

Minu Chibber and ors. Vs. Lt. Col. (Retd.) S.S. Chibber

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Court : Delhi

Decided On : Sep-29-2014

Judge : Rajiv Sahai Endlaw

Appellant : Minu Chibber and ors.

Respondent : Lt. Col. (Retd.) S.S. Chibber

Advocate for Def. : Mr. Gaurav Goel, Ms. Gausia Shah

Advocate for Pet/Ap. : Mr. D.P. Singh, Ms. Sonam Gupta, Mr. Rajkiran Vats, Mr. Salil Bhattacharya, Mr. R.P. Vyas

Judgement :

*IN THE HIGH COURT OF DELHI AT NEW DELHI Date of decision:

29. h September, 2014 % + FAO (OS) No.205/2013 MINU CHIBBER & ORS. Through: .. Appellants Mr. D.P. Singh with Ms. Sonam Gupta, Mr. Rajkiran Vats, Mr. Salil Bhattacharya & Mr. R.P. Vyas, Advs. Versus LT. COL. (RETD.) S.S. CHIBBER .. Respondent Through: Mr. Gaurav Goel & Ms. Gausia Shah, Advs. CORAM:HONBLE THE CHIEF JUSTICE HONBLE MR. JUSTICE RAJIV SAHAI ENDLAW RAJIV SAHAI ENDLAW, J1 This appeal under Section 10 of the Delhi High Court Act, 1966 impugns the order dated 15th March, 2013 (of the learned Single Judge of this Court exercising Ordinary Original Civil Jurisdiction in CS(OS) No.2521/2010 filed by the respondent / plaintiff) of dismissal of IA No.7092/2011 filed by the appellants / defendants under Order VII Rule 11 of the CPC.

2. Notice of the appeal was issued and vide ex parte ad-interim order dated 22nd April, 2013 which continues to be in force, the proceedings in the suit before the learned Single Judge were stayed. The respondent / plaintiff has filed a reply to the appeal. The counsels for the parties have been heard.

3. The respondent / plaintiff in the reply filed to the appeal has taken an objection to the very maintainability of the appeal contending that no appeal against the order of dismissal of application under Order VII Rule 11 of the CPC is provided for under Order XLIII Rule 1 of the CPC and such an order being not a judgment, no LPA or an appeal under Section 10 of the Delhi High Court Act also lies thereagainst. Reliance in this regard is placed on Shah Babulal Khimji Vs. Jayaben D. Kania (1981) 4 SCC 8 and on order dated 22nd March, 2011 of this Court in FAO (OS) No.92-93/2011 titled Satna Cement Works Vs. Delhi Development Authority.

4. We are afraid, the aforesaid contention is on a misreading of Shah Babulal Khimji (supra). The Supreme Court in the said judgment has rather held that where a Trial Court Judge passes an order after hearing the preliminary objections raised by the defendant relating to maintainability of the suit, for example, bar of jurisdiction, res judicata, a manifest defect in the suit, absence of notice under Section 80 and the like and these objections are decided by the Trial Judge against the defendant, the suit is not terminated but continues and has to be tried on merits but the order of the Trial Judge rejecting the objections undoubtedly adversely affects a valuable right of the defendant who, if his objections are valid, is entitled to get the suit dismissed on preliminary grounds. It was thus held that such an order even though keeps the suit alive, decides an important aspect of the trial which affects a vital right of the defendant and must, therefore, be construed to be a judgment so as to be appealable to a larger Bench. To the same effect is the judgment of the Division Bench of this Court in Jyotika Kumar Vs. Anil Soni 156 (2009) DLT 685 and SLP (CC) No.10698/2009 whereagainst was dismissed in limine on 11th May, 2009. Insofar as the reliance on the order in Satna Cement Works (supra) is concerned, the same, rather than supporting the contention of the respondent / plaintiff, is also against the respondent / plaintiff. There is thus no merit in the objection of the respondent / plaintiff to the maintainability of the

appeal.

