

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

WRIT PETITION NO. 13138 OF 2016

1. Smt.Nikita Manohar More	]	
Age 28 years, Occ.Agricultural & Household	]	
	]	
2. Ms.Priyanka Baban Patil	]	
Age 23 years, Occ. Education	]	
Both R/o. Shri Padmanath Temple Road,	]	
Village Tembhode,	]	
Taluka : Palghar, District : Palghar	]	<u>Petitioners</u>

V/s.

Nitesh Pundlik Patil	]	
Age 25 years, Occ.Service	]	
R/o. Tiwari Compound, Boisar Road,	]	
Palghar, Taluka : Palghar, District Palghar	]	<u>Respondent</u>

- Mr.Prajakt M. Arjunwadkar for the Petitioners.
- Mr.Ashok Pande for the Respondent.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 8th JANUARY, 2018.

ORAL JUDGMENT :-

1] Rule. Rule made returnable forthwith. Heard finally with the consent of learned counsel for the Petitioners and the Respondent.

2] By this Writ Petition filed under Article 227 of the Constitution of India, the Petitioners are challenging the order dated 9th September, 2016 passed by the Court of Jt. Civil Judge Junior Division, Palghar, thereby rejecting the Petitioners' application at Exhibit-7 filed under Order-2 Rule-2(3) of Civil Procedure Code. The Petitioners were constrained to file the said application as the Respondent was intending to create third party interests in the joint family properties of the Petitioners. Hence, the Petitioners wanted to seek partition and separate possession of their share in the suit properties along with relief of injunction restraining the Respondent from alienating the suit property. However, in order to file a suit for partition and separate possession of their share in the suit property, the Petitioners wanted to collect various documents but as the Petitioners had apprehension that meanwhile the Respondent may create third party interests in the suit property, by way of urgent relief, the Petitioners had filed only the suit simpliciter for injunction and in order to reserve their right to file suit for partition, they filed an application at Exhibit-7 under Order-2 Rule-2(3) C.P.C., seeking leave of the trial Court to omit that relief in this suit.

3] The trial Court, however, rejected the said application on the count that the Petitioners are not the coparceners and therefore, they are not eligible for filing the suit for partition in the capacity of coparceners. Therefore, the Petitioners are not entitled to get the leave as contemplated under Order-2 Rule-2(3) of C.P.C..

4] It is needless to state that on the face of it also, the impugned order passed by the trial Court cannot be sustainable in law. Whether the Petitioners are coparceners or not, whether they are eligible for partition of suit properties or not, all these questions cannot be relevant for deciding the application filed under Order-2 Rule-2(3) of C.P.C., if one considers the scope of the said provision, which can be reproduced for ready reference, as follows:

“Order - 2. Frame of Suit

Rule - 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.”

5] Thus, this provision mandates that the suit should include the whole claim and all the reliefs to which the Plaintiff is entitled and if the Plaintiff omits to sue in respect of any portion of his claim or the relief, then he shall not afterwards sue in respect of the portion and relief so omitted or relinquished. Sub-Clause 3 of Rule 2 of Order 2 of C.P.C., however, provides that if the Plaintiff wants to omit such claim or relief, he has to do so with the leave of the Court. Otherwise he shall not be entitled to sue for such relief or claim afterwards.

6] Thus, it follows that, for deciding the application for leave, filed by the Plaintiff under Order-2 Rule-2(3) of C.P.C., the scope of inquiry is very limited to the extent of deciding whether the Plaintiff has given sufficient cause or explanation for not claiming that relief in this suit. The Court has only to consider whether the relief sought to be omitted could have been asked in this suit itself. No other inquiry is

warranted at all in deciding such application. The question whether the Plaintiffs are entitled for the said relief, is totally beyond the scope of the inquiry in this application, as the said question will arise in subsequent suit.

7] In the present case, by filing the application under Order-2 Rule-2 of C.P.C., the Petitioners wanted only to reserve their right of filing a subsequent suit for partition. The Petitioners had also given the explanation as to why they could not ask for the relief of partition in this suit itself. The trial Court should have therefore considered that explanation only, to ascertain whether it is sufficient or not, in the light of the urgency made out by the Petitioners for filing the present suit seeking relief of injunction only, though they were entitled for the relief of partition and separate possession also. The trial Court has, however, travelled beyond this scope of enquiry and unnecessarily entered into the aspect as to whether the Petitioners are coparceners or not and whether they are eligible for getting relief of partition or otherwise. The impugned order, passed by the trial Court, therefore, being against the express provisions of law, it cannot be sustained, hence quashed and set-aside.

8] Accordingly, the Writ Petition is allowed. The application filed by the Petitioners below Exhibit-7 is allowed. The permission is granted to the Petitioners to omit the relief of partition and separate possession in this suit, reserving that relief to be sued subsequently, in view of the provisions of Order-2 Rule-2(3) of C.P.C..

9] At this stage, it is clarified that this Court is not at all entering into the merits of the claim of the Petitioners as to whether they are coparceners and whether they are entitled to file the suit for partition, as reserving the Petitioners right to claim such relief does not mean that the Court has held the Petitioners entitled or eligible to get that relief.

10] Writ Petition is disposed off in above terms.
Rule is made absolute.

[DR.SHALINI PHANSALKAR-JOSHI, J.]