

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.5964 OF 2022

**DR. AJAY SHRIKISHANJI PUNPALE AND OTHERS
VERSUS
TRIMBAK GANPATI BHOIBAR AND OTHERS**

...
Advocate for Petitioners : Mr. Ravibhushan P. Adgaonkar
Advocate for Respondent No.7 : Mr. A.A. Khande
Advocate for Respondent Nos.4(1) to 4(3) : Mr. D.J. Patil
Advocate for Respondent Nos. 1 to 3 : Ms. M.S. Mhase
...

CORAM : NITIN B. SURYAWANSHI, J.

DATE : 17th JULY, 2023

PER COURT :

1. By this petition filed under Article 227 of the Constitution of India, petitioners take exception to the order dated 31/01/2022, passed by learned District Judge-1, Nilanga, below Exhibit-49 in Regular Civil Appeal No.04/2013, thereby allowing application filed by respondent Nos.1 to 3 for withdrawal of the suit with liberty to file fresh suit.

2. Respondent Nos.1 to 3/original plaintiffs filed Regular Civil Suit No.147/2005, for declaration of ownership and perpetual injunction in respect of the suit property, against the petitioners /defendants and their vendors. Defendants resisted the suit by filing written statement. After recording of evidence the suit was dismissed by the trial Court vide judgment and decree dated

22/11/2012. Respondent Nos.1 to 3 challenged the said decision in Regular Civil Appeal No.04/2013. At the time of final hearing of the appeal, respondent Nos.1 to 3 filed application Exhibit-49, seeking permission for withdrawal of original suit with liberty to file fresh suit. In spite of opposition by the petitioners, appellate Court allowed the application. Hence, the present petition.

3. Heard learned advocate for petitioners, learned advocate for respondent No.7, learned advocate for respondent Nos.1 to 3 and learned advocate for respondent Nos.4(1) to 4(3). Perused the writ petition memo, annexures thereto and the impugned order.

4. Application Exhibit-49 is filed by respondent Nos.1 to 3 contending that there was partition of some of the properties and since properties bearing Survey Nos.31/B, 31/1/C, 32/2 and 33/C are ancestral properties of late Mr. Venkoba, these lands are reserved and remained joint, as is mentioned in the deed of partition. Plaintiffs are successors of late Ganpati and defendant Nos.1 to 3 are successors of late Mr. Gyanoba, plaintiff No.3 Raghoji and Pandhari are successors of Kerba. No proper prayer is made in the plaint regarding partition of these reserved lands situated at village Lodga and application for amendment is also rejected.

5. Appellate Court allowed the application holding that

there is no counter claim and alternate plea can be taken. Considering the fact that subject matter is an agricultural land i.e. immovable property, the appellate Court without recording any finding on merit and by keeping all the contentions of the parties open, thought it fit to exercise discretion by granting permission to withdraw the suit with liberty to institute fresh suit. The discretion exercised by the appellate Court is not liable to be interfered with in exercise of extraordinary writ jurisdiction.

6. Learned advocate for petitioners has relied on *R. Rathinavel Chettiar and Another Vs. V. Sivaraman and Others, (1999) 4 SCC 89*, wherein it is held that withdrawal of suit by plaintiff after passing of decree, at appellate stage, cannot be allowed by the Court, as a matter of course, when by virtue of such withdrawal vested or substantive rights of any party to the litigation will be adversely affected.

7. The facts of this citation are different. After passing of decree in favour of plaintiff, suit property was sold by plaintiff to a third party, but defendant preferred appeal against the decree. Therefore, it was held that plaintiff cannot seek to withdraw the suit at appellate stage on the ground of he having compromised the dispute with original defendant, as that would result in nullifying the substantive right to property acquired by third party transferee.

8. In the case in hand, since the substantive relief of partition needs to be agitated by the respondents in a separate suit, the application for withdrawal of suit with liberty to file fresh suit is rightly allowed by the appellate Court. No prejudice is likely to be caused to the petitioners by the impugned order. Petitioners can contest the fresh suit on merits.

9. No illegality or perversity is found with the order impugned in present petition. Writ petition being devoid of merit is dismissed.

(NITIN B. SURYAWANSHI, J.)