

R/o. A/3/43 Sector B,
CIDCO Colony, New Panvil,
Raigad, Maharashtra *and others.*

[D-1 By Sri. KBN, Adv]
[D-2(a)-(c) By Sri. HSS, Adv.]
[D-3 By Sri. RMP, Adv.]
[D-4 By Sri. KR D, Adv.]

I.A.No.X

Applicant: 1. Sri. Satish Krishna Sail.
Deft. No.4

Vs.

Opponents: Shaikh Ummer Hassan Haji Shaikh
Plffs. Ahamad, since deceased by his LRs.
1. Smt. Naseemabi W/o. Shaikh
Ummar Hasan and *others.*

I.A.No.XI

Applicant: 1. Sri. Satish Krishna Sail.
Deft. No.4

Vs.

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Plffs. Ahamad, since deceased by his LRs.
1. Smt. Naseemabi W/o. Shaikh
Ummar Hasan and *others.*

COMMON ORDERS ON I.A. NO.X AND XI

The learned counsel for the defendant No.4 has filed these two applications under the provisions of Order 14 Rule 1, 2 and 5(1) & (2) R/W. Sec.151 of C.P.C. to recast and

amend the Addl. issues No.4 and 5 casting burden on plaintiffs to prove as to whether the suit filed by the plaintiff is well within law of limitation, to treat the Addl. Issues No.1 to 5 as preliminary issues, to frame issues on payment of court fee which goes to the root of the case raised in written statement by the defendants No.2(a) to 2(c) which were not framed and which are necessary for adjudication of the suit.

Proposed Addl. Issues:

1. Whether plaintiffs prove that suit for partition is maintainable against the Deft. No.2(a) (b) & (c), as they are not being the co-owners or joint tenants with plaintiffs & Deft. No.1 as pleaded by Deft. No.2(a) in W/s Para No.1 of page No.4?
2. Whether plaintiffs prove that Court Fees paid on independent relief of partition, independent relief of Declaration of Sale Deed as not binding on them & independent relief of permanent injunction, is proper & correct & paid the Court Fee relating to above reliefs correctly & valued the suit property by showing correct valuation of N.A Suit land?

3. Whether the Defts., prove that the suit of plaintiffs is not maintainable, as it is hit by Rule 2 of Order 2 C.P.C.?
 4. Whether Deft. No.2(a) to (c) prove that the plaintiffs are liable to pay Ad-volerem Court Fee under Sec.38 relating to relief claimed by plaintiffs, to the effect that the Regd. Sale Deed dated 12-6-2008 executed by Deft. No.1 to 3 in favour of Deft. No.4 is not binding on them & Ad-volerem Court Fee on the independent relief of Permanent Injunction?
 5. Whether the Deft. No.2(a) to (c) prove that they & their predecessors in interest perfected their right, title, interest & possession over the suit property by way of Adverse Possession & entitled to transfer the said right to Deft. No.4 by way of Sale?
2. It is stated in the memorandum of facts that before proceeding for recording of evidence of P.W.1, the court has not kept the stage of filing written statement of late defendants No.2 and 3 due to mistake or oversight. But,

when these facts brought to the notice of the court, the court has allowed the defendants No.2(a) to 2(c) to file their written statement. Therefore, the defendant No.2(a) has filed the written statement which was adopted by defendants No.2(b) to 2(c). The plaintiffs have amended the reliefs to avoid the payment of court fee to exchequer of State. As per Section 11(2) and 19 of Karnataka Court Fees and Suit Valuation Act, 1958, the court has to conduct an enquiry for non-payment of proper court fee. The defendants No.1, 2(a) and 4 have also raised the question of non-payment of court fee by the plaintiffs on the reliefs claimed in the suit and for framing preliminary issue on payment of court fee and hear the said issue as preliminary issue and to conduct an enquiry. Of course, earlier the court while considering interim application filed under Order 7 Rule 11 by the defendant No.4 has held that court fee paid was proper. But, the said finding was given without framing issue on court fee and before keeping stage of filing written statement by late defendants No.2 and 3. But, when the earlier order on payment of court fee and question of limitation was passed, the defendants No.2(a) to 2(c) were not the parties to the suit. In view of rule of natural justice,

the defendants No.2(a) to (c) have to be given an opportunity to substantiate their case made out in the written statement of defendant No.2(a) by framing issue on court fee and limitation.

