

IN THE HIGH COURT OF BOMBAY AT GOA
CIVIL REVISION APPLICATION NO.16 OF 2018

1. Mr. Wilson Pereira Carvalho,
son of late Mr. Pedro Antonio Pereira Carvalho,
66 years old, retired,
and his wife,
2. Mrs. Clotides Ama Roshana de Boa Vida
Mascarenhas,
wife of Mr. Wilson Pereira Carvalho,
60 years old, housewife,
Both resident of H.No.3,
Binwaddo, Betalbatim,
Salcete, Goa. ... Petitioners

V e r s u s

1. Mr. Nicolau Fernandes
Son of late Mr. Pedro Fernandes,
58 years old, electrician, and his
wife,
2. Mrs. Felicia Vaz e Fernandes,
wife of Mr. Nicolau Fernandes,
46 years old, housewife,
Both resident of H.No.27,
Binwaddo, Betalbatim,
Salcete, Goa. ... Respondents

Shri Jose Serrao, Shri V. Gurav and Ms. Dina Rodrigues,
Advocates for the Petitioner.

Shri John A. Lobo, Advocate for the Respondents.

Coram:- NUTAN D. SARDESSAI, J.

Reserved for Judgment on : 7 September 2018

Judgment Pronounced on : 21 September 2018

JUDGMENT

1. The petitioners who are the defendants in the suit instituted by the respondents are challenging in revision under Section 115 of the Code of Civil Procedure 1908, the order dated 19.03.2018 passed by the learned Civil Judge Junior Division, Margao pursuant to which she dismissed the application for the rejection of the plaint with no order as to costs. The parties would be referred to as the applicants and the respondents for brevity's sake hereinafter.

2. Heard Shri J. Serrao, learned Advocate appearing for the applicants who submitted that the applicants had originally filed a suit simpliciter for declaration against the respondents bearing RCS No.246/2010 seeking the relief of declaration and for deletion of the name of the mother of the respondent no.1 from the Record of Rights Form I and XIV pertaining to the property surveyed under no.169/15 of Village Betalbatim. The respondents were duly served with the notice in the said proceedings who appeared thereafter on 27.04.2010 i.e. the returnable date and sought for time to file their written statement in defence. They sought time again on the next date of hearing and ultimately for their non-participation, the suit was ordered to proceed exparte on 13.07.2010. Thereafter, the respondents appeared in person on 09.08.2010 and filed an application for setting aside the exparte order with

leave to file the written statement in defence. On the next scheduled date i.e. 16.08.2010, the respondents were duly represented by an Advocate who filed the written statement in defence pursuant to which the claim of the applicants was admitted.

3. It was his further contention that the respondents remained present before the Court on 09.09.2010 when final arguments were heard and the matter was listed for judgment on 05.10.2010 which ultimately came to be delivered on 25.11.2010 decreeing the suit in their favour. The respondents filed the Regular Civil Suit No.115/2017 for declaration and other reliefs setting out various grounds to point out how a fraud was played on them and decree snatched by the applicants entitled them to the relief of declaration to set aside the judgment and decree dated 25.11.2010 and for other consequential reliefs including injunction. The applicants herein had moved an application for the rejection of the plaint under Order VII Rule 11(a) and (d) of the Civil Procedure Code which came to be rejected pursuant to the impugned order dated 19.03.2018 giving rise to the present revision application. The suit as filed by the respondents neither disclosed a cause of action and besides was clearly barred by the law of limitation. The Trial Court

had therefore to reject the plaint which had failed to do while dismissing the application for rejection of the plaint. He placed reliance in the case of **Shri Jahangir @Jawahar & anr. vs. Smt. Maureen de Sequeira**[2018 (1) ALL MR 330], **P. V. Guru Raj Reddy & Ors. vs. P. Neeradha Reddy & Ors.** [(2015) 8 SCC 331], **Nagindas Ramdas vs. Dalpatram Ichharam Alias Brijram & Ors.**[(1974) 2 SCJ 21] and **Uma Nath Pandey & Ors. vs. State of U.P. & anr.** [(2009) 12 SCC 40]. The impugned order had therefore to be quashed and set aside and the plaint rejected.

