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

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Date of Decision: 12th May, 2023

+ C.R.P. 220/2022 & CM APPL. 56659/2022, 56661/2022

HITENDER SHOKEEN Petitioner
Through: Mr. Bhuvneshwar Tyagi,
Advocate with Petitioner in person.

versus

RAJAN KUMAR SHOKEEN & ORS. Respondents
Through: Respondent No.1 in person.
Mr. R.N. Vats and Mr. Akshat Gupta,
Advocates for R-2(b) & R-3.
Mr. Arvind Bhatt, Advocate for R-4.

CORAM:
HON'BLE MS. JUSTICE JYOTI SINGH

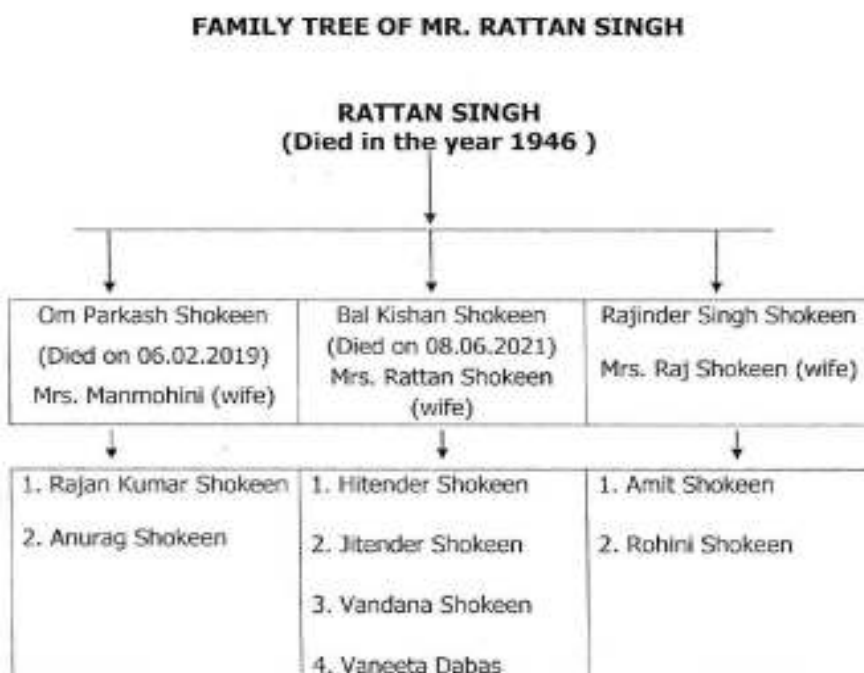
JUDGEMENT

JYOTI SINGH, J.

1. By this revision petition, Petitioner assails the order dated 17.08.2022 passed by the learned Trial Court in Civ DJ 7729/2016 titled as *Rajan Kumar Shokeen v. Om Parkash Shokeen & Ors.*, whereby application filed by the Petitioner under Order VII Rule 11 CPC seeking rejection of the plaint, has been dismissed. Petitioner is Defendant No.3(C) and Respondents No.2(a), 2(b), 3, 4 and 5 are also Defendants before the Trial Court while Respondent No.1 is the Plaintiff and parties are hereinafter referred to by their litigating status before the Trial Court.

2. Facts to the extent necessary and relevant for disposal of this revision petition are that late Sh. Rattan Singh, father of Om Parkash Shokeen, Bal Kishan Shokeen and Rajinder Singh Shokeen, is stated to be the owner of House No.173 (SR-114) in Abadi/ Lal Dora and agricultural land measuring 165 bighas approximately in Village Peera

Garhi, Delhi. For ready reference, a family tree is reproduced here under:-



3. In 1963, the entire agricultural land except 2 Bighas and 10 Biswas in Khasra No.487/1 was acquired by the Government under the Land Acquisition Act, 1894 and compensation was received. As per the Petitioner, on 19.06.1968, Om Parkash, Bal Kishan and Rajinder Singh purchased Property No.1, Sector-4 Market, Punjabi Bagh, New Delhi (hereinafter referred to as 'Property No.1') in the name of Smt. Manmohini Shokeen (now deceased), wife of Om Parkash and mother of Rajan Shokeen, Plaintiff in the suit. Property No.6, Sector-4 Market, Punjabi Bagh, New Delhi (hereinafter referred to as 'Property No.6') was purchased in the name of Smt. Kamla Rani, a stranger to the family, from compensation received from acquisition of the land and personal funds.

4. On 06.11.1971, Om Parkash, Bal Kishan and Rajinder Singh filed a suit against Smt. Kamla Rani, being Suit No.925/1971, for declaration of title alleging to be the real owners of Property No.6. On 03.01.1972, a consent decree was passed in the suit as Smt. Kamla

Rani admitted the claim of the Plaintiffs therein, in her written statement as also in her statement on oath, that the plot in dispute was purchased by the Plaintiffs *benami* in her name and belonged to the Plaintiffs. On 02.03.1972, Om Parkash, Bal Kishan and Rajinder Singh filed a suit against Smt. Manmohini being Suit No.76/1972 for declaration of title in their names, alleging to be real owners of Property No.1. Consent decree was passed in this suit also on 07.04.1972 as Smt. Manmohini admitted in her written statement that the three Plaintiffs were owners of the suit property.

5. Subsequent thereto, in the year 2000, suit being CS(OS) No.2719/2000 was filed by Om Parkash against Bal Kishan and Rajinder Singh seeking partition of properties, bearing House No.173 (SR-114) situated in the Abadi/ Lal Dora of Village Peeragarhi, Delhi and Gher/plot bearing Khasra No.487/31 measuring 2 Bighas 10 Biswas, situated in Village Peeragarhi, Delhi, amongst the three brothers. In 2001, CS(OS) No.965/2001 was filed by Om Parkash seeking partition of Properties No.1 and 6, amongst the three brothers. Bal Kishan filed counter claim on 26.03.2013 in CS(OS) No.2719/2000, which was registered as CS(OS) 314/2008, wherein properties other than the aforementioned four properties were sought to be partitioned.

