

(1965) 11 KL CK 0012
In the High Court Of Kerala
Case No : CRP No. 675 of 1965

P. Parukutty Amma and Another

APPELLANT

Vs

K.M. Ramanunni Nair and Others

RESPONDENT

Date of Decision : 26-11-1965

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10(2), Order 7 Rule 11, 115, 149

Citation : AIR 1966 Ker 150

Hon'ble Judges : C.A. Vaidialingam, J

Bench : Single Bench

Advocate : S. Subramania Iyer, for the Appellant; N. Ananthakrishna Iyer, (for No. 1), V.R. Venkitakrishnan, (for No. 2), C.M. Devan, (for Nos. 3, 4, 6, 7, 9, 11, 13 to 30) and V. Balakrishna Eradi, (for No. 5), for the Respondent

Final Decision : Dismissed

Judgement

C.A. Vaidialingam, J.—In this Civil Revision Petition. on behalf of the petitioners who are defendants 31 and 32. Mr. S. Subramania Iyer learned counsel challenges the order passed by the learned Subordinate Judge of Oltapalarn in I. A. No 471 of 1965 in O. S. 65/56 on the file of that court

2. From the statement of facts in the civil revision petition, it is seen that the 1st respondent to this revision petition, originally instituted the suit O. S. 65 of 1056 for partition of the suit properties, as appurtenant to the Sthanam of the 1st defendant: and that claim was made on the basis of the provisions of the Madras Marumakkathayam (Removal of Doubts) Act 1955 (Madras Act XXXII of 1955) It is also seen that in that suit, the plaintiff wanted a partition of the properties after set ting aside several alienations stated to have been effected by the 1st defendant in favour of some of the parties to the suit, including the present revision petitioners The petitioners contested the claim made by the plaintiff as also the reliefs that he wanted to obtain in the suit

3. While matters stood thus the Sthani, who was the 1st defendant died in

January 1960 and in May 1960 the Supreme Court declared Madras Act XXXII of 1956 as up constitutional and ultra vires. Therefore the plaintiff had necessarily to make certain amendments to the original plaint : and therefore the suit appears to have been amended, claiming partition under Sub-section (3) of Section 7 of the Hindu Succession Act. 1956 (Central Act 30 of 1956) No doubt there appears to have been a challenge directed as against the order of the trial Court, allowing the plaintiff to amend his plaint. But that order was con-tinned by this Court on 9-1-1963 It is also seen that certain proceedings were taken to challenge the constitutional validity of the material provisions contained in the Hindu Succession Act, 1956: and that attempt also failed

Ultimately if is seen that I. A No. 163 of 1960 was filed by the 2nd defendant, to direct the plaintiff to delete the Elaya Sthanam properties, namely those properties enumerated in Schedules C and D There was a direction given by the trial Court on the said application to that effect but that direction was not carried into effect by the plaintiff Therefore, there was an application filed, namely I. A. 903 of 1963, to dismiss the suit for failure of the plaintiff to comply with the directions given by the court. The plaintiff, in turn, appears to have filed I. A.1003/1963 to excuse the delay in carrying out the amendment; and that application was allowed on 17 7 1963 Ultimately after all these skirmishes, the plaint itself was amended on 9-6-1965, and the plaint, as it now stands, is for partition, on the basis of the Hindu Succession Act, 1956.

4. The contesting defendants appear to have raised certain objections that proper court fee has not been paid by the plaintiff Therefore the court passed an order on 9-12-1964 directing the plaintiff to pay additional court fee But the plaintiff filed I. A. 27 of 1964 to review the order dated 9-12 1964 Ultimately the court, after reviewing the order passed earlier, passed a fresh order on 19-2 1965 directing the plaintiff to pay the court fee within 10 days i.e., on or before 23-1965 It may also be stated that the Sthani. 1st defendant, himself died, and that was why the suit had to be amended, basing the claim for partition on the basis of the Hindu Succession Act. 1956

5. On 2-3-1965 the original plaintiff namely the 1st respondent herein did not pay the necessary court fee. In consequence, two applications were filed by the 18th defendant in the suit, namely the 18th respondent herein, on 2-3-1965 being (a) I. A. No 447/65 to transpose him as plaintiff and to transpose the original plaintiff to the array of defendants, and (b) I. A.448/66 to permit the 18th defendant, who was to be transposed as plaintiff, to pay the court fee in accordance with the order of the court dated 19-2 1965. The petitioners, in turn on 6-3-1965 filed an application. I. A. 471/1965 praying for dismissal of the suit on the ground that the original plaintiff had not complied with the directions of the court regarding payment of necessary court fee, and that therefore the court was bound to reject the plaint under Order VII, Rule 11, Sub-rule (c) C.P. C.

6. All these three applications have been disposed of by the learned Subordinate Judge by a common order dated 8th June 1965.

By that order, the learned Judge has, notwithstanding opposition raised by some of the parties, including the petitioners, allowed I. A. 447 and 448/65 and dismissed I. A. 471/65. So far as the applications filed by the 18th defendant, namely I. A. 447 and 448 of 1965, are concerned, the view of the learned Subordinate Judge is that a very wide jurisdiction has been given to the court under Order 1, Rule 10(2), C. P. C., to transpose parties at any stage of the proceedings. And in this case, it is the further view of the learned Subordinate Judge that the various defendants, whose right to claim shares in the partition suit is accepted, have paid necessary court fees, claiming shares, and that court fees have also been paid by them in accordance with the provisions of the Madras Court fees and Suits Valuation Act, 1955 (Madras Act 14 of 1955). The learned Judge is also of the view that inasmuch as this is a partition suit, and as, according to the 18th defendant, the original plaintiff will not be prosecuting the suit property it has become necessary for him, as a sharer, to get himself transposed as plaintiff and to continue the suit, and in consequence, he should also be permitted to pay the necessary court fee which the original plaintiff was called upon to pay by order dated 19-2-1965. These are the reasons given by the learned Subordinate Judge for accepting the applications I. A. 447 and 448 of 1065 filed by the 18th defendant.

Dealing with the application I. A. 471/66. filed by the petitioners, the learned Subordinate Judge is again of the view that it can-not be stated that during the period 19-2-1965 to 2-3-1965 there was no plaint in the eye of the law in respect of which the orders sought for by the 18th defendant could be passed And the learned Subordinate Judge, in that connection, has also referred to some of the decisions placed before him by the parties concerned. Ultimately the learned Judge is of the view that, inasmuch as he is accepting the claim made by the 18th defendant, and has transposed him as plaintiff, after paying the necessary court fee, and inasmuch as the court itself was not inclined to reject the plaint for non-payment of court fees, I. A. 471/1965 has to be dismissed; and in that view the learned Judge dismissed the said application

7. Mr. Subramania Iyer, learned counsel for the petitioners, going by the manner in which the civil revision petition has been framed, attacks directly only the order of the lower court dismissing the application filed by his clients, namely I. A. No. 471 of 1965. He has also raised several other grounds which relate to the reasons given by the lower court for allowing I. A. Nos. 447 and 448 of 1966 1 am particularly referring to this aspect, because according to Mr. Subramania Iyer. though technically the revision petition is directed as against the order passed in I. A 471/1966. nevertheless, in substance, his clients are attacking the jurisdiction of the court to pass any orders on what, according to him, is no plaint in the eye of the law, till the necessary formalities have been complied with. And according to the learned counsel, the court had no jurisdiction at all to entertain the applications filed by the 18th defendant, to transpose him as plaintiff and to permit him to pay the court fees; and the orders on those applications are a nullity. And, inasmuch as all the three applications have been dealt with by the

lower court in common, and the reason given by it for rejecting the application filed by his clients, is really the allowing of the two applications filed by the 18th defendant, the learned counsel pointed out that if he is able to satisfy this Court that the lower court had no jurisdiction to pass the orders in I. A. 447 and 448 of 1965, it will necessarily follow that this Court will have to consider as to whether the lower court was justified in rejecting I. A. 471/ 1965 filed by his clients.

