

Adarsh Kaur Gill and ors. Vs. Ajit Singh (Dead) Thru Surjit Kaur Gill and anr.

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Court : Delhi

Decided On : Jan-27-2009

Reported in : 157(2009)DLT137

Judge : A.K. Sikri and; Manmohan Singh, JJ.

Acts : Limitation Act - Schedule - Articles 51, 58, 69, 106 and 113; [Code of Civil Procedure \(CPC\) , 1908](#) - Order 7, Rule 11

Appeal No. : FAO (OS) No. 290/2008

Appellant : Adarsh Kaur Gill and ors.

Respondent : Ajit Singh (Dead) Thru Surjit Kaur Gill and anr.

Advocate for Def. : Ravinder Sethi, Sr. Adv. and ; M.L. Bhargava, Adv.

Advocate for Pet/Ap. : C.A. Sundaram, Sr. Adv.,; Malavika Rajkotia,; Anuradha Dutt

Judgement :

A.K. Sikri, J.

1. In a suit filed by the respondent herein (hereinafter referred to as the 'plaintiff'), application of the appellant ('defendant' in the said suit and hereinafter referred as such) under Order VII Rule 11 of the Code of Civil Procedure, 1908 has been

dismissed by the learned Single Judge vide impugned orders dated 7.4.2008. The attempt of the defendant, thus, seeking rejection of the plaint on the ground that the relief being time barred has failed in the trial court. Not satisfied with the outcome of her application, this appeal is preferred challenging the order of the learned Single Judge.

2. It is but necessary to know the nature of the suit and traverse the averments made in the plaint, on the basis of which the suit is filed, to find out as to whether the suit of the plaintiff is ex-facie time barred. Reason is simple. When an application under Order VII Rule 11 CPC is to be considered, the Court is not to see the defence raised in the written statement by the defendant or the documents filed by the defendant in support. Application is to be decided on the basis of averments made in the plaint, taking the same on their face value at that stage, while considering such an application. It is for this reason the learned Single Judge has also started discussion in the impugned order from the reading of the plaint. Since the averments made in the plaint, as recorded by the learned Single Judge, are not in dispute, we may reproduce the same as it is:

3. One Ms. Abnash Kaur was the Plaintiff's elder sister, as also of the first and third Defendants, mother of the fifth defendant and the aunt of the second and fourth defendant. She was married to one Mr. Shiva Prasad, who had, it is averred, given cash running into several lakhs of rupees and jewellery as gifts, in addition to the amount paid by him for running the household. It is submitted that he transferred the shares in Lord Krishna Mills Ltd. in her name as consideration for the marriage. It is also averred that out of the said amounts she purchased property No. 3, South End Road, New Delhi in 1956 for a total consideration of Rs. 2,50,000/- and the sale deed was duly registered. The present suit is being filed in relation to this property.

4. It is averred that Smt. Abnash Kaur was in exclusive possession of the said property and was residing therein, until it was handed over to the Vietnam Embassy on rental basis in the name of her sister-the first Defendant. A part of the property was also rented out to Lord Krishna Sugar Mills Ltd. in the year 1956. In the year Mr. Shiva Prasad passed away leaving behind Abnash Kaur, the fifth

Defendant - her minor son, and seven sons from the first marriage as his only heirs. It is also alleged that the sons from the first marriage fraudulently obtained her signatures, came into complete control of the Mill and misappropriated huge sums of money. She informed them that she would not tolerate the mismanagement of funds, objected to the HUF status given to the estate of the deceased and threatened legal action for winding up the company. She also informed them that along with her son and the step sons she would have claim to the property and each of the nine people were entitled to 1/9th share in the property.

5. It is also averred that when she refused to stand guarantee for the company, being one its directors, Mr. Seth Bimal Pershad and his brothers (her stepsons) tried to pacify her by assuring her that the company would be managed by a committee of which she would be a part and no decision would be taken without consulting her. They also clarified that they had fraudulently obtained her signatures to ensure that no estate duty was to be paid on the their father's estate, and that they were aware that she was the exclusive owner of the said property in South end Road as well as precious jewellery and other amounts lying in the bank accounts and lockers. Through a letter dated 14th April 1958 it was also agreed that all of them were entitled to 1/9th share in the deceased's property, pursuant to which Ms. Abnash Kaur signed the bank guarantee required by the bankers of the company.

