

(2008) 12 MAD CK 0091

In the Madras High Court

Case No : Original Side Appeal No's. 337 and 338 of 2008

V.K. John

APPELLANT

Vs

W.S. Seetharam, Prema Chandrasekhar and T.R.T.
Thirumalvasi

RESPONDENT

Date of Decision : 18-12-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 12

Citation : (2009) 2 LW 460

Hon'ble Judges : M. Sathyanarayanan, J;D. Murugesan, J

Bench : Division Bench

Advocate : Abraham Marks, for King and Patridge, for the Appellant; Party-in-Person for R1, Vijaynarayan, S.C. for P.C. Harikumar and Associates for R3 and T.K. Rajasekaran, for R2, for the Respondent

Final Decision : Allowed

Judgement

M. Sathyanarayanan, J.—The appellant in O.S.A. No. 337 and 338 of 2008 is the plaintiff in C.S. No. 423 of 1995 and aggrieved by the

order dated 30.9.2008 made in Application No. 3317 of 2008 in C.S. No. 423 of 1995, wherein the plaint in the above said suit filed by him

came to be rejected, he preferred O.S.A. No. 3317 of 2008.

O.S.A. No. 3318 of 2008 is preferred by the appellant/plaintiff in C.S. No. 423 of 1995 against the rejection of the plaint in C.S. No. 423 of

1995 consequent upon the order dated 30.9.2008 passed in Application No. 3317 of 2008 in the said suit.

The facts in brief which are necessary for the disposal of these appeals are as follows:

The appellant herein filed the above said suit for partition and separate possession of the suit properties. As per the averments made in the

amended plaint dated 14.3.1994, the suit properties originally belonged to his paternal grandmother viz., Late Elie John and she was in exclusive

possession and enjoyment of the same till her demise on 1.3.1984. The Late Elie John had left K. John-father of the plaintiff, Appu John - first

defendant and Leelie Seetharaman (died) - second defendant as the surviving legal heirs entitled to succeed to the estate and under Indian

Succession Act, 1925, and all of them are entitled to 1/3rd share each in respect of suit schedule mentioned properties.

2. The plaintiff further averred that his father viz., K. John died on 20.12.1985 leaving behind the plaintiff as the sole surviving legal heir entitled to

succeed to 1/3rd share of his father. The plaintiff's father and the other defendants were in joint possession and enjoyment of the schedule

mentioned properties while the father of the plaintiff was alive. After the demise of plaintiff's father, the plaintiff along with other defendants are in

joint possession and enjoyment of the suit schedule mentioned properties.

3. It is further averred by the plaintiff that some time thereafter, series of misunderstandings arose between them, and the plaintiffs demand for

partition, went unheated and therefore, he originally filed a suit for partition claiming 50% of the share in respect of schedule mentioned property.

During the pendency of the suit, second defendant died intestate on 24.4.2001 leaving behind the plaintiff and the first defendant as the legal heirs

and the plaintiff also filed an application in A.No.3613 of 2001 to bring the L.Rs. of the deceased second defendant viz., the plaintiff and the first

defendant, on record. The said application was allowed by this Court on 28.8.2002 and therefore, the plaintiff is entitled to 1/3rd share of the

plaint schedule mentioned property. In other words, 50% each of the plaintiff schedule mentioned property.

4. The first defendant has filed his written statement contending among other things that either the plaintiff or the first defendant entitled to 1/3rd

share in the suit schedule mentioned properties as Mrs. Elie K. John had bequeathed the schedule mentioned properties in favour of the second

defendant viz., Leelie Seetharaman by her Last Will and Testament dated 10.2.1984 and the first defendant was appointed as the Executor of the

Will. In view of the demise of Tmt. Elie John on 1.2.1984, the second defendant has become the sole owner of the schedule mentioned properties.

The second defendant while she was alive, has filed the written statement taking the same stand as that of the first defendant and prayed for dismissal of the suit.

5. The third defendant viz., Thiru. W.S. Seetheram, sought to implead as the legal representative and legal heir of the deceased second defendant claiming to be her husband and by virtue of the orders passed in Application No. 1660 of 2006, got impleaded himself as the third defendant and filed his written statement contending that the second defendant has left a Will dated 22.1.2001 in his favour and therefore, prayed for dismissal of the suit.

