

ORDER BELOW EXHIBIT 54 IN REGULAR CIVIL SUIT NO.40/2020
(CNR No.: -MHRG14-000256-2020)

Manohar Patil through Santosh M. Patil & Ors.

V/s.

Chandrakant Patil & Ors.

1. This application is filed by defendant No. 2 for rejection of the suit on the ground that suit is barred by Law of Limitation .

2. It is contended by defendant No. 2 that, plaintiffs have filed the suit against defendants for declaration, partition and injunction. Plaintiffs have added total twelve properties in this suit. It is contended by plaintiffs that out of it nine suit properties in para 1A are not partitioned and three suit properties in para 1B are orally partitioned. But, on 26/08/2003 vide registered partition deed No.6593/2003, there is partition of suit properties between plaintiffs and defendants. Defendant Nos. 10 and 11 have executed release deed of suit properties by registered deed No.6592/2003 in favour of plaintiffs and defendant Nos. 2 to 4. Plaintiff and defendants were present and executed the said partition deed and release deed. Plaintiff was and is party to registered partition deed and registered release deed. As, deeds are executed in year 2003, the suit is barred by law of limitation. This suit is filed after seventeen years, it is not maintainable, because it is barred by law. Hence, defendant No. 2 prayed for rejection of the plaint under Order 7 Rule 11(d) of Code of Civil Procedure.

3. Plaintiffs have filed their say at Exh. 100 and contended that the application is false, frivolous thus, they denied the contents of the application. It is contended that, Plaintiffs have filed this suit for 1/5 share out of self acquired properties of Keshav Mahadev Patil and they have also claimed share from share of Late Keshav Mahadev Patil in ancestral

properties. Present plaintiffs have no knowledge about registered partition deed dated 26/08/2003. Late Shri. Manohar Keshav Patil has not given any intimation or knowledge to their heirs. Present plaintiffs are entitled to suit properties which are self acquired of late Keshav Mahadev Patil as properties are in their possession. On perusal of the partition deed it reflects that there is no equal partition between heirs. Defendant No. 2 Ashok Keshav Patil has taken larger share in the suit property. Thus, the partition is void and it is not as per law. The question of limitation is mixed question of law and facts. As it is mixed question it needs to be decided after evidence of both parties. Present plaintiffs have not knowledge about registered deeds. They came to know about partition deed only after reading written statement filed by defendant No. 2. Thus, as said partition is not as per law and as present plaintiffs have no knowledge about that partition deed at the time of the filing suit, this suit is maintainable. The application filed by defendant No. 2 is liable to be rejected. Hence, he prayed to reject the application.

4. Defendant Nos. 5, 6 and 12 have filed their say below Exh.104. It is contended by these defendants that application of defendant No. 2 is false, frivolous and misleading. Plaintiffs have properly mentioned limitation in the suit. There is no delay of 17 years to the suit. The deed of partition dated 23/08/2003 does not include all suit properties. Thus, present suit of partition is maintainable. Defendant No. 2 and his sons are making encroachment in the other ancestral suit properties which are not mentioned in partition deed and which are not yet partitioned. All suit properties are ancestral properties. But in the deed dated 23/08/2003 all heirs are not included hence, that deed is not legal one. Hence, they prayed to reject the application.

5. Defendant No. 11 has filed his say at Exh.122. He also prayed to reject the application on the ground that the release deed No.6592/2003, dated 26/08/2003 is fraudulent one and is made only for the defendant Nos. 2 to 4 and plaintiffs. This defendant has not released her share. There is no partition of suit properties between parties. Defendant No. 11 has filed Reg. Civil Suit No.62/2016 in this court for the declaration. The partition deed and release deed were illegal. Suit is not barred by law of limitation nor hit by mis-joinder of cause of action. Thus, she prayed to reject the application.