5. As far as the merits of the appeal is concerned, we have perused the suit record. The respondent / plaintiff on 10th December, 2010 instituted the suit from which this appeal arises, for the reliefs of, i) declaration, of the Will dated 16th May, 1993 purportedly executed by Late Mr. S.P. Chibber, as forged, false, null and void; ii) declaration of the relinquishment deed dated 18 th December, 2003 admittedly executed by the respondent / plaintiff as null and void and for cancellation thereof; iii) partition of the estate of Late Mr. S.P. Chibber including of property No.R-1, Nehru Enclave, New Delhi; and, iv) possession, directing the appellants / defendants to handover 1/4 th share of property No.R1, Nehru Enclave, New Delhi to the respondent / plaintiff, pleading:(i) that the respondent / plaintiff is the son from first marriage of the said Mr. S.P. Chibber; the appellant / defendant no.1 is the second wife and the appellants / defendants no.2&3 Mr. Parvesh Chibber & Mr. Mahesh Chibber are the sons of Mr. S.P. Chibber from the said second marriage; (ii) that property No.R-1, Nehru Enclave, New Delhi was a self acquired property of and Mr. S.P. Chibber was the sole absolute owner thereof; (iii) Mr. S.P. Chibber along with the appellants / defendants shifted to London and acquired an immovable property there also; (iv) Mr. S.P. Chibber died in London on 24th July, 2003 leaving the respondent / plaintiff and the three appellants / defendants as his only legal heirs; (v) that when the respondent / plaintiff was in a state of depression owing to the demise of his father, the appellant / defendant no.1 apprised the respondent / plaintiff that Mr. S.P. Chibber had executed and left a Will in favour of the appellant / defendant no.1 whereunder the appellant / defendant no.1 has been appointed as the sole executor of the Will of all the movable and immovable properties of Mr. S.P. Chibber; though the respondent / plaintiff requested the appellant / defendant no.1 to show the said Will but the appellant / defendant no.1 inspite of assurance made excuses; (vi) that the appellant / defendant no.1 further represented that the appellant / defendant no.1 wanted to sort out the estate of Mr. S.P. Chibber equitably amongst the respondent / plaintiff and the appellants / defendants no.2&3 and with this intent had asked the appellants / defendants no.2&3 to execute relinquishment deed in favour of the appellant / defendant no.1 so that the appellant / defendant no.1 could distribute the wealth of Mr. S.P. Chibber equally; the appellant / defendant

no.1 asked the respondent / plaintiff also to execute a relinquishment deed; (vii) that believing the representations of the appellant / defendant no.1, the respondent / plaintiff agreed to sign the relinquishment deed as got prepared by the appellant / defendant no.1 and under the loving spell of the appellant / defendant no.1 blindly signed the same without even reading the same; the said relinquishment deed was duly registered; (viii) that the respondent / plaintiff from time to time requested the appellants / defendants to distribute the wealth of Mr. S.P. Chibber and also to deliver a copy of the Will to him; (ix) that the appellant / defendant no.1 visited India in April, 2007 and again assured the respondent / plaintiff that she would distribute the properties of Mr. S.P. Chibber and also give a copy of the Will of Mr. S.P. Chibber to the respondent / plaintiff; similar representations were made by the appellant / defendant no.2 Mr. Parvesh Chibber during his visit in May, 2007; (x) that just prior to the institution of the suit on 10 th December, 2010, the respondent / plaintiff learnt that the property No.R-1, Nehru Enclave, New Delhi had been put up for sale; the respondent / plaintiff on making enquiry from the office of the MCD learnt that the appellant / defendant no.1 had got the said property mutated in her favour employing / using the Will dated 16th May, 1993; (xi) that while going through the Will, the respondent / plaintiff realized that the signature of Mr. S.P. Chibber thereon are forged - the same was also confirmed by handwriting expert; (xii) that the respondent / plaintiff thereafter also learnt that the appellants / defendants, on the basis of the Will had also got converted the title of the immovable property at London of Mr. S.P. Chibber in their own name; (xiii) that the respondent / plaintiff sent a lawyer to London to file an application for intervention in the probate proceedings; (xiv) that it thus became clear to the respondent / plaintiff that the appellants / defendants in conspiracy with each other had made a false representation to the respondent / plaintiff and believing which representation, the respondent / plaintiff entrusted the appellants / defendants with the relinquishment deed; and, (xv) that the respondent / plaintiff made a complaint of the offence of forgery committed by the appellants / defendants and upon which eventually an FIR had been registered on 10th August, 2010. Accordingly, the suit for the reliefs aforesaid was filed.

6. The appellants / defendants contested the suit by filing a written statement, on the grounds:(a) that the suit was barred by time; (b) that the Will dated 16th May,

