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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ CS(OS) No.1134/2008 & IA No.5689/2017 (of the plaintiff under Order XI Rules 12, 14 & 15 of the CPC).
SHYAM SAHNI Plaintiff

Through: Mr. Dinesh C. Pandey, Ms. Jyoti Pandey and Mr. Rajeev Gurung, Advs.

versus

SARABJIT PRAKASH & ORS Defendants
Through: Mr. Ashim Shridhar, Adv. for D-2.
Mr. Jayant Tripathi and Mr. Dinesh Dahiya, Advs. for D-7.

AND

+ CS(OS) No.511/2016, IAs No.14385/2016 (u/O XXXIX R-1&2 CPC) and 14386/2016 (of D-1 u/S 151 CPC).
SARABJIT PRAKASH & ANR Plaintiffs

Through

versus

SHYAM SAHNI & ORS Defendants
Through: Mr. Dinesh C. Pandey, Ms. Jyoti Pandey and Mr. Rajeev Gurung, Advs.

AND

+ CS(OS) No.983/2013
SHYAM SAHNI Plaintiff

Through: Mr. Dinesh C. Pandey, Ms. Jyoti Pandey and Mr. Rajeev Gurung, Advs.

versus

SARABJIT PRAKASH & ORS. Defendants
Through: Mr. Ashim Shridhar, Adv. for D-2.
Mr. Jayant Tripathi and Mr. Dinesh Dahiya, Advs. for D-6.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

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26.05.2017

CS(OS) No.1134/2008 & IA No.5689/2017 (of the plaintiff under Order XI Rules 12, 14 & 15 of the CPC).

1. This order is in continuation of the orders since 29th September, 2016.
2. Though Arjun Prakash is present in the Court but he has not complied with the undertaking to pay the first instalment of the One Time Settlement (OTS) by 31st May, 2017.
3. The counsel for Shyam Sahni rightly states that the said Arjun Prakash has made a mockery of the undertakings given to this Court.
4. For the time being, Arjun Prakash is restrained from leaving the country and communication in this regard along with the passport details of Arjun Prakash be sent to all the concerned authorities. Arjun Prakash to also deposit his passport with the Assistant Registrar of this Court.
5. Last opportunity is also given to Arjun Prakash and Sanjiv Prakash to file replies to IA No.5689/2017.
6. Recording of evidence in CS(OS) No.1134/2008 to go on.
7. List on 23rd October, 2017.

IA No.14387/2016 (of the defendant no.1 under Order VII Rule 11 of the CPC) in CS(OS) No.511/2016.

8. The counsel for the plaintiff Arjun Prakash seeks adjournment stating that he has been newly engaged and is yet to file his *Vakalatnama*.
9. Arjun Prakash has already taken several adjournments for arguing the application and adjournments cannot be granted in this fashion.
10. The counsel for the applicant / defendant no.1 Shyam Sahni and the counsel for Sanjiv Prakash have been heard on the application.
11. CS(OS) No.511/2016 was instituted on 9th January, 2014 in the Court of the Senior Civil Judge, Saket Court, Delhi and has since been transferred

to this Court. The plaintiffs Sarabjit Prakash and Arjun Prakash in the said suit sought the reliefs of (i) declaration of the Gift Deed dated 17th July, 2004 executed and registered by late Niamat Sahni in favour of Shyam Sahni as null and void and cancellation thereof; (ii) declaration of the Deed dated 13th October, 2003 of Revocation of Irrevocable Registered GPA of the year 2002 (Deed dated 13th October, 2003 of Revocation of GPA) as null and void; (iii) declaration of the plaintiffs Sarabjit Prakash and Arjun Prakash as the owners of “suit property” on the basis of Will dated 23rd December, 1992 and Codicil dated 6th October, 1999 of Niamat Sahni and on the basis of Memorandum of Family Settlement dated 6th October, 1999 as well as on the basis of adverse possession; (iv) mandatory injunction directing the Municipal Corporation of Delhi (MCD) to cancel the mutation in favour of Shyam Sahni; and, (v) permanent injunction restraining Shyam Sahni from dealing with the property pursuant to the Gift Deed dated 17th July, 2004.

