

IN THE HIGH COURT OF BOMBAY AT GOA**CIVIL REVISION APPLICATION NO. 24 OF 2012**

1. Shri Armindo Jose Andrade
alias Armindo Augusto Andrade
alias Armindo Andrade
son of late Shri Jose Augusto de
Andrade, 51 years, married,
R/o H.No.10, Ward No.8,
Valpoi, Sattari Goa.

2. Anthon Jose Andrade,
son of late Luis Manuel Andrade,
major, married,
R/o Colem, Sanguem Goa,
through his Power of Attorney,
Plaintiff No.1/Armindo Andrade.

... Petitioners

Versus

1. M/s Ritesh Developers Pvt. Ltd.,
Through its owner Rajesh Shivdas
Verekar, Contractor,
House Number not known,
Near Saw Mill, Bethora,
Ponda Goa.

2. Goa State Infra Structure Development
Corporation, EDC House,
Atmaram Borkar Road,
Panaji Goa.

3. The Chief Officer,
The Valpoi Municipal Council,
Valpoi Goa

4. M/s H. P. Madhukar,
41, Prashant, Vijaynagar Extension,
Hubli, 580 032. ... Respondents

Mr. V. Menezes, Advocate for the petitioners.

Mr. D. Pangam, Advocate for the respondent no.2.

Mr. A. D. Bhobe and Ms. S. Bhobe, Advocates for the respondent no.3.

Coram:- F. M. REIS, J.

Date:- 29th June, 2017

ORAL JUDGMENT :

Heard Mr. V. Menezes, learned counsel appearing for the petitioners, Mr. A. D. Bhobe, learned counsel appearing for the respondent no.3 and Mr. D. Pangam, learned counsel appearing for the respondent no.2.

2. The above revision challenges an order dated 30.04.2012 whereby an application filed by the petitioners under Order 23 Rule 1(3) of the Civil Procedure Code seeking leave to withdraw the suit filed by the petitioners with liberty to file a fresh suit was partly allowed and the petitioners were allowed to

withdraw the suit without granting liberty to file a fresh suit. The petitioners have thereafter challenged the subsequent order passed by the learned Judge dismissing the suit as withdrawn, when the matter was posted for evidence on 11.06.2012.

3. Mr. V. Menezes, learned counsel appearing for the petitioners has pointed out that based on the stand taken by the respondents herein inter alia contended that the work being carried out by such respondents was on behalf of the State Government, the petitioners filed a Writ Petition before this Court being Writ Petition No.68 of 2012 which came to be disposed of by the Division Bench by order dated 30.01.2012 whereby the petition came to be disposed of on the ground that there are disputed questions of fact which cannot be decided in a petition under Article 226 of the Constitution of India. The learned counsel further pointed out that this Court while disposing of the said petition had also observed that the petitioners had liberty either to amend the plaint or file a fresh suit based on such cause of action. It is further pointed out that

as such the petitioners filed an application under Order 23 Rule 1 (3) of the Civil Procedure Code stating on record the aforesaid facts for seeking leave of the Court to withdraw the suit with liberty to file a fresh suit. The learned counsel further pointed out that as the respondents have opposed such application, the learned Judge by the impugned order dated 30.04.2012 partly allowed the application granting leave to withdraw the suit but refused liberty to file a fresh suit. The learned counsel further submits that this exercise by the learned Judge is contrary to law and in excess of its jurisdiction while disposing of the application under Order 23 Rule 1(3) of the Civil Procedure Code. The learned counsel further submits that thereafter despite of such order, the learned Judge posted the matter for evidence when the petitioners pointed out that the earlier order was under challenge in the above revision, but however, the learned Judge proceeded to dismiss the suit as withdrawn. The learned counsel further pointed out that in view of the impugned order which was under challenge before this Court, the subsequent exercise by the learned Judge for posting the matter for evidence and proceeding

to dismiss the suit as withdrawn is in excess of its jurisdiction and cannot be sustained. The learned counsel as such points out that both the impugned order including the subsequent order are erroneous and deserve to be quashed and set aside.

4. Mr. A. D. Bhobe, learned counsel appearing for the respondent no.3 however points out that the petitioners are not entitled for any leave to file a fresh suit as according to him in case the petitioners so desired they ought to have filed an appropriate application in the suit in terms of the directions issued by this Court while disposing of the said Writ Petition. The learned counsel further submits that merely because the petitioners claim that the State Government had to be a party to such suit does not by itself preclude the learned Judge to examine the application as observed by this Court while disposing of the said petition. The learned Judge further pointed out that as such the application under Order 23 Rule 1 (3) of Civil Procedure Code ought to have been dismissed in toto.

5. Mr. D. Pangam, learned counsel appearing for the respondent no.2 has adopted the submissions of Mr. Bhobe, learned counsel appearing for the respondent no.3.

6. I have considered the submissions of the learned counsel and with their assistance, I have gone through the records. The learned Judge while passing the impugned order has erroneously proceeded to grant leave to withdraw the suit without reserving liberty to the petitioners to file a fresh suit. In case the learned Judge found that no such leave could be granted to the petitioners, the learned Judge ought to have dismissed the application filed by the petitioners under Order 23 Rule 1(3) of the Civil Procedure Code. In the present case, as such, as the learned Judge has partly allowed the application and consequently granted leave to withdraw the suit without reserving liberty to file a fresh suit has resulted in an erroneous exercise of jurisdiction vested in the learned Judge in terms of the provisions of the Civil Procedure Code. On this ground alone, the impugned order and the subsequent order passed by the learned

Judge deserve to be quashed and set aside.

7. At this stage, when asked whether the petitioners desire to introduce in the plaint as subsequent events and even seek impleadment of all the necessary parties, can also be introduced by filing an application for amendment of the plaint filed by the petitioners, Mr. Menezes, the learned counsel pointed out that in the facts and circumstances of the case, the petitioners shall as such file a comprehensive application for amendment to introduce the facts based on the cause of action pleaded and also the subsequent facts which came to their knowledge and even implead the parties which according to them are necessary parties to the suit. In such circumstances, I find that considering the said contention of Mr. Menezes, learned counsel appearing for the petitioners upon instructions in case such right to file an application for amendment is reserved to the petitioners, the petitioners may be permitted to withdraw the application filed under Order 23 Rule 1(3) of the Civil Procedure Code with liberty as stated above. In the facts and circumstances

of the case and for the reasons stated herein above, I find that the impugned order passed by the learned Judge dated 30.04.2012 and the subsequent order dated 11.06.2012 cannot be sustained and deserve to be quashed and set aside.

8. In view of the above, the impugned order dated 30.04.2012 and the subsequent order dated 11.06.2012 are quashed and set aside. The subject application is dismissed as withdrawn. The petitioners are at liberty, if so advised to file an application for amendment as well as for impleading the parties in terms of the observations of this Court in the said Writ Petition which the learned Judge shall examine after hearing the parties in accordance with law. Rule stands disposed off accordingly. The petition stands disposed of accordingly.

F. M. REIS, J.

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