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CHHOTANBEN AND ANR.

v.

KIRITBHAI JALKRUSHNABHAI THAKKAR AND ORS.

(Civil Appeal No. 3500 of 2018)

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APRIL 10, 2018

**[DIPAK MISRA, CJI, A. M. KHANWILKAR AND  
DR. D. Y. CHANDRACHUD, JJ.]**

*Code of Civil Procedure, 1908:*

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*Order VII, r.11(d) – Suit for declaration and permanent injunction – Alleging therein that the suit property was transferred by the defendants (co-owners) without knowledge of plaintiffs and by forging their signatures – Application u/O.VII, r.11(d) by defendants for rejection of plaint on the ground that suit was barred by limitation – Application was dismissed by trial court – In Revision High Court reversed the order of trial court – On appeal, held: The basis to decide an application u/O.VII, r.11(d) are the averments in the plaint (read as a whole) and defence or plea in the Written Statement cannot be the basis – In view of the averments in the plaint and relief claimed, the issue of limitation is a triable issue – Therefore, plaint cannot be rejected at the threshold, in exercise of power u/O.VII, r.11(d).*

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**Allowing the appeal, the Court**

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**HELD: 1. The appellants (plaintiffs) have asserted that until 2013 they had no knowledge whatsoever about the execution of the registered sale deed concerning their ancestral property. Further, they have denied the thumb impressions on the registered sale deed as belonging to them and have alleged forgery and impersonation. In the context of totality of averments in the plaint and the reliefs claimed, which of the Articles from amongst Articles 56, 58, 59, 65 or 110 or any other Article of the Limitation Act will apply to the facts of the present case, may have to be considered at the appropriate stage. [Para 11] [431-E-F]**

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**2. What is relevant for answering the matter in issue in the context of the application under Order VII Rule 11(d), is to**

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examine the averments in the plaint. The plaint is required to be read as a whole. The defence available to the defendants or the plea taken by them in the written statement or any application filed by them, cannot be the basis to decide the application under Order VII Rule 11(d). Only the averments in the plaint are germane. [Para 12] [431-G]

3. In the present case, the appellants (plaintiffs) have asserted that the suit was filed immediately after getting knowledge about the fraudulent sale deed executed by original defendant Nos. 1 & 2 by keeping them in the dark about such execution and within two days from the refusal by the original defendant Nos.1 & 2 to refrain from obstructing the peaceful enjoyment of use and possession of the ancestral property of the appellants. The issue regarding the suit being barred by limitation in the facts of the present case, is a triable issue and for which reason the plaint cannot be rejected at the threshold in exercise of the power under Order VII Rule 11(d). [Para 16] [434-A-C]

*Saleem Bhai and Others v. State of Maharashtra and Others* (2003) 1 SCC 557 : [2002] 5 Suppl. SCR 491; *Mayar (H.K.) Ltd. and Others v. Owners & Parties, Vessel M. V. Fortune Express and Others* (2006) 3 SCC 100 : [2006] 1 SCR 860; and also *T. Arivandandam v. T. V. Satyapal and Another* (1977) 4 SCC 467 : [1978] 1 SCR 742 – relied on.

*Church of Christ Charitable Trust and Educational Charitable Society v. Ponniamman Educational Trust* (2012) 8 SCC 706 : [2012] 6 SCR 404 – referred to.

**Case Law Reference**

[2002] 5 Suppl. SCR 491	relied on	Para 13	
[2006] 1 SCR 860	relied on	Para 13	
[1978] 1 SCR 742	relied on	Para 13	G
[2012] 6 SCR 404	referred to	Para 14	

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 3500 of 2018.

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A From the Judgment and Order dated 13.01.2017 of the High Court of Gujarat at Ahmedabad in Civil Revision Application No. 76 of 2016.

Purvish Jitendra Malkan, Ms. Dharita Purvish Malkan, Ms. Deepa Gorasia, Bhaskar Singh, Ms. Rumi Chander, Advs. for the Appellants.

Gaurav Agrawal, Adv. for the Respondents.

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The Judgment of the Court was delivered by

**A. M. KHANWILKAR, J.** 1. This appeal, by special leave, takes exception to the judgment and order dated 13<sup>th</sup> January, 2017 of the High Court of Gujarat at Ahmedabad in Civil Revision Application No.76 of 2016.

