

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **I.A. No. 10889/2011 (O.VII R.11 CPC) in CS(OS) 453/2011**

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Reserved on: 13th September, 2013

Decided on: 11th October, 2013

MAHENDER KUMAR KHURANA

..... Plaintiff

Through Mr. Pramod Kumar Sharma, Adv.

versus

RAJINDER KUMAR KHURANA & ORS

..... Defendant

Through Mr. Naresh Thanai, Adv. for D-1.
Mr. Arjun Pant, Adv. for DDA.
Mr. Ajay Laroia, Adv. for D-3.
Ms. Meenakshi Jain, Ms. Sandesh
Jindal, Adv. for D-4.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By this application the defendant No.1 seeks rejection of the plaint, inter alia, on the ground that the suit is barred by limitation and for insufficiency in filing Court fees.

2. Learned counsel for the applicant/ defendant No.1 contends that the present suit has been instituted by the plaintiff seeking partition of the suit properties and the consequential relief of possession in favour of the plaintiff of his 1/6th share in the suit properties and the profits arising therefrom. Admittedly, as per the documents filed by the plaintiff the plaintiff had filed

an earlier suit against the defendants being CS(OS) No. 94/96 seeking a decree of declaration of joint ownership with defendant No.1, permanent injunction in favour of the plaintiff being the legal heirs of late Shri Shyam Sunder and against the defendant No.1, his representatives etc. from selling, alienating, transferring property No. C-315 Rewari Line Industrial Area (also known as Mayapuri Industrial Area) Phase-II, New Delhi and shop/ property No. 2961 Bahadur garh Road, Sadar Bazar or parting with the possession and also restraining the defendant No.1 from raising any construction or addition therein. The suit was based on an alleged family arrangement dated 23rd March, 1982 between the families of the sons of late Lala Isher Dass. In the said suit, written statement was filed by the defendant No.1 who is also the defendant No.1 herein stating that there was no family settlement dated 23rd March, 1982 as alleged. It was further mentioned that Shri Shyam Sunder the father of plaintiff and defendant No.1 was owner of 50% share in M/s Shyam Sunder Nand Kumar and after his death his said half share devolved on the plaintiff, defendant No.1 and his wife Smt. Satyawati in equal shares. Smt. Satyawati continued in business. As the plaintiff was well settled in Canada and there was no likelihood of his coming back, the properties were partitioned and the plaintiff took his share in the form of cash to the extent of Rs. 2 lakhs from defendant No.1 in presence of defendants No.2&3. Further the property No. 2916 Sadar Bazar was only a rented property possession of which was handed over to the landlord in the year 1985 and property No. C-315 New Mayapuri Industrial Area, Phase-II is owned by defendant No.1 along with his sons as owner and plaintiff has no entitlement to the same. Admittedly, the said suit of the plaintiff was dismissed as not maintainable. Thus, the factum of the plaintiff not being

entitled to any share in the suit property as alleged was known to the plaintiff admittedly by way of written statement of the defendant No.1 which was filed prior to April, 1997. The present suit having been instituted in January, 2011 is clearly barred by limitation. Once the limitation starts running, the plaintiff cannot seek extension of period on the pretext that some mediation was going on and he was assured that he would get his due share. Further mediation between the parties is no acknowledgment of the liability. It is further stated that the plaintiff is admittedly not in actual possession of the property, thus the Court fees paid is deficient and the suit is liable to be rejected on this count as well. The contention of the plaintiff that the dissolution of the partnership vide dissolution deed dated 5th October, 1992 is a fabricated document is wholly incorrect as under Section 42 of the Partnership Act on death of a partner, the partnership stands dissolved. Thus, the present suit be rejected.

