

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

CIVIL REVISION APPLICATION NO.386 OF 2016

Rakesh Sambhajirao Katkar and Ors. .. Applicant

V/s.

Devidas Ramchandra Bhadavale and Ors. .. Respondent

Mr.R.S.Apte, Senior Counsel i/b Mr.S.C.Wakankar for the applicant

Mr.S.M.Oak i/b Mr.R.R.Sonawane for the respondent

CORAM: K.K. TATED, J

DATED : DECEMBER 6, 2018

P.C. :

1 Heard.

2 By this Civil Revision Application, applicant original plaintiff challenges the order dated 23.03.2016 passed by Civil Judge, Senior Division, Pune below Exhibit 38 in Special Civil Suit No.835 of 2014 rejecting applicant original plaintiff's application under Order 23 Rule 1(3) of the Civil Procedure Code, 1908 seeking permission to withdraw the Suit with liberty to file a fresh Suit on the same cause of action.

3 The learned Senior Counsel for the applicant original plaintiff submits that the Trial Court failed to appreciate the fact that initially the five parties had jointly filed Joint Special Civil Suit No.835 of 2014 and thereafter, they decided to put up their

grievance individually. He submits that on this ground only, the Trial Court ought to have allowed their application under Order 23 Rule 1 (3) of the Civil Procedure Code. He further submits that the learned Trial Court failed to appreciate that on account of some defect in their plaint, they decided to withdraw the Suit and file a fresh for same cause of action.

4 The learned counsel for the applicant original plaintiff submits that initially they preferred Special Civil Suit No.835 of 2014 in the court of Civil Judge, Senior Division, Pune for declaration that the plaintiffs are owner of the properties as described in the Suit and are entitled to easementary right to make use of the property described in paragraph 2 of the plaint for egress and ingress by way of easement of necessity. Following are the prayers in that Suit.

“a) Suit may kindly be decreed with costs.

b) It may be declared that Plaintiffs in the capacity of owners of properties described in Paragraph No. 1 a, b, c, d and e, which is the dominant heritage are entitled to easementary right to make use of the property described in Paragraph No.2 above for the purpose of egress and ingress for beneficial enjoyment of dominant heritage described in Paragraph No.1 a, b, c, d and e of the plaint.

d) Defendants be directed by mandatory injunction to remove the debris and also to remove the truck which has been parked by the Defendants so as to make the access open to the present plaintiffs.

e) Defendant be further restrained by order of preventive permanent injunction from obstructing or

blocking the said access either by themselves or through any one claiming through the Defendants so as present the Plaintiffs to have access for approaching their property described in Paragraph 1 a, b, c,d and e above.

f) During the pendency of the suit temporary mandatory injunction in terms of prayer d) above may be granted against the Defendants.

g) During the pendency of the suit temporary preventive injunction in terms of prayer e) above may be granted against the Defendants.

h) Any other just and equitable orders in the interest of justice may kindly be passed.”

5 The learned Senior Counsel for the applicant submits that in that Suit, they preferred application below Exhibit 5 for an order of temporary injunction. That was rejected by the Trial Court. Hence, the petitioner preferred Misc. Appeal No.286 of 2015 in the court of 4th Adhoc District Judge and Assistant Sessions Judge, Pune. He submits that the appellate court by judgment dated 11.12.2015 dismissed their appeal and confirmed the order dated 26.08.2015 below Exhibit 5 in Special Civil Suit No.835 of 2014 passed by Joint Civil Judge Senior Division, Pune. He submits that after going through both the orders below Exhibit 5 and in Misc. Appeal, they learnt that it is better to file a separate Suit for their own cause of action. He further submits that during the course of argument, they learnt that some of the plaintiffs have access to their land. Therefore, it is better for them to file a separate Suit for their cause of action. Hence, the plaintiffs filed an application under Order 23 Rule 1(3) of the

Civil Procedure Code, 1908 for permission to withdraw the Suit with liberty to file a fresh for same cause of action. He submits that the learned Civil Judge, Senior Division, Pune by its impugned order dated 23.03.2016 rejected their application below Exhibit 38 under Order 23 Rule 1(3) of the Civil Procedure Code, 1908. Hence, they preferred the present Writ Petition.

6 The learned counsel for the petitioner submits that the court below erred in coming to the conclusion that plaintiff's have filed the present application after the decision on Exhibit 5 i.e. temporary injunction application and order in Appeal. He submits that though the Trial Court recorded in paragraph 10 of the impugned order that plaintiff no.2 do not have any access to his properties, rejected application. He further submits that the Trial Court failed to consider the fact that by allowing their application under Order 23 Rule 1(3) of the said Code, same was not going to affect the respondent original defendant's right in any case. Hence, the impugned judgment is required to be set aside by allowing the applicant's application under Order 23 Rule 1(3) of the Civil Procedure Code.

7 On the other hand, the learned counsel for the defendant vehemently opposed the present Civil Revision Application. He submits that when the Trial Court as well as Appellate Court rejected applicant original plaintiff's application for injunction, they filed the present application for withdrawal. This itself shows that with malafide intention, applicant decided to withdraw the present Suit and filed afresh for same cause of action which is not permissible in law. Hence, the present Civil

Revision Application is required to be dismissed with costs.

8 Heard both the sides at length.

9 It is to be noted that, in the present proceeding, Trial Court as well as Appellate Court, declined to grant any relief in favour of the applicant on injunction application. If there is any defect in the plaint about the facts, that can be cured by application. There is no question of allowing the applicant original plaintiff to file a fresh Suit once both the courts decide not to grant any interim relief in favour of applicant.

10 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.”

11. 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.

12 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.

13 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 Civil Revision Application. Hence, same is rejected.

14 No order as to costs.

(K.K. TATED, J.)