8. No doubt, this stand taken by the learned counsel for the petitioners is controverted by Mr. K. V. Suryanarayana Iyer appearing for the 18th defendant, who has been impleaded as the plaintiff and who is the 18th respondent in this revision petition.

According to Mr. Suryanarayana Iyer, notwithstanding the fact that the reasons given by the lower court may be the same and all three applications have been dealt with by a common order, nevertheless the petitioners are challenging in this revision petition only the order rejecting their application, namely I. A. 471/ 1965, and therefore inasmuch the orders passed in I. A. 477 and 478/65 are not being challenged by them, those orders have become final. Though I see considerable force in this contention of the learned counsel for the 18th respondent, ultimately it is only a purely technical matter; and, inasmuch as the lower court has considered all the applications together, I do not propose to accept this technical objection raised by the learned counsel for the 18th respondent, more especially as the jurisdiction of the court. during the particular period, to entertain the applications filed by the 18th defendant to transpose him as plaintiff and to - permit him to pay the deficit court fees, is under challenge at the hands of the learned counsel for the petitioners. Therefore I will consider the entire attack levelled as against the order passed by the lower court, allowing the transposition of the 18th defendant as plaintiff, and also permitting him to pay the necessary court fees on the plaint

9. Before I advert to the contentions that have been raised by the learned counsel for the petitioners, it is necessary to refer to some of the provisions contained in the Madras Court Fees and Suits Valuation Act. 1955 as also in the CPC. There is no controversy that the provisions in the Court Fees Act. which apply to the matter on hand, are those contained in the Madras Court-fees and Suits Valuation Act. 1955 (Madras Act 14 of 1955) hereinafter to be referred to as the Act. Section 4 of the Act. occurring in Chapter II relating to Liability to Pay Fee, deals with levy of fee in courts and public offices. Omitting the proviso, the section will be as follows:

"4. Levy of fee in Courts and public offices.--

No document which is chargeable with fee under this Act shall--

(i) be filed, exhibited or recorded in, or be acted on or furnished by any Court including the High Court, or

(ii) be filed, exhibited or recorded in any public office, or be acted on or furnished

by any public officer, unless in respect of such document there be paid a fee of an amount not less than that indicated as chargeable under this Act:

XX XX XX Considerable reliance has been placed by the learned counsel for the petitioners particularly on Clause (1) of Section 4 to the effect that there is a total prohibition, so to say, according to the learned counsel, which stands in the way of the court taking any action on the basis of the plaint in this case as it was during the period 19-2-1966 to 2-3-1966 Section 5 of the Act deals with fees on documents inadvertently received, and is as follows"

"5 Fees on documents inadvertently received.--

When a document on which the whole or any part of the fee prescribed by this Act has not been paid is produced or has, through mistake or inadvertence, been received in any Court or public office, the Court or the Head of the office may, in its or his discretion at any time, allow the person by whom such fee is payable to pay the fee or part thereof, as the case may be within such time as may be fixed: and upon such payment, the document shall have the same force and effect as if the full fee had been paid in the first instance."

10. Pausing here for a minute, it may be stated that Section 4 of the Act more or less corresponds to the provisions contained in the Court fees Act, 1870 (Central Act 7 of 1870) namely Section 4 relating to jurisdiction of the High Courts and Section 6 relating to the jurisdiction of subordinate courts. Now both these matters have been combined in Section 4 of the Act: but substantially the provisions contained in Section 4 and Section 6 of the Central Act of 1870 are more or less the same as those contained in Section 4 of the Act. I am only referring to these aspects, because in some of the decisions relied on by counsel, reference has been made to the provisions of the Central Act 7 of 1870 which the High Courts had to deal with, and also to Section 54 of the Code of Civil Procedure, which was then in force, corresponding to Order 7, Rule 11 of the present Code. It may also be stated that Section 5 of the Act extracted above, substantially corresponds to Section 28 of Central Act 7 of 1870. In Section 28 of the Central Act 7 of 1870 in respect of a document received through mistake or inadvertence, and which was not affixed with proper court fee or stamp which it ought to bear under the Act, provision is made for collecting the necessary fee or stamp and when once the requirement of payment of additional fee is complied with, the document so received by inadvertence and every proceeding relating thereto shall be as valid as if it had been properly stamped in the first instance.

11. Sections 11 and 12 of the Act, occurring in Chapter III dealing with Determination of Fee, specifically refer to "decision as to proper fee", i.e., Section 11 deals with decision as to proper fee in the High Court, and Section 12 deals with decision as to proper fee in another Courts Sub-section (1) of Section 12 of the Act deals with the jurisdiction of the court, before ordering the plaint to be registered, to decide, on the materials and allegations contained in the plaint, the exact court fee payable thereon; and the decision of the court under Sub-

section (1) is no doubt subject to review, further review and correction in the manner specified in the succeeding Sub-sections of Section 12. Subsection (2) of Section 12, which is more or less in the nature of a new provision, gives a right to a defendant, at the stage and in the manner provided therein, to plead that the subject-matter of the suit has not been properly valued or that the fee paid is not sufficient. This subsection also provides that all questions arising on such pleas shall be heard and decided before evidence is recorded affecting such defendant. on the merits of the claim That Sub-section winds up by stating ultimately that if the court accepts the contention of the defendant, namely that the subject-matter of the suit has not been properly valued or that the fee paid is not sufficient, then the Court shall fix a date before which the plaint shall be amended in accordance with the court's decision and the deficit fee shall be paid. Then provision is also made in this sub-section to the effect, that if the court's directions are not complied with, either in the matter of amending the valuation or paying the deficit fee within the time allowed, the plaint shall be rejected and the court shall pass such order as it deems just regarding costs of the suit

A similar right to raise objection about the subject matter of suit, not having been properly valued or fee paid not being sufficient, is again given, under Sub-section (3) of Section 12 of the Act to a defendant who has been added after framing of issues Sub-section (4) (a) of Section 12 of the Act deals with the powers of a Court of Appeal to consider the correctness of any order passed by the lower court affecting the fee payable on the plaint or in any other proceeding in the lower court and determine the proper fee payable thereon And under Clause (b) of Sub-section (4) it is seen that if the court of Appeal decides that the fee paid in the lower court is not sufficient, the Court shall require the party liable to pay the deficit fee within such time as may be fixed by it Clause (c) of Sub-section 4 is a consequential provision to the effect that if the deficit fee is not paid within the time fixed, and the default is in respect of a relief which has been dismissed by the lower court and which the appellant seeks in appeal the appeal shall be dismissed; but if the default is in respect of a relief which has been decreed by the lower court, then the deficit fee shall be recoverable as if it were an arrear of land revenue. Therefore, it will be seen that under Sub-section (2) of Section 12 of the Act, a right, so to say, is given to a defendant, in the manner and at the stage referred to therein, to raise objection, either to the valuation of the suit or to the payment of court fee on the plaint, and if after an investigation, the court accepts the plea of the defendant and gives time to the plaintiff to pay the deficit fee and such deficit fee is not paid, the court shall reject the plaint.

12. One of the contentions raised by the learned counsel for the petitioners, is particularly based upon the provisions of Section 12(2) of the Act, to the effect that inasmuch as a right, so to say, is given to parties like his clients, namely the defendants, to raise objection regarding the sufficiency of court fees and in this case, particularly such objection having been raised by them and accepted by the

court and the plaintiff having called upon to pay the additional court fee on or before 2-3-1965, and the original plaintiff not having done so the only jurisdiction that the court has is to act in accordance with the concluding part of Sub-section (2) of Section 12 of the Act namely to reject the plaint And, inasmuch as in this case, that has not been done, according to the learned counsel, the lower court had no jurisdiction to entertain the applications filed by the 18th defendant. No" doubt, in this connection, the provisions of Order 7, Rule 11 are also adverted to, to which reference will be made be me immediately

13. Coming to the provisions contained in the Code of Civil Procedure, Section 26, dealing with institution of suits, states that "every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed". Section 149 which assumes considerable importance, in my opinion, in these proceedings, is as follows.

