

Sanjay Kaushish Vs. D.C. Kaushish and Others

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Court : Delhi

Decided On : Sep-10-1991

Reported in : AIR1992Delhi118; 1992(1)ARBLR242(Delhi); 48(1992)DLT414

Judge : P.K. Bahri, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 47 - Order 7, Rule 11 - Order 10, Rule 1 and Order 32; [Arbitration Act, 1940](#) - Sections 17, 20 and 32; [Specific Relief Act, 1963](#) - Sections 31 and 42; [Limitation Act, 1963](#) - Articles 59, 91 and 113;

Appeal No. : I.As. 3888 and 5800 of 1986 in Suit No. 1176 of 1986

Appellant : Sanjay Kaushish

Respondent : D.C. Kaushish and Others

Advocate for Def. : Kapil Sibal, ; N.S. Vashisht, ; Harish Salve, ;

Advocate for Pet/Ap. : L.R. Gupta and; Amit S. Chandha, Sr. Advs

Judgement :

ORDER

1. Vide this Order I shall decide the aforesaid two applications moved by the defendants seeking rejection of the plaint under Order VII Rule I I of the Code of Civil Procedure.

2. Elaborate oral arguments have been addressed by counsel for the plaintiff. Counsel for the applicants had addressed very brief oral arguments, however, both the parties have filed written arguments. I have gone through them thoroughly.

3. Facts of the case as averred by the plaintiff, in brief, are that his late grandfather Pt. Lakshmi Chandra constituted a Joint Hindu Family with his two sons, namely, Pratap Chand and D. C. Kaushish defendant No. 1 and owned and possessed moveable and immoveable properties. The immoveable properties are described in Schedule A to the plaint. Pratap Chand is stated to have died issueless in 1916. Pt. Lakshmi Chand had died on February 10, 1934. D. C. Kaushish defendant No. 1 then became Karta of the Joint Hindu Undivided Family comprising of himself, his wife defendant No. 4, and his three sons, namely, Ajay Kaushish-defendant No. 2 and Uday Kaushish-defendant No. 3 and the plaintiff. It is the case of the plaintiff that defendant No. 1 as Karta of Hindu Undivided Family (for short the 'HUF') managed and possessed the HUF properties together with all acquisitions thereof and in the year 1958 a Cinema Building was constructed on the HUF plot which stood in the name of defendant No. 1 and by 1961 the Cinema Building was completed and business of exhibiting the films in the said Cinema commenced and certain other blocks known as 'Warehouse Block' and other constructions were also raised on the said plot in the year 1962 and there was some construction which preexisted on the said plot and plan of the said plot with its buildings has been filed along with the plaint.

4. It is further averred that in the year 1947 defendant No. 1 as Karta of HUF had brought into existence a private limited company under the name and style of M/s. Asian Art Printers (P) Ltd. with the capital and funds of the HUF and in 1956 only defendant No. 4 and defendant No. 1 were the directors of the said company and prior to it one close friend of defendant No. 1 Dr. Surendra Singh was taken as Director having been given a token one share of Rs. 10/- in the said company. The said company carried on the business of printing from the ground floor of the Press Block in the same building. Till 1971 defendant No. 1 and defendant No. 4 continued to be only shareholders in the said company although in reality the said company was the asset of the HUF.

5. It is averred that the cinema business proved very successful and huge profits were yielded from the said business due to prudent management and intelligent control and guidance of defendant No. 1 and the income went up to Rs. 4,00,000/- per annum. It is pleaded that this huge income attracted a levy of huge income-tax, wealth-tax and other taxes including house-tax and other charges and cases and in order to avoid and/or reduce the incidence of tax liabilities etc. which were then livable and being levied on the HUF, defendant No. 1 devised a scheme of effecting a colourable and sham partition of the assets and properties including businesses and he got filed on December 22, 1962, a collusive and a sham suit for partition. Shri Ajay Kaushish, who was then minor, was shown to be represented by next friend Shri Shiv Narain Vashisht, sister's husband of defendant No. 1, and plaintiff and the other minor son of defendant No. 1 were shown represented through their mother-defendant No. 4.

6. Plaintiff pleads that certain false averments were made in the said plaint that Karta of the HUF-defendant No. 1 had mismanaged the HUF properties and businesses and had committed numerous acts of waste and thus, it was not in the interest of the minor plaintiff to remain joint and a relief of partition of the properties and businesses was sought.

7. It is averred that as per pre-planned scheme, collusive written statements were filed by the defendants and the moveable properties and assets of HUF were shown by defendant No. 1 which were required to be partitioned and thereafter a petition under Section 21 of the Arbitration Act was filed and an order for reference of the disputes was obtained from the court for decision by arbitrator and an arbitrator, who is a close relation of the parties, gave the award to which no objections were filed and the award was got made a rule of the court.

8. So, according to the plaintiff, all the steps have been taken with the sole object of reducing the tax and other liabilities of the family and as a matter of fact, all along the HUF properties and businesses continued to be joint and no partition by metes and bounds or otherwise took place and as a matter of fact, the decree was not given effect to as it was never intended to be given effect to amongst the parties and had been procured only for the purposes of reducing the tax liabilities,

and then the plaintiff has given details in paras 22 to 24 showing how different steps were taken with the sole object of reducing the income-tax, wealth-tax and property-tax liabilities of the HUF properties and businesses. It is not necessary to reproduce these details for the purpose of deciding the present applications. It is then averred by the plaintiff that all relevant parties knew and understood and believed that all the properties and assets and the businesses would continue to belong to HUF and parties continued to hold the said properties and carry on the said businesses as HUF and it is only in or about the year 1984 that defendant No. 2 wanted to grab the HUF properties, assets and businesses to the exclusion of the plaintiff and ultimately to exclude the other members of the family, had started going in the direction of gaining complete control and management of the family company M/s. Asian Art Printers(p) Ltd. with a mala fide intention to appropriate the earnings of Sheila Theatre, other assets and businesses of the family to himself. With this mala fide intention, defendant No. 2,' being the eldest son having a great influence on defendant No. 1 and as plaintiff had contracted a love marriage contrary to the wishes of defendant No. 1, taking undue advantage of the feelings and sentiments of defendant No. 1 who had become unhappy with the plaintiff, instigated defendant No. 1 to exclude the plaintiff from the HUF assets and businesses.

