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

% **Reserved on: 21st August, 2018**
Pronounced on: 19th September, 2018

\+ **CS(OS) 3489/2014 & IA Nos.22638/2014, 6761/2016, 3778/2018**

ANITA ANAND ..... Plaintiff
Through : Mr.Abhijat and Mr.Rishabh Bansal, Advocates.

versus

GARGI KAPUR & ORS ..... Defendants
Through : Mr.Fanish K Jain, Advocate for defendants No.2 .
Defendant No.2 in person.

CORAM:
HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.
IA No.4817/2017

1. This application is under Order 7 Rule 11 of the CPC. The plaintiff and defendants no.2 & 3 are brother and sisters whereas the defendant no.1 was the mother of the parties, who has since expired. This suit is for partition filed by married sister, married in the year 1976.

2. Before going to her claim in the instant application, it would be appropriate to state few facts:

a) it is alleged one Joginder Nath Kapur, the grandfather of the plaintiff was allotted a plot in the year 1956 in lieu of the properties left there as he migrated from Pakistan. The said plot was sold by the father of the plaintiff in the year 1972 and out of those sale proceeds, he has purchased ½ of the property bearing No.12/19, Western Extension Area,

Karol Bagh, New Delhi in the name of his wife i.e. mother of the parties – defendant No.1;

b) thereafter, in the year 1981, the father also purchased remaining ½ portion in the name of his wife – defendant No.1 – the mother of parties;

c) it is alleged the use and right in the subject property was only for the benefit of her all children and though it was purchased by the father in the name of his wife-defendant no.1 but it was an exclusive property of the father.

3. The application under Order 7 Rule 11 of the CPC is filed by the defendants alleging *interalia* a bare reading of the plaint would reveal the plaintiff has no case and the suit needs to be dismissed. The defendant alleges:

(i) prior to filing this suit a public notice in Nav Bharat Times dated 08.11.2014 was got published by the plaintiff claiming the property to be *joint and ancestral* one;

(ii) the plaintiff claims her right in this ancestral property per Section 6 of the Hindu Succession (Amendment) Act, 2005 and she cannot claim such right since her father was not alive on the date of the amendment, as is held in *Prakash vs. Phulavati* (2016) 2 SCC 36;

(iii) further it is alleged the suit is barred by Section 3 of the Benami Transaction Act;

(iv) per Section 14 of the Hindu Succession Act the defendant No.1 became an absolute owner of the entire property and;

(v) the suit is beyond limitation as the suit for declaration ought to have been filed by Late J.N. Kapoor within his lifetime or within 3 years after his death to claim the subject property belong to him;

(vi) the advalorem court fees has not been paid; hence the plaint is liable to the rejected.

4. In support of his contention ***(i)*** and ***(ii)*** the defendant refers to paras 3 and 5 of the plaint :

> *"3. That in 1956, Sh. Chiranjeet Lai Kapur, father of Sh. Joginder Nath Kapur, was allotted a plot of land admeasuring 200 sq. yards, bearing No. 18/17, West Patel Nagar, New Delhi- 110008, by the Government of India under the extant law and the rehabilitation and compensatory scheme of Rehabilitation Ministry, Government of India, in lieu of various properties, ancestral and self-acquired, and various businesses he had left behind in Pakistan. Sh. Chiranjeet Lai Kapur started running a business of educational tuition institute from the said property and also started living in the said property with his wife, Smt.Parvati Kapur, his son, Sh. Joginder Nath Kapur and Smt. Gargi Kapur, Defendant No. 1 herein.*
>
> *5. That with the consent of his brothers and his mother, Sh. Joginder Nath Kapur sold the said property and from the proceeds thereof, purchased 1/2 share of the property admeasuring 556 sq. yards bearing No. 12/19, Western Extension Area, Karol Bagh, New Delhi - 110005 vide Agreement to Sell dated 07.09.1981, in the name of his wife. Defendant No 1 herein. Sh. Joginder Nath Kapur also got executed an Irrevocable General Power of Attorney in his own name. The said General Power of Attorney in the name of Sh. Joginder Nath Kapur stands incorporated by reference in the Agreement to Sell dated 07.09.1981, and is part of the title documents of the Suit Property. The said document also manifests the intention of Sh. Joginder Nath Kapur to be de facto in control of the Suit Property and conduct and control all transactions pertaining to the same himself."*

and also to a public notice given by the plaintiff in newspaper (page 26 of plaintiff's documents) which read as under:

> *"PUBLIC NOTICE*
> *Notice is hereby given to public at large that the entire property bearing No. 12/19, WEA Karol Bagh, New Delhi-110005 is a joint and ancestral property and as such I am a co-sharer of the same. This property is not available for sale, rent, lien construction, reconstruction, exchange, gift, lease, mortgage, charge, trust, possession or otherwise without my concurrence. Whomsoever, enters*

into any kind of agreement regarding the above mentioned property without my knowledge and concurrence, shall be doing so on his/her own costs, risks and consequences.
Sister Name : Anita Anand; Address: GH-IO/IO-B, Outer Ring Road, Paschim Vihar, New Delhi-87."

