

SURJIT KAUR GILL & ANR.

v.

ADARSH KAUR GILL & ANR.
(Civil Appeal No. 8221 of 2011)

JANUARY 30, 2014

[H.L. GOKHALE AND KURIAN JOSEPH, JJ.]

CODE OF CIVIL PROCEDURE, 1908:

O. 7, r.11 - Suit for partition and rendition of account on the basis of a will - Application for rejection of plaint - Held: For deciding an application under O.7, r. 11, one has to look at the plaint and decide whether it deserved to be rejected for the ground raised --The issue of limitation is always a mixed question of facts and law and, therefore, it could not be held that no case was made out for proceeding for a trial -- The application made under O. 7, r. 11 will stand rejected.

A suit was filed before the High Court, inter alia, for partition of property, rendition of accounts etc. on the basis of a will. The plaintiff filed the suit in the capacity of the administrator of the will of his deceased sister. After the issues had been framed and the plaintiff had tendered his affidavit in lieu of the examination-in-chief, an application was made under O 7, r. 11 of the Code of Civil Procedure, 1908, contending that the suit was barred by law and, therefore, it ought to be rejected under O. 7, r. 11 (d). The single Judge of the High Court dismissed the application holding that all the prayers were inter-connected, and they were related essentially to the principal prayer (a) for partition of the property of the deceased. However, the Division Bench of the High Court allowed the appeal in part and allowed the application moved by respondent No.1 under O. 7, r. 11 to the extent of prayer clauses (b) to (f) holding the same

A as time barred.

Allowing the appeal, the Court

B HELD: 1.1 The issue of limitation is always a mixed question of facts and law and, therefore, it could not be held that no case was made out for proceeding for a trial. The submission that respondent No.1 disputed the writing dated 12.2.1991 and it had to be forensically tested, all the more justifies that the trial had to proceed. [para 9] [174-D-E]

C 1.2 For deciding an application under O.7, r. 11, one has to look at the plaint and decide whether it deserved to be rejected for the ground raised. The view taken by the Division Bench of the High Court being clearly erroneous, its judgment and order impugned is set aside. D The application made under O. 7, r. 11 moved by respondent No.1 will stand rejected. [para 9] [174-F-G]

E *Popat and Kotecha Property vs. State Bank of India Staff Association*, 2005 (2) Suppl. SCR 1030 = (2005) 7 SCC 510 -referred to.

Case Law Reference:

2005 (2) Suppl. SCR 1030 referred to para 4

F CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8221 of 2011.

From the Judgment and Order dated 27.01.2009 of the High Court of Delhi at New Delhi in FAO (OS) No. 290 of 2008.

G Shyam Diwan, Gaurav Choudhary, Nirman Sharma, Gaurav Kejriwal for the Appellants.

C.A. Sundaram, Rohini Musa, Zafar Inayak, Govin Singh for the Respondents.

H The Judgment of the Court was delivered by

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H.L. GOKHALE, J. 1. This appeal seeks to challenge the judgment and order dated 27.1.2009 rendered by a Division Bench of the High Court of Delhi in FAO (OS) No.290 of 2008 whereby the Division Bench has set aside in part the decision rendered by a learned Single Judge who had dismissed the application moved by the respondent No.1 (defendant No.1) under Order VII Rule 11 of the Code of Civil Procedure, 1908 by his judgment and order dated 7th April, 2008. A B

2. Heard Mr. Shyam Diwan learned senior counsel appearing on behalf of the appellants and Mr. C.A. Sundaram learned senior counsel appearing on behalf of the respondents. C

3. The brief facts leading to this appeal are that one Ajit Singh filed a Suit bearing No.2167 of 1993, on the Original Side of Delhi High Court for partition of property against his sister Ms. Adarsh Kaur Gill and some others. He filed the suit in his capacity as the Administrator of the Will of his deceased sister Smt. Abnash Kaur. The prayers in the suit were as follows: D

(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 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; E F

(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 G H

A estate of Smt. Abnash Kaur in the hands of defendants
Nos.1 & 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
B 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
C 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
D 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
E 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
F 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 & 2 have dis-entitled themselves from
getting any share in the estate left by Smt. Abnash Kaur
and that the plaintiff and defendants Nos.3, 4 & 5 are the
only beneficiaries under the Will of Smt. Abnash Kaur and
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are entitled to get the entire estate left by Smt. Abnash Kaur divided and partitioned in four equal shares; A

(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 No.3, South End Road, New Delhi, or any part thereof and from making any additions and alterations in the same in any manner whatsoever; B

(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; and C

(j) Cost of the Suit may also be awarded against defendants Nos.1 and 2. D

4. There is no dispute that after the suit was filed issues have been framed and at a later stage the plaintiff had tendered his affidavit in lieu of the examination-in-chief. It is at that stage that the application made under Order VII Rule 11 (though made earlier), came to be pressed into service and decided by the learned Single Judge. The contention on behalf of the respondent-defendant was that as can be seen from the statements in the plaint, the suit was barred by law, and therefore it ought to be rejected under Order 7 Rule 11 sub-clause (d). The learned Single Judge went into the issues and came to the conclusion that all the prayers were inter-connected, and they were related essentially to the principal prayer (a) for partition of the property of deceased Smt. Abnash Kaur on the basis of the Will which she had executed. The learned Single Judge relied upon the dicta of this Court in *Popat and Kotecha Property vs. State Bank of India Staff Association* reported in (2005) 7 SCC 510 which held that the plaint without addition or subtraction must show that it is barred by any law to attract application of Order 7 Rule 11. The language of various paragraphs in the plaint and the pleadings E
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A have to be seen in their entirety to ascertain its terms. The application was, therefore, dismissed by the learned Judge by his judgment and order dated 7.4.2008.

