

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH: NAGPUR**

CIVIL REVISION APPLICATION NO. 45 OF 2021

Subhash Mukundrao Deshmukh

Vs.

Prakash Mukundrao Deshmukh and Ors.

Office notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.

Court's or Judge's Orders.

Mr. Akshaya Sudame, Advocate for applicant.
Mr. Rohit Joshi, Advocate for respondent No.1.

CORAM : MANISH PITALE J.

DATE : 18.07.2022.

By this revision application, the applicant, who is the original defendant No.2, has approached this Court challenging order dated 24.09.2021, passed by the Court of XIth Joint Civil Senior Division, Amravati, whereby an application filed by the applicant for rejection of plaint under Order 7 Rule 11 of the Code of Civil Procedure, 1908 (CPC) was rejected.

2. The case of the applicant before the Court below was that the suit filed by respondent No.1 seeking declaration, injunction, partition and separate possession did not deserve consideration by the Court below, for the reason that an earlier suit for identical

relief filed by the very same party was unconditionally withdrawn and disposed of as such. It was submitted that only one property was subject matter of the earlier suit, but in the subsequent suit other properties were also included. It was submitted that once the respondent No.1 unconditionally withdrew the earlier suit and abandoned his claim, he could not be permitted to pursue the subsequent suit. This contention was obviously raised on the basis of Order 23 Rule 1(4) of the CPC.

3. The respondent no.1 opposed the said application. The Court below took into consideration rival submissions and rejected the said application, primarily on the basis that the earlier suit was dealing with only one property, while the subsequent suit dealt with four properties and therefore, the subject matters of the suits were different.

4. Mr. Akshaya Sudame, learned counsel appearing for the applicant referred to Order 23 Rule 1(4) of the CPC and submitted that in the present case, admittedly the earlier suit was unconditionally withdrawn, as evident from the pursis placed on record of the said suit and the order dated 24.11.2014, passed in the earlier suit bearing Special Civil Suit

No.84/2013. The learned counsel then invited attention of this Court to the subsequent suit bearing Special Civil Suit No.167/2016 filed by the respondent No.1 and he contended that, other than including three more properties as subject matter of the suit, certain pleadings were added as regards the circumstances in which the earlier suit was withdrawn and virtually the same relief was sought on behalf of respondent No.1. It was submitted that by operation of Order 23 Rule 1(4) of the CPC, such a subsequent suit, on the face of it, could not be entertained and that the plaint ought to have been rejected. The learned counsel placed reliance on judgments of the Hon'ble Supreme Court in the case of *Vallabh Das Vs. Dr. Madan Lal and Ors., 1970 (1) SCC 761* and *Sarguja Transport Service Vs. State Transport Appellate Tribunal, MP, Gwalior and Ors., (1987) 1 SCC 5*.

5. When this application was argued on the last occasion, the learned counsel appearing for the contesting respondent No.1 relied upon the judgment of this Court in the case of *Laxman Mahadeo Nikose Vs. Narayan Mahadeo Nikose and Ors. 2014 (5) Mh.L.J. 772*, to contend that the subsequent suit was maintainable, as the suit was for partition and that in such cases, there can certainly be recurring cause of

action, even if an earlier suit is either withdrawn or disposed of without consideration on merits.

6. In response thereto, the learned counsel appearing for the applicant submitted that an earlier judgment in the case of ***Harishchandra Vithoba Narawade and Ors. Vs. Vatsalabai Narayan Shinde 2004 (4) Mh.L.J. 897***, was not brought to the notice of this Court when the case of *Laxmanrao Mahadeo Nikose (supra)* was decided. By placing reliance on the said judgment, it was contended that although the successor-in-title of the respondent No.1 may institute a subsequent suit for such reliefs, in view of the unconditional withdrawal of the earlier suit, respondent No.1 was barred from instituting the subsequent suit. Reliance was also placed on recent judgment of this Court in the case of ***Devidas @ Shekhar s/o Mahadeo Deokar and Ors. Vs. Vasant s/o Ganesh Deokar and Ors. 2022 (3) All.M.R. 224***, to contend that the Court below had committed an error in rejecting the application for rejection of plaint.

7. On the other hand, Mr. Rohit Joshi, learned counsel appearing for the contesting respondent No.1 submitted that the judgement in *Laxmanrao Mahadeo Nikose (supra)* covered the position of law completely

in favour of the said respondent. It was submitted that unlike other suits, when a suit for partition is filed and for some reason, either it is withdrawn or dismissed in default or otherwise not disposed of on merits, a subsequent suit is certainly maintainable for the reason that jointness of the family is not taken away. As long as the status of jointness remains, there would be recurring cause of action for filing such a suit.

8. The judgments in the case of *Harishchandra Vithoba Narwade(supra)* and *Devidas @ Shekhar s/o Mahadeo Deokar (supra)* were sought to be distinguished on the basis that in both the cases it was the successor-in-title who had filed the subsequent suit and even while discussing such a scenario, in the recent judgment of *Devidas @ Shekhar s/o Mahadeo Deokar (supra)*, the judgment of the *Laxmanrao Mahadeo Nikose (supra)* was referred to and expressly confirmed. On this basis, it was submitted that while there could be no quarrel with the proposition of law laid down by the Hon'ble Supreme Court in the aforesaid judgments relied upon by the learned counsel for the applicant, considering the subject matter of the present suit, it could not be said that the subsequent suit was barred by law.

