

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

+ **RFA No. 665/2018**

% **17th August, 2018**

RAKESH KANAUIA Appellant

Through: Mr. Biswas, Advocate (Mobile
No.9810813936).

versus

M/S SUPERWHITE DRYCLEANERS & ANR. Respondents

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. Appl. No. 32831/2018 (for exemption)

1. Exemption allowed, subject to all just exceptions.

C.M. stands disposed of.

C.M. Appl. No. 32830/2018 (for delay)

2. For the reasons stated in the application the delay of 41
days in re-filing the appeal is condoned, subject to just exceptions.

C.M. stands disposed of.

RFA No.665/2018

3. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the plaintiff in the suit impugning the Judgment of the Trial Court dated 31.1.2018 by which the trial court has dismissed the suit for rendition of accounts of the respondent no. 1/defendant no. 1/partnership firm. Appellant/plaintiff had also sought the reliefs of declaration and permanent injunction with respect to appellant/plaintiff being entitled to 50% share in the partnership firm and the respondent no.2/defendant no. 2 be restrained from disposing of the assets of the partnership firm. The partnership firm of which rendition of accounts was sought was a partnership firm of the father of the appellant/plaintiff namely late Sh. Phool Chand with the other/second son of the father late Sh. Phool Chand, namely Sh. Rajender Kanaujia/respondent no. 2/defendant no. 2 i.e. the brother of the appellant/plaintiff.

4. The admitted facts of the case are that the father late Sh. Phool Chand was a partner in the partnership firm in terms of the Partnership Deed dated 22.4.1975 with the respondent no. 2/defendant no. 2. The Partnership Deed dated 22.4.1975 was effective

from 1.4.1975. Business which was carried on by the partnership firm/respondent no. 1/defendant no. 1 was of drycleaners. The share in the profit and loss of this Partnership Deed was in the ratio of 60% of the father Sh. Phool Chand and 40% of respondent no. 2/ defendant no.2 Sh. Rajender Kanaujia. Another Partnership Deed dated 16.4.1992 was entered into between the parties whereby the profit sharing ratio was maintained in terms of the pervious partnership deed. The case of the appellant/plaintiff was that Sh. Phool Chand during his life time had executed his last and final Will dated 19.9.1996 which was duly registered before the concerned Sub-Registrar. As per his Will dated 19.9.1996, out of the 60% share of late Sh. Phool Chand in the partnership business, 50% share in the partnership firm was to devolve upon the appellant/plaintiff, and the balance 10% out of the 60% share of the father Sh. Phool Chand was to devolve upon respondent no. 2/defendant no. 2. Sh. Phool Chand expired on 1.1.2004 and his estate comprised of his share in the partnership firm and also a residential property B-4/7, Safdarjung Enclave, New Delhi, on a plot of land of 200 sq. yards. The property at Safdarjung Enclave was divided between the appellant/plaintiff, the

respondent no. 2/ defendant no. 2 and the third brother Sh. Ratan Lal Kanaujia in terms of the Will, but disputes arose between the two brothers who are parties to this suit as regards partnership business inasmuch as the respondent no. 2/ defendant no. 2 pleaded that the earlier Partnership Deeds dated 22.4.1975 and 16.4.1992(Ex.DW1/1) as per which the father Sh. Phool Chand had a 60% share in the partnership firm, was amended by the subsequent Partnership Deed dated 1.4.2003 (Ex.DW1/2) whereby the share of the father in the partnership firm was brought down by him/the father to 10%. Therefore it was pleaded that at best only 10% share of the partnership firm was available to the legal heirs of late Sh. Phool Chand, whether Sh. Phool Chand died *intestate* or he died leaving behind his Will dated 19.9.1996 (Ex.P2). Respondent no. 2/ Defendant no. 2 accordingly pleaded that appellant/plaintiff could not seek 50% share in the partnership firm.

5. After pleadings were complete, the trial court framed the following issues:-

"(i) Whether the share ratio in the profits and losses of the partnership firm, defendant no. 1 was legally and validly amended between defendant no. 2 and late Shri Phool Chand vide amended partnership deed dated 01.04.2003? OPD

(ii) Whether the partnership deeds dated 22.04.1975 and 16.04.1992 were amended by a subsequent legal and valid amended partnership deed dated 01.04.2003? OPD

(iii) Whether the plaintiff is entitled to 50% share in the business of defendant no. 1 and tenancy rights (in shop no. 7, Jorbagh Market, New Delhi) as bequeathed upon him by the last and final Will dated 16.04.1996 of late Sh. Phool Chand? OPP

(iv) Whether the plaintiff is entitled to rendition of accounts in respect of defendant no. 1 firm? If so, the period thereof. OPP

(v) Relief."