6. The trial of the suit has commenced and the plaintiff has filed proof affidavit and additional proof affidavit and marked Exs. P1 to P18 and he was cross-examined by the third defendant viz., W.S. Seetharam and also by the other Counsel viz., Mr. P.C. Harikumar.

7. The learned Counsel appearing for the first defendant has filed a memo dated 01.08.2007 stating that the first defendant viz., Appu John died on 28.07.2007 and he is unmarried and has no issues and he left behind his brother's son viz., the plaintiff as his only legal heir.

8. The appellant herein/plaintiff filed an application in A. No. 7755 of 2007 praying for the amendment of plaint stating among other things that on

15.7.2007 while he was searching in his house at Kottayam, Kerala, for the old records of his father, he found an envelope under the newspaper

at the bottom of the trunk in which he found old photographs, papers and other records and it also contain two Wills of his grandmother Late Elie

John written in her own hand writing along with a letter addressed to his father and his aunt viz., the second defendant. The said Wills are dated

20.4.1966 and 2.2.1974 respectively and the covering letter is dated 13.5.1966. In view of the said Wills, it is contended by the plaintiff in the said

application that he is entitled to 1/3rd share of the plaint schedule properties which belonged to her absolutely and therefore he prayed for the

amendment of plaint by adding the following paragraph, after para 4 of the plaint:

4a. As per the last Will and Testament dated 2.2.1974 of the Plaintiff's grandmother late Mrs.Elise John also one-third share in all the schedule

properties belonging to her was bequeathed to the Plaintiff and the Plaintiff is

entitled to the same accordingly.

The third defendant herein has filed his counter affidavit opposing the said application.

9. The learned Judge, who dealt with the application held that as against the order passed in Application No. 5707 of 2007 praying for amendment

of plaint by introducing the relief of declaration an appeal in O.S. No. 301 of 2007 is pending before a Division Bench of this Court and in view of

the same, no order can be passed in Application No. 7755 of 2007 and that if the said appeal is ultimately allowed, the plaintiff will get an order

for amending the plaint.

10. The appellant/plaintiff aggrieved by the said order, preferred an appeal in O.S.A. No. 113 of 2008 and a Division Bench of this Court taking

note of the submissions that O.S.A. No. 301 of 2007 has been withdrawn, the application for amendment will have to be considered on its own

merits and therefore, requested the learned Judge to take up the said application and dispose of the same. However, it is represented before this

Court that Application No. 7755 of 2007 is not yet taken up for hearing.

11. It is also useful to refer the common orders dated 17.4.2008 passed in O.S.A. Nos. 301 to 303 of 2007 by a Division Bench of this Court.

The material portion of the said orders has been extracted below:

We accept the submission that the partition suit cannot be converted as testamentary suit for determination of claim as made by one or other on the

basis of any Wills, including Prema Chandrasekar and Thirumalvasi. To that extent they may not be a necessary party in the partition suit. However,

as the deceased Appu John cannot be left undefended, to secure representation of said deceased Appu John, if proposed defendants have been

impleaded, only for the purpose of defending the share of Appu John, we are of the view that no interference is called for against such order

passed by learned Judge.

In the aforesaid background, while we are not inclined to grant relief as sought for in O.S.A. Nos. 302 and 303/07, make it clear that the

defendants Prema Chandrasekar and Thirumalvasi, who have been impleaded may take part in the suit to secure the representation of the

deceased Appu John for determination of his share, but the court below cannot determine their claim in the partition suit in question, which

otherwise is required to be determined in a testamentary suit.

In the above said orders, O.S.A. No. 301 of 2007 was dismissed as withdrawn with liberty to the appellant/plaintiff herein to proceed with the

matter as indicated above and O.S.A. Nos. 302 and 303 of 2007 preferred by the proposed defendants viz., Prema Chandrasekar and

Thirumalvasi and the third defendant herein were dismissed.

12. After the disposal of the above said appeals, the third defendant viz., W.S. Seetharam has filed the Application No. 3317 of 2008 against the

plaintiff/appellant and respondents 2 and 3 herein praying for rejection of plaint on the ground that originally the suit for partition was laid on the

foundation that the plaintiff is entitled to the share of his father who is one of the sons of Late Elie John as per intestate succession and now by

amending the plaint, the plaintiff is projecting the case that he is entitled to get share in the suit properties by way of testamentary succession and

that the plaint does not disclose any cause of action for the testamentary succession.

