

IN THE HIGH COURT OF BOMBAY AT GOA
CIVIL REVISION APPLICATION NO. 36 OF 2015

Ms. Sociedade De Formento Industrial Ltd.,
Villa Flores Da Silva,
E. Carvalho Street,
Margao, Goa.

..... Petitioner

V e r s u s

Shri Gurudas G. Pai,
S/o Shri Gopal Pai,
Major in age, Married,
Landlord, R/o 3/T, Kamat Estate,
Tonca, Caranzalem, Goa,
Through Power of Attorney,
Shri Gurudas N. Kunde, Aged 76 years,
Married, R/O Devashi Bhavan,
Socorro, Porvorim, Goa.

..... Respondent.

Mr. V. A. Lawande, Advocate for the Petitioner/Applicant.

Mr. J. P. Mulgaonkar, Advocate for the Respondent.

CORAM: S. B. SHUKRE, J.
RESERVED ON: 8th JANUARY, 2016.
PRONOUNCED ON : 5th FEBRUARY, 2016.

JUDGMENT:

Heard. Admit. Heard finally by consent.

2. This Civil Revision Application challenges the legality and correctness of the order passed on 27th April, 2015 in Special Civil Suit No.34/2011/A by Court of Civil Judge, Senior Division, Bicholim.

3. The facts leading to filing of this Revision application may be stated in brief as under:

a) The respondent is the original plaintiff who had filed a civil suit against the petitioner, which is the original defendant no.2. The suit claims reliefs of payment of damages of Rs.25.00 lakhs and also injunctions, both permanent and mandatory against all the defendants. Original defendants nos.1, 3 and 4 have not been impleaded as parties to this application, as the relief claimed in this application is only against the respondent.

b) It is the case of the respondent that he is a co-owner of an undivided property, surveyed under no.24/2011 of village Pissurelem Village, hereinafter referred to as the suit property. The present petitioner as well as the original defendant nos.3 and 4, acting under permission from the original defendant no.1 to operate the mining concession, by dumping mining rejects on the suit property indiscriminately, illegally and without any permission and authority obtained from the respondent, have rendered fertile land of the suit property fallow and uncultivable and thereby caused huge loss to the respondent. Respondent has claimed that some time in the past, when he had taken up this matter with the petitioner, the dumping of mining rejects was stopped but his request for settling the issue was neglected. The respondent has further claimed that he had sent a notice dated 28/4/1998 to all the defendants including the petitioner calling upon them to stop further

dumping of the mining rejects, but to no avail. He has also claimed that these illegal activities of the petitioner and other defendants are going on and the mining rejects dumped earlier on the suit property, continue to lie there rendering the land of the suit property as useless for its meaningful use. He has submitted that big heaps of the mining rejects contain silica and iron ore rich clay and these elements being harmful to soil, cause destruction of the soil texture by finding their way into it and then land is rendered fallow. As the defendants including the petitioner refused to make amends to their illegal activities, the respondent says, he filed a civil suit for damages and injunction.

c) The petitioner as the first step towards resistance of the suit, filed an application under Order 7 Rule 11 of C.P.C, 1908 praying for rejection of the plaint on the ground that the suit is barred by law of limitation, the Civil Court has no jurisdiction and that there has been no cause of action disclosed in the plaint.

d) This application came to be rejected by the learned Civil Judge after hearing both sides by the order passed on 27/4/2015. It is this order which is under challenge in the present civil revision application.

4. Mr. V. Lawande, learned counsel for the petitioner submits that the impugned order is illegal and arbitrary as well as perverse as it does not

take into account pleadings in the plaint which are so clear as to unequivocally indicate that the plaint is barred by law of limitation. He submits that the learned Civil Judge has also ignored the settled principles of law in passing the impugned order. He submits that the learned Civil Judge has observed, albeit erroneously, that the application of the petitioner is vague, that it did not give necessary details to show as to how the Court lacked jurisdiction and how no cause of action has been disclosed although written statements giving all these details were filed by the petitioner. He further submits that the learned Civil Judge has only referred to various case laws relied upon by the petitioner but failed to apply their principles, which principles as a matter of fact, were squarely applicable to the facts of the case.

