

IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON 14.07.2017

DELIVERED ON 01.08.2017

CORAM

THE HONOURABLE MR.JUSTICE RAJIV SHAKDHER

and

THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

O.S.A.No.124 of 2017

and

C.M.P.Nos.8188 and 8189 of 2017

1.Mrs.Rehana

2.Mrs.Shireen Fathima

3.Mrs.Nasreen Fathima

4.Mrs.Noor Jahan Begum

5.Ms.Mujeeba Sultana

6.Mohamed Mohsin Sheriff

... Appellants

Vs.

1.Mrs.Maunihal Begum

2.Mr.Mukhram Sheriff

3.Mr.Moazam Sheriff

4.Munavar Sheriff

5.Mustafa Sheriff

WEB COPY

6.Murthuza Sheriff

7.Mrs.Munira Begum

8.Mrs. Shamsad (Babu)

9.Mrs.Majida Begum

10.Mrs.Hameda Banu (Mukthiyar)

11.Mrs.Rafat Begum

12.Moinudeen Sheriff

13.Mazharuddin Sheriff

14.Mrs.Muthara Begum

15.Mrs.Muhashira Begum

16.Mrs.Mashuda Begum

17.Mrs.Masura Begum

18.Mrs.Noor Jahan

19.M/s.Ramky Wavooo Developers

Private Limited,

having its registered office at

Level 5, Diamond Dune,

No.323, Poonamallee High Road,

Chennai 600 029.

... Respondents

Prayer:

Appeal filed under Order XXXVI Rule XI of Original Side Rules read with Clause 15 of Letters Patent praying to set aside the order and

decretal order dated 12.08.2016 passed in Application No.4391 of 2015 in C.S.No.334 of 2015 on the file of this Court and allow the same.

For Appellants : Mr.R.Thiagarajan

For Respondents : Mr.R.Parthasarathy
for R.1 to R.17
Mr.A.Lakshmi Narasiman
for R.18
R.19 - Not Ready

J U D G M E N T

ABDUL QUDDHOSE, J

This appeal has been preferred by the appellants/plaintiffs against the order of the learned Single Judge dated 12.08.2016 allowing Application No.4391 of 2015 in C.S.No.334 of 2015 filed by the respondents/defendants seeking rejection of plaint under Order VII Rule 11 of the Code of Civil Procedure.

2.The appellants/plaintiffs filed the suit C.S.No.334 of 2015 against the respondents/defendants seeking the following reliefs:

"a. Directing division of the plaint schedule properties into three shares by metes and bounds with reference to good and bad soil and allotting of 1/3rd share to the plaintiffs 1 to 7 herein jointly and put the same in plaintiffs possession.

b. Granting permanent injunction, restraining the defendants, or any one claiming through them or authorized by them from in any manner intermeddling or encumbering or alienating or creating any mortgage, lease, charge or joint development in respect of the plaint schedule properties till the final partition takes.

c. For appointment of an Advocate Commissioner to effect division of the plaint suit properties in the aforesaid manner."

3.The reliefs sought for in the suit revolves upon a partition deed dated 31.05.1945 registered as document No.974 of 1945 in the Office of the Sub Registrar, Periamet, Chennai. The learned Single Judge after considering the plaint averments rejected the plaint for the following reasons:

(a)The suit is hopelessly barred by limitation;

(b)Instead of filing a suit for declaration of title, when a serious cloud has been raised over the title, the appellants have sought for partition simpliciter. Subsequent to the partition deed dated 31.05.1945, the parties have also acted upon the deed of partition.

(c)Even during the life time of Abdul Khader, the predecessor in title

of the appellants/plaintiffs, there was no challenge to the partition deed dated 31.05.1945. After having entered into the partition deed dated 31.05.1945, the father of the first appellant/plaintiff viz., Abdul Khader died in the year 1952.

d)A mere fact that the respondents/defendants have entered into a Joint Venture Agreement on 15.11.2012 with a third party cannot be a ground for cause of action for filing the suit.

e)There is no explanation for seeking partition only for the schedule mentioned property in the plaint leaving others. The suit is also hit by the doctrine of partial partition.

