

**IN THE HIGH COURT OF MADHYA PRADESH  
AT INDORE**

**BEFORE**

**HON'BLE SHRI JUSTICE SUBODH ABHYANKAR**

**ON THE 1<sup>st</sup> OF MARCH, 2024**

**MISC. PETITION No. 4647 of 2022**

**BETWEEN:-**

**MADHURIBAI W/O KAMAL KUMAR GARG, AGED ABOUT 55 YEARS, OCCUPATION: AGRICULTURE AND BUSINESS VILLAGE GULJHERA DHAMNOD TEHSIL DHARAMPURI DISTRICT DHAR (MADHYA PRADESH)**

**.....PETITIONER**

***(BY SHRI RAJEEV BHATJIWALE, ADVOCATE***

**AND**

- 1. SHAKUNTALABAI W/O BASANT KUMAR GARG, AGED ABOUT 58 YEARS, OCCUPATION: AGRICULTURE AND BUSINESS VILLAGE GUJRI, ONKAR COLONY DHAMNOD TEHSIL DHARAMPURI DISTRICT DHAR. AT PRESENT MUKANAND PARISAR SHYAM WATIKA GALI NO. 5, WARD NO. 10 DHAMNOD DISTRICT DHAR (MADHYA PRADESH)**
- 2. FIRM RAJA GINING INDUSTRY GULJHERA DHAMNOD DISTT. DHAR PARTNERS KAMALKUMAR S/O KISHAN GARG, AGED ABOUT 60 YEARS, OCCUPATION: AGRICULTURE AND BUSINESS VILLAGE GULJHERA DHAMNOD TEHSIL DHARAMPURI DISTRICT DHAR (MADHYA PRADESH)**
- 3. FIRM RAJA GINING INDUSTRY GULJHERA DHAMNOD DISTT. DHAR PARTNERS SHAKUNTALABAI W/O BASANT KUMAR GARG, AGED ABOUT 58 YEARS,**

**OCCUPATION: AGRICULTURE AND BUSINESS  
VILLAGE GUJRI, ONKAR COLONY DHAMNOD  
TEH. DHARAMPURI DISTT. DHAR AND AT  
PRESENT MUKANAND PARISAR SHYAM  
WATIKA GALI NO. 5, WARD NO .10 DHAMNOD  
(MADHYA PRADESH)**

**4. STATE OF M.P. THROUGH COLLECTOR DHAR  
(MADHYA PRADESH)**

**.....RESPONDENTS**

**(SHRI PADMNABH SAXENA, ADVOCATE FOR RESPONDENT NOS.1 TO  
3 AND MS. BHARTI LAKKAD, P.L./G.A.)**

.....  
*This petition coming on for admission this day, the court passed  
the following:*

**ORDER**

**1]** This petition has been filed by the petitioner/plaintiff under Article 227 of the Constitution of India against the order dated 29.01.2018, as also against the order dated 23.06.2022, passed in Civil Suit No.47-A/2016 and MJC No.35/2019 (although, in the impugned order it is written as MJC No.35/2018), respectively, by Civil Judge Class-I, Dharampuri, District Dhar. Vide order dated 29.01.2018, the petitioner/plaintiff's application under Order XXIII Rule 1(3) of CPC for withdrawal of suit with liberty to file a fresh suit, has been partly allowed whereas, the liberty has been refused, but the suit has been allowed to be withdrawn and is dismissed.

**2]** The petitioner also preferred a review petition of the aforesaid order by filing MJC No.35/2019, which has also been dismissed by the Trial Court on 23.06.2022.

**3]** In brief, the facts of the case are that a civil suit for declaration and injunction was filed by the petitioner/plaintiff on 03.05.2016 and

in the aforesaid suit an application under Order XXIII Rule 1(3) of CPC for withdrawal of the suit with liberty was filed on 05.01.2018 which has been dismissed as aforesaid.

4] Shri Rajeev Bhatjiwale, learned counsel for the petitioner has submitted that the aforesaid application for withdrawal of the suit with liberty could either have been allowed in *toto* or, should have been dismissed entirely and it was not open for the Trial Court to reject the relief of liberty to file a fresh suit while allowing the suit to be withdrawn. It is further submitted that the aforesaid order runs contrary to the spirit of Order XXIII itself and by the aforesaid order, the plaintiff's rights have been seriously prejudiced.

5] In support of his submissions, Shri Bhatjiwale has also relied upon the decision rendered by the Bombay High Court in the case of *Chandrakant Pandurang Shingade and Another Vs. Walchand Gulabchand Bora and Another* reported as *2019 SCC OnLine Bom 1669*. Thus, it is submitted that the petition may be allowed, and the impugned order be set aside, and the Trial Court may be directed to proceed with the suit.

6] Counsel for the respondent, on the other hand, has opposed the prayer and it is submitted that no illegality has been committed by the learned Judge of the Trial Court in rejecting the application, as the application for withdrawal of the suit itself was misconceived as no details of the other suits which the plaintiff submitted were pending between the parties, were mentioned in the application.

7] In support of his submission that the liberty has been rightly refused, counsel has also relied upon a decision rendered by the

Supreme Court in the case of *V. Rajendran and Another Vs. Annasamy Pandian (dead) through LRs Karthyayani Natchiar* reported as *2017 (3) M.P.L.J. 673*.

8] Heard counsel for the parties and perused the record.

9] From the documents filed on record, it is apparent that the plaintiff's application under Order XXIII Rule 1(3) has been partly allowed, and while rejecting his relief to file a fresh suit, his application to withdraw the suit has been allowed.

10] This Court is of the considered opinion that an application under Order XXIII Rule 1(3) cannot be decided in such a manner, which would leave the plaintiff as remediless, as on one hand, the liberty to file a fresh suit has been rejected and, at the same time the suit has also been allowed to be withdrawn, and is rejected. On a bare reading of the language used in Order XXIII Rule 1(3) reveals that an application filed under the said provision is either to be allowed as a whole or rejected as a whole and, there is no third course available to the Court to partly allow it. It has also been held by the Bombay High Court in the aforesaid case of *Chandrakant Pandurang Shingade (Supra)*.

11] In view of the same, this Court is inclined to allow the present petition and resultantly, the impugned orders dated 29.01.2018 and 23.06.2022 are hereby set aside and the application filed by the plaintiff under Order XXIII Rule 1(3) is also hereby rejected and the learned Judge of the Trial Court is requested to proceed further to re-open the case and proceed further in accordance with law.

12] So far as the decision relied upon by Shri Padmnabh Saxena,

counsel for the respondent is concerned, the same is distinguishable and has no application in the facts and circumstances of the case.

**13]** Parties are directed to remain present in the Civil Court on 02.04.2023.

**14]** With the aforesaid, the petition stands *allowed* and *disposed of*.

**(SUBODH ABHYANKAR)**  
**JUDGE**

**Bahar**