
(2005) 02 BOM CK 0105

In the Bombay High Court

Case No : Civil. Rev. Application No's. 158 and 182 to 185 of 2004

Gajanan Bhimrao Thombare

APPELLANT

Vs

Ashok Janakilal Tawari

RESPONDENT

Date of Decision : 07-02-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 1, Order 2 Rule 2, Order 23 Rule 1, Order 23 Rule 1(3), Order 23 Rule 1(4)

Citation : (2006) 2 MhLj 50

Hon'ble Judges : B.P. Dharmadhikari, J

Bench : Single Bench

Advocate : P.Y. Deshpande, for the Appellant; Raj Bakode, for the Respondent

Final Decision : Dismissed

Judgement

B.P. Dharmadhikari, J.—These Revision Applications u/s 115 of Civil Procedure Code, are filed by the original defendants, questioning the order passed upon an application filed by them in the respective suits filed by the respondent/original defendant, by the Civil Judge, Junior Division, Dhamangaon Railway. The said application was moved for rejection of the Plaint on the ground that the suit instituted subsequently after withdrawal of the earlier suit was not maintainable. The trial Court has considered the provisions of the Order 23, Rule 1(3) of Civil Procedure Code, and has found that the said provisions is not applicable in the instant case holding that during the pendency of the earlier suit, the plaintiff (present respondent) instituted subsequent suit and hence after institution of the subsequent suit the permission was sought for withdrawal, and therefore, the provisions of Order 23, Rule 1(3) were not attracted. It found that the objection in relation to the Order 2, Rule 2 of Civil Procedure Code, is already raised before it and it is mixed question of law and fact and issue about it is already framed and will be adjudicated upon during the course of trial.

2. I have heard Advocate Deshpande, for petitioner and Shri Bakode for respondent/Original plaintiff. Advocate Deshpande, states that the respondent

had filed suit against the present revision applicants, Co-operative Society and District Central Co-operative Bank at Amravati for injunction and in it sought relief to restrain the defendants i.e. present revision applicants from collecting the payment of the cheques from the defendant Nos. 6 and 7 i.e. Co-operative Society and Bank. He points out that, an injunction was also sought to direct the said Co-operative Society and Bank, to give payment of these cheques to the plaintiff/respondent with interest. He points out that the Pursis was filed in the suits by the respondent/plaintiffs on 25-4-2001, and as the plaintiff did not want to prosecute the suit, the suit came to be dismissed for want of prosecution. He states that in the Regular Civil Suit No. 41/2000, same plaintiff has joined revision applicant as sole defendant and has sought for money decree for recovery of Rs. 10,000/-. He therefore, states that as the subject-matter in both the suits is same and purpose of filing is same, the subsequent suit i.e. Regular Civil Suit No. 41/2000 is barred in view of Order 23, Rule 1 and Order 2, Rule 2, Civil Procedure Code. He contends that impugned order of trial Court reveals total non-application of mind to the facts and law.

Advocate Bakode, for respondent/plaintiff contends that the subject-matter of both the suits is not identical. He contends that the story of the respondent/plaintiff is that the revision applicant sold his cotton to Maharashtra State Cotton Growers Federation, and as payment thereof was not received, because the Amravati District Central Co-operative Bank did not have necessary amounts the respondent/plaintiff had advanced them payment against the security of cheques issued in favour of the defendants. It is his case that along with the present revision applicant, three other persons had also similarly sold cotton, and they were also advanced money by him. These persons were added as defendant Nos. 3 to 5 in the suit. He further stated that therefore, the relief which was sought in that suit was to recover money on the strength of the cheques from Amravati District Central Co-operative Bank. The learned Advocate further stated that in the meanwhile in view of the subsequent event i.e. rejection of application for grant of temporary injunction in Regular Civil Suit No. 29/2000 on 6-5-2000, respondent thought it fit to file individual suit against each defendant so as to seek a money decree directly against him and hence on 12-5-2000 he filed Regular Civil Suit against the present revision applicant and other suits against others sought money decree only against him. He states that the pursis was moved in the earlier suit on 20-6-2000, and in that pursis, it was mentioned that he has filed fresh suits against the present revision applicant and against other defendants therein, and therefore, respondent sought permission to withdraw the said suit and also sought liberty by praying to the Court to reserve right to file new suit. He points out that "no objection" was given on this pursis by the Advocate who appeared for the revision applicant and the application has been allowed as sought i.e. by reserving right to file new suits. The said Advocate therefore, contends that the view taken by the learned trial Court is just and proper and Order 23, Rule 1(3) of CPC has no application in the facts and circumstances of the case.