6. On 12.12.2005, this Court passed a preliminary decree in CS(OS) No.2719/2000 and CS(OS) No.965/2001 in respect of the four properties. Plaintiff filed I.A. No.12397/2006 in CS(OS) No.2719/2000 and I.A. No.12407/2006 in CS(OS) No.965/2001 on 06.11.2006 for impleadment, claiming joint ownership in the family properties. Vide order dated 15.03.2007, the applications were dismissed. The order was challenged by the Plaintiff before the Division Bench in FAO(OS) Nos. 94/2007 and 95/2007 and the

appeals were dismissed vide order dated 26.03.2007. It was observed

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by the Division Bench that even if it was assumed that all properties were ancestral and the applicant would have a share therein by birth, the share would only be a fraction of the share determined to fall in the hands of Om Parkash i.e. his father.

7. Against the order of the Division Bench, Plaintiff preferred Special Leave Petitions bearing SLP Nos.15955-15956/2007, which were dismissed vide order dated 14.09.2007 and the Supreme Court observed that Plaintiff had been rightly refused re-opening the question at that stage, when a preliminary decree had been passed.

8. On 14.05.2007, draw of lots was held allotting the properties to the three brothers and delivering separate and exclusive possession. On 18.05.2007, Plaintiff filed the present suit being CS(OS) No.947/2007, in which he has sought partition against Om Parkash, his father, claiming 1/3rd share out of 1/3rd share of Om Parkash in the ancestral house bearing No. 173 (SR-114) situated in the Abadi/Lal Dora of Village Peeragarhi, Delhi, which is a constructed property and a plot situated in Phirni/extended Lal Dora of Village Peeragarhi, Delhi bearing Khasra No. 487/31 measuring 2 bighas 10 biswas. Plaintiff has also sought declaration that the two consent decrees dated 03.01.1972 and 07.04.1972 in Suit Nos. 925/1971 and 76/1972 respectively as well as the preliminary partition decree dated 12.12.2005 in CS(OS) No.2719/2000 and CS(OS) No.965/2001, be declared null and void. In 2010, the plaint was amended and on 26.09.2011, issues were settled in CS(OS) No.947/2007. In the meantime, on 06.02.2008 final decree of partition was passed by this Court in CS(OS) No.2719/2000 and CS(OS) No.965/2001, dividing all four properties, i.e. Peeragarhi and Punjabi Bagh amongst the three brothers.

9. On the otherhand, Hitender Kumar Shokeen/Petitioner herein, son of Bal Kishan filed Suit No.1357/2013 on 15.04.2013, seeking setting aside of the final decree dated 06.02.2008 and the suit is pending. Om Parkash expired on 06.02.2019 and Plaintiff and his brother Anurag Shokeen being sons of Om Parkash were impleaded as his legal heirs in Suit No.1357/2013.

10. On 20.08.2019, Rajinder Shokeen/Defendant No.4 in the present suit filed an application under Order VII Rule 11 CPC seeking rejection of the plaint, followed by an application dated 12.11.2021 by Hitender/Defendant No.3(C) for the same relief. Bal Kishan expired on 08.06.2021 and an application filed under Order XXII Rule 4 CPC, filed by Jitender Shokeen, his son, was allowed on 16.10.2021 and LR's of Bal Kishan/Defendant No.3 were impleaded in the suit which included Hitender, Jitender, their mother and two sisters. On 17.08.2022, the learned Trial Court dismissed both the applications under Order VII Rule 11 CPC and it is this order which is the subject matter of challenge in the present revision petition filed by Hitender Shokeen only and there is no challenge to the order by Rajinder Shokeen.

11. Learned Trial Court after recording the respective contentions of the Plaintiff and the Defendants dismissed the applications holding that: (a) while deciding an application under Order VII Rule 11 CPC, only the plaint and the documents filed with the plaint can be considered; (b) power under Order VII Rule 11 CPC is to be exercised when the suit hits the road block of either being barred by any provision of law or having some other legal infirmity in the plaint; (c) issue with respect to the suit being barred by limitation has already been settled in 2011; (d) evidence has started and Plaintiff has been extensively cross-examined by three Defendants and the matter is

pending at the stage of cross-examination qua Defendant No.4; and
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(e) present suit is the oldest matter pending in the Trial Court and at this stage, application under Order VII Rule 11 CPC cannot be entertained.

CONTENTIONS ON BEHALF OF DEFENDANT NO.3(C)/PETITIONER

(A) Plaintiff is not claiming independent interest in Property No.1 and asserts his rights through his mother Late Smt. Manmohini, who had in her written as well as oral statement in Suit No.76/1972 admitted that Plaintiffs therein were true owners of the properties in question and for 28 years, during her lifetime had never challenged or claimed that the decree was obtained by fraud. It is a settled law that admissions made by predecessor-in-interest i.e. Smt. Manmohini will bind the son i.e. the Plaintiff. Reliance was placed in the judgments of *Amarnath and Others v. Deputy Director of Consolidation, Kanpur and Another*, AIR 1985 All 163; *Sahib Singh and Others v. Ram Kumar and Others*, (1993) 103 PLR P&H 206 and *Kapoor Chand and Others v. Ganesh Dutt and Others*, AIR 1993 SC 1145. Therefore, the issue of ownership and title in Property No.1 stands crystalized by the consent decree and cannot be reopened.

