

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

CIVIL REVISION APPLICATION NO.244 OF 2017

1) Sau.Dipali Himmat Meherwal
Age: 40 years, Occu.: Agricultural
& Business.

2) Himmat Kalyanlal Meherwal
Age: 42 years, Occu.: Agricultural
& Business

Both R/o.Gulmohar Road,
Ahmednagar, Tal. & Dist.Ahmednagar. ..Applicants

Versus

1) Shaikh Nazir Mohammad Nasir
Age: 47 years, Occu.: Agriculture
and Business.

2) Shaikh Anwar Mohammad Nasir
Age: 40 years, Occu.: Agri.

Both R/o.Gulmohar Road,
Ahmednagar, Tal. & Dist.Ahmednagar.

3) Gulam Hussain Alabaksh
Age: 42 years, Occu.: Business,
R/o.GPO Road, Ahmednagar.

4) Sau.Ameena Haji Mirza
Age: 38 years, Occu.: Household
and Agriculture.

Mukund Nagar, Ahmednagar.

5) Shaikh Iliyas Mubarak
Age: 41 years, Occu.: Business,
R/o.Abhilasha Colony,
In front of Mothi Mariyam Masjid,
Mukundnagar, Ahmednagar.

6) Gaiakwad David Shamrao
Age: 70 years, Occu.: Agriculture
and Business,
R/o.Loyed Colony, Savedi Road,
Ahmednagar.

..Respondents

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Advocate for Applicants : Mr.A.P.Bhandari
Advocate for Respondent Nos.1 to 4 : Mr.S.G.Jadhavar

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CORAM : M.S.SONAK, J.
DATE : 4th JANUARY 2018

ORAL JUDGMENT:-

1) Heard Mr.A.P.Bhandari for the applicants and
Mr.S.G.Jadhavar for respondent Nos.1 to 4.

2) The revision application challenges order dated
23.11.2017 made by the Second Joint Civil Judge, Senior
Division, Ahmednagar (Trial Court), rejecting their
application under Order VII Rule 11 of the Code of Civil

Procedure, seeking rejection of the plaint in Special Civil Suit No.46 of 2015.

3) Mr.Bhandari, learned counsel for the applicants submits that upon a meaningful reading of the plaint, it is quite clear that the suit is barred under the provisions of Section 47 of the Code of Civil Procedure as well as the provisions under Order XXIII Rule 3 of the the Code of Civil Procedure. He submits that, there is no dispute that there was a decree obtained which was put into execution. At the stage of execution, the applicants objected by invoking the provisions under Order XXIII Rule 3 of the Code of Civil Procedure. The objections were initially dismissed, however, on appeal, the matter was remanded to the Executing Court with a direction for reconsideration. At that stage, the applicants purchased the shares from Shakuntalabai Patole and consequently, stepped into the shoes of Shakuntalabai. It is in this execution proceedings that, consent terms were agreed and

execution proceedings were disposed of. On the said basis, Mr. Bhandari points out that respondent Nos.1 to 4 were parties to the consent terms. On the basis of such consent terms, and order made thereon, the decree has been further executed by the Collector under the provisions of Maharashtra Land Revenue Code. Mr. Bhandari submits that issues raised in the plaint are nothing but issues which arise in the course of execution of decree and therefore, in terms of Section 47 of the Code of Civil Procedure, there is no question of maintaining a separate Suit for the said purpose. Mr. Bhandari also points out that the Suit of this nature, which seeks to question the consent decree, would not be maintainable in terms of Order XXIII Rule 3 of the Code of Civil Procedure.

4) Mr. Bhandari points out that there are other objections to the maintainability of the Suit as well. He submits that the Suit is barred by principles analogues

to *res judicata*. He points out that the suit is barred by the law of jurisdiction. He also points out that the Suit in fact, questions the order made by the Collector, exercising the powers under the Maharashtra Land Revenue Code. He submits that, no Suit would be maintainable to question the exercise of powers under the Maharashtra Lands Revenue Code, since alternate and efficacious remedies are provided under the Code itself. Mr. Bhandari submits that the provisions of such alternate and efficacious remedy constitutes an implied bar to the jurisdiction by the Civil Court.

5) Mr. Bhandari in support of the aforesaid contentions relied on the decisions in the following cases:-

(a) *Tulsan Vs. Pyarelal and Ors.* [(2006) 10 SCC 782].

(b) *Chandrika Misir & Another Vs. Bhaiyalal* [(1973) 2 SCC 474].

(c) *Paygonda Survgonda Patil and others Vs. Jingonda*

Surgonda Patil and others [AIR 1968 Bombay 198].

(d) Popat Jaysingh Rajpure Vs. State of Maharashtra [2012 (5) Mh.L.J. 884].

