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**(2023) 01 BOM CK 0085**

**In the Bombay High Court**

**Case No :** Civil Revision Application No.10 Of 2018

Pascoal Jose Vaz And Others

APPELLANT

Vs

Arnaldo David Vaz e Sousa And Others

RESPONDENT

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**Date of Decision :** 19-01-2023

**Acts Referred:**

Code Of Civil Procedure, 1908 — Section 47, 47(1), Order 7 Rule 11, Order 7 Rule 11(d), Order 21 Rule 35, Order 21 Rule 36  
Goa, Daman And Diu Mundkars (Protection From Eviction) Act, 1975 — Section 8A  
Limitation Act, 1963 — Section 27

**Citation :** (2023) 01 BOM CK 0085

**Hon'ble Judges :** Bharat P. Deshpande, J

**Bench :** Single Bench

**Advocate :** Sudesh Usgaonkar, Rui Gomes Pereira, Rohit Bras De Sa, Pushkar Navti, Prataprao Naik

**Final Decision :** Allowed

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## **Judgement**

Bharat P. Deshpande, J

1. By way of present revision application, the original defendants are challenging the impugned order dated 18.11.2017 in Regular Civil Suit No.46/2016 by which an application at Exhibit 9 filed by the defendants for rejection of plaint under Order 7 Rule 11 CPC was dismissed.

2. Heard Shri Sudesh Usgaonkar, learned counsel who appears along with Mr Rui Gomes Pereira, learned counsel for the applicants and Mr Rohit Bras De Sa who appears along with Mr. Pushkar Navti and Mr Prataprao Naik, learned counsel for respondent No.1(b).

3. With the assistance of the learned counsel, I have perused the entire paper-book and more specifically, the pleadings in the plaint.

4. In a nutshell, respondents/plaintiffs filed a suit for eviction and recovery of possession of the suit property from the defendants. It is their contention that

there is a property in Village Chorao bearing Survey No.4/24 admeasuring 725sq.mts and known as SAUD, which comprises of a residential house bearing No.491 and a well. The property is hereinafter called as 'suit property'.

5. The suit property was originally owned by late Maria Vaz e Sousa, mother of late Arnaldo David Vaz e Sousa, mother-in-law of plaintiff no.1(a) and grandmother of plaintiff no.1(b). Said Maria Vaz e Sousa was residing in the suit house alongwith her sister Esilda Vaz. The mother of defendant no.1 Pascoal Vaz was engaged as a servant by said Maria Vaz e Sousa basically to look after cleanliness/sweeping of the suit house, to cook food for them, etc. The said mother of defendant no,1 was being paid for her services. Apart from this, the mother of defendant no.1 was allowed to occupy a single room at the rear side of the house wherein she was residing alongwith her husband and defendant no.1. The said Maria Vaz expired in the year 1954 and then her sister Esilda continued to reside in the house till her death. She expired in the year 1966. Thereafter, no family member stayed in the suit house. The plaintiff no.1 Arnaldo locked all the rooms of the suit house except the rear room wherein the mother of defendant no.1 used to sleep and defendant no.1 Pascoal Vaz was appointed as caretaker to take care of the suit house and allowed him to occupy the said room. Plaintiff then claimed that the suit house along with the suit property is always in exclusive possession and enjoyment of the plaintiffs. However, conflict arose between plaintiff no.1 Arnaldo and defendant no.1 as defendant no.1 Pascoal started claiming occupancy in the suit house. Accordingly, Arnaldo David Vaz/ plaintiff no.1 filed a suit against Pascoal Vaz and others in the Court of the Tribunal Judicial Da Comarca Das Ilhas which was registered as suit no.4/1966. This suit was disposed of by passing consent decree on 16.12.1966. In terms of such decree defendant no.1 Pascoal and his wife Maria Piedade Vaz were allowed to occupy only one compartment in the suit house at the rear side for a period of 2 years from the date of which the Compromise Terms were filed and accepted by the Court. Beyond such period of 2 years, said Pascoal and his wife were required to obtain fresh permission/authorisation from plaintiff no.1 to continue to reside in the said compartment.