9. Heard learned counsel for the rival parties and perused the material on record. A perusal of the impugned order does show that the principal question that arose for consideration was not referred to or decided, although it was concluded that the subsequent suit was indeed maintainable. The reason stated by the Court below was that since there were four properties made subject matter of the subsequent suit, it could not be said that the subject matter was the same as the one in the earlier suit and therefore, the application filed by the revision applicant stood rejected. This Court is of the opinion that the Court below could have examined the matter in further detail to consider the contentions raised on behalf of the applicant.

10. Be that as it may, it would be appropriate to examine the contentions raised on behalf of the applicant in the backdrop of admitted facts. In the present case, there is no dispute about the fact that, apart from prayers for declaration and injunction, the respondent No.1-plaintiff specifically prayed for partition and separate possession of the subject properties. The fact that the earlier suit was filed for similar relief is also stated in the subsequent suit and certain pleadings are specifically brought on record in the subsequent suit, as to the backdrop in which the

earlier suit was withdrawn and why the respondent No.1 was constrained to file the subsequent suit seeking relief, *inter alia*, of partition and separate possession.

11. A perusal of the judgment of this Court in the case of *Laxmanrao Mahadeorao Nikose (supra)* would show that in similar circumstances, when the very same plaintiffs filed a subsequent suit after an earlier suit for similar relief was withdrawn, this Court considered earlier judgments of the Allahabad High Court in the case of *Bisheshar Das and another Vs. Ram Prasad and anr. 1891 ILR 13 All. 309 (Full Bench)*, Calcutta High Court in the case of *Madan Mohan Mondul Vs. Baikanta Nath Mondul, Vol.X Calcutta Weekly Notes 839* and of the Nagpur High Court *Abdul Majid Kha s/o Mahebubkha Vs. Mahmudabi w/o Bahadurkha, AIR (36) 1949 Nagpur 366*. After considering the aforesaid three judgments, this Court specifically concluded that since the cause of action for partition was a recurring one, the rigour of Order 23 Rule 1(4) of the CPC would not apply. On this basis, it was held that the subsequent suit was maintainable.

12. The aforesaid judgment has been referred to and followed in the recent judgment in the case of *Devidas @ Shekhar s/o Mahadeo Deokar and Ors.*

(supra). The only factual distinction in the recent judgment was that the successor of the original plaintiff had brought the subsequent suit and, in those circumstances, it was held that the subsequent suit was clearly maintainable, being a suit for partition. In the said judgment, reference was made to the aforesaid earlier judgment in the case of *Harishchandra Vithoba Narawade and Ors. (supra)*. In other words, both the judgments were referred to and the position of law was clarified by agreeing with the said judgments.

13. In this backdrop, when the earlier judgment in the case of *Harishchandra Vithoba Narawade and Ors. (supra)* is perused, it is found that in the said case also, the successor-in-title had filed the subsequent suit in the backdrop of her father having filed an earlier suit for partition and having withdrawn the same. In the facts of the said case, the Court referred to Order 23 Rule 1(4) and found that, if the subsequent suit was to be held to be not maintainable it would lead to disastrous consequences. In other words, the point for consideration in the said earlier judgment was not as to whether the subsequent suit by the same person seeking partition could be said to be barred when an earlier suit by the said person had been withdrawn unconditionally.

14. This Court agrees with the law laid down in the judgment in the case of *Laxmanrao Mahadeorao Nikose (supra)*, wherein it is categorically held that cause of action for partition being a recurring one, a subsequent suit by the very same person, having withdrawn an earlier suit would be maintainable.

15. The learned counsel appearing for respondent No.1 also relied upon judgment of this Court in the case of *Ashabai wd/o Rambhau Awachat and Ors. Vs. Madhusudan s/o Rajaram Chourasia, 2017 (5) Mh.L.J. 588*. Although it pertains to Order 9 Rule 9 of the CPC, relevant observations have been made therein also. In the said case, the Court was considering a situation where an earlier suit for partition was dismissed-in-default and a subsequent suit was filed by the same person on the same cause of action. In these circumstances, this Court observed that it was settled position of law that cause of action for a suit for partition is a recurring one and that where a partition suit is dismissed for default, it does not bar filing of a subsequent suit, as even after dismissal of the former suit, jointness continues and there is a continuing cause of action. This Court sees no reason to not follow the same logic in the present case where the earlier suit was unconditionally withdrawn. The

aspect of continuing jointness cannot be denied and therefore, there is no substance in the contentions raised on behalf of the revision applicant.

16. Insofar as reliance placed on the judgments of the Hon'ble Supreme Court in the case of *Sarguja Transport Service* (supra) and *Vallabh Das* (supra) is concerned, there can be no quarrel with the proposition laid down therein, but the said judgments were concerned with the question as to what could be defined as subject matter of a suit in the context of the same being barred under Order 23 Rule 1(4) of the CPC. The question of cause of action concerning partition being a recurring one was not considered in the said judgments and the facts in the said cases were different. Hence, the judgments are distinguishable.

17. Even otherwise, there are detailed pleadings in the subsequent suit about the circumstances in which the respondent no.1 was constrained to file the said suit. There is reference to subsequent events. This aspect would also require examination during the course of trial.

18. In view of the above, it is found that there is no merit in the present civil revision application, Accordingly, it is dismissed.

JUDGE