

Jose

IN THE HIGH COURT OF BOMBAY AT GOA

CIVIL REVISION APPLICATION NO.36 OF 2012

Miss Triveni Sadanand Potekar
daughter of late Mr. Sadanand
Potekar, age 43 years, spinster,
lawyer, residing at Salvador-do-
Mundo, Badem, Bardez-Goa.

... Applicant.

Versus

[1. Dr. Adriano Afonso,
son of late Dr. Bossuet Afonso,
major in age, married,
Scientist, residing at
10 Woodmere Road,
West Caldwell, New Jersey,
07006-713 USA
represented in this act by his
duly appointed attorney
Dr. Antonio Bossuet Afonso,
by virtue of the power of attorney
dated 18.1.1990, executed before
the Notary Dr. Gajana S. Dhumatkar,
at Panaji, Goa.]

[Deleted]

1. Mrs. Beverly Ann Schunk Afonso
residing at 10, Woodmere Road,
West Caldwell, New Jersey
07006-713 USA.

[Amendment carried
out vide order dated
15.09.2017 in MCA
728/2017]

2. Dr. Bossuet Afonso alias
Antonio de Bossuet Afonso,
son of late Dr. Emidio Afonso,
major in age, married, Surgeon,
residing at Row House No.2,
Vivendas Goesas,
La Citadel Colony,
Don-Paula, Ilhas – Goa.

3. Mrs. Nalini Afonso,
wife of the Plaintiff No.2,
major in age, married, teacher,
residing at Row House 2,
Vivenda Souza, La Citadel,
Dona-Paula, Ilhas-Goa.

4. Mr. Paulo Afonso,
son of late Dr. Emidio Afonso,
major in age, bachelor, journalist,
residing at H.No.142, Campal,
Panaji-Goa.

5. Mrs. Ana Afonso Dias, major of age,
daughter of late Dr. Emidio Afonso,
married, service, residing at H.No.190,
Opp. Goa reserve Police,
Altinho, Panaji-Goa.

6. Mr. Ian Dias,
son of late Eng. Eufemiano Dias,
Architect, married, major in age,
residing at H.No.190, Goa Reserve
Police, Altinho, Panaji-Goa.

[7. Dr. Bailon de Sa, major of age (Deceased) son of late Mr. Jose B. De Sa, aged 95 years, widower, residing at H.No.197, Malar, Corlim, Ilhas – Goa.]	[Amendment carried out vide order dated 17.10.2013 in MCA 738/13]
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8. Dr. Edelweiss Desa,
daughter of Plaintiff No.7,
major in age, spinster,
Physician, residing at
H.No.197, Molar,
Corlim, Ilhas – Goa.

9. Dr. Enrich Desa,
son of the Defendant No.7,
major in age, Scientist,
residing at 5 Rye Alexandre
Cabanel, Square Lowerndal,
Batiment 3, Paris 75015, France
represented in this act by his
duly appointed attorney the
Plaintiff no.8 by virtue of the
power of attorney dated
11.8.2006, executed before
the Notary Public Mr. Wilfred
A.F. Boadita at Panaj, Goa.

10. Mrs. Rita Desa,
wife of in age, housewife,
residing at 5 Rule Alexandre
Cabanel, Square Lowendal,
Batiment 3, paris 75015,
France represented in this act
by her duly appointed attorney
the Plaintiff no.8 by virtue of the
power of attorney dated 11/8/2006,
executed before the Notary
Public Mr. Wilfred A.F. Boadita,
at Panaj, Goa.

11. Dr. Elgar Desa,
son of the plaintiff no.7,
major in age, married, Scientist,
residing at H.No.197, Molar, Corlim,
Ilhas, Panaji – Goa.

12. Mrs. Ingrid DeSa,
wife of plaintiff no.11,
major in age, teacher, residing at
197, Molar, Corlim, Goa.

13. Dr. Edwin DeSa,
son of the plaintiff no.7,

major in age, married, Professor,
residing at H.No.197,
Molar, Corlim, Ilhas, Goa.

14. Mrs. Pramilla DeSa,
wife of plaintiff no.13,
major in age, married, businessman,
residing at H.No.197, Molar, Panaji-Goa.

15. Mrs. Melba De Souza,
daughter of late Dr. Bossuet Afonso,
major in age, widow, residing at
La Marvel, Colony, 676, Dona-Paula,
Ilas, Goa 403001.

16. Dr. Fatima De Souza,
daughter of the plaintiff No.15,
major in age, married, lecturer,
residing at La Marvel Colony, 676,
Dona Paula, Ilhas, Goa. 403 001.

