

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

CIVIL REVISION APPLICATION NO.85 OF 2021

**ANKUSHRAO GANPATRAO MITHE
VERSUS
BABURAO GANPATRAO MITHE AND OTHERS**

...

Advocate for Petitioner : Mr. Ruchir Wani h/f Mr. A. S.
Bajaj

Advocate for Respondents : Mr. S. A. Gaikwad

...

CORAM : R.M. JOSHI, J

DATE : MARCH 28, 2023

PER COURT :

1. This application is filed under Section 115 of Code of Civil Procedure taking exception to the order dated 23.02.2021 passed below Exhibit 65 by Learned C.J.J.D., Partur in RCS No. 66/2015 whereby the application filed by the plaintiff for withdrawal of suit with liberty to file fresh suit is disposed of permitting the plaintiff to withdraw suit without leave. It is further observed that plaintiff is precluded from filing fresh suit in respect of subject matter mentioned in the suit in view of Order XXIII, Rule 2 of CPC.

2. Learned Counsel for the Applicant states that suit was filed by the plaintiff for partition of the

suit properties and on 09.03.2020 he moved application for withdrawal of the same with liberty to file fresh suit. The said application was not opposed by the defendants, however, grievance was made that the suit is filed by the plaintiff in order to cause harassment to them and therefore, cost was asked.

3. Perusal of the impugned order shows that while passing the order, learned trial Court was more influenced by the fact that the suit was five year old. Though it is observed by the learned trial Court that no formal defects or any sufficient grounds for withdrawal of the suit is found, still the permission is granted for withdrawal but by rejecting leave and passing specific order to prevent further suit.

4. Learned Counsel for the Applicant placed reliance on the judgment of this Court in case of Mario Shaw Vs. Martin Fernandez and Anr, 1996 (1) Mh.L.J. 564, wherein it is held that if application is made under Order XXIII, Rule 1(4) of CPC for withdrawal of the proceedings with liberty to file fresh proceedings, it is not open for the trial Court to grant permission for withdrawal without liberty to institute proceedings

though it is open for the Court to reject such application. The order passed by the learned trial Court runs contrary to the law laid down by this Court. On this ground alone the impugned order cannot sustain and deserves to be interfered with.

5. Hence order:

O R D E R

a) Civil Revision Application is allowed.

b) The order dated 23.02.2021 passed below Exhibit 65 by Learned C.J.J.D., Partur in RCS No. 66/2015 is quashed and set aside.

c) Learned trial Court to take decision on Exhibit 65 afresh.

d) Parties to remain present before the trial Court on 10th April, 2023. Trial Court not to issue notices to the parties for their appearances.

(R.M. JOSHI, J.)

Malani