

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 2459 OF 2023

Vijay L. Pawar & Anr.

...Petitioners

Versus

Brihanmumbai Municipal Corporation & Ors.

..Respondents

Mr. Aseem Naphade i/b Mr. Soham P. Salvi for the Petitioners.

Mr. R. Y. Sirsikar & Mr. Santosh Parad for MCGM Respondent No. 1.

*Mr. Druv Joshi & Mrs. Nandini Joshi and Ms. Preeti Agarwal i/b Harish Joshi & co.
for Respondent No.9.*

Mr. Steve J. Pulikkoden for Respondent No. 11.

*Mr. Manish Gala & Mr. Nilesh Gala, Ms. Minal Shah i/b Law Square for Respondent
Nos. 12 and 14.*

Coram : Sharmila U. Deshmukh, J.

Date : July 20, 2023.

P. C. :

1. Heard.
2. The challenge in the Petition is to the order dated 19th December, 2022 passed by the City Civil Court in Suit (ST) No. 7892 of 2022 rejecting the Petitioner's Application for withdrawal of the suit with liberty to file the fresh suit. By the impugned order, the permission was granted to withdraw the suit unconditionally but as the Petitioner had not mentioned sufficient reasons for filing the suit before the High Court, the liberty as such was not granted.
3. Heard Mr. Aseem Naphade, learned counsel appearing for the Petitioners,

Mr. R. Y. Sirsikar, learned counsel appearing for MCGM Respondent No.1, Mr. Druv Joshi, learned counsel appearing for Respondent No.9, Mr. Steve J. Pulikkoden, learned counsel appearing for Respondent No. 11 and Mr. Manish Gala, learned counsel for Respondent Nos. 12 and 14.

4. Learned counsel appearing for the Petitioners at the outset mentioned that the present Writ Petition challenging the order of the City Civil Court dated 19th December, 2022 was filed on 5th January, 2023, however the Petitioner without waiting for the outcome of the present Writ Petition, has filed a suit in the High Court on 11th January, 2023. He would further submit that the Application for withdrawal of the suit before the City Civil Court came to be filed as the Respondents had raised an objection as regards the pecuniary jurisdiction. He would further contend that in such an event, the course available for him was to make an application for return of plaint under Order 7 Rule 10 of CPC or to seek withdrawal of the suit with liberty to file a fresh suit under Order 23 Rule 3 of the CPC. He would urge that having adopted the second option, the liberty as prayed for ought to have been granted. He has invited the attention of this Court to the affidavit-in-reply to the Interim Application filed by the Respondents which raised an objection to the pecuniary jurisdiction. He would further submit that a lenient view ought to have been taken in view of the fact that the Petitioner will be permanently precluded from agitating their right in the suit property. He would further submit that the application was filed for withdrawal of the suit with liberty and on such an

application the City Civil Court ought to have allowed or rejected Application but could not partly allow the Application. He would submit that in such event, the Application could not have been rejected partly and the suit would have been continued and as such, his right would be protected. He would urge that an act of the court has resulted in prejudice being caused to the Petitioners by part rejection. In support of his submission he relies upon the decisions in the case of *Manohar v. Ravindra Rajaram Gawande & Anr.*¹ and *Mohinder Singh Gill v. Chief Election Commissioner New Delhi & Ors.*²

5. *Per contra*, learned counsel appearing for the Respondent Nos. 12 and 14 has pointed out the averments which are made in the fresh suit which has been filed in the High Court which is annexed at page No. 141 of the Petition and has pointed out paragraph No. 4.39 at page No. 181 and paragraph No. 5.5 at page No. 184 which reads thus:

“4.39 The Ld. Bombay City Civil court was pleased to pass an ad-interim order dated 26.08.2022 in favour of the Plaintiffs and the same was continued till 6th December 2022, upto the time till the Plaintiffs withdrew the said proceedings by voluntarily, with liberty to file fresh proceedings before this Hon’ble Court.

5.5 The plaintiffs had initially filed a suit bearing No. (L). 7982 of 2022 along with the Notice of Motion No. 2783 of 2022 before the Ld. Bombay City Civil Court. The same has

1 2019 SCC Online Bom 1847

2 (1978) 1 SCC

been withdrawn by the Plaintiffs herein on 6th December, 2022 with a liberty to file the fresh Suit before this Hon'ble Court."

6. He would further urge that the verification clause shows that the second suit has been filed on 19th December, 2022. He would contend that the suit in question came to be filed by reason of an order which was passed by this Court in respect of suit premises in which the issue of demolition of structure was in question and that this Court had directed the Corporation to take action against the demolition, if the structures are found to be illegal. He would submit that the proceedings in questions are *malafide* proceedings. Learned Counsel appearing for Respondent No. 9 adopts the argument of the learned counsel for Respondent Nos. 12 to 14 and would further contend that in the Petition, the Petitioners did not annexe copy of pursis and the same has been annexed by Respondent No.9 in his affidavit-in-reply. He would further contend that it was open for the Petitioners to withdraw the Application before the City Civil Court, however, they choose not to do so being fully aware that they had already filed a suit and that the suit had already been affirmed on the same day i.e. on 19th December, 2022 with a false statement that liberty has been granted on 6th December, 2022.

