

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 9364 OF 2016**

Sudhir Vasudeo Kulkarni & Ors.

... Petitioners

Vs

Shri. Udhav Chintamani Kulkarni & Ors.

... Respondents

Mr. Satish S. Raut, Advocate for the Petitioners.

Mr. Kirankumar J. Phakade, Advocate for Respondents No.
2 to 5.

CORAM : SANDEEP K. SHINDE J.

DATE : July 4th, 2019

P.C. :

1. Petitioners are the defendants no. 1 to 4 in Regular Civil Suit No. 106 of 2012 (Old Special Civil Suit No. 12 of 2019), instituted by the respondent no. 1 herein ('plaintiff', for short), for declaration of his right to the suit property and for perpetual injunction.

2. There are as many as nine issues framed In February, 2012 and thereafter in January 2014, the application was moved by the defendant no. 1 under Section 9-A and under Order 7 Rule 11(a)(d) of the Civil Procedure Code, 1908. At the relevant point of time, the plaintiff had led his evidence, however, his cross examination has not

commenced. The defendants thus sought rejection of the plaint under Clause 'a' and 'd' of Rule 11, Order 7 of the Civil Procedure Code, 1908. Under Clause 'a', the Court is empowered to reject the plaint, wherein it does not disclose the cause of action and under clause 'd' where the suit appears from the statement in the plaint is barred by law.

3. The Learned Trial Court declined to frame the preliminary issue, predominantly on the ground that the, objection has been taken when the parties to the suit were close to leading the evidence. Yet another ground on which the Court declined to frame the preliminary issue is, that whether the suit is barred by limitation or not, is a mixed question of law and fact.

4. I have perused the plaint and the impugned order. The suit for declaration and for injunction was instituted in the year 2009 and in the year 2012, the issues were framed. It is not in dispute that the plaintiff has led the evidence and only thereafter the defendant has requested the Court to reject the plaint on the ground that the plaint, as it appears from the statement, is barred by limitation. Perusal of

the plaint discloses that the plaintiff is seeking declaration that the mutation entries no. 1241, 1427 and 182 be declared null and void. In prayer clause 'b', he seeks the same declaration in respect of mutation entries no. 374, 375, 1045 and 614. These entries were admittedly recorded in the year 1955 and April 1983 respectively. The next prayer is for, the perpetual injunction to restrain the defendants from interfering with their possession in the suit property. Para no. 2 of the plaint refers to partition effected between the parties, in June, 1955, and assertion of a fact that, the properties, which have fallen to their share, were allegedly sold by the defendants. Again in para no. 13 it is claimed and stated that they learnt about such alienation four months before the institution of the suit, when he verified the entries in the revenue record. Thus, upon reading the plaint as whole, the issue of limitation is required to be framed. That even otherwise Section 3 of the Limitation Act, 1963 empowers the Court to dismiss the suit instituted after the prescribed period. Since the parties to the suit are close to leading evidence, it would be appropriate that issue of limitation is framed.

5. Thus, for the reasons stated, the order impugned is quashed and set aside and the Trial Court is directed to frame additional issue as to 'whether the suit is barred by limitation' and answer the same.

6. The petition is allowed in the aforesaid terms and dispose of accordingly.

(SANDEEP K. SHINDE, J.)