9. Then, plaintiff has referred to clandestine activity of the defendants in increasing the share capital of M/s. Asian Art Printers(P) Ltd. without the knowledge of the plaintiff and with the object of taking full control of the business of that company and then facts in detail have been given as to how the defendants have been making efforts to exclude the plaintiff from HUF properties and businesses pleading that fake and fictitious resolutions have been passed changing the shareholding of the said company with a view to reduce the plaintiff to a minority in the said company. The plaintiff has also pleaded that as he had a lot of regard for his father defendant No. 1 who had brought him up and had given him high education and had also sent him abroad for having higher training and education, he has been signing documents without reading their contents and sometimes blank documents to enable defendant No. 1 to run the HUF business and manage the HUF properties and that it is only on December 14, 1984, that he was shocked to receive a letter from defendant No. 1 requiring him to leave the HUF properties.

10. Plaintiff has given details about the affairs of the said company but again, I need not reproduce those details. Suffice it to mention that the case of the plaintiff is that the HUF continues to exist and the properties of the HUF and business of the HUF remained intact and were always treated as such by the parties and only paper, bogus and sham decree had been obtained showing the partition of the properties amongst the HUF members solely for the purpose of obtaining tax benefits but in reality the properties and businesses remained joint of the family at all relevant times.

11. So, the plaintiff sought a decree for partition of the said assets, properties and businesses of the HUF for separating his share and for getting possession of his share and for rendition of accounts and for recovery of the amount which may be found due to him on rendition of accounts and by permanent injunction restraining the defendants from excluding and ousting the plaintiff from the use, occupation and enjoyment of the HUF properties and from participation in the businesses of the HUF and also restraining the defendants from raising loans and advances from third parties or creating any encumbrances, charges or liens on the said properties and restraining them from transferring, alienating, disposing or parting with possession any of those properties and assets and from raising any construction on plot Nos. 8601 to 8630 situated on Deshbandhu Gupta Road, New Delhi or from making any booking of space in the proposed multistoreyed building and receiving any advances from the prospective buyers or from, transferring any portions of the said property to any other person.

12. It appears that later on when the arguments were being heard in these applications, as a plea was sought to be raised by the defendants that the suit was not maintainable as no relief has been sought for cancellation of the decree by which the award partitioning the HUF properties and businesses was made a rule of the Court, the plaintiff amended the plaint and claimed relief that in the event the Court was to hold that it was incumbent upon the plaintiff to seek any relief regarding the void decree, the plaintiff prays that the said decree be declared void, sham, paper transaction and bogus and thus, was not binding on the parties. Later on, the plaintiff again sought amendment of the plaint with a view to incorporate certain admissions made by defendant No. 1 in various proceedings showing that

the properties and businesses were always held out to be HUF assets even subsequent to the passing of the decree.

13. The learned counsel for the defendants-applicants had urged that in view of the fact that a valid decree has been passed by which the award effecting partition of the properties amongst the family members had been made a rule of the Court, the present suit is not at all maintainable and the challenge to the said decree by the plaintiff is totally misconceived and in view of provisions of Sections 32 and 33 of the Arbitration Act, the suit is not at all maintainable. It has been then urged that as partition of the HUF properties and businesses has already taken place by virtue of the award which has been made a rule of the Court the suit seeking the same relief of partition is not maintainable. It has been also argued that the suit, is also barred by limitation inasmuch as it has been filed in 1986 while the decree was passed in 1963.

14. The learned counsel for the plaintiff, on the other hand, has contended that keeping in view the averments made in the plaint, it is quite clear that the plaint discloses cause of action and the decree which has been obtained was void as being merely a paper, sham and bogus (decree) which has been obtained only to defraud the authorities in order to pay less taxes and other duties and the plaintiff has a right to ignore the said decree and there was no need for the plaintiff to seek any relief regarding the void decree and that the HUF properties, assets and businesses continue to be joint at all relevant times and thus, the plaintiff has a right to seek partition of the same and the provisions of Sections 32 and 33 of the Arbitration Act are not applicable and the suit is within limitation having been instituted within three years of the accrual of cause of action to the plaintiff for filing the present suit seeking partition of the said properties.

15. The learned counsel for the plaintiff has also contended that without framing issues the questions being raised by the defendants cannot be decided. He has argued that the question of limitation is always a mixed question of fact and law and unless and until the parties have led evidence, this question cannot be decided by this Court as preliminary point just on the basis of the averments made in the plaint.

16. It is true that in case from bare reading of the plaint and the admitted documents and the facts coming out in the statement of the plaintiff under Order X of the Code of Civil Procedure, the Court could come to the conclusion that the plaint does not disclose cause of action or the suit is barred by limitation or is not maintainable, the Court can decide the said points even without recording any evidence. [See Azhar Hussain v. Rajiv Gandhi, : [1986]2SCR782 and Hardwari Lal v. Kanwal Singh, : [1972]2SCR742].

17. In order to elucidate the facts the plaintiff was examined under Order X of the Code of Civil Procedure and he stated that only in 1985 he became aware (of) the partition decree based on the award and he had never himself appeared before the income-tax authorities in any matters and his father was looking after those matters and the family has derived benefits in taxation in filing returns with income-tax authorities based on partition decree and the tax incidence had gone down substantially because of filing of the tax returns with the tax authorities, based on the partition decree, by his father. It is stated by him that he was not aware of the quantum of benefits accruing to the family on that basis. He also stated when he was again examined on July 19, 1991, about the chartered accountants who were handling the income-tax and wealth-tax matters of the family and that his father was handling all the matters up to 1985 and since 1985 he had not filed any returns.

18. So, the plea taken by the plaintiff in the suit as well as in the facts disclosed by him while he was examined under Order X of the Code of Civil Procedure is that his fatherdefendant No. I had been handling all the affairs and he had only signed blank documents and some documents without reading them as he had full faith in and respect for his father and that partition decree was never given effect to and had been obtained only for purposes of getting the tax benefits and the properties always remained HUF properties.

19. There is a challenge to the decree by the learned counsel for the plaintiff, 'firstly, that it was sham and collusive decree; secondly, that the Court had not applied its mind to see whether the suit has been instituted on behalf of the minor for the benefit of the minor or whether the allegations that Karta had committed

acts of wastage stood proved or not. He has also contended that the award being not registered which was required to be compulsorily registered, thus, the decree passed on the basis of such an award is nullity. As prayed by learned counsel for the defendants, I had also called the file of the suit in which the decree was passed.