5. The defendant also refers to Section 6 of the Hindu Succession (Amendment)Act, 2005 :-

*"**6.Devolution of interest in coparcenary property.--***
(1) xxxx xxxx
(2) xxxx xxxx
(3)Where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005, his interest in the property of a Joint Hindu family governed by the Mitakshara law, shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship, and the coparcenary property shall be deemed to have been divided as if a partition had taken place and,-- the daughter is allotted the same share as is allotted to a son;

the share of the pre-deceased son or a pre-deceased daughter, as they would have got had they been alive at the time of partition, shall be allotted to the surviving child of such pre-deceased son or of such pre-deceased daughter; and

The share of the pre-deceased child of a pre-deceased son or of a pre-deceased daughter, as such child would have got had he or she been alive at the time of the partition, shall be allotted to the child of such pre-deceased child of the pre-deceased son or a pre-deceased daughter, as the case may be.

***Explanation.**—For the purposes of this sub-section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not."*

6. and *Prakash* (supra) wherein the Court held as under:-

23. Accordingly, we hold that the rights under the amendment are applicable to living daughters of living coparceners as on 9th September, 2005 irrespective of when such daughters are born. Disposition or alienation including partitions which may have taken place before 20th December, 2004 as per law applicable prior to the said date will remain unaffected. Any transaction of partition effected thereafter will be governed by the Explanation."

7. Relying upon above it is argued by the defendant the plaintiff could have got her share in the ancestral property only if her father was

alive on 09.09.2005, but since her father expired in the year 1987, she is not entitled to any share in the subject property.

8. The case put up by the defendant is as if the plaintiff has filed the suit for partition of an ancestral property and is claiming herself to be a coparcener in joint Hindu undivided family. However a bare perusal of paras no.7,8 and 9 of the plaint would reveal the plaintiff rather alleges the subject property being a self acquired property of Sh.Joginder Nath Kapur and he was a *de facto owner* of the suit property having purchased the property in the name of his wife *not for her benefit but for the benefit of his family* and further the plaintiff has always allegedly believed the said property to be the property of her father and it was only in the month of *July 2014* when plaintiff visited the said property but was kicked by defendant no.2 the cause of action arose for filing of this suit. Hence earlier to *July 2014* there could be no occasion for the plaintiff to file such suit, much less, within three years from the date of death of her father as she always allegedly believed the subject property to be her father's property as was the alleged oral understanding between the parties for decades.

9. The plaintiff has never stalked her claim as a coparcener in a joint Hindu family and thus if at some odd places in plaint the property is described as an ancestral or joint property but a meaningful reading of the plaint reveal the claim is not based upon ancestral property but upon a plea the property was purchased by deceased Joginder Nath Kapur by his own funds, hence it cannot be said the property is claimed to be an ancestral one and consequently Section 6 of the Hindu Succession Act,

1956 shall have no applicability. The suit property is a coparcenary property has not even been pleaded by the plaintiff. It is, even otherwise, a settled position of law after passing of the Hindu Succession Act, 1956, the traditional concept of "ancestral property" has undergone a change. If a person after 1956 inherits a property from his paternal ancestors, the said property shall not be HUF property in his hands but shall be taken to be a self-acquired property of the person who inherits the same.

