

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD.

CIVIL REVISION APPLICATION NO. 145 OF 2019

Chandrakant s/o Bhaurao Waghmare,
Age : 66 years, Occu. Retired,
R/o. E. S. I. Hospital Employees Quarter,
Warali, Mumbai.

... Applicant

Versus

- 1] Mukesh s/o Rajendra Waghmare,
Age : 44 years, Occu. Labour,
R/o. H. No. 5-7-100, Shantipura,
Chawani, Aurangabad.
- 2] Deepak s/o Rajendra Waghmare,
Age : 40 years, Occu. Service,
R/o. As above.
- 3] Nitin s/o Rajendra Waghmare,
Age : 38 years, Occu. Nil,
R/o. As above.
- 4] Latarani w/o Anil Nikalje,
Age : 48 years, Occu. Household,
R/o. Shantipura, Chawani, Aurangabad.
- 5] Rosemerry w/o Satwadhvir Athavale,
Age : 46 years, Occu. Household,
R/o. Ramnagar, Jalna, Tq. & Dist. Jalna.
- 6] Leelabai w/o Rajendra Waghmare,
Age : 70 years, Occu. Household,
R/o. Shantipura, Chawani, Aurangabad.
[Deceased, her LRs already on record]
- 7] Suvasini w/o Shantawan Pawar,
Age : 65 years, Occu. Household,
R/o. Maheshwari Building, Mulund Mumbai.
[deleted as per Court's order dated 7.2.2020]

....Respondents

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Mr. Amit R. Vaidya, Advocate for the applicant
Mr. Amol K. Gawali, Advocate for respondent nos. 1 to 5
Respondent nos. 6 & 7 deleted.

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CORAM : RAJESH S. PATIL, J.

RESERVED ON : OCTOBER 13, 2022

PRONOUNCED ON : NOVEMBER 17, 2022

JUDGMENT : -

1. Heard. By consent of the parties, taken up for final disposal at the stage of admission.

FACTS : -

2. The Respondent no.1 to 6 herein are the Original Plaintiffs who had filed suit for partition, declaration, possession and perpetual injunction. The applicant herein is the original defendant, who, by way of this Civil Revision Application, has challenged the order dated 29.04.2019 passed below Exh. 71 in R.C.S. No. 1724/2012 by 11th Jt. Civil Judge J.D., Aurangabad, thereby rejecting application Exh.71. The said application Exh. 71 was preferred under the provisions of Order VII Rule 11(d) of the Code of Civil Procedure, seeking rejection of the plaint in R.C.S. No. 1724/2012, being barred by law as per Order IX Rule 8 of CPC. The said application Exh. 71 was filed on 29.10.2018. After hearing both the parties, the said application was rejected on 29.04.2019. This Court, vide order dated 20.04.2022, issued notice for final hearing to the respondents and stayed the trial.

SUBMISSIONS : -

3. The applicant's case is that on the same cause of action the plaintiffs had earlier filed suit being R.C.S. No. 269/2009 for said relief
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and the said suit was dismissed for non-prosecution. It is therefore the case of the applicant's that a fresh suit on the same cause of action was barred by law under the provisions of Order IX Rule 9 of the CPC.

4. It is further argued that the contents of both the suits are almost same and the present applicant is the cousin of original plaintiffs. It is also argued that the First Suit filed by the plaintiffs was dismissed in default by order dated 28.06.2011. It is argued that the Second Suit was filed with identical facts on 03.09.2012 with same cause of action and similar kind of prayers with clever draftmanship. The parties in both the suits are the same. It is also argued that if the plaintiffs were desirous of seeking any relief from the court, the plaintiffs should have restored the earlier suit by filing an application for restoration before the same court. The applicant herein (orig. defendant) had filed an application Exh. 71 on 29.10.2018 under the provisions of Order VII Rule 11(d) of the CPC stating therein that the suit is barred by the provisions of Order IX Rule 9 of CPC, however, learned Judge without taking into consideration the legal provisions, rejected his application Exh. 71, hence he preferred the present Civil Revision Application.