20. It is evident that the award is scribed on the stamp paper and all legal steps have been taken before the decree was obtained. As the award had been given by an arbitrator who was appointed by the Court in a suit, the award was not required to be registered compulsorily. (See Suit No. 316-A/72, Hari Shankar Bhargava v. Smt. Mohan Devi, decided on August 8, 1974*, by Avadh Behari, J).

21. The short questions which arise for decision are whether it can be said that the partition had in fact taken place or not without recording any evidence and whether the said decree was obtained only for the purposes of obtaining tax benefits? It is the case of the plaintiff that in fact, no partition of the properties took place and the properties always were treated as HUF properties by the parties and they intended that those properties would continue to remain HUF properties despite the said decree being obtained. It is not necessary to express any considered view whether the decree is a nullity or not on account of the allegations made by the plaintiff that it was in violation of the provisions of Order 32 of the Code of Civil Procedure as Court had not passed any speaking order showing that the partition is in the interest of minor. The present application to be decided without going into that question.

22. The case of the plaintiff clearly is that a fraud has been practiced in obtaining the decree showing the partition of the properties as the said decree had been obtained when he was a minor and he had come to know about the decree only in 1984 and that in fact, no partition of the properties ever took place actually. As such averments have been made in the plaint, the question is whether it can be said that the suit for partition is not maintainable because the decree has been already obtained in that respect.

23. Counsel for the plaintiff has cited Syed Shah Gulam Ghouse Mohiuddin v. Syed Shah Ahmad Mohiuddin Kamisul Gadri (dead) by his L.Rs, : [1971]3SCR734

. Facts of this case, in brief, are that Shah Abdul Rahim died leaving four sons and two daughters and had left behind large moveable and immoveable properties. Sons and the daughters appointed arbitrators to partition the Matrooka properties and then the arbitrators made the award partitioning the properties and on August 13, 1908, the decree was obtained confirming the award. The suit was filed for setting aside of the decree and for partition of the properties in the year 1941. Suit was dismissed. In appeal the suit was decreed and in further appeal to the High Court the order of the first Appellate Court was set aside. In the said suit also the appellant was a minor at the time the matter was referred for arbitration and the award was given and made a rule of the Court. The award was challenged in the suit by the appellant on the ground that no lawful guardian on behalf of the appellant was appointed to protect and represent his rights and interests and that award was also bad as certain properties were not of the type as indicated in the award. The trial Court had given a finding that the award and the decree had been obtained by fraud. It was also held that the suit was not barred by limitation as the appellant came to know about the real state of affairs only on August 13, 1938. Although in the said case the Supreme Court held that the arbitration proceedings were void by reason of lack of legal guardian of the appellant to enter into a compromise but it was held that the decree had been obtained by practicing fraud and the Supreme Court quoted the principle taken out from the words of Westbury, L. C. in *Rolfe v. Gregory*, (1865) 4 De GJ Sm. 576 as follows:

'When the remedy is given on the ground of fraud, it is governed by this important principle that the right of the party defrauded is not affected by lapse of time, for generally speaking by anything done or omitted to be done so long as he remains, without any fault of his own, in ignorance of the fraud that has been committed.'

On facts the Supreme Court found that the appellant had been kept out of knowledge of the true character of the properties until the year 1927 and even after that the appellant had no knowledge of the true character of the properties or of ouster or adverse possession' of the other party. It was held that the cause of action for seeking partition of the HUF properties is said to be a 'perpetually recurring one'. The Supreme Court held that the suit for partition was maintainable and was within time.

24. In the present case also, the averments made by the plaintiff are that defendant No. 1, his father, had collusively got filed the suit and had got the matter referred to the arbitrator who quickly gave the award showing partition of the properties which was got made a rule of the Court and it was all intended for obtaining the tax benefits and , the plaintiff was not aware of those facts till 1984 or so and the plaintiff had been signing various documents or papers at the behest of his father without knowing their contents and thus, he discovered the actual state of affairs when it was tried to oust him from the benefits of Joint HUF properties and thus, a cause of action arose for him to file the present suit in 1984. It is a question of fact to be decided after recording evidence whether in fact, the plaintiff remained ignorant about the said decree till 1984-85, as alleged by him, but for the purpose of deciding the present application the Court has to presume the facts stated in the plaint as correct. If that is so, it is not understandable as to how the plaintiff does not disclose cause of action and how the suit can be deemed to be barred on the basis of the decree already obtained which the plaintiff terms as sham, bogus one and mere paper transaction brought into existence to have the tax benefits only.

25. Counsel for the plaintiff next has placed reliance on *Mst. Rukmabai v. Lala Laxminarayan*, : [1960]2SCR253 . It is an important decision which has much bearing on the issues arising in this suit. The facts of the case, in brief, were that one Ramasahai and his eight sons and one cousin constituted HUF with Ramasahai acting as Manager. The said HUF carried on its ancestral family business of excise contracts. At the time of Ramasahai's death in 1897, the family though heavily indebted, had extensive properties located at various places. Certain members of the said HUF had died in between the period 1903 to 1940. However, in 1915 five family members, who were brothers, had executed a registered deed of relinquishment in favor of one Janki Prasad, member of the family. In that deed it was recited that the brother had become separated in 1898 by a deed of relinquishment of that date and as the said document was not registered, they were executing a fresh one confirming the earlier arrangement. Another brother of the family Govind Prasad executed a trust deed in favor of his nephew and his niece Rukhmabai, both of whom were minors at the relevant time. In that deed he asserted that he had become divided from his brothers under the

aforesaid two deeds of relinquishment, and had-created a trust in the sum of Rs. 15,000 / for the benefit of said minors and handed over the money to the trustees appointed there under. With a part of the said amount, a site was purchased in Nagpur and a building was constructed thereon.

