

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 5337 OF 2015**

Mr. Rizwan Sayed Abdul Gafoor & Ors .. Petitioners.

Vs

Aayashabi Mohammad Rafiq Patel, since
deceased through her legal heirs
and Ors .. Respondents.

Mr.G.S.Godbole, Senior Advocate, a/w Mr. Sumit S. Kothari,
Advocate, for Petitioners.

Mr. Balkrishna D.Joshi, Advocate for Respondent no.1A to 1D.

Mr S.J.Chaurasia i/b Ashoka Law Firm, Advocates for Respondents
no. 2,5,6, and 8 to 12.

Mr. Sachin S. Punde, Advocate for Respondent no.3.

Mr. Rohit P. Sakhadeo, Advocate for Respondent no.18.

**WITH
WRIT PETITION NO.9658 OF 2013**

Smt. Aminbibi Abdul Latif Patel .. Petitioners
and Ors.

Vs

Mohd. Rafiq Dawood Patel and
Ors. .. Respondents

Mr. Vishal Kanade a/w Mr. S.J.Chaurasia i/b Ashoka Law Firm,
Advocates for Petitioners.

Mr. Anand S. Kulkarni, Advocate for Respondents No. 5 and 6.

Mr. Sachin S. Punde, Advocate for Respondent no.7, 15 to 22.

CORAM : R.G.KETKAR,J.

DATE : 27/07/2015

PC:

1. Heard Mr. G.S. Godbole, learned senior counsel for the petitioners, Mr. Balkrishna Joshi, learned counsel for respondents no.1A to 1D, Mr. Sachin Punde, learned counsel for respondent no.3, Mr. S.J.Chaurasia, learned counsel for respondents no. 2,5,6, 8 to 12, Mr. Rohit Sakhadeo, learned counsel for respondent no. 18 in Writ Petition no.5337 of 2015 at length. On the oral application made by Mr. Godbole, leave to delete Respondents no.4, 7, 13 to 17A and 17B is granted. Amendment shall be carried out forthwith. Rule. Learned counsel for the respective respondents waive service. At the request and by consent of the

parties, Rule is made returnable forthwith and petition is taken up for final hearing.

Mr. Vishal Kanade, learned counsel for petitioners, Mr. Anand Kulkarni, learned counsel for respondents no. 5 & 6 and Mr. Sachine Punde, learned counsel for respondents no. 7, 15 to 22 in Writ Petition No.9658 of 2013.

2. Writ Petition No.5337 of 2015 is instituted by the petitioners, hereinafter referred to as 'applicants', challenging the Judgment and order dated 2.5.2015 passed by the learned Civil Judge, Sr. Dn., Panvel below Exhibit 148 in Special Civil Suit No.109 of 1999. By that order, the learned trial Judge rejected the application taken out by them under Order 1, Rule 10 and Order 22, Rule 10 of C.P.C. for joining them as parties in the suit.

3. Writ Petition No.9658 of 2013 is instituted by original defendants no. 1 to 4, 5 and 7, inter alia, challenging legality and validity of orders dated 31.8.2007 and 27.2.2013 below Exhibits- 119 and 128 respectively in Special Civil Suit No.109 of 1999. It is not in dispute that applications are filed on 31.8.2007 at Exhibit 119 and on 27.2.2013 at Exhibit 128 for withdrawal of Special Civil Suit No.109 of 1999 and the same applications are not disposed of till date.

4. Special Civil Suit No.109 of 1999 was instituted by Aayashabi Mohd. Rafiq Patel (for short, 'original plaintiff') for

partition and separate possession of her 1/18th share in the properties, more particularly described in paragraphs 1A to 1F as also in 12.5 % plots to be allotted in lieu of acquisition of properties described in paragraphs 1A to 1F of Plaint. The applicants claim that during the pendency of the suit, she executed MOU in their favour on 10.5.2005. The applicants paid her Rs. 5 lacs. Original plaintiff expired in the year 2006 and her L.Rs are brought on record. It appears that on 31.8.2007 application was filed by L.Rs of original plaintiff-Exhibit 119 for unconditional withdrawal of the suit. Two sisters of the original plaintiff also instituted Special Civil Suit No.119 of 2008 for similar relief, namely, partition and separate possession. During the pendency of Special Civil Suit No.119 of 2008, the applicants herein filed application under Order I, Rule 10 of C.P.C. for impleading them as party defendants on the ground that the original plaintiff had executed MOU in their favour on 10.5.2005. By order dated 4.4.2013, the trial Court allowed the application and the plaintiffs in Special Suit No.119 of 2008 were directed to implead applicants as defendants.