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2. The appellants filed a suit for declaration and permanent injunction on 18<sup>th</sup> October, 2013, against the respondents before the Principal Senior Civil Court, Anand, being Regular Civil Suit No.166 of 2015 (Old No. Special Civil Suit No.193 of 2013). The frame of the subject suit is on the assertion that the appellants and original defendant Nos.1 & 2 were in joint ownership and possession of an ancestral property inherited by them from their predecessor (father), deceased Bawamiya Kamaluddin Saiyed, bearing Survey No.113/1+2, area H.1-37-59 Ara, Akar Rs.15-81 paise. That land is old tenure agricultural land situated at Mouje Village, Hadgud Taluka and District Anand. The said ancestral, joint, undivided land was jointly possessed and used and enjoyed by the appellants (plaintiffs) and original defendant Nos.1 & 2 (predecessors of respondent Nos.2 to 15), after the demise of their father Bawamiya Kamaluddin Saiyed, being in his straight line of heirs. The names of Jahangirmiya Bawamiya Kamaluddin Saiyed and Hussainmiya Bawamiya Kamaluddin Saiyed (original defendant Nos.1 & 2 respectively) came to be recorded in the record of rights along with the names of the appellants and since that time, all of them were jointly in possession and usage of the undivided land. The appellants assert that they have half (1/2) share, rights, powers, possession and usage rights in the property. It is their case that without their knowledge the original defendant Nos.1 & 2 transferred the said land after forging their (appellants) signatures. The appellants were not aware about the said transaction effected vide registered sale deed No.4425 dated 18<sup>th</sup> October, 1996, which they came to know from their community members, immediately whereafter they made enquiry in the office of Sub Registrar at Anand. It was revealed to them that the land has already been

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transferred by a registered sale deed dated 18<sup>th</sup> October, 1996 in favour of defendant Nos.4, 5 and 6 (Anilbhai Jaikrishnabhai Jerajani, Kiritbhai Jaikrishnabhai Thakkar and Kekanbhai Jaikrishnabhai Thakkar, respectively). They promptly applied for a certified copy of the registered sale deed. They were also informed that Jaikrishnabhai Prabhudas Thakkar had expired and, therefore, the defendant Nos.3 to 6 received the land as heirs. It is then asserted that from the registered sale deed, they came to know that their thumb impressions were obtained as witnesses in the presence of Bhikhansha Pirasha Divan. They asserted that they had never signed or gave their thumb impressions upon any such deed, in any manner, in front of any witness. It is then stated that some person has been fraudulently involved for putting thumb impressions on the sale deed. They have asserted that the thumb impressions on the sale deed did not belong to them and that they were ready and willing to prove that fact by providing their genuine thumb impressions in front of officers. It may be relevant to reproduce paragraph 4 of the plaint which reads thus:

“4. The paragraph no.1 property is jointly owned, co-shared, jointly used and possessed by the applicants and respondents nos.1 and 2. The respondents nos.1 and 2 do not have any rights to sell the property on their own. In case if the respondents nos.1 and 2 have the willingness to sell the property, they are required to obtain our consent. This was very well in the knowledge of the respondents nos.1 and 2 yet they have entered into a sale deed for the property in an illegal manner. But the actual possession and usage of the suit property is jointly undertaken by us. Before two days, the applicants meet the respondents and asked them not to hinder, harass, etc. as to these rights on the land. We asked the respondents to partition our half part, provide actual possession of the land, yet the respondents did not consider this request. On the contrary it was stated by them that the respondents nos.2 to 6 shall sell the property to someone else, the courts are open and we can take steps whatever we can.”

3. In paragraph 6 of the plaint, the appellants have stated about the cause of action for filing the suit in the following words:

“6. The cause as to the filing of the suit, as mentioned under the above mentioned paragraph pertains to the fact that the respondents nos.1 and 2 without the knowledge of the applicants,

A while keeping the applicant in dark, removed the name of the applicants from the record of rights and entered into a registered sale deed no.4425 dated 18.10.1996 without the knowledge of the applicants. Upon getting the above mentioned knowledge, the applicants meet the respondents personally before two days and requested them to cancel the sale deed and hand over the clear, marketable and actual vacant possession of the property to the applicants. Yet the respondents did not consider the request and mentioned that the courts are open for us thereby asking us the applicants to do whatever we wished to do. Therefore the present issue has arise at the village Hadgud without the jurisdiction of the honourable court.”

