

(1978) 09 BOM CK 0005

In the Bombay High Court

Case No : Civil Revision Application No. 63 of 1975

Paikanna Vithoba Mamidwar and Another

APPELLANT

Vs

Laxminarayan Sukhdeo Dalya and Another

RESPONDENT

Date of Decision : 11-09-1978

Acts Referred:

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

Citation : AIR 1979 Bom 298 : (1979) 81 BOMLR 501 : (1979) MhLj 149

Hon'ble Judges : Tulpule, J

Bench : Single Bench

Advocate : B.A. Udhoji, for the Appellant; G.J. Ghate, for the Respondent

Final Decision : Allowed

Judgement

1. This revision application is against an order passed by the Civil Judge (Junior Division), Chandrapur, in Regular Civil Suit No. 41 of 1972 holding that the suit was bad for mis-joinder of causes of action and parties.

2. The brief facts which may be stated, and which are not in dispute, giving rise to this revision are that the plaintiffs are the owners of 2 different plots of lands Nos. 76 and 77. The plaintiffs are father and son. The plots 76 and 77 belonged to them as members of a Joint Hindu family once. Later the parties came to a partition. A godown stands built upon both the portions of plots 76 and 77. To the south of this building and plots of land is the property of defendants 1 and 2 being Plot No. 78, The plaintiffs complained that by the act of the defendants digging 5 pits for the purpose of erecting cement pillars and constructing a plinth thereon, the defendants have encroached upon plot No. 77. A contention was raised that the suit is bad for mis-joinder of parties and causes of action, which as stated above, succeeded. The present revision application is directed against that order.

3. Now it is well settled that in order to determine whether the plaint is bad for mis-joinder of causes of action and parties, one has to look to the plaint. Now

looking to the relevant and material paras 1, 4A, 4B and 9 and 2 of the plaint, it will be seen from para 1 that the plaintiffs set out the fact of partition between them and say further that the plaintiffs own and possess plot No. 77 having an area 2470 sq. ft. and the building thereon which is also over partly plot No. 76. In plot No. 77 apparently both the plaintiffs 1 and 2 were interested. The building standing on plot No. 77 also extends over plot No. 76 and this building is jointly owned. The reference to ownership of plot No. 76 and building thereon are incidental and not material. Those references and the rather imprecise averments in the plaint have created some ambiguity in the plaintiffs' case. Lastly in paragraph 1, the plaintiffs stated that in the partition plot No. 77 and the godown came to be divided into two parts, the dividing line being shown by letters M. R. the eastern portion going to the share of plaintiff No. 2 and the western portion going to plaintiff No. 1. Along with the plaint, is a map attached and that map will go to show that to the west of letters M. R. the property belongs to plaintiff 1, which is described as plot No. 77 while to the east of line M. R. is the property of plaintiff No. 2, which is partly on plot No. 77 and plot No. 76. To the south of this plot No. 77, is plot No. 78 belonging to defendants.

4. In para 4-A, the encroachment alleged to have been made by defendants by means of digging of pits for erecting concrete pillars from out of plot No. 77 is alleged to be 98 sq. ft. The plinth 40 feet in length, 2 1/2 feet in height and 1 foot in thickness and the well put up is shown in the plaint map by letters X, XI, E and O and red hatched lines and so far as that is concerned, it makes an encroachment on plot No. 77 to the extent of 75 sq. ft. The third encroachment on plot No. 77 is of 12 sq. feet. All these encroachments which are alleged to have been made by defendants on the property of the plaintiffs are set out in paras 4A, 4B, 6 and 7.

5. The learned trial Judge held that no common question was involved, though similar evidence, to some extent will have to be recorded and that was far from being a common question of law or fact. He felt that since the portions of the property belonging to plaintiffs 1 and 2 are different and since encroachments were on separate portions of plaintiffs 1 and 2 which went to them by reason of the partition and inasmuch as trespass is an independent act relating to each property, these were two different causes of action in which the plaintiffs were not interested and, therefore, in his opinion, the suit was bad for mis-joinder of causes of action and parties.

6. The plaint map will go to show that the encroachment is only on plot No. 77. Plot No. 76 is to the east of plot No. 78 and the alleged construction by the defendants is only along the line east-west and to the south of plot No. 77. It is plot No. 77 which subsequently on account of partition between plaintiffs 1 and 2 came to be divided into two, the western portion to the west of line M. R. having gone to plaintiff No. 1 and the eastern portion to the line M R having gone to plaintiff No. 2.

7. A reference may now be made to the provisions of O. 1, R 1, Civil P. C., which

lays down that all persons may be joined in one suit where "any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transactions is alleged to exist in such persons, whether jointly, severally or in the alternative; and if such persons brought separate suits, any common question of law or fact would arise".