10. Even otherwise, in *Sunny (Minor) & Others vs Raj Singh and Others* 225 (2015) DLT 211 this Court held:-

> *"(ii) This position of law alongwith facts as to how the properties are HUF properties was required to be stated as a positive statement in the plaint of the present case, but it is seen that except uttering a mantra of the properties inherited by defendant no.1 being 'ancestral' properties and thus the existence of HUF, there is no statement or a single averment in the plaint as to when was this HUF which is stated to own the HUF properties came into existence or was created i.e. whether it existed even before 1956 or it was created for the first time after 1956 by throwing the property/properties into a common hotchpotch. This aspect and related aspects in detail I am discussing hereinafter."*

11. Qua contentions ***(iii)*** viz. the suit is barred under Benami Transaction Act, the learned counsel for defendant has referred to Section 3 of the Benami Transaction Act :-

> *"3. Prohibition of benami transactions.—*
>
> *(1) No person shall enter into any benami transaction.*
>
> *(2) Nothing in sub-section (1) shall apply to—*
>
> *(a) the purchase of property by any person in the name of his wife or unmarried daughter and it shall be presumed, unless the contrary is proved, that the said property had been purchased for the benefit of the wife or the unmarried daughter;*
>
> *(b) xxxxx"*

12. It is alleged by the defendant the plaintiff had failed to plead in her plaint the suit property *was not purchased for the benefit of defendant*

no.1 and thus referred to paras 8 and 9 of the amended plaint to say, the plaintiff has alleged the suit property was held by their mother in **fiduciary capacity** for the children of Mr.Joginder Nath Kapur and per Section 7 of the Prohibition of Benami Transaction Act, the plaintiff now cannot take benefit of Section 4. Section 7 read as under:

> *"7. Repeal of provisions of certain Acts.—*
>
> *(1) Sections 81, 82 and 94 of the Indian Trusts Act, 1882 (2 of 1882), section 66 of the Code of Civil Procedure, 1908 (5 of 1908), and section 281A of the Income-tax Act, 1961 (43 of 1961), are hereby repealed.*
>
> *(2) For the removal of doubts, it is hereby declared that nothing in sub-section (1) shall affect the continued operation of section 281A of the Income-tax Act, 1961 (43 of 1961), in the State of Jammu and Kashmir."*

13. The defendant also relied upon *Amar N.Gugnani vs. Sh.Naresh Kumar Gugnani* in CS(OS) 478/2004 decided on 30.07.2015 wherein the Court held:

> *"17. In my humble opinion therefore the judgment in the case of Marcel Martins (supra) is distinguishable in view of the existence of the provision of Section 7 of the Benami Act repealing Sections 81, 82 and 94 of the Trusts Act.*
>
> *18. In view of the above, since the plaintiff in the plaint himself states that the property was purchased as a benami property in the name of the father, late Sh. Jai Gopal Gugnani, merely and although the plaintiff has used the expressions fiduciary relationship and trustee, yet these expressions of fiduciary relationship and trustee are not those expressions which will cause the transaction to fall under the exception of Section 4(3)(b) of the Benami Act, but these expressions are those expressions which fall under Sections 81, 82, and 94 of the Trusts Act and which have been repealed by Section 7 of the Benami Act.*
>
> *19. In view of the above, I hold that the suit is barred by the provision of Section 4(1) of the Benami Transactions (Prohibition) Act, 1988."*

14. Hence, it is argued per section 4 (3) (b) read with section 7 of the Prohibition of Benami Transactions Act and read with sections 81, 82 and 94 of The Trust Act the claim of the plaintiff is barred.

15. I disagree. The defendant rather has failed to look into the effect of Section *2(9)(A)(b)(iii)* of The Prohibition of Benami Property Transaction Act which read as under:-

> *"2. Definition: In this Act, unless the context otherwise requires,—*
> *(1) to (8) xxxxx*
> *(9) "benami transaction" means,—*
> *(A) a transaction or an arrangement—*
> *(a) where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person; and*
> *(b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration, except when the property is held by—*
> *(i) xxxxx*
> *(ii) xxxxx*
> *(iii) any person being an individual in the name of his spouse or in the name of any child of such individual and the consideration for such property has been provided or paid out of the known sources of the individual;*
> *(iv) xxxxx"*

16. The Prohibition of Benami Property Transactions Act, 1988 has been amended vide the Benami Transaction (Prohibition) Amendment Act, 2016. Under the amended Act, the definition of a benami transaction has been changed and the new definition is contained in Section *2(9)* of the amended Act and the present case does not fall under the ambit of the definition of a "benami transaction", as prescribed under Section *2(9)* of the Act and is squarely covered by proviso *(iii)* to the said definition. The present case thus is not that of a "benami transaction" and hence bar of Section 4 of the Act is not attracted in the present case. There is no legal impediment which can non-suit the plaintiff at the threshold, as sought by the defendants, and the plaintiff may lead evidence to prove Late Sh.Joginder Nath Kapur *was the de facto owner of the suit property.* The argument of the defendant the suit is barred due to repealing of certain provisions of Indian Trust Act, 1882 is also erroneous. Further, the

judgment of *Sh.Amar N.Gugnani V. Naresh Kumar Gugnani* is sub judice before the Ld.Division Bench of this Hon'ble Court in RFA(OS) No.89 of 2015.

