

**(2001) 03 BOM CK 0011**

**In the Bombay High Court**

**Case No : Writ Petition No's. 7396 to 7400 of 2000**

M.B. Development Corporation

APPELLANT

Vs

Manilal Patel and Co.

RESPONDENT

---

**Date of Decision : 07-03-2001**

**Acts Referred:**

**Citation :** (2001) 3 ALLMR 533 : (2001) 3 BOMLR 567 : (2001) 3 CivCC 473 :  
(2001) 3 MhLj 685

**Hon'ble Judges :** A.M. Khanwilkar, J

**Bench :** Single Bench

**Advocate :** R.S. Desai instructed by Rajesh Shah and Co, for the Appellant; R.D. Vora, for the Respondent

**Final Decision :** Allowed

---

## **Judgement**

A.M. Khanwilkar, J.—Rule. Rule returnable forthwith by consent. Mr. R.D. Vora waives notice for Respondents in all the matters.

2. All these petitions can be disposed of together as they involve common question.

3. Briefly stated, the Respondent company, which is stated to be a partnership firm, instituted suits in the Court of Small Causes Court at Bombay for a declaration that they are tenants in respect of the suit property. In response to the said suits the Petitioner-original Defendant filed reply raising objection that the suits filed by the Respondent were not maintainable since the same were filed by a firm which was admittedly dissolved prior to the institution of the said suit. In the context of the objection raised, Mr. Vishistha Manilal Patel, Who claims to be one of the partner of the said dissolved firm Respondent herein, filed Int. Notices praying for permission to withdraw the suits with liberty to file fresh suits for the same cause of action. The Court below made the said Int. Notices absolute and permitted withdrawal of the suits with liberty to file fresh suits on the same cause of action. This order was assailed by the Petitioner by way of

revision application before the Small Causes Court at Bombay. The revisional Court took the view that revision against the said order was not maintainable. Even on merits the revisional Court decided the matter against the Petitioner. The present petitions, therefore, assail not only the order passed by the revisional Court but also the order of the trial Court permitting withdrawal of the suits with liberty to file fresh suits on the same cause of action.

4. The learned Counsel for the Petitioner mainly contends that suits instituted by the dissolved firm were not maintainable in law and that such a defect is not a formal defect. According to him unless the defect is of a formal nature the Court has no option but to dismiss the suit. Reliance is placed on the provisions of Sub-rule (3) (a) of Rule (1) of the Order 23 of CPC in this behalf, The Counsel for the Respondent on the other hand contends that the defect was of a formal nature and in any case by granting such liberty no prejudice would be caused to the Petitioner and therefore no interference was warranted against the discretionary order passed by the Court below. The learned Counsel for the Respondent relies on *Beniram and Others Vs. Gaiind and Others*, . However, the said decision is not an authority on the proposition that the suit filed in the name of dead person or dissolved firm would be defect of a formal nature and not a substantive one.

5. Considering the rival submissions I have no hesitation in concluding that the suit filed in the name of a dead person or a firm which has already been dissolved before the institution of the suit cannot be said to be a formal defect; but unquestionably substantial one. Such a suit is not maintainable in law and ought to be dismissed at the threshold on that Count. It is wholly preposterous to argue that no prejudice would be caused to the Petitioner-original Defendant; and, therefore, to forbear from interfering with the order under challenge. The mandate of law is that it is the duty of the Court to be satisfied as to whether the defect is one of formal nature or otherwise. If the Court is satisfied that the defect is of a formal nature only then the Court is clothed with the power to grant liberty in terms of Rule (1) of order 23 of CPC Code. The only other situation in which the Court could have granted liberty to the Plaintiff to withdraw the suit and to file fresh suit on the same cause of action is when the Plaintiff makes out sufficient ground for allowing him to institute a fresh suit for the subject matter of a suit or part of a claim. However, in the present case, since the Plaintiff, in whose name the suit was filed was a non-existing person when the suit was instituted, therefore, the question of granting permission to some other entity or person other than the Plaintiff who had instituted the suit is not the purport of Sub Rule (3) (b) of Rule (1) of Order 23. In other words, the Court is clothed with the power to grant permission to withdraw the suit under this clause only in favour of the Plaintiff and not in favour of any other person. Whereas, application in the present case has been admittedly filed by Mr. Vishistha Manilal Patel who claims that he was the partner in the erstwhile firm and is also a partner in newly formed firm, albeit bearing the same name; and intends-to file fresh suit on the same cause of action. On the averments in the application it is evident that the fresh suit is to be filed by some other entity and

not the firm which had already instituted the suit as Plaintiff. To permit some other entity or person other than the Plaintiff to withdraw the suit with liberty to file a fresh suit on the same cause of action would be clearly opposed to public policy, for it would inevitably entail in abuse of process of law. It may be noted that the suit has been filed in the name of the firm. Therefore, merely because Mr. Vashistha Manilal Patel happens to be partner common in both firms is inconsequential. Even Mr. Vashistha M. Patel cannot be permitted to withdraw the suit in his individual capacity. Accordingly, in the present case neither sub Clause (a) or (b) of Sub-rule (3) is applicable, and therefore, the impugned order is clearly in excess of jurisdiction. In the circumstances, plea raised by the Respondent is not tenable and deserves to be rejected; and the order passed by the trial Court permitting withdrawal of the suit and filing of fresh suit on the same cause of action cannot be sustained in law.

6. At this stage the learned Counsel for the Respondent points out that partners of the erstwhile firm M/s Manilal Patel and Company, which was dissolved on 31-8-1983, have already instituted fresh suit. He prays that trial Court be directed to decide the said suits independently on merits in accordance with law. The apprehension is totally misplaced. There can be no doubt that the trial Court will decide the said suits in accordance with.

7. For the aforesaid reasons, this petition succeeds. The order under challenge passed by the revisional Court as well as by the trial Court are set aside and interim notices taken out by the Respondent are discharged.

8. Rule made absolute in the above terms, No. order as to costs.