Learned counsel Mr. Amit Vaidya for the applicant relied upon the following judgments;

(i) **Suraj Rattan Thirani and others vs. Azamabad Tea Co. Ltd. and others**, AIR 1965 SC 295. Paragraph no. 30 reads thus :

30. We consider that the test adopted by the Judicial Committee for determining the identity of the cause of action in the two suits in Mohammed Khalil Khan v. Mahbub Ali Mian, 75 Ind App 121 (AIR 1949 PC 78) is sound and expresses correctly the proper interpretation of the provision. In that case Sir Madhavan Nair, after an exhaustive discussion of the meaning of the expression "same cause of action" which occurs in a similar context in para (1) of O. 11 r. 2 of the Civil Procedure Code, observed:

"In considering whether the cause of action in the subsequent suit is the same or not, as the cause of action in the previous suit, the test to be applied is are the causes of action in the two suits in substance-not technically-identical?"

(ii) **C. S. Ramaswamy versus V. K. Senthil & Ors. 2022 LiveLaw (SC)**

822. Paragraph nos. 7.6 to 7.8 reads thus :

7.6 From the aforesaid, it can be seen that most of the cause of actions alleged are much prior to the execution of the registered Sale Deeds.

7.7 Even the averments and allegations with respect to knowledge of the plaintiffs averred in paragraph 19 can be said to be too vague. Nothing has been mentioned on which date and how the plaintiffs had the knowledge that the document was obtained by fraud and/or misrepresentation. It is averred that the alleged fraudulent sale came to the knowledge of the plaintiffs only when the plaintiffs visited the suit property. Nothing has been mentioned when the plaintiffs visited the suit property. It is not understandable how on visiting the suit property, the plaintiffs could have known the contents of the sale deed and/or the knowledge about the alleged fraudulent sale.

7.8 Even the averments and allegations in the plaint with respect to fraud are not supported by any further averments allegations how the fraud has been committed/played. Mere stating in the plaint that a fraud has been played is not enough and the allegations of fraud must be specifically averred in the plaint, otherwise merely by using the word "fraud", the plaintiffs would try to get the suits within the limitation, which otherwise may be barred by limitation. Therefore, even if the submission on behalf of the respondents original plaintiffs that only the averments and allegations in the plaints are required to be considered at the time of deciding the application under Order VII Rule 11 CPC is accepted, in that case also by such vague allegations with respect to the date of knowledge, the plaintiffs cannot be permitted to challenge the documents after a period of 10 years. By such a clever drafting and using the word "fraud", the plaintiffs have tried to bring the suits within the period of limitation invoking Section 17 of the limitation Act. The plaintiffs cannot be permitted to bring the suits within the period of limitation by clever drafting, which otherwise is barred by limitation.

(iii) **Dr. S. Jayakumar & Another Versus K. Kandasamy Gounder**

2005 0 Supreme (Mad) 861. Relevant paragraphs are reproduced as follows:

19. This Court has carefully considered the above principles and observations laid down in the decisions. Though the present suit is one for partition, the observations in the above decision cannot be applied to the case in hand in view of previous several rounds of litigations between the parties. O.S. No. 394 of 1990 alone is not only the earlier litigation. It is only one round of litigation among the plethora of litigations. The Plaintiff Kandasamy is pitted against his Sister Mylathal for more than two decades.
22. I.A. No. 1511 of 1991:- Plaintiff Kandasamy has filed this Application to set aside the exparte decree in O.S. No. 1040 of 1978 after a lapse of nearly 12 years and three months. In the said Application, Defendants 1 and 2 have impleaded themselves as parties. I.A. No. 1511 of 1991 was dismissed on 30.03.1993. Hence, the decree passed in O.S. No. 1040 of 1978 declaring Mylathal as owner of the Schedule A and B Schedule Properties has become final.
23. O.P. No. 108 of 1988:- This Petition was filed by Second Defendant Jayakumar to evict Palani Gounder. The Defendant sought to be impleaded Plaintiff Kandasamy. The Revenue Court found that Kandasamy has no title, property and that impleading petition was dismissed. Aggrieved over the same, the Defendant Palani Gounder filed C.R.P. No. 3021 of 1991 before the High Court. In the said Revision, the High Court has held that Kandasamy has no right to the property and that Kandasamy cannot be impleaded as he has no title or interest in the property and the Civil Revision Petition was dismissed on 20.11.1991. In the backdrop of the above round of litigations, it would not be proper to hold that the bar under Order IX Rule 9 and Order XXIII Rule 1(4) C.P.C is not applicable. Though the present Suit has been filed for partition of "A Schedule" property, the contention that the bar under Order IX Rule 9 and Order XXIII Rule 1(4) C.P.C is inapplicable cannot be countenanced.
26. One of the most abuse of process of Court is re-litigation. Re-litigation is an abuse of process of Court and contrary to justice and public policy. When the party re-agitates the same subject matter on the same cause of action, the same may or may not

