

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.11357/2017

Gaushala Manmad Trust, Dist. Nasik ... Petitioner

V/s.

Dhondiram Gangaram Lahire & Ors. ... Respondents

Mr. Chetan Subhash Damre for the Petitioner
Mr. Ganesh S. Bhat for Respondent Nos.1 to 10.

CORAM: K.K. TATED, J.

DATED : FEBRUARY 5, 2019

P.C. :

1 Heard. By this petition under Article 227 of the Constitution of India the Petitioner challenges the order dated 13.04.2017 passed by the Civil Judge, Junior Division Manmad below Exhibit- 52 in Regular Civil Suit No. 31/2013 and the order dated 13.07.2017 below Exhibit- 55 for withdrawal of the suit under Order 23 Rule 1 and 3 of the Code of Civil Procedure, 1908 with liberty to file afresh for the same cause of action.

2 The learned counsel for the Petitioner submits that the Petitioner - Plaintiff had filed Regular Civil Suit No. 31/2013 in the court of Civil Judge, Junior Division, Manmad for injunction restraining the Respondent from disturbing their possession in respect of the agricultural land bearing Gut N.94 admeasuring 7 H. and 41 Are situate at Satane, Tq. Nandgaon, Dist. Nasik. He submits that in that suit, they made an Application below

Exhibit- 5 for injunction which was rejected. Against that order, they preferred Misc. Appeal which was rejected. He submits that in Regular Civil Suit No. 31/2013 the Respondent - Defendant filed their written statement and counter claim. He submits that on the basis of the pleading of the Respondent - Defendant the Plaintiff realized that the suit filed by them simplicitor for injunction is not maintainable unless prayer for possession is made. Hence, the Petitioner made an Application under Order 6 Rule 17 of the Code of Civil Procedure, 1908 to carry out amendment in the plaint to claim possession of the suit property. The said Application was also dismissed by the court below.

3 The learned counsel for the Petitioner submits that considering the defects in the suit, the Petitioner - Plaintiff decided to withdraw the said suit with liberty to file afresh for the same cause of action. Hence, they made Application below Exhibit- 52 on 16.03.2017 which was rejected by the Trial Court by on 13.04.2017 recording that the Petitioner has failed to make out any case for withdrawal of the suit with liberty to file afresh for the same cause of action. He submits that even the Trial Court has recorded in the said order that the Plaintiff has failed to give sufficient cause and/or reason for withdrawal of the suit.

4 The learned counsel for the Petitioner submits that considering the order passed by the Trial Court on the Application below Exhibit- 52, the Petitioner has made fresh Application below Exhibit- 63 under order 23 Rule 1 & 3 of the Code of Civil Procedure, 1908 for withdrawal of the suit on

02.05.2017. He submits that, in that Application, they made out a case for withdrawal of the suit. He submits that instead of deciding the Application on merits, the Trial Court dismissed the same only on the ground that earlier Application Exhibit- 52 was dismissed. The order passed by the Trial Court on subsequent Application below Exhibit- 55 reads thus:

***“Order
13.7.17***

Read Application & say. Heard both side. It to noted that I have already passed order on Exh.52 where I rejected the prayer to withdraw the said suit and permitted to file fresh suit on the same cause of action. Hence, I do not find that again I have jurisdiction to entertain such type of Application. Hence, said Application is rejected. Both parties are directed to take step to proceed the matter as early as possible.”

5 The learned counsel for the Petitioner submits that as on today, the Petitioner is owner of the suit property. He submits that they filed the suit for injunction on the basis of ownership. He submits that during pendency of the said proceedings, on the basis of the pleadings made by the Respondent - Defendant they decided to withdraw the suit with liberty to file afresh for the same cause of action with prayer for possession. He submits that the Trial Court has failed to appreciate that being owner, the Petitioner has right to file the suit for possession. The learned counsel for the Petitioner submits that the Trial Court ought to have allowed their Application for permission to withdraw the suit with liberty to file afresh for the same cause of action. He

submits that being owner of the suit property, they are entitled to remove the encroachment, if any. He submits that the formal defect can be cured at any time. He relies on the judgment of the Punjab and Haryana High Court in the matter of ***Dalbir Kaur Vs. Jagir Kaur and Anr. 2002 AIHC 2954***. Paragraph 16 thereof reads thus:

“16. Then the question for consideration is whether circumstances exist justifying the grant of permission to the Plaintiff – Respondents to withdraw the suit and allow them to file a fresh suit on the same cause of action within the meaning of Sub rule (3) of Rule 1 of Order XXIII. In this regard, the reasoning followed in respect of point (b) deserves to be approved because a formal defect has been pointed out by the Civil Judge in claiming the relief which is clearly discernible from the plaint. The failure of the Plaintiff – Respondents to claim proper relief in so far as it has omitted to plead that the counter claim made by the Defendant - Petitioner in the earlier suit No.65/1997 has been dismissed by the judgment of the Civil Judge dated 20.04.1998 in which the Plaintiff - Respondent has set up the Will dated 10.04.1986. This omission constitutes a formal defect within the meaning of sub-rule(3) of Rule 1 of Order XXIII. For this proposition, reliance can be placed on a judgment of this Court in the case of Chhindo Vs. Mela Singh, I.L.R. 1967 Punj and Har 6 : Joginder Singh's case (1978 Pun LJ 9) (supra); Bhag Mal's case (AIR 1961 Punjab 421) (supra) and Gurcharan Singh Vs. Smt. Nihal Kaur etc. 1975 Gur 719. Therefore the reasoning adopted in respect of ground (b) merits acceptance.”

