Srihari Hanumandas Totala vs Hemant Vithal Kamat on 9 August, 2021

Equivalent citations: AIR 2021 SUPREME COURT 3802, AIRONLINE 2021 SC 474

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Bench: D.Y. Chandrachud, M.R. Shah

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal No 4665 2021
Arising out of SLP (C) No.3899 of 2021

Srihari Hanumandas Totala ...Appel

Versus

Hemant Vithal Kamat & Ors ...Respo

JUDGMENT

Dr Justice Dhananjaya Y Chandrachud 1 Leave granted.

2 This appeal arises from a judgment dated 18 January 2021 of a Single Judge at the Dharwad Bench of the High Court of Karnataka. The revisional jurisdiction of the High Court under Section 115 of the Code of Civil Procedure 1908 ("CPC") was invoked for challenging an order dated 1 July 2019 of the IInd Additional Senior Civil Judge and Chief Judicial Magistrate, Belgaum on an application1 under Order 7 Rule 11 of the CPC.

3 Ms. Leela Vithal Kamat was the title holder of the suit property. On her death on 16 May 1996, the property was mutated in the names of her legal heirs – the first respondent and his brother. The first respondent and his brother took a loan from the Karnataka State Finance Corporation ("KSFC") and mortgaged the suit property as security for repayment of the loan. Since the loan was not repaid,

KSFC auctioned the property. The third respondent, who is the predecessor-in-interest of the appellant, furnished the highest bid of Rs. 15,00,000. A sale deed of the suit property was executed in favour of the third respondent on 8 August 2006. Despite the execution of the sale deed, the first respondent and his brother failed to handover the possession of the suit property and as a consequence a suit for possession was filed by the third respondent on 13 March 2007. On 20 December 2007, the first respondent, who was impleaded as the second defendant to the suit filed his written statement raising inter alia the following defences:

> (i) KSFC had no authority to put the suit property on sale;
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> (ii) The second defendant (first respondent herein) had not taken any loan from KSFC nor had any transaction with it. He had not executed any documents offering the suit property as security; and
>
> (iii) The second defendant had no concern with the borrower.

IA No. VII in OS 138/2008.

Issues were framed in the suit, among them being the following:

> "4.Whether defendant No.2 KSFC had no authority to put the suit property for sale?"

4 On 12 November 2008, the first respondent instituted a suit being OS No. 138/2008 challenging the sale deed dated 8 August 2006 executed by KSFC in favour of the third respondent primarily on the ground that KSFC had no authority to put the suit property for sale. He sought a partition of the suit property and possession of his share. The first respondent made the following averments in the plaint:

> (i) The suit property was owned by the mother of the first respondent. After her death, the suit property was inherited by the first respondent and his brother and the first respondent has been in possession of this property from 1998 till the filing of the suit;
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> (ii) The brother of the first respondent mortgaged the suit property with KFSC without his consent and KFSC without investigating the title of the suit property and verifying the underlying title documents, accepted the suit property as security;
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> (iii) In 2004, the daughters of the first respondent's brother had filed a suit for partition and separate possession of the said suit property, where the first respondent was a party. There was no mention made of a loan being sanctioned by KFSC against the suit property;
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> (iv) The first respondent did not consent to the mortgage of the suit property to KFSC and executed no documents for this purpose; and

(v) The first respondent received knowledge of the sale deed executed by KFSC in favour of the third respondent only when he appeared in the suit filed by the third respondent-that is OS No. 103/2007. There is a possibility that the first respondent could suffer a decree for possession in OS No. 103/2007. Thus, the first respondent filed this suit for partition and possession to challenge the validity of the sale deed and to claim his share in the suit property.

5 The following issues were framed by the Trial Court:

"1. Whether the description of suit property is correct

2. Whether plaintiff proves that he has purchased suit property and he acquired valid title as pleaded

3. Whether plaintiff is entitled for possession of suit property

4. Whether defendant No.2 proves that K.S.F .C. had no authority to put the suit property for sale

5. Whether defendant No. 2 proves that there is no cause of action for the suit

6. Whether plaintiff is entitled for decree

7. What decree or order"

6 By a judgment dated 26 February 2009, the Trial Judge decreed the first suit (OS No. 103/2007) that was instituted by the third respondent and directed the defendants (first respondent and his brother) in the suit to hand over vacant and peaceful possession of the suit property to the third respondent-plaintiff. The Trial Court concluded that:

(i) The contention of the first respondent-defendant that KFSC did not have the right to auction the suit property cannot be determined in the suit and must be challenged independently. The first respondent took no action to challenge the auction or the sale deed executed between KFSC and the plaintiff-third respondent till arguments were being heard by the Trial Court, though evidence suggests that he had knowledge of the auction. The first respondent acknowledged the receipt of the letter from KFSC. Moreover, KSFC was impleaded as the fourth defendant in O.S No. 369/2004-the suit that was filed by his brother's daughters and it was averred in the plaint that the auction notice by KSFC was null and void;

(ii) The defendant- first respondent had filed suit in OS No. 138/2008 for partition and separate possession, where one of the reliefs claimed was that the sale deed executed between the plaintiff-third respondent and KFSC was not binding on the first respondent. Though an application was filed to club O.S No. 103/2007 and O.S

> No. 138/2008, it was not allowed. Under these circumstances, the validity of the sale deed cannot be determined in the present suit, particularly when KFSC was not made a party to this suit. Thus, the validity of the sale deed and the auction would have to be considered in the other suit filed by the first respondent (OS No. 138/2008); and
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> (iii) On the date of the judgment of the court, the sale deed executed by the plaintiff-third respondent and KFSC had not been set aside. Other than this challenge, there was no other ground raised by the first respondent to challenge the claim of possession of the plaintiff-third respondent. Based on this, the sale deed is valid and title to the suit property is transferred to the third respondent – plaintiff by virtue of the sale deed executed by KSFC. The third respondent had the right to take possession of the property.

7 The first respondent appealed against the judgment of the Trial Court before the High Court2. During the pendency of the appeal, the third respondent filed an application under Section 10 of the CPC in OS No. 138/2008 for staying the suit proceedings till the disposal of the first appeal from the judgment in OS No. 103/2007, on the ground that the issues involved in the second suit were directly and substantially the same as the issues in the previous suit. The Trial Judge by an order dated 3 November 2012 held that the issues involved in the previous suit for possession and the subsequent suit for declaration filed by the first respondent were directly and substantially the same. Hence the application was allowed and the proceedings in the subsequent suit instituted by the first respondent were stayed. 8 The decree in the previous suit (OS No. 103/2007) was upheld by the High Court by a judgment dated 11 August 2017. The High Court dismissed the appeal with the following observations:

> (i) The plaintiff-third respondent states that both the defendants (that is first respondent and his brother) had borrowed the money. However, KSFC filed a memo in Miscellaneous Petition No. 114/2003 stating that the first respondent (second defendant therein) was not a guarantor; and
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> (ii) The application filed for clubbing O.S No. 138/2008 and O.S No. 103/2007 ought to have been allowed by the Trial Court. Since the right of the first RFA No. 3037/2008.

respondent cannot be considered in the present proceedings arising out of O.S No. 103/2007, the third respondent is entitled to the possession of the suit property as he is a bona fide auction purchaser.

9 Pursuant to the judgment of the High Court, the appellant who has purchased the suit property from the third respondent, filed an application3 for rejection of plaint under Order 7 Rule 11 of the CPC on the grounds of (i) non-payment of court fee; (ii) non-disclosure of cause of action; and (iii) the suit being barred by res judicata. It was contended that the suit instituted by the first respondent was barred by res judicata as the grounds relating to the validity of the sale deed and the issue of title were raised in the previous suit O.S No. 103/2007. The appellant urged that after the judgment

of the Trial Court, which had been affirmed by the High Court, the rights of the parties cannot be further adjudicated and re-litigated upon. 10 The application under Order 7 Rule 11 was dismissed by the Trial Judge on 1 July 2019 for the following reasons:

> (i) With respect to non-payment of the court fee, according to Order 7 Rule 11(c), a plaint would only be rejected if the plaint is written on a paper that is insufficiently stamped, and the court requires the plaintiff to supply the requisite stamp paper within a time fixed and despite such an order, the plaintiff fails to do so. In this case, no such order was passed by the court;
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> (ii) The cause of action had been specifically pleaded by the first respondent in paragraph 5 of the plaint; and IA No. VII dated 25 March 2019 in OS No. 138/2008.
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> (iii) In order to reject a plaint for the suit being barred by any law under Order 7 Rule 11(d), the court needs to be guided by the averments in the plaint and not the defence taken. The grounds taken by the appellant – that the issues raised had been decided by the decree of the Trial Court in OS No. 103/2007 and affirmed on appeal by the High Court – were the defence of the appellant.

