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

*Date of Decision: 13<sup>th</sup> December, 2018*

+ **CS(OS) 2723/2014**

**RAMESH KUMAR** ..... Plaintiff

Through: Mr. Ravi Dev Sharma, Advocate.  
(M:9873205388)

versus

**KISHORI LAL & ORS** ..... Defendants

Through: Mr. Mohd. Akram, Advocate.  
(M:9818850448)

**CORAM:**  
**JUSTICE PRATHIBA M. SINGH**

**Prathiba M. Singh, J. (Oral)**

1. The Plaintiff, Shri Ramesh Kumar has filed the present suit for partition against his brother Shri Kishori Lal, his sister Smt. Asharfi, his brother, Shri Pyare Lal and the LR's of his third brother, late Shri Babulal.
2. Late Shri Khacheru Ram was the owner of House No. 18, Gali No.1, Harijan Basti, Sadat Pur, Delhi-110094 measuring 300 square yards out of Khasra No.1397/781,782 situated at Village Karawal Nagar, Delhi-110094. Shri Khacheru Ram died intestate in 1988 and his wife Smt. Shukko also passed away intestate. They had four children, Smt. Asharfi, the eldest daughter and four sons, Shri Pyarelal, Shri Babulal, Shri Kishori Lal and the Plaintiff, Shri Ramesh Kumar. Shri Babulal has also passed away and his LR's are Defendant Nos.4 to 11.
3. The suit was filed, and was first listed on 8<sup>th</sup> September, 2014 on which date, status quo was directed to be maintained in respect of title and

possession. Defendant No.1 thereafter filed his written statement and took the stand that Shri Pyare Lal i.e. Defendant No.3 had sold away his part of the property 6-7 years ago. Thus, only 217.52 square yards of the property was remaining in the possession of Defendant No.1. It is further pleaded that the Plaintiff was paid a sum of Rs.55,000/- sometime in 1984-85 by which Defendant No.1 purchased Plaintiff's share of the property. After the said purchase took place, the Plaintiff moved to Kurukshetra in 1994. Hence, it is the case of the Defendants that the Plaintiff has no share in the suit property.

4. The following issues were framed in the suit on 14<sup>th</sup> September, 2015:-

- “1. Whether the plaintiff is entitled to a decree of partition in respect of suit property thereby holding 1/5<sup>th</sup> share as alleged? OPP*
- 2. Whether suit of the plaintiff is barred by limitation? OPD*
- 3. Whether the suit has not been properly valued for the purpose of Court fee and jurisdiction and has not fixed the proper Court fee? OPD*
- 4. Relief.”*

5. The Plaintiff appeared as PW-1. Defendant No.2, his sister Smt Asharfi, appeared as PW-2. One Shri Gopal Dutt, Bailiff from the Sub-Registrar's office, Nand Nagri, appeared as PW-3. On behalf of the Defendants, Defendant No.1, Shri Kishori Lal appeared as DW-1, Shri Mohd. Tasleem, a neighbour, appeared as DW-2, Shri Rajvir Singh, appeared as DW-3 and Shri Nepal Singh, appeared as DW-4. DW-Nos.2 to 4 were produced on behalf of Defendants in order to establish that the Plaintiff had sold his share in the property to Defendant No.1.

6. The statements of all the parties were recorded and the matter was

finally heard on 7<sup>th</sup> December, 2018. It is submitted by learned counsel appearing for the Plaintiff that the fact that the property belonged to the father, Shri Khacheru Ram, is not disputed. The sister, Smt Asharfi, has deposed in favour of the Plaintiff to the effect that no money was paid to the Plaintiff by Defendant No.1 to purchase the Plaintiff's share. It is also submitted that there is no document to show that the sale of the Plaintiff's share had ever taken place. It is further submitted that the sister having deposed in favour of the Plaintiff, it is a clear case where the Defendants have put up a false defence of having purchased the Plaintiff's share.

7. On the other hand, learned counsel for the Defendants submit that the cross-examination of PW-1 shows that he has been out of the suit property for more than 35 years. The only reason why the Plaintiff had moved out of the property was because he had received the complete consideration for his share in the property.

8. It is further submitted that the suit is barred by limitation, as it has been filed extremely belatedly, when Defendant No.1 has invested in the suit property and has been enjoying it for more than 35 years. In fact, learned counsel for the Defendants submits that upon receiving the amount which was paid by Defendant No.1 to the Plaintiff, the Plaintiff purchased a plot for himself. Accordingly, learned counsel for Defendants submits that the Plaintiff is not entitled to partition.

