

(1)

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

CIVIL REVISION APPLICATION NO.8 OF 2023

- 1) Suresh s/o Chunnilal Sharma,
Since died through his Lrs.
- 1/1) Smt. Shobhadevi w/o Suresh Sharma,
Age : 62 years, Occ. : Household,
R/o. Rangnath Maharaj Nagar, Parbhani.
- 1/2) Pavan s/o Suresh Sharma,
Age : 39 years, Occ. : Business,
R/o. Rangnath Maharaj Nagar, Parbhani.
- 1/3) Pankaj s/o Suresh Sharma,
Age : 37 years, Occ. : Business,
R/o. Rangnath Maharaj Nagar, Parbhani. ...Applicants

VERSUS

- 1) Md. Bashir s/o Abdul Gaffar,
Age : 42 years, Occ. : Business/Agri.,
R/o. Near Noorani Masjid, Gurubaba Open Space,
Rameshwar Plot, Parbhani, Tq. & Dist. Parbhani.
- 2) Deelip s/o Dattapa Basmatkar,
Age : 56 years, Occ. : Business,
R/o. Maharani Laxmibai Road,
Parbhani, Tq. & Dist. Parbhani ...Respondents

...

Advocate for Applicants : Mr. M.M. Patil Beedkar

Advocate for Respondent No.1 : Mr. G.R. Syed

...

CORAM : S.G. MEHARE, J.

DATED : AUGUST 31, 2023

ORDER :-

1. Heard the respective counsels.

2. The order below Exhibit 19 passed in R.C.S. No.28/2022 by the learned Joint Civil Judge, Senior Division, Parbhani on 27.09.2022 is under challenge. Defendant No.1 had filed this application under Order 7 Rule 11 (a)(b) and (d) r/w Section 151 of the Civil Procedure Code.

3. Before advertng to the grounds raised in the application Exhibit 19, a few facts on the same cause of action must be clarified. The parties would be referred to in their original position as 'plaintiffs' and 'defendants.' The plaintiff had filed one R.C.S. No.177 of 2021 on the cause of action dated 11.06.2021. It was a suit for perpetual injunction and a declaration that the sale deed dated 01.06.2017 executed by one Suresh Chunnilal Sharma to Deelip Dattapa Basmatkar, defendant nos.1 and 2 in that suit was not binding upon the plaintiff. The perpetual injunction was also sought against defendant No. 1 that he shall not create third-party interest in the suit land. In the said suit, land gut no.577/1 in Parbhani was the suit land. Defendants appeared in that suit. The defendants moved an application below Exhibit 21 under Order 7 Rule 11 of the Civil Procedure Code. The learned Civil Judge Senior Division, Parbhani, was pleased to reject the plaint by order dated 10.12.2021 on the grounds that the cause of action to file the suit cannot arise because the plaintiff went on the suit property as the agreement executed by the plaintiff *inter alia* will not give him the cause of action to file the

suit without showing the right, title or interest in the suit property. It was a suit based upon the agreement to sell. While deciding that application, a notarized Hibanama was placed before the Court. However, since the said Hibanama is not pleaded in the suit, the Court observed that there is no whisper in respect of the Hibanama in the entire pleadings. Therefore, the said document, being out of context, cannot be taken into consideration. The plaint was rejected.

4. Learned counsel for the plaintiff sought a leave to file a fresh suit. The Court has observed that in this respect, Order 7 Rule 13 is clear; therefore, a specific order of the Court is not warranted. It has also been observed that, needless to mention, the observations in this order are limited to the extent of deciding the present application only.

5. After the rejection of the plaint of R.C.S. No.177 of 2021, the then-plaintiff Md. Bashir Abdul Gaffar had filed R.C.S. No.28 of 2022 on 16.07.2021 before the Civil Judge Senior Division, Parbhani. The defendant, Suresh Chunnilal Sharma, of R.C.S. No.177 of 2021, died. Hence, the suit was filed against his legal representatives, and the same defendant No.2, Deelip, has also been arraigned in this suit. In the subsequent suit i.e. R.C.S. No.28 of 2022, the cause of action was the same as was in the earlier suit. However, the said suit was filed for declaration of ownership of survey no.577/1, Ward No.13, Plot No.20 measuring 1269.87 sq. mtrs situated at Parbhani, and the

perpetual injunction was also sought that the defendants should not create the third party interest. However, the declaration was sought that the sale deed executed by the defendant bearing no.3386 of 2017 dated 01.06.2017 is null and void.

