

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

APPEAL FROM ORDER NO. 417 OF 2018

Smt. Atuli Anton D'mello @
(Atuli @ Atti Andrew Lopes)
through POA Mr. Canan Dominic
D'mello and Ors.

...Appellants

V/s.

Shri Peter Anton Lopes and Ors.

...Respondents

Mr. Surel Shah a/w. Mr. Pramod G. Kathane a/w. Mr. Manoj Sawarde, for the Appellants.

Mr. G. S. Godbole a/w. Ms. Shruti Tulpule and Mr. Aditya Shirke, for the Respondents.

Mr. Rajiv Narula a/w. Mr. Mihir Choudhary i/b. Jhangiani Narula and Associates, for the Respondent No.24.

**CORAM : C.V. BHADANG, J.
DATE : 10 AUGUST 2022**

P.C.

. By this appeal, the Appellants (original Plaintiffs) are challenging the order dated 11 April 2018 (below Exh.39) passed by the learned Senior Civil Judge at Vasai, District Palghar, in Special Civil Suit No.155/2016. By the impugned order, application – Exhibit 39 filed by the Appellants, seeking temporary injunction under Order XXXIX Rule 1 and 2 of Code of Civil Procedure (CPC), has been dismissed.

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2. The Appellants are the original Plaintiffs while the Respondents are the original Defendants before the trial Court. For the sake of convenience, they are referred to in their original capacity as Plaintiffs and Defendants. The Appellants filed the aforesaid suit for declaration, partition and separate possession and for injunction etc. in respect of the suit properties which are more specifically described in the plaint.

3. Late Terez Mingel Lopes is the common ancestor who died intestate on 5 October 1953. Late Terez Lopes had three sons namely Late Victor, Late Anton and Late Dominic and two daughters namely Late Sizubai and Johna. Dominic died intestate somewhere in the year 1945.

4. The Plaintiffs are the successors of Late Sizubai who died on 14 February 1988. Dominic was unmarried and he died without making any provision about his share.

5. The original Defendant Nos.1 to 8 are the legal heirs of Anton while Defendant Nos.9 to 11 are the legal heirs of Late Victor. Defendant Nos.12 to 20 are the legal heirs of Late Johna.

6. The Plaintiffs filed the aforesaid suit for partition and separate possession of their 1/5th share alongwith 1/20th share. The later comprises of the 1/5th share out of 1/4th share of Dominic who died intestate without leaving any other legal heirs. The Plaintiffs contended that the transfer of the property effected

vide agreement dated 13 December 2014 in favour of the Defendant No.24 who is a Builder and Developer by Defendant No.9 is without consent of the other sharers and is illegal and invalid. The Plaintiffs sought partition and separate possession of their aforesaid shares alongwith declaration in respect of the subsequent transfer and an injunction restraining the Defendants from creating any third party interest or effecting any construction on the suit property.

7. The Plaintiffs filed application Exh.39 for temporary injunction for restraining the Defendant Nos.1 to 22 and 24 (Defendant No.23 being Vasai-Virar Municipal Corporation) or anybody on their behalf from creating third party interest or carrying on any development or any construction work. In so far as the Defendant No.24 is concerned, further injunction was sought restraining it from carrying out any development or any construction work on part of suit property namely Survey No.79/24/25-A/25-K admeasuring about 3790 Sq. Meters.

8. The application was resisted on behalf of the contesting Respondents – Defendants, interalia on the ground that there was an earlier suit filed by the legal heirs of Late Anton, son of Terez Lopes being Regular Civil Suit (RCS) No.187/1990. It was contended that that suit was filed for partition of 1/20th share in favour of the Plaintiffs therein being the legal heirs of Late Anton. It was contended that the present Plaintiffs were

Defendant Nos.4 to 11 in RCS No.187/1990 which was decreed on 13 January 2000. It was contended that as per the evidence led in the 1990 Suit, partition was effected more than 50 years back in which the mother of the Plaintiffs namely Sizubai had given up her share in favour of her brother Victor who is father of Defendant Nos.9 to 11 and grandfather of Defendant Nos.10a to 10d. This aspect was also part of the pleadings in 1990 Suit. It was further contended that the Plaintiffs are not entitled to the share as claimed.

9. The trial Court referred to the evidence of Michael Victor Lopes in the said suit which was recorded in the year 1999 in which he has admitted the fact of previous partition and giving up of the share. In that view of the matter, the trial Court has found that the Appellants / Plaintiffs have failed to show prima facie case and there is also a bar of estoppel. The trial Court has also found that the suit filed in the year 2006 is prima facie seen to be barred by limitation. In the face of such findings, the application came to be rejected which is subject matter of challenge in this appeal.

