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

WRIT PETITION NO.7707 OF 2014

Ganesh Keshav Patole	]
r/at Room No.C-6, 2/3, Plot No.2,	] <u>Petitioner</u>
Sector -8 B. Artist Village,	] Original
Sahyadri C.H.S. Ltd.	] Defendant
C.B.D. Belapur, Navi Mumbai	]

V/s.

1. Sheetal Sikandar Darne	]
	]
2. Mr. Shishant Sikandar Darne	]
	] <u>Respondents</u>
Both are residing at Patrakar Nagar,	] Original
Lokmanya Chauk, Near Telephone Centre,	] defendants.
Flat No.12, Shivpark Building	]
Sangli, Dist. Sangli	]

Mr. Bal Joshi, i/by Rohan H. Barge, for the
Petitioner.

Mr. Vivek Vijay Salunke, i/by Sneha G.
Sanap, for the Respondents.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 22nd JANUARY, 2018.

ORAL JUDGMENT :

1] Heard learned counsel for the petitioner and learned
counsel for respondents.

2] Rule.

3] Rule is made returnable forthwith with the consent of learned counsel for the parties.

4] By this petition, filed under Article 227 of the Constitution of India, petitioner is challenging the order dated 30th March, 2016, passed by 8th Jt. Civil Judge, Senior Division, below Exh.27, in Special Civil Suit No.254 of 2014, .

5] Application at Exh.27 was filed by the petitioner under Order VII Rule 11(d) of Code of Civil Procedure, for rejection of the plaint on the ground that the suit is barred by principles of *res-judicata* under Section 11 of Code of Civil Procedure and also on the ground of limitation. The trial Court, however, rejected the said application.

6] The suit before the trial Court is filed by the respondent herein seeking declaration that the agreement dated 11.7.1994, in respect of suit land be declared as illegal, null and void and for further declaration that the petitioner-defendant No.1 is a trespasser in the suit property and consequently for recovery of possession of the suit property.

7] The contention of the petitioner herein, before trial Court and before this Court is that already dispute between the parties has been settled in CCT.No.237 of 2017, filed by respondent herein in the Co-operative Court at Thane. The said proceeding was filed for the declaration and vacant possession of the suit flat. The Co-operative Court, Thane, vide its judgment and order dated 30th January 2011, decided the suit declaring that the present petitioner is trespasser and is in illegal possession of the suit flat. Accordingly he was also directed to hand over the possession of the suit property to respondent. Against the said order, the present petitioner preferred Appeal No.88 of 2011, before the Co-operative Appellate Court and Appellate Court allowed the said Appeal vide its judgment and order dated 26th March, 2013. The respondent herein filed Writ Petition No.4393 of 2013 against the order of the Appellate Court. This Court vide its order dated 17th September 2013, dismissed the said Writ Petition, confirming the finding arrived at by the Co-operative Appellate Court that the petitioner is in lawful possession of the suit flat.

8] Thus, it is submitted that there is concurrent finding of fact of Co-operative Appellate Court and this Court. Thus, the dispute

involved in the present petition is decided finally by the Co-operative Appellate Court, and also by the High Court, categorically holding that the possession of the respondent-plaintiff is not as that of a trespasser. Hence now by this suit, respondent cannot raise the same dispute that the present petitioner is trespasser in the suit property. Hence, the suit is barred by the principles of *resjudicata*. In this respect, learned counsel for the petitioner has also relied upon the Explanation 8 to Section 11 of CPC, relating to *resjudicata* which reads thus:-

“Explanation VIII – An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as *resjudicata* in a subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised.”

9] Learned counsel for the petitioner has also relied upon the judgment of Allahabad High Court, in the case of **Smt. Dayawati and ors -vs- Madan Lal Varma and ors**, [AIR 2003 Allahabad 276) and of Hon'ble Supreme Court, in the case of **Abdul Rahim and ors -vs Sk. Abdul Zabar and ors**, [AIR 2010 SC 211] to advance the plea that when the suit is apparently barred by principles of *resjudicata*, only option left before the trial Court was to reject the plaint.

10] Secondly, it is submitted that as per Section 59 of the Limitation Act, the suit for cancellation of agreement was required to be filed within three years from the date of the knowledge. The facts which according to respondent entitled her for cancellation of the agreement came to her knowledge when the earlier dispute was decided by the Co-operative Court, in the year 2008. Therefore, the present suit which is filed in the year 2014 is hopelessly barred by limitation.

