

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 133 OF 2016**

Smt. Geeta Ravindra Naik and
Ors.

..Petitioners

Vs

Smt. Veena Shrikant Naik and
Ors.

.. Respondents

Mr.Amrut M. Vernekar, Advocate for Petitioners.

Mr. Siddharth R. Ronghe i/b S.S.Redekar, Advocate for
Respondents No.1A to 1C.

CORAM : R.G.KETKAR,J.
DATE : 15/01/2016

PC:

1. Heard Mr. Amrut Vernekar, learned counsel for the petitioners and Mr. Siddharth Ronghe, learned counsel for the respondents no.1A to 1C at length.
2. Mr. Vernekar submits that respondents no.1A to 1C are only contesting respondents, being the plaintiffs in the suit. He orally applies for leave to delete respondents no.2 to 7 in this petition. Leave as prayed for is granted. Amendment shall be carried out forthwith.
3. Rule. Mr. Ronghe waives service. At the request and by consent of the parties, Rule is made returnable forthwith and petition is taken up for final hearing.
4. By this Petition under Article 227 of the Constitution of

India, the petitioners who are legal heirs of original defendant no.1 as well as defendant no.2, have challenged the Judgment and order dated 20.11.2015 passed by the learned Adhoc Judge, Greater Mumbai below Exhibit 3 and Exhibit-3A in L.C.Suit No.8665 of 1994 (High Court Suit No.2766 of 1994). By that order, the learned trial Judge allowed the application made by the original plaintiffs seeking leave under Order II, Rule 2(3) of C.P.C. for filing a separate suit in respect of properties, bearing Gat No.18 at village Alewadi, Taluka Palghar, District-Thane and land bearing Gat No.177-A and 177-B of village Nandgaon (Tarapur), Taluka Palghar, District Thane (for short, 'suit properties).

5. In support of this petition, Mr. Vernekar submitted that the learned trial Judge while allowing the application did not record any finding as to whether cause of action pleaded in the former suit and the cause of action in the subsequent suit is same or not. The learned trial Judge has also not recorded any finding as to whether as per the case of defendants no.1A to 1C and 2, the application falls under Order II, Rule 2(2) or whether it falls under Order II, Rule 2(3) of C.P.C. The learned trial Judge has not given any finding as to whether the plaintiffs have omitted to sue in respect of any portion of his claim or whether the plaintiffs have omitted to sue for all or any of such reliefs. The learned trial Judge has not appreciated the distinction between claim as

contemplated by Order II, Rule 2(2) and the reliefs in Order II Rule 2(3). He, therefore, submitted that the impugned order deserves to be set aside.

6. On the other hand, Mr. Ronghe supported the order. After arguing for some time, he, upon taking instructions from the respondents, states that by consent, the impugned order may be set aside and the trial Court may be directed to decide the issue as to whether cause of action is same in the former suit and the later suit as also the application made by the plaintiffs falls under sub-rule (3) of Rule 2 of Order II as contended by them or under sub-rule (2) of Rule 2 of Order II.

7. In view thereof, by consent of the parties, the impugned order is set aside and Applications- Exhibit 3, and 3A are restored to the file of the trial Court.

(i) The learned trial Judge will consider:

(1) Whether the application made by the plaintiffs falls in Order II, Rule 2(2) as contended by defendants no.1A to 1C and 2 or under Order II, Rule 2(3) as contended by the plaintiffs.

(2) The learned trial Judge will also consider whether cause of action pleaded in the present suit is same as pleaded in the subsequent suit.

(ii) Learned counsel for the parties state that the next date of

hearing before the trial Court is 5.2.2016. The learned trial Judge is requested to dispose of the Applications as expeditiously as possible and in any case within two weeks from 5.2.2016.

(iii) Liberty is reserved to defendants no.1A to 1C and 2 to file reply to the injunction application filed by the plaintiffs in R.C.S. Suit No.77 of 2015 within two weeks from today.

(iv) Rule is made absolute in the aforesaid terms with no order as to costs.

(R.G.KETKAR, J.)