6. Trial court has held that there is no dispute that Sh. Phool Chand executed his Will dated 19.9.1996, however, the trial court further held that the earlier Partnership Deeds dated 22.4.1975 and 16.4.1992 stood amended by the subsequent Partnership Deed dated 1.4.2003 whereby the father's share came down to 10% from 60%. Trial court rejected the case put forth by the appellant/plaintiff that the father Sh. Phool Chand was not of sound mind when the amended partnership deed was executed inasmuch as no documentary evidence was filed of treatment in hospitals of Sh. Phool Chand showing that mental capacity of the father was so diminished that he could not understand the meaning of his actions. Also no doctor was examined by the appellant/plaintiff that the father was of unsound mind when the amended Partnership Deed dated 1.4.2003 was entered into

between him/father and the respondent no. 2/defendant no. 2. Trial court has also relied upon the deposition of Sh. Vipin Lakra who was one of the witness to the amended Partnership Deed dated 1.4.2003 and who deposed with respect to the soundness of mind of late Sh. Phool Chand. Trial court therefore held that the appellant/plaintiff at best would be entitled to 10% of the share of the partnership firm. Trial court has however dismissed the suit as barred by limitation by invoking Section 3 of the Limitation Act, 1963 read with Article 5 of the Schedule of the Limitation Act which provides that the right to file a suit for rendition of accounts of a dissolved partnership firm would be three years and the suit has been filed beyond the period of three years of the dissolution of the firm and that the partnership firm stood dissolved on the death of the father on 1.4.2004. Some of the paras of the impugned judgment of the trial court containing the relevant discussion are paras 10 to 17 and these paras read as under:-

"10. From the conjoint reading of the depositions of DW1, DW2 and PW1, what is positively established is that at the time of the execution of the Amended Partnership deed dated 01.04.2003, Sh. Phool Chand was physically debilitated to the extent that he was unable to walk and was confined to wheel chair, however, no positive consequential, logical inference is capable of being drawn from the oral deposition of the witnesses to the effect that the mental faculties of Sh. Phool Chand were so diminished and compromised that he was incapable of making any

informed decision of his free will and volition, duly understanding the consequences of his actions. It being the positive assertion of the plaintiff that at the relevant time Sh. Phool Chand was not in a fit state of mind to take independent informed decisions, evidence indicating diminished mental capacity was required to have been lead by the plaintiff. The plaintiff in the course of cross-examination reveals that as per his knowledge Sh. Phool Chand was receiving treatment from AIIMS and Orthonova Hospital and the family doctor. No medical record of AIIMS or orthonova hospital or any other hospital is produced which could substantiate the plaintiffs assertion, the family doctor or any other doctor treating Sh. Phool Chand is not examined who could alone have authoritatively shed some light on the mental condition of Sh. Phool Chand at the relvant time. In respect of the amendment to the partnership deed the following alone is suggested to DW1.

“It is wrong to suggest that there was no amendment in the partnership in the year 2003”

The plaintiff never for once suggested to DW1 that the father of the parties in the year 2003 and thereafter was not in a fit state of mind to take independent and informed decisions of his own or that the amendment to the partnership deed dated 01.04.2012 does not bear the thumb impressions of the late father or that the thumb impressions were not affixed of free will and volition of the late father or that the thumb impression was obtained under undue influence or through misrepresentation.

11. As a matter of fact the failing physical health of the partner Sh. Phool Chand itself is recorded as the cause for incorporating the amendment to the deed of partnership w.e.f. 01.04.2003. The onus in respect of issue no: 1 was placed on the defendant and the defendant has tendered into evidence the original amended partnership deed dated 01.04.2003 and has identified the thumb impression of Sh. Phool Chand on Ex. DW1/2 and has examined the witness to the deed whose deposition has remained unwaivering despite an extensive cross examination on the aspect of the execution of the amendment deed. It fell upon the plaintiff to demonstrate that the deed was infact a forged and fabricated document and that Sh. Phool Chand was not physically capable of having executed any such deed and his mental faculties were so compromised that he could not have known

the consequences of his action. The medical condition of Sh. Phool Chand is adverted to however no medical record is tendered in support thereof. The soundness of mind is disputed, however, no medical report or doctor attending to Sh. Phool Chand is examined to demonstrate the status of the mental faculties of Sh. Phool Chand of the relevant time. In view of the above discussion, therefore, I have no hesitation in holding that the share ratio in the profits and losses of the partnership firm were validly amended between the defendant no: 1 and Sh Phool Chand vide amended partnership deed dated 01.04.2003 and concluding the issue no: 1 and 2 in favor of the defendant no: 2 and against the plaintiff.

