

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 522 OF 2016

Neo Sanyas Foundation and anr.

.. Petitioners

vs.

Shri. Yogesh Thakkar alias
Swami Prem Geet and ors.

.. Respondents

WITH

WRIT PETITION NO. 523 OF 2016

OSHO International Foundation and anr.

.. Petitioners

vs.

Shri. Yogesh Thakkar alias
Swami Prem Geet and ors.

.. Respondents

Mr. P.K. Dhakephalkar, Sr. Advocate with Mr. S.R. Nargolkar i/b
Mr. Swapnil Mohite for the Petitioners.

Mr. Tushar Jadhav for the Respondents.

CORAM : M. S. SONAK, J.

Date of Reserving the Judgment : 14 January 2016.

Date of Pronouncing the Judgment : 19 January 2016.

JUDGMENT :-

1] The learned counsel for the parties agree that the issue involved in both these petitions are almost identical and therefore, these petitions can be disposed of by common judgment and order.

2] The challenge in both these petitions is to the orders dated 7 December 2015 made by the Joint Charity Commissioner-I, Maharashtra State, Mumbai rejecting the Petitioners' applications questioning the maintainability of proceedings under Section 41 E of

the Maharashtra Public Trust Act, 10950 (said Act) instituted by the Respondents herein.

3] The Respondents, on 4 October 2011 instituted proceedings under Section 41 E of the said Act complaining that the Trust property held by the Petitioners Trust is in danger of being wasted, damaged or improperly alienated and urging for appropriate measures by the Charity Commissioner. A little later, i.e., on 7 December 2011, the Respondents realising that they have not impleaded all the Trustees to the application dated 4 October 2011, instituted yet another application before the Charity Commissioner, urging action under Section 41E of the said Act. Thereafter, on 5 January 2012, the Respondents applied to the Charity Commissioner for liberty to withdraw the earlier application dated 4 October 2011, with liberty to institute fresh application. By order dated 5 January 2012 itself, such leave was granted by the Charity Commissioner. The order dated 5 January 2012 has not been challenged by the Petitioners in the present petition. However, the Petitioners filed applications (Exhibit-41 and 38 respectively), questioning the maintainability of proceedings under Section 41E of the said Act, in the form of applications dated 7 December 2011, *inter alia*, on the

grounds that such proceedings were barred under the provisions of Order 23 Rule 1 of Code of Civil Procedure, 1908 (CPC), Order 2 Rule 2 of CPC or at least, principles analogous thereto. By the impugned orders dated 7 December 2015, the Charity Commissioner has dismissed the said application at Exhibit-41 and 38 respectively. Hence, the present petitions.

4] Mr. Dhakephalkar, learned senior advocate for the Petitioners in both these petitions, submitted that the date on which, the applications dated 7 December 2011 urging application under Section 41E of the said Act were instituted by the Respondents, earlier applications dated 4 October 2011, for the same reliefs, were very much pending. No leave was either applied for was granted to the Respondents in the matter of institution of the applications dated 7 December 2011. Therefore, the applications dated 7 December 2011 were barred under the provisions of order 23 Rule 1 of CPC or at least, the principles analogous thereto. Secondly, Mr. Dhakephalkar submitted that the cause of action for institution of the applications dated 4 October 2011 and 7 December 2011 is one and the same. Assuming that there was any omission to claim some reliefs, which could have been very well claimed therein, the remedy

was not to institute yet another application seeking comprehensive relief, unless, leave was obtained in the first application as to filing of second application for the omitted reliefs. For this proposition, Mr. Dhakephalkar relies upon the provisions contained in Order 2 Rule 2 of CPC and the decision of the Hon'ble Supreme Court in case of *Virgo Industries (Eng.) Private Limited Vs. Venturetech Solutions Private Limited*¹. Mr. Dhakephalkar, finally submitted that the Charity Commissioner has committed jurisdictional error in rejecting the Petitioners' applications questioning maintainability, *inter alia*, on merits as well as the alleged inapplicability of the provisions of CPC to proceedings under said Act. Mr. Dhakephalkar submitted that the provisions of CPC or in any case, the principles analogous thereto, very much apply to the proceedings under the said Act. For all these reasons, Mr. Dhakephalkar submitted that the impugned orders are liable to be set aside and the proceedings instituted by the Respondents urging action under Section 41E of the said Act, are liable to be dismissed.