26. In October 1929, Rukhmabai filed a suit against Chandanlal for partition of the said property and obtained a decree against him on January, 1934. An appeal was filed which was dismissed. Chandanlal was beneficiary under the trust along with Rukhmabai. After his death, the local commissioner tried to effect partition of the property by metes and bounds but he was obstructed by the other family members living in the house and then a suit was filed for declaration that the trust deed executed by Govind Prasad was a sham and a bogus document. It was the case of the plaintiff that the relinquishment deeds executed earlier were part of a scheme of fraud conceived by the members of the family to defraud the creditors. The plea of Rukhmabai was that in fact, there had taken place separation in the HUF and Govind Prasad had his own business and from out of his self acquisition had created the trust. The points arising for consideration were as to whether the house in question was the property of the joint family or the same was built up by Govind Prasad from his self acquisitions. The Supreme Court laid down that there is a presumption in Hindu Law that the family is joint and there can be division in status among the members of a Joint Hindu Family by defendant of shares which is technically called 'division in status', or an actual division among them by allotment of specific property to each one of them which is described as 'division by metes and bounds'. It was observed that a member need not receive any share in the joint estate but may renounce his interest therein; his renunciation merely extinguishes his interest in the estate but does not affect the status of the remaining members vis-a-vis the family property. It was held that a division in status can be effected by an unambiguous declaration to become divided from the others and that intention can be expressed by any process. It was further emphasized that though prima facie a document clearly expressing the intention to divide brings about a division in status, it is open to a party to prove that the said document was a sham or a nominal one not intended to be acted upon but was conceived and executed for an ulterior purpose. It was held that there is no presumption that any property, whether moveable or immoveable, held by a

member of a joint Hindu family, is joint family property and the burden lies upon the person who asserts that a particular property is joint family property to establish that fact. It was laid down that if it is proved that there was sufficient joint family nucleus from and out of which the said property could have been acquired, the burden shifts to the members of the family setting up the claim that it is his personal property to establish that the said property has been acquired without any assistance from the joint family property. After noticing the contents of the two relinquishment deeds the Supreme Court observed that if the same are not sham documents the same clearly brings about a division of status between all the members of the family. After analysing the other circumstances appearing in the case, the Supreme Court held, that the documents in question were not really intended to be a formal documents affecting the division between the parties. In the said case, evidence was also led that Govind Prasad had executed Wills which showed that he was treating some property as self acquisitions but the Supreme Court on examining the evidence held that there was no separation of the joint family. The evidentiary value of these documents must be rejected on the ground that there were further attempts on the part of the family to keep up the appearance consistent with the alleged partition. In para 29 of the judgment the Supreme Court summarised the position and held that there was no separation of the members of the family. All the members of the family continued to be joint and the family was doing business in different places and they had extensive properties and a fairly large income although they were heavily indebted and that the family was involved in debts in Ramasahai's life time and even after his death the position continued to be the same and various attempts were made to salvage the properties of the family and to keep both the moveable and immoveable properties not mortgaged from the reach of the creditors and the relinquishment deeds, innumerable mortgages, sale deeds and the trust deed were all executed as parts of the said scheme. So , it was held that the suit property was joint family property and the document of trust was held to be colourable and fictitious document which could not affect the said joint property. This judgment would be also relevant for deciding the question of limitation and also the question whether any relief of cancellation of document was required to be obtained along with the declaration that the said document was a void document as the same was only a

sham and nominal document because it was held in this case that no such consequential relief was required and on the point of limitation it was held that the residuary Article 120 of the Old Limitation Act would be applicable which gives six years period of limitation to be counted from the date the right to sue accrues and the right to sue was described as accruing only when the right is asserted and the same is controverted and there must be some unequivocal threat to infringe with the right by the opposite party against whom the suit is instituted. In the said case it was held that the right to sue accrued only when the Commissioner in execution of the decree visited the property on February 13, 1937, for effecting the partition by metes and bounds and the suit was held to be within limitation.

27. In the present case also the plaintiff has clearly made unequivocal averments that a scheme was brought into play by defendant No. 1 of showing the partition of the joint Hindu family properties and business on paper only for the consumption of revenue authorities to have reduction in the incidence of tax and in that way the filing of the suit for partition and getting the matter referred to an arbitrator and obtaining the award from the arbitrator and getting it made a rule of the Court was only for achieving the said purpose and the real intention of the members of the joint Hindu family was to continue to keep the properties and the businesses joint and the said award and the decree were all collusive, sham and nominal one and thus, were void. I have not been able to understand any difference between the facts which were being considered by the Supreme Court in the aforesaid case and the facts of the present case, except that in the said case no decree was obtained while in the present case, a decree has been obtained. I do not think that the legal effect in any manner in both the cases can be at variance.

28. Counsel for the plaintiff has then sought support from *Mudigowda Gowdappa Sankh v. Ramachandra Rev Gowda Sankh* (dead) by his L.Rs, : [1969]3SCR245 , in which it was held that it is now well established that an agreement between all the coparceners is not essential to the disruption of the joint family status, but a definite and unambiguous indication of the intention by one member to separate himself from the family and to enjoy his share in severalty will amount in law to a division of status. It is immaterial in such a case whether the other members assent or not. It was held that if, however, the expression of intention is a mere

pretence or a sham, there is in the eye of law no separation of the joint family status. In the cited case, a partition deed was executed on April 28, 1944, between members of the family. A plea was taken that the same was sham transaction and was not intended to be effective. After recording evidence the trial Court reached the conclusion that the partition deed was not a genuine one and it was effected for an ulterior purpose in order to defeat the rights of the widows in the joint family. That finding was affirmed in appeal by the High Court. It was sought to be urged before the Supreme Court that even though the partition deed was bogus there was in law severance of joint family status and the family could not continue to be joint after execution of the said partition deed. The Supreme Court' held that the expression of intention in the sham document was a mere pretence and in eye of law there was no separation of the joint family status.

29. In the present case also, it is urged by the learned counsel for the plaintiff that the various steps taken for showing partition of the properties and by transferring the business Shiela Theatre to a company of the family have been taken only for the consumption of the revenue authorities and there was no real intention of the family members for separating from the joint Hindu family. So, unless and until the evidence is taken on merits no final decision can be arrived at by the Court whether in fact, all those transactions were brought into existence only for the consumption of the revenue authorities while in fact, the properties and the businesses continues to be owned by the joint Hindu family and there was no expression of the intention to have separation from the joint family and thus, the joint family status continued to be in existence till the filing of the present suit.

