

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

WRIT PETITION NO. 291 OF 2016

Mr.Rizwan Sayed Abdul Gafoor & Ors. ...Petitioners

Versus

Aayashabi Mahammed Rafiq Patel
(since deceased) through her legal heirship
Mohammed Rafiq Dawood Patel & Ors. ...Respondents

**WITH
CIVIL APPLICATION NO. 290 OF 2017
IN
WRIT PETITION NO. 291 OF 2016**

Mr. Abdul Rehman A Latif Patil ...Applicant

IN THE MATTER BETWEEN

Mr.Rizwan Sayed Abdul Gafoor & Ors. ...Petitioners

Versus

Aayashabi Mohammed Rafiq Patel & Ors. ...Respondents

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Mr.S.S.Kanetkar i/b.Mr.Sumit S.Kothari a/w Ms.Shivani S.Samel
for the Petitioners.

Mr.Balkrishna D. Joshi for Respondent Nos. 1 (a) to 1 (d).

Mr. P.S. Dani, Senior Advocate for Respondent No.2.

Mr.S.S.Punde for Respondent Nos. 3.

Mr.R.S.Apte, Senior Advocate a/w Mr. S.J.Chaurasia a/w. Mr.
Ashok Kharwar i/b. Ashoka Law Firm for Respondent Nos. 2,5,6,8
and 10.

Mr.Virendra V. Pethe for Respondent Nos. 11 to 16, 17 (A) and 17 (B).

Mr.V.S.Talkute i/b. Mr. Prashant D. Jadhav for Respondent No.7 in Writ Petition No. 291 of 2016 and the applicant in Civil Application No. 290 of 2017.

Mr. Rohit P. Sakhadeo for Respondent No.18.

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CORAM : MRS.MRIDULA BHATKAR, J.

RESERVED ON: JULY 17, 2017

PRONOUNCED ON: SEPTEMBER 08, 2017

JUDGEMENT :

1. Rule. Rule made returnable forthwith. By consent, petition is heard finally and disposed of at the stage of admission.

2. This Writ Petition is directed against the order dated 19.12.2015 passed by the Civil Judge, Senior Division, Panvel, thereby rejecting the application below Exhibit 148 filed by the present petitioners for impleading them as a party to the proceedings. Respondent No.1/original plaintiff had filed Suit No. 109 of 1999 for a declaration that she has 1/18th share in the suit property and also the land which was given to the original owner under 12.5 scheme by the respondent-CIDCO. She has filed the Suit also for partition and injunction against the defendants. The petitioners herein (who are the applicants in Exhibit 148 filed in

Special Civil Suit No. 109 of 1999) are third party and have claimed their right and share in the suit property and the land which is going to be allotted under 12.5. scheme by CIDCO on the basis of Memorandum of Understanding dated 10.05.2005 and the Deed of Assignment dated 03.07.2013, which was executed in their favour and, therefore, they moved an application at Exhibit 148 on 13.04.2015 in the said Suit that they be impleaded as a party. The facts of the case in brief are as follows:

3. During the pendency of Special Suit No. 109 of 1999, the original plaintiff Aayashabi (i.e. the deceased) executed the Memorandum of Understanding in favour of the petitioners in respect of her share in the land and she had accepted Rs. 5 lakhs at the time of execution of Memorandum of Understanding. She expired on 21.01.2006. Her legal heirs were brought on record as plaintiff nos. 1 (A) to 1 (D). Thereafter, the plaintiffs in the year 2008 gave pursis at Exhibit 119 for withdrawal of the Suit. Respondent Nos. 11 and 12 i.e. two sisters of the original plaintiff had also filed a Special Suit No. 119 of 2008 for partition. In the said Suit, the application dated 14.04.2013 was filed by the

