

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION (ST.) NO.32655 OF 2014

Anwar Sharfuddin Jable	...	Petitioner
Vs.		
Amina Daud Jable and others	...	Respondents

Mr. Sanjeev M. Gorwadkar for Petitioner.
Mr. Saurabh M. Railkar for Respondents.

CORAM : R. G. KETKAR, J.
DATE : 24TH JUNE, 2015

ORDER :

Heard Mr. Gorwadkar, learned Senior Counsel for petitioner and Mr. Railkar, learned Counsel for respondent No.1 at length.

2. By this Petition under Article 227 of the Constitution of India, original defendant No.3 has challenged the judgment and order dated 16.10.2014 passed by the learned Civil Judge, Junior Division, Chiplun below exhibit-87 in R.C.S. No.83 of 2009. By that order, the learned trial Judge allowed the application filed by the respondent No.1, hereinafter be referred to as plaintiff, under Order VI, Rule 17 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') for amending the plaint.

3. In support of this Petition, Mr. Gorwadkar submitted that initially, plaintiff instituted Suit being R.C.S.No.83 of 2009 for partition and separate possession of her share in respect of as many as 10 properties, more particularly described in paragraph 1 of the plaint. During the pendency of that Suit, plaintiff instituted R.C.S. No.25 of 2010 again for partition and separate possession of as many as 6 properties, more particularly described in paragraphs 1A and 1B of the plaint. He

submitted that both the Suits were clubbed together. On 11.02.2013 and 12.04.2013, parties filed Purshis at exhibits-76 and 80 expressing their intention not to lead oral evidence in the Suit. He submitted that on 02.08.2013, plaintiff filed application at exhibit-85 in R.C.S. No.25 of 2010 seeking permission for unconditional withdrawal of that Suit. On the same date, plaintiff filed application at exhibit-87 in R.C.S. No.83 of 2009 for including 3 properties namely properties at serial No.1, 3 and 5 of paragraph 1A of R.C.S. No.25 of 2010 and for amending the plaint. By order dated 28.07.2014, plaintiff was permitted to withdraw R.C.S. No.25 of 2010 unconditionally. By the impugned order, the learned trial Judge has allowed the application and permitted the plaintiff to include properties 1, 3 and 5 of paragraph 1A of plaint in R.C.S.No.25 of 2010 and permitted him to amend plaint in R.C.S.No.83 of 2009. He submitted that the impugned order is wholly unsustainable and is liable to be set aside. In support of this submission, he relied upon Order II, Rule 2, Sub-Rule (2) and (3), Order VI, Rule 17, and in particular proviso thereof and Order XXIII, Rule 1(4) C.P.C.

4. Mr. Gorwadkar submitted that Order II, Rule 2 (2) provides that where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, **he shall not afterwards sue in respect of the portion so omitted or relinquished.** Sub-rule (3) of Rule 2 of Order II lays down that the person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs, but if he omits, except with the leave of the Court, to sue for all such reliefs, **he shall not afterwards sue for any relief so omitted.** He submitted that there is distinction between sub-rule (2) and sub-rule (3) of Order II, Rule 2. Whereas sub-rule (2) talks about relinquishment of part of claim, sub-rule (3) deals with omission to sue for one of several reliefs. He submitted that in the earlier Suit, plaintiff had relinquished her claim

of partition qua certain properties. Plaintiff, therefore, instituted subsequent Suit and included those properties. Plaintiff has thereafter unconditionally withdrawn the subsequent Suit. He, therefore, submitted that in view of Order II, Rule 2 (2), plaintiff has relinquished her claim in respect of properties, which are covered by subsequent Suit. He further submitted that in view of Order II, Rule 2 (3), plaintiff having omitted to sue for relief of partition in respect of the properties, which were not included in the first Suits, she cannot seek relief of partition qua those properties except with the leave of the Court. He further submitted that whereas under sub-rule (3) of Rule 2 of Order II, with the leave of the Court, plaintiff can sue for relief which he had omitted, however, such provision is not made in sub-rule (2) of Rule 2 of Order II. In short, there is no provision enabling the Court to grant leave under sub-rule (2) of Rule 2 of Order II as it is in sub-rule (3) of Rule 2 of Order II C.P.C. In any case, he submitted that in view of proviso to Order VI, Rule 17 C.P.C., since the trial has commenced, the learned trial Judge was not justified in allowing the amendment application. He relied upon the decision of the Apex Court in the case of *Van Vibhag Karamchari Griha Nirman Sahkari Sanstha Maryadit Vs. Ramesh Chander*, (2010) 14 SCC 596. He submitted that the Suit instituted by the plaintiff is hit by Order II, Rule 2 C.P.C. and the learned trial Judge was not justified in allowing the application under Order VI, Rule 17 C.P.C. for amendment.

