

(2010) 12 BOM CK 0033

In the Bombay High Court

Case No : Notice of Motion No. 2413 of 2008 in Suit No. 1188 of 1984

Ramkrishna Shridhar Choube and Others and Smt. Kamtidevi
Premnath Choube and Others

APPELLANT

Vs

The Court Receiver and Others

RESPONDENT

Date of Decision : 02-12-2010

Acts Referred:

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

Citation : (2011) 1 ALLMR 623 : (2011) 1 BomCR 286 : (2011) 2 CivCC 201 : (2011) 2 MhLj 473

Hon'ble Judges : R.Y. Ganoo, J

Bench : Single Bench

Advocate : Tanvir Shaikh, Maheshwari and Reshma Mishra, for the Appellant; T.N. Subramaniam, A.T. Suryanwanshi and Rahul Yagnik, instructed by Markand Gandhi, for the Defendant No. 13 and 14, for the Respondent

Judgement

R.Y. Ganoo, J.—By this notice of motion, the applicants have sought following reliefs:

i) By prayer Clause (a) Order dated 12.5.2008 passed by this Court in this Suit, along with consent terms dated 12.5.2008 be set aside and suit be restored to the file of the court.

ii) By prayer Clause (b) applicants want that the Plaintiffs should bring applicants on record as party Defendants.

Iii) Other prayers are in the nature of interim reliefs.

2 The contesting parties before the court are Plaintiffs as well as Defendant Nos. 13 and 14. Defendant Nos. 13 and 14 have filed affidavit in reply opposing the notice of motion.

3. In order to appreciate the point involved in this motion, it would be necessary to state relevant facts. Original Plaintiff No. 1 and original Defendant No. 12

Premnath were brothers. This Premnath had instituted two suits in the court at Thane, being Suit No. 446 of 1987 and Suit No. 526 of 1987 against the original Plaintiff No. 1 and others. These two cases related to the rights of Premnath in certain properties, more particularly set out in the said suits, out of which one property is the subject matter of the present suit, which property is described in the plaint. Certain interim orders were passed in Suit No. 446 of 1987 and Appeal from Order came to be filed by Premnath in this Court being Appeal from Order No. 676 of 1992, as Premnath was aggrieved by the said interim orders. In the said Appeal from Order No. 676 of 1992 the consent terms were arrived at. Clause 7 of the said consent terms dealt with the suit property concerned in this suit i.e. Suit No. 1188 of 1984. The reading of the said clause would go to show that Premnath and original Plaintiff No. 1 and others agreed that subject to decision in this Suit No. 1188 of 1984, properties at serial Nos. 9 and 10 mentioned in Exhibit A to the consent terms will be joint properties of Premnath and original Plaintiff No. 1 and others who were styled as Respondents in the said Appeal from Order No. 676 of 1992.

4. It is seen that the Plaintiffs in this suit, instituted the suit for reliefs which were in the nature of injunction restraining original Defendants from dispossessing the Plaintiffs from the suit land i.e. Survey No. 111A, B and C of village Amboli, Andheri, without due process of law. A declaration was also sought that the farmhouse admeasuring 30 ft X 20 ft and kaccha hut stands on Survey No. 111D and over land admeasuring 1254 sq. mts. out of Sr. No. 111D on which the Defendants will have no title and interest. It was also prayed that Defendants be restrained from dispossessing the Plaintiffs from the land admeasuring about 1254 sq. meters falling in Survey No. 111D over which the farmhouse and 11 kaccha huts were situated.

5. On coming to know about this suit being filed against certain person, Premnath filed Chamber Summons No. 45 of 1997 praying that he be joined as party Defendant, claiming that he is required to be joined as party Defendant as he has right in respect of the property covered by the present suit.

6. Said Chamber Summons was granted by order dated 10.9.1997. Plaintiffs did not carry out amendment in terms of the chamber summons. Therefore, Premnath who was ordered to be joined as party Defendant took out notice of motion. Said notice of motion was granted. The Plaintiffs carried out amendment and joined Premnath as Defendant No. 12. Premnath filed written statement and contested the suit.

7. Premnath expired on 13.8.2007. This fact was communicated by the heirs of Premnath through Advocate Mr. A.R. Pandey to Advocate for Plaintiffs by letter dated 26.10.2007. The names of heirs of Premnath were communicated and Plaintiffs were requested to take steps to bring on record present applicants as heirs of Premnath who was already impleaded as Defendant No. 12. Plaintiffs did not file any application to join applicants as Defendants.

