



IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 12<sup>TH</sup> DAY OF MARCH, 2015

PRESENT

THE HON'BLE MR.JUSTICE N.KUMAR  
AND  
THE HON'BLE MR.JUSTICE B. SREENIVASE GOWDA

**R.F.A.No.438 OF 2009**

BETWEEN:

MR. JAGADISH POONJA,  
S/O ANAND POONJA,  
HINDU, AGED 28 YEARS,  
R/AT. DEVAKI APARTMENTS,  
6<sup>TH</sup> FLOOR, MATHIAS ROAD,  
ATTAVARA, MANGALORE,  
REP. BY GPA HOLDER,  
K. RAJARAM SHETTY,  
S/O LATE VITTAL SHETTY,  
HINDU, AGED 65 YEARS,  
R/AT BEJAI CHURCH CROSS ROAD,  
BEJAI, MANGALORE. ... APPELLANT

(By SRI. K. M. NATARAJ, SR. COUNSEL A/W  
SRI. SACHIN B.S., ADVOCATE)

AND:

1. THE SOUTH CANARA HOTEL  
COMPLEX PVT. LTD.,  
A COMPANY REGISTERED  
UNDER THE COMPANIES ACT,  
OF 1956 AND HAVING ITS  
REGISTERED OFFICE AT NO.15,  
MARGATH ROAD, BANGALORE – 25  
AND REP BY ITS MANAGING DIRECTOR.

2. MRS. MAINA R. SHETTY,  
W/O. LATE K. RAMANNA SHETTY,  
AGED ABOUT 72 YEARS,  
R/AT. KODIALGUTHU HOUSE,  
KODIALBAIL,  
MANGALORE .
3. SMT. UMADEVI G. SHETTY,  
W/O. GOVINDA SHETTY,  
HINDU, AGED ABOUT 86 YEARS  
R/AT. MOTIWALA JUBILEE BAUGH,  
BLOCK - V, II FLOOR,  
LAMINGTON ROAD,  
MUMBAI - 400 007.
4. SMT. HEELA S. SHETTY,  
W/O. DR. K. G. SUBASH CHANDRA  
SHETTY, AGED ABOUT 55 YEARS,  
R/AT. 'MIHEER', NO.2366  
14<sup>TH</sup> MAIN HALL, 2<sup>ND</sup> STAGE,  
INDIRANAGAR, BANGALORE – 560 038.
5. SMT. BHARATHI FERNANDES,  
W/O. MR. NELSON FERNANDES,  
AGED ABOUT 51 YEARS,  
R/AT NO. A-301, RIVERSA, 287/3, BANEER,  
PUNE – 411 045.
6. SRI. B. BHAGAVANDAS SHETTY,  
S/O. SMT. UMAVATHI G. SHETTY,  
AGED ABOUT 53 YEARS,  
R/AT. POOJA BUILDING,  
BLOCK NO.12, DAISAR, SUB-WAY,  
EAST MUMBAI – 400 068.
7. SMT. HEMAVATHI R. SHETTY,  
W/O. B. RAMANNA SHETTY,  
AGED ABOUT 83 YEARS,  
R/AT. ARANTHADY HOUSE,

BALEPUNI VILLAGE,  
BANTWAL, D. K.

8. SMT. SUCHITHRA A. PUNJA,  
W/O. SRI. ANANDA PUNJA,  
AGED ABOUT 50 YEARS  
R/AT. DEVAKI APARTMENT  
6<sup>TH</sup> FLOOR, KAPRIGUDDA,  
MANGALORE.
9. SMT. SUJATHA S. SHETTY,  
W/O. SRINIVASA SHETTY,  
AGED ABOUT 46 YEARS,  
R/AT. MIJAR GUTTU HOUSE,  
POST – MIJAR,  
MANGALORE.
10. SRI. ASHITH SHETTY,  
AGED ABOUT 21 YEARS,  
R/AT. MIJAR GUTTU HOUSE,  
POST – MIJAR,  
MANGALORE.
11. SMT. SUMITHRA C. SHETTY,  
W/O. CHITTARANJAN P. SHETTY,  
AGED ABOUT 44 YEARS,  
R/AT. JEPPU GUDDA GATTHU HOUSE,  
'SARVANI VIHAR', POST-JEPPINA MOGARU,  
MANGALORE – 575 009.
12. SMT. RATHNA S. SHETTY,  
W/O. LATE K. SRINIVASA SHETTY,  
AGED ABOUT 70 YEARS,  
R/AT. KODIALGUTHU HOUSE,  
M. G. ROAD, KODAILBAIL,  
MANGALORE.
13. SRI. PRAMODH KUMAR D. SHETTY,  
S/O. LATE SMT. K. SEETHAMMA,  
AGED ABOUT 66 YEARS,

