

Ajay

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

CIVIL REVISION APPLICATION NO.247 OF 2024

Damodar Badrinarayan Bhandari

.. Applicant

Versus

~~Vishnu Dagdu Darekar~~

(since deceased) through LR's.

Balkrushna Vishnu Darekar & Ors.

.. Respondents

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- Mr. Drupad Patil a/w. Mr. Namitkumar S. Pansare, Advocates for Applicant.
 - Mr. Ketan Joshi, Advocate for Respondent No.1(a).
 - Mr. Shailesh D. Chavan, Advocate for Respondent Nos.4(b), 4(d) and 4(e).
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CORAM : MILIND N. JADHAV, J.

DATE : JULY 09, 2024.

JUDGMENT:

1. This Civil Revision Application (“**CRA**”) is filed by Defendant No.6, *inter alia*, challenging rejection of his Application filed under Order VII Rule 11 of the Code of Civil Procedure (for short “**CPC**”) by the impugned order dated 30.11.2023 passed by the Trial Court in Special Civil Suit No.1004 of 2022. The said order is appended at page No.174 of the CRA.

2. Suit plaint is filed by Plaintiffs seeking principal relief of partition and injunction in respect of 6 HUF immovable properties described in paragraph No.1 of the Suit plaint. In addition, Plaintiffs seek declaration that registered Sale Deed dated 20.10.2020 executed between Defendant No.1 (one of the coparcener) namely Rama Maruti Darekar and Defendant No.6 - Damodar Badrinarayan Bhandari, whereby out of the 6 Suit properties, 4 properties are transferred in entirety by Defendant No.1 to the exclusion of the other coparceners shall not be binding on the Plaintiffs.

3. Revision Applicant is Defendant No.6 before the Trial Court. Respondent Nos.1 to 3 are Plaintiff Nos.1 to 3. Respondent No.4 is Defendant No.1. Plaintiffs and Defendant Nos.1 to 5 belong to the same family. Defendant No.6 is a third party purchaser of 4 out of the 6 Suit properties.

4. Thus, there are three set of parties before the Court. Plaintiffs and Defendant Nos.1 to 5 belong to 4 branches of the Darekar family whereas Defendant No.6 is a third party purchaser who has purchased 4 out of the 6 HUF Suit properties from Defendant No.1 in the year 2020. Suit is filed on 08.12.2021.

5. Cause of action stated in the Suit plaint by Plaintiff is that the 6 properties stated in paragraph No.1 of the Suit plaint are HUF joint family properties and ancestral properties which are yet to be

partitioned and apportioned between Plaintiffs and Defendant Nos.1 to 5 as per their respective shares in the said properties. It needs to be emphasized that, admittedly partition of the suit properties has not been done till date. This position is not even disputed by Defendant No. 6.

6. Necessity for filing the Suit in December 2021 has arisen for Plaintiffs, when Plaintiffs learnt about alienation of 4 out of the 6 suit properties by Defendant No.1 to Defendant No.6. It is contended by Plaintiffs in the plaint that Suit properties are Hindu Undivided Family (for short “**HUF**”) properties belonging to the original ancestor of Plaintiffs’ and Defendant Nos.1 to 5’s namely deceased "Ranu Mukinda Darekar" who expired in 1956. It is averred in the plaint that by Mutation (फेरफार) Entry No.834, mutation was made in the name of Maruti Dagadu Darekar as Manager of the Suit properties. Here it needs to be added that Defendant No.6 has admitted that name of Maruti was recorded as HUF Manager of the family comprising of himself and his three brothers, viz. Vishnu, Janardhan and Dattu. It is further averred in the Suit plaint that admittedly Suit properties belonged to father of Plaintiff No.1 namely Vishnu Dagadu Darekar, father of Plaintiff Nos.2 and 3 namely Janardan Dagadu Darekar, father of Plaintiff No.4 and husband of Plaintiff No.5 namely Dattu Dagadu Darekar and father of Defendant Nos.1 to 5 namely Maruti

Dagadu Darekar, in the ratio and proportion of Hissa 1 Anna 10 (part) each. It is Plaintiffs' specific case that all along since then, Suit properties stood in the name of Maruti Dagadu Darekar as Manager of the HUF. That on 28.12.1964, Maruti Dagdu Darekar expired and thereafter Suit properties were mutated in the name of his minor son namely Rama and his daughter alongwith the name of father of Plaintiff No.1 namely Vishnu Dagadu Darekar, father of Plaintiff Nos.2 and 3 namely Janardhan Dagadu Darekar and father of Plaintiff No.4 and husband of Plaintiff No.5 namely Dattu Dagadu Darekar as joint family property. It is specifically averred in the Suit Plaint that Mutation (फेरफार) Entry No.1291 was in respect of this specific status and position in respect of the Suit properties.

