



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

901 SECOND APPEAL NO. 443 OF 2004

**SUSHILABAI MAHADEO SHINDE
VERSUS
JAHEDABEE MAHEMOOD SHAIKH AND ORS**

.....

Mr. Shaikh Mujtaba Gulam Mustafa, Advocate for Appellant
Mr. G. L. Deshpande and Mr. G. K. Naik (Thigale) Advocate for
respondent no.2
Mr. M. L. Dharashive, Advocate for respondent no.3.

.....

**WITH
CIVIL APPLICATION NO. 2006 OF 2024
IN SA/443/2004
LAXMIKANT BHIKULAL VARMA AND ANOTHER
VERSUS
SUSHILABAI MAHADEO SHINDE AND OTHERS**

.....

Mr. B. R. Warma, Advocate for Applicants
Mr. G. L. Deshpande and Mr. G. K. Naik (Thigale) Advocate for
respondent nos.1 and 2
Mr. M. L. Dharashive, Advocate for respondent no.3.

.....

**WITH
CIVIL APPLICATION NO. 2586 OF 2024
IN SA/443/2004
MAHADAPPA SIDRAMAPPA KORKE AND OTHERS
VERSUS
SUSHILABAI MAHADEO SHINDE**

.....

Mr. B. R. Warma, Advocate for Applicants
Mr. Shaikh Mujtaba Gulam Mustafa, Advocate for respondent no.1
Mr. M. L. Dharashive, Advocate for respondent no.3
Mr. G. L. Deshpande, Advocate for respondent no.2

.....

WITH
CIVIL APPLICATION NO. 7612 OF 2024
IN SA/443/2004
JAHEDABEE MAHEMOOD SHAIKH AND ANOTHER
VERSUS
SUSHILABAI MAHADEO SHINDE

.....

Mr. G. L. Deshpande, Advocate for Applicants
Mr. Shaikh Mujtaba Gulam Mustafa, Advocate for appellant in SA
Mr. M. L. Dharashive, Advocate for respondent no.3

CORAM : R. M. JOSHI, J.
DATE : 12th FEBRUARY, 2025

PER COURT :-

1. Learned counsel for the appellant along with appellant present.
2. Learned counsel for the appellant, on written instructions, seeks withdrawal of the appeal. The said written instructions are taken on record and marked 'X' for the purpose of identification.
3. Learned counsel for the intervenor opposed the application for withdrawal on the ground that the intervenor has a right and interest in the subject matter of the appeal. It is claimed that the appellant is the original plaintiff and during the pendency of the suit being R.C.S. No. 250/1994 the transfer of the property has been effected by the plaintiff in favour of the intervenor. By referring to provision of Order 23 Rule 1A of the Code of Civil Procedure, it is his contention that the first of all the

withdrawal of suit is not as of a right and secondly, when the intervenor has shown his interest in the subject matter, the application of intervenor ought to be decided first before taking decision on the withdrawal of the appeal. To support his submissions he placed reliance on the judgment of Hon'ble Supreme Court in case of *Amit Kumar Shaw and another Vs. Farida Khatoon and another*, AIR 2005 Supreme Court 2209

4. Learned counsel for the appellant submits that the appellant cannot be compelled to pursue the appeal if she does not desire do so. It is also pointed out that the intervenors have already filed substantial suit.

5. Section 107(2) of CPC provides for Appellate Court to have same powers to perform as nearly as conferred on Courts of original jurisdiction in respect of suit instituted therein. Order XXIII makes provisions about the withdrawal and adjustment of suit. According to Rule 1 at any time after the institution of a suit, plaintiff may against all or any of the defendants abandon his suit or even part of claim. Other part of this rule deal with different contingencies such as withdrawal of suit filed by minor, or with liberty file fresh suit or withdrawal of suit by one of plaintiffs. These contingencies have no application to the present case.

