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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.8276 OF 2021

Kishanrao Pralhadrao Wattamwar and Others PETITIONERS

VERSUS

Gyanoba Pralhadrao Wattamwar and Others RESPONDENTS

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Mr. Swapnil S. Rathi, Advocate for the petitioners

Mr. U. B. Bilolikar, Advocate for respondent No.1

Mr. M. M. Patil (Beedkar), Advocate for respondents No. 2 to 4

Mr. A. G. Vasmatkar, Advocate for respondent No.5

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[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 15th JUNE, 2022

ORDER :

1. The petitioners are aggrieved by the order passed by the learned Third Joint Civil Judge, Senior Division, Nanded below Exhibit-44 in Regular Civil Suit No.135 of 2010, thereby allowing the application filed by respondent No.1 / plaintiff under Order XXIII, Rule 1 of the Civil Procedure Code and permitting the plaintiff / respondent to withdraw the suit with liberty to institute a fresh suit.
2. The respondent – plaintiff filed Regular Civil Suit No. 135 of 2010 seeking rendition of accounts and partition of the

partnership firm's business run by the joint family. The defendants appeared in the suit and resisted the same by filing written statement. The defendants contended that the partition was reduced in writing, but the plaintiff has not signed the partition deed. According to the plaintiff, there is no partition as alleged by the defendants. The relinquishment deed, which is referred to by the plaintiff is also denied by the defendants. The plaintiff, therefore, filed present application, which is allowed. Hence, the present writ petition.

3. Heard learned advocate for the petitioners and learned advocates for the respondents.

4. Learned advocate for the petitioner – defendants submits that the Trial Court has erred in allowing the application filed by the plaintiff, ignoring the fact that the ingredients of Order 23 Rule 1 (3) of the Civil Procedure Code are not complied. In view of Order II, Rule 2 of the Code of Civil Procedure, the plaintiff is not entitled to file fresh suit. He, therefore, submits that the impugned order is not sustainable and the same may be quashed and set aside.

5. On the other hand, learned advocate for respondent – plaintiff supports the impugned order.

6. The Trial Court has allowed the application filed by the plaintiff holding that though the memorandum of partition deed is unregistered document and is not signed by the plaintiff, the share which was allotted to the plaintiff in the said memorandum of the partition is denied by the defendants. So also the defendants have denied that no relinquishment deed is executed. This has necessitated the plaintiff to seek partition of all the properties. By recording this finding, the Trial Court has permitted the plaintiff to withdraw the suit and granted liberty to file a fresh suit.

7. There appear sufficient grounds which are noted by the Trial Court in the impugned order. In view of denial on the part of the defendants in respect of the partition deed and denial of execution of the relinquishment deed, it was necessary for the plaintiff to withdraw the present suit to file a fresh suit.

8. In the facts of the present case, it is not possible to accept the contention of the learned advocate for the petitioners that there would be bar of Order II, Rule 2 of the Civil Procedure Code for the plaintiff to file a fresh suit. The defendants are entitled to contest the fresh suit filed by the plaintiff, by raising this objection in the written statement.

9. No illegality or perversity is found in the order impugned in the present writ petition. The writ petition, being devoid of any merit, is dismissed with no order as to costs.

[NITIN B. SURYAWANSHI]
JUDGE

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