

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

FIRST APPEAL NO.316 OF 2018

1. Mr. Mahendra Chimanlal Shah
87 years, Occ: Business,
R/o. 264 Panchshil,
Sion (W), Mumbai 400 022.

2. Mr. Ramesh Chimanlal Shah
84 years, Occ: Business,
R/o. Flat No.14, 3rd floor,
226 Deepak Building, Sion (W),
Mumbai 400 022.

3.Smt. Kokila Girdharlal Jhaveri
Age 66 years, Occ: Business
R.of. Flat Bo.14, 3rd Floor,
Indian House No.1,
Kemps Corner,
Mumbai 400 036

..Appellants

v/s.

1. M/s. Vora Brothers
214-B, Princess Street,
Mumbai 400 002

2. Mr. Amul Pannalal Shah
1104. 11th Floor, Satya Nasari,
Jain Temple, Sir P.D.Marg,
Worli, Mumbai 400 013

3. Mr. Deepak Pannalal Shah
304, Pradeep, PL 32, Hill Road,
Mumbai 400 018,

4. Mr. Harish Pannalal Shah
D-Buildings, 505 Poonam Apartment,
Dr. A.B.Raod, Worli,
Mumbai 400 018

5. Rahul Harish Shah
D-Buildings, 505, Poonam Apt.
Dr.A.B.Road, Worli
Mumbai 400 018.

..Respondents

Mr. Ashok Gade for the Appellants.
Mr. Kapil Moya a/w. Mr. Alok Patel i/b. Mahendra Patel & Associates for
the Respondent Nos.1 to 5.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

JUDGEMENT RESERVED ON 17/07/2020.

JUDGMENT PRONOUNCED ON 31/08/2020.

JUDGMENT.

1. The Appellants who are the Plaintiffs in Short Cause Suit No.3430 of 2013 have challenged the Order dated 01.07.2016 whereby the learned Judge City Civil Court, Mumbai allowed the Chamber Summons No.2656 of 2016 filed by the Respondents/Defendants and rejected the plaint as barred under the provisions of Order 22 Rule 9 of Civil Procedure Code. For the sake of convenience, the Appellants and the Respondents shall be hereinafter referred to as the Plaintiffs and the Defendant respectively.

2. The Plaintiffs are children of Chimanlal Shah, who died intestate on 7.2.1974. The deceased Chimanlal Shah was one of the partners of the partnership firm M/s Vora Brothers. The Plaintiffs had filed a Short Cause Suit No.1411 of 1976 for rendition of accounts of the partnership firm M/s.

Vora Brothers and other consequential reliefs. The said Suit was dismissed as abated for not bringing on record the legal representatives of Narendra Chimanlal Shah and Sannalal Chimanlal Shah, plaintiff No.3 and Defendant No.2 in the said Suit. The Notice of Motion No.2189 of 1994 to set aside the Order of abatement was dismissed by Order dated 6.8.1988. The Appeal No.943 of 1988 against the said Order was dismissed by the Division Bench of this Court on 1.4.2010. The SLP filed before the Apex Court came to be dismissed by Order dated 8.4.2011.

3. The Plaintiffs filed a fresh suit being Suit No. 3430 of 2013 for rendition of account of partnership firm M/s. Vora Brothers and other similar reliefs. The Defendants filed the Chamber Summons under Order 7 Rule 11 of CPC raising preliminary objections that the suit is barred by the principles of *res judicata* and that the relief sought in the plaint is barred by the law of limitation.

4. By order dated 8.8.2014, the learned judge dismissed the Chamber Summons mainly on the ground that the earlier Suit was not finally adjudicated on merits and hence the principles of *res judicata* are not applicable. The learned Judge further held that the issue of limitation is a question of fact which requires adjudication on merits. The said order was

set aside by this court in Civil Revision No. 1121 of 2014; with direction to the trial court to decide all contentions including the plea of the bar under Order 22 Rule 9 CPC.

5. In compliance with these directions, the learned Judge heard the matter afresh and after considering the averments in both the plaints held that the cause of action as well as the reliefs in both the Suits are the same. The earlier Suit having been dismissed as abated, the subsequent Suit on the same cause of action is barred under the provisions of Order 22 Rule 9 of CPC. Accordingly, the learned Judge allowed the Chamber Summons and rejected the plaint under Order 7 Rule 11 of CPC. Being aggrieved by the Order, the Plaintiffs have filed this First Appeal under Section 96 of CPC.

