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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
BEFORE
HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV
+ **RFA 532/2019 & CM APPL. 40280/2024**

Between: -

PROMILA BHAGAT
W/O LATE MAJOR G.D.S. BHAGAT
R/O HOUSE NO. 1309
SECTOR 29, MAHAVIR APARTMENTS
NOIDA, UTTAR PRADESHAPPELLANT

*(Through: Inderbir Singh Alag, Sr. Adv. with Mr.R.S.Bisht,
Advocate.)*

AND

1. VIJAY KUMAR GUPTA (SINCE DECEASED)
TO BE REPRESENTED BY:

1A. NUTAN GUPTA
W/O LATE SHRI VIJAY KUMAR GUPTA
R/O 6/6, SOUTH PATEL NAGAR
NEW DELHI.

1B. ANKIT GUPTA
S/O LATE SH. VIJAY KUMAR GUPTA
R/O 6/6, SOUTH PATEL NAGAR
NEW DELHI.

1C.EKTA GUPTA
D/O LATE SH. VUAY KUMAR GUPTA
R/O 17, CBD, JEEVAN BIMA APARTMENTS
EASTARJUNNAGAR
NEAR KARKARDOOMA COURTS
DELHI - 110 092.RESPONDENTS

Signature Not Verified
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By:MAANAS JAJORIA
Signing Date:13.12.2024
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Signature Not Verified
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By:PURUSHAINDRA
KUMAR KAURAV

(Through: Mr. Manoj Kumar and Mr. Kapil Kaushik, Advocate.)

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Reserved on: 22.10.2024

Pronounced on: 11.12.2024

J U D G M E N T

This is an appeal under Section 96 of the Code of Civil Procedure, 1908 (hereinafter referred to as “CPC”) challenging the judgment and decree dated 20.12.2018 passed by the learned Additional District Judge, West, Tis Hazari Courts, Delhi in Civil Suit no. 11098/16, whereby, the suit of the appellant was dismissed as being barred by limitation and not maintainable.

Brief factual matrix of the case

2. The appellant is the only daughter of late Shri Madan Gopal Trikhya and late Smt. Chanderkanta Sharma. The appellant’s mother was the registered owner of the property in question i.e. property bearing no. 6/6, South Patel Nagar, New Delhi (hereinafter referred to as “suit property”). Due to one reason or another, the mother of the appellant, Smt. Chanderkanta Sharma, started living separately from her husband in Delhi, while the appellant and her father were living in Pune. As per the appellant, Smt. Chanderkanta Sharma died intestate sometime in the year 1964 leaving behind her husband late Shri Madan Gopal Trikhya and the appellant herein as her only legal heirs.

3. On 19.03.1958, an agreement was alleged to have been entered between late Smt. Chanderkanta Sharma and late Muni Lal Gupta, whereby, the suit property was sold to late Muni Lal Gupta for a consideration of Rs 15,000/-.

4. Thereafter, in 1966, late Muni Lal Gupta filed a suit bearing Civil Suit no. 359/1966 against late Smt. Chanderkanta Sharma for specific performance of the aforementioned agreement dated 19.03.1958. The said civil suit was decreed *vide* judgment and decree dated 07.08.1967 and in execution proceedings, the sale deed dated 12.11.1973 was executed in favour of late Muni Lal Gupta.

5. It transpires from the allegations that though since 1966, the appellant and her father, while residing in Pune, had heard rumours about the aforesaid alleged fraudulent transaction but they could not obtain any particulars to file a case. Thereafter, in 1987, when the appellant and her father finally came to Delhi, they eventually filed a civil suit bearing civil suit no. 429/1987 against late Muni Lal Gupta seeking the setting aside of judgment and decree dated 07.08.1967 passed in Civil Suit no. 359/1966 as null and void as it was obtained by playing fraud upon the Court.

6. *Vide* order dated 16.03.1992, the Trial Court had framed the following issues:-

“I) Whether the judgment and decree passed by Shri M.K. Bansal, Sub-Judge, First Class, Delhi in Suit No, 359/1966, under title Muni LaiGupta vs, Chanderkanta Sharma was obtained on the basis of fraud and concealment of facts? OPP

II) Relief”

7. Meanwhile, during the course of the proceedings, the defendant late Muni Lal Gupta had expired and an application under Order XXII Rule 4 CPC was filed by the appellant, however, his legal representatives failed to appear to contest the said suit, and the suit was proceeded *ex-parte*. Thereafter, *vide* judgment and decree dated 20.09.1995, the said civil suit was decreed, and judgment and decree dated 07.08.1967 passed in a civil suit bearing civil suit no. 359/1966

was set aside as nullity in law. On the basis of the said decree, the appellant, on 03.12.1997 filed a suit for recovery of possession of the suit property against the legal representatives of late Muni Lal Gupta.

8. Thereafter, an application under Order IX Rule 13 CPC was moved by one of the legal representatives of the late Muni Lal Gupta for setting aside *ex-parte* judgment and decree dated 20.09.1995 passed in civil suit no. 429/1987. *Vide* order dated 07.11.2002, the said application was allowed and the judgment and decree dated 20.09.1995 passed in civil suit no. 429/1987 was set aside, and thereby the Civil Suit no. 429/1987 was restored to its original position.

9. Aggrieved thereto, the appellant preferred a revision petition bearing C.R.P. no. 230/2003 before this Court.

10. On 04.08.2003, since the judgment and decree dated 20.09.1995 passed in Civil Suit no. 429/1987 was set aside, therefore, the appellant's suit for recovery of possession was also dismissed as it had become infructuous.

11. Meanwhile, *vide* order dated 04.08.2003 two preliminary issues were framed qua limitation and bar provided under Section 34 of the Specific Relief Act, 1963 ("SRA"). Thereafter, on 15.11.2006, the revision petition filed by the appellant bearing C.R.P. no.230/2003 was dismissed by this Court. The appellant challenged the said order before the Supreme Court in Special Leave Petition bearing SLP(C) no. 21840/2007 and *vide* order dated 25.04.2008, the civil suit was adjourned *sine die* with liberty to move an application for revival of the suit once the SLP was decided by the Supreme Court. Thereafter, *vide* order dated 13.09.2010, the said challenge was not sustained and SLP(C) No. 21840/2007 was also dismissed.

12. Pursuant thereto, the respondents herein preferred an application under Section 151 of CPC for the revival of the suit and *vide* order dated 08.07.2011, the civil suit bearing civil suit no. 429/1987 was revived. Thereafter, on 03.10.2015, the appellant moved an amendment application under Order VI Rule 17 CPC seeking a prayer for possession of the suit property. *Vide* order dated 10.06.2016, the said amendment application was allowed.

13. Aggrieved thereto, the respondents filed a C.M.(Main) No. 1096/2016 before this Court. On 17.04.2018, this Court allowed the said C.M.(Main) and set aside the order dated 10.06.2016. The appellant assailed the said order before the Supreme Court in SLP (C) 21253/2018 and the Supreme Court *vide* order dated 17.08.2018 dismissed the said SLP.

14. Thereafter, on 20.12.2018, the Trial Court passed the impugned judgment and decree, whereby, both the preliminary issues were decided in favour of the respondents and the suit was eventually dismissed. Aggrieved thereto, the appellant has preferred the instant first appeal.

Submissions on behalf of the appellant

15. Mr. Inderbir Singh Alag, learned senior counsel appearing on behalf of the appellant, assailed the impugned judgment on two fundamental counts. He submitted that the suit bearing civil suit no. 359/1966 was filed against the dead person.

16. Learned senior counsel further submitted that in the civil suit bearing civil suit no. 429/1987 filed by the appellant, it was categorically averred that late Smt. Chanderkanta Sharma died intestate well before 1966 and since the suit was against a dead person, which is a nullity since its inception, therefore, the decree

dated 07.08.1967 passed in civil suit no. 359/1966 was obtained fraudulently by late Muni Lal Gupta. He, while taking this Court to various paragraphs of the written statement filed by the respondents before the Trial Court in civil suit no. 429/1987, submitted that the averments made in the plaint regarding the date of the death of late Smt. Chanderkanta Sharma was not categorically denied by the respondents herein.

17. To buttress the aforesaid submission, learned senior counsel then placed reliance on the postulates of Order VIII Rules 3, 4, and 5 of the CPC and submitted that the aforesaid Rules provide the manner in which the defendant is required in law to deny a particular fact in the written statement and consequences of failure to follow the procedure on the part of the defendant.

18. On the anvil of the said Rules, learned senior counsel submitted that since the respondents had completely failed to deny the appellant's specific averment regarding the date of death of late Smt. Chanderkanta Sharma, therefore, the same would be tantamount to an admission on the part of the respondent, and hence, the judgment and decree dated 07.08.1967 passed in civil suit no. 359/1966 ought to have been declared as null and void as the suit was filed against the dead person. He placed reliance on the decision of the Supreme Court in the case of *Badat v. East India Trading Co.*¹.

19. Learned senior counsel further assailed the impugned judgment and decree on the ground that if in any case, the Trial Court believed that the factum of date of death of late Smt. Chanderkanta Sharma was not conclusively proven by the appellant then the Trial Court ought to have framed it as a triable issue and given the parties an opportunity to

¹AIR 1964 SC 538.

lead evidence on the said aspect. In no circumstance, the Trial Court, without following the due procedure as prescribed under the provisions of the Indian Evidence Act, 1872, could decide the said issue.

20. Furthermore, learned senior counsel submitted that the Trial Court ought not to have dismissed the suit as barred by limitation as the question of limitation is a mixed question of law and fact. To substantiate this submission, he placed reliance on the decision of the Supreme Court in the case of ***Ramesh B. Desai v. Bipin Vadilal Mehta & Ors.***².

21. The second prong of learned senior counsel's submission rests on the anvil of the bar expressed in the proviso to Section 34 of the SRA. He submitted that the Trial Court erred in dismissing the suit on the ground of the express bar provided under Section 34 of the SRA. He argued that the present suit was not filed for seeking consequential relief of possession as no title was claimed in the said suit. He took this Court through the prayer clause of the plaint and submitted that prayer was only limited to the declaration of the judgment and decree dated 07.08.1967 passed in civil suit no. 359/1966 as null and void on the ground of fraud. Since, there was no prayer sought for the title of the property, therefore, there was no question of praying for the consequential relief of possession. He argued that once the judgment and decree dated 07.08.1967 passed in civil suit no. 359/1966 is declared as null and void, the appellant would have other remedies available in law to seek title and possession of the suit property.

