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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.6980 OF 2018

Kamla Marya Bari)
Age 43 years, Occupation Housewife,)
Indian Inhabitant, Residing at Flat)
No.B/401, Satellite Towers, General)
A.K.Vaidya Marg, Goregaon (East),)
Mumbai – 400 063.) ...Petitioner

....Versus....

1). Uday Shankar Shukla,)
Age 54 Years, Occupation Business,)
Indian Inhabitant Residing at)
Flat No.601, Vasundhara Enclave)
Bangali Compound, Opposite)
Lakhchanti Towers, Gokuldharm,)
Goregaon (East), Mumbai – 400 063)
)
2). Rukmani Vinayak Chorgare,)
Age 58 years, Indian Inhabitant,)
Residing at Hari Sari Enterprises,)
Cello Infrastructure, Bangali)
Compound, Opposite Lakhchanti)
Towers, Gokuldharm, Goregaon)
(East), Mumbai – 400 063.)
)
3). Mohammed Hanif Sharif Khan,)
Age 46 years, Occupation Business,)
Indian Inhabitant, Residing at)
Sharif Chawl, Kanyapada, General)
A.K.Vaidya Marg, Goregaon (East),)
Mumbai – 400 063.) ...Respondents

Mr.Mayur Khandeparkar I/b Mr.Himanshu Kode for the Petitioner.

Mr.Sushil Shukla for the Respondent No.1.

Mr.M.P. Mishra for the Respondent No.3.

CORAM : **R.D. DHANUKA, J.**
RESERVED ON : **24TH AUGUST, 2018**
PRONOUNCED ON : **12TH SEPTEMBER, 2018**

JUDGMENT :-

1. By this writ petition filed under Article 227 of the Constitution of India, the petitioner has impugned the order dated 5th February, 2018 passed by the City Civil Court at Dindoshi below Exhibit – 9 in SC Suit No.2203 of 2016 which was filed by the petitioner (original plaintiff) *inter-alia* praying for liberty to file a fresh suit before this Court. Some of the relevant facts for the purpose of deciding this writ petition are as under :

2. On or about 9th August, 2016, the petitioner had filed SC Suit No.2203 of 2016 before the City Civil Court at Dindoshi against the respondents (original defendants) for an injunction and other reliefs. The petitioner had filed a Notice of Motion No.2397 of 2016 in the said suit *inter-alia* praying for interim reliefs. The respondent no.3 filed an affidavit in reply to the said notice of motion on 15th September, 2016. Learned trial Judge refused to grant any *ad-interim* reliefs in favour of the petitioner on 6th October, 2016. The petitioner impugned the said order dated 6th October, 2016 before this Court by filing an appeal from order. By an order dated 25th October, 2016, this Court directed the petitioner to approach the learned trial Court and to seek necessary directions from the trial Court and dispose of the said appeal from order.

3. On 18th December, 2017, the petitioner filed an application for withdrawal of the said SC Suit No.2203 of 2016. On 19th

December, 2017, the petitioner made an endorsement on the said application "Not pressed". On 19th January, 2018, the petitioner filed an application for withdrawal of the said SC Suit No.2203 of 2016 with liberty to file a fresh suit before the City Civil Court at Dindoshi on the ground that as per the legal advice, the petitioner desired to file the suit for declaration and injunction in the High Court as per the valuation of the suit property which was more than Rs.1 crore. It was mentioned in the said application that the suit property was admeasuring 5,000 sq. ft. out of survey no.266 (part) CTS No.617 admeasuring 1723.2 sq. mts. and CTS no.699 admeasuring 28,959.4 sq. mtrs., total admeasuring 30,682.6 sq. mtrs. equivalent to 7 acres at village Malad, Taluka Borivli, MSD situated at Kanyapada, Gokuldharm, General A.K. Vaidya Marg, Goregaon (East) Mumbai – 400 063.

4. On 5th February, 2018, the learned trial Judge rejected the said application filed by the petitioner for seeking liberty to file a fresh suit.