7. It is next averred that name of the minor son of Maruti Dagadu Darekar namely Rama Maruti Darekar continued thereafter alongwith his mother Bhagirathi Dagadu Darekar shown as his natural guardian. This position remained unaltered until under the consolidated scheme, certain development took place pursuant to which in the 7/12 extract only the name of Rama Maruti Darekar and his mother Bhagirathi continued to be shown. It is therefore averred that by virtue of Mutation (फेरफार) Entry No.76 which is infact not available in the Revenue Record itself, name of Rama Maruti Darekar continued to be shown as holder of the Suit properties. It is finally

averred that Suit properties are joint family ancestral HUF properties whose partition has not taken place.

8. Mr. Joshi, learned Advocate for Plaintiffs, in the above background would submit that Plaintiffs filed Revenue proceedings namely RTS Appeal before the Sub-Divisional Officer (for short “**SDO**”) bearing RTS No.169 of 2021 to challenge deletion of names of some of the legal heirs of the original holder of the Suit properties. At that time, Plaintiffs approached Defendant No.1 and learnt from Defendant No.1 about the entire Suit properties standing in his name as holder. Plaintiffs therefore informed Defendant No.1 that they would be compelled to approach the Court of law for partition, but immediately before that could happen, Defendant No.1 entered into a registered Sale Deed dated 20.10.2020 with Defendant No.6 to alienate and transfer 4 out of the 6 Suit properties to Defendant No.6. It is by virtue of this action on the part of Defendant No.1, Plaintiffs were compelled to file the Suit in 2021 seeking declaratory relief that the registered Sale Deed executed between Defendant No.1 and Defendant No.6 would not bind their undivided share in the Suit properties.

9. *PER CONTRA*, Mr. Patil, learned Advocate appearing for Defendant No.6 would vehemently contend that the Suit plaint does not disclose cause of action and from the statements made in the Suit plaint, it needs to be barred by the law of limitation. According to

Defendant No.6 who is a third party purchaser of 4 out of the 6 properties, the plaint has been cleverly drafted in order to overcome limitation. That is the fulcrum of Mr. Patil's submissions.

9.1. He would submit that Plaintiffs' are indirectly attempting to challenge Mutation Entry Nos.1291 and 76 which transferred the Suit properties in the name of Defendant No.1. This submission of Defendant No.6 needs to be therefore dealt with at the outset itself as it is contended that Defendant No. 1 is the exclusive owner of 4 out of the 6 Suit properties. When asked how does Defendant No. 1 became the owner, Mr. Patil would point out to the Mutation entries. As delineated herein above, Suit is predominantly filed for seeking partition of 6 Suit properties. The fact that partition of Suit properties has not taken place is infact supported by Defendant Nos.1 to 5 themselves on the basis of their written statement and counter-claim seeking partition of the Suit properties. Once this is done, Defendant No. 6 cannot object to partition.

10. Though, I am aware of the fact that in an Application under Order VII Rule 11 of the CPC, Plaintiffs' case and averments in the Suit plaint depicting the cause of action *qua* the reliefs prayed for are to be seen, in the present case once the Plaintiffs specifically plead that the Suit properties are ancestral joint HUF properties which are yet to be partitioned and on an imminent threat to the Suit properties being

made due to alienation of some of the Suit properties to Defendant No.6 by one of the coparcener, cause of action arises to file the Suit, the Suit is clearly maintainable in law.

11. It is specifically seen that for maintainability of a partition Suit, requirement of joint ownership and possession is the *sine qua non*. Cause of action to file the present Suit arises on the intention of severance or any any cause for severance or any act of exclusion of the Plaintiffs' right in the joint HUF properties being indulged in by Defendant No.1. Once it is an admitted fact that the 6 Suit properties are yet to be partitioned, any alienation of any of the Suit properties by any of the joint holder or a holder in Trust for the legal heirs entitled to their respective shares gives rise to the cause of action. Once these facts are pleaded and more specifically so, that it came to Plaintiffs knowledge immediately before filing of the partition Suit, the Suit is clearly maintainable.

