

Order Below Exh.33

The plaintiffs have filed this application below order 7 rule 11A of the Code of Civil Procedure, 1908.

Brief facts of the application are as under :-

02. The defendants have filed counter claim in this suit which is not tenable. The defendants have contended in the counter claim which they have also contended in counter claim filed in Regular Civil Suit No. 69/2001 Jagannath vs. Subhash. In previous suit Regular Civil Suit No. 69/2001 the defendants also claimed specific performance of contract by the way of Sauda Pavati. The said suit was decided on merit on 16.08.2012. In which the Hon'ble Court had framed issue regarding limitation and recorded its findings and also dismissed defendants' counter claim. Therefore the defendants' said counter claim is not tenable as it is barred under the Law of Limitation. In previous counter claim the defendants have mentioned cause of action regarding Sauda Pavati dated 30.04.1980 and 07.11.1989. In this counter claim also defendants mentioned same cause of action. As the defendants' previous counter claim is dismissed the defendants have no cause of action to file this counter claim. Hence on this ground also the defendants' counter claim is not tenable. The defendants also contended that the suit is barred under section 36A of the Prevention of Fragmentation and Consolidation Act. But the Hon'ble Court in previous suit in issue no. 9 also recorded its negative findings. Hence, on this ground also the defendants have no right to file the counter claim. Hence on aforesaid grounds the defendants' counter claim is not tenable. Hence, prayed to reject the same.

03. The defendants have filed their say below Exh. 37. It is

contended that the plaintiffs have filed this application without taken into consideration the nature of both the suits. In previous suit Jagannath Gayakwad was the plaintiff but in this suit the plaintiff is Ravindra Gayakwad. The present plaintiff declared himself adopted son of the deceased Jagannath and filed this suit. But the previous suit was filed by deceased Jagannath and his wife. Therefore the defendants have claimed their previous claim against them and filed this counter claim against said plaintiff. Therefore findings recorded by the previous Court are not binding on the defendants. Defendants have right to file counter claim on the fresh cause of action. Moreover, the question of limitation is mixed question of law and fact. It shall be recorded after hearing of both the parties. At this stage, it cannot be said that the suit is not within limitation. The plaintiffs of previous suit are died. The defendants have filed this counter claim against said plaintiff. Therefore fresh cause of action arose against him. Hence on the ground of no cause of action also this suit is not barred. The plaintiff has not claimed declaration that he is adopted son of the plaintiffs of previous suit. Therefore the defendants have right to file this counter claim as he filed this suit against said defendants. The parties of this suit and previous suit are different. Therefore findings recorded on section 36A of the Prevention of Fragmentation and Consolidation Act is not applicable to this suit. On this ground also the defendants' counter claim is tenable. Hence, the defendants have prayed rejection of this application.

04. Following points arise for my determination, with findings and reasons thereon are as follows :-

Sr. No.	Points	Findings
1.	Whether the defendants' counter claim is barred under the Order VII Rule 11A of the Code of Civil Procedure ?	Yes
2.	What order?	As per final order.

REASONS

As to point no.1 and 2 :-

05. The advocate for the plaintiffs submitted that the defendants have filed counter claim in previous suit for the specific performance of contract based upon Sauda Pavati. The previous suit dismissed on merit on which the defendants have preferred appeal but said appeal was abated with liberty to file fresh suit to this plaintiff. The defendants denied adoption deed in favour of plaintiff. Hence he filed this suit. The decree of the previous suit is binding on both the parties. The plaintiffs have no right to file this counter claim regarding Sauda Pavati. The defendants have no right to file counter claim as the issue regarding limitation, Prevention of Fragmentation and Consolidation Act is already decided in previous suit. Hence the defendants' counter claim is not at all tenable. On this ground prayed for the rejection of the counter claim.

06. On the contrary advocate for the defendants submitted that the parties of previous suit and this suit are different. The findings recorded in previous suit are not binding on the said parties. The plaintiff has filed this suit on the capacity of adopted son. But he has not sought declaration that he is adopted son of the previous plaintiff. The plaintiff is claiming his title in the capacity of son of plaintiff. Therefore said defendants filed this counter claim to protect their

possession as the parties of both the suits are different. The defendants have right to file this counter claim which is not barred under the Order VII Rule 11A of the Code of Civil Procedure. Hence prayed to reject the application.

