



IN THE HIGH COURT OF JUDICATURE AT BOMBAY

NAGPUR BENCH, NAGPUR

CIVIL REVISION APPLICATION (CRA) NO. 69/2024

Shakuntala Wd/o Ramkuber Tripathi
(Dead) through her legal heirs

1] Ajay Ramkuber Tripathi,
Aged about 51 years, Occu: Doctor
R/o. Breach Candy Hospital,
BhulabaiDesai Road, Near
Mahalaxmi Temple, Mumbai.

2] Sau. Meena Gireesh Trivedi,
Aged about 52 years, Occu:Household,
R/o. A-602, Palms Building,
Plot No. 14, Sector 50, (Old) Nerul
(West), Navi Mumbai, Thane,
Dist. Thane, Pin - 400706.

3] Sanjay Ramkuber Tripathi,
Aged about 46 years, Occu: Private job.

4] Vijay Ramkuber Tripathi,
Aged about 44 years, Occu: Service,
Both 3 and 4 residing at in front of
Old Matrubhumi Press,
Besides Pariamma Temple.
Adarsha Colony, Akola,
District – Akola, Pin - 444001

... PETITIONERS

...VERSUS...**1] Abhishek Rameshchandra Gautam**

Aged about 38 years, Occu: Business,
R/o. Hingna Road, Kaulhed, Akola,
Tq. & Dist. Akola, Pin – 444001.

2] Hirendra Onkarprasad Gautam,

Aged about 70 years, Occu: Nil,
R/o. Hingna Road,
Kaulhed, Akola, Tq.& Dist. Akola.

3] Rajendra Onkarprasad Gautam,

Aged about 62 years, Occu: Nil,
R/o. Behind Potdar Driving School,
Vidya Nagar, Akola, Tq.& Dist. Akola.

4] Abhay Rameshchandra Gautam,

Aged bout 34 years, Occu: Business,
R/o. Sai Appartment, Hingna Road,
Kaulkhed, Akola, Tq. Dist. Akola
444 001.

5] Sangita Suhas Jain,

Aged about 51 years, Occu: Household,
R/o. Sawarkar Chowk, Jatharpeth,
Akola, Tq.& Dist. Akola. Pin-44005.

6] Mamta Nandkumar Tiwari,

Aged about 65 years, Occu :
Household R/o. Giri Peth Arvi Road,
Pimpri Meghe Wardha, Tq. & Dist.
Wardha 442001.

7] Aruna Yagyanarayan Dube,

Aged about 52 years, Occu: Household,
House No EWS 1263, Chattisgarh
Housing.Board.Colony, Industrial
State, Bhilai, Zila: Durg, Chhattisgarh.

...**RESPONDENTS**

Shri K.S.Narwade, Advocate for applicants.

Shri A.H.Mishra, Advocate for non-applicant no. 1.

CORAM : SMT. M. S. JAWALKAR, J.

DATE OF RESERVING THE JUDGMENT : 13/03/2025

DATE OF PRONOUNCING THE JUDGMENT: 22/04/2025

JUDGMENT

Heard learned Counsel for the applicants and
learned Counsel for the non-applicant(s). At the request of
parties, the matter heard finally.

2. Being aggrieved by the order dated 11.03.2024
passed by the learned 6th Joint Civil Judge, Junior Division,
Akola in R.C.S. No. 504 of 2023 below Exh. 20, the applicants
have preferred the instant revision application challenging its
legality and validity.

3. The facts of the case is that the Non-Applicant No.

2 and the mother of the non-applicant no.1 had filed a suit bearing Spl. Civil Suit No. 123/2006 seeking partition of the suit properties as mentioned in schedule 1-A to 1-J and sought possession of their separate share. Further the decree was sought to cancel or set aside of documents which are set up by either of the defendants in the form of gift deed, will deed. The learned Judge framed in all nine issues for its decision. Thereafter, the learned Judge by giving negative finding on all these issues, dismissed the suit.

4. The non-applicant no.1 had filed an appeal under Section 247 of the Maharashtra Land Revenue Code, 1966 challenging mutation entry in favour of the present applicants. However, the learned appellate authority rejected his appeal. The non-applicant no. 1 had filed further appeal before the learned Additional Collector, Akola wherein he accepted knowledge about will deed in the previous suit. Thereafter, the non-applicant no. 1 filed a Regular Civil Suit seeking declaration that, the will deed may declared as null and void

and further sought injunction in the year 2023. Further an application below Exh. 20 was filed by the present applicants, thereby seeking rejection of the plaint. The learned Judge rejected the application below Exh. 20 holding that, prima facie cause of action is there and further the suit is not adjudicated between the same parties, therefore, no question of application of principles of *res judicata*. The applicants are challenging the order below Exh. 20 passed by learned Trial Court rejecting the application for rejection of the plaint.

