

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,  
BENCH AT AURANGABAD

CIVIL REVISION APPLICATION NO. 132 OF 2016

1. Shri Kevaldas s/o Manga Thakur,  
Age : 63 years, Occu.: Business,  
(Orig. Defendant no. 1)
2. Shri Chandrakant s/o Manga Thakur,  
Age : 55 years, Occu.: Business,  
(Orig. Defendant no. 2)
3. Shri Kishor s/o Manga Thakur,  
Age : 51 years, Occu.: Business,  
(Orig. Defendant no. 3)
4. Shri Vivek s/o Kailas Thakur,  
Age : 28 years, Occu.: Business,  
(Orig. Defendant no. 7)
5. Shri Nilesh s/o Kailas Thakur,  
Age : 26 years, Occu.: Education,  
All R/o : plot no. 39,  
Swami Samarth Nagar, Korit Road,  
Nandurbar, Tq. and District Nandurbar.  
(Orig. Defendant no. 8)  
.....Petitioners.

Versus

1. Smt. Sulochana Kailas Thakur,  
Age : 50 years, Occu.: Household,
2. Bharati Kailas Thakur,  
Age : 33 years, Occu.: Household,
3. Shri Ramkrushna Kailas Thakur,  
Age : 31 years, Occu.: Agriculture,
4. Akash Kailas Thakur,  
Age : 27 years, Occu.: agriculture,  
All R/o Plot No. 5, Vedu Govind Nagar,  
Nalava Road, Nandurbar,  
Tq. and District Nandurbar.  
(Orig. plaintiffs)

5. Sau. Ratnabai Sarangdhar Gaikwad,  
Age : 48 years, Occu.: Household,  
R/o plot No. 39, Swami Samarth Nagar,  
Korit Road, Nandurbar, Tq. and District Nandurbar  
  
(Orig. Defendant No.4)
6. Sau. Jijamala shriram Suryawanshi,  
Age : 45 years, Occu.: Household,  
R/o Plot No. 39 Swami Samarth Nagar,  
Korit Road, Nandurbar, Tq. and District Nandurbar  
  
(Orig. Defendant No.5)
7. Chayabai Manga Thakur,  
Age : 43 years, Occu.: Household,  
R/o : Plot No. 39, Swami Samarth Nagar,  
Korit Road, Nandurbar Tq. and District Nandurbar  
  
(Orig. Defendant No.6)
8. Shri Ashok Narayan Gurav,  
Age : 58 years, Occu.: Business,  
R/o : Maliwada, Nandurbar  
Tq. and Dist. Nandurbar  
  
(Orig. Defendant No.9)
9. Shri Govind Motiram Rajput,  
Age : 60 years, Occu.: Business,  
R/o : Bhoi Galli, Nandurbar.  
Tq. and District Nandurbar.  
  
(Orig. Defendant No.10)
10. Smt. Indubai Ramdas Jadhav,  
Age : 68 years, Occu.: household  
R/o : Near Amrut Talkies, Oppo. Marut Temple,  
Desaipura, Nandurbar, Tq. and District Nandurbar  
  
(Orig. Defendant No.11)
11. Shri Kiram Prakash Sali,  
Age : 28 years, Occu.: Business,  
R/o : Bhoi Galli, Nandurbar.  
Tq. and District Nandurbar.  
  
(Orig. Defendant No.12)

12. Shri Kamlesh Ashok Sali,  
Age : 28 years, Occu.: Business,  
R/o : Bhoi Galli, Nandurbar.  
Tq. and District Nandurbar.  
(Orig. Defendant No.13)
13. Sau. Sangita Raju Sali,  
Age : 50 years, Occu.: Business,  
R/o : Bhoi Galli, Nandurbar.  
Tq. and District Nandurbar.  
(Orig. Defendant No.14)
14. Ashok Vedu Rajpur,  
Age : 58 years, Occu.: Business,  
R/o : Bhoi Galli, Nandurbar.  
Tq. and District Nandurbar.  
(Orig. Defendant No.15)
15. Shri Vilas Vedu Rajpur,  
Age : 53 years, Occu.: Business,  
R/o : Bhoi Galli, Nandurbar.  
Tq. and District Nandurbar.  
(Orig. Defendant No.16)
- Respondents