Thus, these cannot be taken into account while rejecting a plaint under Order 7 Rule 11 of the CPC. Moreover, the issue as to whether the suit is barred by res judicata cannot be decided in an Order 7 Rule 11 application but has to be decided in the suit.

11 The appellant filed a revision petition before the High Court assailing the 1 July 2019 order of the Trial Court. The High Court dismissed the appeal upholding the reasoning of the Trial Court on all the three grounds raised in the Order 7 Rule 11 application. On the ground of res judicata, the High Court placed reliance on the decision of this Court in Soumitra Kumar Sen v. Shyamal Kumar Sen4, and observed that the learned Trial Judge correctly came to the conclusion that the application filed under Order 7 Rule 11(d) on the ground of res judicata could not be decided merely by looking into the averments in the plaint. In the view of the High Court, a plaint could be rejected under Order 7 Rule 11 only if it was not maintainable on the basis of the averments contained in the plaint. In the present application, such a determination would require the production of pleadings, the issues framed and the judgment in the previous suit, to compare it with the present (2018) 5 SCC 644.

suit. This exercise, the High Court held, could not be undertaken merely by looking into the plaint averments as held in Soumitra Kumar Sen (supra). Pursuant to the dismissal of the revision petition by the High Court, the appellant has approached this Court challenging the order of the High Court.

12 The rejection of the application under Order 7 Rule 11 of the CPC is the bone of the contention in this appeal. O.S No. 138 of 2008, instituted by the first respondent, is a suit for declaration, partition, possession, and for a consequential relief of injunction. Besides the first respondent, who is the plaintiff in the said suit, KSFC (the second respondent) is the first defendant. The third respondent is the second defendant, the appellant is the fourth defendant. The third defendant to the suit is Dr Arvind Vithal Kamat, the brother of the first respondent. The following reliefs have

been sought in the suit :

> "a] Declaring that the Sale-Deed dated: 08-08-2006 executed by Defendant No. 1 in favor of the Defendant No. 2 with respect to the suit property is null and void to the extent of half share of the Plaintiff and the same is not binding on the plaintiff.
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> b] Awarding half share in the suit property to the plaintiff and putting him in actual possession of his half share by effecting physical partition in the suit property.
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> c] Restraining the defendants from causing inference in the Plaintiffs actual possession of the suit property that may be given to him by issue of perpetual injunction.
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> d] Entire costs of the suit may be awarded to the Plaintiff."

13 The essential averments in the plaint are that the property in question was owned by the mother of the first respondent-plaintiff and the third defendant. It has been averred that their father had predeceased their mother, and that after the death of their mother on 26 May 1996, the property was inherited by the first respondent and his brother in equal shares. The third defendant is stated to have taken a loan from KSFC for setting up a CT scan centre and to have mortgaged the suit property as security for that purpose. According to the first respondent, his brother had no right to create a mortgage in respect of the suit property which was held in joint ownership by both the first respondent and his brother. It has been alleged that KSFC sold the property in executing its charge on the property and entered into a registered sale deed on 8 August 2006 in favour of the second defendant (third respondent herein). According to the first respondent, he had neither consented to the mortgage nor signed any document. The first respondent pleaded that he may suffer a decree for possession in O.S. 103 of 2007 instituted by the auction purchaser and was accordingly seeking to assert his claim and interest as a lawful owner in respect of half share in the suit property by filing O.S No. 138 of 2008. 14 The submission which has been urged on behalf of the appellant is that the issue concerning title of the suit property stands adjudicated in favour of the predecessor-in-interest of the appellant in the earlier suit and the decree for possession was upheld by the High Court. Hence, another suit agitating the same issues and challenging the same sale deed is not maintainable and is barred by the principles of res judicata. Moreover, it has been submitted that the first respondent was arrayed as the second defendant to the earlier suit and had raised a specific defence in regard to the validity of the sale conducted by the KSFC in favour of the third respondent. The submission is that the original sale deed executed by KSFC is of 8 August 2006. The decree in the first suit was of 26 February 2009 and though twelve years have passed since the date of the decree, the appellant as a successor-in-interest of the auction purchaser is not being allowed to enjoy the suit property.