22. Furthermore, learned senior counsel argued that the judgment and decree dated 07.08.1967 passed in civil suit no. 359 of 1966 was

²(2006) 5 SCC 638.

obtained against a dead person and thus, it was nullity since its inception. He argued that in the case of fraud, which vitiates everything, a declaration is enough and no consequential relief needs to be asked for, if the transaction in dispute is a complete nullity and void from the beginning, as there is no need to set aside that which has no existence in the eyes of law. He placed reliance on the judgment of the Madhya Pradesh High Court in the case titled as ***Baldeo Singh v. Gopal Singh***³ to bring force to this argument. Thus, on the anvil of the aforementioned submissions, the learned senior counsel submitted that instant appeal be allowed and the impugned judgment and decree be set aside.

Submissions on behalf of the respondents

23. *Per contra*, Mr. Manoj Sharma, learned counsel appearing on behalf of the respondents vehemently opposed the submissions and argued that the impugned judgment and decree does not suffer from any infirmity. While taking this Court through various paragraphs of the impugned judgment, he submitted that the Trial Court rightly dismissed the suit of the appellant as it was barred by limitation and no consequential relief for possession was prayed for, at the time of institution of the suit.

24. The first prong of the respondents' submissions rested on the anvil that admittedly the original suit was filed in the year 1987 i.e., after the delay of 20 years from the passing of the decree on 07.08.1967. He submitted that as per Article 59 of the Limitation Act, 1963, the limitation to set aside an instrument or decree is three years, from the date when the factum of the impugned decree comes to the

³AIR 1967 MP 221.

knowledge of the appellant. He argued that a bare perusal of the plaint would solidify his contention that the appellant was very well aware of the decree and the only reason for the delay of more than 20 years was the non-furnishing of particulars of the respondents as the appellant was not the resident of Delhi. Based on this stance, he contended that by no prudent stretch of imagination, it can be countenanced that the appellant took more than 20 years to fetch the details of the respondents in order to institute a civil suit.

25. He further submitted that the Trial Court rightly recorded that the date of 14.02.1987 i.e., the date on which the appellant came to Delhi was just an afterthought to make up the lost case on the limitation aspect and bring the suit under the limitation. He further argued that the appellant was well aware of the factum of the decree much before 1987 and still, she chose to slumber over her rights and after the lapse of 20 years, she cannot be permitted under the law to allay any challenge to the decree. Thus, according to him, the Trial Court correctly dismissed the suit as barred by limitation.

26. The second prong of the respondents' submission rested on the edifice of the provisions of Section 34 of the SRA. He argued that the Trial Court rightly dismissed the suit as the consequential relief for possession was not prayed by the appellant. To substantiate his arguments, he took this Court through the checkered history of the present *lis* and submitted that on 03.10.2015, the appellant moved an application under Order VI Rule 17 CPC seeking for an amendment to include the consequential relief for possession. The Trial Court accepted the amendment application; however, this Court *vide* order dated 17.04.2018 in CM(M) 1096/2016 set aside the order amending the prayer. The order dated 17.04.2018 was assailed before the

Supreme Court in SLP, which was also eventually dismissed on 17.08.2018.

27. He argued that the rigors of Section 34 of the SRA are attracted in the present case and the suit simpliciter for declaration of the decree as null and void was not maintainable as the consequential prayer for possession was not claimed by the appellant. He further submits that the *bonafide* aim of Section 34 of the SRA is to avoid the multiplicity of proceedings and should be abided in letter and spirit. To substantiate his submissions, he placed reliance on the decisions of *Vinay Krishna v. Keshav Chandra*⁴ and *Ram Saran v. Ganga Devi*⁵.

28. I have heard the learned counsel appearing for the parties and have also given thoughtful consideration to the rival contentions advanced at Bar.

Analysis

29. The present appeal vividly illustrates a multitude of complex facts, intricately entangled in a web of subtle legal intricacies. This intricate interplay demands careful consideration on the anvil of the judicial precedents and legal doctrines, as issues of fundamental importance emerge in the present case. Before advertng to the analysis of the arguments advanced by both sides, it is pertinent to refer to the rationale of the Trial Court as reflected in the impugned judgment and decree. A bare perusal of the same would indicate that the Trial Court on 04.08.2003 framed two preliminary issues in order to decide the fate of maintainability of the suit. The two preliminary issues as framed by the Trial Court read as under:-

⁴ 1993 Supp (3) SCC 129.

⁵(1973) 2 SCC 60.

“3. Whether the suit is instituted by the plaintiff within the prescribed period of limitation? OPP.

4. Whether the suit of the plaintiff is barred under Section 34 of the Specific Relief Act for omitting the consequential relief of the possession? OPD.”

30. In order to answer the first preliminary issue i.e., the issue on the limitation, the Trial Court referred to the averments made in the plaint as well as called upon the appellant to examine the aforesaid aspect. The Trial Court while ruling that the suit was barred by limitation, noted various inconsistencies from the plaint to exposit that the exact date of death of the appellant's mother was not known to the appellant. The Trial Court pointed out from various averments of the plaint that the death of the appellant's mother was mentioned in the year 1964 in paragraph no. 8 (a), 1966 in paragraph no. 9, 1964-65 in paragraph no. 10 of the plaint to conclude that there are glaring inconsistencies in the appellant's stand with respect to the date of death of her mother. Furthermore, the Trial Court recorded that the appellant had been hearing about the judgement and decree dated 07.08.1967 since 1967, however, when the appellant eventually visited Delhi in the year 1987, the cause of action further arose and then they collected all the particulars and requisite documents and subsequently, filed the suit. Moreover, the Trial Court also called upon the appellant to inquire about the date of knowledge of the judgement and decree dated 07.08.1967, who said that she came to know for the first time about the said decree in the year 1982.

31. Based on the aforementioned rationale, the Trial Court decided the first issue against the appellant and held that for the 20 years from the date of passing of the decree i.e., 1962 to the filing of the suit in the year 1987, the appellant chose to slumber over her rights and thus,

the suit is barred by limitation. For the sake of clarity, the rationale of the Trial Court in deciding the first preliminary issue is extracted as under:-

“13. ...From the entire reading of the plaint, it can be culled out that since 1967, plaintiffs have been hearing about the alleged fraudulent transactions but could not gather complete particulars to sue defendant. However, plaintiff reached Delhi on 14.02.1987 and immediately in span of 10 days, was able to collect all the information and filed suit on 23.02.1987. Plaintiffs have not mentioned any date in the entire plaint. Plaintiffs have not mentioned as to when for the first time they heard rumours about the fraudulent transaction and specific dates when they had made efforts to find out details of the same. Only at the end of paragraph no. 13, plaintiffs mentioned date of 14.02.1987 stating that they visited Delhi on said date and found about fraudulent transaction. A bare perusal of the said portion of the paragraph shows that date has been mentioned later on to filling the blanks. It appears that said date has been mentioned only to bring the suit within limitation as an after thought. As during argument, plaintiff no.2 who was present before the court was asked about the date when she first time heard about the alleged fraudulent act of obtaining of decree and execution of sale deed by the defendant. Plaintiff no.2 replied that she came to know about 'the same for the first time in the year 1982 and since then she is searching for material particulars. Even though the facts stated in the plaint shows that plaintiff was aware about Sale Deed and judgment. However, even if it is taken that all the particulars were obtained by plaintiff on 14.02.1987 then also as per averments made in the plaint, plaintiff was aware about existence of transaction i.e. decree and Sale Deed much prior to 14.02.1987. Plaintiff no.2 herself has stated in the court that she gathered knowledge about decree and sale deed in the year 1982. The provisions of Limitation Act has been made to curb litigation by such litigants who sleep over their rights over period of time. If the litigant is allowed to sue after a lapse of 20 years despite being aware about existence of document just because he/she could not act promptly to gather necessary information then purpose of Limitation Act will be frustrated. Plaintiff cannot buy limitation only by pleading in plaint that for period of 20 years she remained busy and did not have time to visit Delhi and gather formation and when they got time they visited Delhi and filed present suit after gathering informations. No averment is made in the plaint as to what made plaintiff visit Delhi in February 1987 to gather information about plaint and why such steps were not taken earlier. Hence, from the contents of plaint, it is clear that the plaintiff was aware about decree

dated 07.08.1967 and Sale Deed dated 12.11.1973 much prior to filing of the suit and therefore, suit is barred by limitation. Hence, present issue is decided against plaintiff and in favour of defendant.”

32. Thereafter, while examining the second issue i.e., the bar provided under Section 34 of the SRA, the Trial Court held that in the suit, the appellant only sought for declaration of judgment and decree dated 07.08.1967 as null and void. It held that as on the date of institution of the suit, the respondents were in possession of the property, therefore, the appellant, while instituting the suit, apart from seeking mere declaration ought to have prayed for the consequential relief of possession. The Trial Court ruled that the bar of Section 34 of the SRA would be applicable in the present case as the consequential relief of possession was not prayed while instituting the suit. Thus, the Trial Court dismissed the suit being barred by limitation and not maintainable as per Section 34 of the SRA. For the sake of clarity, the relevant extract of the impugned decision, wherein, the issue of Section 34 of SRA was decided is reproduced as under:-

“17. On date of institution of the suit, defendant was in possession of the suit property. Plaintiffs have claimed themselves as co-owners of the suit property as suit property belong to their mother who died intestate. Hence, in case, decree of declaration was passed in favour of plaintiffs, then plaintiffs would have been entitled for recovery of possession of the suit property. Said relief was available with plaintiffs which ought to have been prayed by plaintiff at the time of institution of the suit. Infact, plaintiffs have also moved an application under Order VI Rule 17, CPC seeking amendment of the plaint to add said prayer in the plaint. Said application was dismissed and entire conduct of the plaintiff was observed by the Hon'ble High Court in order dated 17.04.2018. As plaintiff has not sought consequential relief of possession, hence, present suit for declaration alone is not maintainable. Present issue is decided against plaintiff and in favour of defendant.18. In view of the above discussion, present suit is dismissed being barred by

limitation as well as being not maintainable as per Section 34 of the Specific Relief Act.”

