

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 13487 OF 2017

**VIJAY CHUNISING MORE AND ANOTHER
VERSUS
MOGARIBAI BHAGWAN THAKARE AND OTHERS**

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Advocate for Petitioners : Mr. Savale Amit S
Advocate for Respondents : Mr Wani Ruchir S.

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CORAM : V.K. JADHAV, J.
Dated: April 11, 2018

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PER COURT :-

1. Heard finally with consent at admission stage.
2. The respondents/plaintiffs have instituted the suit bearing R.C.S. No.65/2017 for decree of perpetual injunction. Petitioners/original defendants have strongly resisted the suit by filing the written statement. It is the pleadings of the respondents/plaintiffs that, they own the house property having No.117 admeasuring 35x26 sq. ft. and on the eastern side of the said property there is an open space and said open space is the suit property. It has been specifically pleaded in the suit that the petitioners

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had no right whatsoever over the said open space, however, they are trying to disturb the possession of the respondents/plaintiffs over the suit plot. The petitioners in their written statement have specifically pleaded that said open space is having house property no.117/1 sold by the father of the respondents/plaintiffs under a registered sale deed on 7.10.2003 to the petitioner no.1 for valuable consideration of Rs.7,000/-. In the backdrop of this, respondents/original plaintiffs have filed an application exh.22 for withdrawal of the said suit under Order XXIII Rule (1) (2) of the Civil Procedure Code with liberty to file a fresh suit on the same cause of action. The learned Civil Judge S.D., Shahada, District Nandurbar by impugned order dated 21.9.2017 in RCS No.65/2017 allowed the application subject to costs of Rs.2,000/- and permitted thereby the respondents/plaintiffs to withdraw the suit with a liberty to file a fresh suit. Hence, this writ petition.

3. Learned counsel for the petitioners submits that, there was no formal defect fatal to the suit and the trial

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court has granted the permission of withdrawal in terms of clause (b) of Order XXIII Rule 1 sub rule (2). Learned counsel submits that any other sufficient ground “mentioned in clause (b) must be *ejusdem generis* with the ground mentioned in clause (a) . Learned counsel submits that the respondents/plaintiffs have not specifically stated the so called formal defect in their application exh.22 and, as such, the trial court without recording its satisfaction that the suit would fail by reason of the formal defect passed the impugned order. Learned counsel submits that when the respondents/plaintiffs realized that he would not likely to be succeeded in the suit, for want of relief claimed in respect of declaration of the ownership, filed application exh.22 for withdrawal of the suit with liberty to file a fresh suit on the same cause of action. Learned counsel submits that the learned judge of the trial court has erroneously allowed the said application.

4. Learned counsel for the petitioners/original plaintiffs in order to substantiate his contentions placed his reliance

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on the following cases :-

- i) Ramrao Bhagwantrao Inamdar vs. Babu Appanna Samage, reported in (1940) AIR (Bombay) 121;
- ii) Somalraju vs. Samanthu Sivaji Ganesh and Another, reported in AIR 2009 Andhra Pradesh 12;
- iii) K. S. Bhoopathy and others Vs. Kokila and others, reported in AIR 2000 Supreme Court 2132.
- iv) Tarachand Bapuchand Vs. Gaibihaji Ahmed Bagwan, reported in AIR 1956 Bombay 632;
- v) Rajaram Jairam Raut Vs. Baliram Laxman Raut, reported in 2006 (5) LJSOFT 98;
- vi) Veerbhadrappa Mahadappa Raachatte Vs. Mahalingappa Gurlingappa Karanja and others, reported in 2009 (9) LJSOFT 172;
- vii) Madhukar Wamanrao Jadhav and another Vs. Dayalbabu Shyamlal jaiswal and another, reported in 2002 (1) LJSOFT 76;
- viii) Shankar Vyenkoba Shinde (died) through his LR's Vs. Gorakh Madhavrao Shinde and others, reported in 2012 (1) LJSOFT 157.

