

**ORDER ON EXH. 58 IN R.C.S.No. 05 of 2012**  
**(Bhimashankar Ganapatrao Patil Vs. Lingaraj Shankar Trigule)**

1. The defendant Nos. 1 to 9 have moved this application under order 7 Rule 11 (a)(d) of the Civil Procedure Code.

**Brief contents in the application is that :-**

2. The present suit has been filed for declaration of order dated 30/12/2013 passed by Tahsildar, Akkalkot is null and void ab-initio as well as the permanent injunction. He further contended that, after filling the suit, the plaintiffs has not proceeded and intentionally lingering the suit as well as trying to cause physical, economical and mental loss to the defendants. The suit is required to file within 03 years from the date of order as per Section 58 of the Limitation Act. But, the suit is filed after 09 years from the order passed by the Tahsildar. Further, if the order will pass on all issues then also the suit would be dismissed on the ground of issue of limitation. Further he contended that, the plaintiffs has no any cause of action for filling present suit. The cause of action mentioned in plaint is an imaginary, therefore, to save valuable time of Court, the suit liable to dismissed.

3. The plaintiffs have required to file suit instantly after passing order by the Tahsildar in the year 2003, but, the plaintiffs had filed appeal against the order of Tahsildar before the Additional Collector after passing order of Hon'ble High Court and Additional Collector confirm the order of Tahsildar. The plaintiffs have no remedy to file present suit, therefore, the suit is also liable to dismissed on the ground of Order 7 Rule 11(d) of the Civil Procedure Code.

4. The plaintiffs have filed say thereon after setting aside no say order. He resisted the application on the ground that, the application is not tenable, the question/issue of limitation is different in every case as

per fact. The suit is not hit on the point of limitation because the question of limitation has not been decided without final hearing/evidence. It cannot be decided at a preliminary stage. The parties of suit have chosen a forum available to them as per law. It is contended that the application is devoid of merit therefore, the application is liable to be rejected with costs.

5. Perused the application and say. Heard learned advocate of plaintiffs and perused the written argument of defendants. Considering the rival submissions following points arose for my determination. I have given findings thereon for the reasons stated thereunder :-

<b>Sr.No.</b>	<b>Points</b>	<b>Reasons</b>
1.	Whether plaint is liable to be rejected?	No.
2.	What order?	As per final order.

### **REASONS**

#### **Point Nos. 1 and 2 :-**

6. Admittedly, the present suit is filed by plaintiffs for seeking relief of declaration of an order dated 30/12/2003 passed by Tahsildar is illegal, void ab-initio as well as permanent injunction against the defendants have not obstructed the peaceful possession over the suit property by creating a new way as per order of Tahsildar.

7. The defendant Nos. 1 to 9 had filed an Application No. JAMA/3SR/18/2003 before the Tahsildar under the Mamletdar Court

Act seeking injunction restraining the plaintiffs from claiming right of way through their field. This application is allowed and against that order the plaintiffs and defendant Nos. 10 to 15 have preferred revision application before the Collector and it was remanded to the Tahsildar. Thereafter, the plaintiffs and defendant Nos. 10 to 15 have filed writ petition before the Hon'ble High Court and it was remanded to the Additional Collector. Thereafter, the Additional Collector had allowed the revision application. Thereafter, the defendant Nos. 1 to 9 have filed writ petition before the Hon'ble High Court and it was directed to conduct the refresh trial on Revision Application No. 05/2004. Thereafter, the Additional Collector was rejected the Revision Application No. 5/2004 and has confirmed the order of Tahsildar passed in Application No. JAMA/3SR/18/2003. Thereafter, the plaintiffs and the defendant Nos. 10 to 15 had filed Writ Petition No.5747/2011 before the Hon'ble High Court and it was dismissed. The issues were framed at Exh.35 and matter is fixed for hearing.

8. The present suit filed by the plaintiffs claiming relief against the defendants to declaration order of Tahsildar passed in JAMA/3SR/18/2003 was illegal and void ab-initio as well as to restrain the defendants from disturbing their peaceful possession and not creating new way. In the above said circumstances it appears that, there are various applications and revision filed on each others meantime. Moreover, it is specifically averred in Para No.7 of the plaint that, the defendants trying to obstruct and create new way in July-2011. As per order passed by Tahsildar dated 30/12/2003 in JAMA/3SR/18/2003, in such situation it cannot be said that, there is nothing about the cause of action is not pleaded or mentioned in the plaint. It is to be borne in mind that, at this stage, the defence taken

by the defendants can't be considered to arrive at conclusion whether there is cause of action or not. It has to be decided on the basis of averment in the plaint. As it is settled principal of law that the cause of action is to be ascertained from the material on record i.e. the averments made in the plaint and plea taken in written statement is immaterial.

9. Admittedly the plaintiffs instituted the present suit in the year 2011 against the order of Tahsildar for declaration as well as permanent injunction. Article 58 of the Limitation Act 1963, provides “period of limitation of three years to obtain any declaration when the right to sue first accrues”. But, on perusal of plaint it appears that the plaintiffs and defendants filed various application, revision and writ petition against each other. As per the Revision Application No.05/2004 the Additional Collector confirmed the order passed in JAMA/3SR/18/2003 on 30.04.2011. Considering the pleadings in the suit, for invoking the provisions of Order 7 Rule 11(d) of the CPC, it is necessary for the defendants to make out a case that a suit is barred on the basis of a statement in the plaint. At this stage, it is not permissible to go into the defence that can be raised in the written statement. The question of limitation is a mixed question of fact and law. The issue of limitation can be framed as one of the issue and the same can be decided along with all other issues which arise in the suit after adducing necessary evidence at the trial.

10. It is stated by the defendants in written notes of argument, the suit is bad for non-joinder of necessary parties and the plaintiffs has exhausted all the remedies therefore, he cannot seek the relief and the plaint liable to be rejected. But, this issue/objection

cannot be considered in view of Order 7 Rule 11 of CPC. This issue may be an independent issue and needs to be decided after adducing necessary evidence.

11. The defendants have relied on AIR 1995 BOMBAY 227, P.R.Sukeshwala Vs. Devadatta Kerkar, wherein the Hon'ble High Court has observed that, *Order 7 Rule 10 and 11 of the CPC come into play at any stage of the suit right from the presentation of the plaint and even after the filling of the written statement.* In this present matter there is no resistance in respect of presentation of the application at the stage of suit. Therefore, present ruling is not helpful to the present case. Therefore, I answered the point No.1 in accordingly and in view of point No.2, I pass the following order.

**ORDER**

1. The application is rejected.
2. Costs in cause.

**Date:-07/09/2019**

Sd/-  
(S.N.Gavali)  
Jt. Civil Judge Junior Division, Akkalkot.

Certificate

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

Name of Stenographer :- D.S.Landage (L.G.)

Court :- J.M.F.C.& Jt. Civil Court,J.D.,Akkalkot.

Date :- 07/09/2019

Judgment/Order signed by  
the Presiding Officer :- 11/09/2019

Judgment/Order uploaded on :- 13/09/2019