

Ajay

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION**

**WRIT PETITION NO. 10012 OF 2023**

Ashish Manohar Gondhkar

Petitioner

.. (Orig. Defendant)

**Versus**

Rajkumar Khanderao Pimpalgaonkar

Respondent

.. (Orig. Plaintiff)

.....

- Mr. Sandeep Phatak, Advocate for Petitioner.
- Mr. Sanjeev P. Kadam a/w. Mr. Prashant P. Raul, Mr. Pratik Deshmukh, Mr. Mayur G. Sanap and Ms. Aditi Rajput, Advocates for Respondent.

.....

**CORAM : MILIND N. JADHAV, J.**

**DATE : JULY 10, 2024.**

**P.C.:**

**1.** Heard Mr. Pathak, learned Advocate for Petitioner and Mr. Kadam, learned Advocate for Respondent.

**2.** After unsuccessfully contesting RTS proceedings, right upto this Court in Writ Petition No.6883 of 2015 between 1999 and 2015, the Plaintiff – Respondent before me filed a Civil Suit being Regular Civil Suit No.24 of 2017 before the Civil Judge, Junior Division, Ichalkaranji on 18.01.2017, simplicitor for injunction against the Defendant – Petitioner before me. Defendant filed written statement below Exhibit “14” on 08.06.2014. Thereafter the Trial Court framed the issues and the trial commenced. The witness action of Plaintiff's

witness Nos.1 and 2 was completed on 27.01.2020 and 14.02.2021 respectively. On 11.02.2022, Plaintiff filed his closure of evidence *pursis* before the Trial Court and it was the turn of Defendant to lead evidence in rebuttal. However on 11.04.2022, Plaintiff filed Application under Order VI Rule 17 of the Code of Civil Procedure, 1908 (for short “CPC”) before the Trial Court seeking a substantive amendment to the Suit Plaint. By virtue of this Application, Plaintiff sought specific performance of the Agreement for Sale dated 24.03.1999 claiming to have been executed in his favour. Hearing on the said Application was completed before the learned Trial Court and on realizing that the said Application was going to be rejected, Plaintiff filed an Application on 16.01.2023 seeking a request for withdrawal of the entire Suit proceedings under Order XXIII Rule 1(3) (a)(b) of the CPC.

**3.** Record reveals that on 02.05.2023, the learned Trial Court passed two separate orders. By the first order, the Application below Exhibit “33” filed by Plaintiff below Order VI Rule 17 of the CPC was rejected on merits. By the second order dated 02.05.2023, learned Trial Court allowed the Application for withdrawal of the Suit proceedings filed by Plaintiff and granted leave to the Plaintiff to institute a fresh Suit for the subject matter of the Suit or part of the claim. This order dated 02.05.2023 passed by the learned Trial Court allowing the Plaintiff to withdraw the Suit with liberty to institute a

fresh Suit is taken exception to by the Defendant in the present Petition.

**4.** Mr. Pathak, learned Advocate for the Defendant in his usual fairness would submit that though the Petition challenges the entire order dated 02.05.2023 passed below Exhibit - “1” permitting withdrawal of the suit proceedings, the objection of Defendant is restricted to the leave granted by the Court to the Plaintiff to institute a fresh Suit. He would submit that in the facts and circumstances of the present case, especially after what has transpired in the interregnum, and after leading evidence, Plaintiff cannot be forced to continue with the Suit proceedings, but grant of leave to institute a fresh Suit is clearly not permissible. He would submit that Plaintiff filed the Suit after being unsuccessful in RTS proceedings for more than 16 years against the Defendant without having any title. Thereafter, Plaintiff led evidence in the Suit for injunction. He would submit that a Suit for injunction is necessarily filed by a party on the ground of the said party having title to the Suit property, otherwise such a Suit is clearly not maintainable.