17. Dr. Nelia Afonso Alangaden,
daughter of late Dr. Emidio Afonso,
major in age, married, physician,
residing at 23500, Hill Street,
Dearborne Heights, Michigan 48127,
2381, Detroit, USA.

18. Dr. George Alangaden,
husband of defendand no.4,
major in age, Physician, residing at 23500,
Hill Street, Dearborne Heights,
Michigan 481272381,
Detroit, USA, Both the plaintiffs, 17
and 18 are represented in this act by their
duly appointed attorney the plaintiff No.5
by virtue of the power of attorney both dated
28/11/2000 executed before the Notary
Public Mr. Fernando Jorge Colaco, at Panaji,
Goa, Bardez-Goa.

[19. Dr. Miguel Alvaro Dias Afonso,
son of late Dr. Bassuet Afonso,
aged 80 years, residing at Lahnblick,
D-65624 Altendie 2 6 Germany.]

[Deleted as per
order dated
05.05.2014]

20. Mrs. Karen Franziska Grigoleit Afonso,
wife of the defendant no.2,
and the daughter of Otto Grigoleit,
major in age, housewife,
residing at Lahnblick,
D-65624 Altendie 2 6 Germany.

[21. Dr. Gelestino Afonso,
son of late Dr. Emidio Afonso,
major in age, Physician,
residing at 6867, Parkway Cive,
Dearborn, Heights, Michigan,
48127-23612, USA.]

[Deleted as per
order dated
05.05.2014]

22. Mrs. Belize Afonso, major of age,
wife of defendant no.6
housewife, residing at 6867,
Parkway Clive, Dearborn, Heights, Michigan,
48127-23612, USA.

23. Dr. Sergio Afonso,
son of Dr. Emidio Afonso,
major of age, married, Scientist,
residing at 1232, waterdown drive,
Allen Tennis 75013 Dallas, Texas.

24. Dr. Ingrid Afonso,
wide of the defendant no.8,
major in age, dentist,
residing at 1232 Waterdown drive,
Allen Tennis 75013,
Dallas, Texas.

... Respondents.

Mr V.R. Tamba with Mr Paresh Sawant, Advocates for the Applicant.

Mr V.A. Lawande with Mr Akshay Shirodkar, Advocates for the Respondents.

CORAM: BHARAT P. DESHPANDE, J.

RESERVED ON: 12 January, 2023

PRONOUNCED ON: 19 January, 2023

JUDGMENT:

Applicant/original Defendant No.1 preferred the present revision thereby challenging order dated 08.02.2012 passed by the learned Trial Court thereby rejecting application filed under Order 7 Rule 11 (a)(d) CPC.

2. Heard learned Counsel Mr V.R. Tamba along with learned Counsel Mr Paresh Sawant for the Applicant and learned Counsel Mr V.A. Lawande along with learned Counsel Mr Akshay Shirodkar for the Respondents.

3. Respondent Nos.1 to 18/original Plaintiffs filed a civil suit for declaration that they along with other Defendants are entitled to pre-emption right with regard to the sale deed dated 20.12.2007 and for direction to the Defendant to specify the day on or before which the purchase money shall be paid and to deliver possession of the suit property.

4. Applicant along with original Defendant Nos.2 and 3 filed separate applications for rejection of plaint under Order 7 Rule 11 CPC. Applicant/Defendant No.1 filed her application on 07.01.2009 claiming therein that from the averments in the plaint, which discloses that the said plaint is barred by law of limitation since the relief claimed is of pre-emption of the suit property. It is specifically claimed that the right of pre-emption has to be exercised within a period of six months as per Article 1566 read with Article 2309 of the Civil Code, 1867 and since such right was not exercised, the suit as it stands on the basis of averments made in the plaint, is time-barred. Some of the Plaintiffs were notified and were asked to exercise their right of pre-emption within eight days but they failed to do so and only thereafter, sale deed dated 20.12.2007 was executed between Defendant No.1 on one hand and Defendant Nos.2 and 3 on the other side.

5. The learned Trial Court after hearing the parties clearly observed that the suit cannot be dismissed on the aspect of limitation as the suit is filed within a period of six months from the date of cause of action.