4.Mr.R.Thiagarajan, learned counsel for the appellants/plaintiffs has submitted the following arguments:

(i)Limitation is a mixed question of fact and law and that cannot be a ground for rejection of plaint under Order VII Rule 11 of the Code of Civil Procedure.

(ii)Under Muslim Law, the appellants/plaintiffs are tenants in common and the Law of limitation will not apply as in the instant case the

suit schedule property still remains with the family members of the parties to the partition deed dated 31.05.1945.

(iii) Partial partition is inapplicable to Muslim Law;

(iii) the alleged oral Wasiath (Will), mentioned in the partition deed dated 31.05.1945 is not valid as the oral Wasiath (Will) was not executed in the presence of two male witnesses, as Mahoob Bi, a female was the executrix.

(iv) there is no actual division of the suit property by metes and bounds in accordance with the entitlement of the parties as the properties allotted under the partition deed to the six legal heirs of the late Hajee Mohamed Abdul Azeez Sahib were in the ratio of 1/8th, 1/8th, 1/8th, 1/4th, 1/4th and 1/4th which aggregates to 1 and 1/8th (it should be actually 1) and consequently the partition deed dated 31.05.1945 is incorrect and improper.

5. During his arguments, the learned counsel for the appellants/plaintiffs took us through various averments contained in the plaint. He also relied upon the decisions reported in a) **AIR 1963 Pat 375** in the case of **S.M.A. Samad and Others v. Shahid Hussain and others** and b) **AIR 1971 Pat 385** in the case of **Mt. Haliman and**

others v. Md.Manir and others and contended that the learned Single Judge ought not to have rejected the plaint under Order VII Rule 11 of the Code of Civil Procedure.

6.The decisions reported in **AIR 1963 Pat 375** and **AIR 1971 Pat 385** cited supra by the learned counsel for the appellants to support his stand that under Muslim Law co-heirs are tenants-in-common and they are not obliged to sue for a partition of all other properties, in which they are interested. There is nothing to preclude one of the joint owners of several items of the properties from seeking a partition of one of such items of property. Under Muslim Law, the estate of a deceased person devolves on his death on his heirs and each of the heirs becomes entitled to his definite fraction of every part of the estate.

7.In the case on hand, there is no pleading in the plaint that the appellants/plaintiffs are tenants-in-common and as co-heirs they are entitled to a definite fraction of every part of the estate. This is for the first time only during the course of his arguments in the appeal, the learned counsel for the appellants without any pleading in the plaint has put forward this submission.

8. The learned counsel for the appellants also relied upon yet another decision reported in **AIR 1928 ALL 467 (FB)**, in the case of **Rustam Khan and another v. Mt. Janki and others** to support his view that under Muslim Law, limitation will not apply, when on the death of the owner of the property one of the heirs sues another of the heirs for the recovery of the property. The learned counsel for the appellants also took us through paragraph 20 of the said judgment, which deals with this issue and the same is reproduced hereunder:

"It will be noticed that there was no question of limitation in the case before their Lordships. The plaintiff himself contended that he had 12 years under Article 123 and it was nobody's case that Article 144 applied and not Article 123. On the other hand, the case of the defendant was that there was no question of limitation at all, and the plaintiff was bound to exercise, what was called his "option" in claiming his quarter share, as soon as possible, under the circumstances of the case, after the death of the father. In the circumstances, in my opinion, there is no weight in the argument that their Lordships of the Privy Council laid down what article of limitation would apply where, on the death of the owner of a

property, one of the heirs sues another of the heirs for recovery of property."

