

(2011) 11 DEL CK 0090

In the Delhi High Court

Case No : I.A. No. 13610 of 2010 in C.S. (OS) No. 2491 of 2009 and I.A. No. 9402 of 2010 in C.S. (OS) No. 163 of 2010

Aniruddha Dutta and Others

APPELLANT

Vs

Bhawani Shankar Basu and Others
 Ira Dutta Vs
Bhawani Shankar Basu and Others

RESPONDENT

Date of Decision : 18-11-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11, Order 9 Rule 13, 151

Citation : (2012) 127 DRJ 70

Hon'ble Judges : Manmohan Singh, J

Bench : Single Bench

Advocate : M. Qayam-ud-Din, in I.A. No. 13610/2010 in C.S. OS No. 2491/2009 and Mr. G.S. Narula, in I.A. No. 9402/2010 in C.S. OS No. 163/2010, for the Appellant; Sandeep Sethi, with Mr. Ajay Mehrotra and Ms. Namita Goel for D-9. Mr. Amit Sanduja, for Mr. Sunil Malhotra, for D-1, 2, 3 and 5, Mr. Tarun Sharma, for D-7. Mr. Sanjeev Kr. Chaswal, for D-15 and D-17 in I.A. No. 13610/2010 in C.S. (OS) No. 2491/2009 and I.A. No. 9402/2010 in C.S. (OS) No. 163/2010 and Mr. M. Qayam-ud-din, for D-18 in I.A. No. 9402/2010 in C.S. (OS) No. 163/2010, for the Respondent

Judgement

Manmohan Singh, J.—By this common order, I propose to decide two applications under Order VII Rule 11 CPC, being I.A. No. 13610/2010 in CS(OS) No. 2491/2009 and I.A. No. 9402/2010 in CS(OS) No. 163/2010, for rejection of plaints. As the points involved in both the matters are same, thus the common order is being passed.

2. The plaintiffs in both the matters have filed the suits for declaration, partition, rendition of accounts, perpetual and mandatory injunction, who are seeking the following reliefs:

Prayers in CS(OS) No. 2491/2009 & 163/2010

(a) To pass a decree of declaration simplicitor thereby declaring that the

judgment/ decree /declaration dated 15.1.1976 passed in Suit No. 12/75 titled as Shri Sailendra Nath Basu and ors Vs. Shri Birendra Nath Basu and others passed by Shri H. K. S. Malik, Addl. District Judge, Delhi, null and void and nonest qua the plaintiffs and defendant No. 10 herein;

(b) pass a preliminary decree of partition of the suit property to the extent of the 1/8th share of the plaintiffs and defendants No. 10 herein and their, inter-se, shares as to be determined by this Hon"ble Court and thereafter pass a final decree after appointing Local Commission for partitioning the suit property by metes and bound in the ratio of the respective shares of the plaintiffs No. 1 to 4 and defendant No. 10 herein;

(c) pass a decree of rendition of accounts thereby directing the defendants 1 to 7 to render the accounts in respect of the income /rent being received by the defendants 1 to 7 from the suit property bearing No. B-4/66, Safdarjung Enclave, New Delhi, with effect from the date of expiry of Smt. Nirodh Bala Basu or with effect from any date which this Hon"ble Court legally deem fit and proper till up-to-date of filing of the same in favour of the plaintiffs and defendant No. 10 herein and directing the defendants No. 1 to 7 to share the same with the plaintiffs and defendant No. 10 herein;

(d) pass a decree of perpetual injunction against the defendants No. 1 to 7 and 9, thereby restraining them, their agents, servants, attorneys or any one claiming under them from transferring, alienating or in any manner dealing with the suit property Bearing No. B-4/66, Safdarjung Enclave, New Delhi;

(e) pass a decree of mandatory injunction thereby directing the defendant N0.8-DDA, a statutory authority, to revoke and cancel the lease-deed in respect of the suit property No. B-4/66, Safdarjung Enclave, New Delhi, and re-register the same in the name of the rightful owners of the suit property including the plaintiffs and defendant No. 10 herein;

(f) to award costs of the suit in favour of the plaintiff and against the defendants.

3. The matters pertain to a property in question situated at Plot 66, Block B-4/66, Safdurjung Residential Area. The plot admeasures about 401.83 sq yards. The suit property in question was owned by Sri Lalit Kumar Basu. After the demise of Sri Lalit Kumar Basu the property devolved on his wife Smt. Nirod Bala Basu and his four sons and 4 daughters.

4. The plaintiffs in both matters alleged that some mischief and fraud has been played by the Defendants. A suit was filed by Sri Sailendra Nath Basu, Sri Bhawani Shankar Basu and Sri Bhupendra Nath Basu, bearing Suit No. 12 of 1975. The suit was decreed as prayed for and declared Shailendra Nath Basu, Bhawani Shankar Basu and Birendra Nath Basu as joint owner of the suit property on basis of the Will dated 1.2.1971.

5. In the year 1975 and thus a decree dated 15.1.1976 was passed in their favour. The plaintiffs allege that the defendants by use of coercive and wrongful

methods have defrauded the plaintiffs by obtaining the false and fabricated copy of a Will. Hence the plaintiffs have filed the suits for declaration before this Court.