6. It is submitted that after the death of Seth Bimal Pershad in 1959, his brothers did not adhere to the aforesaid arrangement and continued to embezzle the Company's funds, using various devices. When Abnash Kaur threatened to initiate winding up proceedings and take legal steps to protect her, and her son's interest in the estate, they retaliated by threatening her to initiate proceedings claiming the existence of a Seth Shiv Prasad HUF, which included the properties exclusively owned by Abnash Kaur. To meet legal and other expenses, she decided to construct a floor on the aforesaid property and for financing the same, she mortgaged the said property in favour of Sushila Daphtary and Anil Daphtary, by mortgage deeds dated 19.1.1959 and 24.2.1959, for a sum of Rs. 1, 98, 000. At the time of the said mortgage she was residing in the property along with her son

and other family members. The said property along with the additional construction, the furniture and other household items were insured by Abnash Kaur for a total value of Rs. 2, 50, 00 for a year. This insurance policy also noted that she was in exclusive possession of the said property in November 1959.

7. It is submitted that while Ms. Abnash Kaur was contemplating seeking permission from various authorities, to construct the first floor. After having obtained the necessary finances, on 11th July 1960 officials from the Recovery Department of the District Collection Officer, Delhi visited the property for attaching it towards the recovery on Income Tax amounting to Rs. 23,37,547.45 from the alleged Seth Shiv Prasad HUF. In order to overcome the situation it was agreed by Abnash Kaur, the first and third Defendants, in the presence of lawyers, that the said property would be shown as being let out to the two aforesaid defendants with a right to sub-let the same. Later, it was decided that the lease would be in favour of the first defendant only. Cash and jewellery were also similarly entrusted to the first Defendant. It is admitted by the Plaintiff that no lease deed was filed as part of the objection before the District Collection Officer nor were any placed before the Income Tax Officer at Meerut.

8. Abnash Kaur received a notice whereby her step sons alleged that the said property belonged to the pool of properties in the HUF and objected to her mortgaging it. Perturbed by the notice she filed a winding up Petition in relation to the company which was contested by her step sons. It is submitted that the property was given on a leave and license basis to the Vietnam Embassy on behalf of Abnash Kaur by the first Defendant. In order to overcome the legal hurdles, she was advised to make the said lease in favour of the first Defendant on a stamp paper prior to 1959 which was accordingly procured and the leased deed prepared. The Plaintiff also submits that the lease deed in favour of the first Defendant was a sham and was done only to overcome the attachment of the said property and the movables in it. This deed, it is submitted, remained in the possession of Abnash Kaur and the possession of the said property also was never transferred to the first defendant. It is also averred that Ms. Abnash Kaur had been receiving the rent from the Vietnam Embassy. At the time of the lease it was also agreed in writing by the first Defendant that she would never lay a claim

to the said property and that she would never deal with property in any manner without the leave of Abnash Kaur. Meanwhile, several rounds of litigation were going between the Abnash Kaur and step sons in relation to the said property.

9. It is also submitted that the Ms. Abnash Kaur entered into an agreement in 1963 for sale of the said property to Jaswant Rai for a consideration of Rs. 9,35,000/-. It was disclosed to the purchaser that there was sham lease deed in respect of the property and that the property was also mortgaged. In 1963, the mortgagees filed a suit in which a compromise decree was passed, and the mortgage redeemed in favor of the first Defendant. This was done to increase the charge of the first Defendant on the property, since the allegedly fake lease deed was still valid, and this was necessary in order to thwart the claims in the suits pending between the step sons and Abnash Kaur. The property was later leased out to the Embassy of the German Democratic Republic.

10. The Plaintiff also mentions instances of various Income Tax Returns filed by the first Defendant and Abnash Kaur to submit that rent from the said property was being given to Abnash Kaur and not to the first Defendant. Reliance was also placed on the records submitted during the various rounds of litigation between Abnash Kaur and her step sons. It is also submitted that the Plaintiff acted as the first Defendant's General Power of Attorney in collecting rents from the Embassy of the GDR and especially when the first Defendant had been abroad to settle differences with her husband. Further, it is submitted that the first Defendant never claimed the rents from the property since she knew that the entire lease deed was sham.