"149. Power to make up deficiency of court fees.--Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court-fees has not been paid, the Court may, in its discretion, at any stage, allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such court-fee: and upon such payment, the document, in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance "

Under Section 149 extracted above, it will be seen that though originally the whole or any part of any fee prescribed for a document relating to court-fees, had not been paid, the court has got jurisdiction, at any stage, to "allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such court-fee.", and provision is also made to the effect that "upon such payment, the document, in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance" Therefore, in this case there can be no controversy that if the original plaintiff had paid the court-fee which he was called upon to pay, on or before 2-3-1905, as directed by the lower court, the plaint originally filed by him will have retrospective effect from the date of institution and there will be no infirmity whatsoever. Section 149 finds a place for the first time in the Code of 1908; and that aspect will have to be borne in mind in considering some of the decisions placed before me by learned counsel for the petitioners

14. The other provisions in the CPC that have to be noted, are those contained in Order 1. Rule 10(2), which gives wide jurisdiction to the court, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, to order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added. It will be seen that very wide powers

have been given to the Court to take action under Order 1, Rule 10(2), either suo motu or on application of either party, in the matter of striking off or adding any party to the suit, and that such power can be exercised at any stage of the proceedings. One of the questions that will have to be considered in this case will be whether the provisions contained in Order 7, Rule 11, particularly Clause (h) thereof, control the provisions contained in Order 1, Rule 10(2).

15. Order 4 deals with institution of suits. Sub-rule (1) of Rule 1 of that Order provides that every suit shall be instituted by presenting a plaint to the Court or such other officer as it appoints in that behalf. This provision is substantially similar to Section 26 of the Code, which has been referred to earlier, excepting that in Rule 1 of Order 4 it is specifically stated that the plaint is to be presented to "the Court" whereat the expression "Court" does not find a place in Section 26. Sub-rule (2) of Rule 1 of Order 4 provides that every plaint shall comply with the rules contained in Orders 6 and 7, so far as they are applicable; and there can be no controversy that a plaint, as contemplated in the Code, will have to comply with these provisions. It is not necessary to consider the provisions contained in Order 6 which deals with pleadings generally. But it is necessary to consider some of the provisions of Order 7 which deals with plaints. Rule 1 of Order 7 lays down the various particulars to be contained in a plaint. Under Clause (e) of Rule 1 it will be seen that one of the matters to be mentioned in the plaint relates to the facts constituting the cause of action for the suit and as to when exactly it arose; and under Clause (i) it will be seen that the plaint must contain a statement of the value of the subject-matter of the suit for the purposes of jurisdiction and of court fees, so far as the case admits. I am particularly referring to this aspect, because when we come to Order 7, Rule 11, the court has been given jurisdiction to reject the plaint, in the particular circumstances mentioned therein, including on one of the grounds, namely where the plaint does not disclose a cause of action. And that is why I have referred to Clause (e) of Rule 1 of Order 7 to the effect that the plaint must aver the facts constituting the cause of action and as to when exactly it arose. Rule 11 of Order 7 enumerates the various circumstances under which a plaint can be rejected. A plaint can be rejected, as will be seen from Rule 11, under one or other of the four contingencies referred to therein, namely (a) where it does not disclose a cause of action, (b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so, (c) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp paper within a time to be fixed by the Court, fails to do so, and (d) where the suit appears from the statement in the plaint to be barred by any law. We are particularly concerned in this case with the provisions of Clause (c) of Rule 11 of Order 7, namely where the court had found that proper court fee had not been paid, and the plaintiff, after the court gave him time to pay the deficit court fee, by order dated 19-2-1965, on or before 2-3-1965 failed to do so. Under these circumstances, no

doubt Rule 11 of Order 7 provides, that "the plaint shall be rejected in the following cases." The point to be noted is that it is not as if that the court, the moment it finds that the plaint has not been affixed with sufficient stamp, has got the jurisdiction to reject the plaint forthwith, on the other hand, Clause (o) of Rule 11 states that the court will have to require the plaintiff to supply the requisite stamp paper within a time to be fixed by the court and it is only after the plaintiff fails to supply the requisite stamp that the court gets jurisdiction to reject the plaint. Under Rule 12 of Order 7, it is seen that where a plaint is rejected, the Court shall record an order to that effect with the reasons for such order. I am particularly referring to Rule 12 of Order 7 because unless the Court passes an order rejecting a plaint, for one or other of the several reasons mentioned in Clauses (a) to (d) of Rule 11 of Order 7. it must be considered that the plaint is still before the Court, in the eye of the law because even when an application is filed by a party for extension of time for payment of additional court fee and there is rejection by the court of such application, it will not amount to rejection of the plaint itself.

16. In this connection it is necessary (sic) refer to the Division Bench judgment of Horwill and Shahabuddin JJ of the Madras High Court reported in Kumaraswamiah v. Krishna Reddy ILR 1947 Mad 220 : (AIR 1947 Mad 84) In that case it will be seen that the suit itself was filed on a promissory note on the last day of limitation, namely 11th January 1945, with a nominal court-fee; and along with the plaint the plaintiff had filed an application for grant of time for payment of court fee. The time asked for was 14 days. That application was granted. When that period was about to expire, namely on 24th January 1945. the plaintiff filed an application asking for extension of further time That application was rejected on 25th January 1945 Pausing here, it may be stated that what was rejected was not the plaint itself, but the application filed by the plaintiff for extension of time for payment of court fee. No orders rejecting the plaint as such were passed by the court, and the plaint remained on file until 30th January 1945. on which date the Subordinate Judge passed an order that the plaint was to be deemed as rejected as on 25th January 1945, namely on the date when the court passed the order rejecting the request of the plaintiff for grant of further extension of time But in the meanwhile, i.e. when the plaint was on file, on 29th January 1945, the plaintiff filed two applications, one for a review of the order refusing to extend the time, and the other for extension of time The court, notwithstanding opposition by the defendants in the case, appears to have found that there was sufficient cause for review, and passed an order enlarging the time and directing the plaintiff to pay court-fee by the 26th June 1945. The defendants then appealed that order before the High Court on the ground that inasmuch as the court had rejected the plaint by order dated 30th January 1945 and that order according to the directions given by the learned Subordinate Judge, must be deemed to have taken effect from 25th January 1945 the applications filed by the plaintiff on 29th January 1945 should not have been entertained because there was no plaint in the eye of law before the court This

contention was rejected by the learned Judges

Horwill. J.. delivering judgment on behalf of the Court, has held that when the plaintiff filed the application on 29th January 1945, the plaint was still in court and the Subordinate Judge had jurisdiction to consider that application and to extend the time for paying the required court fee. The learned Judge has also held that Order 7. Rule 12, C. P. C. requires the court to pass an order when it rejects the plaint, giving reasons for doing so and that order was not passed till 30th January 1945 by which time the plaintiff had already filed the two applications on 30th January 1945. Therefore the orders passed by the Subordinate Judge, on the applications filed by the plaintiff on 29th January 1945 "were held to be legal No doubt, those two applications related to grant of time for payment of court fee. but I am only relying upon this decision of the Madras High Court for a limited purpose namely that inasmuch as the court in the case before me had not passed an order under Order 7 Rule 12 rejecting the plaint for one or other of the reasons mentioned in Order 7. Rule 11, it must be considered that the plaint was still before the court in the eye of law. To more or less the same effect is the Full Bench decision of this Court, to which I was also a party, reported in *Kathyee Cotton Mills Ltd. Vs. R. Padmanabha Pillai and Others*, : 1957 Ker LT 1175. As to what further action can be taken, on the basis of such a plaint, is a matter which arises for consideration in this revision.

17. Mr. Subramania Iyer, learned counsel for the petitioners urged that u/s 4(1) of the Act, it is categorically provided that no document, which is chargeable with court fee under the Act, shall be filed, exhibited or recorded in, or be acted on or furnished by any Court including the High Court. The learned counsel particularly laid considerable emphasis on the expression "or be acted on" in the said section, in support of his contention that the Court, when it entertained the applications. I. A 447 and 448 of 1965, filed by the 18th defendant, really acted on the plaint, which could not be considered, in the eye of law to be before the court, till the original plaintiff had complied with the directions of the court regarding payment of court fee as per is order dated 19-2-1965.

