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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.4660 OF 2016

Narendra Madhav Pardeshi,
Age: 65 years, Occu: Business,
R/o. Anant Niwas, 4, Shani Peth,
Jalgaon

..PETITIONER

VERSUS

1. Rajendra Liladhar Pardeshi,
Age: 62 years, Occu: Retired
2. Satish Liladhar Pardeshi,
Age: 52 years, Occu: Service,
Both R/o. Krushnai Building,
Plot No.1, Gut No.99/3/K,
Sahyadri Nagar, Nimkhedi Road,
Jalgaon, Tq. and Dist. Jalgaon
3. Aruna Anil Pardeshi,
Age: 55 years, Occu: Household,
R/o. Quarter No.451, Type- IV,
Sector II, Vehicle Estate,
Jabalpur (Madhya Pradesh)
4. Usha Manohar Pardeshi,
Age: 59 years, Occu: Household,
R/o. Plot No. 22, Gut No.80,
Tilak Nagar, Nimkhedi, Jalgaon,
Tq. and District Jalgaon
5. Hemlata Tejlal Rathi,
Age: 68 years, Occu: Household,
R/o. Building No.C-5/34-10,
Sector NO.18, Cidco Area,
Near Shriram Mandir, New Panwel,
Dist. Raigad

..RESPONDENTS

Mr V. B. Patil, Advocate for petitioner;
Mr A. I. Deshmukh, Advocate for respondent Nos.1 to 4;
Mr A. B. Kale, Advocate for respondent No.1

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CORAM : NITIN W. SAMBRE, J.**DATE : 10th November, 2017****ORAL ORDER:**

This petition is by defendant no.1 in Regular Civil Suit No.493 of 2014, instituted by respondents no. 1 to 4-original plaintiffs, which was permitted to be withdrawn with liberty to file fresh, by the impugned order dated 16th March, 2016 by 3rd Joint Civil Judge Junior Division, Jalgaon.

2. Mr Patil, learned Counsel appearing on behalf of petitioner, while questioning the order impugned, would urge that after the suit was instituted by respondents no.1 to 4-original plaintiffs, petitioner-defendant no.1 filed written statement raising an objection about its maintainability.

An application (Exh.11) under Order VII, Rule 11 of the Code of Civil Procedure (for short "CPC") also came to be filed in the aforesaid suit by the petitioner. The present respondents no.1 to 4-plaintiffs were directed to value the suit for partition and separate possession on the basis of valuation of the suit property, considering it to be non-agricultural land. It is claimed that after plaintiffs moving certain frivolous applications, on 12th January, 2016, they were directed to produce market value of the suit properties from the office of Sub-Registrar, Jalgaon under Section 113 of CPC, which they claimed to have complied with by Exh.36.

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3. Present respondents no.1, 2 and 4 filed application Exh.37, purporting to be under Order XXIII of CPC, seeking permission to withdraw the suit with liberty to institute a fresh suit, which was objected to by present petitioner. However, by the orders impugned dated 16th March, 2016, passed below Exhs.1 and 37, respondents-plaintiffs are permitted to withdraw the suit with liberty to institute a fresh suit. Thus, the present petition.

4. Mr Patil, learned Counsel appearing on behalf of petitioner would urge that once respondents-plaintiffs were given an opportunity to pay the requisite court fee and they also had moved an application for amendment, there was no valid reason for granting the application under Order XXIII of CPC. According to him, if respondents-plaintiffs were so meticulous about pursuing their remedy, they could have pressed the application for amendment by inclusion of subsequent purchasers of the suit property. He submits that there is a serious legal defect in the present suit, which respondents-plaintiffs intend cure after withdrawing the same and bring the action against the present petitioner on the same cause. By relying upon requirements under Order XXIII, Rules 1 to 3 of the CPC, he submits that the order impugned is not sustainable. According to him, petitioner has no objection for simplicitor withdrawal of the suit, however, his exception is to the the liberty having been been granted for institution of fresh suit.

