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**(2017) 03 MAD CK 0110**

**In the Madras High Court**

**Case No :** Application No.556 of 2015 in C.S.No.401 of 2013

M/s. Balachandra Builders (Pvt) Ltd.

APPELLANT

Vs

Mr. Anis

RESPONDENT

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**Date of Decision :** 01-03-2017

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11(d)  
Limitation Act, 1963 — Section 5

**Citation :** (2017) 2 LW 140 : (2017) 3 MLJ 52

**Hon'ble Judges :** Mr. N. Sathish Kumar, J.

**Bench :** Single Bench

**Advocate :** Mr. S. Rajasekar, Advocate, for the Applicant/D6; Mr. S. Arukandu, Advocate, for the Respondents/Plaintiffs

**Final Decision :** Allowed

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## Judgement

Mr. N. Sathish Kumar, J.—The 6th defendant in C.S.No.401 of 2013 has taken out this application qua rejection of plaint in the above suit.

2. Originally, the suit property was purchased jointly by all the sons of one Mr. Yahya Noor from U.N. Shiva Rao, vide Sale Deed dated 17.08.1977. They had also put up construction jointly in the said property. Thus, all the six co-owners were entitled to 1/6th share each in the entire suit schedule property. While so, without the knowledge of the other co-owners, one Mr. Rafik and Mr. Zaki, sons of the said Yahya Noor, executed Settlement Deeds dated 03.8.2007 and 25.06.2008 respectively transferring their 1/6th share each to their brother, Mr. Kamil, the 2ndnd respondent herein/ original 2ndnd plaintiff. 7th respondent herein/original 5th defendant, appointed their mother, Balkis, as Power Agent vide Deed of General Power of Attorney dated 01.9.2009 to deal with their undivided share and the 1st floor of the premises. Pursuant to the said execution of Power, Mrs. Balkis leased out the entire first floor to one V.M. Thandapani, by way of Lease Deed dated 12.09.2009. Thereafter, the same was sold to the applicant/original 6th defendant along with 2/6th undivided share of land in

schedule "A" property vide Sale Deed dated 11.12.2009 for a valid consideration of Rs. 1,20,00,000/-. In these circumstances, the instant suit has been filed by the respondents 1 and 2/original plaintiffs for declaration and consequential injunction.

3. Pending the suit, the applicant/original 6th defendant has filed the captioned application qua rejection of plaint. According to the applicant/original 6th defendant, in view of the aforementioned Sale Deed dated 11.12.2009, they became the absolute owner of 2/6th undivided share of land and that they are in possession and enjoyment of the same. It is the case of the applicant that the suit, which has been filed based on preemption, is barred by limitation as the right of preemption is not recognised in Madras Presidency. Hence, the original 6th defendant prayed for rejection of plaint in C.S.No.401 of 2003.

4. Denying the allegations, the respondent No. 1/original 1st plaintiff has filed a counter contending that the suit "A" schedule property was never partitioned among the brothers and they have been in joint possession and enjoyment of the same. It is contended that pursuant to the execution of Power of Attorney, the mother of the plaintiffs Mrs. Balkis was permitted to be in occupation of the 1st floor portion of "A" schedule property with leave and licence of all the six co-sharers /co-owners. Taking advantage of the same, the said Power of Attorney executed a Lease Deed in favour of one Mr. V.M. Thandapani, which caused much prejudice to the original plaintiffs. It is contended that the original 5th defendant unilaterally sold 2/6th undivided portion of "A" schedule property to the original 6th defendant. According to the original 1st plaintiff, the unilateral division as well as sale of 1st floor of undivided share of the "A" schedule property by the original defendants 1 to 5 is not valid in law. It is further contended that the said 2/6th undivided portion conveyed to the original 6th defendant is referred to as "B" schedule property. According to the original plaintiffs, the limitation begins to run from the date on which the possession of the property was taken by the 6th defendant. It is the main contention of the original plaintiffs that the limitation is a mixed question of law and fact, since the date from which limitation begins to run is a triable issue. Hence, the original plaintiffs prayed for dismissal of the application.