12. Defendant No.6 has made a big hue and cry about the fact that father of Plaintiffs was having knowledge about the revenue entries in the name of Defendant No.1 but did not take any action and this should preclude Plaintiffs from filing the present suit for partition. It needs to be reiterated that revenue entries do not create or extinguish the right of the real owners of the property. Once it is a confirmed fact that the 6 Suit properties are ancestral joint HUF

properties in respect of which partition has not taken place and if any of the parties seek partition, it gives rise to a cause of action to seek partition. There is one more pleading in paragraph No. 4 of internal page 7 of the plaint which is material in this regard. It is averred that in 2018, Plaintiff No. 1 had excavated and removed soil from Gat No. 180, i.e. one of the suit properties as he was cultivating the same and Defendant No. 1 lodged a police complaint against Plaintiff No. 1, resultantly the Plaintiff was arrested and was behind bars for 3 days. This clearly shows that the suit properties are jointly held and cultivated by the parties to the suit except Defendant No. 6.

13. Learned Trial Court has in paragraph Nos.9 and 10 dealt with the above aspect and I do not find any reason to interfere with the same. For the sake of convenience, the said paragraphs under reference are reproduced below and read thus:-

“9. If the said averments in the plaint are taken into consideration then it clearly transpires that the plaintiffs have specifically pleaded that the suit lands are their ancestral joint family properties and the same are still in their joint ownership and possession. They have also specifically pleaded that in the year of 2018 they came to know about the fact that defendant No. 1 illegally get recorded only his name in the 7/12 extract and in the year of 2020 sold out the suit lands to defendant No. 6. At this juncture, it is pertinent to note here that the plaintiffs are seeking the relief of partition and also challenging the alienation made in favour of defendant No. 6. For the suit of partition, the requirement is of joint ownership and possession which is specifically pleaded by the plaintiffs. The fact of denial of share, avoidance or refusal to the partition, intention of severance or any cause for severance and exclusion from joint family property always gave rise to the cause of action to seek

the relief of partition. In the present suit, the plaintiffs have specifically pleaded that the defendant No. 1 get recorded his name in the 7/2 extract which fact is revealed to them in the year of 2018 and in the year of 2020 he sold out the suit lands to defendant No. 6. Therefore, alienation suit lands is the factor which shows refusal of share of plaintiffs and also intention to exclude them. The plaintiffs have pleaded the said facts specifically. Therefore, definitely the same are sufficient to show that the plaint discloses cause of action.

10. The learned counsel for defendant No. 6 tried to submit that the entry in the name of defendant No. 1 in the 7/12 extract is effected in the year of 1965 and the plaintiffs are having sufficient knowledge of it. Therefore, their pleading that they came to know about said fact in the year of 2018 are absolutely false and pleaded only to create false cause of action to the suit. To substantiate the said fact, he has invited my attention to the 7/12 extract filed by plaintiffs which shows that the same are obtained in the year of 2016. With this regard, it is pertinent to note here that though from the said documents it appears that the plaintiffs are having knowledge of said revenue entry in the name of defendant No. 1 in the year of 2016 but in my considered opinion the said fact is not sufficient to disprove the cause of action disclosed in the suit or to prove it as false. It can not be ignored that the mere revenue entries does not create or extinguish the right from the property. Therefore, if for sake of a moment, it is presume that the name of defendant No. 1 is recorded in the 7/12 extract in the year of 1965 and the plaintiffs are having knowledge of said fact since from inception but in my considered opinion, it is not sufficient to extinguish the rights of plaintiffs when they are claiming their joint ownership and possession over the said suit lands being coparcener in the said ancestral property. In nut shell, the mere revenue entry in the name of defendant No. 1 as not sufficient to extinguish the right of plaintiffs, the same is not sufficient to give rise to the cause of action to seek the relief of partition. In fact, the act of defendant No. 1 of alienating the suit land to defendant No. 6 when the plaintiffs are claiming the same as joint family property, is the cause of action to seek the relief of partition and the plaintiffs have specifically pleaded the same. Therefore, the submissions raised on behalf of defendant No. 6 are no force and are not sufficient to show that the plaint is having any illusory cause of action created by clever drafting.”

