

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

Reserved on: 14.01.2016
Pronounced on: 29.01.2016

+ **RFA (OS) 44/2015, C.M. APPL.7123 & 7125/2015**

COL. KALYAN SINGH THR. HIS LR.Appellants

Through: Sh. Chayan Sarkar with Sh. Kumar Ankur, Sh.
Karan Bindra and Sh. Bipul Kedia, Advocates.

Versus

WIMPY INTERNATIONAL LTD. AND ORS.Respondents

Through: Sh. Manav Gupta and Ms. Esha Dutta,
Advocates, for Respondent No.2.

Ms. Simran Brar with Sh. Varun Kumar and Ms. Saloni
Chowdhury, Advocates, for Respondent No.1.

Sh. Arun Bhardwaj, Advocate, for Respondent
No.4/HSIIDC.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

MR. JUSTICE S. RAVINDRA BHAT

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1. The unsuccessful plaintiff appeals against the judgment and order of a learned Single Judge, (dated 31.10.2014) rejecting his plaint as barred by law on the ground of limitation and at the same time, holding that this Court lacks territorial jurisdiction. The Court heard the counsel for parties finally, with their consent and also considered the documents and pleadings which were part of the suit records.

2. The suit averments were that the deceased plaintiff, along with Capt. H.S. Bajaj (Retd.) and Shri. N.K. Duggal, was carrying on business under

the name and style of *M/s. Freezo Freezing Complex* in terms of partnership deed dated 28.08.1979. The plaintiff and Capt. H.S. Bajaj, retired Army officers, had applied for allotment of an industrial plot at Dhoondahera under a scheme formulated by the Haryana State Industrial Development Corporation (fourth defendant “HSIDC”). By allotment letter dated 12.12.1979, HSIDC allotted the suit property (i.e. land bearing No. 245, Udyog Vihar, Dhoondahera, Gurgaon, Haryana measuring 19516.60 Sq. Mtrs) jointly to the plaintiff and Capt. H.S. Bajaj. A sale deed (dated 25.02.1983) was executed by HSIDC in favour of *M/s. Freezo Freezing Complex*. The plaintiff paid stamp duty of ₹ 66,750/-; a certificate in this regard was issued by the Registrar’s Office. The plaintiff and his partners secured a medium term loan facility from the fifth defendant (“the Bank”). The partnership firm was the debtor. The loan was for construction upon the suit property as well as for purchase and installation of plant and machinery. The suit property was mortgaged to the Bank to secure the loan.

3. After completion of construction, the suit property was let out to *M/s. I. Ahmad & Company*. During the 1984 riots, suit property was badly damaged as a consequence of which the tenant left the premises. The plaintiff was unable to repay the loan due to the losses suffered by the firm. He was working as Chief Executive of *M/s. Wimpy India Ltd.*, *M/s. Wimpy Fast Foods Pvt. Ltd* and *M/s. Wimpy Foods Pvt. Ltd*. The second defendant and one Mr. Keval Singh Sandhu later acquired these companies. *M/s. Goodwill Foods (P) Ltd.* was incorporated in the year 1985, of which the plaintiff became the Executive Director. Thereafter, the plaintiff entered into a partnership business with the third defendant to carry on the said business

from the suit property on the assurance of M/s. Goodwill Foods (P) Ltd. that it would clear the dues and outstanding liabilities of the plaintiff firm. As a consequence, the plaintiff, Capt. H.S.Bajaj and Shri. N.K. Duggal executed a dissolution deed, along with a partnership deed as well as certain other documents in the year 1988. These included an agreement dated 01.12.1988 executed between M/s. Goodwill Foods (P) Ltd., the plaintiff and his partners, whereby suit property along with the super structures standing upon it were transferred to M/s. Goodwill Foods (P) Ltd. The consideration was that the said company, were to clear all the liabilities of the partnership firm.

4. It was alleged that the first three defendants failed to honour their obligations under the agreement. No amounts were paid to the fifth defendant to clear the plaintiff firm's dues. Later the third defendant, on behalf of M/s. Goodwill Foods (P) Ltd., executed a rent agreement dated 07.09.1989 in favour of the plaintiff whereby it agreed to pay monthly rent of ₹1,50,000/- to the plaintiff from the date of initial agreement i.e. 01.12.1988. Even the rent was not paid. In the meanwhile, M/s. Goodwill Foods (P) Ltd. was merged with the first Defendant (hereafter "Wimpy"), of which the second defendant became Chairman and Managing Director while plaintiff was one of its Directors. Subsequently, plaintiff was illegally removed from the post of Director of Wimpy. It was alleged thereafter that the agreement dated 01.12.1988, the partnership deed, the dissolution deed and other documents were *void ab initio* since they were entered into by the plaintiff and his partners as a result of fraud, because, no sale consideration mentioned in the agreement had been paid. The plaintiff also alleged that he

and Capt. H.S. Bajaj were owners of the suit property and that Wimpy and the second as well as third defendants had no right to deal with the same in any manner whatsoever.

