



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

**SECOND APPEAL NO. 191 OF 2022
WITH
CIVIL APPLICATION NO. 5880 OF 2022**

1. Deelip S/o Kashinath Thakare
Age: 56 Years, Occu- Agri & Service,
Office Address Carecare Maruti Service Center,
P. F. Office, Plot No 85, Service Sector Area,
API Corner, Near Bank of Maharashtra,
CIDCO Bus Stand, CIDCO, Aurangabad

2. Sunil S/o Kashinath Thakare
Age: 52 Years, Occu- Agri
R/o N-2 E. D. 11/11, Bharat Mata Nagar,
CIDCO, Aurangabad

....Appellant (Original Defendants)

VERSUS

1. Ravindra S/o Ramchandra Joshi
Age: 59 Years, Occu- Agri
R/o Muthad, Tq. Bhokardan,
Dist. Jalna.

2. Rajendra S/o Ramchandra Joshi
Age: 52 Years, Occu- Agri
R/o Muthad, Tq. Bhokardan,
Dist. Jalna.

3. Harishchandra S/o Ramchandra Joshi
Age: 49 Years, Occu: Agri
R/o Muthad, Tq. Bhokardan,
Dist. Jalna.

4. Sanjay S/o Ramchandra Joshi
Age: 47 Years, Occu: Agri
R/o Muthad, Tq. Bhokardan,
Dist. Jalna.

5. Padmabai S/o Prakashrao Kulkarni
(deceased)

5A) Sudhir S/o Prakash Kulkarni
Age: 40 Years, Occu: Service
R/o Kingaon, Tq. Yawal, Dist.
Jalgaon

5B) Kishore S/o Prakash Kulkarni
Age: 35 Years, Occu: Service
R/o Kingaon, Tq. Yawal, Dist.
Jalgaon

5C) Durga D/o Prakash Kulkarni
Age: 30 Years, Occu: Service
R/o Kingaon, Tq. Yawal, Dist.
Jalgaon

6. Pushpabai S/o Purushottam Mule
Age: 51 Years, Occu: Household
R/o Pimparkheda, Tq. Kannad,
Dist. Aurangabad

....Respondents (Original Plaintiffs)

Mr. V. D. Sonawane, Advocate for Appellant
Mr. S. S. Bora, Advocate for Respondent Nos. 1 to 4, 5A to 5C

CORAM : R. M. JOSHI, J.

DATE : 13th February, 2025

JUDGMENT :-

1. This appeal takes exception to the judgment and order dated 30.09.2021 passed in Regular Civil Appeal No. 80/2017 whereby the First Appellate Court caused interference into the order passed by the Trial Court of rejection of plaint under Order VII Rule 11 of the Code of Civil Procedure.

2. Few facts require appreciation for proper understanding of the submissions made across the bar on behalf of the rival parties and

hence they are recorded in brief as under :-

The mother of plaintiffs and defendants father are real brother and sister. In the year 1998, plaintiffs along with their mother filed suit bearing Regular Civil Suit No. 30/1998 for partition and separate possession against the defendants in respect of Gut No. 81. The said suit was dismissed for want of prosecution. The proceedings filed for the restoration of the same also came to be rejected. It is thereafter in the year 2014 present suit bearing Regular Civil Suit No. 149/2014 is filed for partition and separate possession of the suit properties i.e., properties bearing Gut No. 81 and 8 situated at Village Muthad, Tq. Bhokardan.

3. Defendants filed written statement and also filed Application Exhibit 26 under Order VII Rule 11 of the Code of Civil Procedure for rejection of plaint on the ground that suit is barred by limitation. This application came to be allowed by the Trial Court by order dated 25.04.2017 and the plaint was rejected. The plaintiffs being aggrieved by the said order preferred appeal bearing Regular Civil Appeal No. 80/2017. The First Appellate Court reversed the findings recorded by the Trial Court and rejected the Application Exhibit 26. Hence this appeal.

