

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

WRIT PETITION NO.4878 OF 2022

**RAMSING LUMBHA RATHOD
VERSUS
PRAFULLA MULCHAND BRAMECHA AND OTHERS**

...
Advocate for Petitioner : Mr. Dattatray K. Kulkarni
Advocate for Respondent Nos. 1 & 2 : Mr. N.S. Muthiyan
...

CORAM : NITIN B. SURYAWANSHI, J.

DATE : 20th APRIL, 2023

PER COURT :

1. Petitioner is aggrieved by the order dated 19/04/2022, passed by learned 11th Civil Judge, Senior Division, Aurangabad, below Exhibit Nos.1, 91 and 92, in Regular Civil Suit No.575/2011.

2. On 24/10/2013, petitioner/plaintiff has filed suit for rectification of instrument of sale dated 31/03/2010. On 21/10/2021, suit was posted for evidence and at that time application Exhibit-91 is filed by the plaintiff for withdrawal of suit stating that, "*The captioned suit is posted on 21/10/2021 for evidence to maintain relation between parties they have settled and resolved their dispute in respect of present suit out of Court and consequent upon that settlement plaintiff intends to withdraw captioned suit unconditionally.*" Hence, he prayed for permission to withdraw the suit. Defendants filed say on the said application as

"Subject to cost as plaintiff withdrawing the suit unconditionally and oblige". On 29/10/2021, plaintiff filed application Exhibit-92 for 'not pressing' application for withdrawal of suit, stating that though he filed application for withdrawal of suit as the parties had settled and resolved their dispute, however, differences again arose and it is practically impossible to settle and resolve dispute out of Court. Hence, plaintiff intends to 'not press' application Exhibit-91 seeking permission for withdrawal of suit.

3. Defendants by filing detail say resisted said application being not maintainable. It is submitted that D.D. of Rs.15 Lakhs is already given to the advocate of plaintiff as the matter is resolved and settled between plaintiff and defendants. Trial Court has not passed order on the said application Exhibit-91 and kept the same for orders on next date and in between plaintiff has encashed D.D. of Rs.15 Lakhs. Defendants, therefore, prayed for dismissal of application Exhibit-92, with heavy costs.

4. Trial Court by relying on ***Anil Dinmani Shankar Joshi and Another Vs. Chief Officer, Panvel Municipal Council and Another, 2003(2) ALL MR 24***, rejected the application Exhibit-92, by common order below Exhibit Nos.1, 91 and 92 and disposed of the suit as withdrawn. Hence, the present petition.

5. Heard learned advocate for petitioner and learned

advocate for respondent Nos. 1 and 2. Perused the memo of writ petition, annexures thereto and the impugned order.

6. Learned advocate for petitioner by relying upon decision of the learned Single Judge of this Court in ***Mrs. Ujwala Pawar Vs. Harish V. Milani and Others, 2017(3) ALL MR 341***, submits that since no order was passed by the trial Court on application Exhibit-91, the petitioner was having a right to withdraw his application seeking withdrawal of suit.

7. Learned advocate for respondent Nos.1 and 2, on the other hand, vehemently opposed the prayer of petitioner contending that once the application seeking withdrawal of suit is filed on the basis of compromise, no order needs to be passed on the same and it becomes effective. By relying on ***Pushpa Devi Bhagat (Died) Through L.R. Sadhna Rai Vs. Rajinder Singh and Others, AIR 2006 SC 2628***, he submits that since there was compromise between the parties and the same was acted upon, as defendants paid amount of Rs.15 Lakhs in terms of compromise, trial Court has rightly passed the order thereby rejecting application Exhibit-92 and disposing of the suit as withdrawn. He, therefore, supports the impugned order and submits that since compromise is already acted upon, application Exhibit-92 filed by the petitioner was not maintainable and the same is rightly rejected by the trial Court.

8. In *Yeshwant Govardhan Vs. Totaram Avasu and Others*, **AIR 1958 Bombay 28**, relied upon by learned advocate for petitioner, the Division Bench of this Court held:-

"7. Mr. Kotwal argues that there is nothing to prevent a plaintiff from withdrawing his withdrawal, because to withdraw from a suit is a matter of the plaintiff's choice and the only thing which the defendant is concerned with is to have an order for costs made in his favour, as provided in Order XXIII, Rule 3. If a plaintiff withdraws from his suit or abandons part of his claim, it is not certainly a matter in which the defendant can have his say. The defendant cannot compel a plaintiff to prosecute his suit and if a plaintiff, therefore, withdraws his suit, it is entirely a matter of his choice. If, therefore, the plaintiff has a right to withdraw his suit, he has equally, a right to withdraw his withdrawal and so long as the Court has not made an order, showing that the withdrawal has become complete or effective, there is always a *locus paenitentiae* for the plaintiff to withdraw his withdrawal. In so holding, there is no injustice to the defendant. If the defendant cannot compel a plaintiff to continue his suit, the defendant cannot, equally, compel a plaintiff not to withdraw his withdrawal. We think, therefore, that, in law, the true position is that it is open to a plaintiff to withdraw his application for withdrawal of his suit, so long as the withdrawal has not become effective by an order of the Court. This view is supported by at least two decisions reported in *Lakshmana Pillai v. Appalwar Alwar Ayyangar*, AIR 1923 Mad 246 (A) and in *Midnapore Zemindary Co. Ltd. v. Bijoy Singh*.

