

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

CIVIL REVISION APPLICATION NO. 779 OF 2015

Dr. Saee Rohan Sabnis ..Vs.. Mr. Rohan Abhay Sabnis

Office Notes, Office Memorandum of appearances, Court's orders or directions & Registrar's orders.	Court's or Judge's orders
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Mr. Abhijit D. Sarwate a/w Nikhil Chavan for Applicant.

Mrs. Seema Sarnaik for Respondent.

CORAM : K. K. TATED, J.

DATE : JULY 05, 2017.

P.C. :

1. Heard learned Counsel for parties.

2. By this Revision Application Applicant is challenging the order dated 10th August, 2015 passed by the Judge, Family Court No.2, Pune below Exhibit 15 in P. D. No. 30 of 2014, by which her Application under Order 2 Rule 2 of the Code of Civil Procedure stand rejected holding that the petition filed by the Respondent -husband under Section 25 of the Guardian and Wards Act for custody of minor son is maintainable.

3. The learned Counsel Mr. Sarwate for Petitioner – wife submit that in the present

proceedings initially the Respondent – husband filed petition under Section 9 of the Hindu Marriage Act, 1955 for restitution of conjugal rights with following prayers.

“(a) The restitution petition may kindly be admitted and notice may kindly be issued to the Respondent;

(b) The Petition may kindly be allowed and the decree of restitution of conjugal rights may kindly be passed in favour of the Petitioner and the Respondent be directed to resume cohabitation with the Petitioner;

(c) The Petitioner may kindly be permitted to add, amend, alter the contents of this Petition if required;

(d) The Petitioner may kindly be permitted to make necessary interim applications;

(e) The Petitioner may kindly be permitted to adduce additional evidence if required;

(f) Any other orders in the interest of justice may kindly be passed.”

4. The learned Counsel for Petitioner submit that said Petition was withdrawn by Respondent on 9th October, 2014. At that time Family Court passed the following order.

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ORDER

Both parties present with their respective advocates. Petitioner has filed his say to Exh. 14 stating that he withdraw this petition with no liberty to file fresh petition for restitution of conjugal rights on same cause of action. Efforts were made by the Court to reconcile the parties but unfortunately

according to the petitioner the same have failed. No order as to costs.”

5. The learned Counsel for Petitioner submit that thereafter Respondent immediately filed another petition on 30th August, 2014 under section 25 of the Guardian And Wards Act for custody of minor son bearing P. D. No. 30 of 2014 on the same cause of action. In that petition Respondent made following prayers :

“(a) the custody petition may kindly be admitted and notice may kindly be issued to the Respondent;

(b) The permanent custody of minor son Arijeet @ Ishaan be granted in favour of the Petitioner; and/or in the alternative

(c) The Petitioner may kindly be granted access rights on every weekend when he is in India. As the child is only a year old the minor son may be allowed to be in the company of his father for half the week from morning 10 a.m. to 7 p.m.; or as

(d) The Respondent is working at Dinanath Mangeshkar Hospital and her work schedule is from 10 a.m. to 7 p.m. so during this period the petitioner may be allowed to be in the company of his son at the petitioner's residence. Petitioner will drop him back to the Respondent's home in the evening by 7 p.m.;

(e) Interim/ad-interim orders in terms of prayer clause (b) (c) (d) may kindly be passed;

(f) The Petitioner may kindly be permitted to make necessary interim application/s for access of minor son Arijeet @ Ishaan as and when necessary;

(g) The petitioner may kindly be permitted to add, amend, alter the contents of this Petition if required;

(h) The Petitioner may kindly be permitted to adduce additional evidence if required;

(I) Any other orders in the interest of justice may kindly be passed.”

6. The learned Counsel for Petitioner submit that Family Court erred in coming to the conclusion that second petition filed by the Respondent under Section 25 of the said Act is maintainable and same is not barred by Order 2 Rule 2 of the Code of Civil Procedure. He submit that the Family Court has erred to appreciate the law under Order 2 Rule 2 of the Code of Civil Procedure, though the Petitioner pointed out to the Family Court that both the Petitions filed by the Respondent were on same cause of action except the prayers. He submit that though the prayers are made different, the same is not maintainable in view of the Order 2 Rule 2 of the Code of Civil Procedure.

7. The learned Counsel for Petitioner submit that Family Court failed to consider the fact that in first petition filed by the Respondent under Section 9 of the Hindu Marriage Act, Respondent would have claimed the relief of custody of minor child,

but he failed to do so. He submit that as per Section 26 of the Hindu Marriage Act, 1955 Applicant can ask relief of custody of child in these proceeding under Section 9 of Hindu Marriage Act. Section 26 of the Hindu Marriage Act, 1955 read thus :

“26. Convert's descendants disqualified – Where, before or after the commencement of this Act, a Hindu has ceased or ceases to be a Hindu by conversion to another religion, children born to him or her after such conversion and their descendants shall be disqualified from inheriting the property of any of their Hindu relatives, unless such children or descendants are Hindus at the time when the succession opens.”