33. This Court, while exercising the appellate jurisdiction under Section 96 of the CPC, shall examine the impugned order on the fulcrum of two fundamental issues as exposited above i.e., the issue of limitation and bar of Section 34 of the SRA.

34. Before dealing with the issue-wise analysis of the impugned order, it is essential to first delineate the contours of the regular first appeal as outlined in Section 96 of the CPC. This provision establishes a critical framework for the Appellate Court, enabling a comprehensive assessment of the lower Court’s judgment. Understanding this framework is fundamental, as it defines the parameters within which the Appellate Court evaluates both the factual and legal aspects of the case.

35. This Court in the case of ***Seema Bansal v. Durga Dass Bansal***⁶, has considered the scope of the regular first appeal and held that under the first appeal, the Appellate Court may reexamine the witness and can also call for the records of the case. The relevant paragraphs of the said decision read as under:-

“33. Before advertng to the merits of the case at hand, the Court deems it significant to refer to the case of MalluruMallappa v. Kuruvathappa to get a flavour of law relating to the scope of a first appeal under Section 96 of the CPC. In the said case, the Supreme Court noted that the expression “appeal” has not been defined in CPC. Black’s Law Dictionary (7th Edn.) defines an appeal as “a proceeding undertaken to have a decision reconsidered by bringing it to a higher authority”. Perhaps, it is a judicial examination of the decision by a higher court of the decision of a subordinate court to rectify any possible error in the order under appeal.

⁶2024 SCC OnLine Del 5440.

34. Further, reliance is placed on the decision in the case of Hari Shankar v. Rao Girdhari Lal Chowdhury, wherein, it was observed that a first appeal carries with itself a right of rehearing on law as well as on facts. Thus, it is a settled position of law that an appeal is a continuation of the proceedings of the original court and thus, the first appellate court is required to address itself on all the issues and decide the case by giving reasons. The court of first appeal must record its findings only after dealing with all the issues of law as well as fact and with the evidence, oral as well as documentary, led by the parties. The judgment of the first appellate court must display conscious application of mind and record findings supported by reasons on all issues and contentions. [See: Santosh Hazari v. Purushottam Tiwari, Madhukar v. Sangram, B.M. Narayana Gowda v. Shanthamma, H.K.N. Swami v. Irshad Basith and Sri. Raja Lakshmi Dyeing Works v. Rangaswamy Chettiar]

35. Accordingly, most of the things which may be undertaken by the Trial Court may also be undertaken in the Regular First Appeal, including but not limited to determining a case, remanding a case, framing issues and referring them to trial, to take on record or to direct to take on record additional evidence. In light of the scope of a first appeal, as delineated in Section 96 and Section 107 of the CPC, this Court deems it fit to determine the case.”

36. Therefore, it is a settled exposition of law that an appeal is deemed to be a continuation of the original proceeding and in the first appeal, all possible avenues of re-examination of the case are available to the Appellate Court including, but not limited to, determining a case, remanding a case, framing issues and referring them to trial, to take on record or to direct to take on record additional evidence. The scope of a first appeal under Section 96 of the CPC is in stark contrast with the scope of the second appeal as envisaged under Section 100 of the CPC, whereas, the former permits a comprehensive re-examination of the issues arising in the case, both factual and legal, however, the latter is restricted to the examination of substantial questions of law only.

37. After taking a brief detour of the Appellate Court's scope in relation to the challenge presented against the impugned order, this Court will now undertake a thorough review of the impugned judgment. This analysis will revolve around the axis of two key preliminary issues as previously articulated, which serve as the foundation for impugned judgment. By focusing on these two pivotal points, which were framed as preliminary issues by the Trial Court, the Court aims to analyze the impugned judgment and decree.

On the issue of limitation

38. The Trial Court, while dismissing the appellant's suit for declaration of setting aside the judgment and decree dated 07.08.1967, held that the suit was barred by limitation. While deciding this issue, the Trial Court placed reliance on the inconsistent stand taken by the appellant in the plaint. Surprisingly, the Trial Court also called upon the appellant during the course of arguments and inquired about as to when the appellant came to know about the alleged fraudulent transaction.

39. At this juncture, it is pertinent to note that it is settled enunciation of law that the question of limitation is a mixed question of fact and law. The Supreme Court in the case of ***Ramesh B. Desai*** has held that when the question of limitation is posed in a suit, it is not just merely the question of fact, rather it is the mixed question of fact and law. A plea of limitation cannot be decided as an abstract principle of law divorced from facts, as in every case, the starting point of limitation has to be ascertained which is entirely a question of fact. The relevant extracts of the said decision read as under :-

"16. A plea of limitation cannot be decided as an abstract principle of law divorced from facts as in every case the starting point of limitation has to be ascertained which is entirely a

question of fact. A plea of limitation is a mixed question of law and fact. The question whether the words "barred by law" occurring in Order VII Rule 11(d) CPC would also include the ground that it is barred by law of limitation has been recently considered by a two Judge Bench of this Court to which one of us was a member (Ashok Bhan J.) in Civil Appeal No. 4539 of 2003 (Balasaria Construction Pvt. Ltd. vs. Hanuman Seva Trust and others) decided on 8.11.2005 and it was held: -

"After hearing counsel for the parties, going through the plaint, application under Order 7 Rule 11(d) CPC and the judgments of the trial court and the High Court, we are of the opinion that the present suit could not be dismissed as barred by limitation without proper pleadings, framing of an issue of limitation and taking of evidence. Question of limitation is a mixed question of law and fact. Ex facie in the present case on the reading of the plaint it cannot be held that the suit is barred by time."

40. A similar view was taken by the Supreme Court in the case of ***Narne Rama Murthy v. Ravula Somasundram and Ors.***⁷, wherein, the question of limitation was also an inextricably mixed question of law and fact, and the Court held that the bar of limitation could not be decided without considering the related facts giving rise to such question. The Court in the said decision held as under:-

"We also see no substance in the contention that the Suit was barred by limitation and that the Courts below should have decided the question of limitation. When limitation is the pure question of law and from the pleadings itself it becomes apparent that a suit is barred by limitation, then, of course, it is the duty of the Court to decide limitation at the outset even in the absence of a plea. However, in cases where the question of limitation is a mixed question of fact and law and the Suit does not appear to be barred by limitation on the face of it, then the facts necessary to prove limitation must be pleaded, an issue raised and then proved. In this case the question of limitation is intricately linked with the question whether the Agreement to Sell was entered into on behalf of all and whether possession was on behalf of all. It is also linked with the plea of adverse possession. Once on facts it has been found that the purchase

⁷2005 (6) SCC 614.

was on behalf of all and that the possession was on behalf of all, then, in the absence of any open, hostile and overt act, there can be no adverse possession and the Suit would also not be barred by limitation. The only hostile act which could be shown was the advertisement issued in 1989. The Suit filed almost immediately thereafter.”

41. At this juncture, it is elementary to refer to the decision of the Supreme Court in the case of **Major S.S. Khanna v. Brig. F.J. Dillon**⁸, wherein, the Court held that where both the issues of fact and law are involved, the Trial Court shall try the issues of law first, leaving the issue of fact to be decided at a later stage. However, the Court expressed a caution that the CPC does not confer the jurisdiction on Courts to deal with a mixed question of fact and law i.e., limitation in the instant case, as a preliminary issue. The relevant extracts of the case read as under:-

“Under Order 14 Rule 2, Code of Civil Procedure, where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined. The jurisdiction to try issues of law apart from the issues of fact may be exercised only where in the opinion of the Court the whole suit may be disposed of on the issues of law alone, but the Code confers no jurisdiction upon the Court to try a suit on mixed issues of law and fact as preliminary issues. Normally all the issues in a suit should be tried by the Court ; not to do so, especially when the decision on issues even of law depend upon the decision of issues of fact, would result in a lop-sided trial of the suit.”

42. In **Ramesh B Desai**, the Supreme Court in paragraph no. 12 has held that the mixed questions of facts and law should not be treated as

⁸1963 SCC OnLine SC 72

the preliminary issue. The relevant extract of the said decision reads as under:-

“12. Sub-rule (2) of Order XIV Rule 2 CPC lays down that where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to (a) the jurisdiction of the Court, or (b) a bar to the suit created by any law for the time being in force...Though there has been a slight amendment in the language of Order XIV Rule 2 CPC by the Amending Act, 1976, but the principle enunciated in the above quoted decision still holds good and there can be no departure from the principle that the Code confers no jurisdiction upon the Court to try a suit on mixed issue of law and fact as a preliminary issue and where the decision on issue of law depends upon decision of fact, it cannot be tried as a preliminary issue.”

43. The Supreme Court in the decision of **Nusli Neville Wadia v. Ivory Properties**⁹, held that in a case where the question of limitation can be decided based on admitted facts, it can be decided as a preliminary issue under Order XIV Rule 2(2)(b) of CPC. However, once the facts are disputed about limitation, the determination of the question of limitation cannot be made under Order XIV Rule 2(2) of the CPC as a preliminary issue or any other such issue of law which requires examination of the disputed facts. In case of dispute as to the facts, it is necessary to determine the facts to give a finding on a question of law. However, such a question cannot be decided as a preliminary issue. The Court further held that in a case, wherein, the question of jurisdiction also depends upon the proof of facts which are disputed, such issues cannot be decided as the preliminary issue. Moreover, if the question of law is dependent upon the outcome of the investigation of facts, then such question of law also cannot be

⁹(2020) 6 SCC 557

decided as a preliminary issue, is a settled proposition of law either before amendment of the CPC and post amendment in the year 1976.

