RAJASTHAN HIGH COURT

Ram Dhan

Vs.

Jagat Prasad

Civil Second Appeal No. 13 of 1982
(N.M. Kasliwal, J.)

30.04.1982

JUDGEMENT

N.M. Kasliwal, J.

1. This civil second appeal by the plaintiff is directed against the judgment and decree of learned Additional District Judge No.6, Jaipur City, Jaipur, dated Dec. 17, 1981 affirming the judgment and decree passed by the learned Munsif (West) Jaipur City, Jaipur dated Jan. 18, 1975 dismissing the suit of the plaintiff.

2. The defendant-respondent No.3 filed a caveat at the stage of admission of the appeal. On 5-3-1982, arguments in the appeal were heard for a considerable long time and no sooner than an order was going to be dictated in the court, learned counsel for the appellant made an oral request that he may be permitted to withdraw the suit itself. On this, an order was passed that no oral request could be considered at that stage. Learned counsel for the appellant then prayed for granting time to move an application in writing in this regard. The appellant, thereafter, submitted an application on 8-3-82 under Order 23, Rule 1, sub-rule (1) read with Section 151. Civil Procedure Code with a request that he was no more interested in prosecuting the present appeal as well as the suit and hence wants to withdraw his suit unconditionally. It was, therefore, prayed that this court may be pleased to accept this application for allowing withdrawal of the present appeal as well as the suit itself unconditionally without any reservation.

3. A reply was submitted by the learned counsel for respondent No.3 contesting the aforesaid application submitted by the appellant. It was submitted in the reply to the application that the application did not lie within the scope of Order 23, Rule 1. Civil Procedure Code and without admission of appeal itself, no application for withdrawal

of suit was maintainable. That after a protracted trial of suit and appeal that is to say after waste of lot of public money and time and after the respondents had been subjected to great strains and expenditures in defending against the suit, the appellant wanted to set at naught the results obtained by the respondent and concurrent findings given on material issues by two courts below. The application was in the nature of abuse of process of the court and law. That the suit did not suffer from any formal defect nor was it claimed that there was any such ground where the withdrawal could be claimed with justification. The main controversy in the suit was whether the plaintiff appellant had been given on lease the disputed piece of land by the U.I.T. The defendant respondent claimed that the same had been sold along with some other land to him i.e. Sri Ashwini Sethi son of Sri O.P. Sethi. The respondent wanted to enclose the land and some other part contiguous to it by raising compound wall. The plaintiff created obstruction unauthorized and filed the suit. He succeeded for as much as 17 years in preventing the defendant- respondent from making the rightful use of his land by obtaining the injunctions during the pendency of appeal and suit. The findings given by the two courts below have negatived in clear terms, the alleged right of the plaintiff. The findings, therefore, were in the nature of the respondent's right, having been determined favorably for him. The accrued rights, therefore, should not be allowed to be taken away by the appellant under the garb of the present prayer of withdrawal of the suit.

4. Learned counsel for the parties were, therefore, heard at length on the application filed under Order 23, Rule 1 sub-rule (1), C.P.C.

5. It was contended by the learned counsel for the appellant that there was a distinction between applications filed under Order 23, Rule 1, sub-rule (1) and sub-rule (2). In a case where the plaintiff did not make a prayer for withdrawing the suit with liberty to institute a fresh suit in respect of the subject matter of such suit and kept no reservation, the plaintiff had an absolute right under sub-rule (1) of Rule 1 of Order 23 to withdraw from his suit and such permission cannot be refused. According to the learned counsel the question of satisfaction of the court to allow withdrawal of the suit on the ground that the suit was failing by reason of some formal defects or that there were other sufficient grounds for allowing the plaintiff to institute a fresh suit could only apply where a plaintiff was praying for withdrawal of the suit with liberty to institute a fresh suit. It was also argued that sub-rule (3) of Rule 1 of Order 23 itself laid down that "where the plaintiff withdraws from a suit or abandons part of a claim