be barred by resjudicata; but if the same subject matter is sought to be re-agitated, it amounts to abuse of process of the Court. Such tendency of filing frivolous or vexatious suits are to be curbed by strong Judicial Hand especially where the proceedings are culmination of several rounds of litigation. In exercising the power of superintendence the High Court has the power to stop summarily to prevent the time of the Public and Court being wasted. Power to stop the proceedings should be sparingly exercised only in rare cases. The case in hand is one such instance where there are several rounds of litigations rendering the present suit O.S. No. 278 of 1999 as a vexatious and is to be struck off.

5. The Civil Revision Application is opposed on behalf of the respondents (plaintiffs) on the grounds that the learned Judge has, while rejecting the application Exh. 71, taken into consideration the provisions of law and passed well reasoned order. It is further argued on behalf of the respondents that the cause of action and the description of suit land in both the suits is different. So also, it is argued that the prayers in both the suits are quite different. The Second Suit is filed when according to Plaintiffs, the Defendant no.1 did not come for filing joint application before revenue authorities and was trying to disturb peaceful possession of Plaintiffs. It is also argued that while considering the application under Order VII Rule 11(d) of CPC, what has to be seen is the contents of the plaint. It is further argued that in the Second Suit it is very specifically stated that the cause of action for filing the suit was arisen only after the applicant herein did not adhere to the oral consent terms which were agreed between the parties and he did not come forward for entering the names of respondents (original plaintiffs) in the revenue record. It is further argued that the application Exh. 71 was filed only for the purpose of delaying the hearing of the suit.

6. It is further argued that Order IX Rule 8 CPC provides for dismissal of a suit when at the time of its being called on for hearing, the defendant appears and the plaintiff does not. It is further argued that
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the decree against the plaintiffs by default bars the fresh suit. It is further argued that the order dismissing the suit for default is not a decree as contemplated under the definition of 'Decree' under Section 2(2) of CPC. The learned counsel Mr. Amol Gawali on behalf of the respondents also relied upon the following judgments.

- (i) **Kanayalal Madhavji Thakkar vs. Shree Padmanabh Builders**
2011(1) Mh.L.J. 939. Paragraph 8 reads thus:

8. The issue before the Court is as to whether the Plaintiff to the counter claim can by a clever act of draftsmanship escape from the consequence of the counter claim being barred by limitation by omitting to refer to the termination dated 27 February 2000. The answer to this is in the negative. Order 7 Rule 11(d) of the Code of Civil Procedure, 1908 provides for the rejection of the Plaint inter alia whether the suit appears from the statements in the Plaint to be barred by any law. Now, it is a well settled position in law that it is the statements in the Plaint which have to be accepted on their face in arriving at a determination as to whether the suit is barred by any law. No amount of evidence can be let in for the purpose of making that determination. In this case, the Plaintiff to the counter claim has instituted the counter claim cognizant of the case of the Defendant who was the Plaintiff in the original suit and to the circumstance that it is the contention of the Defendant to the counter claim that the agreement of 1 October 1989 has been terminated on 7 February 2000. Both the letter dated 7 February 2000 as well as the very institution of the suit in this Court on 27 March 2000 constitute a notice of refusal to perform to the Defendant to the suit. A suit for a declaration had to be filed within a period of three years of the accrual of a right to sue while a suit for specific performance had to be filed within a period of three years of a notice of the refusal to perform. The suit has been filed beyond a period of three years. Hence, on the basis of the counter claim as it stands, and without adding or detracting anything from it, it is ex-facie clear that the claim is barred by limitation.

- (ii) **Dharampal (Dead) Through Legal Representatives Versus Punjab Wakf Board and others** (2018) 11 SCC 449. Relevant paragraph

nos. 18.1, 24 and 26 read thus:

- 18.1. In the first place, learned counsel contended that the present suit is barred by virtue of bar contained in Order 9 Rule 9 of the Code. It was pointed out that the plaintiff had earlier filed one civil suit (74/71) for claiming a relief against defendant No.1, which is now again claimed in the present suit and since the earlier suit was dismissed for default on 28.03.1972, the present suit is barred by virtue of bar contained in Order 9 Rule 9 of the Code. It was pointed out that since the plaintiff did not make any application seeking restoration of the earlier suit under Order 9 Rule 9 of the Code, they are now precluded from filing fresh suit to claim the same relief against defendant No.1 by virtue of bar created under Order 9 Rule 9 read with Section 9 of Code.
24. In our opinion, in order to examine such plea, what is relevant at the first instance is to find out as to whether dismissal of the suit is under Rule 3 or Rule 8 of Order 9 of the Code. If it is under Rule 3 then filing of fresh suit is permissible as provided under Rule 4 but if the dismissal is under Rule 8 then fresh suit may be barred as provided under Rule 9.
26. Apart from what is held above, even otherwise, in our opinion, the present suit could be filed notwithstanding dismissal of the earlier suit because the earlier suit was filed only against one defendant, i.e., father of defendant No.1 on a cause of action which accrued against one defendant at that time whereas the present suit was filed against three defendants out of which two defendants were not parties to the earlier suit. So the parties and even part of the cause of action qua defendants were different in both the suits. It is for all these reasons, so far as the first submission of learned counsel is concerned, it has no merit and hence rejected.

(iii) **Ashabai wd/o Rambhau Awachat and others vs. Madhusudan s/o Rajaram Chourasia** [2017(5) Mh.L.J. 588]. Paragraph nos. 8 and 9 read thus:

8. It is to be noted that in Special Civil Suit No.136 of 1968 that was filed by Tarachand against his brother for partition, relief was sought in respect of the properties mentioned in Schedule A of the plaintiff. These properties included a house at Telipura which is not the present suit property. It also included the present suit property as one of the properties of which partition was sought. In other words, the present suit house was not the

only suit property that was the subject matter of partition in Special Civil Suit No.136 of 1968. The bar under Order IX Rule 9 of the Code is to bring a fresh suit is with regard to the same cause of action. The cause of action in the earlier suit for partition arose on 4-12-1967 and on 23-12-1967 after exchange of notices between the two brothers. The cause of action for the present suit arose on 15-2-1988 when the plaintiffs learnt on the dismissal of their second appeal that they were owners of half undivided share of the house jointly owned by the two brothers. The cause of action in the present suit is, therefore, distinct from the cause of action in the earlier suit.

9. In any event, it is well settled that the cause of action for a suit for partition is a continuing cause of action. In *Suraj Rattan* (supra) it has been held that where a partition suit is dismissed for default it does not bar a subsequent suit as even after dismissal of the former suit, the jointness continues and there is a continuing cause of action. The entire house property having continued to remain joint after dismissal of the earlier suit for partition on 24-11-1970 and the cause of action for the present suit having arisen subsequently which was also distinct from the earlier cause of action, there is no manner of doubt that the bar as prescribed by provisions of Order IX Rule 9 of the Code for filing the subsequent suit is not at all attracted.

The appellate Court fell into error when it is held that the present suit was barred under provisions of Order IX Rule 9 of the Code. As noted above, the cause of action for filing the present suit was distinct from the cause of action for filing the earlier suit and the subsequent suit was only with regard to one of the joint family properties that came to be purchased by the predecessor of the appellants. In that backdrop, suit for partition was maintainable. On that count said finding recorded by the appellate Court cannot be sustained. The substantial question of law is answered by holding that the dismissal of the earlier suit for partition would not bar the subsequent suit for partition under provisions of Order IX Rule 9 of the Code.

- (iv) **Piraji Narayanrao Mathankar and another vs. Laxman Upasrao Pote and others** 2016(1) Mh.L.J. 813. Relevant paragraph nos. 7 to 10 are reproduced below :

- 7] The fact that Regular Civil Suit No.851/1998 was filed by Kasabai for partition and separate possession of the ancestral property and its subsequent dismissal for want of prosecution on 30.07.2002 is not in dispute. It is further not in dispute that the subsequent suit has been filed by the legal heirs of Kasabai seeking partition of very same property that was the

subject matter of Regular Civil Suit No.851/1998. The issue for consideration is whether the suit for partition and separate possession filed by the legal heirs of the plaintiff is tenable despite dismissal of an earlier suit for partition and separate possession filed by the predecessor of the plaintiffs for want of prosecution.

