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

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Date of Decision: 26 .03.2021

+ C.R.P.124/2018

AAKASH EDUCATIONAL SERVICES PVT. LTD.

..... Petitioner

Through: Mr. Anunaya Mehta, Advocate
versus

NITIN JAIN & ORS.

..... Respondents

Through: Mr. Ashok Gurnani, Advocate

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

JYOTI SINGH, J.

1. This Civil Revision has been preferred under Section 115 CPC assailing the order dated 19.02.2018 vide which the Trial Court in CS No.17455/2016 has held that limitation being a mixed question of fact and law cannot be adjudicated without leading evidence and hence would only be decided after holding trial and has declined to adjudicate the issue of limitation as a preliminary issue. Petitioner herein is Defendant No. 1 in the Suit and Respondent Nos. 1 to 3 are the Plaintiffs and are being referred to by the same status as Defendant and Plaintiffs respectively in the present petition.

2. Brief facts to the extent necessary and relevant for adjudication of the present petition are that Plaintiffs instituted a suit for recovery of a sum of Rs. 2 Crores and @ of Rs. 25 Lacs each day from 23.06.2009 for

an alleged damage to their reputation along with *pendente lite* and future interest @ 18% per annum against the Defendant and Respondent No. 4 herein. Defendant filed the written statement and is contesting the suit. Along with the plaint, Plaintiffs filed copies of Advertisement which were alleged to have been published by the Defendant and are also available on the internet. Vide order dated 01.06.2011, Defendants were enjoined from using the name and photograph of Plaintiff No. 1/Nitin Jain. During the pendency of the proceedings, Plaintiffs filed an application under Order XXXIX Rule 2A CPC *inter alia* alleging violation of the order dated 01.06.2011. In the said application, it was averred by the Plaintiffs that in utter disregard of the injunction order, passed by the Court, Defendants continued to show the name and photographs of Plaintiff No.1 on their website. Along with the application, Plaintiffs annexed documents allegedly from the websites of the Defendants published on 29.08.2011 and 30.08.2011. Reply was filed by the Defendant to the said application disputing and denying the allegations of the Plaintiffs that there was violation of the interim injunction.

3. On 12.03.2014, issues were framed by the Court and vide the same order, Court observed that the issue qua limitation did not require any evidence as the Advertisements allegedly causing loss to the reputation of the Plaintiffs were all prior to April, 2010 while the suit was instituted on 31.05.2011. Accordingly, it was directed that the issue qua limitation would be treated as a 'preliminary issue' and the matter was adjourned to 28.07.2014 for arguments on the preliminary issue of limitation.

4. Subsequent to framing of the issues on 12.03.2014, the Plaintiffs filed an application under Order VI Rule 17 CPC seeking amendment of the plaint for incorporating a plea in the pleadings that the Defendants were admittedly using/misusing the name and photographs of Plaintiff No. 1 till 18.10.2011 on its websites on various links. Amendment was also sought in the paragraph relating to cause of action to include 'cause of action further arose on each and every date till 18.10.2011, which was itself admitted by the Defendant'. Defendant filed a reply to the application opposing the amendment on the ground that cause of action sought to be incorporated by way of amendment was barred by time and the application was misconceived having been filed to overcome the delay in filing the suit. Significantly, on 01.03.2016, the application was disposed of as not pressed by the Plaintiffs and Court directed the matter to be listed for arguments on preliminary issue qua limitation, on 12.07.2016.

5. On account of the pecuniary jurisdiction, suit was transferred to the District Court and vide the impugned order, learned Trial Court has held that issue of limitation being a mixed question of fact and law, cannot be decided without holding trial.