6. Plaint further disclosed that Pascoal Vaz and his wife Maria Piedade Vaz, i.e. defendants filed application under Section 8A of the Mundkars Act, seeking a declaration as Mundkars in respect of the suit house, in the year 1998. The Joint Mamlatdar vide order dated 27.11.2006 dismissed the claim of Mundkarship filed by the defendants. Appeal was filed before the Deputy Collector/SDO in the year 2007. Vide judgment and order dated 26.09.2007, such appeal was dismissed thereby confirming the order of Mamlatdar. Defendants then preferred a revision before the Administrative Tribunal at Panaji Goa bearing Mundkar Revision Application No.35/2007. Vide judgment and order dated 29.06.2012 said revision was dismissed.

Said order became final as no challenge was raised by the defendants against it.

7. The plaint further discloses that since the matter was subjudice before the

concerned authorities, the plaintiffs did not evict the defendants from the suit house and the property and only after dismissal of the revision in the year 2012, the plaintiffs, somewhere in the month of October 2012 requested the defendants to quit and deliver vacant possession of the suit property including the suit house. The defendants requested 6 months' time to vacate the suit property and the house so as to make alternate arrangements for accommodation, which the plaintiffs accepted considering services rendered by the mother of defendants. However, even after the lapse of 6 months, defendants failed to vacate the suit house and the property and therefore vide letter dated 16.08.2013, the plaintiffs called upon the defendants to vacate the suit house and the suit property and to deliver vacant possession to the plaintiffs. Again, the defendants through one Lawrence Augustine D'Costa approached the plaintiffs for further time to vacate the suit property and the house and on humanitarian grounds the plaintiffs granted further time till February 2014. However, the defendants failed to obey such promise even till June 2015 and then obstructed the plaintiffs from entering into the suit house and refused to vacate the suit house and the suit property which prompted the plaintiffs to file the suit with the following two prayers:

(A) For a Judgment, Order and Decree for possession of the suit House and the property after eviction of the Defendants from the suit House and the property;

(B) For such other and/or further relief and/or orders as this Hon'ble Court deems fit and proper in the nature and circumstances of this case.'

8. Cause of action for filing of the suit is stated in paragraph 16 which reads thus:-

'16. The Plaintiffs submit that the cause of action to bring the present Suit arose for the first time when the Plaintiff, Mr. Antonio David Sousa vide his letter dated 16/08/2013 called upon the Defendants to vacate the suit House and property within a period of two weeks from the date of receipt of the said letter and further cause of action arose in February 2014, when the time granted to the Defendants to deliver the vacant possession of the suit House and ` property to the Plaintiffs expired in January, 2014.'

9. The defendants, after putting their appearance before the Civil Court, filed application under Order 7 Rule 11(d) of CPC on 06.10.2016. The main objection raised in the said application that the suit as disclosed in the plaint is barred by law as there exist earlier suit which was decreed by filing consent terms on 16.12.1966 wherein same reliefs were prayed. The only remedy available to the plaintiffs is to file an execution of the earlier decree and fresh suit is clearly barred by law. The learned trial Court after hearing both the parties rejected such application on the ground that the question whether the suit is barred by Section 47 of CPC, is a mixed question of fact and law and can only be decided by leading evidence.

10. Mr Sudesh Usgaonkar, learned counsel, first of all contended that the plaint

as filed, is clearly barred under Section 47 of CPC as the relief which has been claimed in the present suit were already granted to the plaintiffs in the earlier suit in the year 1966 itself. Therefore, separate suit for claiming possession of the suit property along with the house is clearly barred by law. The only remedy with the plaintiffs was to file execution proceedings, to execute the decree filed with consent of the parties. He would submit that plaint along with the documents relied upon by the plaintiffs, if read meaningfully, would clearly go to show that the suit is barred by law, under Section 47 of CPC. He would submit that the learned trial Court has completely misread the pleadings and the law and, therefore, arrived at a wrong finding. He relied upon Section 27 of the Limitation Act thereby claiming that at the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished. According to him, even execution proceedings under Order 21 of CPC to execute the consent decree passed in the year 1966 is time barred and, therefore, subsequent suit claiming same relief is clearly barred. He would submit that pendency of the proceedings in the Court of Mamlatdar till the disposal of revision by the Administrative Tribunal would no way extend the period of limitation for the plaintiffs for filing any execution proceedings and certainly for filing of the suit.

