

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CIVIL REVISION APPLICATION NO. 109 OF 2016

Kishanlal S/o Fatechand Lodha,
died through LRs.

- 1] Subhash Kisanlal Lodha,
Age : 65 years, Occupation – Business,
Through his power of attorney holder,
Prakash S/o Kisanlal Lodha
- 2] Prakash S/o Kisanlal Lodha,
Age : 62 years, Occupation – Business,
- 3] Madanbai Wd/o Kisanlal Lodha,
Age : 83 years, Occupation – Household,

All R/o – Kallam, Tq. Kallam,
District – Osmanabad,
at present,
R/o 38/25, Prabhat Road, Lane no.7,
Pune – 411 004

Through her power of attorney holder,
Prakash S/o Kisanlal Lodha,
(petitioner no.2)

.. Petitioners
(Orig. Defendants)

Vs.

- 1] Jijabai Wd/o Laxman Madne,
deceased through
- 1a. Mahadeo @ Bappaji Shivaji Madane,
Age : 18 years, Occupation – Nil,
R/o – Lonar Galli, Kallam,
Tq. Kallam, District – Osmanabad
- 1b. Mahadevi Shivaji Madane,
Age – 23 years, Occupation – Household,
R/o – Lonar Galli, Kallam,
Tq. Kallam, District – Osmanabad

- 1c. Manisha Shivaji Madane,
Age – 14 years, Minor, through her
natural guardian, mother, respondent no.2,
Chandrakala Wd/o Shivaji Madane
- 1d. Suraj Shivaji Madane,
Age – 12 years, Minor, through her
natural guardian, mother, respondent no.2,
Chandrakala Wd/o Shivaji Madane
- 2] Chandrakala W/o Shivaji Madane,
Age – 53 years, Occupation – Household,
R/o – Lonar Galli, Kallam,
Tq. Kallam, District – Osmanabad
- 3] Nasimunnisa W/o Samjurrehman Sayyed,
Age – 67 years, Occupation – Household,
R/o – Vakil Colony, Kallam,
Tq. Kallam, District – Osmanabad .. **Orig. Plaintiffs**
- 4] The State of Maharashtra,
Through the District Collector,
Osmanabad, District – Osmanabad
- 5] The Tahasildar, Kallam,
District – Osmanabad
[Resp. 4 and 5 .. **Orig. Defts. 1 and 2**] .. Respondents

Mr. A.A. Valsangkar, Advocate h/f. Mr. Milind Patil, Advocate for the
petitioners

Mr. D.H. Jadhavar, Advocate for respondents no.2 and 3

Mrs. S.S. Raut, AGP for respondents no.4 and 5

CORAM : SUNIL P. DESHMUKH, J.

DATE : 19-04-2017

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith.

2. Heard learned counsel for the petitioners, learned counsel for respondents no. 2 and 3 and learned A.G.P. for respondents no. 4 and 5, finally, by consent.

3. The revision application purports to take an exception to order dated 20-02-2016 in regular civil suit no. 261 of 2012 instituted by respondents no.1 to 3, on application by defendant no.3 bearing exhibit no. 61 seeking reliefs, reading, thus,

“ A) This application may kindly be allowed and the plaint in RCS No. 162 of 2012 may kindly be rejected.

B) The plaintiffs may be subjected to examination under order X of the CPC, 1908 as expected by the honourable Supreme Court in the case of N.V. Srinivasa Murthy versus Mariyamma as reported in AIR 2005 SC 2897 and the suit may be dismissed on the basis of such examination.