5. The learned counsel appearing for the applicant/original 6th defendant submitted that the applicant / original 6th defendant had purchased 2/6th share in the suit property admeasuring 2 grounds and 1792 sq.ft., but the fact remains that superstructure was enjoyed by all the co-owners directly in proportion to the share owned by them. The ground floor and the second floor of the premises were exclusively enjoyed by the respondents 1 and 2 herein/original plaintiffs, being owners of 4/6th share and the first floor of the building was exclusively enjoyed by Mr. Ismed and Mr. Arauf, as co-owners of the remaining 2/6th share. It is submitted that parties have been agreed for such arrangement of exclusive use, enjoyment and possession of the respective floors.

6. It is further submitted that the applicant/original 6th defendant had purchased

the property consisting of 2/6th share of the total area, i.e., the first floor of the suit property alone, which was given on lease by way of Lease Deed dated 12.09.2009 to one V.M. Thandapani for running a call taxi service. The said lease was terminated and Deed of Surrender of Lease was also executed on 11.12.2009. Thereafter, only the applicant/original 6th defendant had purchased the property on the same day. The respondents/original plaintiffs were aware of the sale, as well as handing over of possession to the applicant/original 6th defendant. Therefore, the suit filed by the respondents/original plaintiffs invoking the ground of preemption, is barred by limitation.

7. It is also the contention of the learned counsel for the applicant/ original 6th defendant that the right of preemption is not recognised in Madras Presidency. Therefore, the respondents/original plaintiffs, being Muslims, are not entitled to invoke the said right and hence, prayed for rejection of plaint. In support of his arguments, the learned counsel for the applicant/original 6th defendant has relied upon the judgments reported in 1972 2 SCC 336 (Sheikh Mohammad Rafiq v. Khalilul Rehman And Another); AIR 1954 SC 417 (Audh Behari Singh v. Gajadhar Jaipuria And Others); AIR 1958 SC 838 (Bishan Singh And Others v. Khazan Singh And Another ) And 1971 (1) SCC 707 (Sukhnandan Singh Etc., v. Jamiat Singh And Others) .

8. Countering the arguments, the learned counsel appearing for the respondents 1 and 2/original plaintiffs submitted that in the year 1997, the original plaintiffs and their four brothers have purchased the property and all of them jointly constructed the 2nd floor in the year 1994 and one of the co-owners of the property, Mr. Zaki executed a Settlement Deed dated 03.08.2007 in respect of his 2/6th portion of undivided share and thus, the second plaintiff became the owner of 3/6th share and the 1st plaintiff is entitled to 2/6th share. Therefore, both the plaintiffs together entitled to 4/6 shares in the undivided property and other two brothers were entitled to 2/6th share. One of the brothers Ismed died leaving behind his legal heirs, i.e., original defendants 1 to 4, and the applicant/original 6th defendant had purchased the remaining share of 2/6th of the undivided "A" schedule property. It is the contention of the learned counsel for the original plaintiffs that the suit property has not been divided between the brothers. In fact, the mother executed the Lease Deed on 12.9.2009 in favour of one V.M.Thandapani, who was running call taxi, for the period of three years. At that time also, the original plaintiffs objected to the said lease.

9. It is also submitted by the learned counsel for the original plaintiffs that immediately after three months from the date of lease, the mother of the respondents 1 and 2/original plaintiffs, executed sale deed in favour of the original 6th defendant. It is submitted that the lessee and the mother of the plaintiffs colluded together and executed Sale Deed in favour of the applicant/original 6th defendant. There were series of correspondence between the original plaintiffs and the original 6th defendant from the year 2010 and no physical possession was handed over to the applicant/original 6th defendant.

10. It is further submitted by the original plaintiffs that the plea of limitation is a mixed question of law and facts and the same cannot be decided in the application itself. Article 97 of the Limitation Act deals with physical possession. But no physical possession whatsoever, was given. Whereas, Article 113 of the Limitation Act prescribes three years period. Hence, it is the contention of the learned counsel that the suit is filed within the period of limitation.

