

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD

WRIT PETITION NO. 6649 OF 2015

Suresh Ramnarayan Mandore
Age – 66 years, Occupation-
Business, Resident of C/o -
Suresh Food World, Plot No.9,
Ganpati Nagar, Jalgaon, Tal &
Dist. Jalgaon

.. Petitioner

versus

1) Devidas Haribhai Ved,
Age 43 years, Occup -Business,
R/o – Visanji Nagar, Jalgaon,
Tal. & Dist. Jalgaon

2) Purushottam Ramnarayan Mandore,
Age 57 years, Occupation-Business,
Resident of C/o Mayur Traders,
TP-II, FP No. 30/1, Visanji Nagar,
Jalgaon, Tal. & Dist. Jalgaon

.. Respondents

Mr R. R. Mantri, Advocate for petitioner

Mr V. T. Choudhary, Advocate for respondent no. 1

CORAM : SUNIL P. DESHMUKH, J.
DATE : 27th September, 2018

ORAL JUDGMENT:

1. Rule. Rule made returnable forthwith. Heard learned counsel for appearing parties finally by consent.

2. Respondent no. 1 is plaintiff in regular civil suit bearing no. 251 of 2014 before the 2nd joint civil judge, junior division, Jalgaon. Suit has been instituted pursuant to provisions of the Maharashtra Rent Control Act, 1999 (hereinafter referred to as "Rent Act") for eviction of defendants no. 1 and 2 and

possession of two properties referred to in paragraphs no. 1 and 2 of the plaint.

3. Defendant no.1 – petitioner herein had filed written statement in the suit, stating that agreements have been entered into by different owners in respect of said two properties. Tenancies are different. The same is skipped to be referred to by the plaintiff. In the circumstances, since there are two different agreements with two different owners, the suit is not maintainable.

4. It has also been stated in the written statement that the property referred to in paragraph no. 2 of the plaint is not premises as referred to under the Rent Act and thus in respect of said property the suit is liable to be dismissed.

5. The plaintiff, in view of objection to maintainability of the suit under the Maharashtra Rent Control Act in respect of the property under paragraph no. 2 of the plaint, had filed application at Exhibit – 29 seeking permission for withdrawal of suit to the extent of property under paragraph no. 2 with leave to file a fresh suit in respect of the same.

6. The defendant had filed ' say ' to application under Exhibit – 29. It is submitted that suit has been filed by plaintiff

claiming to be singular owner against singular tenant of the properties and had accordingly issued notice. In written statement under paragraphs 1, 2, 3 and 7 and elsewhere, legal points have been raised pointing out that suit is not maintainable. Application Exhibit – 29 by plaintiff would not be an application which would fall under Order XXIII, rule 1 of the Code of Civil Procedure, 1908. It is being incorrectly claimed that there is formal defect in the suit in respect of the property under paragraph no. 2 of the plaint. It is a material defect and not formal defect and on that ground suit could be dismissed and the rights accrued in the process in favour of the defendant should not be taken away under application Exhibit – 29. Claimed cause of action in suit and the averments in the plaint make the property indivisible. One suit cannot be divided into two suits and, therefore, it was urged to dismiss application Exhibit – 29.

7. Trial court had considered the submissions on behalf of the parties. Trial court had discussed following decisions which the petitioner – defendant no.1 had referred to and relied on,

- (i) *Promila Bakshi & Ors. V/s Ashok Bhatia & Ors, reported in AIR 2007 Himachal Pradesh, 14.*
- (ii) *Motilal Dutta V/s Kalidas Bhattacharaya, reported in 1929 Law Suit (Cal) 212*
- (iii) *Mahendra Kadam V/s M/s Kachhi Properties, reported in 2011 (7) ALL MR 386,*

(iv) *Babybai w/o Sakharam Pardeshi V/s Ganesh Sawant, reported in 2013 (6) ALL MR 823,*

(v) *Mahalaxmi Co-operative Hou. Society V/s Ashabhai Patel, reported in 2013 ALL SCR 1313 ,*

contending that those will have to be considered by the court having regard to article 141 of the Constitution of India. Along side, it was submitted that the matter would be covered by Order II, rule 2 of the CPC as well.