13. The said application was opposed by the appellant/plaintiff contending that the trial of the suit has already been commenced and the parties

have already been examined and that he is only seeking to add another route of title in respect of his claim for partition of the suit schedule

properties. The respondents 2 and 3 herein have filed their counter praying for the dismissal of the suit and thereby supporting the case of the

applicant therein /third defendant.

14. The learned Judge after taking into consideration the submissions made by the respective counsels, has held that totally a new case is projected

on the basis of testamentary succession and that the said pleadings now available on record, the plaintiff cannot face the trial of the case inasmuch

as the law does not permit the plaintiff to let in evidence without foundation of pleadings. The learned Judge further held that it is not open to the

plaintiff to simply change the route of title and further found the father of the plaintiff is an undischarged insolvent adjudicated upon the Insolvent

Court and once a person adjudicated insolvent, the entire property belongs to him vests with Official Assignee. Therefore, the learned Judge for

the said reasons found that the plaint is liable to be rejected both under Order 7 Rule 11(a) and (d) of C.P.C. The plaintiff aggrieved by the

rejection of the plaint, has preferred these appeals.

15. Heard the submissions of Mr. Abraham Marks for M/s. King & Patridge, learned Counsel appearing for the appellant and Mr. W.S.

Seetharam - first respondent - Party-in-Person and Mr. T.K. Rajassekaran, learned Counsel appearing for the second respondent and Mr. Vijay

Narayan, learned senior Counsel appearing for the respondents 2 and 3 and also perused the typed set of documents filed by the respective parties.

16. The point for consideration is:

Whether the impugned order resulted in the rejection of the plaint is sustainable?

17. A perusal of the affidavit filed in support of Application No. 7755 of 2007 would reveal that Late Elie John, grandmother of the plaintiff has left

a Will dated 2.2.1974 which was later on found by the plaintiff on 15.07.2007 and according to the contents of the said Will, Late Elie John had

bequeathed of her properties to be equally divided into three shares among her two children viz., the first and second defendants and the plaintiff

and the application is still pending adjudication. In the affidavit filed in support of Application No. 3317 of 2008 filed by the first respondent

herein/third defendant in the suit for rejection of the plaint, it has been conceded that the Will dated 2.2.1974 left by Elie John is a genuine Will

written by her in her own handwriting and that the present suit filed by him is a non-testamentary partition suit under the Indian Succession Act

claiming only the share of his deceased father K. John and further that the assets of the plaintiff's father's vests with the Official Assignee and no

property is available to decree the partition suit in favour of the appellant/plaintiff.

18. Our attention was also drawn to the evidence of D.W.1 Mr. S. Parthasarathy, wherein he deposed that as per the Adjudication Register, the

plaintiff's father viz., K. John was adjudicated as an insolvent on 22.12.1965 in I.P. No. 68 of 1965, which has been marked as Ex.D6 subject to

the objection raised by the Counsel for the plaintiff. D.W.1 further deposed that he has not been discharged. In the cross-examination, D.W.1

deposed that as per entry found in Ex.D6, it has been stated as follows:

11.7.1969 Annulled; Assets to continue vests in O.A.

D.W.1 further deposed in the cross-examination that the claim of the Income Tax Department has not been fully settled as per the records and the

claim of the other creditors have also not been settled and no steps have been taken by the office of the Official Assignee to proceed further

against the property of the insolvent. The learned Judge found that originally the suit was laid of non-testamentary succession now a new case has

been projected by the plaintiff on the basis of testamentary succession and that the plaintiff's father is still an undischarged insolvent and hence the

property belongs to his father vests with Official Assignee and hence the plaint is liable to be rejected under Order 7 Rule 11(a) and (d) of C.P.C.

19. It is further submitted by the learned Counsel appearing for the appellant that the prayer for partition sought for by the plaintiff is not solely

based upon non-testamentary succession it is only by way of an alternative plea. It is further contended by the learned Counsel appearing for the

appellant that it is permissible in law to introduce even a new route of title or to set up as many as routes of title as possible and some times may

even to conflict and inconsistent, so long as the amendment does not completely alter the structure and frame of the suit. It is also submitted by the

learned Counsel appearing for the appellant that the Will of Elie John was admitted as an additional evidence more than a year back and the

amendment application based on the said Will in O.A. No. 7755 of 2007 is yet to be adjudicated and as on date, the plaint is not amended based

on the said Will. It is the submission of the learned Counsel appearing for the appellant that assuming that the evidence of D.W.1 is trustworthy, his

oral testimony would disclose that the adjudication of the plaintiff's father was made on 22.12.1965 and the effect of such annulment is that as if no

adjudication as insolvent has been made and this vital aspect has not been taken into consideration by the learned Judge.

