

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.161 OF 2016**

Shri Sharad Ashok Avhad

..Applicant

Vs

Shri Ram Kashinath Shirsat and
Ors.

.. Respondents

Mr. Sachin Gite, Advocate for Applicant.

Ms. Seema Sarnaik, Advocate for Respondents no.1 to 6.

CORAM : R.G.KETKAR,J.

DATE : 30/03/2016

PC:

1. Heard Mr. Sachin Gite, learned Counsel for the applicant and Ms. Seema Sarnaik, learned Counsel for respondents No.1 to 6 at length. Ms. Sarnaik states that she has only filed Vakalatnama on behalf of respondent no.5 and assures that on or before 1.4.2016, she will file Vakalatnama for and on behalf of respondents no.1 to 4 and 6. Mr. Gite orally applies for leave to delete respondent no.7 on the ground that respondents no.1 to 6 are the only contesting respondents. On the oral application made by Mr. Gite, respondent no.7 is deleted from the present proceedings. Amendment shall be carried out forthwith.

2. Rule. Ms. Sarnaik waives service on behalf of the respondents. At the request and by consent of the parties, Rule is made returnable forthwith and Civil Revision Application is taken up for final hearing.

3. By this Application under Section 115 of Code of Civil Procedure, 1908 (for short, 'CPC'), the applicant has challenged the Judgment and order dated 18.11.2015 passed by the learned 2nd Jt. Civil Judge, Senior Division, Nashik, below Exhibit-71 in Special Civil Suit No.254/2014. By that order, the learned trial Judge rejected the application made by the applicant under Order VII, Rule 11 of C.P.C for rejecting the plaint.

4. Mr. Gite submitted that the applicant (orig.defendant no.2) had earlier instituted Civil Revision Application No.325 of 2015 challenging the Judgment and order dated 2.2.2015 below Exhibit-47 as also the Judgment and order dated 10.3.2015 below Exhibit-21.

5. By order dated 2.2.2015, the learned trial Judge rejected the application at Exhibit-47 made by defendant no.2 for framing issue of jurisdiction in view of the provisions of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 (for short, 'Act'). He submitted that by order dated 3.1.2015 below Exhibit-21, the learned trial Judge framed the issue as to whether the suit is within limitation and directed the parties to lead evidence. By order dated 10.3.2015, the learned trial Judge held that the suit is within limitation and rejected

application Exhibit-21.

6. While disposing of Civil Revision Application No.325 of 2015, this Court permitted defendant no.2 to take out appropriate application under Order VII, Rule 11 of C.P.C as application Exhibit-21 under Section 9-A of C.P.C was misconceived. It was noted that the application for interim relief was disposed of on 19.9.2014. The application under Section 9-A was made on 13.10.2014, that is to say, after the application for interim relief was decided. While rejecting the application by the impugned order, the trial Judge observed that the application Exhibit-21 was treated under Order VII, Rule 11 and not under Section 9-A of C.P.C. As the order passed below Exhibits-21 and 47 became final, the application filed at Exhibit-71 was liable to be rejected.

7. With the assistance of learned Counsel appearing for the parties, I have perused the application Exhibit-21 made by defendant No.2. Said application has essentially under Section 9-A of C.P.C. As noted earlier, the application for interim relief was disposed of on 19.9.2014. Defendant no.2 filed application under Section 9-A of C.P.C on 13.10.2014, that is to say, after the application for interim order was decided.

8. On 3.1.2015, the learned trial Judge framed preliminary issue

as to whether the suit is within limitation and directed both the parties to lead evidence on that issue. The very fact that the learned trial Judge has directed the parties to lead evidence clearly indicates that the application Exhibit-21 was treated as one under Section 9-A of C.P.C and not under Order VII, Rule 11(d) of C.P.C. By order dated 10.3.2015, the learned trial Judge decided the preliminary issue by holding that the suit is within limitation. Defendant No.2 filed application Exhibit-47 for review of that order and said application was rejected on 2.2.2015.

9. Aggrieved by the Judgment and order dated 2.2.2015 below Exhibit-47 as also the Judgment and order dated 12.3.2015 below Exhibit-21, defendant no.2 instituted C.R.A No.325 of 2015. On 26.6.2015 Civil Revision Application was disposed of reserving liberty to defendant no.2 to take out application under Order VII, Rule 11 of C.P.C. By the impugned order, the learned trial Judge rejected the application on the ground that the orders below Exhibits 21 and 47 became final and the application is meritless.

10. In my opinion, the learned trial Judge committed serious errors of law apparent on the face of the record. The learned trial Judge failed to appreciate that while disposing of C.R.A., it

was specifically observed that the application Exhibit 21 made under Section 9-A was wholly misconceived. The said application also could not have been treated under Order VII, Rule 11 as by order dated 3.1.2015, the learned trial Judge directed both the parties to lead evidence. In view thereof, while disposing of the C.R.A., liberty was reserved to defendant no.2 to take out application under Order VII, Rule 11. In the impugned order, the learned trial Judge however observed that the application Exh.21 was treated as one filed under Order VII rule 11 of C.P.C. And not under section 9A of C.P.C. The said approach is patently erroneous. In view thereof, the impugned order is liable to be set aside and is accordingly set aside. The Application made by defendant no.2 under Order VII, Rule 11 at Exh.71 is restored to the file of the trial Court. The learned trial Judge will decide this application uninfluenced by the findings/observations in orders dated 3.1.2015 and 10.3.2015 below Exhibit 21 and order dated 2.2.2015 below Exhibit 47 and after considering the material already on record and after hearing counsel appearing for the parties as to whether the suit is barred by limitation as also the suit is barred in view of the provisions of the Act. Rule is made absolute in the aforesaid terms with no order as to costs.

(R.G.Ketkar, J)