6. Thus, there cannot be any dispute about the the position of law that no party can be compelled to prosecute a suit/proceeding. Thus, the simplicitor withdrawal of the proceeding must be allowed. In this regard reference can be made to the judgment of Hon'ble Supreme Court in case of ***Bijayananda Patnaik Vs. Satrughna Sahu and Others, AIR 1964 SC 1566***, wherein it is held that,

7. This position with respect of withdrawal of an election petition is not in dispute. The question however is whether the same position applies to the withdrawal of an appeal and this brings us to the consideration of the provisions of s. 116A of the Act, which we have already set out above. The powers of the High Court in respect of an appeal under that section are contained in sub-s.(2), which lays down that "the High Court shall, subject to the provisions of this Act, have the same powers, jurisdiction and authority, and follow the same procedure, with respect to an appeal under this Chapter as if the appeal were an appeal from an original decree passed by a civil court situated within the local limits of its civil appellate jurisdiction".

Sub-s. (2) therefore confers all the powers on the High Court and enjoins upon it to follow the same procedure as in the case of appeals from original decree in suits. It is true that the powers of the High Court under sub-s. (2) are subject to the provisions of the Act. This Court had occasion to consider this matter in T. K. Gangi Reddy v. M. C. Anjaneya Reddy (1960) 22 E.L.R. 261., in connection with an argument that the High Court had no jurisdiction to set aside the finding of the election tribunal on questions of fact arrived at on an appreciation of the evidence. In that connection this Court observed with respect to sub-s. (2) of s. 116A that

"it was manifest that the jurisdiction of the High Court in the disposal of appeals is similar to that it has in the disposal of appeals from original decrees. No doubt this was subject to the provisions of the Act and no provision has been brought to the notice of the Court

which curtailed that jurisdiction. Therefore when an appeal is filed the entire case is reopened in the appellate court".

Clearly, therefore, when sub-s. (2) says that the powers, jurisdiction and authority of the High Court is subject to the provisions of the Act, it means that the provision must be an express provision in the Act or such as arises by necessary implication from an express provision. One such express provision is to be found in the proviso to sub-s. (2) of s. 116A, which lays down that

"where the High Court consists of more than two judges, every appeal under this Chapter shall be heard by a bench of not less than two judges."

Another express provision is to be found in sub-s. (4) which gives express power to the High Court to stay the operation of the order appealed from and provides that where such a stay order is made, the order appealed from shall be deemed never to have taken effect under sub-s. (1) of s. 107. Again sub-s. (5) enjoins on the High Court to decide the appeal as expeditiously as possible with a direction that it shall be determined finally within three months as far as possible. There is, however, no express provision in Chap. IV-A dealing with appeals, which deals with the question of withdrawal of appeals under that Chapter. Nor do we think that Sections 109 and 110 necessarily imply that an appeal also cannot be withdrawn as a matter of right, unless the procedure laid down in those sections is followed. One reason for this view may at once be stated. The losing party is not bound to file an appeal and if he does not, nobody else has the right to do so. The object apparently is that the election petition filed should, if any voter so desire, be heard and decided. The sections dealing with substitution on death of the petitioner lead to that view : see Sections 112-115. There is no such provision for appeals. It seems to us that if Parliament intended that the provisions of Sections 109 and 110 which deal with withdrawal of election petitions before a tribunal shall also apply to withdrawal of appeals before the High Court under Chap. IV-A an express provision could have been easily made to that effect in s. 116-A by adding a suitable provision in the section that the provisions of Sections 109 and 110 would apply to withdrawal of appeals

before the High Court as they apply to withdrawal of election petitions before the tribunal. In the absence of such a provision in Chap. IV-A, we do not think that the High Court was right in importing the principles of Sections 109 and 110 in the matter of withdrawal of appeals before the High Court. So far therefore as the question of withdrawal of appeals before the High Court under Chapter IV-A is concerned, it seems to us that the High Court has the same powers, jurisdiction and authority in the matter of withdrawal as it would have in the matter of withdrawal of an appeal from an original decree passed by a civil court within the local limits of its civil appellate jurisdiction without any limitation on such powers because of Sections 109 and 110. The High Court thus has the same powers, jurisdiction and authority and has to follow the same procedure in the matter of withdrawal of appeal under s.116-A as in the matter of an appeal from an original decree before it, and there is no warrant for importing any limitation in the matter on the analogy of Sections 109 and 110 of the Act, which expressly deal only with election petitions and not with appeals under s. 116-A.

8. Let us therefore see what powers the High Court has in the matter of withdrawal of an appeal from an original decree before it and what procedure it has to follow in that behalf. The provisions in the Code relating to withdrawal of suits are to be found in O. XXIII, r. 1. Sub-rule (1) thereof lays down that at any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claims. Sub-rule (2) provides that

"where the Court is satisfied (a) that a suit must fail by reason of some formal defect, or (b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of a claim."