---

Mr. Rakesh N. Jain, Advocate for applicant  
Mr. S. V. Natu, advocate for respondents no. 1 to 4  
Mr. Ruchir S. Wani, Advocate for respondents no.8 to 11 and 13 to 15

CORAM : SUNIL P. DESHMUKH, J.  
DATE : 1<sup>st</sup> October, 2016

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith. Heard learned counsel for parties by consent finally.
2. Present applicants- original defendants no. 1 to 3, 7 and 8 aggrieved by order passed by civil judge, junior division, Nandurabar, on 22-01-2016 dismissing their application Exhibit - 60 under Order VII, rule 11 (d) of the Code of Civil Procedure,

1908 ( "CPC") for rejection of plaint in special civil suit no. 9 of 2013, are before this court.

3. Respondents no. 1 to 4 have filed special civil suit no. 9 of 2013 before civil judge, junior division, Nandurbar, against present applicants - defendants no. 1 to 3, 7, 8 and respondents no. 5 to 11 - original defendants no. 4 to 6 and 9 to 12, for partition, separate possession and injunction in respect of the properties contained in the plaint. Parties hereinafter would be referred to by their status in said special civil suit viz.; applicants as 'defendants' and respondents no. 1 to 4 as 'plaintiffs' as a matter of convenience.

4. The plaintiffs in the suit aver that they are wife and wards of deceased Kailash Manga Thakur who has died in 2013. Defendants no. 1 to 5 are brothers and sisters of deceased Kailas Thakur and that Kailas and the defendants no. 1 to 5 constituted a joint hindu family descended from Manga Thakur and deceased defendant no. 6. Properties referred to in the plaint are ancestral properties. Kailash before his death purported to alienate certain properties. It is claimed that plaintiffs as co-parceners are entitled to share in the suit properties. Deceased Kailas Thakur had developed illicit relationship with one Kalpanabai and had been residing with her.

5. During life time of Kailas at the instance of plaintiff no. 1 in present matter, earlier on, suit had been instituted, however, subsequently, the same came to be withdrawn on account of certain formal defects with liberty to institute fresh suit. Subsequently Kailash died.

6. As such, present suit has been filed by plaintiffs, contending that the transactions entered into in favour of vendees by deceased Kailash are not binding on them and that he had no power and/or authority to alienate the properties and the transactions were not backed by any legal necessity. Some of the properties are in possession of other defendants. Partition of the properties was demanded which did not bear any fruit. Plaintiffs valued their share at Rs.7,00,000/-, further referring to that right accrued to plaintiffs by birth being co-parceners and also upon death of Kailash and there is recurring cause of action in their favour.

7. On appearance, defendants no. 1 to 3, 7 and 8 had filed their written statement and say to application for temporary injunction, as also by defendants no. 10 and 11.

8. The suit was being proceeded with and it was at the stage of cross examination of plaintiff no. 1, and an application Exhibit-60 had been moved by defendants no. 1 to 3, 7 and 8

(present applicants) purporting it to be under Order VII, rule 11(d) of the CPC, primarily placing thrust on that there is reference in the plaint to sale deed and partition deed, however, there is no reference as to how the same are not legal or binding on plaintiffs nor any relief is claimed against said instruments. Since it is claimed that sale deeds are not binding on plaintiffs; valuation of the suit is required to be done in accordance with section 6(iv)(ha) of the CPC. It is contended that there is also no relief claimed against the will. With such omissions, the suit is not tenable and plaint is liable to be rejected.

