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IN THE HIGH COURT OF DELHI AT NEW DELHI

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RFA 615/2018

MEENU KHULLAR

..... Appellant

Through: Ms. Neena Malhotra, Adv.

versus

PRAKASH WATI

..... Respondent

Through: Mr. R.S. Juneja, Adv. with
Mr. Yogesh Kr. Rana, Adv.

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

ORDER

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25.04.2019

1. The present appeal has been filed challenging the judgment dated 28th February, 2018 passed by Mr.Sanjay Sharma, ADJ-II (East) Karkardooma Courts, Delhi in CS 3004/2016.

2. The facts in brief are:-

(i) The plaintiff/Appellant entered into an agreement to sell with the defendant/respondent on 01st August, 2010 for the purchase of House No.39, Chander Vihar, Mandawali Fazalpur, Delhi for a sum of Rs.60 lakhs and paid Rs.10 lakhs as earnest money on the same date. The balance amount was to be paid at the time of execution of the sale deed for which the date was fixed

as 07th January, 2011. It is stated that on 04th January, 2011, the appellant visited the office of Sub-Registrar and upon enquiries came to know that registration of the subject property was banned. Consequently the appellant issued a legal notice and also lodged a complaint against the respondent with the police on 05th January, 2011. In spite of this on 06th January, 2011, the appellant did visit the Office of the sub-Registrar for registration of sale deed in accordance with instructions of the respondent but the respondent never arrived.

(ii) the appellant is stated to have filed a suit for recovery of the said earnest money paid by her along with damages and interest on 22nd February, 2011. The respondent appeared in the suit and also filed a written statement. However, on 03rd September, 2014, the appellant, on advice withdrew the said suit with liberty to file a fresh suit in accordance with law. It was in these circumstances that the subject suit was filed in which the impugned judgment has been passed.

(iii) It may be noted that the first suit was filed merely for recovery of amount paid, damages and interest accruing thereon.

Subsequent suit, however, was filed for specific performance of agreement to sell dated 01st August, 2010 along with consequential relief of permanent injunction.

3. Issues in the suit were framed on 21st July, 2015. On 17th February, 2017, a preliminary issue was framed “*whether the present suit is barred by limitation*”. The said issue was framed on the premise that the date of performance of agreement was 07th January, 2011 whereas the suit was filed on 09th October, 2014 which would be beyond the period of limitation of three years.

4. Learned trial Court by relying on *Ashok K.Khurana Vs. Steelman industries AIR 2000 Delhi 336 DB* has concluded that Section 5 of the Limitation Act does not apply to suits. Learned trial Court has also noted that the earlier suit was withdrawn simpliciter with liberty to file afresh in accordance with law. A reference was made to Order 23 Rule 1(3) of CPC which grants permission to plaintiff to withdraw from a suit with liberty to institute a fresh one in respect of subject matter of such suit. Further reference was drawn to Order 23 Rule 2 CPC which says “*in any fresh suit instituted on permission granted under the last preceding rule the plaintiff shall be bound by the law of the limitation in the same manner as if the first*

suit had not been instituted.” In effect, a fresh suit has to be filed within the period of limitation prescribed by a Limitation Act for filing the suit and the pendency of first suit would have no effect on limitation and the same would not be extended.

5. The plaintiff/appellant had sought to rely on Section 14(1) of the Limitation Act, which reads as under:

“14 Exclusion of time of proceeding bona fide in court without jurisdiction. —

(1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.”

6. The learned trial Court has concluded that upon reading of the said provision it appears that time spent by plaintiff in prosecuting any other civil proceeding before any other court can be excluded, but only when the said court suffered from defect of jurisdiction or any other cause of like nature. It was noted that the case in hand, however, did not fall in that category as the earlier suit was filed in the court of learned ADJ, who had both pecuniary as well as territorial jurisdiction to entertain a suit for specific

performance and injunction.

7. Further, relying on Section 14(3) of the Act, the learned trial Court has concluded that when a fresh suit is instituted with permission of the court granted under Order 23 Rule 1 CPC, then the provision of Section 14(1) of the Act would apply, but only when such permission is granted by the Court on the ground of defect in its jurisdiction or any other cause of like nature. According to him a fresh or new ground/relief for filing the suit on the same cause of action would not stand to gain benefit of Section 14 of the Act. The trial Court has relied on ***Consolidated Engineering Vs. Principal Secretary, Irrigation (2008) 7 SCC 169*** in this regard.