5. Aggrieved by this decision, Writ Petitions No. 4580 of 2013 and 5311 of 2014 were instituted in this Court. By order dated 3.7.2013, the petitions were dismissed.

6. It appears that the plaintiffs in Special Civil Suit No.119 of 2008 filed pursuant to Exhibit 99 for withdrawal of the suit. By order

dated 3.7.2014 the learned trial Judge rejected the prayer for withdrawal of the suit. Aggrieved by that decision, C.R.A. No. 66 of 2015 and C.R.A. (ST) No.24787 of 2014 were preferred in this Court. By order dated 11.2.2015, this Court allowed application Exhibit-99 and permitted the plaintiffs therein to withdraw suit unconditionally. The net result is that Special Civil Suit No.119 of 2008 stands withdrawn.

7. It is the case of the applicants that L.Rs of original plaintiff Aayashabi executed registered deed of assignment on 2.7.2013 in their favour. Under the MOU dated 10.5.2005, the applicants had paid Rs. 5 lacs to original plaintiff. Under the deed of assignment dated 2.7.2013, they had paid Rs. 50 lacs to the L.Rs. of the original plaintiff. The L.Rs of the original plaintiff filed application dated 2.9.2013, Ex.131, for substituting applicants in their place as plaintiffs. The applicants took out application at Exhibit 148 under Order I, Rule 10 and Order 22 Rule 10 for impleading them as parties in the suit. By the impugned order, the learned trial Judge has rejected the application. On application Ex.131, the learned trial Judge passed order on 2.5.2015 as under:

“Order passed on Ex.148 on 2.5.2015”.

It is against order below Ex.148, the applicants have instituted Writ Petition No.5337 of 2015.

8. In support of this Petition, Mr. Godbole strenuously

contended that the learned trial Judge has considered only MOU dated 10.5.2005. The learned trial Judge, however, did not consider the registered deed of assignment executed by L.Rs of original plaintiff in favour of the applicants on 2.7.2013. He submitted that in application at Exhibit 148 in paragraph 4 it was specifically asserted that L.Rs of the original plaintiff had executed registered deed of assignment on 2.7.2013 after accepting amount of Rs. 50 lacs from the applicants in addition to Rs. 5 lacs paid under the MOU dated 10.5.2005. In fact, L.Rs of the original plaintiff have filed application Ex.131 on 2.9.2013 for substituting applicants as plaintiffs in their place. He further submitted that the learned trial Judge has not properly considered the order passed by this Court on 11.2.2015 in Civil Revision Application No.66 of 2015 and companion Civil Revision Application. He further submitted that the learned trial Judge also did not properly consider provisions of Order 22, Rule 10. For all these reasons, he submitted that the impugned order deserves to be set aside.

9. On the other hand, Mr. Punde submitted that on 31.8.2007 L. Rs of original plaintiff had filed application at Ex.119 for withdrawal of the suit. The said application, till date, is not decided and it is causing great prejudice to original defendant no.2. The suit is instituted in the year 1999 and till date the same is not disposed of despite the fact that L. Rs of original plaintiff

intend to withdraw the suit unconditionally. He further submitted that the deed of assignment dated 2.7.2013 is only in respect of some of the properties in the suit and even on that ground defendant no.2 is put to inconvenience as the suit is dragged on from 1999 till date.

10. Mr. Joshi appearing on behalf of L. Rs of original plaintiff submitted that on 31.8.2007 the L.Rs of the original plaintiff filed application for unconditional withdrawal of the suit. The application till date is not disposed of. On 27.2.2013, another application was filed by the L.Rs at Exhibit 128 and even that application is not disposed of till date. He further submitted that the applicants are relying on the MOU dated 10.5.2005 which is not a registered instrument. Original plaintiff died in the year 2006. On 9.3.2013, the applicants lodged complaint under section 420 Indian Penal Code, 1860 against the L.Rs of the original plaintiff. The L.Rs of the original plaintiff obtained anticipatory bail. The applicants gave threats to the L.Rs of original plaintiff to execute second agreement otherwise they will face dire consequences. He submitted that under duress and threats given by the applicants, the L. Rs of original plaintiff executed deed of assignment on 2.7.2013. They were compelled to sign the said deed of assignment. In any case, Mr Punde and Mr. Joshi submitted that if Court is inclined to set aside the impugned order, the trial Court may be directed to dispose of all

pending applications, namely, Applications Exhibit 119, 128, 131, 148.