17. Rather in *Manoj Arora vs. Mamta Arora* in RFA No. 522/2017 decided on 07.08.2018 this Court held:-

> *"4. Unfortunately, the trial court has committed a grave and fundamental error in rejecting the suit plaint under Order VII Rule 11 CPC by relying upon the provision of Section 4 and repealed provision of Section 3(2) of the Benami Transactions (Prohibition) Act. When the impugned judgment was passed on 19.12.2016, what was, and is now applicable is the Prohibition of Benami Property Transactions Act, 1988 which became applicable w.e.f 1.11.2016. As per Section 2(9) of the Amended Act what is a Benami Transaction is stated/specified, and also those transactions which are not benami are are also stated/specified. As per the suit plaint/averments, in the present case the existence of the properties in the name of the respondent/defendant/wife will fall as an Exception to the prohibited benami transaction in view of Section 2(9)(A)(b) Exception (iii) inasmuch* ***as it is legally permissible for a person to purchase an immovable property in the name of his spouse from his known sources, and in which position, the property purchased will not be a benami property but the property will be of the de jure owner/plaintiff/husband and not of the de facto owner (in whose name title deeds exist), being the respondent/defendant/wife in the present case.***
> *5. By the impugned judgment since the suit has been held to be barred at the threshold by applying Order VII Rule 11 CPC, and the plaint has been rejected by applying the repealed provision of Section 3(2) of the Act which was no longer applicable, and by ignoring the provision of Section 2(9)(A)(b) Exception (iii) which was applicable, the impugned judgment is hence illegal and is set aside. Whether or not the appellant/plaintiff/husband will or will not have the benefit of Section 2(9)(A)(b) Exception (iii) is a matter of fact which requires trial and such a suit cannot be rejected at the threshold by applying Order VII Rule 11 CPC.*
> *6. In view of the aforesaid position, this appeal is allowed. Impugned Judgment dated 19.12.2016 is set aside. Suit would be tried and disposed of by the trial court in accordance with law after trial/evidence."*

18. Thus the plaintiff's claim she treated her father to be an owner of subject property cannot be ignored *at this stage*. Thus contention ***(iii)*** has no merit. Even otherwise, in the hearing held on 21.08.2018 the learned

counsel for defendants no.2 and 3 conceded the Benami Transactions Act is not applicable to this case.

19. Coming to contention ***(iv)***, it was argued by the defendant viz. per Section 14 of the Hindu Succession Act, the property vested in defendant no.1 and hence she could have even executed a Will/ gift deed for the entire property. Section 14 of the Hindu Succession Act read as under:-

> *"14.* ***Property of a female Hindu to be her absolute property***
> *(1) Any property possessed by a Female Hindu, whether* ***acquired*** *before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.*
>
> ***Explanation:*** *In this sub-section, "property" includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or* ***in lieu of maintenance*** *or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the commencement of this Act.*
>
> *(2) Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property."*

20. It was argued by the learned counsel for the defendants the plaintiff had failed to allege the property though was purchased in the name of defendant no.1 *but was not for her benefit alone* and further the property was acquired by the mother in lieu of maintenance so per Section *14* of Hindu Succession Act the property vested in her as an absolute owner, hence the suit is not maintainable.

21. The learned counsel for the defendant also relied *Jupudy Pardha Sarthy vs Pentapati Rama Krishna & Others* (2016)2 SCC 56 wherein the Court noted:-

