

Sequeira

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

***SECOND APPEAL NO. 1050 OF 2004.
Along with
CIVIL APPLICATION (St.) NO. 16196 OF 2016***

Shri Pralhad Mahadeo Arbune,
Age Adult, Occ.: Business,
R/at. Shaniwar Peth, Final Plot No.
33/1/3, Hotel Sanman, Opp: S.T.Stand,
Karad, Dist. Satara ... Appellant / Applicant

Versus

Shri Tukaram Khashaba Borge,
Age Adult, Occupation : Business,
R/o, Bombay Through his
Power of Attorney Holder,
Maruti Khashaba Chorage,
Occupation : Agriculture and business
R/o Malkapur, Tal. Karad,
District – Satara. ... Respondent.

***Along with
CIVIL APPLICATION NO. 779 OF 2016
(For Adding Party)***

Shri Deepak Sopanrao Arbune ... Applicant
In the matter between
Shri Pralhad Mahadeo Arbune. ... Appellant / Applicant
V/s.
Shri Tukaram Khashaba Borge. ... Respondent.

Along with
CIVIL APPLICATION NO. 908 OF 2016

Shri Deepak Sopanrao Arbune	... Applicant
<i>In the matter between</i>	
Shri Pralhad Mahadeo Arbune.	... Appellant / Applicant
<i>V/s.</i>	
Shri Tukaram Khashaba Borge.	... Respondent.

Along with
SECOND APPEAL NO. 1051 OF 2004.
With
CIVIL APPLICATION (St.) NO. 16178 OF 2016

Shri Pralhad Mahadeo Arbune.	... Appellant / Applicant
<i>V/s.</i>	
Shri Tukaram Khashaba Borge & ors.	... Respondents.

Mr.S.G.Karandikar a/w Mr.S.S.Kanetkar, for Appellant in S.A No.1050 of 2004 and S.A No.1051 of 2004 and Applicant in CASst No.16196 of 2016 and CASst No.16178 of 2016.

Mr.A.A.Kumbhakoni-senior Advocate a/w Mr.A.M.Kulkarni and Mr.Sarthak Diwan, for Respondents in both Appeals and Applicant in CAS No.908 of 2016.

Mr.S.R.Morey i/b Mr.V.S.Talkute, for Applicant in CAS No.779 of 2016.

Coram : N.M. Jamdar, J.
Thursday, 14 July 2016.

Oral Judgment :-

Both these Appeals are between the same parties and they have been argued together. By consent of parties, Appeals are disposed of

by this common Judgment.

2. Second Appeal No.1050 of 2004 arise from the Judgment and Order passed by Civil Judge Junior Division, Karad in Regular Civil Suit No.368 of 1980 and Judgment and Order passed by District Judge, Satara on 8 July 2004 in Civil Appeal No.151 of 2000.

3. The Second Appeal No.1051 of 2004 arises from Judgment and Order dated 19 February 1994 passed by the Civil Judge Junior Division, Karad in Regular Civil Suit No.367 of 1980 and Judgment and Order dated 8 July 2004 passed by District Judge, Satara in Regular Civil Appeal No.150 of 2000.

4. The Appellant in both these Appeals is the original Defendant in the Suits and the Respondents are the Plaintiffs. Both the Suits pertain to Plot No.33/13 situated at Karad. Regular Civil Suit No.368 of 1980 is in respect of property demarcated as A, E, F and M wherein the Respondent-Plaintiff has sought an order of injunction and also mandatory injunction in respect of property described at C, C1, D1, D. By the Regular Civil Suit No.367 of 1980, the Respondent prayed for possession in respect of the property described to the Schedule to the plaint.

5. Heard Mr.Karandikar along with Mr.Kanetkar, for the

Appellant and Mr.Kumbhakoni learned senior Advocate along with Mr.Kulkarni, for the Respondent, in both the Appeals.

6. Mr.Kumbhakoni learned senior Advocate for the Respondent has placed on record a coloured map which depicts the properties involved in both the suits. This map, by consent of parties, is taken on record and marked 'X'. The map shall form part of the record in this Second Appeal. The map simplifies the position of the suit property to understand the controversy between the parties and the subject matter of the two different suits. The portion which is marked in red forms part of the subject matter in Regular Civil Suit No.368 of 1990 and the portion marked in blue and light blue is subject matter of Regular Civil Suit No.367 of 1990. The portion depicted in orange and numbered 2, 5 and 13 is subject matter of the proceedings under the provisions of the Bombay Rent Act which are pending against the Appellant.

