



(1)

[fa784.20]

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

FIRST APPEAL NO. 784 OF 2020

Sudhakar Laxman Patil
Age. 75 years, Occ. Agri.,
R/o. Makrandnagar, Varangaon,
Tq. Bhusawal, Dist. Jalgaon.

.. Appellant
[ori.plaintiff
No.1]

VERSUS

1. Murlidhar Laxman Patil
Age. 67 years, Occ. Lawyer,
R/o. Lokdarshan, C wing 609,
6th floor, Marol Maroshi Road,
Military Road, Wamandayapada,
Andheri East, Mumbai.

.. Respondents
(Res.1&2- ori.
deft. & Res.3 -
ori. Plntf.No.2)

2. Dilip Ananda Kolhe,
Age. 65 years, Occ. Business,
R/o. 78, Housing Society,
In front of Nutan Maratha College,
Jalgaon.

3. Tushar Madhukar Patil
Age. 47 years, Occ. Agri.,
R/o. Gandhi Chauk, Varangaon,
Tq. Bhusawal, Dist. Jalgaon.

**WITH
CIVIL APPLICATION NO. 4416 OF 2023
CIVIL APPLICATION NO. 4694 OF 2023**

Mr.Swapnil S. Patil, Advocate for the appellant.

Mr.V.D.Hon, Sr. Advocate i/b. Mr. A.V. Hon, Advocate for respondent No.1.

Mr.Girish Rane, Advocate for respondent No.2.

**CORAM : KISHORE C. SANT, J.
RESERVED ON : 30.07.2024
PRONOUNCED ON : 23.10.2024**

JUDGMENT :-

01. This appeal arises out of an order passed by the learned Civil Judge, Senior Division, Jalgaon below application Exh.45 in Special Civil Suit No.56 of 2018. By way of the impugned order, the learned Trial Judge allowed the application filed by the defendants under Order VII Rule 11 (a) and (d) and section 151 of the Civil Procedure Code and rejected the plaint, vide order dated 16.10.2019.

02. The suit was filed by the present appellant for partition of the suit properties, separate possession and for compensation of Rs.25,00,000/-. Further injunction is prayed not to transfer suit properties and not to create third party interest. The appellant is original plaintiff No.1. Respondent Nos. 1 and 2 are original defendant Nos. 1 and 2. Plaintiff No.1 and defendant No.1 are real brothers. Plaintiff No.2 is nephew of plaintiff No.1 and defendant no.1, who is respondent No.3 in the appeal.

03. It is case of the plaintiffs that they are members of Hindu joint family. Laxman Ramu Patil – Karta of joint family i.e. father of plaintiff No.1 and defendant No.1 died on 26.08.2002, leaving behind

three sons and four daughters. After death of Laxman, the properties were shown in the name of defendant No.1. It is further case that defendant No.1 happens to be a lawyer. By keeping the plaintiffs in dark, he shown that Survey No.464/4B+5 out of property 1 Hectare was shown to have been partitioned. It is shown that 1 Hectare land was allotted to him and tried to get his name entered vide Mutation Entry No. 20272. The said entry was not approved by the Circle officer as there was no document or order in respect of the said land. However, again by showing that the properties are partitioned, he got the said land entered in his name vide Mutation Entry No. 20962 in 1987. Said land thereafter was divided into two properties. Land admeasuring 1 Hectare was shown in the name of defendant No.1. Remaining 2 Hectare 87 R land was shown to be Survey No. 464/5B. It is thus stated that though the land ought to have been partitioned amongst all the brothers, defendant No.1 got the said land in his own name. It is further alleged that by agreement to sell dated 05.04.1997, defendant No.1 entered into agreement with defendant No.2 by getting the property converted into non-agriculture land. Land 464/4B+5A was shown to be of 10,000 sq. mtr. and Survey No.464/5B was shown to be of 28,700 sq. mtr.

