

**In the High Court at Calcutta
Civil Appellate Jurisdiction
Appellate Side**

**The Hon'ble Justice Sabyasachi Bhattacharyya
And
The Hon'ble Justice Uday Kumar**

**F.A. No.89 of 2023
With
CAN 1 of 2019
(Old No: CAN 158 of 2019)
CAN 9 of 2024**

**Smt. Shefali Mallick, since deceased, her legal
heirs and representatives Smt. Laxmi Mallick
and others**

Vs.

**Durga Chakraborty (Rakshit), since deceased, her legal
heirs and representatives Sri Krishnendu Chakraborty
and others**

For the appellant	:	Mr. Prasad Bhattacharyya Mr. Prantick Ghosh
For the respondent	:	Mr. Rahul Karmakar Mr. Sourav Guchhait
Heard on	:	20.02.2025, 27.02.2025 05.03.2025,
Judgment on	:	11.03.2025

Sabyasachi Bhattacharyya, J.:-

1. The present appeal has been preferred at the behest of the defendants in a suit for declaration that a partition deed dated April 7, 1997 is *void ab initio*, for declaration of the title and shares of the parties and for partition as well as consequential reliefs. The learned Trial Judge, while observing that the said deed of partition was *void ab initio* and as such

the relief of declaration sought in respect thereof was superfluous, arrived at the conclusion that the suit was not barred by limitation on account of the said declaration having been sought beyond the limitation period as stipulated in Article 59 of the Schedule to the Limitation Act, 1963. Consequentially, the shares of the parties were declared in preliminary form. Being thus aggrieved, the present appeal has been preferred.

2. Learned counsel appearing for the appellants argues that the relief of declaration was mandatory and the primary relief, since the partition deed cast a cloud over the plaintiffs' title. Even if Article 59 of the Limitation Act was not applicable, it is argued that the suit would be governed by Article 113 of the Limitation Act which stipulated the starting point of limitation to be when the right to sue accrues. Kamala, plaintiff no.1, being a party to the deed, the right to sue accrued on the date of execution and registration of the partition deed on April 7, 1979. Hence, the suit of 2013 is palpably time-barred.
3. In support of his contentions, learned counsel cites *Khatri Hotels Private Limited and Another v. Union of India and Another*, reported at (2011) 9 SCC 126 and *Prem Singh and Others v. Birbal and Others*, reported at (2006) 5 SCC 353. It is argued that unless the partition deed, being Exhibit-13, is set aside, the plaintiffs are not entitled to seek the other reliefs, including that of declaration of their shares by ignoring the said partition deed and partition. Moreover, as evident from the evidence of the parties, in particular the admissions of P.W.1 and P.W.5, the partition deed was acted upon by the parties.

4. Learned counsel cites *Ranganayakamma and Another v. K.S. Prakash (Dead) By LRs. and others*, reported at (2008) 15 SCC 673 in such context.
5. Learned counsel for the appellants also relies on the judgment of *T. Arivandandam v. T.V. Satyapal and another*, reported at (1977) 4 SCC 467, in support of the contention that the limitation period cannot be stretched on the basis of Exhibit-9, a legal notice dated October 3, 2012, since the cause of action first arose in the year 1979.
6. It is argued that the allegation that Lalita was the daughter of Indumati, in which case the non-allocation of Lalita's shares in the partition deed would vitiate the deed, has not been proved. P.W.3, who sought to prove such relationship, was not a member of Lalita's family and as such was not competent to prove the same. Also, Exhibit-19, a letter given by the concerned Authority, does not prove the relationship between Lalita and Indumati.
7. It is pointed out by learned counsel for the appellants that Kamala, the alleged daughter of Lalita, admitted in her cross-examination that Lalita was not her mother, which also ought to have been considered by the learned Trial Judge.
8. Learned counsel for the respondents alleges that the existence of Lalita is admitted by Exhibit-11, a letter written by the advocate of one of the plaintiffs Mira Mallick. Such concession by the advocate is binding on the defendants. In support of the said contention, learned counsel cites *Om Prakash v. Suresh Kumar*, reported at (2020) 13 SCC 188.