6. Mr V.R. Tamba submitted that the suit as framed in the plaint is not tenable and the prayer clause (a) and (b) cannot be granted in view of the provisions of Article 1566 read with Article 2309 of the Civil Code. He would submit that some of the Plaintiffs were notified by a legal notice asking their option to exercise right of pre-emption, however, they simply sought time without disclosing their intention. Thereafter, a notice was published in the newspaper by the

prospective buyer. Sale deed was executed on 20.12.2007 and hence, the suit filed before the Trial Court is clearly barred by law of limitation. He then submitted that the prayers cannot be allowed or granted in favour of the Plaintiff since there is no mention about the shares of the co-owners as disclosed in the plaint. He then submitted that the said co-owners failed to deposit money in order to exercise their right of pre-emption. Similarly, the sale deed is not challenged. He would submit that mere declaration as framed in prayer clause (a) is not sufficient enough. He, therefore, would submit that there is no cause of action to launch prosecution against Defendants and hence the plaint ought to have been rejected.

7. Per contra, learned Counsel Mr V.A. Lawande first of all submitted that grounds raised before the Trial Court are totally different than the one argued before this Court. He submitted that new grounds raised for the first time in this revision cannot be permitted to be entertained. He would submit that the suit has been filed within a period of six months and therefore, cause of action as mentioned in the plaint would survive and the provisions cited by the learned Counsel for the Applicant nowhere show any specific bar in filing the suit.

8. Mr Tamba referred to the following decisions:-

a) *Rajendra Bajoria and Ors. vs. Hemant Kumar Jalan and Ors.*¹, and

¹ 2021 STPL 10048 SC

b) *Smt. Cynthia Shahid Dhar vs. Shri Carlos Wilfredo Roque de Sequeira Nazareth*².

9. Mr Lawande referred to the following decision:-

a) *P.V. Guru Raj Reddy and Anr. vs. P. Neeradha Reddy and Ors.*³

10. The rival contentions fall for consideration now.

11. In the case of *P.V. Guru Raj Reddy* (supra), the Supreme Court observed in para 5 as under:-

“5. Rejection of the plaint under Order 7 Rule 11 of the CPC is a drastic power conferred in the court to terminate a civil action at the threshold. The conditions precedent to the exercise of power under Order 7 Rule 11, therefore, are stringent and have been consistently held to be so by the Court. It is the averments in the plaint that has to be read as a whole to find out whether it discloses a cause of action or whether the suit is barred under any law. At the stage of exercise of power under Order 7 Rule 11, the stand of the defendants in the written statement or in the application for rejection of the plaint is wholly immaterial. It is only if the averments in the plaint ex facie do not disclose a cause of action or on a reading thereof the suit appears to be barred under any law the plaint can be rejected. In all other situations, the claims will have to be adjudicated in the course of the trial.”

12. Thus, it is necessary to read the contents of plaint so as to find out whether the suit is barred by any law or it does not disclose cause of action. This is so because, Defendant No.1 in her application at

² 1991(2) Goa L.T. 304

³ (2015) 8 SCC 331

Exh. 14 dated 07.01.2009 stated that her application is under Order 7 Rule 11 (a)(d) of CPC. However, if the contents of the application are perused, which is only having two paragraphs, it discloses mainly that the suit is barred by limitation. The ground for such objection is that right of pre-emption is to be raised within six months from the date of cause of action. It is then claimed that in the plaint in paras 17 and 18 it is stated that the Plaintiffs were put to notice about the intention of Defendant Nos.2 and 3 to sell the suit property and therefore, asking them to opt for right of pre-emption. Neither the Plaintiffs nor any other co-owners opted within eight days from such letter. Similarly, the suit is not filed within the period of limitation i.e. six months as required. In both these para Nos.1 and 2 of the application filed by Defendant No.1, only averment is with regard to the suit being barred by law of limitation. Though, the application is also under Order 7 Rule 11 (a) of CPC, there is absolutely no allegations or averments that the plaint does not disclose cause of action. Therefore, Court will only look into the contents of the application which challenges the existence of plaint only on the point of limitation. Thus, the arguments advanced before this Court regarding so called cause of action, will have to be ignored as no contentions have been raised in this respect before the Trial Court by the present Applicant in her application. Only mentioning provisions of CPC is not sufficient enough. The intention of filing such application is to give an opportunity to the opposite party to counter the averments effectively. If the application filed under Order 7 Rule 11 though refers to a specific provision, did not make any averment

in the body of the application, the other side is not required to counter it in their reply.

13. The learned Counsel Mr Lawande was therefore fully justified in submitting that today for the first time, grounds with regard to want of cause of action in the plaint are raised which are not found in the application filed for rejection of plaint and therefore, cannot be looked into.

14. I am in full agreement that the learned Counsel Mr Lawande on the above submissions. First of all, Defendant No.1 ought to have specifically pleaded in her application that the plaint needs rejection as it does not disclose cause of action, as provided under Order 7 Rule 11 (a) of CPC. In absence of such averments in the application for rejection of plaint, Defendant No.1/Applicant cannot be permitted to argue such aspect for the first time before this Court and that too in revision challenging the order of the learned Trial Court.

