

Nikita

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

CIVIL REVISION APPLICATION NO.248 OF 2022

Sharad Dattatray Bal and Anr. ... Applicants
V/s.
 Ratnabai Ramdas Kolhe and Ors. ... Respondents

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Mr. Siddhesh Bhole a/w Mr. Poras Shah i/b SSB Legal
& Advisory for the Applicants.

Mr. Nagesh Chavan i/b Chnbas D. Konale for
Respondent Nos. 1 to 4.

CORAM : AMIT BORKAR, J.

DATED : SEPTEMBER 12, 2023

P.C.:

1. By this application under Section 150 of Code of Civil Procedure, 1908, the applicants (defendant Nos. 1 and 2) seek rejection of plaint under clauses (a) and (d) of the Order 7 Rule 11 of Code of Civil Procedure, 1908.

2. The respondents (original plaintiffs) filed a suit for declaration, partition and injunction. The relief of declaration is in respect of registered sale deed dated 10th September 1997, impounded on 9th January 1998 and consequential injunction restraining defendants from creating third party rights or developing the suit properties.

3. The applicants filed an application under Order 7 Rule 11,

contending that as per paragraph No.20 of the plaint, the plaintiffs had knowledge of sale deed on 10th September 1997, and 9th January 1998. Therefore, suit filed in the year 2019 is barred by limitation. It is also contended that the plaintiffs No.1 to 3, are daughters. Suit properties vest with defendant Nos. 1 to 4 before 2005. Therefore, plaintiffs Nos. 1 to 3, have no cause of action to sue for relief of partition and consequential injunction.

4. The Trial Court rejected the application, hence the defendant Nos. 1 to 4 have filed present application.

5. Learned advocate for the applicants submitted that the plaintiff No.1 to 3 had no cause of action to seek relief of partition as all suit properties vest with defendant No.4 prior to amendment of 2005 in Section 6 of the Hindu Succession Act. According to him, plaintiff No.4, in 1994 executed agreement to sale in favour of defendant No.1 to 4 as regards to suit properties, which was converted into sale deed and, therefore, plaintiff No.4 had deemed knowledge of the sale deed. According to him, based on averments made in paragraph No.20 of the plaint, plaintiffs had knowledge of the sale deed executed in the year 1997 impounded on 9th January 1998. Therefore, suit filed in the 2019, is barred under Clause (d) of the Order 7 Rule 11 of the Code of Civil Procedure, 1908.

6. On perusal of the plaint and documents annexed along with the plaint, in my opinion, there is no averment and material to indicate that the plaintiffs had knowledge of sale deed executed on 10th September 1997 impounded on 9th January 1998. Undisputedly, plaintiffs are not signatories to the sale deed. The

cause of action pleaded is in relation to execution of document which according to plaintiffs is not binding, however such averment do not indicate knowledge of such transaction to the plaintiffs. Reading of the plaint along with the documents as a whole, there is no indication either in the plaint or in the documents annexed along with the plaint that the plaintiffs were aware about the execution of sale deed dated 10th September 1997.

7. Taking into consideration the averments in the plaint, Article applicable would be Article 110 of the Limitation Act, 1963. As per Article 110 of the Limitation Act, 1963, the limitation to file suit for partition begins from the date from exclusion become known to the plaintiffs. In the absence of the averments in the plaint or documents annexed along with the plaint indicating plaintiffs were aware of their exclusion from said property, the application under Order 7 Rule 11 (d) cannot be allowed.

8. In so far as the objection under said clause (a) of the Order 7 Rule 11 of the Code of Civil Procedure, 1908, is concerned, there is substance in the submission of the defendant Nos. 1 to 4, prima facie that the suit property vested with the defendant No.1 to 4, before the amendment of 2005. However, it is well settled that the partial plaint cannot be rejected under Order 7 Rule 11. Right of the plaintiff No.4 (son) to seek partition of ancestral property cannot be taken away based on the averments in the plaint.

9. According to learned advocate of the applicants, the limitation would start from the date when succession opens.

Pandharinath, who is grandfather of the plaintiff No.4 died in the year 2002 and, therefore, according to defendant No.1 to 4, limitation to file suit for partition started in the year 2002. In my opinion, there is no substance in the said submission. As observed earlier, the limitation for filing suit for partition begins when the succession become known to the plaintiff. Opening of succession by itself would not amount to exclusion of co-sharers from the joint family properties. The exclusion as contemplated under Article 110 is some positive act or commission of certain acts which has effect of excluding co-sharers from their possession (actual or constructive) of the joint family properties. In the absence of the averments in the plaint, or documents along with the plaint, indicating such exclusion of co-sharers, opening of succession by itself cannot be construed as exclusion of co-sharers from joint family property. Therefore, in my opinion, the Trial Court was justified in rejecting the application under Order 7 Rule 11.

10. The learned advocate for the applicants place reliance upon judgment in the case of **Uttam Vs. Saubhang Singh and Ors.** reported in (2016) 4 SCC 68. The supreme Court in the said case was concerned with the rights of grand-son born after the death of male Hindu and his right to maintain the suit for partition. In the facts of the present case, grand son that is plaintiff No.4, was born before the death of grand father. Therefore the judgment in the case of **Uttam** (supra) is not applicable.

11. There is neither error of jurisdiction nor perversity.

12. The civil revision application is, therefore, rejected.
13. Ad-interim relief granter earlier shall continue for period of three weeks from today.

(AMIT BORKAR, J.)