

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

25 WRIT PETITION NO.9708 OF 2013

**VITHAL ARJUN PANCHAL AND OTHERS
VERSUS
ASHOK HARIRAM JATAL AND OTHERS**

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Advocate for Petitioners: Mr. C. R. Deshpande
Advocate for Respondent No.1: Mr. B. N. Patil
Advocate for Respondents No.1to3&8:
Mr. R. P. Adgaonkar

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CORAM: SMT. BHARATI H. DANGRE, J.

DATE: 14th FEBRUARY, 2022

PER COURT:

1. Heard the learned Counsel for the Petitioners and the learned Counsel for the Respondents.

2. The Petitioners are original plaintiffs, who have instituted RCS No.601/2007 before the Civil Judge, Junior Division at Latur, seeking perpetual and mandatory injunction against the Defendants. The impugned order is passed on an application taken out by the Plaintiffs invoking order XXIII Rule 1(3) of the Code of Civil Procedure seeking withdrawal of the Suit by reserving liberty to file a fresh suit.

3. The Plaintiff Nos. 1 to 3 pleaded that they along with Shri Prabhakar Manikrao Panchal purchased land situated at village Harangul (Bk.) by a registered Sale Deed dated 02.09.1988 and accordingly their names were mutated in the Revenue Record. One Hariram Jatal i.e. the father of the Defendant No. 1 purchased agricultural land adjacent to the Suit property and it was pleaded that the Suit property was unauthorisedly encroached from the eastern side and there was also encroachment on the western side admeasuring 3 Gunthas.

The plaintiffs moved the Taluka Inspector of Land Records seeking measurement of the land and accordingly the land was measured and the map was prepared, reflecting encroachment by the Defendants on the suit property. In the suit, the relief of perpetual injunction along with the mandatory injunction of was sought vide Prayer Clause 1 and 2. Clause 3 prayed that it be declared that act of the Defendants in encroaching upon the suit property is illegal,

unconstitutional and ultravirous and not binding on the right, title and interest of the Plaintiffs. An equitable relief to which the plaintiffs are entitled to was also sought in prayer clause (5).

4. The Defendants appeared in the said Suit and filed a Written Statement.

The perusal of the same Plaint would disclose that Defendant No.2 in the said suit is Sadashiv Sahakari Gruha Nirman Sanstha, Harangul (Bk.) through its Chairman Hariram Sadashiv Jatal and specific pleading in the plaint is, that the Defendants have no right, title and interest in respect of the plaintiffs land and by taking undue advantage of the land of Hariram Jatal from the eastern side of the plaintiffs land, Defendant No. 2 i.e. the Society made illegal and unauthorized encroachment over the Plaintiffs land from the eastern side. The relief being sought against the cooperative society, one of the defect which was realised pursuant to it's filing is the notice not

being issued in terms of Section 164 of the Maharashtra Cooperative Societies Act.

5. In the Written Statement filed on behalf of Defendant Nos. 1 and 2 before the Trial Court, an objection is also raised about the 4th partner, who had purchased the suit land along with plaintiffs not being party to the suit and therefore it was pleaded that on account his non-joinder in the suit, the suit must fail. Apart from this as far as the land of the Society is concerned, specific pleadings are made in Paragraph No. 5 of the Written Statement as it is pleaded that Defendant No. 1 has got no concern with regard to the suit property of the plaintiffs and he owns his land towards eastern side of Sadashiv Gruha Nirman Sanstha and the plaintiffs land is towards western side of this land belonging to the Society. It is pleaded that the suit must fail on account of misjoinder and since the Defendant No. 1 has been wrongly impleaded, and compensatory costs is also prayed.