15 Order 7 Rule 11 of the CPC reads as follows:

> "11. Rejection of plaint.— The plaint shall be rejected in the following cases:—

(a) where it does not disclose a cause of action;

(b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;

(c) where the relief claimed is properly valued, but the plaint is returned upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;

(d) where the suit appears from the statement in the plaint to be barred by any law;

[(e) where it is not filed in duplicate;] [(f) where the plaintiff fails to comply with the provisions of rule 9:] [Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-paper shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp-paper, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff.]" (emphasis supplied) 16 Order 7 Rule 11(d) of CPC provides that the plaint shall be rejected "where the suit appears from the statement in the plaint to be barred by any law". Hence, in order to decide whether the suit is barred by any law, it is the statement in the plaint which will have to be construed. The Court while deciding such an application must have due regard only to the statements in the plaint. Whether the suit is barred by any law must be determined from the statements in the plaint and it is not open to decide the issue on the basis of any other material including the written statement in the case. Before proceeding to refer to precedents on the interpretation of Order 7 Rule 11(d) CPC, we find it imperative to refer to Section 11 of CPC which defines res judicata:

"11. Res judicata.—No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

17 Section 11 of the CPC enunciates the rule of res judicata : a court shall not try any suit or issue in which the matter that is directly in issue has been directly or indirectly heard and decided in a 'former suit'. Therefore, for the purpose of adjudicating on the issue of res judicata it is necessary that the same issue (that is raised in the suit) has been adjudicated in the former suit. It is necessary that we refer to the exercise taken up by this Court while adjudicating on res judicata, before referring to res judicata as a ground for rejection of the plaint under Order 7 Rule 11. Justice R C Lahoti (as the learned Chief Justice then was), speaking for a two Judge bench in V. Rajeshwari v. T.C. Saravanabava5 discussed the plea of res judicata and the particulars that would be required to prove the plea. The court held that it is (2004) 1 SCC 551.

necessary to refer to the copies of the pleadings, issues and the judgment of the 'former suit' while adjudicating on the plea of res judicata:

> "11. The rule of res judicata does not strike at the root of the jurisdiction of the court trying the subsequent suit. It is a rule of estoppel by judgment based on the public policy that there should be a finality to litigation and no one should be vexed twice for the same cause.
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> 13. Not only the plea has to be taken, it has to be substantiated by producing the copies of the pleadings, issues and judgment in the previous case. Maybe, in a given case only copy of judgment in previous suit is filed in proof of plea of res judicata and the judgment contains exhaustive or in requisite details the statement of pleadings and the issues which may be taken as enough proof. But as pointed out in Syed Mohd. Salie Labbai v. Mohd. Hanifa [(1976) 4 SCC 780] the basic method to decide the question of res judicata is first to determine the case of the parties as put forward in their respective pleadings of their previous suit and then to find out as to what had been decided by the judgment which operates as res judicata. It is risky to speculate about the pleadings merely by a summary of recitals of the allegations made in the pleadings mentioned in the judgment. The Constitution Bench in Gurbux Singh v. Bhooralal [AIR 1964 SC 1810 : (1964) 7 SCR 831] placing on a par the plea of res judicata and the plea of estoppel under Order 2 Rule 2 of the Code of Civil Procedure, held that proof of the plaint in the previous suit which is set to create the bar, ought to be brought on record. The plea is basically founded on the identity of the cause of action in the two suits and, therefore, it is necessary for the defence which raises the bar to establish the cause of action in the previous suit. Such pleas cannot be left to be determined by mere speculation or inferring by a process of deduction what were the facts stated in the previous pleadings.