6. Learned counsel for the Petitioner assails the order on manifold grounds. It is argued that Plaintiff No. 1 was a student of the Defendant No. 1/Coaching Institute in the year 2008-2009. After he fared well at the IIT/AIEEE Entrance Examination, he started denying that he was a student with the Defendant Institute and filed a suit seeking compensation/damages alleging that the Defendant by showing the name and photographs of Plaintiff No. 1 in the Advertisements published by it

has distorted his image by making the public believe that he sold himself. In other words, the suit is for compensation for loss of reputation on account of the tort of libel. The period of limitation for filing a suit for compensation arising out of tort for libel in terms of Article 75 of the Schedule to the Limitation Act, 1963 is one year from the date when the publication is made. It is submitted that the suit was instituted on 31.05.2011 and the prayer for compensation was based on advertisements published in newspaper till April, 2010. Accordingly, the Defendant in this written statement took up a specific objection that the plaint was barred by limitation on its own showing on the principle of demurrer.

7. It is argued that at the stage of framing of issues the same objection was raised by the Defendant and this Court vide order dated 12.03.2014 had clearly observed that question of limitation would be decided as a preliminary issue as no evidence was required. It is also submitted that prior to the order dated 12.03.2014, Plaintiff had moved an application under Order XXXIX Rule 2A CPC on 17.10.2011, alleging breach of the ex-parte ad-interim injunction by the Defendant. Application was premised on the plea that the advertisements were displayed upto 18.10.2011. Taking this plea and the documents filed along with the said application allegedly showing display of advertisement as late as on 18.10.2011, Plaintiffs had sought to argue before the Court on 12.03.2014 that the plaint was not barred by limitation inasmuch as the Defendants had admitted that the advertisements remain on the website till 17.10.2011. It is contended that this argument was taken note of by the Court and as the order would indicate, the said contention was rejected

and Court adjourned the matter for arguments on limitation as a preliminary issue.

8. It is contended that in fact the Plaintiffs had filed an application under Order VI Rule 17 CPC to amend the plaint, to incorporate this very plea that Plaintiff No.1's name/image remaining on the website till 17.10.2011 but ultimately did not press the said application. It is argued that once the Court vide order dated 12.03.2014 had specifically framed the issue of limitation and directed it to be treated as a preliminary issue, it was not open to the successor Court to review that order without any reason / basis and hold that the issue of limitation was to be decided after the evidence was led.

9. Mr. Anunaya Mehta learned counsel for the Petitioner further argues that for the purpose of limitation, the Court has to look into the cause of action as set out in the plaint and it is only the pleadings and the accompanying documents that are relevant. In the present case, it is an admitted position that the pleadings in the plaint were confined to the Advertisements allegedly issued by the Defendant till April, 2010. The publications on the website till 17.10.2011 is an averment which is missing in the plaint and cannot be made a ground to decide the question of limitation on that basis and nor can it be used to extend the limitation.

10. Arguments have been addressed by counsel for the Defendant on the merits as well and it is prayed that the suit being barred by limitation be dismissed.

11. *Per contra* Mr. Gurnani learned counsel for the Plaintiffs has opposed the present petition. It is argued that the order dated 12.03.2014 cannot be construed as a final order between the parties and was only a

prima facie view of the Court, without going into the details of the pleadings and therefore cannot be treated as binding between the parties. It is submitted that it is incorrect for the Defendant to argue that the plaint was only based on the advertisements upto April, 2010 and points to paras 27, 28 and 29 of the plaint, wherein according to the learned counsel, it was clearly averred that the Advertisements are continuously being published in the newspapers and therefore argues that in view of the continuous wrong to the Plaintiffs, it cannot be argued by the Defendant that the suit is barred by limitation.

