

# ALLAHABAD HIGH COURT

Raisa Sultana Begam

Vs.

Abdul Qadir

Civil Revn. No. 805 of 1963, against the order of 1st Addl. Munsif Meerut,  
(M.C. Desai, C.J. and S.C. Manchanda, J.)

25.05.1963. 20.09.1965

## JUDGMENT

**Desai, C.J.**

1. This revision is directed against an order passed by a Munsif rejecting an application of Ghufran Ahmad, applicant No. 3 revoking his withdrawal from the suit.

2. The suit was filed in the Court of the learned Munsif by the three applicants; on 5-2-1962 one of them, namely Ghufran Ahmad, made an application stating that he had no dispute left with the defendants opposite parties and praying that his name might be expunged from the array of plaintiffs because he was left with no interest in the subject-matter of the suit. At the time when the application was made, the learned Munsif was away and the application was placed before another Munsif, who ordered it to be laid before the learned Munsif on his return. The application was placed before the learned Munsif on his return and before any orders could be passed on it Ghufran Ahmad filed an affidavit stating that the application had been made by him on account of fraud practised upon him by the opposite parties and that he did not want to withdraw from the suit. The learned Munsif allowed his earlier application holding that once he had withdrawn from the suit he could not resile from the withdrawal and that even if he had withdrawn on account of fraud practised upon him his remedy was by means of another suit. All the three plaintiffs applied for revision of this order of the learned Munsif and the revision came before our brother D.S. Mathur, who on account of conflict among authorities referred the following question to a larger Bench :-

"Can the plaintiff who has already moved an application under sub-rule (1) of Order 23, Rule 1, C.P.C. withdraw the application for the withdrawal of the suit

before orders are passed on the withdrawal application, i.e., the suit is, as far as the plaintiff is concerned, struck off from the file ?"

3. Order 23, Rules 1 and 2 lay down all the laws regarding withdrawal of suits. Rule 1 reads as follows :-

"1. (1) ... the plaintiff may .... withdraw his suit. . .

(2) Where the Court is satisfied -

(a).....

(b) it may. . ... grant the plaintiff permission to withdraw from such suit with liberty to institute a fresh suit in respect of the subject matter of such suit .....

(3) Where the plaintiff withdraws from a suit . . . without the permission referred to in sub-rule (2), he shall be liable for such costs as the Court may award and shall be precluded from instituting a fresh suit in respect of such subject-matter. . .

(4) Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to withdraw without the consent of the others.'

Rule 2 deals with the period of limitation for a fresh suit instituted on permission granted under Rule 1(2).

4. There is no distinction between withdrawing a suit and withdrawing from a suit. When there is only one plaintiff and he withdraws the whole suit it can be said that he withdraws the suit; when there are more than one plaintiff and one of them withdraws it maybe better to say that he withdraws from the suit.

"At common law a plaintiff has an absolute right to discontinue or dismiss his suit at any stage of the proceedings prior to verdict or judgment, and this right has been declared to be substantial"; (per C.J.) Taft in the matter of Skinner and Eddy Corporation. (1924) 68 Law Eel 912 at p. 914).

It is this right that has been given statutory recognition through Rule 1(1). The right is not fettered by any conditions; it is an absolute right which a plaintiff can exercise at his sweet will at any time before the judgment is delivered. In *Allah Baksh v. Niamaf Ali*<sup>1</sup> the Court described the right as "absolute" and capable of being exercised "without any permission from the Court' Sub rule (4) is a proviso to sub-r (2), which refers

to withdrawal with liberty to file a fresh suit which withdrawal only requires, permission of the Court. The plaintiff does not need consent of the defendant or permission or confirmation of the Court. In the instant case the withdrawal was without liberty to file a fresh suit and consequently we shall leave out of consideration withdrawal with liberty to file a Fresh suit. In *Hasan Badsha v Raziah Begam*,<sup>2</sup> it was observed that normally plaintiff has a right to withdraw his suit without reference to the defendants convenience and without the Courts permission; (the High Court added that there is a limit to the right in suits of a particular nature but we are not concerned with such suits here). Reference may also be made to *Veerawami v. Lakshmindu*<sup>3</sup> and *Mahant Biharidasji v. Parshottam Das*<sup>4</sup>

