

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

WRIT PETITION NO.437 OF 2022

1. Shaikh Hasham Shaikh Babamiya
Age: 71 years, Occu: Agriculture,
R/o: Patoda, Taluka Patoda
District Beed

2. Shaikh Hamid Shaikh Babamiya
Age: 63 years, Occu: Agriculture,
R/o: As above.

... Petitioners

Versus

1. Shaikh Bashir Shaikh Babamiya
Age: 75 years, Occu: Agriculture,
R/o: Patoda, Taluka Patoda
District Beed

2. Shaikh Mubarak Shaikh Babamiya
Age: 60 years, Occu: Agriculture,
R/o: As above.

3. Shaikh Nayyum Shaikh Babamiya
Age: 57 years, Occu: Agriculture,
R/o: As above.

4. Taherabee Abdul Gani
Age: 73 years, Occu: Agriculture,
R/o: As above.

5. Jaherabee Yusuf
Age: 64 years, Occu: Household,
R/o: C/o Javed Shaikh,
9th Floor, Sai Sanskar Colony,
Behind HP Petrol pump,
Near BSNL Telecom Factory,
Sion – Panvel Express way,
Govandi (East),
Mumbai

6. Shakirabee Shaikh Mehaboob
Age: 61 years, Occu: Household,
R/o: Patoda, Taluka Patoda
District Beed

7. Shaikh Jaheda Abdul Haiyee
Age: 62 years, Occu: Household,
R/o: As above.
8. Shaikh Shamim Shaikh Jafar
Age: 50 years, Occu: Household,
R/o: As above.
9. Shaikh Jalil Pashamiya
Age: 51 years, Occu: Business,
R/o: As above.
10. Shaikh Nadim Shaikh Nayyum
Age: 30 years, Occu: Agriculture,
R/o: As above.
11. Vishwanath Dagadu Hule
Age: 56 years, Occu: Agriculture,
R/o: Shivaji Chowk, Patoda,
Taluka Patoda, District Beed
12. Shaikh Fayyaz Shaikh Mubarak
Age: 41 years, Occu: Agriculture
R/o: Patoda, Taluka Patoda,
District Beed
13. Shaikh Tabresh Shaikh Mubarak
Age: 35 years, Occu: Agriculture
R/o: As above
14. Shaikh Parvez Shaikh Mubarak
Age: 35 years, Occu: Agriculture
R/o : As abve
15. Navnath Trimbak Bhalekar
Age: 55 years, Occu: Agriculture
R/o: As above

...Respondents

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Advocate for Petitioners : Mr. Satyajit S. Bora
Advocate for Respondent Nos. 2, 3, 10, 13 & 14 : Mr. M.M. Patil
Beedkar

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CORAM : NITIN B. SURYAWANSHI, J.

DATE : 22nd JUNE, 2023

PER COURT :

1. Petitioners are aggrieved by the common order dated 10/12/2021, passed by learned 2nd Joint Civil Judge, Senior Division, Beed, below Exhibits – 1 and 53 in Special Civil Suit No.35/2017, thereby dismissing the suit.

2. Petitioners/plaintiffs filed the suit for partition and separate possession of the ancestral properties. Defendant Nos.2, 3, 10, 13 and 14 appeared and opposed the suit by filing written statement. Defendants thereafter filed application Exhibit-53 under Order 7 Rule 11 (a), (b) and (d) of the Code of Civil Procedure, claiming that compromise decree in R.C.S. No.125/1995 bars the present suit by the principle of *res judicata*. They also claim that suit is barred by law of limitation. Also, the suit is undervalued and imaginary cause of action is shown in the same. They, therefore, prayed from rejection of the suit. Plaintiffs opposed the said application claiming that compromise decree in R.C.S. No.125/1995 was obtained by fraud, so the suit is maintainable and there is no prescribed period of limitation to seek partition. Petitioners, hence, claimed that the suit is maintainable. In the impugned order, trial Court framed following points:-

Points

Findings

- 1] *Does the compromise decree in R.C.S. No.125/1995 operate as res judicata within the meaning of Section 11 of the Code of Civil Procedure*

In the negative

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|----|---|---|
| 2] | <i>Is the plaint liable to be rejected under Order 7 Rule 11 of the C.P.C.?</i> | <i>In the negative</i> |
| 3] | <i>Is the suit maintainable in view of compromise decree in R.C.S. No.125/1995 vis-a-vis Order 23-3A of C.P.C.?</i> | <i>Not maintainable</i> |
| 4] | <i>What Order?</i> | <i>Suit is dismissed as not maintainable.</i> |

3. Learned advocate for petitioners by relying on Rule 2 of Order 14 states that the Trial Court could not have dismissed the suit without framing preliminary issue as to it's maintainability and recording of evidence. He, therefore, seeks quashing of the impugned order and remanding the matter back to the Trial Court for it's decision on merits in accordance with law.

4. Learned advocate for respondents submits that instead of dismissing the suit, Trial Court ought to have allowed his application filed under Order 7 Rule 11(d) and rejected the plaint.

5. From perusal of impugned order, it is clear that the Trial Court has dismissed the suit without giving opportunity of hearing and leading evidence to the parties. Rule 2 of Order 14 mandates that:-

"(1) Notwithstanding that, a case may be disposed of on preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues.

(2) Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to-
(a) the jurisdiction of the Court, or
(b) a bar to the suit created by any law for the time being in-force,
and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue."

6. It is clear that the Trial Court has failed to follow the procedure envisaged under Rule 2 of Order 14. The impugned order therefore, cannot be sustained.

7. In the result, writ petition is allowed. Impugned order dated 10/12/2021, passed below Exhibits – 1 and 53 in Special Civil Suit No.35/2017, is hereby quashed and set aside.

9. Trial Court is directed to frame preliminary issue as to the maintainability of suit and after giving opportunity to lead the evidence and hearing the parties, may decide the same on merits, in accordance with law.

(NITIN B. SURYAWANSHI, J.)