12. The applicant / defendant no.1 Shyam Sahni seeks rejection of the plaint insofar as qua the first two reliefs of declaration, on the ground of the same being as barred by time.

13. Niamat Sahni was the owner of property no.68 Friends Colony (West), New Delhi.

14. Shyam Sahni is the son of Niamat Sahni and Usha Prakash was the daughter of Niamat Sahni. Sarabjit Prakash is the husband of Usha Prakash and Arjun Prakash and Sanjiv Prakash are the sons of Usha Prakash. Sanjiv Prakash though not a plaintiff in the suit as originally filed was impleaded as legal heir of Sarabjit Prakash.

15. Prior to the institution of CS(OS) No.511/2016, CS(OS)

No.1134/2008 of this Court had been filed by Shyam Sahni against Sarabjit Prakash, Sanjiv Prakash, Arjun Prakash and certain other persons and was pending in this Court.

16. The counsel for the applicant / defendant no.1 Shyam Sahni, to demonstrate that the reliefs of declaration aforesaid claimed in CS(OS) No.511/2016 are barred by time, has drawn attention to (i) amended plaint dated 24th March, 2011 in CS(OS) No.1134/2008 at pages 54 to 79 of the defendants' documents and particularly to pages 56 and 62 thereof where the Gift Deed dated 17th July, 2004 and Deed dated 13th October, 2003 of Revocation of GPA is expressly pleaded; (ii) order dated 2nd June, 2008 in CS(OS) No.1134/2008 at pages 3 to 6 of the defendants' documents wherealso the contention of the counsel for the applicant / defendant no.1 Shyam Sahni of Niamat Sahni having executed Gift Deed dated 17th July, 2004 is noted; (iii) Written statement dated 24th July, 2008 filed by Sarabjit Prakash, Arjun Prakash and Sanjiv Prakash in CS(OS) No.1134/2008 at pages 82 to 130 of the defendants' documents and particularly to pages 87, 88, 109, 110 and 118 thereof where the said Sarabjit Prakash, Arjun Prakash and Sanjiv Prakash have while denying the Gift Deed dated 17th July, 2004 and the Deed dated 13th October, 2003 of Revocation of GPA called the same to be null and void and sham *inter alia* for the reason of incapacity of Niamat Sahni to execute the same; (iv) IA No.8923/2008 in CS(OS) No.1134/2008 filed by Sarabjit Prakash, Arjun Prakash and Sanjiv Prakash under Order XXXIX Rule 4 of the Code of Civil Procedure, 1908 (CPC) at pages 133 to 144 of the defendants' documents and particularly to page 136 where it is stated that the Gift Deed dated 17th July, 2004 had not been produced by Shyam Sahni in the Court; and, (v) Affidavit dated 6th August,

2010 of admission / denial of documents filed by Sarabjit Prakash, Arjun Prakash and Sanjiv Prakash in CS(OS) No.1134/2008 at pages 184 to 193 of the defendants' documents and particularly to pages 186, 187 and 190 where the Gift Deed dated 17th July, 2004 is denied.

17. It is thus contended that Sarabjit Prakash, Arjun Prakash and Sanjiv Prakash, since the very institution on 31st May, 2008 of CS(OS) No.1134/2008, are aware of the Gift Deed dated 17th July, 2004 and the Deed dated 13th October, 2003 of Revocation of GPA and the relief claimed in this suit instituted on 9th January, 2014 for setting aside thereof is barred by time.

18. The counsel for Sanjiv Prakash has argued that the Gift Deed dated 17th July, 2004 was never produced by the applicant / defendant no.1 Shyam Sahni in CS(OS) No.1134/2008 and was produced for the first time on 21st May, 2013 along with CS(OS) No.983/2013 and CS(OS) No.511/2016 instituted on 9th January, 2014 is thus within time.