30. There are a number of judgments cited by the learned counsel for the plaintiff where the documents were found to be sham documents and it was held that undivided status of the parties continued to remain in existence and properties remained joint. (See *Merla Ramanna v. Chelikani Jagannadha Rao*, , *Pandit Sri Chand v. Pandit Orn Prakash*, : AIR 1977 SC1823 and *Kalwa Devadattam v. Union of India*, : [1963]49ITR165(SC)). In the case of *Kalwa Devadattam* (supra), it was held that the continued management of the property by Karta since the alleged partition clearly supports the inference that the deed of partition was a nominal transaction which was never intended to be acted upon and was not given

effect to. It appears, in the said case, for recovering the arrears of income-tax from the joint Hindu family certain properties were attached and a suit was filed challenging the said attachment on the plea that a partition of the joint Hindu family properties had already taken place and thus, the properties which have been attached had come to the share of the plaintiff and were liable to be released from attachment. The suit was dismissed with the finding that the partition deed was a sham and a bogus transaction while the properties continued to be treated as joint Hindu family properties.

31. Counsel for the plaintiff also cited McDowell and Co. Ltd. v. Commercial Tax Officer, : [1985]154ITR148(SC) and Sunil Siddharthbhai v. Commr. of Income-tax, Ahmedabad, : [1985]156ITR509(SC) , wherein principles have been laid down that the tax authorities can go behind the documents to determine the true legal relations between the parties for imposing the proper taxes in accordance with law.

32. It is not for this Court to decide as to what should have been the incidence of tax on the properties to be determined by the revenue authorities. Suffice it to say that averments made in the plaint make it clear that the alleged award and the decree and other transactions detailed out in the plaint were under a scheme envisaged by defendant No. 1 for consumption of the revenue authorities to bring down the incidence of tax and other levies and the said purpose was achieved but the real intention of the members of the joint Hindu family was to treat these documents as sham, bogus and nominal and to continue to be joint in businesses and keep the properties also joint as before and in fact, the properties continued to be joint properties, so also the businesses.

33. The learned counsel for the defendants wanted me to draw an inference against the plaintiff pointing out that the plaintiff after becoming major somewhere in 1972 and till the filing of the suit had been signing various income-tax, wealth-tax returns and have been giving affidavits on the basis of the partition and the other transactions and thus, it does not lie in the mouth of the plaintiff now to assert that the award and the decree and the other transactions were mere bogus and paper transactions. It is to be remembered that the plaintiff has taken up the

plea in the plaint that he had been signing the documents when they *ere blank and at the behest of his father and such a plea cannot be brushed aside on mere inference that plaintiff after becoming major and after receiving high education would not have signed the documents blank without knowing their contents. It is also argued on behalf of the defendants that the plaintiff had also taken tax benefits on the basis of the said decree and the transactions and thus is estopped from challenging the said decree and the documents. The question is not whether the plaintiff has also enjoyed the reliefs in the taxation on account of execution of the said documents and the obtaining of the said decree, the question is whether the said documents and the earlier decree were sham and bogus and nominal ones only for the purpose of obtaining tax reliefs or whether, in fact, the parties effected the partition of the joint Hindu family properties and businesses? That question cannot be decided unless and until necessary issues are framed and parties are given an opportunity to lead evidence. For deciding whether the plaint discloses cause of action or not, the Court has to only see the averments in the plaint and the accompanying documents relied upon in the plaint and the facts elicited from the plaintiff by examining him under Order X of the Code of Civil Procedure. Keeping in view all this material, it cannot be said that plaint does not disclose cause of action.

34. Next question which arises for consideration is whether the plaintiff was legally bound to obtain any declaration in respect of the award and the decree and if so, whether the plaintiff was legally bound to seek any consequential relief of cancellation of the said award and the decree. Counsel for the plaintiff has contended that as the case of the plaintiff is that the said award and the decree were fictitious, sham, make believe and nominal documents and were brought into existence as a subterfuge designed to defraud the tax/revenue authorities and were not intended to be acted upon and thus, the same were not at all binding documents and straightway seek relief of partition as his case is that joint Hindu family properties and the businesses continued to be joint at all relevant times. In the alternative he has contended that the plaintiff could claim a relief for declaration which relief has been sought by the plaintiff by amending the plaint.

35. Counsel for the plaintiff has cited *Petherpermal Chetty v. Muniandy Servai*, (1908) 35 Cal 551 . Facts of this case, in brief, are that in order to defeat the claim of an equitable mortgage of certain property, the predecessor in title of the respondent and co-member with him of a joint Hindu family, executed on June 11, 1895, what purported to be a deed of sale of the property in favor of the predecessor in title of the appellant. The question which came up for decision was whether the said deed was bogus transaction or not? It was held by the Privy Council that there was nothing to prevent the plaintiff from repudiating the said document as being bogus and recovering possession of the property. It was also laid down that the deed being bogus it was unnecessary for the plaintiff to have it set aside as a preliminary to his obtaining possession of the property. It was held that Article 91 of the Old Limitation Act would not be applicable and Article 144 would govern the limitation.

36. Counsel for the plaintiff has also referred to Full Bench decision in *Narsagauda Savantgauda Patil v. Chawagauda Adgauda Patil* : AIR1918 Bom188 , in which also it was held that it is not necessary in the case of void deed to have it set aside or cancelled and if there is any other substantial relief available, the same can be prayed for and cancellation of such a deed be not actually necessary or merely ancillary to the granting of such a relief.

37. In *Fariduddin Alimad v. Murtaza Ali, Khan* AIR 1936 Oudh 67, -it was held that a suit for a mere declaration that a decree is absolutely illegal and void on certain grounds and is not binding on the plaintiffs is maintainable without any prayer for further relief.

38. In *Jamilennessa Khatun v. Ijjatennessa Khatun*, : AIR1929 Cal586 , it was laid down that Section 42 of the Specific Relief Act does not bar a declaratory suit declaring the previous decree in a partition suit throwing clouds on the rights of the plaintiffs as nullity. On this principle following judgments may be also seen: *Ma Mo v. Ma Set*, AIR 1926 Ran 71, *Mathura Singh v. Rama Rudra Prashad Sinha*, AIR 1936 Pat 231 and *Bulakram v. Ganga Bishun Chaudhuri*, AIR 1940 Pat 133. In the last case, it was held that a plaintiff can bring a suit for a declaration that a document is void without seeking its cancellation and the Court may in its

discretion, even if there is no prayer, order cancellation of the document.