The learned counsel", in this connection placed considerable reliance on the provisions of Section 12(2) of the Act, to the effect that under those circumstances the defendant has been given a right to raise objection regarding the correctness of the court fee paid by the plaintiff: and that accepting such a contention raised by the defendant in this case the court had given time to the plaintiff to make up the deficiency in court fee on or before 2-3-1965. Therefore the learned counsel urged that apart from the penal consequence referred to in Section 12(2) of the Act, the only order that the court was hound to pass when the original plaintiff did not comply with the directions of the court regarding payment of additional court fee on or before 2-3-1965. was to take section under C. P. C. Order 7. Rule 11, read with Order 7. Rule 12. i.e.. under Order 7. Rule 11(c) the court has got jurisdiction only to reject the plaint, if proper court fee has not been paid even after the plaintiff was called upon to pay the same.

The learned counsel also pointed out that Order 7. Rule 11 makes the rejection obligatory because the expression used is that "the plaint shall be rejected" by the court. Therefore the learned counsel urged that there was no option for the court except to act in accordance with the mandatory provision contained in the concluding part of Section 12(2) of the Act, read with Rules 11 and 12 of Order 7 C. P. C. The learned counsel also urged it the plaint can for any purposes be considered to be before the court the only action that can be taken by the court in respect of such plaint is to entertain an application that may be filed by the plaintiff who had already been called upon to pay court fee for extension of the time for payment of court fee and. excepting for this limited purpose, namely to entertain such an application connected with a request for payment of court fee and for extension of time the court according to the learned counsel, has no jurisdiction to take any further action on the basis of such a plaint; and if default is committed in the payment of the court fees within the time allowed, then the court is bound to reject the plaint. In this case, inasmuch as the original plaintiff has not admittedly paid the court fee, the learned counsel urged that the jurisdiction of the court is only to reject the plaint and not to entertain any application, as it has done, at the instance of the 18th defendant, namely to transpose him as plaintiff and permit him to pay the court fees Those applications the learned counsel points out could not be entertained at that stage, find, if at all the court will have jurisdiction to entertain such applications and consider the request of the 18th defendant to transpose him as plaintiff, only when the original plaintiff has complied with the direction regarding payment of deficit court fee Therefore the learned counsel for the petitioners urged that in this case the order of the lower court entertaining the applications filed by the 18th defendant and passing orders thereon, is absolutely illegal and without jurisdiction In consequence the learned counsel urged that the application tiled by his clients namely I. A. No 471/1965, should have been ordered by the lower court

18. Mr. K. V. Surianarayana Iyer learned counsel for the 18th respondent 18th defendant, has controverted the stand taken by the learned counsel for the petitioners The learned counsel pointed out quite naturally that there is no revision petition filed by the petitioners is against the order passed by the lower court in I. A. Nos. 447 and 448 of 1965 1 have already dealt with this aspect and indicated that this is a very technical objection Inasmuch as a common order has been passed by the lower court, and the reasons given by it for accepting the applications filed by the 18th defendant are, so to say, the same reasons given for rejecting I. A. 471/1965. I do not think can accept this technical objection raised by the learned counsel for the respondent that this Court must confine the petitioners only to the attack, in so far as the order relates to the rejection of I. A. 471/1965. In fact I have already dealt with this part of the case at the beginning of this judgment Therefore I will have to consider the correctness of the order passed on all the applications; and this contention of the learned counsel for the respondent cannot be accepted

19. The learned counsel for the respondent further urged that notwithstanding the fact that Section 12(2) of the Act has now given a right to a defendant at the stage and in the manner indicated therein, to raise objection to the proper valuation of the suit as well as to the sufficiency of court fees paid on the plaint, nevertheless, if a decision has been given adverse to him he has no jurisdiction at all to come to this Court with a grievance u/s 115 of the Code of Civil Procedure. The learned counsel points out that the question of payment of court fee is essentially a matter between the court and the plaintiff, and the defendant can only raise objection and place it before the court for consideration; and if the objection is not accepted he can have no further grievance so as to enable him to come to this Court.

The learned counsel also pointed out that during the period 19-2-1965 to 2-3-1966, i.e. the date on which the original plaintiff was directed to pay the deficit court fee to the date on or before which he was directed to pay the court fee, it is not as if there was no plaint in the eye of the law before the court, on the basis of which no orders at all could be passed by the lower court. On the other hand the learned counsel points out that there was a plaint before the court, though it may have been a defective plaint, in the sense that the full court fee on the plaint was yet to be paid. The learned counsel pointed out that by virtue of the provisions contained in Section 149. C. P. C. the payment of court fees in accordance with the directions given by the court on 19-2-1965 really puts back the clock and validates the plaint even from the date when it was originally filed. I understood the learned counsel to urge that all orders passed by the lower court on such a defective plaint during the interregnum will also have the same effect by virtue of the provisions of Section 149. C. P. C.

I am not inclined to rest my decision on such a basis alone, because, in my view, a decision can very well be given on the important aspect on a more substantial basis after referring to some decisions bearing on that aspect. But this contention of the learned counsel for the respondent, namely that there was a plaint though a defective plaint--before the court during the period 19-2-1955 to 2-3-1965 on the basis of which certain actions can be taken by the court, is a matter to which I will advert to and express my opinion in the latter part of the judgment.

The learned counsel for the respondent urged that in this case under the provisions of Order 10(2) very wide powers are given to the court in the matter of impleading or striking parties, and that power can be exercised by the court either suo motu or on request made by either party and therefore, in this case, the court itself could very well have impleaded the 18th defendant as plaintiff when it found that the plaintiff was not diligent in prosecuting the suit, more especially when the suit itself is for partition all parties must be considered to occupy the rank of plaintiff. Therefore, according to the learned counsel, when both provisions of Order 1, Rule 10 and Order 7, Rule 11 exist the court will have to reconcile these and give a reasonable interpretation having due regard to the

provisions contained in Section 149. C. P. C. If an these provisions are to be reconciled, the learned counsel points out Order 7. Rule 11 deals with a straight case when there is no other matter arising for consideration excepting to find out as to whether any one "I the infirmities mentioned in Clause (b) of Rule 11 (sic) Order 7 exists, and if that is so the court has jurisdiction to pass an order rejecting the plaint. In this case, the learned counsel points out that actually no order rejecting the plaint has been passed by the lower court, and the application filed by the petitioners, namely I. A. 471/1965, was requesting the court to dismiss the suit on the ground that the court fee has not been paid. It was certainly within the discretion of the lower court, the learned counsel points out, either to grant extension of time for payment of court fee or to refuse the request, but the petitioners cannot certainly compel the court to dismiss the suit on the ground that the court fee directed to be paid by the original plaintiff was not paid, if the court was otherwise inclined to grant time. Therefore on all these grounds, the learned counsel points out that at least for a limited purpose, the court has jurisdiction to give necessary directions on the plaint that was before the court in the eye of law even during the period 19-2-1965 to 2-3-1965. In this connection the learned counsel also referred me to certain decisions to which I will refer immediately

