

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

WRIT PETITION NO. 1813 OF 2014

Mrs. Ujwala Pawar

..Petitioner.

Vs

Harish V. Milani and Ors.

.. Respondents

Mr.A.V.Anturkar, Senior Advocate, with Mr. S.S.Deshmukh,
Advocate for Petitioner.

Mr. Rahul S. Kadam, Advocate for Respondent no.1.

Mr. Sandip Babar, A.G.P for respondent no.2.

CORAM : R.G.KETKAR,J.

DATE : 22/12/2016

PC:

1. Heard Mr.A.V.Anturkar, learned senior counsel for the petitioner, Mr. Rahul Kadam, learned counsel for respondent no.1 and Mr.Sandip Babar, learned A.G.P for respondent no.2 at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the order dated 16.12.2013 below Exhibit 11 in Misc. Judicial Case No.347 of 2013 in Regular Civil Suit No.881 of 2011. The learned trial Judge has passed the following order :

“O”

“Application is filed since it is not pressed.

Sd/-
1612.13.”

Respondent no.1 had filed application-Exhibit-11 on 22.8.2013

seeking permission to delete the name of petitioner as accused no.1 in an application under Section 340 of the Code of Criminal Procedure, 1973 (for short, 'Cr.P.C.'). Petitioner filed reply on 14.10.2016 giving no objection to withdraw and delete the name as prayed. On 16.12.2013, respondent no.1 gave reasons for not pressing the application. By the impugned order, the learned trial Judge has disposed of the application on the ground that it is not pressed. In other words, respondent no.1 does not intend to delete the petitioner as opponent no.1 in an application filed under Section 340 of Cr. P.C. and intends to proceed against the petitioner who is arrayed as opponent no.1.

3. In support of this petition, Mr. Anturkar submitted that the impugned order was passed without hearing the petitioner. On merits, he submitted that once respondent no.1 had filed application Exhibit-11 on 22.8.2013, the said application stands allowed and there is no necessity of passing a formal order permitting respondent no.1 to withdraw the application thereby deleting the name of the petitioner as opponent no.1. He submitted that in the present case, it cannot be said that in pursuance of the application made by the first respondent, after holding preliminary inquiry the learned trial Judge has directed Registry to lodge a complaint against the accused persons. The learned trial Judge directed other side to file say. As the application is not acted upon by issuing appropriate directions

for lodging complaint against the petitioner, once the application Exhibit -11 was made by respondent no.1 for deleting the name of the petitioner as opponent no.1, the said application stands allowed without any formal order of the Court disposing of such application as withdrawal. The application for withdrawal is not dependent on order of the Court. In support of this proposition, Mr. Anturkar relied upon following decisions:

- (i) Shiv Prasad V. Durga Prasad, (1975) 1 Supreme Court Cases 405 and in particular paragraph 12;
- (ii) Prakash Kaur Vs. Sandhooran, (1993) 3 Supreme Court Cases 312;
- (iii) Anil Dinmani Shankar Joshi Vs. Chief Officer, Panvel Municipal Council, AIR 2003 Bombay 238, wherein the learned Single Judge of this Court has followed the Apex Court decision in Shiv Prasad's case while dealing with the application filed by the plaintiff therein under Order XXIII, Rule 1.
- (iv) Oriental Insurance Co.Ltd Vs. Meena Variyal, (2007) 5 Supreme Court Cases 428 to contend that obiter dicta of the Apex Court is binding on High Courts in the absence of direct pronouncement on that question elsewhere by the Apex Court. As far as the Apex Court itself is concerned, though obiter dicta is not binding on it, it does have clear persuasive authority.
- (v) Rajendra Nath Halder Vs. Nilratan Mitter, I.L.R 23 Calcutta 958;

(vi) Amruta Babaji Mozar V Kondabai Babaji Mozar, Vol. 96 Bombay Law Reporter 743=1994 (2) Mh.L.J. 1663 and in particular paragraph 8 to contend that when the High Court has, far from proceeding per incuriam, considered a decision of the Supreme Court and has put its own gloss thereon, that gloss is binding on all the Courts in the state concerned until outweighed by a later decision of the Supreme Court or a Larger Bench of the High Court.

4. Relying upon the decision in Amruta Babaji Mozar (supra), Mr. Anturkar submitted that the decision of Shiv Prasad case was considered by the learned Single Judge of this Court in Anil Dinmani Shankar Joshi as the learned Single Judge has put his own gloss over the decision of the Apex Court in Shiv Prasad, this Court is bound by the interpretation given by the learned Single Judge in the case of Anil Dinmani Shankar Joshi (supra) as there is neither a later decision of Apex Court nor of a Larger Bench of this Court taking a contrary view.

