

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

WRIT PETITION NO. 8791 OF 2017

Nandu Ramji Dalve

.. Petitioner

Versus

Kashiram Bhagoji Savle

.. Respondent

Shri Amit A. Mukhedkar, Advocate for the Petitioner.

Shri K. M. Nagarkar, Advocate for the Respondent.

CORAM : SHARMILA U. DESHMUKH, J.

DATE : 28TH FEBRUARY, 2023.

FINAL ORDER :

. Heard.

2. Challenge in the petition is to the order dated 24th April, 2017 passed below Exhibit 47 in R.C.S. No. 114 of 2014 rejecting petitioner's application under Order XXI Rule 1(3) of the Code of Civil Procedure (for short "Code") for permission to withdraw the suit with liberty to file fresh suit on the same cause of action.

3. R.C.S. No. 114 of 2014 was instituted by the petitioner seeking recovery of possession of 38R land. It was case of the petitioner in the suit that the petitioner is owner of 1H 60R land of gut No. 182 and the respondent/defendant who is adjacent land owner has encroached upon 38R land belonging to the petitioner and, therefore sought recovery of the possession. The proceedings continued and application for amendment came to be filed on 25th April, 2016 seeking to amend the plaint stating that upon the measurement of the disputed gut No. 182 and as per

the mutation entry No. 2183 the area which has come to the share of the petitioner was 90R and the area in possession of the petitioner's brother was 70R land as the partition had taken place. The proposed amendment also sought that the encroachment has taken place on the area which came to the share of the petitioner. The application for amendment came to be rejected, which has not been challenged and is also not part of the present proceeding and hence this Court is unable to examine the reasoning on the basis of which application was rejected.

4. On 14th November, 2016 an application on the same grounds as the application for amendment came to be filed under the provisions of Order XXI Rule 1(3) of the Code seeking withdrawal of the proceedings with liberty to file fresh application. It is admitted position that this application was filed at the time of final arguments. Perusal of the application shows that it is case of the petitioner that the petitioner's elder brother was Karta of the family and with the consent of the petitioner and his brother mutation entry No. 2183 dated 15th April, 2014 was effect and out of the entire 1H 60R land of gut No. 182, the area coming to the share of the petitioner was 70R land and the petitioner's brother was having 90R land. After having stated that this was done with the consent of the petitioner and the petitioner's brother, it is further stated that the said mutation entry was not within the knowledge of the petitioner and as the petitioner's education was only upto 07th standard, he was unaware of the same. With this case the petitioner had filed application for withdrawal of the plaint.

5. Learned counsel appearing for the petitioner submits that no prejudice will be caused to the respondent if the permission as prayed is granted. He would further submit that, in the present case, the petitioner was unaware of the actual land in his possession and as property was joint family property, the petitioner came with a case that he was the owner of the entire 1 H 60R land. He would further submit that the issue was in the nature of subsequent development for which an application for amendment was filed, which came to be rejected. He would further submit that considering the facts of the case same amounts to a formal defect. As such it is necessary that the petitioner be permitted to withdraw the suit with liberty to file fresh suit subject to imposition of reasonable cost. Learned counsel relies on the order of this Court **dated 21st October, 2016 in Writ Petition No. 8807 of 2015 in the case of Sundarabai Purbha Kamate Vs. Manoj Prataprao Kamate and others.**

6. *Per contra*, learned counsel appearing for the respondent submits that, this application is made at the time of final argument of the suit. There is no formal defect in the plaint, as the said facts was within the knowledge of the petitioner. He would further submit that the respondent has objected about the plaintiff's ownership over 1H 60R land and the submission that the suit is required to be withdrawn due to a formal defect is not sustainable. In support of his submissions he has relied upon the decision in the case of **Babybai Sakharam Pardeshi and another Vs. Ganesh Asaram Sawant** reported in **2013(6) Mh. L. J. 328.**

7. Considered the rival submissions of the respective parties.

8. It is not in dispute that the petitioner had come with the case that he is owner of 1H 60R land of gut No. 182. It is his case that by way of subsequent development there has been a partition of the property and by reason of which the petitioner is in possession and ownership of 70R land, out of which he claims that 38R has been encroached upon by the respondent. A perusal of the application filed by the petitioner shows that it is by the consent of the petitioner and the petitioner's brother that the partition has taken place and the mutation entry has been effected. It is also pertinent to note that subsequently there has been sale of 30R land by the petitioner and his brother by way of registered sale deed. Considering the averments which are made in the application, it is clear that these facts were within the knowledge of the petitioner at the time of institution of the suit. At the time of final arguments an application sought to be made to withdraw the suit on the ground of formal defect, which would affect merits of the case. Reliance of learned counsel for the respondent No. 1 in the case of **Babybai Sakharam Pardeshi and another Vs. Ganesh Asaram Sawant** (supra) is squarely applicable to the facts of this case.

09. Under the provisions of Order XXIII Rule 1(3) of the Code, the Court has discretion to allow withdrawal of the plaint if the Court is satisfied that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of the suit. In the present case, the Trial Court has refused to exercise the discretion in favour of the petitioner as the facts on the basis of which the withdrawal is sought were within the knowledge of the petitioner. In my opinion, the discretion exercised by the Trial Court cannot be said to be perverse warranting interference

by this Court.

10. Considering the facts of the case and in particular that the suit is of the year 2012 another aspect which is required to be considered is that great prejudice will be caused to the respondent/defendant, who would be compelled to defend the de-novo proceedings. In my view, there is no infirmity in the order dated 24th April, 2017.

11. As far as decision which has been relied upon by the petitioner in the case of **Sundarabai Purbha Kamate Vs. Manoj Prataprao Kamate and others** (supra) is concerned, in that case pursuant to a compromise the possession of the property was handed over and the plaintiff wanted to withdraw the suit against the defendant who has compromised the suit. In the facts of that case the said decision is given and facts of the present case are completely different. The decision does not assist the case of the petitioner. As such the petition is devoid of merits and stands dismissed.

12. The petitioner is permitted to withdraw the amount of cost which was deposited in this Court pursuant to the order dated 26th July, 2017.

[SHARMILA U. DESHMUKH, J.]