

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

**FIRST APPEAL NO. 170 OF 2022
WITH
INTERIM APPLICATION NO. 1023 OF 2022
IN
FIRST APPEAL NO. 170 OF 2022**

Manu Babu Patel

.... Appellant
(Original Plaintiff No.1.)

v/s.

1. Prakash Mohanlal Desai
2. Bakul Mohanlal Desai
3. Rakeshkumar Mohanlal Desai
4. Hiteshkumar Mohanlal Desai
5. Devchand Kalyan (since deceased)
5A) Niru @ Narbada Devchand

6. Khemani Distillery Pvt. Ltd.
Kachigam, Nani Daman,
Daman.

..Org. Def. Nos.1 to 6

7. Guru Babu Patel,

..Org. Plaintiff No.2.
.... Respondents

Mr. Ram Apte, Sr. Counsel a/w. Sonali Kunekar i/b. Vikas
Mahangare for the Appellant.

Mr. Jenish Kansara i/b. Manoj S. Mhambrey for R.Nos.1 to 4.

Mr. Prathmesh Bhosale i/b. Girish S. Pikale for R.Nos.5A and 5B.

Mr. A.Y. Sakhare, Sr. Counsel i/b. Pirani and Co. for R.No.6.

CORAM: SMT. ANUJA PRABHUDESSAI, J.

DATED : 27th / 28th JULY, 2022.

P. C. :-

. The Appellant has challenged the order dated 25/08/2021 whereby the learned Civil Judge, Senior Division, Daman has allowed the Application filed by Respondent No.5 (original defendant no.5) under Order VII Rule 11(d) of the Code of Civil Procedure (for short 'CPC' and rejected the plaint.

2. The plaint can be rejected under Order VII Rule 11(d) of CPC only on the basis of the averments in the plaint. It is therefore necessary to reproduce the averments in the plaint in order to determine whether the suit is barred by any law.

3. The Appellant and Respondent No.7 were the Plaintiffs and Respondent Nos.1 to 6 were the Defendants in the suit, and shall be hereinafter referred to as the Plaintiffs and Defendants respectively. The Plaintiffs claimed that their grand parents Gopal Chagga and Kashiben Gopal were occupants of the property under Survey No.189 admeasuring 2250 sq. meters, Survey No.210/1 admeasuring 4200 sq. meters, Survey No.215 admeasuring 100 sq. meters and Survey No.216 admeasuring 31600 sq. meters. The said property shall be hereinafter referred to as 'the suit property'. The plaintiffs claim that they have their residential house in the suit property. The grand parents of the plaintiffs were in possession of the suit property as on 20.12.1961.

4. Sometime in the year 1974, Mohanbhai Desai, predecessor of Defendant Nos.1 to 4 forcibly took possession of the suit property which resulted in filing of the proceedings being DAPVR Case

No.9/1974 before the learned Mamlatdar, Daman under the Daman Abolition of Proprietorship of Villages Regulation, 1962. (hereinafter referred to as “Regulation 1962”.) The plaintiffs have averred that by order dated 05.03.1982, learned Mamlatdar declared Gopal Chaggan and Kashiben Gopal, as the occupants and restored possession of the suit land. Being aggrieved by the said order, said Mohanbhai Desai filed an Appeal before the Collector. The Collector by order dated 19.02.1985 dismissed the Appeal and confirmed the order of the Mamlatdar. The plaintiffs have averred that on the basis of the said order, the name of Kashiben Gopal was entered and recorded in the survey records and in the record of rights vide mutation entry no.29 dated 09.03.1985.

5. The order of the Collector was challenged before the Administrative Tribunal at Panaji, Goa being Revision No.1/APV/Daman/85. The said Revision Application was partly allowed and the matter was remanded to the Collector, Daman and renumbered as Appeal No.5/1992. It is stated that Gopal Chaggan had expired on 01.10.1976 during the pendency of the proceedings before the learned Mamlatdar, whereas Kashiben Gopal expired on 18.12.1996 during the pendency of the Appeal No.5/1992. The

averments in the plaint indicate that the legal representatives of Kashiben Gopal were not brought on record. By order dated 30.03.1999, the Collector held that the legal representatives of the deceased had failed to intimate the death of Kashiben Gopal within 90 days and as such the proceedings abated against deceased Kashiben Gopal. The Collector further observed that the claim of Mohanbhai Desai has gone unchallenged and hence, allowed the Appeal.