6. Mr. Gade, the learned Counsel for the Plaintiffs has questioned the correctness of the observations of the learned Judge that both the Suits are based on the same cause of action. He submits that the previous Suit was not adjudicated on merits but was dismissed on technical grounds. He urges that since the subsequent Suit is based on a continuous cause of action, bar under Order 22 Rule 9 of CPC is not applicable. The learned Counsel for the Plaintiffs urges that the impugned order is contrary to the provisions of law and is exfacie illegal. Learned Counsel for the Plaintiffs

has relied upon the decision of the Apex Court ***in Chhotaben Jalkrishnabhai Thakker v. Kiritbhai Jalkrishnabhai Thakker 2016 DGLS 270***, wherein the Apex Court had affirmed the view of the trial court that in the fact situation of the case, the Apex Court has held that the issue of limitation was a triable issue for which reason the plaint could not be rejected under the provisions of Order VII Rule 11 (d) CPC. He has also placed reliance on the decision of the Single Judge of this Court in ***Chabotal Prabhakar Ingole vs. Bakulbhai Jagannath Ingole, through legal representative Baby Prabha Shamraoji Rajpurkar & Ors., 2006(6) BCI 210***. In the aforesaid decision the Id. Single Judge of this Court has reiterated that the bar under Order 22 Rule 9 of Civil Procedure Code is applicable only when the suit is based on the same cause of action. On the facts of the case, it was held that the subsequent Suit for eviction, was based on a fresh notice and that the cause of action in both the Suits was different and hence the Suit was not barred under Order 22 Rule 9 CPC.

7. Mr. Moye, learned Counsel for the Defendants submits that the Plaintiffs have filed both the suits as the descendants of the deceased Chimanlal who was a partner of the Defendant No.1-Firm. He submits that the cause of action as well as the reliefs sought in both these suits are identical. He submits that the previous Suit having been dismissed as

abated; the subsequent Suit that is based on the same cause of action is barred under the provisions of Order 22 Rule 9 of CPC.

8. I have perused the records and considered the submissions advanced by the learned Counsel for the respective parties. The only question for consideration is whether the Short Cause Suit No. 3430 of 2013 is barred under the provisions of Order 22 Rule 9(1) of CPC, which deals with the effect of abatement or dismissal of a suit. Sub-Rule (1) of Rule 9 of Order 22 provides that where a suit is dismissed or abates under this Order, no fresh suit shall be brought on the same cause of action. There is no gainsaying that the bar under Order 22 Rule 9(1) is applicable only when the suit is based on the same cause of action. In other words, the identity of cause of action is the sine qua non for applicability of the bar under Order 22 Rule 9 of CPC.

9. In ***Church of Christ Charitable Trust and Educational Society Ponniamman Educational Trust AIR (2012) 8 Supreme Court Cases 706*** the Hon'ble Supreme Court has explained the meaning of cause of action as under:

"14. In A.B.C. Laminart Pvt.Ltd and another vs. A.P.Agencies, Salem, reported in (1989) 2 SCC 163, this Court explained the meaning of "cause of action" as follows: (SCC p. 170, para 12)

"12. A cause of action means every fact, which if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded. It does not comprise evidence necessary to prove such facts, but every fact necessary for the plaintiff to prove to enable him to obtain a decree. Everything which if not proved would give the defendant a right to immediate judgment must be part of the cause of action. But it has no relation whatever to the defence which may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff."

15. It is useful to refer the judgment in Bloom Dekor Ltd v. Subhash Himatlal Desai, wherein a three-Judge Bench of this Court held as under: (SCC p. 328, para 28) "28. By 'cause of action' it is meant every fact, which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the court, (Cooke v. Gi11); in other words, a bundle of facts which it is necessary for the plaintiff to prove in order to succeed in the suit." It is mandatory that in order to get relief, the plaintiff has to aver all material facts. In other words, it is necessary for the plaintiff to aver and prove in order to succeed in the suit."