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 any fresh suit in respect of such subject matter or such part of the claim". It is contended that from a perusal of the aforesaid provision itself, it is clear that the only liability which can be put on the plaintiff is about the saddling of costs as the court may award and the provisions of sub-rule (1) of Rule 1 of Order 23 were mandatory and the permission cannot be refused where the plaintiff is making a prayer for withdrawing a suit and appeal without any reservation. Reliance in placed on *(Hulas Rai v. K. B. Bass and Co.* [1] *R. Ramamurthi Aiyar v. Raja V. Rajeshwar Rao.* [2] *Kamta v. Gaya,* [3] and *Surajpal Singh v. Gharam Singh,* [4]

6. On the other hand, it was contended by the learned counsel for the respondents that the provisions of sub-rule (1) of Rule 1 of Order 23 though may be applicable in case of a suit but cannot in terms apply in the case of an appeal. A party once having a decision by a decree in his favour by a competent court of law, it acts *res judicata* in subsequent proceedings and a party having lost after having a full trial in a court cannot claim as a matter of right to make a prayer to withdraw the suit in a court of appeal and much less in a court of second appeal. It is further argued that this litigation is going on between the parties for a period of about 17 years and when the appellant considered that he was not going to succeed in the appeal, he cannot set at naught the long proceedings of all this period, by withdrawing the suit without any ryhme or reason. Reliance is placed on *Eknath Bin Ranoji v. Ranoji Bin Bowaji.* [5] *Sita Ram Agarwal v. Harnath,* [6] *Basudeb Narayan v. Shesh Narayan,* [7] *Kedar Nath v. Chandra Kiran,* [8] *V. Dubey v. Har Charan,* [9] and *Kanhaiya v. Dhaneshwari,* [10]

7. I would first deal with the cases cited at the bar. In (1911) ILR 35 Bombay 261 (supra) the plaintiff filed a suit to recover possession of certain lands. The suit was dismissed by the trial Court. The plaintiff filed an appeal before the District Judge and before the admission of the appeal applied before the District Court for leave to withdraw the suit and praying for liberty to file a fresh suit. This application was heard and granted by the District Judge without any notice to the defendants. The defendants aggrieved against the order of the District Judge filed a revision before the High Court. It was contended before the High Court that the learned District Judge acted with material irregularity in exercise of its jurisdiction in two particulars. In the first place, his duty upon the presentation of an appeal was laid down by Order 41, Rule 11 from which it appears that he might dismiss the appeal without sending notice to the

respondents or he may adjourn the hearing, if the appellant did not appear, he might dismiss the appeal. But there was no provision allowing him to entertain an application, the effect of which would be to get rid of the decree of the lower court without any notice to the decree-holder and without any hearing of the appeal. It was also contended that the course taken by the learned District Judge was not sanctioned by the provisions of Order 23. The court was empowered to make an order permitting withdrawal from a suit or abandonment of part of claim where it was satisfied that the suit must fail. That implied that the suit had not yet been disposed of. It was further argued that in the case the suit had been disposed of and the decree had been passed in favor of the defendants. The court in these circumstances observed that it was beyond the power of the court to allow the withdrawal from a suit with leave to file a fresh suit on the same cause of action after the defendant had obtained a decree in his favor. The Court, therefore, set aside the order of the District Judge under Order 23 and directed him to admit or reject the appeal under the provisions of the Order 41, Rule 11.

8. The aforesaid case does not solve the controversy raised in the case before me. In the above case the prayer was made by the plaintiff for leave to withdraw the suit and praying for liberty to file a fresh suit. The application was heard and granted by the District Judge without admitting the appeal and without any notice to the defendants. In the case in hand the plaintiff has prayed for permission to withdraw the suit without any reservation and the respondent has appeared by filing a caveat.