15. Thus, only aspect which has found place in the application under Order 7 Rule 11 of CPC is that the suit is barred by law of limitation. This plea is specifically governed under Order 7 Rule 11 (d) of CPC.

16. Since the present matter is squarely governed by the Civil Code and more specifically Article 1566 of the Portuguese Civil Code, the said provision reads as under:-

“It is not lawful to the co-owners of a property under indivision or undivided to sell to the strangers their respective share, when the other co-owner desires to have it for the same price.

Clause No. 1: The co-owner to whom no notice of sale is given, can have or himself the part sold to the stranger, provided he claims within a period of six months from the date on which he has the knowledge of sale, depositing, before the effective handling over, the price which, according to the conditions of the contract, might have been paid or accrued.

Clause No. 2: There being more than one co-owner, the provisions of para 4 and 5 of Article 2039 shall be observed; but, if the shares are unequal and the co-owner of bigger share is willing to preempt, the said right shall be allotted to him without any auction.

Clause No. 3: The right of preference, in any case, is not prejudiced by cancellation of said contract, which might have been made extra judicially or by consent, or judicial transaction.

Clause No. 4: The period which is referred to in para 1 of this Article is applicable to all the other cases of preference.”

17. Clause 2 of the above provision refers to paras 4 and 5 of Article 2039 of the Civil Code which reads thus:-

“The owners of the landlocked properties, that is, which have no access to the public ways, may demand way or passage through neighbouring lands, upon payment of compensation for damage which may likely to be caused with grant of such passage. When, however, such lands are those mentioned in article 456, the respective owners may get exonerated from such obligation, purchasing the property enclosed for the price which may be fixed by the Court, by way of arbitrament.

Paragraph 1: In case of sale, private or through Court, offering the property in payment of the debt, emphyteusis, or lease for a period exceeding ten years, the owners of landlocked properties, as well as owners of the properties burdened with the respective servitude,

whichever may be the title of constitution , have the right of pre-emption in the first place.

Paragraph 2: In case of auction through Court the provision of article 848 of Civil Procedure Code shall be followed and for that purpose the head of the family or the execution creditor shall indicate names of the owners burdened with the easement, so that they may be summoned in those proceedings.

Paragraph 3: In order to avail of the right of pre-emption, in other cases, the said owner, should be given notice in accordance with article 641 of Civil Procedure Code and in the absence of the notice, they may avail of the remedy, in accordance with paragraph 4 of article 1566.

Paragraph 4: If more than one owner appears claiming to use right of pre-emption, licitation will be held amongst them and the highest bid offered will revert in favour of the seller.

Paragraph 5: In case there is more than one owner with the claim of pre-emption, none of them is permitted to avail of the remedy of article 641 of the Civil Procedure Code in the Court, and in the event any of them appear to put the claim of pre-emption, there shall be licitation amongst them, and the right of pre-emption will be awarded to the highest bidder and thereafter to deposit within three days, in favour of the seller, the excess over the price of the original contract and to pay within thirty days the transfer tax (sisá).

18. A co-joint reading of the above provision would specifically show that first of all there is restraint on the co-owners of undivided property to sell their undivided share to a stranger. However, in case of such sale of any undivided share by one of the co-owners, a right is reserved with other co-owners to opt for pre-emption right and that too within a period of six months which shall be computed from

the date of their knowledge of the sale. Paragraph 1 of Article 1566 specifically provides that the co-owner who is not given notice of the sale, may acquire the share sold to strangers provided he applies within a period of six months from the date of his knowledge of the sale, by depositing, before obtaining the delivery of possession, the price which according to the terms of agreement has been paid or is due.

19. It is clear from the plaint itself and more specifically in para 17 that somewhere in March 2007, Defendant Nos.2 and 3 wrote to Plaintiff Nos. 1, 7, 15 and Defendant No.6 that they intend to sell their right/share to the estate of their parents including the part of house existing therein for a sum of ₹1,25,00,000/-. In this letter, Defendant Nos.2 and 3 stated that such letter was sent to put to the notice by way of pre-emption and called upon Plaintiff Nos.1, 7, 15 and Defendant No.6 to show consent, if any, within eight days. Other Plaintiffs and Defendant Nos.4 and 7, except Defendant No.6, were not intimated at all.

