

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 2908 OF 2013

Ahemadbee Ashrafmiya Shaikh
Age: 38 years, Occu. Household,
R/o : Dapkyl, Tq. Chakur,
Dist. Latur

...PETITIONER
(ori. Deft. No. 1)

versus

1. Yusuf S/o Faijusab Sayyed
Age: 58 years, Occu. Agril.,
R/o : Dapkyl, Tq. Chakur,
Dist. Latur.
2. Maheboob S/o Gulabsab Shaikh
Age: 63 years, Occu. Agri.,
R/o : Mahalanagra, Tq. Chakur,
Dist. Latur.
3. Ismail S/o Maheboob Sayyed,
Age: Major Occu. Agril.,
R/o :as above.
4. Dadamiya S/o Meheboob Sayyed,
Age: Major Occu. Agril.,
R/o: as above.

...RESPONDENTS
(Respondent No. 1 is
original plaintiff whereas
respondents No. 2 to 4 are
ori. Defts. No. 1 3 and 4)

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Mr. Gaurav L. Deshpande, Advocate for petitioner
Respondent No. 1 served.
Respondents no. 2 and 3 (Dismissed as per order dated 03-09-2013)
Mr. Atul B. Haware, Advocate holding for
Mr. A.M. Gaikwad, Advocate for respondent No. 4

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CORAM : K.K. SONAWANE, J.

DATED : 22nd SEPTEMBER, 2016

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith. Heard learned counsel for the petitioner and respondent No. 4. Despite service, respondent No. 1 remained absent. It appears that writ petition is dismissed as against respondents No. 2 and 3 for want of steps. The matter is pending since

2013, therefore, I prefer to determine the issue involved in the petition on merits.

2. The petitioner - defendant No. 2 assails orders dated 20-10-2012 below Exhibits- 99 and 1, in Regular Civil Suit No. 26 of 2005 passed by learned Civil Judge, Junior Division, Chakur, District Latur, whereunder present respondent No. 1 - original plaintiff was allowed to withdraw the suit with liberty to file a fresh suit on the same cause of action.

3. The petitioner contends that respondent No. 1 - Yusuf Faijusab Sayyed initiated civil litigation bearing Regular civil Suit No. 26 of 2005 for the relief of declaration and injunction against petitioner and others in the court of Civil Judge, Junior Division, Chakur, District Latur. Agricultural lands bearing Gut Nos. 181 and 205 located at village Dapkyal, tahsil Chakur were the subject-matter of the suit. After receipt of suit summons, the petitioner and other defendants appeared in the proceedings and resisted the claim by filing written statement. Defendants averred in written statement that portions of land Gut No. 205 admeasuring 1 hectare, 08 *Aar* and Gut No. 181 admeasuring 00 hectare, 92 *Aar* were acquired by the State Government for the purpose of storage tank of village Dapkyal, tahsil Chakur. Pending proceedings, original plaintiff i.e. respondent No. 1 -Yusuf Faijusab Sayyed, preferred application Exhibit-99 and requested to allow him to withdraw the suit with liberty to file a fresh suit on the same cause of action before the Civil Judge, Senior Division, District Latur. Learned trial court kept application awaiting for reply on behalf of defendants, but nobody turn up to the court and ultimately circumstances compelled learned trial court to allow respondent No. 1 - plaintiff to withdraw the suit with liberty to file a fresh suit on the same

cause of action. The impugned order passed by learned trial court dated 20-10-2012 is put in controversy in the present proceedings on behalf of the petitioner.

4. The learned counsel for petitioner submits that impugned order passed by learned trial court is erroneous, illegal and not sustainable within purview of law. The learned trial court did not pass order after hearing the petitioner. There were no formal defects in the proceedings. The reasons mentioned in the petition are false and baseless and not considerable at all. The original plaintiff - Yusuf Faijusab Sayyed is one of the party to the proceeding of Land Acquisition Reference No. 90 of 2007. He has also filed first appeal in the proceedings. Therefore, he cannot claims ignorance of the acquisition of the contentious suit land. The petitioner added that after framing requisite issues, plaintiff adduced his evidence before the learned trial court. The defendants also filed affidavit by way of evidence. But, there was no cross-examination to the defendants on behalf of the plaintiff. Eventually, learned trial court passed order of "No-cross" and forfeited the right of plaintiff to cross-examine the petitioner in the proceeding. The plaintiff made endeavour to get set-aside the order of "no-cross" but, learned trial court did not respond to the request of plaintiff - Yusuf Sayyed and rejected the application. Thereafter, plaintiff played mischief and preferred present application Exhibit-99 for withdrawal of the suit with liberty to file a fresh suit on same cause of action. The permission to withdraw the suit by the plaintiff is at belated stage, and against the principles of natural justice. Therefore, petitioner rushed to this court by invoking remedy under Article 227 of the Constitution of India and filed the present petition to redress her grievances.