9.The learned counsel for the appellants, in support of his contention that the learned Single Judge ought not to have rejected the plaint under Order VII Rule 11 of the code of Civil Procedure also referred to the following decisions:

(a) **1998 (7) SCC 184** in the case of ***Raptakos Breft & Co., Ltd. v. Ganesh Property.***

(b) **2005 (7) SCC 510** in the case of ***Popat and Kotecha Property v. State Bank of India Staff Association.***

(c) **2006 (5) SCC 658** in the case of ***Balasaria Construction (P) Ltd., v. Hanuman Seva Trust and others.***

(d) **2007 (14) SCC 183** in the case of ***C.Natarajan v. Ashim Bai and another.***

(e) **2014 (15) SCC 785** in the case of ***John Kennedy and another v. Ranjana and others.***

10.The learned counsel for the appellants relied upon the decision reported in **1998 (7) SCC 184** referred supra, to substantiate his argument that the intention of the party concerned is to be gathered

primarily from the tenor and the terms of the pleading taken as a whole. He referred to paragraph 33 of the said judgment and the same is reproduced hereunder:

"We are afraid, this ingenious method of construction after compartmentalisation, dissection, segregation and inversion of the language of the paragraph, suggested by counsel, runs counter to the cardinal canon of interpretation, according to which, a pleading has to be read as a whole to ascertain its true import. It is not permissible to cull out a sentence or a passage and to read it out of the context, in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction of words, or change of its apparent grammatical sense. The intention of the party concerned is to be gathered primarily from the tenor and terms of his pleading taken as a whole."

11. The learned counsel for the appellants relied on the decision reported in **2005 (7) SCC 510** referred supra to substantiate his argument that Order VII Rule 11 (d) of the Code of Civil Procedure, applies only where the statement as made in the plaint without any doubt

or dispute shows that the suit is barred by any law in force.

12.As regards the decision reported in **2006 (5) SCC 658** referred supra the learned counsel for the appellants submitted that the suit could not be dismissed as barred by limitation without proper pleadings, framing of issues of limitation and taking of evidence.

13.The learned counsel for the appellants relied on the decision reported in **2017 (14) SCC 183** referred supra to substantiate his argument that applicability of one or other provisions of the Limitation Act per se cannot be decisive for the purpose of determining the question as to whether the suit is barred under one or the other articles contained in the schedule appended to the Limitation Act.

14.The learned counsel for the appellants relied on the decision reported in **2014 (15) SCC 785**, referred supra submitted that rejection of plaint in a suit for partition on the ground that it was vexatious as the suit schedule property was a self-acquired property has to be decided only after the pleadings were completed and evidence was adduced. In view of the above submissions, the learned counsel for the appellants requested that the appeal may be allowed.

15.Per contra, Mr.Parthasarathy, learned counsel for the respondents/defendants has submitted the following arguments.

(a)The suit is hopelessly barred by the law of limitation and even by the plaint averments, it can be established that the suit is ex-facie barred by law of limitation;

(b)The suit revolves upon the partition deed dated 31.05.1945 and after more than 71 years from the date of the said partition, the appellants, without challenging the partition deed dated 31.05.1945, seek partition of the suit schedule property beyond the period of limitation.

(c) The appellants have pleaded in the plaint in unambiguous terms that they are questioning the partition deed dated 31.05.1945. The learned counsel for the respondents took us through various paragraphs in the plaint to establish that the reliefs sought for in the plaint arises out of the unchallenged partition deed dated 31.05.1945. He has submitted that apart from other paragraphs, paragraph 16 of the plaint will clearly prove that the appellants' reliefs in the plaint revolves out of the partition deed dated 31.05.1945. Paragraph 16 of the plaint is reproduced hereunder:

*"The plaintiffs are questioning the partition deed
dated 31.05.1945 registered as document No.974 of*

1945 in the office of the Sub Registrar, Periamet, Chennai. Thus, the division of the properties effected under the partition deed is not valid in the eyes of law."

d)As the predecessor in title, Mr.Abdul Khader, who was a party to the partition deed dated 31.05.1945 and is the father of the first and second appellants died in the year 1952, has himself not challenged the partition deed dated 31.05.1945 during his life time, his legal heirs cannot now indirectly challenge the partition deed after a period of more than 71 years.

