

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
CHAMBER SUMMONS NO. 914 OF 2013
IN
SUIT NO. 3397 OF 2010

Farokh Khodayar Meherbani & Anr. ...Applicant/Orig. Defendant

In the matter between:

Nadeem Sayed Abdul Hafiz & Ors. ... Plaintiffs

Vs.

Farokh Hodayar Meherbani & Anr. ... Defendants

...

Mr. Tanvir Shaikh for applicant / orig. defendant.

None for the respondent.

....

CORAM : S.C. GUPTE, J.

DATE : NOVEMBER 30, 2015.

P.C.:

1. The Chamber Summons seeks recall and setting aside of an order dated 26/06/2013 passed by the Prothonotary & Senior Master of this Court. By the impugned order the Prothonotary & Senior Master allowed the plaintiffs to withdraw the Suit and the Notice of Motion taken out therein with liberty to file a fresh Suit and Notice of Motion.

2. The order is challenged on the footing that whilst the Prothonotary & Senior Master may have the power to record an unconditional withdrawal of a Suit, he has no power to grant liberty to

the plaintiffs to institute a fresh suit in respect of the subject matter of such suit under the Bombay High Court (Original Side) Rules.

3. The powers to be exercised by the Chamber Judge are delegated under Rule 131 to the Prothonotary & Senior Master. Apart from these powers, under rule 163, the Prothonotary & Senior Master is empowered to pass an order for dismissal or unconditional withdrawal of the suit, when a suit has been settled or compromised before the hearing. The rules prescribe a form (Form No. 20) for such order of dismissal or withdrawal of the Suit. The Prothonotary can, thus, simply order dismissal or unconditional withdrawal of the Suit, but has no power to grant the plaintiff permission to withdraw from the Suit or any part thereof with liberty to institute a fresh suit in respect of the subject matter or part of the suit, as the case may be. That power is exclusively reserved unto the Court under Order 23 Rule 3 of the Code of Civil Procedure. Under Order 23 Rule 3 of the Code of Civil Procedure, the Court must be satisfied either that a suit must fail by reason of some formal defect or there are sufficient grounds for allowing the plaintiff to institute a fresh suit on the subject matter of the suit or part of thereof. In such a case, the Court may grant the plaintiff permission to withdraw with liberty on such terms as it deems fit. These are judicial powers to be exercised by a Court and are not entrusted to the Prothonotary &

Senior Master under the High Court Original Side rules.

4. The impugned order of the Prothonotary is, therefore, not sustainable and is set aside. The suit is restored to file to be placed on board on 07/12/2015 for directions. The defendants' advocate to communicate this order to the plaintiffs' advocate. Chamber Summons is disposed of accordingly.

(S. C. GUPTE, J.)