5] Mr. Jadhav, learned counsel for the Respondents, joined the issue with the aforesaid contentions raised by Mr. Dhakephalkar. He submitted that the proceedings instituted vide applications dated 4

1 (2013) 1 SCC 625

October 2011 might have failed for non-joinder of the parties, i.e., the Trustees of the Petitioner-Trusts. Therefore, the proceedings in the form of applications dated 7 December 2011 came to be instituted and thereafter, leave was applied for to withdraw the application dated 4 October 2011 with liberty to institute fresh proceedings. In such a fact situation, Mr. Jadhav submitted that the provisions of Order 23 Rule 1 of CPC are not at all attracted, even assuming without admitting the provisions of CPC apply to proceedings under the said Act. In this regard, Mr. Jadhav placed reliance upon the decision of the Hon'ble Apex Court in case of *Vimlesh Kumari Kulshrestha vs. Sambhajirao and anr.*². Mr. Jadhav further submitted that the provisions contained in Order 2 Rule 2 of the CPC were not even remotely attracted to the fact situation in the present case. There was no omission in the matter of seeking entire reliefs and in any case, liberty having been granted to institute fresh proceedings, there is no question of applicability of provisions contained in Order 2 Rule 2 of CPC or any principles analogous thereto. Mr. Jadhav submitted that the entire objective of the Petitioners is to stall or delay the action under Section 41E of the said Act and the applications questioning maintainability, were rightly rejected by the Joint Charity Commissioner. He submitted

2 2008(4) Mh.L.J. 692

that there is no error, much less any jurisdictional error in making the impugned orders and therefore, this Court ought not to interfere with the impugned orders, in exercise of its extra ordinary jurisdiction under Articles 226 and 227 of the Constitution of India.

6] The rival contentions now fall for determination.

7] In these petitions, there is no necessity to go to the issue as to whether or not the provisions contained in CPC apply to the proceedings under the said Act. Even if we are to proceed on the basis that the provisions of CPC or the principles analogous thereto apply to the proceedings under the said Act, in the facts and circumstances of the present case, there is no reason to interfere with the impugned orders on the issue of maintainability of the proceedings under Section 41E of the said Act.

8] As regards the first contention, reference to the provisions contained in Order 23 Rule 1 of CPC is appropriate. The relevant extract of Order 23 Rule of CPC, reads thus:

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 :

(2)

(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.

9] In the present case, admittedly, the second applications, by impleading all the Trustees of the Petitioner-Trusts were filed before the seeking leave to withdraw the first applications. The first applications, were thereafter withdrawn with liberty. In such circumstances, there is no question of provisions under Order 23 Rule 1 of CPC being attracted. The Hon'ble Supreme Court in case of *Vimlesh Kumari (supra)*, approving the decisions in case of *Mangi Lal Vs. Radha Mohan*³, *P.A. Muhammed vs. The Canara Bank and another*⁴, *Girdhari Lal Bansal vs. The Chairman Bhakra Management Board, Chandigarh*⁵, in almost similar situation, has ruled that bar under Order 23 Rule 1 of CPC is not attracted, in a fact situation of this nature.

3 1930 Lahore 599 (2)

4 AIR (1992) Kar. 85

5 AIR 1985 Punj and Har 219

10] In case of *Vimlesh Kumari (supra)*, the Hon'ble Supreme Court observed thus:

7. It is not in dispute that O.S. No. 13A of 1987 was filed during pendency of O.S. No. 228A of 1986.

Order XXIII Rule 1 of the Civil Procedure Code *stricto sensu* therefore, was not applicable, the relevant provision whereof reads thus:

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 :

(2)

(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.

Admittedly, the second suit was filed before filing the application of withdrawal of the first suit. The first suit was withdrawn as an objection had been taken by the appellant in regard to payment of proper court fee. We, therefore, are of the opinion that Order 23 Rule 1 of the Code was not applicable to the facts and circumstances of the present case.

8. A somewhat similar question came up for consideration in *Mangi Lal Vs. Radha Mohan* 1930 Lahore 599(2), wherein it was held;

"Order 23, Rule 1, refers to permission to withdraw a suit with liberty to institute a fresh suit after the first one has been withdrawn. Order 23, Rule 1, cannot be read so as to bar a suit which has already been

instituted before the other suit has been abandoned or dismissed. The rule is clear and can only be applied to suits instituted after the withdrawal or abandonment of previous suits".

9. *The said view was followed by the Karnataka High Court in P.A. Muhammed Vs. The Canara Bank and Another AIR (1992) Kar. 85.*

10. *An identical view was also taken in Girdhari Lal Bansal Vs. The Chairman, Bhakra Beas Management Board, Chandigarh and Others AIR 1985 Punj and Har 219 wherein it was held;*

"4. The earlier application was filed on 6th October, 1982 and the present application was fixed on 26th October, 1982 and the first application was withdrawn vide order dt. 18-11-1982. The learned counsel for the Board could not show if aforesaid two decisions were ever dissented from or overruled. The aforesaid two Lahore decisions clearly say that if second suit is filed before the first suit is withdrawn then Order 23, Civil Procedure Code is not attracted and the second suit cannot be dismissed under Order 23, R. 1(4) of the Civil Procedure Code. Accordingly, I reverse the decision of the trial Court and hold that the present petition was not barred under Order 23, Civil Procedure Code."