5. Wimpy, in its written statement, submitted that the suit was hopelessly barred by time since the agreements and other documents alleged in the plaint were executed in 1988; the suit was filed in 2004, that is, after about 16 years. It was argued that the plaintiff was not the owner of the suit property, thus, had no *locus standi* to file the suit. The suit property belonged to the firm M/s. Freezo Freezing Complex and since other partners of the firm had not been impleaded, the suit was bad for non-joinder of necessary parties. Capt. H.S. Bajaj and Shri N.K. Duggal, ex-partners of M/s. Freezo Freezing Complex, were also signatories to the agreement dated 01.12.1988 and had not approached the court. The rent agreement dated 07.09.1989 was disputed as forged. Wimpy claimed that the assets and liabilities of M/s. Freezo Freezing Complex were taken over by it pursuant to the agreement dated 01.12.1988. It had cleared the dues payable to the Bank in terms of the agreement. After the Bank's dues had been cleared by Wimpy, original title deeds had been released to it long ago. It was stated that the suit property been mutated in Wimpy's favour in the records of HSIDC. Wimpy stated that its balance sheets were signed by the plaintiff as one of its Directors, in which the suit property has been shown as an asset. Wimpy also submitted that it had cleared dues of the other creditors of M/s. Freezo Freezing Complex to the extent it was limited in the agreement dated 01.12.1988 by making such payments to the plaintiff and other partners

through cheques. Wimpy's position in short was that it was the lawful owner of the suit property.

6. Wimpy filed an application on two grounds, first, that the Court lacked territorial jurisdiction to try the suit as the suit property is situated in Gurgaon, Haryana and second, that the suit is barred by limitation as the action seeking declaration of invalidity of the agreement dated 01.12.1988, was filed in the year 2004 as against the prescribed period of limitation of 3 years as per the Limitation Act. The application contended that though the plaintiff sought to invoke the territorial jurisdiction of the Court on the ground that Wimpy is a registered company located in Delhi and the Bank also carries on business in Delhi, however, this Court would not have territorial jurisdiction as the plaintiff in substance claims a right or interest in immovable property which is situated outside the jurisdiction of this Court, in view of Section 16(d) of the Civil Procedure Code, 1908. As regards limitation, it was argued that being a legal issue, it could be urged at any stage, and in case this Court found on the face of pleading and documents that the suit filed by the plaintiff was time barred, no separate application was required.

7. The plaintiff's response to the application, was that this Court has territorial jurisdiction, and that this fact is not denied in the written statement. It is stated that the documents in question including the impugned agreement dated 01.12.1988 were executed at Delhi. Wimpy has its registered office at Delhi as also the Bank and the cause of action arose in Delhi. It is stated the suit was instituted in the year 2004 and the written statement itself was filed by Wimpy in February, 2005. The application was

an afterthought and moved to harass the plaintiff and delay the proceedings. The plaintiff contended that he was not claiming any relief with regard to the suit property but only for declaration of certain documents as illegal and void. He also sought a permanent injunction against Wimpy compelling them by personal obedience that the suit property should not be dealt with on the basis of the alleged documents. The plaintiff denied that the suit in substance is a suit regarding determination of right to or interest in immovable property situated in Gurgaon.

Impugned judgment

8. The learned Single Judge heard counsel for parties and considered the materials adduced by the plaintiff. He noticed that the impugned agreement dated 01.12.1988 was executed by all the three partners i.e. the plaintiff, N.K. Duggal & H.S. Bajaj on behalf of M/s. Freezo Freezing Complex. The agreement stated that the assets of the partnership firm, including the suit property, was being taken over by the first two defendants. The suit property stood conveyed/mutated in the name of the first two defendants by HUDCO. It was held that:

“13. The reliefs sought for in the present suit are merely declaratory in nature without seeking the necessary consequential reliefs in terms of Section 34 of the Specific Relief Act, 1963. It is settled law that where the plaintiff being able to seek further relief than a mere declaration of title, omits to do so, the plaintiff shall be precluded from seeking such consequential reliefs at a belated stage and the Court would reject the suit on this ground alone.

14. As far as the issue of invoking territorial jurisdiction is concerned, it is settled law that while considering the application

under Order 7 Rule 11 CPC, the Court is to examine the averments made in the plaint and documents filed along with plaint. In view of averments made in the plaint, the contention of the defendant Nos. 1 and 2 cannot be accepted.

15. With regard to other objection raised in the application that the suit is barred by limitation, there is no specific prayer in the application but in the body of the application, the said objection was raised. In the matter, when the issue of limitation is a doubtful case, normally, it becomes mixed question of facts and law. But at the same time, if Court would find that on the face of averment and facts made in the plaint, the suit is time barred, then the Court can reject the plaint.

