

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.10276 OF 2018

Shri Kashinath Eknath Khirkade

Deceased Through LR's & Ors. .. Petitioner

V/s.

Ramdas Pandurang Dhage and Ors. .. Respondents

Mr.Dilip Bodake for the petitioner

Mr.Girish Agrawal for the respondent nos.1 to 3

CORAM: K.K. TATED, J

DATED : FEBRUARY 21, 2019

P.C. :

1 Heard the learned counsel for the parties.

2 By consent of both the parties, the matter is taken up for final hearing at the stage of admission.

3 By this petition, under Article 227 of the Constitution of India, the petitioner original plaintiff is challenging the order dated 24.07.2018 passed by Joint Civil Judge, Junior Division, Dindori, District Nashik below Exhibit 142 in Regular Civil Suit No.67 of 2007 rejecting plaintiff's application under Order XXIII Rule 1 of the Code of

Civil Procedure, 1908 for withdrawal of the Suit with permission to file a fresh Suit for the same cause of action.

4 For the sake of convenience, the nomenclature of the parties as is stated in Regular Civil Suit No.67 of 2007 is referred to hereinafter as petitioner as plaintiff and respondent as defendant.

5 Plaintiff filed Regular Civil Suit No.67 of 2007 in the court of Joint Civil Judge, Junior Division, Dindori, District Nashik on 20.07.2007 for an order of injunction restraining defendant from disturbing his right of way by putting poles etc. In that Suit, the plaintiff preferred application below Exhibit 5 under Order XXXIX Rule 1 of the Code of Civil Procedure, 1908 for temporary injunction. That application was allowed by the Trial Court on 02.01.2008 directing both the parties to maintain the status quo till the final disposal of the Suit. Thereafter, the plaintiff filed application for appointment of Court Commissioner to measure the suit property. That application below Exhibit 20 was allowed by the Trial Court by order dated 02.01.2008. The operative part of the said order reads thus:

“ORDER

1. *The application is allowed.*
2. *The TILOR Dindori is appointed as court commissioner for measuring Gat No.115. He is to measure the land, taking into account the record of old survey No.81/1, 89, 95 and 82/2 and then fixed the boundary marks and prepared*

the separate map and submitted the report in this court within 2 months.

3. *The Plaintiffs to deposit the necessary prescribe charges in the office of T.I.L.R. Dindori.*

4. *The Plaintiffs to deposit the necessary prescribe charges in the office of the T.I.L.R. Dindori.*

5. *The parties to co-operate the commissioner for measuring lands in accordance with the above directions.”*

6 The plaintiff filed application below Exhibit 127 under Order VI Rule 17 of the Code of Civil Procedure, 1908 on 04.01.2017 for carrying out amendment in the plaint for claiming peaceful possession of the property. The plaintiff averred in his application that during the pendency of the Suit, the defendant tried to encroach on the suit property by putting cement poles, inspite of the status quo order passed by the Trial Court. That application was allowed by the court below by order dated 11.10.2017. Order below Exhibit 127 dated 11.10.2017 was challenged by the defendant by preferring the Writ Petition No.13967 of 2017 before this court. This court after hearing both the sides by order dated 20.03.2018 set aside the order dated 11.10.2017 below Exhibit 127 by which the Trial Court permitted the plaintiff to carry out the amendment in the plaint. Paragraph 8 and 9 of the High Court's order dated 20.03.2018 reads thus:

“8. It is true that normally the approach of the court is liberal in allowing the amendment in order to avoid multiplicity of proceedings, but then the liberal approach or the indulgence shown by the court should not be stretched to such

an extent which may result in abuse of the process of law. The original suit for injunction is now being converted into the suit for recovery of the possession. It is, therefore, not only changing the nature of the suit, but also it is being sought at a very belated stage, when the trial is almost at the stage of completion, because evidence of Respondent/Plaintiff and his witness is over.