6. In 2003, Defendant Nos.1 to 4 applied to mutate their names in the properties of deceased Mohanlal Desai. The Mamlatdar proceeded with the said Application vide mutation entry no.840 and certified the same on 07.04.2003 whereunder the names of legal representatives of Mohanlal Desai were ordered to be mutated. One Navinchandra Desai, claiming to be one of the legal representatives of the deceased Mohanlal Desai applied for mutation on 09.03.2007 stating that the proceedings in respect of the suit property which were pending at the time of recording mutation entry no.840, were concluded and to mutate their names in respect of the suit property. It is averred that without hearing the legal representatives of Kashiben Gopal, the Mamlatdar by order dated 15.03.2007 and vide mutation entry no.1033 deleted the name of Kashiben Gopal and recorded the names

of Defendant Nos. 1 to 4, the legal representatives of Mohanlal Desai, in the Record of Rights of suit property.

7. The Plaintiffs have averred that Defendant no.5 had also initiated proceedings being DAPVR 07/2007 before learned Mamlatdar, Daman against Defendant No.1, the legal representative of Mohanlal Desai, wherein Defendant No.5 claimed that he was in possession and cultivation of the suit property as on the appointed day and sought declaration that he is an occupant of the suit property. The Defendant Nos.1 to 4 accepted the claim of Respondent No.5 and by judgment and order dated 04.04.2007 in Case No.7/2007, learned Mamlatdar declared the Defendant no.5 as the occupant of the suit property and ordered to enter his name in the survey records of the suit property.

8. By registered sale deed dated 11.06.2007, the Defendant No.5 sold the property under Survey No.210/1 admeasuring 4200 sq. meters and Survey No.216 admeasuring 13600 sq. meters to Defendant No.6 M/s. Khemani Distilleries Pvt. Ltd. Based on the said sale deed, the name of Defendant no.6 came to be recorded in the survey records in respect of the land under Survey No.210/1 and 216 vide mutation entry no.1059.

9. The Plaintiffs have averred that the Defendant No.5 was not the occupant of the suit land and that the sale deed executed by him in favour of defendant no.5 is illegal, null and void. The Plaintiffs have averred that in the month of December, 2014 they learnt that Defendant no.5 was claiming to be the owner of the suit property and was intending to sell the same. The Plaintiffs made inquiry in the office of the Mamlatdar and learnt about the change in entries in the survey records. They applied for copies of the documents and on receipt of the said copies, learnt about the illegalities committed by the Defendants. The Plaintiffs therefore filed the suit for declaration that :-

(a) they are the owners and occupants of the suit property;

(b) The order dated 30.03.1999 passed by the Collector in Appeal No.5/1992 is illegal and consequently Mutation Entry No.840 and 1033 are illegal and not binding upon the plaintiffs ;

(c) That the order dated 04.04.2007 and Mutation Entry No.1039 passed by the learned Mamlatdar in Case No.DAPVR 07/2007 is illegal and not binding upon them ;

(d) Sale deed dated 11.06.2007 between the defendant

nos.5 and 6 is null and void and not binding on the plaintiffs ;

(e) For permanent injunction seeking to restrain the defendants from alienating, transferring or disposing of the property in any manner ;

10. The Plaintiffs claimed that during the pendency of the suit, the Defendant nos.5 and 6 took forcible possession of the suit property and hence, amended the plaint and sought mandatory injunction to direct the Defendant nos.5 and 6 to handover vacant possession of the suit property.

11. The records reveal that Defendant No.6 had filed an application under Order VII Rule 11(d) of CPC for rejection of the plaint, mainly on the ground that the jurisdiction of the Civil Court was barred under Section 12F of Regulation 1962. The said application was dismissed by order dated 21.3.2016. Relying upon the decision of the Honourable Supreme Court in *Dhulabai vs. State of Madhya Pradesh AIR 1968 SC 78*, the trial court held that the averments in the plaint reveal that the Mamlatdar and the Collector had not followed the fundamental principles of judicial procedure, hence the bar under Section 12(F)(ii) was not attracted and consequently the suit is

maintainable before the Civil Court.

12. The Defendant no.6 did not challenge the said order, but his predecessor, Defendant No.5 filed a fresh application under Order VII Rule 11 of CPC, once again claiming that the jurisdiction of the Civil Court was barred under section 12(F) of the Regulation 1962, and further raised an issue of limitation. Learned Judge without referring to the previous order dated 21.03.2016, granted the Application under Order VII Rule 11 of CPC by recording contradictory findings that the jurisdiction of the Civil Court was barred under section 12(F) of the Regulation. Learned Judge observed that the Collector's order was passed on 30.03.1999 and that the suit was filed on 27.04.2015. Learned Judge held that the date of knowledge of mutation entry, and receipt of certified copy are irrelevant in considering the issue of limitation and concluded that the suit is barred by limitation. Consequently, learned Judge allowed the application and rejected the plaint under Order VII Rule 11(d) of CPC. Being aggrieved by this order, the Plaintiffs have preferred this Appeal.

