

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

**CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 5642 OF 2015**

WITH

CIVIL APPLICATION NO.1955 OF 2015

Sai Balaji Developers & Ors.

..Petitioners

Vs.

Jamunabai Gangaram Kot & Ors.

..Respondents

Mr. Rajesh Datar for the Petitioners

Mr. A. B. Tajane for the Respondent No.1 to 6 and 9 to 11

Mr. Rohit Joshi for the Respondent Nos.7 & 8

CORAM : R.M.SAVANT, J

DATE : 5th October 2015

P.C. :

1 The Writ Jurisdiction of this Court is invoked against the order dated 18-6-2015 passed by the Learned Civil Judge Senior Division, Kalyan, by which order the application Exhibit 18 filed by the Respondent No.1 herein i.e. original Plaintiff No.1 for withdrawal of the Suit under Order XXIII Rule 1(3) (5) of the Civil Procedure Code, came to be allowed and the Plaintiff No.1 was permitted to abandon her claim and withdraw the Suit and to file a fresh Suit on the same cause of action subject to limitation.

2 The Suit in question being Special Civil Suit No.344 of 2014 was filed by as many as 11 Plaintiffs amongst whom was one Jamunabai Gangaram

Kot who was the Plaintiff No.1 and who is the Respondent No.1 herein. The said Suit was filed for cancellation / revocation of the Power of Attorney duly registered in favour of the Defendant Nos.1 to 3 by the Plaintiff Nos.2 to 11. The Plaintiffs had also sought declaration that the Development Agreement dated 28-6-2010 executed by the Defendant Nos.16 to 18 in favour of the Defendant Nos.1 to 5 and which was registered on 30-6-2010, was not binding on the Plaintiffs. The Plaintiffs had also sought a declaration that the Defendant Nos.1 to 5 be directed to remove the construction carried out on the share of the Plaintiffs in the Suit land and to hand over vacant possession of the portion of the Suit land which comes to their share i.e. 50% of the share of the Plaintiffs. The Petitioners herein are the Defendant Nos.1 to 5 who are undertaking the development of the property in question, pursuant to the said Development Agreement dated 28-6-2010 as also the Power of Attorney dated 1-11-2011. In the said Suit, an application for temporary injunction came to be filed by the Plaintiffs in which a reply has been filed by the Defendant Nos.1 to 5 opposing the grant of injunction to the Plaintiffs.

3 In so far as the Plaintiff No.1 Jamunabai Gangaram Kot is concerned, it is an undisputed position that she is not a signatory either to the Power of Attorney or to the Development Agreement. In so far as the Power of Attorney is concerned, the same has been executed by the other Plaintiffs i.e. the Plaintiff Nos.2 to 11 and the Development Agreement in favour of the

present Petitioners i.e. Defendant Nos.1 to 5 has been executed by the Defendant Nos.6 to 18 to the Suit i.e. other family members of the Jamunabai Kot. It is probably in view of the fact that having discovered that her case stands on a different footing than the Plaintiff Nos.2 to 11 who as indicated above are signatories to the Power of Attorney dated 1-11-2011 in favour of the Defendant Nos.1 to 5 that the Plaintiff No.1 filed the instant application Exhibit 18 for abandonment of her claim, withdrawal of her Suit in so far as her claim is concerned and for being permitted to file a fresh Suit on the same cause of action. The said application as indicated above was founded on the fact that the case of the Plaintiff No.1 stands on a different footing than the case of the other Plaintiffs i.e. the Plaintiff Nos.2 to 11. The said application Exhibit 18 was opposed to on behalf of the Defendant Nos.1 to 5 and the sum and substance of the opposition was that the Plaintiffs could not be permitted to abandoned her claim and withdraw the Suit to file a fresh Suit. Significantly the Plaintiff Nos.7 and 8 also field a reply to the said application and took up the same ground as the Defendant Nos.1 to 5. In fact the Plaintiff Nos.7 and 8 went to the extent of calling themselves as the “so called Plaintiffs”. The Plaintiff Nos.7 and 8 denied the case of the Plaintiff No.1 that the plans etc. were sanctioned without informing the Plaintiffs and that the Plaintiff No.1 on the ground made out in the application is entitled to withdraw the Suit.