5. Lastly, he submitted that in view of Order XXIII, Rule 1(4) C.P.C., plaintiff having withdrawn the subsequent suit without seeking liberty to institute a fresh Suit, he is precluded from instituting fresh Suit in respect of such subject matter or such part of the claim.

6. On the other hand, Mr. Railkar supported the impugned order. He

submitted that admittedly, plaintiff had instituted R.C.S.No.83 of 2009 for partition and separate possession in respect of 10 properties. Defendants No.1, 3 and 4 filed written statement on or about 26.03.2010 resisting the Suit and inter alia contending that plaintiff is not entitled to partition and separate possession of the properties. He submitted that plaintiff instituted R.C.S.No.25 of 2010 as some of the properties, which were liable for partition were not included. He submitted that on 02.08.2013, plaintiff filed application in R.C.S.No.25 of 2010 for withdrawal of the Suit unconditionally and on the same day, he filed application at exhibit-87 in R.C.S.No.85 of 2010 for amending the plaint and including the properties at serial No.1, 3 and 5 of paragraph 1A of R.C.S. No.25 of 2010. He, therefore, submitted that the contentions raised on the basis of Order II, Rule 2, sub-rules (2) and (3) as also Order 23, Rule 1(4) C.P.C. are wholly misconceived as plaintiff has not instituted fresh Suit and both the suits were pending on the day when he applied for withdrawal of the subsequent Suit. He further submitted that the proposed amendment is absolutely necessary for deciding the real controversy between the parties, and therefore, the learned trial Judge was fully justified in allowing the amendment.

7. I have considered the rival submissions made by the learned Counsel appearing for the parties. I have also perused the material on record. Order II, Rule 2 C.P.C. reads as under:

“2. Suit to include the whole claim.- (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim - Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs - A person entitled to

more than one relief in respect of the same cause of action may sue for all or any of such reliefs, but if he omits except with the leave of the court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.”

8. Perusal of Order II, Rule 2, sub-rule (2) shows that where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, **he shall not afterwards sue in respect of the portion so omitted or relinquished.** Perusal of sub-rule (3) shows that if a person is entitled to more than one relief in respect of the same cause of action, he may sue for all such reliefs, but if he omits, except with the leave of the Court, to sue for all such reliefs, **he shall not afterwards sue for any relief so omitted.** In the present case, as noted earlier, first Suit is instituted in the year 2009. During the pendency of that Suit, plaintiff instituted subsequent Suit in 2010. It is not disputed that both the Suits were clubbed together. In fact on 11.02.2013 and 12.04.2013, parties filed Purshis at exhibits 76 and 80 placing on record that they do not wish to lead oral evidence. As both the Suits were pending, in my opinion, provisions of Order II, Rule 2, sub-rule (2) and sub-rule (3) will not be applicable. It is nobody's case that after withdrawing R.C.S.No.25 of 2010, plaintiff has instituted Suit either afterwards or has instituted a fresh Suit. As far as the contention based on Order XXIII, Rule 1(4) is concerned, the said provision reads as under:

“1. Withdrawal of suit or abandonment of part of claim - (1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim:

Provided that where the plaintiff is a minor or other person to whom the provisions contained in rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.

(2) ...

(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,
- (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.
- (5) ...”