10. In this backdrop, it is necessary to examine the averments in both the complaints to decide whether both the suits arise from the same cause of action. It is not in dispute that the deceased Chimanlal Shah was one of the Partners of M/s. Vora Brothers, a partnership firm constituted under the Partnership Deed dated 31.8.1952. The gist of Clauses 4, 7 and 11 of the Partnership Deed, which are relevant to decide the issue is as follows:-. Under Clause 4 the shares of the partners in profit and loss of the business

of the partnership are as under:-

1) Chimanlal Chunilal	0-3-4- in a Rupee of 16 annas
2) Karsonlal Chunilal	0-3-4 in a Rupee of 16 annas
3) Sanalal Chunilal	0-3-4 in a Rupee of 16 annas
4) Pannalal Bhikhachand	0-6-0 in a Rupee of 16 annas

Clause 7 provides that the death of partner shall not dissolve the partnership but the partnership shall continue as regards the rest of partners. Clause 11 provides that as soon as practicable after the death or retirement of a partner, the account of the dealings of the partnership shall be taken and the amount payable by or to the continuing partners to or by the heirs and legal representatives of the deceased partner or the retiring partner or his assignee shall be ascertained and paid to or by the heirs and legal representatives of the deceased partner or to the retiring partner or his assignee as the case may be.

11. A perusal of the plaint in S.C. Suit No.1411 of 1976 reveals that the Plaintiffs had filed a Suit No.4311 of 1974 before the City Civil Court, Bombay for rendition of accounts and other similar reliefs. The Defendants had deposited before the Court an amount of Rs.82,783.23, which was due to the estate of said Chimanlal, after retaining an amount of Rs.19,950/- towards payment of income tax. Subsequently, after hearing the parties on the issue of jurisdiction, the learned Judge, City Civil Court, returned the

plaint for presentation to the court of competent jurisdiction. It appears that instead of presenting the same plaint before this Court, the Plaintiffs have filed a fresh suit registered as Civil Suit No.1411 of 1976. This Suit was filed with an assertion that the Defendants had failed to discharge their obligation of settling the accounts and computing the share of profit payable to the deceased partner Chimanlal Shah as on the date of his death. The Plaintiffs claimed that despite repeated requests, the continuing partners did not settle the accounts and did not pay the share of profit payable to Chimanlal Shah. It was averred that the Defendants had assured to execute a fresh Deed of Partnership and induct the Plaintiffs as partners of the firm. However, the Defendants neither inducted them as partners nor settled the accounts. The Plaintiffs further alleged that the Defendants manipulated the books of accounts. It was also a grievance of the Plaintiffs that the share of the deceased in the partnership was being utilized for the conduct of the business and the profit and income derived therefrom was being appropriated by the Defendants.

12. Based on these averments the Plaintiffs filed the suit essentially for (i) rendition of accounts in relation to partnership firm M/s. Vora Brothers as on 7.2.1974 i.e the date of the death of Chimanlal Shah; (ii) to direct the Defendants to pay to the Plaintiffs the share of profit payable to the

deceased Chimanlal Shah as on the date of his death i.e 7.2.1974; (iii) to direct the Defendants to render accounts of the income and profit derived by the Defendant Nos.1 and 2 from the conduct of the business of the suit partnership from and after 7.2.1974, by utilizing the share, right, title and interest of the deceased in the partnership firm; (iv) to direct the Defendants to pay to the Plaintiffs the amount of income and profit derived by the Defendants from the conduct of the business of the partnership firm from 07.02.1974 with interest @ 6% from the date of the suit till final payment. The Plaintiffs had also sought transfer of an amount of Rs. 82,783.23 deposited by the Defendants before the City Civil Court in Suit No.4311 of 1974.

13. Learned Counsel for the Plaintiffs acknowledges that the amount deposited by the Defendants before the City Civil Court has been paid to the Plaintiffs. As stated earlier, the Suit No.1411 of 1976 was subsequently dismissed as abated. The application for setting aside abatement has been dismissed and the said order has been confirmed by the Division Bench of this Court and by the Hon'ble Apex Court by order dated 8.4.2011. It is not in dispute that the partnership firm has since been reconstituted. The Plaintiffs have filed a fresh suit against the reconstituted partnership firm M/s. Vora Brothers and the current partners of the said partnership firm.

