

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

CIVIL REVISION APPLICATION NO. 9/2022

- 1) Shri Chetan s/o Purushottam Borkute,
Aged about 46 years,
Occupation – Business.
- 2) Smt. Priyanka w/o Chetan Borkute,
Aged 42 years,
Occupation – Business.

Both R/o Plot No.2, Ravindra Smruti,
Doctors Colony, Chhatrapati Nagar,
Nagpur – 440015.

.... **APPLICANTS**

VERSUS

- 1) Smt. Nilima w/o Satish Wankhede,
Aged about 48 years,
Occupation – Homemaker,
- 2) Smt. Savita wd/o Dattatraya Borkute,
Aged about 75 years,
Occupation – Nil,

Both R/o Plot No.2, Ravindra Smruti,
Doctors Colony, Chhatrapati Nagar,
Nagpur.

.... **NON-APPLICANTS**

Mr. S.A. Kalbande, Counsel for the applicants,
Ms. Surbhi Naidu, Counsel h/f. Mr. Prakash Naidu, Counsel for the non-
applicants.

CORAM : ROHIT B. DEO, J.
DATED : 25th MARCH, 2022

ORAL JUDGMENT :

The applicants are the defendants in Special Civil Suit 299/2021 which is instituted by the non-applicants/plaintiffs seeking decree for recovery of damages, declaration, possession and permanent injunction. The defendants are calling in question the order dated 23-12-2021 rendered by the learned 18th Joint Civil Judge (Junior Division), Nagpur whereby the application preferred under Order VII Rule 11 of the Civil Procedure Code (Code) is rejected.

2. In view of the well entrenched position of law, that the only material which can be looked into while considering an application for rejection of plaint, is the plaint and the documents on which the reliance is placed by the plaintiffs, a resume of the plaint averments is in order. Plaintiff 1 is the daughter of Dattatraya Gopalrao Borkute, who expired leaving behind three children including the plaintiff. Plaintiff 1 is the only surviving child. Plaintiff 2 is the mother of plaintiff 1 and widow of Dattatraya Gopalrao Borkute.

3. Defendant 1 is the son of Purushottam Gopalrao Borkute, who was the brother of Dattatraya. Dattatraya and his brothers partitioned the ancestral property, to which a reference is made in paragraph 1 of the suit plaint.

4. The averment in paragraph 2 is that the three brothers Dattatraya, Purushottam and Madhukar jointly purchased agricultural field admeasuring 15 acres at Mouza-Walni, Tahsil and District Nagpur. Purushottam, who already had three children including defendant 1-Chetan from the first wife, married again and it was perceived by the family that Purushottam intended to deprive defendant 1 herein and other family members of their share in the agricultural field by alienating the same. Defendant 1-Chetan was a minor, and in order to protect his interest, Dattatraya and Madhukar instituted Regular Civil Suit 1039/1987 which was ultimately compromised. The assertion in the plaint is that notwithstanding that Madhukar acted as the guardian in the suit, at no point of time was defendant 1-Chetan adopted by Madhukar.

Paragraph 4 of the suit plaint refers to certain acquisitions made by Dattatraya and to the fact that defendant 1-Chetan was permitted by Dattatraya to reside at the house at Plot 3, Hindustan Colony, Bhagyodaya Co-operative Housing Society, Wardha Road, Nagpur till he attained the age of majority. Dattatraya resided at the said Plot 3 till 2007 and then shifted to the house constructed on Plot 2 in the same layout, due to certain unfortunate events in the family *inter alia* the death of the son Ravindra. Defendant 1-Chetan continued to stay with Dattatraya at Plot 3, Hindustan Colony till his marriage. Subsequent to