8. Finally, concluding that nothing precluded the plaintiff from claiming the reliefs of specific performance and injunction in the earlier suit, the trial Court has also held that the fresh suit would be hit by the bar of Order 2 Rule 2 CPC. Deciding the preliminary issue against the plaintiff/appellant, the learned trial Court has dismissed the suit as being beyond limitation.

9. It is the submission of the learned counsel for the appellant that the learned trial Court could not have framed the issue of limitation as a preliminary issue, as the issue of limitation is a mixed question of fact and law. She would rely upon the judgment of the Supreme Court in the case of

Balasaria Construction (P) Ltd. v. Hanuman Seva Trust and Ors (2006) 5 SCC 658. She also relies upon the judgment of the Coordinate Bench of this Court in ***RFA 64/2011 R.P. Gupta v. Ajaib Singh & Ors.*** to contend that only those issues are to be treated as preliminary issues, which pertain to jurisdiction of the Court or to a bar of law to the suit. She also relies upon the judgment of the Supreme Court in ***Ramesh B. Desai and Or vs. Bipin Vadilal Mehta and Ors. (2006) 5 SCC 638*** to state that the 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 and could not have been decided at the threshold as a preliminary issue. So, the plea of limitation is a mixed question of law and fact. That apart, she also challenges the finding of the learned trial Court wherein the learned trial Court has held that the mischief of Order 2 Rule 2 CPC would also act against the appellant herein. According to her, the basic requirement for invoking the plea of Order 2 Rule 2 CPC is that the second suit must be shown to be in respect of the same cause of action on which the previous suit was based. In other words, when the causes of action to claim the respective reliefs were different, so also the ingredients for claiming the reliefs, the plea of Order 2 Rule 2 CPC is not applicable.

10. It is her submission that the cause of action for filing the first suit is different from the cause of action with regard to the subsequent suit, wherein the appellant has made a prayer for specific performance. It is her case that the learned trial Court has failed to appreciate that the delay is not occasioned deliberately or on account of culpable negligence. Rather, the learned trial Court was in haste and jumped to the conclusion without observing that the rules of limitation are not meant to destroy the rights of the parties; they are meant to see parties do not resort to dilatory tactics; to seek their remedy promptly.

11. I am not impressed by the submissions made by the learned counsel for the appellant. Firstly, insofar as the plea of the learned counsel for the appellant that the issue of limitation is a mixed question of fact and law and could not have been decided as a preliminary issue is concerned, suffice it would be to state that no prejudice would be caused to the appellant by the trial Court deciding the issue of limitation as a preliminary issue. This I say so, since there is no dispute that the cause of action for filing the suit for specific performance had arisen on January 07, 2011 when the respondent was required to come to the Registrar for executing the Sale Deed. Admittedly, the suit was filed on October 09, 2014, which is much beyond

the period of limitation of three years; there was no defence for the appellant to state that the suit was within time. In other words, the issue of limitation would still have been decided against the appellant as there was no disputed fact for deciding the issue.

12. As far as the reliance placed by the learned counsel for the appellant on the judgment of the Supreme Court in the case of ***Balasaria Construction (P) Ltd. (supra)***, is concerned, the same is not applicable to the facts of this case inasmuch as in the said case, the Supreme Court has held that the suit could not have been dismissed as barred by limitation without proper pleadings, framing of issue of limitation and taking evidence. According to the Supreme Court, the question of limitation is a mixed question of law and fact and ex-facie reading of the plaint, suit cannot be held to be barred by limitation. The said conclusion of the Supreme Court is in the facts of that case, inasmuch as the Supreme Court was concerned with an order passed in an application under Order 7 Rule 11 read with Section 151 of the CPC seeking rejection of the plaint which was termed as dismissal of the suit. The trial Court dismissed the application. In appeal before the learned Single Judge, the learned Single Judge did not agree with the reasoning given by the Trial Court but upheld the conclusion arrived at

by the Trial Court but on different grounds. The learned Single Judge went on the merits of the dispute and dismissed the revision application. It is under these circumstances, the Supreme Court held that the limitation is a mixed question of law and fact. It also held ex-facie on the reading of the plaint it could not be held that the suit is barred by limitation. In the case in hand, there is no application under Order 7 Rule 11 (d), but the decision has come on a preliminary issue framed by the trial Court, pursuant to an application filed by the appellant / plaintiff under Section 5 read with Section 14 of the Limitation Act for condoning the delay in filing the suit. So, it is clear that it was the understanding of the appellant herein that the suit is beyond limitation and the delay in filing the same needed to be condoned on the strength of Section 14 of the Limitation Act. As held by the learned trial Court Section 5 and 14 shall have no applicability in the facts of this case, and the preliminary issue was rightly decided by dismissing the application under Section 5 read with Section 14 of the Limitation Act. Having decided the preliminary issue, against the appellant, the trial Court did not go into the other issues by stating that the appellant is not entitled to any relief and consequently dismissed the suit.