- 8] For deciding aforesaid issue it would be first necessary to consider whether the right to file suit for partition can continue as long as the property continues to be jointly held. This aspect has been considered by the Full Bench of the Allahabad High Court in the case of Nasrat-ullah v. Mujib-ullah and ors. reported in (1891) ILR 13 Allahabad 309. In said decision it was held as under:

“It appears to us that when a decree declaring a right to partition has not been given effect to by the parties proceeding to partition in accordance with it, it is competent for the parties or any of them, if they still continue to be interested in the joint property, to bring another suit for a declaration of a right to a partition in case their right to partition is called in question at a time when, by reason of limitation or otherwise, they cannot put into effect the decree first obtained. In this respect suits for declaration of right to partition differ from most other suits. So long as the property is jointly held so long does a right to partition continue. When a person having a right to partition and desiring to partition has his right challenged it appears to us he can maintain a suit for a declaration, provided his prior decree is not still enforceable.”

From the aforesaid it is, therefore, clear that as long as the status of the property in question continues to be joint, the relief of partition can be sought.

- 9] According to the learned counsel for the petitioners as the plaintiffs were claiming as legal representatives of Kasabai they were precluded from filing the fresh suit in view of the provisions of Order 9 Rule 9 of the Code. In *Suraj Rattan* (supra) that was relied upon by the learned counsel for the petitioner, the proceedings arose from a suit seeking declaration of title and possession of landed property. One Ismail had borrowed certain amounts after depositing title deeds of the mortgaged property. As the amount borrowed was not repaid, suit for enforcement of the mortgage was filed which came to be decreed. The property in question came to be sold in public auction and the same was purchased by the respondent therein. The legal heirs of one of the cosharers filed suit for setting aside the sale in favour of

the respondent therein. The suit was however dismissed in default. Thereafter the subsequent purchasers filed another suit seeking declaration of title as stated aforesaid. In that context, it was observed by the Supreme Court that the word “plaintiff” as used in Order 9 Rule 9 of the Code would include the assigns and legal representatives of the plaintiff. It was found that the cause of action in the subsequent suit was similar to the cause of action in the former suit. In the present case the entitlement of the respondents cannot be defeated in view of the fact that after the death of Kasabai the present respondents as her survivors were entitled to file suit for partition of the joint family property. The cause of action to seek partition continued due to jointness of the suit property and the plaintiffs in their own right were entitled to claim partition. Hence, the ratio of said decision cannot apply to the facts of the present case.

- 10] The question whether withdrawal of an earlier suit for partition without obtaining any liberty for filing a fresh suit would attract the bar of provisions of Order 23 Rule 1 of the Code has been considered by learned Single Judge in 2014(5) Mh.L.J. 772 Laxmanrao Mahadeo Nikose v. Narayan Mahadeo Nikose and others. After considering various decisions it was held that the cause of action for seeking partition was recurring in nature and hence, withdrawal of the earlier suit without any liberty would not bar filing of a fresh suit for partition.

In **Asha Sharma and others v. Amar Nath and others** reported in AIR 2003 H.P. 32, it has been held that a joint owner can file a suit for partition until partition is actually effected irrespective of the fact that earlier suits for such partition were dismissed in default or an earlier decree for partition was not acted upon.

The reliance placed by the Appellate Court on the judgment of the Division Bench of the Punjab High Court in **Manohar Lal Behari Lal v. Onkar Das alias Omkar Dass**, AIR 1959 Punjab 252 also supports aforesaid conclusion.

Hence, it was prayed for dismissal of the Civil Revision Application.

ANALYSIS : -

7. I have heard both the sides and have carefully considered the documents filed along with the Civil Revision Application and the
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copy of the order dated 01.04.2014 passed in Application Exh. 29 in the Second Suit produced by the applicant's advocate and the various judgments filed by both the parties. I would like to compare the averments of both the suits in the tabular form. The relevant part of both the suits is reproduced herein below.