16.The appellants have also not sought for declaration that they are the owners of 1/3rd undivided share in the suit schedule property and without seeking the relief of declaration, they have filed a suit for partition. The plaint also does not disclose as to when the appellants/plaintiffs were put in possession of the suit schedule property as co-sharers along with the respondents. There are also no averments contained in the plaint that the appellants are in possession of the suit schedule property along with other co-sharers. The appellants have not

filed a suit for title despite their being a cloud on their title. The appellants only to avoid payment of Court fee have filed this vexatious suit.

17. The learned counsel for the respondents/defendants took us to the affidavit filed in support of application filed by the respondents seeking rejection of plaint under Order VII Rule 11 of the Code of Civil Procedure. The learned counsel for the respondents, referred to paragraph Nos.10 and 11 of the affidavit filed by the respondents/defendants in support of Application No.4391 of 2015 which is reproduced hereunder:

"Thus, it would be clear from a mere perusal of the terms of the partition deed dated 31.05.1945, registered as Document No.974/45, the same came into being only at the instance of Abdul Khader (the father of respondents 1 and 2, father-in-law of respondents 3-5 and paternal grandfather of respondents 6 & 7 herein) who was described as 'party of the first part' in the said document and that all the properties of Late Hajee Mohamed Abdul Azeez Sahib were being divided by the 3 named mediators mentioned in the Will of the deceased person, after a fair value was arrived in respect of all the properties

and this value has been accepted by all the parties to the document. It would be pertinent to mention that the large amounts of cash and immovable properties to the tune of Rs.1,29,230/- was allotted to the share of Abdul Khader, who is the father of respondents 1 and 2, father-in-law of respondents 3-5 and paternal grandfather of respondents 6 & 7 herein and simultaneously, cash and immovable properties of the value of Rs.10,000/- were allotted to the share of the legal heirs of Ansar Bi, who is the aunt of the deceased respondents 1 and 2 herein and sister of Abdul Khader Sahib. Likewise, cash and immovable properties to the tune of Rs.10,000/- were allotted to the legal heirs of Mariam Bi, who is the pre-deceased daughter of Mehaboob Bi. Hence, the partition was fair and equitable.

The respondents state that the partition deed dated 31.05.1945 has been executed with the full knowledge and consent of all the parties thereto and in fact it was only at the instance of Abdul Khader, the father of the respondents 1 and 2, father-in-law of respondents 3-5 and paternal grandfather of respondents 6 & 7 herein, as will be evident from the recitals contained in the document itself. Moreover, the said partition deed is in the nature of a Family Settlement and has been fully acted upon by all the parties to the document, including the said Abdul

Khader (the father of the respondents 1 and 2, father-in-law of respondents 3-5 and paternal grandfather of respondents 6 & 7 herein) in as much as the said Abdul Khader has disposed of the immovable properties allotted to his share under the partition deed, claiming to be full owner thereof. Likewise, the plaint schedule property was allotted to the share of the second wife of Late Hajee Mohamed Abdul Azeez Sahib viz., Mehaboob Bi, who subsequently, transferred entire suit property in favour of her two sons viz., H.A.G.Dastagir Sheriff and Mohamed Sheriff, vide two documents viz., sale deed dated 19.05.1949, registered as document No.972/49 in respect of the bungalow constructed by her as well as by a settlement deed dated 19.05.1949, registered as Document No.974/49 where under the rest of the suit property was settled. It is submitted that no family settlement which has been validly entered into with open eyes, can be challenged on the ground that it is inequitable, that too by legal heirs of the parties to the suit document, when the parties to the document themselves have acted upon the same and have desired benefit under the same."

18.The learned counsel for the respondents has also referred to paragraph No.14 of the same affidavit and the same is also reproduced hereunder.

