

Santosh

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**APPEAL FROM ORDER NO. 974 OF 2022
IN
S.C. SUIT NO. 2908 OF 2015**

Pramod Ramdas Joshi ...Appellant
Versus
Sheetal Pradip Joshi & Ors. ...Respondents

Mr. Rajesh Talekar, for the Appellant.
Mr. S. P. Srivastava, for the Respondents.

CORAM: N. J. JAMADAR, J.
DATED : 15th MARCH, 2023

ORDER:-

1. This appeal is directed against an order dated 20th May, 2022, passed by the learned Judge, City Civil Court, in Notice of Motion No.1114 of 2016 in S. C. Suit No.2908 of 2015, whereby the Notice of Motion came to be rejected.
2. For the sake of convenience and clarity, the parties are hereinafter referred to in the capacity in which they are arrayed in S. C. Suit No.2908 of 2015.
3. Shorn of unnecessary details, the background facts leading to this appeal can be stated as under:

(a) Smt. Vimal Joshi – defendant No.1 is the mother of Pramod. Defendant No.1 has three sons; Dilip. Pramod – defendant No.2, and deceased Pradip, the husband of plaintiff No.1 and father of plaintiff Nos.2 and 3.

(b) Defendant Nos.1 and 2 had instituted a suit being S. C. Suit No.2728 of 2001 asserting that Flat No.201, Trishul Apartment, 2nd Floor, Sindhi Society, Chembur, Mumbai (“the suit flat”) is the joint family property of the defendants and late Pradip. By a judgment dated 24th January, 2007, the City Civil Court decreed the suit and perpetually restrained late Pradip, the defendant therein, from dispossessing and/or disturbing the possession of the plaintiffs and their family members, the defendants herein, over the suit flat, without following due process of law.

(c) Decree passed in the said suit is assailed in a first appeal pending before this Court.

(d) The plaintiffs, who are the legal representatives of deceased Pradip, the defendant in the said suit, have instituted instant suit for a declaration that they are the owners of the suit flat and also for a decree directing the

defendants and their agents and assigns to hand over vacant and peaceful possession of the suit flat.

4. In the said suit, the defendants took out Notice of Motion No.1114 of 2016 seeking, *inter alia*, the stay of the hearing of the suit and rejection of the plaint.

5. In the affidavit in support of the Notice of Motion the defendants – plaintiffs in Suit No.2728 of 2001, contended that in view of the decree in S. C. Suit No.2728 of 2001, the instant suit is barred by the principles of *res judicata*. Secondly, the plaintiffs had not correctly valued the suit claim. Nor paid the requisite court-fee. The suit was also stated to be barred by law of limitation.

6. The respondents – plaintiffs resisted the prayers in the Notice of Motion by filing an affidavit-in-reply. It was, *inter alia*, contended that the earlier suit instituted by the defendants herein was for injunction simplicitor. Question of title to the suit flat had not been decided therein.

7. By the impugned order, the learned Civil Judge was persuaded to reject the Notice of Motion holding, *inter alia*, that no case for rejection of the plaint was made out. It was observed that issue of limitation is a mixed question of law and facts and, thus, cannot be decided at an interim stage. The

Court has not come to the conclusion that the relief claimed is undervalued nor directed the plaintiffs to pay deficit court-fees. Thus, on that count as well, the prayer for rejection of the plaint was untenable. On the aspect of *res judicata* the trial court was of the view that in the previous suit the substantive rights of the parties were not determined. Therefore, the suit would not be barred by the principles of *res judicata*.

8. Mr. Talekar, the learned Counsel for the appellants – defendants, took the Court through the plaint in the previous suit, the averments in the instant plaint and the judgment delivered by the City Civil Court in the previous suit dated 24th January, 2007. Attention of the Court was invited to the issues framed by the Court in the said suit and the findings recorded thereon.

9. In the said suit, the City Civil Court had framed an issue as to whether the plaintiffs prove that the suit flat was owned by the joint family consisting of the plaintiffs and defendants and on the date of the institution of the suit the plaintiffs were in actual possession of the suit flat as per the family arrangement. The said issue was answered in the affirmative. Eventually, the Court restrained the defendant therein - the predecessor in title of the plaintiffs herein, from dispossessing the plaintiffs –

defendants herein, from the suit flat and/or otherwise disturbing their possession.

10. Mr. Talekar would urge that the learned Judge, City Civil Court, in the face of the aforesaid clear and categorical finding committed an error in arriving at a conclusion that the issue in the instant suit has not been directly and substantially in issue in the said suit.

11. Mr. Srivastava, the learned Counsel for the respondents – plaintiffs, countered the submissions by forcefully asserting that the remit of the said suit was protection of the possession of the defendants herein, as it was a suit for injunction simplicitor. In fact, in the said suit, the Court had expressly kept open the aspect of the defendant therein exercising his remedies as a co-owner of the suit flat. The instant suit, according to Mr. Srivastava, has been instituted to enforce the proprietary rights of the plaintiffs.

12. To this end, attention of the Court was invited to the observations contained in paragraph 11 of the said judgment in the previous suit. They read as under:

“11. In view of this admission of the defendant, I have no hesitation to hold that the plaintiffs have proved their case on preponderance of probability. Before parting with this judgment, it is essential to mention that the defendant is also having proprietary interest in the suit flat. He has every right to claim

his share in the suit flat by filing a partition suit. If blanket order of injunction is passed in this suit, without considering this aspect, complications will arise in future; discretion available with this Court will have to be exercised with caution and after keeping this aspect at the back of mind, I answer the relevant issues accordingly and proceed to pass the following order.”

13. The aforesaid observations do indicate that the Court in the previous suit expressly recorded that the defendant therein also had proprietary interest in the suit flat and had every right to claim his share in the suit flat by instituting a suit for partition.

14. In any event, the issue of bar of *res judicata* can not be decided at an interim stage. For an effective determination of the bar of *res judicata*, an issue as to whether the suit is barred by the principles of *res judicata* ought to be framed and tried. The Court would be required to consider the pleadings in the previous suit, issues settled therein and the evidence so as to arrive at a legitimate finding as to whether the issue in the instant suit had been directly and substantially in issue in the previous suit.

15. In the totality of the circumstances, the learned Civil Judge does not seem to have committed any error in declining to sustain the bar of *res judicata* at an interim stage.

16. Rejection of the plaint sought by the defendants on rest two counts, namely, undervaluation of the claim and bar of limitation are required to be stated to be repelled. The issue of limitation is rooted in facts. More often than not it is a mixed question of facts and law. Likewise, the prayer for rejection of the plaint under Order VII Rule 11 Clauses (b) and (c) is vague and bald. It does not appear that the plaintiff was either called upon to correct the valuation or pay the deficit court-fee and there was failure on the part of the plaintiffs to comply with the same. Resultantly, the trial court was justified in discarding the prayer for rejection of the plaint on the said counts.

17. The conspectus of the aforesaid discussion is that the appeal is devoid of substance.

18. Hence, the following order:

: O R D E R :

- (i) The appeal stands dismissed.
- (ii) No order as to costs.

[N. J. JAMADAR, J.]