

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

SECOND APPEAL NO. 83 OF 2017

WITH

CIVIL APPLICATION NO. 1869 OF 2016

IN

SECOND APPEAL NO. 83 OF 2017

Barkatulla Ali Hasan Shaikh

.... Appellant

v/s.

Shri. Kafiyatulla Mohmed Rasul (since
deceased through legal heirs) :

Inayatulla Kifayatulla Khan and ors.

.... Respondents

Dr. Abhinav Chandrachud a/w. Mr. Chintan Shah and
Mr. Pavan Patil i/b. Triyama Legal for the Appellant.
Mr. R.S. Apte, Sr. Advocate for Respondent No.1.

CORAM: SMT. ANUJA PRABHUDESSAI, J.

DATED : 20th OCTOBER, 2023.

P. C. :-

. The Appeal is **admitted** on the following substantial question of law :-

(a) If the Defendant raises a preliminary objection concerning the maintainability of the suit in the Written Statement, but does not file an application under Order VII Rule 11 of the Code of Civil Procedure, 1908, for rejection of the plaint, is the preliminary objection of the Defendant deemed to have been waived ?

2. With consent, heard finally.

3. A perusal of the impugned judgment reveals that the Appellant herein has raised an issue that the partnership deed at Exhibit – 35 was not registered and hence, the suit was barred in terms of provisions under Section 69 of the Partnership Act. The learned Judge has observed that the Appellant herein had not filed an application under Order VII Rule 11 of the Code of Civil Procedure and hence, abandoned his right to challenge maintainability of the suit.

4. Mr. Apte, learned senior counsel for the Respondent concedes that the objections as regards the maintainability of the suit could not have been rejected solely on the ground that the Appellant herein had not filed an application under Order VII Rule 11 CPC. Hence, with consent, the following order is passed :-

(a) The Appeal is allowed.

(b) The impugned judgment dated 17/10/2016 passed by the learned District Judge, Thane in Regular Civil Appeal No.188/2015, is set-aside.

(c) The Appellate Court is directed to consider the issue of maintainability of the suit and if required record evidence on

the said issue and decide the appeal afresh after hearing the respective parties in accordance with the law.

5. Appeal as well as Civil Application stand disposed of in view of above terms. All contentions of the respective parties are kept open.

PREETI
HEERO
JAYANI

(SMT. ANUJA PRABHUDESSAI, J.)

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