

ALLAHABAD HIGH COURT

Vidhydhar Dube

Vs.

Har Charan

Civil Revn. No. 529 of 1966, against order of Addl. Civil J. Orai
(A.K. Kirty and H. Swarup, JJ.)

22.01.1966. 16.03.1970

JUDGMENT

H. Swarup, J.

1. This revision was referred to a larger Bench by the learned Single Judge at the time of the admission of the revision. The plaintiffs had filed a suit claiming one-third share in the crop grown on the disputed plot in 1371 Fasli and in the alternative a certain sum of money by way of mesne profits. The plaintiffs claimed to be the heirs of one Jhammanlal, who was a cotenant with the contesting defendants. The defendants contested the suit on the ground, inter alia, that the plaintiffs were not the heirs of Jhammanlal and that the crop had not been raised by Jhammanlal. They denied the plaintiffs' right to claim any share in the crop or to get mesne profits. The trial court dismissed the suit. The plaintiffs filed an appeal and in the appeal filed an application under Order 23, Rule 1(2), Civil Procedure Code with a prayer for withdrawal of the suit with liberty to bring a fresh suit. In the alternative the plaintiffs also prayed for withdrawal of the suit under Order 23, Rule 1(1), Civil Procedure Code. The lower appellate court rejected the plaintiff's application. The present revision has been filed against that order.

2. The court below held that the suit or appeal did not suffer from any formal defect and that there was no other sufficient ground for allowing the appellants to institute a fresh suit for the subject-matter of the suit or part of the claim. It, therefore, came to the conclusion that provisions of Order 23, Rule 1(2) were not applicable and consequently no permission to withdraw the suit could be given. The plaintiffs had applied for withdrawal of the suit on the ground that in mutation proceedings the names of respondents Nos. 4 and 5 had been ordered to be mutated and hence it was necessary for the plaintiffs to institute a suit under Section 229B/ 209 of the U. P. Z. A. and L. R. Act. The court below was, therefore, justified in holding that, in the circumstances of the case, the plaintiffs were not entitled to withdraw the suit with leave to file a fresh suit for the same subject-matter.

3. The court below also came to the conclusion that the plaintiffs had no right to withdraw the suit under Order 23, Rule 1 (1), Civil Procedure Code without leave of the Court at the appellate

stage.

4. The learned counsel for the applicant has contended that the court below was in error in holding that the plaintiffs had no absolute right to withdraw the suit at the appellate stage under Order 23, Rule 1(1), Civil Procedure Code. His submission is that appeal is a continuation of the suit and hence even in appeal the plaintiffs can withdraw the suit. We do not find any merit in this contention. A plaintiff has a right to continue or withdraw a suit till a decree comes into existence. Once the court makes a final adjudication and passes a decree, certain rights become vested in the party in whose favor the decree is made. Where the suit is dismissed, certain rights become vested in the defendants inasmuch as the findings given in the judgment become binding on the parties and operate as res judicata in subsequent litigation between the parties. The right of a plaintiff to withdraw the suit at the appellate stage thus becomes subject to the right acquired by the defendants under the decree and ceases to be an absolute right.

5. Even when a suit is at the stage of trial and no decree therein has been passed, there may be cases where conceding an absolute right of withdrawal of suit to the plaintiff might result in serious injury to or jeopardise some valuable and substantive right of the defendant. A suit for accounts for instance may be filed by one of the partners of a dissolved firm. The defendants in such a suit may plead that the plaintiff himself is the accounting party and that on proper accounting they would be entitled to receive from him large sums of money, during the pendency of the suit it may become apparent that the suit is likely to culminate in a decree against him and he may seek to withdraw the suit. To hold that even under such circumstances that plaintiff has an absolute right to withdraw the suit, would be to acknowledge that the plaintiff's has an unfettered right to perpetrate fraud and dishonesty by defeating the legitimate rights of the defendants whose rights to file a fresh suit may have become barred by limitation. If under such or similar circumstances, it becomes difficult to concede an absolute right to the plaintiff of withdrawal of suit, much less can any such right be recognized when a decree has been passed and an appeal against the same has been preferred, sub-rule (1) of Rule 1 of Order 23 of the Code does not in terms apply to appeals and, whatever may be the legal position in the trial court, in the appellate court the plaintiff, be he an appellant or a respondent, cannot be held to possess any absolute right to withdraw the suit.