5. Learned Counsel for the applicants submitted that learned Trial Judge committed an error while rejecting the application below Exh. 20.

6. The documents filed with the plaint by the non-applicant no. 1 i.e. plaintiff in an appeal filed before learned Additional Collector, Akola, in that he has categorically mentioned that, he got knowledge about the alleged will deed in the suit since the proceeding was pending before the court which hold that, he has knowledge about the will deed and

therefore, the suit is barred by limitation.

7. It is further contended that, non-applicant No. 1 made two different statements in two different proceedings as per his convenience. In plaint, he made a statement that, the suit was tried against him ex-parte and therefore, he had no knowledge about the will deed, while his presence is recorded by the Court throughout the proceeding in the judgment.

8. The non-applicant no. 1 and the applicants were co-defendants and had no rival interest, by virtue of the findings of the learned Trial Court on issue is negative, the non applicant no.1 cannot re-agitate the same rights by filing the fresh suit, therefore, the plaint is liable to be rejected in the absence of cause of action. The non-applicant no.1 filed a subsequent suit by making misleading statements in different proceedings, therefore, applicant is seeking stay in further proceeding of the suit.

9. The learned counsel for the applicants relied on the following citations:-

i) Iftikhar Ahmed and ors. V/s. Syed Meharban Ali and ors. [(1974) 2 SCC 151]

ii) Capistrano Gomes and ors. V/s. State of Goa and ors. [AIR Online 2023 BOM 846]

iii) Makhija Construction & Engg. (P) Ltd. V/s. Indore Development Authority and ors. [(2005) 6 SCC 304]

10. Learned Counsel for the non-applicant(s) submitted that the applicants in the instant application before this Court stated that answering non-applicant had knowledge of the alleged will deed, it is totally false and obnoxious. The alleged document which the present applicant is claiming as a will deed executed by one late Onkarprasad Jagatnarayan Gautam is null and void.

11. The present non-applicant no. 1 has not contested the said suit and more particularly, the knowledge of the false and bogus document dated 13/01/1987 was not known to the answering non-applicant no. 1. The knowledge of the instant false and bogus document which present applicants claim as will deed came to the knowledge of answering non-applicant

no.1 when the said document was brought firstly before the Sub-Divisional Officer in its proceedings. The present applicants were trying to create a third party interest in the ancestral property of the answering non-applicant no. 1.

12. The learned C.J.S.D. has categorically observed that, “the legal heirs of late Onkarprasad have their rights in the property left by Onkarprasad” who happens to be the real grandfather of the answering non-applicant no. 1.

13. Learned Counsel for non-applicant no. 1 relied on following citations:-

i) Urvashiben and anr. V/s. Krishnakant Manuprasad Trivedi [2018 0 Supreme(SC) 1265]

ii) Smt. Sita Shripad Narvekar and ors. V/s. Shri Auduth Timblo [2015 0 Supreme (Bom) 1647]

iii) Wilson Pereira Carvalho and ors. V/s. Nicolau Fernandes and ors. [2018 0 Supreme(Bom) 2192]

14. Heard both the parties. Perused the impugned order and documents placed on record and considered the citations relied on by both the parties.

15. The non-applicant no. 2 Hitendra Onkarprasad Gautam and the mother of non-applicant no. 1 had filed a suit seeking partition of the suit properties as mentioned in scheduled 1-A to 1-J in the plaint and further sought possession of their separate share. The decree was also sought to cancel or set aside the documents which are set up by either of the defendants in the form of gift deed, will deed etc. The said suit was registered as R.C.S. No. 123/2006. The non-applicant no. 1 chose not to file written statement, obviously to support the plaintiffs, as his mother was the plaintiff no. 2 in the said suit. The issues were framed. The learned Judge recorded the presence of the non-applicant no. 1 at least at three places in the judgment i.e. in the cause title, in para 10 and also in para 20 of the judgment.

16. The non-applicant no. 1 had filed an appeal before Sub-Divisional Officer, Akola for change in mutation entry in favour of predecessor of the present applicants by filing an appeal under Section 247 of the Maharashtra Land Revenue

Code. The said appeal was rejected by the learned S.D.O., thereby holding that the non-applicant no. 1 had suppressed the material facts about the filing of suit no. 123/2006 and judgment therein dated 16/11/2019. The learned S.D.O. passed an order on 18/10/2023. Being aggrieved by the order passed by the learned S.D.O., the non-applicant no. 1 filed further appeal before the learned Additional Collector, Akola.

