



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

WRIT PETITION NO. 14806 OF 2023

M/s. Lahoti Proeptries,
Registered Partnership Firm
Through its Partner
Ajay s/o Shriniwasji Lahoti,
Age 54 years, Occu.Business,
R/o Lahoti Compound,
Dayaram Road, Latur
Dist. Latur.

...Petitioner
(Original Defendant)

~ versus ~

Gangabhishan s/o Madangopal Bhutada
Age 53 years, Occu. Business,
R/o Dwarkanagari, Lahoti Compound,
Dayaran Road, Latur, Dist.Latur.

...Respondent
(Original plaintiff)

APPEARANCE :

Advocate for the Petitioner : Mr. Swapnil S. Rathi
Advocate for Respondent : Mr. Zabiullah Z. Hussaini

CORAM : ARUN R. PEDNEKER, J.

Reserved Date : 19/03/2024
Pronouncement Date : 08/05/2024

JUDGMENT :

1. Rule. Rule made returnable. With consent of the parties, heard finally.
2. By way of the present petition, the petitioner is challenging the impugned order dated 21/10/2023, passed by the Civil Judge, Senior Division, Latur below Exhibit 31 in Special Civil Suit No.482/2022, whereby the plaintiff /respondent herein was allowed to withdraw the civil suit with liberty to file fresh suit on the same cause of action.

3. Brief facts leading in filing of the petition are summarized as under :-

The respondent /plaintiff filed Special Civil Suit No.482/2022 seeking recovery of possession of landed property from the defendant/ petitioner herein and alternatively for a decree of recovery of amount of Rs.2,61,52,000/- with future interest @ of 15% per annum. It is contended by the plaintiff in the suit that he along with other relatives are owners and possessors of the different portions of lands situated at village Khadgaon, District Latur admeasuring 4 H 96 R. It is further contended in the plaint that the partners of original defendant firm/ present petitioner had approached the land owners with request to enter into development agreement in respect of the suit lands. It is the case of the original plaintiff that he along with other owners had executed development agreement in favour of petitioner firm and they have received earnest amount of Rs.3,20,00,000/-. It is further contended that the actual work of development of land could not materialise, as such, petitioner had decided to purchase entire land for valuable consideration and the earnest amount paid would be adjusted in the sale transaction. Thereafter a registered sale deed was executed on 29/11/2017 in favour of the petitioner/defendant, however, the cheques issued in consideration for amount were dishonoured. As such, the plaintiff prayed for cancellation of the sale deeds and possession of the property. The plaintiff further prayed

for recovery of amount of Rs.2,61,52,000/- with future interest in alternatively.

4. The said suit was contested by filing a written statement. In the written statement, the defendant raised various objection to the suit. In view of the objections raised by the defendant, the plaintiff filed application at Exhibit 25 seeking permission to withdraw the pending suit and to file a fresh suit against the same defendant on the same cause of action. The said application was contested and was rejected. Thereafter, another application Exhibit 31 was filed for similar relief for withdrawal of Special Civil Suit No.482/2022 with liberty to file a fresh suit against the same defendant on the same cause of action. The said application was also contested by the defendant, however, same is allowed by the Trial Court, against which the present writ petition is filed.

5. The learned Advocate for the petitioner contends that once the application Exhibit 25 was rejected, a second application Exhibit 31 could not have been allowed. It is further contended that there are no formal defects in the suit and no sufficient grounds were made out as required under Order 23 Rule 1 of the Code of Civil Procedure so as to enable the plaintiff to file the suit on the same cause of action.

6. The learned Advocate for the petitioner relies up on the Judgment of

this Court in ***Veerbhadrappa s/o Mahadappa Rachatte vs. Mahalingappa s/o Gurlingappa Karanje, reported in 2009 (4) Mh.L.J. 108***, and contends that the plaintiff has to disclose nature of formal defects in application, and if the application remain silent on this material point, such application cannot be entertained by the Court.

7. The learned Advocate for the petitioner relies upon the Judgment in ***Rajaram s/o Jairam Raut vs. Baliram s/o Laxman Raut, reported in 2006 (2) Mh.L.J., 693***, and contends that all defects are such that they can be cured by plaintiff by moving appropriate amendment application, and that the permission for withdrawal of suit with liberty to file a fresh suit on the same cause of action, cannot be granted.

8. The learned Advocate for the petitioner relies up on the Judgment in ***K. S. Bhoopathy and others vs. Kokila and others, reported in AIR 2000 Supreme Court 2132***, to contend that merely stating that the grant of permission would not prejudice defendants is not compliance of the statutory mandate of Order 23 Rule 1 (3) of the Code of Civil procedure.

