

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

CIVIL REVISION APPLICATION NO. 41 OF 2020

1. Dushyant s/o Hiranman Chokhandre,
Aged 68 years, Occupation – Retired.
2. Smt. Sanghamitra Dhananjay Chokhandre,
Aged 56 years, Occupation – Service,
3. Shri Sandesh Dhananjay Chokhandre,
Aged 34 years, Occupation – Doctor,
4. Ku. Mrunalini d/o Dhananjay Chokhandre,
Aged 31 years, Occupation – Service,

All Residents of Plot No.12, Manjulabai
Rahate Layout, Near Durga Mandir,
Rana Pratap Nagar, Nagpur.

.... **APPLICANTS**

VERSUS

1. Dinkar Vasudeo Rahate,
Aged about 58 years, Occupation – Retired,
R/o Plot No. 2446, Gopal Nagar, Nagpur.
2. Chandrabhan s/o Rambhau Gawande,
Aged about 65 years, Occupation – Retired,
R/o Plot No. 2446-A, Gopal Nagar, Nagpur.
3. Dilip s/o Gajanan Lokhande,
Aged about 49 years, Occupation – Service,
R/o Plot No.2446-D, Gopal Nagar, Nagpur.
4. Smt. Sarita Mahadeo Teltumbade,
Aged about 49 years, Occupation – Service,
R/o Plot No.2446-C, Gopal Nagar, Nagpur.

5. Bharat s/o Gajanan Lokhande,
Aged about 39 years, Occupation – Private,
R/o Plot No.2446-D,
Gopal Nagar, Nagpur. **RESPONDENTS**

WITH

WRIT PETITION NO. 5329 OF 2021

1. Shri Sandesh Dhananjay Chokhandre,
Aged 34 years, Occupation – Doctor,
2. Dushyant s/o Hiranman Chokhandre,
Aged 68 years, Occupation – Retired.
3. Smt. Sanghamitra Dhananjay Chokhandre,
Aged 56 years, Occupation – Service,
4. Ku. Mrunalini d/o Dhananjay Chokhandre,
Aged 31 years, Occupation – Service,

All R/o Plot No.12, Manjulabai Rahate
Layout, Near Durga Mandir, Rana Pratap
Nagar, Nagpur. **PETITIONERS**

VERSUS

1. Dinkar Vasudeo Rahate,
Aged about 58 years, Occupation – Retired,
R/o Plot No. 2446, Gopal Nagar, Nagpur.
2. Chandrabhan s/o Rambhau Gawande,
Aged about 65 years, Occupation – Retired,
R/o Plot No. 2446-A, Gopal Nagar, Nagpur.
3. Dilip s/o Gajanan Lokhande,
Aged about 49 years, Occupation – Service,
R/o Plot No.2446-D, Gopal Nagar, Nagpur.
4. Smt. Sarita Mahadeo Teltumbade,
Aged about 49 years, Occupation – Service,
R/o Plot No.2446-C, Gopal Nagar, Nagpur.

5. Bharat s/o Gajanan Lokhande,
Aged about 39 years, Occupation – Private,
R/o Plot No.2446-B,
Gopal Nagar, Nagpur. **RESPONDENTS**
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Mr. U.P. Deopujari, Counsel for the applicants-petitioners,
Mr. S.P. Kshirsagar, Counsel for the respondents.

CORAM: **ROHIT B. DEO, J.**

DATE OF RESERVING THE JUDGMENT : 29.04.2022

DATE OF PRONOUNCEMENT OF THE JUDGMENT : 23.08.2022

JUDGMENT:

The civil revision application and the petition assail the common order dated 01.12.2020 rendered by the learned Civil Judge (Jr.Dn.), Nagpur (trial Judge) in Regular Civil Suit 497/2020, whereby the application (Exhibit 22) preferred by the applicants-petitioners-defendants seeking rejection of plaint, and application (Exhibit 23) preferred by the applicants-petitioners-defendants for separation of trial under Order II Rule 2 of the Civil Procedure Code (Code) are rejected.