petitioners for impleading them as a party in the said proceedings. The said application was allowed and the present petitioners were impleaded as party defendants in Special Suit No. 119 of 2008. Against the said order, two Writ Petitions bearing no. 4580 of 2013 and 5513 of 2013 were filed and both the Writ Petitions were dismissed on merits by the High Court, vide order dated 30.07.2013. On 03.07.2014, a pursis was filed in Special Suit No. 119 of 2008 for withdrawal of the Suit by those plaintiffs, however, it was rejected. The said order was challenged in Civil Revision Application No. 66 of 2015 and the High Court allowed the said Civil Revision Application, vide order dated 11.02.2015. Hence, Suit No. 119 of 2008 was allowed to be withdrawn, vide order dated 11.02.2015 by the High Court. On 03.07.2013, respondent nos. 1 (A) to 1 (D) i.e. the legal heirs of the original plaintiff have executed separately a registered Deed of Assignment in favour of the petitioners on the basis of earlier Memorandum of Understanding dated 10.05.2005 and accepted further amount of Rs. 50,00,000/-. On 02.09.2013, the legal heirs of the original plaintiff i.e. 1 (A) to 1 (D) have filed the application for impleading the petitioners as a party to Suit No. 109 of 1999. However, the

said application was subsequently withdrawn in September 2016 and 'No Order' was passed by the Court on it. On the basis of the Deeds of Assignment, the application at Exhibit 148 dated 13.04.2015 was moved by the petitioners to implead them i.e. assignees as a party to Special Suit No. 109 of 1999. On 02.05.2015, the trial Court had rejected the application at Exhibit 148. Writ Petition No. 5337 of 2015 was preferred against the said order. The High Court while remanding the said matter directed the trial Court to consider the provisions under Rule 10 Order 22 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the C.P.C.") Thereafter, the trial Court heard that application and again rejected the same. Hence, this Writ Petition.

4. Mr.Kanetkar, learned counsel for the petitioners has submitted that the learned Judge has not properly considered the provisions under Rule 10 Order 22 of the C.P.C. He has committed a factual error in the order holding that Memorandum of Understanding and the Deeds of Assignment were executed before filing of the Suit and the application had filed on the basis of the said documents. Thus, the learned trial Judge has erroneously held

that Rule 10 Order 22 of the C.P.C is not applicable to the present case. He has further submitted that the case of the petitioners is squarely covered under Rule 10 Order 22 of the C.P.C. and, therefore, specific directions were given by this Court while remanding the matter, however, the learned trial Judge has failed to follow the directions of this Court. He has further submitted that the order dated 11.02.2015 passed by this Court in C.R.A. No. 66 of 2015 was in respect of withdrawal of the Suit and the said order is not pertaining to the issue of impleading the applicant as a party to Special Civil Suit No. 119 of 2008 and, therefore, the observations made in that order cannot be made directly applicable to the present case. On the point of Rule 10 Order 22 of the C.P.C, he has argued that it is necessary to take into account the language used in Rule 10 Order 22 of the C.P.C. If there is devolution of interest due to assignment, transfer or any other act after filing of the Suit, then the Suit can be continued by impleading other person as a party to the Suit. The present petitioners have claimed their rights on the basis of registered Deed of Assignment executed by the original plaintiff and also through Memorandum of Understanding executed by the original plaintiff. He has further

argued that the plaintiffs themselves had filed the application at Exhibit 131 requesting the Court that the petitioners be added as party plaintiffs in the Suit, the said application in September 2016 was withdrawn after the matter was remanded. He has further submitted that the petitioners had paid total amount of Rs. 55 lakhs (5 + 50 lakhs) to the plaintiffs and purchased undivided share of the original plaintiff in the suit property. The Suit for partition was filed by the plaintiffs, in which the petitioners are necessary and proper parties and the order passed by the learned trial Judge is to be set aside. He has relied on the following rulings:-

- (1) **Dhurandhar Prasad Singh Versus Jai Prakash University and others.,** reported in *(2001) 6 Supreme Court Cases 534;*
- (2) **Ebrahim Mulla Rasuljis Versus Chhatrasinhji Samatasinhji & Anr.,** reported in *1954 AIR (Saurashtra) 20;*
- (3) **C.Wright Neville Versus E.H.Freser,** reported in *AIR 1944 Nag 137;*

(4) *Jawaharlal Shivraj Lunkad Versus Saraswatibai Babulal Joshi and others*, reported in *1986 Mah LJ 225*.

