

\$~22 (Appellate Side)

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

+ RSA 62/2021 & CM APPL. 24529/2021

GIAN CHAND BANSIWAL Appellant

Through: Mr. Madhukar, Adv.

versus

DELHI DEVELOPMENT AUTHORITY AND ORS

..... Respondent

Through: Ms. Mrinalini Sen, Standing
Counsel for DDA

CORAM:

HON'BLE MR. JUSTICE C.HARI SHANKAR

ORDER

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15.03.2022

1. Issue notice. Notice is accepted on behalf of the Respondents 1 to 3 by Ms. Mrinalini Sen. Let notice be issued to the remaining respondents through all modes.

2. The impugned order dated 10th December, 2019, of the learned Additional District Judge, assails the order dated 5th July, 2018, rejecting the petitioner's suit under Order VII, Rule 11(d) of the Code of Civil Procedure, 1908, as time barred.

3. The dispute relates to a passage way which, according to the appellant, is the only mode for ingress and egress to the property owned by him as well as to other adjoining plots. By reason of construction of a brick wall, the passage way, according to the appellant, was blocked, as a result of which there is no access to his entry gate.

4. The appellant relied on an order dated 31st July, 2012, passed by the Consolidation Officer allowing the appellant to use the said passage.

5. The appellant sued the respondents and sought directions to the respondents to provide a pucca passage to enable access to the appellant to his property as well as to remove the wall which was blocking the passage way.

6. Before the learned Civil Judge, the DDA contended that the wall was constructed in 2006, to protect the land which was acquired by it in 1995-1996.

7. In view thereof, the learned Civil Judge dismissed the suit under Order VII, Rule 11(d) of the CPC, 1908 as time barred.

8. Before the learned Additional District Judge, in appeal, the appellant contended that the learned Civil Judge erred in relying on the written statement filed by DDA while rejecting his suit as time barred and also erred in observing that the appellant had admitted construction of the wall by DDA in 2006.

9. The learned ADJ, in the order under appeal, held in favour of the appellant on both these grounds. The learned ADJ agreed with the appellant's contention that, while deciding an application under Order VII, Rule 11 of the CPC, 1908, the Court could not consider the

written statement filed by the defendant. Equally, the learned Additional District Judge concurred with the submission of the appellant that he had not admitted to construction of the wall in 2006 before the learned Civil Judge.

10. Nonetheless, the learned ADJ proceeded to uphold the decision of the learned Civil Judge to dismiss the suit as time barred. For this purpose, reliance was placed by the learned ADJ on the following passage from the order dated 31st July, 2012 of the Consolidation Officer:

“10. The Ld. Civil judge has further relied upon the proceedings initiated by the appellant before the Consolidation officer in the year 2012 and has held that since the construction of the disputed wall was completed in the year 2012 is not disputed, the suit filed by the appellant in the year 2017 is barred by limitation. I have perused the entire record file and the order of the Consolidation Officer dated 31.07.2012. In the proceedings before the Consolidation Officer, the appellant has prayed for the similar relief for providing 'rasta' to his land which falls in khasra no.31/12, 31/19 and 18 min in the Revenue Estate of Singhola, Delhi. In the said order, the Ld. Consolidation Officer has held as follows:

“The applicant is using the 'raasta ' to the land as mentioned above i.e. khasra no. 31/20 from G.T.Road to his holding. The site was inspected and it was found that there exists an electricity transformer in the 'rasta' which the applicant is using for the last 20-25 years, hence, the applicant may continue the rasta through khasra no.31/21 ,22 of the Northern Side from G.T.Road till the Western side of khasra no.31/23 to t, e tune of 16.5 feet as shown in the photocopy of Aksshijra in orange colour as there is no 'rasta' available for his holding ””

11. Having thus relied on the order of the learned Consolidation Officer, the learned ADJ went on to hold that, though the date of

construction of the wall was not forthcoming from the plaintiff, para 18 of the plaintiff which dealt with the claim of limitation, claimed the cause of action to have arisen in favour of the appellant on 7th February, 2012, 21st February, 2013, 15th March, 2013, 27th November, 2013, 26th February, 2014 and 13th March, 2014, when the appellant represented to the DDA. These representations alluded to the wall; ergo, held the learned ADJ, the wall must have been constructed prior to 2012. The suit having been filed in 2017, the learned ADJ held that the learned Civil Judge was correct in dismissing the suit on the ground of limitation.

12. Accordingly, the appeal of the appellant was dismissed.

13. In the present second appeal, under Section 100, the appellant has sought to contend that limitation being a mixed question of fact and law, ought to have been decided only consequent to trial. This contention cannot be accepted. Where the pleadings of the plaintiff disclose that a suit is barred by time, there is no fetter on the trial Court rejecting the suit on that ground, without subjecting it to trial.

14. The appellant has, however, advanced an additional submission, to the effect that the cause of action, in a case such as the present, is continuing in nature. Reliance has been placed, for the said purpose, on the judgment of the High Court of Madras in *Muthusamy Gounder vs. Cinnappa Gounder*¹.

¹ (2012) 3 LW 713

- 15.** This contention according to me, deserves consideration.
- 16.** Accordingly, the following two substantial questions of law are framed, as arising in these facts, for determination:
- (i)** Whether the suit filed by the appellant before the learned Civil Judge could be said to be based on a continuing cause of action?
 - (ii)** Whether, therefore, the Courts below were not in error in dismissing the appellant's suit under Order VII Rule 11(d) of the CPC, 1908, as barred by time?
- 17.** List for disposal on 24th May, 2022.
- 18.** All parties are at liberty to file short notes of their respective contention, if they deem it appropriate, not exceeding three pages, before the next date of hearing, after exchanging copies with each other.
- 19.** Mr. Srivastava, Junior Engineer, is present in this Court, consequent to the order dated 25th November, 2021, this further requirement is dispensed with.

C.HARI SHANKAR, J

MARCH 15, 2022
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