(B) In the impleadment applications filed by the Plaintiff in CS(OS) No.2719/2000 and CS(OS) No.965/2001 as well as in the pleadings in the appeals arising therefrom, Plaintiff admitted that the properties which were subject matter of the said suits, were ancestral properties. The admission right up to the Supreme Court binds the Plaintiff and he cannot be permitted to argue to the contrary, at this stage. The applications were dismissed by the Learned Single Judge and the Appeals were also dismissed by the Division Bench holding that even

assuming the properties were ancestral, Plaintiff could only lay a claim to a share in the defined and partible share of his father i.e. Om Parkash. Supreme Court upheld both the orders and while passing the order on 14.09.2007, observed that the High Court had rightly rejected the claim of the Plaintiff seeking to reopen the question at this stage, when a preliminary decree had been passed. Plaintiff never sought review/recall of order dated 14.09.2007 and cannot seek setting-aside of the preliminary decree dated 12.12.2005, in the present suit.

(C) The reliefs claimed in the present suit are also barred in law on account of the facts that Plaintiff has not challenged: (i) Order dated 14.05.2007, partitioning the properties by draw of lots and allotment of specific shares to the three brothers; and (ii) final decree of partition passed by this Court on 06.02.2008, despite seeking amendment of the plaint in 2010.

(D) Plaintiff has not claimed relief of possession in the suit and the suit is, therefore, hit by provisions of Order II Rule 2 CPC and today the said relief is barred in law since 12 years have elapsed from 14.05.2007. The suit is also barred by limitation since one of the reliefs claimed is for declaring the consent decrees dated 03.01.1972 and 07.04.1972 null and void, almost 35 years after the passing of the decrees. In order to take advantage of Section 17 of the Limitation Act, 1963, two ingredients ought to have been pleaded in support of his plea of the decree being obtained by fraud, i.e. how fraud was played by Defendants No.1, 3 and 4 and secondly, the date of discovery of fraud by the Plaintiff. Clearly, the pleadings in the plaint lack both the essential elements and thus no benefit can be taken to escape the rigours of the provisions of Limitation Act. Section 3(1) of the

Limitation Act provides that a suit instituted after prescribed time shall be dismissed. Limitation period to set aside a decree as per Article 59 of the Limitation Act is 3 years. Calculating 3 years from the dates of the consent decrees, the suit is clearly barred by time.

(E) Trial Court has erred in rejecting the application on the ground that the suit is at the stage of evidence, contrary to the settled law and clear provisions of Order VII Rule 11 CPC that application seeking rejection of plaint can be filed at any stage of the suit. In *Saleem Bhai v. State of Maharashtra, (2003) 1 SCC 557*, the Supreme Court held that the Trial Court can exercise power under Order VII Rule 11 CPC at any stage of the suit before registering the plaint or after issuing summons and at any time before conclusion of the trial. In *Butna Devi v. Amit Talwar & Ors., 2014 SCC OnLine Del 3494*, Division Bench of this Court held that once it appears to the Court, even at the Appellate stage against an interlocutory order in the suit, that the suit is *per se* not maintainable, Court would be entitled to examine the issue and reject the plaint, if so warranted on facts and law.

(F) Plaintiff contends that Property No.1 was allotted by Refugees Cooperative Housing Society Ltd., Punjabi Bagh, to Smt. Manmohini and she could not have transferred the same contrary to the terms of the Sale Deed executed between her and the Society on 20.12.1969. This stand of the Plaintiff is misplaced as by a judicial order, the three brothers have been declared as real owners of Property No.1, being *benami* in the name of Smt. Manmohini and it was not a case of transfer. Secondly, the bar, if any, under the covenants of the Sale Deed was for 5 years, which period has long elapsed and thirdly,

Society has not taken any action against the Defendants. In so far as claim against Property No.6 is concerned, there is not even an averment in the plaint as to on what factual and/or legal basis Plaintiff asserts a right on the said property entitling him to challenge the consent decree passed in Suit No.925/1971 against Smt. Kamla Rani, who was not related to the Plaintiff.

CONTENTIONS ON BEHALF OF PLAINTIFF/RESPONDENT NO.1

(A) Late Sh. Rattan Singh was the grand-father of Defendant No.3(C) and the Plaintiff and father of Defendants No.1, 3 and 4, who died in the year 1946 leaving behind Defendants No.1, 3 and 4 and one more son, wife and two daughters. In 1971 and 1972, Defendants No.1, 3 and 4 filed two suits respectively, one against Smt. Kamla Rani and the other against Smt. Manmohini, mother of Plaintiff and wife of Defendant No.1, seeking declaration of title qua Property No.6 and Property No.1 respectively. Consent decrees were obtained based on the admissions of Smt. Kamla Rani and Smt. Manmohini, without impleading the sisters as parties and without disclosing that Smt. Manmohini had purchased Property No.1 in an open auction as member of the Refugee Cooperative Housing Society. It was also concealed from the Court that there is a statutory bar under Section 10 of the Resettlement of Displaced Persons (Land Acquisition), Act 1948 for transfer of such property without the previous consent of the competent authority, which was one of the covenants in the Sale Deed and therefore, the consent decree was obtained by fraud. Although consent decrees are compulsorily registrable under Section 17 of the Registration Act, these decrees were never registered and Property No.1 still stands in the name of late Smt. Manmohini

in the records of the Sub-Registrar, while Property No.6 is in the name of Smt. Kamla Rani. Since Smt. Manmohini has died intestate, Plaintiff is entitled to 1/3rd share in her property along with other legal heirs.

(B) Plaintiff and his brother i.e. Defendant No.2 are coparceners in the joint family and are thus entitled to a defined share in the ancestral property, by birth. Defendants No.1, 3 and 4 have obtained a preliminary decree on 12.12.2005 in CS(OS) No.2719/2000, wherein 1/3rd share has been allocated to each one of them and Plaintiff is entitled to half share in Defendant No.1's 1/3rd share in the properties, which cannot be denied to him.