6. Cause of action in CS(OS) No. 2491/2009

The cause of action for filing the suit arose in the first week of November, 2009 when the plaintiff No. 1 got an information that the suit property is being demolished and it further arose on 7.11.2009 plaintiff No. 1 talked to defendant No. 1, who refused on telephone to partition the suit property by metes and bounds. It further arose on 2.12.2009 when for the first time it has come to the knowledge of the plaintiffs herein on getting the case file of CS(OS) No. 128/2006 inspected that fraudulently judgment/decreed/ declaration dated 15.1.1976 in Suit No. 12/1975 from the Court of Shri H.K.S. Malik, ADJ, Delhi had been obtained by falsity, concealment of true facts and documents, and by playing fraud upon the said Court and the plaintiffs and defendant No. 1 herein on the basis of the forged and fabricated documents and a lease-deed had been got executed on the basis of the aforesaid fraudulently obtained decree dated 15.1.1976 and the suit property is illegally agreed to be alienated or being transferred in favour of defendant No. 9 and the cause of action is still continuing and subsisting.

7. Cause of action in CS(OS) No. 163/2010

The cause of action for filing the suit arose on 21.12.2009 when the defendant No. 18 informed the plaintiff that certain fraudulent judgment/decreed/declaration dated 15.1.1976 in Suit No. 12/1975 by the brothers of the plaintiff and further arose on 25.12.2009 and 26.12.2009 when the husband of the plaintiff, on the request of the plaintiff, visited the suit property and got snapped photographs of the suit property respectively. It further arose on 5.1.2010 when the plaintiff received the copy of the plaint along with documents more particularly the copy of the fraudulently obtained judgment/decreed/declaration dated 15.1.1976 and order dated 22.12.2009 passed by this Court in CS(OS) No. 2491/2009, sent by the lawyer of the defendants 11 and 18 to 20 herein and the cause of action is still continuing and subsisting.

8. Case of the plaintiffs as per plaint

(a) Sometime in 1950, a plot of land measuring 1000 sq. yards was purchased by late Lalit Kumar Basu in the name of his wife Smt. Nirod Bala Basu, out of his own income and resources as Smt. Nirod Bala was a housewife having no independent income.

(b) The said plot was acquired by the DDA and in lieu thereof an alternate plot measuring 401.83 sq yds, i.e. plot No. 66 Block B-4/66, Safdarjung Residential Area, New Delhi-110029, now also

known as B-4/66, Safdarjung Enclave, New Delhi (being the suit property).

(c) Shri Lalit Kumar Basu i.e. the husband of Smt. Nirod Bala Basu, pre-deceased

her on 26.1.1955, leaving behind the following LR's., being one widow, four sons and four daughters: -

- i) Smt. Nirod Bala Basu - Widow
- ii) Birendra Nath Basu - Son
- iii) Sailendra Nath Basu - Son
- iv) Bhupendra Nath Basu - Son
- v) Bhawani Shankar Basu - Son
- vi) Mrs. Mukul Dutta - Daughter
- vii) Mrs. Manju Sarkar - Daughter
- viii) Miss. Jaba Mitra - Daughter
- ix) Miss. Ira Dutta - Daughter

(d) The entire estate of late Lalit Kumar Basu including the suit property devolved unto his aforesaid legal heirs in equal shares. But the estate of late Lalit Kumar Basu including the suit property were not partitioned.

(e) On 21.2.1971 Smt. Nirod Bala Basu also expired intestate leaving behind the forenamed four sons and four daughters, as her L.Rs. (who, by then, were all married except one son Shri Bhawani Shankar Basu). Out of four daughters, one daughter Mrs. Mukul Dutta was married at Howrah (West Bengal) and rest three daughters were married at Delhi and nearby Delhi.

(f) On 29.7.1986, out of four sons above named, one son Shri Birendra Nath Basu, expired, leaving behind following four sons and one daughter as his legal heirs:-

- i) Lt. Col. Isan Chandra Basu - Son
- ii) Mr. Pratap Chandra Basu - Son
- iii) Mr. Prasanto Kumar Basu - Son
- iv) Dr. Sushanto Basu - Son
- v) Mrs. Ajanta Mitra - Daughter

(g) Mrs. Ajanta Mitra also expired on 19.8.1990, leaving behind her following legal heirs i.e. (defendants No. 5A and 5B) and her husband Mriganka Mitra has also now expired:-

- (A) Shri Deb Dutta Mitra - Son
- (B) Mrs. Deba Shree - Daughter

(h) One daughter of late Lalit Kumar Basu, Mrs. Mukul Dutta, wife of Shri Purna Chandra Dutta (who predeceased her) expired on 7.11.1991 leaving behind the

following L.Rs.. i.e. the plaintiffs and defendant No. 10 herein:-

i) Aniruddha Dutta - Son

ii) Debasish Dutta - Son

iii) Arijit Dutta - Son

iv) Enakshmi Biswas (now deceased) - Daughter leaving behind her LR's as under:

iv)(a) Shri Sujoy Kumar Biswas - husband

(b) Shri Debanjan Biswas - Son

(c) Shri Nilanjan Biswas (unmarried expired)

