ORDER BELOW EX. 47

In RCS NO. 52 of 2022

CNR : **MHRT080003992022**

Atul Sharadchandra Gadre Vs Kanchan Keshav Gadre etc. 22

Order Dated : 29th of November 2023.

Application for Rejection of plaint under Order VII Rule 11(d) of C.P.C.

1. This is an application filed by defendant no. 1 under order VII Rule 11(d) of Code of Civil procedure, 1908.

2. It is pleaded that through this suit plaintiff seeks decree of declaration that gift deed dated 22-11-1989 which was executed and registered in favour of defendant no. 1 by his father is illegal. So, the limitation for taking legal action for the declaration started running from 27-11-1989 as the registered gift deed is the notice in rem. Plaintiff's father didn't challenge tge gift deed in his lifetime. Plaintiff's father died on 19-02-1016. Hence, at the most, cause of action for the suit accrued to plaintiff on 19-02-2016 at the most. Therefore this suit being time barred as per the statement in plaint itself needs to be rejected. Accordingly he prayed that plaint be rejected as time barred on the ground of preliminary issue only.

3. To this application, plaintiff has filed his say at Exh.50 and pleaded that since the suit is filed for declaration that gift deed is void ab initio, the limitation starts running from the day when plaintiff first had idea about the alleged document. Plaintiff has specifically pleaded in his plaint that he came to know about said gift deed on 22-08-1018. Further, the limitation to file suit as per Article 59 of Limitation Act, is Three years, from the date When the facts entitling the plaintiff to have the instrument or decree cancelled or set aside or the contract rescinded first become known to him.

4. It is further pleaded that as per Writ petition 3-2020 in Hon'ble Supreme Court, as the date of limitation was ending during covid-19 pandemic period, as per directions by Apex Court, the limitation further extended and started running from 01-03-2022 for further 90 days. As such limitation ends of 29-05-2022. However, during that period, since it was summer vacation for civil courts, it was not possible to file suit. Hence, the suit is filed on the day when courts resumed their working in 06/06/2022.

5. Further, as pleaded in application, that plaintiff is power of attorney holder of his father. However, the alleged document is hampering rights of plaintiff in his personal capacity also. Hence, he has filed the suit in capacity of being co-owner in suit property. Hence, Ld. Adv. Shri.

Bhatwadekar argued that the suit is clearly within limitation. Hence, application may kindly be rejected.

6. Ld. Adv. For defendant no.1 Shri. A.K. Bhagwat argued that as per mutation enrty no. 215 dated 23-04-1990 (Exh, 55) the said entry was made as per registered gift deed dated 04-04-1990. He has filed written arguments At Exh. 56 whereby he pleaded that as per the plaintiff's theory limitation is mixed question of fact and law. Hence, without full-fledged evidence is led, the question cannot be decided in summary manner. However, it is settled principle of law that while considering an application under O. VII Rule 11(d) only plaint has to be perused and not the written statement of defendant. Plaint must prima facie show that it is time barred suit.

7. He referred the pleading of the plaint where it is claimed that the suit property is ancestral joint family property of Gadre family. Father of defendant no.1 who was karta of this family had no legal right to dispose of the property by way of registered gift deed dated 06-12-1989. Plaintiff claims that he came to know about the alleged gift deed whne defendant produced it before circle officer in the manner of recording name of LRs to revenue record on 23-08-2018.

8. He argued that the gift deed has following recitals in it.

"सदर मिळकतीस एकत्र कुटुंब प्रमुख म्हणून माझे नाव दाखल आहे. एकत्र कुटुंबयापैकी कोणाही व्यक्तीची हरकत असलेस ती मी दूर करेन. सादर मिळकतीस रेकॉर्ड ऑफ राइट्स कागदी मी तुझे नाव दाखल होणेस कबुली देईन."