5. Next it is to be noted that no act is required to be done by the Court to complete or effectuate a plaintiffs withdrawal of his suit. There is no provision for any act to be done in the suit by the Court for making the withdrawal effective or even after the withdrawal it is not even required to pass any order. Withdrawal of a suit is itself its end. A plaintiff withdrawing his suit is liable for such costs as the Court may award; so the Court is empowered to pass an order only in respect of the costs. The liability for costs arises out of the plaintiff's withdrawing his suit; the suit has been withdrawn and consequently he becomes liable. The Court's order awarding costs against him is a consequence of the withdrawal, which means that the withdrawal is already complete and effective. The order is not an element of the withdrawal and is not required to complete or effectuate it. In *Lakshmanan Chetty v. Muthaya Chetty*,<sup>4</sup> Sadasiva Aiyar, J. pointed out at p. 137 that as regards unconditional withdrawal.

"It is.. . wholly at the option of the plaintiff and the Court has nothing to do with it except as regards providing for costs . . . and it is only where he wants some permission that he has to make an application under Clause 2."

In ILR 32 Bom 345 (supra) Sir Lawrence Tenkins, C.J. said at p. 347 that

"if a party desires to withdraw from the suit with such liberty, then he must apply to the Court to permit him so to withdraw. If he does not desire to have that liberty, then he can withdraw of his own motion and no order of the Court is necessary."

We respectfully agree with these observations and respectfully differ from the contrary

observations to which we shall refer presently.

6. The provision is that "the plaintiff may withdraw his suit" so he has to do an act and it is a unilateral act, i.e., an act to be done solely by him. and neither the defendant nor the Court (which are the only other persons concerned with the suit) has any act to do to complete or effectuate it. It is even more unilateral than the institution of a suit, which requires co-operation of the Court (unless the Court co-operates in receiving the plaint there is no institution).

7. There is no provision laying down the procedure for withdrawing a suit, the manner in which it can be withdrawn and the essential physical acts required to be done to constitute withdrawal. Withdrawal can be in any form (see *Mohamad Ali v Shujat Ali*,<sup>5</sup> and *Gulkandi Lal v. Manni Lal*,<sup>6</sup> and can exist even before communication of the fact to the Court. When a person institutes a suit he first makes a mental decision to institute it and then does the physical act of preparing a plaint, signing and verifying it and presenting it in court. A suit is instituted only when this physical act is done; no suit came into existence merely on his deciding in his mind to institute it. In the same way a physical act is essential in order to withdraw a suit merely deciding mentally to withdraw is of no consequence and an overt act must be done. The usual or normal overt act is that of informing the Court that the suit has been withdrawn; as soon as this information is given withdrawal of the suit comes into existence or becomes a *fait accompli* and the suit stands withdrawn from that moment. An order awarding costs against the plaintiff will be an act to be done by the Court in consequence of the withdrawal. There cannot be such an order unless the withdrawal is there as a fact. A physical act of settling the dispute with the defendant out of Court by which his grievance is fully removed may be another overt act having the effect of withdrawal. The essential fact to be remembered is that a plaintiff must do some overt or physical act in order to withdraw the suit; he cannot withdraw it simply by deciding to withdraw it or by treating it as withdrawn in his mind. Since it is for the plaintiff to exercise the right of withdrawing his suit, he has not to make any application to the Court or pray for any order. He has to do the act of withdrawal himself and then he should inform the Court so that it knows that it has been withdrawn and is governed in future proceedings by the knowledge. On a suit being withdrawn it has to decide what costs should be awarded against the plaintiff and naturally it cannot decide this unless the withdrawal is brought to its notice. If the withdrawing plaintiff is the only plaintiff and the whole suit is withdrawn the Court will consign the record to the record room

and will not have to do anything further in the suit. If there are other plaintiffs, or only a part of the suit is withdrawn, it will deal only with the remaining plaintiffs or the remainder of the suit. A written information given by a plaintiff to the Court of the withdrawal may take the form of an application but in the eye of law it must be treated as mere giving of the information. The Court may even pass some such order as "Allowed to be withdrawn" or "Dismissed as withdrawn" but this has no greater effect than its simply writing "seen or "Noted". In the instant case there were the plaintiffs besides the withdrawing plaintiff and he made an application praying that his name be removed from the array of plaintiffs, but it does not follow that there was no withdrawal by him so long as no orders were passed by the Court on the application, it would be the Court's own duty to expunge his name from the array of parties on being informed of the withdrawal : he did not have to pray for this at all. He did inform the Court of the withdrawal and of his having been left no interest in the suit and the mere fact that this information took the form of an application inviting a certain order did not mean that there was no complete or effectual withdrawal so long as the Court did not pass the desired order.