5. Learned counsel for the petitioner further submits that in para 4 of the plaint, the respondent has clearly stated that after he had taken up the issue with the petitioner, some time in the past, dumping came to be stopped and he did not make any averment in the plaint that thereafter dumping activities got restarted. He further points out from the relevant paragraphs of the plaint that respondent specifically admitted that he had sent a notice dated 28/4/1998 to all the defendants and therefore, limitation period for filing the suit can be said to have commenced from the date of 28/4/1998. He also

submits that there is also an admission given by the respondent that he had approached the Court of Deputy Collector and S.D.O, Taluka Bicholim, Bicholim, Goa for redressal of his grievance, but his application was dismissed by order dated 25/4/2003 for want of jurisdiction. He therefore, submits that the limitation period, at the most, could be said to have started from the date of 24/4/2003 and in view of the provision of Section 9 of the Limitation Act, which lays down that once time has begun to run, no subsequent disability or inability to institute a suit or make an application stops it. Thus, according to him, the plaint is hopelessly barred by limitation, which is a law contemplated under Order 7 Rule 11 (d) of C.P.C. Learned counsel for the petitioner has further submitted that there has been an assertion made in the plaint that respondent is the co-owner of undivided suit property and this would show that he has no title in his own rights over the suit property and as such, he would have to be termed as a stranger to the suit property having no right to sue and thus having no cause of action to file the suit.

6. Learned counsel for the petitioner has, however, not pressed the ground of jurisdiction, which the petitioner has taken in his application under consideration in this case. Thus, on the aforestated two grounds of bar of limitation and there being no cause of action, the petitioner has urged that the

impugned order be quashed and set aside and its application filed under Order 7 Rule 11 be allowed.

7. Strongly, resisting the application, Mr. J.P. Mulgaonkar, the learned counsel for the respondent has submitted that it is well settled law that for exercising jurisdiction regarding rejection of plaint by virtue of the power conferred on the Civil Court by Order 7 Rule 11 of C.P.C, only pleadings in the plaint are required to be looked into and no external aids, such as, the averments in the written statement or documents filed in support of the rival claims can be considered. He submits that on bare perusal of the averments in the plaint and the plaint has to be considered as a whole, one can see that the plaint alleges continuing wrong and therefore, discloses a continuing cause of action and as such, the limitation runs on day to day and moment to moment basis, from the point the wrong is committed and is continued to be committed. This would be clear, learned counsel further submits, from section 22 of the Limitation Act, 1963.

8. Learned counsel for the respondent further submits that since there is a difference between absence of cause of action and non disclosure of cause of action, the argument that the respondent, being a stranger to the suit property, has no right to sue in the instant case deserves to be rejected. He

submits that this argument relates to absence of right to sue and whether the respondent has such a right or not would have to be decided on merits of the matter. He also submits that the pleadings in the plaint, when read in their entirety, would show that respondent has disclosed the cause of action, he being a co-owner and thus, an affected person.

9. In support of his argument, learned counsel for the petitioner has relied upon the following Case Laws:

- 1) *Saleem Bhai and others V/s State of Maharashtra and others.*¹
- 2) *Hardesh Ores (P) Ltd. V/s Hede and Company.*²
- 3) *Mst. Phool Sundari V/s Gurbans Singh.*³

10. Learned counsel for the respondent has in support of his arguments relied on the following rulings:

- 1) *Balakrishna Savalram Pujari Waghmare & Ors V/s Shree Dhyaneshwar Maharaj Sansthan and others.*⁴
- 2) *State of Orissa V/s Klockner and Company and others.*⁵
- 3) *Sankar Dastidar V. Banjula Dastidar (Smt.) and Another*⁶
- 4) *Hari Ram V/s Jyoti Prasad and another.*⁷

1) (2003) 1 SCC 557.

