

(2009) 09 DEL CK 0145

In the Delhi High Court

Case No : Regular First Appeal 77 of 2009

Shri Mangat Ram and Others

APPELLANT

Vs

Shri Ram Niwas and Another

RESPONDENT

Date of Decision : 16-09-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 14 Rule 2, Order 14 Rule 2(2), Order 7 Rule 11, 96
Companies Act, 1956 — Section 155
Specific Relief Act, 1963 — Section 41

Citation : (2009) 168 DLT 199 : (2010) 7 RCR(Civil) 1818

Hon'ble Judges : P.K. Bhasin, J

Bench : Single Bench

Advocate : N.S. Dalal and H.L. Verma, for the Appellant; Rajender Dutt, for the Respondent

Final Decision : Allowed

Judgement

P.K. Bhasin, J.—This appeal has been filed u/s 96 of the Code of Civil Procedure, 1908 against the order dated 22/10/2008 passed by the Court of Additional District Judge, Delhi in Suit No. 619/06/05 filed by the appellants herein whereby their suit for declaration and permanent injunction was dismissed as time barred.

2. The relevant facts for the purpose of present appeal may first be noticed. The appellants (hereinafter to be referred to as 'the plaintiffs') claiming themselves as joint owners of certain pieces of land in village Burari and village Badarpur Majra (hereinafter to be referred to as the 'suit property') filed a suit for declaration and injunction against the respondents herein (who shall hereinafter be referred to as 'the defendants?'). It was claimed by the plaintiffs that the suit property belonged to Shri Chajju who was the uncle of plaintiffs No. 1 and 2 (brother of their father late Shri Khacheru) and brother of the grand-father of plaintiffs No. 3 to 7. Shri Chajju had inherited the suit property from his grand-father late Shri Ram Baksh. Shri Chajju was unmarried and he had died intestate. After the suit property was inherited by the plaintiffs from late Shri

Chajju the same was mutated in their names in the revenue records on 19/12/2000. It was further claimed by the plaintiffs that in the month of August 2005 they had come to know that the two defendants, who are husband and wife, were trying to sell the suit property claiming themselves to be the owners thereof on the basis of a Will, allegedly executed in their favour by late Shri Chajju and when they enquired from the defendants about the Will and asked for a copy of the alleged Will the same was not provided to them. Then they inspected the revenue records and it transpired that the defendants had got the suit property mutated in their names in collusion with some revenue officials but no copy of the alleged Will of late Shri Chajju was found even in the revenue records. The plaintiffs then filed the suit in September, 2005 for a decree of declaration to the effect that they were the joint owners of the suit property and the Will, if any, of Shri Chajju was forged and fabricated document. Decree of permanent injunction restraining the defendants from transferring or alienating the suit property was also sought. The cause of action for filing the suit was alleged to have arisen in August, 2005 when the plaintiffs had come to know that the defendants had got the suit property mutated in their names based on the Will allegedly executed in their favour by late Shri Chajju.

3. The suit was contested by the defendants and by way of preliminary objection it was pleaded that the suit was time barred (without stating as to how the suit was time barred). On merits, it was pleaded that Shri Chajju, who was the bhumidar of the suit property, had executed a Will dated 24/07/1963 in their favour in respect his properties during his lifetime and the same was registered also. The defendants also asserted that since the demise of Shri Chajju in 1983 they were recorded as the bhumidars after mutation in their favour of the properties owned by Shri Chajju, including the suit lands, they were continuously in cultivatory possession of the entire suit property as well as other immovable properties belonging to late Shri Chajju whom they had served during his lifetime and further that some of the properties of Shri Chajju they had already sold also. Defendant No. 1 claimed that he was the son of the sister of Shri Chajju and it was also alleged that defendant No. 1 was not only brought up by Shri Chajju but was got married also by Shri Chajju.

4. From the pleadings of the parties the trial Court framed the following issues:

1. Whether the suit is not within time? OPD.
2. Whether the plaintiffs have no cause of action to file the present suit? OPD.
3. Whether the defendants are Bhumidars and in possession of the land in suit as alleged in para 3 of the preliminary objections? If so, its effect? OPD.
4. Whether the suit is barred by Section 41 of the Specific Relief Act? OPD.
5. Whether the suit is not properly valued for the purposes of court fee and jurisdiction? OPD.
6. Whether the defendants inherited the property in suit from Late Sh. Chajju on

the basis of Registered Will dated 24.07.1963 and mutation was entered and sanctioned on 4.10.1983? If so, its effect? OPD.