7. Second Appeal No.1050 of 2014 is taken up for consideration first. This Appeal arises from Civil Suit No.368 of 1980. In this Suit the Respondent-Plaintiff sought an order of perpetual injunction and mandatory injunction. It was his case that he is the owner of the entire Final Plot No.33-1(3). The property mentioned in letter I J K L, E F G H and A B C D mentioned in the plaint and depicted in orange in the Map was given to the Appellant on rent

basis by an Agreement dated 22 July 1975 and the tenancy was terminated on 16 April 1979. The Appellant filed Regular Miscellaneous Application No.20 of 1979 for standard rent wherein he not only claimed tenancy in respect of the three rooms but in addition to one more room and an additional portion. Since the Appellant was claiming to be in possession which was never leased out to him and had encroached, the present Suit needed to be filed. Written statement was filed by the Appellant and it was contended that the Appellant was tenant in respect of four rooms and the additional room was let out to him at the rate of ₹60 per month. It was contended that this Appellant is not a trespasser and is a tenant in the premises. It was also contended that once the Appellant had filed proceedings under the provisions of Bombay Rent Act for fixation of standard rent, the Civil Court should not proceed with the suit filed by the Respondent-Plaintiff. The learned Civil Judge negated the contention based on Section 10 of the Code of Civil Procedure, 1908 and held that no evidence was produced by the Appellant to show that one more room, apart from the three rooms, was let out to him as a tenant. Accordingly by Judgment and Decree dated 21 February 1994, the learned Civil Judge decreed the Suit and directed the Appellant to hand over the possession of the properties stated in the decree. An Appeal was filed by the Appellant to the District Court, Karad. In the Appeal, the Appellant reiterated the contentions raised before the learned Civil Judge and in addition

submitted that the Suit was barred under the Order II Rule 2 of the Code of Civil Procedure. The learned District Judge also held that the Appellant failed to produce any evidence to show that he was tenant of any premises other than the three rooms. The learned District Judge held that the cause of action in the suits instituted was different and bar of Order II Rule 2 of the CPC will not apply. Accordingly the Appeal filed by the Appellant was dismissed, on 8 July 2004.

8. The Second Appeal was admitted on 8 September 2004 on the following substantial questions of law -

(i) Whether both Courts below overlooked that the respondent-plaintiff has filed two separate suits i.e. Regular Civil Suit No.367 of 1980 and Regular Civil Suit No.368 of 1980 against the Appellant and the suit was barred by the provisions of Order 2 Rule 2 of Code of Civil Procedure, 1908?

(ii) Whether both Courts below were justified in not considering both the suits filed by the respondent-plaintiff instituted on the same day and which were based on same cause of action ?

(iii) Whether the Courts below were justified in holding that the suit was maintainable inspite of the fact that the standard rent application was preferred by the appellant and the Civil Court was competent to decide whether the appellant was trespasser or not?'

9. Mr.Karandikar learned counsel for the Appellant submitted

that once the Appellant had filed an application for standard rent under the provisions of Bombay Rent Act and the Respondent-Plaintiff had contested claim of the Appellant regarding tenancy, which is subject matter of the present Suit, the Civil Court ought not to have proceeded with the present Suit. He submitted that after the standard rent application was disposed of against the Appellant, an appeal was filed by the Appellant, which was pending. This submission cannot be accepted. First the language of Section 10 of the CPC needs to be noted. The Section reads thus :

'10. Stay of suit – No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in [India] having jurisdiction to grant the relief claimed, or in any Court beyond the limits of [India] established or continued by [the Central Government] and having like jurisdiction, or before [the Supreme Court].

Plain reading of this provision shows that it states that no Court shall proceed with trial of any Suit with issues directly and substantially in issue in a previously instituted suit having jurisdiction to grant the relief claimed. Both the proceedings should be 'Suits', and the Courts should be competent to grant relief as prayed for. In the present Suit the Appellant has sought to apply Section 10 to a substantive suit filed by the Respondent-Plaintiff for

recovery of possession from the Appellant from the suit premises on the basis of an Application filed for fixation of standard rent. The Section 10 refers to suits. It does not refer to an 'application'. In cases of some applications under particular statutes, the Courts have equated them to suits. Nothing is shown by the Appellant as to why the application for standard rent should be considered within the ambit of the phrase 'suit' especially since the District Court has held that this application is not a suit. The learned District Judge therefore, was not in error in concluding that bar of Section 10 of the Code does not apply. In addition in the application filed for fixation of standard rent, the relief prayed for in the present suit cannot be granted. As rightly contended by Mr.Kumbhakoni that there is absolutely nothing on record to show that the Appellant is tenant of the additional area as claimed by him. The Appellant has failed to show any right whatsoever to the area claimed by them. As regards the three rooms tenancy is created by a written document and it is difficult to believe that for the additional area tenancy would be created orally. There is no written document neither it has been proved through any oral evidence that the Appellant has any claim towards tenancy of additional area claimed by him.

10. The second point that was urged by the learned counsel for the Appellant is based on the provisions of Order II Rule 2. The Order II Rule 2 reads thus-

'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.

Explanation. - For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.'