In support of his contention learned Counsel for Petitioner relies on the Judgment of the Apex Court in the matter of ***Coffee Board ..Vs.. M/s. Ramesh Exports Pvt. Ltd.*** Reported in ***AIR 2014 SUPREME COURT 2301***. Paragraphs 10 and 12 of the Authority read thus :

“10. The above rules are offshoots of the ancient principle that there should be an end to litigation traced in the Full Bench decision of Court in Lachmi V. Bhulli and approved by this Court in many of its decisions. The principle which emerges from the above is that no one ought to be vexed twice for the same cause. In light of the above, from a plain reading of Order 2, Rule 2, it emerges that if different relief and claims arise out of the same cause of

action then the plaintiff must place all his claims before the Court in one suit and cannot omit one of the reliefs or claims except without the leave of the Court. Order 2, Rule 2 bars a plaintiff from omitting one part of claim and raising the same in a subsequent suit. (see : *Deva Ram and Anr. V. Ishwar Chand and Anr.*). Furthermore, this Court in *Alka Gupta v. Narender Kumar Gupta* stated that : “the object of Order 2 Rule 2 of the Code is twofold. First is to ensure that no defendant is sued and vexed twice in regard to the same cause of action. Second is to prevent a plaintiff from splitting of claims and remedies based on the same cause of action. The effect of Order 2 Rule 2 of the Code is to bar a plaintiff who had earlier claimed certain remedies in regard to a cause of action, from filing a second suit in regard to other reliefs based on the same cause of action. It does not however bar a second suit based on a different and distinct cause of action.”

12. The Courts in order to determine whether a suit is barred by Order 2, Rule 2 must examine the cause of action pleaded by the plaintiff in his plaints filed in the relevant suits (see : *S. Nazeer Ahmed v. State Bank of Mysore and Ors.*). Considering the technicality of the plea of Order 2, Rule 2, both the plaints must be read as a whole to identify the cause of action, which is necessary to establish a claim or necessary for the plaintiff to prove if traversed. Therefore, after identifying the cause of action if it is found that the cause of action pleaded in both the suits is identical and the relief claimed in the subsequent suit could have been pleaded in the earlier suit, then the subsequent suit is barred by Order 2, Rule 2.”

8. The learned Counsel for Petitioner submit that in this Authority the Apex Court

held that Plaintiff have to claim the entire relief for the same cause of action, in one proceeding only.

9. The learned Counsel for Petitioner also relies on the Judgment of this Court in the matter of *MV. X-press Annapurana and Anr. Etc. ..Vs.. Gitanjali Woolens Pvt. Ltd. And Ors., reported in AIR 2011 Bombay 105*. He submit that in this authority the Bombay High Court held that if plaintiff is not claiming all reliefs to which he is entitled on same cause of action in one proceeding, then the Order 2 Rule 2 of the Code of Civil Procedure attracts.

10. On the basis of these facts and two authorities, the learned Counsel for Petitioner submit that the impugned order dated 10th August, 2015 passed by the Family Court No. 2, Pune below Exhibit 15 in P. D. No. 30 of 2014 is required to be set aside allowing the Petitioner's application dated 23rd February, 2015 rejecting the Respondent's Petition bearing P. D. No. 30 of 2014.

11. On the other hand, the learned Counsel Mrs. Sarnaik appearing on behalf of Respondent – husband vehemently opposed the present Revision Application. She submit that both the Petitions filed by the

Respondent – husband were for different reliefs. She submit that first petition filed by the husband under section 9 of the Hindu Marriage Act for Restitution of Conjugal rights whereas the second petition was filed by him under section 25 of the Guardian Wards Act for custody of minor child. He submit that in both the petitions prayers were different. She submit that both the petitions were arising out of the marriage between petitioner and Respondent, therefore pleadings were remained same. Except same grounds. These facts were considered by the Family Court at the time of passing the impugned order therefore, there is no substance in the present Writ Petition and same is required to be set-aside.

12. I heard both the sides. Bare reading of both the Petitions filed by the Respondent clearly shows that the first petition was filed under section 9 of the said Act for restitution of conjugal rights and petition filed by him under section 25 of the Guardian Wards Act for custody of minor child. In both the matters, prayers were altogether different. Therefore, that cannot be said that same is hit by Order 2 Rule 2 of the Code of Civil procedure.

13. The authority cited by the Petitioner in the matter of Coffee Board (*supra*) is not applicable in the facts and circumstance of the present case. In that case, the money claim was there. In similar way in another authority, in the matter of *MV. X-press Annapurana and Anr. Etc. (supra)* though the plaintiff made prayer under Order 2 Rule 2 of the Code of Civil Procedure, same was not pressed by him. Hence, the same is not applicable in the present matter.

14. Hence, considering these facts, I do not find any reason to interfere in the impugned order dated 10th August, 2015 passed by the Family Court below Exh. 15 in P. D. No. 30 of 2014. Hence, Civil Revision Application stand rejected.

(K.K.TATED, J.)