

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

42 CRA NO. 89 OF 2021

Nemichand Hanmantrao Kanote died ...PETITIONERS
Through L.Rs.

1-A Trivenibai Nemichand Kanote,
Age : 65 Years, Occ: Household,
R/o. Behind Kotawar Mill, Mukhed
Tq. Mukhed Dist. Nanded

1-B Tanuja Deepak Kanote,
Age : 28 Years, Occ. Household,
R/o. Khore Galli, House of Sidramappa,
Udgir Tq. Udgir Dist. Latur.

1-B-A) Rudra S/o Shahu @ Deepak Kanote,
Age : 10 U/g of real Mother,
Tanuja Deepak Kanote,
R/o Khore Galli, House of Sidramappa,
Udgir Tq. Udgir Dist. Latur

1-B-B) Baby d/o Shahu @ Deepak Kanote,
Age : 12 U/g of real Mother,
Tanuja Deepak Kanote,
R/o. Khore Galli, House of Sidramappa,
Udgir Tq. Udgir Dist. Latur

1-C) Aruna W/o Shamrao Kanote,
Age : 25 Years, Occ. Household,
R/o. Behind Kotawar Mill Mukhed,
Tq. Mukhed Dist. Nanded.

1-C-A) Sara d/o Sham @ Hanmant @ Rahul Kanote
Age : 9 Years, U/g real Mother
Aruna W/o Shamrao Kanote
R/o. Behind Kotawar Mill Mukhed,

Tq. Mukhed Dist. Nanded.

1-D) Pratibha W/o Baburao Bodke
Age : 45 Years, Occ. Household,
R/o. Deep Nagar, Mukhed,
Tq. Mukhed Dist. Nanded

1-E) Pratima W/o Ramrao Kothare,
Age : 40 years, Occ. Household,
R/o Hartal Tq. Mukhed Dist. Nanded.

VERSUS

1. Nitiniketan Shikshan Santsha, ...RESPONDENTS
Jamb (Bk) Tq. Mukhed,
Dist. Nanded, through it's
Secretary
Anil Vithalrao Kolhe,
Age : 59 Years, Occ. Service and Agriculture,
R/o. Jamb (Bk) Tq. Mukhed Dist. Nanded.
2. The State of Maharashtra, Through
i) The Collector, Nanded
ii) The Director of Education,
Maharashtra, Central Building,
Pune.
3. The Deputy Director of Education
Latur Resin, Near Gandhi Chowk,
Latur.
4. Zilla Parishad Nanded, Through
The Education officer (Secondary)
Nanded.
5. The Accountant General (A & E)
Maharashtra State Nagpur ..RESPONDENTS

Mr. R. K. Ashtekar, Advocate for the petitioners
Mr. V. D. Gunale, Advocate for the respondent No.1
Mr. P. N. Kutti, AGP for the respondents/State

CORAM : VINAY JOSHI, J.

RESERVED ON : 08-02-2022

PRONOUNCED ON : 09-02-2022

JUDGMENT:

. Heard finally by consent of both the learned counsels.

2. Legal heirs of defendant No.1 of Special Civil Suit No. 21 of 2009 have called in question legality and correctness of the impugned order dated 26-03-2021 passed by learned Civil Judge, Senior Division, Mukhed, whereby the application for rejection of plaint in terms of order-VII Rule-11(d) has been turned down.

3. The facts in brief are such that:

a] The respondent No.1 (plaintiff) a registered public trust had filed Special Civil Suit for recovery of sum of Rs. 5,50,687.90/- against the petitioner (defendant). It was the plaintiff's case that defendant was plaintiff's employee and had

served as a Headmaster during the period from June, 1989 to November, 1999. In addition to the duty of the Headmaster defendant was also assigned the work of financial Secretary for two hostels. In the said capacity defendant was receiving various government grants. It is alleged that though the amount was entrusted with the defendant however, he has not properly accounted for it and as such he has defalcated said amount. Therefore, suit for recovery of sum has been instituted.

b] The defendant resisted the suit by filing the written statement. Issues were framed and the plaintiff's evidence was recorded. At this juncture defendant had filed application (Exh.113) seeking rejection of plaint in terms of Order-VII Rule-11(d) of the Code of Civil Procedure. It was the contention that the alleged misappropriation was during the period from 01-06-1989 to 31-05-1990. Therefore, suit instituted in the year 2009 is barred by law of limitation. The trial court heard the submissions and ultimately rejected the application by holding that issue of limitation is mixed question of law and fact and therefore, declined to exercise its jurisdiction.

4. The learned counsel for the defendant took me through the plaint, since, it is settled law that only averments of plaint are relevant for the purposes of order-VII Rule-11 of the C.P.C. It is pointed out that alleged misappropriation is of the year 1990. The defendant was also retired in the year 1990 and therefore, suit after gap of eight years is barred by limitation. It is submitted that plaintiff-trust had knowledge about the alleged misappropriation in the year 2002. However, no action was taken. Plaintiff-trust had not initiated departmental enquiry for alleged lapses. According to the defendant when the plaintiff-trust failed in writ petition, the suit has been belatedly filed which is barred by limitation. So far as the submissions on merits are concerned that needs no consideration at this juncture.

5. With the assistance of both the sides I have examined the averments made in the plaint. The plaintiff has pleaded about entrustment in the year 1989-1990. So far as the point of limitation is concerned it is specifically stand that cause of action lastly arose on 24-02-2009 when the defendant

No.4 i.e. Zilla Parishad has informed the Deputy Director of Education about the fixing of liability of Rs. 5,50,687.90/- on the defendant. It is pleaded that seven members enquiry committee was appointed by the Education Officer which has fixed the responsibility. In short, plain averments of plaint conveys that on 24-02-2009 the responsibility was communicated to the Education Department. Though it is argued that there are no supporting documents, it is a matter of merits. The pleadings prima-facie discloses that from the accrual of cause of action suit is filed within period of three years. When the period of limitation begins and which would be appropriate articles is a matter of trial.

6. Scope of revisional jurisdiction of this court is limited and discretionary one. The defendant has failed to substantiate his contention, that the lower court has failed to exercise the jurisdiction in proper manner. In order to invoke the revisional jurisdiction the party approaches to the court much show that there is jurisdictional error as well as interest of justice calls for interference. Besides that it is apt to note that after 10 years from the filing of the suit that too

when the evidence of plaintiff is over, this application has been moved. No doubt, the application under order-VII Rule-11 can be entertained at any stage. However, in all above peculiar facts, there is no propriety to exercise judicial discretion as the question involved is mixed question of law and fact.

7. Both the sides relied on the decision of the Supreme Court in the case of Nusli Neville Wadia Vs Ivory Properties and Ors reported in Manu/SC/1376/2019 wherein the Supreme Court has reiterated the position that when the issue of limitation is mixed question of law and fact it cannot be decided as a primary issue.

8. Having regard to all above facts, there is no error occurred while deciding the application under order-VII Rule-11 of the Code of Civil Procedure. Therefore, revision being devoid of merits stands dismissed.

[VINAY JOSHI, J.]