11. It is the further contention of the learned counsel that right of pre-emption is available in personal law of Muslims. As per the Muslim Personal Law, right of pre-emption may be claimed by a co sharer of the property (Shafi-i-sharik). The respondents / original plaintiffs, being co-sharer, certainly, entitled to claim a right of pre-emption.

12. It is contended by the learned counsel for the original plaintiffs that since limitation is a mixed question law and fact, the same can be decided only after a full-fledged trial. Furthermore, handing over of possession also can be decided at the time of trial. In support of his arguments, the learned counsel for the respondents 1 and 2/original plaintiffs relied on the judgments reported in 2015 (1) MWN (Civil) 427 (N. Saravanan v. Manujothi Ashramam); 2009 (5) CTC 837 (Dega Jayalakshmi v. Kapoor Enterprises); 197 (1) SCC 707 (Sukhnandan Singh Etc., v. Jamiat Singh And Others) And (2006) 5 SCC 658 (Balasaria Constructions (P) Ltd., v. Hanuman Seva Trust And Others).

13. In the light of the above submission, now the point arises for consideration is :

1. whether the suit is liable to be rejected on the ground of limitation? and

2. Whether the right of preemption is recognised in Madras Presidency as stated by the applicant/original 6th defendant.

13.1. Much emphasis was made by the Learned counsel for the original 6th defendant by placing reliance on the judgment reported in Krishna Menon v. Kesavan And Others (1897 (20) Mad. 305) And Audh Behari Singh (Shri) v. Gajadhar Jaipura And Others (AIR 1954 SC 417), that law of presumption is not recognised in the Madras presidency. Therefore, according to the learned counsel for the original 6th defendant that the original plaintiffs cannot lay a suit on the ground of preemptive right.

14. In Audh Behari Singh (Shri) v. Gajadhar Jaipura And Others (cited supra), a Constitution Bench of the Hon"ble Supreme Court traced the origin and development of the law of preemption in India wherein it was observed that during the period of Mughal Emperors, the law of preemption was administered as a rule of common law of the land in those parts of the country which came under the domination of the Mohamedan Rulers and was applied both to Muslims and non-Muslims. The Hon"ble Supreme Court also pointed out the judgment of the Madras High Court in Krishna Menon v. Kesavan, as referred above, and held that law of preemption could not be regarded to be in consonance with the

Principles of Justice, Equity and Good Conscience, and hence, the same is not recognised in the Madras presidency. It is to be noted that in the judgment reported in 2001 (6) SCC 330, (Mattoo Devi v. Damodar Lal And Others), the Hon"ble Supreme Court discussed the various aspects of preemption and the same extracted hereunder:-

"(i)The right of preemption is an incidence of property and attaches to the land itself. It is not a mere personal right.

(ii)As per Muslim Law of preemption there are formalities of Talab and that prior to the Notification dated 07.04.1927 published in Jaipur Gazette, the talabs are necessary for the exercise of right of preemption and after the notification the requirements as laid down therein are to be complied with.

(iii)The preemptor can waive of his right of preemption but in this case the evidence is very clear that the plaintiff preemptors have not expressed their inability to purchase suit property after execution of agreement to sell.

(iv)The court also explained the concepts of Talabs as stated in Muslim Law of preemption."

15. It is also pertinent to note that Muslim Personal Law (Shariat) Application Act, 1937 came into existence by Act 26 of 1937. Section 2 of the said Muslim Personal Law (Shariat) Application Act, 1937, reads as follows:

" 2.It extends to the whole of India (except the State of Jammu and Kashmir)

2.Application of Personal Law to Muslims: - Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)."

