

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 478 OF 2015

MRS. ESPERANCE COSTA AND 2 ORS., ... Petitioners
Versus
GANA L. KONKOLIENKAR AND 2 ORS., ... Respondents

Mr. Prasheen Lotlikar, Advocate for the Petitioners.

Mr. J.J. Mulgaonkar, Advocate for Respondent No. 1.

Coram:- C. V. BHADANG, J.

Date:- 29th August, 2016

ORAL ORDER:

Heard the learned Counsel for the petitioners and the learned Counsel for the respondent no. 1, for sometime.

2. The petitioners, who are the defendants before the Trial Court in Regular Civil Suit No. 102/2007/E, are challenging the order dated 20.03.2015, by which the learned Trial Court has allowed the suit to be withdrawn, with liberty to file a fresh suit.

3. It is undisputed that pursuant to the liberty granted, the respondents have filed a fresh suit on 20.04.2015 bearing Regular Civil Suit (New) No. 117/2015/III. It is also not disputed that the pleadings in the said suit are complete.

4. The learned Counsel for the petitioners has urged that under the provisions of Order XXIII, Rule 1(3) of CPC, a suit can be allowed to be withdrawn, with liberty to file a fresh suit if, the Court finds a formal defect in the suit. The learned Counsel submits that the said provision cannot be used to cure other defects. The learned Counsel pointed out that there is no finding that the defects noticed were of formal nature. The learned Counsel pointed out that there was a previous application under Order XXIII of CPC filed, which was subsequently withdrawn.

5. The learned Counsel for the respondent no. 1 pointed out that the respondents have filed a fresh suit, on the basis of the permission granted, in which the petitioners have appeared and filed written statement. Thus, the petitioners have agused in the impugned order. The learned Counsel further submits that the ground under Order XXIII, Rule 1(3)(b) of CPC, is distinct from the ground under Rule 1(3)(a). The learned Counsel has placed reliance on the decision of the Supreme Court in the case of K.S. BHOOPATHY VS. KOKILA, 2000 DGLS(Soft) 939. It is submitted that apart from the disclosure of formal defect, the Court can also permit withdrawal if, there are sufficient grounds as stated under clause (b) of Rule 1(3) of Order XXIII CPC. The learned Counsel pointed out that the Trial Court after considering the relevant provisions and cases cited, has rightly granted permission for withdrawal, with liberty to file fresh suit.

6. I have carefully considered the rival circumstances and the submissions made. It appears that under clause (b) of Order XXIII, Rule 1(3) of CPC, the Court can permit withdrawal of the suit for any sufficient cause. What constitutes sufficient cause, would depend on facts and circumstances of each case. A perusal of the application filed by the respondents for withdrawal would show that according to the respondents, the plaint was lacking in sufficient particulars about the suit property and the adjacent lands, that are essential to adjudicate the claim made in the suit. Secondly, it is contended that there were two separate causes of action, one based on Article 2309 of the Portuguese Civil Code and the other regarding the right of easementary passage. Thirdly, it is contended that the respondents were not able to make specific pleadings about the ownership of the land, over which the right of passage is claimed. Considering these aspects, the learned Trial Court has found that a case for withdrawal of the suit, with liberty to file a fresh suit is made out.

7. Undisputedly, on the basis of such liberty, a fresh suit has been filed in which the parties have completed their pleadings. It is evident that the petitioners would get an opportunity to contest the suit, on grounds as may be available. Having gone through the impugned order, I do not find that it suffers from any infirmity, resulting into any manifest injustice. The petition is without any

merit and is accordingly dismissed, with no order as to costs.

C. V. BHADANG, J.

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