11. Mr. Kanade appearing on behalf of petitioners in Writ Petition No.9658 of 2013, submitted that the learned trial Judge may be directed to dispose of applications Exhibits 119 and 128 in a time bound manner. He further submitted that if application at Exhibit 148 is allowed it will also change the nature of suit which is for partition and separate possession of the suit properties.

12. I have considered the rival submissions made by learned counsel appearing for the parties. I have also perused the material on record. As noted earlier, the original plaintiff had instituted suit for partition and separate possession of her 1/18th share in the properties described in paragraph 1A to 1F of the Plaint as also plots to be allotted under 12.5 percent scheme in lieu of acquisition of these properties. The suit is instituted in the year 1999. The applicants claim that on 10.5.2005, original plaintiff executed the MOU in their favour upon receipt of Rs. 5 lacs. It appears that original plaintiff died in the year 2006 and her L.Rs are brought on record. On 31.8.2007, L.Rs filed application at Ex.119 for withdrawal of the suit unconditionally. At the same time, two sisters of the original plaintiff instituted Special Civil Suit No.119 of 2008 for identical relief. In that suit, the applicants filed application under Order I, Rule 10. The said

application was allowed by the trial Court on 4.4.2013. Aggrieved by that decision, Writ Petitions No. 4580 of 2013 and 5311 of 2013 were instituted in this Court. Those petitions were dismissed and accordingly the applicants were impleaded as defendants in Spl.Civil Suit No.119 of 2008.

13. During the pendency of that suit, application at Exhibit 99 was filed for withdrawal of that suit. That application was rejected by the learned trial Judge on 3.7.2014. Aggrieved by that decision, Civil Revision Application No.66 of 2014 and one more Revision application were filed. Those Civil Revision Applications were allowed on 11.2.2014. In paragraph 3 it was observed thus :

“3. At this stage, it is required to be noted that there is another suit pending i.e. Special Civil Suit No.109 of 1999 which was filed by the said Ayshabee Mohammed Rafique Patel. The said suit is also filed for partition and possession. It seems that in the said suit the Defendants No.15 to 17 in the instant suit have filed an application for impleadment founded on the fact that they are assignees from the said Ayshabee Patel. It seems that the said application is pending adjudication. Be that as it may, since the Plaintiffs are seeking unconditional withdrawal of the suit, the Trial Court has erred in rejecting the same. The provisions of Order 23, Rule 1 permit such an unconditional withdrawal by the Plaintiffs. If the Defendants No.15, 16 and 17 claim to have any rights from the said Ayashabee, they would undoubtedly be entitled to assert their rights by filing independent proceedings and the order permitting the withdrawal of the instant suit cannot come in their way. **It is also required to be noted that since the other suit being Special Civil Suit No.109 of 1999 is pending and since the application filed by the Defendants No.15 to 17 i.e. Respondents No.1 to 3 herein is pending, it would also be open for the**

said Respondents to agitate their grievance in the said pending suit. This Court does not express any opinion as regards the merits of the case of the Defendants No.15 to 17. However, in the instant case since the Trial Court has failed to exercise jurisdiction in the matter of permitting withdrawal, the exercise of the revisionary jurisdiction of this Court is warranted. In that view of the matter, the impugned order dated 3rd July, 2014 is required to be quashed and set aside and is accordingly, quashed and set aside. The application Exh.99 would accordingly stand allowed. The Plaintiffs would consequently be entitled to withdraw the suit unconditionally. The above Civil Revision Applications are allowed to the aforesaid extent. The Plaintiffs may produce a copy of this order before the Trial Court on 17th February, 2015. The Trial Court to pass an order permitting the withdrawal of the suit in the light of the instant order. The Trial Court may direct the refund of Court Fees as per rules."

(emphasis supplied)

14. Perusal of the extracted paragraphs shows that this Court observed that the applicants who were impleaded as defendants no. 15,16 and 17 are undoubtedly entitled to assert their rights by filing independent proceedings and order permitting withdrawal of the suit, i.e. Spl. Civil Suit No.119 of 2008 will not come in their way. It was also noted that other suit, being Special Civil Suit No.109 of 1999 is pending and since the application filed by the applicants was pending, it would be open for them to agitate their grievance in the pending suit. In other words, the applicants, herein, would be at liberty to agitate their grievance in Special Civil Suit No.109 of 1999.