(i) Another daughter of late Lalit Kumar Basu, Mrs. Manju Sarkar, wife of Shri S. N. Sarkar, expired on 14.2.1993 leaving behind the following LR's i.e. defendants No. 12 to 15:-

i) Late Mrs. Jhuma Das- Married Daughter wife of late S.K. Das (through the following LR's)

a) Shyamal Sarkar - Son

b) Sudeep Sarkar - Son

c) Ms. Sumita Dutta - Married Daughter

d) Ms. Krishna Ghosh - Married Daughter

(j) One more daughter of late Lalit Kumar Basu, Mrs. Jaba Mitra, wife of Shri R. N. Mitra (who has also now expired on 15.12.1999), expired on 8.1.2005 leaving behind the following LR's i.e. defendants No. 16 and 17:-

i) Tapan Mitra - Son

ii) Chandra Shekhar Mitra - Son

(k) During her life time Smt. Mukul Dutta had always disclosed to the plaintiffs that she has got 1/8th share in the suit property as the said property was purchased by their maternal grandfather, out of his own funds but in the name of their maternal grandmother, who was having no source of independent income being a house-wife and she was neither employed nor had any business.

(l) Since the expiry of the mother (daughter of late Lalit Kumar Basu) of the plaintiffs No. 1 to 3 and grandmother of plaintiff No. 4 and wife of defendant No. 10, plaintiffs and defendant No. 10 were being assured that they have got their share in tact in the suit property and they will get their proportionate share as and when the suit property is divided/partitioned amongst the legal heirs of late Lalit Kumar Basu and his wife Smt. Nirod Bala Basu.

(m) That defendant No. 6 (Shri Bhupendra Nath Bose) visited India on or about December 1996, the place of residence of the plaintiffs, at the time of marriage

of his daughter and at that time the plaintiffs wanted to share with him the concern regarding the property in suit and its partition and their share also but the defendant No. 6 postponed the issue by saying that this is an auspicious occasion of the marriage of his daughter and he promised to discuss on his next visit. Defendant No. 6 stayed only for half an hour at the residence of the plaintiffs.

(n) The plaintiffs also contacted defendant No. 1 on telephone and after formal talks, the plaintiff No. 1 asked him to come to India to settle the matter of the suit property and to partition the property by metes and bounds and as per their entitlement/share and defendant No. 1 promised that he will settle the matter when he will visit India and postponed discussing the suit property issue on the plea that the detailed property matters cannot be discussed on telephone and it will be settled after calling all the LR's across the table.

(o) After the marriage of the daughter of plaintiff No. 1 in 1996, defendant No. 6 visited India several times but he did not visit plaintiffs even once, not even at the time of death of the mother of the plaintiffs 1 to 3 (sister of defendant No. 6), despite information.

(p) In the first week of November, 2009, one Mr. Shyamal Kumar Sarkar son of late Smt. Manju Sarkar (maternal aunt of plaintiffs No. 1 to 3 in CS(OS) No. 2491/2009) made a telephone call to plaintiff No. 1 and said that the suit property was being demolished and the plaintiff No. 1 should come to Delhi to take steps to protect their interest in the property. The Plaintiff No. 1 contacted the defendant No. 1 on 07.11.2009 on telephone and enquired from him as to why the suit property is being demolished. The defendant No. 1 stated that the plaintiffs should forget about partition, as the mother of plaintiffs 1 to 3 had got no share in the suit property. Accordingly the plaintiff No. 1 arrived at Delhi on 12.11.2009 with his friend and went to the suit property and saw that the suit property is being demolished.

(q) On 14.11.2009 the plaintiff No. 1 Anirudha Dutta was informed by his aunt Mrs. Ira Dutta for the first time that defendant No. 7 (Shri Saliender Nath Basu) had written in his own handwriting in Bengali a letter dated 15.11.1987 by virtue of which he had admitted that a bad work has been done amongst the family members whereby some fraudulent work has been done and the copy of the said letter was handed over to the plaintiff No. 1 by his aunt on 14.11.2009 and from the perusal of the same it has transpired that some fraud has been played (upon the daughters of late Lalit Kumar Basu) and the defendant No. 7 very well knew about the commission of the fraud. On the basis of a forged and false-Will about which the plaintiffs came to know only on 2.12.2009 pursuant to the inspection of the record of CS (OS) No. 1228/2006 that a fraudulent decree has been obtained by the defendant Nos.1 to 7 (except defendants No. 5A and 5B) and the said forged Will was never shown to the plaintiffs or the mother of the plaintiffs No. 1 to 3 and grandmother of plaintiff No. 4 and wife of defendant No. 10.

9. In nutshell, the case of the plaintiffs is that plaintiffs and defendant No. 10 have 1/8th share in the suit property and they became aware of the decree dated 15.01.1976 only on inspection of the record of Suit No. 1228/2006 on 02.12.2009.

