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IN THE HIGH COURT OF BOMBAY AT GOA

CIVIL REVISION APPLICATION NO.46 OF 2019

WITH

CIVIL REVISION APPLICATION NO.47 OF 2019

CIVIL REVISION APPLICATION NO.46 OF 2019

1. Mrs. Sunita Devendra Deshprabhu

Age – about 60 years; Indian citizen,

Married to Mr. Devendra R. Deshprabhu.

R/o Viscount Palace,

Nanerwada, Pernem, Goa – 403 512.

2. Mrs. Rupa Jitendra Deshprabhu

Age – about 57 years; Indian citizen,

Married to Mr. Jitendra R. Deshprabhu.

R/o Viscount Palace,

Nanerwada, Pernem, Goa – 403 512

... Applicants.

Versus

1. Mrs Sitadevi Deshprabhu [nee: Jaia Valaucar]

Since deceased (Represented through Lrs on record).

Was earlier residing at 60, Keluskar Road, Shivaji Park, Opp. Shivaji Park Gymkhana, Dadar, Mumbai – 400 028.

2. Mrs. Shilpa Satish Ugrankar [nee: Anjalika

Raghunathrao Prabhu Dessai Deshprabhu Rau Raje]

Age – about 66 years; Indian citizen,

Married to Dr Satish Shripad Ugrankar.

R/o Flat No. 2A, Ram Mahal, J. N. Tata Road, Churchgate, Mumbai – 400 020.

3. Dr. Satish Shripad Ugrankar

Age – about 75 years; Indian citizen,

R/o Flat No. 2A, Ram Mahal, J. N. Tata Road,
Churchgate, Mumbai – 400 020.

4. Mrs. Devika Dilip Kulkarni [nee: Achaladevi
Rghunathrau Prabhu Dessai Deshprabhu Rau Raje]
Age – about 65 years; Indian citizen,
Married to Mr. Dilip Mahabal Kulkarni.
R/o Flat No. 23B, New Neelsagar Co-operative
Housing society, 2A/B – Perry Cross Road,
Bandra (W), Mumbai – 400 050.

5. Mr. Dilip Mahabal Kulkarni
Age – about 70 years; Indian national.
R/o Flat No. 23B, New Neelsagar Co-operative
Housing society, 2A/B – Perry Cross Road,
Bandra (W), Mumbai – 400 050.

6. Mr. Devendra Raghuraj Deshprabhu
Son of late Raghuraj Vassudev Deshprabhu,
Age – about 67 years; Indian citizen.
R/o Viscount Palace,
Nanerwada, Pernem, Goa – 403 512.

7. Mr. Jitendra Raghuraj Deshprabhu
(since deceased through LR's)
Son of late Raghuraj Vassudev Deshprabhu,
Age – about 63 years; Indian citizen,
R/o Viscount Palace,
Nanerwada, Pernem, Goa – 403 512.

7(a) Ms. Mrinalini Jitendra Deshprabhu,
Daughter of Jitendra Deshprabhu
Aged 35 years
Resident of Rauraje Palace, 4/68
Nanerwada, Pernem, Goa

7(b) Yuvraj Jitendra Deshprabhu,
Minor son of Jitendra Deshprabhu,
Aged 9 years, represented by his mother
Rupa Jitendra Deshprabhu as

his natural guardian,
Resident of Rauraje Palace, 4/68,
Nanerwada, Pernem, Goa.

... Respondents.

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R/o Viscount Palace,
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... Respondents.

Mr Parag Rao with Mr A. Parrikar, Advocates for the Applicant.
Mr J.A. Lobo, Advocate for Respondent No.2.
Mr Sudin Usgaonkar, Senior Advocate with Mr Ashwin N. Ramani and Mr Shukr S. Usgaonkar, Advocates for the Respondents.