04. Pursuant to an agreement to sell dated 05.04.1997,

defendant No.2 had filed a suit bearing Special Civil Suit No.271 of 2002 and Special Civil Suit No.273 of 2002. Special Civil Suit No. 271 of 2002 was against defendant No.1 and Special Civil Suit No. 273 of 2002 was against defendant No.1 and other joint family members. Thus all the properties were shown to be joint family properties. In the said suit, compromise took place between the parties. In Special Civil Suit No.271 of 2002, defendant No.1 accepted the land to the extent of 273.75 sq. mtr. In Special Civil Suit No. 273 of 2002 out of 27225.09 sq. mtr. defendant No.1 accepted land admeasuring 2329.44 sq. mtr. and remaining land was given to defendant No.2. It is case that after the compromise land admeasuring 7603.19 sq. mtr. was shown to be property of joint Hindu family. It was decided to partition the said land amongst members. The area of 846 sq. mtr. was to be given to the sisters. The remaining land admeasuring 6757.19 sq. mtr. was to be partitioned in three shares of plaintiffs and defendant no.1. Thus, each of the plaintiff and defendant No.1 are having 1/3rd share in the said property.

05. It is further alleged that, however, defendant No.1, thereafter by using his legal knowledge got executed relinquishment deed and gift deed in his favour and got the said plots allotted to himself. Total land of

1483.44 sq. mtr. was thus transferred in the name of defendant No.1 by relinquishment deed executed by all the family members. The land to the extent of 939.90 sq.mtr. is still not given to other members by defendant No.1. Plaintiff No.2 has also not yet received the area to the extent of 768.95 sq. mtr. from defendant No.1. Though defendant was entitled to receive only 2252.40 sq. mtr., however, he is in possession of 3961.25 sq. mtr. Thus, total area of 1708.85 sq. mtr. land is in possession of defendant No.1 in excess to his share. With these allegations and some other allegations, suit was filed. Ultimate prayer was to put the plaintiff in possession of 2/3rd area as shown in para 10 to 15 of the plaint. Rs.25 lakhs was claimed by way of compensation from defendant No.2.

06. Defendant No.1 appeared in the suit. He filed application under Order VII Rule 11 (a) and (d) and section 151 of the CPC. It is the main ground that the plaintiffs have raised dispute about mutation entry No.20962 dated 24.11.1987. Said entry was made under the orders by the Tahsildar, Jalgaon dated 27.10.1987. The said entry ought to have been challenged before the Appellate Authority. It is further case that the suit is not maintainable, as it seeks to challenge compromise decree dated 16.02.2008 in Special Civil Suit No. 273 of 2002 and Special Civil

Suit no. 271 of 2002. The plaintiffs have not challenged the recording of compromise and passing of the consent decree in the said Special Civil Suits. There is no case that the said decrees are obtained by fraud, coercion or misrepresentation. There are no particulars given etc.

07. The learned Trial Court accepted the case of defendant No.1 and rejected the plaint. The learned Trial Court also held that the plaintiffs were aware of the fact that possessory rights in the said land was transferred in the name of defendant No.1 in the year 1987 and still the same was not challenged. Thus, there is no cause of action and the suit is not maintainable. The Tahsildar's order taking entry dated 27.10.1987 is challenged after 31 years and thus barred by limitation. The plaintiff had knowledge of filing Special Civil Suit no. 271 of 2002, wherein there was reference to revenue entries. They were parties to the compromise decree dated 16.12.2008. The Trial Court did not accept the theory of the plaintiff that recently they got the knowledge of giving 10% more open space. The cause of action is taken to be imaginary. The original plaintiffs are thus before this Court challenging the said judgment and order.

08. The learned Advocate for the appellant Mr. Swapnil Patil

vehemently argued that the learned Trial Judge failed to appreciate the case of the plaintiffs and has wrongly rejected the plaint. In the plaint, there is clear averment that the plaintiff got knowledge very recently and immediately thereafter they filed the suit. The learned Trial Court failed to appreciate this fact. The learned Trial Court has practically adjudicated the plaint on merit at preliminary stage. While considering the application under Order 7 Rule 11, the Trial Court has to proceed only on the basis of averments in the plaint. Respondent No.1 is a lawyer by profession. By using his knowledge he has got the documents prepared in his name. Triable issues are involved and it is necessary to try the suit. The case laws cited were not properly appreciated. He thus submits that the order impugned in the appeal deserves to be quashed and set aside by restoring the suit.