9. On application Exhibit-60, plaintiffs filed their say, purporting to point out that suit had been filed in respect of various properties as referred to in the plaint; they have valued their suit accordingly and have paid court fees over the same. According to the plaintiffs, the will has not been proved and that the testator was not competent to execute the will. Sale deeds were without legal necessity and without consent of the plaintiffs and as such are not binding on them. As far as objections raised by defendants in connection with reliefs claimed and court fees are concerned, those are mixed questions of facts and law and such contentions and objections would be required to be considered on merits and evidence and further that if the objections of the defendants emerge to be proper at a later

stage of the suit, the defects can be cured by amendments and payment of court fees. Suit had been part heard and fixed for further evidence and at such a stage, application Exhibit – 60 had been moved to prolong the hearing.

10. Exhibit – 60 had been decided by the trial court under the order impugned after hearing the parties and is rejected. The defendants are, thus, before this court in civil revision application converted from its initial form of writ petition.

11. Mr. Jain learned counsel for applicants-defendants no. 1 to 3, 7 and 8 and Mr. Wani learned counsel for respondents no. 8 to 11- defendants no. 9 to 12 and 14 to 16 vehemently contend that when position emerges that there is reference in the plaint to partition, will deed and registered alienations, merely claiming those to be not binding, when absence of legal necessity being not proved are not sufficient pleadings and are vague and illusory, to say that those constitute material facts forming a complete cause of action, would not be legal and proper. It is contended that in the face of situation when it has been admitted that there are transactions and no relief of declaration of those being not binding and/or are void is claimed, the suit is rendered unmaintainable and deserves to be blocked and thrown out at the threshold.

12. The Learned counsel in support of their submissions cited various judgments, however, have laid heavy stress on a few of them viz; *Sopan Sukhdeo Sable vs. Assistant Charity Commissioner*, reported in *AIR 2004 SC 1801* and of Madras High Court in *second appeal (MD) No. 148 of 2011 and Miscellaneous Petition No. 2 of 2011 [Vedambal vs. Ponnarasi]* decided on 30-06-2011.

13. Mr. Wani purports to contend that the averments in the plaint would not be able to constitute material facts and are short of giving complete cause of action. He submits that the decision relied on would show that omission even to refer to a single material fact would lead to an incomplete cause of action and the averments / statements in the plaint become bad. To buttress his said submission, he quotes passages from Sopan's case *AIR 2004 SC 1801* (supra) reading thus;

" **11.** *L.T.C. Ltd. V. Debts Recovery appellate Tribunal and ors.* MANU/SC/0968/1998 : AIR 1998 SC 634 it was held that the basis question to be decided while dealing with an application filed under Order VII Rule 11 of the Code is whether a real cause of action has been set out in the plaint or something purely illusory has been stated with a view to get out of order VII Rule 11 of the Code.

**12.** *The trial court must remember that if on a meaningful and not formal reading of the plaint it is manifestly vesatious and meritless in the sense of not disclosing a clear right to sue, it should exercise the power under Order VII Rule 11 of the code taking care to see that the ground mentioned therein is fulfilled. If clever drafting has created the illusion of the cause of action, it has to be nipped in the bud at the first hearing by examining the party searchingly under Order X of the Code. (See T. arivandandam v. T.V. Satyapal and Anr MANU/SC/ 0034/1977: [1978] 1 SCR 742).*

20. *There is distinction between 'material facts' and 'particular'. The words 'material facts', show that the facts necessary to formulate a complete cause of action must be stated. Omission of a single material fact leads to an incomplete cause of action and the statement or plaint becomes bad. The distinction which has been made between 'material facts' and 'particulars' was brought by Scott, L.J. In Bruce v. Odhams Press Ltd. (1936) 1 KB 697 in the following passage :*

*The cardinal provision in Rule 4 is that the statement of claim must state the material facts. The word "material" means necessary for the purpose of formulating a complete cause of action: and if any one "material" statement is omitted, the statement of claim is bad; it is "demurrable" in the old phraseology, and in the new is liable to be "struck out" under R.S.C. Order XXV, Rule 4 (see Philipps v. Philipps (1878) 4 QBD 127; or "a further and better statement of claim" may be ordered under Rule 7. "*

