

HIGH COURT OF DELHI : NEW DELHI

+ **RFA (OS) No.2/2005**

% Judgment reserved on: 23rd July, 2008
Judgment pronounced on: 9th January, 2009

Shri Maha Singh

...Appellant

Through : Mr. Sandeep Sethi, Senior Advocate
and Mr. Mohinder Rana for the
appellant

Versus

Shri Anand Singh and another

....Respondents

Through : Mr. Harish Malhotra, Senior
Advocate and Mr. S.N. Gupta for
The respondents

Coram:

HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE MANMOHAN SINGH

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not?
3. Whether the judgment should be reported in the Digest?

Yes

MANMOHAN SINGH, J.

1. This appeal is directed against the judgment dated 6th December, 2004 passed by the learned Single Judge of this Court whereby the appellant/plaintiff's suit was dismissed as being time barred.
2. The property in question is 30, Central Market, Community

Center, Ashok Vihar, Delhi owned exclusively by the respondent No.1, who is the younger brother of the appellant/plaintiff.

3. Briefly the facts of the case are that the appellant and respondent are real brothers being son of Late Sh. Prithi Singh. The suit for partition and rendition of account in respect of the above mentioned property was filed by the appellant Maha Singh being CS (OS) No.982/1986 in the second week of May, 1986.

4. **Case of the Appellant**

a) Sh. Jamuna Dass was the grandfather of the appellant and respondent, who died on 01.09.1904, leaving behind two sons namely Bhim Singh and Prithi Singh. He was the owner of 400 Bighas of land in Village Iradat Nagar Urf Naya Baas, Delhi. After his death the land came to the share of two sons; 50% each i.e. 200 Bighas each.

b) Sh. Prithi Singh, father of the appellant and the respondent died in the year 1935 leaving behind two sons namely Maha Singh-appellant and Anand Singh Mann-respondent.

c) The respondent was working with Air Force and used to be posted outside Delhi and various other places. It was the appellant who had been looking after the said joint ancestral land and the income accruing there from was received as joint Hindu family income/funds. The appellant was the elder brother, he was acting as karta of the joint Hindu family. The land revenue tax etc. on the said joint Hindu family agricultural land was paid by the appellant in the joint names. The tractor for ploughing the

lands, installation of a tube well, pumping set etc. were taken by the appellant in the joint names.

d) On consolidation of the agricultural holdings in the village, the said lands could not be entered in the revenue records as joint Hindu Family lands in view of the provisions of Delhi Land Reforms Act, 1954, therefore, the said 200 bighas of land were, mutated in the separate names of the appellant and the respondent. Two plots were purchased in Hari Nagar in the year 1958-59 and a residential house was constructed on one of the said plots from the joint family funds or income. In the year 1969, the plot in dispute bearing no. 30, Ashok Vihar, Delhi was also purchased from the joint family income which accrued out of the aforesaid ancestral lands. In 1973, a building was constructed on the said plot from the sale proceeds of one of the two plots in Hari Nagar. Some loan was also taken from the Bank of Baroda for the construction of the said house.

e) It was for the first time in 1978-79, the respondent raised the issue of partitioning the aforesaid lands and the other properties of the HUF including the suit property. However, no partition was effected since the respondent was employed with the Air Force.

f) It was only in 1985 when the respondent retired from Air Force that the appellant asked the respondent for partition and rendition of accounts of the suit property. Since the perpetual lease deed of the property of Ashok Vihar was in the name of the respondent and the rent of the said property was received in the name of respondent and was paid by

the bank to the respondent as the property stands in his name, the appellant asked the respondent for partition and rendition of accounts of the said property. The appellant served a notice dated March 20, 1986 on the respondent to partition the aforesaid property.

5. **Case of the Respondent**

a) The respondent in his written statement has denied that the appellant had one-half share in the property bearing no.30, Central Market, Ashok Vihar, Delhi, as alleged, and stated that the disputed property absolutely belongs to the respondent and the appellant has no right or share in the said property.

b) It was also denied that the said property was purchased out of joint Hindu family funds belonging to joint Hindu family of the appellant and the respondent.

c) That the said property was purchased from the auction conducted by DDA on 12.10.1969 by the respondent from his own resources and there was no contribution made by the appellant nor it was purchased from his funds. Thus, the question of partition of property as claimed by the appellant does not arise

d) That the mother of the parties Smt. Sujani Devi, wife of Late Shri Prithi Singh again married with Bhim Singh, elder brother of Prithi Singh. The land measuring 200 Bighas was distributed between two sons i.e. 100 Bighas to each brother with possession and necessary entries were registered in the name of the appellant and respondent in Revenue Record.