5. Learned counsel for the respondents submits that so far as clause (b) of Order XXIII Sub-Rule 3 is concerned, there is no restriction on expression used in clause (b) and the suit may be allowed to be withdrawn on any ground

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whatsoever, provided that the court deems it to be sufficient. Learned counsel submits that as a effect of the withdrawal of the suit without any liberty to institute the fresh suit on the same cause of action, the respondents/plaintiffs would not be in a position to institute a fresh suit in view of the bar of the Order II Rule 2 of Civil Procedure Code. Learned counsel submits that the respondents/plaintiffs were not knowing about the alleged sale deed executed in favour of the petitioners by their father way back in the year 2003 and, consequently after going through the pleadings of the petitioners in their written statement, the suit was required to be withdrawn with a liberty to file fresh suit on the same cause of action by incorporating the relief of declaration of ownership or declaration in respect of the said sale-deed. Learned counsel submits that so far as the application exh.22 is concerned the respondents/plaintiffs have specifically pointed out the said defect in terms of clause (b) of Order XXIII Sub-Rule (3) of the Civil Procedure

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Code and the trial court has rightly considered the same.
No interference is required.

6. Learned counsel in order to substantiate his contention placed reliance on a case of **Anathula Sudhakar Vs. P. Buchi Reddy (dead) by LRs. and others, reported in (2008) 4 Supreme Court Cases 594** wherein in paragraph no.14, the Supreme Court has also observed that in such a contingency there is need for the plaintiff to amend the plaint and convert the suit for declaration or alternatively he may withdraw the suit for bare injunction with the permission of the court to file a comprehensive suit for declaration and injunction.

7. In have carefully gone through the contents of exh.22 and the impugned order passed thereon by the trial court. Order XXIII Sub-Rule (3) read as under :

Order 23 : Withdrawal and adjustment of Suits

(1)

(2)

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- (3) Where the court is satisfied—
- (a) That a suit must fail by reason of some formal defect; or
 - (b) That there are other 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 abandon 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.

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8. In case of **Ramrao Bhagwantrao Inamdar vs. Babu Appanna Samage**, reported in (1040) AIR (Bombay) **121**, the Full Bench of this court has dealt with the similar issue and in para no.20 & 21 of the judgment has made following observations :-

20. With great respect, we concur in this view, which is exactly what we mean by saying that Clause (a) is illustrative of the "grounds" referred to in Clause (b), and although the "grounds" need not be ejusdem generis with the ground mentioned in Clause (a), they must be "at least analogous" to it. The ground in Clause (a) requires that the suit must fail by reason of some formal defect; whereas the grounds contemplated in Clause (b) need not necessarily be fatal to the suit, but must be analogous to a formal defect.

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21. To determine what grounds are analogous to formal defects, it is necessary to know what defects are to be deemed " formal". The instances of defects " of form" cited by the Privy Council in *Robert Watson & Co. v. The Collector of Zillah Rajshahye* (1869) 13 M. I.A. 161 includes misjoinder of parties or of the matters in suit, rejection of a material document for not having a proper stamp and the erroneous valuation of the subject-matter of the suit. This shows that the expression " formal defect" must be given a wide and liberal meaning, and must be deemed to connote every kind of defect which does not affect the merits of the case, whether that defect be fatal to the suit or not.

9. The Full Bench of this court has observed that Clause (a) is illustrative of the "grounds" referred to in Clause (b), and although the "grounds" need not be ejusdem generis with the ground mentioned in Clause (a), they must be "at least analogous" to it. The ground in Clause(a) requires that the suit must fail by reason of some formal defect; whereas, the grounds contemplated in Clause (b) need not necessarily be fatal to the suit, but must be analogous to a formal defect. Full Bench had also dealt with as to what grounds are analogous to formal defect and observed that the expression "formal defect" must be given a wide and liberal meaning and must be deemed to connote every

kind of defect which does not affect the merits of the case, whether that defect be fatal to the suit or not.

10. In the instant case, the defect as pointed out in the application exh.22 cannot be interpreted as a formal defect and, after going through the pleadings of the petitioners in their written statement, when the respondents/plaintiffs realized that they could not succeed in the suit, filed an application exh.22 for withdrawal of the suit with liberty to file a fresh suit on the same cause of action.

