

SAS

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.4301 OF 2018

Mainuddin Kamruddin Sayyed & Anr.	..Petitioners.
V/s.	
Babruwan Dhondiba Raut	..Respondent.

Mr.Samir Kumbhakoni for the petitioners.

Ms.Gauri Shah for Surel Shah for respondent.

CORAM : NITIN W. SAMBRE, J.

DATE : OCTOBER 7, 2019

P.C. :-

Heard learned counsel for respective parties.

2. Petitioners-plaintiff initiated suit for injunction being Regular Civil Suit No.553/2011 which is at the stage of final argument. Application Exhibit-66 was moved by the plaintiffs under Order 29 sub-rule (3) of Rule 1 of the Code of Civil Procedure ('the CPC' for short) seeking withdrawal of the suit with liberty to initiate a fresh suit.

3. Another application Exhibit-68 is also moved for the same cause. Both these applications are rejected by the impugned order dated November 9, 2017 by the Court of Civil

Judge, Junior Division, Solapur with an observation that the basis formed in support of prayer for withdrawal does not amount to formal defect as provided under order 23 Rule 1(3) of the CPC.

4. Learned counsel for the petitioners-plaintiffs while inviting the attention of this Court to the judgment in the case of *V.Rajendra and another V/s. Annasamy Pandian (dead) through legal representative Karthyayni Natchair*¹, would urge that the incorrect description of the suit property being formal defect and that being so, the suit can be permitted to be withdrawn with liberty as prayed.

5. While countering the aforesaid submission, learned counsel for the respondent-defendant, would urge that considering the stage of the suit and having regard to the judgments of this Court, which are relied upon by the Court below while rejecting the prayer, no interference is warranted. She submits that the petition be dismissed.

6. Considered cause for invoking the provisions of Order 23 Rule 1(3) of the CPC. It is the claim of the petitioners-plaintiffs that because of formal defect which is in the nature of incorrect description of the suit property, the suit is likely to fail.

7. The Apex Court in the judgment of *V.Rajendran and another ((cited supra)* in para 12 and 13 has observed thus:-

¹ (2017) 5 Supreme Court Cases 63

“ 12. In the present case, the appellants have filed the suit describing the suit property as Survey No. 192/9 but the respondents are said to have transferred the patta for the suit property settling as Survey No. 192/14. The defect in the survey number of the suit property goes to the very core of the subject matter of the suit and the entire proceedings would be fruitless if the decree holder is not able to get the decree executed successfully and thus, the said defect will constitute to be a “formal defect” within the meaning of Order 23 Rule 1(3)(a) CPC. That apart, the respondents are said to have executed an Inam Settlement Deed on 21.09.2012, in favour of their son Aranmanai Pandian, mentioning the suit property as Survey No. 192/14. We are convinced that the case of the appellants would fall under clause (a) of Rule 1(3) CPC.

13. In the facts and circumstance of the case, the trial court considered the allegation set out in the application as a ground for withdrawal. The view taken by the trial court that the suit suffered from a formal defect to allow the appellants to withdraw the suit with permission to institute a fresh suit, is correct. The High Court, in our view, was not right in interfering with the discretion exercised by the trial court, permitting the appellants to withdraw the suit with liberty to file a fresh suit. Based on the order passed by the trial court, the appellants have already filed suit before District Munsif and the same is numbered as O.S No. 11/2015. The High Court while passing the order on 09.03.2015 does not seem to have kept in view the said suit filed by the appellants. In

the facts and circumstance of the case, the impugned order passed by the High Court cannot be sustained.”

8. Since incorrect description of the suit property amounts to a formal defect, as could be noticed from the aforesaid observations of the Apex Court, a prayer for grant of withdrawal of the suit with liberty to file afresh based on same cause of action, ought to have been allowed by the learned trial Court.

9. In the aforesaid backdrop, the order impugned dated November 9, 2017 below Exhibits-66 and 68 in Regular Civil Suit No.553/2011 is hereby quashed and set aside and applications Exhibits-66 and 68 stand allowed subject to deposit of costs of Rs.15,000/- by February 29, 2020, in the Court of Civil Judge, J.D. Solapur, to which the respondent-defendant will be entitled to withdraw. The deposit of costs shall be condition precedent for the order of withdrawal of the suit.

10. The petition stands allowed in above terms.

(NITIN W. SAMBRE, J.)