

## **Kamlesh Babu & Ors vs Lajpat Rai Sharma & Ors on 16 April, 2008**

**Equivalent citations: 2008 AIR SCW 3241, 2008 (12) SCC 577, AIR 2008 SC (SUPP) 1931, (2008) 6 SCALE 403, 2008 HRR 2 687, (2008) 3 ICC 500, (2008) 2 CIVILCOURTC 650, (2008) 2 CLR 59 (SC), (2008) 3 ALL WC 2903, (2008) 2 CAL LJ 133, (2008) 3 PUN LR 455, (2008) 2 RECCIVR 872**

**Author: Altamas Kabir**

**Bench: A. K. Mathur, Altamas Kabir**

CASE NO.:

Appeal (civil) 2815 of 2008

PETITIONER:

KAMLESH BABU & ORS

RESPONDENT:

LAJPAT RAI SHARMA & ORS

DATE OF JUDGMENT: 16/04/2008

BENCH:

A. K. MATHUR & ALTAMAS KABIR

JUDGMENT:

JUDGMENT Altamas Kabir,J.

CIVIL APPEAL NO. 2815 OF 2008 (Arising out of SLP (Civil) No. 10058 of 2006)

1. Leave granted.

2. This appeal involves a dispute between the parties who are related to each other, having a common ancestor. The dispute involves a registered Will dated 5th August, 1972, executed in favour of the appellants by one Brijlal (deceased), who had four sons. Except for his youngest son, Onkar Prasad, all the other sons were allegedly separated from him and were staying separately. Brijlal was staying with Onkar Prasad and excluding the descendants of his other children executed the said Will dated 5th August, 1972, in favour of his grand-children through Onkar Prasad. Brijlal died on 5th November, 1976, and on the basis of the Will executed by him, the appellants moved an application for mutation of the bequeathed properties in their names. The respondent No. 1, who is one of the grand-sons of the testator through another son, Shanti Swarup, also filed an application for mutation, which was rejected. An appeal preferred therefrom was also dismissed. On 29th April, 1977, the Tehsildar passed an order for mutation of the properties in the name of the appellants on

the basis of the aforesaid Will dated 5th August, 1972.

3. On 2nd January, 1978, the respondent No.1 herein filed a suit for declaration that the registered Will dated 5th August, 1972, had been procured by practising fraud. The suit was duly contested by the appellants herein by filing written statement. On the basis of the pleadings, in order to arrive at a decision in the suit, the following issues were framed: -

(i) Whether the Will dated 5th August, 1972 executed by Brijlal, in favour of defendants 2 to 6 is forged and not binding upon the plaintiff?

(ii) Whether the plaintiff is entitled to get possession on the disputed property of his share?

(iii) Whether the suit was undervalued and the court fee paid is insufficient?

(iv) Whether Brijlal had got a right to execute the Will of his property?

(v) Whether Brijlal was the exclusive owner of the disputed property?

(vi) To what relief, if any, is the plaintiff entitled?

4. All the aforesaid issues were decided against the plaintiff and the suit was dismissed by the Trial Court. While deciding issue No. 6, The Trial Court also held that the suit was barred under Article 59 of the Limitation Act, 1963, because the plaintiff had failed to prove that the Will was not within the knowledge of the plaintiff within three years of the filing of the suit.

5. Aggrieved by the decision in the suit, the plaintiff- respondent No. 1 herein, preferred an appeal before the Civil Judge, Aligarh, which was allowed and the judgment of the Trial Court was reversed without deciding the question of limitation which had been decided against the plaintiff- respondent No.1 and in favour of the defendants-appellants herein.

6. The defendants-appellants herein filed a second appeal before the Allahabad High Court on 3rd October, 1983, and the same was also dismissed on 6th February, 2006, affirming the judgment and order of the Appellate Court.

7. In this appeal, the main point which was urged on behalf of the appellant is that although all the issues in the suit were decided against the plaintiff-respondent No.1 by the Trial Court, in addition, the Trial Court had also held that the suit was barred by limitation. It was submitted that while reversing the judgment of the Trial Court, the First Appellate Court had neither gone into the question of limitation nor reversed the finding that the suit was barred by limitation under Article 59 of the Limitation Act. While affirming the judgment of the First Appellate Court, even the High Court appears to have lost sight of the said finding.

8. Appearing in support of the appeal, Mr. S.B. Sanyal, learned senior advocate, submitted that both the First Appellate Court and the High Court erred in reversing the judgment of the Trial Court without deciding the question relating to limitation and that the judgment both of the High Court as well as of the First Appellate Court were liable to be set aside on such ground alone.

9. Appearing for the respondents, Ms. Rachana Srivastava, learned advocate, firstly submitted that the question now being raised on behalf of the appellants had not been raised on their behalf either before the First Appellate Court or before the High Court, which, therefore, had no opportunity to consider the same. Not having raised the said question before the First Appellate Court and the High Court, the appellants were not entitled to raise the same in this appeal.

10. Ms. Srivastava also submitted that even before the Trial Court no specific issue had been framed regarding limitation and the purported finding of the Trial Court in respect thereof was in the nature of an observation made in passing.