"18. Lastly, His Lordship after elaborate consideration of the law and different authorities came to the following conclusions:- "We would now like to summarise the legal conclusions which we have reached after an exhaustive considerations of the authorities mentioned above on the question of law involved in this appeal as to the interpretation of Sections 14(1) and (2) of the Act of 1956.
These conclusions may be stated thus:
*'**(1)** The Hindu female's right to maintenance is not an empty formality or an illusory claim being conceded as a matter of grace and generosity, but is a tangible right against property which flows from the spiritual relationship between the husband and the wife and is recognised and enjoined by pure Shastric Hindu law and has been strongly stressed even by the earlier Hindu jurists starting from Yajnavalkya to Manu. Such a right may not be a right to property but it is a right against property and the husband has a personal obligation to maintain his wife and if he or the family has property, the female has the legal right to be maintained therefrom. If a charge is created for the maintenance of a female, the said right becomes a legally enforceable one. At any rate, even without a charge the claim for maintenance is doubtless a pre-existing right so that any transfer declaring or recognising such a right does not confer any new title but merely endorses or confirms the pre-existing rights.*
***(2)** Section 14(1) and the Explanation thereto have been couched in the widest possible terms and must be liberally construed in favour of the females so as to advance the object of the 1956 Act and promote the socio- economic ends sought to be achieved by this long needed legislation.*
***(3)** Sub-section (2) of Section 14 is in the nature of a proviso and has a field of its own without interfering with the operation of Section 14(1) materially. The proviso should not be construed in a manner so as to destroy the effect of the main provision or the protection granted by Section 14(1) or in a way so as to become totally inconsistent with the main provision.*
***(4)** Sub-section (2) of Section 14 applies to instruments, decrees, awards, gifts, etc. which create independent and new titles in favour of the females for the first time and has no application where the instrument concerned merely seeks to confirm, endorse, declare or recognise pre- existing rights. In such cases a restricted estate in favour of a female is legally permissible and Section 14(1) will not operate in this sphere. Where, however, an instrument merely declares or recognises a pre-existing right, such as a claim to maintenance or partition or share to which the female is entitled, the sub-section has absolutely no application and the female's limited interest would automatically be enlarged into an absolute one by force of Section 14(1) and the restrictions placed, if any, under the document would have to be ignored. Thus where a property is allotted or transferred to a female in lieu of maintenance or a share at partition, the instrument is taken out of the ambit of sub-section (2) and would be governed by*

> *Section 14(1) despite any restrictions placed on the powers of the transferee.*
> ***(5)*** *The use of express terms like 'property acquired by a female Hindu at a partition', 'or in lieu of maintenance', 'or arrears of maintenance', etc. in the Explanation to Section 14(1) clearly makes sub-section (2) inapplicable to these categories which have been expressly excepted from the operation of sub-section (2).*
> ***(6)*** *The words 'possessed by' used by the Legislature in Section 14(1) are of the widest possible amplitude and include the state of owning a property even though the owner is not in actual or physical possession of the same. Thus, where a widow gets a share in the property under a preliminary decree before or at the time when the 1956 Act had been passed but had not been given actual possession under a final decree, the property would be deemed to be possessed by her and by force of Section 14(1) she would get absolute interest in the property. It is equally well settled that the possession of the widow, however, must be under some vestige of a claim, right or title, because the section does not contemplate the possession of any rank trespasser without any right or title.*
> ***(7)*** *That the words 'restricted estate' used in Section 14(2) are wider than limited interest as indicated in Section 14(1) and they include not only limited interest, but also any other kind of limitation that may be placed on the transferee."*

22. However, I may refer to para 10 of the reply filed by the plaintiff to IA No.4817/2017 wherein the plaintiff alleged :

> *"The contents of paragraph No. 10 of the application under reply are misconceived, incorrect and hence denied. It is specifically denied that the present suit is barred under Section 14(1) of Hindu Succession Act, 1956, as alleged. The present suit is maintainable under the provisions of the Prohibition of Benami Property Transactions Act, 1988 and is not barred by Section 14(1) of Hindu Succession Act, 1956. It is denied that Defendant No. 1 was absolute owner of the suit property. It is denied that Defendant No. 1 had any right to deal with the suit property, as alleged. It is reiterated that Late Sh. Joginder Nath Kapur was the real and de facto owner of the suit property. Smt. Gargi Kapoor only held the suit property in fiduciary capacity for the benefit of Shri Joginder Nath Kapoor and their children. After his demise, and the demise of Smt. Gargi Kapur, the Plaintiff has become an owner of 1/3rd share of the suit property."*

23. In *Hemant Satti vs. Mohan Satti,* 2013 (2015) DLT 130, the Hon'ble Court was faced with a similar question and it has harmonized the provision of Section 14(1) of the Hindu Succession Act with Section 3(2) of the Prohibition of Benami Property Transactions Act, 1988 (as it

existed before the 2016 amendment). In paragraph 16 of the said judgment, the Court has held that a challenge to the right of a woman under Section 14 of the HSA is entertainable if it is proved that the property purchased in the name of a woman was not for her benefit.