5. On 24th February, 2018, the petitioner filed a Suit (Lodging) No.254 of 2018 against the respondents herein *inter-alia* praying for an order of permanent injunction in respect of the land admeasuring 1 acre and 6-R and for other reliefs. This suit was filed not only by the petitioner to this petition but also by four other persons. The petitioner and other parties also claimed benefit of the Court fees exemption in the said suit filed before this Court insofar as the claim of the petitioner herein is concerned. The plaintiffs in the suit including the petitioner herein also filed a notice of motion *inter-alia* praying for interim reliefs. This Court passed an order of *status-quo* in the said notice of motion filed before this Court. The respondents did not

impugn the said *ad-interim* order passed by this Court. The petitioner and the other plaintiffs also filed a Chamber Summons (Lodging) No.500 of 2018 for seeking amendment to the plaint filed in the said suit. The said chamber summons came to be allowed by this Court on 9th April 2018. On 25th June, 2018, the Division Bench of this Court has granted a stay of the said proceedings. The said suit is still pending. The said appeal is now dismissed by an order dated 27th August, 2018.

6. The petitioner thereafter filed this writ petition *inter-alia* impugning the order passed by the learned trial Judge rejecting the application filed for seeking liberty to withdraw the suit with liberty to file a fresh suit.

7. Mr.Khandeparkar, learned counsel for the petitioner invited my attention to the prayers in S.C. Suit No.2203 of 2016 filed by his client before the City Civil Court *inter-alia* praying for an injunction and also the affidavits filed by the respondent nos.1 and 3 in the notice of motion filed by the petitioner in the said S.C. Suit No.2203 of 2016. He submits that the said suit was valued at Rs.1,000/- as regards the prayer for injunction in terms of pr section 6(iv)(j) of the Bombay Court Fees Act. The petitioner was one of the co-owner along with four others in the said suit. The said suit for injunction was required to be filed in view of the respondents herein attempting to dispossess the petitioner.

8. My attention is invited to the application dated 19th January, 2018 filed by the petitioner in the said S.C. Suit No.2203 of 2016 under Order XXIII Rule (1), sub-rule 3(b) of the Code of Civil Procedure, 1908 on the ground that the petitioner desires to file a suit

for declaration and injunction in view of the lease document produced by the respondent no.3 in his affidavit in reply and also on the ground that the value of the property could be more than Rs.1 crore and thus the same would be beyond the pecuniary jurisdiction of the City Civil Court. It is submitted that the respondents had also raised an issue of bar under Order II Rule 2 of the Code of Civil Procedure, 1908.

9. Learned counsel invited my attention to the order dated 5th February, 2018 passed by the learned trial Judge rejecting the application filed by the petitioner for liberty to withdraw the said S.C. Suit No.2203 of 2016 with liberty to file a fresh suit on the ground that the petitioner had not satisfied the conditions under Order XXIII Rule 3 of the Code of Civil Procedure, 1908. He submits that the impugned order passed by the learned trial Court shows perversity and an *ex-facie* error inasmuch as the provision relatable to withdraw with liberty was Order XXIII Rule (1), sub-rule 3(b) of the Code of Civil Procedure, 1908 and not under Order XXIII Rule 1 of the Code of Civil Procedure, 1908. The petitioner had made out a case under Order XXIII Rule 1, sub-rule 3(b) of the Code of Civil Procedure.

10. Learned counsel for the petitioner submits that the learned trial Judge has taken a hyper technical view in the matter that the petitioner ought to have made an application for amendment of the plaint first and after allowing such amendment, the petitioner ought to have applied for liberty to withdraw the said suit with liberty file a fresh suit in this Court.

11. It is submitted by the learned counsel that insofar as other plaintiffs who are parties to the Suit bearing (Lodging) No.254 of 2018 in this Court is concerned, they were admittedly not the parties to the

said S.C. Suit No.2203 of 2016 and thus there was no question of any leave being obtained from the trial Court for withdrawal of the said S.C. Suit No.2203 of 2016 is concerned. Learned counsel invited my attention to the prayers in the said suit filed in this Court by the petitioner herein along with other four plaintiffs, including the amended prayers and would submit that the relief claimed by the petitioner along with other plaintiffs in the said suit are in respect of the larger properties and for availing different reliefs. In that suit, the petitioner herein had applied for exemption and benefit of payment of Court fees insofar as the petitioner no.1 is concerned. He submits that this Court after hearing both the parties has already granted *ad-interim* relief in favour of the petitioner and other plaintiffs to the said suit. None of the respondents have challenged the said *ad-interim* order granted by this Court.