Similarly, Section 3 of Shariat reads as follows:

"... 3.Power to make a declaration.-

(1).Any person who satisfies the prescribed authority-

(a)that he is a Muslim; and

(b)that he is competent to contract within the meaning of section 11 of the Indian Contract Act, 1872 (9 of 1872); and

(c)that he is a resident of (the territories to which this Act extends), may by declaration in the prescribed form and filed before the prescribed authority declare that he desires to obtain the benefit of (the provisions of this section),

and thereafter the provisions of section 2 shall apply to declarant and all his minor children and their descendants as if in addition to the matters enumerated therein adoption, wills and legacies were also specified.

(2)Where the prescribed authority refuses to accept a declaration under subsection (1), the person desiring to make the same may appeal to such officer as the State Government may, by general or special order, appoint in this behalf, and such officer may, if he is satisfied that the appellant is entitled to make the declaration, order the prescribed authority to accept the same. .. ."

16. In view of the above enactment, Shariat Act ruled out the custom or usage with regard to three more steps as referred to in Section 3 (1). The above amendment was also tested by the Division Bench of this Court reported in AIR 1956 Mad. 244 (Puthiya Purayil Abdurahiman Karnavan And Another v. Thayath Kancheentavida Avoomma And Others) wherein it has been held as follows:

" .. . 9. In our opinion, the Shariat Act (including the Madras amendment) did not purport to nor did it abolish the rights and incidents of a Mappilla Marumakkathayam tarwad.

10. The Shariat Act of 1937 by itself did not confer the right of partition on the individual members of the tarwad when the tarwad consisted of Muslims. The following observations of Basheer Ahmed Sayeed, J., are, with great respect to the learned Judge, not warranted upon the language of the Act of 1937:

...Even if the Mapilla Marumakkathayam Act (Madras Act XXVII of (1939) was not enacted, the position would not have been different, for under the Muslim Personal Law (Shariat) Application Act, It would have been still open to a junior member of the tarward or his heirs to apply for a partition of the property of the tarward under the Muslim Personal Law (Shariat) Application Act.

We are unable to see any basis for this conclusion of the learned Judge. None of the subjects mentioned in Section 2 relates to partition by a living member of the tarward, So far as we are able to gather, the only basis for the learned Judge's conclusion appears from the following sentence:

For it cannot be denied that the object of the Muslim Personal Law (Shariat) Application Act was to put an end to all the anti-Islamic customs and rules that had obtained the force of law and in their stead to apply the original principles of Islamic law itself.

This assumption is certainly not justified by the limited scope of Section 2 of the Act. .. ."

17. In Afzal Alim v. Abdul Mughni (2008 (1) AWC 651), the High Court of Allahabad has held as follows:

"8..The Fourth Addl. District Judge, Meerut allowed the Civil Appeal No. 68 of 1975 and dismissed the suit on the findings that the plaintiff did not make the requisite talabs required to enforce the right of preemption. The appellate court

relied upon Muslim Law by Tayyab Ji and Shri Babu Ram Sharma. Right of preemption is known in Muslim Law as "SHUFA". It is the right, which the owner of a share in the immovable property possesses to acquire another's share in the immovable property for the price for which it has been sold to another person. The right if SHUFA can be claimed by three different classes of persons and one of them is co-sharer ("shafe-e-sharik"), the other two classes are those, who claim the right by way of being owner of adjoining property.

9. . . . The appellate court has relied upon the judgement in Sheikh Mahommed Rafiq v. Khalilul Rehman and Anr., which is the leading case on the point. Para 9 of the judgement deals with Mohammedan Law relating to demand before the suit for preemption is filed. The appellate court has relied upon these observations. In order to decide this appeal, it is necessary to quote these observations as follows;

The Mahommedan Law relating to demand before filing a suit for preemption is of a highly technical nature. It is stated in the Principles of Mahommedan Law by Mulla. 16th Edn., that the talab-i-mowasibal is spoken of as the first demand and the talab-i-ishad as the second demand. The third demand consists of the institution of suit for preemption. Both the talabs are conditions precedent to the exercise of the right of preemption. The first talab should be made as soon as the fact of the sale is known to the claimant. Any unreasonable or unnecessary delay will be construed as an election not to preempt. In some of the cases referred to a delay of 24 hours or even 12 hours was considered too long and it was held that where there has been so much delay the preemptor was not entitled to sustain his claim for preemption. There are other highly technical rules about the presence of witnesses and the nature of evidence which they should give with regard to the second demand, the view of the High Courts being conflicting in the matter.