8. The trial court in its order has adverted to that it had been submitted on behalf of the plaintiff that case of *Promila Bakshi (supra)* had been on different factual background. It had been claimed by the plaintiff in said case that since the traced record indicated that a few persons who were parties were dead and certain transfers were made which deserved to be challenged and in the circumstances, it was urged by plaintiff therein that the suit suffers from formal defect and the high court had found that such a defect can be cured by amendments and in the circumstances, request pursuant to Order XXIII, rule 1(3) of the CPC had been refused.

9. Learned counsel for the plaintiff had submitted that case of *Motilal Dutta (supra)* relied on by the defendant was not applicable to the facts of present matter, for, request for withdrawal of suit with liberty to file fresh suit had been made at appellate stage.

10. It was submitted on behalf of the plaintiff that decision in the case of *Mahendra Uttamrao Kadam (supra)* referred to and relied on by defendant had been a case wherein the firm had not been registered and permission had been sought to withdraw the suit and file a fresh one after registration of the firm. The defect being not of formal nature, the request had been declined by the high court.

11. The plaintiff had also referred to that the case of *Babybai w/o Sakharam Pardeshi (supra)* was concerning encroachment and in the same it was observed that boundaries of encroached portion had been given in the plaint and the court considered that the defect had not been of formal nature, however, can be cured by amendment.

12. Learned counsel for the plaintiff had also distinguished the case of *Mahalaxmi Co-operative Hou. Society (supra)* cited by defendant, wherein the suit had been for declaration that the sale deed was illegal and permanent injunction on the ground that the sale deed was executed without requisite permission under section 63 of the Tenancy Act, and while permission sought for filing fresh suit was refused to be granted, the question of limitation would arise.

13. Trial court also referred to submissions on behalf of the defendant about Order XXIII, rule 1(3) of the Code of Civil Procedure dealing with abandonment of part of claim in the suit and in the present matter the plaint in suit instituted by respondent–plaintiff refers to boundaries of both the properties.

14. Trial court in paragraph 15 of the order has observed, thus:

" 15. By reading the whole section, it cannot be said that, the above said section is not applicable with the present application. Plaintiff can seek permission as prayed by the plaintiff. The defect of the present suit is not of formal nature. If permission is not granted to plaintiff he will be precluded from filing the fresh suit. Moreover, though plaintiff mentioned the boundaries of both the properties in the plaint, but that can be amended after allowing this application. The citations filed by both the defendants are not applicable to the present case, as the facts of the present case are totally different from each cited case as argued by the counsel of the plaintiff. "

and allowed application – Exhibit - 29 subject to costs of ₹ 300/-.

15. Learned counsel Mr R. R. Mantri appearing on behalf of petitioner – defendant no. 1 in suit contends that the trial court has narrated only the submissions and contentions of the parties

and has not given sufficient reasons while deciding application Exhibit – 29. He submits that there does not appear to be proper application of mind either to the facts and circumstances of the case or for that matter to the legal provisions. He submits that it is evident from contents of paragraph 15 of impugned order since the court has specifically referred to that " *The defect of the present suit is not of formal nature* ". He submits that in such a case, powers of the court under Order XXIII, rule 1(3) of the Code of Civil Procedure could not have been exercised. He submits that the court has made short work of the citations relied on, on behalf of defendants, tersely stating that those are not applicable to present facts without assigning reasons as to how and why those do not apply to present matter.

16. The next leg of submissions of Mr Mantri is, issuance of one single notice for eviction from two properties referred to in paragraphs no. 1 and 2 of the plaint is a complete depiction of the factual position that the tenancy is one and single in respect of both the properties. If tenancy is one and single, the same is not divisible at all.

