

Ghuge

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

FIRST APPEAL NO.373 OF 2022

Jayesh Dharamdas Jhaveri	... Appellant
V/s.	
Nirmala Dharamdas Jhaveri	... Respondent

**WITH
INTERIM APPLICATION NO.2744 OF 2022**

Jayesh Dharamdas Jhaveri	... Applicant
V/s.	
Nirmala Dharamdas Jhaveri	... Respondent

Mr. Amit Sale a/w T. Shendge for the appellant.

Mr. Vimal Sanghavi for the respondent.

CORAM : AMIT BORKAR, J.

DATED : FEBRUARY 22, 2023

PC.:

1. The appeal arises out of dismissal of the suit in exercise of power under Clause a of Order 7 Rule 11 of the Code of Civil Procedure, 1908. The appellant is original plaintiff who filed suit for injunction and restraining defendant from alienating the suit property or parting with possession of the suit property. Additionally, an injunction restraining defendant from allowing any other person from using and occupying suit property was also sought.

2. The learned Trial Court while dismissing notice of motion

recorded a finding that the suit has been filed with intention is not to obey the order of this Court.

3. I have perused averments in the plaint. According to the plaintiff, by virtue of agreement dated 26th April, 1963 suit property was purchased by plaintiffs father. According to him, plaintiffs *father* contributed sum of sole consideration. According to the plaintiff, sisters Ms. Rashmi Sheth had relinquished her rights over the suit property another sister also relinquished her right. The appellant has, therefore, filed suit contending that in view of release of rights by the sister of his father he is entitled to the suit property exclusively.

4. The scope of clause a of Order 7 Rule 11 is well settled. The Court while considering under Order 7 Rule 11 is required to take into consideration the averments in the plaint only. "Cause of Action" means every fact which would be necessary for the plaintiff to prove, if in order to support his right to judgment. It consists of bundle of material facts, which are necessary for the plaintiff to prove in order to entitle him to the reliefs claimed in the suit. While considering an application under Order 7 Rule 11 what is required to be decided is whether the plaint discloses real cause of action or something purely illusory. What is required is that a clear right must be made in the plaint.

5. In the facts of the case without going into the merits of case, the averments in the plaint discloses that father of the plaintiff was owner of the property and plaintiff is seeking ownership based on his right of inheritance. Based on aforesaid pleading, it is clear that

the plaintiff has pleaded a clear right that he is entitled to the ownership in which capacity as 'Son'. Whether in law plaintiff is entitled to claim needs to be decided after granting opportunity of hearing or such right opportunity to lead evidence to the plaintiff. At the stage of allowing considering under Order 7 Rule 11 merits of the plaint cannot be considered. Therefore, in my opinion, the suit could not have been dismissed under clause (a) of Order 7 Rule 11 of the Code of Civil Procedure, 1908.

6. For the aforesaid reasons, the First Appeal No.373 of 2022 is allowed.

I) The impugned order dated 2nd March, 2022 passed in S.C. suit No.2587 of 2021 below Exhibit 1 is quashed and set aside.

II) The S.C. suit No.2587 of 2021 is restored on the file of learned City Civil Court which shall be decided on merits uninfluenced by the observations made above.

7. The First Appeal stands disposed of in the above terms. No costs.

8. As the First Appeal disposed of the Interim Application does not survive and is disposed of accordingly.

(AMIT BORKAR, J.)

(This order is modified as per dated 1st March, 2023. The correction in the 4th line of para 3 is shown in italicize).