11. Per contra, learned counsel Shri De Sa would submit that the status of the defendants is that of a caretaker. They denied the title of the plaintiffs by filing mundkarial proceedings. Plaintiffs got fresh cause of action for filing suit for possession. He tried to submit that the decree passed in the year 1966 was only in respect of one room, and that such occupancy was allowed for a period of two years. He would submit that the defendant was only permitted to take care of the house and therefore the defendant is having no right over the suit property and the suit house. He then submitted that present suit is not the same one as earlier filed but it is for the entire property as subsequently defendants started claiming right over the said property and the house. Once the mundkarial claim is rejected finally by the Administrative Tribunal and no further proceedings were filed by the defendants to challenge it, defendant is having no right to occupy such premises or to take care of such suit house and the suit property. Such false claim raised by the defendants gives fresh cause of action and therefore, observations of the trial Court needs no interference.

12. Mr Usgaonkar placed reliance on the following decisions:-

- a) Mal Singh Bika Singh and others v/s. Mohinder Singh Mehar Singh AIR 1970 Punjab & Haryana 509
- b) Chhagan Lal v/s. The Indian Iron and Steel Co. Ltd. and others AIR 1979 Calcutta 160.
- c) Ramanand and others v/s. Jai Ram and others AIR 1921 Allahabad 369.
- d) Ramesh B. Desai And Others v/s. Bipin Vadilal Mehta And Others (2006) 5 SCC 638.

13. Mr De Sa, learned counsel placed reliance on the following decisions:-

a) Maria Margarida Sequeira Fernandes and Others v/s. Erasmo Jack De Sequeira(dead) through LRs (2012) 5 SCC 370.

b) Srihari Hanumandas Totala v/s. Hemant Vithal Kamat And Others (2021) 9 SCC 99.

14. Rival contentions fall for the consideration of this Court.

15. The pleadings in the plaint are already discussed at length which clearly go to show that the mother of defendant No.1 alongwith defendant no.1 were residing in one portion of the suit house and they were allowed to take care of the suit house and the suit property as caretakers. It is also clear that after the death of both the sisters, Maria Vaz and Esilda Vas, no other family member of the plaintiffs resided in the said house. Paragraph 4 of the plain clearly goes to show that plaintiff no.1 allowed defendant no.1 and his mother to take care of the suit house and to occupy rear side room. It is also clear from the paragraph 6 of the plaint that plaintiff no.1 Arnaldo Vaz and defendant no.1 Pascoal Vaz had a conflict wherein defendant no.1 Pascoal Vaz started claiming occupancy in the suit house. This resulted in filing a civil suit against Pascoal Vaz and Maria Vaz bearing Civil Suit No.4/1966. Consent decree was drawn in the said suit of 16.12.1966.

16. The plaintiff specifically relied upon such consent decree alongwith the plaint which is clear from the list of documents annexed to the plaint. Perusal of this decree in suit no.4/1966, clearly show that the said suit was compromised on certain terms and conditions arrived at between the plaintiffs and defendants. It is necessary to quote the conditions of such decree in order to properly understand the pleadings in the present suit.

'This suit coming on this day for final disposal before Shri. V.G. Koty, B.A.L.L.B., additional Civil Judge, Senior Division, in the presence of Shri. Fernando Gorge Colaco and Vasco da Silva Ferreira lawyers of plaintiffs and defendants no. 2 and 3 respectively and the plaintiff no.1 and defendant in person it is ordered and decreed in terms of compromise arrived at between the parties the terms of which are mentioned below. -----

1- The defendants admit the facts alleged in the plaint namely acknowledging that the defendants are in detention of the house of the plaintiffs by mere tolerance and without any rights and the plaintiffs are the lawful owners and possessors of the said property.-----

