

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

WRIT PETITION NO. 6380 OF 2015

Vallabhdas Ramprasad Bhattad,
deceased, through legal heirs:
Rajashree Ramsukhaji Mantri
and Ors.

Petitioners

Vs

The State of Maharashtra
and Ors

.. Respondents

Mr. P.S.Dani, Senior Advocate, i/b Tushar N. Sonawane, Advocate
for the petitioners.

CORAM : R.G.KETKAR,J.
DATE : 21/07/2015

PC:

1. Heard Mr. P.S.Dani, learned senior counsel for the petitioners at length.
2. By this Petition under Article 227 of the Constitution of India, original plaintiffs have challenged the Judgment and order dated 4.4.2015 passed by the learned District Judge-1, Niphad below Exhibit-116 in Regular Civil Appeal No.82 of 2005. By that order, the learned District Judge rejected the application filed by the plaintiffs-appellants under Order 23 Rule 1 of C.P.C. seeking permission to withdraw suit with liberty to file a fresh suit on same cause of action with addition of appropriate parties and properties towards northern side of Gram Panchayat house no. 323.
3. In support of this Petition, Mr Dani submitted that the

plaintiffs have instituted suit alleging that defendants no.5 to 8 have made encroachments. The suit is instituted for declaration that the orders passed by defendants no.1 to 4 are illegal and not binding on the plaintiffs; for perpetual injunction restraining defendants no.1 to 4 from enforcing the said orders against the plaintiffs; for declaration that defendants no.5 and consequently defendants no. 6 to 8 have no title and ownership over the property in Schedule no. 8 and/or 9; for restoration of possession of the property described in schedule 8 and/or 9 to the plaintiffs after removal of the structures erected by them.

4. He submitted that during the pendency of the suit, Court Commissioner was appointed. He, however, did not carry out measurement of the entire land. Mr. Dani has taken me through paragraph 6 of the trial Court's Judgment. He submitted that Surveyor was appointed as Court commissioner to measure the suit property. He deposed that when he measured from northern side as per the sale deeds of the plaintiff he found that C.T.S.No.187-A and B is the portion of house no.325. During the course of his cross examination, he admitted that he did not take pains to locate house no. 326. He also admitted that boundaries of house no.326 are fixed. It means the area which the plaintiff is getting is less than his sale deeds. He submitted that the plaintiffs want to withdraw the suit with liberty to file suit on fresh cause of action by adding appropriate parties as also properties

towards northern side of Gram Panchayat House no. 326. The learned District Judge ought to have allowed the application.

5. It is not possible to accept the submission advanced by Mr. Dani. I have carefully gone through the order of the trial Court. The learned trial Judge, after considering the admissions given by the plaintiffs as more particularly referred in paragraph 6 of the order, has dismissed suit on payment of compensatory costs of Rs.1000/- to legal representatives of defendant no.6. The learned District Judge rejected the application by imposing costs of Rs. 10,000/-. The learned District Judge observed in paragraph 13 that the application made by the plaintiffs is vague. In paragraph 14, the learned district Judge considered admissions given by the plaintiffs during the course of his evidence. In paragraph 15, learned District Judge observed that the plaintiffs failed to conduct their suit with proper care and diligence and witnesses failed to support their case. By filing the present application to withdraw suit with liberty to institute fresh suit on same cause of action, the plaintiffs intend to avail opportunity of commencing trial afresh in order to avoid result of their previous badly conducted case so as to cause prejudice to the defendants. In paragraph 16, learned District Judge also observed that at the time of final hearing of the appeal, i.e. after 35 years from filing of the suit, plaintiffs filed applications for carrying out amendment on 2.10.2014 and 28.10.2014. Those applications

were ordered to be heard along with appeal. On 9.1.2015 the plaintiffs filed application for adjournment which was allowed subject to costs of Rs.1000/- as a last chance with specific direction that no further adjournment will be granted as the matter is old one. Despite that, the plaintiffs filed application on 31.1.2015 under Order 23 Rule 1 only with a view to prolonging matter instead of contesting it on merits. The plaintiffs are trying to misuse court machinery by playing various tricks to prolong matter to harass respondents no.7 and 8. In fact, the plaintiffs admitted that they have no concern with Gram Panchayat House No.326.

6. After considering the trial Court's Judgment as also the impugned order, as also the findings recorded by the learned District Judge in paragraphs 13 to 16, I do not find that the learned District Judge has committed any error in passing the impugned order. The learned District Judge also imposed costs of Rs.10,000/- on the plaintiffs. Costs were to be deposited on or before 20.4.2015 failing which Appeal was to stand dismissed for noncompliance of the order. Hence, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed.

(R.G.KETKAR, J.)