R/AT. KODIALGUTHU HOUSE,  
M. G. ROAD, KODIALBAIL,  
MANGALORE – 3.

14. MISS. POORNIMA SHETTY,  
D/O. K. G. SUBHASHCHANDRA SHETTY,  
AGED ABOUT 28 YEARS,  
MIHEER 2366, 15<sup>TH</sup> MAIN HALL,  
2<sup>ND</sup> STAGE, INDIRANAGAR,  
BANGALORE. ... RESPONDENTS

(By SRI. S. SHAKER SHETTY, ADV. FOR R.14,  
R.1 & R.6 NOTICE HELD SUFFICIENT  
VIDE PAPER PUBLICATION DATED 05.10.2012,  
R.2, R.4, R.5, R.7 - R.13 – SERVED,  
R.3 – SERVICE HELD SUFFICIENT)

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THIS RFA IS FILED U/S 96 CPC AGAINST THE  
JUDGMENT AND DECREE DATED 03.04.2009 PASSED IN  
OS.NO.179/2007 ON THE FILE OF THE I ADDL.CIVIL  
JUDGE (SR.DN.) & CJM, MANGALORE, DISMISSING THE  
SUIT AS BARRED BY LAW OF LIMITATION.

THIS APPEAL COMING ON FOR HEARING, THIS DAY,  
N.KUMAR. J., DELIVERED THE FOLLOWING:

### **J U D G M E N T**

This is plaintiff's Regular First Appeal challenging  
the judgment and decree of the trial Court, dismissing  
the suit of the plaintiff as barred by law of limitation,  
allowing the application filed by defendant No.1 under

Order 7 Rule 11(d) of the Civil Procedure Code (for short hereinafter referred to as CPC).

2. The plaintiff filed a suit for a declaration that the sale deed dt. 29-06-1983 in respect of schedule property in so far as the plaintiff's undivided 1/17<sup>th</sup> right is concerned, is illegal, unenforceable, void ab initio, null and void and not binding on him and for a partition and separate possession of the schedule property into 13 shares, taking into consideration good and bad soil and allot one such share to the plaintiff.

3. The subject matter of the suit is an immovable property situated at Kodialbail village of Mangalore Taluk, within the limits of Mangalore City Corporation, bearing R.S.No.385/1A, T.S.No.218/1A measuring 1 acre 66 cents.

4. The case of the plaintiff is that the schedule property along with other properties originally belonged to Kodialguthu family, of which, plaintiff is a member. This is a 'bunt' family and is governed by 'Aliya Santhana Law of Inheritance'. Subsequently, there was a partition and the schedule property along with other properties were allotted to the branch of one Seethamma, the great grand mother of the plaintiff. Plaintiff is a member of that branch. After the partition, the plaintiff and other members were in joint possession and enjoyment of the same. The plaintiff is entitled to 1/17<sup>th</sup> share in the properties allotted to the branch of late Seethamma, including the schedule property. The plaintiff was born on 05-07-1980.

5. In the month of April, 2007, the plaintiff came to know, through his well wishers, that some people were trying to change the nature of the suit schedule property. Plaintiff is residing at Bangalore.

