

Andreza

IN THE HIGH COURT OF BOMBAY AT GOA
WRIT PETITION NO. 866 OF 2019

Satyendradas Uttam Bale & 22 Ors. ... Petitioners
Versus
Keshav V. Prabhu Gaonkar & 103 Ors. ... Respondents

Mr. C. A. Coutinho, Advocate with *Mr. Ivan Santimano, Advocate for the Petitioners.*

Mr. Sudesh Usgaonkar, Advocate with *Ms. Marie Rosette Pereira, Advocate for the Respondent nos. 1 to 4.*

CORAM: MANISH PITALE, J
DATED: 29th November, 2021

ORAL ORDER

1. By this Writ Petition, the Petitioners i.e. the original Plaintiffs have challenged order dated 20.07.2019, passed by the Court of Civil Judge, Junior Division, Canacona, (hereinafter referred to as *the Trial Court*), whereby an application filed under Order 1 Rule 10(2) of the Civil Procedure Code (CPC) (Exhibit -133/D), has been dismissed with costs.

2. The facts in brief leading to the filing of the present Writ Petition are that the Petitioners have filed Regular Civil Suit No. 19 of 2010, before the Trial Court for declaration and injunction. The Petitioners are seeking a declaration that the original Defendant nos. 1 to 37 i.e. the contesting Respondents herein, have no right or title in the suit properties by claiming that the predecessor of these Defendants had already sold his undivided share in the properties. Consequential prayers of injunction and handing over of possession in favour of the

Petitioners and original Defendant nos. 38 to 100, have been made in the aforesaid suit.

3. Some of the contesting Respondents filed their written statement in January 2010, stating that the suit deserved to be dismissed on the ground of non-joinder of necessary parties. It was stated that the original Plaintiff no.24 was married and having three children and yet he was shown as a bachelor in the plaint. It was further stated that the original Defendant no. 57 was survived by his legal representatives who were not made parties in the said suit.

4. It appears that the proceedings before the Trial Court continued and affidavit in evidence was also filed on behalf of the Petitioners. There was no statement made in the evidence tendered on behalf of the Petitioners in respect of the specific objections taken by some of the contesting Respondents as regards the original Plaintiff no. 24 and Defendant no. 57.

5. The process of recording evidence was under way, when the Petitioners filed the aforesaid application under Order 1 Rule 10 of the CPC, before the Trial Court in April 2019, with a prayer to add Defendant nos. 105 to 111 as legal representatives of the original Defendant nos. 57, Defendant nos. 112 to 115 as legal representatives of the branch of Jayu Mahadev Balo and Defendant no.116 as legal representative of original Plaintiff no. 24.

6. This application was opposed on behalf of the contesting Respondents on the ground that it was belated and further on the ground that facts within the knowledge of the Petitioners were

deliberately suppressed from the Trial Court and that, therefore, the Petitioners could not be allowed to join the aforesaid Defendants as parties to the suit, to get over the objections specifically raised on behalf of the contesting Respondents that the suit deserved to be dismissed for non-joinder of necessary parties. It was also specifically stated that there was no explanation put forth on behalf of the Petitioners for the gross delay in moving the application under Order 1 Rule 10(2) of the C.P.C.

7. Mr. Coutinho, learned Counsel appearing for the Petitioners, submitted that the Trial Court erred in dismissing the application, primarily on the basis that a fraud was played by the Petitioner by suppressing the marriage of original Plaintiff no. 24 and that there had been delay in moving the application under Order 1 Rule 10(2) of the C.P.C. It was submitted that at the time when the suit was filed in the year 2009, the original Plaintiff no.24 was indeed unmarried and that it was only on 13.06.2014 that he got married. It was sought to be explained that there were children of the said original Plaintiff no. 24 but they were born outside marriage and that the certificate of registration of marriage was on record, demonstrating that the marriage took place on 13.06.2014 and it was registered on 15.10.2014. On this basis, it was submitted that there was no question of fraud on the part of the Petitioners.

8. As regards the alleged delay in moving the application under Order 1 Rule 10(2) of C.P.C., it was submitted that as per law laid down by this Court, such an objection could be raised only by the parties who were proposed to be added as Defendants and not by the contesting Defendants (Respondents herein). It was further submitted that a proper interpretation of Order 1 Rule 10(2) of C.P.C. would

show that even without an application, the Court can exercise power under the said provision to add parties where it is found that presence of such parties is necessary to the Court to effectually and completely adjudicate upon and settle the questions involved in the suit. According to the learned Counsel appearing for the Petitioners, the Trial Court in the present case failed to appreciate the true scope and jurisdiction of the aforesaid provision while passing the impugned order. Attention of this Court was also invited to Clause (5) of Order 1 Rule 10 of C.P.C. to contend that even the question of limitation could be raised by those proposed to be added as Defendants and that their being added as Defendants to the proceedings, would be subject to the law of limitation and the proceedings against them would be deemed to have begun only on the service of summons. The learned Counsel relied upon the Judgments of this Court in the case of *Anant Bhiku Shirodkar & Ors. vs. Rosalina Fernandes*¹ and *Vithalrao s/o/ Damodhar Depat & anr. vs. Matru Seva Sangh, Dist-Chandrapur & anr.*²