2. Regular Civil Suit 497/2020 is brought by the respondents-plaintiffs for decree of declaration and permanent injunction and the substantive prayers are prayers (a) to (c),

which read thus:

“(a) Decree of declaration that by virtue of Will since the suit properties in that by virtue of agreement of sale executed by Late Manjulabai, as the property described in the Will were agreed to be transferred and transferred to the plaintiffs, the Will dated 29-9-1970 is not operative against the plaintiffs and defendants have no legal right, title and interest over the property already agreed to be sold by Late Manjulabai during her lifetime and hence, the decree passed in R.C.S. No.581 of 1991 to the extent of the properties sold and transferred by Late Manjulabai, be declared as null and void.

(b) The decree of declaration be passed that the decree passed in the Regular Civil Suit No.581 of 1991 and attains finality by virtue of the dismissal of Special Leave Petition No.____ as is outcome of fraud since the material fact of the case were suppressed from the Court of law while passing the decree that the properties under the Will are already sold out to the various persons and legal rights of the several persons are created therein during the lifetime of Late Manjulabai Rahate, is not binding on the plaintiffs.

(c) The decree of declaration be passed that since the plaintiffs are in rightful possession of the suit property exercising every right of ownership, over the same, including making construction and paying the Corporation Taxes, etc. to the Competent Authority and maintaining the property including regularization of the property in the name of the plaintiffs, the plaintiffs are owners of the suit property and a decree obtained by the defendants does not curtail the legal right of ownership of the plaintiffs by way of adverse possession, as an owner of the suit property.”

3. It would be apposite to note the broad case of the respondents-plaintiffs:

(i) The plaintiffs aver that the defendants claim to be the beneficiaries of Will executed by Mrs. Manjulabai Shankarrao Rahate who was the owner of the property described in the Schedule to the plaint.

(ii) The plaintiffs aver that Mrs. Manjulabai expired on 18.12.1988 and did not leave behind any legal heir. The defendants are the nephews from the maternal side of Mrs. Manjulabai and the plaintiff 1 is her grandson. The father of plaintiff 1 was the adopted son of Mrs. Manjulabai and he managed her property during her life time.

(iii) The plaintiffs refer to the provisions of the Hindu Succession Act and state that since Mrs. Manjulabai inherited the suit property from her husband, the estate shall revert to the heirs of her husband.

(iv) The plaintiffs aver that Mrs. Manjulabai was not competent to bequeath the suit property.

(v) The plaintiffs further aver that Mrs. Manjulabai had herself alienated the property mentioned in the Will which includes the suit property. She executed an agreement of sale in

respect of land assigned Khasra 56/7 of Mouza Khamla of which the suit property is part and the sale-deed is executed by the father of plaintiff 1. The plaintiffs state that the Will is practically ineffective since the property which is the subject matter of the Will was alienated by Mrs. Manjulabai during her life time.

(vi) The plaintiffs aver that Mrs. Manjulabai entered into an agreement with plaintiffs 2 to 5 and sale-deed is executed in favour of plaintiff 5 on 07.05.1979. The agreement of sale which was executed by Mrs. Manjulabai in respect of Khasra 56/7 of Mouza-Khamla fructified in sale-deed executed by the father of plaintiff 1 who was holding Power of Attorney. The names of plaintiffs 2 to 5 were duly mutated on the basis of the sale-deeds, in the revenue record.

(vii) The plaintiffs aver that despite having complete knowledge of the sale-deeds and the possession of the plaintiffs over the suit property, the defendants did not challenge the sale-deeds and fraudulently filed Regular Civil Suit 581/1991 claiming to be the legatee under the Will dated 29.09.1970 executed by Mrs. Manjulabai.

(viii) The plaintiffs aver that pursuant to plan sanctioned by the authority, residential houses are constructed in which the plaintiffs are residing since 1990, peacefully and without any obstruction or interference.

(ix) The plaintiffs aver that the defendants did not implead the plaintiffs in Regular Civil Suit 581/1991 nor did the defendants make any disclosure about the sale-deeds referred to supra, and by practising fraud obtained a decree. The decree was challenged in first appeal and then in second appeal, which was dismissed. The plaintiffs aver that in the earlier round of litigation, the competence of Mrs. Manjulabai to bequeath the suit property was not an issue since the material facts were suppressed.