Immediately he came down to Mangalore and made enquiries and also obtained the latest copy of the RTC in respect of the schedule property. To his utter surprise, he came to know that the name of the first defendant had been entered in the RTC. After verification, he came to know that the first defendant in collusion with some others had created some sham documents i.e. sale deed dt. 29-06-1983 registered as document No.189/83-84 in the Office of the Sub-Registrar, Mangalore City, Mangalore. The defendants No. 3 to 9, 11, 13 and 14 are parties to the aforesaid alleged sale deed. Defendants No. 2, 10 and 12 are the legal heirs of other parties to the aforesaid alleged sale deed. The plaintiff is a minor on the date of the said sale deed. He had not sold his share in the suit property either to the first defendant or anyone else. In the sale deed, it is averred that the plaintiff was represented by one Hemavathi R.Shetty – grand mother of the plaintiff, on the strength of the general power of

attorney stated to have been executed by Mrs. Suchithra Poonja, the mother of the plaintiff. At no point of time either the plaintiff or his mother executed any power of attorney empowering Hemavathi R.Shetty – grand mother to execute the alleged sale deed in respect of the suit schedule property. The alleged sale deed was not for any legal necessity of the plaintiff. Plaintiff did not receive any consideration under the aforesaid void document. No permission was obtained from the Court to sell plaintiff's share in the schedule property. No title in respect of the plaint schedule properties so far as the undivided right of the plaintiff is concerned has been conveyed in favour of the first defendant. The recitals in the alleged sale deed are totally false. The sale deed is not binding on the plaintiff and he is entitled to ignore the same to the extent of his undivided right. The plaintiff is in joint and constructive possession and enjoyment of the suit schedule property. At the most, the first defendant



would step into the shoes of the other co-sharers' undivided right. The schedule property is an agricultural property and even in the revenue records and other records, it is shown as an agricultural property. The first defendant is barred from purchasing the suit schedule property. Under the provisions of K.L.R. Act, the first defendant is barred from acquiring agricultural property. Therefore, the alleged sale deed is null and void, illegal, unenforceable and void. Since the alleged sale transaction came to the knowledge of the plaintiff only during the month of April, 2007, the suit is filed within the period of limitation and hence, the suit is within time. Therefore he prayed for the aforesaid reliefs.

6. The first defendant after service of summons entered appearance and filed a detailed written statement contesting the claim of the plaintiff. He pleaded that the suit is frivolous and vexatious, that the

suit is not filed by Jagadish Poonja, but by third person wholly unconnected with the property to try to claim possession, if possible, only because the market value of property is rising in Mangalore, and that apparently the other defendants are colluding with the person who has used the name of Jagadish Poonja to file the suit. The alleged power of attorney by Jagadish Poonja to K.Rajaram Shetty is totally false and fabricated one. The signing of plaint and institution of suit are both null and void. Except admitting the sale deed dated 29-06-1983 in favour of the first defendant, he did not admit any other averments in the plaint at paras 1 to 5. There is no cause of action for the suit. The suit is hopelessly barred by the law of limitation. Assuming, but not admitting that the plaintiff was born on 05-07-1980 as alleged, he attained the age of majority on 05-07-1998. Within three years from that date, the plaintiff did not file the suit. Hence, on the face of it, the suit is clearly barred by law of limitation. Section 8 of the Limitation

Act makes the position clear in this regard. It is significant that the plaint does not contain any valid averment to show how the suit is within limitation, except the bald assertion in para 5 that the suit is within time. The plea of plaintiff that he came to know about the sale deed in April 2007 is false and not relevant when he is shown as seller. The sale by guardian would not be void, but only voidable. Hence, the question of knowledge is irrelevant. Further, if plaintiff had exercised due diligence, the plaintiff would have come to know of the transaction. Declaratory decree cannot be claimed after such long lapse of time, nor can the partition be sought. The plaintiff had been excluded from the property ever since the date of sale deed and the revenue mutation in RTC. It is denied that the plaintiff is entitled to 1/7<sup>th</sup> share or any quantum of share as claimed. The allegation that the sale deed is either sham or collusive, is not true. The plaintiff has no right, much less undivided right in the

suit property at present. It may be that the plaintiff was minor on the date of the sale deed, but eighth defendant – Suchithra Poonja, who is the mother of the plaintiff, took full care of his interest and received valuable consideration for the sale. The family found it difficult to cultivate because of non-availability of labourers and uneconomic nature of holding and other reasons, such as family members not being wedded to agriculture any longer. He has paid Rs.6,000/- per cent of land which was the best price at that time. A sum of Rs.1,17,176.46 ps. was received by the eighth defendant towards the share of property and as regards the present plaintiff who was minor, his share of Rs.58,588.26 ps. was deposited in his name in Karnataka Bank Ltd., Bolar, Mangalore, in fixed deposit No. 198/83, payable fifteen years later on his attaining majority. The original fixed deposit receipt was handed over to eighth defendant as guardian of plaintiff. It is learnt that the plaintiff has encashed the said receipt