4. Shri J. A. Lobo, learned Advocate for the respondents came to be heard on behalf of the respondents who submitted that the respondents were kept in the dark on the contents of the written statement and they were merely asked to remain present in the court and an Advocate arranged for them by the applicants who had filed the written statement without explaining its contents to them. The respondents had clearly set out in their application for the condonation of delay that they had knowledge of the judgment and decree dated 25.11.2010 only on 19.06.2014 upon receipt of the notice of mutation and thereupon they had applied for the certified copies of the judgment and decree which came to their knowledge only on that date. The suit accordingly came to be

filed by them for the relief of declaration and consequential reliefs. They had moved an application for setting aside the exparte order initially when the suit was filed by the applicants. The suit as filed by them for the stated reliefs was filed within the period of three years from the date of knowledge of the judgment and decree dated 25.11.2010 which came to their knowledge only on 19.06.2014 and the suit was filed in the year 2017. In any event, limitation was a mixed question of law and fact and therefore there was no basis to dismiss the suit. It was also his contention that the applicants in collusion with the lawyer had played a fraud on the respondents taking advantage of their illiteracy and the trust which they reposed on the applicant. On his part, he placed reliance in the case of **Ram Chandra Singh vs. Savitri Devi & Ors.**[(2003) 8 SCC 319] and clearly distinguished the judgments in Jahangir (supra) and Raj Reddy (supra) relied upon on behalf of the applicants and submitted that the impugned order did not warrant any interference in revision.

5. i have heard Shri J. Serrao, learned Advocate appearing for the applicants and Shri John A. Lobo, learned Advocate appearing for the respondents, perused Section 115 of the Civil Procedure Code, the various judgments relied upon by

them and in the light thereof, decide the application appropriately.

6. Section 115 of the Civil Procedure Code deals with the power of revision vested in this Court and reads thus :

“(1) The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears-

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit:

Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings.”

7. Order VII Rule 11 of the Civil Procedure Code deals with the rejection of the plaint and provides that the plaint shall be rejected in the following cases:

- (a) where it does not disclose a cause of action;
- (b) ...
- (c) ...
- (d) where the suit appears from the statement in the plaint to be barred by any law;

It is therefore to be seen in the light of these provisions and the judgments relied upon by both the learned Advocates whether the learned Trial Judge exercised jurisdiction not vested in it by law or acted in exercise of its jurisdiction illegally or with material irregularity as to invoke the jurisdiction of this Court under Section 115 of the Civil Procedure Code and whether any of the predicates of Order VII Rule 11(a) and (d) of Civil Procedure Code were fulfilled and despite which the learned Trial Judge committed an error in holding otherwise.

8. Admittedly, the applicants had filed the suit simpliciter for declaration against the respondents seeking a declaration that they were the exclusive owners of the suit property bearing survey no.169/15 of Village Betalbatim, that the

mother of the respondent no.1 had no right or title to it and that her name was liable to be deleted from the Survey Records Form I and XIV. Admittedly, the respondents were served with the summons and thereupon had appeared in Court on 27.04.2010 being the returnable date and sought time as borne out from the roznama. Thereafter, the matter was adjourned and on 13.07.2010, the learned Trial Judge was pleased to order the proceedings exparte against the defendants on their non-appearance as on 13.07.2010. It is equally a matter of record that the respondents had appeared before the Trial Court on 09.08.2010 in the suit filed by the applicants and had filed an application for setting aside the exparte order with leave to file their written statement which was not objected by the applicants and allowed by the Trial Court. The records equally bear out that the respondents had filed their written statement on 16.08.2010 through an Advocate and as they had admitted the claim, the learned Trial Judge listed the matter for hearing on 09.09.2010 when the matter was adjourned for judgment. No judgment was pronounced on three successive dates and ultimately the judgment came to be pronounced on 25.11.2010 when the respondents were not present and also on the earlier three occasions.