We agree with said views of the High Court.

11. *The application filed for withdrawal of the suit categorically stated about the pendency of the earlier suit. Respondent, therefore was aware thereof. They objected to the withdrawal of the suit only on the ground that legal costs therefore should be paid. The said objection was accepted by the learned Trial Court. Respondent even accepted the costs as directed by the Court, granting permission to withdraw the suit. In a situation of this nature, we are of the opinion that an inference in regard to grant of permission can also be drawn from the conduct of the parties as also the order passed by the Court. It is trite that even a presumption of implied grant can be drawn.*

12. *In Hari Basudev Vs. State of Orissa and Others, AIR*

2000 Orissa 125, a Division Bench of the Orissa High Court held;

"7. As already indicated, the cause of action accrued to opposite party No. 4 to file the election dispute u/S. 30 of the Act only after publication of the result of the election. Opposite party No.4 in his petition made out a case for grant of permission to withdraw M.J.C. No. 14 of 1997. He had also stated in the petition that he reserved his right to file a fresh case, if necessary. The learned Civil Judge having permitted him to withdraw the said case, we are inclined to hold that permission to institute a fresh case in the circumstances was impliedly granted."

13. In Mulla's *The Code of Civil Procedure, Seventeenth Edition*, page 674, it is stated

"(g) Permission need not be Express - The permission mentioned in this section need not be given in express terms. It is sufficient if it can be implied from the order read with the application on which the order was made. No formal order is necessary for withdrawal of a suit. But the proceedings must show that the plaintiff has withdrawn the suit or part of the claim. However, if either from the application of the plaintiff or from the order permitting withdrawal, it transpires that while permitting withdrawal, the court had also granted liberty to institute fresh suit, the subsequent suit would be barred. Thus, in a case, the Delhi High Court held that the words 'without prejudice to the right of plaintiff endorsed on the application for withdrawal would only mean that the suit was sought to be withdrawn as compromised and not on merits.

An application for withdrawal of suit was made, seeking liberty to file a fresh suit. The order passed by the court was that 'The application is, therefore, allowed while permitting the plaintiff to withdraw the suit'. It was held that this should be construed as an order also granting liberty, as prayed. The court cannot split the prayer made by the applicant."

14. For the reasons aforementioned, we are of the opinion

that the High Court was not correct in applying the provisions contained in Order XXIII, Rule 1 of the Code of Civil Procedure in the facts and circumstances of the case.

11] In fact, upon perusal of paragraphs 11 to 13 in case of *Vimlesh Kumari (supra)*, it is clear that permission to institute a fresh case, need not be Express and can even be implied. We are, however, not directly concerned with this issue in the present case. Suffice to note that the objection to maintainability of second applications by citing bar under Order 23 Rule 1 of CPC was rightly rejected by the Charity Commissioner and there is no case made out to interfere with the impugned orders on that score.

12] Order 2 Rule 1 of CPC requires every suit to include the whole of the claim to which the Plaintiff is entitled in respect of any particular cause of action. However, the Plaintiff has an option to relinquish any part of his claim if he chooses to do so. Order 2 Rule 2 CPC contemplates a situation where a Plaintiff omits to sue or intentionally relinquishes any portion of the claim which he is entitled to make. If the Plaintiff so acts, Order 2 Rule 2 makes it clear that he shall not, afterwards, sue for the part or portion of the claim that has been omitted or relinquished. However, it must be noticed that Order 2 Rule 2(2) of CPC does not contemplate

omission of relinquishment of any part of the Plaintiff's claim with the leave of the Court so as to entitle him to come back later to seek what has been omitted or relinquished. Such leave of the Court is contemplated by Order 2 Rule 2(3) in situation where a Plaintiff being entitled to more than one relief on a particular cause of action, omits to sue for all such reliefs. In such a situation, the plaintiff is precluded from bringing a subsequent suit to claim the relief earlier omitted except in a situation where leave of the Court had been obtained. The provisions contained in Order 2 Rules 2 (2) and (3) of CPC, contemplate two different situations, namely, where a Plaintiff omits or relinquishes a part of a claim which he is entitled to make and, secondly, where the Plaintiff omits or relinquishes one out of the several reliefs that he could have claimed in the suit. It is only in the latter situations, where the Plaintiff can file a subsequent suit seeking the reliefs omitted in the earlier suit, provided that at the time of omission to claim the particular relief he had obtained leave of the Court in the first suit. The object is to discourage vexing the Defendant again and again by multiple suits, except in a situation where one of the several reliefs, though available to a Plaintiff, may not have been claimed for a good reason.