8. Now, therefore, it will be clear upon a plain reading of O. 1 R. 1, Civil P. C. that persons having a right to relief, whether jointly or severally and even alternatively can bring a single suit, provided the circumstances giving rise to that relief arise out of the same act or transaction or series of acts or transactions and provided further that in doing so any common question either of law or of fact was involved. Now in the present case there can be no dispute that though plaintiffs 1 and 2 were not jointly interested in removal of the encroachment on their respective portions which came to them on partition from out of plot No. 77, they were severally interested. Merely because they were severally interested, O. 1 R. 1, Civil P. C. would not disentitle them to bring a common suit provided the other conditions were satisfied. It cannot also be disputed that it is the same act or series of acts or transactions of the defendants which have given rise to this right to relief based upon the independent rights of plaintiffs 1 and 2. That right to relief is the removal of encroachment occasioned on account of digging of pits and effecting a construction by the defendants to the south of their properties. The third condition, therefore, which has to be satisfied is that if the two plaintiffs had brought separate suits, the suits would have given rise to a common question of law or fact.

9. Now there can be no dispute and no objection if the two plaintiffs could have brought two separate suits. In this particular case since there can be no dispute that the right to relief in the two plaintiffs arose as a result of the same act or series of acts, they could have also combined them in one suit provided any common question of law or fact arose.

10. The essential question which has, therefore, to be decided in the present revision application is whether a common question either of law or of fact would have arisen if two separate suits had been brought. If the answer to that question is in the affirmative, then it would follow that a single suit could lie. Now there is no question here of a common question of law arising. The only question of fact which arises in a suit for removal of encroachment is what are the boundaries of the respective properties and what is the extent of the encroachment. Now the question as to what is the extent of the encroachment and whether it is on two separate portions, may be a different question of fact, but as to what are the boundaries of the plots if they are portions of the same plot, would undoubtedly be a common question of fact. In other words, if in the present case the allegation is that the defendants have by their act encroached upon portions of plot No. 77 which the plaintiffs own, then the question which would have been required to be decided and which is required to be decided, is what is the boundary of the plot No. 77 on the southern side. That would

determine the extent of encroachment of the different portions. Therefore, though the right to remove the extent of the encroachment and possession of the encroached portion in the different plaintiffs is different, the question which has to be basically and first answered is what is the south boundary of plot No. 77, and that undoubtedly is a common question of fact. If that is so, then, in my opinion, it follows that two suits if brought separately would have raised a common question of fact and, therefore, under O. 1, R. 1, Civil P. C. could have been continued in one suit,

11. Mr. Ghatge for the respondents Contended that plaintiff No. 1 is not interested in the portion encroached upon by "the defendants of plaintiff No. 2's property. Similarly, he argued that plaintiff No. 2 is not interested in the portion which is encroached upon by the defendants on plaintiff No. 1's property. That may be so, but that is hardly now a criteria or consideration. I may refer in this connection to the observation or dicta at page 599 of Mulla's Civil P. C., Thirteenth Edition, Vol. I. There the learned Author observes:

"But since the test under the new English rule as well as the present Indian rule is no longer the identity of the cause of action, but the identity of the act or transaction, such a joinder of plaintiffs would not be perfectly legitimate, both in England and India."

It is not, therefore, necessary any more that there must be identity of interest or identity of causes of action. What is necessary is the involvement of common question of law or fact. The words "jointly and severally" with reference to the plaintiffs in whom the right to relief exists are significant and material in this case. If that were not to be so, then the words "severally" or "in the alternative" would not have found place in O. 1 R. 1, Civil P. C.

12. A number of cases were referred to me by Mr. Udhoji, but in view which I have taken of the facts of this case, it is not necessary to refer to them. I would, however, refer to two decisions, one reported in Shambhoo Dayal Vs. Chandra Kali Devi and Others, and Krishna Laxman Yadav and Others Vs. Narsingh Rao Vithalrao Sonawane and Another, which, though not similar in facts, indicate a similarity of questions which have to be answered.

13. In Shambhoo Dayal's case the property belonged to three brothers who leased it out to a tenant. Subsequently the brothers divided the property amongst themselves and sold their separate portions to three different persons. These three persons in their turn terminated the tenancy of the defendant tenant and filed a suit. Question which was raised was whether such a suit was bad for mis-joinder of causes of action, the property being owned by the plaintiffs separately. The contention was negatived on the ground that the question which was involved was the common question of fact, namely, the lease which was created in favour of the tenant by the erstwhile lessors whose interest and rights had devolved on the plaintiffs. Even though lessor's interest originally was one and united and if subsequently, it was disrupted and the plaintiffs had succeeded

to it, a common question which arose was the rights arising under the contract.

14. To the similar effect is the decision reported in Krishna Laxman v. Narasinghrao AIR 1973 Bom 353 (Supra). In that case the suit was brought by the tenant of an erstwhile property which came to be demolished following the panshet flood disaster and the notice issued by the Poona Municipal Corporation requiring the property to be demolished. The landlord started reconstruction of the property and the tenants plaintiffs in a joint suit claimed to be entitled to the property which was being rebuilt on the ground that their tenancies had not been brought to an end. An objection was raised that the suit was bad for multifariousness, and their Lordships held that "there was a common question of law which had arisen by reason of the destruction of the house in consequence of the floods. The relief claimed was essentially several and did not exist jointly in favour of the plaintiffs". The test, therefore, was the arising of a common question. The observations quoted by me above are a complete answer to the contentions raised.

15. The result is, the revision application succeeds and must be allowed, The order passed by the trial Court is set aside. There will be no order as to costs of this revision application.

15. Revision allowed.