

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION

**CIVIL REVISION APPLICATION NO.197 OF 2023**

Wilson Anthony D'Souza & Anr.

...Applicants

**Versus**

Maties Anthony Telies & Ors.

...Respondents

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*Mr. S. G. Kudle for the Applicants.*  
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**Coram : Sharmila U. Deshmukh, J.**

**Date : July 7, 2023.**

**P. C. :**

1. The challenge in the application is to the order dated 30 January, 2023 passed below Exhibit-47 in Regular Civil Suit No. 52 of 2017 rejecting the Applicants application seeking rejection of the plaint under the provisions of Order 7, Rule 11(d) of CPC.

2. The facts of the case are, that the suit came to be instituted by the Respondents being Special Civil Suit No. 52 of 2017 seeking a declaration that the plaintiffs and the defendants are the joint owners of the suit property and for partition and possession of their share of the suit property. It is the case of the plaintiffs that the suit property was owned by one Mr. Jaow Duming Mathes Soaj who died intestate

on 5<sup>th</sup> July, 1966, leaving behind him surviving as his legal heirs, i.e., son, namely, Antony Mathes Soaj and daughter Ms. Maribai Anton Telies. It is further the case of the plaintiffs that Antony and Maribai become entitled to ½ share in respect of the suit property and they were in possession.

3. It is the case of the plaintiffs that after the demise of the original owner, the name of Maribai remain to be recorded in the record of rights and only the name of Anthony was mutated in the revenue records. The plaintiff claims that the Maribai during her lifetime had never released, relinquished her undivided share, right, title and interest in the suit property in favour of her brother Antony. The plaintiff claims that the suit property was in the joint possession and enjoyment of Maribai and Anthony and they shared the yield of the suit property. Upon the death of Maribai on 21<sup>st</sup> March, 1987, the plaintiffs herein acquired undivided right, title and interest in the suit property. It is the case of the plaintiffs that Anthony expired on 30<sup>th</sup> December, 2011 living behind him the defendants as his legal heirs, whose names came to be recorded in the record of rights vide Mutation Entry No. 1197. The contention of the plaintiffs is that the Maribai and the plaintiffs were oblivious of the fact that the name of Maribai was not recorded as of Co-owner in the suit property.

4. The plaintiffs claims that on 28<sup>th</sup> January 2014 the plaintiffs become aware about the Mutation Entry No. 477 mutating the sole name of Antony Joaw D'Souza in the revenue records. Pursuant to acquiring knowledge of the mutation entry, revenue appeals were preferred right up to the Additional Commissioner, Konkan Division and it is stated that the said revision is pending. The plaintiffs have come with the case that the plaintiffs have executed the development agreement in respect of their undivided share in the suit property to a third party. The cause of action is stated to have arisen in the 1<sup>st</sup> January, 2017 when the plaintiffs learned that the defendants were in the process of assigning the development rights in respect of the entire suit property to the exclusion of the plaintiffs. The pleadings in the plaint as regards the cause of action is that the cause of action firstly arose on 28<sup>th</sup> January, 2014 when the plaintiffs learned that the defendants had mutated their name in the suit property and thereafter on 1<sup>st</sup> January, 2017 when they learned that the defendants was trying to create third party interest in the suit property.

5. In this suit an application came to be filed under the provisions of Order 7 Rule 11(d) of the CPC seeking rejection of the plaint on the ground that the suit being filed after a period of 49 years

is barred by limitation. The case of the defendants was that Maribai had released, relinquished her share in the suit property and had never disagreed with the release of her rights during her life time and as such Antony was the sole legal heir. The defendants contention was, that the plaintiffs did not have any right in the suit property as Maribai had relinquished and waived her right in the presence of Talathi which was also recorded as per Mutation Entry No. 477.

6. The contention of defendants in the application was, that the suit filed by the plaintiff was barred by limitation under article 58, 62 to 65 and 110 of Limitation Act. The Trial Court rejected the application taking into consideration the averments in the plaint that the cause of action to file the present suit occurred in the years 2014 and 2017 and that after acquiring knowledge of the mutation entry in the year 2014, revenue appeals were preferred and presently the Mutation Entry No. 477 was set aside. The Trial Court took into consideration the decision of this Court in the case of ***Merit Magnum Constructions v. Nand Kumar Anant Vaity, [2014 (7) ALL MR Bombay, 252]*** wherein this Court held that the issue of limitation is a mixed question of law and fact which requires evidence for effective adjudication.

7. The learned counsel appearing for the petitioner has submitted that considering that the Maribai had never objected to the waiver of her rights in the suit property, the plaintiffs herein being aware of the said fact, could not have instituted the suit in the year 2017. He would further submit that the suit has been instituted after a period of 49 years from the date of the Mutation Entry No. 477 on 25<sup>th</sup> September, 1967. He would further submit that the Trial Court in taking into consideration the averments in the plaint to arrive at a finding that the suit is within limitation.

8. Considered the submissions.

9. The suit has been instituted by the plaintiffs seeking declaration of joint ownership of the property and for partition and separate possession of their shares. The case of the plaintiff is that their ancestor Maribai had not relinquished her share in the suit property and that the suit property was in the joint possession and enjoyment of Maribai. The plaintiff claims that in January 2014 the plaintiffs learned about the mutation entry and immediately took steps by filing revenue appeals which is pending as on the date of the institution of the suit. The cause of action is stated to have arose thereafter in January, 2017 when the plaintiffs learned that the defendants have trying to create third party right in the suit property.

It is settled position in law that for the purpose of adjudication of an application under the provisions of Order 7 Rule 11, only the averments in the plaint are required to be looked into. If we see the averments in the plaint the plaintiff have come with the case of a continuous joint possession of Maribai and Antony. The plaintiff claims that the Mutation Entry No. 477 came to their knowledge on 28<sup>th</sup> January, 2014 pursuant to which they realized that in the revenue records, the name of Maribai is not mutated and only the name of Anthony is shown. The Apex Court in the case of ***Shakti Bhog Food Industries Ltd. v. Cnetral Bank of India, [(2020) 17 SCC 260]*** has held that ordinarily a question of limitation is a mixed question of law and fact and in such a case the provisions of Order 7 Rule 11(d) will not have any application. In the facts of the present case also, the plaintiff have pleaded that they acquired knowledge for the first time on 28<sup>th</sup> January, 2014 and they become aware of the Mutation Entry No. 477.

10. Considering the pleadings which have come on record, the question of limitation is a mixed question of law and fact as regards the date when the exclusion of the plaintiffs from the suit property become known to the plaintiffs. The application seeking rejection of the plaint, places reliance on Article 58, 62 to 65 and 110 of the Limitation Act, however, inspite of query by this Court as to the

specific Article of Limitation Act which will apply to present case, learned counsel for the petitioner has not been able to answer the query. The suit in question has been instituted seeking declaration as to partition and joint possession of the suit property. As to which article of the Limitation Act will be applicable to the present case will be a question of law. Considering the averments in the plaint, it is evident that the question of limitation is a mixed question of law in fact requiring evidence to be led and as such the suit cannot be rejected at the threshold under the provisions of Order 7 Rule 11(d) of the CPC.

11. In light of the above there is no infirmity in the impugned order. The Civil Revision Application stands dismissed.

**[Sharmila U. Deshmukh, J.]**

**This order is corrected as per speaking to the minutes of order dated 17<sup>th</sup> July, 2023.**