

**IN THE HIGH COURT OF BOMBAY AT GOA****FIRST APPEAL NO.59 OF 2015**

- 1 Smt. Sita Shripad Narvekar,  
aged 70 years, residing at  
Plot No.5, Friends Colony,  
Khadpabandh, Ponda, Goa.
- 2 Shri Sagar Shripad Narvekar,  
aged 50 years, residing at  
Plot No.5, Friends Colony,  
Khadpabandh, Ponda, Goa.
- 3 Ms. Aishwarya Sagar  
Narvekar,  
aged 19 years, residing at  
Plot No.5, Friends Colony,  
Khadpabandh, Ponda, Goa.
- 4 Ms. Ishwari Sagar Narvekar,  
aged 13 years, residing at  
Plot No.5, Friends Colony,  
Khadpabandh, Ponda, Goa.  
Represented herein by her  
next friend, Shri Sagar  
Shripad Narvekar, aged 50  
years, residing at Plot No.5,  
Friends Colony,  
Khadpabandh, Ponda, Goa.
- 5 Shri Surajkumar Murlidhar  
Narvekar,  
Power of attorney holder of  
appellants no.6,7,8 & 9.  
aged 38 years, residing at  
House No.204, Main Road,  
Azra, District Kolhapur,  
Maharashtra.
- 6 Smt. Anuradha Murlidhar

Narvekar, aged 65 years,  
residing at House No.204,  
Main Road, Azra, District  
Kolhapur, Maharashtra.  
Through power of attorney  
holder Shri Surajkumar  
Narvekar (appellant no.5).

- 7 Sou. Pooja Padmesh Shetye,  
aged 44 years, residing at  
Plot No.49, Samrat Nagar,  
Kashid Colony, Kolhapur,  
Maharashtra, Through power  
of attorney holder Shri  
Surajkumar Narvekar  
( appellant no.5).
- 8 Sou. Sangeeta Niteen Berde,  
aged 42 years, residing at  
Plot No.72, Sane Guruji  
Vasahat, Kolhapur,  
Maharashtra. Through power  
of attorney holder Shri  
Surajkumar Narvekar  
( appellant no.5).
- 9 Sou. Yogita Dinraj Gevenkar,  
aged 40 years, residing at  
Plot No.175 A/2, 'Ratnraj',  
MES College Road, Zuari  
Nagar, Sancoale 403 726.  
Through power of attorney  
holder Shri Surajkumar  
Narvekar (appellant no.5).
- 10 Shri Motiram Narayan  
Narvekar,  
aged 60 years, residing at  
House No.293, Agarkar  
Road, Tilakwadi, Belgaum.

- 11 Shri Shivram Vishwanath Narvekar, aged 54 years, residing at House No.83, Bombi Sadan, Opp. Fatima Convent, Margao.
- 12 Shri Mahadev Vishwanath Narvekar, aged 52 years, residing at House No.83, Bombi Sadan, Opp. Fatima Convent, Margao.
- 13 Shri Sitaram Vishwanath Narvekar, aged 50 years, residing at House No.83, Bombi Sadan, Opp. Fatima Convent, Margao.
- 14 Shri Atmaram alias Kishore Venkatesh Nevagi (since deceased through LR's)
  - (i) Dr. Urmila Atmaram Nevagi (wife) residing at "PADMA", H.No.3129, near Nehru Children Park, Gogol, Fatorda, Margao, Goa-403 602.
  - (ii) Dr. Venkatesh Atmaram Navagi (son) and his wife;
  - (iii) Dr. Mrs. Sakshi Venkatesh Navagi, both residing at "PADMA", H.No.3129, near Nehru Children Park, Gogol, Fatorda, Margao, Goa-403 602.

(iv) Mrs. Diksha Dattaraj  
Karmalkar alias Renuka  
Atmaram Nevagi (daughter),  
and her husband;

(v) Mr. Dattaraj Dasharath  
Karmalkar,  
both residing at IInd Floor,  
Venkatesh Annapurna  
Sankul, Aquem, Margao,  
Goa-403 501.

.... Appellants

V/s

Shri Auduth Timblo,  
Major in age,  
G-9, La Marvel Colony,  
Dona Paula, Goa-403 004.

.... Respondent

Mr. Yogesh V. Nadkarni with Mr. Rohan Shirodkar, Advocate for the Appellants.

Mr. Sudesh Usgaonkar, Advocate for the Respondent.

**CORAM : F.M. REIS &  
K.L. WADANE, JJ.**

**DATE : 1<sup>st</sup> September, 2015**

**ORAL JUDGMENT : (Per F.M. REIS, J.)**

Heard Mr. Y.V. Nadkarni, learned Counsel appearing for the appellants and Mr. Sudesh Usgaonkar, learned Counsel appearing for the respondent.

