
(1979) 02 BOM CK 0013

In the Bombay High Court

Case No : Civil Appeal No. 411 of 1978 from order with Civil Application No. 3550 of 1978 and Civil Rev. Application No. 626 of 1976 with Civil Application No. 4503 of 1978

Moosa Suleman Memon and Others

APPELLANT

Vs

Hanuman Idol and Others

RESPONDENT

Date of Decision : 06-02-1979

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8(1), Order 23 Rule 1(3)

Citation : (1979) 02 BOM CK 0013

Hon'ble Judges : S.C. Pratap, J

Bench : Single Bench

Advocate : K.J. Abhyankar and D.P. Hegde, in Appeal No. 411 of 1978, K.J. Abhyankar and D.P. Hegde, in Civil application No. 3550 of 1978, K.J. Abhyankar and D.P. Hegde, in Civil Revision application No. 626 of 1976, K.J. Abhyankar and D.P. Hedge, in Civil application No. 4503 of 1978, for the Appellant; M.V. Paranjpe and P.M. Pradhan for respondent Nos. 2 to 12, in Appeal No. 411 of 1978, M.V. Paranjpe and P.M. Pradhan for respondent-defendant Nos. 2 to 12, in Civil Application No. 3550 of 1978, M.V. Paranjpe and P.M. Pradhan for respondent-defendant Nos. 1-6 and 9 to 15, Ajit P. Shah, in Civil Revision Application No. 626 of 1976, M.V. Paranjpe and P.M. Pradhan, Advs . for respondent-defendant Nos. 1 to 6 and 9 to 15, for the Respondent

Final Decision : Dismissed

Judgement

S.C. Pratap, J.—The petitioners herein had filed in the Court of the Civil Judge, Senior Division, Thane, Special Civil Suit No. 125 of 1972, for declaration and permanent injunction in respect of the suit property. Pending the said suit an application, Exhibit 58, was filed by the present petitioners for amendment of the plaint in the aforesaid suit. By its order dated 27th July, 1976, the trail Court rejected the said application for amendment of the plaint. This order is challenged by the petitioners in the present Civil Revision Application No. 626 of 1976. During the pendency of this revision application, the petitioners have filed another petition viz., Civil Application No. 4503 of 1978 for permission to the

petitioners to withdraw their aforesaid Special Civil Suit No. 125 of 1972 with liberty to institutes a properly constituted fresh suit in respect of a portion of the subject matter on the same cause of action under the provisions of Order 23, Rule 1 of the Code of Civil Procedure.

2. I will first take up the said Civil Application No. 4503 of 1978. After the said application was filed in this Court, I directed by my order dated 22nd December, 1978 that as this was an application under Order 23, Rule 1 of the Code of Civil Procedure, notice of this application should be published by public advertisement in the issue of "Loksatta". The said notice was made returnable on 15th January, 1979. In the said order, I had also stated that I was satisfied that personal service should, in the facts and circumstances of this case, be dispensed with. Public notice accordingly has been published in the issue dated 2nd January, 1979 of "Loksatta" giving notice of the petitioners aforesaid application for leave to withdraw their Special Civil Suit No. 125 of 1972. In pursuance of this public notice, over 400 persons have appeared in these proceedings represented by their Advocate, Mr. A.P. Shah. In order to appreciate the prayer for withdrawal of the suit, it is necessary to note the facts and circumstances proceedings the said application.

3. As already observed by me above, the above special civil suit was for declaration and permanent injunction. One of the declarations asked for was in respect of the present petitioners ownership of the property described in Exhibit A to the plaint. According to the plaintiffs, this property belonged to one Goswami Shri Gokuldathji Maharaj who succeeded thereto from his forefather. The sons of the said Goswami had in the year 1951 filed on the Original Side of this Court Suit No. 241 of 1951, for partition of the properties belonging to the family and amongst the said properties, the present suit property was also included. In the said suit proceedings, it was, however, agreed that the present suit property be sold to one R.P. Joshi by and under the direction of and with the sanction of the Court. Ultimately by a conveyance dated 5th December, 1960, the said property was conveyed to one Bai Khatijabai wife of petitioner No. 1 herein and the mother of petitioner Nos. 2 to 6 herein. It is in pursuance of the said conveyance duly executed in their favour that the petitioners claim ownership of and title to the suit property.