9. In *Sita Ram Agarwal v. Harnath* [11] a second appeal was filed by the plaintiff, who had been unsuccessful in both the courts below, Hon'ble Singhal J. (as he then was) considered the entire appeal on merits and held that he had no hesitation in holding that the suit before him could not be instituted by or on behalf of the plaintiff firm because it had not been registered at the time of the institution of the suit. The two courts below were quite right in deciding issue No.1 against the plaintiff and in dismissing the suit. Faced with such a situation in the above appeal, learned counsel for the appellant made a request, while replying to the arguments of the learned counsel for the respondents that the plaintiff may be allowed lo withdraw the suit under Order 23, Rule 1(2), Civil Procedure Code with liberty to institute a fresh suit on the same subject matter. This request was opposed by the learned counsel for the respondents on several grounds. The court thus held that no written application had been made by the learned counsel for the plaintiff appellant giving the reasons why such a request was not made in the trial court or the court of first appeal even though it

was specifically pleaded that the plaintiff was not a registered firm and could not institute the suit. There was also nothing to show why request for withdrawal with liberty to institute a fresh suit should be granted. In these circumstances, the request was turned down. In the above case also, the plaintiff had made a request under Order 23, Rule 1(2), Civil Procedure Code with liberty to institute a fresh suit on the same subject matter. No application was submitted even in writing and the above request was only made orally. The above case thus also does not render any assistance to the problem posed in the ease before me.

10. There are series of conflicting decisions of the Allahabad High Court on the provisions of Order 23, Rule 1(1), Civil Procedure Code N.U. Beg, J. in Kedar Nath V. Chandra Kiran (AIR 1962 Allahabad 2637 laid down that Order 23, Rule 1(1), Civil Procedure Code did not give an absolute right to the plaintiff to withdraw the suit, at any rate at the stage of second appeal. The matter lay within the discretion of the Court. There the case was at the stage of second appeal and the trial court had given a finding of fact in favor of the defendant which was binding in second appeal. The court should not deprive the defendant of the plea of *res judicata* by allowing the plaintiff to withdraw the suit at that stage unless the latter is able to make out some good grounds for giving him the permission. A similar matter came up for consideration before K.S. Asthana, J. of Allahabad High Court in *Kamta v. Gaya Prasad* [12] According to the learned single Judge, sub-rule (1) of Rule 1 of Order 23, Civil Procedure Code conferred an unqualified right on the plaintiff to withdraw the suit at any time. Since an appeal was 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), according to the learned Judge it was difficult to hold that the plaintiff had only a qualified right to withdraw from the suit. The learned Judge placed reliance on the following observations made by the Supreme Court in the case of *Hulas Rai v. K. B. Bass and Company*[13] :-

> "The language of Order 23, Rule 1, sub-rule (1), gives an unqualified right to a plaintiff to withdraw from a suit and. if no permission to file a fresh suit is sought under sub-rule (2) of that Rule, the plaintiff becomes liable for such costs as the Court may award and becomes precluded from instituting any fresh suit in respect of that subject matter under sub-rule (3) of that Rule. There is no provision in the Civil Procedure Code which requires the Court lo refuse permission to withdraw the suit in such circumstances and to compel the

plaintiff to proceed with it. It is of course, possible that different considerations may arise where a set off may have been claimed under Order 8, or a counter-claim may have been filed, if permissible by the procedural law applicable to the proceedings governing the suit.

Further in the case of a suit between principal and agent, it is the principal alone who bas normally the right to claim rendition of accounts from the agent. The agent cannot ordinarily claim a decree from the principal."

According to Asthana, J. the above quoted observations of the Hon'ble Supreme Court, rendered the view taken by the learned single Judge in the casa of *Kedar Nath v. Chandra Kiran (supra),* nugatory.

