

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

WRIT PETITION NO.5212/2022

PETITIONERS:

1. Dr. Joshi Trust Amravati,
Registered No.A-4187, through
Smt. Mangala Pandurang Joshi,
R/o Tryambakashram, Vakil Line,
Ambadevi Road, Amravati.
2. Smt. Mangala Pandurang Joshi,
Aged : Major, Occupation : Trustee,
R/o Tryambakashram, Vakil Line,
Ambadevi Road, Amravati.
3. Charusheela Mukundrao Sathey,
Aged : Major, Occupation : Trustee,
R/o A- 1 Building, Top Floor, Plot No.103,
Todkar Residency, Near Ravikiran Hall,
Bibwaywadi, Upper Indira Nagar, Pune.
4. Sau. Ashatai Sureshrao Kher,
Aged : Major,
Occupation : Trustee, R/o Shri S.N. Kher,
Plot No.19/2, Snehlatangaj, Indore,
Madhya Pradesh.
5. Dr. Digambar Vyankatesh Jahagirdar
Aged : Major, Occupation : Trustee,
R/o Gulamohar Colony, Camp, Amravati.
6. Sunil Prabhakar Rao Chitale,
Aged : Major, Occupation : Trustee,
R/o Vyankatesh Lawn, New Swastic
Nagar, Badnera Road, Amravati.
7. Shivajirao Mahadeorao Gedam,
Aged : Major, Occupation : Trustee,
R/o Shivkrupa Colony, Near Talai

Celebration Hall, V.M.V. Road, Amravati.

8. Shailaja Mahadeorao Bhagvat,
Aged : Major, Occupation : Trustee
R/o Shriram Prasad, Ambapeth, Amravati.

...VERSUS...

- RESPONDENTS :**
1. Shri Ambadevi Sansthan, Amravati.
Registration No.A-429 (Amravati)
Through Trustee.
 2. Smt. Vidhya Vijayrao Deshpande
Aged 72 years, Occ. President,
R/o Ambapeth, Amravati.
 3. Shri Dr. A.M. Parsodkar,
Aged 74 years, Occ. Vice President,
R/o Renuka, Sharda Nagar, Amravati.
 4. Shri Ravindra V. Karve,
Aged 68 years, Occ : Secretary,
R/o 202, Ganediwal Layout, Camp, Amravati.
 5. Shri Deepak M. Shrimali,
Aged 69 years, Occ : Secretary,
R/o Mangilal Plot, Amravati.
 6. Shri Dr. Atul Pandurang Alshi,
Aged 62 years, Occ: Trustee,
R/o Anandvan, Mangilal Plot, Amravati.
 7. Shri Kishor G. Bendre,
Aged 55 years, Occ : Trustee
R/o Mangilal Plot, Amravati.
 8. Shri Surendra R. Burange,
Aged 52 years, Occ : Trustee,
R/o Bhajibazar, Amravati.

9. Sau. Vijaytai A. Gudhe,
Aged 45 years, Occ : Trustee,
R/o Budhwara, Amravati.
10. Shri Ashok Motilal Gupta,
Aged 65 years, Occ : Trustee,
R/o Cotton Market Road, Amravati.
11. Shri Ramesh Krushnarao Kewale,
Aged 75 years, Occ : Trustee,
R/o Budhawara, Amravati.
12. Sau. Deepatai R. Khandekar,
Aged 48 years, Occ : Trustee,
R/o Mudholkar Peth, Amravati.
13. Shri Ashok Shankarrao Khandelwal,
Aged 52 years, Occ : Trustee,
R/o Ratnaprabha Apartment, Mangilal
Plot, Amravati.
14. Shri Digambar M. Mahajan,
Aged 75 years, Occ: Trustee,
R/o In front of D.R.G. Gungalow,
Camp Amravati.
15. Shri Vilas Arun Marathe,
Aged 52 years, Occ : Trustee,
R/o 1st Floor, Pratapgad Apartment,
Khaparde Garden, Amravati.
16. Dr. Yashwant Shankar Mashankar,
Aged 80 years, Occ : Trustee,
R/o Mashankar Hospital, Rajapeth,
Amravati.
17. Adv. Rejendra R. Pande,
Aged 52 years, Occ : Trustee,
R/o Ramprabha, Amar Colony, Amravati.