4. In the meanwhile, during the pendency of the aforesaid Suit No. 241 of 1951 on the Original Side of this Court, one Rameshwar Mataprasad and others made an application some time in the year 1961 to the Assistant Charity Commissioner u/s 22-A of the Bombay Public Trusts Act for a change report by showing and including the presently disputed suit property as the property of a public trust known as "Mota Mandir Trust" which trust was registered with the Charity Commissioner as public trust No. A 2345. The said application was, however, rejected by the Assistant Charity Commissioner on 17th November, 1961. Appeal No. 14 of 1962 preferred therefrom was also dismissed by the Charity Commissioner on 17th August, 1962. Not satisfied with the aforesaid concurrent

dismissal, a further application a further application challenging the said dismissal was filed before the District Court, Thane, under the provisions of section 72 of the Bombay Public Trusts Act. This application filed u/s 72 of the said Act was also dismissed on 29th April, 1965. All the authorities under the Bombay Public Trusts Act, therefore, came to the concurrent and the final finding to the effect that the disputed suit property was not the property of the aforesaid public trust known as "Mota Mandir Trust".

5. Not satisfied with the aforesaid adjudication holding that the suit property was not the property of the Mota Mandir Trust, one Mataprasad Kamtaprasad (father of the aforesaid earlier applicant, Rameshwar Mataprasad) and another made another attempt in respect of the suit property. An application was made to the Charity Commissioner under the provisions of the Bombay Public Trusts Act for registration of an alleged trust as a public trust under the said Act. The said alleged trust was alleged to be known as "The Hanuman Haveli Trust". In the said proceedings for registration as aforesaid, an application Exhibit 102 dated 3rd August, 1965 was made with a prayer that the presently disputed suit property should be declared as the property of the aforesaid alleged Hanuman Haveli Trust. This application was dismissed by the Assistant Charity Commissioner who negatived the aforesaid claim and held that the said property was a private property and not the property of any public trust. Appeal No. 54 of 1970 challenging the decision of the Assistant Charity Commissioner was also dismissed by the Deputy Charity Commissioner by his order dated 27th February, 1971. From the said order dated 27th February, 1971, an application was made to the District Court, Thane, u/s 72 of the Bombay Public Trust Act, challenging the aforesaid finding and dismissal and reiterating the contention that the said property was the property of the above referred to public trust.

6. The position thus was that one litigation for including the present suit property as the property of the Mota Mandir Public Trust finally came to an end with the finding of all the authorities that the suit property was not the property of the said trust at all. After the end of this litigation, a second litigation started by the father of the earlier applicant also in respect of the suit property but this time making a change of and asking for a relief to the effect that the suit property should be shown as the property of another public trust viz. the alleged Hanuman Haveli Public Trust. This second litigation also failed before the Assistant Charity Commissioner as also before the Deputy Charity Commissioner in appeal. But as mentioned hereinabove, the dismissal of the second application in respect of the suit property both by the Assistant Charity Commissioner and the Deputy Charity Commissioner was challenged by a further application u/s 72 of the Bombay Public Trust Act and the said application was filed before the District Court, Thane.

7. It was when the said application u/s 72 of the Bombay Public Trusts Act was pending disposal before the District Court, Thane, that the present petitioners filed the above referred to Special Civil Suit No. 125 of 1972, inter alia, for

declaration of ownership of and title to the suit property. When the said suit was filed, the dispute relating to the suit property was sub-judice, because it was pending at the stage of a proceeding u/s 72 of the Bombay Public Trusts Act. The said proceedings u/s 72 of the said Act was, however, disposed of and dismissed as having abated by an order passed on 29th November, 1974, by the 2nd Additional Sessions Judge, Thane. As the said proceedings u/s 72 of the said Act was finally disposed of as aforesaid, there was no pending dispute before the Bombay Public Trusts authorities or before the Districts Court u/s 72 of the Bombay Public Trusts relating to the present suit property.

8. It is in these circumstances that the petitioners have filed the present Civil Application No. 4503 of 1978. It is in this behalf relevant to note that when the said suit had been filed there was a pending dispute before the authorities under the Bombay Public Trusts relating to the nature and character of the suit property. The said pending dispute came to an end by the order dated 29th November, 1974 already referred to hereinabove. As there was no longer any pending dispute in respect of the suit property, the petitioners filed the present Civil Application No. 4503 of 1978 with a prayer that in view of the aforesaid facts and circumstances they be permitted to withdraw their aforesaid suit with liberty to file a fresh suit on the same cause of action. This liberty is prayed for on the ground that a dispute is likely to be raised in respect of a small portion, out of the large suit property, and that the small portion is the site area where, according to certain persons, a stone representing the same to be an idol of Hanuman was placed.