20. The learned Counsel appearing for the appellant would further submit that the paternal grandmother of the plaintiff viz., Elie John died on

1.3.1984 i.e. nearly 20 years after the alleged adjudication of the father as an insolvent and admittedly at the time of alleged adjudication, the

properties have not devolved on the plaintiff's father and were in the hands of Late Elie John. The learned Counsel appearing for the appellant by

way of submission of legal aspect would contend that Order 7 Rule 11 of C.P.C. can be invoked only at the initial stage of the suit and the facts of

the present case would disclose that the trial has already been commenced and P.W.1 was examined in chief as well as cross-examined and the recording of evidence is almost over and the suit is nearing finality. It is contended by the learned Counsel appearing for the appellant that the learned Judge has taken into consideration the averments made by the defendants while rejecting the plaint and the said course adopted by him is unsustainable in law. As far as rejection of plaint is concerned, the plaint averments alone should be taken into consideration and the Court cannot traverse beyond the facts pleaded in the plaint.

21. The learned Counsel in support of his submissions, has placed reliance upon the following decisions:

1. Liverpool and London S.P. and I Asson. Ltd. Vs. M.V. Sea Success I and Another, .
2. (2007)10 SCC 59 - Ram Prakash Gupta v. Rajiv Kumar Gupta and Ors.
3. (2008)5 MLJ 617 (SC) - Kamala and Ors. v. K.T. Eshwara Sa and Ors.

22. In Liverpool and London S.P. and I Asson. Ltd. Vs. M.V. Sea Success I and Another, , it has been held as follows:

Whether a plaint discloses a cause of action or not 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 as to whether if the averments made in the plaint are taken to be correct in their entirety, a decree would be passed. In ascertaining whether the plaint shows a cause of action, the court is not required to make an elaborate enquiry into doubtful or complicated questions of law or fact. By the statute the jurisdiction of the court is restricted to ascertaining whether on the allegations a cause of action is shown. So long as the claim discloses some cause of action or raises some questions fit to be decided by a judge, the mere fact that the case is weak and not likely to succeed is no ground for striking it out. The purported failure of the pleadings to disclose a cause of action is distinct from the absence of full particulars.

23. In (2007) 10 SCC 59 - Ram Prakash Gupta v. Rajiv Kumar Gupta and Ors., it has been held as follows:

Order 7 Rule 11(d) CPC makes it clear that if the plaint does not contain necessary averments relating to limitation, the same is liable to be

rejected. For the said purpose, it is the duty of the person who files such an application to satisfy the court that the plaint does not disclose how the same is in time. In order to answer the said question, it is incumbent on the part of the court to verify the entire plaint. Before passing an order in an application filed for rejection of the plaint under Order 7 Rule 11(d) CPC it is but proper to verify the entire plaint averments. While deciding the application under Order 7 Rule 11 CPC, few lines or passage should not be read in isolation and the pleadings have to be read as a whole to ascertain its true import. It is trite law that not any particular plea to be considered, and the whole plaint has to be read.

24. In (2008) 5 MLJ 617 (SC)- Kamala and Ors. v. K.T. Eshwara Sa and Ors., wherein it has been held as follows:

Order 7, Rule 11(d) of the Code has limited application. It must be shown that the suit is barred under any law. Such a conclusion must be drawn from the averments made in the plaint. Different clauses in Order 7, Rule 11, in our opinion, should not be mixed up. Whereas in a given case, an application for rejection of the plaint may be filed on more than one ground specified in various sub-clauses thereof, a clear finding to the effect must be arrived at. What would be relevant for invoking Clause (d) of Order 7, rule 11 of the Code is the averments made in the plaint. For that purpose there cannot be any addition or subtraction. Absence of jurisdiction on the part of the Court can be invoked at different stages and under different provisions of the Code. Order 7, Rule 11 of the Code is one, Order 14, Rule 2 is another.