It seems to us that a strict compliance with all the requirements of the two demands which are necessary before a pre-emptor can succeed in a suit for pre-emption under the Mohammedan Law may become very difficult, particularly, on the question of the promptness and avoidance of delay with regard to the first demand. As stated before a sale shall be deemed to be completed only after the sale-deed has been copied in the books of the Sub-Registrar. If the demand has to be made after such completion it would be virtually impossible or at any rate extremely difficult for any pre-emptor to make the first demand as promptly as required under the principles of Mahommedan Law. It cannot be expected that a pre-emptor should keep a perpetual watch and go on making constant inquiries with regard to the point of time when the office of the Sub-Registrar would copy out the sale-deed in the prescribed book. However, that is a matter on which legislation may become necessary and that is for the Parliament to consider and not for us. .... "

18. Similarly, in S.K.Mitra's Mohammedan Law, edited by S.P.Sen Gupta (II Edition 2001), the learned author enlists six circumstances under which the right

of pre-emption may be lost. They are :

" (i) if the pre-emptor acquiesces in the sale;

(ii) if the pre-emptor who claims pre-emption as the owner of a contiguous property, sells his property to another, after the institution of the suit;

(iii) when the pre-emptor of a superior class enforces his right, the claim of the subordinate class falls through;

(iv) If the vendee acquires an equal or superior right of preemption, before the institution of the suit by the pre-emptor.

(v) When a person having no right of preemption is made a co-plaintiff by a pre-emptor; and

(vi) When the pre-emptor splits the bargain."

In such circumstances, I am of the view that judgment in Krishna Menon v. Kesavan (Vol.20 Mad. Series 305) will not serve any purpose to the applicant.

19. Now the right of preemption is recognised under the Muslim personal law. Therefore, the contention of the learned counsel for the applicant/original 6th defendant that preemption is not available to Muslim cannot be sustained. As per Mohammedan Law, the right of preemption may be claimed by the following classes of persons (i) a Co-sharer in the property (Shafi-i-sharik); (ii) A participator in the immunities and appendages (Shafi-i-khalit) and (iii) An owner of adjoining immovable property (Shafi-i-jar). Therefore, I am of the view that the contention of the learned counsel that the right of preemption is not applied in the Madras presidency, is not sustainable.

20. Yet another contention of the learned counsel for the applicant/original 6th defendant is that the suit has to be rejected on the ground of limitation. According to the learned counsel though plea of limitation is generally mixed question of law and facts, when the suit itself is filed beyond the period of limitation, as specifically provided, the suit should be rejected under Order 7, Rule 11 (d), 7 and 8 CPC. In support of his contention, the learned counsel relied on the judgment reported in (2007) 5 SCC 614 (Hardesh Ores (P) Ltd. v. Hede And Company), wherein the Hon"ble Apex Court in paragraph No.25 and 41 held as follows:

"25.The language of Order 7, Rule 11 , C.P.C. is quite clear and unambiguous. The plaint can be rejected on the ground of limitation only where the Suit appears from the statement in the Plaint to be barred by any law. Mr. Nariman did not dispute that "law" within the meaning of clause (d) of Order 7, Rule 11 must include the law of limitation as well. It is well settled what whether a Plaint discloses a cause of action is essentially a question of fact, but whether it does or does not must be found out from reading the Plaint itself. For the said purpose the averments made in the plaint in their entirety must be held to be correct. The test is whether the averments made in the Plaint, if taken to be correct in



their entirety, a decree would be passed. The averments made in the Plaint as a whole have to be seen to find out whether clause (d) of Rule 11 Order 7 is applicable. It is not permissible to cull out a sentence or a passage and to read it out of the context in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction of words or change of its apparent grammatical sense. As observed earlier, the language of clause (d) is quite clear but if any authority is required, one may usefully refer to the judgments of this court in *Liverpool & London S.P. & I Assn. Ltd. v. M.V. Sea Success I and Popat and Kotecha Property v. State Bank of India Staff Assn.*

