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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 5790 OF 2015

Dhankaur w/o Dhammasing Junni
Age – 47 years, Occupation – Household,
R/o Vedant Nagar, MIDC,
Near Railway Station,
Aurangabad

PETITIONER

VERSUS

Deubai w/o Bansi Narwade
Age – 72 years, Occupation – Household
R/o Georai,
Taluka and District – Aurangabad

RESPONDENT

.....
Mr. Milind Patil, Advocate for the petitioner
Mr. P. F. Patni, Advocate for the respondent
.....

[CORAM : SUNIL P. DESHMUKH, J.]

DATE : 1st AUGUST, 2015

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard finally with consent of learned advocates for the parties.
2. The petitioner is plaintiff in Regular Civil Suit No.1306 of 2012 instituted by her seeking direction to sell suit land, described in paragraph A of the plaint free from encumbrances to the plaintiff and / or her nominees by receiving balance consideration of Rs.1,15,000/-; direction to the defendant to

execute conveyance in favour of the plaintiff and / or her nominees; to deliver possession of suit land; rectification of agreement of sale and / or refund of the amount advanced with interest @ 18% p.a. and injunction from creation of third party interest over the suit land.

3. The respondent herein is the defendant in said suit. Parties hereto would be referred to by their status in said suit, hereinafter.

4. According to the plaintiff, the defendant had executed an agreement of sale dated 10th December, 2009 for sale of 4 Acre land described in the plaint for agreed consideration of Rs.2,15,000/- and from the same, Rs.1,00,000/- had been paid to the defendant. However, while executing the document, a mistake with reference to description of northern boundaries had crept in. Before execution of the conveyance, pursuant to the agreement, it was imperative to obtain consent and no objection from members of defendant's family and remove objections, if any, and to supply documents and deeds of title. However, subsequently it surfaced that there was some litigation in respect of various properties, including the suit land, which was pending in second appeal bearing No.694 of 2010. According to the

plaintiff, the defendant had also executed irrevocable power of attorney of even date in respect of adjacent 5 Acre land in favour of husband of the plaintiff namely Dhammasingh Junni. Around January, 2012, the defendant had instituted a suit against husband of the plaintiff seeking declaration that general power of attorney dated 10th December, 2009 (*supra*) is null and void and for certain other reliefs, in which the defendant had purportedly denied agreement of sale dated 10th December, 2012. Under the circumstances, present suit came to be instituted.

5. It appears that in Regular Civil Suit No.301 of 2009, a compromise had taken place between plaintiff in said suit namely Anjanabai, who is real sister of defendant, seeking partition of properties descending on them from their father, Laxman, including the suit property.

6. It also appears that accordingly, written statement came to be filed by the defendant in Regular Civil Suit No. 1306 of 2012 and the suit since then had proceeded further. The plaintiff had adduced evidence. Her examination in chief and cross examination had taken place. So is the case of the defendant. She had lead her evidence and the matter was on the verge of hearing. In the meanwhile, it appears, the plaintiff had moved an

application at Exhibit-64, to produce certain documents and leave accordingly had been sought under the application dated 2nd December, 2014. Said application came to be opposed by the defendant referring to that the defendant had already advanced final arguments and the documents sought, plaint and written statement, are not public documents and said documents have no relevance in present context.

7. The trial court had rejected the request made under application Exhibit-64 referring to that these are not public documents and they are not *ipso facto* admissible in evidence and that there is no reference to the same during the cross examination of the defendant, nor those were relied upon by the plaintiff.

8. Writ petition No.11778 of 2014, filed by the plaintiff challenging order on Exhibit-64 is pending before this court and is being heard along with present writ petition.

9. While the suit went further, an application Exhibit-67 came to be moved by plaintiff. Application Exhibit-67 purports the same to be under Order XXIII Rule 1 (3) of the Civil Procedure Code. Exhibit-67 has been filed contending that the plaintiff wants to add Anjanabi – sister of present defendant as party to

the present suit, since she may be a necessary party and suit may fail on account of her absence, it being a formal defect and that the compromise entered into between Anjanabai and the defendant is to defraud the agreement of sale and thus Anjanabai is a necessary party and as such, liberty was sought to withdraw the suit for filing a suit afresh, under the same cause of action.