4 The Trial Court considered the said application and has by the

impugned order dated 18-6-2015 has allowed the said application. The gist of the reasoning of the Trial Court is that the case of the Plaintiff stands on a different footing than the other Plaintiffs i.e. the Plaintiff Nos.2 to 11 and therefore it was not expected of the Plaintiff No.1 to file a Suit pertaining to the suit property along with the other Plaintiffs i.e. the Plaintiff Nos.2 to 11. The Trial Court, however imposed costs on the Plaintiff No.1 on account of the fact that the application was belated in view of the fact that the application for temporary injunction was pending adjudication in which the Defendant Nos.1 to 5 have filed their reply. As indicated above, it is the said order dated 18-6-2015 which is taken exception to by way of the above Petition.

5 The Learned Counsel appearing for the Petitioners by relying upon Order XXIII Rule 1(3)(5) would contend that the Trial Court has not considered the fact that the application Exhibit 18 filed by the Plaintiffs was opposed to on behalf of the Plaintiff Nos.7 and 8. It was the submission of the Learned Counsel that this was not a case where a simplicitor withdrawal of the Suit was permitted but this was a case where the withdrawal has been permitted to file a fresh Suit on the basis of the same cause of action and therefore the reply of the Plaintiff Nos.7 and 8 assumes significance. The Learned Counsel would further contend that there is no formal defect pointed out by the Plaintiff No.1 so as to entitle her to withdraw the Suit and file a resh Suit on the same cause of action.

6 Per contra the Learned Counsel appearing for the Respondent No.1 as also Respondent Nos.2 to 6 and 9 to 11, would support the impugned order. The Learned Counsel would contend that having regard to the reply filed by the Plaintiff Nos.7 and 8, it is exfacie clear that the said Plaintiffs seem to be supporting the Defendant Nos.1 to 5 and therefore most of the Plaintiffs that is the 8 remaining Plaintiffs being in favour of the withdrawal of the Suit, the Trial Court was right in allowing the application.

7 In my view, there is no merit in the above Petition. The foundation of the application Exhibit 18 is the fact that the case of the Plaintiff No.1 stands on a different footing than the case of the other Plaintiffs i.e. the Plaintiff Nos.2 to 11. In so far as the challenge to the Power of Attorney and the Development Agreement which are the subject matter of the Suit is concerned, indubitably the said documents have not been executed by the Plaintiff No.1 and have been executed by the other Plaintiffs and the Defendant Nos.6 to 18 to the Suit. If that be so, the challenge to the said documents on behalf of the Plaintiffs would be on a different ground than the challenge to the documents by the Plaintiff Nos.2 to 11 who are signatories to the said Power of Attorney. Hence filing of the Suit wherein the Plaintiff No.1 has been arrayed as Plaintiff with the other Plaintiffs i.e. the Plaintiff Nos.2 to 11 can be said to be a mistake as the challenge of the two parties in respect of the said two

documents as indicated above is on a different footing. In so far as Order XXIII Rule 1(3)(5) is concerned, no doubt Rule 5 postulates that withdrawal cannot be permitted without the consent of the other Plaintiffs. However, it is required to be noted that in the instant case out of the remaining 10 Plaintiffs except Plaintiff Nos.7 and 8 rest of the Plaintiffs have given their consent. In so far as Plaintiff Nos.7 and 8 are concerned, there seems to be some substance in the contention of the Learned Counsel for the Respondent No.1 that the said Plaintiff Nos.7 and 8 now seem to be supporting the Defendant Nos.1 to 5. In the said context, it is required to be noted that the said Plaintiff Nos.7 and 8 have called themselves as the “so called Plaintiffs”. This is in the teeth of the fact that they have already been arrayed as Plaintiffs and have been prosecuting the Suit since the year 2014 in the said capacity. The tenor of the reply filed on behalf of the Plaintiff Nos.7 and 8 is also indicative of the fact that the said Plaintiffs seem to be supporting the Defendant Nos.1 to 5. The application Exhibit 18 therefore cannot be rejected at the behest of such Plaintiffs.

8 In my view, having regard to the fact that as may as 8 other Plaintiffs have given consent to the withdrawal of the Suit, merely because the Plaintiff Nos.7 and 8 have filed an affidavit in opposition, the application filed by the Plaintiff No.1 cannot be rejected on the said ground. In that view of the matter, no case for interference in the Writ Jurisdiction of this Court is made

out. The Writ Petition is accordingly dismissed.

9 In view of the dismissal of the above Writ Petition, the Civil Application No.1955 of 2015 does not survive and to accordingly stand disposed of as such. All interim orders stand vacated.

10 At this stage the Learned Counsel appearing for the Petitioners seeks continuation of the Ad-interim order which is operating in the Civil Application. In the facts and circumstances of the case, the said prayer is rejected.

[R.M.SAVANT, J]

CERTIFICATE

Certified to be true and correct copy of the original signed order