

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

CIVIL REVISION APPLICATION NO. 130 OF 2014

PANDURANG GENA ZAMBARE AND OTHERS

VERSUS

DAGADU@ASHOK NAMDEO YADAV AND OTHERS

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Advocate for applicants : Mr. T. M. Tandale

Advocate for Respondents 1 to 7 : Mr. Nitin V. Gaware

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CORAM : S. V. GANGAPURWALA, J.**DATE : 27th August, 2015****PER COURT :**

1. Mr. Tandale, the learned counsel for the applicants submits that in the earlier suit filed by the predecessor-in-title of the present applicants, the plaintiffs were the defendants and the matter was conclusively decided. Now, again suit would not be tenable for the said purpose. Even the suit is barred by limitation. As such, the defendants had filed an application seeking rejection of the plaint under Order 7 Rule 11(D) of the Code of Civil Procedure. The learned counsel submits that the Court did not apply its mind in correct perspective and only on the ground that the said issue involves mixed question of law and facts, rejected the application. Pleadings of the earlier suit and present suit were before the Court. The Court ought to have considered the application on its own merits. The Court has failed to exercise the discretion vested in it.

2. Mr. Gaware, learned counsel submits that for proving issue of limitation and res judicata, evidence will have to be led. At this stage, the

Court could not have conclusively decided the same. The Court has rightly rejected the application.

3. With the assistance of learned counsel, I have gone through the order.

4. The concept of *res judicata* is a rule of procedure. The court will have to consider the pleadings, the parties and intervening circumstances also while deciding the said issue so also the aspect of limitation which also requires evidence to be led. It is not that application for framing issue of limitation was given under section 9-A of the Civil Procedure Code. Moreover, the Court has now framed all the issues and the matter is now ripe for evidence.

5. Considering the above, the impugned order, does not suffer from illegality. The parties will have liberty to adduce evidence on the issue of limitation and *res judicata*. In the light of that, civil revision application is rejected. No costs.

(S. V. GANGAPURWALA, J.)

JPC