
(2016) 06 BOM CK 0189
In the Bombay High Court
Case No : Writ Petition No. 2084 of 2007

Ms. Spring Fresh Drinks Pvt. Ltd.

APPELLANT

Vs

Gani Sons Charitable Trust

RESPONDENT

Date of Decision : 16-06-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, Order 7 Rule 10, Order 7 Rule 10A
Constitution of India, 1950 — Article 226
Evidence Act, 1872 — Section 114

Citation : (2016) 167 AIC 281 : (2017) 1 BCR 672 : (2016) 4 CivillJ 651 :
(2016) 5 MhLJ 400

Hon'ble Judges : A.S. Chandurkar, J.

Bench : Single Bench

Advocate : Shri R.M. Bhangde, Advocate, for the Petitioner; Shri S.V. Purohit, Advocate, for the Respondent No. 1; Shri Masood Shareef, Advocate, for the Respondent No. 2; Shri R.M. Bhangde, Advocate, for the Petitioner; Shri S.V. Purohit, Advocate, for the Responde

Final Decision : Allowed

Judgement

A.S. Chandurkar, J.(Oral)—Since identical orders are challenged in these writ petitions, the same are being decided by this common judgment.

2. For the sake of convenience the facts in Writ Petition No.2084/2007 are being referred to. The petitioners are the original plaintiffs who had filed Regular Civil Suit No.1577/2004 against the respondents herein. In the said suit, it was the case of the petitioners that the respondent No.2 which was a public trust was the owner of the building which had been let out to the respondent No.1 herein. The petitioners were occupying the separate shop blocks, the same having been let out to them by the respondent No.1. It was their further case that with the view to get the premises occupied by them vacated, the respondent No.1 initially committed various illegal acts at the behest of respondent No.2 due to which the petitioners could not enjoy the suit premises as tenants. It was pleaded that on 30.11.2004 the petitioners were restrained from enjoying the suit property and

treating the same as cause of action, the aforesaid suit for permanent injunction seeking to restrain the respondents from obstructing their peaceful possession came to be filed. A further prayer was made that the defendants be directed to remove the iron gate so as to facilitate the usage of the suit premises by the defendants. The respondent No.1 herein was deleted from the array of parties 28.2.2005. In the said suit, the petitioners prayed for grant of temporary injunction which application came to be rejected by the trial Court. A miscellaneous appeal came to be filed by the petitioners against said order. During pendency of this suit, the respondent No.2 herein filed an application under provisions of Order 7, Rule 10 of the Code of Civil Procedure, 1908 (for short, the said Code) stating therein that the plaint be returned for its presentation to the Small Causes Court as it was the case of the respondent No.2 that the relationship between the parties was that of landlord and the tenant and therefore, the civil Court had no jurisdiction to decide the suit. A preliminary issue came to be framed in that regard. On 30.11.2005, the petitioners filed an application below Exhibit 50 seeking permission to withdraw the suit with liberty to approach the competent court. This application filed by the petitioners came to be decided on 4/1/2006 and the trial Court permitted unconditional withdrawal of the said suit.

3. Thereafter, the petitioners filed Regular Civil Suit No.14/2006 before the Small Causes Court against the respondent no.1 herein. In the said suit, it was pleaded that the petitioners were the tenants inducted by the respondent No.1 and that they had a right to enjoyment of the suit property that was being interfered with by the respondent No.1. It was further stated that on 29.12.2005 when the access to the property in question was sought to be obstructed, the aforesaid suit came to be filed. The declaration as sought was that the plaintiffs were the tenants of the suit property and therefore, the respondents be restrained from obstructing their lawful possession. The respondent No.2 herein was added as a defendant in the said suit on 1.2.2006.

4. The respondent No.2 filed an application under provisions of Order 7, Rule 11 of the Code for dismissal of the suit on the ground that the earlier suit filed by the petitioners had been withdrawn without any liberty to file a fresh suit. It was further stated that there was a bar to maintain the subsequent suit in view of provisions of Order 2, Rule 2 of the Code. Reply came to be filed by the petitioners and by an order dated 15.4.2006, the trial Court allowed the application for temporary injunction and rejected the application that was filed under provisions of Order 7, Rule 11 of the Code.

