

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

CIVIL REVISION APPLICATION NO. 38 OF 2016

CHANDRABAI W/O MADHAVRAO KANTHE
VERSUS
IRABAI W/O SHANKARRAO PATIL
AND OTHERS

...
Advocate for Application : Mr. Pathan Hamzakhan I.
Advocate for Respondent No. 1 : Mr. Kiran M. Nagarkar

CORAM : R.M. JOSHI, J.
DATE : 26th April, 2023

PER COURT :

1. Heard.

2. This application is filed for taking exception to order dated 17.02.2016, passed by the Exh. 13 in RCS No. 82/2015 rejecting application filed by the defendant under Order VII Rule 11 of Code of Civil Procedure (for short 'CPC').

3. Learned counsel for the defendants submitted that the plaintiff herein had earlier filed suit being RCS No. 99/2014 seeking injunction claiming her right into the suit property on the basis of Will. It is contended that the said suit was dismissed as abated. Thus, according to him, bar is created for filing fresh suit in respect of the same cause of action. It is also argued that no probate is obtained in

respect of the suit and hence, in absence of probate of Will the suit could not be filed. Learned counsel for the plaintiff supported the impugned order.

4. While deciding application under Order VII Rule 11 of CPC, the pleadings in the plaint only needs to be taken into consideration and any defence sought to be made out by the defendant cannot be looked into. If the plaint does not disclose cause of action or that on the basis of the averment made therein, if it is to be found to be barred by law only in such case, the plaint can be rejected under Order VII Rule 11 of CPC.

5. Even accepting the fact that earlier plaintiff had filed suit for injunction being RCS No. 99/2014 and the said same claim was placed on the Will, however, there is nothing on record to show that the issue regarding the validity of said Will was decided in the said suit. There is no dispute about the fact that the said suit was not decided on merit and as such there is no adjudication of the issues involved therein, in order to attract Section 11 of CPC. No doubt, it would be open for the defendant to claim that fresh suit is barred in view of the dismissal of the earlier suit, however, for that purpose various other factors are relevant and required to be taken into

consideration such as the stage at which the earlier suit was dismissed and whether the fresh suit is barred. For that purpose, the said exercise cannot be done while deciding application under Order VII Rule 11 of CPC. Though, it is open for the defendant to raise the said contention at the time of Trial but it is not possible to accept that on this ground the plaint can be rejected.

6. In view of the above this Court finds no any error in the impugned order. In the result, application stands dismissed. No order as to costs.

7. Parties are directed to appear before Trial Court on 15th June, 2023.

8. Learned Trial Court not to issue fresh notices to the parties for their appearance.

9. Parties to decide as expeditiously as possible and in any case within a period of one year from the date of knowledge of this order.

[R.M. JOSHI, J.]