11. It may be pertinent to observe at this stage that an earlier Division Bench case decided by the Allahabad High Court in *Vdhya Dhar Dube v. Har Charan* [14] was not brought to the notice of Asthana. J. in *Kamta v. Gaya* [15] I the aforesaid Vidhya Dhar Dube's case, the Division Bench of the Allahabad High Court consisting of A.K. truly and H. Swap, JJ. had taken into consideration. AIR 1968 Supreme Court 111, AIR 1963 Supreme Court 1566 and earlier decisions of the Allahabad High Court and had also taken into consideration the case decided by N.U. Bee. J. in *Kedar Nath v. Chandra Kiran (AIR 1962 Allahabad 2637 (supra)* and took the view that the provisions of Order 23. Rule 1 (1) did not apply in terms to. Appeals an argument was specifically raised 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. It was also argued that appeal was a continuation of the suit and hence even in appeal the plaintiffs could withdraw the suit. The Court did not find any merit in this contention. It was observed that "a plaintiff has a right to continue or withdraw a suit till a decree comes into existence. Once the court makes a finale 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 defendant 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 rights acquired by the defendant under the decree and ceases to be an absolute right."

(emphasis added).

12. In the above case the court had considered the Supreme Court case reported in

AIR 1968 Supreme Court 111 and had distinguished it on the ground that 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 decree had come into being. The matter again came up for consideration before K.N. Seth. J. of the Allahabad High Court in *Kanhaiya v. Dhaneshwari* [16] In the above case an application was submitted by the plaintiff-appellant under Order 23, Rule 1. Civil Procedure Code praying that the plaintiffs appellants be permitted to withdraw from the above said 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) of Rule 1. It was also a suit for injunction restraining the defendants from interfering with the plaintiff's right in respect of the plots in dispute alleging that the plaintiffs were "Bhumidars'. The suit was dismissed by the trial court and the decree was confirmed by the learned Additional Civil Judge. The court held that the plaintiffs-appellants had no right under Order 23. Rule 1(1), Civil Procedure Code to withdraw the suit when rights had accrued to the respondents under the decree. Merely because an appeal had been filed, it cannot be said that no rights have vested in or accrued to the respondent under the decree sought to be challenged. That decree can be enforced in spite of the pendency of the second appeal. The view taken by Asthana, J. in *Kamta v. Gaya Prasad* was held to be unjustified. The matter again came up for consideration before Asthana. J. of the Allahabad Bench in *Suraj Pal v. Gharam Singh* [16] The learned Judge again affirmed his earlier view that a plaintiff can always withdraw from a suit even at an appellate stage and the appellate court had power to allow the withdrawal under Order 23, Rule 1 even where the suit had been dismissed by the trial court. It was thus held by Asthana, J. in the above case as under (at p.468):-

> "The learned counsel for the plaintiff-appellant does not claim the order for withdrawal on the basis of absolute unqualified right enuring in the plaintiff. He submits that in view of the ratio of decision in AIR 1871 Allahabad 41 (supra), this Court may permit the plaintiff to withdraw the suit as by such withdrawal no vested or substantive right of the defendants is to be adversely affected. In reply the learned counsel for the defendant respondents submitted that the defendants' vested rights would be adversely affected inasmuch as he findings recorded by the trial court and affirmed by the lower appellate court would be set aside and whatever benefits accrued to the defendant, will no longer be available to them. I do not think the findings recorded on the issues arising in the suit confer any vested or substantive right on the defendants. In fact what

has been decided in the suit is that the plaintiff failed to establish that the land in dispute was the village pathway. I am not impressed with the contention put forward on behalf of the defendants- respondents that in the suit a finding has been recorded in favour of the defendants that the land in dispute belonged to them. Even if there was a finding to this effect in the suit, it will not confer any vested or substantive right on the defendants. The decree of dismissal of the suit by itself does not confer any right on any party to the suit. Moreover, on the allegations in the plaint the land in dispute was said to be a village pathway. There had been some litigation also in the past about this land. It the plaintiff is allowed to withdraw the suit, the defendants will not be affected adversely as by the withdrawal of the suit the cloud, if any, on the defendant's right would vanish. They will not be in a more disadvantageous position than in what they were because of the decree of dismissal of the suit. It has been stated in the application for withdrawal that a representative suit by the residents of the village would be filed as the interest of general public is involved. On a consideration of the entire circumstances of the case, I think the plaintiff appellant may be permitted to withdraw the suit on payment of all the coats hitherto and of this appeal."