9. It is argued that it is a settled proposition of law that the absence of any provision of the share of one of the co-sharers (here, Lalita) vitiates the partition deed, in support of which learned counsel cites *Pugazhenthai and another v. Sundari Ammal and others*, reported at 2013 SCC OnLine Mad 318. Thus, the partition deed, it is submitted, was *void ab initio*.
10. As the instrument was *non est* in the eye of law, there cannot be any limitation period attached to the same. Learned counsel cites *Kewal Krishan v. Rajesh Kumar and others*, reported at (2022) 18 SCC 489 in support of such contention. Learned counsel also cites a judgment of the Madras High Court in *Vathapa Gounder and Others v. Thambayi Ammal and others*, reported at 1989 2 MLJ 67, in support of the proposition that if a document is *non est*, the challenge to the same in the plaint is superfluous and only a surplusage.
11. Learned counsel for the respondents also submits that such declaration was the product of Mofussil pleadings, which are to be liberally construed, as laid down in *Narain Prasad Aggarwal (Dead) By LRs. v. State of Madhya Pradesh*, reported at (2007) 11 SCC 736.
12. The purported admission of Kamala that Lalita is not her mother is a stray admission contrary to the rest of her evidence and, as such, ought not to be lent credence to, it is argued.
13. Before adjudication of the matter, we are to consider the plinth of the plaint case, which is that one Indumati Mallick and one Narayan Rakshit were co-owners of the property. Indumati died, leaving behind Gopeswar as her son and Lalita as her daughter. Lalita predeceased

Indumati, leaving behind her two daughters namely, Kamala and Ashrukana. Ashrukana predeceased Kamala. Kamala, apart from being the daughter of Lalita and inheriting her share, was also the wife of the other original co-owner Narayan and accordingly got shares both through Lalita (since her sister Ashrukana had predeceased her) and through her husband Narayan, along with Kamala's daughter Durga.

14. On the other hand, the defence case is that Lalita was not the daughter of Indumati and the latter, on her demise, left behind as her heir Gopeswar as her only son/child. The defendants claim through Gopeswar.
15. Upon considering the arguments of parties and the materials on record, we come to the following conclusions under certain broad heads:

Limitation

16. For deciding whether the suit is time-barred, it is to be ascertained as to whether the first relief claimed in the plaint, challenging the partition deed dated April 7, 1979, was necessary or superfluous.
17. Section 31 of the Specific Relief Act provides that any person against whom a written instrument is void or voidable and who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it adjudged void or voidable and the court may, in its discretion, so adjudge it and order it to be delivered up and cancelled. Thus, the said provision does not make any distinction between a void and a voidable document.

- 18.** In the present case, the declaration sought regarding the partition deed being null and void is squarely covered by Section 31(1) of the Specific Relief Act, since the said document, if left outstanding, would adversely affect the plaintiffs and would render the partition suit redundant, in view of the property having already been partitioned by the said registered deed of 1979. Thus, in order to get a fresh declaration of shares and a partition decree, the partition deed already effected in 1979 was first to be negated, therefore making it mandatory for the plaintiffs to seek such relief as a precondition for having the other reliefs.
- 19.** In such context, Article 59 of the Schedule to the Limitation Act, which contemplates a suit to cancel or set aside an instrument, is attracted. The limitation for filing such suit is three years from when the facts entitling the plaintiff to have the instrument cancelled or set aside first become known to him. Section 31 of the Specific Relief Act, read in conjunction with Article 59 of the Schedule to the Limitation Act, thus, made it mandatory for the plaintiffs to challenge the partition deed within three years from its execution, since otherwise the same would debar the partition suit.
- 20.** The partition deed was executed and registered on April 7, 1979. The original plaintiff no.1 Kamala, as P.W.1, in her cross-examination dated November 7, 2014, categorically admitted that she had signed the partition deed and was present throughout the registration of the same. Thus, the cause of action for the suit arose on April 7, 1979 itself

whereas the suit was filed on March 7, 2013 and is, thus, palpably time-barred.

- 21.** The plaint, particularly in Paragraph Nos. 49 to 51, alleges that the partition deed of 1979 was fraudulently obtained. However, the pivot of the allegations are that Narayan, one of the parties thereto, was defrauded, without however disclosing any particulars or specific details of such fraud and/or as to how such fraud was perpetrated, as mandated under Order VI Rule 4 of the Code of Civil Procedure. It was never the plaint case that the deed was *void* since Lalita's share was left out; thus, the evidence in that regard are beyond the pleadings and hence, in any event, cannot be looked into.
- 22.** The defendants/appellants cite *Khatri Hotels Private Limited (supra)*, which, however, was on Article 58 of the Limitation Act under which, the limitation starts from when the right to sue first accrues, as opposed to Article 59, where the limitation commences from when the facts entitling the plaintiff to have the instrument cancelled first become known to him. Thus, *Khatri Hotels's* case is not an authority which is relevant to the present case.
- 23.** In *Prem Singh (supra)*, however, the Supreme Court held that Section 31 of the Specific Relief Act refers to both void and voidable documents. It was laid down there that when a document is *void ab initio* a decree for setting aside the same would not be necessary as it would be a nullity in the eye of law. Once, however, a suit is filed for cancellation of a transaction, it would be governed by Article 59 and if the same is not attracted, the residuary Article (Article 113) of the Limitation Act

would be applicable. In the present case, the ratio of the said decision applies, since the plaintiffs specifically sought a declaration and also because the document could not be said to be *void ab initio*, since the declaration was sought on the ground of fraud being perpetrated which, only if proved, would make the instrument voidable.

