

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

CIVIL REVISION APPLICATION NO.569 OF 2019

Sheetal Bhupal Khanjire

..Applicant

V/s.

Bapuso Baburao Chougule & Ors.

..Respondents

Mr.Shriniwas Patwardhan a/w Mr.Bhooshan Mandlik and
Ms.Rajeshwari Patil for the Applicant.

Mr.Surel S. Shah a/w Mr.Sandeep Koregave for Respondent Nos.1 to
3.

CORAM : C.V. BHADANG, J.

DATE : 15th JANUARY 2021

PC.

1. The challenge in this Civil Revision Application is to the judgment and order dated 15th April 2019, passed by the learned District Judge at Sangli in Regular Civil Appeal No.7 of 2017. By the impugned judgment, the learned District Judge has allowed the appeal filed by the respondent Nos.1 to 3 (Original Plaintiffs) and has set aside the order dated 2nd December 2016 below application Exhibit-46 passed by the learned 2nd Civil Judge Junior Division at Sangli in Regular Civil Suit No.113 of 2007. The net result is that application Exhibit-46 filed by the applicant (defendant No.1) for

rejection of the plaint under Order VII Rule 11 of the Civil Procedure Code ('CPC' for short) stands dismissed.

2. The brief facts necessary for the disposal of the petition may be stated thus :-

R.C.S. No.113 of 2007 has been filed by the respondent Nos.1 to 3 against the applicant (defendant No.1), respondent No.4 (defendant No.2) and respondent No.5 (defendant No.3). That suit is filed for declaration and injunction etc. The subject matter of the suit comprises of land admeasuring 62.73 sq. meters from out of City Survey No.85 and 76.67 sq.meters from out of the City Survey No.85/1, total 139.40 sq.meters with a structure standing thereon situated within the jurisdiction of Sangli, Miraj and Kupwad Municipal Corporation, which is more specifically described in paragraph 1 of the plaint.

3. The case made out in the plaint is that the suit property was originally belonging to late Mallappa Ghevare. Mallappa Ghevare had leased out the property to late Baburao Chougule for commercial purpose and late Baburao Chougule was conducting the business of Oil and Oil Cakes as an Commission Agent in the suit property under the name and style as M/s.Baburao Yashwant

Chougule. Late Baburao Chougule was paying rent to the original landlord. Baburao Chougule expired on 08th December 1978. Respondent Nos.1 and 2 are the sons while the respondent No.3 is the widow of Baburao. The respondent No.5 (defendant No.3) is the widow of late Rajkumar son of Baburao Chougule. Mallappa Ghevare expired somewhere in the year 1974-75 after which respondent No.4 (defendant No.2) Chandrakant Ghevare became the landlord.

4. It is the material case that after the death of Baburao Chougule the respondent No.1 was looking after the business of M/s.Baburao Yashwant Chougule. At the relevant time the respondent Sanjay and Late Rajkumar were taking education. For some time the respondent Nos.1 and 3 conducted the business of Laxmi Traders with the help of some others in the suit premises. In the year 1983 the respondent No.2 conducted the business of Furniture Show Room in the suit premises.

5. The applicant purchased the suit property from the respondent No.6 under registered sale deed dated 26th November 2005. For the limited purpose of deciding the present Civil Revision Application, it is not necessary to set out the pleadings in details.

Suffice it to mention that according to the plaintiffs somewhere at the end of November 2006 and the first week of December 2006 the applicants had demolished the structure standing on the said plot and have encroached on the same. It is the specific case made out that except southern side wall entire structure was demolished. It is in these circumstances, that the suit came to be filed, seeking a declaration that the plaintiffs are the contractual tenants of the suit property having protection under the Maharashtra Rent Control Act ('Act' for short) and for the purpose of mandatory injunction directing the applicant and respondent no.4 to reconstruct the suit premises and restraining them or anybody on their behalf from interfering with the possession of the plaintiffs over the suit property.

6. It appears that previously the respondent No.5 (defendant No.3) had filed RCS No.400 of 2006 against the applicant, simplicitor for injunction. In that suit it was contended that the applicant was trying to interfere with the possession of the suit premises and there were attempts to take forcible possession. It was in these circumstances, that the suit simplicitor for injunction had been filed by the respondent No.5 on 30th November 2006. The record discloses that subsequently the respondent No.5 sought

withdrawal of the said suit under Order XXIII Rule 1(3) of the C.P.C., with leave to file a fresh suit, which application was rejected by the learned trial Court by order dated 23rd February 2007. The matter was not carried any further. It transpires during the course of the hearing that subsequently the said suit has been dismissed in default.

7. Be that as it may, the applicant resisted R.C.S. No.113 of 2007 (subsequent suit) *inter alia* on the ground that the same is hit by the provisions of Order II Rule 2 of C.P.C. It is contended that the relief of declaration was very much available to the parties when the previous suit was filed by the respondent No.5. It is submitted that once the respondent No.5 has chosen not to claim the declaration, the subsequent suit is barred by the provisions of Order II Rule 2 of C.P.C.

8. The record further discloses that issues are framed by the Trial Court in the year 2009. However a copy of the issues produced by the learned counsel for the parties, during the course of the hearing, shows that a specific issue based on defence under Order II Rule 2 of C.P.C. has not been framed by the learned Trial Court.

9. When the suit was at the stage of recording evidence, the applicant filed application Exh-46 purportedly under Order VII Rule 11 of C.P.C. for rejection of the plaint on the ground that the same is barred under Order II Rule 2 of the C.P.C.