3. At this juncture it is essentially to note that the respondent has filed fresh suit vide Regular Civil Suit No. 44/2000, against Ramdas Sitaram, who has filed identical revision, vide Civil Revision Application No. 182/2004; The respondent has filed fresh suit against the defendant No. 3-Hanuman Laxman Shende, vide Regular Civil Suit No. 43/2000 and the said Hanuman has filed Civil Revision Application No. 183/2004; The respondent has also filed fresh suit against the defendant No. 5 - Pundlik Marotrao Zade, bearing Regular Civil Suit No. 40/2000 and the said Pundlik has filed Civil Revision Application No. 184/2004; Against the defendant No. 2 - Shripat Kewalu Bansod, fresh Regular Civil Suit No. 42/2000 is filed by the respondent and the said Shripat has filed Civil Revision Application No. 185/2004, before this Hon"ble Court. From the above discussion it is apparent that the facts and grounds in all these Revision Applications are identical and hence they are being disposed of together by treating the Civil Revision Application No. 158/2004, as principal Civil Revision Application, for that purpose.

4, Advocate Deshpande has placed reliance upon the judgment of Rajasthan High Court, reported in Hari Ram Vs. Lichmaniya and Others, . wherein it has been held that the procedure for filing fresh suit in relation to the same subject-matter is prescribed under Order 23, Rule 1; Order 2, Rule 1 and Sections 10, 11 and 12 of Civil Procedure Code, and the parties cannot device their own procedure to file fresh suit by passing the provisions of law. The learned Judge of Rajasthan High Court has held that, there is no provision of law which permits institution of more than one suit by the plaintiff for one subject-matter with same cause of action. Advocate Deshpande, therefore, contends that interpretation upon the provisions of Order 23, Rule 1(3) placed by the learned trial Court is erroneous and deserves to be quashed and set aside. Para 25 of this ruling reads as under :

25. It is immaterial whether plaintiff files another suit with respect to the subject-matter against the same party during the pendency of his earlier suit or after withdrawal of the earlier suit without leave of the Court to file fresh suit, consequence is the same and i.e. abandonment of his CLAIM with statutory restriction against second suit as provided in Sub-rule (4) of Rule 1 of Order 23, Civil Procedure Code. Even if, the principles of res judicata cannot be applied still the plaintiff cannot have any presumption to walk in Court and go out of the Court after inflicting injury upon the defendant and even upon the Court of dragging in litigation and wasting precious time without having any consequence coming into the Court and compelling other party to face the litigation may it be for long period or for shortest period. The complete scheme of the Civil Procedure Code, makes it ambiguously, clear that a party can have one opportunity to approach the Court for getting decision on all the issues raised and on all the issues which could have been raised by the plaintiff at the time of filing suit by the plaintiff and further even on the issues which arise on the pleas of the defendant taken in defence to destroy plaintiff's claim by establishing hollowness of the plaintiff's claim or by establishing his right, title or interest in the subject-matter necessary to destroy plaintiff's claim. If the plaintiff