9. On the other hand, Mr. Sudesh Usgaonkar, learned Counsel appearing for the contesting Respondents, submitted that a perusal of the material on record would show that the finding of fraud rendered by the Trial Court in the impugned order was borne out from the record. It was submitted that the contention regarding children having been born out of wedlock and that the marriage of the Original Plaintiff no. 24 had taken place in June 2014, was being specifically argued before this Court, but none of these aspects were properly brought to the knowledge of the Trial Court. It was further submitted that the Petitioners ought to have stated in their affidavit in evidence

¹ 1996(2) Mh.L.J. 262

² 2009 4 Mh.L.J. 508

before the Trial Court about the true marital status of the original Plaintiff no. 24. But, the said aspect was deliberately suppressed by the Petitioners, thereby indicating that the finding of fraud was correctly rendered by the Trial Court against the Petitioners. As regards the aspect of delay, it was submitted that even though Order 1 Rule 10(2) of C.P.C. provides that the Court may even without an application exercise power of adding a party, but, if the provision is interpreted in the manner in which the Petitioners seek to do, Order 1 Rule 13 of the C.P.C. would be rendered meaningless. It was submitted that when the contesting Respondents had specifically taken an objection and claimed that the suit deserved to be dismissed for non-joinder of necessary parties, way back in the year 2010 itself, the Petitioners could not be heard to say that they would take remedial measures at their own leisure and not promptly. On this basis, it was submitted that the Petition deserved to be dismissed.

10. Heard learned Counsel for the rival parties and perused the material on record. A perusal of the impugned order shows that the Trial Court has primarily proceeded on the basis that the Petitioners committed fraud on the Court by claiming that the original Plaintiff no.24 was a bachelor. The Trial Court found that even after specific objection was raised in that regard in the written statement filed way back in the year 2010, no steps were taken on behalf of the Petitioners and that the Petitioners continued to maintain falsehoods. Due to the emphasis placed on the said aspect of the matter, it is found that the Trial Court has not at all discussed the most crucial aspect to be considered under Order 1 Rule 10(2) of C.P.C. The Trial Court has failed to consider as to whether the presence of the proposed Defendants is necessary for effectually and completely adjudicating upon and settling all the questions involved in the suit. There is no

discussion on the said aspect of the matter, while much emphasis has been placed on the aspect of the alleged fraud committed by the Petitioners.

11. This Court is of the opinion that by doing so, the Trial Court committed an error while exercising its jurisdiction under Order 1 Rule 10(2) of the C.P.C. As regards the question of fraud, this Court is of the opinion that the material on record falls short of reaching a finding to that effect against the Petitioners. It is submitted on behalf of the Petitioners that as on the date when the suit was filed in the year 2009, the original Plaintiff no. 24 was a bachelor. His marriage took place on 13.06.2014 and it was registered on 15.10.2014. The marriage certificate is very much placed on record. That the said original Plaintiff no. 24 may have had children outside marriage cannot lead, ipso facto, to the conclusion that the petitioners committed fraud on the Trial Court. Much emphasis has been placed on the failure on the part of the Petitioners to state in their affidavit in evidence filed before the Trial Court about the marital status of the original Plaintiff no.24, although, even according to them, he did get married on 13.06.2014. But, that in itself, cannot be said to be a basis to render finding of fraud for the reason that no positive statement was made on affidavit on behalf of the Petitioners at the time of filing their affidavit in evidence as regards the marital status of the original Plaintiff no. 24. Therefore, to that extent, this Court is not in agreement with the finding rendered by the Trial Court on the question of fraud.

12. As regards the question of delay, this Court is of the opinion that the learned Counsel appearing for the Petitioners is justified in relying upon the Judgment in the case of *Anant Bhiku Shirodkar & Ors. vs. Rosalina Fernandes* (supra). It has been laid down therein that the

question of delay, if at all, can be raised by the parties who are proposed to be added as Defendants in the proceedings and not by the parties who are already Defendants in the suit pending before the Court. It is also laid down that the question of limitation can also be raised by such parties proposed to be added as Defendants.

13. In the present case, the objection regarding delay is sought to be raised by the contesting Respondents and in terms of the law laid down in the said Judgment, such an objection at their behest could not have been entertained.

14. This Court is of the opinion that if the application filed by the Petitioners is examined on the touchstone of the requirements of Order 1 Rule 10(2) of the C.P.C. i.e. on the ground as to whether the presence of the proposed Defendants is necessary for the Court to effectually and completely adjudicate upon and settle all questions involved in the suit, the prayer made on behalf of the Petitioners deserves to be granted. This is because a perusal of the plaint and prayers made therein would show that while a declaration is sought that the contesting Respondents have no right and title in the suit properties, a specific prayer is made for handing over possession, not only to the Petitioners as the original plaintiffs, but also to the original Respondents-Defendant nos. 38 to 100. The Defendants proposed to be added are similarly situated like the original Defendant nos. 38 to 100 and therefore, for the dispute to be effectually and completely decided, the presence of the proposed Defendants is necessary.

15. Reliance placed on the judgment of this Court in the case of *Vithalrao s/o. Damodhar Hepar vs. Matru Seva Sangh* (supra) on the

aspect of limitation in the context of Order 1 Rule 10(5) of the C.P.C., is also justified and, therefore, it is found that the impugned order is unsustainable.

16. In view of the above, the Writ Petition is allowed. The impugned Order is quashed and set aside. The application filed by the Petitioners at exhibit 133/D is allowed in terms of the prayers made therein.

17. Consequential, amendments to be carried out before the Trial Court within a period of three weeks from today.

18. Pending applications, if any, stand disposed of.

MANISH PITALE, J