11.02.2019

CM. No. 6429/2019

Exemption allowed subject to all just exceptions.

Application stands disposed of.

FAO(OS) 32/2019

The challenge in this appeal is to the order dated January 14, 2019 passed by the learned Single Judge in IA 466/2019 filed by the appellants for rejection of the plaint on the ground that the amended plaint is barred by limitation. There is no dispute that the appellants herein had pressed the issue of limitation to be decided as a preliminary issue, which was rejected

by the Ld. Single Judge on October 17, 2017 on the ground that the evidence is required on this issue. The order dated October 17, 2017 reads as under:-

“1. The matter is listed on short question regarding framing of preliminary issues vide order dated 28.07.2016.

2. Initially, the plaintiff filed a suit seeking decree of mandatory and permanent injunction against the defendants. In IA 7017/2005 (under Order VII Rule 11 CPC), this Court by an order dated 26.09.2012 rejected the plaint holding that it did not disclose any cause of action for grant of mandatory or perpetual injunction. In FAO(OS) 514/2012, the Division Bench of this Court allowed the appeal permitting the plaintiff to amend the suit to seek recovery on the basis of 50% share of the difference between the investment and the further sale subject to payment of the required Court fee. Consequently, application under Order VI Rule 17 CPC (IA 2963/2013) was filed. This Court by an order dated 27.08.2013 dismissed the IA as it was not consistent with the Division Bench order dated 31.10.2012. Subsequently, IA 1865/2014 under Order VI Rule 17 CPC moved by the plaintiff was allowed vide order dated 02.09.2014. The defendants challenged the said order in appeal [FAO(OS) 476/2014]. The said appeal was, however, withdrawn on 30.11.2015 with liberty to urge the contentions with respect to maintainability of the amended suit and the altered reliefs.

3. Vide order dated 28.07.2016, issues were framed and issues No.1 & 2 were ordered to be treated as preliminary issues. Again, the order was challenged in appeal, however, the said appeal FAO(OS) 321/2016 was withdrawn with liberty to raise all points and contentions before this Court to the effect that the issues No.1 & 2 cannot be disposed of without recording evidence.

4. I have heard the learned counsel for the parties and have examined the file. The plaintiff seeks recovery of certain amount on the basis of MOU dated 18.06.2001 executed

between the parties. Execution of MOU has been denied by the defendant No.1. Written statement to the amended plaint, however, reveals that execution of various documents by the plaintiff in favour of the defendant No.1 i.e. registered power of attorney coupled with agreement to sell, Will, possession letter and receipt has not been denied. Defendant No.1 claims that all these documents were executed in two parts; one set was executed on 01.09.1990 and the other one on 19.05.2000. There was no question of execution of MOU subsequently for alleged sharing of profits on sale of property. The plaintiff fraudulently got some blank documents signed from defendant No.1 and fabricated the MOU in question. It is further pleaded that the plaintiff took consideration for sale of 7683 sq.yds. of land. However, subsequently, he came to know that actually the land measured only about 4400 sq.yds.

5. On the basis of pleadings of parties, apparently, triable issues arise which cannot be disposed of without getting evidence of the parties on all the issues. Issues No.1 & 2 cannot be disposed of as they are based upon mixed questions of law and fact. The controversy can't be decided on the basis of the preliminary issues without asking the parties to prove their respective contentions.

6. Without prejudice to the rights of the parties, it is ordered that all the issues framed by an order dated 28.07.2016 shall be decided after getting the evidence of the parties.

7. List before the Joint Registrar on 23rd November, 2017 for recording evidence.

8. The plaintiff shall file list of witnesses and affidavits of evidence within four weeks."

It is also a conceded position that the order dated October 17, 2017 was challenged by the appellants in FAO(OS) 319/2017, which was dismissed as withdrawn on July 19, 2018.

The learned Single Judge dismissed the said application i.e IA 466/2019 by relying upon the order dated October 17, 2017 and observed that the objection of limitation of the appellants shall be considered after conclusion of the evidence.

The order passed by the learned Single Judge is justified, in the facts when the issue of limitation had attained finality in terms of order dated October 17, 2017 and also on the withdrawal of FAO(OS) 319/2017. The appellants could not have by filing application under Order 7 Rule 11, agitated the issue of limitation. The appeal is dismissed. No costs.

CHIEF JUSTICE

V. KAMESWAR RAO, J

FEBRUARY 11, 2019/ak