

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

LEAVE PETITION NO.201 OF 2015

IN

SUIT NO.762 OF 2007

Mukesh V. Panjwani

...Petitioner (Org.Plaintiff)

V/s.

Philomena Loretta D'Silva & Ors.

...Respondents
(Org.Defendants)

.....

Mr. Shailesh Shah, Senior Advocate with Bannerji i/by B.Amin & Co.,
Advocates for the Petitioner.

Mr. Kunal Dwarkadas i/by Hariani & Co., Advocate for the Respondent
Nos.14 and 15.

Mr. Shashi Pandey, Advocate for Respondent Nos.1 to 12.

Mr. Ashish Dubey i/by Manoj Mhatre, Advocates for Respondent No.13.

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CORAM : A. K. MENON, J.

DATE : 23RD FEBRUARY, 2016.

PC.:

This is an Application seeking leave under Order II Rule 2 of the Code of Civil Procedure, 1908 to omit to sue original Defendants for other reliefs as mentioned in paragraph 2 of the Petition. The Petition proceeds on the basis that the Suit as originally filed sought specific performance of two Memoranda of Understanding dated 30.6.2004 executed by the Respondents (Original Defendants) Nos.1 to 11 in respect

of certain immovable property in Mumbai with bungalow standing thereon. During the pendency of this Suit (hereinafter described as '**First Suit**'), the Plaintiff came to learn that the Suit Property had been conveyed on 21.9.2010 to the Respondent Nos.14 and 15.

2 The Petitioner (Original Plaintiff) moved an Application for amendment of the Plaint which came to be allowed on 10.3.2015. As part of the amendments, paragraph 22(G) came to be inserted. Paragraph 22 (G) is reproduced below for ease of reference:

“22G. The Plaintiffs state that leave be granted to the Plaintiff under Order II Rule 2 of the Code of Civil Procedure, 1908 to omit to sue the Defendants herein for other reliefs inter alia of challenging the purported Conveyance dated 21st September, 2010 in favour of Defendant Nos.14 and 15 and of demolition of structure in excess of 50% of construction put up by them on the suit property.”

3 Thereafter, the first Suit proceeded to trial and vide an order dated 27.1.2016, the Petitioner closed his case. The Respondents have filed respective affidavits of evidence and cross-examination of the Respondents' witness is now underway. In the meanwhile, the Petitioner has moved this Petition for leave on 28.8.2015. No reasons are

forthcoming as to why, after the amendment was allowed in March 2015, such leave was not sought in view of the pending trial. Furthermore, after 28.8.2015, this Application has been moved only on 1.2.2016. Once again, there is no explanation why this Application is suddenly felt necessary.

4 Mr. Shah the learned Senior Counsel for the Petitioner in support of his Application has submitted that an Application for leave under Order II Rule 2 of the Code of Civil Procedure, 1908 may be at any time during the pendency of the suit but prior to filing of the subsequent second Suit which will now be filed in relation to the reliefs that the Petitioner omitted to sue for in the first Suit. He relied upon Division Bench's judgment in the case of **Canning Miyra Phoenix Limited and Others v. M/s. Popular Constructions and others** ¹ and submitted that the Division Bench has taken a view that three different points of time when such leave could be sought are

- (a) Before institution of first suit,
- (b) Before institution of second suit, and
- (c) Before the date of decree in first suit.

5 According to Mr. Shah, the Petitioner's Application falls well within Clauses (b) and (c) referred above inasmuch as an application for

¹ 1994(4) Bom.C.R.414

amendment to incorporate a plea for leave has been granted. Such application for leave is being made during the pendency of the first Suit, before date of decree in the first Suit and before institution of the second Suit. He relies upon the provisions of the Order II Rule 2 Sub-clause (3) in support of his contention and submits that having omitted to sue for certain reliefs against newly added Defendant Nos.14 and 15, he is now intending to file second Suit and for that purpose leave as contemplated in Paragraph 22G has now been sought. Since it is within the scope of the Order II Rule 2 of the Code of Civil Procedure, 1908, such leave ought to be granted.

6 While there can be no quarrel with the ratio of the aforesaid decision. On the last occasion when this matter was listed, notice was directed to be issued to the Respondents since the application was made ex-parte. Mr. Dwarkadas appearing for the Defendant Nos.14 and 15 has opposed this Application and rightly so. In my view, a fair reading of Order II Rule 2(3) under which Mr. Shah seeks leave today, it is evident that if the Petitioner was entitled to more than one relief in respect of the same cause of action but if he omits, except with the leave of the Court, to sue for all such reliefs, he will thereafter not be permitted to sue for reliefs so omitted. It is common ground that the cause of action in the present case

which prompts the Petitioner to make this Application is not same as that in the first Suit.

7 In the circumstances, I do not see how Order II, Rule 2(3) of the Code of Civil Procedure, 1908 come into play at all. The application, in my view seems to be made by way of abundant caution. There is no case made out for exercise of discretion under Order II Rule 2. The judgment relied upon by Mr. Shah clearly contemplates that leave under Order II Rule 2 can be sought at any time during the pendency of the first Suit but Court will consider the grant of leave in the facts and circumstances of each case. In the facts and circumstances of the present case, I do not see as to how absence of leave under Order II Rule 2 will come in way of the Petitioner seeking reliefs in respect of a fresh cause of action caused by the conveyance executed in favour of Defendant Nos.14 and 15.

8 In the circumstances, I pass the following order:

(I) Application for leave is declined.

All contentions on merits are kept open.

(II) There will be no order as to costs.

(A. K. MENON, J.)