Their Lordships of the Privy Council in Kali Krishna Tagore v. Secy. of State for India in Council [(1887-88) 15 IA 186 : ILR 16 Cal 173] pointed out that the plea of res judicata cannot be determined without ascertaining what were the matters in issue in the previous suit and what was heard and decided. Needless to say, these can be found out only by looking into the pleadings, the issues and the judgment in the previous suit." (emphasis supplied) 18 At this stage, it would be necessary to refer to the decisions that particularly deal with the question whether res judicata can be the basis or ground for rejection of the plaint. In Kamala & others v. KT Eshwara Sa6, the Trial Judge had allowed an application for rejection of the plaint in a suit for partition and this was affirmed by the High Court. Justice S B Sinha speaking for the two judge bench examined the ambit of Order 7 Rule 11(d) of the CPC and observed:

> "21. Order 7 Rule 11(d) of the Code has limited application. It must be shown that the suit is barred under any law. Such a conclusion must be drawn from the averments made in the plaint. Different clauses in Order 7 Rule 11, in our opinion, should not be mixed up. Whereas in a given case, an application for rejection of the plaint may be filed on more than one ground specified in various sub-clauses thereof, a clear

> finding to that effect must be arrived at. What would be relevant for invoking clause (d) of Order 7 Rule 11 of the Code are the averments made in the plaint. For that purpose, there cannot be any addition or subtraction. Absence of jurisdiction on the part of a court can be invoked at different stages and under different provisions of the Code. Order 7 Rule 11 of the Code is one, Order 14 Rule 2 is another.
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> 22. For the purpose of invoking Order 7 Rule 11(d) of the Code, no amount of evidence can be looked into. The issues on merit of the matter which may arise between the parties would not be within the realm of the court at that stage. All issues shall not be the subject-matter of an order under the said provision." (emphasis supplied) The Court further held:
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> "23. The principles of res judicata, when attracted, would bar another suit in view of Section 12 of the Code. The question involving a mixed question of law and fact which may require not only examination of the plaint but also other evidence and the order passed in the earlier suit may be taken up either as a (2008) 12 SCC 661.

preliminary issue or at the final hearing, but, the said question cannot be determined at that stage.

24. It is one thing to say that the averments made in the plaint on their face discloses no cause of action, but it is another thing to say that although the same discloses a cause of action, the same is barred by a law.

25. The decisions rendered by this Court as also by various High Courts are not uniform in this behalf. But, then the broad principle which can be culled out therefrom is that the court at that stage would not consider any evidence or enter into a disputed question of fact or law. In the event, the jurisdiction of the court is found to be barred by any law, meaning thereby, the subject-matter thereof, the application for rejection of plaint should be entertained." (emphasis supplied) The above view has been consistently followed in a line of decisions of this Court. In Church of Christ Charitable Trust & Educational Charitable Society v. Ponniamman Educational Trust7, Justice P Sathasivam (as the learned Chief Justice then was), speaking for a two judge Bench, observed that "10. [...] It is clear from the above that where the plaint does not disclose a cause of action, the relief claimed is undervalued and not corrected within the time allowed by the court, insufficiently stamped and not rectified within the time fixed by the court, barred by any law, failed to enclose the required copies and the plaintiff fails to comply with the provisions of Rule 9, the court has no other option except to reject the same. A reading of the above provision also makes it clear that power under Order 7 Rule 11 of the Code can be exercised at any stage of the suit either before registering the plaint or after the issuance of summons to the defendants or at any time before the conclusion of the trial.

11. This position was explained by this Court in Saleem Bhai v. State of Maharashtra [(2003) 1 SCC 557] , in which, (2012) 8 SCC 706.

while considering Order 7 Rule 11 of the Code, it was held as under: (SCC p. 560, para 9) "9. A perusal of Order 7 Rule 11 CPC makes it clear that the relevant facts which need to be looked into for deciding an application thereunder are the averments in the plaint. The trial court can exercise the power under Order 7 Rule 11 CPC at any stage of the suit—before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial. For the purposes of deciding an application under clauses (a) and (d) of Rule 11 of Order 7 CPC, the averments in the plaint are germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage, therefore, a direction to file the written statement without deciding the application under Order 7 Rule 11 CPC cannot but be procedural irregularity touching the exercise of jurisdiction by the trial court." It is clear that in order to consider Order 7 Rule 11, the court has to look into the averments in the plaint and the same can be exercised by the trial court at any stage of the suit. It is also clear that the averments in the written statement are immaterial and it is the duty of the Court to scrutinize the averments/pleas in the plaint. In other words, what needs to be looked into in deciding such an application are the averments in the plaint. At that stage, the pleas taken by the defendant in the written statement are wholly irrelevant and the matter is to be decided only on the plaint averments. These principles have been reiterated in Raptakos Brett & Co. Ltd. v. Ganesh Property [(1998) 7 SCC 184] and Mayar (H.K.) Ltd. v. Vessel M.V. Fortune Express [(2006) 3 SCC 100]." Similarly, in Soumitra Kumar Sen (supra), an application was moved under Order 7 Rule 11 of the CPC claiming rejection of the plaint on the ground that the suit was barred by res judicata. The Trial Judge dismissed the application and the judgement of the Trial Court was affirmed in revision by the High Court. Justice AK Sikri, while affirming the judgment of the High Court held:

> "9. In the first instance, it can be seen that insofar as relief of permanent and mandatory injunction is concerned that is based on a different cause of action. At the same time that kind of relief can be considered by the trial court only if the plaintiff is able to establish his locus standi to bring such a suit. If the averments made by the appellant in their written statement are correct, such a suit may not be maintainable inasmuch as, as per the appellant it has already been decided in the previous two suits that Respondent 1-plaintiff retired from the partnership firm much earlier, after taking his share and it is the appellant (or appellant and Respondent 2) who are entitled to manage the affairs of M/s Sen Industries. However, at this stage, as rightly pointed out by the High Court, the defense in the written statement cannot be gone into. One has to only look into the plaint for the purpose of deciding application under Order 7 Rule 11 CPC. It is possible that in a cleverly drafted plaint, the plaintiff has not given the details about Suit No. 268 of 2008 which has been decided against him. He has totally omitted to mention about Suit No. 103 of 1995, the judgment wherein has attained finality. In that sense, the plaintiff-Respondent 1 may be guilty of suppression and concealment, if the averments made by the appellant are ultimately found to be correct. However, as per the established principles of law, such a defense projected in the written statement cannot be looked into while deciding application under Order 7 Rule 11 CPC." Referring to Kamala (supra), the Court further observed that "12. ... The appellant has mentioned about the earlier two cases which were filed by Respondent 1 and wherein he failed. These are judicial records. The appellant can easily demonstrate the correctness of his averments by filing

certified copies of the pleadings in the earlier two suits as well as copies of the judgments passed by the courts in those proceedings. In fact, copies of the orders passed in judgement and decree dated 31-3-1997 passed by the Civil Judge (Junior Division), copy of the judgment dated 31-3- 1998 passed by the Civil Judge (Senior Division) upholding the decree passed by the Civil Judge (Junior Division) as well as copy of the judgment and decree dated 31-7-2014 passed by Civil Judge, Junior Division in Suit No. 268 of 2008 are placed on record by the appellant. While deciding the first suit, the trial court gave a categorical finding that as per MoU signed between the parties, Respondent 1 had accepted a sum of Rs 2,00,000 and, therefore, the said suit was barred by principles of estoppel, waiver and acquiescence. In a case like this, though recourse to Order 7 Rule 11 CPC by the appellant was not appropriate, at the same time, the trial court may, after framing the issues, take up the issues which pertain to the maintainability of the suit and decide the same in the first instance. In this manner the appellant, or for that matter the parties, can be absolved of unnecessary agony of prolonged proceedings, in case the appellant is ultimately found to be correct in his submissions." (emphasis supplied) While holding that "recourse to Order 7 Rule 11" by the appellant was not appropriate, this Court observed that the Trial Court may, after framing the issues, take up the issues which pertain to the maintainability of the suit and decided them in the first instance. The Court held that this course of action would help the appellant avoid lengthy proceedings.

19 In a more recent decision of this Court in Shakti Bhog Food Industries Ltd.

v. Central Bank of India and Another8, a three Judge bench of this Court, speaking though Justice AM Khanwilkar, was dealing with the rejection of a plaint under Order 7 Rule 11 by the Trial Court, on the ground that it was barred by limitation. The Court referred to the earlier decisions including in Saleem Bhai v. State of Maharashtra9, Church of Christ Charitable Trust (supra), and observed that 2020 SCC OnLine SC 482.

(2003) 1 SCC 557.

