

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

CIVIL REVISION APPLICATION NO. 47 OF 2023

Vijaymala Shamrao Magdum & Ors.

...Applicants

Versus

Sangita Babaso Magdum & Ors.

...Respondents

Mr. Sandeep Koregave, for the Applicants.

Mr. S. C. Mangle, for the Respondents.

CORAM : SHARMILA U. DESHMUKH, J.

DATE : 02nd AUGUST, 2023.

P.C.:

1. Heard.

2. The challenge in the application is to the order dated 01st November, 2022 rejecting the application under Order 7 Rule 11 of the Code of Civil Procedure, 1908.

3. Learned Counsel appearing for the Applicants submits that there was a previous decree for partition which was executed and the said facts are mentioned in the plaint. He would further submit that the subsequent suit which is the subject matter of the impugned order seeking injunction and cancellation of sale deed is

in contravention of the earlier decree.

4. *Per contra*, learned Counsel appearing for the Respondents points out that the application filed by the applicants seeking rejection of plaint was on the ground of res-judicata and limitation. He would further submit that it is now settled by the decision of the Apex Court in the case of ***Prem kishore & Ors. V/s. Brahm Prakash and Ors.***¹ that powers under Order 7 Rule 11 of the C.P.C. are not available for examining the ground of res-judicata. He would further submit that there is no ground made out as regards limitation.

5. Considered the submissions.

6. Special Civil Suit No. 149 of 2022 was instituted by the plaintiffs seeking restraining order against defendant Nos. 1 to 5 from interfering with the possession of the suit property 1(A) and 1(B), which are described in the plaint and for a declaration that the sale deed dated 19th March, 2019 executed in respect of suit property 1(B) by defendant No. 2 in favour of defendant Nos. 4 and 5 is illegal and void ab initio. The averments in the plaint indicate

¹ 2023 SCC OnLine SC 356

that as regards the suit properties, it is averred that the plaintiff is the owner of the suit properties and in the 7 x 12 extract, the name of the husband of defendant No. 1 and defendant Nos. 2 and 3 had been inserted illegally. It is further averred that the husband of plaintiff No. 1 had instituted Regular Civil Suit No. 331 of 1983 seeking partition, which came to be decreed on 23rd November, 1990 and the husband of plaintiff No. 1 and plaintiff Nos. 6 and 7 received 1/3rd share each in the property.

7. It is further averred that the husband of defendant Nos.1 did not receive any share in the decree and there was no appeal filed against the said decree and the same had attained finality. The cause of action stated is the sale deed dated 19th March, 2019 and as such the suit in question has been filed. It is evident from the averments in the plaint that placing reliance on the decree passed in the earlier suit of 1983, a specific assertion is made in the plaint that the husband of defendant No. 1 was not given any share in the suit property. It is on that basis submitted that a challenge has been laid to the execution of the sale deed by defendant No. 1 and injunction sought restraining the defendants from interfering with the plaintiffs' possession.

8. The application filed under Order 7 Rule 11 leaves much to be desired. The application in question is six paragraphs with two or three sentences in each paragraph. The application simpliciter says that the suit filed is in contravention of the decree passed in RCS No. 331 of 1983. The other ground which is taken is that the suit is hit by principles of res-judicata and by law of limitation. The ground of contravention of the previous decree is not found in either of the clauses (a) to (d) of Order 7, Rule 11 of the C.P.C.. As far as the the ground of res-judicata and limitation is concerned, the decision of the Apex Court in the case of *Prem kishore & Ors. V/s. Brahm Prakash and Ors.* (*supra*) squarely applies to the facts of the case. As regards limitation, there is no argument made as to how the suit is to be rejected on the ground of limitation. The trial Court has considered the issues of limitation and the principle of res-judicata and upon reading of the plaint, has rejected the application.

9. Considering the averments made in the plaint, a specific case has been put forward that in the earlier suit there was a partition in which each of the plaintiffs got $1/3^{\text{rd}}$ share and that the defendants were not allotted any share in the properties. The plaint discloses a cause of action and a right to sue.

10. In that view of the matter, there is no infirmity in the impugned order rejecting the application under Order 7 Rule 11 of the C.P.C.. Civil Revision Application is devoid of merits and stands dismissed.

(SHARMILA U. DESHMUKH J.)