17. For aforesaid purpose, Mr Mantri refers to and relies on a decision of the supreme court in the case of *Habibunnisa Begum vs. G. Doraikannu Chettiar (D) by Lrs.*, reported in *2000 SAR (Civil)*

59, which appears to be a case dealing with an agreement entered into of single tenancy of the premises. While landlord had moved high court for ejection of the tenant, the high court had split up the property into two pieces and granted eviction in respect of one and declined for other property. In that background, the supreme court had considered that in a case of tenancy under single indivisible contract, court has no right/power to split property unless backed by statutory provisions in that respect.

18. Learned counsel further goes on to refer to a decision of a division bench of this court in the case of *M. L. Chaturvedi vs M/s Sanjay Finance Corporation*, reported in 1998 (2) ALL MR 524 wherein this court had considered that suit by unregistered firm cannot be permitted to be withdrawn with liberty to file a fresh suit considering that non registration of firm is not a formal defect but a defect affecting merits of the suit.

19. He further refers to case of *Ramrao Bhagwantrao Inamdar vs. Babu Appanna Samage*, reported in (1940) 42 BOM MLR 143 to contend that the term "sufficient cause" used in Order XXIII, rule 2(3) will be a term *ejusdem generis* with a formal defect.

20. Mr Mantri also refers to a decision of Honourable single judge of this court in the case of *Babybai w/o Sakharam Pardeshi vs Ganesh s/o Asaram Sawant*, reported in 2013 (6) ALL MR 823 wherein it was considered that as referred to hereinabove that absence of boundaries of encroached portion and a map would not be a formal defect. However, situation would be curable by amendments.

21. Learned counsel Mr Mantri, therefore, urges to allow writ petition and reject application Exhibit – 29.

22. Countering aforesaid submissions, Mr V. T. Choudhary, learned counsel appearing on behalf of respondent no. 1 – plaintiff submits that the suit has been filed on 15-04-2014. Defendant No. 1 had filed written statement on 11-10-2014. Thereupon, application Exhibit–29 had been immediately moved on 03-12-2014. He submits that plaintiff intends to have properties back in his possession and as such, is also eager to see that the purport underlying the litigation should not get obfuscated under technical aspects involved in matter.

23. He submits that it is defendant's own case that the property under paragraph no. 2 of the plaint would not be covered by provisions of the Maharashtra Rent Control Act,

hinting at that the suit would fail on that count and purpose and the object underlying the litigation would be prolonged. He submits that while corrective action is sought to be taken upon contention which is raised in defence under written statement, under 'say' to Exhibit – 29, petitioner – defendant no. 1 would not be allowed to resist the same, rather defendant is estopped from opposing the application. He submits that when on technical ground suit is liable to fail in respect of property under paragraph no. 2 of the plaint and the plaintiff wants said property back in his possession, to avoid failure of suit on technicality/formality, permission had been sought to withdraw the suit to the extent of property under paragraph no. 2 and file a fresh suit concerning said property. He submits, it is not the case that the court is not empowered to grant such a relief.

24. He submits that Order XXIII of the Code of Civil Procedure deals with a situation after institution of suit and while situation arises where the suit would fail by reason of some formal defect or when there are sufficient grounds to allow the plaintiff to institute fresh suit for the subject-matter of suit or part of it, the court may grant permission to the plaintiff to withdraw suit or such part of the claim under the suit with liberty to institute fresh suit to the extent of part of claim in earlier suit withdrawn.

25. For aforesaid purpose, he points out Order XXIII, rule 1(3) of the Code of Civil Procedure, reading thus :

" 23(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

(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,

it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim. "

26. Mr Choudhary submits that in the circumstances it would be a case of approaching the court in a defective form seeking relief in respect of property under paragraph no. 2 of the plaint, while it is being contended by defendant that the suit under the Maharashtra Rent Control Act would not be maintainable in respect of said property. Alternatively, he submits that if it is not formal defect as sought to be contended on behalf of the defendant, the court indeed is empowered for sufficient ground to allow the plaintiff to withdraw suit in respect of said property

with liberty to file fresh suit in respect of the same. He submits that the purpose underlying writ petition is to pre-empt remedy for the plaintiff to get back possession of his property.