We have already said that sub-rule (1) gives absolute power to the plaintiff to withdraw his suit or abandon part of his claim against all or any of the defendants, and where an application

for withdrawal of a suit is made under O. XXIII, r. 1(1), the Court has to allow that application and the suit stands withdrawn. It is only under sub-rule (2) where a suit is not being withdrawn absolutely but is being withdrawn on condition that the plaintiff may be permitted to institute a fresh suit for the same subject-matter that the permission of the court for such withdrawal is necessary. The provisions of O. XXIII r. 1(1) and (3) also apply in the same manner to withdrawal of appeals. In Kalyan Singh v. Rahmu MANU/UP/0040/1901 : I.L.R. (1901) 23 All. 130., it was held that

where no objection had been filed by the respondent, the appellant had an absolute right to withdraw his appeal at any time before judgment. This view was followed by the Allahabad High Court in Kanhaya Lal v. Partap Chand (1931) 29 A.L.J. 232., where it was held that having regard to O. XXIII, r. 1(1) and s. 107(2) of the Code of Civil Procedure, where no cross-objection has been filed by the respondent, an appellant has the right to withdraw his appeal unconditionally, his only liability being to pay costs. In Dhondo Narayan Shiralkar v. Annaji Pandurang Kokatnur I.L.R. (1939) Bom. 66., it was held that "an appellant is entitled as of right to withdraw his appeal, provided the respondent has not acquired any interest thereunder". There was however difference between the Allahabad and Bombay High Courts as to whether s. 107(2) of the Code of the Civil Procedure would help an appellant in such a case. It is unnecessary for our present purpose to decide whether the absolute right of the appellant to withdraw an appeal unconditionally flows from s.107(2) or is an inherent right of the appellant on the analogy of O. XXIII r. 1(1). But there can be no doubt that an appellant has the right to withdraw his appeal unconditionally and if he makes such an application to the court, it has to grant it. The difficulty arising out of any cross-objection under which the respondent might have acquired an interest as pointed out by the Bombay High Court, no longer remains in view of O. XLI r. 22(4), which now permits the cross-objection to be heard even though the appeal is withdrawn. Therefore when the High Court is hearing an appeal from an original decree and an application is made to it to withdraw the appeal unconditionally, it must permit such withdrawal subject to costs and has no power to say that

it will not permit the appeal to be withdrawn and will go on with the hearing of the appeal. The power of the High Court under s. 116A(2) when hearing an appeal from an election petition is the same as its power when hearing an appeal from an original decree, and the procedure is also the same, for there is no express provision to the contrary in the matter of withdrawal of an appeal in the Act. Therefore when an appellant under s. 116-A makes an application for an unconditional withdrawal of the appeal, the power of the High Court, consistently with its power in an appeal from an original decree, is to allow such withdrawal, and it cannot say that it will not permit the appeal to be withdrawn. We are therefore of opinion that the High Court was in error in importing the principles of Sections 109 and 110 of the Act which deal only with the withdrawal of election petitions and not with the withdrawal of appeals."

(Emphasis supplied)

7. Now question arises as to whether the application for intervention filed in this proceedings are required to be heard first. If the applications for intervention are heard at the first instance, it will amount to compelling the appellant to continue with the appeal which she does not wish to. This is wholly impermissible in law.

8. In so far as reliance placed on the Rule 1A of Order 23 of CPC by intervenors is concerned, the said provision applies to a defendant who can make an application to prosecute the suit. Such provision is essentially made in order to take care of the situation which may occur for example in a suit for partition. If plaintiff seeks withdrawal of the suit for partition, the defendant also being plaintiff, may seek to transpose

himself as plaintiff. Such issue however is not involved herein this case. Moreover, the intervenors have already filed substantiate suit and as such no prejudice can be claimed to have been caused to them by accepting request for simplicitor withdrawal of appeal.

9. Having regard to these facts that there cannot be any impediment in permitting simplicitor withdrawal of the appeal. Hence, appeal stands disposed as withdrawn. Pending Civil applications stand disposed of. Needless to say that disposal of this appeal will not become an impediment for adopting any legal remedy available for the intervenor.

(R. M. JOSHI, J.)

ssp