The relevant extracts of the said decision read as under:-

“51. ... As per Order XIV Rule 1, issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other. The issues are framed on the material proposition, denied by another party. There are issues of facts and issues of law. In case specific facts are admitted, and if the question of law arises which is dependent upon the outcome of admitted facts, it is open to the Court to pronounce the judgment based on admitted facts and the preliminary question of law under the provisions of Order XIV Rule 2. In Order XIV Rule 2(1), the Court may decide the case on a preliminary issue. It has to pronounce the judgment on all issues. Order XIV Rule 2(2) makes a departure and Court may decide the question of law as to jurisdiction of the Court or a bar created to the suit by any law for the time being in force, such as under the Limitation Act.

52. In a case question of limitation can be decided based on admitted facts, it can be decided as a preliminary issue under Order XIV Rule 2(2)(b). Once facts are disputed about limitation, the determination of the question of limitation also cannot be made under Order XIV Rule 2(2) as a preliminary issue or any other such issue of law which requires examination of the disputed facts. In case of dispute as to facts, is necessary to be determined to give a finding on a question of law. Such question cannot be decided as a preliminary issue. In a case, the question of jurisdiction also depends upon the proof of facts which are disputed. It cannot be decided as a preliminary issue if the facts are disputed and the question of law is dependent upon the outcome of the investigation of facts, such question of law cannot be decided as a preliminary issue, is settled proposition of law either before the amendment of CPC and post amendment in the year 1976.

53. The suit/application which is barred by limitation is not a ground of jurisdiction of the court to entertain a suit. If a plea of adverse possession has been taken under Article 65 of the Limitation Act, in case it is successfully proved on facts; the suit has to be dismissed.

However, it is not the lack of the jurisdiction of the Court that suit has to be dismissed on the ground of limitation, but proof of adverse possession for 12 years then the suit would be barred by limitation such question as to limitation cannot be decided as a preliminary issue.

55. Reliance has been placed on the provisions of Section 3 of the Limitation Act to submit that the Court cannot proceed with the suit which is barred by limitation although limitation has not been set up as a defence. No doubt about it that Section 3 of the Act provides that subject to the provisions contained in Section 4 and 24 of the Limitation Act, every suit instituted, appeal preferred, and the application made after the prescribed period shall be dismissed, it nowhere provides that Court has no jurisdiction to deal with the matter. Until and unless Court has the jurisdiction, it cannot proceed to dismiss it on the ground of limitation under Section 3."

44. Thus, it is palpably clear that in cases where disputed facts arise on the aspect of limitation, and the determination of the question of limitation requires a mixed analysis of law and facts, the Court should not frame such issue as a preliminary issue. In the instant case, the date of the death of the appellant's mother is a disputed fact, which is incumbent to decide the question of limitation. Equally disputed is the date of knowledge of the decree sought to be challenged by the appellant, which is also crucial for the determination of the limitation period. Thus, in light of the peculiar factual scenario, the Trial Court ought not to have treated the issue of limitation as a preliminary issue. For, the determination of limitation was not based on patently clear facts or admitted facts and was contingent upon the factual determination of disputed facts therefore, it was not open for the Trial Court to render a summary finding on the aspect of limitation, without stepping into its core function of appreciation of evidence by sifting and weighing the material placed before the Court.

45. It is crystal clear from the bare perusal of the impugned order itself, that the Trial Court itself was not convinced with the averments made in the plaint due to the inconsistent stand taken by the appellant regarding the date of death of her mother. Thus, in order to dissuade

any clouds of suspicion, it had called upon the appellant during the course of arguments.

46. At this very stage, the Trial Court committed an error by not following the due procedure of examination of the witness as sanctioned under the scheme of the CPC. It is pertinent to note that if the Trial Court was so concerned about the issue of limitation, in light of the disputed factual matrix, that it called the appellant in open court to inquire about the said aspect, it ought not to have made it a preliminary issue, rather ought to have followed the proper procedure by summoning the witness, recording the evidence supported by an affidavit under oath and also giving a due opportunity of cross-examination to the respondents.

47. At this point, it is pertinent to refer to the salient features enshrined in the CPC for recording evidence in civil cases. The procedural commitment lies at the core of the judicial process and even if the same is used to cause delays or inconvenience at times, it must not deter the Court from its commitment to the procedure. The procedure surrounding the recording of evidence enables the Court to delicately delve into the core issues, while giving due opportunity to the other side to controvert the statements made by the witness.

48. Order XVI of the CPC clearly delineates the procedure to be followed in the summoning and attendance of witnesses in civil cases. Order XVI Rule 2 of the CPC clearly posits that any party desirous of obtaining any summons for the attendance of any person shall file an application before the Court stating the reason and purpose for which the witness is proposed to be examined. Furthermore, Order XVI Rule 3 of the CPC also gives the power to the Court to summon any

witness, which was not even summoned by the parties earlier after exhibiting sufficient cause.

49. Moreover, Rules 8 to 10 of Order XVI of the CPC also depict the entire procedure ranging from the manner of service of summons to the consequences of failure to comply with the summons issued. Additionally, Order XVI Rule 14 of the CPC gives the power to the Court to call any person on its own accord, even a stranger to the suit, as a witness to give evidence or to produce any document in his possession. Consequently, Order XVI Rule 20 of the CPC also enlists the consequence of the refusal of a party to give evidence in Court, enabling the Court to pronounce judgment against him or pass any order in relation to the suit. For the sake of convenience, the relevant rules of CPC, as enunciated above, are reproduced as under:-

“ORDER XVI

Summoning and Attendance of Witnesses

[1. List of witnesses and summons to witnesses.—(1) On or before such date as the Court may appoint, and not later than fifteen days after the date on which the issues are settled, the parties shall present in Court a list of witnesses whom they propose to call either to give evidence or to produce documents and obtain summonses to such persons for their attendance in Court.

(2) A party desirous of obtaining any summons for the attendance of any person shall file in Court an application stating therein the purpose for which the witness is proposed to be summoned.

(3) The Court may, for reasons to be recorded, permit a party to call, whether by summoning through Court or otherwise, any witness, other than those whose names appear in the list referred to in sub-rule (1), if such party shows sufficient cause for the omission to mention the name of such witness in the said list.

(4) Subject to the provisions of sub-rule (2), summonses referred to in this rule may be obtained by the parties on an application to the Court or to such officer as may be appointed by the 2 [Court in this behalf within five days of presenting the list of witnesses under sub-rule (1).]

6. Summons to produce document.—Any person may be summoned to produce a document, without being summoned to

give evidence; and any person summoned merely to produce a document shall be deemed to have complied with the summons if he causes such document to be produced instead of attending personally to produce the same.

7. Power to require persons present in Court to give evidence or produce document.—Any person present in Court may be required by the Court to give evidence or to produce any document then and there in his possession or power.

14. Court may of its own accord summon as witnesses strangers to suit.—Subject to the provisions of this Code as to attendance and appearance and to any law for the time being in force, where the Court at any time thinks it necessary 1 [to examine any person, including a party to the suit] and not called as a witness by a party to the suit, the Court may, of its own motion, cause such person to be summoned as a witness to give evidence, or to produce any document in his possession, on a day to be appointed, and may examine him as a witness or require him to produce such document.

20. Consequence of refusal of party to give evidence when called on by Court.—Where any party to a suit present in Court refuses, without lawful excuse, when required by the Court, to give evidence or to produce any document then and there in his possession or power, the Court may pronounce judgment against him or make such order in relation to the suit as it thinks fit.

21. Rules as to witnesses to apply to parties summoned.—Where any party to a suit is required to give evidence or to produce a document, the provisions as to witnesses shall apply to him so far as they are applicable.”

50. Furthermore, Order XVIII Rule 4 CPC states that the examination-in-chief of a witness shall be on affidavit and the procedure of taking affidavit is duly enumerated in Order XIX of the CPC. Moreover, Section 4 of the Oaths Act, 1969 clearly stipulates that Oaths or affirmations shall be made by the following persons, namely:-

(a) all witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before

any Court or person having by law or consent of parties authority to examine such persons or to receive evidence;

(b) interpreters of questions put to, and evidence given by, witnesses; and

(c) jurors.

51. In the present case, when the Trial Court called upon the appellant during the course of arguments to ascertain the date of knowledge of judgement and decree dated 07.08.1967, neither an affidavit was tendered by the appellant nor the oath was administered to the appellant.

52. The adherence to proper procedural standards as established by law is more vital for resolving issues that involve a mixed question of fact and law, which could not be treated as preliminary issues. It is essential to note that while preliminary issues can often be determined through a straightforward reading of the plaint, mixed questions of fact and law require a more nuanced approach. In such cases, it is imperative to follow the procedural guidelines set forth in the law. This ensures a thorough examination of the complexities involved, allowing for a fair and just resolution of the matter at hand. By adhering to these procedures, the Court can accurately address the intricacies of the case and uphold the integrity of the judicial process.

53. The discussion as exposited above clearly postulates that the issue of limitation in the present case is a mixed question of fact and law and ought not to be treated as a preliminary issue in light of the disputed facts of the present case. The Supreme Court in the case of *Sathyanath v. Sarojamani*¹⁰, held that preliminary issues can be those where no evidence is required and on the basis of reading of the plaint

¹⁰(2022) 7 SCC 644.

or the applicable law, if the jurisdiction of the Court or the bar to the suit is made out, the Court may decide such issues with the sole objective for the expeditious decision. The relevant paragraph of the said decision reads as under:-

“21. The provisions of Order 14 Rule 2 are part of the procedural law, but the fact remains that such procedural law had been enacted to ensure expeditious disposal of the lis and in the event of setting aside of findings on preliminary issue, the possibility of remand can be avoided, as was the language prior to the unamended Order 14 Rule 2. If the issue is a mixed issue of law and fact, or issue of law depends upon the decision of fact, such issue cannot be tried as a preliminary issue. In other words, preliminary issues can be those where no evidence is required and on the basis of reading of the plaint or the applicable law, if the jurisdiction of the court or the bar to the suit is made out, the court may decide such issues with the sole objective for the expeditious decision. Thus, if the court lacks jurisdiction or there is a statutory bar, such issue is required to be decided in the first instance so that the process of civil court is not abused by the litigants, who may approach the civil court to delay the proceedings on false pretext.”

