

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

CIVIL REVISION APPLICATION NO. 18 OF 2021

Uttam s/o. Ananda Lavhale,
42 years, Occ. Agri.
R/o. Takli Bk., Tq. Jamner,
Dist. Jalgaon.

.... Applicant
[Ori. defendant]

Versus

01. Shri Ashok s/o. Natthu Nerkar,
Age 43 years, Occ. Agri. & Business,
R/o. Ganpati Nagar, Jamner,
Dist. Jalgaon.

02. Jagannath s/o. Eknath Sapkal
Age 34 years, Occ. Agri.
R/o. Jamthi, Tq. Bodwad,
Dist. Jalngaon.

.... Respondents
[Ori. Plaintiffs]

Advocate for Applicant: Mr. G.C. Nawandar h/f. Mr. A.M. Gholap.
Advocate for Respondent Nos. 1 and 2 : Mr. G.V. Wani.

CORAM : RAJESH S. PATIL,J.

DATE : 30th November, 2022

JUDGMENT:-

1] This civil revision application is filed by the original defendant challenging the order dated 7.3.2020 below Exhibits 49 and 1 passed by the Civil Judge Junior Division, Jamner, in R.C.S. No. 129 of 2017 thereby rejecting the application filed by the original defendant under Order VII Rule 11(d) of C.P.C.

2] The original defendant, after receipt of summons in the suit, filed an application under Order VII Rule 11(d) of C.P.C. raising an objection about the maintainability of the suit in view of the Maharashtra Amendment to Section 69 of the Indian Partnership Act, 1932. It is the case of the defendant that the dispute is between the partners of the partnership firm. Hence, the suit filed by one partner against the another partner is barred if the partnership firm is not registered. It is an admitted fact that there was a partnership firm of plaintiff and defendant which was not registered.

3] The said application of the defendant was argued by both sides and after hearing the same, the Civil Judge (J.D.) Jamner rejected the defendant's application. Being dissatisfied with the order passed by the Civil Judge (J.D.), Jamner the defendant has preferred the present Civil Revision Application.

4] In the present Civil Revision Application, notices were issued and by order dated 6th June, 2022, notice for final hearing was issued.

5] Hence, the Matter was taken up for final hearing at the stage of admission itself. I have heard the learned advocate for the applicant. It is the case of the learned advocate for the applicant on bare reading of the plaint, what is sought is a relief by one partner against another partner pursuant to the allegation that there is some dispute between them as regards partnership firm. Therefore, the suit itself was not maintainable in view of the Maharashtra amendment to Section 69 of the Indian Partnership Act. As the dispute is between partners inter-se, the same is not maintainable inasmuch as, the firm is not registered. The

learned counsel for the applicant relied upon the judgment of the Apex Court in the matter of ***I.T.C. Limited Vs. Debts Recovery Appellate Tribunal and others; (1998) 2 SCC 70;***

6] Per contra, it is the contention of the learned advocate for the respondent that the order passed by the lower court is with reason and there is no bar to file suit if the issue is not related to partnership firm. The plaintiff and defendant, no doubt, were partners of a partnership firm, but the suit filed is not in the capacity of a partner of partnership firm. It is filed by an individual against another individual which is maintainable in law. What is sought in the suit is the declaration that the said deed executed by the defendant No.1 is not binding on the plaintiff's right. It is further sought by way of declaration that the defendant No.2 has no right to sell the plots. A further declaration is sought that the defendants should not create any third party rights. It is argued that Section 9 of the C.P.C. court has a right to try all the suits and no suit is barred. The provision of Order VII Rule 11(d) of C.P.C. is not applicable to the present case. The learned counsel for respondent relied upon the judgment in the matter of ***Saleem Bhai and others Vs. State of Maharashtra and others; 2003(1) SCC 557.***

For ready reference, para. Nos. 9 and 10 of the judgment are produced hereinbelow :-

“9.A perusal of Order VII Rule 11 C.P.C. makes it clear that the relevant facts which need to be looked into for deciding an application thereunder are the averments in the plaint. The trial court can exercise the power under Order VII Rule 11 C.P.C. at any stage of the suit-before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial. For the purposes of deciding an

application under clauses (a) and (d) of Rule 11 of Order VII C.P.C. the averments in the plaint are germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage, therefore, a direction to file the written statement without deciding the application under Order VII Rule 11 C.P.C. cannot but be procedural irregularity touching the exercise of jurisdiction by the trial court. The order, therefore, suffers from non-exercising of the jurisdiction vested in the court as well as procedural irregularity. The High Court, however, did not advert to these aspects.

10. We are, therefore, of the view that for the afore-mentioned reasons, the common order under challenge is liable to be set aside and we, accordingly, do so. We remit the cases to the trial court for deciding the application under Order VII Rule 11 C.P.C. on the basis of the averments in the plaint, after affording an opportunity of being heard to the parties in accordance with law.”