3. It is further stated that some issues framed wrongly casting burden on defendants and no issues were framed on payment of court fee and relating to maintainability of suit against the defendants No.2 and 3 who are not co-owners of plaintiffs. The 2nd suit of the plaintiffs is hit by Order 2 Rule 2 of C.P.C. This court has casted burden to prove the limitation on defendants, even though as per settled position of law, it is required to be proved by plaintiff. Hence, the issue on limitation framed as issues No.4 and 5 deserves to be amended. The defendant No.2(a) has taken a plea that they are not co-owners, but, trespasser of suit property and hence, the suit for partition filed against them is not maintainable. The defendants No.1, 2(a) & 4 in their additional written statement have taken specific contention that the plaintiffs have wrongly valued the suit claim and they are liable to pay court fee as per Section 38 and 26 of Karnataka Court Fees and Suits Valuation Act, 1958 in the form of ad-volerem court fee. But,

no additional issues have been framed by the court on the said pleas which are necessary and material issues to decide the dispute. Hence, these two applications.

4. The learned counsel for the plaintiffs has resisted both the applications by filing common objections contending that the applications are not maintainable either under law or on facts and deserves to be dismissed. The evidence of the plaintiff's side already started long back in the year 2019. The defendants have commenced the cross-examination. Now the case is posted for further cross-examination of P.W.1. But, in stead of conducting cross-examination, the defendants are unnecessarily filing applications one after another. The defendants have filed an application to frame additional issues recently and the court has already passed the orders on the said applications. Therefore, there is no scope to file the applications for similar prayer.

5. It is further contended that the defendants have prayed that issues No.1 to 5 may be heard as preliminary issues on law of limitation and on payment of court fee. But, the defendant No.4 has not stated the true facts before the

court. The defendant No.4 had filed I.A.No.3 under Order 7 Rule 11(b) and (d) of CPC R/W. Section 11(2) and (3) of Karnataka Court Fees and Suits Valuation Act. The applications are already dismissed by Order dated 18.08.2018. The court has already discussed about the payment of court fee and limitation point raised by the defendants while dismissing the I.A.No.III and has held that since the plaintiffs have not prayed for declaration for cancellation of sale deed, payment of court fee on sale consideration amount does not arise, as the plaintiffs are not parties to the sale deed. The court has answered on the point of limitation raised by the defendants while passing the Orders on I.A.No.3 and held that the limitation point has to be considered on merit of the case only after full fledged trial of the suit. Therefore, there is no question of again filing similar application on the same point. The defendants are very well know that they do not have any case on merit and are trying to find out technicalities and their intention is to delay the matter and therefore, it has to be viewed very seriously and the applications are liable to be dismissed with heavy costs.

6. I have heard the arguments on both the sides and perused the applications, memorandum of facts, objections and entire records.

7. Now the points that would arise for my consideration are as under :

1. Whether the proposed additional issues are just and necessary to adjudicate the controversy between the parties and whether the additional issues No.1 to 5 are to be heard as preliminary issues and whether the issues No.4 and 5 are to be re-casted or amended and whether the defendant No.4 has made out sufficient grounds to allow the applications?

2. What Order?

8. On considering the arguments of learned counsels for both sides and materials placed on record, now, my answers to the above points are as under:

Point No.1: In the **negative**.

