

IN THE HIGH COURT OF BOMBAY AT GOA

CIVIL REVISION APPLICATION NO. 30 OF 2016

1. Mrs. Lidia Inacia da Cunha,
Wife of Late Shri Joao Alexio Do Rosario
Fernandes, Major of age,
 2. Mrs. Cruzina alias Zina Fernandes,
Daughter of late Shri Joao Aleixo
Do Rosario Fernandes,
Major of age, through its Power of Attorney
holder, Petitioner no.4.
 3. Nevil Fernandes,
Husband of Mrs. Cruzina alias
Zina Fernandes,
Major of age, through its Power of Attorney
holder Petitioner no.4.
 4. Mrs. Samya Fernandes,
Daughter of Late Shri Joao Alexio
Do Rosario Fernandes,
Major of age,
 5. Mr. Savio Coutinho,
Husband of Mrs. Samya Fernandes,
Major of age, through its Power of
Attorney holder Petitioner no. 4,
All above residents of House No.338,
Buticas, Navelim, Salcete, Goa.
- Petitioners
(Original Defendant
Nos.4 to 8)

V e r s u s

1. Shri Antonio Fernandes,
Major of age,
Son of late Shri Antonio Tiago Fernandes,
Seaman, and his wife,
2. Shri Palmira Ursula Fernandes,
Major of age, housewife,
Both residents of House No.338/B,
Buticas, Navelim, Salcete, Goa.
3. Shri Domingos Rosario Fernandes,
Major of age,
Son of Late Shri Antonio Tiago Fernandes,
Resident of House no.667,
Calvaddo, navelim, Salcete Goa.
4. Shri Antonio T. Fernandes,
Major of age,
Son of Late Shri Leao Aleluia Fernandes and
5. Shri Alberto Fernandes,
Major of age,
Son of Late Shri. Leao Aleluia Fernandes

Both residents of House No.52,
Near CRSC Club, Colmorod,
Navelim, Salcete Goa. Respondents

Mr. S. D. Padiyar, Advocate for the Applicant.

Mr. Guru Shirodkar, Advocate for the Respondents.

Coram :- SMT. M. S. JAWALKAR,J.

Reserved on : 24th September,2020

Pronounced on:25th September,2020

JUDGMENT

1. Heard Mr. S. D. Padiyar, learned Counsel for the revision applicant and Mr. Guru Shirodkar, learned Counsel for the respondent nos. 3, 4 and 5.

2. The present revision application is filed by applicants, the newly added defendants, in counter claim in Regular Civil Suit no.136/2011/E. For the sake of brevity, it will be referred to as “the said suit”.

3. For the sake of convenience, parties will be described as per their nomenclature in the suit.

4. The present revision application is filed being aggrieved by the order below exhibit 57 in the said suit i.e. application under Order 7 Rule 11 of the Code of Civil Procedure (CPC), by the newly added defendants in counter claim.

5. There is no dispute that the original suit is filed on 11.05.2011 by the plaintiffs no.1 and 2. The suit was filed against the defendant nos.1 to 3 (respondent nos.3 to 5 in the present

application) for the relief in the nature of permanent injunction against the defendants from doing any work of construction specifically of compound wall or the room in the suit property.

6. The defendant nos. 1, 2 and 3 filed written statement on 06.07.2011 and also filed counter claim against the plaintiff nos. 1 and 2 seeking relief in the nature of declaration and injunction. Issues were framed on 13.06.2012.

7. On 29.07.2015, one application was moved by the defendant nos.1 to 3 under Order 1 Rule 10 of CPC to add present applicants as the parties to the counter claim. On 09.10.2015, the Court passed the order adding present petitioners as defendants in the counter claim. It is also admitted fact that summons were served to the present applicant on 20.02.2016. On 11.03.2016, written statement to the counter claim was filed by the newly added parties (present applicant) and they have also filed on the same date, application under Order 7 Rule 11 of the CPC on two grounds that there is no cause of action disclosed in the application against the present applicant and secondly, counter claim is ex-facie hopelessly barred by the law of limitation to the extent of newly added parties. On these counts prayed for rejection of counter claim against them.

