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

+ **RFA(OS) 35/2015**

DR SARJIT SINGH AWLA

..... Appellant

Through: **Mr.Arjun Singh Bhati, Advocate**

versus

KULDEEP SINGH AWLA & ANR.

..... Respondents

Through: **Mr.Ashim Vachher, Mr.Galav**

Mahgam and Mr.Vikas Dabass,

Advocates for R-1

**Mr.Gaurav Mahajan, Advocate for
R-2.**

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE R. K. GAUBA

ORDER

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10.03.2016

RFA(OS) 35/2015 & C.M.Nos.5462/2015

1. The present appeal is directed against an order of the learned Single Judge rejecting the complaint under Order 7 Rule 11 of the Code of Civil Procedure (CPC). The plaintiff/appellant filed the suit seeking decree for declaration, possession, permanent injunction and damages. The case set up is that the plaintiff and his brother i.e. the first defendant were legatees in respect of suit property being a 1000 sq. ft. constructed plot (D-44, South Extension, Part-II, New Delhi) by virtue of the deceased mother's will dated 07.05.1993. The will inter alia stipulated that the plaintiff was the legatee of the first floor and had exclusive right in respect of Barsati and a garage; the first defendant who is the other legatee was to inherit the ground floor and a garage and was also entitled to the rents from two annexe buildings.

It is an undisputed fact that since the plaintiff resided in Germany, he executed a Special Power of Attorney in favour of second defendant i.e. the first defendant's wife on 17.09.2007.

2. The said Power of Attorney inter alia empowered the second defendant to transfer the plaintiff's "undivided share in the suit property" and also execute, sign and present documents for release of the relinquished share in respect of the said property" before the registering authorities. In the suit, plaintiff claimed reliefs that he did, contending that he became aware of the registered relinquishment deed dated 21.01.2008 whereby his share was released in favour of the first defendant much later in 2012. During the course of the proceedings the plaintiff was asked to file an affidavit – by the order of the court dated 25.02.2014. He complied and filed an affidavit on 15.03.2014 disclosing that he became aware of the relinquishment deed sometime in 2012. The material portion of the said affidavit is extracted below:

"2. That with respect to aspect no. (a), I say that the deponent on the instructions of the plaintiff, in the first week of October 2012 met the defendant no.1 for getting let-out, the first floor portion and one garage i.e. the divided portion of the plaintiff/suit property, fallen to the share of the plaintiff under the registered WILL of the mother, and told him that as per the desire and instructions of the plaintiff he wants to let-out the said portions/the suit property on rent. Upon this the defendant no.1 remarked that he has become the owner of the entire property bearing no.B-44, South Extension, Part-II, New Delhi i.e. in pursuance to the relinquishment deed dated 21.01.2008, and handedover simultaneously, the true photocopy of the certified copy of the said

relinquishment deed to the deponent.”

3. The learned Single Judge by the impugned judgment went on to interpretate the document i.e. the registered relinquishment deed and the Power of Attorney dated 17.09.2007. The Single Judge was of the opinion that having regard to these materials, the suit was time barred.

The Single Judge has held as follows:

“13. This Court is of the view that the intent of the plaintiff was to authorize defendant no.2 to deal with his complete half share in the suit property and even to relinquish it/release it. The power of attorney is dated 17.9.2007 and the relinquishment deed followed just three months thereafter i.e. on 21.01.2008 whereby defendant no.2 relinquished this half share of the plaintiff in favour of her husband (defendant no.1). The fact that the plaintiff was a resident of Germany and was living there since the last several years was probably the reason which has weighed in his mind to allow his brother (defendant no.1) to enjoy the property completely.

14. Even as per the case of the plaintiff, he did not care to find out what happened to the property after the execution of his power of attorney on 17.9.2007. The plaint speaks of the relinquishment deed dated 21.01.2008 but it is conspicuously silent as to when the plaintiff learnt about this relinquishment deed. Plaintiff had given a legal notice to the defendant in October, 2013. Issuance of legal notice would not by itself enlarge the period of limitation in favour of the plaintiff. This is also not his argument. Attention has been drawn to the cause of action which has been contained in para 13. After 17.9.2007 (the date of the execution of power of attorney) and 21.01.2008 (the date of execution of the relinquishment deed) there is no cause of action which has arisen in favour of the plaintiff except the issuance of the legal notice which has been mentioned as 31.10.2013.

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16. *This Court is of the view that the plaintiff has failed to cross the hurdle of limitation. A suit seeking declaration is governed by Part-III of the Limitation Act, 1963. Article 58 stipulates a period of three years as limitation to file such a suit and the time begins to run from the date when the right to sue first accrues which in this case would be the date (21.01.2008) of execution of the relinquishment deed and as there is no further averment in the plaint that knowledge about the relinquishment deed was obtained by the plaintiff at any later date; the period of limitation has to be necessarily reckoned from the date of execution of the relinquishment deed. Section 9 of the Limitation Act also provides that once the period of limitation has begun to run, no subsequent disability or inability to institute a suit or make an application stops it.*

17. *At the cost of repetition, there is no averment by the plaintiff that the knowledge about the relinquishment deed was brought to the notice of the plaintiff at any later date. This has neither been averred in the plaint nor does it find mention in the legal notice. The present suit is accordingly barred by limitation. The prayer made in the application filed by the defendant is allowed. plaint is rejected under Order 7 Rule 11 (d) CPC.”*

4. During the hearing counsel for the respondent submitted that this court should not interfere with the impugned judgment. It was submitted that the reading of the plaint as a whole does not disclose that the cause of action arose any time after 2012. Learned counsel endeavours to submit that cause of action arose in fact on 07.05.1993 and that the suit merely stated that the cause of action arose in 2008.

5. The judgment of the Supreme Court in ***Liverpool & London S.P. & I Asson. Ltd. vs. M.V.Sea Success I and Anr.*** (2004) 9 SCC

512 is instructive on the issue that it is not just the pleadings in the suit but all the material, which are placed on record by the plaintiff are to be considered while proceeding with a judgment under Order 7 Rule 11 CPC. We notice that the learned Single Judge did not take into consideration the affidavit which the Court insisted ought to be affirmed and placed on record by the plaintiff/appellant – one which categorically states the date of knowledge. Para 2 of the affidavit states clearly that the plaintiff became aware of the cause of action i.e. the registration of the relinquishment deed of 2008 only in 2012. Given that issue of limitation is not merely one of law but would also entail analysis of fact which is best undertaken in such circumstances after the relevant materials are on the record and having regard to the evidence of the parties, the Court is of the opinion that the impugned judgment cannot be sustained. It is hereby set aside.

6. The rights of the parties to urge whatever they wish to rely upon in accordance with law is reserved. Parties are directed to be present before the concerned Single Judge on 23.03.2016. The appeal is allowed in the above terms.

C.M. 21571/2015 (for amendment of plaint)

The application is rendered infructuous. It is open to the plaintiff/appellant to seek amendment in accordance with law.

S. RAVINDRA BHAT, J

R. K. GAUBA, J

MARCH 10, 2016/rb