

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**ORDINARY ORIGINAL CIVIL JURISDICTION****APPEAL NO.182 OF 2013****IN****SUIT NO. 993 OF 1997**

Kutbuddin Alibhai LakdawalaAppellant

V/s

Asgar A. Lakdawala & Ors. Respondents.

WITH**NOTICE OF MOTION (SUITS) NO.59 OF 2012****IN****SUIT NO. 993 OF 1997**

Kutbuddin Alibhai LakdawalaAppellant

V/s

Asgar A. Lakdawala & Ors. Respondents.

Mr. Rakeshkumar, i/by M/s. Legal Vision, for the Appellant.

Mr. Sudhir Prabhu, Advocate for Respondent No.1.

Mr. S.A. Lakdawala, respondent No.2 present in person.

**CORAM : DR. MANJULA CHELLUR, C.J. &
M.S.SONAK, J.****Date of Reserving the Order : 26 October 2016.****Date of Pronouncing the Order : 08 December 2016.****P.C.:**

This appeal is directed against the judgment and order dated 24/04/2012 made by the learned Single Judge of this Court in Suit No.993/1997 upholding the preliminary objection raised by the respondents (defendants) and dismissing the suit as barred by the law of limitation.

2. Mr. Rakeshkumar, the learned Counsel for the appellant submits that the pleadings in paragraphs 9 & 10 of the plaint have been misconstrued to hold on the basis of such averments that the suit is barred by the law of limitation. He submits that upon conjoint reading of the plaint as well as the affidavit in lieu of examination in chief, it is quite clear that the cause of action for seeking relief in terms of prayer clause (a) of the suit arose some time in the third week of February, 1994 and therefore, the suit which was instituted on 18/02/1997 was well within the prescribed period of limitation. He however, submits that relief as prayed for in prayer clause (b) has no direct nexus with the relief as prayed for in prayer clause (a). This relief proceeds on the basis that the appellant has one fourth share in the immovable property which is the subject matter of this prayer clause. Accordingly, he submits that there was no question of such relief being barred by law of limitation. Finally, Mr. Rakeshkumar submits that the plaint and the reliefs prayed for therein, if construed in their entirety, clearly make out a case of partition of joint property, particularly, since relief of partition by metes and bounds has been applied for. He submits that such a suit could never be held as barred by law of limitation. For all these reasons he submits that the impugned order warrants interference.

3. Mr. Sudhir Prabhu, the learned Counsel for respondent no.1 and Mr. S.A. Lakdawala, respondent no.2, who appears in person, submitted that there is no case made out to interfere with the impugned judgment and order. They submit that the entire thrust of the suit is to cancel the Gujarati language writing, the knowledge of which, was admittedly acquired by the appellant in the first week of February, 1994. The rest of the reliefs in the plaint are only incidental to this main relief. Since, the suit came to be instituted more than three years from the date of accrual of the cause of action, the same has been rightly dismissed by the learned Single Judge.

4. Mr. S.A. Lakdawala also submitted that the appellant is a signatory to the Gujarati writing, which has been acted upon by all the parties. He submits that Gujarati writing is in a nature of a family arrangement and the appellant has no case to dispute or impugn the same. In such circumstances, he submits that there is no case made out to interfere with the impugned judgment and order.

5. After the conclusion of the arguments, Mr. Lakdawala once again appeared in person and handed in a precipe stating that Notice of Motion (L) no.1825/2012 and Notice of Motion no.59/2012 are tagged alongwith

this matter and affidavit in support of Notice of Motion no. 59/ 2012 and affidavit in reply in Notice of Motion (L) no. 1825/2012 be taken into consideration for the purposes of disposal of the appeal.

