

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

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WRIT PETITION NO.1302 OF 2020

Amarnath Dharma Mhatre and Ors.

..Petitioners

Versus

Smt. Mayabai Posuram @ Posha Mhatre and Anr.

..Respondents

Mr. Mohan B. Jadhav, for the Petitioners.

Mr. G. J. Sabnis i/by Jayant B. Apte, for the Respondents.

CORAM : NITIN W. SAMBRE, J.

DATE : 7th MARCH, 2022

PC.

1. This petition is by the plaintiffs questioning the order impugned dated 15th March, 2019 passed by the learned Civil Judge Senior Division, Panvel, whereby application Exh.26 for withdrawal of the Special Civil Suit No.377 of 2015 with liberty to present original plaint in RCS No.110 of 2007 came to be rejected.

2. Submissions of learned counsel for the petitioners/ plaintiffs are, Court below committed an error in rejecting the prayer as the initiation of fresh suit being Special Civil Suit No.377 of 2015 was under wrong legal advise. Whether re-tendering of the original plaint which was returned in earlier suit being RCS No.110 of 2007 in the light of order dated 4th May, 2012 should have been appreciated while dealing with the prayer. According to him, Court having jurisdiction on re-tendering of the plaint, as it can go into objection of limitation. He would further claim that cause pleaded

in both the suits is same, however, under the incorrect advise of the lawyer, mistake of initiation of fresh (different) suit is caused which shall not prejudice the petitioners/litigants.

3. The prayer is opposed. As according to learned counsel for the respondents/defendants, the prayer for withdrawal of the suit and presentation of original plaint after return was ordered, is at much belated stage. According to him, the Court below was justified in rejecting prayer vide Exh.26.

4. I have appreciated the aforesaid submissions.

5. Both the suits being RCS No.110 of 2007 and present suit are based on same cause with same prayer and parties are also same.

6. It appears that after the plaint was returned on 4th May, 2012, instead of presenting the same plaint/suit which was returned in original RCS No.110 of 2007, petitioners/plaintiffs initiated fresh plaint/suit being Special Civil Suit No.377 of 2015 which was without leave of the Court.

7. The fact remains that in these suits i.e. in Special Civil Suit No.377 of 2015 and RCS No.110 of 2007, it is not in dispute that the pleadings, prayers and parties are same.

8. In the aforesaid background, petitioners at this stage appears to be justified in claiming that the fresh suit being Special Civil Suit No.377 of 2015 was initiated under the incorrect advise of

a lawyer and they shall not be put to prejudice for wrong legal advise. The issue of limitation can be gone into, in case, if the plaint is permitted to be presented afresh.

9. That being so, the order impugned passed below Exh.26 is hereby quashed and set aside. The application Exh.26 stands allowed.

10. The petitioners/plaintiffs are permitted to withdraw Special Civil Suit No.377 of 2015 with liberty to file earlier suit being RCS No.110 of 2007 before the learned Civil Judge Senior Division, Panvel in view of order dated 4th May, 2012 passed on preliminary issue framed in the said suit.

11. Presentation of the plaint shall be subject to issue of limitation which is likely so raised by the counsel for the respondents/defendants.

12. If any such issue is raised, by the defendants/respondents, the Court below is expected to deal with the same without being influenced by the findings recorded in this order.

13. The petition as such stands partly allowed, subject to payment of cost of Rs.10,000/- to be deposited by the petitioners/plaintiffs in the Court below within a period of two weeks from today, to which respondents/defendants shall be entitled to withdraw.

[NITIN W. SAMBRE, J.]