CORAM: BHARAT P. DESHPANDE, J.
RESERVED ON: 02 March, 2023
PRONOUNCED ON: 03 March, 2023

JUDGMENT:

1. Both these civil revision applications challenging the same impugned order dated 16.08.2019 in Special Civil Suit No.89/2006 filed on 01.09.2006, are taken up for final disposal with the consent of the parties, at the stage of admission itself.
2. Heard Mr Parag Rao along with Mr A. Parrikar, learned counsel for the applicants in both the matters and learned Senior Counsel Shri Sudin Usgaonkar along with Shri Ashwin Ramani and Shri Shukr Usgaonkar, learned counsel for the respondents.
3. Applicants no.1 and 2 in Civil Revision Application No.46/2019 are original defendants no.2 and 4. Applicant since deceased through his LRs in Civil Revision Application No.47 of 2019 is the original defendant no.3. These defendants filed an application under Order XXIII Rule 1(4) along with Section 151 of CPC in Special Civil Suit No.89/2006 claiming therein that the said suit be dismissed as the plaintiff by abandoning their foundational claim in Special Civil Suit

No.74/2007 are not entitled to pursue the present suit on almost identical reliefs and between the same parties.

4. The learned trial Court rejected both the applications by the impugned order on the ground that Order XXIII Rule 1(4) of CPC is not applicable as the subsequent suit has been withdrawn. Similarly, the learned trial Court did not exercise Section 151 of CPC as tried to be claimed by the applicants for purpose of dismissal of the said suit claiming to be an abuse of process of law.

5. Mr Rao, learned counsel appearing for the applicants vehemently argued that the history of the present litigation between the family members clearly goes to show that two suits were filed on a common foundational claim that the consent decree dated 26.02.1976 grants them title over 246 properties including the suit properties. When the present applicants/defendants by filing written statement in the first suit, challenged the consent decree of 1976 as null and void and when such an issue was framed, the said plaintiffs clandestinely withdrew the first suit with an intention that such issue about the nullity of the consent decree not be adjudicated and decided. Mr Rao then would submit that no such issue was framed in the second suit, however, the foundational claim about the second suit is also similar to the first suit. He then submitted that the original plaintiffs even tried to stay the subsequent suit by filing an application under Section 10 of CPC thereby claiming that the issues in the subsequent suit are the same as that of the first suit. However, such attempts were not fruitful and finally the first suit was withdrawn wherein a specific issue was framed by the trial Court with regard to nullity of the consent decree of 1976.

6. Mr Rao would then submit that the conduct of the plaintiffs clearly goes to show that the proceedings in the second suit are only with intention to harass the present applicant and other defendants. He submitted that the scope of Order XXIII should not be restricted only with respect to the subsequent suit and the intention of the legislature in it must be applied to the previous suit also, when it has been established that the previous suit itself was withdrawn only with an intention not to adjudicate the specific issue when such issue was not framed in the subsequent suit.

7. Mr Rao would then submit that there are contradictory pleas, mutually destructive averments made in both the suits and the order passed by the Court in connection with Portuguese Civil Miscellaneous Application no. 158/2006 filed by the mother as well as of the plaintiffs claiming therein that the marriage between Mrs Sitadevi and her husband Raghunathrao was on the basis of ante nuptial agreement. He would then submit that such agreement clearly goes to show that the family was governed by the Portuguese Civil Code and not by the Code of Gentile Hindu Usages and Customs of Goa, 1880. He would submit that the decision passed by the Court in Portuguese Civil Miscellaneous Application no. 158/2006 dated 08.09.2017 was never challenged by the plaintiffs and, therefore, such findings are binding upon them.

8. Mr Rao would then submit that applicants being the defendants filed application under Order XXIII Rule 1 as well as Section 151 of CPC only with a view to curtail unnecessary litigation which, according to him, is abuse of process of law. He would submit that the principles as laid down under Order XXIII Rule 1 CPC would have to be applied to

the matter in hand on broad perspective and not only on technical grounds.