R.C.S. No. 269/2009 (hereinafter referred to as ' First Suit ')	R.C.S. No. 1724/2012 (hereinafter referred to as ' Second Suit ')
'Suit Land' as described in plaint :	
7 acres 11 gunthas out of Gut No. 43/2	5 acres land out of land adm. 7 acres 11 gunthas from Gut No. 43/2.
'Cause of Action' as described in plaint :	
The cause of action arose to file R.C.S. No. 269/2009 on 26.11.2005 when the father of plaintiff nos. 1 to 5 and husband of plaintiff no. 6 died and on 25.01.2009 when plaintiffs came to know about alienation of suit land illegally at the hands of deceased Rajendra Waghmare within jurisdiction of the Court which is in continuation.	The cause of action arose when the plaintiffs got knowledge about illegal alienation by the father of plaintiff nos. 1 to 5 on 25.01.2009 and as they are entitled for definite share in the suit property. Cause of action is continuously arising day to day since defendant no. 1 handed over possession of 5 acres land in favour of plaintiffs in the month of March 2011 and defendant no. 1 is continuously disturbing peaceful possession of plaintiffs from 20 th August, 2012.
'Prayers' as sought in the Plaint :	
A) The suit of the plaintiffs may kindly be decreed with costs. B) It be declared that the Sale Deed executed by deceased Rajendra Waghmare in favour of defendant no. 1 bearing Sale Deed no. 16 dated 4.10.1991 in respect of suit land ad-measuring 7 Acres 11 gunthas part and parcel of Gut No. 43/2 situated at Sahajapur, Tq. & Dist. Aurangabad is	A) The suit may kindly be decreed with cost. B) The plaintiffs may be put in separate possession of suit property by meets and bounds by issuance of decree of partition in their favour.

<i>void, illegal, ab initio</i> and not binding on plaintiffs to the extent of plaintiffs share 6/7th involved in Sale Deed. C) It be declared that the permission granted by Collector, Land Reforms dated 30.09.1991 in respect of suit land vide File No. 91/Ceiling/Land Reform/VV/CR-32 is illegal and not binding on plaintiffs. D) Decree of partition and separate possession may kindly be passed to the extent of plaintiffs share 6/7th in suit land Gut No. 43/2 ad-measuring to the extent of 7 acres 11 gunthas situated at village Sahajapur, Tq. & Dist. Aurangabad and plaintiffs be inducted into actual possession to the extent of their share. E) Decree of perpetual injunction may kindly be passed against defendant no. 1 and thereby he be restrained perpetually from alienating, or creating any charge over suit land Gut No. 43/2 admeasuring 7 acres 11 gunthas situated at village Sahajapur, Tq. & Dist. Aurangabad.	C) The registered Sale Deed at serial No. 16/1991 dated 04/10/1991 may kindly be declared as not binding on plaintiffs. D) The defendants may kindly be restrained perpetually from disturbing peaceful possession of plaintiffs over suit land and alienating and creating third party interest in suit property in the interest of justice. None.
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8.1 Thus, it can be seen that the First Suit was filed in the year 2009, in which the respondents - original plaintiffs claimed 6/7th share in the suit land i.e. 7 acres 11 gunthas whereas; in the Second Suit, filed in the year 2012 respondents – original plaintiffs claimed 6/7th share in suit land *ad measuring* 5 acres out of 7 acres 11 gunthas. The Second Suit is filed when according to Plaintiffs, the Defendant no.1 did not adhere to settlement terms and did not come for filing joint application before revenue authorities and was trying to disturb peaceful possession of Plaintiffs.

8.2 In the First Suit, the plaintiffs in prayer clause 'B' sought a declaration that sale deed executed by deceased Rajendra Waghmare in favour of defendant no. 1 in respect of suit land *ad measuring* 7 acres 11 gunthas is *void*, illegal, *ab initio* and not binding on plaintiffs to the extent of plaintiff's share 6/7th share involved in the sale deed. In the Second Suit, in prayer clause 'C', the plaintiffs sought a relief that the registered Sale Deed dated 30.09.1991 may kindly be declared as not binding on the plaintiffs.

8.3 In the First Suit, prayer clause 'C' was for a declaration that the permission granted by the Collector, Land Reforms dated 04.10.1991 in respect of suit land is illegal and not binding on the plaintiffs. Such a prayer of declaration is not sought in the Second Suit.

8.4 In the First Suit, prayer clause 'D' seeks a decree of partition and separate possession to the extent of plaintiffs' 6/7th share in suit land to the extent of 7 acres 11 gunthas and the plaintiffs be inducted into actual possession to the extent of their share. In the Second Suit, prayer clause 'B' seeks separate possession of suit property by meets and bounds by issuance of decree of partition in their favour. In turn, the prayer clause 'B' in the Second Suit means that the plaintiffs be given possession of 6/7th share out of 5 acres of land.

8.5 In the First Suit, prayer clause 'E' seeks a decree of perpetual injunction from alienating and creating any charge over suit land *ad measuring* 7 acres 11 gunthas. In the Second Suit, vide prayer clause 'D' it is prayed that defendants be restrained perpetually from disturbing peaceful possession of plaintiffs over suit land and alienating and creating third party interest in the suit property.