10. Most of defendants have filed the written statements. Defendant No. 9, who purchased the said suit property, has also filed the applications under Order VII Rule 11 CPC read with Section 151 CPC for rejection of both plaints. All contesting defendants have denied the case of the plaintiffs and have supported the case of defendant No. 9.

11 The following are the grounds given by the defendant No. 9 in its application for rejection of plaint :

(a) that the right of the plaintiffs have extinguished long back in the year 6.1.1976. Thus, both are barred by limitation as the plaintiff claimed their alleged share after a gap of 19-20 years from the death of Mrs. Mukul Dutta. The plaintiffs now cannot challenge the decree passed in Suit No. 12/1975. The plaintiffs are also guilty of *suppresio very* and *suggestio falsi*.

(b) that the plaintiffs have no direct right over the suit property. They have derived the title from Smt Mukul Dutta (wife of Purna Chandra Dutta, d/o of Late Shri Lalit Kumar Basu). Suit was filed bearing Suit No. 12/75 titled as Sri Shailendra Nath Basu Vs. Shri Birendra Nath Basu & Ors). Smt Mukul Dutta did not choose to contest the suit and hence suit was decreed *ex-parte* on 15.1.1976, declaring Shailendra Nath Basu, Bhawani Shankar Basu and Bhupendra Nath Basu and Defendants No. 1, 6 and 7 are herein are the only owners of the property. Hence the plaintiffs have no interest as the plaintiff's predecessors have been declared not to have any interest over the property. Therefore, there is no valid cause of action in the plaint.

(c) Both suits are filed with malafide intention, vexatious, devoid of any merits and abuse of the process of Court.

12. As far as the purchase of suit property is concerned, it is stated in the application that the owners of the suit property had approached the defendant No. 9 who wanted to sell the suit property. To establish their ownership, they have supplied various documents. It is alleged in the application that as per the perpetual lease deed dated 03.02.1982, the President of India had granted the lease of the suit property admeasuring 401.83 square yards situated at the Ring Road, South Delhi villages Mohmadpur, Munirka and Humayunpur revenue estate in their favour (i.e. Shri Birendra Nath Basu, Shri Shailedra Nath Basu, Shri Bhupendra Nath Basu and Shri Bhawani Shanker Basu). Thereafter, vide their letter No. F4(17)/83/Buldg/ 1535 dated 18.03.1985 the above mentioned persons got the building plan also sanctioned from the DDA and constructed a building for residential purpose. They also got obtained the occupancy certificate from the DDA vide their letter dated 21.08.1989.

12.1 It is further stated that Shri Birendra Nath Basu died on 29.07.1986 and as per his will dated 06.07.1986, his 25% share in the suit property will go in favour of his sons namely Shri Ishan Chandra Basu, Dr. Pratap Chandra Basu, Shri Prosanto Kumar Basu and Dr, Sushanto Basu in equal share i.e. 1/16th undivided share in the suit property to each of his son and the probate of the said will of late Shri Birendra Basu has also been granted in favour of his four sons and said property was even mutated in their names.

12.2 Thereafter, an addendum dated 08.10.2009 in the form of memorandum of understanding was also executed between Shri Ishan Chandra Basu, Dr Pratap Chandra Basu, Shri Prosanto Kumar Basu and Dr, Sushanto Basu alongwith Shri Shailedra Nath Basu, Shri Bhupendra Nath Basu and Shri Bhawani Shanker Basu and the defendant No. 9, in the said agreement, fresh terms and conditions were agreed upon and the parties even agreed to complete the sale within one month by executing a sale deed.

12.3 A probate case was filed in the year 1987. As per order dated 30th June 1994 passed by the Ld. District Judge P.K. Jain Delhi in Probate Case No. 394/87, the Letter of Administration of the said Will of Late Birendra Nath Basu was granted in favour of Mr. Ishaan Chandra Basu, Dr. Pratap Chandra Basu, Mr. Prosanto Kumar Basu and Dr. Sushanto Basu. As per the order of Ld District Judge, the four sons of Late Birendra Nath Basu, applied for mutation to DDA in respect of the said 1/4th share.

12.4 All the four sons of Late Birendra Nath Basu alongwith Mr. Shailendra Nath Basu, Mr. Bhawani Shankar Basu and Bhupendra Nath Basu i.e. sons of Late Lalit Kumar Basu applied to DDA for Sushanto Basu (to the extent of 1/16th share). The same was duly registered in the office of the Sub-Registrar, New Delhi as document No. 7370, Book No. 1 Vol No. 3381 on pages 106-108 on 21.5.2009.

12.5 Defendant No. 9 also states in his application that a Supplementary Agreement to Sell in the form of a Memorandum of Understanding was executed between the four sons of Late Birendra Kumar Basu and Mr. Shailendra Nath Basu, Mr. Bhawani Shankar Basu and Bhupendra Nath Basu i.e. sons of Late Lalit Kumar Basu, all as the First Part and Defendant No. 9 i.e. Ms Sulochona Goyal as the Second Part. Apart from some fresh terms and conditions, the parties also agreed to complete the sale within 1 month by executing a sale deed. Since physical possession was still with Sri Ishaan Chandra Bose.