10. It is contended that the compromise between defendant and her sister, has been entered into after the summons of the present suit had been issued and received by the defendant and same has been executed in order to defraud the agreement. In view of said compromise, Anjanabai, sister of the defendant comes in picture and her non presence in the suit is likely to be fatal to the present suit and non joinder of such party is a defect, formal in nature, as contemplated under Order XXIII, Rule 1 (3) of the Civil Procedure Code. It is referred to that since final arguments are yet not advanced, defendant would not suffer any prejudice if liberty is granted to withdraw the suit with permission to file a fresh one. The compromise has been recorded after the suit summons had been received by the defendant and which came to the knowledge of the plaintiff after the written statement had been filed. Thus, it is contended that

although for filing suit based on cause of action dated 9th August, 2012, no permission is required, yet, by way of abundant precaution permission to withdraw Regular Civil Suit No.1306 of 2012 with liberty to file fresh suit based on same cause of action was sought. This application was opposed by the defendant. The trial court, while deciding application Exhibit-67, referred to the reliefs claimed in the suit and to that the matter was to be heard on reply arguments of the plaintiff and the plaintiff had filed petition against order on Exhibit-64.

11. The court has referred to that present suit has been filed seeking reliefs as referred to herein above on the basis of an agreement to sale, which has been purportedly refused to be performed by the defendant and that it is the contention of the plaintiff that the defendant has entered into the compromise with Anjanabai in Regular Civil Suit No.301 of 2009 to defraud the agreement. The court had considered that in said suit Anjanabai's share in gut No.98 had been confirmed to the extent of 8 Acre 13 *guntha* and that it was not only in that suit, but in the other litigation as well, initiated in 1998, culminating into a decision of this court in a second appeal, finding that Anjanabai is having half share in gut No.98. As such, no formal defect can be said to have occurred in the suit and it is for the plaintiff to

prove her case by leading sufficient evidence and joining of Anjanabai in the suit of present nature is not necessary. The court had adverted to that conditions under Order XXIII, Rule 1 (3) of the Civil Procedure Code not being subsisting for withdrawing the suit with liberty to file a fresh suit. It was thus considered that there is no ground to allow the plaintiff to withdraw the suit with liberty to file a fresh suit on the same cause of action.

12. Mr. Milind Patil, learned advocate for the plaintiff submits that the court ought to have considered that a plaint is distinguishable from the proceedings of the suit and having nature of claims made against the defendant by the plaintiff, Anjanabai indeed, can be said to be a party necessary to be on record for taking the proceedings to its logical end. Having regard to the reliefs claimed against the defendant, the trial court ought to have considered that a suit ought not be confined only to the plaint and having regard to that certain circumstances have surfaced, during proceedings of the suit, to prevent culmination of the proceedings into failure, and to bring it to its logical end, it was necessary to consider that absence of Anjanabai is a defect of formal nature, in the circumstances of the case. He, therefore, submits that the court has committed a

gross error in rejecting the request.

13. Mr. Patil, relies on a judgment reported in *1999 AIR (SC) 958 : 1999 DGLS (Soft) 142* “*Executive Officer, Arthanareswarar Temple V. R. Sathyamoorthy*”, however, looking at the background on which the decision has been rendered, the discussion thereunder cannot be exactly said to carry forward case of the plaintiff. The court appears to have discussed Order XXIII of the Civil Procedure Code with reference to certain citations. In the circumstances under which the matter had been decided and heard, directions were issued to the court. He further relies on a decision reported in *AIR 2003 Bom 136* “*Mahadkar Agency and Another V. Padmakar Achanna Shetty*”. The case appears to be decided predominantly on the facts of that case, and withdrawal of suit with liberty to file fresh suit had been allowed in that case, which had been assailed as a non speaking order, observing that in the application of the respondents therein had shown that the respondent was willing to file a fresh suit for various reliefs on different causes of action and with abundant caution he sought permission to withdraw suit with liberty to file fresh suit. The case in hand can hardly be likened to the case cited. Mr. Patil, learned advocate for the plaintiff relies on yet another judgment reported in *2015 (2) Mh.L.J. 36* “*Raosaheb and others V. Vinod and Others*”. In the circumstances of

that case, which was a suit for partition and separate possession of ancestral property and joint Hindu family properties, this court had considered that it is not the fit case to be interfered with, wherein the trial court granted the plaintiff permission to withdraw the suit with liberty to file a fresh suit with same cause of action. The case hardly can be said to have any nexus with the facts of case in hand.