6. Perused application, say and record of the suit. Heard all sides

7. Defendant No. 2 has filed following six documents along with Exh.57.

Defendant No. 2 has filed verified copy of partition deed, registration document No.6593/2003 at Exh.57/1, verified copy of released deed registration document No.6592/2003 at Exh.57/2, copies of 7/12 extract of Survey Nos.175/1 & 150/1 at Exh.57/3, copies of 8A extract of Survey Nos.175/1 & 150/1 at Exh.57/4, verified copy of letter dated 27/01/2020 issued by Gruop Grampanchayat Kegaon to defendant No. 2 at Exh.57/5 and zerox copies of mutation entries Nos. 2477 and 2476 at Exh.57/6.

8. Defendant No. 11 has filed certified copy of R.C.S.No.62/2016 filed in Civil Court Jr. Divn, Uran at Exh.68/1.

9. Defendant No. 1 has filed following three documents along with Exh.86.

Sixteen Photo copies of new house which is constructed by sons

of defendant No. 2 as per consent of defendant No. 1, zerox copy of application given to Group Grampanchayat, Kegaon, by sons of defendant No. 2, Assessment extracts of house of defendant Nos. 6 & 11 situated in suit property.

10. Plaintiff has filed following three documents along with Exh.112.

Photo copies of suit property dated 29/09/2021, Affidavit of plaintiff dated 01/10/2021 and copy of complaint filed in Mora Sagari Police Station against defendant No. 2.

11. Defendant No. 2 has filed following ten documents along with Exh.114.

Defendant No. 2 has filed certified copy of mutation entry No. 2310 at Exh.114/1, certified copy of mutation entry No. 2036 at Exh.114/2, certified copy of mutation entry No. 2192 at Exh.114/3, certified copy of mutation entry No. 2309 at Exh.114/4, certified copy of mutation entry No. 1443 &1334 at Exh.114/5, certified copy of mutation entry No. 2079 at Exh.114/6, certified copy of mutation entry No. 2308 at Exh.114/7, certified copy of mutation entry No. 2476 at Exh.114/8, certified copy of mutation entry No. 2597 at Exh.114/9 and certified copy of death certificate of Rajan Tukaram Mali is at Exh.114/10.

12. Defendant No. 11 has filed photo copy of N.C.No.97/2021 filed in Uran police station at Exh.116.

13. From the rival pleadings of the parties, following points are raised for my consideration. I have reproduced the same along with findings and reasons thereof as under :

S.N.	Points	Findings
1.	Whether the defendant No. 2 proves that suit is barred by limitation ?	In the negative.
2.	What order ?	As per final order.

REASONS

14. **AS TO POINT NOS.1 AND 2:-**

This application is filed by defendant No. 2 under Order 7 Rule 11-d of Code of Civil Procedure. Defendant No. 2 in his application mainly relied on two grounds. Firstly, his contention that suit is barred by limitation. It is contention of defendant No. 2 that there is already partition of suit properties between plaintiff and defendants and defendant Nos. 10 and 11 has executed registered release deed. Thus, again suit for partition is not maintainable. For this purpose he has also produced copy of registered partition deed and copy of release deed. Advocate for plaintiff argued that for effectual and complete partition there must be all co-parcener and all suit properties included in that partition. Said partition must be equal, legal and enforceable at law. He argued that partition deed as alleged by defendant No.2 is illegal. On bare perusal of it, it seems to be illegal and one sided. There is no equal distribution of suit properties between all parties. All coparceners have not executed deeds. All suit properties are not included in deeds. He argued that present suit is for partition of all properties of plaintiffs and defendants. All coparceners are parties in this suit, thus this suit is maintainable.

15. Advocate for defendant No. 2 argued that by present suit

plaintiffs trying to diminish the value of registered partition deed executed between plaintiffs and defendants. Father of plaintiffs and defendants have jointly executed registered partition deed and release deed. Thus, suit properties are previously partitioned and again partition of suit properties is not maintainable.