13. Similar is the position with regard to the judgment of the Coordinate

Bench of this Court in *R.P. Gupta v. Ajaib Singh & Ors. (supra)*. In the said case, this Court has only held that the issues which pertain to the jurisdiction of the Court or to a bar of law to the suit, unless purely legal issues i.e not based on disputed questions of fact, the issues would not be tried as a preliminary issue. As I have already held that no prejudice has been caused to the appellant for treating the issue of limitation as a preliminary issue when the facts are not disputed that the suit filed by the appellant was barred by time in the facts, the judgment has no applicability.

14. Insofar as the judgment in the case of *Ramesh B. Desai and Ors. (supra)* is concerned, the same is also on a similar proposition wherein the Supreme Court has held that the CPC confers no jurisdiction on the Court to decide a mixed question of fact and law as a preliminary issue unless the facts are clear from the plaint itself. In other words, where a decision on an issue of law depends upon the facts, it cannot be tried as a preliminary issue which is not the case here. Hence, this plea is rejected.

15. Insofar as the plea of the learned counsel for the appellant that the learned trial Court could not have invoked the principle underlying Order 2 Rule 2 CPC is concerned, the same is also without any merit. When the appellant had filed the earlier suit, she could have claimed the relief of

specific performance in that suit as well. She admittedly had not claimed it in the earlier suit. Instead the appellant withdrew the earlier suit, which was basically for recovery of amount paid, damages and interest accrued thereon and filed the subsequent suit for specific performance. The claim in both the suits is based on the Agreement to Sell dated August 01, 2010. That apart, insofar as the submission of the learned counsel for the appellant that the appellant is entitled to the benefit of period for limitation, when she was pursuing the earlier suit is concerned, I am not impressed by the submission for the same reason as stated by the learned trial Court, wherein in paras 12 to 19 it has held as under:

“12. At this stage, it is relevant to mention that the plaintiff had withdrawn her earlier suit on 03.09.2014. The certified copies of the statement of her counsel and order sheet are on record. Her statement for withdrawal of the said suit is reproduced as under:

“I am the Counsel for the plaintiff and I have instructions to make statement on her behalf. The plaintiff does not want to proceed with the present suit. The suit be dismissed as withdrawn with liberty to file fresh.”

13. On the basis of the said statement, the Court

passed the order as under:

“In view of the statement of Ld. Counsel for the plaintiff, the suit of the plaintiff is dismissed as withdrawn with liberty to file afresh in accordance with law”. (emphasis supplied)

14. This, the suit was simply withdrawn by the Ld. Counsel for the plaintiff and the order was also passed for withdrawn of the suit with liberty to file afresh with a rider that it should be filed in accordance with law.

15. The withdrawn of the suit is permitted by Order 23 of the CPC. According to sub-Rule 3 of Rule 1 of Order 23 CPC, the Court can grant permission to the plaintiff to withdraw from a suit with liberty to institute a fresh suit in respect of the subject matter of such suit. However, a rider has been incorporated by Rule 2 of Order 23 CPC regarding limitation and it says ***“In any fresh suit instituted on permission granted under the last preceding Rule, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted”***. It means that the fresh suit has to be filed within the period of limitation prescribed by Limitation Act for filing suits and the pendency of the first suit would have no effect on the limitation and would not extend the limitation.

16. Ld. Counsel for the plaintiff made reference to Section 14 of the Limitation Act for the purpose. **Sub-**

Section (1) of the Section 14 of the Act provides as under:

“(1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceedings relate to the same matter in issue and is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature is unable to entertain it.”