8.6 In the First Suit, the cause of action is very clearly stated as to being arose on 26.11.2005 and on 25.01.2009. In the Second Suit, the cause of action is stated to have arisen on 25.01.2009 when defendant no. 1 handed over possession of 5 acres of land. Therefore, the date 26.11.2005 when the cause of action arose in the First Suit, is not mentioned in the Second Suit. The description of properties in both the suits is also different. Thus it can be seen that the cause of action, description of properties and prayers as sought in the Second Suit, are distinct from the First Suit.

9. For considering the arguments of the Applicant, it is necessary to take note of the provisions of Order IX Rule 9 of CPC, which reads as under : -

"Order IX, Rule 9 : Decree against plaintiff by default bars fresh suit (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 the suit."

10. It is important to quote definition of 'Decree' under Section 2 of CPC, which reads thus :

S. 2 - **"Decree"** means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question **within section 144**, but **shall not include**

- (a) any adjudication from which an appeal lies as an appeal from an order, or
- (b) **any order of dismissal for default.**

Explanation. A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final;

11. Therefore Order IX Rule 9 CPC contemplates passing of a 'Decree' against Plaintiff, barring him/her from filing a fresh suit. However, the definition of Decree under Section 2 of C.P.C., doesn't include any "Order of dismissal for default".

12. In the case in hand, the First suit was dismissed for default hence, in my view, provisions of Order IX Rule 9 CPC are not attracted.

13. The Counsel for the Applicant has referred to authorities of (i) Suraj Rattan Thirani (supra). The said judgment concludes that to consider whether the the causes of action in the two suits in substance, not technically- identical. (ii) The judgment of C.S. Ramaswamy (supra), dealt with the issue of limitation and fraud. (iii) The judgment of Dr. S. Jayakumar (supra), the facts in said judgment as enumerated in paragraph No.22, states that in the First Suit *ex parte* decree was passed. An application for setting aside *ex parte* decree was dismissed, and only thereafter fresh suit was filed. Hence it was held that bar under Order IX Rule 9, and Order XXIII, Rule 1(4) is applicable.

14. Considering the facts of the matter in hand where the First Suit was dismissed for non appearance, none of the above judgments are helpful to the Applicant.

15. Now considering the judgments referred by the Respondent (Orig. Plaintiff), the judgment of Ashabai (Supra) referred by sgp

Respondents Advocate, and more particularly paragraph no.8 and 9, the facts contained therein are identical to the present case. So also the ratio laid down in the judgment of Piraji Narayanrao Mathankar (Supra) applies to the matter in hand wherein the facts are identical in nature. I agree with the view taken in both the judgments.

16. The First Suit was dismissed for default by order dated 28.06.2011. The Second Suit filed by the respondents herein had very different kind of prayers so also the cause of action and the description of the suit properties were also different. Hence, in my view, the Second Suit is not barred under the provisions of Order IX Rule 9 of CPC. Even the cause of action *qua* the defendants were different in both the suits.

17. The applicant in the present Civil Revision Application has furnished a copy of order dated 01.04.2014 passed in R.C.S. No. 1724/2012, thereby rejecting the application filed by the present applicant. In the said application (Exh. 29), two points were framed for determination.

- (i) Whether the jurisdiction of the Court is barred?
- (ii) Whether the suit is barred by limitation?

18. The said application Exh. 29 was filed under Section 9-A before the new amendment of Maharashtra to the CPC. In the said order, various judgments are considered and by a reasoned order the court has rejected the said application. Amongst other points the court also considered that the application was not filed under Order VII Rule 11 of CPC.

19. It is pertinent to note that the Second Suit was filed on 03.09.2012 and thereafter the present application Exh. 71 was filed on
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29.10.2018 i.e. after a period of 6 years under Order VII Rule 11(d), when the written statement were already filed by the defendants. It appears that the defendants belatedly are filing applications after applications just to delay the hearing of the suit.

20. In view of the aforesaid discussion and the judgments cited, the Civil Revision Application is Dismissed.

21. As considerable time has been spent from the stage of filing the suit till filing of the written statement dated 11.12.2012 in Second Suit, the hearing of the suit is expedited and the Judge of the trial Court where the suit is filed should make an endeavour to dispose of the suit within a period of six (06) months from the date of receipt of this order.

[RAJESH S. PATIL]
JUDGE