



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 2999 OF 2023

Shamkant Somnath Bimbe Died Through
His Lrs Shobhabai Shamkant Bimbe and Ors

VERSUS

Pravin Gopal Bute And Others

...

Mr. D. A. Mane, Advocate for the Petitioner

Mr. P. P. Dhorde, Advocate for Respondents

WITH

WRIT PETITION NO. 4992 OF 2023

Pravin Gopal Bute

VERSUS

Shyamkant Somnath Bimbe Deceased
Through Lrs Shobhabai Shyamkant Bimbe And Others

...

Mr. P. P. Dhorde, Advocate for the Petitioner

Mr. D. A. Mane, Advocate for Respondents

CORAM : R.M. JOSHI, J

DATE : NOVEMBER 19, 2024

COMMON ORDER :

ORDER IN WRIT PETITION NO. 2999 OF 2023

1. This Petition takes exception to order passed below Exh. 48 in RCS No. 108/2014 whereby Plaintiff Nos. 1A to 1D i.e., legal heirs of deceased original Plaintiff No. 1 Shyamkant Bimbe filed application for permission to withdraw themselves from the suit. This application came to be rejected solely on the ground

that one of the Plaintiff is not permitted to withdraw suit unless the consent of other Plaintiffs is obtained therefor.

2. Learned Counsel for the Petitioners submits that learned Trial Court has misinterpreted the provisions of Order XXIII, Rule 1, sub-rule 5 CPC as the said rule would apply only in case the one of the Plaintiff abandoned the suit or part of a claim on behalf of other Plaintiffs. Thus, it is his further submission that Petitioners have filed application for withdrawing themselves from the suit with liberty to file fresh suit for same cause of action, but learned Trial Court has not gone into the said issue and hence, this is a fit case to relegate the application Exh. 48 back to the Trial Court for fresh decision in accordance with law.

3. Learned Counsel for the Respondent opposed the Petition and supported the impugned order. In addition to submission on merit, it is his submission that Writ Petition No. 4992/2023 has been filed by these Respondents challenging order passed by the learned Trial Court below Exh. 94 and 95. Thus, it is his

submission that both Petitions are required to be heard and decided together.

4. There is no dispute about the fact that application Exh. 48 is filed by the heirs of the original Plaintiff No. 1 for withdrawing themselves from the suit with liberty to file fresh suit for same cause of action. Since the said request was turned down for the reason that consent of co-plaintiff is not obtained therefor, question arises before this Court for determination is as to whether there is any bar for one of the Plaintiff to so withdraw the suit for himself even in absence of consent of the co-plaintiff. Relevant provision in this regard is sub-rule 5 of Order XXIII, Rule 1, CPC which reads thus:

(5) Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiff.

5. Bare perusal of the said rule clearly indicates that Rule 1, which otherwise permits the withdrawal of suit or abandonment of the part of the plaint, does not allow/authorize the Court to permit

one of the other Plaintiffs to abandon the suit or part of the claim. Meaning thereby, one Plaintiff on behalf of other Plaintiffs, without their consent, cannot abandon the suit or part of the claim. Exh. 48 does not show that the Petitioners herein are seeking abandonment of suit or part of the claim not for themselves but for other Plaintiffs too. This rule, therefore, has no application to the present case. The right of filing suit by an individual includes right not to pursue the same unless prohibited by law. The withdrawal of suit by Petitioners being for themselves, ought not to have been refused. Learned Trial Court, therefore, has clearly erred in rejecting the application on this ground. Thus, the order impugned cannot sustain.

6. In view of the above discussion, Writ Petition No. 2999/2023 is allowed. Impugned order dated 27.01.2023 stands set aside. Application Exh. 48 is relegated back to the learned Trial Court for deciding the issue as to whether leave can be granted to the Petitioners/Plaintiffs to file fresh suit for same cause of action.

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7. This Petition would be taken up for hearing after decision on Exh. 48 by the learned Trial Court.

8. Hence, removed from board.

(R.M. JOSHI, J.)