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Court : Mumbai Aurangabad

Decided On : Jul-31-2013

Judge : S.S. Shinde

Appeal No. : Civil Revision Application No.139 of 2013

Appellant : Babybai and Another

Respondent : Ganesh

Judgement :

Rule. Rule made returnable forthwith. Heard finally with the consent of the parties.

2. This Civil Revision Application takes exception to the order dated 19th April, 2012 below Exhibit-40 in Regular Civil Suit No.222 of 2010 passed by the 5th Joint Civil Judge, Junior Division, Beed.

The back ground facts as disclosed in the Civil Revision Application for filing the same are as under :-

3. The applicants are original plaintiffs. The applicants instituted suit praying therein for removal of encroachment by the respondent and for perpetual injunction.

According to the applicants, the property over which the suit is filed is Grampanchayat Property No.320/City Survey No.735. The total measurement of

CTS No.735 is 22 x 60 feet. It is the case of the applicants that, out of 22 x 60 feet, 5 x 60 feet is disputed. It is the contention of the applicants that, non-applicant in collusion with Gramsevak of village created false record; relying on the said record, the non-applicant is trying to encroach upon the land owned by the applicants. It is further case of the applicants that, on 9th May, 2010 wrong entry is taken over the papers relating to the suit property and the non-applicant is raising illegal construction over the suit property and therefore, the plaintiffs prayed for decree of mandatory injunction. The plaintiffs urged for an order of restraining the non-applicant from encroaching upon their land.

4. The non-applicant appeared in the suit and filed his written statement. The non-applicant has denied the applicants' case. It is his case that, the suit land was originally owned by one Shekuji. Thereafter, Haridas and Hiralal became the owners. After Hiralal's death, his wife Sonabai became the owner of the property. From Sonabai, the non-applicant's grandmother became the owner. After grandmother, non-applicant's father recorded non-applicant's name in the village record.

The suit was filed by the plaintiffs on 17th May, 2010. On 14th June, 2010 issues were framed. It is the case of the applicants that, subsequently the applicants appointed new Counsel before the trial Court to plead their case. On 20th September, 2011 the applicants filed application at Exhibit-40 with prayer to withdraw the suit bearing R.C.S. No.222 of 2010. The applicants/plaintiffs sought permission from the Court to withdraw the suit with further prayer to allow them to file fresh suit on same cause of action. It is the contention of the applicants that, there was 'formal defect' in the suit presented by them. Therefore, as per provisions of Code of Civil Procedure, particularly Order 23 Rule 3(a)(b) the applicants prayed for leave to withdraw the suit with liberty to file a afresh. It is their case that, east west and south north portion of the suit property was not mentioned in the plaint. The description of the suit property owned by the plaintiffs was inadvertently skipped out. The map of the disputed property was also not supplied. Therefore, plaintiffs prayed that, leave may be granted to the plaintiffs to withdraw the suit with liberty to institute fresh suit.

5. The non-applicant herein, original defendant filed his say to the application Exhibit-40 and prayed for rejection of the said application. It is further case of the applicants that, 5th Joint Civil Judge, Junior Division, Beed vide order dated 19th April, 2012 was pleased to dismiss the application Exhibit-40. Hence, this Civil Revision Application.

6. The learned Counsel appearing for the revision applicants submits that, the trial Court ought to have appreciated that, defects realized by the plaintiffs were formal and no prejudice would have been caused to the non-applicant, had the application Exhibit-40 been allowed. It is further submitted that, the expression 'formal defect;' in the Rule must be given a wide and liberal meaning and must be deemed to connote every kind of defect which does not affect the merits of the case, whether that defect be fatal to the suit or not. It is further submitted that, with dismissal of Exhibit-40 the Court below insisted for proceeding with the suit as it is. The learned Counsel pressed into service exposition of this Court in the case of Moosa Suleman Memon and others vs. Hanuman Idol and others (1979 Bom.C.R. 214) and submitted that, defects which were stated in the application for withdrawal of the suit are of formal nature and in view of provisions of Order 23 sub-rule (3)(a) of Rule-1 of the Code of Civil Procedure, the application filed by the applicants ought to have been allowed by the trial Court. It is submitted that, this Court in the case of Moosa Suleman Memon (supra) relying upon the exposition of Full Bench of this Court in the case of Ramrao Bhagwantrao Inamdar vs. Babu Appanna Samage (A.I.R. 1940 Bom. 121 (F.B.)) held that, expression "formal defect" in Rule 1(3)(a) must be given a wide and liberal meaning and must be deemed to connote every kind of defect which does not affect the merits of the case, whether that defect be fatal to the suit or not. The learned Counsel invited my attention to paragraph-12 from the judgment of Moosa Suleman Memon (supra). The learned Counsel submits that, in view of provisions sub rule 3(a) of Rule 1 of Order 23 of the Code of Civil Procedure wherein the Court is satisfied that, a suit must fail by reason of some "formal defects", in that case in view of the judgment of this Court in the case of Moosa Suleman Memon (supra), party should be allowed to remove such 'formal defect'.