54. Furthermore, the Supreme Court in the case of **A. Shanmugam v. Ariya Kshatriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam**¹¹, held that due to the huge pendency of cases, at times, Courts may arrive at an erroneous conclusion because of false pleas, claims, defences and irrelevant facts. However, the Court cautions that at a later stage, when the truth is discovered, it is the duty of the Court to take appropriate remedial and preventive steps so that no one should derive benefits or advantages by abusing the process of law. The relevant paragraph of the said decision reads as under:-

“39. Our courts are usually short of time because of huge pendency of cases and at times the courts arrive at an erroneous

¹¹(2012) 6 SCC 430.

conclusion because of false pleas, claims, defences and irrelevant facts. A litigant could deviate from the facts which are liable for all the conclusions. In the journey of discovering the truth, at times, this Court, at a later stage, but once discovered, it is the duty of the court to take appropriate remedial and preventive steps so that no one should derive benefits or advantages by abusing the process of law. The court must effectively discourage fraudulent and dishonest litigants.”

55. After perusing the judicial precedents as expounded above, at this juncture, it is pertinent to have a brief sojourn over the facts of the case. After the perusal of the plaint, in paragraph no. 1, it is stated that late Smt. Chanderkanta Sharma died intestate well before 1966. Subsequently, in paragraph no. 5 of the plaint, the date of the death of late Smt. Chanderkanta Sharma is left blank. Thereafter, in paragraph 8-A of the plaint, it is stated that the year of death of late Smt. Chanderkanta Sharma was 1964-65.

56. Furthermore, in the written statement filed by the respondents, there is no categorical denial of the specific averment regarding the date of death of late Smt. Chanderkanta Sharma and moreover, they have also failed to mention the exact date of death of late Smt. Chanderkanta Sharma. Thus, from the conjoint reading of the plaint and written statement, it is conspicuously evident that the factum of the date of death of late Smt. Chanderkanta Sharma was not clearly evident from the averments made in the plaint or written statement.

57. Furthermore, regarding the date of knowledge of the decree dated 07.08.1967, it was averred in the plaint that though the appellant heard the rumours about the said decree but could not file the said suit as she did not have the requisite particulars of the respondents. Thereafter, when in 1987, the appellant and her father came to Delhi, they collected the particulars of the respondents and eventually filed

the suit.

58. Furthermore, the appellant has also relied upon the averments made in the counter-affidavit filed by the respondents in SLP(C) 21840/2007, wherein, it has been categorically stated by the respondents that late Smt. Chandrakanta Sharma expired at the end of the year 1967. However, since this counter affidavit was not brought on record before the Trial Court, therefore, this Court as the first Appellate Court, while exercising the jurisdiction under Section 96 of the CPC, is not inclined to consider the same.

59. Nonetheless, irrespective of the averments made in the aforesaid counter affidavit, a bare perusal of the plaint and written statement clearly stipulates that the factum of neither the date of death of late Smt. Chanderkanta Sharma nor the date of knowledge of decree dated 07.08.1967 can be clearly evidenced or safely inferred.

60. Thus, on the edifice of the exposition of law as deduced from judicial precedents analysed above, it is palpably evident that if the issue of limitation is engrossed in the complicated web of facts and law, in such an atypical scenario, the Court should follow the due procedure and not treat the said issue as a preliminary issue. The non-adherence to such procedure, especially in determining the question of limitation aspect, which is intertwined in the web of both facts and law, is an error committed by the Trial Court while holding that the suit is barred by limitation. In the peculiar factual scenario, where disputed questions on the pertinent factual aspects of the suit exist and the answers to such questions will have a fundamental bearing over the outcome of the entire suit, the Trial Court ought to have followed the due procedure as enshrined in law. The ultimate aim and objective of following such procedure, especially in the complicated web of facts, is not only to help the Trial Court to arrive at a correct solution

but also to ultimately put a quietus to the never-ending litigation which may emerge from this unresolved web of factual divergences. Before holding that the suit is barred by limitation, the Trial Court should have correctly ascertained the exact date of cause of action and in the absence of that, the Trial Court's rationale suffers from infirmities and cannot be sustained.

61. Thus, on the conspectus of the above discussion, it is crystal clear that in light of the factual matrix, the Trial Court while deciding the question of limitation ought not to have considered it a preliminary issue and rather followed the proper procedure as enshrined in the provisions of the CPC and the Indian Evidence Act, 1872. In the absence of due procedure, the Trial Court's finding that the suit is barred by the limitation holds no ground and deserves to be set aside. Thus, on the first count, the rationale exhibited in the impugned judgment and decree is held to be perverse and devoid of merit.

On the issue of the bar of Section 34, Specific Relief Act

62. As outlined previously, the reasoning of the Trial Court is based on two key pillars: the issue of limitation and the bar established by Section 34 of the SRA. For the appellant to successfully assail the impugned order, it is essential to navigate both these hurdles.

63. Having already addressed and overcome the first hurdle concerning the issue of limitation, this Court shall now examine the second issue. To fully understand this challenge, it is crucial to examine the salient features of Section 34 of the SRA.

64. Section 34 of the SRA reads as under:-

*“34. Discretion of court as to declaration of status or right.—
Any person entitled to any legal character, or to any right as to
any property, may institute a suit against any person denying, or*

interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Explanation.—A trustee of property is a “person interested to deny” a title adverse to the title of some one who is not in existence, and whom, if in existence, he would be a trustee.”

65. A bare perusal of Section 34 of the SRA clearly stipulates that while praying for the relief for declaration, the consequential relief must be prayed in the suit. The Supreme Court in the case of **Venkataraja v. Vidyane Doureradjaperumal**¹², after following a catena of decisions, examined the scope of Section 34 of the SRA and observed that the mere purpose of this Section is to avoid multiplicity of proceedings and also the loss of revenue of court fees. The Court further held that mere declaratory relief of title is not sufficient and consequential relief of possession ought to have been prayed in suit. The relevant extracts of the said decision read as follows:-

“21. In Vinay Krishna v. Keshav Chandra [1993 Supp (3) SCC 129] , this Court while dealing with a similar issue held : (SCC p. 132, para 14)

“14. ... It is also now evident that she was not in exclusive possession because admittedly Keshav Chandra and Jagdish Chandra were in possession. There were also other tenants in occupation. In such an event the relief of possession ought to have been asked for. The failure to do so undoubtedly bars the discretion of the Court in granting the decree for declaration.”

(emphasis added)

23. The very purpose of the proviso to Section 34 of the 1963 Act, is to avoid the multiplicity of the proceedings, and also the loss of revenue of court fees. When the Specific Relief Act, 1877

¹²(2014) 14 SCC 502.

was in force, the 9th Report of the Law Commission of India, 1958, had suggested certain amendments in the proviso, according to which the plaintiff could seek declaratory relief without seeking any consequential relief, if he sought permission of the court to make his subsequent claim in another suit/proceedings. However, such an amendment was not accepted. There is no provision analogous to such suggestion in the 1963 Act.

24. A mere declaratory decree remains non-executable in most cases generally. However, there is no prohibition upon a party from seeking an amendment in the plaint to include the unsought relief, provided that it is saved by limitation. However, it is obligatory on the part of the defendants to raise the issue at the earliest. (Vide *Parkash Chand Khurana v. Harnam Singh* [(1973) 2 SCC 484 : AIR 1973 SC 2065] and *State of M.P. v. Mangilal Sharma* [(1998) 2 SCC 510 : 1998 SCC (L&S) 599].)

25. In *Muni Lal v. Oriental Fire & General Insurance Co. Ltd.* [(1996) 1 SCC 90] this Court dealt with declaratory decree, and observed that : (SCC p. 93, para 4)

“4. ... mere declaration without consequential relief does not provide the needed relief in the suit; it would be for the plaintiff to seek both the reliefs. The omission thereof mandates the court to refuse the grant of declaratory relief.”

26. In *Shakuntla Devi v. Kamla* [(2005) 5 SCC 390], this Court while dealing with the issue held : (SCC p. 399, para 21)

“21. ... a declaratory decree simpliciter does not attain finality if it has to be used for obtaining any future decree like possession. In such cases, if suit for possession based on an earlier declaratory decree is filed, it is open to the defendant to establish that the declaratory decree on which the suit is based is not a lawful decree.”

66. In the case of *Union of India v. Ibrahim Uddin*¹³, the Supreme Court reiterated that the claim for the relief of declaration simpliciter would not be sufficient without seeking the consequential relief. The relevant paragraphs of the said decision reads as under:-

¹³(2012) 8 SCC 148.

“55. The section provides that courts have discretion as to declaration of status or right, however, it carves out an exception that a court shall not make any such declaration of status or right where the complainant, being able to seek further relief than a mere declaration of title, omits to do so.

56. In Ram Saran v. Ganga Devi [(1973) 2 SCC 60 : AIR 1972 SC 2685] this Court had categorically held that the suit seeking for declaration of title of ownership but where possession is not sought, is hit by the proviso of Section 34 of the Specific Relief Act, 1963 (hereinafter called “the Specific Relief Act”) and, thus, not maintainable. In Vinay Krishna v. Keshav Chandra [1993 Supp (3) SCC 129 : AIR 1993 SC 957] this Court dealt with a similar issue where the plaintiff was not in exclusive possession of property and had filed a suit seeking declaration of title of ownership. Similar view has been reiterated observing that the suit was not maintainable, if barred by the proviso to Section 34 of the Specific Relief Act. (See also Gian Kaur v. Raghubir Singh [(2011) 4 SCC 567 : (2011) 2 SCC (Civ) 366] .)

57. In view of the above, the law becomes crystal clear that it is not permissible to claim the relief of declaration without seeking consequential relief.

58. In the instant case, the suit for declaration of title of ownership had been filed, though Respondent 1-plaintiff was admittedly not in possession of the suit property. Thus, the suit was barred by the provisions of Section 34 of the Specific Relief Act and, therefore, ought to have been dismissed solely on this ground. The High Court though framed a substantial question on this point but for unknown reasons did not consider it proper to decide the same.”