41. We are, therefore, satisfied that the Trial Court as well as the High Court were justified in holding that the Plaint deserved to be rejected under Order 7, Rule 11, C.P.C. since the suit appeared from the statements in the Plaint to be barred by the law of limitation. We, therefore, find no merit in these Appeals and the same are accordingly dismissed."

21. In the above background, when the pleadings of the plaint is carefully perused, it is specifically averred by the plaintiff that "A" schedule property consisting of land, ground floor, and the 1st floor was purchased by the plaintiffs and four brothers on 17.8.1977. Thereafter, they have also put up additional constructions in the second floor. Thus, all the six brothers were equally entitled to 1/6th undivided share in the suit property. The plaintiffs have purchased 2/6th share from other brothers and thereby, they became owner of 3/6th share in the suit property and that the first plaintiff is entitled to 1/6th share. The second plaintiff and two other brothers were entitled to 2/6th share. However, one Ismed and 5th defendant have executed power in favour of Mrs. Balkis, the mother of the original plaintiffs and their siblings. The said Balkis, the mother of the plaintiffs and their siblings executed Lease Deed in respect of the first floor portion of the "A" schedule property on 12.09.2009 in favour of one V.M. Thandapani in respect of 2/6th share. The original plaintiffs objected to such Lease Deed claiming that they also have a right in the first floor. Subsequently, while cancelling the Lease Deed executed in favour of V.M. Thandapani, the brother of the plaintiffs and the original 5th defendant have sold the first floor consisting of 2/6th undivided portion, to the original 6th defendant. The original plaintiffs came to know about the sale only on 30.7.2010 and immediately, on 03.08.2010, they applied Encumbrance Certificate in respect of the "A" Schedule property. Thereafter, they have also issued a legal notice on 06.11.2010 for which the defendants issued a reply notice on 13.12.2010. The defendants 1 to 5 have also issued a reply legal notice on 15.12.2010.

22. It is the contention of the original plaintiffs that there was a collusion between the original plaintiffs' mother and the original 6th defendant. It is further averred in the plaint that original 6th defendant, after purchasing the property, applied for name transfer in the Revenue records. Corporation of Chennai in its notice dated 07.01.2011 instead of transferring the name of the

6th defendant in respect of B-schedule property alone, has entered the name of the 6th defendant in respect of the entire "A" schedule property. The plaintiffs also came to know about the wrong entry and issued a legal notice to the authority on 24.3.2011. The Corporation has set out their error on 08.8.2012. Hence, the suit has been filed for declaration to declare the Sale Deed dated 11.12.2009 as null and void and also for consequent mandatory injunction directing the defendants to execute the registered Sale Deed in respect of "B" schedule property in favour of the original plaintiffs, after receiving the entire sale consideration as stipulated in the Sale Deed dated 11.12.2009.

23. Two reliefs were sought in the plaint, one is for declaration to declare the Sale Deed dated 11.12.2009 as null and void and second is to register the property in their name. It is specifically averred by the plaintiff that the sale in favour of original 6th defendant came to be known to them only on 30.7.2010. In paragraph 8 of the plaint, it is pleaded that subject sale is not valid, as the same was made without knowledge and consent of the other co-owners. Therefore, the same is unlawful and illegal and thereby hit by the principles of preemption and also void ab initio. Paragraph 8 of the plaint clearly shows that the plaintiff has claimed his right only on the ground of preemption whereas the first relief is sought for declaration to declare the sale deed as null and void. It is to be noted that the plaintiffs were admittedly aware of the sale in favour of original 6th defendant on 03.07.2010 as it is clear as per their pleading in paragraph 7. They claimed their right on the basis of preemption. The suit has been filed in the year 2013. The suit was presented before this Court on 08.4.2013. In this regard, it is useful to refer to Article 97 of the Limitation Act, which reads as follows:

Description of Suit

Period of Limitation

Time from which period begins to run

97. To enforce a right of preemption whether the right is founded on law or general usage or on special contract

One year

When the purchaser takes under the sale sought to be impeached, physical possession of the whole or part of the property sold or, where the subject matter of the sale does not admit of physical possession of the whole or part of the property, when the instrument of sale is registered.