(x) The plaintiffs aver that after gathering knowledge of the fraud practised by the defendants, objection under Section 47 of the Code was preferred by plaintiff 1 before the executing Court, which was rejected by the executing Court without conducting the enquiry which was necessary since objection under Section 47 of the Code is required to be decided as if the same is a suit. The plaintiffs state that the objection came to be rejected since the executing Court was swayed by the fact that the

judgment and decree of the trial Court was affirmed till the Hon'ble Supreme Court, with the dismissal of the special leave petition.

(xi) The plaintiffs aver that since the defendants were aware that the decree was obtained by suppressing material fact, the defendants were compelled to enter into compromise with the brothers of plaintiff 1, which fortifies the submission of the plaintiffs that the decree is *non est* in law.

4. The defendants preferred application seeking rejection of plaint under Order VII Rule 11(b)(c) & (d) of the Code.

(i) The defendants contend that in view of the provisions of Section 44 of the Indian Evidence Act, it is only a party to the suit who can challenge the decree on the ground of fraud, and that since the plaintiffs 2 to 5 were not parties to Regular Civil Suit 581/1991, and it was plaintiff 1 who alone was a party to the said suit, the suit is not maintainable at least at the behest of plaintiffs 2 to 5.

(ii) The defendants then contend that the suit is liable to

be dismissed on the ground of *mis joinder* of causes of action. Elaborating further the defendants contend that the cause of action is on the basis of rejection of the objection by the executing Court, which cannot be the cause of action for plaintiffs 2 to 5 since they were not parties either to the suit or to the execution proceedings.

(iii) The defendants contend that the other cause of action is stated to be the discovery of documents on 23.10.2020 and it is obvious that the cause of action for plaintiff 1 is independent of the cause of action for plaintiffs 2 to 5 and the trial will have to be separated.

(iv) The defendants objected to the suit valuation, particularly on the ground that if properly valued, the suit shall be beyond the pecuniary jurisdiction of the Court.

(v) The defendants then invoked the principle of *res judicata* and submitted that all questions and objections raised by plaintiff 1 were raised in Regular Civil Suit 581/1991 as well as in the execution proceedings i.e. Regular Darkhast 1174/2012. The defendants further submit that the findings recorded by the

executing Court bind the plaintiff 1 and cannot be re-agitated, particularly since plaintiff 1 did not challenge the order of the executing Court.

(vi) The defendants then contend that the suit is barred by limitation since the declaration, which is sought, is that the decree in Regular Civil Suit 581/1991 is null and void and that decree was passed on 16.12.1997.

(vii) The defendants preferred separate application (Exhibit 23) seeking separation of trial under Order II Rule 6 of the Code substantially on the grounds which also form the basis for the prayer for rejection of plaint.

5. The learned trial Judge was pleased to reject both the applications Exhibit 22 and Exhibit 23 for rejection of the suit plaint and separation of trial.

6. The trial Court noted that the prayers in applications Exhibit 22 and Exhibit 23 are contradictory inasmuch as the suit can either be rejected or the trial separated.

7. The issue of limitation is not dealt with by the trial Court elaborately. In paragraph 11 of the order impugned all that is said is that the defendants will have to show that the plaintiffs were “completely aware” about the judgment and decree rendered in 1997.

8. The trial Court then observes that whether the decree is null and void, is a matter of evidence and, at any rate, plaintiffs 2 to 5 are not party to the earlier litigation.

9. The trial Court then observes that application Exhibit 22 is not filed under Section 9A of the Code. This observation is made in the context of the observation in *Nusli Neville Wadia v. Ivory Properties and others (2020) 6 SCC 557* that preliminary issue regarding limitation can be framed.

10. I have heard the learned Counsel for the defendants Mr. U. P. Deopujari and the learned Counsel for the plaintiffs Mr. S. P. Kshirsagar at length.

11. Mr. Deopujari would submit that since plaintiffs 2 to 5

are not parties to Regular Civil Suit 581/1991, Section 44 of the Indian Evidence Act, 1872 (for short Evidence Act), precludes them from challenging the decree on the ground of fraud. Apart from the fact that defendant 1 is admittedly party to Regular Civil Suit 581/1991, the submission predicated on the provisions of Section 44 is without substance.