67. The Supreme Court in **Arulmigu Chokkanatha Swamy Koil Trust v. Chandran**¹⁴, while reversing the High Court’s decree, also observed that because of Section 34 of the SRA, the plaintiff not being in possession and claiming only declaratory relief, ought to have claimed the relief of recovery of possession. It was held that the Trial Court rightly dismissed the suit on the basis that the plaintiff had filed

¹⁴ (2017) 3 SCC 702

a suit for a mere declaration without relief for recovery, which is clearly not maintainable.

68. In the instant case, it is the contention of the respondents that, the appellant has only prayed for declaration of judgment and decree being null and void, therefore, the Trial Court rightly dismissed the suit as the consequential prayer of possession was not claimed by the appellant.

69. In order to examine this issue as well, it is pertinent to examine the peculiar factual scenario canvassed in the present case. It is the case of the appellant that the judgement and decree dated 07.08.1967 was obtained by playing fraud upon the Court as the suit was initiated against the dead person. According to the appellant, the Trial Court, without determining the exact date of death of the appellant's mother, could not examine the applicability of the bar of Section 34 of the SRA as a decree obtained by fraud is *void-ab-initio* and not voidable.

70. At this juncture, it is pertinent to refer to the prayer of civil suit no. 429/1987, which reads as under:-

- a) *A decree be passed in favour of the plaintiff and against the defendant declaring that the judgment and decree dated 7.8.1967 in suit No.359 of 1966 passed by the court of Shri M.K.Bansal, Sub Judge I Class, Delhi, under title "Muni Lai Gupta Vs. Chanderkanta Sharma" is a nullity at law and was passed by fraud upon the court and the same be set aside; being a decree against a dead person*
- b) *An appropriate decree/order be passed nullifying and declaring as redundant the effect of the Impugned decree dated 7.8.1967 challenged vide the instant suit and the effect and operation of the sale deed dated 12.11.1973 executed exparte and in the absence of the Vendor before the Sub Registrar of Assurances, pertaining to the subject matter of the suit i.e. 6/6, South Patel Nagar, New Delhi;*
- c) *Such other and further relief may also be granted to the plaintiffs as this learned court may deem appropriate under the circumstances;*

d) Costs of the suit he also awarded to the plaintiffs.

71. The above extracted prayer clause is the genesis of the entire dispute which revolves around the proviso to Section 34 of the SRA. A bare perusal of the prayer clause would clearly posit that the appellant filed the said civil suit for setting aside the judgment and decree dated 07.08.1967 in civil suit no. 359/1966 as null and void. Furthermore, the appellant prayed for nullifying and declaring as redundant the effect and operation of the said decree and consequential sale deed dated 12.11.1973 which is executed ex-parte and in the absence of the vendor before the Sub Registrar of Assurances, pertaining to the subject matter of the suit property.

72. A meticulous glance at the prayer clause would suffice that the appellant has prayed for setting aside the judgement and decree 07.08.1967 in civil suit no. 359/1966 on the ground of fraud played upon the Court as the suit was filed against the dead person. Evidently, the appellant had not sought for the title of the suit property in the said civil suit and thus, whether any question of praying for mandatory consequential relief of possession arises or the express bar of Section 34 of the SRA would be called for, is the core enquiry at this stage. The appellant's case is that the present suit was for simpliciter setting aside of the judgement and decree dated 07.08.1967 in civil suit no. 359/1966, and the relief of title and possession could be availed as per other remedies available in law.

73. Furthermore, a nuanced glance at the prayer clause would suffice that the relief claimed in the instant suit was not just the simpliciter setting aside of judgment and decree, rather it was

contended that the judgment and decree was obtained by playing fraud upon the Court and thus, nullity at law and *void-ab-initio*.

74. In light of such startling facts and circumstances, it is incumbent to examine whether the bar of Section 34 of the SRA would be applicable while praying for declaration in a case of fraud being played upon the Court, in light of the peculiar factual scenario.

75. The term ‘fraud’ incorporates an intention to deceive; whether it is from any expectation of advantage to the party himself or from the ill will towards the others is immaterial. The expression ‘fraud’ involves two elements, deceit and injury to the person deceived. Injury could be something other than mere economic loss, such as, deprivation of property, whether movable or immovable, deprivation of monetary benefit, loss of right etc., and it will include any harm whatever caused to any person in body, mind, reputation, or such other seen or unforeseen harms. In short, it could be a non-economic or non-pecuniary loss. An undue benefit or advantage to the deceiver, will almost always cause loss or detriment to the deceived. Even in those rare cases where there is a benefit or advantage to the deceiver, but no corresponding loss to the deceived, the second condition is satisfied.

76. A comprehensive definition of “fraud” is found in Black's Legal Dictionary, wherein it is defined as an intentional perversion of truth for the purpose of inducing another to rely upon it to part with some valuable thing belonging to him or surrender a legal right; a false representation of a matter of fact whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury. In Concise Oxford Dictionary, it has been defined as criminal deception, use of

false representation to gain unjust advantage; dishonest artifice, or trick. A fraud upon the Court refers to an act of eyewash in the absence of which, the Court would not have reached its finding and the effect of fraud in a judicial proceeding is drastic.

77. The Supreme Court in the case of ***S.P. Chengalvaraya Naidu v. Jagannath***¹⁵, has observed that fraud avoids all judicial acts, ecclesiastical or temporal and it is the settled proposition of law that a judgment or decree obtained by playing fraud on the Court is a nullity and *non-est* in the eyes of law. Such a judgment/decree — by the first Court or by the highest Court — has to be treated as a nullity by every Court, whether superior or inferior. Furthermore, the Supreme Court also observed that in order to put an end to the litigation debacle *inter se* parties, which happened in the present case as well, the Court should not invoke this principle of “finality of litigation” to the extent that it becomes an engine of fraud in the hands of dishonest litigants. The relevant paragraphs of the said decision read as under:-

“Fraud avoids all judicial acts, ecclesiastical or temporal” observed Chief Justice Edward Coke of England about three centuries ago. It is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and non est in the eyes of law. Such a judgment/decree — by the first court or by the highest court — has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings.

5. The High Court, in our view, fell into patent error. The short question before the High Court was whether in the facts and circumstances of this case, Jagannath obtained the preliminary decree by playing fraud on the court. The High Court, however, went haywire and made observations which are wholly perverse. We do not agree with the High Court that “there is no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence”. The principle of “finality of litigation” cannot be pressed to the extent of such an absurdity

¹⁵(1994) 1 SCC 1

that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation."

78. A fraudulent act is devoid of any legal sanctity and it carries within its fold such a potent weapon that vitiates every solemn act. Fraud and justice never dwell together. The act of deceiving the Court with an ulterior motive to deprive the legitimate rights of others about a property would render the entire transaction *void-ab-initio* and not voidable. It is pertinent to refer to the dictum laid down by the Supreme Court in the case of **Ram Chandra Singh v. Savitri Devi and others**¹⁶, which affirms the abovementioned rationale and furthermore, held that fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including *res judicata*. The relevant paragraphs of the said decision read as under:-

"31. 'Fraud' as is well known vitiates every solemn act. Fraud and justice never dwell together. Fraud is a conduct either by letter or words, which includes the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letter. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentation may also give reason to claim relief against fraud. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by wilfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations, which he knows to be false, and injury enures there from although the motive from which the

¹⁶2003(8) SCC 319.

representations proceeded may not have been bad. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of the others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res judicata."

79. The Supreme Court in ***Shrisht Dhawan v. Shaw Bros.***¹⁷ also observed that fraud and collusion vitiate even the most solemn proceedings in any civilized system of jurisprudence. It is a descriptive concept of human conduct. In ***Indian Bank v. Satyam Fibres (India) (P) Ltd.***¹⁸ the Supreme Court after referring to ***Lazarus Estates Ltd. v. Beasley***¹⁹ and other cases observed that, since fraud affects the solemnity, regularity, and orderliness of the proceedings of the Court, it also amounts to an abuse of the process of the Court, that the Courts have inherent power to set aside an order obtained by practising fraud upon the Court, and that where the Court is misled by a party or the Court itself commits a mistake which prejudices a party, the Court has the inherent power to recall its order.

80. The conspectus of the analysis of precedents explicated above clearly elucidates that fraud vitiates everything. Any transaction which rests on the fulcrum of the fraud being played by deceiving the other party or the Court, as the case may be, is nullity in law and such transaction is *void-ab-initio*. An act of polluting the stream of justice, by way of fraud, cannot be condoned on the pretext of finality of rights, consistency, legal policy, or *res judicata*. For, the very essence of the judicial process lies in its solemn task of the discovery of truth

¹⁷(1992) 1 SCC 534.

¹⁸(1996) 5 SCC 550.

¹⁹(1956) 1 All ER 341.

and no Court could claim to have discovered the truth on the basis of an act of deception.

81. At this juncture, it is pertinent to analyze another facet of the controversy at hand i.e., a suit allegedly filed against a dead person. It is pertinent to refer to the latin maxim action “*personalismoritur cum persona*” which means that a personal action dies with the death of the person. The Supreme Court in the case of **Puran Singh & Ors v. State Of Punjab & Ors**²⁰, while placing reliance on the abovementioned Latin maxim explained the rationale of the proposition that the suit cannot proceed against the dead person. In the said decision, the Court held as under:-

“A personal action dies with the death of the person on the maxim "action personalismoritur cum persona". But this operates only in a limited class of actions ex delicto, such as action for damages for defamation, assault or other personal injuries not causing the death of the party, and in other actions where after the death of the party the granting of the relief would be nugatory. (Girja Nandini v. Bijendra Narain, 1967 (1) SCR 93). But there are other cases where the right to sue survives in spite of the death of the person against whom the proceeding had been initiated and such right continues to exist against the legal representative of the deceased who was a party to the proceeding. Order 22 of the Code deals with this aspect of the matter. Rule 1 of Order 22 says that the death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives. That is why whenever a party to a suit dies, the first question which is to be decided is as to whether the right to sue survives or not. If the right is held to be a personal right which is extinguished with the death of the person concerned and does not devolve on the legal representatives or successors, then it is an end of the suit. Such suit, therefore, cannot be continued. But if the right to sue survives against the legal representative of the original defendant, then procedures have been prescribed in Order 22 to bring the legal representative on record within the time prescribed. In view of Rule 4 of Order 22 where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole

²⁰1996 SCC (2) 205

defendant dies and the right to sue survives, the Court, on an application being made in that behalf, shall cause the legal representatives of the deceased defendant to be made a party and shall proceed with the suit. If within the time prescribed by Article 120 of the Limitation Act, 1963 no application is made under sub-rule (1) of Rule 4, the suit shall abate as against the deceased defendant. This Rule is based not only on the sound principle that a suit cannot proceed against a dead person, but also on the principle of natural justice that if the original defendant is dead, then no decree can be passed against him so as to bind his legal representative without affording an opportunity to them to contest the claim of the plaintiff. Rule 9 of Order 22 of the Code prescribes the procedure for setting aside abatement."