9. The question whether the suit property is a private property of Goswami or whether it belonged either to Mota Mandir Trust or Haveli Trust or whether the suit property itself constituted a public trust had been finally decided in proceedings under the Bombay Public Trusts and the title of the present petitioners stood confirmed. In view of the decisions under the Bombay Public Trusts and in view of the facts that the conveyance has been duly executed in their favour in pursuance of proceedings on the original side of this Court, it has become unnecessary for the petitioners to claim by way of a suit a declaration of ownership of and title to the entire suit property. In spite of all the aforesaid facts and circumstances, if the defendants in the aforesaid civil suit after having allegedly brought a stone and start representing the same to be an idol of Hanuman, the plaintiffs if at all would have henceforth and if it becomes necessary to claim relief only in respect of the aforesaid invasion or threatened injury which the defendants to the aforesaid suit seek to cause by bringing a stone and starting representing the same to be an idol of Hanuman. Even if it thus becomes necessary for the plaintiffs to claim relief in the aforesaid behalf, it would only be in respect of a very small site and confined only in respect of the small site. As the reliefs claimed in the above special civil suit pertain to the entire suit property, the said reliefs, in view of the finality of all the proceedings under the Bombay Public Trusts Act, has become redundant and it is no longer necessary for the plaintiffs to pursue the same. It is in these circumstances that

the present Civil Application No 4503 of 1978 has been filed.

10. This application is opposed by Mr. M.V. Paranjpe, the learned Counsel for the contesting opponents as also by Mr. A.P. Shah, the learned Advocate for the parties appearing in pursuance of the above referred to public notice. The first contention raised is to the effect that the public notice is no notice in law, because the number of the proceedings mentioned therein is erroneous and the correct number has not been mentioned in the said notice. It is, no doubt, true that in the said public notice published in the issue of "Loksatta" dated 2nd January, 1979, the number of the revision application has been mentioned as No. 262 of 1976 instead of No. 626 of 1976. Somehow or the other that error has crept in this aid notice. However, that error cannot in any way render the public notice itself bad in law. In the first place, the title is correctly mentioned in the said notice. The names of the parties are also correctly mentioned in the said notice. The number of the special civil suit has also been correctly mentioned along with its Court. The number of the civil application being Civil Application No. 4503 of 1978 has also been correctly mentioned. What is more, the public notice clearly states its purpose and its object. Still further, the fact that as many as over 400 persons have appeared in this Court in pursuance to the above public notice, almost conclusively shows that no one has been misled by the said notice. In these circumstances, a slight error that has scretpt in the said notice relating to the number of the revision application (the year 1976 again being correctly mentioned) cannot in any manner render the said notice itself and bad in law. The notice is perfectly legal and valid and will have its own effect. The contention to the contrary, raised in the aforesaid behalf stands rejected.

11. The next contention raised by the learned Advocates is that an application for withdrawal of the suit cannot be filed in this Court even though a revision application is pending in this Court and that the present application for withdrawal can be filed only in the trial Court. Contention is that it is only the trial Court which can entertain an application for withdrawal of a suit and that an Appellate or Revisional Court has no jurisdiction to do so. It is not possible to accept this contention. The very wording of Order 23, Rule 1 of the CPC shows that such an application can be filed at any time after the institution of a suit. There is no such restriction is the said provisions to even, prima facie indicate that an application as of the present nature cannot be filed either in Appellate or in Revisional Court. On the contrary, the provisions of section 107 of the CPC make it further clear that the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by the Code on courts of original jurisdiction in respect of suits instituted therein. In my view, a party would be entitled to apply at any stage even at the appellate or revisional stage for permission to withdraw his suit under the provisions of Order 23, Rule 1 of the Code of Civil Procedure. In these circumstances, the contention that an application is not maintainable in this Court also stands rejected.

12. The next contention raised by the learned Advocate is to the effect that this is not a case where there can be said to be a defect analogous to a formal defect, so as to warrant leave as prayed for. In support of this contention, the learned Advocate have taken me through a decision of a Full Bench of this Court in Ramrao Bhagwantrao Inamdar Vs. Babu Appanna Samage, . On carefully going through the said ruling, I find that the ratio therein supports, on the contrary the petitioners herein rather than the contesting opponents. It is laid down in the said ruling that the expression "formal defect" in Rule 1(3)(a) must be given a wide and liberal meaning and must be deemed to connote every kind of defect which does not affect the merits of the case, whether that defect be fatal to the suit or not. Illustrating the said principle : the Full Bench has observed that formal defect includes, inter alia, misjoinder of parties or of the matters in suit, rejection of a material document for not having a proper stamp and the erroneous valuation of the subject matter of the suit. This Full Bench decision of this Court has been approved by a Full Bench of the Allahabad High Court in Abdul Ghafoor Vs. Abdul Rahman, . It is thus clear that Order 23 covers not only suits wherein there are certain formal defects but also defects but also defects analogous to formal defects. The construction is thus not to be restricted to the principle of ejusdem generis. On the contrary, as held by both the aforesaid Full Bench decisions---one of this Court and the other of the Allahabad High Court---the expression "formal defects" must receive wide and liberal meaning. It is therefore, not possible to accept the contention of the learned Advocates that to this case, the provisions of Order 23, Rule 1 of the CPC cannot apply.