20. I have already dealt with the technical objection, no doubt, raised by Mr. Suria narayana Iyer learned counsel for the respondent, that no revision as such has been filed by the petitioners against the orders of the lower court on I. A. 447 and 448 of 1965, and I have already rejected that objection. Again, if the question that arises for consideration in this civil revision petition relates only to the question of court fees, the learned counsel for the respondent is well founded in his contention that it is not open to the petitioners, who are only defendants, to come to this court with a grievance u/s 115, C. p. C. The Supreme Court had occasion to consider that aspect with special reference to the provisions contained in Section 12(2) of the Act, in the decision reported in Sri Ratnavaramaraja Vs. Smt. Vimla, . In that decision, the Supreme Court had occasion to consider as to how far a defendant who raised objection regarding the correctness of the court fee u/s 12(2) of the Act can come to the High Court with a grievance u/s 115. C P. C. as well as regarding the jurisdiction of the High Court under those circumstances The learned Judges state that the question as to whether proper court-fee is paid on a plaint, is primarily a question between the plaintiff and the State, and the jurisdiction in revision exercised by the High Court u/s 115 of the CPC is strictly conditioned by Clauses (a) to (c) thereof. The Supreme Court further observes that the defendant, who may believe and even honestly, that proper court fee has not been paid by the plaintiff, has still no right to move the superior courts by appeal or in revision against the order adjudging payment of court fee payable on the plaint; nevertheless he has no right to move the High Court in revision under the Madras Act or any other statute against the decision of the court of first instance on the matter of court fee payable on the plaint. In particular the Supreme Court refers to the provisions contained in

Section 12(2) of the Madras Act, which, no doubt enables so to say, a defendant to raise a contention regarding the correctness of the court fee payable on a plaint and to assist the court in arriving at a just decision on that question. But according to the Supreme Court, there is no provision in the Madras Act or any other statute, which enables the defendant to challenge the decision of the trial court by invoking the jurisdiction of the High Court u/s 115, C. P. C. Therefore, if the question that arises for consideration in this case relates only to the adequacy of the court fee payable by the party concerned, surely the petitioners cannot come to this Court in revision, in view of the decision of the Supreme Court referred to above. Therefore the petitioners cannot certainly challenge the discretion exercised by the trial court in the matter of granting time for payment of the court fee. If such direction had been given in favour of the original plaintiff, the petitioners can have no grievance whatsoever.

21. But the other question is as to how far the entertaining of the application filed by the 18th defendant to transpose him as plaintiff during the period 19-2-1965 to 2-3-1965, is one which the trial court was competent to entertain and pass orders thereon. Again, if the attack in these proceedings is only against the transposition of the 18th defendant as plaintiff, as prayed for by the 18th defendant in I. A. 447/1965, then again the petitioners' grievance cannot at all be considered to be well founded because the suit is one for partition and the trial court has very elaborately gone into this aspect, and after noting the defence of the various parties has also found that the various defendants who have claimed their shares in the properties have paid necessary court fees. In the case of a partition suit it is needless to state that all parties are in the position of plaintiff. More than that, the Supreme Court had again occasion to consider the right of a defendant in a partition action to get himself impleaded as plaintiff, and in that connection the Supreme Court had to consider the scope of the provisions contained in Order 1, Rule 10(2), C. P. C. That decision of the Supreme Court is reported in R.S. Madanappa and Others Vs. Chandramma and Another, In that decision the Supreme Court lays down two propositions, namely (a) that the defendant in the partition suit could also have applied under Order 1, Rule 10(2), C. P. C. to get herself transposed as a co plaintiff in the action and the court could have ordered her transposition as plaintiff: and (b) the power of the court under Order 1, Rule 10(2) can be exercised by the court even suo motu without any application by the party concerned. In this connection the Supreme Court quotes with approval the observation of the Privy Council in AIR 1931 162 (Privy Council), in the effect that the power vested in Order 1, Rule 10(2) ought to be exercised by a court for doing complete justice between the parties. Therefore, in this case the party namely the 18th defendant who has been transposed as the plaintiff by order dated 8-6-1965 in I. A. 447/1965, is admittedly a sharer and has also paid the necessary court fee. Therefore, he was, according to the decision of the Supreme Court, entitled to be impleaded as plaintiff at any stage of the proceedings. And in this case, the application filed by him for getting himself transposed as plaintiff, cannot certainly be considered to

be not valid; nor can it be stated that the exercise of jurisdiction by the lower court in allowing him to be impleaded as plaintiff is one without jurisdiction.

No doubt, I am aware of the contention of the learned counsel for the petitioners that all these filings could be done when once there is a proper plaint, in the sense that all the formalities of law have been complied with and the original plaintiff has paid the court fee as directed by the order dated 19-2-1965. I am clearing some of these grounds in order to consider the more serious objection no doubt pressed before me by the learned counsel for the petitioners. Therefore the position is that the petitioners cannot certainly raise any ground of attack regarding the extension of time for payment of court fee and they cannot also certainly oppose the application filed by the 18th defendant, who is one of the sharers, to get himself transposed as plaintiff. As to whether those orders could have been passed on applications filed during the period 19-2-1965 to 2-3-1965, is a matter which will be dealt with by me later.

22. Therefore the question that now arises for consideration is as to what exactly is the effect of the plaint that was before the court in law, during the period 19-2-1965 to 2-3-1965, and as to whether the court had jurisdiction to entertain on 2-3-1965 the two applications I. A 447 and 448 of 1965, filed by the 18th defendant. According to Mr. Subramania Iyer, learned counsel for the petitioners, that plaint can only be considered to be in court for the limited purpose of granting extension of time for payment of court fee at the instance of the person against whom the original order was passed, and that no other order of any nature could be passed on the basis of that plaint. That is a large contention that has been taken by the learned counsel for the petitioners. No doubt the stand that has been taken by him is very strenuously controverted by Mr. Surianarayana Iyer, learned counsel appearing for the 18th respondent.

23. The earliest decision that has been referred to by the learned counsel for the petitioners is the Full Bench decision of the Allahabad High Court reported in *Jainti Prasad v. Bachu Singh*. ILR (1893) All 65. No doubt that decision is based upon the provisions contained in Section 54 of the CPC which was then in force, viz., Act XV of 1877, corresponding to Order 7 Rule 11(c) of the present Code. But it must be noted that provision similar to Section 149 of the present Code did not exist in the Code of 1877. In that decision the learned Judges had to consider as to whether when a plaint was filed on the last day of limitation with deficit court fees, by the court granting extension of time for payment of court fee u/s 28 of the Court Fees Act, Central Act VII of 1870, it can be considered that it has got retrospective effect and the suit could be treated as filed within time. The learned Judges proceeded on the basis that such a plaint will be barred by limitation. I have already indicated that Section 149 of the present Code did not exist in the Code of 1877.

More or less similar view has been taken by a Division Bench of the Madras High Court by Shephard and Davies, JJ., in the decision reported in *Venkatramayya v. Krishnayya*. ILR (1897) Mad 319. But a slightly different or modified view was

taken in a later decision by a Division Bench of the Madras High Court consisting of Subramania Aiyar and DM vies, JJ.. reported in Assan v Pathumma, ILR (1899) Mad 494 But I do not think it necessary to consider those decisions of the Madras High Court because it will be seen that a Full Bench of the Madras High Court, reported in Gavaranga Sahu v Botokrishna Pathro, ILR (1909) Mad 306 has specifically dissented from the view expressed in ILR (1893) All 65 and in ILR (1897) Mad 319 and has approved and followed the views taken by Subramania Iyer J. in ILR (1899) Mad 404.

In ILR (1909) Mad 305 the question that arose for consideration of the Full Bench was as to whether a plaint, which was not sufficiently stamped and filed before the court. and in respect of which necessary court fee was directed to be paid u/s 54 of the CPC 1882 and which direction was complied with, can be considered to as properly presented before court u/s 4 of the Limitation Act. In this connection. Miller J., before whom the revision petition came on for hearing in the first instance in his order of reference to the Full Bench, has very exhaustively dealt with the case law heating on the aspect and has referred also to the views expressed by the various other High Courts I am particularly referring to the order of reference made by the learned Judge because it will be seen that the Full Bench itself does not discuss this question except recording their agreement with the view expressed by Miller J. in his referring order and supporting his view based on Section 140 of the Code of Civil Procedure. 1908. which had by then come into force Miller J. in his referring order. at page 309 of the report, observes.