12. It is submitted that the petitioner and the other plaintiffs to the said suit had also applied for amendment to the plaint which amendment has been permitted by the learned single Judge of this Court. After closure of the arguments of both the parties, at the instance of the petitioner, the matter was placed on board for directions. The learned counsel for the petitioner informed that the appeal filed by the respondent nos.1 and 3 impugning the order passed by the learned single Judge of this Court allowing the Chamber Summons (Lodging) No.500 of 2018 by an order dated 9th April, 2018 has been dismissed by the Division Bench of this Court.

13. It is submitted by the learned counsel for the petitioner that the petitioner was entitled to apply for leave to withdraw the said S.C. Suit No.2203 of 2016 in the Bombay City Civil Court in view of the fact that the value of the property in question was more than Rs.1 crore

and thus the said suit was beyond the pecuniary jurisdiction of the City Civil Court with liberty to file a suit for cause of action in the said S.C. Suit No.2203 of 2016 along with other reliefs insofar as the petitioner is concerned.

14. It is submitted by the learned counsel that insofar as the value of the suit claimed in the second suit is concerned, the issue of valuation is already referred by this Court to the learned Taxing Master of this Court. The respondents thus cannot be allowed to raise an issue that the valuation of the Suit bearing (Lodging) No.254 of 2018 filed by the petitioner and others before this Court is not proper.

15. It is submitted that merely because the City Civil Court not granting *ad-interim* relief in favour of the petitioner in the notice of motion filed by the petitioner in the said S.C. Suit No.2203 of 2016 and this Court refusing to interfere with the said order, the said issue raised by the respondent nos.1 and 3 in the affidavit in reply cannot be a ground for rejecting this writ petition impugning the order passed by the City Civil Court refusing to grant leave to withdraw the said S.C. Suit No.2203 of 2016 with liberty to file a fresh suit. The said issue can be agitated by the respondent nos.1 and 3 in the pending notice of motion filed by the petitioner for interim relief in the said second suit.

16. It is submitted by the learned counsel for the petitioner that in view of the serious threat of dispossession of the petitioner by the respondents the petitioner along with other co-owners were required to file the second suit for larger relief and for larger property. There are five plaintiffs in the said second suit. He submits that the amendment permitted by this Court in the said second suit would

relate back to the date of filing of the suit . Inconsistency, if any, according to the respondent nos.1 and 3 in the second suit can be pointed out by the respondent nos.1 and 3 at the stage of hearing of the notice of motion filed by the petitioner or by filing a written statement in the said suit.

17. Mr.Khandeparkar placed reliance on the judgment of the Supreme Court in case of **Anil Kumar Singh vs. Vijay Pal Singh & Ors., (2018) 12 SCC 584** and in particular paragraphs 28 to 32. He submits that under Order XXIII Rule (1), sub-rule 3(b) of the Code of Civil Procedure, 1908, the petitioner is entitled to apply for liberty to cure the defect.

18. Learned counsel for the petitioner placed reliance on the judgment of the Calcutta High Court in case of **Balaram Thapa & Anr. vs. Himadri Builders Limited, 2007 SCC OnLine Cal.84** and in particular paragraphs 6 to 9 and would submit that under Order XXIII Rule 1 sub-rule 3(b) of the Code of Civil Procedure, 1908, the petitioner is permitted to withdraw the suit with liberty to file a fresh suit in case there are other sufficient reasons and also for filing a fresh suit for other reliefs including part of the reliefs claimed in the first suit. The second suit is for larger area and for additional reliefs. The plaintiff nos.2 to 5 in the second suit are not the parties in the first suit.

19. A plea of bar raised by the respondent nos.1 and 3 under Order II Rule 2 of the Code of Civil Procedure, 1908 also can be raised by the respondent nos.1 and 3 in the second suit and cannot be a ground for refusing to grant relief under Order XXIII Rule 1 sub-rule (3)(b) of the Code of Civil Procedure, 1908. None of the

respondents herein had filed any written statement in the said S.C. Suit No.2203 of 2016 filed by the petitioner before the City Civil court. No issues are admittedly framed by the City Civil Court in the said suit.

20. Learned counsel for the petitioner invited my attention to some of the allegations and submissions made by the respondent no.1 in the affidavit in reply and would submit that none of the issues raised in the affidavit in reply would be relevant for the purpose of opposing this petition impugning the order passed by the Bombay City Civil Court refusing to grant relief to the petitioner in the said suit with liberty to file a fresh suit. He submits that if this Court sets aside the said impugned order passed by the City Civil Court and grants leave to withdraw the said suit with liberty to file a fresh suit,, this order would relate back to the date of application filed by the petitioner for withdrawal of the said suit with liberty to file a fresh suit.

