



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 13215 OF 2024

Syed Shakeeluddin Syed Mainuddin And Others
VERSUS
Kamalbai Vishwanath Jadhav And Others

• Mr. V. P. Latange, Advocate for the Petitioners

CORAM : R.M. JOSHI, J
DATE : JANUARY 07, 2025

PER COURT :

1. This Petition takes exception to the order passed below Exh. 40 in RCS No 7/2013 whereby the application filed by the Plaintiff for withdrawal of the suit with permission to file fresh suit on the same cause of action came to be rejected.

2. Plaintiffs filed suit for perpetual injunction. They contend that by mistake claim of possession was also included therein. As there were contradictory prayers in the said plaint, an application was moved for amendment to the plaint this application came to be rejected by the learned Trial Court. There is no challenge to the said order by the Plaintiff. Thus, the said order has attained finality.

In the light of these facts, application Exh. 40 is moved for withdrawal of the suit with permission to file fresh suit for the same cause of action.

3. Defendants opposed the said application contending that the suit is filed in the year 2013 and that it is open for the Plaintiff not to press one of the contrary prayers. It is further claimed that this is not a formal defect in order to permit the filing of the fresh suit on the same cause of action.

4. Heard learned Counsel for the Petitioner.

5. Learned Trial Court while passing impugned order has observed that Plaintiff has filed suit for declaration of Bhadepatta made in favour of Defendants as null and void. He has also sought compensation, mense profit as well as perpetual injunction against Defendants not to object the possession of the Plaintiff. It is held that making incorrect prayer of possession is not a formal defect. Plaintiff's claim for injunction and mense profit are main prayers made therein.

6. The term 'formal defect' by its nature would be a defect which is formal in nature. The defect which affects merit of the case cannot be treated as formal defect. It is pertinent to note that the withdrawal of the suit with liberty to file fresh suit on the same cause of action cannot be permitted to enable the party to fill up lacuna, which is not intended by law. Herein this case, this Court finds no formal defect in the suit in order to seek withdrawal thereof with liberty to file fresh suit on same cause of action. This cannot be permitted to be done in the light of the fact that amendment application filed by the Plaintiff is dismissed and has attained finality. Moreover, filing of application for withdrawal of suit with liberty after period of 10 years from filing of suit, disentitles Plaintiff to seek liberty as sought.

7. This Court, therefore, finds no perversity in the findings recorded by the learned Trial Court about this being an attempt of Plaintiff to withdraw the suit to fill up lacuna, which is wholly impermissible in law.

8. In view of above discussion, Petition stands dismissed.

(R.M. JOSHI, J.)