

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.11359 OF 2014

Mannabee Aslam Bagwan

Petitioner

Versus

Bashir Ahmmed Kondaji Bagwan & others

Respondents

Mr.P.G.Godhamgaonkar advocate for the petitioners

CORAM : RAVINDRA V. GHUGE, J.
Dated : 24th December , 2014

PER COURT :-

1 The petitioner is aggrieved by the order dated 4.10.2014 passed by the Trial Court below Exh.135 in RCS No.359/2002.

2 It is, by application Exh.135 that the petitioner plaintiff No.2, has prayed that an additional issue be framed and the petitioner be permitted to cross-examination plaintiff No.1 and defendant No. 3 on account of subsequent events that have occurred pursuant to the institution of the suit.

3 So far as the date on which the issues have been cast by the Trial Court, learned Advocate for the petitioner is not in a position to state the date. On 9.7.2004, the plaint has been amended. Recording of evidence has been concluded long ago and the

matter is at the stage of advancing oral submissions so as to enable the Court to proceed to deliver its Judgment.

4 The contention of the petitioner is that the contents of a compromise between plaintiff No.1 and defendant No.3 are prejudicial to the interest of the petitioner. The said compromise has been arrived at contrary to the pleading. The said compromise is likely to affect the prayers made by the plaintiff No.2 in the said suit. Adverse interest has been shown by the plaintiff no.1 against plaintiff No.2

5 The petitioner had earlier, moved an application Exh.127, seeking liberty to transpose plaintiff No.1 as defendant No.4 and by seeking deletion of the name of plaintiff No.1 from the proceedings. The Trial Court rejected the same. The order of the Trial Court was called in question before this Court by preferring Writ Petition No.1444/2014.

6 By judgment dated 18.2.2014, this Court had noted that the Trial Court had recorded that the matter would be decided on its merits and that would be on the basis of the material before it. The Trial Court had not passed any order on the compromise below Exh.1 and no such order has been passed even there after. The Trial Court had also observed that the plaintiff No.2 has not

signed the compromise and therefore, would not be bound by the same.

7 For the sake of clarity, the contentions of the petitioner and the conclusions of this Court from paragraph No.1 to 4 in its order dated 18.2.2014 in Writ Petition No.1444/2014 are reproduced herein below:-

"The application filed by the petitioner/plaintiff No. 2 for transposing the plaintiff No. 1 as the defendant No. 4 by deleting his name as plaintiff is rejected. Mr. Godhamgaonkar, the learned counsel for the petitioner contends that the plaintiff No. 1 has presented terms of compromise with the defendant No. 3. The said compromise entered into by the plaintiff No. 1 is contrary to the pleadings. The contents of the compromise are prejudicial to the interest of the plaintiff No. 2 as well as the prayers and reliefs claimed. Adverse interest has been shown by the plaintiff No. 1 against the plaintiff No. 2, as such it would not be proper to allow the plaintiff No. 1 to be co-plaintiff with the plaintiff No. 2.

2. *According to the learned counsel, even at the said stage the party can be called for cross examination. The learned counsel relies on the judgment of the Apex Court in a case of **K. K. Velusamy Vs. N. Palanisamy** reported in **2011 SC (Civil) 1000**.*

3. *The Court while passing the order has observed as under :*

"6. *In such situation it is to consider whether application filed by plaintiff is entitled to be allowed. In my candid view the plaintiff No. 2 has noted before this court that,*

compromise is adverse to her interest and as already evidence of both the sides is led and the case is pending for final arguments, in my view, the case should be dealt with on merits and on the basis of material before it. No order is passed as to compromise below Exh. 1. Hence, order."

4. *The matter is for final arguments. The petitioner has not prayed for cross examination of any party in the application Exhibit 127. The Court has specifically recorded that the matter would be decided on merits and the same is pending for final argument on the basis of material before it. No order is passed as to the compromise below Exhibit 01. The Court has also observed that the plaintiff No. 2 has not signed the said compromise. In the order impugned the Court has explicitly made it clear that the Court is deciding the suit on merits."*

8 It is with respect to the same compromise that application Exh.135 has been moved by the petitioner on the ground that two issues need to be cast viz. whether the compromise entered into by the plaintiff No.1 with defendant No.3 is sham and bogus and what is the effect of the said compromise on the rights and prayers made by the plaintiff No.2.

