

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CIVIL REVISION APPLICATION NO.79 OF 2023

SHAIKH NAJIRODDIN JAHIRODDIN SHAIKH
VERSUS
MOHAMMAD SHAIKH ABDUL JABBAR

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Advocate for Applicant : Mr. Sharad V. Natu
Advocate for Respondent No.1 : Mr. Ruchir Subodh Wani

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CORAM : S. G. MEHARE, J.

DATE : 24-08-2023

PER COURT :-

1. Heard the learned counsel for the parties.
2. The applicant had filed an application Exhibit-23 before the learned trial Court seeking relief to withdraw the suit with the liberty to file a suit for specific performance of the contract and injunction. The trial Court recorded the findings that a cause of action that arose for the relief sought in this suit was also a cause of action for seeking the relief of specific performance of the contract. Therefore, there was a bar of Order II, Rule (2)(3) of the Code of Civil Procedure (in short, "C.P.C."). Hence, permission to withdraw the leave to bring a fresh suit cannot be granted as prayed by the plaintiff.

3. The learned counsel for the applicant would submit that the relief of injunction is consequential and would not affect the substantial relief. Where the first suit is withdrawn, the bar under Order 2 rule 2 of C.P.C., would not apply, and provisions of Order 23 would apply.

4. He relied on the case of *Ramlal Maniram Navdhinge vs. Maniram Patiram Navdhinge and others*, 2008(1) Mh.L.J. 860. The facts of the said case were that the earlier suit was withdrawn unconditionally and had instituted another fresh suit. It has been observed in paras no. 8, "To my mind the bar under order 2 rule 2 Civil Procedure Code would apply where either two suits are pending simultaneously or when the earlier suit is decided and fresh second suit is instituted on the same cause of action. At the most, in such a case, the provisions that would apply is Order 23 Rule 1."

5. The learned counsel for the respondent would argue that the application for temporary injunction filed under Order 39 Rule 1 of C.P.Code has been decided against him. Hence, there is the adjudication of some rights. Therefore, the impugned order is legal and correct.

6. However, in view of the above judgment, the learned counsel for the applicant restricts his claim to withdraw as provided under Order XXIII of the C.P.C. On instructions, the

learned counsel for the applicant states that the leave may be granted to withdraw the suit unconditionally; since the ratio laid down in the above case, that withdrawal of the case under Order II, Rule 2 of the C.P.C. would not apply. The unconditional leave to withdraw may be granted. Hence, the following order:-

ORDER

- (i) Application is partly allowed without affecting the right of the defendant to dispute the application of Order II, Rule 2 of the Civil Procedure Code.
- (ii) Unconditional leave to withdraw the suit has been granted.
- (iii) It is clarified that the rights of the parties regarding the subsequent suit have not been disturbed.
- (iv) The application stands disposed of.

**(S. G. MEHARE)
JUDGE**

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