9. Further the learned Advocate for the petitioner relies upon the Judgment in case of ***Babybai w/o Sakharam Pardeshi and Another vs. Ganesh s/o Asaram Sawant, reported in 2013(6) Mh.L.J. 328***,

wherein it is held that the 'formal defect' meaning defect which does not affect the merits of the case and the defects pointed out in that case cannot be considered as a 'formal defect'.

10. Per contra, the learned Advocate appearing for the respondent submits that the earlier application which was filed at Exhibit 25 was dismissed by the Court as in the said application it was pleaded that for some technical reason the plaintiff do not want to proceed further with the suit, and as such, he wants to withdraw the civil suit with liberty to prefer fresh suit on the same cause of action. The said application was rejected by holding that the technical reasons are not disclosed seeking withdrawal of the suit and unless reasons are specified, plaintiff's claim cannot be accepted, considering the provision of Order 23 Rule 1 (3) of CPC, application filed by the plaintiff at Exhibit 25 was rejected.

11. The learned Advocate for respondent further submits that since application Exhibit 25 was rejected on technical ground, fresh application was moved at Exhibit 31 giving entire grounds for withdrawal of the suit. In the application at Exhibit 31, paragraphs No.4, 5 and 8 reads as under :-

"4] That the defendant has raised the number of formal defect in their said written statement (Exh.15). The defects raised in the said written statement are as under : -

a) Non disclosure and production of the registration

particulars of the partnership firm.

b) Failed to make parties defendants to all the partners of the firm who are the necessary parties.

c) The property Gat No.4/5 has been wrongly described by the plaintiff."

"5] The plaintiff further submits that subject matter suit property forms a part and parcel of the sale deed dated 27/11/2017, which is duly registered with the office of the Sub Registrar, Latur at Sr. No.4588/2017. The said sale deed has been made, executed and presented by the plaintiff and other four co-owner of the subject matter property in favour of the defendant firm M/s. Lahoti Properties Latur and its foru partners. The subject matter properties of the sale deed consist of sanctioned layout plots, which are being amalgamated by the individual plot holders belongs to plaintiff and four others."

"8] The formal defect exist in the present suit are as under :-

a) Non production of Registration Certificate of the defendant firm under the Indian Partnership Act.

b) Non-joinder of the all partners of the firm of the defendant firm at the material time of sale deed dated 27.11.2017 viz (a) Mr. Rajesh Shrinivasji Lahoti (b) Mr. Kamalnayan Shrinivasji Lahtoi (c) Mr. Anand Shrinivasji Lahoti and so also the present partners of the said firm.

c) Non-joinder of other co-owners of the properties/ vendors of the subject matter sale deed dated 27.11.2017 viz.(a) Mr. Shrikant Dwarkadasji Bhutada, (b) Mr. Shriram

Dwarkadasji Bhutada, (c) Mr. Balkishan Dwarkadasji Bhutada, (d) Smt. Ushabai Damodarji Bhutada."

12. The learned Advocate appearing for the respondent further submits that in the subsequent application Exhibit 31, the petitioner has made out a detailed case for withdrawal of suit pointing out 'formal defects' and prayed for withdrawal of the suit for filing fresh suit for the same cause of action. He further submits that the Trial Court has correctly appreciated the facts and the law on the subject and has particularly observed that wrong description of the property is a 'formal defect' within the meaning of Order 23 Rule 1(3) of the CPC. According to the plaintiff, he has claimed possession of the suit bearing land Gut No.4/5 admeasuring 1 H 24 R, however, the said property has sanctioned lay out and the nature of the property changed and details regarding the plots are required to be brought on record. Also considering the hardship caused to the defendant cost of Rs.2000/- is imposed and the permission for withdrawal of the suit is granted with liberty to file fresh suit on same cause of action.

13. Having considered the rival submissions, the issue that arises for consideration is, whether the second application at Exhibit 31 was maintainable on the face of rejection of application at Exhibit 25 under Order 23 Rule 1 (3) of CPC. The second issue arises for consideration is that, whether in the fact the situation the Court was justified in granting

permission to withdraw the suit with liberty to file a fresh suit on the same cause of action.

