

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.292 OF 2016

Niyojit Gajanan Gruhnirman Sahkari Sanstha through
Chief Promoter Gopal Tirupati Udata and others ... Applicants
Vs.
Tulsabai Santram Sarvade through her legal heirs
Pandurang Santram Sarvade and others ... Respondents

Mr. A. A. Valsangkar i/b. Mr. Samir Kumbhakoni for Applicants.
Mr. Prasad P. Kulkarni for Respondent No.1.
Mr. Sachin Punde i/b. Mr. Anand Kulkarni for Respondent No.3.

CORAM : R. G. KETKAR, J.
DATE : NOVEMBER 28, 2016

P.C. :

Heard Mr. Valsangkar, learned Counsel for applicants,
Mr. Kulkarni, learned Counsel for respondent No.1 and Mr. Punde,
learned Counsel for respondent No.3 at length.

2. By this Application under Section 115 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), applicants have challenged the judgment and order dated 04.03.2015 passed by the learned Ad-hoc District Judge-1, Solapur below exhibit-21 in Civil Appeal No.493 of 2012. By that order, the learned District Judge rejected the application made by the applicants / appellants / plaintiffs for withdrawal of the Suit with liberty to file fresh Suit on the same cause of action.

3. While rejecting the application, the learned District Judge held that the trial Court dismissed the Suit not only on the ground of maintainability but also recorded findings on all other issues and dismissed the Suit on merits.

4. In support of this Application, Mr. Valsangkar has taken me

through the Suit instituted by the applicants for perpetual injunction. He submitted that applicants-plaintiffs are unregistered co-operative societies. He invited my attention to issue No.4 and the findings recorded by the learned trial Judge against issue No.4. The learned trial Judge referred to the decision in ***Mathura Bhuvan Co-operative Housing Society (proposed) Vs. Official Liquidator, 2004 (1) Mh.L.J. 733*** wherein this Court has held that an unincorporated association of persons cannot sue in its proposed names or through its promoters or chief promoters without obtaining leave under Order I, Rule 8 of C.P.C. In the present case, plaintiffs are proposed societies and are yet to be registered as co-operative societies. He, therefore, submitted that as the defect in instituting the Suit is of a technical / formal nature, plaintiffs filed application under Order XXIII, Rule 1, sub-rules (2) and (3) of C.P.C. He submitted that even at appellate stage, Suit can be withdrawn with liberty to file fresh Suit on the same cause of action. He has also taken me through the findings recorded by the learned trial Judge against issues No.1 and 6 and submitted that as far as finding against issue No.1 is concerned, the learned trial Judge did not record any finding about possession of the plaintiffs. The learned trial Judge did not discuss any evidence and after referring to Order VII, Rule 3 of C.P.C., merely observed that as the suit property is not identifiable, injunction cannot be issued. In short, he submitted that the learned trial Judge did not decide the Suit on merits. In fact in paragraph 23, the learned trial Judge observed that the Suit has failed on some technical grounds, and therefore, defendants No.9 to 11 are not entitled to the compensatory costs.

5. On the other hand Mr. Kulkarni and Mr. Punde supported the impugned order. They have taken me through the impugned order and more particularly paragraph 5 thereof.

6. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. Plaintiffs have instituted Suit for perpetual injunction. In order to seek relief of perpetual injunction, plaintiffs have to establish their possession over the suit property. While answering issue No.1, namely, whether plaintiffs prove that they are in possession of the suit property, the learned trial Judge has considered the sale deeds relied by the plaintiffs at exhibits 4/3 to 4/6. After going through the description given in the sale deeds as also in the plaint, the learned trial Judge has commented upon the sale deeds. The learned trial Judge thereafter observed that plaintiffs are claiming to be in possession of the suit properties as per the sale deeds. The properties which are mentioned in the sale deeds are not identified with the description of the suit properties in the plaint. The learned trial Judge, therefore, did not accept the contention that the properties described in the Suit are the same as mentioned in the sale deeds at exhibits 4/3 to 4/6. The learned trial Judge further held that as the suit properties are not identifiable as per the sale deeds, it cannot be said that plaintiffs are in possession of the suit properties. Thus, it cannot be said that the learned trial Judge has merely referred to provisions of Order VII, Rule 3 of C.P.C.

7. In fact, perusal of paragraphs 13 and 14 of the trial Court's order shows that the learned trial Judge has referred to the evidence adduced by the parties and thereafter recorded a finding after comparing the descriptions given in the sale deeds and the description given in the plaint. I, therefore, do not find that the learned District Judge committed any error in observing in paragraph 5 of the impugned order that the learned trial Judge has dismissed the Suit on merits and at this stage if the plaintiffs are permitted to withdraw the Suit with liberty to file fresh Suit, it will certainly cause prejudice to the defendants. The learned

District Judge further observed that considering the nature of the Suit, decision of the trial Court, evidence on record and dispute involved between the parties, this is not a fit case to allow withdrawal as prayed for and accordingly rejected the application. Hence, Application fails and the same is dismissed. It is however made clear that the learned District Judge will decide the Appeal uninfluenced by the observations made in the impugned order as also in this order. All contentions of the parties on merits are expressly kept open. Order accordingly.

(R. G. KETKAR, J.)

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