11. In support of her submissions, learned counsel referred and relied upon the decision of this Court in *State of Punjab vs. Darshan Singh* [2004 (1) SCC 328] wherein while considering the limits of the Court's powers under Section 152 of the Civil Procedure Code, this Court had occasion to consider whether a new plea in respect of which no specific issue had been framed could be raised in second appeal or in a special leave petition before this Court. Ms. Srivastava submitted that this Court had categorically held that despite a plea with regard to limitation having been taken in the written statement, no specific issue had been framed in respect thereof, and no such plea having been taken before the High Court, this Court could not go into the said question in proceedings under Article 136 of the Constitution. Ms. Srivastava urged that apart from the above, the issue of limitation being a mixed question of law and fact, such a plea could not be raised before this Court under Article 136 of the Constitution if not taken earlier. In support of her second submission, Ms. Srivastava relied upon a decision of this Court in *Balasaria Construction (P) Ltd. Vs. Hanuman Seva Trust and Ors.* [2006 (5) SCC 658] wherein it had been held that a suit could not be dismissed under Order 7 Rule 11(d) of the Code of Civil Procedure in the absence of proper pleadings relating to limitation, particularly when the question of limitation is a mixed question of law and fact and on a mere reading of the plaint the suit could not be held to be barred by limitation.

12. A similar view was taken by this Court in *Narne Rama Murthy vs. Ravula Somasundram and Ors.* [2005 (6) SCC 614] where also the question of limitation was an inextricably mixed question of law and fact and the bar of limitation could not be decided without considering the related facts giving rise to such question.

13. Ms. Srivastava urged that in this appeal, the situation was no different and the plea of limitation now sought to be taken, being a mixed question of law and fact, the same cannot be allowed to be raised in view of the aforesaid decisions of this Court.

14. Having considered the submissions made on behalf of the respective parties, the decisions cited by them and the relevant law on the subject, we are unable to accept Ms. Srivastava's submissions mainly on two counts.

15. Firstly, the facts disclosed clearly indicate that neither the First Appellate Court nor the High Court took notice of Section 3(1) of the Limitation Act, 1963, which reads as follows:-

"3. Bar of limitation. (1) Subject to the provisions contained in Sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed although limitation had not been set up as a defence."

16. Even in the decision of this Court in Darshan Singh's case (supra) the said provision does not appear to have been brought to the notice of the Hon'ble Judges who decided the matter.

17. It is well settled that Section 3(1) of the Limitation Act casts a duty upon the court to dismiss a suit or an appeal or an application, if made after the prescribed period, although, limitation is not set up as a defence.

18. In the instant case, such a defence has been set up in the written statement though no issue was framed in that regard. However, when the Trial Court had in terms of the mandate of Section 3(1) come to a finding that the suit was barred by limitation, it was the duty of the First Appellate Court and also of the High Court to go into the said question and to decide the same before reversing the judgment of the Trial Court on the various issues framed in the suit. Even though the various issues were decided in favour of the plaintiff both by the First Appellate Court and the High Court, the same were of no avail since the suit continued to remain barred under Article 59 of the Limitation Act, 1963.

19. Ms. Srivastava's submission that the plea of limitation not having been taken before the appellate forums, the same could not be taken before this Court in proceedings under Article 136 of the Constitution on the ground that the question of limitation was a mixed question of law and fact, stands nullified by the fact that the suit continued to remain barred by limitation after the decisions of the appellate Courts since such finding of the Trial Court had not been set aside either in the first appeal or by the High Court in second appeal.

20. It is quite obvious that this aspect of the matter had not been looked into either by the First Appellate Court or by the High Court, nor was it raised on behalf of the appellants herein. The question, therefore, which remains to be decided is whether such a plea can now be taken in the special leave proceedings.

21. It is no doubt true, as was pointed out by this Court in the case of Balasaria Construction (P) Ltd. (supra) and also in Narne Rama Murthy's case (supra), that if the plea of limitation is a mixed question of law and fact, the same cannot be raised at the appellate stage. We have no problem with the said proposition of law. What we are concerned with is whether the said proposition is applicable to the facts of this case. In this case the plea of limitation had been raised in the written statement and though no specific issue was framed in respect thereof, a decision was given thereupon by the learned Trial Court. Apart from Section 3(1) of the Limitation Act, even Order 7 Rule 11(d) of the Code of Civil Procedure casts a mandate upon the court to reject a plaint where the

suit appears from the statement in the plaint to be barred by any law, in this case by the law of limitation. Further, as far back as in 1943, the Privy Council in the case of Lachhmi Sewak Sahu vs. Ram Rup Sahu & Ors. [AIR 1944 Privy Council 24] held that a point of limitation is prima facie admissible even in the court of last resort, although it had not been taken in the lower courts.

22. The reasoning behind the said proposition is that certain questions relating to the jurisdiction of a Court, including limitation, goes to the very root of the Court's jurisdiction to entertain and decide a matter, as otherwise, the decision rendered without jurisdiction will be a nullity. However, we are not required to elaborate on the said proposition, inasmuch as, in the instant case such a plea had been raised and decided by the Trial Court but was not reversed by the First Appellate Court or the High Court while reversing the decision of the Trial Court on the issues framed in the suit. We, therefore, have no hesitation in setting aside the judgment and decree of the High Court and to remand the suit to the First Appellate Court to decide the limited question as to whether the suit was barred by limitation as found by the Trial Court. Needless to say, if the suit is found to be so barred, the appeal is to be dismissed. If the suit is not found to be time-barred, the decision of the First Appellate Court on the other issues shall not be disturbed.

The appeal is accordingly allowed, but there will be no order as to costs.