2) (2007) 5 SCC 614

3) (1956) 0 Supreme (Raj) 253/ [1957] 0 AIR (Raj) 97.

4) AIR 1959 SC 798.

5) 1996 (8) SCC 377.

6) (2006) 13 SCC 470.

7) (2011) 2 SCC 682.

11. In the case of ***Saleem Bhai***¹ Hon'ble Apex Court has laid down the statutory principles which must be followed while deciding an application filed under Order 7 Rule 11 seeking rejection of the plaint. The Hon'ble Apex Court has held that only relevant facts which need to be looked into for deciding an application under the said provision of the Code of Civil Procedure are the averments in the plaint and the trial court may exercise the power at any stage of the suit, either before registering the plaint or thereafter are even after summons to the defendants are issued or at any time before the conclusion of the trial. Relevant observations of the Hon'ble Apex Court as they appear in para 9 are reproduced as follows:

“9. A perusal of Order 7 Rule 11 C.P.C. 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 C.P.C. 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 C.P.C. 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 C.P.C. cannot but be procedural irregularity touching the exercise of jurisdiction by the trial court.....”.

12. So, it would have to be seen only from the averments made in the plaint and reading them as a whole as to whether the plaint is barred by law and or whether the plaint discloses case of action or not. Now, it is well settled that the expression “barred by any law” used in clause (b) of Rule 11 of Order 7 must include the law of limitation as well and, therefore, the plaint can be rejected under this provision on the ground of bar of limitation also. This is made clear by Hon'ble Apex Court in the case of **Hardesh Ores P. Ltd.**,², when it said in para 25 thus :

“25. The language of Order 7 Rule 11 CPC is quite clear and unambiguous. The plaint can be rejected on the ground of limitation only where the suit appears from the statement in the plaint to be barred by any law. Mr. Nariman did not dispute that "law" within the meaning of clause (d) of Order 7 Rule 11 must include the law of limitation as well.”

13. In **Hardesh Ores**², Hon'ble Apex Court also held that the averments made in the plaint as a whole have to be seen to find out whether the plaint discloses any case of action or not and as to whether it is barred by

any law, as contemplated under clauses (a) and (d) of Rule 11 Order 7 C.P.C. The Hon'ble Apex Court further held that it is the substance and not merely the form of the pleadings that has to be looked into and the pleadings have to be construed as they stand without addition or subtraction of words or change of their apparent grammatical sense.

14. In **Ms. Phool Sundari** ³, the Division Bench of the Rajasthan High Court held that where a plaint discloses no cause of action against some of the defendants, it can be rejected under Order 7 Rule 11 (a) against particular defendants only, if not all, as in such a case there would be a total rejection of the plaint against those particular defendants. While laying down so, the Division Bench made a distinction between rejection of a plaint in part so far as the subject matter of the plaint or the relief claimed therein is concerned and complete rejection of the plaint as against some of the defendants and found that while the former is not permissible, the latter is.

15. In the case of **Balakrishna S. Pujari Waghmare and others** ⁴, while considering the scope and applicability of Section 23 of the Limitation Act (1908), in the light of Articles 124 and 120 of that Act, Hon'ble Apex Court answered the question - whether the cause of action can arise de die diem or on day to day or moment to moment basis?, and held that section 23

refers not to a continuing right but to a continuing wrong. It further held that a wrong which is a continuing one, creates a continuing source of injury and renders the doer of the act responsible and liable for the said injury. It held that when there is a continuing wrong there is a remedy to redress it under section 23 of the 1908 Limitation Act. The relevant observations of the Hon'ble Apex Court appearing in para 31 are reproduced thus:

“..... In dealing with this argument it is necessary to bear in mind that S. 23 refers not to a continuing right but to a continuing wrong. It is the very essence of a continuing wrong that it is an act which creates a continuing source of injury and renders the 'doer of the act responsible and liable for the continuance of the said injury. If the wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from the act may continue. If, however, a wrongful act is of such a character that the injury caused by it itself continues, then the act constitutes a continuing wrong. In this connection it is necessary to draw a distinction between the injury caused by the wrongful act and what may be described as the effect of the said injury. It is only in regard to acts which can be properly characterised as continuing

wrongs that S. 23 can be invoked.”

