



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**SECOND APPEAL NO.22 OF 2024
WITH
CIVIL APPLICATION NO.1452 OF 2024**

Nitin Keshavlal Shah,
Age : 61 years, Occu.: Business,
R/o.: Tilak Nagar, Latur,
Tq. & Dist. : Latur **APPELLANT**
(Original Plaintiff)

VERSUS

1. Sow. Pratima w/o Nayankumar Shah,
Age : 68 years, Occu.: Household,
R/o.: Pant Nagar, Ghatkoppar,
Mumbai (E), A/P, C/o.: Pritam Shah
1/11. 1st floor, Ghanshyam Nagar,
Opposite Nakhwa High School,
Kopri, Thane (East) – 400603
2. Nilima d/o Keshavlal Shah,
Age : 65 years, Occu.: Household,
R/o.: Latur, at present : F-1, Sai Nagar,
Co-operative Housing Society,
Near Nagarwala High School,
Kalyan Nagar, Pune – 411 006
3. Dr. Pradeepkumar s/o Keshavlal Shah,
Age : 63 years, Occu.: Medical Practitioner,
R/o.: Ganraj Apartment,
Tilak Nagar, Latur, Dist. Latur **RESPONDENTS**
(Original Defendants)

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Advocate for the Appellant : Mr. M. G. Kedar
Senior Advocate for Respondent No.3 : Mr. Rajendrraa Deshmukh
a/w Mr. Shriram V. Deshmukh h/f Mr. Devang R. Deshmukh
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CORAM : SANDIPKUMAR C. MORE, J.

DATED : 19/03/2024.

JUDGMENT :

1. The appellant, who is the original plaintiff in Special Civil Suit No.7 of 2017, has filed this second appeal against the judgment and order dated 31/07/2023 passed by the learned District Judge-1, Latur (hereinafter referred to as 'the learned first appellate court) in RCA No.30 of 2018, whereby the judgment and order dated 12/01/2018 passed by the learned Civil Judge Senior Division, Latur (hereinafter referred to as 'the learned trial court') in aforesaid suit, was confirmed.

2. Background facts are as under :

The appellant / plaintiff is the brother of all the respondents. Their father – Keshavlal Shah allegedly died intestate on 15/01/2004. Their mother- Jostna is also no more and she died on 23/07/2005. As such, the appellant/ plaintiff and respondents are the legal representatives of Keshavlal and Jostna. Keshavlal had acquired a plot No.53 at Latur, admeasuring East-West Southern side 51 ft., 6 inches and Northern side of 40 ft., 9 inches and North-South Eastern side 76 ft., and Western side 74 ft. Out of the said plot, father of the appellant / plaintiff decided to sell

Southern side portion of the said plot to plaintiff and accordingly the plaintiff purchased the same by way of a registered sale deed on 21/06/1999 for a consideration of Rs.1,50,000/-. The remaining part i.e. Northern portion of the entire plot No.53 is now the plot in dispute. The appellant / plaintiff claimed that his father Keshavlal died intestate but the respondents / defendants in collusion with each other, prepared a forged and fabricated *Will-deed* dated 27/01/2000 by taking disadvantage of ill-health of his father. According to him, the said *Will* stood in favour of respondent Nos.2 & 3, was in fact illegal and void and therefore, he filed a suit for partition in respect of the said suit property.

The respondents after appearance, contested the suit by filing written statement and supported the *Will*. According to them, the suit of the plaintiff/appellant was hopelessly barred by limitation since he was already knowing about the execution of the *Will* much prior to the filing of present suit. They contended that the appellant / plaintiff had in fact admitted the said *Will* by producing an affidavit of respondent No.2 in his own suit i.e. RCS No.409 of 2013 which he had filed against Municipal Corporation, Latur on 25/09/2013. Thus, they claimed that the appellant/plaintiff by way of crafty drafting and by indirectly challenging the said *Will* tried to file suit which was completely barred by limitation. They

also filed applications Exhibits-19 & 20 for rejection of the plaint under Order VII Rule 11 of the CPC by contending that the suit was barred by limitation. The learned trial court on the basis of those applications, framed preliminary issue 'as to whether the suit of the appellant / plaintiff was barred by limitation' and ultimately rejected the plaint by passing an order dated 12/01/1918. The appeal preferred by the present appellant / plaintiff before the learned first appellate court has also been dismissed and hence this second appeal.