his marriage, defendant 1-Chetan entered into an agreement of development with Dattatraya in respect of the land admeasuring 1650 square meters assigned City Survey 500, Narendra Nagar, Nagpur. On the same day of execution of the agreement of development, a deed of exchange of properties was registered where under Dattatraya handed over Plots 30 and 31 situated in Ward 15, Nagpur to defendant 1-Chetan and in exchange defendant 1-Chetan transferred his share of field at Walni. In order to give effect to the deed of exchange, Dattatraya intended to sell land admeasuring 1140 square meters assigned City Survey 500/3 in Borkute Layout, Narendra Nagar, Nagpur to a builder and defendant 1-Chetan was joined as a formal party to the document. It is further averred that after marriage, defendant 1-Chetan shifted to Plot 14 along with his wife, which defendant 1-Chetan acquired under the sale-deed executed by Dattatraya in consonance with the deed of development dated 30-4-2008. In the interregnum, defendant 1-Chetan also executed registered gift-deed in favour of Dattatraya in respect of the block on the second floor in the building 'Datta Bhavan'. Dattatraya was placed in peaceful possession of the said block, is the plaint averment. It is then averred that by virtue of Will executed by Dattatraya on 27-3-2018 his entire estate is bequeathed in favour of plaintiff 1 alone. Certain other averments are made in paragraph 8 which may not have much significance in the

context of the issue involved. In paragraph 9, the reference is to eleven properties, which are described as the suit properties which are owned by plaintiff 1. In paragraph 10, it is averred that sometime in 2016 plaintiff 1 and her husband shifted to Pune for two years and at that stage and time defendant 1-Chetan requested that he be permitted to reside on the first floor of the house on Plot 2, Bhagyodaya Co-operative Housing Society, Nagpur till he secures alternate accommodation and similarly induced plaintiff 2 to permit him to occupy one shop block at Narkesari Complex, Mouza-Ajani. In paragraph 12 of the suit plaint, the attempt is to demonstrate that defendant 1-Chetan threatened to deprive plaintiff 1 of her rightful share as the only legal heir of Dattatraya by falsely claiming to be the adopted son. The plaintiffs preferred Regular Civil Suit 245/2018 before the learned Judge, Small Causes Court, Nagpur against defendant 1-Chetan for eviction, possession and mesne profits and defendant 1-Chetan objected to the maintainability of the suit. The plaintiffs had also instituted suit for declaration and injunction i.e. Regular Civil Suit 658/2019 concerning certain properties and Regular Civil Suit 253/2018 before the Small Causes Court, Nagpur against defendant 2 for eviction. Defendant 2 took a stand that the property concerned is occupied by defendant 1-Chetan. It is averred that acting on legal advice, the plaintiffs had deemed fit to withdraw earlier suit

and to institute a comprehensive suit. Rest of the plaint attempts to demonstrate that the defendants, particularly defendant 1-Chetan has indulged in nefarious activity and taking undue advantage of the fact that the plaintiffs are women, has tried to dispossess them. It is broadly on such averments that the suit plaint incorporates the following prayer clause :

“1. Declare that the defendants are in illegal possession/occupation of the properties mentioned in schedule of property at serial no. A and B. and be further pleased to direct the defendants to vacate the said properties and handover physical possession of the same to the plaintiff No.1.

2. Hold and declare that the possession of the defendants over the properties mentioned in the schedule of properties at serial number A and B is illegal and be pleased to direct the defendants to pay damages for the illegal occupation/possession over both the properties mentioned in serial No.A and B @ of Rs.25,000/- per month each from July, 2016 till date amounting to Rs.22,50,000/- and be further pleased to declare that the plaintiffs are entitled to damages of the said properties @ of Rs.30,000/- per month from the date of institution of the suit till the defendants handover the vacant possession of those properties to the plaintiff no.1;

3. Declare that since the plaintiff is the sole owner of all the properties mentioned in the schedule of property and is in possession thereof, the defendants be directed by a permanent injunction to refrain from entering of taking possession or creating third party interest in anyway whatsoever or disturbing the peaceful possession of the plaintiffs either directly or indirectly by an order of an injunction;

4. That since the defendant no.1 has in various proceedings tried to project a frivolous, false and absolutely wrong claim over the properties belonging to the plaintiff no.1 and since the defendant No.1 is fraudulently trying to establish his claim of being an adopted son of Dattatraya s/o Gopalrao Borkute and is trying to establish his relations with

the family of the plaintiffs by claiming himself to be an adopted son, the Hon'ble Court be pleased to declare that the claim of adoption as is being made by the defendant no.1 is null and void, fraudulent and against the facts and settled principles of law and be further pleased to declare that the said Late Dattatraya s/o Gopalrao Borkute and/or the plaintiff no.2 had never adopted the defendant no.1 and as such the frivolous and illegitimate claim of the defendant no.1 is bad in law and also on facts and the defendant no.1 cannot proceed to claim any properties belonging to the plaintiffs.