5. On the other hand, Mr. Kadam has supported the impugned order. He submitted that the petitioner was present at the time of passing of the impugned order on 16.12.2013. She did not raise any objection. He further submitted that the Apex Court in Shiv Prasad case was dealing with the provisions of Order XXI, Rules 89 and 90, whereas the present case is governed by Order XXIII, Rule 1 of C.P.C. He has invited my attention to unamended

provisions of Order XXIII, Rule 1 as also post 1976 C.P.C. Amendment to Order XXIII, Rule 1. He also relied upon Division Bench decision of this Court in Yeshwant Govardhan Saraf Vs Totaram Avasu Firke, AIR 1958 Bombay 28 and in particular paragraph 7 thereof to contend that the true position in law is that it is open to a plaintiff to withdraw his application for withdrawal of his suit, so long as the withdrawal has not become effective by an order of the Court. In short, he submitted that unless and until order is passed by the Court on the application for withdrawal, the plaintiff is entitled to withdraw the application for withdrawal. In the present case, no order was passed by the trial Court and, therefore, respondent no.1 was justified in not pressing application Exhibit-11.

6. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. Mr. Anturkar heavily relied upon the decision of the Apex court in Shiv Prasad (supra) which was subsequently followed in Prakash Kaur (supra) as also the learned Single Judge of this Court in Anil Dinmani Shankar Joshi (supra). In Shiv Prasad's case, the Apex Court has referred the decision of Rajendra Nath (supra) as well. In order to appreciate the submissions advanced by Mr. Anturkar based on these decisions, it is necessary to consider the scheme of Order XXI, Rules 89 and 90.

7. Order XXI, Rule 82 deals with power of Court other than a court of Small Causes to order sales of immovable property in execution of decrees. Order XXI, Rule 84 lays down that on every sale of immovable property person declared to be the purchaser has to pay immediately after such declaration a deposit of 25% on the amount of his purchase money to officer or other person conducting the sale, and in default of such deposit, the property has to be forthwith re-sold. Order XXI, Rule 85 lays down that the full amount of purchase-money payable has to be paid by the purchaser into the Court before the Court closes on the fifteenth day from the sale of the property. Order XXI, Rule 86 provides for consequences in default of payment and lays down that in default of payment within the period mentioned in Rule 85, the deposit may, if the court thinks fit, after defraying the expenses of the sale, be forfeited to the government, and property shall be re-sold, and defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which the property may subsequently be sold. The Apex Court has interpreted the provisions of Order XXI, Rules 84 and 85 are mandatory as the said provision lays down consequences for not satisfying the conditions stipulated therein.

8. It is in that context, we have to consider the provisions of Order XXI, Rules 89 and 90. In particular, sub-rule (2) of Rule 89 of Order XXI lays down that where a person applies under Rule

90 to set aside the sale of his immovable property, he shall not, unless he withdraws his application under Rule 90, be entitled to make or prosecute an application under Rule 89 of Order XXI. Order XXI, Rule 90 enables any other person entitled to share in the asset to apply to the Court for setting aside the sale on the ground of a material irregularity or fraud in publishing or conducting sale. Thus, two-fold remedies are provided for setting aside the sale, one under Order XXI, Rule 89 and another under Rule 90. A person cannot simultaneously prosecute these remedies. Order XXI, Rule 89(2) enables the person to file application for setting aside the sale of his immovable property but he cannot make or prosecute such application unless he withdraws the application made under Rule 90.

9. It is in this context, one has to consider the decision of Shiv Prasad's case. In paragraph 10, the Apex Court has referred to Section 310A of the Code of Civil Procedure, 1882 as also decision of the Calcutta High Court in Rejendranath Halder (supra). The Division Bench consisting of Petheram, C.J. and Rampini, J. observed thus:-

“We consider that the words “he shall not be entitled to make an application under this section” in the proviso cannot mean merely “he shall not be entitled to present an application” under the section, but the word “make” here must mean “carry on” or “prosecute”.

The Apex Court thereafter observed that in order to make the position of law certain, the Legislature added the words “or

prosecute” after word ‘make” in sub-rule (2) of rule 89 of Order XXI.

