

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

**WRIT PETITION (ST) NO.6796 OF 2016
(R.C.No.1696 OF 2016)**

Shri Jatin Manubhai Sheth

..Petitioner.

Vs

Mr. Arvind Pandurang Nagvekar
and Ors.

.. Respondents

Mr. A.Y. Sakhare, Senior Advocate, i/b Mr. M. A. Chaudhari,
Advocate for Petitioner.

Mr. Sachin Thorat , Advocate for Respondent no.1.

Mr. P.J.Thorat, Advocate for Respondents no. 2 and 3.

Mr. P.G.Lad, Advocate for Respondent no.4.

**CORAM : R.G.KETKAR,J.
DATE : 01/07/2016**

PC:

1. Heard Mr. A.Y.Sakhare, learned senior counsel for the petitioner, Mr. Sachin Throat, learned counsel for respondent no.1 and Mr. P.J.Thorat, learned counsel for respondents no.2 and 3 and Mr. P.G.Lad, learned counsel for respondent no.4. at length. By consent of the parties, Writ Petition (ST) No. 6796 of 2016 is taken up for admission.

2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as 'applicant', has challenged the Judgment and order dated 15.7.2016 passed by

the Appellate Bench of the Small Causes Court, below Exhibit-16 in Appeal No. 102 of 2011. By that order, the Appellate Court dismissed the application made by the applicant seeking substitution by his intervention in place of respondent/plaintiff no.1 on the ground that the same is not maintainable.

3. Mr. Sakhare submitted that during the pendency of the suit, the petitioner took out application Exhibit-51 in the trial Court for joining him party defendant in the suit on the ground that applicant is owner of 60% share in the property. By order dated 19.4.2011 the learned trial Judge rejected the application. Aggrieved by that order, the petitioner preferred Appeal No.123 of 2011 before the Appellate Bench of the Small Causes Court. However, pending that Appeal, the suit was decreed on 19.9.2011. Appeal No.123 of 2011 preferred by the petitioner became infructuous and, therefore, on 4.7.2013 the petitioner withdrew the Appeal. Against the trial Court's order, respondent no.4. herein has preferred Appeal. Pending that Appeal, the petitioner took out application Exh.16 for impleadment. The Appellate Court dismissed the application on the ground that the application is not maintainable in view of unconditional withdrawal of Appeal No.123 of 2011. He submitted that the Appellate Court committed several errors in dismissing the application and therefore, Petition requires consideration.

4. On the other hand, Mr. P.J.Throat supported the impugned order.

5. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. It is not in dispute that some time in February 2011, the petitioner made application at Exh.51 in the trial Court. On 19.4.2011, that application was dismissed by the trial Court. On 27.6.2011, the petitioner preferred Appeal No.123 of 2011 before the Appellate court. However, the petitioner did not obtain stay of further proceedings of the suit and eventually on 19.9.2011 the suit was decreed. On 4.7.2013 the petitioner applied for withdrawal of appeal when following order was passed:-

“Heard Mr. Choudhari, Advocate for Appellant. He wants to withdraw Appeal. He does not want to proceed with Appeal. Hence Appeal is dismissed for want of prosecution. No order as to costs.”

6. Respondent no.4 preferred appeal against the trial Court's Judgment and decree dated 19.9.2011. During pendency of that Appeal, the petitioner has filed application Exh.16. The Appellate Court dismissed the application on the ground that the application Exh.16 itself is not maintainable once the appeal preferred by the petitioner challenging the order dated 19.4.2011 was withdrawn unconditionally. I do not find that the

Appellate Court committed any error. It is settled position in law that Appeal is in continuation of the suit. After withdrawal of Appeal No.123 of 2011, the order dated 19.4.2011 passed below Exh.51 has attained finality. If the application Exh.16 is to be allowed it will amount to setting aside the order 19.4.2011 which has attained finality in view of withdrawal of the appeal. Mr. Sakhare submitted that the applicant is owner of 60 percent share in the property and, therefore being the co-owner, is required to be impleaded as party in the Appeal. In view of the unconditional withdrawal of the Appeal preferred by the petitioner, the Appellate Court rightly held that the application Exhibit-16 itself is not maintainable. Hence, Petition fails and the same is dismissed. Order accordingly.

(R.G.KETKAR, J.)