C) Any other relief, to which the defendants are entitled, may kindly be granted in their favour. ”

4. Learned advocate appearing for the applicants Mr. Anirudha A. Valsangkar submits that Regular Civil Suit No. 162 of 2012 instituted by respondents No. 1 (deceased) and 2, is a piece of vexatious litigation. He contends that since Regular Civil Suit No. 432 of 2000 had been restored, as such, decree of injunction therein had

ceased to be in force rendering in the process, suit unmaintainable. Application – Exhibit – 49 by applicants in this respect, was rejected by the court and civil revision application bearing No. 261 of 2012 had been moved before this court. While declining request under the civil revision application, this court had given liberty to the applicants to place on record other grounds and agitate their grievance and take recourse to provisions of Civil Procedure Code by filing appropriate application. Accordingly, application Exhibit-61 had been moved pointing out suppression of that, attempt by predecessor of plaintiffs – respondents No. 1 and 2 – Laxman Madne to secure injunction under Regular Civil Suit No. 64 of 1990 had failed and appeal therefrom had been abandoned and was dismissed in default. The application has referred to suppression by plaintiffs about Regular Civil Suit No. 640 of 2000 seeking declaration that decree of partition in Special Civil Suit No. 13 of 1986 being not binding on them, having been dismissed. Present suit, accordingly stands barred by principle of *res judicata* and have referred to that under application Exhibit-61 that an application would be moved to treat and decide issue of bar of *res judicata* as a preliminary issue.

5. He contends that dismissal of earlier suits, namely, Regular Civil Suit No. 64 of 1990 and Regular Civil Suit No. 640 of 2000 and decree in Regular Civil Suit No. 125 of 1990 running against plaintiffs

are suppressed and its effect would be required to be considered by subjecting plaintiffs to examination as contemplated under Order X of the Civil Procedure Code, relying on a judgment in the case of “*N. V. Shrinivas urthy V/s Mariyamma*” reported in *AIR 2005 SC 2897* .

6. All aforesaid aspects, according to learned advocate have not been properly appreciated and trial court has got swayed away by rejection of Civil Revision Application No. 261 of 2012 by this court preferred against order of trial judge on application Exhibit-49. He goes on to contend that decision in civil revision application No. 261 of 2012 had been rendered under different situation and the court had let an opening to the applicants to file appropriate proceedings. All these aspects, according to learned advocate, have not been properly considered by learned judge of the trial court.

7. He contends that earlier suit filed either by predecessor of plaintiffs or for that matter by plaintiffs against present applicants or their predecessors have failed. According to him, present suit is absolutely a vexatious litigation and defendants are unnecessarily required to face the same. He further contends that since Regular Civil Suit No. 432 of 2000 has been restored and injunction decree thereunder being not in force, the very cause of the suit looking at the plaint pales into insignificance.

8. In the estimate of learned advocate Mr. Valsangkar in the circumstances, the situation is covered by clause (a) of Rule 11 of Order X of the Civil Procedure Code. He submits that the relief of the nature prayed for in the present suit would hardly be possible, having regard to aforesaid situation and provisions of section 41 of the Specific Relief Act. He submits that the plaint particularly refers to past litigations including the ones, namely, Regular Civil Suits No. 64 of 1990, 640 of 2000 and 125 of 1990 and Special Civil Suit No. 13 of 1986. He submits that situation comes close to that suit incurs bar, pursuant to clause (d) of Rule 11 of Order VII of the Civil Procedure Code. According to him, circumstances obligate that Exhibit - 61 be allowed and its refusal is unwarranted. He, therefore, urges to consider the application.

9. Mrs. Raut, learned A.G.P. appearing for defendants no. 1 and 2 supports the contention of the petitioners. In addition to the contentions on behalf of the petitioners, she submits that in any case, the suit is not maintainable against defendants no.1 and 2. Learned A.G.P. submits that she subscribes to the arguments on behalf of the petitioners, save and except the disputed questions of facts like that there has been final disposal of regular civil suit no. 432 of 2000.

10. Countering aforesaid submissions, learned counsel Mr. Jadhavar appearing for the respondents – plaintiffs contends that the application exhibit – 61 at the instance of defendant no.3, is not at all sustainable. He submits that on earlier round, for similar reasons, their such application had already been dismissed. This second round, as would occur from the submissions of the petitioners, is with reference to *res judicata*. He thus contends that this is second application, and, second round for similar reason, is not at all maintainable.

