

(2025) 01 BOM CK 0003

Bombay High Court

Case No: Civil Revision Application No.275 Of 2023

Kishor Ramji Patel & Ors

APPELLANT

Vs

Sunanda Sudhakar Choughule
and Ors

RESPONDENT

Date of Decision: Jan. 2, 2025

Acts Referred:

- Code of Civil Procedure, 1908 - Section 11, 99, Order 2 Rule 2, Order 7 Rule 11, Order 7 11(a), Order 7 11(b), Order 7 Rule 14, Order 23 Rule 1
- Court Fees Act, 1870 - Section 6(iv)(j)
- Limitation Act, 1963 - Article 58, 59

Hon'ble Judges: Milind N. Jadhav, J.

Bench: Single Bench

Advocate: Vijay Killedar, Kuldeep U. Nikam

Final Decision: Dismissed

Judgement

Milind N. Jadhav, J.

1. Heard Mr. Killedar, learned Advocate for the Applicants and Mr. Nikam, learned Advocate for Respondents.

2. The present Civil Revision Application (for short "CRA") was heard by me on 31.07.2024 on which date the

following order was passed:-

1. Heard Mr. Killedar, learned Advocate for the Applicants and Mr. Nikam, learned Advocate for Respondent Nos.1 to 5.

2. Mr. Nikam would submit that the previous Suit which was filed by the parties was for simplicitor injunction. Suit was filed in the year 2015 by Plaintiffs

claiming to be the owners of the Suit property. The Suit for injunction is always maintainable on the ground of entitlement and/or right, title and interest of the Plaintiffs who approaches the Court. To this, Mr. Nikam, learned Advocate for Respondents by stating that the previous Suit was filed for simplicitor injunction by clarifying that the Suit property is undivided property.

3. However, Mr. Nikam would submit that he has not seen the Suit plaint of the previous Suit and he would still like to confirm the same. Undoubtedly, the Plaintiff can confirm the aforesaid position and file appropriate Affidavit by placing the previous Suit plaint on record so that the averments made in the Suit plaint and the reliefs prayed for can be juxtaposed with the details given in the present Suit proceedings.

4. After hearing both the learned Advocates, in view of the suggestion made by Mr. Killedar, without prejudice to the rights and contentions of both parties, I have impressed upon Mr. Nikam to take appropriate instructions from his client. It is clearly seen that there is a good possibility of the present dispute being compromised and settled between the parties. The parties can sit across alongwith their Advocates and reconcile which half portion of the Suit property they would give to Mr. Killedar's client and inform the other side accordingly and the other side can take appropriate instructions and agree to agree or agree to disagree.

5. Once this exercise is carried out and it is informed to the Court, appropriate orders / directions can be passed which be beneficial to the parties.

6. Needless to state that the aforesaid exercise shall be without prejudice to the rights and contentions of the parties. I am requesting the learned Advocates of both the sides attempt this reconciliation process since the dispute with respect to claim of one half share of the Suit property is between the son and the widow of the deceased.

7. Though Mr. Nikam would submit that the widow is entitled to one half share of the Suit property. Be that as it may, considering the fact the widow had purchased a portion of the Suit property and her son is claiming a share, even he should be entitled to his half share. Hence, I have requested to the parties to see and attempt, if any, reconciliation is possible.

8. Without going into the merits of the matter, it is seen that the present lis between the parties is between two Clause I heirs.

9. Mr. Nikam seeks one week time to file appropriate Affidavit-in-Reply within one week from today.

10. Stand over to 7th August 2024. To be listed under the caption "First on Board".

3. Learned Advocates for the parties would thereafter inform the Court that reconciliation is not possible between the parties and therefore have invited an order from the Court. Thereafter, learned Advocates for both parties were heard and final arguments were concluded and the decision is delivered herein under.

