

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

CIVIL REVISION APPLICATION NO.543 OF 2011

Shri Vishnu Bala Kudale & ors ..Applicants

Vs.

Shri Baban Tulshiram Kudale ..Respondent

Mr.PB. Shah, Advocate for the Applicants.

Mr.A.B.Avhad, Advocate for the Respondent.

**CORAM : R.M.SAVANT, J
DATE : 8th October 2015**

PC. :

1 By an order passed today i.e. 8-10-2015 in Civil Application No.236 of 2014 the heirs of the Respondent are allowed to be brought on record. The Learned Counsel appearing for the original Plaintiffs Mr. Avhad undertakes to file vakalatnama on behalf of the said heirs as he is appearing for the said heirs in the companion Writ Petition No.995 of 2014.

2 The above Civil Revision Application has been admitted on 22-9-2011 but was directed to be listed along with Writ Petition No.995 of 2014 which is a companion matter. Both the proceedings were directed to be heard together that is how the above Civil Revision Application is being heard.

3 The Revisionary Jurisdiction of this Court is invoked against the

order dated 11-4-2011 passed by the Learned 23rd Joint Civil Judge Junior Division, Pune, by which order, the application Exhibit 44 filed by the Applicants i.e. the Defendants in the Suit in question being Regular Civil Suit No.902 of 2010, came to be rejected.

4 The facts necessary to be cited for adjudication of the above Civil Revision Application can in brief be stated thus. The Suit in question i.e. Regular Civil Suit No.902 of 2010 has been filed by the Respondent No.1 / Plaintiff in respect of the lands which the Plaintiff claimed to be ancestral lands. The suit properties are culled out in the table mentioned in paragraph 1 of the Plaint and are the properties mentioned in table 1(a), 1 (b) and 1(c). The said properties as indicated above are claimed to be the ancestral properties of the Plaintiff and the Defendants. In the context of the challenge raised in the above Civil Revision Application, it would be apposite to refer to the reliefs sought in the Suit. The same are reproduced herein under for the sake of ready reference (English Translation)

(a) That it be declared that the suit properties mentioned in table 1(a) and 1(b) which are in possession of the Plaintiff and the Defendant Nos.1 to 5 are ancestral properties and it be further declared that in terms of the compromise dated 1974 the Plaintiff and the Defendant Nos.1 to 5 are in possession of ½ share each, as also a declaration and order be issued that the entry be made in respect of the properties mentioned in table 1(a) and 1(b) to the extent of the possession mentioned therein.

(b) That order be issued directing the Defendants to hand over possession of 2 Ares of land in Gat No.219 so as to effect an equitable partition between the Plaintiff and the Defendants.

(c) In the event, the need is felt to partition the properties between the Plaintiff and the Defendants, the same to be sent to the Collector to effect partition.

5 Hence a reading of the prayers discloses that the Plaintiff seeks the relief that a declaration be issued that $\frac{1}{2}$ share in possession of the Plaintiff and the Defendants is as per the compromise which took place in the year 1974. The Plaintiff also seeks the relief that the Defendants be directed to hand over 2 Ares of land in Gat No.219 in suit property 1(c) to the Plaintiff. The Plaintiff also seeks the relief that if necessary the Collector be directed to partition the suit properties. At this stage, it would also be necessary to refer to the clause relating to the cause of action which is paragraph 12 of the Plaint. It has been averred in paragraph 12 that the cause of action arise on 21-1-2005 for the first time when the names of only the Defendants were recorded in the revenue record and thereafter on 10-11-2007 when the Defendants raised a dispute as regards carrying out the partition afresh and thereafter on 16-8-2010 when the Defendant No.2 obstructed the Plaintiff and Vasant Kudale to cultivate the ancestral agricultural land as also on 24-10-2010 when the Defendant No.2 objected to the name of the Plaintiff being recorded in the revenue record and to hand over possession of 2 Ares of land and lastly on 8-6-

2010 when the Defendant No.4 obstructed the Plaintiff from carrying out agricultural operations.