6. Learned counsel for the applicants would submit that both suits were filed on the same cause of action. Hence, the suit was barred under the provisions of Order 2 Rule 2 of the Civil Procedure Code. The plaintiff ought to have claimed the all relief in the earlier suit. This material aspect has not been considered by the learned Joint Civil Judge Senior Division, Parbhani, while rejecting his application under Order 7 Rule 11(a)(b) and (d) r/w Section 151 of the Civil Procedure Code. He would also argue that in the order below Exhibit 21 in the earlier suit bearing R.C.S. No.177 of 2021, the suit was dismissed, which was filed on the same cause of action dated 11.06.2022. Referring to Order 2 Rule 2 of the Civil Procedure Code, he would submit that the plaintiff did not include the whole claim arising from the same cause of action. There was no reason for the plaintiff to omit the relief which he has claimed in this suit. Therefore, the suit was barred under Order 2 Rule 2(3) of the Civil Procedure Code, which covers clause Order 7 Rule 11(d) of the Civil Procedure Code. To bolster his arguments, he would rely upon the case of State Bank of India Vs. Gracure Pharmaceuticals Ltd, AIR 2014 SC 731. He would also argue that no person can be vexed again and again for the

same cause of action. He would submit that the impugned order is illegal, incorrect and improper. Hence, it is liable to be set aside, and the application Exhibit 19 filed in R.C.S. No.28 of 2022 deserves to be allowed.

7. Per contra, learned counsel for the respondent no.1/plaintiff Mr. G.R. Syed would vehemently argue that there is no bar to file a suit subsequently if the plaint is rejected under Order 7 Rule 11. He would refer to Rule 13 of Order 7. He has also referred to the observations the learned Joint Civil Judge Senior Division, Parbhani, recorded in para 20 of the order dated 10.12.2021. He would submit that Order 2 Rule 2 would also not debar the plaintiff from bringing the suit on the same cause of action. The nature of the earlier and present suits was not identical, though the parties were the same. By mistake, the Hibanama was not pleaded in the earlier suit. The earlier suit was filed on the basis of the agreement to sell. The dispute between the parties was not finally adjudicated. Hence, Section 11 of the Civil Procedure Code would also not come into the way. He relied on the case of Shrihari Hanumandas Totala Vs. Hemant Vithal Kamat and Ors, 2022(2) Mh.L.J. 457, in which it has been observed that the plaint does not disclose any fact that may lead to conclusion that the suit is barred by principles of *res judicata*. He prayed to dismiss the civil revision application.

8. In reply, the learned counsel for the applicants would submit that the applicants have not pressed into service the doctrine of *res judicata*. Their contention is that the suit was hit under Order 2 Rule 2 of the Civil Procedure Code that covers under Order 7 Rule 11 (a)(b) and (d) of the Civil Procedure Code.

9. The facts discussed above have not been seriously disputed. The suit and the parties to both the suits and the cause of action were the same is also not disputed. It is also not in dispute that the earlier suit was filed only on the basis of an agreement to sell, and there were no pleadings about the so-called Hibanama. Admittedly, the earlier suit was not filed for declaration of title or interest in the suit property mentioned therein.

10. Order 7 Rule 13 of the Civil Procedure Code appears most relevant in this case, which reads thus :

“13. Where rejection of plaint does not preclude presentation of fresh plaint.

— The rejection of the plaint on any of the grounds hereinbefore mentioned or on the ground mentioned in Rule 14-A (5) (a) of Order VI shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action.”

11. Reading Rule 13 of Order 7, apparently, there is no bar to file the subsequent suit when the plaint has been rejected on any of the grounds mentioned in Order VII Rules 11 and 12. It has also been specifically provided that a fresh plaint can be presented on the same cause of action. The Hon’ble Supreme Court, in the case of *Shrihari Hanumandas Totala* (cited *supra*) in para 20, has summarized the

guiding principles for deciding an application under Order 7 Rule 11(d) of the Civil Procedure Code, which reads thus :

- “(i) To reject a plaint on the ground that the suit is barred by any law, only the averments in the plaint will have to be referred to;
- (ii) The defense made by the defendant in the suit must not be considered while deciding the merits of the application;
- (iii) To determine whether a suit is barred by res judicata, it is necessary that (i) the ‘previous suit’ is decided, (ii) the issues in the subsequent suit were directly and substantially in issue in the former suit; (iii) the former suit was between the same parties or parties through whom they claim, litigating under the same title; and (iv) that these issues were adjudicated and finally decided by a court competent to try the subsequent suit; and
- (iv) Since an adjudication of the plea of res judicata requires consideration of the pleadings, issues and decision in the ‘previous suit’, such a plea will be beyond the scope of Order 7 Rule 11 (d), where only the statements in the plaint will have to be perused. “

12. Admittedly, the doctrine of res judicata will not be applicable in this case. The earlier suit was also not decided on merit.