8. Since withdrawing a suit is a unilateral act to be done by the plaintiff, requires no permission or order of the Court and is not subject to any condition, it becomes effective as soon as it is done just as a compromise does. Any information of it given to the Court is no part of it, so also any order passed by the Court on receiving the information. The act is like a point and not continuous like a line having a beginning and an end. Either it is done or not done; there is nothing like its being done incompletely or ineffectively. The consequence of an act of withdrawal is that the plaintiff ceases to be a plaintiff before the Court. If he is the only plaintiff and withdraws the whole of the suit, the suit comes to an end and nothing remains pending before the Court; if he is only one of several plaintiffs, he ceases to be a party and the suit of only the other plaintiffs continues. If he withdraws only a part of the suit that part goes out of jurisdiction of the Court and it is left with only the other part. This is the natural consequence of the act; a further consequence imposed by sub-rule (3) is that he cannot institute any fresh suit in respect of the subject-matter. He becomes subject to this bar as soon as he withdraws the suit. It follows as a corollary that he cannot revoke or withdraw the act of withdrawal, If he is absolutely barred from instituting a fresh suit, it means that he is absolutely barred from reviving his status as a plaintiff before the Court. The bar on his instituting a fresh suit would be meaningless if he were permitted to revoke the withdrawal and get himself restored to

the status of a plaintiff in respect of the withdrawn suit. There is no provision allowing revocation of the withdrawal. We respectfully agree with Horwill, J. in *Rajagopala Rao v. Bhanoji Rao*,<sup>7</sup> where he observed at p. 766 :-

"O. 23. . . . does not make any provision for withdrawing a withdrawal; and so it would seem that there is no provision in the Code whereby the withdrawal of a suit . . . can be cancelled. The only thing that can now be done for the plaintiff is to grant her permission ..... to file a fresh suit."

It stands to reason that when on withdrawal the plaintiff ceased to be a party and the Court ceased to have jurisdiction over his suit and thus became *functus officio* nothing but a fresh suit can again invest the Court with jurisdiction over it. As far as the withdrawn suit is concerned the suit is at an end and no further proceeding can be taken in it; the suit and the plaintiff do not exist and no application such as one for revoking the withdrawal can be made in the suit or by the plaintiff or entertained. So long as the suit was pending the plaintiff had a status and could exercise the right of withdrawing the suit which vests in a plaintiff; after he ceased to be the plaintiff on withdrawal he is left with no status and cannot make any application or cannot do any act as a plaintiff. We are supported in this view by the decision of Ross and Pearson, JJ., in *Rajah Shamsher Bahadoor v. Mahomed Ali Beg*,<sup>8</sup>

9. In *Ram Bharos Lall v. Gopee Beebee*<sup>9</sup> it was held by another Bench of this Court, of which Pearson, it was a member, that a plaintiff who has withdrawn his suit is at liberty to rescind the act of withdrawal at any time before the final judgment because :-

"It is difficult to understand why a plaintiff should have liberty to withdraw from a suit and not have equal liberty to rescind the act of withdrawal at any time before final judgment".

We may with respect point out the reason and it is that the right of a plaintiff to withdraw his suit is not a divine right but a right expressly conferred upon him by Order 23, Rule 1 and no right is similarly conferred upon him to revoke or rescind the withdrawal. So long as he remains the plaintiff he may do any act which he may do in that capacity; he cannot, after withdrawal of the suit resulting in the loss of the

capacity, do an act which can be done only in that capacity. The learned Judges distinguished *Rajah Shumsher Bahadoor*, (1867) 2 Agra HCR 158 (supra) on the ground that in that case there was a long interval of time between the withdrawal and the revocation of withdrawal whereas in this case there was an interval of only one day. With great respect, we find it difficult to understand that whether withdrawal can be revoked or not depends upon the delay with which it is revoked. The question is of a right and not of delay with which it is sought to be exercised. In *Raj Kumari Devi v. Nirtya Kali Debi*,<sup>10</sup> it was held at p. 893 that

"it was competent to the plaintiff to recall her petition of withdrawal at any time before the final order had been passed."

