

IN THE HIGH COURT OF BOMBAY AT GOA

CIVIL REVISION APPLICATION NO. 24 OF 2018

- 1) Madhav Atmaram Sahakari,
s/o. Late Atmaram Sahakari,
Major of age, married,
H.No.47/1. Mestawada,
Curti, Ponda, Goa.
- 2) Malati Madhav Sahakari,
w/o. Madhav A.Sahakari,
major of age, married,
H.No.47/1. Mestawada,
Curti, Ponda, Goa.
- 3) Bala Atmaram Sahakari,
s/o. Late Atmaram Shakari
major of age, married,
H.No.50, Mestawada,
Curti, Ponda, goa.
- 4) Amita Bala Sahakari,
major of age, married,
H.No.47/1, Mestawada,
Curti, Ponda, Goa.
- 5) Supriya S. Kotibhaskar,
d/o. Late Atmaram Sahakari,
W/o. Shrikrishna Kotibhaskar,
major of age, married,
H.NO. 58, Mestawada,
Ponda, Goa.
- 6) Shrikrishna V. Kotibhaskar,
s/o. Vasant Kotibhaskar,
major of age, married,
H.NO. 58, Mestawada,
Ponda, Goa.

- 7) Ashok Atmaram Sahakari,
s/o. Late Atmaram Sahakari,
major of age, bachelor,
H.No.47/1, Mestawada,
Curti, Ponda, Goa.
- 8) Krishna Atmaram Sahakari,
s/o. Late Atmaram Sahakari,
major of age, married,
H.No.48, Mestawada,
Curti, Ponda, Goa.
- 9) Smita Krishna Sahakari,
w/o Krishna Sahakari,
major of age, married,
H.No.48, Mestawada,
Curti, Ponda, Goa.

... Petitioners

Versus

- 1) Sumitra Govind Panshikar,
w/o. Late Govind Panshikar,
major of age, housewife,
House No.46, Mestawada,
Curti, Ponda, Goa.
- 2) Mahesh Govind Panshikar,
w/o. Late Govind Panshikar,
major of age, housewife,
House No.46, Mestawada,
Curti, Ponda, Goa.
- 3) Mridula Mahesh Panshikar,
w/o. Mahesh G. Panshikar,
major of age, housewife,
House No.46, Mestawada,
Curti, Ponda, Goa.
- 4) Umesh Govind Panshikar,

w/o. Late Govind Panshikar,
major of age, Occ.: service,
House No.46, Mestawada,
Curti, Ponda, Goa.

- 5) Swara Umesh Panshikar,
w/o. Umesh Govind Panshikar,
w/o. Late Govind Panshikar,
major of age, Occ.: service,
House No.46, Mestawada,
Curti, Ponda, Goa. ... Respondents

Shri A.F. Diniz with Shri Ryan Menezes, Advocate for the
petitioners.

Shri J. Godinho, Advocate for the respondents.

CORAM: NUTAN D. SARDESSAI, JJ.

RESERVED ON: 17th OCTOBER, 2018.
PRONOUNCED 29th OCTOBER, 2018.
ON :

JUDGMENT:

1. Heard forthwith with the consent of the learned
Advocate for the parties.
2. Rule.
3. Shri J. Godinho, learned Advocate waives service of
notice on behalf of the respondents.
4. The petitioners who are the original defendants

before the Trial Court have challenged in revision under Section 115 of the Code of Civil Procedure (CPC, for short) the order rejecting an application under Order VII Rule 11 CPC.

5. Briefly stated it was the case of the petitioners that a suit was earlier filed by the ancestors of the respondent bearing no.82/97/B which was dismissed for default on 23/10/2003. No steps were taken for the restoration of the suit and the order attained finality in the course of time. Another suit was filed in respect of the same suit property though in 2018 in which the applicant moved the application for the rejection of the plaint in view of the bar under Order IX Rule 9 CPC. The second suit so filed by the legal heirs was therefore hit by Order IX Rule 9 CPC and was therefore not maintainable.