9. In the alternative, Mr Rao would submit that even if it is considered that the application is not tenable under Order XXIII Rule 1 of CPC, the trial Court was having ample powers under Section 151 of CPC to stop the abuse of process of law by dismissing the subsequent suit. In this respect Mr Rao would submit that the applicants cannot be allowed to continue with the second suit which takes diametrically opposite pleas only to claim right in the property by ignoring the provisions governing the field.

10. Mr Rao then would submit that the impugned order suffer from material irregularity as the learned trial Court failed to consider provisions in its proper perspective and the Court would have a proactive approach in order to curtailing unnecessary litigation and further harassment to the applicants. Mr Rao then placed reliance on the following decisions:-

1. Mrs. Sitadevi Deshprabhu and Others v. Jitendra Raghuraj Deshprabhu¹ .

2. Ram Chand and Sons Sugar Mills Private Ltd., Barabanki v. Kanhayalal Bhargava and Others²

3. Shipping Corporation of India Ltd. V. Machado Brothers and others³

4. Dalip Singh v. State of Uttar Pradesh and Others⁴

5. A. Shanmugam v. Ariya Kshatri Rajakula Vamsathu Madalaya

1 (Port. C.M.A. No. 158/2006/A) dated 08.09.2017

2 (1966) 3 SCR 856

3 (2004) 11 SCC 168

4 (2010) 2 SCC 114

***Nandhavana Paripalanai Sangam*⁵**

***6. V. Chandrasekaran and Another v. Administrative Officer and Others*⁶**

11. Mr Usgaonkar, learned Senior Counsel along with Mr Ramani claimed that the present litigations are in fact abuse of process of law as absolutely no case is made out. He submitted that there was no fraud or mischief on the part of original plaintiffs and the applicants being the defendants are entitled to raise defence on merit, which would be decided by the trial Court on framing issues. Mr Ramani submitted that the Hindu Code is not in conflict with the Portuguese Code and the only exception to the general law being the Civil Code. The Hindu Code nowhere deals with the aspect of marriage whereas marriage is only as per the Civil Code. The plaintiffs were allowed to withdraw the previous suit. However, the defendants/applicants herein even challenged such order before this Court and thereafter only raised the claim of costs.

12. Mr Usgaonkar would submit that the matter is unnecessarily dragged by the applicants and, therefore, revision applications require to be dismissed. He placed reliance on the following decision:-

***Mangi Lal and another v. Radha Mohan and Another*⁷**

13. Rival contentions fall for the determination of this Court.

14. The entire dispute revolves around the family. Two suits were filed on two different dates. Mrs Sitadevi (plaintiff no.1 in Special Civil Suit No.89/2006) was wife of late Raghunathrau alias Raghunath

5 (2012) 6 SCC 430

6 (2012) 12 SCC 133

7 1930 SCC OnLine Lah 69

Deshprabhu, Devendra and Jitendra are two sons whereas Mrs Anjalika and Mrs Achaladevi are two daughters of the said couple.

15. Mrs Sitadevi along with here daughters and their husbands filed Special Civil Suit no.89/2006 for permanent injunction against Devendra, his wife Sunita, Jitendra and his spouse. The prayer (a) in the said suit reads thus:-

'a) The defendants be restrained by way of permanent injunction from interfering in any manner with the suit properties, by themselves or by their agents and representatives.'

16. Such suit of 89/2006 was based on the contention that Devendra/defendant no.1 filed Special Civil Suit No.10/1975 against Raghunathrau, the plaintiff and other plaintiffs for declaration and dissolution of Hindu Undivided Family. By judgment, order and decree dated 26/02/1976, the said suit was decreed and the assets were divided amongst the family as per Schedule A to F. Such decree was engrossed on non-judicial stamp paper. As per the allotment in the decree, parties to the said suit became owners of the properties allotted to them as per the Schedule A to F. As per the said decree, Sitadevi became the sole and exclusive owner of 126 properties enrolled in Schedule B. Plaintiff no.2 Mrs Anjalika became sole and exclusive owner of 128 properties enrolled in Schedule E. Plaintiff no.4 Mrs Achaladevi became sole and exclusive owner of 118 properties enrolled in Schedule F. The said suit was filed only on the ground that subsequently in August 2006 the plaintiffs realised that defendants no.1 and 3 were in the process of finalising the sale in respect of the properties allotted to the plaintiffs. In such circumstances, the said suit was filed against the defendants.