9. Perusal of sub-rule (4) clearly shows that where the plaintiff abandons any suit or part of claim under sub-rule (1) or withdraws from the Suit or part of a claim without the permission referred to in sub-rule (3), he shall be **precluded from instituting any fresh Suit in respect of such subject matter or such part of the claim**. It is nobody's case that after withdrawing the second Suit namely R.C.S.No.25 of 2010, plaintiff has instituted fresh Suit in respect of the subject matter of R.C.S.No.25 of 2010. In other words, the bar under Order II, Rule 2 sub-rule (2) and (3) as also Order XXIII, Rule 1 (4) C.P.C. will be attracted if any only if the plaintiff, after withdrawing the Suit or part of the claim, has instituted a fresh Suit subsequently. I, therefore, do not find any merit in the submissions of Mr. Gorwadkar based upon Order II, Rule 2 (2) and (3) as also Order XXIII, Rule 1 (4).

10. Mr. Gorwadkar relied upon the decision of **Van Vibhag Karamchari Griha Nirman Sahkari Sanstha Maryadit** (*supra*). In that case, on 11.02.1991, appellant had instituted Suit for declaration of ownership and for permanent injunction. On 16.12.2002, the appellant moved application for amendment for inclusion of the relief of specific performance of contract dated 31.03.1976. That was allowed by order dated 10.03.2003 and accordingly, amendment was incorporated on 17.03.2003. Respondent No.1 filed application for review of order

dated 10.03.2003. The same was dismissed on 23.06.2003. The plaint was returned to the appellant for filing the same in the Court of a competent jurisdiction as the Suit exceeded the pecuniary jurisdiction of the civil court (Category II). Immediately on 25.06.2003, the appellant presented the plaint in the Court of the Sixth Additional District Judge, Indore along with application under Section 14 of the Limitation Act praying for exclusion of time spent in prosecuting the Suit in the Court of the Seventh Civil Judge, Class II, Indore (i.e. from 11.02.1991 to 23.06.2003).

11. In paragraph 26, it was observed that though the appellant had instituted Suit on 11.02.1991, he did not include the plea of specific performance. The Apex Court held that the appellants did not file Suit for specific performance against the first respondent within the period of limitation as by public notice dated 03.02.1991 issued by the first respondent to the effect that he is the owner and in possession of the disputed land, and any question taken by the appellant over such land would not affect the rights of ownership and possession. It was further stated that the agreement to sell and power of attorney in favour of the appellant stood canceled. The Apex Court, therefore, held that appellant ought to have instituted Suit within 3 years from cancellation of the agreement of sale. In my opinion, the said decision does not advance the case of the defendant No.3 and the bar of Order II, Rule 2 C.P.C. is not applicable for the reasons already indicated hereinabove.

12. As far as the contention based on Order VI, Rule 17 C.P.C. is concerned, in the case of *Abdul Rehman Vs. Mohd. Ruldu*, (2012) 11 SCC 341, the Apex Court has observed that the Court should allow all amendments that will be necessary for determining real question in controversy between the parties, provided it does not cause injustice or

prejudice to the other side. The main purpose of allowing amendment is to minimise litigation. It was further observed that making clear and explicit what was already implicit in the plaint does not change the nature of the Suit. As noted earlier, in the present case, plaintiff had instituted 2 Suit covering different properties. Subsequently, plaintiff withdrew R.C.S. No.25 of 2010 and made application for amendment for including properties covered by R.C.S.No.25 of 2010. Thus, by amendment, the nature of the Suit did not change as also it did not cause prejudice to the other side.

13. In view of the aforesaid decision of the Apex Court as also having regard to the fact that the plaintiff had instituted Suit for partition, I do not find that the learned trial Judge has committed any error in passing the impugned order. The proposed amendment is absolutely necessary for deciding the real controversy between the parties namely, partition of property between the plaintiff and defendant. Impugned order passed by the trial Court is purely discretionary. In view thereof, no case is made out for invocation of powers under Article 227 of the Constitution of India. Hence, the Petition fails and the same is dismissed. It is, however, expressly made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal as contemplated by Section 105(1) C.P.C.

(R. G. KETKAR, J.)