2- The plaintiffs agree to allow the defendants to reside in the property in question, only in the part shown in the annexed croquis as Exhibit A under Nos.1 to 7 (seven divisions), that is in the compartments lying on the rear part of the house, it being understood that the plaintiffs shall have the rights to utilize and use that part wherever they go to chorao.-----

3- The defendants bind themselves to ventilate and take care of the house which

is handed over to them and to look after for the plantations and the whole house and to give immediate intimation to the plaintiffs or any occurrence and relevant information about the property and to deliver to the plaintiffs the fruits produced in the Court yard.-----

4- The occupation hereby allowed to the defendants is for the period of two years only from the date of this joint application and the said defendants shall have to obtain with due antecedent a fresh authorization from the plaintiffs if they desire to stay more time in the property after the expiring of two years.-----

5- The defendants are bound also to keep conveniently and look after for the moveables which exist in the house as well as the kitchen utensils.

6- If the defendants do not execute this settlement to the satisfaction of the plaintiffs, the plaintiffs shall have the right to order the defendants to vacate the house without the intervention of the Court, at any time which they think fit.-----

Given under my hand the seal of the Court, this 16th day of December 1966.

Seal

Civil Judge Senior Division

Panaji

Judge

Sd/-

(V.G. Koty)'

17. Careful perusal of the above consent decree would clearly go to show that it was a suit for eviction from the suit house as well as from the suit property. It was admitted by the defendants that they are in occupation of the suit house by mere tolerance and without any right and the plaintiffs are the lawful owners and possessors of the suit house. Further, the plaintiffs agreed to allow the defendants to reside in the property only in part shown in the annexure at Exhibit 'A' under Nos. 1 to 7, i.e. in the compartment lying on the rear part of the house with the understanding that the plaintiffs shall have a right to utilise and use that part whenever they go to Chorao. The defendants bound themselves to ventilate and take care of the house which is handed over to them and to look after the plantation and the whole house. Such occupation of the defendants was only for a period of two years from the date of consent terms and defendants would obtain fresh authorisation from the plaintiffs if they desire to stay for more time in the property beyond the period of two years. It further shows that if the defendants failed to satisfy the contents in the consent terms, the plaintiffs shall have a right to order the defendants to vacate the suit house and without intervention of the Court.

18. Comparing such relief granted to the plaintiffs in the year 1966 itself though

on the basis of consent decree, with the present prayers, quoted earlier, would clearly go to show that the plaintiffs now are praying for order and decree for possession of the suit house and the suit property thereby evicting defendants from it. Thus, practically, same relief was granted to the plaintiffs in the year 1966. Consent terms clearly go to show that in case defendants fail to obey or comply with such conditions, the plaintiffs would have a right to evict the defendants without intervention of the Court.

19. The pleadings in the plaint would clearly go to show that after expiry of period of two years from the consent decree, there was no fresh authorisation allowing defendants to occupy part of the suit house, to take care of the entire suit house and the property itself. The pleadings however show that from the year of 1966 till the year 1998 when the defendants filed an application for seeking declaration as Mundkars of the suit house, the plaintiffs did not try to execute the decree either with the intervention of Court or otherwise. The present suit clearly go to show that possession of the suit house and the suit property is with the defendants. Defendants in the year 1998 filed a claim of mundkarship against plaintiffs. No doubt claiming such relief is admitting the ownership and title of the plaintiffs. However, the question is of possession.

20. When the consent decree was passed in the year 1966 granting the relief to the plaintiffs to evict the defendants from the suit house and also from the suit property after a period of two years, i.e. in the year 1968, no steps were taken till filing of the present suit.

21. Section 47 of CPC reads thus:-

'Section 47- (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

22. Section 47 postulates the question to be determined by the Court executing decree and specifically provide that all questions arising between the parties to the suit in which a decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree shall be determined by the Court executing the decree and not by a separate suit.

23. Thus, Section 47 of CPC specifically bar a separate suit to decide any question between the same parties to the suit in which the decree is passed. However, the party is not remedy-less as the Section specifically provide that all such questions between such parties shall be determined by the executing court while executing the decree and not by a separate suit.