First limb of Article provides limitation for one year from the date when physical possession of the whole or part of the property sold or taken by the purchaser and the second limb of Article provides a period of one year where the subject matter of the sale does not admit of physical possession of the whole or part of the property, when the instrument of sale is registered.

24. Therefore, it is clear that the period of limitation is specifically provided in the Article, i.e. from the date when the physical possession of the property was taken by the purchaser or when the sale does not admit physical possession of the whole or part, the date of sale gives rise to the period of limitation.

25. To assess whether the suit is filed within the period of limitation, it is useful to refer to the pleadings of the plaintiffs. The plaintiffs themselves admitted that they came to know about the sale on 30.7.2010. Admittedly, the sale in favour of the original 6th defendant was registered on 11.12.2009. The typed set filed by the plaintiffs clearly shows that on 11.12.2009, the Sale Deed was registered and the schedule of the property mentioned in the Sale Deed filed in the typed set indicates that they have purchased the undivided share of 2/6th share in the "A" schedule, and that the typed set does not show about the physical possession. In this regard, it is useful to refer to the judgment reported in AIR 1971 (1) SCC 707 (Sukhnandan Singh Etc. v. Jamiat Singh And Others), wherein the Hon'ble Supreme Court has held as follows:

"8. The next point relates to the plea of limitation. Article 10 of the Second Schedule of the Indian Limitation Act provides a period of one year to enforce a right of preemption whether founded on law or general usage or on special contract, the terminus a quo being the date when the purchaser takes under the sale, sought to be pre-empted, physical possession of the whole of the property sold or where the subject of the sale does not admit of physical possession, the date when the instrument of sale is registered. Section 30 of the Punjab preemption Act applies only when the case does not fall within Article 10. On the finding of the District Judge and of the High Court it is obvious that physical possession of the whole of the property sold was not taken by the vendees, on the date of sale. Therefore, the first part of article does not apply. According to the appellants' counsel the land sold does admit of physical possession and if a part of the land has been taken into possession by the vendees then Article 10 would be inapplicable and section 30 of the Punjab Pre-emption Act would be attracted. In that case the terminus a quo according to Shri Gosain would be the date on which the vendees took under the sale physical possession of any part of such land. The argument in our view is misconceived. The second part of Article 10, in our opinion, covers cases where the subject of the sale, which means the whole of the property sold, does not admit of physical possession and that would be so when a part of the land is in the possession of the tenant. The argument that use of the expression ""subject of the sale"" suggests that this article would apply only if the entire and not only a part of the land is in the possession of the tenants is not acceptable.

The expression ""physical possession"" came up for consideration before the Privy Council in Batul Begam v. Mansur Ali Khan. Lord Robertson speaking for the judicial committee said: ""What has to be considered is has the High Court accurately formulated, the question, Does the property admit of physical possession? The word "physical" is of itself a strong word, highly restrictive of

the kind of possession indicated; and when it is found, as is pointed out by the High Court, that the Legislature has in successive enactments about the limitation of such suits gone on strengthening the language used, -first in 1859 prescribing "possession", then in 1871 requiring "actual possession" and finally in 1877 substituting the word "physical" for "actual", it is seen that word has been very deliberately chosen and for a restrictive purpose. Their Lordships are of opinion that the High Courts are right in the conclusion they have stated. Their Lordships consider that the expression used by Stuart, C.J., in regard to the words "actual possession" is applicable with still more certainty to the words "physical possession" and that what is meant is a "personal and immediate" possession.""

