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ORDER

R.DEVDAS J., (ORAL):

The petitioners are defendants No.1 to 3 in O.S. No. 17/2020 on the file of the learned II Addl. Sr. Civil Judge & JMFC, Hubballi (for short 'the trial Court') and they are aggrieved by the impugned order dated 09.11.2021 passed in I.A. No. III. The petitioners shall be referred to as defendants and the respondents shall be referred to as plaintiffs for the sake of convenience.

2. I.A. No. III was filed by the defendants under Order VII Rule 11(a) and (d) read with Sec. 151 of CPC praying the trial Court to reject the plaint on the ground that the suit is barred by limitation by reason of Sec. 27 of the Limitation Act, 1963. The said application having been rejected, the defendants are before this Court.

3. Learned Senior Counsel Sri Shreevatsa, appearing for the defendants would submit that the plaintiffs are the full sisters of defendants No.2 and 3 and they filed the instant suit seeking partition and separate possession of the share of each of the plaintiffs in the suit property. The plaintiffs have also sought for a declaration that the registered relinquishment deed dated



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29.12.2004 executed by the plaintiffs in favour of defendants No.1 to 3 is not binding on the share of the plaintiffs.

4. Learned Senior Counsel submits that earlier the linear descendents of Sri Narayansa had filed O.S. No. 178/2005 wherein all the parties herein were arrayed as defendants, including the plaintiffs. Although the present suit schedule property bearing CTS No. 470/1 situated at Ward No.3 ad-measuring 3 acres 15 guntas, 5 sq.yards situated at Marian Timmasagar village, Karwar Road, Hubballi, was also part of the suit schedule properties in O.S. No. 178/2005, nevertheless the claim in respect of that property was given up. The plaintiffs herein were placed exparte and they did not contest the suit. However, after the judgment dated 16.02.2016 was rendered in O.S. No. 178/2005, original plaintiffs in O.S. No. 178/2005 filed R.F.A. No. 100186/2016 before this Court. In the said appeal the plaintiffs sought to file cross-objections. It was sought to be contended at the hands of the plaintiffs that they came to know about the fraud that was played upon them by defendants No. 5, 10 and 11, i.e., their full brothers and uncle in getting a relinquishment deed executed in their favour on misrepresenting that they were called to the Sub-Registrar's office stating that they



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had to execute a power of attorney. However, objections were filed to the cross objections, mainly contending that Court fee was required to be paid as was paid on the plaint. The plaintiffs were directed to pay Court fee. Aggrieved, the plaintiffs approached the Hon'ble Supreme Court in SLP No. 33257/2017. Observations were made by the Hon'ble Apex Court and liberty was granted to the plaintiffs to file a fresh suit and get their rights adjudicated. Taking note of the said orders passed by the apex Court, this Court also permitted the plaintiffs to file a fresh suit. Consequently, O.S. No. 17/2020 was filed at the hands of the plaintiffs.

5. Learned Senior Counsel would therefore contend that the plaintiffs cannot deny the fact that they knew about execution of the relinquishment deed dated 29.12.2004, apparently as far back as 2016 when it was openly contended by the plaintiffs that they came to know about the fraudulent execution of the relinquishment deed and therefore they sought to file cross objection in R.F.A. Cr. Ob. No. 100005/2016. It is therefore the contention of the defendants that when admittedly the plaintiffs expressed that they came to know about the relinquishment deed in the year 2016, after the judgment and decree was rendered in O.S. No. 178/2005, the



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cause of action for seeking a declaration that the registered relinquishment deed dated 29.12.2004 is not binding on the share of the plaintiffs commenced at least in the year 2016. Therefore, having regard to Sec.27 of the Limitation Act read with Article 59 where the period of limitation prescribed is three years, even from the date of knowledge, the suit is barred by limitation.