11. While drawing up her will on 6th February 1973, Abnash Kaur was advised not to disclose the investments made by her in the name of the first Defendant. It is submitted, that she was further advised to write, in her will about a lease agreement between herself and the first Defendant in relation to the said property. The will was also signed by the first Defendant among others, wherein they undertook that all assets movable and immovable belonged to Abnash Kaur and they would not be entitled to any share as beneficiaries, in the event anyone claimed ownership of the assets. It is submitted that since the Plaintiff was familiar

with the aforesaid arrangement and had been looking after the estate of Abnash Kaur he was named the administrator and executor of the will. It is further submitted that the first Defendant conspired with the advocate of Abnash Kaur to claim that she was the subrogee in terms of the compromise decree passed in the suit filed by the mortgagees and that the lease deed was in fact a valid one, whereas the property was redeemed in the name of the first Defendant in order to avoid complications in proceedings filed by the step sons (of Abnash Kaur) which were pending at the time of the compromise. It is also submitted that the payment made to the mortgagees were in fact from the estate of Abnash Kaur. The Plaintiff further avers that the Will, and other documents are in the possession of the advocate of Abnash Kaur, Mr. GC Mittal and that he was unwilling to return them. However, the Plaintiff served a notice to Mr. Mittal after coming to know that he and the first Defendant had received huge sums of money from the Embassy of GDR in lieu of compensation for the said property. After coming to know that the leave and license agreement in favour of the GDR embassy was renewed, the Plaintiff served a notice on the first Defendant as well as the Embassy authorities that under the Will of Abnash Kaur there were six beneficiaries and that he was entitled to recover all profits on account of his being the administrator and executor of the will. Further, he also notified the embassy that the first defendant being a non resident Indian no property could be leased out by her. Through the notice, the first Defendant was asked to render accounts of the amounts received by her and to desist from entering into fresh agreement in relation to the said property. A copy of the said notice was also served on the other defendants. It is submitted that the Embassy, disregarding the aforesaid notice, further renewed the leave and license agreement. The plaintiff also points out to the affidavit filed by him and the fifth Defendant in Suit No. 2084/1980 disclosing the actual state of affairs in relation to the said property and the benamidar status of the first defendant.

12. It is averred that in September 1980 the plaintiff, as the administrator and executor of the will, had made relevant disclosure under the Amnesty Scheme before the Income Tax Commissioner, Delhi disclosing the facts in order to save income accruing from Abnash Kaur's estates. He also disclosed the transactions entered into between the first Defendant and the Embassy. In the appeals preferred against the order of the ITO concerning the above disclosure, the

Plaintiff submitted the list of jewellery which belonged to Abnash Kaur and also alleged that the first Defendant had made insufficient disclosure in this regard while filing her wealth tax returns. He further alleged that all businesses started by the first Defendant in India and abroad were from the funds of the estate of Abnash Kaur and that it was evident from the income tax returns filed by the first Defendant during the period 1966-1979 that she had no wealth whatsoever in her hands in the form of cash or any other property. The Income Tax authorities, pursuant to these applications ordered a investigation.

13. It is also submitted that due to the legal hassles created for the first Defendant and other interested parties including the Plaintiff, in February 1991 the Plaintiff and the first defendant agreed to settle the disputes. The terms for settlement allegedly given by the first Defendant are reproduced in the suit; they are as follows:

a) All the beneficiaries should agree that there is no dispute about the rental income of the property 3 South End road, New Delhi, upto December 1979, as the entire rental income was received by Smt. Abnash Kaur in my name, either through me or through you, on the basis of the General Power of Attorney executed by me in your favour on the asking of Smt. Abnash Kaur, through Smt. Abnash Kaur had been showing the said rental income in my income tax and wealth tax returns.

b) I have received the rental income of South End Road with effect from 1.1.1980 to 31.10.1990 and I agree to render the account of the same. I also agree to pay due share to all the beneficiaries of the said rental income. The rental income will be calculated on the basis of the agreements executed between me and the G.D.R. Embassy for the abovesaid period. I shall produce the said agreements for calculating the rental income. The amounts paid by me to the Income Tax Department after the death of Smt. Abnash Kaur, on the rental income of 3 South End road, which has been shown either in my income tax returns or in the wealth tax returns, shall be deducted from the rent received by me with effect from 1.1.1980;

c) I will not claim any charge on the property 3 South End Road for the two mortgages redeemed in my name from Smt. Shushila Daphtary and Mr. Anil Daphtary, as the amounts paid for redeeming the said mortgages were paid from the estate of Smt. Abnash Kaur;

d) The possession of property 3 South End Road has been taken by me from the G.D.R. Embassy on 1st November, 1990. I will continue to stay in the property upto 30th November, 1992, as I have to alternative arrangements for residence as per my requirements and thereafter I will surrender the possession of the property to you for effecting partition. I will not encumber or part with the possession of the property to any body in any manner nor I will rent out the property in part or whole to any other person. I will not encumber or part with the possession of the property to any body in any manner, nor I will rent out the property in part or whole to any other person. I will not claim any tenancy right or charge in the said property, either on the basis of the Clause in the Will of Smt. Abnash Kaur or on the basis of the stand taken by me or by Smt. Abnash Kaur or by any beneficiary in any proceedings in the Courts or before the Income Tax authorities or any other authority to the effect that there was a lease in my favour with respect to the property 3 South End Road, as the said stand was taken by Smt. Abnash Kaur and by all of us in order to save her property and its income from the false claim of the steps sons of Smt. Abnash Kaur.

