

(2009) 04 BOM CK 0122

In the Bombay High Court

Case No : Writ Petition No. 5300 of 2008

Vitthalrao Hapat and Another

APPELLANT

Vs

Matru Seva Sangh, Warora and Another

RESPONDENT

Date of Decision : 27-04-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 1 Rule 3A

Citation : (2009) 3 CivCC 378 : (2010) 7 RCR(Civil) 2940 : (2011) 1 RCR(Civil) 468

Hon'ble Judges : C.L. Pangarkar, J

Bench : Single Bench

Advocate : M.P. Khajanchi, for the Appellant; A.C. Dharmadhikari, for the Respondent Nos. 1 and 2, for the Respondent

Final Decision : Allowed

Judgement

C.L. Pangarkar, J.—Rule. Rule is made returnable forthwith. Heard finally with consent of the parties.

2. The plaintiffs feeling aggrieved by the order passed by the Civil Judge (Jr.Dn.), Warora on an application under Order 1, Rule 10 of CPC has preferred this writ petition.

3. The facts giving rise to the petition are as follows

It is alleged that the defendant/respondent No. 1 is a public trust and owns certain buildings. It has constructed a Wall. While the plaintiffs/petitioners' child was playing nearby, it is alleged that the said wall collapsed and child came under the collapsed wall and died on the spot. The petitioners, therefore, instituted a suit for damages. The civil suit was instituted against "Matru Seva Sangh" through one Narayan Shrihari Deshpande and defendant No.2 was Narayan Shrihari Deshpande himself.

4. Defendants No. 1 and 2 appeared before the Court and filed their separate

written statement. They denied all the allegations. They denied that wall had collapsed due to negligence on the part of the defendants. The main contention that was raised was that the plaintiffs have not made proper person as party-defendant to the suit. It was also contented that it is necessary to make all trustees of the said trust as party. It was further alleged that defendant No.2 was not the trustee of the trust at all and the suit itself was defective. This written statement was filed by the defendant on 23.04.1992. Later issues were framed. Evidence has been recorded and the matter was fixed for argument before the Court. The plaintiff at that time moved an application under Order 1, Rule 10, CPC seeking to add all trustees as party to the suit and substituting the name of Narayan Shrihari Deshpande with the name of one Smt. Mrunalini.

5. This application was opposed by the defendants on the ground that the application is belated. A right has in fact accrued in favour of the defendants as the suit has now become barred by limitation. The learned Judge of the trial Court, after hearing the parties rejected the application. He found that addition of such party would embarrass the trial.

6. I have heard the Learned Counsel for the petitioners and the respondents.

7. The suit was instituted in the year 1991 and the written statement has been filed in the year 1992. It is the contention of the defendants that they had raised the plea in the written statement that the suit is bad for non-joinder of necessary parties i.e. all the trustees of the trust having not been joined, It is submitted by Learned Counsel for the respondents that upon plaintiffs' request the names of all the trustees were supplied to the plaintiffs in the year 1996 as directed by the Court. The Learned Counsel for the respondents further submits that even though plea of non-joinder was raised in 1992 and names of all the trustees were supplied in 1996, the application for addition of trustees is filed in 2005. He submits that in fact the application is filed at the time of conclusion of the trial i.e. when the matter was fixed for final arguments. It is further his contention that this shows total negligence and lack of bona fide on the part of the plaintiffs and the suit is, in fact, liable to be dismissed for non-joinder of proper and necessary parties. He submits that by allowing such addition, the Court cannot take away the right accrued in favour of the defendants by lapse of time. The main thrust of the argument of the Learned Counsel for the respondents is that the suit is now barred by limitation against the defendants, who are sought to be added and therefore, the application is rightly rejected.

8. One thing that one must bear in mind is that Order 1, Rule 10 permits the Court to add right plaintiff or defendant to suit for final and effective adjudication of the claim. When a suit is instituted in the name of wrong plaintiff or defendant, the right plaintiff or defendant can be added as plaintiff or defendant. In the instant case, the defendants raised a plea that suit is bad because of trustees are not joined and a wrong person is shown to be representing the trust. Now, when defendants themselves raised a plea that the suit is bad for non-joinder of all trustees, the defendants cannot in fact oppose an application of

addition of such persons as defendants. One cannot blow hot and cold in the same breath. In fact, the law is such that if the Court finds that improper person is joined, the Court can strike out him and Court can also suo motu add a person whom the Court thinks ought to be added as party. Sub-rule (2) of Rule 10 of Order 1 permits the Court to do so. As such a Court has certainly a power irrespective of application even to add or substitute a right person. Here, the plaintiff has moved the application due to plea raised by the defendants that proper defendant is not added and all trustees are not added. If, according to the plaintiffs, the position is like that, there ought not be no impediment in adding a right person as party. This takes me to consider the objection about delay and the limitation. There is least doubt that there is an inordinate delay of more than 15 years in making this application. The Learned Counsel had submitted that the suit is now barred by limitation against the trustees. It is not for this Court to enter into that question as to whether the suit is barred by limitation against them. Suffice it to say that sub-rule (5) of Rule 10 of Order 1 of CPC which reads as follows, takes care of the same.

"5. Subject to the provisions of the [Indian Limitation Act, 1877 (15 of 1877), section 22], the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons."

9. Every defendant, who is added, is deemed to be added from the date of service of summons on him. After the proposed defendants are added, they have a right to agitate the question whether the suit is within limitation as against them or not. The only question that this Court was required to consider is whether it was necessary to add these persons or not and this Court finds that it was so necessary. The learned Judge of the lower Court has rejected the application on the ground of embarrassment of trial as contemplated by Rule 3A of Order 1 of the Civil Procedure Code. The question of embarrassment does not arise in the instant case, as this is a case of necessary party not having been joined. I would, therefore, set aside the order passed by the trial Court and allow the application but subject to payment of costs of Rs.2000/-. The writ petition is, therefore, allowed and rule is made absolute.