16. The plaintiff had not denied the fact that the suit property was in the name of partnership firm. The deceased plaintiff himself had admitted that he had signed the agreement dated 1st December, 1988 and he was the partner of partnership firm. The said agreement is challenged in the present suit which was filed in the year 2004 after the expiry of 16 years. The deceased was the signatory to the agreement. Now the issue before this Court is as to whether on the face of admissions made by the deceased plaintiff himself, the suit was time barred and the plaint is likely to be rejected or not.”

9. The learned Single Judge then relied on the decision of the Supreme Court in *Commissioner of Income Tax, Madhya Pradesh Vs. Dewas Cine Corporation*¹ to the effect that under the Indian Partnership Act, 1932, property brought into the firm by partners at the stage of initial constitution, or acquired in the course of the business, becomes the property of the firm and a partner is, subject to any special agreement between the partners, entitled upon dissolution to a share in the money representing the value of the property. The impugned judgment then held:

¹ AIR 1968 SC 676

“19. It is a matter of record that in pursuance to the Agreement dated 1st December, 1988 the assets (including the suit property) and liabilities of M/s Freezo Freezing Complex had been taken over by the defendant No.1 along with the liability existing towards defendant No.5 i.e. State Bank of Saurashtra and thereafter has been duly discharged by the defendant No.1.

20. The plaintiff has made an admission by way of an affidavit dated 1st December, 1988 and indemnity bond executed by him in favour of defendant No.1 (M/s Wimpy International Ltd. earlier known as M/s Goodwill foods P. Ltd.), whereby he admits that he is a partner in M/s Freezo freezing Complex and that there exist no lien over the suit property and further undertakes to indemnify the defendant Nos.1 & 2 against any loss suffered.

26. It is an admitted position that the possession of the suit property has since 1st December, 1988 been with the defendant No.1. A bare perusal of the reply filed by the plaintiff to the present application filed under Order 7 Rule 11 CPC as well as Para 21 and prayer [b] of the present suit would show that the plaintiff admits that the possession has all along been with defendant No.1.

27. For this purpose, reliance has been placed on the judgment of the Supreme Court in the case of N.V.Srinivasa Murthy vs. Mariyamma, (2005) 5 SCC 548 (paras 10-12, 14-18), wherein the Court had observed that the mutation proceedings in the year 1994 did not give rise to a fresh cause of action as it was only in furtherance to the sale deed dated 5th May, 1953 and that it appeared to have been made as a camouflage to get over the bar of limitation. Therefore, the Court had dismissed the suit under Order 7 Rule 11 CPC.

28. After considering the abovementioned circumstances and facts of the case, this Court is of the considered opinion that the present suit is hopelessly barred by limitation as in the present case, the right to sue, if any, first accrued at the time of execution

of the Agreement dated 1st December, 1988 and handing over of the possession. However, the present suit has been filed belatedly only on 10th December, 2004 i.e. after a period of 16 years. The plaintiff and defendant Nos.1 & 2 have duly acted upon the Agreement dated 1st December, 1988 as it is evident from a bare perusal the terms of the said agreement.”

Arguments of parties

10. Counsel for the plaintiff/appellant argued that the learned Single Judge failed to observe the provisions of Order VII Rule 11 in the strictest sense and erroneously passed an order dismissing the plaint after almost about 10 years of it being initiated by the plaintiff. It was urged that the Court should have taken into account the date of knowledge of misuse of a certain document even if it had been executed much prior to such misuse. The learned Single Judge- stressed counsel, failed to take into account that the cause of action first arose was when the plaintiff obtained knowledge of the alleged misuse of the documents on 07.11.2004. Having secured knowledge of the designs of the first two defendants, the plaintiff also sent them a notice.

11. Learned counsel relied on *Ram Prakash Gupta Vs. Rajiv Kumar Gupta and Ors*², where it was held that limitation would begin from the date of knowledge of the decree which had been obtained fraudulently by the Respondents and not from the date when the decree was passed even though the petitioner was appearing regularly in that case. Counsel also relied on *Daya Singh and Anr. Vs. Gurdev Singh (dead) by LR's and Ors*³ where it was held that the right to sue solely accrues when there is unequivocal and

² (2007) 10 SCC 59

³ (2010) 2 SCC 194

clear threat to the infringement of any right. The appellant was one of the directors of Wimpy and was unscrupulously removed in 2004. Till then Wimpy was duly paying rent against the use of the land owned by the appellant. Only after he was removed as a Director, did the appellant become aware of the plaintiffs' *mala fide* intentions, thus leading to the suit.