19. I have enquired from the counsel for Sanjiv Prakash that if that is so on what basis was the affidavit aforesaid of admission / denial of documents in CS(OS) No.1134/2008 was filed.

20. The counsel for Sanjiv Prakash states that he has not inspected the file and is not aware of the affidavit and seeks adjournment.

21. Several opportunities have been given in the past on the request of either counsel for Arjun Prakash or Sanjiv Prakash to argue this application and the matter cannot be so further adjourned.

22. The counsel for Sanjiv Prakash states that Sanjiv Prakash was impleaded only on 2nd July, 2017.

23. Sanjiv Prakash was transposed as plaintiff, on the death of his father

Sarabjit Prakash, vide order dated 2nd March, 2017. Even though that is no ground but even thereafter there was sufficient time available to the counsel to prepare. Moreover what is recorded hereinabove is on the basis of the documents on record and least the counsel could have done is to have inspected the file.

24. Even otherwise, the contention that the Gift Deed was not produced earlier is no ground. In the pleadings in CS(OS) No.1134/2008 the date and other particulars of registration of the Gift Deed are available. It has been held by me in ***MMTC Ltd. Vs. Raj Rani Gulati (Deceased) through LRs & Ors.*** 2013 SCC OnLine Del 4906 relying on earlier judgments that the limitation provided in Article 56 or 58 or 59 of the Schedule to the Limitation Act, 1963 does not stop running merely because the plaintiff for his own lethargy does not chose to take appropriate steps which would have made the documents qua which declaration is claimed available to him for inspection. The question is thus no longer *res integra*.

25. The aforesaid Articles, whichsoever may be applicable, provide for commencement of period of limitation of three years either from the date the issue or registration becomes known to the plaintiff or from when the right to sue first accrues or from the date when the facts entitling the plaintiff to have the instrument cancelled or set aside or rescinded first becomes known to the plaintiff.

26. From the aforesaid record it is evident that the plaintiff first came to know of the execution of the Gift Deed dated 17th July, 2004 and the Deed dated 13th October, 2013 of Revocation of GPA qua which reliefs of declaration are claimed in the suit, from the plaint in CS(OS) No.1134/2008 and this suit instituted on 9th January, 2014 is beyond the period of limitation

and the applicant / defendant no.1 Shyam Sahni has made out a case for rejection of the plaint insofar as for the reliefs of declaration, as barred by time.

27. As far as the other reliefs in the suit are concerned, the same are already subject matter of issues as framed on 21st May, 2013 in CS(OS) No.1134/2008 and need not to be put to trial in this suit and as such no observations in that regard are being made as the same may prejudice Arjun Prakash and Sanjiv Prakash in CS(OS) No.1134/2008.

28. Resultantly, the application succeeds and is allowed and disposed of.

CS(OS) No.511/2016, IAs No.14385/2016 (u/O XXXIX R-1&2 CPC) and 14386/2016 (of D-1 u/S 151 CPC).

29. The plaint is rejected qua the reliefs of declaration and the suit qua other reliefs is disposed of with the observation that they are subject matter of CS(OS) No.1134/2008 and without prejudice to the rights of Arjun Prakash and Sanjiv Prakash in CS(OS) No.1134/2008. The parties to bear their own costs.

CS(OS) No.983/2013.

30. This suit has been filed by Shyam Sahni for the reliefs of (i) recovery of possession of terrace above the second floor of property no.68, Friends Colony (West), New Delhi; and, (ii) for permanent injunction restraining the defendants Sarabjit Prakash, Sanjiv Prakash, Arjun Prakash, Douglas James Breckenridge, Jhilmil Saxena Breckenridge, Arif Sahid Khan and Anish Wig from interfering in the plaintiff's possession of the vegetable garden in the property.

31. IA No.21226/2013 under Order VII Rule 11 of the CPC filed by the legal heirs of Arif Sahid Khan is pending consideration.

32. The counsel for the legal heirs of Arif Sahid Khan has been heard on the application. His contention is that the plaint does not disclose any cause of action against Arif Sahid Khan.