4. As mentioned above, the suit came to be filed for declaration and permanent injunction and for the following reliefs:

D “a) The honourable court be pleased to declare that the property mentioned under the paragraph no.1 being situated at Mouje village Hadgud, Taluka and district Anand, survey no.113/1+2, area heacter 1-37-59 Ara, Akar Rs. 15-81 paisa old tenure agricultural land is ancestral property of the applicants and thereby the applicants have undivided ½ (half) part, share, interest and right in the property and a partition of the land be undertaken in a judicial manner and the actual possession, usage, etc. be provided to the applicants in the interest of justice.

F b) The honourable court be pleased to declare that the Mouje village Hadgud, Taluka and district Anand, survey no. 113/1+2, area Heacter 1-37-59 Ara, akar Rs. 15-81 Paise old tenure agricultural land is ancestral, joint, undivided, jointly possessed and used property of the applicants and the respondents nos.1 and 2 and thereby the respondents nos.1 and 2 solely do not have the rights and powers to sell or interference in the title of the property and further declare that the registered sale deed no.4425 dated 18.10.1996 in the favour of the respondents nos.4 and 6 is null and void, void ab-initio, cancelled, false and frivolous and thereby the honourable court be kind enough to declare in the interest of justice that the respondents nos.3 to 6 do not receive any kind of rights-powers as to the land on the basis of this particular sale deed.

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c) The honourable court be pleased to pass a permanent injunction order against the respondents and in the favour of the applicants such that, neither the respondents nor through their agents, servants, persons, etc. sell, mortgage, charge, lien, etc. the or construct, etc. upon the property mentioned under the paragraph no.1 and situated at the Mouje village Hadgud, Taluka and district Anand, survey no. 113/1+2, area Heacter 1-37-59 Ara, akar Rs. 15-81 Paise old tenure agricultural. A  
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d) The honourable court be pleased to pass a permanent injunction order against the respondents and in the favour of the applicants such that, neither the respondents nor through their agents, servants, persons, etc. interfere, obstruct, hinder, etc. the ancestral, joint, undivided possession, usage, etc. of the applicants upon the property mentioned under the paragraph no.1 and situated at the Mouje village Hadgud, Taluka and district Anand, survey no. 113/1+2, area Heacter 1-37-59 Ara, Akar Rs.15-81 Paise old tenure agricultural. C  
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e) The honourable court be pleased to pass a permanent injunction order against the respondents and in the favour of the applicants such that, neither the respondents nor through their agents, servants, persons, etc. would alter the record of rights entries for the property mentioned under the paragraph no.1 and situated at the Mouje village Hadgud, Taluka and district Anand, survey no. 113/1+2, area Heacter 1-37-59 Ara, Akar Rs.15-81 Paise old tenure agricultural. E

f) The honourable court be pleased to pass an appropriate order found proper and efficacious by the honourable court. F

g) The honourable court be pleased to order the respondents to provide for the cost as the suit.”

5. After filing of the suit, an application was filed on 19<sup>th</sup> November, 2014 under Orders XIII and XVI of the Code of Civil Procedure, 1908 (for short “CPC”) read with Sections 67 and 71 of the Evidence Act for directions to defendant Nos.3 to 6 to produce before the Court, the original deed executed by the original defendant Nos.1 & 2 in respect of the suit land and to obtain the admitted thumb impressions of the appellants and send it for scientific examination and comparison of the thumb impressions by a Handwriting Expert to unravel the truth. The original G  
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A defendant Nos.4 to 6 filed reply to the said application on 3<sup>rd</sup> February, 2015, to oppose the same. Thereafter, the defendant No.5 (respondent No.1) on 17<sup>th</sup> April, 2015 filed an application under Order VII Rule 11(d) for rejection of the plaint on the ground that the suit was barred by limitation having been filed after 17 years. The appellants filed reply to the said application. Both the applications under Order XIII Rule 16 and under Order VII Rule 11(d), were disposed of by the 4<sup>th</sup> Additional District Judge, Anand on 20<sup>th</sup> January, 2016 by separate orders. As regards the application filed by the plaintiffs (appellants), the Court allowed the same by passing the following order:

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The application is hereby allowed.

