

IN THE HIGH COURT OF JUDICATURE OF BOMBAY  
BENCH AT AURANGABAD  
WRIT PETITION NO.7658 OF 2015

Sham Ganeshrao Salunke,  
age: 42 years, Occ: Agril.,  
R/o Jawalgaon, Tq.Ambajogai,  
District Beed.

Petitioner

Versus

01 Malanbai Tanappa Kokane,  
age: 67 years, Occ: Agril. &  
Household,

02 Janardhan Tanappa Kokane,  
age: 40 years, Occ: Agril.,

03 Padminbai w/o Limba Hare,  
age: 62 years, Occ: Household  
and Agril.,

04 Prabhakar Limba Hare,  
age: 42 years, Occ: Agril.,

05 Aatmaram Limba Hare,  
age: 40 years, Occ: Agril.,

All R/o Jawalgaon, Tq.Ambajogai,  
District Beed.

Respondents

Mr.T.G.Gaikwad, advocate for the petitioner  
Mr.V.V.Bhavthankar, advocate for Respondent No.2.

**CORAM : S.B.SHUKRE, J.**

**DATE : 30<sup>th</sup> January, 2017**

**ORAL JUDGMENT :**

1 Heard learned Counsel for the petitioner and learned  
Counsel for Respondent No.2. Original defendants no.1, 3 and 4,

who have been joined as Respondents No.1, 3 and 4 in this petition, are absent though they are duly served. In any case, as contended by learned Counsel for the petitioner, they are formal parties.

2 Rule. Rule made returnable forthwith and heard finally by consent of learned Counsel for respective parties.

3 Relying upon the decision of learned Single Judge of Allahabad High Court in the case of **Jai Prakash Vs. Rajendra Prasad & others**, reported in 2008 (2) ALL MR (Journal) 7, learned Counsel for the petitioner submits that the learned Civil Judge ought to have either rejected the application in toto or accepted it in terms of clause (b) of sub-rule (3) of Rule 1 of Order XXIII of the Code of Civil Procedure.

4 Learned Counsel for Respondent No.2 submits that after the application filed for amendment of plaint was rejected, no liberty to file a fresh suit could be granted to the petitioner and the order of rejection of amendment application sealed fate of the petitioner as, it was not a formal defect.

5 It is true that under clause (a) of sub-rule (3) of Rule 1 of Order XXIII, the provision for granting leave to withdraw the suit, for the reason that it is not likely to succeed on account of some formal defect, is permissible with liberty to file a fresh suit. There is another provision as contained in clause (b) thereof, which allows granting of such leave even when there are other sufficient grounds available for doing so. It appears that the learned Civil

Judge has not applied his mind to the provision of clause (b) of sub-rule (3) of Rule 1 of Order XXIII, while deciding the application Exhibit-37. Then, as rightly held by the learned Single Judge of Allahabad High Court in the case of **Jai Prakash**, the Court has to consider acceptance or rejection of the application in toto and the course adopted by the learned Civil Judge, in the instant case, which is a half-hearted one, i.e. permitting the petitioner to withdraw the suit, however, denying liberty to file fresh suit, could not have been adopted by the learned Civil Judge. On this count, the impugned order could not stand the scrutiny of law.

6            In the circumstances, this writ petition needs to be allowed by remanding the matter to the trial Court for decision afresh.

7            In the result, writ petition is allowed. The impugned order is quashed and set aside and the matter is remanded back to the trial Court for decision afresh on the application Exhibit-37, in accordance with law. Parties to appear before the trial Court on 13.02.2017.

8            Rule is accordingly made absolute in above terms. No costs.

**S.B.SHUKRE**  
**JUDGE**

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