(e) T. Arivandandam Vs. T.V. Satyapal and another [AIR 1277 SC 2421].

(f) P.R.Sukeshwala and another Vs. Dr.Dewadatta V.S. Kerkar and another [AIR 1995 Bombay 227].

6) In addition, Mr.Bhandari also placed reliance on *Satyananda Sahoo Vs. Ratikanta Panda [AIR 1997 Orissa 867]*, in support of the plea of *res judicata*.

7) Mr. S.G.Jadhavar, the learned counsel for the respondent Nos.1 to 4 points out that, *plaint can be rejected under Order VII Rule 11 of the Code of Civil Procedure, only on the basis of a statement in the plaint and not by reference to the defence of the defendants. He submits that, upon a meaningful but entire reading of the plaint, it is quite clear that the same not only*

discloses cause of action but further, plaint cannot be said to be barred by any provisions of law. Mr.Jadhavar submits that issue of limitation at the highest is the mixed issue of law and facts. He submits that the issue of *res judicata* is also a defence which cannot be considered at the stage of deciding an application under order VII Rule 11 of the Code of Civil Procedure. Mr.Jadhavar points out that in this case, the plaintiff has committed alleged fraud and accordingly, there can be no bar to maintain the Suit as instituted.

8) For all these reasons, Mr.Jadhavar submits that this revision application may not be entertained.

9) Rival contentions now fall for determination.

10) There is no serious dispute about the scope of the provisions of Order VII Rule 11 of the Code of Civil Procedure. At this stage, the Court is required to only focus upon the plaint and averments in the plaint. (See:

Saleem Bhai Vs. State of Maharashtra, [(2003) 1 SCC 557].

In a given case, some admitted documents may be looked into, however, that is really not the question in the present case. One thing is clear that in deciding application under Order VII Rule 11 of the Code of Civil Procedure, the defence in the written statement is alien. Such defence is not required to be considered at this stage. Therefore, it is for the defendants to make out a case that plaint is required to be rejected for either failure to disclose any cause of action or that Suit appears from the statement to be barred by any law. There are certain other grounds as well, however, in the facts and circumstances of the present case, we are really not concerned with the same.

11) Upon a meaningful reading of the plaint in its entirety, it is difficult to accept the contention that the Suit appears, from the statement in the plaint, to be barred by any law. All that can be stated at this stage

is that the issue of limitation or *res judicata* raised by the applicants may be arguable defences. However, this is far from concluding that the Suit, on the basis of statement in the plaint, is found to be barred by law.

12) The Trial Judge, upon examination of the plaint, has rightly held that the issue of limitation in this case, at the highest, is a mixed issue of law and facts. No doubt, the issue of limitation has to be taken up for consideration by the Court, whether the same is raised as defence or not. However, the question is whether in the facts of the present case, and that too, on the basis of some statement in the plaint, it can be said that the Suit is barred by limitation. The answer at this stage, will have to be in the negative. Evidence will be necessary for determination of the issue of limitation in the facts and circumstances of this case.

13) *Res judicata* or the defence analogous to *res*

judicata is a classic defence to the maintainability of the Suit. No doubt, the applicants will be entitled to raise such defence. However, this begs the questions as to whether such a defence is required to be considered at the stage of consideration of an application under Order VII Rule 11 of the Code of Civil Procedure. There are several decisions, which prescribe manner in which the defence of *res judicata* is required to be raised in the written statement and thereafter, the manner in which such defence is required to be proved. All this cannot be gone into at the stage of considering the application under Order VII Rule 11 of the Code of Civil Procedure.

14) In this case, the plaintiffs have made allegations of fraud in the matter of execution of the consent terms. The issue, as to whether the proceedings between the parties were disposed off on the basis of consent decree or not, is also a debatable one. Admittedly, in the original proceedings in the Suit and the decree made

therein, respondents nos.1 to 4 were not even parties. Respondents No.1 to 4 were impleaded as parties at the stage of execution of the decree in the original Suit. This is not to suggest that there is any bar to such inclusion. However, the issue, as to whether the consent terms filed in the course of execution proceedings and/or made therein can be recorded as consent decree or not, is itself a debatable or arguable issue. Again, it will not be appropriate to decide such issue at the stage of consideration of application under Order VII Rule 11 of the Code of Civil Procedure.

15) At this stage, it is too premature to say whether the allegations of fraud are well founded. However, upon reading of the plaint, it cannot be denied that such allegations are made. Fraud is said to vitiate even the most solemn of proceedings.