1993 of Mr. S.P. Chibber was probated by the High Court of Justice, Principal Registry of the Family Division, Probate Department, London; a judgment in probate is a judgment in rem and is conclusive in view of the provisions contained in Section 41 of the Indian Evidence Act, 1872 and as such the suit regarding probated Will was not maintainable; (c) that the suit was undervalued for the purpose of court fees and jurisdiction; (d) that the property No.R-1, Nehru Enclave, New Delhi was mutated from the name of Mr. S.P. Chibber to the name of the appellant / defendant no.1 vide letter dated 8th December, 2003 of the Municipal Corporation of Delhi on the basis of Will dated 16 th May, 1993; (e) that the appellant / defendant no.1 leased out the property vide lease deed dated 15th December, 2003 and was exclusively realizing rent thereof; (f) that Mr. S.P. Chibber has vide his Will dated 16th May, 1993 bequeathed all his properties in favour of the appellant / defendant no.1; (g) that the version of the respondent / plaintiff of being depressed on demise of his father was false; the respondent / plaintiff had been living in India while Mr. S.P. Chibber for 35 years prior to his demise on 24th July, 2003 had lived in London; and, (h) denying that any representations as alleged were made by any of the appellants / defendants and pleading that the respondent / plaintiff had executed the relinquishment deed of his own volition.

7. The respondent / plaintiff filed a replication but need is not felt to refer thereto.

8. The appellants / defendants filed the application aforesaid, under Order VII Rule 11 of the CPC against the dismissal whereof this appeal has been preferred, for rejection of the plaint on the ground of, i) the suit being palpably barred by time; ii) the suit challenging the probated Will being not maintainable; and, iii) the suit having not been valued properly for the purpose of court fees and jurisdiction.

9. The respondent / plaintiff filed a reply generally denying all the aforesaid grounds invoked for rejection of the plaint.

10. The learned Single Judge, vide impugned order, dismissed the application aforesaid of the appellants / defendants under Order VII Rule 11 of the CPC holding that the question, of the suit being barred by time is a mixed question of fact and law which would require trial; it was the case of the respondent / plaintiff

that the Will was withheld by the appellant / defendant no.1 from the respondent / plaintiff and he came to know of the same recently; it would be a question of fact to be proved during trial as and when the respondent / plaintiff acquired knowledge that the appellant / defendant no.1 got the property mutated in her name on the basis of a forged Will. Similarly, the challenge in the suit was also to the relinquishment deed; however the case of the respondent / plaintiff was that the appellants / defendants had obtained his signatures on some papers representing that they were required for proper distribution of assets of Mr. S.P. Chibber but subsequently the respondent / plaintiff came to know that the appellants / defendants had used his signatures to his detriment; the question, as to when the respondent / plaintiff came to know about that, would also be a matter of trial. The learned Single Judge did not deal with the other two grounds invoked for rejection of the plaint i.e. of the suit for declaration that a probated Will is void, being not maintainable and the suit being not properly valued for the purpose of court fees and jurisdiction.

11. We are afraid the learned Single Judge, in holding the suit instituted on 10th December, 2010, for declaration of the Will dated 16th May, 1993 and relinquishment deed dated 18th December, 2003 as null and void, to be not barred by time on the averments in the plaint itself, has completely misread the plaint and in the impugned order does not even discuss the period of limitation for such a relief. An issue of limitation is not always a mixed question of law and fact. Where a suit, from statement in the plaint, can be said to be barred by time, certainly a case for rejection under Order VII Rule 11 CPC is made out. The Supreme Court in N.V. Srinivasa Murthy Vs. Mariyamma (2005) 5 SCC548 has held that if on a critical examination of the plaint, the suit seems to be clearly barred on the facts stated in the plaint itself, the plaint is liable to be rejected. Again, in Hardesh Ores Pvt Ltd. Vs. Hede & Company (2007) 5 SCC614 it was held that plaint can be rejected on the ground of limitation where the suit appears from the statement in the plaint to be barred by any law which includes the law of limitation. Similarly, the Division Bench of this Court in Snowwhite Apparels Ltd. Vs. K.S.A. Technopak (I) Ltd. 121 (2005) DLT351 also held that if reading of the averments in the plaint would admittedly establish that the suit is barred by any law which would include the Limitation Act also, the plaint would have to be rejected. Reference in this

regard may be made to T. Arivandandam Vs. T.V. Satyapal (1977) 4 SCC467 laying down that the Court, if on a meaningful - not formal reading of the plaint, finds it to be manifestly vexatious and meritless in the sense of not disclosing clear right to sue, it should exercise its power under Order VII Rule 11 CPC and clever drafting creating an illusion of cause of action should be nipped in the bud so that bogus litigation can be shut down at the earliest stage. To the same effect are the judgments in ITC Ltd. Vs. Debt Recovery Appellate Tribunal (1998) 2 SCC70 and Azhar Hussain Vs. Rajiv Gandhi (1986) 1 SCC573 12. Part III of the Schedule to the Limitation Act, 1963 deals with Suits Relating to Declarations. Article 56 thereunder provides the limitation of three years for a suit to declare the forgery of an instrument issued or registered, commencing from the date when the issue or registration becomes known to the plaintiff. Article 58 also provides a limitation of three years for a suit to obtain any other declaration commencing from the date when the right to sue first accrues. Notice may also be taken of Article 59 under Part IV titled Suits Relating to Decrees and Instruments which provides limitation of three years for a suit to cancel or set aside an instrument or decree or for the rescission of a contract, commencing from the date when the facts entitling the plaintiff to have the instrument or decree cancelled or set aside or the contract rescinded first become known to the plaintiff.