3. Learned counsel for the plaintiff/ non-applicant on the other hand contends that by way of the present suit the plaintiff has sought partition of his 1/6th share in all the suit properties as mentioned in Para 38 and is not confined to the reliefs as mentioned in the earlier suit. The cause of action is based on the fact that the plaintiff was assured of the mediation by Shri Sudershan Kumar Khurana, however when Shri Sudershan Kumar Khurana handed over a dissolution deed allegedly signed and executed by the plaintiff on 5th October, 1992 and the partnership deed dated 1st July, 1980 on 22nd February, 2007 the plaintiff was shocked to see the forged and fabricated dissolution deed dated 5th October, 1992 and thus filed criminal complaint before the SHO PS Paschim Vihar. Shri Sudershan Khurana also died on

19th February, 2009 and since the defendants were bent upon usurping the share of the plaintiff, the plaintiff sent legal notices dated 2nd March, 2010 and filed the present suit in January, 2011. The prayers in the present suit are different from the ones in the earlier suit. The nature of the suit being different is thus not barred under Order 2 Rule 2 CPC as held by this Court in *Nanak Chand and Ors. Vs. Chander Kishore and Ors.* AIR 1982 Delhi 520. There is no dispute that a suit for physical partition is governed by Article 113 of the Limitation Act, however the same has to be brought within three years from the time when the right to sue accrues. At this stage the averments in the plaint have to be read as demurer and in view of an independent cause of action, the present suit is not barred by limitation. Referring to *Raj Ahuja Vs. Major General Satish Mediratta and Anr.* CS(OS) No. (OS) 2822/2011 decided by this Court on 17th September, 2011, MANU/DE/4621/2012 it is contended that the co-owner is in constructive possession of the suit of the joint properties and the suit cannot be thus barred by limitation. Relying upon *Neelavathi and Ors. Vs. N. Natarajan and Ors.* (1980) 2 SCC 247 it is contended that co-owners are in joint possession unless there is a clear ouster and thus no separate Court fees is required to be paid for the relief of possession.

4 Heard learned counsel for the parties and perused the record. The plaintiff who is the brother of defendant No.1, has filed the present suit seeking a decree of partition in respect of his 1/6th share in the suit properties with consequential relief of possession and profits out of the suit properties. It is stated in the plaint that Shri Isher Dass Khurana and his three sons Shyam Sunder Khurana, Sudershan Kumar Khurana and Shri Nand Kumar

Khurana had been carrying on their joint business under partnership firms in the name and style of M/s Isher Dass Sudershan Kumar from Shop No. 2960, Bahadurgarh Road, Delhi-110006 and M/s Shyam Sunder Nand Kumar from Shop No. 2961, Bahadurgarh Road, Delhi 110006. That out of the earnings from the joint business which they had been carrying on in the name and style of the abovementioned partnership firms, three immovable properties were acquired i.e. (a) an industrial plot measuring 421.30 square yards bearing No. C-2/9, Mayapuri Industrial Area, Phase-II, Mayapuri, New Delhi acquired in the name of M/s. Shyam Sunder Nand Kumar; (b) an industrial plot measuring 421.30 square yards bearing No. C-315 Mayapuri Industrial Area, Phase-II, Mayapuri, New Delhi acquired in the name of M/s Isher Dass Sudershan Kumar and (c) an industrial plot measuring 440 square yards approximately bearing No. A-101/9, Wazirpur Industrial Area, Wazirpur, New Delhi acquired in the name of M/s Isher Dass Sudershan Kumar. Construction on the aforesaid industrial plots was raised by Shri Isher Dass and his three sons out of the earnings from the joint business and thus all the aforesaid immovable properties are as such their joint properties. In addition to the three industrial plots, Shri Isher Dass and his sons had also acquired rights of tenancy on pugree basis in shop No. 2960, Bahadurgarh Road, Delhi, in the name of M/s Isher Dass Sudershan Kumar and Shop No. 2961, Bahadurgarh Road, Delhi in the name of M/s Shyam Sunder Nand Kumar. The tenancy rights were also joint as they were carrying on their joint business from the aforesaid two shops and industrial properties. The pedigree of Shri Shyam Sunder Khurana is as under:

Isher Dass (deceased)



↓	↓	↓
Shyam Sunder (Deceased son)	Sudershan Kumar (Deceased son)	Nand Kumar
Satyawati (deceased wife)	Nirmal Khurana (wife)	
Mahender (son)	Sadhna Vinayak (married daughter)	
Rajinder (son)	Archana Pabbi (married daughter)	