21. Learned counsel for the respondent no.1 on the other hand submits that the suit valued by the plaintiff in the said S.C. Suit No.2203 of 2016 filed before the Bombay City Civil Court was proper. There was no question of valuing the suit claim based on the market value of the property which was subject matter of the lease deed and the suit valuation was to be on the basis of the consideration amount mentioned in the said lease deed and not the market price. The said lease deed relied upon by the respondent no.1 in the affidavit in reply filed in the said notice of motion shows consideration of Rs.20,000/- in the said lease deed.

22. Learned counsel for the respondent no.1 submits that the petitioner had initially filed an application for withdrawal of the said

suit with liberty to file a fresh suit on 18th December, 2017 which application was not pressed at that stage. The petitioner thereafter filed a fresh application on 19th January, 2018 which was opposed by his client.

23. Learned counsel for the respondent no.1 placed reliance on paragraph 5 of the impugned order passed by the learned trial Judge and would submit that the learned trial Judge rightly observed that the petitioner ought to have applied for amendment of the said plaint and if such amendment was allowed, the petitioner could have applied for liberty to withdraw the said suit with liberty to file a fresh suit at that stage which option admittedly was not exercised by the petitioner.

24. It is submitted by the learned counsel that the learned trial Judge had rejected *ad-interim* relief in favour of the petitioner which order was upheld by this Court in appeal from order and thus the petitioner having lost before the two forum, could not have applied for withdrawal of the said suit with liberty to file a fresh suit and thereafter to take a chance before this Court on the same cause of action partly. He submits that the petitioner indirectly seeks sanctity to regularize the second suit which is filed by the petitioner though the application for leave to withdraw the said S.C. Suit No.2203 of 2016 with liberty to file a fresh suit was rejected and the said order has not been set aside till date.

25. Leaned counsel for the respondent no.1 placed reliance on the judgment of Patna High Court in case of **Tata Iron & Steel Co. Ltd. vs. Arun Chandra Bose & Anr. AIR 1967 Pat.246** and more particular paragraphs 3 and 4 in support of the submission that the

petitioner having lost in the notice of motion to the extent of refusing *ad-interim* relief by the Bombay City Civil Court and this Court refusing to interfere with the said *ad-interim* order, the petitioner could have applied for withdrawal of the suit with liberty to file a fresh suit.

26. It is submitted by the learned counsel that if the parties in the second suit are different and if the cause of action is also different according to the petitioner, there was no requirement of making any application for leave to withdraw the said S.C. Suit No.2203 of 2016 with liberty to file a second suit.

27. Learned counsel for the respondent no.1 placed reliance on the judgment of the Supreme Court in case of **K.S. Bhoopathy vs. Kokila, LEX (SC) 2000 5 41** and in particular paragraphs 10 to 12 in support of the submission that in view of the City Civil Court refusing to grant *ad-interim* relief and the said order having attained finality, the rights which are vested in the respondent no.1 could not be taken away by granting leave to withdraw the said suit with liberty to file a fresh suit before this Court.

28. Learned counsel for the respondent no.1 distinguishes the judgment relied upon by Mr.Khandeparkar in case of **Anil Kumar Singh** (supra) on the ground that the said judgment was delivered by the Supreme Court considering the provisions of Order XXIII Rule 1(1) of the Code of Civil Procedure, 1908.

29. It is submitted by the learned counsel that the notice of motion filed by the petitioner along with other four plaintiffs in the second suit before this Court is still pending. Only the *ad-interim* order of *status-quo* has been granted by this Court. The writ petition has

been filed by the petitioner after filing the second suit with a view to apply for some interim relief once again in the second suit with which interim reliefs were already rejected by the City Civil Court.

30. Learned counsel for the respondent no.3 would submit that the *ad-interim* relief granted in favour of the petitioner has been already rejected by the City Civil Court in the suit for injunction and the appeal from order having been rejected by this Court as far back as on 25th October, 2016, the petitioner could not have applied for leave to withdraw the said suit with liberty to file the second suit. The said application for seeking such liberty itself was very vague. The said notice of motion filed by the petitioner before the City Civil Court is required to be heard on its own merit.

