

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.10482 OF 2016
(Venkat Pandurang Teleng and another Vs. The State of Maharashtra
and others)

Mr.C.R.Deshpande, Advocate for the petitioners.
Mr.N.T.Bhagat, AGP for respondent/State.

(CORAM : Ravindra V.Ghuge, J.)

DATE : 20/06/2017

PER COURT :

1. The petitioners are aggrieved by the order dated 16/01/2016 passed by the learned Appeal Court by which application Exh.13, praying for liberty to withdraw the suit and file a fresh suit, has been refused.

2. Learned Advocate for the petitioners strenuously submits that Order 23 Rule 1(3) of the C.P.C. lays down certain situations / circumstances in which a suit can be withdrawn and a fresh suit can be instituted. He submits that when the petitioners desired to abandon the claim as put forth in the plaint and file a fresh suit with proper pleadings and addition of necessary parties, the Appeal Court should have granted the application.

3. He further submits that if the petitioners assess their fate and are of the view that the suit is likely to fail by the reason of a formal defect and if sufficient grounds are made out for allowing the plaintiff to withdraw the suit and file a fresh suit, the Court is expected to permit such an act unless oblique motives or malafides or laches are attributable to the conduct of the plaintiff.

4. Reliance is placed upon the judgment of the Hon'ble Apex Court in the matter of Kailash Paliwal Vs. Subhash Chandra Agrawal [AIR 2013 SC 2923]. Observations of the Court in paragraph Nos. 3 to 7 are specifically relied upon.

5. I have considered the submissions of the learned Advocates and have gone through the report cited.

6. Normally, in my view, the application for withdrawal of suit under Order 23 Rule 1(3) could have been entertained. If the plaintiffs succeed in pointing out that the errors cannot be cured and there is no option but to withdraw the suit, the Court could permit a litigant to abandon the claim at that stage with liberty to institute a proper suit.

7. It also needs to be taken into account that such liberty to withdraw can be granted so as to enable the plaintiff to file a fresh suit taking up all grounds and causes of action if that is likely to prevent multiplicity of litigation. However, the factors germane to the case in hand are peculiar which are not convincing so as to permit the plaintiffs to withdraw the suit. The said factors are as under :-

[a] The petitioners had preferred RCS No.536/2001 on 10/10/2001.

[b] Written statement was filed by the defendants in 2002.

[c] The defendant No.3 has specifically mentioned in the suit which was filed for declaration of ownership and permanent injunction of an agricultural land, that the suit was bad in law and deserved to be dismissed for non-joinder of parties.

[d] Though the petitioners were made aware in 2002 that their suit is bad for non-joinder of parties as the plaintiffs have not added/arrayed their sisters in the proceedings, the plaintiffs could have resorted to withdrawal of the suit under Order 23 Rule 1(3).

[e] The petitioners chose to proceed with their suit on the principle of "*dominus litus*" and took the risk of prosecuting the suit and contesting the claim of the defendants.

[f] The suit was then dismissed by judgment dated 04/01/2011.

[g] The petitioners preferred Regular Civil Appeal No.31/2011.

[h] Even in the appeal, copy of which is placed on record, it is not canvassed that the grounds on which the suit was dismissed for non-joinder of necessary parties were not sustainable. What was stated in paragraph No.8 of the appeal

was that the co-owners can file a separate suit and the said suit can be considered on its own merits.

[i] On 29/08/2015, i.e. after 13 years of the written statement filed by the defendant raising objections of non-joinder of parties, the petitioners filed Exhibit No.13 claiming that the suit suffers from formal defects as the sisters of the plaintiffs and the subsequent purchaser of the suit land were not arrayed. No reasons or explanation are put forth to indicate as to what were the circumstances that precluded the petitioners from moving an application for withdrawal of suit immediately after they were alerted by the defendants in 2003.

8. The Hon'ble Apex Court in Kailash Paliwal (supra) had noted in paragraph No.6 as under :-

"6. Learned counsel for the defendant-respondent had no objection to the withdrawal of the suit by the plaintiff-appellant, provided he is granted liberty to raise all such pleas as are open to him in law and on facts."

9. It is, therefore, apparent that in Kailash Paliwal case (supra), the defendant/respondent had given his no objection for the withdrawal of the suit and for filing of a fresh suit by the plaintiffs if the defendant was granted the liberty to raise all such pleas as were available to him on facts and in law. Keeping this in view, the Hon'ble Apex Court allowed the withdrawal of the suit in paragraph No.7,

which reads as under :-

“7. In the circumstances, therefore, we allow this appeal, set aside the judgment and orders passed by the Courts below, permit the plaintiff-appellant to withdraw the suit filed by him and file a fresh suit based on title to the property. We reserve liberty to the defendant-respondent to raise all such defences as may be open to him in law and on facts.”

10. Considering the facts in the Kailash Paliwal case (supra), it would be of no assistance to the petitioners .

11. In my view, the petitioners were alerted by the defendant that the suit property being ancestral property, would necessitate the adding of the sisters and the subsequent purchasers as defendants as the said sale-purchase transaction had occurred prior to the institution of the suit. The petitioners took their chances and virtually confronted the stand taken by the defendant and contested it on the premises that the plaintiffs have every chance of success in the suit. For 9 years, till the suit was dismissed by a judgment, the plaintiffs did not move an application under Order 23 Rule 1(3) of the CPC. Even in the appeal filed, they took a stand that if the sisters and the subsequent purchasers have any right in the suit, they may institute an independent suit. It was after 13 years and during the

pendency of the appeal that application Exh.13 was filed. As such, I do not find that the Appeal Court has committed any error in rejecting Exhibit 13 by the impugned order.

12. The Hon'ble Apex Court in the matter of Syed Yakoob V/s K.S.Radhakrishnan and others, reported at AIR 1964 SC 477 and in the matter of Surya Dev Rai Vs. Ram Chander Rai, reported at 2003(6) SCC 682 has concluded that merely because a second view is possible, the impugned order ought not to be interfered with. It must appear that the impugned order is perverse, erroneous, legally unsustainable and likely to cause gross injustice.

13. In the light of the above, this petition, being devoid of merit, is therefore dismissed.

(Ravindra V.Ghuge, J.)