withdraws from the suit he is at liberty to do so only with consequence of losing all his claims with respect to the subject-matter of the suit. Once defendant is invited by the plaintiff and who is contesting the suit, not agreeing to satisfy the plaintiff for his claim and reliefs expressly in terms of Sub-rule (3) of Rule 1 of Order 23, CPC to the satisfaction of the Court the plaintiff unilaterally cannot walk out of the Court by saying that he himself feels satisfied about his claim and reliefs for which defendant never conceded and plaintiff cannot take away right of the defendant to get the decision on the issues involved in the suit on the basis of the pleading of both the parties to the suit irrespective of the burden of proving the issues. It is true that neither the plaintiff nor the defendant can be compelled to litigate, but after filing suit any of them may not contest or can withdraw from contest but only with by conceding other's claim or withdrawal of his claim for every litigant after start of litigation cannot avoid its lawful and final decision nor have right to prevent Court from deciding the dispute as it is not convenient to them at this point of time and to keep the dispute alive for adjudication by the Court at the time which suits them or suit them by changing their capacity, plaintiff to defendant or vice versa. The proposition is in consonance with number of provisions of the Civil Procedure Code, which are enacted to avoid multiplicity of the proceedings by the parties in the Court.

He further relief upon the judgment of Gujarat High Court, reported in Narayan Jethanand and Others Vs. Asapuri Vijay Saw Mill, to contend that when first suit is withdrawn without permission, subsequent suit on same cause of action is barred. In that case, the Gujarat High Court was considering the case of plaintiff who initially filed a suit in 1973 for recovery of amount of Rs. 8,750/- as recovery of their term loan. It appears that earlier he had filed Civil Suit No. 2023/1971, but it was withdrawn unconditionally on 17-12-1971. In that suit, the plaintiff had pleaded that the defendant purchased the goods on credit. It is in this circumstances, the learned High Court upheld the view of the trial Court that the suit is barred under Order 23, Rule 1(3). However, in the present case, as discussed above the suit was withdrawn reserving right to file a new suit and in pursis it was disclosed that the said suit was already instituted. It is thus clear that after instituting the suit and in view of the institution of new suit plaintiff has withdrawn Regular Civil Suit No. 29/2000. No objection was given by the revision applicant on this Pursis, filed by plaintiff for withdrawal of earlier suit and the learned trial Court also allowed it "as sought". Thus it is apparent that the trial Court has permitted withdrawal of the suit by the plaintiff by reserving right as mentioned above.

5. Advocate Bakode, for the respondent/plaintiff has relied upon the judgment of Andhra Pradesh High Court, reported in AIR 1998 AP 414 M.A. Faiz Khan v. Municipal Corporation of Hyderabad wherein the learned judge has laid down that the procedural rigor cannot be allowed to come in the way of substantive justice. Filing of the second suit without actually obtaining permission to withdraw the first suit should only be treated as a procedural irregularity, which is curable, and the permission to withdraw the first suit is only to file fresh suit and when such

permission is granted, the suit already instituted should not fail. The earlier suit considered by the A. P. High Court, was filed without issuing suit notice and during its pendency, after giving suit notice fresh suit was filed. Observations of High Court in para No. 5 and 6 are important. The same are :

"5. Under Order 23, Rule 1 Sub-rule (3), CPC it is permissible for the Court if the suit must fail for reason of some formal defect, to grant permission to withdraw the suit, with liberty to institute a fresh suit. In the present case, the earlier suit should fail for want of statutory notice. Therefore, the petitioner will come within the four corners of Sub-rule (3) of Rule 1 of Order 23. He is, therefore, entitled to seek the grant of permission to file a fresh suit on the same cause of action. The only defect in the instant case is that before obtaining such a permission, the petitioner filed a fresh suit for same cause of action. It is the contention of the petitioner that there was an imminent threat of demolition and statutory notice could not be given before filing of first suit. Hence he had to file the suit which is now sought to be withdrawn and another suit was filed on the same cause of action. The Learned Counsel for the petitioner relied on a decision in *B. Rizwang Baig v. Municipal Corporation of Hyderabad* 1989(1) APLJ 480, wherein it was held by the learned Single Judge of this Court, following the decision of the Kerala High Court, in *Ammini Kutty and Others Vs. George Abraham*, that merely because a fresh suit has already been instituted, that should not be a ground for not according permission to withdraw the earlier suit and that if the suit was allowed to be withdrawn, it should be recorded as having never been brought. It is the view of the learned Judge of Kerala High Court in the above case *supra* that (at page 248-249)-