B 5. Being aggrieved by the said judgment and order an appeal was preferred to the Division Bench of the Delhi High Court, and the Division Bench by the impugned judgment and order has allowed that appeal in part. It has allowed the application moved by the respondent No.1 under Order 7 Rule 11 to the extent of prayer clauses (b) to (f) as time barred. Being aggrieved by that judgment this appeal has been filed.

C 6. Mr. Diwan, learned senior counsel appearing for the appellants pointed out that all the abovereferred prayers are inter related, and they are essentially concerning the partition which the original plaintiff was seeking. The original plaintiff D having died, the appellant has transposed herself as the appellant. He pointed out that the estate was essentially of Smt.Abnash Kaur who had received it from her husband, and there were disputes between her step sons and herself, and to protect the property certain arrangements had been made amongst the siblings of Smt. Abnhash Kaur. It is as a result of E that arrangement that a lease deed was executed by Smt. Abnash Kaur in favour of the respondent No.1 herein. Similarly various other arrangements were made with the understanding of all the family members. It was in 1992 that the respondent, F for the first time, resiled from all those arrangements and understanding, and that is how it became necessary for the original plaintiff to file the suit. The suit filed in 1993 was well within time and the prayers therein could not be segregated.

G 7. Mr. C.A. Sundaram learned senior counsel, on the other hand, took us through the various prayers of the suit, particularly the prayers (b) to (f). As far as prayer (b) is concerned he pointed out that this prayer seeks the partition of the movable assets belonging to said Smt Abnash Kaur. Smt Abnash Kaur died in 1976 and therefore this prayer is time barred under H Article 69 of the Schedule to the Limitation Act, 1963 since this

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claim is not made within three years therefrom. In respect of prayer clause(c), he pointed out that the accounts are sought with respect to the rental income for the period from 1.1.80 to 30.11.90 and since the suit is filed in September, 1993, at the highest the claim could be maintainable for the last four months, and the claim for the earlier period would be time barred under Article 69 of the Limitation Act. With respect to prayer clause (d), though he opposed the inclusion of the prayer in the plaint, he very fairly stated that perhaps this prayer could have been allowed by the Division Bench.

8. His main objection was to prayer clauses (e) and (f) which according to him, the Division Bench has rightly struck off. According to him they contained separate causes of action. The prayer clause (e) seeks a declaration that there has been no lease deed executed by Smt Abnash Kaur in favour of the defendant No.1, and that she was not the lessee of the concerned property situated at 3, South end Road, New Delhi and that she was not entitled to give the property to any other person on sub-lease basis. Mr. C.A. Sundaram submitted that in the Will itself it is pointed out that the lease has been given to the respondent No.1 herein, and this was all to the knowledge of the plaintiff, and therefore the said declaration could not be sought by filing a suit in 1993. It would be barred under Article 58 of the Limitation Act. With reference to prayer clause (f) which seeks a declaration that the defendant No.1 is not a subrogee in respect of the mortgage deed executed by Smt. Abnash Kaur with respect to the property in favour of Smt. Shushila Daphtary and Mr. Anil Daphtary, Mr.C.A. Sundaram submitted that, this transaction had taken place on 20.2.78 and that being so, again the prayer would be hit by Article 59 of the Limitation Act.

9. with respect to these submission, Mr. Diwan pointed out that in fact there is a clear writing of the respondent No.1 herein executed on 12.2.91 which clearly states, amongst others, in paragraph (d) that she will not claim any tenancy right or charge on the above referred property. In paragraph (b) of that writing she agreed to render the accounts with respect to the rental

- A income received from 1.1.80 to 30.11.90. In paragraph (c) of that writing she states that with respect to the two mortgages redeemed in her name, she will not claim any charge as the amounts paid for redeeming the said mortgages were paid from the estate of Smt. Abnash Kaur. Mr. Diwan states that
- B after executing this writing, the disputes between the parties were supposed to get settled, but then unfortunately it did not happen. The respondent No.1 started construction on the particular property in her own right. This having happened in 1992, the original plaintiff was constrained to file the suit for the partition of the property belonging to Smt. Abnash Kaur. Smt.
- C Abnash Kaur having made a Will about her property, the original plaintiff had to see to it as the administrator of the will that the property is distributed in accordance therewith. This being the position, in his submission it is Article 58 which is the relevant Article for all these prayers, which provides for a period of 3
- D years when the right to sue first accrues. In the present case, it will be when the dispute arose because of the conduct of the respondent No.1 herein. The issue of limitation is always a mixed question of facts and law, and therefore, it could not be held that no case was made out for proceeding for a trial. Mr.
- E C.A. Sundaram submitted that the respondent No.1 disputed the writing dated 12.2.1991, and it had to be forensically tested. This submission all the more justifies that the trial had to proceed. For deciding an application under Order 7 rule 11, one has to look at the plaint and decide whether it deserved to be rejected for the ground raised. In our view, the view taken
- F by the Division Bench is clearly erroneous. The appeal is therefore allowed and the judgment and order of the Division Bench is set aside. The application made under Order 7 Rule 11 moved by the respondent No.1 herein will stand rejected. We may however clarify that all the observations herein are only
- G for the purpose of deciding this appeal.

10. We request the learned Single Judge to hear and decide the suit expeditiously since it is pending for the last 10 years. The parties will bear their own costs.