11. In a case **K. S. Bhoopathy and others Vs. Kokila and others, (supra)** relied upon by the learned counsel for the petitioners in para 16 of the judgment the Supreme Court has made following observations :-

16. From the above it appears that the approach of the High Court was that the plaintiff should have prayed for declaration of title which they had omitted to include in the plaint. It was for the plaintiffs to frame their suit in any form as advised. If they felt that there was a cause of action for declaration of their title to the suit property they could have made a prayer in that regard. If they felt that a declaration of their right to exclusive user of the pathway

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was necessary they should have framed the suit accordingly. On the other hand the plaintiffs merely sought a decree of injunction permanently restraining the defendants from disturbing their right of user of the property. From the facts and circumstances of the case as emanating from the judgments of the trial court and the first appellate court it is clear that the plaintiffs realized the weakness in the claim of exclusive right of user over the property and in order to get over the findings against them by the first appellate court they took recourse of Order XXIII Rules 1(3) Civil Procedure Code and filed the application for withdrawal of the suit with leave to file fresh suit. The High Court does not appear to have considered the relevant aspects of the matter. Its approach appears to have been that since the interest of the defendants can be safeguarded by giving them permission for user of the pathway till adjudication of the controversy in the fresh suit to be filed, permission for withdrawal of the suit as prayed for can be granted. Such an approach is clearly erroneous. It is the duty of the Court to feel satisfied that there exist proper grounds/reasons for granting permission for withdrawal of the suit with leave to file fresh suit by the plaintiffs and in such a matter the statutory mandate is not complied by merely stating that grant of permission will not prejudice the defendants. In case such permission is granted at appellate or second appellate stage prejudice to defendant is writ large as he loses the benefit of the decision in his favour in the lower court.

12. In the facts of the said case the Supreme Court has specifically observed to the effect that from the facts and circumstances of the case as emerging from the judgments of the trial Court and the first appellate Court it is clear that the plaintiffs realized the weakness in the claim of exclusive right of user over the property and in order to

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get over the findings against them by the first appellate Court they took recourse of Order XXIII, Rule (3) of Civil Procedure Code and filed the application for withdrawal of the suit with leave to file a fresh suit. Though the Supreme Court has considered the same at the stage of second appeal when the order came to be passed by the High Court, however, also observed that the duty of the court to feel satisfied that there exist proper grounds or reasons for granting permission for withdrawal of the suit with leave to file a fresh suit by plaintiffs and in such a matter the statutory mandate is not complied by merely stating that grant of permission will not prejudice the defendants.

13. In case of **Rajaram Jairam Raut Vs. Baliram Laxman Raut**, reported in 2006 (5) LJSOFT 98, relied upon by the learned counsel for the petitioners this court (CORAM : B. P. Dharmadhikari, J.) in para 4 of the judgment has observed that it is the duty of the court to feel satisfied that there exists proper grounds and reasons

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for granting permission for withdrawal of the suit with leave to file a fresh suit by the plaintiffs and in such a matter the statutory mandate is not complied by merely stating that grant of permission will not prejudice the defendants. It was also observed that in the facts of case it cannot be said that there was any fatal defect of form in the suit and all the defects pointed out by the respondents/plaintiffs could have been cured by moving appropriate amendment application. In view of facts pleaded, the original plaintiff could have asked for appropriate declaration and injunction along with relief for restoration of possession and return of material. The defect about valuation of suit property or suit for payment of court fees is never treated as defect which cannot be rectified.

14. In a case **Veerbhadrappa Mahadappa Raachatte Vs. Mahalingappa Gurlingappa Karanja and others**, reported in 2009 (9) LJSOFT 172 (CORAM : R. M. Borde, J.), in para no.12 of the judgment in the facts of

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the said case has observed that it is not stated as to what is the defect in describing the suit property. The contentions raised in the application as regards defect in describing the the property are quite vague. It is essential for the plaintiff to disclose as to what is the ambiguity which he wants to clarify by presenting a fresh suit. The contents of the application do not disclose any defect, which is of a formal character enabling the plaintiff to seek withdrawal of the suit within parameters of Order XIII rule 1(3)(a) of the Code of Civil Procedure. It is essential for the plaintiff to make out a ground seeking withdrawal of the suit for presenting a fresh suit on same cause of action and the plaintiff is required to disclose nature of formal defect in the application and if the application remained silent on this material point, such an application cannot be entertained by the court.

15. In the instant case also the plaintiffs have not disclosed the nature of the formal defect in the application and the application remained silent on this material point.

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16. In case of **Anathula Sudhakar Vs. P. Buchi Reddy (dead) by LRs. And others**, (supra) relied upon by the learned counsel for the respondents, the Supreme Court has formulated following questions for its consideration.