3. The learned counsel for the appellant / plaintiff vehemently argued that the present appeal, involves following substantial questions of law :

- i) *Whether both the learned courts below failed to appreciate that for rejection of the plaint under Order VII Rule 11 of CPC only averments of the plaint are required to be considered and not the defence ?*
- ii) *Whether the issue of limitation being a mixed question of law and fact, was-- ought to have been decided on the basis of evidence?*
- iii) *Whether the learned first appellate court was justified in dismissing the appeal without framing proper points for consideration ?*

He further submitted that both the learned courts below erred in rejecting the plaint despite the guiding principle in the aforesaid substantial questions of law.

4. The learned counsel for the appellant / plaintiff also relied on following judgments :

- A) *R. Kempraj vs. Barton Son and Company, reported in 1970AIR (SC) 1872;***
- B) *The Apex Court in case of Salim D. Agboatwala and others vs. Shamalji Oddhavji Thakkar and others, in Civil Appeal No.5641 of 2021, decided on 17/09/2021;***
- C) *The Apex Court in case of Nusli Neville Wadia vs. Ivory Properties and others in Special Leave Petition (Civil) Nos.31982-31983 of 2013, decided on 04/10/2019.***

5. On the contrary, the learned senior counsel for the respondents supported the orders of both the learned courts below and submitted that the appellant / plaintiff was already aware of execution of the Will which according to him executed by the present respondents by playing fraud upon him and by taking disadvantage of ill-health of his father Keshavlal. Further, it is submitted by the learned senior counsel that the appellant /

plaintiff though not claimed any relief in respect of the *Will*, but indirectly has challenged the same in the suit and therefore, prepared a concocted story about the cause of action by way of crafty drafting, which is not at all permissible.

6. Heard rival submissions. Also perused the entire documents on record.

7. It is significant to note that the learned trial court while rejecting the plaint under Order VII Rule 11(d) of CPC, had framed a preliminary issue “as to whether the suit was within limitation” and then gave finding in the negative on the said issue. Admittedly, the appellant / plaintiff has not made any prayer that the disputed *Will* executed in favour of respondent Nos.2 & 3 on 27/01/2000, be declared as void and not binding on him. However, it is extremely important to note that out of the suit plot, the appellant / plaintiff had already purchased Southern side part and the *Will* is in respect of remaining portion of the said plot towards Northern side. The appellant / plaintiff has filed a partition suit in respect of the part mentioned in the said *Will* and therefore, while deciding the partition suit, the learned trial court was under obligation to give certain finding on the said *Will*. As such, the observation of the

learned trial court that the appellant / plaintiff had indirectly challenged the said *Will* is *prima facie* proper.

8. The learned counsel for the appellant / plaintiff has relied upon judgments as mentioned above and on going through the said judgments, the sum and substance is that for rejection of the plaint only averments in the plaint are to be considered and that the issue of limitation is not pure question of law and therefore, cannot be decided as a preliminary issue under Order XIV Rule 2 of CPC since it requires evidence. On the contrary, there are other judgments also which are discussed by the learned first appellate court, wherein it is observed that the plaintiff cannot be permitted to bring suit within period of limitation by clever drafting which otherwise is barred by limitation. It is not in dispute that for rejection of the plaint only averments of plaint and documents relied in support of those averments, are to be considered. However, in the instant case, the learned trial court had in fact framed a preliminary issue of limitation. It is significant to note that as per Section 9A of CPC, before its deletion, defendant was empowered to claim framing of preliminary issue in respect of objection to the jurisdiction of court and also on the point of limitation. The said Section 9A of CPC was in fact deleted on 27/06/2018. As such,

though it is not specially referred in order of framing preliminary issue but the learned trial court was very much empowered to frame such preliminary issue as the order of rejection of plaint was in fact passed much prior to the cancellation of Section 9A of CPC.

