



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

CIVIL REVISION APPLICATION NO. 34 OF 2024

1. Samina Bano w/o Late Idris Khan
2. Zeba Khan w/o Mosin Khan ... APPLICANTS

VERSUS

1. Asma Khan W/O Mazhar Khan
2. Anil Kumar Nandkishor Goyan ... RESPONDENTS

....
Advocate for Applicants : Mr. Swapnil S. Patil
....

CORAM : SANDIPKUMAR C. MORE, J.
DATED : 15/02/2024.

ORDER :

1. Heard the learned counsel for the applicants at admission stage and also perused documents on record.
2. The applicants, who are the original defendant Nos.1 & 2, have challenged the order dated 09/10/2023 below Exhibit-15, passed by the learned 6th Jt. Civil Judge Senior Division, Aurangabad (hereinafter referred to as 'the learned trial court') in Special Civil Suit No. 432 of 2023, whereby the application of the

applicants for rejection of plaint under Order VII Rule 11 of CPC, has been rejected.

3. The learned counsel for the applicants vehemently argued that the plaintiff i.e. present defendant No.1, is daughter of applicant No.1 and she had filed RCS No. 63 of 2018 for partition and declaring the relinquishment deeds executed by her as illegal and void and not binding upon her. It is further pointed out by the learned counsel for the applicants that the defendant No.1 / plaintiff had unconditionally withdrawn the said civil suit i.e. RCS No.63 of 2018 on 11/01/2022 and the then learned trial court also disposed of the said suit in view of the Order XXIII R.1 of CPC as withdrawn unconditionally. The learned counsel for the applicant further submits that respondent No.1 despite unconditional withdrawal of her earlier suit, instituted subsequent suit being Special Civil Suit No.432 of 2023 for the same relief against the same respondents. According to him, under order XXIII R.1(4), the subsequent suit of the plaintiff i.e. present respondent No.1, is not maintainable and it is hit by the principle of *res judicata*. He also pointed out that the present respondent had taken objection by paper publication in the year 2011 and therefore, she was having knowledge of the dispute and now after a gap of 12 years she

cannot claim any declaration in respect of those deeds and hence her suit is barred by limitation. According to him, there is no cause of action of respondent No.1 / plaintiff to file subsequent suit.

4. On going through the impugned order, it appears that the present applicants have claimed rejection of the plaint on the ground that the suit is barred by law of *res judicata* and limitation and that it is also not maintainable under Order XXIII R.1(4) of CPC. On going through both the plaints namely plain in earlier RCS No.63 of 2018 and Special Civil Suit No. 432 of 2023, it is evident that respondent No.1 has given cause of action in both the suits. According to her, the cause of action for earlier suit had arisen on 17/12/2017 when the plaintiff got knowledge of the documents challenged in the said suit. In the subsequent suit, she has given the cause of action being arose when she got knowledge of the registered gift deed dated 23/01/2023 on 19/05/2023.

5. So far as contention of the applicants that suit being barred by law of limitation is concerned, the applicants have claimed that respondent No.1 / plaintiff had published a paper publication in Lokmat news paper on 20/02/2011 and raised objection as

regards the property of Harsool and therefore, the limitation started from that date. However, in this case issue of limitation appears to be mixed question of facts and law since the plaintiff i.e. present respondent No.1 has claimed that the relinquishment deeds allegedly executed by her, were obtained by fraud and misrepresentation. Be that as it may, but in the subsequent suit there is no such prayer for declaring the said relinquishment deeds as illegal and not binding upon her. The second suit appears to be for partition of the suit properties. Moreover, the aspect that the subsequent suit is barred by principle of *res judicata* is also absent since the earlier suit though between the same parties and in respect of same suit property but not decided on merit. It was unconditionally withdrawn. As such, there is no question of the subsequent suit being barred by principle of *res judicata*.

6. The learned counsel for the applicants vehemently argued that the Special Civil Suit No.432 of 2023 is not at all maintainable in view of Order XXIII R.1(4) of CPC. He pointed out that the earlier suit has already been withdrawn by respondent No.1 / plaintiff unconditionally and therefore, the second suit between the parties in respect of same properties is not maintainable. He also relied upon various judgments mentioned below :

- I) *Sarguja Transport Service vs. State Transport Appellate Tribunal M.P., Gwalior and others, reported in (1987) 1 SCC 5;***
- II) *Upadhyay and Co. vs. State of U.P. and others, reported in (1999) 1 SCC 81;***
- III) *University of Agricultural Sciences vs. Saroj Gupta (Smt.), reported in 2017 DGLS(SC) 1801;***
- IV) *C. S. Ramaswamy vs. V. K. Senthil and others with other connected matters, reported in 2022 SCC OnLine SC 1330;***
- V) *Dahiben vs. Arvindbhai Kalyanji Bhanusali (Gajra) dead Through legal representatives and others, reported in (2020) 7 SCC 366***

7. Admittedly, as per Order XXIII R.1(4) of CPC the subsequent suit in respect of same subject matter is not maintainable after withdrawal of the earlier suit in respect of the said subject matter. I would like to reproduce Order XXIII R.1 to 5 herein below for quick reference.

*“R.1. Withdrawal of suit or abandonment of part of claim.—
(1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim:
Provided that where the plaintiff is a minor or other person to whom the provisions contained in rules 1*

to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.

- (2) An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person.
- (3) Where the Court is satisfied,—
 - (a) that a suit must fail by reason of some formal defect, or
 - (b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of suit or part of a claim,it may, on such terms as it thinks fit grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.
- (4) Where the plaintiff—
 - (a) abandons any suit or part of claim under sub-rule (1), or
 - (b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3),he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.
- (5) Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiff.]”

8. Admittedly, from the language of aforesaid Order and Rules it appear that the plaintiff is precluded for instituting any fresh suit in respect of such subject matter or such part of the claim which he had already withdrawn or abandoned. In the instant case, the subject matter of the suit though appears similar to the earlier suit, but in the subsequent suit there is no prayer of declaration of relinquishment deeds being illegal. Moreover, there is addition of two properties in the subsequent suit wherein the partition is claimed by present respondent No.1 / plaintiff. Though if it is presumed that the reliefs and the subject matter in the earlier suit as well as subsequent suit are similar and the earlier suit was withdrawn unconditionally, but the Order XXIII of CPC and the Rules therein cannot be made applicable for the suit for partition. It is observed in the case of **Thota China Subba Rao and others vs. Mattapalli Raju and others, reported in A.I.R.(37) 1950 Federal Court 1**, that a suit for partition stands on a different footing, the cause of action in such a suit being a recurring cause of action and therefore, withdrawal of suit for partition of a joint property though without permission of the court is no bar to a second suit for the partition of same property against same defendants. Therefore, considering the present suit being filed for partition of the properties mentioned therein, cannot be hit by

Order XXIII Rule 1(4) of the CPC. Considering this aspect, I do not find any force in the submission of the learned counsel for the applicants that the present suit is not maintainable in view of the Order XXIII R.1(4) of the CPC. Therefore, considering all these aspects, the order passed by the learned trial court under Order VII R.11 of CPC appears to be passed properly. In view of the same, the present civil revision applications stands dismissed.

(SANDIPKUMAR C. MORE, J.)

VS Maind/-