5. I gave anxious consideration to the arguments canvassed on behalf of petitioner and respondent No. 4. Admittedly, respondent No. 1- original plaintiff - Yusuf Faijusb Fayyed filed suit against the petitioner and other defendants for relief of declaration and injunction pertains to the contentious suit land Gut Nos. 181 and 205 of village Dapkyal, tahsil Chakur. The petitioner accompanied with other defendants appeared in the proceedings and filed written statement. It has been pleaded on behalf of petitioner that portions of land gut Nos. 181 and 205 of village Dapkyal, tahsil Chakur were acquired by the Government of Maharashtra for the purpose of storage of tank. After adducing the evidence particularly in the proceedings, plaintiff preferred application Exhibit-99 seeking permission to withdraw the proceeding with liberty to file suit on same cause of action. Accordingly, learned trial court appreciated circumstances and passed impugned order dated 20-10-2012.

6. The provision of Order XXIII, Rule (1) of the Civil Procedure of Code, 1908 (for short "CPC") gave power to the court to allow the plaintiff at any point of time to withdraw his suit unconditionally or to withdraw from the suit on certain conditions. Object of the rule is not to allow the plaintiff opportunity to commence trial afresh after he has failed to conduct suit with due diligence and care and to substantiate his case by evidence. However, very purpose of Order XXIII of the CPC is to prevent defeat of justice on technical grounds. Provisions of order XXIII Rule (1) of CPC reads as under:

“23. 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 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) withdraw was 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.”

7. In the matter in hand, plaintiff filed an application Exhibit-99 for withdrawal of the suit with liberty to file fresh suit on same cause of action. The plaintiff claimed ownership of the contentious suit land Gut No. 205 and 181 located at village Dapkyal, tahsil Chakur. It has been mentioned that owing to ignorance of law plaintiff did not give proper information about acquisition of the contentious suit property by the Government of Maharashtra for storage tank of village Dapkyal, tahsil Chakur. Plaintiff has *locus standi* to claim legal right of the land acquired by Government. Therefore, it would necessary for the plaintiff to implead the State of Maharashtra as necessary party. The proceedings against the Government of Maharashtra is required to be filed before the Court of Civil Judge, Senior Division, District Latur. Therefore, plaintiff preferred present application with liberty to file fresh suit before the concerned Civil Judge, Senior Division, Latur on the same cause of action.

8. It is to be noted that petitioner or other defendants did not oppose the contention propounded on behalf of the plaintiff in the application Exhibit-99 and they all remained absent. Eventually, learned trial court considering the grounds propounded in the petition, passed impugned order. It is the rule of law that in case a prayer made for liberty to file fresh suit, the matter has to be considered on the touchstone of requirements of order XXIII, Rule 1 of the CPC. If the court is satisfied, it may permit the plaintiff to withdraw the suit with liberty to file fresh suit.

9. It is not put in controversy that part of the contentious suit land Gut Nos. 205 and 181 of village Dapkyal, tahsil Chakur were acquired by the

Government of Maharashtra for storage tank of village Dapkyal, tahsil Chakur. The plaintiff has claimed ownership right and relief of injunction against defendants pertains to the land Gut Nos. 181 and 205. It is brought to the notice that there was acquisition of portion of contentious suit land Gut Nos. 181 and 205 of village Dapkyal, tahsil Chakur by the Government of Maharashtra for the storage of tank. Therefore, the Court below allowed application(Exhibit-99) to give reasonable opportunity to the plaintiff to implead the State of Maharashtra as necessary party in the proceeding. Undisputably, the suit against the Government Authority is required to be instituted before the court of Civil Judge, Senior Division and the learned trial court appreciated the grounds mentioned in the application being sufficient to allow the plaintiff to institute a fresh suit on the subject-matter involved in the proceedings. The possibility of failure of the plaintiff in the proceedings on technical issue of not impleading Government authority as necessary party in the proceeding could not be ruled out. Therefore, learned trial court in the interest of justice allowed the plaintiff for withdrawal of the suit with liberty to file fresh suit on the same cause action. The approach of learned trial court while dealing with the application (Exhibit-99) appears just, proper and reasonable. There is no error committed on the part of the learned trial court while allowing application for withdrawal of the proceeding with liberty to file a fresh suit on the same cause of action.

10. The petitioner has raised objection on the ground that plaintiff filed present application at belated stage after partial evidence into matter. But, order XXIII, Rule (1) of the CPC contemplates that the plaintiff may at any point of time after institution of suit withdraw or abandon the suit or any part of his claim. The petitioner further expressed apprehension of

protracting litigation at the behest of respondent No. 1-original plaintiff. I do not find any substance in the apprehension propounded on behalf of the petitioner. Moreover, documents of evidence being part of judicial proceedings have an evidential value in the eyes of law. The appropriate legal remedy would be available to the petitioner in case of any mischief of protracting/prolonging litigation without any reasonable cause. Needless to state that for the purpose of granting permission for withdrawal of the suit in view of Order XXIII, Rule (1) of the CPC, the civil courts are required to apply their mind as to whether having regard to the dispute between the parties or the case been made out or not. The impugned order appears to be reasonable and proper to meet ends of justice. There would not any perversity or jurisdictional error in the impugned order. It would be painful to cause interference in the impugned order by exercising extra ordinary writ jurisdiction under Article 227 of the Constitution of India. The petition being devoid of merits and deserves to be dismissed.

11. As such, the petition is hereby dismissed. Rule stands discharged. No order as to costs.

Sd/-

[K. K. SONAWANE, J.]

MTK