9. The issue of limitation is required to be decided first. In the plaint, the case of the Plaintiff is that the Plaintiff's father passed away in 1988 and left behind five legal heirs. In paragraphs 5 & 8 the Plaintiff asserts as under:

*“5. That the plaintiff approached the defendants in the end of month July 2014 and asked for partition of the*

*suit properties for demanding his share of the properties but they refused to partition the suit properties and refused to give the plaintiff his share.*

6....7.....

*8. That the cause of action originally accrued when the plaintiffs request for partition of the suit property was declined on 30.07.2014. The cause of action is still continuing, subsisting, recurring as the needful is yet to be done.”*

10. In paragraph 9 of the preliminary submissions in the written statement, Defendant No.1 asserts that he purchased the share of the Plaintiff for a sum of Rs.55,000/-. It is also stated that one of the other brothers, Shri Pyare Lal, Defendant No. 3 had sold his share in the suit property many years ago. The main preliminary objection taken by the Defendants is that the suit is barred by limitation. Paragraphs 1, 4 & 9 of the written statement are set out herein below:

*“1. That the suit of the plaintiff is highly time barred and liable to be dismissed on this score alone as the present suit filed by the plaintiff without any documents on record or site plan, which is not maintainable in the eyes of law.*

2...3....

*4. That one Sh. Pyare Lal - defendant No. 3 had already sold his portion to any other person about 6—7 years ago, thereafter, the said portion was sold two times and now one Bangali purchased the portion, which belong to defendant No.3- Sh. Pyare Lal about 2-1/2 and 3 years ago.*

5....8.....

*9. That the plaintiff as a real brother of the defendant 1, so he was allowed to reside along with defendant No. 1 and his brother namely Sh. Pyare Lal and Sh. Babu Lal. The defendant No. 1 purchased the portion of the plaintiff in the year about 1984-1985 for a sum of Rs.55,000/- and from that amount the plaintiff purchased a plot situated in Gali No.1, Dayalpur, Delhi, from Chaudhary Gayasay and sold the said plot to Lala Prem Raj and the plaintiff then settled in Kurushetra (Haryana) in the year 1994, so there is no question of partition at all."*

11. In his replication, the Plaintiff has merely denied this allegation of the Defendants.

12. In the oral evidence, which has been recorded, the Plaintiff admits that for the past 20 to 22 years, he has been living on rent in Kurukshetra, Haryana. Prior to that he had been residing in Dayalpur, Delhi for 15 years. Thus, the Plaintiff has not been residing in the suit property for at least 35 years, as per his own testimony. He further admits that the property in Dayalpur was purchased in 1984. He also admits that one of the brothers Shri Pyare Lal sold his share in the suit property. He also admits that his other brother Shri Babulal as also Shri Pyare Lal left the suit property in 2001.

13. His sister Asharfi, in her evidence, stated that the Plaintiff had not sold his share to anyone in her presence. She also admitted that the Plaintiff purchased the house in Dayalpur, however she stated that she was not aware of the year in which the said purchase was made. However, she stated that not a single penny was paid by the Defendants to the Plaintiff. DW-2, 3 & 4

are persons from the neighbourhood who claimed that they had heard that the Plaintiff had sold his share in the suit property to the Defendants.

14. From the testimony of PW-1 & PW-2, it is clear that the Plaintiff has been out of the suit property for more than 35 years. As against this, Defendant No. 1 is earning rent from the suit property. He further stated that out of 300 Sq. Yards, currently only 217 Sq. Yards are with him, as Shri Pyare Lal sold his share and left the property.

15. The admitted position, therefore, that emerges from the evidence is as follows:

- 1) The parents of the parties passed away in the 1980s,
- 2) The Plaintiff has been out of the property since at least 1984-85 i.e. he had left the property even before his father's demise in 1988,
- 3) There are no particulars in the plaint as to when he first demanded partition from his brother,
- 4) There is no explanation or material particulars as to in what manner the demand for partition was made in 2014 and how it was refused,
- 5) Except the Defendant, all the other brothers have already left the suit property long ago,
- 6) The Defendant has been in exclusive possession for at least 6 to 7 years and in exclusion to the Plaintiff, for the last 35 years.