12. It is further contended that the Defendant had categorically admitted in the reply to the application under Order XXXIX Rule 2A CPC that the advertisements were removed on 02.09.2011 and 18.10.2011 and therefore the Defendant cannot today contend that the suit is barred by limitation. In any case, whether the suit is premised on the Advertisements upto April, 2010 or their continuous publication upto 2011 is also a matter of trial and therefore the Trial Court has rightly held that the issue of limitation is a mixed question of law and fact, requiring evidence. It is argued that under Order XIV Rule 5 CPC, Court has the power to amend the issues or frame additional issues 'at any time' before passing the decree, if it thinks fit, that it is necessary to do so for determining the matters in controversy between the parties. Since the plaintiffs had brought before the Court the fact of publication of the Advertisements upto October 2011, Court took the said development into account and rightly directed that limitation would be adjudicated after evidence is led, in the interest of justice.

13. Mr. Gurnani next places reliance on the provisions of Order VI Rule 2(1) CPC and contends that pleadings are only required to contain a statement of the case in a concise form having material facts on which the party relies for his claim or defence, but not the evidence. The object of the Rule is only to afford the other side, intimation regarding the facts of the case so as to meet them and secondly, to enable the Court to determine the real issue between the parties. It is also argued that procedural law is only to facilitate and not obstruct the course of substantive justice. In this context reliance is placed on the judgement in ***Virendra Kashinath Ravat vs. Vinayak N. Joshi (1999) 1 SCC 47*** , relevant part of which is as follows:

“16. That apart, the averment extracted above cannot, by any standards be dubbed as bereft of sufficiency in pleading. Under Order 6 Rule 2(1) of the Code the requirement is the following:

“2. (1) Every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved.”

17. The object of the Rule is twofold. First is to afford the other side intimation regarding the particular facts of the case so that they may be met by the other side. Second is to enable the court to determine what is really the issue between the parties. The words in the sub-rule “a statement in a concise form” are definitely suggestive that brevity should be adhered to while drafting pleadings. Of course brevity should not be at the cost of setting out necessary facts, but it does not mean niggling in the pleadings. If care is taken in the syntactic process, pleadings can be saved from tautology. Elaboration of

facts in pleadings is not the ideal measure and that is why the sub-rule embodied the words “and contain only” just before the succeeding words “a statement in a concise form of the material facts”.

18. This Court has indicated the position in Manphul Singh v. Surinder Singh [(1973) 2 SCC 599 : AIR 1973 SC 2158] . On a subsequent occasion this Court has again reiterated the principle in Ganesh Trading Co. v. Moji Ram [(1978) 2 SCC 91 : AIR 1978 SC 484] . Following observations made in the said decision are useful in this context: (SCC p. 93, para 2)

“2. Procedural law is intended to facilitate and not to obstruct the course of substantive justice. Provisions relating to pleadings in civil cases are meant to give to each side intimation of the case of the other so that it may be met, to enable courts to determine what is really at issue between parties, and to prevent deviations from the course which litigation on particular causes of action must take.”

14. Reliance is also placed on the judgement in ***Sagar Ratna Restaurants Pvt. Ltd. Vs. Sri Bihari Ji’s & Ors. 2015 (150) DRJ 420***, to argue that where a Court is misled by a party or the Court itself commits a mistake, which prejudices a party, Court has an inherent power to recall its own order. Relevant para relied upon by counsel for the Plaintiffs is as follows:

“11. So far as the non-maintainability of the application filed by the appellant on the ground of court having become functus officio is concerned, it is contended by Mr. Singh that this question of having become functus officio would not apply to an application where modification, recall, etc. of an order is sought or where

an order which has been obtained by fraud or which is passed under a mistake by the court itself or under a mistaken belief on the statement having been made by the counsel or a party in such a case the court having become functus officio will not be a bar from entertaining an application. In this regard, the learned counsel for the appellant has relied upon the judgment of the Apex Court in Indian Bank v. Satyam Fibres (India) Pvt. Ltd.; (1996) 5 SCC 550 wherein it has been specifically observed that where a court is misled by a party or the court itself commits a mistake which prejudices a party, the court has an inherent power to recall its own order. It has been contended that in the instant case, the appellant had withdrawn the appeal under a mistaken belief that the appeal can be argued before the trial judge on the merits and, therefore, the same was withdrawn.”