"18. It is clear that in order to consider Order 7 Rule 11, the court has to look into the averments in the plaint and the same can be exercised by the trial court at any stage of the suit. It is also clear that the averments in the written statement are immaterial and it is the duty of the Court to scrutinize the averments/pleas in the plaint. In other words, what needs to be looked into in deciding such an application are the averments in the plaint. At that stage, the pleas taken by the defendant in the written statement are wholly irrelevant and the matter is to be decided only on the plaint averment. These principles have been reiterated in Raptakos Brett & Co. Ltd. v. Ganesh Property, (1998) 7 SCC 184 and Mayar (H.K.) Ltd. v. Vessel M.V. Fortune Express, (2006) 3 SCC 100." 20 On a perusal of the above authorities, the guiding principles for deciding an application under Order 7 Rule 11(d) can be summarized as follows:

(i) To reject a plaint on the ground that the suit is barred by any law, only the averments in the plaint will have to be referred to;

(ii) The defense made by the defendant in the suit must not be considered while deciding the merits of the application;

(iii) To determine whether a suit is barred by res judicata, it is necessary that (i) the 'previous suit' is decided, (ii) the issues in the subsequent suit were directly and substantially in issue in the former suit; (iii) the former suit was between the same parties or parties through whom they claim, litigating under the same title; and (iv) that these issues were adjudicated and finally decided by a court competent to try the subsequent suit; and

(iv) Since an adjudication of the plea of res judicata requires consideration of the pleadings, issues and decision in the 'previous suit', such a plea will be beyond the scope of Order 7 Rule 11 (d), where only the statements in the plaint will have to be perused.

21 In the present case, a meaningful reading of the plaint makes it abundantly clear that when the first respondent instituted the subsequent suit, he had been impleaded as the second defendant to the earlier suit (OS No. 103/2007) that was instituted on 13 March 2007. The first respondent instituted the subsequent suit, OS 138/2008 though he had knowledge of the earlier suit. The plaint in the subsequent suit which was instituted by the first respondent indicates that the he was aware of the mortgage executed in favour of KSFC, that KSFC had executed its charge by selling the property for the recovery of its dues and that the property had been sold on 8 August 2006 in favour of the predecessor of the appellant. As a matter of fact, the plaint contains an averment that there was every possibility that the first respondent may suffer a decree for possession in OS 103/2007 which "has forced" the first respondent to institute the suit for challenging the legality of the sale deed. Given the fact that an argument was raised in the previous suit regarding no challenge having been made to the auction and the subsequent sale deed executed by the KFSC, it is possible that the first respondent then decided to exercise his rights and filed the subsequent suit. Be that as it may, on a reading of the plaint, it is evident that the first respondent has not made an attempt to conceal the fact that a suit regarding the property was pending before the civil court at the time. It is also relevant to note that at the time of institution of the suit (OS No. 138/2008) by the first respondent, no decree had been passed by the civil court in OS No. 103/2007. Thus, the issues raised in OS No. 103/2007, at the time, had not been adjudicated upon. Therefore, the plaint, on the face of it, does not disclose any fact that may lead us to the conclusion that it deserves to be rejected on the ground that it is barred by principles of res judicata. The High Court and the Trial Court were correct in their approach in holding, that to decide on the arguments raised by the appellant, the court would have to go beyond the averments in the plaint, and peruse the pleadings, and judgment and decree in OS No. 103/2007. An application under Order 7 Rule 11 must be decided within the four corners of the plaint. The Trial court and High Court were correct in rejecting the application under order 7 Rule 11(d). 22 For the above reasons, we hold that the plaint was not liable to be rejected under Order 7 Rule 11(d) and affirm the findings of the Trial Court and the High Court. We clarify

however, that we have expressed no opinion on whether the subsequent suit is barred by the principles of res judicata. We grant liberty to the appellant, who claims as an assignee of the bona fide purchaser of the suit property in an auction conducted by KSFC, to raise an issue of the maintainability of the suit before the Additional Civil Judge, Belgaum in OS No. 138/2008. The Additional Civil Judge, Belgaum shall consider whether a preliminary issue should be framed under Order XIV, and if so, decide it within a period of 3 months of raising the preliminary issue. In any event, the suit shall be finally adjudicated upon within the outer limit of 31 March 2022.

23 For the above reasons, we dismiss the appeal and affirm the impugned judgment and order of the High Court dated 18 January 2021. The application under Order 7 Rule 11 of the CPC shall stand dismissed. There shall be no orders as to costs.

24 Pending application(s), if any, stand disposed of.

... ... J [Dr Dhananjaya Y Chandrachud]
.....J [MR Shah] New Delhi;

August 09, 2021