Oral partition with possession took place between the appellant and the respondent.

e) In 1954, Delhi Land Reforms Act came into force and the concept of coparcenary and ownership came to an end and both the parties became *Bhumidars* in respect of their respective properties. It was further alleged that till joining defence services in the year 1953, the respondent carried out cultivation of his land himself and thereafter his wife went on with the cultivation in his absence. Sometime his mother also used to help to the wife of the respondent.

f) Thereafter, various properties were purchased by the wife and son of respondent in their own name. No objection as sought was raised by the appellant.

g) In the year 1969, DDA advertised the auction of commercial plot in October, 1969. The respondent purchased the said property by highest bid of Rs.36,200/- for a plot measuring 229 sq. yd. bearing no.30, Community Centre, Ashok Vihar, Delhi. Perpetual lease deed of the plot was registered on 5th July, 1972 in the name of the respondent by the DDA. Various funds were arranged by the family members of the respondent for the purposes of construction over the said plot.

h) That a sum of Rs.1,00,000/- was borrowed by the respondent from the bank i.e. Bank of Baroda as loan in his own name and he has also taken loan from other resources for the purposes of construction of the plot purchased from the DDA. No objection whatsoever was raised by the

appellant for the purchase of the plot as well as raising the construction. It was also mentioned that the funds spent on the construction and purchase proceeds of the plot were shown in the Income Tax Return of the respondent. The suit filed by the appellant is barred by limitation.

6. In addition to the preliminary issue regarding the maintenance of suit, some other issues were framed by order dated 13th February, 2001 and the matter was put up for 31st May, 2001 for arguments on the preliminary issues.

7. By the impugned order, the learned Single Judge dismissed the suit being time barred. It was dismissed on the ground that the appellant failed to pray for a decree declaring the suit property to be joint property. The appellant has challenged the said judgment by filing the present appeal. During the pendency of the appeal the appellant has also filed an application under Order 41 Rule 27 r/w Section 151 CPC for taking on record additional documents.

8. The contention of the appellant is that the suit was filed well within time because the right to sue accrued in the year 1985-86 when the respondent refused/avoided to partition the said property. It has been argued by the learned Senior Counsel for the appellant that there is no limitation for partition as it is recurring cause of action. It has further been argued that the suit seeking relief for declaration was not necessary under Section 34 of the Specific Relief Act as prayer made in the plaint includes that.

9. It has further been argued that since the matter has already went for trial where the statement of the mother Smt. Sujani Devi has been recorded who has deposed that the suit property was purchased out of joint Hindu Family funds, the learned Single Judge ought to have considered the same and ought not to have dismissed the suit on the question of limitation. He has also referred various documents which were filed before the Trial Court in order to establish his case.

10. Learned counsel for the appellant has argued that simply because the property stands in the name of a member of the family does not and cannot mean that it is his exclusive property. In a joint Hindu Family, the different properties can be purchased in different names of a joint Hindu Family yet the same would continue to be the properties of the family and, therefore, liable to be partitioned. In a suit for partition, relief of declaration is implicit to the extent that the said property is HUF property and is liable to be partitioned and no separate relief of declaration is necessary.

11. In support of his submission, the learned counsel has relied upon the judgment of ***Nanak Chand & others v. Chander Kishore and others, AIR 1982 DELHI 520*** wherein the Division Bench of this Court held as under:-

“The mere fact that it was purchased in his name does not render the property his separate property for all that is perfectly consistent with the notion of its being joint. Where a member of a joint Hindu family blends his self acquired property that property of joint family either bringing his self acquired property into a joint family account or by bringing joint family property into his separate account, the effect is that all the properties so blended becomes his joint family

properties. It is well settled principle of law that if any property purchased in the name of any member of HUF, it does not become his separate and absolute property.”