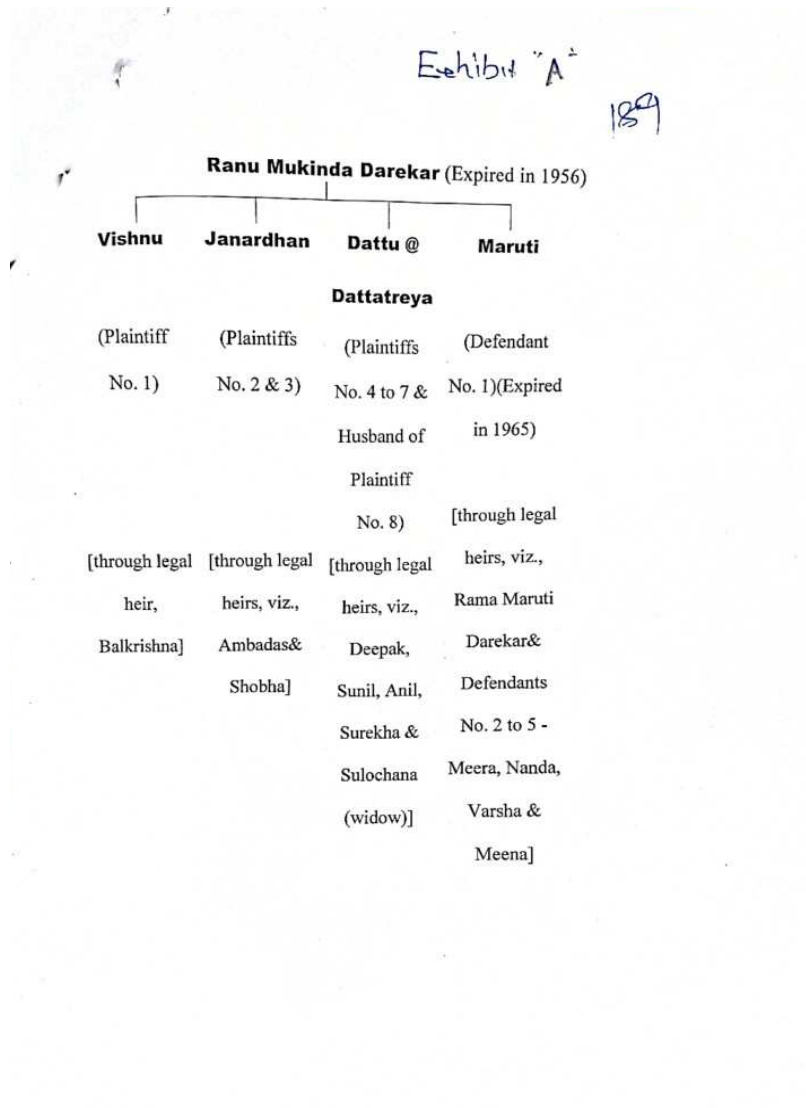
14. In the above background, once it is an admitted fact that 6 Suit properties are ancestral joint HUF properties and Defendant No.1 namely Rama Maruti Darekar i.e. son of Maruti Dagadu Darekar

himself having filed his counter-claim dated 10.06.2022 seeking relief of partition and other reliefs, this fact itself gives credence to the case of Plaintiffs to maintain the Suit for partition and seek partition of the Suit properties as a triable issue between the parties. Defendant No.6 ought to have done due diligence of the fact that 4 out of the 6 Suit properties belonged to the exclusive ownership of Defendant No.1 before executing and registering the Sale Deed dated 20.10.2020. Defendant No.6 therefore cannot seek ouster of the Suit plaint for partition by filing Application under Order VII Rule 11 of CPC. Mere perusal of the Application filed by Defendant No.6 below Exhibit "79" which is appended at Exhibit page No.160 of the CRA is on the basis that Plaintiffs have not challenged the mutation entries. It needs to be understood that mutation entries are not required to be challenged in Civil Suits. There is a procedure prescribed for their challenger under the Maharashtra Land Revenue Code, 1966 separately. Mutation entries are made for fiscal purposes. They do not constitute title to the properties *per se*.

