

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

+ **RFA No.716/2017**

% **13th December, 2017**

PREETINDER SINGH THAPAR Appellant
Through: Ms. Radhika Arora, Advocate
with Ms. Radhika Pahadia,
Advocate.

versus

HARDEEP SINGH THAPAR & ORS. Respondents
Through: Mr. Prashant Mehta, Advocate
with Mr. Vikram Pradeep,
Advocate for respondent no.4.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? **YES**

VALMIKI J. MEHTA, J (ORAL)

C.M. No.45105/2017 (under Order XXII Rule 3 CPC filed by the appellant)

1. By this application, the appellant informs that appellant has expired and it is prayed that the legal heirs of the appellant be brought on record. Accordingly, the legal heirs of the appellant are brought on record for the purpose of this appeal as also the suit inasmuch as in a suit such as the present, and as detailed hereinafter, right to sue will survive on the death of the appellant. Of course, these

observations are made without prejudice to any right of the respondents/defendants who oppose the suit on any legal or factual issue in case the respondents/defendants are entitled to urge that in law the present appellants being the legal heirs of the original deceased appellant/plaintiff had no right to continue with the subject suit with respect to the relief of pre-emption.

2. Application is accordingly allowed and disposed of. Appellant/plaintiff will file the amended memo of parties before the trial court.

RFA No.716/2017 and C.M. No.28716/2017 (stay)

3. This Regular First Appeal under Section 96 of Code of Civil Procedure, 1908 (CPC) is filed by the plaintiff impugning the judgment of the Trial Court dated 11.7.2017 by which the trial court has dismissed the suit as not maintainable. Trial court held that the suit filed by the appellant/plaintiff for declaration, cancellation of the sale deed, permanent injunction and possession was not maintainable in the absence of seeking the relief of partition. The plaint was therefore rejected by the impugned judgment dated 11.7.2017. Plaint has been rejected at the stage of pleadings i.e no issues were framed, evidence

was not led and suit was not decided at the stage of final arguments after trial.

4. The case of the appellant/plaintiff before the trial court was that the suit property bearing no.A-78, Malviya Nagar, New Delhi situated on a plot admeasuring 294 sq. yds. was owned by the father of the appellant/plaintiff and the respondent nos.1 and 2/defendant nos.1 and 2. Appellant/plaintiff and the respondent nos.1 and 2/defendant nos.1 and 2 are brothers. In the plaint it was pleaded that on the intestate death of the father, Capt. (Dr.) K.S. Thapar, appellant/plaintiff and respondent nos.1 and 2/defendant nos.1 and 2 became the co-owners of the suit property which devolved upon them by succession. Appellant/plaintiff pleads that there has never took place a partition between the appellant/plaintiff and respondent nos.1 and 2/defendant nos.1 and 2 but yet the respondent no.1/defendant no.1 wrongly sold the second floor of the suit property to the respondent no.3/defendant no.3 and which respondent no.3/defendant no.3 has sold the second floor thereafter to respondent no.4/defendant no.4. As per the plaint, the pleading is that it is only on 30.5.2007 that the appellant/plaintiff came to know of the transactions of the sale of

the second floor of the suit property firstly to the respondent no.3/defendant no.3 in the year 2003 and thereafter to the respondent no.4/defendant no.4 in the year 2007. The appellant/plaintiff also pleaded a right of pre-emption and which right of pre-emption legally will arise because of Section 22 of the Hindu Succession Act, 1956 and which provides that in case a property of an ancestor devolves upon the legal heirs of the ancestor, then, one legal heir when he sells the same must first offer his share to the other legal heirs of the property.

5. Accordingly, in the suit the following reliefs are claimed:-

“a) pass a declaratory decree in favour of the plaintiff and against the defendants that property bearing No.A-78, Malviya Nagar, New Delhi, comprising of ground floor/first floor/second floor (partly constructed) is joint property of plaintiff, defendant nos.1 and 2 and the same was never partitioned amongst themselves and there is no partition amongst the owners/co-sharers.