16. It seems from the record that defendant No.2 has relied upon partition deed dated 26/08/2003. While deciding the application of rejection of the plaint, it is necessary that only plaint and relief of the suit to be perused. For this purpose plaintiffs have relied upon ratio laid down in *Mayar (H.K.) Ltd. Vs. Owners & Parties, Vessel M.V.Fortune Express, 2006 DGLS (SC) 54*, wherein it is held by Hon'ble Supreme Court that, at the time of deciding application under order 7 rule 11 of code of civil procedure, only plaint could be read and allegation made in written statement could not be considered. If plaint shows cause of action plaint could not be rejected. The ratio laid down is aptly applicable to the case in hand, because plaint shows cause of action for partition of properties and also for other causes. Plaintiffs have further relied upon ratio laid down in *Dipali Himmat Meherwal & Ors. Vs. Shaikh Nazir Mohammad Nasir & Ors.*, wherein it is held by Hon'ble Bombay High Court that, at the time of deciding application under order 7 rule 11 of code of civil procedure, averments in plaint could be read and allegation made in written statement could not be considered. Allegation of fraud can not be decided at this premature stage. Only part of claim could not be rejected. Plaint cannot be rejected partially by dissecting the pleadings in several parts and holding that one of them does not disclose cause of action. The ratio laid down is aptly applicable to the case in hand, because defendant has objected the suit on previous partition and on other grounds as mentioned in written statement. But plaintiffs have challenged previous partition on ground of fraud. Thus suit can not be rejected on these grounds only.

17. Advocate for plaintiff argued that cause of action is bundle of facts. There is no specific cause of action to present suit. Whether partition deed is legal and enforceable at law is question of fact and law, which needs to be decided by leading evidence on issues involved in this suit. Issue as raised by defendant No. 2 is mixed question of law and facts. Facts needs to be decided only by producing evidence. Thus, he prayed to reject the application.

18. It is question of fact when present plaintiffs got knowledge of partition deed ? Evidence is not yet recorded. Thus it will be premature to come on conclusion that suit is barred by limitation. It reflects that plaintiffs have alleged fraud made by defendants for execution of partition deed. Thus, the partition deed which is basis for defendant No. 2 is itself under challenge. As per Article 56 of The Limitation Act, suit for declaring the forgery of an instrument issued or registered, the period of limitation given is of three years which begun to run when the issue or registration become known to the plaintiff. Plaintiffs have specifically alleged that they come to know about the partition deed only after reading written statement of defendant No. 2 filed in the suit. Thus the knowledge of the plaintiff is the issue of fact which has to be decided after evidence of both parties. It is mixed question of facts and law. For this purpose plaintiffs have relied upon ratio laid down in *Surjit Kaur Gill & Anr. Vs. Adarsh Kaur Gill & Anr.*, Civil Appeal No.8221/2011 of Hon'ble Supreme Court, wherein it is held by Hon'ble Supreme Court that, issue of limitation is mixed question of law and facts, it could not be held that no case was made out for proceeding for a trial. The ratio laid down is aptly applicable to the case in hand, because defendant has objected plaint on ground of limitation and in this case, it is mixed question of law and facts.

19. Advocate for defendant Nos. 5, 6 and 12 has also argued that the objection raised by defendant No. 2 is about limitation. But, issue of limitation is a mixed question of law and facts. Thus, it can be decided only after recording evidence and plaint cannot be rejected on this ground under Order 7 Rule 11 of Code of Civil Procedure. For this purpose defendant Nos. 5, 6 & 12 have relied upon ratio laid down in *Salim D. Agboatwala & Ors. Vs. Shamalji Oddhavji Thakkar & Ors., Civil Appeal No.5641/2021, S.L.P. (C) No.26441/2014*, wherein it is held by Hon'ble Supreme Court that, at the time of deciding application under order 7 rule 11 of Code of Civil Procedure, issue of limitation is mixed question of law and facts. Plaint cannot be rejected on this ground. The ratio laid down is aptly applicable to the case in hand, because defendants have objected the plaint on ground of limitation.

20. Defendant Nos. 5, 6 & 12 have further relied upon ratio laid down in *Asian Resurfacing of Road Agency Pvt.Ltd. & Anrs. Vs. C.B.I. , 2020 SCC Online SC 1046*, wherein it is held by Hon'ble Supreme Court that, whatever stay granted by any court expires within period of six months unless extension is granted. With due respect the ratio laid down, I am of the opinion that the ratio laid down is not relevant for case in hand.

