

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

WRIT PETITION NO.8884 OF 2021

Jayprakash Nanaso Gaikwad and Ors.

..Petitioners

Versus

Arun Ramchandra Patil and Anr.

..Respondents

Mr. Rajaram Bansode, for the Petitioners.

Mr. Tejesh Dande a/w Bharati Gadhavi, Vishal Navale, Aniket Aghade and Vikrant Khare i/by Tejesh Dande & Associates, for the Respondents.

CORAM : NITIN W. SAMBRE, J.

DATE : 16th FEBRUARY, 2022

PC.

1. The order impugned in this petition is 27th November, 2021 passed below Exh.164. An application taken out by the petitioner/plaintiff alleged to be Power of Attorney holder for withdrawal of the suit proceedings under Order XXIII Rule 1 of the CPC. The Trial Court instead of passing an effective order has passed following order on the same :-

“Seen and filed”

2. The contention of the learned counsel for the petitioner/plaintiff is, the petitioner is *dominus litis* and that being so, he has every right to decide whether he intends to pursue the suit or

withdraw the suit unconditionally. According to him, in view of provisions of Order XXIII Rule 1 of the CPC, once the petitioner/plaintiff applied for unconditional withdrawal of the suit, the Trial Court is duty bound to grant the same. As such, according to him, the order impugned which is unreasoned is not sustainable. Learned counsel in addition to above would invite attention of this Court to the provisions of Order 8 Rule 6A, so as to claim that once the petitioner has applied for withdrawal of the suit, the Trial Court ought not to have accepted the counter claim as has been done in the present case as has been reflected in the order dated 3rd December, 2021.

3. Learned counsel as such would urge that the Court ought to have granted permission to withdraw the suit unconditionally at the stage at which the suit was pending and ought not to have entertained the counterclaim.

4. Mr. Tejesh Dande, learned counsel would invite attention of this Court to the very requirement of Order XXIII Rule 1(5) of the CPC. According to him, the Trial Court after the aforesaid order which is impugned in the petition has passed detailed order below Exh.1 on 17th December, 2021 which takes care of the issue as regards permission to withdraw the suit. According to him, neither the order passed below Exh.1 on 17th December, 2021 is questioned nor the earlier order entertaining the counterclaim. That being so, according to him, the petition is liable to be dismissed.

5. Considered submissions.

6. At the outset, it is required to be noted that considering the rival claims and contentions before the learned Principal District Judge, learned District Judge rejected the prayer of the petitioner for transfer of the suit. Apart from above, hearing of the suit has been expedited. The Court below has recorded finding that the petitioners/plaintiffs are not cooperating in expeditious disposal of the suit and taking out frivolous application and as such cost was saddled on the petitioners/plaintiffs. Apart from above, what can be noticed that application Exh.164 taken out under Order XXIII of the CPC for withdrawal of the suit is by one of the plaintiff as Power of Attorney holder. One of the executant, namely, Nanaso Gaikwad expired before application Exh.164 was moved. Apart from above, the fact remains that copy of the Power of Attorney which is shown to this Court (not part of the record of the Court) does not specify powers are given to the attorney to pursue or withdraw of the suit.

7. Trial Court while passing order below Exh.1 on 17th December, 2021 has in detail dealt with the aforesaid issues.

8. In that view of the matter, in my opinion, no case for interference in the extraordinary jurisdiction of this Court is made out.

9. One more issue, which this Court must take judicial note

is though it is claimed that the counterclaim ought not to have been entertained at this stage particularly having regard to the provisions of Order 8 Rule 6A of the CPC the fact remains that said issue is not questioned in the present petition. Apart from above, there appears to be sufficient circumstances as reflected in the various orders and pleadings which prompted the Trial Court to entertain counterclaim of the respondents/defendants.

10. In the aforesaid background, no case for interference is made out.

11. The petition as such fails, dismissed.

[NITIN W. SAMBRE, J.]