



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH

WRIT PETITION NO. 3883 OF 2011

- 1] Manikchand Pratapmal Baj,
aged about 78 years, Occ. Trader,
R/o Washim, Taluka and District – Washim.
- 2] Sanjay Narendra Kanhed,
aged about 45 years, Occ. Agri.
- 3] Surendra Subhashchandra Manatkar,
aged about 35 years, Occ. Business.

Petitioner nos. 2 and 3 are R/o Shirpur (Jain),
Tq. Malegaon, District – Washim.

- 4] ~~Hukumchand Madanlal Gahankari.~~
**Deleted as per Court's order dated
2/12/2024.**

...PETITIONERS

Versus

- 1] Shri Antariksha Parshwanath Maharaj Sansthan,
Registered Public Trust Bearing No. A-1042 Akola,
situated at Sirpur, Tq. Malegaon, District – Washim,
through Managing Trustee, Sakarchand Premchand Shah,
aged about 86 years, Trader,
R/o Kamal Housing Society, Akola, Tq. and District Akola.
- 2] ~~Vijaykumar Girdharlal Shah.~~
Deleted as per Court's order dated 22/12/2011.
- 3] Gulabchand Hemrajji Surana,
aged about 89 years, Occ. Trader,
R/o Lonar, Tq. Mehkar, District – Buldhana.
- 4] Manubhai Nakanji Kordiya,
aged about 78 years, Occ. Trader,
R/o Kamal Housing Society, Akola,
Tq. and District Akola.

- 5] Narendrabhai Ravindralal Shah,
aged about 56 years, Occ. Trader,
R/o Khamgaon, Tq. Khamgaon,
District – Buldhana.
- 6] Mahendralal Mishrilalji Kothari,
aged about 56 years, Occ. Trader,
R/o Amalner, District – Jalgaon.
- 7] Prafullachandra s/o Bhogilal Doshi,
R/o Dr. Bhiwapurkar Marg,
Dhantoli, Nagpur.
- 8] Indrachandra Hemrajji Soni,
aged about 83 years, Occ. Trader,
R/o Hingoli, Tq. and District – Hingoli.
- 9] ~~Sakharchand H. Sheth.~~
- 10] ~~R.N. Jain.~~

**Respondent nos. 9 and 10 are deleted
as per Court's order dated 20/6/2013.**

- 11] Santoshkumar Pannalalji Patni,
aged about 58 years, Occ. Business,
R/o Jawahar Colony, Washim,
Tq. and District – Washim.
- 12] Vijaykumar Vasantrao Raut,
aged about 60 years, Occ. Agriculturist,
R/o Rithad, Tq. Risod, District – Washim.
- 13] ~~Civil Judge Junior Division,
Malegaon, District – Washim.~~
Deleted as per Court's order dated 2/1/2025.

...RESPONDENTS

Mr. C.S. Kaptan, Senior Counsel with Mr. M.R. Joharapurkar,
Counsel for the petitioners.

Mr. M.P. Khajanchi, Counsel for respondent nos. 1, 3 and 5 to 8.

None for respondent no.4.

CORAM : ANIL L. PANSARE, J.
ARGUMENTS WERE HEARD ON : DECEMBER 19, 2024
JUDGMENT IS PRONOUNCED ON : JANUARY 2, 2025

JUDGMENT :

The petitioners shall forthwith delete the name of respondent no.13.

2] Heard Mr. C.S. Kaptan, learned Senior Counsel with Mr. M.R. Joharapurkar, learned Counsel for the petitioners, and Mr. M.P. Khajanchi, learned Counsel for respondent nos. 1, 3 and 5 to 8. None appeared for respondent nos. 11 to 13, though served.

3] The short question that arises for consideration is whether Regular Civil Suit No. 27/2003, filed by Svetambara sect of Jainism, is hit by Section 10 of the Code of Civil Procedure, 1908 (for short “the Code”) because of pendency of previously instituted suits, more particularly, Regular Civil Suit No. 218/1961, which was also filed by Svetambaras.

4] The prayers in Regular Civil Suit No. 27/2003 are as under :

“(a) Permission to file the suit in a representative

capacity and to sue the defendants in a representative capacity, be granted to the plffs;

(b) Decree for mandatory injunction be passed against the defendants, directing them to remove all the Idols, and other articles of theirs, from the Paolit Temple, and its courtyards and premises, as also Dewdi in question;

(c) Decree for possession of the suit property be passed in favour of the plffs and against the defendants;

(d) Enquiry into manse profits be ordered to be made under order 20 Rule 12 CPC, from the date of suit till delivery of possession.