9. *In this respect, learned Counsel for the Petitioner has rightly relied upon the Judgment of Punjab & Haryana High Court in the case of Lakmi & Ors. V/s Karam Singh, reported in 2009(4) CIVIL COURT CASES 768 (P&H) and in the case of Prem Chand V/s Chetan Dass, reported in 2006(2) CIVIL COURT CASES 41 (P&H), wherein the application for amendment seeking to convert the suit for injunction into a suit for possession came to be rejected on the ground that amendment will completely change the nature of the suit from mandatory injunction to that of the possession and amendment will cause great prejudice to the rights of the defendants.”*

7 Thereafter, the plaintiff filed application below Exhibit 142 under Order 23 Rule 1 of the Code of Civil Procedure, 1908 dated 05.04.2018 permitting the plaintiff to withdraw the Suit with liberty to file a fresh Suit for the same cause of action. In paragraph 1 of the said application, plaintiff averred that, plaintiff made application below Exhibit 127 for carrying out amendment in plaint, that application was allowed by the Trial Court, but the same was set aside by the High Court in Writ Petition No.13967 of 2017. Hence, it is necessary for the plaintiff to withdraw the present Suit with liberty to file a fresh Suit for the same cause of action. That application was opposed by the defendant by filing their reply dated 07.06.2018. After hearing both the sides, the Trial Court by impugned order dated 24.07.2018 rejected the plaintiff's application under Order XXIII Rule 1 of the Code of Civil

Procedure, 1908 for withdrawal of the Suit with permission to file a fresh Suit for the same cause of action.

8 The Trial Court held that according to Order XXIII Rule 1 of the Code of Civil Procedure, 1908, the plaintiff can withdraw the Suit with permission to file a fresh Suit when plaintiff showed that there is a formal defect in the Suit or to show sufficient ground for filing afresh Suit. The contents of the application filed by the plaintiff below Exhibit 142 shows that, plaintiff wants to rectify the defects, as per their earlier amendment application and to file a fresh Suit on the same cause of action.

9 The learned counsel for the plaintiff submits that the Trial Court erred in coming to the conclusion that, the contents of the application filed by the plaintiff, itself goes to show clearly that the plaintiff have to rectify the defect in their earlier amendment application and to file a fresh Suit on the same footing. He submits that during the pendency of the said Suit, the defendant tried to encroach the Suit Property by putting cement poles. Hence, it was necessary for the plaintiff to withdraw the Suit which was filed simplicitor for injunction with liberty to file a fresh Suit for possession also. He submits in view of subsequent development, that even the Court commissioner's report clearly shows that the defendant encroached the plaintiff's suit property and therefore, it is necessary for the plaintiff to withdraw the present Suit with liberty to file afresh for same cause of action including claiming possession of encroached portion. He submits that Under

Order XXIII Rule 1 of the Code of Civil Procedure, 1908, same is permitted. He submits that the Trial Court failed to consider the fact that, the suit as it is filed by the plaintiff, is going to be failed for the reason of formal defect i.e. for want of prayer for possession and inspite of that Trial Court rejected their application under Order XXIII Rule 1 of the Code of Civil Procedure. He further submits that the Trial Court failed to consider the fact that plaintiff has shown sufficient ground for allowing the plaintiff to institute a fresh Suit for the same cause of action and in addition for possession. On the basis of these submissions, the learned counsel for the plaintiff submits that impugned order dated 24.07.2018 passed by the Trial Court below Exhibit 142 in Regular Civil Suit No.67 of 2007 is required to be set aside and application filed by the plaintiff below Exhibit 142 under Order XXIII Rule 1 of the Code of Civil Procedure, 1908 be allowed and plaintiff may be permitted to withdraw the Suit with liberty to file a fresh for same cause of action including for possession. He submits that if present Writ Petition is not allowed, irreparable loss will be caused to them.