(C) The two consent decrees passed in 1972 have been obtained by Defendants No.1, 3 and 4 by playing fraud on the Court and are a nullity. It is settled law that no one can be allowed to reap the fruits of a decree obtained by fraud on the Court and concealment of material facts. Since the decrees are a nullity and non-est/void ab-initio, the question of suit being barred by limitation does not arise, as held by the Supreme Court in ***A. V. Papaya Sastry and Others v. Govt. of A.P. and Others, (2007) 4 SCC 221*** and ***Naresh Kher v. S. Jagjit Singh and Others, 2022 SCC OnLine Del 363***. In ***Sushil Kumar Mehta v. Gobind Ram Bohra (Dead) through his LRs, (1990) 1 SCC 193***, the Supreme Court held that a decree which is nullity cannot be cured by consent or waiver and can be challenged at any time and in any proceeding.

(D) Several questions have arisen for consideration before the Trial Court, including the effect of the consent decrees being a nullity, extent of share of the Plaintiff in the ancestral properties, bar of limitation in filing the suit etc. which are

inextricably linked and cannot be decided without evidence. Law with respect to adjudicating an application under Order VII Rule 11 CPC is settled and the Courts have repeatedly held that at this stage, only the plaint and the documents appended there can be considered. Disputed questions and issues requiring evidence as also the issue of limitation, which is a mixed question of law and fact, cannot be decided at the stage of Order VII Rule 11 CPC. No Court can be called upon to look at the defence in the written statement or any other plea or document outside the plaint to reject a plaint at the threshold. It is equally settled that plaint cannot be rejected on the ground that the Plaintiff may not succeed at the end of the trial when the suit is finally adjudicated. There is difference between disclosing a cause of action in the plaint and ultimate success after trial.

(E) Issues have been settled in the suit way back on 26.09.2011 and issues No.3 and 4 are whether plots No.1 and 6 are HUF Properties and if so, whether Plaintiff is entitled to a share therein and whether decree passed in CS(OS) No.965/2001 is null, void and unenforceable. An issue has also been settled whether the suit is barred by limitation. These issues directly touch upon the grounds raised for rejection of plaint and there is no reason to entertain the application when the suit has proceeded to near completion of evidence of Plaintiff's witnesses. In these circumstances, it would be travesty of justice if the plaint is rejected under Order VII Rule 11 CPC, defeating the right of the Plaintiff to prove his just claims, by leading evidence and cross-examining the Defence Witnesses.

(F) Defendant No.3(C) has not brought to the attention of the Court order dated 04.07.2015 passed by the Division Bench in FAO(OS) No.604/2012 which has a significant bearing on the

issues raised by the Plaintiff. The plea that a final decree has been passed on 06.02.2008, which is unchallenged till date and therefore, on this ground, the plaint deserves to be rejected is concerned, overlooks the interim order passed in this suit on 31.05.2007, wherein the Court while modifying the earlier status-quo order in respect of title and possession of the properties being subject matter of partition, had passed a direction that the partition granted by the Court in respect of the suit properties shall ultimately be subject to the outcome of the suit and thus the suit deserves to proceed to its logical conclusion.

ANALYSIS

12. This revision petition has been filed by Hitender/Defendant No. 3(C), legal heir of Late Sh. Bal Kishan, challenging dismissal of his application under Order VII Rule 11 CPC. Similar application was filed by Defendant No.4/ Rajinder Singh and both applications were decided by a common order. However, Defendant No.4 has not challenged the order of the Trial Court and therefore, this Court is only concerned with the impugned order to the extent it deals with the application of Defendant No.3(C)/Petitioner herein.

13. The factual expose and neat legal nodus before this Court, concerns rejection of plaint under Order VII Rule 11 CPC and thus, before proceeding further, it is imperative to examine the scope and ambit of exercise of power of a Court under the said provision and for which it is essential to understand the intent and objective of this salutary provision in the Civil Procedure Code. In ***Dahiben v. Arvinbhai Kalyanji Bhanusali (Gajra) Dead through Legal Representatives and Others, (2020) 7 SCC 366***, the Supreme Court observed that remedy under Order VII Rule 11 CPC is an independent

and special remedy, wherein the Court is empowered to summarily
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dismiss the suit without a trial, if it is satisfied that the action should be terminated on any of the grounds mentioned therein. The underlying object of Order VII Rule 11(a) CPC is that if no cause of action is disclosed in the plaint or the suit is barred by any law under Rule 11(d), Court would not permit the Plaintiff to unnecessarily protract the proceedings in the suit and in such a case, it would be necessary to put an end to the sham litigation, so that further judicial time is not wasted. In this context, I may also allude to the judgment in *Azhar Hussain v. Rajiv Gandhi, 1986 Supp SCC 315*, where the Supreme Court held that the whole purpose of conferment of powers under Order VII Rule 11 CPC is to ensure that a litigation which is meaningless and bound to prove abortive, should not be permitted to carry on and occupy the time of the Court, leaving the sword of Damocles hanging over the Defendant.

14. It is equally settled that while exercising power under Order VII Rule 11 CPC the only test to ascertain if the plaint discloses a cause of action and/or is not barred by law, is to examine the plaint and the plaint alone in conjunction with the documents filed with the plaint. [*Liverpool & London S.P. & I Association Ltd. v. M.V. Sea Success I and Another, (2004) 9 SCC 512*]. The Supreme Court has also circumscribed and confined the powers by culling out principles on how a plaint must be construed or interpreted for adjudication of an application under Order VII Rule 11 CPC. In *Hardesh Ores (P) Ltd. v. Hede & Co., (2007) 5 SCC 614*, the Supreme Court held that it is not permissible to cull out a sentence or passage from the plaint and read the same in isolation. It is the substance and not merely the form which has to be looked into. The plaint must be construed as it stands, without addition or subtraction of words and only if on a meaningful reading it is found that the suit is manifestly vexatious and meritless, the power to reject the plaint must be exercised.