In *R. Ramamurthi Aiyer v. Raja V. Rajeshwar Rao* [17] Raja V. Rajeshwar Rao and Raja V. Maheshwar Rao (deceased) who were brothers owned the cinema known as Odeon at Woods Road, Madras in equal shares. This property was leased out by them to Isher Das Sahni and brothers. In 1965, Raja V. Maheshwar Rao filed a suit in which it was stated that apart from other properties owned by the two brothers Odeon Cinema which consisted of land buildings, theatre, furniture, talkie equipments etc. was owned by them in squal shares. The lease in favor of Isher Das Sahni and Brothers was to expire on 30-4-1967. In para No.11 of the plaint, it was pleaded that having regard to the nature of the property, it was not possible or feasible or convenient to divide it into two halves by metes and bounds. It was prayed that the court in exercise of its inherent jurisdiction should direct the property to be sold by public auction and pay the plaintiff his 1/2 share in the net proceeds, the sale being subject to the lease in favor of Isherdas Sahni and Bros. In the written statement filed by Raja V. Rajeshwar Rao, it was denied that Odeon Cinema property was not capable of division into two halves by metes and bounds and it was averred that such a division was not only possible but it would be also just and proper. Their Lordships then Quoted Paras Nos.6 and 7 of the written statement. In Para No.7 a plea was taken by the defendants that in

the event if court held that the property was incapable of division into two shares, defendant was ready and willing to pay the plaintiffs' share in the suit property. In para 12 it was pleaded that in the event of the court ordering sale of the suit property, a decree might be passed in favor of the defendant for the purchase of the plaintiff's share at a valuation determined by the court. On July 26, 1965 the court appointed a Commissioner. Before the Commissioner the defendant consistently pressed for a scheme being suggested by which division of the property in dispute could be affected. The Commissioner submitted a report on Aug. 27, 1965 indicating that he had the difficulty in suggesting a division. Their Lordships of the Supreme Court observed that it is clear from the order of the single Judge that the *prima facie* impression which he had formed after inspection of the property was that it was not capable of division by metes and bounds. He had not given final decision on the matters when an oral application was by made the plaintiff for withdrawing the suit with liberty to institute a fresh suit. An objection was raised before the Judge that because defendant have invoked the provisions of Section 3 of Partition Act, the plaintiff could not be permitted to withdraw the suit. The trial Judge took the view that so long as a preliminary decree had not been passed in the partition suit, it was open to the plaintiff to withdraw the suit. Considering the question whether liberty should be granted to bring a fresh suit under Order 23, Rule 1, the trial court treated it to be axiomatic that in a suit for partition or redemption when a plaintiff withdraws his suit he will be entitled to a fresh suit as the cause of act recurring one. The suit was dismissed as withdrawn by the trial Judge. On Oct. 14, 1966 Raja Maheshwar Rao sold his 1/2 share in Odeon to N.C. Subramanian and his sons who in their turn sold that share to Isherdas Sahni and Brothers on Jan. 1, 1970. Raja Rajeshwar Rao who was defendant in the original suit filed an appeal to the Division Bench of the High Court, During the pendency of the appeal, the plaintiff died leaving a will and the executor was appointed under the will was impleaded as second respondent in the appeal. The Division Bench held that Section 2 of the Partition Act had been invoked by the plaintiff and the plaintiff could not withdraw a suit in the circumstances of that case. It was further held that the request of the defendant under section 3(1) of the Partition Act must be enquired into by the trial court and accordingly the appeal was allowed and the trial court was directed to restore the suit and frame necessary issues and dispose of the request made by the defendant in accordance with law.