21. Defendant No. 2 has also relied upon Article returned by Advocate Dinesh Singh Chauhan. But, as above discussed defendant No. 2 has not shown any ground to reject the plaint. Thus, the Article is not helpful to the defendant No. 2.

22. It is also objection of the defendant No. 2 that there is mis-joinder of cause of action and as relief claimed by plaintiffs barred by

delay and latches. It is contention of the defendant No. 2 that all heirs of Mahadev Dharma patil were not a party to the suit. Thus, this suit is not maintainable, hence, he prayed for rejection of the plaint. For this purpose defendant No. 2 has relied upon ratio laid down in *Samar Krishna Nath Vs. Sri Amitava Nath & Anr.*, RSA No.187/2004, decided on 11/06/2015, wherein it is held by Hon'ble Gauhati High Court that under Order 1 Rule 9 of Code of Civil Procedure suit can be defeated by reason of non-joinder of necessary party. With due respect to the ratio, I am of the opinion that the ratio laid down is not applicable to the case in hand, because in case cited supra evidence is recorded and in case in hand evidence is not yet recorded. Non-joinder of necessary party is not sole ground to reject the plaint under Order 7 Rule 11 of Code of Civil Procedure.

23. For this purpose defendant No. 2 has further relied upon ratio laid down in *Rajani Sivakumar & Ors. Vs. uraikannu & Ors.*, S.A. No.563/2003, decided on 25/01/2010, wherein it is held by Hon'ble Madras High Court that, in a suit for partition all the sharers are necessary parties and suit is liable to be dismissed for non-joinder of any one of the parties. With due respect to the ratio, I am of the opinion that the ratio laid down is not applicable to the case in hand, because the case in hand issues are not framed nor evidence is recorded.

24. It is argued by Advocate for plaintiffs that application under Order 7 Rule 11 of Code of Civil Procedure is not maintainable for non-joinder of necessary party. This ground can be raised only after framing of issues. For this purpose plaintiff has relied upon ratio laid down in *Gajinder Pal Singh Vs. Mehtab Singh & Anr.*, dated 21/08/2001, wherein it is held by Hon'ble Delhi High Court that, application for dismissal of suit on ground of non-joinder of necessary party can not be decided under

order 7 rule 11 of code of civil procedure. This can be decided after framing of issues. The ratio laid down is aptly applicable to the case in hand, because defendant has prayed for rejection of the suit under order 7 rule 11 of code of civil procedure for non joinder of other coparceners of suit properties. But this issue of non joinder of necessary parties could not be decided at this stage.

25. Advocate for defendant No. 2 argued that the period of limitation would be three years from the date of knowledge. But Plaintiffs states that they got knowledge about partition deed after reading written statement of defendant No. 2. He further argued that father of plaintiffs who has filed this suit and died during the pendency of the suit is party to the partition deed. Thus, suit is barred by limitation. He further argued that plaintiffs have made illusory cause of action by clever drafting. From averments in plaint suit appears to be barred by law. For this purpose defendant No. 2 has relied upon ratio laid down in *Dahiben Vs. Arvindbhai Kalyanji Bhanusali & Anr.*, (2020) 7 S.C.C. 366, wherein it is held by Hon'ble Supreme Court that, the time of deciding application under order 7 rule 11 of code of civil procedure, court has to find whether plaint discloses real cause of action or illusory cause of action created by clever drafting. Court must be vigilant against camouflage or suppression and if suit found to be vexatious and and abuse of process of court, plaint could be rejected. Plaint shall be rejected when from averments in plaint suit appears to be barred by any law. With due respect to the ratio I am of the opinion that the ratio laid down is not applicable to the case in hand, because in this case plaintiff has alleged fraud and prayed for partition of suit properties. Only from averments in plaint, suit cannot be rejected. Issue of limitation involved in this suit is mixed question of law and facts which cannot be decided at this stage.