6. The rival contentions now fall for our determination.

7. The appellant is the original plaintiff and respondents are the original defendants in Suit No.993/1997 instituted on 18/02/1997. The respondents are the appellant's brothers and sisters (including legal representatives of the brothers and sisters). The reliefs prayed in the suit read thus:

“(a) that Gujarati Writing Exhibit 'B' alleged to have been signed by deceased is to be null and void and not enforceable and binding upon the plaintiff;

(b) that it be declared that the Plaintiff has 1/4th share in the immovable property known at Falli's Mansion formerly known as Gazder Mansion situated at 77, Chandanwadi, Mumbai – 400 002 as one of the purchasers of the name along with deceased Alibhai Khandbhai Lakdawala and the 1st and 2nd Defendant apart from his share as heir in the 1/4th share of the deceased Alibhai Khanbhai Lakdawala,

(c) that the defendants be ordered and directed to render the true and correct accounts of the estate of the deceased and the income that they may have derived from;

(d) that the plaintiff share in the estate of the deceased be ascertained and declared and be divided by metes and bounds and the same may

be ordered to be handed over and paid to the plaintiff;

(e) that for the purpose aforesaid all such enquiries be made, directions given, account taken, orders passed as may be necessary;

(f) that pending the hearing and final disposal of the suit the Court Receiver, High Court of Mumbai or some other fit and proper person be appointed Receiver in respect of the estate of the deceased Alibhai Khandbhai Lakdawala as set out in the Schedule Ex-B with all powers under Order 40 Rule 1 of the Court of Civil Procedure.;

(g) that pending the hearing and final disposal of this suit the defendants their agents and servants be restrained by an order and injunction of this Hon'ble Court from in any manner dealing with or disposing of the properties belonging to the estate of the deceased Alibhai Khandbhai Lakdawala or surrender the tenancy rights of the House in Lakdawla Gala No.34 and that no tenancy of any tenement in respect of Falli's Mansion, 77, Chandanwaki, Mumbai-400 002, be transferred in any manner;

(h) Ad interim reliefs in terms of prayer (f) and (g);

(i) that the plaintiff's cost of this suit be ordered to be paid out of the estate of the deceased;

(j) that such further and other reliefs as the nature and circumstances of the case may require be granted."

8. Since the impugned judgment and order proceeds almost entirely on the basis of the averments in paragraphs 9 & 10 of the plaint, the same are transcribed below for convenience of reference:

"9. The plaintiff submits that the plaintiff was under lot of depression after the death of the parents and the plaintiff unfortunately because as uncontrollable and taking advantage of such a miserable situation of the plaintiff, the

defendants conspired and secured the signature of the plaintiff on some Gujarati writing without exploring him the contents of the said writing and in as much as the plaintiff is not conversant and does not know Gujarati language particularly reading and writing although he speaks broken Gujarati and plaintiff's signature was taken on the said Gujarati writing purporting to be a settlement amongst the plaintiff and the defendant nos.1 to 3, 5 and deceased Ruby. The plaintiff submits that this incident took place sometime in the last week of January, 1994.

10. The plaintiff submits that copy of the writing was not given but however after the plaintiff's enquiring with one Shri Taherbhai in or about the end of first week of February 1994 a xerox copy of the said writing was furnished by said Taherbhai but the plaintiff could not understand what is meant. The plaintiff's wife read out and explained the contents of the said writing. The plaintiff was shocked to know about its contents and contacted the defendants and produced about the said writing and contended that the contents of the same were not binding upon the plaintiff and that the plaintiff could not have and had not agreed to any settlement or division of the property as per the said writing and that the defendants have dishonestly conspired and defrauded the plaintiff. The plaintiff's signature was taken whilst he was fully intoxicated without explaining the contents of the said writing which is not binding upon the plaintiff. That the defendants and the said Taherbhai promised the plaintiff that the plaintiff should not vary and that all would meet once again together to discuss the division of the property rationally. That pursuant to the said writing the value of the property allotted to the 1st defendant is in the vicinity of about Rs.20 lacs. The value of the property altogether going to defendant nos.3A deceased Rubabbai and 5 is in

the vicinity of Rs.16 lacs and the value of the property going to the plaintiff is sure as pursuant to the said writing what is given to the plaintiff is a time-barred debt and hence the division of the property is unrealistic, unjust, improper, bad in law. Copy of the said writing with the true office translation as annexed hereto and marked as Exhibit 'B' and 'B1'. The plaintiff therefore by his letter dated 2nd March, 1994 of M/s. Khona and Kayser, plaintiff's attorneys contained that the signature of the plaintiff was obtained whilst he was in a depressed and intoxicated condition and not in a proper state of mind and that he did not know Gujarati and that his signature was obtained without explaining the contents of the said writing that the said writing is not registered and that the distribution of property is not just and in proportion to the respective shares and called upon the defendants to seek conciliation of the writing and to divide the property. Copy of the said letter is annexed hereto and marked Exhibit 'C'. That though Taherbhai promised to have a meeting of all but the same was never held."