For the purpose of invoking Order 7, Rule 11(d) of the Code, no amount of evidence can be looked into. The issues on merit of the matter which may arise between the parties would not be within the realm of the Court at that stage. All issues shall not be the subject matter of an order under the said provision.

The principles of res judicata, when attracted, would bar another suit in view of Section 12 of the Code. The question involving a mixed question of law and fact which may require not only examination of the plaint but also other evidence and the order passed in the earlier suit may be taken up either as preliminary issue or at the final hearing, but, the said question cannot be determined at the stage.

It is one thing to say that the averments made in the plaint on their face discloses no cause of action, but it is another thing to say that although the same discloses a cause of action, the same is barred by a law.

The decisions rendered by this Court as also by various High Courts are not uniform in this behalf. But, then the broad principle which can be

culled out therefrom is that the Court at that stage would not consider any evidence or enter into a disputed question of fact of law. In the event,

the jurisdiction of the Court is found to be barred by any law, meaning thereby, the subject matter thereof, the application for registration of plaint

should be entertained.

25. Per contra, the first respondent/third defendant who appeared as party-in-person would submit that the appellant/plaintiff in order to suit his

convenience has chosen to take a stand contradictory to each other on different occasions and he has failed to approach the Court with clean

hands. The first respondent would further submit that admittedly, the suit was laid on the basis of non-testamentary succession and by projecting

the Will dated 2.2.1974 executed by his paternal grandmother he wants to convert the suit based on testamentary succession and the same would

change the entire character of the suit as well as cause of action. That apart, the property of the plaintiff's father under whom he claiming title vests

with the Official Assignee as he was adjudicated as an insolvent in the year 1965 and the same is evidenced from the oral testimony of D.W.1 and

therefore, on that ground also, the plaintiff may not succeed. Hence, it is submitted by the first respondent that the learned Judge has taken into

consideration the said material facts and correctly held that the plaint is liable to be rejected under Order 7 Rule 11(a) and (d) of CPC and no

interference is warranted in exercise of Clause 15 of Letters Patent.

26. Mr. Vijaynarayan, learned senior Counsel appearing for the respondents 2 and 3 apart from supporting the submissions made by the first

respondent would further submit that the second respondent is also claiming a share in the suit property by virtue of a Will and in view of the

change in character of the suit, the plaint has been rightly rejected. The learned senior Counsel in support of his submissions has placed reliance

upon the following decisions:

1. Raj Narain Sarin (Dead) through Lrs. and Others Vs. Laxmi Devi and Others,

2. Mayar (H.K.) Ltd. and Others Vs. Owners and Parties, Vessel M.V. Fortune Express and Others,

27. In Raj Narain Sarin (Dead) through Lrs. and Others Vs. Laxmi Devi and Others, , it has been held that the rejection of plaint is justified where

the litigation was utterly vexatious and an abuse of process of Court.

28. In Mayar (H.K.) Ltd. and Others Vs. Owners and Parties, Vessel M.V. Fortune Express and Others, , it has been held as follows:

Under Order 7 Rule 11 of the Code, the court has jurisdiction to reject the plaint where it does not disclose a cause of action, where the relief

claimed is undervalued and the valuation is not corrected within the time as fixed by the court, where insufficient court fee is paid and the additional

court fee is not supplied within the period given by the court, and where the suit appears from the statement in the plaint to be barred by any law.

Rejection of the plaint in exercise of the powers under Order 7 Rule 11 of the Code would be on consideration of the principles laid down by this

Court. In T. Arivandandam v. T.V. Satyapal 2 this Court has held that if on a meaningful, not formal reading of the plaint it is manifestly vexatious,

and meritless, in the sense of not disclosing a clear right to sue, the court should exercise its power under Order 7 Rule 11 of the Code taking care

to see that the ground mentioned therein is fulfilled. In Roop Lal Sathi v. Nachhattar Singh Gill 3 this Court has held that where the plaint discloses

no cause of action, it is obligatory upon the court to reject the plaint as a whole under Order 7 Rule 11 of the Code, but the rule does not justify

the rejection of any particular portion of a plaint. Therefore, the High Court therein could not act under Order 7 Rule 11(a) of the Code for striking

down certain paragraphs nor the High Court could act under Order 6 Rule 16 to strike out the paragraphs in the absence of anything to show that

the averments in those paragraphs are either unnecessary, frivolous or vexatious, or that they are such as may tend to prejudice, embarrass or

delay the fair trial of the case, or constitute an abuse of the process of the court. In ITC Ltd. v. Debts Recovery Appellate Tribunal 4 it was held

that the basic question to be decided while dealing with an application filed by the defendant under Order 7 Rule 11 of the Code is to find out

whether the real cause of action has been set out in the plaint or something illusory has been projected in the plaint with a view to get out of the said

provision. In *Saleem Bhai v. State of Maharashtra* 5 this Court has held that the trial court can exercise its powers under Order 7 Rule 11 of the