5. Mr. Joshi, learned counsel for the original plaintiffs, has opposed this petition and submitted that the petitioners have played fraud on the original plaintiffs under pressure and false promise. They got Deeds of Assignment executed in their favour by the original plaintiffs. He has further submitted that the plaintiffs did not receive any amount of Rs. 50 lakhs, but the plaintiffs were cheated by the petitioners and, therefore, they had filed a Declaratory Suit No. 375 of 2015 and also lodged a criminal case with the police before the Magistrate, wherein the investigation is directed. He has further submitted that the original plaintiffs had filed two pursis, one in the year 2007 at Exhibit 119 and thereafter on 27.02.2013 at Exhibit 128 for withdrawal of the said suit. He has further submitted that as soon as such pursis are filed, permission of the Court is not required for withdrawal of the Suit and it is deemed to be withdrawn on that day. In support of his submission, he relied on the following rulings:-

- (1) *Anil Dinmani Shankar Joshi & Another Versus Chief Officer, Panvel Municipal Council & another*, reported in *2003 (3) Bom. C.R.856*;
- (2) *Anil Kumar Singh Versus Shivnath Mishrar ALIAS GADASA GURU*, reported in *(1995) 3 Supreme Court Cases 147*.

6. Mr. Dani and Mr. Apte, learned senior counsel, have submitted that under Rule 10 Order 22 of the C.P.C., it is not mandatory for the Court to pass an order of continuation of the Suit in the case of devolution of interest, even though, there is a devolution of interest in the suit property to the third party. He has further submitted that alongwith the original plaintiffs, other sharers cannot be made sufferer when the original plaintiffs want to withdraw the Suit.

7. Mr. Apte, learned senior counsel for respondent nos. 2,5,6,8 and 9 has adopted the submissions made by Mr. Dani so also Mr. Talkute has adopted the submissions of Mr. Joshi and Mr. Dani. Mr. Talkute, learned counsel, relied on the judgment of *Akka Bai and Anr. Vs. Gowrawwa* reported in *AIR 1990Kant.278*. Mr. Talkute

has further relied on the judgment in the case of *Hulas Rai Baij Nath Versus Firm K.B.Bass and Company*, reported in *1968 AIR (SC) 111*.

8. Learned counsel for the CIDCO has relied on the affidavit filed by one Kishan N. Jawale, wherein he has said that entitlement of Abdul Latif i.e. the original owner, father of Aayashabi is not yet sanctioned till date.

9. Learned counsel of both the sides have relied on a number of cases on the point of withdrawal of the Suit under Rule 1 Order 23 of the C.P.C. and so also continuation of the Suit due to devolution of interest under Rule 10 Order 22 of the C.P.C. It is convenient to consider the ratio laid down in those cases before dealing with the merits of the present case. The ratio is culled out as follows:

10. In the case of *Dhurandhar Prasad Singh* (supra), the Supreme Court has held as under :-

“Order 22 Rule 10 CPC is based on the principle that the trial of a suit cannot be brought to an end merely because the interest of a party in the subject matter of the suit has devolved upon another during its pendency but such a suit may be continued with the leave of the

court by or against the person upon whom such interest has devolved. But, if no such step is taken, the suit may be continued with the original party and the person upon whom the interest has devolved will be bound by and can have the benefit of the decree, as the case may be, unless it is shown in a properly constituted proceeding that the original party being no longer interested in the proceeding did not vigorously prosecute or colluded with the adversary resulting in decision adverse to the party upon whom the interest had devolved”.

11. In the case of ***Ebrahim Mulla Rasuljis*** (*supra*), the learned Single Judge of the Saurashtra High Court has referred the case of ***Rai Charan v. Biswa Nath***, reported in ***AIR 1915 Cal 103 (B)***, wherein it is held as under :-

“3..... The litigation will continue in his name for the benefit of his successor. In the alternative the Civil Procedure Code, O. 22, R.10, provides that by leave of the Court the successor in interest may get himself substituted as plaintiff. This is a provision against the danger that the original plaintiff being no longer interested in the proceedings may not vigorously prosecute them or may even collude with the adversary. In such a case the successor in interest who has not got himself substituted is bound by the decision and has no remedy. No doubt O. 22 R.10, gives the Court a discretion in allowing or refusing such an application by the successor in interest but leave should not be unreasonably refused”.