09. The learned Sr. Advocate Mr. Hon for respondent No.1 submits that admittedly the property was a joint family property and there was no dispute about the same. However, there was partition that took place during the life time of father of plaintiff No.1 and defendant No.1. Said partition was even acted upon by all the parties. The parties were put in possession of the respective share in the property. The plaintiffs have sold their land by demarcating plots. The defendant is in

possession of only land which was allotted to his share in the partition. Under the garb of suit for partition, the plaintiff are trying to grab property of defendant No.1. The prayer of compensation is totally misconceived. The plaintiffs are parties to the compromise that took place in 2008 in Special Suit No. 273 of 2012. No parties can be permitted to go behind compromise decree. This is to the knowledge of the plaintiff and there is also averment to that effect in the plaint. The mutation entries were taken by following procedure in the name of defendant No.1. The Court has only seen the pleadings and the documents. Mere reference to the documents cannot be said to be deciding the case on merit. It can be seen by mere reading of the plaint that the entries taken in the year 1987 are being challenged in the suit. There is no specific averment showing as to when the plaintiff got exact knowledge of the sale-deed. If the suit was for partition, then all the sisters were also necessary parties. He submits that the learned Trial Court has rightly held that there is no challenge to the earlier partition. No interference is required in the well reasoned order passed by the Trial Court.

10. Learned Advocate Mr. Rane for respondent No.2 submits that Special Civil Suit Nos. 271 of 2002 and 273 of 2002 both were

compromised. Father of plaintiff No.2 and plaintiff No.1 both have signed the compromise. The annexures to the plaint are part of the plaint and therefore looking to the annexures, the learned Trial Court can certainly look into such annexures. In the earlier compromise decree, there is reference to open space. Thus, it cannot be said that the parties were not aware of the open space given to the share of defendant No.1. In the compromise, all the properties are clearly mentioned including the area of open space. Defendant No.2 is not liable to pay any compensation. There is also no challenge to the compromise decree. There is no exact date given of cause of action in the plaint. The pleadings in the plaint are vague. He further submits that defendant No.2 is unnecessarily added as party, when the dispute is only between family members. He supports the order and prays for dismissal of the appeal.

11. In rejoinder the learned Advocate for the appellant submits that in the present case compromise between the parties is not disputed. The learned Trial Court has not considered case of **Dahiben Vs. Arvinbhai Kalyanji Bhanusali (Gujra) dead through LRs. & Ors., (2020) 7 SCC 366**. There is clear averment in the plaint that defendant No.1 purchased the flat in Mumbai from the income of joint family property. The issue of limitation in this case is an issue requiring trial. In

the present case, it is a question of fact. The Court has passed impugned order on extraneous considerations.

12. To appreciate the arguments and submissions of the parties, it would be helpful to go through the judgments relied upon by the parties. Learned Advocate for the appellant relied upon judgment in the case of **Chhotanben and Anr. Vs. Kiritbhai Jalkrushnabhai Thakkar, reported in 2019 (2) Mh.L.J.17**. In the said case the Hon'ble Apex Court held that while considering application under Order VII Rule 11(d), the Court has to only see the averments in the plaint. In the said case, the Hon'ble Apex Court found that the plaintiff had asserted that suit is filed immediately after getting knowledge about fraudulent sale-deed executed by original defendant Nos. 1 and 2 by keeping them in dark. In the facts of that case it was held that the Trial Court has rightly held that the issue of limitation in that case was triable issue and therefore plaint could not have been rejected under Order VII Rule 11(d) of the CPC. There is no doubt about said proposition.

13. In the case of **Urvashiben and Anr.Vs. Krishnakant Manuprasad Trivedi reported in 2019 (1) ALL M.R. 483**, the Hon'ble Apex Court considered provisions of Order VII Rule 11 of the CPC with

the Limitation Act. In that case also an application was filed for rejection of plaint stating that the suit was barred by limitation. It was held that the said issue in the fact of that case, was required to be adjudicated after trial. It was further held that assuming that there was inordinate delay and latches on the part of the plaintiff, same cannot be a ground for rejection of plaint under Order VII Rule 11 (d) of the CPC.