12.6 There was a preliminary decree which was passed in CS (OS) No. 1228/2006. The suit was filed by Shri Bhawani Chandra Basu. A decree was passed by this Court. It was decided accordingly that Shri Bhawani Shankar Basu, Mr. Shailendra Nath Basu, Shri Bhupendra Nath Basu as joint owners of the said property each having 1/4th share in the suit property while Sri Ishaan Chandra Bose, Dr. Pratap Chandra Basu, Mr. Proshanto Kumar Basu, and Dr. Sushanton Kumar Basu (all sons of Late Birendra Nath Basu) were declared joint owners having 1/16th undivided share each in the said property.

12.7 As the property was not feasible for partition in meets and bounds, it was agreed inter se that the said property would be sold and the money procured after the sale would be divided amongst the co-sharers.

12.8 In the meantime DDA issued a Deed of Conveyance on 17.2.2009 in the joint names of Shri Bhawani Shankar Basu, Mr. Shailendra Nath Basu, Shri Bhupendra Nath Basu (to the extent of 1/4th Share) and Mr. Ishaan Chandra Bose, Dr. Pratap Chandra Basu, Mr. Proshanto Kumar Basu, and Dr. Sushanto Kumar Basu categorically agreed that shall hand over the complete vacant possession of the whole property, while the remaining parties shall deliver symbolic and proprietary possession.

12.9 By way of registered sale deed the joint owners of the said property agreed that Defendant No. 9 upon giving the agreed consideration would become the absolute legal owner of the said suit premises. The sale deed which was duly executed by and between Mr. Shailendra Nath Basu and Mr. Bhupendra Nath Basu (having 1/4th share each. Both sons of Late Lalit Kumar Basu) Dr. Pratap Chandra Basu, Mr. Pratap Chandra Basu, Mr. Prosanto Kumar Basu and Dr. Sushanto Basu (having 1/16th share each) is registered as Document No. 8823 in Additional Book No. 1, Vol No. 4997 on pages 171 to 184 dated 26.10.2009 in the office of the Sub Registrar -IX, New Delhi.

12.10 The other sale deed executed by Mr. Bhawani Shankar Basu and registered the document as No. 8824 in Additional Book No. 1 Volume No. 4997 on pages 185 to 191 dated 26.10.2009 in the office of the Sub Registrar -IX, New Delhi. That by these two sale deed Defendant No. 9 became the legal owner of the said suit property.

12.11 Thereafter, two sale deeds one for a consideration of Rs. 5,25,00,000/- was executed between Shri Shailedra Nath Basu, Shri Bhupendra Nath Basu, Shri Ishan Chandra Basu, Dr Pratap Chandra Basu, Shri Prosanto Kumar Basu and Dr Sushanto Basu and the defendant No. 9 which was duly registered as document No. 8823 in additional Book No. 1, Vol. No. 4997 on pages 171 to 184 on 26.10.2009 in the office of the Sub-Registrar-IX, New Delhi.

12.12 The other sale deed was executed between the Shri Bhawani Shanker Basu and the defendant No. 1 for a consideration of Rs. 1,75,00,000/- which was also registered as document No. 8824 in additional Book No. 1, Vol. No. 4997 on pages 85 to 191 on 26.10.2009 in the office of the Sub-Registrar-IX, New Delhi. Thus, it is stated by defendant No. 9, that now she is the absolute and exclusive owner of the suit property and is also in legal, physical possession thereof and neither the plaintiffs nor their mother/maternal grandmother had/have any right or title in the suit property. Therefore, there is no valid cause of action in the plaint.

13. Reply on behalf of the Plaintiffs to the applications :

(i) The plaintiffs state that Defendant No. 9 has falsely fabricated the facts of this

case. The plaintiffs state that the question as to whether cause of action arose and or not is a question of law but a mixed question of law and facts, which cannot be tried without evidence.

(ii) The plaintiffs strongly object that Defendant No. 9 by way of this application is bringing in new facts which they cannot especially after they have filed their detailed written statement. The plaintiff also states that Defendant No. 9 in order to avoid to lead evidence against Defendant No. 9 is filing this application under Order 7 Rule 11.

(iii) The plaintiffs denied that they have insufficiently stamped. The plaintiffs claim that they have stamped their suit in accordance with the Suit Valuation Act and proper court fees have been paid.

(iv) The plaintiffs claim that a fraud has been played upon the Hon"ble court and on them as well. Hence the lawful owners of the suit premises have been wrongfully denied their legal right. Based on a non-est and null decree, which plaintiff alleges that Defendant No. 9 alongwith other defendants have played fraud and deceived them.

(v) The plaintiffs also deny that they have approached Defendant No. 9 in selling the suit property. Rather the alleged vendors were not actual owners of the property and hence they were not entitled to execute any Sale Deed in favour of Defendant No. 9.

(vi) That the defendants have forged the documents i.e. the Will and obtained a fraudulent Decree. Hence it cannot create any right, title interest on Defendant No. 9. So the whole transaction is null and void ab initio and had no legs to stand in law. (vii) The Plaintiff also states that the property in question devolves upon all the Legal Representative by operation of law and according to Hindu Succession Act. (viii) The plaintiffs submits that since the suit bearing CS(OS) No. 1228/2006 has been dismissed as withdrawn hence all the interim orders along with the suit also stands dismissed. Hence the partition on the basis of the Local Commissioner also does not arise and is dissolved along with the suit.