Code at any stage of the suit before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial and

for the said purpose the averments in the plaint are germane and the pleas taken by the defendant in the written statement would be wholly

irrelevant at that stage. In *Popat and Kotecha Property v. State Bank of India Staff Assn.* 6 this Court has culled out the legal ambit of Rule 11 of

Order 7 of the Code in these words: (SCC p.516, para 19)

19. There cannot be any compartmentalisation, dissection, segregation and inversions of the language of various paragraphs in the plaint. If such a

course is adopted it would run counter to the cardinal canon of interpretation according to which a pleading has to be read as a whole to ascertain

its true import. 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. The intention of the party concerned is to be gathered primarily from the tenor and terms of his pleadings taken as

a whole. At the same time it should be borne in mind that no pedantic approach should be adopted to defeat justice on hair-splitting technicalities.

From the aforesaid, it is apparent that the plaint cannot be rejected on the basis of the allegations made by the defendant in his written statement or

in an application for rejection of the plaint. The court has to read the entire plaint as a whole to find out whether it discloses a cause of action and if

it does, then the plaint cannot be rejected by the court exercising the powers under Order 7 Rule 11 of the Code. Essentially, whether the plaint

discloses a cause of action, is a question of fact which has to be gathered on the basis of the averments made in the plaint in its entirety taking those

averments to be correct. A cause of action is a bundle of facts which are required to be proved for obtaining relief and for the said purpose, the

material facts are required to be stated but not the evidence except in certain cases where the pleadings relied on are in regard to

misrepresentation, fraud, wilful default, undue influence or of the same nature. So long as the plaint discloses some cause of action which requires

determination by the court, the mere fact that in the opinion of the Judge the plaintiff may not succeed cannot be a ground for rejection of the plaint.

In the present case, the averments made in the plaint, as has been noticed by us, do disclose the cause of action and, therefore, the High Court has

rightly said that the powers under Order 7 Rule 11 of the Code cannot be exercised for rejection of the suit filed by the plaintiff-appellants.

29. It is further submitted by the learned senior Counsel that admittedly, the Will of Elie John is to be probated as it came into existence prior to the

amendment made to the Indian Succession Act and even on that ground also, the plaint is liable to be rejected.

30. Admittedly, the plaintiff has filed his proof affidavit on 27.9.2006 marking Exs. P1 to P14 and he filed his additional proof affidavit on

17.4.2007 and also marked Exs.P15 to P18. The Will dated 2.2.1974 executed by his paternal grandmother is yet to be marked. The application

for amendment of plaint in Application No. 7755 of 2004 filed by the appellant/plaintiff based on the said Will is yet to be adjudicated.

31. The applicant in A. No. 3317 of 2008 who is third defendant in the suit and the first respondent herein has commenced cross-examination of

P.W.1/plaintiff on 11.6.2007 and the cross-examination was over on 13.6.2007. Thereafter, an official attached to the office of the Official

Assignee was examined as D.W.1 and it was also over on 25.7.2007. At that juncture, an application in A. No. 3317 of 2008 was filed by the

first respondent/third defendant in the suit praying for rejection of the plaint primarily contending that the suit was originally laid on the ground of

non-testamentary succession and by virtue of the amendment being sought, it is being converted into one of testamentary. It was further contended

by the first respondent herein in the said application that since the father of the plaintiff was already adjudicated as insolvent, even in the year 1965,

no properties were available for partition. The learned Judge has upheld both contentions and ordered rejection of the plaint under Order 7 Rule

11(a) and (d) of CPC.

32. It is trite law which has already been settled in catena of decisions including the above referred citations, an application under Order 7 Rule

11(d) can be filed if the allegations in the plaint appeared to be barred by any law and for this purpose, the averments made in the plaint alone are

relevant and the Court would not be entitled to consider the entire defence at this stage. In so far as Order 7 Rule 11(a) of CPC is concerned,

when no cause of action is disclosed, the Courts will not unnecessarily protract the hearing of the suit.

