

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**NOTICE OF MOTION NO.1 OF 2019
IN
SUIT NO.245 OF 2017**

Bimal Kumar Badriprasad Bajoria and Anr. ...Applicants

In the matter between:-

Kamal Kumar Badriprasad Bajoria and Anr. ...Plaintiffs

Versus

Bimal Kumar Badriprasad Bajoria and Anr. ...Defendants

**WITH
SUIT NO.245 OF 2017
WITH
CHAMBER SUMMONS NO.1095 OF 2017
WITH
NOTICE OF MOTION NO.1618 OF 2017
WITH
NOTICE OF MOTION NO.1 OF 2019
WITH
INTERIM APPLICATION NO.2725 OF 2026
WITH
NOTICE OF MOTION NO.1618 OF 2017
IN
SUIT NO.245 OF 2017**

Mr.Akshay R. Pai a/w Ms.Siddhi Bhosale, Mr.Sahash Sakhare and Mr.Omkar Kalondhrekhar i/b. Bina R. Pai	Advocate for the Plaintiffs
Dr.Abhinav Chandrachud a/w Ms.Kavisha Shah, Mr.Prathmesh Bhosale and Ms.Janhavi Jain i/b. India	Advocates for Defendants.

Law Alliance	
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CORAM : S. M. MODAK, J.

DATE : 24th AUGUST 2026P. C. :-**NOTICE OF MOTION NO. 1 OF 2019**

1. Heard learned Advocate Dr. Shri Chandrachud for the defendants and learned Advocate Shri Pai for the Plaintiffs.

2. By this Notice of Motion, the Defendants are praying for rejection of plaint as per the provisions of Order VII Rule 11 (d) of the Civil Procedure Code, 1908 on the ground that suit is barred by law of limitation. My attention is invited to the averment in para no. 1 of the plaint. It says “*however in the year **2009-10** differences arose between them owing to which the Defendant No. 1 made all possible attempts to throw the Plaintiff No. 1 out of the business as well as the joint properties thereby depriving the Plaintiff No. 1 of all his legal rights and dues*”.

3. Dr. Shri Chandrachud submitted that if such an attempt is made in the year 2009-10, the suit which is filed in the year 2017 is beyond the period of limitation. He read over the provisions of Article 113 of the Limitation Act.

4. Whereas according to Mr. Pai, there was only an attempt and other averments in the plaint also needs to be considered. If they are considered, the suit is not beyond limitation and he read over the provisions of Article 110 of the Limitation Act.

5. Both of them relied upon certain judgments. It is settled law that such an application has to be decided on the basis of averments in the Plaint and supporting documents and there is no need to refer to the averments in the Written Statement.

Averments in the plaint

6. It will be material to consider the averments in the plaint. They are as follows:-

- (a) In the year 2009-10, there was difference and all the possible attempts were made by Defendant No. 1 to throw away the Plaintiff.
- (b) Defendants have deprived the Plaintiff No. 1 of all the rights and joint properties which Defendants have admitted.
- (c) There was attempt to amicably settle the dispute in or around September 2013. Draft of the family settlement was also exchanged. The defendants have tried to overpower the Plaintiff, and hence he has withdrawn from the settlement talks.
- (d) Defendants have adopted all unethical means to deprive the Plaintiffs from their rightful share. Plaintiff No. 2 has filed

complaint with the Amboli Police Station in respect of breaking lock of Unit No. 114 at Kuber Complex, Near Link Road, Andheri (W) by Defendant No. 1. He took away important business and personal documents. It took place on 03.03.2013.

- (e) On 19.04.2013, the defendant no. 1 was arrested on the basis of CCTV footage from the Society.
- (f) On 02.03.2013, the Defendant No. 1 met Plaintiff No. 2 at office premises at Morya Landmark and threatened her with dire consequences, if she refused to handover the possession.
- (g) On 04.03.2013 (page no. 386) Plaintiff No. 2 reported the matter to Amboli Police Station and NC complaint was lodged.
- (h) On 02.03.2013, Defendant No. 1 attempted the entry in the house of the Plaintiffs. The daughter of the Plaintiff has not opened the door. Defendant No. 1 abused the Plaintiff. It was reported to Oshiwara Police Station by Plaintiff No. 2 on 04.03.2013. (page no. 387)
- (i) On 25.06.2015, Plaintiff No. 2 has complained at Mahim Police Station against Defendant No. 1 for illegal transfer of an amount of Rs. 11,00,000/- from her account.
- (j) On 22.04.2013, Plaintiff No. 1 has complained to Pydhonie Police Station for theft and usurping Unit No. 407, Bharat Chambers belonging to Plaintiff No. 1.