24. By amending the old Act by the Benami Transactions (Prohibition) Amendment Act, 2016, the legislators while recognizing and maintaining the said exception contained in Section 3(2) and 4(3) of the Old Act, for abundant clarity, by virtue of Section 2(9)(A)(b)(ii) and Section 2(9)(A)(b)(iii) of the amended Act, specifically excluded transactions of the nature pleaded by the plaintiff from the very definition of Benami Transactions. Given this position and there not being any disharmony between the provisions of the Old Act and the amended Act insofar as the aforesaid exception is concerned, the *ration decendi* of the Hemant Sati case (supra) will, apply *proprio vigore*, to cases covered by the amended Act as well. In view of the above, the argument of the defendants the wife of the father of the parties had become the absolute owner of the suit property when the same was purchased in her name by virtue of Section 14 of the Hindu Succession Act, 1956 would be subject to trial.

25. Admittedly no charge ever was created on the property in favour of defendant no.1 in lieu of maintenance, hence *Jupudy Pardha's* case (supra) even otherwise, shall not be applicable.

26. Qua contention ***(v)*** the learned counsel for defendant relied upon Leena Mehta vs Vijaya Myne & Ors, CS (OS) No.2118/2006 decided on 09.11.2009 wherein it was held:-

> *"5. A perusal of suit shows that the plaintiff sought a declaration that the property standing in the name of her mother, did not belong to her and actually belonged to her father. The property was registered in the*

name of her mother defendant no.1 in 1975. The husband of defendant no.1 remained alive for 22 long years after 1975 and died in 1997. He did not file a suit against his wife seeking a declaration that the property was actually his benami property in the name of his wife and he was the real owner. If he had not considered defendant no.1 (wife) as owner of the property and he considered the property as his property, he was at liberty to file a suit against defendant no.1 during his lifetime. The very fact that the husband of defendant no.1 did not file a suit against her seeking a declaration that the property was his property and not the property of defendant no.1, shows that defendant no.1 was an absolute owner of the property to the exclusion of everyone else. Her husband who remained alive for 22 years, after 1975 only treated her as the sole owner of the property. The plaintiff herself, even after attaining the age of majority did not claim any share in the property either from her father or from the mother. She was married off in 1997 and even after 1997 she did not file a suit within limitation period seeking declaration that the property standing in the name of her mother was not actually the property of her mother but was the property of her father in which she had a right of inheritance. The timing of suit and making only three defendants i.e. her mother, sister and brother, makes it clear that the suit was a collusive suit, filed in collusion with defendants no. 1, 2 & 3 in order to avoid an agreement to sell which defendant no.1 had entered with defendant no.4 and which was not fulfilled and for specific performance of which defendant no.4 had to file a suit. I consider that the suit for declaration filed by the plaintiff seeking a declaration that the property was not the property of her mother but actually property of her father is miserably time barred. The period of limitation for filing such a suit is three years. The limitation starts in this case in 1975, when property was transferred in the name of defendant no.1 by Delhi Development Authority. Suit could have been filed by husband of defendant no.1. He expired in 1997. The suit could have been filed by the plaintiff latest by year 2000. The suit is liable to be dismissed being time barred."

27. It is argued the facts of the present case are akin to the facts narrated in *Leena* (supra). Neither the deceased father of the plaintiff nor the plaintiff ever filed a suit for declaration claiming him to be an absolute owner of the subject property during his lifetime or within three years of the date of death of her father, hence the suit for declaration now is barred by limitation.

28. The learned counsel for the defendants thus argued a legal presumption cannot be rebutted by merely alleging averments of symbolic possession.

29. Qua limitation the learned counsel for the defendants pleaded that Mr.Joginder Nath Kapur expired on 15.12.1987; the plaintiff got married in 1976 and para 8 of the plaint reveal the plaintiff was well aware the property which Mr.Joginder Nath Kapur purchased in the name of his wife was for the benefit of all the children and was in fact the property of late Mr.Joginder Nath Kapur. Admittedly late Mr.Joginder Nath Kapur during his lifetime did not file any suit against his wife seeking a declaration the property belongs to him. Admittedly the plaintiff also did not file such suit till after three years of the death of Mr.Joginder Nath Kapur.

30. Hence, it was argued this suit is primarily a case of declaration and not of partition and the limitation for such a relief would start on 15.12.1987 from the death of Joginder Nath Kapur. It is submitted the claim raised by the plaintiff would only succeed if she gets a declaration that Joginder Nath Kapur is the real owner of this property and she could have got such declaration either during the lifetime of her father or within 3 years of his death and now this suit is barred by limitation. In fact it is argued the plaintiff need to seek a declaration *the suit property exclusively belong to her father* and also *he died intestate* and is now *she is a co-owner* of the property.