(ix) The plaintiff states that the agreement dated 19.9.2008 entered between by the joint owners and Defendant No. 9 are not entitled to do so and hence the agreement should not be treated as anything validly legal.

(x) The plaintiff also claims that the conveyance deed issued by the DDA dated 17.2.2009 is also a sham and fraud. The same was obtained in an untrue and illegal manner. The DDA authorities also have been misrepresented in obtaining the deed.

(xi) The plaintiffs deny that there has been any Addendum dated 8.10.2009 entered into between the alleged vendor/ first part and the vendee/ second part i.e. Defendant No. 9. Hence it is void ab initio.

(xii) The plaintiffs allege that defendant No. 9 is not the true owner of the suit

premises as she does not have any right title and interest over the same. The plaintiff also denies that she is in exclusive physical possession of the suit premises.

(xiii) The plaintiffs also state that Defendant No. 9 does not have a proper chain of title. Hence the application filed by defendant No. 9 under Order 7 Rule 11 should not be allowed and should be dismissed at the threshold.

14. It is argued by the Learned Counsel appearing on behalf of the plaintiffs in both matters that the disputed questions cannot be decided at the time of considering an application under Order VII Rule 11 CPC in view of the settled law. The present case is not a case where the suits of the plaintiffs are barred by law in view of the reading of the entire plaints. The material facts mentioned in the plaints clearly establish that the suits of the plaintiffs are prima facie maintainable.

15. It is also submitted that every cause of action is a question of fact and if disputed, the same can be settled only by evidence and trial. The cause of action mentioned in the plaints for filing the present suits is of November 2009. As far as the judgment and decree dated 15.01.1976 passed in Suit No. 12/1975 is concerned, the same has been obtained by the defendants on the basis of concealment of true facts and documents and by playing fraud upon the said Court. The defendant No. 9 in the present applications, has failed to show any fact from the contents of the plaints that the cause of action had arisen prior to the date of cause of action mentioned in the plaints.

16. The Learned Counsel for the plaintiffs have also argued that in view of the settled law, when an ex-parte decree is passed, the defendant has following four courses open to him:

- (i) To apply under Order 9 Rule 13 CPC to set aside the ex-parte decree.
- (ii) To appeal from the ex-parte decree.
- (iii) To apply for review.
- (iv) To institute a suit on the ground of fraud.

17. The Learned Counsel for the plaintiffs have referred to few decisions in support of his submissions and submitted that the suits filed by the plaintiffs are maintainable. It is also argued that as far as about the challenged of decree passed in 1976 is concerned, the law of limitation would apply when fraud comes to the knowledge of the aggrieved party. The suit could be filed within a period of three years from the date of knowledge of the fraud.

18. Learned Counsel further submits that in the present case, the decree was obtained by playing fraud upon the Court on the basis of the false claim by manipulating the service of process against the deceased and got her proceeded ex-parte by manipulating the service report. As the issue of limitation is a mixed question of facts and law and the suits of the plaintiffs are not to be dismissed

without the trial of the suit.

19. this Court is conscious about the fact that if on a meaningful not formal reading of the plaint, if it appears that the same is vexatious and meritless and it does not disclose a clear right to suit, then the Court may exercise its power under Order VII Rule 11 CPC. While exercising the said power, the court has to read the plaint and documents annexed thereto in a meaningful manner.

20. Before dealing with the rival submissions of the parties in this regard, there are following undisputed facts placed by the parties during the course of hearing :

(i) The suit property belonged to Smt. Nirodh Bala. She had 4 sons and 4 daughters. She passed away in February 1972 leaving behind her last Will and Testament dated 1.2.1971. By virtue of the Will she bequeathed the property to her 4 sons and disinherited the 4 daughters;

(ii) Three of the four sons filed Suit No. 12/1975 before the District Judge, Delhi. The said suit was decreed on 15.1.1976 declaring the four sons to be the owners of the said property. The said decree was passed in suit to which the four daughters were also the parties. The plaintiff herein was arrayed as defendant No. 5 in the said suit and she herself admitted the claims of her brothers and filed her written statement, as is clear from the said decree.

(iii) On 15.1.1982, pursuant to the said decree, the DDA executed perpetual lease deed in respect of the said property in favour of the said four sons of Smt. Nirodh Bala. The property was constructed upon and the DDA granted Occupancy Certificate on 1.1.1989.

(iv) On 29.7.1986, one of the sons, namely Birendra Nath Basu passed away leaving behind his last Will and Testament dated 6.7.1986 thereby bequeathing his one-fourth share in the said property in favour of his own four sons;

(v) By order dated 30.6.1994 the District Judge, Delhi granted Probate in respect of the said share of late Birendra Nath Basu;

(vi) Later on 25.9.2008, the said 1/4th share of deceased Birendra Nath Basu was mutated by DDA in favour of his four sons;

(vii) On 21.5.2009 a Conveyance Deed was executed by DDA in favour of three sons of Nirodh Bala and her four grandsons (being sons of Shri Birendra Nath Basu), as aforesaid.