8. Notwithstanding the principle deducible from these two cases, Mr. Patwardhan contends that no order of the Court is necessary upon an application made by the plaintiff for withdrawal of his suit. In our Opinion, the contention is not correct, and cannot be supported. It is true that Order XXIII, Rule 1 does not require in, terms that the Court should make an order in case in which the plaintiff withdraws his suit without any permission to bring a fresh suit. But under Order XXIII, Rule 1, the Court has to make an order about costs, which suggests that the

Court has to make an order after the plaintiff withdraws his suit. Moreover, the consequence of the plaintiff, withdrawing his suit, is to debar the plaintiff from instituting any fresh suit in respect of the subject-matter or part of the claim withdrawn by him. Surely, if that is the consequence of a withdrawal, the proceedings before the Court must show that the plaintiff has withdrawn either his suit or part of his claim. In our view, therefore, the Court below was wrong in holding that it was not open to the plaintiff to withdraw his application for withdrawal, Ex.36."

9. The said decision is relied upon by the learned Single Judge of this Court in ***Mrs. Ujwala Pawar*** (supra).

10. In ***Anil Dinmani Shankar Joshi*** (supra), learned Single Judge of this Court has held that plaintiff has unconditional right to withdraw his suit unconditionally. Withdrawal would be complete as soon as plaintiff files pursis of withdrawal. Court may pass a formal order recording the withdrawal and also make an order regarding costs, but withdrawal is not dependent on the order of Court. Trial Court has relied on this decision while passing the impugned order.

11. It is pertinent to note that this decision is also considered by the learned Single Judge of this Court in ***Mrs. Ujwala Pawar*** (supra) and it is held that decision in ***Yeshwant Govardhan*** (supra) is not brought to the notice of learned Single Judge while delivering judgment in ***Anil Dinmani Shankar Joshi*** (supra).

12. In the light of ratio laid down in ***Yeshwant Govardhan***

(supra), legal position is clear that plaintiff is entitled to withdraw his application and/or pursis seeking withdrawal of suit.

13. Learned advocate for respondent Nos.1 and 2 has relied on ***Pushpa Devi Bhagat (Died)*** (supra), in support of the impugned order. In the said case, questions for consideration of the Hon'ble Apex Court were:-

"(i) Whether the appeal filed by Pushpa Devi under section 96 of the Code of Civil Procedure, against the consent decree was maintainable.

(ii) Whether the compromise on 23.5.2001 resulting in a consent decree dated 18.7.2001 was not a valid compromise under Order 23 Rule 3 CPC."

While answering point No.(ii), it is held that:-

"13. Order XXIII deals with withdrawal and adjustment of suits. Rule 3 relates to compromise of suits, relevant portion of which is extracted below :

"3. Compromise of suit. Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the parties to the suit, whether or not the subject-matter of the agreement, compromise or satisfaction is the same as the subject-matter of the suit."

The said Rule consists of two parts. The first part provides that where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties, the court shall order such agreement or compromise to be recorded and shall pass a decree in accordance therewith. The second part provides that where a defendant satisfies the plaintiff in respect of the

whole or any part of the subject matter of the suit, the court shall order such satisfaction to be recorded and shall pass a decree in accordance therewith. The Rule also makes it clear that the compromise or agreement may relate to issues or disputes which are not the subject-matter of the suit and that such compromise or agreement may be entered not only among the parties to the suit, but others also, but the decree to be passed shall be confined to the parties to the suit whether or not the subject matter of the agreement, compromise or satisfaction is the same as the subject matter of the suit. We are not, however, concerned with this aspect of the Rule in this appeal.

14. What is the difference between the first part and the second part of Rule 3? The first part refers to situations where an agreement or compromise is entered into in writing and signed by the parties. The said agreement or compromise is placed before the court. When the court is satisfied that the suit has been adjusted either wholly or in part by such agreement or compromise in writing and signed by the parties and that it is lawful, a decree follows in terms of what is agreed between the parties. The agreement/compromise spells out the agreed terms by which the claim is admitted or adjusted by mutual concessions or promises, so that the parties thereto can be held to their promise/s in future and performance can be enforced by the execution of the decree to be passed in terms of it. On the other hand, the second part refers to cases where the defendant has satisfied the plaintiff about the claim. This may be by satisfying the plaintiff that his claim cannot be or need not be met or performed. It can also be by discharging or performing the required obligation. Where the defendant so 'satisfies' the plaintiff in respect of the subject-matter of the suit, nothing further remains to be done or enforced and there is no question of any 'enforcement' or 'execution' of the decree to be passed in terms of it."

14. Taking into consideration the peculiar facts of the present case, in my view above decision does not further the case of respondents and issue raised in the present petition is squarely

covered by the Division Bench Judgment in *Yeshwant Govardhan* (supra) and in that view of the matter, writ petition deserves to be allowed. In the result, following order:-

ORDER

- (I) Writ petition is allowed.
- (II) Order dated 19/04/2022, passed below Exhibit Nos.1, 91 and 92, in Regular Civil Suit No.575/2011, is hereby quashed and set aside.
- (III) Application Exhibit-92 is allowed, subject to the condition that petitioner shall refund amount of Rs.15 Lakhs accepted by him from the defendants, within a period of four weeks from the date of receipt of writ of this order.
- (IV) Point of claim of interest on the said amount is kept open to be decided by the Trial Court.
- (V) All the respective contentions of the parties are kept open. It is made clear that this Court has not expressed any opinion on the merits of the matter.

(NITIN B. SURYAWANSHI, J.)