17. The said suit was resisted by the defendants by filing their written statements.

18. The second suit was filed by Mrs Anjalika along with her husband Satish, Mrs Achaladevi along with her husband Dilip against Devendra, his wife Sunita, Jitendra along with his wife Rupa and Sitadevi, i.e. the mother and against Indian Oil Corporation. This suit was presented on 01.08.2007 and registered as Special Civil Suit no.74/2007. The prayer in the present suit reads thus:-

'a) The Sale Deed executed by defendant No.1 to 5 in favour of defendant No.6, dated 12th July 2001, be declared null and void and direct the sub registrar of Pernem to cancel the same.'

b) The defendant No.6 be directed to remove all the structures, fixtures from the plot which is subject matter of Sale Deed dated 12th July 2001 and reduce the same in its original conditions.'

19. The other prayers in the suit are consequential reliefs.

20. Applicants resisted this suit by filing written statements.

21. It so happened that in the second suit bearing Special Civil Suit No.74/2007, the additional issues were framed on the basis of pleadings. The said additional issues read thus:-

'1. Whether the plaintiffs prove that the marriage of Sitadevi Deshprabhu and Raghunathrao Vassudev Deshprabhu was governed by a family property regime under Portuguese Civil Code of 1867 as per the anti-nuptial agreement?

2. Whether the defendant no.1 proves that the consent decree dated 26.2.1976 was obtained by fraud, as such null and void?'

22. The second issue which is relevant is with regard to the consent decree dated 26.02.1976 as obtained by fraud and as such null and void.

23. The plaintiffs in Special Civil Suit No.74/2007 (second suit) filed an application for withdrawal of said suit unconditionally. The learned trial Court vide order dated 17.01.2019 allowed such application for withdrawal of the said suit though defendants asked for time to file reply. The present applicants challenged such withdrawal of the suit by filing Writ Petition no.87/2019 which came to be decided on 15.07.2019 by this Court. The order dated 15.07.2019 would show that though there was a challenge over the unconditional withdrawal of the suit, statement was made on behalf of the petitioners that their challenge is restricted only for non-grant of costs while withdrawing the second suit. Accordingly, this Court awarded cost of ₹1 lakh to be paid to the present applicants.

24. With this background, the application filed by the applicants under Order XXIII Rule 1 needs to be considered. Admittedly, the second suit was withdrawn unconditionally whereas the first suit of the year 2006 is still pending.

25. Order XXIII Rule 1 of CPC reads thus:-

'Withdrawal And Adjustment of Suits 1. Withdrawal of suit or abandonment of part of claim-- (1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim:

Provided that where the plaintiff is a minor or other person to whom the provisions contained in rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.

(2) An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other persons.

*(3) Where the Court is satisfied,-
(a) that a suit must fail by reason of some formal defect, or
(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.*

*(4) Where the plaintiff-
(a) abandons any suit or part of claim under sub-rule (1), or
(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.*

(5) Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs.

