

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.78 OF 2020

Ranubai Tulshiram Chondhe through

POA Shantaram Tulshiram Chondhe .. Applicant

Versus

Kaluram Hariba Chonde & Ors. .. Respondents

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Mr.Rahul S. Kadam for the Applicant.

Mr.Prasad Bandopant Kulkarni for the Respondents.

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CORAM: BHARATI DANGRE, J.

DATED : 10th DECEMBER, 2021

P.C:-

1. The present applicant, the original plaintiff in Regular Civil Suit No.1117 of 2004, is aggrieved by an order passed by the learned District Judge, Pune on 18/12/2019 in Civil Appeal No.238 of 2013. The said order came to be passed on an application filed by the plaintiff, seeking withdrawal of his original Regular Civil Suit No.1117 of 2004, by reserving a liberty to file a fresh suit on a similar cause of action. The learned Judge rejected the said application, but observed that a simplicitor withdrawal can only be granted, however, refused to grant liberty to file fresh suit, on same cause of action.

2. Heard learned counsel appearing for the applicant and learned counsel appearing for the respondents.

Relying upon the principle underlying Order 23 Rule 1 of the CPC, as enunciated in the two decision of the Hon'ble

Supreme Court, in case of *K.S.Bhoopathy & Ors. Vs. Kokila & Ors.*¹ and in case of *V. Rajendran & Anr. Vs. Annasamy Pandian (dead) through LRs Karthyayani Natchiar*², it is sought to be canvassed that since there is a formal defect in the suit, the Court ought to have permitted withdrawal of the suit, by reserving a liberty to file a fresh one, on a similar cause of action, at a stage when the suit is already dismissed and the Appeal assailing the dismissal, is pending before the learned District Judge.

3. The proposition of law, as enunciated in the aforesaid decision, will have to be read in the backdrop of the facts in which it is decided.

4. In *K.S.Bhoopathy* (supra), the factual matrix involved was, a suit was filed by the plaintiffs wherein injunction was sought against defendant Nos.1 and 2 restraining them from establishing and running flour mill on their property and for further injunction restraining them from disturbing the plaintiffs' exclusive right of user of the pathway, lying between the property of the plaintiffs on one side and defendant Nos.1 and 2 on the other. The case pleaded by the plaintiffs was, the establishment of the proposed flour mill by defendant Nos. 1 and 2 will act as a nuisance and will seriously prejudice the plaintiffs' user of property, on which they have constructed a clinic. The case of the plaintiffs set out in the plaint, rest on a premise that, as far as pathway is concerned, plaintiffs have

1 AIR 2000 SC 2132

2 (2017) 5 SCC 63

exclusive right of user. The defendants refuted the claim of the plaintiffs by contending that the proposed flour mill will in no way act as a nuisance against user of the property by the plaintiffs and that the plaintiffs have no exclusive right of user of the pathway which is a common pathway meant to be used by both the parties.

The trial Court decreed the suit holding that the plaintiffs' have an exclusive right of user over the pathway. On appeal, the first appellate Court modified the decree relating to the pathway holding that the plaintiffs have no exclusive right of user of the pathway and all the parties are entitled to use the same as it is a common pathway.

Being aggrieved by the modification of the decree, the plaintiffs filed the Second Appeal before the High Court of Madras wherein the application under Order XXIII of CPC was taken out, seeking permission to withdraw the suit with leave to file a fresh one. It was averred in the application that since no prayer for declaration of plaintiffs' title over the pathway was made in the plaint and, since cloud was raised against their exclusive title and right of user, it was necessary to withdraw the suit and file a fresh suit, seeking appropriate remedy. This was objected to by the contesting defendants on the ground that it is a move of the plaintiffs to get over the finding that they have no exclusive right of user over the suit pathway and that the defendants have also a right of user of the same, since it is a common pathway meant to be used by the parties. The application filed by the appellants was allowed by the High Court.

5. On construing the entire scheme underlying Order XXIII Rule 1, the Hon'ble Supreme Court elaborated on the said provision of withdrawal of suits by referring to it clause-wise, into two contingencies; (a) where the plaintiff can abandon a suit or abandon a part of his claim as a matter of right without the permission of the Court; in that case he will be precluded from suing again on the same cause of action and (b) the plaintiff may, in the circumstances mentioned in sub-rule(3) be permitted by the Court to withdraw from a suit, with liberty to sue afresh on the same of action. Such liberty being granted by the Court enables the plaintiff to avoid the bar in Order II Rule 2 and Section 11 of the CPC. The Hon'ble Supreme Court referred to its earlier decision in case of Bakhtawar Singh Vs. Sada Kaur³ and gainfully quoted para 8 of the decision, which reads thus :-

"In the present case all the courts below including the High Court concurrently found that the plaintiffs/appellants failed to produce any evidence to show that the permission, to withdraw the suit was given on the ground that the suit was bound to fail by reason of some formal defect or there were sufficient grounds for allowing the plaintiffs to institute a fresh suit in respect of the same subject-matter. The plaintiffs had not even produced the application which is said to have been filed for withdrawal of the earlier suit with permission to file a fresh suit on the same cause of action to show as to what was the formal defect in the earlier suit by reason of which it was sought to be withdrawn. In these facts and circumstances no case for fresh institution of suit on the same cause of action and for the same relief after the withdrawal of the earlier suit was made out by the plaintiffs/

3 (1996) 11 SCC 167

appellants in accordance with the provisions of Clause (3) of Order 23 Rule 1 of the Code."