5. Shri Shyam Sunder Khurana son of Shri Isher Dass died intestate on 24th October, 1976 leaving behind his wife and two sons i.e. Smt. Satyawati (wife), Shri Mahender Khurana (plaintiff) and Shri Rajinder Khurana (defendant No.1) herein. The plaintiff is settled in Canada and in 1980 when he came to India, a deed of partnership was executed of M/s Shyam Sunder Nand Kumar, 2961, Bahadurgarh Road, Delhi 110006 whereby Mr. Anil Kumar, son of defendant No.5 Shri Nand Kumar had retired with effect from 31st March, 1980 and Shri Sudershan Kumar Khurana was taken as working partner in the said firm. As per the partnership deed, the profit and loss sharing ratio of the partners of the firm was in the following proportion:

i) Shri Nand Kumar (Defendant No.5)	45%
ii) Shri Rajender Kumar (Defendant No.1)	20%
iii) Smt. Satyawati (since Deceased)	10%
iv) Shri Mahender Kumar (Plaintiff)	10%
v) Shri Sudershan Kumar (since Deceased)	15%

6. Thereafter the plaintiff neither signed any Deed of partnership nor any Deed of dissolution of the said partnership and as such continued to remain the partner in the said firm till today. In the year 1981 or 1982, Shri Isher Dass also died and after his death, a family agreement was executed between two sons of Shri Isher Dass, i.e., Shri Sudershan Kumar Khurana and Shri Nand Kumar and also the legal heirs of late Shri Shyam Sunder Khurana, i.e. the plaintiff and defendant No.1. The contents of the said family arrangement which was not got registered are as under:

“FAMILY AGREEMENT BETWEEN THE FAMILIES OF SONS OF LATE L. ISHER DASS S/O LATE LALA BANSI LAL.

- 1) The sons of late L. Isher Dass and their respective families have agreed to divide the total assets and their interests in business e.g. M/s Isher Dass Sudershan Kumar, 2960, Bahadurgarh Road, Delhi-110006 and M/s Shyam Sunder Nand Kumar, 2961, Bahadurgarh Road, Delhi-110006 on March 23, 1982.
- 2) M/s Shyam Sunder Nand Kumar own that property situated at C-2/9, Mayapuri Industrial Area, Phase-II and is in possession of the shop situated at 2961, Bahadurgarh Road.
- 3) M/s Isher Dass Sudershan Kumar own the properties situated at C-315, Mayapuri Industrial Area Phase III and A-101/9, Wazirpur Industrial Area and are in possession of the shop situated at 2960, Bahadurgarh Road, Delhi.
- 4) That FAMILIES HAVE AGREED TO DISTRIBUTE THE ABOVE MENTIONED ASSETS IN THE FOLLOWING MANNER:
 - A. Mr. Sudershan Kumar will get the property located at C-2/9, Mayapuri Industrial Area, Phase-II and will withdraw all his interest in all other properties and shops.
 - B. Mr. Nand Kumar and his family including Mr. Nalin Kumar will get property located at A-101/9, Wazirpur Industrial

Area and the shop located at 2960, Bahadurgarh Road, and they will withdraw all their interests in other properties and shops.

C. The legal heirs of late Shri Shyam Sunder will equally share the property located at C-315, Mayapuri and the shop situated at 2961, Bahadurgarh Road and will withdraw all their interest in all other properties and shops.

5) The properties situated at C-2/9, Mayapuri Industrial Area and C-315, Mayapuri Industrial Area are to be interchanged between M/s Isher Das Sudershan Kumar and M/s Shyam Sunder Nand Kumar in DDA. All expenses of interchange are to be shared equally by all families. Any other DDA related expenses will be shared equally as well unless somebody sells his property before the DDA transaction is completed.

6) Mr. Sudershan Kumar and Mr. Nand Kumar and their families will operate business under the name of M/s Isher Dass Sudershan Kumar without any link with each other's business. The heirs of late Shri Shyam Sunder will operate as Shyam Sunder Nand Kumar, if they wish.

7) The total working capital, assets and liabilities of both firms E.G. M/s Isher Dass and Sudershan Kumar and M/s Shyam Sunder Nand Kumar will be equally divided between the families of sons of late Lala Isher Dass.

8) Mr. Sudershan Kumar has agreed to pay Mr. Nand Kumar and family Rs. 20,000/- as compensation within a year after separation.