4. Learned counsel for the appellants/defendants submits that

in view of the pleadings in the plaint, it is absolutely clear that there was an exclusion of plaintiffs mother from the joint family in the year 1998 itself and pursuant thereto, the suit for partition came to be filed. It is his contention that from the contents of the plaint, it is clearly indicated that cause of action for filing suit for partition occurred in 1998 itself and as such, present suit being filed after the period of 16 years i.e., after expiry of period of limitation and, therefore, Order VII Rule 11 of the Code of Civil Procedure would have application to the present case. During the course of arguments, he submitted that at this stage, defendants are not taking exception to the maintainability of the suit on the ground of res judicata or on the ground of non inclusion of all the properties in the previous suit. Rejection of plaint is claimed solely on the ground of bar of limitation. It is his submission that once intention is expressed by the party of severance from joint family, the cause of action accrues for filing suit for partition and since that time, suit must be filed in 12 years. To support his submissions, he placed reliance on the judgment of privy counsel in case of **Vineeta Sharma v. Rakesh Sharma (2020) 9 SCC 1** as well as the judgment of Division Bench of Karnataka High Court in case of **Sri. V. Huligeppa s/o Lingappa through LRs Vs. Sri. V. Bheema s/o Late V. Basappa through LRs in Regular First Appeal No. 100259 of 2015 (PAR/POS)**.

5. Learned counsel for respondent/original plaintiffs submitted that it is settled position of law that the application under Order VII Rule 11 can be considered only on the basis of the pleadings in the plaint and no other material placed before the Court. He drew attention of the Court to the pleadings in the plaint which according to him indicate that previous suit was filed with specific averment that the mother of the plaintiffs had asked for partition in Gut No. 81 and the father of the defendants agreed to give her share therein and accordingly same share was also given. Since, remaining agreed share was not handed over, the said suit came to be filed. It is his contention that said suit cannot be considered as a suit for partition but was for the execution of the partial partition of joint family properties between predecessor of plaintiffs and defendants. Thus according to him, under no circumstances, it could be construed to be exclusion of the plaintiffs from the joint family properties, to hold that suit is barred by limitation.

6. There is no dispute about the position of law that for the purpose of deciding objection in Order VII Rule 11 of C.P.C., only plaint and contents therein could be considered by the Court. No other material is permissible to be looked into for the said purpose. At this stage, perusal of the plaint indicates that the suit properties involved therein are Gut No. 81 and Gut No. 8. There is further pleading in the plaint that

in respect of the Gut No. 81, suit was filed by the plaintiffs and their mother against father of the defendants with averment that the father of the defendants had agreed to give share to the mother of the plaintiffs in the said property and even some portion thereof was handed over to her. It is further stated that since the remaining portion of the said property i.e., 3 Acre and 28 R land was not given into her possession, suit came to be filed for recovery of possession thereof.

7. It is thus clear from averments in plaint that previous suit was not filed to seek partition of joint family properties. It was for the purpose of implementation of partial partition between the parties. There is no embargo in the law for partial partition of joint family properties. Hence, it was open for the plaintiffs mother and defendants father to agree for the partition of one of the joint family properties. Thus, it cannot be held that the previous suit was for partition of joint family properties on desire of plaintiffs mother to sever from joint family. As the said suit was apparently for implementing partial partition, it cannot be said to be exclusion of the plaintiffs from the joint family to accrue cause of action for them to file suit for partition. The cause of action for filing present suit is specifically claimed and on the basis of which such cannot be said to be hit by bar of limitation.

8. In the peculiar facts and circumstances of the instant case, in

considered view of this Court, judgment cited supra on behalf of Appellant would they have no application to the present case. Suffice it to say that on the basis of the pleadings in the plaint, it cannot be said that suit is barred by any law in order to reject the plaint. In any case, since the suit was not filed in respect of both properties, even otherwise it is not possible to reject the plaint entirely. The rejection of plaint, in part is not permissible in law.

9. In view of above discussion, this court finds no perversity in the order impugned and as such no substantial question of law is involved here in this appeal. Hence, appeal stands dismissed. Pending civil application, if any, stands disposed of.

(R. M. JOSHI, J.)

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