

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 1042 OF 2010

Mr. Gulab Baburao Dubal, since
deceased, through legal heirs;
1a) Mrs Gajrabai Gulabrao Dubal
and Ors. Petitioners

Vs

1. Mr. Shankar Babu Dubal,
since deceased through legal
heirs, .. Respondents
1a) Mrs Draupada Shankar
Dubal and Ors.

Mr. Amol D. Wagh i/b Mr. Sagar Kasar, Advocate for Petitioners.
Mr. Ajit Kenjale with Mr. Rajesh Dharap, Advocate for
Respondent no.1(a) to 1(c).

CORAM : R.G.KETKAR,J.
DATE : 17/07/2015

PC:

1. Heard Mr. Amol Wagh, learned counsel for the petitioners
and Mr. Ajit Kenjale, learned counsel for respondents no.1(a) to
1(c).

2. By this Petition under Article 227 of the Constitution of
India, original plaintiffs have challenged the Judgment and order
dated 1.12.2009 passed by the learned 2nd Jt Civil Judge, Jr. Dn.,
Satara, below Exhibit-82 in Regular Civil Suit No. 304 of 1998. By
that order, the learned trial Judge rejected the application filed by
the petitioners, hereinafter referred to as 'plaintiffs, for
withdrawing suit with liberty to institute fresh suit on the same
cause of action.

3. In support of this Petition, Mr. Wagh reiterated the submissions that were made before the trial Court. He submitted that the plaintiffs have instituted suit for recovery of possession of their share in Gat No.53 from defendants no.1 and 2. The plaintiffs also claimed possession of their share in Gat No.101 from defendant no.1. It is the case of the plaintiffs that they are owners of Gat No.53 and presently share of the plaintiffs is in possession of defendants no.1 and 2. In paragraph 1(a) of the plaint, the plaintiffs gave description of Gat No.53. In paragraph 1(b), the plaintiffs gave description of Gat no.101. It is averred in paragraph 1(a) and 1(b) that both the lands are identified by their numbers and, therefore, it is not necessary to give description of boundaries.

4. The present application is filed on 3.11.2009. It is asserted in paragraph 2 that the original plaintiff Gulab Baburao Dubal was handicapped and during pendency of the suit he died. His legal representatives are recently brought on record. It transpired recently that there is formal defect in the suit as also the description of the suit lands is not mentioned and, therefore, plaint is defective. In all probabilities, suit will be dismissed on technical grounds. The plaintiffs, therefor, sought permission for withdrawing the suit with liberty to institute suit.

5. By the impugned order, the learned trial Judge rejected the application. The learned trial Judge held that earlier the plaintiffs

had filed application dated 8.4.2009-Exhibit 70. The said application was rejected on 22.4.2009. Though the suit is instituted in the year 1998, cross examination of the plaintiffs was over on 25.7.2005. The plaintiffs have also given purshis of closure at Exh.44. Likewise, the defendants have also filed affidavit of evidence at Exhibit 52. As the earlier application Exhibit 70 was rejected, the reason given by the plaintiffs in the present application that there is formal defect, is extremely vague. The learned trial Judge, therefore rejected the application. Mr. Wagh submitted that the learned trial Judge ought to have allowed the application as the description of the suit lands are not properly given in paragraph 1(a) and 1(b) of the Plaint. He also submitted that on account of formal defect, the plaintiffs apprehend that suits will be dismissed on technical grounds.

6. On the other hand, Mr. Kenjale supported the impugned order. He submitted that the plaintiffs had earlier filed application on 8.4.2009 Exhibit-70 for the same relief. The application was rejected on 22.4.2009. The plaintiffs did not challenge that order. He further submitted that the plaintiffs have simply alleged that there is formal defect. However, the said assertion is extremely vague. No details are furnished by the plaintiffs. Mr. Kenjale relied upon the decision of the A.P. High Court in the case of Somalraju Vs Samanthu Sivaji Ganesh, AIR 2009 Andhra Pradesh

12 to contend that mere repetition of expression 'formal defect' is not sufficient to grant permission as contemplated under sub-rule (3) of Rule 23(1). What is formal defect according to the plaintiff must be specified. He, therefore, submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India.

7. I have considered the rival submissions made by the learned counsel appearing for the parties. I have also perused the material on record. The submissions advanced by Mr. Wagh cannot be accepted for more than one reason. Firstly, the plaintiffs specifically came with the case that both lands can be identified by their numbers and, therefore, description of boundaries is not given. Thus, the plaintiffs have consciously not given boundaries. Secondly, as is evident from record that the plaintiffs had filed application dated 8.4.2009 at Exh.70 for the same relief which was rejected on 22.4.2009. The plaintiffs have not brought on record to indicate that the said order was challenged. Thirdly, the decision in the case of Somalraju (supra) clearly applies to the facts of the present case as the plaintiffs have merely asserted that there was formal defect in the suit.

8. For all these reasons, no case is made out for invocation of powers under Article 227 of the Constitution of India. It cannot be said that the impugned order is perverse. Hence, Petition fails

and the same is dismissed. Rule is discharged. There shall be no order as to costs.

(R.G.KETKAR, J.)