14. Mr. Patni, learned advocate appearing on behalf of the defendant vehemently submits that the petition had been moved with oblique motive to further procrastinate the litigation, which has reached final stage. The fact about compromise between the defendant and Anjanabai had been brought forth in the written statement filed in 2012 itself. Thereafter, examination of the plaintiff's witnesses and their cross examination is over, so is the case in respect of defendant's evidence and the matter had been closed for final hearing. The petitioner had earlier on attempted to prolong hearing of the suit by filing an application Exhibit-64, seeking production of certain documents and request thereunder had been declined and as such writ petition No.11778 of 2014 had been filed. Subsequently, this application Exhibit-67 has been filed. It is contended that correctness or otherwise of the compromise entered into between the defendant and Anjanabai

is not a matter for adjudication in the present suit. No purpose would be served by adding Anjanabai as a party to the suit, for, the dispute with reference to the compromise cannot form subject matter of the present case. Cause of action, if any, with reference to compromise would be hardly amenable for adjudication in the present matter. The present case is based on alleged agreement of sale and the rights claimed with respect to the same. Unless those are decided, it cannot be said that any cause of action has arisen to the plaintiff against the party sought to be added. He contends that while the fact of compromise had been brought to the notice of the plaintiff way back in 2012, at the fag end, at the stage of hearing, the applications for procrastination of the *lis* had been moved one after other. There is no substance in Exhibit-67 and that deserves to be rejected, which has been rightly rejected by the trial court.

15. Learned advocate for the defendant relies on a decision reported in *AIR 200 SC 2132 "K. S. Bhoopathy and Others V. Kokila and Others"* and contends that merely grant of permission to withdraw the suit with liberty to file a fresh suit on the basis of same cause of action will not cause prejudice to the other side, is not at all a ground upon which such a permission can be granted. He

relies on another judgment reported in 2012 (1) Mh.L.J. 104 “*Shankar Vyankoba Shinde V. Gorakh Madhavrao Shinde*” wherein this court has considered that delay in filing application is indeed a proper ground while considering application under Order XXIII, Rule 1 (3) of the Civil Procedure Code. He relies on yet another judgment of learned single judge of this court reported in 2006 (2) Mh.L.J. 693 “*Rajaram Jairam Raut V. Baliram Laxman Raut*” to contend that permission for withdrawal of suit with liberty to file fresh suit on the same cause of action cannot be granted. It is referred to in said judgment that the defect cannot be said to be fatal defect of the form in the suit and whatever defects are there can be cured by moving applications, as referred to therein.

16. After hearing learned advocates for the parties and upon going through relevant documents, it transpires that the plaintiff had been aware of the litigation in respect of properties, including suit property wherein the defendant had been involved, the one which had culminated into an order in second appeal by this court. While the agreement of sale / power of attorney is stated to have been executed, the litigation between the defendant and her sister for partition of suit property had already been pending and further that the compromise entered into therein has been brought to the notice of the plaintiff way

back in 2012 itself, in the present suit. Despite aforesaid, the plaintiff went on to give evidence and also let the defendant give evidence and the matter was posted for hearing and at this occasion, the application had been moved. If the petitioner knew about compromise in respect of the suit property, the absence of Anjanabai to whom some part of land gut No.98 has been confirmed, her presence in the suit would be formal in nature, may not be a sound proposition. Apart from the causes and stage at which the application had been moved, on aforesaid reasons as well as if with reference to settlement between sisters the rights claimed by the plaintiff are likely to be affected, the settlement can hardly be questioned in the present *lis* and in such a case, it cannot be said that absence of Anjanabai would be formal. That apart, the decision rendered by the trial court while rejecting application Exhibit-67 does not appear to be a non reasoned order, which can hardly be termed as not adhering to the situation.

17. Though learned advocate for the plaintiff submits that the court ought to have distinguished between suit and the plaint, looking at the nature of the dispute involved, it would hardly have any reflection on the outcome of the decision on Exhibit-67. The judgments relied upon on behalf of the defendant, to a

considerable extent would support the decision by the trial court on Exhibit-67. In the circumstances, I am not inclined to interfere with order impugned. The writ petition, as such, stands dismissed. Rule stands discharged with no order as to costs.

[SUNIL P. DESHMUKH, J.]

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