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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

CIVIL REVISION APPLICATION NO.113/2017

WITH

CIVIL APPLICATION NO.10463/2017

Padamabai w/o Atamaram Chavan
and another.

...Applicants..

Versus

Bhagwan Pundlic Chavan & two others.

...Respondents...

.....

Shri D.B. Gaikwad, Advocate for applicants.

Smt.Priya R. Bharaswadkar, Advocate for respondent no.1.

Respondent no.3 is reported dead and her L.Rs. are stated
to be respondent nos.1 & 2.

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CORAM: M.S. SONAK, J.

DATE: 06.02.2018

ORDER :

1] Heard learned counsel for the applicants. He
files affidavit of service in relation to service upon
respondent no.2. This means now that the service is
complete.

2] This civil revision application challenges the
order dated 20.2.2017 made by the learned trial Judge

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rejecting the applicants' application under Order VII Rule 11 of the Code of Civil Procedure on the ground that the Regular Civil Suit No.190/2014 was not at all maintainable and in any case the same was barred by law of limitation.

3] Learned counsel for the applicants submits that RCS No.190/2014 was instituted by the respondents – plaintiffs only in August, 2014 to question the judgment and decree dated 19.6.2006 made in Regular Civil Suit No.125/2005, when in fact the decree dated 19.6.2006 was already executed some time on 10.8.2012. He submits that once the decree was executed, there was no question of maintaining a second suit to question such a decree whether on grounds of fraud or any other reason.

4] Learned counsel for the applicants, without prejudice, submits that there is ample material on record, which suggests that the respondents – plaintiffs were very much aware of the decree dated 19.6.2006 some time in the year 2007 itself and, therefore, the suit, which was instituted in August, 2014, was *ex-facie* barred by law of limitation. On this ground also, learned counsel for the applicants submits that the plaint was

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required to be rejected by taking resort to provisions of Order VII Rule 11 of the Code of Civil Procedure.

5] In this case, the second suit has been filed on the ground that the decree dated 19.6.2006 in RCS No.124/2005 was obtained by playing fraud. The record indicates that the decree was an *ex-parte* decree. Whether any fraud was involved or not is obviously a matter, which will have to be decided in the suit on taking evidence. However, merely because the decree dated 19.6.2006, which is alleged to have been obtained by fraud came to be executed on 10.8.2012, is not a ground, which renders the second civil suit i.e. Regular Civil Suit No.190/2014 as not maintainable. If ultimately such suit is decreed, it might perhaps be open to the plaintiffs to apply for restitution. Merely because the decree has been executed, that does not render the second suit to question such decree on the ground of fraud as not maintainable. Therefore, it is not possible to accept the first contention of the learned counsel for the applicants.

6] Insofar as the second contention is concerned, there is no statement in the plaint, which suggests that

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the plaintiffs were aware of the decree dated 19.6.2006 in the year 2007 itself. In order to exercise powers under Order VII Rule 11 (d) of the Civil Procedure Code, the suit is required to be shown as barred under any law, on the basis of some statement in the plaint itself. For the exercise of powers under Order VII Rule 11(d) of the Code of Civil Procedure, it is not permissible to look to the statements in the written statement or any other document, which the defendant may produce by way of defence. Since in this case, there is no statement in the plaint on the basis of which it can be categorically stated that the suit is *ex-facie* barred by law of limitation, there was no error on the part of the trial Court in dismissing the applicant's application under Order VII Rule 11 of the Code of Civil Procedure. The trial Court has also held that limitation in the present case is a mixed question of law and fact and, therefore, evidence is required to be led on this issue. There is no jurisdictional error in the view taken by the learned trial Judge.

7] No doubt, in this matter, the issue of both maintainability as well as limitation can always be

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framed and may be framed by the learned trial Judge so that such issues are decided alongwith other issues, which may arise in the suit. Further, any observations in the impugned order or for that matter in the present order, need not influence the learned trial Judge while deciding the suit on its own merits and in accordance with law.

8] Subject to the aforesaid observations, this civil revision application is dismissed. There shall be no order as to costs.

9] Civil Application No.10463/2017 to produce additional documents is dismissed since the main civil revision application itself is dismissed. However, this shall not preclude the applicants from applying before the trial Court for production of such documents. Such application, if made, to be considered by the trial Court on its own merits and in accordance with law.

(M.S. SONAK, J.)