

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 11804 OF 2014

MANGALABAI NAVNATH BHOSALE
VERSUS
SAUDAGAR KISAN KORKE AND OTHERS

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Advocate for Petitioner : Shri Dharashive M.L.

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CORAM : RAVINDRA V. GHUGE, J.
Dated: January 20, 2015

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PER COURT :-

1. The petitioner is the original plaintiff in RCS No.32 of 2010, preferred for seeking partition and separate possession as regards ancestral property. The petitioner has amended the plaint. By application Exhibit 97, dated 2.1.2014, the petitioner has sought to invoke Order XXIII Rules 1 and 3 of the CPC seeking withdrawal of the suit with liberty to file a fresh suit in the same cause. The said application has been rejected by the impugned order dated 11.4.2014.

2. Contention of the petitioner is that she can withdraw the suit at any stage, whenever she desires. The suit has been amended prior to filing application Exhibit 97. According to the petitioner, some more events, that have occurred prior to the institution of the suit and subsequent thereto, which have come to her knowledge recently, need to be pleaded. They are formal defects. Withdrawing the suit under Order XXIII Rule 1 is the only option available. Hence, the impugned order is unsustainable in law.

3. I have considered the submissions of the learned Advocate for the petitioner and have gone through the petition paper book with his assistance.

4. In Exhibit 97, the petitioner has not even whispered as to which are those factors which constitute a formal defect and which cannot be cured thereby leaving the petitioner with the only remedy of withdrawing the suit with liberty to file a fresh suit. It is simply pleaded in paragraph No.3 of Exhibit 97 that some more amendments to the plaint are required to be done and it is not possible to amend the plaint.

5. The trial Court, while considering the said contentions, has observed as follows:-

" (4). I do not see any justified ground to allow the application as the plaintiff can convince the Court that specific amendment is necessary for final adjudication of the matter. Even if there are certain inadvertent mistakes taken place while carrying out earlier amendments, the same can be corrected if the plaintiff convince the court."

6. A plaintiff cannot seek withdrawal of a suit as a matter of right. The permissibility as enshrined under Order XXIII Rule 1 is to be considered within the ambit of Order XXIII Rule 3, since the Court has to be satisfied that the suit must fail by reason of some formal defect or that there are sufficient grounds for permitting the plaintiff to institute a fresh suit for the

subject matter of a suit or a part of a claim.

7. In the instant case, firstly, there are no pleadings set out in application Exhibit 97 so as to convince the trial Court to permit the withdrawal of the suit under Order XXIII Rule 3. Secondly, the trial Court has observed in the impugned order, as reproduced above, that the plaintiff can attempt to convince the Court that a specific amendment is necessary for final adjudication of the matter and that such an amendment or correction is required to be done.

8. As such, the interest of the petitioner is protected by the observations of the trial Court as she can make an attempt for convincing the trial Court as regards any further amendment.

9. In the light of the above, this petition does not deserve to be entertained and is, therefore, dismissed.

(RAVINDRA V. GHUGE, J.)

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