24. In other words, there is a specific bar to file a separate suit to decide the questions between some parties which are already involved and decided by the Court and which could arise while executing the decree.

25. The consent terms quoted earlier clearly show that defendants were allowed

to reside in part of the suit property and to look after the entire property along with the house. Therefore, it is clear that defendants were allowed to reside and to look after the property for a period of only two years. The decree passed in 1966 specifically provide that in case defendants fails to satisfy the contents of the consent terms, plaintiff shall have right to order the defendants to vacate the suit house without intervention.

26. Mr De Sa placed reliance in the case of Maria Margarida Sequeira Fernandes (supra), to claim that permissive possession would not give any right to the concerned party to dispute the title. The Supreme Court observed that suit filed by the respondents thereinfor injunction against the true owner was not maintainable particularly when it was established beyond doubt that the respondent was only a caretaker and he ought to have given possession of the premises to the true owner on demand.

27. There is no dispute at all with regard to such proposition of law as far as right of caretaker qua the property in question. In that matter a suit for injunction was filed by the caretaker against the true owner and in that context the above observations were passed by the Supreme Court. The matter in hand is clearly distinguishable as there is no suit filed by the caretaker against the true owner. In fact, the owner has filed suit for possession, that too, after his first suit was decreed by way of consent terms. Therefore, the ratio laid down in the case of Maria Margarida (supra) will not help the plaintiffs with regard to the present plaint is concerned.

28. In the case of Srihari Hanumandas Totala (supra), the Apex Court was specifically dealing with the aspect of res judicata qua the application under Order 7 Rule 11(d) of CPC. In that context, it was observed that the question of res judicata cannot be decided only based on the pleadings in the plaint. Defendant has to raise such pleadings in written statements, issue needs to be framed and then the parties are required to lead evidence to prove that the subsequent suit is barred. Provisions of res judicata is, the issue between the parties has been finally adjudicated in the earlier proceedings. The defendant is not claiming any relief under res judicata but their specific contention is bar of the present suit under Section 47 of CPC. Thus, such decision is not at all applicable.

29. Mr Usgaonkar placed reliance in the case of Mal Singh Bika Singh (supra) wherein the Punjab & Haryana High Court while dealing with Section 47 of CPC observed in paragraph 5 as under:-

'5. Under sub-section (1) of Section 47 of the Code of Civil Procedure.--

"All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit."

In a Bench decision of the Allahabad High Court of Sulaiman, J., (later Chief Justice Sulaiman) and Gokul Prasad, J., in *Ramanand and others v. Jai Ram and others*

(1), the plaintiffs had obtained a decree in a suit for pre-emption conditional on their paying Rs. 1,000 within three months from the date of the decree. The money was paid, but for one reason or another, the plaintiffs did not get possession of the property either by process in execution, or by private arrangement. Eventually, a suit was brought by the plaintiffs on 25th April, 1917, for possession of the property awarded to them by the decree of 1905. The Bench found that the suit was barred by time under the principle of section 47 of the Code of Civil Procedure. It was argued before the Allahabad Bench, on basis of an earlier decision of that Court, that it was always open to a decree-holder to bring a suit on the decree at any time within twelve years, notwithstanding that the decree had become incapable of execution by lapse of time. This dictum, in the view of that Bench deciding the case in *Ramanand* (AIR 1921 All 369), "would mean that suit aftersuit could be brought upon barred decrees. If this is correct law, it is a very alarming situation". If the nature of the decree requires that it should be executed, a decree-holder cannot, after allowing the limitation period to lapse without issuing process of execution, seek by a fresh suit on the decree to obtain that which he should have sought for by execution. Towards the end, the Bench in the Allahabad case observed thus :—

"We have given our best consideration to the question before us and we are of opinion that, both on authority and on a correct interpretation of section 47 of the Code of Civil Procedure, the present suit was not maintainable. Stripped of all unnecessary details, the relief claimed by the plaintiffs, in substance, amounts to asking for the fruits of a decree which they are unable to execute owing to lapse of time. The suit, in effect, does raise a question 'relating to the execution, discharge or satisfaction' of the former decree and cannot be determined by a separate suit."