9. It is not particularly in dispute that the respondents had filed an application for the condonation of delay alongwith the appeal challenging the said judgment dated 25.11.2010 and in which the learned District Judge by her order dated 21.07.2017 allowed the application for the condonation of delay accepting the grounds urged on behalf of the respondents that they had knowledge of the judgment and decree dated 25.11.2010 only on 19.06.2014 and in that view of the matter, allowed the application and condoned the delay in filing the appeal with a direction to register the appeal. It is another matter that the respondents on legal advise thereafter filed the suit bearing RCS No.115/2017 for the relief of declaration and permanent injunction against the applicants herein setting out a case how they had acquired right to the house in the suit property bearing survey no.169/15, the manner in which the applicants had arranged for their appearance before the Court in the suit filed by them, arranged a Lawyer for them and prevailed upon them to believe that all the steps taken by the applicants were primarily aimed at in assisting them in seeking the correction of the survey entries and record their name as mundkars. In short, it was their case that the applicants herein had played a fraud on them and procured the judgment and decree dated 25.11.2010 which they were entitled to set aside by seeking

the assistance of the Court in the nature of relief of declaration and consequential relief of injunction.

10. The applicants herein moved an application for the rejection of the plaint on the premise that it did not disclose a cause of action and besides it was barred by the law of limitation under order VII Rule 11 of the Civil Procedure Code. The learned Trial Judge on hearing the learned Advocate for the parties clearly considered the pleadings in the plaint filed by the respondents and found on a reading thereof that the respondents had clearly spelt out a cause of action, that the admission of the respondents was obtained by the exercise of fraud and further that the burden of proving the fraud lay upon the respondents. The learned Trial Judge for that matter on a consideration of the various judgments relied upon on behalf of the parties also held that the bar of limitation was not attracted to the case of the respondents as urged on behalf of the applicants apart from being a mixed question of law and fact and ultimately rejected the application moved by the applicants for rejection of the plaint and rightly so.

11. In **Jahangir** (supra), a learned Single Judge (C. V. Bhadang,J) of this Court held at para 14 that it was well settled that for the purposes of the determination of the

question as to whether, the plaint is liable to be rejected under Order VII, Rule 11(d) of CPC, the Court has to confine itself to the allegations in the plaint and in the documents produced and relied upon by the plaintiff. It was further observed that there cannot be any manner of dispute that limitation is a mixed question of law and fact. However, that does not mean that in every case it is a question involving disputed facts. In other words, there may be cases where, the facts on the basis of which, the issue of limitation has to be decided are either admitted, or are undisputed or are clearly borne out of record. The fact that the plaint in the given case can be rejected as being barred by limitation, would itself indicate that there may be a case where, the issue of limitation may not necessarily depend on facts, which are disputed, requiring trial, else otherwise, the plaint could never be rejected as being barred by limitation. Thus, the submission that limitation being a mixed question of law and fact, the plaint cannot be rejected, to my mind could not be accepted.

This judgment is clearly distinguishable in the facts of the case unlike the present case where even the learned District Judge had found favour with the case of the respondents that they had acquired knowledge of the judgment and decree dated 25.11.2010 only on 19.06.2014

after the receipt of the notice of mutation and acquiring the copies of the judgment and decree on 19.06.2014.

12. In **Guru Raj Reddy** (supra), it was held at para 5 that rejection of the plaint under Order VII rule 11 of the CPC is a drastic power conferred in the court to terminate a civil action at the threshold. The conditions precedent to the exercise of power under Order VII rule 11, therefore, are stringent and have been consistently held to be so by the Court. It is the averments in the plaint that have to be read as a whole to find out whether it discloses a cause of action or whether the suit is barred under any law. At the stage of exercise of the power under Order VII rule 11, the stand of the defendants in the written statement or in the application for rejection of the plaint is wholly immaterial. It is only if the averments in the plaint ex facie do not disclose a cause of action or on a reading thereof the suit appears to be barred under any law the plaint can be rejected. In all other situations, the claims will have to be adjudicated in the course of the trial.