**4.1.** He would submit that after leading witness action of two witnesses and failing in seeking a substantial amendment to the Suit proceedings which would have changed the nature of the Suit, it is *prima facie* clear that Plaintiff has no right, title and interest in the Suit

property. He would submit that this fact is proved because the Plaintiff himself sought specific performance of the alleged Agreement for sale dated 24.03.1999 for the first time in the year 2022. Hence he would submit that the impugned order dated 02.05.2023 ought not to have granted any liberty to the Plaintiff to institute a fresh Suit on withdrawal of his Suit.

**5.**        *PER CONTRA*, Mr. Kadam, learned Advocate for the Plaintiff in his reply would submit that the impugned order dated 02.05.2023 has been correctly passed. He would submit that it is Plaintiff's prerogative being *dominus litis* to seek withdrawal of the Suit and while doing so Plaintiff can always seek liberty of the Court to institute a fresh Suit in view of the previous Suit not been determined. However, Mr. Kadam in his usual fairness would submit that the Plaintiff undoubtedly cannot take advantage of his own wrong and therefore even if leave has been granted to institute the fresh Suit, it cannot prejudice the Defendant's right to raise any objection in the fresh Suit that may be instituted in accordance with law. Hence, he would submit that the impugned order dated 02.05.2023 be sustained as it is.

**6.**        The relevant provisions which govern the right of a Plaintiff to seek withdrawal of a Suit proceeding is provided under Order XXIII Rule 1 of the CPC. The same are reproduced below for immediate

reference:-

**“1. *Withdrawal of suit or abandonment of part of claim.*—**

(1) *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:*

*Provided that where the plaintiff is a minor or other person to whom the provisions contained in rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.*

(2) *An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person.*

(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 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.*

(4) *Where the plaintiff—*

*(a) abandons any suit or part of claim under sub-rule (1), or*

*(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3),*

*he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.*

(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.”*

**7.** Applying the above provisions to the facts of the present case, it is seen that, assuming at the highest that leave is granted to the Plaintiff to institute a fresh Suit as is granted in the present case, the provisions of Order XXIII Rule 2 would still aid and assist the Defendant and the withdrawal of the previous Suit will not be of any assistance to the Plaintiff in so far as the issue of limitation is concerned. The law on this issue is clear and well settled. The Plaintiff is clearly precluded from instituting any fresh Suit on a different cause of action. This is a case where the Defendant apprehends that the Plaintiff will now institute a fresh Suit on a different cause of action other than injunction because of the leave granted to the Plaintiff. This is because the Plaintiff not having title to the Suit property would now institute a fresh Suit for specific performance which was rejected by the Trial Court in the previous Suit. This apprehension of the Defendant is clearly answered by the provisions of Order XXIII Rule 2 of the CPC and the Plaintiff in the present case shall be clearly precluded from instituting a fresh Suit on a different cause of action.

**8.** In so far as allowing the Plaintiff to withdraw the Suit is concerned, since the Plaintiff is *dominus litis*, he has to be permitted to do so but strictly within the confines of Order XXIII Rules 1 and 2. The learned Trial Court has recorded its satisfaction that if the law permits the Plaintiff may institute a fresh Suit and whether the Plaintiff will succeed or not in the new Suit is altogether a different matter.

Therefore, the objection of the Defendant that prejudice would be caused to him if permission is granted to the Plaintiff to institute a separate Suit is not well founded. All defences of the Defendant would be available to him including the issue of limitation or change of cause of action. Therefore, if the Plaintiff does not wish to prosecute the present Suit, he cannot be compelled to prosecute the said Suit. When the Plaintiff filed the present Suit for injunction, the Defendant in his written statement has not filed any counter claim. It is also seen that the learned Trial Court has not adverted to any of the merits of the matter while allowing the Plaintiff to withdraw the Suit and granting him liberty in accordance with law.

**9.** In that view of the matter, the impugned order dated 02.05.2023 does not call for any interference. It is however clarified that the right of the Plaintiff to institute a fresh Suit shall be governed strictly by the provisions of Order XXIII Rules 1 and 2 of the CPC and all defences of the Defendant are expressly kept open as available to him in law.

**10.** With the above clarification and directions, the impugned order dated 02.05.2023 is sustained.

**11.** Writ Petition is dismissed.

[ MILIND N. JADHAV, J. ]

Ajay