(e) Costs of the suit be awarded to the plffs from the defendants;

(f) Such other reliefs be granted as the court deems fit.”

5] Thus, the plaintiffs – Svetambaras are seeking order of mandatory injunction against the defendants – Digambaras to remove all the idols and other articles belonging to them from the Pavli temple, Dewdi and its courtyards. By way of further prayer, possession of the suit property is sought to be given to the plaintiffs.

6] The question is whether the issue involved in Regular Civil Suit No. 27/2003 is also directly and substantially in issue in Regular Civil Suit No. 218/1961. There is no dispute that both the suits are between the same parties.

7] Considering the prayer, I will refer to the relevant

issues, as framed by the trial Court in Regular Civil Suit No. 218/1961, which read thus :

“1. Does the plaintiff prove that the idols of Shri Antariksha Parshwanath and the temple are Shwetambari one ?

2. Does the plaintiff prove that the Shwetambaris are exclusively managers of the temple, Idol and its property ?

3. Does the plaintiff prove that the Pauli temple and its area in Survey No. 197 in Sirpur belongs to him?

4 and 5

6. Does the plaintiff prove that it was declared in the above suit that Shwetambaris were exclusive managers of the temple and idol and that the Digambaris were only entitled to worship according to the time table ?

7 to 11

12. Does the deft No.1 prove that the Digambari Jains are in exclusive management and possession of the Pauli temple as owners and as of right of over 12 years before the year 1903 ?

13 to 18

19. Does the Charity Commissioner prove that Digambaris collect offerings and donations and owned and managed their separate property in the name of the main idol ?

20. Does the Charity Commissioner prove that two different Boards of Trustees are for the properties held by Shwetambaris and the upkeep and management of the temple and the other for management of the properties held by Digambaries including offerings and donations received by them exist ?

21 to 28”

8] Since the question involved is whether the issue in subsequent suit is directly and substantially in issue in the

previous suit, it will be appropriate to reproduce the issues in the subsequent suit, i.e., Regular Civil Suit No. 27/2003, which are as under :

“1] Do plaintiffs prove that they are title holder of suit property?

2] Do they prove that portion of paoli temple and dewdi and its courtyard is retained by Defendants without any right ?

3] Are Plaintiffs entitled for possession of paoli temple and its precincts ?

4] Are Plaintiffs entitled for reliefs of mandatory injunction as prayed for ?

5] Are they entitled for relief of enquiry into mesne profit as prayed ?

6] Do Defendants prove that suit is barred by limitation ?

7] Whether the suit is properly valued for the purposes of court fees and valuation as described in para 14 of the Complaint ?

8] Do Defendants prove that the suit is not maintainable in view of specific bar and declaration provided under provisions of “Places of worship (Special Provisions) Act, 1991 ?

9] Whether the suit for injunction without seeking declaration regarding title in the suit property of the subject matter of suit is maintainable ?

10] What decree and order ?”

9] As could be seen, in order to succeed in the subsequent suit, i.e., Regular Civil Suit No. 27/2003, the plaintiffs – Svetambaras will have to prove title over the suit

property. They will have to further prove that the defendants – Digambaras have no right to retain portion of Pavli temple, Dewdi and its courtyards. The subsequent reliefs are dependent on the proof of first two issues.

10] In context with above, if the issues in Regular Civil Suit No. 218/1961 are looked into, the Svetambaras will have to prove that idol of Shri Antriksha Parshwanath Swami and the temple are of Svetambaras, and further that they are exclusively managing the said idols, temple and its property. They are further under obligation to prove that Pavli temple and its area in survey no. 197 in Village – Shirpur, District – Washim, belongs to them. Then there is an issue whether Digambaras were entitled to only worship but not to manage the temple and idols. Digambaras are, however, claiming that they are in exclusive management and possession of Pavli temple as owners and as of right. There is yet another issue whether Digambaras are collecting offerings and donations, and they own and manage their separate property in the name of main idol. Last but not the least, there is an issue whether there are two board of trustees; one for the property held by

Svetambaras to upkeep and manage the temple, and the other of Digambaras to manage the property held by them, including offerings and donations received.