9. In this case, preliminary issue as to limitation was framed and by the impugned judgment and order, the learned Single Judge has upheld the preliminary objection and dismissed the suit as barred by limitation.

10. Suitable opportunity for leading evidence on the preliminary issue was offered to all the parties. The appellant has filed his affidavit in lieu of examination in chief. Despite opportunity, none of the respondents chose to cross-examine the appellant. The respondents also did not lead any evidence in support of their plea that the suit is barred by the law of

limitation.

11. The learned Single Judge, in making the impugned order, has however relied upon the averments in paragraphs 9 & 10 of the plaint to hold that the cause of action for seeking relief in terms of prayer clause (a) of the plaint arose in the first week of February, 1994 and since the suit was instituted only on 18/02/1997, i.e. a few days after the expiry of three years, the same was barred by the law of limitation. For this purpose, the learned Single Judge has placed reliance upon Article 59 of the Schedule to the Limitation Act, 1963. Further, the learned Single Judge has held that the relief in terms of prayer clause (a) was the main relief and the relief in terms of the remaining prayer clauses were only incidental or ancillary reliefs. Since, the main relief was barred by the law of limitation, there was no question of examining whether relief in terms of the other prayer clauses could be granted independently.

12. In terms of prayer clause (a) of the plaint, the plaintiff seeks a decree (to declare) the Gujarati writing at Exhibit 'B' to be “*null and void and not enforceable and binding upon the plaintiff*”. Although, the prayer clause does not specifically refer to “*declaration*”, it is quite clear that this is the relief which is applied for in prayer clause (a). To that extent therefore, Article 59 of the Schedule to the Limitation Act may not

apply. Nevertheless, this aspect makes no significant difference, since, the matter would be governed by Article 58 of the Schedule to the Limitation Act, 1963, which also provides that a suit of this nature is required to be instituted within three years when the right to sue first accrues. Even if we are to hold that Article 59 applies, the period of limitation prescribed is three years from the date when the facts entitling the plaintiff to have the instrument or decree cancelled or set aside or the contract assigned first became known to him.

13. In this case, the appellant has pleaded that his signature on the documents was obtained in the last week of January 1994, when he was in an intoxicated state and therefore not in position to understand the contents and the import of the documents in question. In paragraph 10 of the plaint, the appellant has averred that the copy of said document was delivered to him “*in or about the end of the first week of February, 1994*”. The appellant has further averred that he could not understand what the writing in the document meant. He has further averred that his wife read out and explained the contents of the writing. Significantly, there is no precise date set out in the plaint as to when the appellant's wife read out and explained the contents of the writing to the appellant. However, in the affidavit in lieu of examination in chief, the appellant

has stated that this was some time in the last week of February and it is in the last week of February that the appellant came to know about the contents of the Gujarati writing and perceived that it was a deliberate and fraudulent attempt to oust the rights of the appellant. As stated earlier, despite opportunity, none of the respondents chose to cross examine the appellant.

14. There is material on record that on 2/03/1994 that is soon after the appellant realised the import of the Gujarati writing, the appellant caused a legal notice to be served upon the respondents stating out therein the circumstances in which his signature was obtained upon the Gujarati writing and urging the respondents not to act upon such Gujarati writing. This notice dated 2/03/1994 was in fact produced by the appellant along with his affidavit in lieu of examination in chief and is deemed to be a part of the record.