8. It is the case of the applicants who have taken out this notice of motion that the Plaintiffs colluded with the present Defendant Nos. 13 and 14 and Defendant No. 4 and it was decided that all the Defendants except Defendant No. 4 will be deleted and the present Defendant Nos. 13 and 14 be brought on record. According to Plaintiffs, it was further decided to obtain orders on the basis of consent terms to be signed by the Plaintiffs, Defendant No. 4, Defendant No. 13 and Defendant No. 14 to the prejudice of present applicants who had right in the suit properties on account of death of Premnath. According to the applicants, on 12.5.2008 the consent terms were tendered as per above plaint. Similarly, Consent Minutes of Order were tendered and decree dated 12.5.2008 came to be secured by Plaintiffs, Defendant No. 4, Defendant Nos. 13 and Defendant No. 14 by collusive action.

9. The applicants have pleaded that on account of collusive actions on part of Plaintiffs, Defendant Nos. 4, 13 and 14, fraud is practised upon the applicants as well as on the court and rights of the present applicants as heirs of Defendant No. 12 have been deprived of. In substance, applicants have pleaded that fraud is practised on applicants as well as on court and that is how they have approached this Court for setting aside the decree dated 12.5.2008 as also consent terms dated 12.5.2008.

10. Learned Counsel appearing on behalf of applicants had taken me through the aforesaid facts and had submitted that the Plaintiffs fully knew that they had accepted the right of Premnath in the suit property covered by this suit and therefore it was not proper for Plaintiffs as to not bring heirs of Premnath on record, though Plaintiffs were asked to do so in terms of Advocate's letter dated 26.10.2007. Learned Counsel for the applicants submits that the seeds of fraud were sown at this time and the applicants were in dark as they were thinking that after they are joined, they would contest the suit. Learned Counsel for the applicants had taken me through the affidavit in support and particular paragraph 10 of the affidavit where the applicants have stated the grounds on which they claim that fraud was perpetrated on them.

11. Learned Counsel for the applicants submitted that the circumstances in which the applicants were placed, they had no alternative but to take out this notice of motion for getting the decree dated 12.5.2008 set aside as according to them the decree is sought by playing fraud.

12. Learned Counsel for the applicants had taken me through Order 23A of the CPC and the title of the said Order 23 is "Withdrawal and Adjustment of Suits." He had also taken me through Rule 3A of Order 23 of CPC and had submitted that on account of Order 23 Rule 3A, a suit cannot be filed for setting aside the decree on the ground that compromise on which the decree is passed was not lawful. Learned Counsel Mr. Maheshwari therefore submitted that on account of provisions of Order 23 Rule 3A the only course which the applicants could adopt was institution of this notice of motion. Learned Counsel Mr. Maheshwari had ultimately submitted that the conduct on the part of Plaintiffs, Defendant No. 4

and Defendant Nos. 13 and 14 manifestly indicates intention of these parties to played fraud upon the court as well as upon the applicants and therefore the court should allow this notice of motion and permit the present applicants to contest the suit after it is restored, as their rights are affected on account of decree dated 12.5.2008.

13. Learned Sr. Counsel Mr. Subramaniam, appearing on behalf of Defendant Nos. 13 and 14 had opposed the present notice of motion by contending that no fraud was practiced as alleged. According to him, Plaintiffs were entitled to take the decision of dropping certain Defendants, including the Defendant No. 12, whose heirs were not brought on record. He submitted that deleting all the Defendants except Defendant No. 4 did not amount to fraud. According to him the rights of the present applicants are not affected in as much as Premnath would have rights in the suit properties subject to the decision of this Suit i.e. Suit No. 1188 of 1984.

14. Learned Senior Counsel appearing on behalf of Defendant Nos. 13 and 14 had submitted that in any case, if it is the stand of the applicants that decree dated 12.5.2008 should be set aside, they will have to institute substantive suit and have appropriate decree in the said suit. Counsel for the Plaintiffs and Defendant No. 4 respectively had supported the arguments advanced by Counsel for Defendant Nos. 13 and 14.

15. After having considered the rival submission, I am of the view that it would be necessary for this Court, first to decide whether in the facts and circumstances of the case, institution of this notice of motion seeking to set aside decree dated 12/5/2008 could be the appropriate proceeding. Once the answer to this question is furnished, then one may go into the claims made by the applicants for the purpose of deciding merits of the notice of motion.

16. Applicants pleaded that the decree dated 12.5.2008 is brought about by playing fraud upon the court as well as on the applicants. One may proceed to accept this proposition for the purpose of deciding the question of maintainability. Learned Counsel for the applicants had submitted that on account of bar created by Order 23 Rule 3A, of Code of Civil Procedure, the present applicants are unable to file substantive suit and proper procedure would be to press this notice of motion.