6. The appellate court may permit the plaintiff to withdraw the suit when by such withdrawal no vested or substantive right of the defendant is to be adversely affected but the plaintiff may not be permitted to withdraw the suit at the appellate stage if it results in depriving the defendant of some vested or substantive right. In the appellate court, the appellant may be held to have an absolute right to withdraw the appeal by equating the words "suit", "plaintiff" and "defendants" occurring in Order 23, Rule 1 (1) of the Code with the words "appeal", "appellant" and "respondents" but he has no absolute right to withdraw the suit. The withdrawal of the appeal will not adversely affect the respondents if they have filed any separate appeal or a cross-objection as

the same will remain unaffected.

7. The learned counsel for the applicants placed reliance on the decision in *M/s. Hulas Rai Bajinath v. Firm K. B. Bass and Co*¹. In that case the Court had to consider the right of a plaintiff to withdraw the suit before a decree came into existence and not after the

¹ AIR 1968 SC 111

decree had come into being. It was observed : "It is unnecessary for us to express any opinion as to whether a Court is bound to allow withdrawal of the suit of a plaintiff after some vested right may have accrued in the suit in favor of the defendant. On the facts of this case, it is clear that the right of the plaintiff to withdraw the suit was not at all affected by any vested right existing in favor of the appellant and, consequently, the order passed by the trial court was perfectly justified." In the present case, however, a right has become vested in the defendant after the decree in the suit had been passed. In the case of *Bijayananda Patnaik v. Satrughna Sahu*², relied upon by the learned counsel for the applicants, the court had held that provisions of Order 23, Rule 1(1), Civil Procedure Code were not applicable to election petitions before the Tribunal and the observation was only to this effect : "But for these special provisions, Order 23, Rule 1(1), Civil Procedure Code would have been applicable, and it is well established that that provision gives an absolute right to the plaintiff to withdraw his suit or abandon any party of his claim." In this case also the right of the party to withdraw the suit after the passing of the decree by the trial court was not considered.

8. The learned counsel for the applicants also placed reliance on the decision in *Bhagwat Prasad v. Raghunath Prasad*³. In that case, however, the point for consideration was "whether the plaintiff can withdraw his suit at the stage of the first appeal, when he did not challenge the decree and the decree was challenged by the other party?" In answer to that question this Court held that the plaintiff had a right to withdraw the suit even at the appellate stage but as is evident the plaintiff had not challenged the decree and no vested right had come into existence by means of the decree in favour of the defendants who had filed the appeal. In such a case if the plaintiffs withdraw the suit the right of the defendants is not affected.

9. The learned counsel for the opposite parties, on the other hand, placed reliance on the case of *Kedar Nath v. Chandra Kiran*⁴. In that case the Court held that at the stage of second appeal, the matter of withdrawal of the suit under Order 23, Rule 1(1), Civil Procedure Code lies within the discretion of the Court. It was held that sub-rule (1) of Rule 1 of Order 23 did not give an absolute right to the plaintiff-appellant to withdraw the suit at the stage of second Appeal.

10. In our opinion at the stage of appeal, the plaintiff, if he had filed the appeal, has the right to withdraw the appeal but not the suit except with the leave of the Court. The order of the court below thus suffers from no error of law or jurisdiction.

11. The revision is accordingly dismissed with costs.

Revision petition dismissed.

² AIR 1963 SC 1566 ⁴ AIR 1962 All 263

³1962 All LJ 915