14. Next case relied upon by the appellant in **Merit Magnum Construction Vs. Nand Kumar Anant Vaity & Ors., 2014(7) ALL MR 252**. In the said case Division Bench of this Court held that for rejection of plaint at the stage of deciding application under Order VII Rule 11 of the CPC, the pleadings are required to be seen as they stand without adding or subtracting any words or by changing their apparent grammatical sense. It was further considered that the issue of limitation is a mixed question of law and fact which requires trial for adjudication of the said issue. There is no doubt about the proposition.

15. In the case of **Smt. Sushilabai wd/o. Bomenshaw Byramji Vs. Smt. Kamalruxh we/o. DPR Cassad through LRs. & Anr. reported in 2014(2) ALL MR 629**, it was held that compromise decree can be challenged. Their allegation was that the decree in

question was obtained by practicing fraud upon the plaintiff. It was also held that while rejecting plaint, the Court cannot travel beyond statement in the plaint. In the said case also the Court held that the question of limitation is a mixed question of fact and law and under such circumstances, rejection of plaint as barred by limitation amounts to exercise of excess jurisdiction. So far as proposition of law all the cited judgments is concerned, there is no dispute as the position is well settled by now. It need to be kept in mind that where issue of limitation is a mixed question of law and fact, the said needs to be decided by trial.

16. Learned Sr. Advocate Mr. V.D. Hon for respondent No.1 relied upon judgment in the case of **Colonel Shrawan Kumar Jaipuriyar Vs. Krishna Nandan Singh and Anr., 2019 SCC OnLine SC 1358**. Para No. 10 of the said judgment is as under :-

10. This Court in Church of Christ Charitable Trust and Educational Society Represented by its Chairman v. Ponniammam Educational Trust Represented by its Chairman/ Managing Trustee 1 has referred to the earlier judgment of this Court in A.B.C. Laminart Pvt. Ltd. and Another v. A.P. Agencies, Salem² to explain that the cause of action means every fact which, if traversed, would be necessary for the plaintiff to prove in order to seek a decree and relief against the defendant. Cause of action requires infringement of the right or breach of an obligation and comprises of all material facts on which the right and claim for breach is founded, that is, some act done by the defendant to infringe and violate the right or breach an obligation. In T. Arivandanam v. T.V.Satyapal and Another this Court has held that if the plaint is manifestly vexatious, meritless and groundless, in the sense that it does not disclose a clear right to sue, it would be right and proper to exercise power under Order VII Rule 11 of the Code of Civil Procedure, 1908 ('Code', for short). A

mere contemplation or possibility that a right may be infringed without any legitimate basis for that right, would not be sufficient to hold that the plaint discloses a cause of action.

. The Hon'ble Apex Court ultimately allowed the application filed under Order VII Rule 11 of the CPC.

17. In the case of **Sree Surya Developers and Promoters Vs. N. Sailesh Prasad & Ors., (2022) 5 SCC 736**, the Hon'ble Apex Court considered the provisions of Order 23 Rule 3-A and Order 7 Rule 11(d) of the CPC. In that case the plaintiff had claimed declaration of title, recovery of possession, cancellation and revocation of gift deed, declaration for development-cum-general power of attorney and deed of assignment, which was subject matter of earlier suit, in which thereafter compromise had taken place. In that case, it was correctly held that the Trial Court rightly rejected the plaint in exercise of powers under Order 7 rule 11(d) of the CPC.

18. So far as case of **Dahiben (supra)** is concerned, the Hon'ble Apex Court considered that the Court has to read averments in conjunction with documents relied upon in plaint as a whole. The Court has to see the substance and not only the form in which it is presented.

It is also held that the pleas taken by defendant in written statement is also not relevant at that stage. If the Court finds that the suit is manifestly vexatious, not disclosing any right to sue, it would be justified in exercise of power under Rule 11(a). About cause of action the Hon'ble Apex Court held that the Court has to find out as to whether plaint discloses real cause of action or illusory cause of action created by clever drafting. The Court has to see camouflage or suppression and if the Court comes to a conclusion that the suit is vexatious and would be an abuse of process of Court, the Court can exercise drastic power under Order VII, Rule 11 and reject the plaint.