27. Learned counsel submits that the situation is no longer *res-integra* and is sufficiently covered by a decision of the Honourable single judge of this court in the case between *Moosa Suleman Memon and others vs Hanuman Idol and others*, reported in 1979 *Bom.C.R. 214*, wherein the court under paragraph 12 has considered thus;

" 12. The next contention raised by the learned Advocate is to the effect that this is not a case where there can be said to be a defect analogous to a formal defect, so as to warrant leave as prayed for. In support of this contention, the learned Advocate have taken me through a decision of a Full Bench of this Court in (Ramrao Bhagwantrao Inamdar and another v. Babu Appanna Samage and others) 1, A.I.R. 1940 Bombay page 121. On carefully going through the said ruling, I find that the ratio therein supports, on the contrary the petitioners herein rather than the contesting opponents. It is laid down in the said ruling that the expression " formal defect " in Rule 1 (3) (a) must be given a wide and liberal meaning and must be deemed to connote every kind of defect which does not affect the merits of the case, whether that defect be fatal to the suit or not. Illustrating the said principle : the Full Bench has observed that formal defect includes, inter alia, misjoinder of parties or of the matters in suit, rejection of a material document for not having a proper stamp and the erroneous valuation of the subject matter of the suit. This Full Bench decision of this Court has bene (been) approved by a Full Bench of the

*Allahabad High Court in (Abdul Ghafoor v. Abdul Rahman) 2, A.I.R. 1951 Allahabad page 845. It is thus clear that Order 23 covers not only suits wherein there are certain formal defects but also defects analogous to formal defects. **The construction is thus not to be restricted to the principle of ejusdem generis.** On the contrary, as held by both the aforesaid Full Bench decisions -- one of this Court and the other of the Allahabad High Court -- the expression " formal defects " must receive wide and liberal meaning. It is therefore, not possible to accept the contention of the learned Advocates that to this case, the provisions of Order 23, Rule 1 of the Code of Civil Procedure cannot apply. "*

28. He submits that not only said decision, but the decision of the supreme court as well in the case of *V. Rajendran vs Annasamy Pandian (Dead) through legal representative Karthyayani Natchiar*, reported in (2017) 5 SCC 63 has dealt with the situation quite elaborately. He refers particularly to paragraphs no. 8, 9, 10, 11, 12 and 13 from said judgment.

29. He submits that the supreme court has observed in *V. Rajendran's* case (supra) that suit may be allowed to be withdrawn with permission to file fresh suit when the court is satisfied that earlier suit suffers from some formal defect or there are other sufficient grounds to allow the plaintiff to institute fresh suit. Power in this respect, as observed by the supreme court, is discretionary.

30. Learned counsel submits that, as a matter of fact, writ petition filed on behalf of defendant no. 1 has been rendered infructuous. He submits that while order had been passed by trial court permitting plaintiff to file fresh suit in respect of property under paragraph 2 of the plaint and suit accordingly had been filed, defendant did not object to the same. Not only that fresh suit has been filed but petitioner – defendant no. 1 has also filed his written statement in the same.

31. He submits that looking at the scenario either way, the case of the plaintiff would squarely stand covered by ground " formal defect " or " sufficient grounds ". He, therefore, urges not to indulge into petitioner's request and seeks dismissal of writ petition.

32. Mr Mantri, learned counsel appearing on behalf of petitioner-defendant no.1, submits that petitioner is exasperated by the conduct of plaintiff – respondent no. 1 herein, and contends that situation has deteriorated because of deliberate avoidance of service of notice of this court by the plaintiff and points out that for service on plaintiff, paper publication had been required to be issued.

