

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD

CIVIL REVISION APPLICATION NO.150 OF 2014

Sayyed Noor s/o Sayyed Burhan,
Age 70 years, Occu. Agril.,
R/o Jogeshwari, ZDP Gate,
Kamlapur Road, Tq. Gangapur,
District Aurangabad

... APPLICANT
(Orig. Defendant No.1)

VERSUS

1. Sayyed Minya s/o Sayyed Burhan,
Age 73 years, Occu. Agril.,
R/o Jogeshwari, Tq. Gangapur,
District Aurangabad. ... Respondent No.1
(Original Plaintiff)
2. Sayyed Ayyub Sayyed Noor,
age 46 years, Occu. Agril.,
R/o Jogeshwari, Opp. to Z.D.P. Gate,
Kamlapur Road, Tq. Gangapur,
District Aurangabad. ... Respondents No.2 to 5
(Original Defts.No.2 to 5)
3. Sayyed Sarwar Sayyed Noor,
Age 43 years, Occu. Agril.,
R/o Jogeshwari, Opp. to Z.D.P. Gate,
Kamlapur Road, Tq. Gangapur,
District Aurangabad.
4. Sayyed Afsar Sayyed Noor,
Age 41 years, Occu. Agril.,
R/o Jogeshwari, Opp. to Z.D.P. Gate,
Kamlapur Road, Tq. Gangapur,
District Aurangabad.
5. Sayyed Akhtar Sayyed Noor,
Age 39 years, Occu. Agril,

R/o Jogeshwari, Opp. to Z.D.P. Gate,
Kamlapur Road, Tq. Gangapur,
District Aurangabad.

... RESPONDENTS
(No.1 Orig. Plaintiff,
No.2 to 5 Orig. Defendants)

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Shri A.M. Nagarkar, Advocate for applicant
Ms. Swati Nakhate, Advocate holding for
Ms. Mansi P. Joshi, Advocate for respondent No.1
None present for respondents No.2 to 5

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CORAM: A.I.S. CHEEMA, J.

DATED: 10th March, 2015.

Date of reserving judgment : 3/3/2015

Date of pronouncing judgment : 10/3/2015

JUDGMENT :

1. This revision has been filed by Sayyed Noor – original defendant No.1 (hereinafter referred to as 'defendant' of Regular Civil Suit No.404/2013, filed by respondent No.1 – original plaintiff (hereinafter referred to as plaintiff). The plaint filed as R.C.S. No.404/2013 before the Civil Judge, Junior Division, Gangapur is for possession of 40 R land from Gat No.97, situated at Jogeshwari, Taluka Gangapur and for removing the obstruction to way of 20 ft. x 600 ft. The suit has been brought against applicant – defendant No.1 as well as his children – respondents No.2 to 5 - original defendant

No.2 to 5.

2. The defendant filed application Exhibit 16 in the suit, claiming that in view of provisions of Order II Rule 2 and Order VII Rule 11 of the Code of Civil Procedure (C.P.C. for short), the suit deserved to be dismissed as there was earlier R.C.S. No.30/2011 filed by plaintiff for the same cause of action and which suit had been withdrawn unconditionally and so the suit was barred. The application of the defendant came to be dismissed by Jt. Civil Judge, Junior Division, Gangapur and hence, the present revision application.

3. I have heard learned counsel for the applicant – defendant No.1 and learned counsel for respondent No.1 – original plaintiff. Respondents Nos.2 to 5 are stated to be formal respondents in the revision filed by the defendant No.1. It has been argued by learned counsel for the defendant that for the same property in dispute, earlier plaintiff had filed R.C.S. No.54/2009 simplicitor claiming injunction against the defendant on the plea that defendant No.1 was encroaching land, with help of defendants Nos.2 to 4 arrayed therein. That suit came to be dismissed on

30.11.2010 after the suit was contested. Then the plaintiff filed R.C.S. No.30/2011 claiming possession of the same 40 R of land from the defendant. In the said suit, the present defendant had rather filed application against the plaintiff and injunction was granted in favour of the defendant. Subsequently, however, the plaintiff withdrew that suit unconditionally. Later on, the present suit R.C.S. No.404/2013 has been filed claiming possession of the same 40 R land and further claiming removal of obstruction to the alleged way. The learned counsel submitted that, as per Order II Rule 2 of C.P.C., it was necessary for the plaintiff to include the whole claim in the earlier suit R.C.S. No.30/2011 and could not split claim and having not done so, and having withdrawn the suit unconditionally, the subsequent suit could not be instituted for the same matter. The learned counsel relied on the case of **"State Bank of India Vs. Gracure Pharmaceuticals Ltd."**, reported in **AIR 2014 SC 731** to claim that the defendant cannot be vexed twice for the same cause of action by filing separate suits. According to the learned counsel, the trial Court, by the impugned order, rejected the application by referring to untenable reasoning that earlier suit R.C.S. No.30/2011 was only against Sayyed

Noor (defendant No.1) and now his children have been added.