Being aggrieved by the aforesaid, the respondent No.2 herein filed an appeal under Section 26A of the Provincial Small Causes Court Act. The appellate Court came to the conclusion that it would not be permissible for the petitioners to file the subsequent suit especially when the earlier suit was withdrawn without being granted liberty to file the fresh suit. To that extent, the appellate Court held that the suit filed against the respondent No.2 herein was liable to be dismissed. By

order dated 16.4.2007, the appellate Court partly allowed the appeal and dismissed the suit against the respondent No.2. It further directed that the order of injunction would operate against the respondent No.1 herein. Being aggrieved, the petitioners have approached this Court by filing the present writ petitions.

5. Shri R. M. Bhangde, the learned Counsel for the petitioners submitted that the appellate Court was not justified in holding that the suit as filed was not maintainable against the respondent No.2. It is submitted that Regular Civil Suit No.1577/2004 had been filed in the civil Court wherein the relief of permanent and mandatory injunction had been sought against the defendants. In the said suit, the respondent No.2 had filed an application below Exhibit 19 under provisions of Order 7, Rule 10 read with Rule 10A of the Code stating therein that as the dispute related to matters between the landlord and tenant, the civil Court had no jurisdiction and the suit was triable by the Small Causes Court. He submitted that the plaintiffs had moved an application to withdraw the said suit with liberty to approach the competent Court. The order passed by the trial Court on said application permitted the petitioners to withdraw the suit unconditionally after which the petitioners filed the subsequent suit before the Small Causes Court. According to him, the order passed below Exhibit 50 would not come in the way of the petitioners in prosecuting the subsequent suit. He submitted that the cause of action in both the suits was distinct and therefore, even if no liberty was granted to the petitioners while withdrawing the earlier suit, the same would not come in their way in prosecuting the subsequent suit. He also submitted that the respondent No.2 had been joined as a defendant in the subsequent suit in view of the order passed below Exhibit-1 on 1.2.2006. He, therefore, submitted that the suit was maintainable against the respondent No.2 and the appellate Court erred in holding otherwise. In support of his submissions, the learned Counsel relied upon the decision in *R. J. Mehta and another v. Govind Ramchandra Nadkarni*, 1989 Mh. L. J. 809, *Babulal Bhuramal and another v. Nandram Shivram and others* AIR 1958 SC 677, *Kiran Singh and others v. Chaman Paswan and others* AIR 1954 SC 340 and *Bengal Waterproof Limited v. Bombay Waterproof Manufacturing Company and another* (1997) 1 SCC 99.

6. Shri Masood Shareef, the learned Counsel appearing for the respondent No.2 supported the impugned order. He raised a preliminary objection that one writ petition raising challenge to two orders passed in two separate appeals by the appellate Court was not maintainable and separate writ petitions ought to have been filed independently challenging both the orders. He then submitted that the reliefs sought in the subsequent suit were identical to the reliefs that were sought in the earlier suit. Even the cause of action was identical and, therefore, the bar under provisions of Order 2, Rule 2 of the Code would apply. According to him, the respondent No.1 herein came to be deleted by the petitioners in the earlier suit on 28.2.2005 and the subsequent suit was filed initially against the respondent No.1 alone. It was only after the order passed by the Small Causes Court that the respondent No.2 came to be added as the defendant No.2. The subsequent suit had been filed by suppressing material facts and the same was

filed despite the fact that no liberty was granted to the petitioners to file the subsequent suit while withdrawing the earlier suit. According to him, the same was not permissible in view of provisions of Order 23, Rule 3 of the Code. The fact that in the earlier suit the trial Court had refused to grant temporary injunction against which a miscellaneous appeal had been filed and was pending at which stage the said suit had been withdrawn was also a relevant fact. In support of his submissions, the learned Counsel relied upon decision in *Coffee Board v. Ramesh Exports Pvt. Ltd.*, 2014 (6) Mh.L.J. 531, *Suraj Rattan Thirani and others v. Azamabad Tea Co. Ltd. and others* AIR 1965 SC 295, *Purna Medium Project Division, Amravati v. Y. R. Reddy and another* 2004(1) Mh.L.J. 729 and *SNP Shipping Services Pvt. Ltd and others v. World Tanker Carrier Corporation and another* 2000(2) Mh.L.J. 570.

Shri S. V. Purohit, the learned Counsel for the respondent No.1 supported the case of the petitioner and stated that the petitioners and the respondent No.2 had arrived at an interim arrangement with which the respondent No.1 was not concerned.