7. Whether the plaintiffs in absence of any will are the joint owners of the suit property? OPP.

8. Whether the plaintiff is entitled for a decree of declaration as prayed in prayer Clause A & B? OPP.

9. Whether the plaintiff is entitled for decree for permanent injunction as prayed in prayer Clause C? OPP.

10. Relief.

5. The trial Court after framing these ten issues decided to treat issue No. 1 as a preliminary issue and then after hearing the arguments of the counsel for the parties decided that issue against the plaintiffs and as a consequence thereof the suit came to be dismissed as time barred.

6. The plaintiffs felt aggrieved and so preferred this appeal questioning the correctness of the trial Court's decision dismissing their suit without any trial.

7. After having gone through the order under challenge and having considered the arguments advanced by the counsel for the parties I have no manner of doubt that the trial Court's order under challenge cannot be sustained. Order XIV Rule 2(2) of the CPC does provide that if in a suit, issues of facts as well as law arise the Court can decide any issue of law as a preliminary issue but there is a rider also to the effect that the issue proposed to be decided as a preliminary issue must be a legal issue relating to the jurisdiction of the Court to try the suit or any bar to its maintainability created by any law for the time being in force. There is no doubt that a plea of limitation can also be decided as a preliminary issue, but only if the averments in the plaint itself show clearly that the suit was time barred and if any enquiry into some facts as to when the cause of action for the suit arose is required to be undertaken then the plea of limitation cannot be tried as a preliminary issue. For deciding any issue as a preliminary issue without recording evidence, the averments made in the plaint only have to be looked into and accepted as correct. In case, for deciding the legal issue some enquiry into facts is required to be undertaken then that issue cannot be decided as a preliminary issue. Reference in this regard can be made to a decision of the Supreme Court reported as Ramesh B. Desai and Others Vs. Bipin Vadilal Mehta and Others, where the scope of Order XIV Rule 2(2) CPC came to be examined. In that case an objection regarding the Company petition u/s 155 of the Companies Act being time barred was raised by the contesting respondents and a request was made to the Court for treating the issue of limitation as a preliminary issue. That petition had been filed by some shareholders of a Company by the name of M/s. Sayaji Industries Ltd. for rectification of the register of the Company by deleting certain names from that register as shareholders of the Company whose names had been entered in the register on

17-11-1982. The rectification petition was filed on 10-11- 1987. The petitioners opposed that prayer on the ground that the question of limitation was not a pure question of law and since they were alleging fraud it required evidence to be adduced to show as to when they had come to know about the fraud and so could not be decided as a preliminary issue. It was the case of the petitioners that they had come to know about the fraud in May, 1987 and, therefore, the period of limitation for filing the rectification petition was to commence from the date they got the knowledge about the fraud. The Company Court accepted that prayer of the contesting respondents and after hearing the parties rejected the petition as time barred. The Division Bench in appeal affirmed the Company Court's order. The Supreme Court, however, reversed the decision of the High Court. The relevant paras of the judgment in which the provisions of Order XIV Rule (2) CPC and its scope particularly in respect of plea of limitation were considered are re-produced below:

12. Sub-rule (2) of Order XIV Rule 2 CPC lays down that where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to (a) the jurisdiction of the Court, or (b) a bar to the suit created by any law for the time being in force. The provisions of this Rule came up for consideration before this Court in Major S.S. Khanna Vs. Brig. F.J. Dillon, and it was held as under: Under Order 14 Rule 2 where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined. The jurisdiction to try issues of law apart from the issues of fact may be exercised only where in the opinion of the Court the whole suit may be disposed of on the issues of law alone, but the Code confers no jurisdiction upon the Court to try a suit on mixed issues of law and fact as preliminary issues. Normally all the issues in a suit should be tried by the Court: not to do so, especially when the decision on issues even of law depends upon the decision of issues of fact, would result in a lop-sided trial of the suit.

Though there has been a slight amendment in the language of Order XIV Rule 2 CPC by the Amending Act, 1976, but the principle enunciated in the above quoted decision still holds good and there can be no departure from the principle that the Code confers no jurisdiction upon the Court to try a suit on mixed issue of law and fact as a preliminary issue and where the decision on issue of law depends upon decision of fact, it cannot be tried as a preliminary issue.

13. The plea raised by the contesting respondents is in fact a plea of demurrer. Demurrer is an act of objecting or taking exception or a protest. It is a pleading by a party to a legal action that assumes the truth of the matter alleged by the opposite party and sets up that it is insufficient in law to sustain his claim or that there is some other defect on the face of the pleadings Constituting a legal

reason why the opposite party should not be allowed to proceed furtherwhere an objection to jurisdiction is raised by way of demurrer and not at the trial, the objection must proceed on the basis that the facts as pleaded by the initiator of the impugned proceedings are true. The submission in order to succeed must show that granted those facts the court does not have jurisdiction as a matter of law. In this case the decision of the High Court on the point of the jurisdiction was set aside as the High Court had examined the written statement filed by the respondents....