33. A reading of the plaint averments would reveal that the plaint is sought to be amended based on the Will dated 2.2.1974 executed by the

plaintiff's paternal grandmother which was also admitted by the first respondent/third defendant as a genuine one and according to the plaintiff it

was necessitated on account of the fact it just been recovered and the amendment is sought by filing application No. 7755 of 2007 and it is only to

set up an additional route of title without disregarding the original route of title by way of non-testamentary succession.

34. Admittedly, application No. 7755 of 2007 is pending adjudication and it is pertinent to point out at this juncture that a Division Bench of this

Court while permitting the appellant herein to withdraw O.S.A. No. 301 of 2007 and dismissing the appeals in O.S.A. Nos. 302 and 303 of 2007

has held that even though the partition suit cannot be converted as testamentary succession suit for determination of claim as made by on the one or

other on the basis of any Wills, including respondents 2 and 3 herein; found that the deceased Appu John cannot be left undefended and secure

representation of the said person, the proposed defendants viz., respondents 2 and 3 herein have to be impleaded only for the purpose of

defending the share of Appu John. Therefore, by virtue of the said orders passed in the said O.S. Appeals, the present suit is to be adjudicated on

merits. That apart, the learned Judge has gone into evidence of D.W.1 and found that the plaintiff's father has been adjudicated as insolvent and

the properties are vests with the Official Assignee. We are afraid that the said exercise cannot be done while invoking Order 7 Rule 11(a) and (d)

of C.P.C.

35. In 2007(4) L.W. 798 : 2008 (1) MLJ 45 - Ram Prakash Gupta v. Rajiv Kumar Gupta and Ors., the rejection of plaint was sought on the

ground of limitation and the Hon'ble Supreme Court of India on taking into consideration the factual aspects of the said case has held as follows:

It is also relevant to mention that after filing of the written statement, framing of the issues including on limitation, evidence was led, plaintiff was

cross-examined, thereafter before conclusion of the trial, the application under Order VII Rule 11 was filed for rejection of the plaint. It is also

pertinent to mention that there was not even a suggestion to the plaintiff/appellant to the effect that the suit filed by him is barred by limitation. On

going through the entire plaint averments, we are of the view that the trial Court has committed an error in rejecting the same at the belated stage

that too without advertent to all the materials which are available in the plaint. The High Court has also committed the same error in affirming the

order of the trial Court.

36. In the case on hand, the amendment based on the Will dated 2.2.1974 is yet to reach finality as application in A. No. 7755 of 2007 is pending

adjudication. The plaintiff by virtue of the said amendment being sought, wants to set up only an additional route of title without disregarding the

original route of title already claimed by him. The alleged adjudication of the plaintiff's father as an insolvent and his properties vests with the

Official Assignee is also subject matter of adjudication in the suit as the oral testimony of D.W.1 and Ex.D6 marked through him can be

appreciated only during the course of trial. P.W.1 has filed his proof affidavit and additional proof affidavit and he was also subjected to lengthy

cross-examination by the first respondent herein-first defendant in the suit who filed application for rejection of plaint and succeeded. Therefore at

the fag end of the trial, the plaint cannot be rejected holding that the character of the suit has been changed. That apart, a Division Bench of this

Court in the common order dated 17.04.2008 in O.S.A. Nos. 301 to 303 of 2007 has held that the respondents 2 and 3 have to be impleaded

only for the purpose of defending the share of Appu John as he cannot be left undefended. It has been further held in the said order that the

respondents 2 and 3 herein may taken part in the suit to secure the representation of the deceased Appu John for determination of his share. So, in

order to give effect to the said judgment also, the suit is to be tried and to reach its logical conclusion.

37. Therefore, in our considered opinion, the impugned order dated 30.09.2008 passed in Application No. 3317 of 2008 in C.S. No. 423 of

1995 is liable to be set aside.

38. In the result, these appeals are allowed and the order dated 30.09.2008 in

O.A. No. 3317 of 2008 is set aside and consequently the plaint stands restored to the file. In the circumstances, there will be no order as to costs. The portfolio judge is requested to expedite the disposal of the suit as it is of the year 1995.