This Suit has been filed on 4.7.2017 i.e. more than six years from the date of the order of the Hon'ble Apex Court dismissing the SLP, without disclosing that the Defendants had deposited an amount of Rs.82,783.23 before the City Civil Court towards the share of profit payable to the deceased partner and that the same has been paid to the Plaintiffs. The fresh Suit also proceeds on an assertion that the Plaintiffs are the legal representatives of deceased Chimanlal Shah, the deceased partner of the Defendant No.1 firm, and that they are entitled for the share of profit payable to the deceased Chimanlal Shah. The Plaintiffs have alleged that the Defendants have failed to settle the accounts and compute the share of profit payable to the deceased partner Chimanlal Shah. The grievance of the Plaintiffs is that the Defendants have infringed their right, as legal representatives of the deceased Chimanlal, to receive share in the profits of the firm to the extent of the share payable to the deceased partner Chimanlal till the date of his death. The Plaintiffs have further averred that the Defendants have utilized the share payable to the deceased partner to run the business and earned profit therefrom. The Plaintiffs claim that they are entitled to receive the share of profit earned by the Defendant No.1 by utilizing the share of the deceased since his death till the date of the decree. Based on these pleadings the Plaintiffs have sought the following reliefs:

- (i) For rendition of accounts of the Defendant No.1 partnership firm

since the date of death of Chimanlal Shah i.e. from 7.2.1974;

(ii) To direct the Defendants to render account of income and profit derived from conduct of business from 7.2.1974; and to pass further necessary orders.

14. A perusal of the averments in both the complaints indicate that the cause of action to file both the suits had accrued on failure of the Defendants to discharge their obligation under clause 11 of the Partnership Deed by settling the accounts and paying the amount payable to the deceased Chimanlal Shah as on the date of his death. The Plaintiffs have also asserted that the Defendants continued the partnership business. The accounts have not been finalized and the share of the profit in the firm has not been paid to the Plaintiffs. The case of the Plaintiffs in both these suits is that the Defendants have retained the share of profit payable to the deceased partner- Chimanlal Shah and utilized the same in subsequent conduct of the partnership business. The Plaintiffs have raised a plea that they are entitled to the share in the profit attributable to the use of that share. Based on these assertions the plaintiffs had filed the previous suit with a prayer for rendition of accounts and payment of profit payable to the deceased Chimanlal Shah till the date of his death i.e. 7.2.1974. The Plaintiffs had also prayed for rendition of accounts under the provisions of Section 37 of

the Partnership Act, for determination and payment of share of the deceased in the profits of the business since the death of the deceased partner. In the subsequent Suit the Plaintiffs have restricted their relief for rendition of accounts under the provisions of Section 37 of the Partnership Act.

15. The essential bundle of facts on which the Plaintiffs have based their claim and right to relief are identical in the two Suits. The only difference in the second suit is that the Plaintiffs have impleaded the partnership firm as a party defendant and have abandoned the relief of rendition of account and share of profit payable to the deceased Chimanlal Shah till the date of his death. They have restricted their prayer for rendition of accounts of the income and profit derived from the conduct of business of the suit partnership since the date of death of the deceased Chimanlal Shah i.e. 7.2.1974. It is pertinent to note that the prayer for rendition of accounts and share in the profits of the business, under the provisions of Section 37 of the Partnership Act, was also sought in the previous suit, which was founded on the same facts. Suffice it to say that impleading the partnership firm or abandoning one of the reliefs in the subsequent suit does not wipe out the identity of the cause of action.. The cause of action for filing both the Suits being the same and the first Suit having been dismissed as abated; a fresh Suit on the same cause of action is barred under the provisions of Order 22

Rule 9 CPC. The decisions in Chabuta (supra) and Chhotaben (supra) are not applicable to the facts of the case.

16. Under the circumstances and in view of discussion supra, the impugned order does not suffer from any infirmity and hence does not warrant any interference. The Appeal has no merits and is accordingly dismissed.

Prasanna
P.
Salgaonkar

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Prasanna P.
Salgaonkar
Date:
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(ANUJA PRABHUDESSAI, J.)