12. Section 44 of the Indian Evidence Act, 1872 reads thus:-

44. Fraud or collusion in obtaining judgment, or incompetency of Court, may be proved. — Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under sections 40, 41 or 42 and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion.

13. The expression “any party to a suit or other proceeding” refers to and takes within its sweep the party to the suit or proceeding in which the provisions of Sections 41 to 43 of the Evidence Act are invoked. If a party to the suit or proceeding realized on the provisions of Sections 41, 42 and 43, the other party is entitled to demonstrate that the judgment which is pressed

in service as relevant, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion.

14. Sections 41, 42 and 43 of the Evidence Act read thus:-

41. Relevancy of certain judgments in probate, etc., jurisdiction. — *A final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant.*

Such judgment, order or decree is conclusive proof—

that any legal character which it confers accrued at the time when such judgment, order or decree came into operation;

that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment, order or decree declares it to have accrued to that person;

that any legal character which it takes away from any such person ceased at the time from which such judgment, order or decree declared that it had ceased or should cease;

and that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, order or decree declares that it had been or should be his property.

42. Relevancy and effect of judgments,

orders or decrees, other than those mentioned in section 41. — Judgments, orders or decrees other than those mentioned in section 41, are relevant if they relate to matters of a public nature relevant to the enquiry; but such judgments, orders or decrees are not conclusive proof of that which they state.

43. Judgments, etc., other than those mentioned in sections 40 to 42, when relevant. — Judgments, orders or decrees, other than those mentioned in sections 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree, is a fact in issue, or is relevant under some other provisions of this Act.

15. Conjoint reading of the statutory scheme makes it abundantly clear, that the submission canvassed by Mr. Deopujari is based on clear misunderstanding of the statutory scheme. There is nothing in the statutory scheme to suggest that a person who is not a party to the suit cannot challenge the judgment and decree on the ground that the same is fraudulently obtained.

16. Mr. Deopujari would then submit that Regular Civil Suit 497/2020 is barred by the principle of *res judicata*. Such submission is canvassed on the premise that plaintiff 1 was a party to Regular Civil Suit 581/1991, and that plaintiff 1 is re-agitating the very same issues which are answered against him

in Regular Civil Suit 581/1991 and in Regular Darkhast 1174/2012.

17. The Hon'ble Supreme Court has authoritatively enunciated that *Res Judicata* cannot a ground for rejection of plaint under Order VII Rule 11 (d) of the Code since the adjudication of the plea of *Res Judicata* requires consideration of the pleadings, issues and decisions in the previous suit, and such a consideration is beyond the scope of adjudication of an application for rejection of plaint, where the consideration must be restricted to the averments in the plaint and the documents which are deemed part of the plaint (***Srihari Hanumandas Totala v. Hemant Vithal Kamat and others (2021) 9 SCC 99***).

18. In view of the authoritatively pronouncement of the Hon'ble Supreme Court in *Srihari Totala supra*, it would not be permissible to consider the objection to the tenability of the suit on the plea of *Res Judicata*, at the stage of consideration of application for rejection of the plaint.

19. Mr. Deopujari would submit that the suit claim is

under valued, and if properly valued the claim shall be beyond the pecuniary jurisdiction of the Court. The learned trial Judge has not considered the objection that the suit claim is under valued and if properly valued, the trial Court may not have the pecuniary jurisdiction to entertain and try the suit. In my considered view, it would be not appropriate to consider the said objection at this stage. The defendants shall be at liberty to prefer an appropriate and structured application seeking an inquiry into the valuation of the suit, and if such an application is preferred, the same shall be considered on its own merits, and decided as expeditiously as possible.

20. Mr. Deopujari then submitted that on the face of the averments in the suit plaint, the suit is barred by limitation since the challenge is to the decree dated 16.12.1997 in Regular Civil Suit 581/1991, and the suit is instituted 23 years from the date of the judgment and decree. The learned trial Judge has observed that it would not be appropriate to reject the plaint and a preliminary issue can be framed as regards limitation. In view of the deletion of the provisions of Section 9-A of the Code, it would not be necessary to render any positive finding on the observation

of the learned trial Judge. However, while plaintiff 1 was party to the litigation, plaintiffs 2 to 5 were admittedly not. The issue of limitation is, therefore, a triable issue which will have to be answered on the basis of evidence on record. I, therefore, find no error in the ultimate conclusion of the learned trial Court that the plaint is not liable to be rejected on the ground that the suit is barred by the law of limitation.