2. The notice issued to the respondent indicated that the appeal may be disposed of finally at the stage of admission. Hence, with the consent of the learned Counsel, the appeal was heard finally.
3. Admit. The respondent waives service of notice of final hearing.
4. The above appeal challenges an order passed by the learned Civil Judge, Senior Division, Panaji dated 5/03/2015 whereby an application under Order 7 rule 11(a) and (d) of the Civil Procedure Code for rejection of the plaint filed by the respondents came to be allowed.
5. Briefly the facts of the case are that there were disputes between the appellants and other family members of the appellants which came to be settled and a consent decree was passed dated 20/04/2000 settling the claims of the parties. It appears that the respondent herein had facilitated such consent terms and had given a declaration to the Court that he would honour all the commitments payable to the appellants in terms of such consent decree. The consent decree came to be passed in the year 2000 and in terms of the decree there were different amounts payable to the appellants. Apparently, it is not disputed that some amounts were to be paid from the amounts lying in the hands of the receiver and some other amounts were payable based on the agreements for raising ore in

respect of mining concession belonging to the family besides refunds from the income tax department. As there was default in payment of such amounts, the appellants filed execution proceedings in the Court of Civil Judge, Senior Division, Margao to execute the consent decree somewhere in the year 2002. In such proceedings, the respondents raised objections under Section 47 of the Civil Procedure Code to the claim put forward by the appellants, inter alia, disputing the correctness of the amounts claimed by the appellants. The learned Judge held an inquiry to adjudicate upon the claim of the appellants and ultimately after a detailed inquiry which included recording of evidence by an order dated 30/06/2012, the learned Judge came to the conclusion that a sum of Rs.1,29,45,707/- is payable and due to the appellants from the respondent. Such amount was worked out after examining all the objections raised by the respondent herein. The amount determined by the Executing Court was not disputed by the respondent herein and accordingly the amount was paid by the respondent in October, 2012. Thereafter, the appellants served a notice on the respondent claiming interest for the delay in paying the amounts. As no such amounts were forthcoming, the appellants filed a suit in the year 2014 for recovery of such amount together with other reliefs as stated in the plaint. The respondent filed his written statement and also an application under Order 7 Rule 11 of Civil Procedure Code for rejection of plaint. The

grounds for rejection were essentially under Order 7 Rule 11(a) and (d) of the Civil Procedure Code. It was the contention of the respondent that the plaint did not disclose any cause of action and, as such, such plaint deserves to be rejected. The next ground was that as the amounts were not claimed in the earlier proceedings the present claim of the appellants in the suit was barred by the principles of res judicata.

6. The appellants disputed the said contention and pointed out that the plaint disclosed a cause of action and that the principles of res judicata would not be applicable to the facts of the present case. The learned Judge by the impugned order dated 5/03/2015 allowed the application filed by the respondent and rejected the plaint of the appellants. Being aggrieved by the said order the appellants have preferred the present appeal.

7. Mr. Y.V. Nadkarni, the learned Counsel appearing for the appellants has pointed out that the learned Judge has erroneously rejected the plaint on the ground that the suit is barred by the principles of res judicata. The learned Counsel has pointed out that the plea of res judicata is a mixed question of law and fact and such issue cannot be decided without recording of evidence. The learned Counsel further pointed out that such aspect can be examined only after considering the defence of the

respondent and, consequently, the learned Judge was not justified to dismiss the suit as being barred by principles of *res judicata*. The learned Counsel further pointed out that the learned Judge has lost sight of the fact that the claim of the appellants was for an amount which they are to claim only after the year 2003 which is much after the consent decree. The learned Counsel further pointed out that the decree itself stipulated the specific dates on which the amounts were to be paid by the respondent to the appellants. Having defaulted in the payment of such amounts, the appellants were entitled to claim amounts for illegally detaining the amounts legally payable to the appellants which claim in the suit is in the nature of damages claimed by the appellants. The learned Counsel submitted that the plaint has to be read as a whole and in para 11 of the plaint there is a specific averment that the appellants' have been deprived of this amount by the respondent by illegally detaining such amounts when they were legally payable to the appellants. The learned Counsel further pointed out that reading para 11 of the plaint and the plaint as a whole, it can be clearly construed that the plaint itself discloses a cause of action to recover an amount from the respondent for unlawfully depriving the appellants of an amount which was legally payable to the respondent in terms of the consent decree on specific dates. The learned Counsel, as such, pointed out that the impugned order deserves to be quashed and set aside. The learned

Counsel in support of his submissions has relied upon the judgment of the Apex Court in the case of ***Kamala & Ors. V/s. K.T. Eshwara Sa and Ors.*** reported in ***(2008) 12 SCC 661*** giving emphasis to paras 21 to 25.