31. It is submitted by the learned counsel that even the second suit filed by the petitioner along with other four plaintiffs was also for simplicitor injunction. The petitioner along with other plaintiffs however, filed a frivolous chamber summons *inter-alia* praying for a declaration in respect of the said lease deed. He submits that the valuation of the lease deed was Rs.20,000/-and thus this Court even otherwise could not have entertained the said second suit. The market value of the property is not required to be considered for the purpose of filing a suit for declaration in respect of the document but consideration amount mentioned in the said document has to be considered.

32. Learned counsel for the respondent no.3 placed reliance on the judgment of this Court in case of **Sau.Asha Sopan Maithane vs. Ramkrushna Punjaji Wanare & Ors.** in Writ Petition No.4870 of 2009 delivered on 29th July, 2010 and in particular paragraph 16

thereof in support of his submission that the suit filed by the petitioner before the City Civil Court was rightly valued at Rs.1,000/- and thus on the ground of valuation of the property, the subject matter of the said lease deed could not have been considered by the learned trial Judge and on the basis of that argument, the petitioner could not have applied for leave to withdraw the said suit with liberty to file a fresh suit. He submits that the application for seeking liberty to withdraw the said S.C. Suit No.2203 of 2016 with liberty to file a fresh suit itself was not maintainable and was thus rightly rejected by the City Civil Court.

33. Learned counsel for the respondent no.3 distinguishes the judgment of the Supreme Court in case of **Anil Kumar Singh** (supra) relied upon by Mr.Khandeparkar, learned counsel for the petitioner on the ground that in the said judgment, the Supreme Court had considered the application under Order XXIII Rule 1 and not under Order XXIII Rule (1), sub-rule 3 of the Code of Civil Procedure, 1908. He placed reliance on paragraphs 24 and 25 of the said judgment. He submits that it was the modus operandi of the petitioner to file the consent terms in Suit (Lodging) No.21 of 2012 filed by Janaki Marya Bari & Ors. vs. Kamala Marya Bari. He submits that the petitioner herein was a defendant in the said suit. He submits that in view of the consent terms already having been filed in that suit, the other plaintiffs to the second suit are not at all concerned in the second suit. This Court shall not permit the petitioner to succeed in such modus operandi of the petitioner.

34. Mr.Khandeparkar in rejoinder would submit that the respondents had made three attempts to dispossess the petitioner. An anticipatory bail applied by the respondent no.3 was rejected. The

Criminal Court had rendered the findings in favour of the petitioner. The respondent no.3 was subsequently granted regular bail. The respondents themselves have filed the suit *inter-se* between them before the City Civil Court.

35. Insofar as reliance placed on the consent terms in the Suit (Lodging) No.21 of 2012 is concerned, it is submitted by the learned counsel that the petitioner himself has disclosed the said consent terms in the second suit. The entire consent terms have to be read and not any particular portion thereof. In the said consent terms, the existing rights of the owners are not released.

36. Insofar as the judgment of the Patna High Court in case of **Tata Iron & Steel Co. Ltd.** (supra) relied upon by the learned counsel for the respondent no.1 is concerned, learned counsel for the petitioners distinguishes the said judgment on the ground that in that matter, an application for withdrawal of the suit was made in the second appeal filed before the High Court and thus the said application for withdrawal was rejected. Reliance is placed on paragraphs 2 and 4 in support of the said submission.

37. Learned counsel for the petitioner distinguishes the judgment of the Supreme Court in case of **K.S. Bhoopathy** (supra) relied upon by the learned counsel for the respondent no.1 on the other ground that even in the said matter, the application for withdrawal of the suit was filed before the Appellate Court and thus the said application was dismissed, whereas in this case the application for withdrawal of the suit with liberty to file a fresh suit was filed by the petitioner before the trial Court itself.

38. Learned counsel for the petitioner invited my attention to the description of the property in the first suit and the second suit. He also distinguishes the judgment of this Court in case of Sau.Asha Sopan Maithane (supra) on the ground that the facts before this Court on the said judgment were totally different.

39. Insofar as the issue of the valuation of the second suit is concerned, it is submitted by the learned counsel that this Court in the second suit has already directed the Taxing Master to determine the value of the suit which issue is still pending before the Taxing Master. He submits that insofar as the document of lease relied upon by the respondents are concerned, the said document is neither registered nor stamped. The petitioner was not even a party to such lease deed.

