

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

21 C.R.A. NO.88 OF 2016

YOGESH SUDHAKAR CHAVANKE AND ANOTHER
VERSUS
SITARAM DAMU MATE

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Advocate for Petitioners/Applicants : Mr. Kulkarni Sudhir D.

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CORAM : S. G. MEHARE, J.

DATE : 11.09.2023

PER COURT :-

1. Heard the learned counsel for the applicants. None was present for the respondent.
2. The applicants have impugned an order passed on a pursis Exh.42 filed in Regular Civil Suit No.295 of 2013. The plaintiffs had filed the pursis informing the Court that they were withdrawing the suit subject to reserving their right of filing the suit again. The impugned order was passed on the pursis and allowed them to withdraw the suit and imposed the costs of Rs.20,000/-.
3. The learned counsel for the applicants has vehemently argued that a separate suit filed by the defendant for the cancellation of the sale deed in favour of the plaintiff has been decreed. The High Court dismissed the first appeal against the said decree, and S.L.P is pending before the Hon'ble Supreme

Court. The Hon'ble Supreme Court was pleased to pass the *status quo* order. It is still in operation.

4. The vehement argument of the learned counsel for the applicants is that once the Court grant the leave to withdraw the suit under Order 23, the Court cannot decline the permission to initiate a fresh suit. To bolster his argument, he relied on the judgment of the Bombay High Court passed in *Chandrakant Pandurang Shingade and another Vs. Walchand Gulabchand Bora and another; 2019 S.C.C. OnLine Bom. 1669*, in which the ratio laid down in the case of *Mario Shaw Vs. Martin Fernandez and another; A.I.R. 1996 Bom. 116* was relied upon. Further, he relied upon the *Writ Petition No.1903 of 2020 filed by Sayyad Akbar Sayyad Abdulla Vs. Sayyad Usman Gani Sayyad Abdulla and others of the Bombay High Court at Aurangabad Bench, dated 25.02.2022*, in which the ratio laid down in the case of *Mario Shaw* was again considered. Lastly, he relied upon the case of *Hans Raj Akrot Vs. State of Himachal Pradesh; A.I.R. 1989 Himachal Pradesh 43*.

5. The consistent ratio in the cases relied upon by the applicants was that 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 to withdraw without liberty to file the suit, it is not open for the learned Judge of the Court to grant only permission for withdrawal without liberty to institute the proceedings, though it is open for the Court to reject such an application.

6. The condition for withdrawal of the suit under Order 23 is that the application for leave under proviso Sub Rule 1 shall be accompanied by an affidavit. The applicant seeking permission to leave to withdraw the suit with the liberty to file a fresh application, the Court must satisfy that the suit must fail by reason of some formal defect or there are sufficient grounds for allowing the plaintiffs to institute a fresh suit for the subject matter of the suit or part of a claim. Then, the Court, on such terms as thinks fit, may grant the plaintiffs 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.

7. However, herein the case, the present applicants/petitioners have barely filed a pursis mentioning that they are withdrawing the suit subject to reserve the right of filing the suit again. The pursis is just information to the Court without prayer. In the said pursis, no grounds required under Order 23

Rule 3 of C.P.C. were pleaded, nor was an affidavit filed. In fact, the Court was not supposed to pass a detailed order considering the legal provisions of leave to withdraw the suit on the pursis.

8. The case laws relied on by the learned counsel for the petitioners apply to the facts of the present case. Therefore, the impugned order dated 17.02.2016 passed below Exh.1 in Regular Civil Suit No.295 of 2013 on the basis of pursis Exh.42 stands quashed and set aside, and the revision application stands allowed.

9. The liberty has been granted to the plaintiffs to file an appropriate application under Order 23 of the C.P.C. for withdrawal of the suit with the liberty to file a fresh suit. In the circumstances, the cost of Rs.20,000/- imposed by the Court on the plaintiffs should be returned to them if deposited in the Court. If the defendant has received the costs, it be recovered from the defendant by following the appropriate remedy under the law.

10. The suit be restored to its original number.

(S. G. MEHARE, J.)

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vmk/-