13. We will first apply the aforesaid law to the suit insofar as for the relief of declaration of the relinquishment deed dated 18th December, 2003 as null and void because if the suit on the averments in the plaint for this relief is found to be barred by time, the respondent / plaintiff having by a registered deed relinquished his share in the estate of his father, irrespective of the finding on the Will, would not be entitled to claim any share therein and which is the consequential relief claimed in the suit.

14. Though we have already succinctly set out the contents of the plaint but since the language of the plaint is to be meaningfully read and interpreted, we deem it appropriate to set out herein below the relevant paragraphs of the plaint

8. That during the period of depression the defendant no.1, approached the plaintiff and apprised that the father of the plaintiff had executed and left a Will in

favour of the defendant no.1, whereby the defendant no.1 has been appointed as the sole executor of the Will of all moveable and immovable properties of Late Mr. S.P. Chibber. Since the plaintiff was suspicious of the document/ Will thus the plaintiff requested the defendant no.1 to show the copy of the said Will, however the defendant no.1 always made the excuses and represented that being the mother of the plaintiff it is now her responsibility to take care of the plaintiff and assured that the copy of the Will shall be given to the plaintiff and after all she is the mother of the plaintiff.

9. That the defendants being the step mother and brothers also showed their care and love towards the plaintiff and represented through phone calls that the defendant no.1 wants to sort out all the plaintiffs fathers estate i.e. estate of Late Mr. S.P. Chibber and wealth equitably amongst the plaintiff and the defendant no.2 and 3 and to achieve this the defendant no.1 further represented that the defendant no.1 has asked the defendant no.2 and 3 for executing a Relinquishment Deed in favour of the defendant No.1 i.e. Ms. Minu Chhibber, so that she can distribute the wealth of plaintiffs father equally and also asked the plaintiff to execute the document in favour of the defendant no.1 so that the defendant No.1 could protect the interest and distribute the property / wealth of the plaintiffs father equally. Believing on the representations of the defendants, the plaintiff agreed to sign the documents / Deed in favour of defendant No.1 and the defendants also represented that the lawyer of the defendants would prepare the Relinquishment Deed as per the above representations. Accordingly, the plaintiff signed a Relinquishment Deed prepared by the Lawyers of the defendants and without even reading it signed the same while acting blindly under loving spell of the plaintiffs step mother and brothers. The defendants also got the said relinquishment deed registered even without the presence and availability of the defendant No.1 as the same is required for getting the deed registered.

10. That thereafter on various occasions, the plaintiff requested the defendants to distribute the wealth and give the plaintiff the certified copy of the alleged Will of the plaintiffs father. Sometimes in the month of April, 2007 the defendants No.1 visited India and met the plaintiff and assured the complainant that defendant No.1 would distribute the property of the plaintiffs father and also give to the plaintiff the

copy of the Will. Further in the month of May, 2007 the defendant No.2- Sirv Parvesh Chhibber visited India and also assured the plaintiff that the defendant No.1 will be going to provide the certified copy of the Will to the plaintiff.

11. That recently the plaintiff came to know that one of the property i.e. Property No.R-1, Nehru Enclave, New Delhi owned by the plaintiffs father has been put up on sale. On coming to know about the above, the plaintiff sought to verify the property records by seeking inspection at the Property Tax Office of Municipal Corporation of Delhi, Lajpat Nagar, Delhi, and while inspecting the records of the Municipal Corporation of Delhi, the plaintiff was shocked to note that the defendant No.1 in collusion with others got the aforesaid property mutated in favour of defendant no.1 by employing / using the Will dated 16.05.1993. While going through the Will, the plaintiff realized that the signatures of the plaintiffs father in the Will are forged and the defendants have used the forged Will and deposited the same with the Department. The forged signatures of the plaintiffs father can be judged by the naked eye as there are various discrepancies and does not match with the admitted signatures of the plaintiffs father i.e. the plaintiffs father signature on General Power of Attorney executed in February, 1993, an application addressed by the plaintiffs father to M.T.N.L. for telephone connection and a cheque payable to office of M.C.D. wherein the writing of the father of the plaintiff is available. The suspicion of the forgery of the Will is further strengthened from the point that the alleged Will was executed at London but the address is given of Nepal.