"Thus, the partition deed dated 31.05.1945 was accepted and acted upon in its entirety by Abdul Khader, the father of respondents 1 and 2, father-in-law of respondents 3-5 and paternal grandfather of respondents 6 & 7 herein and hence, the partition deed is certainly binding not only on Abdul Khader but also on his legal heirs viz., the respondents 1 to 7 herein. The partition deed dated 31.05.1945 which was not questioned by Abdul Khader, the father of respondents 1 and 2, father-in-law of respondents 3-5 and paternal grandfather of respondents 6 & 7 herein and which was accepted and acted upon by him during his life time and thereafter, by the respondents 1 to 7 herein, after his demise, cannot now be challenged after a time gap of more than 71 years and hence, the suit is clearly barred by limitation."

19.Mr.Parthasarathy, learned counsel for the respondents also submitted that the partition deed dated 31.05.1945 came into existence only at the instance of Abdul Khader (the father of respondent 1 and 2, father-in-law of respondents 3 to 5 and paternal grandfather of respondents 6 and 7 herein) and that all properties of late Haji Mohamed Abdul Azeez were being divided by the three named mediators mentioned in the Will of the deceased person, after a fair value was arrived at in

respect of all the properties and this value has been accepted by all the parties to the document. The partition deed dated 31.05.1945 was not questioned by Mr.Abdul Khader, the father of respondents 1 and 2, the father-in-law of the respondents 3 to 5 and the paternal grand father of respondents 6 and 7 herein and it was accepted and acted upon in its entirety by him during his lifetime and thereafter by the respondents 1 to 7 herein and after his demise in the year 1952 cannot now be challenged after a time gap of more than 71 years and hence according to the learned counsel for the respondents, the suit is clearly barred by limitation.

20.The learned counsel for the respondents also took us to paragraph Nos.4, 5 and 7 of the counter affidavit filed by the appellants/plaintiffs to the rejection of plaint application filed by the appellants.

21.According to the respondents, it is clear from paragraph 4 of the counter affidavit filed by the appellants in Application No.4391 of 2015 that the reliefs sought for in the plaint revolves upon the partition deed dated 31.05.1945 and that the appellants have cleverly attempted to overcome limitation by seeking partition instead of questioning the validity

of the partition deed dated 31.05.1945, which ought to have been the normal and legal recourse available to the appellants. The appellants/plaintiffs in order to avoid limitation and by clever drafting of the plaint, after more than 71 years from the date of the partition deed dated 31.05.1945 have come forward with the suit seeking partition. The respondents have not disputed the subsequent transfers pursuant to the execution of the partition deed dated 31.05.1945. Subsequent to the partition deed dated 31.05.1945 as seen in paragraph 7 of the counter affidavit filed by the appellants in Application No.4391 of 2015 in C.S.No.334 of 2015, Mahabob Bi, second wife of Abdul Khader executed the settlement deed dated 19.05.1949 settling her entire property in favour of the second and third sons of her late husband viz, H.A.G. Dastagir Sheriff and Mohamed Sheriff and that by a registered partition Deed dated 16.02.1970 registered as Doc.No.261 of 1970, the said Dastagir Sheriff and Mohamed Sheriff divided the property among themselves. The appellants have also not disputed that there was a sale deed dated 19.05.1949, registered as document No.972 of 1949 in and by which, Mahaboob Bi sells "the Bungalow constructed by her".

22. According to the learned counsel for the respondents, the partition deed dated 31.05.1945 has been fully acted upon and the respondents have not challenged the subsequent undisputed registered documents namely, (i) Settlement deed dated 19.05.1949 registered as document No.974 of 1949, (ii) Sale deed dated 19.05.1949 registered as document No. 972 of 1949 (iii) Partition deed dated 16.02.1970 registered as document No.261 of 1970.

23. In support of his arguments, the learned counsel for the respondents took us through the findings recorded by the learned Single Judge in the order under challenge.