"It seems to me that a document purporting to be a plaint and drawn up substantially in accordance with the provisions of Section 48 - 52. CPC is a plaint whether it is stamped or not. It is clear that it does not cease to be a plaint because it is not drawn up exactly in accordance with those provisions vide Section 53(b)(i) and (ii) it is a plaint but on imperfect plaint "

It will be seen from the extract quoted above that according to the learned Judge a plaint which has been drawn up in accordance with the provisions contained in the Code of Civil Procedure, is a plaint nevertheless, whether it is stamped or not; and the further view of the learned Judge is that it does not cease to be a plaint because it is not drawn up in accordance with the provisions of Section 52(b) (i) and (ii), corresponding to Order 7, Rule 11 of the present Code. The learned Judge emphasises that even such a document will be a plaint, but it will be an imperfect plaint Then the learned Judge considers as to action can or cannot be taken by the court on the basis of such an imperfect plaint And at page 310. the learned Judge, referring to the provisions contained in the Court Fees Act. which was then in force. states:

"One of Ms main purposes, no doubt, is to levy fees for services to be rendered by courts and public offices, and the plaint is not to be effectual for such purposes until it is duly stamped The court will not be empowered to issue process for the defendant, or to try the suit or grant relief to the plaintiff, but if it

does any of these things by mistake or inadvertence, its proceedings can be validated by payment of the required fees in the way prescribed by law."

It will be seen from the above extract also that one of the main objects of the Court Fees Act is to levy fees for services to be rendered by the courts and public offices and the plaint is not to be effectual for such purposes until it is duly stamped. Under those circumstances, on the basis of such an imperfect plaint, the learned Judge says that the court will not be empowered (a) to issue process to the defendant, (b) to try the suit, or (c) to grant relief to the plaintiff. The learned Judge no doubt also observes that even if any of these things are done. In the court, those proceedings can be validated by payment of the required fees in the manner prescribed by law. Ultimately the Full Bench itself agreed with the reasoning of the referring Judge, and after giving its stamp of approval to the reasons given by the learned Judge the Full Bench also refers to Section 149 of the Code of Civil Procedure, 1908, which according to the Full Bench, is in accordance with the view expressed by Miller. J

24. Therefore it will be seen that the Full Bench of the Madras High Court in ILR (1909) Mad 305 referred to above dissents from the view expressed by the Full Bench of the Allahabad High Court in ILR (1893) All 65 as also from the view expressed in the earlier Division Bench decision of the Madras High Court in ILR (1897) Mad 319. On the other hand the Full Bench has fully accepted the view expressed by Subramania Ayyar J., in the Division Bench decision of the Madras High Court reported in ILR (1899) Mad 494. Therefore it will be seen that according to the Full Bench of the Madras High Court a plaint which is insufficiently stamped, does not cease to be a plaint at the most it is only an imperfect plaint, and it is not as if that no action can be taken by the court on such an imperfect plaint. The Full Bench has also indicated as to what action cannot be taken by the court on such an imperfect plaint namely that it cannot issue process for the defendant, it cannot try the suit, and the plaintiff cannot be granted any relief as asked for by him. Therefore the contention of the learned counsel for the petitioners that it cannot certainly be stated that there is no plaint before the court in the eye of law till the proper court fee is paid thereon, cannot, in that large manner, be accepted, at any rate in view of the Full Bench decision of the Madras High Court referred to above.

25. In *Mt. Asghari Begum v. Fasihuddin*, AIR 1934 All 989. Mukerji, J. observes at page 990, that there would be no proper suit before the Court till the deficiency in court fee had been paid, and the only order that could be passed by the trial court under the circumstances was one rejecting the plaint. The learned Judge also, no doubt, observes that the trial court has no jurisdiction to pass an order permitting the plaintiff to withdraw the suit and bring a fresh suit, inasmuch as the request is being made on the basis of an insufficiently stamped plaint, which was liable to be rejected by the court. These observations have been relied on by the learned counsel for the petitioners in this case, in support of his contention that on the basis of an imperfect plaint if we can give that name

to the plaint in this case no order can be passed by the lower court permitting the plain tiff to withdraw the suit, because such an order can be passed by the Court, according to the learned counsel, only if the plaint is before court and satisfies the requirements of law

The learned counsel also relied on the Full Bench decision of the Allahabad High Court reported in *S. Wajid Ali Vs. Mt. Isar Bano Urf Isar Fatma*, . In that case the Full Bench considers in particular the provisions contained in Order. 7, Rule 11. C. P. C and also Section 149 of the Code. The learned Judges, in considering Section 149 of the Code, proceed on the basis that the said section has to be read as a proviso to Section 4 of the Court Fees Act, in order to avoid a contradiction between the two sections, namely Section 4 of the Court Fees Act and Section 149 of the CPC Then the learned Judges lay down the four propositions flowing from such construction. In particular the fourth proposition, that is very strongly relied upon by the learned counsel for the petitioners in this case, occurs at p. 68 and is as follows:

"(4) If it decides that time should be granted, it will give time to the party to make good the deficiency, and in order to enable the party to make good the deficiency within the time allowed, the court will tentatively for that limited purpose receive the document "

Based on this proposition, the learned counsel for the petitioners before me urged very strenuously that the court keeps the plaint in respect of which time has been given for payment of deficit court fee on file, only for the limited purpose of enabling the plaintiff to pay the deficit court fee, and it is kept on file only for that limited purpose, and that the court has got jurisdiction only to receive the document for that limited purpose. But so far as could see the learned Judges of the Full Bench of the Allahabad High Court had no occasion to consider in that cast; whether the court has got jurisdiction to pass an order similar to the one with which this Court is now concerned. No doubt, later on the learned Judges also observe that Section 149 of the Code gives jurisdiction to the court to grant time for making good the deficiency, and that the discretion is to be exercised in a judicial manner. But we are not concerned with this aspect in the present case.

26. The learned counsel for the petitioners then relied on the Division Bench decision of the Calcutta High Court, reported in *Midnapur Zaminary Co. Ltd. v. Secretary of State for India*, ILR 44 Cal 353; (AIR 1917 Cal 77). The learned Chief Justice, speaking on behalf of the Court after referring to the provisions contained in Order 7, Rule 11, C.P. C., as also the circumstances under which a plaint is to be rejected when the requisite stamp as called for by the court has not been furnished, observes at page 357 of the report, that the court will have to reject the plaint. The learned Chief Justice also states, that the court, in such circum-stances, has no other alternative but to reject the plaint in accordance with the terms of the rule So far as this proposition is concerned, with great respect, I must say that it is strictly in accordance with the provisions of the

Code. But it is seen that before the learned Judges a request was made by learned counsel appearing for the plaintiff for leave to allow the plaintiff to amend his plaint by striking out a particular paragraph in Clause 11 in his plaint, so as to avoid payment of court fees. And so far as that request is concerned, the learned Judges of the Calcutta High Court held that the plaintiff cannot be allowed to do so, inasmuch as the High Court has no more power than the trial Court when it is shown that the case comes within Order 7. Rule 11. C. P. C. Therefore the Calcutta High Court ultimately held that it has no jurisdiction to grant the permission asked for on behalf of the plaintiff in that case. At this stage it may be mentioned that this decision of the Calcutta High Court, has been dissented from, by two Bench Decisions of the Bombay High Court, to which reference will be made immediately.

27. The decision of the Allahabad High Court in *Mt. Asghari Begum Vs. Fasihuddin*, can be explained on the basis that permitting the plaintiff to withdraw the suit under Order 23 of the Code on an imperfect plaint, may amount to the court granting relief to the plaintiff, which the Full Bench decision of the Madras High Court referred to above has held could not be done.

28. Mr. Suriauarayana Iyer learned counsel for the 18th respondent drew my attention to a Full Bench decision of the Patna High Court, reported in *Bajinath Prasad v. Umeshar Singh*. AIR 1937 Pal 600 wherein the learned Judges had to consider the scope of Order 7. Rule 11, C. P. C. At page 553 the learned Chief Justice observes :

"In this case the defendant was actually sued in time as provided by the Limitation Act. The fact that the plaint was not properly stamped does not in the least militate against its efficacy, although. It might very likely happen that the Court might be prevented from entering into the merits of the suit and making an order by way of judgment."

from the above extract it will be seen that the plaint, though not properly stamped, does not in the least militate against its efficacy, although it may very likely happen that the court might be prevented from entering into the merits of the suit and making an order by way of judgment. The Full Bench of the Madras High Court in (1969) ILR Mad 305 referred to earlier, has laid down certain directions which the court cannot give on an imperfect plaint. The learned Judges of the Full Bench of the Patna High Court in AIR 1997 Pat 550 have also stated that in the case of an imperfect plaint, the court cannot enter into merits of the suit and make an order by way of judgment. Therefore, the only limitation, so far as I could see, placed by the Full Bench of the Patna High Court in respect of an imperfect plaint, is that the Court is not entitled to enter into the merits of the suit or make an order by way of judgment.