11] Thus, the issue in the subsequent suit whether the Svetambaras are the title holders of the suit property is also an issue in the earlier suit. Similarly, whether the Digambaras are holding portion of Pavli temple, Dewdi and its courtyards, without any right, is also an issue in the earlier suit. In that sense, the entire subject matter of Regular Civil Suit No. 27/2003 is in issue in Regular Civil Suit No. 218/1961. The provisions of Section 10 of the Code, therefore, will be attracted.

12] Mr. M.P. Khajanchi, learned Counsel for the respondents – Svetambaras, however, contends that since the cause of action for filing both the suits is different and since all the issues and the subject matter in both the suits being not same, the provisions of Section 10 of the Code will be not attracted. In support, he has relied upon the judgment of the Hon'ble Supreme Court in the case of *Aspi Jal And Another Vs. Khushroo Rustom Dadyburjor [(2013) 4 SCC 333]*, wherein the

Court held thus :

“12. As observed earlier, for application of Section 10 of the Code, the matter in issue in both the suits have to be directly and substantially in issue in the previous suit but the question is what “the matter in issue” exactly means? As in the present case, many of the matters in issue are common, including the issue as to whether the plaintiffs are entitled to recovery of possession of the suit premises, but for application of Section 10 of the Code, the entire subject-matter of the two suits must be the same. This provision will not apply where a few of the matters in issue are common and will apply only when the entire subject-matter in controversy is same. In other words, the matter in issue is not equivalent to any of the questions in issue. As stated earlier, the eviction in the third suit has been sought on the ground of non-user for six months prior to the institution of that suit. It has also been sought in the earlier two suits on the same ground of non-user but for a different period. Though the ground of eviction in the two suits was similar, the same were based on different causes. The plaintiffs may or may not be able to establish the ground of non-user in the earlier two suits, but if they establish the ground of non-user for a period of six months prior to the institution of the third suit that may entitle them the decree for eviction. Therefore, in our opinion, the provisions of Section 10 of the Code is not attracted in the facts and circumstances of the case.”

13] Thus, the Court has held that to apply Section 10 of the Code, the matter in issue in both the suits have to be directly and substantially in issue in the previous suit. In that sense, the matter in previous suit should be such that it should cover the entire subject matter of the subsequent suit, which is,

in fact, what has been rightly pointed out by Mr. C.S. Kaptan is existing in the present suit. The Supreme Court has further observed that the provisions under Section 10 of the Code will not apply where few of the matters in issue are common but will apply only when the entire subject matter in controversy is same. As stated earlier, the entire subject matter of the subsequent suit is in issue in the previous suit.

14] So far as the question of different cause of action is concerned, the Supreme Court held that in a suit where decree of eviction is sought on the ground on non-user of the premises, even if the plaintiffs therein failed to prove the said cause in previous suit, they may succeed in the subsequent suit because though the cause is same, period of user is different. Therefore, what is important is not only the difference in date of cause of action but also the grounds giving rise to the cause.

15] In the present case, Svetambaras are claiming different cause of action on the basis of the judgment passed by the Supreme Court in Appeal (Civil) No. 1798/1991, which arose out of the judgment passed by this Court in Second Appeal No. 164/1968 arising out of order passed by the Court

of S.D.M. on 17/12/1927 coupled with order passed by the Court of the Additional Judicial Commissioner on 6/8/1928. The subject matter of the dispute was Pavli temple and field survey nos. 197 and 198/1. The Supreme Court upheld the finding of this Court, wherein it was held that Digambaras failed to prove that the two suit fields belong to Pavli temple or that Pavli temple itself belongs to Digambara community or the two suit fields belong to Digambara community except for their rights of user as passed by the trial Court. The trial Court had held that Digambaras, as worshipers of idol of Shri Antriksha Parshwanath Swami, have rights to use southern portion of survey no. 198/1 as way to access the temple and to enjoy water of well 'W' for the purpose of drinking, bathing, etc. and also for temporary parking of cars and tethering of bullocks of the pilgrims during the periodical annual yatra day on portions of survey nos. 197 and 198/1.