10 On the other hand, the learned counsel for the defendant vehemently opposed the present Writ Petition. He submits that the Trial Court rightly held in paragraph 4 of the impugned order that the plaintiff failed to make out any case as required under Order XXIII Rule 1 of the Code of Civil Procedure, 1908 for withdrawal of the Suit with liberty to file a fresh for the same cause of action. He submits that knowingly that the defendant is in possession of portion of the suit property, plaintiff filed a suit simplicitor for injunction. Not only that,

he also filed application below Exhibit 5 for an order of injunction and same was allowed by the Trial Court. Thereafter, plaintiff filed application for appointment of Court Commissioner, same was allowed. On the basis of Court Commissioner's report, plaintiff filed application for amendment of the plaint under Order VI Rule 17 of the Code of Civil Procedure, 1908. By way of amendment, plaintiff wanted to convert the suit for injunction into suit for possession. Hence, defendant preferred Writ Petition No.13967 of 2017 before this court. This court after hearing both the sides and relying on high court authorities, held that plaintiff cannot be permitted to convert the suit for injunction into suit for possession. High Court set aside the order passed by the Trial Court permitting the plaintiff to carry out amendment in the Suit. Thereafter, plaintiff with malafide intention filed a present application below Exhibit 142 under Order XXIII Rule 1 of the Code of Civil Procedure, 1908 for withdrawal of the suit with liberty to file a fresh for the same cause of action including for possession. He submits that bare reading of the application below Exhibit 142 shows that plaintiff wanted to withdraw the present Suit just because their application for amendment under Order VI Rule 17 of the Code of Civil Procedure, 1908 was set aside by the High Court in Writ Petition No.13967 of 2017.

11 The learned counsel for the defendant submits that bare reading of the Order XXIII Rule1 of the Code of Civil Procedure, 1908 shows that Court can permit to withdraw the Suit with liberty to file afresh for same cause of action, if court satisfies that suit is going to be failed by reason of formal defect or plaintiff shows sufficient ground for

withdrawal. Order XXIII Rule 1 of the Code of Civil Procedure, 1908 reads thus:

“1. Withdrawal and Adjustment of Suits-

1) At any time after the institution of a suit the plaintiff may as against as against all or any of the defendants abandon his suit or abandon a part of his claim.

Provided that where the plaintiff is a minor or other person to whom the provisions contained in rules to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the court.

(2) An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person.

(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.

(5) Nothing in this rule shall be deemed to authorise the court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs.”

12 The learned counsel for the defendant submits that bare reading of the application filed by the plaintiff below Exhibit 142 shows that plaintiff wanted to withdraw the suit just because their application for amendment of the plaint was set aside by the High Court in Writ Petition. Therefore, Trial Court rightly rejected plaintiff's application under Order XXIII Rule 1 of the Code of Civil Procedure, 1908. In support of this contention, the learned counsel for the defendant relies on the judgement in the matter of **Kashinath s/o. Ninu Badhe vs. Vishnu s/o. Narayan Kolte.**¹ Paragraph 8 reads thus:

“8. In the present case the non-applicant in the suit filed by him has pleaded that the work of construction undertaken by the applicant resulted in affecting the easement by prescription and that such construction was illegal. In the written statement the applicant came up with the defence that certain parties who were necessary parties to the suit were not impleaded. The map relied upon by the non-applicant was not according to scale. It is to be noted that the written statement was filed on 09/03/2010 after which the trial Court framed issues on 08/06/2010 and thereafter the non-applicant filed his affidavit-in-lieu of evidence on 22/11/2012. It is at this stage that the permission to withdraw the suit was sought by

1 2017(3) All MR 236

the non-applicant. According to him the suit was liable to be dismissed on the ground that the map placed on record was not according scale, there was no prayer made with regard to seeking declaration that no permission had been obtained from the Gram Panchayat while making the construction and further declaration that the applicant was not the owner of the disputed portion was not prayed for. The trial Court while considering said prayer found that the reasons furnished by the non-applicant for withdrawing the suit were sufficient and thus allowed the application. In so far as production of valid map as per scale is concerned, the same can always be brought on record by obtaining permission of the trial Court. However in so far as absence of seeking reliefs with regard to declaration as to the absence of permission from the Gram Panchayat and ownership of the disputed road are concerned, the same cannot be treated to be formal defects. Absence of these prayers definitely affects the merits of the case and as held in Tarachand Bapuchand (supra) even if the provisions of Order XXIII Rule 1(2)(b) of the Code are construed liberally, the defect in pleadings or absence of parties cannot be regarded as formal defects. These would be defects of substance and not defects of form. As observed in Rajaram Jairam Raut (supra) these defects can be attempted to be rectified by amending the plaint.”