9) All the liabilities of M/s Shyam Sunder Nand Kumar towards Bank, Creditors, Loanees have to be cleared satisfactorily before separation.

10) Till such time that it is possible to divide the assets and interests between the three families in the above manner the business will continue to operate as at present as mutually agreed to by the three families.

Sd/- (Nand Kumar)

Sd/-(Nalin Kumar)

Sd/-(Sudershan Kuamr)

Sd/-(Mahender Kumar)

Sd/-(Rajinder Kumar)
Sd/-(Smt. Satyawati)”

7. The Plaintiff had executed a General Power of Attorney on 15th July, 1983 in favour of Shri Ramesh Kumar Manchanda known to the plaintiff and defendant No.1 in good faith and trust as the mother of the plaintiff was also alive at that time and there was no reason to disbelieve the defendant No.1 or the uncles. Though the plaintiff was settled in Canada, however he had been coming frequently to India and was also contributing to the family in all responsibilities. The mother of the plaintiff and defendant No.1, Smt. Satyawati died intestate on 5th October, 1992 and the plaintiff was informed of the death after one week by his uncle Shri Sudershan Kumar Khurana and by that time the cremations and other ceremonies had already taken place. Thus, after the death of the plaintiff's mother, the plaintiff and defendant No.1 became the equal co-owners of the movable and immovable properties which belonged to late father Shri Shyam Sunder and late mother Smt. Satyawati. Though the defendant No.1 agreed to pay and deposit the share of plaintiff, however he did not do so despite promises. In June 1993 when the plaintiff was in India, the defendant No.1 purchased some stamp papers and got some documents prepared upon the same regarding settlement, however since no settlement was finally arrived, the documents were not signed by the plaintiff or the other parties. In 1996, the plaintiff came to India and filed a suit for declaration and permanent injunction against the defendants No.1 and 5, Shri Sudershan Kumar and Shri Nalin Kumar (son of defendant No.5) relying upon the family arrangement. The aforesaid suit being suit No. 94/96 was however dismissed as not maintainable and the

plaintiff could not amend the said suit as well for partition because Shri Sudershan Kumar had mediated. Shri Sudershan Kumar assured that the plaintiff would get his due share in all properties and that the plaintiff should not insist for partition because the same would adversely affect the business of the family and assured that the plaintiff's assets were appreciating. In the interest of the family, the plaintiff did not pursue the partition at that time. The properties continued to be held jointly, in joint ownership and possession by plaintiff, defendant No.1, Shri Sudershan Kumar Khurana and defendant No.5, the plaintiff being in constructive possession thereof. However, Shri Sudershan Kumar did nothing and was trying to create documents so as to divest the plaintiff of his share in the aforesaid properties and usurp the same. On 22nd February, 2007 the plaintiff approached his uncle Shri Sudershan Kumar Khurana and requested him to get plaintiff's share in the ancestral properties, when Shri Sudershan Kumar Khurana handed over a dissolution deed alleged to have been signed and executed by the plaintiff on 5th October, 1992 and also the partnership deed dated 1st July, 1980. The plaintiff found that the dissolution deed dated 5th October, 1982 was forged and fabricated by the defendant No.1 in collusion with his uncle on a stamp paper bearing date of purchase as 6th October, 1992 whereas on the said date the plaintiff was not in India and the plaintiff's mother had expired which fact was informed to the plaintiff after about a week. The plaintiff lodged a complaint in this regard to the SHO, PS Paschim Vihar, DCP Crime Branch and the Commissioner of Police, Delhi on 8th February, 2008. Shri Sudershan Khurana also passed away on 19th February, 2009 and thereafter all the defendants are trying to usurp the share of the plaintiff. Thus the plaintiff has filed the present suit.