12. It was contended that the question of limitation is a mixed question of law and fact, which could have only been dealt with along with the final disposal of the suit on merits and not at such an early stage. The judgment of the Supreme Court, in *Balsaria Construction (P) Ltd. Vs. Hanuman Seva Trust and Ors*⁴ which held that a "*Question of limitation is a mixed question of law and fact. Ex facie in the present case on reading of the plaint it cannot be held that the suit is barred by time.*" was relied upon. Next, *Alka Gupta Vs. Narender Kumar Gupta*⁵ by a three-judge bench judgment was relied upon to say that

"A civil proceeding governed by the code will have to be proceeded with and decided in accordance with law and the provisions of the code and not on the whims of the court. There are no short-cuts in trial of suits, unless they are provided by law. A civil suit has to be decided after framing and trial permitting the parties to lead evidence on the issues, except in cases where the code or any other law makes an exception or provides any exemption."

13. It was submitted that a partnership firm is not a separate legal entity and in no manner whatsoever, can it claim ownership of any particular property, both movable and immovable. The Supreme Court judgment, in a

⁴ (2006) 5 SCC 658

⁵ (2010) 10 SCC 141

three-judge bench judgment in *N. Khadervali Saheb (Dead) by LRS & Anr. Vs. N.Guddu Saheb (Dead) & Ors*⁶ was relied on. The Court held that:

"A partnership firm is not an independent legal entity, the partners are the real owners of the assets of the partnership firm. Actually the firm name is only a compendious name given to the partnership for the sake of convenience. The assets of the partnership belong to and are owned by the partners of the firm. So long as partnership continues each partner is interested in all the assets of the partnership firm as each partner is the owner of all the assets to the extent of his share in the partnership."

14. Counsel argued that not only can a firm not own business assets, even a partnership deed without any consideration cannot be the source of a valid transfer. It is hereby also pointed out that the partnership deed *per se* cannot confer title rights on a particular property on any one partner. Furthermore, the same was without any consideration and hence a void agreement under the Indian Contract Act, 1972.

15. The appellant, it was urged, had the right of redemption under Section 58 of the Transfer of Property Act, 1882, and as such the transfer of his title by the Bank completely ignored provisions of law. Reliance was placed on the judgment of the Supreme Court in *L.K Trust Vs. E.D.C Ltd. & Ors*⁷, which categorically held that the right of redemption of a mortgaged property can be extinguished only on execution of conveyance of mortgaged property by a registered instrument or by decree of a court. As an original mortgagor, the appellant had the right to redeem the mortgaged premises- a

⁶ (2003) 3 SCC 229

⁷ (2011) 6 SCC 780

right that could not be unilaterally deprived.

16. Reliance was also placed on *Sidharth Choudhary Vs. Mahamaya General Finance*⁸, in which the Court held that when relief sought in the suit is only for directing the defendant to execute the sale deed and where the latter had its registered office in Delhi and also carried on business in Delhi, the courts in Delhi had territorial jurisdiction to try the suit.

17. Relying on the decisions in *Popat and Kotecha Property v. SBI Staff Association*⁹ and *C. Natrajan v. Ashim Bai & Anr* 2007 (14) SCC 183. Learned counsel for the appellant argued that the Court's jurisdiction to reject a plaint on the ground that the law bars it is extremely limited. In this context, it was highlighted that where the question of possession itself is in dispute and issues had to be framed, the Court had to decide the suit on merits after considering the evidence.

18. Learned counsel next submitted that the property of a partnership firm vests in its partners and that there is no transfer or extinguishing of any right with respect to the firm's assets, without dissolution. In this context, learned counsel relied upon the decision reported as *N. Khadervali Saheb v. N. Gudu Saheb*¹⁰. He also relied upon the judgment in *Malabar Fisheries Company, Calcutta v. CIT*¹¹. It was urged that for transfer of assets, an *inter se* distribution of the rights and responsibilities of the partners has to take place, upon which the mutual adjustments of their rights accrues. In the absence of these pre-requisites, it cannot be said that the firm or the partners

⁸ 80(1999) DLT 460

⁹ 2005 (7) SCC 510

¹⁰ 2003 (3) SCC 229

¹¹ 1979 (4) SCC 766

are divested of their entitlements to the properties. It was argued that the learned Single Judge fell into error in confining his enquiry under Order VII Rule XI CPC to the agreement, dated 01.12.1988 and the documents executed at that point of time. Learned counsel relied upon the additional documents written by the State Bank of Saurashtra particularly and the correspondence by the plaintiff with the subject bank in that regard, particularly the letter dated 27.06.2003 received by the appellant which indicated that outstanding amounts were due and payable. His further letter (Ex.P-14) dated 01.07.2002) and the bank's later letter dated 01.07.2003 were relied upon in this regard. Since these were part of the record and they clearly showed that the plaintiff's liabilities had not been discharged which in fact disclosed fraud on the part of the defendants, the suit was clearly maintainable. Learned counsel also relied upon Ex.P-25, i.e. the certified copy of the sale deed executed by HSIDC in favor of M/s. Freezo Freezing Complex to say that the cause of action arose within the time and the plaint could not have been rejected as was done by the learned Single Judge.

