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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIRCUIT BENCH AT KOLHAPUR
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.72 OF 2025

Deepak Anant Shelar & Ors.Applicants
Vs.
Raghunath Vishram Gurav & Ors.Respondents

Mr. Saurabh M. Railkar (Through VC) a/w. Mr. Rushikesh Patil & Vaishanawi R. Gaikwad for the Applicants.
Mr. Satyajeet A. Rajeshirke a/w. S.K. Vasekar & G.R. Kulkarni, for the Respondents.

CORAM : M.M. SATHAYE, J.

DATE : 4th FEBRUARY, 2026

P.C. :

1. By this Revision Application under Section 115 of the Civil Procedure Code, 1908 ('CPC' for short), the Plaintiffs are challenging order dated 05.09.2024 passed by the Civil Judge Junior Division, Rajapur below Ex. 132 in Regular Civil Suit No.27 of 2019. By the said impugned order, the Plaintiffs' application Ex. 132 for withdrawal of the suit with liberty to file fresh suit, has been rejected.

2. The Petitioners filed the said suit contending inter alia that they belong to a family which has ancestral right of participating in worship / rituals / *Utsav* of local village deities. It is contended that due to dispute in the family of the Petitioners, the *Utsav* was closed for a long time; however, in May 1993, compromise has taken place, which is witnessed by the villagers and *Utsav* has started again. It is contended that the Petitioners have right to participate as '*dwitiya*

mankari' and since the Respondents/Defendants were creating obstruction in the said right, the said suit is filed seeking perpetual injunction restraining the Respondents. The Petitioners carried out amendment in the plaint during the course of the proceedings.

3. The Respondents filed written statement contending inter alia as under. That the Petitioners have no locus to file such suit. That civil rights are not involved. The alleged right as '*dwitiya mankari*' is denied specifically.

4. Issues were framed and the Petitioners examined its first witness, who has been duly cross-examined.

5. At this stage, the Petitioners filed the said application Exh. 132 contending that there is a 'formal defect' in the plaint in as much as the declaration of rights are not sought and mere injunction without declaration of rights, will not be effective. The Petitioners therefore prayed for withdrawal of the suit with liberty to file fresh suit.

6. The Respondents filed reply and opposed the prayer. It is contended that the reason for not proceeding with the suit as it is, is not stated clearly. That the witness has already been examined who has given vital admissions. That the nature of formal defect is not explained. That the application is nothing but an effort to prolong the litigation. It is contended that the alleged defect in the plaint cannot be considered as a formal defect.

7. The learned Trial Judge has rejected the application under impugned order.

8. Mr. Railkar, learned counsel for the Petitioners submitted that absence of prayer of declaration itself is a formal defect and unless a declaration is sought, mere injunction will not serve the purpose. He submitted that it is the discretion of the Court and the term 'formal defect' is not defined and in the facts and circumstances of this case, permission needs to be granted for filing separate suit. He relied upon judgment of Hon'ble Supreme Court in the case of *V. Rajendran & Anr. Vs. Annasamy Pandian (D) Thr. LRs. [2017(6) ALL MR 490 (S.C.)]*. He submitted that in the said judgment the facts were similar in as much as the Trial Court had accepted the defect as 'formal defect' and had permitted withdrawal of the suit, which order was interfered by the High Court; however the Hon'ble Supreme Court, accepted the defect as formal defect and reinstated the said order of the Trial Court.

9. *Per contra*, Mr. Rajeshirke for the Respondents supported the impugned order by contending that the so called defect is not of formal nature. He contended that the Petitioners have failed in securing interim relief. Witness of the Petitioner has been examined who has given vital admissions. He submitted that omission on the part of the Petitioners not to pray for declaration, cannot be cured by calling it a formal defect. He further submitted that for many dates, the Petitioners are taking adjournment for proceeding with the evidence and the application Exh.132 is one more effort in prolonging the litigation. He submitted that judgment of the Hon'ble Supreme Court was on different facts.

10. I have considered rival submissions and perused the record.

11. At the outset, it is necessary to note that mere reading of the plaint indicates that the Plaintiffs are asserting a right to participate in the worship / rituals / *Utsav* of local village deities as '*dwitiya mankari*'. Simply put, it is a kind of right to perform rituals and participate in a particular sequence and at a particular serial number. The whole claim of the Petitioners is based on said right asserted. With such assertion, the Petitioners have chosen not to seek any declaration and continue with only prayer of perpetual injunction. The Respondents have specifically denied the right asserted by the Petitioners. The Petitioners then not only amended the plaint but have led evidence by examining a witness who has been cross-examined. As such, Trial has commenced.

12. In such circumstances, granting a permission to file fresh suit, will amount to taking away a valuable right accrued with the Respondents/Defendants to contend that the prayer which ought to have been made while filing the suit, is not made and it is omitted. Also admissions given by the Petitioners' witness, if any, will be nullified under the garb of permission to file fresh suit.

13. Order 23 Rule 1(3) of the CPC provides that where the Court is satisfied that the suit must fail by reason of a formal defect the Plaintiff can be given a permission to file fresh suite. Therefore, satisfaction of the Court is necessary and whether a particular defect is formal in nature depends on facts and circumstances of each case. It is for the Court to decide whether a particular defect is of formal nature or otherwise. It is the perception of the Petitioners that mere perpetual injunction will not suffice.

14. Viewed in the light of what is observed above, when the impugned order is perused, it is seen that the Trial Court has considered the provisions of Order 23 of Rule 1(3) of CPC and has considered that when the plaint was amended earlier, the Petitioners/Plaintiffs were aware about the objection and defence taken by the Defendants (including denial of Petitioners' right). The Trial Court has considered that the suit is already posted for trial with one witness examined. In such circumstances, the Trial Court has come to a conclusion that omission to claim declaration cannot be termed as a formal defect and therefore, permission is rejected.

15. In my view, the Trial Court has considered the facts and circumstances in proper perspective to come to the conclusion that the defect is not formal in nature. Discretion has been exercised by the Trial Court. In the facts and circumstances narrated above, it is not possible to arrive at a different conclusion and substitute the discretion.

16. In the judgment of **V. Rajendran (supra)**, it can be seen from paragraph No.12 of the said judgment that the suit property therein was transferred and defect was in the nature of defect in the survey number. In that context, it was held that the defect goes to the core and entire proceedings would be fruitless, if the decree holder is not able to get decree executed successful. In that context, the Court was convinced. The facts of the present case are squarely distinguishable. There is no dispute about the principle laid down by the Hon'ble Supreme Court that granting permission under Order 23, Rule 3 is a discretion of the Court. However, in the present case, the defect has

been found as not of formal nature. Therefore the said judgment will not advance the case of the Petitioners.

17. In any case, the learned Trial Judge has already clarified in paragraph 14 of the impugned order, that instead of withdrawing the suit, a prayer for amendment or modification or alternation prayer in the plaint can be made which can be decided independently in the facts and circumstances involved.

18. In that view of the matter, there is no apparent error or perversity in the impugned order. There is no jurisdictional error. This is not a fit case to interfere.

19. **The civil revision application is accordingly dismissed. No order as to costs.** It is however clarified that if an application for amendment is preferred by the Petitioners, the same shall be decided on its own merits, in accordance with law.

20. All concerned to act on duly authenticated or digitally signed copy of this order.

(M.M. SATHAYE, J.)