e) A part of the jewellery declare by Smt. Abnash Kaur in her wealth tax returns is with me, out of which I have declared some jewellery in my wealth tax returns under the Amnasty Scheme. I will hand over to you all the said Jewellery for distribution amongst all the beneficiaries;

f) The above mentioned offer is being made by me subject to the following conditions:

i) That one of the beneficiaries, including you, would lay a claim or file any litigation for the share in any of the assets acquired by me in my name or in the names of the companies or in the names of my nominees or in the income of my business in India and abroad, which is as floated by me out of the estate of Smt. Abnash Kaur in my hands.

(ii) That you or any other beneficiary will not pursue the complaint filed by you against me with the Income Tax Department.

I am giving this offer in the light of the discussion which we held and in view of the serious consequences which may result if the complaint filed by you before the Income Tax Authorities is further pursued. The final settlement on the basis of the terms suggested will also avoid the litigation amongst the beneficiaries if the matter is amicably settled as it will save the estate of Late Smt. Abnash Kaur from heavy tax liabilities, penalties and payment of interest and will also save both of us from serious consequences. If other beneficiaries are agreeable to these terms, you may work out the scheme to partition the estate of Smt. Abnash Kaur amongst all the beneficiaries and arrange a meeting for finalizing the settlement once for all. I am giving this offer on my behalf as well as on behalf of Nina and Venu.

14. It is submitted, that in March 1992 the Plaintiff was surprised to find fresh ongoing construction on the property. He was informed that in 1990 the Embassy had vacated the premises and that first Defendant was occupying it since then. He submits that under the conditions of the settlement, the first Defendant was to hand over possession of the property by November 30th 1992. He also alleges that alterations were being made to the property with malafide intention and that the first Defendant had invested profits earned from the said property in her business abroad and has made huge profits. But being aware of the attitude of the first Defendant, the Plaintiff decided to file a suit which was delayed due to his ill health and finally the present suit came to be filed.

15. It is clear from the above that the suit for partition of the estate of late Smt. Abnash Kaur is filed on the basis of a registered Will dated 8.2.1973. In this Will, six persons, who are parties to this suit, are the beneficiaries. Some of the facts, which are taken note of above, which need reiteration are that there was a lease deed dated 18.11.1958 executed in favour of defendant No. 1 by late Smt. Abnash Kaur, vide which defendant No. 1 was inducted as tenant in property No. 3, South End Road, New Delhi at a rent of Rs. 500/- p.m., which was later increased to Rs. 1,500/- p.m. This property was later on mortgaged in favour of Smt. Sushila Dapthary and Mr. Anil Dapthary against a loan of Rs. 1.98 lacs vide mortgage

deeds dated 19.1.1959 and 24.1.1959 respectively. The aforesaid mortgagees filed Suit No. 332/1963 in the District Court and defendant No. 1 redeemed those mortgages, which is recorded by the court in its order dated February 1978.

16. The defendant No. 1 in her written statement has not denied the facts mentioned in the previous paragraphs, namely, execution of the Will dated 8.2.1973; lease deed dated 18.11.1958; mortgage deeds and redemption thereof by her. In fact, as per the said Will, she claims that she is the owner to the extent of 1/6th undivided share in the property. Her further claim is that as she had redeemed the mortgages, by the principle of subrogation she stepped into the shoes of the mortgagees. According to her, as she became the subrogate mortgagee and the time limit for the co-owners for redeeming the mortgage having expired, she has become the absolute owner of the entire property as a mortgagee/subrogate. She also claims that she is the statutory tenant of the entire property.