15. From the conjoint reading of the averments in the plaint and the affidavit in lieu of examination in chief, which remains unchallenged, we are of the opinion that the right to sue in respect of the prayer clause (a) arose in or about the last week of February, 1994 and therefore, the suit instituted on 18/02/1997 could not be said to have been barred by the law

of limitation. If we are to apply Article 59 of the Schedule to the Limitation Act, 1963, even then, the material on record does suggest that the facts entitling the appellant to have the Gujarati writing set aside became effectively known to him in the last week of February, 1994 and therefore, the suit which was instituted on 18/02/1997 cannot be said to be barred by limitation.

16. The learned Single Judge has offered no credence to the evidence in paragraph 3 of the affidavit in lieu of examination in chief by observing that the averments in paragraphs 9 & 10 of the plaint being so clear, there is no question to looking into any evidence which may be in variance with the averments in the plaint. However, as noted earlier in paragraphs 9 & 10 of plaint, there is no clear date set out as to when the appellant's wife read out and explained the contents of the Gujarati writing to the appellant and which was the precise date on which the appellant came to know of the facts entitling him to set aside the Gujarati writing. The appellant, even in paragraphs 9 & 10 of the plaint has used the expression "*in or about*" to indicate the period when he received the copy of the Gujarati writing. These matters/pleadings are however explained in the course of examination in chief, which has gone unchallenged. This is not the case of there being any variance between

pleadings and proof. Rather, this is a case where the pleadings have been explained in the course of evidence, which has gone unchallenged. Even otherwise, pleadings in such matters need to be construed liberally. From the context, it does appear that all the facts entitling the appellant to have the Gujarati writing set aside came to his knowledge some time in the last week of February 1994. Therefore, we are of the opinion that the suit which was instituted on 18/02/1997 was not barred by limitation in so far as relief in terms of prayer clause (a) is concerned.

17. Upon reading of the plaint in its entirety and the reliefs applied for therein, we are also not convinced that the relief in terms of prayer clause (a) was the main relief and the remaining reliefs were only ancillary or incidental reliefs. For example prayer clause (b) relates to the immovable property known as Gazder Mansion situated at 77, Chandanwadi, Mumbai – 400 002. In so far as this property is concerned, the appellant claims that he has one fourth share to the same in his capacity as a joint purchaser. Similarly, prayer clause (d) relates to the estate of his deceased parents and the appellant seeks division by metes and bounds. In such a situation, even if there was some issue about some of the reliefs being barred by limitation, there was no reason to dismiss the entire suit as being barred by limitation.

18. For the aforesaid reasons, we set aside the impugned judgment and order dated 24/04/2012 and restore Suit No.993/1997 to the file of the learned Single Judge for deciding the same in accordance with law and on its own merits. The interim arrangement which was operational during the pendency of the suit and which was continued during pendency of the appeal is also restored. However, on account of lapse of time or any other reasons, if the parties need any variation or modification, they are at liberty to apply to the learned Single Judge for the same.

19. Notice of Motion (L) no. 1825 of 2012 has already been disposed of by this Court by order dated 3 September 2012. The affidavit in reply filed by respondent No.2 to this motion, mainly deals with the merits of the matter. At this stage, therefore, averments in the said affidavit in reply can have no impact on deciding the issue of limitation.

20. The order dated 3 September 2012 also records the request made by respondent No.2 that Notice of Motion no. 59/2012, which was filed by him before the learned Single Judge, may be heard by the Appeal Court. Now that the impugned order is being set aside and the matter

restored to the file of the learned Single Judge, it will be only appropriate that Notice of Motion no. 59/2012 is heard and disposed of by the learned Single Judge.

21. We make it clear that the observations in this judgment and order are in the context of deciding the issue of limitation and therefore none of the observations be construed as observations on the merits of the respective contentions. Needless to add that all such contentions are kept open to be determined at the stage of the final disposal of the suit.

22. This appeal is therefore allowed. The impugned judgment and order dated 24/04/2012 is set aside. The suit No.993/1997 is restored to the file of the learned Single Judge for decision in accordance with law and on its own merits.

23. In view of disposal of the appeal, the pending Notices of Motion also stand disposed of. However, the parties are granted liberty to seek appropriate reliefs from the learned Single Judge, if necessary, by filing fresh Notices of Motion.

(M.S. SONAK, J.)
NH/DSS

(CHIEF JUSTICE)