4. Applicants are original Defendants in the Regular Civil Suit (for short "RCS") No.116 of 2023. Respondent Nos.1 to 5 are original Plaintiffs in

the said Suit. Defendants' Application for rejection of Suit plaint under Order VII Rule 11 of the Code of Civil Procedure, 1908 (for short

"CPC") is rejected by the impugned order dated 26.04.2023 passed by the Trial Court below Exhibit "42" in RCS No.116 of 2022. RCS

No.116 of 2023 is filed for reliefs of permanent injunction, partition, possession and declaration. Perusal of the Suit plaint shows that prayer clause (b)

in paragraph No.18 of the Suit plaint seeks relief of permanent injunction. The Suit plaint is appended at Exhibit "B" page No.37 of the CRA.

5. Mr. Killedar, learned Advocate for Applicants i.e. Defendants in the Suit proceedings would contend that Plaintiffs had filed a previous suit being

RCS No.327 of 2015 for relief of permanent injunction. He would submit that RCS No.327 of 2015 was dismissed after a trial by judgment dated

17.01.2019.

5.1. Next, he has drawn my attention to the issues framed by the learned Trial Court in the previous Suit which are reflected on page No.89 of the

CRA. I have perused the said issues. From the issues, it is clearly gathered that the previous Suit proceedings is for permanent injunction only and nothing else.

5.2. Next, he has drawn my attention to the judgement and order dated 17.01.2019 whereby the previous Suit is dismissed after trial. In this judgement

he has drawn my attention to the finding returned by the learned Trial Court at page No.102 wherein a clear finding is returned that Plaintiffs in the

current Suit are not entitled for relief of injunction.

5.3. Thereafter, Mr. Killedar has drawn my attention to the challenge maintained to the above judgement in Regular Civil Appeal No.57 of 2020

before the Appeal Court. It is seen that Appellate Court dismissed the Appeal by judgement dated 22.11.2021. Plaintiffs did not stop here, they

challenged both concurrent judgements in this Court in Second Appeal No.380 of 2022. This Court dismissed the Second Appeal by order dated

20.03.2023 which reads thus:-

“1. Mr. Kuldeep Nikam, learned counsel appearing for the Appellant seeks withdrawal of the Second Appeal with liberty to file suit for partition and separate possession, injunction and declaration.

2. Leave as aforesaid is granted. However, it is clarified that all the contention of both the parties with respect to the said suit are kept open. Second Appeal is dismissed as withdrawn with aforesaid liberty and aforesaid clarification.

3. In view of dismissal of the Second Appeal, nothing survives in the Interim Application and the same is also disposed of.

4. Mr. Kuldeep Nikam, learned counsel appearing for the Appellants states that status-quo order is in operation till date be continued for three weeks. Said status-quo order is extended for a period of two weeks i.e. 10th April 2023.

5. Second Appeal is disposed of in the above terms with no order as to costs.”

5.4. It is seen that by the order dated 20.03.2023, status quo was granted upto 10.04.2023.

5.5. Mr. Killedar would submit that as delineated in paragraph Nos.1 and 2 herein above, this Court granted leave to Plaintiffs to file a Suit for partition

and separate possession, injunction and declaration. Plaintiffs instead filed the present Suit on 10.03.2023 only for injunction. This is what is argued by

Mr. Killedar, however it is not correct.

5.6. In support of his submissions, Mr. Killedar has relied upon the decisions of the Supreme Court in the cases of Dahiben Vs. Arvindbhai

Kalyanji Bhanushali (Gajra) dead through Lrs. and Or. s(2020) 7 SCC 366 and Khatri Hotels Private Limited and Anr. Vs.

Union of India and Anr. (2011) 9 SCC 126

5.7. In view of his above submissions, Mr. Killedar would urge the Court to allow the CRA and thereby reject the Suit filed by Plaintiffs.

6. It is seen that the present Suit is filed for the reliefs for which leave was granted by the Court. On the perusal of the prayers at page No.48B of the CRA, it is seen that prayer clause (b) is for perpetual injunction and prayer clause (c) is for partition and separate possession and prayer clause (d) is for declaration.