11. He goes on to submit that while application pursuant to order VII, rule 11, is to be considered, what is *germane*, is the plaint, and, the court is not supposed to go beyond the contents of the plaint. He submits that the plaint specifically points out that suit no. 432 of 2000 has been decreed. Going by the plaint averments, according to him, it has to be considered that the suit is not instituted only with reference to regular civil suit no. 432 of 2000 but there are several other causes which have been referred to and contained in the plaint, particularly, also to the execution proceeding from a different litigation impinging upon possession and rights of the plaintiffs.

12. He contends that although it is being submitted on behalf

of the petitioners, the circumstances raise a barrier for consideration of the suit, yet, the applicants have not been able to point out any absolute bar incurred by the circumstances for prosecution of the suit.

13. He submits that under the circumstances, the order passed by the trial court impugned in the civil revision application, is not liable to be found fault with. According to him, the reason given may not specifically refer to the argument as advanced in the revision about disposal of regular civil suit no. 432 of 2000, yet, the suit is absolutely not liable to be thrown out pursuant to order VII, rule 11, particularly, clauses (a) and (d) therein.

14. Learned counsel Mr. Valsangkar, during the course of his submissions purports to cite and rely on quite a few judgments of the supreme court.

15. To stress on that if subsequent event makes a proceeding infructuous, it would be duty of the court to take such an action, as would be necessary in the interest of justice including disposal of infructuous litigation. For said purpose, he refers to judgment of supreme court in the case of *Shipping Corporation of India Ltd. Vs. Machado Brothers and others* reported in *AIR 2004 S.C. 2093*, head note (D) of the

citation reading, thus,

“ (D) Civil P.C. (5 of 1908), O.7 R.11 – Subsequent events – Rendering suit infructuous – Can be brought to notice of Court qua application under S. 151 – Court can dismiss the suit after making necessary enquiry into facts and circumstances.

Evidence Act (1 of 1892), S. 57 -

By the subsequent event if the original proceeding has become infructuous, ex debito justitiae it will be the duty of the Court to take such action as is necessary in the interest of justice which includes disposing of infructuous litigation. For said purpose it will be open to the parties concerned to make an application under S. 151 of CPC to bring to the notice of the Court the facts and circumstances which have made the pending litigation infructuous. Of course, when such application is made, the Court will enquire into the alleged facts and circumstances to find out whether the pending litigation has in fact become infructuous or not. (Para 25) ”

Head note itself refers to that it is for a party to make an application pursuant to section 151 of code of civil procedure to bring to the notice of the court the facts and circumstances rendering the matter infructuous.

16. He cites 2005 DGLS(SC) 488 – the case of *N.V. Srinivasa Murthy Vs. Mariyamma (Dead) By proposed Lrs.*, in order to lay stress on that order X may have to be invoked having regard to the situation in the present matter.

17. He refers to and relies on 2007 AIR SCW 3456 *Hardesh Ores Pvt. Ltd. V. M/s. Hede and Company*. For, according to him, that with restoration of regular civil suit no. 432 of 2000 the cause of action does not subsist, and, as such, the plaint was liable to be rejected. He refers to head note (C) from the same reading, thus,

“ (C) Civil P.C. (5 of 1908), O.7 R.11 – Rejection of plaint – Absence of cause of action – Conclusion as to - To be drawn from totality of averments made in plaint.

Whether a plaint discloses a cause of action is essentially a question of fact, but whether it does or does not must be found from reading the plaint itself. For the said purpose the averments made in the plaint in their entirety must be held to be correct. The test is whether the averments made in the plaint if taken to be correct in their entirety a decree would be passed. The averments made in the plaint as a whole have to be seen to find out whether Cl. (d) of R.11 of O. 7 is applicable. It is not permissible to cull out a sentence or a passage and to read it out of the context in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction of words or change of its apparent grammatical sense. (Para 21) ”

18. He also refers to and relies on MANU/SC/0224/2014 Equivalent Citation AIR 2014 SC 1931 – the case of *Soumik Sil Vs. Subhas Chandra Sil*. He draws attention to paragraphs no.8, 9, 10 and 12 from the same, in order to support his contentions. That viewed

from the facts and circumstances, and, the relief claimed under the plaint, according to him, it may emerge that no cause of action subsists, and, thus, the plaint would be liable to be rejected.