14. Perusal of order passed at Exhibit 25, paragraph No.9 would indicate that the application is dismissed because the plaintiff has not mentioned sufficient grounds for allowing him to withdraw the suit and permission to file a fresh suit on the same cause of action. As such, the statutory mandate is not complied by the plaintiff. The Trial Court at paragraph No.9 of the order dated 21/07/2023 has observed as under : -

"09. In the present case in hand the plaintiff has sought withdrawal of the suit on technical reasons, however, plaintiff has not explained those reasons in the application. Therefore, in view of the observations in the ruling cited supra and in view of O.23 R.1 and 3 of the CPC, it becomes clear that plaintiff has not mentioned sufficient grounds for allowing him to withdraw the suit with permission to file fresh suit on same cause of action. Therefore, it is clear that no proper grounds and reasons for granting permission for withdrawal of the suit with permission to file fresh suit are given. As such, statutory mandate is not complied by the plaintiff."

15. Thus, the petitioner filed a fresh application giving the grounds of withdrawal of suit with liberty to file a fresh suit on the same cause of action. Therefore, it cannot be said that the second application giving the particulars and the grounds for withdrawal would be barred. The first application is dismissed on account of technical reason and not by

considering the merits of the ground that remain to be raised. As such, the second application cannot be said to be barred by principles of res judicata.

16. Relevant provision of C.P.C. required to be considered for decision of the application are noted below. Order 23 Rule 1 (1), (2) and (3) (a)(b) of the CPC are quoted below : -

"1. Withdrawal of suit or abandonment of part of claim .--

(1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim :

Provided that where the plaintiff is a minor or other person to whom the provisions contained in rules 1 to 14 of Chapter XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.

(2) An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person.

(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 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 of such suit or such part of the claim."

17. Order 23 Rule 1 (3) of the CPC provides 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 of such suit or such part of the claim.

18. This Court in case of **Babybai Sakharam Pardeshi** (Supra), at paragraph No.14 which considering Order 23 Rule (1) of CPC has observed as under : -

"14. The Supreme Court in the case of K.S. Bhoopathy and others vs. Kokila and others [(2005) 5 S.C.C. 458] held that, the provision in Order 23 Rule (1) is an exception to the common law principle of nonsuit, 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

[A.I.R. 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 Bapu Chand vs. Gaibihaji Ahmed [A.I.R. 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."

19. In the case of **Veerbhadrappa Mahadappa Rachatte** (Supra), Single Bench of this Court while interpreting the Order 23 Rule 1 (3)(a) of C.P.C. has observed that, the plaintiff to make out a ground seeking withdrawal of the suit for presenting a fresh suit on same cause of action, the plaintiff is required to disclose nature of formal defect in the application

and if the application remains silent on this material point, such an application cannot be entertained by the Court.

20. This Court in case of **Rajaram Jairam Raut** (Supra) has held that all the defects that could have been cured by plaintiff by moving appropriate amendment application, permission for withdrawal of suit with liberty to file fresh suit on same cause of action cannot be granted.

21. In case of **V Rajendran and Anr. vs. Annasamy Pandian (D) Thr. LRs. Karthyayani Natchiar, reported in AIR 2017 Supreme Court 685**, the Hon'ble Supreme Court considered Order 23 Rule 1 (3)(a) of the CPC and at paragraph No.9, 10 and 11 observed as under : -

"9. Order XXIII Rule 1(3) CPC lays down following grounds on which a Court may allow withdrawal of suit. It reads as under:

R.1. Withdrawal of suit or abandonment of part of claim.-

(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 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 of such suit or such part of the claim.

As per Order XXIII Rule 1(3) CPC, suit may only be withdrawn

with permission to bring a fresh suit when the Court is satisfied that the suit must fail for reason of some formal defect or that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit. The power to allow withdrawal of a suit is discretionary. In the application, the plaintiff must make out a case in terms of Order XXIII Rule 1 (3) (a) or (b) CPC and must ask for leave. The Court can allow the application filed under Order XXIII Rule 1 (3) CPC for withdrawal of the suit with liberty to bring a fresh suit only if the condition in either of the clauses (a) or (b) that is, existence of a "formal defect" or "sufficient grounds". The principle under Order XXIII Rule 1 (3) CPC is founded on public policy to prevent institution of suit again and again on the same cause of action."

"10. In K.S. Bhoopathy and Ors. vs. Kokila and Ors. (2000) 5 SCC 458 : (AIR 2000 SC 2132), 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, mis-joinder 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'."

22. It is pertinent to note that in the same Judgment of **V Rajendran** (Supra) at paragraph No.12, the Supreme Court considered the aspect of 'formal defects' that the plaintiff therein filed a suit describing the suit property as Survey No.192/9 but the respondents are said to have transferred the patta for the suit property settling as Survey No.192/14. The defect in survey number of the suit property goes to the very core of the subject-matter of the suit and the entire proceedings would be fruitless if the decree holder is not able to get the decree executed successfully, and thus, the said defect will constitute to be a 'formal defect' within the meaning of Order XXIII Rule 1 (3)(a) CPC. That apart the respondents are said to have executed an Inam Settlement Deed on 21/09/2012, in favour of their son Aranmanai Pandian, mentioning th suit property as Survey No.192/14. The Supreme Court held that they were convinced that the case of the appellant would fall under clause (a) of Rule 1(3) of Order 23 of CPC. Thus, uphold the order of the Trial Court permitting to withdraw the suit and to file fresh suit on same cause of action.