17. Though the rejection of the plaint, as per the application, was sought on various grounds, before us, the only ground canvassed was that suit filed by the plaintiff was patently time barred. Before coming to the grounds, on the basis of which the defendant Nos. 1 and 2 contend that these reliefs are time barred, it will be apposite to take note of the reliefs as claimed in the suit:

a) Pass a preliminary decree of partition of the property bearing No. 3, south end Road, New Delhi, more particularly shown on the plan, and, thereafter, pass a final decree partitioning the said property by metes and bounds and put each of the parties to the suit in actual physical possession of the portion of the property allotted to him/her. If the partition of the property by metes and bounds is not feasible, then the property by metes and bounds is not feasible, then the property may ordered to be sold by public auction through Court and proceeds thereof be divided between the parties to the suit in accordance with their share and entitlement;

b) Pass a preliminary decree for partition of the movable assets belonging to the estate of Smt. Abnash Kaur, as mentioned in the Schedule to the plaint and, thereafter, pass a final decree and give to each of the party to the suit his/her

share of the said property. In case it is not feasible to distribute the movable assets belonging to the estate of Smt. Abnash Kaur in the in the hands of defendants Nos. 1 and 2 to each of the beneficiaries, as per the share and entitlement, then the said movable assets may be ordered to be sold by public auction through this Hon'ble Court and the proceeds thereto may be divided amongst the parties, as per their share and entitlement;

c) Pass a decree for rendition of accounts and enquiry into the same with respect to the rental income of the property received by defendant No. 1 from the tenant of property bearing No. 3, south End Road, New Delhi, w.e.f. 1.1.1980 to 30.11.1990;

d) Pass a decree for rendition of accounts and enquiry into the same with respect to the profits made by defendant Nos. 1 and 2 from the business which they have been carrying on by investing the funds from the estate of Smt. Abnash Kaur;

e) Pass a decree for declaration that there has been no lease deed executed by Smt. Abnash Kaur in favour of Defendant No. 1 and that defendant No. 1 is not a lessee in the property, 3, South End Road, New Delhi, and she is not entitled to give the said property to any person on sub-lease basis;

f) Pass a decree of declaration to the effect that defendant No. 1 is not a subrogee of the mortgage deeds executed by late Smt. Abnash Kaur with respect to the property in favour of Smt. Sushila Daphtary and her son Mr. Anil Daphtary said mortgage deeds have been redeemed out of the estate left by Smt. Abnash Kaur.

g) Pass a decree of declaration to the effect that defendants Nos. 1 and 2 have dis-entitled themselves from getting any share in the estate left by Smt. Abnash Kaur and that the plaintiff and defendants No. 3, 4 and 5 are the only beneficiaries under the Will of Smt. Abnash Kaur and are entitled to get the entire estate left by Smt. Abnash Kaur divided and partitioned in four equal shares;

h) Pass a decree for permanent injunction against Defendant No. 1 restraining her permanently from transferring, alienating, letting out or parting with the possession of the property, 3 South End Road, New Delhi, or any part thereof and from

making any additions and alterations in the same in any manner whatsoever;

i) Any relief which this Hon'ble Court may deem fit and proper in the circumstances of the case may also be granted to the plaintiff and other beneficiaries under the Will of Smt. Abnash Kaur.

18. In nutshell, the submission of the appellants was that though the lease deed is of the year 1963, suit is filed in the year 1993 claiming that such a lease deed is sham; mortgage deeds were of 1959, which were redeemed by the defendant No. 1 in the year 1978 and, thus, defendant No. 1 became subrogate-mortgagee and on that basis owner of the property, as the beneficiary under the Will redeemed the mortgage; and the defendant Nos. 1 and 2 were in exclusive possession of the property without any right thereupon claimed by the plaintiff till the filing of the suit and, therefore, they became owners by adverse possession as well.

19. Submission of learned Counsel for the appellant was that whether the plaintiff was co-owner of the property, under the Will, was not the question. As the appellant had pleaded that the suit was barred by limitation, the focus of the trial court should have been on this issue, as limitation bars a remedy and not the right.

20. Learned Counsel for the respondents, on the other hand, argued that there was no dispute about the Will and 1/6th share of the plaintiff as per that Will, which was admitted by the appellant even in her application under Order VII Rule 11 CPC. He submitted that as the property was given on rent, in the application under Order VII Rule 11 CPC, no plea of ouster of the plaintiff was taken. Therefore, the defendant could not raise such issue at this stage. He also relied upon the oral partition, as stated in the plaint, which was entered into in the year 1991 only and the suit filed in 1993 could not be time barred. He also submitted that provisions of Article 106 of the Limitation Act were not applicable in the instant case. Learned Counsel also made a statement that in as far as relief No. (G) is concerned, the plaintiff was giving up the said relief. He further submitted that relief (F) was only consequential and should not be examined in isolation. He also adopted the reasons given by the learned Single Judge while dismissing the application.

21. We have considered the submissions of Counsel for the parties and have also gone through the record as well as the impugned order minutely. Before we start with our discussion on these arguments, it would be useful to reproduce paras 27, 30 and 32 of the impugned order where the nature of reliefs claimed are discussed and the reasons given for not allowing the application of the defendant at this stage.