11] According to learned counsel for respondent, however, both the issue of *resjudicata* and the issue of limitation being a mixed question of facts and law cannot be decided at this stage. According to settled position of law, application filed under Order VII Rule 11(d) CPC is required to be decided on the plain reading of the plaint and plain reading of the plaint in this case goes to show that the suit is very much within limitation and is not barred by *resjudicata*.

12] Secondly, it is submitted that in the earlier suit, dispute relating to the agreement itself being not legal and valid was not decided as it was held that the Co-operative Court has no jurisdiction to decide the said issue and therefore, that issue remained very much undecided. Thus, the present suit is maintainable. Hence, it is

submitted that under Section 14 of the Limitation Act, the present suit is required to be held as within limitation as respondent herein was prosecuting the remedy in the Co-operative Court, which was not the proper forum.

13] In this case, as rightly submitted by learned counsel for respondent, both the issue of *res-judicata* and also issue of limitation being mixed question of facts and law, they cannot be decided at this stage in an application under Order VII Rule 11(d) of CPC. As held by this Court, in case of **Smt. Sita Shripad Narvekar and ors -vs- Auduth Timblo [2015 (11) LJSOFT 34]** that “*for deciding the application under Order VII Rule 11 (d) CPC, the averments in the plaint are to be examined without any additions or subtractions. Resjudicata being a mixed question of law and fact, which the Court will have to examine based on evidence adduced by both the parties on merits of the claim. Therefore, the trial Court is not justified to examine the contention that the suit is barred by res-judicata at this stage while examining application under Order 7 Rule 11 (d) CPC.*”

14] In paragraph No.7 of the said judgment, it has been further held that whether the suit is within the period of limitation or not, will have to be decided on the basis of evidence led by parties and

after framing a issue as regards the bar of limitation. It is well settled law that in case of exercise of the power under Order VII Rule 11 of CPC, the same has to be done solely on the basis of pleadings in the plaint and not on the basis of the materials, which can be produced by the defendant seeking exercise of the power by the Court under the said provisions of law.

15] In the instant case, it has to be considered that, admittedly respondent/plaintiff was earlier prosecuting his remedy in Co-operative Court. The Co-operative Court has categorically held that, it cannot decide the question as to validity or legality of the said agreement as the said question has to be decided by the Civil Court. Therefore, when respondent was prosecuting remedy in good faith in wrong forum, her case prima facie would fall within the four corners of the provisions of Section 14 of the Limitation Act. At the most it will be a question of fact to be decided, on the basis of evidence to be led by parties before trial Court, but on plain reading of the plaint, it cannot be said, at this stage at-least that, the suit is barred by limitation.

16] The perusal of the judgment of the Appellate Co-operative Court clearly goes to show that it has categorically held therein that

whether the agreement is legal, valid or not and declaration to that effect cannot be decided by said Court, as it has no jurisdiction and hence said issue has to be decided by the Civil Court. It was held that whether the possession of the petitioner is that of trespasser or otherwise, the finding to that effect may be given, but as regards the main contention that agreement itself is not legal or valid, no finding could have been given by the Co-operative Court and that issue needs to be decided by Civil Court. In such situation, it cannot be said that the bar of *resjudicata* laid down in section 11 of CPC is attracted to the present case, either by Explanation 4 or by Explanation 8 of the said section.

17] As regards even the issue relating to possession whether it is that of a trespasser or otherwise, it was not the issue directly and substantially in issue before Co-operative Court in the earlier proceeding. Thus, the issue which is now raised in this suit, being not the issue directly and substantially in issue in that proceeding, at this stage it cannot be said that the suit of respondent is barred by principles of *resjudicata* so as to reject plaint on that ground. As per the consistent view held by the various Courts on the issue of *resjudicata* and limitation, both these issues are required to be decided after the evidence is led by the parties. This is too early a

stage or premature to reject the plaint under Order VII Rule 11(d) CPC on these grounds.

18] The trial Court, has, therefore, rightly dismissed petitioner's application for rejection of the plaint. The impugned order passed by the trial Court being just, legal and correct, no interference is warranted therein.

19] Accordingly, writ petition stands dismissed, with clarification that whatever observations are made hereinabove are only for the purpose of deciding this writ petition and trial court is not to be influenced by them. All contentions of the parties in this respect are expressly kept open to be decided by the trial Court.

20] Considering the fact that the parties are litigating since more than 10 to 14 years, trial court is expected to decide the suit as expeditiously as possible.

[DR.SHALINI PHANSALKAR-JOSHI, J.]