9. Even otherwise also, the learned trial court was also empowered to treat the issue of limitation as a preliminary issue under Order XIV Rule 2 of CPC which was to be framed on the basis of admitted fact. The learned first appellate court has dealt with this aspect and observed that since the appellant / plaintiff was already aware about the disputed *Will* in question as he himself had filed an affidavit of present respondent No.2 in his own suit i.e. RCS No.409 of 2013 filed by him against Latur Municipal Corporation for declaration of his title over the Southern portion of the plot as per his sale deed. Therefore, by the such act of the appellant / plaintiff, it appears that the execution of the said *Will* was well within his knowledge and an admitted fact for him. Therefore, from that angle also the framing of preliminary issue as regards the limitation by the learned trial court, is justified.

10. Not only this but it appears from the judgment of the learned first appellate court that the appellant / plaintiff did not challenge

the order of the learned trial court below Exhibits-19 & 20 whereby it had framed the preliminary issue of limitation. It is extremely important to note that the appellant / plaintiff had in fact filed an application Exhibit-59 for framing other issue before the learned trial court, but it was rejected and writ petition preferred by the appellant / plaintiff against the said order, was also dismissed by this court and the matter was expedited for deciding the preliminary issue. Thus, it appears that this court at the relevant time had found no error with the act of the learned trial court of framing such preliminary issue. In the judgment of the first appellate court the observation of this court in Writ Petition No.11514 of 2017 is quoted, which has been reproduced below:

“After considering the extensive submissions of the learned advocate for the respective sides and upon perusing paragraph No.6, 7 and 8 of the plaint and the entire contents of Exhibit-59, it is obvious that the thrust of the plaintiff/s case is solely upon the Will-deed dated 27/01/2000. If that be so, then the suit would appear to be barred by limitation. Considering the effect of paragraph No.6, 7 & 8 though the petitioner contends that he has not challenged the sale-deed, the said contention is camouflage and the whole claim of the petitioner is based on the contention that a

false, forged and fabricated Will-deed was prepared on 27/01/2000.”

Thus, at the relevant time also it was established that the appellant / plaintiff had indirectly challenged the *Will-deed* in dispute.

11. The learned counsel for the appellant / plaintiff vehemently argued that no opportunity of evidence was given to the appellant / plaintiff on the said preliminary issue. However, the order dated 12/01/2018 passed by the learned trial court itself indicates that the present appellant / plaintiff had filed a pursis before the learned trial court at Exhibit-85 that he did not want to lead any evidence. As such, there appears no force in the submission of the learned counsel for the appellant / plaintiff to that effect. Further, from the own act of the appellant / plaintiff of filing an affidavit of respondent No.2 in his own suit, wherein reference of the said *Will* has come, it is established that the appellant / plaintiff was well aware about the existence of the *Will* in the year 2013 itself or prior to that. As such, the present suit of the plaintiff which is filed on 21/01/2017 clearly appears to be time barred as per Article 59 of the Limitation Act. Further, by clever drafting, the appellant / plaintiff has tried to bring his suit within limitation which is not at

all permissible as per the observation of the Hon'ble Apex Court in the case of ***C. S. Ramaswamy vs. V. K. Senthil and others [2022 AIR (Supreme Court) 4724]***. Thus, it appears that the act of framing preliminary issue of limitation by the learned trial court was proper in peculiar circumstance of the case. In view of the admission given by the appellant / plaintiff in respect of existence of the disputed *Will*, the act of rejecting the plaint being barred by limitation, of the learned trial court, appears proper. Moreover, the learned first appellate court by considering every aspect in detail, has confirmed the order of the learned trial court by dismissing the first appeal of the present appellant / plaintiff. Considering all these aspects, no substantial question of law appears to be involved in this matter and therefore, the second appeal stands dismissed at admission stage and disposed of accordingly.

12. In view of dismissal of the second appeal, Civil Application No.1452 of 2024 also stands disposed of accordingly.

(SANDIPKUMAR C. MORE, J.)