24. It is settled law that for the purpose of rejection of plaint under Order VII Rule 11 of the Code of Civil Procedure, the plaint averments as a whole must alone be looked into by the Court. The reliefs sought for by the appellants in the suit C.S.No.334 of 2015 revolves only upon the partition deed dated 31.05.1945 registered as document No.974 of 1949. The partition deed dated 31.05.1945 has been acted upon by the parties and the suit schedule property has changed hands though among family members themselves under (a) Settlement deed dated 19.05.1949, (b) Sale

deed dated 19.05.1949 and (c) Partition deed dated 16.02.1970 and those documents remain unchallenged.

25. The appellants, who have questioned the partition deed dated 31.05.1945, have not challenged the document and the subsequent transfers, but have filed a simple suit for partition without claiming declaration as to their ownership of their alleged 1/3rd undivided share in the suit schedule property. The averments contained in the plaint also do not disclose as to how the appellants are in possession of the suit schedule property along with other co-heirs excepting for the averment made in paragraph 28 of the plaint that the appellants are also asserting right and possession in the suit property. Paragraph 28 of the plaint is reproduced hereunder:

"The plaintiffs with a view to maintain the cordial relationship amongst the family members and with a view to maintain the family honour and dignity, were solely guided by the assurances made by H.A.G.Dastagir Sheriff Sahib and Mohammed Sheriff. The plaintiffs did not seek for partition during their life time. They had assured to effect division of property without any heart burning amongst the family members. The plaintiffs submit that H.A.G.Dastagir Sheriff Sahib

and Mohammed Sheriff died in 1999 and 2001 respectively. Even thereafter, the plaintiffs have been persuading the other co-sharers to effect division of the property amicably among themselves in accordance with the right and entitlement as per the Shariat Mohamadan Law, that the parties did not approach the Court for effecting division of the property. However, the defendants 1 to 10, who are the legal heirs of late H.A.G.Dastagir Sheriff Sahib and the defendants 11 to 17, who are the legal heirs of late Mohammed Sheriff, instead of fulfilling the assurances made by late H.A.G.Dastagir Sheriff Sahib and late Mohammed Sheriff, the defendants 1 to 17, have entered into a joint venture agreement with the 18th defendant after demolishing the existing superstructure which were in occupation of various co-sharers, who have been collectively and jointly enjoying the property as owners thereof. The plaintiffs were also asserting the right and possession in the suit property when the defendants 1 to 17 were attempted to demolish the structure erected thereon. Even after demolition of the existing superstructure, the defendants 1 to 17 have been assuring the plaintiffs that the rights of the parties may be protected and reworked out, so that all the shares

will have their due entitlement in the suit property, which is sought to be promoted and developed. That is the reason why the plaintiffs have been keeping quiet all along without rushing to the Court."

26. The cause of action paragraph of the plaint namely, paragraph 37 also does not disclose as to when the appellants were put in possession of the suit schedule property along with other co-heirs. Paragraph 37 of the plaint is reproduced hereunder:

"That the cause of action for the suit arose within the jurisdiction of this Hon'ble Court where the suit property originally belonged to Haji Mohamed Abdul Azeez Saheb who died in the year 1945 and subsequently when the properties were partitioned between Abdul Khader Sahib and others, on 09.02.1945 when Haji Mohamed Abdul Azeez Sahib died and subsequently when his second wife (first wife dead) and her children succeeded to the properties and later there when there are claims and counter claims between the legal heirs with regard to the allocation of shares, later when there was an alleged oral Waziath by Haji Mohamed Abdul Azeez Sahib in favour of his second wife Mahoob Bi and later when there was division among the parties on

21.2.1945 and divided the properties and later when there has been a partition on 31.05.1945 between the parties which was registered as document No.974 of 1945 in the office of the Sub Registrar, Periamet on 19.05.1949 when Mahaboob Bi made a settlement deed in favour of her two sons and subsequently, on 16.02.1970 when there was partition between Dastagir Sheriff and Mohamed Sheriff and later on in 2012 when it was discovered that the partition among the legal heirs was not in accordance with Shariath law, which governs the rights of all parties, later on 15.11.2012 when there was a joint venture agreement between Ramky Wavoo Deveopers, 18th defendant and other defendants, on 08.03.2013 when the plaintiffs caused a legal notice to the defendants calling upon them to effect partition of the suit property in accordance with their share and entitlement and subsequently on 23.03.2013 when a reply was caused in response to the same, later on 15.04.2014 caused a notice to the developer the 18th defendant herein which was ignored by the defendant and there was no response to the same and lastly, when the threat of wrongful alienation of the suit properties continues DE-DIE-IN-DIAM."