24. The defendants/appellants cite *Kewal Krishan (supra)*, where the facts were that certain sale deeds were sham and *void ab initio* since no consideration passed. Under the law, a sale without consideration is *void ab initio*, in which context it was held that no declaration was required to be sought separately. As opposed to the facts of the said case, in the present case, the alleged fraud was required to be proved. Also, the facts relating to whether Lalita was the daughter of Indumati and at all had any share in the property were all factual questions, to be proved on evidence and it cannot be said that the document-in-question was *void ab initio*.
25. The judgment of a learned Single Judge of the Madras High Court in *Vathapa Gounder (supra)* has been relied on by the respondents, where it was held that the word 'cancellation' implies that the person suing should be a party to the document sought to be cancelled and strangers are not bound by the document and are obliged to sue for cancellation. In the said case, a person not having authority to execute a deed had executed the same, in which circumstance it was held to be a non-existent document.
26. Fact remains that in the said case, a stranger to the document had filed the suit and as such the court held that no cancellation was required to

be prayed for. As an obiter dictum, the court observed that even if the plaintiff is a party to the document but impugns it as sham and nominal and *void ab initio*, he need not set aside the document.

- 27.** In the present case, there is no question about the authority of the person executing the impugned partition deed and as such, the said principle does not apply. Rather, the plaintiff no.1 being a party to the document, and the plaintiff no.2 being her daughter and claiming through her, it was necessary for the plaintiff no.1 Kamala to seek such declaration.
- 28.** In *Pugazhenth* (*supra*), a learned Single Judge of the Madras High Court had held that since one of the co-sharers was not included in the partition deed, the document was required to be set aside. However, in the said judgment, notably, the court passed a declaratory decree to the effect that the partition deed was invalid, null and void, hence substantiating the view that even in such a case, a declaration is required from the court to avoid the document.
- 29.** Thus, in the facts of the case, the relief of declaration that the partition deed dated April 7, 1979 was void was the principal relief and was mandatorily required to be sought in order to get the consequential reliefs of declaration of title/shares and partition.
- 30.** Hence, since the suit was filed on March 7, 2013, long after the limitation period of three years from the date of execution of the document on April 7, 1979, particularly since plaintiff no.1, through whom the plaintiff no.2 claimed, was also a party to the same, the suit is palpably barred by limitation.

Mofussil pleadings

- 31.** Learned counsel for the respondents relies on *Narain Prasad Aggarwal* (*supra*) for the proposition that pleadings of Mofussil courts are to be construed liberally. However, the relief of declaration regarding the partition deed cannot be brushed aside as Mofussil pleadings, since the said pleading was mandatory within the contemplation of Section 31 of the Specific Relief Act and in the facts of the case.
- 32.** Moreover, the trial court at Barasat, District – North 24 Parganas does not come within the contemplation of “Mofussil”, since the said Court is in close proximity to the metropolis of Kolkata and in modern days, is sufficiently populated by an erudite bar. Hence, the pleadings drafted by counsel of the said Court cannot, by any stretch of imagination, be treated to be “Mofussil pleadings” and taken lightly.

Whether the partition deed was void

- 33.** The allegation in the plaint centres around fraud being practised on one of the executants of the partition deed, namely Narayan. In the absence of any pleading as to the particulars of fraud or even the nature of fraud, the suit on such count is barred under Order VI Rule 4 of the Code of Civil Procedure.
- 34.** The allegation as to the deed being void due to omission of Lalita’s shares was beyond the pleadings and the evidence in support thereof could not be looked into.