b) pass a decree declaring in favour of the plaintiff and against the defendants that the sale deed dated 16th January, 2003 executed by defendant no.1 in favour of defendant no.3 of second floor with roof rights thereof, registered with Sub-Registrar-V vide registration No.446, Volume No.3187, pages 183 to 193 on 16th January, 2003, claiming as exclusive property belonging to him is a null & void and cancel the same being joint property and in violation of the provision of Section 22 of the Hindu Succession Act and for want of notice to the plaintiff and further sale by defendant no.3 in favour of defendant no.4 vide registration No.4672, Book No.1, Vol. No.7222, pages 36 to 49 on 23rd April, 2007 with the Sub-Registrar-V, New Delhi is also null & void and does not confer any title, right or interest on him;

c) pass a decree of pre-emption in favour of plaintiff under Section 22 of the Hindu Succession Act, declaring and holding that the plaintiff being a co-owner/co-sharer has right to pre-empt the sale deed dated 16th January, 2003 made by defendant no.1 in favour of defendant no.3 for consideration of Rs.5 lakhs, the valuable consideration reflected therein and defendant no.1 be directed to execute the sale deed in favour of the plaintiff for such consideration.

d) Restrain defendant no.4 from alienating, selling, mortgaging or parting with possession of the suit property to any person and to create third party interest and further restrain defendant no.4, his agents, assigns, LRs., power of attorney holders or any person/s claiming through him directly or indirectly from raising any sort of construction on the second floor of the property No.A-78, Malviya Nagar, New Delhi and above second floor and further not to make any addition, alteration or renovation on the second floor. The defendant no.4 be further restrained from causing any obstruction or hindrance or interfere with the use, enjoyment access of the roof of the second floor and car parking plot on the ground floor under the lock and key of the plaintiff of property No.A-78, Malviya Nagar, New Delhi.

e) pass a decree of declaration in favour of the plaintiff and against the defendants that the clandestine sale deed dated 16th January, 2003 in favour of defendant no.3 of second floor with roof rights thereof registered with Sub-Registrar-V, New Delhi vide Registration No.446, Addl. Book No.I, Vol. No.3187, on pages 183-193 on 16th January, 2003, claiming as exclusively property of defendant no.1 is null and void and a decree for the cancellation of sale deeds be passed and further sale by defendant no.3 in favour of defendant no.4 vide registration No.4672, Addl. Book No.1, Vol. No.7222 on pages 36-49 on 23rd April, 2007 with the Sub-Registrar-V, New Delhi is also null and void and does not confer any title, right or interest in him and the plaintiff seeks a decree of cancellation of the said sale deed. The plaintiff further prays that a decree for possession be passed against defendant nos.3 and 4 in respect to the second floor and the top floor of property No.A-78, Malviya Nagar, New Delhi and in favour of the plaintiff as shown in the plan attached and pass such other and further order as this Hon'ble Court may deem fit and proper."

6. The main contest in the appeal is obviously by respondent no.4/defendant no.4 who is the present owner of the second floor of the suit property by virtue of the sale documents dated 23.4.2007.

Counsel for the respondent no.4/defendant no.4 vehemently contends that by virtue of orders dated 7.8.2008 and 15.10.2008 passed in the suit, appellant/plaintiff had conceded that the suit was time barred and not maintainable without seeking the relief of partition, and the appellant/plaintiff therefore took time for amending the plaint to seek the relief of partition which was not till then claimed. It is argued that the suit plaint has been rightly rejected by the impugned judgment noting these two orders passed in the suit and that appellant/plaintiff had failed to amend the suit to seek the relief of partition. It is argued that the suit is barred by limitation as per Article 97 of the Limitation Act, 1963 because a right of pre-emption can be claimed only from one year from delivery of possession or from one year of execution of the sale deed in favour of the purchaser, and that since the documents in this case of purchase of the second floor firstly are of the year 2003, therefore, the suit seeking pre-emption filed in the year 2007 was barred by limitation as per Article 97 of Limitation Act.

7. This Court is called upon to decide as to whether the suit as framed is maintainable i.e whether the suit filed with a prayer seeking the relief of cancellation of sale deed executed for a specific

portion being second floor of an undivided property is maintainable without seeking partition and further as to whether the subject suit would be barred by limitation as per Article 97 of the Limitation Act.

8. Taking first the issue of maintainability of the suit for seeking the relief of pre-emption as being or being not barred by limitation on the applicability of Article 97 of the Limitation Act, for the sake of convenience Article 97 of the Limitation Act is reproduced below:-

Article	Description of suit	Period of limitation	Time from which period begins to run
97	To enforce a right of pre-emption whether the right is founded on law or general usage or on special contract	One year	When the purchaser takes under the sale sought to be impeached, physical possession of the whole or part of the property sold, or, does not admit of physical possession of the whole or part of the property, when the instrument of sale is registered.