6 The Defendants having regard to the reliefs sought in the Suit and especially the relief sought vide prayer clauses 15(a) and 15(b) filed an application under Order VII Rule 11(d) questioning the maintainability of the Suit on the ground of limitation. It was the case of the Defendants in the said application that going by the averments in the plaint, the Plaintiff by seeking to rely upon the partition which has allegedly taken place in the year 1974, is seeking to reopen the partition and also seeking reliefs on the said basis that the Suit is barred by limitation.

7 The Trial Court considered the said application and as indicated above by the impugned order dated 11-4-2011 has rejected the said application. The Trial Court has from a reading of the plaint sought to refer to the cause of action clause in the plaint and thereafter has observed that the cause of action has arisen when the names of the Defendants were only entered qua the suit property after the demise of Bala Kudale and further observed that upon considering the said averments, the facts of the case warrant investigation on merits and is therefore a mixed question of law and fact and hence the Suit cannot be dismissed at the threshold. This was the gist of the reasoning of the Trial Court whilst rejecting the application Exhibit 44.

8 The Learned Counsel appearing for the Applicants Mr. P. B. Shah would contend that having regard to the reliefs sought in the Suit, the same is ex-facie barred by limitation as the foundation of the Suit is based on the alleged compromise which took place in the year 1974 and the Plaintiff by the present Suit is seeking to reopen the partition which has taken place in respect of the properties. This was the principal contention of the Learned Counsel for the Applicants.

9 Per contra, the Learned Counsel Mr. Avhad appearing for the Respondents original Plaintiff would support the impugned order. The Learned Counsel would contend that vide prayer clause 15(a) the relief sought by the Plaintiff is that of a declaration and the relief sought vide prayer clause 15(c) is sought on the basis that if the need for partition arises then the Collector may be directed to partition the properties. The Learned Counsel would contend that the Plaintiff has very elaborately stated the cause of action for filing the Suit in paragraph 12 of the plaint and therefore no interference is called for with the order passed by the Trial Court rejecting the application filed under Order VII Rule 11(d) of the Civil Procedure Code.

10 Having heard the Learned Counsel for the parties I have considered the rival contentions. In so far as the application under Order VII

Rule 11(d) is concerned, it is trite that only averments in the Plaint have to be looked into and the defence taken by the Defendants is not material. The averments in the plaint as a whole disclose as to how the suit properties were partitioned pursuant to the compromise which took place in the year 1974. The averments also disclose as to how after the death of Balu Kudale the names of only the Defendants were entered into the revenue record as also to how the Defendants impeding the Plaintiff from cultivating the ancestral agricultural lands. These are the gist of the averments in the plaint. It is on the basis of the averments that the reliefs have been sought in the Suit. The substantive relief sought is for the Trial Court to issue a declaration that the Plaintiff and the Defendants are entitled to and in possession of $\frac{1}{2}$ share each in the suit properties pursuant to the compromise which took place in the year 1974. The relief is also sought that the Defendants be directed to hand over possession of 2 Ares of land in Gat No.219 which the Defendants have refused to hand over. If the plaint is read as a whole, in my view, it cannot be said that the Suit per-se is barred by limitation. The Trial Court has rightly observed that it's a mixed question of law and fact which aspect would have to be gone into at the trial of the Suit. The maintainability of the Suit and the entitlement to reliefs are two different aspects. The Trial Court has on the basis of the averments in the plaint held the Suit to be maintainable and is not liable to be dismissed under Order VIII Rule 11(d) of the Civil Procedure Code whether the Plaintiffs are entitled to the reliefs sought in the Suit is another matter which the Trial Court

would undoubtedly have to consider at the trial of the Suit. In my view, therefore, the impugned order dated 11-4-2011 rejecting the application Exhibit 44 cannot be said to be suffer from any error of jurisdiction on the part of the Trial Court. Hence the same does not warrant exercise of the Revisionary Jurisdiction of this Court. The Civil Revision Application is accordingly dismissed.

[R.M.SAVANT, J]

CERTIFICATE

Certified to be true and correct copy of the original signed order