13. The Hon’ble Supreme Court, in the case of State Bank of India (cited supra), has observed that if a plaintiff is entitled to seek relief against the defendant in respect of the same cause of action, the plaintiff cannot split up the claim so as to omit one part to the claim and sue for the other. If the cause of action is the same, the plaintiff has to place all his claims before the Court in one suit, as Order 2 Rule 2, C.P.C. is based on the cardinal principle that the defendant should not be vexed twice for the same cause. Order 2 Rule 2 of

C.P.C., therefore, requires the unity of all claims based on the same cause of action in one suit; it does not contemplate the unity of distinct and separate causes of action. In the said case, an earlier suit for recovery of the amount was filed against the bank and its officers towards a letter of credit, while a subsequent suit claiming damages was filed against the appellant for withdrawing the credit facility. No fresh cause of action arose between the first and second suits. On this fact, the above ratio has been laid down.

14. The facts of this case appearing from the two complaints were that in the earlier suit, the claim was based upon the agreement to sale. The Hibanama was brought before the Court. The Court refused to consider the Hibanama on the basis of which the title was claimed as it was not pleaded in the complaint. The learned Joint Civil Judge recorded the specific observations in an earlier order dated 10.12.2021 that the agreement to sale does not create the right to claim the title, and barely going on suit land does not create the cause of action. However, in the impugned judgment and order, the Court has refused to reject the complaint, observing that in the present suit, the plaintiff prayed for a declaration on the basis of Hibanama, which was not the subject matter of R.C.S. No.177 of 2021. Therefore, it could not be said that the suit is barred by principles of *res judicata*.

15. The argument of the learned counsel for the applicants was that the date of the so-called Hibanama was prior to the date of

an earlier suit that was available with him. However, the suit was not filed on the basis of the said Hibinama.

16. In the earlier suit bearing R.C.S. No.177 of 2021, as discussed above, the suit was for a declaration that the sale deed dated 01.06.2019 was not binding as well as for the perpetual injunction. However, in the present suit, the declaration has been sought that the plaintiff became the owner in view of the Hibinama. The declaration is not claimed against the defendants only. It was against all who may claim right over the suit property. The suit property in the earlier suit and this suit was a small part of field survey no.577/1. In the present suit, they came up with a case based on the title document, which was not before the Court in an earlier suit. The object of Order 2 Rule 2 is to prevent the multiplicity of the suit, and the person shall not be vexed for one and the same cause. The Hon'ble Supreme Court in the case of Union of India Vs. H.K. Dhruv, (2005) 10 SCC 218 has laid down the law that the earlier suit must have been decided on merits for the application of Order 2 Rule 2 of the Civil Procedure Code. Order 2 Rule 2 deals with the frame of the suit and does not refer to a case of abandonment of part of the claim after the suit is filed or impose on any Court an obligation to allow the plaint to be amended or a claim to be relinquished solely to deprive itself of the jurisdiction which it possesses. In order to apply Rule 2, it should be found out; (1) What was the cause of action in

respect of which the claim was made in the previous suit; (2) What is the claim made in the present suit; (3) Whether the claim made in the present suit could have been made either wholly or in part in respect of the cause of action in previous suit.

17. The earlier suit was filed for a part of the suit land and not for the whole land. A declaration was sought that the sale deed of defendants nos.1 and 2 was not binding upon them. The said suit was based upon the agreement to sale. Though it has been tried to argue that the doctrine of *res judicata* would not apply, he has argued that clause (d) of Order 7 Rule 11(2) covers Order 2 Rule 2. When it is considered, the guiding principles laid down by the Hon'ble Supreme Court in the case of Shrihari Hanumandas Totala (cited supra) in para 20 would squarely be applicable to the case at hand.

18. After having a look at the averments of the plaint, the Court is satisfied that the subsequent suit filed by the plaintiff is well within the jurisdiction and tenable. The plaintiff was not precluded from filing the suit on the same cause of action as the right has been protected under Order 7 Rule 13 of the Civil Procedure Code.

19. For the above reasons, the civil revision application stands dismissed. No order as to costs.

(S.G. MEHARE, J.)