12. In terms of the amended partnership deed dated 01.04.2003, Sh. Phool Chand was a partner with 10% share in the profit and loss of defendant no: 1, Sh. Phool Chand breathed his last on 01.01.2004 leaving behind Will dated 19.09.1996 making the following bequest:

“5. That my estate consists of one 2-1/2 storeyed residential building bearing no: B4/7, Safdarjung Enclave, New Delhi, Constructed over a plot of 200 square yards. I have also 60% partnership interest in the partnership firm M/s Super White Dry Cleaners, shop no: 7, Jor Bagh, New Delhi. I have also other movable assets like Bank balance, fixed deposits etc.

6. I bequeath and devise my house property no: B-4/7, Safdarjung Enclave, New Delhi as under:-

- i) Ground Floor to my son, Shri Rajindra Kanojia,*
- ii) First Floor to my son, Shri Rattan lal Kanojia, and*
- iii) Second Floor to my son, Shri Rakesh Kumar Kanojia.*

Each one of them shall become absolute owners of their respective floors and portions, subject to joint enjoyment of the common area like front entrance gate, passage, stair case etc. Shri Rakesh Kumar Kanojia shall have the right to complete the construction of second floor at his own cost. Shri Rakesh Kanojia shall have the absolute right to the enjoyment and the use of the roof over the second floor and have also all rights to raise construction over the second floor upto the sky of which he will be absolute owner.

7. That I bequeath and devise 10% out of my 60% partnership share and interest in the firm M/s Super-White Dry Cleaners to my son, Shri Rajindra Kanojia, who is a partner with me in the said firm holding 40% share of profit and my balance 50% partnership share and interest shall go to my youngest son Shri Rakesh Kumar Kanojia. In case during my life time, there is a change in the constitution of the above partnership and my partnership interest and share is reduced from 60% to 50% or below than any entire share and interest shall go to my younger son Shri Rakesh Kumar Kanojia.

8. I declare that Shop no. 22 under the flyover Defence Colony, New Delhi, already belongs to Shri Rajindra Kanojia.

9. As regards the balance in my bank accounts, and the fixed deposit receipts etc., the same are bequeathed and devised to the nominee intimated by me to the bank etc. The balance estate, if any, shall be shared by me three sons equally."

The present suit does not pertain to declaration of share in the immovable properties constituting the estate of the testator, the suit of the plaintiff is for being declared a 50% partner in defendant no: 1. At the time of the execution of Will Sh. Phool Chand was partner to the extent of 60% and at the time of his death, Sh. Phool Chand was a partner with 10% share only in defendant no: 1. The defendant alleges that the bequest is rendered infuctuous and inexecutable due to the subsequent developments and the amendment in the partnership deed dated 01.04.2003. The bequest, however, I find is not rendered vulnerable due to the subsequent amendment to the partnership deed effective 01.04.2003 as the testator had envisioned and could foresee such a future contingency and had provided therefor. The bequest is clairvoyant to this effect. The testator desired that in the event of his share falling to any percent below 50%, the entire subsisting share shall become the entitlement of the plaintiff, the younger son. The solemn desire /wish/will of the testator is to be honored, existence due execution and contents of Will dated 19.09.1996 not being in dispute. The plaintiff is, therefore entitled to the share of late Sh. Phool Chand in defendant no: 1 as subsisting at the time of his death on 01.04.2004 i.e. 10% share.

13. The plaintiff seeks to be instated as a partner in the place of Sh. Phool Chand succeeding to his share in defendant no: 1, stepping into his

shoes for all intents and purposes and be declared as a partner in defendant no: 1 firm.

