

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

CIVIL REVISION APPLICATION NO.32 OF 2018

Shaikh Shafi Bashamiya
Age major, Occu. Business,
R/o Metro Shoes, Subhash Road,
Bhande Galli, Latur, District Latur ... APPLICANT

VERSUS

1. Ganesh s/o Omprakash @ Prakash
Hamine, Age 33 years, Occu. Business
2. Anand s/o Omprakash @ Prakash
Hamine, Age 28 years, Occu. Business
3. Smt. Parwatibai w/o Omprakash @ Prakash
Hamine, Age 58 years, Occu. Household,

All R/o Subhash Road, Bhande Galli,
Latur, Tq. and District Latur. ... RESPONDENTS

.....
Shri A.G. Vasmatkar, Advocate for petitioner
Shri A.S. Kulkarni, Advocate for respondents
.....

CORAM : R.G. AVACHAT, J.

Date of reserving judgment : 29th August, 2019

Date of pronouncing judgment : 20th September, 2019

J U D G M E N T :

Rule. Rule returnable forthwith and heard finally with
the consent of learned counsel appearing for the parties.

2. The challenge in this revision application is to the order dated 10/11/2017, passed below Exh.83, in a Rent Petition (Suit) No.2/2014. By the impugned order, the application preferred by the plaintiffs, seeking permission to withdraw the suit with a liberty to file fresh suit on the same cause of action, came to be allowed.

3. The petitioner herein was original defendant in the suit. The respondents were the plaintiffs. The suit was filed for possession of a premises given on rent. Affidavit of evidence has been submitted. Meanwhile, the plaintiffs/ respondents preferred application Exh.83, seeking permission to withdraw the suit with a liberty to file fresh suit on the same cause of action.

4. The petitioner/ defendant resisted the application, contending that the application is silent to state what was the formal defect in the suit, whereby the suit will fail if no permission to withdraw the same with liberty to file the fresh suit on the same cause of action is granted.

5. The Trial Court, after hearing the petitioner and the respondents, was pleased to allow the application Exh.83.

6. Learned counsel for the petitioner would submit that, the respondents/ plaintiffs did not disclose in the application what was the formal defect in the suit which would have proved fatal if the permission to withdraw the same was not granted. According to learned counsel, the impugned order is also silent to state nature of the formal defect in the suit, which inclined the Trial Court to allow the application.

7. Learned counsel for the respondents/ plaintiffs would submit that, the Trial Court did take note of a formal defect in the suit although the same has not been mentioned in the impugned order. Learned counsel would urge that, in exercise of revisional jurisdiction, the impugned order be not set aside.

8. Order XXIII Rule 1(3) and (4) of the Code of Civil Procedure reads as under :

“3. Where the Court is satisfied, –

(a) that a suit must fail by reason of some formal defect, or

(b) 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,

it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or 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.

- (4) Where the plaintiff –
 - (a) abandons any suit or part of claim under sub-rule (1), or
 - (b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3),he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.”

9. The application was moved while recording of evidence in the suit was under way. It was a suit under Rent Act. Possession was sought of the premises given on rent. Mid-way, the respondents/ plaintiffs preferred the application (Exh.83). The application for withdrawal of the suit reads thus :

- (1) That, the plaintiffs have filed instant petition for recovery of possession against defendant and the same is pending.
- (2) That, the petition is likely to fail due to some formal defects in the pleadings. Therefore, the plaintiffs wish to withdraw the petition with liberty to file fresh petition on same cause of action, such liberty. Therefore, deserves to be granted.”

10. Reading of the aforesaid application would indicate that the respondents/ plaintiffs did not disclose what was the formal defect in the suit. The order impugned herein is also silent to state as to what was orally submitted on behalf of the respondents/ plaintiffs, disclosing the nature of formal defect.

11. Since the application for withdrawal of the suit did not disclose nature of the formal defect and the impugned order also does not state as to what was the formal defect in the suit, that inclined the learned Judge to allow the application, interference with the impugned order is called for.

12. The respondents/ plaintiffs would, however, be at liberty to amend the application (Exh.83) or move a fresh application for withdrawal of the suit in terms of provisions of Order XXIII Rule 1(3) of the Code of Civil Procedure.

13. In view of the above, the Civil Revision Application is allowed in terms of prayer clause (B). Rule made absolute in above terms.

The respondents/ plaintiffs are at liberty to either amend the application (Exh.83) or move a fresh application for withdrawal of the suit in terms of Order XXIII Rule 1(3) of the Code of Civil Procedure.

(R.G. AVACHAT)
JUDGE

fmp/-