

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**CIVIL APPELLATE JURISDICTION**

**CIVIL REVISION APPLICATION NO.40 OF 2018**

|                                       |   |                 |
|---------------------------------------|---|-----------------|
| 1. Sultan Mubin Khan,                 | ] |                 |
| An Adult Indian Inhabitant of Mumbai, | ] |                 |
| Age : 34 years.                       | ] |                 |
| 2. Mubin Khan,                        | ] |                 |
| An Adult Indian Inhabitant of Mumbai, | ] |                 |
| Age : 39 years.                       | ] |                 |
| Both residing at Room No.8, Rassiwala | ] |                 |
| Chawl, R.S. Nimkar Marg, Chikalpada,  | ] |                 |
| Mumbai – 400 008.                     | ] | .... Applicants |

***Versus***

|                                         |   |                 |
|-----------------------------------------|---|-----------------|
| Vimmi Shaikh, D/of Zahrunisha,          | ] |                 |
| An Adult Indian Inhabitant of Mumbai,   | ] |                 |
| Age : ....., residing at Room No.10/11, | ] |                 |
| Rassiwala Chawl, R.S. Nimkar Marg,      | ] |                 |
| Chikalpada, Mumbai – 400 008.           | ] | .... Respondent |

Mr. Ram Upadhyay, a/w. Mr. Dharmesh Singh, i/by M/s. Law Competere Consultus, for the Applicants.

Mr. Arvind Kumar Chauhan, with Mr. Prasad and Mr. Narpat Singh, for the Respondent.

**CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.**

**DATE : 28<sup>TH</sup> FEBRUARY 2018.**

**ORAL JUDGMENT :**

1. Heard Mr. Upadhyay, learned counsel for the Applicants, and Mr. Chauhan, learned counsel for the Respondent.

2. By this Civil Revision Application, filed under Section 115 of the Civil Procedure Code, 1908, Applicants are challenging the order dated 17<sup>th</sup> June 2017 passed by the Ad-Hoc Judge, City Civil Court, Bombay, thereby dismissing the Notice of Motion No.4557 of 2014 filed by the present Applicants in L.C. Suit No.260 of 2011.

3. The said Notice of Motion was taken out by the Applicants raising the contention that the Suit is not maintainable, it being barred by the principle of *res judicata*, under Section 11 of CPC. It was the contention of the Applicants that, the Respondent herein has filed a Suit for declaration that the Applicants are the rank trespassers in the suit premises and other ancillary reliefs. However, the issue as to '*whether the Applicants are the rank trespassers in the suit premises*', has already been decided in S.C. Suit No.901 of 2010, which was filed by the present Applicants against the Respondent. The 'Decree' passed in S.C. Suit No.901 of 2010 is challenged in the First Appeal and as per the Judgment and Order dated 4<sup>th</sup> December 2012, the Applicants are restrained from causing obstruction to the possession of the Respondent over the suit premises, without following due process of law. Thus, it is submitted that, as the issue, which is agitated in the present Suit, has already been finally decided by the Court of competent jurisdiction in the earlier Suit, the present Suit is squarely barred by the provisions of Section 11 of CPC.

4. The Trial Court has rejected the said Notice of Motion by holding that, the litigating parties in both the proceedings are not the same in a sense that, the earlier Suit was filed by the present Applicants; whereas, the instant Suit is filed by the Respondent. Secondly, it was held that, the reliefs claimed in the former Suit and the pending Suit are not one and same and are not directly or substantially related.

5. While challenging this order of the Trial Court, the submission of learned counsel for the Applicants is that, in the earlier Suit, which was filed by the present Applicants against the Respondent, a specific issue, being Issue No.4, was framed as to *'whether the Defendant proves that the Plaintiff took the possession of the suit premises by force prior to May, 2006 in his absence, when he was abroad'*. After discussing that issue in paragraph Nos.7 to 13, it was held that, the Plaintiff therein has failed to prove that the possession of the Applicants in the suit premises is that of trespassers and, accordingly, the Trial Court has decreed the Suit and granted the relief of injunction to the Respondent, restraining the present Applicants from causing obstruction to his peaceful possession over the suit property, without following due process of law.

6. It is pointed out by learned counsel for the Applicants that, in the present Suit also, the Respondent is claiming again the same relief of

declaration that the Defendants (present Applicants) are the rank trespassers in respect of the suit premises and, therefore, as this issue is already settled and decided by the Court of competent jurisdiction, the second Suit on the same ground cannot be tenable.

7. It is also submitted that the contentions, which were raised in the earlier Suit to allege that the possession of the Applicants in respect of the suit premises is of the rank trespassers, are the same contentions, which are raised in the present Suit also and, in those premises, the present Suit is barred by the principle of *res judicata*.

8. However, as rightly submitted by learned counsel for the Respondent, in the present Suit, the Respondent is not only seeking a declaration that the Applicants are the rank trespassers in respect of the suit premises, but Respondent is also seeking two further reliefs, which are as follows :-

(i). *That this Hon'ble Court by its mandatory order and direction, please to direct the Defendants to handover the quiet, vacant and peaceful possession of the suit premises i.e. Room No.08, 1<sup>st</sup> Floor, Rassiwala Chawl, R.S. Nimkar Marg, Chikalpada, Mumbai - 400 008 to the Plaintiff forthwith;*

(ii) *That this Hon'ble Court may please to declare the proposed documents relied upon by the Defendants i.e. Electricity Bills, Ration Card, Phono Identity Crd issued*

*by the Election Commission and other public documents stands in the name of the Defendants at the address of the suit premises being Room No.08, 1<sup>st</sup> Floor, Rassiwala Chawl, R.S. Nimkar Marg, Chikalpada, Mumbai - 400 008 be null, void and illegal and not enforceable in law.”*

9. Thus, the present Suit is for substantive relief of getting possession of the suit premises, after following due process of law, and, as can be seen from the Judgment passed in the earlier Suit, it was clearly stated that the present Applicants were restrained from causing obstruction to the possession of the Respondent in respect of the suit premises, without following due process of law. Thus, the relief claimed therein and the issue raised therein was limited; whereas, now, after following due process of law, as the Respondent is seeking possession of the suit premises and in addition thereto, the declaration relating to certain documents also, it cannot be said that the issue raised in the present Suit is also covered and decided finally by the Court in the earlier Suit.

10. In such situation, at this interim stage, it becomes difficult to accept that the Suit is barred by the principle of *res judicata*, under Section 11 of CPC. Moreover, it has to be stated that, the plea raised that the present Suit is being barred by the principle of *res judicata*, can be considered only at the time of final hearing, on the basis of appreciation of pleadings and evidence led in both the Suits and also on the basis of the Judgment passed in the earlier Suit. This is too early a stage to

decide this issue finally. At this stage, apparently, considering the two additional reliefs claimed by the Respondent in this Suit and that too, in the light of the Judgment passed in the earlier Suit, holding that the Applicants cannot disturb possession of the Respondent in respect of the suit premises, without following due process of law, the present Suit cannot be treated to be barred by the principle of *res judicata*.

11. The impugned order passed by the Trial Court, rejecting the Notice of Motion filed by the Applicants to that effect, therefore, does not call for any interference. Revision Application, accordingly, stands dismissed.

12. At this stage, it is clarified that, whatever observations made herein-above, are only for the purpose of deciding this Revision Application and the Trial Court, at the time of final hearing of the Suit, shall decide this issue on its own merits.

**[DR. SHALINI PHANSALKAR-JOSHI, J.]**