5. He would invite attention of this Court to the judgment of the Apex Court, in the matter of **K.S. Bhoopathy vs. Kolila**, reported in **2000 AIR**

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(SC) 2132, so as to claim that even though the discretion is vested in the Court, still such discretion of grant of liberty to file fresh suit has to be exercised with more caution and circumspection. Paragraph 13 of the said judgment reads thus:-

“The provision in Order XXIII Rule 1 Civil Procedure Code is an exception to the common law principle of non suit. Therefore on principle an application by a plaintiff under sub-rule 3 cannot be treated on par with an application by him in exercise of the absolute liberty given to him under sub-rule 1, In the former it is actually a prayer for concession from the Court after satisfying the Court regarding existence of the circumstances justifying the grant of the such concession. No doubt, the grant of leave envisaged in sub-rule (3) of Rule 1 is at the discretion of the Court but such discretion is to be exercised by the Court with caution and circumspection. The legislative policy in the matter of exercise of discretion is clear from the provisions of sub-rule (3) in which two alternatives are provided; (1) where the Court is satisfied that a suit must fail by reason of some formal defect, and the other where the Court is satisfied that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim. Clause (b) of sub-rule (3) contains the mandate to the Court that it must be satisfied about the sufficiency of the grounds for allowing the plaintiff to institute a fresh suit for the same claim or part of the claim on the same cause of action. The Court is to discharge the duty mandated under the provision of the Code on taking into consideration all relevant aspects of the matter including the desirability of permitting the party to start a fresh round of litigation on the same cause of action. This becomes all the more important in a case where the application under Order

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XXIII Rule (1) is filed by the plaintiff at the stage of appeal. Grant of leave in such a case would result in the unsuccessful plaintiff to avoid the decree or decrees against him and seek a fresh adjudication of the controversy on a clean slate. It may also result in the contesting defendant losing the advantage of adjudication of the dispute by the Court or courts below. Grant of permission for withdrawal of a suit with leave to file afresh suit may also result in annulment of a right vested in the defendant or even a third party. The appellate/second appellate court should apply its mind to the case with a view to ensure strict compliance with the conditions prescribed in Order XXIII Rule 1(3) CPC for exercise of the discretionary power in permitting the suit with leave to file a fresh suit on the same cause of action. Yet another reason in support of this view is that withdrawal of a suit at the appellate/second appellate stage results in wastage of public time of Courts which is of considerable importance in the present time in view of large accumulation of cases in lower courts and inordinate delay in disposal of the cases.”

6. According to Mr Patil, unless the Court is satisfied about sufficiency of grounds for allowing the party to institute a fresh suit, the Court should not, just for asking, grant such liberty. In addition, he would also rely upon observations of this Court, in the matters of **Veerbhadrappa Mahadappa Rachatte vs. Mahalingappa Gurlingappa Karanje & ors.**, reported in **2009 B.C.I. 318**, **Rajaram Jairam Raut vs. Baliram Laxman Raut**, reported in **2006 (Supp.1) Bom. C.R. 718**; paragraphs 3 and 7 and **Babybai w/o Sakharam Pardeshi & anr. vs. Ganesh s/o Asaram Sawant**, reported in **2013 (6) ALL M.R. 823**.

7. Per contra, Mr Kale, learned Counsel appearing on behalf of respondents would urge that it is after institution of the suit, respondents-plaintiffs came to know about creation of third party interest by selling 60 plots and said purchasers, whose sale deeds are required to be questioned, are necessary to be added as defendants. He would then urge that in a suit for partition, the court fee is not required to be paid at the initial stage, as it is required to be paid only upon adjudication of share of a party. He submits that it is discretion of the Court under Clause (3) of Rule 1 of Order XXIII of CPC, which, in the present case, is reasonably exercised by the Trial Court as the defects which are noticed and pointed out are formal. According to him, the defects as pointed out are not affecting the merits of the suit and are formal one. He would then urge that this Court, in the matters of **Govind Gulabrao More and another vs. Laxman Sahebrao More and others**, reported in **2000 (1) Mh.L.J. 310**, particularly paragraph 11 and **Raosaheb s/o Shamrao Patwari and others vs. Vinod s/o Raosaheb Patwari and others**, reported in **2015 (2) Mh.L.J. 36**, particularly paragraphs 9 and 10, has interpreted the requirements under Order XXIII, Rule 1 of CPC and the case of respondents-plaintiffs herein specifically fits into the same. He, therefore, sought dismissal of the petition.