17. After the above appeal was filed, the non-applicant no. 1 also filed the suit seeking declaration that the will deed dated 13/01/1987 be declared as null and void in that view of the judgment passed in Special Civil Suit No. 123/2006. He impleaded the present applicants as defendant nos. 3A to 3D. The suit property has been described, which is a suit property of previous suit, which was described as property 1-G. The applicants herein, after receipt of suit summons appeared before the learned Trial Court and filed their written statement opposing the suit as well as filed an application under Order 7 Rule 11 of the Code of Civil Procedure seeking

rejection of the plaint vide Exh. 20. It was pointed out that the suit is not only barred by limitation, but there is no cause of action and it is also hit by principles of *res judicata*. The non-applicant no. 1 filed his reply to Exh. 20. The learned Trial Court rejected the application below Exh. 20 observing that, *prima facie*, it appears that there is cause of action for filing of the suit. Secondly, though the non-applicant no. 1/plaintiff was party to the previous suit, the applicants and non-applicant no. 1 were no rival parties, as such, the principles of *res judicata* does not apply.

18. On perusal of impugned order, it can be seen that the learned Trial Court observed that, the knowledge about disputed will deed to the plaintiff i.e. non-applicant no. 1 herein is a mixed question of fact and law and it requires evidence. However, while observing such, the learned Trial Judge committed an error as the presence of non-applicant no. 1 herein is clearly revealed from the judgment dated 16/11/2019 in Spl.C.S. No. 123/2006. In view thereof, he was

having knowledge about the will deed. This fact of knowledge about will deed also reflects from the order passed by the learned Additional Collector, Akola. In the said appeal, the appellant (non-applicant no. 1 herein) categorically mentioned that he got knowledge about the alleged will deed in the suit bearing Special Civil Suit No. 123/2006 and since the proceedings was pending before the Court, the same could not be challenged. Thus, there is no question of any evidence to be led when this fact is admitted fact. As such, the question raised about the limitation was required to be answered in the negative.

19. From the judgment of the Court in Special Civil Suit No. 123/2006 also reveals that, it was not ex-parte and his presence is duly recorded by the Court. The suit property in Special Civil Suit No. 123/2006 wherein it is described as property 1-G is the same suit property in RCS No. 504/2023 filed by the non-applicant. The judgment in Spl.C.S. No. 123/2006 decided issue regarding jointness of the suit

properties which has been held in negative. As such, the said issue became final between the parties in the previous suit and as such, no party can claim that the property is a joint family property in any subsequent suit between them. Thus, definitely, subsequent suit is barred by principles of *res judicata*.

20. From the issues framed in Spl. C.S. No. 123/2006, the issues regarding will deed, whether it is legal and binding ? The issue is answered in negative. As such, this issue was concluded by the judgment and order in earlier suit. The learned Trial Court refused to apply the principles of *res judicata* under Section 11 of C.P.C. on the ground that the applicants and non-applicant no. 1 herein were not rival parties in the previous suit. The learned Trial Court committed error apparent on the face of record by not appreciating Explanation III to the principles of *res judicata* which reads as under:-

“The matter above referred to must in the former suit

have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.”

Thus, there is no necessity that the parties should be rival parties even if admission expressed or implied, the issue can be said to be concluded as happened in the present previous suit.

21. Though the non-applicant no. 1 was present in the previous suit, he did not controvert. After answering issue nos. 2 and 3 i.e. whether suit property is joint family property ? Whether will deed dated 13/01/1987 is legal and binding? Both the issues were answered in negative, the same cannot be agitated by filing fresh suit. Thus, there is no cause of action to file the said suit that too in the year 2023.

22. It is the contention of the applicants that though non-applicant no. 1 is co-defendant but he has conflict of interest. The learned counsel for the applicants relied on the judgment of the Hon'ble Apex Court in *Iftikhar Ahmed and ors. (supra)*, wherein, in para 13, it is held as under:-

“13. Now it is settled by a large number of decisions that for a judgment to operate as res judicata between or among co-defendants, it is necessary to establish that (1) there was a conflict of interest between co-defendants; (2) that it was necessary to decide the conflict in order to give the relief which the plaintiff claimed in the suit; and (3) that the Court actually decided the question.”

In my considered opinion, even if there is no conflict of interest, the issue is finally concluded between the parties and Explanation III attracts in the matter.