19. The defendant argued that the original sale deed relied upon by the plaintiff clearly showed that the suit land was owned by the partnership firm 'M/s. Freezo Freezing Complex' and the plaintiff was only a partner in the said firm and not the owner of the land. Therefore, the plaintiff had no *locus standi* to file the present suit in his individual name and in terms of Order XXX Rule I of the CPC the suit deserved to be, and was correctly dismissed on this account alone. It was argued that all the three partners of the firm, M/s. Freezo Freezing Complex, i.e. the plaintiff, N.K. Duggal, and H.S. Bajaj had entered into an Agreement on 28.08.1979, whereby the business of

firm was to be carried out by all of them jointly and the land in question was to be used as the place for carrying out the business. Thereafter, the said partnership was dissolved by deed dated 01.12.1988 and the business of the partnership was exclusively taken over by Wimpy. A copy of the Dissolution Deed is part of the record. It was highlighted that ownership of the land by the Firm was admitted by the Plaintiff in the agreement dated 01.12.1988 of which he is a signatory as a partner of firm where it was stated that the suit land was purchased by Wimpy from M/s. Freezo Freezing Complex and not the plaintiff. This agreement was signed/executed by all the three partners. The agreement stated that the assets of the partnership firm including the suit property was being taken over by Wimpy. Thus, the first two defendants purchased the land in question from its rightful owner, i.e. firm and the land stood conveyed/mutated in their name by the fourth Defendant HSIDC. The appellant had no title or interest in M/s. Freezo Freezing Complex, had no *locus standi* in any case whatsoever to initiate the suit and it was not maintainable in the form it was presented in. For this purpose reliance was placed on this Court's judgment in *Tarachand v. Hulkar Mal & Ors*¹², and the judgment in *M/s. Shankar Housing Corporation v. Smt. Mohan Devi*¹³ where it was held that the correct procedure of bringing a suit under Order XXX Rule 1 was to sue in the name of the firm as a plaintiff or in the name of all the partners of the firm failing which the suit had to be dismissed. Similarly, the judgment of Orissa High Court in the case of *Afsar Hussain & Anr v. Trilokchand Premchand*¹⁴

¹² AIR 1979 Del 160

¹³ AIR 1978 Del 255

¹⁴ AIR 1975 Orissa 84

was relied on.

20. It was also highlighted that by the judgment and order dated 09.01.2012 the Court finally vacated the interim injunction operating in favor of the plaintiff since 15.12.2004 and had been further pleased to hold that the plaintiff is not the owner of the said land and has got no right, title or interest therein the following terms:

"11.....It is, thus clear that plaintiff had himself admitted that the suit property belonged to M/s. Freezo Freezing Complex and thereafter assets and liabilities including the immovable property had been taken over by the defendant no.1. Be that as it may, from the agreements executed between defendant no.4 and M/s. Freezo Freezing Complex, it is clear that the plaintiff is not the owner of the suit property nor has got any right, title and interest therein.

12.....Plaintiff has filed this suit claiming himself to be the owner of the suit property. As already held above, M/s. Freezo Freezing Complex was the owner of the suit property and later on, the defendant no.1 having taken over the assets and liabilities of M/s. Freezo Freezing Complex became the owner of the suit property along with the super structures on it. Thus, plaintiff, acting as an individual, had no right to challenge the ownership rights of the defendant no.1."

It is further a matter of record that the FAO (OS) 100/2012 preferred by the plaintiff against the said judgment and order was dismissed as withdrawn by order, dated 02.03.2012.

21 The defendants contended that the suit was hopelessly barred by limitation as in the present case, the right to sue, if any, first accrued at the time of execution of the Agreement dated 01.12.1988 and the handing over of the possession of the suit property. However, the suit has been filed

belatedly on 10.12.2004, i.e. after a period of 16 years. The parties, i.e. the plaintiff and Wimpy acted upon the Agreement dated 01.12.1988 as is evident from a perusal of the terms of the document. Furthermore, the plaintiff admitted through an affidavit dated 01.12.1988 and indemnity bond executed by him in favor of M/s. Wimpy International Ltd. [earlier known as M/s. Goodwill Foods P. Ltd.], whereby he admits that he was a partner in M/s. Freezo Freezing Complex and that there existed no *lien* over the suit property and further undertook to indemnify the first two Defendants against any loss suffered. The said affidavit dated 01.12.1988 and the indemnity bond have been before the Court.

