

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

WRIT PETITION NO.8846 OF 2021

GIYASODDIN BASHIRSAB PATEL AND ANOTHER
VERSUS
SIDHARMESHWAR MAROTI BHINGE UNDER GUARDIAN OF
GRANDMOTHER DHONDUBAI VENKATRAO BHINGE

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Mr. Gopal D. Kale, Advocate for the Petitioners.
Mr. Ram Shinde, Advocate for Respondent.

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**CORAM : SHARMILA U. DESHMUKH, J.
DATED : 19th JANUARY, 2023.**

PER COURT:-

1. Heard.
2. The petition challenges the order dated 24.06.2021 passed in RCA No.81/2016, whereby the petitioners' application for permission to withdraw the appeal with liberty to institute a fresh suit came to be dismissed.
3. RCS No.229/2012 was filed by the petitioners seeking declaration of ownership in respect of the suit property on the basis of an agreement for sale executed between the petitioners and the respondent, which came to be decreed by the judgment and decree dated 04.05.2016. As against the judgment and decree the petitioners preferred an Appeal bearing RCA No.81/2016 and during the pendency of the appeal, an application came to be filed by the petitioners seeking permission to withdraw the Appeal as well as RCS No.229/2012 with liberty to institute a fresh suit. The application filed for withdrawal proceeded on the ground that

instead of filing a suit for specific performance inadvertently and due to wrong legal advice, the suit was filed for declaration and recovery of possession.

4. Learned counsel appearing for the petitioners submits that one of the findings in the judgment dated 04.05.2016 negating the issue nos.3 to 5 as regards the entitlement of the petitioners is that the suit has not been filed for specific performance. As such, he would urge that upon reading of Order XXIII Rule 3 of the Code of Civil Procedure the petitioners were entitled to seek withdrawal of the suit with liberty to file a fresh suit. In support of his contention, he relies upon the decision of the Apex Court in case of ***V. Rajendran and Another Vs. Annasamy Pandian (dead) through L.Rs. Karthyayani Natchiar, reported in 2017 (5) Mh.L.J. 281.***

5. Per contra, learned counsel for the respondent supports the order and would urge that after having failed before the Trial Court, the petitioners had filed an appeal and thereafter, now seeking to withdraw the suit to which he has no objection, however, objection is as to the liberty for instituting a fresh suit.

6. I have considered the rival submissions of the parties.

7. The provisions of sub-Rule (3) of Rule 1 of Order XXIII permits the withdrawal of the suit and where the court is satisfied that a suit must fail by reason of some formal defect or that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a 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. In the present case, the application is filed for withdrawal of the suit with liberty to institute fresh suit on the ground of an inadvertent mistake based on the legal advice that the suit which ought to be filed for specific performance has been filed for a declaration and recovery of possession. Such ground in my opinion cannot be pressed into service for seeking a liberty to institute a fresh suit particularly when the suit bearing RCS No.292/2012 has resulted into a dismissal on merits. In my opinion, the respondents cannot be sued twice for the same cause of action, especially after having succeeded in the first round of litigation. It is also relevant to note the provisions of Order II Rule 3, which provides as under:

“3. Joinder of causes of action.

(1) Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit.

(2) Where causes of action are united, the jurisdiction of the Court as regards the suit shall depend on the amount or value of the aggregate subject-matters at the date of instituting the suit.”

8. Admittedly, in the present case without reserving the rights to file suit for specific performance, the petitioners filed the suit for declaration of the ownership in respect of the suit property. As such, when the petitioners have failed to sue, he cannot at this stage seek liberty as prayed for. The impugned order rightly records that, the liberty is sought for on the ground that the suit has failed by reason of some formal defect and cannot be countenanced as formal defect only mean defect unconnected with the merits of the case. As far as the decision

relied upon by the learned counsel for the petitioners is concerned, in the said case what was under consideration of the Apex Court was that due to an incorrect description of the suit property as Survey No.192/14, that transferred the patta for the suit property settling as Survey No.192/14, the defect in the survey number of the suit property goes to the very core of the subject matter of the suit. It was observed by the Apex Court that, the entire proceeding would be fruitless as the decree could not have been executed. In the facts of that case the Apex Court had held that the defect will constitute a formal defect. In the facts of the present case it cannot be said that filing of the suit for declaration of the ownership inadvertently instead of filing suit for specific performance of a contract would amount to a formal defect.

9. As such, there is no infirmity in the impugned order. Writ Petition is devoid of merits and is accordingly dismissed.

(SHARMILA U. DESHMUKH)
JUDGE