16. It may be mentioned here that Section 23 of the Limitation Act 1980 is almost in pari materia to Section 22 of the Limitation Act 1963, which stands in the statute in following terms:

“Section 22. **Continuing breaches and torts.**-In case of a continuing breach of contract or in the case of a continuing tort, a fresh period of limitation begins to run at every moment of the time during which the breach or tort, as the case may be, continues.”

17. In **Hari Ram**⁷, Hon'ble Apex Court relying on **Sankar Dastidar V. Banjula Dastidar**,⁶ held that when a right of way is claimed, whether public or private over a certain land over which the tortfeasor has no right of possession, the breaches would be continuing, to which the provisions of section 22 of the Limitation Act 1963, would apply.

18. In **Sankar Dastidar**⁶, Hon'ble Apex Court held that a suit based on a continuing wrong stands on a different footing than the suit for damages simplicitor and therefore, the principle that once the limitation period begins to run, there is no stopping to it has no application to cases where the provisions of section 22 would apply.

19. In **Klockner and Company and others**⁵, Hon'ble Apex Court held by approving the observations of the Orissa High Court that there is a distinction between the plea that there is no cause of action to file a suit and the one that plaintiff does not disclose any cause of action, for the question that there is no cause of action has to be determined on the basis of the material other than the plaintiff, whereas, the objection that the plaintiff does not disclose the cause of action has to be determined by only looking into the averments made in the plaintiff as a whole.

20. Now, these principles of law would have to be borne in mind while deciding the objection of the petitioner that the plaintiff filed in this case by the respondent is barred by law of limitation and also fails to disclose cause of action and this exercise has to be carried out by looking into the pleadings in the plaintiff taken as a whole and not in a disjunctive manner.

21. Learned counsel for the petitioner wants this Court to consider the averments in para 4 and also some of the admissions given by the respondent in the plaintiff and conclude that the plaintiff is barred by limitation.

Para 4 of the plaintiff reads thus:

“The Plaintiff states that sometime earlier the Plaintiff did take up the matter with the Respondent no.2 and with that the dumping

has been stopped and the Respondent no.2 seen made contact with the Defendant with a view to settle the matter but nothing was realized thereafter.”

The admissions in the plaint are to the effect that the respondent had served a notice dated 28/4/1998 upon the defendants calling upon them to stop further dumping of the mining rejects and not to interfere in the property and that the application of the respondent filed before the Court of Dy. Collector and S.D.O, Bicholim, Goa was dismissed by the order dated 25/4/2003 for want of jurisdiction. These pleadings and said admissions, however, cannot be divorced from the rest of the averments in the plaint. Doing so, would be going against the settled principles of law discussed earlier. Therefore, these pleadings and admissions would have to be read together with the other averments in the plaint and when it is done, the inevitable conclusion that arises is that the plaint cannot be said to be barred by law of limitation.

22. The respondent has pleaded at different places in the plaint that although the dumping had been stopped when he had taken up the issue with the petitioner in the past, there was further dumping of mining rejects. There are also averments in the plaint that the respondent had served a notice dated

28/4/1998 upon the defendants calling upon them to stop further dumping of the mining rejects and that by this notice he had called upon the defendants including the petitioner to desist from these illegal activities. The respondent has pleaded that by carrying out the mining activities rashly and negligently, the defendants have not only damaged the crop but also destroyed fertility of the soil, which can be seen from para 8. In para 10, the respondent has averred that the defendants have neither removed the mining rejects nor stopped dumping of mining rejects inspite of all their efforts. These pleadings being of great significance are reproduced as under:

“10. The Plaintiff says that the Defendants have neither removed the mining rejects nor stopped dumping of mining rejects into the suit property inspite of all efforts of the Plaintiff.”