7. It is further submitted that, in view of the provisions of sub rule (3)(b) of Rule (1) of Order 23 of the Code of Civil Procedure, where the Court is satisfied that, if there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim, it may, on such term as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of the claim. The submission of the Counsel for the applicants is that, the Court ought to have allowed the application filed by the applicants in the light of sub rule (3) of Rule (1) and in particular sub rule (3)(a) and 3(b) of Order 23 of the Code of Civil Procedure. The learned Counsel invited my attention to the averments in the application and submitted that, if the application Exhibit-40 is read in its entirety, certainly averments in the said application would unequivocally indicate that, there were certain formal defects in the suit and therefore, the application was filed by the plaintiffs. It is submitted that, in case such application is not allowed, the suit will be continued with defects and ultimately it would cause great prejudice to the interest of the plaintiffs. It is submitted that, by way of allowing such application, no prejudice can be caused to the defendant, he will have opportunity to file further written statement.

8. The learned Counsel appearing for the respondent invited my attention to the written statement filed before the trial court in the suit and reply which was filed to the application Exhibit-40 and submitted that, defects are not formal defects. It is submitted that, careful reading of the contents of the application would itself demonstrate that, the defects are not formal but the plaint itself is badly drafted and reliefs are not properly claimed. Therefore, it cannot be said that, there are formal defects and the plaintiffs can be allowed to cure such defects. It is submitted that, it is only formal defects can be allowed to be cured by the Court in view of the provisions of Order 23 Rule (1) of the Code of Civil Procedure. The learned Counsel appearing for the respondent pressed into service reported judgment of this Court in the case of Rajaram Jairam Raut vs. Baliram Laxman Raut (2006 (Supp.) Bom.C.R. 718 and submitted that, facts in the case in hand and in the case of Rajaram Jairam Raut (supra) are almost similar. This Court in the case of Rajaram Jairam Raut (supra) has taken a view that, if the defect is not formal, a defect by substance arising out of inability to prove, cannot be said to be

formal defect. It is submitted that, in the facts of that case, this Court was pleased to set aside the order allowing the application for removal of formal defects. Therefore, the Counsel appearing for the respondent submits that, Civil Revision Application is devoid of any merits and same may be rejected.

9. I have given careful consideration to the rival submissions of the learned Counsel appearing for the parties, with their able assistance perused the averments in the application, annexures thereto, written statement filed by the respondent in the suit and also say filed to the application which was filed for withdrawal of the suit with further prayer to institute a fresh suit for same cause of action. At this juncture, it would be apte to reproduce herein below the contents of the application (Exhibit-40) which reads thus ;

"1. He ki, prastut davyat vadine, prativadine tyanche malki v tabyatil 5 x 60 jagevar kelele atikraman kathun ghenes magni keli aaghe, prantu najar chukine sadar atikramit kshetrache purva pacchim v dakshinottar namud karneche rahun gele aahe, tasech davyatil dava milakat vadichi vadiloparjitmilkat asleche namudle asun vadinche malkiche jageche varnan davyat namud nahi. Ji milakat vadichi darshavili aahe ti milkat prativadichi aahe. Tasech vadgrasta jagecha nkasha dekhil davyasobat deneche rahun gele aahe. Ashyaprakare prastut davyat anek truti (defects) rahun gelya aahe. Sadar truti durust hone shakya nahi. Ashya paristhiti madhye dava puthe chavavanes davyache nikarakaran honar nahi. Sabab vadina prastut dava kathun ghene aahe."

