

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.4806 OF 2021

**RAJU MAHADU KHOSE AND OTHERS
VERSUS
KRISHI UTPANNA BAZAR SAMITI PARNER, THROUGH THE
SECRETARY, SHIVAJI MARUTI PANSARE**

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Advocate for Petitioners : Mr. Amit S. Deshpande

Advocate for Respondent : Mr. M.S. Kulkarni

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CORAM : NITIN B. SURYAWANSHI, J.

DATE : 18th AUGUST, 2023

PER COURT :

1. This petition is directed against the order dated 23/10/2019, passed by learned Joint Civil Judge, Junior Division, Parner, below Exhibit-1 in Regular Civil Suit No.214/2019, thereby accepting pursis filed by the respondent/plaintiff for withdrawal of suit.

2. Respondent filed the suit for measurement of the sub-share and fixation of boundaries of suit property as per the sale deed by which plaintiff purchased the suit property. Suit was opposed by the petitioners/defendants by filing written statement. During pendency of the suit, Court Commissioner was appointed for measurement of the suit property. Court Commissioner submitted his report on 30/03/2019. Thereafter, application Exhibit-37 is filed

by the plaintiff contending that the suit is filed for measurement of suit property, however, during pendency of the suit Court Commissioner was appointed who has carried out measurement and has submitted the report in Court. On the basis of said measurement report, plaintiff wants to file fresh suit for possession of encroached portion and hence, the plaintiff does not want to proceed with the suit. Therefore, the suit may be disposed of as withdrawn. In the order passed below said application trial Court has observed;

"Today plaintiff appeared before the Court along with their advocate. Plaintiff stated that he has settled the dispute out of Court. He want to withdraw the suit. The contents of Pursis were read over the plaintiff. Plaintiff admitted the contents of Pursis he also admitted his signature on Pursis. He also admitted signature of their advocate on pursis. Considering this pursis is read and recorded necessary order passed below Exh.1."

3. Accordingly, the trial Court passed order below Exhibit-1, thereby allowing plaintiff to withdraw the suit in terms of withdrawal pursis Exhibit-37. Petitioners are aggrieved by this order.

4. Heard learned advocate for petitioners and learned advocate for respondent. Perused the writ petition memo, annexures thereto, the impugned order, affidavit-in-reply filed by respondent and the citation relied upon by learned advocate for petitioners.

5. Learned advocate for petitioners/defendants assailed the impugned order contending that there is no satisfaction recorded by the Court in terms of Order 23 Rule 1(3)(a and b) of the Code of Civil Procedure. Therefore, the impugned order is vitiated and cannot be sustained. In support of his submission, he relied on *K. S. Bhoopathy and Others Vs. Kokila and Others, (2000) 5 SCC 458*. He further submits that, since the suit was not likely to be decreed in favour of respondent/plaintiff, he sought permission to withdraw the same, which is wrongly granted by the trial Court. By pointing out Roznama dated 14/10/2019, he submits that on that day application was filed by the plaintiff for sending back report to the Court Commissioner for showing both the Gut numbers specifically. The matter was adjourned to 11/11/2019. On 23/10/2019, the matter was taken on board at the instance of plaintiff and the application Exhibit-37 was allowed without even calling upon the defendants. He submits that, since the impugned order is passed without hearing defendants, the same is liable to be quashed and set aside. By pointing out observations of the trial Court that, plaintiff has stated that there is compromise between plaintiff and defendants, he submits that there was no such compromise between the parties and trial Court is misled by the plaintiff in obtaining order passed below Exhibit-37. He further submits that, since plaintiff has failed to get any interim injunction

order up to this Court, he has sought permission to withdraw the suit and file fresh suit by filling up the lacunas in previous suit.

6. Per contra, learned advocate for respondent submits that, by application Exhibit-37 no permission was sought by the trial Court to file fresh suit on the same cause of action. He fairly concedes that there was no settlement between the parties. He, however, submits that since fresh cause of action was accrued in view of measurement map wherein the encroachment is shown, plaintiff has filed fresh suit in which interim injunction is granted in favour of respondent/plaintiff. By pointing out order passed by this Court in Writ Petition No.11774/2019, he submits that petitioners/defendants were aware about the intention of plaintiff to withdraw the suit and institute fresh suit, which is reflected in the said order. He, therefore, submits that there is no merit in the challenge raised by the petitioners and the petition must fail.

7. Undisputedly, the earlier suit i.e. R.C.S. No.214/2019 was filed seeking measurement of sub-share and for fixing of boundaries. It is also not in dispute that, during pendency of suit no interim injunction was granted in favour of plaintiff and Court Commissioner was appointed who has conducted measurement on 30/03/2019, in presence of plaintiff and defendants. The map is submitted by the Court Commissioner which shows encroachment

on the suit property. It is specifically contended by the plaintiff in application Exhibit-37 that after measurement of the suit property by Court Commissioner, it was revealed that there is encroachment in suit property and the plaintiff intends to file fresh suit for obtaining possession of the encroached portion. Therefore, he does not want to prosecute the present suit and the suit may be disposed of. Learned advocate for respondent is right in contending that this application cannot be said to be filed under Order 23 Rule 1(3)(a) and (b), as no permission is sought from the trial Court to withdraw the suit and file fresh suit on the same cause of action. Since fresh cause of action had arisen to the plaintiff on the basis of Court Commissioner's report, he has requested to dispose of the suit, which is rightly granted by the Trial Court by passing the impugned order.

8. Though it is mentioned in the impugned order that plaintiff has stated that he has settled the dispute out of Court, that by itself is not sufficient to set aside the impugned order. In order dated 30/09/2019, passed in Writ Petition No.11774/2019, this Court has observed;

"1. Though the learned Advocate for the respondents is willing to tender an affidavit that the shops will be demolished since the suit is decreed against them, the learned Sr. Advocate submits, on instructions, that the petitioner desires to withdraw this petition, so also the petitioner desires to file an application before the trial

Court to seek withdrawal of the suit and institute a fresh suit with correct property details.”

9. It is thus, clear that the defendants were aware about the intention of plaintiff to withdraw the suit and to instituted fresh suit. In that view of the matter, no prejudice is caused to the defendants though they were not called upon to file say on application Exhibit-37.

10. In ***K. S. Bhoopathy*** (supra), the Apex Court has held that, it is the discretion of Court to grant permission for withdrawal of suit with liberty to sue afresh on same cause of action, but such discretion is to be exercised with caution and circumspection. The Court is to be satisfied that there are sufficient grounds for allowing plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim. Clause (b) of Sub-rule (3) contains the mandate to the Court that it must be satisfied about the sufficiency of grounds for allowing plaintiff to institute a fresh suit for the same claim or part of the claim on the same cause of action. The Court is to discharge duty mandated under the provision of the Code on taking into consideration all relevant aspects of the matter including the desirability of permitting the party to start a fresh round of litigation on the same cause of action. There cannot be any dispute about said proposition of law. However, in the facts of the present case, since subsequent suit is instituted by the plaintiff on fresh cause of

action, this citation is of not assistance to the case of defendants.

11. For the aforestated reasons, no illegality or perversity is found in the order impugned in present petition. No jurisdictional error or error of law is committed by the trial Court in passing the impugned order. Writ petition being devoid of merit is dismissed.

(NITIN B. SURYAWANSHI, J.)