20. The plaint further shows that somewhere on 28.03.2007, they came across a newspaper notice from Advocate L.K. Fadte stating that his clients intended to purchase 1/5th share in the ancestral property from Defendant Nos.2 and 3. Plaintiff No.1 through his Advocate objected to such notice vide letter dated 06.04.2007. In the meantime, son of Plaintiff No.1 also proposed to purchase the said share of Defendant Nos.2 and 3 in the said estate for a sum of ₹30,00,000/- The Defendant Nos.2 and 3 through their Advocate, raised objection to the claim of Plaintiff No.1 and that of his son.

21. The plaint further disclosed that somewhere in the month of January 2008, the labour started cleaning the front portion of the said house and upon enquiry, it was revealed that he was engaged by some other person who stated to him that the said place belongs to them. Accordingly, the Plaintiff made search in the office of Sub-Registrar at Panaji and observed and got the knowledge about the sale deed dated 27.12.2007 executed by Defendant Nos.2 and 3 through their power of attorney in favour of Defendant No.1 thereby selling their undivided share for a price of ₹35,00,000/-. The sale deed shows that undivided share of Defendant Nos.2 and 3 would be equivalent to 226 sq. mts. in terms of the land area. It is specifically claimed by the Plaintiffs that the Plaintiffs as well as Defendant Nos. 4 to 7 were not intimated that Defendant Nos.2 and 3 were intending to sell said property for ₹35,00,000/-. However, the earlier notice issued to Plaintiff Nos.1, 7, 15 and Defendant No.6 was mentioning about the price of ₹1,25,00,000/-. It is, therefore, claimed by the Plaintiffs that earlier such notice to some of the Plaintiffs and Defendant No.6 is not at all a notice for exercising right of pre-emption as the Defendant Nos.2 and 3 failed to sell such property for the price mentioned in such notice i.e. ₹1,25,00,000/- but actually sold it for ₹35,00,000/-. The Plaintiffs and Defendant Nos.4 to 7 would have opted for pre-emptive right by paying the amount of ₹35,00,000/- to Defendant Nos.2 and 3.

22. Para 46 of the plaint therefore shows that cause of action arose in the first week of January 2008 when the Plaintiff learnt for the

first time about execution of sale deed by Defendant Nos.2 and 3 in favour of Defendant No.1.

23. It is well settled proposition of law that in order to consider application under Order 7 Rule 11 CPC, only the contents in the plaint and the documents relied upon with the plaint are required to be looked into. In the present matter, admittedly, there are averments made in the plaint that the Plaintiff came to know for the first time about sale deed executed by Defendant Nos.2 and 3 in favour of Defendant No.1 thereby selling undivided right, only somewhere in January 2008. The sale deed is dated 27.12.2007. Therefore, in view of the provisions of Article 1566 of the Civil Code and more particularly, Clause 1, the pre-emptive right is exercised from the date of knowledge of sale and same is within period of six months. The suit was filed somewhere on 18/19 June 2008. The cause of action as stated in para 46 arose for the first time in first week of January 2008. Thus, from the plain reading of the plaint, it is clear that present suit is filed within period of six months from the date of knowledge of the Plaintiff about execution of sale deed.

24. The other ground raised by the learned Counsel Mr Tamba appearing for the Applicant cannot be looked into in the present revision application for the simple reason that such ground regarding prayer clauses (a) and (b) being not tenable, was not raised before the Trial Court. Even otherwise, such ground is not even available under Order 7 Rule 11 of CPC. Contention of the learned Counsel Mr Tamba that the Plaintiffs did not challenge the sale deed, is not at all

available to him while arguing the application under Order 7 Rule 11 CPC and that too filed only on the ground of bar of limitation.

25. In the case of *Rajendra Bajoria* (supra), the suit filed by the legal heirs of a deceased partner claiming declaration that they are entitled to the assets and properties of the firm was rejected on the simple ground that under the Partnership Act and upon death of a particular partner, the legal heirs are only entitled to claim the profit of the firm and upon dissolution of the firm, they are entitled to the surplus of the sale proceeds of the assets and properties of the firm, if any. Thus, said decision in the case of *Rajendra Bajoria* (supra) is totally on different context and distinguishable. Such decision is not at all helpful to the Applicant.

26. In the case of *Smt. Cynthia Shahid Dhar* (supra), revision petition was filed challenging the inventory proceedings and the order passed therein. Though the provisions under Article 1566 and Article 2309 of the Civil Code were considered, they were on totally different contexts. Even otherwise, co-joint readings of both these Articles nowhere project that the suit as framed in the present matter is barred by any provision of law.

27. In sum and substance, the revision must fail and hence, I pass the following order:-

- i. Revision application stands rejected.
- ii. Parties shall bear their own cost.

BHARAT P. DESHPANDE, J.