and is now estopped from disputing the correctness of the sale or calling it by names like sham, etc. Sale was for legal necessity and binding on the plaintiff. Plaintiff has also received the consideration. Court permission is not required because the mother and grand mother have acted as guardian for the minor plaintiff and this is permissible in law and therefore, he sought for dismissal of the suit.

7. Fourteenth defendant filed a written statement consenting for a decree. Other defendants did not file written statement.

8. On the aforesaid pleadings, the trial Court framed the following issues :

1. *Whether the plaintiff proves that the Sale Deed dated 29-06-1983 registered as document No.189/83-84 in the office of the Sub-Registrar, Mangalore City, Mangalore is a sham and void document ?*

2. *Whether the plaintiff proves that at no point of time either the plaintiff or his mother has executed any power of attorney Hemavathi R.Shetty to execute sale deed in respect of the suit schedule property ?*
3. *Whether the plaintiff proves that the sale deed dated 29-06-1983 is illegal, unenforceable and not binding on the plaintiff, as averred in para No. 3 and 4 of the plaint ?*
4. *Whether the plaintiff proves the cause of action ?*
5. *Whether the plaintiff proves that he is a co-sharer/co-owner of the schedule property and he is in joint and constructive possession and enjoyment of same ?*

6. *Whether the defendant No.1 proves that the signing of plaint and institution of the suit are both null and void ?*

7. *Whether the defendant No.1 proves that the suit is hopelessly barred by limitation as averred in para No.4 of its written statement ?*

8. *Whether the plaintiff is entitled for the relief as prayed for ?*

9. *To what order or decree ?*

9. After framing the issues, the Court directed that Issue No.7 should be tried as preliminary issue. The defendant No.1 filed an application under Order 7 Rule 11(d) of CPC for rejection of the plaint on the ground that the suit is barred by limitation. Plaintiff filed his objections.

10. Both the preliminary issue and the application filed under Order 7 Rule 11(d) of CPC for rejection of the plaint were taken up for consideration

together. The learned Counsel for the parties addressed their arguments and in support of their contention, relied on several judgments which are extracted in the judgment of the trial Court.

11. Plaintiff filed an application for permission to lead evidence on the preliminary issue relating to limitation. That was also taken up for consideration.

12. The trial Court after going through the pleadings in the case, the documents produced and taking note of the various judgments on which reliance is placed, held that the plaint is defective, since general power of attorney is not produced and the plaint is not signed by the plaintiff. Further it held, looking to the plaint averments, suit is hopelessly barred by limitation and also plaint does not disclose the cause of action. Accordingly, it held issue No.7 in the affirmative and held, the suit is barred by law of limitation and allowed



the application for rejection of the plaint and dismissed the application filed by the plaintiff for re-opening the case and further to lead evidence on the point of limitation.

13. Aggrieved by the said order, the plaintiff is in appeal.

14. **Sri. K.M. Nataraj**, learned Senior Counsel appearing for the appellant, assailing the impugned judgment and decree, contended that the question of limitation being purely a mixed question of law and fact, it could not be tried as a preliminary issue at all. Further he contended to consider the rejection of the plaint under Order 7 Rule 11(d), all that has to be seen is, the averments in the plaint. In the plaint, the plaintiff has specifically averred that the suit is filed within the period of limitation and hence, the suit is within time and therefore the plaint could not have been

rejected on the ground of bar of limitation. Even if the Court wanted to decide the preliminary issue regarding limitation, the same being a mixed question of law and fact, the plaintiff sought for permission to adduce evidence, which has been erroneously rejected. Further, the suit is dismissed on the ground that the plaint is defective and plaintiff has not signed the plaint and general power of attorney executed by him in favour of Power of Attorney Holder is not produced. On those grounds, without recording evidence and without permitting the plaintiff to adduce evidence, the plaint cannot be rejected or the suit cannot be dismissed and therefore he submits that seen from any angle, the impugned judgment and decree cannot be sustained. Accordingly he prayed that the judgment and decree be set aside and the matter be remanded back to the trial Court for trial of the suit on all issues, including the issue regarding limitation.