12. In the case of *Jawaharal Shivraj Lunkad (supra)*, the learned Single Judge of this Court has held that when the application is made for continuing the Suit under Rule 10 Order 22 of the C.P.C., a full scale enquiry about the existence and validity of the assignment or devolution of interest would not be necessary at the stage of granting leave under Rule 10 Order 22 of the C.P.C. Similarly, it also relied on the precedent laid down in the case of *C.Wright Neville v. E.H.Freser*, reported in *AIR 1944 Nagpur 137*, in which it was held that the assignment was disputed was no ground for refusing leave and the Court could enquire into the factum and validity of the assignment.

13. In the case of *Anil Kumar Singh (supra)*, the Suit was filed for specific performance of the contract in respect of immovable property and the application was made that he be impleaded as a party defendant because he got interest as co-owners. Even though, such decree of co-ownership is acquired in favour of a person, leave can be refused to add him as a party defendant when no relief is claimed against him and he was not a party to the agreement of sale.

14. In the case of *Anil Dinmani Shankar Joshi (supra)*, the learned Single Judge of this Court while dealing with Rule 1 Order 23 of the C.P.C. by giving reference to the judgment in the case of *Shiv Prasad v. Durga Prasad*, reported in *1975 (1) SCC 405* has held that withdrawal is not dependent on the order of the Court. The act of withdrawal is complete as soon as the plaintiff intimates the Court that he wants to withdraw the Suit. The Court may make a formal order disposing of the Suit as withdrawn, but the withdrawal of the Suit is not dependent on the order of the Court and 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.

The present case is not of non-joinder of the necessary parties as defendants, but the applicant has filed the application below Exhibit 148 that he be impleaded as a party plaintiff being assignee.

15. In the case of **Hulas Raj Baij Nath** (supra), the Suit was filed for rendition of accounts and the question was whether the plaintiff is entitled to withdraw from the suit at the stage when the issues were framed and the evidence is recorded, however, no preliminary decree for rendition of accounts was passed in the said matter. The Supreme Court has held that under Sub Rule (1) Order 23 of the C.P.C., gives an unqualified right to the plaintiff to withdraw from a Suit. However, in the said matter, the Supreme Court has given a reference of Division Bench of the Madras High Court in the case of ***Seethai Achi v. Meyappa Chettiar and others***, reported in **AIR 1934 Mad 337**, wherein the Division Bench of the Madras High Court has held that the plaintiffs right though is unqualified to withdraw, but due to some exceptions, the suit will not be dismissed if by reason of withdrawal of the plaintiff for the obvious reason that the rights declared in favour of the defendants would be rendered nugatory under the preliminary decree if the Suit is allowed to be withdrawn. Thus, under certain situations withdrawal is not to be necessarily permitted if the defendant is entitled to relief in his favour. In the case in hand, it is not defendant, but the assignee of the interest of the plaintiff wants to

be added as a plaintiff under Rule 10 Order 22 of the C.P.C. As the plaintiffs and the defendants want to compromise the Suit, the plaintiffs seek to withdraw the Suit.

16. In the case of *Akka Bai (supra)*, the Division Bench of the Karnataka High Court has held that while deciding the application under Rule 10 Order 22 of C.P.C., the Court may look into the aspect of delay and laches and so also when there is a dispute between the parties, then the Court may reject such applications and allow the disputed question of fact or law to be decided elsewhere.

17. It is true that the trial Court has erred in holding that the Agreement, i.e., Memorandum of Understanding dated 10.05.2005 which is the base of the assignment, has taken place before filing of the suit as it is factually wrong. The suit is of 1999 and original plaintiff Aayashabi has executed MOU for Rs.5 lakhs and has allegedly sold her rights in favour of the applicant. Another Deed of Agreement dated 03.07.2013 was executed between the present petitioner and the legal heirs of original plaintiffs for

Rs.50,00,000/-. Thus, the right and interest in the suit *prima facie* is devolved upon the petitioners. The plaintiffs have also made an Application on 02.09.2013 below Exhibit 131 for impleading assignee, i.e., petitioner as party plaintiffs. However, the said application was withdrawn by the applicant in September, 2016.