7. On the basis of the above averments, Plaintiffs have pleaded in para no. 12 that they were having serious disputes in between co-

owners and they have apprehension that defendants will not allow them to take peaceful possession of the suit property and its lawful enjoyment.

8. In para no. 5 and in para no. 13, the description of the properties are given. It is also pleaded those premises stand in whose name and who are using it.

9. On the above said facts, the suit is filed asking for following reliefs:-

- a) To partition the suit property by metes and bounds.
- b) the Appropriate order and directions be passed.
- c) Pending suit, interim reliefs and injunction are sought.

Notice of Motion

10. On this background, the Notice of Motion is filed. Following are the material averments:-

- a) Difference arose since 2009-10. However, suit is filed on 13.07.2016. The period of limitation is three years from the date of cause of action, the suit is time-barred.
- b) Except averring “no part of the suit is barred by limitation”.

No further details are given in para no. 19.

11. By way of reply the prayer is opposed. There is serious dispute

about which Article of the limitation Act is applicable, Whether it is Article 113 or 110. The issue needs to be decided at an interim stage and not after pleadings are over and suit is put to trial.

12. For deciding this issue, the relevant personal law governing the parties also needs to be considered. From the averments in the plaint, it is clear that from the business income, the Plaintiff and the Defendants have purchased several commercial as well as residential premises. Either they are in their individual name or joint names. The properties are situated in Mumbai except property described at Exhibit A-8 at Kolkata. There is a separate notice of motion which is filed. This is what is stated from the averments in the plaint.

Submissions

13. When Mr. Pai has referred to the provisions of Article 110 of the Limitation Act, Dr. Shri Chandrachud submitted that it will not be applicable because the word used in Article 110 is joint family property and this will be applicable only when the case is put up to that effect. When property is inherited from the earlier generation, it is called as joint family property.

14. In this case, the Plaintiff No. 1 and Defendant No. 1 by their business income have purchased these properties. So my *prima- facie*

opinion that Article 110 will not be applicable. At the most, both of them can be termed as co-owners instead of joint owners.

Judgments cited

15. In case of *Krishna Pillai Rajasekharan Nair (Dead) By Lrs. Vs. Padmanabha Pillai (Dead) by LRS and Others*¹, the Hon'ble Supreme Court opined that limitation for the partition suit will be governed by Article 120 of the Limitation Act, 1908 old. The starting point of limitation is when right to sue accrues that is when Plaintiff has noticed all his entitlement to partition being denied. It is true the corresponding Article as per Limitation Act, 1963 is Article 113. The cause of action as per both the articles is “*when the right to sue accrues*”. Earlier, the period of limitation was six years, now it is restricted for three years.

16. Dr. Mr. Chandrachud is fair enough to quote the observations in case of *Syed Shah Ghulam Ghouse Mohiuddin and Ors. Vs. Syed Shah Ahmed Mohiuddin Kamisul Quadri (Died) and Ors.*². In para no. 20, it is observed “*the cause of action for partition of properties is said to be a “perpetually recurring one”*”. The shares of heirs under Mohammedan law are definite and known before actual partition. Dr.

¹ (2004) 12 SCC 754

² (1971) 1 SCC 597

Mr. Chandrachud, also relied upon the observations in case of *Dattatraya Digambar Panchwadkar and Others Vs. Prabhakar Ramkrishna Panchwadkar and Anr.*³. The observation are, “*it is true that it was alleged in the earlier suit that a demand for partition was made in 1915 and was met with a refusal. But if the conclusion to which we have come on the evidence is correct, then it must follow that for long afterwards the status of the family was joint and the property continued to be a joint family property, and there is no evidence of any exclusion or ouster to the knowledge of the plaintiffs as regards their share in the family properties*”. The submission is that even if the incident of 2009–10 is not considered a cause of action, for bringing the suit for limitation, the Plaintiff has to plead that he was excluded from or ousted from joint properties.

17. In order to differentiate in between ouster and exclusion, he relied upon observations in case of *Chandra Kishore Chakravarty Vs. Biseswar Par and Anr.*⁴. It is observed that to exclude is to “keep out” and oust is to “put out” of possession. Lastly, he relied upon the observations in case of *Ashabai wd/o Rambhau Awachat and Others Vs. Madhusudan s/o Rajaram Chourasia*⁵. The issue is when first suit

3 (1963) SCC Online Bom 104

4 XXXII Calcutta Weekly notes 291, in Appeal No. 489 of 1925, decided on 28.07.1927.

5 2017 (5) Mh.L.J.

for partition is dismissed, whether second suit is maintainable. He relied upon observations in para no. 9. The submission is when first incident happened in the year 2009-10, the Plaintiff must be aver that after this incident, even property has remained joint.