The learned Judges relied upon the case of (1874) 6 NWP 66, and distinguished the case of *Shumsher Bahadoor* (1867) 2 Agra HCR 158. It has not been pointed out by them why an order of the Court is required in order to complete or effectuate the withdrawal and have not cited any authority for imposing this condition. We have pointed out that on withdrawal certain orders may be passed by the Court but they are not for giving effect to the withdrawal, but to give effect to consequences arising out of the withdrawal. Order 23, Rule 1 does not require any order; there can be no question of an order if no application is to be made by the plaintiff. We, therefore, respectfully disagree with the view of the Calcutta High Court. In *Mukkammal v. Kalimuthu Pillay*,<sup>11</sup> Sundara Aiyar, J. was of the view that the plaintiff has a right to revoke the act of withdrawal, while Sadasiva Aiyar, J. was inclined to the view that neither can he revoke his withdrawal application except on good grounds nor can he be allowed to play fast and loose with the litigation launched by him at his sweet will and pleasure. Sundara Aiyar, J. referred to the absence of any provision in the Code giving a right to a defendant to insist that a petition of withdrawal not acted upon by the Court must be enforced as against the plaintiff and thought that a mere petition of withdrawal does not debar the plaintiff from proceeding with the suit unless, in the meanwhile, the suit has been dismissed by the Court. We respectfully disagree as no order of the Court is required when a plaintiff withdraws a suit and there is no justification for saying that the act of withdrawal is not complete so long as the Court does not dismiss the suit. The bar imposed by sub-rule (3) operates on withdrawal and not on any order by the Court dismissing the suit and must be deemed to include the prevention of revival of the suit. In *Lakshmana Pillai v. Appalwar Alwar Ayyangar*,<sup>12</sup> it was assumed by Oldfield, J. that an application for withdrawing a suit is conditional

on the passing of an order regarding costs. But it seems to us, with respect to the learned Judge, that there is a distinction between withdrawal by a plaintiff of the suit and his liability to be awarded the costs of the suit. The liability arises out of the withdrawal but it would be wrong to argue that so long as the liability is not imposed the withdrawal is not complete. There may be an interval of time between the withdrawal and imposition of the liability through an order without its in any way derogating from the effect of the withdrawal. The facts in *Midnapur Zamindari Co. Ltd. v. Raja Bijoy Singh Dudhuria*,<sup>13</sup> were distinguishable because the plaintiff sought to withdraw from the suit with permission to file a fresh one and that required an order from the Court granting permission. There is a distinction between withdrawal without liberty to file a fresh suit which is at the absolute discretion of the plaintiff and withdrawal with liberty which can be done only when the Court grants permission. In this case the Court postponed passing orders on the application for permission to withdraw with liberty and before the orders were passed the plaintiff withdrew the application. A plaintiff may have a right to withdraw an application for withdrawal with liberty but it does not follow that a plaintiff who withdraws the suit under sub-rule (1) has a right to revoke the withdrawal before the Court passes some order. Then we come to *Yeshwant Govardhan v. Totaram Avasu*,<sup>14</sup> in which Dixit and Vyas, JJ. held that an application by a plaintiff withdrawing the suit requires an order, that so long as no order is passed it can be withdrawn and that no reasons are required for his withdrawing the application. With great respect we find it difficult to agree. It is true that a Court has control over the proceedings initiated by a plaintiff through a suit but the plaintiff has been given an absolute right to withdraw from it at any stage and the Court has no control over this act of withdrawal. The learned judges said at p. 29 :-

"If. . . .the plaintiff has a right to withdraw his suit, he has, equally, a right to withdraw his withdrawal, and so long as the Court has not made an order showing that the withdrawal has become complete or effective there is always a locus penitential for the plaintiff to withdraw his withdrawal."

