

IN THE HIGH COURT OF BOMBAY AT GOA**CIVIL REVISION APPLICATION NO. 42 OF 2015**

SMT.KAMAL MANOHAR NAIK
GADEKAR AND ANR.

... Petitioners

Versus

SHRI ANTHONY JOSEPH
VALLES AND ANR.

... Respondents

Shri L. Raghunandan, Advocate for the
Petitioners.

Shri S.M. Walwaikar, Advocate for Respondent
No.1.

Shri A. Lobo, Advocate for Respondent No.2.

Coram:- C. V. BHADANG, J.

Date:- 10th August, 2016

ORAL ORDER :

This revision application is taken up
for final disposal by consent of the parties.

2. The petitioners are the original
plaintiffs in Regular Civil Suit No.32/1998/F on
the file of the learned Civil Judge Junior
Division at Mapusa, in which the respondents are
the defendants. It appears that the petitioners
are seeking permanent injunction restraining the
respondent no.1 or anybody on his behalf from

carrying out any construction in violation of the Building Rules and Regulations and the approved plan by Village Panchayat, Calangute and for mandatory injunction directing the defendant no.1 to remove all the illegal construction towards the Northern boundary of the petitioners' property and restore the setbacks as per the approved plans.

3. It appears that the suit was initially filed by the petitioner no.1. The petitioner no.2 was added as a co-plaintiff by an amendment which was allowed on 20/10/2014. Pursuant to this, the respondent no.1 raised a counter claim claiming the following reliefs:

(a) The Hon'ble Court be pleased to allow this counter claim and decree and order the plaintiff by way of Mandatory Injunction to demolish, all that part of illegal construction standing on the portion of the said property bearing Survey No.241/8 and 241/6 of Village Calangute and belonging to this Defendant.

(b) This Hon'ble Court be graciously pleased to declare the sale certificate bearing No.AR/NZ/BTH

/EXE/Case-4/02-03 dt. 31.10.2005
issued by the Asst. Registrar of
Coop. Societies, North Zone, Bardez
Goa being fraudulent is null and
void.

(c) This Hon'ble Court be pleased to
declare that the agreement for sale
dt. 4/3/2009 executed by the
Plaintiff No.2 K.K. Suresh in favour
of Sudhakaran Nair and registered
before the Notary Public Adv. D.S.
Petkar in his Notarial Book at reg.
No.2438/2009 being fraudulent is null
and void.

(d) This Hon'ble Court be pleased to
pass a decree of permanent injunction
and permanently retrain the
plaintiffs, their agents, servants
etc. from using the suit illegal
construction in whatsoever manner.

(e) This Hon'ble Court be pleased to
decree and order the plaintiffs to
pay compensation @ Rs.15,000/- per
month commencing from the date of
defendants first attendance with his
advocate in the instant suit before
this Hon'ble Court till the date of
final disposal of the suit.

(f) This Hon'ble Court be pleased to
pass a decree and declare that the
construction of the plaintiffs
building in the suit property is
violative of CRZ Regulations and
buildings plans as approved by the
Town & Country Planning Department
and as such is illegal.

(g) Any other order as this Hon'ble
Court deems fit and proper in the

circumstances of the case be passed.

4. In para 23 of the counter claim, it is contended that the cause of action to file the counter claim, arose when the plaint was amended by addition of plaintiff no.2, who is an auction purchaser of the property. It was contended that the Certificate of Sale in favour of the petitioner no.2 is fraudulently obtained.

5. The petitioners filed an application under Order 7 Rule 11 of CPC, for rejection of the counter claim on the ground that it does not disclose any cause of action and the same is barred by limitation. It was also contended that the relief sought in the counter claim is also the relief claimed by the respondent no.1 in a previously instituted suit being Regular Civil Suit No.201/1996 (which is now registered as Regular Civil Suit No.228/2010/F).

6. The learned Trial Court by order dated

10/08/2015 has rejected the application keeping the issue of limitation open. It was found that the petitioners were unable to satisfy as to how there is a bar of limitation and about the alleged absence of the cause of action. In so far as the aspect of similar reliefs being claimed in the previously instituted suit (being Regular Civil Suit No.228/2010/F), it was found that the said aspect cannot be looked into, under Order 7 Rule 11 of CPC. Feeling aggrieved by the said order, the petitioners are before this Court.

7. I have heard the learned Counsel for the petitioners, the learned Counsel for the respondent no.1 and the learned Counsel for the respondent no.2.

8. It is contended on behalf of the petitioners that in the previous suit where the respondent no.1 is the plaintiff, an application for addition of the party was moved sometime in

the year, 2008 whereby, the petitioner no.2 was arrayed as defendant in the said suit. It is thus contended that the respondent no.1 was aware of the issuance of the Sale Certificate in favour of the petitioner no.2 in the year, 2008 and thus the counter claim seeking declaration in respect of the Certificate of Sale would be barred under Article 59 of the Limitation Act.

9. On the contrary, it is submitted by the learned Counsel for the respondent no.1 that the cause of action would arise only when the claim based on the Certificate of Sale is made against the respondent no.1. The learned Counsel pointed out that the petitioner no.2 was added in the year October, 2014 and thus the counter claim, which was filed on 11/03/2015 would be within limitation. The learned Counsel further points out that apart from the prayer clause 26(b) seeking a declaration that the Sale Certificate is null and void, there are various other reliefs claimed including mandatory

injunction, against the petitioners to demolish their illegal construction standing on the portions of the suit property bearing Survey No.241/8 and 241/6 of village Calangute, which is belonging to the respondent no.1. It is submitted that the counter claim thus cannot be rejected in part.

10. The learned Counsel for the respondent no.2 supports the respondent no.1.

11. I have considered the rival circumstances and the submissions made.

12. It may be mentioned that the learned Counsel for the petitioner has confined his challenged only to the ground of Order 7 Rule 11(d) of CPC, that is, the counter claim being barred by limitation.

13. It appears that apart from declaration, that the Sale Certificate is fraudulently

obtained and is null and void, the petitioner is also seeking other reliefs in the counter claim. It is now well settled that the issue of limitation is a mixed question of law and fact. It is true that in every case it may not involve a disputed fact. However, considering the overall circumstances and, particularly, the fact that the respondent no.1 is seeking various other reliefs in the counter claim, the same cannot be rejected at the threshold. All that the Trial Court has said is that the said issue is kept open, to be gone into at the trial of the suit. Thus, keeping all the rival contentions open, no case for interference is made out.

14. In the result, the revision application is dismissed with no orders as to costs.

C. V. BHADANG, J.

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