10. I have heard learned counsel for the Appellants and the learned counsel for the Respondents. With the assistance of the learned counsel for the parties, I have gone through the record.

11. It is submitted by Mr. Shah, the learned counsel for the Appellants that the learned trial Court was in error in holding that Sizubai had surrendered her right, particularly when Sizubai had expired in the year 1988. It was contended that the share of Late Dominic who was unmarried was never partitioned and hence, heirs of Late Sizubai i.e. the Appellants were entitled to 1/20th share (i.e. 1/5th of the 1/4th share of Late Dominic). It was contended that the partition of the property was never complete as per the judgment delivered in RCS No.187/1990 as the issue about share of Late Sizubai was not at all adjudicated in the said suit. In short, it is contended that reliance placed by the learned trial Court on the decision in RCS No.187/1990 is misplaced. The learned counsel for the Appellants has also referred to a mutation entry No.822, copy of which is produced at page No.103 of the compilation.

12. Mr. Godbole, the learned counsel for the Respondents has supported the impugned order. It is submitted that the Appellants – Plaintiffs were parties in RCS No.187/1990 as Defendants 4 to 11. The learned counsel has also referred to the evidence of Johna Lopes. It is submitted that the trial Court has rightly relied upon the pleadings / evidence and the decision in RCS No.187/1990 to find that the Appellants have failed to establish any prima facie case.

13. On behalf of the Respondents, reliance is placed on the decision of this Court in *Madhav Narayan Mujumdar & Ors. Vs. Southern Knitting Works Pvt. Ltd. and Anr.*¹ in order to submit that the claim in the suit would be barred on the principle of *res judicata*.

14. I have considered the rival circumstances and the submissions made.

15. The intersay relationship between the parties is not in dispute. It is also not in dispute that the legal heirs of Late Anton Lopes had filed RCS No.187/1990 for partition and separate possession making a similar claim of 1/20th share (1/5th of 1/4th share of Dominic). It is a matter of record that the present Plaintiffs were party Defendants in that suit. The copy of the judgment and decree in that suit is placed on record. A perusal of the evidence of Johna Lopes who was the alone survivor out of two daughters and three sons of Terez Lopes, shows that she alongwith Sizubai (through whom the Appellants are claiming right) had given up their share in favour of their brother as he had looked after them in their childhood. She also stated that the partition of the property was effected after the death of their mother Late Terez Lopes prior to 50 years and Anton had sold his share. Thus, in my considered view, the trial Court is right in finding that the Appellants-Plaintiffs have failed to establish any

¹1998 (4) Bom CR 153

prima facie case and the consideration of balance of convenience and irreparable loss also are not established.

16. This Court in *Madhav Muzumdar (supra)* has referred to the decision of the Supreme Court in *Workmen of Cochin Port Trust Vs. The Board of Trustees of the Cochin Port Trust*² in which it is held thus in paragraph 9 of the judgment.

9. *“It is well known that the doctrine of res judicata is codified in Section 11 of the Code of Civil Procedure but it is not exhaustive. Section 11 generally comes into play in relation to civil suits. But apart from the codified law the doctrine of res judicata or the principle of res judicata has been applied since long in various other kinds of proceedings and situations by courts in England, India and other countries. The rule of constructive res judicata is engrafted in Explanation IV of Section 11 of the Code of Civil Procedure and in many other situations also principles not only of direct res judicata but of constructive res judicata are also applied. If by any judgment or order any matter in issue has been directly and explicitly decided the decision operates as res judicata and bars the trial of an identical issue in a subsequent proceedings between the same parties. The*

²(1978) 3 SCC 119

principle of res judicata also comes into play when by a judgment and order a decision of a particular issue is implicit in it, that is, it must be deemed to have been necessarily decided by implication, then also the principle of res judicata on that issue is directly applicable.

When any matter which might and ought to have been made a ground of defence or attract in a former proceedings but was not so made, then such a matter in the eye of law, to avoid multiplicity of litigation and to bring about finality in it is deemed to have been constructively in issue and therefore, is taken as decided.”

17. I have gone through the impugned order and it does not suffer from any infirmity so as to require interference in an appeal under Order XLIII of CPC which is essentially an appeal on principle.

18. In the result, the appeal from order is hereby dismissed, with no order as to costs.

C.V. BHADANG, J.