D The defendants are directed to produce registered sale deed no.4425 dt.18/10/1996 in the court and further the register civil court is directed to take specimen thumb impression of the plaintiffs as per rules and further such sale deed along with the specimen of thumb impressions of the plaintiffs be sent to thumb impression of the witnesses in such sale deed are of the plaintiffs or not.

Further the thumb impression expert is directed to submit his report within period of 30 days after receiving the documents.”

E 6. As regards the application filed by defendant No.5 (respondent No.1) for rejection of the plaint, the said application was dismissed by the Trial Court on the same day i.e. 20<sup>th</sup> January, 2016. The Trial Court opined that the contention urged by defendant No.5 (respondent No.1) for rejection of the plaint was not tenable as the factum of suit being barred by limitation was a triable issue, considering the averments in the plaint. The Trial Court observed thus:

G “3. I have given my thoughtful consideration to the submission made by the learned advocate for both the parties. The plaintiffs have filed this suit to set aside in registered sale deed no.4425 dt. 18/10/1996. And this suit has been filed on 18/10/2013. And the contention of the Ld. Advocate for defendant no.5 that the suit has been filed after delay of almost 17 years and hence the suit is prima facie barred by law of limitation and other submissions of the Ld. Advocate of defendant no. 5 that the plaintiffs do not

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have prima facie case, it cannot be considered at this stage because whether there is delay of almost 17 years in filling this suit or not and whether it is barred by law of limitation or not, it is subject matter of trial and moreover, the other submissions of Ld. Advocate for defendant no.5 regarding no prima facie case in favour of plaintiff also cannot be considered as these are also the subject matter of trial which can be decided only after taking the evidence. Moreover, at the time of deciding the application under order 7 rule 11 the Court has to just look into the averments made in plaint only and the plea or defense raised by defendant cannot be taken into account at the stage of deciding the application under Order 7 Rule 11 and here in this case merely looking to the pleading in the plaint it does not come out that the suit barred by law of limitation. Moreover, I am of humble view the case law cited by Ld. Advocate for plaintiffs reported as 2015 (1) GLH 1, fully support to the case in hand. Moreover, I am of humble view that, the case cited by Ld. Advocate for defendant reported in 2015(2) GLH 355 and 2013 (1) GLR 398, does not support in the present case as the factual position of these cases and present case are different.”

7. Respondent No.1 carried the matter before the High Court by way of a Civil Revision Application No.76/2016 against the order passed by the Trial Court dismissing his application under Order VII Rule 11(d) of CPC for rejection of the plaint. The High Court allowed the application under Order VII Rule 11(d) of CPC filed by respondent No.1 (defendant No.5) and reversed the decision of the Trial Court on the finding that the suit was barred by limitation. For so holding, the High Court in the impugned judgment observed thus:

“18. This Court notices that the plaintiffs are the sisters and defendants No.1 and 2 in the suit of the year 2013 have chosen not to file written statement. Thereby the original defendants No.1 and 2 who are sellers have not made their stand clear. Strong possibility cannot be ruled out that the plaintiffs after about 20 years of the registered sale deed has chosen to bring a collusive suit. It is true that only detail of the plaint shall be examined at the stage of considering application under Order VII Rule 11 of CPC. From a bare reading of the plaint, it is clearly indicative that the

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A registered sale deed has been effected in the year 1996 where the plaintiffs have affixed their thumb impression as witnesses in the very document and the same came to be challenged in the year 2013. The reason is not very far to fetch. With the phenomenal increase in the land price in the State of Gujarat, such litigations by some of the family members are sponsored litigations by other unscrupulous elements are so often initiated. It is not at all difficult to engineer the same and upset many equations of the purchasers who have enjoyed the title and peaceful possession for many years. Attempt is made to question the registered sale deed on the ground that these were the ancestral property and 7/12 Form reflected the name of the revisionist and other defendants. Revenue entry has also been mutated soon after the registered sale deed in favour of the revisionist and other defendants in the year 1997. The mutation order of village form has been effected on the basis of such registered sale deed on 21<sup>st</sup> January, 1997. Copy of which has been issued on 31<sup>st</sup> March, 1997. For such inexplicable delay plaintiffs ought to have brought on record substantiating the documents. However, the documents which have been brought also point out that the plaintiffs' suit is barred by law of limitation for having been preferred after expiry of three years period. It is to be noted that even during the course, when revenue authority mutated the names of present revisionist and other respondents, no objection came to be raised and it is almost after 18 years, such objections have surfaced."