12. In the case of Nanak Chand (supra), it was laid down that Article 114 of the Limitation Act would apply to a suit for partition seeking a separation from joint family and de facto division into specific shares of joint property. There is no dispute as far as the proposition of law referred is concerned but in the present case, we are dealing with the point of limitation and maintainability of the suit. Therefore, the decision cited does not help the case of the appellant as the suit property is purchased by the respondent from the DDA and the perpetual lease deed stands exclusively in the name of respondent.

13. In the case of *Shri Ramesh Chand v. Shri Tek Chand and Ors.* reported as **115 (2004) DLT 193, 2005 (80) DRJ 166** by this court in which the decision of the Division Bench in *Nanak Chand & others v. Chander Kishore and others; AIR 1982 DELHI 520* has been dealt by the Court, similar observations were made in para 8 of the decision which reads as under:-

“As has already been mentioned above the Lease Deed (Title Document) is in the exclusive name of Defenant No.1 and has been registered over twenty years ago, on 10.06.1982. this being the position, the plaintiff ought to have filed a Suit for Declaration within three years of this event, that is, before 9.6.1985. Article 58 of the Limitation Act, 1963 prescribes this, the only possible controversy which may remain when the right to sue had first accrued. Reliance has been placed by Mr. Mehta, learned Senior Counsel for the Plainitff on the decision of the Hon’ble Division Bench of this Court in Nanak Chand and others vs. Chander Kishore and others, MANU/DE/0432/1982 where it had been opined that

Article 113 of the Limitation Act would apply to a Suit of Partition seeking a separation from Joint Family and de facto division into specific shares of joint property. This decision is of no avail to the Plaintiff for the reason that there is not even a smattering of evidence that the Suit Property was Joint Hindu Family property. There would scarcely have been any need to pray for a declaration if the property avowedly was Joint Hindu Family property, and the Plaintiff and Defendant No.1 were coparcener therein. Learned counsel for the Defendants have drawn my attention to Articles 106, 109 and 110 of the Limitation Act, 1963 which prescribe that action must be initiated within twelve years of a legacy or share becoming payable or an alienee take possession of ancestral property illegally alienated by the father; or when the Plaintiff is excluded from a share of Joint Family property. This period has also expired many years prior to the filing of the Suit. Prima facie, therefore, the Suit is not maintainable since it appears to be barred by limitation.”

14. The learned counsel for the appellant has referred various other decisions and heavily relied upon the case of ***Sanjay Kaushish v. Kaushish and others, AIR 1992 DELHI 118***. Most of these judgments proceed on the basis of properties where the joint Hindu Family/HUF family is involved. In the case of Sanjay Kaushish (supra) there was no contest between the parties that the property belongs to joint family and the father was admittedly the karta of HUF. The said judgment does not help the case of the appellant in this case as the main question embarked in the present case is of limitation. Further, in the present case, the respondent has denied that the property in question belongs to Joint Family and purchased from the funds of Joint Hindu family. The main question involved in the present case is of limitation and whether the suit filed by the appellant is maintainable or not.

15. On the other hand, learned senior counsel for the respondent

has argued that there was already an oral partition which took place between the appellant and respondent and both were living separately from each other and were having separate kitchens and holding their respective pieces of land separately and there is no question of any HUF or any joint Hindu Family. It has further been argued by the learned senior counsel for the respondent that the suit filed by the appellant is barred by limitation as the said suit was filed on 8th May, 1986 and the disputed property was purchased in an auction in the year 1969 from his own resources and no contribution was made by the appellant at all. The possession of the plot was delivered by the DDA to the respondent on 20th May, 1970. The construction of the plot commenced in January, 1973 and concluded in August, 1973 and the same was let out to the Bank on 28th August, 1973. The building plan was sanctioned in the name of the respondent. The appellant did not raise any objection in any of the matters. The suit was filed during the second week of May, 1986 after more than 12 years, therefore, the suit was liable to be dismissed with cost. He further argued that there was an admission made by the appellant in para 2 of I.A. 8966/1987 and as per his own case, the suit is barred by time.

16. We have heard the rival submissions of the parties and also gone through the pleadings and the documents. There are certain admitted facts between the parties. The same are:-

(a) It is not disputed that the property in dispute i.e. plot no.30, Central Market, Community Center, Ashok Vihar, Delhi was purchased by

the respondent in his own name in October, 1969 by the auction of DDA. It is also not in dispute that a sum of Rs.1,00,000/- was borrowed by the respondent from the Bank of Baroda as loan in his own name for the purposes of construction on the said plot purchased from DDA.