15. I have heard the learned counsels for the parties and examined their rival contentions.

16. The short point that arises for consideration before this Court is whether there is any legal infirmity in the order of the Trial Court whereby it has held that the issue of limitation would be decided only after the evidence is led, being a mixed question of fact and law, in the face of order dated 12.03.2014, passed by the predecessor Court, holding that the issue of limitation would be decided as a preliminary issue, requiring no evidence, in the facts of the case.

17. While there cannot be a dispute with the proposition of law sought to be raised by Mr. Gurnani learned counsel for the Plaintiffs that under Order XIV Rule 5 CPC Court has the power to amend an issue or frame an additional issue, at any time, to decide the dispute / controversy between the parties to the *lis*, however, the question is whether Order

XIV Rule 5 CPC per se is even applicable to the issue raised before this Court. As is evident, the provisions of Order XIV rule 5 CPC give power to a Court to amend/frame additional issues. In the present case by the impugned order the Trial Court, in my considered view, has neither amended nor framed an additional issue and has only directed that the issue of limitation framed vide Order dated 12.03.2014, be adjudicated after the trial is held and not as a preliminary issue. Thus, the stage at which the issue is to be adjudicated has been shifted and provisions of Order XIV Rule 5 CPC have no application in the present case.

18. Coming now to the legality of the order impugned in the present petition. At this stage, I may also refer to the order dated 12.03.2014 which really is the bone of contention between the parties. The order is extracted hereunder for ready reference:

“1. This suit for recovery of Rs. 2 crores on account of damages for causing loss of reputation of the plaintiffs is ripe for framing of issues.

2. On the pleadings of the parties, the following issues are framed:

(i) Whether the defendants, by naming the plaintiff No. 1 as the student of the defendant No. 1 in the advertisements published by the defendant No. 1, have distorted the image of the plaintiff No. 1 by making the public believe that the plaintiff No. 1 or the plaintiffs No. 2 and 3 are entitled to any damages and if so, in what amount and from which of the defendants? OPP

(ii) Whether the claim in suit is within time? OPP

(iii) If the plaintiffs succeed in Issue No. 1, whether the plaintiffs are entitled to any interest and if so, for what period and at what rate? OPP

(iv) Relief.

3. Though both the counsels have also proposed an issue on the aspect whether the plaintiff No. 1 was a bona fide student of the defendant No. 1 institute or not but the claim of the plaintiffs being for loss of reputation, the said issue is not found to be material for adjudication of the suit.

4. The other issues proposed by the counsels though are taken on record, but suffice it is to state that the need for framing thereof does not arise. Moreover, they are repetitive in nature.

5. The issue qua limitation does not appear to require any evidence as the advertisements causing loss to the reputation of the plaintiffs are all prior to April, 2010 and the suit was instituted on 31st May, 2011. The counsel for the plaintiffs states that the defendants in reply to the application u/O 39 R-2A of the CPC admitted the name of the plaintiff No. 1 remaining on the website of the defendants till 17.10.2011. However, that is not the cause of action pleaded in the plaint. Accordingly, Issue No. (ii) is treated as a preliminary issue.

6. List for arguments on the preliminary issue on 28th July, 2014.

I.A. No. 3250/2012 (of the plaintiff for direction to the defendant to file documents)

7. The said application shall be treated as a notice under Order 12 Rule 8 of the CPC and consequences shall follow.

8. The application is disposed of.

I.A. No. 16891/2011 (of the plaintiff u/O 39 R-2A of the CPC)

