


MHSN020008722025 	<u>Special Civil Suit No. 136/2025</u> <u>(Dhanyakumar Balaso Kothale Etc.</u> <u>Vs.</u> <u>Balaso Alias Balasaheb Shripal Kothale etc.)</u>
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Order Below Exh. 19
(Passed on 31/10/2025)

This interim application is taken out by defendant No. 3 for rejection of plaint under the provisions of Order VII, Rule 11 of the Civil Procedure Code, on the ground inter-alia that suit properties are under valued and the plaintiff has not paid proper court fees. So also due to non issuance of pre suit notice under section 164 of the Maharashtra Co-operative Societies Act, the suit is barred by law.

2. The suit has been instituted claiming that, suit properties specifically described in plaint para no.1 are joint family properties of defendant no.1, 2, plaintiff no.1 and 2. By this suit the plaintiffs are claiming separate possession of their share by partitioning the suit property. So also, they are claiming declaration that, the mortgage deed dated 14/12/2020 executed by defendant no.1 and 2 in favor of defendant no.3 is not binding upon them. However, the plaintiffs have specifically pleaded and admitted that, defendant nos. 1 and 2 have mortgaged suit property twice for huge loan amounts with defendant No.3 Society. Defendant No.3 is a Co-operative Banking Society, registered under the provisions of Maharashtra Co-operative Societies Act. Advancing

loans and its recovery is part of their business.

3. Defendant no.1 and 2 have taken huge loan amount from defendant no.3 co-operative Society. Plaintiff No.1 has consented to it. However, said loan remained unpaid. So, defendant No.3 has initiated recovery proceeding. Therefore, the suit has been instituted as counter blast to the recovery proceeding which may be initiated by defendant No.3. By this suit, the plaintiffs are trying to exert undue pressure upon defendant No.3. The work of advancing and recovery of loan comes under the term touching to the business of the society. Therefore, before filing any suit against defendant no.3 Co-operative Society pre-suit notice under section 164 of The Maharashtra Co-operative Societies Act is necessary. However, no such notice has been issued by the plaintiff before filing present suit. So, the suit is barred by section 164 of The Maharashtra Co-operative Act.

4. Secondly, defendant no.3 has challenged the suit on the ground that, in para no.1 the plaintiffs have specifically admitted that, suit property is non-agricultural (N.A.) plot. However, they have not valued the suit property. In the year 2020 the market value of the suit property was at Rs. 1,57,65,000/-. Though, it was so, the plaintiffs have valued the suit property for Rs. 15,00,000/- only and has paid court fees accordingly. By this suit they are claiming declaration that, mortgage deed is not binding upon them. Therefore, they have to pay the court fees as per the market value of the suit

property. Hence, on all these and other grounds defendant No.3 prayed for allowing the application.

5. The plaintiffs have resisted the application by filing say (Exh.24). In which they have denied all the contents of the application. It is their contention that, defendant No.3 himself admitted in his application that, the suit is for partition, declaration and injunction. Further plaintiff no.1 and 2 are not the member of defendant No.3 society bank. Therefore, there will be no bar under any law to file present suit. Defendant No.3 is not the family member of the joint family of the plaintiffs and defendant no.1 and 2. Therefore, they cannot contend about the partition and shares of defendant no.1 and 2. The plaintiffs are claiming the legal and personal rights in their ancestral/joint family property. Defendant No.3 wants to take illegal possession of the suit property. However, without deciding the share of the plaintiffs defendant No.1 and 2 the defendants can not take the possession of the suit property. The plaintiffs and defendant No.1 and 2 have birth right in the suit property. These defendants cannot take possession of the suit property forcefully by taking law in their hands. There is no necessity to issue notice to defendant No.3 before filing of the suit. They are trying to hide their own mistakes and for this reason application under consideration has been moved. Hence, on all these grounds the plaintiffs prayed for rejection of application with heavy compensatory cost.

6. Heard both learned advocates and gone through the

record of proceeding. In support of his contentions the learned advocate for the defendant relied upon the decision of Hon'ble Bombay High Court at Goa in the case of **Mr. Akshay Quenim Vs. Mr. Royce Savio Pereira Writ Petition No.375/2025** decided on 25th September, 2025.