22. The defendant contends that it is a matter of record that further to the Agreement dated 01.12.1988, the assets [including the suit property] and liabilities of M/s. Freezo Freezing Complex were taken over by Wimpy along with the liability existing towards the Bank and which was thereafter duly discharged by Wimpy. Copies of the Certificate dated 26.12.1989 along with the Fixed Deposit Receipt dated 14.12.1988, Promissory Note dated 01.12.1988 and the Letter of Guarantee dated 01.12.1988 were filed by the plaintiff as part of the record. The decision in *N.V. Srinivasa Murthy v. Mariyamma*¹⁵ was relied on to say that the mutation proceedings did not give rise to a fresh cause of action as it was only in furtherance to the sale deed and doing so is a camouflage to get over the bar of limitation.

23. It is argued that it is a settled position in law that if by means of clever drafting, a camouflage or illusory cause of action is created, such cases should be nipped in the bud at the first hearing itself, i.e. even before

¹⁵ 2005 (5) SCC 548

admission of the suit and the issuance of summons, or any time thereafter. Reliance in this regard has been placed on the judgments of the Supreme Court in *T. Arivandandam v. T.V. Satyapal* 1977 (4) SCC 467; *Church of Christ Charitable Trust v Ponniamman Education Trust* 2012 (8) SCC 706 and *Ajay Goel v. K.K. Bhandari* 1999 (48) DRJ 292.

24. It is an admitted position that the possession of the suit property has been with Wimpy since 01.12.1998. Learned counsel pointed to the reply filed by the plaintiff to Wimpy's application under Order VII Rule 11, as well as para 21 and prayer (b) of the suit to show that the plaintiff admits to the same. In this view, the reliefs sought for in the suit were merely declaratory without seeking the necessary consequential reliefs in terms of Section 34 of the Specific Relief Act, 1963. Where the plaintiff can seek relief other than a mere declaration of title, but omits to do so, the plaintiff shall be precluded from seeking such consequential reliefs at a belated stage and the Court would reject the suit on this ground alone. Reliance was placed on the Division Bench judgment of this Court in *Virender Gopal v. Municipal Corporation of Delhi*¹⁶, where the Court had outlined the law regarding the workability of Section 34 of the Specific Relief Act 1963 and held that once the possession was taken over by the defendant, the plaintiff had to claim the relief of possession failing which the suit was hit by the provisions of Section 34 of the Act, and therefore, liable to be dismissed. The Supreme Court judgment of *Vinay Krishna v. Keshav Chandra*¹⁷ held that the plaintiff ought to have asked for the relief of possession and the failure to do so clearly barred the discretion of the Court in granting the

¹⁶ AIR 2007 Del 183

¹⁷ 1993 Supp SCC 129

decree of declaration. Admittedly, the the suit was filed to seek a declaration that documents misused by the defendants for claiming title over the land were null and void and not for claiming title on the said piece of land. Stressing that since no claim for possession had been made, the Supreme Court in *Adcon Electronics Pvt. Ltd. Vs. Daulat & Anr*¹⁸ applied wherein it was held that where there is no specific prayer in the suit for giving possession of a land, the same cannot be interpreted by the court on its own.

25. The defendants highlight that after vacation of the interim injunction operating in favor of the plaintiff by the Court by its judgment and order dated 09.01.2012, the plaintiff along with his family members had instituted a frivolous suit for declaration on 30.01.2012 before Civil Judge, Gurgaon District Court seeking a declaration that he be declared as the owner of the suit property by falsely asserting that he is the owner of the suit property and completely suppressing the pendency of the suit before this Court and the order dated 09.01.2012 vacating the interim injunction, and obtained a fraudulent consent decree dated 01.02.2013 from the Gurgaon District Court. On the strength of such fraudulent decree the plaintiff filed another suit for Wimpy's eviction from the suit property. The learned Civil Judge, Gurgaon District Court dismissed the suit for eviction by its judgment and order dated 31.05.2014 and further held that the said decree dated 01.02.2013 was a nullity as it was obtained by playing fraud on this Court and unsustainable in law. The Court observed that the plaintiff had

“deliberately concealed the judgment and order dated 09.01.2012 from this Court. The judgment dated 09.01.2012

¹⁸ (2001) 7 SCC 698

clearly holds that Col. Kalyan Singh is not the owner of the suit property. As far as the consent decree in favor of the petitioner is concerned, it can be safely said that a decree obtained by collusion and by playing fraud with the Court is not sustainable in the eyes of law. No other document of ownership has been filed by the petitioner. Accordingly the present suit is not maintainable and the issues is decided in favor of respondent and against the petitioner."