16. In view of these facts, the version of the Plaintiff is not possible to believe, inasmuch as there is no evidence of the cause of action having arisen in 2014. The Plaintiff, having been out of the property for more than 35 years, the right to sue has accrued long back. Going by any reasonable

standard, the right to sue had accrued much prior to 2014. No evidence has been led to prove as to how and in what manner the cause of action arose in 2014. Without any evidence, the bald averment in the plaint that it arose in 2014, cannot be believed. The Defendant No. 1's stand is more credible. Defendant No. 1 has been earning rent of Rs.7,500/- from various tenants. This is the only property which he has. Knowing fully well that there is rent being earned from the suit property, any rights which the Plaintiff would have had ought to have been asserted upon the death of the father/mother. Non-assertion of the same leads one to the conclusion that the version of the Defendant that he had purchased the share of the Plaintiff in 1984-85 is correct on a preponderance of probability. The right to sue having accrued in the 80s/early 90s, the creation of an artificial cause of action in 2014 is not liable to be accepted. The law on this aspect is clear and is settled in the case of **Krishna Pillai Rajasekharan Nair (D) By Lrs v. Padmanabha Pillai (D) by Lrs and Ors.**, AIR (2004) SC 1206, wherein the Supreme Court has observed as under:

*“22. In our opinion, the suit filed in the present case being a suit for partition primarily and predominantly and the relief of redemption having been sought for only pursuant to the direction made by the High Court in its order of remand, the limitation for the suit would be governed by Article 120 of Limitation Act, 1908. For a suit for partition the starting point of limitation is – when the right to sue accrues, that is, when the plaintiff has notice of his entitlement to partition being denied.”*

17. A learned Single Judge of this Court, in **Amrit Kaur v. Sarabjeet Singh & Ors.**, 153 (2008) DLT 392, has held that the law of limitation being

applicable to a suit for partition, a suit filed 90 years of the death of the parents is barred by limitation. The observations of this Court are set out herein below:

*“7. Article 110 of the Schedule to the Act provides that a suit by a person excluded from a joint family property, to enforce a right to share therein is twelve years. The starting point is when the exclusion becomes known to the plaintiff.*

*8. It has been held that the object underlying this Article is to afford protection to a member of a joint Hindu family against prejudicial action by the other members of the family behind his back with respect to his interest in the family property. It has been held that this provision, prescribing the period of limitation, and the conditions of its applicability also apply to suits for partition (Radhoba v. Ahurao, MANU/PR/0049/1929 : AIR 1929 PC 231). It has also been held that ‘exclusion’ is a fact specific circumstance, to be seen in the light of materials on record in every case. However, what should be seen by the Court is the intention of the persons so seeking to exclude the plaintiff, from the enjoyment of his (or her)n share (Haresh v. Hardevi, MANU/UP/0073/1927 : 1927 (1) ILR 49 All 763; Velayudhan v. Velumpi Kunji, ILR 1958 Ker. 389 (FB) and Marudhanayagam Pillai v. Sola Pillai, MANU/TN/0306/1965 : 77 Mad LW 697). This Court too, had applied a similar criteria, when considering whether the suit was time-barred, and in the judgment reported as Ramesh Chand v. Tek Chand and Others, MANU/DE/1092/2004 : 115 (2004) DLT 193.”*

18. A similar view has been taken in the case of ***Sangita Rehan v. Surinder Kishan Grover***, 218 (2015) DLT 305, where a suit filed 36 years after the death of the father was held to be barred by limitation.

19. In the present case, there is no doubt that the Plaintiff has filed the suit belatedly, and the suit is barred by limitation. The onus upon the Defendant, accordingly, stands discharged and this issue is decided against the Plaintiff.

20. In any case, even on merits, the Plaintiff is not entitled to a decree of partition as from the evidence it has emerged that all along he never objected to his brother Shri Pyare Lal selling his share of the property. He also did not object to the property being rented out and rent being enjoyed by Defendant No. 1 for several years. He further did not object or even make any attempt for more than 35 years to assert his rights in the property. The conduct of the Plaintiff itself shows that the Plaintiff's claim is not bonafide, and that he has been ousted from the property or has sold his share in the property.

21. For all these reasons, the suit is liable to be dismissed and is, accordingly, dismissed. There shall be no orders as to costs.

**PRATHIBA M. SINGH  
JUDGE**

**DECEMBER 13, 2018**

*Rekha*