15. Present case concerns an application seeking rejection of plaint under Order VII Rule 11(d) CPC. The enunciation of law by the Supreme Court in the context of Rule 11(d), therefore, needs to be alluded to. In **Ramesh B. Desai and Others v. Bipin Vadilal Mehta and Others**, (2006) 5 SCC 638, the Supreme Court held that principles underlying Clause (d) of Order VII Rule 11 CPC are no different and relied upon another judgment of the Supreme Court in **Popat and Kotecha Property v. State Bank of India Staff Assn.**, (2005) 7 SCC 510, wherein it was held as under:-

“10. Clause (d) of Order 7 Rule 11 speaks of suit, as appears from the statement in the plaint to be barred by any law. Disputed questions cannot be decided at the time of considering an application filed under Order 7 Rule 11 CPC. Clause (d) of Rule 11 of Order 7 applies in those cases only where the statement made by the plaintiff in the plaint, without any doubt or dispute shows that the suit is barred by any law in force.”

16. The Supreme Court reiterated that in order to examine whether the plaint is barred by any law, the averments made in the plaint alone have to be seen and they have to be assumed to be correct. It is not permissible to look into the pleas raised in the written statement or to any piece of evidence and the plea of limitation raised by a Defendant will also have to be examined by looking into the plaint alone. Plea of limitation cannot be decided as an abstract principle of law divorced from facts, as in every case the starting point of limitation has to be ascertained, which is entirely a question of fact. It was further held that plea of limitation is a mixed question of fact and law. The Supreme Court relied upon another judgment in **Balasaria Construction (P) Ltd. v. Hanuman Seva Trust**, (2006) 5 SCC 658, relevant passage of which is as follows:-

“8. After hearing counsel for the parties, going through the plaint, application under Order 7 Rule 11(d) CPC and the judgments of the trial court and the High Court, we are of the opinion that the present suit could not be dismissed as barred by limitation without proper pleadings, framing of an issue of limitation and taking of

evidence. Question of limitation is a mixed question of law and fact. Ex facie in the present case on the reading of the plaint it cannot be held that the suit is barred by time. The findings recorded by the High Court touching upon the merits of the dispute are set aside but the conclusion arrived at by the High Court is affirmed. We agree with the view taken by the trial court that a plaint cannot be rejected under Order 7 Rule 11(d) of the Code of Civil Procedure.”

17. The statement of law that limitation is a mixed question of law and fact was reaffirmed by the Supreme Court in ***Shakti Bhog Food Industries Limited v. Central Bank of India and Another, (2020) 17 SCC 260*** and very recently again in ***C.S. Ramaswamy v. V.K. Senthil and Others, 2022 SCC OnLine SC 1330***.

18. Coming to the present case, plea of bar in law is set forth by Defendant No.3(C) on multi-fold grounds. First objection is that the suit is barred by limitation with respect to the relief of declaration for declaring the two consent decrees passed in 1972 as null and void. In a nutshell, the argument is that the suit filed in the year 2007, laying challenge to consent decrees passed in 1972, is time barred under the Limitation Act and plaint ought to be rejected on this ground. Rejection is also sought on the ground that consent decree in Suit No. 76/1972, was passed on a consent given by Plaintiff's mother and he being bound by the admissions of his mother i.e. predecessor-in-interest, is debarred in law from assailing the decree.

19. It is trite that limitation is a mixed question of law and fact and a plaint should not ordinarily be rejected on the ground of limitation, without framing an issue on limitation and taking evidence. [***Ref. Balasaria Construction (P) Ltd. (supra)***]. In this context, it would also be profitable to refer to a judgment of the Supreme Court in ***Vaish Aggarwal Panchayat v. Inder Kumar and Others, (2020) 12 SCC 809***, wherein it was re-stated that a suit cannot be dismissed as barred by limitation on a mere *ex facie* reading of the plaint, without proper pleadings, framing issues and taking evidence. This case is

particularly relevant to the present case as the facts also come close and one of the issues involved was a challenge to an earlier decree having been obtained by fraud. In the said case, contesting Respondents before the Supreme Court had filed a suit for decree of specific performance of an agreement to sell in respect of a suit land and the suit was decreed by the Trial Court against which no appeal was preferred. Respondents sought execution of the decree, in which the Society/Appellant before the Supreme Court, filed objections claiming ownership of the suit land by way of Gift Deed. Objections were rejected and thereafter, the Society filed an application for setting aside the judgment and decree, which was also dismissed and the appeal suffered the same fate. In the meantime, the Society filed a suit for declaration for declaring the judgment and decree passed in the civil suit as null and void with consequential relief of permanent injunction. Respondents who were the Plaintiffs in the first suit filed an application under Order VII Rule 11 CPC for rejection of the plaint on the ground that the suit was barred by law. The application was allowed by the Trial Court against which the Society preferred an appeal, which was allowed by the First Appellate Court, ordering the suit to be restored and tried. This order was challenged before the High Court, which allowed the revision petition and restored the order of the Trial Court. The stand of the Society before the High Court was that it was not bound by the judgment and the decree and had a right to challenge the same through a suit and the civil suit which was fixed for evidence after framing of issues and a specific issue regarding maintainability was framed, could not be summarily dismissed at that stage. Importantly, Society had taken a plea that the earlier decree was vitiated by fraud and collusion. The High Court rejected the argument of the Society and observed that the First Appellate Court had erred in

trial, the question regarding maintainability could not have been decided, more particularly because the civil suit was decreed and no appeal having been filed the decree had attained finality and the suit of the Society was also barred by principles of *res judicata*.

20. While examining the contentions of the Society/Appellant, the Supreme Court relied on an earlier judgment of the Supreme Court in ***Kamala and Others v. K.T. Eshwara SA and Others, (2008) 12 SCC 661***, wherein principles engrafted under Order VII Rule 11(d) CPC were examined. The Supreme Court, dealing with the facts before it, held that there were allegations in the plaint, more particularly, of fraud and collusion with respect to the earlier decree and the High Court had thus fallen into an error by expressing a view that plea of *res judicata* was obvious from the plaint. In fact, in doing so, the High Court has accepted the plea taken in the written statement, which was incorrect and in the obtaining factual matrix suit must proceed to trial with regard to all the issues framed.