8. In the plaint it is admitted by the plaintiff that before filing the present suit the plaintiff had filed a suit in 1996 being suit No. 94/96 titled as “Mahender Kumar Khurana Vs. Rajinder Kumar Khurana and Ors.” which was dismissed as not maintainable and the plaintiff could not amend the suit as well for partition. The plaintiff has placed on record the plaint filed by the plaintiff and the written statement filed by the defendant No.1 in suit No. 94/96. The averments in suit No. 94/96 filed before the Senior Civil Judge, Delhi which are relevant for the decision of the present application are that in the said suit the plaintiff had relied upon the family agreement between the parties arrived at after the death of Shri Isher Dass which is also mentioned in Para 11 of the present plaint. The plaintiff also stated that under the said agreement the parties started separate business in the property as agreed/ settled under the said agreement and as Smt. Satyawati the mother of the plaintiff and defendant No.1 had passed away in 1992, the plaintiff and defendant No.1 being her legal heirs and legal heirs of late Shri Shyam Sunder became the owners of properties C-315, Mayapuri Phase-II, New Delhi and shop No. 2961, Bahadurgarh Road as co-owners in joint possession. It is alleged that the defendant No.1 despite agreement did not pay to the plaintiff his share. To complete the formalities, the plaintiff executed a General Power of Attorney in favour of Shri Ramesh Kumar Manchanda, however the parties did not move the DDA for inter-se change and other formalities. It is also stated that in June 1993 when plaintiff came to India, defendant No.1 purchased the stamp paper and agreed to settle the matter, however nothing came out of the settlement as the intention of defendant No.1 was malafide and thus the deeds were not signed. Defendant No.1 did not render true accounts/ income to the plaintiff. When the plaintiff

was in India in 1993, the defendant No.1 got executed some documents for settlement from the plaintiff, however the defendant No.1 did not honour the settlement and thus the bank account opened by the wife of the plaintiff was closed in 1995. It is alleged that the plaintiff repeatedly visited India in 1983, 1986, 1989, 1993 and again in June 1993 and finally on 10th February, 1996 giving cause of action to the plaintiff herein to file the said suit. In the said suit the prayer of the plaintiff was for a decree of declaration in favour of the plaintiff and against defendant No.1 declaring the plaintiff as joint owner of equal share in property No. C-315, Rewari Line, Industrial Area (also known as Mayapuri Industrial Area, Phase-II) with defendant No.1 and in property No. 2961 Bahadurgarh, Sadar Bazar as per family agreement. A decree of permanent injunction was also sought and no decree was sought against defendant No.2 to 4 therein i.e. the uncles. In the said suit the written statement filed by defendant No.1 stated that the suit of the plaintiff was based on non-existing documents. The alleged family settlement on the basis of which plaintiff had filed the suit was inadmissible document and did not exist, as such could not create any right in favour of the plaintiff in the properties. It was also stated that the plaintiff was not entitled to any relief in respect of suit property No. 2961 Bahadurgarh Road, Sadar Bazar, Delhi as the same was only rented property, possession of which has been handed over to the landlord in the year 1985 in accordance with the oral settlement and as far as property No. C-315, Rewari Line Industrial Area, Phase-II, New Delhi was concerned, the plaintiff did not have any right title or interest therein as the defendant No.1 was holding the said property as owner along with his sons. It was also stated that the Plaintiff had relinquished his rights in respect of the properties left behind by Shri Shyam Sunder and 14 years

had elapsed after the alleged oral settlement and the suit was filed highly belatedly and not within the period of limitation. It was further explained in the written statement filed by the defendant No.1 that by virtue of the agreement dated 23rd March, 1982 the plaintiff intended to defer the partition of the property by the terms and conditions mentioned therein which were not in accordance with law and were not acceptable, thus the same was cancelled and destroyed. It was further stated that it seems that the plaintiff had secretly kept a photocopy of the same on the basis of which the plaintiff had been claiming ownership of half the share in the property. It was clearly stated that Shri Shyam Sunder was the owner of 50% share in the firm M/s Shyam Sunder Nand Kumar and after his death half share devolved upon the plaintiff, defendant No.1 as well as Smt. Satyawati in equal shares. Smt. Satyawati continued with the business and as far as the plaintiff is concerned he was settled in Canada and there was no likelihood of his coming back. Therefore it was agreed that the properties be partitioned and as far as the share of the plaintiff in the immovable properties is concerned he expressed his intention that the same should be given in cash. Smt. Satyawati never intended to give her share to the plaintiff as he was well settled in Canada and she was being looked after and maintained by defendant No.1 and his wife and had love and affection of her grandsons i.e. the sons of defendant No.1. It was also noted that the plaintiff who was residing in Canada did not even turn up at the demise of his father or the mother. The plaintiff visited India in 1982 when partition of the properties was effected and the plaintiff received his share in the form of cash to the extent of Rs. 2 lakhs from the defendant No.1 in presence of defendant No.2 & 3 therein and others and thus the defendant No.1 and his sons are the absolute owners of the property.