...it is not really material whether the permission is granted before or after the institution of a fresh suit. Even if the institution of the second suit before obtaining of permission to withdraw the first is not proper, that can at best only be an irregularity, which should be considered as cured at least from the time permission is obtained. It is settled law that grant of permission under the Rule is no guarantee for the maintainability of the second suit, that is a question which will have to be decided separately, as and when it is raised in the subsequent proceedings.

Thus, the only question that should fall for consideration for the Court when an application was filed under Order 23, Rule 1, Sub-rule (3) CPC is whether the suit must fail by reason of some formal defect as stipulated in Clause(a) of Sub-rule (3), (we are not concerned now with this Sub-rule (b)). If the Court is satisfied that the case is covered Clause (a) of Sub-rule (3), then the Court is empowered to grant permission to file fresh suit in respondent of the same subject-matter. The Court should not really concern itself whether a fresh suit is already filed or not. It is a wholly immaterial consideration for exercising the jurisdiction under Sub-rule (3) of Rule 1, Order 23, Civil Procedure Code. Whether the second suit was validly filed or whether it was vitiated by the principles of *res judicata* are matters entirely within the jurisdiction of the said Court where it was filed. It

should be made clear that even during such consideration, as has been held by the learned Judge of Kerala High Court, in the above decision supra that filing of fresh suit without obtaining permission was "improper and at best only be an irregularity, it should be considered as cured at least from the time permission is obtained." This approach to my mind is salutary and services the interest of justice. The procedural rigour cannot be allowed to come in the way of substantive justice. Filing of the second suit without actually obtaining permission to withdraw the first suit should only be treated as a procedural irregularity, which is curable. The permission to withdraw the first suit is only to file a fresh suit and when such permission is granted the suit already instituted should not fail. The permission takes away the bar of res judicata. Hence the second suit should be held as maintainable.

6. In view of the above circumstances, I am of the view that the petitioner is entitled to withdraw the first suit with liberty to institute a fresh suit on the same cause of action and that the suit already filed for the same cause of action is not an obstruction for invoking Order 23, Rule 1(3), Civil Procedure Code.

He has also relied upon the judgment of Kerala High Court reported in P.A. Muhammed Vs. The Canara Bank and Another, in which the learned Single Judge has held that when earlier suit is dismissed as not pressed and subsequent i.e. Fresh suit was pending at the time of such dismissal, bar as u/s 23 Rule 1 is not attracted. In the said judgment the reliance has been placed upon by ruling of Lahore High Court, AIR 1930 Lah 599(2) Mangilal v. Radha Mohan. In which the Lahore High Court was pleased to hold that Order 23, Rule 1, cannot be read as a bar to suit which has already been instituted before the said suit was abandoned or dismissed. It appears that this view of the Lahore High Court has been approved by the Punjab High Court, in its judgment reported in AIR 1985 P&H and Bar. 210 Girdharilal v. Chairman.

However, in the facts and circumstances of this case and in view of the Pursis Exh. 29, filed on record by plaintiff in earlier suit for its conditional withdrawal, express "No objection" for its withdrawal endorsed by all these revision applicants, and the order passed upon it on 25-4-2001 the said controversy need not be gone into, in the present revision applications.

The said order dated 25-4-2001 granting permission to respondent to withdraw the Civil Suit with right to prosecute new suits is not challenged by the revision applicants and it has become final. The order passed on plaint dismissing it for want of prosecution is in pursuance of this order below Exh. 29 i.e. Pursis. Therefore, no case is made out for disturbing the view taken by the trial Court. Civil Revision Applications accordingly fails and are dismissed, with no order as to costs.