40. Insofar as the issue as to whether the leave was required to be obtained at all by the petitioner or not , it is submitted that the plaintiff nos.2 to 4 in the second suit were not required to apply for leave in the first suit since they were not parties to the said S.C. Suit No.2203 of 2016. Thus the petitioner who was the plaintiff in the first suit was required to file such application. Insofar as the petitioner no.1 is concerned, the relief sought in the second suit is only relating to 5000 sq. ft. area described in the second suit. All the issues on merits of the second suit, including the issue of interim relief whether the petitioner has made a case or not can be kept open.

41. Insofar as the submission of the learned counsel for the respondents and the reasons rendered by the learned trial Court that the petitioner ought to have applied for amendment of the plaint and thereafter could have applied for liberty to file a fresh suit or to return the plaint for proper presentation before appropriate Court is

concerned, learned counsel for the petitioner submits that it is for the petitioner to decide as to how the suit has to be framed and not the respondents. The Court has to do justice while considering the issues raised by both the parties. The petitioner was not prevented under any provisions of law to seek liberty to withdraw the pending suit with liberty file a fresh suit in view of the petitioner having satisfied the conditions under Order XXIII Rule (1) sub-rule (3)(b) of the Code of Civil Procedure, 1908.

REASONS AND CONCLUSIONS :-

42. It is not in dispute that S.C. Suit No.2203 of 2016 was filed by the petitioner herein before the Bombay City Civil Court against the respondents herein *inter-alia* praying for an injunction and other reliefs. The plaintiff nos.2 to 5 in the second suit i.e. Suit (Lodging) No.254 of 2018 were admittedly not the parties to the said S.C. Suit No.2203 of 2016. In the second suit which was filed by the five plaintiffs including the petitioner herein was for permanent injunction initially in respect of the land admeasuring 1 Acre and 6-R and for other reliefs. Since the respondent no.3 relied upon a Lease Deed, the petitioner herein along with other four plaintiffs in the second suit applied for amendment to the plaint so as to seek relief also in respect of the said Lease Deed. It is not in dispute that the said Chamber Summons (Lodging) No.500 of 2018 has been allowed by this Court and an appeal filed against the said order passed by the respondent nos.1 and 3 has been dismissed by the Division Bench of this Court.

43. It is not in dispute that the petitioner herein had applied for *ad-interim* relief in the said S.C. Suit No.2203 of 2016. The City Civil

Court however, has refused to grant *ad-interim* relief in favour of the petitioner. This Court in the appeal from order filed by the petitioner did not grant any relief to the petitioner and directed the petitioner to approach the learned Trial Judge for disposal of the notice of motion expeditiously. The said notice of motion is still pending.

44. It is not in dispute that the petitioner and other four plaintiffs in the Suit (Lodging) No.254 of 2018 filed in this Court have been granted *ad-interim* relief in the notice of motion filed by the petitioner and other four plaintiffs. None of the respondents herein have challenged the said *ad-interim* relief passed by this Court. This Court after considering the argument of both the parties had allowed the said chamber summons filed by the petitioner and other four plaintiffs in the said second suit for seeking amendment to the plaint. The Division Bench of this Court after hearing both the parties, has dismissed the said appeal arising out of the said order of the learned single Judge.

45. Insofar as the submission of the learned counsel for the respondent nos.1 and 3 that the petitioner herein have deliberately filed the second suit for almost the same reliefs though the City Civil Court had already rejected the *ad-interim* relief in favour of the petitioner which order was confirmed by this Court in the appeal from order filed by the petitioner is concerned, in my view, Mr.Khandeparkar, learned counsel for the petitioner is right in his submission that this Court has already granted *ad-interim* relief in the second suit filed by the petitioner and other four plaintiffs. None of the respondents have challenged the said *ad-interim* order. Be that as it may, whether the petitioner herein along with four other plaintiffs should be granted any interim relief or not in the notice of motion filed

in the second suit in view of refusal of *ad-interim* relief by the City Civil Court which order has been confirmed by this Court, the said argument can always be advanced by the respondents at the time of hearing of the notice of motion filed by the petitioner and other four plaintiffs. The respondent nos.1 and 3 cannot be allowed to oppose this petition arising out of the order passed by the City Civil Court refusing to grant leave to the petitioner to withdraw the said suit with liberty to file a fresh suit on the ground that the City Civil Court had already rejected the *ad-interim* relief and the said order had been confirmed by this Court. In my view on such ground this Court cannot refuse to interfere with the impugned order passed by the City Civil Court.