6. Shri A.F. Diniz, learned Advocate for the petitioners set forth his case in that regard and submitted that the reliefs sought in the first suit of 1997 and in the subsequent suit were those for declaration, injunction and

correction of the survey records. The second suit was explicitly barred under Order IX Rule 9 CPC. There was no basis in the order passed by the trial Court and therefore the revision application had to be allowed and the impugned order had to be quashed and set aside rejecting the plaint filed by the respondents. He placed reliance in **Dattu Hari Mali v/s. Peel Alli Darga Masjid** [2005(2) Bom.C.R. 442], **Darachand Harakchand Oswal and others v/s. Suresh Waman Karmarkar and another** [2003(2) Bom.C.R. 605], **Fortis Hospitals Ltd. and others v/s. Antonieta Ribeiro e Souza and others** [2017(1) Bom.C.R. 436] and **Suraj Rattan Thirani and others v/s. Azamabad Tea Co. Ltd. and others** [AIR 1965 SC 295].

7. Shri J. Godinho, learned Advocate for the respondents referred to the impugned order and submitted that the application for the rejection of the plaint was not at all tenable. It was his contention that the provisions of Order IX Rule 9 CPC would not at all come into application. On his part he placed a copy of the

written statement filed on record and relied in Alka Gupta v/s. Narendra Kumar Gupta [(2010) 10 SCC 141] while wrapping up his arguments that there were different causes of action in both the suits and therefore the application had to be dismissed.

8. i would consider their submissions, the judgments relied upon and in the light thereof proceed to decide the application accordingly.

9. The predecessor in title of the respondents Govind had filed a Civil Suit No.82 of 1997 for declaration, permanent injunction and consequential reliefs claiming that he had purchased the property bearing distinct Matriz and land registration numbers from the father of the defendants therein i.e. the petitioners herein by a Deed of Sale dated 12/11/1964, on account of the cordial relations with him he had kept the Sale Deed in the custody of the petitioners' father and constructed a house therein in 1975. He was looking after the suit property from the time of its purchase as well as that of the father of the

petitioners till the year 1984 and it is only after obtaining the survey records Form I and XIV he was shocked to know that the suit property had been included in the property of the petitioner's father and collectively surveyed under Nos. 76/0 and 77/0. He had sought for carrying out the mutation but it could not be carried out and he was constrained to move an application before the Deputy Collector to carry out the mutation. The petitioners' father as the defendant on notice had taken a plea that they were the owners in possession of the entire property surveyed under Nos. 76 and 77 of the Village Curti and denied the execution of the Sale Deed. In those circumstances, the respondents' predecessor Govind sought for the relief of declaration that he was the owner of the said property, to delete the name of the petitioners' father from the survey records and to include his name and permanent injunction to restrain them from interfering in the suit property.

10. Admittedly, this suit was dismissed for default on 23/10/2003 and thereafter no steps were taken for its

restoration. The legal representatives of the said Govind filed a suit only in the year 2018 carving a similar case that late Govind had purchased the property by the Sale Deed dated 12/11/1964 bearing distinct matrix and Land Registration number from the father of the petitioners' Atmaram, that Govind had good relations with the petitioners predecessor Atmaram and had constructed a house therein in 1975 by obtaining a loan. The successors of the said Govind also referred to the civil suit filed by Govind being R.C.S. No.82/1997/B for declaration, permanent injunction and other reliefs, that there was a denial of the execution of any Sale Deed by the predecessor of the petitioners' Atmaram in favour of the said Govind and admitting that the said suit had dismissed for default. The legal heirs of the said Govind canvassing a case that there were acts of interference by the petitioners of demolishing the compound wall filed a suit for declaration as owners of the suit property, for injunction and also for correction of the survey records to incorporate their names. In other words, the second

plaint filed by the legal heirs of the said Govind was precisely for the same reliefs as claimed in the suit No.87 of 1997 by their predecessor Govind.

11. The petitioners moved the application under Order VII Rule 11 CPC for rejection of the plaint on the premise that the suit in respect of the same property involving the same parties and/or their successors in interest for the same relief was clearly barred and pressed for the rejection of the plaint. The respondents herein opposed the application on the premise that the same was misconceived, not specifying the clause of Rule 11 Order VII under which the plaint had to be rejected and that the rejection of the plaint by recourse to Order IX Rule 9 CPC was not available to the petitioners.