10. In paragraph 11, the Apex Court observed that an application under XXI Rule 89 validly made on the date of its presentation cannot be allowed to be prosecuted until the subsequent application filed under Rule 90 is withdrawn. In paragraph 12, it was observed thus;

“12. Even on the interpretation of Rule 89(2) which we have put we are not prepared to accept the contention put forward on behalf of the appellant that an application under Rule 90 does not stand withdrawn until an order to that effect is recorded by the Court. The applicant merely has to convey to the Court that he is withdrawing his application under Rule 90 which he had filed prior to the making of the application under Rule 89. Thereupon he becomes entitled to make the latter application. Every applicant has a right to unconditionally withdraw his application and his unilateral act in that behalf is sufficient. No order of the Court is necessary permitting him to withdraw the application. The Court may make a formal order disposing of the application as withdrawn but the withdrawal is not dependent on the order of the Court. The act of withdrawal is complete as soon as the applicant intimates the court that he withdraws the application.”

11. The decision of Shiv Prasad was followed in the case of Prakash Kaur (supra). In that case, the application under Order XXI, Rule 89 was made on 23.9.1974. The prior application made under Order XXI, Rule 90 was withdrawn on 23.11.1974. The High Court held that the application was made by the Judgment Debtor under Order XXI, Rule 89, even though was filed in the court within the prescribed period of limitation on 23.9.1974, it would be deemed to have been made only on 23.11.1974, as the

earlier application under Order XXI, Rule 90 was withdrawn only on 23.11.1974 and on that date an application under Order XXI, Rule 89 was time barred. The correctness of the view taken by the High Court fell for consideration before the Apex Court. The Apex Court observed in paragraph 9 that withdrawal of the prior application made under Order XXI, Rule 90 is the unilateral act of the judgment debtor, for which no permission of the Court is necessary; the act of withdrawal is complete as soon as the applicant intimates the Court that he withdraws the application; and no order of the Court is necessary for permitting such a withdrawal.

12. As against this, in the present case, we are concerned with Order XXIII of C.P.C. Order XXIII, Rule 1 enables the plaintiff to abandon his suit or abandon part of his claim against all or any of the defendants. We are not concerned herewith the proviso to sub-rule (1) as also sub-rule (2) in the present case. Sub-rule (3) thereof lays down that where the Court is satisfied (a) that a suit must fall by reason of some formal defect, or (b) that there are other 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 abandon such part of a claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of a claim. Sub-rule (1) speaks about

abandonment of suit or part of a claim. Sub-rule (3) deals about withdrawal of suit or part of a claim. Sub-rule (4) lays down that 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 permission referred to in sub-rule (3), among other, he is precluded from instituting fresh suit in respect of such subject matter or such part of a claim. Thus, while considering the application of the plaintiff for abandonment of any suit or part of a claim under sub-rule (1) or withdrawal from a suit or part of a claim under sub-rule (3), Court has necessarily to pass order either granting permission or refusing permission. If the plaintiff abandons any suit or part of a claim under sub-rule (1) or withdraws from a suit or a part of claim without permission referred in sub-rule (3), he is precluded from instituting any fresh suit in respect of such subject matter or such part of a claim.

13. In the case of Yeshwant Govardhan Saraf (supra) , the Division Bench of this Court has considered provisions of Order XXIII. In paragraph 7, it was observed thus:

“7. Mr. Kotwal argues that there is nothing to prevent a plaintiff from withdrawing his withdrawal, because to withdraw from a suit is a matter of the plaintiff's choice and the only thing which the defendant is concerned with is to have an order for costs made in his favour, as provided in Order XXIII, Rule 3. If a plaintiff withdraws from his suit or abandons part of his claim, it is not certainly a matter in which the defendant can have his say. The defendant cannot compel a plaintiff to prosecute his suit and if a plaintiff, therefore, withdraws his suit, it is entirely a matter of his choice. If, therefore, the plaintiff has a right to withdraw his suit, he has equally, a right to withdraw his withdrawal and

so long as the Court has not made an order, showing that the withdrawal has become complete or effective, there is always a locus poenitentiae for the plaintiff to withdraw his withdrawal. In so holding, there is no injustice to the defendant. If the defendant cannot compel a plaintiff to continue his suit, the defendant cannot, equally, compel a plaintiff not to withdraw his withdrawal. We think, therefore, that, in law, the true position is that it is open to a plaintiff to withdraw his application for withdrawal of his suit, so long as the withdrawal has not become effective by an order of the Court. This view is supported by at least two decisions reported in *Lakshmana Pillai v. Appalwar Alwar Ayyangar* AIR 1923 Mad 246 and in *Midnapore Zemindary Co. Ltd. v. Bijoy Singh* AIR 1941 Cal 1."