The right to withdraw has been expressly conferred by rule 1(1); there is no provision conferring the right to revoke the withdrawal and there is no justification for saying that the right to withdraw includes in itself a right to revoke' the withdrawal. As we said earlier, certain consequences arise from the withdrawal which prevent his revoking the withdrawal, the withdrawal is complete or effective as soon as it takes place, and, in any case, as soon as information of it is conveyed to the Court, and no

order of the Court is required to effectuate it or even to recognize it. Then the learned Judges referred to the order regarding costs and inferred that the Court has to make an order after the withdrawal. Whatever order the Court may, or may have to make is not regarding the withdrawal but regarding the effect or consequences of the withdrawal, which is quite a different matter. The proposition that a plaintiff has an absolute right to withdraw his application for withdrawal is not accepted universally and we have already referred to the observations to the contrary. Lastly, we come to *Masulipatam Municipality v. Venkatappayya*,<sup>15</sup> Umamaheshwaram and S. Omar Hassan, JJ. observed at p. 575 :-

"Without the stroke of the judicial pen under Order 23, Rule 1, sub-rule (3), C.P.C. the suit is not terminated and that in appropriate cases the provisions of Order 1, Rule 10 or Order 22, Rule 10 C.P.C. may be applied." The order referred to in R. 1, sub-rule (3) is only one imposing costs upon the plaintiff on account of his withdrawal from the suit; this provision does not contemplate any order.

10. In AIR 1958 Bombay 28 (supra) and AIR 1923 Madras 246, the doctrine of locus paenitentiae was advanced and it was held that a plaintiff can revoke his withdrawal of a suit at any time before an order is made by the Court regarding withdrawal. With great respect, we may point out that if locus paenitentiae has to be allowed it must be allowed by the legislature and not by the Courts. We see no reason why we should be so solicitous about a plaintiff on the threshold of withdrawal of his suit that we should allow him locus paenitentiae. There is no reason why a plaintiff should claim to have locus paenitentiae and in any case whatever locus paenitentiae he needs is already there between his mental decision to withdraw and his informing the Court of the withdrawal. He has no locus paenitentiae in the matter of institution or of compromise of a suit and there is no justification for saying that he has locus paenitentiae after withdrawal of the suit. The doctrine of locus paenitentiae falls to the ground when it is realized that he has not to apply for withdrawing and that he needs neither the permission of the Court for withdrawing nor its order allowing, recognizing or confirming the withdrawal.

11. Our answer, therefore, to the question referred to us is in the negative.

12. We have answered the question on the assumption that there is withdrawal in fact

as well as in law. The question referred to us would not arise if there is withdrawal in fact but not in law. The contention of Ghufuran Ahmad is not that he revokes his application for withdrawal of his suit but that there was no withdrawal of his suit in law because the withdrawal that was there in fact was vitiated by the fraud practiced upon him by the opposite parties. His case is that he never withdrew his suit, which is quite distinct from the case that he withdrew the suit but now wants to revoke or withdraw the withdrawal. In the former case the suit was never withdrawn at all and in the latter case it was withdrawn but the withdrawal is sought to be revoked. The question that we have answered arises in the latter case and not in the former case. We are not concerned with the questions whether the opposite parties practiced fraud upon Ghufuran Ahmad, whether on account of it his withdrawal of his suit was nullified so as not to exist in the eye of law and whether the trial Court did not refuse to exercise jurisdiction vested in it to decide whether fraud was practiced by the opposite parties upon Ghufuran Ahmad, whether he withdrew the suit on account of it and whether the withdrawal was null and void because it was brought about by fraud. All these are questions to be considered by our brother Mathur.

13. Let the case be laid before our learned brother with this opinion of us.

Reference answered accordingly.

Cases Referred.

1. 1892 All WN 53 (1)
2. AIR 1949 Mad 772
3. AIR 1951 Mad 715
4. (1921) 40 Mad LJ 126
5. AIR 1917 Nag 1
6. (1901) ILR 23 All 219
7. AIR 1940 Mad 765
8. (1867) 2 Agra HCR 158
9. (1874) 6 NWP 66
10. (1910) 7 Ind Cas 892 (Cal)
11. 15 Ind Cas 852 (Mad)
12. AIR 1923 Mad 246
13. AIR 1941 Cal 1

14. AIR 1958 Bom 28

15. AIR 1960 And Pra 572