13. That thereafter the plaintiff further came to know that the defendants have used the said forged Will and also converted the title of property owned by the plaintiffs father at London i.e. Flat no.3, 55 Portland Place, London...

15. That now it has been clear that the above said defendants in conspiracy with each other have made false representation and believing on the representation of the defendants the plaintiff entrusted the defendants with the Relinquishment Deed, but the defendants didnt use the deed for which it was entrusted to the defendants and they dishonestly misappropriated the deed entrusted to them with the dishonest intention and committed the offence under Penal Law....

24. That the cause of action to institute the present suit arose in favour of the plaintiff and against the defendant when the plaintiff came to know that one the property i.e. property No.R-1, Nehru Enclave, New Delhi owned by father of the plaintiff has been put on sale by defendant No.1, the cause of action further arose in favour of the plaintiff and against the defendants when upon coming to know about the sale of the aforesaid property the plaintiff got inspected the records of M.C.D. at Lajpat Nagar, New Delhi and during inspection it was found that the aforesaid property got mutated in favour of the defendant No.1 by using the forged Will dated 16 th May, 1993 purportedly executed by the father of the plaintiff, the cause of action further arose in favour of the plaintiff and against the defendants on the very same day when plaintiff discovered the Will purportedly dated 16.05.1993 allegedly executed by the father of plaintiff, the cause of action further arose in favour of the plaintiff and against the defendants when the plaintiff got examined the signatures appended on the Will with admitted signatures of father of plaintiff on the GPA executed in February, 1993 and application addressed by father of the plaintiff to the MTNL and where upon the handwriting expert has given opined that the signatures on the Will dated 16.5.93 are forged and fabricated and does not match with the admitted signatures of the father of plaintiff, the cause of action further arose in favour of the plaintiff and against the defendants when the counsel for the plaintiff i.e. M/s Shams Khwaja and Associates, Advocates had visited London to verify the truthfulness of the Will and appeared before District Courts at London and during proceedings got verified the signatures of the plaintiffs father on Will from admitted documents and wherein the handwriting expert in London had concluded that signatures on the alleged Will does not match in all probability with Will dated 16.05.1993, the cause of action further arose in favour of the plaintiff and against the defendants when the defendants breached the trust of the plaintiff and converted the property of the plaintiff father in the name of defendant No.1 and pursuant to which FIR bearing No.119/10 was registered by EOW Cell of Delhi Police, the cause of action further arose in favour of the plaintiff and against the defendants recently when the defendant No.1 put the property for sale, the cause of action is still continue and subsistence as defendants are acting most illegal and unlawful manner thus the present suit.

15. From the aforesaid, the following can be culled out:(I) that the respondent / plaintiff immediately after the demise of Mr. S.P. Chibber on 24th July, 2003, was informed of Mr. S.P. Chibber having left a Will bequeathing his entire estate to the appellant / defendant no.1 and particularly to the exclusion of the respondent / plaintiff; (II) that the respondent / plaintiff was aware of the nature of the deed which the appellants / defendants were asking him to execute i.e. relinquishing his share in the estate of Mr. S.P. Chibber in favour of the appellant / defendant no.1 - once the respondent / plaintiff admitted of such knowledge, it matters not whether he signed it without reading; (III) that the respondent / plaintiff claims to have signed the relinquishment deed on the representation of the appellants / defendants that the appellant / defendant no.1 after becoming the sole owner of the estate of Mr. S.P. Chibber, on the basis of relinquishment deeds executed not only by the respondent / plaintiff but also by the appellants / defendants no.2&3, would distribute the same equitably between the respondent / plaintiff and the appellants / defendants no.2&3.

16. We have not been able to decipher as to from where the learned Single Judge in the impugned order has held that it is the case of the respondent / plaintiff that the appellants / defendants no.1 to 3 had obtained his signatures on some papers representing that they were required for proper distribution of the assets of Mr. S.P. Chibber and the respondent / plaintiff only subsequently came to know that his such signatures have been used to his detriment. The same is clearly not the case pleaded neither in the plaint nor in the replication. On the contrary the respondent/plaintiff has expressly pleaded having been informed immediately after the demise of Mr. S.P. Chibber that Mr. S.P. Chibber had left a Will bequeathing his entire estate to the appellant/defendant No.1 and having agreed to otherwise also relinquish his share in the estate in favour of the appellant/defendant no.1, making the appellant/defendant no.1 sole owner thereof. His only case is that he agreed to so relinquish his share on the representation that the appellant/defendant no.1 after becoming sole owner will distribute the same equitably between the respondent/plaintiff and the appellants/defendants No.2 and 3 and which representation subsequently turned out to be false.