Point No.2: As per final order,
for the following:

REASONS

9. **Point No.1**:- The learned counsel for the defendant No.4 has argued with force that before proceeding for recording of evidence of P.W.1, the court has not kept the stage of filing written statement of late defendants No.2 and 3 due to mistake or oversight. But, when these facts brought to the notice of the court, the court has allowed the defendants No.2(a) to 2(c) to file their written statement and therefore, the defendant No.2(a) has filed the written statement which was adopted by defendants No.2(b) to 2(c). As per Section 11(2) and 19 of Karnataka Court Fees and Suit Valuation Act, 1958, the court has to conduct an enquiry for non-payment of proper court fee. The defendants No.1, 2(a) and 4 have raised the question of non-payment of court fee by the plaintiffs and for framing preliminary issue on payment of court fee and to hear the said issue as preliminary issue and to conduct an enquiry. Of course, earlier the court while considering

interim application filed under Order 7 Rule 11 by the defendant No.4 has held that court fee paid was proper. But, the said finding was given without framing issue on court fee and before keeping stage of filing written statement by late defendants No.2 and 3. In view of rule of natural justice, the defendants No.2(a) to (c) have to be given an opportunity to substantiate their case made out in the written statement.

10. It is further contended that some issues framed wrongly casting burden on defendants and no issues were framed on payment of court fee, relating to maintainability of suit. The 2nd suit of the plaintiff is hit by Order 2 Rule 2 of C.P.C. The court has casted burden to prove the limitation on defendants, even though as per settled position of law, it is required to be proved by plaintiff. The defendant No.2(a) has taken a plea that they are not co-owners, but, trespasser of suit property and hence, the suit for partition filed against them is not at all maintainable. The defendants No.1 & 2(a) & 4 in their additional written statement have taken specific contention that the plaintiffs have wrongly valued the suit claim and they are liable to pay court fee as

per Section 38 and 26 of Karnataka Court Fees and Suits Valuation Act, 1958. But, no additional issues have been framed by the court on the said pleas which are necessary and material issues to decide the dispute. Hence, it is necessary to allow the applications

11. Per contra, the learned counsel for the plaintiffs has vehemently contended that the evidence of the plaintiff's side already started long back in the year 2019. But, in stead of conducting cross-examination, the defendants are unnecessarily filing applications one after another. The defendants have filed applications to frame additional issues recently and court has already passed the orders on the said applications. Therefore, there is no scope to file the applications for similar prayer.

12. It is further contended that the defendants have prayed that issues No.1 to 5 may be heard as preliminary issues on law of limitation and on payment of court fee. But, the defendant No.4 had filed I.A.No.3 under Order 7 Rule 11(b) and (d) of CPC R/W. Section 11(2) and (3) of Karnataka Court Fees and Suits Valuation Act. The applications are already dismissed by Order dated

18.08.2018. The court has already discussed about the payment of court fee and limitation point raised by the defendant while dismissing the I.A.No.III and has held that since the plaintiffs have not prayed for declaration for cancellation of sale deed, payment of court fee on sale consideration amount does not arise, as the plaintiffs are not parties to the sale deed. The court has answered on the point of limitation raised by the defendants while passing the Orders on I.A.No.3 and has held that the limitation point has to be considered on merit of the case only after full fledged trial of the suit. Therefore, there is no question of again filing similar application on the same point. The defendants are very well know that they do not have any case on merit and are trying to find out technicalities and their intention is to delay the matter and therefore, it has to be viewed very seriously and the applications are liable to be dismissed with heavy costs.

13. In support of his submission, the learned counsel for the plaintiffs has relied upon a decision reported in **ILR 1995 KAR 3420** in between **Mohammed Ali vs Dawood Basha**, wherein, while dealing with the provisions of Order 14 Rule 2(2) of C.P.C., the Hon'ble High Court of Karnataka

has held that issues involving mixed questions of law and fact cannot be tried as preliminary issue. Question as to valuation involves mixed question of fact and law not pure issue of law. If there are issues of fact or issues involving mixed questions of law and fact then even if they relate to jurisdiction cannot be tried as a preliminary issue.

