

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

SECOND APPEAL NO.147 OF 2007

Maruti s/o Hullaji Kamble,
R/o-Udgir, Ashok Nagar,
Near to the House of Dr.Madhware,
Proper Udgir, Tq-Udgir,
Dist-Latur.

...APPELLANT.

VERSUS

- 1) Madhavrao s/o Narayanrao Biradar,
R/o-Udgir, New Mondha,
Tq-Udgir, Dist-Latur,
- 2) Nirmalabai w/o Vaijanath Mitkari,
R/o-Deoni, Tq-Deoni,
Dist-Latur.
- 3) Sheshrao s/o Madhappa Biradar,
R/o-Udgir, Tq-Udgir,
Dist-Latur.

...RESPONDENTS.

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Mr. K.A. Gugale Advocate i/b. Mr. D.B.
Bhange Advocate for the Appellant.
Mr. A.N. Gaddime Advocate h/f. Mr. V.D.
Gunale Advocate for Respondent No.1.
Mrs. S.G. Chincholkar Advocate for
Respondent No.2.
None present for Respondent No.3.

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CORAM: K.K. TATED, J.

ORDER RESERVED ON : 22ND JUNE, 2009

ORDER PRONOUNCED ON : 30TH JUNE, 2009 .

ORDER:

1. Heard learned counsel for the respective parties.

2. The present Second Appeal preferred by the original defendant No.1 against the Judgment and decree dated 15th July, 2006 passed by IInd Additional District Judge, Udgir in Regular Civil Appeal No.326 of 2001 arising out of the Judgment and decree dated 11th April, 2001 passed by Joint Civil Judge, Junior Division, Udgir in Regular Civil Suit No.133 of 1995. In the present Second Appeal, Appellant is original defendant No.1, Respondent No.1 is original plaintiff, Respondent No.2 is original defendant No.2 and Respondent No.3 is original defendant No.3. Herein after the parties will be referred as they appear in the Suit proceedings.

3. The plaintiff filed Regular Civil Suit No. 133 of 1995 for partition and separate possession as well as for declaration and injunction in respect of land Survey No.175/1 admeasuring 86 R's situated at

village Deoni, Tq- Deoni, Dist-Latur. It is the contention of the plaintiff that the original owner of land Survey No.187/1 and new Survey No. 175/1 to the extent of 86 R's was Amrutrao Madhavrao Patil. On 20th April, 1994, plaintiff, defendant No.1 and one Pramod Shivaji Patil had purchased the suit land under the sale deed. As they became joint owners and possessors of the suit land, the plaintiff is having his undivided 1/3rd share in the suit land. Subsequently on 28th March, 1995 defendant No.1 purchased the undivided 1/3rd share of Pramod Shivaji Patil from the suit land and therefore, the plaintiff remained the owner of 1/3rd share and defendant No.1 became the owner of 2/3rd share of the suit land. The trial Court by its Judgment and decree dated 11th April, 2001, held that plaintiff failed to prove his title and joint possession over the suit property and dismissed the Suit. Therefore, the plaintiff preferred Regular Civil Appeal No. 326 of 2001. The first appellate Court allowed the said Appeal holding that plaintiff is entitled for partition and separate possession to the extent of 1/3rd share in the suit land bearing old Survey No.187/1 and new Survey No.

175/1 after excluding the plots which had been sold out under registered sale-deeds jointly by himself and other co-sharers as well as the plot sold out to the defendant No.3.

4. Being aggrieved by the Judgment and decree dated 15th July, 2006 passed by IInd Additional District Judge, Udgir in Regular Civil Appeal No. 326 of 2001, the defendant No.1 preferred present Second Appeal on the ground that the first appellate Court has not considered the oral and documentary evidence on record in its proper perspective, hence the Judgment and decree under the Appeal deserves to be quashed and set aside and the Judgment and decree passed by the trial Court deserves to be confirmed. The defendant No.1 further submitted that the first appellate Court has erroneously come to the conclusion that the plaintiff is entitled for partition and separate possession to the extent of 1/3rd share in the suit land after excluding the plots which has been sold out under registered sale deeds jointly by himself and other co-sharers as well as the plots sold out to the defendant No.3.