8. Defendant nos.1 to 3 filed their reply to the said application and the learned Civil Judge, Junior Division, rejected the application vide order dated 27.06.2016.

9. The learned Counsel for the applicant Mr. Padiyar, submitted that the Trial Court has not exercised jurisdiction vested in it while giving a finding that the applicants are necessary parties to decide the controversy in the counter claim even though there is no cause of action disclosed in the counter claim with respect to the present applicant. It is also submitted that the learned Trial Court misconstrued jurisdictional bar created under the proviso to Section 21 of the Limitation Act in respect of the claims being barred by the law of limitation as against the petitioners.

10. The learned Counsel for the applicant relied on the citation reported in *2001(4) SCC 96* in the case of ***Ramalingan Chettiar vs. . K.Pattabiraman & anr.***, wherein the Apex Court held that

“Section 21 of the Limitation Act contemplates two situations - one under the substantive provision which provides that where after filing of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been brought on the day when he was added or substituted as a party in the suit. The second situation contemplated under the proviso to the substantive provision is where the court is satisfied that a new plaintiff or defendant

was omitted to be added or substituted due to a mistake in good faith, the court may direct that the suit, as regards the newly added or substituted party, shall be deemed to have been instituted on any earlier date. Thus, under the proviso, if the court is satisfied, it can direct that the suit as regards newly added or substituted plaintiff or defendant shall be deemed to have been instituted on an earlier date. In such a case, the court after substituting or adding a party in the suit is required to pass a separate/further order that the suit as regards the newly added defendant or plaintiff shall be deemed to have been instituted with effect from the date the suit was laid. Merely adding or substituting a plaintiff or defendant by the court is not enough. In the absence of any order that the impleadment of newly added or substituted party shall take effect from the date of institution of a suit, the period of limitation so far as the newly added or substituted shall run from the date of their impleadment in the suit. We have looked into the records but do not find any order having passed under the proviso to Section 21 of the Limitation Act that the impleadment of the State of Tamil Nadu would take effect from the date of institution of the suit. In the absence of such an order by the trial court, the suit filed by the respondent was barred by limitation as contemplated under Section 59 of the Act.”

The said matter was in respect of recovery of dues under the Tamil Nadu Revenue Recovery Act.

11. The learned Counsel for the appellant has also relied on the citation in the case of *Church of Christ Charitable Trust and*

Educational Charitable Society represented by its Chairman vs Ponuiyaman Educational Trust represented by the Chairman / Managing Trust, (MANU/SC/0515/2012), in support of his contention that Court has to decide whether the party proposed to be impleaded is necessary party. The Court has reminded the duty of the Trial Court while considering application under Order VII Rule 11. The Court should exercise its power under Order VII Rule 11 taking care to see that the grounds mentioned therein are fulfilled.

12. He also pointed out that the judgment relied on by the defendant nos.1 to 3 before the learned Trial Court also supports to the contention of the applicants and which is very well referred by the learned Trial Court in its order i.e. *Chami Narayanan vs V. R. Krishna Iyer & Ors, AIR 1998 Kerala 365*. Learned Counsel also relied on the citation *AIR 2001 Calcutta 137* in the case of *Usha Beltron Ltd., vs. Nandkishore Parasramka & Ors*, wherein it is held at para 71 that :

“71. The learned Trial Judge while finally deciding the suit cannot pass any necessary order in Section 21(2) of the Limitation Act as such order should have been passed by this Court at the time of entertaining the second amendment application not at the time of finally deciding the suit. The law in this regard has already been settled by the Supreme

Court in the case of Ramalingam Chettiar vs P. K.Pattabiraman & anr. reported in 2001(3) JT (SC) 179, AIR 2001 SC 1185.”