14. The learned counsel for the plaintiffs has also relied upon a decision reported in **(2006) 5 SCC 638** in between **Ramesh B. Desai and others vs. Bipin Vadilal Mehta and others**, wherein, while dealing with the provisions of Order 7 Rule 11(d) and Order 14 Rule 2 of C.P.C., the Hon'ble Supreme Court of India has held that as starting point of limitation has to be ascertained on facts in every case, held, plea of limitation cannot be decided as a abstract principle of law divorced from facts. The Code of Civil Procedure confers no jurisdiction on court to decide a mixed question of fact and law, unless the facts are clear from the plaint itself and the mixed question of fact and law can be determined on the principle of demurrer. Where a decision on an issue of law depends upon a decision of fact, it cannot be tried as a preliminary issue.

15. In the light of the arguments canvassed on both the sides, I have carefully gone through the applications, memorandum of facts, objections including pleadings of both the parties and issues, Addl. issues already framed by this court and entire records and also gone through the principles laid down in the cited decisions by the learned counsel for the plaintiffs and also provisions of Order 14 Rule 1, 2 and 5(1) & (2) of C.P.C.

16. Now, keeping the arguments of learned counsels for both the sides, principles laid down in the cited decisions including provisions of law in mind, let us consider as to whether the proposed amendments are just and necessary to adjudicate the real controversy between the parties and additional issues No.1 to 5 are to be heard as preliminary issues and whether the defendant No.4 has made out any grounds to recast or amend the issues and to frame the additional issues and to hear the additional issues No.1 to 5 as preliminary issues.

17. As per the case of the plaintiffs that after the death of their father, they were in possession of suit schedule properties along with first defendant as tenants in

common and the sale deed dated 12.06.2008 executed by defendants No.1 to 3 in favour of defendant No.4 is not binding on their share and therefore, they are entitled for half share in the suit schedule properties. Therefore, the plaintiffs have sought for Partition and Separate Possession of half share in the suit schedule properties and to declare that the sale deed dated 12.06.2008 executed by defendants No.2 and 3 in favour of defendant No.4 in respect of suit schedule properties is not binding on the them to the extent of half share in the suit schedule properties and consequential relief of permanent injunction restraining the defendant No.4 from alienating the suit schedule properties.

18. The defendants have resisted the suit by filing written statement denying the material averments made in the plaint. The first defendant has contended that he is in actual possession of suit schedule properties to the knowledge of husband of first plaintiff and other plaintiffs and he has perfected his title over half share claimed by the plaintiffs by way of adverse possession. The defendant No.4 has contended that he is a bonafide purchaser of suit schedule properties under the registered sale deed dated

12.06.2008 executed by defendants No.1 to 3. Further, the defendants have contended that the suit of the plaintiffs is not maintainable for want of relief of possession as against the plaintiffs in O.S.No.70/1979 on the file of the then Munsiff Court, Karwar and the suit is hit by rule of res-judicata in view of judgment and decree passed in O.S.No.70/1979 which was modified of R.A.No.29/1988 and R.A.No.30/1988 and the suit of the plaintiffs is barred under the provisions of Order 11 Rule 2 of C.P.C. and the suit of the plaintiffs also barred by law of limitation and also under the provisions of Section 135 of Karnataka Land Revenue Act in view of order passed by the Deputy Commissioner, Uttar Kannada, Karwar dated 7.2.1987 vide Case No.RB/RTC/SR/84 and the plaintiff has not valued the suit properly and not paid the court fee as per law.

19. Based on the rival contentions of both the parties, this court has framed the following issues on 23.11.2018 and additional issues on 1.6.2021.

ISSUES

1. Whether the plaintiffs prove that after the death of their father the plaintiffs were all in joint

possession of the suit schedule properties along with defendant No.1?

2. Whether the defendant No.1 proves that he is in actual possession of the suit schedule properties to the knowledge of husband of plaintiff No.1 and other plaintiffs and he perfected his title over the half share claimed by the plaintiff, by way of adverse possession?
3. Whether the defendant No.4 proves that he is bona-fide purchaser of suit schedule property under a registered sale deed dtd: 12.6.2008 executed by the defendant No.1 to 3 ?
4. Whether the plaintiffs further prove that the said sale deed dtd:12.6.2008 executed by defendant No.1 to 3 in favour of defendant No.4 is not binding on the share of the plaintiffs?
5. Whether the plaintiffs are entitled for half share in the suit schedule properties?
6. What order or decree?

