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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.9 OF 2021**

Smt. Vijaya Arvind Birje and Ors.Applicants.
v/s
Shri Sudhir Shakarrao Birje
and Ors. Respondents.

Mr. Umesh Mankapure for the Applicants.
Mr. Ashok B. Tajane for Respondent No.1.

CORAM: NITIN W. SAMBRE, J.

DATE: JUNE 21, 2022

P.C.:-

1] This Revision is by original Defendant Nos. 1 to 5 to Special Civil Suit No.263 of 2016 initiated by Respondent No.1 seeking relief of partition, possession and declaration as regards the registered Will dated 1/3/1993 executed by their father.

2] The said suit appears to have been initiated sometime in December, 2016. Father of non-applicant No.1/Plaintiff Shankarrao executed registered Will on 1/3/1993 which was registered on 26/3/1993, thereby bequeathing the property on certain conditions in favour of another brother of Respondent No.1/Plaintiff.

3] Said Shankarrao expired on 8/5/1993 that is after execution and registration of the Will. Exhibit-44 – Application has been taken out by Respondent No.6, claiming that there is no cause of action disclosed to file a suit, alleging that after demise of his father Shankarrao, notices were issued to respective parties including the Non-applicant/Plaintiff informing about Will which was duly acknowledged by the Plaintiff. It is further claimed that Plaintiff has agreed to the contents of the Will and signature of attesting witnesses over the said Will and accordingly sworn an affidavit for himself and his minor son on 19/4/1994. It is claimed that from the affidavit, it can be inferred that Plaintiff has in the affidavit in clear terms admitted execution, attestation and registration of the Will. It is also claimed that Arvind in whose favour the Will was executed has mutated suit property in revenue record which fact was known to the Plaintiff way back in 2003 and as such, it is claimed that suit initiated is without there being any cause of action and the Plaint is liable to be returned under Order 7 Rule 11 of the Civil Procedure Code.

4] Defendant Nos. 1 to 5 raised an objection vide Application Exhibit-60 pursuant to provisions of Order 7 Rule 11(d) of the Civil Procedure Code, alleging that the suit preferred by the Plaintiff is barred by limitation. It is claimed that date of execution of Will is 1/3/1993 and same was registered on 26/3/1993. On 23/10/1993, Advocate Kulkarni has informed the Plaintiff by Registered Post Acknowledgment Due letter about the Will in question alongwith copy thereof. As such, it is claimed that Respondent/Plaintiff was having knowledge of the Will on receipt of the notice dated 23/10/1993. It is further claimed that Plaintiff for himself and his son executed an affidavit dated 19/4/1994 accepting the execution, attestation and registration of the Will. It is further claimed that Plaintiff thereafter in 2003 consented for mutation of the name of the beneficiary under the disputed Will in the revenue record. As such, it is claimed that suit for declaration is brought in action before the Court after lapse of 24 years. It is claimed that suit is brought beyond the period of limitation which is prescribed under Article 56 or Article 110 of the Limitation Act which provides for limitation of 3 years for relief for grant of declaration. It is further claimed that suit

for partition can be brought into action within a period of 12 years from the date of carrying out of mutation entry which was in the year 2003. Contentions are, even the claim for partition is also barred by limitation as the same was brought into action beyond the period of 12 years from the date of the mutation i.e. in the year 2003.

5] These prayers were rejected by common order dated 25/5/2017 passed by Civil Judge, Senior Division, Sangli. Applicants who are Defendant Nos. 1 to 5 have questioned the legality of the said order, particularly the order passed below Exhibit-60 by reiterating aforesaid contentions on the point of limitation.

6] Mr. Mankapure, learned Counsel appearing for Applicants/Defendant Nos. 1 to 5 in categorical terms have invited my attention to (a) claim put forth by non-applicant No.1 of having 1/6th share in the suit property, (b) that Will was executed on 1/3/1993 and registered on 26/3/1993 in support of which the Plaintiff has sworn an affidavit on 19/4/1994 which was preceded with receipt of notice from Advocate Kulkarni alongwith copy of the Will on 23/10/1993

and (c) mutation entries were effected in relation to suit property after considering consent of the Petitioner which was extended in 2003.

7] Mr. Tajane, learned Counsel appearing for Respondent No.1/Plaintiff while opposing the prayer and seeking dismissal of Revision would urge that there is no error of jurisdiction or failure to exercise jurisdiction and as such revisional powers cannot be invoked. So as to substantiate his contention, he would urge that while dealing with the issue raised under Order 7 Rule 11(d) (rejection of plaint to be barred by limitation), the Civil Court is not required to take into account Written Statement of the Defendants or the averment in the Application for rejection of the Plaint. From the pleadings in the Plaint, Court is required to consider the plea of Defendant for rejection. As such, according to him, Revision is liable to be rejected.

8] I have considered aforesaid contentions.

9] Trial Court has rejected prayer of rejection of the Plaint on the

count of suit claim not being barred by limitation by furnishing reason that Plaintiff has averred in the Plaint of receipt of report of handwriting expert in the month of July, 2016 wherein it is mentioned that alleged Will Deed is a bogus document.