Analysis and Findings

26. The plaintiff appellant, as is evident from the above discussion of facts, sought a declaration that the agreement dated 01.12.1988 was unenforceable. This was essentially based on allegations of fraud and illegality. So far as the fraud alleged went, it was submitted that firstly M/s. Goodwill Foods (P) Ltd (Wimpy's predecessor) agreed to pay rent to the plaintiff, which it did not; and that the plaintiff was removed from the position of Director of Wimpy. The other ground was illegality: here it was argued that the property belonged to the plaintiff in his capacity as a partner of the firm and that Wimpy could not claim ownership as a result of the documents executed on 01.12.1988. It was sought to be urged that the partner's rights as mortgagor to redeem the mortgage of the property: as it was secured to the fifth defendant Bank too could not be prejudiced. To resist the ground of limitation, the plaintiff relied on certain letters received from the bank, in 2002 and 2003. It was urged that he continued to be shown as a debtor- this was possible given his status as a partner. It was argued that all these questions required decision after trial and that hence, the learned Single Judge erred in rejecting the plaint. The plaintiff also urged that the Court possessed territorial jurisdiction to entertain and try the suit, because all the defendants were in Delhi and carried on business within jurisdiction;

the reliefs claimed could be enforced through personal injunction. In this the plaintiff sought to invoke the explanation to Section 16 of the Civil Procedure Code. The defendants pointed out, on the other hand, that the documents sought to be impugned as void, were old and had been acted upon; they were executed 16 years before the filing of the suit. That the HSIDC issued a formal conveyance much later, did not mean that a fresh cause of action arose. The plaintiff's claim about becoming aware of fraud, etc. later are questionable, since Wimpy discharged the debts of the erstwhile firm of which he was a partner. It was also urged besides that the plaintiff could not assert rights or title over the property as an individual partner, because the firm owned the asset. Furthermore the defendant (Wimpy) argued that the form of the suit was defective; if the plaintiff wished to assert that his rights as a partner could not be preserved, he should have instituted the suit in the form prescribed under Order XXX, CPC.

27. The agreement of 01.12.1988 shows that Wimpy's predecessor, Goodwill Foods Pvt Ltd agreed to take over the firm and its assets. This was preceded by another agreement whereby Goodwill Foods Pvt. Ltd became 70% partner of Freezo Freezing Complex; the existing partners of the latter firm became owners to the extent of 10% each. The third agreement produced along with the suit was a Dissolution deed, dated 1.12.1988 whereby all partners (including the plaintiff, whose shareholding had been reduced to 10%) agreed to dissolve Freezo Freezing Complex; Wimpy was to take over the assets and liabilities of the said firm (Freezo Freezing Complex). The plaintiff also executed an indemnity bond the same day,

agreeing to part with all his rights in the firm as well as in relation to the property.

28. The defendants are correct in asserting that the plaintiff cannot take advantage of two contradictory pleas. On the one hand, he could not have, consistent with his plea of being a victim of fraud, claimed sole ownership without impleading other members of the dissolved firm. The documents produced along with the suit clearly reveal that the firm *Freezo Freezing Co owned the suit property*. The decisions of this Court in *Tarachand* and *Shankar Housing (supra)* and of the Orissa High Court in *Afsar Hussain (supra)* are authorities to say that since a firm is not a legal entity, but a compendium term denoting all partners, a suit to enforce its rights should have to be instituted in the name and on behalf of the firm. In the present case, this was concededly not the position; the suit was filed by the plaintiff alone, as if he was the owner of the property- clearly he was not, at the time its assets were made over to the defendants. Order XXX Rule 1 applied; the form of the suit itself was defective; the plaintiff could not lay claim to the title to the suit property, assuming his argument to be correct. On this count, the learned Single Judge's judgment, in this court's opinion, is unexceptionable.

29. Turning next to the substantial issue of whether the suit was time barred. There is no doubt that as to whether an action is time barred or not, is not a pure question of law, but fact dependent. However, that alone is indeterminate about the nature of the court's power under Order VII Rule 11 CPC. The Court has to be vigilant, and is a sentinel in ensuring that claims that should not be let into the docket are weeded out. Therefore, the power

conferred says that the court may *at any time*, exercise its jurisdiction and reject a plaint, on the ground that law bars the action. Here the necessary facts are that all the transactions which were impugned took place in December 1988; the dissolution deed, the agreement and the indemnity bond. The plaintiff could not have claimed ignorance; he was a highly qualified man. He, together with other partners consciously chose to give away his rights. *Arguendo*, though he was right in contending that notices were received sometime in 2002 or 2003 from the Bank, that does not explain why in the first instance he did not approach the court for the declaration which he sought in 2004, within the time granted by law, i.e. three years. The cause of action arose in 1988. The time for filing the suit would have reasonably expired in 1992. Even if the plaintiff's contention were assumed to be correct that some amounts were payable to him as rentals, that does not in any way extend the period of limitation. The plaintiff is quite vague on this count in the suit; no specific amount is mentioned; more importantly it was never claimed. The same logic would prevail over his removal from directorship of the defendant, and removal from the post of Director. These are *ex facie* unrelated events and have no co-relation with the alleged fraud played upon the plaintiff for which he sought relief in the suit. As a result, the decisions cited, i.e. *Ram Prakash Gupta* (supra) and *Daya Singh* (supra) are inapt in the circumstances of the case. Likewise, the *ratio* in *Alka Gupta* (supra) too has no application, because the court in the present case could decide whether the suit was time barred, based on the pleadings in the suit itself; no more evidence was required, having regard to the plaintiff's averments in it. So far as *N. Khadervali Saheb* (supra) and *Malabar Fisheries Co* (supra) are concerned,