18. As against this, Mr. Pai has relied upon the observations in case of *Vidya Devi Alias Vidya Vati (Dead) by LRS Vs. Prem Prakash and Others*⁶ wherein the provisions of Delhi Land Reforms Act were involved. There is schedule attached to the said Act which also contains period of limitation. No period of limitation is prescribed for filing a suit for partition of joint holding by co-bhumidhar. The contention of Mr. Pai is where no specific period of limitation is fixed for the partition suit as per Limitation Act, the period of limitation will not start. Dr. Mr. Chandrachud tried to submit that it was under the Special Act and facts are different and there is a residuary Article as per Limitation Act.

19. Mr. Pai also relied upon observations in case of *Daya Singh and Another Vs. Gurdev Singh (Dead) By LRS and Others*⁷, wherein there was compromise for sharing of the suit property and it was not considered as cause of action on filing partition suit. The entries in the

6 (1995) 4 SCC 496

7 (2010) 2 SCC 194

revenue record coming to the knowledge of the Plaintiff is considered as a cause of action for filing of the suit. In para number 14, it is observed that :-

“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 suit is instituted”.

It will be material to consider meaning of cause of action, because as per Article 113 of the new Act, the period will start when right to sue accrues. It accrues when there is a cause of action. It is not defined anywhere.

20. Order II of the Civil Procedure Code only says about joinder of the cause of action but the Courts have interpreted it as a bundle of facts which gives right to Plaintiff to approach a court of law. There was an occasion for the Hon’ble Supreme Court to interpret the wordings of Article 113 of present Limitation Act in case of ***Shakti Bhog Food Industries Ltd. Vs. Central Bank of India***⁸. The suit for rendition of accounts filed against the Bank was dismissed as per provisions of Order VII Rule 11(d) being barred. It was confirmed by the High

8 2020 (17) SCC 260

Court. However, Hon'ble Supreme Court reversed the same order. The Supreme Court interpreted the meaning of words "right to sue accrues". While doing that exercise, the Supreme Court compared those provisions with provisions of Article 58, 59 and Article 104. In all these Articles, the legislatures have put emphasis on word "**FIRST**".

21. While doing comparison, in para no. 17 the Supreme Court observed :-

"The expression used in Article 113 of the 1963 Act is "when the right to sue accrues", which is markedly distinct from the expression used in other Articles in First Division of the Schedule dealing with suits, which unambiguously refer to the happening of a specified event. Whereas, Article 113 being a residuary clause and which has been invoked by all the three Courts in this case, does not specify happening of particular event as such, but merely refers to the accrual of cause of action on the basis of which the right to sue would accrue."

22. The word '**first**' is not used in Article 113. The Supreme Court observed :-

"Concededly, the expression used in Article 113 is distinct from the expressions used in other Articles in the First Division dealing with suits such as Article 58 (when the

right to sue “first” accrues), Article 59 (when the facts entitling the plaintiff to have the instrument or decree cancelled or set aside or the contract rescinded “first” become known to him) and Article 104 (when the plaintiff is “first” refused the enjoyment of the right). The view taken by the trial Court, which commended to the first appellate Court and the High Court in second appeal, would inevitably entail in reading the expression in Article 113 as – when the right to sue (first) accrues. This would be re-writing of that provision and doing violence to the legislative intent. We must assume that the Parliament was conscious of the distinction between the provisions referred to above and had advisedly used generic expression “when the right to sue accrues” in Article 113 of the 1963 Act. Inasmuch as, it would also cover cases falling under Section 22 of the 1963 Act, to wit, continuing breaches and torts.”

23. In para nos. 19 and 20, the observation in earlier judgment were reproduced. Earlier observations are :-

“the distinction between Article 58 and Article 113 is, thus, apparent inasmuch as the right to sue may accrue to a suitor in a given case at different points of time and, thus, whereas in terms of Article 58, the period of limitation would be reckoned from the date on which cause of action arose first, in the latter the period of limitation would be differently computed depending upon the last day when cause

of action therefore arose”.

24. Even in para number 21, the comparison done in Article 58 and Article 120 of the present Act were also referred. The difference is addition of word “**First** in Article 58 and it is not there in Article 113”. Even the Supreme Court has considered the expression under Article 113 of the old Act and Article 120 of the new Act and observed that they are similar except the period of limitation. (Para number 21). It is observed :-

“Notably the expression used in Article 113 is similar to that in Article 120 namely when right to sue accrues. Hence, the principle underlying this dictum must apply proprio vigore to Article 113.”