26. This provision clearly permits withdrawal of suit or abandonment of part of claim at any time after institution of the suit. However, consequent to such withdrawal and more specifically unconditional withdrawal as provided in Rule 4 plaintiff is precluded from filing a fresh suit on the same cause of action . Rule 3 postulates that where the Court is satisfied that the suit must fail by reason of some formal defect

or there are sufficient grounds for allowing the plaintiffs to institute fresh suit for the subject matter of the suit or part of the claim, it may, on such terms and conditions as it thinks fit, grant permission to the plaintiff to withdraw such suit or part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim. Thus, the main purpose of Order XXIII Rule 1 is on the principle that the plaintiff is the *dominus litis* and if he wants to withdraw the suit at any time or even abandon part of it, he may do so, subject to payment of costs to the defendants. Secondly, if the Court is satisfied on account of any formal defect or that the suit would fail, allow such plaintiff either to withdraw the entire suit or part of the claim with liberty to file fresh suit on the same subject. If no such liberty is sought while withdrawing the suit, the subsequent suit would not be maintainable.

27. The matter in hand is entirely converse. The plaintiffs were permitted to withdraw second suit of the year 2007 unconditionally and by awarding costs to the defendants. The purpose of Order XXIII Rule 1 is to protect the plaintiffs as well as defendants from unnecessary litigation or to continue with the suit which, on the face of it, is having defects. Therefore, this is purely procedural law which allows the plaintiffs either to withdraw the suit unconditionally or with liberty. Therefore, in no circumstances, the provision of Order XXIII Rule 1 CPC stands attracted to the matter in hand. The contention of Mr Rao that such provision shall be construed in broader perspective to include the contention which cropped up in the present matter, cannot be accepted for the simple reason that the purpose of granting permission to the plaintiffs under Order XXIII Rule 1 CPC with liberty to withdraw the suit and come up with a fresh suit is only to rectify defects in the

previous suit. Therefore, the arguments advanced by Mr Rao in connection with Order XXIII Rule 1 CPC are of no help.

28. Section 151 of CPC reads thus:-

'Saving of inherent powers of Courts:- Nothing in this code shall be deemed to limit or otherwise effect the inherent powers of the court to make such orders as may be necessary for the ends of the justice or to prevent abuse of the process of the court.'

29. First of all, it is saving of inherent powers of the Court. The object of this provision is to supplement and not to replace the remedies provided for in the CPC. Section 151 will not be available when there is alternate remedy. While exercising powers under Section 151 CPC the court has to first consider whether exercise of such power is expressly prohibited by any other provision of the Code and if there is no such prohibition, then the Court will consider whether such powers should be exercised or not on the basis of facts mentioned in the application, as held in the case of ***Shipping Corporation of India***(supra). In that case it was observed that the suit having become infructuous, the Court was bound to exercise its inherent powers under Section 151 of CPC for dismissal of the said suit as no purpose would have been served in continuing such suit. Though the principle laid down in the ***Shipping Corporation's*** case (supra) are connected with exercising discretionary powers under Section 151 of CPC, the same cannot be applied to the present matter for the simple reason that the first suit bearing No.89/2006 is still subsisting and the claim raised therein by the plaintiffs cannot be dumped as infructuous.

30. Shri Rao would submit that the pleas raised by the plaintiffs in both the suits are completely contrary to the decision given in Portuguese Civil Miscellaneous Application no. 158/2006 which was filed by the plaintiffs wherein they have admitted that the marriage between Sitadevi and Raghunathrau was performed on the basis of ante-nuptial agreement.

31. At this stage, it is improper and incorrect to consider these statements which are purely on merit of the matter. However, the submissions of Mr Ramani are more appropriate when he claims that the Gentile Hindu Code of 1880 is not a complete Code but only provides an exception to the Civil Code. In this respect, Article 2 of the Hindu Code 1880 reads thus:-

'A marriage contracted between gentile Hindus in accordance with their religious rite produces all the civil effects which the laws of the kingdom ascribe to a Catholic or civil marriage.'

32. Article 30 reads thus:-

'When the parties entitled to enjoy the exceptions established in the present decree opt, by common agreement, for the application of the civil code and remaining legislation of the kingdom, these shall be applied.'

33. Therefore, it is clear from the above provisions that there is no bar for the Hindu families to have an ante-nuptial agreement as provided under the Portuguese Code. The Hindu Code of 1880 was only an exception and option for the Hindu families to protect their customs and usages in Goa.