8. The aforementioned decision of the High Court is the subject matter of this appeal at the instance of the appellants (plaintiffs). According to the appellants, the High Court committed manifest error in being swayed away by the fact that the suit was filed after about 17 years. It has proceeded on the basis of assumptions and surmises and not in consonance with the limited sphere of consideration at the threshold stage for examining the application for rejection of the plaint in terms of Order VII Rule 11(d) of CPC. It has not even bothered to analyse the relevant averments in the plaint which, it is well settled, has to be read as a whole and has also not adverted to the reasons recorded by the Trial Court that the factum of suit being barred by limitation was a triable issue in the facts of the present case.

9. The respondents, on the other hand, would contend that there is no infirmity in the view expressed by the High Court and being a

possible view coupled with the fact that the suit instituted by the appellants appears to be a collusive suit, no interference in exercise of jurisdiction under Article 136 of the Constitution, is warranted. According to the contesting respondents, it is unlikely that the appellants who are sisters of original defendant Nos.1 & 2, would not have any knowledge about the transaction effected vide registered sale deed and especially, when defendant Nos.3 to 6 were in possession of the land for such a long time, which fact is reinforced from the mutation entries recorded in 1997 and including the conversion of the land from agricultural to non-agricultural use. According to the contesting respondents, this appeal ought to be dismissed.

10. We have heard Mr. Purvish Jitendra Malkan, learned counsel for the appellants and Mr. Gaurav Agrawal, learned counsel for the contesting respondents.

11. After having cogitated over the averments in the plaint and the reasons recorded by the Trial Court as well as the High Court, we have no manner of doubt that the High Court committed manifest error in reversing the view taken by the Trial Court that the factum of suit being barred by limitation, was a triable issue in the fact situation of the present case. We say so because the appellants (plaintiffs) have asserted that until 2013 they had no knowledge whatsoever about the execution of the registered sale deed concerning their ancestral property. Further, they have denied the thumb impressions on the registered sale deed as belonging to them and have alleged forgery and impersonation. In the context of totality of averments in the plaint and the reliefs claimed, which of the Articles from amongst Articles 56, 58, 59, 65 or 110 or any other Article of the Limitation Act will apply to the facts of the present case, may have to be considered at the appropriate stage.

12. What is relevant for answering the matter in issue in the context of the application under Order VII Rule 11(d), is to examine the averments in the plaint. The plaint is required to be read as a whole. The defence available to the defendants or the plea taken by them in the written statement or any application filed by them, cannot be the basis to decide the application under Order VII Rule 11(d). Only the averments in the plaint are germane. It is common ground that the registered sale deed is dated 18<sup>th</sup> October, 1996. The limitation to challenge the registered sale deed ordinarily would start running from the date on which the sale deed

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A was registered. However, the specific case of the appellants (plaintiffs) is that until 2013 they had no knowledge whatsoever regarding execution of such sale deed by their brothers - original defendant Nos.1 & 2, in favour of Jaikrishnabhai Prabhudas Thakkar or defendant Nos.3 to 6. They acquired that knowledge on 26.12.2012 and immediately took steps to obtain a certified copy of the registered sale deed and on receipt thereof they realised the fraud played on them by their brothers concerning the ancestral property and two days prior to the filing of the suit, had approached their brothers (original defendant Nos.1 & 2) calling upon them to stop interfering with their possession and to partition the property and provide exclusive possession of half (1/2) portion of the land so designated towards their share. However, when they realized that the original defendant Nos.1 & 2 would not pay any heed to their request, they had no other option but to approach the court of law and filed the subject suit within two days therefrom. According to the appellants, the suit has been filed within time after acquiring the knowledge about the execution of the registered sale deed. In this context, the Trial Court opined that it was a triable issue and declined to accept the application filed by respondent No.1 (defendant No.5) for rejection of the plaint under Order VII Rule 11(d). That view commends to us.

