

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 5534 OF 2013

M/s. Shahdara & Company
through its Partners

.. Petitioner

vs.

M/s. Ramakrishna Resort Pvt. Ltd.
through its Director

.. Respondent

Mr. S.R. Nargolkar for the Petitioners.

Mr. D.S. Patil for the Respondent.

CORAM : M. S. SONAK, J.

DATE : 17 JUNE 2015.

P.C. :-

1] This petition questions the orders dated 7 September 2011 and 2 July 2012, which have the effect of permitting the respondent (original plaintiff) to withdraw the suit with liberty to file a fresh suit as contemplated by Order 23 Rule 1 of the Code of Civil Procedure, 1908 (CPC).

2] Mr. Nargolkar, learned counsel for the petitioner, submitted that the respondent-plaintiff has not chosen to amend the plaint so as to accept the petitioner as tenant/lessee in respect of the space described as 1B and 1C in the plaint. In absence of any such amendment to the plaint, it cannot be said that there is any formal defect in the plaint or that the suit must fail by reason of some

formal defect. Further, the impugned orders proceed on the basis that no prejudice will occasion the petitioner, in case the suit is permitted to be withdrawn with liberty to institute a fresh suit. Such consideration of prejudice, according to Mr. Nargolkar, is quite irrelevant to the exercise of powers under Order 23 Rule 1 of the CPC.

3] In the present case, the respondent-plaintiff has quite categorically and repeatedly conceded that the petitioner-defendant is being accepted as the tenant/lessee in respect of the space described as 1B and 1C in the plaint. Besides, there is no serious dispute that no notice was ever addressed by the respondent to the petitioner with regard to tenancy/lease of the said portion of the suit property. In such circumstances, the view taken by the District Court that the suit would fail by reason of formal defect, i.e., non-service of notice, cannot be said to be a view which is either without jurisdiction or vitiated by any perversity. The circumstance that no formal amendment was carried out to the plaint, would be quite irrelevant, in view of categorical and repeated assertions of the respondent-plaintiff, as aforesaid.

4] Mr. Nargolkar is, however, right in his submission that an application for withdrawal of suit with liberty to file a fresh suit cannot be granted, merely on the ground that the same would not occasion any prejudice to the defendant. In the present case, however, it cannot be said that permission to withdraw the suit with liberty has been granted upon such sole consideration. This is a case where the District Court has recorded the nature of formal defect and thereafter permitted withdrawal with liberty. Besides, Order 23 Rule 1(3)(b) further provides that withdrawal of suit may be permitted where there are sufficient grounds. The impugned orders, in the circumstances, cannot be said to be contrary to the provisions contained in Order 23 Rule 1 of the CPC.

5] Accordingly, present petition is dismissed. There shall be, however, no order as to costs.

(M. S. SONAK, J.)

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