The learned counsel for respondent also relied upon judgment in the matter of ***Mr. Hans Jurgen Buchmann vs. Mrs. Leopodina C. Rodrigues and others; 2004(4) All M.R. 140*** wherein in para. 19, it has been held thus :-

“19. Admittedly, in terms of the memorandum of understanding dated 17-12-1991 the exclusive possession of the plaintiff was recognised by the defendants, possession which the plaintiffs were certainly entitled to protect unless they were evicted under due course of law. The plaintiffs had expressed their fear that they might be evicted because of the belligerent attitude of the defendants particular defendant no. 1 after the plaintiffs had stopped the personal financial assistance which the plaintiffs claimed they were rendering to defendant no. 1 from 1997. Since the possession of the suit premises was with the plaintiffs, the plaintiffs could have sought for an injunction against the defendants independently of seeking specific performance for execution of the conveyance deed in terms of prayer (a) of the plaint. The relief of

injunction was not incidental to the relief of specific performance sought by the plaintiffs and the relief of injunction sought could not be said to be adjunct to the relief of specific performance. The plaintiffs also would be entitled to amend the plaint to incorporate the subsequent events which took place resulting in the appointment of the Commissioner etc. In my opinion, the pleadings of the plaint were sufficient to grant or refuse either both or any of the reliefs sought by the plaintiffs in terms of prayers (a) and (c) of the plaint and one was not dependent on the other. **Order VII, Rule 11(d)** speaks of rejection of the plaint and the plaint to be rejected had to be rejected as whole and not in part. In any authority is required to support this proposition then reference could be made to the case of [D. Ramachandran v. R.V. Janakiraman](#) and others (supra) wherein the Honble Supreme Court with reference to **Order VII, Rule 11** has stated that under the rule there cannot be a partial rejection of the plaint or petition. In this view of the matter, in my opinion, the learned trial Court fell into error by rejecting the plaint entirely considering the same to be basically based only on prayer (a) and ignoring that the suit was also filed for injunction in terms of prayer (c) of the plaint.

The learned counsel for respondent also relied upon the judgment of this Court in the matter of *Shivrudra Shivling Pailwan and others Vs. Prakash Maharudhra Pailwan and others; 2003(1) Mh.L.J. 299*, wherein in para.5, it has been held thus :-

“5. Undoubtedly, Order VII, Rule 11(d) of Civil Procedure Code provides that the plaint shall be rejected in case when the suit appears from the statement in the plaint to be barred by any law. The object behind the said provision of law is to avoid manifestly vexatious and meritless litigation and to protect the parties being unnecessarily harassed by others. The clause (d) of Rule 11 of the Order VII of Civil

Procedure Code would apply to the cases when it would reveal from the contents of the plaint that the suit is barred. In other words, in order to enable the Court to arrive at the conclusion that the suit filed by plaintiff is barred, the pleadings in the plaint should apparently disclose the facts revealing the bar to the suit instituted by the plaintiff. The conclusion under clause (d) regarding the bar to the suit cannot be arrived at on the basis of materials extraneous to the pleadings in the plaint. The jurisdiction of the Court to take action under Order VII, Rule 11(d) of Civil Procedure Code can arise only in case where the pleadings in the plaint are sufficient to disclose the bar to the suit, and not otherwise. Of course, the jurisdiction can be exercised at any stage of the suit, however, the decision under Order VII, Rule 11(d) has to be on the basis of the pleadings in the plaint. The law on this point being very clear, it would be necessary to examine the pleadings in the plaint before arriving at any conclusion in the matter in relation to the contentions raised by the petitioner.”

7] In the suit, the plaintiff has sought a declaration that sale-deed executed by defendant No.1 is not binding on plaintiff's right, a further declaration that defendant No.2 has no right to sell the flats and an injunction that defendant No.1 should not create any third party rights. These reliefs are sought on the basis of averments made in the plaint, which challenges the sale deed in favour of defendant No.2, and further lays foundation for declaration and perpetual injunction. The suit does not seek any right to enforce arising out of a contract against the partner of partnership firm.

8] Taking into consideration the averments made in the plaint and reliefs sought, it is clear that the suit is between two individuals and is not filed by one partner against another partner. The ratio laid down in

the matter of *Shivrudra Shivling Pailwan and others (supra)*; *Saleem Bhai (supra)* and *Hans Jurgen Buchmann (supra)* are squarely applicable to the facts of the present case. The trial court has rightly held that the suit is maintainable. No interference is warranted. There is no merit in the civil revision application. Hence, the civil revision application is dismissed.

[RAJESH S. PATIL]
JUDGE

grt/-