21. During the course of hearing, both the learned counsel Mr. Deopujari and Mr. S. P. Kshirsagar canvassed submissions on the permissibility or otherwise of rejecting the plaint in its entirety against some defendants. Mr. Deopujari invited my attention to the Division Bench decision of this Court in ***Sheela Ram Vidhani and Others v. S. K. Trading Company and Others 2021 (4) ALL MR 474*** in which it is held that the plaint can be rejected as a whole against some of the defendants. I am not inclined to consider the said aspect since I find that the trial Court was not called upon to consider such submission. Moreover, the well entrenched position of law is that the defence cannot be looked into at the stage of consideration of an application seeking rejection of plaint. The submission canvassed by Mr. Deopujari that some of the

defendants have irrefutably acquired ownership on the basis of sale-deed executed by deceased Manjulabai Rahate during her life time, and therefore, as against them no cause of action as such is demonstrated, would require consideration of the defence and the material placed on record by the concerned defendants, which is not the scope and ambit of Order VII Rule 11 of the Code. Notably, such ground or contention is conspicuous by its absence in the memo of revision. In any view of the matter, I am not inclined to delve deeper in the submission that qua some of the defendants, the plaint will have to be rejected.

22. Mr. Deopujari would invite my attention to the decision of the Hon'ble Supreme Court in ***T. Arivandandam v. T. V. Satyapal and another (1977) 4 SCC 467*** to buttress the submission that the challenge to the judgment and decree in Regular Civil Suit 581/1991 is an abuse of the process of law, since the judgment and decree is confirmed till the Supreme Court. While I am respectfully bound by the articulation of the Hon'ble Supreme Court, in the present case, defendants 2 to 5 was not parties to the earlier litigation and their claim to the suit property does give rise to a triable issue and the litigation cannot be nipped in the bud.

23. Mr. Deopujari would then argue that since there is apparent *mis joinder* of causes of action, the suit is liable to be dismissed. The extension of the submission is that while the plaintiff 1 claims that the rejection by the Executing Court of the objection to the judgment and decree in Regular Civil Suit 581/1991 furnishes the cause of action, the plaintiffs 2 to 5 claim that the cause of action arose on 23.01.2020 when all the documents were discovered. Perusal of paragraph 15 reveals, that contrary to the submission canvassed by Mr. Deopujari, there is no segregation of the causes of action. Paragraph 15 of the plaint reads thus:

15) That the causes of action accrues to the plaintiffs when the objection raised by the plaintiff No.1 under section 47 of the Code of Civil Procedure to the decree was not properly adjudicated by the Executing Court in accordance with law and thereby rejected the objection on 5/8/2019, as also the plaintiffs are forced to file the present suit and further when the plaintiffs came across with all the documents of the suit property on 23/1/2020 and thereafter immediately the present suit is filed. The cause of action is continuing one till today.

That apart, I am satisfied that there is no *mis joinder* of causes of action considering the averments in the plaint as a whole. I see no error in the view taken by the learned trial Judge

on the said aspect.

24. I am satisfied, that the order passed by the learned trial Judge rejecting application 22 which seeks rejection of plaint, does not suffer from any infirmity much less an infirmity warranting interference in writ jurisdiction.

25. Writ Petition 5329/2021 also merits dismissal since there is no case made out for separation of trial. The cause of action of plaintiff 1 and that of plaintiffs 2 to 5 cannot be separated. Contrary to the submission canvassed by Mr. Deopujari, separation of trial would not only be wholly unwarranted, the same would unnecessarily lead to multiplicity of litigation and inconsistent findings.

26. The upshot of the discussion *supra*, is that Civil Revision Application 41/2020 and Writ Petition 5329/2021 are liable to be dismissed, and are dismissed accordingly.

JUDGE

adgokar/nikhare