34. In the case of **Ram Chand** (supra), the Apex Court discussed inherent powers of Section 151 of CPC however, in that case such

provisions was exercised by trial Court to strike of defence of the Company when the Director was unable to appear though summoned. These observations, in the facts and circumstances of the matter in hand would not be helpful to the applicants.

35. In the case of ***Dalip Singh*** (supra), and ***V. Chandrasekaran*** (supra), the Apex Court considered about the abuse of process by dishonest litigants. In this context, it was observed that when a party approaches the Court with unclean hands, he is not entitled for any relief.

36. In the case of ***Chandrasekaran*** (supra), appeals were filed before the Apex Court from the orders of the High Court in relation to land acquisition proceedings. In that context the Supreme Court in para 44 held that whenever a person approaches a court of equity, in the exercise of its extraordinary jurisdiction, it is expected that he will approach the said court not only with clean hands but also with a clean mind, a clean heart and clean objectives. Thus, he who seeks equity must do equity. It is the law of nature that one must not be enriched by causing loss or injury to another. The judicial process cannot become an instrument of oppression or abuse, or a means in the process of the court to subvert justice, for the reason that the court exercises its jurisdiction only in furtherance of justice.

37. In the case of ***A. Shanmugam*** (supra), the Apex Court observed that when a plaint is filed with documents having no relevance, it is the duty of the Court that it should not go into the trap and be misled by such documents and to reach an entirely erroneous findings which resulted in undue delay of disposal of the case. Similarly, in para 42, the Apex Court observed that when a party is guilty of introducing untenable pleas to gain undue benefit, the Court must be cautious and such facts must be

taken into account while granting relief. Finally, in paragraph 43.4 and 43.5, the Apex Court observed thus:-

43.4 Once the Court discovers falsehood, concealment, distortion, obstruction or confusion in pleadings and documents, the court should in addition to full restitution impose appropriate costs. The court must ensure that there is no incentive for wrongdoer in the temple of justice. Truth is the foundation of justice and it has to be the common endeavour of all to uphold the truth and no one should be permitted to pollute the stream of justice.

43.5 It is the bounden obligation of the court to neutralise any unjust and/or underserved benefit or advantage obtained by abusing the judicial process.'

38. First of all, these contentions raised by the applicants are not tested in evidence. These are only contention of the applicants that the suit is based on document which are irrelevant. Such aspect needs to be considered only on merit. Only because some of the defendants are claiming that the suit is frivolous and based on contradictory statements, the powers under Section 151 of CPC cannot be invoked. The intention of providing inherent powers under Section 151 CPC is to exercise jurisdiction whenever there is no specific provision under the Code of Civil Procedure which can be invoked to meet the ends of justice. In the present matter, subsequent suit of 2007 was withdrawn though for some reasons, it cannot be contended that the plaintiffs had a malafide intention to withdraw the said suit. As found in Order XXIII Rule 1 of CPC, the plaintiff is entitled to withdraw his suit or part of its claim unconditionally subject to payment of costs. Therefore, the contention raised in the present revision applications, as far as Section 151 of CPC is concerned, cannot be accepted.

39. Coming back to the impugned order passed by the trial Court, one thing is clear that it is a reasoned order. Secondly, there is no infirmity or illegality found in it so as to interfere in the revisional jurisdiction. Thus, the submissions on behalf of the applications in both the revision applications cannot be entertained. In the result, the revision applications fail and hence, order:-

ORDER

Civil Revision Application No.46 of 2019 and Civil Revision Application No.47 of 2019 stand rejected.

40. Parties shall bear their own costs.

41. Since the Special Civil Suit No.89 of 2006 is more than 15 years old matter as on date, the trial Court is requested to consider it in such category as old cases and try to dispose of the same as expeditiously as possible.

BHARAT P. DESHPANDE, J.

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