I have gone through this decision. In this decision of the Hon'ble their Lordship has observed as under;

“The correct approach that the Court would have to follow would be to examine the plaint as it stood when filed, and consider whether on a holistic reading of the plaint, the Court totally lacked on inherently lacked jurisdiction to entertain the suit. If it did, it may not be appropriate for the Court, if it inherently lacks jurisdiction, either because the statute bars its jurisdiction or where the statute confers jurisdiction to try particular types of suits before a different forum, to allow an amendment application and bring a suit within its jurisdiction”

In other words, the Court would have to examine in the first place, whether its act of issuing summons in a suit, where it lacked the jurisdiction to entertain such a suit, (either because it was beyond its pecuniary jurisdiction or because it was barred by law), was itself void and a nullity.

This is in my view, is an erroneous approach, as what is necessary is for the Court to consider whether, in the first place it would have the jurisdiction to issue summons/notice in the suit as framed, and if it totally lacked jurisdiction, it would either have to reject the plaint under Order 7 Rule 11 or return the plaint under Order 7 Rule 10 to be presented before a Court within jurisdiction.”

Trial Court would be required to examine the plaint as it

stood, and based upon the averments of the plaint, if it inherently lacked jurisdiction to take up the suit, it has to reject or return the plaint as the case may be without looking into the amendment.

7. On the other hand, the learned advocate for the plaintiffs relied upon the following decisions of Hon'ble Bombay High Court.

- 1) **B. Y. Chavan & Anr. v/s Association of Tenants of Bombay Catholic housing society and others.**
- 2) **Shilpa Cooperative Housing Society through its secretary Versus Smt. Janabai GulabRao Wangal Through LR's Second Appeal No. 417/2017 decided on 11/08/2014.**

In the decision of B. Y. Chavan & Anr., Hon'ble their lordship of Bombay High Court Bench has observed that,

It is not in dispute that the petitioner never raised the issue regarding the absence of notice under Section 164, either in the written statement or even at the appellate stage. It cannot also be disputed that the requirement of notice under Section 164 can be waived and the waiver can be specific or implied. It is settled position in law that when a statute requires a notice should precede the filing of a suit, the compliance of such statutory provision is mandatory, but at the same time, the right thereof can be waived by the party for whose benefit the provision regarding pre-suit notice has been made, and further that the waiver can be expressly made as also impliedly. While dealing with the provision of law comprised under Section 30

of C.P.C., the Apex Court in Dhian Singh Shobha Singh and another v. Union of India, reported in AIR 1958 SC 274 as well as the Full Bench of our High Court in Vasant Ambadas Pandit V. Bombay Municipal Corporation and other, reported in AIR 1981 Bombay 394 had held that the notice can be lawfully waived. Undoubtedly, the waiver has to be established by the plaintiff. However, the same can be presumed when in spite of specific averment in the plaint regarding service of notice, the sufficiency of the notice is not challenged by the defendant till the disposal of the appeal” (emphasis supplied.) What constitutes waiver must depend upon the facts of each case.

Section 164 of the said Act reads as under:-

164. Notice necessary in suits.

No suit shall be instituted against a society, or any of its officers, in respect of any act touching the business of the society, until the expiration of two months next after notice in writing has been delivered to the Registrar or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims, and the plaint shall contain a statement that such notice has been delivered or left.”

If the conduct of a party is such that the giving of notice would render, the suit to be instituted against the society or any of its office bearers infructuous or would effectively or substantially prejudice the parties right to approach the Court

for relief, interim or final, it must be deemed to have waived the requirement of a notice under Section 164. Provisions such as section 164 of the Maharashtra Co-operative Societies Act, 1960 and section 80 of the Code of Civil Procedure are for the benefit of a party that may be affected by the litigation. AS observed in paragraph 9 of the said Judgment:

“A statutory notice for filing of the suit is merely to put the defendant on guard so that it can avoid the lis by complying with the demand of the plaintiff based on the cause of action disclosed in the notice.”