39. Reference may be also made to *Kalu Ram v. Babu Lal*, : AIR1932 All485 , where a Full Bench of the said Court also held that a declaration seeking to avoid a mortgage deed on the ground that it was fictitious and a compromise on the ground of fraud and a decree on the ground of negligence and collusion of the guardian, is maintainable without seeking any further relief of cancellation of the said documents and the decree. [See also *B. Dattu Singh v. B. Chhakan Singh*, : AIR1930 All446 , *Khata Chinna Eswarareddi v. Kukkala Reddigari Venkatachelamma Reddi*, : AIR1954 Mad83 , *Dhondiram v. Bhagubai*, 1956 Hyderabad 118, *Syed Rasool v. Mohammad Moulana*, : AIR1977 Kant173].

40. Then reliance was placed by counsel for the plaintiff on *Vemareddi Ramagaghava Reddy v. Konduru Seshu Reddy*, : AIR 1967 SC436 . In this judgment the Supreme Court held that Section 42 of the Specific Relief Act is not exhaustive of the cases in which a declaratory decree may be made and the Courts have power to grant such a decree independently of the requirements of the section. In the said suit, a declaration was sought that compromise decree was not binding on the deity. It was held that such a suit is maintainable. Same principle was reiterated by the Supreme Court in *M/s. Supreme General Films Exchange Ltd. v. His Highness Maharaja Sir Brijnath Singhji Deo of Maihar*, : [1976]1SCR237 .

41. Counsel for the plaintiff also strongly placed reliance on *Pandit Sri Chand v. Pandit Om Prakash*, : AIR 1977 SC1823 . It is a short judgment. In this case a suit for partition was filed. The question which arose for decision was whether the - plaintiff, in fact, had relinquished his share by two deeds of relinquishment or not? The trial Court held that the plaintiff had executed the relinquishment deeds. The suit was dismissed. The High Court, however, set aside the said judgment and passed a decree for partition holding those deeds as sham documents. The Supreme Court affirmed the finding.

42. So, the learned counsel for the plaintiff argues that in this suit seeking substantive relief of partition the plaintiff need not seek any-declaration for avoiding the void award and decree.

43. Be that as it may, in my view, the well settled principle of law is that if a particular document or decree is void the person affected by the said document or decree can very well ignore the same and file a suit seeking substantive relief which may be available to him without seeking any declaration that the said decree or document is void or any consequential relief of cancellation of the same.

44. The next question is of limitation. It is evident that if averments in the plaint are to be taken into consideration, then the decree and the other transactions are to be treated as void, sham and fictitious documents. therefore, it was not necessary for the plaintiff to have sought any declaration for avoiding the said document and the decree and plaintiff could file a suit claiming substantive relief which is a relief of partition and other ancillary reliefs flowing from the same. The limitation for filing the suit for partition starts from the date the right to sue accrues. The right to sue could accrue when the said right is threatened by the opposite side. The residuary Article 113 of the Limitation Act would apply and in the present case, according to the plaintiff, the said right to sue accrued to him when he was tried to be ousted from the joint Hindu family businesses and properties which occurred in 1985 and the suit filed in the year 1986 is within time. The final decision on the point of limitation cannot be given at this stage. If we treat only the averments made in the plaint as correct, then the suit appears to be within time. The learned counsel for the plaintiff has cited a number of judgments to show that in such a suit residuary article is applicable and not the article dealing with relief of cancellation of the document or decree. [See Balasundara Pandiam Pillai v. Authimulam Chettiar, AIR 1919 Mad 679, Mst. Basant Kaur v. Ram Singh, AIR 1939 Lah 544, Appanna Jami Venkatappadu, , Dalim Kumar Sam v. Sint. Nandarani Dassi, : AIR1970 Cal292 , Asaram v. Ludheshwar, AIR 1938 Nag 335 and Mst. Aisha Begam v. Mst. Kundan Jan, : AIR1945 All367 .

45. So, keeping in view the averments made in the plaint, it cannot be said that the suit is on the face of it barred by time. However, the final decision on the point of limitation would be given after framing issues and recording evidence.

46. One of the points raised was that the present suit is barred by provisions of Sections 32 and 33 of the [Arbitration Act, 1940](#). In the present case, there was no

question of the award being challenged by filing any objections or filing any petition to challenge the agreement for reference. The case of the plaintiff is that the award and the decree were bogus and sham documents and have been brought into existence only for the consumption of the revenue authorities to reduce the incidence of tax and were not intended to be, in fact, acted upon by the parties. If that is so, it is not understood how the suit can be deemed to be barred by virtue of provisions of Sections 32 and 33 of the Arbitration Act.

47. Counsel for the plaintiff has cited *Kailashpati Singhania v. Ram Gopal Gupta*, : AIR1973 All316 . In the said case a consent decree based on an award was passed which was declaratory in nature and the rights and liabilities of the parties under the same were only contingent, a suit was brought for enforcement of certain claims which have accrued subsequent to the passing of the decree, it was held that even if claims are made by virtue of rights declared by the decree, the same is not barred under Section 32 of the Arbitration Act or barred under Section 47 of the Code of Civil Procedure.

48. In the present case, the right to sue to the plaintiff is stated to have accrued only when his rights in the joint Hindu family properties and businesses were threatened. The award and the decree which are alleged to be a paper transaction had not put any threat to his right in the joint Hindu family properties and businesses because, according to the plaintiff, as averred in the plaint the parties never intended to effect any disruption in the status of the joint Hindu family or to give effect to any partition of the joint Hindu family properties and businesses as was laid down in the award and the decree and the parties continued to have the joint Hindu family properties and businesses up to till 1985 when the threat was held out for giving effect to the award and the decree and thereafter the right to sue accrued to the plaintiff for filing the suit claiming partition of the property. Obviously the cause of action for filing the suit arose to the plaintiff as is disclosed in the plaint on account of the threat held out to him of being ousted from the joint Hindu family properties and businesses somewhere in 1985. So, it cannot be said that present suit could be deemed to be barred by provisions of Sections 32 and 33 of the Arbitration Act.