13. Here, on the contrary, is a case where the said provisions would preliminary apply. The facts mentioned hereinabove indicate that the special civil suit in question is in respect of a large property which was filed at a time when there was a dispute pending before the authorities under the Bombay Public Trusts relating to the said large property itself. Pending the said suit, the dispute before the authorities under the aforesaid Act came to a final end. One proceeding under the Bombay Public Trusts claiming the suit property to be that of a public trust failed. A second similar proceeding under the aid Act also finally failed. Once both these proceedings came to an end, there was hardly any good reason to persist in and pursue the present special civil suit. It is precisely because the title to the entire suit property was in dispute and under cloud that the said special civil suit became necessary. Once that dispute finally came to an end and the cloud removed it has become unnecessary for the plaintiffs to pursue their said suit any more. Petitioner's title has been finally established in, if one may say so, collateral proceedings. The only authority having jurisdiction to decide whether a particular property is a property of a public trust has more than once come to a definite conclusion that the suit property is not the property of a public trust and that the same was a private property.

14. No doubt, while asking for leave to withdraw the suit, the petitioners also claim liberty to file a fresh suit on the same cause of action. But this liberty is

being asked for also for sound reasons. There is a genuine apprehension that a small stone placed or sought to be placed at a small site, out of the large suit property, is being sought to be characterized or will be sought to be characterized as the idol of Hanuman and consequently, some sort of a legal colour of a trust is likely to be claimed in that behalf. It is with a view to avoid any technical contention or defence to any subsequent suit (if such a claim as aforesaid is set forth) which may under given circumstances become necessary that the petitioners have claimed the liberty in question. It fail to see any prejudice or inter alia any injustice if such liberty is granted.

15. It also cannot be ignored that the present suit is itself still at a preliminary stage. I am told by the Advocates appearing before me that even issues have not been framed much less has the recording of evidence commenced. The application, therefore, is made at an early stage. It is well known that such application can be granted even after disposal of the suit and even in an appeal. Here is a case where an application is being made at an early stage even before the suit has commenced its substantial hearing. It is also pertinent to note that the contesting opponents before me do not state that they are not going to raise and contention to the effect that there is a stone giving it the colour of an idol and a public trust or that a part of the suit property, however small, is property of some public trust or the other. If in these circumstances and considering the previous litigations, the petitioners feel apprehensive of there being raised or set up some contention or the other or some claim or the other in respect of some part, however, small, out of the present large suit property, the said apprehension cannot be said to be unjustified. Therefore, considering the facts and circumstances of the case, the relief and the liberty claimed by the petitioners is, to my mind perfectly justified and the same discover to be granted. Strenuous opposition thereto makes grant of the said liberty all the more necessary.

16. It was also contended before me that granting of relief would result in multiplicity of proceedings. It is not possible to accept this submission. On the contrary, multiplicity of proceedings all these years and a successful and thereto in favour of the petitioners herein has ultimately resulted in the present application for leave to withdraw even the present litigation with, of course, a small prayer that in case such a similar dispute in again raised by any one, the liberty prayed herein would protect the interests of the petitioners. Furthermore, looking at the history of the litigation, it is rather strange that the contesting opponents should raise the cry of multiplicity of proceedings. If any party could be held responsible for this multiplicity it is not the petitioners herein but the contesting opponents. The petitioners cannot be refused relief which they otherwise legitimately deserve only because the present contesting opponents are likely, by their action and conduct to give rise to multiplicity of proceedings.

17. In the result, this Civil Application No. 4503 of 1978 is allowed. The petitioners are permitted to withdraw their Special Civil Suit No. 125 of 1972

pending in the Court of the Civil Judge, Senior Division, Thane, with liberty to institute a property constituted fresh suit in respect of a portion of the subject matter on the same cause of action.

18. In the circumstances of the case, there will be no order as to costs of this civil application.

19. As I have granted the above civil application, Civil Revision Application No. 626 of 1976 challenging the order refusing the petitioners to amend their plaint does not survive, as I have permitted the petitioners plaintiffs herein to withdraw their main suit itself. Rule in the said civil revision application is, therefore, discharged with no order as to costs.

20. Appeal from Order No. 411 of 1978 has been preferred by the plaintiffs from order dated 2nd September, 1978 passed by the trial Court below application Exhibit 83 in the above Special Civil Suit No. 125 of 1972. As the said suit itself is being allowed to be withdrawn, and as the said impugned order dated 2nd September, 1978, was only till the decision of the above suit, this appeal therefrom would also not survive. In these circumstances, Mr. K.J. Abhyankar, the learned Advocate for the appellants seeks permission to withdraw the said appeal. The appeal is allowed to be withdrawn.

21. Civil Application No. 3550 of 1978 filed in the above appeal from Order No. 411 of 1978 also no longer survives. Hence the said civil application is also dismissed.