



ORDER BELOW EXH.55

This is an application filed by defendant nos.1 and 2 under Order 7 Rule 11 of the C.P.C. for rejection of the plaint. Perused the application and reply (Exh.59) filed by the plaintiff. Heard the learned counsel Shri. R. P. Ghorpade for defendant nos.1 and 2 and the learned counsel Shri. R. V. Borate for the plaintiff at length.

2. It is the contention of defendant nos.1 and 2 that the instant suit is for declaration, partition and separate possession. The plaintiff has challenged the will dtd. 21/09/2012. Defendants have obtained the probate from the court of Civil Judge Senior Division, Satara on 12/07/2019. The plaintiff has not preferred appeal against the said order. As such, the instant suit is not maintainable in this court. After grant of probate, the will gets proved and as per section 227 of the Indian Succession Act it becomes valid. As the plaintiff has not preferred the appeal against the order of grant of probate hence, this court is not having jurisdiction to try the instant suit. Thus, the instant suit is hit by the principle of res judicata as per section 11 of the C.P.C. Hence, the plaintiff prayed for rejection of the plaint.

3. Vide reply (Exh.59), the plaintiff has resisted the instant application on the ground that it is false one. In probate proceedings, only the execution of the will gets proved. In those proceedings, it cannot be decided that whether the property is self acquired or joint family property. The instant application is filed by defendants to harass the plaintiff and to delay the instant

proceeding. Hence, the plaintiff prayed for rejection of the instant application.

4. In view of rival contentions of both the parties, following points arise for my determination and I have given my finding against each of them with reasons to follow.

<u>Sr. No.</u>	<u>POINTS</u>	<u>FINDINGS</u>
1.	Whether the plaint needs to be rejected ?	NO
2.	What order ?	The application stands rejected.

REASONS

AS TO POINT NOS. 1 AND 2 :

5. As these points are interlinked with each other hence, they are taken up together for consideration under one common caption.

6. I have carefully gone through the record of the case and also gave thoughtful consideration to the submissions made by both learned counsels. At the outset, it needs to be noted that it is the cardinal principle civil jurisprudence that the application under Order 7 Rule 11 of the C.P.C. needs to be decided by considering the averments in the plaint only. At that stage, the court cannot consider the defence raised by defendants.

7. It is pertinent to note that defendant nos.1 and 2 have contended that the instant suit is hit by the principle of res judicata. But, the perusal of written statement (Exh.37) of defendant nos.1 and 2 reveals that these defendants have not taken the plea regarding the same in their defence. It is to be noted that the plea

of res judicata needs to be taken by way of defence only. The said aspect was held by the Hon'ble Supreme Court of India in the ruling reported in **(2004) 1 SCC 551** between **V. Rajeshwari Vs. T. C. Saravanabava**. Thus, it becomes clear that the plea of res judicata cannot be considered in the absence of specific pleadings.

8. Moreover, the Hon'ble Supreme Court of India in the ruling reported in **(2008) 12 SCC 661** between **Kamala Vs. K. T. Eshwara Sa** has held that *the plea of res judicata being the mixed question of facts and law cannot be decided at the stage of proceeding under Order 7 Rule 11 of the C.P.C.* Thus, it becomes clear that to decide the plea of res judicata the trial is required.

9. It is pertinent to note that defendant nos.1 and 2 though contended that this court is not having jurisdiction to try the instant suit but, they have not demonstrated how there is ouster of jurisdiction of this court. Moreover, the jurisdiction of the court cannot be ousted merely on the blanket statement of defendant nos.1 and 2.

10. In the light of above discussion, I hold that the instant application is bereft of any merit. Resultantly, it warrants rejection. Consequently, I answer point no. 1 in the negative and in answer to point no. 2, I proceed to pass following order.

ORDER

1. The instant application stands rejected.
2. Costs in cause.

Place : Phaltan
Date : 29/01/2025

(R. D. Bhuyarkar)
Jt. CJJD