46. A perusal of the plaint in the said S.C. Suit No.2203 of 2016 and in the Suit (Lodging) No.254 of 2018 filed in this Court indicates that the plaintiff nos.2 to 4 in the second suit were admittedly not the parties to the said S.C. Suit No.2203 of 2016 filed before the City Civil Court. The reliefs claimed in the first suit and the second suit are substantially different. In the second suit, all the plaintiffs have not only applied for permanent injunction in respect of the larger property but also have applied for declaratory relief which amendment has been already permitted by this Court and the order is upheld by the Division Bench of this Court. The value of the property which was the subject matter of the suit filed before the City Civil Court was according to the petitioner was more than Rs.1 crore and thus the petitioner was entitled to cure such defect. I am not inclined to accept the submission made by the learned counsel for the respondent nos.1 and 3 that if the valuation of the said property which was the subject matter of the suit before the City Civil Court was more than Rs.1 crore, the petitioner at the first instance ought to have applied for

amendment of the said plaint and thereafter could have applied for return of the plaint for presentation before the Court having jurisdiction or for seeking liberty to withdraw the said suit with liberty to file a fresh suit.

47. Learned Trial Judge also has rejected the said application filed by the petitioner mainly on the ground that the petitioner ought to have first applied for amendment of the plaint and only thereafter could have applied for withdrawal of the said suit with liberty to file a fresh suit. In my view, the argument of the respondent nos.1 and 3 before this Court and also before the Bombay City Civil Court was totally hyper technical. The other four plaintiffs who are parties to the Suit (Lodging) No.254 of 2018 were admittedly not required to obtain any leave from the City Civil Court in the said S.C. Suit No.2203 of 2016.

48. Insofar as the issue of valuation raised by the respondent nos.1 and 3 in the second suit is concerned, this Court has already referred to the said issue to the Taxing Master and the said issue is yet to be crystallized. Upon such issue of valuation of the Court fees if crystallized, an appropriate order can always be passed by this Court based on the determination by the Taxing Master. I am thus not inclined to accept this submission urged on behalf of the respondent nos.1 and 3 while considering this writ petition challenging the order passed by the Bombay City Civil Court refusing to grant liberty to withdraw the said S.C. Suit No.2203 of 2016 with liberty to file a fresh suit. The petitioner along with other four plaintiffs have already filed Suit (Lodging) No.254 of 2018 in this Court for various reliefs.

49. Under Order XXIII Rule 1(3)(b) of the Code of Civil

Procedure, 1908, the Court is empowered to allow the plaintiff to withdraw the existing suit with liberty to institute a fresh suit for the subject matter of the suit or part of a claim. It is not in dispute that part of the claim made by the petitioner herein before the City Civil Court in the said S.C. Suit No.2203 of 2016 is also part of the subject matter of the Suit(Lodging) No.254 of 2018. Learned Trial Judge while rejecting the application filed by the petitioner erroneously held that if the application of the petitioner was considered in terms of Order XXIII Rule 3 of the Code of Civil Procedure, 1908, it could not be said that there was formal defect or that there was any sufficient ground for allowing the plaintiff to institute a fresh suit. Learned Trial Judge while rejecting the said application filed by the petitioner referred to Order XXIII Rule 3 and not Order XXIII Rule 1(3)(b) of the Code of Civil Procedure, 1908.

50. The Supreme Court in case of **Anil Kumar Singh** (supra) has held that the High Court should have confined its enquiry to examine as to whether the requirement of Order XXIII Rule 1 were complied with or not but not beyond it while considering of the application under Order XXIII Rule 1 of the Code of Civil Procedure, 1908. It is held that the High Court could not have considered the issue of grant of injunction while considering the question of withdrawal of the suit. In my view, the said judgment of the Hon'ble Supreme Court in case of **Anil Kumar Singh** (supra) would assist the case of the petitioner herein.

51. The Calcutta High Court in case of **Balram Thapa & Anr.** (supra) has held that Order XXIII Rule 1 sub-rule 3(b) goes a step further and it permits withdrawal of a suit with leave to sue afresh in case there are other sufficient reasons. The petitioner is entitled to

cure the defect. I am in agreement with the views expressed by the Calcutta High Court in case of **Balram Thapa & Anr.** (supra).