The Order II Rule 2(1) states that every suit shall include whole of the claim which the Plaintiff is entitled to make in respect of the cause of action. The bar in sub-rule 3 also speaks of 'same cause of action'. It is the contention of Mr.Karandikar that three suits have been filed in respect of the same premises between the same parties and that Respondent-Plaintiff ought to have filed one suit or sought leave to file the subsequent suit. Firstly, this contention was not raised by the Appellant before the trial Court and was raised for the first time in Appeal Court, still the learned District Judge considered the same. The learned District Judge held that cause of action in all

three suits was different. Though larger property in question in these suits is same, the claim made by the Appellant in respect of each identifiable area is different. So also the relationship between the parties is different for the different areas. The rooms are clearly identifiable and the Respondent-Plaintiff has filed suits praying completely different reliefs. As regards the subject matter in Regular Civil Suit No.368 of 1980, it is filed on the ground that the Appellant is falsely claiming to be a tenant in the premises and Regular Civil Suit No.367 of 1980 is filed for injunction on the ground that he has trespassed a different part of the property. The cause of action for the suits cannot therefore be considered as the same to attract the bar of Order II Rule 2. The questions of law framed in this Appeal will have to be accordingly answered against the Appellant.

11. Taking the Second Appeal No.1051 of 2004 now for consideration. In this Appeal the Respondent-Plaintiff filed the Suit seeking a decree of injunction on the ground that the Appellant has trespassed in the property. The subject matter of the Suit is the area depicted in blue in the sketch which is tendered. It is the stand taken by the Appellant that the Appellant is licensee of the Suit area. The learned Civil Judge considered the defence of the Appellant of being a licensee. The learned Civil Judge found that this defence was a complete after-thought and nothing was produced by the Appellant

to demonstrate that he was a licensee of the premises. The learned Civil Judge, accordingly directed the Appellant to hand over possession of the area which is specified in clause (a) of the decree and for the other portion, the learned Civil Judge decreed the suit and injuncted the Appellant from using the said premises. Mandatory injunction to demolish the shed was granted. It is informed that the shed is already demolished by the local Authority. In the Appeal filed by the Appellant, the learned District Judge re-assessed the evidence and confirmed the findings of the learned Civil Judge that Appellant had failed to produce any evidence to show that he was licensee of the premises. The argument based on Order II Rule 2 was also advanced in this Appeal, which was negated.

12. The Second Appeal was admitted on following questions of law-

'i) Whether both Courts below overlooked that the respondent-plaintiff has filed two separate suits i.e. Regular Civil Suit No.367 of 1980 and Regular Civil Suit No.368 of 1980 against the Appellant and the suit was barred by the provisions of Order 2 Rule 2 of Code of Civil Procedure, 1908?

(ii) Whether both Courts below were justified in not considering both the suits filed by the respondent-plaintiff instituted on the same day and which were based on same cause of action ?

(iii) Whether the Courts below were justified in holding that the appellant defendant has not proved that he was

occupying the suit property as a Licensee? Whether the Courts below were justified in overlooking that the only inference which could have been drawn from the long standing possession of appellant was that the appellant was a licensee ?'

13. In this Appeal Mr.Karandikar sought to advance the argument based on the Order II Rule 2 of the Code of Civil Procedure. This argument has already been dealt with in the above mentioned paragraph while dealing with Second Appeal No.1050 of 2004. Furthermore, this argument cannot be advanced in both the Appeals i.e. both the Suits.

14. As regards the contention of Mr.Karandikar in respect of licensee, mere longstanding possession of the Appellant, cannot fructify into a licensee. As far as the three rooms, for which a written document was executed between the parties on 22 July 1975, there is no reference at all to any premises other than the ones specified therein. Even when the Appellant moved an application for fixation of standard rent, no claim was made that the Appellant is licensee of the suit area. In the cross-examination the Appellant admitted that in his application for fixation of standard rent, no reference was made to an additional area to which the Appellant now claims as a licensee. He also claimed that he paid money for construction of the area for which he was in occupation, but admitted that it was not so stated in the Written statement. No agreement or any written

document nor any rent receipt is placed on record to substantiate the claim of being a licensee in the area claimed by the Appellant in these proceedings. Nothing is shown as to how the Appellant can claim being licensee for this area. In absence of any evidence whatsoever, the concurrent finding rendered by both the Courts that Appellant is not licensee of this suit area but a trespasser and he has encroached on some portion of the property, cannot be disturbed. Consequently, the questions of law framed in this Appeal will have to be answered against the Appellant.

15. Resultantly, both the Second Appeals are dismissed. Civil Applications pending in the Second Appeals are accordingly disposed of.

16. At this stage, Mr.Karandikar seeks continuation of the ad-interim relief for a period of twelve weeks. Mr.Kumbhakoni opposes. Considering the facts and circumstances, the interim order, operating in this Appeal will continue for a period of ten weeks, on a condition that the Appellant files an undertaking in this Court within period of four weeks from today that he will not create any third party rights and will hand over vacant and peaceful possession of the suit properties involved in both these Appeals, if no order is passed after expiry of period of ten weeks.

(N.M. Jamdar, J.)