33. Mr Choudhary, learned counsel on behalf of respondent no.1 – plaintiff without admitting aforesaid, submits that may be

it is a sagacious submission on behalf of the petitioner, however, it seldom would affect factual and legal position concerned in present matter. The petitioner has deliberately skipped to refer to the developments after the order passed by trial court about institution of fresh suit by plaintiff and filing of written statement therein by defendant.

34. While the arguments are advanced on behalf of appearing parties as aforesaid, it is discernible that the petitioner is not consistent in his stands before trial court.

35. In written statement, it is the contention of petitioner that the two properties concerned in the suit were owned by different persons and different agreements have been entered into and tenancies are different and, as such, the suit is not maintainable whereas, in the 'say' to application at Exhibit – 29, it is being claimed that the plaintiff claims to be singular owner of the properties and prosecution is against a singular tenant and contends that the points raised in the written statement are legal points. It is further contended that application Exhibit – 29 would not fall under Order XXIII, rule 1 of CPC and the defect in the plaint would not be formal as the same would be a material defect on which ground the suit is liable to be dismissed.

36. Perusal of Order XXIII, rules 1 and 3 (a) and (b) thereunder shows that if court is satisfied that suit would fail for reason of formal defect or there are sufficient grounds for allowing plaintiff to institute fresh suit for subject matter of suit or part of a claim, it may grant permission to plaintiff to withdraw such suit or such part of the claim with liberty to institute a fresh suit in respect of subject-matter of such suit or such part of the claim.

37. In present matter while the plaintiff had been before trial court for properties referred to in paragraphs 1 and 2 of plaint, defendant had objected to maintainability of the suit claiming that the properties belong to different owners and agreements had been different further referring to that property under paragraph no. 2 of the plaint is not premises under the Rent Act. Upon such grounds, objection to maintainability of suit having been taken, specially in respect of property under paragraph no. 2 of the plaint, that it would not be covered under Rent Act, a caution is being taken by withdrawing suit in respect of the same with permission to file fresh suit. Objection is that property under para 2 cannot be claimed in the form of civil suit filed by plaintiff. Apart from it, the court under sub

clause (b) of rule 3 of Order XXIII of the CPC is sufficiently empowered to allow the plaintiff to institute fresh suit for subject matter of earlier suit or part of the claim therein, if there are sufficient grounds. In the circumstances, the court in its discretion appears to have deemed it appropriate to allow the plaintiff to withdraw part of the claim in the suit and file a fresh suit in respect of the same.

38. It is difficult to go by defendant's digressing stands at different stages in the matter. In the given facts and circumstances of the case, pleadings of defendant in written statement and the stand taken by him in the 'say', do not appear to be compatible. Defendant would not be able to reprobate in the same proceedings at different stage.

39. While a capital is sought to be made out from a sentence in paragraph 15 of impugned order, it would be pertinent to refer to that impugned order will have to be read as a whole and it would indicate that sentence on which attention is sought to be focused by petitioner – defendant no. 1 is a human error under inadvertence. Even tenor of paragraph 15 of impugned order would indicate that the court had intended otherwise. The very next sentence in said paragraphs vividly refers to that if permission is not granted to the plaintiff, he would be precluded

from filing fresh suit. As such, it would not be proper to seclude the sentence wherein the word " *not* " has crept in due to oversight and appears to be an inadvertent error. It appears that the purpose underlying the litigation is being tried to be obfuscated on behalf of petitioner.

40. The exercise of discretion by trial court is in consonance of sound judicial principles and appears to be guided by justice, equity and good conscience. Having regard to facts and circumstances in present matter, the discretion exercised by trial court in favour of the plaintiff does not appear to be an exercise of power which can be dubbed as arbitrary or not adhering to judicial principles.

41. Under the circumstances, this court is disinclined to indulge into the request under the writ petition. Writ petition, thus, is dismissed. There shall be no order as to costs.

42. Rule is discharged.

43. The observations in this order have efficacy only to the extent of decision in present writ petition and shall not have influence elsewhere.

SUNIL P. DESHMUKH
JUDGE

pnd/-