15. Though the first defendant is duly served, he has remained absent. All other respondents have remained absent. Even in the suit, they continued to remain absent though duly served. However, fourteenth defendant in the trial Court is represented herein, by a Senior Counsel **Sri S.Shaker Shetty**, who addressed arguments supporting the impugned order.

16. In the light of the aforesaid facts and submissions made, the points that arise for our consideration in this appeal are as under :

- (a) Whether an issue regarding limitation can be tried as a preliminary issue ?
- (b) Whether a suit could be dismissed as barred by time under Order 7 Rule 11(d) of the Code of Civil Procedure ?

**POINT (a)**

17. Order 14 of the Code deals with 'Settlement of Issues and Determination of Suit on Issues of Law or on Issues Agreed upon'. Order 14 Rule (2) mandates that Court shall pronounce judgment on all issues. It reads as under :

***"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 that 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.”*

18. This provision fell for consideration before the Apex Court in a number of judgments. In the first of its judgments in the case of **Major S.S.Khanna v. Brig. F.J.Dillon** reported in **AIR 1964 SC 497**, at para 18, it was held as under :

*“Under O.14 R.2 Code of Civil Procedure, 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 the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit,, postpone the settlement of the issues of fact until after the issues of law have been*

*determined. The jurisdiction to try issues of law apart from the issues of fact may be exercised only where in the opinion of the Court the whole suit may be disposed of on the issues of law alone, but the code confers no jurisdiction upon the court to try a suit on mixed issues of law and fact as preliminary issues. Normally all the issues in a suit should be tried by the Court: not to do so, especially when the decision on issues even of law depends upon the decision of issues of fact, would result in a lop-sided trial of the suit.”*

19. The Apex Court in the case of **Ramesh B.Desai and others v. Bipin Vadilal Mehta and others** reported in **AIR 2006 SC 3672**, after noticing the aforesaid judgment at para 12 have held as under :

*“Though there has been a slight amendment in the language of Order XIV Rule 2 CPC by the Amending Act, 1976, but the principle enunciated in the above quoted decision still holds good and there can be no*

*departure from the principle that the Code confers no jurisdiction upon the Court to try a suit on mixed issues of law and fact as a preliminary issue and where the decision on issue of law depends upon decision of fact, it cannot be tried as a preliminary issue.”*

At para 16 in the same judgment, they have observed as under :

*“A 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. A plea of limitation is a mixed question of law and fact.”*

20. Order 14 Rule 1 (4) provides that issues are of two kinds : (a) issues of fact, (b) issues of law. Order 14 Rule 2 makes it obligatory for the Court to pronounce judgment on all issues. But, it is subject to the provisions of sub-rule (2) which gives a discretion to the

Court to frame issues of law only if it relates to the jurisdiction of the Court or a bar to the institution of the suit itself. The intention of the legislature as is apparent from the wording of Order 14 Rule 2 is clear that the disposal of the suit should be expedited. It has therefore, been left to the discretion of the Court to frame an issue of jurisdiction as a preliminary issue if the Court thinks that the suit should be disposed of on that issue. A perusal of sub-rule (2) of Rule 2 of Order 14 would show that issue of law may be tried as a preliminary issue provided it relates to the jurisdiction of the Court or to a bar to the suit created by any law for the time being in force. Therefore, all issues of law cannot be tried as a preliminary issue. It is only issues of law relating to jurisdiction of the Court or a bar to the suit created by any law which shall be tried as a preliminary issue and nothing else. However, decision on issues even of law depends upon the decision on fact, then it cannot be tried as a preliminary issue, as



otherwise it would result in a lop-sided trial of the suit. Order 14 Rule 1 (4) does not mention about the mixed question of law and fact. Therefore, sub-rule (2) of Rule 2 of Order 14 is confined to only issues of law. It does not deal with a mixed question of law and fact. A question relating to jurisdiction may be a pure question of law or a mixed question of law and fact.