9 The said application, having been rejected by the Trial Court aggrieves the petitioner for the reason that unless a proper issue is framed on the basis of the pleading of the parties, the whole purpose of proceeding with the adjudication of the suit would be fruitless. It is therefore, canvassed that the said issue would

enable the trial Court to decide the actual controversy in the suit.

10 The petitioner has placed reliance upon the Judgment of the Apex Court in the case of *K.K. Velusamy V/s N. Palanisamy reported at 2011 AIR SC (Civil) 1000*. The petitioner has specifically placed reliance upon paragraph No.13 of the said Judgment. The contention therefore, is that order 18 rule 17 read with section 151 CPC empowers the Trial Court to consider application Exh.135 and to ensure that justice is done to one and all. It is, therefore, prayed that the impugned order, being unsustainable, be quashed.

11 I have considered the submissions of the learned Advocate for the petitioner at length and I have gone through the petition paper book with his assistance.

12 Issue is of due diligence. The moment the compromise was entered into, the petitioner could have made an application requesting the Court to frame an issue. Nevertheless, when in the submission of the petitioner, the compromise is an event subsequent to the institution of the suit, an application for amendment should have been made under order 6 rule 17 keeping in view the proviso below Rule 17, which has been introduced by

an amendment in 2002.

13 The specific contention of the petitioner is that there is no requirement of an amendment. In that view of the matter, I have to proceed on the premises that the petitioner has given up the option of amending the plaint in order to incorporate the subsequent events.

14 In so far as the compromise between plaintiff No.1 and defendant No.3 is concerned, the observations of this Court in paragraph No.4 of the order dated 18.2.2014 reproduced above sufficiently protects the interest of the petitioner. This Court has noted the observations of the Trial Court, while dealing with application Exh.127 that the suit would be decided on its own merits and no order has been passed by the Trial Court on the compromise below Exh.1. This, therefore, settles the issue that the suit would be decided on its own merit.

15 Notwithstanding the above, the issue of due diligence naturally arises in this petition. Application Exh.135 does not in any manner whisper as regards efforts taken by the petitioner to request for framing of an additional issue at the earliest. Similarly, there is no whisper in the application as to what were the circumstances that prevented the petitioner from moving the Trial

Court for framing of an issue and that despite due diligence, it could not have moved the application before 19.4.2014 the date on which it was filed.

16 Needless to state, the proceedings before the Trial Court instituted in 2002 are at the stage of advancing oral submissions for quite some time. Recording of evidence in the suit has already been concluded.

17 The ratio laid down by the Apex Court in K.K. Velusamy's case (supra) in paragraph No.13, in my view would not assist the petitioner. The said paragraph is reproduced hereunder:-

"13 The learned counsel for respondent contended that once arguments are commenced, there could be no re-opening of evidence or recalling of any witness. This contention is raised by extending the convention that once arguments are concluded and the case is reserved for judgment, the court will not entertain any interlocutory application for any kind of relief. The need for the court to act in a manner to achieve the ends of justice (subject to the need to comply with the law) does not end when arguments are heard and judgment is reserved. If there is abuse of the process of the court, or if interests of justice require the court to do something or take note of something, the discretion to do those things does not disappear merely because the arguments are heard, either fully or partly. The convention that no application should be entertained once the trial or hearing is concluded and the case is reserved for judgment is a sound rule, but not a straitjacket formula. There can always be exceptions in exceptional or extra-ordinary circumstances, to meet the ends of justice and to prevent abuse

of process of court, subject to the limitation recognized with reference to exercise of power under section 151 of the Code. Be that as it may. In this case, the applications were made before the conclusion of the arguments.”

18 I do not find any such exceptional circumstances made out by the petitioner, so as to attract Sec.151 of the C.P.C.. The petitioner has failed to make out such extraordinary circumstances, so as to be covered by the ratio laid down in paragraph No.13 of the K.K. Velusamy judgment (supra).

19 In the light of the above and in view of the fact that the petitioner has not been diligent in making a request for framing of additional issues and more so, when the compromise at issue, has also been put to rest, by the observations of this Court in paragraph No.4 of the order dated 18.2.2014, this petition is devoid of merit and is therefore, dismissed.

(RAVINDRA V. GHUGE, J.)