8. On the other hand, Mr. Sudesh Usgaonkar, learned Counsel appearing for the respondent has disputed the contentions of the learned Counsel appearing for the appellants. The learned Counsel submits that the claim of the appellants is essentially towards interest which the appellants have failed to claim in the original suit and consequently in terms of Section 34 of the Civil Procedure Code when further interest was claimed and refused by the Court it would clearly imply that the decree holder would not be entitled for such amount of interest. The learned Counsel has thereafter taken us through the different averments in the plaint to point out that the claim of the appellants is essentially for interest and, as such, as future interest was not claimed in the earlier proceedings, the suit itself is barred by the principles of res judicata. The learned Counsel has thereafter taken us through the consent decree to point out that the decree is totally silent with regard to payment of any future interest which would imply that such interest has been refused in terms of Section 34 of the Civil Procedure Code. The learned Counsel has thereafter taken us through the averments in the plaint to point out that as the claim of the appellants was towards interest the plaint itself

does not disclose a cause of action and the learned Judge has rightly rejected the plaint in terms of Order 7 Rule 11 of the Civil Procedure Code. The learned Counsel fairly does not dispute that the ground of res-judicata is based on the defence in the suit raised by the appellants and these aspects have to be decided by examining the defence taken by the respondents. The learned Counsel, as such, submits that the learned Judge has rightly rejected the plaint. The learned Counsel, as such, submits that the appeal be rejected.

9. We have considered the submissions of the learned Counsel and we have also gone through the records. Based on the rival contentions, the following points for determination arise in the appeal:

Whether the learned Judge was justified to reject the plaint in terms of Order 7 Rule 11 of the Civil Procedure Code on the ground that the claim of the appellants is barred by res judicata and that the plaint does not disclose cause of action.

10. With regard to the finding of the learned Judge to the effect that the claim of the respondent is barred by res judicata, the Apex Court in the said judgment ***Kamala & Ors. V/s. K.T. Eshwara Sa and Ors.*** (supra) has observed at paras no.21 to 25 which reads thus:

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.

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.

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 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.

11. In the present case, in order to examine whether the principles of res judicata or principles analogous to res judicata would be applicable the defence of the respondent in the written statement would have to be gone into. It is now well settled that for examining an application under Order 7 Rule 11 of the Civil Procedure Code the averments in the plaint are to be examined without any additions or subtractions. On plain reading of the plaint, we find that the averments therein do not disclose that the suit is barred by the principles of re judicata. Apart from that, res judicata is a mixed question of law and fact which the Court will have to examine based on evidence advanced by both the parties on merits of the claim put forward by the appellants. Hence, the learned Judge was not justified to examine the contention of the respondent that the suit is barred by res judicata, at this stage, while examining the application under Order 7 Rule 11 of the Civil Procedure Code.

12. With regard to the contention of Mr. Usgaonkar, learned Counsel appearing for the respondent that the plaint itself does not disclose a cause of action, we are of the opinion that in order to examine such aspect, one has to read the plaint as a whole and give a broad meaning

thereto. The essential claim of the appellants prima facie appears to be that the amounts were due way back in the year 2002 in terms of the consent terms and that the appellants were unlawfully deprived of such amount from the dates specified in the consent decree. At para 11 of the plaint, there is a specific averment that the appellants have been deprived of such amount since the year 2003 when they were legally entitled to receive as on those dates. Considering such averment the claim of the appellants prima facie appears to be for damages which is quantified as interest. Whether the appellants are entitled for such amount is a matter which the learned Judge has to examine on its own merits after recording of evidence. There were specific dates on which the amounts had to be paid by the respondent to the appellants. In such circumstances, any cause of action after the consent decree was passed cannot be treated to be a claim which could be raised in the earlier suit.

13. The contention of Mr. Usgaonkar based on the provisions of Section 34 of the Civil Procedure Code has in fact not been raised either in the application under Order 7 Rule 11 of the Civil Procedure Code nor during the course of the hearing before the learned Judge. Hence, it is not open for the respondent to now contend that the claim of the appellants is barred in terms of Section 34 of the Civil Procedure Code. Be that as it may, this aspect can also be examined by the learned Judge

while deciding the suit merits.

14. On perusal of the impugned order, we find that the learned Judge was not justified to reject the plaint on the ground that the suit was barred by the principles of res judicata nor that the plaint does not disclose a cause of action. Keeping all the contentions of the respondent on merits open, we find that the impugned order passed by the learned Judge dated 05/03/2015 cannot be sustained and deserves to be quashed and set aside. We however clarify that we have examined the rival contentions only in the context of examining the application under Order 7 Rule 11 of the Civil Procedure Code and any finding herein would not come in the way of the learned Judge in deciding the rival contentions on its own merits.

15. In view of the above, we pass the following order:

### **O R D E R**

- (i) The impugned order dated 5/03/2015 is quashed and set aside.
- (ii) The Civil Suit is restored to the file of the learned Civil Judge, Senior Division, Panaji.
- (iii) The learned Judge is directed to decide the suit after hearing on merits in accordance with law.
- (iv) The parties are directed to appear before the learned Judge on 12/10/2015 at 10.00 a.m.

(v) The appeal stands disposed of accordingly with no order as to costs.

**K.L. WADANE, J.**

**F.M. REIS, J.**

NH/-