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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION (ST) NO.1453 OF 2018.**

Jaywant Bhaskar Patil (decd) Through Legal Heirs and ors	...	Petitioners
V/s.		
Rakeshkumar Kuldipsingh Wadhawan through Diwan Builders and ors	...	Respondents

Mr. Datta Mane a/w Mr. Prasad Patil, for the Petitioners.
Mr. Shrikrishna R.Ganbavale, a/w Shreyas Vyas, for the
Respondent Nos. 8 to 10.
Mr.Rajesh Bhaskar Parad for respondent Nos. 1 and 9.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 16th MARCH, 2018.

P.C. :

1] Heard learned counsel for the petitioner and learned
counsel for the respondents.

2] By this petition, filed under Article 227 of the Constitution
of India, the petitioners are challenging the order dated 4th August,
2014, passed by Civil Judge Junior Division Vasai, below the pursis
Exh.22 in R.C.S.No. 70 of 2009.

3] The facts of the matter can be stated to the effect that, the
petitioners had filed the said suit challenging some mutation entries.
The respondent-defendants appeared and filed written statement

therein. Then, the petitioners have filed, this pursis at Exh.22 for withdrawing the said suit on the ground that it was inadvertently filed before the wrong forum as the the mutation entries cannot be challenged in the Civil Court, in view of the bar raised under Section 158 of the Maharashtra Land Revenue Code. The Trial Court, has accordingly passed the following order:-

“In view of withdrawal pursis Exh.22, plaintiff is permitted to withdraw the suit unconditionally. In view thereof suit can disposed off. Requisite Court fee is refundable to the plaintiff as per rule”

4] Subsequent thereto, the petitioners have filed fresh suit bearing Special Suit No.117 of 2015, seeking various reliefs, along with the relief that the sale deed dated 23.11.2006, is not legal and binding. The respondents herein have resisted the said suit on the ground that it is barred by law, in view of Section 12 of Code of Civil Procedure, as the earlier suit seeking the same relief was withdrawn unconditionally. Respondents also filed the application to that effect for dismissal of the suit, on the count that petitioners' earlier suit was withdrawn unconditionally without seeking leave to file fresh suit on the same cause of action.

5] Hence, the petitioners have preferred this writ petition, challenging the order passed below Exh.1 in view of the withdrawal

pursis Exh.22 filed in R.C.S.No.70 of 2009.

6] The submission of learned counsel for the petitioners is that in the said pursis, petitioners have stated that the suit was inadvertently filed in the Civil Court and the petitioners want to file the suit in proper forum. Hence, they are withdrawing the suit. Thus, the petitioners had made their intention clear that they want to file another suit. Therefore, it was not proper on the part of trial Court, only to allow the suit to be withdrawn unconditionally, without giving leave to file fresh suit on the same cause of action.

7] To substantiate this submission, learned counsel for the petitioners has relied upon the various judgments, including the judgment of this Court in the case of *Shri.Caetano Miguel Dias s/o Francisco Dias -vs- Shri.Panga Govind Desai s/o late Govind Desai, and ors* [2016 SCC Online Bom 3860], Judgment of the Madras High Court, in the case of *Marudachala Nadar -vs- Chinna Muthu Nadar and another* [1931 SCC Online Mad.255], judgment of Karnataka High Court in the case of *Amalgamated Electricity Co.Ltd -vs- Kutubuddin Rajesaheb Chancha and ors* [1969 SCC Online Kar.134] and judgment Allahabad High Court, in the case of *Nathji and another -vs- Languria and another* [1924 SCC Online All 348].

8] Perusal of these judgments show that the facts therein were more or less the same. In all those cases, the application was

filed before the trial Court seeking a specific permission to withdraw the suit, with liberty to file a fresh suit, on the same cause of action. In view thereof, it was held that the trial Court cannot grant only the first part of the prayer pertaining to the withdrawal of suit without the grant or refusal of the permission to file a separate suit on the same cause of action.

9] However, the facts of the present case show that petitioners had not at all sought permission to withdraw the suit with liberty to file fresh suit on the same cause of action. The pursis Exh.22 is very clear to show that the petitioners have stated therein that as the suit was filed inadvertently in the Civil Court, the petitioners want to withdraw the said suit for the purpose of filing suit before proper forum and accordingly the petitioners were permitted to withdraw the suit unconditionally. Therefore, it is clear that no such permission was sought by the petitioners to file the fresh suit on the same cause of action. Conversely, the very statement made by the petitioners in this Writ Petition, is also to the effect that, in view of Section 158 of the Maharashtra Land Revenue Code, as the Civil Court has no jurisdiction to set aside or challenge the mutation entries in the revenue record, the petitioners had withdrawn the said suit from that Court as they wanted to file suit in the proper forum. Thus, no liberty or leave was sought from the Court to file suit on the

same cause of action.

10] In such situation, no fault can be found in the impugned order passed by the trial Court of permitting the petitioners to withdraw the suit unconditionally. If the petitioner has not at all sought any leave or liberty, then no question arises of granting such liberty of leave. It is also pertinent to note that the impugned order passed by the Court is of 4.8.2014. At no time, it was challenged by the petitioners. Even the petitioners have also not filed any application before the said Court itself for review of the said order on the ground that they wanted to file fresh suit on the same cause of action, but such leave was not granted. It is only after the respondents appeared in subsequent suit and raised objection as to maintainability of the said suit, the petitioners have filed this Writ Petition. It being devoid of merits, stands dismissed.

11] It is clarified that all above observations are made only for the purpose of deciding this Writ Petition and those observations shall not come in the way of trial Court in any way, while deciding the suit.

[DR.SHALINI PHANSALKAR-JOSHI, J.]