15. Perusal of paragraph Nos.8 to 12 as pleaded by Defendant No.6 in the Applicant is merely on the basis of the existing mutation entries. It is Defendant No.6's case that the mutation entries ought to have been challenged by the predecessors-in-title of Plaintiffs. The question of challenge to the said entries would only arise in the event of a cause of action. Entire Application of Defendant No.6 is completely

silent on the issue of the admitted position that Suit properties are/were joint HUF properties in respect of which partition had not taken place. All that the Application states is that by virtue of filing of the Suit plaint, an indirect challenge is maintained to the mutation entries and the Suit plaint gives an illusory cause of action. However, once it is an admitted position that the Suit properties are not partitioned, which is also not denied by Defendant No.6, Suit filed by Plaintiffs on the intention of severance and alienation of some of the Suit properties by Defendant No.1 (one of the coparceners) to Defendant No.6 raises substantial triable issues, which are required to be decided in the partition Suit.

16. Once it is *prima facie* proved that Suit properties are joint HUF properties, no right would accrue to Defendant No.1 i.e. Rama Maruti Darekar to alienate the Suit properties to the exclusion of the other joint owners of the Suit properties. In this regard, it would be worthwhile to reproduce the family tree of the parties to the Suit proceedings to see who would be entitled to the Suit properties according their respective shares. The said family tree is appended as Exhibit "A" – page No.189 to the Affidavit-in-Reply dated 18.06.2024 of Plaintiffs to the CRA. For convenience and immediate reference, the said family tree is scanned and reproduced below:-



17. Mr. Patil has also referred to and relied upon the same family tree in his submissions, including the written submissions filed by him. Infact according to him, Suit properties originially belonged to Mukinda Darekar. From Mukinda Darekar, they devolved upon Dagadu Darekar and Ranu Mukinda Darekar. Ranu Mukinda Darekar expired in 1956. Dagadu Darekar was survived by 4 sons namely Vishnu Darekar, Janardhan Darekar, Dattu Darekar and Maruti Darekar. Maruti Darekar expired in 1964; Dattu Darekar expired in

1991; Janardhan Darekar expired in 1996 and Vishnu Darekar expired in 2012. In the Petition itself, Mr. Patil has infact relied upon Mutation entries at page No.26 of the CRA which clearly record names of Maruti Darekar as Manager of HUF comprising of himself and his three brothers (Vishnu, Janardhan and Dattu). Once this is the admitted position even by Defendant No.6 in his own submissions, there can be no reason for Defendant No.6 to contend that the title to Suit properties devolved upon Defendant No.1 only.

18. In the Application filed by Defendant No.6, a lame defence is attempted to be resurrected by stating that during the interregnum, consolidation scheme was implemented pursuant to which some of the Suit properties stood transferred to the name of Defendant No.1 only. If such defence is pleaded, then in the same breath, how can the other legal heirs namely the three brothers of Maruti i.e. Vishnu, Janardhan and Dattu be left out? Defendant No.6 has pleaded in his Application that there is supression of material facts by Plaintiffs regarding old survey numbers of Suit property nomenclatured as 1B; suppression of source of title regarding Suit properties nomenclatured as 1B and 1D and supression of consolidation scheme extracts. If such a defence is taken, it is an admitted position that it raises triable issues.

19. From the above and information provided by Defendant No.6 himself before me in his written submission, it is seen that Maruti

Darekar expired in 1964; Dattu Darekar expired in 1991; Janardhan Darekar expired in 1996 and Vishnu Darekar expired in 2012. It is therefore unfathomable to believe that they can be left out from implementation of the alleged consolidation scheme and substantial properties i.e. 4 out of the 6 would devolve upon only one legal heir of Maruti namely Rama Maruti Darekar.

20. I do not agree with the submission made by Mr. Patil that the Suit is *ex-facie* barred by limitation. He has vehemently raised this ground and persuaded me to consider a decision of the Division Bench of this Court in the case of *Mudhit Madanlal Gupta, through his PoA Caetano Fernandes Vs. Mazher Khan Farooqui and Anr.*¹ to contend that the Suit plaint in the present case is a result of clever and skillful drafting and a dead cause of action is camouflaged to be subsisting. I have perused the said decision. The facts in that case revolved around suppression of a Memorandum of Understanding executed between the parties. The facts in that case are completely dissimilar to the facts in the present case. There is no agreement between the parties entitled to the Suit properties from their ancestor which has been suppressed by any party. Infact Defendant No.1 himself is seeking partition through his counter-claim which is adequate is proof of the fact that the present *lis* between the parties raises substantial triable issues. Defendant No.6 cannot state that his entire case is based upon the fact that Defendant

¹ 2022 SCC OnLine Bom 7183

No.1 is shown as the holder of the Suit properties by virtue of a Mutation entry.