13. Mr. Apte, learned Sr. Counsel for the Plaintiffs submits that the previous order dated 21.03.2016 rejecting application under Order VII

Rule 11 CPC filed by the Defendant No.6 having attained finality, the subsequent application is hit by the principles of res judicata. He submits that Kashiben Gopal, the only surviving Respondent in an appeal before the Collector, had expired during the pendency of the appeal. He submits that though the Collector has held that the appeal stands abated, strangely the Collector allowed the appeal filed by Mohanlal Desai and consequently set aside the order of the Mamlatdar. He submits that the order is patently illegal and nullity, and can be challenged before the Civil Court.

14. Learned Sr. Counsel for the Plaintiffs submits that the grand parents of the Plaintiffs were already declared to be the occupants of the suit property, they were put in possession and the name of Kashiben was recorded in Record of Rights under mutation entry no.29 dated 9.3.1985. He further submits that the Plaintiffs had approached the Civil Court on the ground that they were in actual possession and that the mutation entries 840 and 1033 as well as order dated 04.04.2007 declaring Defendant No.5 to be the occupant of the suit property are illegal, null and void. Relying on the decision in Dhulabai (supra) he submits that the jurisdiction of the Civil Court would not be barred when the fundamental principles of judicial procedure are not

followed. He submits that the order of the Collector is not in conformity with the provisions of the Regulation 1962, and is nullity, and hence the Civil Court has jurisdiction to try the suit.

15. Mr. Apte, learned Sr. Counsel submits that the Plaintiffs were not aware of the mutation entry as well as execution of the sale deed in favour of defendant no.6. He submits that the averments in the plaint clearly indicate that the cause of action first arose in 2014 when Defendant no.5 claimed to be the owner of the suit property and tried to sell the suit property to a third person. Cause of action also arose in the year 2015 when the Plaintiffs received certified copies of the documents from the concerned authorities. He submits that the averments in the plaint indicate that the plaint was within the period of limitation.

16. Per contra, Mr. Bhosale, learned Counsel for Defendant no.5 submits that though the Plaintiffs had averred that the certified copies were obtained in the year 2015, certified copies produced before the Court reveal that the same were obtained in the year 2011 – 2013. He has relied upon the decision of the Apex Court in *Dahiben v/s. Arvinbhai Kalyanji Bhanusali (Gajra) dead through legal*

representatives and ors. (2020) 7 SCC 366 to contend that while exercising powers under Order VII Rule 11, Court has to read averments in conjunction with documents relied upon in plaint as a whole, without addition or subtraction of any words. He submits that the Plaintiffs has challenged the orders passed by the Collector after a period of over 13 years, order of the Mamlatdar after 5 years and has sought cancellation of the sale deed after a period of 4 years. He submits that there is gross delay on the part of the plaintiff in instituting the suit. The suit is barred by the law of limitation and is liable to be rejected under Order VII Rule 11 of CPC.

17. Learned Counsel for the Defendant No.5 further submits that the Plaintiffs have challenged the orders passed by the concerned authorities under Section 12A of the Regulation 1962. He submits that the jurisdiction of the Civil Court to entertain such challenge is expressly barred under Section 12F of the Regulation, 1962.

18. Mr. Sakhare, learned Senior Counsel for the Defendant No.6 has also tried to support the order on the ground that the Plaintiffs had appropriate remedies under the Regulation 1962 and having failed to avail the said remedy, they could not have challenged the said order

before the Civil Court, jurisdiction of which is expressly barred under Section 12(F) of the Regulation 1962.

19. I have perused the records and considered the submissions advanced by the learned counsel for the respective parties.

20. Before dealing with the contentions raised by the learned Counsel for the respective parties, it would be advantageous to refer to Order VII Rule 11 CPC which deals with rejection of the plaint. Order VII Rule 11 reads thus:

“The plaint shall be rejected in the following cases:-

- (a) where it does not disclose a cause of action;
- (b) where the relief claimed is under-valued, and the plaintiff, on being required by the Court to so correct the valuation within a time to be fixed by the Court, fails to do so;
- (c) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;
- (d) where the suit appears from the statement in the plaint to be barred by any law;
- (e) Where it is not filed in duplicate;
- (f) where the plaintiff fails to comply with the provisions of rule 9;

[Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-papers shall not be extended unless the Court, for reasons to be recorded is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp-papers, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff.]”

