

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

APPEAL FROM ORDER NO.13 OF 2016

Sulochana Sharadrao Chinawale,
Age 50 years, Occu. Small Scale
Industry, R/o Flat No.4, 2nd floor,
Om Sai Apartment, Plot No.15B,
Above Talathi Office of Pimprala
Jalgaon, Taluka and Dist.Jalgaon

..Appellant
(Original Defendant)

Versus

1. Smt. Shobha Subhash Vanjari,
Age 45 years, Occu. Agri. &
Household, R/o Joshi wada,
Shivaji Chowk, Mehrun,
Jalgaon, Taluka and District
Jalgaon
2. Sau. Kalpana Santosh Vanjari,
Age 38 years, Occu. Agri. &
Household R/o Gandhipura,
Erandol, Taluka Erandol,
District Jalgaon
3. Sau. Hirabai Ashok Vanjari,
Age 35 years, Occu. Agri. &
Household, R/o Joshi wada,
Shivaji Chowk, Mehrun,
Jalgaon, Taluka and District
Jalgaon, through General
Power of Attorney Ulhas
Devram Sable, Age 55 years,
Occu. Agri., R/o Plot No.5
Ring road, Jalgaon

..Respondents
(Original Plaintiffs)

Mr S.P. Brahme, Advocate for appellant
Mr V.B. Patil, Advocate for respondents No.1 to 3

CORAM : V.K. JADHAV, J.

DATE : 15th June 2016

PER COURT

1. Being aggrieved by the judgment and order dated 27th April 2015 passed by Ad-hoc District Judge - 1, Jalgaon in Regular Civil Appeal No.306 of 2013, the original respondent before the lower appellate Court/original defendant before the trial Court has preferred this appeal from order.

2. The original plaintiffs instituted Special Civil Suit No.110 of 2011 before the trial Court, for declaration and a decree of perpetual injunction in respect of the suit property. The defendant has strongly resisted the suit by filing the written statement. Furthermore, the appellant - original defendant has also filed an application Exh.19 under Order VII, Rule 11 of the Code of Civil Procedure (hereinafter referred to as "the Code" for brevity) with a prayer to return the plaint. The learned Judge of the trial Court by order dated 12th November 2013 returned the plaint by invoking the powers under Order 7 Rule 11 (d) of the Code. The original plaintiffs have challenged the said order by filing Regular Civil Appeal No.306 of 2013. The learned Judge of the lower appellate Court allowed the appeal with costs and thereby quashed and set aside the order dated 12th November 2013, passed below Exh.1 in Special Civil Suit No.110 of 2011, renumbered as Regular Civil Suit No.443 of 2012 and rejected the application Exh.19 filed by the original defendant. The

learned Judge of the lower appellate Court has directed to restore the suit to the file of the lower Court and further directed the lower Court to proceed with the suit in accordance with the provisions of law. Being aggrieved by the same, the original defendant has preferred this appeal from order.

3. The learned Counsel for the appellant/original defendant submits that Regular Civil Appeal No.306 of 2013 came to be decided *ex parte*. The learned Counsel further submits that the lower appellate Court has not given opportunity of being heard to the appellant/original defendant, on whose application the trial Court has passed the order directing return of the plaint. The learned Counsel submits that the judgment and decree passed by the lower appellate Court is not proper, correct and legal and the same is thus liable to be quashed and set aside. The learned Counsel submits that the trial Court has rightly considered the provisions of the Code and allowed the application Exh.19 filed by the appellant/original defendant.

4. The learned Counsel for the respondents/original plaintiffs submits that the order passed by the trial Court on the application below Exh.19 and below Exh.1 of the plaint is not proper, correct and legal. The trial Court has returned the plaint by invoking the powers under Order VII, Rule 11 (d) of the Code. The learned Counsel submits that the specific provision of Order VII, Rule 10 of the Code deals with return of the plaint and Order 7, Rule 11 speaks about rejection of the plaint. The learned Counsel submits that in paragraph 19 of the

impugned judgment, the learned Judge of the lower appellate Court has rightly observed that the issue of limitation is a mixed question of facts and law and needs to be decided at the time of final hearing by giving an opportunity to the parties to lead their evidence. The learned Counsel submits that there is no substance in the appeal and the same is thus liable to be dismissed.

5. It appears from the order passed by the trial Court below Exh.1 that the learned Judge of the trial Court has discussed the provisions of law and passed the order, which was impugned before the learned lower appellate Court. The learned Judge of the lower appellate Court, in paragraph 15 of the judgment has referred the pleadings of the plaintiffs and on the basis of the pleadings, it is averred by the plaintiffs that the suit is within limitation. In view of the same, all the facts as referred in the plaint by way of pleadings need to be considered by the trial Court, since the point of limitation as raised by the appellant/defendant before the trial Court is a mixed question of facts and law and the same is required to be decided at the time of final hearing by giving an opportunity to the parties to lead the evidence in support of their rival contentions. The learned Judge of the lower appellate Court has, therefore, rightly set aside the order passed on the application below Exh.1 in the original suit and also rejected the application Exh.19 filed by the present appellant/original defendant before the trial Court. I do not find any substance in the appeal. The appeal is thus liable to be dismissed. Hence, the following order:

ORDER

The appeal from order is hereby dismissed. In the circumstances, there shall be no order as to costs.

(V.K. JADHAV, J.)

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