



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

WRIT PETITION (WP) NO.7092 OF 2022

- 1) Nisar Ahmed Khan
Aged about 65 years,
Occ. Retd. Govt. Servant, R/o Mahesh
Nagar, Nagpur.

.... Petitioner(s)

// VERSUS //

- 1) Gulab s/o Ramchandara Dangre,
Aged about 50 years, Occ.
Agriculturist, R/o Village Hattidoi,
Tah. & Distt. Bhandara.

... Respondent(s)

Shri Tabish Mirza, Advocate for the Petitioner/s
Ms D.I. Charlewar, Advocate for the respondent-sole

**CORAM : ANIL S. KILOR, J.
DATED : 01.11.2023**

ORAL JUDGMENT :

1. Heard.
2. **Rule.** Rule made returnable forthwith. Heard finally by consent by the parties.

3. The order dated 26.04.2022 passed by 3rd Joint Civil Judge Junior Division, Bhandara in the Regular Civil Suit No.121 of 2020, allowing the respondent/plaintiff to withdraw the suit under Order XXIII Rule 3(b) of the Code of Civil Suit (CPC), is under challenge in this writ petition.
4. The respondent/plaintiff filed the suit for perpetual injunction against the petitioner/defendant. The defendant filed his reply-cum-written statement.
5. Thereafter, the plaintiff moved an application Exh.25 for withdrawal of suit with liberty to file fresh suit.
6. The reasons, for withdrawal of the suit with liberty to file fresh suit, are stated in paragraph 4 and 5 of the application, which read thus:

“4) That, prior to passing the order by Tahasildar Saud Khan and Shoeb Khan (who are the L.R of Abdul Jamil Khan Ahmad Khan) and misrepresented him that if the plaintiff would execute sale deed they would support him for correction of record of Gat No.4911 and accordingly one document of mutual agreement was prepared on 29/2/2019 amongst them. Thereafter on as per mutual understanding nominal sale deed was prepared on 5/3/2019 without any consideration. The said

sale deed is shown, bogus and void document hence the plaintiff wants to challenge the same.

5) That, now the L.R's of Abdul Hamid Khan and Abdul Jamil Khan conspired to ousted the plaintiff from the suit land and claiming that neither the plaintiff is owner of Gat No.47/2 or Gat No.4311 (suit land). The plaintiff in present suit would not get entire relief required for proper adjudication of issues. The plaintiff wants to file separate suit for getting declaration of right and injunction by joining all the L.R's of original owner. Hence considering the above submission the plaintiff may be permitted to withdraw this suit with liberty to file fresh suit. ..."

7. The said application was opposed by the petitioner on the following grounds:

"1. The application filed by the plaintiff for withdrawal of suit with liberty to file fresh suit are matter of pleadings and evidence. The plaintiff has produced the pleadings in the suit which he intends to withdraw. The defendant has already filed detailed written statement in the same.

2. The grounds stated for liberty to file fresh suit are not tenable in law. The plaintiff ought to have sought consequential relief in the present suit is barred under O.II R.2.

3. It is therefore, submitted that no justified or legal grounds is made out to grant liberty to file fresh. The application for liberty to file fresh suit cannot be granted and to that extent the application be rejected."

8. The learned trial Court allowed the application Exh.25 by recording the reasons, which are as follow:

"5. After perusal of record it appears that, the plaintiff want to withdraw the present suit with liberty to file fresh suit. It appears that if the application is allowed no prejudice will be

caused to other side. In view of Order XXII Rule 3(b) of the Code of Civil procedure, 1908, it appears that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of the suit and it appears just and proper to allow the plaintiff to withdraw the present suit with liberty to institute fresh suit. The Court is satisfied with the grounds mentioned by the plaintiff. To compensate the defendant it appears proper to impose the costs on the plaintiff of Rs.500/- and pay to the defendant. Hence, the order.”

The said order dated 26.04.2022 is the subject matter of challenge in this writ petition.

