

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 1903 OF 2020

Sayyad Akbar Sayyad Abdulla,
 Age 76 years, Occu. Retired,
 R/o. 102, Kohinoor Apartment,
 Noor Mohalla Neharu Nagar,
 Pimpri, Pune, Pin No. 411018.

.. Petitioner
 (Original Plaintiff)

Versus

1. Sayyad Usman Gani Sayyad Abdulla,
 Age 81 years, Occu. Agriculture,
2. Sayyad Abdul Rajjak Sayyad Mukthar,
 Age 30 years, Occu. Agriculture,
3. Sayyad Abdul Jabbar Mukthar Ahmed,
 Age 25 years, Occu. Agriculture,
4. Alimabano Alikhan,
 Age 21 years, Occu. Agriculture,
5. Sayyad Shahajanabi Mukhtar Ahmed,
 Age 51 years, Occu. Agriculture,

All above 1 to 5 are R/o. Khed, Taluka Karjat,
 District Ahmednagar

.. Respondents
 (Original Defendants)

...

Mr. Sanket S. Kulkarni, Advocate for Petitioner
 Mr. Yunus Basheer Pathan, Advocate for Respondents No.1 to 5

...

CORAM : NITIN B. SURYAWANSHI, J.

DATE : 25-02-2022

JUDGMENT :-

Rule. Rule made returnable forthwith. Heard finally with
 the consent of learned Advocate for the parties.

2. This petition takes exception to the Order passed by the learned Civil Judge, Junior Division, Karjat, District Ahmednagar, below Exhibit-31 in Regular Civil Suit No. 27 of 2015, dated 16.10.2019, thereby partly allowing the Application filed by the petitioner for withdrawal of the suit but denying liberty to him to file a fresh suit.

3. The plaintiff has filed suit for partition and separate possession of the suit property. In the suit, by filing application Exhibit-31, the plaintiff claimed that, the parties are Sunni Muslims and they are claiming partition, however, the dates of death of his sisters are not mentioned in the plaint. Due to technical defects, the plaintiff prayed for permission to withdraw the suit with liberty to file a fresh suit.

. The defendants opposed the said application contending that the application is not maintainable. Another suit bearing No. 75 of 2013 for partition is pending and the defendants have moved an application under Section 10 of the Civil Procedure Code, 1908 (C.P.C.). Accordingly, hearing of the said suit was stayed. The plaintiff can get his share by the Decree passed in Regular Civil Suit No. 75 of 2013. According to them, plaintiff has an opportunity to raise his objection, if any, in that suit. Therefore, there is no need to file another suit. Hence, defendants prayed for rejection of the said application.

4. The trial Court, partly allowed the said application, thereby granting permission to withdraw the suit, however, the permission to file fresh suit is rejected. Hence, the present petition.

5. Heard learned Advocate for the petitioner and learned Advocate for the respondents.

6. The learned Advocate for the petitioner submits that the learned trial Court can allow or reject the application, but it cannot partly allow the application, thereby, granting permission only to withdraw the suit and refuse permission to file a fresh suit.

In support of argument, petitioner has relied on following decisions -

- (i) *Devidas Tulsiram Brijwani Versus The Commissioner, Poona Municipal Corporation, AIR 1974 Bombay 39,*
- (ii) *Mario Shaw Versus Martin Fernandez And Another, AIR 1966 Bom 116.*

7. The learned Advocate for the respondents, on the other hand, strongly opposed the prayer of the petitioner contending that, the petitioner could have amended the plaint and withdrawal of it was not necessary. In the circumstances, at this stage, according to him, another suit R.C.S.No.75 of 2013 for partition is pending. The plaintiff can agitate the claim in that suit, and therefore, fresh suit is not necessary. He, therefore, submits that the writ petition is liable to be dismissed.

8. Order XXIII, Rule 1, Sub-Rule 3 (a) and (b) of the C.P.C. provides that -

“(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.

The language used in Order XXIII, Rule 1, Sub-Rule 3 (a) and (b) of the C.P.C. is clear. It provides that the Court has to grant permission to the plaintiff to withdraw such suit or part of claim with liberty to institute a fresh suit in respect of the subject-matter of such suit. The Court cannot pass order granting permission to withdraw the suit and refuse permission to file a fresh suit.

9. In ***Devidas Tulsiram Brijwani’s*** (*supra*), the Co-ordinate Bench of this Court, in similar facts, held thus -

“... For withdrawing a suit without liberty under Order 23, Rule 1(1) of the Civil Procedure Code, no permission or order of the Court was required by the plaintiff. The plaintiff’s application was for withdrawing with liberty to file a fresh suit under Order 23, Rule 1(2) and, if the learned Judge of the Court below thought that that liberty should not be granted, he could reject that application, but he

could not make an order whereby the plaintiff's suit stood withdrawn without liberty to file a fresh suit, with the result that the plaintiff would be precluded from filing a fresh suit in respect of the same cause of action as stated in sub -rule (3) of Order 23, Rule 1 of the Code of Civil Procedure.”

10. In “**Mario Shaw**” (*supra*), the Co-ordinate Bench of this Court, held thus -

“6. There is one more reason for rejecting the petitioner's contention. Admittedly, the application made by the respondents before the Co-operative Court was for withdrawal of the dispute with a liberty to file fresh proceedings. If that is so, the Co-operative Court was clearly in error in passing an order of withdrawal without granting permission to initiate fresh proceedings. It is well settled and if an application is made for 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, though it is open for the Court to reject such application. Thus I do not find any merit in this petition and the same is dismissed summarily.”

11. In the light of above ratio, the trial Court could have rejected the application in its entirety, but could not have partly allowed the application thereby granting permission to withdraw the suit and refused permission to file a fresh suit. The trial Court has erroneously exercised the jurisdiction vested in it. The impugned order of the trial Court is therefore unsustainable in law and the facts of the present case.

12. In the result, the impugned order passed by the learned Civil Judge, Junior Division, Karjat, District Ahmednagar, below Exhibit-31, in Regular Civil Suit No. 27 of 2015, dated 16.10.2019, is hereby quashed and set-aside.

13. Application Exhibit-31 in Regular Civil Suit No. 27 of 2015 is hereby allowed.

14. Rule is made absolute in above terms.

15. No costs.

(NITIN B. SURYAWANSHI)
JUDGE

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