

ALLAHABAD HIGH COURT

Kanhaiya

Vs.

Dhaneshwari

Civil Misc. Appln. No. 20196 of 1971, in Second Appeal No. 4322 of 1964.
from judgment and decree of Prem Singh, 2nd Addl. Civil J. Varanasi

(K.N. Seth, J.)

06.08.1964. 17.03.1972

ORDER

1. This is an application by the plaintiff appellants under Order 23, Rule 1, Civil Procedure Code praying that the plaintiff's appellants be permitted to withdraw from the aforesaid suit with liberty to institute a fresh suit in respect of the subject-matter. At the time of arguments, however, the learned counsel pressed his prayer only under sub-rule (1).

2. The suit was filed for an injunction restraining the defendants from interfering with the plaintiff's right in respect of the plots in dispute alleging that the plaintiffs were Bhumidhars. A relief for damages for misappropriation of the fruits of the grove was also claimed. The suit was dismissed by the trial court and the decree was confirmed by the learned Additional Civil Judge. It may also be noted that during the pendency of the second appeal in this Court Mewa Lal, one of the plaintiff appellants, died and his heirs were not brought on record. Baul, respondent No. 2 also died during the pendency of the second appeal and his heirs were also not brought on record. This Court by its order dated 15-11-1971 ordered that the appeal of Mewa Lal abated as against the respondents and the appeal as a whole abated against Baul respondent No. 2.

3. The question for consideration is whether the appellants have a right to withdraw the suit at this stage. Sub-rule (1) of Order 23, Rule 1 runs as follows :-

"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 claim."

It is contended by the appellants that they have an unfettered and unqualified right to withdraw the suit at any stage and as the appeal is a continuation of the suit that right can be exercised even at the stage of the appeal. Reliance has been placed on *Kamta v. Gaya Prasad*,¹ wherein a learned Single Judge of this Court laid down that "sub-rule (1) of Rule 1 of Order 23, Civil Procedure Code confers an unqualified right on the plaintiff to withdraw the suit at any time. Since an appeal is continuation of the suit, the right of the plaintiff to withdraw from the suit inheres even at the appellate stage. On the language of sub-rule (1) it is difficult to hold that the plaintiff had only a qualified right to withdraw from the suit." The learned Judge relied on the decision of the Supreme Court in *M/s. Hulas Rai v. K. B. Bass and Co.*,² That case related to a suit for rendition of accounts by the Principal against his agent. Issues had been framed in that suit and some evidence had also been recorded, but no preliminary decree for rendition of accounts had been passed when the application under sub-rule (1) of Rule 1 of Order 23, Civil Procedure Code was made. It was in this context that the Supreme Court observed that the aforesaid rule gives an unqualified right to the plaintiff to withdraw his suit and that there was no provision in the Code of Civil Procedure which required the court to refuse permission to withdraw the suit in such circumstances and to compel the plaintiff to proceed with it. It appears that the attention of the learned Judge was not invited to the observation made in the subsequent part of the same paragraph where the Supreme Court observed that the stage at which the application for withdrawal of the suit had been made no vested right in favor of the appellant had come into existence and there was no ground for the court to refuse withdrawal of the suit. This observation clearly indicates that if rights had accrued in favor of a party, there could be no unqualified right in favor of the plaintiff to withdraw the suit. This case cannot be treated as an authority for the proposition that even at the appellate stage when a decree has come into existence in favor of the respondents, the plaintiff continues to have an unqualified right to withdraw the suit. It is unfortunate that the attention of the learned Single Judge was not invited to an earlier decision of a Division Bench of this Court in *Vidhyadhar Dube v. Har Charan*,³ In the aforesaid case this court observed :

"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 operates 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 rights acquired by the defendants under the decree and ceases to be an absolute right."