(viii) In the meantime, one of the sons of Smt. Nirodh Bala, namely Shri Bhawani Shanker Basu filed a Suit No. 1228/2006 before the Hon"ble High Court of Delhi for partition of the said property;

(ix) By order dated 10.1.2007, a preliminary decree was passed by this Court appointing shares in the suit property limited to the three sons of Smt. Nirodh Bala and four of her grandsons, as aforesaid;

(x) Pursuant thereto by 2 sale-deeds dated 22.10.2009, the defendant No. 9

purchased the suit property, after having gone through the title-documents in chain and hence the defendant No. 9 is a bonafide buyer of the suit property for valuable consideration.

21. Ms. Ira Dutta, the plaintiff in CS(OS) No. 163/2010 claims to be the legal heir of late Smt. Nirod Bala Basu and late Lalit Kumar Basu. Smt. Nirod Bala Basu was admittedly a party to the said Suit No. 12/1975 in which the impugned decree was passed and she herself filed a written statement being defendant No. 5 and admitted the claims of the plaintiffs in the said suit and on the basis of admission the judgment and decree was passed on 15.1.1976.

22. The fact of execution of Will dated 01.02.1971 by Smt. Nirodh Bala Basu was admitted by her on oath in her affidavit dated 20.01.1974 duly attested on 22.01.1974 filed in Suit No. 12/1975, inter alia, as under:

I have no objection to the transfer of the plot in the names of my said brothers Shri Birendra Nath Basu, Shri Shailendra Nath Basu, Bhupendra Nath Basu and Bhawani Shanker Basu alone as per the deposition made by my mother in her last will and testament and I claim no interest in the said suit.

23. Now after the expiry of 34 years, it is alleged in the suit that she never received any notice or summon in the said suit or in any other suit in respect of the suit property nor did she engage any Advocate or signed any Vakalatnama or written statement or any pleading in the said suit or in any other suit at any point of time in respect of the suit property and the decree was obtained by playing fraud upon the court in connivance with defendant No. 1 in Suit No. 12/1975.

24. Late Smt. Mukul Dutta, of whom the plaintiffs in CS(OS) No. 2491/2009 claim to be the legal heir, was a party to the suit No. 12/1975 in which the impugned decree was passed. As per the final order of decree, it appears that Smt. Mukul Dutta was proceeded ex-parte in the said suit vide order dated 6.1.1975 as she did not appear despite of service. In the present suits, it has been alleged by the plaintiffs that Smt. Mukul Dutta was not served in the said suit.

25. As per the final order of decree, it is mentioned that Smt. Mukul Dutta was proceeded ex-parte in the said suit vide order dated 6.1.1975. There is not a whisper in the plaint that that Smt. Mukul Dutta was not served in the said suit. Instead of that, it is alleged that the said decree was obtained by playing fraud upon the Court on the basis of the false claim by manipulating service of process against her and got her proceed ex-parte by manipulating service report. No record of the said suit has been cited or produced to show that Smt. Mukul Dutta was wrongly proceeded ex-parte. It is a settled law that record of the Court is sacrosanct. Neither of the aforesaid facts are disclosed to the Court. Even otherwise, the plaintiffs have not challenged the perpetual lease-deed, occupancy certificate, conveyance deed or the sale-deeds in favour of the defendant No. 9 nor has impugned the proceedings in Probate Case No. 394/87 or the Suit No.

1228/2006. The plaintiffs have also not filed the relevant record of CS(OS) No. 12/1975 in order to support their case. Learned Counsel for the plaintiffs on the other hand has stated that the relevant record about the service of Late Smt. Mukul Dutta and Late Smt. Nirod Bala Basu is not available (being old record) in the trial court. Therefore, it could not be filed.

26. It is pertinent to mention that in para 16 of the plaint in CS(OS) No. 163/2010 and para 19 in CS(OS) No. 2491/2009, the plaintiffs in both suits made specific statements. The relevant extracts of the same are as under :

in the month of January, 2001, the defendant No. 18 contacted the plaintiffs and requested to intervene into the matter and talk to her brother Sailender Nath Basu as he had also written the plaintiffs a letter regarding suit property that some bad things had been done in the family.

Thus, it is clear that the plaintiffs were aware about the bad things happened in the month of January, 2001. The present suits were however, filed in the year 2009 and 2010.

27. It is settled law that record of the Court is sacrosanct. The defendant No. 9 has referred to D.P. Chadha Vs. Triyugi Narain Mishra and Others, . The relevant paras of the said judgment read as under :

18. The record of the proceedings made by the court is sacrosanct. The correctness thereof cannot be doubted merely for asking. In State of Maharashtra Vs. Ramdas Shrinivas Nayak and Another, , this Court has held:

...the Judges record was conclusive. Neither lawyer not litigant may claim to contradict it, except before the Judge himself, but nowhere else. The court could not launch into inquiry as to what transpired in the High Court.