18. Albeit these two facts in favour of the petitioners, there are certain circumstances and factual aspects, which are also to be taken into account while considering impleadment of the petitioners -

(i) The petitioners and plaintiffs are singing different tunes as the plaintiffs have challenged the assignment. The plaintiffs have filed Declaratory Suit No. 375 of 2015 against the present petitioners in respect of Deed of Assignment. So also, criminal case of forgery and cheating is pending between the petitioners and legal heirs of the plaintiffs.

(ii) The plaintiffs have also filed two applications for withdrawal of the suit, one in 2008 and other in 2013. Considering the

provision of Rules 1 and 2 Order 23 of the C.P.C., such application for withdrawal of suit ought to have been disposed of by the Court immediately. Surprisingly, first Application of 2008 was kept pending and then the plaintiffs filed second Application with similar request in the year 2013 and that was also kept pending. The plaintiffs enjoy unqualified right to prosecute or withdraw the suit. The present plaintiffs cannot be compelled to proceed with the matter, so the application is necessarily to be allowed.

It is also to be mentioned that earlier Special Civil Suit No. 119 of 2008 filed by two sisters of Aayashabi for similar relief of partition was allowed to be withdrawn. The Application for withdrawal of the suit was opposed by the present petitioners, who were defendant nos. 15 to 17. While allowing the said Application, this Court by order dated 11.02.2012 has made reference of the pendency of this suit and the present application made by the assignee. However, in the present suit also, the plaintiffs have asked for unconditional withdrawal of the suit, which cannot be

refused.

(iii) The present suit is for partition and under Order 22 of CPC, the same old suit to continue with same prayers. However, considering the nature of the dispute between the parties, it appears that there may be other cause of action may expand its scope beyond the present suit of partition. The petitioners will have to seek relief against the present petitioners which virtually will amount to putting the present plaintiffs in a status of defendants. Thus, it will not be consistent with the present frame of the suit and will be chaotic due to the conflicting interest and the claim of forgery and fraud made against each other. However, the petitioners assignees cannot be rendered remedy-less and the right to prosecute independently is always available to them.

(iv) From the affidavit of CIDCO, it appears that the CIDCO has not yet approved the entitlement of the original land owner.

(v) It was argued that earlier the advocate of the plaintiffs has

withdrawn his appearance for the plaintiffs and has filed appearance for the petitioners, i.e., applicants in Exhibit 148. This may not have direct bearing on the merits of the matter. However, this fact weighs on the mind while granting discretionary relief.

19. Thus, if leave is granted to the petitioners, then the Suit in their hands is not a new Suit, it is a old suit carried on at the instance of the petitioners and they are bound by all proceedings in the said Suit. However, considering the conflicting interest and the filing of a separate Suit for declaration by the plaintiffs against the petitioners, the scope of the old Suit is going to be expanded. In order to decide the application under Rule 10 Order 22 of the C.P.C., the Court has to satisfy itself generally whether there is any assignment or devolution of interest upon the applicant by the plaintiff. If due to the application for withdrawal of the Suit made under Rule 1 Order 23 of the C.P.C. by the plaintiff, the said interest and right of the assignee or the applicant is in jeopardy, then the Court may allow the application under Rule 10 Order 22 of the C.P.C. and also allow the plaintiff to withdraw from the Suit

and the proceedings may not be withdrawn and the Suit to continue. However, in the present case, the petitioners/ assignees who are going to be substituted for the plaintiffs have conflicting interest with the plaintiffs. The plaintiffs have denied the execution of any agreement or any document with the petitioners. Though Court need not go into the merits and proof of the facts, while dealing with the application under Rule 10 Order 22 of the C.P.C., in view of peculiar facts of the present matter, I find it is not judicious to use discretion to grant leave.

20. In view of the above, Writ Petition is dismissed.

21 In view of the dismissal of the Writ Petition, nothing survives in the Civil Application and the same is disposed of as such.

22. The stay granted earlier on 08.01.2016 is extended by eight weeks from today.

(MRIDULA BHATKAR, J.)