4. The learned counsel for the respondent No.1 submitted that, as claimed by the respondent No.1 in affidavit-in-reply in para 15 shows, the nature of suit of R.C.S. No.30/2011 and the nature of suit R.C.S. No.404/2013 were totally different. It has been argued by the learned counsel that the cause of action for both the suits are different and that the impugned order passed by the trial Court below Exhibit 16 was correct, legal and proper. According to the counsel, earlier suit R.C.S. No.54/2009 was not in respect of recovery of possession and it was simplicitor suit for injunction while R.C.S. No.404/2013 is on different cause of action and for different relief.

5. The questions before me are :-

- (1) Whether the impugned order is illegal or is suffering from material irregularity ?
- (2) Is the R.C.S. No.404/2013 filed by plaintiff barred in view of the unconditional withdrawal of R.C.S. No.30/2011 ?

6. The counsel for defendant has relied on the case of

“State Bank of India” (supra), in which, while dealing with Order II Rule 2 of C.P.C., the Hon'ble Supreme Court, discussing facts of that matter, observed as under :

“15. When we go through the above quoted paragraph it is clear that the facts on the basis of which subsequent suit was filed, existed on the date on which the earlier suit was filed. The earlier suit was filed on 15.3.2003 and subsequent suit was filed on 21.5.2003. No fresh cause of action arose in between the first suit and the second suit. The closure of account, as already indicated, was intimated on 20.3.2002 due to the alleged fault of the respondent in not regularizing their accounts i.e. after non-receipt of payment of LC, the account became irregular. When the first suit for recovery of dues was filed i.e. on 15.3.2001 for alleged relief, damages sought for in the subsequent suit could have also been sought for. Order 2 Rule 2 provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the same cause of action. Respondent is not entitled to split the cause of action into parts by filing separate suits. We find, as such, that respondent has omitted certain reliefs which were available to it at the time of filing of the first suit and after having relinquished the same, it cannot file a separate suit in view of the provisions of sub-rule 2 of Order 2 Rule 2, CPC. The object of Order 2 Rule 2 is to avoid multiplicity of proceedings and not to vex the parties over and again in a litigative process. The object enunciated in Order 2 Rule 2, CPC is laudable and it has a larger public purpose to achieve by not burdening the court with repeated suits.”

7. Keeping the above in view, now if the present matter is appreciated, there is copy of plaint available from

R.C.S. No.30/2011, which the plaintiff had filed before Civil Judge, Junior Division, Gangapur (Exhibit E). Material contents relevant for appreciation can be reproduced as follows –

In R.C.S. No.30/2011, the plaintiff claimed that the suit related to 40 R land from Gat No.97 of Jogeshwari, Taluka Gangapur. The title shows that it is suit for possession of the said 40 R land. Plaintiff claimed that he and defendant Sayyed Noor were brothers and at Jogeshwari they had ancestral property of 22 acres and 8 gunthas and many years back the same was partitioned between both the brothers. In Gat No.97, defendant was given eastern part in his possession and he claimed that, he himself had part on the South(?). He claimed that, plaintiff got 11 acres 4 gunthas and defendant also got similar portion. The suit claimed that, between the lands there was north-south bandh dividing the field and 4-5 years back the defendant Sayyed Noor broke the bandh and started encroaching. The suit claimed that defendant is trying to grab 1 acre land. The suit claimed that, the defendant Sayyed Noor had encroached upon 40 R land from his west encroaching into the land of plaintiff from east. Thus, the plaintiff claimed 40 R land from the western portion of the field of defendant which was in possession of the defendant. The suit claimed that, such encroachment by defendant on the western side of his field was found in the measurement dated 8.12.2010.

8. Now if the present suit R.C.S. No.404/2013 is perused, it shows that the plaintiff, apart from defendant, Sayyed Noor added his children as defendants. In this suit

also, the title says that the suit is for recovery of 40 R land as shown in the suit map. Additionally, it claims removal of obstruction of way of 20 ft. x 600 ft. In this present suit also the plaintiff claims that, field Gat No.97 of Jogeshwari is ancestral property which was 22 acres 8 gunthas and there was long standing partition between plaintiff and defendant No.1. Here also plaintiff claimed that, his share was 11 acres 4 gunthas in the western half and the defendant No.1 had 11 acres 4 gunthas of the eastern half. The suit claimed that in "recent times" defendant No.1, with the help of other defendants, encroached on 40 R land of the plaintiff from the eastern part of the land of plaintiff and is trying to create right in the 1 acre land and the way of 20 ft. x 600 ft. and to sell the same. In para 2 of the plaint, it is claimed that the encroachment took place about three years back. Para 4 of the plaint claimed that, at the time of partition, in the northern part of the land of defendant, 20 ft. broad way was given from the west. Because of the encroachment in the 1 acre land of plaintiff, defendants are not letting plaintiff use that way and the said way has also been encroached.