9. For the application of Article 97 of the Limitation Act, and when this Article is read with Section 17 of this very Act, it is seen that it is necessary that the plaintiff in the suit knows about the factum of delivery of possession or about execution of the sale deed with respect to a property with which right of pre-emption is claimed.

A reading of the plaint shows that appellant/plaintiff in fact demonstrates his ignorance of the first sale deed having been executed in the year 2003 by the respondent no.1/defendant no.1 in favour of the respondent no.3/defendant no.3 and that the appellant/plaintiff pleads that he came to know of the sale of the suit property in the year 2003 to the respondent no.3/defendant no.3 only in the year 2007 and when the appellant/plaintiff also came to know of the sale of the second floor from the respondent no.3/defendant no.3 to respondent no.4/defendant no.4. The suit therefore came to be filed in the year 2007. Once appellant/plaintiff professes ignorance with respect to sale of an undivided property by one co-owner in favour of a stranger, then, Section 17 of the Limitation Act steps in and which conditions Article 97 of the Limitation Act that the commencement of period of limitation if is concealed from the plaintiff, then limitation will only commence on the plaintiff coming to know of the facts on the basis of which the cause of action would have arisen. Section 17 of the Limitation Act reads as under:-

“Section 17. Effect of fraud or mistake.—(1) Where, in the case of any suit or application for which a period of limitation is prescribed by this Act,—

(a) the suit or application is based upon the fraud of the defendant or respondent or his agent; or

(b) the knowledge of the right or title on which a suit or application is founded is concealed by the fraud of any such person as aforesaid; or

(c) the suit or application is for relief from the consequences of a mistake; or

(d) where any document necessary to establish the right of the plaintiff or applicant has been fraudulently concealed from him, the period of limitation shall not begin to run until the plaintiff or applicant has discovered the fraud or the mistake or could, with reasonable diligence, have discovered it; or in the case of a concealed document, until the plaintiff or the applicant first had the means of producing the concealed document or compelling its production:

Provided that nothing in this section shall enable any suit to be instituted or application to be made to recover or enforce any charge against, or set aside any transaction affecting, any property which—

(i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know, or have reason to believe, that any fraud had been committed, or

(ii) in the case of mistake, has been purchased for valuable consideration subsequently to the transaction in which the mistake was made, by a person who did not know, or have reason to believe, that the mistake had been made, or

(iii) in the case of a concealed document, has been purchased for valuable consideration by a person who was not a party to the concealment and, did not at the time of purchase know, or have reason to believe, that the document had been concealed.

(2) Where a judgment-debtor has, by fraud or force, prevented the execution of a decree or order within the period of limitation, the court may, on the application of the judgment-creditor made after the expiry of the said period extend the period for execution of the decree or order:

Provided that such application is made within one year from the date of the discovery of the fraud or the cessation of force, as the case may be.”

10. Therefore on a conjoint reading of the averments made in the plaint along with Article 97 and Section 17 of the Limitation Act shows that since the plaint itself pleads ignorance or lack of knowledge of the sale document of the year 2003 between the

respondent no.1/defendant no.1 and the respondent no.3/defendant no.3, and that the appellant/plaintiff had come to know of the 2003 sale only in the year 2007 because of further sale in the year 2007 by the respondent no.3/defendant no.3 to respondent no.4/defendant no.4, Section 17 of the Limitation Act will step in for the suit not to be barred by limitation. At the cost of repetition, it may be noted that suit has been dismissed not after issues were framed and thereafter parties led evidence and at the stage of final arguments thereafter but at the stage of pleadings itself and at the stage of pleadings, by application of either Order VII Rule 11 CPC or Order XII Rule 6 CPC, only admitted facts can be seen and once there exists disputed questions of facts as to when the appellant/plaintiff first derived knowledge of the 2003 sale by the respondent no.1/defendant no.1 in favor of respondent no.3/defendant no.3, then the suit cannot be dismissed or plaint be rejected unless the disputed question of fact is tried after giving opportunities to lead evidence to prove their respective cases, and evidence led will be as the date of knowledge to the appellant/plaintiff of the 2003 sale. Surely the appellant/plaintiff was entitled to lead evidence to show that he was in ignorance with respect to the sale of

the second floor of the suit property by the brother respondent no.1/defendant no.1 to the respondent no.3/defendant no.3 in the year 2003 and that he came to know of such facts only in the year 2007 when the second floor was further sold by the respondent no.3/defendant no.3 to the respondent no.4/defendant no.4. Such issues being disputed questions of fact could only have been decided at the stage of final arguments after trial and plaint cannot be rejected as barred by time by the trial court holding that Article 97 of the Limitation Act applied.