13. Learned Counsel relied on the citation in the case of *Fatehji & Company and ors. vs. L.M. Nagpal and ors., (MANU/SC/0493/2015)*. It is the case of specific performance and it was held that last extension of six months by the defendants expired on 01.02.1977 and suit seeking the specific performance was filed by the plaintiff on 29.04.1999 which is much beyond the period of three years. The Hon'ble Apex Court upheld the order of the trial Court rejecting plaint under Order VII Rule 11 of CPC .

14. It is the contention of the learned Counsel for the applicant that if there is no separate order specifying the effect of impleadment in view of Section 21 of Limitation Act, then the date of impleadment of the parties will be the date of institution of the suit for them. In absence of any separate order, specifying the date other than date of impleadment of the party, it would be deemed that date of impleadment will be the date of institution of suit for the newly added parties and suit is barred by limitation and learned Trial Judge ought to have rejected the Counter Claim.

15. He has also relied on citation reported in *1998 (2) SCC 70* in the case of *I.T.C. Limited vs. Debts Recovery Appellate*

Tribunal, wherein it is held that power to reject plaint can be exercised even after filing of issues and when matter is posted for evidence and if there is no cause of action disclosed.

16. Considering the proposition of law laid down in the above referred citation, learned Counsel for the applicant prayed for setting aside the order passed below exhibit 57 and to reject the counter claim in view of Order 7 Rule 11 of CPC against newly added defendants.

17. As against this, Mr. Guru Shirodkar, the learned Counsel for the respondent nos.3, 4 and 5 (original defendant nos. 1 to 3), submitted that all the parties are children and grand children of Antonio Fernandes. Parents were owner of the suit property and after death of mother, father took out Inventory Proceedings No.23/1976 to decide the shares amongst himself and his children. No notice was served of the said inventory to the defendant no.1 In the said Inventory, without partition, shares were determined. Father got half share of the property and four sons got one-fourth each of remaining half of the share in property. Thereafter, father had not filed any proceedings for partition of the shares. Father executed Gift Deed of his half share on 27.11.1978 but shares were not divided by metres and bounds. Plaintiff no.1-Antonio divided it into half share on 13.02.1979. They partitioned among

themselves half of the property held by the father without making original defendant nos.1 to 3 as party to that partition. There were other forced legal heirs of the father of the plaintiff no.1 and such a Gift Deed as per law has to be declared as null and void or be declared as in-officious. The Decree dated 26.08.1988 passed in Regular Civil Suit No. 12/88/D has to be set aside as the Court was deceived to believe that northern portion of the suit property was of the plaintiff and his brother. The suit property is the common property and the plaintiff has no right to do any construction or to interfere in any manner in the suit property.

18. The learned Counsel pointed out from written statement that he has taken objection that the necessary parties namely Joao Aleixo Rosario Fernandes and his wife have not been joined in the suit as they are the co-owners of the suit property. The co-owners were not made party to the suit of 1988. On the basis of Decree obtained in the said suit, the plaintiffs succeeded in recording their names in Record of Rights without knowledge of the defendants. In the year 1997, father expired as such there was no partition by metes and bounds among surviving heirs though shares were carved out in the Inventory Proceedings of 1976.

19. It is further submitted that the citation relied on by the applicant is in respect of money recovery and odd, however, when

there is a question of partition involved, all persons holding share in the property are necessary parties. Therefore, counter claim cannot be decided unless co-owners are joined, as plaintiff failed to join them inspite of specific objections in the written statement. Therefore, the plaintiff in counter claim applied for joining the proposed parties as defendants in counter claim vide exhibit 51, which came to be allowed.

20. The learned Counsel relied on *Chammi Narayanan* (supra), wherein it is held that Section 21 of the Limitation Act clearly indicate that a suit in respect of a new plaintiff or defendant added subsequently has to deem to have been instituted when the defendant or the plaintiff was made as a party. In case there are more than one defendant or plaintiff before the newly added party is brought on record, it will have to be deemed that the suit has been instituted on the date of impleadment so far as the newly added party is concerned. Even if the new party has been brought on record after the expiry of the period of limitation of the claim, it cannot be held that the suit is barred by limitation for the other parties are already on record and so far as they are concerned, the cause of action was already put in motion before the expiry of limitation.