17. Though undoubtedly the consent to an agreement obtained by misrepresentation makes the agreement voidable under Section 19 of the Indian Contract Act, 1872 (Contract Act) and the consent to an agreement caused by undue influence makes the same voidable under Section 19A of the Contract Act but what has to be seen is whether on the pleadings aforesaid, a case of misrepresentation or undue influence is made out.

18. Section 16 of the Contract Act provides that a contract is induced by undue influence where the relationship between the parties is such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other. Section 18 defines misrepresentation as positive assertion of that which is not true, to mislead the other to make a mistake as to the substance of the agreement.

19. We are unable to find any pleading in the plaint, of the respondent / plaintiff having executed the relinquishment deed under undue influence of the appellants / defendants or any of them or, of any of them having executed the relinquishment deed by misrepresenting to the respondent / plaintiff or of the appellants / defendants or any of them having fraudulently induced the respondent / plaintiff to execute the relinquishment deed. On the contrary, the plea of the respondent / plaintiff is of the appellant / defendant no.1 immediately after the demise of Mr. S.P. Chibber having informed the respondent / plaintiff of Mr. S.P. Chibber having left a Will of all his moveable and immoveable properties in favour of the appellant / defendant no.1; the said Will being however not shown to the respondent / plaintiff; of the appellant / defendant no.1 having represented to the respondent / plaintiff that she had asked appellants / defendants no.2&3 to execute a relinquishment deed in her favour so she can distribute wealth of Mr. S.P. Chibber equally and having asked the respondent / plaintiff to execute a relinquishment deed; the said relinquishment deed being got prepared by the appellants / defendants and the respondent / plaintiff having signed it without reading under the loving spell of his step mother and step brothers; the appellant / defendant no.1 however not having so distributed the estate of Mr. S.P. Chibber.

20. What has emerged is that there indeed is a Will of Mr. S.P. Chibber bequeathing all his moveable and immoveable properties to the appellant / defendant no.1. The only plea of the respondent / plaintiff is that he saw the said Will just prior to the institution of the suit and realized that the signatures of Mr. S.P. Chibber thereon are forged. The said plea in our view does not amount to a plea of misrepresentation. The respondent / plaintiff immediately after the demise of Mr. S.P. Chibber was told that there was a Will of Mr. S.P. Chibber and under which he had been excluded from any share in the estate. It was open to the respondent / plaintiff at that stage to, if doubted the same, procure the said Will. It has been held in Kamal Kant Paliwal Vs. Smt. Prakash Devi Paliwal AIR1976 Raj 79 followed by this Court in URI Civil Contractors AB Vs. Pampa Mukherjee 56 (1994) DLT608 that if a party alleging fraud had the means to know the facts, he cannot claim to have been defrauded even if false statement was made. As far as the plea of undue influence is concerned, the only plea is of the respondent / plaintiff being then in depression and / or under the loving spell of his step mother and step brothers. It is however the undisputed position that Mr. S.P. Chibber for 35 years prior to his demise was residing in London with the appellants / defendants while the respondent plaintiff was living in India serving in the Indian Army from which he has retired from the rank of Lieutenant Colonel. The respondent/plaintiff as per the age disclosed in the affidavit filed in the suit, at the time of demise of Mr. S.P. Chibber, was 53 years of age. There is no plea, either express or inferable, of the appellants/defendants in the said circumstances being in the position to dominate the will of or to obtain an unfair advantage over the respondent/plaintiff. Though a parent and / or a sibling may in certain circumstances be said to be in such a position but not in the said facts. The Supreme Court in Subhash Chandra Das Mushib Vs. Ganga Prosad Das Mushib AIR 1967 SC878 held that merely because the parties were nearly related to each other, no plea of undue influence can arise. Moreover the representation made has not turned out to be false. There indeed was a Will of Mr. S.P. Chibber of which probate was applied for and obtained in a foreign Court soon after the death of Mr. S.P. Chibber. Moreover, the demand, pleaded to have been made by the appellant / defendant no.1 on the respondent / plaintiff, was for execution of relinquishment deed, which is executed by one of the heirs of a deceased giving

up his / her share of inheritance, thereby enlarging the others share. The existence of the Will of the deceased is not a prerequisite for such a relinquishment. The respondent / plaintiff in the relinquishment deed admittedly executed by him also has not referred to any such Will. In fact the said relinquishment deed proceeds on the premise that there is no Will.