The property No. 2961 Bahadurgarh Road, Delhi was a tenanted property and its possession was taken over by the landlord in 1985 which fact was within the knowledge of the plaintiff. It may be noted that defendant No. 2 to 4 who are the uncles and son of defendant No.3 in the earlier suit also filed their written statement. They have also stated that the defendant No.1 is the owner of C-315 Rewari Line Industrial Area, Phase-II in accordance with the oral settlement arrived at in the year 1985. They have also stated that in fact a settlement was arrived at in between the parties and then plaintiff received his share and thereafter he has permanently settled in Canada for the last 30 years. Since he was settled in Canada he himself suggested to take cash only in lieu of his share.

9. The main crux of the argument of the learned counsel for the defendant No.1 is that the present suit is hopelessly barred by limitation as once the stand of the defendants was clear in the earlier suit, the plaintiff had requisite knowledge about the same and the plaintiff cannot seek extension of time in the garb that Shri Sudershan Kumar Khurana was mediating in the matter. It is further contended that once the period of limitation starts running, the same cannot be postponed for any oral settlement, as alleged in the present plaint. I find merit in the contention of the learned counsel for the defendant No.1/ applicant that since the plaintiff had already filed a suit and was well aware of all the facts he cannot seek extension of period of limitation on the ground that Shri Sudershan Kumar Khurana was mediating. Further by the earlier suit the plaintiff had accepted that the other branches of late Shri Isher Dass i.e. Shri Sudershan Kumar and Nand Kumar were enjoying their own properties and the plaintiff was a co-owner only in

respect of the properties which fell to the share of Shri Shyam Sunder i.e. C-315 Mayapuri Industrial Area, Phase-II, New Delhi and Shop No. 2961 Bahadurgarh, Delhi whereas by the present suit, the plaintiff claims himself to be the co-owner and in joint possession of all the properties purchased by Shri Isher Dass Khurana and his sons claiming himself to be entitled to 1/6th share therefrom.

10. In none of the decisions relied upon by the plaintiff there was an earlier suit filed by the plaintiff therein making admission of certain facts which are now sought to be denied and a claim based thereon. In *Nanak Chand and Ors. (supra)* relied upon by learned counsel for the plaintiff it was held:

“(8) After consideration, we agree that the contentions of the plaintiffs ought to prevail on all the points but we wish to say something regarding the article of limitation applicable to the case.

(9) Separation from the joint family involving severance in status with all its legal consequences is quite distinct from the de facto division into specific shares of the joint property. One is a matter of individual decision, the desire to cover himself and enjoy his hitherto undefined and unspecified share separately from the others; whilst the other a natural resultant from his decision is the division and separation of his share which may be arrived at either by private agreement or by arbitration appointed by the parties or in the last resort by the court. One should not confuse the severance of status, with the allotment of shares. Therefore, a division in status takes place when a member expresses his intention to become separate unequivocally and unambiguously, and makes it known to other members of the family from whom he seeks to separate. The process of communication may vary in the circumstances of each particular case. The filing of a suit for partition is clear expression of such an intention. A decree may be necessary for working out the results of severance and for allotting definite shares, but the status of the plaintiff as separate in estate is