12. Order VII Rule 11 CPC dealing with the rejection of plaint contemplates the basis on which the plaint is liable for rejection namely a) where it does not disclose a cause of action; (b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the

valuation within a time to be fixed by the Court, fails to do so; (c) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so; (d) where the suit appears from the statement in the plaint to be barred by any law; (e) where it is not filed in duplicate; (f) where the plaintiff fails to comply with the provisions of rule 9.

13. Order IX CPC deals with the appearance of parties and the consequence of non-appearance. Rule 9 in particular provides that a decree against the plaintiff by default bars a fresh suit. Sub- rule 1 reads thus: (1) Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon

such terms as to costs or otherwise as it thinks fit and shall appoint a day for proceeding with suit. Sub-rule (2) reads: No order shall be made under this rule unless notice of the application has been served on the opposite party. In other words, where a suit of the plaintiff has been dismissed for default and such order of dismissal has attained finally without the dismissal being set aside, it bars a fresh suit. Looking to the tenor of the pleadings in the suit No. 82 of 1997 and in that of 2018, it is apparent that the suit subsequently filed though by the legal heirs of the original plaintiff was for the same reliefs relating to the same property and was on the face of the pleadings expressly barred.

14. First and foremost the learned trial Court while dealing with the application under Order VII Rule 11 CPC in his wisdom and apparent overenthusiasm considered Order XI Rule 9 CPC and hastily concluded that though the respondent had mentioned in the plaint that the earlier suit had been mentioned, they had not relied upon the final order passed in the said suit while recording at same

time that the defendants had relied upon the order alongwith their written statement. A perusal of the roznama dated 23/10/2003 recorded by the Trial Court in respect of the RCS No. 82/1997 indicates that the plaintiff and his Advocate were absent when the matter was called out on that date till around 5.00p.m. and that they were absent also on the previous date of hearing and for that reason dismissed the suit for default under Order IX Rule 8 CPC closing the proceedings. Therefore it was not at all in order for the Trial court to record that the final order had not been relied upon and to quote the well settled principle that while deciding an application under Order VII Rule 11 CPC the Court had to restrict itself to only examining the contents of the plaint and documents filed alongwith it. There can be no dispute with this proposition but its appreciation was not in the proper context when such final order had already been produced on record. The learned Judge for that matter on going though the pleadings in the plaint in RCS No. 82 of 1997 and the subsequent suit No.48 of 2018 ought to have held that

the two suits were based on the same cause of action but proceeded to hold otherwise and to conclude that it was not possible for it to reject or dismiss the plaint on the ground of bar contained under Order IX Rule 9 CPC. The learned Judge for that matter without any basis also referred to the bar of the suit under Order II Rule 2 CPC when it was nobody's case that such a bar applied to the subsequent suit filed by the respondents.

15. In **Dattu Hari Mali** (supra), a learned Single Judge of this Court as his Lordship then was held that under Order IX Rule 9 CPC, if the earlier application is dismissed for default, it is not open to a litigant to take out another application for the same relief. Earlier application was filed by respondent under Section 88-B of B.T.A.L. Act which was dismissed for default and that order having attained finality it was not open to maintain a second application for the same relief.

16. In **Darachand Harakchand Oswal** (supra), the learned Single Judge of this Court as his Lordship then

was dealt with a Writ Petition under Article 227 of the Constitution of India taking exception to the judgment and order passed by the IIIrd Additional District Judge, Pune. The petitioners instituted a suit for possession of the suit premises on the ground of default, tenant having secured alternate accommodation of residence and unlawful subletting, being Civil Suit No.797 of 1984. That suit was decreed by the trial Court on 28-4-1986 only on the ground of respondents-tenants having secured alternative residential accommodation within the meaning of section 13 (1) (1) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 i.e. the Bombay Rent Act, for short. The respondents carried the matter in appeal but the Appellate Court reversed the decree for possession and instead dismissed the suit.