29. The question as to whether an application for amendment of plaint can be entertained by the court in cases where the plaint is to be rejected under Order 7, Rule 11, C.P.C. directly came up for consideration in two Division Bench

decisions of the Bombay High Court, reported In *Narsidasji v. Hal Jamna*, AIR 1999 Bom 354 and *Gaganmal v. Hongkong and Shanghai Banking Corporation*, AIR 1050 Bom 345. In particular, in the earlier of these two decisions, the question directly arose as to whether an application for amendment is maintainable, during the period when the court has passed an order directing the plaintiff to pay additional court fee, and that time has not expired. In my opinion, that decision will have considerable bearing in adjudicating on the controversy that arises in this case, In AIR 1930 Bom 354 the learned Judges, after referring to the provisions of Order 7, Rule 11, and noting the circumstances Under which a plain, can be rejected, and also considering the rather wide jurisdiction given to the court to effect amendments to pleadings under Order 6 Rule 17, had to consider the (mention as to whether the provisions of Order 7, 11 control the jurisdiction of the Court to be exercised under Order 6, Rule 17 It is necessary to state a few facts, so that the decision of the learned Judges can be properly appreciated. It is seen that the defendants in that suit raised objection to the valuation made in the plaint and to the court fee paid by the plaintiff. The trial Court accepted the objections raised by the defendants and passed an order on 10th October 1984 giving the plaintiff a fortnights time for payment of the deficit court fee. That time was again extended by a month, on 25th October 1934 and again by another week on 22nd November 1934. Therefore, it will be seen that the plaintiff in that case was directed to pay the additional court fee on 10th October 1934, and he wanted one more week from. 22nd November 1934 to comply with the directions given by the trial Court. On 20th November 1984, i.e., even before the time allowed by the court for payment of the deficit court fee expired, the plaintiff made an application for amending the plaint under Order 6, Rule 17. Those dates are to be found at page 356 of the report. Under these circumstances objection was taken that inasmuch the court had granted time for payment of deficit court fee, the court had no jurisdiction to entertain in the meanwhile an application for amendment of the plaint and to order the same. In particular, it will be seen that the learned Advocate General of Bombay, who appeared in that case, raised a contention that as the additional court fee which the plaintiff was ordered to pay was not paid, the plaint should have been rejected under Order 7. Rule 11, C. P. C., and that an amendment of the plaint was not permissible.

The teamed Judges refer to the provisions of Order 7, Rule 11 and the various clauses therein, and also take note of the fact that Order 7, Rule 11 uses the words "shall reject", which are mandatory words. But the learned Judges at p. 357 observe :

"But prima facie the rule would seem to be mandatory only *rebus sic stantibus*, that is to say when the court has to deal simply with the position referred to in the rule, and would not preclude an amendment of the plaint which, under Order 6, Rule 17, may be made at any stage of the proceedings."

Therefore the learned Judges, after referring to the very wide jurisdiction given

to the court to amend the pleadings under Order 6, Rule 17. directly deal with the objection raised by the learned Advocate General that In matters coming under Order 6, Rule 17, especially when the deficit court fee is to be paid by the plaintiff, the court has no jurisdiction to entertain an application for amendment of the plaint. That contention was overruled by the learned judges In fact, later on it is seen that the decision of the Calcutta High Court in ILR 44 Cal 952: (AIR 1917 Cal 77) was relied on by the learned Advocate General in support of his contention. But the Bombay High Court expressed its dissent from the view expressed by the Calcutta High Court in that decision

The learned Judges of the Bombay High Court, at page 357. observe:

"We think that Order 7, Rule 11 and Order 6, Rule 17, ought to be read together, and are not prepared to say that the amendment was not proper allowed in this case"

Therefore, according to the learned Judges of the Bombay High Court. the provisions in Order 7, Rule 11 and Order 6, Rule 17 have to be road together. Ultimately the Bombay High Court was not prepared to say that the order of the trial Court permitting the plaintiff to amend his plaint during the particular period in question is to be considered to be one passed without jurisdiction.

30. Pausing here, if I may say so with respect, adopting the principles laid down by the Bombay High Court in the decision refereed to above, the position in this case also will be that under Order 1, Rule 10(2) the court has got very wide jurisdiction in the matter of impleading parties; and as pointed out by the Supreme Court in R.S. Madanappa and Others Vs. Chandramma and Another, to which have referred earlier. The position is absolutely clear that a sharer in a partition action, who figures as defendant, can be impleaded as plaintiff at any stage of the proceedings; and that order can be passed either on application filed by the party, or suo motu by the court itself. Therefore, in my opinion, the provisions contained in Order 1, Rule 10(2) and the provisions contained in O, 7, Rule 11, will have to be read together, as the Bombay High Court did when they held that the provisions of Order 6, Rule 17 and Order 7, Rule 11 have to be read together. If that is so, the application filed by the 18th defendant and which was dealt with by the Trial Court, was perfectly valid, and the court's order thereon must be considered to he one passed with jurisdiction.

31. More or less to the same effect is the later decision of the Bombay High Court, referred to earlier, namely Gaganmal Ramchand Vs. The Hongkong and Shanghai Banking Corporation, wherein Chagla, C. J., and Coyaji, J., had occasion to consider the scope of Order 6, Rule 17 and Order 7, Rule 11, C. P. C. No doubt that was a case where the court could reject the plaint under Order 7, Rule 11(a) on the ground that it did not disclose a cause of action. Under those circumstances, objection was taken that the only jurisdiction given to the court was to reject the plaint, and that the plaintiff could not be allowed to amend the plaint. In that case it will be seen that Mr. Seervai learned counsel appearing for

the defendant, placed considerable reliance on Order 7, Rule 11 which provides that the plaint shall be rejected in the cases mentioned in the rule and one of the circumstances under which the plaint can be so rejected, is when it does not disclose a cause of action. Therefore, Mr. Seervai appears to have urged that when a plaint comes before the court and that plaint does not disclose a cause of action, it is mandatory upon the court to reject that plaint and dismiss the suit and the court has no power to permit the plaint to be amended, nor has the court the jurisdiction to pass an order as prayed for by the plaintiff. The learned Judges summarise this contention at page 345 thus:

"in other words, Mr. Seervai's contention is that Order 6. K. 17 is controlled by Order 7, Rule 11, and in cases falling under Order 7, R, 11 the court has no jurisdiction to order the amendment of the plaint."

The teamed Chief Justice, speaking for the court, was not inclined to accept the contention of Mr. Seervai that the provisions of Order 6, Rule 17 are in any manner controlled by Order 7, Rule 11. The learned Chief Justice also observes later on in the judgment, that the mere fact that jurisdiction is given to the court under Order 7. Rule 11 to reject a plaint in the circumstances mentioned therein, does not take away the jurisdiction of the court to entertain an application to amend the plaint so that it may be brought in accordance with the provisions of the Code.

32. Therefore, it will be seen that the Bombay High Court has expressly dissented from the view expressed by the Calcutta High Court in ILR 44 Cal 352: (AIR 1917 Cal 77). And one of the decisions of the Bombay High Court, namely the one reported in Mahant Narsidasji Balmukunddasji Vs. Bai Jamna, had directly to consider the question regarding the jurisdiction of the court to entertain an application for amendment of plaint after an order has been passed against the plaintiff directing him to pay the deficit court fee on the, plaint and before that period has expired. The Bombay High Court in that decision has recognised the jurisdiction of the court to receive such an application and to pass orders thereon, notwithstanding toe fact that the said application is an imperfect plaint, as observed by the learned Judges of the Full Bench of the Madras High Court in ILR 32 Mad 305. referred to already.

