

VINA
ARVIND
KHADPE

Digitally
signed by
VINA
ARVIND
KHADPE
Date:
2023.07.15
11:00:53
+0530

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 15426 OF 2022

Smt. Yasmeen Iqbal Bardi and ors Petitioners

Vs.

Shri Imran Yusuf Khot
since deceased through Lrs

Mrs. Ashrafunnisa Imran Khotn and ors Respondents

Dr. D.S. Hatle a/w Mr. Deepak Jamsadekar for the Petitioners.

Mr. Hamid Ahmad for the Respondent Nos.1/2 , 1/3 , 1/4 , 2 and 3.

Mr. Shakeel Sheikh a/w Npatel for the Respondent Nos. 4 to 9.

CORAM : SHARMILA U. DESHMUKH, J.

DATE : 27th JUNE 2023.

P. C.

1. By this Petition, the challenge is to order dated 8 August 2022 permitting the plaintiffs to withdraw their entire claim in respect of the certain lands and to withdraw the Suit against defendant nos.1 to 6 i.e. respondent nos.4 to 9.

2. Heard learned counsel Dr. D.S. Hatle for the petitioners, Mr. Hamid Ahmad, learned counsel for respondent Nos.1/2 , 1/3 , 1/4 , 2 and 3 and Mr. Shakeel Sheikh, learned counsel for respondent Nos. 4 to 9.

3. Learned counsel appearing for the petitioners pointed out that the Suit in question was instituted for partition and separate possession by metes and bounds, and to determine the shares of the parties in respect of the suit land. He would further submit that 26 properties out of 41 properties were permitted to be released by

the impugned order. He further submits that this being the Suit for partition, the plaintiffs could not be permitted to withdraw their claim as regards 26 properties. He submitted that out of these properties two properties are already sold out.

4. *Per contra*, the learned counsel for respondent nos.4 to 9 has invited attention of this Court to the provisions of Order 23 Rule 1 of the Code of Civil Procedure, 1908 ("CPC"). Drawing support from the said provision, he would urge that at any time after the institution of a Suit, the plaintiff may as against all or any of the defendants abandon his Suit or abandon a part of his claim against all or any of the defendant. He would further submit that the provisions of sub-rule 5 of Rule 1 of Order 23 of CPC mandates that the Court is not authorised to permit the plaintiffs to abandon a Suit or part of a claim under sub-rule 1 without consent of other plaintiffs. He would urge that consent of defendants is not mandated.

5. Considering the submission and properly appreciating the provisions of Order 23 Rule 1 of CPC, the relief which is sought in the Suit will have to be considered. By Regular Civil Suit No.103 of 2009, the substantial reliefs were sought, they are as follows;

- “(a) The Hon’ble Court be pleased to administer the suit land shown in Para-2 of the plaint as per Islamic Law against plaintiffs and the defendants by dividing it as per shares of the parties to the suit by metes and bounds by giving the shares in their possession.
- (b) The defendants, their agents, servants, any person or persons claiming through them be restrained by an order of permanent injunction from creating third

party interest by whatsoever nature till final disposal of the suit in respect of the suit lands.

- (c) Ad-Interim Injunction in terms of prayer clauses-(b) above be granted.
- (d) Cost of this Suit may be awarded to the plaintiff.
- (e) Any other relief, which this Hon'ble Court deem fit and proper may be granted in favour of the plaintiff."

6. The Suit is filed for partition and specific performance wherein 41 properties were listed against which by the impugned order the petitioners now seek to withdraw their claim as against 26 properties and also as against the original defendant Nos.1 to 6. It is a settled position of law that in the Suit for partition, all the parties are plaintiffs and defendants in as much as the reliefs which will be granted in the Suit determine the shares of the parties in the properties forming the subject matter of the partition.

7. In this view of the matter, the reliance placed by the learned counsel for defendant nos.1 to 6 on the provisions of Order 23 Rule 1 sub-rule 1 of CPC is clearly misplaced.

8. If we peruse sub-rule 5 of Rule 1 Order 23 of CPC what is evident is that the consent of the other plaintiffs is required to be sought. The Suit for partition stands on the different footing from the other Suits. Considering that each party will be entitled to a share in the properties upon adjudication of their rights and as such one of the co-parcener / party cannot be permitted to abandon a part of the claim and withdraw the same against some or other co-parceners/parties.

9. In this view of the matter, the impugned order dated 8

August 2022 is unsustainable. It is open for the respondent Nos.1 to 4/Orig. plaintiffs to delete defendant nos.1 to 6 from the array of defendants if so advised. However, the claim as regards the properties forming part of the Suit cannot be permitted to be withdrawn.

10. In this view of the matter, Writ Petition stands allowed.

SHARMILA U. DESHMUKH, J.