23. In para 7, the respondent has submitted that the defendants are mining companies having strong financial base and are not in a mood to respond to his request for paying compensation for damage or loss to crop and also are not bothered to remove the mining rejects dumped in the suit property. He has further pleaded that the defendants have not taken any steps to remove the mining slit accumulated in the suit property inspite of repeated requests of the plaintiff.

24. All these pleadings make it crystal clear that what has been alleged by the respondent/plaintiff is a continuing wrong in the nature of continuing activity of dumping of mining rejects in the suit property and continuous refusal to remove the accumulated waste and continuous failure to restore the original status of the property. In other words, the pleadings are about continuing breach and obtuse attitude in committing the wrong *die diem*. Therefore, Section 9 of the Limitation Act 1963, as sought to be canvassed by the learned counsel for the petitioner, would have no application and Section 22, which lays down that in the case of a continuing wrong, a fresh period of limitation begins to run at every moment of the time during which the tort or wrong continues would have application. The principles laid down in the cases of **Balakrishna Savalram Pujari and others**⁴, **Sankar Dastidar**⁶ and **Hari Ram**⁷ would squarely apply to these facts and therefore, the argument that the plaint is barred by law of limitation cannot be accepted.

25. The bar of limitation, however, would operate in a different way when it comes to claim of recovery of damages in terms of money made in the plaint. For such a money claim, Section 9 of the Limitation Act may have its application. But, the question as to what extent Section 9 of the Act, which lays down that once time begins to run, it runs continuously and there

is no stopping to it until the claim gets time barred under relevant Articles, would have to be considered, having regard to the facts of this case, on the basis of the evidence available on record that is on merits of the case. Such a question cannot be decided by merely looking into the plaint in a case where the claim for damages arises from the averments of continuing wrong. In such a case, claim for recovery of damages in terms of money can be found to be partly time barred and partly within limitation. But, a plaint cannot be rejected partly. In **Mst. Phool Sundari**³, the Division Bench of the Rajasthan High Court has held that if a plaint is to be rejected, it has to be rejected in toto in the sense that a Court cannot reject one part of the plaint against all the defendants and carry on with the rest of the plaint against them, although, there can be a total rejection of the plaint against a particular defendant, if not all. Now, this is the settled position of law. Therefore, I find no merit in the argument of the learned counsel for the petitioner that claim for damages being time barred, the plaint must be rejected.

26. The next argument of the petitioner is that the respondent admittedly being a co-owner of a property which is undivided can have no right to sue in his own right and is thus a stranger to the suit. The argument would have to be straightaway rejected as the law requires, under the provisions of clause (a) Rule 11 Order 7, that the plaint should disclose the

cause of action. In the case of **Klockner and Company and others**⁵ Hon'ble Apex Court has approved the observation of Orissa High Court that there is a distinction between a plea that there is no cause of action for the suit and a plea that the plaint does not disclose the cause of action. The difference between these two pleas essentially lies in the manner in which the correctness or otherwise of the two pleas is to be ascertained. The averment that there is no cause of action to file a suit would have to be tested for its correctness or otherwise upon consideration of all material available on record including evidence of parties, and whereas, the assertion that the plaint is fundamentally defective for non disclosure of cause of action has to be examined only by going into the pleadings in the plaint and considering them as a whole, without making any additions or subtractions thereto. What has been argued on behalf of the petitioner is that the respondent being a stranger to the suit cannot have cause of action or any right to file a suit and this argument essentially belongs to the category of plea of absence of cause of action and not to the kind of non-disclosure of cause of action. Such an argument cannot be considered at this stage in view of the law discussed earlier.

27. It is clear from the above discussion that this is not a case where the plaint can be rejected by considering the pleadings in the plaint as a

whole under the provisions of Clauses (a) and (d) of Order 7 Rule 11 C.P.C.

There is no merit in this application and it deserves to be dismissed.

28. The application stands dismissed. No costs.

S. B. SHUKRE, J.

Ap/-