(b) The suit was filed during the second week of May, 1986. It is the admitted case of the parties that the suit property was let out to the Bank of Baroda comprising of basement, ground floor and mezzanine floor at the monthly rent of Rs.11,500/- w.e.f. September, 1973. The respondent no.1 since the inception of the suit property has been realizing the rent.

(c) The order of framing of additional issues and putting up the matter for arguments for maintainability of the suit is admittedly not challenged by the appellant.

17. Apart from the above said facts of the parties, there were following averments made by the appellant in paragraphs 2, 3 and 4 of the application under Order 39 Rule 1 & 2 CPC r/w 151 CPC. The said paragraphs read as under:-

“2. That is significant to submit here that the suit property namely 30, Central Market, Ashok Vihar, Delhi was purchased out of the Joint Hindu Family funds belonging to the Joint Hindu Family of the plaintiff and the defendant. That the said H.U.F. property belonging to the plaintiff and the defendant in equal shares was rented out to the Bank of Baroda comprising of basement, ground floor and mezzanine floor at a monthly rental of Rs.11,500/- at present. The defendant since the inception of the aid tenancy has been realizing the rents and is appropriating to himself to the exclusion of the plaintiff.

3. That the defendant by mis-representation and threats have required the aforesaid tenant, Bank of Baroda to pay rent to him on the false and fraudulent pleas that he alone is the absolute and sole owner of the said property. It is significant

to submit that on the basis of the said representation and also for ulterior motives and purposes, the defendant has cast a cloud on the title and ownership of the plaintiff in the said property and have falsely, illegally, unauthorisedly colluded with the said tenant to pay rent to him only.

4. That the plaintiff have repeatedly asked the defendant not to cast a cloud on his right and title in respect of the said property and to claim absolute right, title or interest in the said property and also not to realize/receive any rent from the tenant and to appropriate the same to himself but he did not pay any heed and is bent upon to continue with his wrongful and illegal act and is misappropriating and diverting and utilizing the amounts of rent received by him for his own personal gains, to the complete exclusion and ouster of the plaintiff."

18. In the present case, it is not disputed that the appellant in his application under Order 39 Rule 1 & 2 CPC being IA No.8966/1987 made the statement in paragraphs 2, 3 and 4 that the premises in dispute was let out to the Bank of Baroda in September, 1973 on the exclusion of the appellant from his share in the rental of the portion of the suit property. It is further stated that the defendant since inception of the said tenancy has been realizing the rent and is appropriating to himself to the exclusion of the plaintiff. The suit was filed by the appellant in May, 1986 which is more than 12yrs from the date of exclusion of the rent by the respondent . From the above said facts and circumstances it appears that the appellant has knowingly not filed the Suit for Declaration under Article 58 of the Limitation Act which provides the period of three years to obtain declaration from the date when the right to sue accrues.

19. Another statement has been made in para 3 of the said application that the defendant has cast a cloud on the title and ownership

of the plaintiff in the suit property and have falsely, illegally, unauthorisedly colluded with the said tenant to pay the rent to him and to claim absolute right and title in the said property to the complete exclusion and ouster of the plaintiff.

20. In view of the above, the contention of the appellant that the suit was filed well within time or there is no limitation for partition has no force. We also do not agree with the contention of the appellant that since the matter is already gone for trial, the suit ought not to have dismissed. It appears from the trial court record that the preliminary issues relating to maintainability were framed in the presence of the parties before the trial begin and the learned Single Judge decided the issues on the question of maintainability of the suit itself.

21. It is apparent that the plaintiff is aware of the exclusion of the benefit/usufruct of the property rented and is being excluded from receiving any rent for the suit property. The suit property was rented in September, 1973 however, the appellant had slept over his right for more than 12 years and has filed the suit only in May, 1986 which is not maintainable and time barred as per the provisions of the Limitation Act.

22. We are of the view that the suit is not maintainable. It is clearly barred by limitation and the same has rightly been dismissed by the learned Single Judge. The appellant's pending application under Order 41 Rule 27 CPC is also dismissed in view of the above said finding.

23. We agree with the findings given by the learned Single Judge and

found no infirmity in the impugned judgment. The appeal being devoid of merits is hereby dismissed.

MANMOHAN SINGH, J

JANUARY 09, 2009
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A.K. SIKRI, J