19. In the case of **Raghwendra Sharan Singh Vs. Ra. Prasanna Singh (dead) by LRs. reported in (2020) 16b SCC 601**, the plaintiff had not prayed for setting aside gift deed. It was held that said prayer is made cleverly, as in that case the suit would have been clearly barred by limitation in view of Article 59 of the Limitation act. The Court in that case held that rejection of plaint was proper and rejected the suit.

20. In the case of **Kesharbai alias Pushpabai Eknathrao Nalawade (dead) By LRs. Vs. Tarabai Prabhakarrao Nalawade &**

Ors., reported in (2014) 5 SCC 707, the Hon'ble Apex Court held that once partition takes place in the family, presumption would be that all properties stood partitioned. In such cases, burden would be on the party to prove exclusion of certain property, who asserts the same to be joint. In that case the learned Trial Court found that earlier there was partition in the family by family arrangement and rejected the suit. Said order was held to be correct.

21. In the case of **N.V. Srinivasa Murthy and Ors. Vs. Mariyamma (dead) by proposed LRs. & ors., reported in (2005) 5 SCC 548**, the Hon'ble Apex Court held that by omitting to claim relief necessary in the facts and claiming other relief, just to avoid bar of limitation is not permissible.

22. Learned Advocate Mr. Rane for respondent No. 2 also relies upon judgment in the case of **Sree Surya (supra)** by inviting attention the fact that compromise decree was passed in a suit, when one of the parties was minor. The compromise was entered into by his father. On attaining majority, said person filed a suit through general power of attorney for declaration of right, title and interest over the suit properties. He prayed for revocation of gift deed as null and void.

Therein the defendant-appellant filed application for rejection of plaint on the ground that suit for setting aside consent decree would be barred under Order 23 Rule 3A of the CPC. This application came to be allowed by the Trial Court holding that no independent suit would be maintainable against compromise decree. It is this order, that was confirmed by the Hon'ble Apex Court holding that the Trial Court rightly rejected the plaint.

. In the present case also, there was already a suit that was compromised. Though the said compromise decree is not challenged but a declaration is sought that the said compromise decree is not binding. In the present case, it is considered mainly for the reason that the parties were aware of the said compromise decree, wherein the present suit property was involved.

23. Learned Advocate Mr. Rane for respondent No.2 further relied upon judgment in the case of **Rajendra Bajoria and Others Vs. Hemant Kumar Jalan & Ors. reported in 2021 SCC OnLine SC 764.** In the said case the Hon'ble Apex Court held that reading of the averments made in the plaint should not only be formal but also meaningful. Clever drafting creating illusion of cause of action needs to be seen. Para No.17 of the said judgment reads as under :-

"17. It could thus be seen that the court has to find out as to whether in the background of the facts, the relief, as claimed in the plaint, can be granted to the plaintiff. It has been held that if the court finds that none of the reliefs sought in the plaint can be granted to the plaintiff under the law, the question then arises is as to whether such a suit is to be allowed to continue and go for trial. This Court answered the said question by holding that such a suit should be thrown out at the threshold. This Court, therefore, upheld the order passed by the trial court of rejecting the suit and that of the appellate court, thereby affirming the decision of the trial court. This Court set aside the order passed by the High Court, wherein the High Court had set aside the concurrent orders of the trial court and the appellate court and had restored and remanded the suit for trial to the trial court."

24. On this legal position, this Court has to deal with the submissions of the parties to the present case. About the facts, which are discussed in the initial paragraphs, there is no dispute that earlier two suits were filed by respondent No.2, wherein compromise took place. The plaintiffs have knowledge as they were also parties to the said suits and also to compromise. Present suit property was also subject matter of the suits. It has also come on record that in 1987 itself there was partition and parties were put in possession of the respective shares. On this accepted position, this Court has to carefully see as to whether any cause of action is shown to have arisen in filing the present suit in 2018. So far as averment in respect of date of cause of action, it is only stated that the plaintiff recently got the knowledge that the defendant No.1 has given some plots with open space to defendant No.2. In-fact, there it is

mentioned in the plaint about earlier facts, still while stating cause of action, it is conveniently avoided to mention the said. Even date of exact knowledge and how plaintiff got knowledge is not mentioned. Conveniently even no prayer is made in respect of compromise decree. This is clearly an instance of clever drafting.

