

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL APPLICATION NO.2973 OF 2016
IN
REJECTED CASE NO.1345 OF 2016
IN
WRIT PETITION (ST.) NO.28675 OF 2014

Bansilal Sukhdeo Suryavanshi and another ... Applicants
Vs.
Santosh Namdeo Patil ... Respondent

Mr Pritesh K. Bohade for Applicants / Petitioners.

CORAM : R. G. KETKAR, J.
DATE : FEBRUARY 09, 2017

P.C. :

Heard Mr. Bohade, learned Counsel for applicants.

2. This is an application for setting aside order dated 21.03.2016 passed by the Registrar (Judicial-I) and for restoration of the main Petition after condoning the delay of 150 days in filing the Application.
3. Mr. Bohade submits that notice was not issued in the main Petition.
4. In view thereof and for the reasons stated in the application, Civil Application is allowed in terms of prayer clauses (a) and (b) with no order as to costs and Writ Petition is restored to its original position.
5. At the request, Writ Petition (St.) No.28675 of 2014 is taken up for admission.

6. By this Petition under Article 227 of the Constitution of India, petitioners, hereinafter referred to as 'plaintiffs', have challenged the judgment and order dated 27.08.2013 passed by the learned 4th Joint Civil Judge, Junior Division, Malegaon below exhibit-66 in Regular Civil Suit No.105 of 2007. By that order, the learned trial Judge rejected the application made by the plaintiffs under Order XXIII, Rule 1(3) of the Code of Civil Procedure, 1908 (for short 'C.P.C.') for withdrawal of the Suit with liberty to file fresh Suit on the same cause of action.

7. In support of this Petition, Mr. Bohade invited my attention to the Suit instituted by the plaintiffs and application at exhibit-66. He submitted that plaintiffs have instituted Suit against the defendants for recovery of possession of 40 Ares encroached by the defendants from Gat No.225/1 and 225/2 from eastern side. Along with the Suit, plaintiffs did not file map as contemplated by Order VII, Rule 3 of C.P.C. Plaintiffs also did not give boundaries of encroached area inadvertently. It is, therefore, necessary to permit plaintiffs to withdraw the Suit on the technical ground, namely, "formal defects" with liberty to file fresh Suit on the same cause of action. He submitted that the learned trial Judge committed error in rejecting the application on the ground that Commissioner's report is already filed on record and that plaintiffs have closed their evidence.

8. I have considered the submissions advanced by Mr. Bohade. I have also perused the material on record. As noted earlier, plaintiffs have instituted Suit against defendants for recovery of encroached portion. During the pendency of the Suit, on the application made by the plaintiffs for appointment of the Court Commissioner, Court Commissioner was appointed. Court Commissioner also submitted

report in the trial Court. In paragraph 3, the learned trial Judge observed that plaintiffs have already closed their evidence. Matter was posted on 04.07.2012 for cross-examination of the defendants. At that stage, present application is filed. The learned trial Judge also held that under Order XXIII, Rule 1(3), plaintiffs can be permitted to withdraw the Suit on two grounds namely, where the Court is satisfied that a Suit must fail by reason of some formal defect and secondly, 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. The learned trial Judge observed that considering the nature of the Suit, failure on the part of the plaintiffs cannot be termed as a 'formal defect'. Having regard to the stage of the Suit, namely, plaintiffs have already adduced evidence, prejudice will be caused to the defendants.

9. For the reasons recorded in paragraph 3 of the impugned order, I do not find that the learned trial Judge has committed any error in rejecting the application. Hence, Petition fails and the same is dismissed. However, it is made clear that where a decree is challenged by the petitioners, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of the proceedings as contemplated by Section 105 (1) of C.P.C.

(R. G. KETKAR, J.)

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