27. The learned counsel for the respondents/defendants referred to the following decisions:

(1)2008 (4) SCC 594 in the case of Ananthulla Sudhakar vs. Buchi Reddy.

(2)2015 (8) SCC 390 in the case of Fatehji and Company and another v. L.M.Nagpal and Others.

(3)Unreported decision of the First Bench of this Court in O.S.A.No.191 of 2015 dated 22.09.2015 in the case of Mrs.Pushpa Raju v. Vasumathi H.Shah.

28.The learned counsel for the respondents relied upon the decision reported in 2008 (4) SCC 594 cited supra to substantiate his argument that where the plaintiffs' title to the property is under a cloud and he does not have possession, the remedy is a suit for declaration and possession. Paragraph 21 (a) of the said judgment is reproduced hereunder:

"Where a cloud is raised over the plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Where

there is merely an inference with the plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter."

29.The learned counsel for the respondents relied upon the decision of the Supreme Court reported in 2015 (8) SCC 390 and the unreported decision of the First Bench of this Court in O.S.A.No.191 of 2015 dated 22.09.2015 cited supra to substantiate his argument that when the suit is ex-facie barred by limitation and there is nothing to be adjudicated during trial, limitation is not a mixed question of fact and law. According to the learned counsel, the plaint averments and the reliefs sought for in the plaint arise out of the partition deed dated 31.05.1945 and hence, the appellants cannot indirectly challenge the partition deed entered into 71 years back and acted upon by the parties by filing a suit for partition.

30.Further, in the decision reported in **1977 (4) SCC 467 (T.Arivandandam Vs. T.V.Satyapal and another)**, the Supreme Court while considering an application under Order VII Rule 11 CPC, has reminded the trial Judges with the following observations: (SCC Pg.470 Para 5):

" The learned Munsif must remember that if on a meaningful not- formal - reading of the plaint

it is manifestly vexatious and meritless, in the sense of not disclosing a clear right to sue, he should exercise his power and under Order VII Rule 11 CPC taking care to see that the ground mentioned therein is fulfilled. And, if clever drafting has created the illusion of a cause of action, nip it in the bud at the first hearing by examining the party searchingly under Order X, CPC. An activist Judge is the answer to irresponsible law suits. The trial Courts would insist imperatively on examining the party at the first hearing so that bogus litigation can be shot down at the earliest stage. The penal code is also resource full enough to meet such men, (Cr. XI) and must be triggered against them. "

सत्यमेव जयते

31. We are convinced after perusing the averments contained in the plaint that the reliefs sought for by the appellants in the suit arises out of only the partition deed dated 31.05.1945, registered as document No.974 of 1995 in the office of the Sub Registrar, Periamet, Chennai.

32. In the arguments advanced by the learned counsel for the appellants, for the first time, the appellants have put forward a plea that they are tenants-in-common along with other co-heirs viz., respondents. There is no pleading to that effect anywhere in the plaint. The learned counsel for the appellants further submitted in his arguments that under Muslim Law, partial partition is inapplicable. These arguments will also not hold water as the appellants have themselves sought for partial partition as they have specifically sought for partition only in respect of one property leaving out others and further the suit schedule property has already been transferred and changed hands though among family members, under a settlement deed dated 19.05.1949, sale deed dated 19.05.1949 and registered partition deed dated 16.02.1970 and the execution of these documents remain unchallenged.