The notice, inter-alia, is to enable the society, upon being informed by the Registrar, to avoid litigation involving time and expense by settling a just claim. If therefore, such a party by its act deprives the plaintiff of an opportunity of approaching the Court and seeking relief, final or even interlocutory, it is axiomatic that it does not wish to avail the benefit or opportunity provided by legislature to avoid the litigation by setting the matter or otherwise. On the question of waiver, it matters little whether the conduct prejudicially affects the right to obtain the final relief or even interim reliefs. The logical inference is that the party does not wish to settle the dispute and avoid litigation. It, thereby, waives its right to such a notice. The plaintiff may yet give a notice and claim the benefit of exemption of the period of limitation. That however, would not lead to a conclusion that, the defendant can not waive a notice.”

Further this defect can be cured by allowing the plaintiff to amend the plaint by dropping the society and rejoining it with a notice served in the meantime. A Division Bench of this Court in an unreported judgment dated 26th April, 2009 in the case of Sahara India Commercial Corporation Limited V. M/s. B. Jeejeebhoy Vakharia & Associates and others (Appeal No.78 of 2009 in Chamber Summons NO.587 of 2007 in Suit no.3376 of 2005) has approved this procedure.

8. While in the decision of **Shilpa Co-operative Housing Society**, Hon'ble their lordship of Bombay High Court Bench at Nagpur has observed that,

“In the instant case, the suit filed by the plaintiff was for claiming their share, namely, 1/7th share each and that is their independent civil right and such a suit for exercising independent civil right before the Civil Court must be held to be without any prohibition contemplated by Section 164 of M.C.S.Act. The plaintiffs have no concern whatsoever with the appellant-society which purchased the suit property without there being any partition of the suit property. The act of the society in purchasing such a property in the absence of any partition between coparceners cannot be said to be a legal act or even the act touching the business of the society”

Therefore, the provisions of Section 164 will have no application since the plaintiffs want to exercise their independent civil rights for claiming partition and separate possession and declaration. In the light of the above decision of Apex Court and the facts of the present case, I am of the considered opinion, that notice

u/s 164 for filing the suit was not at all necessary.

“Coming to the second substantial question of law, I find that when notice u/s 164 of the MCS Act was not at all necessary before filing the suit in a civil court for partition, separate possession and declaration, even if the respondents/ plaintiffs, in fact, had given such notice but did not wait for two months, there cannot be any estoppel against law when the legal position is no such notice is necessary for filing the suit as a pre-requisite to maintain the suit. Whether or not the plaintiffs had issued notice u/s 164 and did not wait for the period of two months, would make no difference at all.”

9. As far as decisions relied upon by learned advocate for the defendant is concern, fact and circumstances of the case in hand and decision relied upon by learned advocate for defendants are totally different. Therefore, in my view the observations Hon’ble Their Lordship in supra cited decisions will not be applicable to the case in hand as both applications i.e. applications under Order 7 Rule 11 and Order 6 Rule 17 of Code of Civil Procedure are taken up together for decision and before deciding application under Order 6 Rule 17 of Code of Civil Procedure, application under Order 7 Rule 11 of Code of Civil Procedure is taken for order. While, in decision relied upon by learned advocate for the plaintiff Hon’ble Their Lordship has observed that, defect of non-issuance of pre-suit notice can be cured by deleting the name of the defendant to whom notice was required to be given. So also, it has been observed that, when the suit is in respect of protection of civil

right of the parties against the co-operative society and other defendants, in such case pre-suit notice under Section 164 of Maharashtra Co-operative Societies Act is not mandatory. So, keeping in mind these observations of Hon'ble their lordship in supra cited decisions now I turned to facts of case in hand.

10. Admittedly, present suit is for partition, separate possession, declaration and injunction. From 7/12 extract produced by the plaintiff at Exh.3/1, it can be seen that, name of defendant No.1 is mutated in revenue record of the suit property vide mutation entry No.1671. Though learned advocate for defendant No.3 contended that, this property is self acquired property of defendant no.1. But, this mutation entry shows that, by this mutation names of Sukumar Shripad Kothale and Champabai Shripad Kothale has also been mutated in revenue record. It gives strength to the contention of the plaintiffs in plaint para no.3 that, suit property has been acquired by defendant no.1 in partition between his brother and mother and himself, and it is his ancestral property.