9. List for hearing on 28th July, 2014.”

19. From a reading of the order, what emerges is that (a) issue qua limitation does not appear to require any evidence as the Advertisements were all prior to April, 2010 and the suit was instituted on 31.05.2011; (b) averment in the application under Order XXXIX Rule 2A CPC that the publications remained on the website of the Defendants till 17.10.2011 is

not the cause of action pleaded in the plaint and (c) limitation be treated as a preliminary issue. Therefore, the Court while passing the said order was clearly of the view that the plaint had only set out a cause of action based on advertisements prior to April, 2010 and issue of limitation, not requiring any evidence, must be decided at the threshold, as a preliminary issue. Subsequent to the passing of the said order, the position did not change and nor has any subsequent development been pointed out by the counsel for the Plaintiffs, so as to trigger the passing of the impugned order, holding that limitation would be decided after taking evidence. Learned counsel for the Plaintiffs despite his eloquent arguments has not been able to establish any change in the circumstances between 12.03.2014 and passing of the impugned order, which led the Trial Court to reverse the order dated 12.03.2014 and an admitted position between the parties that the order dated 12.03.2014 was never assailed by the Plaintiffs and has thus attained finality. In fact, it is rightly contended by the counsel for the Defendant that by virtue of the impugned order, the Trial Court has actually set aside the order dated 12.03.2014.

20. I also tend to agree with the Counsel for the Defendant that if at the time of framing of the issues an issue though arising from the pleadings is not pressed and/or framed, it would not stop a party from moving an application to frame the issue or the Court from framing such an issue, but the position would be different when an issue is framed and an order is passed treating it as a preliminary issue and the order is accepted by the parties and not assailed by the aggrieved party. In such a case the bar of *res judicata* would come in the way of the aggrieved party as well as the Court from recalling the said order. It is a settled law that the bar of *res*

judicata is applicable even between the successive stages in the same suit, to the extent that the Court having at an earlier stage decided the matter in one way will not allow the parties to reagitate the matter again at a subsequent stage. It has been held by the Supreme Court in ***Y.B. Patil & Ors. vs. Y.L. Patil (1976) 4 SCC 66*** that once an order made in course of a proceeding becomes final, it would be binding at subsequent stage of that proceeding. Relevant part of the judgement is extracted hereunder:

“4. It is well settled that principles of res judicata can be invoked not only in separate subsequent proceedings, they also get attracted in subsequent stage of the same proceedings. Once an order made in the course of a proceeding becomes final, it would be binding at the subsequent stage of that proceeding. In view of the High Court judgment dated December 18, 1964, the tribunal while passing the order dated September 12, 1967, disposing of the revision petition filed by the appellant, could not reopen the questions of fact which had been decided by the Assistant Commissioner, and the Deputy Commissioner. The High Court, in our opinion, was right in holding in the judgment under appeal that the concurrent findings of fact arrived at by the Assistant Commissioner, the Deputy Commissioner and the tribunal cannot be set aside in the writ petition. The appeal consequently fails and is dismissed but in the circumstances with no order as to costs.”

21. Supreme Court in ***Narayan Dutt Tiwari vs. Rohit Shekhar & Anr. (2012) 12 SCC 554***, has held as under:

“45. It is a settled principle of law that the principles of res judicata and constructive res judicata apply to the successive stages of the same proceedings also. The Supreme Court, as far back as in Satyadhyam

Ghosal v. Deorajin Debi [AIR 1960 SC 941] observed that the principle of res judicata applies also as between the two stages in the same litigation to the extent that the court having at an earlier stage decided the matter in one way will not allow the parties to reagitate the matter again at a subsequent stage of the same proceedings.”

22. Therefore, once the Court vide order dated 12.03.2014 had directed that limitation would be decided as a preliminary issue with a finding that it requires no evidence. I find no justification in the Trial Court, having reversed the said order.

