



IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION

CIVIL WRIT PETITION NO. 14719 OF 2024

**Gunvantraï Vaghani alias  
Gunvant Vaghani**  
Aged 83 years, Indian inhabitant  
and carrying on business at 501/502  
Victory Park,  
Chandavarkar Road,  
Roshan Nagar, Above Indrayani  
Saree, Borivali (W),  
Mumbai – 400 091.

...Petitioner

Vs.

**1. Ms. Sushila Anilkumar Bhatia**

**2. Sunil Anilkumar Bhatia**

**3. Dipti Anilkumar Bhatia**

**4. Devi Anilkumar Bhatia**  
All having their address at  
Ratanshi Bungalow,  
SV Road, Borivali West, Mumbai – 400 092.

**5. M/s. Shree Sagar Builders Pvt. Ltd.**  
Shanti Niketan,  
Office No. 3, 1<sup>st</sup> Floor,  
Opp. Railway Station, Chawarkar Road,  
Borivali (West),  
Mumbai – 400 092.

...Respondents

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| Mr. Vivek Kantawala a/w Mr. Jash<br>B. Vyas i/by Mehul Shah and | Advocate for the Petitioner |
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| Abhishek Nikharge |  |
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CORAM : S. M. MODAK, J.

DATE : 24<sup>th</sup> OCTOBER 2024**ORAL JUDGMENT :-**

1. Heard learned Advocate Shri Kantawala for the Petitioner-Plaintiff.

2. The correctness of the Order passed by the Court of the 1<sup>st</sup> Additional Principal Judge, City Civil and Sessions Court, Dindoshi, Mumbai dated 01.10.2024, thereby dismissing Plaintiff's Notice Motion is challenged. The Plaintiff has sought leave of the Court under Order II Rule 2 of the Civil Procedure Code to file separate suit before Competent Court of law. **The learned Judge refused leave and observed this leave was not sought prior to filing of the suit** and one of the observation is leave cannot be granted at this stage, the stage at which suit is fixed. Learned Judge relied upon the provisions of Order XXIII Rule (3) of the Civil Procedure Code.

3. According to Learned Advocate Mr. Kantawala, trial Court has committed mistake. He has wrongly held that leave cannot be granted

subsequently. To buttress his submission, learned Advocate Mr. Kantawala relied upon the observations in case of **Canning Mitra Phoenix Ltd. Vs. M/s Popular Constructions and Anr.**<sup>1</sup>. Wherein the Division bench of this Court has elaborately dealt with **the stages at which such leave can be granted**. It is in para no. 5. Whereas the Division bench accepted the submission **that leave can be granted at any stage till the date of decree** (Para no. 7). It is observed “*in any case such leave has to be obtained prior to filing of second suit*”. It is further observed “*whether to grant leave or not depends on facts and circumstances*”.

4. Learned Advocate Mr. Kantawala also relied upon the observations in case of **Vimal Builders Vs. Ketan Kantilal Thakkar and Others**<sup>2</sup> and more specifically para nos. 36 and 37.

5. For two reasons, the impugned order needs to be set aside. It is true that wordings of the Order II Rule 2 does not describe at what stage such leave can be obtained. The provision nowhere indicates that it has to be obtained at the stage of filing of the suit. Secondly, the issue before the trial Court is whether to grant a leave or not. To grant leave,

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1 1994 Mh. L. J. 812

2 2009 SCC Online Bom 1447

when learned Judge with all his experience has quoted provisions of Order XXIII Rule 3 of the Civil Procedure Code, but the issue is Court can't give such observation that, 'the remedy is elsewhere'.

6. If the provisions of Order XXIII Rule 3 of the Civil Procedure Code are perused, it talks about granting permission to the Plaintiff to withdraw the suit or part of the claim with liberty to institute a fresh suit. It can be granted under two contingencies:-

- (i) The suit must fail by reason of some formal defect; or
- (ii) 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.

7. Admittedly, there was no formal defect. It is for the reason, the suit was originally filed for simpliciter injunction. Second contingency will come into play only when Plaintiff comes with prayer that he wants to withdraw the suit and intends to file fresh suit. In this case after filing of the suit on 22.03.2024, the Defendant Nos. 1 to 4 have executed Deed of Conveyance on 26.03.2024.

8. According to the learned Advocate for the Plaintiff, the pecuniary jurisdiction for challenging that Deed of Conveyance is not

the City Civil Court but this Court. In future Plaintiff may also withdraw the City Civil Court suit. It is choice of the Plaintiff to exhaust that exercise but at this stage when Plaintiff wants leave of the Court to file a fresh suit, it was not proper on the part of the trial Court to opine, there can be action elsewhere that is under Order XXIII Rule 3 of the Civil Procedure Code.

#### Factual aspect

9. When I have gone through factual aspect, what I gather is that the simpliciter suit for injunction was filed on the basis of the public notice dated 11.03.2023. The present Plaintiff is mortgagee and suit was filed for injunction against the person who claims to be co-owner of the property mortgaged in favour of the Plaintiff. At that juncture, the Plaintiff was justified in filing suit only for permanent injunction. But when on 25.03.2024, there was Conveyance in between Defendant Nos. 1 to 4 and M/s I. M. Builtkon Private Limited, the Plaintiff is entitled to challenge that Deed of Conveyance.

10. I am not going into issue, whether the original cause of action for filing of the suit and cause of action for challenging the Deed of Conveyance whether they are the same or different or extended cause

of action. The facts and circumstances warrant grant of leave as prayed in Notice of Motion. It is true that Writ of Summons was not served on Defendant when Notice of Motion was moved.

11. So order cannot be sustained in the eyes of law. The prayer clause 'a' of Notice of Motion read thus:-

*“(a) That this Hon’ble Court may be pleased to allow the Plaintiff and grant leave under Order II Rule II of the Code of Civil Procedure, 1908 to the Plaintiff to file separate Suit before the Competent Court of Law against the Defendants herein.”*

12. Hence the order:-

### **ORDER**

- (i) Writ Petition is allowed.
- (ii) The Order dated 01.10.2024 passed by the City Civil Court, Dindoshi in Notice of Motion No. 2827 of 2027 in Civil Suit No. 701 of 2024 is set aside.
- (iii) Notice of motion is allowed in terms of prayer cause 'a'.

13. Accordingly, Writ petition is disposed of.

**[S. M. MODAK, J.]**