21. The learned Counsel for the applicant herein pointed out para 13 of the same judgment i.e. ***Chammi Narayanan*** (supra), wherein the Court referred citation ***Karunakara Pshirady vs. Raman, 1992(2) KLT 785***, wherein it is held that,

“It is interesting to note that Order 1 Rule 10 (5) does not deal with the effect of the subsequent impleading of the plaintiff in the suit. But, coming to Section 21 of the Limitation Act, it comprehends within its scope the adding of a new plaintiff or a new defendant and Section 21(1) of the Limitation Act, provides that the suit as regards the newly added plaintiff or defendant shall be deemed to have been instituted when he was made a party. Normal effect of reading order 1 Rule 10(1) of CPC and Section 21 of the Limitation Act, it is to be postulated that in the case of addition of a new plaintiff, the suit must be deemed to be commenced only when he was so impleaded. This position emerges notwithstanding the fact that Order 1 Rule 10(5) speaks only to the addition of a defendant when it refers to Section 21 of Limitation Act. The power conferred on the Court under Order 1 Rule 10 (1) of the CPC for impleading an additional plaintiff has nothing to do with the effect of that impleading insofar as it relates to the question of limitation to be determined under the Indian Limitation Act. So considering Section 21(1) of the Limitation Act specifically provide that insofar a newly added plaintiff is concerned, the suit will be deemed to have been filed only when he was made a party to the suit. But this provision in Section 21(1) of the Indian Limitation Act is circumscribed by a

power vested in the Court to regard the suit as having been filed even in favour of a newly added plaintiff from the day of its original institution in the name of wrong plaintiff. This power is conferred by the proviso to Section 21(1) of the Limitation Act and it calls for the satisfaction of the Court that the omission to implead a new plaintiff was a bonafide or due to a mistake made in good faith. This entails an enquiry as to whether an omission to implead originally was a bonafide mistake or omission.”

22. After considering arguments advanced by the parties and propositions of law laid down in the citations relief on, no other view can be taken that Section 21(1) of the Limitation Act speaks about the effect of substituting or adding new plaintiff or defendant and Courts power to declare any other date as date of institution of suit for newly added parties.

23. For the sake of convenience, Section 21 of the Limitation Act is reproduced herein below :

“21. Effect of substituting or adding new plaintiff or defendant: (1) Where after the institution of a suit, a new plaintiff or, defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party:

Provided that where the court is satisfied that the omission to include a new plaintiff or defendant was due to a mistake made in good faith it may direct that the suit as regards such plaintiff or defendant shall be deemed to have been instituted on any earlier date.

(2) ... ”

24. After reading, it is clear that after the institution of the suit, if a new plaintiff or defendant is substituted or added, the suit shall as regards him be deemed to have been instituted when he was so made a party. Thus, it is deeming provision and when there is no specific order in view of the proviso in Section 21(1) specifying the date other than the impleadment of the party to the suit, the date of impleadment will be the date of institution of the suit for those newly added parties.

25. In the present matter, it appears that by passing order below exhibit 51, the learned Trial Judge allowed the plaintiff in counter claim to add proposed parties as defendants, however, there is no separate order passed to the effect that what would be the date of institution of counter claim for those newly added parties. By not passing specific order, the deeming provision would apply and their impleadment in the counter claim would be the date of institution of suit for newly added party. If this would be the position, the

counter claim is filed on 06.07.2011 and summons were served to newly added party on 20.02.2016. If there is no specific order is passed as per proviso to Section 21(1) of the Limitation Act, they would deem to have been joined on 20.02.2016 and counter claim for declaration would be barred by limitation. In view thereof, it was essential on the part of learned Civil Judge Junior Division, Margao, to pass specific order in view of proviso to Section 21(1) of the Limitation Act, that what would be the date of institution of counter claim for the added parties and the reasons thereof.

