

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

WRIT PETITION NO. 1278 OF 2018

Smt.Fausta Sathyasilan & Anr.	...	Petitioners
V/s.		
Hubert Joseph Fonsica & Ors.	...	Respondents

- Mr.G.S. Godbole, Sr. Counsel a/w. Mr.Atharv Dandekar and Ms.Nikita Jacob for the Petitioners.
- Mr.Rohan Cama a/w. Mr.Kabir Rachure i/b. Ms.Sapna Rachure for Respondent No.1.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 24th APRIL, 2018.

P.C. :

1] Heard learned counsel for the Petitioners and learned counsel for Respondent No.1.

2] By this Writ Petition, filed under Article 227 of the Constitution of India, the Petitioners are challenging the order dated 20th March 2017 passed by City Civil Court, Dindoshi, Mumbai, thereby rejecting the Notice of Motion No.3098 of 2016 in Suit No. 3341 of 2015.

3] The Notice of Motion was preferred by the present Petitioners, who are the Plaintiffs before the trial Court seeking leave

under Order II Rule 2(3) of the Code of Civil Procedure, 1908, for institution of separate suit for substantive relief of Specific Performance of Contract.

4] Perusal of the impugned order passed by the trial Court reveals that the trial Court has rejected the said leave on the count that it was sought after filing of the suit. In this respect, the trial Court has relied upon the decision of the Single Bench of this Court in the case of *Canning Mitra Phoenix Ltd. V/s. M/s.Popular Construction, AIR 1883 Bom.67*.

5] Now, learned counsel for the Petitioners has brought to the notice of this Court that the Division Bench of this Court in the same case of *Canning Mitra Phoenix Ltd. V/s. M/s.Popular Construction, 1994 Mh.L.J. 812*, has overruled the decision of the Single Bench holding as follows:

“Accordingly, we hold that the plaintiff can seek leave of the Court under sub-rule (3) of Rule 2 of Order II of the Code of Civil Procedure at any time before the date of decree in the first suit and the jurisdiction of the Court is not ousted because the leave is not sought before the institution of the first suit. The leave to institute second suit can be sought at any time during the pendency of the first suit but such leave must be obtained prior to the date of institution of the second suit. The question as to

whether leave should be granted under sub-rule (3) of Rule 2 will depend upon the facts and circumstances of each case and the Court will exercise jurisdiction after considering all the circumstances including whether the application is bona fide and whether it is likely to cause any prejudice to the defendants. The Court would grant leave provided the plaintiff is seeking leave for any relief omitted and not in respect of any portion of the claim which was omitted or intentionally relinquished at the time of the institution of the first suit.”

6] In view thereof, the impugned order rejecting the leave merely because it is sought after the suit has commenced cannot be tenable.

7] However, as rightly submitted by learned counsel for the Respondent, the trial Court has not considered all other aspects as it has rejected the same only on the count that such leave cannot be granted after the suit is filed. However, as held in the above said judgment of the Division Bench, the question as to whether leave should be granted or not will depend upon the facts and circumstances of each case and the Court will have to exercise its discretion after considering of the circumstances, including whether the application is bonafide and whether it is likely to cause any prejudice to the Defendants. In the present case, all these aspects are not considered

by the trial Court and as a result, the matter is required to be remanded back to the trial Court for considering afresh the said Notice of Motion.

8] At this stage, learned counsel for the Respondent also brings to the notice of this Court that in the Notice of Motion, the Petitioners are seeking the leave to file a suit for specific performance of contract. It is submitted that such leave cannot be asked for, nor such leave can be granted as held in the judgment of the Hon'ble Apex Court in the case of *Shiv Kumar Sharma V/s. Santosh Kumari, AIR 2008 SC 171*, that, "A Civil Court does not grant leave to file another suit. If the law permits, the plaintiff may file another suit but not on the basis of observations made by a superior Court." Therefore, the only relief which the Petitioners can seek in the Notice of Motion is the leave to omit the relief of specific performance from the present case, which will indirectly enable him to file a separate suit for the said relief.

9] Learned counsel for the Petitioners submits that, in that case, he will seek necessary amendment in the Notice of Motion.

10] In view thereof, keeping all the questions raised between the parties expressly open, the matter is remanded to the trial Court,

by setting aside the impugned order passed by the trial Court.

11] The trial Court to decide the Notice of Motion afresh after giving an opportunity of amending the same to the Petitioners and after giving an opportunity of filing the say thereto, to the Respondent and hearing the matter afresh.

12] The trial Court to allow the application, if filed by the Petitioners, to correct the prayer clause in Notice of Motion.

13] Writ Petition is disposed of in above terms.

[DR.SHALINI PHANSALKAR-JOSHI, J.]