

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.8055 OF 2012

Uday Jivaji Kulkarni : Petitioner
versus
Bapu @ Jivaji Digamber Kulkarni
Deceased through Legal heirs
Respondent Nos.2, 3 and 4 and ors. : Respondents.

Mr Umesh Mankapure for the Petitioner.
Mr. V B Rajure for the Respondent No.5.

CORAM : R. M. SAVANT, J.
DATE : 26th February 2015

P.C.

1 The order dated 11/07/2012 passed by the learned Civil Judge, Junior Division, Palus whereby the Application (Exhibit 147) filed by the Plaintiff came to be partly allowed is taken exception to by way of the above Petition.

2 The Petitioner is the original Plaintiff. By the said order the Plaintiff was allowed to withdraw the suit against the Defendant Nos. 6 to 10 who are the Co-operative Society/Office bearers. However, the Plaintiff's application for rejoining the Defendant Nos. 6 to 10 after compliance by way of issuing the statutory notice under Section 164 of the Maharashtra Co-operative Societies Act, 1960 was rejected.

3 As indicated above the Petitioner is the original Plaintiff. The Plaintiff has filed the suit in question for partition of the suit properties amongst which is the property which is the subject matter of the auction conducted by the Respondent No.5 herein i.e. the original Defendant No.6 which is the Palus Co-operative Bank Ltd. It seems that the Defendants had objected to the maintainability of the suit on the ground of non-issuance of the statutory notice under Section 164 of the Maharashtra Co-operative Societies Act. In view of the objection raised by the Defendants, it seems that the Plaintiff has filed the instant Application (Exhibit 147) for the reliefs which have been adverted to herein above i.e. deletion of the Defendant Nos.6 to 10 and rejoining the Defendant Nos.6 to 10 after compliance of statutory notice under Section 164 of the Maharashtra Co-operative Societies Act which application has been partly allowed. It is the case of the Plaintiff that after the impugned order came to be passed the Plaintiff has ventured to serve the notice to the Defendant Nos.6 to 10 under Section 164 of the Maharashtra Co-operative Societies Act, and in view of the issuance of the notice, the Plaintiff whilst challenging the impugned order has sought the relief that the Plaintiff may be permitted to rejoin the Defendant Nos.6 to 10.

4 However, after the above Petition was heard at some length, the learned counsel appearing on behalf of the Petitioner – original Plaintiff Shri Mankapure, on instructions of the Plaintiff, who is personally present in Court,

states that the Plaintiff would withdraw the suit in question under the provisions of Order XXIII Rule 3(A) of the Code of Civil Procedure and would file a fresh suit on the same cause of action. The learned counsel appearing on behalf of the Respondent No.5 herein i.e. the original Defendant No.6, who is the main contesting Respondent, Shri Rajure states that he has no objection to the said course of action being followed.

5 In view of the fact that there is a formal defect in the suit filed by the Plaintiff on account of non-issuance of the statutory notice under Section 164 of the Maharashtra Co-operative Societies Act in so far as the Defendant Nos.6 to 10 are concerned, having regard to Order XXIII Rule 3(A) of the Code of Civil Procedure the Plaintiff is allowed to withdraw the suit with liberty to file a fresh suit on the same cause of action. In view of the withdrawal of the suit, the above Writ Petition does not survive and to accordingly stand disposed of. The petitioner to produce the instant order before the Trial Court, the Trial Court would then formally pass an order of withdrawal of the suit in question.

[R.M.SAVANT, J]