



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

WRIT PETITION NO. 6667 OF 2022

- 1] Ashruba s/o Vitthal Najan,
Age: 56 years, Occupation: Agriculture,
R/o. Palwan, Tal. & Dist. Beed.
- 2] Babasaheb s/o Kashinath Dukare,
Age: 56 years, Occupation: Agriculture,
R/o. Palwan, Tal. & Dist. Beed.
- 3] Anna s/o Kashinath Dukare,
Age: 51 years, Occupation: Agriculture,
R/o. Palwan, Tal. & Dist. Beed.
- 4] Rukhminbai w/o Ashruba Jadhav,
Age: 56 years, Occupation: Housewife,
R/o. Palwan, Tal. & Dist. Beed.
- 5] Parubai w/o Navnath Ghongade,
Age: 46 years, Occupation: Housewife,
R/o. Rui Dhanora, Tal. Georai, Dist. Beed.

...Petitioners..
[Original defendants]

VERSUS

- 1] Tukaram s/o Limbaji Maske,
Age: 75 years, Occupation: Agriculture,
R/o. Palwan, Tal. & Dist. Beed.
- 2] Ashruba s/o Baburao Maske (Died)
 - 2-A] Sumanbai w/o Ashruba Maske,
Age: 76 years, Occupation: Housewife,
R/o. Palwan, Tq. & Dist. Beed.
 - 2-B] Sakharam s/o Ashruba Maske,
Age: 44 years, Occupation: Agriculture,
R/o. Palwan, Tq. & Dist. Beed.
 - 2-C] Shobha w/o Vaijnath Chavan,
Age: 49 years, Occupation: Housewife,
R/o. Imampur, Tq. & Dist. Beed.

- 2-D] Bhagirathi w/o Aarun Chavan,
Age: 47 years, Occupation: Housewife,
R/o. Imampur, Tq. & Dist. Beed.
- 3] Sau. Kusumbai w/o Vaijnath Ghadge,
Age: 59 years, Occupation: Housewife,
R/o. Palwan, Tal. & Dist. Beed.
- 4] Bharat s/o Ramrao Maske,
Age: 53 years, Occupation: Agriculture,
R/o. Palwan, Tq. & Dist. Beed.
- 5] Sau. Sunanda w/o Anil Lahane,
Age: 51 years, Occupation: Housewife,
R/o. Palwan, Tq. & Dist. Beed.
- 6] Shravan s/o Ramrao Maske,
Age: 49 years, Occupation: Agriculture,
R/o. Palwan, Tq. & Dist. Beed.
- 7] Sominath s/o Ramrao Maske,
Age: 47 years, Occupation: Agriculture,
R/o. Palwan, Tq. & Dist. Beed.
- 8] Smt. Mangal w/o Chintaman Maske,
Age: 53 years, Occupation: Housewife,
R/o. Palwan, Tq. & Dist. Beed.
- 9] Sau. Sadhana w/o Rajendra Wagh,
Age: 52 years, Occupation: Agriculture,
R/o. Palwan, Tq. & Dist. Beed.
- 10] Suhas s/o Chintaman Maske,
Age: 29 years, Occupation: Agriculture,
R/o. Palwan, Tq. & Dist. Beed.
- 11] Smt. Shevantabai w/o Maroti Maske,
Age: 81 years, Occupation: Agriculture,
R/o. Palwan, Tq. & Dist. Beed.
- 12] Sau. Kamalbai Ashruba Talekar,
Age: 61 years, Occupation: Agriculture,
R/o. Palwan, Tq. & Dist. Beed.
- 13] Sau. Mandabai w/o Uddhav Ghadge,

Age: 59 years, Occupation: Agriculture,
R/o. Palwan, Tq. & Dist. Beed.

- 14] Shamsundar s/o Maroti Maske,
Age: 57 years, Occupation: Agriculture,
R/o. Palwan, Tq. & Dist. Beed.
- 15] Sangita w/o Raosaheb Maske,
Age: 46 years, Occupation: Agriculture,
R/o. Palwan, Tq. & Dist. Beed.
- 16] Ananta s/o Raosaheb Maske,
Age: 22 years, Occupation: Education,
R/o. Palwan, Tq. & Dist. Beed.
- 17] Vrushali d/o Raosaheb Maske,
Age: 20 years, Occupation: Education,
R/o. Palwan, Tq. & Dist. Beed.
- 18] Sonali d/o Raosaheb Maske,
Age: 18 years, Occupation: Education,
R/o. Palwan, Tq. & Dist. Beed.

....Respondents
[Original Plaintiffs]

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Mr. S. E. Shekade – Advocate for the Petitioner

Mr. R. D. Gaikwad h/f Mr. S. G. Kawade – Advocate for Respondent Nos.
1 to 18

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CORAM : NEERAJ P. DHOTE, J.

RESERVED ON : 19TH NOVEMBER, 2025

PRONOUNCED ON : 10TH DECEMBER, 2025

FINAL ORDER: -

1. By the present Writ Petition under Article 227 of the Constitution of India, the Petitioners herein, who are the Original Defendants in the Regular Civil Suit No. 470 of 2010, have raised challenge to the order dated 24.05.2022, passed by the learned 2nd Jt Civil Judge Junior Division, Beed, in the said suit allowing the

application below Exh. 76 filed by the Respondents herein, who are the Original Plaintiffs in the said suit. By the impugned order, the Plaintiffs are allowed to withdraw the suit with liberty to file afresh on the same cause of action in respect of the same subject matter by removing the defects in pleadings.

