

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

CIVIL REVISION APPLICATION NO.184 OF 2016

Smt.Anubai Janardhan Mhatre & Ors. ... Applicants

Vs.

Mrs.Bayamabai Hari Patil
since deceased, through
Shri Hari Dattu Patil & Ors. ... Respondents

Mr.S.M. Kamble for the Applicants

**CORAM: Mrs.MRIDULA BHATKAR, J.
DATED: APRIL 19, 2017**

P.C. :

1. The applicants are the original defendant Nos.3 to 9 in Special Civil Suit No.121 of 1997 filed by respondent No.1. The present petitioners moved application under Order 7 Rule 11 of the Civil Procedure Code on the ground that the cause of action is not made out by the original plaintiff. The defendants i.e., the petitioners, are the legal representatives of one Janardhan, brother of Respondent No.1. The present petitioners have filed the suit for declaration of their 1/3rd share through their late father Janardhan against the two brothers Mahadev and Sudam, i.e., the present respondent Nos.2 and 3. The said suit was decreed and 1/3rd

share of the petitioners being the legal representatives of the brother Janardhan and $\frac{1}{3}^{\text{rd}}$ share of other two brothers being their ancestral property, was declared. Respondent No.1 Bayamabai Hari Patil, who was the sister of Janardhan, Sudam and Mahadev, was not made party to the Special Civil Suit No.280 of 1992 but she gave evidence as witness on the point of oral partition and to the satisfaction of her claim. The said suit No.280 of 1992 was decreed on 3.5.1997. Thereafter, she filed Special Civil Suit NO.121 of 1997 wherein she sought a declaration of $\frac{1}{3}^{\text{rd}}$ share in the said ancestral property and the declaration of $\frac{1}{3}^{\text{rd}}$ share of her brothers in Special Civil Suit No.280 of 1992 was to be stayed.

2. Therefore, the present petitioners moved an application on the ground of maintainability of the suit under Order 7 Rule 11 of Civil Procedure Code.

3. The learned Counsel for the Petitioners has submitted that the suit is not maintainable on the ground that the cause of action never arose and not shown in the suit. He further submitted that the original plaintiff Bayamabai has earlier deposed in Special Civil Suit No.280 of 1992 that she had received Rs.30,000/- towards satisfaction of her claim and there was oral partition between the

brothers. She did not take steps nearly for five years. Thereafter, till the suit was decreed and then she filed the suit and therefore, there is no cause of action for her to file this suit. He further submitted that the parties and the suit property are the same.

4. When the suit was filed, they moved application under Order 7 Rule 11 of the Civil Procedure Code and the said application was allowed on 13.9.2004 by the learned Civil Judge Senior Division, Panvel against which the present respondents i.e., legal representatives of Bayamabai preferred civil Appeal No.164 of 2004 and the said appeal was allowed and the order passed by the trial Judge was set aside by order dated 10.9.2015 by the learned District Judge, Raigad-Alibag below exhibit 38/C. Perused both the orders. It is the case of the plaintiff that the maintainability of the suit and the cause of action is to be determined on the basis of the averments and the pleadings in the plaint. The suit is based on fraud and coercion. It is averred that Bayamabai Patil gave evidence under coercion and her brother in Special Civil Suit No.280 of 1992. Thus, the cause of action, it appears, arose when she gave the evidence and thereafter when the suit was decreed on 3.5.1997, wherein 1/3rd share in her three brothers was decided

in the ancestral property. At this stage, it is not necessary for the learned Judge to go into merits and other aspects of the matter, as it is a suit filed on the ground of coercion and fraud, I am of the view that the cause of action is pleaded in the suit and so it is maintainable. The order of the trial Court has rightly been set aside and I do not find any illegality in the order passed by the learned District Judge and hence, it is maintained.

5. Civil Revision Application is accordingly dismissed.

(MRIDULA BHATKAR, J.)