Further, by referring to another position in case of Executive Officer **Arthaneswarar Temple Vs. R.Sathyamoorthy**⁴, the question arisen was formulated as under :-

"Whether the Court has exercised the discretion vested under Order XXIII Rule 1(3) of CPC, on consideration of matter relevant for exercise of such power"

The finding is recorded to the following effect :

"But one fact situation has to be remembered in this case, viz., that it was the appellants who succeeded in the trial Court in obtaining a decree and in the appeal against such decree by the respondents, which was partly allowed, the appellate Court found that the pathway was common to both the parties, but the right was not gone into, title was not determined, in such a situation withdrawal of the suit at the appellate stage although it may amount to withdrawal or nullification of the appellate Court's order, still not hurt any part other than the withdrawing plaintiffs, because they are also having the right to use the common pathway and the decree preventing installation of the machinery is nullified. Therefore, the contention that withdrawal will prejudice the Respondents, has no basis. The apprehended prejudice can be safeguarded by keeping the right to use the pathway by both the parties till the disposal of the suit.

.....In view of this settled position, it is appropriate to permit withdrawal of the suit with a liberty to file a fresh suit for declaration of title which they ought to have done at the

⁴ (1999) 3 SCC 115

initial stage. By withdrawal, the respondents should not be deprived of the benefit of usage of that passage till the final adjudication. If there are valid defences, they can raise all such defences."

In paragraph 16, it is further recorded that the approach of the High Court was that the plaintiffs should have prayed for declaration of title which they had omitted to include in the plaint. From the facts and circumstances emanating from the judgment of the trial Court and appellate Court, the plaintiffs has realized the weakness in the claim of exclusive right of user of the property and in order to get over the findings, they took recourse of Order XXIII, Rule 1(3) of the CPC and filed the application for withdrawal of the suit with leave to file fresh suit. The High Court, however, did not consider the relevant aspect of the matter, its approach appears to have been that since the interest of the defendants can be safeguarded by giving them permission for user of the pathway till adjudication of the controversy in the fresh suit to be filed, permission for withdrawal of the suit as prayed for can be granted.

Such an approach of the High Court was recorded to be erroneous in the following words;

"It is the duty of the Court to feel satisfied that there exist proper grounds/reasons for granting permission for withdrawal of the suit with leave to file fresh suit by the plaintiffs and in such a matter the statutory mandate is not complied by merely stating that grant of permission will not prejudice the defendants. In case such permission is granted

at appellate or second appellate stage prejudice to defendant is writ large and he loses the benefit of the decision in his favour in the lower Court.”

The impugned order was thus set aside.

6. The decision in case of V.Rajendran (supra), undisputedly is in respect of formal defect and what would be covered within the formal defects have been set out in paragraph 11 of the judgment, which read as under :-

“In terms of Order 23 Rule 1(3) (b) where the court is satisfied that there are sufficient grounds for allowing the plaintiff to institute a fresh suit, the Court may permit the plaintiff to withdraw the suit. In interpretation of the word “sufficient grounds”, there are two views: one view is that these grounds in clause (b) must be “ejusdem generis” with those in clause (a), that is, it must be of the same nature as the ground in clause (a) that is, formal defect or at least analogous to them; and the other view was that the words “other sufficient grounds” in clause(b) should be read independent of the words a ‘formal defect’ and clause (a). Court has been given a wider discretion to allow withdrawal from suit in the interest of justice in cases where such a prayer is not covered by clause (a). Since in the present case, we are only concerned with “formal defect” envisaged under clause (a) of Rule (1) sub-rule (3), we choose not to elaborate any further on the ground contemplated under clause (b) that is “sufficient grounds”.

7. There can be no doubt in my mind after perusal of the facts of the case that the case of the present applicant do not fall within what is referred to as a formal defect in the suit.

8. The plaintiff filed the Regular Civil Suit No.1117 of 2004 for injunction against the defendants qua the suit property mentioned in para 1 of the plaint. In para 2, it is averred that she is in ownership and possession of the suit property, which has come in her possession from one Sitabai Kad through a registered Will executed on 29/08/1974. Pursuant to the said Will, it is pleaded that her name has been mutated in the record of right and since then, she is in possession of the said property. The defendant, who is pleaded to be her cousin brother-in-law, was obstructing her possession and, therefore, she filed the said suit, after she agitated her grievance with the revenue authority and could not get any relief.