82. In the case of ***Hira Lal Patni v. Kali Nath***²¹, the Supreme Court held that the validity of the decree can be challenged on the ground that a suit had been initiated against the dead person. The relevant paragraph of the said decision reads as under:-

"The validity of a decree can be challenged in execution proceedings only on the ground that the court which passed the decree was lacking in inherent jurisdiction in the sense that it could not have seisin of the case because the subject-matter was wholly foreign to its jurisdiction or that the defendant was dead at the time the suit had been instituted or decree passed, or some such other ground which could have the effect of rendering the court entirely lacking in jurisdiction in respect of the subject-matter of the suit or over the parties to it,"

83. The Supreme Court in the case of ***Ashok Transport Agency v. Awadhesh Kumar & Anr.***²² while setting aside the impugned judgment held that the Executing Court correctly followed the law as the suit filed against the dead person is a nullity in law and thus, could not be executed.

²¹AIR 1962 SC 199

²²(1998) 5 SCC 567

84. In the case of **Indana International Limited V/s. Santana Miguel Fernandis and Another**²³, the Bombay High Court has also followed the rationale that the suit filed against the dead person is a nullity in law and therefore, should not be instituted at all. The relevant paragraphs of the said decision read as under:-

“6. The learned trial Court has made a correct observation that the legal heirs of a sole defendant who is dead, cannot be brought on record, since the suit against a dead person itself is a nullity. In fact, it appears that to prevent this, that the plaintiff sought to withdraw the suit itself, which has been denied on the ground that the suit is a nullity.

7. Undisputedly, such a suit must be held to be a nullity and therefore not instituted at all. However, it does not follow that the fact that a suit has been filed upon payment of Court fees must be ignored. In such a case, the withdrawal that is sought by the plaintiff must be viewed as a request for withdrawal of the filing of the suit which is the physical aspect of the suit. For this purpose therefore, filing of the suit against a dead person must be treated to be a formal defect within the meaning of Order 23, Rule 1(3) since the defect is in the nature of mis-joinder and non-joinder.”

85. This Court as well in the case of **Pratap Chand Mehta v. Krishna Devi Mehta**²⁴, after analysing the catena of judgements held that the suit filed against the dead person is a nullity in law and thus, the plaintiff cannot be allowed to subsequently amend the suit. The relevant paragraphs of the said decision read as under:-

“18. In Sisir Kumar Tarafdar v. Manindra Kumar Biswas, AIR 1958 Calcutta 681 (9). It was held as under:—

“It must therefore be held that the power given to the court under sub-rule (2) of Rule 10 of Order, 1, of the Code of Civil Procedure to add a party contemplates only those cases where is somebody else as plaintiff or defendant and the effect of bringing on record another person as plaintiff or defendant would be really a case of ‘addition’ of

²³2007 SCC OnLine Bom. 381.

²⁴1987 SCC OnLine Del 335

plaintiff or defendant. A case of mere substitution as distinct from addition is not contemplated in sub-rule (2)."

19. *In C. Muttu v. Bharath Match Works, AIR 1964 Mysore 293 (10) relying upon Hira Lal's case (supra) it was held that a suit against a dead person is a nullity. Where it is later on discovered that the person against whom the suit was filed was dead when it was filed no amendment can be allowed for substitution of another person.*

20. *In Roop Chand v. Sardar Khan, AIR 1928 Lahore 399 (11) a Division Bench of the Lahore High Court held that in case the suit had been brought against one defendant only who had admittedly died before the institution of the suit there was really no suit properly instituted and that there was nothing in the Civil Procedure Code to authorise a Court to allow the plaint in such a case to be amended by substituting the names of the representatives of the deceased, even though the suit had been instituted bona fide and in ignorance of the death of the defendant. The position however, is quite different where the deceased person is not the sole defendant but is one out of a large number of defendants.*

21. *In Municipal Council v. Thazhel Puthan Puravil Kunhi Pathumma, AIR 1933 Madras 454 (12) it was held that where the plaint is filed against a person who is in fact dead no application by way of amendment or bringing on record legal representatives can be validly made because the whole proceeding is void and has no effect whatsoever.*

22. *In Joginder Singh v. Krishan Lal, AIR 1977 Punjab & Haryana 180 (13) it was held that the question of substituting the legal representatives of only such a person under Order, 22 Rule 4 can arise who was alive at the time when the suit was instituted and has died during the pendency of the suit. The case of a person who had died before the institution of the suit or the appeal, and who was erroneously impleaded as a party, does not fall within the purview of Order, 22 of the Code. Whether the amendment to substitute legal representatives is made under Order, 1 Rule 10(2) or under Section 153 CPC would not make any material difference.*

23. *In Ali Mohd Khan v. Vijay Tulsi, AIR 1986 J&K 26 (14) relying upon the pronouncement of the Supreme Court in Hira Lal's case (supra) it was held that where a suit is filed against a dead person it is a nullity and the plaintiff cannot be allowed subsequently to amend the suit and substitute the legal representatives in place of the defendant.*

24. I have considered the relevant contentions of the parties. The contention of the learned counsel for Mr. Vishwa Nath Mehta has force and it should prevail. Suit cannot be filed against a dead person. In view of the pronouncement of the Supreme Court in Hira Lal's case (supra) and in view of the various other High Courts relied upon by the learned counsel for Mr. Vishwa Nath Mehta I am of the considered opinion that the suit against a dead person is a nullity and the plaintiff cannot be allowed subsequently to amend the suit and substitute the legal representatives in place of the defendant. I fully agree with the reasoning given in these judgments. ”

86. Thus, on the edifice of the precedents analysed above, it is manifestly evident that a suit instituted against the dead person is a nullity in law. The case in hand revolves around the application of legal principles as cited above. In the facts of the case, the appellant filed civil suit no. 429/1987 on 10.02.1987, for setting aside the judgement and decree dated 07.08.1967 as null and void as it was obtained by playing fraud upon the Court. It is the contention of the appellant that civil suit no. 359/1966 was instituted against the dead person as at that time, the appellant's mother i.e., the defendant in the said suit had already expired. It is pertinent to note that the said suit proceeded *ex-parte*. It is the contention of the appellant that the said suit proceeded *ex-parte* because as on the date of institution of the suit, the appellant's mother had already died and thus, the judgement and decree dated 07.08.1967 was obtained by playing fraud upon the Court.

87. As exposited above, any transaction which is obtained by way of fraud vitiates everything. An act of obtaining an *ex parte* decree from the Court without disclosing the institution of the suit against a dead person is an egregious case of fraud. The suit instituted against the dead person is *non-est* in law, and if the appellant had succeeded in

civil suit no. 429/1987, then the judgement and decree dated 07.08.1967 shall be rendered as *void-ab-initio* and all consequential actions shall fall. Whether in a case of fraud, which vitiates everything and renders the decree as *void-ab-initio*, the bar of Section 34 of the SRA would be applicable, so as to necessitate the appellant to have prayed for the consequential relief of possession, is the decisive question which the Trial Court ought to have examined.

88. In order to answer this seminal question, it is pertinent to refer to the decision of the Madhya Pradesh High Court in the case of ***Baldeo Singh v. Gopal Singh***²⁵, wherein, the issue involved is the levy of the Court fee on the declaratory relief or consequential relief which ought to have been prayed. The Court referred to the decision of the Bombay High Court in ***Madanlal v. Shri Ramchandra Devasthanan***²⁶ and held that in cases where the transaction in dispute is complete nullity and *void-ab-intio*, then a mere declaration is enough and there is no need to pray for the consequential relief. The relevant extracts of the said decision read as under:-

“If I may say so with great respect, the rule to be followed in such cases is succinctly stated by Bose, J., in Madanlal v. Shri Ramchandra Devasthan [Taxing Decisions, 1936-1943 at page 35.] :

“A declaration is enough and no consequential relief need be asked for if the transaction in dispute is a complete nullity and void from the beginning as there is no need to set aside that which has no existence in the eyes of the law. But where the transaction is valid and operative until avoided, consequential relief is involved and has to be sought because of the prayer for the removal of a burden legally created.”

A Full Bench of the Patna High Court (Fazl Ali, C.J., Chatterji and Sinha, JJ.) laid down the following rules in Mt. Rupia v. Bhatau Mahton [AIR 1944 Pat 17.] :

²⁵1966 SCC OnLine MP 38

²⁶Taxing Decisions, 1936-1943 at page 35.

“(1) No doubt in considering what court-fee is payable on a plaint, caution must be observed so as not to import into the plaint anything which it does not really contain, either actually or by necessary implication. In construing the plaint the Court must take it as it is, not as it may think it ought to have been. A relief not asked for cannot be imported so as to charge court-fee thereon. Where a plaintiff who is entitled to consequential relief frames his suit as one for a declaration only, the Court is not entitled to insist upon his praying for a consequential relief and paying the court-fee proper for such a suit.

(2) But the dexterity of the person drawing up the pleadings avoiding the use of certain words in the plaint, which would make the relief a consequential one, should not determine the amount of court-fee payable on the plaint. The court-fee is dependent not on the form of the pleadings, but on the real substance of the relief claimed.

(3) A suit though cast in the form of a declaratory relief only, but in substance aiming at setting aside a deed formally executed and registered in accordance with law is governed by S. 7(iv)(c) and not by Sch. 2 Art. 17(iii).”