7. Prima facie, I find that the present Suit filed adheres to the leave which is granted by the Court while disposing of Second Appeal and permitting Plaintiffs to file the Suit for partition and separate possession, injunction and declaration. Once the said leave has been granted by this Court and having perused the prayers in the present Suit proceedings which are appended a page No.48B of the CRA, I do not find that any case is made out by Mr. Killedar for dismissal of the present Suit on the ground of res judicata.

8. Learned Trial Court has determined the Application filed below Exhibit 42 and the order is at page No.163 of the CRA. Three issues have been framed therein, the first issue pertains to under-valuation of the Suit proceedings, the second and third issues pertain to bar of limitation and res judicata under Order VII Rule 11(a) and (b) of CPC. Learned Trial Court in paragraph No.21 after analysing the facts in the Suit proceedings which are duly discussed in paragraph Nos.16 to 20 has concluded that the Suit is well within limitation from the averments made in the Suit plaint since it is for partition and separate possession.

9. On the issue of under-valuation of the Suit proceedings, learned Trial Court has opined that Plaintiffs are not a party to the Sale Deed between Defendant Nos.1 to 5 on one hand and Defendant Nos.6 and 7 who are third party purchasers. In that view of the matter, learned Trial Court has clearly opined and derived that the Court fees paid as per Section 6(iv)(j) of the Court Fees Act, 1870 is correctly paid on the basis of the averments in the Suit plaint having been considered.

10. On the issue of res judicata, the order dated 20.03.2023 passed by this Court in Second Appeal comes to the aid of Plaintiffs. Dismissal of the previous Suit for perpetual injunction does not close the doors of Plaintiffs to approach the Civil Court for relief of partition, separate possession and declaration. Once it is an admitted position that the Suit property is commonly possessed by the original holders then in the facts of the present case

and the leave granted in the Second Appeal order to Plaintiffs keeps their right and remedy alive. Such is the finding returned in paragraph No.36 of the impugned order dated 26.04.2023.

11. Mr. Killedar has attempted to base his submissions on five heads namely; bar of res judicata under Section 11 of CPC, bar of limitation under

Articles 58 and 59 of the Limitation Act, 1963, documents to be treated under Order VII Rule 14 of CPC, bar under Order II Rule 2 of CPC and

inapplicability of Order XXIII Rule 1 o Section 99 of CPC. However, in view of the above observations in the present matter and perusing the record

of the case, I am not in agreement with the submissions made by Mr. Killedar.

12. The submissions on the above heads advanced by Mr. Killedar and the facts of the case which are delineated herein above would unodubtedly

require a trial. Learned Trial Court has also held that limitation being a mixed question of law and fact is best left to be decided at the time of trial. In

the facts of this case, it is a correct finding.

13. The contention of Mr. Killedar that the order dated 20.03.2023 passed in Second Appeal allowed Plaintiffs to withdraw the Second Appeal and not

the Suit or the First Appeal and that would confirm the judgment passed in the previous Suit and the First Appeal cannot be accepted. This is because

the Plaintiffs and Defendant Nos.1 to 5 are the owners of the Suit property even today. The suit property is a joint and commonly possessed property

even today. Defendant Nos.1 to 5 have sold their undivided share to Defendant Nos.6 and 7 who are third parties. Defendant Nos.6 and 7 are causing

obstruction to the holding / possession of Plaintiffs. In such facts, considering the order passed in Second Appeal dated 20.03.2023, the present Suit is

clearly maintainable for partition, separate possession and declaration as prayed. The impugned order under challenge appended at page No.163 is a

well-reasoned and cogent order rejecting the Application below Exhibit â€œ42â€ and does not call for any interference whatsoever. The said order is

upheld.

14. With the above observations and findings, Civil Revision Application No.275 of 2023 is dismissed.