8. Considered the rival claims in the aforesaid background.

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9. Application Exh.37 for withdrawal of Regular Civil Suit No.493 of 2014 with liberty to file a fresh suit came to be moved on following grounds:-

- (a) Since valuation of the suit is exceeding Rs.5,00,000/-, the pecuniary jurisdiction of the Court is ousted.
- (b) 70 to 80 persons, who have purchased plots from the suit property, are required to be added as defendants.
- (c) After valuation of the non-agricultural property, appropriate amendment is required to be carried out in the plaint.
- (d) Un-registered documents remained to be questioned in the suit.
- (e) Serious legal lacunae and infirmities remained to be removed.

10. The aforesaid application for withdrawal of suit with liberty to institute a fresh suit was objected to by petitioner-defendant no.1 by pointing out the developments took place till filing of such application under Order XXIII of CPC.

11. Having considered rival submissions of the parties, learned Trial Court noticed that the suit filed by respondents no.1 to 4 is for partition of undivided agricultural land, which was converted to non-agriculture use by

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carving out plots. Trial Court further noticed that application under Order VI, Rule 11 (b) of CPC as the suit was undervalued, was considered and consequential orders were passed. The learned Trial Court then noticed that it is necessary to value non-agricultural properties as per the market valuation and such valuation may result into failure of the suit due to formal defect. The Trial Court then considered what includes formal defects and based on the law laid down in the matter of Govind Gulabrao More vs. Laxman Sahebrao More, reported in 2000 (1) Mh.L.R. 310, permit withdrawal of the suit with liberty to file a fresh suit.

12. It is required to be noted that the consequences of the act of respondents no.1 to 4-plaintiffs of fairly conceding that the suit was undervalued, by filing an application for amendment of the plaint, the defects which are cited could have been cured in the present suit itself, is not at all considered and touched by the learned Trial Court. It is required to be noted that the Court must dwell upon the issue as regards satisfaction of requirements under clause (3) of Rule 1 of Order XXIII of CPC. The Court must record its satisfaction that there exists a formal defect and considering the averments of the application for withdrawal of suit with liberty, it shall deal with such formal defects. In any case, the serious defects/lacunae, if any, should not be permitted to be cured/filled in by permitting withdrawal of suit with liberty to file a fresh suit. Though this Court is not inclined to discuss all judgments cited supra, still what is required to be noted is, there has to be a satisfaction to be recorded about sufficiency of grounds for allowing the plaintiffs to institute a fresh suit for

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the same claim or part of the claim, on the same cause of action as could be noted from the judgment of the Apex Court in the matter of K.S. Bhoopathy (supra). The effect of liberty to file a suit afresh must be appreciated by the Court while exercising the powers under Sub-Rule (3) of Rule 1 of Order XXIII of CPC, though such powers are required to be exercised with care and caution.

13. It is to be noted that by the impugned order, the learned Trial Court has inferred the formal defects to mean mis-joinder of parties or rejection of material documents for not having properly stamped. In the present case, the Trial Court was expected of to first find out, whether the defects could have been cured before it only, which fact is lost sight of by Trial Court.

14. *Prima facie*, it could be noticed that the order permitting withdrawal cannot be objected to, however, for the purpose of granting liberty to institute a fresh suit, the Court must record the reasons.

15. For all aforesaid reasons, in my opinion, the petition needs to be partly allowed by quashing the order impugned. Hence, following order :-

The order dated 16th March, 2016, passed by 3rd Joint Civil Judge Junior Division, Jalgaon, below Exhs.1 and 37, in Regular Civil Suit No.493 of 2014, is quashed and set aside. Application Exhibit 37 stands restored.

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The learned Trial Court is directed to decide application Exh.37 afresh, by recording appropriate reasons for granting liberty to file fresh suit, having regard to the law cited supra,

It is clarified that this Court has not examined merits of the matter.

Writ Petition stands partly allowed in above terms.

(NITIN W. SAMBRE, J.)

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