5. Learned counsel appearing on behalf of the defendant No.1 submitted that the first appellate Court has failed to consider that the plaintiff himself had sold out plots independently to other purchasers and hence he is not entitled for partition and separate possession. Learned counsel for defendant No.1 submitted that the Suit as filed by the plaintiff in the trial Court was not maintainable at all. He submitted that the plaintiff filed the Suit for partition and possession of his 1/3rd share in the suit property including the plots which were sold out by the plaintiff with the consent of other co-owners. Therefore, the defendant No.1 raised objection about maintainability of the Suit itself. Therefore, the plaintiff filed application for amendment of the Plaint to delete the area of plots sold out by him with the consent of other co-owners from the suit property. The said application came to be rejected by the trial Court. In spite of rejection of the said application for amendment of the Plaint, the plaintiff failed to challenge the said order. Learned counsel for the defendant No.1 further submitted that in

Appeal, the plaintiff filed application at Exhibit 31 under Order 23 Rule 1 of the Code of Civil Procedure for abandonment of part of the claim to the extent of property sold to the co-owners and other persons. The said application at Exhibit 31 allowed by the first appellate Court. It is the contention of the learned counsel for defendant No.1 that first appellate Court has no jurisdiction to allow the application Exhibit 31 under Order 23 Rule 1 of the Code of Civil Procedure, as the similar application was dismissed by the trial Court and the said order was not challenged by the plaintiff. Not only that, at the time of filing Appeal against the Judgment and decree passed by the trial Court on 14th April, 2001, the plaintiff has not raised any objection and/or ground for rejecting his application for amendment of Plaint. Therefore, the first appellate Court erred in allowing the application Exhibit 31 under Order 23 Rule 1 of the Code of Civil Procedure. It is submitted by learned counsel for the defendant No.1 - Appellant that because of allowing the application Exhibit 31 by the first appellate Court, defendant No.1's rights are affected and therefore the Judgment and decree passed

by the first appellate Court is liable to be set aside.

6. At the outset, the learned counsel appearing on behalf of the defendant No.1 made a statement across the Bar that he is restricting the present Second Appeal only on the ground that first appellate Court erred in allowing the application Exhibit 31 under Order 23 Rule 1 of the Code of Civil Procedure, filed by the plaintiff for abandonment of his claim in respect of the property sold by plaintiff with consent of co-owners to the other persons. Learned counsel for the defendant No.1 produced the copy of paper book in Regular Civil Appeal No.326 of 2001. With the assistance of learned counsel appearing for the parties, I have gone through the copy of the Plaint, written statement and deposition of witnesses.

7. It is the contention of the learned counsel for the defendant No.1 - Appellant that first appellate Court has no jurisdiction under Order 23 Rule 1 of the Code of Civil Procedure to allow the plaintiff at the appellate stage to abandon his claim

in respect of part of the suit property. He submitted that because of abandonment of certain claim by the plaintiff, the defendant No.1's claim in the suit property was affected. To consider whether the first appellate Court has jurisdiction to entertain the application for abandonment of certain claim at appellate stage or not, it is necessary to reproduce Order 23 Rule 1 of the Code of Civil Procedure:

"Order 23 - Withdrawal and adjustment of suits.

*1. Withdrawal of suit or abandonment of part of claim.- (1)
At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim:*

Provided that where the plaintiff is a minor or other person to whom the provisions contained in rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.

(2) An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person.

(3) Where the Court is satisfied,-

(a) that a suit must fail by reason of some formal defect, or

(b) that there are 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 such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part

of the claim.

(4) Where the plaintiff-

(a) abandons any suit or part of claim under sub-rule (1), or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3),

he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(5) Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs.]"

8. It is crystal clear from Order 23 that Appeal is a continuation of suit and therefore

whatever provisions are applicable to the suit, same are applicable at the stage of Appeal also. In any case the plaintiff can abandon a suit or proceedings at appellate stage. Order 23 Rule 1 of the Code of Civil Procedure also applies to the Appeals and the Appellate Court therefore can allow the withdrawal of the Appeal with liberty to bring a fresh suit. Appeal being a continuation of the suit, can be withdrawn with liberty to file fresh suit at appellate stage even after institution of fresh suit. The Appeal being continuation of the suit and the decree of the Court below not being final, it is always open to the plaintiff to withdraw his suit under sub Rule (1) of Rule 1 of Order 23 of the Code of Civil Procedure. In the present case though the application filed by plaintiff before the trial Court was dismissed, the appellate Court could allow the same. These facts are considered by the first appellate Court at the time of deciding Point No.1. The first appellate Court in para 6 of the Judgment, elaborately discussed the effect of Order 23 Rule 1 of the Code of Civil Procedure by relying on the Judgment in the matter of **SICOM Ltd. vs. Prashant S. Tanna and others, reported in 2004 (2)**

Maharashtra Law Journal, Page 292 , wherein the Full Bench of this Court held that the plaintiff is entitled at any point of time to abandon or give-up a part of the claim unilaterally.

9. In view of the above settled law on the point under consideration, I do not find any merit in the contention of the learned counsel for the defendant No.1 - Appellant that the first appellate Court erred in allowing application at Exhibit 31 filed by the plaintiff, under Order 23 Rule 1 of the Code of Civil Procedure. Except this issue, the learned counsel for defendant No.1 has not advanced any other point in the present Second Appeal. In view of the above mentioned facts and circumstances, I do not find any substance in the present Second Appeal as there is no substantial question of law involved in the present Second Appeal and the same is dismissed. No order as to the costs.

(K.K. TATED, J.),

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