6 On the basis of this submission and the authority in the matter of Dalvir (supra), the learned counsel for the Petitioner submits that this Hon'ble Court be pleased to set aside the impugned order dated 13.04.2017 passed below Exhibit- 52 and order dated 13.07.2017 passed below Exhibit- 55 and allow the

Petitioner's Application under Order 23 Rule 1 and 3 of the Code of Civil Procedure, 1908. He submits that if the Writ Petition is not allowed, irreparable loss will be caused to the Petitioner.

7 On the other hand, the learned counsel for the Respondent - Defendant vehemently opposed the Writ Petition. He submits that admittedly, the Petitioners, at their own, filed the suit only for the purpose of injunction in spite of knowing that the Respondents - Defendants were in possession of the suit premises. He submits that the first Application made by the Petitioner for withdrawal below Exhibit- 52 was without giving any reason as required under Order 23 Rule 1 and 3 of the Code of Civil Procedure, 1908 and hence, it was rejected by the Trial Court by order dated 13.04.2017. That order was not challenged by the Petitioner before the higher court. Again the Petitioner made similar Application below Exhibit- 55 for the same cause of action. Hence, the Trial Court rejected their Application below Exhibit- 55 by order dated 13.07.2017. He submits that the Petitioner has failed to make out any formal defect in filing the suit as required under Order 23 Rule 1 and 3 of the Code of Civil Procedure, 1908 for permission to withdraw the suit with liberty to file afresh. In support of this contention, he relies on the judgment in the matter of **V. Rajendran and Anr. Vs. Annasamy Pandian (D) Through Lrs. Karthyayani Natchiar 2017 DGLS (SC) 114**. He relies on para 10 of the said authority, which reads thus:

“10. In K.S. Bhoopathy and Ors. v. Kokila and Ors. MANU/SC/0395/2000MANU/SC/0395/2000 : (2000) 5

SCC 458, it has been held that it is the duty of the Court to be satisfied about the existence of "formal defect" or "sufficient grounds" before granting permission to withdraw the suit with liberty to file a fresh suit under the same cause of action. Though, liberty may lie with the Plaintiff in a suit to withdraw the suit at any time after the institution of suit on establishing the "formal defect" or "sufficient grounds", such right cannot be considered to be so absolute as to permit or encourage abuse of process of Court. The fact that the Plaintiff is entitled to abandon or withdraw the suit or part of the claim by itself, is no licence to the Plaintiff to claim or to do so to the detriment of legitimate right of the Defendant. When an application is filed under Order XXIII Rule 1(3) Code of Civil Procedure, the Court must be satisfied about the "formal defect" or "sufficient grounds". "Formal defect" is a defect of form prescribed by the Rules of procedure such as, want of notice Under Section 80 Code of Civil Procedure, improper valuation of the suit, insufficient court fee, confusion regarding identification of the suit property, mis-joinder of parties, failure to disclose a cause of action etc. "Formal defect" must be given a liberal meaning which connotes various kinds of defects not affecting the merits of the plea raised by either of the parties.

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8 The learned counsel for the Respondent submits that as the Petitioner - Plaintiff has failed to make out any formal defect in the suit, there is no question of allowing the Writ Petition. He submits that before the Trial Court, the Plaintiff's evidence is closed. Now the matter is pending only for the Defendants' evidence. Therefore, at this stage, there is no question of allowing the Plaintiff to withdraw the suit with liberty to file afresh for the same cause of action without showing any formal defect. There is no substance in the Writ Petition. Same be dismissed with costs.

9 Heard both sides at length. Admittedly, in the present proceedings, the Petitioner - Plaintiff has filed the suit simplicitor for injunction. On the basis of the written statement-cum-counter claim filed by the Defendant, the Petitioner made an Application below Exhibit- 52 for withdrawal of the suit with liberty to file afresh for the same cause of action. Bare reading of the Application below Exhibit- 52 shows that the Plaintiff has failed to make out any formal defect in their suit. Therefore, the Trial Court rejected that Application. That order was not challenged by the Petitioner before the Higher Court. Again for the same cause of action, the Petitioner has made another Application below Exhibit- 55.

10 It is to be noted that for withdrawal of the suit with liberty to file afresh as required under Order 23 Rule 1 and 3 of the Code of Civil Procedure, 1908, the Plaintiff has to make out a formal defect in the pleadings. In the present proceedings, at the time of making the Application below Exhibit- 52, the Plaintiff has failed to make out any formal defect. Hence, the Trial Court has rightly rejected their Application. Even the apex court in the matter of V. Rajendran (Supra) held that unless formal defect is pointed out, there is no question of allowing the Plaintiff to withdraw the suit with liberty to file afresh for the same cause of action as per Order 23 Rule 1 and 3 of the Code of Civil Procedure, 1908.

11 Considering these facts and the law declared by the apex court, I do not find any substance in the Writ Petition.

12 Hence, the Writ Petition stands rejected.

13 No order as to costs.

(K. K. TATED, J.)