
(2009) 11 BOM CK 0171

In the Bombay High Court

Case No : Writ Petition No. 4427 of 2003

Amarchand Kunjilal Sharma

APPELLANT

Vs

Kondu Dagdu Paulkar and Others

RESPONDENT

Date of Decision : 05-11-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 10

Citation : (2010) 2 ALLMR 814 : (2010) 1 BomCR 803

Hon'ble Judges : Naik Vasanti A., J

Bench : Single Bench

Advocate : C.A. Joshi, for the Appellant; S.S. Deshpande, for Respondent Nos. 1 and 2 and Ahirkar, A.G.P. for Respondent Nos. 3 and 4, for the Respondent

Judgement

Naik Vasanti A., J.—By this petition, the petitioner impugns the orders passed by the Joint Civil Judge, Senior Division, Washim dated 11.9.2003, rejecting the application filed by the petitioner u/s 10 of the CPC for staying the suit. The respondent Nos. 1 and 2 had filed the Regular Civil Suit No. 60/2002 against the petitioner alleging therein that they had a right to perform pooja and archa in the temple of Devi-goddess situated in Field Gat No. 374, measuring 1 hectare 48 r, of village Wanoja. The respondent Nos. 1 and 2 had prayed for a declaration that they being the members of Mang Community, had a right of pooja and archa in the said temple along with other villagers of the village Wanoja. It was pleaded by the respondent Nos. 1 and 2 that the petitioner was restraining the respondent Nos. 1 and 2 from performing their pooja and archa in the said temple.

2. Prior to the institution of the Regular Civil Suit No. 60/2002 by the respondent Nos. 1 and 2, the petitioner had instituted a suit against seven defendants and respondent Nos. 1 and 2 were defendants Nos. 4 and 5 in the said suit. The suit filed by the petitioner was registered as Civil Suit No. 133/1997. It was the case of the petitioner in Civil Suit No. 133/1997, that the defendants in that suit including the respondent Nos. 1 and 2 were disturbing the peaceful possession of

the petitioner, over the suit field and the Mandir of goddess - Devi. The petitioner, had therefore sought a decree of permanent injunction restraining the defendants in Regular Civil Suit No. 133/1997 from disturbing the peaceful possession of the petitioner over the field and the Mandir. It is necessary to note that the civil suit filed by the petitioner was decreed by the judgment dated 29.1.2001. The trial Court had permanently restrained the defendants in Regular Civil Suit No. 133/1997 from disturbing the peaceful possession of the petitioner over the property. However, the defendants, including the respondent Nos. 1 and 2 and all the villagers of the village were allowed to perform pooja and archa in the temple of goddess - devi situated in the suit land.

3. In view of the decree passed in the previous suit i.e. Regular Civil Suit No. 133/1997, the petitioner pleaded that the suit filed by the respondent Nos. 1 and 2 i.e. R.C.S. No. 60/2002 was not maintainable. The petitioner had pleaded that the relief sought by the respondent Nos. 1 and 2 in Regular Civil Suit No. 60/2002 was already granted to the respondent Nos. 1 and 2 and all the villagers by the judgment and decree dated 29.1.2001. According to the petitioner the issues involved in both the suits were common and hence it was necessary to stay the suit filed by the respondent Nos. 1 and 2. The application filed by the petitioner was however, dismissed by the trial Court by the impugned order dated 11.9.2003.

4. Shri C.A. Joshi, the learned Counsel for the petitioner took this Court through the issues framed in the previous suit and the present suit to show that they were common and the trial Court committed an error in dismissing the application filed by the petitioner by impugned order dated 11.9.2003. The learned Counsel for the petitioner submitted that the relief claimed by respondent Nos. 1 and 2 in R.C.S. No. 60/202 was already granted to the respondent Nos. 1 and 2 and the other villagers by the judgment and decree dated 29.1.2001, The learned Counsel for the petitioner submitted that in case it was the case of respondent Nos. 1 and 2 that the petitioner was preventing them from performing pooja and archa in the temple of the goddess, the respondent Nos. 1 and 2 could have sought the execution of the decree, but could not have filed the R.C.S. No. 60/2002.

5. Shri S.S. Deshpande, the learned Counsel for the respondent Nos. 1 and 2 supported the order passed by the learned trial Court on 11.9.2003 and submitted that the previous suit filed by the petitioner was for permanent injunction and the present suit filed by respondent Nos. 1 and 2 is for declaration that they belong to Mang Community and they have a right of pooja and archa in the temple of the goddess. The learned Counsel for the respondent Nos. 1 and 2 submitted that the issues in both the suits were not common and the trial Court had rightly dismissed the application filed by the petitioner. The learned Counsel for the respondent Nos. 1 and 2 sought for dismissal of the writ petition.

6. Shri Ahirkar, the learned A.G.P. for respondents Nos. 4 and 5 had nothing much to say in the matter, as according to him the said controversy was mainly

between the petitioner and the respondents Nos. 1 and 2.

7. I have considered the submissions made on behalf of the parties and perused the issues in the previous suit and the instant suit. I have also perused the plaint in R.C.S. No. 133/1997 along with plaint in R.C.S. No. 60/2002. It is pleaded by the petitioner in R.C.S. No. 133/1997 that the defendants in that suit which included respondents No. 1 and 2 had started claiming rights over the temple and were seeking permission to come to the temple at any time. It was stated that the defendants tried to disturb the possession of the petitioner in the field and the temple. The petitioner had therefore, sought a permanent injunction restraining the defendants from disturbing the peaceful possession of the petitioner over the field and the Mandir. It is necessary to note that before the R.C.S. No. 60/2002 was filed by respondent Nos. 1 and 2, the suit of the petitioner was decreed and though the permanent injunction was granted against the defendants restraining them from disturbing the peaceful possession of the petitioner over the field property the defendants and all the villagers were allowed to perform the pooja and archa in the temple of goddess situated in the suit property lawfully as per their religious rights. The respondent Nos. 1 and 2 have pleaded in R.C.S. No. 60/2002 that they were members of the Mang Community and had a right to perform pooja and archa in the temple of the goddess and the petitioner was restraining them in performing the pooja and archa. Therefore they had sought a declaration that they being members of Mang Committee should be permitted to perform pooja and archa in the said temple along with other villagers according to their religious rights and customs. It is necessary to note that this relief was already granted to the respondent Nos. 1 and 2 by the judgment and decree dated 29.1.2001. The Issue No. 3 in the first suit was common to the other issues involved in the present suit. The respondents Nos. 1 and 2 were trying to agitate the same questions before the Court by filing a second suit i.e. R.C.S. No. 60/2002 though the relief sought in the said suit was already granted by the judgment and decree dated 29.1.2001 in the previous suit. Since the issues involved in both the suits were common, it was necessary for the trial Court to have allowed the application filed by the petitioner u/s 10 of the Code of Civil Procedure. The trial Court was not justified in rejecting the application only on the ground that the relief claimed in the first suit was not similar to the relief claimed in the second suit as in the first suit a permanent injunction was sought and in the second suit a declaration was sought. The approach of the trial Court in considering the matter was not just and proper. In the facts and circumstances of the case, the trial Court ought to have allowed the application filed by the petitioner u/s 10 of the Code of Civil Procedure.

8. In the result, the writ petition is allowed. The impugned order dated 11.9.2003 is hereby quashed and set aside. The application filed by the petitioner u/s 10 of the CPC is hereby allowed. Rule is made absolute in the aforesaid terms with no order as to costs.