7. Considered the Submissions.

8. The suit in question has been instituted by the Petitioner-Original Plaintiff seeking declaration of ownership in respect of the property ad-

measuring about 10,008.2 sq. mtrs. at Powai and for an injunction from being dispossessed. From the relief which is sought in the suit it appears that the same has been instituted pursuant to the order of this Court dated 16th March, 2020 passed in Writ Petition No. 2601 of 2018 which has been pointed out by the learned counsel appearing for Respondent No. 12 in which the direction was given to the Corporation to demolish the structures if the same are found to be illegal. Considering that the suit in question was beyond the pecuniary jurisdiction the Application came to be filed for withdrawal of the proceedings under the provisions of Order 23, Rule 1(3) which reads as under.

(3) Where the Court is satisfied,-

- (a) that a suit must fail by reason of some formal defect, or
- (b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff 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.

9. Plain reading of the provisions indicate that where the Court is satisfied that there are sufficient grounds for allowing the plaintiff to institute the fresh suit for the subject matter of the suit or part of the claim, it may grant permission to the Plaintiff to withdraw the suit with liberty to institute a fresh suit in respect of the subject matter of the suit. The provisions contemplate that sufficient ground must be shown for the purpose of allowing the Plaintiff to

institute a fresh suit. In the background of the statutory provisions, if we consider the pursis which has been filed on 19th December, 2022 which is annexed at page No. 58 of the Petition the pursis does not gave any reason much less sufficient grounds for permission to withdraw with liberty of the Court to file a fresh suit. In such an event, the City Civil Court, in the absence of the sufficient reasons, was well justified to permit the withdrawal of the suit unconditionally, but refused to grant the leave as prayed. This is for the reason that the litigants cannot be permitted to institute fresh proceedings unless sufficient reasons are made out for the same as the multiplicity of the proceedings vexes the Defendants again and again. To safeguard the interest of the Defendants by reason of subsequent litigation on same cause of action, the statute has provided that there must be sufficient grounds for permitting a party to withdraw the proceedings with liberty to file fresh suit. It was thus incumbent upon the Petitioner-Plaintiff to raise sufficient grounds in the Application seeking withdrawal with liberty as prayed. It would also be pertinent to note the replies which were filed to the pursis, whereby the Defendants had given no objection only for withdrawal of the suit unconditionally. In such an event, the Petitioner ought to have been put on guard that in the absence of any reason and considering the objection of the Respondents, the liberty as such would not have been granted. Even at that stage the Application could have been withdrawn and detailed Application filed,

however, the same was not done.

10. It is apparent that the reason why the Application was not withdrawn was that the Petitioner had already affirmed a suit, and as per the contention of the learned counsel for the Petitioner it was filed later on but the fact remains that the Petitioner has made false statement in the plaint that the liberty has been granted by the City Civil Court on 6th December, 2022, knowing fully well that no such liberty is granted and in fact, the pursis itself had been filed on 19th December, 2022.

11. The reliance placed by learned counsel appearing for the Petitioner on the decision in the case of *Manohar v. Ravindra Rajaram Gawande*, dealt with the case as regards the post facto permission to be granted even after institution of the filing of subsequent suit. The facts in the present case are gross inasmuch as being aware that no such pursis has been filed on 6th December, 2022, a solemn statement on oath is made before this Court that liberty has been granted by the City Civil Court on 6th December, 2022. In my opinion no judgment can assist the case of such a litigant who makes false statement on oath. Pertinently, the Petitioner did not wait for the adjudication of the present Petition which was filed on 5th January, 2023. It was expected that at the outset, a submission would be made that although the suit was affirmed on 19th December, 2022, the same was filed on 11th January, 2023 and unconditional apology would be tendered that inadvertently a false statement is made in the

suit. However there was no such submission and it is only upon the said fact being pointed out by the learned counsel for the Respondents that this Court became aware of this fact.

12. The decision which has been relied upon by the learned counsel appearing for the Petitioner in the case of ***Mohinder Sing Gill v. Chief Election Commr.*** was in support of his proposition that when a statutory functionary passes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. This authority was pressed into service to counter the submission if any, by the learned counsel appearing for the Respondents based on the affidavits which came to be filed. Even if the law laid by the said authority is accepted, considering the pursis which has been filed on record which is completely bereft of any reasons as to why the liberty as sought ought to be granted, in my opinion, the impugned order cannot be said to be legally unsustainable. As regards the decision of the Apex Court in the case of ***K. D. Sharma v. Steel Authority of India Ltd.***³ the same was in support of the proposition that the equitable and discretionary jurisdiction of this Court under Article 226 must not be exercised in favour of a litigant who does not come before the Court with clean hands. The Authority in question is in respect of the extraordinary jurisdiction of this Court under Article 226.

13. The present Petition has been filed under Article 227 of the

3 (2008) 12 Supreme Court Cases 481

Constitution of India which is a supervisory jurisdiction. In exercise of this jurisdiction, this Court will not correct mere errors of law and fact unless it shows that the same has resulted in miscarriage of justice or that the Trial Court has exceeded his jurisdiction or has failed to exercise the jurisdiction. Considering the facts of this case, I did not find that the Trial Court has exceeded his jurisdiction or there is miscarriage of justice.

14. The impugned order has been passed taking into consideration the pursis which has been filed seeking withdrawal and as such, there is no infirmity in the impugned order passed by the City Civil Court dated 19th December, 2022. The Writ Petition being devoid of merits stands dismissed.

[Sharmila U. Deshmukh, J.]