

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

CIVIL REVISION APPLICATION NO.129 OF 2022

Gajanan Mahadeo Potdar

..Applicant

Versus

Hanamant Kisan Yadav and Ors.

..Respondents

Mr. A. V. Anturkar, Senior Advocate i/by Yatin Malvankar, for the Applicant.

Mr. Umesh Mankapure, for the Respondents.

CORAM : NITIN W. SAMBRE, J.

DATE : 6th APRIL, 2022

PC.

1. Respondent No.1 initiated RCS 52 of 2019 for declaration and permanent injunction based on title. The present applicant/defendant No.1 took out an application Exh.34 under the provisions of Order VII Rule 11 of the CPC for rejection of plaint. The said application Exh.34 came to be rejected vide order impugned dated 15th January, 2022 passed by the Civil Judge, Junior Division, Atpadi. As such, this Revision.

2. Contentions of Mr. A. V. Anturkar, learned senior counsel appearing for the applicant/defendant No.1 are, the Court below erred in rejecting prayer for rejection of plaint under Order VII Rule 11 of the CPC, as the suit claim was barred by limitation. According to him, the limitation prescribed for remedy of declaration is three

years. He would urge that the suit is initiated beyond the period of three years of the cause of action. So as to substantiate his contentions, he would invite attention of this Court to the cause of action cited in the plaint which is based on the earlier suit being RCS No.110 of 2009 which was dismissed in default on 19th September, 2015. According to him, the suit was initiated on 1st March, 2019. As such, the suit is barred by limitation. His next contention is, the earlier suit being RCS No.110 of 2009 was for declaration of correct Gat Number and declaration of ownership over Gat No.1583/2 which is Gat No.1582. According to him, for very similar relief the present suit is brought into action which is barred under Order IX Rule 9 of the CPC. His further contention is, the suit is hit by the provisions of Section 36 of the Fragmentation Act, as under Section 36(b), challenge cannot be raised to the consolidation scheme. According to him, the survey which led to the implementation of consolidation scheme took place in 1953, whereas in the suit in 2019 a challenge is to the said survey at much belated stage. In the aforesaid background, the contention of Mr. A. V. Anturkar is, the Court below committed an error in recording a finding that the plaint is not liable to be rejected.

3. Mr. Umesh Mankapure, learned counsel appearing for the respondents/plaintiffs would oppose the prayer. According to him, the Trial Court was conscious of the principle that the pleadings in the plaint are required to be considered, while dealing with the claim under Order VII Rule 11 of the CPC. According to

him, based on the pleadings and the cause of action narrated, the Court below was justified in rejecting the prayer. As such, he would claim that there is no error of jurisdiction and that being so, the revision is liable to be rejected.

4. Considered submissions.

5. The suit being RCS No.110 of 2009 was initiated by the respondents/plaintiffs for declaration and permanent injunction. A declaration of ownership of correct gat number is sought, so also the declaration of ownership of adverse possession. The said suit was dismissed in default on 19th September, 2015. As such, while dismissing the said suit, the Court of Joint Civil Judge, Junior Division, Atpadi in its order of dismissal on 19th September, 2015 has observed that the plaintiffs repeatedly remained absent. As such, plaintiffs have lost interest in the suit. That being so, the suit was dismissed. As such, the claim in the said suit was not adjudicated on its merit.

6. The applicant was defendant No.1 in the said suit has filed his written statement on 2nd March, 2009 and has admitted entire claim. In the aforesaid background, if we appreciate the contention of Mr. A. V. Anturkar, the fact remains that the earlier suit since was not adjudicated on merit, the bar under Order IX Rule 9 of the CPC will not be attracted. The provisions of Order IX Rule 9 of the CPC contemplates a decree against the plaintiff by default bars

the fresh suit. However, exception provided in Rule 8 to the aforesaid Rule 9 is that in case, if the defendant appears and admits the claim, the bar under Order IX Rule 9 of the CPC will not operate. That being so, the Court below was justified in rejecting the prayer of the applicant on that count.

7. This takes me to the next submissions of Mr. A. V. Anturkar as regards the suit claim for declaration being barred by limitation, as same was brought in action after three years of order of dismissal i.e. 19.09.2015. The fact remains that in the present suit, the cause of action narrated is not only based on the admission of claim in the aforesaid suit by the preset applicant but it is also based on the obstruction by the present applicant to the alleged settled possession of respondents/plaintiffs on 11th October, 2018. As such, *prima-facie* it is noticed that the claim in the suit is within limitation and is also based on continuous cause of action.

8. The prayer in the plaint is as regards the declaration of ownership over the suit property and injunction not to interfere with possession. Though Mr. A. V. Anturkar as relied on pleadings in the plaint that there is challenge raised to the survey of 1953 which has led to implementation of consolidation scheme and bar under Section 36(b) of the Fragmentation Act, there is no specific prayer in the plaint to the effect of challenge to the consolidation scheme that was effected.

9. However, in case if such issue cropped up, of course the Civil Court will not go into it, as the Civil Court is required to refer the same to the appropriate forum. In the aforesaid background, particularly, having regard to the admission of claim by the applicant as reflected from the written statement in RCS No.110 of 2009, in my opinion, the Court below was justified in rejecting the prayer for rejection of plaint. The learned Trial Court vide its detailed order has considered all the aforesaid contentions and rightly so evaluated that the plaint is not liable to be rejected under Order VII Rule 11 of the CPC, as the suit claim is barred by limitation and cause of action is not disclosed. That being so, no error of jurisdiction could be noticed in the order impugned.

10. The Revision Application as such fails, dismissed.

[NITIN W. SAMBRE, J.]