16] There was yet another issue involved in the said suit whether the suit was barred by the principles of *res judicata* in view of the judgment in Civil Suit No. 4/1910. The High Court had answered the same in the negative holding that

the said suit is related to right of worship and exclusive possession or management of the main town temple of Shri Antriksha Parshwanath Swami at Shirpur but the issue in the suit before the High Court was regarding title to the two suit fields and accordingly it was held that it will not be directly and substantially an issue involved in the earlier suit. In the suit that was filed earlier, i.e., in the year 1910 by Svetambaras, the Judicial Commissioner, in an appeal, held that Svetambaras are entitled to exclusive management of the temple and the image of Shri Antriksha Parshwanath Swami at Kasbe Shirpur and have right to worship the image with Chakshu, Tika and Mugut and to put ornaments over the same in accordance with their custom. The Judicial Commissioner also held that Digambaras have right of worshipping the image in accordance with the arrangement made in the year 1905 without Chakshu, Tika, Mugut and ornaments. Thus, the rights of both the sects has been recognized in the said judgment, which finding is the subject matter of challenge before the Supreme Court.

17] This judgment is dated 2/8/2002 and is said to be the cause of action for filing the subsequent suit. Even if it is to

be said so, the judgment, to certain extent, recognizes rights of Digambaras, at least to the extent of worshipping the image of Shri Antriksha Parshwanath Swami in accordance with the arrangement made in the year 1905. The said temple is the subject matter of the subsequent suit, pleadings therein also recognizes rights of both the parties in terms of the agreement entered into between the two sects in the year 1905.

18] The question therefore is, will this cause be sufficient to answer the issues involved in the subsequent suit independent of the issues involved in the earlier suit. To state it differently, will the finding to the issues in earlier suit supersede the cause for filing the subsequent suit. The answer would be certainly in the affirmative. It is so because the finding to the issues in the earlier suit will act as *res judicata* for the subsequent suit.

19] It is worth mentioning here that despite the aforesaid judgment of the Supreme Court, which has allegedly given fresh cause of action, Svetambaras are pursuing Regular Civil Suit No. 218/1961, meaning thereby, that there is still a dispute as to whether the idol of Shri Antriksha Parshwanath

Swami and the temple belong to Svetambaras and whether they are exclusively managing the temple, idol and its property and whether Pavli temple and its area in survey no. 197 in Village – Shirpur belong to them. Further, one of the issues is whether Digambaras are in exclusive management and possession of Pavli temple as owners. Answer to these issues will directly and substantially affect the issues involved in the subsequent suit where Svetambaras are claiming title over the suit property and where they have to prove that Digambaras have retained possession of Pavli temple, Dewdi and its courtyards without any right. Thus, despite judgment of the Supreme Court which gives rise to alleged cause to file subsequent suit, the answer to issues in the previous suit will have direct bearing on the subsequent suit. That being so, the judgment cited by Mr. Khajanchi, learned Counsel for the respondents, will be of no assistance.

20] Another judgment referred to by Mr. Khajanchi is in the case of *National Institute of Mental Health & Neuro Sciences Vs. C. Parameshwara [(2005) 2 SCC 256]*, wherein the Supreme Court held that the fundamental test for

applicability of Section 10 of the Code is whether on final decision being reached in the previous suit, such decision would operate as *res judicata* in the subsequent suit and that Section 10 of the Code applies in cases where whole of the subject matter in both the suits is identical. The emphasis of Mr. Khajanchi is on the expression ‘whole of the subject matter in both the suits is identical’. He submits that there are multiple issues in the previous suit, which are not the subject matter of the subsequent suit and, therefore, it cannot be said that the subject matter of both the suits is identical.

21] I do not find substance in the aforesaid argument inasmuch as the important finding rendered by the Supreme Court is ignored. What is important is whether on final decision being reached in the previous suit, such decision would operate as *res judicata* in the subsequent suit.

22] In the present case, and as noted earlier, answer to the issues in previous suit will operate as *res judicata* in the subsequent suit and in that sense, whole of the subject matter in the subsequent suit is in issue in the previous suit and in that context, it could safely be said that whole of the subject matter

in both the suits is identical with a rider that previous suit has some additional issues to be answered. Thus, second judgment will be also of no assistance to the Svetambaras.

23] The trial Court failed to appreciate that the issue involved in the subsequent suit is directly and substantially in issue in the previous suit and further failed to apply the provisions of law. The order impugned, therefore, is unsustainable.

24] Resultantly, the petition is allowed. Order dated 12/1/2011 passed by the Civil Judge Junior Division, Malegaon, in Regular Civil Suit No. 27/2003, is quashed and set aside. Applications – Exhibits 77 and 82 filed by the defendants – Digambaras to the extent of seeking stay to the subsequent suit are allowed.

25] Rule is made absolute in the above terms. No order as to costs.

JUDGE

Sumit