Hence, it clearly shows that one Keshav Gadre was aware of the fact that the suit property is ancestral joint family property and he was acting as a head of family. This line was so inserted in gift deed as Keshav Gadre was aware of the fact that when an application for recording name of defendant no. 1 to the suit property would be submitted in future and mutation entry would be recorded, all the co-sharers will get notice of this entry and perhaps someone from co-sharer may object to this mutation entry and in this situation the donor of gift would resolve the dispute. Fortunately, father of plaintiff didn't object this gift deed even after getting the notice of this mutation entry.

9. Further he pleaded that as per plaintiff's theory, father of defendant no.1 has himself applied to Talathi Deorukh in the year 1985 to record name of all co-sharer in the suit property and thereafter the mutation entry 7593 is certified by circle officer. Prior to gift deed in 1989, the said mutation was made. It shows bonafide act of Keshav, father of defendant no. 1 to record name of all co-sharer including father of plaintiff.

10. Further the so-called notice of proposed mutation entry no. 7593, clearly mentions that the compliance of Rule 14 and 24 is given. The said gift deed was registered and mutation entry no. 215 was registered on 04-04-1990. It is

certified by circle office on 23-04-1990. In this mutation entry it is specifically mentioned that "**Notice Received**". So, circle officer after giving intimation to all co-sharer, after waiting for mandatory period of 15 days made at entry final. The due procedure of law was followed as per MLRC and especially Record Of Rights And Registers Preparation And Maintenance Rules 1971. As per Rule 14 and 24 of Rules 1971, *As soon as a mutation is entered in the Property Card under Rule 23, the Talathi shall post up a complete copy of the entry in the Village Chavdi or where there is no Chavdi in a conspicuous place in the Village, Town or City. He shall also simultaneously give notice in Form IX to all persons appearing from the Property Card to be interested in the mutation and to any other person whom he has reason to believe to be interested therein, requiring them to send their objections, if any, to the entry either orally or in writing within fifteen days from the date of receipt of such notice.*

11. Also, form IX of the Rule mentions that 15 days time is given for taking objection to the certification of mutation entry and if no objection is received it is presumed that the interested person agree the said entry.

12. Ld. Adv. Shri Bhagwat also argued that as per section 157 of MLRC, there is presumption as to correctness of entries in record of rights and mutation register. The said entries are not challenged by the plaintiff till date. Hence,

this mutation entry goes to the root of the point of limitation and its legal effect is all the interested person especially father of plaintiff had knowledge in the year 1989 only.

13. He further went on to argue that since date of registration of gift deed, plaintiff's father never challenged this registered gift deed. The bare perusal of plaint is only required to arrive at the conclusion whether suit is time barred or not. Plaint even doesn't mention that father of plaintiff had no idea about registration of gift deed or notice of mutation entry no. 215. Limitation to file suit started running under Section 9 of Limitation Act since year 1989. The knowledge of registered gift deed to father of plaintiff can be easily averred from pleading in the suit. Father of plaintiff approved the capacity of father of defendant no. 1 as a Karta of joint Hindu family and consented the gift deed of minimal area of 1 Guntha by taking no action, amounting to waiver of his right. Hence, plaintiff is estopped from filling the suit.

14. The limitation clearly expired during lifetime of father of plaintiff. Hence disclosure of gift deed in the year 2018 is totally irrelevant for covering the period of limitation. Had it been a case that plaintiff averred that his father had no idea about gift deed then it would have been a mixed question of law and fact. However, this is not so. Hence, it was argued that the suit is clearly time barred.

15. Having heard Ld. Advocate for both the parties, in order to decide tenability of the suit on the ground of period of limitation following preliminary issue is framed. I have recorded my findings on each of them with reason thereto.

Sr no.	Preliminary issue	Findings
1.	Whether suit is barred by law of limitation?	No.
2.	What order?	Application is rejected.

REASONS

16. First of all before dwelling in to main crux, it is necessary to mention here that limitation if mixed question of fact and law. It has to decided on the bare perusal of the plaint. No full-fledged evidence is required to be given in respect of the same. The point of tenability of the suit has to be decided prima facie. In view of above settled principle of law, lets proceed towards main application.