The Court is bound to accept the statement of the Judges recorded in their judgment, as to what transpired in court. It cannot allow the statement of the Judges to be contradicted by statements at the Bar or by affidavit and other evidence. If the Judges say in their judgment that something was done, said or admitted before them, that has to be the last word on the subject. The principle is well settled that statements of fact as to what transpired at the hearing, recorded in the judgment of the court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the Judges, to call the attention of the very Judges who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error. That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there.

19. Again in Bhagwati Prasad Vs. Delhi State Mineral Development Corporation, this Court has held:

It is now settled law that the statement of facts recorded by a Court or Quasi-Judicial Tribunal in its proceedings as regards the matters which transpired during the hearing before it would not be permitted to be assailed as incorrect unless steps are taken before the same forum. It may be open to a party to bring such statement to the notice of the Court/Tribunal and to have it deleted or amended. It is not, therefore, open to the parties or the Counsel to say that the proceedings recorded by the Tribunal are incorrect.

20. The explanation given by the appellant for not moving the trial court for rectification in the record of proceedings is that the presiding judge of the court had stood transferred and therefore it would have been futile to move for rectification. Such an explanation is a ruse merely. The application for rectification should have been moved as the only course permissible and, if necessary, the record could have been sent to that very judge for dealing with prayer of rectification wherever he was posted. In the absence of steps for rectification having been taken a challenge to the correctness of the facts recorded in order sheet of the court cannot be entertained, much less upheld. We agree with the finding recorded in the order under appeal that the proceedings dated 8.4.1994 correctly state the appellant having appeared in the court and argued the matter in the manner recited therein.

28. In *State of Maharashtra Vs. Ramdas Shrinivas Nayak and Another*, , the Supreme Court observed as under:

4. When we drew the attention of the learned Attorney General to the concession made before the High Court, Shri A.K. Sen, who appeared for the State of Maharashtra before the High Court and led the arguments for the respondents there and who appeared for Shri Antulay before us intervened and protested that he never made any such concession and invited us to peruse the written submissions made by him in the High Court. We are afraid that we cannot launch into an inquiry as to what transpired in the High Court. It is simply not done. Public Policy bars us. Judicial decorum restrains us. Matters of judicial record are unquestionable. They are not open to doubt. Judges cannot be dragged into the arena. "Judgments cannot be treated as mere counters in the game of litigation". (Per Lord Atkinson in AIR 1926 136 (Privy Council)) We are bound to accept the statement of the Judges recorded in their judgment, as to what transpired in court. We cannot allow the statement of the judges to be contradicted by statements at the Bar or by affidavit and other evidence. If the judges say in their judgment that something was done, said or admitted before them, that has to be the last word on the subject. The principle is well settled that statements of fact as to what transpired at the hearing, recorded in the judgment of the court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the judges, to call attention of the very judges who have made the record to the fact that the statement made with

regard to his conduct was a statement that had been made in error. (Per Lord Buckmaster in *Madhusudan v. Chanderwati*, AIR 1917 P.C. 30) That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. Of course a party may resile and an Appellate Court may permit him in rare and appropriate cases to resile from a concession on the ground that the concession was made on a wrong appreciation of the law and had led to gross injustice; but, he may not call in question the very fact of making the concession as recorded in the judgment.

29. The defendant No. 9 has purchased the suit property for Rs. 7.5 crores by way of two sale deeds which have not been challenged in the plaint nor any court fee is paid. The plaintiffs have valued the suit for Rs. 1 crore and not paid *ad-valorem* court fee.

30. The plaintiffs have also filed the suit for partition being joint owner who had been excluded from the joint ownership of the property as per the averments made in the plaint for which they are entitled to, they are admittedly not in possession of the suit property.

31. Further, the perpetual lease deed impugned by the plaintiffs in the present suits is dated 15.1.1982. The plaintiffs did not disclose the date of the document as it would have been clear that the suit was filed 27 years after the execution of the said perpetual lease deed. The said perpetual lease deed has ceased to exist as the suit property was converted into freehold by Conveyance Deed dated 21.05.2009. The said Conveyance Deed has also not been challenged by the plaintiffs in their respective suits. Admittedly, the said property was sold in favour of defendant No. 9 by two sale deeds dated 22.10.2009. The said sale deeds have also not been challenged by the plaintiffs.

31. Ex-facie, if the entire complaints are taken into consideration, it is clear that both the suits are barred by limitation and there is no valid cause of action in favour of the plaintiffs as they were aware about the property dispute amongst their family members as it was alleged by them that they learnt that some bad things had been done in the family. Thus, there is no valid cause of action in both the complaints and the statement made is not correct.

Both the suits are meritless and hopelessly time barred. The pleadings are vexatious and contrary to the record of suit No. 12/1975 as the plaintiffs were aware about the factum of Suit No. 12/1975 much prior to the dates as alleged in their respective paras of cause of action.

32. Under these circumstances, both the applications filed by the defendant No. 9 are allowed. Consequently, complaints registered as CS(OS) No. 2491/2009 and CS(OS) No. 163/2010 are rejected. All pending applications also stand disposed of.