Partnership is a contractual relationship and is defined in section 2 of the Indian Partnership Act, 1932 as the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. The persons who have entered into partnership with one another are individually referred to as partners and collectively they constitute the firm and the name under which the business is carried on is called the firm name. The relation of partnership arises per contract and not from status. Where no provision is made between the partners for the duration of their partnership or for the determination of their partnership the partnership is partnership at will. No person can be introduced as a partner into a firm without the consent of all the existing partners subject to the contract to the contrary between the partners. A partner may retire with the consent of all the other partners in accordance with an express agreement by the partners or where the partnership is at will by giving notice in writing to all the other partners of his intention to retire. No partner can be expelled from a firm by any majority of partners save in exercise of good faith of powers conferred by contract between the partners.

The dissolution of partnership between all the partners of a firm is called the dissolution of the firm. A firm may be dissolved with the consent of all the partners or in accordance with the contract between the partners. Under certain exigencies a firm may be compulsorily dissolved as by the adjudication of all the partners or of all the partners but one as insolvent, or by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the partners to carry it on in partnership. A firm may be dissolved by the Court at the suit of a partner and the grounds thereof are enumerated under section 44 of the Act. A firm may be dissolved on the happening of certain contingencies as laid down under section 42 which envisages as follows:

“42. Dissolution on the happening of certain contingencies.- Subject to contract between the partners a firm is dissolved.-

(a) if constituted for a fixed term, by the expiry of that term;

(b) if constituted to carry out one or more adventures or undertakings by the completion thereof;

(c) by the death of a partner; and

(d) by the adjudication of a partner as an insolvent.”

These contingencies as provided in section 42, however, are not absolute and are subject to contract to the contrary between the parties.

14. The contingencies as laid down u.s. 42 upon the occurrence of which a firm may be dissolved are not absolute and are subject to contract to the contrary between the parties, partnership being a relationship borne of a contract is governed by the terms of the contract. The partners may agree that upon the death of anyone of the parties the firm shall not stand automatically dissolved and the surviving partners may continue with the business of the firm under the name and style of the firm as a reconstituted firm. This however applies where there are more than two partners. Where the partnership constitutes of two partners upon the death of one the contingencies envisaged under section 42 are rendered applicable and the partnership stands dissolved automatically. Where a partnership constitutes of two partners it is automatically dissolved by the death of one of them.

Moreover, there ought to exist a specific agreement between the partners captured in the deed of partnership to the effect that the partnership shall not stand dissolved automatically upon the death of a partner. No such clause is found embodied either in the deed of partnership dated 22.04.1975 or the amendment incorporated vide amendment of the partnership deed dated 01.04.2003. Even in the amendment to the partnership deed i.e. dated 16.04.93 there is no such agreement between the partners that firm shall not stand dissolved upon the death of anyone of the partner infact in terms of clause 10 an embargo is created to the effect that none of the partners to the deed shall be entitled to sell his share to any outsider and such action shall be void and not binding to the other partner in the partnership deed dated 16.04.1993 and under clause 18 of the amended partnership deed dated 01.04.2003 extracted elsewhere in the course of discussion the contracting parties had agreed that the partnership will get dissolved upon the death of any of the two partners and the surviving partner shall have the option to continue the firm under the name and style of super white Dry Cleaner as a sole

proprietor ship concern, and it is the case of the defendant no: 2 that after the death of Sh. Phool Chand, the defendant no: 2 the surviving partner has continued the defendant no: 1 as his sole proprietorship concern and therefore he is not liable to render the accounts of defendant no: 1.

As a consequence of the above discussion, it is held that upon the death of Sh. Phool Chand, the firm partnership that came into existence by virtue of partnership deed dated 22.04.1975 as amended on 16.04.1993 & 01.04.2003 came to be dissolved.