15. It is also a matter of record that on 27.2.2013, L.Rs of original plaintiff filed application at Exhibit 128 for withdrawal of

the suit and the same is also not disposed of till date. Now, though the L.Rs have filed applications for withdrawal of the suit on 31.8.2007 and 27.2.2013, it appears that they executed registered deed of assignment in favour of the applicants on 2.7.2013. They have also filed application Ex.131 on 2.9.2013 for their substitution by the applicants. On one hand, they want to withdraw the suit and at the same time they have executed a registered deed of assignment on 2.7.2013 in favour of the applicants and also filed application Ex.131 on 2.9.2013.

16. As noted earlier, by the impugned order, the learned trial Judge rejected the application- Exhibit 148 on the ground that this Court while disposing of C.R.A. on 11.2.2015 directed the applicants to file independent suit. In my opinion, the impugned order cannot be sustained for more than one reason. In the first place, the learned trial Judge did not consider execution of the deed of assignment dated 2.7.2013 by the L.Rs of the original plaintiff in favour of the applicants herein. Secondly, the learned trial Judge also did not consider provisions of Order 22, Rule 10 of C.P.C. which lays down that in case of an assignment, creation or devolution of any interest during the pendency of a Suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved. Thirdly, the learned trial Judge has not properly applied the order passed by this Court on 11.2.2015 in C.R.A. This court specifically

permitted the applicants to agitate their grievances in the pending suit. In other words, it cannot be expected that the applicants are left high and dry. Whereas Special Civil Suit No.119 of 2008 filed by the two sisters of the original plaintiff stood withdrawn by virtue of the order passed on 11.2.2015, despite execution of registered deed of assignment on 2.7.2013 by none other than the L.Rs of the original plaintiff, now they want to withdraw the suit and the applicants should be driven to file a separate suit. Having regard to the provisions of Order 22 Rule 10, in my opinion, the learned trial Judge should have considered the effect of the deed of assignment executed by the L.Rs of original plaintiff in favour of the applicants. The impugned order, therefore, cannot be sustained and, is liable to be set aside. It is also material to note that on 2.9.2013, the L.Rs of original plaintiff filed application-Exhibit 131 for substituting the applicants as plaintiffs in their place. The learned trial Judge passed the following order.

“ Order passed on Exhibit 148 on 2.5.2015“

17. S/s Punde, Joshi and Kanade submitted that by that order the learned trial Judge has disposed of application-Exhibit 131 in the light of the order passed below Exhibit-148. Perusal of the extracted order does not indicate that the learned trial Judge disposed of application-Exhibit 131 in view of the order passed below Exhibit-148. It is, therefore, necessary to direct the trial

Court to decide following applications afresh.

- (i) Application dated 31.8.2007 at Exhibit 118 filed by L.Rs of original plaintiff for unconditional withdrawal of the suit;
- (ii) Application dated 27.2.2013 filed by L.Rs of the original plaintiff for unconditional withdrawal of the suit at Exhibit 128;
- (iii) Application dated 2.9.2013 filed by L.Rs of the original plaintiff at Exhibit 131;
- (iv) Application at Exhibit 148 filed by the applicants under Order I, Rule 10 and Order XXII, Rule 10 of C.P.C.

18. The learned trial Judge will hear all these applications together but will first pass order on application below Exhibit-148 as in the impugned order itself the learned trial Judge has recorded in paragraph 4 that though the L.Rs of original plaintiff filed application dated 31.8.2007 remained pending because the parties did not take any interest in the matter to proceed according to law. After deciding application-Exhibit-148, learned trial Judge will thereafter proceed to decide rest of the applications mentioned herein above.

19. In case the applications-Exhibit 131 and 148 are allowed, the said order shall not take effect for a period of 4 weeks therefrom, so as to enable aggrieved party to challenge that order. At the same time if applications - Exhibits 119 and 128 are allowed, the said order shall not take effect for a period of 4 weeks so as to enable the applicants to challenge that order. The

learned trial Judge will decide these applications uninfluenced by observations made herein and in accordance with law and on the basis of material on record. All contentions of the parties are expressly kept open.

20. Rule is made absolute in Writ Petition No.5337 of 2015 with no order as to costs.

21. In view of the order passed in Writ Petition No.5337 of 2015, nothing survives in Writ Petition No.9568 of 2013 and the same is disposed of. Order accordingly.

(R.G.KETKAR, J.)