7. Taking up the preliminary objection as raised by the learned Counsel for the respondent No.2, I find that the said objection is too technical for being upheld. Though it is a fact that the respondent No.2 herein had filed two separate appeals which came to be decided on 16.4.2007 challenging the grant of temporary injunction as well as the order passed on the application for rejection of the plaint, it cannot be said that the challenge to both the orders in one writ petition would not be tenable. At the most, it would only be a question of paying separate set of court fee for challenging said orders. The parties to the proceedings being the same in both the appeals and the suit also being one, I do not find that the preliminary objection as raised deserves to be upheld. Moreover, the writ petitions are at the stage of final hearing and at this stage upholding the preliminary objection would only result in further unwarranted proceedings. The petitioners can be directed to pay separate set of court fees with regard to the challenge to the orders in the two miscellaneous appeals.

8. I have given due consideration to the respective submissions on merits. I have gone through the documents filed on record. Certain facts on record which are relevant for deciding the challenge to the impugned order are that the petitioners had initially filed Regular Civil Suit No.1577/2004 in the civil Court against both the respondents. In the said suit, the respondent No. 2 herein had filed an application below Exhibit 19 under provisions of Order 7, Rule 10 read with Rule 10A of the Code on 22.12.2004. The averments of the respondent No.2 in the said application are relevant and the same read thus:

"1. A bare perusal of the pleadings of the plaintiffs in the plaint, it is an admitted fact that the dispute is between landlord and tenant. It is now well settled that all matters relating to landlord and tenant are triable by the Small Causes Court only and this Hon'ble Court has no jurisdiction to entertain the instant suit and try the same inasmuch as there are Small Causes Courts having jurisdiction to

entertain and try suits between landlords and tenant."

A preliminary issue with regard to the jurisdiction of the civil Court accordingly came to be framed on 3.2.2005. On 28.2.2005, the petitioners deleted the name of the respondent No.1 herein from the array of parties. In the meanwhile, the prayer for interim injunction came to be rejected by the trial Court against which a M. C. A. No.177/2005 was pending. At that stage, the petitioners moved an application below Exhibit50 seeking permission to withdraw the suit on the ground that the dispute related to matters between landlord and tenant for which the Small Causes Court had jurisdiction. On this application, the trial Court passed an order on 4.1.2006 and permitted to the petitioners to withdraw the said suit unconditionally. Thereafter, Regular Civil Suit No.14/2006 was filed before the Small Causes Court against the respondent No.1 herein. On 1.2.2006, the Small Causes Court passed an order directing addition of the respondent No.2 herein as a defendant on the ground that it was a necessary party. The application for temporary injunction below Exhibit4 came to be allowed by the Small Causes Court on 15.4.2006. Similarly, the application below Exhibit24 moved by the respondent No.2 under provisions of Order 7, Rule 11 of the Code for rejection of the plaint also came to be dismissed. These orders came to be challenged before the appellate Court by filing appeals under Section 26A of the Provincial Small Causes Court Act and the adjudication therein in so far as the suit has been held to be not maintainable against the respondent No.2 is under challenge.

9. While considering the question of bar of the subsequent suit on account of permission not being granted to file the same while withdrawing the earlier suit, it is to be noted that the earlier suit was filed before the civil court. On an objection raised by the respondent No.2 that the dispute related to matters between landlord and tenant, the civil Court framed a preliminary issue. In the application for withdrawal of the civil suit below Exhibit50, a reason given was that the dispute was required to be tried by the Small Causes Court. Therefore, the order passed by the civil Court on the said application dated 4.1.2006 would at the most have to be treated as refusing permission to the petitioner to again approach the civil court for filing a suit based on an identical cause of action. In the present case, the subsequent suit was filed before the court of Small Causes. If the order dated 4.1.2006 passed by the civil court permitting the petitioners to withdraw the suit unconditionally is treated as an order by which the petitioners were precluded from even approaching the Small Causes Court, the same would have the effect of the civil Court passing an order in respect of the matter over which it had no jurisdiction. Moreover, the application moved by the respondent No.2 below Exhibit19 under provisions of Order 7, Rule 10A of the Code stating that only the Small Causes Court had jurisdiction also cannot be lost sight of. Hence, in my view the order dated 4.1.2006 passed by the civil Court cannot be read in such a manner that would prevent the petitioners from approaching a different court exercising different jurisdiction. As observed by the Hon"ble Supreme Court in Kiran Singh and others (supra) a decree/order passed by a

court which has no jurisdiction would be a nullity.

10. Coming to the objection raised on behalf of the respondent No.2 based on the provisions of Order 2, Rule 2 of the Code, it is a fundamental requirement that for attracting a bar of provisions of Order 2, Rule 2 of the Code, the court in which the earlier proceedings were initiated ought to have jurisdiction to entertain the subsequent proceedings. If the earlier court had no jurisdiction to try the claim as made in the latter suit, the bar under Order 2, Rule 2 would not apply. The reference in that regard can be made to the decision of the Privy Council in *Jagatsingh v. Sangatsingh* AIR 1940 PC 70.

