

IN THE HIGH COURT OF BOMBAY AT GOA**LD-VC-CW-71-2020**

Shri Krishnath alias Krishanand

Gurudas Dicholkar

... Petitioner

Versus

Shri Santosh Yeshwant

Dicholkar & Ors.

... Respondents

Shri C. Padgaonkar, Advocate for the Petitioner.

Shri S.N. Joshi, Advocate for the Respondents.

Coram:- DAMA SESHADRI NAIDU, J.**Date:- 14th August 2020****ORAL ORDER :**

The respondents filed Civil Suit No.2 of 2020 before the Civil Judge, Senior Division, Bicholim. It was in 2012. They sought a declaration and other consequential reliefs. Soon thereafter, the petitioner as the defendants filed their written statement. The pleadings completed, the trial Court framed the issues in March 2014; then, in October 2015, one of the plaintiffs filed his affidavit-in-chief as PW1.

2. Eventually, before the trial could begin, in July 2019 the respondents applied under Order 23 Rule 1(3) to withdraw the suit with liberty to file a fresh one. To justify their request, they have pleaded that their suit has suffered from certain formal defects and discrepancies in describing the suit subject suit, narrating the facts, linking the documents,

and so on. They have also wanted to incorporate the subsequent developments.

3. The trial Court, exercising its discretion, has allowed the application. Aggrieved, the defendants have come before this Court.

4. Shri C. Padgaonkar, the learned counsel for the petitioners, has strenuously contended that the suit was filed in 2012 and, after seven years, the respondents sought to withdraw the suit with liberty to file afresh. According to him, the respondent's application in that respect is vague and does not meet the legal standards set out in Order 23 Rule 1(3) of CPC. Besides, he has also stressed that the trial Court has directed the respondents to file a fresh suit in three months. And that amounts, in his view, to indirectly ruling on the limitation.

5. In response, Shri S.N. Joshi, the learned counsel for the respondents, has submitted that the respondents' application under Order 23 Rule 1(3) has sufficiently explained the grounds for their withdrawing the suit with liberty to file a fresh one. According to him, the trial Court has judiciously exercised its discretion and allowed it. As to the limitation, Shri Joshi has fairly submitted that the statutory position as incorporated in Order 23 Rule 2 remains unaffected. That is, both parties are free to take all pleas available to them in the fresh suit being instituted—including that of the limitation.

6. Heard Shri C. Padgaonkar, the learned counsel for the petitioners, and Shri S.N. Joshi, the learned counsel for the respondents.

7. Indeed, Order 23, Rule 2 does declare that limitation law remains unaffected if a party withdraws the first suit and files a fresh, of course, with the court's leave. It has introduced a legal fiction. As the provision reads, if any fresh suit is instituted based on the permission granted under Order 23, Rule 1 (3), "the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted." Simply put, the fresh suit, too, must be instituted within limitation from the date the cause of action arose.

8. If we examine Section 14 of the Limitation Act, for reckoning limitation, its sub-section (1) allows a party to exclude the time he spent in "prosecuting another proceeding bona fide in a court without jurisdiction." But Rule 2 of Order 23 applies the law of limitation "in the same manner as if the first suit had not been instituted". So ex facie, Rule 2 of Order 23 is an exception to Section 14 (1) of the Limitation Act. On deeper consideration, we may appreciate that both the provisions coexist. In fact, sub-section (3) of Section 14 harmonises both the provisions.

9. To sum up, if the plaintiff voluntarily withdraws the suit with the court's permission to file a fresh suit, his instituting the second suit is subject to the law of limitation. On the other hand, if the plaintiff gets the court's leave on the premise that the court has no jurisdiction to try the suit, the limitation stands saved under Section 14 (1) of the Limitation Act.

10. Here, the suit involves no jurisdictional issue; the withdrawal is on the grounds of formal defects and other collateral considerations. So Rule (2) of Order 23 applies.

Under these circumstances, I am disinclined to interfere with the discretion exercised by the trial Court. As a result, I dismiss the Writ Petition. At any rate, I observe that the petitioner can as well raise before the trial Court all defences including that of limitation in terms of Order 23 Rule 2 of CPC if the respondents file a fresh suit.

DAMA SESHADRI NAIDU, J.

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