33. Having considered the rival submissions made by the learned counsels on either side and having looked into the plaint averments as a whole, we are in agreement with the decision of the learned Single Judge in allowing the Application filed by the respondents to reject the plaint filed in C.S.No.334 of 2015 under Order VII Rule 11 of the Code of the Civil

Procedure. We are of the view that the suit filed by the appellants is hopelessly barred by the law of limitation and is a vexatious suit.

34. We therefore, find no infirmity in the order of the learned Single Judge dated 12.08.2016 in Application No.4391 of 2015 in C.S.No.334 of 2015 rejecting the plaint under Order VII Rule 11 of the Code of Civil Procedure and the appeal shall stand dismissed. Consequently C.M.P.Nos.8188 and 8189 of 2017 are also closed. Considering the conduct of the appellants in filing the suit in the year 2017 after a gap of more than 71 years from the date of the partition deed dated 31.05.1945, from which the cause of action has allegedly arisen, we impose a cost of Rs.25,000/- on the appellants.

[R.S.A.,J.]

[A.Q.,J.]

सत्यमेव जयते

cla

Speaking order / Non Speaking order

Index: Yes / No

Internet: Yes / No

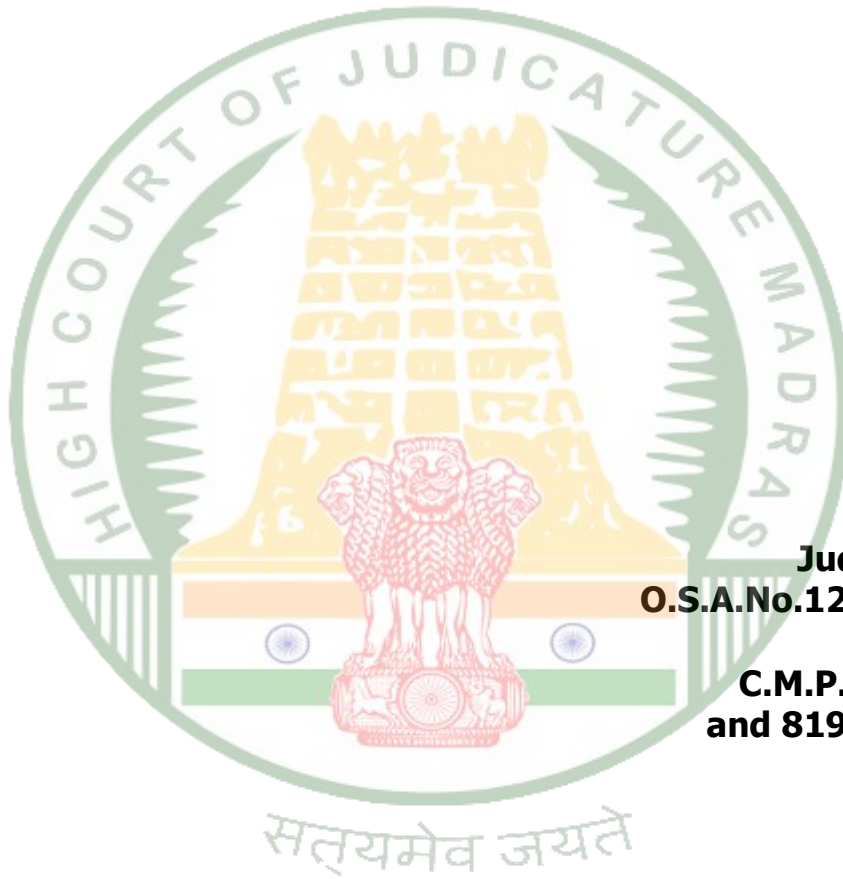
Note to Office:

Issue order copy

on 3.08.2017

**RAJIV SHAKDHER,J.
AND
ABDUL QUDDHOSE,J.**

cla



**Judgment in
O.S.A.No.124 of 2017
And
C.M.P.Nos.8188
and 8199 of 2017**

WEB COPY

01.08.2017