

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CIVIL REVISION APPLICATION NO. 185 OF 2014

1. Sow. Saroj w/o Ramesh Jadhav,
Age : 52 years, Occu. Household,
R/o Shrikarpa Apartment,
Behind Parijat Mangal Karalaya,
Latur, Tq. & Dist. Latur
2. Ramesh s/o Kishanrao Jadhav,
Age : 59 years, Occu. Agri.,
R/o as above.

PETITIONERS
(Ori. Defendants)

VERSUS

Kongaree Veera Reddy,
Age : 50 years, Occu. Business,
R/o Budhoda, Tq. Ausa,
District Latur

RESPONDENT
(Ori. Plaintiff)

Mr. Prashant K. Deshmukh, Advocate for the Petitioners
Mr. G.L. Deshpande, Advocate for the Respondent

CORAM : SANGITRAO S. PATIL, J.

RESERVED ON : 2nd SEPTEMBER, 2016

PRONOUNCED ON : 8th SEPTEMBER, 2016

JUDGMENT :

The original defendants in Regular Civil Suit
No. 22 of 2004 have preferred this application,
challenging the legality and correctness of the order

dated 1st January, 2014, passed in Regular Civil Appeal No. 32 of 2010 by the learned Ad-hoc District Judge-1, Latur whereby the respondent (original plaintiff) has been permitted to withdraw the said suit with liberty to institute a fresh suit in respect of the same subject matter.

2. The respondent instituted the above numbered Regular Civil Suit in the Court of Civil Judge, Junior Division, Ausa, seeking declaration of his title to the suit property, admeasuring 11 gunthas out of the land block No. 19/B/1, situate at village Budhoda, Taluka Ausa and further sought perpetual injunction restraining the applicants from disturbing his possession thereon. The suit came to be dismissed by the learned Civil Judge, Junior Division, Ausa vide judgment and decree dated 9th September, 2009, mainly on the ground that the suit property, in fact, was belonging to a firm namely Pandurang Vitthal Firm Pvt. Ltd., which was registered under the Bombay Public Trusts Act. However, the said Firm had not passed any resolution, authorising the respondent to institute the said suit and prosecute it. The respondent preferred Regular Civil Appeal No. 32 of

2010 in the District Court at Latur against the judgment and decree passed by the Trial Court. During pendency of that appeal, the respondent filed an application (Exh-15) under Order XXIII Rule 3 (a) and (b) of the Code of Civil Procedure ("the Code", for short), seeking permission to withdraw the suit with liberty to institute a fresh suit in respect of the same subject-matter by setting aside the impugned judgment and decree. The learned Ad-hoc District Judge-1, Latur allowed that application as per the impugned order.

3. The learned counsel for the applicants submits that once the suit was dismissed by the Trial Court, certain rights were created in favour of the applicants. Consequently, the first appellate court was not justified in setting aside the judgment and decree passed by the Trial Court and allowing the respondent to withdraw the suit with liberty to file a fresh suit in respect of the same subject-matter. In support of his contention, he relied on the judgment in ***M.B. Development Corporation V. Manilal Patel & Co. 2001 (Supp.) Bom. C.R. 801.*** He, therefore, submits that the impugned order may be set aside and the order passed by

the Trial Court may be restored.

4. As against this, the learned counsel for the respondent submits that the appeal being in continuation of the suit, the judgment and decree passed by the Trial Court had not become final due to pendency of R.C.A. No. 32/2010. It was, therefore, open to the respondent to withdraw the suit with liberty to file a fresh suit on the ground that because of the technical defect in drafting the plaint, it was liable to be dismissed. He submits that the first appellate court has rightly set aside the judgment and decree passed by the Trial Court and allowed the application filed by the respondent under Order XXIII Rule 3 (a) and (b) of the Code by granting him permission to withdraw the suit with liberty to file a fresh suit in respect of the same subject-matter. In support of his contention, he cited the judgments in the cases of (i) **Ratan Lal and another V. Mohammad Hamidulla Khan AIR 1921 Allahabad 65**, (ii) **Suraj Pal Singh V. Gharam Singh and others AIR 1973 Allahabad 466** and (iii) **Mahendra Uttamrao Kadam and others V. Kacchi Properties 2011 (7) ALL M.R. 386**.

5. The provisions of Order XXIII Rule (3) of the Code read as under :-

(3) Where the Court is satisfied :

(a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim.

It may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim."

6. There is no dispute about the proposition that the appeal is continuation of the suit and the decree passed by the Trial Court would not become final until the appeal is decided. As such, the application for withdrawal of the suit can very well be filed during pendency of the appeal. In the case of **Suraj Pal Singh** (supra), the suit was dismissed and during the pendency of the appeal, the learned counsel for the plaintiff/appellant made an application for withdrawal of the suit. It was observed by the Allahabad High

Court that the decree of dismissal of the suit by itself does not confer any right on any party to the suit. In view of these observations, the contention of the learned counsel for the applicants herein that because of the dismissal of the suit by the Trial Court, certain rights have been accrued in favour of the applicants, cannot be accepted.

7. Relying on the judgment in case of **M.B. Development Corporation** (supra), the learned counsel for the applicants submits that the respondent filed a suit on behalf of a Firm which is not registered. As such, the defect in the suit was not formal but was substantive. Therefore, the suit ought to have been dismissed and accordingly has rightly been dismissed by the Trial Court. He submits that the suit cannot be allowed to be withdrawn with liberty to file a fresh suit when there is substantive defect therein.

8. As against this, the learned counsel for the respondent relied on the judgment of the Bombay High Court in the case of **Mahendra uttamrao Kadam** (supra), wherein the suit presented by the plaintiff, which was

an unregistered firm, being not maintainable in view of Section 69 of the Partnership Act, considering the said defect as a formal defect, the plaintiff was permitted to withdraw the suit with liberty to file fresh suit on the same cause of action. In the said judgment, in paragraph 9, there is reference of the judgment in the case of *M/s Haldiram Bhujawala V. Anand Kumar Deepak Kumar 2000 (3) SCC 250*, wherein in the similar circumstances, it was held that if the firm is not registered on the date of suit and the suit is to enforce a right arising out of a contract with the third party-defendant in the course of its business, then it will be open to the plaintiff to seek withdrawal of the plaint with leave and file a fresh suit after registration of the firm, subject of course to the law of limitation. It is further observed that this is so even if the suit is dismissed for a formal defect.

9. In the present case, the suit was filed by the respondent on behalf of a registered trust namely Pandurang Vitthal Firm Private Limited. He ought to have been authorised by the said trust to institute a

suit on its behalf. No such authorisation was produced by him with the plaint. Therefore, it was held that the respondent was not competent to file and prosecute the suit. In my view, this is clearly a formal defect in the suit. The valuable rights of the parties cannot be allowed to be defeated on account of such formal defects. Consequently, in view of the judgments cited by the learned counsel for the respondent, which are fully applicable to the facts of the present case, I am of the opinion that the learned Ad-hoc District Judge-1, Latur rightly allowed the application (Exh-15) and rightly permitted the respondent to withdraw the suit and file a fresh suit in respect of the same subject-matter. The judgment in the case of **M.B. Development Corporation** (supra), cited on behalf of the applicants, in circumstances of the case, cannot be made applicable to the facts of the present case.

10. In the above circumstances, I hold that the Civil Revision Application, being sans substance, is liable to be dismissed. Hence, the order :-

O R D E R

The Civil Revision Application is dismissed. No costs.

Sd/-
[**SANGITRAO S. PATIL**]
JUDGE

npj/cra185-2014