*The function of "particulars" under Rule 6 is quite different. They are not to be used in order to fill material gaps in a demurrable statement of claim – gaps which ought to have been filled by appropriate statements of the various material facts which together constitute the plaintiff's cause of action. The use of particulars is intended to meet a further and quite separate requirement of pleading, imposed in fairness and justice to the defendant. There (Their) function is to fill in the picture of the plaintiff's cause of action with information sufficiently detailed to put the defendant on his guard as to the case he had to meet and to enable him to prepare for trial.*

*The dictum of Scott, L. J. in Bruce case (supra) has been quoted with approval by this Court in Samant N. Balkrishna v. George Fernandes, MANU/SC/0270/1969 : [1969] 3 SCR 603, and the distinction between "material facts" and "particulars" was brought out in the following terms :*

*The word 'material' shows that the facts necessary to formulate a complete cause of action must be stated. Omission of a single material fact leads to an incomplete cause of action and the statement of claim becomes bad. The function of particulars is to present as full a picture of the cause with such further information detail as to make the opposite party understand the case he will have to meet.*

*Rule 11 of Order VII lays down an independent remedy made available to the defendant to challenge the maintainability of the suit itself, irrespective of his right to contest the same on merits. The law ostensibly does not contemplate at any stage when the objection can be raised, and also does not say in express terms about the finding of a written statement. Instead, the word 'shall' is used clearly implying thereby that it casts a duty on the Court to perform its obligations in rejecting the plaint when the same is hit by any of the infirmities provided in the four clauses of Rule 11, even without intervention of the defendant. In any case, rejection of the plaint under Rule 11 does not preclude the plaintiffs from pressing a fresh plaint in terms of rule 13.*

*22. Under Order II Rule 11 of the code which contains provisions of mandatory nature, the requirement is that the plaintiffs are duty bound to claim the entire relief. The suit has to be so framed as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them. Rule 2 further enjoins on the plaintiff to include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action. If the plaintiff omits to sue or intentionally relinquishes any portion of his claim, it is not permissible for him to sue in respect of the portion so omitted or relinquished afterwards. If the plaintiffs as contended by Mr. Mohta want to relinquish some reliefs prayer in that regard shall be done before the trial Court. A reading of the plaint and the reliefs along with the contents of the plaint goes to show that the main dispute relates to the question of continuance of tenancy and the period of tenancy. They are in essence unrelated with the other reliefs regarding enquiry into the affairs of the trust. Such enquiries can only be undertaken under Section 50 of the Act. For instituting the suit of the nature specified in Section 50, prior consent of the Charity Commissioner is necessary under Section 51. To that extent Mr. Savant is right that the reliefs relatable to Section 50 would require a prior consent in terms of Section 51. If the plaintiffs give up those reliefs claimed in accordance with law, the question would be whether a cause of action for the residual claims/reliefs warrant continuance of the suit. The nature of the dispute is to be resolved by the Civil Court. The question of tenancy cannot be decided under Section 50 of the Act. Section 51 is applicable only to suits which are filed by a person having interest in the trust. A tenant of the trust does not fall within the category of a person having an interest in the trust. Except relief in Para D of the plaint, the other reliefs could be claimed before and can be considered and adjudicated by the Civil Courts and the bar or impediment in Sections 50 and 51 of the Act will have no relevance*

*or application to the other reliefs. That being so, Section 50 and 51 of the Act would not have any application to that part of the relief which relates to question of tenancy, the term of tenancy and the period of tenancy. The inevitable conclusion therefore is that Courts below were not justified in directing rejection of the plaint. However, the adjudication in the suit for the rest of the reliefs, the plaintiffs shall be permitted within a month from today to make such application as warranted in law for relinquishing and/or giving up claim for other reliefs. "*

14. To contend that the plaint is liable to be rejected, Mr. Wani relies on Madras high court decision in *Vedambal v. Ponnarasi* (supra), holding that the plaintiff having filed suit for relief of partition and separate possession without claiming relief of setting aside sale deed Exhibit B-1, the suit is liable to be thrown out in limine, particularly on following excerpt under paragraph no. 22 :