this court has already noted that the plaintiff cannot on the one hand contend that the partnership subsisted and without suing in the name of the firm, seek a declaration that the agreements are void, nor can he without claiming consequential relief of the kind required, i.e. declaration as to subsistence of the partnership, or possession, maintain the suit.

30. *Mayar (H.K.) Ltd. v Vessel M.V Fortune Express*¹⁹, *Sopan Sukhdeo Sable v. Asstt. Charity Commr*²⁰ and *Saleem Bhai v State of Maharastra*²¹ are authorities for the proposition that only averments in the plaint are to be looked into. At the same time, it has also been held that the list of documents filed along with the suit is part of the pleadings (Ref *Liverpool & London SP & I Asson. Ltd v M.V. Sea Success*)²². The plaintiff, so the saying goes cannot by the stratagem of clever drafting resuscitate a cause of action which has long since died; the court is within its rights to look through smokescreens created by clever drafting and invoke its powers under Order VII Rule 11, CPC if the suit is indeed barred in law. That precisely is what the learned Single judge did, in this case; this court whole-heartedly approves that finding.

31. As far as lack of territorial jurisdiction goes, this Court is of opinion that the relief of declaration sought against the defendants is in relation to property outside the territorial jurisdiction of the court. Sections 15 to 20 of

¹⁹ (2006) 3 SCC 100

²⁰ (2004) 3 SCC 137

²¹ (2003) 1 SCC 557

²² (2004) 9 SCC 512- it was held that for the purposes of rejecting a plaint under Order VII Rule XI the Court should not only look at the averments in the plaint but also must look into documents filed along with, in view of Order VII Rule XIV.

the CPC deal with the rules applicable for territorial jurisdiction. Sections 15 and 16 embody the rule that in cases involving rights relating to immovable property, the suit should be instituted within jurisdiction of the court where the property is located. Proviso to Section 16, which is relied on by the plaintiff has limited application, as held by the Supreme Court in *Harshad Chimanlal Modi v DLF Universal Ltd*²³:

“Section 16 thus recognizes a well established principle that actions against res or property should be brought in the forum where such res is situate. A court within whose territorial jurisdiction the property is not situate has no power to deal with and decide the rights or interests in such property. In other words, a court has no jurisdiction over a dispute in which it cannot give an effective judgment. Proviso to Section 16, no doubt, states that though the court cannot, in case of immovable property situate beyond jurisdiction, grant a relief in rem still it can entertain a suit where relief sought can be obtained through the personal obedience of the defendant. The proviso is based on well known maxim "equity acts in personam, recognized by Chancery Courts in England. Equity Courts had jurisdiction to entertain certain suits respecting immovable properties situated abroad through personal obedience of the defendant. The principle on which the maxim was based was that courts could grant relief in suits respecting immovable property situate abroad by enforcing their judgments by process in personam, i.e. by arrest of defendant or by attachment of his property.

In Ewing v. Ewing, (1883) 9 AC 34 : 53 LJ Ch 435, Lord Selborne observed :

"The Courts of Equity in England are, and always have been, courts of conscience operating in personam and not in rem; and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts in trusts as to subjects which were not either locally or ratione

²³ (2005) 7 SCC 791

domicilli within their jurisdiction. They have done so, as to land, in Scotland, in Ireland, in the Colonies, in foreign countries."

The proviso is thus an exception to the main part of the section which in our considered opinion, cannot be interpreted or construed to enlarge the scope of the principal provision. It would apply only if the suit falls within one of the categories specified in the main part of the section and the relief sought could entirely be obtained by personal obedience of the defendant."

Were the plaintiff's interpretation of the rule (embodied in Section 16) to be accepted, the proviso would become all-important, rendering the main provision itself ineffective and redundant. This court is therefore of the opinion that the cause of action, if it ever existed at the time of filing the suit, did not arise within the jurisdiction of the court. For this reason too, the learned Single Judge's impugned judgment does not disclose any error requiring interference.

32. For the foregoing reasons, this Court is of the opinion that there is no merit in the present appeal. It is therefore dismissed. Having regard to the circumstances, the appellants are directed to pay costs quantified at ₹75,000/- to the respondents within four weeks from today.

S. RAVINDRA BHAT
(JUDGE)

DEEPA SHARMA
(JUDGE)

JANUARY 29, 2016