17. After having considered Order 23 of CPC in its entirety, I am inclined to observe that Order 23 speaks of what happens between the persons who are parties to the suit. Order 23, 3A of CPC will therefore have to be treated as an extension of provisions of Order 23 Rule 1, 2, 3 of CPC This would mean that the restrictions as regards institution of suit to have the decree set aside would in principle apply to the parties to the suit. At this juncture itself, it would be proper to refer to the judgment of this Court in the case of Jethalal C. Thakkar v. Lalbhai Hiralal reported in (1984) 86 BLR 10 where the court had an occasion to deal with Order 23 Rule 3A of CPC This was the case where the application was made

by a party to the suit, for setting aside the decree was brought about by fraud. On behalf of the said party a submission was advanced that on account of Rule 3A of Order 23 of CPC the suit cannot be filed and therefore institution of application was the correct procedure. On this submission, the court gave its view in paragraph 4. The relevant portion of paragraph 4 is as under:

I am not inclined to give to the words "not lawful", the unrestricted connotation which Mr. Modi invites me to do. To my mind, Rule 3A bars a substantive suit not in all imaginable cases but in cases where the compromise was "not lawful", where for instance in passing the consent decree the Court has on the face of it no jurisdiction to do so or where fraud or misrepresentation was perpetrated on the court (as distinct as in the present case, from fraud, coercion or misrepresentation perpetrated by one party on the other) or where on the face of it the consent decree suffers from some palpable defect or error which the Court must correct, where for instance it contains a term or clause opposed to law, morality or public policy, or where the court was misled into passing the consent decree, say by reason of lack of authority or limited authority of the consenting advocate or advocates not brought to the court's notice at the time and so forth. It is in such context thus illustrated that words "not lawful" must be construed in reference to a compromise envisaged by Rule 3A and not in each and every case where a party seeks to set aside a compromise on the ground of fraud, coercion or misrepresentation practised upon him by the other party as alleged in the present case. In such a case resort to Rule 3A would be impermissible. I do not see anything in Rule 3A as stultifying the ratio of the decisions relied on have been simpler than to have enacted that no suit shall be filed to set aside by Mr. Chagla. If such has been the intention of the Legislature, nothing could a compromise decree, rather than enacting Rule 3A in the phraseology as it has been done.

18. Reading of above para would go to show that the provisions of Order 23 Rule 3A of CPC is not applicable to the all kinds of decrees on the ground that the compromise on which the decree is based was not lawful. This would mean some decrees can be challenged by filing a suit by a party to the suit on the ground that the compromise on which the decree is based was not lawful. However, this could be done by a person who was party to the suit. The bar of Order 23 Rule 3A of CPC in my view would not be applicable to a person who was not a party to the suit. If it was the intention of the legislature that the bar created by Order 23 Rule 3A of CPC was applicable to person who was not a party to the suit, the legislature would have specifically provided so. In the absence of such bar, if a person who is not a party to the suit wants to have a decree set aside by contending that the compromise on which the decree is based was not lawful has to file suit to seek appropriate reliefs. For the reasons mentioned above, I hold that the applicants will have to file a suit to seek necessary declarations. The notice of motion is not maintainable.

19. In support of the contention that the present notice of motion is

maintainable, learned Counsel for the applicants had relied upon the judgment *Dwarika Prasad Vs. Nirmala and Others*, . Having gone through the said judgment, I am inclined to observe that the point covered by the said judgment is totally different from the point involved in this case. This judgment is not applicable to the facts of this case.

20. There is one more reason as to why institution of suit is proper remedy. As the present applicants were not parties to the suit, what exactly transpired before the Court at the time of arriving the consent terms, would not be known to them. One will have to read the text of decree, minutes of the order, consent terms etc. If it has been the stand of the applicants that the fraud has been played on the court and on them, they will have to provide full particulars of fraud. Undoubtedly all concerned, who are interested in opposing such a plea will have to be given a chance to defend such allegations. Once the allegations are defended by the parties, it will result in disputed questions of fact and evidence will have to be led in support of rival contentions. Surely, this cannot be effectively done in a Notice of Motion which is taken out by the present applicants. It is for this reason also, I am inclined to observe that the institution of the suit so as to challenge the decree dated 12.5.2008 is the proper remedy.

21. It is pertinent to note that in the CPC no specific procedure is set down for the purpose of filing proceeding to have the decree set aside by a person who was not party to suit by alleging that the said decree is not lawful, in the absence of such procedure in the Code of Civil Procedure, the normal rule of institution of suit should be accepted as a proper procedure. Such a procedure would meet the ends of justice.

22. For the reasons mentioned aforesaid, I hold that the present notice of motion is not maintainable for the purpose of seeking reliefs which are set out in the prayer clauses and as such the motion will have to be dismissed on the question of maintainability.

23. Having observed that the notice of motion is not maintainable, I do not wish to say anything about the allegations levelled by the applicants against the Plaintiffs, Defendant No. 4 and Defendant Nos. 13 and 14 and to that extent this Court has expressed no views about the stand taken by the applicants in this notice of motion.

24. For the reasons mentioned aforesaid, the motion is disposed of by passing following order:

ORDER

- i. Notice of Motion is dismissed. There shall be no order as to costs.
- ii. The suit is already disposed of, therefore, there is no need to show it on board. Removed from board.