27. No doubt, reliefs such as declaration about the true status of documents, returns filed before statutory authorities etc, have to be claimed with diligence, as the prescribed limitation is three years from the alleged cause of action. In that sense, limitation has to be claimed from the point of time when the denial, or the cause arose. However, both the Plaintiff and the first Defendant claim to be owners of the property on the basis of a registered will. The first Defendant herself claims to be one-sixth owner. Her claim for exclusive right is that if the Plaintiff wanted to claim a share, they should have sued for partition within time.

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30. The Defendant applicants do not deny about the existence of the will, in which they and the Plaintiff are entitled to one sixth shares; the plaintiff alleges that the defendant started to receive rents from the entire property without accounting for it; and that a letter was written by the latter, offering to settle all disputes. The first Defendant disputes these averments; the Plaintiff has also asserted that he is in constructive possession. At this stage, the Court's scrutiny, however, is confined to plaintiff averments and the list of documents filed with the suit.

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32. In this case, even if some of the causes pleaded by the suit are seemingly barred, yet this court should not reject the plaint on the ground of the relief being time barred. The question of constructive possession, being an answer to the defendant's argument about their adverse possession, the will conferring rights on many people and the Plaintiff's claim being founded on an alleged admission of the first Defendant, all point to the fact that neither can it be said that the plaint does not disclose a cause of action; nor can it be said, without going into rival

versions, and permitting parties to lead evidence, that all claims are time barred.

22. It is clear from the above that even the learned Single Judge was conscious of the fact that some of the reliefs sought by the plaintiff appeared to be time barred. However, the trial court deemed it proper not to reject the plaint primarily on the ground that the plaintiff and the first defendant were claiming to be the owners of the property on the basis of a registered Will. Since the defendant No. 1 herself claimed that she was 1/6th owner as per the said Will, it would be necessary to permit the parties to lead evidence on the issue of limitation as well.

23. We may state that such an approach of the learned trial court may not be entirely correct. We have already reproduced the various reliefs claimed by the plaintiff in the suit. The learned Single Judge should have seen the limitation period for each relief to find out as to whether, by taking into consideration the facts stated in the plaint, any of these reliefs were time barred or not. Skipping reliefs (A) and (B) for the time being, to which we shall advert later, we may first discuss the issue of limitation qua other reliefs.

24. Reliefs (C) and (D)

Under reliefs (C) and (D), the plaintiff has sought decree for rendition of accounts in respect of the rental income of the property as well as profits made by defendant Nos. 1 and 2 from the business which they have been carrying on by investing the funds from the estate of Smt. Abnash Kaur. The period for which rendition of accounts in respect of rental income is sought is 1.1.1980 to 30.11.1990. It is accepted in the plaint itself that property was rented to the Embassy of German Democratic Republic in 1980 and defendant No. 1 was receiving the rent. However, this action of the defendant No. 1 was never questioned and/or objected to by the plaintiff earlier. Instant suit for rendition of accounts is filed only in the year 1993. It cannot be disputed that under Article 51 of the Limitation Act, action for profits of the immovable property has to be brought within three years from the date when the profits are received. Suit was filed on 15.9.1993. Suit for this relief is, thus, ex-facie time barred. Once we hold that the plaintiff cannot claim rendition of accounts insofar as rents are concerned, relief (D), as a consequence, also becomes time barred and is not maintainable

inasmuch as the plaintiff under the said relief wants rendition of accounts in respect of profits from the business, which was allegedly started by defendant Nos. 1 and 2, from the aforesaid rentals received. These two reliefs would, therefore, be patently time barred.

25. Relief (E)

Coming to relief (E), the lease deed was admittedly executed on 19.11.1961. Suit is filed on 15.9.1993, i.e. 29 years later. Such a relief on declaration that lease deed was a sham document could not have been sought as this is also time barred.

26. Relief (F)

Same would be the position in respect of relief (F). There is a court decree clearly recording that defendant Nos. 1 and 2 redeemed the mortgage, which order was passed on 8.5.1981. Filing a suit in the year 1993 with the averments that it was redeemed out of the estate left by Smt. Abnash Kaur would again be time barred, keeping in view the provisions of Article 58 of the Limitation Act, which prescribes three years period for seeking such a declaration.