21. From the plain language of Section 11(d) it is clear that the court can reject the plaint only where from statement in plaint, the suit appears to be barred by any law. It is well settled that Order VII Rule 11 leads to termination of the proceeding before trial and has serious consequence affecting the rights of the parties. Hence the drastic powers conferred on the court to terminate a civil action at threshold are required to be exercised carefully.

22. In ***Dhulabhai*** (supra) the Honourable Supreme Court has held that the bar of jurisdiction should not be easily inferred

(1) Where the statute gives a finality to the orders if the special tribunal the Civil Courts, jurisdiction must be held to be excluded if there is adequate remedy to do what the Civil Court would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the

fundamental principles of judicial procedure.

(2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the Civil Court. Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provide for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in Civil Courts are prescribed by the said statute or not.

(3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the tribunals.

(4) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ or certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but is not a compulsory remedy to replace a suit.

(5) *Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected, a suit lies.*

(6) *Questions of the correctness of the assessment apart from its constitutionality as for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant enquiry.*

(7) *An exclusion of jurisdiction of the civil Court is not readily to be inferred unless the conditions above set down apply Case Law discussed.”*

23. In the instant case rejection of the plaint was sought primarily on two grounds (a) that the suit is barred under 12 (F) of the regulation and (b) that the suit is barred by limitation. It is pertinent to note that in the previous application the Defendant No.6 had also sought rejection of the plaint on the ground that the jurisdiction of the Civil Court is expressly barred under 12(F) of the regulation. The trial Court observed that the grand father of the Plaintiffs was already held to be the occupant of the suit property and the possession of the land was restored to him. After the order of the Mamlatdar the name of the grandmother of the Plaintiffs was recorded as the occupant. The

learned Judge observed that in the appeal pending before the Collector the legal representatives of sole respondent Kashiben were not brought on record, resulting in abatement of the appeal. Despite the abatement, the appeal was allowed. Subsequently, based on the said order, the Mamlatdar mutated the names of the Defendant Nos.1 to 4 in the survey records without issuing any notice to the Plaintiffs. Learned Judge held that the averments in the plaint indicate that the Mamlatdar and the Collector did not follow the fundamental principles of judicial procedure and relying upon the judgment of the Apex Court in Dhulabhai, the learned Judge held that the jurisdiction of the civil court is not barred and accordingly dismissed the appeal.

24. It is not in dispute that the previous Application under Order VII Rule 11(d) filed by Defendant No.5 was rejected on merits . The said order was not challenged and has attained finality. In ***Y.B.Patil vs. Y.L.Patil, AIR 1977 SCC 392*** the Hon'ble Supreme Court has held that principles of resjudicata can be invoked not only in separate and subsequent proceeding, they also get attracted in subsequent stage of the same proceeding. Once an order made in the course of the proceeding becomes final, it would be binding at the subsequent stage of that proceeding.

25. In *U.P State Road Transport Corporation vs State of UP (2205) 1 SCC 444* has held that the principle of res judicata is based on the need of giving a finality to judicial decisions. The principle which prevents the same case being twice litigated is of general application and is not limited by the specific words of Section 11 of Code of CPC in this respect. Res judicata applies also as between two stages in the same litigation to this extent that a court, whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to reargue the matter again at the subsequent stage of the said proceedings.

26. The records reveal that despite rejection of the previous application under Order VII Rule 11 CPC filed on the same ground, the learned Judge has allowed the subsequent application filed by Defendant No5 on the same ground. Learned Judge has held that the Plaintiffs have averred that their grand parents were occupants of the suit property vide Section 8 (i) of the Regulation, 1986. The Plaintiffs are claiming to be the owners and occupants of the suit property through their grand parents. As per Section 12(F)(i) of the Regulation 1962, it is within the jurisdiction of Mamlatdar to decide the question

occupancy rights under the Regulations 1962 and further that there is express bar under Section 12(F)(ii) to adjudicate upon the orders passed by the Mamlatdar. Hence, the jurisdiction of the Civil Court is expressly barred by Section 12 (F)(1) and (2) of the Regulation 1962.

27. As noted above, the application filed by Defendant No.6 for rejection of the plaint in view of express bar under Section 12 F of the Regulation 1962 was rejected on merits. While rejecting the said application, the learned Judge has recorded a specific finding that the Mamlatdar and Collector had not followed the fundamental principles of judicial procedure. Therefore in view of the principles laid down by the Hon'ble Supreme Court in Dhulabi (supra) the suit is not barred by Section 12F of Regulation 1962. These findings operate as res judicata in subsequent application, filed on the same ground. Despite which the learned Judge entertained the subsequent application and passed a contradictory order without referring to the previous order and considering the elaborate reasons recorded therein. This in my view is nothing but sheer abuse of process of law.