23. The learned counsel for the applicants also placed reliance on the judgment of this Court at Goa in ***Capistrano Gomes and ors.*** (supra), wherein in para 8, this Court held as under:-

“8. Though it is well settled that while deciding an application under Order VII Rule 11 CPC, the contentions of the plaint are only required to be taken into consideration, it is also well-settled proposition of law that documents which the plaintiff placed reliance on and consider as documents which are relevant for deciding the matter by submitting the list of reliance, would be considered as part and parcel of the plaint to be taken into consideration for ascertaining whether an application under Order VII Rule 11 CPC could be considered and decided with it.”

As such, the non-applicant no. 1 placed reliance on various documents which can be considered as a part and parcel of the plaint.

24. In *Makhija Construction & Engg. (P) Ltd.* (supra), the Hon'ble Apex Court held in para 16 as under:-

"16. The principle of res judicata has been held to bind co-defendants if the relief given or refused by the earlier decision involved a determination of an issue between co-defendants (or co-respondents as the case may be). This statement of the law has been approved as far back as in 1939 in Munni Bibi v. Tirloki Nath [AIR 1931 PC 114], IA at p. 165, where it has been said that to apply the rule of res judicata as between co-defendants three conditions are requisite: (AIR p. 117)

"(1) There must be a conflict of interest between the defendants concerned; (2) it must be necessary to decide this conflict in order to give the plaintiff the relief he claims; and (3) the question between the defendants must have been finally decided."

25. The learned counsel for the non-applicant no. 1 opposed the application and submitted that the knowledge of will deed was not to the non-applicant. Moreover, the will deed is not proved, therefore, it is not binding.

26. The learned counsel for the non-applicant no. 1 relied on *Urvashiben and anr.* (supra), wherein the Hon'ble Apex Court held that,

“for deciding application under Order VII Rule 11(d), averments stated in the plaint alone can be looked into. Merits and demerits of the matter and the allegations by the parties cannot be gone into. Facts about the date of knowledge and refusal of execution of sale deed are matter of adjudication, not a case for rejection of plaint.”

However, the said citation is not applicable in the present set of facts, though it is well settled principle that while deciding the application under Order VII Rule 11(d), averments stated in the plaint alone can be looked into. However, in view of the peculiar facts in this matter, there is nothing remained to prove about the knowledge of will deed in view of the judgment passed in earlier suit as well as a statement made by the non-applicant no. 1 in the appeal before S.D.O., Akola.

27. The learned counsel for the non-applicant no. 1

also relied on ***Smt. Sita Shripad Narvekar and ors.*** (supra), wherein this Court at Goa held as under:-

“The judgment discusses the rejection of a plaint under Order 7 Rule 11 of the Civil Procedure Code, focusing on the grounds of res judicata and cause of action. The court emphasizes that the application under Order 7 Rule 11 should be examined based on the averments in the plaint without considering evidence or disputed questions of fact or law. The court concludes that the rejection of the plaint on the grounds of res judicata and cause of action was not justified and quashes the impugned order, directing the suit to be restored and decided on its merits”

However, the facts involved in the said matter at the hands of this Court at Goa are distinguishable than the facts involved in the present matter. In the said matter, the suit was ordered to proceed ex-parte that is not the case in the present matter. The non-applicant no. 1 herein participated in the suit which is evident from the decision in the earlier suit.

28. The learned counsel for the applicants drawn my attention to para 89 of the judgment in the earlier suit i.e. Spl.

C.S. No. 123/2006 that, there were two will deeds on record. However, attesting witness only one will deed is examined by defendant no. 5. For will deed of Onkarprasad, no attesting witness is brought as they are no more. As regard bringing evidence of person who identifies signature of attesting witness, statement in evidence close pursis is made that those witnesses could not be found. There is no mention as to what efforts are taken to search those persons. As a matter of record, no any witness summons was issued to anyone. In fact, no any person is named as person identifying signature of attesting witness. As such, the impugned order has not appreciated the contents of the plaint as well as documents placed along with plaint. Therefore, impugned order is liable to be quashed and set aside and consequently the application filed by the defendants under Order 7 Rule 11 of C.P.C. vide Exh. 20 needs to be allowed. Accordingly, the present Civil Revision Application is **allowed**.

29. The impugned order dated 11/03/2024 passed

below Exh. 20 in Reg. Civil Suit No. 504/2023 by learned 6th Joint Civil Judge, Junior Division, Akola is hereby quashed and set aside and consequently, the application at Exh. 20 filed under Order 7 Rule 11 of C.P.C. stands allowed.

30. The Reg. Civil Suit No. 504/2023 consequently stands rejected.

(Smt. M.S. Jawalkar, J.)

B.T.Khapekar