

**IN THE HIGH COURT OF BOMBAY AT GOA.**

**LD-VC-CW-74/2020**

Jasjit Singh Dhami

...Petitioner.

Vs

Gokul Kumar and ors.

...Respondents.

Shri Ryan Menezes, Advocate for the Petitioner.

Shri Vivek Rodrigues, Advocate for the respondent nos.1 and 2.

Ms Maria Correia, Addl. Govt. Advocate for the respondent nos.3 to 6.

**Coram:- DAMA SESHADRI NAIDU, J.**

**Date: 13 October 2020.**

**ORAL ORDER:**

The petitioner, along with another person, filed Special Civil Suit No.65/2014/A before the Senior Civil Judge at Mapusa, primarily against two defendants. In that suit, they have sought many reliefs, including the recovery of money. Initially, in the array of defendants, the plaintiffs had three more persons. But, later, they were transposed as the plaintiffs. Thus, there are five plaintiffs and two defendants. Over time, the suit was transferred to the Commercial Court as Special Civil Suit No.47/2017.

2. In March 2018, among the five plaintiffs, the petitioner alone applied under Order 23 Rule 1 of CPC. He wanted the Commercial Court's leave to withdraw himself from the suit and to initiate appropriate proceedings before a competent forum. Despite the objection by the defendants/respondents, the trial Court allowed that application on 9.3.2020—but only in part. That is, it granted the liberty to the petitioner to withdraw from the suit but did not provide him with the freedom to prosecute the defendants on the same cause of action elsewhere. Aggrieved, the petitioner has filed this Writ Petition.

3. Shri Ryan Menezes, the learned counsel for the petitioner, submits that because of the plea taken by the defendants themselves, the petitioner is constrained to seek the Court's leave to approach another forum for ventilating his grievance. Therefore, as the other plaintiffs wanted to continue with the matter, the petitioner secured no-objection affidavits objection from them and, then, applied under Order 23 Rule 1 of CPC. According to him, the trial Court ought to have allowed the application in its entirety but not piecemeal.

4. On the other hand, Shri Vivek Rodrigues, the learned counsel for the respondents/defendants, with equal intensity, has contended that the trial Court has not committed any error requiring this Court's intervention. According to him, the petitioner's application under Order 23 Rule 1 is highly belated: three after the defendants filed the written statement. To elaborate, Shri Rodrigues has submitted that if at all the petitioner had been constrained to invoke Order 23 Rule 1 of CPC based on the defendants' averments in the written statement, he would have acted diligently there and then. So, he urges this Court not to interfere with the impugned order.

5. Heard Shri Ryan Menezes, the learned counsel for the petitioner, and Shri Vivek Rodrigues, the learned Counsel for the respondents.

**Discussion:**

6. Let us examine Rule 1 of Order 21 CPC to the extent relevant. It reads:

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:

...

(2)...

(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.

(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)...

7. Recently, in *Wilbert Mascarenhas v. Ana Francisca Antao E Mascarenhas*<sup>1</sup>, this Court had the occasion to examine the above provision. Under Rule 1 of Order XXIII, the plaintiff may abandon his suit or abandon a part of his claim, at any time, against all or any of the defendants. It needs no leave from the Court. But if the plaintiff is a minor or any other person to whom Rules 1 to 14 of Order XXXII apply, neither the suit nor any part of the claim shall be abandoned without the Court's leave. Rule 2 of the same Order describes the abandonment or withdrawal takes place if the plaintiff is one under some legal disability as described in the Proviso to Rule 1.

8. Sub-rule (3) of Order XXIII, the key provision for our purpose, has two limbs: the suit failing because of some formal defect, or the plaintiff having sufficient grounds to institute a fresh suit for the subject matter of a suit or part of a claim. In either contingency, the Court may permit the plaintiff to withdraw the suit or a part of the suit claim, with the liberty to institute a fresh suit "in respect of the subject matter of such suit or such part of the claim." This leave can be on such terms as the Court thinks fit. Nowhere has the provision split the withdrawal of the suit and filing afresh on the same cause of action. They go together. If leave is granted for the plaintiff only to withdraw the suit without liberty for him to file a fresh suit, his cause of action and the right to remedy perish. On the other hand, if the whole application is rejected, the plaintiff may persist with the present suit and remedy, as best as he can,

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<sup>1</sup>(High Court of Bombay, dated 15 January 2020)

the problems that prompted him, in the first place, to apply for withdrawal with leave to file afresh.

9. In *Wilbert Mascarenhas*, this Court has further observed that once a party applies under Order 23 Rule 1, the trial Court may allow the application or dismiss it in its entirety. It is impermissible for the trial Court to allow mere withdrawal, without granting the leave for the party to sue afresh. In this context, it has relied on *Mario Shaw v. Martin Fernandez*<sup>2</sup>.

10. In *Mario Shaw*, this Court has noted that “if an application is made for the withdrawal of the suit with liberty to file a suit, it is not open for the Court to grant only permission for withdrawal without liberty to institute the proceedings.”

11. I reckon *Mario Shaw* and *Wilbert Mascarenhas* clinch the issue. The trial Court, on merits, could have granted the leave as the petitioner had sought or could have refused it simpliciter.

I, therefore, set aside the order, dated 9.3.2020, and remand the matter to the trial Court. It will the parties on both sides and pass orders afresh, keeping in view the judicial dictum mentioned above.

**DAMA SESHADRI NAIDU, J.**

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