13. The High Court on the other hand, has considered the matter on the basis of conjectures and surmises and not even bothered to analyse the averments in the plaint, although it has passed a speaking order running into 19 paragraphs. It has attempted to answer the issue in one paragraph which has been reproduced hitherto (in paragraph 7). The approach of the Trial Court, on the other hand, was consistent with the settled legal position expounded in *Saleem Bhai and Others Vs. State of Maharashtra and Others*<sup>1</sup>, *Mayar (H.K.) Ltd. and Others Vs. Owners & Parties, Vessel M.V. Fortune Express and Others*<sup>2</sup> and also *T. Arivandandam Vs. T.V. Satyapal and Another*<sup>3</sup>.

14. These decisions have been noted in the case of *Church of Christ Charitable Trust and Educational Charitable Society Vs. Ponniamman Educational Trust*,<sup>4</sup> where this Court, in paragraph 11, observed thus:

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<sup>1</sup> (2003) 1 SCC 557

<sup>2</sup> (2006) 3 SCC 100

<sup>3</sup> (1977) 4 SCC 467

H <sup>4</sup> (2012) 8 SCC 706

“11. This position was explained by this Court in *Saleem Bhai v. State of Maharashtra*, in which, while considering Order 7 Rule 11 of the Code, it was held as under: (SCC p. 560, para 9) A

“9. A perusal of Order 7 Rule 11 CPC makes it clear that 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 under Order 7 Rule 11 CPC at any stage of the suit—before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial. For the purposes of deciding an application under clauses (a) and (d) of Rule 11 of Order 7 CPC, the averments in the plaint are germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage, therefore, a direction to file the written statement without deciding the application under Order 7 Rule 11 CPC cannot but be procedural irregularity touching the exercise of jurisdiction by the trial court.” B C D

It is clear that in order to consider Order 7 Rule 11, the court has to look into the averments in the plaint and the same can be exercised by the trial court at any stage of the suit. It is also clear that the averments in the written statement are immaterial and it is the duty of the Court to scrutinise the averments/pleas in the plaint. In other words, what needs to be looked into in deciding such an application are the averments in the plaint. At that stage, the pleas taken by the defendant in the written statement are wholly irrelevant and the matter is to be decided only on the plaint averments. These principles have been reiterated in *Raptakos Brett & Co. Ltd. v. Ganesh Property* and *Mayar (H.K.) Ltd. v. Vessel M.V. Fortune Express*.” E F

15. The High Court has adverted to the case of *Church of Christ Charitable Trust and Educational Charitable Society* (supra), which had occasion to consider the correctness of the view taken by the High Court in ordering rejection of the plaint in part, against one defendant, on the ground that it did not disclose any cause of action qua that defendant. The High Court has also noted the decision relied upon by the contesting respondents in the case of *Mayur (H.K.) Ltd. and Ors.* (supra), which has restated the settled legal position about the scope of power of the Court to reject the plaint under Order VII Rule 11(d) of CPC. G H

- A           16. In the present case, we find that the appellants (plaintiffs) have asserted that the suit was filed immediately after getting knowledge about the fraudulent sale deed executed by original defendant Nos.1 & 2 by keeping them in the dark about such execution and within two days from the refusal by the original defendant Nos.1 & 2 to refrain from obstructing the peaceful enjoyment of use and possession of the ancestral property of the appellants. We affirm the view taken by the Trial Court that the issue regarding the suit being barred by limitation in the facts of the present case, is a triable issue and for which reason the plaint cannot be rejected at the threshold in exercise of the power under Order VII Rule 11(d).
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- C           17. In the above conspectus, we have no hesitation in reversing the view taken by the High Court and restoring the order of the Trial Court rejecting the application (Exh.21) filed by respondent No.1 (defendant No.5) under Order VII Rule 11(d). Consequently, the plaint will get restored to its original number on the file of the IVth Additional
- D Civil Judge, Anand, for being proceeded further in accordance with law. We may additionally clarify that the Trial Court shall give effect to the order passed below Exh.17 dated 20<sup>th</sup> January, 2016, reproduced in paragraph 5 above, and take it to its logical end, if the same has remained unchallenged at the instance of any one of the defendants. Subject to that, the said order must be taken to its logical end in accordance with
- E law.
18. Accordingly, this appeal succeeds and is allowed in the above terms, with no order as to costs.