21. Question of limitation is ordinarily a mixed question of law and fact. 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. Therefore, it is now well settled that a plea of limitation is a mixed question of fact and law. The jurisdiction to try issues of law apart from issues of fact may be exercised only where in the opinion of the Court the whole suit may be disposed of on the issues of law alone. But the Code confers no jurisdiction upon the

Court to try mixed issues of law and fact as preliminary issue. Therefore, the issue regarding limitation cannot be tried as a preliminary issue.

22. In the instant case, in spite of the plaintiff filing an application seeking for permission to adduce evidence on the issue regarding limitation but without granting permission to lead evidence and deciding the issue regarding limitation only on the basis of the averments in the plaint is illegal as held by the Apex Court. The trial Court had no jurisdiction to try the issue regarding limitation as a preliminary issue. Therefore, the said finding of the trial Court cannot be sustained and accordingly, it is hereby set aside.

**Point No.(b) Barred by Law:**

23. Section 3 (1) of the Limitation Act, 1963 puts an embargo on the Court to entertain a suit if it is found to be barred by limitation. Section 3 reads as under : -

**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 has not been set up as a defence.*

24. This Section provides that a suit instituted after the prescribed period of limitation must subject to the provisions of Section 4 to 24, be dismissed, although limitation has not been set up as a defence. It only means that where the Court finds that a suit or other proceeding has been instituted after the period of limitation, it must be dismissed, although limitation has not been set up as a defence. The question of limitation is ordinarily mixed a question of law and fact. Order VII Rule 11 of the Code requires that a plaint shall be rejected if the allegations in the plaint appears to be barred by any law. Hence, from the statements in the

plaint the suit appears to have been instituted after the prescribed period of limitation, it is the duty of the Court to reject the plaint. But, under Section 3 of the Limitation Act the duty of the Court is to dismiss the suit if it has been instituted after the period of limitation. Combining the two provisions, the result would be that where the conclusion of the Court that the suit has been instituted after the period of limitation is based on the allegations in the plaint itself, the proper procedure is to reject the plaint and where such conclusion is based after trial, the Court could dismiss the suit. It is a general principle that the onus of proving that a suit has been instituted within the period of limitation is on the plaintiff. Where a suit is prima facie barred by limitation, the onus of proving the circumstances which save the suit from such bar is on the plaintiff. The burden of proof to show that the suit was within time and not barred by limitation is required to be pleaded and proved by the plaintiff. These basic

rules of the Code of Civil Procedure require the plaintiff to state in his plaint the date of cause of action as also the grounds which save the suit from limitation if at all the plaint averments give an appearance that the suit is time barred. Thus, where the suit as framed by the plaintiff is within time and falls within a particular Article, but the defendant sets up the bar of limitation under a different Article, it is for the defendant to plead and establish the necessity to apply that Article.

25. The Apex Court in the case of ***Popat and Kotecha Property v. State Bank of India Staff Assn.*** – (2005) 7 SCC 510 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.”*

26. In **SALEEM BHAI V. STATE OF  
MAHARASHTRA** reported in **(2003) 1 SCC 557**, the  
Apex Court has held as under : -

*the relevant facts which need to be looked  
into for deciding an application thereunder  
are the averments in the plaint. The trial  
Court can exercise the power at any stage of  
the suit – before registering the plaint or after  
issuing summons to the defendant or at any  
time before the conclusion of the trial. For the  
purposes of deciding an application under  
clauses (a) and (d) of Order 7 Rule 11 of the  
Code, the averments in the plaint are  
germane; the pleas taken by the defendant in  
the written statement would be wholly  
irrelevant at that stage.”*

27. The Apex Court in the case of **Satti Paradesi Samadhi v. M.Sankuntala** reported in AIR (SCW) 2014, held as under :

*“13. In the case at hand, we find that unless there is determination of the fact which would not protect the plaintiff under Section 10 of the Limitation Act the suit cannot be dismissed on the ground of limitation. It is not a case which will come within the ambit and sweep of Order 14, Rule 2 which would enable the Court to frame a preliminary issue to adjudicate thereof. The learned single judge, as it appears, has remained totally oblivious of the said facet and adjudicated the issue as if it falls under Order 14, Rule 2. We repeat that on the scheme of section 10 of the Limitation Act we find certain facts are to be established to throw the lis from the sphere of the said provision so that it would come within the concept of limitation. The Division Bench has fallen into some error without appreciating the facts in proper perspective. That apart, the*