11. The argument which is urged on behalf of the respondent no.4/defendant no.4 by placing reliance upon orders passed in the suit dated 7.8.2008 and 15.10.2008 is a misconceived argument because even if appellant/plaintiff conceded, as recorded in the order dated 15.10.2008 that the suit was barred by limitation as per Article 97 of the Limitation Act with respect to the relief of pre-emption, such an erroneous concession of law will not bind the appellant/plaintiff because there is no estoppel against law. Estoppel acts only on a wrong concession made of a fact and an erroneous concession of law will not bind or estop a party. Appellant/plaintiff therefore made a

wrong concession of law with respect to the suit being barred although as per the plaint it is clearly mentioned that the factum with respect to the sale deed of the year 2003 in favour of the respondent no.3/defendant no.3 by the respondent no.1/defendant no.1 was not known to the appellant/plaintiff till the year 2007, and that consequently Section 17 of the Limitation Act will only come into play for the suit not to be dismissed at this stage of pleadings without giving opportunities to the appellant/plaintiff to prove his case that he was factually not aware of the sale deed of the year 2003 having been executed of the second floor of the suit property by respondent no.1/defendant no.1 in favour of the respondent no.3/defendant no.3 and he came to know of such fact only in the year 2007.

12. Counsel for the respondent no.4/defendant no.4 argues that respondent no.4/defendant no.4 as per the written statement has pleaded that the respondent no.4/defendant no.4 is a *bonafide* purchaser for consideration, and therefore he should be entitled to succeed, but surely this argument is predicated as if this Court is hearing a Regular First Appeal after the judgment is passed in the suit at the stage of final arguments after parties have lead evidence on

issues which would be framed in the suit. The argument of the respondent no.4/defendant no.4 of being a *bonafide* purchaser for value is a factual issue/stand/argument and this factual issue/stand/argument will have to be established during the course of trial by the respondent no.4/defendant no.4 for him to succeed i.e surely this factual issue cannot be decided today at this stage of pleadings only and for consequently dismissing the suit.

13. The next reason given by the trial court for rejecting the plaint is that the suit ought to have been a suit for partition which it is not and therefore the suit without seeking the relief of partition was liable to be dismissed at the threshold, but this argument flies in the face of Section 7(iv)(b) of the Court-fees Act, 1870 and this Section of the Court-fees Act shows that one co-owner of a joint family property need not sue for partition but such a co-owner without seeking partition can file a suit simply to enforce a right to share in the joint property on the ground that property is a joint family property. I for one do not know any legal provision of any statute which compels a co-owner to file a suit for partition necessarily and that a co-owner cannot simply file a suit that he is not interested in partition but is only

interested in joint enjoyment of the suit property once the position is that no partition is yet effected. For the sake of convenience Section 7(iv)(b) of the Court-fees Act reads as under:-

“Section 7. Computation of fees payable in certain suits.- The amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows:-

(iv) In suits-

to enforce a right to share in joint family property.- (b) To enforce the right to share in any property on the ground that it is joint family property.”

In my opinion therefore trial court was also completely unjustified in dismissing the suit as not maintainable allegedly on account of suit not being a suit for partition of the suit property by the appellant/plaintiff.

14. In my opinion, the arguments and stands urged on behalf of respondent no.4/defendant no.4 besides leading to wastage of judicial time, has caused prejudice to the appellant/plaintiff because the suit of the appellant/plaintiff has been mired in unnecessary complications with respect to the suit being barred by limitation and not being maintainable without seeking partition, although such defences are clearly defences which can only be decided only at the stage of final arguments after giving opportunities to the parties to

prove their cases by leading evidence. Accordingly, this appeal is allowed with costs of Rs.25,000/- and which costs shall be paid by the respondent no.4/defendant no.4 to the appellant/plaintiff within a period of six weeks from today. Impugned judgment of the trial court dated 11.7.2017 is set aside. Trial court will now proceed to decide the suit in accordance with law and also in terms of the observations made in the present judgment.

15. Parties to appear before the District & Sessions Judge (South), Saket Courts, New Delhi on 8th January, 2018 and the District & Sessions Judge will now mark the suit for disposal to a competent court in accordance with law. Trial court record be sent back.

DECEMBER 13, 2017
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VALMIKI J. MEHTA, J