26. For this purpose defendant No. 2 has further relied upon ratio laid down in *Sayyed Ayaz Ali Vs. Prakash G. Goyal & Ors.*, Civil Appeal Nos.2401-2402/2021, SLP (Civil) No.29975-29976/2018, decided on 20/07/2021, wherein it is held by Hon'ble Supreme Court that, at the time of deciding application under order 7 rule 11 of Code of Civil Procedure, amendment could not be allowed, where suit appears from statements in the plaint to be barred by any law, the defects are not curable. With due respect to the ratio, I am of the opinion that the ratio laid down is not applicable to the case in hand, because from statements in the plaint suit prima-facie does not appear to be barred by law. Until evidence is recorded, it will be pre-matured to decide barring of the suit.

27. For this purpose defendant No. 2 has further relied upon ratio laid down in *Raghwendra Sharan Singh Vs. Ram Prasanna Singh (dead) by LRs.*, Civil Appeal No.2960/2019, SLP (C) No.20068/2013, decided on 13/03/2019, wherein it is held by Hon'ble Supreme Court that, if the plaintiff by clever drafting of the averments in the plaint and the bundle of facts stated in the plaint, tried to bring the suit within the period of limitation which, otherwise, is barred by law of limitation, the suit is clearly barred by law of limitation, thus, the plaint is required to be rejected in exercise of powers under Order 7 Rule 11 of the Code of Civil Procedure. With due respect to the ratio, I am of the opinion that the ratio laid down is not applicable to the case in hand, because the suit is prima facie seems to be within limitation.

28. For this purpose defendant No. 2 has further relied upon ratio laid down in *N.V. Srinivasa Murthy & Ors. Vs. Mariyamma (dead) by proposed Lrs.*, Appeal (civil) 4500/2004, decided on 11/07/2005, 11/07/2005, wherein it is held by Hon'ble Supreme Court that, the plaint

is liable to rejection, if it does not disclose 'cause of action' from the averments in the plaint. The trial court must remember that if on a meaningful, no formal, reading of the plaint is manifestly vexatious and meritless in the sense of not disclosing a clear right to sue, it should exercise its power under Order 7 Rule 11 of the Code of Civil Procedure taking care to see that the ground mentioned therein is fulfilled. If clever drafting has created the illusion of a cause of action, the court must nip it in the bud at the first hearing by examining the party searchingly under Order 10 of Code of Civil Procedure. With due respect to the ratio, I am of the opinion that the ratio laid down is not applicable to the case in hand, because upon careful reading plaint discloses cause of action and it is prima facie within limitation.

29. For this purpose defendant No. 2 has relied upon ratio laid down in *Chandrakant Vassudev Lotikar & Ors. Vs. Vaman Mahadev Lotikar & Ors.*, AIR 1989 Bom 17, decided on 10/04/1987, decided on 10/04/1987, wherein it is held by Hon'ble Bombay High Court that, once the plaint is rejected, there is no suit and if thing does not exist, the appeal cannot be a continuation of a non-existing thing. The plaint has been rejected and therefore, there was nothing before the court. With due respect to the ratio, I am of the opinion that the ratio laid down is not applicable to the case in hand, because in case cited supra the facts are about clause (b) and (c) of Rule 11 of Order 7 of Code of Civil Procedure and in case in hand application is under Order 7 Rule 11(d) of Code of Civil Procedure.

30. On perusal of the plaint and record it also reflects that plaintiff has stated cause of action. On face of record the suit does not reflect to be barred by law. It seems to be maintainable one. The defence of limitation as raised by defendant No. 2 is mixed question of law and facts. Thus, it needs to be decided only after receiving evidence of both

parties. Thus, the defence raised by defendant No. 2 is not acceptable. The issue involved in the suit of limitation is mixed question of law and facts.

31. From perusal of the above reasoning I did not find it fit to allow the application. Thus, I proceed to pass following order :

ORDER

Application is rejected.

Place: Uran.
Date: 12/10/2021.

(Nilesh M. Wali)
Civil Judge Jr.Divn., Uran.