17. A careful reading of this provision would show that the time spent by a plaintiff in prosecuting any other civil proceedings before any other Court, whether of first instance or revision or appeal can be excluded but only when the said Court suffered from the defect of jurisdiction or any other cause of like nature. It would mean that such time can be excluded where the Court in which the earlier suit was filed was not having either pecuniary or territorial jurisdiction or was unable to try the suit for any such reason. The case in hand is not one which would fall in this category. As already observed above, the earlier suit was filed by the plaintiff in the Court of Ld. ADJ who had both pecuniary as well as territorial jurisdiction to entertain a suit for specific performance and injunction and nothing has been shown that the said Court was suffering from the defect of jurisdiction or any such defect so that it was unable to try the suit of the present nature.

18. Further, **sub-Rule (3) of Section 14 of the Act**

provides as under:-

“(3) Notwithstanding anything contained in Rule 2 of Order XXIII of the Code of Civil Procedure, 1908, the provisions of Sub-Section (1) shall apply in relation to a fresh suit instituted on permission granted by the Court under Rule 1 of that Order, where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the Court or other cause of a like nature.”

19. It would mean that when a fresh suit is instituted with the permission of the Court granted under Order 23 Rule 1 CPC then the provision of sub-section (1) of the Limitation Act would apply but only when such permission is granted by the Court on the ground of defect in its jurisdiction or any other cause of like nature. To clarify further, the period of pendency of the earlier suit or civil proceeding can be excluded from counting the limitation only if the Court while allowing the withdrawal of the earlier suit gives permission to file a fresh suit, holding that it was not having any jurisdiction or on any other such ground. The term ‘any such ground’ in my opinion, would not include a fresh or new ground / relief for filing the suit on the same cause of action. Hence, Section 14 of the Limitation Act would also not come to the rescue of the plaintiff in extending the limitation for filing the present suit which has admittedly been filed beyond the period of prescribed manner. This view finds support in the judgment

delivered by the Hon'ble Apex Court in Consolidated Engg. Enterprises vs. Principal Secy. Irrigation dt. 03.04.2008 in Appeal (Civil) 2461 of 2008 (<https://indiankanoon.org/doc/1818558/>) where it was held as under:

“12. Section 14 of the Limitation Act deals with exclusion of time of proceeding bona fide in a court without jurisdiction. On analysis of the said Section, it becomes evident that the following conditions must be satisfied before Section 14 can be pressed into service:

- (1) Both the prior and subsequent proceedings are civil proceedings prosecuted by the same party;*
- (2) The prior proceeding had been prosecuted with due diligence and in good faith;*
- (3) The failure of the prior proceeding was due to defect of jurisdiction or other cause of like nature;*
- (4) The earlier proceeding and the latter proceeding must relate to the same matter in issue and;*
- (5) Both the proceedings are in a court.*

The policy of the Section is to afford protection to a litigant against the bar of limitation when he institutes a proceeding which by reason of some technical defect cannot be decided on merits and is dismissed. While considering the provisions of Section 14 of the Limitation Act, proper approach will have to be adopted and the provisions will have to be interpreted so as to advance the cause of justice rather than abort the proceedings. It will be well to bear in mind that an element of mistake is inherent in the invocation of Section 14. In fact, the section is intended to provide relief against the bar of limitation in cases of mistaken remedy or selection of a wrong forum. On reading Section 14 of the Act it becomes clear that the legislature

has enacted the said section to exempt a certain period covered by a bona fide litigious activity. Upon the words used in the section, it is not possible to sustain the interpretation that the principle underlying the said section, namely, that the bar of limitation should not affect a person honestly doing his best to get his case tried on merits but failing because the court is unable to give him such a trial, would not be applicable to an application filed under Section 34 of the Act of 1996. The principle is clearly applicable not only to a case in which a litigant brings his application in the court, that is, a court having no jurisdiction to entertain it but also where he brings the suit or the application in the wrong court in consequence of bona fide mistake or law or defect of procedure. Having regard to the intention of the legislature this Court is of the firm opinion that the equity underlying Section 14 should be applied to its fullest extent and time taken diligently pursuing a remedy, in a wrong court, should be excluded.”

16. The reliance placed by the learned counsel for the appellant on the judgment of the Supreme Court in *Rathnavathi & Anr. v. Kavita Ganashamdas* 2015 (1) CLJ 249 S.C., is not applicable to the facts of this case, inasmuch as the Court therein had come to a conclusion that the suit was within limitation, as in the absence of any date being fixed in the agreement for performance, limitation would begin from the date of refusal to perform. Suffice it would be to state that on facts, the judgment is distinguishable.

17. In view of my discussion above, I do not see any merit in the appeal.

The same is dismissed. No costs.

V. KAMESWAR RAO, J

APRIL 25, 2019/ak