6. During the pendency of the said suit, after the evidence of the plaintiffs was over, in the year-2013, an application was moved seeking permission of withdrawal of the suit, with liberty to file fresh suit. The application at Exhibit-127 pleaded that after going through the pleadings and evidence of the plaintiffs, the suit suffers from various formal defects, which goes to the root of case and cannot be cured by amendment, one such formal defect being non issuance of statutory notice against the Society before institution of the suit and on this ground there was every likelihood of the suit not being entertained and therefore the liberty was sought to file a fresh suit, by curing the defects.

7. The learned Judge on 19.08.2013 determined the said application and arrived at a following conclusion-

"7. It is true, a want of statutory notice in the case of suits against cooperative society is a formal defect, but the defects affecting the merits of the case cannot be called to be formal defects. A mis-joinder of parties or

of cause of action is a formal defect but a non joinder of party is not a formal defect within the meaning of the rule. Failure or the inability of the plaintiff to secure necessary evidence to support his case is not a ground contemplated by Order- XXIII, Rule- 1(3)(b) of the Code of Civil Procedure. It is not the object of the rule to enable a plaintiff who has failed to prove his case to reagitate the matter and thus prejudice the other side. In the present matter, discrepancy in area of encroachment in pleading and evidence and non joinder of necessary parties are not the formal defects. Furthermore, the contents of application clearly shows that, the plaintiffs have not disclosed all defects which they wants to remove by the withdrawal. In these circumstances, granting permission to the plaintiffs to withdraw this suit with liberty to file fresh suit on same cause of action is the prejudice to defendants. Hence, I pass the following order.

Order

This application is rejected with costs."

8. On perusal of the plaint and the consequent Written Statement by the Defendants, along with the application seeking withdrawal of the suit and the order passed thereon, it can be seen that the plaintiff is the author of his proceedings and it is for him to determine what relief he intend to seek in the backdrop of the pleading that he choose to make in support of the relief sought.

The withdrawal and adjustment of suit which is the specific provision contained in order XXIII of the Code of Civil Procedure, 1908 and in particular Rule 1 which permits withdrawal of the suit only on the grounds which are limited, and set out in Sub-Rule 3, reads thus-

“(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 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."

9. The said provision came up for interpretation in case of **K.S. Bhoopathy and Ors Vs. Kokila and Others** reported in (2000) 5 SCC 458 and Their Lordships of the Apex Court held that it is the duty of the Court to be satisfied about 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. It is further observed that, though the liberty may lie with the plaintiff in a suit to withdraw the suit at any time after its institution, on establishing the "formal defect" or "sufficient grounds", such right has been held to be not absolute, so as to permit or encourage abuse of process of Court.

The term "formal defect" or "sufficient grounds" has been considered by the Court in the following words-

"10...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 23, Rule 1(3) CPC, 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 CPC, 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 cannotes various kinds of defects not affecting the merits of the plea raised by either of the parties."

10. The Application of the Plaintiff has to be considered in the light of the wording used in Sub Clause (b) of Rule (3) of Order XXIII "sufficient grounds", and whether permission could be granted to withdraw the suit by reserving the liberty to institute a fresh suit.

By applying law to the facts in hand, it can be seen that the only defect which the plaintiff has pleaded is non-issuance of notice to the cooperative society and what is pleaded is that it is "formal defect". The learned Judge while passing the impugned order has noted that there is no other defect which has been said to be projected except the absence of notice U/Sec.164 of the Maharashtra Cooperative Societies Act. In any case the consequence of the non issuance of the notice can be determined at the time of trial since the requirement of the notice contemplated U/Sec.164 of the Maharashtra Cooperative Societies Act, to the Authorities under the Act, can if required be waived during the course of the trial.

Apart from this there is no other ground has been projected, which would have justified the learned Judge to invoke Clause (b) of Rule (3). I do not find any legal infirmity in the impugned order, and hence the writ petition is dismissed.

Since the proceedings in the suit are stayed from the year-2013, the learned Judge is directed to conclude the proceedings in the suit within six (06) months from today.

[SMT. BHARATI H. DANGRE, J.]

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