Therefore, in my opinion, the position in the case on hand is more or less the same as that which arose for consideration at the hands of the Bombay High Court and this case has to be decided having due regard to the principles laid down by the Full Bench of the Madras High Court in ILR 32 Mad 305 the Full Bench decision of the Patna High Court reported in Baijnath Prasad Singh and Others Vs. Umeshwar Singh and Others, and the two Division Bench decisions of the Bombay High Court reported in AIR 1939 Bum 354 and Gaganmal Ramchand Vs. The Hongkong and Shanghai Banking Corporation, .

33. No doubt there are lour propositions laid down by the Full Bench of the Allahabad High Court in S. Wajid Ali Vs. Mt. Isar Bano Urf Isar Fatma, and I have

already stated that the learned Judges of that Full Bench had no occasion to consider any other provisions of the Code and as to whether they are controlled by Order 7, K. 11. No doubt the two decisions, wherein under those circumstances the court had taken the view that even a withdrawal of the suit could not be permitted, are the Single Judge's decision of the Allahabad High Court in *Mt. Asghari Begum Vs. Fasihuddin*, and the Division Bench decision of the Calcutta High Court in ILR 44 Cal 352: (AIR 1917 Cal 77). So far as the decision of the Allahabad High Court in AIR 1934 AIR 989 is concerned, it does not appear to have been cited before any other High Court, and I am not inclined with respect to adopt the reasoning in that decision. I have also stated that the said decision could be explained. Again, with great respect. I am not inclined to adopt the reasoning of the Calcutta High Court in ILR 44 Cal 352: (AIR 1917 Cal 77). I am inclined to adopt the views expressed by the Full Bench decisions of the Madras High Court in ILR 32 Mad 305 and of the Patna High Court in *Bajinath Prasad Singh and Others Vs. Umeshwar Singh and Others*, as well as by the two Division Bench decisions of the Bombay High Court in AIR 1939 Bom 354 and *Gaganmal Ramchand Vs. The Hongkong and Shanghai Banking Corporation*, I am in respectful agreement with the views expressed in the decisions of the Madras, Patna and Bombay High Courts.

34. Therefore, the position in this case also is that the court does not have jurisdiction to give any relief to the plaintiff, or to try the suit, or in any manner enter into the merits that arise for decision, or in any manner to pass an order by way of judgment. Those are matters which are prohibited by the principles laid down by the Full Bench decisions of the Madras and Patna High Courts. The power of entertaining an application for amendment of the plaint under circumstances similar to those existing in the case on hand, is recognised directly by the Bombay High Court in *Mahant Narsidasji Balmukunddasji Vs. Bai Jamna*, . The provisions of the Act, as observed by the Supreme Court in AIR 1961 SC 1200. are only for the purpose of safeguarding the collection of court fee from the litigant; and the mere fact that u/s 12(2) of the Act a right is given to the defendant to raise objection regarding the pro per court fees paid on the plaint, in my opinion, will not entitle him to raise objection on the ground that the plaint, which was before the court on the date when the two applications were filed by the 18th defendant, is not a plaint in the eye of law. In my opinion, that contention is opposed to the two Full Bench decisions of the Madras and Patna High Courts, referred to above. That contention cannot also be accepted in the face of the principles laid down by the two Division Bench decisions of the Bombay High Court referred to above. No doubt, if nothing else happens, under Order 7, Rule 11, it is open to the court to reject the plaint. I have also referred to the Division Bench judgment of the Madras High Court reported in ILR 1947 Mad 220: (AIR 1947 Mad 84),. wherein the learned Judges specifically hold that notwithstanding the fact that time was given to the plaintiff for payment of the deficit court fee the plaint is still before the court in the eye of law, till an order rejecting it is passed by the court. The learned Judges have also emphasised that

the mere rejection of an application by the court declining to grant time for payment of deficit court fees, does not amount in law to rejection of the plaint itself, as contemplated in Order 7. Rule 11. C. P. C.. read with Order 7, Rule 12. No doubt it was perfectly within the jurisdiction of the court to have taken action immediately after 2-3-1066 to reject the plaint, for non payment of the deficit court fee ordered to be paid on or before that date. It was also perfectly within the jurisdiction of the court to have declined to grant the request made by the 18th defendant in I A. Nos. 447 and 448 of 1965. But so long as the court has jurisdiction to entertain those applications filed by the 18th respondent on 2-3-1965 in my opinion, the orders passed on those applications cannot be considered to be without jurisdiction There was a plaint but an imperfect plaint, in respect of which only certain acts cannot be done by the court, but that does not mean that matters collateral to the proceedings and without going into the merits cannot be considered by the court

35. If the contention of the learned counsel for the petitioners that no action can at all be taken by the court on the basis of that plaint, is to be accepted, then it will lead to a very anomalous result; because, supposing in a case, the court, in view of very heavy deficit court fee, grants a long time to the plaintiff to pay the same, and on the next day after that order is passed one of the defendants to the suit dies, under Order 22. Rule 4(1) the plaintiff" is bound to file an application, within the time allowed by law, namely 90 days if he is aware of the death of the defendant, for bringing on record the legal representatives of the deceased defendant. And if no such application is filed by the plaintiff within that time, the suit abates under Order 22, Rule 4(3). Under this particular provision, no separate order declaring that the suit has abated is necessary at all, as is contemplated under Order 7. Rule 11 whereunder a specific order rejecting the plaint has to be made. If the plaintiff, after being granted time for payment of the deficit court fee and before that period expires, files an application for bringing on record the legal representatives of the deceased defendant, can it be said that that application is one not in accordance with law because according to the learned counsel for the petitioners the court has no jurisdiction at all, till the entire court fee due on the plaint is paid, to take any action on the plaint? If that is so, there will be no plaint at all before the court in respect of which an application for bringing on record the legal representatives of a deceased defendant could be filed If ultimately the plaintiff pays the deficit court fee only on the last day of six months granted by the court, what is the position in respect of an application filed by the plaintiff to bring on record the legal representatives of a deceased defendant? Can he wait till he pays the entire court fee on the plaint and then only file the application to bring on record the legal representatives of the deceased defendant? In which case, he will be met with a plea that the suit has abated as against that party, because no application had been filed within time allowed by law And if the plaintiff files an application during that interim, he will be met with the plea that the said application is not maintainable because there was no plaint before the court That is not a

situation, in my opinion, that is contemplated by the Code. The limitations as to the exercise of jurisdiction by the court in respect of an imperfect plaint, have been clearly indicated by the Full Bench decisions of the Madras and Patna High Courts referred to earlier, and the nature of the jurisdiction to be exercised by the court has also been indicated by the two Division Bench decisions of the Bombay High Court in which also reference has been made already.

36. Therefore, on the basis of these decisions in my opinion, it cannot certainly be held that the filing of the applications I.A. 447 and 448/1965 by the 18th defendant on 2-3-1965, is incompetent or invalid; nor can it be said that the orders passed by the trial Court allowing those applications are to be considered as orders passed without jurisdiction. Those orders are only passed in collateral proceedings: and by passing those orders the trial court could not be considered to have contravened any of the principles laid down in the decisions referred to above. Therefore the application I. A. 471/1965 filed by the petitioners for dismissal of the suit on the ground that the original plaintiff has not complied with the directions regarding payment of deficit court fee, was dismissed by the lower court for very good reasons, because that is really based upon the view that the 18th defendant is entitled to be transposed as plaintiff and he should be permitted to pay the deficit court fees. If the orders passed in I. A. 447 and 448 of 1965 are valid, the order dismissing I. A. 471, filed by the petitioners, which is the order under attack, must also be considered to have been passed within the jurisdiction of the lower court.

37. The result is that the Civil Revision Petition fails, and stands dismissed. The parties will bear their own costs.