9. The learned counsel for the petitioner submits that in absence of any formal defects or any sufficient grounds shown in the application, permission to withdraw the suit cannot be granted. For this purpose, he has placed reliance on the judgment of the Hon’ble Supreme Court of India in the case of *V. Rajendran And Another Vs. Annasamy Pandian (Dead) Through Legal Representatives Karthyayani Natchiar*¹. He has also placed reliance on the judgments of the Co-ordinate Bench of this Court in the cases of *Rajaram v. Baliram*² and *Babybai w/o Skharam Pardeshi and another Vs. Ganesh s/o Ashram Sawant*³.

1 2017 AIR SC 685

2 2006 (2) Mh. L.J. 693

3 2013(6) Mh.L.J. 328

10. The learned counsel for the respondent submits that sufficient grounds were stated in the application and since the plaintiff wants to raise challenge to a sale deed and join the legal heirs of the original owner to the suit, it amounts to formal defect and accordingly, the learned trial Court has rightly allowed to withdraw the suit with liberty to file fresh suit.

11. The learned counsel for the respondent further submits that there is no illegality committed by the trial Court. Accordingly, she prays for dismissal of the present writ petition.

12. In light of rival contentions of the parties, I have perused the record and the impugned order.

13. The Hon'ble Supreme Court of India in the case of *V. Rajendran And Another* (supra), has held thus:

"10. In K.S. Bhoopathy and Ors. v. Kokila and Ors. (2000) 5 SCC 458, it has been held that it is the duty of the Court to be satisfied about the existence of "formal defect" or "sufficient grounds" before granting permission to withdraw the suit with liberty to file a fresh suit under the same cause of action. Though, liberty may lie with the plaintiff in a suit to withdraw the suit at any time after the institution of suit on establishing the "formal defect" or "sufficient grounds", such right cannot be considered to be so absolute as to permit or encourage abuse of

process of Court. The fact that the plaintiff is entitled to abandon or withdraw the suit or part of the claim by itself, is no licence to the plaintiff to claim or to do so to the detriment of legitimate right of the defendant. When an application is filed under Order XXIII Rule 1(3) CPC, the Court must be satisfied about the "formal defect" or "sufficient grounds". "Formal defect" is a defect of form prescribed by the Rules of procedure such as, want of notice under Section 80 CPC, improper valuation of the suit, insufficient court fee, confusion regarding identification of the suit property, misjoinder of parties, failure to disclose a cause of action etc. "Formal defect" must be given a liberal meaning which connotes various kinds of defects not affecting the merits of the plea raised by either of the parties.

11. In terms of Order XXIII Rule 1(3) (b) where the court is satisfied that there are sufficient grounds for allowing the plaintiff to institute a fresh suit, the Court may permit the plaintiff to withdraw the suit. In interpretation of the word "sufficient grounds", there are two views: - One view is that these grounds in clause (b) must be "ejusdem generis" with those in clause (a), that is, it must be of the same nature as the ground in clause (a) that is formal defect or at least analogous to them; and the other view was that the words "other sufficient grounds" in clause(b) should be read independent of the words a 'formal defect' and clause (a). Court has been given a wider discretion to allow withdrawal from suit in the interest of justice in cases where such a prayer is not covered by clause (a). Since in the present case, we are only concerned with "formal defect" envisaged under clause (a) of Rule (1) sub-rule (3), we choose not to elaborate any further on the ground contemplated under clause (b) that is "sufficient grounds". "

14. The Co-ordinate Bench of this Court in the case of *Rajaram* (supra), has held thus:

"6.In AIR 1956 Bombay 632, Tarachand v. Gaibihaji, Hon'ble Shri Gajendragadkar J. (as he then was) held that the non-joinder of parties or failure to make proper claim is not a formal

defect. The Appellate Judge was told that as the plaintiff had failed to attack the mortgage decree and parties to the mortgage were not impleaded in the suit, there was formal defect and on that ground the suit was allowed to be withdrawn with liberty under Order 23 Rule 1. It has been observed that plaintiff was fighting against auction purchaser who was trying to recover possession and plaintiff's purchase was affected by lis pendens and the suit filed was with full knowledge that the auction purchaser was seeking to enforce his rights as such, and still no allegations were made in plaint that mortgage decree was not binding upon him and no relief was claimed in that behalf. It is observed by this Court that failure to make this claim and failure to implead parties in respect of the claim cannot be regarded as formal defect which is fatal to the suit. The appeal was therefore restored to the file of Appellate Court and plaintiff was given leave to apply for amendment in plaint."

