

Shobha and Others Vs. Namdeo and Others

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Court : Mumbai Nagpur

Decided On : Jan-15-2016

Judge : A.S. Chandurkar

Appeal No. : Writ Petition No. 5475 of 2015

Appellant : Shobha and Others

Respondent : Namdeo and Others

Advocate for Def. : Shri. M. P. Khajanchi

Advocate for Pet/Ap. : Ms. Kirti Satpute

Judgement :

Oral Judgment:

1. In view of notice for final disposal of the writ petition, the learned Counsel for the parties have been heard at length.
2. The petitioners who are the original defendant Nos.2 to 6 are aggrieved by the order passed by the trial Court below Exhibit-53 granting leave to the respondent No.1 “ original plaintiff to file subsequent pleadings under provisions of Order VIII Rule 9 of the Code of Civil Procedure, 1908 (for short the Code.).
3. The facts found relevant for adjudicating the challenge are that the respondent No.1 filed suit for declaration that he had 1/3rd share in the amount of

compensation determined and awarded in land acquisition proceedings. It is his case that he, the respondent No.2 and the predecessor of the petitioners were the real brothers and they along with their mother had 1/4th share each in the land which was acquired. According to the respondent No.1, the predecessor of the petitioners had illegally withdrawn the entire amount of compensation and hence the aforesaid suit was filed. The petitioners filed their written statement on 31-1-2010 wherein a stand was taken that on 28-6-1997 a written memorandum of partition was executed by which the land which had been acquired fell to the share of the predecessor of the petitioners. It was pleaded that said document was handed over to the respondent No.2. The respondent No.2 also filed his written statement on 15-3-2010 and relied upon said document of partition dated 28-6-1997.

4. The issues were framed by the trial Court on 15-3-2010 and on 6-9-2010 the respondent No.1 filed his affidavit in lieu of evidence. During his cross examination by the petitioners, the respondent No.1 was confronted with the document dated 28-6-1997. The respondent No.1 found from the record that said document had been filed by the respondent No.2 on 16-2-2012. On 26-9-2013, the respondent No.1 filed an application below Exhibit-53 seeking permission to file written statement under provisions of Order VIII Rule 9 of the Code. Said application was opposed by the petitioners on the ground that the respondent No.1 was having knowledge of the said document and there was delay in seeking leave to file written statement under aforesaid provisions. By order dated 24-7-2015, the trial Court allowed aforesaid application by accepting the case of the respondent No.1 that though said document had been filed on record, a copy of said document was misplaced by the Counsel for the respondent No.1. It held that as said document had not been filed on record along with the pleadings, the respondent No.1 was not expected to respond to the same immediately. By imposing costs of Rs.1000/-, the application came to be allowed.

5. Ms. Kirti Satpute, learned Counsel for the petitioners submitted that the original plaintiff had no authority in law to seek permission to file written statement under provisions of Order VIII Rule 9 of the Code. According to her, the original plaintiff had prior knowledge of the document in question and, therefore, necessary

pleadings could have been made in the plaint. For the purposes of covering lacuna in the plaint, the application in question had been filed. It was submitted that the plaintiff could have sought production of the document in question before leading evidence but the same was not done. It was submitted that the plaintiff was therefore, not diligent while moving the present application and on that count, the same could not have been allowed. In support of her submissions, the learned Counsel placed reliance upon the judgment of the learned Single Judge in *Jayashree Subhash Kalbande and another vs. Bhauroo Nagorao Derkar and others* 2014 (4) Mh.L.J.168. It was, therefore, submitted that the impugned order was liable to be set aside.

6. Shri M. P. Khajanchi, learned Counsel for the respondent No.1 supported the impugned order. According to him though there was reference to the alleged document in the written statement filed on behalf of the defendant Nos. 2 to 6, said document was filed on record belatedly after the plaintiff had filed his affidavit in lieu of evidence. It was submitted that the plaintiff had explained the reason for not filing the application below Exhibit-53 at a prior point of time. There was no counter affidavit filed to the affidavit filed by the Counsel for the plaintiff. The learned Counsel by relying upon *Law of pleadings in India?* by P. C. Mogha submitted that pleadings filed by a plaintiff in reply to the defendants pleadings with the leave of the Court were also called as written statement?. Reference was also made to the Commentary by Stone and Iyer on pleadings to urge that the course followed in the present case was in the nature of confession and avoidance. He relied upon the judgment of learned Single Judge of the Delhi High Court in *Anant Construction Private Limited Vs. Ram Niwas* 1995(1) Civ CC 348 to urge that the pleadings sought to be filed in the present case were in the nature of replication. He also placed reliance on the decisions in *State of Rajasthan and another vs. Mohammed Iqbal and others* AIR 1999 Rajasthan 169, *Velji Bharmal Vs. Samji Poonja and another* AIR 1952 Kutch 27, *Thakkar Babul Dayashankar vs. Mehta Natwarlal Kaluram and another* AIR 1978 Gujarat 94 and the decision of the Supreme Court in *Olympic Industries Vs. Mulla Hussainy Bhai Mulla Akberally and others* (2009) 15 SCC 528. It was, therefore, submitted that there was no reason to interfere with the discretion exercised by the trial Court while allowing the application. Shri S. A. Choudhary, learned Counsel appeared for the respondent

No.2 and Shri Kaustubh Lule, learned Assistant Government Pleader appeared for respondent No.3.

7. I have given due consideration to the respective submissions and have gone through the documents filed on record. The facts are not in dispute that the document dated 28-6-1997 was filed by the defendant No.7 on record on 16-2-2012 much after the defendants had filed their written statement. Said document was filed on record after the plaintiff had filed his affidavit in lieu of evidence. During the course of the cross-examination of the plaintiff and on being confronted with said document, the application seeking leave to file written statement under provisions of Order VIII Rule 9 of the Code came to be filed.