2. Heard the learned Advocate for the Petitioners and the learned Advocate for the Respondents. With their assistance, gone through the papers on record.

3. The Respondents instituted the aforesaid Suit for declaration of ownership and injunction in respect of the suit property mentioned in the Plaint. As per the Plaintiffs, there were two survey numbers i.e. 544/411 and 547/414, *ad measuring* 4 Hectare 37 *Are* and 3 Hectare 98 *Are*, respectively. Prior to the consolidation scheme, the original survey number of the said survey numbers was 209. At that point of time, the survey number 209 was divided into two parts as 209/1 and 209/2, *ad measuring* 19 Acre 35 Gunthas and 11 Acre 36 Gunthas, respectively. The dispute was in respect of Survey No. 209/1. The father of the Plaintiffs was illiterate and at the time of registration of the Sale Deed, wrong area came to be included in the Sale Deed and by taking disadvantage of the same, the Petitioners mutated their names on the entire portion. The same was revealed on 28.10.2010, when the

Petitioners advertised the sale of the land in newspaper. By raising the objection, the aforesaid suit was filed.

4. The Plaintiffs amended the suit twice. On various dates, the learned Trial Court directed the Plaintiffs to adduce the evidence. However, they failed to do so. In the meanwhile, the Plaintiffs filed the aforesaid Application below Exh. 76 under Order 23 Rule 1 of the Code of Civil Procedure, for permission to withdraw the suit with liberty to file afresh by contending that at the time of filing the suit, the Plaintiffs, who are illiterate, had no knowledge about the exact area of survey numbers and the gut numbers and, therefore, could not supply the information to the Advocate. They were unable to tell the exact area from the gut numbers and survey numbers and it was not amendable. The said Application was opposed by the Petitioners by way of Reply by contending that the Application does not satisfy the conditions of the provision of Order 23 Rule 3 (b), and it was liable to be rejected. The learned Trial Court by the impugned order allowed the Application.

5. It is submitted by the learned Advocate for the Petitioners that, without there being any formal defect in the Suit, the Application was allowed by the learned Trial Court. The Plaintiffs had amended the Plaint thrice, and on the same ground the Application for withdrawal of the suit was filed. Though another suit is filed and the Petitioners joined

the same by filing written statement, the challenge to the impugned order persists. The Writ Petition be allowed by setting aside the impugned order. In support of his contention, he cited the judgment in *V. Rajendran and Another Versus Annasamy Pandian (Dead) through Legal Representatives Karthyayani Natchiar, (2017) 5 SCC 63, and Ramrao Bhagwantrao Inamdar and others Versus Babu Appanna Samaga and others, 1939 SCC OnLine Bom 57.*

6. It is submitted by the learned Advocate for the Respondents that, the defect in the Plaint was in respect of the gut number and the area of the gut numbers, which was the formal defect. The second Suit was filed in the year 2022 and the Petitioners have filed their Written Statement. Issues were framed and trial had commenced. In reply to the Application, the Petitioners have indicated to allow the Application with costs. The learned Trial Court has rightly passed the impugned order and the Writ Petition be dismissed.

7. In V. Rajendran (supra), the provisions of Order 23 Rule 1 of CPC in respect of withdrawal of the Suit is considered. In paragraph no. 9 and 10 thereof, it is observed as under : -

9. Order 23 Rule 1(3) CPC lays down following grounds on which a Court may allow withdrawal of suit. It reads as under:
“1. Withdrawal of suit or abandonment of part of claim.- (1)-(2)

(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.”

(emphasis supplied)

As per Order 23 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, 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.”*

8. In Ramrao (supra), it is observed that the expression ‘formal defect’ must be given a wide and liberal meaning, and must be deemed to connote every kind of defect which does not affect the merits of the case, whether the defect be fatal to the suit or not.

9. There is no dispute that the Application below Exh. 76 was filed by the Respondents under Order 23 Rule 1 of the CPC. The Petitioners had opposed the said Application by filing Reply at Exh. 82. Perusal of the Reply show that though the said Application was opposed, in paragraph no. 3 of the Reply, it was stated that the financial condition of the Petitioners' was weak and they had incurred expenditure to oppose the suit and in case the Court allows the Applications, the costs of Rs. 5000/- to each Defendant, be ordered. This indicate that there was no serious objection to the Application filed by the Plaintiffs. Be that as it may.

10. The impugned order shows that the learned Trial Court considered the Application and the provisions of the aforesaid Order 23 Rule 1 of the CPC, and reached to the conclusion that, the defect pointed out by the Plaintiffs in the Application was the formal defect and the Application was allowed by imposing costs of Rs. 5,000/-. The Plaintiffs are permitted to withdraw the suit with liberty to file afresh on the same cause of action in respect of the same subject matter by removing the defects in the pleadings. This indicate that the learned Trial Court used its discretion after being satisfied that the defect, which was in respect of the area of the suit property, was formal. Examining the impugned order in the light of the above referred settled legal position, the same cannot be faulted.

11. In addition to the above, admittedly, the second suit appears to have been filed by the Plaintiffs/Respondents herein in the year 2022, which is opposed by the Petitioners/Orig. Defendants by filing the written statement and the trial has commenced.

12. In view of the above observations, no interference is called for in the impugned order and the Writ Petition fails. Hence, the following order: -

ORDER

[i] The Writ Petition stands dismissed.

[NEERAJ P. DHOTE]
JUDGE

SG Punde