

(2019) 08 BOM CK 0097

In the Bombay High Court

Case No : Civil Revision Application No. 264 Of 2014

Chandrakant Pandurang Shingade And Anr

APPELLANT

Vs

Walchand Gulabchand Bora

RESPONDENT

Date of Decision : 06-08-2019

Acts Referred:

Code Of Civil Procedure, 1908 — Section 115, Order 7 Rule 11(a), Order 7 Rule 11(b), Order 7 Rule 11(c), Order 7 Rule 11(d), Order 23 Rule 3, Order 23 Rule 4, Order 23 Rule 3(a), Order 23 Rule 4(b)

Citation : (2019) 08 BOM CK 0097

Hon'ble Judges : Sandeep K. Shinde J

Bench : Single Bench

Advocate : S.M. Oak, Sagar Anant Joshi, Shriram S. Kulkarni

Final Decision : Dismissed

Judgement

Sandeep K. Shinde, J

1. It is an application under Section 115 of the Civil Procedure Code, 1908 (for short, "CPC"), taking exception to the order dated 09.10.2007, passed by the Learned Civil Judge, Senior Division, Baramati, in Special Summary Suit No. 30 of 2007.

2. The applicant-defendant filed an application under Order 7, Rule 11(d) r/w., Order 23, Rule 3 and 4(b) of the Civil Procedure Code, 1908 and urged for rejection of plaint. Order 7, Rule 11 (a) to (d) reads as under :-

"11. Rejection of Plaint - The plaint shall be rejected in the following cases:-

(a) where it does not disclose a cause of action;

(b) where the relief claimed is under-valued, and the plaintiff, on being required by the Court to so correct the valuation within a time to be fixed by the Court, fails to do so;

(c) where the relief claimed is properly valued, but the plaint is written upon

paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;

(d) where the suit appears from the statement in the plaint to be barred by any law".

3. It is applicant's case that the Respondent-Plaintiff had instituted Summary Suit No. 30 of 2007 (hereinafter called 'previous suit') in the Court of Civil Judge, Senior Division, Baramati, but he withdrew it in pursuant to order dated 09.10.2007. It reads as under :-

"Heard the learned counsel for the plaintiff. Perused the application. The plaintiff wants to withdraw the suit converting its nature in Special Civil Suit. I find substance in his submission. The permission is accorded to withdraw the suit. The documents and stamp be returned to the plaintiff as prayed for."

4. It is applicant's case that soon thereafter Respondent instituted Special Civil Suit No. 128 of 2007 on 20.02.2008 on same cause of action, as was in the previous suit. The applicant would contend that the previous suit was withdrawn by the Plaintiff unconditionally without liberty to institute a fresh suit in terms of Rule 3 r/w. Rule 4 and Order 23 of the CPC. The applicant would therefore contend that in absence of expressed liberty to institute a fresh suit, subsequent suit (present subject suit) was not maintainable, and thus sought for rejection of plaint under Order 7, Rule 11(d) of CPC.

Learned Judge rejected the said application holding that previous suit was permitted to be withdrawn, with liberty to institute a fresh suit. Aggrieved by the order dated 23.01.2014, this application is preferred.

5. Learned counsel for the applicant submits that order dated 09.10.2007 passed under Order XXIII CPC does not expressly permit or grant liberty to the Respondent/ Plaintiff, to institute a fresh suit. He further submits that while permitting to withdraw the previous suit, Learned Judge has not recorded the satisfaction about the formal defect in the suit and reasons for its' likely failure.

6. Perused application made for withdrawal of previous suit and order dated 09.10.2007. Respondent-Plaintiff, sought leave to withdraw the previous suit with liberty to file suit, having found and realized that instead of Special Summary Suit, he ought to have filed Special Civil Suit. It is more than clear from the order dated 09.10.2007, that the Learned Trial Court has recorded its satisfaction as required under Rule 3 Clause (a) of Order XXIII of the CPC and having found substance in the application, granted permission to withdraw the suit. Thus, there was complete compliance of Rule 3 of the Order XXIII CPC

7. Contention of the Applicant that though Plaintiff was permitted to withdraw the suit but in absence of express liberty to institute fresh suit, second suit was not maintainable, cannot be accepted. In as much as prayer for withdrawal and liberty to file fresh suit cannot be split up in two parts viz. withdrawal and liberty

to file fresh suit. It has to be allowed as whole or rejected as whole. It is well settled that if an application is made for withdrawal of the suit with liberty to file suit, it is not open for the Court to grant only permission for withdrawal, without liberty to institute the proceedings, though it is open for the Court to reject such application, as held in the case of Mario Shaw Vs. Martin Fernandez and Anr. reported in AIR 1996 Bombay 116.

8. Application is devoid of merit. It is dismissed with no order as to costs.