



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

**CIVIL REVISION APPLICATION NO. 159 OF 2024**

Nanasaheb Kachru Nalawade

**VERSUS**

Dilip Khushalchand Pardeshi Through His G.P.A. Holder  
Basantabai Shivilal Rajput And Another

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Mr. Mahesh B. Ubale, Advocate for Applicant

Mr. G.S. Mene and Mr. S.S. Ghumare, Advocates for  
Respondent No.1/Caveator

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**[CORAM : S. G. CHAPALGAONKAR, J.]**

**DATE : 21<sup>st</sup> NOVEMBER, 2024**

**ORDER :**

1. The applicant/original defendant in Regular Civil Suit No.3/2020 pending before the learned Civil Judge, Junior Division, Kannad, District Aurangabad, impugns the order dated 04.01.2024 passed below Exhibit10, by which his prayer for rejection of plaint, invoking order 7 Rule 11 of the Code of Civil Procedure, has been turned down.

2. Mr. M.B. Ubale, learned advocate appearing for the applicant submits that the respondent filed Regular Civil Suit No.3/2020 seeking relief of perpetual injunction pertaining to land Gut No.48 to the extent of 4 Hectors situated at village Kanadgaon (Ka.) against the applicant. The said property was

subject matter of Regular Civil Suit No.97/1983 that was instituted by the applicant's father against legal heirs of Kesarbai for the relief of perpetual injunction. The said suit has been decreed on 29.08.1990. The possession of Kacharu as a tenant in suit property was proved. The said decree attained finality. It is, therefore, submitted that the present suit would be barred by the principles of *res judicata*, and therefore, the plaint is liable to be rejected.

3. Having considered the submissions advanced, it can be observed that there was previous litigation in respect of the suit property between father of applicant and father of plaintiff. In those suits, the decree has been passed and attained finality. The possession of applicant's father Kachru as a tenant over suit property has been approved. Therefore, Khushalchandu i.e. father of plaintiff was restrained from obstructing possession of plaintiff Kachru. Similarly, there were two other suits bearing Regular Civil Suit No.288/1995 and Regular Civil Suit No.97/1983, wherein again the tenancy and possession of Kachru has been approved.

4. The core issue that arises for consideration is, whether the applicant made out a case for exercise of powers under Rule 11 of Order 7 of Code of Civil Procedure for

rejection of plaint. It is trite that the application under Order 7 Rule 11 can be entertained for the reasons as stipulated under Clause (a) to (d) of Rule 11. The pleadings in the plaint are only germane for deciding the application filed under Order 7 Rule 11 of the Code of Civil Procedure. The defence, if any, raised would not be relevant while dealing with such application. In this background, if the pleadings in application for rejection of plaint are considered, the applicant attempts to make the case of bar of *res judicata* under section 11 of the Civil Procedure Code. Apparently, the issue as regards the applicability of *res judicata* in the facts of the case will have to be framed and the trial Court will have to record the finding on the relevant aspects required for application of the principles of *res judicata*. It cannot be said that merely because the defence of *res judicata* is available to the applicant, the plaint shall be rejected at the threshold. In fact, the provisions of Order 7 Rule 11 would be applicable where taking cognizance of the suit itself would be barred in the light of the specific provision engrafted under any law. However, in this case, the applicant seeks to reject the plaint on the basis of defence that suit is barred by *res judicata*.

5. The Supreme Court in case of ***Kamala and Others Vs. K.T. Eshwara SA and others, (2008) 12 SCC 661***, observed that issue of *res judicata* is mixed question of law and fact and needs to be decided in Trial. Hence, contention of applicant can not be accepted. In such cases, it is always open for the plaintiff to pursue trial Court to frame the preliminary issue under Order 14 Rule 1 of the Code of Civil Procedure and it would be within the discretion of the trial Court to accept such prayer. If the trial Court is of the opinion that in the facts of particular case, the issue of *res judicata* can be decided without recording of evidence or referring to controversial material, the trial Court can take its own call. However, the exercise of jurisdiction under Order 7 Rule 11 would not warrant in such cases.

6. Mr. Ubale, learned advocate appearing for the applicant relying upon the judgment of this Court in case of ***Sarjerao Dhondiba Sarode and Others Vs. Kamal Kerubhau Pachange and Others, 2018 (5) Mh. L.J. 323***, submits that the preliminary issue can be framed and dealt with when on *prima facie* consideration, it is apparent that the suit is barred in the earlier matter. There cannot quarrel of the proposition of law, however, this Court approved framing of preliminary issue and

its decision at preliminary stage. Therefore, law laid down by this Court in case of ***Sarjerao*** (supra), would have no application in this case. Consequently, there is no merit in the civil revision application, the same is dismissed in limine.

[ S. G. CHAPALGAONKAR ]  
JUDGE