07. I have gone through pleadings and documents filed on record. On perusal of the copy of judgment of Regular Civil Suit No. 69/2001 it is clear that, deceased Jagannath Gayakwad, Anjanabai Gayakwad and Bhagwanrao Gayakwad have filed previous suit for perpetual injunction and declaration in which defendant no. 1 filed his counter claim for the execution of the registered sale-deed of suit property Gat no. 11 on the basis of Sauda Pavati which is allegedly executed by the previous plaintiffs in favour of defendant no. 1. My Learned Predecessor had framed issue no. 3 that *'whether the defendant no. 1 entitled for the specific performance of contract and thereby entitled to get registered sale-deed executed from plaintiff in respect of 10 guntha land of Gat no. 11 as per Sauda Pavati dated 07.11.1989.'* My Learned Predecessor also framed issue no. 7 *'whether the contract of sale in favour of defendant no. 1 dated 30.04.1980 and 07.11.1989 is barred by law of limitation.'* To the issue no. 4 My learned predecessor recorded her findings negative and to issue no. 7 recorded findings in the affirmative. In reasons to issue no. 7 it has mentioned that the limitation to file suit for specific performance is of three years. The Sauda Pavati executed on 30.04.1980 and 07.11.1989, therefore the counter claim was barred by the law of limitation. Considering this fact, it is clear that My learned predecessor had recorded findings regarding the law point of the limitation after recording evidence of both the parties and dismissed defendants' counter claim on the merit.

08. The learned advocate for the defendants contended that

the law of limitation is mixed question of law and fact. Therefore it is necessary to be decided after hearing of both the parties. There is substance in the argument advanced by the advocate for the defendants. But said submission is not applicable to the case of the defendants because though the law of limitation is mixed question of law and fact and it required detail hearing. In this case my learned predecessor also recorded her findings after hearing of both the parties. Therefore to decide the issue of limitation the hearing of both the parties is not necessary in this suit. Moreover, it is also submission of the defendants that the previous suit is filed by the Jagannath Gayakwad, Anjanabai Gayakwad and Bhagwanrao Gayakwad and this suit is filed by Ravindra Gayakwad who is so called adopted son of Bhagwanrao Gayakwad. As he has not sought declaration that he is adopted son of the Bhagwanrao Gayakwad he has no right to claim any remedy regarding suit property. But on perusal of the pleadings of the plaint it is clear that it is pleaded that the plaintiff is adopted son of Bhagwanrao Gayakwad by way of registered adoption deed. He filed this suit for perpetual injunction based upon possession. Considering the nature of this suit the plaintiff has only burden to prove his possession over the suit property and obstruction made by the defendants. According to the defendants though the plaintiff has not sought declaration of plaintiff's legal character, this issue is not fact in issue of this suit.

09. The defendants have filed counter claim in previous Regular Civil Suit No. 69/2001 which was dismissed on merit. The defendants Regular Civil Appeal No. 241/2012 was also abated. In this situation the decree of the previous suit i.e. Regular Civil Suit No.

69/2001 is binding on both the parties till it will set aside by the Appellate Court. In this situation the defendants have no right to file counter claim on the same cause of action which was already dismissed on the ground of law of limitation.

10. As per above discussion, I came to the conclusion that, the defendants' counter claim is barred under the law of limitation. Moreover, the principle of res-judicata is also applicable to this counter claim. Hence, defendants' counter claim is liable to be rejected. Hence, I pass following order.

ORDER

1. Application is allowed.
2. The defendants' counter claim is rejected.

Date:-14.01.2025

(Smt. R. V. Patil)
Civil Judge Junior Division,
Bhokardan.

CERTIFICATE

I affirm that the contents of this PDF file are word to word as per original Judgment/Order.

Name of Steno :- Smt. S. R. Ingle,

Name of Court :- Civil & Criminal Court, Bhokardan.

Date :- 14.01.2025.

Sd/-
Signature of Steno