49. Reference is then made by the learned counsel for the plaintiff to Vineet Kumar v. Smt. Bhagwande, : AIR1977 All403 . It was held in this judgment that in terms Sections 32 and 33 of the Arbitration Act do not apply where the challenge is to the decree and not to the award. In the said case, the decree was sought to be attacked on the ground of fraud in the proceedings. It was held that a separate suit was maintainable to challenge such a decree.

50. In Ved Parkash v. Ram Narain Goel, : (1977)ILLJ101Del , it was held that after an award of an Arbitrator has been made a Rule of Court by the Court by consent of parties or after contest, no -application will lie under Section 33 though if the decree passed was a nullity in the sense that it was passed without jurisdiction, it may be possible to have it challenged under Section 47 of the Code of Civil Procedure whenever and wherever it is sought to be enforced against a party.

51. In Sukumar Ghosh v. Tulsi Charan Ghosh, : AIR1980 Cal134 , it was held that though Section 32 of the Arbitration Act has barred any challenge to the award yet if there exists an independent ground to challenge the decree passed on such an award such a challenge is not barred under Section 32.

52. Similarly in the present case, the case of the plaintiff is that the said award and the decree were bogus and sham one and have been brought into existence for a specific purpose and were never intended to be acted upon. So, the challenge to the award and the decree in the present case is independent of the contents of the award and the decree. So, a separate suit is maintainable to enforce the substantive rights of the plaintiff. Plaintiff could ignore the bogus and the sham award and the decree while seeking the substantive relief. So, the question of the suit being barred under the provisions of Sections 32 and 33 of the Arbitration Act does not arise.

53. The Division Bench judgment given in Sudhindra Coomar v. Monmohini Coomar, 1983 Tax LR 730 appears to support the case of the plaintiff on this point. In this case a suit for partition was brought by the plaintiff claiming his title to the property by inheritance and he also claimed that his mother had obtained the fictitious award and the decree and the sham award was obtained in collusion to defraud the creditors and the Income-tax Department during the lifetime of the

father of the plaintiff. It was pleaded that the plaintiff's father continued to remain owner of the property covered under the sham award and thus, on his death the plaintiff inherited his share in the property. It was held that such a claim involving an adjudication as to factual existence of the decree based on the award did not come within the purview of Section 33 and as such Section 32 did not bar such an adjudication in an independent suit. It was held that the plaintiff in this suit had not asked for setting aside the award nor had he challenged the existence or validity thereof but he admitted existence and validity of the award, had claimed that it was a sham decree set up by his father and mother to defraud the creditors.

54. This case squarely applies to the facts of the present case as averred in the plaint. So, for parity of reasons it must be held that the suit of the plaintiff is not hit by the provisions of Sections 32 and 33 of the Arbitration Act.

55. In *Orient Transport Co., Gulabra v. M/ s. Jaya Bharat Credit and Investment Co. Ltd.*, : [1988]1SCR47 , it was observed by the Supreme Court that Section 32 of the Arbitration Act does not contemplate the case of a suit challenging the validity of a contract merely because it contains an arbitration clause. It was held that Sections 32 and 33 have a very limited application, namely, where the existence or validity of an arbitration agreement and not the contract containing the arbitration agreement is challenged. It was held that every person has a right to bring a suit which is of a civil nature and the Court has jurisdiction to try all suits of civil nature under Section 9 of the Code of Civil Procedure and this right has not been taken away by Section 32 of the Arbitration Act. On the same principle the right of the plaintiff to file the present suit does not appear to have been affected by provisions of Sections 32 and 33 of the Arbitration Act whereas the plaintiff's case is that the award and the decree were bogus and the sham documents and were never intended to be given effect to and were brought into existence fraudulently to defraud the revenue authorities and thus are void.

56. In the written arguments dated January 7, 199 1, filed on behalf of defendant No. 1, emphasis is only to show that the plaintiff minor was duly represented by next friend in the partition suit brought in 1961 and the plaint disclosed the cause of action for filing the suit as allegations were made regarding the Karta having

indulged in wasteful acts in respect of the joint properties and a petition under Section 21 of the Arbitration Act was duly filed and the Court made reference to the arbitrator and the arbitrator gave the award to which no objections were filed and the award was made a rule of the Court and even if the Court in so many words had not recorded its satisfaction that the suit was brought in the interest of the minor even then impliedly it has to be held that the Court did examine the question before proceeding in the matter.

57. The issues raised in the plaint are not even alluded to in these written arguments which have been dealt - with by me above in detail. The question is not whether proper procedure has been followed in getting the award and the decree, the question is whether parties intended to give effect to the partition contemplated by the award and the decree? This is a question of fact to be determined by recording evidence whether in fact, the partition of the properties actually took place or not.

58. Then reference has been made in the written arguments to certain admissions made by the plaintiff in affidavit and the returns filed under his signatures with the revenue authorities. Plaintiff has categorically taken the plea in the plaint that he had signed the documents without bothering to look into the contents and the (sic) some of the documents even blank and he did sign the documents as he had full faith in his father. This issue also cannot be decided without recording evidence, whether plaintiff was also party to the fraud being practiced on the revenue authorities or not; or whether he signed those documents knowing their contents fully or not

59. It has been then mentioned in the written arguments that no particulars of said fraud have been enumerated in the plaint. I do not understand what more particulars could be given by the plaintiff. After all, the case of the plaintiff is that the award and the decree were brought into existence for the specific purpose of defrauding the revenue authorities and the incidence of tax was, in fact, got reduced by adopting this method. Whether in fact the award and the decree were intended to create partition of the Joint Hindu Family properties and in fact, the said partition had taken place, can be decided only after recording evidence.

60. Reference is made to decision of the Supreme Court given in *Bishundeo Narain v. Seogeni Rai and Jagernath*, : [1951]2SCR548 , in which it has been held that general allegations are insufficient even to amount to an averment of fraud of which any Court ought to take notice however strong the language in which they are couched may be, and the same applies to undue influence and coercion. I do not see how these observations can show that the averments made in the plaint are not exact or in any manner vague. In this judgment, it was observed that a decree unless and until it is set aside or avoided in one or other of the ways in which alone a decree may be attacked, holds its force and binds all concerned. There is no dispute about this proposition of law. However, where the decree is bogus, sham and a nominal paper decree, the same can be avoided by the person affected by it by filing a suit claiming the substantive relief and a proper plea could be taken in the suit that the decree is void. This is also one of the modes of avoiding the decree as contemplated in the said observations of the Supreme Court.