8. Under provisions of Order VIII Rule 9 of the Code, no pleadings subsequent to the written statement of a defendant other than by way of defence to set off or counter claim can be presented except with the leave of the Court. Reference may be made to the observations of learned Single Judge of the Delhi High Court in paras 14 and 15 of the judgment in *Anant Construction Private Limited (supra)*. It was observed thus:

14. Decided cases in India use the term rejoinder loosely for a reply or replication filed by the plaintiff in answer to the defendantTMs plea. Strictly speaking a reply filed by the plaintiff (when permissible) is a replication. A pleading filed by the defendant subsequent to replication is a rejoinder.

15. A replication is not to be permitted to be filed ordinarily, much less in routine. A replication is permissible only in three situations: (1) when required by law; (2) when a counter claim is raised by the defendant; (3) when the Court directsTM or permits a replication being filed. The Court may direct filing of a replication when the court having scrutinized the plaint and the written statement feels the necessity of asking the plaintiff to join specific pleadings to a case specifically and newly raised by the defendant in the written statement. The plaintiff may also feel the necessity of joining additional pleading to put forth his positive case in reply to the defendantTMs case but he shall have to seek the leave of the court by presenting the proposed replication along with an application seeking leave to file the same. The Court having applied its mind to the leave sought for, may grant or refuse the

leave. Ordinarily the necessity of doing so would arise only for ~confession and avoidance™.?

Learned Single Judge of the Rajasthan High Court in *State of Rajasthan and another (supra)* has referred to certain principles as regards the nature of provisions under Order VIII Rule 9 of the Code. In para 9 therefore, it was observed thus:

9. The principles deducible from the above discussion may be summarized thus “

a) The plaintiff cannot be allowed to introduce new pleas by way of filing rejoinder, so as to alter the basis of his plaint.

b) In rejoinder, the plaintiff can be permitted to explain the additional facts which have been incorporated in the written statement.

c) The plaintiff cannot be allowed to come forward with an entirely new case in his rejoinder.

d) The plaintiff cannot be permitted to raise inconsistent pleas so as to alter his original cause of action.

e) Application under Order VIII Rule 9, CPC cannot be treated as one under Order VI Rule 17, CPC as both are contextually different.?

9. It can thus be seen that by filing subsequent pleadings under provisions of Order VIII Rule 9 of the Code, a new case cannot be permitted to be introduced by the plaintiff, but he can be permitted to explain additional facts that have been pleaded in the written statement. While the plaintiff cannot be permitted to raise any inconsistent pleas so as to alter his original cause of action, the same would only enable the plaintiff to putforth his positive case in reply to the defendants case as observed in *Anant Construction Private Limited (supra)*. The same is in the nature of confession and avoidance™.

10. The facts of the present case indicate that the suit was filed by the plaintiff seeking declaration of his 1/3rd share in the amount of compensation. According to the defendant Nos.2 to 7, the plaintiff had no right in the amount of

compensation on account of deed of partition dated 28-6-1997. By way of subsequent pleadings under provisions of Order VIII Rule 9 of the Code, the plaintiff intended to deny the legality of aforesaid document on various counts including the fact that their mother Laxmibai was alive when said document was executed. Thus, the pleadings in replication were not inconsistent with the case as set up in the plaint that the plaintiff had 1/3rd share in the amount of compensation. It, therefore, cannot be said that the subsequent pleadings were either inconsistent with the averments in the plaint or that a new case was being sought to be set up. The plaintiff was, therefore, justified in seeking leave to file subsequent pleadings. The judgment in the case of *Jayashree Subhash Kalbande (supra)* is on the aspect of due diligence while amending pleadings under Order VI Rule 17 of the Code. Said aspect would not be relevant in the present facts.

11. On the aspect of delay in seeking such leave, the plaintiff had explained in the application below Exhibit-53 as to why said application could not be moved earlier. Affidavit of the plaintiffTM's Counsel was also filed in support of the stand that the document though filed on record, its copy had been misplaced by the plaintiffTM's Counsel. The trial Court accepted said explanation and proceeded to allow the application below Exhibit-53. As observed by the Supreme Court in *Olympic Industries (supra)*, an application under provisions of Order VIII Rule 9 of the Code could not be dismissed merely on the ground of delay. Moreover, the trial Court had imposed costs of Rs.1000/- on the plaintiff while allowing the application.

12. Thus, it can be seen that the trial Court did not commit any error of jurisdiction when it allowed the application below Exhibit-53. The trial Court has taken into consideration all relevant aspects before passing the impugned order. It is also to be noted that costs of Rs.1000/- imposed while allowing the application below Exhibit-53 on 24-7-2015 were duly received by the Counsel for the defendant Nos.2 to 6 on 6-8-2015 as can be seen from the endorsement in that regard on page 26 of the record. The application having been allowed subject to payment of costs and said costs having been accepted by the defendant Nos.2 to 6, they are, in fact, precluded from challenging the impugned order. As observed by the Supreme Court in *Bijendra Nath Srivastava through legal heirs Vs. Mayank Srivastava, AIR 1994 SC 2562*, where an order has been passed subject to

payment of costs and the same are duly accepted by the other side without demur, the right to challenge the order subsequently is lost. Nevertheless, the challenge raised on behalf of said defendants has been considered and found to be without merit.

13. In view of aforesaid, there is no case made out to interfere in the writ jurisdiction. The writ petition is, therefore, dismissed with no order as to costs. Rule stands discharged.

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