

A

RAMJI SINGH PATEL

v.

GYAN CHANDRA JAISWAL

(Civil Appeal No(s). 1799-1800 of 2018)

B

JANUARY 11, 2018

[A. K. SIKRI AND ASHOK BHUSHAN, JJ.]

C *Code of Civil Procedure, 1908 – s.100 – Second appeal – Respondent ran the business of flour mill (Atta Chakki) etc., since 1990, which initially operated on electricity, from his residential accommodation – Appellant, is the owner and resident of the adjoining house, which has a common wall with the house of respondent – Suit by appellant in 2004 for perpetual injunction prohibiting the respondent from running the said business, as according to the appellant from the year 2003 respondent started*
D *operating the flour mill with machines, on diesel engine, which started causing severe vibrations and air pollution – Suit decreed – Decree upheld by first appellate court – High Court set aside the orders of the Courts below – On appeal, held: Substantial question of law formulated by High Court pertained to the issue of limitation in filing the suit – No such plea was taken up by the respondent in*
E *the written submissions filed by him in the suit and no evidence was led by the parties on the issue – Thus, no issue on limitation came to be casted – However, even in the absence of any specific issue of limitation, such a plea could have been taken by the respondent in second appeal before High Court only if the issue of limitation was*
F *raised as a pure question of law – But, in the instant case the issue of limitation was a mixed question of law and fact and, therefore, it could not have been entertained by High Court for the first time in the second appeal filed by the respondent – Further, even on merits the approach of High Court was not correct – Impugned judgment of High Court set aside – Decree passed by the Courts below is*
G *restored – Limitation Act, 1963 – s.3 – Suit.*

Limitation – Plea of – Question of law/fact – When can be raised – Discussed.

Allowing the appeals, the Court

H

HELD: 1.1 The judgment of the High Court has not tinkered with any of the findings recorded by the Trial Court and affirmed by the first appellate court. On the contrary, the substantial question of law which was formulated by the High Court pertained to the limitation in filing the suit. In the first instance no such plea was taken up by the respondent in the written submissions filed by him to the suit which was filed by the plaintiff/appellant and no issue on limitation came to be casted. Obviously, in the absence of any such issue framed, the parties did not lead any evidence. No doubt, even in the absence of any specific issue of limitation, by virtue of Section 3 of the Limitation Act, 1963 power is cast on the Court to see whether the suit is within limitation or time barred. However, such a plea could have been taken by the respondent in the Second Appeal before the High Court only if the issue of limitation was raised as a pure question of law. In the instant case, it was a mixed question of law and fact and, therefore, it could not have been entertained by the High Court for the first time in the second appeal filed by the respondent. [Paras 10, 12] [692-E; 693-B-D]

1.2 That apart, even on merits there is blemish in the approach of the High Court. There are at least two reasons for that which are as under:

a) The explanation given by the appellant was justified. The cause of action for filing the suit was the installation of DG Set which was installed in the year 2003. The suit was filed in the year 2004 and was, thus, well within time.

b) Furthermore, the High Court had taken a very myopic view of the matter. Once there were categorical findings that the flour mill of the respondent was causing noise as well as air pollution, it would be a continuing cause of action. Such a grave consequence of running the mill should not have been ignored by the High Court. [Para 13] [693-E-G, H; 694-A]

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 1799-1800 of 2018.

From the Judgment and Order dated 29.05.2012 by the High Court of Judicature at Allahabad in Second Appeal No. 622 and 623 of 2013.

A Anurag Dubey, Ms. Anu Sawhney, Rajesh Pandey, Sanchit M.,
S. R. Setia, Advs. for the Appellant.

Mrs. Rachna Gupta, Anil Kumar Sinha, Siddhant S. Malik, Advs.
for the Respondent.

B The Judgment of the Court was delivered by

A. K. SIKRI, J. 1. Leave granted.

C 2. By means of these appeals the appellant challenged the
judgment and order dated 29.05.2013 passed by the High Court of
Judicature at Allahabad in Second Appeal Nos. 622 of 2013 and 623 of
2013 whereby the High Court has allowed these appeals of the respondent
and set aside the judgment and decree that was passed by the Trial
Court in favour of the appellant and also upheld by the First Appellate
Court. The chronology of the events is as under:

D 3. The respondent started running the business of Flour Mill, Oil
Mill and Expeller, Ice Factory etc. which were operated on electricity
from his residential accommodation. The appellant, who is an advocate,
is the owner and resident of the adjoining house, which has a common
wall with the house of the respondent.

E 4. According to the appellant, from the year 2003 the respondent
started operating the above said flour mill with machines, on diesel engine,
which started causing severe vibrations and air pollution. The vibrations
caused by the machines cracked the wall of the appellant and the pollution
emitted was detrimentally affecting the health of the appellant and his
family members. The appellant being an advocate also runs his chambers
from his residence and, therefore, the severe vibration and air pollution
F also started adversely affecting his professional activities.

G 5. Due to the aforesaid harassment and nuisance the appellant
made a complaint to the Sub-Divisional Magistrate, who directed the
Administrative Officer to file his report on the complaint of the appellant.
The Administrative Officer, after enquiry, submitted his report on
02.12.2003.