5. Grant any other relief this Hon'ble Court deems fit and proper in favour of plaintiffs in view of the facts and circumstances of the case."

5. Defendant 1-Chetan applied for rejection of the plaint on the premise that Regular Civil Suit 245/2018 and Regular Civil Suit 253/2018 instituted against defendant 1-Chetan and defendant 2-Mrs. Priyanka have been withdrawn with permission to file separate suits before the appropriate Court and Regular Civil Suit 658/2019 in respect of certain agricultural fields was also withdrawn with permission to institute fresh suit. However, Regular Civil Suit 989/2018 instituted for injunction in respect of Shop 6, Narkesari Complex, Deo Nagar Chowk was withdrawn unconditionally without securing permission to file fresh suit and, therefore, in view of the provisions of Order II Rule 2 and Order XXIII Rule 1(4) of the Code, suit is not maintainable. The other objection is on the basis that it would be the Small Causes Court and not the civil Court which will have the jurisdiction to decide the suit. A reference is then made to Regular Civil Suit 1065/2019

instituted by defendant 1-Chetan seeking a declaration of status as adopted son of Dattatraya and plaintiff 2.

6. The learned trial Judge considered the application for rejection of plaint on the touchstone of the established principle that the plaint averments must be read holistically. The learned trial Judge noted that plaintiff 2 withdrew Regular Civil Suit 253/2018 with permission and liberty to file fresh suit. The learned trial Judge then found from record that prior to institution of Regular Civil Suit 253/2018, Regular Civil Suit 989/2018 was withdrawn. It is noted that during the proceedings since Regular Civil Suit 253/2018 defendant 2-Mrs. Priyanka did not object to the tenability of the suit nor did she raise any objection invoking the provisions of Order II Rule 2 and Order XXIII Rule 1(4) of the Code. The trial Judge noted that defendant 2-Mrs. Priyanka not only participated in the suit proceedings, she contended that the learned Judge, Small Cases Court did not have the jurisdiction to entertain the suit. The learned trial Judge then noted that Regular Civil Suit 253/2018 was withdrawn with liberty to file fresh suit. The learned trial Judge reasoned that the objection on the ground of withdrawal of the earlier suit/s ought to have been taken in Regular Civil Suit 253/2018 and that since while withdrawing Regular Civil Suit 253/2018 the learned Judge, Small Causes Court permitted filing of

fresh suit, such an objection cannot be entertained. Dealing with the objection that the suit ought to have been filed before the Small Causes Court since according to the plaintiffs, defendant 1-Chetan was in permissive occupation of the residential house and the shop, the learned trial Judge reasoned that considering the prayers made in the suit, the civil Court did have the jurisdiction to entertain the suit. While the trial Court does not appear to have discussed the objection premised on the tenability of the suit elaborately, the ultimate conclusion is right. The suit is instituted concerning as many as eleven properties which according to plaintiff 1 are bequeathed in her favour by her father Dattatraya. While it is true that out of the aforesaid eleven properties, defendant 1-Chetan is described as a permissive occupant in relation to one residential block and one shop block, the issues involved can only be appropriately decided by the civil Court. The issue of title is not an incidental question which can be looked into by the Small Causes Court. Defendant 1-Chetan claims to have instituted a separate civil suit seeking a declaration that he is the adopted son of Dattatraya. Whether Dattatraya did adopt defendant 1-Chetan and more importantly whether the alleged adoption is legal, do not become incidental questions, as is argued by the learned Counsel for defendant 1 Mr. S.A. Kalbande.

7. The learned Counsel Mr. S.A. Kalbande has placed on record as many as thirteen decisions to buttress the submission that on the face of the plaint averments, the plaint merits rejection. I need not burden this order by discussing the plethora of decisions pressed in service. I have already observed that in the factual matrix the issue of existence of factum and legality of adoption may not be an incidental issue. Moreover, the suit pertains to as many as eleven properties and the averment in the suit plaint that at one point in time defendant 1-Chetan was permitted to occupy the residential block and the shop block permissively, pertains only to two of the eleven properties which are the subject matter. Piecemeal rejection of the plaint will not be in the interest of either the plaintiffs or then the defendants. Such a course is impermissible in law, particularly since defendant 1-Chetan is claiming to be the adopted son of Dattatraya and that claim will have to be adjudicated by the civil Court.