*" 22. The first and foremost substantial question of law raised in the present second appeal as stated supra is as to whether the present suit is legally maintainable without setting aside Ex. B.1 ? It has already been discussed in detail and ultimately found that Ex.1 is a valid document. Since Ex.B.1 is a valid document, the plaintiff ought to have sought for relief of cancellation. But the plaintiff has straight away filed the present suit for the relief of partition and separate possession without setting aside Ex.B.1. Since the plaintiff has filed the present suit for the reliefs of partition and separate possession without setting aside Ex.B.1, it is needless to say that the present suit is not legally maintainable and the same is maintainable and the same is liable to be thrown out in limini. "*

Mr. Wani's submissions reflect commendable effort working on and in appreciation of the ' subject matter ' and for his standing indeed deserves a mention for conducting the matter with poise.

15. Learned counsel Mr. S. V. Natu, appearing for the plaintiffs submits that plaintiffs no. 1 to 4 have claimed right to the suit properties as co-parceners and right to plaintiff no.1 has accrued upon death of her husband Kailas Thakur. The plaint contains such averments. The properties under the plaint are claimed to be ancestral – joint family properties. Kailas Thakur is stated to be member of joint family constituted by progeny of deceased Manga Yedu Thakur. Certain transactions by deceased Kailas Thakur have been referred to which too give cause of action for asserting rights. After his death, present suit has been filed. As such, according to learned counsel, the plaint contains all the requisite averments constituting material facts, giving complete cause of action. He submits that it cannot be said that facts so averred and cause of action accrued are illusory or for that matter are creating illusion of material facts or cause of action. He submits that it cannot be said that for absence of relief being claimed in specific words as contended on behalf of the applicants, suit shall be considered barred by law.

16. According to him the contentions, on behalf of the defendants about the will, carry no substance as the same is yet not proved and would seldom be capable of being taken into account. He submits that the so called want of claiming reliefs

and declaration in specific terms is unlikely to hinder and affect the plaintiffs' rights.

17. Learned counsel submits, as far as decision of the supreme court in Sopan Sable's case (*supra*) relied on by defendants is concerned, that gives propositions, however, in present case requirements under the propositions, to quite a large extent, stand satisfied.

18. Learned counsel submits that the decision being relied on, on behalf of the applicants, would not be able to truncate the proceedings of the suit in present situation. He points out that the decision of Madras high court is at second appellate stage and not in proceedings referable to Order VII, rule 11 of the CPC.

19. He submits, trial court has taken stock of the situation and has further referred to that at appropriate stage the difficulties as are being perceived can be removed.

20. Mr. Natu relies on a judgment of the supreme court in the case of *Kamala and ors. v. K. T. Eshwara Sa and ors*, reported in *AIR 2008 SC 3174* which, according to him, would govern the situation squarely, particularly having regard to paragraph no. 22 of the same which reads :

*" 22. The plaintiff-appellant might not have prayed for any decree for setting aside the deeds of sale but they have raised a legal plea that by reason thereof the rights of the coparceners have not been taken away. Their status might not be of the coparceners, after the preliminary decree for partition was passed but as we have indicated hereinbefore the same cannot be a subject-matter of consideration in terms of Order VII, rule 11 (d) of the Code. "*

21. Learned counsel on either side have quite fairly referred to that only plaint averments would be required to be considered when an application is moved with reference to Order VII, rule 11 of CPC.

22. From averments in the plaint, it appears, plaintiffs claim to be legal heirs left behind by deceased Kailas Manga Thakur and further that Kailas and his brothers and sisters constituted joint hindu family and that the properties referred to in the plaint having been descended to joint family from their father Manga Vedu Thakur and he had acquired certain properties which are in possession of some of the defendants and claiming the same to be joint family properties and further that during his life time, Kailas had dealt with certain properties giving rise to a suit which later-on was withdrawn with liberty to file fresh suit, since the same, had suffered formal defects and present suit has been filed after his death.

23. It is claimed that the properties being joint family properties and plaintiffs being entitled to share in the same, they had demanded their share from the defendants, however, the defendants did not respond to demands and as such the suit ensued.