25. In the present partition suit, both the Plaintiff No. 1 and Defendant No. 1 have purchased the properties jointly. Yet the reply of the Defendant No. 1 has to come on record but if both have purchased the properties jointly, both are having the right in those properties as co-owners. Why co-owner will claim partition, when relationship is cordial. He will seek partition and ask for separation only when relationship is not cordial and one of the co-owner has denied the right of another. The question is when it can be said that right is denied or there is infringement of right. It is held as such infringement should be

clear and unequivocal.

26. On facts, it is further held “ *Moreover, the fact that the appellant had eventually sent a legal notice on 28.11.2003 and again on 7.1.2005 and then filed the suit on 23.2.2005, is also invoked as giving rise to cause of action. Whether this plea taken by the appellant is genuine and legitimate, would be a mixed question of fact and law, depending on the response of the respondents.* (para no. 22).

27. On this background, when the averments in the plaint are perused, I find that in the year 2009-10, Defendant No. 1 has attempted to throw the Plaintiff No. 1 out of business and joint properties. Para No. 1 does not contain the details about any incident that has happened in the year 2009-10. As against this, in subsequent paragraphs, Plaintiff has pleaded about various incidents right from 02.03.2013 to 25.06.2015 and on this background, the suit is filed on 13.07.2016. The Plaintiff has approached the Court only when they have realized that the incidents are sufficient to plead that defendants are denying their rights to their detriment. I do not find to reject the plaint at this stage. Let the defendants to file their Written Statement and then Court can go into this issue after recording evidence.

28. Dr. Mr. Chandrachud also relied upon the observations in case of

M/s. Sree Surya Developers and Promoters Vs. N. Sailesh Prasad and Ors.⁹. It is observed that “*clever drafting would not permit the plaintiff to make the suit maintainable which otherwise would not be maintainable and/or barred by law. It has been consistently held by this Court that if clever drafting of the plaint has created the illusion of a cause of action, the court will nip it in the bud at the earliest so that bogus litigation will end at the earlier stage*”. I do not think considering the averment in the plaint, it can be said that the incident that are referred therein are by way of illusion.

29. For the above discussion, I am not inclined to accept the contention of Dr. Shri Chandrachud that suit is barred by law of limitation. Article 113 permits the Plaintiff to file suit within three years from the time of accrual of right to sue. The Plaintiffs are entitled to file a suit on the basis of last cause of action, if it is within three years. Hence, there is no merit in the Notice of Motion. Hence, it is dismissed.

30. I have not made any comments about which Article of Limitation Act is applicable. It can be decided at the time of the trial.

⁹ 2022 (5) SCC 736

INTERIM APPLICATION NO.2725 OF 2026

31. On this application, the Plaintiffs are seeking leave to carry out amendment as per Schedule and seeking leave as per provisions of Order XXIII Rule 1 (3) read with Order II Rule 2 of the Code of Civil Procedure, 1908.

32. There is one property situated at Kolkata. It is also described in the plaint as A-8 and the description is given at Exhibit A-8 (on page no. 24). The Plaintiffs contend that this Court is not having territorial jurisdiction to partition this property. About location, there is no dispute. However, Dr. Chandrachud submitted that as per provisions of Section 21 of the Civil Procedure Code, objection to the jurisdiction on account of territory has to be taken at first instance and he has not filed written statement.

33. In fact on the basis of instructions, he submitted that he is surrendering to the territorial jurisdiction of this Court in respect of that property.

34. He relied upon the observation in case of *Sneh Lata Goel Vs. Pushplata and Others*¹⁰, there is no dispute about this proposition of law, but the issue is when the Plaintiff himself wants that in respect of

¹⁰ (2019) 3 SCC 594

this property, he does not want assistance of court by way partition, can we compel the Plaintiff to continue with the suit in respect of that property. In fact, originally Plaintiffs have filed a suit in respect of the properties situated in Original Ordinary Jurisdiction of this Court and also included the property situated at Kolkata. By giving no objection, defendants are waving their rights to object about territorial jurisdiction. Even Mr. Pai submitted to pass appropriate orders.

35. In view of that instead of allowing the prayers, I am dismissing it by observing that defendants have waived the right to take that objection in that sense the Plaintiff can continue the suit in respect of the Kolkata property also.

36. With these observations, the Interim Application is disposed of.

[S. M. MODAK, J.]