15. The Co-ordinate Bench of this Court in the case of *Babybai* (supra), has held thus:

"14. The Supreme Court in the case of K.S. Bhoopathy and Others Vs. Kokila and Others, (2005) 5 SCC 458 held that, the provision in Order 23 Rule 1 is an exception to the common law principle of non-suit, sub rule (1) grants an absolute liberty to the plaintiff, whereas under sub rule (3) the Court has the discretion to grant leave or not. It is further held that, discretion of the Court is to be exercised with caution and circumspection. All aspects of the matter are to be examined, including the desirability or otherwise of permitting a fresh round of litigation on a cause of action which has already been agitated.

In Case of Somalaraju Vs. Samanthu Sivaji Ganesh, AIR 2009 A.P. 12, it is held that, expression 'formal defect' in the normal parlance connotes defects of various kinds not affecting the merits of the case. Thus, a 'formal defect' is a defect of form unrelated to the claim of the plaintiff on merits. The High Court, Bombay in the case of Tarachand Bapuchand

Vs. Gaibihaji Ahmed, AIR 1956 Bombay 632 while interpreting provisions of Order 23 held that, failure to make a property claim and failure to implead parties in respect of the claim cannot be properly regarded as a 'formal defect', which is fatal to the suit within the meaning of Order 23 Rule 1 of the Code of Civil Procedure.

This Court in the case of Rajaram Jairam Raut (supra) held that, merely because no prejudice will be caused to the defendant is not a ground for allowing withdrawal of the suit. In the said judgment in paragraph-4 this Court has adverted to the judgment of the Supreme Court in the case of K.S. Bhoopathy (supra) and observed that, it is duty of the Court to feel satisfied that, there exist proper grounds and reasons for granting permission for withdrawal of the suit with leave to file fresh suit by the plaintiffs and in such a matter the statutory mandate is not complied by merely stating that, grant of permission will not prejudice the defendants.”

16. Thus, from the above referred authorities, it is evident that while granting permission for withdrawal of the suit with leave to file fresh suit, statutory mandates must be complied with and in absence of compliance of such statutory mandates, it is not sufficient to say that, no prejudice would be caused to the other side by withdrawing the suit with liberty to file fresh suit. It is also evident that not raising a challenge or not joining parties cannot be considered as formal defects.

17. In the above referred backdrop, it is evident that the learned trial Court without recording any observation on the mandate of

statute i.e. without recording the existence of pre-requisites i.e. formal defect or sufficient ground before granting permission to withdraw the suit with liberty to file a fresh suit under the same cause of caution, allowed the application. The learned trial Court further failed to consider the case of the petitioner to oppose the said application. The learned trial Court without recording any reason for rejection of any of the submissions of the petitioner, allowed the application.

18. In the circumstances, as there is no compliance of statutory mandates of Order XXIII Rule 3(b) of the CPC, the learned trial Court has committed error in allowing the application for withdrawal of the suit with liberty to file fresh suit.

19. In that view of the matter, the impugned order needs to be quashed and set aside. Accordingly, I pass the following order:

- (i) The writ petition is **allowed**.
- (ii) The order dated 26.04.2022 passed by 3rd Jt. Civil Judge Junior Division, Bhandara in Regular Civil Suit No.121/2020, is hereby quashed and set aside and consequently, the application (Exh.25) for withdrawal of suit with liberty to file fresh suit, is hereby rejected.

Rule accordingly. No costs.

[ANIL S. KILOR, J.]