28. Be that as it may, the averments in the plaint reveal that by order dated 5.3.1985 in DAPVR Case No.9 of 1974 learned Mamlatdar had

declared Gopalbhai Chaganbhai and Kashiben Gopal, grand parents of the Plaintiffs as the occupants and restored their possession in respect of the suit property. The appeal filed by Mohanlal Lalbhai Desai, predecessor of the Defendant Nos.1 to 4 was rejected and in the revision, the Administrative Tribunal had remanded the matter to the Collector. The averments in the plaint reveal that during the pendency of the appeal, the sole respondent Kashiben Gopal had expired and her legal representatives were not brought on record. Though the Collector had observed that the appeal stands abated, surprisingly the Collector allowed the appeal.

29. Undisputedly, the order passed by the Collector was against a dead person. An order against a dead person is nullity and cannot be allowed to operate against his legal representatives who were never brought on record to defend their case. It was on the basis of such order that the Defendants Nos.1 to 4 got their names mutated in the survey records, without giving notice to the Plaintiffs.

30. The abatement of the appeal filed by the predecessor of Defendant Nos.1 to 4 resulted in confirmation of order of the Competent Authority under the Regulation 1962 declaring the grand

parents of the Plaintiffs as the occupants and restoring their possession in respect of the suit property. During subsistence of this order, Defendant No.5 filed proceedings before the Mamlatdar claiming to be the occupant of the suit property. The Plaintiffs were not parties to these proceedings. The Defendant Nos.1 to 4 admitted the claim of the Defendant No.5 even though the grand parents of the Plaintiffs were already declared to be occupants by the Competent Authority. On the basis of such admission that the Defendant No.5 came to be declared as an occupant of the suit property. On this factual matrix the Plaintiffs have challenged the subsequent orders passed by the Mamlatdar and the Collector. The averments in the plaint indicate that the Collector as well as the Mamlatdar did not comply with the statutory provisions and did not act in conformity with the fundamental principles of judicial procedure. Hence, as per the law laid down by the Apex Court in Dhulabhai, provision under Section 12F would not bar the jurisdiction of the Civil Court.

31. As regards the issue of limitation, the Plaintiffs have averred that cause of action for filing the suit first arose in the month of December, 2014 when they learnt that the Defendant No.5 had claimed to be the owner of the suit property and proposed to sell the suit property. It is

stated that thereafter they applied for certified copies of the relevant documents which were received on 27.1.2015 and 9.2.2015, whereas the suit was filed on 03.06.2019, which was within the period of three years from the date of knowledge.

32. Learned Counsel for the Defendant No.5 submits that the certified copy of the documents relied upon by the plaintiff clearly indicate that the documents were obtained in the year 2013. Even if the date mentioned in the said document is considered to be the date of knowledge, the suit would still be within the period of limitation. It is to be noted that in *Salim Agbotwala vs. Shamalji Oddhavji Thakkar (2021) 6 SC 502*, the Honourable Supreme Court referred to the judgment in *P.V.Guru Raj Reddy vs. P Neeradha Reddy & Ors. (2015) 8 SCC 31* and reiterated that the rejection of the plaint under Order VII Rule 11 is a drastic power conferred on the court to terminate the civil action at the threshold. Therefore, the conditions precedent to the exercise of power are stringent and it is especially so when rejection of the plaint is sought on the ground of limitation. When the Plaintiffs claim that they gained knowledge of the essential facts giving rise to the cause of action only at a particular point of time, the same has to be accepted at the stage of considering the application

under Order VII Rule 11. Considering the above principles, I am unable to accept the plea that the Plaintiffs had constructive notice of mutation entries proceeding initiated by the Defendant No.5 before the Mamlatdar and/or sale in favour of the Defendant No.6. The learned Judge was not justified in rejecting the plaint on the ground of limitation which is otherwise to be adjudicated on merits of the matter.

33. Under the circumstances and in view of discussion supra, the impugned order cannot be sustained. Hence the appeal is allowed.

- . The impugned order dated 25.08.2021 is quashed and set aside.
- . The suit is restored to file.
- . The trial Court shall decide the suit on its own merits without being influenced by the observations made hereinabove.
- . Pending applications stand disposed of.

(SMT. ANUJA PRABHUDESSAI, J.)