

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 1080 OF 2018**

1. Shriram alias Ajit Shripad Kamat, 63 years of age, Businessman, s/o Shripad Kamat and his wife,
2. Indira alias Reva Shriram alias Ajit Kamat, aged 59 years, housewife, Both r/o House No. 806, Wadalwada, Madkai, Ponda, Goa. Petitioners

Versus

1. Nilima Vinay Prabhu Verlekar, d/o late Vallabh Kamat, 62 years of age, housewife and her husband,
2. Vinay Prabhu Verlekar, aged 65 years, Businessman, Both r/o Shrikrupa, Altinho, Mapusa, Goa.
3. Sushma Avdhoot alias Bharat Agshikar, d/o late Vallabh Kamat, 61 years of age, housewife and her husband,
4. Avdhoot alias Bharat Agshikar, aged 63 years, landlord, Both r/o H. No. 105, Zarina Towers, St. Inez, Panaji-Goa. Respondents

Mr. V. Tamba with Mr. Vibhav Amonkar, Advocates for the Petitioners.

Mr. Sudin Usgaonkar, Senior Advocate with Ms. Vinita Palyekar, Advocate for the Respondents.

CORAM : C.V. BHADANG, J.

DATE : 23rd January, 2019

ORAL JUDGMENT:

Rule made returnable forthwith. Ms. Palyekar, the

learned Counsel for the respondents, waives service. Heard finally by consent of parties.

2. The petitioners, who are the plaintiffs are challenging the order dated 12.07.2018, below Exhibit-D/22, by which, the learned Trial Court has dismissed the application, filed by the petitioners under Order XXIII, Rule 1 of CPC for withdrawal of the suit with liberty to file a fresh suit.

3. On hearing the learned Counsel for the parties and on perusal of the impugned order, I find that it was necessary for the Trial Court to consider the application for withdrawal (Exhibit-D/22), in the context of the requirements of Order XXIII, Rule 3 of CPC, where the Court can permit withdrawal of the suit with liberty to institute a fresh suit (i) where the Court is satisfied that a suit must fail by reason of some formal defect or (ii) where there are sufficient grounds for allowing the plaintiffs to institute a fresh suit for the subject matter of the suit or part of the claim.

4. The learned Counsel for the petitioners has placed reliance on the decision of the Supreme Court in the case of **V. Rajendran & Another Vs. Annasamy Pandian (dead) Thr.**

LRs. Karthyayani Natchiar, (2017) 5 SCC 63, while the learned Senior Counsel for the respondents has placed reliance on the decision of this Court in the case of the **Asian Assurance Co. Ltd. Vs. Madholal Sindhu & Others, AIR 1950 Bom 378**, in support of their respective submissions.

5. The learned Counsel for the petitioners urged that the application makes out a formal defect in the plaint and therefore, would require a permission to be granted, as sought for, while it is contended on behalf of the respondents that the application does not make out any formal defects, on the basis of which, the suit can be allowed to be withdrawn, with liberty as prayed.

6. In my considered view, it would be appropriate if the Trial Court reconsiders the application in the context of the requirements of Order XXIII, Rule 3 of CPC and then decides the application afresh, after hearing the parties and in accordance with law. In such circumstances, the following order is passed:

ORDER

- (i) The petition is allowed.
- (ii) The impugned order is hereby set aside.

- (iii) The learned Trial Court shall consider the application (Exhibit-D/22) afresh, after hearing the parties and in accordance with law.
- (iv) Rival contentions of the parties are left open.
- (v) In the circumstances, there shall be no order as to costs.

C. V. BHADANG, J.

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