17. In **Darachand Harakchand Oswal** (supra), the petitioners did not challenge the finding with regard to the other two grounds. In so far as the ground for possession under section 13 (1)(1) is concerned, the Appellate Court has adverted to the fact that the petitioners had filed an

earlier suit being Civil Suit No. 2214 of 1978 on the self same ground on the allegation that the respondents had secured alternative suitable residence at Kasba Peth, Pune but that suit was dismissed for default and which order attained finality on rejection of the application for restoration filed by the petitioners. The Appellate Court in the circumstances found that even in the present suit the ground under section 13(1)(1) was founded on the acquisition of the same premises by the respondents at Kasba Peth. The Appellate Court, therefore, held that since the subsequent suit was founded on same cause of action it was barred in view of the provisions of Order IX, Rule 9 of the Civil Procedure Code and the appeal preferred by the respondents was allowed and the suit filed by the petitioners was dismissed in its entirety which came to be challenged in the Writ Petition.

18. In **Darachand Harakchand Oswal** (supra), the sole question that arose for consideration is whether the second suit filed by the petitioners for possession on the ground of tenant having acquired alternative residential

premises at Kasba Peth, was barred? According to the petitioners, such a suit was not barred because the cause of action was a continuing one. Besides it was contended that the legislative intent of enacting section 13 (1) (I) of the Act should be kept in mind while deciding this issue. It is, therefore, although the earlier suit was dismissed for default and which order had become final, that by itself, would not preclude the filing of a subsequent suit founded on the same cause of action when it is possible to take a view that the cause of action was a continuing one. It was not in dispute that even in the previous suit the petitioners had alleged that the tenant has secured alternative residential premises at Kasba Peth, Pune and that suit was dismissed for default and which order had become final. Even in the present suit the ground under section 13 (1) (1) was founded on acquisition of self same premises at Kasba Peth, Pune by the tenant. Accordingly, the present suit was founded on the same cause of action. In that backdrop the Appellate Court held that the suit is barred by the provisions under Order IX, Rule 9 of the Civil

Procedure Code.

19. In **Darachand Harakchand Oswal** (supra), the learned Judge was of the view that the Appellate Court was right in dismissing the present suit being barred by the provisions of Order IX, Rule 9 of C.P.C. There is no substance in the plea that in view of the legislative intent in enacting the provision such as section 13 (1)(1) of the Act, the cause of action being continuing, would enable the plaintiff-landlord to institute another suit in succession on the same allegations even when his earlier suit is dismissed for default. This argument clearly overlooks that if such a plea was to be accepted then that logic would also apply to a situation where the landlord had unsuccessfully invoked the ground under section 13 (1) (1) in the earlier suit on the allegation of acquisition of a premises by the tenant and that issue were to be decided against the landlord on merits even then the landlord would file a subsequent suit on the same allegations, principles of res judicata notwithstanding. Then there would be no finality to the adjudication of that ground

which could not be countenanced. On the other hand, the provision such as Order IX Rule 9 of C.P.C. would plainly preclude the plaintiff from filing a fresh suit in respect of the same cause of action, which presupposes that the Court cannot entertain the subsequent suit in respect of the same cause of action. Therefore it was not possible to accept the submission made on behalf of the petitioners so as to permit them to extricate from the rigours of the mandatory provision under Order IX, Rule 9 of C.P.C. and in that view the matter dismissed the petition with costs.

20. Forties Hospitals Limited (supra), challenged the order dated 25/3/2015 passed by the learned District Judge at Panaji in Civil Suit No.38/B, by which the learned District Judge has refused to reject the plaint under Order VII Rule 11 CPC. The learned Single Judge of this Court (C.V. Bhadang,J) reiterated that it was well settled that while considering an application under Order VII Rule 11 of C.P.C, the Court has to confine itself to the allegations in the plaint and the defence, if any, is irrelevant and cannot be looked into. At the same time, the Court has to

see whether by a clever drafting an illusion of cause of action is being created as held by the Hon'ble Supreme Court in the case of **Church Of Christ Charitable Trust and Educational Charitable Society vs M/S. Ponniamman Educational Trust** [(2012) 8 SCC 706] where the Supreme Court had noticed its earlier decision in the case of **T. Arivandandam, Petitioner Vs. T. V Satyapal and another, respondents**, [AIR 1977 SC 2421], in which it has held thus in para 5 of the judgment:

“We have not the slightest hesitation in condemning the petitioner for the gross abuse of the process of the court repeatedly and unrepentantly resorted to. From the statement of the facts found in the judgment of the High Court, it is perfectly plain that the suit now, pending before the First Munsif's Court, Bangalore, is a flagrant misuse of the mercies of the law in receiving complaints. The learned Munsif must remember that if on a meaningful-not formal-reading of the complaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, he should exercise his power under Order VII Rule 11

C.P.C. taking care to see that the ground mentioned therein is fulfilled. And, if clever, drafting has created the illusion of a cause of action, nip it in the bud at the first hearing by examining the party searchingly under Order X C.P.C. An activist Judge is the answer to irresponsible law suits. The trial court should insist imperatively on examining the party at the first hearing so that bogus litigation can be shot down at the earliest stage. The Penal Code (Ch. XI) is also resourceful enough to meet such men, and must be triggered against them. In this case, the learned Judge to his cost realized what George Bernard Shaw remarked on the assassination of Mahatma Gandhi "It is dangerous to be too good.

16. It has been further held as under:

It is clear that if the allegations are vexatious and meritless and not disclosing a clear right or material(s) to sue, it is the duty of the trial Judge to exercise his power under Order 7 Rule 11. If clever drafting has created the illusion of a cause of action as observed by Krishna Iyer, J, in the above referred decision, it should be nipped in the bud at the first hearing by examining the parties under Order X of the

Code.(Emphasis supplied)

17. It can thus be seen that an illusion of cause of action by camouflaging the fact has to be guarded against and the Court would be perfectly within its powers to go through the plaint, and on a meaningful and not formal, reading of the plaint, to find out, whether there is a right to sue or whether there is an illusion of a cause of action created. In the later case, the Court is duty bound to nip the suit in bud in exercise of its jurisdiction under Order 7 Rule 11 of CPC."

21. In **Suraj Rattan Thirani** (supra), a three Judge Bench of the Hon'ble Apex Court held at paragraph 29 that a cause of action is a bundle of facts on the basis of which relief is claimed. If in addition to the facts alleged in the first suit, further facts are alleged and relief sought on their basis also, and he explained the additional facts to be the allegations about possession and dispossession in October, 1934, then the position in law was that the entire complexion of the suit is changed with the result that the words of Order IX Rule 9 in respect of the same cause of

action are not satisfied and the plaintiff is entitled to reagitate the entire cause of action in the second suit. It was further held at paragraph 31 that the learned Judge thereafter referred to an earlier decision of the Privy Council in **Soorijomonse Dayee v. Suddanund** [12 Beng LR 304 at p. 315] and extracted the following passage as laying down the approach to the question: "Their Lordships are of opinion that the term 'cause of action' is to be construed with reference rather to the substance than to the form of action...." Applying this test we consider that the essential bundle of facts on which the plaintiffs based their title and their right to relief were identical in the two suits. The property sought to be recovered in the two suits was the same. The title of the persons from whom the plaintiffs claimed title by purchase, was based on the same fact viz.

22. Alka Gupta (supra), held that the bar of a second suit under Order II Rule 2 CPC would not be applicable where the second suit is based on a different and distinct cause of action while restating the object, effect and scope

of Order II Rule 2 CPC. This judgment does not have any applicability to the facts of the present case when it is borne out from the pleadings in the suit of 1997 and subsequent suit No. 48 of 2018 that despite the dismissal of the suit for default having attained finality, the respondents chose to file the second suit against the petitioners for the same reliefs pertaining to the same property though with an illusory cause of action in 2018 claiming the same reliefs as in the first suit. The contentions of Shri Godinho, learned Advocate for the respondents that the impugned order does not call for any interference cannot stand the test of scrutiny. The exercise of jurisdiction by the learned trial Court is patently illegal and which calls for interference in exercise of power of revision of this Court.

23. In view of thereof, i pass the following

O R D E R

1. Rule is made absolute.

2. The revision application is allowed and the impugned order declining to reject the plaint is quashed and set aside.

NUTAN D. SARDESSAI, J.

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