6. Per contra learned counsel for the plaintiffs seeks to support the impugned order passed by the trial Court.

7. Having heard the learned counsels and on perusing the petition papers, this Court finds that the question that arises for consideration in this writ petition is, ***whether in a suit for partition between the family members, the suit could be rejected on the ground that it is time barred, more so, when a declaration is sought by the plaintiffs against a registered instrument?***

8. It would be relevant to notice that it is a settled position of law that when a document is valid, no question arises of its cancellation. However, when a document is void ab initio, a decree for setting aside the same would not be necessary as the same is ***non est*** in the eye of law, as it would be a nullity. This position has



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been reiterated in *Prem Singh & Ors. Vs. Birbal & Ors. (2006) 5 SCC 353* and it was further held that Sec. 31 of the Specific Relief Act, 1963 refers to both void and voidable documents. It provides for a discretionary relief. It was further held that Article 59 of the Limitation Act applies specially when a relief is claimed on the ground of fraud or mistake. It only encompasses within its fold fraudulent transactions which are voidable transaction. Article 59 would be attracted when coercion, undue influence, misappropriation or fraud which the plaintiff asserts is required to be proved. Article 59 would apply to the case of such instruments. It would, therefore, apply where a document is prima facie valid. It would not apply only to instruments which are presumptively invalid.

9. What is very apparent from the plaint and the prayer made therein is that the plaintiffs, being the female members of the joint family have sought for declaration of their rightful share in the joint family properties. The other prayer is to declare that the relinquishment deed dated 29.12.2004 executed by the plaintiffs in favour of their brothers, defendants No.2 and 3 is not binding on the share of the plaintiffs. Adverting to such a situation where there



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is more than one prayer made in a plaint, the question as to whether under such circumstances by invoking the provisions contained under Order VII Rule 11 of the Code, whether the Court could reject the plaint as a whole or whether a portion of the pleading or prayer could be struck down under the Rule fell for consideration at the hands of the Hon'ble Supreme Court in the case of ***Roop Lal Sathi Vs. Nachhattar Singh Gill*** reported in ***(1982) 3 SCC 487***; ***D.Ramachandran Vs. R.V. Janakiraman*** ***(1999) 3 SCC 267***; ***Sopan Sukhdeo Sabie Vs. Assistant Charity Commissioner*** ***(2004) 3 SCC 137***; ***Saleem Bhai Vs. State of Maharashtra*** ***(2003) 1 SCC 557***; ***I.T.C. Ltd. Vs. Debts Recovery Appellate Tribunal*** ***(1998) 2 SCC 70***; ***T. Arivandanam Vs. T.V.Satypal*** ***(1977) 4 SCC 467*** and ***Balasaria Construction (P) Ltd. Vs. Hanuman Seva Trust*** ***(2006) 5 SCC 658***. These judgments of the Hon'ble Supreme Court were noticed by a Division Bench of the Bombay High Court in the case of ***Merit Magnum Construction Vs. Nand Kumar Anant Baity & Ors.*** reported in ***2013 SCC Online Bombay 1361*** and it was held that there can be no rejection of only a part of the plaint. It was noticed that in ***Balasaria Construction*** (supra), the Hon'ble Supreme Court noticed the conflict of opinion on the issue whether the plaint



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can be rejected under Order VII Rule 11(d) CPC on the ground that it is hit by 'Law of Limitation' and in view of the importance of the issue, made a reference to a bench of three Hon'ble Judges. The Larger Bench, in the case of **Balasaria Construction** which was decided on 19.10.2005 recorded the submission of the learned counsels that it is not the case of either side that as an absolute proposition an application under Order VII Rule 11(d) CPC can never be based on the law of limitation. However, such an action will depend upon the facts and circumstances of each case. Where the issue of limitation is a mixed question of law and fact or where a conclusion is not disearnable from the statement that the suit is barred by limitation, the plaint cannot be rejected by rescrting to Order VII Rule 11 (d) CPC. In the case before the Bombay high Court, it was noticed that on the basis of the averments of the plaintiff it was found that the plaintiff pleaded that the conveyance dated 18.08.1989 is void and barred or **void ab initio** and that on the basis of such conveyance the plaintiffs were never divested of their title to the property, which continue to vest in them. Having regard to such averments in the plaint, it was held that it shall have to be accepted as correct only for the purposes of deciding the application under Order VII Rule



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11 CPC and therefore it was held that it is not a fit case to reject the plaint as being barred by law of limitation by resorting to Order VII Rule 11(d) CPC. It was held that the merits and demerits of the defences pleas could not have been gone into at the stage of deciding an application under Order VII Rule 11. The issue of limitation at the highest was an arguable one. The issue, however, raises mixed question of law and fact.