21. The other plea, of the respondent / plaintiff having executed the relinquishment deed on the representation of the appellant / defendant no.1 that she will distribute the estate equitably, also fails to meet the test of misrepresentation or fraud. There is no plea of the respondent / plaintiff at the time of having made the said representation having never intended to distribute the said estate. Moreover, the said representation even if any, at best constituted the consideration for execution of the relinquishment deed. The remedy if any of the respondent / plaintiff, for the refusal of the appellant / defendant no.1 to fulfill her part of the contract, of distributing the estate, was to seek specific performance thereof and which the respondent / plaintiff failed to claim. Mere failure of consideration does not amount to fraud. The Supreme Court in *Amteshwar Anand Vs. Virender Mohan Singh* (2006) 1 SCC148 held that mere non-payment is certainly not supportive of a ground for setting aside, in that case a decree, on the basis of an allegation of fraud. This Court also, in *Vibha Mehta Vs. Hotel Marina* MANU/DE/4951/2012 and appeal whereagainst was dismissed by the Division Bench of this Court vide judgment reported in MANU/DE/0994/2014 (SLP(C) No.20124/2014 arising therefrom was also dismissed on 19th August, 2014) held that a plea of nonpayment of compromise amount, did not amount to a plea of fraud.

22. We find the Division Bench of the High Court of Madhya Pradesh in *State of Madhya Pradesh Vs. M. Hassonjee* AIR 1957 MP135 to have also held that even if the Government at the time of entering into the contract was contemplating a change in policy and as per which change, the rates payable under the contract would have stood considerably lowered but subsequently gave up the said idea, the same does not amount to misrepresentation about any of the material terms of the contract which were clear and when the contract was entered into voluntarily with full realization about its implications. It was observed that the reasons which impelled the Government to demand higher rates may have become non-existent

at a subsequent date but that would not affect any of the terms of the contract. It was accordingly held that the contract could not be said to have become void on account of having been induced by misrepresentation that there was going to be a change in rates. Applying the said principle to the facts of the present case, even if the appellant / defendant no.1 had at the time of or before the respondent / plaintiff executed the Relinquishment Deed informed the respondent / plaintiff of her intention to distribute the property of Mr. S.P. Chibber equally between the appellant / defendants no.2&3 and the respondent / plaintiff, and subsequently changed the said intention, the same would not amount to misrepresentation so as to make the Relinquishment Deed, admittedly executed and got registered by the respondent / plaintiff, void. The Supreme Court in *Kuppuswamy Chettiar Vs. A.S.P.A. Arumugam Chettiar* AIR 1967 SC1395 held the plea of misrepresentation to be an afterthought when the plaintiff was well aware of the nature of the document when he executed it and when he himself has acted in consonance therewith.

23. The matter can be looked at from yet another angle. Section 91 of the Indian Evidence Act, 1872 inter alia stipulates that where the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to a form of document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, except the document itself. Therefore if there is a Sale Deed executed and registered in respect of an immovable property, the registration whereof is compulsory under the law, neither party can claim that the terms of the sale such as the consideration or the nature of transaction / disposition is in fact different from that contained in the document itself. The Relinquishment Deed in the present case does not contain any term that the same was being executed in consideration of the promise of the appellant / defendant no.1 to subsequently distribute the estate of Mr. S.P. Chibber equally between the respondent / plaintiff and the appellants / defendants no.1&2. On the contrary, the same records the respondent / plaintiff to have voluntarily of his own free will decided to relinquish his rights, title and interest in the entire estate of his father in favour of the appellant / defendant no.1. The terms of the said Relinquishment Deed clearly record that as of the date of execution thereof, the respondent / plaintiff was left with no claims or interest in the movable as well as immovable