16) The challenge in the plaint is not merely to the

exercise of powers of the Collector under the provisions of Maharashtra Land Revenue Code, the challenge is basically to the alleged act of deprivation of appropriate share, which respondents no.1 to 4 claim to have acquired from Mrs.Shakuntalabai Patole. The learned Counsel for respondents no.1 to 4 states that respondents no.1 to 4 have not even been allotted the share, which was purchased by them and entitled to get in terms of the decree. This contention is no doubt seriously disputed by the learned Counsel for the applicants. But again, this is not the stage to go into such disputed issues.

17) It is not possible to dissect claim in the basic plaint and on the said basis to reject it by applying provisions under Order VII Rule 11 of the Code of Civil Procedure. The decision in the case of **Tulson** (*supra*), no doubt deals with the principle of *res judicata* or the principle analogous thereto. The decision also relates to interpretation of Order XXIII Rule 3 of the Code of

Civil Procedure. However, the decision does not involve exercise of powers at the stage of deciding application under Order VII Rule 11 of the Code of Civil Procedure.

18) The decision in ***Paygnda Survgonda Patil*** (*supra*) is also distinguishable, considering the main challenge in the plaint in the present case. Rest of the decisions also turn on their own facts and in any case do not lay down any principles contrary to what have now been applied for considering applicants' case for rejection of plaint under Order VII Rule 11 of the Code of Civil Procedure.

19) There may be some merit in the submission of Mr.Bhandari that the impugned order has not considered all the objections raised by the applicants in their application seeking rejection of the plaint. It is specifically for this reason that Mr.Bhandari was prompted to urge all such objections at this stage

itself. However, even upon consideration of all such objections, there is no case, may be, for exercising powers under Order VII Rule 11 of the Code of Civil Procedure.

20) In *Roop Lal Sathi Vs. Nachhattar Singh Gill*, [(1982) 3 SCC 487], the Hon'ble Supreme Court has held that under Order VII Rule 11 (a) of the Civil Procedure Code, only a part of the plaint cannot be rejected. In *D. Ramachandran Vs. R.V. Janakiraman & others*, [(1993) 3 SCC 267], the Hon'ble Supreme Court has held that a plaint cannot be rejected partially by dissecting the pleadings in several parts and holding that one of them does not disclose cause of action. In *Balsaria Construction (P) Ltd. Vs. Hanuman Seva Trust and Ors.*, [(2006) 5 SCC 658], the Hon'ble Supreme Court has held that the plaint cannot be rejected as barred by limitation without proper pleadings, framing of an issue of limitation and taking of evidence particularly when limitation is a mixed

question of law and fact and on *ex facie* reading of the plaint, it is not clear that the suit is barred by limitation.

21) In *Popat and Kotecha Property Vs. State Bank of India Staff Association [(2005) 7 SCC 510]*, the Supreme Court has held that under Order VII Rule 11(d) of the Civil Procedure Code, plaint cannot be rejected if it appears to be barred by any law from the statement in the plaint. Disputed questions cannot be decided at the time of considering application under Order VII Rule 11 of the Code of Civil Procedure. This provision applies in those cases only where the statement made by the plaintiff in the plaint, without any doubt or dispute, shows that the suit is barred by any law in force.

22) In ***Popat*** (*supra*), the Supreme Court has held that there cannot be any compartmentalisation, dissection, segregation and inversions of the language of various

paragraphs in the plaint. If such a course is adopted it would run counter to the cardinal canon of interpretation according to which a pleading has to be read as a whole to ascertain its true import. It is not permissible to cull out a sentence or a passage and to read it out of the context in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction of words or change of its apparent grammatical sense. The intention of the party concerned is to be gathered primarily from the tenor and terms of his pleadings taken as a whole. At the same time, it should be borne in mind that no pedantic approach should be adopted to defeat justice on hair-splitting technicalities. The real object of Order VII Rule 11 of the Code is to keep out of courts irresponsible law suits. Therefore, Order X of the Code is a tool in the hands of the courts by resorting to which and by searching examination of the party in case

the court is *prima facie* of the view that the suit is an abuse of the process of the court in the sense that it is a bogus and irresponsible litigation, the jurisdiction under Order VII Rule 11 of the Code can be exercised.

23) Applying the aforesaid principles to the facts and circumstances of the present case, there is no reason to interfere with the conclusion recorded in the impugned order. Accordingly, this Revision Application is liable to be dismissed.

24) However, it is clarified that the observations in the impugned order or for that matter, observations made in this order are limited for determining whether plaint deserves rejection under Order VII Rule 11 of the Code of Civil Procedure. Therefore, such observations, may not be taken into consideration at the stage of deciding the Suit finally. It is also further clarified that the objections relating to the maintainability of the Suit or

otherwise are specifically kept open and the Trial Court shall consider the same in accordance with law and on its own merits while disposing of the Suit on merits.

25) With the aforesaid observations, the Civil Revision Application is dismissed. There shall be no order as to costs.

[M.S.SONAK, J.]