- 35.** However, even assuming that such evidence could be looked into, Lalita admittedly died in 1934/1935, long before the execution of the partition deed in 1979. Hence, on the date of execution of the partition deed, her estate had devolved, even if the plaint case is to be believed, on her daughter Kamala, the plaintiff no.1, who claimed not only as the daughter of Lalita but also through Narayan, her husband.
- 36.** Kamala, as discussed above, admitted in her cross-examination that she not only signed the partition deed, but was present throughout its registration, thereby being estopped from challenging the same. Since, as per the plaint case, the estate of late Lalita devolved on her heir/daughter Kamala, it is Kamala whose interest would be affected at the relevant juncture even if her alleged mother Lalita's share was omitted, and as Kamala was estopped from challenging the deed by her own conduct, the challenge in that regard to the deed fails.
- 37.** Secondly, the partition deed was acted upon, as evinced from the admission of P.W.5, the plaintiff no.2 Durga, in her cross-examination dated July 11, 2017, to the effect that the plaintiffs reside on the western side of the land and the defendants on the eastern side, which is in consonance with the allocation made in the impugned partition deed.
- 38.** Moreover, Exhibit-11, a purported letter issued prior to the filing of the suit by the advocate of one of the plaintiffs, does not bind the plaintiffs as a whole in any manner whatsoever and does not even form a part of the pleadings. The judgment of *Om Prakash (supra)*, cited by the appellants in that regard, is on an entirely different context. In the said

case, it was held that the statement made to court by counsel is binding on the client if the statement is unequivocal and in relation to commitment of his client qua the subject-matter of the proceedings in which the counsel was engaged and instructed to appear. In the present case, Exhibit-11 was not filed during pendency of the suit or was not a concession made before a court of law and as such, has no binding effect on the plaintiffs. In any event, only one of the plaintiffs, namely Mira, had apparently authorised such counsel to communicate on her behalf at the pre-litigation period and not to represent her or the other plaintiffs in the suit, which had not even been instituted then. Thus, such document is entirely irrelevant and has no value as an admission of the plaintiffs.

- 39.** On the contrary, Kamala, allegedly the daughter of Lalita and the plaintiff no.1, in her cross-examination as P.W.1 dated November 7, 2014, categorically denied that Lalita is her mother. She also admitted that she did not have any document to proof that Lalita was her mother or that Indumati was her grandmother. She also admitted that Lalita had no identification proof. Thus, the admission that Lalita was not her mother cannot be brushed aside as a stray comment but was in consonance with the rest of her evidence as well.
- 40.** Exhibit-19 is a letter written by the local authority in reply to an application under the Right to Information Act and discloses precious little or nothing as to whether Lalita was the daughter of Indumati, thus, having no evidentiary value at all with regard to the alleged

daughter-mother relationship of Lalita with Indumati and/or even the existence of Lalita.

- 41.** P.W.3, the son of the second wife of Lalita's husband after Lalita's demise, could not have direct knowledge, let alone special knowledge, about the existence of Lalita or whether Lalita was the daughter of Indumati and hence, not being a member of the family of Lalita at any point of time, P.W.3 did not have any *locus standi* or authority to prove the relationship between Lalita and Indumati. Thus, his evidence cannot be looked into at all in the said context.
- 42.** Accordingly, the registered Partition Deed of 1979 has not been proved to be void either on the ground of fraud or for omitting Lalita's share and, thus, is a valid document in the eye of law.
- 43.** Thus, from the discussions as made above, it is evident that not only was the suit palpably barred by limitation, the relationship of Lalita as the daughter of Indumati also could not be proved by cogent evidence by the plaintiffs. As such, the alleged omission of her share in the partition deed is not credible.
- 44.** Moreover, Kamala, even if Lalita's daughter, solely represented the estate and interest of late Lalita at the time of execution and registration of the partition deed. She signed the Partition Deed and also was a party to the entire process of registration of the same and cannot now turn around and challenge the said deed.
- 45.** It is Kamala who was representing the estate of Lalita when the partition deed was executed and in view of her conduct, the challenge to the partition deed has to fail.

- 46.** As discussed above, the plaint case of fraud was not even sustainable and was not supported by particulars as contemplated under Order VI Rule 4 of the Civil Procedure Code.
- 47.** Moreover, the partition deed was acted upon, as is evident from the evidence of P.W.5 and thus, there is no scope of challenging the same at this belated juncture.
- 48.** In view of the above, the learned Trial Judge erred in law and on facts in granting a preliminary decree of partition and in observing that the relief of declaration that the partition deed dated April 7, 1979 was void was superfluous. Hence, the impugned judgment and decree are vitiated by patent error of law and of fact.
- 49.** Thus, F.A. No.89 of 2023 is allowed on contest, thereby setting aside the impugned judgment and decree dated September 29, 2018 passed by the learned Civil Judge (Senior Division), Second Court at Barasat, District: North 24 Parganas in Title Suit No.46 of 2013. Accordingly, the said suit is hereby dismissed on contest.
- 50.** There will be no order as to costs.
- 51.** A formal decree be drawn up accordingly.
- 52.** CAN 1 of 2019 (Old No: CAN 158 of 2019) and CAN 9 of 2024 are also disposed of accordingly.

(Sabyasachi Bhattacharyya, J.)

I agree.

(Uday Kumar, J.)