brought about by his assertion of his right to separate whether he obtains a consequential judgment or not: see *Mt. Girju Bai v. Sada Dhundiraj and others*, Air 1916 P.C. 104 Sura) *Narain v. Ikbai Narain*, (1913) 40 I.A. 40, and *Kawal Narain v. Budh Singh*, AIR 1917 P.C. 39 partition in its larger sense, no doubt, therefore, consists in a division by which the share of each co-parcener with respect to all or any of the joint property is fixed, and once the shares are defined, the partition in the sense of severance or disruption of the family is complete, but after 'the shares are so ascertained', the parties might elect either to have a partition of their shares by metes and bounds' or continue to live together and 'enjoy their property in common as before.' Whether they did one or the other would affect the mode of enjoyment, but not the tenure of the property or their interest in it. The joint ownership turns into possession and enjoyment in common until the physical partition takes place according to the shares standing at the date of severance of status. It is no more in doubt that a suit for such physical partition is governed by Article 120(113 new) as was held in *Raghunath Das v. Gokal Chand and another*, AIR 1958 SC 829, and *Mst. Rushmabai v. Lala Laxminarayanan and others*, : [1960]2SCR253 . Such a suit under Article 113 is to be brought within three years from the time when the right to sue accrues. If the date of service of notice is the date from which the limitation is to start, then in virtue of section 30 of the Act, the suit should have been brought latest by 17-5-1969 but it was filed on 23-7-1969. It appears thus *ex facie* barred by time but *ex facto* it is not so. The crucial question in such cases is when a right to sue accrues, there can be no 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 : *Mst. Bolo v. Mt. Koklen and others*, MANU/PR/0054/1930. Where there are successive invasions or denials of a right, the right to sue under Article 120 (Article 113) accrues when the defendant has clearly and unequivocally threatened to infringe the right asserted by the plaintiff in the suit. Every threat by a party to such right, however, ineffective or innocuous it may be, cannot be considered to be a clear and unequivocal threat so as to compel him to file a suit. Whether a particular threat gives rise to a compulsory cause of action depends upon the question whether the threat effectively invades or jeopardizes

the said right: Mst Rukna Bai v. La!a Laxminarayan, : [1960]2SCR253 . The right to partition sprang into existence in this case when the notice of severance and demand for partition was served, but right to sue did not accrue until the defendant infringed or threatened to infringe that right. The plaintiffs had averred that it was in 1968 and afterwards that the defendant began to infringe the tenancy-in-common and deny their right to share. Such a pleas could be defeated by a specific denial and by proof that the right had been lost on account of ouster and exclusion that is adverse possession for more than the statutory period that is for not less than 12 years, vide Govindrao and another v. Raja Bai and another MANU/PR/0076/1930. That is the effect of Article 65 and section 27 of the Limitation Act. We are, therefore, of the view that the suit is not barred under Article 113. Consequently, we reject the argument so assiduously and ably built by Mr. Malhotra in this regard.

(10) Mr. Malhotra also tried to urge that the suit was barred by Order 2 Rule 2 Civil Procedure Code , but we do think that the nature of the earlier suit and the present suit being different, there can be no question of such a bar and reject this submission.

11. It is thus evident that the plaintiff was required to file the present suit within three years when the cause of action accrued. The plaintiff in the earlier suit asserted his right as a co-owner with defendant No.1 and now as co-owner with all the defendants. The stand of the defendants is that the plaintiff was not the co-owner in the properties and had already taken his share in the form of Rs. 2 lakhs as he was settled in Canada and had no intention of coming to Delhi. Further the present suit is also barred under Order II Rule 2 CPC. The earlier suit for declaration and injunction filed by the plaintiff was dismissed as not maintainable, as no relief of partition was sought. The plaintiff cannot maintain the present suit seeking this relief. Further the plaintiff cannot also seek the extension of the period of limitation

on the ground that Shri Sudershan Kumar Khurana was mediating. Once the period of limitation starts running, the same cannot be set at naught by settlement talks going on. In the present suit the only fresh fact pleaded is the receiving of a forged dissolution Deed dated 5th October, 1992. The plaintiff has not sought the declaration of the said dissolution Deed to be forged and fabricated in the present suit. Further the said dissolution Deed had no effect on the rights of the partners inasmuch as the partnership stood dissolved automatically on the death of one of the partners i.e. Smt. Satyawati Devi on 5th October, 1992 as per Section 42 of the Partnership Deed.

12. In view of the aforesaid discussion, the suit is liable to be rejected. Consequently, the application is disposed off rejecting the suit.

CS(OS) 453/2011

In view of IA 10889/2011 under Order VII Rule 11 CPC having been allowed, the suit is rejected.

(MUKTA GUPTA)
JUDGE

OCTOBER 11, 2013
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