This judgment would rather support the case of the respondents unlike the contention of Shri J. Serrao to the contrary. Even otherwise, it is settled law that it is the pleadings in the plaint alone which will have to be looked into

for its rejection and not the defence which might be taken up on behalf of the defending party.

13. In **Nagindas** (supra), the Apex Court held that admissions if true and clear are by far the best proof of the facts admitted. Admissions in pleadings or judicial admissions, admissible under Section 58 of the Evidence Act, made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admissions. There cannot be any dispute with these observations of the Hon'ble Apex Court but the fact of the matter is whether there were admissions true and clear are matters which would fall for determination before the Trial Court which is seized of the suit filed by the respondents viz a viz the written statements filed by the respondents in the applicant's suit or whether there is a grain of truth in their case that these applications were wrangled out of them by the exercise of fraud as is their specific case in the suit maintained by them.

14. **Umanath** (supra) held at para 8 that the adherence to principles of natural justice as recognized by all civilized States is of supreme importance when a quasi-judicial body embarks on determining disputes between the parties, or any administrative action involving civil consequences is in issue.

These principles are well settled. The first and foremost principle is what is commonly known as audi alteram partem rule. It says that no one should be condemned unheard. Notice is the first limb of this principle. It must be precise and unambiguous. It should appraise the party determinatively of the case he has to meet. Time given for the purpose should be adequate so as to enable him to make his representation. In the absence of a notice of the kind and such reasonable opportunity, the order passed becomes wholly vitiated. Thus, it is but essential that a party should be put on notice of the case before any adverse order is passed against him. This is one of the most important principles of natural justice. It is after all an approved rule of fair play.

15. Ramchandra (supra), held at paras 33, 37 and 38 as below :

33. Once it is held that a judgment and decree has been obtained by practising fraud on the court it is trite that the principles of res-judicata shall not apply. The High Court, therefore, in our opinion committed a serious error in referring to the earlier orders passed by it so as to shut the doors of justice on the face of appellant for all time to come. We, therefore, are of the opinion that the

impugned judgment dated 10.12.1998 cannot be sustained.

34. ...

35. ...

36. ...

37. It will bear repetition to state that any order obtained by practising fraud on court is also non-est in the eyes of law.

38. It is true that pursuant to or in furtherance of the consent order, the respondents had deposited the amount and State Bank of India has appropriated the same. The legal issues as regards the effect of commission of fraud on court vis a vis the conduct of the parties are still at large. The High Court was, therefore, required to adjust the equities between the parties. The Bank cannot also unjustly enrich itself insofar as, while enforcing a preliminary decree of mortgage, it also cannot take recourse to recover the decretal amount from the judgment-debtors at the expense of the auction-purchaser."

16. On a consideration of the judgments and that the period of limitation for maintaining a suit for declaration is three years in a case like the present in terms of Article 59 of the Limitation Act 1963, it cannot be at all heard on behalf of the applicants that the suit as filed was barred by the law of limitation. Even assuming it is so, it would be a mixed question of law and fact which the learned Trial Court will have to decide on a full dress trial and it is not as if such a ground is available to the applicants in the factual matrix to seek the rejection of the plaint on the bar of limitation. It is also another matter that the ground for want of cause of action is also not available to the applicants in the factual matrix. No illegality is writ large in the order passed by the learned Trial Court nor does the order suffer from the vice of illegality or an exercise of jurisdiction not vested in the Court or in excess of that vested in the Court as to invoke the jurisdiction of this Court under Section 115 of the Civil Procedure Code.

17. In view thereof, i do not find any merit in the application which is hereby dismissed with no order as to costs.

NUTAN D. SARDESSAI J.

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