13 The learned counsel for the defendant submits, that the defendant filed their written statement on 12.09.2007 and specifically pleaded that defendant is in possession of the portion of the suit land. In support of this contention, he relies on paragraph 10 of the said written statement. He submits that though these facts were disclosed by the defendant in their written statement way back in 2007, plaintiff failed and neglected to take proper steps for more than 12 years. Therefore, Trial Court rightly rejected plaintiff's application under Order XXIII Rule 1 of the Code of Civil Procedure, 1908. In support of this contention, he relies on the judgment in the matter of **Shankar s/o**

Vkenkoba Shinde (died) through his Lr's vs. Gorakh s/o Madhavrao Shinde and Ors.² Paragraph 7 reads thus:

“7. I have given due consideration to the rival submissions of the learned Counsel appearing for the respective parties and upon perusal of the application below Exh. 48, it is crystal clear that, the applicant was aware about the sale-deed dated 29-05-1974, even on the date of filing of Regular Civil Suit No. 503 of 1995. There is nothing in the application which would indicate that the Plaintiffs were not aware of such sale-deed, when Regular civil Suit No. 503 of 1995 was instituted. It is also not in dispute that Regular Civil Suit No. 95 of 1992 was filed by the applicants herein in respect of Survey No. 52-A for ownership and perpetual injunction. However, according to the applicants in said plaint area of survey No. 52-A was shown less and therefore, the said suit came to be withdrawn. Both the suits i.e. R.C.S. No. 95 of 1992 and R.C.S. No. 503 of 1995 are in respect of land survey No. 52-A with prayer for declaration of ownership and perpetual injunction.

By way of filing application at Exhibit 48, the applicants herein wanted to withdraw Regular civil Suit No. 503 of 1995 with liberty to file a fresh suit. From perusal of the contents of application at Exhibit 48, it is abundantly clear that by filing fresh suit in place of earlier Suit No. 503 of 1995, the applicants herein want to seek a relief of declaration that, sale-deed executed in favour of Defendants on 29-05-1974 is not binding on the Plaintiffs i.e. applicants herein. The defect which is shown in the application itself is of a substantial nature and the same cannot be termed as formal defect. Therefore, on careful reading of the impugned order, in my opinion, the Trial Court has taken a correct and possible view, which needs no interference. The Joint Civil Judge, Junior Division, Nilanga who decided the application, has a jurisdiction to entertain the said application. The findings recorded in the impugned order are not perverse in any manner. In that view of the matter, this civil revision application is devoid of any merits same stands dismissed”

14 The learned counsel for the defendant further submits that bare reading of the application filed by the plaintiff below Exhibit 142 under Order XXIII Rule 1 of the Code of Civil Procedure, 1908 shows that plaintiff failed to disclose the formal defects in that application. He submits that if formal defect is not specified nor explained, there is no question of allowing such type of application. In support of this application, he relies on the judgment in the matter of **Somalraju Chinnammi vs. Samanthu Sivaju Ganesh & Anr.**³ Paragraph 9 reads thus:

“9. It is also relevant to note that under Order 23, Rule 1(3) of C.P.C. for granting permission to institute a fresh suit on the same cause of action the satisfaction of the Court that the suit must fail by reason of some formal defect is mandatory. Hence, it is essential for the plaintiff while seeking leave of the Court under Order 23, Rule 1(3) of C.P.C. to establish that the formal defects in the suit are likely to lead to dismissal of his suit. Thereupon if the Court is satisfied that the suit must fail by reason of such formal defects then only the plaintiff can be permitted to withdraw his suit with liberty to file a subsequent suit in respect of the same subject-matter.”