ADDL.ISSUES

1. Whether the defendants prove that the suit of the plaintiff is not maintainable for want of relief of possession as against the plaintiff in

O.S.No.70/1979 on the file of then Munsiff Court, Karwar?

2. Whether the defendants prove that the suit of the plaintiff is hit by the Rule of "Res-judicata" in view of judgment and decree passed in O.S.No.70/1979 which was modified in RA No.29/1988 and RA No.30/1988?

3. Whether the defendants prove that the suit of the plaintiffs is barred under the provisions of order II Rule 2 of CPC?

4. Whether the defendants prove that the suit of the plaintiff is barred by law of limitation?

5. Whether the defendants prove that the suit of the plaintiff is barred under the provisions of Sec.135 of the Karnataka Land Revenue Act in view of order passed by the Deputy Commissioner, U.K.Karwar dated 7.2.1987 vide case No.RB/RTC/SR/84?

20. On behalf of plaintiffs, the plaintiff No.1 has already been examined as P.W.1 and got the documents marked as Exs.P.1 to P.13. When the case is set down for cross-examination of P.W.1, the defendant No.4 has filed these two applications to recast or to amend the issues and

to frame the Addl. Issues and to hear the Addl. Issues No.1 to 5 as preliminary issues.

21. The defendant No.4 all the while in his applications has stated that the plaintiffs have amended the relief to avoid the payment of court fee as per Section 11(2) and 19 of Karnataka Court Fees and Suit Valuation Act, 1958 and the court has to conduct an enquiry for non-payment of proper court fee and the defendants have also raised the question of non-payment of court fee by the plaintiffs on the reliefs claimed in the suit and for framing preliminary issues on payment of court fee and to hear the said issues as preliminary issues and to conduct an enquiry, but, the court has not framed the issues on the contentions raised by the defendants and the payment of court fee and limitation has to be heard as preliminary issues by framing proposed Addl. issues and to cast the burden on the plaintiffs to prove that the suit is filed within time and the defendants also taken a contention that the suit of the plaintiffs is not maintainable which goes to the very root of the case and therefore, it is necessary to frame the Addl. issues and to hear the Addl. Issues No.1 to 5 as preliminary issues.

22. But, as could be seen from the records and also Order dated 22.02.2021 passed on I.A.No.XII filed by the defendants, this court has already framed the issues No.1 to 6 vide dated 23.11.2018 and based on the additional pleadings of both the parties including specific contention raised by the defendants, this court has already framed the additional issues No.1 to 5 with respect to maintainability of the suit for want of relief of possession as against the plaintiffs in O.S.No.70/1979, principles of res-judicata in view of judgment and decree passed in O.S.No.70/1979 which was modified in R.A.No.29/1988 and R.A.No.30/1988 and also maintainability of suit in view of provisions of Order 2 Rule 2 of C.P.C., point of limitation, maintainability of suit under the provisions of Section 135 of Karnataka Land Revenue Act including plea of adverse possession. Under these circumstances, when once the court has already framed Addl.Issues on 1.6.2021 based on the rival contentions of both the sides, again question of framing of Addl. issues does not arise.

23. Further, the defendants also prayed for hearing on Addl. issues No.1 to 5 as preliminary issues. According to defendants that the suit of the plaintiffs is barred by

limitation and the plaintiffs have not paid the proper court fee which goes to the very root of the case and therefore, the said preliminary issues have to be heard as preliminary issues.

24. But, as could be seen from the Order dated 18.08.2018 passed on I.A.No.III, the defendant No.4 has filed the said application under Order 7 Rule 11(b) and (d) of C.P.C. R/W. Section 11(2) and (3) of Karnataka Court Fees and Suits Valuation Act, 1958 to reject the plaint on the ground of under valuation of suit and non-payment of court fee and point of limitation. The said applications were came to be dismissed vide order dated 18.08.2018.