27. Relief (A)

Under relief (A), the plaintiff has claimed decree of partition, on the basis of the Will, as well as possession of his 1/6th share under the said Will. Will is dated 8.2.1973. As per the appellant, the suit claiming such a relief should have been filed within a period of three years under residuary provision, i.e. Article 113 of the Limitation Act. As per this provision, it should have been filed within three years from the date when the right to sue accrues. In the instant case, the period should be treated as commenced from the date when the appellant claimed exclusive possession of the property in a manner adversarial to the plaintiff's rights, as that would amount to ouster of the plaintiff. Submission of the appellant is that even as per the averments made in the plaint, the appellant/defendant claimed such a right in the year 1980 or 1982 and, therefore, suit ought to have been filed by 1985. Learned Counsel relied upon the judgment of the Privy Council in *Mt. Bolo v. Mt.*

Koklan and Ors. and that of this Court in Sanjay Kaushish v. D.C. Kaushish and Ors. : AIR1992 Delhi118 .

28. As conceded by the Counsel for the appellant also (and he proceeded to argue on that premise itself) at this stage defence of the defendant is not to be seen while considering the application of the appellant under Order VII Rule 11 CPC and only on the basis of averments made in the plaint it is to be considered whether this relief is time barred. No doubt, the appellant has relied upon the averments contained in para 5 of the plaint wherein the plaintiff has stated that the defendant No. 1 had started collecting the rent from the Embassy of German Democratic Republic from 1.1.1980 onwards to the exclusion of the plaintiff and other beneficiaries. On this basis, the appellant wants the Court to infer that it would amount to ouster of the plaintiff and possession of the defendant No. 1 over the property. However, when we read the entire para 5, we do not agree that such an inference can be gathered. The plaintiff has specifically stated that the defendant No. 1 entered into the said agreement 'secretly'. Furthermore, the plaint has to be read in its entirety. In the opening portion of para 5 itself the plaintiff has mentioned about the Will dated 8.2.1973, on the basis of which he filed the suit for partition. The plaintiff has also stated about some family arrangement in the year 1990-91. No doubt, the plaintiff has accepted that settlement did not fructify and has given details about the same. These averments in the plaint would indicate that even in the year 1990-91, the parties were discussing about the settlement of the disputes. It would be possible for the appellant to argue on that basis that the plaintiff did not file the suit earlier because of the aforesaid developments which had taken place and only when the defendant Nos. 1 and 2 allegedly backed out of the settlement by not signing the formal settlement deed that the plaintiff filed the suit. What we emphasize is that the relief relating to partition and possession of the basis of Will cannot be treated as time barred at this stage and the matter would require evidence. We may also observe that there is a difference between the rejection of the plaint under Order VII Rule 11 on the ground of limitation and dismissal of the suit if issue is framed on limitation and that issue is decided against the plaintiff.

29. So far as plea of adverse possession or rights on the basis of subrogate mortgagee is concerned, these are the defences of the appellant and they cannot be looked into at this stage. Furthermore, these defences, even otherwise would require evidence. Therefore, insofar as this relief is concerned, we are of the opinion that the learned Single Judge rightly held that issue of limitation could be decided only after permitting the parties to lead evidence. Following judgments referred to by the trial court in the impugned order would be relevant insofar as Relief (A) is concerned:

28. In *Bindhyachal Chand v. Ram Gharib Chand* : AIR1934 All993 , a Full Bench of the Allahabad High Court examined the difficulties which arise when a co-sharer sues another on the allegation that he had been dispossessed. It held that:

No doubt in many cases the distinction is very fine, and the line of demarcation between dispossession and adverse possession is thin. But, the question in each case is one of burden of proof, and it is incumbent on the plaintiff, when he admits his dispossession, to establish his possession within twelve years....

It was also held that:

Ordinarily, the possession of one co-owner, who is entitled to joint possession of the whole property, is referable to his title, and he cannot ask the Court to presume that his possession was illegal or adverse to the other co-owner. It follows that if one co-owner is in actual possession of the joint property, and the other co-owner is either absent or is not in actual possession, the latter would still be in constructive possession of his property through his co-owner. There would be prima facie no case, where the possession of one co-owner was illegal and was, necessarily adverse to that of the other co-owner. The presumption would be that they are both in joint possession.

In a similar vein, in *Karbalai Begum v. Mohd. Sayeed* : [1981]1SCR863 it was held that:

It is well settled that mere non-participation in the rent and profits of the land of a co-sharer does not amount to an ouster so as to give title by adverse possession

to the other co-sharer in possession. Indeed even if this fact be admitted, then the legal position would be that Mohd. Bashir and Mohd. Rasheed, being co-sharers of the plaintiff, would become constructive trustees on behalf of the plaintiff and the right of the plaintiff would be deemed to be protected by the trustees.