10. The application was opposed by the respondent Nos.1 to 3. The learned Trial Court allowed the application by Order dated 2nd December 2016. Feeling aggrieved, the respondent Nos.1 to 3 challenged the same before the learned District Judge in RCA No.7 of 2017. The learned District Judge by the impugned judgment has allowed the appeal, thereby refusing to reject the plaint, which brings the applicant to this Court.

11. I have heard Mr.Patwardhan, the learned counsel for the applicant and Mr.Shah, the learned counsel for contesting respondent Nos.1 to 3. Perused record.

12. The learned counsel for the applicant submitted that the application under Order VII Rule 11 has to be decided on the basis of the averments made in the plaint. It is submitted that the previous suit was filed by the respondent No.5 when the premises were already demolished and therefore the respondent No.5 was

required to file a comprehensive suit for declaration and injunction. The respondent No.5 having omitted to do so, the subsequent suit is barred under Order II Rule 2 of the C.P.C. The learned counsel referred to the averments in paragraph No.3 of the plaint in the previous suit, in order to point out that the respondent No.5 had contended that because all the heirs of late Baburao Chougule were not available for signing, they are not made as parties and they are not necessary parties, inasmuch as, no relief is claimed against them. In the submission of the learned counsel the previous suit was filed for and on behalf of the legal heirs of late Baburao Chougule and therefore, notwithstanding the fact that the respondent Nos.1 to 3 (plaintiffs in the subsequent suit) were not the plaintiffs, in the previous suit, the subsequent suit would be barred.

13. On behalf of the applicant reliance is placed on the decision of the Supreme Court in the case of *Surayya Begam (MST) V/s. Mohd. Usman & Ors.*¹ and *Pandit Ishwardas V/s. State of Madhya Pradesh & Ors.*² It is submitted that the learned District Judge was in error in interfering with the order passed by the learned Trial Court.

1 (1991) 3 SCC 114

2 (1979) 4 SCC 163

14. Mr.Shah, the learned counsel for the respondent Nos.1 to 3 has supported the impugned order. It is submitted that the previous suit was only between the respondent No.5 and the applicant. It is pointed out that admittedly the respondent Nos.1 to 3 were not parties in the previous suit and therefore they cannot be bound by the act of the respondent No.5 in filing a suit for the relief of injunction alone. It is submitted that even otherwise the cause of action shown in the two suits is distinct and therefore bar under Order II Rule 2 of C.P.C. would not apply. The learned counsel submitted that, the plaint cannot be rejected as being barred by any law. It is submitted that, in any event, the issue is one which requires trial.

15. I have carefully considered the rival circumstances and the submissions made. Admittedly, the previous suit was filed by the respondent No.5 alone against the applicant which was simplicitor for injunction. The respondent Nos.1 to 3 were not parties to the said suit as the respondent No.5 claimed in the previous suit that the other heirs of Baburao Chougule, were not available for signature. If that be so the respondent Nos.1 to 3 being the other legal heirs, were not made parties, as defendants in the previous suit. The cause of action shown in the previous suit is when there

was an alleged attempt to take forcible possession of the suit premises which is apparent from paragraph No.4 of the plaint in the previous suit. The cause of action in the subsequent suit as found in paragraph 11 is when the applicant issued a notice reply in May 2006 to the notice issued by the respondent No.2 (plaintiff No.2) thereby denying the tenancy rights of the parties and when the structure standing on the land was demolished at the end of the November 2006 and the first week of December 2006.

16. Thus *prima facie* it can be seen that cause of action shown is different. It is trite that while considering the prayer for rejection of plaint, the Court has to confine itself to the averments made in the plaint and cannot consider any defense, actual or probable. In my considered view, once it is pointed out that a specific defence based on Order II Rule 2 of the C.P.C. was raised in the written statement, it was necessary for the Trial Court to have framed an issue on the said point. It is necessary to note that there is also a lapse on the part of the parties in not seeking modification of the issues in order to include an issue based on Order II Rule 2 of the C.P.C.

17. Be that as it may, considering the overall circumstances, I find that it would be appropriate to direct the learned Trial Court to frame an issue in view of the defence based on Order II Rule 2 of the C.P.C. and the said issue can be tried along with other issues.

18. Reliance placed on the decision in the case of *Surayya Begam* and *Pandit Ishwardas (Supra)* to my mind is misplaced, as both these cases, turned on their own facts. The case of *Surayya Begam* involved an issue of *res-judicata* in the context of non-joinder of parties. The case of *Pandit Ishwardas* involved an issue of amendment of pleadings under Order VII Rule 11 of the C.P.C. Perusal of the said judgment would show that in that case the plaintiff in both the suits was the same, unlike in the present case, where the respondent Nos.1 to 3 are admittedly not the plaintiffs, in the previous suit.

19. In the result, the following order is passed:-

ORDER

- (i) The Civil Revision Application is dismissed, with no order as to costs.

(ii) The Trial Court shall frame an issue about the maintainability of the suit, in view of the bar under Order II Rule 2 of C.P.C.

(iii) The said issue shall be decided along with other issues at the trial of the suit, without being influenced by the observations made in the order dated 15th April 2019, passed by the learned District Judge, and the order dated 02nd December 2016 passed by the learned trial Court or the observations made by this Court, which are essentially for the limited purpose of deciding the issue of rejection of plaint.

(iv) Rival contentions of the parties are left open.

C.V. BHADANG, J.