26. The above judgment makes it clear that when the sale does not admit physical possession, second part of Article of Limitation Act would apply. Further, a perusal of the sale deed dated 11.2.2009, it could be easily concluded that handing over of physical possession on the date of sale has not been established. That being the case, the limitation starts from the date of registration of the instrument of Sale. While so, the suit ought to have been filed within the period of one year from the date of sale.

27. From a mere perusal of the above judgments and the pleadings of the original plaintiffs and other materials filed by the original plaintiffs in the typed set, it is seen that on 06.11.2010, though the original plaintiffs sent a legal notice not only to original 6th defendant but also to their mother and other relatives, in paragraph 5, they pleaded that they were aware of the sale in respect of the first floor premises consisting 2/6th share in the entire property on 30.7.2010 itself. This legal notice was sent on 06.11.2010 itself. In the above legal notice, they also clearly stated that they are willing to purchase the said portion of 1st floor i.e. 2/6th share of the portion. The specific recitals in the legal notice is as follows:

".... When the fact remains that my clients are ready and willing to purchase the said portion of 1st floor i.e. 2/6 share of your portion in the property more than the amount of Rs. 1.40 crores which may be fixed by you at a reasonable price. ... "

28. The above categorical admission clearly shows that the parties were enjoying the properties according to the convenience and all along exercised right over the same. The above recitals in the legal notice clearly shows that 2/6th share sold to original 6th defendant is already in their possession. Similarly, in page 8 of the above notice, it is stated by the original plaintiffs 1 and 2 that their mother has no right to handover any physical or constructive possession to a third party.

29. Similarly, the mother of the plaintiff also sent a reply denying the allegations that the properties were undivided. According to her, the properties were divided, demarcated or separated and enjoyed by all the co-sharers individually. On 24.3.2011, the legal notice was sent by the original plaintiffs to the Corporation

authorities, wherein in paragraph "2", they pleaded as follows:

".. .. 2. My clients further state and therefore, there is no dispute with regard to the fact as of now first of my client Mr. Kamil owns three out of six shares of the property and 2nd of my client Mr. Anis Owns one out of six shares in the property. The remaining two out of six shares are with M/s. Balachandra Builders Private Limited since 11.12.2009. .. .."

30. In the above legal notice, it is clearly admitted that the property in question, is held by the original 6th defendant from 11.12.2009. Similarly, in paragraph 6 of the said legal notice, they pleaded that property is jointly owned by the original plaintiffs as well as the 6th defendant, viz., Balachandra Builders Private Limited. In the legal notice dated 24.3.2011 issued by the original plaintiffs to the Corporation, they had categorically admitted that 3rd share is now in possession of the applicant herein. Even assuming that the applicant has taken possession of the property subsequently, the suit ought to have been filed within the period of one year from the date of legal notices dated 06.11.2010 and 24.03.2011 respectively, whereas the suit has been filed only in the year 2013, much after the period of limitation. Though the contention of the learned counsel for the original plaintiffs that the suit property is a undivided property is true, the proper remedy lies for the original plaintiffs is to file suit for partition and not to exercise the right of preemption, that too, after the expiry of limitation period.

31. Insofar the judgments relied on by the learned counsel for the original plaintiffs are concerned, there is no dispute with regard to the proposition laid down in the above judgments. Though the plea of limitation is always mixed question of law and facts, in the instant case, the entire perusal of the plaint averments itself clearly shows that the suit itself is barred by limitation. Therefore, applying the ratio laid down by the Hon'ble Supreme Court in the case *Hardesh Ores (P) Ltd. v. Hede And Company* cited supra, this Court is of the view that it is a fit case which falls within the ambit of Order 7 Rule 11 (d) of CPC for rejection of plaint. The points are answered accordingly.

32. In view of the foregoing discussion, this Court holds that the suit is liable to be rejected. The captioned application is allowed. Consequently, the plaint in C.S.No. 401 of 2013 is rejected. Connected original application is closed.