properties left by his father Mr. S.P. Chibber. The terms on which the share of the respondent / plaintiff in the property was relinquished in favour of the appellant / defendant no.1 having been so set out in the registered Relinquishment Deed, in view of the bar contained in Section 91 of the Indian Evidence Act, it is not open to the respondent / plaintiff to claim that the Relinquishment Deed was executed for the consideration now alleged in the suit. The terms of the Relinquishment Deed completely ruled out the so-called understanding as pleaded by the respondent / plaintiff in the plaint. Section 92 of the Indian Evidence Act inter alia provides that where the terms of a grant or other disposition of property have been proved according to Section 91 (we may note that the execution and registration of the Relinquishment Deed is not disputed by the respondent / plaintiff) no evidence of any oral agreement or statement shall be admitted, as between the parties to such instrument for the purpose of contradicting, varying, adding to, or subtracting from its terms. The respondent / plaintiff by the case made out in the plaint is making a claim which clearly contradicts and varies the terms of the Relinquishment Deed and which is not permissible. It is not the case of the respondent / plaintiff that when he executed the Relinquishment Deed, he did not know that it is a Relinquishment Deed which he is executing. It is not respondent / plaintiff's case that he is uneducated or executed the document under any duress or coercion. The respondent / plaintiff knew that he was executing a Relinquishment Deed and in our opinion, it is now not open to him to claim that the said Relinquishment Deed is hit by fraud on account of the understanding between the respondent / plaintiff and the appellant / defendant no.1 being contrary to the written terms of the said Relinquishment Deed. The spirit and purpose of enacting Sections 91 and 92 of the Indian Evidence Act is to render the written contract, grant or other disposition, the sole repository of the terms contained therein. Reliance if any required in this regard can be placed on Roop Kumar Vs. Mohan Thedani (2003) 6 SCC595 Sparsh Builders Pvt. Ltd. Vs. Maharishi Ayurveda Products Pvt. Ltd. 163 (2009) DLT411 Krishi Utpadan Mandi Samiti Sahaswan Vs. Bipin Kumar 2004 (2) SCC283 and on Abhey Dewan Vs. Manoj Sethi 202 (2013) DLT392 24. We therefore hold that no triable issue arises on the pleas of the respondent / plaintiff of the registered Relinquishment Deed being voidable and the suit claiming the said relief is also barred by time.

25. Though in view of the above, the need to examine whether the suit insofar as for the relief of declaration of the Will of Mr. S.P. Chibber is time barred, does not arise but in our view the suit for the said relief also is barred by time. The respondent / plaintiff was admittedly told of the said Will immediately after the death of Mr. S.P. Chibber.

26. Once the appellant / defendant no.1 is admitted to have disclosed to the respondent / plaintiff of the Will of Mr. S.P. Chibber in favour of appellant / defendant no.1 and to the exclusion of the respondent / plaintiff, it matters not whether the Will was shown to the respondent / plaintiff or not. A Single Judge of this Court in Satya Prakash Gupta Vs. Vikas Gupta MANU/DE/2042/2010 held that where the plaintiff was aware of the existence of the document qua which the declaration of forgery was claimed, limitation of 3 years under Article 56 would begin to run and the plea of the plaintiff of not knowing of the exact documents would be of no avail. RFA (OS) No.23/2010 titled Satya Prakash Gupta Vs. Vikas Gupta preferred thereagainst was dismissed, again emphasizing knowledge of existence of documents and observing that rules of limitation are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly and those who sleep upon their claims should not be assisted by the courts. If the respondent / plaintiff was interested in contesting the said Will, the respondent / plaintiff ought to have taken steps within the prescribed period of limitation for inspection of the said Will. The respondent / plaintiff cannot be permitted in law to so sit pretty and at his whims and fancy at any time choose to challenge the said Will. The same if permitted would lead to titles in immovable property being never perfected at any time. We are therefore of the view that the suit insofar as for declaration of the Will as forged is also barred by time.

27. Once the suit for the said relief is held to be barred by time, the question of the respondent / plaintiff being entitled to the relief of partition or possession of 1/4th share of property No.R-1, Nehru Enclave, New Delhi does not arise.

28. For the sake of completing the record, we may also deal with yet another ground taken for rejection of the plaint, of the suit for declaration of the probated Will as fraud being not maintainable. The appellants / defendants in this regard

relied on Section 41 of the Evidence Act.

29. The probate on the basis whereof the said plea has been taken has been granted not by any Court in India but by foreign Court. However for advantage of such a foreign probate to be taken, the provision of Section 228 of the Indian Succession Act, 1925 has to be complied with i.e. of producing a properly authenticated copy of the Will and obtaining letters of administration thereof. The said procedure has admittedly not been followed. The reliance placed on Section 41 of the Indian Evidence Act is misconceived. The title which the Will and the probate confer and which is rendered relevant evidence under Section 41 of the Indian Evidence Act is given effect to by the provision in Section 228 of the Indian Succession Act and on the production of the English probate, what might be termed as ancillary probate is directed to be granted with the Will annexed to enable such executors to assert their rights to the estate of the deceased in India. A very fruitful discussion in this regard is to be found in an old judgment of the High Court of Madras in Blackwood and Sons Ltd. Vs. A.N. Parasuraman AIR1959 Madras 410. There is thus no merit in the said plea of the appellants / defendants for rejection of the plaint.

30. In view of the discussions hereinabove, the appeal is allowed and the plaint in CS(OS) No.2521/2010 filed by the respondent / plaintiff is rejected under Order VII Rule 11 of the CPC. RAJIV SAHAI ENDLAW, J CHIEF JUSTICE SEPTEMBER29 2014 gsr

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