In this background, if the facts of the case in hand are examined, it is clear that such bar is not at all attracted. Regular Civil Suit No.1577/2004 had been filed in the civil court seeking a relief of permanent and mandatory injunction against the defendants who were the landlord and superior landlord respectively. The respondent no.2 - superior landlord came up with a specific defence that the issues raised in the suit could be tried only by the Small Causes Court and that the civil Court had no jurisdiction. The subsequent suit was filed before the Court of Small Causes in which ultimately both the parties who were initially arrayed as defendants has been impleaded though belatedly. On that count, therefore, it cannot be said that bar under provisions of Order 2, Rule 2 of the Code was attracted.

11. The ratio of the decision of the Hon"ble Supreme Court in *Coffee Board* (supra) as well as the decisions of learned Single Judge in *Purna Medium Project Amravati* (supra) and *SNP Shipping Services Pvt. Ltd.* (supra) cannot apply to the facts of the present case in view of the undisputed position that the earlier suit was filed before the civil Court to which an objection was raised by the respondent no.2 and the subsequent suit was filed before the Court of Small Causes. On the own showing of the respondent No.2, the petitioner had claim relief in the earlier suit which could not be granted by the civil Court. In this background, therefore, the bar under provisions of Order 2, Rule 2 of the Code would not apply.

12. Another relevant aspect that requires consideration is that the respondent No.2 cannot be permitted to approbate and reprobate in the same matter. When initially the suit was filed in the civil Court, the respondent raised an objection to its jurisdiction on the ground that the dispute related to matters between landlord and tenant. When the petitioners withdrew the said suit from the civil Court and approached the Small Causes Court, the respondent No.2 took the stand that the subsequent suit was barred as it was based on an identical cause of action and the earlier suit had been withdrawn unconditionally. Having raised an objection to the maintainability of the suit in the civil Court, it would not be open for the respondent No.2 to now turn around and contend that the suit filed before the Small Causes Court was based on the same cause of action as the earlier suit and hence, not maintainable.

13. Even otherwise, I find that the cause of action in both the suits is distinct. In the prior suit, it was pleaded that the respondent No.2 by illegally closing the iron gate in question had infringed the legal rights of the petitioners. The cause of action was stated to have arisen on 30.11.2004. In the subsequent suit, it was pleaded that the respondent No.1 had erected Iron bars in between the entrance gate and also had put a lock on the same. The cause of action was stated to have arisen on 29.12.2005. Moreover, as observed in *Bengal Waterproof Ltd.* (supra), the cause of action was based on continuous acts of obstruction by the defendants. Thus, it cannot be said that the subsequent suit was barred under law for the same to be entertained.

14. The appellate Court while allowing the appeal preferred by the respondent No.2 lost sight of the fact that Regular Civil Suit No.1577/2004 had been filed in the civil Court which had no jurisdiction to entertain the suit relating to the dispute between landlord and tenant. In that view of the matter, the order passed by the appellate Court cannot be sustained. The same is, therefore, liable to be set aside.

15. It is to be noted that during pendency of the present writ petitions, the petitioners and the respondent No.2 arrived at an ad hoc arrangement as regards the manner in which the petitioners would have access to approach the respective premises. By order dated 25.2.2008 this Court had accepted the said arrangement and the same is continued since then. The interests of justice would be served if the proceedings in the suit are expedited and the aforesaid arrangement is permitted to be continued during pendency of the suit without prejudice to the rights of the parties.

16. Hence, for the aforesaid reasons, the following order is passed:

(1) The writ petitions are allowed. The petitioners shall pay additional set of court fees as regards challenge to two separate orders passed by the appellate Court. The order passed by the appellate Court dated 16.4.2007 to the extent the suit have been dismissed against the respondent No.2 is set aside.

(2) The suit shall proceed against both the defendants and shall be decided in accordance with law.

(3) As the suit pertains to the year 2006, the proceedings therein are expedited and the suit shall be decided by the end of March, 2017.

(4) The interim arrangement that was operating during the pendency of the present writ petition as per the minutes of order dated 14.2.2008 shall continue to operate during pendency of the suit. This continuation is, however, without prejudice to the rights of the parties.

(5) Rule is made absolute in aforesaid terms with no order as to costs.