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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO. 1 OF 2018**

Shri. Jayendra Chandram ZampaleApplicant

V/s.

Mohammad Iliyas A. Rahemanattar and anotherRespondents

Mr. Suhas Inamdar for the Applicant

Mr. S. R. Trivedi for Respondent nos. 1 & 2

CORAM : K. K. TATED, J.

DATE : 03rd DECEMBER, 2018.

P.C.

Heard the learned counsel for the parties. By this Revision Application, the Applicant/Original Plaintiff challenges the order dated 21/09/2017 passed by Ad-hoc District Judge-3, Solapur rejecting the Applicant's Application below Exhibit 17 under Order 23 Rule 3 of the Code of Civil Procedure for withdrawal of the Suit with liberty to file afresh.

2 The learned counsel Mr. Suhas Inamdar for the Applicant submits that the Trial Court failed to consider the fact that earlier, the Plaintiff filed the Application for amendment that was rejected. Hence, the

Applicant preferred the Application under Order 23 Rule 3 of the Code of Civil Procedure for withdrawal of the Suit with liberty to file afresh for the same cause of action. The learned counsel for the Applicant in support of his contentions relies on the ground nos. 'a' to 'n' stated in Civil Revision Application which reads thus:

- a. The impugned order is ex-facie, bad in law, illegal and unjust in as much as the petitioner is seeking the withdrawal of the original suit with liberty to file a fresh only on the ground of formal defect of mentioning the proper description of the suit property. Hence the application ought to have been allowed.*
- b. That the appeal is continuation of the suit & hence application filed by the petitioner at appellate stage is maintainable.*
- c. That the Hon'ble Civil Judge Junior Division Solapur while dismissing the suit observed that the plaintiff has not clearly mentioned how much portion out of land block no 6/2c is owned by plaintiff & how much owned by defendants. Further it was observed that the petitioner has not specifically mentioned that, the starting and end point of the said easementary road. Further the petitioner has filed application for amendment which was rejected. Hence it is submitted that there remained formal*

de4fect in the plaint viz. Proper description of the suit property & prayer to that effect & hence the application filed by the petitioner ought to have been allowed.

d. That the petitioner will suffer irreparable loss & prejudice if the application is not allowed & permission is not granted to him to withdraw the present suit with liberty to file fresh suit since the wall constructed by the respondents is affecting the easementary rights of the petitioner.

e. That the Hon'ble District Court did not properly consider the application filed by the applicant to the extent that the applicant has specifically made averment that the applicant could not incorporated the details of the description of the suit property since the application made for the amendment was rejected. Hence there remains formal and technical defect in the plaint & hence it is necessary to withdraw present suit with liberty to file a fresh suit.

f. That in absence of proper description of the suit property & the rough map on record, it is difficult for the court to arrive at a definite conclusion to meet the end of justice. Hence there are the sufficient grounds allow the petitioner to withdraw the suit with liberty to file a fresh suit for the same cause of action.

g. That there is no discussion in the impugned order as to whether there is formal defect remained in the plaint or not.

Further there is no discussion as to whether there are sufficient grounds made by the plaintiff to file present application. Hence the impugned order is liable to quash & set aside since there is no discussion regarding the plaintiff's case in the impugned order.

h. That the impugned order is non reasoned order since the Hon'ble District Court did not assign any reasons while rejecting the application filed by the petitioner.

i. That the facts of the judgment cited from the facts in the present case. Further there is no discussion in the impugned order as to whether there is fulfillment of the grounds as mentioned in Order 23 Rule 3 of C.P.C.

j. That the petitioner has filed application for amendment to that effect which was rejected & hence the petitioner has no option but to file present application.

k. That the the trial court has not considered that there is no prejudice will cause to the Respondents by allowing the application. Hence the application ought to have been allowed.

l. That the Respondents have constructed compound wall & closed the way of the petitioner to go in the suit property. Hence it is necessary in the interest of justice to allow the petitioner to withdraw the suit with liberty to file fresh suit as mentioned in

the application.

m. Even otherwise the Impugned order is bad in law & illegal & liable to set aside.

n. If this petition is not allowed the Petitioner will be put to loss, which cannot be compensated in terms of moneys.

3 The learned counsel for the applicant submits that considering the grounds raised by the Applicant in Revision Application and as the Trial Court failed to consider facts of present case, the impugned order dated 21/09/2017 passed by the Appellate Court is required to be set aside and liberty may be granted to the Applicant to withdraw the Regular Civil Suit No. 107 of 2018 with liberty to file afresh for same the same cause of action.

4 On the other hand, the learned counsel Mr. Trivedi appearing on behalf of Respondent vehemently opposes the present Civil Revision Application. He submits that the Trial Court considered the fact that the Applicant failed to disclose any cogent reason in his Application below Exhibit 17 for allowing the Plaintiff to withdraw the Suit with liberty to

file afresh for the same cause of action. Hence, there is no substance in the present Civil Revision Application and same is required to be rejected.

5 Heard both sides at length. Bare reading of the Application below Exhibit 17 shows that the Applicant failed to disclose any reason as required under Order 23 Rule 3 of the Code of Civil Procedure for withdrawal of the Suit with liberty to file afresh for the same cause of action. Apart from that, the Trial Court decided the Applicant's Regular Civil Suit No. 107 of 2008 on its own merits.

6 It is to be noted that the Apex Court in the matter of ***R. Rathinavel Chettiar and Another Vs. V. Sivaraman and Others, (1999) 4 SCC 89*** held that under Order 23 Rule 1 of the Civil Procedure Code, 1908, plaintiff cannot be allowed to withdraw the Suit after final decree at the appellate stage. It is held that court cannot be allowed as a matter of course to withdraw the suit when by virtue of such withdrawal, vested or substantive right of any party to litigation will be adversely affected. Para 22 of the said Judgment reads thus:

“In view of the above discussion, it comes out that where a decree passed by the trial court is challenged in appeal, it would not be open to the plaintiff, at that stage, to withdraw the suit so as to destroy that decree. The rights which have come to be vested in parties to the suit under the decree cannot be taken away by withdrawal of suit at that stage unless very strong reasons are shown that the withdrawal would not affect or prejudice anybody's vested rights. The impugned judgment of the High Court in which a contrary view has been expressed cannot be sustained.”

In similar way, Apex Court in the matter of **Avenue Supermarts Private Limited vs. Nischint Bhalla and Others (2016) 15 SCC 411** held that where a decree is passed by the Trial Court is challenged in appeal, it would not be open to the plaintiff, at that stage, to withdraw the suit so as to destroy that decree. The rights which have come to be vested in the parties to the suit under the decree cannot be taken away by withdrawal of the suit at that stage unless very strong reasons are shown that the withdrawal would not affect or prejudice anybody's vested rights.

In the case in hand, petitioner failed to make out any case to that effect and the court below rightly rejected petitioner's application for withdrawal at the stage of appeal.

7 Considering these facts and the law laid down by the Apex Court in the matter of **R. Rathinavel Chettiar and Ors. Vs. V. Sivaraman and Ors [(1999) 4 SCC 89]** and in the matter of **Avenue Supermarts Vs. Nischint Bhalla and Ors [(2016) 15 SCC 411]**, I do not find any substance in the present Revision Application. Hence, same is rejected.

8 No order as to costs.

[K. K. TATED, J.]