21. I may also refer to another judgment of the Supreme Court in ***Union of India and Others v. Ramesh Gandhi, (2012) 1 SCC 476***, where the Supreme Court held as follows:-

“27. If a judgment obtained by playing fraud on the court is a nullity and is to be treated as non est by every court, superior or inferior, it would be strange logic to hear that an enquiry into the question whether a judgment was secured by playing fraud on the court by not disclosing the necessary facts relevant for the adjudication of the controversy before the court is impermissible. From the above judgments, it is clear that such an examination is permissible. Such a principle is required to be applied with greater emphasis in the realm of public law jurisdiction as the mischief resulting from such fraud has larger dimension affecting the larger public interest.”

22. Reading of the aforesaid judgments shows that where there are allegations that an earlier decree has been obtained or secured by playing fraud on the Court, an examination is permissible, since fraud

has larger dimensions affecting the larger public interest and as held

by the Supreme Court, it is only after evidence is led on the intent to deceive that a conclusion of fraud can be arrived at. The application filed by Defendant No. 3(C) under Order VII Rule 11(d) CPC would have to be seen in the light of the aforesaid judgments and the aspect of limitation would need to be contextualized in the backdrop of allegations of the consent decrees including the preliminary decree of partition being obtained by fraud and collusion.

23. Plaintiff has been filed and a plain reading of the averments therein shows that Plaintiff has reproduced the family tree of the alleged HUF and pleaded that Plaintiff and Defendant No.2/his brother are coparceners in the joint family and thus entitled to share in the ancestral properties, by birth. It is averred that going by the law of succession, share of Defendant No.1 would fall to the share of Plaintiff on partition of the suit properties between Defendant No.1 and Defendant No.3 and Defendant No.4. It is stated that despite Defendant No.1/Om Parkash being aware that Plaintiff had 1/3rd share in his share, clandestinely filed a suit for partition without disclosing the other coparceners to the properties. It is further averred that Smt. Manmohini was the owner of Property No.1, purchased by her in an open auction in 1968. Auction was for members of the Refugee Cooperative Housing Society, Punjabi Bagh and similarly, Property No.6 was owned by Smt. Kamla Rani. Without disclosing the source of title in Property No.1 in the records of the authorities and/or how Defendants No.1, 3 & 4 were asserting their rights as joint owners, including the factum of the Sale Deed between Smt. Manmohini and the Cooperative Society containing a covenant barring any transfer, Plaintiffs obtained declaration as owners in respect of the properties by fraudulently taking consent from Smt. Manmohini. It is also pleaded that consent decrees were compulsorily registrable under

Section 17 of the Registration Act, 1908, but were never registered.

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There is a clear asseveration of fraud and misrepresentation in the plaint in obtaining the consent decrees. It is stated that the decrees are null and void and unenforceable in law as also having been obtained by concealment and misrepresentation of material facts. In the paragraph relating to cause of action, Plaintiff asserts that the cause of action first arose in respect of ancestral properties on 12.12.2005 when Defendants No.1, 3 and 4 obtained a preliminary decree and when the share of Defendant No.1 stood determined on the said date as 1/3rd.

24. From a reading of the plaint, it is evident that there are allegations of fraud and collusion in obtaining the earlier decrees with respect to part of the suit properties. It is also stated that the cause of action arose on 12.12.2005 when the share of Defendant No.1 was determined and partitioned. Seen in the light of the judgments aforementioned and the principles elucidated therein for adjudication of an application under Order VII Rule 11 CPC, this Court agrees with the finding of the Trial Court that limitation being a mixed question of law and fact and in view of a host of triable issues raised in the plaint, on which issues were settled in 2011, cannot be decided without evidence. Stand of the Plaintiff that plaint cannot be rejected at this stage is pronounceably correct in light of asseverations of fraud and misrepresentation in obtaining the said consent decrees and the rights asserted by the Plaintiff in the suit properties.

25. Relevant would it be to refer to a few passages from the judgment of the Supreme Court in ***A.V. Papaya Sastry (supra)*** as follows-

“21. Now, it is well-settled principle of law that if any judgment or order is obtained by fraud, it cannot be said to be a judgment or order in law. Before three centuries, Chief Justice Edward Coke proclaimed:

“Fraud avoids all judicial acts, ecclesiastical or temporal.”

22. *It is thus settled proposition of law that a judgment, decree or order obtained by playing fraud on the court, tribunal or authority is*

a nullity and non est in the eye of the law. Such a judgment, decree or order—by the first court or by the final court—has to be treated as nullity by every court, superior or inferior. It can be challenged in any court, at any time, in appeal, revision, writ or even in collateral proceedings.

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26. *Fraud may be defined as an act of deliberate deception with the design of securing some unfair or undeserved benefit by taking undue advantage of another. In fraud one gains at the loss of another. Even most solemn proceedings stand vitiated if they are actuated by fraud. Fraud is thus an extrinsic collateral act which vitiates all judicial acts, whether in rem or in personam. The principle of “finality of litigation” cannot be stretched to the extent of an absurdity that it can be utilised as an engine of oppression by dishonest and fraudulent litigants.*

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39. *The above principle, however, is subject to exception of fraud. Once it is established that the order was obtained by a successful party by practising or playing fraud, it is vitiated. Such order cannot be held legal, valid or in consonance with law. It is non-existent and non est and cannot be allowed to stand. This is the fundamental principle of law and needs no further elaboration. Therefore, it has been said that a judgment, decree or order obtained by fraud has to be treated as a nullity, whether by the court of first instance or by the final court. And it has to be treated as non est by every court, superior or inferior.”*

26. In a recent judgment titled as ***Mongia Realty & Buildwell Private Limited v. Manik Sethi, (2022) 11 SCC 572***, the Supreme Court had again considered the vexed question on whether the limitation being a mixed question of fact and law can be decided without evidence. The Supreme Court held as follows:-