30. It was further observed that a long period of inactivity on the part of plaintiff showed his ready acquaintance of the *fait accompli* in the shape of possession having been retained by the other side. These observations are squarely applicable to the fact and circumstances of the matter in hand for the simple reason that if a separate suit is allowed to maintain, it would mean that suit after suit could be brought upon barred decrees.

31. In the case of *Chhagan Lal* (*supra*), the Calcutta High Court again while dealing with the provisions of Section 47 along with Order

21 Rule 35 and 36 of CPC observed in paragraph 10 as under:-

10. If every decree-holder could proceed by regular suit to enforce his decree, all the provisions in the Code of Civil Procedure in regard to executions of the decree would be of no avail. But it is evident to the Court that where the Legislature has prescribed a particular mode of enforcing a right created by a

decree, the possessor of that right is bound to follow the procedure prescribed, and no other. The Judicial Committee of the Privy Council agreed with that principle and approved of it. When in the Code of Civil Procedure there is the mandatory provision for execution of the decree as prescribed for getting the reliefs under the decree, no separate suit shall lie for getting the reliefs under the decree by a separate suit. Clearly, therefore, when a decree is executable under the law and when the decree-holder allows such decree to become barred by law, he cannot be allowed to get the fruits of the decree by a separate action.

32. The above observations are again applicable to the matter in hand for the simple reason that the consent decree obtained by the plaintiffs in the year 1966 itself was allowed to be time barred without filing execution therein and now, is filing the present suit practically to execute the earlier decree which cannot be allowed by a separate suit.

33. In the case of Ramanand and others (supra), the Allahabad High Court observed that correct interpretation of Section 47 of the Code of Civil Procedure show that separate suit for enforcement of the same right decided earlier between the parties is not maintainable as it would amount to asking for the fruits of a decree which they are unable to execute owing to lapse of time. Subsequent suit in fact does raise a question relating to the execution, discharge or satisfaction of the former decree which cannot be determined by a separate suit. The above observations are applicable to the matter in hand. The prayers in the earlier suit and the one prayed in the present suit are identical. Decree passed in the year 1966 was purely for possession of the suit house. Such decree was passed on the basis of consent terms. The defendants clearly admitted the fact that the plaintiffs are owners and possessors of the suit property and that defendants are residing therein by mere tolerance. Similarly, it was further agreed that defendants will be allowed to reside in the rear portion of the suit house for a period of two years. The defendants were further allowed to take care of the entire suit house and the suit property for a period of two years and any further period with authorisation from the plaintiffs. Finally, in clause 6 as quoted earlier, defendants agreed that the plaintiffs shall have right to order the defendants to vacate the suit house without intervention of the Court. Now, in the present suit, the plaintiffs are praying the same relief, i.e. to direct the defendants to hand over vacant possession of the suit house and the property, which was granted in favour of the plaintiffs in the year 1966 itself. The plaintiffs allowed the defendants to occupy the rear portion of the suit house, to take care of the suit house and the suit property even after a period of two years from the date of decree and further period of two years, thereby allowing such decree as un-executable. Thus, by a separate suit filed in the year 2016 for the same relief, the provisions of Section 47 of CPC clearly stand attracted and thereby, such suit is considered to be barred under the law.

34. Learned trial Court failed to consider the above aspects and thereby arrived at incorrect conclusion. Thus, when there is a specific bar to launch separate

proceedings, the plaint is required to be rejected under Order 7 Rule 11(d) of CPC.

35. The revision succeeds.

ORDER

i) The revision stands allowed.

ii) The impugned order dated 18.11.2017 in Regular Civil Suit No.46/2016 passed by the learned Civil Judge Senior Division Panaji is hereby quashed and set aside. Application filed at Exhibit 9 by the defendants under Order 7 Rule 11 CPC stands allowed and, accordingly, plaint in Regular Civil Suit No.46/2016 stands rejected.

36. Parties shall bear their own costs.