14. The principle underlying Clause (d) of Order VII Rule 11 is no different....

....The principle is, therefore, well settled that in order to examine whether the plaint is barred by any law, as contemplated by Sub-rule (d) of Order VII Rule 11 CPC, the averments made in the plaint alone have to be seen and they have to be assumed to be correct. It is not permissible to look into the pleas raised in the written statement or to any piece of evidence....

15. x x x

16. A plea of limitation cannot be decided as an abstract principle of law divorced from facts as in every case the starting point of limitation has to be ascertained which is entirely a question of fact. A plea of limitation is a mixed question of law and fact. The question whether the words "barred by law" occurring in Order VII Rule 11(d) CPC would also include the ground that it is barred by law of limitation has been recently considered by a two Judge Bench of this Court to which one of us was a member (Ashok Bhan J.) in Civil Appeal No. 4539 of 2003 (Balasaria Construction Pvt. Ltd. v. Hanuman Seva Trust and Ors.) decided on 8.11.2005 and it was held:

...we are of the opinion that the present suit could not be dismissed as barred by limitation without proper pleadings, framing of an issue of limitation and taking of evidence. Question of limitation is a mixed question of law and fact....

This principle would be equally applicable to a Company Petition. Therefore, unless it becomes apparent from the reading of the Company Petition that the same is barred by limitation the petition cannot be rejected under Order VII Rule 11(d) CPC.

(emphasis laid)

8. In the present case, the learned trial Judge while deciding the preliminary issue had observed at the outset that the issue of limitation was a legal issue and so the same could be decided after hearing arguments only from the counsel for the parties but in the impugned order he has not held that based on the averments in the plaint itself the suit was time barred. The trial Judge instead of confining his attention to the plaint averments alone has in his order running into 29 pages repeatedly referred to the pleas raised by the defendants in their written statement and particularly the plea that they had got the suit property mutated in their favour in October, 1983. The learned trial Judge has not only

extensively referred to the pleas taken by the defendants in their written statement but has virtually accepted the entire case of the defendants in the impugned order while rejecting the plaintiffs' case that they had come to know about the illegal mutation of the suit property in favour of the defendants only in August, 2005. The Judge has found the suit to be time barred because of the pleas taken by the defendants which, as noticed already, could not be taken into consideration at all by the trial Court while deciding the preliminary issue. For that purpose, only the averments made in the plaint had to be considered and the decision had to be taken by treating those averments in the plaint to be correct. As has also been noticed already, the plaintiffs had categorically pleaded in the plaint that they had come to know about the mutation of the suit property in the names of the defendants in August, 2005 and during that period only they had also come to know that the defendants had got the suit property mutated in their names on the basis of a Will allegedly executed by late Shri Chhajju, who according to the case of both the parties owned the suit property. The plaintiffs had also averred that the cause of action for filing the suit for declaration and injunction had arisen only in August, 2005 on their coming to know about the mutation of the suit property having been got done by the defendants in their names in the revenue records.

9. Surprisingly, the learned trial Judge even after noticing the averments in the plaint to the effect that the cause of action for the suit had arisen in August, 2005 found the suit to be time barred by observing that the cause of action for filing the suit had arisen on 04/10/1983 when the suit property had been mutated in favour of the defendants. That observation was made on the basis of the averments made in the written statement which could not at all be considered while deciding the preliminary issue. If the defence of the defendants was to be taken into consideration then the decision on the point of limitation ought to have been left to be given along with all other issues of facts after full trial. The learned trial Judge also observed that it was not possible to believe that the plaintiffs being the family members of late Shri Chhajju were not aware of his Will and further that since the Will of late Shri Chhajju had been made in the presence of many respectable of the area those persons "....might have whispered about the Will of late Shri Chhajju in the village and the plaintiffs might have become aware much earlier." These observations of the trial Judge are conjectural and only an imagination of the Judge having no factual or legal foundation.

10. Shri Rajinder Dutt, the learned Counsel for the respondents- defendants except for saying that the suit had been rightly dismissed by the trial Court could not really support the trial Court's decision.

11. In the result, this appeal is allowed and consequently the judgment and decree passed by the Additional District Judge dismissing the suit of the plaintiff as time barred are set aside. The trial Court shall now proceed to record evidence of the parties on all the issues framed in the case, including the issue of

limitation, and shall then decide all the issues together, uninfluenced by anything said in the present order.