24. It will have to be adverted to that rights have been claimed by plaintiffs as co-parceners. Having regard to observations as quoted from the judgment of supreme court in the case of *Kamala (supra)*, the contentions of the defendants as are now being advanced would seldom be amenable for consideration under Order VII, rule 11 (d) of CPC having regard to that the averments in the plaint purport to assert right as coparceners to property against joint family members and also to that the plaintiffs have related the properties to the ancestors, and through relationship with deceased Kailas Thakur. Further claiming that he had alienated some properties and had led to a certain degree vagrant life and as such some of the defendants are in possession of certain properties and thus the plaintiffs claimed partition and possession of suit properties as well as other properties albeit without overtly claiming reliefs of declaration of cancellation of alienations and other transactions and those being not binding on them.

25. In the decision of the Madras high court, in the peculiar facts of that case, it clearly emerged that the plaintiff therein was considered to be a party to the alienation and in such a case it was accordingly ruled in that the matter as referred to earlier. The ruling by Madras high court has been given at the stage of second appeal and it was not a case concerning Order VII, rule 11 of the CPC.

26. The contention that since relief of setting aside alienation being not claimed, the suit would be barred by law, may not be able to arrest the proceedings at this stage since it would be a matter to be decided on merits and evidence. Whether in the given facts and circumstances, such a relief ought to be prayed or not would be required to be tried and it cannot be straight-away said that the rulings relied on by defendants would create a bar to suit.

27. A plaint ordinarily is not liable be rejected in part and/or accepted in part. Having regard to aforesaid, overall position emerges that the plaint refers to several properties a few of which appear to have been dealt with by deceased Kailas Thakur. It is not the case that only said properties are involved in the suit. The plaint in the circumstances may not be liable to be rejected.

28. Judgment about asserted rights for want of claiming reliefs may not be possible at the threshold, without letting parties adduce evidence in this respect. It does not appear to be a case wherein it can be said that averments fall short of making out cause of action.

29. In the circumstances, so far as the citation of Sopan's case (*supra*) is concerned, at least at this stage, it seems contention of Mr. Natu that, the requirements under the same to quite a large extent appear to be satisfied, carries quite some weight.

30. Mr. Wani, learned counsel for defendants during course of submissions has shown concern in respect of certain observations appearing in the impugned order about that while it is not pleaded by plaintiffs absolutely, the learned judge has observed about the plaintiffs having pleaded the transactions being *nullity* or *void-ab-initio*. According to him, observations in that respect appearing in the impugned order sound as if such are the pleadings and as the matter would proceed with the same, those would create impediments and hurdles for the defendants at later stages.

31. Perusal of the impugned order would show that the learned judge has observed thus in paragraphs no. 8 and 9:

" 8. .... The plaintiffs have specifically pleaded in the plaint that sale deeds and Will of suit properties executed by Late Kailas Thakur are void ab-initio. It is well settled that when a document is void ab-initio, a decree for setting aside the same would not be necessary as the same is non est in the eyes of law, as it would be a nullity. "

9. .... According to the plaintiffs, the sale deeds and the Will of suit properties are void-ab-initio. In this context, I think that the decree for setting aside the same would not be necessary. A question of payment of court fees in connection with the sale deeds and Will, therefore, does not arise at this stage. "

32. Aforesaid observations apparently are from outside the pleadings and have been at intermediate stage and as such will have to be considered accordingly as not final and should not be deemed to cause any impediments or hurdles for the defendants to canvass their cases as would be deemed proper and appropriate.

33. Taking stock of the situation, though to a certain degree aforesaid observations appear to be digressed, it would not overwhelm final outcome of impugned judgment. Ultimate outcome of the impugned order would seldom be liable to be faulted with.

34. The impugned order considers other relevant aspects as would be necessary for deciding the application of such a nature. In the circumstances, rejection of application Exhibit – 60 does not require any interception.

35. It is, however, made clear that observations hereinbefore are for the purpose of decision in civil revision application and have no further efficacy and shall not influence decision making on merits.

36. Civil revision application is dismissed. Rule stands discharged.

SUNIL P. DESHMUKH,  
JUDGE

pnd