In that case, it was held:—

“As the sale deeds on their very face had been duly executed and properly registered, carrying with them the necessary legal consequence that title passed from the transferor to the transferee, the sale deeds would necessarily require to be cancelled in order to get rid of the legal consequences attaching to them. That being the very object of the suit though the plaintiff did not in terms ask for the cancellation of the deeds in question, that relief was implicit in the relief sought for. The suit therefore being one for declaration and consequential relief was governed by section 7(iv)(c) and not Schedule 2, Article 17(iii).”

In my opinion, the dicta in the two last-mentioned cases and also the observations in Duttaji Parashuram's Case (supra), all of which have been cited with approval in Ratansingh's Case (supra), apply to the appellant's suit here. Recalling the observations in Ratansingh's Case, that it is not the language or the form but the substance and the nature of the claim which is the crux, it must be said that although the relief clause is worded as mere declaratory, essentially and substantially this is a suit for setting aside the sale. The sale deed, being a registered document, is valid and operative until avoided. As the plaintiff seeks the relief for declaration that the sale deed is void not only against his rights and interest but also that it is void in toto, that is, against those also who executed it, the prayer for its selling aside and cancellation is necessarily involved. ”

89. On the fulcrum of the decision cited above it is evidently clear that if the transaction in dispute is a complete nullity and void from the beginning, a mere declaration is enough and there is no need to pray for the consequential relief. More so, in the present case, title itself has not been claimed in the prayer, as discussed above, therefore, no question arises for claiming possession. The entire rationale of such a stipulation is that if the decree is a nullity in the eyes of the law and *void-ab-intitio*, there is no need to pray for the consequential relief as such decree does not even exist in the eyes of the law since its inception and any title transferred on the strength of such a decree shall have no existence in the eyes of law. The explanation behind this exposition of law also lies in the conceptual difference between the concepts of voidness and voidability. Jurisprudentially, there is a marked distinction between the legal consequences attached with voidness and voidability. Whereas, the former strikes at the very foundation of the legal action and renders it non-est, null and void from the very beginning, the latter holds the action and its legal consequences as valid unless there is a declaration of voidness. In other words, a declaration of *void-ab-initio* has the effect of removing the foundation of the entire building and the entire structure falls down. For all intents and purposes, it restores the original position *inter-se* parties and operates in a retrospective sense, unless directed otherwise by the Court. Once it is ascertained that the basis of claiming a declaration is fraud, the Court needs to first arrive at a finding regarding the existence of fraud, which is necessarily a factual enquiry, and once it is so arrived at, there is no question of a procedural bar coming into play to protect an action based on fraud.

The settled principle of '*fraud vitiates everything*' would be of no consequence if such a course of action is permitted and bar under Section 34 of the SRA is levelled.

90. In the instant case, it is the contention of the appellant that the judgement and decree dated 07.08.1967 was obtained by playing fraud upon the Court and the said suit bearing civil suit no. 359/1966 would be a nullity in law if it was instituted against the dead person. It is crystal clear that before examining the said issue, the Trial Court cannot arrive at the conclusion that in the absence of a consequential relief of possession, the suit is barred under Section 34 of the SRA. Moreover, the suit was filed seeking the declaration of the decree dated 07.08.1967 as null and void, thus, since the title was not sought in the present suit, therefore, the prayer to seek for the consequential relief of possession was not called for.

91. It is noteworthy that once the judgment and decree is declared as null and *void-ab-initio* in law, the title would automatically get restored in the name of the deceased (or her legal heirs) by operation of law and the same would be subject to devolution in accordance with the law. The effect of declaration of a decree being *void-ab-initio* would be to render the title and consequential *ex-parte* sale deed as null, void and non-existent from the very inception. Thus, it would restore the original position and the question of title, in the aftermath of the declaration of nullity, would no more be a question before the appellant and the respondents herein. It would, then, be a question between the legal heirs of the deceased *inter-se*. And thus, there was no basis for the consequential prayer of title or possession against the respondents herein as the same was neither necessitated nor available to the appellant. In fact, it would be absurd for a person to seek a

declaration of nullity of a decree along with title against someone who has earned the title by obtaining the same decree on fraud. A declaration of nullity on the ground of fraud would in itself have the effect of resetting the clock and no claim of title would survive as the basis of the title has been rendered null and void. The said question of claiming title may arise if the respondents, in the aftermath of the declaration of nullity, goes on to claim the title afresh on the basis of the agreement to sell or otherwise, however, that would be a completely distinct proceeding based on a distinct cause of action.

92. A declaration sought on the basis of fraud is on a different footing as compared to a general declaration of right. In a case of fraud upon the Court, the Court becomes a stakeholder in the enquiry and it becomes expedient in the interest of justice to examine the same. Furthermore, a general declaration may not have a sweeping effect and consequential rights would not automatically flow from such a declaration, unless prayed. However, once fraud upon the Court is established, it takes within its sweep every consequential action based on such fraud and it does not matter if a certain consequence was envisaged or not. It happens by sheer operation of law.

93. Although, the procedural bar under Section 34 of the SRA is not attracted in an instant manner, it is nonetheless important to understand that the Court cannot lose sight of the fact that what is under consideration is a rule of procedure, which is manifested in Section 34 of the SRA. The rule manifested in the said provision is meant to prevent multiplicity of litigation and is intended to ensure that the suits instituted before the Courts are complete in all respects and the prayers are such that the dispute between the parties is brought to a quietus. It is also meant to ensure that the concern of the State

with respect to the payment of Court fee is duly taken care of by preventing the parties from drafting their prayers in a clandestine manner or claiming their rights in a piecemeal manner. However, a rule of procedure is nevertheless a rule of procedure and it cannot disentitle the Court from enquiring into a case of fraud upon the Court. In *Hamza Haji v. State of Kerala & Ors.*²⁷, the Supreme Court has pertinently observed that no Court will allow itself to be used as an instrument of fraud and no Court, by the application of the rules of evidence or procedure can allow its eyes to be closed to the fact that it has been used as an instrument of fraud. To permit so would offend against that principle of substantial justice and would perpetuate an illegality on the strength of a procedural bar. In *A.V. Papayya Sastry and Ors. v. Government of A.P. and Ors.*²⁸, the Supreme Court observed that even after a cause has attained finality and has become law under Article 141 of the Constitution of India, if it is discovered that the finding was based on fraud, the same would stand vitiated. The relevant paragraph highlights the gravity of an allegation of fraud upon the Court and reads thus:

“31. The matter can be looked at from a different angle as well. Suppose, a case is decided by a competent Court of Law after hearing the parties and an order is passed in favour of the applicant/plaintiff which is upheld by all the courts including the final Court. Let us also think of a case where this Court does not dismiss Special Leave Petition but after granting leave decides the appeal finally by recording reasons. Such order can truly be said to be a judgment to which Article 141 of the Constitution applies. Likewise, the doctrine of merger also gets attracted. All orders passed by the courts/authorities below, therefore, merge in the judgment of this Court and after such judgment, it is not open to any party to the judgment to approach any court or authority to review, recall or reconsider the order. The above principle, however, is subject to exception of fraud. Once it is

²⁷(2006) 7 SCC 416

²⁸(2007) 4 SCC 221.

established that the order was obtained by a successful party by practising or playing fraud, it is vitiated. Such order cannot be held legal, valid or in consonance with law. It is non-existent and non est and cannot be allowed to stand. This is the fundamental principle of law and needs no further elaboration. Therefore, it has been said that a judgment, decree or order obtained by fraud has to be treated as nullity, whether by the court of first instance or by the final court. And it has to be treated as non est by every Court, superior or inferior.”

94. Thus, the public policy underlying the power of the Court to declare a judgment obtained on fraud as nullity is on a higher pedestal than the public policy underlying Section 34 of the SRA. In the considered opinion of this Court, the Trial Court fell in error in not examining the factual question of fraud and dismissing it in a summary manner by applying the procedural bar under Section 34 of the SRA. In terms of the prayer clause of the plaint and effect of a finding of fraud upon the Court, as discussed above, there was no occasion for the appellant to have claimed any consequential relief and the aspect of fraud ought to have been examined on a factual basis before foreclosing the matter.

95. Furthermore, much reliance was placed upon the decision of this Court dated 17.04.2018 passed in CM (M) 1096/2016, whereby, the order allowing the amendment application under Order VI Rule 17 CPC, was set aside and in light of such order which prohibits the appellant to amend the plaint and add the consequential relief of possession, the suit should not be held maintainable as per Section 34 of the SRA.

96. It is pertinent to point out that the said order limits its analysis to the question of the amendment application only. It neither addresses the broader implications for the suit itself nor does it determine whether the consequential prayer for possession is necessary. The

97. Thus, the bar under Section 34 of the SRA would not be applicable under the facts of the present *lis*.

Conclusion

98. After a comprehensive and meticulous review of the applicable judicial precedents and a detailed examination of the two critical issues as outlined above, it is evident that the Trial Court reached an incorrect conclusion. The analysis reveals that the present suit does not fall within the prohibitions established by Section 34 of the SRA.

99. In view of the aforesaid, the appeal is allowed and the impugned judgment and decree dated 20.12.2018 passed by the learned Additional District Judge, West, Tis Hazari Courts, Delhi in Civil Suit no. 11098/16 is hereby set aside.

100. Needless to state, this Court has not determined the question of limitation, rather only observed that the issue of limitation which is the mixed question of fact and law, should not be treated as a preliminary issue in light of the disputed factual matrix. This Court has also not expressed any view on the merits of the case.

101. Accordingly, the matter is remanded back to the Trial Court for *de-novo* consideration to examine the issue of limitation and/or other issues. The Trial Court is also directed to expedite the trial and decide the case not beyond 12 months from the date of receipt of this judgment.

102. In view of the aforesaid, the appeal is disposed of alongwith pending applications, if any.

103. No order as to costs.

(PURUSHAINDRA KUMAR KAURAV)
JUDGE

Signature Not Verified
Digitally Signed
By:MAANAS JAJORIA
Signing Date:13.12.2024
18:10:14
DECEMBER 11, 2024/MJ/am

Signature Not Verified
Digitally Signed
By:PURUSHAINDRA
KUMAR KAURAV