25. From reading of the judgment it is clear that annexures and the documents annexed to the plaint are also need to be seen as a part of plaint. The contention of the plaintiff that the Court has to look inly to the averments in the plaint and should not look into annexures without any substance. The learned Court in the present case rightly looked into the annexures. The reliance of the appellant on the judgment in the case of **Chhotanben (supra)** is of no any help to him. The judgment in the case of **Urvashiben (supra)** is also of no help.

26. Looking to the plaint in the present case the limitation is not a mixed question of fact and law. There are two admitted facts, first that in 1987, the partition took place and secondly that in 2002, there were two suits filed and those were compromised. Plaintiff No.1 and father of plaintiff No.2 were parties to those compromise decrees. Merely no relief is sought in respect of compromise decrees, will not free the plaintiffs

from the clutches of the Limitation Act. Limitation is, therefore, in the present case, purely a question of law, as the facts are admitted. It can be easily made out that in 1987, there was cause of action and also there was cause of action in 2002. Thus, no trial is required to decide the limitation in the present case. Thus, reliance on **Merit Magnum (supra)** is misplaced. Further argument that the exclusion of certain property from partition would require trial is also without any substance as in the present case the suit itself is beyond limitation. This Court, thus, is not in a position to accept the arguments of learned Advocate for the appellant.

27. So far as arguments by defendant No.1 are concerned, it is argued that it is duty of the Court to see that the suit is within limitation, the documents referred in the plaint and annexed to the plaint forms basis of the plaint. This submission is based on judgment in the case of **Dahiben (supra)**. This Court does not find any difficulty in accepting this submission. There are documents on record showing that father of plaintiff No.1 and defendant No.1 was a tenant, his name was entered in record in 1976. The material entries are on record showing that the partition of land has taken place on 34.11.1987. Same was even certified on 09.12.1987. Copy of Mutation Entry was obtained by the

plaintiff on 26.02.2008. From the record, it is clear that the plaintiff had knowledge of the partition, when there is mention about the suit properties.

28. Keeping in mind above submissions and judgments cited by the parties, we need to examine the order passed by the learned Trial Court. This Court finds that the Trial Court has rightly considered all the aspects. It considered that the compromise decrees are passed on 16.02.2008. The plaintiffs did not take any objection to the compromise decrees. On the contrary they are the parties to it. So far as Mutation Entry No. 20962 in respect of 1 Hectare of land taken in 1987 is concerned, it also shows that the plaintiffs had knowledge of the partition. Even the present suit land was a part of Special Civil Suit No. 271 of 2002. The learned Trial Court has thus considered that defendant No.1 was exclusive owner of the suit property in Special Civil Suit No. 271 of 2002. So called gift deed dated 14.04.2016 also shows that there is already a partition between the members of the joint family of plaintiff and defendant No.1 and as such now there is no joint family in existence. The learned Trial Court further rightly considered that the plaintiff failed to show that the property described in plaint para No. 2B is joint family property. The learned Trial Court also considered that the cause of action

is illusory and vague. This Court finds that the judgments are rightly appreciated by the Trial Court. This Court does not find any illegality or perversity in the order passed by the learned Trial Judge. No interference is called for in the impugned order. This Court has no hesitation to record that no case is made out to call for interference in the impugned order at the hands of this Court. The appeal, therefore, deserves to be dismissed. Hence, the following order :-

ORDER

- (i) First Appeal No. 784 of 2020 is dismissed with no order as to costs.
- (ii) In view of disposal of the First Appeal, pending Civil Applications also stand disposed off.

[KISHORE C. SANT, J.]

. At this stage, learned Advocate for the appellant requests for continuation of status-quo order passed by this Court earlier. Said request is opposed by learned Advocates for both the respondents, stating that the appellant is claiming land to the extent of 939.90 sq. mtr. only.

. Considering above, there shall be status-quo only to the extent of the land claimed by the appellant in the plaint for a period of 8 (eight) weeks from today.

[KISHORE C. SANT, J.]