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

CIVIL REVISION APPLICATION NO.620 OF 2017

Subhash Narayan Agivale	...	Petitioner
V/s.		
Shakuntala Mate and ors	...	Respondents

Mr. Prashant Darandale, for the Petitioner.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 25th JANUARY, 2018.

P.C. :

- 1] Heard learned counsel for the petitioner.
- 2] By this petition, filed under section 115 of the Code of Civil Procedure, the petitioner is challenging the order dated 15.03.2017, passed by the Joint Civil Judge Junior Division, Khalapur below exh.12 in R.C.S. No.22 of 2015.
- 3] Application at Exh.12 was filed by the present petitioner, who is defendant in the suit for rejection of the plaint under Order VII Rule 11(d) of Code of Civil Procedure, on the ground that it is barred by principle of res-judicata. It was submitted that similar Civil Suit No.5 of 2002 was already filed and decided between the same parties and therefore, on plain reading of the averments in the plaint, suit is

barred by law. The plaint is liable to be rejected.

4] This application was resisted by the respondents contending inter alia that earlier R.C.S.No.5 of 2002 was not decided on merits, but it was dismissed for default and therefore, this application for rejection of the plaint on the ground that suit is barred by res-judicata is not tenable and this application needs to be dismissed.

5] The trial court after considering the submissions advanced by learned counsel for both parties, was pleased to reject the said application. Hence the instant revision is filed.

6] At the time of argument, learned counsel for petitioner fairly concedes that the earlier suit bearing R.C.S.No.5 of 2002 came to be dismissed for default under Order IX rule 3 CPC. In this respect, he also brings to the notice of this Court, copy of order dated 14.1.2005, passed below Exh.1 in of the said suit, which is produced on record at Exhibit B. The perusal of the said order reveals that the plaintiff therein did not turn up before the Court for leading the evidence and hence it was found that the plaintiff is not at all interested and willing to proceed in the suit and as defendant was also absent, the suit came to be dismissed for default under Order IX Rule 3 CPC. Therefore, it follows that the said suit was not decided on merits and hence obviously bar of res-judicata laid down in Section 11

CPC has no application in the present application.

7] The next submission advanced by learned counsel for the petitioner is that the suit is also barred by limitation. However, as that plea is not taken in the application filed before the trial Court, this Court cannot consider the same in its revisional jurisdiction.

8] Learned counsel for petitioner, therefore, seeks liberty to move such application before the trial Court for rejection of the plaint on the ground that the suit is barred by limitation. That liberty is always there and it need not be given expressly.

9] In view thereof, this Revision Petition holds no merit stands dismissed.

[DR.SHALINI PHANSALKAR-JOSHI, J.]