
(1997) 05 DEL CK 0057

In the Delhi High Court

Case No : Interim Application No. 9039 of 1996 and Suit No. 869 of 1995

Irshad Ali

APPELLANT

Vs

Shahaba Begum

RESPONDENT

Date of Decision : 14-05-1997

Acts Referred:

Limitation Act, 1963 — Article 58

Citation : (1997) 4 AD 21 : (1998) 2 CivCC 478 : (1997) 67 DLT 576 : (1997) 42 DRJ 224 : (1997) 4 RCR(Civil) 660 : (1998) RLR 6

Hon'ble Judges : A.D. Singh, J

Bench : Single Bench

Advocate : Asrar Ahmed and O.P. Sharma, for the Appellant;

Judgement

Anil Dev Singh, J.

(1) The main question is: whether the suit of the plaintiff is liable to be dismissed under Order 7 Rule 11 CPC as being out of time on the basis of the facts stated in para 13 of the plaint? The facts necessary to appreciate this question are as follows:-

(2) The defendant Smt. Shahaba Begum is stated to be the real sister of the plaintiff. The plaintiff, the defendant and Mr. Dilbar Hussain Malik, their brother, are the only legal heirs of Smt. Mumtaz Chowdharan who died on 14th October, 1988. Smt. Mumtaz Chowdharan executed a Will dated 30th October, 1982. The plaintiff asserts that the Will was obtained by the defendant by exercising fraud on Smt. Mumtaz Chowdharan. The plaintiff also states in para 8 of the plaint that the Will dated 30th October, 1982 could not be executed by Smt. Mumtaz Chowdharan for whole of the property in favor of the defendant only as according to the Shariat Law, a Mohammedan cannot dispose off more than a third of the surplus of his estate after the payment of funeral expenses and debt except where all the heirs consent to the bequest after the death of a Testator. It is the allegation of the plaintiff that it came to know about the execution of the Will only on 1st January, 1991. The plaintiff is stated to have approached the

defendant on 16th March, 1994 and 4th January, 1995 for discussion in regard to the Will executed by Smt. Mumtaz Chowdharan including the question of money received by the defendant from the sale of her (testatrix) properties, but the defendant refused to discuss the issue. The plaintiff instituted the instant suit for declaration to the effect that any transaction or deal entered into by the defendant, inter-alia on the basis of the above said Will dated 30th October, 1982 as null & void.

(3) The defendant in her above said application under Order 7 Rule 11 CPC inter-alia pleaded that as per the facts disclosed in para 13 of the plaint, the suit instituted on March 29, 1995 is barred under Article 58 of the Limitation Act, 1963. She has pointed out that in para 13 of the plaint it has been unequivocally stated that cause of action for institution of the suit arose on 1st January, 1991 when the plaintiff came to know about the Will of Smt. Mumtaz Chowdharan.

(4) Learned counsel appearing for the plaintiff submitted that on the facts disclosed in para 13 of the plaint the suit filed by the plaintiff is within time. He pointed out that in para 13 of the plaint it is clearly stated that the defendant refused to discuss the issues relating to the Will of Smt. Mumtaz Chowdharan and the monies received by her from the sale of the properties which were the subject matter of the Will.

(5) I have considered the submission of learned counsel as also the stand set up by the defendant.

(6) It is well settled that what constitutes a proper cause of action must depend upon the entirety of facts mentioned in the plaint and a mere inaccuracy in stating the date of accrual of the cause of action cannot be given undue importance and considered in isolation. (See: Jethmal Vs. Hiralal and Others,). Though it is correct that the plaintiff in para 13 of the plaint has stated that the cause of action arose on 1st January, 1991 when the defendant disclosed the fact with regard to the execution of the Will of the mother, this statement of the plaintiff cannot be considered in isolation. The remaining facts stated in para 13 have also to be considered in conjunction with the entirety of facts stated in the plaint. In para 13 of the plaint it has also been stated that the cause of action arose on 16th March, 1994 when the defendant refused to talk to the plaintiff about the above said Will. It is further stated that the cause of action also arose on 4th January, 1995 when the defendant refused to part with monies received from the sale of the property of the mother. Para 11 of the plaint is also devoted to the sales made by the defendant.

(7) In Mst. Rukhmabai Vs. Lala Laxminarayan and Others, , the Supreme Court while considering the interpretation of Article 120 of the Limitation Act, 1908 held that there cannot be any "right to sue" until there is an accrual of the right asserted in the suit and its infringement, or at least a clear and unequivocal threat to infringe that right, by the defendant against whom the suit is instituted. The Supreme Court further held that, every threat by the defendant to such a

right, however ineffective and innocuous it may be, cannot be considered to be a clear and unequivocal threat so as to compel the plaintiff to file a suit. Therefore, it clearly follows that whether a particular threat gives rise to a compulsive cause of action depends upon the question whether that threat effectively invades or jeopardizes the right of the plaintiff; In other words cause of action for the first time will accrue to the plaintiff when he is compelled to come to the Court by the action of the defendant. According to the plaintiff she was compelled to institute the present suit as the defendant had refused to part with the money received by her by the sale of the properties of Smt. Mumtaz Chowdharan. The mere fact that the plaintiff had come to know about the alleged fraudulent character of the Will on 1st January, 1991 is no ground to hold, without anything more, that the suit filed on 29th March, 1995 was barred by limitation. Considering the statement of the plaintiff that the defendant refused to discuss the issue regarding payment of money received by the defendant from the sale of properties of the mother, in the light of the principle laid down by the Supreme Court in *Mst. Rukhmabai vs. Lala Laxminarayan and others* (supra), I have no hesitation in holding that the suit cannot be dismissed under Order 7 Rule 11 CPC on the ground that the facts as disclosed in para 13 of the plaint point out that the suit was filed beyond the period of limitation laid down by Article 58 of the Limitation Act, 1963. When for the first time the right of the plaintiff was threatened by the defendant by acting under the Will, it is then that the right to sue accrues and the limitation starts running.

(8) In view of the aforesaid discussion, the contention of defendant that the suit of the plaintiff is barred under Article 58 is rejected.

(9) The other plea of the defendant is that the suit is barred by provisions of Order 2 Rule 2 CPC. It appears to me that it will be conducive for the speed trial of the case if the question is raised as a preliminary issue & decided after the framing of issues and after the parties file certified copies of the plaints in Suit Nos. 12/89, 809/90 and 896/95. The application is disposed of in the light of the above observations.