

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 572 OF 2022

Baburao Dagadu Wadkar
[deceased through legal heirs]. ...Petitioner.

Versus

Aaba Dagadu Wadkar
[deceased through legal heirs)
and Others. ..Respondents.

Mr. Nikhil Wadikar i/b Nandu Pawar for the petitioner.
Mr. Vaibhav R. Gaikwad for the respondents

Coram : Sharmila U. Deshmukh, J.

Date : June 20, 2023.

P. C. :

1. Heard Mr. Nikhil Wadikar, learned counsel appearing for the petitioner and Mr. Vaibhav Gaikwad, learned counsel appearing for the respondents.
2. The petitioner questions the order dated 16th January 2020 passed by the appellate Court below Exhibit-54 whereby the appellant's application for permission to withdraw Regular Civil Suit No. 172 of 2007 with liberty to file a fresh suit was allowed.
3. Learned counsel for the petitioner submits that the impugned

order does not take into consideration the fact that by the judgment and decree dated 15th December 2014, the petitioner has been declared as the owner of of Gat No.1005/1B (area 65-R) and Gat No. 544/3 (area 17-R) at Mouje Limb, District Satara. He would further point out that the provisions of Order-23 Rule-1 of CPC permit the withdrawal of suit with liberty to file a fresh suit only in the event of contingencies which are enumerated in the said provision. He would further contend that in the present case, the respondent is seeking to cure their lacunae which have taken place during the trial of RCS No. 172 of 2007. He has taken this Court to the averments in the plaint and would point out that it was the specific case of the respondent that the property as described in paragraph 1B was the ancestral property and as the same came to be acquired, the alternate land was given and, as such, the same is also subject to partition. He would further submit that in the face of such pleadings, it was for the respondent to establish the said fact by leading evidence of the District Collector and the Land Acquisition Officer. He has pointed out that the application filed by the respondent seeking withdrawal of suit in which the specific ground is taken as that the evidence of the District Collector and the Land Acquisition Officer was not on record, liberty may be granted for withdrawal of the suit so that they can be made necessary parties and their evidence may be brought on record.

He would urge that the second round of litigation is impermissible and in violation of provisions of Order-23 Rule-1, Sub-rule (3) of the Code of Civil Procedure, 1908.

4. *Per contra*, learned counsel for the respondent submits that no prejudice will be caused to the the petitioner inasmuch as the findings which are rendered by the trial Court can also form part of record in the fresh suit. He submits that pursuant to the impugned order, the suit as such is already filed and also this ground can be taken by the petitioner in the fresh round of litigation. He further points out that during the proceedings of RCS No.172 of 2007, certain parties had expired and their legal heirs were not brought on record due to inadvertence and as such there is a formal defect.

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

6. Learned counsel appearing for the petitioner has rightly relied upon the decisions of the Apex Court in ***Executive Officer, Ardhanareswarar Temple v. R. Sathyamoorthy [1999 (1) SCR 485]*** and ***K.S. Bhoopathy v. Kokila [(2000) 5 SCC 458]***. The provisions of Sub-rule (3) of Rule 1 of Order-23, CPC permit the withdrawal of suit 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.

7. Perusal of the impugned order shows that the appellate Court has proceeded on the basis that by reason of the District Collector and the Land Acquisition Officer not being made party and by reason of the fact that some of the respondents had expired and their legal heirs were not brought on record, there appears a formal defect justifying the application of the respondent seeking withdrawal of the proceedings with liberty to file a fresh suit. What is important to be noted is that the appellate Court has failed to take into consideration the fact that by the impugned decree passed in RCS No.172 of 2007 based on the evidence which has come on record, the trial Court has held that the respondent is the owner of property bearing Gat No. Gat No.1005/1B (area 65-R) and Gat No. 544/3 (area 17-R) at Mouje Limb, District Satara.

8. The Apex Court in the case of ***Executive Officer, Ardhanareswarar Temple v. R. Sathyamoorthy (supra)*** has held that if any finding of the trial Court in favour of the defendant would get nullified, the permission to withdraw a suit should not be granted. Applying the said law laid down by the apex Court to the facts of the present case, in my opinion, the withdrawal of the suit will result in

the findings which are being given on merits in the favour of the petitioner being nullified. That being so, the provisions of Sub-rule (3) of Rule 1 of Order-23, CPC do not get satisfied in the present case. The appeal filed by the respondent can be permitted to be prosecuted by the respondent. However, the impugned order considering the legal infirmity is required to be quashed and set aside and the same is hereby quashed and set aside.

9. In the light of above, the writ petition stands allowed in terms of prayer clause (b), which reads thus :

“(b) that this Hon’ble Court may be pleased to issue a writ of certiorari or any other appropriate writ, order or direction calling for the records and proceedings of Regular Civil Appeal No. 3 of 2015 from the District Court, Satara and after going through the legality, validity, propriety and correctness of the order dated 16th January 2020 passed by the learned District Judge-4, Satara below Exhibit-54 in Regular Civil Appeal No. 3 of 2015, this Hon’ble Court may be pleased to quash and set aside the said order.”

10. Needless to clarify that in event the respondent seeks to prosecute Regular Civil Appeal No.3 of 2015, the appropriate application may be preferred by the respondent which will be considered by the appellate Court on its own merits and in accordance with law.

[Sharmila U. Deshmukh, J.]