

FARAD CONTINUATION SHEET No.
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

WRIT PETITION NO. 3733/2016

(RASHTRAPAL CHIRKUT GAURKHEDE **VERSUS** DEVANAND SUKHDEO GOURKHEDE & OTHERS)

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Shri S.H. Sudame, counsel for petitioner.

CORAM : A.S. CHANDURKAR, J.

DATE : JULY 01, 2019.

The petitioner is the original defendant who is aggrieved by the order passed by the trial Court rejecting the application that was filed under provisions of Order VII Rule 11 of the Code of Civil Procedure, 1908 (for short, 'the Code').

The respondents are the original plaintiffs who have filed a suit for declaration that the will-deed stated to be executed by one Yashodabai in favour of the defendants was a void document and was not binding on the plaintiffs. Further relief of perpetual injunction has also been sought in the suit. The defendant moved an application seeking rejection of the plaint on the ground that the partition-deed dated 25.08.1975 as well as the subsequent mutation entry had not been challenged by the plaintiffs and hence the suit was barred by limitation. It was further stated that the plaintiffs had knowledge about the Will executed by Yashodabai in favour of the defendant despite that had challenged the same. The trial Court observed that the question of limitation was a mixed question of law and facts and therefore the suit could not be dismissed.

Shri S.H. Sudame, learned counsel for the petitioner submitted that the partition-deed 25.08.1975 had not been challenged by the plaintiff. Based on partition-deed subsequent mutation entries have also been taken which are also not challenged. Despite having knowledge of the execution of the Will in the year 2009 itself, the suit came to be filed only in the year 2013. As the same was barred by limitation, it was liable to be dismissed.

Perused the plaint as well as the application below Exhibit 15. Under provisions of Order VII Rule 11 of the Code, only the averments in the plaint needs to be taken into consideration. The stand taken by the defendant that the plaintiffs had knowledge about the execution of the partition-deed in the year 1975 and that the plaintiffs were also aware about the execution of the Will in the year 2009 is a matter to be brought on record by leading evidence. The trial Court in that context has observed that the aspect of limitation as sought to be raised is a mixed question of law and facts and the parties are at liberty to lead evidence before the trial Court in that regard. In that view of the matter, I do not find that the trial Court committed any error while passing the impugned order.

By observing that the defendant is free to raise the aspect of limitation before the trial Court in accordance with law, the Writ Petition is dismissed with no order as to costs.

JUDGE