13] If the facts and circumstances of the present case are examined, then the provisions contained in Order 2 Rule 2 of CPC cannot be said to be attracted. In the first place, this is neither a case where the Respondents have omitted or relinquished a part of claim, which they were entitled to make nor is this a case where the Respondents have omitted or relinquished one out of several reliefs, which they could have claimed in the first applications. In the present case, the reliefs claimed in both the applications are substantially the same. The first applications were withdrawn with liberty, only because the same might have failed on account of formal defect. In the first applications, all the Trustees of the Petitioner-Trusts or at least Trustees of the Petitioner-Trusts, in respect of whom orders under Section 41E of the said Act were applied for, had not been impleaded. Besides, it must be noted that an application under Section 41E of the said Act is not in the nature of any 'claim' as such. The application is more in the nature of a complaint, to the Charity Commissioner pointing out certain illegalities in the function of the Trust and urging appropriate action. Therefore, it cannot be said that the provisions contained in Order 2 Rule 2 of CPC are in any manner attracted to the fact situation of the present cases. The pre-conditions necessary for attracting the

principles set out in Order 2 Rule 2 of CPC are not attracted to the fact situation of the present cases. There is accordingly, no jurisdictional error in making of the impugned orders.

14] If the object behind enactment of Section 41E of the said Act is taken into consideration, there is necessity to dispose of the proceedings thereunder with utmost despatch. Section 41E of the said Act is attracted in a situation where it is brought to the notice of Charity Commissioner, either by Deputy or Assistant Charity Commissioner through his Report or by an application by at least two persons having interest, supported by affidavit that any Trust property is in danger of being wasted, damaged or improperly alienated by any Trustee or any other person, or that the Trustee or such person threatens or intends to remove or dispose of that property. The Charity Commissioner may then by order grant a temporary injunction or make such other order for the purposes of and preventing the wasting, damaging, alienation, sale, removal or disposition of such property, on such terms as to the duration of injunction, keeping an account, giving security, production of the property or otherwise as he thinks fit. Sub-section (2) of Section 41E of the said Act is concerned with notice to the Trustees or the

persons concerned before granting of injunction, except perhaps in a situation where the object of granting injunction would be defeated by delay in giving such notice. Sub-section (4) of Section 41E is concerned with disobedience or breach of injunction orders made by the Charity Commissioner. Sub-section (5) of Section 41E provides that a Trustee or a person against whom the order of injunction or any other order made under this section, may appeal to the Court against the same.

15] Therefore, it is clear that the Charity Commissioner can exercise powers under Section 41E of the said Act, where certain jurisdictional facts, are brought to the notice of the Charity Commissioner, either by the Deputy or Assistant Charity Commissioner through their report or by an application by at least two persons having interest supported by an affidavit. In the present case, the Respondents, three in number, claiming to be persons having interest, they have brought to the notice of Charity Commissioner certain facts, which according to them, warrant making of orders under Section 41E of the said Act. To an application of such nature, it is hardly proper that objections as to maintainability by invoking the provisions contained in Order 23

Rule 1 of CPC or Order 2 Rule 2 of CPC are raised. As noted earlier, the objections, even otherwise, lack any merit and are untenable. In these circumstances, Mr. Jadhav is right in his submission that the entire purpose of questioning maintainability was to stall an enquiry into circumstances whether orders as contemplated by Section 41E of the said Act, are at all warranted in the facts and circumstances concerning the Petitioner-Trusts and its Trustees.

16] The Joint Charity Commissioner, in the impugned orders, has also held that the cause of action for seeking injunction is of a recurring nature and the same persists until invasion of rights is enjoined by a Competent Authority or a Court. In matters relating to Trustees and Trust property, adjudication as to whether circumstances exist for making of orders under Section 41E of the said Act, cannot be frustrated by raising technical and hyper technical pleas.

17] These petitions are therefore, dismissed with costs of Rs.10,000/- each. The Joint Charity Commissioner to ensure that such costs are paid by the Petitioners to the Respondents.

18] Further, the Joint Charity Commissioner is directed to dispose of the proceedings under Section 41E of the said Act, as expeditiously as possible and in any case within a period of six months from the date of production of an authenticated copy of this order.

19] Parties are directed to appear before the Joint Charity Commissioner on 27 January 2016 at 3.00 p.m., and produce an authenticated copy of this order.

20] All concerned to act on the basis of authenticated copy of this order.

(M. S. SONAK, J.)