18. Shri Dr. Jayant Damodhar Pandhrikar,
Aged 52 years, Occ : Trustee,
R/o Near Topper Hospital, Rajpeth, Amravati.
19. Sau. Minatai D. Pathak,
Aged 48 years, Occ : Trustee,
R/o Dahane Nagar, Amravati.
20. Shri Shailesh P. Potdar
Aged 48 years, Occ : Trustee,
R/o Durgavihar, Amravati.
21. Shri Dr. Pradeep Balavant Shingore
Aged 62 years, Occ : Trustee,
R/o Rutuparna, Camp Amravati.

Shri A.C. Dharmadhikar, Advocate for petitioners
Shri J.T. Gilda, Senior Advocate assisted by Shri A.J. Gilda, Advocate for respondents

CORAM : AVINASH G. GHAROTE, J.

DATE : 14/09/2022

ORAL JUDGMENT

1. Heard Shri A.C. Dharmadhikari, learned counsel for the petitioners and Shri J.T. Gilda, learned senior counsel for the respondents. Rule. Rule made returnable forthwith. Heard finally with the consent of the learned counsel for the rival parties.

2. The petition challenges the order dated 13/07/2022 (pg.30) whereby the application filed by the plaintiffs/respondents

in Regular Civil Suit No.95/2022, for withdrawal of the suit under Order XXIII Rule 1 (3) (a) of the Code of Civil Procedure (for short, “CPC” hereinafter) with liberty to institute a fresh suit, has been allowed by the learned Trial Court.

3. Shri Dharmadhikari, learned counsel appearing for the petitioners, submits that though the right of withdrawal by the plaintiffs is an absolute right vested in the plaintiffs, however when liberty is sought, the same cannot be granted merely for the sake of asking, but has to satisfy the requirement of Order XXIII Rule 1 (3) (a) of CPC, which requires that such liberty be granted, if the Court is satisfied that the suit must fail for the reason of some formal defect. He submits that perusal of the application for withdrawal at Exh.45, merely spelt out, that since the suit was filed for declaration and mandatory injunction and since the plea on which it was sought to be withdrawn indicated that what was necessary was to file a suit under Section 6 of the Specific Relief Act, 1963 for restoration of possession against the defendants, this could not be termed as a defect which was formal in nature for the reason that the nature of the suit intended to be filed was a totally different one. He lays

stress upon the expression “formal defect as comparative to a substantive defect” and contends that what was filed was a substantive suit which itself was not maintainable for want of permission under Section 50 of the Maharashtra Public Trusts Act, 1950, which was necessary as the plaint itself indicated that permission of the learned Charity Commissioner was necessary to institute the suit which defect goes to the very jurisdiction of the Court to entertain the suit. He further submits that what was the nature of the formal defect is also not spelt out in the application at Exh.45. Reliance is placed by him on *M.B. Development Corporation Vs. Manilal Patel and Co.*, MANU/MH/0278/2001, on *Jagjit Singh Vs. Gursharan Singh*, 2002 (1) Civil LJ 302 and on *Govind Gulabrao More and another Vs. Laxman Sahebrao More and others*, 2000 (1) Mh.L.J. 310.

4. Reliance is also placed upon the Full Bench judgment in *Ramrao Bhagwantrao Inamdar and another Vs. Babu Appanna Samage and others*, AIR 1940 Bombay 121 to contend that a formal defect and sufficient grounds are two different and distinct things which cannot be mixed together.

5. Shri Gilda, learned senior counsel appearing for the respondents supports the impugned order and submits that though the plaint indicated that it was a suit for declaration and permanent injunction in sum and substance, it was a suit for recovery of possession from the defendants, as on 22/02/2022 the defendants had put a lock upon the premises from which Shri Ambadevi Sansthan and Dr. Joshi Trust Hospital was being run and the plaintiffs were prevented from running the hospital in the said premises though admittedly, under the agreement dated 09/02/1984 between the plaintiff no.1 and the defendant no.1 the premises were put in possession of the plaintiffs for the purpose of running the aforesaid hospital, which position is again reiterated by the supplementary agreement dated 13/06/1991. It is thus submitted that what was necessary in law was for the plaintiffs to have filed the suit under Section 6 of the Specific Relief Act, 1963 for restoration of possession instead of suit for declaration and mandatory injunction as filed, and the application for withdrawal with liberty merely sought to rectify this defect.