23. It is also required to be noted that the Hon'ble Supreme Court in case of **V. Rajendran and Anr.** (Supra) held that the 'formal defect' is a defect of form prescribed by the Rules of procedure, for example, want of notice under Section 80 CPC, improper valuation of the suit, insufficient court fee, confusion regarding identification of the suit property, mis-

joinder of parties, failure to disclose a cause of action etc. The Supreme Court has further observed that the '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.

24. In the instant case, defects are pointed out by the defendant in written statement. In Paragraph No.4, 5 and 8 of the application filed by the plaintiff, it is pointed out that the defendant has raised number of formal defects in their written statement are as regards non disclosure and production of the registration certificate, particulars of the partnership firm, failed to make party defendants to all the partners of the firm who are the necessary parties, and the property Gat No.4/5 has been wrongly described by the plaintiff. The formal defects which are pointed out at paragraph No.8 are, non production of Registration Certificate of the defendant firm under the Indian Partnership Act, non-joinder of the all partners of the firm of the defendant firm at the material time of sale deed dated 27/11/2017, non-joinder of other co-owners of the properties/vendors of the subject matter sale deed dated 27/11/2017.

25. In the instant case, the description of the suit property is erroneous and the defect is formal in nature and can defeat the suit and giving liberally interpretation to the concept of 'formal defect', it cannot be said that the Trial Court has exercised its discretion erroneously. In the instant

case, the withdrawal of application is filed at a very early stage and it cannot be said that the plaintiff is abusing the process of Court and no prejudice will be caused to the defendant although that alone is not the ground but one of the factors that could be taken into consideration.

26. The the law on the subject matter is that under Order 23 Rule 1 (3) (a) of CPC, if there is a 'formal defect' in the suit, withdrawal of suit is permissible with liberty to file a fresh suit on the same cause of action. The defect pointed should not be pertaining to the merits of the matter and if there is an adjudication on the merits on the defects pointed out and the suit could be defeated on the adjudication of the defects, such a defect cannot be said to be a 'formal defect'. However, even on the adjudication of the defects pointed out in the written statement and answered in favour of the plaintiff, the suit could be still be defeated for the reasons of some 'formal defect' in the suit, in such a situation, the plaintiff is permitted to withdraw the suit and to file a fresh suit, on same cause of action.

27. In the instant case, it was pointed out to the Trial Court that there is a defect in the description of the suit property on account of subsequent sub-divisions of the land and there is a possibility that the suit may be frustrated on that count. The other defects pointed out were such that it could have been cured by the plaintiff.

28. The Trial Court has passed the order under Order 23 Rule 1 (3) (a) of CPC and this Court would not to interfere in the impugned order of the trial Court for the following reasons :-

- (1) The defect relied upon by the Trial Court as regards the description of the suit property is a 'formal defect' and the same has occurred on account of further sub-divisions of the property and on account of plotting of the suit property.
- (2) The other defects pointed out to the Trial Court though curable but the 'formal defect' is pointed out as regards description of the suit property.
- (3) The relief under Order 23 Rule 1 (3) of CPC is a discretionary relief and the prayer being made at the first possible opportunity after the written statement was filed, the Trial Court in exercise its discretion has permitted the withdrawal of the suit and granted permission to file fresh suit on the same cause of action. The discretion exercised by the Trial Court cannot be said to be unreasonable. More so, when no prejudice is caused to the defendant and the cost is imposed on the plaintiff for the inconvenience caused to the defendants.
- (4) The application for withdrawal of the suit with liberty to file a fresh suit on the same cause of action cannot be said to be an abuse of process of law as the plaintiff has not been negligent in applying for withdrawal of the suit and filing the same on the fresh cause of action as the application is filed immediately after filing of the written statement.

For all these aforesaid reasons, I deem it appropriate not to entertain the present writ petition and not interfere in the order passed by

the Trial Court.

29. Thus, it cannot be said that there is grave injustice or that no cause is made out to withdraw the suit to file a fresh suit on the same cause of action. No case is made out to interfere in the order passed. The writ petition is dismissed. Rule is discharged.

(ARUN R. PEDNEKER, J.)

vj gawade/-.