23. Insofar as the argument of the Respondent that the publications annexed with the application under Order XXXIX Rule 2A CPC and the averments made therein, gave rise to a continuous cause of action till 18.10.2011 and this being a mixed question of fact and law, requiring trial, is concerned, I may only note that the argument only deserves to be rejected for two reasons. Firstly, this argument was raised by the Plaintiffs before the Court on 12.03.2014 and the Court had specifically given a finding that this would not give rise to a cause of action, having a bearing on the issue of limitation. Secondly, the Plaintiffs conscious of the fact that the plaint was premised on publications upto April, 2010 and the objection being raised on issue of limitation by the Defendant, filed an application under Order VI Rule 17 CPC, to amend the pleadings in the plaint as well as the paragraph relating to the cause of action. Relevant paras of the application are as under:

“3. That the aforementioned suit was listed on 12.03.2014 and this Hon'ble Court had observed that since the plaintiff is seeking damage in the suit due to the loss

caused to the reputation of the plaintiff, however, the documents which have been annexed alongwith the plaint were all prior to April, 2010, and the Suit was instituted on 31.5.2011, hence the issue of Limitation be treated as preliminary issue. The counsel for the plaintiff mentioned the fact that infact in reply to the application U/o 39 Rule 2-A, the defendant itself admitted that the defendant kept on using the name of the plaintiff on their website till 17.10.2011, however, the Hon'ble Court observed that since the said fact was not the part of the pleadings, therefore, the same cannot be considered while deciding the issue of limitation.

4. That under such circumstances, the plaintiff is moving the instant application for the purpose of incorporating the facts in the pleadings which the defendant itself admitted while replying the application under order 39 Rule 2A between para no. 27 and 28 and the same may be treated as para 27A. The plaintiff wish to amend/add the said para No. 27A as such:

"27-A. That the defendant admittedly using/misusing the name and photographs of the plaintiff no. 1 since the declaration of the result of IIT-JBE and AIBEE in May 2009 till 18.10.2011 on its websites on various links. Even the Form which they got signed from the plaintiff No.1 fraudulently was shown on the websites continuously. Though some web files, were removed on 1.6.2011 after knowing the injunction order passed by this Hon'ble Court on 1.6.2011 against them as alleged, however since using the name and photograph of the plaintiff no. 1 was very profitable and lucrative, therefore, they kept on using/misusing the same till 18.10.2011 whereby the Ld. Single Judge of this Hon'ble Court vide its order dated 11.8.2009 and the Division Bench of the Hon'ble High Court vide judgment dated 7.9.2009 had already held that the defendant had no authority or right to use/misuse the name

and photographs of the plaintiff no.1 and no one could have commercially exploited his name and photograph due to statutory embargos".

5. That the plaintiffs also wish to incorporate following lines in the cause of action:

"The cause of action further arose on each and every date till 18.10.2011 which was itself admitted by the defendant.

6. That it is necessary to incorporate the said aforementioned paragraphs/lines for proper adjudication of the present dispute and to save any technical hurdle. The aforementioned amendments are necessary for the proper adjudication of the present dispute. No prejudice be caused to the defendant if the aforementioned amendment is allowed in the plaint of the plaintiffs. Amended plaint is also annexed alongwith this application."

24. However, the said application was admittedly withdrawn as not pressed on 01.03.2016. Thus, the Trial Court has erred in holding that the subsequent allegation of the publications having remained on the website till 17.10.2011, could only be adjudicated by leading evidence and thus declined to adjudicate limitation as a preliminary issue.

25. In view of the above, the impugned order dated 19.02.2018 passed by the Trial Court is set aside. The Trial Court is directed to decide the issue of limitation framed by the Court on 12.03.2014 as a preliminary issue.

26. Both parties had sought to argue on the merits of the case with respect to the suit being barred by limitation or otherwise. It is made clear that this Court is only directing the Trial Court to decide the issue of limitation as a preliminary issue and has not expressed any opinion on the

merits of the case qua the issue of limitation. It is open to the Trial Court to decide the said issue, uninfluenced by any observations made by this Court and needless to state that the decision will be on the basis of the facts before the Trial Court and the law on the subject.

27. The petition is accordingly allowed.

JYOTI SINGH, J

MARCH 26, 2021

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