6. It is a trite position of law that where an application is filed under Order XXIII Rule 1 (3) (a) of CPC for withdrawal of the

suit with liberty, the Court has either to grant the application as it is, in light of the prayer made or dismiss the application. It is not permissible, in my considered opinion, for the Court to partly allow the application regarding withdrawal and partly reject it insofar as the liberty is concerned, for the reason that in case the liberty is rejected, the plaintiff may choose to continue the suit as it is and take appropriate steps to bring the suit in the nature and form which the plaintiff deems fit and appropriate.

7. Insofar as the averment in the plaint in Regular Civil Suit No.95/2022 is concerned, it is a suit for declaration and permanent injunction claiming a restraint also, in the working of the hospital on behalf of the defendant nos.1 to 8. It is the contention as reflected from the plaint itself that on 22/02/2022 the defendants had put a lock to the main gate of the hospital and therefore restrained the plaintiffs from operating the said hospital. As rightly contended by Shri Gilda, learned senior counsel for the respondents, what was necessary to be filed was a suit seeking restoration of possession which could be a suit under Section 6 of the Specific Relief Act. The plaint in Regular Civil Suit No.95/2022 did not seek

such a relief of possession. It is in this context that the objection that the suit was infirm in light of not having obtained permission under Section 50 of the Maharashtra Public Trusts Act has to be considered. The question whether permission was necessary or not would not be germane for deciding whether the application at Exh.45 for withdrawal with liberty needs to be allowed. What is to be seen as to whether the plaintiffs in spite of a decree being passed, as it is, on the basis of the prayer clause in the plaint would have been put in possession of the property in question, to which obviously the answer is in the negative. The Full Bench judgment in ***Ramrao Bhagwantrao Inamdar*** (supra) relied upon by Shri Dharmadhikari, learned counsel for the petitioners itself indicates that the expression “formal defect” must be given a wide and liberal meaning and must be deemed to connote every kind of defect which does not affect the merits of the case, whether that defect be fatal to the suit or not. Since a relief for possession was not claimed it was even otherwise permissible for the plaintiffs to have filed a suit under Section 6 of the Specific Relief Act.

8. ***Govind Gulabrao More*** (supra) was a case in which the learned lower Court had on merits dismissed the suit of the plaintiffs

by giving a categorical finding, as a result of which, it was held that a right had accrued in favour of the defendants and it is in light of that position that the learned Court had refused to grant liberty holding that the withdrawal of the suit at the appellate stage would give liberty to the plaintiffs to file a suit afresh and deprive the defendants from the right accrued in their favour and therefore the same is not applicable in the facts of the present matter, as the suit is still at a very nascent stage.

9. In *M.B. Development Corporation* (supra) the suit was filed in the name of dead person or a firm which had already been dissolved before the institution of the suit and therefore liberty could not be granted to a third person or entity to file a fresh suit on the same cause of action, considering which, the same is not attracted in the present matter. In *Jagjit Singh* (supra) formal defect has been held to be understood differently from the suit which was not legally maintainable. Insofar as the maintainability of the suit is concerned, in my considered opinion, when a Trust seeks to recover possession having been dispossessed, that would be enforcement of the rights of the Trust under the common civil law and therefore would not be a

situation where the requirement of permission would be necessary to restore the possession of the property and therefore *prima facie* it cannot be said that the suit was not maintainable. A perusal of the plaint therefore indicates that since the possession was not claimed and since even otherwise it is permissible for the plaintiffs to have filed suit under Section 6 of the Specific Relief Act, the learned Trial Court did not commit any irregularity or illegality in permitting the plaintiffs to file a fresh suit on the same cause of action. I, therefore, do not see any reason to interfere in the impugned order. The writ petition is therefore dismissed. No order as to costs.

10. Needless to say, that the above observations will not shut off any defence which the defendants may have available in law in respect of any suit which may be instituted by the plaintiffs on the same cause of action, on the basis of the liberty granted.

(AVINASH G. GHAROTE, J.)