15. On the dissolution of a firm every partner or his representative is entitled as against all other partners or their representatives to have the property of the firm applied in payment of the debts and liabilities of the firm and to have the surplus distributed amongst the partners or their representatives according to their rights. It has come to be determined as a consequence of findings returned in issues no. 1 & 2 that the plaintiff is entitled to 10% share of Sh. Phool Chand in defendant no: 1 as by virtue of the amendment to the partnership w.e.f. 01.04.2003 Sh. Phool Chand was entitled to a 10% share in the profit and loss of the defendant no: 1. What is however pertinent is that this entitlement accrued in favor of the plaintiff on 01.04.2008 on the death of Sh. Phool Chand and the suit of the plaintiff has come to be instituted on 03.04.2008 as per the stamp endorsed of the dealing Assistant bearing diary no: 56244 and the defendant no: 2 was rendered liable to render accounts to the plaintiff for the determination of 10% share of the plaintiff in the profit and loss of defendant no: 1. In terms of Article 5 of the Schedule to the Limitation Act, a suit for an account and share of the profits of a dissolved firm is to be instituted within three years of the date of dissolution and the cause of action in this case, therefore, for the first time accrued in favor of the plaintiff on 01.04.2004 i.e. upon the death of the partner. The cause of action is not recurring in nature in the facts and circumstances of the case at hand. Only where the suit for rendition of accounts is instituted by a partner or the representatives of an outgoing partner in respect of a reconstituted and running partnership concern can it be stated that the cause of action is recurrent, though the determination of entitlement may be restricted to the preceding three years before the institution of the suit, however, the suit itself for rendition of accounts in such a case is not time barred, however, in respect of the dissolved firm, the cause of action is not recurrent in nature, a suit instituted beyond three years of the dissolution of the firm for rendition of accounts of the dissolved firm becomes time barred.

16. In the case at hand there is no specific issue framed in respect of limitation, however, the statute casts an onus on the court to ward off the stale claims.

The laws of limitation are founded primarily on public policy. In Halsbury's Law of England the policy of Limitation Act is laid down as follows

“The court have expressed at least three different reasons supporting the existence of statutes of limitation namely (I) that long dormant claims have more of cruelty than justice in them (ii) that a defendant might have lost the evidence to dispute the stated claim (iii) that person with good causes of action should pursue them with reasonable diligence”.

The doctrine of Limitation is based on two broad considerations, the first is that there is a presumption that the right not exercised for a long time is non-existent. The second consideration on which principles of limitation and prescription are based is that it is necessary that the rights in property and rights in general should not be in a state of constant uncertainty, doubt and suspense. The statutes of limitation are known as statutes of repose or peace. The Hon. Supreme Court of India in various judicial pronouncements (Balkrishnana Vs. MA Krishna Murti 1998 Vol.7SCC123) has reiterated the object of fixing time limit for litigation and it is observed that the rules of limitation are not meant to destroy the rights of the parties but are meant to see that the parties do not resort to dilatory tactics but seek their remedy promptly because the idea is that every legal remedy must be alive for a legislatively fixed period of time and law of limitation fixes a life span for legal injury suffered and it is for the general welfare that a period be put to litigation. It is the duty of the court to decide the question of limitation even if no such plea is raised by the defendant and so far as the case at hand is concerned, the defendant has raised a preliminary objection to the maintainability of the suit on the ground that the suit is time barred. The Limitation Act is intended to provide a time limit for all conceivable types of suits and all such suits have to be instituted within the period prescribed therein unless there is any ground for extension as is provided in the Act itself. The limitation Act is self-contained and exhaustive and effect must be given to the provisions of the Act unhampered by the questions of expediency and the like. The principle of equity cannot be invoked to

enlarge the period of limitation. There is no law of limitation outside the limitation Act except specific provisions contained under Limitation Act. As it is an exhaustive code, the court cannot travel beyond its provisions to add to or supplement them. The court has no general discretion outside the limits of Act to dispense with its provisions or to relieve a suitor from the operations of the Act on the ground of hardship or mistake.

Section 3 of the Limitation Act casts a duty upon the court to ensure that no suit, appeal petition is filed beyond the period of limitation prescribed and reads as under:-

“3. Bar of limitation (1) Subject to provisions contained in section 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed although limitation has not been set up as a defence.

(2) For the purposes of this Act-

(a) a suit is instituted-

- (i) in an ordinary case, when the plaint is presented to the proper officer;*
- (ii) in the case of pauper, when his application for leave to sue as a pauper is made; and*
- (iii) in the case of claim against the company which is being wound up by the court when the claimant first sends in his claim to the official liquidator;*

b) any claim by way of a set off or a counter claim, shall be treated as a separate suit and shall be deemed to have been instituted-

- (i) in the case of set off, on the same date as the suit in which the set off is pleaded;*
- (ii) in the case of a counter claim, or the date on which the counter claim is made in the court;*

(c) an application by notice of motion in a high Court is made when the application is presented to the proper officer of the court.