17. Admittedly, the suit properties are ancestral properties of father of defendant no. 1 and father of plaintiff. Even though the alleged gift deed was executed in the lifetime of father, being coparcener in joint family

property, plaintiff seems to be having share in suit property.

18. Now, so far as Art. 59 of Limitation Act is concerned, Article 58 of the Second Schedule to the Limitation Act provides for the period of limitation to file **a suit to obtain any other declaration**. The period of limitation under this article is **three years** from the date when the right to sue first accrues. **It is a residuary article governing all those suits for declaration which are not specifically governed by any other articles in the Limitation Act.** However, there is special Article governing the said facts. Hence Art. 59 has no application in this case.

19. It is admitted position that father of defendant no. 1 was acting in the capacity of Karta to joint family property. In that said capacity he executed gift deed in favour of defendant no.1 For the fruitful reliance, it is here to be noted that **Art. 110 of the Limitation Act** enacts that ***period of limitation is 12 years and it begins to run from the date when exclusion become known to plaintiff, in the cases where person is excluded from joint family property to enforce right to sue.***

20. There is no dispute that the parties to the suit are Hindus and are governed by Mitkashara Law. The plaintiff has challenged the alienation made by father of

defendant no. 1. Transfer of property by way of Gift amounts to excluding plaintiff from his rightful share in the capacity of Karta. In order to attract Article 110, the following conditions have to be fulfilled, namely, (1) the parties must be Hindus governed by Mitakshara; (2) the suit is for setting aside the alienation by way of gift thereby excluding share of plaintiff at the instance of the plaintiff ; (3) the property relates to ancestral property; and (4) the person excluded must know the fact.

21. It is trite law that Karta/Manager of a joint family property may alienate joint family property only in three situations, namely, (i) legal necessity (ii) for the benefit of the estate and (iii) with the consent of all the coparceners of the family. In the instant case, the alienation of the joint family property by way of gift was with the consent of all coparcener or not is yet to be decided.

22. It is settled law that where an alienation is not made with the consent of all the coparceners, it is voidable at the instance of the coparceners whose consent has not been obtained Therefore, the alienation of the joint family property in favour of the defendant no. 1 was voidable at the instance of the plaintiff whose consent had not been obtained as a coparcener before the said alienation, as pleaded in plaint. Whether or not that

alleged gift deed was with consent or not cannot be decided at this moment.

23. It is well settled that a Hindu father or any other managing member of a HUF has power to make a gift of ancestral property only for a 'pious purpose' and what is understood by the term 'pious purpose' is a gift for charitable and/or religious purpose. Therefore, a deed of gift in regard to the ancestral property executed 'out of love and affection' does not come within the scope of the term 'pious purpose'. Hence, the doubt creates about the validity of alleged gift deed.

24. In view of Art. 110 of Limitation Act, suit can be hence said be filed within limitation as plaintiff has specifically pleaded in his plaint that he came to know about said gift deed on 22-08-1018. Hence, period of limitation can be said to run from that day.

25. So far as arguments by Ld. Advocate for the defendant no. 1 that there is no recital in plaint that father of plaintiff had no idea about alleged gift deed, no doubt father of defendant might have idea about said gift, however, since the fact that plaintiff is coparcener in joint family property this fact was not known to him. The documents produced on record by the plaintiff at Exh. 59 prima facie shows that the family of plaintiff used to reside

in Mumbai. Hence, plaintiff cannot be said to have consented the said gift deed.

26. In view of above discussion, though the alleged gift deed was not challenged by father of plaintiff in his lifetime, plaintiff being coparcener has every right to file suit for his own rights in capacity of co-owner of suit property. Further, limitation is mixed question of facts and law. Hence, at this stage, bare perusal of plaint shows that plaint is clearly within limitation. In view of above discussion, I record my finding to issue no. 1 in negative and in an answer to point no. 2 I pass following order;

ORDER

Application is rejected.

Sd/-

Place : Deorukh [Shruti H.Patil]
Date : 29/11/2023 Jt. CJJD, Deorukh