

**ORDER BELOW EXH.107**

1] By this application, defendants No. 2 to 13 pray to frame preliminary issue regarding limitation and to decide the same.

2] According to them, present suit is false and frivolous. It is not within limitation and is liable to be dismissed. Preliminary issue regarding limitation is necessary to be framed and decided. Hence, they pray to allow this application.

3] Learned Advocate for plaintiffs filed say and resisted this application. According to him, present application is not legal. Defendants No. 2 to 13 did not raise contention of limitation in their written statement. Limitation is the mixed question of law and fact. It can not be decided at preliminary stage and hence present application is liable to be rejected.

4] Heard both sides. Perused record.

5] This is a suit for partition and separate possession. According to plaintiffs, on 04-04-2011, defendants refused partition of ancestral joint family properties and hence, they filed instant suit on 29-4-2015. During arguments, learned Advocate for

defendants No. 2 to 13 submits that the ancestral properties are partitioned long back. However, this fact is not disclosed by plaintiffs. They also did not aver as to when earlier partial partition took place and as to when shares are denied to plaintiffs. Due to laps of limitation, plaintiffs' right to claim partition is extinguished and the suit is thus barred by limitation. As against this, learned Advocate for plaintiffs admits partition between Mohan and Bandu, who are great great grandfathers of plaintiffs and defendants. It is not the case of present defendants that after this partition, there was subsequent partition between further branches. If it is so, the theory of earlier partition, as propagated by learned Advocate for defendants No. 2 to 13 during arguments, can not be accepted.

6] It is to be noted that the story of earlier partition is not introduced by those defendants in their written statement. As rightly pointed out by learned Advocate for plaintiffs, the contention regarding limitation is not raised by those defendants either in their earlier or amended written statement. No issue in this regard is framed in the matter. Presently, the matter is practically pending for defendants' evidence. Undoubtedly, this is quite belated stage to frame and decide preliminary issue, that too regarding limitation.

7] It also can not be ignored that the question of limitation is a mixed question of law and facts. In order to decide factual aspect of this question, pleading and proof are necessary. As stated above, defendants No. 2 to 13 have not pleaded this fact. Even if they would have pleaded this fact, it was not possible to decide starting point of limitation to file suit without any proof and for that purpose, evidence is required. Moreover, plaintiffs have specifically averred in their plaint that defendants refused partition on 04-04-2011. If this averment is true or otherwise, will be decided after taking evidence of both sides. In short, it is not proper and desirable to decide the issue of limitation at a preliminary stage. I do not find any merit in this application. It is liable to be rejected and hence, I pass the following order :-

ORDER

- 1) Application (Exh.107) stands rejected.
- 2) Costs in cause.

Sd/-

(Anil B. Kulkarni )

Civil Judge (J.D.) Shirur Kasar.

Date:- 22/3/2017