Upon careful perusal of the contents of the application, it appears that, applicants / plaintiffs have stated that, suit is filed against the respondent praying therein, for direction to the respondent to remove the encroachment from the area admeasuring 5x60 ft. which is owned and possessed by the respondent, however, by inadvertence east west and south north of the encroached portion has remained to be mentioned in the plaint. It is further contended in the said application that, the suit property is inherited from the father, however, description of the suit property of the plaintiff remained to be mentioned in the suit. The description of the property which is given in the plaint/suit showing that, it belongs to the plaintiffs is in fact property of the respondent. The map showing

encroachment is also not annexed with the suit. Accordingly, there are many defects in the plaint/suit. Such defects cannot be cured. Therefore, in this condition if the suit is continued, there cannot be adjudication and therefore, the plaintiffs may be allowed to withdraw the suit with liberty to file a fresh suit.

10. Upon careful perusal of the averments in the application which are discussed herein above, it appears that, no boundaries of the encroached portion have been mentioned in the plaint/suit. The property of the respondent is shown as the property of the plaintiffs in the suit, no map of encroached portion has been placed on record. According to the plaintiffs/applicants, description of the plaintiff's property is not given in the plaint/suit. Therefore, whether such defects in the pleadings which would certainly affect on merits of the case, can be termed as 'formal defects' and further plaintiffs can be allowed to withdraw the suit with further prayer to institute a fresh suit for same cause of action is the point to be decided in the facts of case in hand.

11. While deciding the application of the plaintiffs on merits, it appears that, the Civil Judge, Junior Division held that, defects which are stated in the application praying for withdrawal of the suit cannot be said to be 'formal defects'. In paragraph-5 of the impugned order, upon upon perusal of averments of the plaint, the Court has observed that, reasons for which the applicants are asking to allow the application, were known to the plaintiffs even prior to institution of the suit. It is also observed by the Court that, if such application is entertained, certainly it will affect on the right and entitlement of the respondent and the respondent will have to bear unnecessary trouble. It is further observed that, before institution of the suit, the plaintiffs should know that, for what reason the suit is being instituted. The suit is filed for removal of encroachment and for perpetual injunction. It is further observed that, if the plaintiffs themselves do not know boundaries of their own property and they have instituted the suit for removal of the encroachment, it was incumbent upon the plaintiffs to mention east west and south north boundaries of encroached portion, however, same has not been mentioned. The description of the property of the plaintiffs has not been given in the plaint. In fact, it was incumbent upon the plaintiffs to give such description in the original plaint itself. It was also necessary to file map of encroached portion, however, such map was

also not filed. Therefore, the trial Court has drawn conclusion that, the plaintiffs have instituted the suit just to harass the defendant. Prayer in the application does not fall under the definition of 'formal defects' and therefore, said application is rejected.

12. The provisions of Order 23 Rule 1(3)(a) (b) of the Code of Civil Procedure reads thus ;

ORDER

"1. Withdrawal of suit or abandonment of part of claim.-

(1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim: Provided that where the plaintiff is a minor or other person to whom the provisions contained in rules to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned Without the leave of the court.

(2) An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person.

(3) Where the court is satisfied,-

a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of the claim."

If the averments in the application filed by the plaintiffs are carefully perused, it is stated that the property which is shown/described as property of the plaintiffs is in

fact the property of the respondent. Therefore, it cannot be said that, above said defect is 'formal defect'. Said defect cannot be treated as 'formal defect', since said shall certainly affect on the merit of the case. If by mistake the description of the property of the plaintiffs is remained to be mentioned in the plaint, said can be termed as 'formal defect'. However, in the present case, the plaintiffs have mentioned property of the respondent in the plaint stating therein that, the said property belongs to the plaintiffs. Therefore, said defect does not appear to be 'formal defect'.

13. Even the plaintiffs have not bothered to file map of the disputed property, at the time of institution of the suit. The plaintiffs should have filed such map and more particularly where the prayer of the plaintiffs is for removal of encroachment by the defendant. Therefore, it appears to this Court that, reasons assigned by the trial Court are correct.