- (i) What is the scope of a suit for prohibitory injunction relating to immovable property?
- (ii) Whether on the facts, plaintiffs ought to have filed a suit for declaration of title and injunction ?
- (iii) Whether the High Court, in a second appeal under section 100 Civil Procedure Code, examine the factual question of title which was not the subject matter of any issue and based on a finding thereon, reverse the decision of the first appellate court?
- (iv) What would be the appropriate decision?

The Supreme Court while dealing with the same points as formulated has made the observations in para 14 of the judgment without laying down any ratio as such. The Supreme Court in para 14 of the judgment has made following observations.

- 14. We may however clarify that a prayer for declaration will be necessary only if the denial of

title by the defendant or challenge to plaintiff's title raises a cloud on the title of plaintiff to the property. A cloud is said to raise over a person's title, when some apparent defect in his title to a property, or when some prima facie right of a third party over it, is made out or shown. An action for declaration, is the remedy to remove the cloud on the title to the property. On the other hand, where the plaintiff has clear title supported by documents, if a trespasser without any claim to title or an interloper without any apparent title, merely denies the plaintiff's title, it does not amount to raising a cloud over the title of the plaintiff and it will not be necessary for the plaintiff to sue for declaration and a suit for injunction may be sufficient. Where the plaintiff, believing that defendant is only a trespasser or a wrongful claimant without title, files a mere suit for injunction, and in such a suit, the defendant discloses in his defence the details of the right or title claimed by him, which raises a serious dispute or cloud over plaintiff's title, then there is a need for the plaintiff, to amend the plaint and convert the suit into one for declaration. Alternatively, he may withdraw the suit for bare injunction, with permission of the court to file a comprehensive suit for declaration and injunction. He may file the suit for declaration with consequential relief, even after the suit for injunction is dismissed, where the suit raised only the issue of possession and not any issue of title.

17. It is clear that the Supreme Court has not specifically dealt with the provisions of Order XXIII Rule-1(3) Clause (a) & (b) of the Civil Procedure Code.

18. In view of above discussion and fact that the trial court has not considered that the respondents/plaintiffs have failed to specifically state the formal defects in application exh.22 for grant of permission for withdrawal of suit with liberty to file a fresh suit on the same cause of action, the impugned order, in the light of the ratio laid down by the Full Bench of our High Court and also in view of ratio laid down by the Supreme Court and the other cases as referred above, the impugned order is not sustainable in the eyes of law. However, it also appears that if such liberty is not granted to institute a fresh suit on the same cause of action, in view of the bar of Order II Rule 2 of the Civil Procedure Code, a fresh suit would not be entertained incorporating the relief in respect of declaration of the said sale deed. In the aforesaid case in para no.14 of the judgment even the Supreme Court has also observed that in such a contingency, the plaintiff may amend the plaint and convert the suit into one for declaration or he may file the suit for declaration with

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consequential relief even after the suit for injunction is dismissed, where the suit raises only the issue of possession and not any issue of title. Even this court in case of **Rajaram Jairam Raut Vs. Baliram Laxman Raut** (supra), in the similar set of facts has observed that all the defects pointed out by the respondent/plaintiff could have been cured by moving appropriate amendment application and in view of the facts pleaded the original plaintiff could have asked, for appropriate declaration and injunction along with relief for restoration of possession and return of material.

19. In the instant case also the respondents/plaintiffs may file an application in the suit itself for seeking appropriate amendment in the light of the pleadings of the petitioners/defendants in their written statement and it is always for the trial court to consider the same and decide it in accordance with law. Even if, such application is filed seeking amendment in the plaint, in the light of pleadings of the petitioners/defendants in the written statement, the

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same would hardly cause any prejudice to their defence.

20. In view of above discussion, I pass the following order.

ORDER

- I) Writ petition is hereby allowed. No costs.
- II) The impugned order dated 21.09.2017 passed by the Civil Judge Senior Division, Shahada, District Nandurbar in RCS No.65 of 2017 below Exh 22 is hereby quashed and set aside.
- III) Application exh.22 is hereby rejected.
- IV) In the light of above discussion, the respondents/plaintiffs would be at liberty to file an application seeking amendment in the plaint and it is for the trial court to decide the said application on its own merits in accordance with law.
- V) Writ petition is accordingly disposed of.

(V.K. JADHAV, J.)

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