10. In ***Ranganayakamma and another Vs. K.S.Prakash and others*** reported in ***(2008) 15 SCC 673*** it was held that illegality of a contract need not be pleaded, but, when a contract is stated to be voidable by reason of any coercion, misrepresentation or fraud, the particulars thereto are required to be pleaded. It is a well settled principle of law that a void document is not required to be avoided whereas a voidable document must be. It was held that a deed of release for a consideration is a transaction. When, thus, a release is made for consideration, the particulars of consideration and other particulars which are required to be awarded in the deed are essential elements thereto. Relinquishment of a property by a sister in favour of her brother for a consideration or absence of it, stands on a different footing. Section 25 of the Contract Act must be read



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and construed having regard to the fact situation obtaining in the cases. It was held that even in proceeding on the basis that the consideration of Re.1/- is shown in the deed of partition is no consideration in the eye of law, the question remains is as to whether a partition deed would be violative of Section 25 of the Contract Act for want of consideration. It was held that in a suit for partition, one of the question is as to whether a document had been executed out of love and affection or not. It was held that consideration even in the Indian context would mean reasonably equivalent or other valuable benefit passed on by the promisor to the promisee or by the transferor to the transferee. Applicability of Article 65 or 110 of the Limitation Act, on the one hand and Article 59 thereto, on the other, was held to be depending upon the factual situation involved in a case. A decree for setting aside the document may be sought for in terms of Section 31 of the Specific Relief Act. Applicability of Article 59 would depend upon the question as to whether deed was required to be set aside or not.

11. As noticed in the beginning, the petitioners/ defendants have sought to contend that in view of the fact that the plaintiffs knew about the deed of relinquishment as far back as 2016, in the



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proceedings before this Court in R.F.A. No. 100186/2016 and the suit is filed after lapse of more than three years, the prayer seeking a declaration regarding the deed of relinquishment is time barred. However, it is noticeable that Order VII Rule 11 CPC provides for rejection of the plaint and not rejection of one of the prayers made in the plaint or rejection of the plaint partly. This is the reason why the petitioners / defendants have sought for two prayers in their application, that is, the rejection of the plaint under Rule 11(a) – that there is no cause of action and under Rule 11(d) – that the suit is barred by law of limitation.

12. It is interesting to notice the observations of a minority view in *Vidya Devi alias Vidya Vati Vs. Prem Prakash and others* reported in **AIR 1995 SC 1789**. It was held that the legislature has not prescribed any period of limitation for filing a suit for partition because partition an incident attached to the property and there is always a running cause of action for seeking partition by one of the co-sharers if and when he decides not to keep his share joint with other co-sharers. Since filing of the suit is wholly dependent upon the will of the co-sharer, the period of limitation, specially the date or time from where such period would commence, could not have



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been possibly provided for by the legislature and, therefore, no such prescription is made in the law of limitation, as far as suits for partition are concerned.

13. However, one of the defences that a defendant could raise in a suit for partition is that there has already been a prior partition or that the plaintiff has already relinquished his/ her rights in the suit schedule properties. Since, technically, rejection of the plaint in a suit for partition could not be sought by the defendants by targeting a prayer seeking declaration against the deed of relinquishment, the defendants have resorted to making two prayers in the instant application. There to, the trial Court could have rejected the application by considering the objections raised at the hands of the plaintiffs that since two different reliefs are sought, the application was required to be rejected in view of Section 23 of the Karnataka Civil Rules of Practice.

14. The trial Court is however, right in holding that having regard to the averments made in the plaint that the deed of relinquishment was obtained fraudulently, on the premise that a power of attorney was required for the brothers and since no consideration is passed on under the deed of relinquishment, many questions would arise



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in the present suit. Questions as to whether the deed of relinquishment is a void document or a voidable document; whether there was a need to seek a declaration in respect of the deed of relinquishment, if document is a void document; etc. would arise for decision making. Therefore, the trial Court has rightly held that the question regarding the law of limitation raised at the hands of the defendants would be a mixed question of law and facts, having regard to the averments made in the plaint.

15. In that view of the matter, this Court is in agreement with the trial Court in coming to a conclusion that the issue of limitation raised at the hands of the defendants is a mixed question of law and facts and therefore the same is required to be considered after looking into the evidence that could be adduced by the parties in a full dressed trial. At any rate, suit for a primary relief of partition and separate possession cannot be rejected at the threshold on the ground that law of limitation would apply insofar as the deed of relinquishment is concerned. The two prayers made by the plaintiffs are inter connected. There cannot be rejection of the plaint partly. The plaint also cannot be rejected on the ground that



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there is no cause of action, since the plaint does disclose cause of action for seeking partition of the suit schedule property.

Consequently, the writ petition stands dismissed.

**SD
JUDGE**

BVV

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