11. It is specifically mentioned in plaint that, the suit is in respect of partition and as the name of defendant No. 3 is appearing in the revenue record of the suit property. On the basis of it defendant No. 1 to 3 have joined hands each other and they are trying to take possession of the suit properties forcibly till the rights of plaintiffs are decided, they cannot take possession of the suit property. So the plaintiffs are constrained to claim permanent injunction against all the defendants. The

plaintiffs are not members of defendant No. 3 society and dispute is not between the members and society. So it cannot be said that suit is in respect of the transaction touching to the business of the society. Therefore, in my view notice under Section 164 of the Maharashtra Co-operative Societies Act is not necessary in this matter.

12. So far as the objection raised by the learned advocate for the defendant No.3 that, the suit 1/A property is self acquired property of plaintiff No. 1 or not ? or it is jointly owned property. Whether suit properties are joint family property or not? and whether properties are liable for partition or not? are the questions which are to be considered after taking evidence from both sides.

13. Moreover, even if the contention of defendant No. 3 is accepted as it is, then also defendant No. 3 has concern with suit property only. It is now settled principle of law that the relief of rejection of plaint in exercise of powers under Order VII, Rule 11(d) of Civil Procedure Code cannot be pursued only in respect of one of the defendant. In other words, the plaint has to be rejected as a whole or not at all, in exercise of power Order VII, Rule 11(d) of Civil Procedure Code. It is not permissible to reject plaint qua any particular portion of a plaint including against some of the defendants and continue the same against the other. In no uncertain terms the Court has held that if the plaint survives against certain defendants and/or properties, Order VII, Rule 11(d) of Civil Procedure

Code will have no application at all, and the suit as a whole must then proceed to trial.

14. Second ground for the challenge to the plaint is in respect of under valuation of the suit property. It is the contention of the defendants that the market value of the suit property is more than **Rs.1,57,65,000/-** and the plaintiff has admitted in plaint that, it is a non-agricultural land. However, when regarding this point I have gone through the plaint Exh.1, I found that, in plaint para no.1 and 4 the plaintiff has contended that, the suit property is an agricultural land and along with this land, one more N.A. plot bearing plot no.12/3/A situated at Bamnoli has been mortgaged with defendant No.3 Society. Therefore, the contention of the advocate for defendant no.3 that, in pleading, the plaintiffs have admitted that, suit property is non-agricultural plot can not be accepted. This contention regarding non-agricultural plot is in respect of plot no.12/3/A . This contention gets strength from the mortgage deed produced by the plaintiff along with list Exh.3/3 and 3/4. Therefore, from the documents produced by the plaintiff along with plaint, it can be prima-facie safely hold that, suit property is an agricultural land i.e. admeasuring 0.28 R. Except the mortgage deed nothing is on record to show that, the market value of the suit property is more than RS. 15,00,000/- or it is of Rs.1,57,65,000/-. So, also the plaintiffs are claiming only 1/4 share each in the suit property and accordingly they have paid court fees. Therefore it

can not be said that, the plaintiffs have under valued the suit.

15. As mentioned earlier the suit is in respect of partition of the property which is mortgaged with defendant No. 3 Society. It is mainly for partition. Defendant No. 3 is not member of joint family of the plaintiffs and defendant Nos. 1 and 2. Therefore, their contention in respect of nature of the suit property or its ownership is immaterial and suit being for partition is very tenable against defendant No. 1 and 2. So as discussed earlier plaint cannot be rejected in part by bifurcation as it is tenable against defendant Nos. 1 and 2. So on this count also plaint cannot be rejected in this way. Hence, in view of this discussion, following order is passed.

ORDER

Application (Exh. 19) is hereby rejected.

Date: 31/10/2025.
Sangli.

(Vibha P. Gaikwad)
Jt. Civil Judge, Sr. Division, Sangli.