4. The learned counsel for the appellants contended that as appeal was only a continuation of the suit, the word 'suit' used in sub-rule (1) should be interpreted to mean the appeal if the right is sought to be exercised at the appellate stage. In my opinion this argument too has no merits. If the word 'suit' in sub-rule (1) is to be interpreted to include the appeal, that interpretation should be given to the word "suit" used at two places in that Sub-rule. If that interpretation is given then the right of the appellants would be only to withdraw the appeal and would not extend to the withdrawal of the suit. This interpretation also finds support from the case of *Vidhyadhar Dube v. Har Charan*, 1970 All LJ 732 : AIR 1971 Allahabad 41 (*supra*) wherein it was observed :-

"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".

5. The principle that an appellant has no unqualified right to withdraw a suit when rights have accrued to the respondents finds some support from the observation of the Supreme Court in the case of *Inamati Mallappa Basappa v. Desai Basavaraj Ayyappa*.⁴ Dealing with the question of the right of the petitioner to withdraw or abandon a part of his claim once an election petition is presented to the Election Commissioner, the Supreme Court laid down that there was no power in the Election Commission to allow a petitioner to withdraw or abandon a part of his claim either by having resort to the provisions of Order 23, Rule 1, Civil Procedure Code or otherwise as such a withdrawal or abandonment would have the effect of depriving the returned candidate or any other party of the right of re-creation which had accrued to him under Section 97 of the Act. On the same analogy it can safely be laid down that a plaintiff

appellant has no right under Order 23, Rule 1 (1), Civil Procedure Code to withdraw the suit when rights have accrued to the respondents under the decree.

6. A learned Single Judge of this court in *Kedar Nath v. Chandra Kiran*,⁵ also took the view that Order 23, Rule 1 (1) does not give an absolute right to the plaintiff to withdraw the suit at the stage of second appeal and that the matter of withdrawal of the suit under the aforesaid provision of the Code lay within the discretion of the Court. This case was cited with approval in the case of *Vidhyadhar Dubey*, 1970 All LJ 732 : AIR 1971 Allahabad 41 (supra). The observation of the learned Single Judge in *Kamta's case*, 1971 All WR (HC) 667 : AIR 1972 Allahabad 143 (supra) that the view taken in *Kedarnath's case* (supra) has been rendered nugatory due to the law laid down by the Supreme Court in the Case of *M/s. Hulas Rai*, AIR 1968 Supreme Court 111 (supra) does not appear to be justified. The case of *M/s. Hulas Rai* had nothing to do with the right of an appellant to withdraw the suit at the appellate stage.

7. The argument of the learned counsel that no rights have vested in or accrued to the respondents as the second appeal has been filed challenging the decree of the court below is equally fallacious. Merely because an appeal has been filed, it cannot be said that no rights have vested in or accrued to the respondents under the decree sought to be challenged. That decree can be enforced in spite of the pendency of the second appeal. It may be that an appeal is a continuation of a suit, but the decree passed by the Court below does certainly confer rights in favor of the respondents which is not destroyed or taken away merely by filing of the appeal.

8. There is an additional ground in the present case to hold that the plaintiffs-appellants have no right to withdraw the suit. As mentioned earlier, the appeal already stands abated with regard to one of the appellants and one of the respondents. It is not open to the present appellants to take away the vested rights of the parties. The fact that the present application is also on behalf of the widow of the appellant *Mewa Lal*, who is alleged to be his sole heir and legal representative, is of no consequence. She has not been brought on record of the appeal as the legal representative of the deceased appellant and the appeal of *Mewa Lal* stands abated as against the respondents. Similarly the entire appeal has abated as against the deceased respondent *Baul*.

9. The application has no merits and is accordingly dismissed.

Application dismissed.

Cases Referred.

1. 1971 All WR (HC) 667: AIR 1972 All 143

2. AIR 1968 SC 111

3. 1970 All LJ 732: AIR 1971 All 41

4. AIR 1958 SC 698

5. AIR 1962 All 263