

(2011) 07 BOM CK 0105

In the Bombay High Court

Case No : Civil Revision Application No. 123 of 2004

Shankar Shinde (died) through his L.Rs. (Awantikabai Shinde and Others) APPELLANT

Vs

Gorakh Shinde and Others RESPONDENT

Date of Decision : 06-07-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1(3)
Limitation Act, 1963 — Section 14, 5

Citation : (2012) 1 MhLj 104

Hon'ble Judges : S.S. Shinde, J

Bench : Single Bench

Advocate : Vinesh Solshe and Vivek Solshe, for the Appellant; D.N. Sabnis, for the Respondent

Final Decision : Dismissed

Judgement

S.S. Shinde, J.—This civil revision application has been filed challenging the order dated 24-03-2004 passed below Exh. 48 in Regular Civil Suit No. 503 of 1995, by the learned Joint Civil Judge, Junior Division, Nilanga, District Latur.

2. The revision applicant herein filed application at Exhibit 48/D contending that the Plaintiff filed suit for declaration of ownership with perpetual injunction in respect of land bearing survey No. 52/A. The Plaintiff knows that there is sale-deed of Defendant which is overlapping of suit land. It was contended that it is very necessary to claim declaration regarding sale-deed in favour of Defendant passed on 29-05-1974, which is not binding on the Plaintiff. It is further contended that adding this relief in the plaint, will change nature of suit and amendment was not possible. The Plaintiff therefore prayed for withdrawal of suit with liberty to file fresh suit on same cause of action.

3. The said application of the applicant was heard by the Joint Civil Judge, Junior Division, Nilanga on 24-03-2004 and said application came to be rejected. Being aggrieved by the said order, the instant civil revision application has been filed by

the applicants.

4. The learned Counsel for the applicants submitted that the sale-deed dated 29-05-1974 executed in favour of Defendant is not binding on the Plaintiff. According to the learned Counsel appearing for the applicant, the said prayer in the application to withdraw the suit with liberty to file another suit would not cause prejudice to the original Defendants, who are Respondents herein. It is further submitted that merely because sale-deed is dated 29-05-1974 the learned Judge was not right in observing that to claim relief pertaining to sale-deed is barred by law of limitation. It is further submitted on oral instructions of applicant that Regular Civil Suit No 95 of 1992 is withdrawn by the Plaintiffs since the area mentioned in the plaint was less than the actual area of Survey No. 52/A. It is further submitted that if the applicant is not allowed to withdraw the suit with liberty to file fresh suit, it will cause great prejudice to the rights of the applicants. Therefore, in all fairness the learned Judge ought to have allowed the application for withdrawal of the suit with liberty to file fresh suit for same cause of action to challenge the sale-deed.

5. The learned Counsel for the applicants has placed reliance on the reported judgment of Punjab and Haryana High Court in case of Dalbir Kaur V. Jagir Kaur and Anr., reported in 2003 (1) B.C.J, 13 (OHC), and in particular Head Note B, para No. 16 & 17 of the said judgment and submitted that fresh suit can be allowed to be instituted by granting permission to withdraw the earlier suit for same cause of action. According to learned counsel for the applicant, fresh suit can be instituted for same cause of action and defect which was there in the earlier suit was of formal nature. Therefore, learned Counsel for the applicant prays that civil revision application maybe allowed.

6. On the other hand, learned Counsel appearing for the Respondents submitted that the contents of the application filed by the Plaintiffs would show the defect is not of formal nature and if such application is allowed it will cause prejudice to the interest of the Respondents. The learned counsel further submitted that only in case there is formal defect in the suit, under Order XXIII Rule 1(3) of CPC the same can be entertained, however, if there is a substantial defect and same is allowed to be cured would ultimately affect the interest of the Defendants, in that case such application cannot be entertained. In support of his contentions learned counsel appearing for the Respondents placed reliance on reported judgment of the Supreme Court the case of K.S. Bhoopathy and Others Vs. Kokila and Others, , in particular para Nos. 13 & 14. He further placed reliance on reported judgment of Full Bench of the Bombay High Court, in the case of Ramrao Bhagwantrao Inamdar Vs. Babu Appanna Samage, . Therefore, counsel appearing for the non-applicants/Respondents would submit that this civil revision application is devoid of merits and same may be dismissed.

7. I have given due consideration to the rival submissions of the learned Counsel appearing for the respective parties and upon perusal of the application below Exh. 48, it is crystal clear that, the applicant was aware about the sale-deed

dated 29-05-1974, even on the date of filing of Regular Civil Suit No. 503 of 1995. There is nothing in the application which would indicate that the Plaintiffs were not aware of such sale-deed, when Regular civil Suit No. 503 of 1995 was instituted. It is also not in dispute that Regular Civil Suit No. 95 of 1992 was filed by the applicants herein in respect of Survey No. 52-A for ownership and perpetual injunction. However, according to the applicants in said plaint area of survey No. 52-A was shown less and therefore, the said suit came to be withdrawn. Both the suits i.e. R.C.S. No. 95 of 1992 and R.C.S. No. 503 of 1995 are in respect of land survey No. 52-A with prayer for declaration of ownership and perpetual injunction.

By way of filing application at Exhibit 48, the applicants herein wanted to withdraw Regular civil Suit No. 503 of 1995 with liberty to file a fresh suit. From perusal of the contents of application at Exhibit 48, it is abundantly clear that by filing fresh suit in place of earlier Suit No. 503 of 1995, the applicants herein want to seek a relief of declaration that, sale-deed executed in favour of Defendants on 29-05-1974 is not binding on the Plaintiffs i.e. applicants herein. The defect which is shown in the application itself is of a substantial nature and the same cannot be termed as formal defect. Therefore, on careful reading of the impugned order, in my opinion, the Trial Court has taken a correct and possible view, which needs no interference. The Joint Civil Judge, Junior Division, Nilanga who decided the application, has a jurisdiction to entertain the said application. The findings recorded in the impugned order are not perverse in any manner. In that view of the matter, this civil revision application is devoid of any merits same stands dismissed.

8. If the applicants wish to file application for amendment in Regular Civil Suit No. 503 of 1995, the applicants can do so. If such application is filed, the concerned Court will decide the same in accordance with law. This Court has not expressed any opinion in that regard. In case Court finds that, there is delay in filing application for amendment, the concerned Court shall keep in mind the provisions of Section 5 and 14 of the Limitation Act, and then decide the point of limitation.