33. It is informed that Usha Prakash acting under the Power of Attorney of Niamat Sahni and before the Deed dated 13th October, 2003 of Revocation of the GPA had executed a Sale Deed of the said terrace in favour of Arif Sahid Khan. The counsel for the legal heirs of Arif Sahid Khan states that the said legal heirs are in physical possession of the property.

34. Once that is so, the question of the plaint in a suit for recovery of possession of the property of which the said legal heirs of Arif Sahid Khan are admittedly in possession of not disclosing cause of action does not arise.

35. The counsel for the legal heirs of Arif Sahid Khan has next contended that the suit for the relief of possession is barred by time.

36. However, on being asked the Article of the Schedule to Limitation Act which is invoked, he states that he has not checked the same.

37. Without even telling which Article of the Schedule to the Limitation Act would apply, rejection of the plaint on the ground of relief claimed therein being barred by time cannot be claimed.

38. The last ground urged is of Order II Rule 2 of the CPC.

39. The said ground is dealt in the discussion hereunder.

40. IA No. 21226/2013 is thus dismissed.

41. I find that in the issues framed on 21st May, 2013 in CS(OS) No.1134/2008 issue no.(v) is as under:-

“(v). *Whether the purported sale deeds dated 21st March, 2002, 7th August, 2002, 15th September,*

2003, 7th October, 2003, 11th January, 2005 and 23rd September, 2005 are unauthorized, without consideration, sham, concocted, illegal, bogus, null and void and non-est ab initio and result of fraud/mis-representation and not binding upon the ownership and possessory rights of the plaintiff over the suit property. If so to what effect? OPP”

42. I have thus enquired from the counsel for the legal heirs of Arif Sahid Khan whether not in the event of the aforesaid issue being decided against the legal heirs of Arif Sahid Khan who are parties in CS(OS) No.1134/2008 also, the said legal heirs would become liable to deliver possession of the terrace to Shyam Sahni.

43. The counsel for legal representatives of Arif Sahid Khan states that the legal heirs of Arif Sahid Khan would so deliver possession.

44. There is thus no need for duplication and to proceed with CS(OS) No.983/2013 insofar as the said relief is concerned and the suit qua the said relief can be disposed of by observing that in the event of Shyam Sahni succeeding on issue no.(v) in CS(OS) No.1134/2008, a decree for possession against the legal heirs of Arif Sahid Khan shall also follow.

45. Once it has been stated that the legal heirs of Arif Sahid Khan will have to logically deliver possession in the event of issue no.(v) aforesaid being decided against them, the plea of Order II Rule 2 of the CPC for rejection of the plaint in CS(OS) No.983/2013 also does not survive. Even otherwise, there is no merit in the said plea as the cause of action for the relief of declaration and the cause of action for the relief of possession of immovable property are different and inasmuch as Order II Rule 2 of the CPC does not apply while the earlier suit is still pending and applies only

after the earlier suit has been disposed of. Reference in this regard can be made to ***Roshan Lal Vs. Man Mohan Kaur*** MANU/DE/3510/2009, holding that for Order II Rule 2 to apply, earlier suit must have been decided on merits.

46. The counsel for Shyam Sahni has drawn attention to the order dated 3rd October, 2013 in FAO(OS) No.401/2013 preferred by the legal heirs of Arif Sahid Khan against the order dated 24th May, 2013 in CS(OS) No.1134/2008 and which also clarifies this position further.

47. Resultantly, with the clarification that in the event of Shyam Sahni succeeding in issue no.(v) in CS(OS) No.1134/2008, Shyam Sahni shall also be entitled to recovery of possession of the terrace as claimed in CS(OS) No.983/2013 including from the legal heirs of Arif Sahid Khan and incorporating the order of *status quo* qua the vegetable garden in CS(OS) No.983/2013 in CS(OS) No.1134/2008, CS(OS) No.983/2013 is also disposed of, leaving the parties to bear their own costs.

RAJIV SAHAI ENDLAW, J

MAY 26, 2017

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