9. Traversing the plea raised by the plaintiff, the defendants filed their written statement and denied the claim of the plaintiff that she inherited the said property through Will. It was specifically pleaded that the disputed land alongwith some other portion of land were the ancestral property of one Maruti Chondhe, Narayan Chondhe and Haribhau Chondhe and there was partition between them in the year 1950-51. It was pleaded that the defendant's father Haribhau was allotted some portion of agricultural land. Whereas Narayan Chondhe was allotted some other parcels of land, while Maruti was given the land from Survey No.314/6, 274/3, 288/5 and 337. The lands given to the share of the deceased Maruti, now are in possession of the present plaintiff. It is pleaded that deceased Sitabai Kad had no right to execute the Will in respect of the disputed property in the year 1974 and, therefore, the claim of the plaintiff cannot be sustained

and her action of mutating the properties in her name in the revenue records is unlawful. It was pleaded that the defendants are in possession of their lands given to their father Haribhau.

With the rival pleadings, the learned Judge settled the issues as under :-

“1. Whether plaintiff is entitled to perpetual injunction as prayed?

2. Whether defendant is entitled to the declaration in respect of Will executed by deceased Sitabai Kad as prayed?

3. Whether defendants are entitled to the declaration of their ownership as prayed?

4. Whether the counter claim Exh.37 is within limitation?”

10. The plaintiff did not enter into the witness box, but her power of attorney Shantaram Chondhe deposed on her behalf. She examined two other witnesses whereas the defendants examined defendant No.3 and two other witnesses. Several documents in form of the mutation entries and orders of the revenue authorities are placed on record. While determining the issues settled, the learned Judge recorded as under :-

“19. Here in the propounder and beneficiary in the said Will is present plaintiff Ranubai Chondhe. However, to utter dismay, the plaintiff did not enter into witness box to clarify the situation about the Will. Instead the plaintiff examined her power of attorney Shantaram Chondhe at Exh.57. This witness did depose that, he is having knowledge about the disputed lands and about the averments in the plaint. During

cross-examination, he stated that his birth date is 06.02.1976. But, the Will (Exh.60) was executed on 29.08.1974 i.e. even prior to two years of his birth. In these circumstances, this witness is not at all competent person to depose about the Will and the factual circumstances behind it. As discussed earlier, PW-2 Tulshiram Chondhe has caused much damage to the contentions of the plaintiff by way of his statements in the cross-examination. This witness has not elaborated all those aspects. Hence, he is not at all useful to prove the said Will Exh.60 in real sense.

20. I do find that, there is heavy cloud of suspicion around the execution of Will and as to whether it shows the real intention of the testator. SO also, there is another aspect about the said Will. As discussed earlier, defendants have raised two fold objections, one of which is about the competency of the deceased Sitabai Kad to execute Will of those properties, which were not given to her share. Indeed, Will Exh.60 include various agricultural lands at village Bhoogaon. Present disputed lands are also subject matter of the said Will, but then they are not the only one. Now, the power of attorney of plaintiff Ranubai had admitted during his cross-examination at Exh.57 that, all the properties are ancestral properties. Apparently, after the death of Ram and Laxman, Sitabai Kad was not the only heir surviving them. Maruti, Narayan and Haribhau were their other legal representatives. So, when all the properties are joint family properties, then a necessary question arises as to how deceased Sitabai Kad bequeathed agricultural lands belonging to the joint family irrespective of her own share. This aspect is also not at all explained by the plaintiff at any point of time. At the most, it can be said that, Sitabai Kad was entitled to execute the said Will in respect of her share

only. But, the Will clearly overreaches her share and includes all the joint family property. This is another facet which give severe blow to the Will executed by deceased Sitabai Kad.

21.Indeed, in view of my above discussion, it becomes clear that, the Will is not validly executed in view of provisions of Indian Succession Act. So, the defendants succeed to prove that the Will is not valid. But, the point of limitation mars their prayer for declaration in respect of that Will. Hence, I answer the issue accordingly in the negative.”

11. In the wake of the aforesaid finding being rendered, specifically to the effect that the defendants have succeeded to prove that the Will on the basis of the which the plaintiff is claiming her ownership and possession, is not valid and when the suit is dismissed with the aforesaid finding, I cannot agree with the learned counsel for the applicant that the defect in the suit is merely a formal defect, since she had inadvertently claimed a relief of declaration. Once the findings have been arrived at, in response to the issues formulated and when the claim of the plaintiff is refused by dismissing the suit, merely because the counter-claim of the defendants is also rejected, in any case, it can be said to be a formal defect as is contemplated by the Hon'ble Supreme Court in case of V.Rajendran (supra). Further, the parameters laid down by the Hon'ble Supreme Court in case of K.S.Bhoopathy (supra), also cannot be invoked as the defect in the suit is not a formal defect.

In the wake of the aforesaid, the learned Judge has rightly applied the law laid down in case of K.S.Bhoopathy

(supra) and refused the liberty to the plaintiff. The reasoning of the learned District Judge cannot be faulted with. Resultantly, the order is upheld and the Civil Revision Application stands dismissed.

Needless to state that since the appellate Court has issued directions in para 3 of the impugned order, the Appeal shall be disposed of within a period of three months from today.

(SMT. BHARATI DANGRE, J.)