10] It is not the case of the Plaintiff that he was not aware about the Will which was registered on 26/3/1993 executed by his deceased father. Rather, he has kept quiet since the date of execution of Will, the date of communication of notice about execution of Will, the date of he having sworn the affidavit in support of execution of such Will and date of entering of revenue entries in favour of Defendants. Fact remains that while deciding Application under Order 7 Rule 11(d) Court is not required to appreciate the pleading and documents which are placed on record in the form of defense. However, what can be noticed is, in the case in hand execution of the Will is not disputed by the non-applicant/Plaintiff and as such has sought setting aside of the same.

11] Fact remains that it is the claim of Defendants, in a suit

claiming declaration, it was expected of the Respondent No.1/Plaintiff to initiate suit within a period of three years from the date of execution of the Will, date of execution of affidavit by him or within three years from the date of carrying out revenue entries.

12] It is also claimed by the Defendants that Plaintiff has extended consent for carrying out entries in revenue record as could be inferred from the public document which he cannot dispute. From the revenue entries which are not disputed or questioned by the Plaintiff, it can be inferred that Plaintiff was having knowledge about execution of the Will and as such was duty bound to take out proceedings if so required, either for setting aside the Will or for partition within a period of three years from the date of revenue entries which is in 2003.

13] The respondent/plaintiff has not come out with any explanation as to why the revenue entries in favour of defendant effected in 2003 in relation to suit property based on the Will-Deed have not questioned on the date of filing of the suit for a period of almost thirteen years. The revenue entries are the public document

and it is not open for the plaintiff to claim that he was ignorant of such documents. As such, the claim put forth by the plaintiff that the limitation for seeking relief of declaration about the Will-Deed being forged or bogus will start running from the date of the revenue entries and not from the Hand Writing Expert's opinion as is claimed. Merely because the plaintiff has applied for having opinion of the Hand Writing Expert in 2016 will not bring the suit claim within limitation unless the delay is explained from the above referred date of the revenue entries. Rather it can be inferred that the plaintiff has intentionally applied for having Hand Writing Expert's opinion in 2016 in relation to Will of 1993 so as to bring his cause within limitation.

14] Even in the plaint, the plaintiff has claimed that he has not consented for carrying out revenue entries based on the alleged Will-Deed of 1993 executed by his father, however, it is an admitted fact that such revenue entries were effected in 2003 and the plaintiff has not questioned the same in spite of same being within his knowledge. This Court is also required to be sensitive to the provisions of Section 17 of the Limitation Act, which provides for effect of fraud or mistake.

15] As such, it is settled position of law in the following referred judgments of the Apex Court that the Court is required to consider is whether the relief claimed in the plaint can be granted in the backdrop of the facts stated in the plaint. The aforesaid observations primarily takes this Court to the conclusion that the relief claimed cannot be granted to the plaintiff particularly in the backdrop of the suit claim being barred by limitation. In support of aforesaid observations, reliance can be placed on paragraph 19 of the judgment of the Apex Court in the matter of ***Rajendra Bajoria & Ors. Vs. Hemant Kumar Jalan & Ors.*** reported in ***2021 SCC Online SC 764***. Though it is claimed by Mr. Ashok Tajane that rejection of plaint is a drastic step as the entire *lis* between the parties come to an end without there being any trial on the disputed issue, however, this Court is required to be sensitive to the law laid down by the Apex Court in the judgment of *Rajendra Bajoria (cited supra)*.

16] Perusal of the plaint would reveal that frame of the plaint is developed in such a manner so as to overcome not only the suit claim

within limitation but also the impediment of disclosure of cause of action based on the bundle of facts pleaded therein. The 2016 Hand Writing Expert's opinion, in my opinion, will be of hardly any assistance to the plaintiff for bringing the suit claim within limitation. In this background, the reliance placed by Mr. Ashok Tajane on the judgment of Apex Court in the matter of *P. V. Guru Raj Reddy & Anr. Vs. P. Neeradh Reddy & Ors.* reported in *(2015) 8 SCC 331* will be of hardly any assistance.

17] Once the claim for declaration of the Will Deed as illegal has failed on the ground of limitation, fact remains that contents of the Will governs the relationship between the parties and as such Plaintiff cannot claim to have any cause of action in the suit even for claiming partition.

18] The suit for partition ought to have been brought into action within period of twelve years. Such period of twelve years has to be counted from the date of the revenue entries in favour of the defendant. Even such claim of the plaintiff is also barred by limitation.

19] In the aforesaid backdrop, in my opinion, Court below has failed to exercise jurisdiction vested in it. As such order impugned passed below Exhibit-60 is hereby quashed and set aside. Application-Exhibit-60 stands allowed. Suit claim for setting aside Will Deed or for partition hereby stands rejected, same being barred by limitation.

20] Revision is accordingly allowed in the aforesaid terms and disposed of.

21] Present order shall remain in abeyance upto 31/12/2022 as prayed by the Counsel for Respondent No.1.

(NITIN W. SAMBRE, J.)