26. It is true that the question of shares and partition is involved in the present counter claim and therefore, whosoever holding share would definitely going to be affected and therefore they may be necessary parties. Proviso to Section 21 (1) of the Limitation Act vest with the power with the Court to pass orders specifying date of institution of suit for newly added party if it is satisfied that it is due to bonafide mistake. It may direct that for those newly added parties suit will deemed to be instituted on any earlier date. It appears that the learned trial judge failed to exercise jurisdiction vested in it. There is no order to that effect while deciding exhibit 51. The learned Trial Court ought to have passed specific order below exhibit 51 before taking up application under Order VII Rule 11 CPC.

27. The order below exhibit 51 is not challenged either by the plaintiff in the counter claim or by the present applicant. It would be proper by exercising power under revisional jurisdiction to set aside the order passed by the learned Civil Judge, Junior Division, below exhibit 51. It is settled proposition of law that if the suit is beyond limitation for newly added parties, the whole suit cannot be rejected. However, to the extent of added parties, it can be rejected.

28. Considering the nature of litigation, I am of the considered opinion that learned Civil Judge, Junior Division, exercise jurisdiction vested in it in view of proviso to Section 21(1) of the Limitation Act and pass appropriate orders after hearing the parties afresh on exhibit 51. The order passed below exhibit 57 i.e. the application under Order VII Rule 11 of CPC, will also require to be quashed and set aside. After hearing and deciding the application at exhibit 51, the learned Civil Judge, Junior Division shall take up hearing of exhibit 57. However, it is made clear that there is no necessity to issue fresh notices the proposed defendants to be added in Counter Claim and they can submit their contentions below exhibit 51.

29. While passing order below exhibit 57, it appears that learned Trial Court failed to consider that application is moved on the

grounds i.e. non-disclosure of cause of action and the counter claim is hopelessly barred by the law of Limitation. Unless there is any order specifying the date other than the date of impleadment of party, it would be deemed that the date of impleadment will be the date of institution of suit for the newly added party. However, non impleadment may further lead to multiplicity of litigations. The learned Trial Court ought to have considered what would be the effect on newly added parties if relief claimed in counterclaim is granted or rejected after hearing all the parties / proposed parties to the Counter Claim.

30. In view thereof, both the orders below exhibit 51 and 57, are liable to be set aside and the learned Trial Judge is required to be directed to hear both applications afresh by taking into account the observations, the propositions of law laid down by the Hon'ble Apex Court and the effect of non-passing of specific order as per proviso to Section 21(1) of the Limitation Act.

31. Accordingly, I proceed to pass the following :

ORDER

- (i) The revision application is hereby partly allowed.
- (ii) The orders passed below at exhibit 51 and exhibit 57 in Civil Suit No.136/2011/E dated 09.10.2015 and

27.06.2016 respectively, passed by Civil Judge Junior Division, 'C' Court, Margao, are hereby quashed and set aside.

(iii) The learned Civil Judge, Junior Division, 'C' Court, Margao, is hereby directed to hear the application at exhibit 51 afresh in view of the observations and citations referred by this Court and to consider the import of Section 21 of the Limitation Act.

(iv) All the grounds and contentions available to the parties are kept open.

(v) After deciding exhibit 51, the learned Trial Judge to take up application at exhibit 57 for hearing afresh.

(vi) The learned Trial Judge is also requested to explore the possibility of settlement through mediation as all the parties are in relation to each other.

(vii) The parties to appear before the Trial Judge on 2nd November, 2020 at 10.00 a.m.

(viii) Civil Revision Application is disposed off. There shall be no orders as to costs.

M. S. JAWALKAR,J.

arp/*/mv

ANDREZA
PEREIRA

Digitally signed by
ANDREZA PEREIRA
Date: 2020.09.30
11:30:25 +05'30'