

Sushma

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

APPEAL FROM ORDER NO. 10 OF 2022
WITH
CIVIL APPLICATION NO. 5069 OF 2022

Sunita Shankar Patil and others ... Appellants

Versus

Ramesh Hullappa Band (Dhulgande) and others ... Respondents

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Mr. S.B. Solanke – Advocate for Appellants

Mr. R.B. Deshmukh – Advocate for Respondent Nos. 1 and 2

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CORAM : GAURI GODSE, J.

DATE : 21st February, 2023

PER COURT :

1. This appeal is preferred by the original defendants challenging the judgment and order dated 22nd October, 2021, passed by the learned Adhoc District Judge-2, Kandhar, in Regular Civil Appeal No. 32 of 2016.
2. The Regular Civil Appeal was filed by the plaintiffs for challenging rejection of plaint under Order VII Rule 11 (d) of Code of Civil Procedure, 1908 (“CPC”), by an order dated 05th April, 2016, passed by the Joint Civil Judge Junior Division, Mukhed, at exhibit 1 and 14 in Regular Civil Suit No. 151 of

2014. The respondents filed the said suit for declaration of ownership and title. The defendants appeared in the suit and filed an application at exhibit 14 praying for rejection of the plaint under Order VII Rule 11 (d) of CPC. It was the contention of the defendants that the plaintiffs had initially filed Regular Civil Suit No. 63 of 2012 for the same relief and the said suit was unconditionally withdrawn on 18th July, 2014. Hence, it was contended that the fresh suit was barred under Order XXIII Rule 1 (4) of CPC and it was also barred by the principle of *res judicata* under Section 11 of CPC. The plaintiffs had opposed the said application by filing their say and contended that both the suits have raised different cause of action and hence, the plaint cannot be rejected as prayed by the defendants. The learned trial Court Judge perused the plaint in the fresh suit as well as the plaint in the earlier suit and the withdrawal pursis produced on record by the defendants. By examining the documents produced by defendants, the trial Court recorded the findings that the fresh suit was filed on the same cause of action and since the earlier suit was withdrawn without taking any leave, hence, the suit was barred under the provisions of Order XXIII Rule 1 (4) of CPC. Thus, the plaint

was rejected under the provisions of Order VII Rule 11 (d) of the CPC, as being barred by the provisions of Order XXIII Rule 1 (4) of the CPC.

3. Being aggrieved by the rejection of the plaint, the plaintiff preferred aforesaid Regular Civil Appeal. The first appellate Court after considering the submissions of both the parties, have set aside the order of rejection of plaint and has remanded the matter back to the trial Court for deciding it on merits. Hence, the defendants have filed the present Appeal From Order.
4. Learned counsel appearing for the appellant submitted that perusal of the plaint in the earlier suit as well as the withdrawal pursis and the order allowing withdrawal of the suit clearly shows that the suit is barred under Order XXIII Rule 1 (4) of the CPC. Learned counsel relied upon the documents that were produced by the defendants in support of the submissions that the suit was barred.
5. Learned Advocate appearing for the respondents submitted that the plain reading of the plaint do not show that the suit was barred as claimed by the defendants. He further submitted that the objections with respect to same cause of action cannot be decided at the stage of Order VII Rule 11 of the CPC and that

the same would require evidence by both the parties. Hence, he submitted that the plaint could not have been rejected under Order VII Rule 11 of the CPC, by examining the documents that were produced by the defendants. He, therefore, supports the impugned order and prays for dismissal of the present appeal.

6. I have considered the submissions made by the both the parties. Perusal of the plaint shows that the filing of the earlier suit and withdrawal of the suit is not pleaded by the plaintiffs. The suit is filed on a specific cause of action as pleaded in the plaint. From the perusal of the record, it appears that the filing of the earlier suit as well as withdrawal of the suit brought on record by defendants along with the application filed under Order VII Rule 11 of CPC. The Trial Court has considered the documents that are produced on record by the defendants for the purpose of arriving at a conclusion that the suit was barred.
7. The first appellate Court has also examined the documents on record and reversed the findings recorded by the Trial Court that the suit is barred under the provisions of Order XXIII Rule 1(4) of CPC. The first appellate Court has also concluded that the cause of action in both the suits are different and hence, the issues in the fresh suit were not finally decided in the earlier

suit. Hence, the suit would not be barred by the principles of *res judicata*. Thus by recording findings on the point of principles of *res judicata* as well as bar under Order XXIII Rule 1(4) of CPC, the order of rejection of plaint is set aside and the suit is referred to the trial Court for deciding on merits.

8. It is well established principle of law that the rejection of the plaint can be decided only on the basis of the plain reading of the plaint and the documents relied upon in the plaint. There is no question of examining the documents produced by the defendant for the purpose of deciding whether the plaint can be rejected under the provisions of Order VII Rule 11 of CPC. The point of objections raised by the defendants on the ground of Order XXIII Rule 1(4) of CPC, as well as the suit being barred by the principles of *res judicata* cannot be decided without a trial. Plain reading of the plaint do not show that the same can be rejected on the ground as claimed by the defendants. It is necessary to decide both the points at an appropriate stage when issues are framed under Order XIV of CPC. Hence, I do not find that there is no reason to interfere with the order passed by the first appellate Court, thereby, remanding the matter back to the Trial Court for decision on merits. Needless to record that

the issue with respect to the suit being barred under Order XXIII Rule 1 (4) of CPC, as well as the principles of *res judicata* can be decided at the time of framing regular issues and the observations in the impugned order are only for the stage of the decision of application under Order VII Rule 11 of CPC. Hence, all the contentions with respect to the said issues are kept open.

9. Appeal from Order is dismissed.

[GAURI GODSE, J.]