

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

WRIT PETITION NO. 7501 OF 2019

Mr.Arun Jaywant Pawale
Deceased through Legal Heirs
& Anr.

.. Petitioners

Vs.

Mr.Raju Krishnarao Bhosekar
& Ors.

.. Respondents

Mr.Nikhil P. Mallelwar I/b Sachin Ramrao Pawar for petitioners.

None for respondents.

CORAM : N.J. JAMADAR, J.

DATE : 22ND JULY 2019

P.C.

1 Heard the learned counsel for the petitioners.

2 Challenge in this petition is to an order dated 20th March 2019 on an application preferred by the petitioners-plaintiffs under Order XXIII Rule 1(3) of the Code of Civil Procedure, 1908 ('CPC') for withdrawal of the suit with permission to institute a fresh suit in respect of the same cause of action, passed by the learned 7th Additional Judge, Court of Small Causes and Joint Civil Judge, Senior Division, Pune, whereby the said application came to be rejected.

3 The petitioner has preferred the application for withdrawal of the suit with permission to institute a fresh suit on same cause of action on two

grounds. One, there was an inadvertent omission to include CTS No.240 B as the subject matter of the suit. And, two, the legal heirs of deceased Vithabai Jaywant Pawale were the necessary parties to the suit and they were not impleaded as party defendants to the said suit. The petitioner asserted that the aforesaid two grounds constituted a 'formal defect' entailing the failure of the suit and, therefore, the petitioners sought the permission to withdraw the suit with liberty to institute a fresh suit in respect of the subject matter of the suit.

4 The learned Civil Judge was persuaded to reject the application on the premise that the plaintiffs were deliberately delaying the disposal of the suit by preferring untenable application. For arriving at the said conclusion, the learned Civil Judge took into account the fact that CTS No. 240-B, the omission to include which as a suit property was stated to be a formal defect in the suit, was, in fact, included as the subject matter of the suit but the petitioners-plaintiffs got the said property deleted from the suit property by way of an amendment in terms of the order below Exh.97. Secondly, the application to implead the legal heirs of deceased Vithabai Jaywant Pawale also came to be rejected by the Civil Court by an order below Exh.73. In these circumstances, none of the grounds pressed into service by the petitioners-plaintiffs found favour with the learned Civil

Judge so as to put the case within the four corners of the Order XXIII Rule 1(3) of CPC.

5 The learned counsel for the petitioners was at pains to point out any error, much less perversity, in the order passed by the learned Civil Judge. Both the grounds, i.e., non-inclusion of CTS 240-B and non-impleadment of legal heirs of deceased Vithabai Jaywant Pawale, in the circumstances of the case, cannot be said to either constitute a formal defect or a sufficient ground for allowing the petitioners to withdraw the suit with permission to file a fresh suit, as, in the former case, the petitioners have themselves deleted the property bearing CTS No. 240-B from the subject matter of the suit and, in the later case, the Court had already recorded a finding that the proposed parties were not necessary parties to the suit. In this backdrop, the learned Civil Judge was wholly justified in rejecting the application of the petitioners by imposing costs.

6 No interference is warranted in the impugned order in exercise of the extra-ordinary jurisdiction.

7 The petition stands dismissed.

(N.J. JAMADAR, J.)