The onus is therefore cast upon the court to ensure that the suit, appeal, petition, application is instituted within the time frame provided

under the limitation Act and parties cannot by agreement extend the period of limitation and it is immaterial whether an objection in this regard is taken by the opposite party or not.

17. In the facts and circumstances of the present case, the issue of limitation has emerged as a pure question of law and not a mixed question of law and fact as the plaintiff does not claim knowledge of the will from any date after the death of the father and has founded his claim upon the will of the father w.e.f. the date of death of the father to be declared as 50% partner in defendant no: 1, on the premise that the defendant no: 1 firm is not dissolved upon the death of the father partner which premise in terms of the statute and terms of the partnership deed is found to be unsustainable. Any suit for declaration was also to be instituted within three years of the death of the father, and as per Article 5 of the Schedule to the Limitation Act any suit for a share in the profits of a dissolved partnership firm is to be instituted within three years of the date of dissolution. The question of limitation in the facts and circumstances discussed above being a pure question of law capable of being determined on the strength of material available on record, I proceed to frame the following issue no: 1A:

**1A: Whether the suit of the plaintiff is instituted within limitation ?
OPP**

From the discussion above I answer the issue no: 1A against the plaintiff and in favor of the defendants in terms of article 5 of the schedule to the Limitation Act. As a consequence of the issue wise findings returned it is held that the plaintiff became entitled to a 10% share in the profit / loss of defendant no: 1 upon the death of Sh. Phool Chand on 01.04.2004 by virtue of Will dated 01.09.1996 of Late Sh. Phool Chand, however, the suit of the plaintiff is time barred in view of the Article 5 of the schedule of the Limitation Act. Issue no: 3 and 4 are answered accordingly."

7. Learned counsel for the appellant/plaintiff has vehemently argued before this Court that the trial court has dismissed the suit as being barred by limitation although this issue was not taken

up as a defence by the respondent no. 2/defendant no. 2, and infact the trial court did not also hear arguments on this issue. It is therefore argued that the impugned judgment has to be set aside because the impugned judgment decides the suit on the point of limitation without the appellant/plaintiff being heard.

8. To the extent that trial court ought to have put parties to notice with respect to the suit being barred by limitation by invoking Section 3 of the Limitation Act which permits a Court to *suo moto* take notice of the issue of limitation the same is a correct argument that the aspect of limitation has to be decided on parties being heard, however for this reason I need not remand the case to the trial court because Order XLI Rule 24 CPC provides that once the record of the trial court is complete, an appellate court can sustain a judgment after hearing the appellant. Supreme Court in the case of ***Lisamma Antony and Another Vs. Karthiyayani and Another (2015) 11 SCC 782*** has held with reference to the provisions of Order XLI Rule 23, 23A and 24 CPC that an appellate court should not remand a suit for fresh decision to the trial court when record of the suit is complete, and in such a case the appellate court must decide the issue itself. I have,

therefore, asked the counsel for the appellant/plaintiff to address this Court on the issue of limitation as to how the suit is not barred by limitation in view of Section 3 of the Limitation Act read with Article 5 of the Schedule of the Limitation Act.

9. In response the learned counsel for the appellant/plaintiff has argued that the suit is not barred by limitation as the appellant/plaintiff came to know about the alleged amended Partnership Deed dated 1.4.2003 only when the appellant/plaintiff sent a Legal Notice dated 11.1.2008 to the respondent no. 2/defendant no. 2 to give to the appellant/plaintiff 50% share in the partnership firm, and in reply to this legal notice the respondent no. 2/defendant no. 2 by his Reply dated 29.1.2008 admitted the existence of the Will dated 19.9.1996 giving 50% share to the appellant/plaintiff, but the respondent no. 2/defendant no. 2 for the first time placed reliance on and put forth the existence of the amended Partnership Deed dated 1.4.2003 whereby the father had reduced his share in the partnership firm from 60% to 10%. Accordingly, learned counsel for the appellant/plaintiff has argued that cause of action has only accrued to the appellant/plaintiff in January, 2008, when the appellant/plaintiff

received reply to the legal notice from the respondent no. 2/defendant no. 2 and hence the suit was within limitation inasmuch as the suit was filed on 7.4.2008.