H 6. Upon the report filed by the Administrative Officer, the Sub-
Divisional Magistrate directed the Station House Officer to investigate
the matter. The SHO directed the respondent to stop the nuisance and
pollution but the respondent did not comply with the said direction. At
that stage, the respondent filed Original Suit No. 2518/2003 against the

appellant wherein the respondent prayed for perpetual injunction against the appellant from interfering in the running of the business of the respondent. A

7. Thereafter the appellant also filed Original Suit No. 26/2004 against the respondent wherein the appellant prayed for perpetual injunction against the running of the business of the respondent which was causing nuisance and pollution. After the trial, the suit of the appellant was decreed and the Trial Court passed a decree of permanent injunction dated 03.12.2012 prohibiting the respondent from operating the said machines and from spreading air and noise pollution. On the other hand, suit filed by the respondent was dismissed vide decree of the same date. B C

8. The respondent being aggrieved by the judgments and decree passed by the Civil Judge (Junior Division) Sakri, Allahabad filed Civil Appeal No. 206/2012 and 207/2012 before the Additional District Judge, Court No.2, Allahabad. The Additional District Judge, Allahabad passed a common confirmatory judgment and decreed dated 25.02.2013 in Civil Appeal Nos. 206 and 207 of 2012 observing that: D

“i. The house of the respondent is adjacent to appellant’s house and there was a wall of 4" breadth between the two houses.

ii. The respondent has a business of Flour Mill, Oil Mill and expeller, Ice factory etc. and he uses the said machines on diesel. E

iii. The respondent started his business in 1990 but at that time his machines were operated on electricity.

iv. In 2003 the respondent started using expeller machine etc. which was operated on diesel which produced a lot of vibrations and air and noise pollution. F

v. Because of a vibrations caused by the said machines the wall on the appellant’s side cracked at many places.

vi. The running of his business is detrimental to the health of the appellant and his family. G

vii. The oral evidences of the witnesses made it clear that the machines used by the respondent caused vibrations and emitted air and noise pollution.

viii. It was admitted by the respondent that the machines caused air and noise pollution. H

A ix. The running of said business came under the ambit of private nuisance and that such activities should not be carried out in residential areas as it is detrimental to physical and mental health of people at large.

B x. The defence of *volunt non fit injuria* does not sustain as when the appellant started living in this house in 1990 the respondent was operating the machines on electricity and it was in 2003 that the respondent started operating the machines on diesel which caused vibrations and pollution.

C xi. The appellant is entitled to perpetual injunction against the respondent.”

D 9. Being aggrieved by the judgment and decree in Civil Appeal No. 206/2012 and 207/2012 passed by the Additional District Judge, Allahabad, the respondent filed Second Appeals Nos. 622/2013 and 623/2013 before the Allahabad High Court. The High Court has been pleased to allow both the Second Appeals and set aside judgments and decree dated 03.10.2012 passed by the Civil Judge (Junior Division), Sakri, Allahabad and 25.02.2013 passed by the Additional District Judge, Court No. 2, Allahabad and also dismissed Original Suit No. 26/2004.

E 10. A perusal of the judgment of the High Court shows that it is not tinkered with any of the findings recorded by the Trial Court and affirmed by the first appellate court. On the contrary, the substantial question of law which was formulated by the High Court pertains to the limitation in filing the suit which reads as under:

F “Whether the suit in question was barred by time inasmuch as prayer sought in the plaint shows that cause of action arose in 1990 though the suit was filed in 2004 and admittedly the period of limitation is only three years.”

G 11. According to the High Court the evidence on record shows that the Atta Chakki was installed initially in 1990, but no inconvenience was felt by the appellant herein and, therefore, he did not make any complaint. The only explanation is that at that time the respondent was running the aforesaid machine with electricity which was not causing pollution or any inconvenience and since from the year 2003 the respondent started using diesel generator set (DG Set), the smoke and noise created by DG Set has caused serious air and other pollution. This

H

explanation has not been found to be convincing by the High Court. Thus, influenced by the fact that the Atta Chakki was started in 1990 and the suit was filed 14 years thereafter, i.e. in the year 2004, it was held to be time barred.

12. After hearing the learned counsel for the parties, we do not find ourselves in agreement with the approach of the High Court. It may be noted that in the first instance no such plea was taken up by the respondent in the written submissions filed by him to the suit which was filed by the plaintiff/appellant and no issue on limitation came to be casted. Obviously, in the absence of any such issue framed, the parties did not lead any evidence. No doubt, even in the absence of any specific issue of limitation, by virtue of Section 3 of the Limitation Act, power is cast on the Court to see whether the suit is within limitation or time barred. However, such a plea could have been taken by the respondent in the Second Appeal before the High Court only if the issue of limitation was raised as a pure question of law. In the instant case, we find it to be a mixed question of law and fact and, therefore, it could not have been entertained by the High Court for the first time in the second appeal filed by the respondent.

13. That apart, even on merits we find blemish in the approach of the High Court. There are at least two reasons for that which are as under:

a) The explanation given by the appellant was justified. He had categorically stated that nuisance started in operating the said Atta Chakki (Floor Mill) when the respondent had installed DG Set in the year 2003 as it emitted smoke thereby creating air pollution and had also started creating noise pollution. Therefore, the cause of action for filing the suit was the installation of DG Set which was installed in the year 2003. The suit was filed in the year 2004 and was, thus, well within time.

b) Furthermore, we find that the High Court has taken a very myopic view of the matter. The findings of fact which were recorded by the courts below were clear to the effect that after the use of DG Set by the respondent and because of the vibration created by it and the machines run through it, cracks on the wall of the appellant side developed at many places. This has happened after 2003. Another categorical finding is that running of the business is detrimental to the health of the appellant and his family. Once there are categorical findings that the flour mill of

A the respondent is causing noise as well as air pollution, it would be a continuing cause of action. Such a grave consequence of running this mill should not have been ignored by the High Court.

14. To sum up, we find that the High Court was in error in allowing the appeals in the aforesaid manner. These appeals are accordingly
B allowed, the impugned judgment of the High Court is set aside and the decree passed by the Courts below is restored.

15.No order as to costs.

Divya Pandey

Appeals allowed.