15 The learned counsel for the defendant further submits that plaintiff filed application below Exhibit 142 in Regular Civil Suit No.67 of 2007 on 05.04.2018 i.e. when the issues were framed, evidence was over and matter was kept for arguments. He submits that at this stage, there is no question of allowing such type of application. In support of these contention, he relies on the judgment of Orissa High Court in the

3 2009(1) All MR (Journal) 1

matter of **Sayed Mansoor Saheb Peer Bije and Ors. vs. The State of Orissa and Ors.**⁴ Paragraph 4 reads thus:

“4. On perusal of the decisions cited above, it is clear that whether the suit should be permitted for withdrawal with liberty to file a fresh suit or not depends on the facts of each case. No doubt, the said prayer can be allowed at any stage of the proceeding. In the present case, the suit was filed in the year 1986 and permission for withdrawal of the suit was made 16 years after filing of the suit. Apart from the above, such petition was also filed at the stage of argument. If those facts are taken into consideration, in my view, prayer for withdrawal of the suit with liberty to file a fresh suit should not be allowed. The defendants-opposite parties having participated for 16 years in the suit, cannot be permitted again to participate in a proceeding by way of a fresh suit that may be filed by the petitioners with permission of the Court. This will cause serious prejudice to the defendants-opposite parties. Apart from the above, the grounds taken by learned counsel for the petitioners that though notice under Section 80 C.P.C. had been served, the same was not found to be on record, does not appear to be acceptable. When the witnesses on behalf of the plaintiffs were examined, notice under Section 80 was required to be proved and at that point of time the learned counsel appearing for the petitioners in the trial Court must have noticed absence of such notice in the record. At that point of time, an application for

4 AIR 2007 Orissa 31

withdrawal of the suit should have been filed instead of waiting till the closure of evidence from both sides. I am, therefore, of the view that the trial Court was justified in rejecting the petition. However, the revisional Court for no reason permitted withdrawal of the suit without giving liberty to file a fresh suit is putting the plaintiffs-petitioners to serious prejudice. I am, therefore of the view that the revisional order is not sustainable I, accordingly set aside the order passed by the learned Additional District Judge, Bhadrak in C.R.P. No. 3 of 2003 and confirm the order dated 20.1.2003 passed by the learned Civil Judge, Bhadrak in the aforesaid suit.”

16 On the basis of these submissions and the authorities, the learned counsel for the defendant submits that there is no substance in the present Writ Petition and same is required to be dismissed with costs.

17 I have heard both the sides at length. It is to be noted that bare reading of the application below Exhibit 142 filed by the plaintiff shows that, just because their application for amendment under Order VI Rule 17 of the Code of Civil Procedure, 1908 was set aside by the High Court in Writ Petition No.13967 of 2017, plaintiff filed application under Order XXIII Rule 1 of the Code of Civil Procedure, 1908 for withdrawal of the Suit with liberty to file a fresh for same cause of action and for possession. It is to be noted that plaintiff initially filed a suit for simplicitor injunction on 20.07.2007. In that defendant filed their written statement on 12.09.2007. Paragraph 10 of the written

statement shows that defendant specifically averred, in possession of portion of suit property. In spite of that plaintiff failed to take action immediately.

18 Plaintiff filed application below Exhibit 142 in the year 2018 i.e. after more than 10 years. Not only that there is no explanation as required under Order XXIII Rule 1 of the Code of Civil Procedure, 1908. In spite of that plaintiff failed to take action immediately. Plaintiff filed application below Exhibit 142 in the year 2018 i.e. after more than 10 years. Not only that there is no explanation as required under Order XXIII Rule 1 of the Code of Civil Procedure, 1908 in their application for withdrawal of the suit with liberty to file a fresh for same cause of action.

19 These facts are considered by the Trial Court particularly paragraph 4 of the impugned order. Not only that, considering the authorities cited by the learned counsel for the defendant, I am of the opinion that plaintiff failed to make out any case to interfere with the well reasoned order passed by the Trial Court at the time of rejecting their application below Exhibit 142.

20 Hence, Writ Petition stands rejected. No order as to costs.

(K.K. TATED, J.)