10. In my opinion the argument urged on behalf of the appellant/plaintiff to contend that the suit is within time and not barred by limitation is a misconceived argument for the reason that Article 5 of the Schedule of the Limitation Act specifically provides the limitation period to be three years for seeking accounts of a dissolved partnership firm, and which period of three years begins from the date of dissolution. The date of dissolution of a partnership firm in which there are only two partners has to be the date of death of one of the partners inasmuch as partnership is a contract. If there are more than two partners then the partnership firm could have continued with the other remaining partners, but once the partnership firm only had two partners being the father Sh. Phool Chand and the respondent no. 2/defendant no. 2, on the death of the father Sh. Phool Chand the partnership firm would stand dissolved in view of Section 42 of the Indian Partnership Act, 1932. Trial court has rightly discussed this

aspect in paras 13 to 15 of its judgment and these paras are already reproduced above.

11. In the present case admittedly the father Sh. Phool Chand expired on 1.1.2004. On the death of the father, the partnership firm being the respondent no. 1/defendant no. 1 stood dissolved. As per Article 5 of the Limitation Act a suit had to be filed within three years from 1.1.2004 i.e. on or before 1.1.2007. The suit however has admittedly being filed only on 7.4.2008 i.e. beyond the period of three years, and therefore I do not find any illegality or perversity in the impugned judgment dismissing the suit for rendition of accounts as being barred by limitation.

12. In my opinion, the trial court was also justified in holding that the amended Partnership Deed dated 1.4.2003 cannot be said to have been executed by the father Sh. Phool Chand in a state of lack of requisite mental capacity. No doubt, the appellant/plaintiff in his cross-examination conducted on 26.9.2016 brought on record document Ex.DX, being a medical prescription of the Doctor Suraj Prakash showing the father was having Alzheimer disease because of compression of the joints of the backbone, however, firstly it is noted

that this document was filed on record and proved by the appellant/plaintiff not for the purpose of proving the lack of mental capacity of the father Sh. Phool Chand but in response to a question of the father being confined to bed. Secondly and in any case, reference to the mental capacity of Sh. Phool Chand is Alzheimer disease and this in itself is not complete lack of mental capacity because Alzheimer disease means a person would forgot certain things but Alzheimer disease does not mean complete lack of mental capacity to understand what a person is doing and in this document Ex. DX it is not mentioned by the doctor that the patient Sh. Phool Chand is suffering from Alzheimer disease whereby the disease has brought about complete lack of mental capacity of Sh. Phool Chand to understand what was being done by him. Also, the appellant/plaintiff ought to have brought into the witness box Dr. Suraj Prakash who had issued the prescription Ex.DX, if the issue was of complete lack of mental capacity, but admittedly Dr. Suraj Prakash was not brought into the witness box by the appellant/plaintiff. For all these aforesaid reasons, in my opinion, the appellant/plaintiff cannot argue that the father Sh. Phool Chand was not in a sound state of mind when he

executed the amended Partnership Deed on 1.4.2003. These aspects are correctly analysed and discussed in paras 10 and 11 of the impugned judgment which have already been reproduced above, and I accept the reasoning and conclusions contained in these paras.

13. In my opinion, in fact there exists valid reason for the father to have executed the amended Partnership Deed dated 1.4.2003, inasmuch as, the respondent no. 2/defendant no. 2 has deposed with respect to the fact that the father was only being taken care of by him including on aspects of expenditure with respect to medical treatment of the father and the appellant/plaintiff has neither pleaded in his pleadings nor in his affidavit by way of evidence deposed that the respondent no. 2/ defendant no. 2 is incorrectly stating that only the appellant/plaintiff took care of his father. I have examined the affidavit by way of evidence filed by the appellant/plaintiff and this affidavit by way of evidence does not show any deposition by the appellant/plaintiff that he was taking care of the father including incurring medical expenses for his medical treatment. Also, admittedly the father was living on the ground floor of the Safdarjung Enclave property and on the ground floor of the Safdarjung Enclave

property it was the respondent no.2/defendant no. 2 who was living with his family, and not the appellant/plaintiff, who is an IIT graduate, and who was living on the second floor of the Safdarjung Enclave property. Therefore, in my opinion, the father Sh. Phool Chand had in fact for valid reasons given 50% share in the partnership firm to the respondent no. 2/defendant no. 2, and with whom the firm was started, carried on and continued till the death of the father Sh. Phool Chand on 1.1.2004.

15. In view of the aforesaid discussion, I do not find any merit in the appeal and the same is hereby dismissed.

AUGUST 17, 2018

AK

VALMIKI J. MEHTA, J