52. Insofar as the submission made by the learned counsel for the respondent nos.1 and 3 and the applicability of the provision of Order II Rule 2 of the Code of Civil Procedure in the facts of the second suit is concerned, such issue also can be raised by the respondent nos.1 and 3 before this Court in the second suit. The said arguments cannot be considered for the purpose of opposing this writ petition *inter-alia* challenging the order passed by the City Civil Court refusing to grant leave to withdraw the said suit with liberty to file a fresh suit. It is not in dispute that even in the said suit, none of the defendants have filed any written statement so far.

53. Insofar as the submission of the learned counsel for the respondent nos.1 and 3 that the valuation of the suit property before the City Civil Court in the suit filed by the petitioner was proper and there was no question of valuing the said claim based on the market value of the property which was the subject matter of the Lease Deed is concerned, it is for the plaintiff to frame the suit. According to the petitioner, in the said suit, the value of the property was more than Rs.1 crore and also on that ground that the petitioner had applied for liberty to withdraw the said suit with liberty to file a fresh suit.

54. Insofar as reliance placed by the learned counsel for the respondents on the judgment of the Patna High Court in case of **Tata Iron & Steel Co. Ltd.** (supra) is concerned, a perusal of the said judgment clearly indicates that an application for withdrawal of the said suit with liberty to file a fresh suit was made for the first time before the Appellate Court and not before the Trial Court. The said

judgment of the Patna High Court is distinguishable in the facts and circumstances of the case. Reliance placed by the learned counsel for the respondent nos.1 and 3 on the said judgment is totally misplaced.

55. Insofar as the judgment of the Supreme Court in case of **K.S. Bhoopathy** (supra) relied upon by the respondent nos.1 and 3 is concerned, in my view the said judgment of the Supreme Court would not assist to the case of the respondent no.1 or the respondent no.3. In that judgment also, an application for withdrawal of the suit with liberty to file a fresh suit was filed before the Appellate Court. In this case, application was made before the Trial Court itself. The City Civil Court had not rejected the notice of motion but has only refused to grant *ad-interim* relief. On the other hand, this Court after hearing both the parties, has granted *ad-interim* relief in favour of the petitioner along with other four plaintiffs. The said *ad-interim* relief has not been impugned by any of the respondents before the Division Bench of this Court. Be that as it may, the ground raised by the respondent nos.1 and 3 that the City Civil Court having already rejected the *ad-interim* relief and the said order having been upheld by this Court can be agitated before this Court in the pending notice of motion. In my view, the judgment of the Supreme Court in case of **K.S. Bhoopathy** (supra) thus would not assist the case of the respondent nos.1 and 3.

56. Learned counsel appearing for the respondent no.3 also has reiterated the submission made by the learned counsel for the respondent no.1 which I have already dealt with in the earlier paragraphs of this judgment. Insofar as the judgment of this Court in case of **Sau.Asha Sopan Maithane** (supra) relied upon by the respondent no.3 is concerned, in view of the fact that this Court has already referred the issue of valuation in the second suit to the

Taxing Master, further orders may be passed by this Court after such valuation is made by the learned Taxing Master. The reliefs claimed in the first suit and in the second suit are substantially different. The judgment of this Court in case of **Sau.Asha Sopan Maithane** (supra) thus would not assist the case of the respondent no.3.

57. A perusal of the record indicates that it is the case of the petitioner herein that the respondents had made three attempts to dispossess the petitioner. An anticipatory bail application filed by the respondent no.3 was rejected. The Criminal Court has rendered various findings in favour of the petitioner. The respondent no.3 was ultimately granted a regular bail.

58. A perusal of the order passed by the learned Trial Judge refusing to grant liberty to withdraw the said suit with liberty to file a fresh suit shows that the reasons recorded by the learned Trial Judge are totally erroneous and contrary to the principles laid down by the Supreme Court and this Court and contrary to Order XXIII Rule 1 sub-rule 3(b) of the Code of Civil Procedure and thus deserves to be set aside.

59. I therefore, pass the following order :-

a). The impugned order dated 5th February, 2018 passed by the Bombay City Civil Court below Exhibit – 9 in said S.C. Suit No.2203 of 2016 is quashed and set aside.

b). The application filed by the petitioner herein (Exhibit – 9) for seeking liberty to withdraw the said S.C. Suit No.2203 of 2016

with liberty to file a fresh suit is allowed.

c). The writ petition is allowed in aforesaid terms. There shall be no order as to costs.

Vasant
Anandrao Idhol

Digitally signed by Vasant
Anandrao Idhol
Date: 2018.09.12 17:24:05 +0530

(R.D. DHANUKA, J.)