The contention of the Counsel appearing for the applicants that, in view of the judgment in the case of Moosa Suleman Memon (supra), the applicants' case deserves to be allowed, cannot be accepted. It is true that, it is laid down that, expression "formal defect" in Rule (1) sub rule (3)(a) must be given a wide and liberal meaning and must be deemed to connote every kind of the defect which does not affect merits of the case, whether that defect be fatal the suit or not. It appears that, this Court in the case of Moosa Suleman Memon (supra) has placed reliance upon the Full Bench Judgment of this Court in the case of Ramrao Bhagwantrao Inamdar (supra) wherein Full Bench has observed that, formal defect includes, inter-alia misjoinder of parties or of the matters in suit, rejection of a material documents for not having a proper stamp and the erroneous valuation of the subject-matter of the suit. It is true that, Order 23 covers not only suits wherein there are certain formal defects but also defects analogous to formal defects. However, Full Bench has observed that expression 'formal defect' must be given a wide and liberal meaning, but, the defects which does affect the merits of the case cannot be considered as a 'formal defects'.

14. The Supreme Court in the case of K.S. Bhoopathy and others vs. Kokila and others ((2005) 5 S.C.C. 458) held that, the provision in Order 23 Rule (1) is an

exception to the common law principle of non-suit, sub rule (1) grants an absolute liberty to the plaintiff, whereas under sub rule (3) the Court has the discretion to grant leave or not. It is further held that, discretion of the Court is to be exercised with caution and circumspection. All aspects of the matter are to be examined, including the desirability or otherwise of permitting a fresh round of litigation on a cause of action which has already been agitated.

In case of Somalaraju vs. Samanthu Sivaji Ganesh (A.I.R. 2009 A.P. 12), it is held that, expression 'formal defect' in the normal parlance connotes defects of various kinds not affecting the merits of the case. Thus, a 'formal defect' is a defect of form unrelated to the claim of the plaintiff on merits. The High Court, Bombay in the case of Tarachand Bapu Chand vs. Gaibihaji Ahmed (A.I.R. 1956 Bombay 632) while interpreting provisions of Order 23 held that, failure to make a property claim and failure to implead parties in respect of the claim cannot be properly regarded as a 'formal defect', which is fatal to the suit within the meaning of Order 23 Rule (1) of the Code of Civil Procedure.

This Court in the case of Rajaram Jairam Raut (supra) held that, merely because no prejudice will be caused to the defendant is not a ground for allowing withdrawal of the suit. In the said judgment in paragraph-4 this Court has adverted to the judgment of the Supreme Court in the case of K.S. Bhoopathy (supra) and observed that, it is duty of the Court to feel satisfied that, there exist proper grounds and reasons for granting permission for withdrawal of the suit with leave to file fresh suit by the plaintiffs and in such a matter the statutory mandate is not complied by merely stating that, grant of permission will not prejudice the defendants.

15. In the facts of the present case, it was possible for the plaintiffs to cure defects, if any, by moving appropriate application for amendment. In the present case, already written statement is filed by the respondent/defendant and issues are also framed by the trial Court. As observed by the Supreme Court in the case of K.S. Bhoopathy (supra) while exercising discretion under Order (sic 23) Rule 1(3), discretion of the Court is to be exercised with caution and circumspection. It is required to be keep in mind that, all aspects of the matter are to be

examined,including the desirability or otherwise of permitting a fresh round of litigation on a cause of action which has already been agitated. The Supreme Court in paragraph-13 of the judgment held that, grant of permission for withdrawal of a suit with leave to file a fresh suit may also result in annulment of a right vested in the defendant or even a third party and withdrawal of a suit at the appellate/second appellate stage results in wastage of public time of Courts which is of considerable importance in the present time in view of large accumulation of cases in lower Courts and inordinate delay in disposal of cases.

16. Therefore, taking overall view of the matter, in my opinion, the impugned order does not suffer from any jurisdictional error or is not a case of exceeding jurisdiction or the reasons assigned by the Court below are not perverse. Therefore, Civil Revision Application sans merit, hence same stands rejected. Rule discharged. However, the applicants will be at liberty to file application for amendment of the plaint and if such application is filed, respondent/defendant will have an opportunity to contest the said application and the concerned Court to decide the same in accordance with law.

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