13. Aggrieved against the aforesaid judgment of the Division Bench of the Madras High Court, an appeal was filed to the Hon'ble Supreme Court. Learned counsel for

the parties appearing before the Supreme Court agreed that the only question which survived and which required decision was whether in the circumstances of the case, the trial Judge could allow withdrawal of the suit. Their Lordships were, therefore, in the above case were only called upon to determine the correct position under Order 23, Rule 1, Civil Procedure Code in respect of a suit for partition of joint property in which the provisions of the Partition Act had been invoked or were sought to be applied. After citing two cases, AIR 1963 Supreme Court 1566 and AIR 1968 Supreme Court 111, their Lordships observed as under:-

> "Counsel for both sides have sought to derive support from the above decisions of this Court. On behalf of the appellant it has been contended that under Order 23, Rule 1 there is an unqualified right to withdraw the suit if the plaintiff does not wish to proceed with it. It is conceded that if any vested right comes into existence before the prayer for withdrawal is made, the court is not bound to allow withdrawal but it is suggested that this can happen only in very limited circumstances i.e. where a preliminary decree had been passed or in those cases where a set off has been claimed or a counter-claim has been made. According to the appellant no preliminary decree had been passed in the present suit and thus no vested right had come into existence in favour of the defendant. There was no question of any counter-claim or set off and therefore the trial court was fully justified in allowing withdrawal of the suit. If the matter were to be viewed only in the above light the appellant's contention would have a good deal of force. But the nature and incidents of a partition suit and the consequences which ensue once the provisions of the Partition Act are invoked or sought to be applied must be considered before the contentions of the appellant's counsel can be accepted."

Their Lordships thus held that a suit in which the provisions of Sections 2 and 3 of the Partition Act were invoked cannot be allowed to be withdrawn by the plaintiff after he had himself requested for a sale under Section 2 of the Partition Act and the defendant had applied to the court for leave to buy at a valuation the share of the plaintiff under Section 3. In the above case, their Lordships were considering a suit under the Partition Act and a prayer was made for withdrawal to suit at the trial stage. In the case before me, the situation is entirely different. Even with regard to the scope of Order 23, Rule 1 on behalf of the appellant before the Supreme Court, it was conceded that if any vested right came into existence before the prayer for withdrawal was

made, the court was not bound to allow withdrawal but it was suggested that this could have been only in very limited circumstances that, is where a preliminary decree had been passed or in those cases where a set off had been claimed or a counter-claim had been made. Their Lordships held that if the matter were to be viewed only in the above light, the appellants' contention could have a great deal of force. From a perusal of the above observations, it cannot be held that in the above case it was laid down that a plaintiff had an absolute right to withdraw a suit, by making a prayer at the stage of second appeal, where the suit had been dismissed by both the lower courts.

14. From a perusal of all the above mentioned authorities, I am of the view that a plaintiff even under sub-rule (1) of Rule 1 of the Order 23 had no absolute right to withdraw from the suit where some vested right had accrued to the defendant. Before a final decree is passed by the trial court, the question of any vested right in favor of a defendant may arise only in very limited circumstances, and that would be for the trial court where such request is made before decision of the case finally. Ordinarily, under sub-rule (1) of Rule 1 of Order 23, it would not be necessary for the plaintiff to show any formal defect in the suit before making a prayer for its withdrawal without any reservation. But in a suit like partition suit or some other Act, where the defendant acquires any right, the court will consider all the circumstances before accepting the prayer of the plaintiff for withdrawal of the suit. There can be no manner of doubt that where a plaintiff makes a prayer for withdrawal of a suit along with liberty to file a fresh suit, the provisions of sub-rule (2) of Rule 1 of Order 23 would be attracted. The position for a plaintiff to withdraw his suit without any reservation i.e. without any prayer to allow him to bring a fresh suit in respect of the same subject-matter, would be considered under the provisions of sub-rule (1) of Rule 1 of Order 23 but in my view the considerations would be different if such request is made during the trial of a suit and during the stage of first appeal or second appeal where the plaintiff has lost his case in the lower courts. There can be no manner of doubt that the appeal is a continuation of the suit, but at the same time a court of 1st appeal or second appeal may not even admit the appeal and can dismiss at the admission stage. It would be certainly unfair to the defendant if a plaintiff having lost in the two courts below and after making arguments for admission of second appeal in the High Court and having not been able to succeed in getting the appeal admitted, may be allowed to withdraw the suit itself by way of absolute right and thus negative the benefit of long trial having culminated in favor of the defendant. It is no doubt correct that there is provision under sub-rule (3) of Rule 1 of Order 23 that the plaintiff 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, but in my view the award of costs alone can hardly be a just and proper solace to the defendant. It is right that the plaintiff will be precluded from bringing a fresh suit on the same subject matter, but it also cannot be denied that the defendant would not be entitled to use the findings given in such a suit, as *res judicata* in subsequent proceedings.