25. While passing order on I.A.No.III, this court has already observed and held that the plaintiffs have filed suit for Partition and Separate Possession of legitimate share along with suit properties and for declaration that the sale deed dated 12.06.2008 is not binding on them. But, the plaintiffs have not sought for any relief of cancellation of sale deed and therefore, question of payment of court fee on the sale consideration of Rs.42,30,000/- does not arise and the point of limitation has to be considered on merits of

the case only after full fledged trial. The order passed on I.A.No.III is still in force and the defendants have not challenged the said order.

26. It is pertinent to note here that the plaintiffs have already commenced the evidence long back in the year 2019 and the case is set down for cross-examination of P.W.1 after marking the documents as per Exs.P.1 to P.13. But, instead of cross-examine P.W.1, the defendants have filed applications one after the other under similar provisions of law seeking similar relief.

27. As could be seen from the Order dated 12.04.2021, the defendant No.4 had filed similar application vide I.A.No.VIII under the provisions of Order 14 Rule 1, 4 and 5 R/W. Sec.151 of C.P.C. which was came to be allowed and accordingly, the Addl. Issues No.1 to 5 are already framed. Therefore, question of framing again same additional issues does not arise.

28. The court has already framed the additional issues with respect to maintainability of suit, point of limitation and plea of adverse possession and also under Order 2 Rule 2 of C.P.C. This court has already observed

that the payment of court fee and point of limitation have to be considered after full fledged trial and the plaintiffs are not the parties to the sale deed and they have not sought for cancellation of sale deed and therefore, question of payment of court fee does not arise.

29. It is well settled position of law that issues involving mixed questions of law and fact cannot be tried as preliminary issues and if there are issues of fact or issues involving mixed questions of law and fact, it cannot be tried as a preliminary issue which requires evaluation of evidence to be recorded at the trial. It is also well settled position of law that plea of limitation cannot be decided as an abstract principle of law divorced from facts.

30. Under these circumstances, the arguments of the learned counsel for the defendants that this court has not framed the material issues based on the rival contentions made by the defendants with respect to plea of adverse possession, plea of limitation and court fee which goes to the very root of the case and therefore, the additional proposed issues are just and necessary for just decision of the case

and the said issues are required to be heard as preliminary issues is not sustainable under law and cannot be accepted.

31. On the other hand, there is some legal force in the submission of the learned counsel for the plaintiffs in contending that similar applications have already been filed by the defendants which were already disposed off and this court has already framed the additional issues on all the contentions raised by both the parties with respect to point of limitation, maintainability of suit and hence question of again framing additional issues on same fact does not arise and all the additional issues has to be considered after full fledged trial and the decisions cited in this regard also applicable to the present facts and circumstances of the case.

32. Therefore, for the reasons discussed above, this court is of the considered view that in view of this court has already framed the additional issues based on rival contentions made by both the parties, the proposed additional issues mentioned in the applications are not necessary and all the additional issues have to be considered after full fledged trial and also after evaluation

of evidence to be recorded at the trial and the defendants have not made out any grounds to recast or amend the issues and to frame the additional issues and the applications are deserve to be dismissed with costs. Hence, ***I answer point No.1 in the negative.***

33. **Point No.2**:- In view of my findings on point No.1, I proceed to pass the following:

:ORDER :

I.A.Nos.X and XI filed by the learned counsel for the defendant No.4 under the provisions of Order 14 Rule 1, 2 and 5(1) & (2) R/W. Sec.151 of C.P.C., are hereby dismissed with costs.

It is made it clear that since the matter is relates to the year of 2011, the learned counsel for the defendants is specifically directed to cross-examine P.W.1 on the next date of hearing without fail and without taking any further adjournments.

(Dictated to the Stenographer, transcribed by her, revised and corrected by me, signed and then pronounced in the Open Court on this the **23rd Day of September, 2021.**)

(N.M. Ramesha)
Pr. Senior Civil Judge,
Karwar.