“13. *The issue as to whether the claim of the appellant is barred by limitation cannot be isolated from the nature of the transactions between the parties. In any event, whether the plea of the appellant as set up in Para 5 of the plaint is proved would depend upon evidence adduced at the trial. The course of action which was followed by the learned trial Judge of directing the parties to address arguments on the issue of limitation was irregular. The issue of limitation in the present case would require evidence to be adduced.*

14. *Order 14 Rule 2CPC stipulates that when issues of both law and facts arise in the same suit, the court may dispose the suit by trying the issue of law first. For this purpose, the provision specifies two questions of law, which are : (i) jurisdiction of the court; and (ii)*

a bar to the suit created by any law for the time being in force. The provision is extracted below:

“2. Court to pronounce judgment on all issues.—(1) Notwithstanding that a case may be disposed of on a preliminary issue, the court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues.

(2) Where issues both of law and of fact arise in the same suit, and the court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if the issue relates to—

(a) the jurisdiction of the court, or

(b) a bar to the suit created by any law for the time being in force, and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue.”

15. Before this Court in *Nusli Neville Wadia v. Ivory Properties* [*Nusli Neville Wadia v. Ivory Properties*, (2020) 6 SCC 557 : (2020) 3 SCC (Civ) 671], the issue was whether the issue of limitation can be determined as a preliminary issue under Order 14 Rule 2. The three-Judge Bench of this Court observed that if the issue of limitation is based on an admitted fact, it can be decided as a preliminary issue under Order 14 Rule 2(2)(b). However, if the facts surrounding the issue of limitation are disputed, it cannot be decided as a preliminary issue. This Court observed as follows : (SCC pp. 596-97, paras 51-52)

“51. ... As per Order 14 Rule 1, issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other. The issues are framed on the material proposition, denied by another party. There are issues of facts and issues of law. In case specific facts are admitted, and if the question of law arises which is dependent upon the outcome of admitted facts, it is open to the court to pronounce the judgment based on admitted facts and the preliminary question of law under the provisions of Order 14 Rule 2. In Order 14 Rule 2(1), the court may decide the case on a preliminary issue. It has to pronounce the judgment on all issues. Order 14 Rule 2(2) makes a departure and the court may decide the question of law as to jurisdiction of the court or a bar created to the suit by any law for the time being in force, such as under the Limitation Act.

52. In a case, question of limitation can be decided based on admitted facts, it can be decided as a preliminary issue under Order 14 Rule 2(2)(b). Once facts are disputed about limitation, the determination of the question of limitation also cannot be made under Order 14 Rule 2(2) as a preliminary issue or any other such issue of law which requires examination of the disputed facts. In case of dispute as to facts, is necessary to be determined to give a finding on a question of law. Such question cannot be decided as a preliminary issue. In a case, the question

of jurisdiction also depends upon the proof of facts which are disputed. It cannot be decided as a preliminary issue if the facts are disputed and the question of law is dependent upon the outcome of the investigation of facts, such question of law cannot be decided as a preliminary issue, is settled proposition of law either before the amendment of CPC and post amendment in the year 1976.”

16. *Since the determination of the issue of limitation in this case is not a pure question of law, it cannot be decided as preliminary issue under Order 14 Rule 2CPC. Hence, we allow the appeal and set aside the judgment of the trial Judge dated 16-8-2018 and of the Single Judge of the High Court dated 4-9-2019 [Mongia Realty & Buildwell (P) Ltd. v. Manik Sethi, 2019 SCC OnLine Del 9956]. The issue of limitation which has been framed by the learned trial Judge may be decided, along with other issues at trial. The appeal shall stand allowed in the above terms.”*

27. As noted above, there are allegations of fraud and collusion in the plaint with regard to the earlier consent decrees and tested on the anvil of the aforementioned judgements, no ground is made out for rejection of the plaint under Order VII Rule 11(d) CPC and the plea of limitation will require to be decided on the basis of evidence led by all parties to the *lis*. Plaintiff is also correct in his submission that jurisdiction to dismiss the suit has to be distinguished from jurisdiction to reject a plaint under Order VII Rule 11 CPC. Existence of cause of action cannot be equated with the merits of the suit filed. It will only be after trial and on evidence adduced before the Court that it can be determined whether the Plaintiff is justified in making allegations of fraud in obtaining consent decrees as fraud cannot be proved or established without leading evidence and on the same score, whether or not the Plaintiff has share in the suit properties and to what extent, are also questions which need determination. Questions have been raised by the Plaintiff with respect to the consent of Smt. Manmohini in suit No. 76/1972 including her right to transfer the property obtained under a Sale Deed. While Defendants contend that partition has become final after the final decree passed by this Court

Rajinder Singh Shokeen, but it cannot be overlooked that by an interim order in this very suit, at the initial suit partition was made subject to the outcome of the present suit. It may be that the Plaintiff may not finally succeed in the suit but this cannot be a consideration to oust him at this stage by rejecting the plaint. [*Ref. Mansi Gupta v. Prem Amar and Another, 2022 SCC OnLine Del 900*].

28. The chequered history of this case and the complicated web of facts, judicial orders, both interim and final, issues of limitation, challenge to the earlier decrees being a nullity on ground of fraud etc. leads me to an irresistible conclusion that present suit does not fall in the category of cases where the plaint can be rejected exercising power under Order VII Rule 11 CPC, as rightly held by the Trial Court in the impugned order. In *Snowwhite Apparels Ltd. v. K.S.A. Technopak (I) Ltd., 2005 SCC OnLine Del 479*, this Court cautioned that rejection of a plaint is a serious matter as it non-suits the Plaintiff and kills a cause for good. Therefore, a plaint should not be rejected cursorily without satisfying the requirements of provisions of Order VII Rule 11 CPC. In my view, the Trial Court has rightly exercised the discretion looking at the complicated facts, vexed questions of law arising between the parties and holding that the same can only be decided after parties have led their evidence.

