
(2008) 02 BOM CK 0185
In the Bombay High Court
Case No : Writ Petition No. 2002 of 2006

Baban Karale

APPELLANT

Vs

Mahendra Karale and Yelnath karale

RESPONDENT

Date of Decision : 06-02-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 1 Rule 10(2), Order 22 Rule 10
Constitution of India, 1950 — Article 227

Citation : (2008) 2 BomCR 524 : (2008) 3 MhLj 222

Hon'ble Judges : Naresh H. Patil, J

Bench : Single Bench

Advocate : S.T. Ghute, for the Appellant;

Final Decision : Allowed

Judgement

Naresh H. Patil, J.—Notice for final disposal of petition at admission stage was issued to respondents. None appeared for the respondents.

2. Rule, returnable forthwith.

3. The petitioner, plaintiff, filed a suit being Regular Civil Suit No. 144 of 2005 in the Court of Civil Judge (Junior Division), Paranda, District Osmanabad, for possession of the suit property. In short, the petitioner's case is that at the time of measurement of land, it was noticed that respondents had encroached upon the land owned and possessed by the petitioner. The petitioner requested the respondents to remove the encroachment, but as they were found to be reluctant, the petitioner was constrained to file suit. The suit was filed in the year 2005. According to the petitioner, respondents defendants appeared in the suit.

4. The defendant No. 1, who is a son of the defendant No. 2, filed an application dated 28/10/2005 stating therein that the defendant No. 2 does not hold any land in Block No. 260 in his name; whereas the defendant No. 1 holds land admeasuring 1 Hectare 52 Ares in the said Block number. The defendant No. 1

prayed for deletion of defendant No. 2 from the proceedings of the suit. The plaintiff objected to the said application.

5. By an order dated 01/02/2006, the learned Civil Judge allowed the application filed by defendant No. 1 and directed deletion of name of the defendant No. 2 as prayed for by observing that, according to the defendant No. 1 he is in possession of portion out of Block No. 260 and his father was not in possession of the same. The said order is subject-matter of the writ petition filed under Article 227 of the Constitution of India.

6. The learned Counsel Shri. S.T. Ghute submitted that considering the provisions of Order I Rule 10 of Code of Civil Procedure, 1908 (for short "C.P.C."), a plaintiff is dominus litis as far as the litigation started by him is concerned and would be in a better position to decide as to who should be defendant of the suit instituted by him. In the facts of the case, it was submitted that the plaintiff had raised pleadings in the suit to the effect that both the defendants had encroached upon the portion occupied by the plaintiff and, therefore, the suit was filed against both the defendants for relief of possession. The plaintiff contends that the defendant No. 1 is son and defendant No. 2 is father of defendant No. 1. In the light of these facts and circumstances, according to the counsel, the trial Court committed error of jurisdiction in directing deletion of defendant No. 2 from array of defendants. The learned Counsel placed reliance on the following reported judgments to support his contentions.

(1) Herbertsons Ltd. v. Kishore Rajaram Chhabria 2003(3) Mh.L.J.550,

(2) Adam A. Sorathia and Another Vs. Municipal Corporation of Greater Bombay and Another, ,

(3) Amit Kumar Shaw and Another Vs. Farida Khatoon and Another, .

7. The relevant provisions of Order I Rule 10(2) C.P.C. read thus:

10.(1) ...

(2) Court may strike out or add parties. - The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

8. The purport of the provisions of Order I Rule 10, is clear that the Court has power to order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out and the name of any person who ought to have been joined, whether as plaintiff or defendant, may be added.

9. In the present case, the defendant No. 2 has not filed any application for

seeking directions to delete himself from the suit, but the application is made by defendant No. 1 stating therein that the defendant No. 2 is not at all interested in the suit property.

10. The trial Court allowed the application of the defendant on the premise that the defendant No. 1 was not in possession of the property situated in Block No. 260. Considering the pleadings and the stand adopted by the defendants, I am of the view that the trial Court committed an error in allowing the application of defendant No. 1. The plaintiff's allegations are against both the defendants from whom the plaintiff seeks possession. The issue as to whether the defendant No. 2 encroached upon the area of the land owned and possessed by the plaintiff, whether the defendant No. 2 resides with the defendant No. 1 and other incidental issues could be decided only after the evidence is led by the parties. It would be premature, in the facts of the case, to order deletion of the defendant No. 2, more particularly in view of the fact that the plaintiff wanted defendant No. 2 as party to the suit.

11. It is necessary to refer to the observations made by the Apex Court in the case of Amit Kumar Shaw (cited supra) in para No. 12, which read thus:

12. Under Order XXII Rule 10, no detailed inquiry at the stage of granting leave is contemplated. The Court has only to be prima facie satisfied for exercising its discretion in granting leave for continuing the suit by or against the person on whom the interest has devolved by assignment or devolution. The question about the existence and validity of the assignment or devolution can be considered at the final hearing of the proceedings. The Court has only to be prima facie satisfied for exercising its discretion in granting leave for continuing the suit.

12. In the case of Adam A. Sorathia (cited supra), the Bombay High Court observed in para No. 8 thus:

8. The law relating to the necessary and proper parties to the proceedings is no longer untouched. The law is settled by series of judgments of this Court and of the Apex Court that where the presence of respondent is necessary for complete and effectual adjudication of the dispute, though no relief is claimed, against him, he is a proper party.

13. In the case of Herbertsons Ltd. (cited supra), the learned Single Judge of Bombay High Court observed, placing reliance on reported judgment in the case of Jivanlal Damodardas v. Naraya 1972 Mh.L.J. 64, thus:

It is principally for the plaintiff to decide whom to join as a defendant. It is only with his concurrence that somebody can be added as a defendant. This is because the plaintiff is the dominus litis so far as the litigation started by him is concerned, when however a party is absolutely necessary, such a party can be added into the litigation, no matter whether the plaintiff opposes joining of such a party.

14. The authoritative pronouncements (cited supra) on the issue are in support

of the submissions advanced by the learned Counsel for the petitioner. For the reasons stated, the impugned order is required to be quashed and set aside.

15. The petition is allowed. The impugned order below Exh.11 in Regular Civil Suit No. 144 of 2005, dated 1/02/2006, passed by Civil Judge (Junior Division), is quashed and set aside.

16. Rule made absolute in above terms. No costs.