*Division Bench by taking recourse of Art.s 92 to 96 without appreciating the factum that it uses the words “transferred by the trustee for a valuable consideration” in that event the limitation would be twelve years, but in the instant case the assertion of the plaintiff is that the trustee had created three settlement deeds in favour of his two daughters and a grand daughter. The issue of consideration has not yet emerged. This settlement made by the father was whether for a consideration or not has to be gone into and similarly whether the property belongs to the trust as trust is understood within the meaning of section 10 of the Limitation Act has also to be gone into. Ergo, there can be no shadow of doubt that the issue No.1 that was framed by the learned single judge was an issue that pertained to fact and law and hence, could not have been adjudicated as a preliminary issue. Therefore, the impugned order is wholly unsustainable.”*



28. The first defendant has filed an application under Order 7 Rule 11(d) of the Code, requesting the Court to reject the plaint as barred by law of limitation. According to them, plaintiff was born on 05-07-1980. During his minority, the sale deed came to be executed by his grand mother on 29-05-1983. The plaintiff attained majority on 05-07-1998. If he wanted a declaration as sought for in the plaint, he should have filed the suit within three years from the date of attaining majority. The suit having been filed in the year 2007 is clearly barred by law of limitation. Therefore according to the first defendant, the case falls under Order 7 Rule 11(d).

29. When in the plaint the plaintiff specifically avers that the suit is filed within the time of limitation and hence the suit is in time, the Court cannot embark upon an enquiry on an application filed by the defendant under Order 7 Rule 11 (d) to find out whether

the statement is correct or not and then decide the said issue. The plaint to be rejected on the ground of bar of limitation under Section 3 what has to be seen is only the plaint averments. If the plaint averments do not disclose that the suit is barred by limitation, then the question of rejecting the plaint under Order 7 Rule 11 (d) would not arise. When the defendant raises the plea of bar of limitation, the Court is bound to frame an issue regarding limitation. As the issue regarding limitation cannot be tried as a preliminary issue, the said issue has to be decided after recording of evidence upon all the issues framed in the suit including the issue regarding limitation. It is only thereafter the Court could decide the question whether the suit is barred by the law of limitation. Therefore, the question of the Court going into the question of bar of limitation on an application filed under Order 7 Rule 11 (d) CPC would not arise. Rejection of the plaint on the ground that the suit is barred by limitation is *ex facie* illegal

and cannot be sustained. In that view of the matter, the order passed by the trial Court cannot be sustained.

30. The trial Court also has dismissed the suit on the ground that plaintiff has not signed the plaint and that plaintiff has not produced the power of attorney executed in favour of the power of attorney holder. That is not a ground to reject the plaint under Order 7 Rule 11(d). That is a matter which should have been gone into after enquiry and recording evidence on all issues. During that period, the plaintiff had opportunity to produce the power of attorney to show that he had executed a valid power of attorney duly authorizing to sign the plaint. Therefore, the entire approach of the trial Court is wrong. It is unfortunate that, the trial Court has spent considerable time in disposing of this application and thus wasted its judicial time. If it had recorded the evidence on all the issues, probably the suit itself could have been disposed of on merits,

including on the issue of limitation, which in an appeal we could have gone into and passed a final order giving a quietus to this litigation.

31. Under these circumstances, we pass the following order :

- (a) *Appeal is allowed.*
- (b) *Impugned order passed by the trial Court is hereby set aside.*
- (c) *The original suit is restored to its original file.*
- (d) *The trial Court is directed to record evidence on all issues and then pronounce judgment on merits, including the issue regarding limitation.*
- (e) *The application filed under Order 7 Rule 11(d) is hereby dismissed.*

Parties to bear their own costs.

**Sd/-  
JUDGE**

**Sd/-  
JUDGE**

*Mgn/-*