

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.9027 OF 2019

VASANT DAULAT DEORE AND OTHERS
VERSUS
THE STATE OF MAHARASHTRA AND OTHERS

Mr.V.C.Solshe h/f Mr.M.H.Patil, Advocate for the petitioners.
Mr.S.P.Tiwari, AGP for respondent No.2.

(CORAM : Ravindra V.Ghuge, J.)

DATE : 25/07/2019

PER COURT :

1. The petitioners/original plaintiffs in RCS No.306/2008 and who are original appellants in RCA No.57/2011, are aggrieved by the impugned order dated 17/04/2019 passed by the learned Principal District Judge, Dhule, by which application Exh.71, seeking leave to withdraw the 2008 suit and prefer a fresh suit, has been rejected.

2. The petitioners had preferred RCS No.306/2008. The said suit was filed for seeking a declaration that the decision in RCS No.336/2000 filed by the father of the plaintiff, is not binding upon them, injunction be granted against the defendants from challenging the revenue entries and restrain them from creating third party

interests. The said suit was dismissed by a judgment dated 25/04/2011. The Trial Court concluded that original defendant Nos. 3 to 6 have not fraudulently obtained a decree in the 2000 suit. It is therefore held now that the doctrine of *res-judicata* would apply to the 2008 suit.

3. The petitioners had approached the Appellate Court by preferring an appeal on 26/05/2011. On 17/04/2019, application Exh.71 is filed in the appeal seeking leave under Order 23 Rule 1(3) and Section 107(2) CPC to withdraw the 2008 suit and liberty be granted to prefer a new suit. The ground taken is that the plaintiffs realized that there was no sale deed in favour of their father, who has preferred the 2000 suit and since they laboured under the impression that there is a registered sale deed that they have filed the 2008 suit. They realized in 2019 that there was no registered sale deed in favour of their father.

4. Reliance is placed upon the following judgments to support the contention that a suit can be withdrawn even at the appellate stage :-

- [a] Dinabandhu Sahoo Vs. Budhi Debi (Dead) and after her
Narasingh Parida [(1991) AIR (Orissa) 215],
- [b] Shekh Hassan Walad Gulam Mohidin Tisekar Vs. Mahomed Ali

Alias Nana Walad Shekh Mahomed Tisekar and others [(1921)
AIR (Bombay) 278].

5. Having heard the strenuous submissions of the learned Advocate for the petitioners, the issue is as to whether the petitioners satisfy the requirements under Order XXIII Rule 1. It is obvious from Order XXIII Rule 1 that the Court must be satisfied that the suit has to fail on account of a formal defect or there are certain grounds for allowing the plaintiff to institute a fresh suit.

6. In the instant case, the plaintiffs have put forth a spacious plea that they have preferred the 2008 suit believing that their father had a registered sale deed and he was an exclusive owner of the suit property. As they realized in 2019 that there is no such sale deed in existence, that they desire to withdraw the suit.

7. It is obvious that the ground put forth by the petitioners is purely a pretense. Their father suffered an adverse order and the suit was dismissed. Since the defendants in the 2000 suit succeeded, these petitioners preferred the 2008 suit seeking a declaration that the earlier decree be declared as not binding upon them. This 2008 suit also suffered a dismissal. The appeal is pending from 2011. It

is far fetched to contend that the plaintiffs realized that there was no sale deed in existence after 3 rounds of litigation and after a passage of 19 years.

8. In view of the above, I do not find that the impugned order could be termed as being perverse or erroneous. This petition, being devoid of merit, is therefore, dismissed.

(Ravindra V.Ghuge, J.)