

IN THE HIGH COURT OF BOMBAY AT GOA.

WRIT PETITION NO. 863 OF 2018.

WILBERT MASCARENHAS,
THR. POA BY PETITIONER
NO. 2 AND 2 ORS.,

... Petitioners.

Versus

ANA FRANCISCA ANTAO
E MASCARENHAS AND 8 ORS.,

... Respondents.

Shri R. G. Ramani and Shri P. Kakkar, Advocates for the petitioners.
Shri V. Naik, Advocate for the respondent nos.1,2 & 3.

Coram:- DAMA SESHADRI NAIDU, J.
Date:- 15th January 2020.

P.C.

In the suit filed by the respondents, the petitioners as the defendants nos.1, 4 and 5 raised a counterclaim. Over time, based on the defendants' objection under Order 7 Rule 11 of CPC, the trial Court rejected the plaint. Thus, the original suit disappeared, but only the counterclaim remained. Then, the defendant nos.1,4 and 5 applied under Order 23 Rule 1(1) of CPC to withdraw the counterclaim. The defendants wanted to withdraw the counterclaim and file a fresh suit, so it seems. But the trial Court, through its order dated 19.7.2017, allowed "simpliciter withdrawing the counterclaim but granted no liberty". Aggrieved those defendants have filed this Writ Petition.

2. Heard Shri R. G. Ramani, the learned counsel for the

petitioners, and Shri V. Naik, the learned counsel for the respondent nos.1 to 3.

3. As the impugned order is cryptic, I may quote that in its entirety:

"No question of granting any liberty. The simpliciter withdrawal of counterclaim is permitted. Counterclaim dismissed as withdrawn. Proceeding closed."

4. Let us examine the provision. Order XXIII, Rule 1 reads:

1. Withdrawal of suit or abandonment of part of claim.—(1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim:

...

(2)...

(3) Where the Court is satisfied,—

(a) that a suit must fail by reason of some formal defect, or

(b) *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, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.*

(4) Where the plaintiff—

(a) abandons any suit or part of claim under sub-rule (1), or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3),

he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(5)...

4. Under Rule 1 of Order XXIII, the plaintiff may abandon his suit or abandon a part of his claim, at any time, against all or any of the defendants. It needs no leave from the Court. But if the plaintiff is a minor or any other person to whom Rules 1 to 14 of Order XXXII apply, neither

the suit nor any part of the claim shall be abandoned without the Court's leave. Rule 2 of the same Order describes the abandonment or withdrawal takes place if the plaintiff is one under some legal disability as described in the Proviso to Rule 1.

5. Rule 3 of Order XXIII, the pivotal provision for our purpose, has two limbs: the suit failing because of some formal defect, or the plaintiff having sufficient grounds to institute a fresh suit for the subject matter of a suit or part of a claim. In either contingency, the Court may permit the plaintiff to withdraw the suit or a part of the suit claim, with liberty to institute a fresh suit "in respect of the subject matter of such suit or such part of the claim." This leave can be on such terms as the Court thinks fit. Nowhere has the provision split the withdrawal of the suit and filing afresh on the same cause of action. They go together. If leave is granted for the plaintiff only to withdraw the suit without liberty for him to file a fresh suit, his cause of action and the right to remedy perish. On the other hand, if the whole application is rejected, the plaintiff may persist with the present suit and remedy, as best as he can, the problems that prompted him, in the first place, to apply for withdrawal with leave to file afresh.

6. I reckon it is an established principle of law that once a party applies under Order 23 Rule 1, the trial Court may allow the application or dismiss it in its entirety. It is impermissible for the trial Court to

allow mere withdrawal, without granting the leave for the party to sue afresh.

7. Recently, in *Chandrakant Pandurang Shingade v. Walchand Gula-bchand Bora*¹, this Court, per Sandeep K. Shinde, J, has held that “if an application is made for withdrawal of the suit with liberty to file suit, it is not open for the Court to grant only permission for withdrawal, without liberty to institute the proceedings, though it is open for the Court to reject such application.” For this proposition, *Chandrakant Pandurang Shingade* has relied on *Mario Shaw v. Martin Fernandez*².

8. In *Mario Shaw*, this Court has noted that the petitioner applied to the Co-operative Court to withdraw the dispute with a liberty to file fresh proceedings. But the Co-operative Court dismissed the proceedings but gave no liberty to file fresh proceedings. According to *Mario Shaw*, the Co-operative Court’s approach is flawed. “It is well settled that if an application is made for the withdrawal of the suit with liberty to file a suit, it is not open for the Court to grant only permission for withdrawal without liberty to institute the proceedings,” ruled *Mario Shaw*. It has further held that the Co-operative, in the alternative, could have rejected the whole application.

9. Under these circumstances, I set aside the trial Court’s order,

¹ 2019 SCC OnLine Bom 1669

² AIR 1996 BOMBAY 116

dated 19.7.2017, and remand the matter to the trial Court for fresh consideration, as indicated above.

The Writ Petition stands disposed of accordingly.

DAMA SESHADRI NAIDU, J.

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