

Meena

IN THE HIGH COURT OF BOMBAY AT GOA

CIVIL REVISION APPLICATION NO.37 OF 2019

SITARAM RAGLO GAONKAR

... Applicant

Versus

THE COMUNIDADE OF USGAO, REP. BY
ITS ATTORNEY, SANJAY HARICHANDRA
PRABHU

... Respondent

Mr J.A. Lobo and Ms. A. Gawas, Advocate for the Applicant.

Mr Rui Gomes Pereira, Advocate for the Respondent.

CORAM: BHARAT P. DESHPANDE,J.

DATED : 5th JANUARY 2023

ORAL ORDER:

1. Heard Mr J.A. Lobo, learned Counsel for the applicant and Mr Rui Gomes Pereira, learned Counsel for the respondent.
2. By the present revision application, the applicant/original defendant is challenging the order passed by the learned Civil Judge Junior Division, Ponda in Regular Civil Suit No.20 of 2019 dated 25/06/2019 thereby allowing the application filed by the plaintiff/respondent under Order XXIII Rule 1(3) of the Civil Procedure Code thereby permitting the plaintiff to withdraw the suit with liberty to file afresh.
3. Learned Counsel Mr Lobo would submit that the challenge in the present revision application is only the grant of liberty by the trial Court

to file the suit afresh. He submitted that there was no formal defect in the suit filed by the plaintiff as ground raised in the application is only with regard to absence of permission to institute the suit from the Administrator of Comunidade. He further submitted that the said defect could have been cured by way of amendment. However, withdrawing of the suit on this count and too by granting liberty was not at all justified.

4. Mr. Pereira appearing for the respondents would submit that the revision application is not maintainable as no prejudice is going to cause to the applicant/defendant. However, he is unable to inform the Court as to whether such liberty has been availed by the plaintiff for institution of suit afresh.

5. The rival contentions fall for the determination of this Court.

6. Order XXIII Rule 1(3) reads thus:

1 (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.”

7. The application for withdrawal of the suit was filed by the plaintiff disclosing two main reasons. First reason is that the suit is filed without

following procedure mandated/prescribed under the Code of Comunidades. Second ground is that there was no approval sought from the Hon'ble Administrative Tribunal prior to filing of the suit. The said application was supported by resolution passed by the Comunidade and copy of it was annexed along with the application.

8. In the said Resolution, Comunidade of Usgao observed that the suit has been filed without following the procedure prescribed in the Code of Comunidade and therefore, it is resolved to withdraw the said suit with liberty to file afresh.

9. Though the application was filed by the President of Comunidade for withdrawal of the suit, the same is supported by Resolution. Thus, question of filing by the attorney is of no substance.

10. The Advocate appearing for the plaintiff filed reply stating that the defect could be cured by filing application for amendment. However, the plaintiff is the *dominus litis* and to decide whether to apply for amendment or to withdraw the suit by asking liberty to file afresh thereby curing the defect.

11. The impugned order refers to the provision giving discretion to the Court and also decision in the case of ***V. Rajendran vs Annasamy Pandia (Died) Thr. Lr.***¹ Though the reasons are found in only paragraph 8, it shows that the learned trial Court exercised the jurisdiction by

¹ 2017 5 SCC 63.

applying its mind thereby considering that the suit can be allowed to be withdrawn with liberty for the purpose of curing formal defect.

12. Mr Lobo appearing for the applicant submitted that the defect which was pointed out was not formal but goes to the root of the matter and the applicant/defendant was prejudiced because he would have to face another litigation if being instituted on the basis of such liberty.

13. However, it is well settled that powers of this Court under Section 115 of CPC are limited and could be exercised only if there is patent illegality committed by the trial Court while deciding the application.

14. The impugned order shows that all aspects have been considered and only after considering the Resolution of the Commuidade, the suit was allowed to be withdrawn with liberty to file afresh. I do not find any illegality or impropriety in the impugned order. Even otherwise no prejudice is going to cause to the applicant if the suit has been withdrawn though with liberty to file afresh. The applicant will be entitle to raise all his defences in case new suit is instituted on the basis of such liberty. The revision therefore deserves to be rejected.

15. The revision stands dismissed. The parties to bear their own costs.

BHARAT P. DESHPANDE, J.