31. I am afraid the contention of the plaintiff has no force since a suit for partition would, even otherwise, be maintainable as in order to grant a prayer of partition the Court will nonetheless shall decide the property is being capable of partitioned and hence a separate relief of declaration

would be superfluous as held in *Vakil Chand Jain vs. Prakash Chand Jain* 2009 SCC online Del 2769 as under :

> *"15. On the basis of the pleadings the following issues were framed by this Court on 15th April 2005:*
> *1-3. xxxx*
> *4. Whether the suit pertaining to prayer 3 is barred by limitation? OPD*
> *5-7. xxxx*
> *29. Viewed from another angle, the relief of declaration as sought for by the plaintiff is actually superfluous. Even if one were to omit this relief from the prayers in the suit, in order to succeed in the prayer for partition, the plaintiff would nevertheless have to prove:*
> *(a) that the property is capable of being partitioned;*
> *(b) that the plaintiff has a share in the property;*
> *(c) that such share can be ascertained and granted either by metes and bounds or by sale of the property.*
> *30. Therefore, in effect, the Court will have to decide whether the plaintiff has any right, title or interest to a share in the property as claimed by him. This Court, therefore, does not find any inconsistency in the pleas for a decree of declaration and a decree for partition sought for by the plaintiff in the instant case."*

32. I have already noted above there being no occasion for the plaintiff to come to the court prior to July 2014 in view of an alleged settled understanding between the parties prior to such date and if such understanding ever existed is a question of *fact* requiring evidence.

33. Qua contention ***(vi)*** viz. the advalorem Court-fee, it is argued ***(a)*** the plaintiff has valued the suit property at ₹5,93,56,644/- and seeks a declaration to be a co-owner of such property when, admittedly, she is neither in physical nor symbolic possession of the property, she being married since 1976 and is residing in her matrimonial home, hence has to pay advalorem Court fee on the relief of declaration/partition with a consequential relief and ***(b)*** the plaintiff seeks a declaration qua the gift deed valued at ₹5.93 Crores, to be void but whereas the Court-fee of ₹200 only has been paid and hence the plaintiff be directed to pay the actual Court fee.

34. I agree to these submissions. Though the plaintiff claims to be in constructive possession of the property but she herself alleges all documents concerning the property are with defendant no.2 who is even enjoying the rental income, and even per allegations in the plaint she claims her ouster in July, 2014, she need to pay Court fee to the extent of her share in the property to seek partition.

35. In Suresh Kapoor versus Shashi Krishan Lal Khanna & Ors. 2015 (2016) DLT 273 the Court held:

> *"15. The learned Single Judge culled out para 7 of the plaint in the judgment and observed that there is unambiguous ouster or exclusion from possession in the suit property and the facts situation being akin to Prakash wati, the Plaintiff will be required to pay court fee on the market value of his share. It would be expedient to extract para 7 of the plaint in that suit which led the learned Single Judge to held that the Plaintiff was ousted from possession:*
>
> *" .. That though the Plaintiffs are co-owners and in joint possession of the aforesaid property along with the defendants, the defendants have been enjoying the rights in the said property and the defendants have not paid any amount realized by them from the tenants and/or for their occupation of the premises, to the Plaintiffs till date though the Plaintiffs and the defendants became co-owners of the property since May, 1993, i.e. after the death of late Smt. Swadesh Kumari Bhalla...."*

36. In Anil Kumar Bansal vs R.K.Bansal & Ors. II (2013) DLT 11B (CN) the Court held:

> *"16. It is clear that upon a bare reading the entire plaint as a whole and in particular, paras 11, 12 and 26 thereof, the plaintiffs have not been able to establish the fact that at the time of institution of the suit, they were in possession of any portion of the suit premises, either actual or physical or symbolic, for claiming a right to pay any amount less than the ad valorem court fees on the value of their shares, as has been done by them. Rather, the plaintiffs have admitted their exclusion from the joint possession of the suit premises.*
> *17. In view of the aforesaid facts and circumstances, this Court is of the opinion that the plaintiffs are required to pay ad valorem court fees on the value of their shares, for seeking the relief of partition and possession of their separate shares in the suit premises."*

37. Thus merely by assertion of possession the Plaintiff cannot avoid payment of Court fee in a suit for partition. The married daughter once

moves to her matrimonial home after marriage cannot claim that contrary to the customs she is keeping possession of the suit property owned by her mother.