29. In the recent judgment of the Supreme Court, in *Govindammal v. R. Perumal Chettiar* (2006) 11 SCC 600 the law was further explained in the following terms:...no hard-and-fast rule can be laid down from which it can be inferred that any co-sharer has ousted his co-sharer. That will depend upon facts of each case. Simply long possession is not a factor to oust a co-sharer but something more positive is required to be done. There must be a hostile open possession, denial and repudiation of the rights of other co-owners and this denial or repudiation must be brought home to the co-owners. Simply because a co-sharer gave notice claiming partition of the suit properties and possession and did not pursue the matter further, that will not be sufficient to show that the co-sharer has lost his/her right.

30. Judgment of the Privy Council in *Mt. Bolo* (supra), as referred to by the learned Counsel for the appellant, would not be of any avail to the appellant. We may note that following portion of the said judgment was referred to and relied upon by the appellant:

There can be no 'right to sue' until there is an accrual of the right asserted in the suit and its infringement or at least clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted. No doubt *Mt. Koklan's* right to the property arose on the death of *Tara Chand*, but in the circumstances of this case their Lordships are of (the) opinion that there was no infringement of, or any clear and unequivocal threat to her rights till the year 1922, when the suit, as stated above, was instituted.

Interestingly, on the facts of that case itself, the Privy Council concluded that suit was within limitation. It was decided on the basis of evidence on record. Therefore, plea of limitation qua relief (A) is pre-mature and cannot be determined unless evidence is led.

31. Likewise, in Sanjay Kaushish (supra), the court was of the opinion that on the basis of averments made in the plaint, it cannot be said that suit on the face of it is time barred and final decision could be taken only after framing of the issues. Paras 44 and 45, in this behalf from the said judgment, are reproduced below (counsel for the appellant laid emphasis on para 44):

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 (I), Mst. Basant Kaur v. Ram Singh AIR 1939 Lah 544, Appanna Jami Venkatappadu AIR 1953 Mad 611, 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.

32. Relief (B)

Coming to relief (B), with which we are left with, it relates to passing of preliminary decree qua movable properties left behind by Smt. Abnash Kaur. Argument of learned Counsel for the appellant was that an action for specific movable property, in keeping with Article 69 of the Limitation Act, needs to be initiated when the property is wrongfully taken. Upon Smt. Abnash Kaur's death on 10.6.1976, the plaintiff states that the defendant has misappropriated some of the movable assets. Therefore, the period of limitation for a decree of partition of movable assets would, thus, arise when the assets were wrongfully taken by the defendant, in and around 1976, and would end in 1979. The instant suit has been filed in 1993. It is also relevant that the plaintiff, in an affidavit in the proceedings in Bombay, had sought to submit that upon the death of Smt. Abnash Kaur, the plaintiff, as executor of her Will, had taken charge of all jewellery and cash left by her. Further, the original plaintiff, namely, Ajit Singh, had in an affidavit in FAO (OS) No. 8/2005, admitted that movables, including jewellery, had been removed and taken possession by the defendant No. 1 in 1980. This affidavit was filed in Bombay High Court in October 1980 in another litigation between the parties in relation to a flat in Bombay.

33. Obviously, over these movable properties no claim was made earlier by the plaintiff. More importantly, it is the plaintiff who was the executor of the Will and, therefore, it was his duty to take possession of these movable properties and distribute the same as per the Will. If defendant No. 1 was in possession of any movable assets and was not handing over the same after the death of the testator, it was the duty of the plaintiff, as executor, to spring into action immediately. However, nothing was done and the suit is filed in the year 1993.

34. Furthermore, the plaintiff's Counsel could not deny that the original plaintiff Shri Ajit Singh had filed an affidavit in FAO (OS) No. 8/2005 alleging that movable properties, including jewellery, had been removed and taken possession of by the plaintiff in the year 1980. In that event, limitation would start running for such a relief from that date and the suit should have been filed thereafter. This relief is, therefore, ex-facie time barred even when the averments made in the plaint are to be taken on their face value. The averments made in the affidavit filed by the plaintiff can always be looked into for this purpose.

35. The upshot of the aforesaid discussion would be to hold that the suit in respect of reliefs (B) to (F) would be time barred. Relief (G) has to go as it is not pressed. Therefore, suit will survive only qua relief (A) and consequential relief claimed in reliefs (H) and (I).

36. These appeals are, therefore, partly allowed. The impugned order of the learned Single Judge is set aside and application of the appellant under Order VII Rule 11 CPC is allowed to the extent reliefs (B) to (F) are concerned holding that these reliefs are time barred and, therefore, cannot be claimed by the plaintiff. Suit shall now proceed only qua relief (A), (H) and (I). No costs.

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