61. In the written arguments a quotation has been given from an unreported judgment in CA No. 162/62, *Uttam Singh Duggal and Co. v. Union of India*, decided on October 11, 1962*, to the following effect:

'After an award has been pronounced, the rights and liabilities of the parties in respect of their claims can be determined only on the basis of the award and after an award is pronounced, no action can be started on the original claim which had been the subject matter of the reference.'

These observations must have been made by the Supreme Court in keeping in view the peculiar fact appearing in that case. The judgment has not been made available to this Court to analyze the same. So, it cannot be held that the Supreme Court has pronounced that even if the award and the decree are void even then the suit on the basis of the substantive right cannot be brought.

62. Then reliance is placed on *Jawahar Lal Barman v. Union of India*, : [1962]3SCR769 . I do not think this judgment is of any help in support of the contention that the present suit is barred by any provision of the Arbitration Act. The judgment only refers to the main object of introduction of Sections 32 and 33

in the statute.

63. Then reference is made to certain judgments viz. Dhartipakar Madan Lal Aggarwal v. Rajiv Gandhi, : [1987]3SCR369 , Nithayya Thevar v. Subramanian Ambalakarar, (1970) 1 Mad LJ 400, Bhagwan Das v. Goswami Brijesh Kumarji, , Udhav Singh v. Madhav Rao Scindia, : [1976]2SCR246 and Delhi Development Authority v. Durga Chand Kaushish, : [1974]1SCR535 , which lay down that while deciding the application under Order VII, Rule I I of the Code of Civil Procedure the Court can look to the documents referred to in the plaint. There is no dispute about this proposition of law and I have referred to the averments made in the plaint and also to the facts which have come out in the statement made under Order X of the Code of Civil Procedure and to the documents to which my attention has been drawn during the course of arguments.

64. Then reference is made to Syed Asadullah Kazmi v. The Addl. District Judge, Allahabad, : [1982]1SCR77 , in which it was observed that once an order has acquired finality the controversy stands concluded and it could not be reopened and also to B. N. Pandey v. Smt. Indira Chohan, AIR 1983 Him Pra 93, wherein it has been observed that the decree or the order which has become final cannot be reopened on the ground that any new developments had taken place. These judgments are not applicable to the facts of this case. Apparently the question of the award and the decree being nullity was not in issue in those cases. The question in the present case is whether the said award and the decree are sham and bogus or not and have been brought into existence only to defraud the revenue authorities or not

65. Reference is made to Modi Spinning and Weaving Mills Co. Ltd. v. Ladha Ram and Co., : [1977]1SCR728 , which lays down that the repudiation of a clear admission is not permissible. Again, it is a question of fact whether the plaintiff has made any admission or not knowingly. So, this judgment also does not advance the case of the defendants in support of the said applications.

66. Reference is then made to T. Arivandandam v. T. Y. Satyapal, : [1978]1SCR742 , in which it has been held that the Court must have a meaningful and no formal reading of the plaint and see whether the plaint is vexatious and

meritless and could exercise the power under Order VII, Rule 11 of the Code of Civil Procedure for rejecting the plaint and the Court can also examine the party under Order X of the Code of Civil Procedure so that bogus litigation can be shot down at the earliest stage. I do not think that this judgment applies to the facts of the present case in view of the averments made in the plaint which cannot be brushed aside on the short ground that the defendants are of the opinion that in fact, the award and the decree had in fact been given effect to between the parties because that would be begging the question. It could be decided only after recording evidence as to whether actually parties had effected the partition on the basis of the said award and the decree.

67. In the written arguments reliance is also placed in *Patasibai v. Ratanlal*, : [1990]1SCR172 . In this judgment, the Supreme Court has held that even after issuance of summons the Court is not debarred from examining whether the trial should proceed when in fact, no triable issue is shown to arise. I do not understand how this judgment helps the case of the defendant. Keeping in view the averments made in the plaint it cannot be said that no triable issues arise.

68. Reference is made to *Mohammad Ismail v. District Judge, Bijnor*, 1983 All LJ 876, which lays down that if there was a duly sworn affidavit and no counter-affidavit in contravention has been filed, the contents of the affidavit should be deemed to be believed. I do not understand how this judgment is of any relevance to the points in (issue?) arising in the aforesaid applications.

69. I have also gone through the written arguments of defendant No. 1 dated April 6, 1991. An effort has been made in these written arguments to show that the judgment given in *Bishundeo Narain*, : [1951]2SCR548 (supra) is binding as it was the judgment given by a Bench of five Judges. I have already analysed the said judgment above and I have come to the conclusion that it is not applicable to the facts of the present case. So, nothing turns on this contention raised in the written arguments. Support is also sought to be drawn from *Sant Bhushan Lal v. Brij Bhushan Lal*, : AIR1967 Delhi137 . I have gone through this judgment and I find that the same is based on different facts and is not applicable to the points which I have to decide keeping in view the case set up by the plaintiff. It is true that if

Court has to give a finding on merits that in fact, the partition of the Joint Hindu Family properties was given effect to on the basis of the award and the decree then the said judgment would become applicable and the plaintiff may fail in the suit ultimately on merits. For the same reason the judgment given in Maturi Pullaiah v. Maturi Narasimham, : AIR 1966 SC1836 , is not applicable and also Ram Charan Das v. Girja Nandini Devi, : [1965]3SCR841 . Some support was sought to be drawn from Commr. of Wealth Tax-II, Ahmedabad v. Arvind Narottam : [1988]173ITR479(SC) ,which lays down that a citizen can adopt lawful methods for avoidance of the taxes. There is no dispute about this proposition of law. In the present case, the question is whether while avoiding the incidence of tax the award and the decree in question were intended to be acted upon and in fact, were acted upon or not? I have also gone through the written arguments given separately by defendant No. 3. They, in my opinion, do not make out the case for rejection of the plaint. Defendant No. 4 has also given written arguments which have been also perused by me. In my opinion, nothing mentioned therein meets with the points discussed by me in detail above.

70. In view of the above discussion, I hold that the plaint is not liable to be rejected under Order VII, Rule 11 of the Code of Civil Procedure. The applications are dismissed.

71. Applications dismissed.