

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

WRIT PETITION NO.10129 OF 2019

Smt. Shashikala Shriram Shetty Petitioner
(Ori. Plaintiff No.1)

Vs.

Jagannath Honnaya Shetty & Ors. Respondents

Mr. Siddharth C. Wakankar for Petitioner
Ms. Vrushali Vaidya a/w Mr. Ajinkya Udane for Respondents

Coram : NITIN W. SAMBRE, J.
Date : 24TH FEBRUARY, 2021

P.C.:

1. This Petition is by Plaintiff No.1 to Special Civil Suit No. 1228 of 2017 pending on the file of Civil Judge, Senior Division, Pune, in which Defendant No.6 is alleged to be running a restaurant namely Hotel Roopali i.e. property No. 1-B mentioned in the suit, illegally in collusion with Defendant No. 1. It appears that said Defendant No.6 initiated Civil Suit No. 227 of 2017 in the Court of Small Cause at Pune under Section 88 read with Order XXXV of the Code of Civil Procedure, 1908 read with Section 26 of the Provincial Small Cause Courts Act, 1887 thereby praying a decree that the Defendants be directed to inter-

plead amongst them concerning their claims to the sum of Rs.27,75,000/- and all future sums under the agreement dated 30th July, 2015, an injunction is claimed in the Inter-pleader suit from taking any proceeding or legal action in relation to the suit property and the sum of Rs.27,75,000/- and all the future sums.

2 Invoking provisions of Order XXXV, Rule 3 C.P.C., Defendant No. 6 to the said suit for partition being Special Civil Suit No.1228 of 2017 moved an application, Exhibit 51 seeking stay to the suit to the extent of said Defendant No. 6, which is allowed vide impugned order dated 22nd July, 2019. As such, this petition by the Petitioner- original Plaintiff No.1.

3. Learned counsel for the Petitioner would invite attention of this Court to the prayer clause in the plaint in Special Civil Suit No.1228 of 2017, which is for partition. According to him, apart from the decree for partition and separate possession, an enquiry in mesne profit is also claimed. A specific prayer i.e. prayer clause (G) is made against Defendant No. 6 i.e. the Plaintiff in the Interpleader suit, which

reads thus :

“(G) Defendant No. 6 be ordered to be evicted from the suit premises described in para 1(B) and be permanently restrained from entering into the suit property described in para- 1(B) or to carry any business therein so also mesne profit enquiry may also be ordered to be carried against Defendant No.6 and the same be decreed along with future interest thereon.”

4 As such, the contention of learned counsel for the Petitioner is in view of prayer Clause (G) and the other prayer clauses, the pendency of the suit being Interpleader Suit No. 227 of 2007 ought not to have been considered against the Petitioner and that being so, the order impugned is not sustained.

5 Provisions of Section 88, so also Order XXXV, Rule 3 are also relied, so as to question the order impugned.

6 While countering the submissions, learned counsel for the Respondents would urge that the provisions of Rule 3 of Order XXXV C.P.C. was justifiably invoked by Respondent/Defendant No.6 to the

partition suit, as according to her, said provisions creates an embargo on continuing the other suit against Interpleader suit. She would further claim that suit is stayed only to the extent of Defendant No. 6, however, the parties are at liberty to claim other reliefs in the suit.

7 Considered rival submissions.

8. By way of prayer Clause (G) in the partition suit i.e. Special Civil Suit No.1228 of 2017 pending on the file of Civil Judge, Senior Division, Pune and decree for eviction is prayed against the said tenant in regard to the property described in para- 1(B) of the plaint and also an injunction is claimed from entering into the suit property described in para- 1(B), an enquiry of mesne profit is also claimed in the suit.

9 In the aforesaid background, if we consider the provisions of Section 88 of C.P.C., the said provisions create an embargo on the right of Defendant No.6 to initiate an Interpleader suit by virtue of proviso. The said proviso provides that in case if the suit is pending, in which the rights of all parties can be properly decided, it is not open for Defendant No.6 to initiate Interpleader suit. As such, there is an

embargo on the right of Defendant No.6 to continue with the Interpleader suit even if same was initiated prior in point of time than that of partition suit. As such, the trial Court ignoring the said proviso to Section 88 has proceeded to pass the order impugned.

10 As far as the case of Defendant No. 6 in the Interpleader Suit is concerned, it is claimed that one Smt. Appi Sridhar Shetty, who was proprietor of Hotel Roopali entered into an agreement of Leave and License dated 30th July, 2015 with Defendant No.6 on terms and conditions mentioned therein. As such, according to him, he would become a licensee and was conducting himself in accordance with Rent Agreement dated 30th July, 2015. It is claimed that said Smt. Appi Sridhar Shetty, landlord expired on 29th August, 2016 leaving behind the Defendants as her legal heirs. It is further claimed that Defendant No.6 approached the other Defendants in the Interpleader Suit, enquiring as to in whose name the alleged license fees needs to be deposited. He has also issued notices to the Defendants to the said suit and as such has come out with the following prayers against the parties to the partition suit, which reads thus :

- “(a) The defendants may kindly be directed to interplead amongst them concerning their claims to the said sum of Rs.27,75,000/- and all the future sums under the agreement dated 30/07/2015 and arrive at a decision,
- (b) The defendants may kindly be restrained by decree of permanent injunction from taking any proceeding/legal action against the plaintiff in relation to the suit property and the sum of Rs.27,75,000/- and all the future sums under the agreement dated 30/07/2015.
- (c) The costs of the present proceedings throughout may kindly be awarded in favour of the plaintiff from the defendants,
- (d) Any other just and equitable reliefs in the interest of justice may kindly be granted.”

11. As such, in the aforesaid background, if we consider the nature of pleadings and prayers in Interpleader Suit and the partition suit, it can be noticed that the subject matter in both the suits is different. As in the partition suit, what is claimed against the Plaintiffs in Inter-pleader Suit is a decree for eviction, enquiry in the mesne profit, whereas in the Interpleader suit, the prayer is to interplead concerning a sum of Rs.27,75,000/- and future sums to be payable

under Leave and License Agreement dated 30th July, 2015 and also the future sums arising out of liability against alleged leave and license agreement.

12. That being so, it cannot be said that the subject matter is same in both the suits, as the different reliefs are claimed by the parties in the different suits. As such, it is apparent that the very requirements under Rule 3 of Order XXXV is not satisfied so as to sustain the order impugned. That being so, the Court below was not justified in exercising powers under Rule 3 in favour of the Respondent/Defendant No. 6 to the partition suit in granting application Exhibit 51. As such, the order impugned dated 22nd July, 2019 passed below Exhibit 51 is hereby quashed and set aside.

13. Application Exhibit 51 stands rejected.

14. The petition stands allowed in above terms.

(NITIN W. SAMBRE, J.)