38. In the present case the Plaintiff herself in para no.11 of the plaint has averred the defendant no.1 and 2 live in the suit property and are currently in possession of the title documents. It is also averred defendant no.2 continuous to derive income from the suit property and has acquired other properties from the proceeds and earnings of the said income from the suit property.

39. Once it is own case of the plaintiff that defendant no.1 and 2 are living in the suit property and the defendant no.2 is deriving income from the suit property, itself shows that the suit property is not in the possession of the plaintiff and the defendant no.2 is deriving income either by letting out the same or by doing some kind of work, business of the said property.

40. A meaningful reading of averments in the plaint shows the plaintiff admits her ouster by the defendants and the ouster is premised on the plaintiff right, title or interest in the property being denied, the plaintiff has to pay advalorem Court fee. In para no.14D of the plaint she has averred the defendant no.2 was conducting commercial business of tuition centre at the suit property.

41. Clever nature of pleadings in the plaint which is of ambiguous nature will not save the plaintiff from her liability to pay Court fee if the exclusion from possession is being established from the pleadings.

42. All the above facts, clearly establishes complete ouster of the plaintiff from the suit property. Moreover as per Section 8 of the Suit

Valuation Act, 1887, the value of the suit for the purpose of jurisdiction and Court fee has to be same. The plaintiff has not paid advalorem Court fee on the relief of partition on her share. The plaintiff is liable to pay the same.

43. Qua ***(b)*** of contention ***(vi)*** the learned counsel for the plaintiff has relied upon *Suhrid Singh vs Randhir Singh & Others* AIR 2010 SC 2807 the Court held otherwise:-

> *"7. Where the executant of a deed wants it to be annulled, he has to seek cancellation of the deed. But if a non-executant seeks annulment of a deed, he has to seek a declaration that the deed is invalid, or non-est, or illegal or that it is not binding on him. The difference between a prayer for cancellation and declaration in regard to a deed of transfer/conveyance, can be brought out by the following illustration relating to `A' and `B' -- two brothers. `A' executes a sale deed in favour of `C'. Subsequently `A' wants to avoid the sale. `A' has to sue for cancellation of the deed. On the other hand, if `B', who is not the executant of the deed, wants to avoid it, he has to sue for a declaration that the deed executed by `A' is invalid/void and non- est/illegal and he is not bound by it. In essence both may be suing to have the deed set aside or declared as non-binding. But the form is different and court fee is also different. If `A', the executant of the deed, seeks cancellation of the deed, he has to pay ad-valorem court fee on the consideration stated in the sale deed. If `B', who is a non-executant,* ***is in possession*** *and sues for a declaration that the deed is null or void and does not bind him or his share, he has to merely pay a fixed court fee of Rs. 19.50 under Article 17(iii) of Second Schedule of the Act. But if `B', a non- executant, is not in possession, and he seeks not only a declaration that the sale deed is invalid, but also the consequential relief of possession, he has to pay an ad-valorem court fee as provided under Section 7(iv)(c) of the Act."*

44. Admittedly the plaintiff is *not in possession* of the suit property, hence, the above judgment would *not* be applicable upon her and she need to pay advalorem Court fee on the value of Gift Deed since asking for its cancellation.

45. As per Section *7 (iv) (c)* of the Court fee Act, 1870 where the plaintiff filed a suit for declaratory decree with consequential relief, advalorem Court fee is payable. Thus for above prayers of declaration,

the plaintiff is liable to pay advalorem Court fee as per *Section 7 (iv) (c)* of the Court fee Act.

46. The relief of partition sought by the plaintiff will be consequential to the declaration of gift deed as illegal as till the time the gift deed will stand in the name of defendant no.2, the plaintiff shall not be entitled for partition. Thus, the present suit is a suit for declaration with consequential relief and the judgment of the Apex Court would be of no help to the plaintiff as incase the suit would have been only qua the declaration of a document as illegal without any further relief viz. possession, the said judgment would have been applicable.

47. No Court fee was payable in the cited case viz. *Suhrid Singh* (supra) as the plaintiff had not sought any consequential relief of possession and being a non-executant simply sought for a declaration of the sale deed as illegal, hence was held not required to seek relief of cancellation since was not a party to the said sale deed. However, the facts are otherwise in the present case and since the plaintiff is seeking declaration of Gift Deed as *null and void* need to pay advalorem court fee. This issue is decided accordingly. The plaintiff is given four weeks' time to make good the court fee.

48. Application stands disposed of in terms of above.

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49. List on 14.11.2018.

YOGESH KHANNA, J

SEPTEMBER 19, 2018 *M/DU*