29. It is, no doubt, true that an application under Order VII Rule 11 CPC can be filed at any stage, even where issues have been framed, however, it is equally true and settled that if the Defendant feels that the plaint is liable to be rejected, he is expected to raise such a plea at the earliest so that valuable time and energy is not wasted in trying the suit. In this context, I may refer to the observations of this Court in *Nabha Investment Pvt. Ltd. v. Harmishan Dass Lukhmi Dass, 1995 SCC OnLine Del 239*, as follows:-

“11. It is true that a prayer seeking rejection of a plaint is ordinarily made, entertained and adjudicated at a preliminary stage of the suit but that is not a hard rule. Order 7 Rule 11 CPC contemplates the ‘grounds’ for rejection of the plaint; it does not contemplate or provide the ‘stage’ at which the court may exercise such jurisdiction. Excepting the High Court of Allahabad and the Judicial Commissioner’s Court of Ajmer the trend of judicial opinion is that the jurisdiction to reject the plaint can be exercised at any stage of the proceedings and even by an appellate court in appropriate cases. In my opinion if the defendant feels that the plaint is liable to be rejected he is expected to raise such plea at the earliest so that valuable public time and energy is not wasted in trying the suit and pronouncing a dismissal thereof if only a non-deserving plaintiff could have been shown an early exit by rejecting the plaint. At the same time if the defendant has permitted the trial to advance without insisting on rejection of the plaint at an early stage, his belated prayer seeking rejection of plaint would not be shown indulgence by the court so as to obstruct the smooth flow of trial in midstream. Any other view to the contrary would open gate for the unscrupulous litigant filing an application for rejection of plaint and insisting on its disposal when the parties especially the plaintiff was before the court ready with the trial to proceed. Such a defendant would be told by the court that he was a non-deserving branded so by his conduct displaying delay and his acquiescence in trial. He would be rebuffed by rejection of his application before the plaintiff was even called upon to show cause why his plaint be not rejected.”

30. The observations of the Court squarely apply to the present case where issues were settled way-back in 2011 and the suit has advanced to the stage of near completion of Plaintiff’s evidence. The suit was filed in the year 2007 and the Trial Court has noted that it is the oldest case pending in that Court. It also needs a mention that issues have been settled with respect to the rights of the Plaintiff in the suit properties, nullity of the consent decrees and limitation. There is also merit in the contention of the Plaintiff that on 31.05.2007, the Court in this suit had while modifying the earlier status-quo order on title and possession, lifted the stay on proceeding with partition but with a caveat that partition of the suit properties, shall be subject to the outcome of the suit and the plaint cannot thus be rejected at this stage, truncating the trial. Therefore, it is not correct for learned counsel for

been effected and separate shares have been allocated to Defendants No.1, 3 and 4 along with possession of the suit properties, the plaint deserves a rejection, at this stage. It needs a mention that Defendants have themselves brought to fore that a suit has been filed by Defendant No.3(C) himself being CS(OS) No.1357/2013, re-numbered as CS(OS) No.13556/2016, wherein he has alleged that the decrees in CS(OS) No.2719/2000 and CS(OS) No.965/2001 pertaining to partition of the suit properties between Om Parkash, Bal Kishan and Rajinder have been obtained by fraud, misrepresentation and concealment of facts and that suit is also stated to be pending. The suit was filed in the year 2007 and the Trial Court has noted that it is the oldest case pending in that Court. It also needs a mention that issues have been settled with respect to the rights of the Plaintiff in the suit properties, nullity of the consent decrees and limitation.

31. The judgments relied upon by the Petitioner, in my view, also do not come to his aid. In *Saleem Bhai (supra)*, the Supreme Court has held that the Trial Court can exercise power under Order VII Rule 11 CPC at any stage of the suit and this proposition of law is beyond a debate and binding on this Court. However, in the set of facts in the present case as noted above, the issues raised by the Plaintiff pertain to the consent decrees being allegedly obtained by fraud, partition of his shares in the property, etc. and issues have been framed on these very aspects and the suit has proceeded to near completion of Plaintiff's evidence. Rightly the Trial Court did not think this to be a fit case for exercising jurisdiction under Order VII Rule 11 CPC at this stage to reject the plaint. Insofar as the case of *Butna Devi (supra)* is concerned, the observations of the Division Bench of this Court are in line with the judgment of the Supreme Court in *Saleem Bhai (supra)* and going a step further the Division Bench held that even at the

appellate stage against an interlocutory order in the suit, if the Court
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finds that the suit is not maintainable, the question of maintainability can be gone into. For the reasons stated above, this Court sees no reason to interfere with the discretion exercised by the Trial Court of continuing the suit and proceeding to completion of trial on account of the vexed questions that arise and the complicated and inextricably linked web of facts. This judgment also cannot help Defendant No. 3(C). As far as the other judgments relied upon by counsel for Defendant No. 3(C) are concerned on the issue that Plaintiff is bound by the stand of the Smt. Manmohini his predecessor-in-interest, suffice would it be to state that the Plaintiff has raised triable issues on the right of Smt. Manmohini to transfer the property, the decree being obtained by fraud and therefore a nullity and specific issues were framed by the Trial Court in 2011, which order remains unchallenged till date by the

32. For all the aforesaid reasons, no interference is warranted in the impugned order dated 17.08.2022 passed by the Trial Court, rejecting the application of Defendant No.3(C) under Order VII Rule 11 CPC. Accordingly, the Revision Petition is dismissed upholding the impugned order.

33. It is made clear that this Court has not expressed any opinion on the merits of the case and the observations in the present judgment are only for the purpose of deciding the present Revision Petition and will have no bearing on the adjudication of the suit and/or any other related proceedings.

34. Revision Petition stands disposed of, along with the pending applications.

JYOTI SINGH, J

MAY 12, 2023/kks/shivam/ka