21. In the written submissions which are filed by Mr. Patil on 09.07.2024 after arguing the present case before me, in the dates and events chart, it is stated that vide Mutation entry No.834, name of Maruti Darekar was recorded as HUF Manager of family comprising of himself and his three brothers namely Vishnu, Janardhan and Dattu (Dattatraya). Thereafter, it is stated that as per the consolidation scheme, Gat Nos.180, 181, 227 and 179 are allotted to Defendant No.1 i.e. Rama Maruti Darekar and Gat Nos.550 and 555 are allotted to the remaining legal heirs of the original ancestor Ranu Mukinda Darekar. Merely by stating such a submission, Defendant No.6's case cannot be believed. There is no iota of evidence placed on record by Defendant No.6 regarding the aforementioned allotment which can be considered at this stage. Thus, Defendant No.6 without any due diligence has purchased undivided HUF properties, which is clear from the record of the case.

22. In this regard, a recent order of the learned Single Judge of the Madras high Court dated 19.07.2024 passed in the case of ***Y.V.B. Jeevan (Died) Vs. V. Bhuvaneshwari and Anr.***² in facts which are identical to the present case may be referred to. In that case, Suit was filed for partition and declaration of Sale Deeds executed in favour of

² C.R.P.(P.D.) No.2592 of 2024 decided on 19.07.2024

third parties as null and void and not binding on Plaintiffs. The Court held that the cause of action for filing the Suit therein arose when the Sale Deeds were registered in favour of the third party. Learned Trial Court in that case considered the Application of the third party under Order VII Rule 11 of the CPC seeking rejection of the Suit plaint and dismissed the same. In Revision, the Madras High Court in paragraph Nos.11 and 12, after referring to the decision of the Supreme Court in the case of ***C.S. Ramasamy Vs. Nanjammal and Others***³ held as under:-

“11. In so far as the judgment that has been referred to by M/s.Tamilselvi Santhanaraman, the Supreme Court specifically held that from the reading of the plaint it came to a conclusion that the suit is barred by time. A reading of the plaint in this case would point out that the joint family property had been alienated by one coparcener in entirety in favour of a third party. No coparcener is entitled to alienate more than his/her share. In fact the purchaser from a coparcener is also not entitled to be in joint possession of the property and his remedy is only to file a suit for partition. In this case, instead of the purchasers filing a suit for partition, a coparcener has approached the court for the said relief.

12. Furthermore, for rejection of plaint on the grounds of being barred by limitation, a reading of the plaint itself must disclose that the suit is barred. A reading of entirety of the plaint from Paragraph Nos.4 to 15 would show that it is a joint family property which had been alienated in its entirety by a coparcener. To reiterate alienation by one coparcener of the entire extent which belongs to the joint family will not bind the other coparceners.”

23. Such is the case before me. On a reading of the Suit plaint, more specifically paragraph Nos.4 and 5, it would clearly show that admittedly joint family properties have been alienated by a coparcener i.e. Defendant No.1. This alienation is in favour of Defendant No.6 to

³ 2022 SCC Online SC 1330

the exclusion of the other legal heirs. Once that is the position, there can be no rejection of the Suit plaint as contemplated by the alienation of the Suit properties i.e. Defendant No. 6 herein. Suit for partition will have to be taken to its logical conclusion.

24. From the above, it is clearly seen that any act of Defendant No.1 of alienating 4 out of the 6 Suit properties in the year 2020 clearly gives a legal right to the other coparceners to file the partition Suit proceedings.

25. The impugned order therefore cannot be faulted with and does not call for any interference as it is a well reasoned and cogent speaking order. In that view of the matter, filing of the Suit proceedings by Plaintiffs in the above facts and circumstances is clearly not barred by the provisions of Order VII Rule 11 of the CPC. The issues raised by Plaintiffs require adducing of evidence and therefore Defendant No.6's case for rejection of the Suit plaint is clearly not maintainable.

26. In view of the above observations and findings, the CRA is rejected. Impugned order dated 30.11.2023 passed by the learned Trial Court in an Application filed below Exhibit "79" in SCS No.1004 of 2022 is upheld. CRA is disposed.

[MILIND N. JADHAV, J.]

Ajay

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by RAVINDRA
MOHAN
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