8. While I am not inclined to discuss every decision pressed in service, some observations on which Mr. S.A. Kalbande heavily relied may be looked into. Mr. S.A. Kalbande invited my attention to the observations of a learned Single Judge in *Ashok Khubchand Vaswani v. Gopidevi wd/o Shyamkumar Vaswani and others*, 2017(3) Mh.L.J. 536, particularly in paragraph 8. The observation is that question of title to

the suit property can be considered by the Small Causes Court only as an incidental question and such finding does not operate as *res judicata*. The learned Single Judge referred to two Supreme Court decisions which hold that such finding does not assume finality. More importantly reference is made to the decision in ***Shamim Akhtar v. Iqbal Ahmad and another*, (2000) 8 SCC 123**, which articulates that the power vested with the Small Causes Court under Section 23(1) of the Provincial Small Causes Court Act, 1887 is discretionary and can be exercised only when the relief claimed by the plaintiff depends upon proof or disproof of title and cannot be granted without determining that question. Few of the decisions cited explained the term “licensor” and “licensee”. These decisions need not be considered in view of the issue involved. Decision in ***Upadhyay v. State of U.P and others*, AIR 1999 SC 509** explains the rationale underlying the embargo on instituting fresh suit without obtaining permission to withdraw the earlier suit with liberty. The decision of the Hon’ble Supreme Court in ***Coffee Board v. Ramesh Exports Pvt. Ltd.*, 2014(6) Mh.L.J. 531** articulates the scope and ambit of Order II Rule 2 of the Code and articulates that the bar comes into operation where the cause of action on which the previous suit was filed forms the foundation of the subsequent suit. Pertinently, the Supreme Court observes thus :

“11. The bar of Order II Rule 2 comes into operation where the cause of action on which the previous suit was filed, forms the foundation of the subsequent suit; and when the plaintiff could have claimed the relief sought in the subsequent suit, in the earlier suit; and both the suits are between the same parties. Furthermore, the bar under Order II Rule 2 must be specifically pleaded by the defendant in the suit and the Trial Court should specifically frame a specific issue in that regard wherein the pleading in the earlier suit must be examined and the plaintiff is given an opportunity to demonstrate that the cause of action in the subsequent suit is different. This was held by this Court in Alka Gupta vs. Narender Kumar Gupta (supra) which referred to decision of this Court in Gurbux Singh vs. Bhooralal, AIR 1964 SC 1810 wherein it was held that:

“6. In order that a plea of a bar under Order II Rule 2(3) of the Civil Procedure Code should succeed the defendant who raises the plea must make out: (1) that the second suit was in respect of the same cause of action as that on which the previous suit was based; (2) that in respect of that cause of action the plaintiff was entitled to more than one relief; (3) that being thus entitled to more than one relief the plaintiff, without leave obtained from the court omitted to sue for the relief for which the second suit had been filed. From this analysis it would be seen that the defendant would have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed, for unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the later suit is based there would be no scope for the application of the bar.”

In view of the enunciation of the Hon'ble Supreme Court that to consider bar under Order II Rule 2 of the Code, a specific issue must be framed and the plaintiff must be given an opportunity to demonstrate that the cause of action in the subsequent suit is different, in any event, such an objection could not have been raised in support of the

application under Order VII Rule 11 of the Code.

9. *Church of Christ Charitable Trust and Educational Charitable Society v. Ponniamman Educational Trust, 2012(6) Mh.L.J. 738*

explains the term 'cause of action' and further articulates that the plaint can be rejected at any stage if cause of action is not disclosed. The said decision articulates a proposition which is well settled, and the case of defendant 1-Chetan is taken no further.

10. In the totality of the circumstances, there is no reason to interfere in the order impugned in exercise of revisional jurisdiction.

11. The civil revision application is dismissed.

JUDGE

adgokar