15. Taking in view the facts and circumstances of the present case, the parties are fighting this litigation for the last 17 years. The plaintiff by obtaining a temporary injunction in his favor had restrained the defendant from raising constructions over the disputed portion for all this period. The defendant was thus deprived for all these years to make use of his property, in the manner he liked. The controversy raised in the case has been decided in favour of the defendant by the trial court as well as the first appellate court. After hearing the arguments in the second appeal at the admission state, it was not inclined to admit the appeal and when going to dictate the order of dismissal, a prayer was made for allowing to move an application for withdrawal as oral request was not accepted. I am, therefore, clearly of the view that before granting any permission for withdrawal of a suit at the stage of second appeal, the plaintiff cannot claim an absolute right to withdraw the suit and the facts and circumstances of each case will have to be seen before granting or refusing such prayer. In the present case, the plaintiff has not mentioned any circumstance worth-the-name for allowing such prayer and in the facts and circumstances of this case as already mentioned above, I do not consider it a fit case for granting such request made by the plaintiff.

16. In the result, the application filed by the plaintiff dated 8-3-1982 for withdrawing the suit and appeal is dismissed.

17. The lower appellate court after considering the oral and documentary evidence in detail has arrived to the finding that though the plaintiff was allotted 219.44 sqr, yards of land but the plaintiff was unable to prove that he had left any portion out of it unconstructed only towards the northern side. The plaintiff himself was not clear as to on which side the portion was left vacant i.e. without construction. It was incumbent upon the plaintiff to have clearly mentioned in the plaint as to what were the dimensions of his land north-south and east-west and he failed to prove beyond any manner of doubt that some portion of his land remained vacant only towards the northern side. There is no dispute even by the plaintiff that he has already constructed

shops over 216.33 sq. yards of land, out of 219.44 sq. yards given on lease to him by the U.I.T. For the remaining 3.11 sq. yards of land, he was unable to prove that it was left over by him only towards the northern side. The lower appellate court has made a detailed discussion of oral and documentary evidence in this regard and this being a finding of fact, even if erroneous, cannot be challenged in second appeal. No question of law much less any substantial question of law arises in the case for consideration in the second appeal and accordingly I do not find any force in this second appeal and the same of dismissed is dismissed summarily.

Appeal dismissed.

Cases Referred.

1. AIR 1968 SC 111
2. AIR 1973 SC 643
3. AIR 1972 All 143
4. AIR 1973 All 466
5. (1911) ILR 35 Bom 261
6. 1969 Raj LW 561
7. AIR 1979 Pat 73
8. AIR 1962 All 263
9. AIR 1971 All 41
10. AIR 1973 All 212
11. (AIR 1970 Raj 99)
12. (AIR 1972 All 143)
13. (AIR 1968 SC 111 at p.113)
14. (AIR 1971 All 41)
15. (AIR 1972 All 143)
16. (AIR 1973 All 466)
17. (AIR 1973 SC 643)