9. From the comparison of both the plaints, it is quite

clear that, the plaintiff had in the earlier suit R.C.S. No.30/2011 also claimed possession of 40 R land from the western side of the field of defendant claiming that it was his land which had been encroached. In that earlier suit, he referred to the measurement dated 8.12.2010. Thus, at least from 8.12.2010 plaintiff claimed he knew of the encroachment. Looking to the map filed by the plaintiff, with his plaint R.C.S. No.404/2013, if the said encroachment was there even when the earlier suit was filed, the plaintiff did not claim in that suit that the encroachment has obstructed his right of way of 20 ft. x 600 ft. from the northern part of field of defendant. Order II Rule 2 of C.P.C. requires that, suit should include the whole claim which the plaintiff is entitled to make. Plaintiff cannot first bring suit only to remove encroachment and later another suit to remove some encroachment and consequential obstruction to alleged way. If right of way was there, it was obstructed even at the time of earlier suit due to alleged encroachment. Plaintiff should have in earlier suit itself claimed that the encroachment has further obstructed his right of way. Plaintiff does not appear to have done this when earlier R.C.S. No.30/2011 was filed. Under Order II Rule 2 of C.P.C., such claim must be deemed

to have been relinquished and so barred. As regards the claim of possession of 1 acre land from the western side of the land of defendant, which according to plaintiff had been encroached, both the suits are clearly based on same cause of action. In R.C.S. No.404/2013, merely by saying that plaintiff went to the defendant No.1 on 14.11.2013 requesting to give back the possession of encroached land does not make out fresh cause of action.

10. In earlier R.C.S. No.30/2011, plaintiff filed pursis Exhibit 35 (Page 66 of present revision), requesting for withdrawal of the suit. The Judge endorsed on the pursis that, "Plaintiff wants to withdraw this suit. Hence, permission granted unconditionally."

11. There is then endorsement of the same Judge on the plaint Exhibit E that, the suit is disposed of as withdrawn. Thus, it is clear that the earlier suit field was withdrawn unconditionally. Now it would be appropriate to refer to Rule 1 of Order XXIII which deals with withdrawal of suit or abandonment of part of claim. Sub-rules (3) and (4) of the said provision read as under :

“(3) Where the Court is satisfied, ---

(a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim,

it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of the claim.

(4) Where the plaintiff ---

(a) abandons any suit or part of claim under sub-rule (1) or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3),

he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim.”

12. If the above provision is kept in view, it is apparent that the plaintiff withdrew R.C.S. No.30/2011 unconditionally and without taking permission of the Court under above sub-rule (3). This being so, the plaintiff would be precluded from instituting fresh suit in respect of the same “subject matter”, The subject matter of both the suits is same that, the plaintiff is claiming that his land to the extent of 40 R has been

encroached by the defendant from the west of field of defendant and he wants encroachment removed. In view of Order XXIII Rule 4 of C.P.C., the subsequent suit R.C.S. No.404/2013 would not be maintainable for above reasons.

13. It appears that, between the parties there have been various other litigations also to which I need not make reference for decision of the present matter.

14. The trial Court, without going into any details to compare R.C.S. No.30/2011 with present R.C.S. No.404/2013, in a vague manner, observed that, R.C.S. No.30/2011 was for recovery of possession, but admittedly the said suit came to be withdrawn on 16.9.2008 and moreover that, that suit was filed only against Sayyed Noor. The impugned order of the trial Court does not show that the trial Court has considered the relevant provisions to see if the present suit R.C.S. No.404/2013 was maintainable. Merely by adding sons of defendant the bar of Order XXIII Rule 1(4) cannot be avoided looking to the facts. For reasons recorded earlier, the second suit is not maintainable.

I pass the following order :-

The revision application is allowed with costs.
The R.C.S. No.404/2013 filed by respondent No.1
- plaintiff Sayyed Minya Sayyed Burhan before
Civil Judge, Junior Division, Gangapur is dismissed
as barred under Order XXIII Rule 4 of the Code of
Civil Procedure, 1908.

(A.I.S. CHEEMA, J.)