19. Perusal of the plaint indicates that the plaintiff makes reference to several litigations in the past and also to regular civil suit no. 432 of 2000 having been decreed. As also to that execution of decree wherein plaintiffs had not been party, impinging upon rights and possession of the plaintiffs, and, the relief is claimed, which according to the plaintiffs, it appears, would secure their rights and possession.

20. Perusal of the order shows that court has considered that there had been many litigations between the parties. Court has considered that so far as setting aside of decree in Regular Civil Suit No. 432 of 2000 is concerned, same had already been considered while considering application Exhibit-49 and the decision thereon had been confirmed by high court. Trial court has further considered that the plaintiffs have referred to that Regular Civil Suit No. 64 of 1990 and Regular Civil Suit No. 640 of 2000. Learned judge has further referred to section 41 of the Specific Relief Act and contention of the applicants that plaintiff is not entitled to such injunction, therefore, there is bar under law. Yet the court has considered that suit is for

simplicitor injunction against defendants. The plaint refers to various litigations between the parties.

21. Plaint in Regular Civil Suit No. 162 of 2012 refers to that suit land admeasured about 7 acre, 3 *guntha* of survey No. 110 had been under ownership and cultivation of husband of plaintiff No. 1 and to that father in law of plaintiff No. 2 and that revenue record bears defendant No. 3 had no right to the same. It is averred, in collusion with defendants No. 1 and 2 – revenue authorities had been trying to meddle with and interfere with plaintiffs' rights whereas, revenue record is in favour of plaintiffs and their predecessors. Plaint refers to dismissal of Regular Civil Suit No. 64 of 1990 which was in respect of 8 acre, 21 *guntha* as well as failure of appeal therefrom.

22. Trial court has observed that the plaint also refers to the previous litigations among parties and further to that notices are being issued in the execution proceedings in respect of a decree which according to plaintiffs is decree in Special Civil Suit No. 13 of 1986. Plaintiffs in the plaint have referred to that plaintiffs husband and father in law respectively or the plaintiffs were not parties to Special Civil Suit No. 13 of 1986 and further that notices of execution in respect of said decree are not being issued to judgment debtors in that suit but only to the plaintiffs. It further appears that the cause

has also been referred to notices issued around 2009 and 2012 and that there has been misuse of power by the authorities.

23. In the circumstances, although the arguments on behalf of the petitioners appear to be quite persuasive, yet, going by the prevailing position of law, it would be difficult to consider that the plaint at this stage, can be said to be liable to be rejected. Having regard to the contents of the plaint, which refers to several events and occurrences claiming them to be the causes of action in addition to suit no. 432 of 2000. Therefore, the other contentions on behalf of the petitioners about several litigations having filed against defendant no.3, would cause damage to the institution of suit, would be a matter which will have to be decided with reference to facts, circumstances and evidence, and, as such, it cannot be determined at this stage summarily that facts and circumstances would create a barrier for prosecution of the suit.

24. The ultimate decision as appearing under the impugned order does not appear liable to be faulted with, as contended on behalf of the respondents no.1 to 3.

25. Perusal of the impugned order shows that although the application exhibit - 61 refers to order X, yet, the observations under

the impugned order do not reflect upon consideration of said relief claimed under the application. Since the impugned order does not reflect upon the request under exhibit 61 about application of order X, it would be open for the petitioners, if they are so advised, to take up appropriate application in respect of the same, this order would not be an impediment for the same.

26. The application thus is not being entertained, and, is rejected, however, one will have to consider that this rejection would not foreclose recourse to other remedial measures as would be deemed proper.

27. It is further being made clear that the observations in this order have efficacy only to the rejection of this civil revision application, and, not further. The observations in this order shall not influence the decision making in any other proceeding.

28. Rule stands discharged.

[SUNIL P. DESHMUKH]
JUDGE

arp/