14. Mr. Anturkar relied upon decision of the learned Single Judge of this Court in *Anil Dinmani Shankar Joshi* (supra). In that case, the applicants had instituted suit against Chief Officer Panvel Municipal Council as defendant no.1 and respondent no.2 as defendant no.2. On 11.2.2001 the plaintiff filed a purshis stating therein that as respondent no.1 Council had granted the necessary permission for constructing of a building and sanctioned the plans, the plaintiff had no grievance against respondent no.1. By that purshis, the plaintiff gave up all his claims against respondent no.1 -Municipal Council and sought to unconditionally withdraw the suit against respondent no.1 Respondent no.1-Municipal Council also gave consent for the said withdrawal. Respondent no.2, however, opposed the said purshis and by order dated 20.7.2002, the trial Court refused permission which was subject matter of challenge before this Court. The learned single Judge referred the decision of *Shiv Prasad* case

and has observed in paragraphs 3 and 4 thus;

“3. Order XXIII Rule 1 of the Code of Civil Procedure permits the plaintiff at any time after the institution of the suit to abandon the suit or abandon a part of the claim in the suit against all or any of the defendants. No permission of the Court is necessary for the plaintiff to unconditionally abandon his claim or any part of his claim against all or one or more of the defendants. Abandonment is complete as soon as the plaintiff informs the Court. No order of the Court is necessary though the Court often passes formal order recording the abandonment. In this connection, reference may be made to the decision of the Apex Court in Shiv Prasad v. Durga Prasad reported in MANU/SC/0024/1975MANU/SC/0024/1975 : [1975]3SCR526 wherein the Court observed in paragraph No. 12 of the Judgment as follows:

"Every applicant has a right to unconditionally withdraw his application and his unilateral act in that behalf is sufficient. No order of the Court is necessary permitting him to withdraw the application. The Court may make a formal order disposing of the application as withdraw but the withdrawal is not dependent on the order of the Court. The act of withdrawal is complete as soon as the applicant intimates the Court that he withdraws the application."

“4. In my opinion, what is said by the Apex Court in respect of an application applies with equal force to the suit. Every plaintiff has an unconditional right to withdraw his suit unconditionally. The withdrawal would be complete as soon as the plaintiff files a purshis of withdrawal. The Court may pass a formal order recording the withdrawal and also make an order regarding costs, but the withdrawal is not dependent on the order of the Court. This could apply also where the plaintiff seeks withdrawal of the suit against one or more of the defendants and the withdrawal would be complete against those defendants as soon as the plaintiff files an application/purshis for withdrawal. The Court may then consider whether the suit survives against the other defendants against whom suit is not withdrawn. If it comes to the conclusion that the defendant or defendants against whom the suit is withdrawn was or were necessary parties, the Court would then be entitled to dismiss the suit against all on the ground of non-joinder of the necessary parties. But the Court cannot refuse to allow the withdrawal on the ground that the person against whom the suit is sought to be withdrawn is a necessary party.”

15. In the first place, the decision of Division Bench of this Court in Yeshwant Govardhan Saraf (supra) was not brought to the notice of the learned Single Judge. Secondly, decision of Shiv Prasad (supra) considered the provisions of Order XXI, Rules 89 and 90 of C.P.C. Thirdly, in the case of Amruta Babaji Mozar (supra), it is held that when the High Court has, far from proceeding per incuriam, considered a decision of the Supreme Court and has put its own gloss thereon, that gloss is binding on all the courts in the state concerned **until outweighed by a later decision of the Supreme Court or a Larger bench of the High Court**. In the present case, Larger Bench of this Court in Yeshwant Govardhan Saraf (supra) has already laid down true position of law that it is open to the plaintiff to withdraw his application for withdrawal of his suit so long as withdrawal has not become effective by an order of the court. Fourthly, on facts also the decision of the learned Single Judge of this Court in Anil Dinmani Shankar Joshi (supra) is not applicable to the present case. In any case, perusal of this decision does not indicate that attention of the learned Single Judge was invited to sub-rule (4) of Rule 1 of Order XXI which provides for consequences in not obtaining permission in abandoning any suit or part of claim in sub-rule (1) or withdrawing from a suit or part of a claim without permission referred to in sub-rule (3). In view thereof, I do not find that the decision in the case of Anil Dinmani Shankar Joshi

(supra) advances the case of the petitioner. In view thereof, I do not find that the learned trial Judge has committed any error in passing the impugned order.

16. Mr. Kadam submitted that respondent no.1 will delete the transcription dated 24.2.2014 which is at page 182 of affidavit of first respondent. Leave as prayed for is granted. Amendment shall be carried out forthwith.

17. Petition accordingly fails and the same is dismissed.

(R.G.KETKAR, J.)